ANNOTATED CODE

OF THE

STATE OF IOWA

CONTAINING

ALL THE LAWS OF A GENERAL NATURE

ENACTED BY

THE TWENTY-SIXTH GENERAL ASSEMBLY,

AT THE EXTRA SESSION, WHICH ADJOURNED JULY 2, 1897.

PUBLISHED BY AUTHORITY OF THE STATE.

DES MOINES, IOWA:
F. R. CONAWAY, STATE PRINTER.
1897.

STAR ENGRAVING CO., ELECTROTYPERS.

PREFACE TO SECOND EDITION.

This edition of the Code is published under the provisions of Chapter 211 of the Acts of the Twenty-ninth General Assembly as found in the 1902 Supplement to the Code at page three and contains all the matter of the first edition with additional tables.

The committee, under the authority of said act, has caused to be prepared by John R. Carter, editor of the 1902 Supplement, and to be printed with this edition of the Code, a table of corresponding sections, so far as it has been practicable to arrange them, of the Code of 1873, and of the matter contained in the Session Laws from the Fifteenth to the Twenty-sixth General Assemblies inclusive, with the Code of 1897; also a table of cases giving, in alphabetical order under the name of plaintiff only, all the Iowa cases found among the annotations of the Code of 1897 and cited by reference only to the Northwestern Reporter, showing the volume and page where found in the official reports; also a table giving the sections and parts of the Code of 1897 which have been amended or repealed by the Twenty-seventh, Twenty-eighth and Twenty-ninth General Assemblies, with the proper references.

These tables have been inserted immediately following the table of corresponding sections as printed in the first edition of the Code of 1897.

October 1902.

JAMES H. TREWIN,
W. P. WHIPPLE,
CLAUDE R. PORTER,
FRANK S. PAYNE,
W. K. BARKER,
ALBERT W. HAMANN.
Committee.

PREFACE.

The Extra Session of the First General Assembly of the State of Iowa enacted a law, approved January 25, 1848, appointing Charles Mason of Des Moines County, Wm. G. Woodward of Muscatine County and Stephen Hempstead of Dubuque County, a committee "to draft, revise and prepare a code of laws for the State of Iowa." This committee duly made report, and the Code of 1851 was enacted.

In 1857 the new constitution was adopted and the Seventh General Assembly, at the beginning of the session, passed a joint resolution appointing Wm. Smith of Linn County, W. T. Barker of Dubuque County and Chas. Ben Darwin of Des Moines County, "commissioners to prepare and report to the judiciary committee of the two houses a code of civil and criminal procedure, and such changes as may seem necessary to harmonize existing laws and adapt them to the new constitution, and to revise and codify the general laws of the state so far as practicable." These commissioners finding it impossible to complete their work during the session, a law was enacted directing them to publish their report by the first of September, 1858.

They reported to the Eighth General Assembly, in January, 1860, having construed the statute and joint resolution prescribing their duties to authorize a revision only, saying, "We add nothing to the law—subtract nothing therefrom—make no change of word or phraseology—merely of the arrangement of the existing law." The "Revision of 1860" was then published.

The Thirteenth General Assembly passed a law, approved April 7, 1870, appointing Wm. H. Seevers of Mahaska County, John C. Polley of Clinton County and Wm. J. Knight of Dubuque County, as commissioners "to carefully revise the statutes of this state, rewrite the same, omit obsolete parts, insert all amendments, transpose words and sentences, and when necessary to change the phraseology." The report of this commission was the basis of the Code of 1873 enacted at the adjourned session of the Fourteenth General Assembly.

Since that time there has been no revision or codification of the laws of Iowa, but in 1880 there was issued by Mr. Emlin McClain an annotated compilation including the Code of 1873 and subsequent statutes, and about the same time a similar compilation by the late Judge Wm. E. Miller. These compilations, familiarly known as McClain's and Miller's Code, respectively,

were authorized by the general assembly and came into general use throughout the state. A second edition of McClain's Code was issued, and later a supplement.

After the year 1880 the Code of 1873 was practically out of use, although it, with subsequent session laws, was still in the hands of township, county and other officers, as the only means of ascertaining the law.

The Twenty-fourth General Assembly enacted a law appointing a commission to revise the revenue laws, and report to the Twenty-fifth General Assembly, which was done.

It became apparent to the members of the Twenty-fifth General Assembly that the laws could not be revised piecemeal, and that a general revision and codification of all the laws was necessary. A bill was passed providing for the appointment of a commission of five persons, "to carefully revise and codify the laws, rewrite the same and divide them into appropriate parts and arrange them into titles, chapters and sections, omit all parts repealed or obsolete, insert all amendments to make the laws complete, transpose words and sentences, arrange the same into sections or paragraphs, number them, change the phraseology and make any and all alterations necessary to improve, systematize, harmonize and make the laws clear and intelligible."

This commission consisted of Emlin McClain, appointed by the Senate, John Y. Stone and Charles Baker, appointed by the House, and H. S. Winslow and H. F. Dale, appointed by the Supreme Court.

The commission presented to the general assembly a "Proposed Code" with an "Explanatory Report." The Twenty-sixth General Assembly, at its regular session, in addition to its ordinary work entered upon the consideration of revision and codification; but at the end of the customary period found itself unable to complete the work, and a concurrent resolution was adopted setting forth the difficulties and labor involved, that the value of the work would depend upon the care exercised, that its importance demanded ample time for thorough consideration, that it was deemed advisable to secure the benefit of the knowledge, experience and work of members of the Twenty-sixth General Assembly, and that the public interests required that the Code should be adopted and published at as early a date as possible.

In December, 1896, Gov. F. M. Drake issued a call for an Extra Session, to convene January 19, 1897, for the purpose of making necessary appropriations for public buildings destroyed by casualty, and of completing the revision and codification of the laws. In obedience to the call of the Gov ernor, the Twenty-sixth General Assembly convened in Extra Session on that date and took up the work which had been laid down at the adjournment of the regular session. As the work progressed, it was found to be more arduous and difficult than had been at first supposed; that many changes of great importance were deemed necessary to be made in the laws for the purpose of adapting them to the changed conditions and interests of the people of the state, and of bringing about many needed reforms; therefore the session was necessarily extended until the eleventh day of May, 1897, when a recess was taken until July 1, 1897. The General Assembly finally

adjourned July 2, 1897, the laws under the constitution taking effect ninety days thereafter.

When the bill for the appointment of the commission to revise and codify the laws was under consideration in the Twenty-fifth General Assembly, it was proposed by its author and others that the state should, when the work of revision was completed, publish and sell, at a moderate price, a complete annotated code.

Toward the close of the Extra Session a concurrent resolution was adopted providing for the appointment of a joint committee of five to investigate the subject and report a bill for annotating, editing, publishing and distributing the Code. L. A. Ellis and Jas. H. Trewin, of the Senate, H. K. Evans, C. C. Dowell and W. I. Hayes, of the House, composed this committee, and made an exhaustive report recommending the passage of the bill known as Substitute for Senate File No. 1, which was enacted substantially as reported, and is printed in this Code under the heading, "Provisions Relating to the Code and Subsequent Statutes."

Under this law, Mr. E. C. Ebersole, having especial qualifications for the work, was elected editor by the general assembly. Jas. H. Trewin and Lyman A. Ellis were elected by the Senate, and Parley Finch, W. W. Cornwall and John T. P. Power by the House, as Code Supervising Committee, to have general supervision of the entire work of editing, annotating and publishing the Code.

The editor and committee immediately entered upon the discharge of their duties. The editor first carefully read the laws, correcting punctuation and all manifest errors. An accurate and exhaustive index being of paramount importance, the committee relieved him from all other duties and for more than two months he labored incessantly and has produced an index which it is thought will meet all requirements.

Mrs. C. A. Neidig and Miss Capitola Mardis, clerk of the committee, read the proofs by the enrolled bills.

By authority of the general assembly, the committee made a contract with Mr. Emlin McClain to annotate the Code—his preëminent qualifications for the work being universally recognized. Mr. McClain read the proofs of his annotations.

Although the time allowed for so great an undertaking was very short, and many difficulties were encountered, yet the utmost care has been exercised and the possibility of error reduced to a minimum.

The publication of the Code, including annotations, in the manner provided, has reduced the cost to the public from thirteen dollars to five dollars per volume. It will cost the state only about two dollars and fifty cents per volume. The sale to the public is expected ultimately to reimburse the state.

The pages of the Code have been electrotyped and the plates deposited with the Secretary of State, and another edition can be produced for the cost of paper, presswork and binding.

The limits of this note admit of only the briefest mention of the evolution of the laws of Iowa, and not even a summing up of the numerous and weighty reasons for the codification of 1897.

The Code is the result of the best efforts of all connected with its production and is by authority of the Twenty-sixth General Assembly presented to the public in the hope it will be fairly judged and generally approved.

JAS. H. TREWIN,
Chairman.
L. A. ELLIS,
Vice-Chairman.
PARLEY FINCH,
Secretary.
W. W. CORNWALL,
JNO. T. P. POWER
Committee.

September, 1897.

EDITORIAL NOTE.

In turning over my work as editor of the Code, there are many things which I might with propriety say. Some of them have been sufficiently referred to by the members of the Supervising Committee in their prefatory statement, others, of more interest, perhaps, to myself than to the public, I have concluded to leave unsaid. A few matters by way of acknowledgment cannot well be omitted.

The synopsis of the Constitution of the United States, printed in the "Prefix," was taken, substantially, from Hough's American Constitutions. As credit for its use was inadvertently omitted in the proper place, it is given here.

In the preparation of the index. I did not hesitate to avail myself of all the helps and suggestions to be derived from other indexes of substantially the same subject-matter. This I deemed to be my personal privilege, if not, indeed, my public duty. It is nevertheless proper that I should make public acknowledgment of the fact.

As I bid adieu to the work, I have nothing to say by way of apology. Conscious that I have done the very best I could within the allotted time, I am content to submit the results of my labors to the judgment of an intelligent and considerate people.

E. C. EBERSOLE.

September, 1897.

TABLE OF CONTENTS.

TABLE OF

CORRESPONDING SECTIONS

Showing the sections of this Code which correspond in subject matter with the consecutive sections of McClain's Annotated Code of 1888, and the chapters of subsequent Session Laws.

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
1–11	1–11	156	147,157,170	248	297	395	416
12	12, 13	157	165–7	249	Repealing	396–8	417–419
13	14	158	168	250–6	281–7	399	415
14, 15	15	159–160	169	257–8	288	400–1	420–1
16–31	16–31	161–2	178	259–262	289–292	402	422–4
32, 33	32	163	179	263	Obsolete	403–4	426–7
34–49	33–48	164	185	264–5	293	405–6	428
50–52	49	165	180	266	294	407	759
53–57	50–54	166	Temporary	267	1072	408	{ 760-4,902,
58	Omitted	167	184	268–274	301–7		{ 1014
59–61	55–57	168–170	186–8	275	Omitted	409	{ 761, 896,
62	59	171	189, 2175	276	Obsolete		{ 1005
63	58	172	190	277	308	410,411	761, 764
64	60	173	192	278	Temporary	412	761
65, 66	61	174	201	279	Repealing	413	429
67–69	62–64	175	Repealing	280–7	309–316	414	758
70	66	176	202	288	Repealing	415	425
71–2	68–9	177–8	193	289–302	317–330	416–418	430–2
73	126	179–184	195–200	303–4	331	419	431
74	67	185–8	204	305–7	332–4	420	433
75–83	89–97	189–190	208–9	308–11	345–8	421–2	434
84–91	101–8	191–2	210	312	335	423–4	435
92–95	111–114	193–204	213–224	313	Omitted	425	436
96	Repealing	205	Repealing	314	336	426	440
97–109	72–84	206–7	225	315, 316	337	427	549
110	Temporary	208	226	317	344	428–430	441–3
111	66	209	228	318	338	431–8	446–453
112, 113	88	210, 211	232, 233	319	339,342	439	{ 454, 897,
114	Temporary	212, 213	234	320–1	343–4		{ 1006
115, 116	117	214–217	235–8	322	Omitted	440	{ 455, 897,
117	Omitted	218, 219	239	323	353		{ 1006
118–131	118–131	220–1	240–1	324–332	355–362	441	456
132	140	222–3	242	333	360	442–9	460–7
133–6	132–5	224–5	243–4	334	Repealing	450–6	470–6
137–8	145–6	226	Supersed'd	335–9	364–8	457	477, 545
139	154	227–9	245–7	340–1	369	458	482
140–2	147–9	230	Supersed'd	342–353	370–381	459	483–4
143	150, 151	231–2	248	354–363	383–392	460–1	484
144	152	233–4	Temporary	364–5	393	462	483–4
145	149	235	227	366–7	394–5	463–5	485–7
146	153	236	227, 1069	368–374	396–402	466–7	488
146 a	152	237	228–231	375	396	468	489
147	155	238	232	376–9	403–6	469	494
148–9	171	239	225	380	409	470–1	493
150	171,172,174	240	Temporary	381–2	407–8	472–6	499–503
151	171	241	225	383–4	403–4	477–8	546–7
152	174, 175	242	249	385–7	406–8	479–482	504–7
153	173	243	Omitted	388	Omitted	483	4062
154	174	244	253	389–393	410–414	484–5	513
155	156	245–7	250–2	394	410	486–7	514, 515

McC.'s Code	Code of '97
488–490	517–519
491	520, 530
492–3	520
494–9	521–6
500	520
501–3	527–9
504–5	534
506–513	535–542
514	544
515	550
516	551
517	Omitted
518–524	553–9
525	Omitted
526	1073
527	564
528	565, 647–650, 660, 1185. 1272
529	Omitted
530	566, 674
531	576
532–3	574-5
534	576
535	393, 576
536	393
537–8	577–8
539–540	579
541–552	Obsolete
553–5	580–2
556	2568
557	2571
58–9	2568
560	2573
561	2571
562–8	583–9
569	599
570	600–1
571–2	602–3
573	602
574–8	617–621
579–582	610–613
583	613, 615
584–5	615
586	616
587–591	631–5
592	637
593–9	622–7
600–1	604
602	605–6
603	605, 609
604–5	607–8
606	606
607–9	628
610, 611	629, 630
612	Omitted
613	668, 695
614	695
615	695-6,702, 704, 714, 717, 754, 769
616	711
617	697
618	706–7
619	703
620	727, 894, 953, 1005
621	700
622	700,702-3, 708, 754
623	751, 756, 767, 969, 999
624	751, 782, 791, 794, 969
625	782, 816
626	812,813,880
627	829, 976
628	840
629	751, 782
630	779,792-3, 818
631	780
632	777
633	1051, 3447
634	3447
635	785–790, 884, 1002
636	880, 884, 999, 1001
637–8	885–6
639	720, 955
640	720, 723
641	720, 725
642	722
643	724-5,894, 1005
644	720,722-5, 894, 955, 1005
645	722
646	721, 956
647	884, 1002
648	884, 1002
649	840, 975, 982, 984
650	986
651	698
652	975, 982
653	850, 991
654	853, 991
655	852, 992
656	852, 994
657	852, 995
658 9	996–7
660	680, 947
661	687
662	693
663	694
664	735
665	950, 3447, 5166
666	692
667	891–3
668	899
669	681–3
670	668, 943
671	677, 944
672	686
673	668, 683
674	684, 793
675	636, 887, 902, 1014
676	887
677	890
678	Omitted
679	902, 1014
680	889
681	898, 1007
682	898, 1007
683–6	Supersed'd
687	642, 1090
688	1146
689	1145–6
690	1180,1183, 1185, 1266
691	669
692	658, 692
693	691
694–5	638
696	639. 640
697	640
698	643.645-6, 649,668
699	658–9
700	1277
701	649, 668, 1180, 1183 1185
702	651-2,655, 662, 673, 946
703	1258
704	1272
705	668, 1276, 1278
706	Repealing
707	Supersed'd
708	648, 695
709	643, 658
710–713	685
714	658, 670, 677, 945
715	641
716	643–6
717	651, 659, 668–9
718	668, 676, 695
719	900–1,1009
720	900, 1009, 1258
721	900, 1009
722	655, 668, 676, 695
723	664, 668, 716
724	696, 717
725	696-7,705, 714, 717, 725, 753, 758, 769, 775,780-1, 783, 792, 794, 809, 834, 888, 959, 1258
726	751, 753, 757, 792
727	655, 668, 676, 718
728	719
729	1272, 1276 1278
730	882–3, 1000
731	700–1
732	709
733	797, 960
734–6	712
737	713
738	696
739	809
740	791, 809, 1030
741	817, 894, 1005
742	830, 894, 977, 1005
743	912, 1022
744	912, 1022
745	Temporary
746	819, 831, 894, 978, 1005
747	795, 960
748	809, 812
749	794
750	Repealing
751	759, 896
752	760-4,896, 902. 1005, 1014
753–4	764–5
755	905–6
756	906
757	907, 909, 910
758	905
759	894, 911, 1005
760	Supersed'd
761	1381
762	904
763–6	255–8
767–8	259
769–773	260–4
774	265, 279
775	266, 280
776	267, 278
777–783	268, 274
784	5097
785–6	275
787	645, 658
788	648,651-2, 660, 666
789	643
790	1088, 1090
791	662, 673, 946
792	735
793	722, 894, 1005
794	651–2, 658
795	647,651-2, 655, 666, 676, 1258
796	652, 655, 660, 666, 1185
797	Temporary
798	647, 652, 660, 666
799	653,662-3, 946
800	Repealing
801	662,673,946
802	652, 658, 662, 664, 754, 945
803	733, 957
804	734, 3234
805–6	3234

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
807	656, 668, 688-90, 735	853	Omitted	949-950	794	1078	1117
		854	836, 980	951-2	Supersed'd	1079-80	1115
808	688	855	821-2	953-4	1012	1081	1116
809	671	856	Repealing	955	983	1082	Supersed'd
810	688, 690	857	817, 819, 894, 967, 1005	956-8	1016-18	1083-4	1130
811	691			959	1019	1085	1138
812	658, 670			960	1010	1086	1138-9, 1170
813	675, 946	858	912, 1022	961-5	1025-9	1087-8	Supersed'd
814	675	859	792	966	1032	1089	1138
815	Repealing	860	812	967	Supersed'd	1090	1140
816	669	861	813, 816	968-978	1033-43	1091-2	1144-5
817	Repealing	862	815	979	1044-6	1093	1142
818	711	863	822	980-6	Omitted	1094	1146
819	Repealing	864	842-3, 987	987	593	1095	1149, 1169
820	894, 1005	865	844	988-9	594	1096-1100	1147-51
821	782, 792	866	844-5	990-3	595-8	1101	1170
822	668, 942	867	845-6, 988	994	914	1102	1152
823	667-8, 941-2	868	817, 818, 820-2, 967	995	915, 917	1103-5	1154-6
				996	917	1106-7	1169
824	751, 779, 782, 792-3, 812	869	821, 823, 826, 971	997	Omitted	1108	1157
				998	918	1109	1153
825	813, 815	870	825-7, 829, 972, 974-6	999-1001	919	1110	1162
	816, 817, 820, 825-7, 829, 833, 836-7, 840, 967, 972, 974, 976, 980-1			1002	921	1111	1167
		871	816	1003-4	931-2	1112-15	1158-61
		872	828	1005-7	922-4	1116-18	1163-5
826		873	833, 847	1008-9	929-930	1119	1167
		874-5	841	1010	915	1120	1165
		876	825	1011	917	1121	1166-7
		877	823, 971	1012	914	1122	Omitted
827	Omitted	878	794	1013	Saving	1123	1144, 1149, 1163
828	817, 827, 894, 967, 974-5, 1005	879	810, 965	1014	Repealing		
		880	Repealing	1015-16	925-6	1124-5	1173
		881	863, 1272	1017	927-8	1126	1144
829	821, 825, 827-9, 834, 972, 974-6	882-5	864-7	1018	928	1127	1149-51, 1157
		886	867, 870	1019	920		
		887	869	1020-8	1057-65	1128	1161, 1163
830	894, 1005	888	868	1029-30	1066	1129	1169-70
831	830, 894, 977, 1005	889	869, 870	1031	1067	1130	1168, 1174
		890	869, 870	1032-9	1070-4	1131-2	1174
832	904	891-4	871-4	1040	Repealing	1133-6	1175-8
833	817, 830, 894, 967, 977, 1005	895	711	1041	1075	1137	See Const.
		896-901	875-8	1042-3	Repealing	1138	1179
		902	870	1044	1090	1139	1182-3
834	836-7, 980	903-5	1047-9	1045-8	1076-9	1140	1180-1
835	837, 981	906-7	Omitted	1049	1078, 1080	1141	1180
836	838, 981	908	954	1050	1081	1142	1188
837	Legaliz'ng	909	Omitted	1051	1087	1143	1184-5
838	794, 819, 831, 894, 912, 978, 1005, 1022	910	939, 940	1052	1085	1144	1187
		911	715	1053	1124-5, 1127-8, 1133	1145	1188-9
		912	710			1146-7	1190-1
		913	707			1148-9	1196-7
839	812, 813, 815	914	Supersed'd	1054	1091	1150	1177-9
840	825, 827, 829, 972, 974-6	915	938	1055	1077, 1080	1151	1177
		916	939, 940	1056	1084	1152	1177, 1266
		917-918	Supersed'd	1057	1080, 1084	1153	1177
841	826, 840	919	938	1058	1080	1154	Omitted
842	Saving	920	716	1059	1076	1155	1192
843	796	921-2	Supersed'd	1060	1086, 1145	1156	1193, 1195
844	Saving	923	751, 767	1061	1082	1157	1194
845	816, 825, 827, 829, 833, 840, 972, 974-6	924	759	1062	1088	1158-68	1198-1208
		925	1054	1063	Repealing	1169	1209, 1213
		926-36	Supersed'd	1064	1090	1170-83	1210-23
		937	709	1065	1092	1184	1198
846	842-3, 988	938	699	1066	1090	1185-9	1224-8
847	Omitted	939-940	Omitted	1067-9	1093	1190	1212
848	813	941	933	1070-2	1094-6	1191-4	1229-32
849	810, 965	942	Repealing	1073	1126-7	1195	1250
850	810, 812, 822, 965	943	794	1074	1128	1196	1198
		944	Supersed'd	1075	1130	1197-1202	1233-8
851	820	945	984	1076	1132	1203	1198
852	823, 971	946-8	Supersed'd	1077	Supersed'd	1204-10	1239-45

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
1211	1250	1301	1352	1467–8	1530–1	1638	1608
1212	1198	1302	1354, 1357	1469	1532	1639	1636
1213–19	1246–52	1303–4	1355–6	1470–5	1533	1640	1619
1220	1254	1305	1365–6	1476	1532	1641–2	1637–8
1221–2	1252–3	1306	1353	1477	1534	1643	Omitted
1223	1255	1307	1367	1478	1538	1644	1639
1224	1256–7	1308	1369	1479–81	1535–7	1645	Repealing
1225	1257	1309–10	1370	1482	1535	1646–7	1882–3
1226–7	1254	1311	1372	1483	Repealing	1648	1882
1228	1256	1312	1371, 1373	1484–8	1539–43	1649	1642
1229	1252	1313	1375	1489–90	1544	1650	1642, 1649
1230	1257	1314	1377	1491–2	1545	1651–2	1645
1231	1259	1315	1378–9	1493–1509	1546–62	1653–4	1642–3
1232	1261	1316	1380	1510–14	1566–9	1655–7	1647–9
1233–6	1261–4	1317–18	1382–3	1515–24	1572–81	1658	1642
1237	1260	1319	1014, 1383	1525–6	Obsolete	1659	1643, 3270
1238	87,99,116, 207, 298, 481, 491, 496, 510, 1186, 2621	1320	1014, 1303, 1383	1527–8	1589	1660	1650
				1529–42	1590–1603	1661–2	1651
		1321–6	1384–9	1543–4	1604	1663–4	1652
		1327	1391	1545–6	1605–6	1665–74	1653–62
		1328	1390	1547–53	1582–8	1675	2448
1239–40	87,99,116, 207, 298, 481, 491, 496, 510, 2621	1329–32	1392–5	1554	766	1676–7	1663–4
		1333–5	1398–1400	1555–6	2167	1678–81	1669–72
		1336–7	1401–2	1557–60	2169–72	1682	1673
		1338	Omitted	1561–2	2212	1683–4	1674
		1339	1403, 1406	1563	2168	1685	1684-5, 1687
1241	510	1340–6	1406–12	1564	2173	1686	1686, 1688
1242	87,99,116, 207, 298, 481, 491. 496, 510, 2621	1347	1400, 1413–14	1565	2174-5, 2211	1687	1691–3
				1566	2176	1688–94	1694–1700
		1348	1413–14	1567	2177–8	1695	1709–11
		1349	1405	1568	2178	1696–7	1712
		1350–3	1415–18	1569	2179–80	1698-1700	1701–3
1243	491, 496, 510	1354–6	1419	1570–1	2182–3	1701	1704–5
		1357–9	1422–4	1572	2186	1702	1706–7
1244 52	1280–8	1360	1426	1573	2209	1703	1689
1253	1266, 1276	1361	1425, 1437	1574	2189	1704	1714
1254	1268	1362	1437	1575	2184-5, 2213	1705	1718
1255	1272	1363	1425	1576	2187-8, 2196	1706	1717
1256	1265	1364	1414	1577–80	2190–2	1707	1721-3
1257	1274, 1276	1365	1421	1581–2	2193	1708	1725
1258	1275	1366	1420	1583	2194	1709	1716, 1724, 1726
1259	1273	1367–74	1427–34	1584	2210		
1260	1267	1375	1436	1585	2195	1710	1747–8, 1751
1261	1278–9	1376–81	1438–43	1586	2181	1711	1749
1262–4	1269–71	1382	1444–5	1587	2196	1712–13	1731–2
1265–7	1171	1383	Saving	1588–90	2198–2200	1714	1733–4
1268	1272, 1278	1384	1446	1591–2	2201	1715	1735
1269	1272, 1278	1385–6	1435	1593–5	2202–4	1716	1752
1270	888, 1303	1387–91	1447–51	1596	2211	1717–18	1736–7
1271	1304	1392–3	1347–8	1597	2205	1719	1753
1272	Omitted	1394–5	1349	1598	2196	1720–1	1719–20
1273–5	1307–9	1396–1409	1453–66	1599–1600	2206–7	1722	1690
1276	1312	1410–15	1482–7	1601–3	2181	1723	1759, 1762, 1764–5
1277	1314	1416–18	1488	1604	Temporary		
1278	1316, 1353	1419–20	1489	1605–6	2214	1724	1745, 1763
1279	1317	1421–3	1490–2	1607	Repealing	1725–6	1738–9
1280	1333	1424	1488, 1493	1608	1607	1727	1738
1281	1342	1425–8	1494–7	1609–11	1609–11	1728	1740
1282–4	Obsolete	1429–30	1498–9	1612–13	1613	1729–30	1727
1285	1344	1431	1498	1614–15	1614–15	1731	1728, 1730
1286	1334	1432–3	1499	1616–17	1617	1732	1750, 1815
1287	Omitted	1434–5	1500	1618	1616	1733	1741, 1815
1288	1321-2, 1350	1436–43	1501–8	1619	1618	1734	1742, 1744
1289	1310	1444	Repealed	1620	1643–4	1735–7	1768–70
1290	1326	1445–6	1510, 1511	1621	1620	1738	1772
1291	1311	1447–8	1512	1622–3	1621	1739	1808
1292	1318	1449–56	1513–20	1624–5	1622–3	1740	1799, 1800
1293–5	1319	1457–8	1521	1626–8	1624–6	1741	1773
1296	1320	1459–63	1522–6	1629–32	1628–31	1742	1799
1297–9	1322	1464–5	1528–9	1633–4	1632	1743–50	1774–81
1300	1359, 1364	1466	1528	1635–7	1633–5	1751–2	1801–2

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
1753	1806	1908	1999	2080–1	Repealing	2256	2320
1754–5	1803–4	1909	1999, 2000	2082–9	2084–91	2257	2311
1756	1805, 3313	1910–18	2001–9	2090–7	2099–2106	2258–9	2317–18
1757	1818	1919–20	2010	2098–9	2107–8	2260–1	2321
1758–60	1811–13	1921–3	2011–13	2100	2107, 2110	2262–3	2322–3
1761–4	1784–7	1924–7	2014	2101–2	2109–10	2264	Omitted
1765	1800	1928–33	2015–20	2103–8	2158–64	2265	2324
1766–8	1788–90	1934–5	2021	2109–10	1328	2266–7	Omitted
1769	1806–7	1936	2022	2111	1329	2268–9	2326
1770–1	1792	1937–40	770–3	2112–13	1331	2270	2329
1772	1793	1941	Omitted	2114	1332	2271–2	2327–8
1773	{ 1794, 1808	1942	774	2115	1357	2273–5	2330–2
	{ 1810, 3499	1943	2023	2116	Repealing	2276–8	2334–6
1774–5	1814	1944	Omitted	2117–18	2216–17	2279–80	2341
1776	1795	1945–54	2024–33	2119	2254	2281–4	2337–40
1777	1808	1955–61	2034–40	2120	2218	2285	2333
1778	1796	1962–4	2143	2121–9	2219	2286–7	2348
1779	1816	1965–7	2041–3	2130–5	2220	2288–9	457–8
1780–1	1797–8	1968–9	2044	2136–8	2221–3	2290	457
1782–3	Omitted	1970	2045	2139–40	2224	2291	459
1784	1890–1	1971	2054	2141–3	2225–7	2292–3	Omitted
1785	1898	1972	2055–6	2144	2228	2294	2529, 2538
1786	1898	1973	2057	2145	2229	2295–2302	2530–7
1787	1902	1974–5	2058	2146–7	2228	2303	2544–5
1788	1840	1976	2059	2148–51	2230–3	2304	2540
1789	1841, 1843	1977	Temporary	2152	2234–5	2305	2544
1790	1840, 1842–3	1978	2048	2153–61	2235–43	2306	2547
1791	Omitted	1979–84	2092–7	2162–4	2244	2307–9	2539
1792	1844	1985–6	2098	2165	3234	2310–11	2540
1793	1845–7	1987	2103, 2125	2166–7	2245–6	2312	Repealing
1794–8	1848–52	1988	2103, 2125	2168	2247, 2249	2313–15	Temporary
1799	1882	1989	2103, 2125	2269	2248	2316–18	2548
1800	1847	1990	2103, 2125	2170	{ 2253, 2609	2319–20	2549
1801	1847 1854	1991	2103, 2125		{ –11	2321	2550
1802	1854	1992–4	2127	2171	{ 2254, 2617	2322–3	2355–6
1803	1841, 1855	1995–8	2066–9		{ –18	2324	2358
1804–5	1869–70	1999	2128	2172	2255	2325	2356
1806	1868	2000	2070, 2076	2173	2255, 2616	2326	2358
1807–8	1859	2001	Omitted	2174	2903	2327	2355
1809–10	1872–3	2002	2071	2175	189	2328	2355, 2357
1811	1881	2003–4	2072	2176–9	2256–9	2329	2356
1812	1877	2005–6	2073	2180	2258	2330	Supersed'd
1813–14	1887–8	2007–8	2074–5	2181	2260	2331	Omitted
1815	1322	2009–15	Omitted	2182–3	2253	2332	2361–2
1816–18	1856–8	2016	1334	2184	2609	2333	2363
1819	1859	2017	1334–5, 1357	2185–8	Temporary	2334–5	2364
1820	Repealing	2018–21	1336–9	2189–90	2261	2336	2356
1821	1861	2022	Temporary	2191–5	2262–6	2337–8	2365–6
1822	Temporary	2023	1340	2196–8	2267	2339	Omitted
1823	1862	2024–5	1341	2199–2208	2268–77	2340	2367
1824–5	1884–5	2026–8	2076–8	2209	2309	2341	2355
1826–7	1921	2029	{ 1067, 1184,	2210–12	2278–80	2342	2355, 2368
1828–30	1922–4		{ 2111	2213	5544, 5709	2343–4	Omitted
1831	1925, 1930	2030	1272	2214–15	2307	2345	2371
1832–51	1926–1945	2031–2	Omitted	2216–26	2281–91	2346	2374
1852	1946–8	2033	2112–13	2227–9	2292	2347	2377
1853–4	1947	2034	2114	2230	2307	2348–58	2371–81
1855–6	1949	2035	2143	2231	Temporary	2359	2382, 2408
1857	Omitted	2036	2121, 2143	2232–7	2993–8	2360	2382, 2385
1858–61	1949	2037	2143	2238–42	2299–2303	2361	2383
1862–3	1950	2038–9	2115–16	2243	2307	2362	2388
1864–7	1951–4	2040–1	2144	2244	2299	2363	2387
1868–76	Supersed'd	2042	Omitted	2245–7	2304–6	2364	2390
1877	1961	2043	2117	2248	2307	2365–6	2389
1878–9	1955–6	2044	2122	2249	2314	2367	2391
1880	1956	2045	2118	2250	2312	2368	2392, 2400
1881–2	1962–3	2046	Repealing	2251	2313–15	2369	2387
1883	1955	2047–8	2119–20	2252	2313	2370	2393
1884–7	1957–60	2049–51	2122–4	2253	444, 2311	2371	Repealed
1888–98	1964–74	2052–78	2125–51	2254	445	2372	2394
1899–1907	1990–8	2079	Omitted	2255	2314, 2316	2373	2397

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
2374	2399, 2425	2465	2489	2561	2565	2658	Supersed'd
2375	2385	2466	2491	2562–3	2566	2659–60	2666–7
2376	2401	2467	Repealing	2564	526	2661–2	2668
2377	Temporary	2468–9	2479–80	2565	Omitted	2663	2652
2278	2386	2470–1	2481	2566	2564	2664	2670
2379	2395	2472–4	2490	2567	2564, 2574	2665	2669
2380	2403	2475–6	2491	2568	2565	2666	2671
2381	2382–3, 2425, 2430	2477	2490	2569	2564, 2575	2667	Repealing
		2478	2482	2570–1	2568	2668	2672
2382	2382	2479–80	2490	2572	2571	2669	2649
2383	2382–3, 2427, 2430	2481	2491	2573	2568, 2573	2670	2673
		2482	Omitted	2574	2568, 2573	2671	2648
2384	2405, 2408, 2430	2483	2503, 2505, 2508	2575–6	2568	2672	Supersed'd
				2577–8	2569	2673	2675
2385	2406	2484	2504–5	2579–80	2570	2674	2609–11, 2681
2386	2405	2485	2503	2581	2571		
2387	2407	2486	2505	2582	Repealing	2675	2617
2388	2384, 2430	2487	2506	2583–4	1872–3	2676	2675
2389	2408, 2426	2488–90	2508	2585	1877	2677	2616, 2676
2390–1	2409–10	2491	2509	2586–9	Omitted	2578–9	Temporary
2392	2427	2492–3	2508	2590	2622–3	2680	2680
2393	2411	2494	2503	2591	2621	2681	2609–11, 2683
2394	Repealing	2495	2508	2592–4	2624		
2395	2408	2496	2503	2595–6	2625	2682	2616, 2683–4
2396	2412	2497	2513	2597	2622, 2626	2683	2613, 2617
2397–8	2405	2498	2511	2598	2628	2684	2617
2399	2429	2499	2512–13	2599–2601	2629	2685	2612
2400	2427	2500	2512–13	2602–3	2631	2686	2684
2401 4	2413–16	2501	2512	2604	2632	2687	2683
2405	2402	2502	2514	2605	2634	2688	2614, 2691
2406	2424	2503–4	2516–17	2606	2633	2689	2691
2407	2423	2505	2516	2607–8	2640	2690	2683
2408	2427	2506	2519	2609	2609, 2616, 2635	2691	Obsolete
2409	2422	2507–8	2517			2692	2688, 2690
2410	2419	2509	2520	2610	2610–11	2693–5	2686
2411–12	2420–1	2510	2519	2611	2640	2696–9	2687
2413	2404	2511	2517	2612	2635	2700	Obsolete
2414	Repealing	2512	2527	2613	2642	2701–2	2685
2415	2382, 2431	2513	2515	2614	2635–6	2703	2688
2416	2382	2514	2515, 2528	2615	2612, 2635, 2637	2704	2683
2417	2417	2515–16	2515			2705–6	2691–2
2418	2418	2517	2521	2616–17	2637	2707	2689
2419	2422	2518–22	Omitted	2618	2635	2708	Omitted
2420	2395	2523–4	2588	2619–20	2639	2709	Repealing
2421	Supersed'd	2525	2584	2621	2638	2710	2609–11, 2693
2422	2448	2526	2590	2622–3	2641		
2423	Supersed'd	2527	2589	2624	2617–18	2711–12	2693–4
2424	2382	2528	2590	2625	2613	2713	2616–17, 2693, 2701
2425	Supersed'd	2529	2592	2626	2614, 2643		
2426	2382	2530	2589	2627	2614	2714–15	2695–6
2427	2425	2531–3	2593–5	2628	2643	2716	2693
2428	2426	2534	2588	2629	Obsolete	2717	2614, 2700
2429	Supersed'd	2535	2599	2630	2609, 2645–6	2718–20	2697–9
2430–1	2448	2536–7	2597	2631	2610–11	2721–2	2693–4
2432–8	2462–8	2538	Temporary	2632	2616, 2647	2723	2702
2439–42	2469, 2477	2539	2599	2633	2615	2724	Temporary
2443–4	2470–1	2540	2597	2634–5	2617–18	2725	2609–11, 2702
2445–8	Repealed	2541	2598	2636–7	2650		
2449	2478, 2481-2	2542	2600	2638–40	2651–3	2726	2612, 2702
2450	516, 2482	2543	2597	2641	2654–5	2727	2617
2451	2478, 2483	2544–5	2599	2642	2612, 2655	2728	2616, 2702–3
2452	2483	2546–7	2576	2643–4	2656–7	2729	2706
2453	2478	2548	2576, 2580	2645	1351, 2658	2730–1	2704–5
2454	2482	2549–50	2577	2646	2663	2732–3	2707
2455	2485	2551	2576, 2583	2647	2656	2734–40	2708
2456–7	2486	2552–3	2578–9	2648–9	2664–5	2741	2709
2458	2488	2554–5	2580	2650	Repealing	2742–3	2711
2459–61	2489	2556	Temporary	2651	1351, 1435	2744	2710
2462	2492	2557	Repealing	2652–5	2659–62	2745	2712
2463	2491	2558–9	2564–5	2656	Temporary	2746	2614, 2713
2464	2484	2560	2567	2657	Repealing	2747	2702

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
2748	Temporary	2835	2776	2915	2801	3044	2856
2749	2713	2836	2783	2916	2791	3045	2855
2750	Temporary	2837-8	2787	2917	2792	3046	2858
2751	2609-11, 2714	2839	2817	2918	551	3047	2852, 2858
2752-4	2613-15	2840	2740, 2817	2919-20	2794	3048-50	2859
2755	2617	2841	2817	2921	2802	3051	Repealing
2756-8	2714	2842	2773	2922	2794	3052	2861
2759	2715	2843	2829	2923-4	2795	3053	2858, 2860
2760	2714	2844	2783	2925	2796	3054	2861
2761	Omitted	2845	2771-2	2926	Omitted	3055-6	2862
2762	2614, 2718	2846	2760	2927	2823	3057-9	2863-5
2763	2718	2847	2780	2928-31	2797	3060-1	2866-7
2764	2717	2848	2780	2932	2793	3062-3	2881
2765	2716	2849-50	2781-2	2933	2749	3064	Repealing
2766	2718	2851	2766	2934	Legalizing	3065-6	2882-3
2767	2715	2852	2772	2935	2754	3067	2884
2768	1272	2853	2771, 2780, 2801, 2806	2936-9	2755	3068	2883
2769	2609, 2723	2854	2758, 2762	2940-1	2756	3069-72	2885-8
2770	2616, 2723	2855	2758	2942	Repealing	3073-4	2889
2771	2615, 2723	2856	2761	2943-4	Omitted	3075	2891
2772-3	2724	2857	2762	2945	2799	3076	2893
2774	2723	2858	2761	2946	Legalizing	3077	Omitted
2775	Omitted	2859-60	2765	2947	Obsolete	3078	2890
2776	2727	2861	2822	2948	2780	3079	Omitted
2777	2614, 2618, 2727	2862-5	2768	2949	Omitted	3080	Repealing
2778-80	2725-7	2866	2769	2950-5	2800	3081-4	3894-8
2781	2609-11, 2723	2867	2758	2556-9	2798	3085	2898-9
2782-3	2723	2868-70	2785	2960	Omitted	3086	2898-9
2784	Temporary	2871	2781-2	2961	2812	3087	2898-9
2785	2601	2872	2778	2962	2763, 2812	3088-9	2899
2786	2609-11, 2615-17	2873	2788	2963	2767, 2813	3090	2898-9
2787	2612	2874-5	2789	2964	2768	3091-2	2901-2
2788-96	Temporary	2876-7	2773	2965	2812	3093-6	2905-8
2797-8	2603-4	2878	2749	2966	2813	3097-8	2910-11
2799	Temporary	2879	2805	2967-72	2812	3099-3113	2912-26
2800-1	2608	2880	2734	2973	2811, 2813	3114-17	2935-8
2802	2614, 2618	2881	2735-6	2974	Repealing	3118	2941
2803-4	2728	2882	2737	2975-80	2786	3119	2939, 4636
2805	2728-9	2883	2736	2981-2	2814	3120	2940
2806	2729	2884	2689, 2706, 2736, 2775	2983-4	2815-16	3121-4	2927-30
2807	2728	2885	2739-40, 2776	2985-7	2818	3125	2932
2808-9	2730	2886	2736-7	2988-90	2819	3126	2934
2810	2729	2887	2738, 2773	2991-2	2820	3127	2933
2811	2730-1	2888	2734	2993-4	2838-9	3128-9	2942-3
2812	2731	2889	2737	2995-6	2838	3130-6	2947-53
2813-14	2733	2890	2739	2997	2808, 2839	3137-8	2955-6
2815	2732	2891	2741	2998-3000	2847	3139-43	Legalizing
2816	2731	2892	2735	3001-3	2840	3144-5	2957-8
2817	2729	2893	2739	3004	Obsolete	3146	2961
2818	2731	2894	2742	3005	2842	3147	Omitted
2819	2743, 2790	2895	2767, 2806	3006	2844	3148-9	2962-3
2820	Omitted	2896	2753, 2806	3007-8	2843	3150	2963
2821	2802	2897	1401, 2897	3009	2844	3251	2964
2822	2743-4	2898	2807	3010-11	2846	3152-3	2965
2823	2745-6, 2749	2899	2806	3012-14	2843	3154-6	2966
2824	2750	2900	2808	3015-16	2848	3157-8	2967
2825	2751	2901	2762, 2808	3017-21	2849	3159-62	2968-71
2826	2746, 2751	2902	2809	3022	2855	3163-6	2972-5
2827	2752	2903-4	2810	3023	2849	3167-8	2976
2828	2734, 2748	2905	2822	3024	Repealing	3169-70	2977
2829	2748	2906	2811	3025	Legalizing	3171-2	2978
2830	2752, 2757, 2760	2907	Obsolete	3026-7	2850-1	3173	2979-80
2831	2757	2908	2751, 2754	3028	2853	3174	2979
2832	2778-9	2909	2758	3029-30	2850	3175-6	2981
2833	2773	2910	2770	3031-2	2851-2	3177-8	2982
2834	2774, 2801	2911	Omitted	3033-5	2854	3179-80	2983
		2912	2803	3036	2850	3181	2984
		2913-14	2804	3037-8	2853	3182	2985
				3039	2857	3183	2985, 3377
				3040-1	2852	3184-5	2986-7
				3042-3	2855	3186-8	2988-90

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
3189-91	2991	3360	3122-3	3569-70	3306	3775-3814	3485-3524
3192-3	2992-3	3361	3124	3571-2	3308	3815-19	3528-33
3194-8	2994-8	3362	3125, 3128	3573	Legalizing	3820	3526
3199-3201	2999	3363	3126, 3128	3574	3310	3821	3525
3202-5	3000-3	3364-5	3130	3575	3312	3822	3527
3206-10	3004-8	3366-71	3131-6	3576	1805, 3313	3823-5	2534-6
3211	Saving	3372-3	3137	3577-8	3311	3826	Legalizing
3212	3009	3474-5	3138	3579	3314	3827	3537
3213-14	3010	3376-7	3139-40	3580	3310	3828-9	3538
3215-16	3011	3378-9	3141	3581	3314	3830-41	3539-50
3217-18	3012	3380-1	3142	3582	3311	3842-4	3552-4
3219-20	3013	3282-5	3143-6	3583-90	3315-22	3845	3551
3221-2	3014	3386-7	3147	3591-2	3323	3846-7	3555
3223	3013	3388	3146, 4630	3593	3324	3848	3556
3224-8	3015-19	3389-90	3149	3594-5	3325	3849-51	3557
3229-31	3020	3391-2	3150-1	3596-9	3326	3852-55	3559-62
3232	3021	3393-3439	3153-99	3600-1	3328	3856	3563, 3758
3233-4	3022	3440	3193	3602	3329	3857	3564
3235-6	3023	3441	3200	3603-4	3330	3858-60	3565
3237	3024	3442-3	3201	3605	3332	3861-3914	3566-3619
3238-9	3025	3444-9	3202-7	3606	3333	3915	Obsolete
3240-1	3026-7	3450-1	3208	3607-8	3334	3916-25	3620-9
3242-3	3028	3452-4	3209-11	3609-15	3335-41	3926	3618
3244-5	3029-30	3455-6	3212	3616	3393	3927-49	3630-52
3246-7	3031	3457-64	3213-20	3617-21	3342-6	3950-3	3654-7
3248-9	3032	3465-70	3223-7	3622-3	3347	3954-67	3661-74
3250	3033	3471-2	3229	3624-5	3348-9	3968-78	3676-86
3251-2	3037	3473	3230	3626-7	3350-1	3979	3687-8
3253-7	3038-42	3474-5	3231	3628	3350	3980-1	3689-90
3258-9	3043	3476-7	3232-3	3629	3352	3982	Supersed'd
3260-4	3044-8	3478	3235	3630-1	3353	3983-4	3691-2
3265-7	3049	3479-80	3236	3632-46	3354-68	3985-92	3699-3706
3268-70	3050-2	3481-4	3237-40	3647-8	3369	3993	3708
3271-4	3053-6	3485-6	3241	3649-51	3370-2	3994	3707-8
3275-6	3057	3487	3249	3652-3	3373	3995	3708
3277	3058	3488	3242	3654-6	3374-6	3996-4006	3709-19
3278-9	3059	3489	3243	3657-8	3378	4007-8	3720
3280	3060	3490	3243, 3249	3659-63	3379-83	4009-35	3721-47
3281	3062	3491	3245	3664	3392	4036	Omitted
3282	3061	3492-3	3246	3665-9	3387-91	4037-45	3748-56
3283-4	3063	3494	3247	3670	3384	4046	Omitted
3285-91	3064-70	3495	3249	3671-2	3385	4047-8	3762-3
3292-3	3071	3496	3248	3673	Omitted	4049	3757, 3760
3294	3072	3497	3244	3674	3394	4050	3761
3295	3072, 3085	3498-3508	3250-60	3675-6	3395	4051-65	3764-78
3296	3072	3509	225	3677-83	3396-3402	4066	3757
3297-8	3076-7	3510-11	3261-2	3684-5	3403	4067-72	3780-5
3299-3301	3079	3512	Legalizing	3686-9	3404-7	4073	Omitted
3302-6	3080-4	3513-14	Supersed'd	3690-1	3408	4074-88	3786-3800
3307	3086	3515-16	3268	3692-3	3409	4089	3801
3308	3078	3517-21	3263-7	3694-8	3410-14	4090-1	3802
3309	Repealing	3522-6	3270-4	3699-3700	3415	4092	3803
3310-23	3088-3101	3527-8	3275	3701	3416	4093	3801
3324-5	Omitted	3529-30	3276	3702-3	3417	4094	3803
3326-7	3102	3531	3277	3704-5	3418	4095-4115	3804-24
3328-9	3103-4	3532-3	3278	3706-7	3419	4116-58	3826-68
3330-2	3106	3534-5	3279	3708	Omitted	4159-60	3869
3333	3107	3536-7	3280-1	3709	3424	4161-2	3870-1
3334-7	3108	3538-9	3282	3710-11	3425	4163-70	3876-83
3338-9	3109	3540-1	3283-4	3712-16	3426-30	4171-2	3884
3340-3	3110-13	3542	3286	3717	Omitted	4173-80	3885-93
3344-5	3114	3543-4	3287	3718-30	3431-43	4181	3894-8, 3900
3346	3115	3545-52	3288-95	3731	3313, 3444	4182	3901
3347-8	3116	3553	Legalizing	3732-42	3445-55	4183	3898
3349-53	3117-21	3554	3296	3743	Obsolete	4184	3822
3354	3129	3555-6	3297	3744-6	3456-8	4185-6	3902-3
3355	3126	3557	3298	3747	2637	4187-8	3904
3356	3126, 3129	3558-9	3299	3748-9	3459	4189	3905, 3979
3357	3126	3560-2	3300	3750-70	3460-80	4190	3905, 3980
3358	3128	3563-4	3301	3771-3	3482-4		-4, 3987
3359	3127	3565-8	3302-5	3774	3481	4191	3905, 3986

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
4192	3905, 3988	4404-5	4112	4834-6	4556-8	5018	Omitted
4193	3905, 3987	4406-7	4113-14	4837-51	4560-74	5019-20	138-9
4194	3905, 3989	4408	4122, 4125	4852-9	4576-83	5021	141
4195-9	3906	4409	4116	4860-1	4208	5022-3	143-4
4200-3	3935-8	4410-12	Omitted	4862-3	4209-10	5024	203
4204	3935	4413	4137	4864-5	4212	5025	211
4205	3939	4414	4123	4866-7	4214-15	5026	205, 207
4206	3935, 3940	4415-16	4127-8	4868	4221	5027	Omitted
4207-8	3941-2	4417	4132	4869-71	4216-18	5028	Obsolete
4209-10	3943	4418-19	4133	4872-3	4219-20	5029	254, 3675
4211	3944, 3946	4420	4134	4874	4222	5030	191
4212-13	3945-6	4421-3	4129-31	4875-83	4584-92	5031	See Const.
4214-18	3949-53	4424-7	4139-43	4884	4594	5032	1289
4219-39	3907-27	4428-32	4145-9	4885	4483	5033-4	296
4240	3930	4433	4117	4886	4601, 5484	5035	Supersed'd
4241	3928	4434-5	4139	4887-4908	4602-23	5036	297, 298
4242	3888	4436	4144	4909-13	4629-33	5037-8	299, 300
4243	3929	4437	4136	4914-15	4625	5039	296
4244-5	3931-2	4438	4138	4916-18	4626-8	5040	Repealing
4246	3878, 3933	4439	4124	4919	4624	5041-62	511
4247	3899	4440	4135	4920	4648	5063	Repealing
4248	3934	4441-3	4150-2	4921	Obsolete	5064	512
4249	4579	4444	4115	4922-4	4658-60	5065	469
4250	3955	4445-58	4153-66	4925	4662	5066	489
4251	3954	4459	4167, 4176	4926-8	4664-6	5067	490-1
4252-4	3955-7	4460-3	4168-77	4929-30	4670-1	5068-9	1396-7
4255	Omitted	4464-5	4172	4931-3	4672	5070	492
4256-63	3958-65	4466	4173	4934-5	4667-8	5071	478
4264	3966	4467	4172, 4174	4936-9	4654-7	5072	479, 481
4265	3779, 3966-7	4468-99	4175-4206	4940-1	4673	5073	177
4266	3966-7	4500-2	4207	4942-51	4674-83	5074	300, 480, 548
4267	3779, 3966-7	4503-5	4223-5	4952-3	4634-5	5075	533
4268-72	3968-3972	4506	4227	4954	Obsolete	5076	543
4273	4007	4507	4239	4955-66	4636-47	5077	382
4274-9	3973-8	4508	4228-9	4967-70	4649-52	5078-9	3035-6
4280-2	3991-3	4509	4230-4	4971	954, 4653	5080-2	4597-9
4283	Omitted	4510	4230, 4235-8	4972	4684, 4687	5083	511
4284-96	3995-4006	4511-31	4240-60	4973	4685, 4688	5084	590
4297	4008, 4017	4532-3	4261	4974	4685	5085	591, 2235
4298	4012	4534	4262	4975	4686	5086	592
4299	4011	4535	4263-4	4976-7	4690-1	5087	354, 4593
4300-3	4013-16	4536-42	4265-71	4978	4689	5088	3872
4304-6	4008-10	4543-8	4273-8	4979	4692	5089	1290
4307	Omitted	4549	4280	4980	Omitted	5090	4661
4308	4023	4550-1	4281	4981	4688, 4698	5091	4595
4309	4024, 4026	4552-4	4282-4	4982-3	4696	5092	Temporary
4310-14	4027-31	4555-8	4287-90	4984	4697	5093	4596
4315	4042	4559	4292	4985	4694	5094	4663
4316	4025	4560	4291	4986-7	4699-4700	5095	5492
4317-23	4032-8	4561-6	4293-8	4988	4700, 4705	5096-7	1291-2
4324-5	4039	4567-71	4302-6	4989	4704	5098-9	2349
4326	4040	4572	Omitted	4990	4707	5099-5100	2325
4327-8	4043	4573-4	4307-8	4991	4706	5101	1527
4329	4041	4575-7	4309	4992	4708	5102-3	2309-10
4330	4044	4578-4631	4310-63	4993	4703	5104-5	2617
4331	4045	4632	4364-5	4994-5	4709-10	5106	Repealing
4332	4045-6	4633-61	4366-94	4996-7	4718	5107	1172
4333	4046	4662-7	4396-4401	4998-5000	4719-4721	5108	3152
4334	4047	4668-80	Omitted	5001	4723	5109	2428, 5314
4335	4950-1	4681-93	4402-14	5002	4711-12	5110-11	5314
4336	4048	4694	4402	5003-4	4713-14	5112	1293, 4024
4337-8	4049	4695-4739	4415-58	5005	4717	5113	1419
4339	4049	4740-59	4460-79	5006	65	5114	3873-4
4340-3	4052-5	4760-1	4480	5007	85, 86, 87	5215	4715
4344-8	4056	4762-3	4481-2	5008	98, 99, 100	5116-18	1294-6
4349-56	4058-65	4764-83	4484-4503	5009	115, 116	5119	Omitted
4357	Omitted	4784-4822	4505-43	5010-12	Obsolete	5120	1297
4358-61	4066-9	4823	4545	5013-14	2627	5121	5354
4362	4071	4824	4546-7	5015	Repealing	5122	1298-9
4363	4070	4825-32	4548-55	5016	2881	5123	1300
4364-4403	4072-4111	4833	4553	5017	3034	5124	468

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
5125	4724, 5096	5382–3	5002	5649	5241–3	5842	5400
5126–35	4725–34	5384–5	5004	5650–7	5248–55	5843–4	5401
5136–7	4735–8	5386–7	5008	5658	5256–8	5845–7	5402–4
5138	4739	5388–90	5009–11	5659	5259	5848–9	5405
5139–40	4740	5391	Repealing	5660–75	5260–75	5850–6	5406–12
5141–2	Supersed'd	5392–3	2551–2	5676	5276–7	5857	5414
5143–8	4741–6	5394–9	2553–8	5677	5278	5858	5413
5149	Temporary	5400–1	2559	5678	Repealing	5859–62	5405
5150	Repealing	5402	Repealing	5679	5276	5863	5409
5151–95	4747–92	5403–11	Supersed'd	5680–97	5279–96	5864–5	5415
5196	4852	5412–14	5012–14	5698–5706	5298–5306	5866–82	5416–32
5197	4819	5415	5016–18	5707–9	5307	5883–6	5433
5198–9	4827–8	5416	5015	5710–12	5308–10	5887–90	5434–7
5200	4825	5417	5019	5713–14	5311	5891–2	5438
5201	4820	5418–22	5020–4	5715–16	5312	5893–7	5439–43
5202–7	4810–15	5423–5	2561	5717	5313	5898–5900	5444
5208–10	4831–3	5426	5025	5718–30	5315–27	5901	5445
5211–14	4837–40	5427–8	5026	5731	5330	5902	5444
5215	4842–3	5429–35	5027–33	5732	5329, 5338	5903–4	5446–7
5216–17	4844–5	5436	5035	5733	5329	5905–7	5448
5218–22	4847–51	5437–46	5039–48	5734–6	5338	5908–9	5449
5223–66	4853–96	5447–53	5053–9	5737	5328	5910–12	5450–2
5267–80	4898–4911	5454–7	5060–7	5738	5330	5913–14	5453
5281–2	1301–2	5458–62	5068–72	5739–42	5331	5915	5454
5283–4	4912–13	5463	5159	5743	5332	5916–17	5455
5285	4818	5464	5073	5644	5333, 5335	5918–22	5456–60
5286–7	4806–7	5465	5074–5	5745	5334–5	5923–6	5462–5
5288	4824	5466	5074	5746	5334	5927–8	5466
5289	4825	5467	Omitted	5747–51	5337–41	5929–31	5467–9
5290	4801	5468–87	5076–95	5752	5336	5932–4	5470
5291	4829	5488–9	5096	5753–9	5342–8	5935–6	5475
5292	4826	5490	5097–8	5760–1	5349	5937–8	5476–7
5293	4822	5491–5501	5099–5109	5762–5	5350–3	5939–40	5473–4
5294–5	4802–3	5502–3	5110	5766–7	5354–5	5941	5471
5296	4830	5504–26	5111–33	5768–70	Obsolete	5942	5477–8
5297	4800	5527–8	5134–42	5771	5354	5943	5479
5298	4809	5529–38	5143–52	5772–3	Obsolete	5944	5478
5299	4804	5539	5153	5774	5356	5945	5480
5300	4805	5540–55	5154–69	5775–80	3693–7	5946	5478
5301	4808	5556–7	5170	5781	3698, 5357	5947	5482
5302	4914	5558–70	5171–83	5782	Omitted	5948	Temporary
5303–20	4918–35	5571–2	5184	5783–8	5358	5949	5473
5321–30	4938–47	5573–80	5185–92	5789–90	5359–60	5950	5481
5331	4948–9	5581	5193	5791	3692	5951–2	5478
5332	4950	5582	5195	5792	5361	5953	5482
5333	588	5583–4	5196	5793–4	5362	5954	5483
5334–40	4951–7	5585–6	5197–8	5795–6	5363	5955–6	5486–7
5341	Repealing	5587	5193	5797	3685	5957	5489
5342–8	4959–65	5588–92	5199–5203	5798	5365	5958	5490
5349–50	4967–8	5593–5	5194	5799	5364	5959–60	5492
5351	4936	5596–7	5204–5	5800	5367	5961–2	5493
5352–5	4969–72	5598–5600	5206	5801	5366	5963–6	5494–7
5356–8	4981–3	5601–2	5207–8	5802	5369	5967	5492
5359	2593, 4976	5603	5209	5803	5368	5968	5479
5360	4977–8	5604	5209–10	5804	5370	5969–72	5498–5501
5361	4980	5605–9	5211–15	5805–7	5372–4	5973–4	5507–8
5362	4979	5610–11	5216	5808	5372	5975–6	5509
5363	4989	5612	5216–17	5809	5375	5977	5510
5364–6	4984–6	5613–14	5218	5810	5297, 5490	5978–9	5512
5367	{ 2516, { 4987, 4989	5615–20	5219–24	5811	5483	5980–3	5502–5
		5621	5485	5812	5491	5984	Omitted
5368	4988	5622–6	5225–9	5813–20	5376–83	5985	5506
5369	Repealing	5627–9	5230	5821	5371	5986	Omitted
5370–1	4992	5630–7	5231–8	5822	5384	5987–93	5524–30
5372–3	4993	5638–9	5240	5823	5091	5994–6001	5515–22
5374–5	4994–5	5640	Supersed'd	5824	5385	6002–3	5523
5376	Temporary	5641	5241, 5243	5825–6	5386	6004–5	5513
5377	4996–8	5642	5243	5827–36	5387–96	6006	5514
5378	4994	5643	5241	5837–8	5397	6007–14	5531–8
5379	Temporary	5644	5243	5839	5398	6015–17	5539
5380–1	5000–1	5645–8	5244–7	5840–1	5399	6018–19	5540

McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97	McC.'s Code	Code of '97
6020	5541	6128-43	5644-59	6185-7	5716	6218	5707
6021-2	5542	6144	Omitted	6188-90	5688	6219	5676, 5707
6023-6	5543	6145-6	5661	6191-6202	5689-5700	6220	Repealing
6027-32	5545-50	6147-54	5662-9	6203-4	5714-15	6221	Supersed'd
6033	Omitted	6155-6	5670	6205	5701	6222	5663
6034-73	5551-90	6157	5671	6206	Saving	6223	Repealing
6074-7	5592-5	6158-65	5672	6207-8	5702	6224	Supersed'd
6078	5591	6166	5673	6209	5703	6225-9	5709
6079-6104	5596-5621	6167-8	Supersde'd	6210-11	Temporary	6230	5710
6105	692	6169	5712	6212	5707	6231	5717
6106-21	5622-38	6170-82	5675-87	6213	Temporary	6232-3	Temporary
6122-5	5640-3	6183	5717-18	6214	5674	6234	5713, 5717
6126-7	5639	6184	5717	6215-17	Supersed'd		

TWENTY-THIRD GENERAL ASSEMBLY.

Ch.	Sec.	Code of '97	Ch.	Sec.	Code of '97	Ch.	Sec.	Code of '97
1	5	642	22		2630		16	2392
2		758	23		2841, 2849, 2855		17	2386
3	2	1272	24		2824-35	35	18	2395
	1	905	25		552	Cont	19	Temporary
	2	906	26		Temporary		20	2387
	3	908	27		566	36		2591
4	4	910	28		5060-7	37		1072
	5	907, 909	29		1677-80	38		Legalizing
	6, 7	894, 911, 1005	30		Legalizing	39		1322
5		818, 894, 1005	31		109, 110	40		3038
	1	797, 960	32		448	41		511
	2-5	798-801	33		1782	42	1	3219
	6	802		1	Repealing		2	3221, 5134
	7	802, 829, 976		2	2540-1, 2546	43	3	3222, 5134
6	8	803		3	2540		4-11	5135-42
	9	Omitted		4	2543	44		1669
	10	804, 961	34	5	2544	45		3053
	11-12	805-6		6-7	2540	46		Omitted
	13	807, 963		8-9	2544	47		3105, 4019-22
7		See McC.,725		10	2545	48		4019-22
8		716, 1005		11	2547	49		497
9		792, 834		12	2539	50	1, 2	1875-6
10		794		1	Repealing	51		Superseded
11		767, 955		2	2382, 2385, 2401		1	125
12		905		3	2388		2	126
13		722, 894, 1005		4	2387	52	3	Omitted
14	5	822		5	2390-2		4	2597
15		Sp. Ch.		6	2389		5	2515
16	1	945		7	2400	53		Temporary
17	1-5	2152-7	35	8	Superseded	54		2713
	1-4	2979-82		9, 10	2393-4	55	1, 2	2726-7
18	5	2143		11	2397-8	56		2700
	6	2083		12	2399, 2425	57	1-4	5703-6
19		2088-9		13	2385-6, 2584	58		2608
20		2058		14	2396	59-124		Temporary
21		2027		15	2401	125		1664

TWENTY-FOURTH GENERAL ASSEMBLY.

Ch.	Sec.	Code of '97	Ch.	Sec.	Code of '97	Ch.	Sec.	Code of '97
	1	850, 1272	2		850	9		Repealed
	2	851	3		863	10	1-4	560-3
	3	852, 902, 1014	4		998	11		794
	4	852-3	5		276-7	12		Repealed
1	5	854	6	1	670	13		Sp. Ch.
	6	855		2	691		1	905-6
	7	853, 895, 1005	7	1	670, 945	14	2	906
	8, 9	858	8	1	795, 960		3	907, 909-10

CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97
	4	Omitted		7	1104	44	4	3124
	5	894, 911, 1005		8	1101, 1104	Cont	5	3126, 3128
14	6	Omitted		9	1102		6	3127
Cont	7	1381		10	1103–4	45	1	1562
	8	904		11	1105		2	5024
15		905–6		12	1108	46		2549
16		Temporary		13	1105	47		4999
17		403		14	1106, 1109	48		2296
18		2084, 2086		15	1106–7, 1110	49		2343–7
19		2771		16	1106		1–3	4989–91
20		Omitted		17, 18	1111–12	50	4, 5	2524
21		2750		19	1114		6	2515
22		2027		20	1113, 1117, 1129		7, 8	2525–6
23	1–4	2079–82	33	21	1115–17		1–3	2719
24	1	2605	Cont	22	1117, 1119–21		4	2616, 2720
	2	2270		23	1118		5	2609–10
25		2155		24	1123	51	6	2612, 2721
26		2105		25	1117, 1121, 1139,		7	2617
27		2143			1141, 1143		8	2720
28		1805		26	1124, 1134		9	2722
29		1709		27	1120, 1134	52	1–4	2505–7
30		1806		28	1135	53		227
	1	2169		29	1136	54		227
	2	2168		30	1137	55		227
	3–6	2173–8		31	Temporary	56	1–8	2875–80
	7	2178		32	1096	57	1	1363
	8	2179–80	34		3538–9	58	1, 2	1675–6
	9–10	2183–5	35		1400	59		2568, 2573
31	11	2189		1	5049, 5051	60		2881
	12	2191		2	5051	61		2645
	13	2193	36	3	5049	62		Repealed
	14	2199		4–5	5050–1	63	1	1681
	15	2201		6–7	5050–1		2	1679
	16	2202	37		2348	64		70, 71
	17	2204	38		Swamp land	65		2723
	18	2207	39		4937	66		2342
32		2208	40		1570	67	1–4	1665–8
	1	1097	41		293	68	1–4	1571
	2	1089, 1129	42		Legalizing	69		430, 432
	3	1098	43		5008	70		Temporary
33	4	1098–9, 1104		1	3124	71		2497–2502
	5	1100	44	2	3125, 3128	72–94		Temporary
	6	1099		3	3128	95		2606

TWENTY-FIFTH GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97
	1	851		15	825, 841		1	658
1	2	852, 902, 1014		16	825, 841		2, 3	654
	3–7	854–7		17	825	15	4	665
2		852–3	7	18	823, 825, 971		5	654, 1258
3		905	Cont	19	793–4, 811, 825,		6	668, 672
4		784			965	16		3089
5		See McC., § 725		20	792, 810, 812, 821	17	1	2858
6		897, 1006		21	819, 820		2	2875
	1	Sp. Charter	8		817,830,894,967,	18		2028
	2, 3	812, 813			977, 1005		1	759
	4	815		1	842–3, 847, 988	19	2	760, 896, 1005
	5	822		2	845, 848		3	764
	6	842–3, 847, 988	9	3	849	20		5707–8
	7	844		4	847, 988	21		1571
7	8	844–5		1–3	396–8	22		1528, 1530
	9	845–6	10	4	400	23		2046
	10	817, 820, 834, 967	11		612	24		2047
	11	823,825,827,831, 894	12		Legalizing	25		2060–6
				1	651–2	26		2049–50
	12	816, 825	13	2	1258	27		2084, 2086
	13	825, 828		3	651, 653	28		2051–3
	14	825, 833, 847, 988	14		663	29		1878–80

CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97
30	1-2	1869-70	62	1, 2	2432-3	86		136
	3	1887		3	2435	87		137
	4	1871		4	2441	88		1570
31		1746		5	2442-3	89		Legalizing
32		1709		6	2444	90	1	295
33		1806		7	2436		2	2931
34		2783		8	2434	91		1563-5
35		2824		9	Superseded	92	1	Repealing
36		2634		10	2437-8		2	4735
37		2784		11	2436		3	4736-8
38		2794		12	2439		4, 5	4740
39		1131, 2747		13	2439-40		6	4741
40		2678-9		14-18	2445-9	93		3075, 3080, 3083
41		728-732		19-21	2451-3	94		4702
42		Legalizing		23-4	2454-5	95		4008
43		894, 1005	63		2385	96		3564
44		2867	64		2560, 4821	97		5036-8
45		2517	65		2540	98		2490
46	1	Repealing	66		227	99		894, 1005
	2	2516	67		227	100		5488
	3	2518	68		227	101		5238, 5606
	4	2517	69	1	193	102	1, 2	4018
	5	2516		2	1066		3	Omitted
	6	2519		3	Temporary	103		4226
	7-8	2517		4	194	104		2355, 2368
	9	2527	70		Superseded	105		1293
	10	2521	71		5256, 5258	106		2711
47		2515, 2523	72		333	107		2648
48		3122	73		13	108		2903-4
49		Temporary	74	1-3	4600	109		6
50		4852		4	1073	110	1	2667
51		3308	75		508-510		2	1435
52		393, 2942	76		495, 496	111		1653
53		4295	77		297	112		2647
54		403-4	78		3423	113		Temporary
55		403-4	79		5052	114		1303, 1380
56		403-4	80		2253	115-144		Temporary
57		403	81		1441	145		2674
58		1083-4	82		2889	146-151		Temporary
59		4915-17	83		511	152		2643
60		1090	84		2340	153-8		Temporary
61		5005	85		1671	159		2502

TWENTY-SIXTH GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97
1	1-12	742-9	22		1754-7	43		1528, 1542, 1548
2		778	23		1758			1554, 1566
3		905	24		860	44	1	1517
4		905	25		2445	45	2	1509
5		894	26		567-573			Omitted
6		670	27		1005	46		1975-89
7	1-6	738-9	28		1467-81	47		1556
8		881	29		1304	48		1570
9		817, 967	30		1308	49	1	2868-74
10		970	31		1308	50	2	729
11		1035	32		1345-6			732
12		Omitted	33		2165-6	51		993
13		720	34		2150	52		2297
14		737	35		2105	53		2261
15		686	36		4794	54		3225
16		905	37	1	2836	55		Omitted
17		741		2-6	2783, 2837	56		2257
18		906	38		2777	57		Omitted
19		Omitted	39		2737	58		5015-19
20		740	40		2745	59		2585-7
21	1-7	1822-8	41		2718	60		2385
	8	Temporary	42		Temporary	61		332-353
	9-19	1829-39				62		1076
						63		3447

CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97
64		4122, 4142	85	1–29	1890–1918	102	16–29	2182–95
65		4051		30, 31	Temporary		30	2181
66		2903–4		32, 33	1919–20		31–42	2196–2207
67		4840	86	1	2477	Cont	43–5	2181
68	1, 2	1104–5		2–7	2471–6		46–53	2208–14
	3	1093	87		4823	103		2214
69		4951	88		4894	104		2889
70		4757	89		3495	105		5638
71		4834–6	90		Omitted	106		4898
72		1066	91		2564	107		3130
73		4299–4301	92		2493–6	108		2164
74		4693	93		2493	109		1380
75		3340	94		2505	110		Local
76		403–4	95		5003	111		Omitted
77		258	96		5006	112		Local
78		1563	97		Omitted	113		Temporary
79	1	5667	98		1610	114		2644
	2	5717	99		5137	115–119		Temporary
80	1	2540	100		473	120		Local
	2	2542	101		1682–3	121		227
	3	2544	102	1	2165, 2167	122		227
81		1626		2	2166, 2169	123–143		Temporary
82		5080		3–5	2170–2	144		2643
83		468		6	2168			
84		2906		7–15	2173–80			

ANALYSIS OF THE CODE

BY TITLES AND CHAPTERS.

PART FIRST.

PUBLIC LAW.

TITLE I.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE, AND THE LEGISLATIVE DEPARTMENT.

TITLE II.

OF THE EXECUTIVE DEPARTMENT.

TITLE III.

OF THE JUDICIAL DEPARTMENT.

TITLE IV.

OF COUNTY AND TOWNSHIP GOVERNMENT.

TITLE V.

OF CITY AND TOWN GOVERNMENT.

TITLE VI.

OF ELECTIONS AND OFFICERS.

TITLE VII.

OF THE REVENUE.

TITLE VIII.

OF ROADS, BRIDGES AND FERRIES AND THE DESTRUCTION OF THISTLES.

TITLE IX.

OF CORPORATIONS.

TITLE X.

OF INTERNAL IMPROVEMENTS.

TITLE XI.

OF THE MILITIA.

TITLE XII.

OF THE POLICE OF THE STATE.

TITLE XIII.

OF EDUCATION.

PART SECOND.

PRIVATE LAW.

TITLE XIV.

OF RIGHTS OF PROPERTY.

TITLE XV.

OF TRADE AND COMMERCE.

TITLE XVI.

OF THE DOMESTIC RELATIONS.

TITLE XVII.

OF THE ESTATES OF DECEDENTS.

PART THIRD.

CODE OF CIVIL PRACTICE.

TITLE XVIII.

PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

TITLE XIX.

OF ATTACHMENTS, GARNISHMENT, EXECUTIONS, AND SUPPLEMENTARY PROCEEDINGS.

TITLE XX.

OF PROCEDURE TO REVERSE, VACATE, OR MODIFY JUDGMENTS.

TITLE XXI.

OF PROCEDURE IN PARTICULAR CASES.

TITLE XXII.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

TITLE XXIII.

OF EVIDENCE.

PART FOURTH.

CODE OF CRIMINAL PROCEDURE.

TITLE XXIV.

OF CRIMES AND PUNISHMENTS.

TITLE XXV.

OF CRIMINAL PROCEDURE.

TITLE XXVI.

OF THE DISCIPLINE AND GOVERNMENT OF JAILS AND PENITENTIARIES.

ABBREVIATIONS.

C.'51	Code of 1851.
C.'73	Code of 1873.
Ch.	Chapter.
Const.	Constitution.
Et seq. (in index)	And sections following.
Fed.	Federal Reporter.
G. A.	General Assembly.
G. Gr.	George Greene's Iowa Reports.
Ibid.	Same reference.
Mor.	Morris' Iowa Report.
N. W.	Northwestern Reporter.
¶ or Par.	Paragraph.
R. or Rev.	Revision of 1860.
R. S. or Rev. Stat.	Revised Statutes of 1843.
R. (in index)	Indicates section of Rules of Supreme Court.
S. C.	Same case.
§ or Sec.	Section.

Volumes of the regular series of Iowa Reports are referred to by giving the numbers of the volume and page separated by a dash (-).

A TABLE OF

CORRESPONDING SECTIONS.

Showing the sections of the Code of 1897 which correspond in subject matter with the consecutive sections of the Code of 1873.

CODE OF '73	CODE OF '97	CODE OF '73	CODE OF '97	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.
1-11	1-11	163	226	301-2	420-1	412-4	580-2
12	12,13	164	228	303	422-4	415	2568
13-27	17-31	165-6	232-3	304	Repealed	416	2571
28,29	32	167,8	234	305	440	417, 8	2568
30-45	33-48	169-172	235-8	306	549	419	2573
46-48	49	173,4	239	307-8	441-2	420	2571
49-53	50-54	175	240	309	443,4	421	599
54	Omitted	176,7	242	310-317	446-453	422	600-1
55	60	178-9	243-4	318	454,897,1006	423-4	602-3
56,57	61	180	Superseded	319	455,897,1006	425	602
58-60	62-64	181-3	245-7	320-4	470-4	426-9	617-620
61	66	184	Abolished	325	476	430-2	610-2
62-63	68-69	185,6	248	326	477,545	433	613, 614
64	126	187-192	281-6	327	482	434-8	632-5
65	67	193	Repealed	328	483,4	439	637
66-74	89-97	194	287	329-331	485-7	440 4	622-6
75-82	101-108	195	Repealed	332,3	488	445, 6	627
83-93	72-82	196,7	288	334	489	447, 8	604
94-110	Sup'rs'd'd, 117-144	198-201	289-292	335	494	449	605, 6
		202	Obsolete	336	493	450	605, 609
111	155	203-4	293-4	337	499	451-2	607-8
112,113	171	205-210	Repealed	338-341	500-3	453	606
114	171,172,174	211-224	 317-330	342-3	546-7	454	668, 695
115	171	225,6	331	344-7	504-7	455	695
116	174,175	227-9	332-4	348	4062	456	695-6,702, 704-5,714, 717,755, 769
117-8	173-4	230-3	345-8	349,350	513		
119	156	234	335	351-2	514, 5		
120	147.157, 167,170	235	Omitted	353-5	517-9		
		236	336	356	520, 530	457	711
121	165,166,167	237	Sup'rs'd'd	357, 8	520	458	697
122	168		337	359-364	521-6	459	706, 7
123,124	178	238	337	365	520	460	703
125	Omitted	239	341	366-8	527-9	461	727, 894, 953, 1005
126	179	240	338	369, 370	534		
127	185	241	339,342	371-8	535-542	462	700
128	180	242-3	343-4	379	551	463	700,702-3, 708, 754
129,130, 131	Omitted	244	335	380	Omitted		
		245	353	381-7	553-9	464	751, 756, 767, 880, 969, 999
132	184	246-250	355-9	388	Omitted		
133	192	251-5	364-8	389	1073		
132-7	Repealed	256,7	369	390	565, 647-650, 661, 674,1185, 1272	465	751, 782, 791, 794, 969
138	202	258-266	373-381				
139	193	267-276	383-392				
140-5	195-200	277	393,2942			466	779,792-3, 818
146,9	204	278	393	391	566		
150-1	208-9	279-287	394-402	392	576	467	780
152,3	210	288	396	393-4	574-5	468	777
154	213	289-290	403-4	395	576	469	785-790, 884, 1002
155-7	Repealed	291-3	406-8	396	393, 576		
158-9	214-5	294-8	410-414	397	577	470	880, 883, 999, 1001
160	Repealed	299	410	398, 9	579		
161,2	225	300	415	400-411	Obsolete	471	720, 955

CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.
472	720, 723	532	648,651-2, 660, 666	647	1162	770	87,99,116, 298, 481, 491, 496, 510, 2621
473	720, 725			648	1167		
474	722	533	662, 673, 946	649	1158		
475	724-5,894, 1005	534	651-2, 658	650-2	1159-61		
		535	647, 652, 660, 666	653-5	1163-5	771	481, 491, 496, 510
476, 7	884, 1002			656	1167		
478	840, 975, 982, 984	536	662, 673, 946	657	1165	772-5	1280-3
		537	652, 658, 662, 664, 754	658	1166, 7	776	87,99,116, 1284
479	986			659, 660	1173		
480	698			661	1144	777	87,99,116, 1285
481	975, 982	538	733, 957		1149-50,		
482	680, 947	539	734, 3234	662	1151,	778	87,99,116, 1286
483-4	693-4	540,1	3234		1157-8		
485	735	542	656, 668, 688, 689, 690, 735	663	1161-63	779-780	1287-8
486	950, 3447			664	1169-70	781	1266, 1276
487	891-3			665	1168, 1174	782	1268
488	899	543	688	666, 7	1174	783	1272
489	681-3	544	671, 946	668-671	1175-8	784	1265
490	688, 943	545	688, 690	672	Omitted	785	1274, 1276
491	677-944	546	691-2	673	1179	786	1275
492	686	547	658, 670, 945	674	1182, 3	787	1273
493	668, 683	548-550	1047-9	675	1180, 1	788	1267
494	684, 793	551	Omitted	676	1180	789	1278-9
495	636, 887, 902, 1014	552	593	677	1188	790	1269
		553,4	594	678	1184, 5	791-3	1171
496	887	555-8	595-8	679	1187	794, 5	1272, 1278
497	Omitted	559	914	680	1188, 9	796	888, 1303
498	902-1014	560	915, 917	681-2	1190-1	797	1304
499	889	561	917	683-4	1196-7	798	Omitted
500	898, 1007	562	Omitted	685	1177-9	799	Repealed
501	642, 1090	563	918	686	1177, 1266	800-2	1307-9
502	1146	564-6	919	687	1177	803	1312
503	1145, 6	567-570	921-4	688	Omitted	804	1314
504	1180,1183, 1185,1266	571-2	929-930	689	1192	805	1316, 1353
		573-583	1057-67	690	1193, 1195	806	1317
505	669	584-6	Repealed	691	1194	807	1333
506	658, 691, 2	587-590	1070-3	692-717	1198-1223	808	1342
507, 8	638	591	1074, 5	718	1198	809	1344
509	639, 640	592, 3	1073	719-723	1224 8	810	1334
510	640	594-602	Repealed	724	1212	811	Omitted
511	643, 645-6 649, 668	603	1090	725-8	1229-32	812	1321-2,1350
		604	1092	729	1250	813-4	1310-11
512	658, 9	605	1090	730	1198	815-7	1318-20
513	1277	606-8	1093	731-6	1233-8	818-820	1322
514	649, 655, 668, 1180, 1183, 1185	609-611	1094-6	737	1198	821	1360, 1364
		612	1126, 7	738-744	1239-45	822	1352
		613	1128	745-7	1250-2	823	1354, 1357
515	651-2,662, 673, 946	614	1130	748	1254	824	1355
		615	1132	749-750	1252-3	825	1365, 6
516	1258	616	Superseded	751	1255	826	1353
517	648, 695	617	1177	752	1256, 7	827	1367
518	643, 658	618	Repealed	753	1257	828	1369
519	658. 670, 677, 945	619, 620	1115	754, 5	1254	829, 830	1370
		621	1116	756	1256	831	1371, 1373
520	641	622	1138	757	1252	832	1375
521	643-6	623	1138-9, 1170	758	1257	833	1377
522	651, 659, 668	624, 5	Superseded	759	1259	834	1378, 9
523	668, 676, 695	626	1138	760, 1	1261	835	1380
524	655, 668, 676, 695	627	1140	762-4	1262-4	836	1382
		628	1144	765	1260	837	1014, 1383
525	664, 668, 716, 751	629	1145	766	207, 298, 481, 491, 496, 510, 1186, 2621	838	1383
		630	1142			839	1014, 1383
526	696, 717	631	1146			840-5	1384-9
527	751, 753, 757, 792	632	1149, 1169			846	987, 1390
		633-7	1147-51	767	298, 481, 491, 496, 510, 2621	847-850	1392-5
528	655, 668, 676, 718	638	1170			851-5	1398-1402
		639	1152			856	Omitted
529	719	640-2	1154-6	768	298, 481, 491, 496, 510	857	1403, 1406
530	1272,1276, 1278	643, 4	1169			858	1406
		645	1157			859-863	1407-11
531	645-658	646	1153	769	510	864	987, 1412

CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.
865	1400,1413-14	1092	1642	1255, 6	2010	1451	445
866	1413-14	1093-4	1645-6	1257-9	2011-13	1452	2314, 2316
867	1405	1095-6	1642-3	1260-5	2015-20	1453	2311
868-871	1415-18	1097-9	1647-9	1266-7	2021	1454-5	2317-18
872-4	1419	1100	1642	1268-9	2022-3	1456	2321
875-7	1422-4	1101	1643, 3270	1270	Omitted	1457-63	Repealed
878	1426	1102	1650	1271-2	2024-5	1464-6	2321-3
879	1414	1103-4	1653-4	1278-9	2034-40	1467	Omitted
880	1421	1105	Repealed	1280-2	2143	1468	2324
881	1420	1106-13	1655-62	1283-7	2041-5	1469-70	Omitted
882-9	1427-34	1114	2448	1288	2054	1471-2	2326
890	1436	1115-16	1663-4	1289	2055, 6	1473	2329
891-6	1438-43	1117-21	1669-73	1290	2059	1474-5	2327-8
897	1444-5	1122	1684-5, 1687	1291	Omitted	1476	2330
898	Omitted	1123	1686, 1688	1292-6	2103, 2125	1477-8	2331-2
899	1446	1124	1691-3	1297-9	2127	1479-85	2334-40
900	Sup'rs'd'd and 1435	1125-31	1694-1700	1300-3	2066-9	1486	2333
		1132	1709-11	1304	2128	1487-8	2348
901-5	1447-51	1133-4	1712-13	1305	2076	1489-90	2355-6
906-7	1347-8	1135-7	1701-3	1306-7	2070-1	1491	2358
908-914	1453-9	1138	1704, 5	1308-9	2074-5	1492	2356
915	Repealed	1139	1706, 7	1310-16	Omitted	1493	2358
916-919	1460-3	1140	1689	1317	1334	1494	2355
920-5	1482-7	1141	1714	1318	1334-5, 1357	1495	2355, 2357
926-8	1488	1142	1718	1319-22	1336-9	1496	2356, 2358
929, 930	1489	1143	1717	1323	Omitted	1497	Superseded
931-940	1490-9	1144	1721-3	1324-9	2158-63	1498	Omitted
941	1498	1145	1725	1330-1	2216-17	1499	2361-2
942, 3	1499	1146	1716, and 1724, 1726	1332	2250	1500	2363
944, 5	1500			1333	2218, 2251	1501-2	2364
946-953	1501-8	1147	1747-8, 1751	1334-42	2219	1503	2356
954	Repealed	1148	1749	1343-8	2220	1504-5	2365-6
955-6	1510-11	1149-50	1731-2	1349-51	2221-3	1506	Omitted
957, 8	1512	1151	1733, 4	1352, 3	2224	1507	2367
959-966	1513-20	1152	1735	1354-8	2225-9	1508	2355
967, 8	1521	1153	1752	1359-60	2228	1509	2371
969-970	1528-9	1154-5	1736-7	1361-4	2230-3	1510	2374
971	1528	1156	1753	1365	2234, 5	1511	2377
972-6	1539-43	1157-8	1719-20	1366	2235	1512-22	2371-81
977, 8	1545	1159	1690	1367-74	2236-43	1523	2382, 2408
979-995	1546-62	1160	1759, 1762, and 1764-5	1375-7	2244	1524	Repealed
996-8	1566-8			1378	3234	1525	2383
999	Omitted	1161-3	1768-70	1379-80	2245-6	1526-38	Repealed
1000	1569	1164	1772	1381	2247, 2249	1539	2403
1001-10	1572-81	1165	1808	1382	2248	1540	2382-3, and 2425, 2430
1011, 12	1589	1166	1800	1383	2253, 2609-11		
1013-26	1590-1603	1167	1773, 1799	1384	2254, 2617-18	1541	2382
1027, 8	1604	1168	1799	1385	2255	1542	2382-3, and 2427, 2430
1029-30	1605-6	1169-76	1774-81	1386	2255, 2616		
1031-37	1582-8	1177-8	1801-2	1387	189, 2903	1543	2384, 2405, and 2408, 2430
1038-57	Sup'rs'd'd and 2167-2214	1179	1806	1388	189		
		1180-1	1803-4	1389-92	2256-9	1544-7	2413-16
1058	1607	1182	1805, 3313	1393	2258	1548	2402
1059-61	1609-11	1183	1818	1394	2260	1549	2424
1062, 3	1613	1184	1891	1395, 6	2261	1550	2423
1064-5	1614-15	1185, 6	1898	1397-1401	2262-6	1551	2428
1066, 7	1617	1187	1902	1402-9	2270-7	1552	2422
1068	1616	1188, 9	1921	1410	2309	1553	2419, 2439
1069	1618	1190-2	1922-4	1411-13	2278-80	1554	2382, 2431
1070	1643-4	1193	1925, 1930	1414	Sup'rs'd'd and 5544, 5709	1555	2382
1071	1620	1194-1213	1926-45			1556-7	2417-18
1072, 3	1621	1214	1946-8	1415, 16	2307	1558	2422
1074, 5	1622, 3	1215	1947	1417-39	2281-2303	1559	2395
1076-8	1624-6	1216	1946-8	1440	2307	1560-6	2462-8
1079-82	1628-31	1217-26	Superseded	1441	2299	1567-9	Repealed
1083, 4	1632	1227	1961	1442-5	2304-7	1570-1	1872-3
1085-7	1633-5	1228-35	1967-74	1446	2314	1572	1877
1088	1608	1236-43	1990-7	1447	2312	1573-6	Omitted
1089	1636	1244	1999	1448	2313-15	1577	2622-3
1090	1619	1245	1999-2000	1449	2313	1578	2621
1091	1642, 3	1246-54	2001-9	1450	444, 2311	1579	2624

CODE OF '73.	CODE OF '97	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.
1580	Repealed	1668	2617	1752	2758	1845	2840
1581	2624	1669-71	2714	1753-5	2785	1846	2840-1
1582-3	2625	1672	2715	1756	2781-2	1847	2840
1584	2622, 2626	1673	2714	1757	2778	1848	Obsolete
1585, 6	2640	1674	Omitted	1758	2788	1849	2842
1587	2609, 2616, 2635	1675	2718	1759-60	2789	1850	2844
		1676	2614, 2718	1761-2	Modified	1851-2	2843
1588	2610-11	1677	2717		2773	1853	2845
1589	2640	1678	2716	1763	2749	1854-5	2846
1590	2635	1679	2718	1764	2805	1856-8	2843
1591	2642	1680	2715	1765	2734	1859-60	2848
1592	2635-6	1681-3	Repealed	1766	2734, 6	1861-3	2849
1593	2612, 2635, 2637	1684	Superseded	1767	2737	1864	2850
		1685	2609, 2723	1768	2735-6	1865	Repealed
1594-5	2637	1686	2616, 2723	1769	2738, 2773	1866	2851
1596	2635	1687	2615, 2723	1770	2734	1867	2853
1597-8	2639	1688-9	2724	1771	2737, 2739	1868-9	2850
1599	2638	1690	2723	1772	2739	1870-1	2851-2
1600-1	2641	1691	Omitted	1773	2741	1872-4	2854
1602	2617, 18, 2641	1692	2727	1774	2735	1875	2850
		1693	2618	1775	2739	1876-7	2853
1603	2613	1694-6	2725-7	1776	2742	1878	2857
1604	2609, 2645-6	1697-8	2728	1777	2767, 2806	1879-80	2852
1605	2610-11	1699	2728-9	1778	2753, 2806	1881-2	2855
1606	2616, 2647	1700	2729	1779	1401, 2807	1883	2856
1607	2615	1701	2728	1780	2806-7	1884	2855
1608	2617	1702-3	2730	1781	2808	1885-6	2858
1609-10	2650	1704	2729	1782	2762, 2808	1887-8	2859
1611-13	2651-3	1705	2730-1	1783	2809	1889	2861
1614	2654-5	1706	2731	1784-5	2810	1890	2858, 2860-1
1615	2612, 2655	1707 8	2733	1786	2822	1891	2861
1616	Repealed	1709	2732	1787	2811	1892-3	2862
1617	Superseded	1710	2731	1788	Obsolete	1894-7	2863-6
1618	2672	1711	2729	1789	2751, 2754	1898	Repealed
1619	2649	1712	2731	1790	2758	1899	2867
1620	2673	1713	2743, 2790	1791	2770	1900-2	2882-4
1621	2648	1714	Omitted	1792	Omitted	1903	2883
1622	Superseded	1715	2802	1793	2803	1904-7	2885-8
1623	2609-11, 2683	1716	2743-4	1794-5	2804	1908-9	Repealed
1624	2616, 2683-4	1717	2746, 2749	1796	2801	1910-13	2894-7
1625	2613, 2617	1718	2751	1797-8	2791-2	1914-16	2898-9
1626	Modified 2617	1719	2746, 2751	1799	551	1917-18	2899
		1720	2752	1800 1	2794	1919	2898-9
1627	2612	1721	2752, 2757, 2760	1802	2745, 2795	1920-1	2901-2
1628	2684			1803	Sup'rs'd'd	1922-5	2905-8
1629	2683	1722	2757		2795	1926-42	2910-26
1630	2614, 2691	1723	2778-9	1804	2796	1943-6	2935-8
1631	2691	1724	2773	1805	Omitted	1947	2941
1632	2683	1725	2774, 2801	1806	Sup'rs'd'd	1948-51	2927-30
1633	Obsolete	1726	2776		2823	1952	2932
1634	2688, 2690	1727	2773	1807	2749	1953	2934
1635-7	2686	1728	Modified 2829	1808	2754	1954	2933
1638-41	2687			1809-10	Omitted	1955-6	2942-3
1642	Obsolete	1729	2783	1811	2799	1957-63	2947-53
1643	2702	1730	2771-2	1812	Omitted	1964-5	2955-6
1644	2609-11, 2702	1731	2760	1813	2780	1966-8	Omitted
1645	2612, 2702	1732-3	2780	1814	Omitted	1969-70	2957-8
1646	2617	1734-5	2781-2	1815-20	2800	1971-2	2961
1647	2616, 2702-3	1736	2766	1821	2812	1973	2962
1648	2706	1737	2772	1822	2763, 2812	1974-5	2963
1649-50	2704-5	1738	2771, 2780, 2801, 2806	1823	2767, 2813	1976	2964
1651-2	2707			1824	2768	1977-8	2965
1653-8	2708	1739	2759, 2762	1825-6	2814	1979-81	2966
1659	2709	1740	2759	1827-8	2815-16	1982-3	2967
1660-1	2711	1741	2761	1829-31	2818	1984-91	2968-75
1662	2710	1742	2763	1832-4	2819	1992-3	2976
1663	2712	1743	2761	1835-6	2820	1994-5	2977
1664	2609-11, 2714	1744-5	2765	1837-8	2838-9	1996-7	2978
1665	2613	1746	2822	1839-40	2838	1998-9	2979
1666	2714	1747-50	2768	1841	2808, 2839	2000-1	2981
1667	2615	1751	2769	1842-4	2847	2002-3	2982

CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.
2004-5	2983	2171	3129	2373-4	3311	2636 8	3552-4
2006-7	2984-5	2172	3126	2375	3314	2639	3551
2008	2985, 3377	2173	3126, 3129	2376	3310	2640, 1	3555
2009-13	2986-90	2174	3126	2377	3314	2642	3556
2014-16	2991	2175	3128	2378	3311	2643-5	3557
2017-23	2992-8	2176	3127	2379-86	3315-22	2646-51	3559-64
2024-6	2999	2177-8	3130	2387-8	3323	2652-4	3565
2027-35	3000-8	2179-84	3131-6	2389	3324	2655-2708	3566-3619
2036	Omitted	2185-6	3139-40	2390-1	3325	2709	Obsolete
2037	3009	2187-8	3141	2392-5	3326	2710-13	3620-3
2038-9	3010	2189-90	3142	2396-7	3328	2714-18	3625-9
2040-1	3011	2191-4	3143-6	2398	3329	2719	3618
2042-3	3012	2195-6	3147	2399, 2400	3330	2720-42	3630-52
2044-5	3013	2197	3146, 4630	2401-2	3332-3	2743-6	3654-7
2046-7	3014	2198-2201	3148-51	2403-4	3334	2747-60	3661-74
2048-52	3015-19	2202-48	3153-99	2405-11	3335-41	2761-71	3676-86
2053-5	3020	2249	3193	2412	3393	2772	3687-8
2056	3021	2250	3200	2413-17	3342-6	2773-4	3689-90
2057-8	3022	2251-2	3201	2418-19	3347	2775	Superseded
2059-60	3023	2253-8	3202-7	2420-3	3348-51	2776-7	3691-2
2061	3024	2259-60	3208	2424	3350	2778-86	3699-3708
2062-3	3025	2261-3	3209-11	2425	3352	2787	3707-8
2064-5	3026-7	2264-5	3212	2426-7	3353	2788-99	3708-19
2066-7	3028	2266-73	3213-20	2428-42	3354-68	2800-1	3720
2068-9	3029-30	2274-9	3223-8	2443-4	3369	2802-28	3721-47
2070-1	3031	2280-1	3229	2445-7	3370-2	2829	Omitted
2072-3	3032	2282	3230	2448-9	3373	2830-8	3748-56
2074	3033	2283-4	3231	2450-2	3374-6	2839	Omitted
2075-6	3037	2285-6	3232-3	2453-4	3378	2840-1	3762-3
2077-81	3038-42	2287	3235	2455-9	3379-83	2842	3757, 3760
2082-3	3043	2288-9	3236	2460-4	3387-91	2843	3761
2084-8	3044-8	2290-3	3237-40	2465	3384	2844-9	3764-9
2089-91	3049	2294-5	3241	2466-7	3385	2850	3758, 3770
2092	3050	2296	3249	2468	Omitted	2851-8	3771-8
2093-7	3052-6	2297	3242	2469	3394	2859	3757
2098-9	3057	2298	3243	2470-1	3395	2860-4	3780-4
2100	3058	2299	3243, 3249	2472-8	3396-3402	2865-6	3785
2101-2	3059	2300	3245	2479-80	3403	2867-82	3786-3801
2103	3060	2301-2	3246	2481-4	3404-7	2883-4	3802
2104	3062	2303	3247	2485-6	3408	2885	3803
2105	3061	2304	3249	2487-8	3409	2886-2905	3805-24
2106-7	3063	2305	3248	2489-93	3410-14	2906-48	3826-68
2108-14	3064-70	2306	3244	2494-5	3415	2949-56	3876-83
2115-6	3071	2307-11	3250-4	2496	3416	2957-8	3884
2117-19	3772 4	2312	225	2497-8	3417	2959-61	3885-7
2120-1	3076-7	2313-14	3261-2	2499, 2500	3418	2962-6	3889-93
2122-7	3079-84	2315-16	Repealed	2501-2	3419		3894,
2128	3085-6	2317-21	3263-7	2503	Omitted	2967	3896-8,
2129-30	3088-9	2322-6	3270-4	2504	3424		3900
2131	3093	2327-8	3275	2505-6	3425	2968	3901
2132	Repealed	2329-30	3276	2507-11	3426-30	2969	3898
2133	3094	2331	3277	2512	Omitted	2970	3822
2134-6	Repealed	2332-3	3278	2513-25	3431-43	2971-2	3902-3
2137	3092	2334-5	3279	2526	3313, 3344	2973-4	3904
2138	3100	2336-7	3280-1	2527-37	3445-55	2975	3935, 3947
2139	3095	2338-9	3282	2538	Obsolete	2976-8	3936-8
2140	3090, 3095	2340-1	3283-4	2539-41	3456-8	2979	3935
2141	3095	2342	3286	2542	2637, 2852	2980	3939
2142	3098	2343-4	3287	2543-4	3459	2981	3935, 3940
2143	Repealed	2345-53	3288-96	2545-65	3460-80	2982-3	3941-2
2144	3096	2354-5	3297	2566-8	3482-4	2984-5	3943
2145	3101	2356	3298	2569	3481	2986	3944, 3946
2146	3097	2357-8	3299	2570-2609	3485-3524	2987-8	3945-6
2147-9	3106	2359-61	3300	2610-11	3528-9	2989-93	3949-53
2150-4	3108	2362	1805, 3301	2612-14	3531-3	2994-3014	3907-27
2155-6	3109	2363	3301	2615	3526	3015	3930
2157-60	3110-13	2364-7	3302-5	2616	3525	3016	3928
2161-2	3114	2368-9	3306	2617	3527	3017	3888
2163	3115	2370	3310	2618-21	3534-7	3018	3929
2164-5	3116	2371	3312	2622-3	3538	3019-20	3931-2
2166-70	3117-21	2372	1805, 3313	2624-35	3539-50	3021	3878, 3933

CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.
3022	3899	3211-13	4150-2	3689-90	4673	3799	531
3023	3934	3214	4115	3691-3700	4674-83	3800	543
3024	4579	3215-28	4153-66	3701-2	4634-5	3801	382
3025	3955	3229	4167,76	3703	Obsolete	3802-3	3035-6
3026-9	3954-7	3230-3	4168-71	3704-15	4636-47	3804-6	4597-9
3030	Omitted	3234-5	4172	3716-19	4649-52	3807	511
3031-8	3958-65	3236-69	4173-4206	3720	954,4653	3808	590
3039	3966-7	3270-2	4207	3721	4684,4687	3809	591, 2335
3040	3779, 3956-7	3273-5	4223-5	3722	4685,4687-8	3810	592
3041	3966-7	3276	4227	3723	4685	3811	354, 4593
3042	3779, 3966-7	3277-97	4240-60	3724	4686	3812	3872
3043-7	3968-72	3298-9	4262-3	3725-6	4690 1	3813	1290
3048	4007	3300 6	4265-71	3727	4689	3814	4661
3049-54	3973-8	3307-12	4273-8	3728	4692	3815-16	4595-6
3055-7	3991-3	3313	4280	3729	Omitted	3817	4663
3058	Omitted	3314-15	4281	3730	4688, 4698	3818	5492
3059-70	3994-4005	3316-18	4282-4	3731-2	4696	3819-20	1291-2
3071	3966, 4006	3319-22	4287-90	3733	4697	3821	2349
3072	4008, 4017	3323	4292	3734	4694	3822	2325, 2349
3073	4012	3324	4291	3735-6	4699-4700	3823	2325
3074	4011	3325-30	4293-8	3737	4695,4700, 4705	3824	1527
3075-8	4013-16	3331-5	4302-6			3825 6	2309-10
3079	4023	3336	Omitted	3738	4704	3827	1172
3080	4024, 4026	3337-8	4307-8	3739	4707	3828	3152
3081-5	4027-31	3339-41	4309	3740	4706	3829	2428, 5314
3086	4042	3342-95	4310-63	3741	4708	3830-1	5314
3087	4025	3396	4364-5	3742	4703	3832	1293
3088-94	4032-8	3397-3425	4366-94	3743-4	4709-10	3833	1419
3095-6	4039	3426-44	4396-4414	3745-6	4718	3834	3873
3097	4040	3445	4402	3747-9	4719-21	3835	4715
3098-9	4043	3446	4415	3750	4723	3836-8	1294-6
3100	4041	3447	4402	3751	4711-12	3839	Omitted
3101	4044	3448-90	4416-58	3752-3	4713-14	3840	1297
3102	4045	3491 3510	4460-79	3754	4717	3841	5354
3103	4045-6	3511-12	4480	3755	65	3842	1298-9
3104-5	4046-7	3513-14	4481-2	3756	85-87	3843	1300
3106	4050-1	3515-34	4484-4503	3757	98-100	3844	468
3107	4048	3535-73	4505 43	3758	115, 116	3845	4724, 5096
3108-9	4049	3574	4545	3759	Obsolete	3846-51	4725-30
3110	4056	3575	4546-7	3760	2627	3852-68	4747-63
3111-14	4052-5	3576-83	4548-55	3761	Superseded	3869-71	4765-7
3115-19	4056	3584	4553	3762	2881	3872	4024, 4768
3120-7	4058-65	3585-7	4556-8	3763	3034	3873-93	4769-89
3128	Omitted	3588-3602	4560-74	3764-8	Sup'rs'd'd 117-144	3894	4791
3129-32	4066-9	3603-10	4576-83			3895	4852
3133	4071	3611-12	4208	3769	203	3896	4819
3134	4070	3613-14	4209-10	3770	211	3897-8	4827-8
3135-74	4072-4111	3615	4212	3771	205	3899	4826
3175-6	4112	3616	4211-12	3772	Repealed	3900	4820
3177-8	4113-14	3617-18	4214-15	3773	Omitted	3901	Repealed
3179	4122,4125	3619	4221	3774	Superseded	3902-4	4831-3
3180	4116	3620-3	4216-19	3775	Repealed	3905-8	4837-40
3181	4120	3624	4222	3776	Obsolete	3909	4842-3
3182	Omitted	3625-33	4584-92	3777	254, 3675	3910-11	4844-5
3183	4137	3634	4594	3778	191	3912-16	4847-51
3184	4123	3635	4483	3779	Omitted	3917-48	4853-84
3185-6	4127-8	3636	4601,5484	3780	1289	3049-58	4887-96
3187	4132	3637-58	4602-23	3781-2	296	3959-72	4898-4911
3188-9	4133	3659-62	4629-32	3783	Superseded	3973-4	1301-2
3190	4134	3663-4	4625	3784	297-8	3975-6	4912-13
3191-3	4129-31	3665-7	4626-8	3785-6	299-300	3977	4818
3194-6	4139-41	3668	4624	3787	296	3978-9	4806-7
3197	4143	3669	4668	3788-9	Repealed	3980	4824
3198-3202	4145-9	3670	Obsolete	3790	512	3981	4826
3203	4117	3671-3	4658-60	3791	469	3982	4801
3204-5	4139	3674	4662	3792	498	3983	4829
3206	4144	3675-7	4664-6	3793	490-1	3984	Modified 4826
3207	4136	3678-9	4670-1	3794-5	1396-7		
3208	4138	3680-2	4672	3796	492	3985	4822
3209	4124	3683-4	4667-8	3797	478	3986-7	4802-3
3210	4135	3685-8	4654-7	3798	479, 481	3988	4830

CODE OF '73.	CODE OF '97.	CODE OF '73.	CODE OF '97.	CODE OF '73	CODE OF '97.	CODE OF '73.	CODE OF '97
3989	4800	4226-7	5216	4412	3685	4557-8	5486-7
3990	4809	4228	5216-17	4413	5365	4559	5489
3991-2	4804-5	4229-30	5218	4414	5364	4560	5488
3993	4914	4231-6	5219-24	4415	5367	4561-2	5492
3994,4011	4918-35	4237-8	5484-5	4416	5366	4563-4	5493
4012-16	4938-42	4239-43	5225-29	4417	5369	4565-8	5494-7
4017-19	4945-7	4244-6	5230	4418	5368	4569	5492
4020	4950	4247-54	5231-8	4419	5370	4570	5479
4021	Modified 588	4255-6 4257	5240 Superseded	4420-2 4423	5372-4 5372	4571-4 4575 6	5498-5501 5507-8
4022	4951	4258	5241, 5243	4424	5375	4577-8	5509
4023-9	4959-65	4259	5243	4425	5297, 5490	4579-81	5510-12
4030	4936	4260	5241	4426	5483	4582-5	5502-5
4031-4	4969-72	4261-5	5243-7	4427	5491	4586	Omitted
4035-7	4981-3	4266	5241-3	4428-35	5376-83	4587	5506
4038	2593, 4976	4267-74	5248-55	4436	5371	4588	Omitted
4039	4977-8	4275	5256-8	4437	5384	4589-95	5524-30
4040	4980	4276-92	5259-75	4438	Omitted	4596-4603	5515-22
4041	4979	4293	5276-7	4439	5385	4604-5	5523
4042	4989	4294	5276	4440-1	5386	4606-7	5513
4043-4	5000-1	4295-4312	5279-96	4442-51	5387-96	4608	5514
4045-7	5009-11	4313-21	5298-5306	4452-3	5397	4609-16	5531-38
4048-54	Superseded	4322-4	5307	4454	5398	4617-19	5539
4055-7	5012-14	4325-7	5308-10	4455-6	5399	4620-1	5540
4058-62	5020-4	4328-9	5311	4457	5400	4622	5541
4063	Superseded	4330-1	5312	4458-9	5401	4623-4	5542
4064	5025	4332	5313	4460-2	5402-4	4625-8	5543
4065-9	5029-33	4333-45	5315-27	4463-4	5405	4629-34	5545-50
4070	5035	4346	5330	4465-71	5406-12	4635	Omitted
4071-80	5035 48	4347	5329, 5338	4472	5414	4636-75	5551-90
4081-87	5053-9	4348	5329	4473	5413	4676-9	5592-5
4088	5068	4349-51	5338	4474-7	5405	4680	5591
4089-4107	5078-96	4352	5328	4478	5409	4681-4706	5596-5621
4108	5097-8	4353	5330	4479-80	5415	4707	692
4109-19	5099-5109	4354-7	5331	4481-97	5416-32	4708-23	5622-37
4120-1	5110	4358	5332	4498-4501	5433	4724-43	5640-59
4122-37	5111-26	4359	5333, 5335	4502-5	5434-7	4744	Omitted
4138	5091, 5127	4360	5334-5	4506-7	5438	4745-6	5661
4139-44	5128 33	4361	5334	4508-12	5439-43	4747-54	5662-9
4145-71	5143-69	4362-6	5337-41	4513-15	5444	4755-6	5670
4172-3	5170	4367	5336	4516-19	5445-7	4757	5671
4174-86	5171-83	4368-74	5342-8	4520-2	5448	4758-65	5672
4187-8	5184	4375-6	5349	4523-4	5449	4766	5673
4189-97	5185-93	4377-82	5350-5	4525-7	5450-2	4767-8	Superseded
4198	5195	4383-5	Obsolete	4528-9	5453	4769	5713
4199,4200	5196	4386	5354	4530	5454	4770-82	5675-87
4201-2	5197-8	4387-8	Obsolete	4531-2	5455	4783	5716-17
4203	5193	4389-95	5356	4533-7	5456-60	4784	5716
4204-8	5199-5203	4396	5357	4538-41	5462-5	4785-7	5718
4209-11	5194	4397	5356	4542-3	5466	4788-90	5688
4212-13	5204-5	4398-4403	5358	4544-6	5467-9	4791-4802	5689-5700
4214-16	5206	4404-5	5359-60	4547-9	5470	4803-4	5714-15
4217-18	5207-8	4406	3692	4550-1	5475	4805	5701
4219	5209	4407	3684, 5361	4552-3	5476-7	4806	Omitted
4220	5209-10	4408-9	5362	4554-5	5473-4		
4221-5	5211-15	4410-11	5363	4556	5483		

FIFTEENTH GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1		169	3	1	14	8	1	4239
2	1	1799,1800		2,3	15		2	4228 9
	2	1773		4	16		3	4230-4
	3	1775	4		Repealing		4	4228,4230,4235-8
	4	1776	5		766	9		403-4
	5	1801	6		767,880,969,999	10		3541
	6	1802	7		2618	11		4832-3

Ch.	Sec.	Code of '97	Ch.	Sec.	Code of '97.	Ch.	Sec.	Code of '97.
12		231	41		4220		7–11	1848–52
13		4790	42		4008,4017		12	1853,1882
14		5026	43		Superseded		13	1847
15		Omitted	44		3098-9		14	1847,1853–4
16		353	45		Repealed		15	1854
17		4808			17-50-2		16	1841,1855
18		2103,2125	46		1418		17–18	1869–70
19		1504	47		2017	60	19	1868
20		2044	48		5684	Cont	20,21	1859
21		2614,2713	49		3093–4		22–23	1872–3
22		1926	50		Superseded		24	1881
23		Temporary		1	782		25	1877
24		Repealing		2	812,813		26–27	1887–8
25		Repealed	51	3	816,829,976		28	1322
		18–53–5		4	840		29–32	1856–9
26		2297		5	751,782	61		920
27		2745,2752,2757,	52		639,640	62		1347
		2760,2795	53	1	2255,2259,2616	63		1321–2,1350
28		1303		2	2300–2	64		2786
29		Omitted		1–2	925–926	65		2015
30		5238	54	3	927–8	66		1307
31		Repealed		4	928	67		2806
		18–202	55		1721,1723,1725		1–2	2076–7
32		3872	56		Omitted	68	3–6	Omitted
33		Repealing	57		2738,2773		7	2078
34	1–4	2028-31	58		Repealed	69		Repealing
35	1–2	2032–3			22–82–41		1	Omitted
36		Lacked en-	59		5002		2	2314
		acting clause		1	1840		3	2313–15
37		2402		2	1841,1843	70	4	444,2311
38		5025		3	1840,1842–3		5	445
39	1–4	416–419	60	4	Omitted		6	2314,2316
40	1,2	1651		5	1844		7	2311
	3,4	1652		6	1845–7	71		Repealed
								20–72–8

SIXTEENTH GENERAL ASSEMBLY.

Ch.	Sec.	Code of '97.	Ch.	Sec	Code of '97.	Ch.	Sec.	Code of '97.
1–2		Temporary		1	647,650–1,655	58		643,658
3		650			666,676,1258	59		Temporary
4		481,491,496,510	33	2	647,650,652,	60		591,1721–3
5		Temporary			655,660,666,	61		2335
6		565,647–9,661			1183,1185	62		4661
7	1	193	34		Temporary	63		Repealed
	2	1066	35		590			18–53–5
8		Omitted	36		3624	64		2803
9		Temporary	37		1753	65		Temporary
10		4633	38	1	2702	66		Repealed
11		3283		2–4	2708			17–125
12–13		Temporary	39		Repealing	67		Temporary
14		3078		1–6	Omitted	68	1	2108
15–19		Temporary	40	7	5707		2	2110
20		1260		8	5676, 5707	69		3872
21		1552	41–46		Temporary		1–3	Omitted
22		Temporory	47	1–3	615		4	2544 5
23		1173		4	616		5	Omitted
24		700, 702–3,	48–49		Temporary	70	6	2540
		708, 754	50		578		7	2544
25		543	51		905		8–9	Omitted
26		2231	52		3016		10	2547
27		Temporary	53		Temporary	71		Repealing
28		2292	54		794	72		1060
29		1556	55	1–3	1811–13	73–74		Temporary
30		Omitted	56		Omitted	75		2024
31–32		Temporary	57		Superseded			

Ch.	Sec.	Code of '97.
76		Repealed
		21-59-4
77-78		Temporary
79	1	1425, 1437
	2	1437
	3	1425
80		422-4
81		3051
82-83		Temporary
84		456
85-88		Temporary
89		3016
90		939
91		Superseded
92-93		Temporary
94	1, 2	2685
	3	2688
	4	2683
	5-6	2691-2
	7	2689
	8, 9	Omitted
	10	2609,2683
95		898,1007
96		Temporary
97		Repealed
		17-110
98-99		Temporary
100	1	Omitted
	2-10	3088-96
101		2367
102	1	5072
	2	5159
	3	5073
	4	5074.5
	5	5074
103		1756
104-5		Temporary
106		Omitted
107	1	831,894,978,1005
	2	795,819,960
	3	809,812
108		Temporary
109		2774, 2801
110		393
111	1-2	1524-5
112	1	2765
	2	2769
113	1-3	1464-6
114	1-3	55-57
	4	59
115		Temporary
116	1	1012
	2	Omitted
	3	983
	4-6	1016-18
	7-16	Omitted
	17	709
	18	699
	19-20	Omitted
	21	933
117		Temporary
118	1-7	2092-98
119		2616, 2647
120		Temporary
121		2812
122		Repealed
123		Repealed
		20-159-1
124		Temporary
125	1, 2	403, 404-5
126-8		Temporary
129	1	2675
	2	2609, 2680
	3	2617
	4	2675
	5	2616
	6-8	Omitted
	9	2680
130	1-4	583-6
131		1349
132		38-43
133-5		Temporary
136	1	2748
	2	2734
137		Superseded
138		Repealed
139		Temporary
140	1	1939, 1944
	2	1942
	3	1945
	4	1946-8
	5	1947
141		Temporary
142	1-7	Omitted
	8	147, 170
143	1-8	255-262
	9	263
	10	264
	11	265, 279
	12	266, 280
	13	267-278
	14-16	268-270
	17-19	272-4
144		Temporary
145		Repealed
		17-101
146	1-2	460, 461
	3-8	462-7
147		2609,2616,2635
148	1-2	4810-11
149		Omitted
150-1		Temporary
152		Repealed
		19-40-1
153		1337
154		Temporary
155		2800
156		5716-17
157-8		Temporary
159	1-8	Repealed
	9	2650
160-2		Temporary
163		Superseded
164		1720
165-6		Temporary
167		1545
168		Temporary

SEVENTEENTH GENERAL ASSEMBLY.

Ch.	Sec.	Code of '97
1-2		Temporary
3	1	612
	2	613-14
4-8		Temporary
9		643,645-6,649
		658-9, 668
10-11		Temporary
12	1, 2	1074
13		Temporary
14		643-6
15-18		Temporary
19		5372
20	1	647, 651-2,
		666, 1258
	2	647, 652, 666,
		1183, 1185
21-22		Temporary
23		1610-14
24		Temporary
25		707
26		4711-12
27-32		Temporary
33		3392
34		Temporary
35		5107
36		Temporary
37		2231
38		Temporary
39		1745
40		426
41		2803
42		3016
43-44		Temporary
45		Repealed
46		Temporary
47		1774, 1806
48-49		Temporary
50		Omitted
51		Temporary
52		1557
53		Temporary
54		2738, 2773
55		4785
56	1	946, 675
	2	675
57	1-4	111-14
58	1	403-4
	2	404
	3-5	406-8
59	1, 2	1328
	3	1329
	4, 5	1331
	6	1332
	7	1357
60 64		Temporary
65		5169
66		Temporary
67	1-3	186-8
68		416
69-70		Temporary

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
71		1130	107	1	1268	153		Temporary
72	1	2715		2-3	1270-1	154		403-4
	2	2614,2718	108-9		Temporary	155		1457
73		Temporary	110		Repealed	156	1	Omitted
74		205			18-149-3		2-7	2551-6
75		2881	111	1-2	1738-9		8	Omitted
76	1	2614		3	1738		9	2558
	2	2643		4	1740		10	Omitted
	3	2614	112		Repealing		11	2559
77	1	Omitted	113		2745	157		Repealed
	2	1068,1184,2111	114	1	1340			20-15-91
	3	2112,13		2-3	1341	158-161		Temporary
	4	2114	115		Obsolete	162		794, 819, 831,
	5	2143	116		106		1	894, 912, 978,
	6	2121,2143	117		Omitted			1005, 1022
	7	2143	118		3505		2	812, 813, 815
	8	Omitted	119	1	Omitted		3	825, 827, 829,
	9-10	2115-16		2	2448			972,975-6
	11	Omitted		3	Omitted		4	826, 840
	12	2144		4	2382		5	Omitted
	13	2130,2144		5-6	Omitted		6	796
	14	Omitted		7-8	2425-6	163		Temporary
	15	2117	120		Temporary	164		Legalizing
	16	2122	121		1949	165	1	4728
	17	2118	122	1	1459		2-5	4731-4
78-79		Temporary		2	Omitted		6, 7	Omitted
80	1	2539		3	490,491,496.510		8	4739
	2,3	Omitted	123	1-2	42-3		9, 10	4740
	4	2539	124		2367		11, 12	Omitted
	5,6	2540	125		Repealed		13-18	4741-6
81		Superseded			18-74-52	166		2247, 2249
82		Temporary	126		1995	167		5716, 17
83		5718	127-8		Temporary	168	1	5484
84		2291	129	1	3801		2	5483
85-88		Temporary		2	2610-11		3	5373
89		233			3801-2	169	1-3	615
90		Temporary		3-4	2798		4, 5	616
91		2428,5314	130-1		Temporary	170		Temporary
92	1,2	2617	132		Superseded	171		5348
93-96		Temporary	133		2798	172		Repealed
97		2614,2713	134-5		Temporary			20-185-5
98		2727		1	2610, 11, 2723	173		Repealed
	2	2614,2618		2	2723			20-159-1
99		Superseded	136	3	Omitted	174		1018
100	1	2254,2618		4	2723	175		Temporary
	2	2257		5	2609, 2723	176	1-6	3255-60
101	1	1435,2617	137-141		Temporary	177-82		Temporary
	2	1435	142		2616, 2676	183	1-3	2292
102		Repealing	143		2735, 6		4	2307
103		5096	144	1-2	189-190	184		338
104		1759,1763-5	145		3652	185		Temporary
105		Temporary	146-8		Temporary	186		5678
106	1	116,587	149		5663	187		5707
	2	116,588	150-1		Temporary	188		2548
	3	116,589	152		2098	189-90		Temporary

EIGHTEENTH GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1		Temporary	7	1	2751	11		4792
2	1	4728		2	2754	12	1,2	2849
	2-3	4731,2	8	1-4	2755		3	2855
3 4		Temporary		5,6	2756		4	2840-1
5		1805,3313	9		5348		5	2854
6		1672	10		Temporary	13		1303

Ch.	Sec.	Code of '97.	Ch.	Sec.	Code of '97.	Ch.	Sec.	Code of '97.
14		Temporary		23	Omitted	130	4	5277
15		2015		24–26	2190–2	Cont	5	5278
16–20		Temporary		27,28	2193	131		2798
21		3016		29	2194	132	1–5	2812
22	1	544		30	2210		6	2811, 2813
	2	475		31	2195	133		2230
	3	Omitted		32	Omitted	134–6		Temporary
	4	550		33	2196	137		4992
23		Temporary		34–36	2198,2200	138		Temporary
24		938	74	37,38	2201	139		638,2794
25		3137	Cont	39–41	2202–4	140		Omitted
26		641		42	Omitted	141		Temporary
27		203		43	2205	142		2961,2963
28	1–2	Repealed		44	2196	143		2745
	3	293		45–46	2206–7	144		Repealed
29–30		Temporary		47–50	Omitted			20–159–1
31		3053		51	2214	145		Temporary
32		2026 7		1,2	2588	146	1	658,683
33–35		Temporary		3	2584		2	683
36		1544		4	2590–1		3	668
37		Temporary	75	5–6	2589–90	147		2448
38	1	Omitted		7	2592	148		Temporary
	2	12,13		8	2589	149		5702
39		Repealed		9–11	2593–5	150	1–2	2624
		21–52–18		12	2588		1–2	2564–5
40		493	76	1	5076		3	2567
41–44		Temporary		2	5077		4	2565
45		758	77		692		5–8	Omitted
46		422–3	78		Temporary		9	2564
47		2367	79		599		10	2564,2574
48	1–3	437–9	80		1054		11	2565
49		Temporary	81		Temporary		12	2564,2575
50		1487	82		2448	151	13, 14	2568
51	1	2812	83		3651		15	2571
	2	2813	84		2750		16	2568,2573
	3	2812		1	Omitted		17	2573
52		899		2, 3	1949		18	Omitted
53	1	915	85	4	1947–9		19	2568
	2	917		5	1949		20, 21	2569
	3	914		6, 7	1950		22, 23	2570
54		Temporary		8	1944		24	2571
55		794	86–87		Temporary	152	1–2	2267
56		621	88		429		3	Omitted
57	1,2	1319	89		882–3,1000		4–5	2268–9
58		3935,3947	90–91		Temporary		6	2266
59		2763	92		2547	153	1–2	1884–5
60	1–9	216–224	93–95		Temporary	154	1	5703
61		Temporary	96		751,767		2	Omitted
62		Omitted	97–102		Temporary		3	5669,5707
63		2746,2749	103		Legalizing	155		Temporary
64–68		Temporary	104–8		Temporary	156		Repealed
69		2859	109	1	1371,1373			21–155–6
70		Temporary		2	1356	157–160		Temporary
71		2882		3	1372	161		1075
72–73		Temporary	110		Temporary	162		3295
74	1,2	2167	111		2792	163		4546–7
	3–6	2169–72	112–14		Temporary	164		Repealed
	7–8	2212	115		Repealed			19–40–1
	9	2168			19–94–1	165		2718
	10	2173	116–19		Temporary	166		Temporary
	11	2174,5,2211	120		645 658	167		82
	12	2176	121–2		Temporary	168		Temporary
	13	2177–8	123		Repealed	169	1–2	2109–10
	14	Omitted			19–17	170		Temporary
	15	2179–80	124		Legalizing	171		2702
	16,17	2182–3	125–7		Temporary	172–5		Temporary
	18	2186	128		2048	176		2757
	19	2209	129		Temporary	177–80		Temporary
	20	2189	130	1	5232	181		3138
	21	2184,5,2213		2	5254	182	1	Omitted
	22	2187,8,2196		3	5272		2	4945
							3	4948–9

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
183		403–4	191		2014	204–5		Temporary
184	1	297–8	192		Repealed	206	1	Omitted
	2	496–510			20–159–1		2	66
	3	479–481	193	1–2	2551–2		3, 4	88
	4	490–1	194		2867	207		5492
	5	299,480,548	195	1	245	208	1	1882
185	1–2	3869		2	254, 3675		2	1883
	3–4	3870–1	196–9		Temporary		3	1882
186	1	2939,4636	200		5716–17	209		3749
	2	2940	201	1	565, 647, 650, 661, 1185	210	1, 2	1727
187		Temporary					3	1728, 1730
188	1	2314,2316		2	661	211	1	1750, 1815
	2	2320	202		Repealed		2	1741, 1815
189		691			20–21–20		3	1742, 1744
190		Omitted	203		2614, 2618, 2727			

NINETEENTH GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1–6		Temporary		6–7	2695–6	95–99		Temporary
7	1	56	40	8	2693	100	1	3202
	2	58		9	2700		2	3213
8		3109	Cont	10–12	2697–9	101		Temporary
9–12		Temporary		13–14	2693–4	102		Repealed
13		2867		15	2614			20–159–1
14–15		Temporary	41–43		Temporary	103	1,2	484
16	1–3	628	44	1–6	1939–44	104		2158
	4	629		7	1946–8	105		2618,2727
	5	630		8	1947	106–8		Temporary
17–18		Temporary		9, 10	1949	109		1495
19		4759		11	1947, 1949, 50	110		565,647–50,660
20–22		Temporary	45		1436	111		Temporary
23	1	2787	46		2759, 2762	112	1–4	4812–15
	2	Omitted	47 48		Temporary	113		2867
	3	2765	49		4008, 4017	114		Temporary
24	1–2	255–6	50		Temporary	117	1	207,1186
	3–4	260–1	51		2746, 2749		2	205
	5	268	52	1	Omitted	118		2794
	6	270		2	12, 13	119		Temporary
	7–8	272–3	53		Temporary	120–1		Temporary
25		643–6	54		425	122		2017
26		Temporary	55		Temporary	123		82
27		Repealed	56		Repealed	124	1	1272
		22–82–41			21–134–1–3		2	668,1276,1278
28–31		Temporary	57–61		Temporary	125–7		Temporary
32		891–3	62		4008	128		687
33–34		Temporary		1	759	129–32		Temporary
35		3652		2	760–4,902,1014	133	1–2	885–6
36	1	2599	63	3	761–2,896,1005	134–5		Temporary
	2, 3	2597		4	761–2,764	136		702
	4	Omitted		5	762,764	137	1	2590–1
	5	2599		6	762		2–3	2594–5
	6, 7	2597–8	64–79		Temporary		4	2588
	8	2600	80		1488,1493	138		Temporary
	9	2597	81–88		Temporary	139		Omitted
	10, 11	2599		1	700,701	140		2567
37		Temporary		2	709	141–3		Temporary
38	1	817, 894, 1005		3	797,960	144		4148–9
	2	830, 894, 977, 1005	89	4–6	712	145		Temporary
				7	713	146		Repealed
	3–4	912, 1022		8	809			22–29–1
39		Temporary		9	696	147		403–4
40	1	Omitted	90		Superseded	148		Temporary
	2	2609, 2610, 2611, 2693	91		5718	149		2783
			92		2713	150		2709,2711
	3–4	2693–4	93		Temporary	151		300,4595
	5	2616, 17, 2693, 2701	94	1	Omitted	152		Temporary
				2–23	511			

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
153		Repealed 22-82-41	165		Superseded 2614,2718	169	1	1351,1435
			166				2-5	2659-62
154		735	167	1	2628	170	1-3	4984-6
155-7		Temporary		2-4	2629		4	2516,4987,4984
158		890		5,6	2632		5	4988
159		469		7	2631	171		Temporary
160		2792		8	2634	172	1-20	Omitted
161	1	2742		9	2633		21	2773
	2	2735	168	1-5	1025-9	173		Temporary
162		Temporary		6	1032	174		2849
163	1-13	Omitted		7	Omitted	175		Repealed 22-82-41
	14	1149,1163		8-18	1033-43			
164		635		19	1044-6			

TWENTIETH GENERAL ASSEMBLY

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1-6		Temporary	26		Temporary	126		3493
7		652, 662-3	27		2648	127		Temporary
8		2382	28		Obsolete	128		1673
9		Superseded	29-43		Temporary	129-131		Temporary
10		Temporary	44		980-1	132	1-4	2469,2477
11		1759	45		3906		5	2470
12		Temporary	46-63		Temporary		6	2471
18		Obsolete	64		529	133	1-2	2119-20
14-16		Temporary	65	1	2168	134		1674
17		5661		2	2177-8	135-8		Temporary
18-19		Repealed 21-134-1, 3		3	2206	139	1-4	2099-2102
				4	2184-5, 2213	140	1	Omitted
	1	751,779, 782, 792-3		5	2214		2	152
			66		2254, 2617-18	141		Temporary
	2	812, 813, 815	67		2551	142	1	4939
		816-7, 820, 825-7, 833,	68-69		Temporary		2-4	4942-4
			70		Superseded		1	2383
	3	836-7, 840,	71		Temporary		2-8	Omitted
20		967, 972, 974, 976, 980-1		1-2	2656-7		9	2403
				3	1351, 2658		10	2382 3,2425,2430
	4	Omitted	72	4	2663	143	11	2382-3,2427,2430
	5	817, 827, 894, 967, 974, 975, 1005		5	2656		12	2384,2405,2408, 2430
				6-7	2664-5			
			73		2614,2618,2727		13	2428
	6	821,825 827-9, 834 972, 974-6	74		Superseded		14	2419,2429
			75		Temporary		15	2404
	1	2478, 2481-2	76	1	2609,2645-6	144-6		Temporary
	2	516, 2482		2	2610-11	147	1-2	1522-3
	3	2478, 2483	77		3524	148-50		Temporary
	4	2483	78		5004	151	1	850,991
	5	2478	79		898,1007		2	853,991
	6	2482	80		403-4		3	852,992
	7	2485	81-93		Temporary		4	852,994
21	8, 9	2486	94		3505		5	852,995
	10	2488	95-101		Temporary		6-7	996-7
	11-13	2489	102		4977-8	152-7		Temporary
	14	2492	103	1	2817	158		616
	15	2491		2	2740	159	1	Omitted
	16	2484	104		2072		2-9	2084-91
	17	Omitted	105		5008	160-1		Temporary
	18	2489	106		554	162		Repealed 21-62-4
	19	2491	107-114		Temporary			
22		1611	115		2643	163		2073
23	1-2	4009-10	116-8		Temporary	164-7		Temporary
24	1-2	2103-4	119		168	168	1	309
	1-8	975	120		564		2-8	310-16
		816, 825, 827,	121-2		Temporary	169-72		Temporary
25	9	829, 833, 840, 972, 974-6	123		4884	173		2564,2574-5
			124		3079	174		Temporary
	10	842-3, 975, 987	125		216	175		403

Ch.	Sec.	Code of '97.	Ch.	Sec.	Code of '97.	Ch.	Sec.	Code of '97.
176-7		Temporary	187	1	Omitted	194	2-3	1418-9
178	1	433		2	5674,5716		4	1428
	2,3	434		1	1955		5	1459
179	1,2	3102		2,3	1956		6	1425
	3-4	3103-4	188	4-5	1962-3	195		4946
180		Temporary		6	1955	196		Temporary
181		Superseded		7-10	1957-60	197	1	Omitted
182		1303	189	1	2529,2538		2	441
183	1-2	3046-7		2-9	2530-7	198		228
184		4261	190		1998	199		Temporary
185	1	2503,2505,2508	191	1,2	Omitted	200	1-2	1530-1
	2	2504-5		3	2867		3	1553
	3	2503		4	2881		4-5	1532-3
	4-5	2505-6	192		685		6-9	Omitted
	6-8	2508	193	1-3	2666-8		10	1533
	9	2509		4	2652		11	1532
	10-11	2508		5	2670		12	1534
	12	2503		6	2669		13	1538
	13	2508		7	2671		14-16	1535-7
	14	2503,2505		1	1400,1406,		17	1533
186	1-4	1951-4			1413-14	201-3		Temporary

TWENTY-FIRST GENERAL ASSEMBLY.

Ch.	Sec.	Code of '97.	Ch.	Sec.	Code of '97.	Ch.	Sec.	Code of '97.
1	1	2677, 2689, 2706, 2736, 2775	52	1-2	2516-17	65	19	Omitted
				3	2516	Cont	20-21	1797-8
	2	2739-40, 2775		4	2519		1	2406, 2429
	3	2736-7, 2775		5, 6	2517		2	2405
2		255		7	2520		3	2407
3		Temporary		8	2519		4	2384, 2429-30
4		3145		9	2517		5	2408, 2426
5-9		Temporary		10	2527	66	6-7	2409-10
10		2247		11	2515		8	2427
11-12		Temporary		12	2515, 2528		9	2411
13	1	759, 896		13, 14	2515		10	2419, 2429
	2	760-4, 896, 902,1005,1014		15	2521		11	2420, 2429
	3-4	764-5	53		Temporary		12	2422
14		403	54		1177	67-70		Temporory
15		469	55	1-3	1964-6	71		1642-3
16-19		Temporary	56		Temporary	72	1	1861
20		Omitted	57		1611		2	Omitted
21		Temporary		1-3	2601-3		3	1862
22		403-4	58	4	2601, 2603, 2609-11, 2615-17		1	1072
23-28		Temporary		5	2612	73	2-3	301-2
29		3883		6-14	Omitted		4-8	303-7
30		4842-3		15-16	2603-4		9-10	Omitted
31-33		Temporary	59	1	192		11	308
34		794, 819, 831, 894, 912, 978, 1005, 1022		2	201	74		2610-11
			60-61		Temporary	75	1-2	931-2
35-40		Temporary	62	1, 2	435	76	1-2	1637-8
41		Legalizing		3	436		3	Omitted
42	1	346	63	1, 2	2549	77	4	1639
	2	339, 342		3	2550			Temporary
	3	5240	64	1-4	2610-11	78	1	905-6, 1005
	4	5274		1-4	1784-7		2	906
43		2484		5	Omitted		3	907, 909-10
44		275		6-8	1788-90		4	905
45-46		Temporary		9	1806-7		5	894, 911
47		2283	65	10, 11	1792		6	Omitted
48		556		12	1793		7	1381
49		Temporary		13	1794, 1808, 1810, 3499		8	904
50		3013		14-15	Omitted	79	1	5018
51		3268		16	1795		2	Omitted
							3	5019
						80-82		Temporary

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
83	1	2584,2588	125		85	157	1-4	360-3
	2	2588-9	126		Superseded		5	360
	3	2588,2594	127		Temporary	158		2881
84		483-4	128	1	241	159		Temporary
85	1	427		2	346	160	1	Omitted
	2,3	428	129		Repealing		2	894, 1005, 6
86		441	130		4263-4		3	830, 894, 977, 1005-6
87		1556	131		2749		4	904
88-90		Temporary	132		1387	161	1-4	Omitted
91	1	5471	133		1400		5-7	1077-9
	2	5477-8	134	1-2	Omitted		8	1078
	3	5476		3	227		9	1081
	4	5479		4	227,1069		10	1087
	5	5478		5	228-31	162		Temporary
	6	5480		6	232	163		Legalizing
	7	5478		7	225	164		Temporary
	8	5482		8-9	Omitted	165	1	3122-3
92		664,754		10	249		2	3124
93	1	954		11,12	Omitted		3	3125, 3128
	2	Omitted		13-15	250-2		4	3126, 3128
	3	939-40		16	297		5	3128
	4	715	135-8		Temporary		6-18	Omitted
	5	710	139		1946-8		19	1816
94		Temporary	140	1	2478,2481,2	166		Temporary
95		2812		2	516,2482	167	1-2	Omitted
96		Temporary		3	2478,2483		3	1076
97		1304		4	2483	168	1	792
98		759		5	2478		2	812
99-102		Temporary		6	2482		3	813, 816
103		3308	141	1	643,648		4	815
104	1,2	2576		2	648,1088,1090		5	822
	3	2576,2580	142-3		Temporary		6	842-3, 987
	4,5	2577	144		3261		7	Omitted
	6	2583	145		1721-3		8	845
	7-8	2578-9	146		4063		9	845-6, 988
	9,10	2580	147		Temporary		10	817-8, 820-2, 967
105-6		Temporary	148	1-2	145-6		11	821, 823, 971
107		2783		3	154		12	825, 827, 829, 972, 974-6
108		898,1007		4-5	147-8		13	Omitted
109-10		Temporary		6	149		14	828
111		2685		7	150-1		15	833, 847
112		Temporary		8	152		16-17	841
113		2427		9	149		18	Omitted
114	1	4756		10	153		19	823, 971
	2	4760	149	1,2	2505		20	794
	3	4761		3	2508		21	810, 965
115	1	3085		4	2503,2505	169		1774, 1806
	2	3080	150		Temporary	170		Temporary
116		791,809,1030	151	1	5473	171		716
117	1	3905,3979		2	5481	172		211
	2	3905,3980-4, 3987		3	5478,5482	173		766
	3	3905,3986		4	5478	174	1-2	4994-5
	4	3905,3988	152		State Senatorial Apportionment Act.		3	Omitted
	5	3905,3987					4	4996-8
	6	3905,3989	153		5654		5	4994
118	1	65	154		Congressional Apportionment Act.	175		Temporary
	2	87				176		5639
	3	99				177	1-6	4952-7
	4	116	155		Temporary	178	1-2	83-4
	5	2627	156	1	Omitted	179-80		Temporary
	6	205		2	5020	181		2609, 2616, 2635
119-123		Temporary		3	5021			
124		2774,2801						

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1	1	863, 1272	26		720, 955	64	1	2609,2680
	2–5	864–7	27		939–940		2	2680
	6	867–870	28	1–30	2122–51	65		2571
	7	869	29	1	Omitted	66		2576,2583
	8	868		2	1068, 1184, 2111	67		5018
	9, 10	869, 870	30	1	2057	68	1	2266
	11–14	871–4		2, 3	2058		2	2271
	15	711	31	1–3	2105–7	69	1–5	5709
	16–20	875–9	32	1–4	770–3		6	5710
	21	878		5	Omitted		7	5716
	22	870		6	774		8	Omitted
2		Superseded	33		215		9	5711
3	1	900–1, 1009	34		192		10	5711,5716
	2	660, 900	35		4122	70	1	457,3225
		1009, 1258	36	1	1186		2	458,3225
	3	900, 1009		2	297–8		3	457,3225
4	1	668, 942	37		228–31	71	1	2382,2385
	2	667–8, 941–2	38		5256–7		2	2388
5	1–2	812–3	39		5364–5		3	2387
	3	822	40	1–2	260–1		4	2390
	4	842–3,987		3	270		5,6	2389
	5	817–8, 820–2, 967		4	259		7	2391–2
	6	821, 823, 826,971		5	271		8	2400
	7	825–7, 829,972	41	1–3	370–2		9	2387
		974–6	42		Omitted		10	2393
6	1	Omitted	43		1303		11	Omitted
	2	810, 965	44	1	836–7		12	2394
	3	810,812,822,965		2	837, 981		13	2397
	4	820		3	838, 981		14	2399,2425
	5	823, 971	45		1543		15	2385
	6	Omitted	46		890		16	2401
	7	836, 980	47		409		17	Omitted
	8	822	48	1	1077, 1080		18	2386
7	1	817, 819, 894		2	1084		19	2395
		967, 1005		3	1080, 1084		20	Omitted
	2	912, 1022		4	1080		21	2589
8	1, 2	794		5	1076		22	2590–1
9		791, 809, 1030		6	1086, 1185	72		Temporary
10		722, 894, 1005		7	1082	73	1	2408
11	1	955, 720		8	Omitted		2	2412
	2	720, 722–5,		9	1124–5, 1127–8,		3,4	2405
		894, 955			1133		5	2429
	3	722		10	1078		6	2419,2429
	4	721, 956		11	Omitted		7	2421
12		817, 830, 894,		12	1076, 1079	74		2609,2683
		967, 977, 1005	49	1	1198	75	1,2	2253
13		782, 792		2–4	1246–8		3	2609
14		Superseded	50		1168,1174–5	76		2296
15		780	51		2751, 2754	77	1	Omitted
16	1	696, 700, 705,	52	1	2483		2	2617
		714, 717, 725,		2–21	Omitted	78		5069
		752, 758, 769,		22–23	2479–80	79		4993
		775, 780, 781,		24, 25	2481	80		5070
		783, 792, 794,	53	1–3	2490	81		2588
		809, 834, 888,		4–5	2491		1,2	117
		959, 1258	54	1	2490		4–17	188–31
17	1	905–6		2	2482		18	140
	2	906		3	2490		19–22	132–5
	3	907, 909–10	55	1–2	2490–1		23–24	138–9
	4	905	56	1,2	2486		25	141
	5	894, 911, 1005		3	2488		26	143
18		894, 1005		4	2492	82	27	89
19		Omitted	57	1–2	5027–8		28	107
20		Superseded	58		2668		29	2625,2641
21		711	59		2624		30	2683
22		939–940	60		2778		31	2705
23		938	61		2797		32	2717,2725
24		669	62		2793		33	2866
25		1051, 3447	63		2799		34	2887

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
	35	5665	88		1615	101		2234–5
	36	2693	89		1845–7	102		2341
	37	2565	90		3070	103		Omitted
	38	2506	91		403–4	104		5071
82	39	2532	92		1526	105	1–3	430–2
Cont	40	293	93		1759		4	431
	41	Omitted	94		Superseded	106		2590–1
	42	144	95	1	2355, 2357	107	1	2513
	43	2174–5		2	2355, 2368		2	2512
83	1–2	4885–6	96	1	1955		3, 4	2512–13
84		Superseded		2, 3	1956		5	2512
	1, 2	2889		4–5	1962–3		6	2514
	3	2891		6	1957	108		2549
85	4	2893		7–10	1957–60	109		2627
	5	Omitted	97		1953	110–20		Temporary
	6	2890	98		2515	121	1	2608
86		1607	99		2942		2	2608
87		1642–3	100		375		3	2608, 2614, 2618
						122–196		Temporary

TWENTY-THIRD GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1	5	642	22		2630		16	2392
2		758	23		2841, 2849, 2855		17	2386
3	2	1272	24		2824 35	35	18	2395
	1	905	25		552	Cont	19	Temporary
	2	906	26		Temporary		20	2387
4	3	908	27		566	36		2591
	4	910	28		5060–7	37		1072
	5	907, 909	29		1677–80	38		Legalizing
	6, 7	894, 911, 1005	30		Legalizing	39		1322
5		818, 894, 1005	31		109, 110	40		3038
	1	797, 960	32		448	41		511
	2–5	798–801	33		1782	42	1	3219
	6	802		1	Repealing	43	2	3221, 5134
	7	802, 829, 976		2	2540–1, 2546		3	3222, 5134
6	8	803		3	2540		4–11	5135–42
	9	Omitted		4	2543	44		1669
	10	804, 961		5	2544	45		3053
	11–12	805–6	34	6–7	2540	46		Omitted
	13	807, 963		8–9	2544	47		3105, 4019–22
7		See McC., 725		10	2545	48		4019–22
8		716, 1005		11	2547	49		497
9		792, 834		12	2539	50	1–2	1875–6
10		794		1	Repealing	51		Superseded
11		767, 955		2	2382, 2385, 2401		1	125
12		905		3	2388		2	126
13		722, 894, 1005		4	2387	52	3	Omitted
14	5	822		5	2390–2		4	2597
15		Sp. Ch.		6	2389		5	2515
16	1	945	35	7	2400	53		Temporary
17	1–5	2152–7		8	Superseded	54		2713
	1–4	2079–82		9–10	2393–4	55	1, 2	2726–7
18	5	2143		11	2397–8	56		2700
	6	2083		12	2399, 2425	57	1–4	5703–6
19		2088–9		13	2385–6, 2584	58		2608
20		2058		14	2396	59–124		Temporary
21		2027		15	2401	125		1664

TWENTY-FOURTH GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1	1	850, 1272	31	9-10	2183-5	39		4937
	2	851		11	2189	40		1570
	3	852, 902, 1014		12	2191	41		293
	4	852-3		13	2193	42		Legalizing
	5	854		14	2199	43		5008
	6	855		15	2201	44	1	3124
	7	853, 895, 1005		16	2202		2	3125,3128
	8, 9	858		17	2204		3	3128
2		850		18	2207		4	3124
3		863	32		2208		5	3126,3128
4		998		1	1097		6	3127
5		276-7		2	1089,1129	45	1	1562
6	1	670		3	1098		2	5024
	2	691		4	1098-9,1104	46		2549
7	1	670, 945		5	1100	47		4999
8	1	795, 960		6	1099	48		2296
9		Repealed		7	1104	49		2343-7
10	1-4	560-3		8	1101,1104	50	1-3	4989-91
11		794		9	1102		4,5	2524
12		Repealed		10	1103-4		6	2515
13		Sp. Ch.		11	1105		7,8	2525-6
14	1	905-6		12	1108	51	1-3	2719
	2	906		13	1105		4	2616,2720
	3	907, 909-10		14	1106,1109		5	2609-10
	4	Omitted		15	1106-7,1110		6	2612,2721
	5	894,911,1005		16	1106		7	2617
	6	Omitted	33	17,18	1111-12		8	2720
	7	1381		19	1114		9	2722
	8	904		20	1113,1117,1129	52	1-4	2505-7
15		905-6		21	1115-17	53		227
16		Temporary		22	1117,1119-21	54		227
17		403		23	1118	55		227
18		2084,2086		24	1123	56	1-8	2875-80
19		2771		25	1117,1121,1139	57	1	1363
20		Omitted			1141,1143	58	1,2	1675-6
21		2750		26	1124,1134	59		2568,2573
22		2027		27	1120,1134	60		2881
23	1-4	2079-82		28	1135	61		2645
24	1	2605		29	1136	62		Repealed
	2	2270		30	1137	63	1	1681
25		2155		31	Temporary		2	1679
26		2105		32	1096	64		70,71
27		2143	34		3538-9	65		2723
28		1805	35		1400	66		2342
29		1709		1	5049,5051	67	1-4	1665-8
30		1806		2	5051	68	1-4	1571
31	1	2169	36	3	5049	69		430,432
	2	2168		4-5	5050-1	70		Temporary
	3-6	2173-8		6-7	5050-1	71		2497-2502
	7	2178	37		2348	72-94		Temporary
	8	2179-80	38		Swamp land	95		2606

TWENTY-FIFTH GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1	1	851	7	5	822	7 Cont	15	825,841
	2	852,902,1014		6	842-3,847,988		16	825,841
	3-7	854-7		7	844		17	825
2		852-3		8	844-5		18	823,825,971
3		905		9	845-6		19	793-4,811,825,
4		784		10	817,820,834,967			965
5		See McC.,§ 725	Cont	11	823,825,827,831,		20	792,810,812,821
6		897,1006			894		21	819,820
7	1	Sp. Charter		12	816,825	8		817,830,894,967,
	2, 3	812,813		13	825,828			977,1005
	4	815		14	825,833,847,988			

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
9	1	842-3,847,988	46	3	2518	75		508-510
	2	845,848		4	2517	76		495, 496
	3	849		5	2516	77		297
	4	847,988	Cont	6	2519	78		3423
10	1-3	396-8		7-8	2517	79		5052
	4	400		9	2527	80		2253
11		612		10	2521	81		1441
12		Legalizing	47		2515, 2523	82		2889
13	1	651-2	48		3122	83		511
	2	1258	49		Temporary	84		2340
	3	651,653	50		4852	85		1671
14		663	51		3308	86		136
15	1	658	52		393, 2942	87		137
	2,3	654	53		4295	88		1570
	4	665	54		403-4	89		Legalizing
	5	654,1258	55		403-4	90	1	295
	6	668,672	56		403-4		2	2931
16		3089	57		403	91		1563-5
17	1	2858	58		1083-4	92	1	Repealing
	2	2875	59		4915-17		2	4735
18		2028	60		1090		3	4736 8
19	1	759	61		5005		4-5	4740
	2	760,896,1005	62	1, 2	2432-3		6	4741
	3	764		3	2435	93		3075, 3080, 3083
20		5707-8		4	2441	94		4702
21		1571		5	2442-3	95		4008
22		1528,1530		6	2444	96		3564
23		2046		7	2436	97		5036-8
24		2047		8	2431	98		2490
25		2060-1-6		9	Superseded	99		894, 1005
26		2049-50		10	2437-8	100		5488
27		2084,2086		11	2436	101		5238, 5606
28		2051-3		12	2439	102	1, 2	4018
29		1878-80		13	2439-40		3	Omitted
30	1-2	1869-70		14-18	2445-9	103		4226
	3	1887		19-21	2451-3	104		2355, 2368
	4	1871		23-4	2454-5	105		1293
31		1746	63		2385	106		2711
32		1709	64		2560, 4821	107		2648
33		1806	65		2540	108		2903-4
34		2783	66		227	109		6
35		2824	67		227	110	1	2667
36		2634	68		227		2	1435
37		2784	69	1	193	111		1653
38		2794		2	1066	112		2647
39		1131, 2747		3	Temporary	113		Temporary
40		2678-9		4	194	114		1303, 1380
41		728-732	70		Superseded	115-144		Temporary
42		Legalizing	71		5256, 5258	145		2674
43		894, 1005	72		333	1461-51		Temporary
44		2867	73		13	152		2643
45		2517	74	1-3	4600	153-8		Temporary
46	1	Repealing		4	1073	159		2502
	2	2516						

TWENTY-SIXTH GENERAL ASSEMBLY.

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
1	1-12	742-9	10		970	19		Omitted
2		778	11		1035	20		740
3		905	12		Omitted	21	1-7	1822-8
4		905	13		720		8	Temporary
5		894	14		737		9-19	1829-39
6		670	15		686	22		1754 7
7	1-6	738-9	16		905	23		1758
8		881	17		741	24		860
9		817, 967	18		906	25		2445

CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.	CH.	SEC.	CODE OF '97.
26		567–573	61		332–353	92		2493–6
27		1005	62		1076	93		2493
28		1467–81	63		3447	94		2505
29		1304	64		4122, 4142	95		5003
30		1308	65		4051	96		5006
31		1308	66		2903–4	97		Omitted
32		1345–6	67		4840	98		1610
33		2165–6	68	1, 2	1104–5	99		5137
34		2150		3	1093	100		473
35		2105	69		495	101		1682–3
36		4794	70		4757	102	1	2165, 2167
37	1	2836	71		4834–6		2	2166, 2169
	2–6	2783, 2837	72		1066		3–5	2170–2
38		2777	73		4299–4301		6	2168
39		2737	74		4693		7–15	2173–80
40		2745	75		3340		16–29	2182–95
41		2718	76		403–4		30	2181
42		Temporary	77		258		31–42	2196–2207
43		1528,1542,1548	78		1563		43–5	2181
		1554, 1566	79	1	5667		46–53	2208–14
44		1517		2	5717	103		2214
45	1	1509	80	1	2540	104		2889
	2	Omitted		2	2542	105		5638
46		1975–89		3	2544	106		4898
47		1556	81		1626	107		3130
48		1570	82		5080	108		2164
49		2868–74	83		468	109		1380
50	1	729	84		2906	110		Local
	2	732	85	1–29	1890–1918	111		Omitted
51		993		30, 31	Temporary	112		Local
52		2297		32, 33	1919–20	113		Temporary
53		2261	86	1	2477	114		2644
54		3225		2–7	2471–6	115–119		Temporary
55		Omitted	87		4823	120		Local
56		2257	88		4894	121		227
57		Omitted	89		3495	122		227
58		5015–19	90		Omitted	123–143		Temporary
59		258587	91		2564	144		2643
60		2385						

TABLE OF CASES.

The following table of cases gives in alphabetical order, under the name of plaintiff only, all of the Iowa cases found among the annotations of the Code of 1897, which are cited by reference only to the Northwestern Reporter. Immediately following the title of the case appears the number of the volume of Iowa Reports in figures, and the page thereof separated with a hyphen, where the case is reported. There are a few cases cited by reference to the Northwestern Reporter, which are not found in any of the official Iowa Reports. These are inserted in the table with reference to the Northwestern Reporter and the words "Not officially reported" in parentheses.

A TABLE

Showing sections and parts of the code of 1897, that have been amended or repealed, and substitute enactments passed, by the Twenty-seventh, Twenty-eighth, and Twenty-ninth General Assemblies, with a reference to the chapter of the acts of the particular General Assembly where the same occurs.

Provisions relating to the Code, Sec. 27: 27 G. A. c. 1. 28 G. A. c. 1.

PART FIRST. Public Law.

41: Rep. and Subst. 27 G. A. c. 2,
65: Amd. 29 G. A. c. 1.
89: Par. 8: Amd. 28 G. A. c. 2.
Tit. II, c. 4: 29 G. A. c. 3.
104: Amd. 27 G. A. c. 3.
106: Amd. 29 G. A. c. 2.
Tit. II, c. 5: 29 G. A. c. 8.
118: Amd. 29 G. A. c. 4.
119: Amd. 29 G. A. c. 4.
120: Amd. 29 G. A. c. 5.
123: Amd. 28 G. A. c. 3.
125: Amd. 28 G. A. c. 4, 29 G. A. c. 6.
126: Amd. 27 G. A. c. 4, 29 G. A. c. 6.
136: Amd. 28 G. A. c. 5, 29 G. A. c. 7.
144: Rep. 27 G. A. c. 5.
Tit. II, c. 6: Rooms in Capitol for State Agricultural Society, 27 G. A. c. 6.
152: Amd. 27 G. A. cc. 6, 7.
Tit. II, c. 7: Warrants in anticipation of revenues, 27 G. A. c. 8.
161: Rep. and Subst. 29 G. A. c. 9.
163: Rep. New act, 28 G. A. c. 6.
164: Amd. 29 G. A. c. 10.
165: Amd. 29 G. A. cc. 10, 11.
166: Amd. 28 G. A. c. 7.
168: Amd. 29 G. A. c. 173, Sec. 8.
Tit. III, c. 1: Amd. 29 G. A. c. 12.
Tit. III, c. 5: 27 G. A. c. 14, 29 G. A. c. 15.
227: Amd. 27 G. A. cc. 10, 11, 28 G. A. c. 8.
253: Amd. 29 G. A. c. 13.
254: Rep. and Subst. 29 G. A. c. 14.
255: Amd. 29 G. S. c. 16.
256: Rep. and Subst. 28 G. A. c. 9.
258: Rep. and Subst. 28 G. A. c. 9.
260: See 27 G. A. c. 14.
261: Amd. 28 G. A. c. 10.
276: Amd. 28 G. A. c. 9.
296: Par. 29: Amd. 29 G. A. c. 17.
298: Amd. 27 G. A. c. 12.
303: Rep. and Subst. 29 G. A. c. 18.
308: Amd. 29 G. A. c. 18.
310: Amd. 28 G. A. c. 11.
311: Amd. 28 G. A. c. 11.
312: Amd. 28 G. A. c. 11.
315: Amd. 28 G. A. c. 11.
316: Amd. 28 G. A. c. 12.
325: Amd. 29 G. A. c. 19.
337: Amd. 29 G. A. c. 20.
340: Rep. 27 G. A. c. 114.
370: Amd. 28 G. A. c. 13.
371: Amd. 28 G. A. c. 14.
Tit. IV, c. 1: 27 G. A. cc. 13, 14.
407: Amd. 27 G. A. c. 15.
423: Amd. 29 G. A. c. 21.
441: Amd. 29 G. A. c. 22.
Tit. IV, c. 3: of the County Auditor, 29 G. A. c. 23.
483: Amd. 29 G. A. c. 24.
490: Amd. 27 G. A. c. 16.
496: Amd. 29 G. A. c. 25.
508: Amd. 29 G. A. c. 26.
509: Rep. and Subst. 29 G. A. c. 27.
510: Rep. and Subst. 29 G. A. c. 27.
511: Amd. 27 G. A. c. 17.
576: Amd. 28 G. A. c. 15.
586: Amd. 29 G. A. c. 28.
602: Amd. 28 G. A. c. 16
Tit. V, c. 2: Cities and towns, 29 G. A. c. 31.
645: Amd. 29 G. A. c. 29.
654: Amd. 27 G. A c. 18.
658 Par. 5: Amd. 29 G. A. c. 29.
661: Amd. 29 G. A. c. 30.
669: Amd. 28 G. A. c. 17.
674: Amd. 29 G. A. c. 30.
683: Amd. 27 G. A. c. 19.
Tit. V, c. 4: General Powers of Cities, 27 G. A. c. 20; 29 G. A. cc. 35, 37.
696: Amd. 27 G. A. c. 22.
700: Amd. 27 G. A. cc. 21, 22.
704: Amd. 28 G. A. c. 18.
720: Amd. 28 G. A. c. 19.
721: Amd. 29 G. A. c. 32.
724: Amd. 28 G. A. c. 19; 29 G. A. c. 33.
725: Amd. 28 G. A. c. 19.
727: Amd. 29 G. A. c. 34.
729: Amd. 28 G. A. c. 20.
732: Amd. 28 G. A. cc. 21, 22; 29 G. A. c. 36.
737: Amd. 27 G. A. c. 22.
740: Amd. 28 G. A. c. 23.
742: Amd. 27 G. A. c. 23; 28 G. A. c. 24; see 29 G. A. c. 38.
744: Amd. 27 G. A. c. 23.
745: Amd. 27 G. A. c. 23; 29 G. A. cc. 39, 40.
746: Amd. 29 G. A. c. 39.
747: Amd. 27 G. A. c. 23; 28 G. A. c. 25; 29 G A. c. 39. Rep. and Subst. 29 G. A. c. 41.
748: Amd 28 G. A. c. 25; 29 G. A. c. 39.
Tit. V, c. 6: 29 G. A. c. 42.
771: Amd. 29 G. A. c. 43.
773: Amd. 29 G. A. c. 43.
774: Amd. 29 G. A. c. 43.
777: Amd. 28 G. A. c. 26.
779: Amd. 28 G. A. c. 27.

Tit. V, cc. 7, 8: 28 G. A. c. 29.
799: Amd. 28 G. A. c. 28.
814: Amd. 27 G. A. c. 24.
821: See 28 G. A. c. 29.
822: See 28 G. A. c. 29.
823: See 28 G. A. c. 29. Amd. 29 G. A. c. 44.
824: See 28 G. A. c. 29.
829: See 28 G. A. c. 29.
830: See 28 G. A. c. 29.
831: See 28 G. A. c. 29.
839: See 28 G. A. c. 29.
Tit. V, c. 9: 29 G. A. c. 47.
850: Amd. 27 G. A. c. 25; 28 G. A. c. 30; 29 G. A. c. 45.
851: Amd. 28 G. A. c. 30.
852: Amd. 28 G. A. cc. 30, 31.
859: Amd. 27 G. A. cc. 25, 26; 28 G. A. c. 30; 29 G. A. c. 45.
860: Amd. 29 G. A. c. 46.
861: Amd. 29 G. A. c. 46.
862: Amd. 29 G. A. c. 46.
891: Amd. 27 G. A. c. 27.
892: Amd. 27 G. A. c. 27.
894: Amd. 28 G. A. c. 32; 29 G. A. c. 48.
915: Amd. 29 G. A. c. 49.
Tit. V, c. 14: 29 G. A. c. 51.
952: Amd. 27 G. A. c. 28.
953: Amd. 27 G. A. c. 28; Rep. 29 G. A. c. 50.
958: Amd. 27 G. A. c. 28.
971: Amd. 27 G. A. c. 28.
979: Amd. 27 G. A. c. 28.
1004: Amd. 29 G. A. c. 52.
1005: Amd. 27 G. A. c. 29; 29 G. A c. 50.
1020: Amd. 27 G. A. c. 28.
1075: Amd. 29 G. A. c. 53.
1077: Amd. 28 G. A. c. 33.
Tit. VI, c. 3: 28 G. A. c. 37.
1096: Amd. 28 G. A. c. 34.
1106: Amd. 28 G. A. c. 35.
1119: Amd. 28 G. A. c. 36.
1130: Amd. 29 G. A. c. 53.
1173: Amd. 28 G. A. c. 38.
Tit. VI, c. 6: 29 G. A. c. 54.
1222. Amd. 28 G. A. c. 39.
Tit. VI, c. 11: 29 G. A. c. 54.
Tit. VI, c. 12: 29 G. A. c. 55.
Tit. VII, c. 1: 28 G. A. cc. 40, 49; 29 G. A. cc. 60, 61, 62.
1304: Amd. 29 G. A. c 56.
1305: Amd. 27 G. A. c. 30.
1306: Rep. and Subst. 28 G. A. c. 41.
1321: Amd. 27 G. A. c. 30.
1330: Amd. 28 G. A. c. 42.
1331: Rep. 28 G. A. c. 42.
1333: Amd 28 G. A. c. 43; 29 G. A. c. 57.
1334: Amd. 29 G. A. c. 58.
1337: Amd. 29 G. A c. 58.
1340: Amd. 28 G. A. c. 44.
1345: Rep. 28 G. A. c. 45.
1346: Amd. 27 G. A. c. 31; Rep. 28 G. A. c. 45.
1347: Rep. and Subst. 27 G. A. c. 32.
1348: Amd. 28 G. A. c. 46.
1360: Amd. 27 G. A. c. 30.
1361: Amd 27 G. A. c. 30.
1371: Amd. 27 G. A. c. 33.
1372: Amd. 27 G. A. c. 30.
1380. Rep. and Subst. 27 G. A. c. 34.
1385: Rep. and Subst. 28 G. A. c. 47.
1389: Rep. and Subst. 28 G. A. c. 48.
1400: Amd. 29 G A. c. 59.
Tit. VII, c. 2: 28 G. A. c. 50.
1436: Amd. 27 G. A. c. 35.
1457: Amd. 27 G. A. c. 36.
Tit. VII, c. 4: 27 G. A. c. 37; 28 G. A. c. 51; 29 G. A. c. 63.
1476: Amd. 27 G. A. c. 37.
1528: Amd. 29 G. A. cc. 53, 64.
1530: Amd. 29 G. A. c. 65.
1532: Rep. and Subst. 29 G. A. c. 53.
1533: Amd. 29 G. A. cc. 53, 64.
1540: Rep. and Subst. 29 G. A. c. 53.
1541: Rep. 29, G. A. c. 53.
1542: Amd. 29 G.A. c. 53; Rep.and Subst. 29 G. A. c. 64.
1545: Amd. 29 G. A. c. 53.
1546: Rep. 29 G. A. c. 53.
1551: Amd. 29 G. A. c. 53.
1553: Rep. 29 G. A. c. 53.
1554: Amd. 29 G. A. cc. 53, 64.
1560: Amd. 28 G. A. c. 52.
1562: Amd. 27 G. A. c. 39.
Tit. VIII, c 2:27 G. A. c. 37, 28 G. A. c. 139.
1563: Amd. 28 G. A. c. 53.
1567: Rep. 29 G. A. c. 53.
1570: Amd. 28 G. A. c. 54.
1571: Amd. 28 G. A. c. 55.
1610: Amd. 27 G. A. c. 40, 41, 29 G. A. c. 66
1613: Amd. 29 G. A. c. 67.
1618: Amd 28 G. A. c. 56, 29 G. A. c. 66.
1627: Amd. 28 G. A. c. 57.
1653: Rep. 28 G. A. c. 58.
1654: Rep. and Subst. 27 G. A. c. 42: Rep. 28 G. A. c. 58.
1655: Rep. 28 G. A. c. 58.
1656: Rep. 28 G. A. c. 58.
1657: Rep. 28 G. A. c. 58.
1658: Amd. 28 G. A. c. 59.
1659: Amd. 28 G. A. c. 59.
1661: Rep. and Subst. 27 G. A. c. 43; Amd. 28 G. A. c. 59.
1672: Amd. 29 G A. c. 68.
1673: Amd. 29 G. A. c. 68.
1674: Rep. 28 G. A. c. 58.
1675: Amd. 29 G. A. c. 69.
1679: Amd. 28 G. A. c. 58.
1681: Amd 28 G. A. c. 58.
1682: Rep. 28 G. A. c. 58.
1683: Rep. 28 G. A. c. 58.
Tit. IX, c. 4: 29 G. A. c. 73.
1709: Amd. 28 G. A. c. 60, 29 G. A. cc. 70, 71.
1710: Amd. 28 G. A. c. 61, 29 G. A. c. 72
1720: Rep. and Subst. 28 G. A. c. 62.
1743: Amd. 28 G. A. cc. 63, 64.
1744: Amd. 27 G. A. c. 44.
1752: Amd. 27 G. A. c. 45.
1759: Amd. 29 G A. c. 74.
1771: Amd. 29 G. A. c. 75.
1782: Amd. 27 G. A. c. 46.
Tit. IX, c. 7: 28 G A. c. 65.
1784: Amd 28 G. A. c. 65.
1806: Amd. 28 G. A. c. 66.
1832: Amd. 27 G. A. c. 47.
Tit. IX, c. 10: 28 G. A. c. 67.
1848: Amd. 28 G. A. c. 67.
1852: Amd. 28 G. A. c. 67.
1870: Amd. 29 G. A. c. 76.
1889: Amd. 28 G. A. c. 68.
Tit. IX, c. 13: 28 G. A. c. 69, 29 G. A. c. 77.
1898: Amd. 27 G. A. c. 48, 28 G. A c. 69.
1946: Amd. 29 G. A. c. 78.
1948: Amd. 29 G. A. c. 78.
1951: Amd. 29 G. A. c. 78.
Tit. X, c. 4: 29 G. A. cc. 80, 83.
1998: Amd. 28 G. A. c. 70, 29 G. A. c. 79.

2026: Amd. 29 G. A. c. 81.
2028: Amd. 29 G. A. c. 82.
Tit. X, c. 5: 27 G. A. c. 50, 29 G. A. cc. 81, 84, 87.
2071: Amd. 27 G. A. c. 49.
2080: See 27 G. A. c. 50.
2083: See 27 G. A. c. 51.
2084: Amd. 29 G. A. c. 85.
2085: Ext. 29 G. A. c. 85.
2086: Ext. 29 G. A. c. 85; Amd. 29 G. A. c. 86.
2087: Ext. 29 G. A. c. 85.
2088: Ext. 29 G. A. c. 85.
2089: Ext. 29 G. A. c. 85.
2090: Ext. 29 G. A. c. 85.
2091: Ext. 29 G. A. c. 85.
Tit. X, c. 7: 28 G. A. c. 71 .
Tit. XI, c: 29 G. A. c. 90
2168: Rep. and Subst. 29 G. A. c. 88.
2169: Rep. and Subst. 29 G. A. c. 88.
2173: Amd. 28 G. A. c. 72; Rep. and Subst. 29 G. A , c. 88.
2174: Amd. 29 G. A. c. 88.
2175: Amd. 29 G. A. c. 88.
2176: Rep. and Subst. 28 G. A. c. 72.
2178: Amd. 28 G. A. c. 72.
2179: Rep. and Subst. 28 G. A. c. 72; 29 G. A. c. 88.
2180: Amd. 28 G. A. c. 72.
2181: Rep. and Subst. 28 G. A. c. 72; Amd. 29 G. A. c. 88.
2199: Amd. 29 G. A. c 88.
2203: Amd. 28 G. A. c. 72.
2204: Amd. 29 G. A. c. 89.
2211: Rep. and Subst. 28 G. A. c. 72.
2212: Amd. 28 G. A. c. 72.
2213: Amd. 28 G. A. c. 73.
2214: Amd. 29 G. A. c. 89.
Tit. XII, 27 G. A. cc. 52, 53, 28 G. A., c. 93.
Tit. XII, c. 2; 28 G. A. c. 144, 29 G. A. c. 93.
2253: Rep. and Subst., 29 G. A. c. 91.
2267: Amd. 29 G. A. c. 92.
2291. Rep. and Subst. 27 G. A. c. 54, 28 G. A. c. 140.
2308: Amd. 27 G. A. c. 55.
2382: Amd. 28 G. A. c. 74.
2386: Amd. 27 G. A. c. 56.
2390: Amd. 28 G. A. c. 75.
2392: Amd. 27 G. A. c. 57.
2393: Amd. 28 G. A. c. 75.
2400: Amd. 27 G. A. c. 58.
2401: Amd. 28 G. A. c. 76.
2403: Amd. 28 G. A. c. 77.
2410: Amd. 29 G. A. c. 94.
2433: Amd. 29 G. A. c. 95.
2435: Amd. 29 G. A. c. 95.
2448: Amd. 29 G. A. c. 96.
2451: Amd. 28 G. A. c. 78.
2470: Amd. 29 G. A. c. 97.
2471: Amd. 29 G. A. c. 97.
2472: Amd. 29 G. A. c. 97.
Tit. XII, c. 9: 28 G. A. c. 82, 29 G. A. cc. 98, 100.
2479: Repeal and Subst. 29 G. A. c. 98.
2482: Amd. 29 G. A. c. 99.
2483: Amd. 28 G. A. c. 79.
2488: Amd. 27 G. A. c. 59.
2490: Amd. 28 G. A. cc. 80, 81.
2494: Amd. 27 G. A. c. 60.
2495: Rep. and Subst. 27 G. A. c. 60.
2503: Amd. 27 G. A. c. 61.
2508: Amd. 27 G. A. c. 62, 28 G. A. c 83, 29 G. A. c. 101.
2512: Amd. 28 G. A. c. 84.
2513: Amd. 28 G. A. c. 84.
2514: Amd. 28 G. A. c. 84.
2515: Amd. 28 G. A. c. 85.
2522: Amd. 29 G. A. c. 102.
Tit XII; c. 14: 28 G. A. c 93.
2536: Amd. 27 G. A. c. 63.
Tit. XII, c. 15: 27 G. A. c. 65, 28 G. A. cc. 86, 87, 29 G. A. c 103.
2539: Amd. 27 G. A, c 64 29 G. A. c. 103.
2540: Amd. 27 G. A. c. 64, 29 G. A. c. 103.
2546: Amd. 29 G. A. c. 103.
2547: Amd. 29 G. A. c. 104.
2551: Amd. 27 G A. c. 66, 29 G. A. c. 103.
2556: Amd. 29 G. A. c 103.
2559: Amd. 27 G. A. c. 64.
2561: Amd. 29 G. A. c. 103.
Tit. XII, c. 16: 29 G. A. c. 108.
2564: Amd. 27 G. A. c. 67, 28 G. A. c. 88.
2570: Rep. and Subst. 29 G. A. c. 105.
2571: Amd. 29 G. A. c. 106.
2572: Amd. 29 G. A. c. 107.
Tit. XII, c 17: 27 G. A. c. 69.
2576: Amd. 28 G. A. c. 89.
2581: Amd. 29 G. A c. 109.
2582: Amd. 28 G. A. c. 89.
2583: Amd. 27 G. A. c. 68, 28 G. A. c. 90.
Tit. XII; c. 18: 29 G A. c. 110.
2589: Amd. 27 G. A. c. 70.
Tit. XII, c. 19: Rep. and Subst. 28 G. A. c. 91.
2597: Amd 27 G. A. c 71.
Tit. XII, c. 20: 28 G. A. c. 92.
2604: Amd. 29 G. A. cc. 111, 112.
2608: Amd 27 G A. c. 72, 29 G. A. c 113.
Tit. XIII: 27 G A. cc. 74, 116, 28 G. A. cc. 141, 143, 144, 29 G. A. c. 128.
2622: Amd. 28 G. A. c. 94.
2627: Amd. 28 G A. c. 94.
Tit. XIII, c. 2: 29 G. A. c. 115.
2629: Amd. 28 G. A. c. 95, 29 G. A c. 114.
2630: Rep. and Subst. 28 G. A. c 96
2634: Rep. and Subst. 27 G. A. c. 73
Tit. XIII, c 3: 28 G. A. cc. 97, 116, 29 G. A. c. 116.
2644: Amd. 27 G. A. c. 75.
Tit. XIII, c. 4: 28 G. A. cc. 99, 116, 29 G. A. c. 116.
2646: Amd 27 G. A. c. 76.
2650: Amd. 27. G. A. c. 76.
2667: Amd. 28 G. A. c. 98.
Tit. XIII, c. 5: 28 G. A. c. 116, 29 G. A. cc. 116, 117.
2682: Amd. 27 G. A. c. 77.
2683: Amd. 27 G. A. c. 78.
2685: Amd. 27 G A. c. 78.
2688: Amd. 27 G. A. c. 78.
2692: Amd. 27 G. A. c. 78
Tit. XIII, c. 7: 29 G. A c. 118.
2700: Amd. 27 G. A. c. 79.
Tit. XIII, c. 8: 28 G. A. cc. 100, 101, 102.
2702: Rep. 28 G. A. c. 100.
2703: Rep. 28 G. A c. 100.
2704: Amd. 28 G. A. c. 100.
2705: Rep. 28 G. A. c 100.
2707: Amd. 28 G. A. c. 100.
2708: Amd. 27 G. A. c. 80, 28 G. A. c. 100, 29 G. A. c. 119.
2709: Amd. 27 G. A. c 80, 28 G. A c. 100, 29 G. A. c. 119.
2710: Amd. 28 G. A. c. 100.

2711: Amd. 27 G. A. c. 80, 28 G. A. c. 100, 29 G. A. cc. 119, 120.
2713: Amd. 27 G. A. c. 81, 28 G. A. cc. 100, 101.
2718: Amd. 27 G. A. c. 82; Rep. and Subst. 29 G. A. c. 121.
Tit. XIII, c. 10: 28 G. A. c. 103.
2727: Amd. 27 G. A. c. 83; Rep. and Subst. 29 G. A. c. 122.
2728: Amd. 27 G. A. c. 84.
2730: Amd. 27 G. A. c. 84.
2731: Amd. 27 G. A. c. 84.
2732: Amd. 27 G. A. c. 84.
2733: Rep. and Subst. 27 G. A. c. 84.
2734: Amd. 27 G. A. c. 85.
2736: Amd. 27 G. A. c 86.
2737: Amd. 27 G. A. c. 86
2738. Amd. 27 G. A. c. 87, 29 G. A. c, 123.
2742: Amd. 29 G A. c. 124.
Tit. XIII, c. 14: 27 G, A. cc. 88, 89, 90, 28 G. A. cc. 109, 110.
2744: Amd. 27 G. A. c. 91.
2750: Amd. 28 G. A. c. 104.
2752: Amd. 27 G. A. c. 92.
2754: Amd. 27 G. A. cc. 91, 93.
2755: Amd. 28 G. A. c. 105; 29 G. A. c. 125.
2771: Amd. 28 G. A. c. 106.
2778: Amd. 28 G. A. c. 107.
2794: Amd. 29 G. A. c. 126.
2806: Amd. 28 G. A. c. 108.
2808: Amd. 27 G. A. c. 94.
2812: Amd. 27. G. A. c. 95, 28 G. A. c. 142, Rep. and Subst, 29 G. A. c. 127.
2813: Amd. 27 G. A. c. 95.
2831: Amd. 28 G. A. c. 111.
2832: Amd. 28 G. A. c. 112.
2849: Amd. 28 G. A. c. 113.
2855: Amd. 28 G. A. c. 113.
Tit XIII, c. 17: 28 G. A. c. 114.
2868: See 29 G. A. c. 173.
2869: Rep 29 G. A. c. 173.
2871: See 29 G. A. c. 173.
2872: See 29 G. A. c. 173.
2873: See 29 G. A. c. 173.
2874: See 29 G. A. c. 173.
2881: Amd. 28 G. A. c, 115.

PART SECOND. Private Law.

Tit. XIV: 27 G. A. c. 118, 28 G. A. cc. 117, 143, 144.
Tit. XIV, c. 6: 28 G. A. c. 118.
2930: Amd. 27 G. A. c. 106.
2942: Amd. 27 G. A. c. 96. See 26 G. A. Ex. Sess. c. 23; 27 G. A. cc. 165, 166, 182.
2943: Amd. 27 G. A. c. 97.
2978: Amd. 28 G. A. c. 119.
2979: Amd. 27 G. A. c. 98.
3016: Amd. 29 G. A. c. 129.
3043: Rep. 29 G. A. c. 130.
3045: Rep. 29 G. A. c. 130.
3049: Rep. 29 G. A. c. 130.
3050: Rep. 29 G. A. c. 130.
3051: Rep. 29 G. A. c. 130.
3052: Rep. 29 G. A. c. 130.
3054: Rep. 29 G. A. c. 130.
3055: Rep. 29 G. A. c. 130.
3138: Amd. 28 G. A. c. 120.
3225: Amd. 29 G. A. c. 131.
3253: Amd. 29 G. A. c. 132.
Tit. XV, c. 3: 29 G. A. c. 130.
Tit. XVI, c. 8: Rep. and Subst. 29 G. A. c. 133.
3287: Amd. 29 G. A. c. 134.
Tit. XVII, c. 4: 29 G. A. c. 136.
3386: Amd. 29 G. A. c. 135.

PART THIRD. Code of Civil Practice.

3439: Amd. 29 G. A. c. 137.
Tit. XVIII, c 4: 28 G. A. c. 121.
3494: Amd. 27 G. A. c. 99.
3497: Amd. 29 G A. c. 138.
3529: Amd. 29 G. A. c. 139.
3825: Amd. 29 G. A. c. 140.
3847: Amd. 27 G. A. c. 100.
3849: Amd. 27 G. A. c. 100.
3912: Rep. and Subst. 27 G. A. c. 101.
3947: Amd. 27 G. A. c. 102.
3948: Amd. 27 G. A. c. 103.
3958: Amd. 28 G. A. c. 122.
3988: Amd. 27 G. A. c. 104.
4027: Amd. 28 G.A . c. 123.
4051: Amd. 28 G. A. c. 124.
4142: Amd. 27 G. A. c. 105.
4259: Amd. 27 G A. c. 106.
4538: Amd. 27 G. A. c. 107.
4544: Amd. 29 G. A c. 141.
4606: Amd. 27 G. A. c. 108.
4608: Amd. 28 G. A. c. 125.

PART FOURTH. Code of Criminal Procedure.

Tit. XXIV: 27 G. A. c. 109, 29 G. A. c. 152.
Tit. XXIV, c. 2: 29 G. A. cc. 142, 143.
4790: Amd. 29 G. A. c. 144.
Tit. XXIV, c. 4: 28 G. A. c. 127.
4807: Amd. 28 G. A. c. 126, 29 G. A. c. 145.
4808: Amd. 29 G. A c. 53.
Tit. XXIV, c 5: 29 G. A. c. 146.
4850: Amd. 27 G. A. c. 110.
Tit. XXIV, c. 7: 28 G. A. c. 128.
4897: Rep. and Subst. 29 G. A. c. 147.
Tit. XXIV, c. 8: 27 G. A. c. 111.
Tit. XXIV, c. 9: 29 G. A. c. 148.
4946: Rep. and Subst. 28 G. A. c. 129.
Tit. XXIV, c. 10: 27 G. A. c. 112. 28 G. A. c. 130, 29 G A. cc. 149, 150.
Tit. XXIV, c. 11: 28 G. A. c. 131.
5016: Rep. and Subst. 27 G. A. c. 113.
Tit. XXIV, c. 12: 28 G. A. c. 133.
5034: Amd. 28 G. A. c. 132.
5052: Amd. 29 G. A. c. 151.
5096: Amd. 29 G. A. c. 153.
5240: Amd. 27 G. A. c. 114.
5246: Amd. 27 G. A. c. 114.
5258: Amd. 28 G. A. c. 134.
5274: Rep. and Subst. 27 G. A. c. 115.
5373: Amd. 28 G. A. c. 135.
Tit. XXV, c. 34; 29 G. A. c. 154.
Tit. XXVI: 27 G. A. c 118, 28 G. A. cc. 142, 143.
Tit. XXVI, c. 2: 27 G. A. c. 116, 28 G A. cc. 102, 138.
5662: Amd. 28 G. A. c. 136.
5663: Amd 27 G. A. c. 117.
5667: Amd. 28 G. A. c. 136.
5685: Amd. 28 G. A. c. 137.
5707: Amd. 29 G. A. c. 155.
5716: Amd. 29 G. A. c. 156.

PROVISIONS

RELATING TO THE CODE AND SUBSEQUENT STATUTES.

SUMMARY.

AN ACT to provide for the annotation, indexing, publication, distribution and sale of the code and statutes hereafter enacted, and the appointment of a supervising committee and the election of an editor, and prescribing their duties.

Be it Enacted by the General Assembly of the State of Iowa:

SECTION 1. Former revisions and codes shall be cited and designated as follows "Code of 1851," "Revision of 1860," "Code of 1873," and the revision and codification passed and adopted at the extra session of the twenty-sixth general assembly, the "Code."

SEC. 2. The twenty-sixth general assembly shall, on or before the third legislative day after the passage of this act and before the day of the adjournment of the extra session thereof, convene in joint session and select by *viva voce* vote in a non-partisan manner, upon a roll call of the members, an editor of the code, who shall perform the duties hereinafter defined. A joint committee, consisting of two members of the senate and three of the house, shall be elected by the senate and the house, respectively, to have general supervision of the work of annotation, indexing and publication of the code, and the members thereof shall be allowed actual expenses for attending its meetings, which shall be at the capitol, and such committee shall be known and designated as the code supervising committee

SEC. 3. The secretary of state shall, as soon as possible, cause all the enrolled bills comprising the code to be bound by the state binder in such volumes as shall be most convenient, which shall be delivered only to the chairman of the code supervising committee, who shall be responsible therefor, and keep the same safe from fire or loss or damage by other cause, and shall return the same, upon completion of his work, free from interlineation, memoranda, erasure or alteration whatever, except as herein provided.

SEC. 4. The code supervising committee shall cause the code to be

annotated, and require the persons employed for that purpose, as hereinafter provided, to classify and cite immediately under each section, giving the names of parties, book and page, all of the decisions of the supreme court of Iowa which may aid in understanding or explaining the same, stating briefly the pertinent points decided; also the decisions of the supreme court of the United States, of the United States circuit court of appeals, and, as far as practicable, of the United States circuit and district courts construing statutes of Iowa.

SEC. 5. For the purpose of accomplishing such annotation so that the work shall be done in time to be published as a part of said code, the code supervising committee shall employ three competent attorneys to annotate said code, the committee designating the titles and parts of the code for the different annotators to be employed upon, so as to keep the printers constantly supplied with copy and accomplish dispatch in the prosecution of the work; the committee to have the authority to employ additional annotators or editorial assistance, stenographers and clerks necessary to complete the work by the time required, and to direct generally the prosecution of the work, in all not to cost to exceed seven thousand five hundred dollars for such annotation.

[In accordance with a joint resolution passed subsequent to this act, the supervising committee employed Emlin McClain to annotate the code.]

SEC. 6. The compensation of such persons so employed to make and provide such annotation shall be not to exceed one thousand two hundred and fifty dollars each, and actual railway expenses of meeting and conferring together and with the code supervising committee. It shall be the duty of such persons, so employed to annotate, to proceed immediately to the discharge of their respective duties, to the end that the same be completed on or before the first day of October, 1897. For any failure to properly prosecute their work with diligence, the code supervising committee may discharge such attorney or attorneys and employ others in their stead, and for like reasons may discharge any successor. The said annotators shall be compensated only for the time actually employed, not to exceed ten dollars per day for each calendar day, and their accounts for such service to be sworn to, and then audited and allowed by the code supervising committee and approved by the executive council. Such persons so employed to annotate shall furnish their manuscript typewritten.

SEC. 7. The code supervising committee shall supervise in all things the entire work of editing and annotating the code, and, in case of neglect or inability to act on the part of such editor, said committee may discharge him and employ another editor in his stead, and for like reasons may discharge any successor.

SEC. 8. The editor shall arrange and number consecutively, and in a convenient and suitable manner, sections, subdivisions, titles and parts of the code, and the chapters of each title shall be numbered separately, and he shall cause to be printed in parentheses at the end of each section the numbers of corresponding sections of the code of 1873, the revision of 1860, and the code of 1851, in the order named, and references to session laws so far as practicable.

SEC. 9. He shall prepare suitable catch words to be printed at the beginning of each section in black-faced type; he shall read the proofs; correct all manifest grammatical and clerical errors in the code, and attend to its proper punctuation, but shall not change the meaning thereby; and shall note all such corrections, or changes in punctuation, on the enrolled bills in red ink. He shall sign any corrections, except in punctuation, made by him, with his name, and any unauthorized correction or change made on the enrolled bills by the editor, or any change made by any other person than the editor, shall be deemed a forgery, and punished accordingly

SEC. 10. He shall prepare for publication with the code the rules of the supreme court, with annotations.

SEC. 11. He shall also prepare for publication and publish with the code a prefix thereto, which shall contain the declaration of independence, the constitution of the United States, the statutes of the United States relating to citizenship and naturalization, and those relating to the authentication of statutes, records and the like, the ordinance of 1787 and the articles of compact, the organic law of Michigan, of Wisconsin and of Iowa, and amendments thereto, the act for the admission of Iowa into the Union, the constitution of the state of Iowa, annotated as hereinbefore provided for the code, and this act; and an analysis of the contents and table of abbreviations. He shall also copyright the code of 1897, its indexing, numbering of titles, chapters and sections, annotations, and its entire arrangement and publication, and assign such copyright to the state of Iowa. The editor shall also prepare a suitable, exhaustive and plain index to said code with cross references in the usual manner of indexing statutes and codes of laws, accomplishing, as near as practicable, with extraordinary care and diligence, a perfect index.

SEC. 12. The code supervising committee shall cause said code to be well made of first-class materials, printed and bound in full law sheep in one volume, to be hand-sewed, and in accordance with the best workmanship and methods of publishing law books. The main body of the code, the prefix, index and appendices shall be printed in new, clear cut, plain long primer type, and the annotations in brevier of same quality, double columns, all set solid, on paper of the size as near as may be, to the supplement to the revised statutes of the United States, the leaves to be seven and one-half inches in width by ten and three-quarters in length, the printed matter to be five inches by eight and one-half inches. The state binder shall furnish all the material and do all the work of binding these codes in the manner herein provided for the sum and price not to exceed one dollar a volume. The state printer shall furnish the type and set the same and do all the work of printing the codes in the manner herein provided for the sum and price not to exceed thirty-eight cents a copy or volume; the state to furnish the paper for such codes, and the electrotypes and the work of electrotyping the same.

The state printer shall deliver the type in page forms to the person employed by the code supervising committee to electrotype the same. The code supervising committee shall procure the pages of the code to be electrotyped; the state to furnish the metal and own the electrotypes, which shall be in the custody of the secretary of state and be carefully preserved by him; the bills for electrotyping to be verified and audited and allowed by the code supervising committee and approved by the executive council.

If the printed pages of the code exceed in number two thousand pages, the state printer shall receive *pro rata* compensation for such excess.

The work must be done to the satisfaction and approval of said code supervising committee, and to commence as soon as matter or copy is furnished, and continue as rapidly as practicable, so that the code of 1897 shall be ready for distribution on or before the first day of October, 1897.

SEC. 13. The editor shall begin to deliver manuscript of the code and annotations to the printer within thirty days from the time of receiving the enrolled bills from the chairman of the supervising committee, and the work of publication, printing and binding the code shall be done as speedily as is consistent with good work, and the whole shall be completed and ready for distribution and sale on or before October 1, 1897.

SEC. 14. The state binder shall deliver one thousand copies to the secretary of state within ten days after receiving the last printed matter, and at the rate of two thousand five hundred per week thereafter until all are completed.

SEC. 15. The editor of the code shall be provided with a stenographer

or clerk, whose compensation shall be not to exceed the sum of fifty dollars per month, or the aggregate sum of two hundred and fifty dollars.

SEC. 16. As soon as five hundred copies of the code are printed and bound to the satisfaction of the editor and code supervising committee, the same shall be deposited with the secretary of state, and so on until all are completed, and the secretary of state shall be the custodian thereof, and shall distribute the same as follows: To the governor, all judges of the supreme court and judges of the United States circuit and district courts in Iowa, two copies each; state officers, district and superior courts, members of the twenty-sixth and succeeding general assemblies, the secretary of the senate, clerk of the house, state or territorial libraries in the United States, county officers, mayor of each city or town, justices of the peace, township clerks, public libraries of the state, each one copy; to the state library twenty copies, state university ten copies; to the agricultural college and the state normal school, each two copies; and to each of the other public institutions of the state, one copy. And said code shall be sold to the public generally at the uniform price of not more than five dollars; the price to be fixed by the executive council, and the proceeds of said sale shall be accounted for to the secretary of state and paid into the state treasury.

SEC. 17. For the convenience of distribution, the secretary of state shall deliver to the auditor of each county the requisite number therefor, to be distributed as herein provided, who shall in turn deliver the same to the persons entitled thereto, and take their receipts for the same, and keep a memorandum thereof on file in his office.

SEC. 18. The secretary of state may also deliver to each county auditor such number of copies of the code as, in his judgment, will be required to supply the demand, who shall sell such copies at the price fixed under the provision of section sixteen hereof, at not more than five dollars per copy, and pay the proceeds into the county treasury, on or before the fifteenth day of November of each year. Each county auditor shall, upon receipt of the copies transmitted to him, execute receipts therefor in duplicate, one of which he shall immediately transmit to the secretary of state, and the other to the state auditor.

SEC. 19. The said county auditor shall also, on or before the fifteenth day of November of each year, make out in writing under oath a statement of the number of copies sold by him and not before accounted for, and the number remaining on hand, and the amount paid to the county treasurer, and transmit such statement to the auditor of state, who shall charge the county treasurer with such amount, and the secretary of state shall certify to the auditor the number of copies transmitted to each county auditor, and the state auditor shall charge each county auditor therewith, and subsequently credit him with such as may be sold or otherwise lawfully disposed of.

SEC. 20. When the county auditor goes out of office having any such copies remaining, he shall deliver them to his successor, taking his receipt therefor in duplicate, one of which shall be sent to the state auditor, which shall be his sufficient discharge for the same; and every county officer, justice of the peace, and mayor of city or town, and township clerk receiving a copy shall give his receipt therefor, and shall pass the copy to his successor, or deliver it to the auditor for the use of subsequent officers, and each shall be liable therefor on his official bond.

SEC 21 The editor of the code shall receive as his compensation the sum of one thousand five hundred dollars, to be audited by the code supervising committee and executive council, and paid as the work progresses. Said sum shall be in full for the entire service to be rendered by the editor under the provisions of this chapter, and for all his work of editing said code and indexing the same.

SEC. 22. There shall be published fifteen thousand copies of the code.

SEC. 23. The executive council, with the advice of the editor and code supervising committee, shall select and approve the paper and other materials for said code, and shall audit all bills for the same; and shall approve all bills for expenses of printing, binding and distribution.

SEC. 24. The twenty-ninth general assembly and each third general assembly thereafter shall select, in a manner as provided in section two hereof for the selection of editor, some competent and suitable person to compile, annotate and superintend the publication of the statutes of a general or permanent nature enacted after the adoption of the code.

SEC. 25. Such compilation shall in all respects, so far as applicable, be numbered, annotated, indexed, printed, bound, published and distributed to the same persons, and sold and accounted for in the same manner, as herein provided for the code, and the price thereof shall not be more than one dollar and fifty cents each.

SEC. 26. The code supervising committee shall audit and allow all bills contracted under the provisions of this act as the work progresses, subject to the approval of the executive council.

SEC. 27. The code. as herein provided to be published and distributed, shall be the official edition and the only authoritative publication of the existing laws of the state, and no other publication of the laws of the state shall be used in the courts or referred to in the decisions, by title, chapter or section, in the reports of the same; and the secretary of state and all other persons are hereby prohibited from delivering or permitting to be copied any acts or resolutions, or copies thereof passed at this special session of the general assembly, except as herein provided, until after the code goes into effect; and the code or any part thereof shall be published only in the manner herein or hereafter provided by the general assembly; and the rules of the supreme court providing for the citations of sections of the laws of this state shall designate the same as contained and numbered in the official code of 1897. No public money shall be paid or expended for any publication of the laws of the state except for those published by authority of the state, and any such purchase or publication herein prohibited shall be a misdemeanor.

SEC. 28. There is hereby appropriated, out of any money in the treasury not otherwise apppropriated, an amount sufficient to defray all expenses incurred in carrying out the provisions of this act.

SEC. 29. All acts or parts of acts inconsistent with this act are hereby repealed.

This act took effect by publication May 5, 1897.

DECLARATION OF INDEPENDENCE.

IN CONGRESS, JULY 4, 1776.

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA.

[*Adopted by the Continental Congress July 2, and authenticated and proclaimed July 4, 1776.*]

WHEN in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world:

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained, and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation,

have returned to the people at large for their exercise; the state remaining, in the mean time, exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation—

For quartering large bodies of armed troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas, to be tried for pretended offenses;

For abolishing the free system of English laws in a neighboring province; establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies,

For taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments;

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here by declaring us out of his protection and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is, at this time, transporting large armies of foreign mercenaries to complete the works of death, desolation and tyranny, already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these oppressions we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts, by their legislature, to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them,

by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

New Hampshire.—Josiah Bartlett, Wm. Whipple, Matthew Thornton.

Massachusetts Bay.—Saml. Adams, John Adams, Robt. Treat Paine, Elbridge Gerry.

Rhode Island, &c —Step. Hopkins, William Ellery.

Connecticut.—Roger Sherman, Sam'el Huntington, Wm. Williams, Oliver Wolcott.

New York.—Wm. Floyd, Phil. Livingston, Frans. Lewis, Lewis Morris.

New Jersey —Richd. Stockton, Jno. Witherspoon, Frans. Hopkinson, John Hart, Abra. Clark.

Pennsylvania.—Robt. Morris, Benjamin Rush, Benja. Franklin, John Morton, Geo. Clymer, Jas. Smith, Geo. Taylor, James Wilson, Geo. Ross.

Delaware.—Cæsar Rodney, Geo. Read, Tho. M'Kean.

Maryland.—Samuel Chase, Wm. Paca, Thos. Stone, Charles Carroll of Carrollton.

Virginia —George Wythe, Richard Henry Lee, Th. Jefferson, Benja. Harrison, Thos. Nelson, Jun., Francis Lightfoot Lee, Carter Braxton.

North Carolina.—Wm. Hooper, Joseph Hewes, John Penn.

South Carolina.—Edward Rutledge, Thos Heyward, Jun., Thomas Lynch, Jun., Arthur Middleton.

Georgia.—Button Gwinnett, Lyman Hall, George Walton.

ARTICLES OF CONFEDERATION

AND PERPETUAL UNION BETWEEN THE STATES.

[*Adopted by the Congress of the United States November 15, 1777, and submitted for ratification to the several states. Ratification consummated and proclaimed March 1, 1781.*]

SUMMARY.

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE THE UNDERSIGNED, DELEGATES OF THE STATES AFFIXED TO OUR NAMES, send greeting:

Whereas the delegates of the United States of America in congress assembled did, on the fifteenth day of November, in the year of our Lord one thousand seven hundred and seventy-seven, and in the second year of the independence of America, agree to certain articles of confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, in the words following, viz:

ARTICLES OF CONFEDERATION AND PERPETUAL UNION, BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY, RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA:—

ARTICLE 1. The style of this confederacy shall be "THE UNITED STATES OF AMERICA."

ART. 2. Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States, in congress assembled.

ART. 3. The said states hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

ART. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free cititizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively: *provided* that such restrictions shall not extend so far as to prevent the removal of property imported into any state to any other state of which the owner is an inhabitant: *provided, also,* that no imposition, duties or restriction, shall be laid by any state on the property of the United States, or either of them.

If any person guilty of or charged with treason, felony or other high misdemeanor in any state shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense.

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

ART. 5. For the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the legislature of each state shall direct, to meet in congress on the first Monday in November, in every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No state shall be represented in congress by less than two, nor by more than seven, members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of these states.

In determining questions in the United States in congress assembled, each state shall have one vote.

Freedom of speech and debate in congress shall not be impeached or questioned in any court or place out of congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from and attendance on congress, except for treason, felony or breach of the peace.

ART. 6. No state, without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with, any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever, from any king, prince or foreign state; nor shall the United States in congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties which may interfere with any stipulations in treaties, entered into by the United States in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only as shall be deemed necessary by the United States, in congress assembled, for the defense of such state, or its trade, nor shall any body of forces be kept up by any state, in time of peace, except such number only as in the judgment of the United States, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such state, but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition and camp-equipage.

No state shall engage in any war, without the consent of the United States in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the United States, in congress assembled, can be consulted; nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in congress assembled, shall determine otherwise.

ART. 7. When land forces are raised by any state for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each state, respectively, by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

ART. 8. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in congress assembled shall, from time to time, direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in congress assembled.

ART. 9. The United States, in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving ambassadors, entering into treaties and alliances, *provided* that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all

cases of captures: *provided* that no member of congress shall be appointed a judge of any of the said courts.

The United States, in congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise, between two or more states concerning boundary, jurisdiction, or any other cause whatever, which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but, if they cannot agree, congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as congress shall direct, shall, in the presence of congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which congress shall judge sufficient; or, being present, shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed in the manner before prescribed shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress, for the security of the parties concerned: *provided* that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward:" *provided, also,* that no state shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more states whose jurisdictions, as they may respect such lands, and the states which passed such grants, are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The United States, in congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states, fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the states: *provided* that the legislative right of any state, within its own limits, be not infringed or violated; establishing and regulating post offices from one state to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land

forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in congress assembled, shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "*A Committee of the States,*" and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside: *provided* that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state, which requisition shall be binding; and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm and equip them, in a soldier-like manner, at the expense of the United States; and the officers and men, so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on, by the United States, in congress assembled; but if the United States, in congress assembled, shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number can not be safely spared out of the same, in which case they shall raise, officer, clothe, arm and equip as many of such extra number as they judge can be safely spared, and the officers and men, so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on, by the United States, in congress assembled.

The United States, in congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine states assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in congress assembled.

The congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each state, on any question, shall be entered on the journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ART. 10. The committee of the states, or any nine of them, shall be

authorized to execute, in the recess of congress, such of the powers of congress as the United States, in congress assembled, by the consent of nine states, shall, from time to time, think expedient to vest them with: *provided* that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states, in the congress of of the United States assembled, is requisite.

ART. 11 Canada, acceding to this confederation and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ART. 12. All bills of credit emitted, moneys borrowed and debts contracted by or under the authority of congress, before the assembling of the United States in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. 13. Every state shall abide by the determinations of the United States, in congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state.

And whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in congress to approve of, and to authorize us to ratify, the said articles of confederation and perpetual union, Know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents that they shall abide by the determinations of the United States, in congress assembled, on all questions which by the said confederation are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent, and that the Union shall be perpetual. In witness whereof, we have hereunto set our hands, in congress.

Done at Philadelphia, in the State of Pennsylvania, the 9th day of Ju'y, in the year of our Lord 1778, and in the third year of the Independence of America.

On the part and behalf of the State of New Hampshire.—Josiah Bartlett, John Wentworth, Jun. (August 8, 1778)

On the part and behalf of the State of Massachusetts Bay.—John Hancock, Samuel Adams, Elbridge Gerry, Francis Dana, James Lovell, Samuel Holten.

On the part and behalf of the State of Rhode Island and Providence Plantations.—William Ellery, Henry Marchant, John Collins.

On the part and behalf of the State of Connecticut.—Roger Sherman, Samuel Huntington, Oliver Wolcott, Titus Hosmer, Andrew Adams.

On the part and behalf of the State of New York.—Jas. Duane, Fra. Lewis, Wm. Duer, Gouv. Morris.

On the part and behalf of the State of New Jersey.—Jno. Witherspoon, Nathl. Scudder. (November 26, 1778.)

On the part and behalf of the State of Pennsylvania.—Robt. Morris, Daniel Roberdeau, Jona. Bayard Smith, William Clingan, Joseph Reed (July 22, 1778).

On the part and behalf of the State of Delaware.—Thomas M'Kean (February 12, 1779), John Dickinson (May 5, 1779), Nicholas Van Dyke.

On the part and behalf of the State of Maryland.—John Hanson (March 1, 1781), Daniel Carroll (March 1, 1781).

On the part and behalf of the State of Virginia.—Richard Henry Lee, John Banister, Thomas Adams, Jno. Harvie, Francis Lightfoot Lee.

On the part and behalf of the State of North Carolina.—John Penn (July 21, 1778), Corns. Harnett, Jno. Williams.

On the part and behalf of the State of South Carolina.—Henry Laurens, William Henry Drayton, Jno. Matthews, Richd. Hutson, Thos. Heyward, Jun.

On the part and behalf of the State of Georgia.—Jno. Walton (July 24, 1778), Edwd. Telfair, Edwd. Langworthy.

THE CONSTITUTION

OF THE UNITED STATES.

[*Recommended by the convention of the states to congress Sept. 11, 1787, and by it submitted to the states for ratification, which, by the concurrence of nine states, was consummated and proclaimed Sept. 13, 1788.*]

SUMMARY.

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I.

SECTION 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SEC. 2. (1)* The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

(2) No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

(3) [Representatives and direct taxes shall be apportioned among the several states which may be included within this union according to their

*The figures in brackets are inserted for convenience of reference; they are not in the original.

respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.]* The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative, and, until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

(4) When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

(5) The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

SEC. 3. (1) The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof for six years; and each senator shall have one vote.

(2) Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

(3) No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

(4) The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

(5) The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

(6) The senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

(7) Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SEC. 4 (1) The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

(2) The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. 5. (1) Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a

*The foregoing clause included in brackets is amended by sec. 2 of the 14th amendment, *post*.

quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

(2) Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

(3) Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

(4) Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. (1) The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

(2) No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SEC. 7. (1) All bills for raising revenue shall originate in the house of representatives, but the senate may propose or concur with amendments, as on other bills.

(2) Every bill which shall have passed the house of representatives and the senate, shall, before it becomes a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house, respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

(3) Every order, resolution or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States, and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SEC. 8. The congress shall have power:—

(1) To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

(2) To borrow money on the credit of the United States;

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

(4) To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

(5) To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures;

(6) To provide for the punishment of counterfeiting the securities and current coin of the United States;

(7) To establish post-offices and post roads;

(8) To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

(9) To constitute tribunals inferior to the supreme court;

(10) To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

(11) To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

(12) To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

(13) To provide and maintain a navy,

(14) To make rules for the government and regulation of the land and naval forces,

(15) To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

(16) To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress;

(17) To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings; and—

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SEC. 9. (1) The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

(2) The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

(3) No bill of attainder or *ex post facto* law shall be passed.

(4) No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

(5) No tax or duty shall be laid on articles exported from any state.

(6) No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another.

(7) No money shall be drawn from the treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

(8) No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince or foreign state.

SEC. 10. (1) No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

(2) No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

(3) No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1. (1) The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president chosen for the same term, be elected as follows:

(2) Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective states and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then, from the five highest on the list, the said house shall, in like manner, choose the president. But in choosing the president the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president.

[The foregoing clause has been superseded and annulled by the twelfth amendment, *post*.]

(3) The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

(4) No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

(5) In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation or inability,

both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly until the disability be removed or a president shall be elected.

(6) The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

(7) Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

SEC. 2. (1) The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

(2) He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.

(3) The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SEC. 3. He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and, in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SEC. 4. The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SEC. 2. (1) The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states,

and between a state, or the citizens thereof, and foreign states, citizens or subjects.

(2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases, before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

(3) The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SEC. 3. (1) Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(2) The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SEC. 2. (1) The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

(2) A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

(3) No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SEC. 3. (1) New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

(2) The congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

SEC. 4. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: *provided* that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first

article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

(1) All debts contracted and engagements entered into before the adoption of this constitution shall be as valid against the United States under this constitution as under the confederation.

(2) This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

(3) The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON, PRESIDENT,
and Deputy from Virginia.

New Hampshire—John Langdon, Nicholas Gilman.

Massachusetts—Nathaniel Gorham, Rufus King.

Connecticut—Wm. Saml. Johnson, Roger Sherman.

New York—Alexander Hamilton.

New Jersey—Will: Livingston, David Brearley, Wm. Patterson, Jona: Dayton.

Pennsylvania—B. Franklin, Thomas Mifflin, Robt. Morris, Geo. Clymer, Thos. Fitzsimons, Jared Ingersoll, James Wilson, Gouv. Morris.

Delaware—Geo. Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jaco. Broom.

Maryland—James M'Henry, Dan of St. Thos Jenifer, Danl. Carroll.

Virginia—John Blair, James Madison, Jr.

North Carolina—Wm. Blount, Richd. Dobbs Spaight, Hugh Williamson.

South Carolina—J. Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.

Georgia—William Few, Abr Baldwin.

Attest, WILLIAM JACKSON, *Secretary.*

AMENDMENTS TO THE CONSTITUTION.

[*Proposed by congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution. For dates of ratification see foot note.**]

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

*The first *ten* of these amendments were proposed by congress to the legislatures of the several states September 25, 1789, and were ratified by all of the states, except Connecticut, Georgia and Massachusetts, before the end of the year 1791, thereby becoming a part of the organic law, pursuant to the fifth article of the original constitution.

The *eleventh* amendment was in like manner proposed September 5, 1794, and was, in a message of the president to congress, January 8, 1798, declared to have been duly ratified by the legislatures of three-fourths of the states.

The *twelfth* amendment was in like manner proposed December 12, 1803, in lieu of the original third paragraph of the first section of the second article, and September 25, 1804, was proclaimed by the secretary of state to have been duly ratified.

The *thirteenth* amendment was proposed February 1, 1865, and was December 18, 1865, by the secretary of state proclaimed to have been duly ratified.

The *fourteenth* amendment was proposed June 16, 1866, and was July 28, 1868, by the secretary of state proclaimed to have been duly ratified.

The *fifteenth* amendment was proposed February 27, 1869, and was March 30, 1870, by the secretary of state proclaimed to have been duly ratified.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

SECTION 1. The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

SEC. 2. The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum, for that purpose, shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

SEC. 3. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SEC. 3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SEC. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SEC. 2. The congress shall have power to enforce this article by appropriate legislation.

CITIZENSHIP.

REVISED STATUTES OF THE UNITED STATES OF 1878.

SUMMARY.

SECTION 1992. All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

SEC. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

SEC. 1994. Any women who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

SEC. 1995. All persons born in the district of country formerly known as the territory of Oregon, and subject to the jurisdiction of the United States on the 18th May, 1872, are citizens in the same manner as if born elsewhere in the United States.

SEC. 1996. All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the president, dated the 11th March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.

[Subsequent statutes provide for the removal, upon certain conditions, of the disabilities imposed by section 1996.—See Sup. to Rev. St. U. S., vol. 1 (2d Ed.), pp. 692 and 901; and vol. 2, pp. 54 and 425.]

SEC. 1997. No soldier or sailor, however, who faithfully served according to his enlistment until the 19th day of April, 1865, and who, without proper authority or leave first obtained, quit his command or refused to serve after that date, shall be held to be a deserter from the army or navy; but this section shall be construed solely as a removal of any disability such soldier or sailor may have incurred, under the preceding section, by the loss of citizenship and of the right to hold office, in consequence of his desertion.

SEC. 1998. Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval

service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six.

SEC. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic.

SEC. 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens.

SEC. 2001. Whenever it is made known to the president that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the president forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the president shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the president shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the president to congress.

NATURALIZATION OF ALIENS.

REVISED STATUTES OF THE UNITED STATES OF 1878.

SUMMARY.

SECTION 2165. Any alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.

[Declaration before *clerk* of any of the courts named in this paragraph authorized and legalized by amendment incorporated in sixth paragraph of this section. See *post.*]

Second. He shall, at the time of his application to be admitted, declare, on oath, before some one of the courts above specified, that he will support the constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

Third. It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the state or territory where such court is at the time held one year at least; and that during that time he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.

Fourth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Fifth. Any alien who was residing within the limits and under the jurisdiction of the United States before the twenty-ninth day of January, one thousand seven hundred and ninety-five, may be admitted to become a citizen, on due proof made to some one of the courts above specified, that he has resided two years, at least, within the jurisdiction of the United States, and one year, at least, immediately preceding his application, within the

state or territory where such court is at the time held; and on his declaring on oath that he will support the constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty whereof he was before a citizen or subject; and, also, on its appearing to the satisfaction of the court, that during such term of two years he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same; and where the alien, applying for admission to citizenship, has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his, moreover, making in the court an express renunciation of his title or order of nobility. All of the proceedings, required in this condition to be performed in the court, shall be recorded by the clerk thereof.

Sixth. Any alien who was residing within the limits and under the jurisdiction of the United States, between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the eighteenth day of June, one thousand eight hundred and twelve, and who has continued to reside within the same, may be admitted to become a citizen of the United States without having made any previous declaration of his intention to become such; but whenever any person, without a certificate of such declaration of intention, makes application to be admitted a citizen, it must be proved to the satisfaction of the court, that the applicant was residing within the limits and under the jurisdiction of the United States before the eighteenth day of June, one thousand eight hundred and twelve, and has continued to reside within the same; and the residence of the applicant within the limits and under the jurisdiction of the United States, for at least five years immediately preceding the time of such application, must be proved by the oath of citizens of the United States, which citizens shall be named in the record as witnesses; and such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place where the applicant has resided for at least five years, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States. [*Be it enacted by the senate and house of representatives of the United States of America in congress assembled*, That the declaration of intention to become a citizen of the United States, required by section two thousand one hundred and sixty-five of the revised statutes of the United States, may be made by an alien before the clerk of any of the courts named in said section two thousand one hundred and sixty-five; and all such declarations heretofore made before any such clerk are hereby declared as legal and valid as if made before one of the courts named in said section.]

[The part in brackets is the act of February 1, 1876.]

SEC. 2166. Any alien, of the age of twenty-one years and upwards, who has enlisted, or may enlist in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such, and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States.

SEC. 2167. Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make

application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States; and he shall in all respects comply with the laws in regard to naturalization.

SEC. 2168. When any alien who has complied with the first condition specified in section twenty-one hundred and sixty-five, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths proscribed [prescribed] by law.

SEC. 2169. The provisions of this title shall apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent.

[The words in brackets are inserted by the act of February 18, 1875.]

SEC. 2170. No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.

SEC. 2171. No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States, or the territories thereof, on the eighteenth day of June, in the year one thousand eight hundred and twelve, who had before that day made a declaration, according to law, of their intention to become citizens of the United States, or who were on that day entitled to become citizens without making such declaration, may be admitted to become citizens thereof, notwithstanding they were alien enemies at the time and in the manner prescribed by the laws heretofore passed on that subject; nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien.

SEC. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the revolutionary war, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed.

SEC. 2173. The police court of the District of Columbia shall have no power to naturalize foreigners.

SEC. 2174. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of

intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, anything to the contrary in any act of congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen.

SUPPLEMENTARY PROVISIONS.

CHINESE NOT TO BE NATURALIZED.

Sup. to Rev. St. U. S., vol. 1 (2d Ed.), p. 342.

That hereafter no state or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

NATURALIZATION OF ALIENS SERVING IN NAVY OR MARINE CORPS.

Sup. to Rev. St. U. S., vol. 2, p. 206.

Any alien of the age of twenty-one years and upward who has enlisted or may enlist in the United States navy or marine corps, and has served or may hereafter serve five consecutive years in the United States navy or one enlistment in the United States marine corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States navy or marine corps.

AUTHENTICATION OF RECORDS.

REVISED STATUTES OF THE UNITED STATES OF 1878.

SECTION 905. The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

SEC. 906 All records and exemplifications of books, which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the state, or territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the state, territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken.

THE ORDINANCE OF 1787.

AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE OHIO RIVER.

[*Adopted by Congress July 13, 1787.*]

SUMMARY.

ARTICLES OF COMPACT.

(1) *Be it ordained by the United States, in congress assembled,* That the said territory, for the purposes of temporary government, be one district; subject, however, to be divided into two districts, as future circumstances may, in the opinion of congress, make it expedient.

(2) *Be it ordained by the authority aforesaid,* That the estates, both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take a share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving, in all cases, to the widow of the intestate her *third part* of the real estate for life, and one-third part of the personal estate; and this law relative to descents and *dower* shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws, as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age), and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose; and

personal property may be transferred by delivery; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them relative to the descent and conveyance of property.

(3) *Be it ordained by the authority aforesaid*, That there shall be appointed, from time to time, by congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by congress; he shall reside in the district, and have a freehold estate therein in one thousand acres of land, while in the exercise of his office.

(4) There shall be appointed from time to time, by congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings, every six months, to the secretary of congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

(5) The governor and judges, or a majority of them, shall adopt and publish, in the district, such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to congress from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

(6) The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by congress.

(7) Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of peace and good order in the same. After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

(8) For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

(9) So soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *provided* that for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five, after which the number and proportion of representatives shall be regulated by the legislature: *provided* that no person be eligible or qualified to act as a representative, unless he

shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years, and in either case shall likewise hold in his own right, in fee simple, two hundred acres of land within the same: *provided, also*, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

(10) The representative thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

(11) The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress; any three of whom to be a quorum. And the members of the council shall be nominated and appointed in the following manner, to-wit: as soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to congress; five of whom congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to congress; one of whom congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to congress; five of whom congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council and house of representatives shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever shall be of any force without his assent. The governor shall have power to convene, prorogue and dissolve the general assembly, when in his opinion it shall be expedient.

(12) The governor, judges, legislative council, secretary, and such other officers as congress shall appoint in the district, shall take an oath or affirmation of fidelity and of office; the governor before the president of congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to congress, who shall have a seat in congress, with a right of debating, but not of voting, during this temporary government.

ARTICLES OF COMPACT.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments which forever hereafter shall be formed in the said territory; to provide also for the establishment of states, and permanent governments therein, and for their admission to share in the federal councils, on an equal footing with the original states, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to-wit:

ARTICLE 1. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.

ART. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus* and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for criminal offenses where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land; and should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.

ART. 3. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent, and in their property, rights and liberty they never shall be invaded or disturbed, unless in just and lawful wars, authorized by congress; but laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

ART. 4. The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States, in congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, contracted, or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new states, as in the original states, within the time agreed upon by the United States, in congress assembled. The legislatures of those districts or new states shall never interfere with the primary disposal of the soil by the United States, in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands, the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor.

ART. 5. There shall be formed in the said territory not less than three nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: the western state in the said

territory shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania and the said territorial line: *provided, however, and it is further understood and declared,* That the boundaries of these three states shall be subject so far to be altered that, if congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: *provided,* the constitution and government so to be formed shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

ART. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *provided always* that any person escaping into the same, from whom labor or service is lawfully claimed in any of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service, as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the twenty-third of April, one thousand seven hundred and eighty-four, relative to the subject of this ordinance, be, and the same are, hereby repealed and declared null and void.

DONE by the United States, in congress assembled, the thirteenth day of July, in the year of our Lord one thousand seven hundred and eighty-seven, and of their sovereignty and independence the twelfth.

WILLIAM GRAYSON, *Chairman.*

CHARLES THOMPSON, *Secretary.*

ORGANIC LAW OF MICHIGAN.

AN ACT TO DIVIDE THE INDIANA TERRITORY INTO TWO SEPARATE GOVERNMENTS.

[*Approved January 11, 1805.*]

SUMMARY.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the thirtieth day of June next, all that part of the Indiana territory which lies north of a line drawn east from the southerly bend or extreme of Lake Michigan, until it shall intersect Lake Erie, and east of a line drawn from the said southerly bend through the middle of said lake to its northern extremity, and thence due north to the northern boundary of the United States, shall, for the purpose of temporary government, constitute a separate territory, and be called Michigan.

SEC. 2. *And be it further enacted*, That there shall be established within the said territory a government in all respects similar to that provided by the ordinance of congress, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven, for the government of the territory of the United States, northwest of the river Ohio; and by an act passed on the seventh day of August, one thousand seven hundred and eighty-nine, entitled "an Act to provide for the government of the territory northwest of the river Ohio;" and the inhabitants thereof shall be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States, northwest of the river Ohio, by the said ordinance.

SEC. 3. *And be it further enacted*, That the officers for the said territory, who by virtue of this act shall be appointed by the president of the United States, by and with the advice and consent of the senate, shall respectively exercise the same powers, perform the same duties, and receive for their services the same compensations as, by the ordinance aforesaid and the laws of the United States, have been provided and established for similar officers in the Indiana territory; and the duties and emoluments of superintendent of Indian affairs shall be united with those of governor.

SEC. 4. *And be it further enacted*, That nothing in this act contained shall be construed so as, in any manner, to affect the government now in force in the Indiana territory, further than to prohibit the exercise thereof within said territory of Michigan, from and after the aforesaid thirtieth day of June next.

SEC. 5. *And be it further enacted*, That all suits, process and proceedings which, on the thirtieth day of June next, shall be pending in the court of any county which shall be included within the said territory of Michigan; and also all suits, process and proceedings which, on the said thirtieth day of June next, shall be pending in the general court of the Indiana territory, in consequence of any writ of removal or order for trial at bar, and which had been removed from any of the counties included within the limits of the territory of Michigan aforesaid, shall, in all things concerning the same, be proceeded on, and judgments and decrees rendered thereon, in the same manner as if the said Indiana territory had remained undivided.

SEC. 6. *And be it further enacted*, That Detroit shall be the seat of government of the said territory, until congress shall otherwise direct.

ORGANIC LAW OF WISCONSIN.

AN ACT ESTABLISHING THE TERRITORIAL GOVERNMENT OF WISCONSIN.

[*Approved April 20, 1836.*]

SUMMARY.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the third day of July, next, the country included within the following boundaries shall constitute a separate territory, for the purposes of temporary government, by the name of Wisconsin; that is to say: Bounded on the east by a line drawn from the northeast corner of the state of Illinois, through the middle of Lake Michigan, to a point in the middle of said lake, and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menomonie river; thence through the middle of the main channel of said river to that head of said river nearest to the Lake of the Desert; thence in a direct line to the middle of said lake; thence through the middle of the main channel of the Montreal river to its mouth; thence with a direct line across Lake Superior, to where the territorial line of the United States last touches said lake northwest; thence on the north, with the said territorial line, to the White-earth river; on the west, by a line from the said boundary line following down the middle of the main channel of White-earth river, to the Missouri river, and down the middle of the main channel of the Missouri river to a point due west from the northwest corner of the state of Missouri; and on the south, from said point, due east to the northwest corner of the state of Missouri; and thence with the boundaries of the states of Missouri and Illinois, as already fixed by acts of congress. And after the said third day of July next, all power and authority of the government of Michigan in and over the territory hereby constituted shall cease: *provided* that nothing in this act contained shall be construed to impair the rights of person or property now appertaining to any Indians within the said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or anywise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property or other rights, by treaty, or law, or otherwise, which it would have been competent to the government to make if this act had never been passed: *provided* that nothing in this act contained shall be construed

to inhibit the government of the United States from dividing the territory hereby established into one or more other territories, in such manner, and at such times, as congress shall, in its discretion, deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

SEC. 2. *And be it further enacted*, That the executive power and authority in and over the said territory shall be vested in a governor, who shall hold his office for three years, unless sooner removed by the president of the United States. The governor shall reside within the said territory, shall be commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs, and shall approve of all laws passed by the legislative assembly before they shall take effect; he may grant pardons for offenses against the laws of the said territory, and reprieves for offenses against the laws of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory, and shall take care that the laws be faithfully executed.

SEC. 3. *And be it further enacted*, That there shall be a secretary of the said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first Monday in December in each year, to the president of the United States; and, at the same time, two copies of the laws to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation or necessary absence of the governor from the territory, the secretary shall have, and he is hereby authorized and required to execute and perform, all the powers and duties of the governor during such vacancy or necessary absence.

SEC. 4. *And be it further enacted*, That the legislative power shall be vested in a governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue four years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue two years. An apportionment shall be made, as nearly equal as practicable, among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in and be inhabitants of the district for which they may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory to be taken and made by the sheriffs of the said counties, respectively, and returns thereof made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner, as the governor shall appoint and direct; and he shall, at the same time, declare the number of members of the council and house of representatives to which each of the counties is entitled under this act. The number of persons authorized to be elected, having the greatest number of votes in each of the said counties for the council, shall be declared, by the said governor, to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared, by the governor, to be duly elected: *provided*, the governor shall order a new election, when there is a

tie between two or more persons voted for, to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place on such day as he shall appoint; but, thereafter, the time, place and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives according to population, shall be prescribed by law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session, in any year, shall exceed the term of seventy-five days.

SEC. 5. *And be it further enacted*, That every free white male citizen of the United States, above the age of twenty-one years, who shall have been an inhabitant of said territory at the time of its organization, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters at all subsequent elections shall be such as shall be determined by the legislative assembly: *provided* that the right of suffrage shall be exercised only by citizens of the United States.

SEC. 6. *And be it further enacted*, That the legislative power of the territory shall extend to all rightful subjects of legislation; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws of the governor and legislative assembly shall be submitted to, and, if disapproved by, the congress of the United States, the same shall be null and of no effect.

SEC. 7. *And be it further enacted*, That all township officers and all county officers, except judicial officers, justices of the peace, sheriffs and clerks of courts, shall be elected by the people, in such manner as may be provided by the governor and legislative assembly. The governor shall nominate, and, by and with the advice and consent of the legislative council, shall appoint, all judicial officers, justices of the peace, sheriffs, and all militia officers, except those of the staff, and all civil officers not herein provided for. Vacancies occurring in the recess of the council shall be filled by appointments from the governor, which shall expire at the end of the next session of the legislative assembly; but the said governor may appoint, in the first instance, the aforesaid officers, who shall hold their offices until the end of the next session of the said legislative assembly.

SEC. 8. *And be it further enacted*, That no member of the legislative assembly shall hold or be appointed to any office created or the salary or emoluments of which shall have been increased whilst he was a member, during the term for which he shall have been elected, and for one year after the expiration of such term; and no person holding a commission under the United States, or any of its officers, except as a militia officer, shall be a member of the said council, or shall hold any office under the government of the said territory.

SEC. 9. *And be it further enacted*, That the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory, annually, and they shall hold their offices during good behavior. The said territory shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts by one of the judges of the supreme court, at such times and places as may be prescribed by law. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of the justices of the peace, shall be as limited by law: *provided, however*, that the justices of the peace shall not have jurisdiction of any matter of controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed

exceeds fifty dollars. And the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held, and the said clerks shall also be the registers in chancery; and any vacancy in said office of clerk, happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case removed to the supreme court shall a trial by jury be allowed in said court. The supreme court may appoint its own clerk, and every clerk shall hold his office at the pleasure of the court by which he shall have been appointed. And writs of error and appeals from the final decisions of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner, and under the same regulations, as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error, and appeals from the final decisions of the said courts, in all such cases, shall be made to the supreme court of the territory, in the same manner as in other cases. The said clerks shall receive, in all such cases, the same fees which the clerk of the district court of the United States in the northern district of the state of New York receives for similar services.

SEC. 10. *And be it further enacted*, That there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the Michigan territory. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as the marshal of the district court of the United States for the northern district of the state of New York; and shall, in addition, be paid the sum of two hundred dollars, annually, as a compensation for extra services.

SEC. 11. *And be it further enacted*, That the governor, secretary, chief justice and associate judges, attorney and marshal, shall be nominated, and by and with the advice and consent of the senate appointed, by the president of the United States. The governor and secretary, to be appointed as aforesaid, shall, before they act as such, respectively, take an oath or affirmation before some judge or justice of the peace in the existing territory of Michigan, duly commissioned and qualified to administer an oath or affirmation, to support the constitution of the United States, and for the faithful discharge of the duties of their respective offices; which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken, and such certificate shall be received and recorded by the said secretary among the executive proceedings. And afterwards the chief justice and associate judges, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation before the said governor or secretary, or some judge or justice of the territory who may be duly commissioned and qualified, which said oath or affirmation shall be

certified and transmitted by the person taking the same to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified and recorded in such manner and form as may be prescribed by law. The governor shall receive an annual salary of two thousand five hundred dollars for his services as governor and as superintendent of Indian affairs. The said chief justice and associate judges shall each receive an annual salary of eighteen hundred dollars. The secretary shall receive an annual salary of twelve hundred dollars. The said salaries shall be paid quarter-yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each per day, during their attendance at the sessions thereof, and three dollars each for every twenty miles' travel in going to and returning from the said sessions, estimated according to the nearest usually traveled route. There shall be appropriated, annually, the sum of three hundred and fifty dollars, to be expended by the governor to defray the contingent expenses of the territory, and there shall also be appropriated, annually, a sufficient sum, to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

SEC. 12. *And be it further enacted*, That the inhabitants of the said territory shall be entitled to, and enjoy, all and singular, the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said territory, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said territory. The said inhabitants shall also be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Michigan, and to its inhabitants, and the existing laws of the territory of Michigan shall be extended over said territory, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified or repealed by the governor and legislative assembly of the said territory of Wisconsin; and, further, the laws of the United States are hereby extended over and shall be in force in said territory, so far as the same, or any provisions thereof, may be applicable.

SEC. 13. *And be it further enacted*, That the legislative assembly of the territory of Wisconsin shall hold its first session at such time and place in said territory as the governor thereof shall appoint and direct; and at said session, or as soon thereafter as may by them be deemed expedient, the said governor and legislative assembly shall proceed to locate and establish the seat of government for said territory at such place as they may deem eligible, which place, however, shall thereafter be subject to be changed by the said governor and legislative assembly. And twenty thousand dollars, to be paid out of any money in the treasury, not otherwise appropriated, is hereby given to the said territory, which shall be applied by the governor and legislative assembly to defray the expenses of erecting public buildings at the seat of government.

SEC. 14. *And be it further enacted*, That a delegate to the house of representatives of the United States, to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been granted to the delegates from the several territories of the United States to the said house of representatives. The first election shall be held at such time and place or places, and be conducted in such manner, as the governor shall appoint and direct. The person having the greatest number of votes shall

be declared by the governor to be duly elected, and a certificate thereof shall be given to the person so elected.

SEC. 15. *And be it further enacted*, That all suits, process, and proceedings, and all indictments and informations, which shall be undetermined on the third day of July next, in the courts held by the additional judge for the Michigan territory, in the counties of Brown and Iowa; and all suits, process and proceedings, and all indictments and informations, which shall be undetermined on the said day of July, in the county courts of the several counties of Crawford, Brown, Iowa, Dubuque, Milwaukee and Des Moines, shall be transferred to be heard, tried, prosecuted and determined in the district courts hereby established, which may include the said counties.

SEC. 16. *And be it further enacted*, That all causes which shall have been or may be removed from the courts held by the additional judge for the Michigan territory in the counties of Brown and Iowa, by appeal or otherwise, into the supreme court for the territory of Michigan, and which shall be undetermined therein on the third day of July next, shall be certified by the clerk of the said supreme court, and transferred to the supreme court of said territory of Wisconsin, there to be proceeded in to final determination, in the same manner that they might have been in the said supreme court of the territory of Michigan.

SEC. 17. *And be it further enacted*, That the sum of five thousand dollars be, and the same is hereby, appropriated out of any money in the treasury not otherwise appropriated, to be expended by and under the direction of the legislative assembly of said territory, in the purchase of a library for the accommodation of said assembly, and of the supreme court hereby established.

ORGANIC LAW OF IOWA

AND AMENDMENTS THERETO.

SUMMARY.

ORGANIC LAW OF IOWA.

AN ACT TO DIVIDE THE TERRITORY OF WISCONSIN, AND TO ESTABLISH THE TERRITORIAL GOVERNMENT OF IOWA.

[*Approved June 12, 1838.*]

SECTION 1. ***Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,*** That, from and after the third day of July next, all that part of the present territory of Wisconsin which lies west of the Mississippi river, and west of a line drawn due north from the head waters or sources of the Mississippi to the territorial line, shall, for the purposes of temporary government, be and constitute a separate territorial government, by the name of Iowa; and that, from and after the said third day of July next, the present territorial government of Wisconsin shall extend only to that part of the present territory of Wisconsin which lies east of the Mississippi river. And, after the said third day of July next, all power and authority of the government of Wisconsin, in and over the territory hereby constituted, shall cease: *provided* that nothing in this act contained shall be construed to impair the rights of person or property now appertaining to any Indians within the said territory, so long

as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or anywise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property or other rights, by treaty, or law, or otherwise, which it would have been competent to the government to make if this act had never been passed: *provided* that nothing in this act contained shall be construed to inhibit the government of the United States from dividing the territory hereby established into one or more other territories, in such manner and at such times as congress shall, in its discretion, deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

SEC. 2. *And be it further enacted*, That the executive power and authority in and over the said territory of Iowa shall be vested in a governor, who shall hold his office for three years, unless sooner removed by the president of the United States. The governor shall reside within the said territory, shall be commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs, and shall approve of all laws passed by the legislative assembly before they shall take effect; he may grant pardons for offenses against the laws of said territory, and reprieves for offenses against the law of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory, and shall take care that the laws be faithfully executed.

SEC. 3. *And be it further enacted*, That there shall be a secretary of the said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first Monday in December in each year, to the president of the United States; and, at the same time, two copies of the laws to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation or necessary absence of the governor from the territory, the secretary shall have, and he is hereby authorized and required to execute and perform all the powers and duties of the governor during such vacancy or necessary absence, or until another governor shall be duly appointed to fill such vacancy.

SEC. 4. *And be it further enacted*, That the legislative power shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue one year. An apportionment shall be made as nearly equal as practicable among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in and be inhabitants of the district for which they may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory to be taken and made by the sheriffs of the said counties, respectively, unless the same shall have been taken within three months previous to the third day of July next, and returns thereof

made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner, as the governor shall appoint and direct; and he shall, at the same time, declare the number of members of the council and house of representatives to which each of the counties or districts are entitled under this act. The number of persons authorized to be elected, having the greatest number of votes in each of the said counties or districts for the council, shall be declared by the said governor to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared by the governor to be duly elected: *provided*, the governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place and on such day as he shall appoint; but thereafter the time, place and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives according to population, shall be prescribed by law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session in any year shall exceed the term of seventy-five days.

SEC. 5. *And be it further enacted*, That every free white male citizen of the United States above the age of twenty-one years, who shall have been an inhabitant of said territory at the time of its organization, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters at all subsequent elections shall be such as shall be determined by the legislative assembly: *provided* that the right of suffrage shall be exercised only by citizens of the United States.

SEC. 6. *And be it further enacted*, That the legislative power of the territory shall extend to all rightful subjects of legislation; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws of the governor and legislative assembly shall be submitted to, and, if disapproved by, the congress of the United States, the same shall be null and of no effect.

SEC. 7. *And be it further enacted*, That all township officers, and all county officers except judicial officers, justices of the peace, sheriffs and clerks of courts shall be elected by the people in such manner as is now prescribed by the laws of the territory of Wisconsin, or as may, after the first election, be provided by the governor and legislative assembly of Iowa territory. The governor shall nominate, and, by and with the advice and consent of the legislative council, shall appoint all judicial officers, justices of the peace, sheriffs, and all militia officers, except those of the staff, and all civil officers not herein provided for. Vacancies occurring in the recess of the council shall be filled by appointments from the governor, which shall expire at the end of the next session of the legislative assembly; but the said governor may appoint, in the first instance, the aforesaid officers, who shall hold their offices until the end of the next session of the said legislative assembly.

SEC. 8. *And be it further enacted*, That no member of the legislative assembly shall hold, or be appointed to, any office created, or the salary or emoluments of which shall have been increased, whilst he was a member, during the term for which he shall have been elected, and for one year after the expiration of such term; and no person holding a commission or appointment under the United States, or any of its officers except as a militia officer, shall be a member of the said council or house of representatives, or shall hold any office under the government of the said territory.

SEC. 9. *And be it further enacted*, That the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory annually; and they shall hold their offices during the term of four years. The said territory shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts, by one of the judges of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointment, respectively, reside in the districts which shall be assigned to them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the jutices of the peace, shall be as limited by law: *provided, however*, that justices of the peace shall not have jurisdiction of any matter of controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed exceeds fifty dollars. And the said supreme and district courts, respectively, shall possess a chancery as well as a common law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held, and the said clerks shall also be the registers in chancery; and any vacancy in said office of clerk, happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case removed to the supreme court shall trial by jury be allowed in said court. The supreme court may appoint its own clerk, and every clerk shall hold his office at the pleasure of the court by which he shall have been appointed. And writs of error and appeals from the final decision of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error and appeals from the final decisions of the said courts, in all such cases, shall be made to the supreme court of the territory, in the same manner as in other cases. The said clerk shall receive in all such cases the same fees which the clerks of the district courts of Wisconsin territory now receive for similar services.

SEC. 10. *And be it further enacted*, That there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the present territory of Wisconsin. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees as the marshal of the district court of the United States for the present territory of Wisconsin; and shall, in addition, be paid the sum of two hundred dollars annually as a compensation for extra services.

SEC. 11. *And be it further enacted*, That the governor, secretary, chief justice and associate judges, attorney and marshal shall be nominated, and, by and with the advice and consent of the senate, appointed, by the president of the United States. The governor and secretary, to be appointed as aforesaid, shall, before they act as such, respectively take an oath or affirmation before some judge or justice of the peace in the existing territory of Wisconsin, duly commissioned and qualified to administer an oath or affirmation, or before the chief justice or some associate justice of the supreme court of the United States, to support the constitution of the United States, and for the faithful discharge of the duties of their respective offices; which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken, and such certificate shall be received and recorded by the said secretary among the executive proceedings. And, afterwards, the chief justice and associate judges, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation, before said governor, or secretary, or some judge or justice of the territory, who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted, by the person taking the same, to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified and recorded in such manner and form as may be prescribed by law. The governor shall receive an annual salary of fifteen hundred dollars as governor, and one thousand dollars as superintendent of Indian affairs. The said chief judge and associate justices shall each receive an annual salary of fifteen hundred dollars. The secretary shall receive an annual salary of twelve hundred dollars. The said salaries shall be paid quarter-yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each, per day, during their attendance at the session thereof, and three dollars each for every twenty miles travel in going to and returning from the said sessions, estimated according to the nearest usually traveled route. There shall be appropriated annually the sum of three hundred and fifty dollars to be expended by the governor to defray the contingent expenses of the territory; and there shall also be appropriated annually a sum sufficient, to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

SEC. 12. *And be it further enacted*, That the inhabitants of the said territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Wisconsin, and to its inhabitants; and the existing laws of the territory of Wisconsin shall be extended over said territory, so far as the same be not incompatible with the provisions of this act, subject, nevertheless, to be altered, modified or repealed by the governor and legislative assembly of the said territory of Iowa; and, further, the laws of the United States are hereby extended over and shall be in force in said territory, so far as the same, or any provisions thereof, may be applicable.

SEC. 13. *And be it further enacted*, That the legislative assembly of the territory of Iowa shall hold its session at such time and place in said territory as the governor thereof shall appoint and direct; and at said session, or as soon thereafter as may by them be deemed expedient, the said governor and legislative assembly shall proceed to locate and establish the seat of government for said territory, at such place as they may deem eligible, which place, however, shall thereafter be subject to be changed by the governor and legislative assembly. And the sum of twenty thousand dollars, out of any money in the treasury not otherwise appropriated, is hereby granted to the said territory of Iowa, which shall be applied by the governor

and legislative assembly thereof to defray the expenses of erecting public buildings at the seat of government.

SEC. 14. *And be it further enacted*, That a delegate to the house of representatives of the United States, to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been granted to the delegates from the several territories of the United States to the said house of representatives. The first election shall be held at such time and place or places, and be conducted in such manner, as the governor shall appoint and direct. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given to the person so elected.

SEC. 15. *And be it further enacted*, That all suits, process and proceedings, and all indictments and informations, which shall be undetermined on the third day of July next, in the district courts of Wisconsin territory, west of the Mississippi river, shall be transferred to be heard, tried, prosecuted and determined in the district courts hereby established, which may include the said counties.

SEC. 16. *And be it further enacted*, That all justices of the peace, constables, sheriffs, and all other executive and judicial officers, who shall be in office on the third day of July next in that portion of the present territory of Wisconsin which will then, by this act, become the territory of Iowa, shall be, and are hereby authorized and required to continue to exercise and perform the duties of their respective offices, as officers of the territory of Iowa, temporarily, and until they or others shall be duly appointed to fill their places by the territorial government of Iowa, in the manner herein directed: *provided* that no officer shall hold or continue in office by virtue of this provision over twelve months from the said third day of July next.

SEC. 17. *And be it further enacted*, That all causes which shall have been or may be removed from the courts held by the present territory of Wisconsin, in the counties west of the Mississippi river, by appeal or otherwise, into the supreme court for the territory of Wisconsin, and which shall be undetermined therein on the third day of July next, shall be certified by the clerk of the said supreme court, and transferred to the supreme court of said territory of Iowa, there to be proceeded in to final determination, in the same manner that they might have been in the said supreme court of the territory of Wisconsin.

SEC. 18. *And be it further enacted*, That the sum of five thousand dollars be, and the same is hereby, appropriated, out of any money in the treasury not otherwise appropriated, to be expended by and under the direction of the governor of said territory of Iowa in the purchase of a library, to be kept at the seat of government, for the accommodation of the governor, legislative assembly, judges, secretary, marshal and attorney of said territory, and such other persons as the governor and legislative assembly shall direct.

SEC. 19. *And be it further enacted*, That, from and after the day named in this act for the organization of the territory of Iowa, the term of the members of the council and house of representatives of the territory of Wisconsin shall be deemed to have expired, and an entirely new organization of the council and house of representatives of the territory of Wisconsin, as constituted by this act, shall take place as follows: As soon as practicable, after the passage of this act, the governor of the territory of Wisconsin shall apportion the thirteen members of the council, and twenty-six members of the house of representatives, among the several counties or districts comprised within said territory, according to their population, as nearly as may be (Indians excepted). The first election shall be held at such time as the governor shall appoint and direct, and shall be conducted, and returns thereof made, in all respects according to the provisions of the laws of said territory, and the governor shall declare the person having the

greatest number of votes to be elected, and shall order a new election, when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. The persons thus elected shall meet at Madison, the seat of government, on such day as he shall appoint, but thereafter the apportioning of the representation in the several counties to the council and house of representatives according to population, the day of their election, and the day for the commencement of the session of the legislative assembly, shall be prescribed by law.

SEC. 20. *And be it further enacted*, That temporarily, and until otherwise provided by law of the legislative assembly, the governor of the territory of Iowa may define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts, and also appoint the time for holding courts in the several counties in each district, by proclamation to be issued by him; but the legislative assembly, at their first or any subsequent session, may organize, alter or modify such judicial districts, and assign the judges, and alter the times of holding the courts, or any of them.

AMENDMENTS TO THE ORGANIC LAW.

AN ACT TO ALTER AND AMEND THE ORGANIC LAW OF THE TERRITORIES OF WISCONSIN AND IOWA.

[*Approved March 3, 1839.*]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That every bill which shall have passed the council and house of representatives of the territories of Iowa and Wisconsin shall, before it become a law, be presented to the governor of the territory; if he approve he shall sign it, but if not, he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of that house it shall become a law. But, in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for and against the bill shall be entered on the journals of each house, respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the assembly by adjournment prevent its return, in which case it shall not be a law.

SEC. 2. *And be it further enacted*, That this act shall not be so construed as to deprive congress of the right to disapprove of any law passed by the said legislative assembly, or in any way to impair or alter the power of congress over laws passed by said assembly.

AN ACT TO AUTHORIZE THE ELECTION OR APPOINTMENT OF CERTAIN OFFICERS IN THE TERRITORY OF IOWA, AND FOR OTHER PURPOSES.

[*Approved March 3, 1839.*]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the legislative assembly of the territory of Iowa, shall be, and are hereby, authorized to provide by law for the election or appointment of sheriffs, judges of probate, justices of the peace and county surveyors within the said territory, in

such way or manner, and at such times and places, as to them may seem proper; and, after a law shall have been passed by the legislative assembly for that purpose, all elections or appointments of the above named officers thereafter to be had or made shall be in pursuance of such law.

SEC. 2. *And be it further enacted*, That the term of service of the present delegate for said territory of Iowa shall expire on the twenty-seventh day of October, eighteen hundred and forty; and the qualified electors of said territory may elect a delegate to serve from the said twenty-seventh day of October to the fourth day of March thereafter, at such time and place as shall be prescribed by law by the legislative assembly, and thereafter a delegate shall be elected, at such time and place as the legislative assembly may direct, to serve for a congress, as members of the house of representatives are now elected.

ADMISSION OF IOWA

INTO THE UNION.

SUMMARY.

ORIGINAL ACT.

SUPPLEMENTAL ACT.

ACCEPTANCE OF PROPOSITION BY LEGISLATURE OF IOWA.

AN ACT FOR THE ADMISSION OF THE STATES OF IOWA AND FLORIDA INTO THE UNION.

[*Approved March 3, 1845.*]

WHEREAS the people of the territory of Iowa did, on the seventh day of October, eighteen hundred and forty-four, by a convention of delegates called and assembled for that purpose, form for themselves a constitution and state government; and whereas the people of the territory of Florida did, in like manner, by their delegates, on the eleventh day of January, eighteen hundred and thirty-nine, form for themselves a constitution and state government, both of which said constitutions are republican; and said conventions having asked the admission of their respective territories into the union as states, on equal footing with the original states:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the states of Iowa and Florida be, and the same are hereby, declared to be states of the United States of America, and are hereby admitted into the union on equal footing with the original states, in all respects whatsoever.

SEC. 2. *And be it further enacted,* That the following shall be the boundaries of the said state of Iowa, to wit: beginning at the mouth of the Des Moines river, at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude passing through the mouth of the Mankato or Blue-earth river, thence west along the said parallel of

latitude to a point where it is intersected by a meridian line, seventeen degrees and thirty minutes west of the meridian of Washington city, thence due south to the northern boundary line of the state of Missouri, thence eastwardly following that boundary to the point at which the same intersects the Des Moines river, thence by the middle of the channel of that river to the place of beginning.

SEC. 3. *And be it further enacted*, That the said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same: such rivers to be common to both; and that the said river Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said state of Iowa.

SEC. 4. *And be it further enacted*, That it is made and declared to be a fundamental condition of the admission of said state of Iowa into the union, that so much of this act as relates to the said state of Iowa shall be assented to by a majority of the qualified electors at their township elections, in the manner and at the time prescribed in the sixth section of the thirteenth article of the constitution adopted at Iowa City the first day of November, Anno Domini eighteen hundred and forty-four, or by the legislature of said state. And, so soon as such assent shall be given, the president of the United States shall announce the same by proclamation; and therefrom, without further proceedings on the part of congress, the admission of the said state of Iowa into the union, on an equal footing in all respects whatever with the original states, shall be considered as complete.

SEC. 5. *And be it further enacted*, That said state of Florida shall embrace the territories of East and West Florida, which, by the treaty of amity, settlement and limits between the United States and Spain, on the twenty-second day of February, eighteen hundred and nineteen, were ceded to the United States.

SEC. 6. *And be it further enacted*, That, until the next census and apportionment shall be made, each of said states of Iowa and Florida shall be entitled to one representative in the house of representatives of the United States.

SEC. 7. *And be it further enacted*, That said states of Iowa and Florida are admitted into the union on the express condition that they shall never interfere with the primary disposal of the public lands lying within them, nor levy any tax on the same whilst remaining the property of the United States: *provided* that the ordinance of the convention that formed the constitution of Iowa, and which is appended to the said constitution, shall not be deemed or taken to have any effect or validity, or to be recognized as in any manner obligatory upon the government of the United States.

AN ACT SUPPLEMENTAL TO THE ACT FOR THE ADMISSION OF THE STATES OF IOWA AND FLORIDA INTO THE UNION.

[*Approved March 3, 1845.*]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the state of Iowa as elsewhere within the United States.

SEC. 2. *And be it further enacted*, That the said state shall be one district, and be called the district of Iowa; and a district court shall be held therein, to consist of one judge, who shall reside in the said district, and be called a district judge. He shall hold, at the seat of government of the said state, two sessions of the said district court annually, on the first

Monday in January, and he shall, in all things, have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an act entitled "An act to establish the judicial courts of the United States." He shall appoint a clerk for the said district, who shall reside and keep the records of the said court at the place of holding the same; and shall receive, for the services performed by him, the same fees to which the clerk of the Kentucky district is by law entitled for similar services.

SEC. 3. *And be it further enacted*, That there shall be allowed to the judge of the said district court the annual compensation of fifteen hundred dollars, to commence from the date of his appointment, to be paid quarterly at the treasury of the United States.

SEC. 4. *And be it further enacted*, That there shall be appointed in the said district a person learned in the law to act as attorney for the United States; who shall, in addition to his stated fees, be paid annually by the United States two hundred dollars, as a full compensation for all extra services; the said payments to be made quarterly, at the treasury of the United States.

SEC. 5. *And be it further enacted*, That a marshal shall be appointed for the said district, who shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as are prescribed and allowed to marshals in other districts; and shall, moreover, be entitled to the sum of two hundred dollars annually as a compensation for all extra services.

SEC. 6. *And be it further enacted*, That, in lieu of the propositions submitted to the congress of the United States by an ordinance passed on the first day of November, eighteen hundred and forty-four, by the convention of delegates at Iowa City, assembled for the purpose of making a constitution for the state of Iowa, which are hereby rejected, the following propositions be, and the same are hereby, offered to the legislature of the state of Iowa, for their acceptance or rejection; which, if accepted, under the authority conferred on the said legislature, by the convention which framed the constitution of the said state, shall be obligatory upon the United States.

1. That section numbered sixteen in every township of the public lands, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for the use of schools.

2. That the seventy-two sections of land set apart and reserved for the use and support of a university, by an act of congress approved on the twentieth day of July, eighteen hundred and forty, entitled "An act granting two townships of land for the use of a university in the territory of Iowa," are hereby granted and conveyed to the state, to be appropriated solely to the use and support of such university, in such manner as the legislature may prescribe.

3. That five entire sections of land, to be selected and located under the direction of the legislature, in legal divisions of not less than one quarter section, from any of the unappropriated lands belonging to the United States within the said state, are hereby granted to the state for the purpose of completing the public buildings of the said state, or for the erection of public buildings at the seat of government of the said state, as the legislature may determine and direct.

4. That all salt springs within the state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to the said state for its use; the same to be selected by the legislature thereof within one year after the admission of said state, and the same, when so selected, to be used on such terms, conditions and regulations as the legislature of the state shall direct: *provided* that no salt spring, the right whereof is now vested in any individual or individuals, or

which may hereafter be confirmed or adjudged to any individual or individuals, shall, by this section, be granted to said state: *and provided, also*, that the general assembly shall never lease or sell the same, at any one time, for a longer period than ten years, without the consent of congress.

5. That five per cent. of the net proceeds of sales of all public lands lying within the said state, which have been or shall be sold by congress, from and after the admission of said state, after deducting all the expenses incident to the same, shall be appropriated for making public roads and canals within the said state, as the legislature may direct: *provided* that the five foregoing propositions herein offered are on the condition that the legislature of the said state, by virtue of the powers conferred upon it by the convention which framed the constitution of the said state, shall provide by an ordinance, irrevocable without the consent of the United States, that the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof; and that no tax shall be imposed upon lands the property of the United States; and that in no case shall non-resident proprietors be taxed higher than residents; and that the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the state, whether for state, county, township, or any other purpose, for the term of three years from and after the date of the patents, respectively.

ACCEPTING PROPOSITIONS OF CONGRESS.

AN ACT AND ORDINANCE ACCEPTING THE PROPOSITION MADE BY CONGRESS ON THE ADMISSION OF IOWA INTO THE UNION AS A STATE.

[*Approved January 15, 1849.*]

SECTION 1. *Be it enacted and ordained by the General Assembly of the State of Iowa*, That the propositions to the state of Iowa on her admission into the union, made by the act of congress, entitled "An act supplemental to the act for the admission of the states of Iowa and Florida into the union," approved March 3, 1845, and which are contained in the sixth section of that act, are hereby accepted in lieu of the propositions submitted to congress by an ordinance, passed on the first day of November, eighteen hundred and forty-four, by the convention of delegates which assembled at Iowa City on the first Monday of October, eighteen hundred and forty-four, for the purpose of forming a constitution for said state, and which were rejected by congress: *provided* the general assembly shall have the right, in accordance with the provisions of the second section of the tenth article of the constitution of Iowa, to appropriate the five per cent. of the net proceeds of sales of all public lands lying within the state which have been or shall be sold by congress from and after the admission of said state, after deducting all expenses incident to the same, to the support of common schools.

SEC. 2. *And be it further enacted and ordained*, As conditions of the grants specified in the propositions first mentioned in the foregoing section, irrevocable and unalterable without the consent of the United States, that the state of Iowa will never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof, and that no tax shall be imposed on lands, the property of the United States; and that in no case shall non-resident proprietors be

taxed higher than residents; and that the bounty lands granted, or hereafter to be granted, for military services during the late war with Great Britain shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the state, whether for state, county, township, or other purposes, for the term of three years from and after the dates of the patents respectively.

SEC. 3. It is hereby made the duty of the secretary of state, after the taking effect of this act, to forward one copy of the same to each of our senators and representatives in congress, who are hereby required to procure the consent of congress to the diversion of the five per cent. fund indicated in the proviso to the first section of this act.

SEC. 4. This act shall take effect from and after its publication in the weekly newspapers printed in Iowa City.

CONSTITUTION OF IOWA.

Preamble. WE, THE PEOPLE OF THE STATE OF IOWA, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the STATE OF IOWA, the boundaries whereof shall be as follows:

Boundaries. Beginning in the middle of the main channel of the Mississippi river, at a point due east of the middle of the mouth of the main channel of the Des Moines river; thence up the middle of the main channel of the said Des Moines river, to a point on said river where the northern boundary line of the State of Missouri—as established by the constitution of that state, adopted June 12th, 1820—crosses the said middle of the main channel of the said Des Moines river; thence westwardly along the said northern boundary line of the state of Missouri, as established at the time aforesaid, until an extension of said line intersects the middle of the main channel of the Missouri river; thence up the middle of the main channel of the said Missouri river to a point opposite the middle of the main channel of the Big Sioux river, according to Nicollett's map; thence up the main channel of the said Big Sioux river, according to the said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence east along said parallel of forty-three degrees and thirty minutes, until said parallel intersects the middle of the main channel of the Mississippi river; thence down the middle of the main channel of the said Mississippi river to the place of beginning.

"The middle of the main channel of the Mississippi river" as here used means the middle of the main bed of the river from shore to shore: *Dunleith, etc., Bridge Co. v. Dubuque County*, 55–558.

But the supreme court of the United States holds that this language means the thread of the stream, or the "mid-channel," and if there are several channels the middle of the principal one, or rather, the one usually followed in navigation: *Iowa v. Illinois*, 147 U. S. 1.

A lake connected with the Mississippi river, but separated from it at ordinary stage of water, by dry land, *held*, to be included within the term "waters of the state" as used in a statute: *State v. Haug*, 64 N. W., 398.

ARTICLE 1.—BILL OF RIGHTS.

Rights of persons. SECTION 1. All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.

Discrimination on account of color: This section forbids discrimination by a common carrier against a passenger on account of color. Therefore, *held*, that a regulation of a steamboat by which a colored person was denied the privilege of a seat at the table provided for passengers could not be enforced: *Coger v. Northwestern U. Packet Co.*, 37–145.

Also, *held*, that colored children cannot be excluded from the public schools, nor compelled to attend a separate school: *Clark v. Board of Directors*, 24–266; *Smith v. Directors*, 40–518; *Dove v. Independent School Dist.*, 41–689.

Discriminations against corporations: An act providing a special method for the taxation of the property of railway companies, *held* unconstitutional, because not made applicable to property of the same character owned by private individuals. (See art. 8, § 2): *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

But the statute authorizing the recovery of double damages for stock injured by a railway company on its track where it has a right to fence is not unconstitutional as denying to any person the equal protection of the law, such provision being intended merely as a penalty for the purpose of inducing the fencing of railroads: *Tredway v. Sioux City & St. P. R. Co.*, 43–527.

Permits to sell liquors: This section is not violated by a statutory provision that permits to sell intoxicating liquors shall only be granted to persons of good moral character: *In re Ruth*, 32–250.

Nor by the provisions of the prohibitory liquor law: *Santo v. State*, 2-165, 216.

As to requirement that laws shall have a uniform operation, etc., see art. 1, § 6, and art. 3, § 30.

As to due process of law, see art. 1, § 9.

Political power. SEC. 2. All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it.

Political power consists of legislative, executive and judicial authority, and these all inhere in the people in the first instance: *Stewart v. Board of Supervisors*, 30-9. And see notes to art. 3, § 1.

See, further, art. 1, § 25.

Religion. SEC. 3. The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry.

The statute exempting church property from taxation is not in conflict with this section. *Trustees of Griswold College v. State*, 46-275.

The use of a schoolhouse for the purpose of religious worship, when authorized by a vote of the electors of the district, is not prohibited: *Davis v. Boget*, 50-11.

The guaranty of religious freedom is not violated by the casual use of a public building as a place for offering prayer and doing other acts of religious worship; and the statute allowing the Bible to be used in public schools, with the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian, is not unconstitutional: *Moore v. Monroe*, 64-367.

Religious test. SEC. 4. No religious test shall be required as a qualification for any office of public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.

Competency of witnesses: This section renders competent as a witness for the defendant in a criminal prosecution a person who is jointly indicted with him for the same crime but is put upon a separate trial: *State v. Nash*, 10-81.

Even where such defendants are put upon trial jointly, either one is entitled to the testimony of his co-defendant: *State v. Gigher*, 23-318.

The legislature may declare that interest in the event of a suit may or may not disqualify a witness, as shall be deemed best; and the provisions of Rev., § 3983, that husband or wife should not be a witness for or against the other in a civil action to which either of them was a party, *held* not to be in conflict with this section: *Karney v. Paisley*, 13-89. But see, also, *Blake v. Graves*, 18-312.

The provisions of this section as to the competency of witnesses do not give a party the right to the testimony of a child not possessed of sufficient understanding, by reason of tender years, to feel the obligation of an oath: *Kilburn v. Mullin*, 22-498.

It is not a violation of any constitutional privilege to provide that the credibility of a witness may be affected by the fact as to his sensibility to the obligation of an oath: *Searcy v. Miller*, 57-613.

Dueling. SEC. 5. Any citizen of this state who may hereafter be engaged, either directly or indirectly, in a duel, either as principal or accessory before the fact, shall forever be disqualified from holding any office under the constitution and laws of this state.

Laws uniform. SEC. 6. All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens.

Uniformity of operation of general laws: If a law operates upon every person within the relations and circumstances provided for, it is sufficient as to uniformity: *Iowa R. Land Co. v. Soper*, 39-112, 116.

Therefore, *held*, that a provision as to liability of a railroad company for injuries to employees is not open to the objection that it is not of uniform operation: *McAunich v. Mississippi & M. R. Co.*, 20-338; *Deppe v. Chi-*

cago, R. I. & P. R. Co., 36-52; *Bucklew v. Central Iowa R. Co.*, 64-603; *Central Trust Co. v. Sloan*, 65-655.

So *held*, also, as to a provision making railroad companies liable in certain cases for double damages for stock killed: *Jones v. Galena & C. U. R. Co.*, 16-6; *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

A curative act is not necessarily unconstitutional as not being of uniform operation: *McMillen v. County Judge*, 6-391; *Chicago, R. I. & P. R. Co. v. Independent Dist.* 68 N. W., 881.

So a law legalizing the defective organization of a specified school district was sustained: *State ex rel. v. Squires*, 26-340.

So a law legalizing taxes levied without authority of law: *Iowa R. Land Co. v. Soper*, 39-112.

Laws are of uniform operation if in their operation they apply to all persons in like situation. Granting to certain medical colleges the privilege of having their diplomas considered sufficient to entitle the holder to a certificate to practice medicine is not, as against colleges not given this privilege, invalid as a granting of a special privilege: *Iowa Ec. Med. College v. Schrader*, 87-659.

The statute providing that the fact that defendant in an action was in the military service of the United States or the state should be sufficient cause for a continuance so long as such defendant was in such service, *held* not unconstitutional as not being of uniform operation: *McCormick v. Rusch*, 15-127.

A statute providing for excluding property from city limits would be unconstitutional if not made applicable to cities already incorporated as well as those to be incorporated: *Whiting v. Mt. Pleasant*, 11-482.

It is not competent for the legislature to submit the question whether an act shall become a law to a vote of the people. Therefore, *held*, that § 18 of the prohibitory liquor law of 1855, providing for the submission of the question to vote in each county as to whether such law should be in force therein, was unconstitutional, and that the act was in force throughout the state without such submission: *Santo v. State*, 2-165; *State v. Beneke*, 9-203.

And the license act of 1857, containing a provision that the prohibitory liquor law of 1855 should not be repealed in any county except by a vote of the people of that county, was held unconstitutional for the same reason: *Geebrick v. State*, 5-491; *State v. Weir*, 33-134.

But § 114 of Code of '51, and the act of 1857 (Rev. § 287 *et seq.*), allowing the county judge to submit to vote in each county the question whether sheep and swine should be allowed to run at large, were held not unconstitutional on this ground, inasmuch as the law was in force without a vote of the people, and it simply authorized the people of the county to adopt a mere police regulation: *Dalby v. Wolf*, 14-228.

See, further, art. 3, § 1, and notes.

The statute prohibiting the sale of ale, wine and beer within two miles of the corporate limits of a municipal corporation, *held*, not objectionable on the ground of want of uniformity in its operation: *State v. Shroeder*, 51-197.

So, also, the provisions as to granting of permits to sell intoxicating liquors only to persons of good moral character, *held* not unconstitutional: *In re Ruth*, 32-250.

A statute dividing railroads into three classes and fixing maximum rates of charge for each class, *held* not unconstitutional on account of lack of uniformity: *Chicago, etc., R. Co. v. Iowa*, 94 U. S., 155.

A statute making special provisions as to the time for bringing actions on insurance policies different from the provisions relating to actions on other contracts is not unconstitutional by reason of not being of uniform operation: *Christie v. Life Indemnity, etc., Co.*, 82-360.

A statute specially applicable to itinerant vendors is not unconstitutional: *State v. Gouss*, 85-21.

A statute applicable to certain cities only, designated as having a population in excess of a certain number, is not invalid for want of uniformity: *Owen v. Sioux City*, 91-190.

See, also, notes to art. 3, § 30.

Uniformity in taxation comes within the purview of the provision as to uniform operation of laws: *Dubuque v. Illinois Cent. R. Co.*, 39-56.

But it is not necessary to the validity of a tax that it operate upon all persons in the state alike: *Primghar State Bank v. Rerick*, 64 N. W., 801.

A statute providing a special method for the taxation of express and telegraph companies, *held* not objectionable under this provision, as the burdens imposed by it fell equally upon all citizens coming within a certain class or condition: *United States Ex. Co. v. Ellyson*, 28-370.

The fact that a city is authorized to exempt from water-rent property within its limits which has not the benefit of the water supply does not render such a provision unconstitutional: *Grant v. Davenport*, 36-396.

The provisions for a different method for assessing the property of railroad companies from that provided for the assessment of other property, *held* not to be unconstitutional as being in conflict with this section: *Central Iowa R. Co. v. Board of Supervisors*, 67-199.

Also, *held*, that the power given to cities to improve streets and make the cost thereof a lien upon abutting property was not void as authorizing unequal taxation: *Warren v. Henly*, 31-31.

An act exempting lots of ten acres or more in extent from municipal taxation under certain circumstances is not unconstitutional under this section: *Leicht v. Burlington*, 73-29.

A city ordinance discriminating in favor of resident merchants of such city and against other merchants of the state, by imposing a license tax on the latter, would be unconstitutional as not being of uniform operation: *Pacific Junction v. Dyer*, 64-38. And see *Marshalltown v. Blum*, 58-184.

The imposition of a license fee upon transient merchants is not invalid for want of uniformity. *Ottumwa v. Zekind*, 64 N. W., 646.

Exclusive privileges: The provisions of this section prohibiting the granting of exclusive privileges, etc., does not affect exclusive charters or franchises already granted: *Burlington, etc., Ferry Co. v. Davis*, 48–133.

See, further, as to uniformity of laws, art. 3, § 30, and notes.

Liberty of speech and the press. SEC. 7. Every person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appear to the jury that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the party shall be acquitted.

Newspaper publications; contempt: The publication of newspaper comments upon the decision of a court when the case is disposed of and the decision announced are not punishable as contempt of the court: *Dunham v. State*, 6–245.

Publication of articles in a newspaper reflecting upon the conduct of a judge in relation to a cause disposed of before such publication does not amount to a contempt: *State v. Anderson*, 40–207.

Privileged communications: Words spoken by one in the performance of public or official duty, upon a just occasion, without malicious motive, are privileged communications, and are not actionable unless express malice is shown: *Mayo v. Sample*, 18–306.

A communication by a grand jury to the court, not required by law to be made, such as a report charging misconduct on the part of officers, but not returned by way of indictment, is not privileged: *Rector v. Smith*, 11–302.

Charges made in a judicial proceeding, whether civil or criminal, will not support an action for libel, though the same charges, if made under other circumstances, would constitute libel: *Mass v. Meire*, 37–97.

If words charged as slanderous were spoken by a witness without malice, believing them to be responsive, he would not be liable. But if what is testified to is not pertinent and material to the matter in controversy, and is spoken for the purpose of defaming plaintiff, such words are not protected: *Smith v. Howard*, 28–51.

Every one who believes himself to be possessed of knowledge which, if true, does or may affect the rights or interests of another, has the right to communicate in good faith his belief to such person: *Mott v. Dawson*, 46–533.

Words spoken of a candidate at an election for a public office, to electors whose suffrages are sought, if spoken without malice and in good faith believing them to be true, by one having reasonable cause to so believe, and with the honest purpose of protecting the public from the supposed dishonesty of such candidate, do not render the person speaking them liable in an action for slander: *Ibid.*

A parent has a right to know the truth of reports charging a minor child with an offense or immoral conduct, and a person having information which is sought by such parent will be completely justified in imparting the same, if acting in good faith: *Long v. Peters*, 47–239.

The fact that words are privileged is only presumptive evidence of the want of malice, and plaintiff may show by extrinsic evidence that there was malice nevertheless: *Mielenz v. Quasdorf*, 68–726.

Instructions of court in cases of libel: Although the jury in prosecutions for libel determine both the law and the facts, the court has the right to instruct them in these as well as in other criminal cases; and the conclusive presumption is that they follow the instructions of the court; therefore, an erroneous instruction will be regarded as prejudicial and a ground for reversal as in other cases: *State v. Rice*, 56–431.

The doctrine that the jurors are judges of the law as well as of the facts, in libel, applies only to criminal prosecutions, and not to civil actions for damages: *Forshee v. Abrams*, 2–571.

Personal security. SEC. 8. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Searches and seizures: A search-warrant is not unreasonable in the legal sense when it is for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause: *Santo v. State*, 2–165.

Therefore, *held*, that the provision for the issuance of a search-warrant for the seizure of intoxicating liquors is not unconstitutional as not requiring sufficient particularity in description, or as authorizing unreasonable search and seizure: *Ibid.*

Description of the place *held* sufficient in a particular case: *State v. Thompson*, 44–399.

An objection to the sufficiency of a warrant under which property has been seized cannot be raised for the first time in the district court on appeal from the justice issuing the warrant: *Ibid.*

The sheriff is justified in searching the person arrested and taking from him money or property in any way connected with the crime charged, or which may serve in identifying the prisoner, or be used by him in

effecting an escape. But property thus taken is not subject to attachment: *Commercial Exchange Bank v. McLeod*, 65–665.

Police officers upon the arrest of one charged with felony may make search of his person for stolen property, instruments used in the commission of the crime, or any article which may give a clue to its commission or the identification of the criminal: *Reifsnyder v. Lee*, 44–101.

The fact that an officer makes search for and seizure of intoxicating liquors unlawfully kept for sale without having any warrant for such action will not render the proceedings under the warrant afterwards obtained illegal: *State v. Ward*, 75–637.

Trial by jury; due process of law. SEC. 9. The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

What constitutes trial by jury: The right of trial by jury implies a trial by jury of twelve men except where the constitution authorizes trial by a less number: *Santo v. State*, 2–165.

The jury contemplated by this section is the jury recognized by the common law, which is constituted of twelve persons, and the legislature has no authority, in providing for jury trial under the constitution, to provide for a less number than twelve jurors. Therefore, *held*, that a provision for a verdict by ten or eleven jurors, when the jury has been reduced to that number by sickness, is unconstitutional: *Eshelman v. Chicago, R. I. & P. R. Co.*, 67–296; *Kelsh v. Dyersville*, 68–137.

It is immaterial that the party complaining of the illegality of the jury is a municipal corporation. Although it may be that such a corporation has no constitutional right to jury trial, yet the statute does not profess to make any special provisions for such cases: *Kelsh v. Dyersville*, 68–137.

Less than twelve jurors in inferior courts: As this section provides for a trial by a less number of jurors than twelve in inferior courts, and § 11 of this article gives such inferior courts jurisdiction of offenses of an inferior grade, a trial in such a court of an offense within its jurisdiction by a jury of less than twelve is not a violation of the right of jury trial: *Byran v. State*, 4–349.

If, in the inferior tribunal, a party has a trial before the constitutional jury provided for such court, though of less than twelve men, he cannot, of right, claim in the face of the statute a second trial on the merits on appeal to the district court: *Des Moines v. Layman*, 21–153.

A defendant accused of an offense triable under the provisions of the constitution before a justice of the peace by a jury of less than twelve cannot complain of being deprived of the right of jury trial, even though he is not allowed the right of trial by jury on appeal to the district court: *Baurose v. State*, 1–374.

The right to one jury trial is all that is guaranteed, and that is preserved by allowing an appeal to the district court, where the cause is to be tried anew by a jury: *Zelle v. McHenry*, 51–572; *State v. Beneke*, 9–203.

The statute providing for trial by a jury of six in the superior court, unless the additional expense involved in securing a jury of twelve is deposited by the party demanding such jury, is not unconstitutional: *Conners v. Burlington, C. R. & N. R. Co.*, 74–383.

The right of trial by jury discussed generally: *Trimble v. State*, 2 G. Gr., 404.

Ordinance of 1787: In so far as the constitution of the state modifies the common-law right of trial by jury, and authorizes trial by a jury of less than twelve in inferior courts, it is an alteration of the provision for jury trial found in the ordinance of 1787. The admission of the state under the constitution adopted by it amounted to an abrogation by mutual consent of the provisions of that ordinance in conflict therewith: *Higgins v. Farmers' Ins. Co.*, 60–50.

Waiver of objection to trial by less than twelve jurors: The verdict in a trial by a jury defective as to the number will be void unless the defect is waived. And where a party has no knowledge of such deficiency, his mere acceptance of the jury will not constitute a waiver of objection to number: *Cowles v. Buckman*, 6–161.

The fact that the party objecting to the cause being tried by a less number than twelve proceeds with the trial does not constitute a waiver of his objection: *Eshelman v. Chicago, R. I. & P. R. Co.*, 67–296.

The provisions of the federal constitution with reference to trial by jury have no bearing on the question of the right of trial by jury in the state courts: *McLane v. Leicht*, 69–401.

In equity cases: The right of trial by jury does not obtain in cases which are of equitable cognizance: *State v. Orwig*, 25–280.

As cases of mutual account are subjects of equitable jurisdiction, it is not unconstitutional to provide for a compulsory reference in such cases: *Burt v. Harrah*, 65–643.

The statutory provisions allowing an injunction against persons engaged in the illegal sale of intoxicating liquors are not unconstitutional as depriving defendant of the right of trial by jury. Such cases being of equitable cognizance at the time of the adoption of the constitution, and the court of equity having jurisdiction at that time to abate a nuisance, it is within the power of the legislature to enlarge the jurisdiction of the court of equity in such cases so as to allow that remedy even where property rights are involved: *Littleton v. Fritz*, 65–488; *Martin v. Blattner*, 68–286.

So the right of trial by jury is not impaired by the provision that foreclosure of mortgages shall be by equitable proceedings, and that in the same action a recovery may be had on the note secured by mortgage: *Clough v. Seay*, 49–111.

Under the chancery practice, as it existed

at the time the constitution was adopted, a person could be deprived of his liberty or his property, and such deprivation has always been regarded as having been accomplished by due process of law, although no jury trial was allowed: *Eikenberry v. Edwards*, 67-619.

Trial de novo on appeal: By virtue of the provisions of this section as to jury trial and of art. 5, § 4, as to method of appeal in suits in equity, every party has a right either to a trial by jury or to a trial *de novo* on appeal: *Sherwood v. Sherwood*, 44-192.

Jury trial in other cases: Where the only issue made by the pleadings was contained in a written agreement, the proper construction of which was in question, *held*, that it was not error to refuse defendant a jury trial: *Packer v. Packer*, 24-20.

It is not prejudicial error to refuse a jury trial where the questions involved are such that nothing arises for the determination of a jury: *Bremer County Bank v. Bremer County*, 42-394.

The proceeding auxiliary to execution authorized by statute is not in violation of the guaranty of the right to trial by jury: *Marriage v. Woodruff*, 77-292.

Offense committed in another county: The right to jury trial is not infringed by allowing defendant to be put on trial in one county for an offense committed in another county within five hundred yards of the boundary line between them: *State v. Pugsley*, 75-742.

References: Any provision authorizing the reference of questions of fact in actions by ordinary proceedings, without the consent of both parties, would be in violation of the right of jury trial: *McMartin v. Bingham*, 27-234; *Blair Town Lot, etc., Co. v. Walker*, 50-376.

Appraisement of property taken for public use: The appraisers appointed to assess damages resulting to a land owner from the establishment of a highway are not a jury within the meaning of this section, and, upon appeal properly taken from their decision, such owner is entitled to trial by jury: *Sigafoos v. Talbot*, 25-214. And see *Des Moines v. Layman*, 21-153.

Contempt: A statute providing for imprisonment of a debtor for contempt in certain cases, where the object was to enforce the payment of a debt by summary proceedings, *held* in conflict with the constitutional provisions for jury trial: *Ex parte Grace*, 12-208.

Judgment on stay bond: The statutory provisions giving to a stay bond the effect of a judgment confessed against the parties thereto is not objectionable as denying them the right of trial, or depriving them of property without due process of law. The bond amounts to a waiver of the privilege which it is competent for them to make: *Cavender v. Smith's Heirs*, 5-157.

Jury fee: A provision requiring a party to pay a jury fee, or increasing the jury fee, is not in conflict with this section: *Adae v. Zangs*, 41-536; *Steele v. Central R. of Iowa*, 43-109; *Little v. McGuire*, 43-447; *State v. Verwayne*, 44-621.

Waiver of jury trial in civil cases: The right of jury trial in a civil case is not an attribute inalienable in its nature and character, but rather a privilege, which may be waived or forfeited: *Wilkins v. Treynor*, 14-391.

Where the parties appear and a trial is had to the court without objection, it will be presumed that jury trial is waived: *Saum v. Jones County*, 1 G. Gr., 165; *McGuire v. Kemp*, 3 G. Gr., 219. And see *Hawkins v. Rice*, 40-435.

By consenting to a reference a party waives his right to a trial by jury, and cannot afterwards, upon a new order directing the referee to proceed, object and claim a jury trial: *Hewitt v. Egbert*, 34-485.

The right to jury trial is waived by failing to demand it when the cause comes up for trial: *Davidson v. Wright*, 46-383.

By making default a party waives his right to a jury trial: *Clute v. Hazleton*, 51-355.

The fact that actions of different kinds are by agreement submitted together does not change the method of trial as to either. Such submission amounts only to waiver of jury trial: *Leighton v. Orr*, 44-679.

The right to such trial will be waived by failure of the party to take proper steps to secure a transfer of the cause from the equity docket to the law docket, where by reason of the nature of the case it properly belongs: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 490.

Where, on filing an amended petition, a cause was improperly transferred to the equity docket, and no motion to transfer it to the law docket was made before answer, *held*, that error in the kind of proceedings would be deemed waived, and defendant could not demand a jury trial: *Gibbs v. Coonrod*, 54-736.

As to jury trial in criminal cases, see § 10 of this article and notes.

Due process of law; what constitutes: Due process of law means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It was intended thereby to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice: *Foule v. Mann*, 53-42.

Therefore, *held*, that a statute limiting the remedy against a sheriff for wrongful levy to a recovery on the indemnity bond given by the plaintiff in execution, was void in so far as it defeated the right of the person whose property was illegally taken to sue for the specific recovery thereof: *Ibid.*

Due process of law is not confined alone to law and chancery actions. Special proceedings applicable to specified subject-matter conformable to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike whose property or rights come within the lawful scope of the proceeding, are prosecuted by due process of law: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

Therefore, *held*, that the statute giving railroad commissioners authority to fix joint rates over connecting lines of road, with an

opportunity to the roads interested to have a hearing before such commissioners on notice, does not deprive them of their property without due process of law: *Ibid.*

Even where the right of legislative regulation of rates exists such regulation must be fair, reasonable and not oppressive; otherwise it will be invalid: *Des Moines v. Des Moines Water Works Co.*, 64 N. W., 269.

The rule in respect to due process of law, stated in a general way, is that every one is entitled to the protection of those fundamental principles of truth and justice which lie at the basis of all our civil and political institutions: *Trustees of Griswold College v. Davenport*, 65-633.

The statutory provision requiring that, before action can be brought against an officer for wrongful levy of a writ of attachment upon property of a person other than the one against whom the writ is directed, notice of the rights of such owner must be given to the officer in writing, is not unconstitutional as depriving the party of his property without due process of law: *Cheadle v. Guittar*, 68-680.

A person may be deprived of property by his own negligence. Also lapse of time may prevent recovery by reason of the statute of limitations, and existing remedies may be taken away and new ones given, all without infringement of due process of law: *Ibid.*

The meaning of the phrases "due process of law," "due course of law," and "course of the common law," discussed: *Mason v. Messenger*, 17-261.

Partition proceedings: Judgment in proceedings for partition of property, brought against a defendant served by publication only, *held* not void as depriving the defendant of his property without the benefit of judicial proceedings according to the course of the common law: *Ibid.*

The provisions authorizing a sale of property in a partition suit when division thereof cannot be made are not unconstitutional as depriving the party of his property without due process of law. When parties by contract assume the relation of tenants in common, the law fixes their respective rights, one of which is that the property may be divided, and, if necessary, sold to effect that object: *Metcalf v. Hoopingardner*, 45-510.

The provisions of certain statutes of the territories of Iowa and Wisconsin providing a method for partition of a tract of land known as the "half-breed tract," *held* unconstitutional as providing for proceedings to determine private rights in a method not in accordance with due course of law: *Reed v. Wright*, 2 G. Gr., 15.

Claim for improvements on land: Rev., §§ 2274, 2275, allowing a money judgment for the value of improvements to be rendered against the owner of the land in proceedings under the occupying-claimant law, *held* unconstitutional under this section: *Childs v. Shower*, 18-261.

The statute giving to any one who drains mineral land, even though without consent of the owner, one-tenth of the mineral taken therefrom, *held* not unconstitutional as depriving the owner of his property without due process of law; *Ahern v. Dubuque, etc., Mining Co.*, 48-140.

The short foreclosure of mortgages on real property by notice and sale without action in court, as at one time allowed, *held* unconstitutional as depriving the owner of his property without due process of law: *Thatcher v. Haun*, 12-303.

But under the constitution of 1846, which did not contain the clause relating to due process of law, *held*, that such a proceeding was not unconstitutional: *Boyd v. Ellis*, 11-97.

A proceeding in equity should be classed as due process of law: *McLane v. Leicht*, 69-401.

Proceedings in rem against lost goods and property, and against estray animals and against unknown owners of property, have been too long sanctioned to be now called in question as not being due process of law: *Kinney v. Roe*, 70-509.

License: A permit to sell intoxicating liquors for lawful purposes, granted in pursuance of statutory provisions not requiring the payment of any compensation for such privilege, is not property in such sense that the party having the permit cannot be deprived thereof without due process of law: *State v. Schmidtz*, 65-556.

Other cases: The provision authorizing double damages in an action against a railway company for stock killed through failure of the company to maintain a fence along its track does not interfere with the constitutional protection to property nor deprive the company of its property without due process of law: *Mackie v. Central R. of Iowa*, 54-540.

A statute providing for the forfeiture of property by reason of the use thereof in the manufacture or sale of intoxicating liquors contrary to law, such forfeiture to take place, however, upon an adjudication of the court and proceedings to abate the premises as a nuisance, is not unconstitutional: *Craig v. Werthmueller*, 78-598.

Proceedings by fence-viewers being provided for by statute in the exercise of the authority of the legislature to provide special tribunals to determine the rights of the parties under proper rules applicable thereto, such provisions are not unconstitutional although they may operate to deprive the party of his property without the intervention of judicial proceedings or without allowing him a trial in court upon the facts passed upon by such fence-viewers: *McKeever v. Jenks*, 59-300.

While it is true as a general rule that the title to real property of one who dies intestate vests immediately in his heirs, yet such descent is regulated by statute, and it is competent for the legislative power to impose upon the property inherited such conditions as it shall deem proper to enact: *Van Aken v. Clark*, 82-256.

The provisions of the amendment to the federal constitution guarantying due process of law, etc., have no application to the state courts except as expressly so provided, but, in the absence of such express provision, are merely restrictions upon the federal government: *Boyd v. Ellis*, 11-97.

Contempt: A person cannot be imprisoned in pursuance of an order of the court in an investigation authorized by statute, but unusual or unheard of at common law or in the known and regular course of the administration of the law through courts of justice: *Ex parte Grace*, 12-208.

But the power to punish for contempt without the intervention of a jury is not in violation of due process of law: *Ibid.*

Statutory provisions not in accord with the common law, but more nearly like the proceeding in chancery, by which a debtor may be subjected to examination as to whether he has property, not exempt from execution, liable to the satisfaction of an execution against him, and may be imprisoned for contempt in not turning over such property to apply on such indebtedness under order of the court, are not in violation of the requirements of this section as to due process of law: *Eikenberry v. Edwards*, 67-619.

Taxation: The state has the taxing power, and where property is taken in the valid exercise of that power, the owner is not deprived of it without due process of law: *Allen v. Armstrong*, 16-508.

But there are indispensable prerequisites to the exercise of the power which cannot be omitted without violating the constitutional provision as to due process of law: *Ibid.*

Therefore, *held*, that Rev., § 784, making a tax deed conclusive of the regularity of all prior proceedings, was unconstitutional: *McCready v. Sexton*, 29-356, 390.

Due process of law means ordinary judicial proceedings in court, and has no reference whatever to the taxing power. Where property is taken in the due exercise of that power, it is not taken without due process of law: *Stewart v. Board of Supervisors*, 30-9.

Therefore, *held*, that the constitutional provision was not violated by a law authorizing local taxes in aid of railways: *Ibid.* But see *Hanson v. Vernon*, 27-28, and cases cited.

The exercise of the taxing power in accordance with the law of the state whereby assessments are levied upon property is not the taking of property without due process of law: *Yeomans v. Riddle*, 84-147.

At no time, nor in any court, nor before any tribunal or officer, has the tax payer the right to have a constitutional jury impaneled for the purpose of determining the rate of the levy of taxes or the assessable value of his property: *Davis v. Clinton*, 55-549; *Dunleith, etc., Bridge Co. v. Dubuque County*, 55-558.

Where an exemption from taxation is provided for by the general laws of the state, any subsequent legislature is not thereby deprived of the power to alter the law and remove the exemption: *Slimer v. Jacobs*, 62-392.

The rule that the owner of property shall not be deprived of it arbitrarily and without due process of law renders it illegal to enforce against such property a tax as to the assessment and levy of which the property owner has had no notice nor opportunity to be heard in pursuance of general statute or special provision: *Gatch v. Des Moines*, 63-718.

Property cannot be taken for the payment of taxes under a special assessment made without notice to the property owner and opportunity to be heard, at least where the assessment is made under a statute or ordinance providing for assessment according to benefits: *Trustees of Griswold College v. Davenport*, 65-633.

So *held* where a city council was charged with the duty of determining whether any part of the costs of constructing a sewer should be paid out of the general revenues of the city, and if so, what part, the balance being payable by special assessment upon abutting property: *Ibid.*

Courts are not necessary to taxation; and it is generally agreed that property taken for non-payment of taxes is not taken without due process of law, if the tax payer is afforded an opportunity to be heard in relation to the tax, though it be only before the officers clothed with power to assess: *Ibid.*

If there is any ground upon which a tax can be upheld which has been levied without notice to the tax payer and without an opportunity to be heard, it is incumbent upon the party claiming its validity to show that the notice would have been unavailing: *Auer v. Dubuque*, 65-650.

Want of notice of assessment and levy are objections which cannot be urged as against an action to recover costs of construction of a sewer under statutory provisions: *Dittoe v. Davenport*, 74-66.

See, further, as to taxation, notes to art. 1, § 18, and art. 3, § 30.

Eminent domain: A party cannot complain that his property has been taken for public use without due process of law when it has been taken for a highway by proper proceedings, and his claim for damages has been disallowed, and he has not taken the proper steps to have the disallowance corrected on appeal: *Tharp v. Witham*, 65-566.

Proceedings for the assessment of damages for the construction of underground drains by one land owner through the property of an adjoining land owner, authorized by 20 G. A., ch. 188, *held* unconstitutional because not providing for an appeal from the action of the township trustees in case no damages are awarded. The non-assessment of damages by such trustees cannot be regarded as due process of law unless there is a right to appeal to a tribunal where such assessment can be made by a constitutional jury: *Fleming v. Hull*, 73-598.

As to taking private property for public use, see, further, notes to § 18 of this article.

And in general, as applicable to this section, see notes to §§ 10 and 21 of this article.

Rights of persons accused. SEC. 10. In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him; to have a copy of the same when demanded;

to be confronted with the witnesses against him; to have compulsory process for his witnesses; and to have the assistance of counsel.

Criminal prosecution: A proceeding before a magistrate or court in the name of the city, accusing defendant of the violation of a city ordinance, is a criminal prosecution: *Davenport v. Bird*, 34–524; *Jaquith v. Royce*, 42–406; *State v. Vail*, 57–103; *Columbus City v. Cutcomp*, 61–672; *Creston v. Nye*, 74–369.

An inquest of lunacy is not a criminal proceeding and the party whose sanity is questioned has not the right to a jury trial: *In re Bresee*, 82–573.

Speedy trial: The requirement of this section as to a speedy trial must be construed in a reasonable manner, and if the defendant demands a jury trial in a superior court after the jurors have been discharged, the case should be continued to the next term: *Creston v. Nye*, 74–369.

What is a speedy trial must depend upon the circumstances of the case. An adjournment of a criminal case for more than three days will not necessarily be invalid: *State v. Valure*, 64 N. W., 280.

Trial by jury: A defendant has the right to trial by jury at some stage of the proceedings in a criminal prosecution: *Creston v. Nye*, 74–369.

The right to trial by jury is not infringed by the provisions of § 11 of this article, that a certain grade of offenses may be tried summarily: See notes to that section.

See, further, as to jury trial, notes to preceding section.

Waiver of trial by jury: As the defendant in a criminal prosecution may waive a statute enacted for his benefit, he may consent that the trial proceed with a jury of less than twelve jurors, and will be bound by the verdict rendered: *State v. Kaufman*, 51–578; *State v. Grossheim*, 79–75.

But defendant cannot waive a jury trial and consent to a trial by the court, there being no provision by which the court, without a jury, has jurisdiction to try the issues of fact in a criminal case: *State v. Carman*, 63–130; *State v. Larrigan*, 66–426; *State v. Douglass*, 65 N. W., 151; not even in a prosecution by indictment for a misdemeanor: *State v. Tucker*, 65 N. W., 152.

Right to be confronted with witnesses: Dying declarations may be received according to the rules of evidence without violating the provision of this section giving the accused the right to be confronted with witnesses against him: *State v. Nash*, 7–347, 377.

But this right is violated by allowing the introduction of a certificate of a notary public as to the fact that a bill of exchange has been protested, when such fact is material in establishing the guilt of the accused: *State v. Reidel*, 26–430.

Where a deposition has been taken on behalf of the prisoner and filed in court, it is not error to allow the prosecuting attorney to read the same in evidence, it not appearing that the prisoner sought or desired to withdraw it from the files before the trial of the case: *Nash v. State*, 2 G. Gr., 286.

Depositions of witnesses, or minutes of evidence on preliminary examinations, are not admissible as against a defendant in a criminal prosecution: *State v. Collins*, 32–36.

The statutory provisions as to method of determining the question of sanity by commissioners are not in violation of this section: *Black Hawk County v. Springer*, 58–417.

The admission in evidence upon a criminal trial of testimony of witnesses given in a preliminary examination, which witnesses have since died, is not in violation of the right to be confronted by witnesses under this section: *State v. Fitzgerald*, 63–268.

As defendant is entitled to be confronted with the witnesses against him, if a witness for the prosecution is subpœnaed from another state and the costs are afterwards taxed to the prosecution, such witness should be paid by the county for the distance traveled outside the state as well as in it: *Westfall v. Madison County*, 62–427.

The provision about being confronted by witnesses is not applicable to proceedings before a grand jury: *State v. Smith*, 74–580.

This privilege of defendant has no reference to record evidence, and in a prosecution for bigamy record evidence of the first marriage of the defendant may be introduced: *State v. Matlock*, 70–229.

And in a prosecution for the unlawful sale of intoxicating liquors the monthly statements of a pharmacist, filed in the county auditor's office as required by law, are admissible in evidence against him: *State v. Smith*, 74–580.

The provision in the constitution of the United States and in the statutes of the state that defendant shall not be required to be a witness against himself is not violated by introducing in evidence reports made by him as required by law, and properly made matter of record, which tend to show violation of law on his part: *Ibid.*

Waiver of privilege: The right to be confronted by the witnesses against him is personal with the accused and not jurisdictional, and may be waived; so *held* in a case where, by consent of the accused, a written transcript of the testimony taken on a former trial was read to the jury in place of recalling the witnesses themselves: *State v. Polson*, 29–133; *State v. Fooks*, 65–452.

Compulsory attendance of witness: Defendant does not have the absolute right to have a witness who is in the penitentiary or in jail produced as a witness: *State v. Kennedy*, 20–372; nor to have a witness present who is beyond reach of compulsory process: *State v. Yetzer*, 66 N. W., 737.

When indictment necessary. SEC. 11. All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath,

without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger.

[As to indictment and the number of grand jurors, see amendment inserted as [sec. 15] at the end of art. 5.]

Jurisdiction of justice of peace: Where there is nothing appearing affirmatively on the face of the proceedings before a justice of the peace showing want of jurisdiction, defendant cannot complain that the evidence shows an offense which can only be prosecuted on indictment: *State v. Sipult*, 17–575.

A justice of the peace has jurisdiction over violations of city ordinances. The jurisdiction of the mayor in such cases is not exclusive: *Jaquith v. Royce*, 42–406.

When a defendant is tried before a justice for an offense of which the justice has not jurisdiction the district court does not acquire jurisdiction on appeal from the judgment of the justice: *State v. Carpenter*, 23–506.

The provisions allowing a trial in a summary manner before a justice of the peace or other officer, in cases here specified, is not in violation of the right of trial by jury guarantied in § 9, and in art. 2 of the ordinance of 1787. The right to one jury trial is all that is guarantied, and that is preserved by allowing an appeal to the district court, where the cause is to be tried anew by a jury: *Zelle v. McHenry*, 51–572; *State v. Beneke*, 9–203.

The corresponding section of the Const. of 1846, *held* prospective, and applicable not only to offenses cognizable by justices of the peace at the time of its adoption, but also to those which should thereafter be made so cognizable: *Bryan v. State*, 4–349.

Extent of punishment in justices' courts: Where an ordinance provided that, in case of non-payment of a fine, defendant should be imprisoned for a period of time longer than that authorized by the constitution for imprisonment on conviction in an inferior court, *held*, that the ordinance was not void, but that it might be enforced up to the limit of the punishment allowed: *Keokuk v. Dressell*, 47–597.

The provision of statute authorizing the imposition of a fine of one hundred dollars, and the imprisonment of defendant until the fine and costs are paid, does not make the case one which is beyond the jurisdiction of the justice, although the length of imprisonment for non-payment of fine and costs may extend beyond thirty days. The imprisonment for non-payment of fine and costs is not a punishment for the crime, but a method of enforcing payment: *Albertson v. Kriechbaum*, 65–11.

The provision that only offenses which are punishable by fine not exceeding one hundred dollars, or imprisonment not to exceed thirty days, are within the jurisdiction of a justice, is not violated by allowing different offenses of the same kind by the same person to be joined in one information before a justice of the peace, although the aggregate of the fines imposed under such information may exceed one hundred dollars: *Jackson v. Boyd*, 53–536.

Right of appeal: If defendant gives proper notice of appeal there is nothing which the justice can do which will deprive the party of his right to such appeal, and therefore the justice cannot be liable in damages for refusing an appeal, or committing the party without appeal, whatever may be his motives: *Anderson v. Park*, 57–69.

There is no provision for a review of errors of law only, in a criminal case tried before a justice of the peace. The provisions as to writs of error in civil cases are not applicable in criminal prosecutions: *Part of Lot, etc., v. State*, 1–507; *State v. Flinn*, 51–133.

The provisions of Rev., § 5094 (not now in force), giving the state as well as defendant the right of appeal from the judgment of a justice of the peace in a criminal trial, *held* not in conflict with the provision saving to defendant the right of trial by jury on appeal from a justice of the peace in a criminal case: *State v. Tait*, 22–140.

But these provisions were held to be unconstitutional as being in conflict with the following section, providing that "no person shall, after acquittal, be tried for the same offense:" *State v. Van Horton*, 26–402.

Unauthorized indictment: An indictment for an offense, the punishment for which does not exceed a fine of one hundred dollars or imprisonment for thirty days, is not authorized, and all proceedings thereunder are unauthorized and void. So *held* in case of an indictment for illegal sale of intoxicating liquors: *Walters v. State*, 5–507; *State v. Kœhler*, 6–398; *State v. Shawbeck*, 7–322.

Conviction of lesser offense: Where defendant is indicted for an indictable offense, but is found guilty of a lower degree thereof, or of an offense necessarily included in the offense for which he is indicted, he may be convicted and punished for such lower offense, although exclusive jurisdiction thereof is given to a justice: *State v. Shepard*, 10–126; *State v. Jarvis*, 21–44; *Orton v. State*, 4 G. Gr., 140.

So, under an indictment for larceny, charging the value of the goods stolen to be more than twenty dollars, the district court has jurisdiction to try defendant and sentence him, if found guilty, although the jury find the value of the goods to be less than that amount: *State v. Stingley*, 10–488.

And the question whether the offense is triable as a misdemeanor or a felony is to be determined by the value of the property alleged in the indictment or information, and not by the value ascertained by the verdict of the jury: *State v. Church*, 8–252.

Indictable offenses: The provisions of

this section that offenses of a certain grade shall be prosecuted only on indictment by a grand jury does not limit the power of the legislature to prescribe the form and constituent elements of an indictment, and authorize one as good and sufficient which would not be so at common law: *State v. Bevans*, 37-178.

The number of the grand jury is left to legislative regulation: *State v. Ostrander*, 18-435.

The provision of the federal constitution, that no person shall be held to answer for an infamous crime except upon indictment, is applicable alone to the exercise of power by the federal government, and is not a restriction upon the legislative authority of the state: *State v. Wells*, 46-662.

Offense committed before adoption of constitution: The provisions of this section *held* inapplicable, under art. 12, § 3, to an offense which was committed prior to the adoption of the constitution: *State v. Axt*, 6-511.

Twice tried; bail. SEC. 12. No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great.

What constitutes jeopardy; dismissal of prosecution: A dismissal of the proceedings, either by the court or by the district attorney, after the trial has commenced, unless in the cases authorized by statute, will operate as an acquittal: *State v. Callendine*, 8-288.

The fact that material witnesses for the prosecution cannot be called because their names are not indorsed on the indictment will not be such a peremptory or controlling cause as to justify the court in dismissing the case: *Ibid.*

But where, in an indictment for burglary, the defendant is also charged with assault with intent to commit murder, merely for the purpose of bringing the case within the aggravated punishment provided by statute, the charge of such assault may be dismissed after defendant has entered a plea of former acquittal of such assault: *State v. Struble*, 71-11.

Continuance: Where the names of the witnesses for prosecution have not been indorsed on the indictment defendant may be required to consent to their introduction under statutory provisions, notwithstanding the defect, or consent to a continuance; but he has no right to ask a verdict nor insist on the procedure as a former jeopardy when again put on trial: *State v. Parker*, 66-586: *State v. Falconer*, 70-416.

Discharge of jury: The fact that in the exercise of sound discretion the jury is discharged for failure to agree does not entitle defendant to be released as having been once in jeopardy: *State v. Vaughan*, 29-286.

Where, after all the evidence had been introduced, the judge, on receipt of a telegram announcing the sickness of his wife, adjourned court for a few days to go home; and subsequently, by telegram, adjourned court over the term, *held*, that there was sufficient cause to warrant the adjournment, and that defendant could not, on a subsequent trial, plead previous jeopardy: *State v. Tatman*, 59-471.

Defective verdict: Although defendant is put upon trial on a good indictment, yet if the verdict is so defective that no judgment can be rendered upon it, it may be set aside and defendant again put on trial. The defective verdict will not amount to an acquittal: *State v. Redman*, 17-329; *State v. Arthur*, 21-322.

Verdict set aside: After conviction which is set aside on motion nominally in arrest of judgment but in fact upon a statutory ground for new trial such as that the verdict is contrary to the evidence, defendant is not entitled to discharge on the ground of having once been put in jeopardy: *State v. Bowman*, 62 N. W., 759.

Punitive damages, when awarded for a criminal act, do not constitute a punishment in such sense that one who should also be criminally punished for the same act would be twice put in jeopardy for the same offense: *Hendrickson v. Kingsbury*, 21-379: *Hauser v. Griffith*, 71 N. W., 223.

New trial on appeal from justice's court: A defendant, acquitted before a justice of the peace in a prosecution for a crime over which the justice has jurisdiction, cannot be again tried upon an appeal to the district court, taken by the state, even though the statute may so authorize. (See Rev., § 5094, since repealed): *State v. Van Horton*, 26-402.

Offense against state and city: An ordinance of a city punishing an act which is punishable under the laws of the state is not, on that account, void. The act may be punished under both without violating any constitutional principle: *Bloomfield v. Trimble*, 54-399.

Fraudulent acquittal or conviction: Where the former conviction or acquittal was procured by the defendant by collusion or fraud, it may be treated by the state as a nullity and disregarded, and a new prosecution commenced: *State v. Green*, 16-239.

In such case the burden of proof is on the state to establish the fraud: *State v. Maxwell*, 51-314.

Conviction of lower degree: Where a defendant has been convicted of a lower degree of the offense than that for which he was indicted and put upon trial, such conviction operates as an acquittal of the degree for which he was tried, and if he appeal and secure a reversal, he cannot be again tried for any higher offense, or higher degree of the offense, than that of which he was convicted: *State v. Tweedy*, 11-350; *State v. Clemons*, 51-274.

Nor will the fact that defendant, being put on trial a second time for the higher degree or higher crime, is again found guilty of only the lower degree or lower crime of which he was previously convicted, render the error in improperly putting him on trial

a second time error without prejudice: *State v. Tweedy*, 11-350.

Second trial for higher crime: A conviction or acquittal of a minor offense will not bar prosecution for a greater one, or for a higher degree of the same offense, except that an acquittal of manslaughter will bar an indictment for murder. Therefore, *held*, that a conviction for assault and battery would not bar a prosecution for assault with intent to do great bodily injury: *State v. Foster*, 33-525.

A former conviction or acquittal of the crime of petit larceny will bar a subsequent prosecution for larceny from the person, although the first offense is a misdemeanor triable before a justice of the peace, and the other is a felony: *State v. Gleason*, 56-203.

Where same act constitutes two crimes: A previous prosecution for an act as constituting one crime will not bar a subsequent prosecution for a greater crime committed in the same act. For instance, a prosecution for assault will not bar a subsequent prosecution for a riot committed in the same transaction: *Scott v. United States*, Mor., 142.

Proof of the commission of an assault upon one person will not sustain an indictment for assault upon two; therefore, under a subsequent indictment for assault and battery upon one of the persons named, defendant could not show, under a plea of former conviction or acquittal, a judgment under an indictment for assault upon two. But under an indictment for an assault by two, either one may be acquitted either on a joint or on a separate indictment: *State v. McClintock*, 8-203.

Where the same essential element is included in two or more crimes, as, for instance, larceny in the crimes of larceny from a dwelling-house in the night-time, and robbery, a previous conviction or acquittal for one of such crimes will bar a subsequent prosecution for the other. In the prosecution for the one crime the defendant might be convicted of the included crime: *State v. Mikesell*, 70-176.

Where defendant was tried and acquitted upon an indictment for uttering and publishing as true a certain false and forged note and chattel mortgage, *held*, that he could not be subsequently prosecuted upon an indictment for obtaining property under false pretenses in exchange for such note and mortgage, when the transactions relied on in both indictments were the same: *State v. Stone*, 75-215.

Where a statute as to the punishment of the crime of nuisance in maintaining a place for the sale of intoxicating liquors was amended, and it was provided that the former law should remain in effect as to offenses already committed, *held*, that the prosecution of the offense under an indictment charging its commission during a time previous to the amendment of the statute was not barred by an acquittal under an indictment charging the commission of the same offense during a time subsequent to the amendment of the statute: *State v. Webber*, 76-686.

Right to Bail: Where a bail bond recited that defendant was charged with "feloniously killing two persons," *held* that, as the offense was not necessarily punishable with death, bail might be allowed, and the bond was not void: *State v. Klingman*, 14-404.

This section applies to §§ 4177, 4178 of Code of '73; and a party charged with murder in the second degree is entitled to bail notwithstanding the language there used: *State v. Hufford*, 23-579.

Habeas corpus. SEC. 13. The writ of *habeas corpus* shall not be suspended or refused when application is made as required by law, unless, in case of rebellion or invasion, the public safety may require it.

Military restraint: A return by respondent that he is a military officer of the United States holding the person restrained for the crime of desertion, awaiting trial by court-martial, is sufficient, and the prisoner will be remanded: *Ex parte Anderson*, 16-595.

A soldier while on furlough is not within the jurisdiction of the military authorities, and may be arrested by civil authority without conflict: *Ex parte McRoberts*, 16-600.

Appeal: The right of appeal in such proceedings exists only as provided by law; and *held*, under Revision, an appeal did not lie from an order by a judge of the supreme court: *In re Curley*, 34-184. (But this right is now given by the Code.)

Military. SEC. 14. The military shall be subordinate to the civil power. No standing army shall be kept up by the state in time of peace; and in time of war no appropriation for a standing army shall be for a longer time than two years.

Quartering soldiers. SEC. 15. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war except in the manner prescribed by law.

Treason. SEC. 16. Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.

Bail; punishments. SEC. 17. Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.

Rev., § 3276, making officers of municipal corporations personally liable for failure to levy tax to pay off judgments, etc., *held* not to impose an unusual fine nor an excessive punishment upon such officers: *Porter v. Thomson*, 22-391.

Penalties provided in particular cases by statute, *held*, not excessive within the provisions of this section: *Martin v. Blattner*, 68-286; *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

A statute fixing a severe penalty for a crime which may be trivial or otherwise according to circumstances, is not unconstitutional: *State v. Teeters*, 66 N. W., 754.

Bail required in a certain case, *held* not excessive: *State v. Wells*, 46-662.

Eminent domain. SEC. 18. Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

Eminent domain: Power to take private property for public use is one of the sovereign powers of the state. It is a necessary attribute of sovereignty in the state, rather than any reserved right in the grant of property to the citizen: *Noll v. Dubuque, B. & M. R. R. Co.*, 32-66.

It is within the power of the general assembly to make the same property subservient to different public uses, or even to take from one public use and devote it to another. Therefore, *held*, that it was not unconstitutional to provide by statute for the laying out of streets across railroad depot grounds: *Chicago, M. & St. P. R. Co. v. Starkweather*, 66 N. W., 87.

But this doctrine is subject to the modification that the power to take the property for the second public use when such an appropriation would supersede or defeat the first one must be given expressly or by necessary implication. *Ibid.*

Statutes delegating the right of eminent domain to corporations are in derogation of common right and are not to be extended by implication but are to be strictly construed. *Creston Waterworks Co. v. McGrath*, 89-502.

Public use: This section prohibits, by implication, the taking of private property for anything but a public use. The question as to when public exigencies demand the exercise of the power is solely a question for the legislature, upon whose determination the courts cannot sit in judgment; but the question as to what is such a public use as to justify the exercise of the power is for the courts. However, if a public use be declared by the legislature, the courts will hold such use public, unless it manifestly appears from the provisions of the act that it can have no tendency to advance or promote such public use: *Bankhead v. Brown*, 25-540.

Therefore, *held*, that 11 G. A., ch. 127, authorizing the taking of private property for the establishment of a private road, was unconstitutional: *Ibid.*

But a provision for condemnation of right of way for a public highway or railway to mineral land, the right of way thus condemned to be public, is not unconstitutional as taking private property for private use: *Phillips v. Watson*, 63-28.

Private property cannot be properly taken for a private way. Therefore, *held*, that where the sole purpose of a road which was attempted to be laid out as a public highway was to give more convenient outlet to the owner of a tract of land, who already had an outlet by public highway, the taking of a right of way over the lands of another for such purpose was unconstitutional: *Richards v. Wolf*, 82-358.

The act of 20 G. A., ch. 188, authorizing proceedings by which land owners might acquire the right, upon payment of the damages assessed, to lay underground drains through the property of an adjoining land owner in other cases than those where by reason of the wet or swampy condition of the land the public health requires it, *held* unconstitutional as providing for the taking of private property for other than public use: *Fleming v. Hull*, 73-598.

The taking of private property by a railroad company for a right of way is the exercise of a public right, and the duty imposed by the state in such case of providing crossings for the owner whose land is taken is a public duty, with reference to which the board of railroad commissioners has jurisdiction: *State v. Mason City & Ft. D. R. Co.*, 85-516.

What constitutes a taking; security: The object of the provision of this section requiring security for compensation is to protect and compensate the owner in case his land is entered upon pending proceedings for an assessment of its value, and if, after final determination thereof and before payment of the damages assessed, the occupancy of the land is abandoned, the owner's title and right of possession can be extinguished only by the payment of the damages assessed. Although entry is permitted at once upon security being given, such right of possession is but temporary and permissive until the compensation finally determined is paid. In case of failure to perform the obligation and pay such compensation, no right is acquired by the giving of security; and if the security given becomes unavailing to the land owner by way of compensation when the damages are finally assessed, possession can be retaken by him unless such compensation is paid: *White v. Wabash, St. L. & P. R. Co.*, 64-281.

Assessment by jury: An assessment of the damages by a jury of three persons appointed as provided by Rev. § 1065, *held* an assessment by jury as required by the provisions of this section: *Des Moines v. Layman*, 21-153. But see, *contra*, *Sigafoos v. Talbot*, 25-214.

A party cannot be deprived of his property without provision for a judicial proceeding either originally or by appeal: *Ragatz v. Dubuque*, 4-343.

Benefits: Under this section benefits to accrue to the property from the proposed improvement are not to be estimated: *Deaton v. Polk County*, 9–594; *Israel v. Jewett*, 29–475.

Benefits to result from the construction of the improvement as well as from the use thereof are to be excluded: *Frederick v. Shane*, 32–254; *Bland v. Hixenbaugh*, 39–532.

Therefore, in an action for damages for breach of warranty by reason of the existence of a right of way upon land conveyed, the advantages resulting from the construction of a railway upon such right of way cannot be taken into account: *Koestenbader v. Peirce*, 41–204.

Advantages to the land resulting from its better drainage will not be taken into account in estimating the deterioration in value by reason of the taking of a portion thereof for the right of way of a railroad: *Britton v. Des Moines O. & S. R. Co.*, 59–540.

The statutory provisions allowing damages to one whose property is injured by reason of change of grade in an adjoining street, do not relate to the taking of private property for public use, and the benefits resulting to the property from such change may be taken into account: *Stewart v. Council Bluffs*, 84–61.

Taxation; not taking private property for public use: Legitimate taxation is not the taking of private property for public use without compensation within the constitutional provision. The protection afforded the citizen by the government is the just compensation required: *Morford v. Unger*, 8–82.

There are limits beyond which the legislative discretion cannot go in subjecting property to taxation; and while the judiciary will not interpose in every case of injustice or of oppression, yet this power may be so unreasonably and unjustly exercised as to amount to the taking of private property for public use without compensation: *Ibid.*

Taxation of agricultural lands, etc., for municipal purposes: An unreasonable extension of the limits of an incorporated city, by which land needed only for agricultural purposes is brought within the city limits and subjected to municipal taxation, without deriving any advantage from municipal control, is unconstitutional under this section, even though it is provided that it shall be assessed only at its value for agricultural purposes: *Ibid.; Langworthy v. Dubuque*, 16–271; and see *Taylor v. Waverly*, 63 N. W., 347.

But where property included within an extension of the city limits was situated within three hundred feet of the old limits, and used for pork house, etc., and the streets of the city were laid out and worked to and beyond the property, and the surrounding property was laid out into lots and blocks, *held*, that the proceeding by which it was brought within the city limits was not unconstitutional: *Butler v. Muscatine*, 11–433.

The doctrine of *Morford v. Unger*, *supra*, with reference to the extension of city limits, is also applicable to lands used for agricultural purposes within the corporate limits as originally laid out: *Buell v. Ball*, 20–282; *Deeds v. Sanborn*, 22–214.

Where a tract of land within the extended limits of the city lay near one of the principal streets, and was so surrounded as to receive current benefits from the expenditures made by the city as well as permanent increase in value, *held*, that it was liable to municipal taxation: *O'Hare v. Dubuque*, 22–144; and see *Perkins v. Burlington*, 77–553.

Lands included within an extension of the city limits, but used exclusively for agricultural purposes, and not affected by the current expenditures of the city, nor being enhanced in value by being within the corporate limits, *held* not subject to municipal taxation: *Deiman v. Fort Madison*, 30–542.

But property which is held for the opportunity of bringing it into the market as city lots is not entitled to exemption. So, if land within the city limits is used for the purpose of dwellings or business, it cannot ordinarily be claimed to be exempt from taxation, even though the city fails to open or improve the streets leading thereto: *Durant v. Kaufman*, 34–194.

Municipal taxes from which farm property within the corporate limits is exempt are those levied exclusively for municipal purposes, such as to support the police, lights, water, sewerage, fire department, local government, etc.; but such property is not exempt from taxes voted by the city in aid of a railway, which might be levied as effectually upon property not included within the city: *Sears v. Iowa Midland R. Co.*, 39–417.

A tract of one hundred acres within city limits, used only for farming purposes and having no houses thereon, but against which streets abut, and adjoining an addition laid out in lots and partially improved, *held* subject to city taxes: *Brooks v. Polk County*, 52–460.

The fact that land included within the city limits is used for agricultural purposes will not render the taxation thereof illegal, it not being shown that it is used exclusively for such purposes, nor that it does not derive such benefit from the expenditure of municipal taxes that it is properly subject to such taxation: *Tubbesing v. Burlington*, 68–691.

The doctrine under which agricultural land included within city limits is exempt from municipal taxation is not applicable to railway property under the statutory provisions for the taxation thereof: *Illinois Cent. R. Co. v. Hamilton County*, 73–313.

For other cases where facts were considered as determining whether the property was properly subject to municipal taxation or not, see *Fulton v. Davenport*, 17–404; *Davis v. Dubuque*, 20–458; *Hershey v. Muscatine*, 22–184; *Deeds v. Sanborn*, 26–419; *Burlington & M. R. Co. v. Spearman*, 12–112.

Cities should not be allowed, against the will of property owners, to include within their limits lands which are not needed for city purposes, and are not benefited by being within the corporation, for the purpose of deriving revenues therefrom: *Evans v. Council Bluffs*, 65–238.

Such land should be allowed to be severed from the city upon proper proceedings being taken, and upon such severance should not be held liable for indebtedness of the city

incurred during its attachment to the city: *Ibid.*

Moneys and credits of non-resident: The statutory provision subjecting to taxation in this state moneys and credits belonging to a non-resident, but under the control and management of an agent in the state, *held* not in conflict with the provisions of this section, as providing for the taking of private property for public use without compensation: *Hutchinson v. Board of Equalization*, 66-35.

Compensation: While the right to take private property for public use is conditioned upon compensation, the taxing power is not thus limited: *Stewart v. Board of Supervisors*, 30-9.

A special participation in the benefits of a particular tax on the part of the tax payer has nothing to do with the right to impose the tax. The identical revenue collected by the special tax may be used for purposes from which the tax payers of whom it was received derive no benefit: *Warren v. Henly*, 31-31.

Not subject to judicial control: The taxing power being one of the sovereign powers vested in the general assembly by the people, and not being limited either expressly or by implication, the judicial power possesses no authority to limit it: *Ibid.*

Tax in aid of railroad: The imposition of a tax to aid in the construction of a railroad is an exercise of the taxing power for a public purpose though it be for a private profit, and statutory provisions authorizing such taxation *held* not unconstitutional: *Stewart v. Board of Supervisors*, 30-9; *McGregor & S. C. R. Co. v. Birdsall*, 30-255: *Bonnifield v. Bidwell*, 32-149; *Renwick v. Davenport & N. W. R. Co.*, 47-511; *Snell v. Leonard*, 55-553; *Chicago, M. & St. P. R. Co. v. Shea*, 67-728.

Under a former statute, with similar provisions, such taxation was *held* to be illegal: *Hanson v. Vernon*, 27-28; *King v. Wilson*, 1 Dillon, 555.

Just compensation: The provision as to "just compensation" means that the person whose property is taken for public use shall have a *fair equivalent in money* for the injury done him by such taking. This compensation should be precisely commensurate with the injury sustained from the taking of the property: *Sater v. Burlington, etc., Plank Road Co.*, 1-386; *Henry v. Dubuque & P. R. Co.*, 2-288.

It is only when the damages are properly assessed that they are to be paid or secured. The compensation must be ascertained in the mode prescribed by law: *McCrory v. Griswold*, 7-248.

A payment of the damages assessed is a condition precedent to the right to enter upon and take the land under the right of way act, and if the property is taken before such compensation is made, the owner may proceed as against a trespasser: *Henry v. Dubuque & P. R. Co.*, 10-540; *Daniels v. Chicago & N. W. R. Co.*, 35-129.

The provision allowing the taking of property pending an appeal in the condemnation proceeding is not unconstitutional: *Peterson v. Ferreby*, 30-327.

If no damages are claimed, or if the appraisers appointed in the manner prescribed by law ascertain that the claimant is entitled to no damages, and no appeal is taken from their decision, the property owner cannot enjoin the condemnation of his property on the ground that compensation has not been made: *Connolly v. Griswold*, 7-416; *Dunlap v. Pulley*, 28-469; *Abbott v. Board of Supervisors*, 36-354; *Tharp v. Witham*, 65-566.

And if his claim is rejected as not filed in proper time, he cannot resist the opening of the highway on the ground that he has not had just compensation. *Dunlap v. Pulley*, 28-469; *Abbott v. Board of Supervisors*, 36-354.

Compensation for property taken for public purposes is guarantied by this section of the constitution only where the usual and ordinary forms and remedies provided by law are adopted by the person desiring to obtain such compensation, and if he fails to avail himself of such remedies he cannot be permitted to complain. So *held* where a land owner whose property was taken for a public highway, and whose claim for damages was disallowed by the board of supervisors, failed to appeal from such action: *Tharp v. Witham*, 65-566.

Public highways: There is no doubt of the power of the legislature to provide for the condemnation of right of way for public highways upon notice by publication in newspapers or posted notices. The proceeding is in the nature of a proceeding *in rem* in which the court acquires jurisdiction of the property which is the subject of the adjudication: *Wilson v. Hathaway*, 42-173.

When the location of a road over a party's land is changed, he should be allowed compensation for the additional damage caused by the change and no more: *Israel v. Jewett*, 29-475.

Vacation of highway: Where a person has only the right to the use of a highway which pertains to the general public, he cannot maintain an action for damages by reason of its vacation. Such proceeding is not the taking of private property within the constitutional provision: *Ellsworth v. Chickasaw County*, 40-571; *Brady v. Shinkle*, 40-576.

Streets: The use of land for a street is a public purpose for which it may be taken upon rendering compensation, and the court will not review the decision of the city authorities holding that the public interests require a street to be established: *Cherokee v. Sioux City & I. F. Town Lot, etc., Co.*, 52-279.

Use of streets by railway: The legislature may authorize the use of the streets of a city by a railway company for the construction and operation of its road without compensation being made to the city or to adjoining property owners. But the city may have property acquired for other authorized purposes which could not be so taken without compensation being made: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24-455.

The statutory provision authorizing a city to grant to railroads right of way through its streets upon condition that compensation for damages be paid to abutting property owners is twofold in its objects: first, to secure to the city control over its streets; and

secondly, to secure to property owners compensation for damages. And in a particular case, *held*, that although the first object could not be accomplished, owing to prior rights having been conferred by another railroad upon the company in question, nevertheless, the second object being a proper one, the statute would be upheld as constitutional: *Drady v. Des Moines & Ft. D. R. Co.*, 57-393.

Improvement of streets: Levying a tax upon property abutting upon a street to pave such street is not an exercise of the right of eminent domain, but of the power of taxation: *Warren v. Henly*, 31-31.

The compensation provided by statute for damages resulting from changing the grade of a street is not intended as compensation for the taking of private property for public use, and the constitutional provision as to compensation has no application: *Meyer v. Burlington*, 52-560.

Right of way for railways: When a right of way is, by statute, taken for the use of a railway company, it is in contemplation of law taken by the state for public use and not simply for the private use of the company in whose behalf it is taken, although the compensation be paid by the company. The easement thus acquired is in the nature of a grant from the state to the company for the uses and purposes fixed by law, and when the company fails to carry out the purposes of the grant the state may transfer the easement to another company upon compensation being made to the former company: *Noll v. Dubuque, B. & M. R. R. Co.*, 32-66.

Destruction of buildings to stop fires: An ordinance of a municipal corporation authorizing the destruction of buildings to stop the spread of fire is not an exercise of the power of eminent domain, but a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity: *Field v. Des Moines*, 39-575.

A city cannot exercise the right of eminent domain except when that power is expressly given: *Ibid.*

Mill-dams: The statute allowing the taking of private property for the purpose of erecting mill-dams is constitutional: *Burnham v. Thompson*, 35-421.

Prohibitory liquor law: The legislature being the supreme judge and guardian of the public health, safety, happiness and morals, may, if the traffic in certain property is deemed detrimental or dangerous to these public interests, prohibit it, and declare that property illicitly held, kept, or used, shall be forfeited and destroyed, and such a provision is not one authorizing the taking of private property for public use: *Santo v. State*, 2-165, 216.

The provision making the judgment for the wrongful sale of intoxicating liquor a lien upon the property in which the business is carried on is not the taking thereof for public use. *Polk County v. Hierb*, 37-361.

The present statute prohibiting the sale of intoxicating liquors cannot be said to unlawfully deprive the owner of such property of his property without compensation, at least unless it be made to appear that such property was owned by such party prior to the enactment of the prohibitory statute of 1855: *McLane v. Leicht*, 69-401.

Imprisonment for debt. SEC. 19. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud; and no person shall be imprisoned for a military fine in time of peace.

The statutory provision for imprisonment of debtor for contempt in refusing to turn over property, etc., is not in conflict with this section: *Ex parte Grace*, 12-208. (But such provision is in conflict with § 10 of this article. See same case in notes to that section.)

The provision by which one convicted of illegal selling of intoxicating liquors may be imprisoned to enforce payment of a fine imposed and costs of the prosecution is not unconstitutional under this section. The costs in such case are not a debt but a penalty even though they go to the officers of the court and others: *Boyer v. Kinnick*, 90-74.

Petition. SEC. 20. The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives, and to petition for a redress of grievances.

Attainder; ex post facto law; obligation of contract. SEC. 21. No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed.

EX POST FACTO LAWS.

Defined: An *ex post facto* law is one which makes acts innocent when done criminal, or if criminal when done aggravates the crime, increases the punishment or reduces the measure of proof. The term applies only to criminal laws. Retrospective or retroactive laws are not in conflict with the constitution of the United States or this constitution, except when they interfere with vested rights: *State ex rel. v. Squires*, 26-340.

An *ex post facto* law is a retroactive criminal law, and a statute which does not make an act already done a crime, although it subjects the person guilty thereof to liability, cannot be *ex post facto: Polk County v. Hierb*, 37-361.

A change in the law by which petit larceny was made cognizable only before a justice of the peace and not upon indictment, *held* not to affect the statute as to the punishment of larceny so as to prevent punishment, under the statute, of grand larceny committed prior to the taking effect of the change: *State v. Church*, 8-252.

Where the elements of the crime are not affected by change in the statute, but only the amount of punishment, it is not necessary that the indictment show whether the crime was committed before or after such change: *State v. Reylets*, 74–499.

Retroactive laws: A constitutional provision is not to be given a retrospective operation unless the words employed show a clear intention that it shall have that effect: *Burlington Ferry Co. v. Davis*, 48–133.

Retrospective laws, as distinguished from *ex post facto* laws, are not necessarily unconstitutional: *Iowa R. Land Co. v. Soper*, 39–112, 117.

Legislation operating retrospectively, to render binding and effective contracts before invalid, is not in conflict with the constitution. It does not impair the obligation of contracts, nor, as between the parties thereto, disturb vested rights: *Tilton v. Swift*, 40–78.

Legalizing acts: In order to a rightful exercise of the legislative power to cure a defective proceeding, the legislature must have possessed the power to authorize the result by a prior legislative enactment; but it is not necessary that it might have accomplished the result in the precise manner adopted to cure the defect; nor is the power of the legislature to cure defective proceedings limited by the fact that but for such curative act the defective proceeding would be wholly invalid or inoperative: *State ex rel. v. Squires*, 26–340.

The power of the legislature to cure defective or irregular proceedings is not limited by the fact that but for such curative act the proceedings would be wholly inoperative; and *held*, that where the legislature has the power to authorize by general law the levy and collection of special taxes by municipal corporations without limitation as to rate, the legislature may rightfully legalize levies made in excess of lawful authority: *Iowa R. Land Co. v. Soper*, 39–112.

As the legislature might provide by law that a conveyance should impart constructive notice without acknowledgment, so it may by a curative act provide that defective acknowledgments to instruments, which have been duly recorded, shall be legal and valid, notwithstanding such defects; but such curative acts cannot affect rights of third parties which have vested before their passage: *Brinton v. Seevers*, 12–389; *Newman v. Samuels*, 17–528; *Ferguson v. Williams*, 58–717.

But *held* that such acts legalizing conveyances defectively acknowledged were applicable only to conveyances which, without acknowledgment, would have been valid, but not to instruments (as, for instance, deeds of married women under the law as it then stood) which, unless acknowledged in the manner required, were void: *Heaton v. Fryberger*, 38–185.

A retrospecive law authorizing an act, or curing defects in a proceeding which the legislature might have previously authorized, is not unconstitutional: *McMillen v. County Judge*, 6–391: *Huff v. Cook*, 44–639.

Therefore an act legalizing the establishment of a county road is not unconstitutional: *Bennett v. Fisher*, 26–497.

A valid curative act cannot be passed where the act to be cured is prohibited by the constitution: *Mosher v. Independent School Dist.*, 44–122.

While retrospective legislation may be proper under some circumstances, *held*, that a retrospective statute validating a deed by the chairman and clerk of the board of supervisors of a county, conveying to a railroad company certain swamp land belonging to the county, together with a cash indemnity to which the county was entitled from the United States, such cash indemnity not being included in the original contract of sale of said swamp land to the railroad company which the electors had approved as required by law, was invalid: *Palmer v. Howard County*, 45–61.

A law which purports to legalize an act of a municipal corporation which it had no lawful power to do, not in mere matter of form but in substance, is invalid. The legislature cannot legalize the passage of an ordinance which it could not specifically authorize in the first instance: *Independent School Dist. v. Burlington*, 60–500.

As the legislature cannot amend corporate charters by special laws, it cannot legalize the passage of an ordinance not authorized by such charter: *Stange v. Dubuque*, 62–303.

But an act legalizing the action of a county superintendent in attaching territory of one district to another, not justified by the circumstances so as to render the original action valid under the statute, may be passed, as no general statute could be made applicable, and therefore the constitutional prohibition against special statutes does not apply: *Independent Dist. v. Independent Dist.*, 62–616.

Where a note individual in form was in fact given in payment for insurance of school buildings, and was signed by the officers of the school district with their individual names, affixing the words "President," "Secretary" and "Director," *held*, that the statute legalizing all contracts made by school officers for insurance of school buildings, as well as evidence of indebtedness therefor, and relieving the members from their individual liability, was not applicable: *American Ins. Co. v. Stratton*, 59–696.

If the legalizing act is invalid it will not affect the former act: *Lytle v. May*, 49–224.

A legalizing act merely operating to carry out the intent of the parties, which would otherwise be defeated by formal defects, as valid. So *held* as to a statutory provision legalizing conveyances of real estate by foreign executors: *Smith v. Callaghan*, 66–552.

Impairing Obligation of Contracts.

Re-enactment of statute: The obligation of contracts is not impaired by the re-enactment of a statute in existence at the time the contract was made: *Bridgman v. Wilcut*, 4 G. Gr., 563.

Subsequent contracts: A law enacted prior to the formation of a contract cannot be objectionable as impairing the obligation thereof: *Davis v. Bronson*, 6–410.

Negotiability of bills and notes: A statute attaching the attributes of negotiability to instruments which have not been previously negotiable, and thereby cutting off defenses as against an innocent holder, cannot be made applicable to contracts already in existence: *Griffey v. Payne*, Mor., 68; *Harlan v. Seigler*, Mor., 39.

But a provison that, in case of assignment of such an instrument, suit may be brought in the name of the assignee instead of that of the original payee for the assignee's benefit, merely affects the remedy and may be applicable to assignments already made: *Harlan v. Seigler*, Mor., 39.

Although the legislature is not prohibited from changing the remedy on a contract or the rules of evidence that shall be brought to bear upon it, yet a statute authorizing the defense of fraud to be set up as against a *bona fide* holder for value of a negotiable instrument acquiring the same before maturity can only apply to contracts made after the taking effect of the statute: *Temple v. Hays*, Mor., 9.

Divorce: A legislative divorce is not a law impairing the obligation of contracts: *Levins v. Sleator*, 2 G. Gr., 604.

The decision of a court declaring a contract void is not unconstitutional as impairing the obligation of contracts. So *held* in case of bonds issued by counties in payment for stock in railroad companies, where the bonds were held void: *McClure v. Owen*, 26–243; *Railroad Co. v. McClure*, 10 Wall., 511.

Change in judicial decision cannot be allowed to render invalid contracts which, when made, were held to be lawful: *Thompson v. Lee County*, 3 Wall., 327.

Where a state has passed no law nor put any construction upon any law impairing the obligation of a contract then in existence, but changes its policy or construction of the state constitution in regard to a class of contracts, the validity of any one of that class of contracts will be determined by the law then in force: *Railroad Co. v. McClure*, 10 Wall., 511.

Effect of sealed instrument: The statute allowing the want of consideration to be pleaded in an action on a sealed instrument does not impair the obligation of the contract when applied to an instrument executed out of the state, where the common-law rule making the seal conclusive as to the consideration is in force: *Williams v. Haines*, 27-251.

A state bankrupt law does *prima facie* impair the obligation of contracts, and is unconstitutional and void, except in case the debtor and creditor are domiciled in the state where the discharge is granted and the law was in existence at the time when the contract was made: *Collins v. Rodolph*, 3 G. Gr., 299.

The appearance of a non-resident creditor for the purpose of opposing the discharge of the insolvent will not constitute a waiver or abandonment of his exemption from the effect of such discharge: *Ibid.*

A discharge under a state insolvent law does not discharge a debt due to a citizen of another state, no matter where the debt was contracted or made payable, unless the creditor has appeared and submitted to the jurisdiction of the court by becoming a party or claiming a dividend: *Hawley v. Hunt*, 27–303.

Legal Tender Notes: The act of congress making United States notes a legal tender in payment of debts previously contracted is constitutional: *Wilson v. Tribleeock*, 23–331; *Richmond v. Dubuque & S. C. R. Co.*, 33–422, 503.

Attachment: The actual service of an attachment upon property creates a real lien thereon which nothing subsequent can destroy but the dissolution of the attachment. Therefore, *held*, that an act exempting property of persons in the military service of the United States from levy or sale was not applicable to property already levied on by attachment: *Hannahs v. Felt*, 15–141; *Ryan v. Wessels*, 15–145.

Existing vendor's lien: The right to a vendor's lien, arising by virtue of contract of sale and conveyance without express reservation thereof, at a time when such lien was recognized, *held* not to be affected by subsequent legislation declaring that such a lien should not be recognized or enforced after conveyance by the vendee, unless reserved by conveyance, mortgage or other instrument duly executed and recorded: *Jordan v. Wimer*, 45–65.

License: A license to sell intoxicating liquors is not a contract between the state and the person licensed, giving the latter vested rights, but is a mere temporary permit issued in the exercise of the police power, and subject to the direction of government, which may revoke it as it deems fit. Such power of revocation may be exercised by a municipal corporation where the license has been issued by it under authority of law: *Columbus City v. Cutcomp*, 61–672.

Dower: The widow's right to dower becomes vested at the time of the husband's death and cannot be changed by a subsequent statute: *Burke v. Barron*, 8–132.

A statute increasing the extent of the widow's dower right cannot be made to operate against the purchaser of land conveyed by the husband before the taking effect of the statute: *Davis v. O'Ferrall*, 4 G. Gr., 168.

Liability of wife's property: A change in the statutory provisions relating to the liability of the wife's property for debts of the husband which diminished such liability *held* not applicable to a contract entered into before such change took place, although proceedings were not commenced nor the property seized until after the change: *Schmidt v. Holtz*, 44–446.

Taxation; change in law: A change in the revenue law as to the mode of enforcing a tax does not impair the obligation of contracts: *Haskel v. Burlington*, 30–232.

A statute as to the method of enforcing the payment of taxes may be made applicable to taxes delinquent at the time of its passage, as well as those to become delinquent in the future: *Sully v. Kuehl*, 30–275.

Exemption from taxation is not a vested right, and may be taken away at the will of the legislature: *Shiner v. Jacobs*, 62–392.

Land dedicated to city for public use: Where, by dedication, the title to property is vested in a city for special public purposes, the legislature cannot authorize the city to sell the land in violation of such trust: *Warren v. Mayor of Lyons City*, 22–351.

Right to taxes not earned: A statute providing that taxes voted in aid of a railway company should not be collected until the company complied with the conditions entitling it to receive such tax from the treasurer, *held* not to interfere with vested rights: *Harwood v. Case*, 37–692.

Penalties on railroad taxes: While penalties already accrued upon a tax in aid of a railroad cannot be taken away by the repeal of the statute under which the tax is voted, there is no vested right in the continuance of such penalties: *Tobin v. Hartshorn*, 69–648.

Corporate franchises; police regulation of: While the legislature may not deprive a corporation of rights vested under its charter without infringing an implied contract between the state and the corporation that there shall be no change in the laws existing at the time of incorporation which shall render the use of the franchise more burdensome or less remunerative, yet a corporation cannot complain of the passage of statutes in the nature of police regulations, although they may operate to its disadvantage: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41–297.

Therefore, *held*, that the provision making railway companies absolutely liable for damages caused by fires set out by their engines was not unconstitutional as applied to railways previously chartered: *Ibid.*

The statute (21 G. A., ch. 76) requiring foreign corporations doing business within the state to file articles of incorporation with the auditor, and receive permits to transact business, and subjecting them to penalties for doing business without such permit, *held* constitutional: *Goodell v. Kriechbaum*, 70–362.

By statute the legislature has reserved the right to repeal and amend articles of incorporation of corporations organized after its enactment, and also to impose such conditions upon the enjoyment of the franchise as the general assembly may deem necessary for the public good. Therefore, *held*, that a street-car company could properly be subjected to further burdens in regard to the paving of its tracks than those imposed by law at the time its franchise was granted: *Sioux City Street R. Co. v. Sioux City*, 78–367; *S. C.*, 78–742.

The state has not by any legislation delegated to municipal corporations the powers reserved to the legislature by this statutory provision: *Ibid.*

Railroad corporations are subject to legislative control as to the rates of fare and freight unless protected by their charters: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

Right of municipal corporation in taxes levied: A municipal corporation acquires a vested right in taxes already levied under existing laws, which cannot be destroyed by a subsequent statute releasing property from the payment of such taxes: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633; *Dubuque v. Illinois Cent. R. Co.*, 39–56; *Dubuque v. Chicago, D. & M. R. Co.*, 47–196; *Burlington v. Burlington & M. R. R. Co.*, 41–134; *Independent Dist. v. Independent Dist.*, 62–616.

Laws affecting the remedy: The legislature has the power to change the remedy and remedial proceedings upon contracts, and as to them the law in force when the remedy is pursued prevails unless there be statutory provisions preserving the old remedy. So *held* as to the method of sale under a judgment recovered after the change in the law as to appraisement in an action upon a contract made before such change: *Babcock v. Gurney*, 42–154; *Holland v. Dickerson*, 41–367.

A citizen has no vested rights in a particular course of practice in the courts nor to a particular remedy. Remedies are within the control of the legislature, subject to the restriction that the obligation of contracts shall not be impaired and all remedy for the enforcement of rights under a contract shall not be taken away. Retrospective laws which affect pending suits and give a new remedy, modify an existing one, or remove the impediment in the way of a legal proceeding, are not unconstitutional: *Tilton v. Swift*, 40–78.

Statutes may constitutionally be enacted changing the remedy existing when the contract is made, if they preserve existing remedies in substance and with integrity, and do not destroy or embarrass the remedies existing when the contract is made so as substantially to defeat the rights of a creditor. A law merely limiting the amount of the costs recoverable does not so affect the remedy as substantially to defeat the rights of creditors. So *held* in regard to a statute limiting the amount of attorneys' fees taxable as costs upon foreclosure of school-fund mortgages: *Kossuth County v. Wallace*, 60–508.

A law which, by construction, gives a new and more efficient remedy upon a contract does not impair its obligation: *Van Metre v. Wolf*, 27–341.

A change of statutory provisions relating to the production of testimony may be made applicable to suits before commenced: *Wormley v. Hamburg*, 40–22.

A retrospective statute, regulating the remedy but not affecting subsequent rights, is constitutional: *Johnson v. Semple*, 31–49.

So *held* as to a statute rendering a motion for a new trial in an action at law unnecessary in order to bring before the supreme court, on appeal, the question as to the sufficiency of the evidence to support the judgment: *Ibid.*

Proceedings are to be had in accordance with the statutes in force, even though they may have been passed subsequently to the commencement of the action: *Ballard v. Ridgley*, Mor., 27; *Ingham v. Dooley*, Mor., 28.

Rules of practice of a court cannot be regarded as vested rights which may not be modified by a subsequent statute. A party has no vested right as to a particular course of practice: *Brotherton v. Brotherton*, 41–112.

A change in the statute regulating the place of bringing action to foreclose a mortgage, by which the action is authorized to be brought in the county where suit on the note may be maintained instead of in the county where the property is situated, is not such a change in the remedy as to be unconstitutional as to mortgages previously executed: *Equitable L. Ins. Co. v. Gleason*, 56-47.

An amendment to the statute in reference to changes of venue, *held* not to affect any vested right as applied to actions pending: *Eikenberry v. Edwards*, 71-82.

The right to a particular mode of procedure is not a vested right which the state cannot change or abolish: *Drake v. Jordan*, 73-707.

Redemption and appraisement laws: An appraisement law providing that property levied upon under execution can only be sold at a certain proportion of the appraised value is unconstitutional as applied to contracts entered into before its passage. The law in force when the contract is made necessarily forms a part of the contract and fixes the rights and obligations growing out of it, and any substantial change in the law of the remedy which shall lessen its efficiency or burden it with any new conditions and restrictions comes within the constitutional prohibition: *Rosier v. Hale*, 10-470; *Landis v. Abrahams*, 11-284.

A law depriving a judgment debtor of the right to have his real property appraised, or sold subject to redemption, is not unconstitutional as impairing vested rights: *Holland v. Dickerson*, 41-367; *Babcock v. Gurney*, 42-154.

But a change in the law regulating judicial sales, by which appraisement is allowed in cases where the right before did not exist, is unconstitutional in its application to sales under judgments rendered upon contracts made before the change in the law took effect: *Olmstead v. Kellogg*, 47-460.

A law giving a right of redemption from sales under foreclosure of mortgage in cases where it did not exist at the time when the mortgage was made impairs the obligation of the contract and is unconstitutional: *Malony v. Fortune*, 14-417.

Valuation and appraisement laws in general are not applicable to sales under judgments existing prior to their enactments: *Burton v. Emerson*, 4 G. Gr., 393.

A judgment is not a contract within the provisions of the constitution prohibiting legislation impairing the obligation of contracts, and valuation and appraisement laws may be applicable to a judgment for costs rendered before the enactment of such laws: *Sprott v. Reid*, 3 G. Gr., 489.

Valuation laws, so far as they do not impair the obligation of the contract, are applicable to executions under a judgment upon a contract entered into before they take effect: *Coriell v. Ham*, 4 G. Gr., 455.

Exemptions: The act exempting property purchased with pension money from liability for indebtedness arising under contracts previously entered into is unconstitutional as impairing the obligation of contracts: *Foster v. Byrne*, 76-295.

A statute which undertakes after contracts are entered into to exempt property from seizure for their satisfaction which, but for the exemption created would have been liable to seizure, is unconstitutional: *Willard v. Sturm*, 65 N. W., 847.

Statutes of limitation relate to the remedy and not to the substance of the contract, and may therefore be made to operate upon prior contracts without impairing their obligations: *Maltby v. Cooper*, Mor., 59.

If a substantial remedy is left for the enforcement of the contract, the fact that by the statute of limitations a particular action for its enforcement is completely barred will not render such a statute unconstitutional as to existing contracts: *Ibid.*

The statute of limitations found in Code of '51 and Rev. of '60, *held* not unconstitutional as impairing the obligation of contracts, since the right to sue upon accrued causes of action was not cut off: *Campbell v. Long*, 20-382.

It is not competent for the legislature by a statute of limitations to take away all remedies existing upon causes of action: *Kennedy v. Des Moines*, 84-187.

Therefore, *held*, that a statute requiring claims against cities for personal injuries to be presented within ninety days after the injury would not be considered as applicable to a claim for injuries received more than ninety days before the statute took effect: *Ibid.*

Extending time for defending: Laws which merely change the remedy are not liable to constitutional objection, although the remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult; but in altering the remedy the obligation of the contract must not be so impaired that the rights of the party in it are in effect destroyed or the remedy rendered hardly worth pursuing by reason of being burdened with new restrictions. Therefore, *held*, that statutory provisions giving a defendant who should be in the military service of the United States, or of the state, the right to a continuance in actions pending or afterwards to be brought, did not impose on the remedy such new burdens or restrictions as to impair its benefit, and that therefore such restriction was not unconstitutional as to contracts already existing: *McCormick v. Rusch*, 15-127.

Extending time for bringing suit: A law extending the time within which action may be brought upon a contract is not unconstitutional: *Edwards v. McCaddon*, 20-520.

Nor is an act extending the time within which a defendant might answer in proceedings to foreclose a mortgage open to such objection: *Holloway v. Sherman*, 12-282.

Prohibition of action upon judgment: The statutory provision prohibiting an action upon a judgment within fifteen years from its rendition, without leave of the court, *held* not unconstitutional when applied to judgments rendered before its passage, as impairing their obligation. Although it takes away one remedy, it leaves a complete one: *Watts v. Everett*, 47-269.

No vested right in pending action: The bringing of a suit vests no right to a particular decision, and the case must be determined on the law as it stands when the judgment is rendered: *Huff v. Cook*, 44-639.

Right to hold office: Therefore, where a woman elected to the office of county superintendent was held unqualified to fill that office, and subsequently a law was passed providing that no person so elected should be deprived of office by reason of sex, *held*, that on appeal taken after the passage of the act the statute would be given effect, and the judgment of the court below was reversed: *Ibid.*

In the absence of any express constitutional provision it is competent for the legislature to abolish an office, increase or decrease the duties devolving upon an incumbent, and add to or take away from his salary. It is also within the legislative power to add to or change the method in which vacancies may occur, and make such changes applicable to existing offices and those holding them: *Bryan v. Cattell*, 15–538.

Resident aliens. SEC. 22. Foreigners who are, or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property, as native-born citizens.

This section does not change the common-law rule as to non-resident aliens, and a resident alien, to take advantage of its provisions, must be such at the time of descent cast: *Stemple v. Herminghouser*, 3 G. Gr., 403. But the section does not restrict the power of the legislature to extend the same privileges to other foreigners than those named (per Cole, J.): *Purczell v. Smidt*, 21–540; and it confers upon resident aliens the right to *transmit* as well as to *acquire* real property by descent (per Dillon, J.): *Ibid.*

The statute which limits the descent and distribution of real property to non-resident alien widow and heirs is not in conflict with this provision of the constitution, which applies only to foreigners who were at the time of its adoption or who thereafter became residents of this state. Such statute does not affect the title of the resident alien but only the rights of the non-resident widow and heirs: *Easton v. Huott*, 64 N. W., 408.

Slavery. SEC. 23. There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.

Imprisonment for contempt for the violation of an injunction, under the prohibitory liquor law, against maintaining a nuisance, is not involuntary servitude, within the prohibition of the constitution: *Martin v. Blattner*, 68–286.

Reservation of rents. SEC. 24. No lease or grant of agricultural lands, reserving any rent or service of any kind, shall be valid for a longer period than twenty years.

Rights retained. SEC. 25. This enumeration of rights shall not be construed to impair or deny others, retained by the people.

The theory of the constitution is that all powers not vested in the general assembly remain in the state: *State ex rel. v. Wapello County*, 13–388.

"There is, as it were, back of the constitution, an unwritten constitution which guaranties and well protects all the absolute rights of the people" (per Beck, J.): *Hanson v. Vernon*, 27–28, 73. But see *Stewart v. Board of Supervisors*, 30–9, 18, and note to art. 3, § 1.

Intoxicating liquors. SEC. 26. No person shall manufacture for sale, or sell, or keep for sale, as a beverage any intoxicating liquors whatever, including ale, wine and beer. The general assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall thereby provide suitable penalties for the violation of the provisions hereof.

[By the nineteenth general assembly (Joint Res. No. 8) the foregoing proposed amendment was agreed to, as having already been in due form agreed to by the previous general assembly (18 G. A., Joint Res. No. 8). By 19 G. A., ch. 172, in pursuance of a previous statute authorizing submissions of constitutional amendments at special elections this proposed amendment was submitted to the people at a special election to be held June 27, 1882, and by proclamation of the governor, dated July 29, 1882, it was declared adopted.]

For irregularities in entering this amendment upon the journals of the eighteenth general assembly, and a want of agreement between the amendment as there entered and as subsequently agreed to by the nineteenth general assembly, this amendment, as submitted to and adopted by the people, did not become a part of the constitution: *Koehler v. Hill*, 60–543; *State v. Johnson*, 61–504.

ARTICLE 2.—RIGHT OF SUFFRAGE.

Electors. SECTION 1. Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six

months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.

[By proper legislative action a proposed amendment striking the word "white" from the first line of this section, as it originally stood, was submitted to the electors at the general election in 1868 and adopted.]

What elections: The term "elections" as here used, means the choice of persons for public offices made by the people, and does not apply to votes of the electors in district townships in the levy of a school tax at a district meeting: *Seaman v. Baughman*, 82-216.

The registry laws: This section confers upon persons possessing the qualifications mentioned therein the right to vote, which right cannot be impaired by legislation. But the legislature may regulate the exercise of the right, and provide a method for determining whether persons proposing to vote possess the required qualifications. A registry law is therefore not unconstitutional: *Edmonds v. Banbury*, 28-267.

Residence: Where a student entered the state university at Iowa City while still a minor, making his father's home in another county his residence during vacations, and receiving support from his father, without having any definite intention of making Iowa City his home after graduation, *held*, that he was not a resident of the county in which he was attending school, so as to be entitled to vote there on coming of age: *Vanderpœl v. O'Hanlon*, 53-246.

If a person has actually removed to another place with the intention of remaining there for an indefinite time, and making it a place of fixed residence or present domicile, it is to be regarded as his domicile, notwithstanding he may entertain a floating intention to return at some future time. The place where a married man's family resides is generally to be considered his domicile: *State v. Groome*, 10-308.

Persons in military service: A statute providing that citizens of the state in the military service should have a right to vote at all elections authorized by law, whether at the time of voting they were within or without the state, and providing for the opening of polls and holding of elections wherever a regiment or battalion of Iowa troops was stationed, *held* not unconstitutional: *Morrison v. Springer*, 15-304.

Holding office: Only those who are qualified electors are capable of holding office unless by special provision: *State ex rel v. VanBeek*, 87-569.

Privileged from arrest. SEC. 2. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such elections, going to and returning therefrom.

From military duty. SEC. 3. No elector shall be obliged to perform military duty on the day of election, except in time of war or public danger.

Persons in miltary service. SEC. 4. No person in the military, naval, or marine service of the United States shall be considered a resident of this state by being stationed in any garrison, barrack, or military or naval place or station within this state.

Insane. SEC. 5. No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.

Ballot. SEC. 6. All elections by the people shall be by ballot.

General election. [SEC. 7.] The general election for state, district, county and township officers shall be held on the Tuesday next after the first Monday in November.

[By proper action of the legislature (19 G. A., Joint Res. No. 12, and 20 G. A., Joint Res. No.13) the foregoing section was submitted to vote of the electors at the general election in 1884, and by them adopted.]

ARTICLE 3.—OF THE DISTRIBUTION OF POWERS.

Departments of governments. SECTION 1. The powers of the government of Iowa shall be divided into three separate departments: the legislative, the executive and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

This section does not prohibit the judicial department from passing upon the legality of the acts of the officers of the several departments; as, for instance, to compel the

auditor of state by *mandamus* to issue a warrant for payment of salary of an officer, where the auditor has refused to act: *Bryan v. Cattell*, 15–538.

The charter of a city, conferring upon the mayor judicial authority, is not in conflict with this section. The mayor of the city is not a part of the government of the state of Iowa: *Santo v. State*, 2–165, 220.

Provisions for proceedings in court for the annexation of contiguous territory to a city, *held* not in conflict with this section: *Burlington v. Leebrick*, 43–252, 258.

See, further, notes to following sections.

LEGISLATIVE DEPARTMENT.

General assembly. SECTION 1. The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives; and the style of every law shall be—"*Be it enacted by the General Assembly of the State of Iowa.*"

General scope of power: In ascertaining the power of the legislature under the constitution, the courts look not at what the instrument authorizes but at what is prohibited: *McMillen v. County Judge*, 6–391.

The legislature possesses sovereign legislative power over all subjects except such as are prohibited to it in the state constitution: *Boyd v. Ellis*, 11–97.

The general assembly possesses all legislative authority not delegated to the general government or prohibited by the constitution. The constitution, as applied to the legislative department, is a limitation and not a grant of power: *Morrison v. Springer*, 15–304. And see *State v. Hockett*, 70–442.

The rule in construing the state constitution is that the state legislature may exercise all rightful legislative powers which are not expressly prohibited or necessarily included in the prohibited powers: *Purczell v. Smidt*, 21–540.

All the legislative authority inherent in the people is vested in the general assembly, and the legislative power of the general assembly is therefore supreme, except as it is bounded by the limitations written in the constitution: *Stewart v. Board of Supervisors*, 30–9, 18.

The power of legislation is vested in general terms in the general assembly, and thereby there is conferred upon that body the authority to legislate upon all rightful subjects, unless prohibited from so doing expressly or by clear implication: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

It is an elementary principle that legislative power is primarily plenary, and that state constitutions are not grants of but limitations upon that power, and he who would challenge a legislative enactment must be able to specify a particular provision of the constitution which deprives the legislature of the power to pass the act: *State ex rel. v. Forkner*, 62 N. W., 772.

It is the duty of the court to reconcile the statutes with the constitution when it can be done without doing violence to the language of either, and in all cases of doubt the doubt must be resolved in favor of the constitutionality of the statute: *Ibid.*

It is likewise true that the constitution is a shield which the state in its sovereign capacity has provided for the protection of public and private rights; that unrestricted legislation is inimical to both public and private rights; and that it is the duty of the court to see that no legislation is enacted which improperly intrenches upon the constitutional rights of the whole people and of the individual or of his property: *Ibid.*

And see notes to art. 1, § 25.

While the constitution vests the legislative power in the general assembly and it may legislate on all subjects not prohibited by express words or necessary implication, yet under the constitutional provision placing the educational interests of the state under the management of a board of education authorized to legislate and make all needful rules and regulations in relation to schools, *held*, that the power to legislate on such subject was thereby denied to the legislature: *District T'p v. Dubuque*, 7–262.

Legislative divorces: Under the terms of the organic law providing "that the legislative power of the territory shall extend to all rightful subjects of legislation," *held*, that the territorial legislature was invested with as much power as is usually vested in an unrestrained legislative body, and that such power included the power to grant legislative divorces, even where the grounds for divorce were not such as to entitle the party to relief in the courts: *Levins v. Sleator*, 2. G. Gr., 604. (But under this constitution art. 3, § 27, legislative divorces cannot now be granted.)

The taxing power being one of the sovereign powers of the state vested in the general assembly, and not being limited by the constitution as to the kinds or classes of property subject to taxation, the general assembly has general legislative authority to subject all kinds and classes of property to taxes for all proper purposes: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

It being within the proper scope of legislative authority to pass general laws for the levy and assessment of taxes, the passage of a general law curing and legalizing the levy and collection of taxes irregularly or illegally levied is also an exercise of legislative authority and not an encroachment upon judicial power: *Iowa R. Land Co. v. Soper*, 39–112.

Taxation is an attribute of sovereignty. It is one of the powers necessary to the life and existence of the state, and, unless restricted in the fundamental law, the power of the state is full and ample to subject all species of property within its limits to taxes for all lawful purposes: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

Property cannot be taxed until authority

therefor is conferred by the legislature, and the manner of imposing taxes authorized by law must be followed: *Chicago, R. I. & P. R. Co. v. Davenport*, 51-451.

No property can be taxed until the law-making power authorizes and requires it to be done, and if it has been authorized only in a particular way, that alone can be pursued. It cannot be done in another: *Tallman v. Treasurer of Butler County*, 12-531.

Without express legislative enactment or constitutional provision the property of the people cannot be subjected to taxation: *Appanoose County v. Vermilion*, 70-365.

Judicial revision of legislative action: Where the legislative authority reserves to itself the power to act under certain circumstances, the existence of such circumstances is to be determined by it, and a court cannot call into question the propriety of its action: *Miners' Bank v. United States*, 1 G. Gr., 553.

The judicial branch of the government has no power to determine whether an act of the legislative branch is wise or unwise, nor has it power to declare an act void except in cases where the statute in question is plainly, palpably, and without doubt, repugnant to some provision of the constitution: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

And see notes to art. 5, § 1.

Delegation of legislative power: The legislative authority being vested in the general assembly, it is not competent for it to submit the question whether an act shall become a law to the vote of the people. Therefore, *held*, that a statute providing for a submission to vote, in each county, of the question as to whether a prohibitory liquor law should be in force in that county, was unconstitutional, and that the act itself was in force throughout the state without such submission: *Santo v. State*, 2-165, 203; *State v. Beneke*, 9-203.

So the license act of 1857, containing a provision that the prohibitory law of 1855 should not be repealed in any county except by a vote of the people of that county, was held unconstitutional: *Geebrick v. State*, 5-491.

Held, also, that a statute providing for the submission to vote in each county of the question whether a previous prohibitory liquor law allowing the sale of wine and beer should be repealed within that county, and the sale of wine and beer prohibited, was unconstitutional: *State v. Weir*, 33-134.

Held, also, that a statute which prohibited stock from running at large, and was a valid enactment in itself, but contained a section providing that the act should not be enforced in any county until adopted by the electors of that county, was in force throughout the state without any such submission to vote, the provision for a submission being unconstitutional: *Weir v. Cram*, 37-649.

But a statute allowing the county judge to submit to vote in each county the question whether sheep and swine should be allowed to run at large was held not unconstitutional as being a delegation of legislative power, inasmuch as the law itself was in force without such vote, and the people of each county were simply authorized to adopt its provisions as a police regulation: *Dalby v. Wolf*, 14-228.

The mulct law which provides that on certain conditions as to petition for consent and action of the city council the penalties of the prohibitory law as to selling intoxicating liquors shall be suspended in cities where such consent is given is not unconstitutional as a delegation of legislative authority to the people or particular electors. In so far as such statute affects the general prohibitory law it does so only by implication and such fact is not made to depend upon the vote of the people. It is the statute itself and not the action of the people or the council under such statute which affects the prohibitory law. The objection based on the delegation of legislative authority is met if the act as it comes from the legislature and receives the governor's approval becomes a complete and perfect enactment and the act is not invalid if it depends upon the action of the people simply in order to determine the limits of its operation: *State ex rel v. Forkner*, 62 N. W., 772.

Although the general assembly cannot delegate to the people the right to make or repeal a law, it has not been held that the state cannot delegate legislative power to municipal corporations within proper bounds. *State v. King*, 37-462.

It is not unconstitutional to provide, in an act enlarging the boundaries of a city, that it shall only take effect after its acceptance by the city council: *Morford v. Unger*, 8-82.

A statute empowering cities of a certain grade to establish superior courts by vote is not unconstitutional as providing for an exercise of legislative power by the people. The statute itself is in force without any vote, but simply confers upon cities an option to be exercised by vote to avail themselves of the power conferred: *Lytle v. May*, 49-224.

The statute conferring upon cities authority to be exercised at their discretion is not void as delegating legislative power. Such statute confers authority which the city may exercise or not, as it chooses: *Des Moines v. Hillis*, 55-643.

The voting of aid to railways by a county is not in derogation of the legislative power vested in the general assembly: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

While the legislature cannot delegate legislative power to the courts or to any other authority, yet proceedings for the annexation of territory to a municipal corporation may be authorized before a court: *Ford v. North Des Moines*, 80-626.

Where by statute the assent of a majority of the voters of a city or a town to the erection of water-works was required, *held*, that the council might, by ordinance, first determine the conditions involved in the proposition submitted to vote: *Taylor v. McFadden*, 84-262.

Sessions. SEC. 2. The sessions of the general assembly shall be biennial, and shall commence on the second Monday in January next ensuing

the election of its members; unless the governor of the state shall, in the meantime, convene the general assembly by proclamation.

As to the powers of the general assembly at an extra session, see note to art. 4, § 11.

Representatives. SEC. 3. The members of the house of representatives shall be chosen every second year, by the qualified electors of their respective districts, on the second Tuesday in October, except the years of the presidential election, when the election shall be on the Tuesday next after the first Monday in November, and their term of office shall commence on the first day of January next after their election, and continue two years, and until their successors are elected and qualified.

[By the amendment [sec. 7] inserted at the end of art. 2 the election now occurs uniformly in November.]

Eligibility. SEC. 4. No person shall be member of the house of representatives who shall not have attained the age of twenty-one years; be a male citizen of the United States, and shall have been an inhabitant of this state one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the county or district he may have been chosen to represent.

[By an amendment to the constitution properly proposed (17 G. A., Joint Res. No. 5; 18 G. A., Joint Res. No. 6), and adopted by vote of the electors at the general election in 1880, the words "free white" were stricken from the second line of this section.]

Senators. SEC. 5. Senators shall be chosen for the term of four years, at the same time and place as representatives; they shall be twenty-five years of age, and possess the qualifications of representatives as to residence and citizenship.

Number and classification. SEC. 6. The number of senators shall not be less than one-third nor more than one-half the representative body; and shall be so classified by lot that one class, being as nearly one-half as possible, shall be elected every two years. When the number of senators is increased, they shall be annexed by lot to one or the other of the two classes, so as to keep them as nearly equal in numbers as practicable.

Elections determined. SEC. 7. Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law.

The senate has power to choose its own clerk and to remove him at pleasure without a notice or a hearing. *Cliff v. Parsons*, 90–665.

Quorum. SEC. 8. A majority of each house shall constitute a quorum to transact business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

Authority of the houses. SEC. 9. Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and with the consent of two-thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the general assembly of a free and independent state.

Protest. SEC. 10. Every member of the general assembly shall have the liberty to dissent from or protest against any act or resolution which he may think injurious to the public or an individual, and have the reasons for his dissent entered on the journals; and the yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals.

Privilege. SEC. 11. Senators and representatives, in all cases except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the general assembly, and in going to or returning from the same.

Vacancies. SEC. 12. When vacancies occur in either house, the governor, or the person exercising the functions of governor, shall issue writs of election to fill such vacancies.

Doors open. SEC. 13. The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secrecy.

Adjournments. SEC. 14. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

Bills. SEC. 15. Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses.

Approval. SEC. 16. Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him (Sunday excepted), the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof.

An act is not passed by the legislature until it is approved by the governor, who, for such purpose, is a part of the legislature: *United States v. Fanning*, Mor., 348.

The copy or certificate, in the printed acts, of the approval by the governor, is but evidence of the fact, and is not essential in order that the act may take effect. It is the approval of the original bill filed in the office of the secretary of state which is required to give the act validity: *Dishon v. Smith*, 10-212.

In case a bill is submitted to the governor for his approval during the last three days of a session of the general assembly, and he neither signs nor returns it with objections before the adjournment, it becomes a law only in case he subsequently approves it; and the filing of the bill within the thirty days mentioned, with the secretary of state, without approval or disapproval, will not give it the effect of a law: *Darling v. Boesch*, 67-702.

The fact that a law passed thirty-four years previously did not bear the signature of the governor, *held* not sufficient to render the act void. The presumption would be that the act became a law by failure of the governor to return it within proper time after its presentation to him: *Collins v. Laucier*, 45-702.

Majority vote. SEC. 17. No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.

Receipts and expenditures. SEC. 18. An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at every regular session of the general assembly.

Impeachment. SEC. 19. The house of representatives shall have the sole power of impeachment, and all impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present.

Who liable to; judgment. SEC. 20. The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial, and punishment according to law. All other civil officers shall be tried for

misdemeanors and malfeasance in office, in such manner as the general assembly may provide.

Members not appointed to office. SEC. 21. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people.

Disqualification. SEC. 22. No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the general assembly. But offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster, whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

Failure to account. SEC. 23. No person who may hereafter be a collector or holder of public moneys, shall have a seat in either house of the general assembly, or be eligible to hold any office of trust or profit in this state, until he shall have accounted for and paid into the treasury all sums for which he may be liable.

Money drawn. SEC. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.

The executive council under § 120 of Code of '73 had authority to audit and certify to proper expenses not otherwise provided for, such as the compensation for the national guards when called out by the governor to suppress or prevent breaches of the peace, as well as for supplies of state offices, repairs of the state house etc., to be paid out of the state treasury: *Prime v. McCarthy*, 92-569.

Compensation of members. SEC. 25. Each member of the first general assembly under this constitution shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no general assembly shall have the power to increase the compensation of its members. And when convened in extra session they shall receive the same mileage and per diem compensation as fixed by law for the regular session, and none other.

Laws, when to take effect; publication. SEC. 26. No law of the general assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next, after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the general assembly by which they were passed. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state.

An act not now in force, conferring upon the governor authority to publish acts of a general nature, and providing that they should take effect from such publication, *held* unconstitutional as delegating to the governor the power given to the legislature to determine what acts should go into effect by publication: *Scott v. Clark*, 1-70; *Pilkey v. Gleason*, 1-522.

Under the provision found in a former constitution, that statutes should take effect only when published and circulated by authority, *held*, that the publication without legislative authority was not sufficient to bring the statute into operation: *Calkin v. State ex rel.*, 1 G. Gr., 68.

Divorce. SEC. 27. No divorce shall be granted by the general assembly.

A divorce granted by the territorial legislature *held* to be valid, where it did not appear to have been granted for causes over which the district courts had jurisdiction: *Levins v. Sleator*, 2 G. Gr., 604.

Lotteries. SEC. 28. No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed.

A contract in furtherance of a lottery scheme *held* void: *Guenther v. Dewein*, 11-133.

Acts; one subject; expressed in title. SEC. 29. Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

Act to embrace but one subject: The intention of the provision of this section prohibiting more than one subject being embraced in the same act was to prevent the union in the same act of incongruous matter and of objects having no connection or relation. But there must be some limit to the division of matter into separate bills and acts. It cannot be held that each step should be embraced in a separate act. The unity of object is to be looked for in the ultimate end designed to be attained, and not in the details looking to that end: *State ex rel. v. County Judge*, 2-280; *Morgan v. Des Moines*, 54 Fed., 456.

Therefore, *held*, that an act containing sixty-six sections, entitled "An act in relation to certain state roads," in which forty-six roads were established, others vacated, and provisions for the relocation of still others were made, was not in conflict with the constitutional provision: *State ex rel. v. County Judge*, 2-280.

An act entitled "An act for revising and consolidating the laws and incorporating the city of Dubuque and establishing a city court therein," *held* not objectionable as embracing more than one subject: *Davis v. Woolnough*, 9-104, 107.

The act of 1855 for the suppression of intemperance, *held* not to embrace more than one subject, the several provisions therein being but so many steps fairly conducive to the end or object expressed in the title: *Santo v. State*, 2-165.

The statute prohibiting the sale of malt or vinous liquors within two miles of city limits, and giving cities authority to regulate and license the sales of such liquors within those limits, *held* not unconstitutional as containing more than one subject: *State v. Shroeder*, 51-197.

The fact that the title of an act embraces more than one subject will not affect its validity: *Ibid.*

The act of 20 G. A., ch. 143, amendatory of prior legislation, intended for the suppression of the traffic in intoxicating liquors, and providing for additional penalties and remedies against the violators of the statute, does not embrace more than one subject under the prohibition of this provision: *Martin v. Blattner*, 68-286.

The statute in relation to school bonds is not unconstitutional as embodying more than one subject: *Ackley School Dist. v. Hall*, 113 U. S., 135.

An act is to embrace but one subject and matters properly connected therewith; but *held*, that a provision with reference to the time after which action on an insurance policy might be brought was properly connected with the subject of an act relating to insurance: *Christie v. Life Indemnity, etc., Co.*, 82-360.

An act legalizing proceedings of a board of supervisors for the location and construction of a levee and providing for the assessment of the costs thereof, *held* not to embrace two subjects: *Richman v. Supervisors of Muscatine County*, 77-513.

A particular statute *held* not unconstitutional as embracing more than one subject: *State v. Aulman*, 76-624.

The subject of a legislative act prohibiting the sale of adulterated lard, unless labeled in a certain manner, showing the ingredients of which it is composed, is sufficiently expressed in the title as "An act to prevent fraud in the sale of lard and to provide punishment for the violation thereof:" *State v. Snow*, 81-642.

Where a statute was entitled "An act relating to insurance and fire insurance companies," *held*, that the title sufficiently embraced provisions with reference to the time after which action on a policy could be brought: *Christy v. Life Idemnity, etc., Co.*, 82-360.

Title of act: It is not contemplated that anything more than general terms shall be used in the title to express the object sought to be obtained. The title of the mulct law describing it as an act to tax the traffic in intoxicating liquors and to regulate the control of the same sufficiently covers the purposes of the statute. Even though the act should be considered to be in effect a license law, yet when the title and act are construed together there is no uncertainity as to the purpose: *State ex rel. v. Forkner*, 62 N. W., 772.

Provisions made in an act entitled "An act to amend an act to incorporate the city of Muscatine," for enlarging the corporate boundaries of said city, *held* to be sufficiently specified in the title: *Morford v. Unger*, 8-82.

Provisions for excluding territory from the limits of cities already incorporated are sufficiently covered by the title of an act "for the incorporation of cities:" *Whiting v. Mt. Pleasant*, 11-482.

Section applied: See *Duncombe v. Prindle*, 12-1.

Every law prescribing duties must have the sanction of liabilities; therefore, *held*, that the statutory provision prescribing the liabilities of railroad companies in certain cases, etc., was sufficiently embraced in the title of the bill in which it was originally enacted, which was "An act in relation to the duties of railroad companies:" *McAunich v. Mississippi & M. R. Co.*, 20-338.

Statutory provisions as to the method of enforcing a judgment against a municipal corporation are sufficiently connected with the subject of the chapter on executions, under which they are found in Code of '73, not to be objectionable under this constitutional provision: *Porter v. Thompson*, 22-391.

Where an act in one section legalized the organization of a school district, and in another legalized the acts of the officers thereof, *held*, that the second was so connect-

ed with the first that it was sufficiently embraced in the title "An act to legalize the organization of the," etc., or at least that the invalidity on this ground would extend only to the second section: *State ex rel. v. Squires*, 26-340.

In an act to amend the charter of the city of Keokuk was inserted a section purporting to legalize elections previously held to determine whether the city council should subscribe to the stock of a certain railroad; *held*, that such section was not in any sense an amendment to the charter, and the object was not embraced in the title, nor germane to anything contained therein, and the section was, therefore, void under a statutory provision containing similar provisions in reference to ordinances: *Williamson v. Keokuk*, 44-88.

A section contained in an act entitled "An act providing the place of bringing suits in certain cases," designating upon whom service might be made in such cases, *held* germane to the subject expressed in the title: *Farmers' Ins. Co. v. Highsmith*, 44-330.

The statute reorganizing the judicial districts and providing for the election of additional judges is not in conflict with this section: *State v. Emmons*, 72-265.

Local or special laws. SEC. 30. The general assembly shall not pass local or special laws in the following cases:

For the assessment and collection of taxes for state, county, or road purposes;

For laying out, opening, and working roads or highways;

For changing the names of persons;

For the incorporation of cities and towns;

For vacating roads, town plats, streets, alleys, or public squares;

For locating or changing county seats.

Laws general and uniform; boundaries of counties. In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, cast for and against it.

General and special laws: A statute which operates upon a particular condition and attaches to it certain consequences, so that whenever that condition exists such consequences follow, is a general and not a special statute: *Iowa R. Land Co. v. Soper*, 39-112.

A law which affects all persons who may be brought within the relations for which it provides is a general and not a special law within the meaning of those provisions of the constitution prohibiting the passing of special laws in cases where general laws may be made applicable. Therefore, *held*, that the statute regulating the liability of railway companies for injuries to employees is general and not special, within the constitutional prohibition: *McAunich v. Mississippi & M. R. Co.*, 20-338; *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52.

Special laws as to taxation: This prohibition of special laws for the assessment and collection of taxes is not infringed by the provision allowing a debtor to deduct the amount of his moneys and credits in listing his property for assessment: *Macklot v. Davenport*, 17-379.

A law remitting penalties upon taxes not paid within a certain time is not a special law within the meaning of this provision: *Beecher v. Board of Supervisors*, 50-538.

A curative act legalizing the levy and assessment of taxes made for a year when no law authorizing any levy and assessment was in force, *held* not in conflict with this section: *Boardman v. Beckwith*, 18-292.

An act which prescribed a fixed and specific rule for the assessment of property of one class of corporations or persons different from that applicable to other classes is not necessarily a special act within the meaning of the constitution: *Primghar State Bank v. Rerick*, 64 N. W., 801.

Therefore, *held*, that a statute as to the assessment of stock in state banks differing from the provisions as to assessment of stock in national banks was not invalid: *Ibid.*

A curative act, such as an act to legalize a levy of taxes for school purposes made by the directors of a particular district after the expiration of the time fixed by statute is not invalid under the provisions of this section: *Chicago, R. I. & P. R. Co. v. Independent Dist.*, 68 N. W., 881.

A curative act legalizing the proceedings of a board of supervisors by which a levee was constructed and the costs of construction assessed to the adjacent property, *held* not obnoxious to this section, as the state of facts was such that it would not come within the provisions of a general law: *Richman v. Supervisors of Muscatine County*, 77-513.

For incorporation of cities and towns: An act applicable to cities of the first class organized subsequently to a certain date is not invalid as being special: *Owen v. Sioux City*, 91-190.

An act applicable to cities of a specified population is not invalid as special legislation, although the limit of population is such that it is applicable to but one city, if

in terms it may be applicable to other cities should they attain the specified population: *Tuttle v. Polk*, 92–433.

It is not necessary that the law should operate uniformly on all the people of the state, nor when the legislation pertains to cities is it important that it should operate uniformly on all cities throughout the state; but where the language of a statute with reference to extending city limits was such as to necessarily restrict it to one particular city and prevent its being applicable to any other city at any future time, *held*, that the statute was special and invalid: *State v. Des Moines*, 65 N. W., 818.

The prohibition as to local and special legislation is absolute as to the enumerated cases and extends to acts amending charters and acts creating such corporations: *Ibid.*

The legislature cannot pass a special act amending the charter of a municipal corporation. Such act would be in conflict with the clause prohibiting special acts for the incorporation of cities and towns, and would be a law not of general and uniform operation in a case where a general law could be made applicable: *Ex parte Pritz*, 9-30; *Davis v. Woolnough*, 9–104; *Hetherington v. Bissell*, 10–145; *Baker v. Steamboat Milwaukee*, 14–214.

This provision is not violated by a law empowering cities and towns incorporated under a special charter to amend such charter: *Von Phul v. Hammer*, 29–222.

Applicable to municipal corporations: A law applicable to all cities and towns existing under special charter is not unconstitutional, even though it be considered an amendment of their charters: *State v. King*, 37–462.

A law establishing a special court in a particular town named, and providing for the jurisdiction, etc., thereof, *held* unconstitutional, as being in fact an amendment to the city charter, and as being a local and special law in a case where a general law could be made applicable: *McGregor v. Baylies*, 19–43.

An act which operates upon a particular condition, and attaches to it certain consequences whenever that condition exists, is not in conflict with this provision. So an act applying only to cities under special charters was held not unconstitutional, although it could apply to but few cities: *Haskel v. Burlington*, 30–232.

An act legalizing ordinances of a city is not invalid under this provision: *Windsor v. Des Moines*, 70 N. W., 214.

A statute validating the acts of municipal corporations in levying special taxes in excess of the legal limit, to pay judgments, *held* constitutional: *Iowa R. Land Co. v. Soper*, 39–112.

As the legislature cannot amend the charter of a city, it cannot legalize an act of such city not authorized by the charter, as such an act would be equivalent to an amendment: *Independent School Dist. v. Burlington*, 60–500; *Stange v. Dubuque*, 62–303.

By the constitutional provision that no corporation shall be created by special laws, it was not intended to repeal city charters already granted: *Warren v. Henly*, 31–31.

The provision of art. 8, § 12, authorizing the general assembly to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly, has reference exclusively to corporations for pecuniary purposes, and does not authorize the amendment of the charters of municipal corporations by special statute: *Ex parte Pritz*, 9-30.

The statutory provisions relating to the enforcement of judgments against municipal corporations are not in any proper sense amendments to the charter of a city, and are not obnoxious to this constitutional prohibition: *Porter v. Thompson*, 22–391.

Although the passage of a local or special law incorporating a certain school district would be in conflict with the constitutional provision above referred to, yet a curative act legalizing a defective organization thereof is not unconstitutional. In such case a general law could not be made applicable: *State ex rel. v. Squires*, 26–340.

Other cases of special laws: A special act authorizing the building of a particular railroad, *held* not in violation of the provision of this section, for the reason that the object of the act was to execute certain trusts confided to the state to secure the building of a railroad on a particular route: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24–455.

Statutes legalizing official acts done without authority are not invalid on account of being special statutes, for the reason that a general statute could not be made applicable in such cases: *Independent Dist. v. Independent Dist.*, 62–616.

An appropriation is necessarily made by a special act, and is not invalid because not general and uniform throughout the state: *Merchants' Union Barb Wire Co. v. Brown*, 64–275.

All statutes punishing criminally the violation of law, or providing for the prevention of crimes, are special in their character, and do not come within the restriction that they shall be of uniform operation with respect to different crimes. They may provide remedies and penalties as to nuisances, for instance, committed by the sale of intoxicating liquors, which are not extended to other cases of nuisance: *Martin v. Blattner*, 68–286.

An act providing for the holding of terms of court in a particular county at a place other than the county seat is not unconstitutional. A general law could not be applicable in such case: *Cooper v. Mills County*, 69–350.

The statute reorganizing the judicial districts and providing for additional judges relates to subjects of legislation where a general law could not be made applicable: *State v. Emmons*, 72–265.

Uniformity of taxation: The restriction upon the power of taxation that taxes must be uniform is applicable generally to the principle or plan of taxation, and not to specific or particular taxes. It means that all individuals and all classes shall be uniformly taxed, and that all must contribute

uniformly with like individuals and like classes to these burdens. The manner of imposing the burden must of necessity be left to the discretion of the legislative branch of the government: *Warren v. Henly*, 31-31.

An act providing a special method of taxing express companies *held* not unconstitutional: *United States Ex. Co. v. Ellyson*, 28-370.

The mere fact that land in question being that of a non-resident was taxed higher than corresponding lands of residents will not be sufficient to show that there has been a discrimination against non-residents and will not render the tax title void: *Beeson v. Johns*, 124 U. S., 56.

The statutory provision with reference to assessment of railroad bridges across the Mississippi and Missouri rivers is not unconstitutional, being of uniform operation with reference to the class of bridges therein mentioned: *Missouri Valley & B. R. & B. Co., v. Harrison County*, 74-283.

Uniform operation: As to the requirement that laws shall have a uniform operation, see art. 1, § 6, and notes.

Boundaries of counties: The provision that no law changing the boundary of a county shall have effect until submitted to the people of the counties affected, applied: *Duncome v. Prindle*, 12-1.

Extra compensation. SEC. 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid on any claim, the subject-matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local or private purposes, unless such appropriation, compensation, or claim be allowed by two-thirds of the members elected to each branch of the general assembly.

Oath of members. SEC. 32. Members of the general assembly shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States, and the constitution of the state of Iowa, and that I will faithfully discharge the duties of senator (or representative, as the case may be), according to the best of my ability." And members of the general assembly are hereby empowered to administer to each other the said oath or affirmation.

Census. SEC. 33. The general assembly shall, in the years one thousand eight hundred and fifty-nine, one thousand eight hundred and sixty-three, one thousand eight hundred and sixty-five, one thousand eight hundred and sixty-seven, one thousand eight hundred and sixty-nine, and one thousand eight hundred and seventy-five, and every ten years thereafter, cause an enumeration to be made of all the inhabitants of the state.

Apportionment. SEC. 34. The number of senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties according to the number of inhabitants in each.

Districts. SEC. 35. The senate shall not consist of more than fifty members, nor the house of representatives of more than one hundred; and they shall be apportioned among the several counties and representative districts of the state according to the number of inhabitants in each, upon ratios to be fixed by law; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled to one representative; and any one county containing in addition to the ratio fixed by law one-half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed.

[By proper legislative action proposed amendments striking the word "white" from each of the last three preceding sections as they originally stood were submitted to the electors at the general election in 1868 and adopted.]

Ratio of representation. SEC. 36. At its first session under this constitution, and at every subsequent regular session, the general assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative.

Districts. SEC. 37. When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district.

Elections by general assembly. SEC. 38. In all elections by the general assembly, the members thereof shall vote *viva voce;* and the votes shall be entered on the journal.

ARTICLE 4.—EXECUTIVE DEPARTMENT.

Governor. SECTION 1. The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the governor of the state of Iowa.

Election and term. SEC. 2. The governor shall be elected by the qualified electors at the time and place of voting for members of the general assembly, and shall hold his office two years from the time of his installation, and until his successor is elected and qualified.

Lieutenant-governor; returns of elections. SEC. 3. There shall be a lieutenant-governor, who shall hold his office two years, and be elected at the same time as the governor. In voting for governor and lieutenant-governor, the electors shall designate for whom they vote as governor, and for whom as lieutenant-governor. The returns of every election for governor and lieutenant-governor, shall be sealed up and transmitted to the seat of government of the state, directed to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the general assembly.

Election by general assembly. SEC. 4. The persons respectively having the highest number of votes, for governor and lieutenant-governor, shall be declared duly elected; but in case two or more persons shall have an equal, and the highest number of votes for either office, the general assembly shall, by joint vote, forthwith proceed to elect one of said persons governor, or lieutenant-governor, as the case may be.

Contested elections. SEC. 5. Contested elections for governor, or lieutenant-governor, shall be determined by the general assembly in such manner as may be prescribed by law.

Eligibility. SEC. 6. No person shall be eligible to the office of governor, or lieutenant-governor, who shall not have been a citizen of the United States, and a resident of the state two years next preceding the election, and attained the age of thirty years at the time of said election.

Commander-in-chief. SEC. 7. The governor shall be commander-in-chief of the militia, the army, and navy of this state.

Duties. SEC. 8. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

Execution of laws. SEC. 9. He shall take care that the laws are faithfully executed.

Vacancies. SEC. 10. When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people.

Convening assembly. SEC. 11. He may, on extraordinary occasions, convene the general assembly by proclamation, and shall state to both houses, when assembled, the purpose for which they shall have been convened.

The general assembly, when it is convened in special or extra session, has full legislative authority, unless its business is restricted by some constitutional provision.

Its action is not confined to the special purpose for which it is convened, and it may enact any law at such session that it might at a regular session: *Morford v. Unger*, 8–82.

Message. SEC. 12. He shall communicate, by message, to the general assembly, at every regular session, the condition of the state, and recommend such matters as he shall deem expedient.

Adjournment. SEC. 13. In case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he may think proper; but no such adjournment shall be beyond the time fixed for the regular meeting of the next general assembly.

Disqualification. SEC. 14. No person shall, while holding any office under the authority of the United States, or this state, execute the office of governor, or lieutenant-governor, except as hereinafter expressly provided.

Term; compensation of lieutenant-governor. SEC. 15. The official term of governor and lieutenant-governor, shall commence on the second Monday of January next after their election, and continue for two years, and until their successors are elected and qualified. The lieutenant-governor, while acting as governor, shall receive the same pay as provided for governor; and while presiding in the senate, shall receive as compensation therefor, the same mileage and double the per diem pay provided for a senator, and none other.

Pardons. SEC. 16. The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the general assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted.

The governor may remit the penalty for forfeiture under a bail bond, even after a judgment on such bond has been rendered: *Harbin v. State*, 78–263.

Neither the district attorney nor board of supervisors has any authority to remit fines or to compromise judgments therefor, for a less sum than the amount of the fine imposed: *McKay v. Woodruff*, 77–413.

Therefore, where certain judgments were satisfied of record by the district attorney for a less sum than the fines for which they were rendered, and by authority of the board of supervisors, *held*, that the satisfactions were absolutely void and no bar to further proceedings to enforce the judgments: *Ibid.*

And a commutation of the judgments by the governor so far as they were a lien on certain property, but not releasing defendant from personal liability, and upon condition that he pay all costs and forever refrain from engaging in the saloon business in Iowa, *held* to be no bar to his subsequent arrest and imprisonment, when it did not appear that he had complied with the condition upon which the commutation was granted: *Ibid.*

The power of the governor to remit fines and forfeitures does not apply to costs taxed in favor of officers and witnesses: *State v. Beebee*, 87–636.

The provision of the mulct law suspending in localities the penalties of the prohibitory law on certain conditions is not an infringement of the pardoning power of the governor as given by the constitution. The provisions of that act simply constitute a bar under the conditions referred to, to a proceeding under the prohibitory law which might result in a fine or forfeiture if allowed to continue. Thus, it is provided as to the punishment for intoxication that when a person is convicted he may be discharged and his fine remitted upon giving information as to where and through whom he purchased the liquor which produced the intoxication. So it is provided with reference to seduction that if the defendant shall marry the prosecutrix any further proceedings for the offense shall be barred. So it is allowable to compromise certain offenses with leave of court and when so compromised the proceeding is stayed and a bar is created to any prosecution for the same offense. As to none of these cases is it claimed that the pardoning power has been infringed: *State ex rel v. Forkner*, 62 N. W., 772.

While in the broad meaning of the term

a pardon contemplates a remission of guilt whether before or after conviction, yet our constitution in terms limits the governor's right to pardon to cases where conviction has already been had. *Ibid.*

The power to pardon is not to be confounded with the power of dispensation or suspension; the former is undoubtedly a prerogative of the executive while the latter must be exercised by the legislative department. The pardoning power does not extend to creating a bar to proceedings under or to suspension of the operation of the laws: *Ibid.*

Lieutenant-governor to act as governor. SEC. 17. In case of the death, impeachment, resignation, removal from office, or other disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant-governor.

President of senate. SEC. 18. The lieutenant-governor shall be president of the senate, but shall only vote when the senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of governor, the senate shall choose a president *pro tempore.*

Vacancies. SEC. 19. If the lieutenant-governor, while acting as governor, shall be impeached, displaced, resign, or die, or otherwise become incapable of performing the duties of the office, the president *pro tempore* of the senate shall act as governor until the vacancy is filled, or the disability removed; and if the president of the senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the house of representatives.

The statutory provision for the suspension by the governor of other officers elected by the people as here provided is not unconstitutional: *Brown v. Duffus*, 66-193.

As to *mandamus* against executive officer, see notes to art. 3, § 1.

Seal of state. SEC. 20. There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called the great seal of the state of Iowa.

Grants and commissions. SEC. 21. All grants and commissions shall be in the name and by the authority of the people of the state of Iowa, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

Secretary, auditor and treasurer. SEC. 22. A secretary of state, auditor of state, and treasurer of state, shall be elected by the qualified electors, who shall continue in office two years, and until their successors are elected and qualified; and perform such duties as may be required by law.

ARTICLE 5.—JUDICIAL DEPARTMENT.

Courts. SECTION 1. The judicial power shall be vested in a supreme court, district court, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish.

Judicial authority: The provisions for proceedings in court for the annexation of contiguous territory to a city are not unconstitutional as conferring upon a court powers not judicial in their nature. The question as to whether the conditions therein mentioned exist, or whether, under the circumstances, justice and equity require the annexation, are of a judicial character, and their determination may properly be vested in the judicial department: *Burlington v. Leebrick*, 43-252.

The charter of a city, conferring upon the mayor judicial authority, is not in conflict with the constitutional provision that the three departments of government shall be distinct. The mayor of a city is not a part of the government of the state of Iowa: *Santo v. State*, 2-165, 220.

It is competent for the legislature to determine that terms of court may be held at places other than the county seat for the transaction of certain business and for the trial of particular classes of cases: *Wilner v. Chicago, M. & St. P. R Co.*, 77-755.

Therefore, the establishment of a district court at Avoca with power to try cases arising in a certain designated part of Pottawattamie county is not repugnant to this section of the constitution: *Ibid.*

It is not unconstitutional to vest in the executive council the authority to deter-

mine in which one of the penitentiaries of the state a convict shall be confined: *O'Brien v. Barr*, 83-51.

Although the board of railroad commissioners may not be a court, it may still be given jurisdiction to investigate and determine by prescribed rules and judicial inquiry questions submitted to it under statutory authority: *State v. Mason City & Ft. D. R. Co.*, 85-516.

A suit to control the discretion of the executive council in entering into a contract in behalf of the state is in effect a suit against the state and cannot be maintained: *Mills Publishing Co. v. Larrabee*, 78-97.

Power to declare statute unconstitutional: The constitutional provision that no person charged with the exercise of powers properly belonging to one of the three departments of government shall exercise any function appertaining to either of the others does not prohibit the judicial department from passing upon the legality of the acts of the officers of the several departments: *Bryan v. Cattell*, 15-538.

To the judicial department is intrusted the power to decide all questions of constitutional law. It belongs to that department, as a matter of right and duty, to declare every act of the legislature made in violation of the constitution, or any provision of it, null and void; but the violation of the constitution should be clear and apparent before the act should be declared void: *Reed v. Wright*, 2 G. Gr., 15.

To declare an act unconstitutional and void is the exercise of the highest power of the court and is not to be resorted to unless it becomes necessary. It is the duty of the court to give an act such a construction, if possible, as to avoid the necessity and uphold the act: *State ex rel. v. County Judge*, 2-280.

The power of the court to hold an act of the legislature unconstitutional and void, while everywhere admitted, is of the most delicate and responsible nature, and should not be resorted to unless the case be clear, decisive and unavoidable: *Santo v. State*, 2-165, 208; *McCormick v. Rusch*, 15-127.

The court will not without invitation by argument, upon the expression of mere doubt, enter upon inquiry as to the constitutionality of a statute. Such a duty is the gravest and most delicate which a court can be called upon to discharge. A statute will not be declared void for unconstitutionality unless in a clear case after the fullest opportunity for consideration of the questions involved: *Henderson v. Robinson*, 76-603.

A court can only adjudge a law invalid or unconstitutional in a case where a party is to be deprived of his rights in consequence of the invalidity of the law: *State v. Mosher*, 78-321.

The court will uphold a statute as constitutional unless so plainly and palpably in conflict with the constitution as to leave no doubt or hesitation in the judicial mind as to its invalidity: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

It is the duty of the court to give a statute such construction, if possible, as will maintain it rather than one which will render it unconstitutional: *Santo v. State*, 2-165, 208; *State ex rel. v. County Judge*, 2-280; *Duncombe v. Prindle*, 12-1; *Iowa Homestead Co. v. Webster County*, 21-221.

The supreme court will not consider constitutional questions unless it is necessary for the disposition of the case; *Bond v. Wabash, St. L. & P. R. Co.*, 67-712.

The court will not decide the constitutionality of a statute unless it be necessarily involved in a case which cannot be disposed of without such decision. If there is any other point upon which the case can be decided, the constitutionality of the statute will not be passed upon. Parties cannot, by waiving other questions, form an agreed case upon which the courts will decide the constitutional question: *Dubuque & D. R. Co. v. Diehl*, 64-635.

Where a party assails the constitutionality of a statute and goes into the supreme court as appellant, that court will scrutinize the record with considerable strictness to see whether the determination of the constitutional question is necessary to the decision of the case: *State ex rel. v. Rosencrans*, 65-382.

Appellate courts will not decide questions of constitutional law, unless absolutely necessary, when the bench is not full, or when all the judges cannot assist in the determination: *McClure v. Owens*, 21-133.

A statute should not be supported unless its constitutionality is so obvious as to admit of no doubt: *Whiting v. Mt. Pleasant*, 11-482.

A court should declare an act of the legislature void only when it violates the constitution so clearly, palpably and plainly as to leave no doubt or hesitation in their minds: *Morrison v. Springer*, 15-304.

It is an elementary principle in determining the constitutionality of a statute that any reasonable doubt must be solved in favor of the legislative action, and the act sustained: *Gates v. Brooks*, 59-510.

The authority and power of the court to annul an act of the legislature in conflict with the fundamental law is universally acknowledged, but this authority should be exercised only when the statute is clearly, palpably, plainly and beyond reasonable doubt in conflict with the constitution: *Stewart v. Board of Supervisors*, 30-9.

It is fundamental that a statute should not be declared unconstitutional unless it is clearly so: *Central Iowa R. Co. v. Board of Supervisors*, 67-199.

The court is not authorized to pass upon the justice or expediency of a statute. Expediency and public policy and state necessity are not within its domain. Therefore the court has no authority to annul an act of the legislature as unconstitutional unless it is found to be in clear, plain and palpable conflict with the constitution. *Ibid.*

Where the legislature had passed an act appropriating a sum of money to aid a private corporation in testing the validity of the barbed wire patents, *held*, that the courts had no jurisdiction to inquire into the question whether such an appropriation was wise or not: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

Under the provision of the constitution that a special statute should not be passed in cases where a general law could be made ap-

plicable, *held*, that the legislature is not the sole judge of whether a general law can be made applicable, but that the special law might be declared unconstitutional for the reason that a general law applicable to the subject might be framed: *Ex parte Pritz*, 9-30.

Where the statute allows an appeal from the action of the board of supervisors in establishing a road, a court in determining such appeal may pass upon the constitutionality of the act under which the road is laid out: *Bankhead v. Brown*, 25-540.

Construction of the constitution: To arrive at the meaning of words used in a section of the constitution, sections preceding and following it, having reference to the same subject-matter, must be read and considered, unless the words to be construed have such a clear and express meaning that there can be but one conclusion as to what was meant: *Allen v. Clayton*, 63-11.

Where, after considering previous and subsequent sections relating to the same matter, there is any doubt as to the meaning of the language used, then the court may consider, first, the evil intended to be remedied; second, the debates on the subject in the convention which framed the constitution; third, the contemporaneous legislative construction of the constitution; and fourth, the practical construction adopted by the people: *Ibid.*

Effect of unconstitutionality: Where money is paid under mistake of law as to the unconstitutionality of a statute, there being no charge of fraud, duress, deceit or mistake of fact, it cannot be recovered back: *Kraft v. Keokuk*, 14-86.

So *held* where a license fee for the permission to sell intoxicating liquors had been paid to a city in pursuance of a provision of a statute which, after the expiration of the time for which the license was granted and the enjoyment of the privilege by the person paying the tax, was declared unconstitutional: *Ibid.*

Unconstitutionality of part: Statutes which are partly in conflict with the constitution will be held void no further than as to those parts which are unconstitutional. Provisions which are within the legislative authority will be enforced. The same rule applies in case of the ordinance of a city. But if the parts of the statute or ordinance be necessarily connected and dependent, the whole must fail with the void part: *Keokuk v. Keokuk N. L. Packet Co.*, 45-196; *Packet Co. v. Keokuk*, 95 U. S., 80.

An act void in part as unconstitutional is not necessarily void *in toto*. If sufficient remain to effect its object without the aid of the invalid portion, the latter only shall be rejected and the former shall stand: *Santo v. State*, 2-165, 205.

Therefore, *held*, that the prohibitory act of 1855, one section of which provided that it should take effect from a certain date in case it was adopted by a popular vote, became a law although the provision for such submission was unconstitutional: *Ibid.*

Where an act was in three sections, the subject-matter of the first and third being properly embraced in the title, *held*, that these portions were constitutional, although the second section referred to a subject-matter not embraced in the title: *Henkle v. Keota*, 68-334.

When one section of a statute is void and others valid, and it evidently appears that one section is the compensation or inducement for the other, and the connection between them is such as to warrant the belief that the valid part would not have been passed alone, then the whole should be held void. But, in a particular case, *held*, that one section was not an inducement to, but was entirely distinct and separate from, the other portion of the act, and that the balance of the act was valid although that one section was unconstitutional: *Dubuque v. Chicago, D. & M. R. Co.*, 47-196.

Where a portion of a statute is unconstitutional, and that portion affects the validity of the entire statute, it must all fall: *Geebrick v. State*, 5-491.

Where a city ordinance provided that an offense should be punished to a greater extent than the city had authority to inflict punishment, *held*, that a conviction thereunder would authorize the infliction of punishment up to the limit of the authority of the city: *Keokuk v. Dressell*, 47-597.

Decisions of other courts as authority: In questions arising upon the construction of the laws and constitution of this state, the supreme court of the United States is not the final arbiter, but it is required to look to the courts of this state for the rules of construction of its laws and constitution: *McClure v. Owen*, 26-243.

The construction given to the constitution of a foreign state by the court of last resort of such state will be regarded as authority by the courts of this state: *Brown v. Phillipps*, 16-210.

Superior and inferior courts: An inferior court is one from which an appeal lies to a superior court, and over which the latter has a supervisory power and control. Courts may be organized not inferior to the district, provided they be inferior to the supreme court: *Hetherington v. Bissell*, 10-145.

A statute for the organization of a city court possessing in some respects a co-ordinate jurisdiction with the district court, *held* not unconstitutional under such provision: *Davis v. Woolnough*, 9-104.

In general, with reference to this section, see *Laird v. Dickerson*, 40-665; *Iowa Land Co. v. Soper*, 39-112, 123.

Supreme court. SEC. 2. The supreme court shall consist of three judges, two of whom shall constitute a quorum to hold court.

As to the number of judges, see statutory provisions.

Judges elected. SEC. 3. The judges of the supreme court shall be elected by the qualified electors of the state, and shall hold their court at

such time and place as the general assembly may prescribe. The judges of the supreme court so elected, shall be classified so that one judge shall go out of office every two years; and the judge holding the shortest term of office under such classification, shall be chief justice of the court during his term, and so on in rotation. After the expiration of their terms of office, under such classification, the term of each judge of the supreme court shall be six years, and until his successor shall have been elected and qualified. The judges of the supreme court shall be ineligible to any other office in the state, during the term for which they shall have been elected.

Jurisdiction. SEC. 4. The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state.

Law and Equity: A marked distinction is made between law and equity, and the two jurisdictions should be kept distinct and not confounded: *Cooper v. Armstrong*, 3 G. Gr., 120.

Appeals: The provision of statute prohibiting appeals in cases where the amount in controversy does not exceed one hundred dollars, unless the judge shall certify the question on which the decision of the supreme court is desired, is not unconstitutional as taking away the right of appeal and trial *de novo* in equity cases as provided by this section. Such statutory provision is a mere restriction or regulation upon the right of trial *de novo: Andrews v. Burdick*, 62–714.

It is only in equity cases wherein issues of fact are joined and evidence taken upon those issues, that the supreme court can try the case anew. In all other cases appeals are allowed for the correction of errors at law only, whether the case be at law or in equity, and in order that errors at law may be considered, exception to the action of the lower court must have been taken and assignment of error thereon must be made. Therefore in an equity case rulings upon demurrer can be reviewed only upon exceptions and assignment of errors. *Exchange Bank v. Pottorfe*, 65 N. W., 312.

Errors at law: The provision dispensing with the necessity of a motion for new trial to secure review of actions at law is not in conflict with this provision. Previous to that statute the ruling of the lower court on a motion to set aside the verdict as contrary to the evidence was reviewed as a matter of law, and the statute simply acts as a standing motion for new trial: *Coffin v. City Council*, 26–515.

District court and judge. SEC. 5. The district court shall consist of a single judge, who shall be elected by the qualified electors of the district in which he resides. The judge of the district court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of judge of the supreme court, during the term for which he was elected.

This section does not prevent a judge from holding court in another district than his own, by exchange, under statutory provisions: *State v. Stingley*, 10–488.

Since the amendment of the constitution with reference to the judicial districts (art. 5, § 10), and the statutory provisions increasing the number of judges, more than one judge may properly hold the district court in a county at the same time: *State v. Emmons*, 72–265.

When a judge is authorized by statute to perform a judicial act in vacation, his act, when done, has the force and effect of an act done by the court: *McLane v. Granger*, 74–152.

Jurisdiction. SEC. 6. The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

The district court is here invested with all the powers of a court of law, and those of a court of equity, and the distinctions between the two jurisdictions is recognized. This distinction the legislature cannot take away: *Claussen v. Lafrenz*, 4 G. Gr., 224.

In this state the distinction between law and equity jurisdiction is perpetuated by this constitutional provision and error in the form of action adopted will not cause an abatement of the action but the cause may be transferred to the proper docket: *United States Bank v. Lyon County*, 48 Fed., 632.

Held, that in a proceeding in equity the court possessed no jurisdiction to render in favor of the party such judgment as he might show himself entitled to at law: *Roberts v. Taliaferro*, 7–110.

The jurisdiction of the district court is not limited by the provisions giving justices jurisdiction in cases where the amount does not exceed one hundred dollars: *Nelson v.*

Gray, 2 G. Gr., 397; *Hutton v. Drebilbis*, 2 G. Gr., 593.

The jurisdiction of the district court, which is a superior court of general original jurisdiction, can only be taken away by express words or irresistible implication. Therefore, *held*, that Rev., § 2395, which prohibited the bringing of action in that court on claims against an estate for a mere money demand, except with the approbation of the county court, was not intended to take away the jurisdiction of that court, but merely as a restraint on the plaintiff: *Sterritt v. Robinson*, 17–61; and that the failure on the part of the plaintiff to obtain such leave must be set up as a defense, and could not be made the ground of a collateral attack on the judgment: *Cooley v. Smith*, 17–90.

Further, as to the jurisdiction of district courts, see *Laird v. Dickerson*, 40–665, 669.

Conservators of the peace. SEC. 7. The judges of the supreme and district courts shall be conservators of the peace throughout the state.

Style of process. SEC. 8. The style of all process shall be "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.

An original notice is not "process" within the meaning of this section: *Nichols v. Burlington, etc., Plank Road Co.*, 4 G. Gr., 42.

"Process" defined. "Prosecutions," as here used, are such criminal prosecutions as shall be instituted and prosecuted before the tribunals provided for in this article, under the statutes of the state, and do not include prosecutions for violations of city ordinances. The latter may be in the name of the city: *Davenport v. Bird*, 34–524.

The expressions "State of Iowa" and "The State of Iowa" are essentially the same: *Harriman v. State*, 2 G. Gr., 270.

An indictment in which the presentment is "in behalf of the state of Iowa" is good although the expression "In the name and by the authority of the state of Iowa" is a more appropriate style. It need not be expressed in each proceeding in the conduct of a prosecution that it is made "in the name and by the authority," etc.: *Wrocklege v. State*, 1–167.

A prosecution to recover a fine should be in the name of the state, and not in the name of the treasurer of the county to which the fine would go when recovered: *Rogers v. Alexander*, 2 G. Gr., 443.

Salaries. SEC. 9. The salary of each judge of the supreme court shall be two thousand dollars per annum; and that of each district judge one thousand six hundred dollars per annum, until the year eighteen hundred and sixty; after which time they shall severally receive such compensation as the general assembly may, by law, prescribe; which compensation shall not be increased or diminished during the term for which they shall have been elected.

Judicial districts. SEC. 10. The state shall be divided into eleven judicial districts; and after the year eighteen hundred and sixty, the general assembly may reorganize the judicial districts, and increase or diminish the number of districts, or the number of judges of the said court, and may increase the number of judges of the supreme court; but such increase or diminution shall not be more than one district, or one judge of either court, at any one session; and no reorganization of the districts, or diminution of the judges, shall have the effect of removing a judge from office. Such reorganization of the districts, or any change in the boundaries thereof, or any increase or diminution of the number of judges, shall take place every four years thereafter, if necessary, and at no other time.

[AMENDMENT.] At any regular session of the general assembly, the state may be divided into the necessary judicial districts for district court purposes, or the said districts may be reorganized and the number of the districts and the judges of said courts increased or diminished; but no reorganization of the districts or diminution of the judges shall have the effect of removing a judge from office.

[By proper legislative action (19 G. A., Joint Res. No. 12, and 20 G. A., Joint Res. No. 13) the foregoing was submitted to the electors at the general election in 1884 as a proposed amendment to the constitution, and was by them adopted.]

Since the adoption of this amendment the legislature has power to provide for the election of more than one judge in a district, and to authorize two or more judges to hold court in the same county at the same time: *State v. Emmons*, 72–265.

When chosen. SEC. 11. The judges of the supreme and district courts shall be chosen at the general election; and the term of office of each judge shall commence on the first day of January next after his election.

Attorney-general. SEC. 12. The general assembly shall provide, by law, for the election of an attorney-general by the people, whose term of office shall be two years, and until his successor shall have been elected and qualified.

County attorney. SEC. 13. The qualified electors of each county shall, at the general election in the year eighteen hundred and eighty-six, and every two years thereafter elect a county attorney, who shall be a resident of the county for which he is elected, and shall hold his office for two years, and until his successor shall have been elected and qualified.

[By proper legislative action (19 G. A., Joint Res. No. 12, and 20 G. A., Joint Res. No. 13) a proposition to substitute the foregoing for the original section was submitted to the electors at the general election in 1884, and by them adopted. The original section was as follows:

SEC. 13. The qualified electors of each judicial district shall, at the time of the election of district judge, elect a district attorney, who shall be a resident of the district for which he is elected, and who shall hold his office for the term of four years, and until his successor shall have been elected and qualified.]

Carrying into effect. SEC. 14. It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state.

The grand jury. [SEC. 15.] The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of the grand jury.

[By proper legislative action (19 G. A., Joint Res. No. 12, and 20 G. A., Joint Res. No. 13) the foregoing was submitted to the electors at the general election in 1884 as a proposed amendment to the constitution, and was by them adopted.]

The provision that when the grand jury consists of five members an indictment may be found upon the concurrence of four jurors is not in conflict with the constitution on the ground that it authorizes an indictment to be found by less than the smallest number of which the grand jury can be composed: *State v. Salts*, 77–193.

The fact that by mistake as to the population of the county the grand jury consists of five instead of seven grand jurors does not render the indictment void and deprive the court of jurisdiction of the case. No objection being made to the indictment until after judgment upon a plea of guilty, the defendant is not entitled to relief: *State v. Belvel*, 89–405.

The defect in the grand jury in such case is one which may be waived by the defendant: *Ibid.*

ARTICLE 6.—MILITIA.

Who constitute. SECTION 1. The militia of this state shall be composed of all able-bodied male citizens, between the ages of eighteen and forty-five years, except such as are or may hereafter be exempt by the laws of the United States, or of this state; and shall be armed, equipped, and trained, as the general assembly may provide by law.

[By proper legislative action a proposed amendment striking the word "white" from this section, as it originally stood, was submitted to the electors at the general election in 1868 and adopted.]

Exemption. SEC. 2. No person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace: *provided* that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens.

Officers. SEC. 3. All commissioned officers of the militia (staff officers excepted) shall be elected by the persons liable to perform military duty, and shall be commissioned by the governor.

ARTICLE 7.—STATE DEBTS.

Credit not to be loaned. SECTION 1. The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become respon-

sible for the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the state.

Limitation. SEC. 2. The state may contract debts to supply casual deficits or failures in revenues; or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

In determining the state indebtedness the indebtedness of the counties of the state is not to be considered: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

Losses to school funds. SEC. 3. All losses to the permanent school, or university fund of this state, which shall have been occasioned by the defalcation, mismanagement, or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state, in favor of the respective fund sustaining the loss, upon which not less than six per cent. annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article.

The school fund belongs to the state, and it has solemnly pledged itself to maintain the same inviolate: *Des Moines County v. Harker*, 34–84.

War debts. SEC. 4. In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or defend the state in war; but the money arising from the debts so contracted shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

Question of incurring debt submitted. SEC. 5. Except the debts hereinbefore specified in this article, no debt shall be hereafter contracted by, or on behalf of this state, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal of such debt, within twenty years from the time of the contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each county, if one is published therein, throughout the state, for three months preceding the election at which it is submitted to the people.

Legislature may repeal. SEC. 6. The legislature may, at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time forbid the contracting of any further debt, or liability, under such law; but the tax imposed by such law, in proportion to the debt or liability which may have been contracted in pursuance thereof, shall remain in force and be irrepealable, and be annually collected, until the principal and interest are fully paid.

Tax imposed distinctly stated. SEC. 7. Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

ARTICLE 8.—CORPORATIONS.

How created. SECTION 1. No corporation shall be created by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided.

It was not intended hereby to repeal city charters already granted: *Warren v. Henly*, 31–31.

Local or special laws for incorporation of cities and towns prohibited, see art. 3, § 30.

The board of medical examiners is not a corporation within the provisions of this article: *Iowa Eclectic Medical College v. Schrader*, 87–659.

Property taxable. SEC. 2. The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals.

Taxation of corporations: This section requires the legislature to provide for the taxation of such property the same as private property, and an act releasing such property from city taxes is void: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633, 642; *Dubuque v. Illinois Cent. R. Co.*, 39–56. And see *Iowa R. Land Co. v. Woodbury County*, 39–172.

A statute relating to the taxation of express and telegraph companies *held* not in violation of this provision, for the reason that it made such property liable to taxation in the same manner and to the same extent when held by individuals as when held by a body corporate: *United States Ex. Co. v. Ellyson*, 28–370.

Taxation of shares in an incorporated company, which may have some value in addition to the interest in the capital stock by reason of the good-will, etc., of the business of the corporation, does not result in such inequality of taxation between the shareholders in the corporation and individuals holding property similarly employed as to make such taxation unequal: *Davenport Nat. Bank v. Board of Equalization*, 64–140.

If the property of a banking corporation is subject to the same rate of taxation as other property it cannot be a ground of complaint that the method of assessment is different, provided it is uniform as to that class of property: *Primghar State Bank v. Rerick*, 64 N. W., 801.

Railroad property: So *held*, also, under 14 G. A., ch. 26, regulating the taxation of railroad property: *Dubuque v. Chicago, D. & M. R. Co.*, 47–196.

No constitutional rights are infringed by providing a different method for assessing railroad property than that provided for assessing property of the same nature belonging to other owners: *Central Iowa R. Co. v. Board of Supervisors*, 67–199.

As to taxation of railroad property in general, see *Davenport v. Mississippi & M. R. Co.*, 16–348; *Dubuque & S. C. R. Co. v. Dubuque*, 17–120.

Taxation of water-works: The fact that a company operating water-works is exempted from taxation in part payment for water furnished the city does not render the provision a violation of the constitutional requirement as to taxation of corporate property: *Grant v. Davenport*, 36–396.

State not to be a stockholder. SEC. 3. The state shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the state.

The provision of this section is not violated by authorizing aid to be voted by counties of the state towards the construction of a railway: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

An act making an appropriation to a corporation to assist it in testing the validity of the barb wire patents, *held* not unconstitutional under the same provision: *Merchants' Union Barb Wire Co. v. Brown*, 64–275.

Municipal corporation. SEC. 4. No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

Act creating banking associations. SEC. 5. No act of the general assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.

This restriction upon legislative authority to pass or amend acts authorizing or creating corporations or associations with banking powers is not intended to forbid the repeal by the legislature of acts organizing banks, it being required, however, by §

12 of this article, that such repeal be by a two-thirds vote: *Morseman v. Younkin*, 27-350.

This section has reference only to banks of issue: *State ex rel v. Union Stock Yards State Bank*, 70 N. W., 752.

State bank. SEC. 6. Subject to the provisions of the foregoing section, the general assembly may also provide for the establishment of a state bank with branches.

Special basis. SEC. 7. If a state bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each other's liabilities upon all notes, bills and other issues intended for circulation as money.

General banking law. SEC. 8. If a general banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of state, of all bills, or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the state treasurer, in United States stocks, or in interest-paying stocks of states in good credit and standing, to be rated at ten per cent. below their average value in the city of New York, for the thirty days next preceding their deposit; and in case of a depreciation of any portion of such stocks, to the amount of ten per cent. on the dollar, the bank or banks owning said stock shall be required to make up said deficiency by depositing additional stocks; and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.

Stockholders responsible. SEC. 9. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

The provision of this section rendering stockholders in a banking corporation or institution individually liable to an amount equal to their respective shares, applies only to banks of issue and not to banks merely of discount and deposit: *Allen v. Clayton*, 63-11.

The liability of the stockholder is not limited to a proportional sum, nor is it affected by any fraud or wrong of the officers of the bank or a receiver, and he cannot delay recovery in order to secure contribution: *Stewart v. Lay*, 45-604.

Bill-holders preferred. SEC. 10. In case of the insolvency of any banking institution, the bill-holders shall have a preference over its other creditors.

Suspension of specie payments. SEC. 11. The suspension of specie payments by banking institutions shall never be permitted or sanctioned.

Amendment or repeal of charters; exclusive privileges. SEC. 12. Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.

The statutory provisions as to liability of railroads are not unconstitutional as in conflict with this section: *Bucklew v. Central Iowa R. Co.*, 64-603; *Central Trust Co. v. Sloan*, 65-655.

This section has reference exclusively to corporations for pecuniary purposes, and does not authorize the amendment or repeal of laws for the organization or creation of municipal corporations, in violation of art. 3, § 30: *Ex parte Pritz*, 9-30.

Even though the power to regulate corporate franchises is here reserved to the legislature yet it would seem that such regulations must be reasonable or they will be invalid: *Des Moines v. Des Moines Water Works Co.*, 64 N. W., 269.

ARTICLE 9.—EDUCATION AND SCHOOL LANDS.

1.—*Education.*

Board of education. SECTION 1. The educational interest of the state, including common schools and other educational institutions, shall be under

the management of a board of education, which shall consist of the lieutenant-governor, who shall be the presiding officer of the board, and have the casting vote in case of a tie, and one member to be elected from each judicial district in the state.

Who eligible. SEC. 2. No person shall be eligible as a member of said board who shall not have attained the age of twenty-five years, and shall have been one year a citizen of the state.

How elected. SEC. 3. One member of said board shall be chosen by the qualified electors of each district, and shall hold the office for the term of four years, and until his successor is elected and qualified. After the first election under this constitution, the board shall be divided, as nearly as practicable, into two equal classes, and the seats of the first class shall be vacated after the expiration of two years; and one-half of the board shall be chosen every two years thereafter.

First session. SEC. 4. The first session of the board of education shall be held at the seat of government, on the first Monday of December, after their election; after which the general assembly may fix the time and place of meeting.

Limited. SEC. 5. The session of the board shall be limited to twenty days, and but one session shall be held in any one year, except upon extraordinary occasions, when, upon the recommendation of two-thirds of the board, the governor may order a special session.

Secretary. SEC. 6. The board of education shall appoint a secretary, who shall be the executive officer of the board, and perform such duties as may be imposed upon him by the board, and the laws of the state. They shall keep a journal of their proceedings, which shall be published and distributed in the same manner as the journals of the general assembly.

Rules and regulations. SEC. 7. All rules and regulations made by the board shall be published and distributed to the several counties, townships, and school districts, as may be provided for by the board, and when so made, published, and distributed, they shall have the force and effect of law.

Power to make. SEC. 8. The board of education shall have full power and authority to legislate and make all needful rules and regulations in relation to common schools, and other educational institutions, that are instituted, to receive aid from the school or university fund of this state; but all acts, rules, and regulations of said board may be altered, amended, or repealed by the general assembly; and when so altered, amended, or repealed, they shall not be re-enacted by the board of education.

The legislature has thus full power to make needful regulations, and this power has been given to district boards; and in the absence of abuse of such power being shown, the rules of such boards will not be held unconstitutional (per Cole, J.): *Burdick v. Babcock*, 31–562, 571.

Under this section, *held*, that a statute providing a full system of public instruction for the state was unconstitutional, on the ground that the legislature had no authority to pass such an act, the powers in reference to such matters being committed to the board of education: *District T'p v. Dubuque*, 7–262; *High School v. Clayton County*, 9–175.

High schools are deemed a part of the common school system of the state, though they are not to derive any support or assistance from the school fund: *High School v. Clayton County*, 9–175.

Under the provisions of this section, authorizing an amendment by the legislature of regulations of the board of education, *held*, that an alteration of an act of the board so as to extend and apply its provisions to unincorporated as well as to incorporated cities and towns was an amendment which the legislature might properly make: *Fort Dodge City School Dist. v. District T'p*, 15–434.

Governor ex officio a member. SEC. 9. The governor of the state shall be, *ex officio*, a member of said board.

Expenses. SEC. 10. The board shall have no power to levy taxes, or make appropriations of money. Their contingent expenses shall be provided for by the general assembly.

State university. SEC. 11. The state university shall be established at one place without branches at any other place, and the university fund shall be applied to that institution, and no other.

Common schools. SEC. 12. The board of education shall provide for the education of all the youths of the state, through a system of common schools, and such schools shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school, as aforesaid, may be deprived of their portion of the school fund.

Held, that the expression "all youths" prohibits any distinction being made between white and colored children: *Clark v. Board of Directors, etc.*, 24-266; *Smith v. Directors*, 40-518; *Dove v. Independent School Dist.*, 41-689.

Compensation. SEC. 13. The members of the board of education shall each receive the same per diem during the term of their session, and mileage going to and returning therefrom, as members of the general assembly.

Quorum; style of acts. SEC. 14. A majority of the board shall constitute a quorum for the transaction of business; but no rule, regulation, or law, for the government of common schools or other educational institutions shall pass without the concurrence of a majority of all the members of the board, which shall be expressed by the yeas and nays on the final passage. The style of all acts of the board shall be, "Be it enacted by the board of education of the state of Iowa."

Board may be abolished. SEC. 15. At any time after the year one thousand eight hundred and sixty-three, the general assembly shall have power to abolish or reorganize said board of education, and provide for the educational interest of the state in any other manner that to them shall seem best and proper.

The board of education was abolished by 10 G. A., ch. 52, § 1.

2.—*School Funds and School Lands.*

Under control of general assembly. SECTION 1. The educational and school fund and lands, shall be under the control and management of the general assembly of this state.

Permanent fund. SEC. 2. The university lands, and the proceeds thereof, and all moneys belonging to said fund shall be a permanent fund for the sole use of the state university. The interest arising from the same shall be annually appropriated for the support and benefit of said university.

Lands appropriated. SEC. 3. The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this state, for the support of schools, which may have been or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress, distributing the proceeds of the public lands among the several states of the Union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent. as has been or may hereafter be granted by congress, on the sale of lands in this state, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the general assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state.

See notes to § 7, *infra*.

Fines, etc., how appropriated. SEC. 4. The money which may have been or shall be paid by persons as an equivalent from exemption from military duty, and the clear proceeds of all fines collected in the several

counties for any breach of the penal laws, shall be exclusively applied in the several counties in which such money is paid, or fine collected, among the several school districts of said counties, in proportion to the number of youths subject to enumeration in such districts, to the support of common schools, or the establishment of libraries, as the board of education shall from time to time provide.

There are statutory provisions on this subject.

It is not contemplated that the fees of the prosecuting attorney in enforcing the collection of the fines, etc., due to the school fund shall be deducted from the whole amount collected. The term "clear proceeds" evidently refers to a case of forfeiture of property or payment of funds in orders or warrants: *Woodward v. Gregg*, 3 G. Gr., 287.

The double damages authorized by statute to be recovered against railroad companies is not a fine such as is contemplated in this section, but is simply a measure of damages: *Mackie v. Central R. of Iowa*, 54-540.

Proceeds of lands. SEC. 5. The general assembly shall take measures for the protection, improvement, or other disposition of such lands as have been, or may hereafter be reserved, or granted by the United States, or any person or persons to this state, for the use of the university, and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be, and remain, a permanent fund, the interest of which shall be applied to the support of said university, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the general assembly, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.

Agents of school funds. SEC. 6. The financial agents of the school funds shall be the same that, by law, receive and control the state and county revenue, for other civil purposes, under such regulations as may be provided by law.

Distribution. SEC. 7. The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the general assembly.

An act as to distribution of the school fund, *held* unconstitutional as in conflict with this section: *District T'p v. County Judge*, 13-250.

ARTICLE 10.—AMENDMENTS TO THE CONSTITUTION.

How proposed; submission. SECTION 1. Any amendment or amendments to this constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the general assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people in such manner, and at such time as the general assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the general assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state.

[For amendments, see art. 1, § 26; art. 2, §§ 1 and [7]; art. 3, §§ 4, 33, 34 and 35; art. 5, §§ 10, 13 and [17]; art. 6, § 1.]

It is the design and intention of this provision that the proposed amendment should be so entered upon the journals that it can be known from an examination of such journals what it is that has been agreed to by the houses of the general assembly; and such

entry is the highest evidence of what the amendment is which is agreed to by each house. Therefore, where it appeared from the journal of the senate of one general assembly that the proposed amendment, as passed by it, was different from the same amendment as concurred in by the subsequent general assembly, and submitted to and voted upon by the people, *held*, that it was not legally adopted and did not become a part of the constitution, although the joint resolution of the general assembly first acting upon the amendment, which was signed by the presiding officers of the two houses and by the governor, and preserved in the office of the secretary of state, showed such amendment to be the same as that subsequently concurred in and submitted; also, *held*, that the recital in the joint resolution of the general assembly which submitted said amendment to vote of the people, that it had been agreed to by the previous general assembly, was not conclusive upon the court: *Koehler v. Hill*, 60-543.

The provisions as to the amendment of the constitution are not simply directory, and the legislative department is not the sole judge as to whether or not they have been complied with, but the courts have jurisdiction to inquire into the question whether these requirements have been observed, and if not to declare the amendment invalid: *Ibid.*

More than one. SEC. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.

Convention. SEC. 3. At the general election to be held in the year one thousand eight hundred and seventy, and in each tenth year thereafter, and also at such times as the general assembly may, by law, provide, the question, "Shall there be a convention to revise the constitution, and amend the same?" shall be decided by the electors qualified to vote for members of the general assembly; and in case a majority of the electors so qualified, voting at such election for and against such proposition, shall decide in favor of a convention for such purpose, the general assembly, at its next session, shall provide by law for the election of delegates to such convention.

ARTICLE 11.—MISCELLANEOUS.

Jurisdiction of justice of the peace. SECTION 1. The jurisdiction of justices of the peace shall extend to all civil cases (except cases in chancery, and cases where the question of title to real estate may arise), where the amount in controversy does not exceed one hundred dollars, and by the consent of parties may be extended to any amount not exceeding three hundred dollars.

The jurisdiction of justices in such cases is not exclusive, but concurrent with courts of record: *Nelson v. Gray*, 2 G. Gr., 397; *Hutton v. Drebilbis*, 2 G. Gr., 593.

Counties. SEC. 2. No new county shall be hereafter created containing less than four hundred and thirty-two square miles; nor shall the territory of any organized county be reduced below that area; except the county of Worth, and the counties west of it along the northern boundary of this state, may be organized without additional territory.

An act organizing the county of Crocker *held* unconstitutional under this section: *Garfield v. Brayton*, 33-16.

This section *held* not to prohibit the legislature from establishing a second county seat in a county already organized: *Trimble v. State*, 2 G. Gr., 404.

Indebtedness of political or municipal corporations. SEC. 3. No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness.

What indebtedness excessive: Outstanding warrants as well as bonds are to be taken into consideration in estimating the indebtedness. The constitutional inhibition applies to indebtedness incurred in any manner or for any purpose: *Council Bluffs v. Stewart*, 51-385.

It applies to indebtedness already due as well as that to become due: *Grant v. Davenport*, 36-396.

If the corporation has money in its treasury to meet its indebtedness, the issue of warrants to any amount, however great, over the constitutional limit, will not be a viola-

tion of such provisions: *Dively v. Cedar Falls*, 27–227.

Where by virtue of a compromise the city recived one sum of money, and issued its certificate for a smaller sum, *held*, that such warrant would not be deemed void as incurring an indebtedness in excess of the constitutional limitation: *Hintrager v. Richter*, 85–222.

The indebtedness here contemplated is different from an obligation to pay. A contract under which a certain sum within the constitutional limit was to be paid each year would be valid, although the entire amount of the obligation of the contract was greatly in excess of the constitutional limit: *Ibid.*

This section applies not only to a present indebtedness, but also to such a one as is payable on a contingency at some future time, or which depends on some contingency before a liability is created; but it must appear that such contingency is sure to take place, irrespective of any action taken or option exercised in the future. Therefore, *held*, that an ordinance of a city authorizing the erection of water-works by a private company, with the provision that the city might, at its option, purchase them in the future on certain terms, etc., was not the incurring of an indebtedness: *Burlington Water Co. v. Woodward*, 49–58.

A contract by a city with a water company for a supply of water for fire protection to be furnished from year to year does not create an indebtedness within this constitutional provision: *Creston Waterworks Co. v. Creston*, 70 N. W., 739.

Bonds issued in payment of valid judgment or bonds, not exceeding the constitutional limit when rendered or issued, will be valid, although at the time they are issued the limit of indebtedness has been reached. The issue of such bonds does not increase the indebtedness: *Sioux City v. Weare*, 59–95; *Heins v. Lincoln*, 71 N. W., 189; *Thompson v. Independent Dist.*, 71 N. W. —.

Where a statute provided for a board of park commissioners authorizing them to levy a tax and issue bonds, *held*, that they had no authority to issue bonds which, in addition to the indebtedness of the city, would cause such indebtedness to exceed the constitutional limit: *Orvis v. Board of Park Commissioners*, 88–674.

The citizens and the corporation are not one and the same so that the indebtedness imposed upon citizens for such purposes is an indebtedness of the corporation. The property of a citizen may by reason of his being within the limits of several municipal corporations, as for instance, a county and city and school district, be subjected to indebtedness in the aggregate beyond the constitutional limitations: *Tuttle v. Polk*, 92–433.

A judgment against a municipal corporation is not a creation of indebtedness but only evidence of a pre-existing indebtedness and a corporation should plead the fact that the indebtedness is in excess of the constitutional limit. If this fact is not pleaded and made a ground of defense it cannot be urged as a defense in a *mandamus* proceeding to compel the levying of a tax to pay the judgment: *Edmundson v. Independent School Dist.*, 67 N. W. 671; *Ætna L. Ins. Co. v. Lyon County*, 44 Fed., 329.

The issuance of new bonds, the proceeds of which are to be used in extinguishing existing bonds, is an increase of indebtedness, and if such increase is beyond the constitutional limit the bonds are invalid (reversing 42 Fed., 644): *Doon Township v. Cummins*, 142 U. S., 366.

The municipal corporation or its officers cannot render such bonds valid by ratification as by making payments of interest thereon: *Ibid.*

The constitutional limit does not relate to interest and coupons upon bonds legally issued, and although they may swell the total indebtedness to a sum in excess of the constitutional limit they will be valid: *Durant v. Iowa County*, Woolworth, 69.

Estoppel: Even though refunding bonds are sold for cash the purchaser can not rely upon the action of the officers in applying the money to the indebtedness, but if it has so applied the proceeds the refunding bonds although in excess of the constitutional limit will be valid. The purchaser is bound to take notice of the constitutional provision and also of the amount of the taxable property of the district: *Shaw v. Independent School Dist.*, 62 Fed., 911.

Nor can the person rely upon the recitals in the bonds as an estoppel on the district. If it should appear that the bonds were in fact used to retire or refund a pre-existing enforceable indebtedness they might be valid even though they should exceed the limitation, but not if the indebtedness thus paid off was in itself in excess of the constitutional limit: *Ibid.*

Representations of a county agent as to the validity of the debt to be refunded will not estop the county: *Ætna L. Ins. Co. v. Lyon County*, 44 Fed., 329.

The fact that the officers of the corporation permit the person holding the illegal indebtedness to obtain judgment therefor does not estop the corporation, and it may set up the defense in a *mandamus* proceeding wherein it is sought to compel the officers of the corporation to levy a tax for the payment of such judgment: *Ibid.*

Tax payers of a city do not, by failure to object to the contracting of an indebtedness in excess of the constitutional limit, estop themselves from insisting upon the invalidity of such indebtedness: *McPherson v. Foster*, 43–48.

Bona fide holder: Bonds issued in excess of the constitutional limit are void without regard to the good faith and want of notice of the holder: *McPherson v. Foster*, 43–48; *Mosher v. Independent School Dist.*, 44–122.

Where bonds were fraudulently issued ostensibly in payment of a judgment which was in fact satisfied and such bonds were in excess of the constitutional limit of indebtedness, *held*, that they were invalid even in the hands of an innocent purchaser: *First Nat. Bk. v. District T'p*, 86–330.

An order or warrant issued in excess of the constitutional limitation is void. Such

order not being negotiable, a *bona fide* holder will acquire no rights thereunder: *National State Bank v. Independent Dist.*, 39–490.

A party contracting with a city, whereby indebtness is created, must at his peril take notice of the financial standing and condition of the city, and whether the proposed indebtedness is in excess of the constitutional limit: *French v. Burlington*, 42–614.

A party who becomes the creditor of a municipal corporation must at his peril take notice of the fact that its indebtedness is in excess of the constitutional limitation: *Kane v. Independent School Dist.*, 82–5.

A purchaser of bonds is chargeable with notice of the assessment of the municipal corporation, and that the amount of bonds issued, as shown by recitals on the bonds, constitutes an indebtedness in excess of the limit (affirming 25 Fed., 635: *Nesbit v. Independent Dist.*, 144 U. S., 610.

Lien: The statute giving to holders of bonds issued in excess of the constitutional limit a lien for material furnished by them upon a building in which it should be used, *held* unconstitutional, in that it was sought thereby to render the corporation liable for such improvements beyond its constitutional limit of indebtedness: *Mosher v. Independent School Dist.*, 44–122.

A guaranty by a municipal corporation which is beyond the constitutional limit is void: *Carter v. Dubuque*, 35–416.

Portion invalid: If a part of the indebtedness is in excess of the constitutional limit, the portion within the limit will be valid and enforced, while the portion beyond the limit will be held void: *McPherson v. Foster*, 43–48.

Where, in such a case, bonds were issued bearing the same date and for portions of the same indebtedness, *held*, that the bonds would be considered valid for the *pro rata* proportion of the indebtedness not in excess of the constitutional limit: *Ibid.*

If the refunding bonds are in excess of the valid indebtedness of the county they will not be deemed issued in the order of their number, but the equities of the respective holders may be adjusted in a proper action. The rights of the holders cannot be adjusted in an action at law: *Ætna L. Ins. Co. v. Lyon County*, 44 Fed., 329.

Bonds issued in excess of the constitutional limit are to be deemed void *in toto* and not merely to the extent by which they exceed the limit of indebtedness: *Anderson v. Orient Fire Ins. Co.*, 88–579.

To defeat recovery on bonds which are issued in excess of the constitutional limit it is not necessary to show that all the bonds in controversy are void. If it is claimed that a part of them are valid, for instance because the proceeds were applied to a legal debt, the burden of showing that fact is upon the holder of the bonds: *Holliday v. Hildebrandt*, 66 N. W., 89; *Independent Dist. v. Society for Savings*, 67 N. W., 370.

Purchasers of municipal bonds are bound at their peril to take notice of the constitutional limit upon the power of such corporations to become indebted and of such facts as the authorized official assessments disclose touching the valuation of all taxable property within the limits of the corporation: *Holliday v. Hildebrandt*, 66 N. W., 89.

Judgment bonds: Bonds issued in payment of a judgment recovered on debts contracted in excess of the constitutional limit are valid in the hands of innocent holders: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168; *Sioux City & St. P. R. Co. v. Osceola County*, 52–26.

Restraining tax: It is not ground for restraining the collection of a tax that, when collected, it will be applied to an unconstitutional indebtedness: *Strohm v. Iowa City*, 47–42.

By contract: In an action against a city for damages by reason of negligence in the care of its streets, it is no defense that the city is already indebted beyond the constitutional limit: *Bartle v. Des Moines*, 38–414; *Rice v. Des Moines*, 40–638; *Thomas v. Burlington*, 69–140.

An indebtedness, strictly speaking, cannot be created except by contract, either express or implied, and the indebtedness prohibited by the constitution is such as is created by the voluntary action of both the debtor and creditor: *Thomas v. Burlington*, 69–140.

So where the city has unlawfully collected taxes, an action to recover back taxes thus unlawfully collected will not be defeated by reason of the indebtedness of the city beyond the constitutional limit: *Ibid.*

Current revenues: A city has a right to obtain and apply its current revenues to the payment of its ordinary and current expenses, even as against a judgment creditor; and where the contract made by the municipal corporation pertains to its ordinary expenses and is, together with other like expenses, within the limit of its current revenues, and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the "incurring of indebtedness" within the meaning of the constitutional provision: *Grant v. Davenport*, 36–396.

A municipal corporation may assume an obligation to pay money without incurring a debt in a constitutional sense, if payment can be and is to be made from the current revenues of the corporation: *Tuttle v. Polk*, 92–433.

This constitutional limitation is applicable to the expenses of necessary as well as convenient improvement of the streets. It matters not for what purpose the indebtedness is incurred; it is prohibited for any purpose in excess of the limit, unless it can be reasonably shown that it can be liquidated and paid from the ordinary current revenues of the city: *French v. Burlington*, 42–614.

In ascertaining whether the contemplated indebtedness is within the current revenue, such revenue as is absolutely certain to be received from the collection of taxes may be anticipated to at least some extent, and an indebtedness accordingly contracted: *Ibid.*

In ascertaining the whole resources of a city, taxes levied should be regarded as available assets up to the time of the annual tax sale, but after that period the burden is on the city to show that such taxes have any

value which can be counted as available for the purpose of meeting a proposed indebtedness: *Ibid.*

Uncollected taxes: In ascertaining the entire indebtedness with reference to the constitutional limitation, uncollected taxes and the levy for the current year will not be taken into account as reducing such indebtedness (explaining *French v. Burlington*, 42–614): *Council Bluffs v. Stewart*, 51–385.

The tax lists are not made until after the equalization in June, and are not completed until after the levy of taxes in September. And where a tax was voted in May, which was in excess of the five per cent. limit as based upon the tax list of the previous year, *held*, that it was not proper to consider the assessor's lists of the current year as showing that such tax was not in excess of the constitutional limit: *Wilkinson v. Van Orman*, 70–230.

Where the question was whether, at the time certain orders were given by the secretary of a school district upon the treasury, its indebtedness exceeded its constitutional limit, it appeared that certain lands included in the tax list were not valued therein, and that the taxes thereon were marked paid, *held*, that evidence as to the value of such lands was admissible, subject to the right of defendant to show the rate per cent. of the taxes and the amount paid, and thus ascertain the assessed value: *Wormley v. District T'p*, 45–666.

What corporations: This constitutional provision as to the limit of indebtedness is applicable to school districts: *Winspear v. District T'p*, 37–542; *Mosher v. Independent School Dist.*, 44–122.

Also to cities organized under special charter prior to the constitution: *Scott v. Davenport*, 34–208; *Council Bluffs v. Stewart*, 51–385.

Previous contracts: The adoption of the constitutional provision as to limit of indebtedness did not impair any contract previously made, although in excess of the limit imposed; but any provisions of a city charter authorizing the contracting of indebtedness in excess of the limit fixed were thereby repealed: *Scott v. Davenport*, 34–208.

The fact that, as a result of the incurring of the indebtedness, the city is to acquire valuable property productive of revenue, does not take the case out of the constitutional provision: *Ibid.*

A contract for gas, made before the constitutional limitation was adopted, *held* binding, although the effect was to impose an indebtedness in excess of the limit: *Davenport Gas, etc., Co. v. Davenport*, 13–229.

Contracts for improvements: The provisions of a city charter limiting the amount of indebtedness which the city council might contract for borrowed money, *held* not applicable to indebtedness contracted for making improvements: *Rice v. Keokuk*, 15–579.

Where a city enters into a contract with a contractor for the building of a sewer with the agreement that the contractor shall accept in full satisfaction for the whole work certificates of assessment made upon the property adjacent to the sewer, such contract does not create a debt against the city within the meaning of this section: *Davis v. Des Moines*, 71–500; *Tuttle v. Polk*, 92–433; *Clinton v. Walliker*, 68 N. W., 431.

Boundaries. SEC. 4. The boundaries of the state may be enlarged, with the consent of congress and the general assembly.

Oath of office. SEC. 5. Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States, and of this state, and also an oath of office.

How vacancies filled. SEC. 6. In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified.

Where there was a failure to elect a county officer at a general election at which such office should have been filled, and the incumbent held over, qualifying anew as required by statute, *held*, that he filled a vacancy only, and his successor should be elected at the next general election: *Dyer v. Bagwell*, 54–487; *Boone County v. Jones*, 58–373.

This section explicitly defines and prescribes the term of office of a person who is appointed to fill a vacancy in an office where the statutes authorize the filling of such vacancy by the board of supervisors, and such board cannot afterward, except for the causes recognized by statute, remove the person appointed before the expiration of the term: *State v. Chatburn*, 63–659.

Land grants located. SEC. 7. The general assembly shall not locate any of the public lands which have been, or may be granted by congress to this state, and the location of which may be given to the general assembly, upon lands actually settled, without the consent of the occupant. The extent of the claim of such occupant so exempted, shall not exceed three hundred and twenty acres.

Seat of government; state university. SEC. 8. The seat of government is hereby permanently established, as now fixed by law, at the city of

Des Moines, in the county of Polk; and the state university at Iowa City, in the county of Johnson.

ARTICLE 12.—SCHEDULE.

Supreme law. SECTION 1. This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.

Laws in force. SEC. 2. All laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed.

Any provisions in a city charter inconsistent with the constitution (as, for instance, with § 3 of the preceding article) were repealed by the adoption of the constitution: *Dively v. Cedar Falls*, 27–227; *Scott v. Davenport*, 34–208.

Proceedings not affected. SEC. 3. All indictments, prosecutions, suits, pleas, plaints, process, and other proceedings pending in any of the courts, shall be prosecuted to final judgment and execution; and all appeals, writs of error, *certiorari*, and injunctions, shall be carried on in the several courts, in the same manner as now provided by law, and all offenses, misdemeanors, and crimes that may have been committed before the taking effect of this constitution, shall be subject to indictment, trial, and punishment, in the same manner as they would have been had not this constitution been made.

A crime committed prior to the adoption of this constitution, *held* subject to trial and punishment under the provisions of the prior constitution: *State v. Axt*, 6–511.

Fines inure to the state. SEC. 4. All fines, penalties, or forfeitures due, or to become due, or accruing to the state, or to any county therein, or to the school fund, shall inure to the state, county, or school fund, in the manner prescribed by law.

Bonds in force. SEC. 5. All bonds executed to the state, or to any officer in his official capacity, shall remain in force and inure to the use of those concerned.

First election for governor and lieutenant-governor. SEC. 6. The first election under this constitution shall be held on the second Tuesday in October, in the year one thousand eight hundred and fifty-seven, at which time the electors of the state shall elect the governor and lieutenant-governor. There shall also be elected at such election, the successors of such state senators as were elected at the August election, in the year one thousand eight hundred and fifty-four, and members of the house of representatives, who shall be elected in accordance with the act of apportionment, enacted at the session of the general assembly which commenced on the first Monday of December, one thousand eight hundred and fifty-six.

For secretary, auditor, etc. SEC. 7. The first election for secretary, auditor, and treasurer of state, attorney-general, district judges, members of the board of education, district attorneys, members of congress, and such state officers as shall be elected at the April election, in the year one thousand eight hundred and fifty-seven (except the superintendent of public instruction), and such county officers as were elected at the August election, in the year one thousand eight hundred and fifty-six, except prosecuting attorneys, shall be held on the second Tuesday of October, one thousand eight hundred and fifty-eight: *provided* that the time for which any district judge or other state or county officer elected at the April election in the year one thousand eight hundred and fifty-eight shall not extend beyond the time fixed for filling like offices at the October election, in the year one thousand eight hundred and fifty-eight.

For judges of supreme court. SEC. 8. The first election for judges of the supreme court, and such county officers as shall be elected at the

August election, in the year one thousand eight hundred and fifty-seven, shall be held on the second Tuesday of October, in the year one thousand eight hundred and fifty-nine.

First session general assembly. SEC. 9. The first regular session of the general assembly shall be held in the year one thousand eight hundred and fifty-eight, commencing on the second Monday of January of said year.

Senators. SEC. 10. Senators elected at the August election, in the year one thousand eight hundred and fifty-six, shall continue in office until the second Tuesday of October, in the year one thousand eight hundred and fifty-nine, at which time their successors shall be elected as may be prescribed by law.

Offices not vacated. SEC. 11. Every person elected by popular vote, by a vote of the general assembly, or who may hold office by executive appointment, which office is continued by this constitution, and every person who shall be so elected or appointed to any such office, before the taking effect of this constitution (except as in this constitution otherwise provided), shall continue in office until the term for which such person has been or may be elected or appointed shall expire; but no such person shall continue in office after the taking effect of this constitution, for a longer period than the term of such office, in this constitution prescribed.

Judicial districts. SEC. 12. The general assembly, at the first session under this constitution, shall district the state into eleven judicial districts, for district court purposes; and shall also provide for the apportionment of the members of the general assembly in accordance with the provisions of this constitution.

Submission of constitution. SEC. 13. This constitution shall be submitted to the electors of the state at the August election, in the year one thousand eight hundred and fifty-seven, in the several election districts in this state. The ballots at such election shall be written or printed as follows: those in favor of the constitution, "new constitution—yes." Those against the constitution, "new constitution—no." The elections shall be conducted in the same manner as the general elections of the state, and the poll-books shall be returned and canvassed as provided in the twenty-fifth chapter of the code, and abstracts shall be forwarded to the secretary of state, which abstracts shall be canvassed in the manner provided for the canvass of state officers. And if it shall appear that a majority of all the votes cast at such election for and against this constitution are in favor of the same, the governor shall immediately issue his proclamation stating that fact, and such constitution shall be the constitution of the state of Iowa, and shall take effect from and after the publication of said proclamation.

Proposition to strike out the word "white." SEC. 14. At the same election that this constitution is submitted to the people for its adoption or rejection, a proposition to amend the same by striking out the word "white," from the article on the "right of suffrage," shall be separately submitted to the electors of this state for adoption or rejection, in the manner following, viz.: a separate ballot may be given by every person having a right to vote at said election, to be deposited in a separate box. And those given for the adoption of such proposition shall have the words, "shall the word 'white' be stricken out of the article on the 'right of suffrage?' yes." And those given against the proposition shall have the words, "shall the word 'white' be stricken out of the article on the 'right of suffrage?' no." And if at said election the number of ballots cast in favor of said proposition, shall be equal to a majority of those cast for and against this constitution, then said word "white" shall be stricken from said article and be no part thereof.

Mills county. SEC. 15. Until otherwise directed by law, the county of Mills shall be in and a part of the sixth judicial district of this state.

Done in convention at Iowa City, this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States of America, the eighty-first.

In testimony whereof, we have hereunto subscribed our names:

TIMOTHY DAY,	A. H. MARVIN,	JNO. T. CLARKE,
S. G. WINCHESTER,	J. H. EMERSON,	S. AYRES,
DAVID BUNKER,	R. L. B. CLARKE,	HARVEY J. SKIFF,
D. P. PALMER,	JAMES A. YOUNG,	J. A. PARVIN,
GEO. W. ELLS,	D. H. SOLOMON,	W. PENN CLARK,
J. C. HALL,	M. W. ROBINSON,	JERE. HOLLINGSWORTH,
JOHN H. PETERS,	LEWIS TODHUNTER,	WM. PATTERSON,
WM. H. WARREN,	JOHN EDWARDS,	D. W. PRICE,
H. W. GRAY,	J. C. TRAER,	ALPHEUS SCOTT,
ROBT. GOWER,	JAMES F. WILSON,	GEORGE GILLASPY,
H. D. GIBSON,	AMOS HARRIS,	EDWARD JOHNSTONE.
THOMAS SEELEY,		FRANCIS SPRINGER, *President.*

Attest:

TH. J. SAUNDERS, *Secretary.*
E. N. BATES, *Assistant Secretary.*

THE CODE OF IOWA

ENACTED BY THE TWENTY-SIXTH GENERAL ASSEMBLY AT ITS EXTRA SESSION, 1897.

PART FIRST.

PUBLIC LAW.

TITLE I.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE, AND THE LEGISLATIVE DEPARTMENT.

CHAPTER 1.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

SECTION **1. State boundaries.** The boundaries of the state are as defined in the preamble of the constitution. [C., '73, § 1; R., § 1; C., '51, § 1.]

The boundary line between this state and Illinois is the middle of the main navigable channel of the Mississippi river or the channel most used, and not the middle of the great bed of the stream as defined by the banks of the river: *Chicago & N. W. R. Co., v. Clinton*, 88–188.

And see notes to the preamble to the constitution.

SEC. **2. Sovereignty.** The state possesses sovereignty co-extensive with the boundaries referred to in the preceding section, subject to such rights as may at any time exist in the United States in relation to public lands, or to any establishment of the national government. [C., '73, § 2; R., § 2; C., '51, § 2.]

SEC. **3. Concurrent jurisdiction.** The state has concurrent jurisdiction on the waters of any river or lake which forms a common boundary between this and any other state. [C., '73, § 3; R., § 3; C., '51, § 3.]

This concurrent jurisdiction does not extend to the abatement of a nuisance existing on the Illinois shore, or connected with such shore (*Gilbert v. Moline, etc., Co.*, 19–319); but does extend to the abatement of a nuisance and punishment of a crime committed upon a boat in said river, even though resting upon the shore of an island beyond the middle of the stream: *State v. Mullen*, 35–199.

The jurisdiction of the courts of the state does not extend to the abatement of a nuisance on an island in the Mississippi river, which is not shown to be within the Iowa boundary as fixed by act of congress: *Buck v. Ellenbolt*, 84–394.

SEC. **4. Lands of United States—jurisdiction—taxation—process.** Exclusive jurisdiction over all lands situate in the state now or hereafter purchased by the United States, on which buildings for public use are or shall be erected, is hereby ceded to the United States, and the same shall be exempt from taxation so long as owned by the United States; subject to the right of service of any judicial process issued from or returnable to any court of this state or judge thereof, and the exercise by such courts of jurisdiction of crimes committed thereon; and further subject to the enforcement of quarantine and health regulations of the state. [C., '73, § 4; R., §§ 2197, 2198.]

CHAPTER 2.

OF THE GENERAL ASSEMBLY.

SECTION **5. Sessions—where.** The sessions of the general assembly shall be held at the seat of government, unless the governor shall convene them at some other place in times of pestilence or public danger. [C., '73, § 5; R., § 3; C., '51, § 4.]

SEC. **6. Temporary organization.** At ten o'clock in the forenoon of the day on which the general assembly shall convene, and at the place of convening the houses respectively, the president of the senate, or in his absence some person claiming to be a member, shall call the senate to order. If necessary, a temporary president shall be chosen from their own number by the persons claiming to be elected senators; and some person claiming to be elected a member of the house of representatives shall call the house to order, and the persons present claiming to be elected to the senate shall choose a secretary, and those of the house of representatives, a clerk for the time being. [25 G. A., ch. 109; C., '73, § 6; R., § 14; C., '51, § 5.]

SEC. **7. Certificates of election.** Such secretary and clerk shall receive and file the certificates of election presented, each for his own house, and make a list therefrom of the persons who appear to have been elected members of the respective houses. [C., '73, § 7; R.. § 15; C., '51, § 6.]

SEC. **8. Temporary officers—committee on credentials.** The persons so appearing to be members shall proceed to elect such other officers for the time being as may be requisite; and when so temporarily organized shall choose a committee of five, who shall examine and report upon the credentials of the persons claiming to be members. [C., '73, § 8; R., § 4; C., '51, § 7.]

SEC. **9. Permanent organization.** The members reported by the committee as holding certificates of election from the proper authority shall proceed to the permanent organization of their respective houses by the election of officers. [C., '73, § 9; R., § 5; C., '51, § 8.]

SEC. **10. Oaths—who administer.** Any member may administer oaths necessary in the course of business of the house of which he is a member, and, while acting on a committee, in the course of business of such committee. [C., '73, § 10; R., § 7; C., '51, § 10.]

SEC. **11. Freedom of speech.** No member shall be questioned in any other place for any speech or debate in either house. [C., '73, § 11; R., § 6; C., '51, § 9.]

SEC. **12. Compensation of members.** The compensation of the members of the general assembly shall be: To every member, for each regular session, five hundred and fifty dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session; and in going to and returning from the place where the general assembly is held, five cents per mile, by the nearest traveled route; but in no case shall the compensation for any extra

session exceed six dollars per day, exclusive of mileage. [19 G. A., ch. 52, § 2; 18 G. A., ch. 38, § 2; C., '73, § 12; R., § 18; C., '51, § 11.]

SEC. **13. Compensation of officers and employes.** The compensation of the officers and employes of the general assembly shall be: To the secretary of the senate and chief clerk of the house, six dollars per day, each; to the assistant secretaries of the senate and clerks of the house, journal, enrolling and engrossing clerks, five dollars per day, each; the speaker's clerk, lieutenant-governor's clerk, and sergeant-at-arms, four dollars per day, each; to postmaster and assistant, mail carriers, bill clerks, file clerks, door keepers, janitors and committee clerks three dollars per day, each, and the necessary stationery for each of the clerks, secretaries, and their assistants aforesaid; to the lieutenant-governor's page and speaker's page, two dollars per day, each; to the messengers, one dollar and fifty cents per day, each. And no other or greater compensation shall be allowed such officers or employes, nor shall there be any allowance of or for stationery, except as above provided, postage, newspapers, or other perquisites in any form or manner, or under any name or designation. [25 G. A., ch. 73; 19 G. A., ch. 52, § 2; 18 G. A., ch. 38, § 2; C., '73, § 12; R., § 18; C., '51, § 11.]

SEC. **14. Payment of members.** Within thirty days after the convening of the general assembly, the presiding officers of the two houses shall jointly certify to the auditor of state the names of the members, officers and employes of their respective houses, and the amount of mileage due each member, respectively, who shall thereupon draw a warrant upon the state treasurer for the amount due each member for mileage, as above certified, and shall also issue to each member of the general assembly, at the end of said thirty days, a warrant for one-half the salary due him for the session, and the remaining one-half at the close of the session. At the close of any extra or adjourned session, the compensation of the members shall be paid upon certificate of the presiding officer of each house, showing the number of days of allowance, and the compensation as provided by law. [15 G. A., ch. 3, § 1.]

SEC. **15. Of officers and employes.** The auditor shall also issue to each officer and employe of the general assembly, from time to time, upon certificates signed by the president of the senate and the speaker of the house, warrants for the amount due for services rendered. [15 G. A., ch. 3, §§ 2, 3.]

SEC. **16. Warrants to be paid.** Said warrants shall be paid out of any moneys in the treasury not otherwise appropriated. [15 G. A., ch. 3, § 4.]

SEC. **17. Officers—tenure.** The speaker of the house of representatives shall hold his office until the first day of the meeting of the regular session next after that at which he was elected. All other officers elected by either house shall hold their offices only during the session at which they were elected, unless sooner removed. [C., '73, § 13; R., § 16.]

This section does not fix the term of office of the secretary of the senate. It prescribes the limit of his term but does not fix his right to the office during such term. After election he may be removed by the senate electing him, before the expiration of such term, without notice or a hearing: *Cliff v. Parsons*, 90–665.

SEC. **18. Contempt—what is.** Each house has authority to punish as for a contempt, by fine or imprisonment or both, any person who commits any of the following offenses against its privileges, dignity or authority:

1. Arresting a member, knowing him to be such, in violation of his privilege, or assaulting, or threatening to assault, or threatening any harm to the person or property of, a member, knowing him to be such, for anything said or done by him in such house as a member thereof;

2. Attempting by menace, or by force, or by any corrupt means, to control or influence a member in giving his vote, or to prevent his giving it;

3. Disorderly or contemptuous conduct tending to disturb its proceedings;

4. Refusal to attend, or to be sworn, or to affirm, or to be examined, as a witness before it, or before a committee thereof, when duly subpœnaed;
5. Assaulting or preventing any person going before it, or before any of its committees, by its order; the offender knowing such fact;
6. Rescuing or attempting to rescue any person arrested by its order; the offender knowing of such arrest;
7. Impeding any officer of such house in the discharge of his duties as such; the offender knowing his official character. [C., '73, § 14; R., § 8; C., '51; § 12.]

SEC. **19. Punishment for—how executed.** Fines and imprisonment for contempt shall be only by virtue of an order of the proper house, entered on its journals, stating the grounds thereof. Imprisonment shall be effected by a warrant, under the hand of the presiding officer, for the time being, of the house ordering it, countersigned by the acting secretary or clerk, running in the name of the state, and directed to the sheriff or jailer of the proper county. Under such warrant, the proper officer will be authorized to commit and detain the person. Fines shall be collected by a similar warrant, directed to any proper officer of any county in which the offender has property, and executed in the same manner as executions for fines issued from courts of record, and the proceeds paid into the state treasury. [C., '73, § 15; R., § 10; C., '51, § 14.]

SEC. **20. Same—how limited.** Imprisonment for contempt shall not extend beyond the session at which it is ordered, and shall be in the jail of the county in which the general assembly is then sitting; or, if there be no such jail, then in one of the nearest county jails. Punishment for contempt shall not constitute a bar to any other proceeding, civil or criminal, for the same act. [C., '73, § 16; R., §§ 9, 11; C., '51, §§ 13, 15.]

SEC. **21. Witnesses—attendance compulsory.** Whenever a committee of either house, or a joint committee of both, is charged with an investigation requiring the personal attendance of witnesses, any person may be compelled to appear before such committee as a witness, by serving an order upon him, which service shall be made in the manner required in case of a subpœna in a civil action in the district court, such order stating the time and place he is required to appear, signed by the presiding officer of the house appointing the committee, and attested by its acting secretary or clerk; or, in case of a joint committee, signed and attested by such officers of either house. [C., '73, § 17.]

SEC. **22. Same—compensation.** Witnesses shall be entitled to the same compensation for attendance under the preceding section as before the district court, but shall not have the right to demand payment of their fees in advance. [C., '73, § 18.]

SEC. **23. Joint conventions.** Joint conventions of the general assembly shall meet in the hall of the house of representatives for such purposes as are or shall be provided by law. The president of the senate, or, in his absence, the speaker of the house of representatives, shall preside, or, in the absence of both, a temporary president shall be appointed by a joint vote. [C., '73, § 19; R., §§ 674, 675.]

SEC. **24. Tellers.** After the time for the meeting of the joint convention has been designated and prior thereto, each house shall appoint one teller, and the two shall act as judges of the election. C., '73, § 20; R., § 676.]

SEC. **25. Secretary—record.** The clerk of the house of representatives shall act as secretary of the convention, and he and the secretary of the senate shall keep a fair and correct record of the proceedings of the convention, which shall be entered on the journals of each house. [C., '73, § 21; R., § 677.]

SEC. **26. Election—vote—how taken.** When any officer is to be elected by joint convention, the names of the members shall be arranged in alphabetical order by the secretaries, and each member shall vote in the

order in which his name stands when thus arranged. The name of the person voted for, and of the members voting, shall be entered in writing by the tellers, who, after the secretary shall have called the names of the members a second time, and the name of the person for whom each member has voted, shall report to the president of the convention the number of votes given for each candidate. [C., '73, § 22; R., §§ 678, 679.]

SEC. **27. Second poll.** If no person shall receive the votes of a majority of the members present, a second poll may be taken, and so on from time to time until some person receives such majority. [C., '73, § 23; R., § 680.]

SEC. **28. Adjournment.** If the purpose for which the joint convention is assembled is not concluded, the president shall adjourn the same from time to time as the members present may determine. [C., '73, § 24; R., § 681.]

SEC. **29. Certificates of election.** When any person shall have received a majority of the votes as aforesaid, the president shall declare him to be elected, and shall, in the presence of the convention, sign two certificates of such election, attested by the tellers, one of which he shall transmit to the governor, and the other shall be preserved among the records of the convention and entered at length on the journal of each house. The governor shall issue a commission to the person so elected. [C., '73, § 25; R., § 682.]

SEC. **30. Election of senators.** Joint conventions for the purpose of electing a senator in the congress of the United States, and canvassing the votes for governor and lieutenant-governor, shall be conducted according to the foregoing provisions, so far as applicable. [C., '73, § 26; R., § 685.]

SEC. **31. Parliamentary rules.** In the absence of other rules, those of parliamentary practice comprised in Cushing's Manual shall govern. [C., '73, § 27; R., § 686.]

CHAPTER 3.

OF THE STATUTES.

SECTION **32. Bills—approval—passage over veto—certificate.** If the governor approves a bill, he shall sign and date it; if he returns it with his objections and it afterwards passes as provided in the constitution, a certificate, signed by the presiding officer of each house in the following form, shall be indorsed thereon or attached thereto: "This bill, having been returned by the governor, with his objections, to the house in which it originated, and, after reconsideration, having again passed both houses by yeas and nays by a vote of two-thirds of the members of each house, has become a law this.....day of....." [C., '73, §§ 28, 29; R., §§ 19, 20; C., '51, §§ 16, 17.]

As to how the fact of approval may be shown, see note to § 38.

As to approval by governor, see Const., art. 3, § 16.

SEC. **33. Bills retained—certificate.** When a bill has passed the general assembly, and is not returned by the governor within three days as provided in the constitution, it shall be authenticated by the secretary of state indorsing thereon: "This bill, having remained with the governor three days (Sunday excepted), the general assembly being in session, has become a law this.....day of.....

.....

[C., '73, § 30; R., § 21; C., '51, § 18.] Secretary of State."

See Const., art. 3, § 16.

SEC. **34. Acts—where deposited.** The original acts of the general assembly shall be deposited with and kept by the secretary of state. [C., '73, § 31; R., § 22; C., '51, § 19.]

The original act thus deposited with the secretary of state is the ultimate proof of the statute, whatever errors there may be in the printed copies thereof; and the court will inform itself and take cognizance of the true reading as thus shown: *Clare v. State*, 5–509.

The acts thus deposited are the bills which receive the signatures of the officers, etc., and behind them it is impossible for any court to go for the purpose of ascertaining what the law is: *Duncombe v. Prindle*, 12–1, 11.

Where the newspaper publication of an act corresponded with the original rolls, *held*, that the act as thus existing and published would govern as to an offense committed thereunder prior to the formal publication of the statute, although such formal publition differed from the original rolls and the newspaper publication: *State v. Donehey*, 8–396.

As the constitution requires a proposed amendment to be entered upon the journals of the respective houses of the general assembly when agreed to, such journals are higher evidence of the contents of such amendment as it was agreed to than the enrolled copy of the joint resolution proposing such amendment, signed by the presiding officers of the respective houses and by the governor: *Koehler v. Hill*, 60–543.

SEC. **35. Private acts—when take effect.** Acts of a private nature, which do not prescribe the time when they take effect, shall do so on the thirtieth day next after they have been approved by the governor, or indorsed as provided in this chapter. [C., '73, § 32; R., § 23; C., '51, § 20.]

SEC. **36. Acts taking effect by publication.** Acts which are to take effect from and after publication in newspapers shall be published in two or more papers, one at least of them at the seat of government, and, if such papers are not designated in the act, the same may be designated by the secretary of state, and the act published accordingly. All such acts shall take effect from and after the date of the last publication, and the secretary of state shall make and sign on the original roll of each of such acts a certificate, stating in what papers it was published, and the date of the last publication in each of them, which certificate and the printing thereof at the foot of the act shall be presumptive evidence of the facts therein stated. [C., '73, § 33; R., § 24; C., '51, § 21.]

A statute does not become a law so as to affect the rights of property or parties until the time when by publication or otherwise it is to take effect: *Charless v. Lamberson*, 1–435.

The provision in the former section that "all such acts shall take effect on the twentieth day after the date of the last publication" held to apply only to acts in which the time of taking effect was not specified, and not to render it incompetent for the legislature to specify in the act itself when it should take effect. Where an act provided that it should take effect "from its publication in," etc., *held*, that it took effect from the date of such publication: *Hunt v. Murray*, 17–313.

Under a prior provision, however, to the same effect, *held*, that although the act contained a special section directing that it should take effect from and after its publication, such section should not be considered as repealing the general provision that it should take effect at the expiration of twenty days from the date of publication: *Thatcher v. Haun*, 12–303.

Certificate of secretary that act was published in one newspaper, *held* not sufficient: *Welch v. Battern*, 47–147.

The general assembly may provide that an act shall take effect by publication, and the courts have no power to prevent the injustice which may result therefrom. (Decided under old Const.): *Pierson v. Baird*, 2 G. Gr., 235.

If a statute is in force, ignorance thereof from any cause on the part of those affected by it is no reason why it should not be enforced against them. They cannot require that it should be published in such manner as that it should be known by them: *Barber v. St. Louis, K. C. & N. W. R. Co.*, 43–223.

Where at the time of the commission of an offense under a statute the only publication that had been made was in a newspaper under authority of law, and the statute as thus published corresponded to the original rolls, *held*, that the form of the statute as thus appearing would prevail over a subsequent publication, although it was official, varying from the form found in the rolls and as originally published: *State v. Donehey*, 8–396.

A court will take judicial notice of the fact of publication of a statute, where such publication is necessary in order that the act shall go into effect: *Allen v. Dunham*, 1 G. Gr., 89.

The courts are bound *ex officio* to take notice of publication of statutes which take effect by publication: *Pierson v. Baird*, 2 G. Gr., 235.

While the statement appended to the printed act that it is "approved" is evidence of that fact, it is not essential to the validity of the act, and the approval may be shown from the original in the office of the secretary of state: *Dishon v. Smith*, 10–212.

SEC. **37. Acts of public nature—when take effect.** All acts and resolutions of a public nature passed at regular sessions of the general assem-

bly shall take effect on the fourth day of July following their passage, unless some specified time is provided in the act, or they have sooner taken effect by publication. [C., '73, § 34; R., § 25; C., '51, § 22.]

SEC. **38. Secretary of state to publish laws.** Within fifty days after the adjournment of the general assembly, the secretary of state shall prepare a manuscript or printed copy of all the laws, joint resolutions and memorials passed thereat, arranging the same in chapters, with chapter headings and sectional catch-words and an index, to which he shall attach his certificate that the acts, resolutions and memorials therein contained are truly copied from the original rolls, which shall be presumptive evidence of their correctness, and deliver them to the state printer. [16 G. A., ch. 132; C., '73, § 35; R., §§ 62, 63, 144; C., '51, §§ 46, 47.]

While the statement appended to the printed act that it is "approved" is evidence of that fact, it is not essential to the validity of the act, and the approval may be shown from the original in the office of the secretary of state: *Dishon v. Smith*, 10–212.

SEC. **39. Style of publication.** The acts of each general assembly shall be printed in pages of the same size, and, as near as may be, of the same style, type and appearance with the official edition of this code. [16 G. A., ch. 132; C., '73, § 36.]

SEC. **40. Superintendence of publication—copies—time.** The secretary of state shall superintend the printing of the laws as above directed. In the absence of any other provision, the number of copies to be printed and bound, and the time within which the same shall be completed, may be fixed by resolution of each general assembly, or, in case no such resolution is passed, shall be determined by the executive council. [16 G. A., ch. 132; C., '73, § 37.]

SEC. **41. Amendments—reference to amended act.** Every act passed in amendment of or in addition to any chapter or section of this code, or in amendment of or in addition to any previous act of the same kind, shall contain in the title thereof a reference to the number and name of the chapter so amended or added to, and, if such reference be omitted, the secretary of state shall, in preparing such act for publication, supply the omission. [16 G. A., ch. 132; C., '73, § 38.]

The marginal notes and head-lines inserted by the secretary of state in publishing the statutes are not to be considered in construing them. They are not a part of the law: *Cook v. Federal Life Ass'n*, 74–746.

An amendatory act from which the number and name of the chapter of the Code, which is amended, is omitted, is not invalid, even though the omission is not supplied by the secretary of state as required by this section: *State v. Shreves*, 81–615.

The provisions of this section are directory rather than mandatory, and the omission of the reference here required will not invalidate the act even though the secretary of state does not supply the omission: *Morgan v. Des Moines*, 54 Fed., 456.

SEC. **42. Distribution of laws by secretary of state.** The secretary of state shall distribute the laws aforesaid as follows: To the state library for distribution to other states and territories, and for exchange, two hundred copies; two copies to each state institution, to each judge of a court of record, including United States circuit and district judges whose districts lie within this state, and to each state office; one copy to each member of the general assembly; ten copies to the library of the law department of the state university; ten copies to the state historical society; one to each public library within the state,—all of the foregoing to be bound in law sheep; thirteen thousand copies to be bound in boards for distribution to county auditors upon their requisition. [17 G. A., ch. 123, § 1; 16 G. A., ch. 132; C., '73, § 39.]

SEC. **43. By county auditors—accounting.** Each county officer, justice of the peace, township clerk and mayor of a city or town shall be supplied with a copy of the laws for the use of his office, which shall be delivered to his successor in office. Distribution shall be made upon the

requisition of the county auditor upon the secretary of state, which requisition shall state the number of copies required for distribution under the provisions of this section, and also the number of copies requisite for sale in the county, and said requisition shall be made before the first day of March in each year, and thereupon the secretary of state shall forward the number so certified, and file with the auditor of state a certificate thereof, which shall be charged to such county by the auditor of state. The auditor of state shall credit the county with the number of copies distributed under the provisions of this chapter, upon the filing of the proper vouchers by the county auditors, and upon the sale of such laws by the county auditor at the rate of fifty cents per copy. The said county auditor shall pay said amounts to the county treasurer of his county, for the use of the state revenue, and the treasurer shall execute duplicate receipts therefor, one of which shall be filed with the auditor of state. The county auditors shall furnish the laws in their respective counties as hereinbefore provided. [17 G. A., ch. 123, § 2; 16 G. A., ch. 132; C., '73, § 40.]

SEC. **44. Sales—reports—accounting.** The secretary of state and county auditors shall sell the copies remaining in their hands at fifty cents a copy. The secretary of state shall report under oath to the auditor of state the number of copies remaining on hand after the distribution aforesaid, and the auditor of state shall charge him therewith, and credit him with the proceeds of all that are sold, upon payment of the same into the state treasury. The county auditor shall pay the proceeds of all copies sold by him to the county treasurer, taking his duplicate receipts therefor, one of which he shall transmit to the auditor of state. [C., '73, § 41.]

SEC. **45. Same.** The secretary of state and county auditors shall, on or before the fifteenth day of November in each year, report to the auditor of state the number of copies sold and the number remaining on hand, and the amount paid into the state or county treasury, and the auditor shall charge such state or county treasurer with such amount. [C., '73, § 42.]

SEC. **46. Copies to be delivered to successors.** When the secretary of state or county auditor goes out of office having any such copies remaining, he shall deliver them to his successor, taking his duplicate receipts therefor, one of which he shall transmit to the auditor of state, who shall thereupon give such officer the proper credit and charge his successor with the copies received by him. Every officer receiving a copy of such laws shall execute a receipt therefor, and shall deliver such copy to his successor, or to the officer from whom he received it, for the use of such successor, and upon failure to do so shall be liable on his official bond or in his individual capacity. [C., '73, § 43.]

SEC. **47. Cost of publishing.** The compensation for the publication of laws which are ordered by the general assembly to take effect by publication, unless otherwise fixed, shall be audited and paid by the state, and shall be one-third the rates of legal advertisements allowed by law. [C., '73, § 44.]

SEC. **48. Construction.** In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute: [C., '73, § 45; R., § 29; C., '51, § 26.]

1. *Repeal—effect of.* The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed.

For similar provision as to the effect of Code upon previous legislation, see § 51 and notes.

The repeal of a statute by an act which substantially retains the provisions of the old statute does not destroy or interrupt the binding force of such statute: *Hancock v. District T'p*, 78–550.

Previous statute not revived: The repeal of a statute does not revive a statute previously repealed: *Burlington v. Kellar*, 18–59; *Negus v. Negus*, 46–487.

As to proceedings commenced: Where a statute is repealed it must be considered as if it never existed except with reference to such parts as are preserved by the repealing statute; and though the suit may have been instituted under the statute while in existence, such repeal takes away the jurisdiction over the case thus pending: *Thatcher v. Haun*, 12-303.

Where a statute relating to the remedy is changed after the bringing of an action, subsequent proceedings should so far as practicable conform to the new law: *Davidson v. Wheeler*, Mor., 238.

Where a rule of practice is changed by statute without any saving clause the new law is applicable to all cases then pending: *Meigs v. Parke*, Mor., 378.

An amendment to the statute as to granting a change of venue, *held* applicable to actions pending. Such a change does not affect vested rights: *Eikenberry v. Edwards*, 71-82.

Where the times of holding terms of court were changed by statute, *held*, that such change did not affect a cause already commenced by service of notice, and that defendant should be held to appear at the "next term," as so changed: *Peoria M. & F. Ins. Co. v. Dickerson*, 28-274.

Where action was commenced by service by publication before the taking effect of the Revision, and the service of notice was not sufficient under the law as it then stood, *held*, that a judgment rendered upon such service after the taking effect of the Revision was defective, although the service, if made under the provisions of the Revision, would have been sufficient: *Bristow v. Guess*, 12-404.

Statutory provisions as to the method of trial in equity cases upon appeal, *held* not applicable to an appeal taken after the act took effect from a judgment rendered before that time: *Simondson v. Simondson*, 50-110; *Trebon v. Zuraff*, 50-180.

Nor to an appeal commenced but not brought to judgment before the act took effect: *Schmeltz v. Schmeltz*, 52-512; *Bailey v. Malvin*, 53-371.

Effect upon judgments or orders: Proceedings to enforce a judgment should be governed by the law in force when they are commenced, and not by that under which the judgment is rendered: *Gray v. Iliff*, 30-195.

The law in force at the time of the rendition of a judgment should govern as to a sale made thereunder: *Fonda v. Clark*, 43-300; *Babcock v. Gurney*, 42-154.

Also as to the right to appraisement: *Holland v. Dickerson*, 41-367.

Also as to stay of execution: *Du Boise v. Bloom*, 38-512.

Also as to right of appeal: *Davenport v. Davenport & St. P. R. Co.*, 37-624; *Ingram v. Chicago, D. & M. R. R. Co.*, 38-669.

Proceedings commenced are not, under statutory provision above set out, affected by the repeal of the statute under which they are commenced: *Inskeep v. Inskeep*, 5-204, 221.

Rights accrued: The statute authorizing suit on a promissory note to be brought by an assignee thereof in his own name instead of in the name of the assignor for his benefit, *held* applicable to notes already executed: *Phillips v. Runnells*, Mor., 391.

Where an action was brought prior to the adoption of the Code of '51, but judgment therein was not rendered until after that time, *held*, that defendant's homestead exemption should be governed by the provisions of the law under which action was commenced: *Helfenstein v. Care*, 3-287.

Where a new revenue law was passed making no express provisions as to the enforcement of the penalties under the previous law, *held*, that the penalties already accrued could be enforced in accordance with the previous statute: *Bartruff v. Remey*, 15-257.

The general assembly cannot alter, change or repeal statutes relating to the remedy so as to substantially impair a vested right; therefore, where a mortgage and a mechanic's lien upon the same property attached under the Revision, *held*, in an action brought under the Code, that the mortgagee had a right to have his lien determined and enforced, as against the holder of the mechanic's lien, in accordance with the provisions of the Revision: *Brodt v. Rohkar*, 48-36.

Accruing and accrued rights are of the same character. There is no other distinction made by the statute, except that one has accrued and the other is accruing. The statute takes effect upon both, and both are preserved to the party entitled thereto: *Woods v. Haviland*, 59-476.

The repeal of a statute with reference to widow's dower will not affect a dower interest already vested though not yet assigned: *Burke v. Barron*, 8-132.

Prior to the death of a testator his devisees have no rights which are protected against subsequent legislation: *Lorieux v. Keller*, 5-196.

The right contemplated by this provision pertains to any property right, or person, of the citizen. A permit granted under a statute is not such a right that it is not affected by the repeal of the statute: *State v. Mullenhoff*, 74-271.

Crimes previously committed: Where, after an indictment was found, the law prescribing the punishment for the offense therein charged was changed, so that the offense was no longer triable on indictment, but only on information, *held*, that the prosecution under the indictment was not affected by the change. (Overruling *State v. Burdick*, 9-402): *State v. Shaffer*, 21-486.

A new statute which provides a milder punishment repeals so much of the former law as concerns the punishment without any express repeal, and where one statute prescribes different degrees of punishment in different sections for the same offense, only the milder degree can be adopted: *State v. Brandt*, 41-593.

Where the repealing clause of a penal statute provided that no offense committed and no penalty incurred under the act repealed should be affected by the repeal, *held*, that a crime committed under a previous act,

which was repealed with a similar saving clause to the act thus repealed, was not within the exception and could not be prosecuted: *Jones v. State*, 1-395.

Where the statute defining a crime is repealed and another provision substituted defining the same crime, but providing a different punishment, an indictment is not subject to demurrer which fails to state whether such crime was committed before or after the change in the statute: *State v. Reyelts*, 74-499.

The repeal of a penal statute without a special saving clause does not release a party who has already incurred the penalty thereunder from liability: *Kemmish v. Ball*, 30 Fed., 759.

Illegal act not validated: The abrogation and repeal of the constitutional provision prohibiting the issuance of paper to circulate as money, *held* not to render valid scrip so issued while the law was in operation: *Dively v. Cedar Falls*, 21-565.

Taxes accrued: Taxes, and the interest and penalties thereon, are not affected by a repeal of the law under which they have accrued: *State ex rel. v. Stewart*, 11-251; *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41-153.

But the repeal of the statute terminates the right to additional penalties: *Tobin v. Hartshorn*, 69-648.

Where a railway company had expended money in reliance on a tax voted in its aid, *held*, that a repeal of the statute did not deprive the company of the right to have the tax levied and collected: *Burges v. Mabin*, 70-633.

The repeal of a statute authorizing special assessments for improvements deprives a city of the power to levy such a tax for improvements not yet contracted for: *Wardens, etc., of Christ Church v. Burlington*, 39-224.

The repeal of a statute *held* not to affect the right of redemption from a tax sale existing thereunder prior to the repeal: *Adams v. Beale*, 19-61; *Myers v. Copeland*, 20-22.

A general repealing clause should be construed as referring only to laws of a general nature on the same subject. Therefore where, under the charter of an incorporated town, it was authorized to grant licenses for the sale of intoxicating liquors, *held*, that a subsequent license law, making different provisions, would not repeal the authority conferred in the charter: *State v. Neeper*, 3 G. Gr., 337.

Where provisions for the foreclosure of tax titles were made by special statutes applicable to sales for taxes levied by cities, and subsequently other provisions were made in regard to tax sales, *held*, that the original remained in force as to sale for city taxes: *Sweet v. Billings*, 14-384.

Express repeal: Where there is a direct conflict between two different statutes, and the latter in express terms repeals all prior acts in conflict with its provisions, the former must be held repealed: *Staples v. Plymouth County*, 62-364.

The question of the effect of a repealing clause in an unconstitutional statute is one of legislative intention and to be determined from all the circumstances of the particular case. Where the language used was "so much of chapter 80 as comes in conflict with this act is repealed," *held*, that such previous statute was not thereby repealed: *Childs v. Shower*, 18-261.

Implied repeal: Where two laws are in conflict and cannot be reconciled the last must prevail, being the last expression of the legislative will: *McKinney v. Wood*, 35-167.

Where two statutes are in terms repugnant or inconsistent, if the latter is intended to provide the only rule which is to govern the case, it will be considered as repealing the prior statute: *State v. Courtney*, 73-619.

In a particular case, *held*, that two sections being manifestly inconsistent, one of them must be regarded as having been repealed by implication: *State v. Delong*, 12-453.

A general statute making regulations upon a particular subject inconsistent with those in a special act of incorporation of a city repeals the provisions in such special act: *State v. Harris*, 10-441.

Where a statute to which, by subsequent legislation, an exception is made is repealed, and subsequently re-enacted without providing for the exception, the last statute being inconsistent with the one making the exception will be deemed to repeal it by implication: *State v. Bissell*, 67-616.

The passage of a statute making women eligible to school offices, *held* to repeal by implication such portions of the statutes relating to contesting elections as require a contestant to show the qualification of an elector in the county: *Brown v. McCollum*, 76-479.

While the repeal of a statute by implication is not favored by the courts, yet where a statute is inconsistent in its provisions with one subsequently enacted, and is out of harmony with the spirit of later general legislation on the subject-matter, the courts will sustain the more recent statute: *Yant v. Brooks*, 19-87.

Where a statute covers an entire subject it thereby repeals prior statutes on the same subject, although they are not expressly repealed: *Ellis v. Jackson County*, 38-175.

Where one ordinance embraced and revised the whole subject-matter contained in the corresponding portion of a previous ordinance, *held*, that such previous ordinance was repealed by the subsequent one: *Decorah v. Dunstan*, 38-96.

Where a subsequent statute is passed containing provisions substantially the same as those of a previous statute, but not containing all the provisions of the previous one, there being no inconsistency between the two, and they being such that both will be enforced, the later statute will not be regarded as repealing even that portion of the previous statute not included in the later one: *Phillips v. Council Bluffs*, 63-576; *Ament v. Humphrey*, 3 G. Gr., 255.

The fact that a subsequent statute provides a new remedy for the same wrong will not necessarily show an implied repeal. The

new remedy may be merely cumulative: *State v. Berry*, 12–58.

Where statutes are not in conflict, the latter cannot be held to repeal by implication authority conferred in the former: *Burlington v. Putnam Ins. Co.*, 31–102.

The amendment to § 4413 of Code of '73 by which the number of peremptory challenges of the defendant in criminal cases was reduced from twenty to ten, *held* not a repeal but applicable to the organization of juries after it took effect, no matter when the proceeding was commenced: *State v. Shreves*, 81–615.

Change in statute upon which another statute depends will not affect the latter: *Garber v. Clayton County*, 19–29; *Kinsey v. Sherman*, 46–463; *Weir v. Allen*, 47–482.

But where a special charter refers to the general law for subjects of taxation under such charter, it seems that a change in the general law will operate equally on the charter: *Tackaberry v. Keokuk*, 32–155.

Repeals by implication not favored: The law does not favor repeals by implication, and though two acts are seemingly repugnant, yet they should, if possible, receive such construction that the latter shall not repeal the former: *Harriman v. State*, 2 G. Gr., 270; *Hummer v. Hummer*, 3 G. Gr., 42; *Casey v. Harned*, 5–1; *Cole v. Board of Supervisors*, 11–552; *Baker v. Steamboat Milwaukee*, 14–214; *Burke v. Jeffries*, 20–145; *State v. Shaw*, 28–67; *Dubuque v. Harrison*, 34–163.

If by any fair and reasonable construction a prior and later statute can be reconciled, both shall stand. If it can be avoided, no court can conclude that a statute is repealed by implication: *Casey v. Harned*, 5–1; *Baker v. Steamboat Milwaukee*, 14–214.

In order to work the repeal of an old law by a new one by implication, there must be an absolute repugnance between the two. Effect will be given, if possible, to several statutes *in pari materia: State v. Shaw*, 28–67.

Any reasonable construction will be adopted to avoid a repeal by implication: *State v. Brandt*, 41–593.

Repeal by implication is not to be presumed: *Risdon v. Shank*, 37–82.

Non-user: Mere failure to enforce a statute does not result in its repeal by nonuser: *Pearson v. International Distillery*, 72–348.

2. *Words and phrases.* Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning.

The word "acquire" with reference to real property applies to the acquisition of the same by will as well as by purchase: *Bennett v. Hibbert*, 88–154.

Under statutes with reference to the acquisition of property by aliens, *held* that "purchase" includes acquisition by will as well as by purchase for a consideration: *Ibid.*

3. *Number and gender.* Words importing the singular number may be extended to several persons or things, and words importing the plural number may be applied to one person or thing, and words importing the masculine gender only may be extended to females.

4. *Joint authority.* Words giving a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority.

5. *Highway—road.* The words "highway" and "road" include public bridges, and may be held equivalent to the words "county way," "county road," "common road," and "state road."

Public bridges are a part of the highway: *Gallaher v. Head*, 72–173.

6. *Insane.* The words "insane person" include idiots, lunatics, distracted persons, and persons of unsound mind.

7. *Issue.* The word "issue" as applied to descent of estates includes all lawful lineal descendants.

8. *Land—real estate.* The word "land" and the phrases "real estate" and "real property" include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal.

The term real property includes all legal rights in land: *Strong v. Garret*, 90–100.

Therefore, *held* that the reversionary interest of an heir to the premises in which the widow had by election a life estate by virtue of the homestead right is such an interest as may be levied upon and sold as real property in the hands of the heir or in the hands of the testator herself who has acquired the interest of such heir by inheritance: *Ibid.*

The interest which a mortgagee has in the real property mortgaged constitutes "real estate:" *Severin v. Cole*, 38–463; and also the equitable interest which the heir of such mortgagee has in such property: *Burton v. Hintrager*, 18–348.

Real estate includes equitable as well as legal interests in real property: *Blaine v. Stewart*, 2–378.

The making improvements upon land by one in possession under contract of purchase

gives him an equitable interest which will pass by a conveyance: *White v. Butt*, 32–335.

A mere license to make improvements upon and use real property is not real estate. *Melhop v. Meinhart*, 70–685.

Where water-works were erected upon land occupied under a lease to continue as long as the works should operate, *held*, that the buildings, machinery, mains, pipes, etc., constituted real property, assessable as an entirety in the township where the main works were located: *Oskaloosa Water Co. v. Board of Equalization*, 84–407.

9. *Personal property.* The words "personal property" include money, goods, chattels, evidences of debt, and things in action.

A promissory note is "personal property:" *Allison v. King*, 21–302; so are municipal bonds: *Callanan v. Brown*. 31–333; and so is a draft, though it be against the government, and upon which action could not, therefore, be brought, and though it has not been indorsed by the payee; so *held* in case of embezzlement: *State v. Orwig*, 24–102.

Applied: *Iowa Lumber Co. v. Foster*, 49–25.

10. *Property.* The word "property" includes personal and real property.

Applied: *Briggs v. Briggs*, 69–617.

The word "property" used in § 2901 with reference to perpetuities applies to personal as well as real property; *Meek v. Briggs*, 87–610.

A non-negotiable draft of an insurance company in settlement of a claim is property, although acceptance of the company is essential before liability would attach on such draft: *State v. Patty*, 66 N. W., 727.

11. *Month—year—A. D.* The word "month" means a calendar month, and the word "year" and the abbreviation "A. D." are equivalent to the expression "year of our Lord."

The designation of the year by numerical figures with A. D. prefixed, *held* sufficient in an indictment: *State v. Seamons*, 1 G. Gr., 418.

12. *Oath—affirmation.* The word "oath" includes affirmation in all cases where an affirmation may be substituted for an oath, and in like cases the word "swear" includes "affirm."

13. *Person.* The word "person" may be extended to bodies corporate.

So *held* under the statute as to garnishment: *Wales v. Muscatine*, 4–302, 307.

The rule that the word persons may be extended to bodies corporate cannot be of universal application, especially in the construction of criminal statutes, for the reason that there are some crimes for which corporations cannot be punished. The true rule is that corporations are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in the statute: *Stewart v. Waterloo Turn Verein*, 71–226.

14. *Seal.* Where the seal of a court, public office or officer, or public or private corporation, may be required to be affixed to any paper, the word "seal" shall include an impression upon the paper alone, as well as upon wax or a wafer affixed thereto.

15. *State.* The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words "United States" may include the said district and territories.

16. *Town.* The word "town" means an incorporated town, and may include cities.

"Town" does not include unincorporated village; so *held* in construing a statute as to extent of the homestead: *Truax v. Pool*, 46–256.

17. *Will.* The word "will" includes codicils.

18. *Written—in writing.* The words "written" and "in writing" may include any mode of representing words and letters in general use, except that signatures, when required by law, must be made by the writing or mark of the person.

19. *Sheriff.* The term "sheriff" may be extended to any person performing the duties of the sheriff, either generally or in special cases.

This does not authorize a person other than the sheriff to serve notices, levy executions, etc.: *Conway v. McGregor & M. R. R. Co.*, 43–32.

20. *Deed—bond—indenture—undertaking.* The word "deed" is applied to an instrument conveying lands, but does not imply a sealed instrument; and the words "bond" and "indenture" do not necessarily imply a seal, and the word "undertaking" means a promise or security in any form.

A seal is not therefore essential to the validity of a conveyance: *Pierson v. Armstrong*, 1-282; though it formerly was so: *Switzer v. Knapps*, 10-72; *Simms v. Hervey*, 19-273, 290.

21. *Executor—administrator.* The term "executor" includes administrator, and the term "administrator" includes executor, where the subject-matter justifies such use.

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

The designation of the year by numeral figures with A. D. prefixed, *held* sufficient in an indictment: *State v. Seamons*, 1 G. Gr., 418.

23. *Computing time.* In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday. [C., '73, § 45; R., § 4121; C., '51, § 2513.]

Calendar months are to be computed by reckoning from a given day to the day of a corresponding number where there is one: *Parkhill v. Brighton*, 61-103.

In computing the number of days that a process has been served before return day the day of service should be included and the day of return excluded: *Dilts v. Zeigler*, 1 G. Gr., 164.

Where sixty days from March 17th were given in which to file bill of exceptions, *held*, that a bill filed on May 17th could not be considered: *McCoid v. Rafferty*, 84-532.

In computing time the first day shall be excluded and the last included: *Richardson v. Burlington & M. R. R. Co.*, 8-260; *Teucher v. Hiatt*, 23-527; *Manning v. Irish*, 47-650; *Bonney v. Cocke*, 61-303.

The words "from and after," used in a contract with reference to an act done, are inclusive, but with reference to a day named are exclusive; therefore where it was agreed in the sale of a stock of goods that plaintiff should have the proceeds of sales from and after a certain date it was held that plaintiff was not entitled to the proceeds of the sales of the day named: *Chicago Title and Trust Co. v. Smyth*, 62 N. W., 792.

But under a provision that notice shall be served in such time as to leave at least ten days between the day of service and the first day of the next term, both the day of service and the first day of the term should be excluded from the computation: *Robinson v. Foster*, 12-186.

In such case, where the first day of the term falls on Monday, Sunday is not to be excluded from the computation: *Ibid.*

The law does not recognize parts of a day. Therefore, *held*, that notes of evidence filed with the clerk on the same day as the entry of a judgment in a contempt proceeding, but two hours later, would be deemed filed in connection with the entering of the judgment: *Small v. Wakefield*, 84-533.

Where it was provided that a tenancy should terminate upon ten days' notice, *held*, that notice being given on the last day of April, an action brought on the 10th day of May was premature, and that the day of service of the notice must be excluded: *Aiken v. Appleby*, Mor., 8.

The provision that the last day, if it falls on Sunday, shall be excluded in any computation, applies only where it is required that some act shall be done on the last day. Under the statutory provision that a petition shall be filed ten days before the first day of the term, *held*, that Sunday should be included in the computation, although it was the last day before the first day of the term: *Conklin v. Marshalltown*, 66-122.

Section applied in determining whether a bill of exceptions was filed within the ninety days allowed therefor: *Sheldon Bank v. Royce*, 84-288. And see *Ritchey v. Fisher*, 85-560.

Provisions as to computation of time applied: *Holbrook v. Mill Owners Mut. Ins. Co.*, 86-255.

Where the compensation of an officer is provided for by the day, he is entitled to compensation for each day on which he is required to render services, and is not to be limited to pro rata compensation for the number of hours actually employed in such service: *White v. Dallas County*, 87-563.

24. *Consanguinity and affinity.* Degrees of consanguinity and affinity shall be computed according to the civil law. [C., '73, § 45; R., § 4124.]

Applied: *Martindale v. Kendrick*, 4 G. Gr., 307.

25. *Clerk—clerk's office.* The word "clerk" means clerk of the court in which the action or proceeding is brought or is pending; and the words "clerk's office" means his office. [C., '73, § 45; R., § 4123.]

Where papers are prepared for the district court and the law requires them to be filed, it is unnecessary for the clerk to give his full official title, as the word "clerk" after his name designates him as the clerk of the court in which the action is brought or pending: *Wetmore v. Marsh*, 81-677.

26. *Population.* The word "population," where used in this code or any statute hereafter passed, shall be taken to be that as shown by the last preceding state or national census, unless otherwise specially provided.

CHAPTER 4.

OF THE CODE AND ITS OPERATION.

SECTION **49. Citations—repeal of prior statutes.** In citations, this revision of the laws shall be given as the "Code," adding chapter or section, as required. All public and general statutes adopted prior to the present extra session of the general assembly, except acts appropriating money when the same has not been fully paid out, and all public and special acts the subjects whereof are herein revised or which are repugnant hereto, are repealed, subject to the limitations and exceptions hereinafter expressed, but local acts are repealed only by express terms or on account of repugnancy. [C., '73, §§ 46–8; R., §§ 30–2; C., '51, §§ 27–9.]

While each title of the Code of '73 was separately enacted, *held*, that the whole Code should, for the purpose of construction, be regarded as having been enacted at the same time, and sections in different titles relating to the same matter must be read and construed together and such construction adopted, if consistent with the language used, as would give force and effect to both sections: *Hunt v. Farmers' Ins. Co.*, 67–742.

The provisions of the Revision and session laws prior to the Code in reference to swamp lands being "public and special acts," and not revised in the Code, *held* not to be repealed thereby: *Gray v. Mount*, 45–591.

Under this provision, all public and general statutes passed prior to the enactment of the Code and not therein re-enacted are repealed: *Staples v. Plymouth County*, 62–364.

Under the corresponding provision of the Revision, *held*, that the prior act relating to the jurisdiction of counties bordering on the Mississippi river was not thereby repealed, although not embraced in the Revision: *State v. Mullen*, 35–199.

A general statute making regulations upon a particular subject inconsistent with those in special act of incorporation of a city repeals the provisions in such special act: *State v. Harris*, 10–441.

The Revision of 1860 was not, as a whole, enacted by the general assembly. Those parts not enacted in the code of civil practice and the code of criminal practice, or other acts adopted at the same session, were simply a compilation by the commissioners of the laws then in force, and, in case of an error in such compilation, the original statutes prevailed and were not to be deemed repealed: *State v. Lee*, 37–402.

The provisions of the Revision relating to boats and rafts were repealed by the enactment of the corresponding section of the Code of '73 on the subject: *Seippel v. Blake*, 86–51.

The recording of a deed in a county to which another county is attached is an act done which remains valid notwithstanding the repeal of a statute by virtue of which such annexation was made: *Meagher v. Drury*, 89–366.

SEC. **50. Code—when take effect—publication.** The code shall take effect ninety days after the final adjournment of the extra session of the twenty-sixth general assembly, until which time existing statutes continue in force, and nothing contained in this title in relation to the preparation and publication of the statutes shall be construed as including the code. [C., '73, § 49; R., § 49; C., '51, § 30.]

SEC. **51. Existing rights not affected.** This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of the code as far as consistent. [C., '73, § 50; R., § 34; C., '51, §§ 31, 2514.]

The general assembly cannot alter, change or repeal statutes relating to the remedy so as to substantially impair a vested right; therefore, where a mortgage and a mechanic's lien upon the same property attached under the Revision, *held*, in an action brought under the Code of '73, that the mortgagee had a right to have his lien determined and enforced as against the holder of the mechanic's lien, in accordance with the provisions of the Revision: *Brodt v. Rohkar*, 48–36.

A construction of the statute of limitations which would extend the time on debts existing before the adoption of the Code of '73 and on which the previous statute of limitations had commenced to run, to the full period after the taking effect of that Code, was held not admissible, for the reason that it would affect a right accrued under the debt: *McDonald v. Jackson*, 55–37.

A change made by the Code of '73 in the law as to the liability of railroad companies for injuries in certain cases, *held* not to apply in a case where the injury was received before that Code took effect: *Payne v. Chicago, R. I. & P. R. Co.*, 44–236.

A judgment being rendered before the taking effect of the Code of '73 against the husband, under which certain property of the wife, being in his possession, was liable as the law then stood, *held*, that such property might still be taken upon execution issued after the taking effect of that Code, although by its provisions the property of the wife would not have been liable under similar circumstances: *Schmidt v. Holtz*, 44–446.

Where an original notice was served before the taking effect of the Code of '73, but the second day of the next term occurred after that time, *held*, that the provisions of that Code would govern the time of pleading: *Brotherton v. Brotherton*, 41–112; *Connable v. Colvin*, 41–93.

The right of a party to a trial by jury, in an action commenced prior to the taking effect of the Code of '73, *held*, not to be affected by any change made by that Code: *Wormley v. Hamburg*, 46–144. So *held* in an action for divorce in which, under the Revision, the parties were entitled to a jury trial: *Wadsworth v. Wadsworth*, 40–448.

The provisions of the Code of '73 *held* applicable as to the admissibility of evidence in a particular case commenced before it went into effect: *Wood v. Brolliar*, 40–591.

An order being made before the Code of '73 took effect for a special term of court to be held after that time, and that fifteen jurors be called (the proper number under Revision), *held*, that such order was an "act done" so as to be valid, although the proper number under the Code of '73 was twenty-four: *Fifield v. Chick*, 39–651.

As to the effect of the Code of '73 upon penalties or taxes delinquent before it took effect, see *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153, 190.

Under Revision, § 4172, *held*, that proceedings to enforce a judgment should be governed by the law in force when they were commenced and not by that under which the judgment was rendered; a judgment not being "an action:" *Gray v. Iliff*, 30–195.

Under a similar provision in the Code of '51, *held*, that, where an action was brought prior to its adoption, but judgment therein was not rendered until after that time, the defendant's homestead exemption should be governed by the provisions of the law under which the action was commenced: *Helfenstein v. Cave*, 3–287.

And see § 48, ¶ 1, and notes.

SEC. **52. Same.** No offense committed, and no penalty or forfeiture incurred under any statute hereby repealed and before the repeal takes effect, shall be affected by the repeal; except that, when a punishment, penalty or forfeiture is mitigated by the provisions herein contained, such provisions shall be applied to a judgment to be pronounced after the repeal. [C., '73, § 51; R., § 35; C., '51, § 32.]

SEC. **53. Same.** No suit or prosecution pending when this repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of the code as far as consistent. [C., '73, § 52; R., § 36; C., '51, § 33.]

SEC. **54. Heretofore and hereafter.** The terms "heretofore" and "hereafter," as used in the code, have relation to the time when the same takes effect. [C., '73, § 53; R., § 38; C., '51, § 35.]

Applied: *Bennett v. Bevard*, 6–82; *Davenport v. Davenport & St. P. R. Co.*, 37–624; *Rivers v. Cole*, 38–677; *Thatcher v. Haun*, 12–303.

The expression "prior to the passage" of an act means prior to its taking effect: *Rogers v. Vass*, 6–405; *Charless v. Lamberson*, 1–435.

It is proper to make a curative act applicable to all acts described therein, intermediate the taking effect of the act and its passage: *Shearer v. Mills*, 35–499.

CHAPTER 5.

SUBMISSION OF CONSTITUTIONAL AMENDMENTS.

SECTION **55. Publication—record kept.** Whenever any proposition to amend the constitution has passed the general assembly and been referred to the next succeeding legislature, the secretary of state shall cause the same to be published in two newspapers of general circulation in each congressional district in the state, for the time required by the constitution; and proof of the publication shall be made by the affidavits of the publishers thereof, and such affidavits, with the certificate of the secretary of state of the selection of such newspapers therefor, shall be filed in his

office, recorded in a book kept for that purpose, and preserved, and he shall report to the following legislature his action in the premises. [16 G. A., ch. 144, § 1.]

SEC. **56. Submission to vote—results declared—record.** Whenever a proposition to amend the constitution shall have been adopted by two succeeding general assemblies, if no other time is fixed by the last general assembly adopting the same for its submission to the people, it shall be done at the ensuing general election, in the manner required by law, and the board of state canvassers shall declare the result and enter the same of record in the book mentioned in the preceding section, immediately following and in connection with the proofs of publication. [19 G. A., ch. 7, § 1; 16 G. A., ch. 144, § 2.]

SEC. **57. Proclamation of submission.** Whenever a proposition to amend the constitution is submitted to a vote of the electors, the governor shall include such proposed amendment in his election proclamation. [16 G. A., ch. 144, § 3.]

SEC. **58. Submission at special election.** The general assembly may provide for the submission of constitutional amendments to the people at a special election for that purpose, at such time as it may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed by law for the submission of constitutional amendments at a general election. [19 G. A., ch. 7, § 2.]

SEC. **59. Expense.** Expenses incurred under the provisions of this chapter shall be audited and allowed by the executive council, and paid out of any money in the state treasury not otherwise appropriated. [16 G. A., ch. 144, § 4.]

TITLE II.

OF THE EXECUTIVE DEPARTMENT.

CHAPTER 1.

OF THE GOVERNOR.

SECTION **60. Office—secretary.** The governor shall keep his office at the seat of government, in which shall be transacted the business of the executive department of the state, and he shall keep a secretary at said office during his absence. [C., '73, § 53.]

SEC. **61. Must keep journal.** He shall cause a journal to be kept in the executive office, in which a record shall be made of each official act as done, except if in cases of emergency an act is done away from the office, such entry shall be made as soon thereafter as may be; and he shall cause a like military record to be kept of his acts done as commander-in-chief. [C., '73, §§ 56, 57.]

SEC. **62. May offer rewards for arrests.** Whenever the governor is satisfied that a crime has been committed within the state, punishable by death or by imprisonment in the penitentiary for a term of ten years or more, and that the person charged therewith has not been arrested or has escaped from arrest, he may, in his discretion, offer a reward not exceeding five hundred dollars for the arrest and delivery to the proper authorities of the person so charged, which reward, upon the certificate of the governor that the same has been earned, shall be audited and paid by the state. [C., '73, § 58; R., § 57.]

The board of supervisors has no authority to offer a reward for the arrest of a criminal, but it may for the recovery of funds stolen from the county: *Hawk v. Hamilton County*, 48–472. Nor has a city any authority to offer such reward: *Hanger v. Des Moines*, 52–193.

SEC. **63. May employ counsel.** Whenever the governor is satisfied that an action or proceeding has been commenced which may affect the rights or interests of the state, he may employ counsel to protect such rights or interests; and when any civil action or proceeding has been or is about to be commenced by the proper officer in behalf of the state, he may employ additional counsel to assist in the cause. [C., '73, § 59; R., § 44; C., '51, § 40.]

SEC. **64. Expenses.** The expenses thus incurred, and those caused in executing the laws, may be allowed by him and paid from the contingent fund. [C., '73, § 60; R., § 45; C., '51, § 41.]

SEC. **65. Salaries.** The salary of the governor shall be three thousand dollars per annum; and that of his secretary, fifteen hundred dollars per annum. [21 G. A., ch. 118, § 1; C., '73, § 3755; R., § 41; C., '51, § 37.]

CHAPTER 2.

OF THE SECRETARY OF STATE.

SECTION **66. Duties—records to be kept.** The secretary of state shall keep his office at the seat of government, and perform all duties required of him by law; he shall have charge of and keep all the acts and resolutions of the territorial legislature and of the general assembly of the state,

the enrolled copy of the constitutions of the state, and all bonds, books, records; maps, registers and papers which are now or may hereafter be deposited to be kept in his office, including all books, records, papers and property pertaining to the state land office. [18 G. A., ch. 206, § 2; C., '73, § 61; R., § 59; C., '51, § 42.]

SEC. **67. Records relating to cities and towns.** He shall receive and preserve in his office all papers transmitted to him in relation to the incorporation of cities and towns, or the annexation of territory thereto, or the consolidation or abandonment of municipal corporations; and shall keep an alphabetical list of said cities and towns in a book provided for that purpose, in which shall be entered the name of the town or city, the character of the same, whether town or city, the county in which situated, and the date of organization. [C., '73, § 65; R., § 1046.]

SEC. **68. Must countersign and register commissions.** All commissions issued by the governor shall be countersigned by the secretary, who shall register each commission in a book to be kept for that purpose, specifying the office, name of officer, date of commission, and tenure of office. [C., '73, § 62; R., § 60; C., '51, § 44.]

SEC. **69. Must report criminal statistics.** He shall report to the governor, before each regular session of the general assembly, an abstract for each year of the criminal returns received from the clerks of the several district courts, embracing all the facts contained in such returns. [C., '73, § 63, R., § 64, C., '51, § 48.]

SEC. **70. Must publish and distribute "Iowa Official Register."** He is hereby authorized and directed to compile and publish, annually, fifteen thousand copies of the "Iowa Official Register," to contain historical, political and other statistics and facts of general value, but nothing of a partisan character. [24 G. A., ch. 64, § 1.]

SEC. **71. Distribution of register.** The distribution shall be as follows: To members of the general assembly last elected, sixty copies each; the balance to be distributed to the newspapers of the state, to county and school officers, school principals, public libraries, colleges, seminaries and state institutions, and other citizens or institutions, either private or public, at the discretion of the secretary of state. [Same, § 2.]

SEC. **72. Records of land office—how kept.** The books and records of the land office shall be so kept as to show and preserve an accurate chain of title from the general government to the purchaser of each smallest subdivision of land; to preserve a permanent record, in books suitably indexed, of all correspondence with any of the departments of the general government in relation to state lands; to preserve, by proper records, copies of the original lists furnished by the selecting agents of the state, and of all other papers in relation to such lands which are of permanent interest. [C., '73, § 83; R., §§ 92, 95.]

SEC. **73. Separate books for separate grants.** Separate tract books shall be kept for the university lands, the saline lands, the half million acre grant, the sixteenth sections, the swamp lands, and such other lands as the state now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate. [C., '73, § 84; R., § 94.]

SEC. **74. Tract books—how ruled.** Said tract books shall be ruled in a manner similar to those used in the United States land offices, so as to record each tract by its smallest legal subdivisions, its section, township and range, to whom sold, and when, the price per acre, to whom patented, and when. [C., '73, § 85; R., § 92.]

SEC. **75. Land office—how kept—clerk—duties—copies furnished.** The land office shall be kept open during business hours, and shall have the personal supervision of the clerk thereof; the documents and records therein shall be subject to inspection, in his presence, by parties having an

interest therein, and certified copies thereof, signed by the secretary with the seal of his office attached, shall be deemed presumptive evidence of the facts to which they relate, and on request they shall be furnished by him for a reasonable compensation. [C., '73, § 86.]

SEC. **76. Patents—how issued—what to contain.** Patents for lands shall issue from the land office, shall be signed by the governor and recorded by the secretary; and each patent shall contain therein a marginal certificate of the book and page on which it is recorded, which certificate shall be signed by the secretary, and all patents shall be delivered free of charge. [C., '73, § 87; R., § 97.]

SEC. **77. Patents—on what conditions issued.** No patents shall be issued for any lands belonging to the state, except upon the certificate of the person or officer specially charged with the custody of the same, setting forth the appraised value per acre, name of person to whom sold, date of sale, price per acre, amount paid, name of person making final payment, and of person who is entitled to the patent, and, if thus entitled by assignment from the original purchaser, setting forth fully such assignment, which certificate shall be filed and preserved in the land office. [C., '73, § 88; R., §§ 98, 99.]

SEC. **78. Secretary to make corrections—effect of.** The secretary is authorized and required to correct all clerical errors of his office in name of grantee and description of tract of land conveyed by the state, found upon the records of such office; he shall attach his official certificate to each conveyance so corrected, giving the reasons therefor; record the same with the record of the original conveyance, and make the necessary corrections in the tract and plat books of his office. Such corrections, when made in accordance with the foregoing provisions, shall have the force and effect of a deed originally correct, subject to prior rights accrued without notice. [C., '73, § 89.]

SEC. **79. Maps, field notes, etc., to be kept.** The secretary of state shall receive and safely keep in his office, as public records, any field notes, maps, records or other papers relating to the public survey of this state, whenever turned over to the state in pursuance of law; the United States at all times to have free access thereto for the purpose of taking extracts therefrom or making copies thereof. [C., '73, § 90.]

SEC. **80. Governor to relinquish color of title.** Whenever the governor is satisfied by the commissioner of the general land office that the title to any lands which may have been certified to the state under any of the several grants is inferior to the rights of any valid interfering pre-emptor or claimant, he is authorized and required to release by deed of relinquishment such color of title to the United States, to the end that the requirements of the interior department may be complied with, and that such tract or tracts of land may be patented by the general government to the legal claimants. [C., '73, § 91.]

SEC. **81. Governor to correct errors.** Whenever the governor is satisfied by proper record evidence that any tract of land which may have been deeded by virtue of any donation or sale to the state is not the land intended to have been described, and that an error has been committed in making out the transfers, in order that such error may be corrected, he is authorized to quitclaim the same to the proper owner thereof, and to receive a deed or deeds for the lands intended to have been deeded to the state originally. [C., '73, § 92.]

SEC. **82. Secretary to make lists of lands—effect of.** In cases where lands have been granted to the state of Iowa by act of congress, and certified lists of lands inuring under the grant have been made to the state by the commissioner of the general land office, as required by act of congress, and such lands have been granted, by act of the general assembly, to any person or company, and such person or company shall have complied with and fulfilled the conditions of the grant, the secretary of state is hereby

authorized to prepare, on the application of such person or company, or on the application of a party claiming title to any land through such person or company, a list or lists of lands situated in each county inuring to such applicant, from the lists certified by the commissioner of the general land office, as aforesaid, which shall be signed by the governor of the state, and attested by the secretary of state, with the state seal, and then be certified to by the secretary to be true and correct copies of the lists made to this state, and deliver them to such applicant, who is hereby authorized to have them recorded in the proper county, and when so recorded they shall be notice to all persons the same as deeds now are, and shall be evidence of title in such grantee, or his or its assigns, to the lands therein described, under the grant of congress by which the lands were certified to the state, so far as the certified lists made by the commissioner aforesaid conferred title to the state; but where lands embraced in such lists are not of the character embraced by such acts of congress or the acts of the general assembly of the state, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be void; but lands in litigation shall not be included in such lists until the actions are determined and such lands adjudged to be the property of the company; nor shall the secretary include, in any of the lists so certified to the state, lands which have been adjudicated by the proper courts to belong to any other grant, or adjudicated to belong to any county or individual under the swamp-land grant, or any homestead or pre-emption settlement; nor shall said certificate so issued confer any right or title as against any person or company having any vested right, either legal or equitable, to any of the lands so certified. [19 G. A., ch. 123; 18 G. A., ch. 167; C., '73, § 93.]

If the certificate provided for in this section is introduced it dispenses with all other proof, and makes at least a *prima facie* case. In the absence of such certificate the party must prove the selection of the lands, that they are within the grant, and the construction of the road, so as to entitle the grantee to the lands under the act. But whilst the certificate establishes the title of the grantee, it is not essential to such title: *Chicago, B. & Q. R. Co. v. Lewis*, 53–101.

As to recording railway land grant titles, see §§ 2939, 2940.

SEC. **83. Secretary to issue patents for university lands.** The secretary of state is hereby authorized to issue patents for lands, the legal title to which is vested in the state university, in cases wherein it is shown to the satisfaction of the governor and attorney-general that such lands have been in fact sold by the authority of the state and paid for, and that the certificates of purchase have been lost or destroyed. [21 G. A., ch. 178, § 1.]

SEC. **84. Effect of such patents.** The patents thus issued shall inure to the benefit of the original purchaser and his grantees only, and a clause to this effect shall be inserted in the patent. [Same, § 2.]

SEC. **85. Fees to be collected by secretary.** He shall collect the following fees for services: For each commission to commissioners in other states, and to notaries public, five dollars; for certificate, with seal attached, one dollar; for a copy of any law or record, upon the request of any private person or corporation, for every hundred words, ten cents; he shall also collect such other fees as directed by law. [21 G. A., ch. 125; C., '73, § 3756; R., § 4133; C., '51, § 2524.]

SEC. **86. Salary of secretary.** The salary of the secretary of state shall be twenty-two hundred dollars per annum. [C., '73, § 3756; R., § 58; C., '51, § 42.]

SEC. **87. Deputy—qualification—bond—duties—salary.** He may appoint, in writing, any person, except one holding a state office, as deputy, for whose acts he shall be responsible, and from whom he shall require bonds, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner,—both the appointment and revocation to be filed with

and kept by such officer. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and when so qualified he shall, in the absence or disability of the secretary, perform all the duties of the secretary pertaining to his office, and shall receive a salary of fifteen hundred dollars a year. [21 G. A., ch. 118, § 2; C., '73, §§ 776–8, 770, 3756; R., §§ 642–4, 647; C., '51, §§ 411, 412, 413, 416.]

SEC. **88. Clerk for land department—salary.** He shall be allowed one clerk to perform the work pertaining to the land department and such other duties as he may direct, whose salary shall be twelve hundred dollars per annum. [18 G. A., ch. 206, §§ 3, 4.]

CHAPTER 3.

OF THE AUDITOR OF STATE.

SECTION **89. Office—duties.** The auditor shall keep his office at the seat of government. He is the general accountant of the state, and it is his duty:

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

2. *To make settlements with officers.* To settle the accounts of all county treasurers and receivers of state revenues payable into the state treasury, for each of their official terms, separately;

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

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

5. *To settle with creditors.* To settle all claims against the treasury, and, when a claim is recognized by law for which no appropriation has been made, to give the claimant a certificate thereof, and report the same to the general assembly;

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

7. *To superintend fiscal affairs—furnish forms to officers.* To superintend the fiscal affairs of the state, and secure their management as required by law; to furnish proper instructions, directions and forms to the county auditors and treasurers, in compliance with which they shall severally keep their accounts relating to the revenue of the state, and perform the duties of their several offices; also forms for the reports required to be made by said officers to such auditor, and of receipts to be given by such treasurers to the taxpayers, and such officers shall conform in all respects to the forms and directions thus prescribed;

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

The auditor is required to issue warrants without regard to the fact that there may be no money in the treasury to pay them: *State v. Sherman*, 46–415.

The court cannot, by *mandamus*, compel the auditor to allow a particular sum on the settlement of a claim, but he can be compelled to issue a warrant for whatever sum he does audit or allow: *Bryan v. Cattell*, 15–538.

Under provisions of § 120 of Code of '73 (as amended) which are made more specific in the present Code (see § 170), *held*, that if an expenditure was authorized by law, and necessary, and there was no appropriation therefor, the executive council might give a certificate, upon which it would be the duty of the auditor to issue a warrant: *Prime v. McCarthy*, 92–569.

9. *To have custody of securities.* To have the custody of all books, papers, records, documents, vouchers, conveyances, leases, mortgages, bonds and other securities appertaining to the fiscal affairs and property of the state, which are not required to be kept in some other office;

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

11. *To report fiscal condition of state* To report to the governor before each regular session of the general assembly a complete statement of the revenue, funds, income, taxable property and other resources and property of the state, and of the public revenues and expenditures since his last report, with a detailed statement of the expenditures to be defrayed from the treasury for the term following that covered by his report, specifying each object of expenditure, and distinguishing between such as are provided for by appropriations and such as are not, and showing the probable deficiency of any former appropriations;

12. *To apportion school fund interest.* He shall, on the first Monday of March and September of each year, apportion the interest of the permanent school fund among the several counties in proportion to the number of persons between five and twenty-one years of age in each, as shown by the last report filed with him by the superintendent of public instruction. [22 G. A., ch. 82, § 27; C., '73, § 66; R., §§ 71, 1967; C., '51, § 50.]

SEC. **90. To divide warrants on request.** When the amount due from the state to any person exceeds twenty dollars, the auditor shall, if requested, divide the amount into parcels of not less than ten dollars, and issue warrants therefor. [C., '73, § 67; R., § 72; C., '51, § 51.]

SEC. **91. May require statements from others.** The auditor may at any time require any person receiving money, securities or property belonging to the state, or having the management, disbursement or other disposition of the same, an account of which is kept in his office, to render statements thereof and information in reference thereto. Any such person refusing or neglecting to render such statement or information shall forfeit twenty-five dollars, to be recovered by civil action in the name of the state. [C., '73, § 68; R., § 73; C., '51, § 52.]

SEC. **92. Presentation of claims — limitation — examination of claimant.** Every claim against the state shall be presented to the auditor for settlement within two years after it accrues, and, if thereafter presented, the same shall not be audited. When a claim is presented, the auditor is authorized to examine the claimant and any other persons, under oath, touching such claim, or cause them to verify the same by affidavit or deposition. [C., '73, § 69; R., § 74; C., '51, § 53.]

SEC. **93. Duty as to officers failing to account.** If any officer who is accountable to the treasury for any money or property neglects to render an account to the auditor within the time prescribed by law, or, if no time is so prescribed, then, within twenty days after being required so to do by the auditor, the auditor shall state an account against him from the books of the auditor's office, charging ten per cent. damages on the whole sum appearing due, and interest at the rate of six per cent. per annum on the aggregate from the time when the account should have been rendered; all

of which may be recovered by an action brought on such account, or on the official bond of such officer. [C., '73, § 70; R., § 75; C., '51, § 54.]

SEC. **94. Duty as to officers failing to pay.** If any such officer fails to pay into the treasury the amount received by him within the time prescribed by law, or, having settled with the auditor, fails to pay the amount found due, the auditor shall charge such officer with twenty per cent. damages on the amount due, with interest on the aggregate from the time the same became due at the rate of six per cent. per annum, and the whole may be recovered by an action brought on such account, or on the official bond of such officer, and he shall forfeit his commission. [C., '73, § 71; R., § 76; C., '51, § 55.]

SEC. **95. Such officers may defend—costs.** The penal provisions in the two preceding sections are subject to any legal defense which the officer may have against the account as stated by the auditor, but judgment for costs shall be rendered against the officer in the action, whatever be its result, unless he rendered an account within the time named in the two preceding sections. [C., '73, § 72; R., § 77; C., '51, § 56.]

SEC. **96. County treasurers seeking credit—conditions.** When a county treasurer or other receiver of public money seeks to obtain credit on the books of the auditor's office for payment made to the treasurer, before giving such credit, the auditor shall require him to take and subscribe an oath that he has not used, loaned or appropriated any of the public money for his private benefit, nor the benefit of any other person. [C., '73, § 73; R., § 78; C., '51, § 57.]

SEC. **97. Requisitions for accounts—civil action.** In those cases where the auditor is authorized to call upon persons or officers for information, or statements, or accounts, he may issue his requisition therefor in writing to the person or officer called upon, allowing reasonable time, which, having been served and return made thereon to the auditor as a notice in a civil action, shall be evidence of the making of the requisition therein expressed. [C., '73, § 74; R., § 79; C., '51, § 58.]

SEC. **98. Salary of auditor.** The salary of the auditor of state shall be twenty-two hundred dollars per annum. [C., '73, § 3757; R., § 70; C., '51, § 49.]

SEC. **99. Deputy—qualification—bond—duties—salary.** The auditor may appoint, in writing, any person, except one holding a state office, as deputy, for whose acts he shall be held responsible, and from whom he shall require bond, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner,—both the appointment and revocation to be filed and kept in the office of the secretary of state. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and when so qualified he shall, in the absence or disability of the auditor, perform all the duties of the auditor pertaining to his office, and receive a salary of fifteen hundred dollars a year. [21 G. A., ch. 118, § 3; C., '73, §§ 766–8, 770, 3757; R., §§ 642–4, 647; C., '51, §§ 411, 412, 413, 416.]

SEC. **100. Collect fees from banks, etc.** He shall collect such fees as are provided for in the chapters on insurance, banks and building and loan associations. [C., '73, § 3757.]

CHAPTER 4.

OF THE TREASURER OF STATE.

SECTION **101. Office—accounts.** The treasurer shall keep his office at the seat of government, and shall keep an accurate account of the receipts

and disbursements at the treasury in books kept for that purpose, in which he shall specify the names of the persons from whom money is received, and on what account, and the time thereof. [C., '73, § 75; R., § 83; C., '51, § 62.]

SEC. **102. Record and payment of warrants.** He shall enter in a book the memorandum of warrants issued as certified to him by the auditor, and receive in payment of public dues the warrants so issued in conformity with law, and redeem the same, if there be money in the treasury not otherwise appropriated, and on receiving any such warrant shall cause the person presenting it to indorse it, and shall write on the face thereof "redeemed," and enter in the book containing the auditor's memoranda, in appropriate columns, the name of the person to whom paid, date of payment, and amount of interest paid. [C., '73, § 76; R., § 84; C., '51, § 63.]

SEC. **103. To give receipts.** When money is paid him, the treasurer shall execute receipts in duplicate therefor, stating the fund to which it belongs, one of which must be delivered to the auditor in order to obtain the proper credit, and the treasurer must be charged therewith. [C., '73, § 77; R., § 85; C., '51, § 64.]

SEC. **104. Payment of warrants—interest on when no funds.** He shall pay no money from the treasury but upon the warrants of the auditor, and only in the order of their presentation; or, if there is no money in the treasury from which such warrants can be paid, he shall, upon request of the holder, indorse upon the warrant the date of its presentation and sign it, from which time the warrant shall bear interest at the rate of six per cent. per annum until the time directed in the next section. [C., '73, § 78; R., § 86; C., '51, § 65.]

SEC. **105. Record of unpaid warrants—notice to stop interest.** He shall keep a record of the number and amount of the warrants so presented and indorsed for non-payment, and, when there are funds in the treasury for their payment to an amount sufficient to render it advisable, he shall give notice to what number of warrants the funds will extend, or the number which he will pay, by three insertions in a newspaper printed at the seat of government. At the expiration of thirty days from the day of the last publication, interest on the warrants so named as being payable shall cease. [C., '73, § 79; R., § 87; C., '51, § 66.]

SEC. **106. Must report to and account with auditor.** Once in each week he shall certify to the auditor the number, date, amount and payee of each warrant taken up by him, with the date when taken up, and the amount of interest allowed; and on the first Monday of January, April and July, and the first day of October, annually, he is directed to account with the auditor and deposit in his office all such warrants received at the treasury, and take the auditor's receipt therefor. [17 G. A., ch. 116; C., '73, § 80; R., § 88; C., '51, § 67.]

SEC. **107. Must report to governor.** As soon as practicable after the first Monday of November preceding the regular session of the general assembly, he shall report to the governor the state of the treasury up to the first day of July preceding, exhibiting the amount received and paid out by the treasurer since his last report, and the balance remaining in the treasury. [22 G. A., ch. 82, § 28; C., '73, § 81; R., § 89; C., '51, § 68.]

SEC. **108. Interest on bonds—how payable.** When interest on any bonds of the state becomes due, the treasurer shall provide funds for the payment thereof on the day and at the place where payable; and persons holding such bonds are required to present the same at such place within ten days from such day, at the expiration of which time the funds remaining unexpended and vouchers for interest paid shall be returned to the treasury. [C., '73, § 82.]

SEC. **109. Moneys appropriated—how drawn—limitations.** All moneys now or hereafter appropriated by general or special act shall be drawn in accordance with the provisions of such act, and in no case shall such money

or any part thereof be drawn until the same is needed for use within thirty days from the date of the requisition, for the purpose for which the appropriation was made. If a larger sum is thus drawn than is needed for use within such thirty days, the amount not needed shall be forthwith returned to the state treasury. [23 G. A., ch. 31, § 1.]

SEC. **110. Duties of officers drawing appropriations.** The treasurer, or other officer of any state institution authorized to draw any appropriation made by the general assembly, shall forward with the requisition for the same a certified statement of the amount of funds then in his hands, and the sum or sums required for expenditure as provided by the act making such appropriation, within thirty days from the time of making such requisition, and such treasurer or other officer shall, in the printed report made by the board or other body in charge of such institution to the general assembly, governor or other officer to whom a report is required to be made, make a verified statement, showing the dates and sums drawn by such requisitions, and the total amount of such money actually paid out by him for each month of the biennial period. [Same, §§ 2–4.]

SEC. **111. Banks as depositaries.** The treasurer of state, with the advice and approval of the executive council, may designate one or more banks in the city of Des Moines as a depositary for the collection of any drafts, checks and certificates of deposit that may be received by him on account of any claim due the state. [17 G. A., ch. 57, § 1.]

SEC. **112. Security required.** The bank or banks designated as such depositary shall be required to give security to the state, to be approved by the executive council, for the prompt collection of all drafts, checks, certificates of deposit or coupons that may be delivered to such depositary by the treasurer of state for collection; and also for the safe keeping and prompt payment, on the treasurer's order, of the proceeds of all such collections; also, for the payment of all drafts that may be issued to said treasurer by such depositary. [Same, § 2.]

SEC. **113. Collections through depositaries.** The treasurer of state, on the receipt of any draft, check or certificate of deposit on account of state dues, may place the same in such depositary for collection, and it shall be the duty of such depositary to collect the same without delay, and charge no greater per cent. for such collection than the minimum per cent. charged to other parties, and notify the treasurer when collected. On the receipt of such notice, the treasurer shall issue his receipt to the party entitled thereto, as now required by law. [Same, § 3.]

SEC. **114. Treasurer not released.** The provisions of the three preceding sections in no way release the treasurer of state or his bondsmen, or any county treasurer or his bondsmen, from any liabilities now imposed by law. [Same, § 4.]

SEC. **115. Salary of treasurer.** The salary of the treasurer of state shall be twenty-two hundred dollars per annum. [C., '73, § 3758; R., § 82; C., '51, § 61.]

SEC. **116. Deputy—qualification—duty—salary.** The treasurer of state may appoint in writing any person, except one holding a state office, as deputy, for whose acts he shall be held responsible, and from whom he shall require bond, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner,—both the appointment and revocation to be filed and kept in the office of the secretary of state. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and, when so qualified, he shall, in the absence or disability of the treasurer, perform all of the duties of the treasurer pertaining to his office, and receive a salary of fifteen hundred dollars a year. [21 G. A., ch. 118, § 4; C., '73, §§ 766–8, 770, 3758; R., §§ 642–4, 647; C., '51, §§ 411, 412, 413, 416.]

CHAPTER 5.

OF THE PUBLIC PRINTING AND BINDING.

SECTION **117. Printer and binder—election—tenure—duties.** The state printer and binder shall each be elected at the regular sessions of the general assembly, and hold their office for two years from the first day of January in each odd-numbered year. They shall keep their respective offices at the seat of government, and sufficiently equipped to enable them promptly to print and bind the laws, journals, reports, and do all other printing and binding required for the state officers, boards or commissioners having their offices at the capitol, or by or for the general assembly; but nothing in this section shall be construed as interfering with the authority of the executive council to apportion so much of the public printing and binding as it may deem advisable to have done at the institution for the deaf and dumb. [22 G. A., ch. 82, §§ 1, 2.]

SEC. **118. How work to be delivered.** The state printer shall promptly deliver to the state binder the printed sheets of laws, journals and other publications as the work progresses, as well as all other work requiring stitching or binding, and the state binder shall, upon completion of the work as required, deliver the same to the secretary of state, taking his receipt therefor; and it is the duty of the secretary of state to see that the proper number of copies is so delivered. All printing which does not require binding shall be promptly delivered by the state printer to the secretary of state, or the officer ordering the work. [Same, § 4.]

SEC. **119. Printing—how ordered and delivered.** No work shall be ordered of the state printer except upon a regular form of blank furnished by the secretary of state and kept in his office. Whenever printing is ordered by either house of the general assembly, the secretary or clerk thereof shall immediately notify the secretary of state of such order, and, when such printing is done, the same shall be delivered to the secretary of state for distribution, subject to the instructions of the house ordering the printing. [Same, § 5.]

SEC. **120. Secretary of state to examine and certify work.** The secretary of state, upon the completion of any printing or binding for the state, or the presentation of any bill for such printing or binding, shall make examination of the work done, and ascertain whether it has been done in accordance with the provisions of this chapter. If he finds there has been a compliance herewith, he shall certify the same, stating the amount to which the officer presenting the bill is entitled. In case such work has not been properly done, or any item of said bill has not in his judgment been earned, he shall refuse to certify as to such item, or shall state what reduced amount, if any, the officer is entitled to as compensation for such defective work. [Same, § 6.]

SEC. **121. Auditor to draw warrant.** The auditor of state, upon presentation to him of the foregoing certificate, shall draw his warrant upon the treasurer of state for the amount therein stated to be due. [Same, § 7.]

SEC. **122. Biennial reports of officers—when made.** The regular biennial reports of the various officers, inspectors, commissions, boards or other bodies required to be made by law shall be laid before the governor of the state, in the odd-numbered years, at the following times:

1. On or before August fifteenth, those of all boards of trustees of state institutions, except the agricultural college;
2. On or before September fifteenth, those of the fish commissioner, the board of health, the commission of pharmacy, the oil inspector, the mine inspectors, the visiting committee to the hospitals for the insane, the wardens of the penitentiaries, the state veterinary surgeon, and the board of curators of the historical society;

3. On or before October first, those of the state librarian, and the commissioner of labor statistics, and that of the secretary of state pertaining to the land office;

4. On or before November first, those of the auditor of state, the treasurer of state, the superintendent of public instruction, the university and the normal school;

5. On or before November fifteenth, that of the board of dental examiners;

6. On or before December first, that of the board of trustees of the agricultural college, that of the adjutant-general, and that of the secretary of state pertaining to criminal convictions. [Same, § 8.]

SEC. **123. Biennial fiscal term—reports to cover.** The biennial fiscal term of the state ends on the thirtieth day of June in each odd-numbered year, and the succeeding fiscal term begins on the day following; and the reports required in the preceding section shall cover the period thus indicated, except when otherwise provided by law, and shall show the condition of such offices and institutions, respectively, on that day. [Same, § 9.]

SEC. **124. What to be printed—style of work.** The governor shall cause the foregoing reports, and all others required by law to be made, to be printed. He shall, however, cause all reports to be carefully examined before being printed, and shall omit from the printed copy all matters he may deem not of sufficient importance to warrant publication thereof at the state's expense. Such parts of the reports as emanate from boards or officers directly required by law to report may be leaded with six-to-pica leads. All extracts copied therein, as well as reports and papers submitted therewith, shall be set in brevier or nonpareil type, with six-to-pica leads. No tables of any character shall be leaded, and all tables, rule and figure work and matter of three or more justifications shall be set in solid brevier or nonpareil type, and in as compact a form as practicable. But when any of the above work is quadded or spaced between the lines, by order of the executive council, all such quadded lines or spaces shall be deducted from the measurement. Itemized accounts of receipts and disbursements, together with inventories, accompanying the reports, shall be omitted from the printed report, unless the governor deem the same of sufficient importance to warrant their publication. [Same, § 10.]

SEC. **125. Number of copies to be printed.** There shall be printed of the various public documents the number of copies hereinafter designated, to wit: Of the biennial message, three thousand copies; of the inaugural address, twenty-five hundred copies; of the biennial report of the auditor of state, three thousand copies; of the report of the superintendent of public instruction, four thousand five hundred copies; of the report of the agricultural college, and of the report of the state board of health, three thousand copies each; of the report of the bureau of labor statistics, four thousand copies; of the annual report of the auditor upon insurance, six thousand copies; of the report of the commissioner of pharmacy, three thousand copies; of the report of the railroad commissioners, four thousand copies, two thousand of which shall be bound in cloth; of the report of the secretary of state pertaining to lands, fifteen hundred copies; of the report of the state visiting committee to the hospitals for the insane, two thousand copies; of the report of the state inspector of oils, and of the examiners in dentistry, two thousand copies each; of the reports of the joint committees of the general assembly to visit state institutions, fifteen hundred copies; of the proceedings of the pioneer lawmakers' association, twelve hundred copies, five hundred of which shall be delivered to the association; and of all other reports not herein specified, two thousand copies, unless the executive council shall direct a greater number to be printed, not exceeding four thousand. Of said reports, five hundred copies each of the biennial message, inaugural address, auditor's biennial report, the report of the superintendent of public instruction, agricultural college, board of health, commis-

sioner of pharmacy, secretary of state pertaining to lands, secretary of state's report of criminal convictions, the auditor's annual report pertaining to insurance, and the report of the bureau of labor statistics, shall be bound in cloth; all other reports shall be bound in paper covers, and reports of the legislative visiting and special committees shall be printed and stitched without covers. [23 G. A., ch. 52, § 1; 22 G. A., ch. 82, § 11.]

SEC. **126. Distribution of documents—by and to whom.** The secretary of state shall make distribution of the various public documents turned over to him, as follows:

1. The secretary of state shall distribute to each member of the general assembly one copy of the various public documents, and, upon request, such additional number as the secretary of state may provide for, and such remaining number as is not necessary to be retained for future general assemblies shall be distributed upon special calls made therefor.

2. One thousand copies shall be stitched and bound in half-sheep, containing a copy of each report, to be arranged under the direction of the secretary of state. Some distinctive mark shall be put on the even-numbered pages of each document, to indicate its place in the bound document, with the year of the report on each odd-numbered page, and in each volume shall be placed a table of contents of all the volumes.

3. The foregoing one thousand copies shall be distributed as follows: One copy to the lieutenant-governor, to the speaker, to each member of the general assembly, to the secretary of the senate and to the clerk of the house of representatives; one copy each to the governor of the state and his private secretary, the secretary of state, the auditor of state, the treasurer of state, the attorney-general, the superintendent of public instruction, the clerk and reporter of the supreme court and each of their deputies, the commissioner of labor statistics, the adjutant-general, the custodian of the capitol, and the fish commissioner; one copy to each judge of the supreme court; one copy to each railroad commissioner, mine inspector, and commissioner of pharmacy; one copy to the state librarian, and the secretary of the board of health, respectively; one copy to each state institution, to remain therein; one copy to the office of each county auditor, to remain therein; forty copies to the historical society; one copy to each of the other states and each territory reciprocating the same, and to each foreign nation or province desiring to exchange like reports; twenty-five copies to the state library; the remaining copies to be placed under the control of the secretary of state, to be disposed of as he may see fit, the person so receiving them to pay express charges thereon.

4. He shall furnish to the library of congress two copies of all legislative journals and reports of state offices, immediately upon their publication.

5. Six hundred copies of the message, two hundred copies of each of the reports of the joint visiting committees, and five hundred copies of each of the other documents, shall remain with the state for the use of the future general assemblies, and to supply special calls therefor.

6. The copies not above disposed of shall be distributed to the officers, institutions and committees making report. [23 G. A., ch. 52, § 2; 22 G. A., ch. 82, § 12; C., '73, § 64.]

SEC. **127. Daily legislative proceedings to be printed.** The state printer shall be furnished daily, during the sessions of the general assembly, with a copy of the journal of each house thereof, at such hours and by such officers as may be directed by the houses, respectively, who shall thereupon print and number the pages consecutively through each session, and, after the same are properly stitched at the state bindery, deliver for the use of the senate and house, respectively, on the following legislative day, at such hours as may be prescribed by the proper officer, two hundred copies of the proceedings of the senate, and three hundred copies of those of the house of representatives. When a session is held after seven o'clock p. m.,

the proceedings thereof shall be furnished the printer as soon after the close of such session as practicable. [22 G. A., ch. 82, § 13.]

SEC. **128. Corrections.** Upon the return to the printer, by the proper officer of each body, of the daily proceedings, corrected as shall be directed by the house to which they pertain, the printer shall correct the same, the secretary and clerk correcting the written journal, when necessary, to correspond. [Same, § 14.]

SEC. **129. Stitching and distribution.** He shall forthwith make the corrections indicated, print three hundred copies of the senate proceedings, and five hundred copies of the house proceedings, and deliver them to the state binder sufficiently early to permit the latter to fold, stitch and deliver them to the secretary of the senate and clerk of the house, respectively, not later than noon of the third day following that to which the proceedings pertain. Of the printed proceedings of the senate, one hundred and twenty-five copies shall be delivered to the sergeant-at-arms of the house for distribution therein, and seventy-five copies of the proceedings of the house shall be delivered to the sergeant-at-arms of the senate for distribution therein. The remaining copies shall be under the control of the respective houses for distribution. [Same, § 15.]

SEC. **130. Journals to be printed and bound.** He shall thereupon proceed to print two thousand copies of each of the journals. Within fifteen days after the adjournment of the general assembly, a complete and thorough index of each journal shall be delivered to the state printer, who shall forthwith print the same, and within fifteen days thereafter deliver the sheets complete to the state binder, who shall, within thirty days thereafter, bind one thousand copies of each journal in half-sheep, and one thousand in paper covers, and deliver the same to the secretary of state. [Same, § 16.]

SEC. **131. Distribution by secretary of state.** The secretary of state shall make distribution of the journals of the respective houses as follows:

1. Of the bound journals of the respective houses, two copies of each shall be distributed to each member thereof; one copy each to the secretary of the senate and clerk of the house, respectively;

2. The remaining copies shall be distributed as follows: One copy each to the governor, lieutenant-governor, the state officers and deputies, as provided for the distribution of documents; also one copy of each journal to each newspaper of general circulation in the state;

3. The undistributed number shall be under the control of the secretary of state. [Same, § 17.]

SEC. **132. Original copies to be preserved.** The secretary of the senate and the clerk of the house of representatives shall preserve copies of the printed daily journals of their respective bodies, as corrected, certify to their correctness, and file them with the secretary of state at the adjournment of the legislature. The secretary of state shall cause the same to be bound and preserved as the original journals of the senate and the house. [Same, § 19.]

The journals of the respective houses are competent evidence to show the proceedings of either or both of such houses: *Koehler v. Hill*, 60–543.

SEC. **133. Session laws to be printed.** Within fifty days after the secretary of state shall deliver to the state printer a copy of the laws, joint resolutions and memorials passed at any session of the general assembly, he shall print all the copies thereof that may be by law required, and the secretary of state shall, within five days after the same are printed, make out and deliver to such printer an index of the same, who shall, within ten days after receiving such index, print the same, and deliver to the state binder such copies, in sheets, as are required for binding; but this section shall not apply to any revised code adopted by the general assembly. [Same, § 20.]

SEC. **134. Size of type, and how set, for public printing.** The laws, journals and all other printing in book form shall be set in long primer, brevier or nonpareil type; the titles to the laws and resolutions, all indexes, all messages, all reports and resolutions copied in the journals, to be in brevier; rule and figure work, in either brevier or nonpareil, as may be directed by the officer ordering the work; all other matter to be in long primer, except when otherwise ordered by the officers under whose direction the work is done. Each printed page shall be paid for at actual measurement. Whenever a subject is begun, whether it be the name of member or otherwise, the subject-matter shall follow in the same line, unless such line is filled by such word. The report of each motion or resolution shall be embraced in one paragraph, and, where the yeas and nays are given, each division list shall be in one paragraph, with the names set in alphabetical order, and the result in the last line. [Same, § 21.]

SEC. **135. Paper-receipt book and samples of work to be kept.** The secretary of state shall provide a state paper-receipt book, and, whenever he shall deliver to the state printer paper for any kind of printing, a receipt therefor shall be entered in said book, which receipt shall describe the kind and quality of paper, and the purpose for which it is delivered. Upon return of the work for which any paper has been delivered, he shall enter the date thereof, and the quantity so returned. He shall also preserve for not less than two years a sample of each kind of work done, together with a memorandum of the measurement of composition, the quantity of press work, price paid and date of delivery. [Same, § 22.]

SEC. **136. Report of academy of sciences—distribution.** There shall be published and bound in boards, in the same form as the acts of the general assembly are, by the state and under the supervision of the Iowa academy of sciences, one thousand copies of its annual report, to contain not more than two hundred and fifty pages, to be distributed as follows: To the governor, lieutenant-governor, secretary of state, auditor of state, state treasurer, each member of the general assembly, horticultural society, agricultural society, state library, university, agricultural college and the normal school, two copies each; to each public library and each incorporated college of the state, two copies; the remainder to be distributed by the secretary of state, as directed by the secretary of said academy, for exchange and such other purposes as the academy may specify; the exchanges and reports received to be preserved in the capitol for the benefit of the state at large. [25 G. A., ch. 86.]

SEC. **137. Proceedings of state teachers' association—distribution.** There shall be published annually by the state, under the supervision of the superintendent of public instruction, fifteen hundred copies of the proceedings of the state teachers' association, to contain not more than two hundred pages, to be distributed as follows: One copy each to the governor, lieutenant-governor, auditor of state, secretary of state, treasurer of state, each member of the general assembly, each enrolled member of the state teachers' association, and each public library of the state; the remainder to be distributed by the superintendent of public instruction. [25 G. A., ch. 87.]

SEC. **138. Prices for state printing.** The state printer shall be paid the following prices for all work done for the state in an acceptable manner, as hereinbefore provided, and no more:

1. For hand composition on laws, journals, reports and all other printed matter, except blanks, forty-eight cents per thousand ems, and sixty cents per thousand for figure work when figures are arranged in columns, and three or more justifications are required, and eighty cents per thousand ems for rule and figure work. But plain indexes, such as those of the statutes of this state, shall be reckoned as ordinary composition;

2. For book press work, the compensation shall be two dollars for the first one thousand impressions of sixteen pages, and one dollar and twenty-five cents per thousand for each additional one thousand impressions from

the same form. If in finishing a job of press work it shall be necessary to print an eight-page form, the compensation shall be the same as for a sixteen-page form, and, if there shall not be one thousand impressions in any one book form, the compensation shall be the same as for one thousand. No extra charge shall be allowed for dry pressing of sheets, which shall be done in all cases when so directed by the secretary of state;

3. For printing blanks, including composition and press work on one side of a sheet of folio post or larger paper, two dollars and fifty cents for the first one hundred impressions; for the next four hundred impressions, forty cents for each hundred, and fifteen cents for each additional one hundred impressions above five hundred. On paper smaller than folio post, for blanks or circulars, including composition and press work, two dollars for the first one hundred impressions; for the next four hundred impressions, thirty cents for each hundred, and ten cents for each additional one hundred impressions above five hundred. When both sides of a blank can be printed at once, only one impression shall be paid for;

4. For printing one thousand copies or less of the docket for the supreme court, including press work and composition, the docket page to conform in size and form with the dockets of 1896, two dollars for each printed page contained in a single volume thereof. For printing senate or house bills, five hundred or less, including composition and press work, two dollars and twenty-five cents for each printed page contained in a single bill, and for each additional one hundred, twenty-five cents. For briefs to the supreme court, fifty copies or less, of size and form prescribed by the rules of the supreme court, ninety cents per printed page contained in a single volume. For letter heads, envelopes, labels and postal cards, including composition and press work, one dollar and fifty cents for each one thousand impressions or less, and one dollar and twenty-five cents for each additional thousand; and when postal cards are printed upon both sides, two press works shall be paid for. [22 G. A., ch. 82, § 23.]

SEC. **139. Conditions of payment.** No charges of any kind shall be allowed the state printer, except as the same are expressly provided by this chapter. He shall be allowed only for press work done and type actually set up and imposed, or for paper actually printed, and he shall file with the secretary of state a copy of each job of work, on which each item of charge is made, at the time of rendering his account. Before the secretary can issue him the receipt contemplated by this chapter, the actual number of ems and number of impressions of press work in each job shall be specified, with a statement that the law has been strictly complied with, and that no unlawful charges are embraced in his account, as rendered, which statement shall be verified by the affidavit of the state printer. Where type set for messages or documents shall be used twice, the state printer shall have pay for the same but once, but he shall be allowed one dollar and fifty cents each sixteen page form where it is to be used a second time. [Same, § 24.]

SEC. **140. Indexes of legislative journals.** The secretary of state shall cause indexes of the journals of the senate and house of representatives to be made, the cost thereof not to exceed the sum of fifty dollars. [Same, § 18.]

SEC. **141. Compensation of state binder.** The state binder shall be paid the following prices for all work done for the state in an acceptable manner, as in this chapter provided:

1. For folding and trimming all documents not stitched, ten cents per hundred copies;

2. For folding, trimming and stitching documents not covered, fifteen cents per one hundred copies;

3. For folding, stitching, and binding in paper covers all messages, reports, documents, not exceeding one sheet, allowing sixteen pages for a sheet, eighty cents per hundred copies of sixteen pages or less, and for each

additional sheet of sixteen pages or less, eighteen cents per one hundred copies, the cover not to be counted;

4. For folding, sewing, and binding in paper covers the journals of the two houses, sixteen cents per copy;

5. For folding, sewing, and binding in muslin or cases, with gilt letters, the lettering and general style of the books to be the same as reports heretofore published, fifteen cents per copy for a volume of one hundred and fifty pages or less; twenty-one cents per copy for a volume containing one hundred and fifty pages, and not more than four hundred pages, and for each additional one hundred pages or fraction thereof, four cents; for folding, sewing and binding agricultural and horticultural society reports in board covers with muslin backs, similar in style with the acts of the general assembly, eighteen cents per copy;

6. For folding, sewing, and binding in half-sheep, with gilt letters for title, the lettering and general style of the books to be the same as documents heretofore published, twenty-six cents per copy for each volume of four hundred pages or less, and four cents for each additional hundred pages or fraction thereof;

7. For folding, stitching and binding the acts and resolutions of each general assembly in boards, with muslin backs and paper sides, same as laws of 1886, ten cents per copy;

8. For folding, sewing, and binding in law sheep, same style as the reports of the supreme court, fifty cents per copy for each volume of five hundred pages or less, and four cents for each additional one hundred pages or fraction thereof;

9. For ruling he shall be allowed the sum of seventy-five cents per hour for time actually employed;

10. For binding the Iowa official register, eight cents per copy for the first ten thousand copies, and six cents per copy thereafter. [24 G. A., ch. 64, § 3; 22 G. A., ch. 82, § 25.]

SEC. **142. "Sheep" construed.** Wherever in this chapter the word sheep is used, it shall be construed to mean law sheep.

SEC. **143. Part payment as work progresses.** At any time during the progress of the printing or binding of the laws, or the journals of either house, or any other work amounting to more than one hundred pages, the secretary of state may issue his certificate for one-half the value of the work thus far done, to be ascertained by said secretary, and, upon said certificate being presented to the auditor of state, he shall draw his warrant for the amount therein named. [22 G. A., ch. 82, § 26.]

SEC. **144. This chapter not retroactive.** Nothing in this act shall be construed to in any manner affect the compensation of the present state printer and binder during the unexpired term of their offices. [Same, § 42.]

CHAPTER 6.

OF THE CUSTODIAN OF PUBLIC BUILDINGS.

SECTION **145. Appointment—qualification—duties.** The governor, with the advice and consent of the senate, shall appoint a custodian of public buildings and property, who shall have the care of the capitol, together with all the grounds and premises appurtenant thereto belonging to the state, and such custodian shall, before entering upon the discharge of his duties, qualify as provided by law, and execute and file with the secretary of state a bond in the penal sum of one thousand dollars, conditioned for the faithful discharge of his duties, with sureties thereto, to be approved by the governor. [21 G. A., ch. 148, § 1.]

SEC. **146. Term of office—vacancies.** His term of office shall be for two years, which shall expire on the thirty-first day of March of each even-numbered year; but he may be removed at any time for cause by the governor. If a vacancy should occur in said office when the general assembly is not in session, it shall be filled by appointment by the governor, but the person so appointed shall hold his office only until the next general assembly shall have been permanently organized, when the vacancy shall be filled by appointment of the governor by and with the advice and consent of the senate, which appointment shall be for the unexpired portion of the term for which the appointment had been made. [Same, § 2.]

SEC. **147. Duties specified.** It shall be the duty of the custodian to take charge of and protect the capitol building and all furniture and other property connected therewith; to preserve the same from injury; at all proper times to open and ventilate the several apartments, and constantly to keep every part thereof cleansed and in proper order, and at all suitable hours to personally or by proper escort attend visitors who may wish to view the same, or any part thereof entrusted to his care, free of expense; to control and take care of the capitol grounds, walks, fences, trees, shrubbery, statuary and other property of the state on or about the capitol grounds or premises, and to keep the same clean and in good order; to have charge and control of all buildings and grounds belonging to the state at the seat of government, not by law placed in charge of some other person, and to protect and care for the same. [Same, § 4; 16 G. A., ch. 142, § 8; C., '73, § 120.]

SEC. **148. May employ and discharge assistants—actions for injuries.** He is hereby authorized and empowered, subject to the limitations contained in this title, to employ such labor as shall be required in carrying out the duties imposed by this chapter; to have, at all times, charge of and supervision over the police and janitors in and about the capitol, not otherwise provided for, and to employ and discharge the same as the public interest may demand, and, with the advice and consent of the attorney-general, to institute in the name of the state civil or criminal proceedings against any person for injury or threatened injury to any public property under his control. [21 G. A., ch. 148, § 5.]

SEC. **149. Number and compensation of employes—report—pay.** The persons employed by him, as above authorized, shall at no time exceed the maximum number, and their compensation shall not exceed the maximum amount allowed by law. At the end of each month he shall make out a list of the expenses incurred under this chapter, specifying the names of the persons employed, the time employed, the kind of labor performed, and the amount due to each, which report shall be subscribed and sworn to by him and filed with the executive council, and, when approved by it, the auditor shall issue a warrant to each person for the amount to which he is entitled. [Same, §§ 6, 9.]

SEC. **150. Record to be kept—contents—report.** He shall keep in his office a complete record containing an itemized list of all property of the state under his care and control, with accurate plans and surveys of the public grounds at the seat of government, and shall make a quarterly report to the executive council on the last days of March, June, September and December, and a biennial report to the governor on the last day of December preceding each regular session of the general assembly. He shall perform all other duties imposed by law, or order of the executive council. [Same, § 7.]

SEC. **151. Contents of report.** Such reports shall show in detail all expenditures of every kind made by him fully itemized, the condition of all real and personal property of the state under his care or control, together with any loss or destruction of, or injury to, any such property, with the causes thereof, and measures necessary for the care and preservation of the same, and recommendations as to methods which would tend to render the

service more efficient and economical. They shall also embrace any other matter ordered by the executive council. Each biennial report shall contain an inventory of all state property under his control. All reports of the custodian shall be subscribed and sworn to by him. [Same, § 7.]

SEC. **152. Officers of senate and house—use and control of apartments in capitol.** Either house of the general assembly may employ such officers and janitors as it shall deem necessary for the conduct of its business; and every officer, board, court or commission may control the official apartments assigned to them by the executive council, but shall have no right to employ any janitor, clerk or person, except as authorized by joint resolution as provided in this title. The senate chamber, the hall of the house of representatives and the committee rooms shall be used only for legislative purposes, and official apartments shall be used only for the purpose of conducting the business of the state. [Same, § 8; 20 G. A., ch. 140, § 2.]

SEC. **153. No interest in contracts.** It shall be unlawful for the custodian to have any pecuniary interest, directly or indirectly, in any contract for supplies or labor provided for by this chapter, or any business enterprise involving any expenditure by the state; and a violation of the provisions of this section shall be deemed a misdemeanor, and on conviction thereof he shall be fined in any sum not exceeding one thousand dollars, and be removed from office. [21 G. A., ch. 148, § 10.]

SEC. **154. Salary.** He shall be paid a salary of fifteen hundred dollars a year. [Same, § 3.]

CHAPTER 7.

OF THE EXECUTIVE COUNCIL.

SECTION **155. How constituted.** The governor, secretary, auditor and treasurer of state shall constitute the executive council, and any three of them shall constitute a quorum. No deputy of either of such officers shall act in said council for his principal. [C., '73, § 111; R., § 993.]

SEC. **156. Secretary.** The executive council shall choose a secretary, to hold office during its pleasure. The secretary shall keep a journal in which shall be entered all the doings of the council. [C., '73, § 119; R., § 999.]

SEC. **157. Secretary to prepare report—contents.** The secretary shall, on or before the fifteenth day of January in each year, prepare a report of the doings of the executive council for the preceding year; which report shall include a statement of the assessment of railroad, sleeping and dining cars, telegraph and telephone companies; the official canvass of the votes cast at the general election; a list of the building and loan associations authorized to do business in the state within the year, and of those refused authority to do business, with a statement of the reasons for such refusal; a statement of the cities and towns the grades whereof may be changed during the year by reason of increase or decrease of population, as shown by the census; a list of the official and other bonds approved by the executive council; a statement of the contracts for prison labor authorized and approved; a classified and detailed statement of the expenditures made by the said council or with its approval; and a full statement of all other acts of the said council. The report so made shall be published in the Iowa official register. C., '73, § 120.]

SEC. **158. Accounts of state institutions controlled.** In addition to the duties provided by law, the executive council shall direct the manner in which the accounts of all transactions of the several state institutions

shall be kept, and the various items thereof, and such method shall be subject to change by them from time to time, as occasion may require. All officers or persons having charge of or supervision over said institutions shall keep accounts as directed by the executive council, which shall at all times be open for the inspection of the governor or any examiner appointed under the provisions of this code. A failure to so keep such accounts shall be ground for suspension from office.

SEC. **159. Annual examination.** At least once each year, and oftener if deemed expedient, the executive council shall cause the books, accounts, vouchers, expenditures and conduct of each of the state institutions to be examined into by a skilled accountant and examiner not otherwise in the employ of the state, who shall make report to the executive council of such matters and in such form as it may prescribe.

SEC. **160. Compensation of examiner.** Such examiner shall receive actual necessary expenses, and such compensation as the executive council may allow, not to exceed six dollars per day for each calendar day actually employed. The examiner shall itemize his bills for expenses and services, and they shall be subscribed and sworn to by him.

SEC. **161. Annual settlements.** The executive council shall annually, and oftener in its discretion, make a full settlement between the state of Iowa and the officers of the state, officers and superintendents of state institutions, and all persons receiving, handling or expending state funds.

SEC. **162. Itemized statements required.** All officers of the state, officers and superintendents of state institutions, and all persons drawing funds from the treasury of the state, shall file with the auditor of state an itemized statement, setting forth the object for which money is sought to be drawn, before a warrant is issued upon the state treasury. When the law permits the drawing of funds in advance of their expenditure, the persons drawing such funds shall file such itemized statement within one hundred days after the issuance of any such warrant. The statements provided for in this section shall be presented to the executive council by the auditor.

SEC. **163. Council to publish itemized statement.** The executive council shall publish, annually, as soon after January first as is practicable, an itemized statement of all warrants issued, and of all moneys paid out by the state treasurer. Said report shall be so arranged as to show the itemized cost of each department or office of the state, and of each state institution, and the disposition by items of all state funds and supplies.

SEC. **164. Supervision of capitol—contracts—auditing of bills.** The executive council is empowered to assign apartments in the capitol building to the several state officers, commissions and boards; and such assignment shall be subject to change by it, from time to time, when required in the interest of the public service. It shall also make for the state all contracts for lighting and repairing the capitol building and grounds, and for the necessary telephone, telegraph and water service therein; but the cost of such service shall not exceed the minimum amounts paid by private parties for like service. The bills for such service shall be itemized, subscribed and sworn to by the persons entitled thereto, and filed with the council, who shall audit the same and order a warrant drawn upon the treasury therefor, payable out of the amount appropriated by the general assembly for that purpose, and not otherwise.

SEC. **165. Purchase of supplies.** The council is also empowered and authorized to purchase the necessary furniture, fuel, stores and supplies for the capitol building and grounds, and for the use of the general assembly, public offices at the seat of government, and the supreme court, and all paper needed for the public printing. All paper purchased for the use of the state shall have a distinguishing mark or water line by which it can be

identified, and all furniture, stores or supplies for use in and about the capitol shall, when practicable, be marked with the word "Iowa." [C., '73, § 121; R., §§ 61, 81, 2170; C., '51, §§ 45, 60.]

SEC. **166. Advertise for sealed proposals.** The council shall, from time to time, make estimates of the kind, quantity and quality of the articles needed and authorized to be purchased by it, as provided in the preceding section, and shall cause the secretary thereof to advertise for sealed proposals therefor in two newspapers published at the seat of government, and such others as it may deem expedient. Such advertisement shall state the kind, quantity and quality, and time and place of delivery, of the articles to be purchased, and that such proposals shall be filed with the secretary of the council, the time and place where all bids will be opened, and such other matters as the council may direct. Bills for such advertising shall be subscribed and sworn to by the persons entitled thereto, and, when the same are audited by the executive council, the auditor shall draw warrants therefor. [C., '73, § 121; R., § 2169.]

SEC. **167. Award contracts—security—auditing bills.** All bids shall be opened by the council at the time and place fixed in the advertisement, and it shall award the contracts to the lowest responsible bidder therefor, who shall give security, to be approved by it, for the performance of such contracts; or it may reject any or all bids and advertise anew. Upon the delivery of the articles contracted for in compliance with the terms of the contract, the person so furnishing the articles shall file with the council an itemized bill therefor, and it shall thereupon audit the same, and order a warrant drawn upon the treasury for the amount due, payable out of the sum appropriated by the general assembly for that purpose, and not otherwise. [C., '73, §§ 120, 121.]

SEC. **168. Supplies and postage—to whom furnished.** The executive council shall take charge of all property purchased under the provisions of this chapter, and shall keep a full, accurate, complete and itemized account of all such property, with the cost and disposition thereof. The council shall supply the governor, secretary, auditor, treasurer, judges of the supreme court and clerk thereof, attorney-general, supreme court reporter, superintendent of public instruction, railroad commissioners, adjutant-general, the dairy commissioner, the historical department, the mine inspectors, the labor commissioner, the horticultural department, and other officers entitled thereto by law, the general assembly, its committees, and the clerks, secretaries and special and standing committees of either house thereof, with all such articles required for the public use, and necessary to enable them to perform the duties imposed upon them by law. Postage shall not be furnished to the general assembly, its officers, employes, or to any committee of either branch thereof. It shall also furnish the public printer with all paper required for the various kinds of public printing, in such quantities as may be needed for the prompt discharge of his duties. Supplies, including postage and stationery, shall be furnished to the officers and persons entitled thereto by law, only in the manner provided in this chapter. [20 G. A., ch. 119; C., '73, § 122; R., § 2170.]

SEC. **169. Supplies—how drawn—accounts to be kept.** In order to draw supplies, each officer or person entitled thereto, or the chairmen of the respective committees, shall make a written requisition on the secretary of the council, specifying the amount and kind that is necessary; and, upon presentation thereof to said secretary, he shall deliver the articles to the person entitled thereto, taking a receipt therefor, to be filed and preserved with the records of the council. The council shall keep an account so as to show the amount, cost and kind of supplies purchased, the amount and kind on hand, and the disposition of the balance. It shall keep an accurate itemized account with each office, board, commission, or person drawing supplies, charging thereto the several articles furnished at the cost price. The council shall also keep an account with the public printer,

charging him with all paper drawn for public use at the cost price. All printed matter shall be returned to the secretary of the council for distribution, and the printer shall be credited with the cost price of the paper so returned, and required to account for the balance. [15 G. A., ch. 1.]

SEC. **170. Warrants on contingent fund—for what purposes.** The executive council is authorized to draw warrants upon any contingent fund set apart for its use for the purpose of paying the expenses of suppressing any insurrection or riot actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding or restoring any state property injured, destroyed or lost by fire, storm, theft or unavoidable cause, and for no other purpose whatever. [16 G. A., ch. 142, § 8; C., '72, § 120.]

Under § 120 of Code of '73 (as amended by 16 G. A., ch. 142, § 8) which was more general in language than this section, it was held expenses of calling out the militia to suppress an insurrection or riot were "necessary and lawful expenses," "not otherwise provided for," within the language of the section and should be paid by warrant on certificate of the council without any special appropriation: *Prime v. McCarthy*, 92–569.

CHAPTER 8.

OF THE CENSUS.

SECTION **171. Executive council to provide blank forms.** The executive council shall cause to be prepared and printed blank forms suitable for the purpose of taking the census, to enable the assessors to make uniform returns upon the following matters: The number of males, the number of females, the number of persons entitled to vote, the number of militia. Such blanks must be furnished to the respective county auditors, and by them to the township assessors, on or before the first Monday in January of the year in which the census is to be taken. [C., '73, §§ 112–115; R., §§ 991–4.]

SEC. **172. Assessors to fill and return blanks.** The assessor shall at the time of assessing property in the year nineteen hundred and five, and every ten years thereafter, take such census in his township, municipality, or division thereof, and make entry upon such blanks of all matters therein required to be enumerated or returned, and return the same to the county auditor on or before the first day of June of the census year. [C., '73, § 114; R., § 992.]

SEC. **173. When assessor fails.** When any assessor fails to perform the duties required in this chapter, such auditor shall appoint some suitable person to take the census, as provided herein, at as early a day as practicable, at the expense of the county. [C., '73, § 117; R., § 997.]

SEC. **174. Returns to be forwarded—provision for failure.** The county auditor shall forward such return to the secretary of state as soon as possible, and not later than the first day of July following. If such returns or any of them are not received by the fifteenth day of July, the executive council may cause such census to be made in said county, or any township, municipality, or division thereof, or the returns brought up, at the expense of the delinquent county. All of such returns shall be filed and preserved by the secretary of state. [C., '73, §§ 114, 116, 118; R., §§ 992, 996, 998.]

SEC. **175. Abstracts to be made.** The executive council shall cause abstracts or compilations of said census to be prepared, which shall be recorded by the secretary of state in a book to be kept by him for that purpose. [C., '73, § 116; R., § 996.]

SEC. **176. Population to be published in official register.** It shall be the duty of the secretary of state to publish in the Iowa official register

the population of counties, cities and towns as shown by the last census, either state or national; and when the printing is completed the secretary of state shall certify that the same includes the census publication required by law, and such certificate, with the date and signature, shall be printed on the page following the title page thereof.

SEC. **177. Such publication to be evidence.** Wherever in this code the population of any county, city or town is referred to, it shall be determined by the publication above provided for as of the date of said certificate, and such census publication shall be evidence of all matters therein contained, and of said certificate thereto.

CHAPTER 9.

OF DUTIES ASSIGNED TO TWO OR MORE OFFICERS, AND GENERAL REGULATIONS.

SECTION **178. Contingent funds to be accounted for.** Any contingent fund set apart to any office or officer to be expended for the state shall, as used, be entered in a proper book showing when, to whom and for what purpose it was devoted, and receipts shall be taken therefor, preserved and filed with the report hereinafter required. On or before the first day of November preceding each regular session of the general assembly, the officers or person having charge of the fund shall make report to the state auditor in writing, showing, in detail, each item of expenditure made, and he shall not be credited with any sum not paid out in the manner contemplated by the law making the appropriation, nor unless the report shall be accompanied with the proper vouchers and receipts. All funds not thus accounted for may be recovered by the state from the proper officer or person, with fifty per cent. damages thereon, and the state auditor shall, in his report to the governor, make a detailed statement of the condition of each appropriation contemplated by this section. [C., '73, §§ 123, 124; R., §§ 2172–6.]

SEC. **179. Oath to be taken by regents, trustees, etc.** Every person appointed or elected a regent, trustee, manager, commissioner or inspector, or a member of any board of regents, trustees, managers, commissioners or inspectors, now or hereafter created or provided by law for the government, control, management or inspection of any public building, improvement or institution whatever, owned, controlled or managed, in whole or in part, by or under the authority or direction of this state, shall, before entering upon the discharge of his duties as such regent, trustee, manager, commissioner or inspector, take and subscribe an oath, in substance and form as follows: "I (here insert affiant's name) do solemnly swear that I will support the constitution of the United States, and of the state of Iowa; that I will honestly and faithfully discharge the duties of (here describe the nature of the office, trust or position as regent, trustee, manager, commissioner or inspector (as the case may be) according to the laws that now are or that may hereafter be in force regulating said institutions, and prescribing the duties of regents, trustees, managers, commissioners or inspectors thereof (as the case may be); that I will, in all things, conform to the directions contained in said law or laws, and that I will not, directly or indirectly, as such regent, trustee, manager, commissioner or inspector (as the case may be) make, or enter into, or consent to, any contract or agreement, expressed or implied, whereby any greater sum of money shall be expended or agreed to be expended than is expressly authorized by law at the date of such contract or agreement." [C., '73, § 126; R., § 2180.]

SEC. **180. Oaths to be filed.** Oaths required by this chapter shall be filed in the office of the auditor of state, and he shall not draw any warrant

on the state treasury for expenditures made or directed by any such officer until such oaths are so filed. [C., '73, § 128; R., § 2183.]

SEC. **181. Committee on retrenchment and reform.** The chairmen of the committees on ways and means, judiciary, and appropriations, of the senate and house, respectively, at each regular session, shall constitute a standing committee, to be known as the joint committee on retrenchment and reform.

SEC. **182. Duties.** Said committee shall examine into the reports and official acts of the executive council and of each officer, board, commission and department of the state at the seat of government, in respect to the conduct and expenditures thereof, and the receipts and disbursements of public funds thereby. It shall report to the general assembly a joint resolution fixing the number of employes, and the salary of each, for the several offices, boards, commissions and departments for the ensuing biennial period, and recommend such appropriations and legislation as shall promote public interests and an efficient and economical administration of the affairs of the state.

SEC. **183. May take evidence.** Said committee shall have the same power to summon and examine witnesses, administer oaths, compel the production of books, papers and evidence, and to punish for contempt, as the district court.

SEC. **184. Books and accounts to be inspected.** The books, accounts, vouchers, and funds belonging to, or kept in, any state office or institution, or in the charge or under the control of any state officer or person having charge of any state funds or property, shall, at all times, be open or subject to the inspection of the governor or any committee appointed by him, or by the general assembly or either house thereof; and the governor shall see that such inspection of the office of state treasurer is made at least four times in every twelve months. [C., '73, § 132; R., §§ 80, 90; C., '51, §§ 59, 69.]

SEC. **185. Contracts for unauthorized expenditures.** Any officer who shall be empowered to expend any public money, or to direct such expenditures, is hereby prohibited from making any contract for the erection of any building, or for any other purpose which shall contemplate any excess of expenditures beyond the terms of the law under which such expenditures were authorized. [C., '73, § 127; R., § 2181.]

SEC. **186. Contracts in excess of appropriations.** It shall be unlawful for any trustee, superintendent, warden or other officer of any of the educational, penal or charitable institutions of this state to contract any indebtedness against said institutions or the state in excess of the appropriation made for said institutions; but nothing herein contained shall prevent the incurring of an indebtedness on account of support funds for state institutions, upon the prior written direction of the executive council, specifying the items and amount of such indebtedness to be increased, and the necessity therefor. [17 G. A., ch. 67, § 1.]

SEC. **187. Appropriations not to be diverted.** It shall be unlawful for any superintendent, warden, trustee, or other officer of any of the institutions mentioned in the preceding section, to divert any money that has been or may be appropriated for the use of said institutions to any other purpose than the specific purpose named therefor in the act appropriating the same. [Same, § 2.]

SEC. **188. Misdemeanor.** Any person violating any of the provisions of the two preceding sections shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment. [Same, § 3.]

SEC. **189. Trustees, etc., not to be interested in contracts.** It shall be unlawful for any trustee, warden, superintendent, steward, or any other officer of any educational, penal, charitable or reformatory institution, supported in whole or in part by the state, to be interested directly or indirectly

in any contract to furnish or in furnishing provisions, material, or supplies of any kind, to or for the institution of which he is an officer; and it shall be unlawful for any such trustee, warden, superintendent, steward or other officer, directly or indirectly, to receive in money or any valuable thing any commission, percentage, discount or rebate on any provision, material or supplies furnished for or to any institution of which he is an officer. And it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer of any state institution, to be directly or indirectly interested in any contract with the state to build, repair or furnish any institution of which he may be an officer. [17 G. A., ch. 144, § 1; C., '73, § 1387.]

SEC. **190. Misdemeanor.** Any person violating the provisions of the preceding section shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars, in the discretion of the court, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment, in the discretion of the court. [17 G. A., ch. 144, § 2.]

SEC. **191. Secretary and auditor to account for fees.** The secretary of state and the auditor of state shall keep an accurate and particular account of all fees received by them, which shall be verified by affidavit, and rendered monthly to the treasurer of state, and they shall pay the amounts thus received to such treasurer at the end of each month. [C., '73, § 3778.]

TITLE III.

OF THE JUDICIAL DEPARTMENT.

CHAPTER 1.

OF THE ORGANIZATION OF THE SUPREME COURT.

SECTION **192. Terms—business at each term.** The supreme court shall be held at the seat of government, and shall convene and hold three terms each year, one of which shall commence on the third Tuesday in January, one on the second Tuesday in May, and one on the first Tuesday in October. Each of said terms of court shall be for the submission and determination of causes and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term, unless continued or otherwise disposed of by order of the court. The court shall remain in session, so far as practicable, until it is determined what the opinion of the court shall be in all causes submitted to it, except in causes where reargument is ordered. Judgments of affirmance, rulings and orders in causes submitted, and orders authorized by law, may be made and entered by the court at any time, regardless of the terms of court. [22 G. A., ch. 34; 21 G. A., ch. 59; C. '73, § 133; R., § 2623.]

SEC. **193. Judges—quorum.** The supreme court shall consist of six judges, four of whom shall constitute a quorum for the transaction of business, but one alone may adjourn from day to day, or to a particular day, or until the next term. [25 G. A., ch. 69, § 1; 16 G. A., ch. 7, § 1; C. '73, § 139; R., § 2627; C. '51, § 1551.]

SEC. **194. Division into sections.** The judges shall join in the open sessions of the court and all other court duties, except that, in the preliminary consideration of submitted cases, they may divide into two sections of not less than three judges each, but no decision of the court shall be filed until it shall have been considered by the whole court and concurred in by not less than a majority of the judges. [25 G. A., ch. 69, § 4.]

SEC. **195. Divided court.** When the court is equally divided in opinion, the judgment of the court below shall stand affirmed, but the decision is of no further force or authority, but in such cases opinions may be filed. [C. '73, § 140; R., § 2628; C. '51, § 1552.]

The court has, however, the same power in such case as in any other to grant a rehearing: *Zeigler v. Vance*, 3-528.

If, upon rehearing, the court is equally divided as to whether its first opinion should stand, judgment will be affirmed as if such division had occurred on first hearing: *Richards v. Burden*, 59-723, 754.

As to effect of opinion in a case where the judges are equally divided, see *Bennett v. Hibbert*, 88-154.

SEC. **196. Failure of judges to attend.** If none of the judges attend on the first day of the term, the clerk must enter the fact on the record, and the court shall stand adjourned until the next day, and so on until the fourth day; then, if none of the judges appear, the court shall stand adjourned until the next term. [C. '73, § 141; R., § 2629; C. '51, § 1553.]

SEC. **197. Business continued.** No process or proceeding shall in any manner be affected by an adjournment or failure to hold court, but all shall stand continued to the next term, without any special order to that effect. [C. '73, § 142; R., § 2630; C. '51, § 1554.]

SEC. **198. Opinions to be filed.** The decisions of the court on all questions passed upon by it, including motions and points of practice, shall

be specifically stated, and shall be accompanied with an opinion upon all such as are deemed of sufficient importance, together with any dissent therefrom, which dissent may be stated with or without an opinion, and all decisions and opinions shall be in writing and filed with the clerk, except that rulings upon motions may be entered upon the announcement book. [C. '73, § 143; R., §§ 2636–7; C. '51, §§ 1560–1.]

As to construction of former provision requiring written opinion to cover each error assigned, see *Baker v. Kerr*, 13-384.

SEC. **199. Dissenting opinions.** The records and reports must in all cases show whether a decision was made by a full bench, and whether either and, if so, which of the judges dissented from the decision. [C. '73, § 144; R., § 2638; C. '51, § 1562.]

SEC. **200. What cases reported.** If the decision, in the judgment of the court, is not of sufficient general importance to be published, it shall be so designated, in which case it shall not be included in the reports, and no case shall be reported except by order of the full bench. [C. '73, § 145.]

SEC. **201. Bailiffs.** The court may appoint the necessary bailiffs to attend its sessions and perform such other duties and execute such orders as may be directed or ordered by it, who shall receive two dollars and fifty cents per day each, to be paid out of the contingent fund on the order of the chief justice. The court may also at any time require the attendance and services of the sheriff of Polk county. [21 G. A., ch. 59, § 2.]

SEC. **202. Contingent expenses.** All bills for contingent expenses shall contain the items thereof, and shall be certified to as correct by the chief justice before being audited. [C. '73, § 138; R., § 2626; C. '51, § 1548.]

SEC. **203. Salaries of judges.** The salary of each judge of the supreme court shall be four thousand dollars per annum. [18 G. A., ch. 27; C. '73, § 3769.]

CHAPTER 2.

OF THE CLERK OF THE SUPREME COURT.

SECTION **204. Office—duties.** The clerk of the supreme court shall have an office at the seat of government, keep a complete record of the proceedings of the court, and allow no opinion filed therein to be removed except by the reporter, which opinions shall be open to examination and may be copied, and, upon request, shall be certified by him. He shall also, when required, make out and certify a copy thereof. He shall promptly announce by mail to one of the attorneys on each side any ruling made or decision rendered, record every opinion rendered as soon as filed, and perform all other duties pertaining to his office. [C. '73, §§ 146–9; R., §§ 2647–51; C. '51, §§ 1564–5.]

SEC. **205. Salary of clerk and deputy—fees to be collected.** The salary of the clerk of the supreme court shall be twenty-two hundred dollars per annum, and the salary of the deputy clerk of the supreme court shall be fifteen hundred dollars per annum. The clerk shall collect the following fees and account for them as provided in section one hundred and ninety-one, of chapter nine, of title two of this code, and shall also keep account of and report in like manner all uncollected fees:

Upon filing each appeal, three dollars;

Upon entering judgment when the cause has been tried on its merits, two dollars;

Upon each continuance, one dollar;

Upon issuing each execution, one dollar and twenty-five cents;

Upon entering satisfaction of each judgment, fifty cents;

Upon each writ, rule or order to be served upon any person not in court, twenty-five cents;

For copying an opinion to be transmitted to an inferior court upon reversal of a judgment or an order, to be paid by the party against whom the costs are adjudged, or for a copy of such opinion or any record made at the request of any person, for each hundred words, ten cents. [21 G. A., ch. 118, § 6; 19 G. A., ch. 117, § 2; 17 G. A., ch. 74, § 1; C. '73, § 3771; R., §§ 2949, 4134–5; C. '51, §§ 2525–6.]

SEC. **206. Execution for fees.** If any of the foregoing fees of the clerk are not paid in advance, execution may issue therefor, except where the fees are payable by the county or the state.

SEC. **207. Deputy—qualification—duties.** The clerk of the supreme court may appoint, in writing, any person, except one holding a state office, as deputy, which appointment must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner,—both the appointment and the revocation to be filed and kept in the office of the secretary of state. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and, when so qualified, he shall, in the absence or disability of the clerk, perform all of the duties of such clerk pertaining to his office, and receive a salary of fifteen hundred dollars a year. [19 G. A., ch. 117; C. '73 § 766; R., § 643.]

CHAPTER 3.

OF THE ATTORNEY-GENERAL.

SECTION **208. Office—duties.** The attorney-general shall keep his office at the seat of government. He shall appear for the state, prosecute or defend all actions and proceedings, civil and criminal, in which the state shall be a party or interested, when requested to do so by the governor, executive council or general assembly; and shall prosecute or defend for the state all causes in the supreme court in which the state is a party or interested. [C. '73, § 150; R., § 124.]

When a criminal case is appealed to the supreme court, the attorney-general obtains control of it, but any agreements made by the attorney for the state while the case is in the lower court are binding as against the attorney-general: *State v. Fleming*, 13–443.

SEC. **209. Must give opinions.** When requested, he shall give his opinion in writing upon all questions of law submitted to him by the general assembly or either house thereof, the governor, lieutenant-governor, auditor, secretary of state, treasurer, superintendent of public instruction, and executive council. He shall, when required, prepare drafts for contracts, forms and other writings which may be required for the use of the state, and shall report to the governor, preceding each general assembly, the condition of his office, opinions rendered and business transacted of public interest. [C. '73, § 151; R., § 125.]

SEC. **210. Account for moneys.** All moneys received by him belonging to the people of the state, or received in his official capacity, shall be paid into the state treasury. He shall keep, in proper books, a record of all official opinions, and a register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which books shall be delivered to his successor. [C. '73, §§ 152–3; R., §§ 126–7, 130–1.]

SEC. **211. Compensation.** He shall be provided with an office in the capitol building. His salary shall be four thousand dollars per annum, as full compensation; and whenever he is required by the duties of his office, or by direction of the governor or general assembly, to attend any of the

courts of this state, or any of the federal courts, or transact other business for the state, he shall receive his actual expenses when so engaged elsewhere than at the seat of government. [21 G. A., ch. 172; C. '73, § 3770.]

SEC. **212. Assistant—salary.** He shall be supplied with an assistant, whose annual salary shall not exceed twelve hundred dollars.

CHAPTER 4.

OF THE SUPREME COURT REPORTER AND REPORTS.

SECTION **213. Office—may take opinions.** The office of the supreme court reporter shall be kept at the seat of government, and, when the opinions filed at any term of the supreme court are recorded by the clerk, he may take and retain the same for a period not exceeding four months, to prepare a report therefrom, but within such time they shall be returned to and remain in the office of such clerk. [C. '73, § 154.]

SEC. **214. New editions of reports.** The supreme court may order the publication of a new edition of any volume of its reports of which the copyright is owned by the reporter, when the public interest requires it, and may require compliance therewith within six months by an order entered of record; and if the reporter neglects or refuses to comply with such order, then such copyright shall be forfeited to the state. [C. '73, § 158.]

SEC. **215. Distribution of reports.** The copies received by the secretary of state shall be disposed of by him as follows: Two copies of each volume to the library of congress and the library of the supreme court of the United States; one copy to each judge of the supreme, district, and superior courts, including United States district judges whose districts lie within this state, the clerk of the supreme court and attorney-general; one hundred copies to the state library, one copy to each county in the state, two copies to each county where the district court is held in more than one place; one copy to the supreme court reporter; twenty copies to the law department of the state university; twenty copies to the state historical society, for exchange in such manner as the proper officers thereof think advisable. The remaining copies shall be used by the trustees of the state library in exchange for such books on law or equity, or reports of other states, as they may select. All books received by such exchange shall be deposited in and become a part of the state library. [22 G. A., ch. 33; C. '73, § 159.]

SEC. **216. Copy for and duties of publisher—size and quality of volume.** After sufficient opinions are announced and recorded to make a volume, he shall forthwith deliver at his office, to the person, persons or corporation having the contract with the state for publishing the same, copies of such opinions, and with each opinion a syllabus, and a brief statement of the facts involved. Within twenty days after the proof-sheets for a volume have been furnished to him by the publishers at his office, he shall furnish to such publishers an index and table of cases to such volume. The publishers shall furnish to the reporter without delay, as soon as they shall be issued, eight copies of the revised proof-sheets of the opinions, head notes, index and table of cases of each volume, for correction and approval by the reporter and judges of the supreme court, and shall cause such corrections to be made therein as shall be indicated by the reporter or said judges. Each of said volumes shall contain not less than seven hundred and fifty nor more than eight hundred pages, exclusive of the table of cases and index, and the workmanship and quality of material shall be approved and accepted by a majority of the judges of the supreme court. [20 G. A., ch. 125; 18 G. A., ch. 60, § 1.]

SEC. **217. Copyrights secured.** The copyrights of all the supreme court reports hereafter published shall vest in the secretary of state for the benefit of the people of this state; but this shall not be construed to prevent the contractor by whom any volume is published, his representatives or assigns, from continuing the exclusive publication and sale of such volume so long as he or they shall, in all respects, comply with the requirements of this chapter in respect to the character, sale and price of such volume. [18 G. A., ch. 60, § 2.]

SEC. **218. Published under contract.** The supreme court reporter shall have no pecuniary interest in such reports, but the same shall be published under contract, to be entered into by the executive council with the person, persons or corporation who shall agree to publish and sell the same on the terms most advantageous to the people of the state, at a price not to exceed two dollars per volume, of the size and quality as provided for in this chapter. And if any such volume shall in any way or from any cause contain more than eight hundred pages, no increased or additional price shall be charged therefor. [Same, § 3.]

The acceptance of a bid does not constitute the contract required by this section. Until the contract is entered into in accordance with the statutory requirements no contract is made, and the executive council may exercise a discretion: *Mills Publishing Co. v. Larrabee*, 78–97.

Therefore, *held*, that an action of *mandamus* would not lie to compel the executive council to enter into a contract with plaintiff whose bid had been accepted, the council having afterwards reconsidered such action and awarded the contract to another bidder: *Ibid.*

SEC. **219. Executive council to advertise.** The executive council shall, in the first week in April preceding the expiration of the present contract, and every eight years thereafter, advertise weekly, in six different newspapers in different localities in this state, for the term of six weeks, that sealed proposals will be received at the office of the secretary of state for printing, publishing and selling the said reports for the term of eight years next after the first day of June of said year, at a certain rate per volume, to be stated in said proposal, not exceeding the maximum price fixed by this chapter, and in accordance with the provisions of this chapter. [Same § 4.]

SEC. **220. Bidders to make deposit.** Each bidder shall deposit with the state treasurer the sum of one thousand dollars before making his proposal, to be forfeited to the state in case he shall not make a contract according to his proposal, if accepted, and according to the requirements of this chapter, and shall take a receipt from said treasurer, and deposit the same with his proposal, and, upon entering into the contract herein provided, or upon the proposal being rejected, the said sum shall be returned. [Same, § 5.]

SEC. **221. Terms of contract.** The successful bidder shall enter into a contract that he will publish the supreme court reports of the state, of the quality, style and character in all respects as required in this chapter; that he will publish and deliver to the secretary of state, at the capitol, the three hundred and fifty copies first issued, free of cost for publication or delivery, at the earliest practicable time, and within sixty days after the delivery of the manuscript for any one copy of such reports to the publishers; that he will stereotype the same, and at all times keep the same on sale in the state of Iowa to residents of this state for actual use at the contract price, in suitable quantities, in the city of Des Moines; that he will furnish the state any number of additional copies that may be required for its own use at the contract price, and procure new stereotype plates whenever the original plates shall become defaced or destroyed; and the said contract shall fully provide for the carrying into effect of all the provisions of this chapter, and shall be made within thirty days after he is notified of the acceptance of his proposal. [Same, § 6.]

SEC. **222. Security required.** The successful bidder shall, at the time of making his contract, execute and file with the treasurer of state a bond, in the penal sum of ten thousand dollars, conditioned to fulfill such contract in all particulars, with at least two sufficient sureties, residents of this state, to be approved by the executive council of the state. Such bond shall, by its terms, be the joint and several obligation of the persons executing it. If the successful bidder shall fail to complete his contract, or shall forfeit the same for any cause, the executive council shall relet the contract as soon thereafter as practicable, in the manner provided in this chapter; but such bidder, in lieu of sureties to such bond, may deposit therewith bonds of the United States, payable to the bearer, amounting to not less than ten thousand dollars, in which case the certificate of approval on such bond shall recite such fact. [Same, § 7.]

SEC. **223. Covenants of contract.** The contract of the successful bidder required under this chapter shall contain, among others, the following covenants on his part:

First. That he will not take out in his own name, nor procure to be taken out in the name of any person other than the secretary of state of this state, a copyright upon any volume of the supreme court reports published under such contract; and that, upon any breach of this covenant, he will pay to the treasurer of this state the sum of two thousand dollars as liquidated damages;

Second. That, in case it shall be determined in any action upon the bond of such contractor that he has failed in any respect to comply with the provisions of this chapter or his contract, the executive council may declare the contract forfeited; and that, upon such forfeiture so declared, such contractor will, upon demand, transfer to the secretary of state of this state, for the use of the state, the stereotyped plates of each volume of such reports published under such contract, or, in default thereof, will pay to the treasurer of this state two thousand dollars for each such volume as liquidated damages for a failure to make such transfer; and such failure shall be deemed a breach of the conditions of such bond, and such liquidated damages may be recovered by action on such bond. [Same, § 8.]

SEC. **224. Compensation of reporter.** The supreme court reporter shall receive as full compensation for all services rendered the sum of six hundred dollars for each volume of the reports completed by him in accordance with the provisions of this chapter, which sum shall be paid only after the publication of the volume, and upon the certificate of the chief justice that he has properly performed his official duties. Each volume shall conform in manner and style, as near as may be, to volume eighty of the Iowa reports. [Same, § 9.]

CHAPTER 5.

OF THE DISTRICT COURT.

SECTION **225. Jurisdiction—civil, criminal, probate—successor of circuit court.** The district court shall have general, original and exclusive jurisdiction of all actions, proceedings and remedies, both civil and criminal, except in cases where exclusive or concurrent jurisdiction is or may hereafter be conferred upon some other court or tribunal by the constitution and laws of the state, and shall have and exercise all the powers usually possessed and exercised by courts of record. It shall also possess and exercise jurisdiction in all appeals and writs of error taken in civil and criminal actions and special proceedings authorized to be taken from all inferior courts, tribunals, boards or officers, under any provisions of the laws of this state, and shall have a general supervision thereof, in all matters, to prevent and correct abuses, where no other remedy is provided.

First. The district court of each county shall have original and exclusive jurisdiction to probate the wills of, and to grant administration upon the estates of, all persons who at the time of their death were residents of the county, and of non-residents of the state who die leaving property within the county subject to administration, or whose property is afterwards brought into the county.

Second. To appoint guardians of the persons and property of all persons resident in the county subject to guardianship.

Third. To appoint guardians of the property of all such persons non-residents of the state who have property within the county subject to guardianship, or whose property is afterwards brought into the county.

Fourth. It shall have jurisdiction in all matters in relation to the appointment of executors and trustees, and the management and disposition of the property of and settlement of such estates: *provided* that, where jurisdiction has heretofore been acquired, the same shall be retained until such estate is closed.

The district court shall succeed to, and exercise full authority and jurisdiction over, the records of the circuit court, and may enforce all judgments, decrees and orders thereof in the same manner and to the same extent as it may exercise like jurisdiction and authority over its own records, and, for the purpose of the issuance of process, and of any and all other acts necessary to the due and efficient enforcement of the orders, judgments and decrees of the circuit court, the records thereof shall be deemed records of the district court. Transcripts and process from the judgments, decrees and records of the circuit court shall be issued by the clerk of the district court, and under the seal of his office. [21 G. A., ch. 134, § 7; C. '73, §§ 161–2, 2312; R., § 2663; C. '51, § 1576.]

Jurisdiction: The district court is a court of general jurisdiction. It may have jurisdiction over any case brought within its district, except so far as the exercise of its jurisdiction is limited by statute. The general and unlimited scope of its jurisdiction is illustrated by the fact that it is styled the district court for the state, held in and for a particular county, and its judges are judges of the state with authority to grant writs running into every part of the state. The legislature cannot deprive it of its jurisdiction or limit such jurisdiction, but the manner of its exercise may be prescribed by law: *Laird v. Dickerson*, 40–665.

The jurisdiction of the district court, which is a superior court of general original jurisdiction, can only be taken away by express words or irresistible implication. Therefore, *held*, that Revision, § 2395, which prohibited the bringing of an action in that court on claims against an estate for a mere money demand, except with the approbation of the county court, was not intended to do away with the jurisdiction of the district court, but merely as a restraint upon the plaintiff: *Sterrett v. Robinson*, 17–61; and that the failure on the part of the plaintiff to obtain such leave must be set up as a defense in the district court and could not be made a ground of collateral attack on the judgment: *Cooley v. Smith*, 17–99.

The statutes conferring jurisdiction upon the probate court did not defeat or oust the general jurisdiction of the district court: *Harlin v. Stevenson*, 30–371.

As the district court is one of general jurisdiction, its powers are such as to give it cognizance of proceedings by creditors to compel an administrator to sell real estate for debts, and of all other proceedings except where jurisdiction is denied or taken away by express language or necessary implication: *Waples v. Marsh*, 19–381.

The district court has general original jurisdiction, both civil and criminal, when not otherwise provided. But by statute it is provided that mayors of cities of the second class and incorporated towns shall have exclusive jurisdiction of violations of city ordinances, and the district court, therefore, has no jurisdiction of such an action: *Lansing v. Chicago, M. & St. P. R. Co.*, 85–215.

At law and in equity: The district court is invested with all the powers of a court of law and those of a court of equity, and the distinction between the two jurisdictions is recognized. This distinction the legislature cannot take away: *Claussen v. Lafrenz*, 4 G. Gr., 224.

Under statutes different from those now in force, *held*, that in a proceeding in equity the court possessed no jurisdiction to render in favor of the party such judgment as he might show himself entitled to at law: *Roberts v. Taliaferro*, 7–110. See now § 3427.

Supervisory powers: As to the distinction between the jurisdiction of the district court and that of the circuit court in *certiorari* under former statutes, see *Keniston v. Hewitt*, 48–679; *Groves v. Richmond*, 53–570.

Appeals are not permitted in cases where there is no statute authorizing them; as, for instance, in the case of action of fence viewers: *McKeever v. Jenks*, 59–350.

Judge; unauthorized person cannot act as: A person not duly authorized and qualified by law cannot, by consent of parties or

by direction of the duly qualified judge act as judge in the trial of a cause: *Michales v. Hine*, 3 G. Gr., 470; *Winchester v. Ayres*, 4 G. Gr., 104; *Petty v. Durall*, 4 G. Gr., 120; *Smith v. Frisbie*, 7-486.

It is not proper for a judge of the court to have an attorney substituted temporarily in his place, even by consent of parties, and himself act as attorney for one of the parties to the case: *Wright v. Boon*, 2 G. Gr., 458.

The judge may, during the argument of the case to the jury, properly be absent from the court room for the purpose of hearing another case, or otherwise: *Hall v. Wolff*, 61-559; especially if it does not appear but that such absence was necessary, or that prejudice resulted or might be inferred therefrom: *Baxter v. Ray*, 62-336.

In a criminal case, *held*, that the temporary absence of the judge from the court room during the argument to the jury, and alleged misconduct of prosecuting attorney in interrupting defendant's attorney in his argument during such time and causing disorder in the court room, were not such errors as to entitle defendant to new trial: *State v. Griffin*, 79-568.

Substitute: Where a statute provides that, in case of the absence or disability of the judge, a certain other officer designated shall act in his place, it must appear, in order to support an action of the person thus designated in sitting as judge, that the contingency upon which he was authorized to act had occurred: *Burlington University v. Stewart's Ex'rs*, 12-442; *State v. Chicago, R. I. & P. R. Co.*, 50-692.

Powers may be conferred upon the judge which cannot be exercised by the court of which he is judge: *Cummings v. Des Moines, W. & S. W. R. Co.*, 36-173.

Exclusive jurisdiction: Where a circuit court had, under prior provisions, exclusive jurisdiction and a change of place of trial was granted, *held* the case was to be sent to some other circuit court and not to the district court: *Schuchart v. Lammey*, 62-197.

Although an appeal to the circuit court from a justice of the peace in a civil case could not be changed to the district court, yet, if such appeal was consolidated by consent of the parties with an original action already pending in the circuit court, the consolidated action might be changed as in any other case: *Broune v. Hickie*, 68-330.

Probate jurisdiction: Probate courts are courts of general jurisdiction and their proceedings are presumed to be regular until it is shown that they are not. If jurisdiction depends upon facts not disclosed by the record they will be presumed to have existed: *Reed v. Lane*, 65 N.W., 380.

The probate court has not jurisdiction to appoint an administrator of the personal property of a person who was not a resident of the county at the time of his death, and held no property there, merely on the ground that the property was brought into the county after his death for a special purpose and removed again before the appointment of such administrator: *Christy v. Vest*, 36-285.

If there is any claim due the estate of decedent on which action might be maintained in the courts of this state by an administrator properly appointed, the courts of this state have jurisdiction to appoint such administrator. So *held* as to a cause of action accruing in another state under the laws of that state for causing the death of decedent, defendant being suable in Iowa: *Morris v. Chicago, R. I. & P. R. Co.*, 65-727.

The fact that a court, in granting administration upon the estate of a foreign decedent, appoints an administrator for the sale of real estate in that county, does not limit its jurisdiction as to property in other counties of the state: *Lees v. Wetmore*, 58-170.

Jurisdiction of the probate court is not exclusive as to land belonging to an intestate, which is not required for the payment of debts, and remains in the possession of the heirs after administration is concluded, and an action against heirs in possession by a person claiming to be heir may be brought in another court: *In re Seaton's Estate*, 58-523.

Where the relief sought is the enforcement of a lien, the action may properly be brought in equity, there being no method of obtaining relief in probate proceedings: *Goodnow v. Wells*, 67-654.

In an action to foreclose a mortgage given by decedent, no personal judgment can be rendered against the executor although made a party to the action. Proceedings to enforce a claim against the estate must be prosecuted in the probate court: *Orcutt v. Hanson*, 71-514.

The adjudication of a claim against the estate is to be deemed a part of the settlement of the estate, and action cannot be brought in the district court against the administrator of the estate on an indebtedness of decedent: *Tillman v. Bowman*, 68-450.

The court having taken jurisdiction to appoint an administrator, such action cannot be attacked collaterally by showing that there was no property in the county to warrant such appointment: *Murphy v. Creighton*, 45-179; *Lees v. Wetmore*, 58-170.

The probate court has exclusive jurisdiction of an action to probate a will, but such probate is not conclusive on adverse parties, and an original action to set the will aside may be instituted in the district court: *Leighton v. Orr*, 44-679.

The probate court does not have exclusive jurisdiction of the question of the validity of a will: *Kohn v. Ryan*, 31 Fed., 636.

The court of probate does not have exclusive jurisdiction of a suit on an administrator's bond: *Wheelhouse v. Bryant*, 13-160; *Jenkins v. Shields*, 36-526.

An order of a probate court approving the report of an administrator, in which he certifies to a distribution of all the funds to certain heirs, is not an adjudication that there are no other heirs: *Crossley v. Calhoon*, 45-557.

A probate court may appoint a referee in the matter of the examination of administrator's accounts: *In re Heath's Estate*, 58-36.

The jurisdiction of a court of probate relates to probate matters exclusively, and no chancery powers are thereby conferred upon it. It may regulate the distribution of property to legatees, but cannot supervise the

management of such property by the legatees charged with a trust duty in respect thereto by the will, the execution of trusts being within the jurisdiction of a court of equity: *Perry v. Drury*, 56–60.

The provisions as to the probate jurisdiction do not defeat or oust the general equity jurisdiction of the district court: *Harlin v. Stevenson*, 30–371.

Where a probate court directed that notice of an application by the administrator for sale of the real property to pay debts of the estate should be served by publication for two weeks in a newspaper, which order was complied with, *held*, that the court thereby acquired jurisdiction as against nonresident defendants to act upon such application: *Casey v. Stewart*, 60–160.

Where a proceeding which should have been in probate is brought in law or equity, the error is merely one as to the form of the action, and cannot be raised on appeal, if not interposed in the lower court: *Goodnow v. Wells*, 67–654.

Nor can such objection be taken advantage of by demurrer, but it must be raised by motion to transfer the proceeding to the proper docket: *Ashlock v. Sherman*, 56–311.

Where the parties submitted to the court a controversy involving the allowance of claims against the estate upon an agreed state of facts, *held*, that the court might determine such question, although it was not one involving the exercise of probate jurisdiction: *Baugh v. Barrett*, 69–495.

The district court, being a court of general and original jurisdiction, and also of probate jurisdiction, may determine an issue presented on the probate of a will, although the question is not one proper for determination in the probate court: *Leacox v. Griffith*, 76–89.

The probate jurisdiction is not exclusive of the jurisdiction of the federal courts in cases properly brought before them: *Clark v. Bever*, 139 U. S., 96.

Guardianship matters: The jurisdiction of the probate court in relation to estates of insane persons does not exclude that of the district court in an action of right between an insane person and others: *Flock v. Wyatt*, 49–466.

The district court has original and exclusive jurisdiction of the persons and estates of those who require guardianship: *Coffin v. Eisminger*, 75–30.

The probate court does not have such exclusive jurisdiction of a guardianship that an action on a bond for breach of duty cannot be brought without an adjudication of default in the probate court: *Robb v. Perry*, 35 Fed., 102.

The court of probate may authorize expenditures of a guardian for the support and education of a ward without notice to the ward. Such a proceeding is not adversary in its nature, and does not partake of the character of an action: *Brewer v. Stoddard*, 49–279.

An order with reference to the settlement of the account of a guardian appointed in one county entered of record in the court of another county is not valid: *Gillespie v. See*, 72–345.

Circuit court records: Since the circuit court has been abolished the district court has the same power with reference to its records that the circuit court might have exercised: *De Wolfe v. Taylor*, 71–648; *Risser v. Martin*, 86–392.

Rules: Previous provisions as to authority of the court to adopt rules and as to a uniform set of rules to be adopted by a convention of district judges, are omitted from this Code, the rules adopted by the convention of judges being incorporated into this Code as statutory provisions. As to the effect of those provisions on the common law power of a court to make rules for its own guidance see *Shane v. McNeill*, 76–459. And in general as to the effect of the provisions as to rules, see *State v. Ensly*, 10–149; *Pinders v. Yager*, 29–468; *McGrew v. Downs*, 67–687; *David v. Ætna Ins. Co.*, 9–45; *Meffert v. Dubuque, B. & M. R. Co.*, 34 430; *Burlington & M. R. R. Co. v. Marchand*, 5–468; *Lyon v. Byington*, 7–422; *Horseman v. Todhunter*, 12–230; *Baldwin v. St. Louis, K. & N. W. R. Co.*, 75–297; *Aken v. Coldren*, 80–254.

SEC. **226. City or town to provide court room.** Where terms are held in any city or town not the county seat, such city or town shall provide and furnish the necessary rooms and places for such terms, free of charge to the county. [C. '73, § 163; R., § 2653; C. '51, § 1566.]

SEC. **227. Judicial districts.** For judicial purposes, the state is hereby divided into twenty judicial districts, as follows:

The first district shall consist of the county of Lee, and have one judge.

The second district shall consist of the counties of Lucas, Monroe, Wapello, Jefferson, Davis, Van Buren and Appanoose, and have four judges.

The third district shall consist of the counties of Wayne, Decatur, Clarke, Union, Ringgold, Taylor and Adams, and have two judges.

The fourth district shall consist of the counties of Cherokee, O'Brien, Osceola, Lyon, Sioux, Plymouth, Woodbury, Harrison and Monona, and have four judges.

The fifth district shall consist of the counties of Dallas, Guthrie, Adair, Madison, Warren and Marion, and have three judges.

The sixth district shall consist of the counties of Jasper, Poweshiek, Mahaska, Keokuk and Washington, and have three judges.

The seventh district shall consist of the counties of Muscatine, Scott Clinton and Jackson, and have four judges.

The eighth district shall consist of the counties of Johnson and Iowa, and have one judge.

The ninth district shall consist of the county of Polk, and have four judges.

The tenth district shall consist of the counties of Delaware, Buchanan, Black Hawk and Grundy, and have two judges.

The eleventh district shall consist of the counties of Story, Boone, Webster, Hamilton, Hardin, Franklin and Wright, and have three judges.

The twelfth district shall consist of the counties of Bremer, Butler, Floyd, Mitchell, Worth, Cerro Gordo, Hancock and Winnebago, and have two judges.

The thirteenth district shall consist of the counties of Clayton, Allamakee, Fayette, Winneshiek, Howard and Chickasaw, and have two judges.

The fourteenth district shall consist of the counties of Buena Vista, Clay, Palo Alto, Kossuth, Emmet, Dickinson, Humboldt and Pocahontas, and have two judges.

The fifteenth district shall consist of the counties of Pottawattamie, Cass, Shelby, Audubon, Montgomery, Mills, Page and Fremont, and have four judges.

The sixteenth district shall consist of the counties of Ida, Sac, Calhoun, Crawford, Carroll and Greene, and have two judges.

The seventeenth district shall consist of the counties of Tama, Benton and Marshall, and have two judges.

The eighteenth district shall consist of the counties of Linn, Jones and Cedar, and have two judges.

The nineteenth district shall consist of the county of Dubuque, and have two judges.

The twentieth district shall consist of the counties of Des Moines, Henry and Louisa, and shall have two judges.

The district judge shall be a resident of the district in which he is elected, and each judge shall hold office until the expiration of the term for which he has been heretofore elected. Each district judge hereafter elected, except to fill a vacancy, shall hold office four years and until his successor is elected and qualified. Each judge elected to fill a vacancy shall hold for the unexpired term and until his successor is elected and qualified. [26 G. A., chs. 121, 122; 25 G. A., chs. 66, 67, 68; 24 G. A., chs. 53, 54, 55; 21 G. A., ch. 134, §§ 3, 4.]

SEC. **228. Terms where two county seats.** In any county having two county seats, terms of court shall be held at each, and, in the county of Pottawattamie, court shall be held at Avoca, as well as at the county seat. [22 G. A., ch. 37; 21 G. A., ch. 134, § 5; 20 G. A., ch. 198; C. '73, § 164.]

The legislature may, by special act, authorize the holding of court at a place other than the county seat: *Cooper v. Mills County*, 69–350; *Milner v. Chicago, M. & St. P. R. Co.*, 77–755.

This provision for the holding of court at Avoca, does not affect the jurisdiction of justices of the peace or mayors of cities within the county: *Deere v. Council Bluffs*, 86–591; *Coffman v. Trimble*, 90–737.

SEC. **229. Terms to be held.** The district judges shall hold four terms of court at each of the places in the several counties of their districts where court is authorized to be held, and, if business requires, then the judges of such district shall, by joint order made at the time of making the assignment of terms hereinafter required and entered of record, provide for regular additional terms. [22 G. A., ch. 37; 21 G. A., ch. 134, § 5.]

As to place of holding court see notes to § 286.

SEC. **230. Terms not at county seats—effect—duty of clerk.** When a court shall be held at a place not the county seat, all of the provisions of

the statute in relation to district courts shall be applicable thereto, except as herein modified. All proceedings had in said court shall have, within the territory over which said court shall have jurisdiction, the same force and effect as though ordered in the court at the county seat of said county, but transcripts of judgments and decrees rendered therein, levies of writs of attachment upon real estate, mechanics' liens, *lis pendens*, sales of real estate, redemption, satisfaction of judgments and mechanics' liens, dismissals or decrees in *lis pendens*, together with all other matters affecting titles to real estate, shall be forthwith certified by the deputy clerk at such place to the clerk of such court at the county seat, who shall immediately enter the same upon the records in his office. [22 G. A., ch. 37; 21 G. A., ch. 134, § 5.]

The failure of the deputy clerk to certify to the clerk of the district court the levy of a writ of attachment in proceedings at a place where court is held other than the county seat will operate to defeat notice of the attachment which would have been imparted by a record properly made: *Benjamin v. Davis*, 73–715.

SEC. **231. Division of work by judges.** In case the judges of any district are unable to agree as to the manner of holding their courts, or as to the counties in which they are severally to preside, they shall refer the matter to the chief justice of the supreme court, who shall assign said judges to such counties as he may determine; and the chief justice of the supreme court shall also have power to assign any district judge, when not occupied in holding court in his own district, to hold court in any other district in the state where any judge may be incapacitated from holding court, or there may arise a necessity therefor. But this section shall not be held to affect the right of the judges to interchange holding their terms of court, as now provided by law. [22 G. A., ch. 37; 21 G. A., ch. 134, § 5.]

SEC. **232. Judges to prepare schedule—printing—distribution.** On or before the first day of October in each odd-numbered year, the judges shall meet in their respective districts and determine the times and places of holding their courts during the two succeeding calendar years. The plan or schedule thus agreed upon, or ordered by the chief justice of the supreme court when they cannot agree, shall be forthwith forwarded by the district judges to the secretary of state and the clerk of the district court in each county in such district, and the clerk shall file the same and enter it of record in the journal of the court, and cause such order to be published for four weeks in some weekly newspaper published in such county, if there be any such published. The secretary of state shall, within ten days after receiving said orders, or before the first Monday in December after said orders are made, prepare a tabular statement of the times of holding the several courts, as fixed by the several orders in his office, and have printed one thousand copies thereof, which shall be distributed as follows: One copy to each state officer, the state library, the library of the law department of the university, each clerk of the district court and sheriff, and the residue to the county auditors, in proportion to the population of each county, for gratuitous distribution among the attorneys of the county. In preparing said plan or schedule, the judges shall so arrange, if practicable, that each judge shall hold at least one term of court during the year in each of the several counties of his district. [21 G. A., ch. 134, § 6; 15 G. A., ch. 12, § 1; C. '73, § 165; R., §§ 2654–5; C. '51, §§ 1567–8.]

SEC. **233. When special terms ordered.** A special term may be ordered in any county at any regular term of court in that county, or at any other time, by any judge of the district, for the trial of all causes pending at the last regular term of said court held prior to said special term, in which either party shall have served a trial notice as provided by law. When ordering a special term, the court or judge shall direct whether a grand or trial jury, or both, shall be summoned. [17 G. A., ch. 89; C. '73, § 166; R., §§ 2656–8; C. '51, §§ 1569–71.]

The authority to hold special terms should never be withheld from a court. It may be regarded as a right which a court of general jurisdiction should exercise *ex officio*: *Harriman v. State*, 2 G. Gr., 270.

Where a special term of court was provided for the trial of criminal cases only, *held*, that the jurisdiction of the court at such term was that provided for the trial of criminal cases in general, and was not limited merely to the trial of those in which there was consent: *State v. Smith*, 7–244.

And *held*, that at such special term an indictment might be found: *State v. Nash*, 7–347.

The court may call a grand jury together at a special term: *State v. Reid*, 20–413, 424.

Whether a judge may, for the purpose of concluding a trial begun during a regular term of court, appoint a special term at a day fixed by law for the regular term in another county, *quœre: State v. Knight*, 19–94.

Under Revision, §§ 2656–8, *held*, that a special term which was ordered for the same day fixed for the general term of the same court in another county, but was afterwards adjourned to a later date, was not illegal: *State v. Clark*, 30–168.

It is not improper to adjourn a term of court in one county in order that the judge may hold an adjourned term in another county, and the proceeding in the latter will not be invalid. This is not holding two terms of court at the same time: *State v. Van Auken*, 68 N. W., 454.

A special term is not a continuance of the regular term after an adjournment, but is a new term: *Dryden v. Wyllis*, 54–667.

As to adjournments, see § 235 and notes.

SEC. **234. When judge fails to attend.** If the judge does not appear on the day appointed for holding the term, the clerk shall make an entry thereof in his record, and adjourn the court until the next day, and so on until the third day, unless he appears, provided three days are allowed for such term, and if he does not appear by five o'clock p. m. of the third day, and before the expiration of the time allotted to the term, it shall stand adjourned until the next regular term. [C. '73, §§ 167–8; R., §§ 2668–9; C. '51, §§ 1581–2.]

SEC. **235. When special adjournment ordered.** If the judge is sick, or for any cause is unable to attend court at the regularly appointed time, he may by letter or telegram direct an adjournment to a particular day, and the clerk shall, on the first day thereof, or as soon after as he receives the order, adjourn the court as directed. [C. '73, § 169; R., § 2670; C. '51, § 1583.]

The judge is clothed with full power over the adjournments of his court: *State v. Clark*, 30–168.

Where the judge, being absent from the state, wrote and telegraphed to the clerk to adjourn the approaching term of court to a further date, and the clerk, in accordance with the telegram, published a notice of the adjournment, and notified parties, jurors and witnesses, but no proclamation of the adjournment was made at the day for opening the term, and the written order was not filed nor entry thereof upon the record made until after the opening of the term at the time to which it was so adjourned, nor until after defendant, who was held for trial at the regular term under a continuance from a previous term, had filed his protest against being tried at such adjourned term, *held*, that a *nunc pro tunc* record of the order was sufficient, and the trial of defendant was properly held at the adjourned term, no prejudice being shown: *State v. McGuire*, 53–165.

Before the enactment of the provision as to telegrams, *held*, that a telegram from the judge to the clerk, making the proper direction as to adjournment, was a sufficient written order within the requirements of the former section: *State v. Holmes*, 56–588.

The adjournment of the January term of court in one county to a term subsequent to the holding of the February term of the court in another county of the same district, *held* valid: *In re Hunter's Estate*, 84–388. And see notes to §§ 233 and 248.

SEC. **236. Business stands continued.** No recognizance or other instrument or proceeding shall be rendered invalid by reason of there being a failure of the term; but all proceedings pending in court shall be continued to the next regular term, unless an adjournment be made as authorized in the last preceding section. [C. '73, § 170; R., § 2671; C. '51, § 1584.]

SEC. **237. Recognizances continued.** In cases of such continuances or adjournments, persons recognized or bound to appear at the regular term, which has failed as aforesaid, shall be held bound in like manner to appear at the time so fixed, and their sureties, if any, shall be liable in case of their non-appearance, in the same manner as though the term had been held at the regular time and they had failed to make their appearance thereat. [C. '73, § 171; R., § 2672; C. '51, § 1585.]

SEC. **238. Regular adjournment—business continued.** Upon any final adjournment of the court, all business not otherwise disposed of shall stand continued. [C. '73, § 172; R., § 2673; C. '51, § 1586.]

SEC. **239. When no court-house.** When there is no court-house at the place where the courts are to be held, its sessions shall be at such suitable place as the board of supervisors provide, but if no such place is provided, the court may direct the sheriff to procure one at the expense of the county. [C. '73, §§ 173–4; R., §§ 2660–1; C. '51, §§ 1573–4.]

Where it appears that a court was sitting at some place other than the court house, it will be presumed, in the absence of a showing to the contrary, that it was at a place properly provided for the purpose, if any reason appears why the court house might not be a proper place: *State v. Shelledy*, 8–477, 509.

SEC. **240. Judges may interchange.** The district judges may interchange and hold each other's courts. [C. '73, § 175; R., § 2662; C. '51, § 1575.]

This section is not in conflict with Constitution, art. 5, § 5, and a judge holding court out of his district, in exchange with another judge, is not acting without authority: *State v. Stingley*, 10–488.

An unauthorized person cannot by consent of parties, or by direction of the court, act as judge. See notes to § 225.

SEC. **241. Judges not to sit together.** In districts in which the district court is composed of more than one judge, the judges shall not sit together in the trial of causes, nor upon the hearing of motions for new trials, but may together hold the same term, making an apportionment of the business between them; and in districts composed of more than one county they may hold terms in different counties at the same time. [21 G. A., ch. 128, § 1.]

The statutory provisions by which in the same case two or more district judges are authorized to hold court in the same county at the same time are not unconstitutional: *State v. Emmons*, 72–265.

Where, after the submission of a cause on deposition to the judge of the circuit court, the circuit was so changed that another judge became judge of such court, *held*, that a decision of the cause by the new judge was proper: *Manning v. Mathews*, 66–675.

Where at one term of court a judge signs or makes a memorandum of a decree which is not entered at that term on the record, and before the next term the judge goes out of office, his successor should cause the record to be made up from the previous decree or memorandum, and cannot regard the cause as open for trial: *Tracy v. Beeson*, 47–155.

Where the judgment rendered by one judge, upon the report of a referee, was set aside by his successor as having been improperly entered in vacation, and a new judgment to the same effect was rendered, *held*, that the unsuccessful party had no right to have his exceptions to the referee's report passed upon anew by the incoming judge: *Mellinger v. Von Behren*, 53–374.

SEC. **242. Record to be signed—execution not delayed.** The clerk shall from time to time make a record of all proceedings of the court, which, when correct, shall be signed by the judge. When it is not practicable to have all the records prepared and signed during the term, they may be prepared in vacation and corrected and signed at the next succeeding term; but such delay shall not prevent an execution from issuing in the meantime, and all other proceedings may be had in the same manner as though the record had been signed. Entries authorized to be made in vacation shall be signed at the next term of the court. [C. '73, §§ 176–7; R, §§ 2664–5; C. '51 § 1578.]

Signing and approval of record: The provisions of this and the following sections as to signing the record are directory only, and a failure to comply therewith does not render a judgment void: *Vanfleet v. Phillips*, 11–558; *O'Hara v. Leonard*, 19–515; *Childs v. McChesney*, 20–431; *Hamilton v. Barton*, 20–505.

An approval of the entries at any succeeding term relates back to the time of the entry, and is as effectual as if given at that time: *Vanfleet v. Phillips*, 11–558.

The expiration of the term of a judge before the approval and signing of the record does not make judgments rendered by him void: *Tracy v. Beeson*, 47–155.

Though the record of the judgment is not read and approved until the term after it is made, nevertheless exceptions thereto must be taken at the term when the judgment is entered: *State v. Orwig*, 34–112.

A judgment is valid though the record be not signed by the judge; so *held* as to a decree signed by the judge in vacation, filed with the clerk, and entered by him without the record being signed: *Traer v. Whitman*, 56–443.

Although the practice of procuring the

signature of the judge to a form of decree is to be commended as tending to secure accurate records, such signature is not the signature of the record contemplated by the statute: *Bosch v. Kassing*, 64–312.

Signature of orignal draft of decree is sufficient: *Smith v. Baldwin*, 85–570.

Entries in vacation: The reading, approval and signing of a judgment entry made in vacation at the next term of court does not make it valid where there is no authority to enter a judgment in vacation. Approval at the subsequent term is only allowable as to entries authorized to be made in vacation: *Townsley v. Morehead*, 9–565; *McClure v. Owens*, 21–133.

Where a judgment is entered in vacation it is under the control of the court and subject to modification or correction until finally approved: *Porter v. McBride*, 44–479.

The court may, at the next term after the making of an entry in vacation, proceed to correct or expunge it without notice to the party at whose instance it has been made: *Carpenter v. Zuver*, 56–390.

When a judgment upon a confession is entered in vacation, it should be approved and signed at the next term: *Dullard v. Phelan*, 83–471.

Failure of the judge to sign the record will not invalidate the judgment: *Ibid.*

As to a case reserved for decision in vacation a judgment rendered during the succeeding term will not be void. Jurisdiction is not lost by failure in such case to render a decision during vacation, nor is a resubmission necessary: *Reed v. Lane*, 65 N. W., 380.

Entry by clerk without authority: The clerk has no authority to enter up a decree not warranted by the entry on the judge's calendar: *Smith v. Cumins*, 52–143.

Notice of its own records: The court is supposed to know the genuineness of its own records and signature of its officers: *State v. Postlewait*, 14–446.

A court will not in one case take judicial notice of what has transpired in another case between different parties: *Baker v. Mygatt*, 14–131.

A court cannot take judicial notice in one case of its records in a different case. So *held* where it appeared that the opinion of the supreme court in a different case was introduced in evidence on the trial in the court below, but was not set out in the abstract on appeal: *Enix v. Miller*, 54–551.

The court will, in a proceeding for contempt, take judicial notice of its own orders in the matter out of which the alleged contempt grew: *Jordan v. Circuit Court*, 69–177.

The supreme court cannot, on appeal, take notice of the record in another case in the same trial court, not made part of the record in the case appealed: *State v. Lee*, 64 N. W., 284. And see notes to § 288.

SEC. **243. Court controls record.** The record aforesaid is under the control of the court, and may be amended, or any entry therein expunged, at any time during the term at which it is made, or before it is signed by the judge. [C. '73, § 178; R., § 2606; C. '51 § 1579.]

Correction of records: During all the term the record is under the control of the court, and at any time before adjournment an order of nonsuit or a judgment by default may be set aside on proper showing: *Taylor v. Lusk*, 9–444.

Until the record is signed it is not conclusive upon the court as against a bill of exceptions subsequently signed: *Shepherd v. Brenton*, 15–84.

The discovery by the court of an error or mistake in its ruling is good cause for amending or expunging the record thereof as herein provided: *Bruce v. Grady*, 36–352; and this may be done of its own motion: *Wolmenstadt v. Jacobs*, 61–372; so a default, improperly entered, may thus be set aside without following the provisions as to setting aside defaults: *Boals v. Shules*, 29–507.

The action of the court in attempting to amend its record at the next term, without notice to the opposite party, will be void, but will not affect the validity of the record itself as made at the previous term: *Elsner v. Shrigley*, 80–30.

Where, in entering judgment, attorney's fees were erroneously included, *held*, that the court should have stricken such allowance from the judgment, and approved the record as thus modified: *Dullard v. Phelan*, 83–471.

The court has the power at any time during the term to have the record corrected so as to conform to its rulings: *Robbins v. Neal*, 10–560.

The court has discretionary power to modify or reverse any order during the term at which it is made: *Chapman v. Allen*, Mor., 23.

The pleadings may be referred to for the purpose of explaining a judgment which is ambiguous on its face: *Redhead v. Baker*, 86–251.

The power of the courts to revise, correct and change their sentences, at the term at which they were pronounced and before anything has been done under them, has long been recognized both in this country and in England, and any doubt as to the existence of the power is removed by this section: *State v. Dougherty*, 70–439.

The presiding judge may change a ruling previously made by another judge with the same freedom that he might change a ruling made by himself: *McClain v. Capper*, 67 N. W., 102.

A formal decree which has been signed by the judge, and copied into the records by the clerk, may be amended before the record has been signed: *Bosch v. Kassing*, 64–312.

The court may, before a decree is read and approved, correct it on motion to make it conform to the pleadings: *Beer v. Nelson*, 73–186.

The court may, for a good reason shown, set aside at the same term a previous order: *Kirby v. Gates*, 71–100.

Where the petition has been held insufficient on demurrer and an amended petition is filed to which defendant again demurs,

the court is not bound by its ruling on the first demurrer, but may change its theory of the case and rule on the second demurrer in accordance with its judgment: *Van Werden v. Equitable L. Assurance Soc.*, 68 N. W., 892.

The record of the court being under its control, it may, during the term, change the same as it sees fit; therefore in an action for damages tried to the court without a jury, the court may change its findings as to the amount of damages and enter a judgment for a less amount without giving to the successful party the option of a new trial: *Flickinger v. Omaha Bridge & Terminal R. Co.*, 67 N. W., 372.

The court may, for good cause shown, change an order made during the term. If a motion for such change is made, the party adversely interested should have notice; but if counsel appear for him and are heard, and no prejudice results from want of formal notice, failure to give it will not constitute error: *Chicago, I. & D. R. Co. v. Estes*, 71-603.

As between a ruling upon demurrer and one made upon final hearing, the latter will prevail, even though they are made by different judges: *Richman v. Supervisors of Muscatine County*, 77-513.

Where final judgment has been entered of record, approved and signed, the court cannot, even during the same term, set it aside in the absence of and without due notice to the party interested, and an order thus made is void and may be corrected by *certiorari: Hawkeye Ins. Co. v. Duffie*, 67-175.

It is doubtful whether a court should correct its record after the term and before it is signed upon affidavits uncorroborated by anything in the record or within the recollection of the judge. And a refusal to make such correction upon parol evidence will not be interfered with on appeal where the evidence is conflicting: *State v. Crosby*, 67-352.

This section refers to a record made in a cause, and not to a total omission to make a record, which can be supplied at the succeeding term: *Tracy v. Beeson*, 47-155, 158.

Further as to the record, see notes to § 288.

SEC. **244. Corrections.** Entries made and signed at a previous term can be altered only to correct an evident mistake. [C. '73, § 179; R., § 2667; C. '51, § 1580.]

Correction of evident mistake: The power to change entries on account of evident mistake is not necessarily limited to the term next succeeding the one at which they were made. A correction in a particular case *held* proper under peculiar circumstances: *Hurley v. Dubuque Gas etc., Co.*, 8-274.

Entries made, approved and signed at a previous term can be altered only to correct an evident mistake: *Independent School Dist. v. Ross*, 63 N. W., 576.

Entries made at a previous term may be altered and corrected for mistake when it is clearly made to appear: *State v. McComb*, 18-43, 48.

Where a verdict is returned but no judgment rendered thereon at that term, it is not error to render such judgment at the next term: *Shephard v. Brenton*, 20-41.

This section does not deprive the court of the power to make a *nunc pro tunc* entry at a subsequent term of a fact such as consent of parties to trial by a certain method, etc.: *Buckwalter v. Craig*, 24-215; and a *nunc pro tunc* order showing certain facts in regard to the impaneling of a grand jury at a previous term *held* allowable: *State v. Munzenmaier*, 24-87.

By analogy, the provisions of this section will be followed in the supreme court: *Roberts v. Corbin*, 26-315, 331.

This section provides for the correction of entries made, approved and signed at *a* (not *the*) previous term: *Goldsmith v. Clausen*, 14-278.

The proceeding by motion to correct a judgment entry reciting a judgment against a party, where it appears that no judgment was in fact rendered, is not limited to one year: *Shelley v. Smith*, 50-553.

A mistake which may be corrected under this section is a mistake of fact, and not a mistake of law: *Knox v. Moser*, 72-154.

Where a judge at a term of court signs a decree, which is filed with the papers but not recorded at that term, and before the next term of court goes out of office, the court, at the succeeding term, cannot consider the cause as still open, but should enter the decree previously signed: *Tracey v. Beeson*, 47-155.

Action of the judge in ruling upon a motion for supplying an omission in the records will not be overruled on appeal where it appears that the facts which it is sought to make of record transpired in the trial before him, and that the evidence upon which he acted in correcting the record was conflicting: *Stockdale v. Johnson*, 14-178.

An amendment of the record upon motion of one of the parties, supported by an affidavit setting forth an agreement as to what should be submitted to the court, cannot be made under the authority to correct an evident mistake: *Eno v. Hunt*, 8-346.

The statement of a decree as to the time of its rendition cannot be overcome by the certificate of the clerk as to the time when the decree was filed with him: *Buck v. Holt*, 74-294.

As to manner of correcting mistakes of the clerk or irregularities in obtaining judgment, see § 4093.

A *nunc pro tunc* record of exceptions to instructions which is not entered until after the term is not valid: *State v. Hathaway*, 69 N. W., 449.

Where the entry upon a confession of judgment, by the omission of the clerk failed to show judgment against one of the parties, who, by the confession, was shown to be liable, and who joined therein, *held*, that such omission might be subsequently corrected by a *nunc pro tunc* entry. In such case it is not necessary to show diligence: *Risser v. Martin*, 86-392.

Further as to *nunc pro tunc* entries, see notes to § 288.

Notice of correction: A motion at a subsequent term to modify the decree in a matter affecting another party should not be sustained, no notice of such motion having been given to the party adversely interested: *Wetmore v. Harper*, 70–346.

The court cannot, after a judgment, execution and sale, so amend its record as to show proper service of notice which did not before appear, without notice of the proceeding for such amendment having been given to the opposite party: *McGlaughlin v. O'Rourke*, 12–459.

Where judgment by default is rendered against one defendant, and the case continued as to others, a party against whom default is rendered is not bound by subsequent proceedings in the case: *Okey v. Sigler*, 82–94.

SEC. **245. Shorthand reporter.** Each judge of the district court shall appoint a shorthand reporter who shall, upon the request of either party in a civil case or a criminal case, take and report in full the oral evidence and proceedings in the case, and perform all duties required of him on the trial, as provided by law. [18 G. A., ch. 195 § 1; C. '73, § 181.]

As to the duties of the shorthand reporter, and the effect to be given his transcript of the notes, see § 3675.

SEC. **246. Oath—removal.** Such reporter shall take an oath faithfully to perform the duties of his office, which shall be filed in the office of the clerk. He shall attend such sessions of the court as the judge who appointed him may direct, and may be removed by the judge making such appointment. [C. '73, § 182.]

SEC. **247. Decisions in vacation.** With consent of parties, actions and other matters pending in the courts named in this chapter may be taken under advisement by the judges, decided and entered of record in vacation, or at the next term; if so entered in vacation, they shall have the same force and effect from the time of such entry as if done in term time. [C. '73, § 183.]

A judgment rendered and entered in vacation, without consent of the parties or any order of court made during term therefor is void: *Spear v. Fitchpatrick*, 37–127; *Balm v. Nunn*, 63–641.

The court cannot in vacation enter an order making of record exceptions not properly preserved: *State v. Hathaway*, 69 N. W., 449.

A judge has no authority, without consent of parties, to render a decision in vacation discharging a garnishee: *Laughlin v. Peckham*, 66–121.

It is only where authority is specially conferred by statute that the judge is authorized to make orders and exercise judicial functions in vacation: *Prosser v. Prosser*, 64–378.

Where, by agreement of parties, either party was to have a certain time to file a motion for a new trial to be decided in vacation, and thereafter a motion for a new trial was filed and so decided, *held*, that a motion in arrest of judgment could not be filed and decided in vacation under the same agreement, it not being expressly provided for therein: *Scribner v. Rutherford*, 65–551.

Although a judgment be entered after the close of the term and without special direction of the court, yet if not contrary to the pleadings and verdict, and its entry was a matter of course, it is not void, but at most irregular, and such irregularity must be taken advantage of on motion: *Collins v. Chantland*, 48–241.

The entry of a judgment in vacation, except in cases authorized by statute, is irregular, and whether it is void, *quære: Carmichael v. Vandebur*, 50–651.

Whether a decree entered in vacation is void or merely irregular, the parties seeking to have it set aside in equity must offer to pay the amount appearing to be justly due, or allow judgment to be rendered for that amount: *Byers v. Odell*, 56–618.

Where upon the appearance of defendant at a subsequent term, the judgment in vacation was set aside and a new judgment entered of that term, *held*, that the new judgment was not void: *First Nat. Bank v. Hostetter*, 61–395.

The court may hear a case and render judgment during vacation if the parties consent thereto: *O'Hagen v. O'Hagen*, 14–264.

Where parties in open court agreed that judgment should be entered upon the disposition of a motion for a new trial, and that such motion might be decided in vacation, *held*, that a judgment entered in vacation in pursuance of such arrangement was proper: *Hattenback v. Hoskins*, 12–109.

An agreement for the submission of a cause and for a decision in vacation as of the last day of the term does not have the effect of extending the time for filing the bill of exceptions: *Edwards v. Cosgro*, 77–428.

An order of the judge may issue in vacation directing the sheriff as to publication of notice of sale under execution: *Herriman v. Moore*, 49–171.

Under the circumstances of a particular case, *held*, that consent to judgment in vacation appeared: *Guthrie v. Guthvie*, 71–744.

The consent of a party to a cause being determined in vacation, implied from the conduct of his attorney in not objecting thereto, *held*, sufficient to authorize such decision: *Myers v. Funk*, 51–92; *Babcock v. Wolf*, 70–676.

An agreement for a decision in vacation

implies that the judge will decide the case at his chambers or wherever he may be when he finally considers it: *Johnson v. Mantz*, 69–710.

Where a decree was signed by the judge before the expiration of his term of office and delivered to the attorney of one of the parties to be filed in the clerk's office, but was not so filed until the day after the expiration of the judge's term of office, *held*, that the decree was not therefore rendered invalid: *Babcock v. Wolf*, 70–676; *Guthrie v. Guthrie*, 71–744.

A decree signed by the judge and entered in vacation is valid, and not void, though it contain provisions not contained in the memorandum made in the judge's calendar at the trial; nor does the fact that it improperly provides for the sale of real property without redemption render a sale thereunder absolutely void: *Traer v. Whitman*, 56–443.

Entry of judgment in vacation, when it is not practicable to prepare and enter it in term time, is valid: *Ibid.*

Judgments in particular cases *held* to be proper in vacation by stipulation: *Falcy v. O'Malley*, 77–531; *Western Land Co. v. English*, 75–507.

This section does not prevent the determination of a cause which has been taken under advisement and the entry of judgment at a later term than that next following its submission: *Trulock v. Merte*, 72–510.

Entry of judgment on confession, as contemplated in § 3816, may be made by the clerk in vacation and approved, under this section, at the next term: *Kendig v. Marble*, 58–529.

As to what constitutes the record, see notes to § 288.

SEC. **248. Trials commenced to be concluded—motion for new trial.** Whenever a trial has been commenced, it may be concluded and all proceedings in the case thereafter conducted in the usual course, whether the time has arrived for commencing a term in another county in the district or not, and without regard to any other court or term thereof. If a verdict shall be returned after the expiration of the term, a motion for a new trial may be filed at any time on or before the first day of the next term of court. [C. '73, §§ 185–6.]

It not being specified to whom the jury are to return their verdict, *held*, that it would be good if received by the judge in person. It is not contemplated that such verdict must be received by him sitting as a court: *Tilton v. Swift*, 40–78.

The fact that the trial is had and completed during the time fixed for the court to be held in another county, the term of such other county having, however, been previously adjourned, will not constitute error: *State v. Stevens*, 67–557; *State v. Peterson*, 67–564.

Where it appeared that a judgment was rendered in the court of one county three days after the term of the same court should have commenced in another county, *held*, not sufficient to render such judgment void, even though it did not appear affirmatively of record that the term of court fixed for the other county had been adjourned: *Weaver v. Cooledge*, 15–244.

Where a trial is commenced in the midst of a term, under the *bona fide* expectation and belief that it can be concluded before the day shall arrive when the judge is by law directed, but not imperatively required, to hold court in another county, he may remain and conclude that case, receive the verdict and pass judgment, even though this may happen to be done on a day when regularly he would be opening or holding court in another county: *State v. Knight*, 19–94.

A term of court in one county may legally be extended beyond the time at which the same court, by the terms fixed by statute, should be in session in another county. At least a judge may, if he sees proper, extend the term in one county during the first three days in another county: *Cook v. Smith*, 54–636.

Before enactment of above section the rule was otherwise: *Davis v. Fish*, 1 G. Gr., 406; *Grable v. State*, 2 G. Gr., 559; *Sheppard v. Wilson*, Mor., 448. And see notes to § 233.

SEC. **249. Change of venue—to where.** When a change of venue is granted on the ground of objection made to the judge, he may, in his discretion, if there be a judge or judges of the same district against whom there is no objection, assign the cause to one of such judges for trial. If there be no other judge of his district against whom there is no objection, then he may, in his discretion, send the cause for trial to the nearest and most convenient county of another district, or to a county of another district agreed upon by the parties, for trial before a judge of such district; or he may procure another judge of another district to interchange with him for the trial of such cause. [21 G. A., ch. 134, § 10.]

Further as to change of place of trial, see § 3507.

SEC. **250. Probate powers conferred on clerk.** The clerk of the district court shall have and exercise within his county all the powers and jurisdiction of the court and of the judge thereof, in the following matters:

First. The appointment, when not contested, of resident administrators, executors, and guardians of minors, and the approval of any and all bonds given by administrators, executors, trustees and guardians in the discharge of their several trusts;

Second. The examination and approval of all intermediate or interlocutory accounts or reports of administrators, executors and guardians;

Third. The making of all necessary orders in relation to the personal effects of a deceased person, where no objection is filed, and perform all other acts within his jurisdiction, as provided for in this code. [Same, § 13.]

SEC. **251. Clerk's actions may be reviewed.** Any person aggrieved by any order made or entered by the clerk, under the powers conferred in the last section, may have the same reviewed in court, on motion filed at the next term and not afterwards, unless upon good cause shown within one year, and upon such notice as the court or a judge thereof may prescribe. Upon the filing of such motion, the clerk shall place the cause or proceeding on the docket without additional docket fee, and the matter shall stand for hearing or trial *de novo* in open court. [Same, § 14.]

The action of the court with reference to the appointment of a guardian of the person and property of a minor by the clerk is reviewable only on errors assigned: *Lawrence v. Thomas*, 84–362.

SEC. **252. Validity of clerk's orders—not to make reports for parties.** The records, orders and judgments made and entered by the clerk as hereinbefore provided, and not reversed, set aside or modified by the court, shall stand, and be of the same force, validity and effect, and shall be entitled to the same faith and credit, as if made by the court or by the judge thereof. No clerk, deputy or employe shall make or assist in making, drafting or filling out any report of any administrator, executor, guardian, assignee, receiver, trustee, or any other report to be filed in his office. [Same, § 15.]

SEC. **253. Salary of judges.** The salary of each judge of the district court shall be two thousand five hundred dollars per year. [Same, § 12.]

SEC. **254. Compensation of shorthand reporters.** Shorthand reporters of district courts shall be paid six dollars for each day's attendance upon the court under the direction of the judge, out of the county treasury, upon the certificate of the judge holding the court; also, for transcribing shorthand notes, six cents a hundred words, to be paid for, in civil cases, by the party ordering the same; the charge for reporting in all cases, except where a defendant in a criminal case is acquitted, to be taxed as a part of the costs in the case. If a defendant in a criminal cause has perfected an appeal from a judgment against him, and shall satisfy a judge of the court from which the appeal is taken that he is unable to pay for a transcript of the evidence, such judge may order the same made at the expense of the county. [18 G. A., ch. 195, § 2; C. '73, § 3777.]

The costs of the transcript of the reporter's notes are to be taxed as part of the costs on appeal: *Palmer v. Palmer*, 66 N. W., 734.

If the court refuses to order a transcript of the evidence in a criminal case to be made at the expense of the county on an appeal by defendant, such exercise of discretion will not be interfered with on appeal: *State v. Waddle*, 64 N. W., 276.

CHAPTER 6.

OF THE SUPERIOR COURTS.

SECTION **255. Establishment and effect of.** Any city in this state containing seven thousand inhabitants, whether organized under a special charter or the general law for the incorporation of cities and towns, may

establish a superior court as hereinafter provided, which, when established, shall take the place of the police court of such city. [21 G. A., ch. 2; 19 G. A., ch. 24, § 1; 16 G. A., ch. 143, § 1.]

SEC. **256. Submission to voters—election of judge—result certified.** Upon the petition of one hundred citizens of any such city, the mayor, by and with the consent of the council, may, at least ten days before an annual election for city officers, issue a proclamation submitting to the qualified voters of said city the question of establishing said court. At the same election, and every fourth year thereafter (if the said court is established), there shall be elected a judge of the superior court, the votes for whom shall be upon the same ballot with other city officers. Should a majority of all the votes cast at such election be in favor of said court, the same shall thereby be established, and the said judge shall qualify and hold his office for the term of four years, and until his successor is elected and qualified. Immediately after each election of said judge, the mayor of said city shall transmit a certificate of the election of said judge to the governor of the state, who shall thereupon issue to him a commission empowering him to act as judge as herein provided. [19 G. A., ch. 24, § 2, 16 G. A., ch. 143, § 2.]

This provision for the submission of the question to popular vote is not unconstitutional: *Lytle v. May*, 49–224.

SEC. **257. Judge—qualification—bond as clerk.** Said judge shall be a qualified elector of the city, and a practicing attorney at law, and shall subscribe in writing the same oath required of judges of the district court, and file the same with the mayor of the city, and when he acts as clerk thereof he shall give bond to the state of Iowa, in the sum of four thousand dollars, for the faithful discharge of his duties as clerk, which must be filed with and approved by the mayor; and the effect of such election and qualification shall be to abolish the office of police judge of such city. [16 G. A., ch. 143, § 3.]

SEC. **258. Vacancy—inability.** Should the office of judge become vacant, the mayor, by and with the consent of the council, shall appoint a judge, who shall hold the office until the next annual city election, and until his successor is elected and qualified, who shall be chosen to fill the unexpired term. And in case of inability of any judge to act, through sickness or other cause, a judge shall be so appointed to hold during such inability. [26 G. A., ch. 77; 16 G. A., ch. 143, § 4.]

SEC. **259. Terms.** There shall be held not less than eight nor more than eleven terms of court in each year, the times being arranged by the judge in such manner as shall least conflict with the terms of the district court of the county where said superior court is held, to be fixed by general order made of record, at least ten days before the first term in each year; but, as a police court, it shall always be open for the dispatch of business. [22 G. A., ch. 40, § 4; 16 G. A., ch. 143, § 5.]

SEC. **260. Jurisdiction—attachments of real estate—city prisons used.** Said court shall have jurisdiction concurrent with the district court in all civil matters, except in probate matters and actions for divorce, alimony and separate maintenance. It shall have exclusive original jurisdiction to try and determine all actions, civil and criminal, for the violation of city ordinances, and all jurisdiction conferred on police courts as now or as may hereafter be provided by law, and concurrent jurisdiction with justices of the peace. Writs of error and appeals may be taken thereto from justices' courts in the township in which the court is held, and, by consent of parties, from any other township in the county. For the trial of criminal actions on information and complaint, the court shall be open at such times and under such rules as it shall prescribe. In actions by attachment, where real property is levied on by writ of attachment, the officer levying the writ shall make entry thereof in the incumbrance book in the office of the clerk

of the district court, in like manner and with like effect as of levies made in the district court. Parties may be committed to the city prison for confinement or punishment, instead of the county jail, at the option of the judge. In the absence of the judge, or in case of his inability to act, then, during such time, proceedings for the violation of city ordinances may be had before a justice of the peace residing in such city. [22 G. A., ch. 40, § 1; 19 G. A., ch. 24, § 3; 16 G. A., ch. 143, § 6.]

The superior court has, as to cases originally brought therein, concurrent jurisdiction throughout the county with courts of general jurisdiction. The limitation of jurisdiction to the township in which the city is located applies only to appeals and writs of error from justices of the peace: *Winet v. Berryhill*, 55–411.

As to jurisdiction of superior court at a county seat in a case where the district court is also held at another place in the county, which is thus divided for court purposes, see *Whitaker v. Daly*, 78–31.

The jurisicdtion over appeals in civil cases from justices of the peace is not exclusive of that of the district court: *Hickox v. Nutting*, 55–403; *Hickox v. Burlington, C. R. & M. R. Co.*, 55–431. And see § 4546.

The superior court has jurisdiction of a proceeding by *certiorari: College of Physicians and Surgeons v. Guilbert*, 69 N. W., 453.

In all civil matters, other than as expressly excepted in this section, the superior court has jurisdiction concurrent with the district court to try and determine the issue whether in law or in equity and to render judgment thereon as fully as the district court might do and when an existing lien on real estate is established and foreclosed the court may direct the property to be sold to satisfy the judgment; but in all cases process for the sale of real estate from judgments of the superior court must issue out of the district court upon transcript filed therein: *International Trust Co. v. Keokuk St. R. Co.*, 90 90.

But *held*, that where by agreement of parties sale of property was made under order of the superior court such sale would be valid: *Ibid.*

SEC. **261. Changes of venue—no jury in criminal cases.** Changes of venue may be taken from said court in all civil actions to the district court of the same or another county, in the same manner, for like causes and with the same effect as the venue is changed from the district court. All criminal actions, including those for the violation of the city ordinances, shall be tried summarily and without a jury, saving to the defendant the right of appeal to the district court, which appeal shall be taken in the same time and manner as appeals are taken from justices' courts in criminal actions. [22 G. A., ch. 40, § 2; 19 G. A., ch. 24, § 4; 16 G. A., ch. 143, § 7.]

A change of venue to the proper county may be granted where the action is brought in the wrong county, as in cases in the district court: *Day v. Greenwood*, 64 N. W., 789.

Under the provisions of this section before amendment, *held*, that there was no law in force authorizing an appeal from a superior court except to the supreme court, and therefore the defendant in a prosecution in the superior court had the right of trial by a jury: *Creston v. Nye*, 74–369.

SEC. **262. Powers of judge.** The judge shall have the same power in regard to injunctions, writs, orders and other proceedings, out of court, as are possessed by the judges of the district court. [16 G. A., ch. 143, § 8.]

SEC. **263. Court of record—laws relating to district court to apply.** The superior court shall be a court of record. All statutes governing the district court as to venue, commencement of action, jurisdiction, process, pleadings, practice, modes of trial, judgment, execution and costs shall apply to and govern the superior courts, except when the same may be inconsistent with the provisions of this chapter. [Same, § 9.]

SEC. **264. Seal.** Each such court shall have its own seal, with the words "superior court" and the name of the city and state thereon. [Same, § 10.]

SEC. **265. When recorder to act as clerk.** As long as the business of the court can be done without a clerk, the judge shall be the clerk of said court. Whenever, from the accumulation of causes and other demands upon the court, a clerk becomes necessary, the city recorder or clerk shall be the clerk thereof. He shall give bonds as required when the judge acts as clerk, and perform the same services as required by law of the clerk of the district court. [Same, § 11.]

SEC. **266. Marshal as sheriff.** The city marshal shall be the executive officer of said court, and his duties and authority in court and in executing process shall correspond with those of the sheriff of the county in the district court, and with process from that court. But the process of said court may be also served by the sheriff. [Same, § 12.]

SEC. **267. Costs—amount of—how paid—to be accounted for—fines.** The costs and fees of said courts in civil actions shall be the same as in the district court, except as herein otherwise provided, and the clerk of the superior court shall account for and pay over to the city all fees that may be paid into the said court, and also all fines for the violation of the city ordinances. Of all other fines he shall render the same account as is provided for justices of the peace. In actions for the violation of city ordinances, if unsuccessful, the city shall pay all costs, the same as provided by law for the county in criminal actions prosecuted in the name and on behalf of the state. The fees in criminal actions shall be the same as in justices' courts, and shall be paid and accounted for as hereinbefore stated, and as otherwise provided by law for justices of the peace and their courts. [Same, § 13.]

SEC. **268. Right to jury, on demand.** When causes are assigned for trial, any party desiring a jury shall then make his demand therefor, or the same shall be deemed to have been waived. Causes in which a jury has been demanded shall be tried first in their order, and when disposition shall have been made of such causes the jury shall be discharged from further attendance at that term. [19 G. A., ch. 24, § 5; 16 G. A., ch. 143, § 14.]

SEC. **269. How jurors provided.** In order to provide jurors for the superior courts, the county auditor, clerk of the district court and recorder, of the county in which any city having a superior court is located, shall meet at the court-house on the third Monday of February, April, June, August, October and December of each year, and proceed to draw, from the first box provided by chapter eleven of this title, and in the manner provided by this chapter, the names of fifteen persons to act as jurors in said superior court. The persons whose names are drawn at any drawing under the provisions hereof shall be subject to jury duty, and constitute the regular panel of jurors in said superior court, for the two calendar months commencing with the first day of the month next succeeding the drawing. A list of the names of the persons drawn at each drawing provided by this act shall be immediately made out and certified by the clerk of the district court, under his hand and seal, and such certified list transmitted by mail to the recorder or clerk of the city in which said superior court is located, and a precept of said superior court shall issue, five days before the first day of each term of court, for the jurors constituting the panel for such term, under the provisions hereof, which precept shall be issued and served as provided by law in like cases in the district court. [16 G. A., ch. 143, § 15.]

SEC. **270. Jury of six unless twelve demanded.** The jury shall consist of six qualified jurors, unless, when a jury is demanded as provided in this chapter, the party at that time shall demand a jury of twelve, and in all civil cases the party requesting a jury of twelve shall at the time of making such demand deposit with the clerk the entire additional expense of the additional jurors, which sum shall be fixed by the court and paid to the clerk at the time of making such demand. Talesmen may be summoned on the order of the court by the marshal from the body of the county. All such deposits of additional expense for jurors shall be paid into the county treasury at the close of each term of such superior court, and the county treasurer shall give duplicate receipts therefor, one to be held by said clerk, and the other to be presented by him to the county auditor, who shall charge the treasurer with the amount thereof in the proper account. [22 G. A., ch. 40, § 3; 19 G. A., ch. 24, § 6; 16 G. A., ch. 143, § 16.]

As a party may have a trial by a jury of twelve by depositing the amount necessary to cover the additional expense caused thereby, the provisions of this section are not unconstitutional: *Conners v. Burlington, C. R. & N. R. Co.*, 74–383.

SEC. **271. Challenges.** In all civil cases, where the jury shall consist of six jurors, the challenges allowed to either party shall be limited to three each, but where the jury shall consist of twelve jurors, the same number of challenges shall be allowed to either party as is or may be allowed in the district court. [22 G. A., ch. 40, § 5.]

SEC. **272. Appeals to supreme court.** All appeals from judgments or orders of said court, or the judge thereof, in civil actions shall be taken to the supreme court in the same manner, under the same restrictions, within the same time and with the same effect as appeals are taken from the district court to the supreme court. [19 G. A., ch. 24, § 7; 16 G. A., ch. 143, § 17.]

SEC. **273. Judgments made liens by transcript.** Judgments in said court may be made liens upon real estate in the county in which the city is situated, by filing transcripts of the same in the district court, as provided in this code in relation to judgments of justices of the peace, and with equal effect, and from the time of such filing they shall be treated in all respects as to their effect and mode of enforcement as judgments rendered in the district court as of that date, and no execution can thereafter be issued from the said superior court on such judgments, and no real property shall be levied on or sold on process issued out of the superior court. Judgments of said court may be made liens upon real estate in other counties in the same manner as judgments in the district courts. [19 G. A., ch. 24, § 8; 16 G. A., ch. 143, § 18.]

Sales under process of the superior court are limited to personal property. Sales of real property can be had after a transcript of the judgment of the superior court is filed in the district court and thereby made a lien: *International Trust Co. v. Keokuk St. R. Co.*, 90–90.

SEC. **274. City attorney to file informations.** It shall be the duty of the city attorney or solicitor to file informations in the superior court for violations of the city ordinances and prosecute the same, and for such services he shall receive such compensation as the city council shall allow. [16 G. A., ch. 143, § 19.]

SEC. **275. Shorthand reporters—compensation.** The judge of each superior court may appoint a shorthand reporter. All provisions relating to shorthand reporters and their duties in the district court, in so far as applicable in every respect, shall govern, except the compensation shall not exceed five dollars a day for the time actually employed. [21 G. A., ch. 44, §§ 1, 2.]

SEC. **276. Question of abolishing court to be submitted.** Upon the petition of one-third of the qualified electors of any city in which a superior court is now or hereafter established, the mayor, by and with the consent of the council of such city, shall, at least ten days before an election for city officers, issue a proclamation submitting to the qualified voters of said city the proposition to abolish the superior court. The ballots shall be printed, and in the following form: "Shall the proposition to abolish the superior court of ———— be adopted?" and the election shall be conducted in all respects in accordance with the provisions of the election law. [24 G. A., ch. 5, § 1.]

SEC. **277. When abolished—duties of mayor, judge and clerk.** If a majority of the votes cast at said election are for abolishing said superior court, the mayor of such city shall immediately transmit a certificate showing such fact to the secretary of state, and said court shall be abolished, to take effect upon the date of the expiration of the term of office of the judge then upon the bench, and the effect of such abolition shall be to revive and re-establish in such city the police court and all the powers incident thereto,

in the same manner as the law prescribes for cities where superior courts do not exist. The judge of said superior court shall, before retiring from said position, turn over to the clerk of said city the judgment records of his court in which are entered and recorded all judgments and fines for the violation of ordinances of such city, together with all money collected as fines for the violation of such ordinances, and take the clerk's receipt therefor. All other books, records and papers pertaining to said superior court shall be turned over to the clerk of the district court of the county in which such city is situated, and his duplicate receipt taken therefor, together with all the money in the hands of said judge which has come into his hands as judge of said court, one receipt to be filed with the county auditor, and said judge shall immediately make reports to the board of supervisors and city council as to the disposition made of said books, papers, dockets and moneys, as herein provided. It shall be the duty of the clerk of the district court, upon receipt of such books, dockets and records belonging to said superior court, to transfer all cases pending before the same, as shown by said record, and of which the district court would have jurisdiction, to the proper appearance docket of the district court, and to notify the parties or their attorneys of such transfer, and such causes shall stand for trial as if brought originally in said court. All causes pending in the superior court at the time it is abolished, of which the district court would not have jurisdiction, shall be transferred to the police court. The clerk of the district court shall make transcripts and issue executions from the records of said superior court under the seal of the district court, for which he shall be entitled to charge and receive the same fees as are now allowed for like services in the district court, and all papers so issued shall have the same force and effect as if issued from the superior court during its existence. [Same, § 2.]

SEC. **278. Salary of judge.** The salary of each superior court judge shall be two thousand dollars per annum, and paid quarterly; the first two quarters from the city treasury, and the last two from the county treasury of the county wherein said court is located. [16 G. A., ch. 143, § 13.]

SEC. **279. Compensation of clerk.** When a clerk or recorder of a city in which such court is established is required to perform the duties of clerk thereof, he shall receive such compensation for such services as the city council may allow. [Same, § 11.]

SEC. **280. Compensation of marshal.** The marshal shall receive the same fees and compensation for serving the process of said court, and for other services required of the sheriff in the district court, as the sheriff receives for like services. [Same, § 12.]

CHAPTER 7.

OF GENERAL PROVISIONS.

SECTION **281. Judges not to practice.** No judge of any court of record shall practice as an attorney or counselor at law, or give advice in relation to any action pending or about to be brought in any of the courts of this state. [C. '73, § 187; R., § 2674; C. '51, § 1587.]

SEC. **282. Attestation of process.** All process issued by the clerk of the court shall bear date the day it is issued, and be attested in the name of the clerk who issued it, and under the seal of the court. [C. '73, § 188; R., § 2682; C. '51, § 1592.]

SEC. **283. Judicial proceedings public.** All judicial proceedings must be public, unless otherwise specially provided by statute or agreed upon by the parties. [C. '73, § 189; R., § 2683; C. '51, § 1953.]

To give existence to a court, its officers and the time and place of holding it must be such as are prescribed by law. The term "open court" as used in the statutes is to be understood as conveying the idea that the court must be in session, organized for the transaction of judicial business. Hence, a trial before a referee cannot be considered a trial in open court: *Hobart v. Hobart*, 45–501.

While witnesses may be separated and excluded from the place of trial, in the discretion of the court, upon the application of a party, an exception arises in the case of a party to the action, who has the right to be present during the trial: *Jemmison v. Gray*, 29–537.

That there may be a separate examination of witnesses, see *Hubbell v. Ream*, 31–289.

SEC. **284. When judge disqualified.** A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding. But this section shall not prevent him from disposing of any preliminary matter not affecting the merits of the case. [C. '73, § 190; R., § 2685; C. '51, § 1595.]

A judge who is uncle to one of the parties to an action is within the prohibited degrees of consanguinity and is disqualified from presiding at the trial, except by mutual consent of parties: *Chase v. Weston*, 75–159.

Where the judge was related within the prescribed degree to plaintiff, but it appeared that defendant, with knowledge of that fact, entered into a stipulation by which plaintiff should not take change of venue, and went to trial without objection to the judge, *held*, that he thereby waived objection on that ground, and the disability was removed by mutual consent: *Stone v. Marion County*, 78–14.

A judgment rendered by a judge who has previously been an attorney in the case is not to be deemed absolutely void, where it does not appear that the judgment has ever been questioned or objected to by the party interested: *Floyd County v. Cheney*, 57–160.

SEC. **285. No business done on Sunday, except.** No court can be opened nor any judicial business transacted on Sunday, except:

1. To give instructions to a jury then deliberating on its verdict;
2. To receive a verdict or discharge a jury;
3. To exercise the powers of a single magistrate in a criminal proceeding;
4. And such other acts as are provided by law. [C. '73, § 191; R., § 2686; C. '51, § 1596.]

To avoid a judgment, regular on its face, on the ground that it was rendered on Sunday, the fact that it was so rendered should be clearly established, beyond the reasonable doubt naturally arising from the difficulty of establishing the precise time of a transaction: *Bishop v. Carter*, 29–165.

Before enactment of this section a verdict received, or a judgment entered, on Sunday was void: *Davis v. Fish*, 1 G. Gr., 406.

SEC. **286. Courts to be held at places provided, except.** Courts must be held at the places provided by law, except for the determination of actions, special proceedings and other matters not requiring a jury, when they may, by consent of the parties therein, be held at some other place. [C. '73, § 192; R., § 2687; C. '51, § 1597.]

Notwithstanding the statutory provision that courts must be held at the places provided by law, probate courts are expressly authorized (see § 3261) to appoint the time and place for the hearing of matters requiring notice: *Casey v. Stewart*, 60–160.

But the provision authorizing probate courts to appoint time and place for hearing cases was held not to authorize a probate court to sit outside the county, unless, perhaps, by consent of parties, and that any order made by the court outside the county in which the case was pending would be void: *Capper v. Sibley*, 65–754. (But see later provisions in § 3261.)

A trial at a place not within the county where the suit was pending, had by agreement of parties during vacation, *held* binding: *O'Hagen v. O'Hagen*, 14–264.

Where it is agreed that a case shall be heard in vacation at a particular place, and it is heard, but at another place, the record showing that counsel on both sides were present at the argument and made no objection to the place of hearing, it will be presumed that objection to the place was waived: *Johnson v. Mantz*, 69 710.

A party is bound to take notice of the place of sitting of the court, where, by reasonable effort, he might have ascertained such fact: *Jordan v. Circuit Court*, 69–177.

There is no authority to adjourn a court to a private house or other place not provided by law for the purpose of a trial, and if this is done the court so sitting is without jurisdiction. The proceedings in the place not provided by law are of no effect: *Funk v. Carroll County*, 64 N. W., 768.

Therefore, *held*, that where a continuance was asked on account of the inability of a

witness to be present by reason of sickness and the court adjourned to the residence of such witness for the purpose of hearing his testimony, such proceeding was erroneous; that the continuance ought to have been granted, and that the evidence of the witness thus taken could not be considered on appeal: *Ibid.*

Where it appears that a court was sitting at some place, other than the court-house, it will be presumed, in the absence of a showing to the contrary, that it was at a place properly provided for the purpose, if any reason appears why the court-house might not be a proper place: *State v. Shelledy*, 8-477, 509.

CHAPTER 8.

OF THE CLERK OF THE DISTRICT COURT.

SECTION **287. Office—duties.** The clerk of the district court shall keep his office at the county seat, attend the sessions of the district court himself or by deputy, keep the records, papers and seal, and record the proceedings of the court as hereinafter directed, under the direction of the judge. [C. '73, § 194; R., §§ 343, 2664; C. '51, § 1577.]

As the court knows its own clerk and his deputy, it is not necessary that the signature of either one of them to a jurat should be authenticated by an official seal: *Finn v. Rose*, 12-565.

SEC. **288. Records—books to be kept.** The records of said court shall consist of the original papers filed in all proceedings, and the books to be kept by the clerk thereof as follows:

1. One containing the entries of the proceedings of the court, which may be known as the "record book," and which is to have an index referring to each proceeding in each cause under the names of the parties, both plaintiff and defendant, and under the name of each person named in either party;

2. One containing an abstract of the judgments, having in separate and appropriate columns the names of the parties, the date of the judgment, the damages recovered, costs, the date of the issuance and return of executions, with the entry of satisfaction, and other memoranda, which book may be known as the "judgment docket," and is to have an index like that required for the record book;

3. One in which to enter in detail the costs and fees in each action or proceeding under the title of the same, with an index like that required above, and which may be known as the "fee book";

4. One in which to enter the following matters in relation to any judgment under which real property is sold, entering them after the execution is returned: The title of the action, the date of the judgment, the amount of damages recovered, the total amount of costs, and the officer's return in full; which book may be known as the "sale book," and is to have an index like those required above;

5. One to be called the "incumbrance book," in which the sheriff shall enter a statement of the levy of every attachment on real estate;

6. One to be known as the "appearance docket," which shall contain all matters required by law to be kept therein; but the entries provided for in this subdivision and subdivisions two and three may be combined in one book, indexed as provided in subdivision one hereof, which, when thus kept, shall be known as the "combination docket";

7. One in which an index of all liens in said court shall be kept. [C. '73, §§ 196–7; R., §§ 345–6, 3243.]

What constitutes the record: All the papers of the case constitute the record, and the decree assumes them and their contents: *Campbell v. Ayres*, 6-339.

What deemed part of: An affidavit for publication, when filed, becomes part of the record: *Bradley v. Jamison*, 46-68, 73.

It is a common practice to keep records, other than the ordinary journals of the court, in which judgments by confession and by

default are entered, and such practice has been sustained: *Brown v. Barngrover*, 82-204.

Taking notice of: Ordinarily a court will take notice of what has been done by it or in its presence and evidence of the result of one trial is not required in a subsequent one: *Cleveland v. Atkinson*, 63 N. W., 465.

The supreme court cannot on appeal take notice of the record in another case in the same court which is not made a part of the record in the case appealed: *State v. Lee*, 64 N. W., 284. And see notes to § 242.

Judge's calendar not part of record: The judge's calendar or docket is not a record of the court: *Rogers v. Morton*, 51-709; *Traer v. Whitman*, 56-443; *Case v. Plato*, 54-64.

Where a decree was entered in vacation containing provisions not found in the memorandum on the judge's docket, *held*, that such provisions would not therefore be void: *Traer v. Whitman*, 56-443.

The judge's minutes kept by him in his calendar are not sufficient to make matter of record exceptions taken by a party to the ruling of the court: *Lewis v. May*, 22-599.

The judge's calendar is not a record provided for by law, and the entries made therein constitute the mere announcement of the judge's mental conclusion, and not the court's action: *Miller v. Wolf*, 63-233; *State v. Manley*, 63-344.

A judgment cannot be proven by a memorandum on the judge's calendar: *Miller v. Wolf*, 63-233.

A judgment evidenced only by a memorandum on the judge's calendar and an entry thereof filed with the clerk but not approved by the court, is of no validity and an execution issued thereon may be enjoined although the judgment is subsequently entered of record: *Winter v. Coulthard*, 62 N. W., 733.

The judge's minutes upon his calendar do not constitute a judgment. Where it was sought, in an action on an injunction bond, to prove the dismissal of the action for injunction by proof of the entry on the judge's calendar "dismissed as per stipulation," and a stipulation was not shown, the evidence was held not sufficient: *Towle v. Leacox*, 59-42.

The entry in a judge's calendar is for the guidance of the clerk, and such entry is evidence tending to show a decree was ordered: *In re Estate of Edwards*, 58-431.

The minutes of the judge are intended as a direction to the clerk and are in the most general form: *Burroughs v. Ellis*, 76-649.

While the judge's notes will not control or vary the formal judgment entered, yet in the absence of higher proof, they are entitled to their due weight as to what transpired or was done in the case: *Keller v. Killion*, 9-329.

The dropping of a case from the judge's calendar is not necessarily a dismissal of the case and a question whether it has been dismissed may be determined on the motion to reinstate the case on the calendar: *Barber v. Scott*, 68 N. W., 919.

The bar docket constitutes no part of the records of the court, and can only become a part of the record in a particular case by being incorporated into or sufficiently identified by a bill of exceptions: *Gifford v. Cole*, 57-272.

Impeachment of record: The record of the judgment must be taken as absolute verity. On appeal the supreme court will not consider affidavits presented to the court below for the purpose of impeaching it: *Mornyer v. Cooper*, 35-257.

A writ of execution upon a judgment is as to third persons only secondary evidence of the amount due upon such judgment, the judgment itself being the first and best evidence: *Parsons v. Hedges*, 15-119.

Where the record is blank as to the name of the party against whom judgment is rendered, such judgment will be reversed on appeal: *Riggleswerth v. Reed*, Mor., 19.

Correction of Record: Where the judgment, erroneous when entered, is corrected in the proper manner before the rights of third persons have been acquired against it, such correction will be valid as against such subsequent rights: *Monroe v. West*, 12-119.

As to correction of records in general, see notes to §§ 242-244.

Entry nunc pro tunc: Courts possess the inherent authority to enter judgment *nunc pro tunc*, and lapse of time will not bar its exercise. Such power is not taken away, nor the time within which it may be exercised affected, by the provisions of the statute with regard to proceedings to correct mistakes in the entries of the clerk. Therefore, *held*, that where the judgment had in fact been rendered by the court, as shown by the minutes in the judge's calendar, but had not been entered up by the clerk, a motion three years and six months afterwards for the entry of judgment *nunc pro tunc* was proper: *Fuller v. Stebbins*, 49-376.

A judgment *nunc pro tunc*, entered while an appeal from the ruling upon a demurrer was pending in the supreme court, and without the appellee having elected to stand upon his demurrer, and entered without notice to him, *held* unauthorized and void: *Turner v. First Nat. Bank*, 30-191.

Where the court has failed to make record entry of an essential act, such omission may be supplied upon motion *nunc pro tunc*, but such entries are limited to supplying omissions occurring through oversight or negligence, and cannot be made to alter or expunge a record: *Goodrich v. Conrad*, 28-298.

Held not error, in an action on a bail bond, to admit in evidence the entry of the court ordering the bond filed *nunc pro tunc*, it appearing that the bond had been in fact deposited in the clerk's office at and ever since the date upon which it was so marked as filed: *State v. Guisenhause*, 20-227; *State v. Patterson*, 23-575.

Where a *nunc pro tunc* judgment *in rem* was substituted for a personal judgment rendered twelve years before in an attachment proceeding, and the defendant, who had previously conveyed his interest in the land, was served by publication, *held*, that the *nunc pro tunc* judgment was not available against the defendant's grantee, because notice upon the defendent by publication was unauthorized, as he had no interest in the land, and as the grantee was not made a party to such proceeding her rights were in no way affected by it: *Cassidy v. Woodward*, 77-354.

Where an entry was made of the suggestion of the death of plaintiff and the substitution of his administrator, the name of the administrator being left blank, and afterwards by *nunc pro tunc* order the name of the administrator was inserted, *held*, that such correction was proper: *Maish v. Crangle*, 80–650.

In a particular case, *held*, that an entry in the probate court of the allowance of a claim which was duly filed and proved might be made *nunc pro tunc: In re Estate of Seavey*, 82–440.

In a particular case, *held*, that evidence was sufficient to justify the court in correcting and making of record by a *nunc pro tunc* entry a prior order in a probate case as to the distribution of assets: *Jones v. Field*, 80–281.

When the record entry is lost or destroyed, the judgment may be shown by secondary evidence; and memoranda of a judge entered in his docket, when duly authenticated, may be considered as evidence of what the judgment was: *Ibid.*

As to *nunc pro tunc* entries see also notes to § 244.

Lost records: Courts of record have inherent power, independent of statute, to restore judgments the records of which have been lost or destroyed, as fully as other records; and such power is not taken away by the statute permitting action to be brought on such judgments: *Gammon v. Knudson*, 46–455.

In a proceeding to restore the record of a judgment which had been destroyed, *held*, that the prior existence of the record and its destruction were the only matters in issue and its original validity could not be inquired into: *Kanke v. Herrum*, 48–276.

In a proceeding to supply lost records it is error to make the substitution in such form as to bind a party holding under the original party to the proceeding without proof that the record as it originally existed was such as to be binding upon the new party: *McDonald v. Des Moines Valley R. Co.*, 61–192.

Where an indictment is lost the court may, upon motion, substitute a copy, and proceed thereon as upon the original: *State v. Rivers*, 58–102; *State v. Stevisiger*, 61–623; *State v. Shank*, 79–47; *State v. Thomas*, 66 N. W., 743.

Evidence as to the contents of records of the court destroyed by fire, *held* sufficient in a particular case to establish a decree of divorce rendered therein: *In re Estate of Edwards*, 58–431.

Where a pleading supposed to be lost is supplied by a copy, and afterward the original is found, the substitute should be, on motion, stricken from the files: *Sweet v. Brown*, 61–669.

As to supplying by substitution written testimony which has been lost, see *Loomis v. McKenzie*, 48–416.

Par. 1. Record book: This section so far as it requires the clerk to keep one book known as the record book is directory merely, and is not violated by keeping a separate book for foreclosure decrees: *Carr v. Bosworth*, 72–530.

Record necessary: There can be no judgment until it is entered in the proper records of the court. It cannot exist in the memory of the officers of the court or in memoranda entered in books not intended to preserve the records of judgments: *Balm v. Nunn*, 63–641.

Parol evidence is not admissible to show that judgment was rendered, it not being claimed that any record was ever made thereof: *Cadwell v. Dullaghan*, 74–239.

Judgment entries, and even entries in the judgment docket, without other parts of the record, may be introduced in evidence, and will be presumed to have been in accordance with the pleadings and the evidence, unless the contrary is made to appear: *American Emigrant Co. v. Fuller*, 83–599.

Where the entry of the judgment was blank as to the amount of damages and specified only the amount of costs, *held*, that it was valid only as to the costs, although the judge's calendar contained an entry directing the clerk to assess the damages, and the judgment docket contained an entry of the judgment for the amount of damages thus assessed: *Case v. Plato*, 54–64.

The entry of a judgment, blank as to the amount, is not effectual: *Roane v. Hamilton*, 70 N. W., 181.

A judgment is valid as to costs although the amount thereof is not filled into the record: *Lind v. Adams*, 10–398; *Frankel v. Chicago, B. & Q. R. Co.*, 70–424.

Construction: It is always proper, and in cases where the entry is obscure or not clear it is necessary, to read the record entry of the judgment in the light of the pleadings and the entire record: *Fowler v. Doyle*, 16–534; *Mayfield v. Bennett*, 48–194.

Where the entry recited that "service of notice had been made upon" defendant, and the record showed a service by publication, *held*, that it would not be presumed that there was personal service: *Mayfield v. Bennett*, 48–194.

Where the proof of a judgment is involved, the entire pleadings and records of the case are receivable in evidence: *Smith v. Smith*, 22–516.

The pleadings in the case constitute a part of the record, and the judgment may be established and construed with the aid of the light which they reflect upon it. If from an examination of the whole record such a construction may be fairly placed upon a judgment as to relieve it from error, the court should give it that construction: *Tyler v. Langworthy*, 37–555.

The memoranda of a judge entered in his docket are not part of the record, but they are admissible in evidence to prove a judgment or order which has been lost or destroyed: *Jones v. Field*, 80–281. And see *Jamison v. Weaver*, 84–611, and other cases cited *supra* under this section.

In a particular case, *held*, that there was no conflict between such minutes and the decree of the court: *Burroughs v. Ellis*, 76–649.

Under the facts of a particular case, *held*, that the variance between the names "Van

Nortrick " and Van Nortwick " was not sufficient to prevent a former adjudication from being considered a bar to a subsequent action: *Mallory v. Riggs*, 76–748.

Presumptions: The records of a court, regular upon their face, have a large degree of sanctity attached to them, and are not to be lightly overcome: *Wheeler v. Cox*, 56–36.

Where the record of the court states an act of the court, it will be presumed to have occured in open court: *State v. Hirronemus*, 50–545.

Where a decree recited that the cause came on for hearing in the presence of counsel for plaintiff and defendants, *held*, that it was sufficiently shown that there was an appearance by all of the defendants: *Cooper v. Miller*, 10–532.

Where it was recited in a decree that it was made upon proof read in evidence to the court, *held*, that it would be presumed that evidence to support the plea was introduced: *Wahl v. Phillips*, 15–478.

The presumption is strong in favor of the verity and truth of judicial records, and they can only be impeached by evidence clear and satisfactory. Evidence that the draft of a decree was filed and entered in vacation is not sufficient without a showing that the court never ordered the decree in term time: *Parker v. Slaughter*, 23–125.

The presumptions of law are all in support of a judgment, and when it is sought to avoid it because rendered on Sunday, the evidence must clearly establish the fact in order to overcome the presumption of regularity: *Bishop v. Carter*, 29–165.

The cancellation of a portion of the record of a judgment entry being shown, *held*, that the presumption would be that such cancellation was made at the time of the approval of the judgment, and was authorized, rather than it was subsequently made without authority: *Lutz v. Kelly*, 47–307.

When an official document is found in the custody of the officer charged with the duty of preserving it, the presumption arises that it remains in the condition in which it was when the officer received it: *Barber v. Scott*, 92–52.

Further as to record, see notes to §§ 242–244.

Complete record: The former provision for making a complete record has been omitted, the only present provision as to such a record is in probate matters: See § 3411. As to former provisions on the subject see *Smith v. Cumins*, 52–142.

After the taking of an appeal the lower court may correct its record: *Maxon v. Chicago, M. & St. P. R. Co.*, 67–226; *Mahaffy v. Mahaffy*, 63–55.

The power to supply lost records may be exercised whenever the protection of the rights of parties demands it. Therefore, *held*, that where, after the perfection of an appeal, the evidence in the case was lost, so that the appeal could not be prosecuted, the proper remedy was to apply to the lower court to supply such record by substitution, and that the loss of the record was not a ground for a new trial: *Loomis v. McKenzie*, 48–416; *Steiner v. Steiner*, 49–70.

If the record of the lower court does not correctly state the facts a party desiring to appeal should prosecute the correction of the record there; it cannot be changed or corrected on appeal: *Duffees v. Sherman*, 48–287.

In a certain sense the court below retains jurisdiction so long as anything remains to be done by it. It may order a lost record to be substituted, and do whatever else is proper to be done to enable the supreme court to review the alleged errors: *Becker v. Becker*, 50–139; *State v. Dillard*, 53–749.

Par. 2. Judgment docket: Where the judgment docket is introduced in evidence, without objection, to prove a judgment, it should be received without proof of the loss or destruction of the original: *Moore v. McKinley*, 60–637.

Where it appeared that there was a mistake in the entry in the judgment docket, it not appearing whether or not there was such mistake in the record, *held*, that it would be presumed, in order to support other proceedings, that the judgment was correctly entered in the record: *Preston v. Wright*, 60–351.

The judgment docket is intended to show merely an abstract of the judgment, and it is contemplated that it shall be made up from a judgment previously entered in the record book. Therefore, *held*, that entry of amount of judgment in the judgment docket did not supply an omission in the record: *Case v. Plato*, 54–64.

Indexing judgment docket: If a party is not charged with constructive notice of a judgment by what appears in the index book, he is not bound to look further, and is therefore not bound by what appears of record; so *held* where there was a mistake in the first name of the party against whom judgment was rendered: *Thomas v. Desney*, 57–58.

The entry and indexing of a judgment as A. B. v. C. D. *et al.* does not operate as notice to strangers of such judgment as against co-defendants of C. D., whose names do not appear: *Cummings v. Long*, 16–41.

A judgment not indexed is not notice to the purchaser at foreclosure sale of premises upon which such judgment would be a lien, and the holder of such judgment cannot therefore redeem in equity from such sale: *Sterling Mfg. Co. v. Early*, 69–94.

Even though a judgment is not properly indexed, a sheriff's deed thereunder duly recorded imparts notice of all prior proceedings: *Cushing v. Edwards*, 68–145.

As to sufficiency of indexing in general to impart notice, see notes to § 2936.

Notice of judgment or order: A party is bound to know and take notice of any judgment or order that is entered in an action to which he is properly made a party, whether the records of the court are read from time to time as required by statute, or not: *Finch v. Hollinger*, 47–173.

After judgment a party is not bound to take notice of further proceedings: *Wright v. Leclaire*, 3–221.

Par. 5. Incumbrance book: Where the

entry of attachment in the incumbrance book is not made until after the execution of a mortgage upon the property, without actual notice of such attachment, the mortgagee acquires priority over the levy: *First Nat. Bank v. Jasper County Bank*, 71–486.

An entry by the sheriff in the incumbrance book of a levy of attachment becomes notice, though not indexed: *Blodgett v. Huiscamp*, 64–548.

Par. 7. Lien Index: If the lien index shows date of satisfaction of judgment, but does not show method of satisfaction, a purchaser is put on inquiry as to whether such satisfaction was by reason of the sale of the premises under execution: *Mather v. Jenswold*, 72–550.

The purpose of the index of liens is to give notice of the incumbrance; and where a judgment is not indexed, a purchaser without actual notice is not bound thereby: *Ætna Life Ins. Co. v. Hesser*, 77–381.

A purchaser is entitled to rely upon the "index of all liens," and is not required to pursue inquiry through other indexes: *Ibid.*

Therefore, where the index showed a judgment against J. H. Hesse instead of J. H. Hesser, and it appeared that the clerk changed the name by adding "r" to the former name after a subsequent mortgage was executed, *held*, that such change was unauthorized and illegal, and as the index failed to show a judgment against J. H. Hesser the mortgage was the superior lien: *Ibid.*

Further, as to the records see §§ 242–244 and notes.

SEC. **289. How appearance docket to be kept.** The clerk shall enter in said appearance docket the titles of all actions or special proceedings that shall be brought in the court, numbering them consecutively in the order in which they shall have been commenced, which numbers shall not be changed during the further progress thereof. In making such entries, the clerk shall set out the full names of all the parties, plaintiffs and defendants, as contained in the petition, or as subsequently made parties by any pleading, proceeding or order. [C. '73, § 198.]

Name of defendant: The omission of the name of a defendant will not affect the jurisdiction of the court over such defendant, if he is in fact made defendant and served with notice: *Toliver v. Morgan*, 74–619.

Notice of filing of pleadings: After completed service or voluntary appearance a party is deemed in court and must take notice of what is done therein up to the time of final judgment, but after judgment he is not bound to take notice of further proceedings: *Wright v. Leclaire*, 3–221.

Notice of filing motions: Under § 2834 a party must take notice of motions filed during the term. No other notice is necessary: *Wagner v. Tice*, 36–599.

Notice of a motion for change of venue, made in vacation, should be given as required by that section: *Preston v. Winter*, 20–264; *Loomis v. McKenzie*, 31–425.

A motion to set aside a judgment rendered at a prior term should not be heard without notice to the parties interested: *Keeney v. Lyon*, 21–277. And see notes to §§ 242–244.

SEC. **290. Entry of return of notice.** When the original notice shall be returned to the office of the clerk, he shall enter in said docket so much of the return thereon as to show who of the parties have been served therewith, and the manner and time of service. [C. '73, § 199.]

SEC. **291. Pleadings—when deemed filed—dates to be entered.** The clerk shall, immediately upon the filing thereof, make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions, or papers of any other description in the cause; and no pleading of any description shall be considered as filed in the cause, or taken from the clerk's office, until the said memorandum is made. [C. '73, § 200.]

Filing of pleadings: Where a pleading is marked filed by the clerk, but no entry of such filing is made on the appearance docket, it cannot be considered as having been filed: *Padden v. Moore*, 58–703. And where the petition in an attachment proceeding was marked "filed" by the clerk, but not entered on the appearance docket, *held*, that the action was properly dismissed upon motion, as the court was bound to consider the petition as not filed: *Nickson v. Bair*, 59–531.

A paper placed with the files, but not marked filed by the clerk, and not entered on the appearance docket, cannot be made a part of the pleadings in the case by a *nunc pro tunc* order, after judgment: *Winkelman v. Winkelman*, 79–319.

Failure to note the filing of the petition in the appearance docket will not make a judgment thereon void. The petition having been made the basis of the court's action, the question whether it authorizes action by the court is for decision, and error in that respect can be corrected only by direct proceedings: *Rotch v. Humboldt College*, 89–480.

This section does not apply in respect to the filing of depositions: *Byington v. Moore*, 62–470; nor to the filing of bills of exceptions: *Royer v. Foster*, 62–321; nor to the filing of a justice's transcript on an appeal

from him to the district court. In such cases the return of the justice may be regarded filed if deposited with the clerk, although no entry in the appearance docket is made: *Harrison v. Clifton*, 4–736.

The filing consists in the delivery of the paper to the clerk and his receiving it to be kept on file in his office. It is not essential that it shall be indorsed as filed, although that would be the better practice. The indorsement is simply evidence of the filing: *State v. Briggs*, 68–416; and see *State v. Patterson*, 23–575.

The provision of this section that no pleading is filed until the memorandum thereof is made in the appearance docket is not applicable to other papers, as, for instance, an affidavit for service by publication: *Simmons v. Simmons*, 91–408.

Where a pleading was given to the clerk and indorsed by him as filed and remained attached to the files in the case in his office, but no memorandum of the filing was entered on the appearance docket, *held*, that when the pleading was subsequently attacked as not being on file in the case the court properly disregarded the attack and ordered the entry of the pleading on the appearance docket as of the date when it was actually delivered to the clerk and marked filed: *Snell v. Dubuque & S. C. R. Co.*, 88–442.

Where the appearance docket contains a memorandum of the filing of the petition, the fact that the clerk fails to enter the name of one of the parties defendant will not deprive the court of jurisdiction as to such defendant, if he is properly served with notice: *Toliver v. Morgan*, 74–619.

Where pleadings were properly filed in probate under the circuit court system, and subsequently the issues in the case were transferred to the equity docket, and the case was pending in the district court, the circuit court having been abolished, *held*, that the pleadings thus filed should be considered without refiling: *Winkleman v. Winkleman*, 79–319.

A bill of exceptions which has been signed by the judge and handed to the clerk to be filed is filed in contemplation of law, even though the clerk has failed to properly indorse the fact that it has been filed: *Foster v. Hinsen*, 75–291; *Sheldon Bank v. Royce*, 84–288.

The minutes of the testimony taken before the grand jury are to be deemed filed when delivered to the court to be kept as part of the records, and indorsement of such filing is not essential, nor that a memorandum of the filing be made in the appearance docket: *State v. Craig*, 78 637.

Short-hand notes of testimony left upon the clerk's desk *held* to be filed within the terms of § 4466, with reference to preserving the evidence in a contempt proceeding: *Small v. Wakefield*, 84–533.

As to provisions with reference to filing copies of pleadings, see § 3558.

Return of papers taken from the files: A court has the power to enter an order for the return of papers withdrawn from the records without previous notice to the party required to return them: *Wisconsin I. & N. R. Co. v. Given*, 69–581.

While it may be irregular to take a bill of exceptions from the files for the purpose of preparing an abstract, such act will not prevent the filing from being effectual: *Sheldon Bank v. Royce*, 84–288.

SEC. **292. Minutes of subsequent proceedings, with date and reference.** Immediately upon the sustaining or overruling of any demurrer or motion, the striking out or amendment of any pleading, trial of the cause, rendition of the verdict, entry of judgment, issuing of execution, or any other act or thing done in the progress of the cause, the like memorandum thereof shall be made in said docket, giving the date thereof, and the number of the book and page of the record where such entry shall have been made, it being intended that the appearance docket shall be an index from the commencement to the end of a suit. [C. '73, § 201.]

SEC. **293. Clerk to report criminal statistics.** The clerk of the district court is required to report to the secretary of state, on or before the first Monday in November of each year, the number of convictions for all crimes and misdemeanors in that court in his county for the year preceding, and such report shall show the character of the offense and the sentence of punishment, the occupation of the convict, whether he can read and write, his general habits, and also the expenses of the county for criminal prosecutions during the year, including, but distinguishing, the compensation of the county attorney, which report shall be for the year ending the thirtieth day of September preceding. [24 G. A., ch. 41; 22 G. A., ch. 82, § 40; 18 G. A., ch. 28, § 3; C. '73, § 203; R., § 349; C. '51, § 148.]

SEC. **294. Clerk and deputy not to be justice or attorney.** The clerk or deputy clerk of the district court is prohibited from holding the office of justice of the peace, or practicing, directly or indirectly, as an attorney or solicitor in any of the courts of this state. [C. '73, § 204.]

SEC. **295. Change in title to be certified to auditor.** Where the title of any real estate is finally established in any person or persons by judgment or decree of said court or of the supreme court, or where title to

real estate is changed by judgment, decree, will or order in probate, the clerk of the district court shall certify the same, under the seal of said court, to the county auditor of the county in which said land is located. [25 G. A., ch. 90, § 1.]

SEC. 296. **Fees to be collected and paid to county—when payable by county.** The clerk of the district court shall be entitled to charge and receive the following fees:

1. For filing any petition, appeal or writ of error and docketing the same, one dollar and fifty cents;
2. For every attachment, fifty cents;
3. For every cause tried by jury, one dollar and fifty cents;
4. For every cause tried by the court, seventy-five cents;
5. For every equity case, one dollar and fifty cents;
6. For each injunction or other extraordinary process or order, one dollar;
7. For all causes continued on application of a party by affidavit, fifty cents;
8. For all other continuances, fifteen cents;
9. For entering any final judgment or decree, seventy-five cents;
10. For taxing costs, fifty cents;
11. For issuing execution or other process after judgment or decree, fifty cents;
12. For filing and properly entering and indorsing each mechanic's lien, one dollar, and in case a suit is brought thereon, the same to be taxed as other costs in the action;
13. For certificate and seal, fifty cents;
14. For filing and docketing transcript of judgment from another county or a justice of the peace, fifty cents;
15. For entering any rule or order, twenty-five cents;
16. For issuing writ or order, not including subpœnas, fifty cents;
17. For issuing commission to take depositions, fifty cents;
18. For entering sheriff's sale of real estate, fifty cents;
19. For entering judgment by confession, one dollar;
20. For entering satisfaction of any judgment, twenty-five cents;
21. For all copies of record, or papers filed in his office, transcripts, and making complete record, ten cents for each hundred words;
22. For taking and approving a bond and sureties thereon, fifty cents;
23. For declaration of intention by an alien to become a citizen, twenty-five cents;
24. For all services on naturalization of aliens, including oaths and certificates, fifty cents;
25. For certificates and seal to applications to procure pensions, bounties or back pay for soldiers or other persons entitled thereto, ten cents;
26. For making out transcripts in criminal cases appealed to the supreme court, when the defendant is unable to pay, for each one hundred words, ten cents, to be paid by the county;
27. In criminal cases, and in all causes in which the state or county is a party plaintiff, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant. Where the state fails, the clerk's fees shall be paid by the county.

In addition to the foregoing, he shall charge and collect:

28. For issuing marriage licenses, one dollar each;
29. For all services performed in the settlement of the estate of any decedent, except where actions are brought by the administrator or against him, or as may be otherwise provided herein, where the value of the estate does not exceed three thousand dollars, three dollars; where such value is between three and five thousand dollars, five dollars; where such value

is between five and seven thousand dollars, eight dollars; where the value exceeds eight thousand dollars, ten dollars;

30. In addition to the foregoing, for making a complete record in cases where the same is required by law or directed by an order of the court, for every one hundred words, ten cents.

All of which fees shall be paid into the county treasury. [C. '73, §§ 3781–2, 3787; R., §§ 430, 436, 1852, 4136, 4140–1; C. '51, §§ 2531–2.]

SEC. **297. Compensation of clerk.** The clerks of the district courts shall receive as full annual compensation for all services the following: In counties having a population of less than ten thousand, the board of supervisors shall fix the salary at an amount not exceeding eleven hundred dollars. In counties having a population of ten thousand and not exceeding fifteen thousand, the salary shall be twelve hundred dollars. In counties having a population of fifteen thousand and not exceeding twenty thousand, the salary shall be thirteen hundred dollars. In counties having a population of twenty thousand and not exceeding twenty-five thousand, the salary shall be fourteen hundred dollars. In counties having a population of twenty-five thousand and not exceeding thirty thousand, the salary shall be fifteen hundred dollars. In counties having a population of thirty thousand and not exceeding thirty-five thousand, the salary shall be sixteen hundred dollars. In counties having a population of thirty-five thousand and not exceeding forty thousand, the salary shall be eighteen hundred dollars. In counties having a population of forty thousand and not exceeding forty-five thousand, the salary shall be two thousand dollars. In counties having a population of forty-five thousand and over, the salary shall be twenty-two hundred dollars. The board of supervisors may, in addition to the salary fixed for clerks, allow them out of the probate fees, as additional compensation, an amount not exceeding three hundred dollars. [25 G. A., ch. 77; 22 G. A., ch. 36, § 2; 21 G. A., ch. 134, § 16; 18 G. A., ch. 184, § 1; C. '73, § 3784.]

Under 21 G. A., ch. 134, § 16, from which the last provision of this section is taken, it was held, that the clerk was no longer entitled to any special compensation in probate matters, but considering all services rendered and all compensation received it was for the board of supervisors to make such additional allowance as justice required for his services as clerk and unless the board made an allowance the clerk was not entitled to retain any of the fees in probate, the presumption being in the absence of an allowance that full compensation for all services had otherwise been made: *Poweshiek County v. Patton*, 89–308.

It seems that such provision as to salary covers the fees allowed to the clerk as commissioner of insanity under § 2309: *Moore v. Mahaska County*, 61–177.

SEC. **298. Deputies—appointment—compensation—qualification.** The clerk, with the consent of the board of supervisors, may, when necessary, appoint a deputy, or employ a clerk or clerks, who shall not be a county officer. A certificate of such appointment and of the revocation thereof, when made, shall be filed with the county auditor. In counties of twenty thousand population or less, such deputy or clerk shall receive a salary not to exceed one-half the sum allowed to the principal. In counties having a population above twenty thousand and not exceeding thirty-five thousand, one or more deputies or clerks may be employed, their total compensation not to exceed fifteen hundred dollars, except that, where court is held at two places in a county, it may be any sum not exceeding two thousand dollars. In counties having a population of thirty-five thousand and less than forty thousand, one or more deputies may be employed, their total compensation not to exceed the sum of two thousand dollars. And in counties having a population exceeding forty thousand, one or more deputies or clerks may be employed, whose total compensation shall not exceed three thousand dollars. The compensation of such deputy or clerk shall be fixed by the board of supervisors at the time of the consent to the appointment. The deputy shall take the same oath as his principal, to be

indorsed on the certificate of his appointment, and may perform the duties of his principal. Clerks' and deputies' salaries to be paid out of the county treasury in equal monthly installments. [22 G. A., ch. 36, §§ 1, 2; 18 G. A., ch. 184, § 1; C.'73, §§ 766–8, 770, 3784; R., §§ 644–5; C.'51, §§ 411–14, 416.]

Where the duties of a public officer are of a ministerial character they may be discharged by deputy; duties of a judicial character cannot be so discharged. The deputy has the right to subscribe the name of his principal, and the act of the deputy in the name of his principal, within the scope of his authority, is the act of his principal. And *held*, that a deputy clerk had authority in the name of the principal to certify to the acknowledgment of a deed: *Abrams v. Ervine*, 9-87; or to a copy of a judgment record: *Greasons v. Davis*, 9-219.

The deputy clerk has the same power to administer oaths as his principal: *Wood v. Bailey*, 12-46. And it is not necessary that the absence or inability of the principal should be stated: *Finn v. Rose*, 12-565.

During the absence or disability of the principal the deputy stands in his place, and any official acts performed by him are regarded as having been performed by the principal. Therefore, *held*, that service of notice of appeal upon the deputy clerk, evidenced by an acceptance of such notice signed in the name of the clerk by the deputy, was sufficient: *Sanxey v. Iowa City Glass Co.*, 68-542; *Wheeler & Wilson Mfg. Co. v. Sterrett*, 62 N. W., 675.

The former statutory provision that the deputy should perform the duties of the principal pertaining to his office in the absence or disability of the principal was not designed to withhold from the deputy the power to perform such duties except in the absence or disability of such principal. The deputy may act in the presence of the principal as well: *Moore v. McKinley*, 60-367.

As to former provisions for compensation of deputies and assistants, see *Washington County v. Jones*, 45-260; *Gamble v. Marion County*, 85-675; *State v. Van Auken*, 68 N. W., 454.

SEC. **299. Clerk to report and pay over fees of office.** The clerk of the district court shall report to the board of supervisors of his county, at each regular session, a full and complete statement of the amount of fees received by him, which shall be verified by his affidavit, and pay such fees into the county treasury as hereinbefore provided. [18 G. A., ch. 184, § 5; C.'73, § 3785; R., § 431.]

SEC. **300. Other fees to be reported and paid over.** He shall, on the first Monday in January and July of each year, pay into the county treasury, for the use of the county, all other fees not belonging to his office, in his hands at the date of preceding payment and still unclaimed, and, at the time of so doing, he shall take from the treasurer duplicate receipts therefor, giving the title of the cause and style of the court in which the same was pending, with the names of the witnesses, jurors, officers or other persons, and the amount each one is entitled to receive; one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and, on demand by the persons entitled to said fees, he shall issue county orders for the amount due each person, respectively. [19 G. A., ch. 151, § 1; C.'73, § 3786; R., §§ 353–6.]

CHAPTER 9.

OF COUNTY ATTORNEYS AND THEIR DUTIES.

SECTION **301. Duties.** The county attorney shall appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, and in the supreme court in all cases in which the county is a party, and shall collect and pay over to the person or officer entitled thereto all money due the state or county, so far as he is able to collect the same; but in criminal cases less than a felony, pending elsewhere than in the district court, it shall not be his duty to appear if otherwise engaged in the performance of his official duties. He shall promptly notify the attorney-general of every criminal case appealed from his county to the supreme court, and, at least thirty days prior to the term

at which the case is to be heard, prepare and deliver to him a properly prepared abstract or amended abstract of the case. [21 G. A., ch. 73, § 2.]

The county attorney is a county officer and proceedings to contest the election of such officer should be in accordance with provisions for contesting the election of county officers: *Clark v. Tracy*, 64 N. W., 290. And his resignation is to be tendered to the board of supervisors: *State v. Kovolosky*, 92–498.

District attorney under former statutes: It was the duty of the district attorney to appear for the county, and it was his right to do so: *Clark v. Lyon County*, 37–469; *Tatlock v. Louisa County*, 46–138.

The district attorney was required to appear for the state in *habeas corpus* proceedings, and it was provided that notice of such proceedings shall be served upon him. In such cases the district attorney was the representative of the state, and, as such, might control them within the limits of his authority and duty: *Miller v. Buena Vista County*, 68–711.

Authority: The prosecuting attorney had authority to follow and prosecute a case commenced in his county in any other county to which the venue might be changed: *State v. Carothers*, 1 G. Gr., 464.

A case in the district court was under the control of the district attorney, and any agreement he might make with reference to the disposition thereof was binding as against the attorney-general, who controlled the case in the supreme court: *State v. Fleming*, 13–443.

Additional counsel: The district attorney could not bind the county to pay fees of additional counsel employed by him: *Tatlock v. Louisa County*, 46–138; *Foster v. Clinton County*, 51–541.

But the board of supervisors might employ additional counsel to prosecute criminal cases: *Hopkins v. Clayton County*, 32–15.

The board would be bound by a contract for that purpose, although not entered upon the records. Such contract might be proven by parol evidence: *Jordan v. Osceola County*, 59–388.

The court might, in the absence of the district attorney, appoint a special prosecutor: *White v. Polk County*, 17–413.

But the court could not, unless perhaps in the absence of the district attorney and to prevent failure of justice, bind the county for the payment of additional counsel for prosecution. The county is liable to pay for additional counsel only as the board of supervisors may have determined such counsel to be necessary: *Seaton v. Polk County*, 59–626.

The practice of allowing county attorneys the assistance of private counsel on the trial of criminal cases is of long standing in this state and has been repeatedly sanctioned by the court: *State v. Crafton*, 89–109.

The right to assistant counsel in criminal cases is left to the discretion of the court: *Maloney v. Traverse*, 87–306.

In an action to abate a liquor nuisance a citizen bringing the action has the right to employ counsel not only to secure the order of abatement, but also in a proceeding for contempt to punish for disobeying such order: *Ibid.*

Further as to associate counsel, see notes to § 303.

In criminal appeals: The printing of abstracts on appeal in criminal cases, prepared by the county attorney, should be paid for by the state, and may be allowed and paid by the executive council upon application: *State v. Billings*, 81–566.

SEC. **302. To give opinions.** He shall, without compensation, give opinions and advice to the board of supervisors and other county officers, when requested to do so by such board or officer, upon all matters in which the state or county is interested, or relating to the duty of the board or officer in which the state or county may have an interest, but shall not appear before the board of supervisors in the trial of any cause in which the state or county is not interested, or in applications to establish, vacate or alter highways. [Same, § 3.]

SEC. **303. Deputies—assistance—compensation.** He may appoint deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties. With the approval of the district court he may procure such assistance in the trial of a person charged with the crime of felony as he shall deem necessary, and such assistant, upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the service rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors. But nothing in this section shall prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested. [Same, § 4.]

In a proper case, the court may permit an attorney to assist in the prosecution of an indictment, without regard to the fees charged, even though he may not be employed by the supervisors, and is not a deputy of the county attorney: *State v. Shinner*, 76–147.

This section does not prohibit a prosecuting witness or party complaining from em-

ploying counsel, with the approval of the court and county attorney, to assist in the prosecution of a criminal case, and in the absence of such prohibition the rule is the same as that in force before its enactment: *State v. Shreves*, 81-615.

The right of the board of supervisors to employ counsel on behalf of the county does not depend upon the consent of the county attorney nor upon his willingness or ability to appear for the county: *Taylor County v. Standley*, 79-666.

The board of supervisors does not have an absolute discretion as to the compensation to be allowed associate counsel, and after the claim has been presented the attorney entitled to compensation is not under obligation to accept the amount allowed, but may resort to the courts for determination of the question as to how much he is entitled to receive: *Stone v. Marion County*, 78-14.

Where the attorney selected agrees to render specified services for an agreed compensation, and afterwards performs services in excess of what he was required to do by the agreement or of a character not required by it, he will be entitled to recover for such extra services: *Ibid.*

Further, as to associate counsel, see notes to § 301.

SEC. **304. Substitute in case of disability—compensation.** In case of absence, sickness or disability of the county attorney and his deputies, the court before whom it is his duty to appear, and in which there may be business for him to attend to, may appoint an attorney to act as county attorney, by order to be entered upon the minutes of the court, and he shall receive out of the compensation allowed to the county attorney, when such appearance is before a justice of the peace, such sum as the board of supervisors shall determine to be reasonable for the services rendered, and, when it is before a court of record, such sum as the judge shall determine to be a reasonable compensation, and, while acting under said appointment, he shall have all the authority and be subject to all the responsibilities herein conferred upon county attorneys. But in criminal cases less than a felony, a justice of the peace or magistrate cannot appoint an attorney at the expense of the county or county attorney; and no justice of the peace shall appoint an attorney to act as county attorney in any case, unless reasonable notice in writing has been given the county attorney that his services will be required before such justice at a time therein named. Same, § 5.]

SEC. **305. Prohibitions.** No county attorney shall accept any fee or reward from or on behalf of any one for services rendered in any prosecution or the conduct of any official business, nor shall he, or any member of a firm with which he may be connected, be directly or indirectly engaged as an attorney or otherwise for any party other than the state or county in any action or proceeding pending or arising in his county, based upon substantially the same facts upon which a prosecution or proceeding has been commenced or prosecuted by him in the name of the county or state; nor shall any attorney be allowed to assist the county attorney in any criminal action, where such attorney is interested in any civil action brought or to be commenced, in which a recovery is or may be asked upon the matters and things involved in such criminal prosecution. [Same, § 6.]

The section as it previously stood was *held* not to create a limitation upon the compensation to be paid county attorneys, and such attorney was entitled to the attorney's fees taxed in an injunction suit brought by him to abate a nuisance in the illegal sale of intoxicating liquors, in addition to his other compensation as county attorney: *Furr v. Seaward*, 82-221.

SEC. **306. To receipt for money.** It shall be the duty of the county attorney, whenever he shall receive any money in his official capacity, to give the person paying the same a receipt, and file a duplicate thereof with the county auditor. [Same, § 7.]

SEC. **307. Attend grand jury.** The county attorney shall, when required by the grand jury, attend it for the purpose of examining witnesses before it, or of giving it legal advice, or to procure subpœnas or other process for witnesses, or to lay before it bills of indictment; but he must not be present when an indictment is considered or found. [Same, § 8.]

The county attorney may appear by deputy in the discharge of his duties before a grand jury, and therefore a showing that some person other than the county attorney was pres-

ent with the grand jury during the investigation of the case will not be sufficient ground for setting aside the indictment where it does not appear that such person was not the county attorney's deputy: *State v. Fertig*, 67 N. W., 87.

SEC. **308. Compensation.** County attorneys shall be allowed an annual salary to be fixed by the board of supervisors of their respective counties at any regular or special session of said board, and in case said board has failed or may hereafter fail or neglect to fix said salary, then the compensation as last fixed shall continue until changed by the board at a regular or special session thereof; in counties having a population of five thousand or less, not to exceed five hundred dollars; in counties over five and under ten thousand, not to exceed six hundred dollars; in counties over ten and under fifteen thousand, not to exceed seven hundred and fifty dollars; in counties over fifteen and under twenty thousand, not exceeding nine hundred dollars; in counties over twenty and under thirty thousand, not to exceed one thousand dollars; and in all counties of thirty thousand or more, not to exceed fifteen hundred dollars, except that, where the court is held at two places in a county, it may be any sum not exceeding two thousand dollars; but in no county shall it be less than three hundred dollars. Said salary shall be paid quarterly out of the general fund of the county, and shall be due at the end of each quarter, namely: March thirty-first, June thirtieth, September thirtieth, and December thirty-first. In addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected and school fund mortgages foreclosed, and his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county. [21 G. A., ch. 73, § 11.]

A county attorney has no right to add to the amount to be recovered against a surety on a bail bond a claim for attorney's fees which he may have for the collection of such bond as against the principal; *State v. Beebe*, 87-636.

Where the salary of a county attorney was fixed at one-half the amount he should receive under a mistake as to the fees he would receive in criminal cases, and the board of supervisors, at a subsequent meeting, increased the salary, *held*, that the salary of the county attorney having been fixed according to the provisions of this section, it could not be increased during his term of office: *Goetzman v. Whitaker*, 81-527.

CHAPTER 10.

OF ATTORNEYS AND COUNSELORS.

SECTION **309. Power to admit to practice.** The power to admit persons to practice as attorneys and counselors in the courts of this state, or any of them, is vested exclusively in the supreme court. [20 G. A., ch. 168, § 1.]

SEC. **310. Qualifications.** Every applicant for such admission must be at least twenty-one years of age, of good moral character, and an inhabitant of this state, and must have actually and in good faith pursued a regular course of study of the law for at least two full years, either in the office of a member of the bar in regular practice of this state or other state, or of a judge of a court of record thereof, or in some reputable law school in the United States, or partly in such office and partly in such law school; but, in reckoning such period of study, the school year of any such law school, consisting of not less than thirty-six weeks exclusive of vacations, shall be considered equivalent to a full year. [Same, § 2.]

SEC. **311. Examinations.** Every such applicant shall also be examined by the court, or by a committee of not less than three members of the bar appointed by the court, as to his learning and skill in the law; and the court must be satisfied, before admitting to practice, that the applicant has

actually and in good faith devoted the time hereinbefore required to the study of law, and possesses the requisite learning and skill therein. [Same, § 3.]

SEC. **312. Of students in law department of university.** Students in the law department of the university, who are recommended by the faculty of said department as candidates for graduation, and as persons of good moral character who have actually and in good faith studied law for the time and in the manner required by statute, at least one year of such study having been as a student in said department, may be examined at the university by a committee composed of not less than three persons, members of the bar or judges of courts of record, appointed by the supreme court for that purpose, and upon the certificate of such committee that such candidates possess the learning and skill requisite for the practice of law, they shall be admitted without further examination. [Same, § 4.]

SEC. **313. Practitioners from other states.** Any person becoming a resident of this state, after having been admitted to the bar of any other of the United States in which he has previously resided, may, in the discretion of the court, be admitted to practice in this state without examination or proof of period of study as hereinbefore provided, on proof of the other qualifications required by this chapter, and on satisfactory proof that he has practiced law regularly for not less than one year in the state from which he comes, after having been duly admitted to the bar according to the laws of such state. [Same, § 5.]

SEC. **314. Oath required.** All persons on being admitted to the bar shall take an oath or affirmation to support the constitution of the United States and of the state of Iowa, and to faithfully discharge the duties of an attorney and counselor of this state according to the best of their ability. [Same, § 6.]

SEC. **315. Mode of examination.** The supreme court may by general rules prescribe the mode in which examinations under this chapter shall be conducted, and in which the qualifications required as to age, residence, character and term of study shall be proved, and may make any other and further rules, not inconsistent with this chapter, for the purpose of carrying out its object and intent. [Same, § 7.]

SEC. **316. Attorneys resident in other states.** Any member of the bar of another state, actually engaged in any cause or matter pending in any court of this state, may be permitted by such court to appear in and conduct such cause or matter while retaining his residence in another state, without being subject to the foregoing provisions of this chapter. [Same, § 8.]

SEC. **317. Duties of attorneys and counselors.** It is the duty of an attorney and counselor:

1. To maintain the respect due to the courts of justice and judicial officers;
2. To counsel or maintain no other actions, proceedings or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense;
3. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;
4. To maintain inviolate the confidence, and, at any peril to himself, to preserve the secret of his client;
5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;
6. Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest;
7. Never to reject for any consideration personal to himself the cause of the defenseless or oppressed. [C. '73, § 211; R., § 2704; C. '51, § 1614.]

I. DUTIES AND LIABILITIES.

Retainer against opinion: While an attorney ought not to accept a retainer in a case where he feels that the law is against his client, yet the fact that he has, under a prior retainer, advocated views of the law and facts different from those upon which his client rests his cause, or has officially, as a judge or officer of the government, held a different view of the rights of the parties, will not, of itself, disqualify him to accept a retainer; and it will not constitute fraud on his part not to reveal to his client the fact of such prior opinion: *Smith v. Chicago & N. W. R. Co.*, 60-515.

In a particular case, *held*, that an attorney assisting the prosecution had not sustained toward the defendant any such confidential relations with reference to the case as to prevent him from acting against the defendant: *State v. Lewis*, 65 N. W., 295.

Good faith: Improper conduct of attorneys in appearing for a party in the case after having been consulted by other parties in the same case is not a ground for reversing the action of the lower court on appeal: *Shoemake v. Smith*, 80-655.

The law governing the conduct of attorneys is well defined and requires the utmost good faith: *Prouty v. Bullard*, 77-42.

The fact that an attorney writes letters to the opposite party encouraging him to maintain his claim against the attorney's client and to think that he will succeed in the litigation may be sufficient to show a rescission of the contract of employment between the attorney and his client or bad faith rendering him liable for damages: *Bullis v. Easton*, 65 N. W., 395.

Where in a misdemeanor case the court is proceeding to try the defendant without his personal presence on the ground that he is represented by an attorney, it may refuse to allow such attorney to withdraw his appearance and deprive the court of jurisdiction: *State v. Young*, 86-406.

An attorney who has acted for defendant in a preliminary examination cannot afterwards act for the state in a prosecution against the same defendant for a crime substantially the same though not identical with that for which he was first examined. Attorneys are not bound to serve those who will not compensate them, and may withdraw from the service of such, but they cannot take employment on the other side: *State v. Halstead*, 73-376.

Purchase of property: An attorney who procures in himself legal title to property of which his client is owner holds the property in trust for his client: *Byington v. Moore*, 62-470. The same rule applies to property purchased by an attorney in the course of the litigation in which he is employed: *Harper v. Perry*, 28-57; *Reickhoff v. Brecht*, 51-633.

Where an attorney, having connection with property as representing the plaintiff in the foreclosure of a mortgage thereon, advised his client as to the amount necessary to pay the taxes for the last year then due thereon, provided they would be paid by a certain time, and subsequently one of them took by assignment a certificate of sale of the land for prior taxes, as to which they had not advised their client, *held*, that by such assignment the partner became trustee for his client, and could not transfer such tax title fee from the trust: *Lynn v. Morse*, 76-665.

An attorney cannot purchase as against the interest of his client, a judgment, the enforcement of which he was employed to defeat; but where the clients were husband and wife, and the husband's land was about to be sold to satisfy a judgment against him, and the attorney bought the judgment under an agreement with the husband that he should hold it as security for the repayment of the money, and that it should be the first lien on the premises, and a mechanic's lien suit by the wife against her husband, which was pending should be dismissed, *held*, that the transaction was valid, and the money not being repaid as agreed, nor the lien dismissed, the attorney was authorized to take execution on the judgment assigned to him, and to purchase the premises, and the title thus obtained should be superior to the title obtained by the wife under a foreclosure of the mechanic's lien: *Baker v. First Nat. Bank*, 77-615.

Estopped by fraud or negligence: An attorney who obtains a judgment for his client which is void for want of service of notice, due to his own culpable negligence or fraudulent intention, and allows the client, in ignorance of the defect, to purchase property at execution sale under such judgment, is estopped as against the client from asserting title to the same property acquired from the execution defendant, even after the relation of attorney and client has ceased. In such case whatever title is acquired by the attorney inures to the benefit of its former client: *Phillips v. Blair*, 38-649.

Conveyance to attorney: A conveyance from client to attorney will be set aside whenever advantage has been taken of the client through the influence or knowledge of the attorney possessed by reason of their peculiar relations: *Polson v. Young*, 37-196.

Tax title on client's property; trustee: An attorney who is acting as agent of the owner with respect to property, and has money in his hands derived from the property, buying in the property at tax sale, will be held to have acquired the same in trust for such owner, and cannot take and hold, as against his principal, a tax deed, although the principal is negligent in reimbursing him for his expenses in acquiring such title, unless he has first made a full and fair statement to his principal of the account between them and of the amount necessary to reimburse him: *Continental L. Ins. Co. v. Perry*, 65-709.

Bad faith of client: Good faith and fairness is also required of the client in his relations with the attorney, and an attempt of the former to defraud the latter will authorize the latter to sever the relation and act for the protection of his own interests: *Eckrote v. Myers*, 41-324.

Where the attorney, having procured a decree of foreclosure for his client, and demanded the payment of his fees and ad-

vances without avail, bought in at tax sale the property covered by the decree and notified his client of that fact, still urging payment, which was not made, *held*, that a tax deed, subsequently taken by him in pursuance of the sale, could not be set aside seven years afterward at the suit of the client: *Ibid.*

The fact that an attorney retains in his possession papers relating to a transaction affecting land under a claim of a lien on such papers for services, does not continue his relation as attorney of the owner in such sense as to defeat a tax title acquired thereon by him after the performance of his duties with reference to the matter is entirely completed: *Baker v. Davis*, 35–184.

Where the attorney, after in vain requesting payment of his fees by his client, by consent of the client caused property to be sold under his client's judgment, and bought the same at the sale, *held*, that such purchase was not fraudulent: *Page v. Stubbs*, 39–537.

Liability for interest and rents; demand: An attorney is not ordinarily liable for interest on money collected by him until demand thereof is made; nor is he liable for rent of property bought in by him in his own name at execution sale under a judgment in behalf of his client, where such purchase is not in fraud of his client's rights: *Johnson v. Semple*, 31–49.

But the commencement of suit to recover money in the attorney's hands constitutes sufficient demand to authorize the allowance of interest from that time: *Hollenbeck v. Stanberry*, 38–325.

The attorney is not liable for interest on money if kept on hand for his client or deposited in bank to the client's credit, but if used by the attorney he is liable for interest: *Mansfield v. Wilkerson*, 26–482.

Improper conduct: A court should never hesitate to stop counsel in attempts to drag improper matters before a jury, and should visit merited punishment when such unprofessional conduct is indulged in. But it does not follow that in such cases a verdict will not stand. To require setting aside of the verdict prejudice must be shown: *Hammond v. Sioux City & P. R. Co.*, 49–450.

Where an attorney, in an excited manner, directly contradicted the statements of the court in ruling upon an objection to evidence, alleging that the facts upon which such ruling was based, as stated by the court, were not true, *held*, that he was guilty of contempt: *Russell v. French*, 67–102.

Liability in general: A decision under the provisions of § 3830, authorizing a summary determination, on motion, of the liability of an attorney for money collected, constitutes an adjudication, and a discharge of the attorney in such proceeding will bar subsequent action by the client, to collect the money in controversy: *Hawk v. Evans*, 76–593.

In an action against an attorney on an express promise to pay for the conversion of a note left with him for collection, *held*, that plaintiff could not recover on an implied promise growing out of defendant's tort: *Aultman v. Goldsmith*, 84–547.

Where an attorney undertook to prosecute an appeal but failed to take the steps necessary, and the appeal was dismissed by motion in the supreme court and the printing fee taxed to the client, *held*, that the client might recover damages from the attorney for negligence: *Jamison v. Weaver*, 81–212.

Also *held*, that failure of the client to furnish the money necessary to pay the expenses incident to the appeal was not an excuse if it appeared that the client was ready to pay any amount necessary and was not advised by the attorney that any payment was required: *Ibid.*

The costs taxed in the supreme court under such circumstances must be regarded as the direct result of the negligence of the attorney. While costs of the appeal might have been taxed to the appellant even had the appeal been properly prosecuted, yet such a result would have been a different one from that occasioned by failure to prosecute the appeal: *Ibid.*

Not liable for exercise of discretion: Where an attorney was employed with the understanding that he was to use his best judgment as to the steps necessary to be taken in the case, *held*, that he was not liable in an action for damages, in view of the care taken in the particular case: *Bennett v. Phillips*, 57–174.

Liability for trespass: An attorney cannot be held liable for the wrongful seizure of property in the suit in which he acts, unless his acts or directions are shown to have in some way caused the seizure: *Rice v. Melendy*, 41–395.

An attorney who simply obeys the instructions of his client in directing the seizure of property under attachment is not liable therefor. It is immaterial that he has neither belief nor suspicion as to the ownership of the property and seeks no information with respect thereto: *Dawson v. Buford*, 70–127.

Not jointly liable with client: An attorney who has acted as a mere agent for his client should not be made a party to a suit against his client in regard to acts so done, unless he is charged with fraud: *Lyon v. Tevis*, 8–79.

If the attorney is thus improperly made a party defendant, he is entitled to be dismissed with costs: *Paton v. Lancaster*, 38–49.

II. Compensation.

Evidence as to value of services: In an action to recover the value of professional services, evidence as to the success attending the rendition of such services is admissible: *Berry v. Davis*, 34–594; *Stevens v. Ellsworth*, 33 N. W., 683.

Under the general custom of the profession, the values in controversy control charges for services. Therefore, in an action by an attorney to recover for services rendered, *held* error to instruct the jury that the magnitude of the controversy and the great value of the property involved should not be considered in determining the amount of recovery: *Smith v. Chicago & N. W. R. Co.*, 60–515.

Contract for services in another state: Where an attorney is employed in this state to render services in another state, the rate

of compensation is to be determined acording to the value of the services at the place where the contract is made: *Stanberry v. Dickerson*, 35-493.

Contract for excessive fees: Nothing but the best of reasons will justify an attorney in exacting from his client, after the work is partially completed, an agreement to pay more than an ordinary fee under a threat of withdrawing from the case if such agreement is not made: *Bolton v. Daily*, 48-348.

Additional attorney: Where an attorney contracted to prosecute the case for a given sum, and afterwards turned the case over to another attorney, stating to the client that he had taken the second attorney into the case with him, *held*, that in the absence of any other knowledge on the part of the client as to the relation of the second attorney to the case, the latter could not recover more than the contract price: *Ennis v. Hultz*, 46-76.

Where the client employs an attorney and authorizes him to employ such legal assistance as he may require, any attorney employed by him reasonably necessary in the prosecution of the case may recover compensation from the client: *Clyde v. Peavy*, 74-47.

Implied contract: Where an attorney was employed by one of several defendants, and rendered services in the case for all, with the knowledge and implied consent of the others, *held*, that a recovery for services rendered might be had by such attorney as against all the defendants, although by contract between them, not known to the attorney, the one employing him was to bear the entire expense of attorney fees: *McCrary v. Ruddick*, 33-521.

Where an attorney performs legal services for a client with the knowledge and consent of such client, who receives the benefit thereof without objection, the attorney will be entitled to recover the reasonable value of such services without regard to a contract therefor between such client and another by virtue of which such services are to be rendered, unless such agreement was known to the attorney before rendering the services: *Hudspeth v. Yetzer*, 78-11.

Therefore where defendant had a contract with plaintiff's father by which legal services were to be rendered by plaintiff and his father, and compensation was to be made therefor by indorsement of credits upon notes held by defendant against plaintiff's father, *held*, that in the absence of proof that plaintiff had knowledge of such contract he could recover from defendant the reasonable price of such services thus rendered by him: *Ibid.*

Surety not liable to principal's attorney: One who is a party to an action and interested in the result, as a surety in an action to which his principal is party, will not, for that reason alone, be liable for the compensation of an attorney rendering services for the principal, but his liability must be proven by evidence of retainer or recognition as attorney of the party sought to be charged: *Turner v. Myers*, 23-391.

Liability of husband for fee of wife's attorney in divorce suit; necessaries: The husband is liable for services rendered by attorney for the wife for establishing the innocence of the latter on a charge of adultery made by the husband in an action for divorce. Such services are deemed necessaries: *Porter v. Briggs*, 38-166. And the allowance of suit money to the wife in the divorce proceeding will not preclude the recovery of additional compensation from the husband: *Clyde v. Peavy*, 74-47.

A law does not imply liability of the husband to attorney's fees for services rendered to the wife in a divorce proceeding brought by her in which she is unsuccessful and which was not necessary for her protection: *Sherwin v. Maben*, 78-467.

The husband is not liable for wife's attorney's fees in a suit brought by the wife for divorce where it is not shown that such services come within the scope of necessaries: *Johnson v. Williams*, 3 G. Gr., 97.

III. Contingent Fee; Champerty.

Good faith: If the attorney visits the client for the purpose of entering into a contract of employment, it is his duty, before making the contract, to distinctly and clearly advise the client as to all the facts and circumstances within his knowledge relating to the case. So *held* in regard to the contract for a share of the amount to be recovered as a contingent fee: *Ryan v. Ashton*, 42-365.

Construction: A construction of a contract between attorney and client which would operate to prevent the client from settling his suit will not be favored by the courts: *Ellwood v. Wilson*, 21-523.

Champerty and maintenance: There being no statute in this state against champerty or maintenance, and there being no necessity for enforcing the English doctrine on the subject, that doctrine is not deemed in force here: *Wright v. Meek*, 3 G. Gr., 472.

Contingent fee; against public policy: A contract by which the attorney was to receive a per cent. of the amount recovered by the client in the suit or on settlement, the attorney to advance costs and expenses, to be paid out of the recovery, and the client agreeing not to settle without the attorney's consent, *held* void as against public policy. Preceding case doubted: *Boardman v. Thompson*, 25-487. See, also, *Hyatt v. Burlington, C. R. & N. R. Co.*, 68-662.

Contract of attorney to hold client harmless: A contract between attorney and client, that the former will hold the latter harmless from any judgment to be recovered against him provided he will appeal the case, is against public policy and void: *Adye v. Hanna*, 47-264.

Contracts not champertous: A mere contract for a contingent fee, without stipulation against settlement by client or for advancement of costs by attorney, is valid: *McDonald v. Chicago, & N. W. R. Co.*, 29-170; *Winslow v. Central Iowa R. Co.*, 71-197.

The assignment of a note or open account and action thereon is not champertous, although the assignee gives, as the only consideration therefor, his obligation to pay the net proceeds of the action to the assignor: *Knadler v. Sharp*, 36-232.

An agreement by a mortgagee, in consideration of his release from a note upon which he was surety and the repayment to him of money paid on the note, that he would foreclose a mortgage held by him as such surety, and procure the execution of the sheriff's deed to the payee of the note, *held* not champertous: *Cooley v. Osborne*, 50–526.

Expense; share of recovery: The mere agreement for a contingent fee is not champertous. To constitute champerty the agreement on the part of the champetor must be to carry on the suit at his own expense, as well as for a share of the recovery: *Jewel v. Neidy*, 61–299.

Neither is it champertous for a person who is a party in interest, and not an officious promoter of another's strife, to agree to bear the expenses of litigation; and an attorney agreeing to carry on the litigation for a proportion of the recovery, knowing that the costs are thus to be paid by a party in interest, is not guilty of champerty: *Ibid.*

Champerty not a defense: The fact that an action is being prosecuted under a champertous contract cannot be set up as a defense therein: *Allison v. Chicago & N. W. R. Co.*, 42–274; *Small v. Chicago, R. I. & P. R. Co.*, 55–582. Nor is evidence that the attorney has contracted for a contingent fee admissible: *Swanson v. French*, 92–695.

The defense that a contract by which a cause of action is assigned is champertous can be only pleaded in an action between the parties to such contract, and if not pleaded therein the contract can be enforced as valid between them: *Vimont v. Chicago & N. W. R. Co.*, 69–296.

SEC. **318. Deceit or collusion—punishment.** An attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages to be recovered in a civil action. [C. '73, § 212; R., § 2705; C. '51, § 1615.]

The office of an attorney is one of great confidence, and it ought to be one of the strictest integrity. Certain facts *held* sufficient to justify the suspension of an attorney for fraud and deceit towards his clients: *Slemmer v. Wright*, 54–164.

SEC. **319. Authority of attorneys and counselors.** An attorney and counselor has power:

1. To execute in the name of his client a bond, or other written instrument, necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding, or final judgment rendered therein;

2. To bind his client to any agreement, in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court;

3. To receive money claimed by his client in an action or proceeding during the pendency thereof, or afterwards, unless he has been previously discharged by his client, and, upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment. [C. '73, § 213; R., § 2706; C. '51, § 1616.]

Authority in general: It is within the scope of the employment of an attorney to receive money from a client with which to procure a surety on an attachment bond in a proper case, and such money received by one member of the firm is so far within the scope of his authority as that the other members of the firm are liable therefor: *Fornes v. Wright*, 91–392.

Authority to an attorney to take a note and mortgage to secure a debt, will not, without more, authorize him to seize and sell chattel property included in the mortgage: *St. Paul & Kansas City Grain Co. v. Rudd*, 71 N.W., 417.

Where an attorney of two defendants accepted service of notice addressed to him as attorney of both, signing himself only as attorney for one, *held*, that the acceptance was binding as to both: *Walker v. Abbey*, 77–702.

Where the same attorneys represented two parties plaintiff, one of them being the party who originally brought the suit and the other being a defendant who, on motion, had been made co-plaintiff, and a notice of appeal directed to the original plaintiff or his attorneys, naming them, was accepted by such attorneys as attorneys for plaintiff, *held*, that such action on their part did not constitute acceptance of service of notice by the co-plaintiff: *Goodwin v. Hilliard*, 76–555.

Authority to sign bond: Where the lower court upheld an attachment bond signed by the attorney for his client, *held*, that on appeal it would be presumed that it appeared to the lower court that the attorney had such authority, in the absence of any showing to the contrary: *Goddard v. Cunningham*, 6–400.

Affidavits, verifications of pleadings, etc.: An attorney may make affidavit on an application of his client for a change of venue: *State v. Mooney*, 10–506; or for continuance: *Widner v. Hunt*, 4–355.

The attorney may verify a petition where

he shows a knowledge of the facts: *Chittenden v. Hobbs*, 9–417; *Bates v. Robinson*, 8 318.

But if the knowledge of the attorney is not shown the verification is insufficient: *Clute v. Hazleton*, 51–355.

Professional statement: Where the professional statement of an attorney is received it is to be regarded as an affidavit: *Rice v. Griffith*, 9–539.

Witness for client: An attorney is a competent witness for his client: *Walsh v. Murphy*, 2 G. Gr., 227.

But no attorney having a just conception of his true and proper position will willingly unite the character of counsel and witness in the same case: *Alger v. Merritt*, 16–121.

As to privileged communications between attorney and client, see § 4608.

Before bringing suit: An attorney may be employed in contemplation of a suit to be brought, and his client will be bound by his stipulations with reference thereto, to the same extent as if such stipulations had been made after the bringing of suit: *Hefferman v. Burt*, 7–320.

Employment of another attorney: An attorney intrusted with the business of his principal has no authority to employ another attorney to represent his principal, and the latter will not be liable for costs incurred by the attorney thus employed: *Antrobus v. Sherman*, 65–230.

But where by reason of reliance on an agreement with such second attorney the adverse attorney was not present when the case was called, and a judgment was recovered by default, *held*, there was sufficient surprise to warrant a new trial: *Chicago & N. W. R. Co., v. Gillett*, 38–434.

When an attorney for any cause is unable to give attention to the business of his client which has been intrusted to him, he may lawfully place it in the hands of other attorneys, and his client will not be chargeable with negligence in regard to the case if the counsel thus selected acts with ordinary prudence in attempting to appear at the proper time: *First National Bank v. Harwick*, 74–227.

Contract to turn over business: An attorney to whom notes have been intrusted for collection has no authority to turn them over to another for that purpose, and a contract to do so is illegal, so that damages cannot be recovered for its breach: *Smalley v. Greene*, 52–241.

Receipt of money: The right of an attorney to receive money for his client is no greater than that of the client to receive it: *Logan v. McCahan*, 71 N. W., 252.

Fraud of attorney: An attorney, when acting in court procedure for his client, acts in his stead, and a judgment recovered may be set aside for fraudulent representations made by the attorney in procuring it, when such representations would have been a ground for setting it aside if made by the party himself: *De Louis v. Meek*, 2 G. Gr., 55.

The malfeasance of an attorney in accepting a retainer for one party, after having previously been employed by the other, the fact being known to the first client from the time of the wrongful act, will not constitute fraud, vitiating the judgment recovered for the second client against the first: *Humphrey v. Darlington*, 15–207.

Negligence of attorney: The law regards the negligence of an attorney as the client's own neglect, and will give no relief from the consequences thereof: *Jones v. Leech*, 46–186.

Negligence of the clerk of the attorney in filing pleadings, must be imputed to the client himself: *Hayward v. Goldsbury*, 63–436.

The negligence of the attorney is imputed to the client, when it is sought to set aside default where verdicts or judgments binding upon the parties have been entered, but not where the action has merely been dismissed for want of prosecution: *Byington v. Quincy*, 61–480.

In an action by an attorney to recover for services evidence that he was negligent in rendering such services is admissible as bearing upon the value of the services rendered, even though there was no counterclaim for damages: *Lindsay v. Carpenter*, 90–529.

In such an action services in giving advice as to an appeal may be shown, although the attorney was not authorized to take an appeal: *Ibid.*

A contract to render services in the trial of a case for a specified sum includes services rendered in resisting a counterclaim as well as in prosecuting the claim of plaintiff: *Ibid.*

Mistake of attorney: While the law exacts of attorneys diligence in their business, and will not relieve against their negligence, yet relief may be granted where mistake has occurred without fault. Attorneys are not required to be diligent and careful beyond the capacities of human nature: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49–657.

Collection of claim or judgment: The authority of an attorney with respect to a claim does not terminate with the rendition of judgment, but he may control the judgment until its collection: *Death v. Bank of Pittsburg*, 1–382; and he has authority to receive payment and enter satisfaction of the judgment: *McCarver v. Nealey*, 1 G. Gr., 360.

As the attorney has the authority to receive money claimed in the action, he may receive it from any person from whom it may be collected in the action, or who, for the protection of any interest of his own, has the right to pay it. Therefore *held*, that an attorney prosecuting an action to foreclose a mortgage might accept from a junior mortgagee who was a party to the suit the money necessary to entitle the junior mortgagee to an assignment of the mortgage under § 4292, with the agreement that the action should afterwards be prosecuted for the interest of the junior mortgagee: *Harbach v. Colvin*, 73–638.

May receive money only in payment: An attorney has no authority to receive anything but money in payment of a claim left with him for collection, unless specially so authorized: *Drain v. Doggett*, 41–682; *McCarver v. Nealey*, 1 G. Gr., 360. But if the attorney accepts a check in payment and realizes the money thereon the client is bound: *Harbach v. Colvin*, 73–638.

He cannot without special power accept as payment a less amount than the whole sum due, and such special authority must be established in the same way that the authority of other agents must be shown, and not by the attorney's declarations: *Bigler v. Toy*, 68-687.

Action by attorney in his own name: It seems that it is not unusual nor improper for an attorney to whom a claim has been sent for collection to bring action thereon in his own name: *Seevers v. Hamilton*, 6-199.

Recovery back of money paid over: In such a case, the money collected on the judgment thus recovered having been paid to the client, *held*, that the attorney could not recover back from the client the amount thus paid over, upon being compelled to refund the sum collected on account of irregularities in the proceeding in which the judgment was recovered, unless he could put the client *in statu quo* as to the original claim: *Ibid.*

Ratification: Unauthorized acts of an attorney in the name of his client may be ratified by the client, who cannot retain the benefit of an unauthorized act and repudiate the portions of the transaction which are injurious to him: *Brown v. Kiene*, 72-342.

Granting extension: Where the attorney was directed to "secure or collect" the claim, *held*, that he had authority to extend the time of payment on receiving additional security: *Crawford v. Nolan*, 70-97.

Agreement for judgment and stay: An attorney appearing for a party may make an agreement in writing for judgment and an extension of time of payment: *Potter v. Parsons*, 14-286.

Compromise: An attorney cannot, without express authority, make a compromise which will operate injuriously upon his client: *De Louis v. Meek*, 2 G. Gr., 55; *Powell v. Spaulding*, 3 G. Gr., 443.

An attorney may compromise a pending suit: *Martin v. Capital Ins. Co.*, 85-643.

Where an attorney, retained in an action to recover possession of real property, entered into a contract that his client should pay defendant a specified sum, whereupon defendant should surrender possession, *held*, that such agreement was not binding upon the client and that one could recover without payment of the sum stipulated: *Stuck v. Reese*, 15-122.

When an attorney has, in good faith, compromised the suit and consents to judgment against his client, the latter cannot, afterward, in an action in another state on such judgment, defend on the ground of want of authority in the attorney to make the compromise: *Crawford v. White*, 17-560.

Under a general employment to prosecute a case an attorney has no right to dismiss it. Such power should be specially delegated: *Rhutasel v. Rule*, 65 N. W., 1013.

Agreement of client not to compromise: A construction of a contract between an attorney and client which would prevent settlement of the suit by the client will not be favored by the courts: *Ellwood v. Wilson*, 21-523.

Agreement as to judgment: An attorney cannot consent to a judgment against his client or waive any cause of defense in the case; neither can he settle or compromise it without special authority; but he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial and the like are all in the sphere of his general authority, and as to these matters his client is bound by his action. Therefore, *held*, that the attorney, representing his client in two suits involving substantially the same questions might bind his client by an agreement, that the judgment resulting in the trial of one of the cases should determine the kind of judgment to be entered in the other: *Ohlquest v. Farwell*, 71-231.

An attorney without special authority cannot sell and transfer a judgment in favor of his client: *Cottrell v. Wheeler*, 89-754.

Agreement to convey land: An agreement by attorney for plaintiff in an action of right, for conveyance of a portion of the premises, *held* not binding on the client: *Rayburn v. Kuhl*, 10-92.

On appeal: An attorney retained to attend to a suit in a particular court is not thereby authorized without further authority to appeal the case, and cannot recover, under such circumstances, for services rendered in the appellate court: *Hopkins v. Mallard*, 1 G. Gr., 117.

Held, that an agreement by an attorney waiving the right to appeal was authorized: *In re Heath's Will*, 83-215.

Agreement of record: A *nunc pro tunc* record of an agreement by an attorney made a year after the agreement was entered into, and upon affidavits, after a dispute had arisen with reference to the agreement, *held* not sufficient: *Hiller v. Landis*, 44-223.

Where a new trial was asked on the ground of an agreement of the opposite attorney that the cause should not be tried that week, *held*, that as the agreement was denied by the attorney, and did not appear to have been made of record and signed by the attorney, or made in open court and entered of record, the motion could not be granted: *Barnes v. Ennenga*, 53-479.

Agreement of attorney for the state in a criminal prosecution that judgment be arrested until a future time, *held* invalid, because not in writing and recorded: *State v. Stewart*, 74-336.

The facts appearing from an affidavit of the attorney of a party, *held* sufficient to establish implied consent to the determination of a cause in vacation: *Myers v. Funk*, 51-92.

While the client might bind himself by a stipulation in the case, his affidavit is not receivable as evidence of an agreement by his attorney binding him: *Sapp v. Aiken*, 68-699.

An agreement of the attorney that a case should be presented to the supreme court upon an abstract, waiving a transcript of the evidence, cannot be enforced, if denied, unless in writing or of record: *Preston v. Hale*, 65-409.

Agreements of attorneys not reduced to writing or made of record will not be considered: *Taylor v. Chicago, M. & St. P. R. Co.*, 80-431.

Affidavits of counsel as to oral agreements and understandings between them must be disregarded so far as they are in conflict; *Hardin v. Iowa R. & Const. Co.*, 78–726.

An oral agreement by counsel, that a case shall be submitted upon appeal on appellant's abstract, and transcript waived, cannot be established by affidavits of appellant's attorneys: *Riegelman v. Todd*, 77–696.

The supreme court will not act upon a statement of counsel as to the effect of an oral agreement as to introduction of depositions: *Borland v. Chicago, M. & St. P. R. Co.*, 78–94.

It is not competent to prove a disputed verbal agreement for the continuance of a cause made with an attorney, by the testimony of an adverse party or his attorney, but it may be proven as against a party by the testimony of his attorney who made it: *Council Bluffs L. & T. Co. v. Jennings*, 81–470.

The only evidence receivable to show a contract by an attorney in regard to the submission of a case binding upon his client is his written agreement or an entry of record: *Searles v. Lux*, 86–61.

Stipulations made in open court by an attorney of record in the case, and while the case is pending, if free from fraud and mistake and clearly established, will be enforced by the court: *Lockwood v. Black Hawk County*, 34–235.

It is competent for attorneys to agree for an extension of time for filing a bill of exceptions, and when such agreement is reduced to writing and filed it becomes a part of the record in the case without being embodied in a bill of exceptions: *State ex rel. v. Chamberlin*, 74–266.

An agreement of an attorney to an abstract on appeal cannot be shown by affidavits, not being evidence in writing: *Doerr v. Southwestern Mut. L. Ass.*, 92–39.

A direction given by an attorney to an officer as to the disposition of property is not an agreement within the provisions of this section: *Citizens National Bank v. Loomis*, 69 N. W., 443.

An agreement made by attorneys by telephone, the attorneys acting in what is said as the agents of their clients, who are present with their respective attorneys, is not a contract between attorneys and is not within the provisions of this section: *Kramer v. Chambers*, 92–681.

It is not improper for an attorney to call to the attention of the court an oral agreement made between the attorneys in open court: *Leek v. Chesley*, 67 N. W., 580.

SEC. **320. Proof of authority may be required.** The court may, on motion of either party and on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of the several adverse parties, to produce or prove by his own oath, or otherwise, the authority under which he appears, and, until he does so, may stay all proceedings by him on behalf of the parties for whom he assumes to appear. [C. '73, § 214; R., § 2707; C. '51, § 1617.]

Want of authority; how raised: Absence of authority on the part of plaintiff's attorney to bring a suit may be a ground for dismissing it, or, if the attorney wants time in order to make a showing of authority, for continuance, but it cannot be taken advantage of as a ground to defeat recovery: *Savary v. Savary*, 3–271.

The showing to require an attorney to prove his authority, *held* insufficient in a particular case: *Savery v. Savery*, 8–217.

A judgment by default entered against a defendant upon an appearance for him by attorney, which is made without authority and by mistake, should be set aside: *Rice v. Griffith*, 9–539.

Where a demurrer is filed without authority and a valid appearance is afterward made, a new demurrer may be filed: *Winterstien v. Walker*, 10–198.

Authority; evidence of: Authority to appear, *held* sufficiently established by the attorney's own testimony and a written receipt signed by the party for whom appearance was made, acknowledging receipt of money collected by the litigation, although the party himself testified that no such authority was given: *Ellis v. White*, 61–644.

Where the statement of the attorney in showing his authority discloses the fact that he is acting on written authority, he may properly be required to produce it: *State ex rel. v. Tilghman*, 6–496.

An affidavit of an attorney, that he appeared in the lower court for defendant, cannot be received on appeal to show that the lower court had jurisdiction: *Stout v. Fortner*, 7–183.

Notice to attorney: Knowledge of the attorney is, in general, considered notice to the client: *De Louis v. Meek*, 2 G. Gr., 55.

Service upon attorney: In ordinary actions service upon an attorney is not sufficient to give a court jurisdiction: *Death v. Bank of Pittsbury*, 1–382.

Under the English chancery practice, where the judgment plaintiff was a nonresident, service in an action in equity to enjoin the collection of the judgment might be made upon a resident attorney having charge of such collection; but under our procedure such an action might be brought to enjoin the sheriff from levying execution under the judgment: *Ibid.*

Appearance of authorized attorney cures any defect by reason of want of authority in such attorney to accept service of the notice: *Fanning v. Minnesota R. Co.*, 37–379.

Defense should be shown: A party seeking to have a judgment set aside on the ground that it was rendered on appearance by an attorney without authority should allege and show a defense to the claim: *Russell v. Pottawattamie County*, 29–256.

Authority not questioned on appeal: Where the record, without setting out the

evidence, shows that the lower court was satisfied by affidavit of the authority of the attorney to appear, the ruling will not be disturbed on appeal: *Huston v. Stringham*, 21-36.

The authority of the attorney cannot be first questioned by his client on appeal, when he has acquiesced in his action in the court below: *Hefferman v. Burt*, 7-320.

Presumption as to attorney's authority: A regular attorney has authority to bring a suit and continue it to its final determination. He cannot be called upon to prove his authority, but the want of it must be shown by the objecting party: *State v. Carothers*, 1 G. Gr., 464.

Where the record shows appearance by attorney, a party attacking the judgment, on the ground of want of authority of the attorney to appear, must overcome such presumption: *Potter v. Parsons*, 14-286; and must do so by clear and satisfactory evidence: *Wheeler v. Cox*, 56-36: *Russell v. Pottawattamie County*, 29-256.

Although the attorney cannot, without special authority, admit service of jurisdictional process upon his client, yet it will be presumed in all collateral attacks, and perhaps on appeal or writ of error, that a regular attorney who appeared for a defendant, though not served, had authority to do so: *Harshey v. Blackmarr*, 20-161.

The appearance of an attorney for a party is *prima facie* evidence of authority, and, before his act can be avoided, injury resulting from the unauthorized appearance must be shown: *Piggott v. Addicks*, 3 G. Gr., 427.

Where the record recites an acceptance of service by attorney, it will be presumed, in favor of the judgment, that authority to accept service existed, or that some other form of service was shown: *Prince v. Griffin*, 16-552.

The fact of appearance by attorney being established, it is for the party insisting that the appearance was unauthorized and the judgment void to show that fact: *Bond v. Epley*, 48-600.

Absence of authority; foreign judgment: The defendant in an action upon a foreign judgment may deny the authority of the attorney who appeared for him: *Baltzell v. Nosler*, 1-589; *Harshey v. Blackmarr*, 20-161.

When want of authority of attorney to enter appearance is made the ground of an equitable defense in an action on a foreign judgment, it should be alleged also that defendant is not indebted to plaintiff on the claim on which the judgment was based: *Crawford v. White*, 17-560.

In a suit on a foreign judgment the fact that the attorneys who appeared for defendant were not authorized to do so is immaterial, if it appears that defendant was duly served with notice, and would have been concluded without an appearance: *Woodward v. Willard*, 33-542.

In action on domestic judgments: In case of a domestic judgment rendered upon an unauthorized appearance and without service, the party against whom the judgment is thus improperly rendered is entitled to relief if the judgment is unjust, and relief is sought by bill or motion, without laches; but the party must promptly disavow the action of the attorney upon receiving knowledge thereof: *Harshey v. Blackmarr*, 20-161.

A judgment rendered without service of notice and upon appearance by attorney without authority is void: *Macomber v. Peck*, 39-351.

If an attorney is in fact not authorized to appear for a party, the latter may be relieved against the judgment by direct action in equity to set it aside: *Bryant v. Williams*, 21-329.

A junior lienholder may, for the purpose of establishing his right to redeem from the foreclosure under a senior mortgage, show that an agent or attorney who entered appearance for him, or accepted service, did so without authority, and this may be shown as against third persons purchasing at the sale: *Newcomb v. Dewey*, 27-381.

Attorney exceeding authority: The right to contest a judgment, on account of want of authority of the attorney appearing for a defendant not served, exists only when the want of authority is total, and not where an attorney, regularly employed, has merely exceeded his authority: *Harshey v. Blackmarr*, 20-161.

Ratification: A party claiming the benefit of a plea put in by an attorney cannot deny the authority of such attorney to act in the case: *Oltrogge v. Schutte*, 51-279.

Where an attorney accepted part payment in full satisfaction of a judgment procured for his client, and no further steps were taken for the enforcement of said judgment for eleven years, *held*, that it would be inferred that the attorney had authority to make such settlement or that the client was informed of his action, if without authority, and had by long silence ratified it: *Reed v. Dickinson*, 37-56.

The client, having ratified the act of the attorney appearing for him by paying him for his services, is bound by the judgment: *Ryan v. Doyle*, 31-53.

SEC. **321. Attorney's lien—notice.** An attorney has a lien for a general balance of compensation upon:

1. Any papers belonging to his client which have come into his hands in the course of his professional employment;

2. Money in his hands belonging to his client;

3. Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession

or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services;

4. After judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor, by entering the same in the judgment or combination docket opposite the entry of the judgment. [C. '73, § 215; R., § 2708; C. '51, § 1618.]

Liens in general: Two classes of liens are recognized at common law in favor of attorneys, namely, a retaining lien and a charging lien. A party owing money is not bound by a charging lien unless notified thereof. This section of the statute is a substantial enactment of the common law in this respect, and adds nothing thereto except the provision as to giving notice on the judgment docket. No such notice having been given at the time of the assignment of the judgment, the lien does not attach to the judgment as against the assignee: *Jennings v. Bacon*, 84–403.

When a statute has barred the right of an attorney to recover fees, his right to enforce a lien for such fees is also barred: *Larned v. Dubuque*, 86–166.

The statute is not extended by the provisions of the common law but is in lieu thereof and fixes the rights of the parties. The statute provides for the only lien to which an attorney is entitled and to obtain it the requirements of the statute must be observed: *Ward v. Sherbondy*, 65 N. W., 413.

Securities; assignment of: Where an attorney transfers to another securities on which he claims a lien, his assignee can only hold them for the reasonable value of the services rendered: *Collins v. Jennings*, 42–447.

Subject to rights under trust deed: Where a suit was commenced to subject the property and income of a corporation to the payment of bonds secured by deed of trust, and a receiver was appointed, *held*, that the attorney of the corporation had no lien on its funds for services rendered after commencement of suit which would have priority over the claims of the bondholders: *Des Moines Gas Co. v. West*, 50–16.

Burden of proof: Where money collected by an attorney was retained by him under the claim of a lien, *held*, that it was for him to aver and prove the services and their value: *Stanton v. Clinton*, 52–109.

Lien prior to garnishment: The lien of an attorney upon money due his client in the hands of the adverse party, attaches from the time of giving notice to such party, and his lien will not be postponed to a subsequent garnishment: *Myers v. McHugh*, 16–335.

Notice in writing: The notice of the lien to bind the adverse party must be in writing: *Phillips v. Germon*, 43–101.

Notice at commencement of suit: A notice of a claim for a lien is sufficient if inserted in the original notice of the action (at least if signed by the attorney in his individual capacity as well as in his capacity as attorney for his client): *Smith v. Chicago, R. I. & P. R. Co.*, 56–720.

Service of notice upon agent of corporation: While service of notice of attorney's lien, in an action against a corporation, might not be sufficient if made upon one of the class of agents upon whom service of original notice is authorized, yet if such service of notice of lien is upon one of such agents in connection with the service of the original notice, such service of notice of lien is sufficient, the service of the original notice being sufficient to charge such agent with a duty in relation to the matter: *Ibid.*

In action on tort: An attorney's lien may properly be claimed, not only in all actions on contract, but also in actions for damages arising from tort: *Ibid.*

For future services: The lien attaches, after proper notice, not only for services then rendered, but for those thereafter rendered: *Ibid.*

Settlement: The parties may settle without the consent of the attorneys, and without first paying their fees, unless notice of an attorney's lien has been given: *Casar v. Sargeant*, 7–317.

But if notice is given the lien will not be defeated by the fact that the case is settled without judgment having been rendered: *Smith v. Chicago, R. I. & P. R. Co.*, 56–720.

After the rendition of judgment and pending an appeal to the supreme court, the parties have the right to settle their case and if payment is made after notice of an attorney's lien, the person making payment will be liable for an attorney's fee estimated on the basis of the claim, but not on the basis of the judgment. The lien is not on the judgment but upon the claim, and the amount paid in settlement rather than the amount of the judgment is to be made the basis of estimating the compensation to be paid to the attorney: *Parsons v. Hawley*, 92–175.

The adverse party is charged with notice by the entry on the judgment docket, and from the time of such entry he cannot prejudice the rights of the attorney claiming a lien by settlement with his client. As the law does not give the lien on the judgment, but on the claim of the adverse party, or the money in the hands of such party, the lien will continue, although the judgment itself may be reversed on appeal. Also, *held*, that the fact that the entry on the judgment docket claimed the lien on the judgment and not on the money in the hands of the adverse party was immaterial: *Winslow v. Central Iowa R. Co.*, 71–197.

A creditor who makes settlement with his debtor of a claim in litigation does so at the peril of being thereafter compelled to pay to the attorney any sum due to him under his lien in such case: *Larned v. Dubuque*, 86–166.

Notice; set-off: An attorney's lien does not attach upon money due his client in the hands of the adverse party until notice is given to such party; therefore, *held*, that the right to set off a judgment existing in favor

of the adverse party against the client *before* notice of the attorney's lien was not subject to such lien. Whether such right of set-off may be taken advantage of as against the attorney's lien, where it does not arise until *after* notice of such lien, *quære*: *Hurst v. Sheets*, 21-501. (This case was under Rev., § 2708, which did not contain a provision similar to ¶ 4 of this section.)

The lien of an attorney is upon the interest of his client in the judgment, and it is subject to an existing right of set-off in the other party: *National Bank v. Eyre*, 3 McCrary, 175.

Subject to costs: An attorney cannot have a lien upon any greater amount than shall actually be found to be owing by the opposite party to his client. And where an attorney took an assignment of a judgment to secure his fees, *held*, that he stood in the shoes of his client, and must take the judgment with all the burdens, such as costs taxed in favor of the opposite party, etc., attaching by the course of the litigation: *Tiffany v. Stewart*, 60-207; *Watson v. Smith*, 63-228.

The supreme court cannot grant an attorney's lien on a judgment when such lien is not secured in the proceedings in the court below, as such relief would be the exercise of original jurisdiction: *Preston v. Daniels*, 2 G. Gr., 536.

Satisfaction of judgment; discharge of lien: After the entry of the notice in the judgment docket the attorney acquires an interest in the judgment, and may, by proper proceedings, have the same enforced to the extent of such interest. His interest cannot be divested by a discharge of the judgment by the parties, or by their consenting that it be set aside: *Brainard v. Elwood*, 53-30.

Although the statute now provides for an attorney's lien not only for money due his client in the hands of the adverse party, but also after judgment upon the judgment itself, yet the right to enforce the lien upon such judgment is barred after the right of action to recover his fees has become barred by the statute of limitations: *Larned v. Dubuque*, 86-166.

Where the attorney perfected the title of his client in real property attached in the action, and thereby satisfied the judgment as against the adverse party, *held*, that the entry of his lien in the judgment docket did not preserve it upon such property in the hands of a purchaser from his client: *Cowen v. Boone*, 48-350.

An attorney's lien does not attach to a judgment in favor of his client so as to give the attorney by virtue of an assignment of the judgment on which his lien has been filed priority over the right of the defendant in the judgment to have the same set off against a prior judgment held by the defendant against the plaintiff: *Benson v. Haywood*, 86-107.

The notice here provided for is effectual to create an attorney's lien only from the time it is served or given and operates to create a lien on money in the hands of the person who receives it subject to prior rights thereto: *Ward v. Sherbondy*, 65 N.W., 413.

Where the attorney, by authority of his client, releases of record the lien of the judgment in behalf of the client, the attorney cannot afterwards assert, as against a subsequent purchaser, any lien or interest in himself under such judgment: *Wishard v. Biddle*, 64-526.

Payment of money to clerk: A party cannot avoid the lien by unconditionally paying the money to the clerk; but he may pay it to the clerk to be held by him subject to such lien: *Fisher v. Oskaloosa*, 28-381.

SEC. **322. How lien released.** Any person interested may release such lien by executing a bond in a sum double the amount claimed, or in such sum as may be fixed by any district judge, payable to the attorney, with security to be approved by the clerk of the supreme or district court, conditioned to pay any amount finally found due the attorney for his services, which amount may be ascertained by suit on the bond. Such lien will be released, unless the attorney, within ten days after demand therefor, files with the clerk a full and complete bill of particulars of the services and amount claimed for each item, or written contract with the party for whom the services were rendered. [C. '73. § 216; R., § 2709; C. '51, § 1619.]

The filing of the bond discharges, not only the lien of the attorney on the judgment, but any lien which he may have under the preceding section. The provisions of § 331 do not apply to a case of this kind, and after the filing of the bond provided in this section and release of the attorney's lien, he cannot retain such lien by filing a bond as there provided: *Cross v. Ackley*, 40-493.

In an action by the client against the attorney to recover moneys collected by the attorney, the fact that the attorney is entitled to a portion of the money collected in payment for services will not render the proceeding one to discharge an attorney's lien in such sense as to make it necessary to tender a bond in order to obtain a release of the property: *Armitage v. Sullivan*, 69-426.

SEC. **323. License to practice may be revoked.** Any court of record may revoke or suspend the license of an attorney or counselor at law to practice therein, and a revocation or suspension in one county operates to the same extent in the courts of all other counties. [C. '73, § 217; R., § 2710; C. '51, § 1620.]

The court cannot revoke or suspend the license of an attorney except after proceedings are commenced for that purpose as hereinafter provided, and the party has had his day in court. It cannot be done summarily as a punishment for contempt: *State v. Start*, 7-499.

SEC. **324. Grounds of revocation.** The following are sufficient causes for revocation or suspension:

1. When he has been convicted of a felony, or of a misdemeanor involving moral turpitude; in either of which cases the record of conviction is conclusive evidence;

2. When he is guilty of a wilful disobedience or violation of the order of the court, requiring him to do or forbear an act connected with or in the course of his profession;

3. A wilful violation of any of the duties of an attorney or counselor as hereinbefore prescribed;

4. Doing any other act to which such a consequence is by law attached. [C. '73, § 218; R., § 2711; C. '51, § 1621.]

An attorney may be punished under ¶ 2 for disobedience to an order of court to pay over money to his client as provided in § 3826: *Cross v. Ackley*, 40-493, 498.

Charges in a particular case against an attorney for making false representations to clients for the purpose of retaining money collected and defrauding them, also for collecting and refusing to pay over money, to which the attorney pleaded guilty, *held* sufficient to justify an order suspending the attorney and providing in a certain contingency for his final disbarment: *Slemmer v. Wright*, 54-164.

SEC. **325. Proceedings—how begun.** The proceedings to remove or suspend an attorney may be commenced by the direction of the court, or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter, the accusation must be drawn up and sworn to by the person making it. [C. '73, § 219; R., § 2712; C. '51, § 1622.]

Proceedings to disbar an attorney are special proceedings in which the provisions for change of venue in civil actions are applicable: *State v. Clarke*, 46-155.

It is probable that the court could, in the exercise of its inherent authority, require a member of the bar to discharge the duty of conducting the prosecution of a proceeding for disbarment. But the exercise of such authority rests in the sound discretion of the judge, and the persons commencing the disbarment proceedings could not object to the action of the court in refusing to make such appointment: *Byington v. Moore*, 70-206.

In proceeding against an attorney for contempt the accusation should specify the manner in which the contempt was committed: if by words, the words used should be set out; if by acts they should be described: *Perry v. State*, 3 G. Gr., 550.

SEC. **326. Notice.** If the court deem the accusation sufficient to justify further action, it shall cause an order to be entered requiring the accused to appear and answer on a day therein fixed, either at the same or a subsequent term, and shall cause a copy of the accusation and order to be served upon him personally. [C. '73, § 220; R., § 2713; C. '51, § 1623.]

SEC. **327. Pleading—trial—evidence preserved.** To the accusation he may plead or demur, and the issues joined thereon shall, in all cases, be tried by the court, all the evidence being reduced to writing, filed and preserved. [C. '73, § 221; R., § 2714; C. '51, § 1624.]

SEC. **328. Plea of guilty or failure to plead—judgment.** If the accused plead guilty, or fail to answer, the court shall proceed to render such judgment as the case requires. [C. '73, § 222; R., § 2715; C. '51, § 1625.]

SEC. **329. Appeal.** In case of a removal or suspension being ordered, an appeal therefrom lies to the supreme court, and all the original papers, together with a transcript of the record, shall thereupon be transferred to the supreme court, to be there considered and finally acted upon. A judgment of acquittal by a court of record is final. [C. '73, § 223; R., § 2716; C. '51, § 1626.]

SEC. **330. Retention of money—misdemeanor.** An attorney who receives the money or property of his client in the course of his professional business, and refuses to pay or deliver it in a reasonable time, after demand, is guilty of a misdemeanor. [C. '73, § 224; R., § 2717; C. '51, § 1627.]

SEC. **331. When not guilty.** When the attorney claims to be entitled to a lien upon the money or property, he is not liable to the penalties of the preceding section until the person demanding the money proffers sufficient security for the payment of the amount of the attorney's claim, when it is legally ascertained. Nor is he in any case liable as aforesaid, provided he gives sufficient security that he will pay over the whole or any portion thereof to the claimant when he is found entitled thereto. [C. '73, §§ 225–6; R., §§ 2718–19; C. '51, §§ 1628–9.]

The bond here provided is only to exempt an attorney from proceedings against him under this section, and is not designed to enable him to retain a lien which is discharged by the bond referred to in § 322: *Cross v. Ackley*, 40–493.

CHAPTER 11.

OF JURORS.

SECTION **332. Competency to act.** All qualified electors of the state, of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, and who can speak, write and read the English language, are competent jurors in their respective counties. [26 G. A., ch. 61, § 1; 25 G. A., ch. 70, § 1; C. '73, § 227; R., § 2720; C. '51, § 1630.]

Under certain facts, *held*, that a juror was incompetent as not being a qualified elector; also *held*, that an objection to the competency of a juror should be interposed when he is sworn, but, if not then known, may be interposed after verdict: *State v. Groome*, 10–308.

As to who are electors, see Const., art. II, § 1.

A judgment rendered upon a verdict by a jury, some members of which are disqualified, is erroneous, but not void; it might be reversed upon appeal, but it cannot be disregarded as a nullity. *Foreman v. Hunter*, 59–550.

The former requirement that jurors be chosen from the body of the county was intended to prevent the selection of jurors resident out of the county, and did not require that jurors should be taken from all parts of the county; therefore, *held*, that a statute authorizing the holding of the district court in two places in a county, and providing that when held at one of these places the jurisdiction should be limited to certain townships, and the jurors should be selected from only these townships, did not interfere with the right of trial by jury: *Trimble v. State*, 2 G. Gr., 404.

SEC. **333. Who exempt.** The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States or this state; all practicing attorneys, physicians, registered pharmacists, and clergymen; all acting professors or teachers of any college, school or other institution of learning; and all persons disabled by bodily infirmity, or over sixty-five years of age; active members of any fire company; and any person who is conscientiously opposed to acting as a juror because of his religious faith. [26 G. A., ch. 61, § 2; C. '73, § 228; R., § 2721; C. '51, § 1631.]

The exemption is a personal privilege, which may be waived, and is not a ground for challenge: *State v. Adams*, 20–486; *State v. Edgerton*, 69 N. W., 280. See § 3692.

SEC. **334. Who may be excused—false statements punished.** Any person may also be excused from serving on a jury when his own interests or those of the public will be materially injured by his attendance, or when the state of his own health, or the death or sickness of a member of his family, requires his absence from court. Any person who knowingly makes any false affidavit, statement or claim, for the purpose of relieving himself from serving as a juror, or any person who requests the judges of election to return his name as such juror, shall, upon conviction, be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days, or the court may punish such person as for contempt. [26 G. A., ch. 61, § 3; 25 G. A., ch. 70, § 4; C. '73, § 229; R., § 2722; C. '51, § 1632.]

That jurors have been excused on their own statements, not under oath, is not ground of objection by the defendant in a criminal case, and he cannot have an attachment issued to compel the attendance of those so excused: *State v. Ostrander*, 18–435, 448.

SEC. **335. Lists to be made annually.** There shall annually be made lists from which to select persons to serve as grand and petit jurors and talesmen for the year commencing on the first day of January following, as follows: Seventy-five persons in each county from which to select grand jurors, four hundred persons in each county, having twenty thousand inhabitants or less, and eight hundred persons in counties having more than twenty thousand inhabitants, from which to select petit jurors; one hundred and fifty persons in counties having twenty thousand inhabitants or less, and three hundred persons in counties having more than twenty thousand inhabitants, from which to select talesmen. The talesmen list shall be made from names of persons who reside in the city or town in which the district court is held and the township or townships in which such city or town is located; but, if according to the last state or national census there be less than one thousand inhabitants in the territory from which talesmen are required to be drawn, such lists may include residents of another township next nearest to the court-house. In counties where court is held in more than one place, the persons shall be selected from the qualified electors of the separate divisions of the county, giving to each division of the county the number of grand and petit jurors and talesmen it would be entitled to under this act if it were a separate county. [26 G. A., ch. 61, § 4; C. '73, § 234; C. '73, § 244; R., § 2738.]

SEC. **336. Auditor to apportion.** On or before the first Monday in September in each year, the county auditor shall apportion the number of grand and petit jurors to be selected among the several election precincts, and the talesmen among the precincts from which the same are to be drawn, in each case as nearly as practicable in proportion to the number of votes polled in such precincts at the last general election. [26 G. A., ch. 61, § 5; C. '73, § 236; R., § 2725; C. '51, § 1635.]

A substantial compliance with such provisions *held* sufficient: *State v. Edgerton*, 69 N. W., 280; *State v. Pierce*, 58 N. W., 891.

SEC. **337. Judges of election to return names—if they fail, supervisors supply names.** The auditor shall, at the time of furnishing the poll-books to the judges of election, furnish them also a statement of the number of persons apportioned to their respective precincts to be returned for each of the said jury lists, together with the names of all persons who have served as grand or petit jurors since January first preceding, which latter names shall be furnished to him by the clerk of the district court. The judges shall thereupon make the requisite selection, and return lists of names so selected to the auditor with the returns of elections; and in case the judges of election shall fail to make and return said lists as herein required, the board of supervisors shall, at the meeting held to canvass the votes polled in the county, make such lists for the delinquent precincts, and the auditor shall file such lists in his office, and cause a copy thereof to be recorded in the election book. Such lists shall be composed only of persons competent and qualified to serve as jurors; and the judges of election or boards of supervisors shall omit from said lists the name of any person who has served as a grand or petit juror in a court of record since January first preceding. And if the name of any such person is returned, the fact that he has requested to be so returned, or has served as such juror in a court of record during the jury year, as defined in this chapter, shall be a ground for challenge for cause. The members of the election board, or the board of supervisors, when certifying to such lists, shall state that the lists do not contain the name of any person who requested, directly or indirectly, that his name appear thereon. If the boundaries of any voting precinct shall be changed, it shall be the duty of the auditor, in making the appor-

tionment of grand and petit jurors and talesmen, to assign to the new voting precincts the total number of grand and petit jurors and talesmen to which all the former precincts affected by the change were entitled, giving to each new precinct an equal number, as nearly as possible. [26 G. A., ch. 61, § 6; C. '73, § 238; R., §§ 2727–8; C. '51, §§ 1637–8.]

A failure to record the names returned on the grand jury list does not invalidate proceedings of the grand jury drawn therefrom: *State v. Knight*, 19–94; *State v. Howard*, 10–101.

Where the judges of election and county canvassers each failed to make out and return names of jurors for one election precinct, but two names were supplied by the board of supervisors, which two jurors, however, were not drawn upon the grand jury, *held*, that the irregularity did not vitiate an indictment: *State v. Brandt*, 41–593.

No formal certificate of the judges to the lists so returned is necessary, though it would be proper. Where the record in the record book shows due and proper selection, the presumption is that such record was the result of the list duly made. When the law has been substantially complied with, an indictment should not be set aside for slight irregularities in such matters: *State v. Ansaleme*, 15–44.

It is not required that the records of the board of canvassers shall show that the selection of jurymen was made for precincts from which no returns were sent in: *State v. Carney*, 20–82.

A substantial compliance with the provisions of the law relating to the selection of jurymen is all that is required: *Ibid.*

SEC. **338. Auditor and clerk prepare ballots.** On or before the first Monday in December in each year, the county auditor and clerk of the district court shall prepare from said lists separate ballots, containing the names and places of residence of all persons so returned by the judges of election or board of supervisors, keeping the names of the several classes of jurors separate, and deposit in separate boxes the ballots of the grand jurors, petit jurors and talesmen, as returned on said lists, which boxes shall be plainly marked, sealed and forthwith deposited with the clerk of the district court. In preparing the lists as herein provided, the county auditor and clerk shall omit therefrom the names of all persons who have served as grand or petit jurors since January first preceding. [26 G. A., ch. 61, § 7; 17 G. A., ch. 184; C. '73, § 240; R., § 2730; C. '51, § 1640.]

As to previous provisions as to persons who have served within a year, see *State v. Standley*, 76–215; *Barnes v. Newton*, 46–567.

SEC. **339. Grand jurors—panel of twelve for each year.** Twelve persons shall be drawn from the grand jury list, and shall constitute the panel from which to select grand jurors for one year; but no more than one person shall be drawn as grand juror from any civil township, except when there are less than twelve civil townships in the county, in which case not more than two persons shall be drawn from any one township. No person shall be summoned or serve as grand juror for two consecutive years. If more persons shall be drawn from any civil township than is hereby authorized, or any person is drawn who has served during the preceding jury year as grand juror, it is the duty of the officer drawing such grand jury to reject all such names so drawn, and to proceed with the drawing until the required number of jurors shall be secured. [26 G. A., ch. 61, § 8; 21 G. A., ch. 42, § 2; C. '73, § 241; R., §§ 2731, 2733; C. '51, §§ 1641, 1643.]

Under former provisions, *held*, that the return of a larger number of names of persons to serve as grand jurors was an irregularity only, the extra names having been struck off before the grand jury was drawn: *State v. Knight*, 19–94.

The provision that there should not be two grand jurors from the same township, *held* not directory only but mandatory, and that a failure to comply with such requirement might be taken advantage of by motion to set aside the indictment, where the defendant had not had an opportunity to challenge the grand jury: *State v. Russell*, 58 N. W., 915.

SEC. **340. Clerk draws seven for each term.** The names of twelve persons constituting the panel of the grand jury shall, on the second day of each term of court, unless otherwise ordered by the court or judge, be placed by the clerk in a box, and, after thoroughly mixing the same, he shall draw therefrom seven names; and the persons so drawn shall constitute the grand

jury for that term. Should any of the persons so drawn be excused or fail to attend on said second day of the court, the clerk shall draw other names until the seven grand jurors are secured. [26 G. A., ch. 61, § 9.]

SEC. **341. Petit jurors—new panel each term.** Petit jurors shall be drawn from the petit jury lists for each term, but no person shall be required to attend as a petit juror more than one term in the same year. But this exemption shall not apply to talesmen. [26 G. A., ch. 61, § 10; C. '73, § 239; R., § 2729; C. '51, § 1639.]

SEC. **342. When, how, and by whom drawn.** At least twenty days prior to the first day of each term at which a grand or petit jury is required to be selected, the county auditor, clerk of the district court and recorder shall meet at the court-house and proceed to draw the grand and petit jurors as provided herein. The ballots, when placed in the respective boxes from which the drawings are to be made, shall be uniform in size and paper, and be so folded as to conceal the names on the ballots, and the boxes shall be arranged with only an aperture to insert the hand, and at the time of the drawing the boxes shall be thoroughly shaken in the presence of the officers attending the drawing, and the seal on the aperture broken in their presence, and one of the said officers shall then, without looking at the ballots, draw one from the appropriate petit jury or grand jury box, as the case may be, and pass it to one of the other officers attending the drawing, who shall open it, and the name thereon shall be read aloud by him and taken down; then another ballot shall be drawn and opened in the same manner until the whole number of jurors required shall be drawn for each class, when the boxes shall again be sealed up and returned to the clerk of the district court, who shall immediately issue his precept to the sheriff of the county, commanding him to summon the persons so drawn to appear at the court-house at the time designated in such precept, or, if the court shall determine that either the grand or petit jurors have been illegally drawn, selected or summoned the court may set aside the precept under which they were summoned, and direct a sufficient number drawn and summoned in the manner above provided. Such drawing may proceed forthwith, and the jurors so drawn be required to appear immediately, or at such time as the court may fix. [26 G. A., ch. 61, § 11; 25 G. A., ch. 70, § 6; 21 G. A., ch. 42, § 2; C. '73, § 241; R., §§ 2731, 2733; C. '51, §§ 1641, 1643.]

Under prior provisions, *held*, that a direction that the drawing be by the sheriff was not complied with by a drawing by his deputy: *State v. Brandt*, 41–593; *Dutell v. State*, 4 G. Gr., 125; also that on failure of the panel to appear, the requisite number of grand jurors should be selected from the body of the county: *State v. Beste*, 91–565.

Grand jury: Provisions as to the drawing of jurors are directory and in a particular case *held*, that there was sufficient compliance with the law to render the drawing legal: *State v. DeBord*, 88–103.

While the provisions of the law in regard to the mode of obtaining jurors are directory, yet the drawing should be in substantial conformity thereto: *State v. Beckey*, 79–368.

SEC. **343. Sheriff to summon.** The sheriff shall immediately obey such precepts, and on or before the day for the appearance of said jurors must make return thereof, and, on a failure to do so without sufficient cause, may be punished for contempt. [26 G. A., ch. 61, § 12; C. '73, § 242; R., § 2734; C. '51, § 1644.]

Under prior provisions, *held*, that service of precept might be made by deputy sheriff and special bailiffs: *State v. Arthur*, 39–631.

SEC. **344. Grand jurors summoned but once.** Except when required at a special term, the twelve persons from which the grand jury is to be impaneled need not be summoned after the first term, but must appear at each succeeding term during the year without summons, under the same penalty as though they had been summoned. [26 G. A., ch. 61, § 13; C. '73, § 243; R., § 2736; C. '51, § 1646.]

See *State v. Braskamp*, 87–588, decided under prior provisions.

Where a term of the district court began on December 8, 1884, grand jurors empaneled for 1884 were held competent to return an indictment after January 1, 1885, but during the same term: *State v. Winebrenner*, 67–230.

SEC. **345. When to appear—excuses—contempt.** Unless the court or judge otherwise orders, jurors shall be summoned to appear at each place where court is to be held at ten o'clock a. m. of the second day of the term, at which time they shall be called, and all excuses shall be heard and determined by the court, but the impaneling of the grand or petit juries may be postponed to a subsequent day by order of the court or judge. If any person summoned fail to appear without sending a sufficient excuse, the court may issue an order requiring him to appear and show cause why he should not be punished for contempt, and unless he render a sufficient excuse for such failure he may be punished for contempt. [26 G. A., ch. 61, § 14; C. '73, § 230; R., § 2735; C. '51, § 1645.]

This provision as to summoning jurors is not applicable to grand jurors at a subsequent term to that at which they are first summoned to appear, and during the same year: *State v. Standley*, 76–215. And see § 344.

SEC. **346. Number of jurors to be drawn.** The grand jury shall be composed of seven members. The petit jurors, in counties containing a population of less than fifteen thousand, shall be fifteen in number, unless the court or judge otherwise orders. In counties having fifteen thousand or over, the number shall be twenty-four, unless the court or judge otherwise orders. When a single county constitutes a district, the court may increase the number, not to exceed seventy-two. [26 G. A., ch. 61, § 15; 21 G. A., ch. 128, § 2; 21 G. A., ch. 42, § 1; C. '73, § 231; R., § 2732; C. '51, § 1642.]

The statute (21 G. A., ch. 42) passed in pursuance of an amendment to the constitution (see art. V, § 15), reducing the number of grand jurors, was not unconstitutional for lack of uniformity and though by its terms it was not to affect juries empaneled prior to January 1, 1887, yet it applied to juries empaneled after that date although the venires for such juries had been issued and served prior to that date: *State v. Standley*, 76–215.

The provision that when the grand jury consists of five members an indictment may be found upon the concurrence of four jurors is not in conflict with the constitution, on the ground that it authorizes an indictment to be found by less than the smallest number of which the grand jury can be composed: *State v. Salts*, 77–193.

The population of a county, for the purpose of ascertaining the number of jurors to be chosen, is to be determined from the last preceding census the results of which can be ascertained and judicial notice is to be taken of what the population is according to such census: *State v. Braskamp*, 87–588.

The fact that the population of the county at the time the grand jury was empaneled by a census already taken appeared to be slightly in excess of 16,000 so that a grand jury of seven should have been empaneled, whereas the grand jury consisted of only five, *held*, that such error did not deprive the court of jurisdiction under the indictment and such defect could not be taken advantage of after judgment on a plea of guilty: *State v. Belvel*, 89–405.

SEC. **347. Others drawn when necessary.** Should the number of petit jurors summoned fail to appear, or be excused as provided in this chapter, the requisite number shall be drawn in the same manner as the original panel, and the persons so drawn shall be forthwith summoned to appear and serve as jurors during the term. Persons so drawn shall have the right to present excuses as provided for the original panel. The court or judge thereof, either before or during the term, may order as many additional jurors drawn for the term, or for the trial of any particular case, as may be deemed necessary, which drawing shall be in the same manner as for the original and regular panel, so far as applicable. [26 G. A., ch. 61, § 16; C. '73, § 232; R., § 2737; C. '51, § 1647.]

Under a similar section of Code of '73, *held*, that the provision for a second drawing was directory only and a failure to comply with it was not a ground of challenge to the panel: *Buford v. McGetchie*, 60-298; nor of reversal: *Brentner v. Chicago, M. & St. P. R. Co.*, 68–530; *State v. Rockwell*, 82–429; also that it was not applicable to a criminal case where the panel had been exhausted by challenges: *State v. Ryan*, 70–154.

As to prior provisions for filling the panel, see *State v. Pierce*, 8–231; *State v. Arthur*, 39 –631; *Emerick v. Sloan*, 18–139; *State v. Hart*, 67–142.

SEC. **348. Court controls number.** If in the judgment of the court the business of the term does not require the attendance of all the petit

jurors, such number as the court deems proper may be discharged. Should it afterwards appear that a jury is required, the court may direct them to be resummoned. [26 G. A., ch. 61, § 17; C. '73, § 233.]

Where the court discharged all but eighteen of the jury, and afterwards a larger number becoming necessary caused additional jurors to be summoned from the bystanders, *held*, that the proceeding was not erroneous: *State v. McCahill*, 72-111.

SEC. **349. Talesmen—when and how drawn—waiver.** If, upon the trial of any cause, the court shall determine that it is probable talesmen will be needed to complete the jury, or if the regular panel has been exhausted, the clerk shall, in the presence of the court, draw such number of names as the court may order from the talesmen box to complete the jury. In drawing such names, the clerk, when the court directs, shall reject those known to be unable to serve or absent from the territory from which drawn, and proceed until the required number is secured. The persons whose names are so drawn, or as many thereof as may be found within the territory from which talesmen are selected, shall be immediately summoned by the sheriff to appear forthwith, and the jury shall be completed from the persons so summoned and appearing. The names of jurors so drawn, and who serve, shall be placed in a safe receptacle from time to time, until all the ballots are drawn from the talesmen's box, when such ballots shall be returned to the said box, to be drawn in like manner as before. When the parties to the cause, by agreement entered of record, waive the drawing of talesmen as above provided, the court may direct the sheriff to summon such talesmen from the body of the county. [26 G. A., ch. 61, § 18; 25 G. A., ch. 70, § 7.]

SEC. **350. Disposition of ballots drawn.** All ballots drawn, when the persons do not appear or do not serve (except when permanent disability is shown), shall be returned to the respective boxes from which drawn, but the ballots of the petit jurors, except talesmen, so drawn, who appear and serve for any term, shall be destroyed. [26 G. A., ch. 61, § 19; 25 G. A., ch. 70, § 7.]

SEC. **351. Special venire in lieu of talesmen.** When a city or town is a party to a suit, the talesmen shall not be drawn therefrom, but in such cases the court shall order a special venire, or may order the talesmen drawn from the petit jury box. [26 G. A., ch. 61, § 20.]

SEC. **352. Failure of officer—misdemeanor.** Any officer whose duty it is to perform any of the services in this chapter mentioned, who shall intentionally fail to perform them as required by law, or who shall act corruptly in the discharge of such duties or any of them, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be imprisoned not less than six months, nor more than one year. [26 G. A., ch. 61, § 21; 25 G. A., ch. 70, § 9.]

SEC. **353. Compensation of jurors—how secured.** At the close of each term of the district court, the clerk shall make out a certificate to each juror of the amount to which he is entitled for his services, and, on the presentation of such certificate, the county auditor shall issue to each juror a warrant for said amount on the county treasury, without the same being audited by the board of supervisors. [26 G. A., ch. 61, § 22; 15 G. A., ch. 16; C. '73, § 245; R., § 2739; C. '51, § 1649.]

SEC. **354. Fees of jurors.** Jurors shall receive the following fees:

1. For each day's service or attendance in courts of record, two dollars, and for each mile traveled from his residence to the place of trial, the sum of ten cents;
2. For each day's service before a justice of the peace, one dollar.
3. No mileage shall be allowed talesmen or jurors before justices.

Immediately after the adjournment of each term of a court of record, the clerk thereof shall certify to the county auditor a list of the jurors, with

the number of days' attendance to which each one is entitled. [C. '73, § 3811; R., § 4154; C. '51, § 2545.]

Where a case before a justice of the peace is commenced in one week and extends into the next, Sunday should not be computed in the number of days of service: *Anson v. Dwight*, 18-241.

The clerk is not entitled to any fees for drawing the certificates for jurors' fees: *Palo Alto County v. Burlingame*, 71-201.

CHAPTER 12.

OF SECURITIES AND INVESTMENTS.

SECTION **355. Security to be by bond.** Whenever security is required to be given by law or by order or judgment of a court, and no particular mode is prescribed, it shall be by bond. [C. '73, § 246; R., § 4113; C. '51, § 2505.]

SEC. **356. To whom payable.** Such security, when not otherwise directed, may, if for the benefit of individuals, be given to the party intended to be secured thereby; if in relation to the public matters concerning the inhabitants of one county or part of a county, it may be made payable to the county; if concerning the inhabitants of more than one county, it may be made payable to the state, but a mere mistake in these respects will not vitiate the security. [C. '73, § 247; R., § 4114; C. '51, § 2506.]

The giving of a bond to the "people of Woodbury county," instead of to the county, *held* not such a mistake as to vitiate the security: *Charles v. Haskins*, 11-329.

The fact that a bond which should be executed to a county is executed to parties who are in fact intended to be secured will not render it void: *Carnegie v. Hulbert*, 70 Fed., 209.

SEC. **357. Defects rectified.** No defective bond or other security or affidavit in any case shall prejudice the party giving or making it, provided it be so rectified, within a reasonable time after the defect is discovered, as not to cause essential injury to the other party. [C. '73, § 248; R., § 4119; C. '51, § 2511.]

So *held* in case of appeal bond on appeal from the county court: *Mitchell v. Goff*, 18-424; and *held* applicable to a bond on appeal from a justice of the peace: *Brock v. Manatt*, 1-128.

Section applied: *Clarke v. Riddle*, 70 N. W., 207.

As to amendment in cases of bond or affidavit for attachment, see notes to § 3933.

SEC. **358. Qualifications of sureties.** The surety in every bond provided for or authorized by law must be a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured, except as otherwise provided by law. Where there are two or more sureties in the same bond, they must in the aggregate have the qualification prescribed in this section. [C. '73, § 249; R., § 4126.]

The corresponding section of the Code of '73 was said to be applicable only to bonds authorized by that Code and not those provided for by subsequent statutes: *Carnegie v. Hulbert*, 70 Fed., 209.

The surety will not be heard to say that he does not possess the statutory qualifications: *Ibid.*

That an attorney should not be received as surety, see § 3851.

SEC. **359. Affidavit of sureties—effect of—guarantee companies as sureties.** The officer whose duty it is to take a surety in any bond provided for or authorized by law shall require the person offered as surety to make affidavit of his qualification, which affidavit may be made before such officer, or other officer authorized to administer oaths. The taking of such an affidavit shall not exempt the officer from any liability to which he might otherwise be subject for taking insufficient security. Any company

engaged in the business of becoming surety upon bonds shall file, with the clerk of any county in which it shall do business, a certificate from the state auditor that it has complied with the law and is authorized to do business in this state; and, should said authority be withdrawn at any time, the state auditor shall at once notify the clerk of each district court to that effect. The clerk shall keep a book, properly indexed, in which shall be recorded all such certificates and revocations. [C. '73, § 250; R., § 4125.]

Negligence in approving bond: The clerk of the courts is liable for injury resulting from his negligence in approving the sureties on a bond required to be approved by him, if the party injured is without fault. But it will be otherwise if there is also negligence on the part of complainant: *Parks v. Davis*, 16–20.

The clerk may be liable for taking insufficient surety on a stay bond, and taking the affidavit of the surety as to his qualification does not exempt the officer approving the bond from liability in accepting insufficient security: *Hubbard v. Switzer*, 47 681.

The action of an officer approving and accepting a bond may be either judicial or ministerial, depending upon the particular thing he is required to do; and *held*, that the action of a clerk in accepting and approving a stay bond after expiration of the time limited by statute was judicial: *Maynes v. Brockway*, 55–457.

An action for damages for negligence of an officer in approving a stay bond does not accrue until the expiration of the stay: *Steel v. Bryant*, 49–116; *Moore v. McKinley* 60–367.

Where a clerk approved a stay bond upon a certificate of the clerk of another county as to the sufficiency of the surety, and indorsed a statement on the back of the bond that the surety thereon was responsible, and it afterwards appeared that the bond had not been, in fact, signed by the surety whose name appeared thereto, *held*, that the certificate being as to the responsibility of the surety and not as to the genuineness of his signature, the clerk making such certificate was not liable for loss occasioned by reason of the acceptance of the same: *Bringolf v. Burt*, 44–184.

The fact that the clerk makes inquiry of the surety as to the value of his property, and is informed that it is sufficient, does not relieve him from liability in approving a a bond, nor will he be relieved by the fact that he assured the party complaining that he would disregard the bond and issue execution upon evidence showing its sufficiency, and the further fact that no motion for additional security was made in court by such party, and refused: *Haverly v. McClelland*, 57–182.

The clerk will be liable for negligence of his deputy in approving a bond with insufficient security, and will have an action over against such deputy on his bond for the damages. The fact that the principal has previously accepted the same surety on other bonds will not relieve the deputy from liability: *Moore v. McKinley*, 60–367.

The members of the board of supervisors are not liable for damages resulting from the approval of an insufficient bond, when their action results from an honest mistake or error of judgment, whether of law or fact; but they are personally liable for neglect, carelessness and official misconduct in such matters: *Wasson v. Mitchell*, 18–143.

Under a statute requiring a bond to be approved by certain officers, it was held that in a suit thereon it was unnecessary to aver and prove such approval in the first instance: *State v. Fredericks*, 8–553.

SEC. **360. When guarantee company may be accepted as surety.** Whenever any person who now or hereafter may be required or permitted to give a bond applies for the approval thereof, any officer or body who is now or shall hereafter be required to approve the sufficiency of such bond shall accept and approve the same, whenever its conditions are guaranteed by a company or corporation duly organized or incorporated under the laws of this state, or authorized to do business therein, and to guarantee the fidelity of persons holding positions of public or private trust, or secure any bond above referred to, and which company shall have the certificate of the auditor of state authorizing it to do business therein, as provided in chapter four of title nine of this code. The certificate of the auditor of state, to the effect that such company has complied with the requirements of said chapter and title and is authorized to do business in this state, shall be sufficient evidence to authorize the officer or body having the approval of such bond to accept and approve the same, but no such security shall be accepted on any bond for an amount in excess of ten per cent. of the paid up cash capital of such company or corporation; but nothing herein contained shall apply to bonds in criminal cases. [21 G. A., ch. 157, §§ 1, 5.]

SEC. **361. Release from liability—same as private persons.** Such company or corporation may be released from its liability as such surety on any bond on the same terms and conditions, and in the same manner, as

is by law prescribed for the release of natural persons as such sureties; it being the intent of this chapter to enable companies created, incorporated or chartered for such purposes to become surety on bonds required by law, subject to all the rights and liabilities of natural persons. [21 G. A., ch. 157, § 2.]

SEC. **362. Suit on bond of guarantee company—notice.** Whenever suit is required to be brought on any bond given by such company, service shall be had upon any agent of such company in this state, and if there is no agent in the state, then service may be had by serving the auditor of state fifteen days before the term of court in which the suit is sought to be brought, and it shall be the duty of the auditor of state, upon service being made upon him, to immediately mail a copy of such notice to such company at their principal place of business, and any notice so served shall be deemed to be good and sufficient service on any such company. [21 G. A., ch. 157, § 3.]

SEC. **363. Estoppel—stockholders liable.** Any company which shall execute any bond as surety under the provisions of this chapter shall be estopped, in any proceeding to enforce the liability which it shall have assumed to incur, to deny its corporate power to execute such instrument or assume such liability; and the private property of the stockholders shall be liable for the debts of the corporation to the full amount of the capital stock held by such stockholders. [21 G. A., ch. 157, § 4.]

SEC. **364. Investments—in what to be made.** Where investments of money are directed to be made, and no mode of investment is pointed out by statute, they must be made in the stocks or bonds of this state, or of those of the United States, or upon bond or mortgage of real property of the clear unencumbered value of at least twice the investment. [C. '73, § 251; R., § 4115; C. '51, § 2507.]

SEC. **365. Security not to be changed without order.** When such investment is made by order of any court, the security taken shall in no case be discharged, impaired or transferred without an order of the court to that effect, entered on the minutes thereof. [C. '73, § 252; R., § 4116; C. '51, § 2508.]

SEC. **366. Duty of investor under order.** The clerk or other person appointed in such cases to make the investment must receive all moneys as they become due thereon, and apply or reinvest the same under the direction of the court, unless the court appoints some other person to do such acts. [C. '73, § 253; R., § 4117; C. '51, § 2509.]

SEC. **367. Must account annually.** Once in each year, and oftener if required by the court, the person so appointed must, on oath, render to the court an account in writing of all moneys so received by him, and of the application thereof. [C. '73 § 254; R., § 4118; C. '51, § 2510.]

SEC. **368. When court may order money or property deposited.** When it is admitted by the pleadings, or shown by the examination of a party, that he has in his possession, or under his control, any money or property capable of delivery, which is in any degree the subject of litigation, and which is held by him as trustee for another party, the court, or judge thereof, may order the same to be deposited in the office of the clerk, or delivered to such party, with or without security, subject to the further direction of the court; or may order such money to be deposited in a bank, with the consent of the parties in interest, to the credit of the court in which the action is pending, and the same shall be paid out by such bank only upon the check of the clerk, annexed to a certified copy of the order of the court directing such payment. [C. '73, § 255; R., § 3416.]

Where property is by a court ordered to be sold in the satisfaction of a claim, as against a guardian who is the owner of such property, that it was wrongfully purchased by funds belonging to the ward's estate, it is proper to order that the money realized from such sale be paid to the clerk: *Reed v. Lane*, 65 N. W., 380.

SEC. **369. When order disobeyed.** Whenever a court, or judge in the exercise of its or his authority, has ordered the deposit or delivery of money or other property, and the order is disobeyed, such court or judge, besides punishing the disobedience, may make an order requiring the sheriff to take the money or property, and deposit or deliver it in conformity with the directions of the court or judge, and in such cases he has the same power as when acting under an order for the delivery of personal property. [C. '73, §§ 256–7; R., §§ 3417–18.]

SEC. **370. Administrator, trustee, etc., may deposit with clerk —effect.** Whenever any administrator, guardian, trustee or referee shall desire to make his final report, and shall then have in his possession or under his control any funds, moneys or securities due, or to become due, to any heir, legatee, devisee or other person, the payment of which might then be made to such heir, legatee, devisee or other person, if living or present within the county where such appointment as administrator, guardian, trustee or referee was made, such funds, moneys or securities may be deposited with the clerk of the district court of the county wherein such appointment was made, and, if he shall otherwise discharge all the duties imposed upon him by such appointment, he may take the receipt of the clerk of the district court for such funds, moneys or securities so deposited, which receipt shall specifically set forth from whom said funds, moneys or securities were derived, the amount thereof, and the name of the person to whom due or to become due, if known. Thereupon said administrator, guardian, trustee or referee may file such receipt with his final report, and, if it shall be made to appear to the satisfaction of the court that he has in all other respects complied with the law governing his appointment and duties, the court may approve such final report and enter his discharge; but notice of such contemplated deposit, and of final report, shall be given for the same time and in the same manner as is now required in cases of final report by administrators. [22 G. A., ch. 41, § 1.]

SEC. **371. Duty of clerk in such cases.** The clerk of the district court with whom any deposit of funds, moneys or securities shall be made, as provided in the preceding section, shall enter in a book, to be provided and kept for that purpose, the amount of such deposit, the character thereof, the date of its deposit, from whom received, from what source derived, to whom due or to become due, if known. He shall be liable upon his bond for all funds, moneys or securities which may be deposited with him under the provisions of this chapter. If the funds, moneys or securities so deposited with the clerk shall not be paid to the person or persons to whom the same is due, or to become due, within one year from the date of its deposit, the clerk shall then deposit such funds, moneys or securities with the county treasurer for the use of the county wherein such appointment was made, taking the treasurer's receipt therefor, countersigned by the county auditor, who shall thereupon charge upon the books of his office and against the treasurer the amount named in such receipts. [Same, § 2.]

SEC. **372. Duty of treasurer.** Whenever any funds, moneys or securities shall be deposited with the county treasurer, as provided in this chapter, he shall enter in a book, provided and kept for that purpose, the date of such deposit, the amount thereof, from whom received, the source from which derived, and the name of the person to whom the same is due or to become due, if known. Whenever the claimant therefor, upon proper application made to the district court, shall satisfactorily show to such court that he is the rightful owner of said funds, moneys or securities and entitled thereto, the court, by order entered of record, shall direct the county auditor to issue a warrant on the county treasurer for said money, funds or securities, and, upon such order, the said treasurer shall pay to the person named in such order the funds, moneys or securities to which the claimant shall have shown himself entitled. [Same, § 3.]

CHAPTER 13.

OF NOTARIES PUBLIC.

SECTION **373. Appointment—commissions expire—notice.** The governor may appoint and commission one or more notaries public in each county, and may at any time revoke such appointment. The commissions of all notaries public heretofore or hereafter issued prior to the fourth day of July, A. D. 1900, shall expire on that day, and commissions subsequently issued shall be for no longer period than three years, and all such commissions shall expire on the fourth day of July in the same year. The secretary of state shall, on or before the first day of June, A. D. 1900, and every three years thereafter, notify each notary when his commission will expire. [C. '73, § 258; R., § 195; C. '51, § 78.]

A notary public is a public officer, and the acts of one who is such *de facto*, though not *de jure*, cannot be collaterally assailed; therefore, *held*, that a deposition taken by a *de facto* notary could not be suppressed on the ground that such notary had not qualified as required by law: *Keeney v. Leas*, 14–464.

A court will take judicial notice of the official character of a notary public, and of the county for which he is appointed: *Rowland v. Brown*, 75–679.

SEC. **374. Conditions.** Before any such commission is delivered to the person appointed, he shall:

1. Procure a seal, on which shall be engraved the words, "Notarial Seal" and "Iowa," with his surname at length, and at least the initials of his christian name;
2. Execute a bond to the state of Iowa in the sum of five hundred dollars, conditioned for the true and faithful execution of the duties of his office, which bond shall be approved by the clerk of the district court of the proper county;
3. Write on said bond, or a paper attached thereto, his signature, and place thereon a distinct impression of his official seal;
4. File such bond with attached papers, if any, in the office of the secretary of state;
5. Remit to such secretary the fee required by law.

When the secretary of state is satisfied that the foregoing particulars have been fully complied with, he shall deliver the commission to the person appointed. [C. '73, § 259; R., §§ 197, 200, 207–9; C. '51, §§ 80, 83.]

An official certificate of the notary is not receivable in evidence without his seal attached, but the seal may be attached subsequently to the date of signing the certificate: *Rindskoff v. Malone*, 9–540.

Although the statute does not in terms prescribe that the acts of the notary shall be authenticated by his seal, there could have been no other purpose in requiring him to procure a seal; and *held*, that a wafer with the name, etc., of the notary written thereon was not a sufficient authentication; and that the genuineness of his signature could not be shown by the certificate of the clerk of the court. *Stephens v. Williams*, 46–540; and see notes to § 384.

The acts of the notary should be authenticated both by his seal and his signature: *Tunis v. Withrow*, 10–305; *Chase v. Street*, 10–593, *Pitts v. Seavey*, 88–336.

An affidavit before a notary, not attested by his seal, lacks an essential requisite: *Slyfield v. Healy*, 32 Fed., 2.

The laws of another state with reference to notary's seal will be presumed to be the same as those of this state until the contrary is shown: *Hewitt v. Morgan*, 88–468.

An affidavit showing the county by the usual venue, and to which the notary affixed his signature with his official designation, and to which his seal was affixed showing the city of his residence, *held* to sufficiently show that the person purporting to administer the oath as a notary public was a notary and had authority to act: *Mackie v. Central R. of Iowa*, 54–540.

An affidavit will be presumed to have been sworn to within the jurisdiction of the notary taking it, although the caption is entitled as of another county: *Goodnow v. Litchfield*, 67-691.

Where an affidavit is headed with the name of the state and county, and the notary's signature is authenticated with a seal, such signature is sufficient if it contains his name with the addition "Notary Public," without stating the state or county for which he is notary: *Stone v. Miller*, 60–243.

The court will take judicial notice of the seal of a notary public, attached to the jurat

of an affidavit, and knowing from the seal used as required by the state statute that he is notary for the state of Iowa, the court will take judicial notice of the county in which he is authorized to act as notary: *Stoddard v. Sloan*, 65-680.

But the signature of a certificate of acknowledgment must show the county for which the notary was appointed, which must be that in which the certificate purports to have been taken, the name of the county being deemed a part of the official signature of the notary. The fact that the name of the county appears on the seal is not sufficient, that not being a matter required to be shown by the seal: *Willard v. Cramer*, 36-22; *Greenwood v. Jenswold*, 69-53.

SEC. **375. Certificate filed with clerk.** When the secretary of state delivers the commission to the person appointed, he shall make a certificate of such appointment, and forward the same to the clerk of the district court of the proper county, who shall file and preserve the same in his office, and it shall be deemed sufficient evidence to enable such clerk to certify that the person so commissioned is a notary public during the time such commission is in force. [22 G. A., ch. 100; C. '73, § 260.]

SEC. **376. Revocation—notice.** Should the commission of any person appointed notary public be revoked by the governor, the secretary of state shall immediately notify such person and the clerk of the district court of the proper county, through the mail. [C. '73, § 261.]

SEC. **377. Powers.** Each notary is invested with the powers and shall perform the duties which pertain to that office by the custom and law of merchants. [C. '73, § 262; R., § 196; C. '51, § 79.]

Acts of notary, how authenticated, see notes to § 374.

SEC. **378. Record to be kept.** Every notary public is required to keep a true record of all notices given or sent by him, with the time and manner in which the same were given or sent, and the names of all the parties to whom the same were given or sent, with a copy of the instrument in relation to which the notice is served, and of the notice itself. [C. '73, § 263.]

SEC. **379. Record filed with clerk.** On the death, resignation or removal from office of any notary, his records, with all his official papers, shall, within three months therefrom, be deposited in the office of the clerk of the district court in the county for which such notary shall have been appointed; and if any notary, on his resignation or removal, neglects for three months so to deposit them, he shall be held guilty of a misdemeanor and be punished accordingly, and be liable in an action to any person injured by such neglect; and if an executor or administrator of a deceased notary wilfully neglects, for three months after his acceptance of that appointment, to deposit the records and papers of a deceased notary which came into his hands in said clerk's office, he shall be held guilty of a misdemeanor, and punished accordingly. [C. '73, § 264.]

SEC. **380. Change of residence.** If a notary remove his residence from the county for which he was appointed, such removal shall be taken as a resignation. [C. '73, § 265; R., § 203; C. '51, § 86.]

SEC. **381. Duty of clerk as to records.** Each clerk aforesaid shall receive and safely keep all such records and papers of the notary in the cases above named, and shall give attested copies of them, under the seal of his court, for which he may demand such fees as by law may be allowed to the notaries, and such copies shall have the same effect as if certified by the notary. [C. '73, § 266; R., § 294; C. '51, § 87.]

SEC. **382. Notaries fees.** Notaries public shall be entitled to charge and receive the following fees:

1. For every protest of a bill or note, seventy-five cents;
2. For registering any protest, fifty cents;
3. For being present at a demand, tender or deposit, and noting the same, fifty cents;
4. For administering an oath, five cents;
5. For certifying to the same under his official seal, twenty-five cents;

6. For certificate under seal, twenty-five cents;
7. For other services, the same fees as are allowed justices of the peace for similar services. [C. '73, § 3801; R., § 4151; C. '51, § 2542.]

CHAPTER 14.

OF COMMISSIONERS IN OTHER STATES.

SECTION **383. Appointment—tenure—powers.** The governor may appoint and commission, in each of the United States and territories, one or more commissioners, to continue in office for the term of three years from the date of commission, unless such appointment shall be sooner revoked by the governor. Such commissioners, when qualified as hereinafter provided, shall be empowered to administer oaths, take depositions and affidavits to be used in the courts of this state, and to take acknowledgments or proof of deeds and other instruments to be recorded and used in this state. [C. '73, § 267.]

SEC. **384. Seal.** Each commissioner exercising the authority conferred upon him by this chapter shall have an official seal, on which shall be engraved the words, "Commissioner for Iowa" with his surname at length, and at least the initials of his christian name; also the name of the state in which he has been commissioned to act, which seal must be so engraved as to make a clear impression on wax, wafer or paper. [C. '73, § 268.]

The certificate of such commissioner *held* not to be sufficiently authenticated by his seal, when the word "Iowa" was written in the body of the seal instead of being impressed upon the paper as here contemplated: *Gage v. Dubuque & P. R. Co.*, 11–310, and see notes to §374.

SEC. **385. Seal and signature as evidence.** A signature and impression of such seal of any commissioner qualified as herein provided, and corresponding with that on file in the office of the secretary of state, shall be entitled to the same credit as evidence in the courts and public offices of this state as the signature and seal of a clerk of the district court or notary public of this state. [C. '73, § 269.]

SEC. **386. Fees.** Such commissioner is authorized to demand for his services the same fees as may be allowed for similar services by the laws of the state in which he is to exercise his office. [C. '73, § 270.]

This rule as to fees of commissioners does not apply to other officers taking depositions in other states: *McNider v. Sinine*, 84–745.

SEC. **387. Oaths, etc., as evidence.** Oaths administered by any such commissioner, affidavits and depositions taken by him, and acknowledgments, as aforesaid, certified by him over his official signature and seal, are made as effectual in law, to all intents and purposes, as if done and certified by a clerk of the district court or justice of the peace of this state. [C. '73, § 271.]

As to the requisites of the seal, see § 384, and notes.

SEC. **388. Conditions required.** Before such commissioner can perform any of the duties of his office, he is required to take and subscribe an oath that he will support the constitution of the United States and the constitution of the state of Iowa, and that he will faithfully perform the duties of such office; which oath shall be taken and subscribed before some judge or clerk of a court of record in the state in which the commissioner is to exercise his appointment, and certified under the hand of the person taking it and the seal of his court, or before a duly authorized commissioner for Iowa, resident in said state; which certificate shall be filed in the office of the secretary of state of this state, and on which shall be the official signa-

ture and clear impression of the official seal of such commissioner. [C. '73, § 272.]

SEC. **389. Authority to be certified.** The secretary of state, upon the reception of the certificate as provided in the last preceding section, shall examine the same, and, if this chapter has been strictly complied with, it shall be his duty to forward to said commissioner a certificate, properly attested, that he has been duly commissioned as a commissioner for Iowa, and that he is duly qualified as required by the laws of Iowa authorizing the appointment of commissioners in other states; and it shall be the further duty of the secretary of state to forward a duplicate of said certificate to the secretary of the state in which said commissioner may have been appointed. [C. '73, § 273.]

SEC. **390. List to be published.** The secretary of state shall cause to be published with the session laws of each general assembly a full and complete list of all commissioners for Iowa who are duly qualified, and whose commissions do not expire on or before the fourth day of July of the year in which such publication is made, which list shall give the post-office address, date of qualification, and date of expiration of the commission, of each commissioner. [C. '73, § 274.]

SEC. **391. Commissioners of other states—authority of.** Commissioners of the like nature appointed in this state, under the authority of any other of the United States or territories, are hereby invested with the authority of a justice of the peace to issue subpœnas, requiring the attendance of witnesses before them to give their testimony by deposition or affidavit, in any matter in which such deposition or affidavit may be taken by the law of such other state, and they are also authorized to administer oaths in any matter in relation to which they are required or permitted by such law of the other states; and false swearing in such cases is hereby made subject to the penal laws of this state relating to perjury; but such commissioner shall cause to be filed in the office of the secretary of state a certificate of the secretary of the state or territory for which he claims to act, that he is properly appointed and qualified, as required by the laws of said state, and has in his possession a certificate that this section has been complied with. [C. '73, § 275.]

SEC. **392. Records of appointments.** The secretary of state shall keep in his office a complete record of all appointments made by the governor pursuant to the provisions of this chapter. [C. '73, § 276.]

CHAPTER 15.

OF THE ADMINISTRATION OF OATHS.

SECTION **393. Who may administer.** Judges of the supreme, district, superior and police courts; clerks of said courts and their deputies; county auditors and their deputies; justices of the peace and notaries public within the county of their residence; sheriffs and their deputies, in cases where they are authorized by law to select commissioners or appraisers, or to impanel jurors for the view or appraisement of property, or are directed as an official duty to have property appraised, or take the answers of garnishees; the governor, secretary of state, auditor and treasurer of state, in any matter pertaining to the business of their respective offices, or that may come before them for consideration and action as members of the executive council; the mayor and clerk of cities and towns; judges and clerks of election; township clerks; the chairman of the board of supervisors; the surveyor or coroner in any county, in relation to any duty imposed upon either of

them where the administration of an oath may be required; members of all boards of any state institutions, of all commissions, boards or bodies created by law, and all persons, referees or appraisers appointed by authority of law, who have any duty to perform by virtue of their office or appointment requiring the administration of oaths, are authorized to administer oaths and take affirmations. Notaries public may perform such services in any adjoining county in which they have filed with the clerk of the district court a certified copy of the certificate of their appointment. [25 G. A., ch. 52; 16 G. A., ch. 110; C. '73, §§ 277–8, 396; R., §§ 201, 449, 1843–4, 2684, 3201; C. '51, §§ 226, 979, 980, 1594, 1865.]

The court, that is, the judge while holding court, is authorized to administer an oath: *State v. Caywood*, 65 N. W., 385.

As to acknowledgments, see § 2942.

TITLE IV.

OF COUNTY AND TOWNSHIP GOVERNMENT.

CHAPTER 1.

OF COUNTIES.

SECTION **394. Body corporate.** Each county is a body corporate for civil and political purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law. [C. '73, § 279; R., § 221; C. '51, § 93.]

A county is strictly a political corporation, a grant of power to a designated portion of the people to aid and arrange the machinery of government for the whole state. It is not designed for pecuniary profit, nor has it any powers but such as pertain to its strict municipal and public character: *Jefferson County v. Ford*, 4 G. Gr., 367.

Although clothed with corporate powers, counties stand low down in the scale of corporate existence, and are reckoned as *quasi*-corporations, as distinguished from municipal corporations, and they are held to a much less extended liability than the latter. They are not liable to an action by a private party for negligence of their officers in respect to highways, unless the statute has expressly created such liability: *Soper v. Henry County*, 26–264.

A county is a political corporation invested with certain limited and specified powers, which are divided among and are to be exercised by a class of agents or county officers appointed for that purpose. Their duties are not only defined, but the mode of performing them is often prescribed by law, and this being done, the power must be exercised precisely as it is given: *Hull v. Marshall County*, 12–142.

Courts will take judicial notice of the organization of counties: *Hillard v. Griffin*, 72–331; *Pitts v. Lewis*, 81–51; *Ellsworth v. Nelson*, 81–57.

SEC. **395. Concurrent jurisdiction.** Counties bounded by a stream or other water have concurrent jurisdiction over the whole of the waters lying between them. [C. '73, § 280; R., § 223; C. '51, § 94.]

Jurisdiction being given to the state over crimes committed upon the Mississippi river between the north and south boundaries of the state, *held*, that the jurisdiction of the district court of any county extended over acts committed upon the river between the north and south boundaries of such county: *State v. Mullen*, 35–199.

SEC. **396. Relocation of county seat.** Whenever citizens of any county desire a relocation of their county seat, they may petition the board of supervisors respecting the same at the regular June session, but not oftener than once in five years. [25 G. A., ch. 10, § 1; C. '73, §§ 281, 288.]

Proceedings for the relocation of a county seat are special in their character. The board of supervisors is clothed with no other powers with reference thereto than those conferred by statute: *Loomis v. Bailey*, 45–400.

It is not error for the board to refuse to entertain a petition of this kind, presented at an adjourned session: *Ellis v. Board of Supervisors*, 40–301.

The legislature cannot, by any act declaring a county seat permanent, deprive the voters of the right to change such county seat as provided by statute. If land has been conveyed to the county for public use under the condition that the location shall be permanent, it should be reconveyed to the grantor in case of a removal: *Twiford v. Allamakee County*, 4 G. Gr., 60.

The right to a new election at the expiration of the specified period does not deprive parties of the right to call in question by injunction or otherwise the validity of an election to remove: *Sweatt v. Faville*, 23–321, 327.

SEC. **397. Petition for—contents.** Such petition shall designate the place at which the petitioners desire to have the county seat relocated, and

shall be signed by none but legal voters of said county. It shall contain, in addition to the names of the petitioners, the section, township and range on which, or town or ward, if in a city, in which the petitioners reside, their ages and time of residence in the county. It shall be accompanied by affidavits of one or more residents of the county, stating that the signers thereof were, at the time of signing, legal voters of said county, and the number of signers to the petition at the time of making the affidavit, and shall be filed with the auditor at least sixty days before the June session of the board. [25 G. A., ch. 10, § 2; C. '73, § 282.]

Where jurats to the affidavits required under this section were imperfect in that they did not show the official title of the officer, or were entirely without signature, *held*, the board might allow them to be amended: *Stone v. Miller*, 60–243.

It is a compliance with the statute to show by affidavit that the signers of the petition were legal voters at the time of signing: *Ibid.*

SEC. **398. Remonstrance.** Remonstrances signed by voters with like qualifications and in all respects as required of petitioners, and verified in the same manner, may be filed with the auditor ten days prior to the date fixed by the notice hereinafter provided for. If the same persons petition and remonstrate, they shall be counted only on the remonstrance, and if a greater number of legal voters remonstrate against the relocation than petition for it, no election shall be ordered. [25 G. A., ch. 10, § 3; C. '73, § 283.]

No other papers, except petition and remonstrance, are to be considered. A re-petition is not authorized; and names appearing both on remonstrance and re-petition are to be counted on the remonstrance: *Loomis v. Bailey*, 45–400.

Those signing petition, remonstrance and re-petition should be counted as remonstrants: *Jamison v. Board of Supervisors*, 47–388.

While the board in passing upon the sufficiency of the petition and remonstrance acts in a judicial capacity, it is not authorized to consider any evidence not specified, and cannot, therefore, consider counter-affidavits: *Herrick v. Carpenter*, 54–340.

If the number of signers to the remonstrance exceeds the number of signers to the petition the election should not be ordered, although the number of signers to the petition exceeds the majority of the legal voters of the county as provided in § 400: *Loomis v. Bailey*, 45–400; *Duffees v. Sherman*, 48–287.

SEC. **399. Notice of hearing.** Upon the filing of such petition, sixty days' notice thereof and of the date of hearing shall be given by the auditor by three insertions in a weekly newspaper, if there be one printed in the county; if not, then by posting the same in every township in the county, and on the door of the court-house therein. [C. '73, § 284.]

The notice is sufficient if the first of the three insertions is sixty days before the presentation of the petition: *Bennett v. Hetherington*, 41–142.

The giving of notice is not jurisdictional, and a failure therein will not invalidate the election: *Dishon v. Smith*, 10–212.

SEC. **400. Hearing—notice of election.** Upon the hearing of such petition and remonstrance, if no objections are filed to either, the board shall proceed to determine whether the petition has been signed by one-half of all the legal voters in the county as shown by the last census, either state or federal, after deducting therefrom all names appearing on the remonstrance which also appear on the petition, and also to determine whether more legal voters have signed the petition than have signed the remonstrance. If the requisite notice has been given, and the board shall find that one-half of all the legal voters, after making said deduction, have signed said petition, and that said one-half exceeds the number that have signed the remonstrance, the board shall order that, at the next general election, a vote shall be taken between said place and the existing county seat, and shall require a constable of each township in the county to post notices of such order in three public places in such township, at least fifty days before said election, and shall also publish a notice of such election in some newspaper, if there be one published in the county, for four consecutive weeks, the last publication to be at least twenty days before said

election; but if objections are made, either as to petition or remonstrance, the board shall inquire into and hear additional evidence with reference to the fact as to whether the names appearing on either petition or remonstrance were the names of legal voters at the time they were placed on the petition or remonstrance, and whether the signatures are genuine. [25 G. A., ch. 10, § 4; C. '73, § 285.]

The election should not be ordered unless the number of signers to the petition not only constitutes a majority of the legal voters of the county, but also exceeds the number of signers to the remonstrance: *Loomis v. Bailey*, 45-100; *Duffees v. Sherman*, 48-287.

A former provision as to posting notices *held* directory, and that a failure to comply therewith would not render an election invalid: *Dishon v. Smith*, 10-212.

The decision of the board upon the sufficiency of the petition and notice is judicial, and is conclusive until set aside in some method provided for direct review: *Baker v. Board of Supervisors*, 40-226; *Bennett v. Hetherington*, 41-142.

The limitation provided upon the time within which an action by *certiorari* to correct an error of the board in holding a petition sufficient may be brought commences to run only from the time the board orders an election, and not from the time they decide that the petition is sufficient: *Jamison v. Board of Supervisors*, 47-388, 391.

The action of the board on a petition presented cannot be prevented by injunction: *Luce v. Fensler*, 85-596.

SEC. **401. Mode of voting.** Such election shall be conducted as elections for county officers. The proposition to be submitted shall be, "Shall the proposition to change the county seat to (naming the town to which the change is proposed) be adopted?" [C. '73, § 286.]

If the ballot expresses the intention of the voter beyond a reasonable doubt it should be counted, without regard to technical inaccuracies, or the form adopted. The language of the ballot is to be construed in the light of all facts connected with the election: *Hawes v. Miller*, 56-395.

SEC. **402. Removal of records.** If a majority of all the votes cast be in favor of the proposition, the board of supervisors shall make a record thereof, and declare the town named therein to be the county seat of said county, and shall remove the records and documents thereto as early as practicable thereafter. [C. '73, § 287.]

The result of the election may be declared and record thereof made at a special meeting: *Cole v. Board of Supervisors*, 11-552.

The fact that in declaring the result of the vote the board also fixes the time within which the records shall be removed is no ground for restraining the removal in accordance with the vote, even though there be no authority to fix such time: *Ibid.*

The fact that there is a controversy pending as to which of two places is duly selected as the county seat is a proper ground for enjoining a county official from ordering the erection of a county building at one of such places: *Rice v. Smith*, 9-570.

Where fraud or illegality in the election is alleged, an injunction may be granted to prevent the removal of the records; and in such proceedings the validity of the election may be tried: *Ibid.; Sweatt v. Faville*, 23-321.

Action of the board in canvassing the vote is ministerial, but its action in ordering a removal in accordance with the count is judicial, and may be reviewed on *certiorari: Herrick v. Carpenter*, 54-349.

Where the board has decided the petition for submission to be legal, and such action has been reversed upon *certiorari*, the board will be guilty of an error which may be corrected if they canvass the votes at an election upon such question and make an order for removal thereon: *Ibid.*

SEC. **403. County bonds—form of.** Whenever the outstanding indebtedness of any county on the first day of April in any year exceeds the sum of five thousand dollars, the board of supervisors, by a two-thirds vote of all its members, may fund or refund the same, and issue the bonds of the county therefor in sums not less than one hundred dollars nor more than one thousand dollars each, payable at a time stated, not more than twenty years from their date. Said bonds shall bear interest not exceeding six per cent. per annum, payable semiannually, and be substantially in the following form, but subject to changes that will conform them to the resolution of the said board, to wit:

No..... ....., Iowa,.....

The county of....., in the state of Iowa, for value received, promises to pay to bearer.....dollars, lawful money of the United

States of America, on....., with interest on said sum from the date hereof until paid at the rate of.....per cent. per annum, payable..... annually on the first days of.....and.....in each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest payable at.....

This bond is issued by the board of supervisors of said county pursuant to the provisions of section four hundred and three, chapter one, title four of the code of Iowa, and in conformity to a resolution of said board duly passed.

And it is hereby certified and recited that all acts, conditions and things required by the laws and constitution of the state of Iowa to be done precedent to and in the issue of this bond have been properly done, happened and been performed in regular and due form, as required by law, and that the total indebtedness of said county, including this bond, does not exceed the constitutional or statutory limitations.

In testimony whereof, said county, by its board of supervisors, has caused this bond to be signed by the chairman of the board and attested by the auditor, with the county seal attached, this.....day of.....

.....

Chairman Board of Supervisors.

Attest:

.....

County Auditor, ...County, Iowa.

(Form of Coupon.)

The treasurer of.....county, Iowa, will pay to bearer..... dollars, on....., at....., for.....annual interest on its.....bond, dated.....

No..... .....

County Auditor.

[26 G. A., ch. 76; 25 G. A., chs. 54, 55, 56, 57; 24 G. A., ch. 17; 22 G. A., ch. 91; 21 G. A., chs. 14, 22; 20 G. A., chs. 80, 175; 19 G. A., ch. 147; 18 G. A., ch. 183; 17 G. A., chs. 58, 154; 16 G. A., ch. 125; 15 G. A., ch. 9; C. '73, § 289.]

The validity of negotiable bonds, issued in satisfaction of a judgment, in the hands of innocent holders for value, cannot be questioned by showing that the judgment was rendered upon a warrant issued in excess of the constitutional limitation: *Sioux City & St. P. R. Co. v. Osceola County*, 45-168; *Same v. Same*, 52-26.

SEC. **404. Negotiation of—duties of treasurer.** Whenever bonds issued under this chapter shall be executed, numbered consecutively, and sealed, they shall be delivered to the county treasurer and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell the same, or exchange them, on the best available terms, for any legal indebtedness of the county outstanding on the first day of April next preceding the resolution of the board authorizing their issue, but in neither case for a less sum than the face value of the bonds and all interest accrued on them at the date of such sale or exchange. And if any portion of said bonds are sold for money, the proceeds thereof shall be applied exclusively for the payment of liabilities existing against the county at and before the date above named. When they are exchanged for warrants and other legal evidences of county indebtedness, the treasurer shall at once proceed to cancel such evidences of indebtedness by indorsing on the face thereof the amount for which they were received, the word "canceled" and the date of cancellation. He shall also keep a record of bonds sold or exchanged by him by number, date of sale, amount, date of maturity, and the name and post-office address of purchasers, and, if exchanged, what evidences of indebtedness were received therefor, which record shall be open at all times for inspection by the public. Whenever the holder of any bond shall sell or transfer it, the purchaser shall notify the treasurer of such purchase, giving at the same time the number of the bond transferred and his post-office address, and every such

transfer shall be noted on the records. The treasurer shall also report under oath to the board, at each regular session, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange; and, when exchanged, a list or description of the county indebtedness exchanged therefor, and the amount of accrued interest received by him on such sale or exchange, which latter sum shall be charged to him as money received on bond fund, and so entered by him on his books; but such bonds shall not be exchanged for any indebtedness of the county except by the approval of the board of supervisors of said county. [26 G. A., ch. 76; 25 G. A., chs. 54, 55, 56; 22 G. A., ch. 91; 21 G. A., ch. 22; 20 G. A., ch. 80; 19 G. A., ch. 147; 18 G. A., ch. 183; 17 G. A., ch. 154; 17 G. A., ch. 58, § 2; 16 G A., ch. 125, § 1; 15 G. A., ch. 9; C. '73, § 290.]

SEC. **405. Unconstitutional issue forbidden.** Any member of a board of supervisors in any county, who shall vote to order an issue of bonds under the provisions of this chapter in excess of the constitutional limit, shall be held personally liable for the excess of such issue. [16 G. A., ch. 125, § 2.]

SEC. **406. Levy to pay interest and principal.** The board of supervisors shall cause to be assessed and levied each year upon the taxable property in the county, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds issued in conformity with the provisions of this chapter, accruing before the next annual levy, and such proportion of the principal that, at the end of eight years, the sum raised from such levies shall at least equal fifteen per cent. of the amount of bonds issued; at the end of ten years, at least thirty per cent. of the amount; and at or before the date of maturity of the bonds, shall be equal to the whole amount of the principal and interest; the money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer shall open and keep in his books a separate account thereof, which shall at all times show the exact condition of said bond fund. [17 G. A., ch. 58, § 3; C. '73, § 291.]

This section does not limit the board in its levy to the amount of tax here required, and taxes levied thereunder are exempt from the limitation contained in § 1384: *Sioux City & St. P. R. Co. v. Osceola County*, 52–26.

SEC. **407. Redemption—notice—interest stopped.** Whenever the amount in the hands of the treasurer belonging to the bond fund, after setting aside the sum required to pay interest maturing before the next levy, is sufficient to redeem one or more bonds, he shall notify the owner of such bond or bonds, in the manner hereinbefore prescribed, that he is prepared to pay the same, with all the interest accrued thereon. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bond shall cease, and the amount due thereon shall be set aside for its payment whenever presented. All redemptions shall be made in the order of their numbers. [17 G. A., ch. 58, § 4; C. '73, § 292.]

SEC. **408. Failure to levy tax—remedy.** If the board of supervisors of any county which has issued bonds under the provisions of this chapter shall fail to make the levy necessary to pay such bonds or interest coupons at maturity, and the same shall have been presented to the county treasurer and the payment thereof refused, the owner may file the bond, together with all unpaid coupons, with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council shall, at its next session as a board of equalization, and at each annual equalization thereafter, add to the state tax to be levied in said county a sufficient rate to realize the amount of principal or interest past due and to become due prior to the next levy, and the same shall be levied and collected as a part of the state tax, and paid into the state treasury, and passed to the credit of such county as bond tax, and

shall be paid by warrant, as the payments mature, to the holder of such registered obligations, as shown by the register in the office of the state auditor, until the same shall be fully satisfied and discharged; any balance then remaining being passed to the general account and credit of said county; but nothing in this chapter shall be construed to limit or postpone the right of any holder of any such bonds to resort to any other remedy which such holder might otherwise have. [17 G. A., ch. 58, § 5; C., '73, § 293.]

See *Ætna L. Ins. Co. v. Lyon County*, 44 Fed., 329.

SEC. **409. Additional tax to pay interest.** In all counties wherein county bonds are issued in pursuance of a vote of the people to obtain money for the erection of any public building, and wherein the annual tax named in the proposition so submitted to the people for the purpose of paying the annual interest accruing upon such bonds is insufficient to pay the same as it matures, the boards of supervisors are authorized to levy for said purpose, and no other, a tax, not exceeding one mill on the dollar, until said bonds are paid; but this provision shall not prevent the levy of a greater tax than above mentioned, if any such proposition authorized such higher levy. [22 G. A., ch. 47, § 1.]

CHAPTER 2.

OF THE BOARD OF SUPERVISORS.

SECTION **410. How constituted—number—how determined.** The board of supervisors in each county shall consist of three persons, except where the number may heretofore have been or hereafter be increased in the manner provided by this chapter. They shall be qualified electors, and be elected by the qualified voters of their respective counties, and shall hold their office for three years. The board of supervisors of any county may, and, when petitioned to do so by one-fourth of the electors of said county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as such board may elect in the absence of a petition, or as may be requested in said petition: "Shall the proposition to increase the number of supervisors to five be adopted?" or, "Shall the proposition to increase the number of supervisors to seven be adopted?" as the board shall elect in submitting the question. If the majority of the votes cast shall be for the proposition so submitted, then, at the next ensuing election for a supervisor, the requisite additional supervisors shall be elected, whose terms of office shall be determined by lot, in such a manner that one-half of the additional members shall hold their office for three years, and one-half for two years. In any county where the number of supervisors has been increased to five or seven, the board of supervisors, on the petition of one-fourth of the legal voters of the county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as the same may be requested in such petition: "Shall the proposition to reduce the number of supervisors to five be adopted?" or, "Shall the proposition to reduce the number of supervisors to three be adopted?" If a majority of the votes cast shall be for the decrease, then the board of supervisors shall be reduced to the number indicated by such vote, and thereafter there shall be annually elected the number requisite to keep the board full. [C. '73, §§ 294, 299.]

Where the board of supervisors is thus increased the additional members are not to be designated on the ballots for their election in any different manner from the others: *Bradfield v. Wart*, 36–291.

SEC. **411. Election—only one from one township.** At the general election in each year there shall be at least one supervisor elected in each

county, who shall not be a resident of the same township with either of the members holding over, except that, in counties having seven supervisors, and having therein a township embracing an entire city of thirty-five thousand inhabitants or over, he may be a resident of the same township; and in no case shall there be more than two supervisors from such township. Such supervisors shall continue in office three years. [C. '73, § 295.]

SEC. **412. Meetings.** The members of the board shall meet at the county seat of their respective counties on the first Mondays in January, April, June, September, and the first Monday after the general election, in each year, and shall hold such special meetings as are provided for by law. [C. '73, § 296.]

Upon the final adjournment of a meeting of the board the members have no power to assemble or to transact any business required to be transacted in session until the next regular meeting, unless they be convened in special session in the meantime in the manner prescribed in § 420: *Scott v. Union County*, 63–583.

SEC. **413. Quorum.** A majority of the board of supervisors shall constitute a quorum to transact business, but should a division take place on any question when only two members of the board are in attendance, the question shall be continued until there is a full board. [C. '73, § 297.]

It is not necessary that everything done by the board of supervisors must be entered of record in order to be binding, but there should at least be an assent to such action given by a majority of the members of the board, while in session, before it will be binding upon the county: *Rice v. Plymouth County*, 43–136.

SEC. **414. Absence from county—vacancy.** The absence of any supervisor from the county for six months in succession shall be treated as a resignation of his office, and the board shall, at its next meeting thereafter, by resolution regularly adopted and spread upon its records, declare his seat vacant. [C. '73, § 298.]

SEC. **415. Organization.** The board of supervisors, at its first meeting in each year, shall organize by choosing one of its members as chairman, who shall preside at all of its meetings during the year. [C. '73, § 300; R., § 308.]

SEC. **416. Supervisor districts.** The board of supervisors may, at its regular meeting in June in any even-numbered year, divide its county by townships into a number of supervisor districts corresponding to the number of supervisors in such county; or, at such regular meeting, it may abolish such supervisor districts, and provide for electing supervisors for the county at large. [17 G. A., ch. 68; 15 G. A., ch. 39, § 1.]

SEC. **417. How formed.** Such districts shall be as nearly equal in population as possible, and shall each embrace townships as nearly contiguous as practicable, each of which said districts shall be entitled to one member of such board, to be elected by the electors of said district. [15 G. A., ch. 39, § 2.]

SEC. **418. One member for each district.** In case such division or any subsequent division shall be found to leave any district or districts without a member of such board of supervisors, then, at the next ensuing general election, a supervisor shall be elected by and from such district having no member of such board; and if there be two such districts or more, then the new member or members of said board shall be elected by and from the district or districts having the greater population according to the last state census, and so on, until each of said districts shall have one member of such board. [Same, § 3.]

SEC. **419. Redistricting—term of office not affected.** Any county may be redistricted, as provided by the three preceding sections, once in every two years, and not oftener, and nothing herein contained shall be so construed as to have the effect of lengthening or diminishing the term of office of any member of such board. [Same, § 4.]

SEC. **420. Special meetings—how called—what business done.** Special meetings of the board of supervisors shall be held only when

requested by a majority of the board, which request shall be in writing, addressed to the county auditor, and shall specify the object for which such meeting is desired, which may include the doing of any act not required by law to be done at a regular meeting. The auditor shall thereupon fix a day for such meeting, not later than ten days from the day of the filing of the petition with him, and shall immediately give notice in writing to each of the supervisors personally, or by leaving a copy thereof at his residence, at least six days before the day set for such meeting. The notice shall state the time and place where the meeting will be held, and the object of it, as stated in the petition; and at such special meeting no business other than that so designated in the petition and notice shall be considered or transacted. The auditor shall also give public notice of the meeting by publication in not exceeding two newspapers published in the county, or, if there be none, by causing notice of the same to be posted on the front door of the court-house of the county, and in two other public places therein, one week before the time set therefor. [C. '73, § 301; R., § 309.]

Any business transacted at a special meeting of the board will be presumed to have been lawful: *Allen v. Cerro Gordo County*, 34-54.

Upon the final adjournment of a meeting of the board the members have no power to assemble or to transact any business required to be transacted in session until the next regular meeting unless they be convened in special session in the manner prescribed in this section: *Scott v. Union County*, 63-583.

Six days' notice to each member of the board of supervisors of a special meeting is not required when it is personally served, but only when it is left at his residence; and one week's notice is not necessary when it is given by publication, but only when such notice is posted, in cases where no newspaper is published: *Supervisors v. Horton*, 75-271.

Where certain members of the board of supervisors were present at a special meeting and protested against the validity of the meeting, but subsequently participated in the meeting, *held*, that they were estopped from afterwards questioning the sufficiency of the notice: *Ibid.*

Where notice is by publication, it is not a necessary condition to a legal meeting that each subscriber receive a copy of the paper containing the notice: *Ibid.*

Where a board of supervisors at a regular meeting ordered the construction of a bridge, and appointed a committee to contract for the same, but at a subsequent special meeting rescinded the order and entire action in regard to the bridge, *held*, that they had a right to reconsider their action at the special meeting, and the committee appointed to contract for the building of the bridge had acquired no rights which they could urge against such action: *Ibid.*

Where a board of supervisors took action at a regular meeting in regard to the building of a bridge, *held*, that it had power to afterwards reconsider the action at a special meeting: *Supervisors v. Horton*, 75-271.

Business imposed upon the board of supervisors may be transacted as properly at a special as at a regular meeting, excepting in cases where, from the nature of the business, or the provisions of law in regard to it, the purpose or policy of the law, or the rights of others, require that it be done at a regular meeting: *Ibid.*

SEC. **421. Neglect of duty—penalty.** If any supervisor shall neglect or refuse to perform any of the duties which are or shall be required of him by law as a member of the board of supervisors, without just cause therefor, he shall, for each offense, forfeit one hundred dollars. [C. '73, § 302; R., § 311.]

SEC. **422. Powers specified.** The board of supervisors at any regular meeting shall have the following powers, to wit:

1. To appoint one of its number chairman in the absence of the regular chairman, and a clerk, in the absence of the auditor or his deputy;
2. To adjourn from time to time, as occasion shall require;
3. To make such orders concerning the corporate property of the county as it may deem expedient;
4. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle and allow all claims against the county, unless otherwise provided for by law;
5. To build and keep in repair the necessary buildings for the use of the county and of the courts;
6. To cause the county buildings to be insured in the name of the county,

or otherwise, for its benefit, and, in case there are no county buildings, to provide suitable rooms for county purposes;

7. To set off, organize and change the boundaries of townships in the respective counties, designate and give names thereto, and define the place of holding the first election;

8. To grant licenses for keeping ferries in the respective counties, as provided by law;

9. To purchase, for the use of the county, any real estate necessary for the erection of buildings for county purposes; to remove the site of, or designate a new site for, any county buildings required to be at the county seat, when such site shall not be beyond the limits of the town, village or city at which the county seat is located;

10. To require any county officer to make a report, under oath, to it on any subject connected with the duties of his office, and to require any such officer to give such bonds, or additional bonds, as shall be reasonable or necessary for the faithful performance of his duty; any such officer who shall neglect or refuse to make such report or give such bonds within twenty days after being so required, may be removed from office by the board by a vote of a majority of the members elected thereto;

11. To represent the respective counties, and to have the care and management of the property and business thereof, in all cases where no other provision shall be made;

12. To manage and control the school fund of the respective counties as shall be provided by law;

13. To appoint commissioners to act with similar commissioners duly appointed in any other county or counties, and to authorize them to lay out, alter or discontinue any highway extending through their own and one or more other counties, subject to the ratification of the board;

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

15. To authorize the taking of a vote of the people for the relocation of the county seat, as provided by law;

16. To alter, vacate or discontinue any state or territorial highway within their respective counties;

17. To lay out, establish, alter or discontinue any county highway heretofore laid out, or hereafter to be laid through or within the county, as may be provided by law;

18. To provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair, except as is otherwise provided by law;

19. To determine what bounties, in addition to those already provided by law, if any, shall be offered and paid by the county on the scalps of such wild animals taken and killed within the county as it may deem it expedient to exterminate, but no such bounty shall exceed five dollars;

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

21. To have and exercise all the powers in relation to the poor given by law to the county authorities;

22. To make such rules and regulations, not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order. [18 G. A., ch. 46; 16 G. A., ch. 80; C. '73, § 303; R., § 312.]

In general: By the enactment of the statutory provisions substituting the board of supervisors for the county judge it was the intention of the legislature to confer upon such board all the powers and duties before that time devolving upon the county judge so far as they related to the management of the affairs of the county and the government thereof: *Yant v. Brooks*, 19–87.

Par. 3. The control and management of county property is given to the board. See ¶ 11 and notes.

Where a conveyance was made by the county of swamp land to which the county had no title, *held*, that while the county was not liable for failure of title or for fraudulent representations of its officers as to title, yet, it should have returned the purchase price and was liable for not doing so: *Nelson v. Hamilton County*, 71 N. W., 206.

Par. 4. Claims: A claim cannot be a "just claim" against the county to be allowed under this provision unless the law somewhere either requires or authorizes its payment: *Foster v. Clinton County*, 51–541.

The board has a discretion as to the allowance of claims against the county, unless otherwise provided: *Bean v. Board of Supervisors*, 51–53.

A county is not liable for the cost of printing abstracts for appeal in criminal cases, whether prepared by the county attorney or the attorney-general, and the same should not be allowed by the board of supervisors, but they should be paid by the state upon an allowance by the executive council: *State v. Billings*, 81–566.

One who has been confined in the county jail cannot recover damages against the county by reason of the fact that the jail was kept in an unhealthy, filthy, unventilated and improper condition: *Lindley v. Polk County*, 84–308.

The acts of the county judge in allowing certain claims against the county, and issuing warrants thereon, *held* to be ministerial, and not judicial: *Campbell v. Polk County*, 3–467.

Where no vote was taken or record made as to the allowance of a claim by the board, but it was seen and inspected at a meeting of the board by all the members, and marked allowed by one of them, with the knowledge and consent of all, this being the rule in the ordinary course of business, *held*, that it sufficiently appeared that the claim was allowed: *Griggs v. Kimball*, 42–512.

The allowance of a claim by the board, and the issuance of a warrant therefor, does not constitute an adjudication such as to preclude inquiry as to its correctness, and a warrant thus issued may be impeached for illegality: *Hospers v. Wyatt*, 63–264.

Where it is provided by statute that the board of supervisors shall make a reasonable allowance for the particular claim of services rendered to the county the act of the board in making an allowance is not conclusive, but a greater amount may be recovered in an action if it can be shown that such greater amount is reasonable: *Moser v. Boone County*, 91–359; *Stone v. Marion County*, 78–15.

An appeal may be taken from an order of the board of supervisors denying a claim for salary by a county officer: *Garber v. Clayton County*, 19–29.

But a creditor is not obliged to appeal from the action of the board disallowing his claim. He may, instead, bring action against the county: *Armstrong v. Tama County*, 34–309; *Curtis v. Cass County*, 49–421.

When a claim presented to the board is not allowed the claimant may bring his action, and cannot be defeated therein because of the failure of the board to take action or make a record thereof: *White v. Polk County*, 17–413.

It being provided by statute that the district court of Lee county might be held in the city of Keokuk, provided the authorities of the city should furnish, free of charge, the necessary rooms for the use of the county in holding court, *held*, that the county was not liable for the rent of rooms used for that purpose, under an arrangement made by the sheriff: *Lee County v. Deming*, 3 G. Gr., 101.

The expense of providing a polling place at the general election is not chargeable to the county: *Turner v. Woodbury County*, 57–440.

The expenses of township elections to vote aid to railroads are not chargeable to the county: *McBride v. Hardin County*, 58–219.

No action may be brought against the county on an unliquidated claim until the same has been presented to the board and payment demanded: See § 3528 and notes.

Par. 5. Public buildings: The board may order the purchase of real estate, not exceeding $2,000 in value, and the erection thereon of a public building not costing to exceed $5,000, without submitting the question to a vote: *Merchant v. Tama County*, 32–200.

Under the Code of '51, *held*, that a county judge (possessing substantially the authority of the present board of supervisors) had power to contract for the erection of a county court-house or other public building for the use of the county, but could not be compelled by *mandamus* to submit to the voters of the county the question whether such a contract should be entered into: *State ex rel. v. Napier*, 7–425.

A county is not liable in damages for injuries received by reason of negligence in the construction of a court-house. The principle holding a county liable for the defective construction of a county bridge is not to be extended further or made to apply to public buildings. In such cases there is a difference between the liability of *quasi*-corporations, such as counties, and that of municipal corporations: *Kincaid v. Hardin County*, 53–430.

Therefore, *held*, that a county was not liable for damages caused by the overflow of water from a county ditch, such overflow being due to an accumulation of sediment therein: *Green v. Harrison County*, 61–311; *Nutt v. Mills County*, 61–754.

The county cannot be made liable upon implied agreement beyond the limit of the contract entered into by the board for the erection of a public building: *Reichard v. Warren County*, 31–381.

Par. 11. Power to contract: The power being given to a county, by § 394, to hold property, and by this section to the board of supervisors to control it, *held*, that the power to make all contracts necessary to the protection and perfection of the title to such property rests in such board: *Allen v. Cerro Gordo County*, 34–54; *Page County v. American Emigrant Co.*, 41–115.

Therefore, *held*, that a contract by the

county to give to an agent a portion of its interest in the swamp lands in compensation for procuring the allowance of the same by the government was valid: *Ibid.*

The board cannot make a valid contract with the county treasurer to allow him a per cent. of interest and penalties on delinquent personal property taxes, for their collection. Such a contract is contrary to public policy: *Adams County v. Hunter*, 78–328.

Knowledge and acquiescence by a majority of the members of the board, in a contract which the board might make, does not give rise to either an express or implied contract. To show a ratification of such a contract by the board, so as to bind the county, knowledge and acquiescence by the board as such must be established: *Fouke v. Jackson County*, 84–616.

Compromising claims: A county has power to make a valid compromise of a disputed claim: *Grimes v. Hamilton County*, 37–290; *Mills County v. Burlington & M. R. R. Co.*, 47–66; *Collins v. Welch*, 58–72.

The board of supervisors have authority to accept from an officer who is in default a promissory note in settlement of the claims of the county against him; and such note will be based upon such consideration that it can be enforced: *Sac County v. Hobbs*, 72–69.

Under Code of '51, *held*, that settlement with the county judge in a matter properly going to him for settlement was binding upon the county, whether he had required from the person making settlement the report contemplated by law or not: *Poweshiek County v. Stanley*, 9–511.

Defending claims: If the board of supervisors neglects or refuses to defend a suit against the county a citizen tax-payer may intervene and do so: *Greeley v. Lyon County*, 40–72.

Offering reward: The board may offer a reward for the recovery of funds stolen from the county, but not for the arrest of the criminal: *Hawk v. Marion County*, 48–472.

Where a reward was offered by a county for the recovery of money, *held*, that a person giving information leading to the recovery of a portion of the money was entitled to a *pro rata* share of the reward: *Ibid.*

Where a person in another state acts upon the promise made by a board of supervisors in Iowa to pay a reward for the arrest and conviction of persons who have robbed the county treasury, he is bound to know the fact that the board has no power to offer such reward. In such case the members of the board will not be individually liable: *Huthsing v. Bosquet*, 3 McCrary, 569.

Peace officers acting under process in arresting a criminal are not entitled to a reward offered for such arrest unless the terms of the reward offered clearly include them: *Means v. Hendershott*, 24–78.

Employment of agents: The board has authority to employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer: *Wilhelm v. Cedar County*, 50–254.

As incident to the care and management of the county property, the board may, in a proper case, employ an agent to aid them; and therefore, *held*, an agent employed by the county to find a purchaser for indemnity swamp lands might maintain action for the value of his services: *Call v. Hamilton County*, 62–448.

Employment of counsel: The board may, whenever they deem it expedient, employ counsel to prosecute or defend actions against the county, or to perform other services, and no form of vote by the board or entry of the fact of such employment of record is necessary to the validity of the contract. It may be proved by parol: *Tatlock v. Louisa County*, 46–138; *Jordan v. Osceola County*, 59–388.

The board may employ counsel, in addition to the district attorney, to prosecute criminal cases: *Hopkins v. Clayton County*, 32–15.

The county judge, when that office existed, had the power, and it was his duty, to secure the services of an attorney whenever he thought such services were needed, and he might pay a reasonable compensation therefor out of the county treasury: *Chickasaw County v. Bailey*, 13–435.

Attorney assisting in prosecution: The district attorney cannot render the county liable for services of an additional attorney employed by him to aid in criminal prosecutions: *Tatlock v. Louisa County*, 46–138; *Foster v. Clinton County*, 51–541.

A county can be made liable to pay for additional counsel only as the board of supervisors has determined such counsel to be necessary. The court cannot, at the request of the district attorney, appoint assistant counsel and thereby bind the county to pay therefor, at least unless on account of the absence of the district attorney, and in order to prevent the failure of justice: *Seaton v. Polk County*, 59–626.

In the absence of the district attorney the court may appoint a special prosecutor, but as to whether in such case the county is rendered liable for his compensation the court were equally divided: *White v. Polk County*, 17–413.

Recovery against county for services rendered on appointment of court to assist in the prosecution of a particular case, *held* proper: *Curtis v. Cass County*, 49–421.

It may be that in proper cases the court may appoint and require a member of the bar to appear and represent the state in a *habeas corpus* proceeding, although no compensation therefor is provided: *Miller v. Buena Vista County*, 68–711.

A justice of the peace has no power to appoint an attorney to prosecute a criminal action in behalf of the state, and no compensation can be recovered by reason of such an appointment: *Davis v. Linn County*, 24–508.

See, further, notes to § 301.

Liability for contracts made by officers or agents: A member of the board of supervisors has no power to bind the county by acts, contracts or declarations in the absence of authority of the board authorizing him to do so. He stands on the same footing as any other agent: *Rice v. Plymouth County*, 43–136.

The chairman of the board of supervisors has no more authority to make contracts binding on the county than has any other member; but the chairman or any other member may be empowered by consent, without any formal action, to make contracts for proper purposes as agent for the board: *Tatlock v. Louisa County*, 46-138.

The board having the power to do an act may properly direct the performance of it by a committee: *Hopkins v. Clayton County*, 32-15.

Acceptance by the board of supervisors of the report of a committee appointed to settle with an agent will bind the board to the terms of the settlement, in the absence of fraud or mistake: *Ringgold County v. Allen*, 42-697.

Ratification: While ratification of an unauthorized contract may be inferred from acquiescence therein with knowledge of all the material facts, yet, *held*, that where such ratification was claimed on account of payments being reported as made thereunder by the treasurer, it must appear not only that he reported the contract in full, but also that the board examined his report in this respect: *Wilhelm v. Cedar County*, 50-254.

Where the board, when not in session, offered a reward for the recovery of money stolen from the county, *held*, that a ratification thereof made afterward while in session, even after the acts had been done on which the reward was claimed, would render the county liable: *Hawk v. Marion County*, 48-472.

Certain action of the board in appointing a committee to examine a bridge built under contract, etc., *held* not to amount to an acceptance of the work or ratification of the change. A conditional acceptance, even when not authorized, will not necessarily amount to a full acceptance: *Mallory v. Montgomery County*, 48-681.

Implied contract: The county cannot be made liable upon implied agreement beyond the limit of the contract entered into by the board for the erection of a public building: *Reichard v. Warren County*, 31-381.

Estoppel: Where the county denies that its right and title to land has passed under a claimed conveyance thereof, it is estopped from collecting taxes on such land for the period during which it claims that it had not parted with the title: *Iowa R. Land Co. v. Story County*, 36-48.

Where a county accepts payment of taxes from a person claiming to own lands, and with full knowledge of such claim, it is estopped from afterwards asserting title in itself to such lands: *Adams County v. Burlington & M. R. R. Co.*, 39-507; *Audubon County v. American Emigrant Co.*, 40-460. (On a subsequent appeal in the leading case the doctrine there stated was doubted by some members of the court: *Adams County v. Burlington & M. R. R. Co.*, 55-94.)

The county is estopped from asserting title to lands which it has assessed and sold for taxes as the property of another: *Austin v. Bremer County*, 44-155.

Where a county has taxed property in the name of a person as owner, it cannot afterwards, when he brings action to restrain the collection of the tax, deny that he is the owner of the land: *Brandiff v. Harrison County*, 50-164.

A mere unauthorized assessment of lands by the county will not estop it from afterwards asserting title, the adverse claimant not having parted with his money or changed his position in reliance upon such act: *Page County v. Burlington & M. R. R. Co.*, 40-520.

Unauthorized acts of county officers in levying taxes on lands which are at the time claimed by the county will not constitute an estoppel as against the county: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 46-226.

A county will not be estopped or bound by the acts of its officers which are in violation of law, and void: *Howard County v. Bullis*, 49-519; *Gill v. Appanoose County*, 68-20.

Representations of authorized agents of a county, made in connection with a sale of its lands, that there are no taxes assessed against them, will estop the county from collecting taxes for preceding years: *Calhoun County v. American Emigrant Co.* 93 U. S., 124.

If a conveyance is made of land to which the county has been adjudged not to have title, the purchaser may recover the price paid: *Nelson v. Hamilton County*, 71 N. W., 206.

An action by a county to set aside a conveyance will not render taxes levied on the property after such conveyance void: *American Emigrant Co. v. Iowa R. Land Co.*, 52-323.

In a particular case, *held*, that it was not sufficiently shown that taxation of certain lands by a county was made by such inadvertence or mistake that it should not be estopped from asserting title thereto: *Adams County v. Burlington & M. R. R. Co.*, 55-94.

The fact that land has been taxed to a purchaser, who has obtained title thereto from the county by fraud, will not estop the county from asserting its title: *Bixby v. Adams County*, 49-507.

Assignment of notes to: Under some circumstances a county may take an assignment of notes, and in an action by the county against the maker of a note it will be presumed that the circumstances were such as to authorize the assignment to the county until the contrary is shown: *Marshall County v. Hanna*, 57-372.

Trust property: Where public lands were granted to counties, the proceeds thereof to be used in erecting county buildings, *held*, that such proceeds were held in trust by the counties, and in an action by the county to recover a portion of such fund a general indebtedness due defendant from the county could not be set off: *Davis v. Muscatine County*, Mor., 161.

Construction of ditches: Where the board of supervisors, in pursuance of a proper application, have had a ditch constructed, and have paid the contractor the amount of his claim therefor, a person whose land is taxed for its construction cannot restrain the collection of such taxes. His objection ought

to be made sooner: *Noyes v. Harrison County*, 57-312.

While it has been held in this state, against the decided weight of authority in other states, that counties are liable for damages caused by reason of the negligent construction and maintenance of county bridges, the court is not disposed to extend the rule which has been held applicable to bridges so as to make the county liable for damages resulting from the negligent construction of a county ditch, or from negligence in allowing the same to become obstructed: *Green v. Harrison County*, 61-311; *Nutt v. Mills County*, 61-754.

Construction of levees: In a proceeding before the board of supervisors to authorize the construction of a levee, and the assessment of taxes therefor upon adjacent lands, it is essential that a petition signed by residents interested in the improvements shall be presented. Unless this requirement is complied with the supervisors can obtain no jurisdiction: *Richman v. Board of Supervisors*, 70-627.

Construction of roads: The county has authority to aid in the construction of a road, and warrants issued for that purpose are valid: *Long v. Boone County*, 32-181.

The county collecting and expending a road tax under the provisions of 20 G. A., ch. 200, § 1533 is not liable for damages due to the negligence of its agents in constructing a highway as authorized by such act, resulting in injury to adjacent property: *Packard v. Voltz*, 62 N. W., 757.

The only exception to the rule that counties are not liable for the negligent or unlawful acts of their agents is in case of defective bridges and such exception rests upon the authority of decisions not in harmony with general principles and not to be extended to other cases: *Ibid.*

A county being an involuntary corporation forced into existence for the purpose of such governmental duties as are imposed by law, which duties must be discharged through agents or employes, is not liable for the wrongful acts of such agents, nor are such agents liable unless acting maliciously where they are discharging the express authority conferred upon them: *Ibid.*

Par. 12. School fund: The board of supervisors cannot take advantage of the exemptions from tax sales accorded to school-fund mortgages, and buy in land sold for taxes upon which such a mortgage exists, for the express purpose of defeating a prior mortgage. The purchase of such tax title not being necessary for the protection of the fund, they have no power to make it: *Miller v. Gregg*, 26-75.

Par. 18. Bridges: The board of supervisors have authority to contract for the erection of bridges within the limits of cities in the county: *Oskaloosa Steam-Engine Works v. Pottawattamie County*, 72-134.

While municipal corporations have power to erect such bridges as public convenience may require, within their respective counties, they are not authorized to construct bridges over navigable waters without express legislative enactment: *Snyder v. Fosier*, 77-638.

The board may properly delegate to committees the authority to make application of county funds for small expenditures in the repair of bridges and the like: *Denison v. Watts*, 66 N. W., 886.

The board may furnish plank for culverts or small bridges in accordance with the public convenience. The authority under this subdivision is not limited to bridges of such extent that the county would be liable for injuries resulting from negligence of the board in maintaining them in good condition: *Ibid.*

Liability for defects: The county being expressly empowered to make and repair bridges and levy a bridge tax for such purposes (§ 1303), it is its duty, and not that of the road supervisors, to build and keep in repair bridges of such size as to require an extraordinary expenditure of money to construct them, or the repairs upon which involve a considerable expense; and the county is liable for the damages resulting from negligence in building or failing to repair: *Wilson v. Jefferson County*, 13-181; *Brown v. Jefferson County*, 16-339; *Soper v. Henry County*, 26-264; *Kendall v. Lucas County*, 26-395; *Davis v. Allamakee County*, 40-217; *Moreland v. Mitchell County*, 40-394; *Chandler v. Fremont County*, 42-58; *Huston v. Iowa County*, 43-456; *Krause v. Davis County*, 44-141; *Cooper v. Mills County*, 69-350.

The general language of this paragraph is to be construed in connection with the general provisions of the statute regulating the making and repairing of highways (§ 1528 *et seq.*): *Soper v. Henry County*, 26-264.

The county board is not required to assume that a bridge will be used in an unusual and extraordinary manner, either by passing in great speed or by passage of a large weight. Its liability stops with constructing and maintaining its bridges so as to protect them against injury by a reasonable, proper and probable use thereof, in view of the circumstances, such as the extent, kind and nature of the travel and business on the road of which it forms a part: *Yordy v. Marshall County*, 80-405.

But the court cannot declare as matter of law that the passage of a steam thresher is not to be anticipated, and therefore that it is not negligence not to make provision for such traffic. It is for the jury to determine whether the county is guilty of negligence in not maintaining the bridge in a safe condition for the passage of such machine, and whether plaintiff was guilty of negligence in attempting to move such apparatus across the bridge under the circumstances: *Ibid.*

What deemed county bridges: The county is not responsible for bridges which it is contemplated shall be built and kept in repair by the road district (§ 1528) and for damages resulting from the unsafe condition for which the road supervisor is made personally liable, after notice in writing (§ 1557): *Soper v. Henry County*, 26-264; *Chandler v. Fremont County*, 42-58; *Taylor v. Davis County*, 40-295.

But even though it may be the obligation of the road supervisors to make small repairs on county bridges for the purpose of keeping them in order, the county is not thereby

relieved from its liability as to such bridges: *Roby v. Appanoose County*, 63-113.

Where a bridge, not originally built by the county, which was twelve feet in span, and could be built for seventy-five dollars, was defective for want of a railing which would have cost five dollars, and the road district had ample means for repairing or rebuilding if necessary, *held*, that such bridge was not a county bridge, and the county was not liable for injuries received from defects therein: *Chandler v. Fremont County*, 42-58.

Held, that the county was not liable for damages resulting from the falling of a bridge, where it did not appear that it had ever assumed control thereof, or made appropriation for building it or keeping it in repair, and that the records of the board showing the appropriation for rebuilding after the accident, were not admissible to establish such liability: *Titler v. Iowa County*, 48-90.

The fact that the county is authorized to change the location of a highway, and that it is required that the new highway shall be put into as good condition as the old one, will not render it liable for defects in a small bridge upon such new highway, although the committee of the board of supervisors authorized to examine such new highway has accepted it: *Taylor v. Davis County*, 40-295.

Bridges, properly designated county bridges, and for the construction or repair of which the county is liable, are bridges of the larger class requiring an extraordinary expenditure of money: *Ibid.*

That citizens or another corporation has contributed to the construction of the bridge does not relieve the county from liability for negligence in constructing it or keeping it in repair: *Moreland v. Mitchell County*, 40-394, and see *Albee v. Floyd County*, 46-177.

The board has power to construct, and levy taxes for, a free bridge over a stream, although within the limits of an incorporated city, when it will accommodate the county and traveling public at large: *Bell v. Foutch*, 21-119; *Barrett v. Brooks*, 21-144.

The board may also aid in the construction of free bridges, erected with the sanction of the proper authorities, for public use upon public lines of travel within as well as without incorporated towns or cities: *Ibid.*

While the county is liable for injuries resulting, through its fault, from defective bridges erected by it upon a public highway within a town which is not made a separate road district, yet when the town becomes incorporated as a city of the second class, and its organization as such is perfected, the city becomes bound to keep its bridges in repair, and is, in the absence of contract, alone liable for their safe condition: *McCullom v. Black Hawk County*, 21-409.

The provision found in § 527 of Code of '73 that public bridges exceeding forty feet in length over any stream crossing a state or county highway shall be constructed and kept in repair by the county was held applicable to all bridges and not merely to those within city limits. But this provision did not affect the question whether bridges less than forty feet in length are to be deemed county bridges, and that fact depends upon their necessity to the public, their character and cost, and the financial ability of the road district in which they are located to construct and maintain them: *Casey v. Tama County*, 75-655. [This portion of § 527 of Code of '73 has been omitted.]

Where, by the provisions of § 426 relating to bridges near a county line, one county constructs a bridge along the line of a county road within the limits of another county, it becomes liable for injury resulting from negligence in constructing and maintaining such bridge: *Ibid.*

Extent of liability: The county is to be held to the exercise of such care with reference to its bridges as reasonably prudent and careful men would use in the conduct and management of their own affairs of like importance: *Cooper v. Mills County*, 69-350.

The county is required to use the care which might be expected of a prudent and reasonably diligent person under similar circumstances in the management of his own affairs: *Wiers v. Jones County*, 80-351.

In an action against a county for damages resulting from the falling of one span of a bridge, *held*, that the jury should not have been limited to the consideration of evidence relating to the condition of that portion of the bridge alone: *Hughes v. Muscatine County*, 44-672.

Approaches: The county is liable not only for the defective construction of a bridge, but for negligently and carelessly adopting an insufficient plan therefor: *Ferguson v. Davis County*, 57-601.

Where it appeared that the plan, in accordance with which a contract for the erection of a bridge was made and carried out, was defective, and that, although prepared by the contractor, it was so prepared at the direction of the county and against his advice as to particular features, *held*, that such contractor was not liable for defects of the bridge constructed by him due to a defective plan: *Holland v. Union County*, 68-56.

Where it is claimed that the place where an accident occurs is an approach to a bridge in such sense as to be a part of it, the question as to whether it is or not is for the jury. An approach having the character of a highway rather than a structure to aid approach to the bridge cannot be regarded as a part of the bridge. There is an obvious distinction between an approach having the character of a highway, or of an independent structure, and an embankment, wall, or other structure intended alone for an approach to the bridge: *Newcomb v. Montgomery County*, 79-487.

The approaches to a county bridge are a part of the bridge and a county is liable in a proper case for negligence in the construction of such approaches: *Miller v. Boone County*, 63 N. W., 352.

The question as to whether the place where the injury occurred was on the approach to the bridge or on the highway is a question of fact for the jury: *Ibid.*

A resolution of the board of supervisors

is admissible to show that they recognize the approach to a bridge as a portion of the bridge: *Jessup v. Osceola County*, 92-178.

Evidence that a few days after the accident timbers were found to be decayed is admissible as tending to show the condition of the bridge at the time of the accident: *Ibid.*

The approaches to a county bridge constitute a part of the bridge, and the county is liable for defects in the construction of such approaches: *Moreland v. Mitchell County*, 40-394; *Albee v. Floyd County*, 46-177.

The county may be liable for injuries received by a person who, in the night-time, goes upon a newly-constructed bridge and suffers injury by reason of the embankments not being completed or properly guarded: *Van Winter v. Henry County*, 61-684.

It is error to instruct the jury that as a matter of law the embankment constituting the approach to the bridge is to be regarded as a part of it. That is a question for the jury: *Nims v. Boone County*, 66-272; *Nims v. Boone County*, 68-642.

Where a span of a bridge over a bayou was separated from the main bridge over a stream on the same line of road by some twenty feet of embankment, *held*, that whether such span was a part of the main bridge was a question for the jury: *Casey v. Tama County*, 75-655.

Notice: A county may be liable for injuries received from the falling of a bridge, which, though properly constructed, has become unsafe by decay of the timbers, if it has failed to exercise care and diligence in inspecting and repairing the same, whether the need of such repairs is open and obvious or not: *Huff v. Poweshiek County*, 60-529.

The county will be liable for negligence in failing to inspect and repair where a bridge, though properly constructed, has been built so long that in the exercise of ordinary care and diligence the board of supervisors ought to have known that it would in such time become dangerous: *Ferguson v. Davis County*, 57-601.

The county may also become liable for failure of its authorities, upon being notified of the dangerous condition of the bridge, to have it examined and repaired if defective, and its use in the meantime prevented: *Ibid.*

But where it appeared that an examination had been made by a competent person, who reported that the bridge would run about four years, *held*, that the fact that it had already stood for a period greater than the average life of the timber of which it was composed would not render the county liable unless some member of the board knew or was informed of its unsafe condition, or, in the exercise of reasonable care, should have known such condition: *Ibid.*

Where it appeared that the county authorities had placed a written notice of the defective condition of a bridge somewhere thereon, and put a pole across one end of it, but there was nothing to show that such notice or pole was there when plaintiff received his injury, *held* not error to refuse an instruction assuming that defendant would not be liable if notice was given and the bridge obstructed, and such notice or obstruction were subsequently removed by some unauthorized person: *Brown v. Jefferson County*, 16-339.

Where the county erects a barricade and notice at a dangerous bridge, and the barricade is moved without the knowledge or consent of the county, it is not liable for damages which result from such removal unless it is notified thereof, or in the exercise of reasonable diligence should have known of such removal in time to have prevented the accident: *Wiers v. Jones County*, 80-35.

It is the duty of each member of the board to report knowledge of defects in county bridges that they may be repaired or replaced and proper steps taken to prevent accidents, and notice given to a member long enough before the accident to have enabled him to report the matter to the board, and for repairs to have been made, will charge the county with notice of the defect: *Morgan v. Fremont County*, 92-644.

As bearing on the question of negligence in failing to use reasonable care in keeping the bridge in repairs evidence of experts is admissible as to the ordinary life of timbers used in the bridge: *Ibid.*

Where a defect in a bridge has been open and notorious for more than six months, *held*, that the county was chargeable with notice thereof: *Waud v. Polk County*, 88-617.

Contributory negligence on the part of the person injured will defeat his recovery but mere knowledge of the defective condition of the bridge will not be, as a matter of law, negligence: *Ibid.*

The defect in the bridge may be so manifest, open and notorious as that by reason of its continuance the county is chargeable with notice thereof without the plaintiff's being chargeable with contributory negligence in regard to an accident happening to him from such defect: *Homan v. Franklin County*, 68 N. W., 559.

In an action against a county to recover damages for injuries received by reason of a defective bridge, defendant may show that plaintiff had knowledge of the unsafe condition of the bridge and might have reached his destination by another road equally convenient, over a good bridge: *Walker v. Decatur County*, 67-307.

It will not, however, as a matter of law, constitute contributory negligence that plaintiff, knowing the bridge in question was unsafe, did not take another road which was safe and convenient, the bridge at which the accident occurred not having been barricaded but left open for public travel: *Ibid.*

In a particular case, *held*, that there was such contributory negligence on the part of a person killed by falling from a bridge that no recovery could be had, although it was claimed that the bridge was defective by reason of the absence of any railing between the spans: *Dale v. Webster County*, 76-370.

If a person about to drive on a bridge knows it to be unsafe and that it is imprudent to drive thereon, and that he might take another way to reach his destination which would be safe and convenient, he will

be guilty of negligence in going upon the unsafe bridge: *Homan v. Franklin County*, 90-185.

Where the board of supervisors have taken the proper steps to place barriers across a defective bridge and post notices warning travelers of its dangerous condition, the county will not be liable to one who drives upon such bridge and is injured, even though, by reason of his being unable to understand the English language, he could not read the notices: *Weirs v. Jones County*, 86-625.

Par. 19. Bounties for scalps of wild animals: To entitle a party to recover the additional bounty herein contemplated, the animals must be taken and killed within the county: *Murray v. Jones County*, 72-286.

Par. 22: The rules and regulations here contemplated are for their own government and not for the government of other bodies or boards: *Hunter v. Jasper County*, 40-568.

SEC. **423. Expenditures for improvements—when vote necessary.** The board of supervisors shall not order the erection of a court-house, jail, poor-house or other building, or bridge, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding two thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given for thirty days previously, in a newspaper, if one be published in the county, and, if none be published therein, then by written notice posted in a public place in each township in the county. [18 G. A., ch. 46; 16 G. A., ch. 80; C. '73, § 303; R., § 312.]

The members of the board of supervisors violating these provisions by voting to erect a building or bridge, the probable cost of which exceeds the amount here specified, without having submitted the question to vote, are guilty of a misdemeanor under § 4905: *State v. Conlee*, 25-237.

Where the erection of a building, the probable cost of which exceeds $5,000, has been formally authorized, the board are limited to the amount authorized by such vote, and an indebtedness contracted beyond that amount is void: *Reichard v. Warren County*, 31-381.

The county cannot be held on an implied contract for a *quantum meruit* where an express contract would have been unauthorized. The acceptance and occupation of a building, erected at greater expense than that authorized, will not render the county liable for its cost beyond the amount authorized: *Ibid.*

Where the people of a county had by vote authorized the erection of a court-house, and an expenditure of $75,000 for that purpose, and plaintiff contracted to build it for that amount, according to certain plans and specifications, but the contract provided for possible changes in the plans and specifications, the cost of which was to be added to or deducted from the amount agreed to be paid for the building, and the changes which were made added materially to the contract price, and no corresponding reductions were made, *held*, that all agreements whereby the total cost of the work was to exceed the amount authorized to be expended were void, having been made in excess of the authority of the board of supervisors, and that plaintiff was not entitled to recover anything on such contracts; and the fact that the county was compelled to vote an additional $50,000 for the completion of the building could not be construed to be a ratification of the illegal acts of the parties in making the contracts: *King v. Mahaska County*, 75-329.

And in such case *held*, that the county might insist that all money paid was paid on the original contract, and not on the illegal modification: *Ibid.*

The board may order the purchase of real estate, not exceeding $2,000 in value, and the erection thereon of a public building not costing to exceed $5,000, without submitting the question to a vote: *Merchant v. Tama County*, 32-200.

In the submission of a proposition for the outlay of money, two distinct objects, each calling for a certain specified amount, cannot be included in one proposition: *Gray v. Mount*, 45-591.

Before the amendment made by 18 G. A., ch. 46, *held*, that the submission here authorized could only be made at a general election: *Ibid; Yant v. Brooks*, 19-87.

Where a proposition was made to a county to sell property to it for a court-house, and the proposition was submitted to the voters and acquiesced in by them, *held*, that such action did not constitute an acceptance, but only authorized an acceptance by the board of supervisors, and in the absence of such action on the part of the board the contract was not binding on the county: *Starr v. Board of Supervisors*, 22-491.

And *held*, that such a proposition must be accompanied, when submitted to vote, by a provision to lay a tax for the payment thereof, as provided in § 447: *Ibid.*

It is not necessary that in connection with a proposition to expend more than $5,000 in the erection of a court-house there be submitted a proposition to levy a tax, where to meet the required expenditure no special tax need be voted. But when, in order to pay for the building, money must be borrowed or a debt be incurred, then the question of borrowing the money must be submitted with the proposition to erect the building: *Miller v. Merriam*, 62 N. W., 689.

The proceeds of swamp lands may be appropriated to the building of public bridges when duly authorized by the vote of the people: *Barrett v. Brooks*, 21-144.

The submission of such a question to vote

need not include the submission of the contract under which the bridge is to be built: *Ibid.*

A proposition to sell swamp lands and to devote the proceeds to the erection of a courthouse are not necessarily separate propositions, but may be submitted together: *Rock v. Runehart*, 88-37.

That proceeds of swamp lands are appropriated by a vote of the electors to the construction of a bridge does not restrict the board from appropriating a further sum from the bridge fund: *Bell v. Foutch*, 21-119.

Under a statute authorizing the voting of taxes by a township to aid in the construction of county bridges, *held*, that the electors of the township could only vote such taxes when the cost was at least $10,000, which estimate or cost must be fixed by the board of supervisors: *Ritz v. Tannehill*, 69-476.

SEC. **424. Appropriations for county bridges—limitations.** The board of supervisors of any county having a population of more than ten thousand may appropriate, for the construction of any one bridge which is or may hereafter become a county charge, within the limits of such county, or may appropriate toward the construction of any bridge across any unnavigable river which is the dividing line between any two counties in this state, or between one county in this state and another state, such sum as may be necessary, not exceeding the sum of forty dollars per lineal foot for superstructure, but in no case shall they appropriate for said purpose, including substructure, superstructure and approaches, a sum exceeding fifteen thousand dollars; but, in any county having a population exceeding fifteen thousand, said board may appropriate, as aforesaid, not to exceed twenty-five thousand dollars; but not more than fifteen thousand dollars shall be expended in the construction of such bridge across a stream which is the dividing line between two counties. [16 G. A., ch. 80; C. '73, § 303.]

SEC. **425. Expenditure of insurance money.** In any county in this state where any of the public buildings thereof have been or may hereafter be destroyed by fire, wind or lightning, the board of supervisors of such county, for the purpose of reconstructing the same, may appropriate and use, in addition to the amount now authorized by law, the amount received by way of insurance on such building or buildings so destroyed. [19 G. A., ch. 54.]

SEC. **426. Bridges on county-line roads.** Whenever a county-line road intersects a stream of sufficient width to require a county bridge, and the point of intersection does not afford a suitable site for the construction thereof, and there is a good site for its erection wholly within one or the other of said counties, at a reasonable distance from the county line, the boards of supervisors of the respective counties to be benefited by said bridge may make the necessary appropriations for the construction and maintenance thereof, as they might do if said bridge was located on the county line. [17 G. A., ch. 40.]

Where, under the provisions of this statute, one county erects a bridge along a county road but within the limits of another county, it may be held liable for injuries resulting from negligence in constructing and repairing such bridge: *Casey v. Tama County*, 75-655.

SEC. **427. Highways established to avoid bridging.** The board of supervisors of any county shall have the power, on its own motion, to change and establish highways along streams, where it can avoid building a bridge or bridges over such streams, and said highways shall be placed in good traveling condition by such board of supervisors; and all costs accruing in the establishment of said road shall be paid out of the county bridge fund. [21 G. A., ch. 85, § 1.]

SEC. **428. Damages—appeal.** Whenever it is found necessary to establish such highway, the board of supervisors, at any regular session, may appoint three disinterested citizens as appraisers to assess the damages occasioned thereby, and may hear evidence, and increase or decrease the damages allowed by the appraisers as to it may seem just. Any party aggrieved by its action may appeal therefrom to the district court in the same time and manner, and with the same effect, as is provided in relation to the establishment of highways. [Same, §§ 2, 3.]

SEC. **429. Expenditure of bridge fund on highways.** Whenever any county in the state is free from debt, and has a surplus in its bridge fund, after providing for the necessary repairs of bridges in said county, the board of supervisors may, out of such surplus, make improvements upon the highways, upon the petition of one-third of the resident freeholders of any township in said county; but in no case shall they be authorized to run the county in debt for such improvement of the highways; and whenever they shall make such improvements, they shall let the work by contract to the lowest responsible bidder, after having advertised for proposals, in some newspaper printed in the county, for not less than fourteen days previous to the letting of said contract. [18 G. A., ch. 88, § 1.]

SEC. **430. Dependent soldiers' and sailors' tax.** A tax of one-half mill upon the dollar, or such less sum as may be needed, may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of and to pay the funeral expenses of honorably discharged, indigent Union soldiers, sailors and marines, and their indigent wives, widows, and minor children not over fourteen years of age, if boys, nor over sixteen years, if girls, having a legal residence in the county. [24 G. A., ch. 69, § 1; 22 G. A., ch. 105, § 1.]

SEC. **431. Commission to disburse—duties.** Said fund shall be disbursed by the soldiers' relief commission, which shall consist of three persons, two of whom shall be honorably discharged Union soldiers, sailors or marines, to be appointed by said board, subject to removal at any time by said board for neglect of duty or maladministration, at the regular meeting in September, and who shall hold their office for three years, and until their successors shall be appointed and qualified; all vacancies to be filled by appointment by the board, one to be appointed each year. They shall qualify by taking the usual oath of office, and give bond in the sum of five hundred dollars each, conditioned for the faithful discharge of their duties, with sureties to be approved by the county auditor, and, when approved, shall be filed and recorded by him as other official bonds. The commission shall organize by the selection of one of their number as chairman, and one as secretary. [22 G. A., ch. 105, §§ 2, 4.]

SEC. **432. Meetings—report to supervisors—disbursements—how made.** The commission shall meet annually at the county auditor's office, on the first Monday in September, and at such other times as may be necessary, at which annual meeting it shall determine who are entitled to relief, and the probable amount required to be expended therefor, which sum it shall certify to said board, together with a list of those found to be entitled to relief, and the sum to be paid in each case, the aggregate not to exceed the amount to be raised by the tax levy authorized; and it, at its regular September meeting, shall levy a sufficient tax to raise this amount. Upon the filing of the list with the board of supervisors, the county auditor shall, within twenty days thereafter, transmit to the township clerks in the county the names of those, if any, to whom relief has been awarded, and the amount. On the first Monday of each month after the fund is ready for distribution, the auditor shall issue his warrant upon the county treasurer to the commission for the sums thus awarded, and it shall proceed to disburse the same to the parties named in the list, taking receipts therefor, or distribution may be made in any other manner the commission may direct. Should it appear to the commission that any person entitled to assistance will not properly expend the same, then the payment may be made to some suitable person, who shall, as directed by it, make the disbursements thereof, for the use and benefit of such person. The amount awarded to any party may be increased, decreased or discontinued by the commission at any regular meeting. New names may be added and certified thereat, and it shall, at the close of the year, make annual detailed reports of its

work, which shall be accompanied with the proper vouchers for all moneys received by it. [24 G. A., ch. 69, § 2; 22 G. A., ch. 105, § 3.]

SEC. **433. Burial of indigent soldiers and sailors.** The board of supervisors shall designate some suitable person in each township to cause to be decently interred the body of any honorably discharged soldier, sailor or marine who served in the army or navy of the United States during the late war, who may hereafter die without leaving sufficient means to defray the expenses of his funeral. Such burial shall not be made in any cemetery or burying-ground or part thereof used exclusively for the burial of the pauper dead. The expenses of such burial shall in no case exceed the sum of thirty-five dollars, and in case surviving relatives of the deceased shall desire to conduct the funeral, and are unable or unwilling to pay the charges therefor, they shall be permitted to do so, and the expenses shall be paid as herein provided. [20 G. A., ch. 178, § 1.]

SEC. **434. Graves to be marked.** The grave of any deceased soldier, sailor or marine shall be marked by a headstone, showing his name and the organization to which he belonged or in which he served; and such headstone shall not cost more than the sum of fifteen dollars, and shall be of such design and material as may be approved by the board of supervisors. The expenses of such burial and headstone shall be paid by the county in which such person died. The board of supervisors of such county shall audit the account and pay the same in such manner as other claims are audited and paid. [Same, §§ 2, 3.]

SEC. **435. Soldiers' monuments and memorial halls—tax for—inscriptions.** Whenever a petition shall be presented to the board of supervisors of any county, signed by a majority of the members of the grand army posts therein, asking it to submit to the voters of such county, at the next general election thereafter, the question of aiding in the erection of a soldiers' and sailors' monument or memorial hall, the same shall be ordered by such board. The board shall cause the proposition to be printed and placed upon the ballots, and the election shall be conducted in the manner provided in case of similar or like propositions in the chapter on elections. If a majority of the votes polled is in favor of the adoption of the proposition, then such board, at the time of levying the ordinary taxes following the election, shall levy the same, which levy shall be placed upon the tax list and collected as other taxes. The tax thus voted shall not exceed one mill on the dollar upon the assessed valuation of the taxable property within the county. If a monument shall be erected, then there shall be inscribed thereon, or, if a hall be erected, recorded therein, the names of all deceased soldiers and sailors who have died or may hereafter die, and who enlisted or entered the service from the county, and such other names of soldiers and sailors as may be directed by the grand army posts of the county. [21 G. A., ch. 62, §§ 1, 2.]

SEC. **436. How tax expended.** Such taxes, when collected by the county treasurer, shall be drawn and expended for the erection of such soldiers' and sailors' monuments or memorial halls, under the direction of a committee of three, to be selected by a majority of all the members of the grand army posts in the county where such tax is voted, who shall each give bonds in such amount as shall be fixed by the board, and the county auditor shall draw his warrants upon the treasurer for said money, at the times and in such amounts as may be directed by said committee, and shall charge it with the same, and such committee shall settle and account to the board of supervisors for all money so drawn, in the same manner as is now or may hereafter be provided by law for the settlement of the accounts of township clerks; but no such tax shall be voted in any county which has before made an appropriation for said purposes, or either of them, by virtue of any law heretofore in force. [Same, § 3.]

SEC. **437. Compromise by county with sureties.** Where judgment has been or may hereafter be rendered against any county treasurer or

other county officer and the sureties on his official bond, in favor of any county in this state, and remains unsatisfied, and the board of supervisors of such county are satisfied that the full amount thereof cannot be collected, such board of supervisors shall have power to compromise the said judgment, and to enter full satisfaction thereof under the terms of said compromise. [18 G. A., ch. 48, § 1.]

SEC. **438. Conditions of compromise.** In all cases referred to in the preceding section, if the principal debtor and each of the sureties on his official bond shall execute a written consent to a compromise with any one or more of said sureties, and to a release of said surety or sureties, and in such writing shall agree that such compromise or release shall not release any of the sureties who shall not compromise and be released from the payment of the unpaid judgment, then in that case, upon the filing of such written consent with the auditor of such county, the board of supervisors of such county shall have full power, and are hereby authorized, to compromise with any one or more of such sureties, and to release such surety or sureties upon the terms which may be agreed upon in such compromise. [Same, § 2.]

SEC. **439. Disposition of funds therefrom.** In case of any compromise as provided in the two preceding sections being made, the money received by the county thereon shall be paid to the various funds of the county, in proportion to the amount that each fund is in default, as such default existed at the time the judgment was rendered, as nearly as the same can be ascertained, so that each fund shall receive its *pro rata* share, as the same shall be determined by the board of supervisors. [Same, § 3.]

SEC. **440. Acts requiring majority of whole board.** No tax shall be levied, no contract for the erection of any public buildings entered into, no settlement with the county officers made, no real estate purchased or sold, no new site designated for any county buildings, no change made in the boundaries of townships, and no money appropriated to aid in the construction of highways and bridges, without a majority of the whole board of supervisors voting therefor and consenting thereto. [C. '73, § 305; R., § 313.]

The authority of a county to aid in the construction of a road is here necessarily implied and warrants issued therefor are valid: *Long v. Boone County*, 32–181.

While it is not necessary that everything done by the board must be entered of record or be put in writing in order to be binding, yet there should at least be an assent to such action given by a majority of the members of the board, while in session, before it will be binding on the county: *Rice v. Plymouth County*, 43–136.

SEC. **441. Official newspapers—how selected—what published in—compensation.** The board of supervisors of each county shall, at its January session in each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of *bona fide* yearly subscribers within the county, which circulation shall be determined as follows: In case of contest, the applicants shall each deposit with the county auditor, on or before a day named by the board of supervisors, a certified statement, subscribed and sworn to before some competent officer, giving the names of the several post-offices, and the number and the names of the *bona fide* yearly subscribers receiving their papers through each of said offices living within the county; such statements to be in sealed envelopes, and opened by the county auditor upon direction of the board of supervisors; and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers, in which all the proceedings of the county board of supervisors, the schedule of bills allowed, and the reports of the county treasurer, including a schedule of the receipts and expenditures, shall be published at the expense of the county during the ensuing year, and the costs of such publication shall not exceed thirty-three and one-third cents for each ten lines of brevier type, or its equivalent; but in counties having

a population of seventeen thousand or more, three papers, not more than two of which shall be published in the same town, shall be selected, in which such proceedings shall be published, with the same limitation as to compensation; and, in counties having two county seats, each district shall be regarded as a county for the purposes of such publication. The county auditor shall furnish all such papers selected a copy of such proceedings for that purpose. In case a contest is made by a publisher, the board shall receive other evidence of circulation, and he shall have the right of appeal to the district court, to be taken as in ordinary actions. Neither publisher to the contest shall receive pay for publishing such proceedings until the case is finally disposed of. [21 G. A., ch. 86, § 2; 20 G. A., ch. 197, § 2; C. '73, § 307.]

Decisions under the original section: The proprietor or publisher of a newspaper has no such interest in the selection of his paper for the publication of proceedings, etc., that he can maintain an action in his own name to compel the board to comply with the law, and order such publication in his paper: *Welsh v. Board of Supervisors*, 23–199; *Smith v. Yoran*, 37–89; *Iowa News Co. v. Harris*, 62–501.

The schedule of the receipts and expenditures, with the names of all claimants, etc., required to be published under the provisions of § 304 of Code of '73 before its repeal, were not required to be published under this section as a part of the proceedings of the board: *McBride v. Hardin County*, 58–219. Nor was the treasurer's semi-annual report to be so published: *Haislett v. Howard County*, 58–377.

Where the board entered into a contract for the publication of matter authorized to be published by them, in four newspapers instead of two as authorized by law, but at such rate that the aggregate amount of compensation was less than that which they were authorized to pay for the proper printing of such matter, *held*, that their action could not be restrained by injunction at the suit of a tax-payer: *Sperry v. Kretchner*, 65–525.

Section as amended: The intention of the amended section which is here substantially retained is to give the aggrieved publisher the right to appeal in all cases from the action of the board in determining the newspaper in which publication shall be made, and not merely in cases where fraud is charged: *Brown v. Lewis*, 76–159.

The right of appeal does not depend upon a charge of fraud and the person who desires to contest the action of the board must file the statement required by the statute and such statements may be filed without the order of the board fixing the time for filing. When more than two statements are filed there is a contest within the meaning of the statute and the board could not ignore or defeat it by neglecting to fix a day for the filing of the statements and for hearing. One who has filed no statement cannot complain on appeal, the printing having been awarded to two papers in behalf of which statements have been filed: *Runion v. Haislet*, 90–376.

The fact that the board had not previously fixed a day for the filing of statements and hearing of evidence in regard to them, *held* not to deprive a hearing actually had, in which the applicants protested, of the character of a contest. The provision in regard to naming a day for the filing of statements is designed for the benefit of the applicants, and may be waived by them: *Cory v. Hamilton*, 84–594.

Objections should be made when the statements are opened, and objection on the ground of fraud in such statements should not be postponed until the selection is made: *Ibid.*

Where a newspaper was selected to do the county printing, subject to a contest, and at the time fixed for the determination of the contest one of the supervisors was absent and there was a tie vote on the motion to proceed with the contest, and on a subsequent day there was a tie vote on a motion to dismiss the contest, *held*, that the first action had the effect of postponing the matter, and the second left it still pending, and as there had been no final action upon the contest, no appeal could be taken: *Hoxie v. Shaw*, 75–427.

Although it is provided that the supervisors shall select the newspapers to do the printing at the January term, final action upon a contest may be taken at a subsequent term, when by reason of the absence of one of the supervisors, causing an equal division of the board, the matter cannot be disposed of until the entire board is present: *Ibid.*

Such appeals are governed by the provisions of §§ 4548 and 4552 relating to appeals from judgments of justices of the peace, and must therefore be taken within twenty days and by the filing of an appeal bond: *Starr v. Ingham*, 84–580.

A contest as to whether a paper is under the provisions of this statute entitled to be selected for the publication of the proceedings of the board is triable in the first instance by the board of supervisors, and formal pleadings are not in all cases necessary. On appeal to the district court the case should be tried and decided as it was made before the board of supervisors, and it is not error to fail to require the filing of pleadings: *Ashton v. Story*, 64 N. W., 804.

To become a subscriber to a newspaper involves some voluntary act on the part of such subscriber or something which is in effect an assent by him to the use of his name as a subscriber. A person to whom a paper is sent without his knowledge or consent, either express or implied, is not a subscriber within the meaning of this statute. Therefore, *held*, that names of persons to whom the paper was sent in accordance with

a contract made by a real estate dealer as an advertisement of his business were not to be counted in determining the actual subscribers: *Ibid.*

The list of subscribers as presented to the board of supervisors should not be allowed to be amended on the hearing of an appeal in the district court. The case should be tried as it was heard before the board: *Ibid.*

When two or more statements are filed with applications to have specified newspapers selected by the board of supervisors and made official there is a contest under this section; and the publisher is aggrieved when an adverse application based upon a fraudulent list is filed, and also when another paper is selected if his should have been chosen. But the contest is triable in the first instance by the board of supervisors, and when fraud is relied upon the charge of fraud should be made and brought to the attention of the board before it determines the contest, and it is only in such case that the board is required to seek evidence of circulation other than that presented in the statements of the applicants. If no such question of fraud is raised before the board it should not be considered by the district court on appeal: *Ross v. Campbell*, 66 N. W., 1064.

On the consideration of the appeal in the district court the evidence must be introduced as in other actions by ordinary proceedings and cannot be introduced by affidavits: *Democrat Publishing Co. v. Lewis*, 90–304.

SEC. **442. Books to be kept by board.** The board is authorized and required to keep the following books:

1. A book to be known as the "minute book," in which shall be recorded all orders and decisions made by it, except those relating to highways. All orders for the allowance of money from the county treasury shall state on what account and to whom the allowance is made, dating the same and numbering them consecutively through each year;

2. A book to be known as the "highway record," in which shall be recorded all proceedings and adjudications relating to the establishment, change or discontinuance of highways;

3. A book to be known as the "bridge book," where a record of bridges shall be kept in a numerical order in each congressional township, commencing in section one, and numbering each bridge; give location in fractional parts of sections; name the kind of material used for substructure and superstructure; give length and cost of bridge, and, when repaired, to keep a record of repairs and charge it to the bridge; and warrants drawn in payment for erection or repairs of bridges shall indicate the number of the bridge for which it is issued in payment;

4. A book to be known as the "warrant book," in which shall be entered, in the order of its issuance, the number, date, amount, name of drawee of each warrant drawn on the treasury, and the number of warrants, as directed in relation to the minute book. [C. '73, § 308; R., § 318.]

It is not necessary that everything done by the board be entered of record in order to be binding, although there must at least be an assent thereto given by a majority of the members while in session: *Rice v. Plymouth County*, 43–136.

The fact that the members of the board, when not in session, expressed views different from their recorded action will not affect such action as recorded: *Palo Alto County v. Burlingame*, 71–201.

SEC. **443. Questions to be submitted to voters—tax payable in money only.** The board of supervisors may submit to the people of the county at any regular election, or at any special one called for that purpose, the question whether money may be borrowed to aid in the erection of any public buildings, and the question of any other local or police regulation not inconsistent with the laws of the state. And, when the warrants of a county are at a depreciated value, it may, in like manner, submit the question whether a tax of a higher rate than that provided by law shall be levied; and in all cases when an additional tax is levied in pursuance of a vote of the people of any county for the special purpose of repaying borrowed money, or constructing or aiding to construct any highway or bridge, such special tax shall be paid in money. [C. '73, § 309; R., § 250; C. '51, § 114.]

Where the proposition submitted to the voters was to issue bonds for the erection of a court-house and provide a tax for their payment, and the ballots were "for court-house bonds" and "against" the same, a majority of the ballots cast being in the

affirmative, *held*, that such vote authorized the levy of a tax as well as the issuance of the bonds: *Milwaukee & St. P. R. Co. v. Kossuth County*, 41–57.

Where a proposition is submitted for ratification at an election it is necessary that the voters shall be advised of the nature or terms of the contract or proposition submitted, and when or where they are called upon to express by vote their assent or dissent: *Page County v. American Emigrant Co.*, 41–115.

The manner and form of notice is not essential if there has been sufficient notice in fact upon which the voters of the county have acted; and in a particular case, *held*, that a notice of submission of a proposition for the disposition of swamp lands by the county was sufficient, although such notice was not in the form required by statute: *Ibid.*

Two or more propositions may be submitted to vote at the same time, but they cannot be joined together so as to make the adoption of each depend upon the adoption of all the others: *McMillan v. Lee County*, 3–311; *Gray v. Mount*, 45–591.

If the board are authorized to borrow money they may do it by means of negotiable bonds, but if not so authorized they have no authority to issue such bonds, and bonds so issued will be void. [Decided under § 114, Code 1851]: *Hull v. Marshall County*, 12–142; *Casady v. Woodbury County*, 13–113.

When authorized by vote of the people the counties of Iowa have the power to issue negotiable bonds for borrowed money or extraordinary expenditures: *Carpenter v. Buena Vista County*, 5 Dillon, 556.

SEC. **444. Restraining live stock—submission to voters.** The board of supervisors may submit to the people of the county at any regular election, or at a special one called for that purpose, and on the petition of one-fourth of the legal voters must submit, one of the following questions of police regulation:

1. Shall stock be restrained from running at large?
2. Shall stock be restrained from running at large between sunset and sunrise?
3. Shall stock be restrained from running at large from the first day of (naming the month) in each year, until the first day of (naming the month) following?
4. Shall stock be restrained from running at large between sunset and sunrise from the first day of (naming the month) in each year, until the first day of (naming the month) following?

The word "stock" as used in this section shall have the same meaning as in the chapter of this code relating to domestic animals. [15 G. A., ch. 70, § 4; C. '73, §§ 309, 1450; R., § 250; C. '51, § 114.]

The provisions of former statutes authorizing a submission of the question whether swine and sheep should be allowed to run at large, to vote in each county, were held to be merely an exercise of the police power, and therefore not unconstitutional as not having a uniform operation, nor as depending for their validity upon a vote of the people. (Const., art. I, § 6, and art. III, § 1): *Dalby v. Wolf*, 14–228.

A section similar to this, making the question whether that act should be in force in any county dependent upon a vote of the people of the county was held unconstitutional, and the act was held to be in force in all the counties of the state without such adoption: *Wier v. Cram*, 37–649; *Little v. McGuire*, 38–560; *Hallock v. Hughes*, 42–516.

SEC. **445. When vote takes effect—former like vote.** If at such election the majority of the electors voting thereon shall vote in favor of either of such regulations, then the same shall take effect and be in force at the end of thirty days after said election, and shall continue in force until the end of ninety days after an election at which, on a resubmission of the same question, a majority of the electors of the county voting thereon shall vote against the same. Where in any county the question for restraining stock from running at large, or for restraining stock from running at large between the hours of sunset and sunrise, has been submitted and adopted, in accordance with any law heretofore in force, such vote shall be construed and held to be an adoption by the county of the police regulation so voted upon, as fully and effectually as if the same had been done under the provisions of this chapter. [15 G. A., ch. 70, § 5; C. '73, § 1451.]

SEC. **446. Manner of submitting questions to vote.** The mode of submitting such questions to the people shall be the following: The whole question, including the sum desired to be raised, or the amount of tax

desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty for its violation if there be one, shall be published at least four weeks in some newspaper printed in the county. If there be no such newspaper, the publication shall be by being posted up in at least one of the most public places in each township in the county, and, in addition, in at least five among the most public places in the county, one of them being at the door of the court-house, for at least thirty days prior to the time of taking the vote. All such notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election. [C. '73, § 310; R., § 251; C. '51, § 115.]

Where the question submitted was whether a special tax should be levied to pay depreciated county warrants, *held*, that the omission to specify for what year the tax should be levied rendered the submission invalid: *Iowa R. Land Co. v. Sac County*, 39–124, 149.

SEC. **447. When tax must be voted also.** When any question submitted involves the borrowing or the expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes, as directed in the following section, and no vote adopting the question proposed will be of effect unless it adopt the tax also. [C. '73, § 311; R., § 252; C. '51, § 116.]

Under the corresponding section of the Code of '73, *held*, that the provisions of that section referred to questions the submission of which was authorized by the two preceding sections, but had no relation to the expenditure of money already in the county treasury which might be authorized in excess of five thousand dollars for the erection of a court-house by vote under § 303, ¶ 24, of that Code (see § 423; explaining *Starr v. Des Moines County*, 22–491): *Miller v. Merriam*, 62 N. W., 689.

It is not necessary that the provision for levying the tax be a distinct proposition to be voted upon separately from the main one; each proposition, however, must be accompanied by such provision: *McMillan v. Lee County*, 3–311.

SEC. **448. Rate of such tax.** The rate of tax shall in no case be more than one per cent. on the county valuation in one year. When the object is to borrow money for the erection of public buildings, as above provided, the rate shall be such as to pay the debt in a period not exceeding ten years; but in counties having a population of forty thousand or over, and where it is proposed to expend one hundred thousand dollars or over, the rate of levy shall be such as to pay the debt in not exceeding twenty-five years. In issuing bonds for such indebtedness, when voted, the board of supervisors may cause portions of said bonds to become due at different definite periods. But none of such bonds so issued shall be due and payable in less than five or more than twenty-five years from date. When the object is to construct, or to aid in constructing, any highway or bridge, the annual rate shall not be less than one mill on the dollar of the assessed valuation; and any of the above taxes becoming delinquent shall draw the same interest as the ordinary taxes. [23 G. A., ch. 32; C. '73, § 312; R., § 253; C. '51, § 117.]

The authority of a county to aid in the construction of a road is here necessarily implied, and warrants issued therefor are valid: *Long v. Boone County*, 32–181.

SEC. **449. Tax for successive years.** When it is supposed that the levy of one year will not pay the entire amount, the proposition and the vote must be to continue the proposed rate from year to year until the amount is paid. [C. '73, § 313; R., § 254; C. '51, § 118.]

SEC. **450. Result of vote to be published.** The board of supervisors, on being satisfied that the above requirements have been complied with, and that a majority of the votes were cast in favor of the proposition, shall cause the same and the result of the vote to be entered at large in the minute book, and the proposition shall take effect and be in force thereafter.

Notice of such adoption shall be published for the same time and in the same manner as above provided for publishing the preliminary notice. This section shall not apply to police regulations in so far as is otherwise provided with respect thereto. [C. '73, § 314; R., § 255; C. '51, § 119.]

After the authority to levy the tax has been duly conferred by vote of the people, the board must proceed to make a levy of the tax, as provided by law, in order to make it valid: *Iowa R. Land Co. v. Woodbury County*, 39-172.

SEC. **451. Rescission by subsequent vote.** Propositions thus adopted, and local regulations thus established, may be rescinded in like manner and upon like notice, by a subsequent vote taken thereon, but neither contracts made under them, nor the taxes appointed for carrying them into effect, can be rescinded. [C. '73, § 315; R., § 256; C. '51, § 120.]

SEC. **452. Board must submit questions on petition.** The board shall submit the question of the adoption or rescission of such a measure, when petitioned therefor by one-fourth of the voters of the county, unless a different number be prescribed by law in any special case. [C. '73, § 316; R., § 257; C. '51, § 121.]

SEC. **453. Regularity presumed.** The record of the adoption or rescission of any such measure shall be presumptive evidence that all the proceedings necessary to give the vote validity have been regularly conducted. [C. '73, § 317; R., § 258; C. '51, § 122.]

SEC. **454. Surplus of tax—disposition of.** In case the amount produced by the rate of tax proposed and levied exceeds the amount sought for the specific object, it shall not therefore be held invalid, but the excess shall go into the ordinary county funds. [C. '73, § 318; R., § 259; C. '51, § 123.]

SEC. **455. Money specially appropriated.** Money so raised for such purposes is specially appropriated, and constitutes a fund distinct from all others in the hands of the treasurer, until the obligation assumed is discharged. [C. '73, § 319; R., § 260; C. '51, § 124.]

SEC. **456. Unclaimed money placed in county fund.** In any county of this state where any special levy has been made to pay any claim, bond or other indebtedness, and the same shall have remained in the treasury of the county, uncalled for, for a period of three years, the board of supervisors of such county may authorize such unclaimed fund to be transferred to the general county fund. [16 G. A., ch. 84.]

SEC. **457. Dogs to be assessed.** It shall be the duty of every assessor of this state, at the time of listing the property of his district, to list each dog over three months of age in the name of the owner thereof, without affixing any value thereto. Any person keeping or harboring a dog or dogs shall be deemed the owner thereof within the meaning of this section, and it shall be the duty of each county auditor to provide suitable columns, properly headed, in the assessor's book, in which to make said lists. [22 G. A., ch. 70, §§ 1, 3.]

SEC. **458. Supervisors to tax.** The board of supervisors of each county shall, at its September session, each year, when levying other taxes, levy a tax of fifty cents on each male, and two dollars on each female, dog listed by the assessor, which tax shall be paid into the general county fund. [Same, § 2.]

SEC. **459. Treasurer to collect.** The treasurer of each county, on receiving the tax books for the collection of other taxes, shall collect the tax herein provided for as other taxes are collected. [Same, § 4.]

SEC. **460. Changing names of villages.** The boards of supervisors may change the names of villages within their respective counties in the manner herein prescribed. [16 G. A., ch. 146, § 1.]

SEC. **461. Petition for.** When any number of the inhabitants of any such village shall desire to change the name thereof, there shall be filed in the office of the county auditor of the proper county, at least ten days before the regular meeting of the board of supervisors, a petition for that

purpose, which must be signed by at least two-thirds of the qualified electors of said village, setting forth the name by which the same is known, its location as near as practicable, and giving the name by which they desire it shall thereafter be known. [Same, § 2.]

SEC. **462. Notice.** Notice of the filing of said petition, and the time and place when the same shall be heard, and the objects and purposes thereof, shall be given at least four weeks before the regular meeting of the board of supervisors, in like manner as the publication of original notices in civil actions where the defendant can not be personally served within the state; or by posting up a notice of said petition in three public places in the village the name of which is sought to be changed, at least four weeks before the meeting of said board, and also one copy of said notice for the same length of time on the front door of the court-house of the proper county, wherein the last term of the district court was held. [Same, § 3.]

SEC. **463. Hearing.** At the first regular meeting of said board after publication of notice is completed, the board of supervisors shall proceed to hear and determine said petition, unless said hearing is for good cause continued until the next meeting; and said board, on the hearing of said petition, shall hear any remonstrances against the proposed change, and in all its proceedings in relation to the hearing of said petition and remonstrances to the same the said board shall be governed by the law regulating the hearing of petitions for the establishment of highways, so far as they are applicable and not inconsistent herewith. [Same, § 4.]

SEC. **464. Order of board.** If on the hearing it shall appear to the said board that two-thirds of the qualified electors of said village in good faith signed said petition for change of name, and desired the same, then the said board shall order said name to be changed as prayed for. [Same, § 5.]

SEC. **465. When order takes effect—publication.** Said order of the board shall thereupon be entered of record, giving the name of said village as set forth in said petition, the new name given, the time when the change shall take effect, which shall not be less than thirty days thereafter, and directing that notice of said change shall be published in at least one newspaper published in said county, if any; and if there is no newspaper published therein, then said notice shall be published by posting the same for four weeks on the front door of the court-house where the last term of the district court of said county was held. [Same, § 6.]

SEC. **466. Proof preserved.** The ordinary proof of such publication shall be filed in the office of the county auditor, shall be by him filed for preservation, and, on the day fixed by the board as aforesaid, the change shall be complete. [Same, § 7.]

SEC. **467. Costs.** In all cases arising under the provisions of the seven preceding sections, where there is no remonstrance or opposition to said petition, the petitioners shall pay all costs; but in all other cases costs shall abide the result of the proceeding, and be taxed to either party, in the discretion of the board, or divided equitably between the parties. [Same, § 8.]

SEC. **468. Supplies for county officers.** The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney and county superintendent with offices at the county seat, together with fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices; but in no case shall any of such officers, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney. Nothing herein shall be construed to include the law books or library of the county attorney. [26 G. A., ch. 83; C. '73, § 3844.]

SEC. **469. Compensation of supervisors.** The members of the board of supervisors shall receive four dollars per day each for each day actually

in session, and two dollars and fifty cents per day, exclusive of mileage, when not in session, but employed on committee service, and five cents per mile for every mile traveled in going to and from the regular, special and adjourned sessions thereof, and in going to and from the place of performing committee service; but in counties having a population of ten thousand or less, they shall not receive compensation for session service of more than twenty days in a year; in counties having a population of more than ten and less than twenty-three thousand, for not more than thirty-five days of such service in a year; in counties having a population of twenty-three and not over forty thousand, for not more than forty days of such service in a year; and in counties having a population of forty thousand and over, not more than fifty days in a year. [21 G. A., ch. 15; 19 G. A., ch. 159; C. '73, § 3791.]

CHAPTER 3.

OF THE COUNTY AUDITOR.

SECTION **470. Duties defined.** The county auditor shall:

1. Record all the proceedings of the board in proper books provided for that purpose;
2. Make full entries of all its resolutions and decisions on all questions concerning the raising of money, and for the payment of money from the county treasury;
3. Record the vote of each supervisor on any question submitted to the board, if required by any member present;
4. Sign all orders issued by the board for the payment of money, and record, in a book provided for the purpose, the reports of the county treasurer of the receipts and disbursements of the county;
5. Preserve and file all accounts acted upon by the board, with its action thereon, and perform such special duties as are or may be required of him by law;
6. Designate upon every account, on which any sum shall be allowed by the board, the amount so allowed, and the charges for which the same was allowed;
7. Deliver to any person who may demand it a certified copy of any record or account in his office, on payment of his legal fees therefor. [C. '73, § 320; R., §§ 319, 320.]

Mandamus may be brought to compel the proper officer to attach the county seal to a warrant drawn by him or his predecessor on the treasurer, to make it conform to the requirements of § 482. Such action will be barred under § 3447, ¶ 5, in three years from the issuance of the warrant, and not from the time demand was made to have the seal attached: *Prescott v. Gonser*, 34–175.

The county auditor not being authorized to receive money due on school fund notes, his sureties cannot be held for money paid to him in satisfaction of a judgment for such funds: *Mahaska County v. Ruan*, 45–328. [But now see § 473. But school fund money is still payable to the treasurer and not to the auditor: See § 2853.]

Sureties of the auditor are liable for overdrafts made by him from the treasury in the payment of his compensation. The auditor being authorized to sign orders, the treasurer is not in fault in paying them: *Ibid.*

Where a county auditor surrenders securities of the school fund in his hands under improper circumstances he becomes liable on his bond for damages resulting therefrom; and if no actual damages are shown he is at least liable for nominal damages: *Madison County v. Tullis*, 69–720.

In an action against a board of supervisors, service of notice cannot be made on the county auditor: *Polk v. Foster*, 71–26.

SEC. **471. Issuing warrants.** The auditor shall not sign or issue any county warrant, except upon the recorded vote or resolution of the board of supervisors authorizing the same, except for jury fees, and every such warrant shall be numbered, and the date, amount and number of the same,

and the name of the person to whom issued, shall be entered in a book to be kept by him in his office for the purpose. [C. '73, § 321; R., § 321.]

If a vote is legally passed authorizing the issuance of warrants, and the failure to record it is a mere clerical omission, such failure to record will not invalidate a warrant otherwise legally and properly issued: *Clark v. Polk County*, 19–248; *Long v. Boone County*, 36–60, 66.

The auditor has no authority to issue a county warrant except upon the recorded vote or resolution of the board, save in case of jury fees. Therefore a warrant issued by the auditor under an order of the district court to reimburse a property owner for erroneous taxes collected is not valid: *Polk County v. Sherman*, 68 N. W. 562

As no recorded vote is necessary to authorize the issuance of warrants for jury fees, *held*, that the fact that no vote authorizing certain warrants appeared of record did not necessarily render such warrants invalid: *Clark v. Polk County*, 19–248.

County warrants are not negotiable instruments: *Ibid.*

This section is directory and not mandatory, and a warrant issued where there is no recorded vote is not on that account void: *Griggs v. Kimball*, 42–512.

Where a warrant is issued by the proper officers to a contractor for work done under an unauthorized contract, and the warrant is paid, the county cannot recover back the amount thus paid: *Long v. Boone County*, 36–60.

SEC. **472. Duty as to school fund.** Whenever the auditor of any county shall receive from the state auditor notice of the apportionment of school moneys to be distributed in the county, he shall file the same in his office, and transmit a certified copy thereof to the county treasurer, and he shall also lay a certified copy thereof before the board at its next regular meeting. [C. '73, § 322; R., § 322.]

SEC. **473. Custody of court-house—collection of moneys.** The county auditor shall have the general custody and control of the court-house in each county, respectively, subject to the direction of the board of supervisors. The county auditor is hereby authorized to collect and receive all money due their respective counties, except when otherwise provided by law, and shall be responsible for all public funds received or collected by them. [26 G. A., ch. 100; C. '73, § 323.]

SEC. **474. Report list of county officers to secretary of state.** The county auditor shall report to the secretary of state the name, office and term of office of every county officer elected or appointed, within ten days after their election and qualification, and the secretary of state shall record the same in a book to be kept for that purpose in his office. [C. '73, § 324; R., § 291.]

SEC. **475. Statistics of crime to clerk of court.** The county auditor snall report to the clerk of the district court, before the fifteenth day of October in each year, the expense of the county for criminal prosecutions during the year ending the thirtieth day of September preceding, including, but distinguishing, the compensation of county attorneys. [18 G. A., ch. 22, § 2.]

SEC. **476. Clerk or recorder may be auditor.** The clerk of the district court and county recorder shall each be eligible to the office of county auditor, and may discharge the duties of both offices. [C. '73, § 325.]

SEC. **477. Treasurer may not be.** The offices of county auditor and county treasurer shall not be united in the same person. [C. '73, § 326.]

SEC. **478. Fees to be collected.** The county auditor shall be entitled to charge and receive the following fees:

1. For recording each bond required to be by him recorded, fifty cents;
2. For transfers made in the transfer books, for each deed, or transfer of title certified by clerks of district courts, twenty-five cents;
3. For issuing certificate of redemption of land sold for taxes, twenty-five cents;
4. For each certificate issued by the treasurer for lands sold for non-payment of taxes, fifteen cents. [C. '73, § 3797; R., § 777.]

SEC. **479. Compensation.** The total compensation of the auditor in any one year shall not exceed the sum of twelve hundred dollars, inclusive of fees; but, in counties having more than twenty-five thousand population,

the board may grant such additional compensation to the auditor, deputy or clerks as it may deem reasonable. [18 G. A., ch. 184, § 3; C. '73, § 3798.]

Under prior provisions, *held*, that the allowance to a county auditor as here authorized was not the same as that authorized to be made to a deputy (see § 481): *State v. Van Auken*, 68 N. W., 454.

Where a county auditor during one term received, by reason of the action of the board, a certain amount, with the stipulation that the fees of the office should be applied thereon; and upon re-election applied for increase of salary and was allowed a smaller sum, nothing being said as to fees, *held*, that under the latter allowance he was entitled to the fees in addition to the salary allowed: *Madison County v. Holliday*, 43–251.

SEC. **480. Record and report of fees collected.** It is hereby made the duty of the county auditor, in each county of the state, to keep a complete and accurate account of all the fees charged and collected by him, as now provided by law; which account shall be made and kept as a permanent record of the office, and he shall make a report of such fees to the board of supervisors of his county at each regular session thereof, verified by his oath or affirmation, a summary of which report shall be spread upon the minutes of said board and made a part of its record. [18 G. A., ch. 184, § 5.]

SEC. **481. Deputy—qualifications—compensation—other assistants.** Each county auditor may, in writing, with the consent of the board of supervisors, appoint one or more deputies not holding a county office, for whose acts he shall be responsible, and from whom he shall require bond, which bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing; which appointment and revocation shall be filed and kept in the auditor's office. The person thus appointed shall qualify by taking the same oath as his principal, indorsed upon the certificate of appointment. The deputy, in the absence or disability of his principal, may perform all the duties of the principal pertaining to his office, and each deputy shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of supervisors. In case no deputy shall be appointed, but on account of the pressure of business in his office the auditor is compelled temporarily to employ an assistant, he shall file the bill for such service at their next regular meeting, and the board of supervisors shall make a reasonable allowance therefor. [18 G. A., ch. 184, § 3; 16 G. A., ch. 4; C. '73, §§ 766–8, 770–1, 3798; R., §§ 421, 643–5, 647–8; C. '51, §§ 411, 414, 416, 417.]

Where an officer accepts his position with a knowledge of the work to be done and the remuneration promised, while he may employ assistants, he cannot recover compensation for them: *Benton v. Decatur County*, 36–504.

The county is under no legal obligation to reimburse the county auditor an amount paid out by him for services of a deputy: *Ibid.*

CHAPTER 4.

OF THE COUNTY TREASURER.

SECTION **482. Duties in general.** The treasurer shall receive all money payable to the county, and disburse the same on warrants drawn and signed by the county auditor and sealed with the county seal, and not otherwise, and shall keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the board of supervisors. [C. '73, § 327; R., § 360; C. '51, § 152.]

Liability: The county treasurer is only held to a reasonable degree of care and diligence, and if, notwithstanding such care, moneys of the county are stolen from him, he is not liable: *Ross v. Hatch*, 5–149.

Where a county treasurer, without authority, deposited public money in a bank which subsequently failed, *held*, that this constituted an unlawful disposal of the public funds for which he was liable on his bond: *Lowry v. Polk County*, 51–50.

Where under the statutory provision authorizing the deposit of public money in a bank to be selected for that purpose, upon

the giving of bond by such bank (see § 1457) if the bond is given and allowed to remain outstanding it constitutes security, not merely for the first deposit, but for other deposits which may subsequently be made: *Poor v. Merrill*, 68–436.

Demand upon the person in charge of the bank where the deposit is made is sufficient to constitute a breach of the bond in case of non-payment of the funds: *Ibid.*

Where a certificate of deposit is issued for the repayment of the deposit when it is returned, but no objection to the payment of the money is made on the ground of the failure to return such certificate, the fact that it is not returned will not defeat the right to recover, it being afterwards surrendered: *Ibid.*

One who has wrongfully borrowed county funds of the treasurer and repaid them, cannot be held liable to the county: *Marshall County v. Baum*, 53–528.

Where a county treasurer had made use of county funds in a partnership business, but it did not appear that such illegal use was known to his partner, or that all the funds so used had not been paid back, *held*, that the county could not establish a trust in lands held in the name of such partner: *Ibid.*

Where it was claimed that a treasurer had represented to the board of supervisors that a certain portion of the general school fund had been paid to the district township entitled to it, and by such representation had obtained credit for the amount, which had not in fact, been paid, in an action upon the treasurer's bond to recover the amonnt, *held*, that if the money were in the treasury, a warrant duly countersigned would be essential to entitle plaintiff to recover it from the treasurer, but it was not essential to a recovery from one who had obtained it by such false representations: *District Township v. Espeset*, 75–500.

In an action to recover money belonging to the county, which had been fraudulently obtained from the treasurer of the county by defendant and converted to his own use, *held*, that the remedy upon the treasurer's bond was not exclusive and that suit was properly brought against defendant: *Taylor County v. Standley*, 79–666.

Under the provisions of previous statutes, *held*, that as to the state revenue the county treasurer was required to account to the auditor of state, and could not by a settlement with the county authorities defeat an action for deficiency of state funds unaccounted for by him: *Ford v. Jefferson County* 4 G. Gr., 273; *Jefferson County v. Ford*, 4 G. Gr., 367.

Where the treasurer failed to cancel warrants redeemed by him as required by law, and they were stolen, without fault on his part, and again put in circulation, and paid, *held*, that there was such neglect of duty as to render him liable: *Johnson County v. Hughes*, 12–360.

A county treasurer having paid over to the treasurer of a school district taxes belonging to such district without a warrant signed by the president and countersigned by the secretary as required by law, and the treasurer of the district having failed to account for all the money so paid over, *held*, that the directors of the district must, under the circumstances, have known that such money came into the hands of their treasurer, and might have protected themselves by requiring from him a sufficient bond; that the irregular payment by the county treasurer was not the proximate cause of the loss, and he was not liable therefor: *District T'p v. Bowman*, 55–129.

Where the county treasurer collected taxes voted in aid of a railroad and neither paid them to the railroad company nor to his successor in office, and his bond was conditioned that he should "promptly pay over to the person or officer entitled thereto all money that shall come into his hands by virtue of said office," *held*, that the railroad company was the proper party to bring an action on the bond: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

A railroad company entitled to the proceeds of a tax paid into the treasury may recover the amount thereof on the bond of the treasurer to whom the money is paid. The company cannot maintain *mandamus* against the successor of such treasurer who has never received the money collected: *Ibid.*

As to bond of county treasurer and his liability thereon, see § 1183, and notes.

Warrants: A warrant to which the county seal is not affixed is not valid. The county may be liable on the indebtedness for which such warrant was issued, but not on the warrant: *Springer v. Clay County*, 35–241. As to compelling auditor to affix the seal in a proper case, see note to § 470.

A county treasurer, in taking up and canceling warrants, is a servant of the county; and, although he issues a new warrant for an excess of warrants presented in payment of indebtedness to the county, instead of a certificate of overplus as provided by law, a recovery of such overplus may be had as against the county: *Barney v. Buena Vista County*, 33–261.

Collection of taxes: A special tax for, and in aid of, a railway company is not payable to the county; and where the tax payer becomes entitled to have it refunded the treasurer may refund it so far as the proceeds of such tax are in his hands, without a warrant from the auditor: *Barnes v. Marshall County*, 56–20.

Taxes paid without objection by the tax payer, and received by the treasurer under color and by virtue of his official authority, must be accounted for by him. Irregularities or illegalities in the assessment and collection of taxes will not constitute a defense in an action, on his part, for taxes actually received: *Mahaska County v. Ingalls*, 14–170.

The treasurer, and not the auditor, should receive money belonging to the school fund: *Mahaska County v. Searle*, 44–492; *Mahaska County v. Ruan*, 45–328. See § 2853.

The county is not liable for wrongful acts of the treasurer in wilfully, and without authority, collecting taxes in excess of the sum due, where it has not subsequently approved the act or been benefited thereby: *Estep v. Keokuk County*, 18–199.

SEC. **483. As to warrants presented but not paid.** When a warrant drawn by the auditor on the treasurer is presented for payment, and not paid for want of money, the treasurer shall indorse thereon a note of that fact and the date of presentation; and sign it, and thenceforth it shall draw interest at the rate of six per cent. He shall keep a record of the number and amount of the warrants presented and indorsed for non-payment, which shall be paid in the order of such presentation. [21 G. A., ch. 84, § 1; C. '73, § 328; R., § 361; C. '51, § 153.]

Under prior provisions *held*, that a county could not stop interest on outstanding warrants by notice that it was ready to redeem the same. Nothing short of actual tender was sufficient for that purpose: *Roony v. Dubuque County*, 44–128. But see now the provision in the next section.

Judgment may be rendered against a county upon a county order or warrant drawn upon the county treasurer: *Steel v. Davis County*, 2 G. Gr., 469.

Where a warrant is issued, payable out of a special fund, and the county has ample power to provide such fund for the payment of the warrant, a general judgment against the county upon such warrant may be rendered. Demand on the board of supervisors to levy a tax to pay the warrant is not necessary: *Mills County Nat. Bank v. Mills County*, 67–697.

It seems, however, that in such case the creditor, after obtaining judgment on the warrant, could not, by *mandamus* compel the treasurer to pay his judgment out of the general fund, a method of raising the amount for the payment of claims against the special fund being provided by statute: *Ibid.*

A warrant drawn, payable "out of any money in the county treasury not otherwise appropriated," is a general warrant payable unconditionally, and action may be brought thereon without proof that there is any money in the treasury subject to such warrant. (Overruling *Brown v. Johnson County*, 1 G. Gr., 486): *Campbell v. Polk County*, 3–467.

SEC. **484. Calls for outstanding warrants—interest stopped.** He shall issue calls for outstanding warrants at any time he may have sufficient funds on hand for which such warrants were issued; shall give notice to what number of warrants the funds will extend, or the number which will be paid, by posting a written notice in the treasurer's office, and, at the expiration of thirty days from the date of such posting, interest on the warrants so named shall cease; and, when a warrant which draws interest is taken up, he shall indorse upon it the date and amount of interest allowed, and such warrant shall be canceled and not reissued. [21 G. A., ch. 84, § 1; 19 G. A., ch. 103, §§ 1, 2; C. '73, § 328; R., § 361; C. '51, § 153.]

SEC. **485. Warrants partially paid—certificate for balance.** When a person wishing to make a payment into the treasury presents a warrant of an amount greater than such payment, or presents for payment a warrant in excess of the funds in the treasury, the treasurer shall cancel the same and give the holder a certificate of the overplus, upon the presentation of which to the county auditor he shall file it, and issue a new warrant of that amount, and charge the treasurer therewith; and such certificate is transferable by delivery, and will entitle the holder to the new warrant, payable to his order, and containing reference to the original warrant. [C. '73, § 329; R., §§ 362, 755; C. '51, §§ 154, 490.]

Where the treasurer failed to cancel warrants as here provided, and they were stolen without fault on his part, and again put in circulation and paid, *held*, that there was such neglect of duty as to render him liable: *Johnson County v. Hughes*, 12–360.

Where the treasurer issued what purported to be warrants instead of certificates for such overplus as here provided, such instruments were held invalid: *Barney v. Buena Vista County*, 33–261.

SEC. **486. Warrant book to be kept.** The treasurer shall keep a record of all warrants drawn on him by the auditor and presented, in a book so ruled as to show in separate columns, as to each warrant, the number, date, principal, name of drawee, when paid, to whom paid, and amount of interest paid. [C. '73, § 330; R., § 363; C. '51, § 155.]

SEC. **487. Separate account of each fund.** The treasurer shall keep a separate account of the several taxes for state, county, school, highway, and all other funds created by law, opening an account between himself and each of those funds, charging himself with the amount of the tax, and

crediting himself with the amounts paid on each, and with the amount of delinquent taxes, when authorized so to do. [C. '73, § 331; R., § 364; C. '51, § 156.]

SEC. **488. Duty upon canceling warrants.** The warrants returned by the treasurer shall be compared with the warrant book, and the word "canceled" be written over the minute of the proper numbers in the warrant book, and the original warrant be preserved for at least two years, and he shall make weekly returns to the auditor of the number, date, drawee's name, when paid, to whom paid, original amount, and interest. [C. '73, §§ 332–3; R., §§ 365–6; C. '51, §§ 159, 160.]

SEC. **489. Separate account for each official term.** A person re-elected to, or holding over, the office of treasurer shall keep separate accounts for each term of his office. [C. '73, § 334; R., § 367; C. '51, § 161.]

SEC. **490. Compensation.** Each county treasurer shall receive for his services the following compensation:

1. Three-fourths of one per cent. of all money collected by him as taxes due any city or town, to be paid out of the same;
2. Three per cent. of all taxes collected by him for all other tax funds, to be paid out of the county treasury;
3. For each certificate of purchase issued for lands sold for non-payment of taxes, twenty cents;
4. For paying money into the state treasury, when required by law or the auditor of state, such compensation as the board of supervisors shall allow, not exceeding one-fourth of one per cent. on the amount so paid, which allowance shall be paid by the county;
5. When the aggregate amount of compensation allowed exceeds fifteen hundred dollars in any year, the excess shall be paid into the county treasury; but in counties where the population does not exceed ten thousand, the salary shall not exceed thirteen hundred dollars, and in such counties there shall not be allowed for deputy or clerk hire more than the amount provided in the next section. [18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; C. '73, § 3793; R., § 777.]

Allowance of payment of other or greater compensation to a treasurer than that fixed by law for his services is unauthorized and void: *Adams County v. Hunter*, 78-328.

An attempt of the board of supervisors to make an allowance to the treasurer greater than authorized by statute cannot be construed into an allowance to the extent to which an allowance is authorized: *Griffin v. Clay County*, 63-413.

While in making up the amount of the treasurer's compensation the three per cent. of taxes collected is to be computed on all tax funds, including railroad aid taxes, yet this section does not authorize the deduction from such taxes of such per cent. for collection: *Merrill v. Marshall County*, 74-24.

Where the county treasurer deducted a larger per cent. of the taxes collected for the city than he was entitled to retain, under the existing statute, *held*, that the city by accepting such erroneous payment was not estopped from recovering the balance even though such balance had by the county been expended in the usual course of affairs: *Iowa City v. Johnson County*, 61 N. W., 995. (But on rehearing the appeal was dismissed for want of notice: S. C., 68 N. W., 815.)

SEC. **491. Deputies—qualification—compensation—other assistants.** Each county treasurer may, in writing, with the consent of the board of supervisors, appoint any one not holding a county office his deputy, for whose acts he shall be responsible, and from whom he shall require bond, which bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing; which appointment and revocation shall be filed and kept in the auditor's office. The person thus appointed shall qualify by taking the same oath as his principal, indorsed upon the certificate of appointment. The deputy, in the absence or disability of his principal, may perform all the duties of the principal pertaining to his office, and shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of supervisors. In case no deputy shall be appointed, but, on account of the pressure of business in his office, the treasurer is compelled temporarily to employ an

assistant, he shall file the bill for such service at their next regular meeting, and the board of supervisors shall make a reasonable allowance therefor. In counties where the population does not exceed ten thousand, the board shall not allow to exceed three hundred dollars for deputy or clerk hire, and in counties having a population of more than thirty thousand, it may allow such sum in addition to the salary above fixed, or for clerk hire, as may be proper. [18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; 16 G. A., ch. 4; C. '73, §§ 766–8, 770–1, 3793; R., §§ 421, 643–5, 647–8; C. '51, §§ 411, 414, 416, 417.]

The deputy county treasurer has, *prima facie*, authority to sign the name of his principal to a certificate of redemption from tax sale: *Byington v. Allen*, 11-3.

Under former provision as to deputy and assistants, *held*, that the allowance to the deputy might be fixed, at the time he was appointed, in the form of a stipulated salary, and in such case the amount fixed would limit the recovery; but where no allowance was fixed the county must pay a reasonable compensation for the necessary services rendered, and the payment was not left discretionary: *Bradley v. Jefferson County*, 4 G. Gr., 300; *Harvey v. Tama County*, 46–522; *Washington County v. Jones*, 45–260, 265, and see *Harris v. Chickasaw County*, 77-345. But a deputy employed merely for the personal accommodation of the officer cannot recover compensation from the county: *Harvey v. Tama County*, 46–522.

The officer himself cannot recover against the county for money paid as compensation for a deputy. The county is liable to the deputy and not to the principal: *Mahaska County v. Ingalls*, 14–170.

Where a deputy treasurer and bookkeeper was employed by the board of supervisors, *held*, that for defalcation of such officer, without fault on the part of the treasurer, the latter was not liable: *Scott County v. Fluke*, 34–317.

SEC. **492. Fees to be reported and paid to county.** He shall enter in a book kept for that purpose all moneys received by him for services rendered, designating for what service the same was received, and shall render an account, verified by affidavit, to the board of supervisors at each session thereof, stating fully all money so received and from what source; and any excess to which he would be entitled under the preceding section, over and above the sum therein limited, shall be paid into the county treasury. [C. '73, § 3796.]

CHAPTER 5.

OF THE COUNTY RECORDER.

SECTION **493. Who eligible.** In counties with a population of ten thousand or less, the same person may hold the office of county recorder and treasurer, and no person shall be disqualified on account of sex from holding the office of recorder. [18 G. A., ch. 40; C. '73, § 336.]

SEC. **494. Office—duties.** The recorder shall keep his office at the county seat, and shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law. [C. '73, § 335; R., § 358; C. '51, § 150.]

SEC. **495. Fees to be reported and paid to county—compensation.** The recorder shall report quarterly, under oath, to the board of supervisors, on blanks furnished by the auditor, all fees collected by him, and certify under oath that he has collected all fees for recording instruments provided by law; shall make annual settlement with the board of supervisors on the first Monday in January of each year, and pay into the county treasury all fees received by him in excess of twelve hundred dollars per annum in counties having a population of less than twenty-five thousand, and fifteen hundred dollars per annum in counties having a population over twenty-five thousand. [25 G. A., ch. 76, § 1.]

SEC. **496. Deputies—qualification—compensation—other assistants.** Each county recorder may, in writing, with the consent of the board of supervisors, appoint any one not holding a county office his deputy, for

whose acts he shall be responsible, and from whom he shall require bond, which bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing; which appointment and revocation shall be filed and kept in the auditor's office. The person thus appointed shall qualify by taking the same oath as his principal, indorsed upon the certificate of appointment. The deputy, in the absence or disability of his principal, may perform all the duties of the principal pertaining to his office, and shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of supervisors. In case no deputy shall be appointed, but, on account of the pressure of business in his office, the recorder is compelled temporarily to employ an assistant, he shall file the bill for such service at their next regular meeting, and the board of supervisors shall make a reasonable allowance therefor. But the county shall not pay for such deputy service more than is received from the fees of said office, over and above the amount the recorder is allowed to retain. [Same, § 2; 18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; 16 G. A., ch. 4; C.'73, §§ 766–8, 770–1; R., §§ 421, 463–5, 467–8; C.'51, §§ 411, 414, 416, 417.]

SEC. **497. Vacancy—how filled.** In case of vacancy occurring in the office of recorder, by death or otherwise, the auditor shall discharge the duties pertaining to said office until such vacancy is filled by appointment by the board of supervisors. [23 G. A., ch. 49.]

SEC. **498. Fees to be collected.** The recorder shall be entitled to charge and receive the following fees:

1. For recording each instrument containing four hundred words or less, fifty cents;

2. For every additional hundred words or fraction thereof, ten cents. [C.'73, § 3792; R., § 4143; C.'51, § 2534.]

CHAPTER 6.

OF THE SHERIFF.

SECTION **499. Duties in general.** The sheriff shall, by himself or deputy, execute and return all writs and other legal process issued by lawful authority, to him directed, and perform such other duties as may be required of him by law. [C.'73, § 337; R., § 383; C.'51, § 170.]

Liability of: A sheriff who seizes property beyond the limits of his own county is a wrong-doer, and is liable to the owner and possessor in an action for trespass: *Parmlee v. Leonard*, 9–131.

A sheriff who commits a trespass by taking goods illegally is liable after going out of office, though his successor sells the same and receives the money: *Duke v. Vincent*, 29–308.

Failure to make return of execution, etc., as required by § 3964 renders the sheriff liable for damages only when such failure has resulted in injury to the plaintiff: *Musser v. Maynard*, 55–197.

A sheriff is not liable in damages for failure to levy execution upon property in defendant's hands if he uses ordinary skill and diligence in the discharge of his duties: *Crosby v. Hungerford*, 59–712.

Deputy sheriff: The sheriff is responsible for the acts of his deputy, and action upon the sheriff's bond, and not upon the bond of the deputy, is the proper remedy in case of neglect or failure of the deputy to pay over to the person entitled thereto money collected by him: *Brayton v. Town*, 12–346.

In executing process the deputy sheriff acts for the sheriff, and the latter is responsible for whatever is done: *Headington v. Langland*, 65–276.

Therefore the sheriff is liable under his bond for the wrongful act of the deputy in making a levy: *Ibid.*

In case of vacancy in the office of sheriff caused by his suspension, the duties of the office do not devolve upon his deputy, but the vacancy is to be filled by the board of supervisors under § 1224: *McCue v. Circuit Court*, 51–60.

Resisting sheriff: A receiver directed to take possession of property may call upon the sheriff to prevent the commission of the crime of resisting the execution of such order on the part of the person in possession of the property: *State v. Rivers*, 66–653.

Suspension: When a sheriff is suspended

from office by order of court, and the district attorney is directed to file a petition for his removal (§§ 1256, 1257), such suspension will continue after the term although there may not be time to file the petition and serve the notice before the adjournment of the term: *McCue v. Circuit Court*, 51–60.

SEC. **500. Disobedience punished.** His disobedience of the command of any such process is a contempt of the court from which it issued, and may be punished by the same accordingly, and he is further liable to the action of any person injured thereby. [C. '73, § 338; R., § 384; C. '51, § 171.]

SEC. **501. Duty as to jail and prisoners.** He has the charge and custody of the jail or other prison of his county, and of the prisoners in the same, and shall receive those lawfully committed, and keep them himself, or by his deputy or jailer, until discharged by law. [C. '73, § 339; R., § 385; C. '51, § 172.]

SEC. **502. Power to summon aid.** The sheriff and his deputies are conservators of the peace, and, to keep the same, or to prevent crime, or to arrest any person liable thereto, or to execute process of law, may call any person to their aid, and, when necessary, the sheriff may summon the power of the county. [C. '73, § 340; R., § 386; C. '51, § 173.]

SEC. **503. Bailiffs—appointment—duties.** The sheriff shall attend upon the district court of his county, and while it remains in session he shall be allowed the assistance of such number of bailiffs as the judge may direct. They shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible. [C. '73, § 341; R., § 387; C. '51, § 174.]

The bailiffs here provided for are entitled to compensation from the county, which shall be reasonable in amount: *Bringolf v. Polk County*, 41–554, 561; and such bailiffs may serve a precept for a jury: *State v. Arthur*, 39–631.

SEC. **504. Execution of process after expiration of term.** Sheriffs and their deputies may execute any process which may be in their hands at the expiration of their office, and, in case of a vacancy occurring in the office of sheriff from any cause, his deputies shall be under the same obligation to execute legal process then in his or their hands, and to return the same, as if the sheriff had continued in office, and he and they will remain liable therefor under the provisions of law, as in other cases. [C. '73, § 344; R., § 390; C. '51, § 177.]

SEC. **505. Must deliver to successor.** When a sheriff goes out of office, he shall deliver to his successor all books and papers pertaining to the office, and property attached and levied upon, except as provided in the preceding section, and all prisoners in the jail, and take his receipt specifying the same, and such receipt shall be sufficient indemnity to the person taking it. [C. '73, § 345; R., § 391; C. '51, § 178.]

This section is directory only, and if the attached property, etc., be actually delivered to the incoming sheriff he would become responsible therefor, and the outgoing officer would be discharged, although no receipt was given: *McKay v. Thorington*, 15–25; *McKay v. Leonard*, 17–569.

An offer on the part of the outgoing sheriff to deliver attached property to the incoming one, and a waiver of delivery by the latter, discharges the former from further responsibility for the safe keeping of the property: *Fockler v. Martin*, 32–117.

SEC. **506. Successor may complete execution of process.** If the sheriff die or go out of office before the return of any process then in his hands, his successor, or other officer authorized to discharge the duties of the office, may proceed to execute and return the same in the same manner as the outgoing sheriff should have done; but nothing in this section shall be construed to exempt the outgoing sheriff and his deputies from the duty imposed on them to execute and return all process in their hands at the time the vacancy in the office of sheriff occurs. [C. '73, § 346; R., § 3264.]

SEC. **507. New process to new sheriff.** On the election or appointment of a new sheriff, all new process shall be directed to him. [C. '73, § 347; R., § 392; C. '51, § 179.]

SEC. **508. Fees to be reported and paid to county.** Quarterly itemized reports under oath, upon blanks to be furnished by the county auditor, shall be made to the board of supervisors by the sheriff, of all fees and mileage charged or taxed, and all that are collected by him and his deputies, including all sums for which the county is liable, except for dieting prisoners; and at the time of making such quarterly reports he shall make full settlement with said board, filing therewith the receipts of the county treasurer for all moneys paid over to him. [25 G. A., ch. 75, § 1.]

SEC. **509. Compensation.** Sheriffs shall receive yearly, in full compensation for all services, except the expenses hereinafter provided for, in counties having a population of more than twenty-eight thousand and less than forty-five thousand, two thousand dollars, and in counties having a population in excess of forty-five thousand, twenty-five hundred dollars; said sums to be paid out of the receipts of the office, and any excess over said sums shall be paid into the county treasury quarterly. If the receipts of the office shall not equal the amounts herein provided, then the sheriff shall receive only such sum as shall be collected for services rendered in that year, and, in either case, all expenses incurred and actually paid while necessarily engaged in the performance of official duties in serving criminal process, shall be allowed by the board of supervisors and paid as other claims against the county; and in all civil matters, he shall be allowed to retain the regular mileage collected by him. In counties having a less population than twenty-eight thousand, the sheriff shall have the fees of his office, out of which he shall pay his deputies, if any; but in no case shall any sheriff, in counties of less population than twenty-eight thousand, receive as fees, after paying his deputies, to exceed the sum of two thousand dollars. All other fees collected by him shall be paid into the county treasury. [Same, § 2.]

SEC. **510. Deputies—qualification—compensation.** Each sheriff may in writing appoint one or more persons, not holding a county office, his deputy or deputies, for whose acts he shall be responsible, and from whom he shall require bond, which appointment and bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing; which appointment or revocation shall be filed and kept in the auditor's office. In all counties having over twenty-eight thousand population, the board may fix the number of such deputies, and their salaries at not exceeding one thousand dollars per annum each, but the total compensation of the sheriff and such deputies shall in no case exceed the receipts of the office. [Same, § 3; 18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; 16 G. A., ch. 4; C. '73, §§ 766–771; R., §§ 421, 643–8; C. '51, §§ 411–417.]

The official acts of the deputy sheriff are in law the acts of his principal, and the interest which will prevent the principal from acting will disqualify his deputy: *Gollobitsch v. Rainbow*, 84–567.

The sheriff is not bound by service of notice of ownership of property which is accepted by his deputy, acceptance of service not being an official act: *Chapin v. Pinkerton*, 58–236.

The sheriff is responsible for acts of his deputy, and when the latter collects money on execution and fails to pay it over to the party entitled thereto, an action should be brought against the sheriff himself. The bond of the deputy is for the protection of his principal: *Brayton v. Town*, 12–346.

The deputy sheriff has no original power, but acts simply as a representative of the sheriff, who is his principal, and who is responsible for the manner in which he performs the duty assigned to him: *Headington v. Langland*, 65–276.

The suspension from office of a sheriff, as provided in § 1256, is not such disability on his part as will authorize the deputy to act in his place. In such case his duties are to be performed by the person appointed (see § 1257): *McCue v. Circuit Court, etc.*, 51–60.

Where acts required by law to be performed by certain officers are not performed by them, but by unauthorized persons, it is as if such acts were not done at all. So *held* in regard to the action of a deputy sheriff in connection with the selection of the grand jury, the statute at that time in force providing for the performance of such acts by the sheriff only: *State v. Brant*, 41–593.

SEC. **511. Fees to be collected.** Each sheriff is entitled to charge and receive the following fees:

1. For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of said court, two dollars per day;
2. For serving a notice and making return thereof, for the first person served, fifty cents, and for each additional person, twenty-five cents;
3. For each warrant served, two dollars, and the repayment of any amount actually paid by him as necessary expenses in executing such warrant, as sworn to by the sheriff; if service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable;
4. For serving and returning a subpœna, for each person served, twenty cents;
5. For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service;
6. For summoning a jury to assess the damages to the owners of lands taken for public improvements, and attending them, five dollars per day. This paragraph shall not be so construed as to allow a sheriff to make separate charges for different assessments, which can be made by the same jury and completed in one day of ten hours;
7. For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court, and making return thereof, two dollars;
8. For collecting and paying over money, on the first five hundred dollars or fraction thereof, two per cent.; on all in excess of five hundred dollars and under five thousand dollars, one per cent.; on all over five thousand dollars, one-half per cent.;
9. For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property sold, one dollar;
10. For the time necessarily employed in making an inventory of personal property attached or levied upon, twenty-five cents per hour;
11. For a copy of any paper required by law, made by him, for each one hundred words, ten cents;
12. Mileage in all cases required by law, going and returning, five cents per mile;
13. For taking each bond required by law, twenty-five cents;
14. For each commitment to jail, twenty-five cents; discharge from same, twenty-five cents;
15. For receiving a prisoner on surrender by bail, fifty cents;
16. For boarding a prisoner, a compensation of twelve and one-half cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and twelve and one-half cents for each night's lodging;
17. For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors;
18. For attending before any judge with a prisoner, one dollar per day;
19. For attending sale of property, for each day, one dollar;
20. For conveying one or more convicts to either of the penitentiaries of the state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane person or persons to any insane asylum in the state, or person or persons to either of the industrial schools, he shall be allowed, as full compensation therefor, his necessary traveling expenses actually paid by him, including board and railroad fare for himself and such person or persons, or any other necessary expenses, and, in addition thereto, forty cents per hour for the time necessarily employed in going to and from said prisons, asylums, or schools, to be certified by the affidavit of such sheriff, accompanied by the proper vouchers, to the board of supervisors of the county from which the persons were committed.

Should the sheriff need any assistance in taking prisoners to the penitentiary or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors;

21. He shall be allowed for serving any warrant for the seizure of intoxicating liquors, one dollar; for the removal and custody of such liquor, actual and reasonable expenses; for the destruction of such liquor under the order of the court, his actual and reasonable expenses, and one dollar; for posting and leaving notices in such cases, one dollar;

22. The jailer may be furnished a dwelling in connection with the jail, or as convenient thereto as practicable, in the discretion of the board of supervisors;

23. The sheriff is also entitled, for attending the district court, and for other service for which no compensation is allowed by law, except in counties having a population of over twenty-eight thousand, an annual salary, which shall be fixed by the board of supervisors, but in no case less than two hundred dollars nor more than four hundred dollars. When sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables. [25 G. A., ch. 83; 23 G. A., ch. 41; 19 G. A., ch. 94, §§ 2–23; C. '73, § 3807; R., § 1570.]

In general: Where the compensation of the sheriff is fees, he cannot claim a *quantum meruit* for his services: *Wapello County v. Monroe County*, 39–349.

These fees, together with the salary provided, are in full of all services, and *held* that the sheriff could not make extra charge for guarding and waiting on prisoners: *Grubb v. Louisa County*, 40–314; but under present statute see *Hamill v. Carroll county*, 69 N.W., 1122.

The provisions as to various items of charge considered: *Bringolf v. Polk County*, 41–554.

Jury to assess damages: The sheriff is allowed but one fee for summoning a jury to assess the damages to owners of land taken for works of internal improvement. He may not claim a separate fee for each tract when only one jury is summoned: *Robb v. Albia, K. & D. M. R. Co.*, 44-440.

Warrant of arrest: Where two or more defendants are jointly indicted, they may be arrested on a joint warrant or several warrants, and the sheriff's fee will be for serving one warrant or several, as the case may be: *State v. Hunter*, 33–361.

Serving warrant: Under previous statutes it was held that the provision as to serving warrant for seizure of intoxicating liquor was superseded by a statute providing among other services for the service of a warrant in general: *Painter v. Polk County*, 70–596.

Attending with prisoner: The sheriff is not entitled to compensation for attending the court with the prisoner, but only for such attendance before the judge not at a regular term of court: *Ibid.*

But where payments of fees had been made by the county to the sheriff prior to the decision that such charges were not lawful, *held*, that the payment was voluntary and the county could not recover the money paid: *Painter v. Polk County*, 81–242.

Notices: Where a person not an officer serves notices, etc., his charges cannot be taxed as costs: *Conway v. McGregor & M. R. R. Co.*, 43–32.

Sheriff's sale: As to sheriff's fee in case of purchase of property by plaintiff in execution, see *Gilman v. Des Moines Valley R. Co.*, 42–495.

Under other provisions, *held*, that the sheriff was entitled to a percentage upon the amount of a sheriff's sale of real estate, where the judgment plaintiff was purchaser and the amount of the bid was not paid to the sheriff but credited on the judgment: *Litchfield v. Ashford*, 70–393.

Keeping jail: The sheriff has charge of the county jail and is required to perform the duties of jailer. He may appoint a deputy to act in such capacity; but such jailer cannot recover compensation from the county: *McDonald v. Woodbury County*, 48–404.

Waiting on prisoners: The sheriff is entitled to a reasonable compensation, outside of his salary, for washing for and waiting on prisoners: *Hamill v. Carroll County*, 69 N.W., 1122.

Keeping attached property: The sheriff is individually responsible to a person employed by him to take care of attached property, and any claim for necessary expenses of keeping such property is to be presented by the sheriff and not by the person employed by him for that purpose: *Rowley v. Painter*, 69–432.

Mileage: A sheriff is entitled to mileage for actual travel and no more. When only one trip is necessary to bring several prisoners from the penitentiary and return them, he should only charge mileage for one prisoner: *Barnes v. Marion County*, 54-482.

For service of subpœnas on the same witnesses in several state cases, made in one trip, the sheriff is entitled to mileage for but one trip: *Redfield v. Shelby County*, 64–11.

The route of travel referred to in a previous statute as fixing the amount of mileage to be allowed for conveying prisoners, etc., *held* to be the route usually traveled by persons pursuing a journey between the given points; and *held*, that where the usual and speediest route was by rail, the sheriff might convey the prisoner in that way and charge

mileage for the distance traveled, although there was a shorter route by highway: *Maynard v. Cedar County*, 51–430.

A sheriff is not entitled to mileage for conveying a prisoner from the county jail to the court room, where it does not appear but that the two places are in the same building: *Bringolf v. Polk County*, 41–554.

Where a sheriff was entitled by statute to fees and mileage for attending the prisoner before the court or judge when required, *held*, that for attendance before the court with five prisoners at the same time and for the same purpose he was entitled to but one fee and mileage for one prisoner: *Ibid.*

The same fees should be allowed for conveying a prisoner to the reform school as for conveying a convict to the penitentiary: *Ibid.*

Under § 3788 of Code of '73 as it originally stood, allowing the sheriff, in full compensation for conveying each convict to the penitentiary, sixteen cents for each mile traveled, to be computed from the county seat by the most direct route of travel, *held*, that the sheriff was entitled to that rate of mileage for each mile traveled on the journey going and returning: *Harding v. Montgomery County*, 55–41.

But such compensation was in full of all services, and the sheriff could not charge car fare and hotel bills in addition to the mileage thus allowed: *Ibid.*

The allowance made by that section for conveying an insane person to an asylum was held applicable only where the person conveyed had been adjudged insane under statutory provisions: *Ibid.*

Copy fees: Under statutes providing for service of subpœnas by delivering a copy, and that the sheriff should have fees for copies of papers required by law when made by him, *held*, that he was entitled to the copy fee in addition to the fee for service, where the copy was made by him: *Bringolf v. Polk County*, 41–554.

In computing compensation for copies of subpœnas the sheriff should be allowed ten cents for each one hundred words or any number less than one hundred; twenty cents for any number greater than one hundred and less than two hundred, and so on: *Painter v. Polk County*, 70–596.

Serving execution, fee for, under previous statute, see *Bell v. Weddington*, 54–561.

Salary: The board of supervisors may properly fix the amount of the sheriff's annual salary at the beginning of his term, and the rendering of the service on the faith of such action will constitute a contract binding upon the county: *Holmes v. Lucas County*, 53–211.

Bailiffs: Where a bailiff is appointed and performs services for which fees are allowed by law, such bailiff becomes entitled to the fees, which must be taken into account in fixing the compensation to be allowed him by the board of supervisors: *Bringolf v. Polk County*, 41–554.

Mistake as to fees: Where a sheriff had presented his claim for certain services which had been allowed by the party and paid, *held*, that he could not afterward recover additional compensation for the same services, although in his original claim he had not asked all that the law allowed him for such services: *Harding v. Montgomery County*, 55–41.

Where the board of supervisors had, by reason of erroneous certificates of the clerk, paid fees and costs to the sheriff in some cases twice or thrice over, *held*, that the county might recover back the money as paid by mistake: *Holmes v. Lucas County*, 53–211.

Contract as to fees: An agreement by a sheriff to accept a fixed sum in lieu of legal fees for services to be performed will be null and void as against public policy and against the provisions of statute, whether the sum to be paid be greater or less than the legal fees: *Gilman v. Des Moines Valley R. Co.*, 40–200.

The officer issuing or serving a search warrant for the seizure of intoxicating liquors is entitled to have his fee therefor paid by the county, in case no liquors are found, in the same way as other costs are paid by the county in cases in which for any reason the prosecution fails: *Byram v. Polk County*, 76–75; *Garrett v. Polk County*, 78–108.

SEC. **512. Fees in criminal cases—when payable by county.** In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as their knowledge extends, and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury. [C. '73, § 3790; R., § 4146; C. '51, § 2537.]

This section applies only to sheriff's fees, and does not render the county liable for costs of printing abstract and argument on appeal by defendant to the supreme court, although on such appeal the judgment against defendant be reversed: *Red v. Polk County*, 56–98; *State v. Rainsbarger*, 74–540.

The county is not liable for costs in a bastardy proceeding, such proceeding being civil, and not criminal: *McAndrew v. Madison County*, 67–54.

Under the provision of Rev. Stats. of '43, *held*, that counties were liable for costs in a criminal case in which a *nolle prosequi* was entered, or in which an indictment was quashed, or judgment entered for defendant on demurrer: *Bonney v. Van Buren County*, 2 G. Gr., 230.

Under this section the costs in liquor cases, including the attorney's fee, provided for under § 2429, are to be paid by the county, where not recoverable from the defendant: *Newman v. Des Moines County*, 85–89.

CHAPTER 7.

OF THE CORONER.

SECTION **513. When to perform duties of sheriff.** The coroner shall perform all the duties of sheriff, when that office is vacant; where it appears from the papers that the sheriff is a party to an action or proceeding in a court of record; where, in any action commenced or about to be commenced, an affidavit is filed with the clerk of the court, showing the absence of the sheriff and his deputy from the county, and that they are not expected to return in time to perform the service needed, or showing partiality, prejudice, consanguinity, or interest upon his part, in which case the clerk shall direct process to the coroner, indorsing thereon the reason therefor, which he shall execute in the same manner as if he were sheriff. [C. '73, §§ 349, 350; R., §§ 393–4; C. '51, §§ 183–4.]

The sureties upon the official bond of the coroner are accountable on such bond for his acts while acting as *ex officio* sheriff: *Tieman v. Haw*, 49–312.

To make a service of notice by the coroner, as such, good, it must appear from the record that the sheriff was disqualified to act: *Beard v. Smith*, 9–50: *Chord v. McCoy*, Mor., 311.

Where the sheriff is disqualified by interest or other personal reason, the coroner, and not the deputy sheriff, should act: *Minott v. Vineyard*, 11–90.

This section applies in criminal as well as in civil cases, and upon the filing of the affidavit here contemplated the coroner should be directed to act in place of the sheriff: *State v. Hardin*, 46–623.

Under this section, a deputy of a sheriff who is a party to the case is disqualified for empaneling the jury. Such officer in calling jurors into the box is enforcing process of the court within the meaning of the statute: *Gollobitsch v. Rainbow*, 84–567.

In such case, the deputy is also disqualified from serving a notice to take depositions: *Ibid.*

SEC. **514. When no qualified sheriff or coroner—clerk appoints.** When there is no sheriff, deputy sheriff or coroner qualified to serve legal process, the court, or, if not in session, the clerk, may, by writing, under his hand and the seal of the court, certifying the above fact, appoint any suitable person specially in each case to execute such process, who shall be sworn, but need not give bond, and his return shall be entitled to the same credit as the sheriff's, when the appointment is attached thereto. [C. '73, § 351; R., § 395; C. '51, § 185.]

Where the disqualification of the sheriff is made known before the issuance of a writ, and also the disqualification of the coroner, it is not objectionable to direct the writ to the person specially appointed: *Minott v. Vineyard*, 11–90.

The credit to be given to the return of the person so appointed will depend on the validity of the appointment. In a particular case the appointment *held* not to show sufficiently that there was "no sheriff, deputy sheriff, or coroner qualified," etc.: *Currens v. Ratcliffe*, 9–309.

SEC. **515. Inquest—when held—warrant for jurors.** The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means, and in such other cases as are required by law. When he has notice of the dead body of a person, supposed to have died by unlawful means found or being in his county, he is required to issue his warrant to a constable of his county, requiring him to summon forthwith three electors of the county to appear before him at the time and place named in the warrant. [C. '73, § 352; R., § 396; C. '51, § 186.]

SEC. **516. Inquest on person killed in mine.** When a person shall come to his death by accident or otherwise, in any manner connected with the working of, or in, any mine, or by any explosion therein, an inquest shall be held, and the coroner shall make careful inquiry into the cause thereof, and return a copy of the verdict in said proceeding, with the minutes of all testimony taken thereat, to the state inspector of mines; and no person shall be qualified to serve as a juror at said inquest who has a personal interest in, or is employed in or about, the mine in which or at

which the deceased came to his death, or by any of its proprietors. [21 G. A., ch. 140, § 2; 20 G. A., ch. 21, § 2.]

SEC. **517. Form of warrant.** The warrant may be, in substance, as follows:

State of Iowa, }
.....County. }

To any peace officer of said county:—In the name of the state of Iowa, you are hereby required to summon forthwith three electors of your county to appear before me at (name the place), at (name the day and hour, or say forthwith), then and there to hold an inquest upon the dead body of....., there lying, and find by what means he died. Witness my hand this.....day of....., A. D.....

A.....B.....,
[C. '73, § 353; R., § 397; C. '51, § 187.] Coroner of.....County.

SEC. **518. Service and return.** The officer to whom it is delivered shall execute the warrant, and make return thereof at the time and place named. [C. '73, § 354; R., § 398; C. '51, § 188.]

SEC. **519. Filling vacancies—oath.** If any juror fails to appear, the coroner shall cause the proper number to be summoned or returned from the bystanders immediately, and proceed to impanel them, and administer the following oath, in substance: "You do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, when, how, and by what means the person whose body lies here dead came to his death, according to your knowledge and the evidence given you." [C. '73, § 355, R., § 399; C. '51, § 189.]

SEC. **520. Witnesses.** The coroner shall issue subpœnas for such witnesses as have knowledge touching the manner of the death of the person whose inquest is being held, returnable at such time and place as he may direct. They shall be sworn as in other cases, and their evidence reduced to writing under the direction of the coroner, subscribed by them, and returned to the district court, with the verdict and all other papers in the case. The coroner may enforce the attendance of witnesses and jurors, and punish them for contempt in disobeying his process, in like manner as a justice of the peace may do in a criminal proceeding before him. [C. '73, §§ 356–8, 365; R., §§ 400–2, 409; C. '51, §§ 190–2, 199.]

SEC. **521. Finding of jurors—form.** The jurors, having inspected the body, heard the testimony and made all needful inquiries, shall return to the coroner their inquisition in writing, under their hands, in substance as follows, stating the matters in the following form suggested, as far as found:

State of Iowa, }
.....County. }

An inquisition holden at....., in.....county, on the..... day of....., A. D....., before..... coroner of the said county, upon the body of..... (or person unknown), there lying dead, by the jurors whose names are hereto subscribed:

The said jurors upon their oaths do say (here state when, how, by what person, means, weapon, or accident he came to his death, and whether feloniously).

In testimony whereof, the said jurors have hereunto set their hands, the day and year aforesaid (which shall be attested by the coroner). [C. '73, § 359; R., § 403; C. '51, § 193.]

SEC. **522. Finding kept secret.** If the inquisition find that a crime has been committed on the deceased, and name the person who the jury believe has committed it, the inquest shall not be made public until after the arrest of the person. [C. '73, § 360; R., § 404; C. '51, § 194.]

SEC. **523. Arrest of suspected person.** If the person charged be present, the coroner may order his arrest by an officer or any other person present, and shall then make a warrant requiring the officer or other per-

son to take him before a justice of the peace. [C. '73, § 361; R., § 405; C. '51, § 195.]

SEC. **524. Warrant for.** If the person charged be not present, and the coroner believes he can be taken, he may issue a warrant to the sheriff and constables of the county, requiring them to arrest the person and take him before a justice of the peace. [C. '73, § 362; R., § 406; C. '51, § 196.]

SEC. **525. Proceedings against.** The warrant of the coroner in the above case shall be of equal authority with that of a justice of the peace, and when the person charged is brought before the justice, such justice shall cause an information to be filed against him, and the same proceedings shall be had as in other cases under information, and he shall be dealt with as a person held under an information in the usual form. [C. '73, § 363; R., § 407; C. '51, § 197.]

SEC. **526. Contents and effect of warrant—report of coroner.** The warrant of the coroner shall recite substantially the transactions before him, and the verdict of the jury of inquest leading to the arrest, and such warrant shall be a sufficient foundation for the proceeding of the justice instead of an information. The coroner shall report to the clerk of the district court all cases of death which may come under his supervision, with the cause or mode of death, in accordance with forms furnished by the state board of health. [C. '73, § 364; R., § 408; C. '51, § 198.]

SEC. **527. Disposition of body—expenses.** The coroner, except as otherwise provided by law, shall cause the body of the deceased person which he is called to view to be delivered to his friends, if any there be, but if not, he shall cause him to be decently buried, and the expense to be paid from any property found with the body, or, if there be none, from the county treasury, by certifying an account of the expenses; which, being presented to the board of supervisors, shall be allowed by them, if deemed reasonable, and paid as other claims on the county. [C. '73, § 366; R., § 410; C. '51, § 200.]

SEC. **528. Justice may act as coroner.** When there is no coroner, or in case of his absence or inability to act, any justice of the peace of the same county is authorized to perform the duties of coroner in relation to dead bodies, and in such cases he may cause the person charged to be brought before himself by his warrant, and may proceed with him as a justice of the peace. [C. '73, § 367; R., § 411; C. '51, § 201.]

SEC. **529. Physician employed—fees.** In the above inquisition by a coroner or justice of the peace, as the case may be, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees, shall receive a reasonable compensation, to be allowed by the board of supervisors. [20 G. A., ch. 64; C. '73, § 368; R., § 412; C. '51, § 202.]

The physician is entitled to a reasonable fee and the action of the board in making an allowance is not conclusive. He may in an action in court recover more than the amount allowed if he shows the allowance is not reasonable: *Moser v. Boone County*, 91–359.

Under previous provisions the compensation of such witnesses was to be fixed by the coroner, or justice acting in his place, and his jurisdiction in such matter was exclusive. He might be compelled by *mandamus* to act, but no appeal was provided: *Cushman v. Washington County*, 45–255; *Sanford v. Lee County*, 49–148.

SEC. **530. Fees of witnesses and jurors.** Witnesses and jurors shall receive the same fees as witnesses and jurors are paid in actions before justices of the peace. [C. '73, § 356; R., § 400; C. '51, § 190.]

SEC. **531. Compensation of coroner.** The coroner is entitled to charge and receive the following fees:

1. For a view of each body and taking and returning an inquest on the same, five dollars;

2. For a view of each body and examination without inquest, three dollars;

3. For issuing subpœna, warrant, or order for a jury, twenty-five cents;

4. For each mile traveled to and returning from an examination or inquest, five cents.

5. Which fees shall be paid out of the county treasury when they cannot be obtained from estate of deceased.

6. For all other services, the same fees as are allowed sheriffs in similar cases, to be paid in like manner. [C. '73, § 3799; R., § 4148; C. '51, § 2539.]

SEC. **532. Disposition of property of deceased.** Any property or money found with or upon the person of deceased, if there be no person authorized to receive the same, shall forthwith be turned over by the coroner to the clerk of the district court, to be held until disposed of according to law.

SEC. **533. Same.** A failure to comply with the preceding section shall be deemed a misdemeanor.

CHAPTER 8.

OF THE COUNTY SURVEYOR.

SECTION **534. Duties—record to be kept.** The county surveyor shall make all surveys of land within his county which he may be called upon to make, and the field-notes and plats made by him shall be transcribed into a well-bound book, under his supervision, at the expense of the person requesting the survey, which book shall be kept in the county auditor's office, and his surveys shall be held as presumptively correct. [C. '73, §§ 369, 370; R., §§ 413, 414; C. '51, §§ 203–4.]

SEC. **535. Former field-notes to be used.** Previous to making any survey, he shall furnish himself with a copy of the field-notes of the original survey of the same land, if there be any in his office or that of the auditor, and his survey shall be made in accordance therewith. [C. '73, § 371; R., § 415; C. '51, § 205.]

SEC. **536. Corners—how marked.** He is required to establish the corners by taking bearing trees, and noting particularly their course and distance, but if there be no trees within reasonable distance, the corners are to be marked by stones or other permanent monuments placed firmly in the earth. [C. '73, § 372; R., § 416; C. '51, § 206.]

SEC. **537. Rules to be followed.** In the resurvey and subdivision of land by county surveyors, their deputies or other persons, the rules prescribed by the acts of congress, and the instructions of the secretary of the interior, copies of which shall be furnished him by the county, shall be in all respects followed. [C. '73, § 373.]

The rule now recognized by the construction put upon the act of congress by the interior department is that in finding the center of a section where the center has not been fixed by the government surveyor, the intersecting method and not the bisecting method is to be pursued. According to this method the center will be at the point of crossing of the two lines connecting the quarter section posts on the opposite sides of the section: *Gerke v. Lucas*, 92–79.

SEC. **538. Record to be furnished—presumptive evidence.** The county surveyor shall, when requested, furnish the person for whom the survey is made with a copy of the field-notes and plat of the survey, and such copy, certified by him, and also a copy from the record, certified by the county auditor with the seal, shall be presumptive evidence of the survey, and of the facts herein required to be set forth, and which are stated accordingly, between those persons who join in requesting it and any other

person then concerned, who has reasonable notice that such a survey is to be made, and the time thereof. [C. '73, § 374; R., § 417; C. '51, § 207.]

SEC. **539. Supervisors to furnish record book.** The board of supervisors is required to furnish a substantial, well-bound book, in which the field-notes and plats made by the county surveyor shall be recorded. [C. '73, § 375; R., § 418; C. '51, § 208.]

SEC. **540. Record to show what.** The plat and record shall show distinctly of what piece of land it is a survey, at whose personal request it was made, the names of the chainmen, and that they were approved and sworn by the surveyor, and the date of the survey; and the courses shall be taken according to the true meridian, and the variation of the magnetic from the true meridian stated. And the surveyor shall determine the correct variation by an observation on the pole-star, or some other approved method, at least once each year, and enter the same, with the date, and description of the method used, in his record. [C. '73, § 376; R., § 419; C. '51, § 209.]

SEC. **541. Chainmen—qualifications.** The necessary chainmen and other persons must be employed by the person requiring the survey done, unless otherwise agreed; but the chainmen must be disinterested persons, and approved by the surveyor, and sworn by him to measure justly and impartially, to the best of their knowledge and ability. [C. '73, § 377; R., § 420; C. '51, § 210.]

SEC. **542. Witnesses subpœnaed—fees.** County surveyors, when engaged in the performance of official duties, may issue subpœnas for witnesses and administer oaths to them, and all fees for services of officers and attendance of witnesses shall be the same as in proceedings before justices of the peace. [C. '73, § 378.]

SEC. **543. Surveyor's fees.** The county surveyor is entitled to charge and receive the following fees:

1. For each day's service actually performed in traveling to and from the place where any survey is to be made, and for making the same, and return thereof, four dollars;
2. For making up the record of any survey, and the plat and field-notes thereof, one dollar per page;
3. For certified copy of the plat or field-notes, fifty cents. [16 G. A., ch. 25; C. '73, § 3800; R., § 4155; C. '51, § 2546.]

CHAPTER 9.

OF THE DUTIES OF COUNTY OFFICERS.

SECTION **544. County officers to furnish information.** It is the duty of each county officer, whenever called upon by the governor or either house of the general assembly, to communicate to the governor or such house any information that may be in his possession as such officer, and to furnish any statistics at his command, when thus called upon. [18 G. A., ch. 22, § 1.]

SEC. **545. Not to act as agent or attorney.** No county officer shall appear as agent, attorney or solicitor for another, in any matter pending before the board of supervisors. [C. '73, § 326.]

This section does not prevent the officers named from making complaint before a magistrate of the violation of a penal law: *Santo v. State*, 2–165, 221.

SEC. **546. Not to act as counsel.** No sheriff, deputy sheriff, coroner or constable shall appear in any court as attorney or counsel for any party, nor make any writing or process to commence any action or proceeding, or to be in any manner used in the same; and such writing or process made by any of them shall be rejected. [C. '73, § 342; R., § 388; C. '51, § 175.]

SEC. **547. Not to purchase property.** No sheriff, deputy sheriff, coroner or constable shall become the purchaser, either directly or indirectly, of any property by him exposed to sale under any process of law; and every such purchase shall be void. [C. '73, § 343; R., § 389; C. '51, § 176.]

SEC. **548. Accounts may be examined.** If any officer required by law to report the fees collected by him to the board of supervisors shall neglect or refuse to make such report, it shall be the duty of the board to employ an expert accountant to examine the books, papers and accounts of such officer, and to make said report, the expense of which shall be charged to such delinquent officer, and shall be collectible upon his official bond. [18 G. A., ch. 184, § 5.]

SEC. **549. May designate newspapers.** The clerk of the district court, sheriff, auditor, treasurer, and recorder shall each designate the newspapers printed in the English language in which the notices pertaining to his office shall be published, and the board of supervisors shall designate the papers in which all other county notices shall be published. [C. '73, § 306.]

This refers only to county notices and not to notices in reference to the commencement of actions or sales upon execution, in which cases plaintiff may designate the papers in which publication shall be made: See § 4024 and note.

SEC. **550. Misdemeanor.** Failure on the part of any officer to perform any duty required of him by this chapter shall render him liable to prosecution and punishment for a misdemeanor. [18 G. A., ch. 22, § 4.]

CHAPTER 10.

OF TOWNSHIPS AND TOWNSHIP OFFICERS.

SECTION **551. Supervisors divide county into townships.** The board of supervisors of each county shall divide the same into townships, as convenience may require, defining the boundaries thereof, and may from time to time make such alterations in the number and boundaries of the townships as it may deem proper; but if the congressional township lines are not adopted and followed, the board shall not change the lines of any civil township so as to divide any school township or district, unless a majority of the voters of said school township or district shall petition therefor. [C. '73, §§ 379, 1799; R., § 441; C. '51, § 219.]

A township is not a corporation authorized to sue and to be sued. It is no more than a legal subdivision of a county for governmental purposes and has no corporate powers as such: *Township of West Bend v. Munch*, 52–132; *Wells v. Stomback*, 59–376.

But if the action is brought in the name of the township the petition may be amended by the substitution of the name of the officer of the township as plaintiff, who is entitled to the custody of the money sued for: *Wells v. Stomback*, 59–376.

The board has the power, and it is its duty, to divide the county into townships, and it has the power to divide the townships and create new ones when the public convenience requires that that be done: *Lones v. Harris*, 71–478.

A township clerk may maintain a suit to recover money to which he is entitled by virtue of his office, such as road funds: *Long v. Emsley*, 57–13.

Township trustees have no authority to maintain an action to recover from the county money paid out by them in the discharge of their duties as a board of health. They are not entitled to such funds and are not the real parties in interest: *Sanderson v. Cerro Gordo County*, 80–89.

SEC. **552. Boundaries conformed to city boundaries.** Where the boundaries of any city have been changed, the board of supervisors of the county in which the same is situated shall have power to change the boundary lines of townships so as to make them conform to the boundaries of the city, and to make such other changes in township lines, and the number of

townships, as it may deem necessary; but no action shall be taken affecting the boundaries or existing conditions of school districts. [23 G. A., ch. 25.]

SEC. **553. Boundaries to be recorded.** The description of the boundaries of each township, and of all alterations in them, and of all new townships, shall be recorded in full in the records of the board of supervisors, and of the township. [C. '73, § 381; R., § 442; C. '51, § 220.]

SEC. **554. Division where city included—petition—remonstrance.** When any township has within its limits a city or town with a population exceeding fifteen hundred inhabitants, the electors of such township residing without the limits of such city or town may, at the January, April, or June session of the board of supervisors of the county, petition to have such township divided into two townships; the one to embrace the territory without, and the other the territory within, such corporate limits; which petition shall be accompanied by the affidavit of three individuals, to the effect that all the signatures to such petition are genuine, and that the signers thereof are all legal voters of said township, residing outside said corporate limits. Remonstrances signed by such legal voters may also be presented at the hearing before the board of supervisors hereinafter provided for, and if the same persons petition and remonstrate, they shall be counted on the remonstrance only. [20 G. A., ch. 106; C. '73, § 382.]

SEC. **555. Notice.** Notice of the time when such petition shall be presented shall be given by two publications in a weekly newspaper published in the township, the last of which publications shall be at least ten days prior to the time fixed for the presentation of such petition; or if no paper is printed in such township, or the papers therein printed refuse to make such publication, the notice herein contemplated shall be given by posting in five public places in the township, two of which shall be without, and three within, such corporate limits. [C. '73, § 383.]

SEC. **556. Division—effect.** If such petition is signed by a majority of the electors of such township residing without the corporate limits of such city or town, the board of supervisors shall divide such township into two townships, as prayed; but, except for election purposes, including the appointment of all judges and clerks of election rendered necessary by the change, such division shall not take effect until the first Monday of January next ensuing. But when the citizens of any township so set off desire to dissolve their township organization and return again to the township from which they were taken, they may do so by the same proceedings as provided for the division thereof, except that said petition shall be signed by a majority of the electors of both townships. [21 G. A., ch. 48; C. '73, § 384.]

Where the application for division is properly made, the board of supervisors has no discretion and may be compelled by *mandamus* to make such division: *Henry v. Taylor*, 57–72.

The new township does not become independent until its complete organization, which is on the 1st of January following, when the officers elected for it enter upon the discharge of their duties: *Lamb v. Burlington, C. R. & M. R. Co.*, 39–333.

Upon the formation of a new township, no election except one for the election of officers of such township can be held until after the 1st of January following. Special elections contemplated or authorized by law to be held prior to that time must be held in the old or original township: *Williams v. Poor*, 65–410.

SEC. **557. New township—first election.** When a new township is formed, the board of supervisors shall call the first township election, to be held at such place as it may designate, on the day of the next general election. [C. '73 § 385; R., § 453; C. '51, § 231.]

SEC. **558. Auditor to issue warrant for.** The auditor shall issue a warrant for such first election, stating the time and place of the same, the officers to be elected, and any other business which is to be attended to; and no other business shall be done than such as is so named. [C. '73, § 386; R., § 454; C. '51, § 232.]

The warrant provided for by this section relates only to the first election in a new township. Failure to issue it will not render subsequent elections invalid: *Lones v. Harris*, 71–478.

SEC. **559. Service and return.** Such warrant may be directed to any constable of the county, or to any citizen of the same township, by name, and shall be served by posting up copies thereof, in three of the most public places in the township, fifteen days before the day of the election; the original warrant shall be returned to the presiding officer of the election, to be returned to the clerk when elected, with a return thereon of the manner of service, verified by oath, if served by any other than an officer. [C. '73, § 387; R., § 455; C. '51, § 233.]

SEC. **560. Township and city coterminous—clerk and trustees abolished.** Where a town or a city having a population of less than seven thousand constitutes one civil township, the boundary lines of which coincide throughout with the boundary lines of the town or city, the offices of township clerk and trustee are abolished. [24 G. A., ch. 10, § 1.]

SEC. **561. Clerk and council to act.** The duties required by law of the township clerk in such cities shall be performed by the city clerk, and those required of the board of trustees shall be performed by the city council. [Same, § 2.]

SEC. **562. Township funds go to city.** The moneys and assets belonging to such civil township shall become the moneys and assets of the city or town in which said civil township is situated; and the township clerks shall turn such moneys and assets over to the city or town treasurer, to be disbursed by such city or town in the same manner and for the same purposes as required by law for the disposition of township funds, and such cities or towns shall assume all liabilities of a civil township to which the provisions of this section shall apply. [Same, § 3.]

SEC. **563. County treasurers to pay.** County treasurers are hereby authorized to pay over to the city or town treasurers which come under the provisions of the three preceding sections all moneys collected for the road fund, or other funds which would otherwise be paid over to the township clerks of such townships. [Same, § 4.]

SEC. **564. Trustees may employ counsel.** Whenever litigation shall arise, involving the right or duty of township trustees to certify or levy taxes which have been authorized upon expressed conditions, then in such cases, if the trustees are made parties to said litigation, they shall have authority to employ attorneys in behalf of said township, and are further authorized to levy the necessary tax to pay for said legal services, and to defray the unavoidable expenses of said litigation. [20 G. A., ch. 120.]

SEC. **565. Assessor where city included.** In each even-numbered year, there shall be elected in each township, a part of which is included within the corporate limits of any city or town, by the voters of such township residing without the corporate limits of such city or town, one assessor, in the same manner as provided by law for the election of township assessor. [19 G. A., ch. 110; 18 G. A., ch. 201, § 1; 16 G. A., ch. 6; C. '73, § 390.]

Under the original section, *held*, that an assessor elected by the city as therein prescribed was not a city but a township officer: *Kinnie v. Waverly*, 42-486.

This section, both as it originally stood and as re-enacted by the sixteenth general assembly, applied only to townships containing cities incorporated under the general incorporation law and not those existing under special charter: *State v. Finger*, 46-25.

Where two townships being included within the corporate limits of a city comprise but one assessorial district, the county board of equalization cannot equalize taxation as between such townships, but can only act upon the whole district: *Getchell v. Board of Supervisors*, 51-107.

As to the election of assessors in other townships, see § 1075, and in cities and towns, see chapter two, of title five.

SEC. **566. Places for holding elections.** The trustees shall designate the place where elections will be held, and the board of supervisors shall allow a reasonable compensation for the use thereof. Whenever a change is made from the usual place of holding elections in the township, notice of such change shall be given by posting up notices in three public places in the township, ten days prior to the day on which the election is to be held. [23 G. A., ch. 27; C. '73, § 391; R., § 444; C. '51, § 222.]

Under § 391 of Code of '73, no provision was made for the payment by the county of compensation for the place thus designated, and it was not liable therefor: *Turner v. Woodbury County*, 57–440; *McBride v. Hardin County*, 58–219.

SEC. **567. Township hall—submission to vote.** The trustees, on a petition of a majority of the resident freeholders of any civil township, shall submit the question of building a public hall to the electors thereof, by posting notices of such election in four conspicuous places in the township, thirty days before election, and the form of the proposition shall be: "Shall the proposition to levy a tax for the erection of a public hall be adopted?" [26 G. A., ch. 26, § 1.]

SEC. **568. Tax to build.** If a majority of the votes cast are in favor of the tax, the trustees shall certify such fact to the board of supervisors, and they shall thereupon levy not to exceed three mills on the dollar on the taxable property of the township; and when such tax is collected by the treasurer, it shall be paid to the township clerk; but said clerk shall not receive to exceed one per cent. for handling said money. [Same, § 2.]

SEC. **569. Location.** Any public hall built under the provisions of this chapter shall be located by the township trustees so as to accommodate the greatest number of the resident taxpayers, and for such purpose the trustees may purchase land not to exceed in value one hundred dollars. [Same, § 3.]

SEC. **570. Trustees to build.** The township trustees shall have charge of the building of such hall, shall receive bids, and shall let the building of the same to the lowest responsible bidder, and the township clerk shall pay out of the funds collected, only on the order of the trustees of said township. [Same, § 4.]

SEC. **571. Clerk to be custodian.** The township clerk, under the direction of the trustees, shall be the custodian of the building, and the use thereof may be permitted by the township trustees to all the citizens of the township for all lawful purposes; and, for the purposes of this act, the township clerk is hereby clothed with all the power and duties of a constable of the township, to maintain order within and about the premises, protect the property, and enforce orders of the township trustees with respect thereto. A copy of this section shall be at all times kept posted in a conspicuous place in said hall. [Same, § 5.]

SEC. **572. Clerk to give bond.** When a tax is voted as provided in this act, the township clerk shall, before drawing any of said tax from the treasury of the county, execute a bond, with penalty double the amount of said tax, which bond shall be approved by the board of supervisors. [Same, § 6.]

SEC. **573. Tax for repairs.** The trustees of any township where such building has been erected are hereby authorized and empowered to certify to the board of supervisors that a tax of not exceeding one-half mill on the dollar in any one year, of the taxable property of the township, should be levied, to be used in keeping such building in repair, to furnish same with necessary furniture and provide for the taking care thereof. When such certificate is filed in the auditor's office, the board of supervisors shall levy such tax. [Same, § 7.]

SEC. **574. Trustees—duties.** The township trustees are the overseers of the poor, fence viewers, and the township board of equalization, and board of health, and shall have charge of all cemeteries within the limit of their townships dedicated to public use, when the same are not controlled by other trustees or incorporated bodies. [C. '73, § 393; R., § 446; C. '51, § 224.]

Further as to cemeteries, see §§ 583–589.

The law invests township trustees with a discretion as to what is deleterious to public health and the power to cause its abatement: *Bushnell v. Whitlock*, 77–285.

Where certain land purchased for cemetery purposes was found to be unsuitable, and the township trustees proposed to sell the same on condition that it should never be used for cemetery purposes, *held*, that it

was within their discretion as a board of health to impose the restriction as to the use of the land: *Ibid.*

Sections 415–418 of Code of '73, as to power of township trustees as a board of health were in effect repealed by 18 G. A., ch. 151 (see §§ 65–68, *et seq.*): *Tweedy v. Fremont County*, 68 N. W., 921.

SEC. **575. Refusing to serve—penalty.** Any person elected to a township office, and refusing to qualify and serve, shall forfeit the sum of five dollars, which may be recovered by action in the name of the county for the use of the school fund in the county, but no person shall be compelled to serve as a township officer two terms in succession. [C. '73, § 394; R., § 447; C. '51, § 225.]

SEC. **576. Clerk to keep record.** The township clerk shall keep a record of all the proceedings and orders of the trustees, and of all acts done by him, including the filing of certificates of official oaths having been taken before other officers, and perform such other acts as may be required of him by law. [C. '73, §§ 392, 395–6; R., §§ 445, 448–9; C. '51, §§ 223, 226–7.]

Entries made on the record by one township clerk from memoranda of the action of the trustees made by the previous clerk are admissible as a part of the record: *Moses v. Penquit*, 72–611.

Written orders for the relief of poor persons, given by the township trustees under § 2235, are valid, without being otherwise made of record under this section: *Bremer County v. Buchanan County*, 61–624.

The complaint to trustees as fence-viewers is not part of their proceedings, and need not be in writing nor of record: *Tubbs v. Ogden*, 46–134.

Record of a direction or order of the trustees for the election of additional justices under § 592 of Code of '73 (not retained) must be made by the trustees in order to be valid: *State v. Gaston*, 79–457.

SEC. **577. Notify auditor of elections.** The clerk, immediately after the election of officers in his township, shall send a written notice thereof to the county auditor, stating the names of the persons elected, and to what offices, and the time of the election, and shall enter the time of the election of each officer in the township record. [C. '73, § 397; R., § 450; C. '51, § 228.]

SEC. **578. Post notice of receipts and expenditures.** Each township clerk, on the morning of the day of the general election and before the hour for opening the polls, shall post up, at the place where such election is to be held in his township, a statement in writing, showing all receipts of money and disbursements in his office for the preceding year, which shall be certified as correct by the trustees of the township. [16 G. A., ch. 50.]

SEC. **579. Constables—duties.** Constables are ministerial officers of justices of the peace, and shall serve all warrants, notices or other process directed to them by and from any lawful authority, and perform all other duties now or hereafter required of them by law. [C. '73, §§ 398–9; R., §§ 451–2; C. '51, §§ 229, 230.]

A constable is properly a township officer, although he is considered as a county officer for some purposes: *State v. Bevans*, 37–178.

A justice of the peace has no authority to appoint a special constable to assist peace officers in seizing liquors. He cannot give to a special constable thus appointed general authority: *Foster v. Clinton County*, 51–541.

SEC. **580. Changing township name—petition—notice.** Any township desirous of changing its name may petition the board of supervisors of the county in which such township is situated, and, if it shall appear to said board that a majority of the actual resident voters of such township are in favor of such change, such board shall cause three notices to be posted up in three of the most public places of such township, for at least thirty days previous to the next session of said board, which notice shall state the fact that a petition has been presented to said board by the citizens of said township, praying for a change of the name of the same, and the name prayed for in said petition, and that, unless those interested in the change of such name shall appear at the next regular session of said board and show cause why said name shall not be changed, there will be

an order made granting such change; which notice shall be attested by the auditor. [C. '73 § 412.]

SEC. **581. Hearing—order.** If, at the time fixed for the hearing of said petition, the board is satisfied that there is a majority in favor of such change of name, it shall make an order granting the same, which shall be attested by the auditor, and recorded in the office of the recorder of the county where such township is situated. [C. '73, § 413.]

SEC. **582. Same.** If it appear to said board that a majority of the citizens of such township are opposed to such change, such petition shall be dismissed, and the cost of the proceeding in all cases shall be taxed against the petitioners. [C. '73, § 414.]

SEC. **583. Cemeteries—plat—record.** Where there is located in any township one or more cemeteries, the owner or owners of the same, or any party or parties owning an interest therein, may cause the same to be surveyed, platted, and laid out into subdivisions and lots, numbering the same by progressive numbers, giving the dimensions, length and breadth thereof, with reference to known or permanent monuments to be made; and which plat shall accurately describe all the subdivisions of the tract of land used or designed to be used as a cemetery. Said plat shall be recorded in the office of the county recorder, and filed with and recorded by the township clerk, and preserved by him among the records of his office. [16 G. A., ch. 130, § 1.]

SEC. **584. Conveyance of lots—record of.** All conveyances of subdivisions or lots of a cemetery thus platted shall be by deed from the proper owner, which deed shall be recorded with the township clerk in a book kept by him for that purpose, for the recording of which the said clerk shall be entitled to a fee of fifty cents for each instrument recorded, to be paid by the party desiring the record made. [Same, § 2.]

SEC. **585. Trustees condemn lands.** The township trustees are hereby empowered to condemn, or purchase and pay for out of the general fund, and enter upon and take, any lands within the territorial limits of such township for the use of cemeteries, in the same manner as is now provided for cities and towns. [Same, § 3.]

Where land was purchased for cemetery purposes, but was found to be unsuitable, *held*, that the township trustees could not be enjoined from selling the land because they proposed to sell only on condition that the premises should never be used for cemetery purposes, and in case of a breach of the condition the purchasers should forfeit the land to the trustees: *Bushnell v. Whitlock*, 77-285.

It is contemplated that only the question of compensation shall be submitted to the jury and not the question as to necessity, that being a matter for the trustees alone to determine, and the question whether or not they have so determined is a question for the court: *Barrett v. Kemp*, 91-296.

SEC. **586. Tax to pay for.** They shall, at the regular meeting in April, levy a tax sufficient to pay for any such lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established. They shall have power to control any such cemeteries, or appoint trustees for the same, or sell them to any private corporation for cemetery purposes. [Same, § 4.]

SEC. **587. Regulations for cemeteries.** The trustees, board of directors, or other officers having the custody and control of any cemetery in this state, shall have power, subject to the by-laws and regulations of said cemetery, to inclose, improve and adorn the grounds of such cemetery; to construct avenues in the same; to erect proper buildings for the use of said cemetery; to prescribe rules for the improving or adorning the lots therein, or for the erection of monuments or other memorials of the dead upon such lots; and to prohibit any use, division, improvement or adornment of a lot which they may deem improper. [17 G. A., ch. 106, § 1.]

A grantor of land conveyed to township trustees for use as a cemetery cannot maintain action by *mandamus* against them to compel its use for such purpose, before it has

been actually appropriated to that purpose, it not appearing that the use to which it was to be put constituted any part of the consideration for the sale: *Christy v. Whitmore*, 67–60.

SEC. **588. Misdemeanors in—punishment—damages.** Any person who shall wilfully and maliciously destroy, mutilate, deface, injure or remove any tomb, vault, monument, gravestone, or other structure placed in any public or private cemetery in this state, or any fences, railing, or other work for the protection or ornamentation of said cemetery, or of any tomb, vault, monument or gravestone, or other structure aforesaid, on any cemetery lot within such cemetery, or shall wilfully and maliciously destroy, cut, break or injure any tree, shrub, plant or lawn within the limits of said cemetery, or shall drive at an unusual and forbidden speed over the avenues or roads in said cemetery, or shall drive outside of said avenues and roads, and over the grass or graves of said cemetery, shall be guilty of a misdemeanor, and, upon conviction, punished accordingly, in the discretion of the court, and such offender shall also be liable, in an action in the name of the person or corporation having the custody and control of said cemetery grounds, to pay all such damages as have been occasioned by his unlawful act or acts; which money, when recovered, shall be applied by said person or corporation to the reparation and restoration of the property so injured or destroyed, if the same can be so repaired or restored. [Same, § 2.]

SEC. **589. Watchmen—police powers.** It shall be lawful for the trustees, directors or other officers having the custody and control of any cemetery in this state to appoint as many day and night watchmen of their grounds as they may think expedient, and such watchmen, and also all their sextons, superintendents, gardeners and agents, stationed upon or near said grounds, are hereby authorized to take and subscribe, before any mayor of a city or justice of the peace of the township where such cemetery is situated, an oath of office, similar to that required by law of constables, and, upon the taking of such oath, such watchmen, sextons, superintendents, gardeners and agents shall have, exercise and possess all the powers of police officers within and adjacent to the cemetery grounds, and they and each of them shall have power to arrest any and all persons engaged in violating the laws of this state in reference to the protection, care and preservation of cemeteries, and of the trees, shrubbery, plants, structures, grass and adornments therein, and to bring such person so offending before any justice of the peace within such township, to be dealt with according to law. [Same, § 3.]

SEC. **590. Compensation of trustees.** Township trustees shall receive:

1. For each day's service of eight hours necessarily engaged in official business, to be paid out of the county treasury, two dollars each;

2. For each day engaged in assessing damages done by trespassing animals, one dollar each, to be paid as other costs are in such cases;

3. When acting as fence viewers, or viewing or locating any ditch or drain, or in any other case where provision is made for their payment otherwise, they shall not be paid out of such treasury, but in all such cases their fees shall be paid in the first instance by the party requiring their services, and they shall append to the report of their proceedings a statement thereof, and therein shall direct who shall pay said fees, and in what sums respectively; and the party having so advanced any such fees may have his action therefor against the party so directed to pay the same, unless, within ten days after demand by the party entitled thereto, he shall be reimbursed therefor. [16 G. A., ch. 35; C. '73, § 3808; R., § 4156; C. '51, § 2548.]

SEC. **591. Compensation of clerk.** The township clerk shall receive:

1. For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, two dollars;

2. For all money coming into his hands by virtue of his office, except money received from his predecessor in office, unless otherwise provided by law, five per cent.;

3. For filing each application for a drain or ditch, fifty cents;

4. For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation as the board of supervisors may allow. [16 G. A., ch. 61; C. '73, § 3809; R., §§ 909, 911.]

SEC. **592. Compensation of assessor.** Each township assessor shall receive, in full for all services required of him by law, a sum to be paid out of the county treasury, and fixed annually by the board of supervisors of the county at the January session; said compensation shall be for the succeeding year, and shall not exceed the sum of two dollars for each day of eight hours which said board determines may necessarily be required in the discharge of all the official duties of such assessor. [C. '73, § 3810; R., § 730.]

CHAPTER 11.

OF GENERAL REGULATIONS AFFECTING COUNTIES AND TOWNSHIPS.

SECTION **593. No money for sectarian purposes.** Public money shall not be appropriated, given or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association or object which is under ecclesiastical or sectarian management or control. [C. '73, § 552.]

Although municipal corporations have no power to appropriate or otherwise use public money for the benefit of any institution, association or object under ecclesiastical or sectarian management, yet such a corporation may by devise properly become trustee to hold funds to aid religious societies of the city: *Phillips v. Harrow*, 61 N. W., 434.

SEC. **594. County not to become stockholder.** No county shall, in its corporate capacity, or by its supervisors or officers, directly or indirectly, subscribe for stock, or become interested as a partner, shareholder or otherwise, in any banking institution, plank road, turnpike, railway, or work of internal improvement; nor shall it issue any bonds, bills of credit, scrip, or other evidence of indebtedness, for any such purposes; and all such evidence of indebtedness for said purposes are hereby declared void, and no assignment of the same shall give them validity; but this section shall not be so construed as to prevent counties from lawfully erecting their necessary public buildings and bridges, laying off highways, streets, alleys and public grounds, or other local works in which such counties may be interested. [C. '73, §§ 553–4; R., §§ 1345–6.]

SEC. **595. Actions on bonds—county not estopped.** In all actions now pending, or hereafter brought, in any court in this state, on any bond or coupon issued, or purporting to be issued, by any county for the purposes prohibited in this chapter, a former recovery against such corporation on any one or more or any part of such bonds or coupons shall not bar or estop such corporation from setting up any defense it has made, or could have made, to such bonds or coupons in the action in which such former recovery was had, but the county may allege and prove any matter of defense in such action to the same extent, and with the same effect, as though no former action had been brought, or former recovery had. [C. '73, § 555.]

SEC. **596. Officers not to purchase warrants.** No officer of any county, nor any deputy or employe of such officer, shall, directly or indirectly, be permitted to take, purchase, or receive in payment, exchange, or in any way whatever, any warrant, scrip, or other evidence of its indebted-

ness or any demand against it, for a less amount than that expressed on the face of the warrant, scrip, or other evidence of indebtedness or demand, with accrued interest thereon. [C. '73, § 556; R., § 2186.]

SEC. **597. Treasurer to indorse warrants.** The treasurer of every county, when he shall receive any warrant, scrip, or other evidence of its indebtedness, shall indorse thereon the date of its receipt, from whom received, and what amount he paid thereon. [C. '73, § 557; R., § 2187.]

SEC. **598. Breach of duty—misdemeanor.** Any officer of any county, or any deputy or employe of such officer, who violates any of the provisions of this chapter, shall be guilty of a misdemeanor, and fined not less than one hundred dollars, nor more than five hundred dollars, for each offense. [C. '73, § 558; R., § 2188.]

TITLE V.

OF CITY AND TOWN GOVERNMENT.

CHAPTER 1.

OF INCORPORATION.

SECTION **599. How effected.** When the inhabitants of part of any county, or of two or more counties lying contiguous to each other, not embraced within the limits of any city or town, desire to become incorporated as a town, they may apply to the district court of the proper county, by a petition in writing signed by not less than twenty-five of the qualified electors of the territory proposed to be embraced in such town, which petition shall describe said territory, and contain or have annexed thereto an accurate plat thereof, and shall state the name proposed for such town. Proof of the residence and qualification of the petitioners as electors shall be made by affidavit or otherwise, as directed by the court. If the territory embraced within the limits of said proposed town lies in more than one county, the district court of either of said counties shall have jurisdiction of such proceedings, but that in which the petition for incorporation is first filed shall have exclusive jurisdiction thereafter. [24 G. A., ch. 6, § 1; 18 G. A., ch. 79; C. '73, § 421.]

Prior to the adoption of 24 G. A., ch. 6, the provisions as to annexation contemplated that the added territory should be in the same county as that of the city to which it was added: *Tabor & N. R. Co. v. Dyson*, 86–310.

SEC. **600. Commissioners—notice.** Upon compliance with the provisions of the preceding section, the court shall at once appoint five commissioners, who shall at once give notice of an election for incorporation, for not less than three successive weeks preceding the same, by posting notices in three public places within the limits of the proposed town, and by publication in one or more newspapers published in the county where the court is held; which notice shall state the time and place of holding the election, and a description of the limits of the proposed town, and that a plat and description thereof is on file in the office of the clerk of the district court. The court is vested with power to change or limit the territory proposed to be incorporated, before appointing the commissioners as herein provided. [C. '73, § 422.]

Where notice, instead of being given as required by statute, was published only on the morning of the day of election, *held*, that although a majority of the votes cast were in favor of organization, the election was void: *State ex rel. v. Young*, 4–561.

SEC. **601. Election.** The commissioners shall act as judges and clerks of the election, and shall qualify as required by law, and the proposition to be submitted thereat shall be: "Shall the proposition for incorporation be adopted?" and the commissioners shall have charge of the printing of the ballots, and shall cause the proposition to be placed upon them, and the elector shall designate his vote in the same manner provided with respect to like or similar propositions in the chapter on elections. The commissioners shall promptly report the result of the election to the court, or judge thereof, which may be confirmed and approved, or set aside, by said court, or judge in vacation. If it is set aside, the court or judge thereof may order a new election with the same or other commissioners. [C. '73, § 422.]

SEC. **602. Notice of election of officers.** If a majority of the ballots cast at such election be in favor of the incorporation, and the same has been confirmed and approved as above provided, the court, or a judge thereof in vacation, shall order the election of a council, mayor, clerk and treasurer. The commissioners shall give notice for two consecutive weeks of the time and place of holding the election of councilmen and the aforesaid officers, by publication in a newspaper published in the county where the court is held, and by posting the same in five public places within the limits of such town, at which the qualified electors residing within such limits shall elect such councilmen and officers, who shall hold their offices until the first regular election thereafter. Said commissioners shall act as judges and clerks of the election, and shall have the same power and discharge the same duties as clerks in city or town elections, and such election shall be conducted, as far as practicable, in the manner prescribed by law for the election of town councilmen and officers. [C. '73, §§ 423, 425.]

SEC. **603. Incorporation complete.** Said commissioners shall promptly report the result of the election to the court, and it, or a judge thereof in vacation, may confirm and approve such election and report, or set the same aside and order a new election, with the same or other commissioners. Upon the confirmation of such election and report, a judgment shall be entered of record declaring the town duly incorporated, and confirming and approving the first election of officers; who, after having qualified as provided for city officers, shall hold until the next annual election of officers. The court or judge shall declare the office of any person elected, and who fails to qualify as such as aforesaid, vacant, and shall at once proceed to appoint some other person to fill such vacancy. The clerk shall enter all the proceedings in the court in the matter of such incorporation and election of officers in the complete record book and file a certified copy of such entry in the office of the recorder of said county, who shall record the same, and in the office of the secretary of state. The costs of all the aforesaid proceedings shall be paid by the town; but if no judgment is entered establishing the town, they shall be paid by the petitioners, and judgment entered accordingly. [C. '73, § 424.]

A court will take judicial notice in what county a given town is situated: *State v. Reader*, 60–527.

SEC. **604. Discontinuance—how effected.** Upon a petition of voters equaling twenty-five per cent. of the number voting at the last preceding municipal election, petitioning the district court of the county wherein such corporation is situated for the discontinuance of the same, the court shall, thirty days next prior to the next annual corporation election, cause notice to be given that the question of discontinuing such corporation will be submitted to the legal voters of the same at the next annual corporation election, by publication at least once a week in a newspaper, if any, published within the limits of such city or town, and by posting the same in five public places within such limits. The proposition to be submitted shall be: "Shall the proposition to discontinue the incorporation be adopted?" and the clerk of the city or town shall cause the ballots to be printed and the proposition to be placed thereon, and the elector shall designate his vote and the election shall be conducted in the same manner provided with respect to like or similar propositions in the chapter on elections. [C. '73, §§ 447–8.]

SEC. **605. Canvass of vote—indebtedness.** The vote shall be taken and canvassed in the same manner as other municipal elections, and returns thereof made to the district court. If it finds that a majority of the legal votes cast were for the discontinuance of the incorporation, then a judgment shall be entered discontinuing the same, and, upon the entry of said judgment, its corporate powers shall cease, and the court shall cause notice to be given, in a manner to be prescribed by it, requiring all claims against

the corporation to be filed in said court within a time fixed in the notice, not exceeding six months, and all claims not so filed shall be forever barred. At the expiration of the time so fixed, the court shall adjudicate said claims, which shall be treated as denied. Any citizen of such town or city at the time the vote was taken may appear and defend against any claim so filed, or the court may, in its discretion, appoint some person for this purpose, in which event the proceedings shall conform as near as may be to those prescribed for the prosecution of actions by ordinary proceedings. [C. '73, §§ 449, 450.]

SEC. **606. Payment of debts—surplus.** The court shall have full power to wind up the affairs of the corporation, to dispose of its property, and to make provision for the payment of all indebtedness thereof, and for the performance of its contracts and obligations, and shall order such taxes levied from time to time as may be requisite therefor, which the board of supervisors shall levy against the property within the corporation. Said taxes shall be collected by the county treasurer like other taxes, and paid out under the orders of the court, and any surplus shall be paid into the temporary school fund of the district or districts where the same is levied. [C. '73, §§ 449, 453.]

SEC. **607. Records deposited.** The books, documents, records, papers and corporate seal of any city or town so discontinued shall be deposited with the county auditor of the county in which the council last held its sessions, for safe keeping and reference in future. All court records of any mayor or other officer shall be deposited with the nearest justice in the township in the county where the office of mayor or other officer is situated, who shall have authority to execute and complete all unfinished business standing on the same. [C. '73, § 451.]

SEC. **608. Publication.** When the incorporation of any city or town shall have been discontinued, the clerk of the court shall cause a notice thereof to be published for four consecutive weeks in a newspaper published in the county where the court is held, and shall also certify the fact to the secretary of state and to the recorder of the county. [C. '73, § 452.]

SEC. **609. Expenses.** All expenses of the election and of winding up the affairs of the corporation shall be paid by it. [C. '73, § 450.]

SEC. **610. Annexation—submission of question.** When any city or town shall desire to annex any unplatted contiguous territory, the council may, by an ordinance describing by metes and bounds the territory proposed to be annexed, passed at least one month before the annual election, submit thereat the question of annexation to the qualified electors of such corporation. The proposition to be submitted shall be: "Shall the proposition to annex the territory described in the ordinance of (giving the date of its passage) be adopted?" The ballots shall be printed and the proposition submitted in the manner provided for in section six hundred and four of this chapter. If a majority of those voting shall favor it, the council shall present to the district court a petition praying for such annexation, which shall describe the territory proposed to be annexed, and have attached thereto a plat thereof; and like proceedings shall be had upon said petition as are provided for the incorporation of towns, so far as may be applicable; and if the result of the election be favorable to annexation, the same record and certified copies thereof shall be made and filed as provided in case of incorporation. Should the annexed territory, or any part thereof, be in a different county from that where the court is held, such certified copy shall be filed and recorded in the office of the recorder of such county. Thereupon the territory proposed to be annexed shall be included in said corporation. [C. '73, § 430.]

This section is not void as conferring legislative power upon the court in violation of the constitution, art. III, § 1: *Burlington v. Leebrick*, 43-252.

SEC. **611. By proceedings in court.** When any city or town shall desire to annex abutting and contiguous territory which has been laid out

in lots or parcels, not within the limits of a city or town, the council thereof may present to the district court of the county in which the city or town is situated a petition, describing the territory to be annexed, and stating that the same had been laid out as above mentioned, the facts constituting the desirability of annexation, the name of each owner of any portion thereof, if there is more than one such owner, and the particular portion of such territory owned by each, which petition shall have attached thereto a plat thereof. Notice of the filing of such petition shall be served, by publication in one daily or weekly newspaper published in the city or town for four consecutive weeks, and by posting in five public places in the territory desired to be annexed for the same period; the corporation shall be plaintiff, the owners defendants, and issues joined and the case tried as an ordinary action, as far as applicable, except that no judgment for costs shall be rendered against any defendant who does not make defense. If the court finds the allegations of the petition true, and that justice requires the annexation of said territory or any part thereof, a decree shall be entered accordingly, and from that time the territory therein described shall be included in such corporation. The same record and certified copies shall be made and filed as provided in the preceding section. [C. '73, § 431.]

The provision for the annexation of territory by a proceeding in court is not unconstitutional: *Ford v. North Des Moines*, 80–626.

When a petition has been presented, signed by the requisite number of electors, the court has no discretion. The court has the authority to appoint the commissioners of election, and nothing more. The question of incorporation or annexation, as the case may be, is determined by the electors: *Ibid.*

These provisions for annexation are not unconstitutional for want of provision as to notice to property owners of the proceeding before the court: *Ibid.*

It is not required that the notice of election shall be made of record, and where it appears that notice was actually given and commissioners report that an election was held under due and legal notice, that is sufficient: *Ibid.*

Under particular facts, *held*, that annexation of territory to a city was proper, although separated by a river: *Ibid.*

Where the copies of the proceedings filed in the office of the county recorder and that of the secretary of state were not certified as correct copies, *held*, that such defect did not affect the validity of the annexation, and a subsequent correction of such defect after the bringing of action to question the validity of proceedings taken in pursuance of such annexation was sufficient: *Ibid.*

SEC. **612. Corporations unite.** When any city or town desires to be annexed to another and contiguous city or town, the council of each shall appoint three commissioners to arrange and report to the respective councils the terms and conditions on which the proposed annexation can be made; and if the council of each approve of the terms and conditions proposed, they shall by proper ordinance so declare. Thereupon the council of each of such cities or towns, by one publication of each of said ordinances in a newspaper, if any, published in each of such cities or towns, and by posting the same in five public places in each of such cities or towns, at least ten days prior to the general annual election, or at a special election therein, may submit the question of annexation, upon the terms and conditions proposed, to the electors of their respective cities or towns. The proposition to be submitted at such election shall be: "Shall the proposition for the annexation of (naming the city or town) to (naming the city or town) be adopted?" The clerk of each city or town shall cause the ballots to be printed and the proposition to be placed on the same, and the elector shall designate his vote and the election shall be conducted in the manner provided in like or similar cases in the chapter on elections. If a majority of the votes cast in each city or town is in favor of annexation, the council of each shall by ordinance so declare; and a certified copy of the whole proceedings for annexation of the city or town to be annexed being filed with the clerk of the city or town to which the annexation is made, the latter shall file with the secretary of state, and in the recorder's office of the county, a certified copy of all proceedings had by both of such cities or towns in relation thereto, and which shall be recorded in the

recorder's office. [25 G. A., ch. 11; 17 G. A., ch. 3, § 1; C. '73, § 432; R., § 1044.]

SEC. **613. Annexation complete.** When certified copies of the proceedings are so filed, the annexation shall be complete, and the city or town to which the annexation is made shall have the power, and it shall be its duty, to pass such ordinance as will carry into effect such annexation, and thereafter the city or town annexed shall be a part of the city or town to which the annexation is made. Any citizen of the annexed town or city may maintain legal proceedings to compel the city or town, and the council thereof, to which annexation is made, to execute such terms and conditions, but such annexation shall not affect or impair any rights or liabilities then existing for or against either of such cities or towns, and they may be enforced as hereinafter provided. [17 G. A., ch. 3, § 2; C. '73, § 433.]

SEC. **614. Indebtedness—how paid.** All present indebtedness of the city to which annexation is made shall be paid by such city by a tax to be levied exclusively upon the property subject to taxation within the limits of the same as it existed prior to such annexation, and none of the real estate or property embraced within the limits of the annexed city or town shall ever be subjected, in any way, to the payment of any part of said indebtedness. The indebtedness of the city or town annexed shall be paid by such city or town, and the council of the city as it exists after annexation is authorized, and it is made its duty, to provide for the payment of such indebtedness by the levy of taxes upon the property subject to taxation within the limits of such city or town so annexed, and to continue such tax from year to year so long as the same shall be necessary; but if such city or town owns any real estate, the fair market value thereof at the time of its annexation shall be credited upon its said indebtedness, and the amount of such credit shall be assumed and paid by such city as it exists after annexation, and such property shall become the property of such city as enlarged. Suits to enforce claims or demands existing at the time of annexation against the city or town annexed may be prosecuted or brought against the city or town to which annexation is made, and judgments obtained shall be paid as hereinbefore provided for the payment of the indebtedness of such annexed city or town. [17 G. A., ch. 3, § 2; C. '73, § 433.]

SEC. **615. Extension—how effected.** Any city or town may have its limits enlarged by resolution of the council, fixing the boundaries of the city or town, to the proposed extent, which shall, as far as practicable, be terminated by straight lines drawn parallel, respectively, to the corresponding lines of the government survey, and the question must then be submitted to the vote of the electors of the city or town as thus proposed to be enlarged, on a day fixed by resolution of the council, and notice thereof given by proclamation of the mayor of the time and place of holding the same, setting forth the exact question to be presented to the electors for determination, which shall be published in some newspaper published in said city or town for four weeks, consecutively. The council shall select three judges and two clerks for said election, whose duties shall be the same as prescribed by law for judges and clerks of election. If at such election a majority of the votes cast are for such extension, the mayor shall issue a proclamation announcing that fact, and from thenceforth the limits of said city or town shall be enlarged as proposed. [17 G. A., ch. 169, §§ 1–3; 16 G. A., ch. 47, §§ 1–3.]

An act for the extension of city limits which by its terms is applicable to only one city in the state and can under no circumstances become applicable to another, is unconstitutional as a special statute. (See constitution, art. III, § 30): *State ex rel. v. Des Moines*, 65 N. W., 818.

But where no objection to the extension has been made for four years and the city had in the meantime been exercising its functions under the statute extending its limits and its operations would be seriously interfered with by holding the annexation illegal, *held*, that the complaining party was

estopped from urging the invalidity of the annexation: *Ibid.*

Former statutes as to extension of limits construed: *Glass v. Cedar Rapids*, 68-207.

SEC. **616. Taxation of lands.** No lands included within said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that they may be subjected to a road tax to the same extent as though they were outside of the city or town limits, which tax shall be paid into the city or town treasury. [20 G. A., ch. 158; 17 G. A., ch. 169, §§ 4, 5; 16 G. A., ch. 47 § 4.]

General effect as to included agricultural lands, without reference to statutory exemption: Extension of limits of an incorporated city or town and bringing additional land or people under municipal authority are acts of like nature with the incorporation of such city or town, and depend for their authority upon the same constitutional provisions: *Morford v. Unger*, 8-82.

Property which is so far removed from the local government as not to derive benefit therefrom, and which the owner desires to use as farming land and not for laying off into city lots, cannot, by being included in city limits against the will of the owner, be subjected to city taxation, even though it is provided that it shall be assessed only at its value for farming land: *Ibid.*

Land which has always been occupied and used for agricultural purposes, which does not adjoin the platted portion of the city, but is remote therefrom, with other unplatted farm lands between, which is not held for future speculation as city property, which has no street or alley of the city extending to it except the ordinary public highways of which it would have the advantage if not within the city limits, which does not have the advantage of the city water supply for use or fire protection, is not subject to municipal taxation: *Taylor v. Waverly*, 63 N. W., 347.

While enlargement of boundaries of a city or town whereby the property of individuals is brought within the corporate limits without the consent of its owners, and subjected to taxation for town purposes, may not be an infringement of the constitutional provision against taking private property for public use without compensation, yet it may become so by an unreasonable extension in taking in lands not at all needed for buildings and population, and taxing the same for the benefit of the portion of the corporate domain which may be peopled or occupied. In such cases the courts will limit the taxing power whenever practicable to the point or line where it ceases to operate beneficially to the proprietor in a municipal point of view: *Langworthy v. Dubuque*, 16-271; *Fulton v. Davenport*, 17-404.

Facts in particular cases considered as determining whether the property was properly subject to municipal taxation or not: *Morford v. Unger*, 8-82; *Butler v. Muscatine*, 11-433; *Langworthy v. Dubuque*, 16-271; *Hershey v. Muscatine*, 22-184.

Where the land thus included is laid off into lots and platted as an addition it becomes subject to municipal taxation: *Fulton v. Davenport*, 17-404.

So where the proprietors of undedicated town property, being locally within the corporate limits, hold such close proximity to the settled and improved parts of the town that the corporate authorities cannot open and improve its streets and alleys, and extend to the inhabitants thereof its usual police regulations and advantages, without incidentally benefiting such proprietors in their personal privileges and accommodations, or in the enhancement of their property, then the power to tax the property arises; but in its exercise great care and circumspection should be observed lest perchance injustice and oppression should ensue: *Ibid.*

Certain tracts of land in Dubuque *held* not liable to taxation for municipal objects under the foregoing doctrines: *Davis v. Dubuque*, 20-458.

Where a tract of land within the extended limits of the city lay near one of the principal streets, and was so surrounded as to receive current benefits from the expenditures made by the city as well as permanent increase in value, *held*, that it was liable to municipal taxation: *O'Hare v. Dubuque*, 22-144.

But *held*, that a lot was not liable to such taxation which was not upon a principal street, nor accessible by any street leading to the business part of the city, and was surrounded exclusively by agricultural and mineral lands, and was not benefited by current expenditures: *Ibid.*

The doctrine of *Morford v. Unger*, *supra*, with reference to the extension of city limits, is also applicable to lands used for agricultural purposes within the corporate limits as originally laid out: *Buell v. Ball*, 20-288; *Deeds v. Sanborn*, 22-214.

Tracts of forty and ten acres respectively, all lying together, occupied for agricultural purposes, remote from the city proper, no streets or alleys having been worked near them, *held* not liable for municipal taxation: *Deeds v. Sanborn*, 26-419.

Lands included within an extension of the city limits but used exclusively for agricultural purposes, and not affected by the current expenditures of the city, no money being spent for improvements thereon, and no streets or alleys being worked for their benefit, such lands not being used for buildings and not being enhanced in value by be-

ing within the corporate limits, *held* not subject to municipal taxation: *Deiman v. Fort Madison*, 30–542.

The fact of payment of previous taxes will not estop the property owner from claiming the exemption of his property from municipal taxation: *Ibid.*

Property included within the corporate limits, deriving no benefit from being thus included, and used alone for agricultural purposes, and not demanded for use as city property, nor possessing a value on account of its adaptation for dwellings or business, is exempt from taxation: but property which is held for the opportunity of bringing it into the market as city lots is not entitled to exemption. So, if land within the city limits is used for the purpose of dwellings or business, it cannot ordinarily be claimed to be exempt from taxation, even though the city fails to open or improve the streets leading thereto: *Durant v. Kauffman*, 34–194.

Municipal taxes from which farm property within the corporate limits is exempt are those which but for municipal purposes would not have been levied, such as taxes to support the police of the city, its necessary lights, water, sewerage, fire department, local government, etc.: but such property is not exempt from taxes voted by the city in aid of a railway, which might be levied as effectually upon property not included within the city: *Sears v. Iowa Midland R. Co.*, 39–417.

A tract of one hundred acres within city limits, used only for farming purposes and having no houses thereon, but against which streets abut, and adjoining an addition laid out in lots and partially improved, *held* subject to city taxes: *Brooks v. Polk County*, 52–460.

The fact that land included within the city limits is used for agricultural purposes will not render the taxation thereof illegal, it not being shown that it is used exclusively for such purposes, nor that it does not derive such benefit from the expenditure of municipal taxes that it is properly subject to such taxation: *Tubbesing v. Burlington*, 68–691.

The character and use of the land alone are not sufficient to determine the question of exemption. It is important to consider the benefits, if any, derived from the expenditure of municipal taxes. Although land is adjudged not to be liable to municipal taxation for a particular year, such adjudication will not necssarily show that municipal taxes thereon for previous years were illegal: *Ibid.*

A tract of land used for railway depot purposes, and situated within the boundaries of the city, is to be deemed subject to municipal taxes, although not platted: *Burlington & M. R. R. Co. v. Spearman*, 12–112.

Under statutory provisions for exemption: This provision, making distinction between lots of ten acres or more and those of less than ten acres is not unconstitutional: *Leicht v. Burlington*, 73–29.

Under this provision as to exemption of tracts of ten acres, *held*, that land included within territory annexed to a city under a previous statute by which the lots exempt from taxation because used for agricultural purposes must exceed twenty acres, became exempt under the new statute although not exempt under the previous one, by virtue of which the annexation was made: *Winzer v. Burlington*, 68–279.

Municipal corporations have no vested right to tax rural or farming property within their limits for city purposes, and if such right is given by statute it is competent for the legislature to take it away: *Ibid.*

The fact that the owner has a residence upon land not platted, and used for agricultural purposes, does not destroy his right to exemption under this provision: *Ibid.*

The provisions of this section in regard to exemption from taxes apply to lands added to the city and not to those already within its limits: *Perkins v. Burlington*, 77–553.

A tract of eighteen acres of land occupied as a homestead and situated within the city limits, which has never been platted, but which is surrounded on all sides by land laid out into lots, streets and alleys, and which is benefited by city improvements, such as lights, water, streets, railroads and fire stations, *held* subject to city taxation: *Ibid.*

Under a similar provision in a statute extending city limits (23 G. A., ch. 1) *held*, that one who acquired title to land within the city limits for purpose of speculation with the intention of laying it out into lots for sale, would not by reason of occupancy or use of the land temporarily for farming purposes be the occupant in good faith for such purposes. The question is one of intent: *Farwell v. Des Moines Brick Mfg. Co.*, 66 N. W., 176.

Such property is liable for special assessments: See notes to § 792; also for road taxes: See § 890, and for sidewalk tax: See § 780.

SEC. **617. Annexation—petition.** When the inhabitants of a part of any county adjoining any city or town shall desire to be annexed thereto, they may apply to the district court of the county in which the land lies, by petition in writing, signed by not less than a majority of the electors residing within the territory proposed to be annexed, which shall state at whose instance it is presented, and shall be accompanied by a plat of such territory. [C. '73, § 426; R., § 1038.]

It is not competent in the petition for annexation to provide for the exemption in the annexed territory of certain property from city taxes, and such provision is a nullity: *Hayzlett v. Mt. Vernon*, 33–229.

SEC. **618. Procedure.** The proceedings shall be the same as in the incorporation of towns, as nearly as applicable, and such election shall be

held in the territory proposed to be annexed, not less than three weeks' notice of which shall be served on the mayor or other presiding officer of the town or city to which the annexation is proposed. [C. '73, § 427; R., § 1039.]

SEC. **619. Proposition submitted.** The council of said city or town may give consent to such annexation, or may, in its discretion, provide by ordinance or resolution for submitting to the electors at the next annual election the question whether such annexation shall be made; and if such consent be given, or if a majority of the electors at such election shall vote in favor thereof, then, on the return of such vote to the proper authority of such city or town, a resolution or ordinance shall be adopted declaring that the territory described in the petition has been annexed, a copy of which consent or resolution or ordinance, duly certified by the clerk of said city or town, and attested by the corporate seal, shall be by him filed in the proceedings in the district court in which the matter of annexation is pending. If the court, or the judge thereof in vacation, approves and confirms said election and consent of such city or town, in case such consent be given, said court or judge shall thereupon enter of record its judgment declaring the territory described in the petition is annexed to such city or town, and upon the entering of such judgment the clerk of said court shall make a complete record of such proceedings, including the consent of such city or town, or the resolution or ordinance declaring the annexation, as the case may be, certified copies of which record shall be filed and recorded as provided in the case of the incorporation of towns; whereupon the territory proposed to be annexed shall be a part of such city or town. [C. '73, § 428; R., § 1041.]

SEC. **620. When complete.** When a resolution or ordinance declaring such annexation has been adopted, and the copies recorded, the territory shall be a part of the city or town. [C. '73, § 429; R., § 1042.]

SEC. **621. Extension by application to council.** When the owner or owners of lands adjoining any city or town shall desire to have such lands brought within the same, they may apply to the council to have the limits thereof extended so as to include such lands, and attach to the application a plat of such lands, showing their situation with respect to the existing limits of the city or town. If the council assent to the extension of the limits applied for, a minute thereof shall be indorsed by the clerk upon the plat, and the same shall then be acknowledged by the owner, and recorded in the office of the recorder of deeds of the proper county, and thereafter the limits of the city shall be extended so as to conform to the line proposed and assented to by the council. [18 G. A., ch. 56.]

SEC. **622. Severance—application.** When the inhabitants of a part of any town or city, whether the same is or is not laid out in lots and blocks, desire to have the part thereof in which they reside severed therefrom, they may apply by petition in writing, signed by a majority of the resident property holders of that part of the territory of such city or town, to the district court of the county, which petition shall describe the territory proposed to be severed, and have attached thereto a plat thereof, and shall name the person or persons authorized to act in behalf of the petitioners in the prosecution of said petition. [C. '73, § 440; R., § 1048.]

Land not needed for city purposes, and not benefited by being within the corporation, should be severed upon proper proceedings being taken, and the part severed should not be held liable for municipal indebtedness incurred during its attachment, if it was not liable to municipal taxation whilst attached: *Evans v. Council Bluffs*, 65–238.

The provisions of this section apply to any territory within a city or town, whether such territory is or is not laid out into lots and blocks. If so laid out *it seems* that the severance would operate as an extinguishment of the rights of the corporation in the streets and alleys of such portion: *McKean v. Mt. Vernon*, 51–306; *Way v. Center Point*, 51–708.

Where property was sought to be charged with a tax levied by a municipal corporation, such property being situated in a plat that had been vacated since the levy, *held*, that, under the statute providing for such vacation it was proper to admit evidence that the city was indebted in a large sum prior to the

vacation of the plat, the property being liable for its proportion thereof: *Deeds v. Sanborn*, 26–419.

Previous statutes as to severance construed: *Whiting v. Mt. Pleasant*, 11–482.

SEC. **623. Notice.** Notice of the filing of the same shall be given by publication in a newspaper published in said city or town, or by posting a notice of the same in five public places therein, four weeks previous to the succeeding term of court, which notice shall contain the substance of said petition, and state the term of court at which the hearing thereof will be had. [C. '73, § 441; R., § 1049.]

SEC. **624. Hearing—affidavits.** The hearing of said petition may be had by the court, or either party may demand a jury, and the proper authorities of such city or town, or any person interested in the subject matter of said petition, may appear and contest the granting of the same. Affidavits in support of or against said petition may be submitted and examined by the court or jury, and the court may, in its discretion, permit the agent or agents named in the petition to amend or change the same, except that no amendment shall be permitted whereby the territory embraced in said petition shall be increased or diminished, without continuing the case to the next term, and requiring new notice to be given as above provided. [C. '73, § 442; R., § 1050.]

This peculiar provision for the introduction of affidavits in evidence is not improper. The question to be determined is whether the interests of the territory in question require the severance, and upon appeal from the decision the only question is whether the court and jury abused the discretion reposed in them by the statute: *Ashley v. Calliope*, 71–466.

SEC. **625. Trial—commissioners appointed.** If the court or jury, after hearing the petition and evidence, shall be satisfied that the petition has been signed by a majority of the property holders residing within the limits of the part of the city described in the petition and plat, and that the limits have been accurately described and a correct plat thereof filed, and that the prayer of the petitioners should be granted, the court shall appoint three disinterested persons commissioners to adjust the terms upon which such part shall be so severed, as to any liabilities of such city or town that have accrued during the connection of such part with such corporation. The commissioners shall take and subscribe an oath that they will impartially perform their duties, and the same shall be filed with the proceedings in such case. [C. '73, § 443; R., § 1051.]

A decision granting the severance of certain territory, as prayed in a proceeding, such as is here contemplated, *overruled* on appeal, for the reason that, under the circumstances, justice and equity did not require it: *Mosier v. Des Moines*, 31–174.

The wishes of the owners of the land are entitled to some weight but should not be permitted to control. The future growth of the town, its probable improvement for sanitary purposes, the importance of having jurisdiction of the territory for various purposes accomplished by the exercise of the police power of the town should be duly considered. The discretion of the lower court will not be controlled on appeal unless it appears to have been abused: *Monk v. George*, 86–315.

SEC. **626. Hearing and report.** The commissioners shall, at a time by them fixed, hear the agent named in the petition, and also the proper authorities of the city or town, in regard to the subject-matter to them submitted, and report to the next term of said court their findings in the premises; upon the filing of which report the court shall decree in accordance therewith, and with the prayer of the petition, unless for good cause, and upon a proper showing, the court shall reject or set aside said report, and appoint new commissioners, and continue the cause for further action to be had thereon. [C. '73, § 444; R., § 1052.]

SEC. **627. Transcript—costs.** The clerk shall forthwith make a complete record of all such proceedings, except the affidavits in support of or against such petition and the cross-examination of the affiants, and file for record a certified transcript thereof in the office of the recorder of the county where the court is held, and of the county where the severed

territory or any part thereof lies, if in a different county, and shall also file such transcript in the office of the secretary of state, and, when so filed, the severance shall be complete. The costs, except witness fees, shall be paid by the petitioners, but each party shall pay its own witnesses. [C. '73, §§ 445–6; R., §§ 1053–4.]

SEC. **628. Changing name—question submitted.** The corporate name of any city or town may be changed as follows: The council may, by resolution, propose such change of name, setting forth therein the proposed new name, which shall not be the same as that of any city, town or post-office existing in the state at the time of the passage of such resolution. The question shall then be submitted to a vote of the qualified electors at the next annual election, or at a special election, as the council may provide. Notice that a change of name is to be voted on at any election shall be published in a newspaper published in said city or town, or, if there be none, then by posting in five public places, at least ten days before the election. [19 G. A., ch. 16, §§ 1–3.]

SEC. **629. Manner of voting—result.** The proposition to be submitted at such election shall be: "Shall the proposition to change the name of (here insert the name of the city or town) to (here insert the proposed name) be adopted?" and the proposition shall be printed and placed upon the ballots, and the election shall be conducted in the same manner, as provided with respect to like or similar propositions in the chapter on elections. If a majority of the votes cast is in favor of the proposed change, the clerk of the city or town shall enter upon the records thereof the result of such election, and set forth in such record the new name adopted, as well as the original name thereof, and shall cause to be filed for record a certified copy of the entry so made in the office of the recorder of the county or counties in which such city or town is situated, and in the office of the secretary of state. [Same, § 4.]

SEC. **630. Change complete.** When certified copies are made and filed as required by the preceding section, the change of name shall be complete, and the new name adopted shall be judicially recognized in all subsequent proceedings wherein said city or town may be interested. [Same, § 5.]

SEC. **631. Abandoning special charter.** Any city or town incorporated by special charter may abandon its charter and organize under the provisions of the general law, with the same territorial limits, by pursuing the course hereinafter prescribed. [C. '73, § 434.]

The mere act of a town, existing under special charter, in electing officers provided by the general incorporation act, at the time and in the manner there contemplated, does not amount to a surrender of its charter and an organization under the provisions of the general act; and where the officers, etc., are not the same the officers so elected will not even be officers *de facto*: *Decorah v. Bullis*, 25–12.

Mere irregularities in effecting the change cannot be made available in a suit by the city to enforce payment of an assessment not valid under the general law: *Des Moines v. Casady*, 21–570.

Where, upon an election to reorganize a city under the general incorporation laws and abandon its special charter, a person who had been acting as city marshal under the special charter was re-elected, and was entitled to hold such office until qualification under the new election, *held*, that the city council could not, between the time of re-election and qualification, reduce his salary: *Cox v. Burlington*, 43–612.

SEC. **632. Petition—election ordered.** Upon a petition of legal voters, equaling ten per cent. of the number voting at the last preceding municipal election in any such city or town, to the council, praying that the question of abandoning its charter be submitted to the legal voters, the council shall immediately direct a special election to be held at which such question shall be decided, specifying at the same time the time and place of holding the same, and appointing the judges and clerks of the election. [C. '73, § 435.]

SEC. **633. Proclamation—notice.** The mayor, or, in case there is no mayor, the president of the council, shall at once issue a proclamation giving notice of such election, of the question submitted to the electors, and of the time and place of holding the election, which proclamation shall be published for four consecutive weeks in some newspaper published in such city or town, and, if there is none published therein, then such proclamation shall be published by posting a copy thereof in five public places within the corporate limits of such city or town, one of which shall be on the door of the mayor's office. [C. '73, § 436.]

SEC. **634. Manner of voting—result.** At such election the proposition to be submitted shall be: "Shall the proposition to abandon the special charter of (naming the city or town) be adopted?" and the proposition shall be printed and placed upon the ballots, and the election shall be conducted in the same manner, as provided with respect to like or similar propositions in the chapter on elections. The abstract of votes shall be returned to the council or board of trustees, who shall canvass the same and declare the result, which shall be entered on the journal. [C. '73, § 437.]

SEC. **635. Officers elected—ordinances—resubmission.** If a majority of the votes cast be in favor of the adoption of the proposition, the charter shall be abandoned as herein provided. At the proper time prior to holding the next succeeding municipal election, as provided in the chapter on elections for cities and towns organized under this title, the mayor shall issue his proclamation, and an election shall be held and officers chosen in such city or town under the provisions of the chapter relating to elections for cities and towns of the class to which such corporation shall belong when the charter shall be abandoned. On and after the election and qualification of such officers, the charter of such city or town shall be deemed abandoned, and such city or town shall be considered organized under this title. All ordinances of such city or town in force at the time of the abandonment of such charter, not inconsistent or in conflict with the laws of the state, shall remain in force until amended or repealed by the council. If a majority of the votes be against the proposition for abandonment of the charter, the question can not be again submitted until after the expiration of one year from the time of such election. [19 G. A., ch. 164; C. '73, § 438.]

SEC. **636. Delinquent taxes.** In special charter cities or towns accepting the provisions of the general incorporation laws, all delinquent taxes remaining unpaid upon the tax books thereof, except such as were levied to pay indebtedness created to take stock or aid in the building of railways, shall be certified at the time, collected and paid over as provided in the chapter relating to taxation. [C. '73, § 495.]

SEC. **637. Vested rights.** All rights and property of every description which were vested in any such city or town under its former organization shall vest in the same under the organization herein contemplated, and no right or liability, either in favor of or against it, existing at the time, and no suit or prosecution of any kind, shall be affected by such change; but when a different remedy is given by this title, which can be made properly applicable to any right existing at the time such change is made, the same shall be cumulative to the remedies before provided, and may be used accordingly. [C. '73, § 439.]

CHAPTER 2.

OF ORGANIZATION AND OFFICERS.

SECTION **638. Classes of cities—towns.** The municipal corporations referred to in this title shall be divided into cities of the first and cities of the second class and towns. Town sites platted and unincorporated shall

be known as villages. Every municipal corporation now organized as a city of the first class, or having a population of fifteen thousand or over, shall be a city of the first class; every municipal corporation now organized as a city of the second class, or having a population of two thousand, but not exceeding fifteen thousand, shall be a city of the second class, and every municipal corporation having a population of less than two thousand shall be deemed a town. [18 G. A., ch. 139; C. '73, §§ 507–8; R., §§ 1077–8, 2105.]

SEC. **639. Change of class.** Within six months after the publication of any state or federal census, the executive council shall cause a statement and list of each city or town affected thereby, in its class as a municipal corporation, to be published in some newspaper at the seat of government, and in each city or town the class of which is changed by an increase of population. [15 G. A., ch. 52; C. '73, § 509; R., § 1079.]

SEC. **640. Necessary ordinances to be passed.** At the next regular annual or biennial period for the election of officers after such statement is published, showing a change of class of a city or town, the council shall make and publish such ordinances, not inconsistent with law, as may be necessary to perfect such organization in respect to the election, duties and compensation of officers. All the assets and property of the corporation shall be held and administered as provided for its new class as a corporation. Upon the change of a town to a city, for the purpose of holding the first election, the council shall divide the same into wards as provided by law. [15 G. A., ch. 52; C. '73, §§ 509–10; R., §§ 1079–80.]

Under former statutes, *held*, that where a town was changed into a city the officers were to be elected for the full term at the next regular period for city elections, and the term of office of the town officers would terminate: *State ex rel. v. Wymen*, 66 N. W., 786.

Although by 21 G. A., ch. 141, the election of city officers was made biennially and would occur as to cities then existing to which such statute was applicable, in the same year in all cities, yet it did not follow that in cities becoming such after the enactment of that statute the biennial elections must be held in the same years as in cities already existing: *Ibid.*

SEC. **641. Wards.** Cities may be, by the council thereof, divided into wards, new ones created, or the boundaries changed, but in all cases, whether it be the creation of wards or the changing of the boundaries thereof, the same shall be laid off, as nearly as may be, in a rectangular form, conforming the lines to the center of the streets or alleys, and giving to each ward, as far as practicable, an equal population; but in cities of the second class the number shall not be increased beyond seven nor decreased to less than three. [18 G. A., ch. 26; C. '73, § 520; R., § 1092.]

SEC. **642. Regular elections.** The regular municipal elections in cities and towns shall be held annually or biennially, as hereafter provided, on the last Monday in March. The voting places shall be fixed by the council, one polling place for each precinct, and the election shall be conducted in the manner provided by law for general elections. Each qualified elector may vote thereat who is a resident of the city or town, and, at the time, has been ten days a resident of the precinct in which he offers to vote. [23 G. A., ch. 1, § 5; C. '73, § 501.]

SEC. **643. Officers to be residents.** Every mayor, councilman-at-large, town councilman and officer elected by the whole electorate of the city or town, or by its council, or appointed by the council, mayor or other officer of any city or town, shall be a resident and qualified elector of the city in which he shall be elected, and shall reside within the limits of said city during his term of office. [21 G. A., ch. 141, § 1; 19 G. A., ch. 25; 17 G. A., chs. 9, 14; 16 G. A., ch. 58; C. '73, §§ 511, 518, 521; R., §§ 1091, 1093.]

SEC. **644. Qualifications of officers.** Every councilman and other officer elected by any ward or district of any city or town shall be a qualified elector of said city or town, residing within the limits of the ward or district in which he shall be elected, and shall reside within the limits of

said ward or district during the term of his office. [19 G. A., ch. 25; 17 G A., ch. 14; C. '73, § 521; R., § 1093.]

SEC. **645. Council—how composed.** City and town councils shall be composed as follows: In cities of the first class, a mayor, two councilmen-at-large and one councilman from each ward; in cities of the second class, a mayor, and two councilmen from each ward; in towns, a mayor and six councilmen. [19 G. A., ch. 25; 18 G. A., ch. 120; 17 G. A., chs. 9, 14; C. '73, §§ 511, 521, 531; R., §§ 1081, 1093.]

SEC. **646. Election of councilmen.** On the organization of a city or town, or on its reorganization after the change of its class, a council shall be elected at the first ensuing municipal election as follows:

1. By the election in cities of the first class of two councilmen-at-large; but if any city embraces within its limits the whole or parts of two or more townships, two of which contain one thousand or more electors, only one of the councilmen-at-large shall be chosen from any one such township. There shall also be elected at the same time one councilman from each ward, who shall be chosen by the electors residing within the limits thereof. Thereafter the successors of such councilmen-at-large and ward councilmen shall be chosen at the regular biennial elections, and shall hold office for two years. The term of all ward councilmen and councilmen-at-large heretofore elected in the year other than that in which the mayor and other city officers were elected is extended for one year.

2. In cities of the second class, two councilmen shall be elected from each ward by the electors thereof, and, at the first regular meeting of the council after such election, one of such councilmen for each ward shall be selected by lot to hold office for one year, and the other for two years, and thereafter, at each annual election, one councilman shall be elected from each ward to serve for two years.

3. In towns, six councilmen shall be elected by the electors thereof, who shall, at the first regular meeting of the council following their election, be divided by lot into three classes of two each, the members of which classes shall hold office, respectively, for one, two and three years, and, at each annual election thereafter, two councilmen shall be elected to hold office for three years. [19 G. A., ch. 25; 17 G. A., chs. 9, 14; C. '73, §§ 511, 521; R., §§ 1081, 1093.]

SEC. **647. Elective officers in cities of first class.** In all cities of the first class there shall be elected, biennially, a mayor, solicitor, treasurer, auditor, city engineer, assessor, and, where there is no superior court, a police judge. [19 G. A., ch. 110; 18 G. A., ch. 201, § 1; 17 G. A. ch. 20; 16 G. A., chs. 6, 33; C. '73, §§ 390, 535; R., § 1106.]

SEC. **648. In cities of second class.** In cities of the second class there shall be elected, biennially, a mayor, solicitor, treasurer and assessor. [21 G. A., ch. 141; 19 G. A., ch. 110; 16 G. A., ch. 6; C. '73, §§ 390, 517, 532; R., §§ 1090, 1103.]

SEC. **649. In towns.** In towns there shall be elected, biennially, a mayor, clerk, treasurer and an assessor. [19 G. A., ch. 110; 17 G. A., ch. 9; 16 G. A., ch. 6; C. '73, §§ 390, 511, 514; R., §§ 1081, 1084.]

SEC. **650. Terms of office—assessor.** Each officer named in this chapter shall hold his office until his successor is elected and qualified; but the term of office of the assessor shall commence on the first day of January, next ensuing his election. [19 G. A., ch. 110; 18 G., A. ch. 201, § 1; 16 G. A., chs. 3, 33; C. '73, § 390.]

SEC. **651. Officers appointed by council.** In cities of the first class, the council, at the first meeting after the biennial election, shall appoint a clerk, a physician, a street commissioner, and, when deemed necessary, a wharf-master. If there is a board of public works, such board shall appoint the street commissioner. In cities of the second class, the council shall appoint a clerk and such other officers above named as are necessary. In towns, the council shall appoint a street commissioner and such other officers

as are necessary, all to be appointed after the organization of the new council. [25 G. A., ch. 13, §§ 1, 3; 17 G. A., ch. 20, § 1; 16 G. A., ch. 33, § 1; C. '73, §§ 515, 522, 532, 534; R., §§ 1086, 1093, 1103, 1105.]

SEC. **652. Officers appointed by mayor.** The mayor in each city and town shall appoint a marshal who, in cities of the first class, shall be *ex officio* chief of police, and in cities of the second class, or towns, he may appoint one or more deputy marshals. In cities and towns he shall appoint as many policemen as the council, by general ordinance, shall direct, and such officers shall hold their positions during the pleasure of the mayor. He may also, in cases of emergency, appoint such number of special policemen as he may think proper, reporting such special appointments to the council at its next regular meeting, all such appointments to continue in force until such meeting, unless sooner terminated by the mayor. [25 G. A., ch. 13; 20 G. A., ch. 7, § 1; 17 G. A., ch. 20, §§ 1, 2; 16 G. A., ch. 33, § 2; C. '73, §§ 515, 532, 534–5, 537; R., §§ 1086, 1103, 1105–6.]

SEC. **653. Deputy marshal—appointment.** The marshal, in cities of the first class, may designate one or more members of the police force to act as deputies. [25 G. A., ch. 13, § 3; same, ch. 14; 20 G. A., ch. 7, § 1.]

SEC. **654. Police matrons—appointment.** In cities having a population of twenty-five thousand or more, for each station-house provided therein for the detention or imprisonment of women or children under arrest, the mayor shall appoint two or more women, residents of the city, as police matrons, who shall be over thirty years of age. The appointees shall be, so far as applicable, subject to the same regulations and restrictions as policemen, and hold their positions during good behavior, unless by reason of age or infirmity they become incapacitated to perform the duties of the position. [25 G. A., ch. 15, §§ 2, 3, 5.]

SEC. **655. Other officers.** Cities and towns may, by general ordinance, provide for the election at any regular municipal election, or for the appointment, of such additional officers, including superintendent of markets, harbor-masters and port wardens, usual and proper for the regulation and control of navigation, trade or commerce, or needful and proper for the good government of the city or town, or the due exercise of its corporate powers, and fix their term of office, as they may deem necessary. [16 G. A., ch. 33, §§ 1, 2; C. '73, §§ 514, 524, 528; R., §§ 1084, 1095, 1098.]

SEC. **656. Clerk of police court.** The council may provide by ordinance for the appointment of a clerk of the police court by the judge thereof, who shall hold his office subject to removal; the appointment or removal, when made, to be entered in the records of the court. [C. '73, § 542; R., § 1116.]

SEC. **657. Removal of appointive officers.** All persons appointed to office in any city or town may be removed by the officer or body making the appointment, unless otherwise provided.

SEC. **658. Mayor—powers and duties.** In cities and towns, the mayor shall have powers and perform duties as follows:

1. *Executive officer—magistrate.* He shall be a conservator of the peace, and, within the limits of the same, shall have all the powers conferred upon sheriffs to suppress disorders. He shall be the chief executive officer thereof, and it shall be his duty to enforce all regulations and ordinances; he may, upon view, arrest any one guilty of a violation thereof, or of any crime under the laws of the state, and shall, upon information supported by affidavit, issue process for the arrest of any person charged with violating any ordinance of the city; shall supervise the conduct of all corporate officers, examine into the grounds of complaint made against them, and cause all neglect or violation of duty to be corrected, or report the same to the proper tribunal, that they may be dealt with as provided by law. [C. '73, §§ 506, 519, 537; R., §§ 1085, 1091, 1102, 1105.]

In an appeal from the board of equalization of a city or town notice of the appeal may be served on the mayor: *Farmers' Loan & Trust Co. v. Newton*, 66 N. W., 784.

2. *Office.* He shall keep an office at some convenient place in the city or town, to be provided by the council, and keep the corporate seal thereof in his charge. [16 G. A., ch. 58; C. '73, § 518; R., § 1091.]

3. *Signature.* He shall sign all commissions, licenses and permits granted by the authority of the council, and do such other acts as by law or ordinance may require his signature or certificate. [16 G. A., ch. 58; C. '73, § 518; R., § 1091.]

4. *Other duties.* He shall also perform such other duties compatible with the nature of his office as the council may from time to time require. [C. '73, § 519; R., § 1091.]

5. *Presiding officer—vote.* In cities of the first class, he shall be the presiding officer of the council, with the right to vote only in case of a tie; in cities of the second class, he shall be a member and the presiding officer of the council, with the right to vote only in case of a tie; in towns, he shall be a member of the council and presiding officer thereof, with the same right to vote as a councilman. [18 G. A., chs. 120, 146, 17 G. A., ch. 9; 16 G. A., ch. 58; C. '73, §§ 512, 518, 531; R., §§ 1082, 1091.]

Under the Revision it was held that the mayor of cities of the second class was not the presiding officer of the city council, nor a member thereof: *Cochran v. McCleary*, 22–75.

The right to preside at a meeting of the council is a franchise which may be protected by proceedings in *quo warranto: Ibid.*

The mayor being the presiding officer of the council, and having at least a casting vote, is equally liable with the councilmen under the statute making officers of the city personally liable for failure under proper circumstances to levy a tax for the payment of a judgment against the city: *Porter v. Thomson*, 22–391.

The action of the mayor in erroneously announcing that a resolution is not adopted, for the reason that it has not received a three-fourths vote, when a majority vote is all that is necessary, is not judicial in its character in such a sense that it cannot be called into question in a collateral proceeding. The erroneous, arbitrary announcement cannot have the effect to nullify the act of the majority of the city council: *Chariton v. Holliday*, 60–391.

6. *Report.* He shall, at the first regular meeting of the newly elected council in April, and at such other times as he may deem expedient, report to it concerning the municipal affairs of the city or town, and recommend such measures as to him may seem advisable. [C. '73, § 534; R., § 1105.]

7. *Hold police court.* Until a police judge or judge of superior court shall be elected and qualified in cities entitled to elect such officer, he shall have all the powers and jurisdiction and shall hold the police court in such manner as is required of such judge. [C. '73, § 547; R., § 1121.]

8. *Station-houses for women.* In all cities containing a population of twenty-five thousand or more, he shall designate one or more station-houses within such city for the detention or imprisonment of all women and children under arrest in said city, and see that provisions are made by which the rooms or cells set apart for them shall be separate from and out of sight of the rooms or cells in which male prisoners are imprisoned. [25 G. A., ch. 15, § 1.]

SEC. **659. Clerk—duties.** The clerk in all cities and towns shall perform the following duties: He shall attend all meetings of the council, but in no event have the right to vote on any question before it; make an accurate record of all proceedings had, rules and ordinances adopted by the council, and the same shall at all times be open to the public; he shall supply the treasurer with a statement of all warrants issued after each meeting, giving the number and amounts of each, and shall have the custody of all by-laws and ordinances of the city or town, and perform such duties as may be required by ordinance. [17 G. A., ch. 9; C. '73, §§ 512, 522; R., §§ 1082, 1093.]

SEC. **660. Treasurer—duties.** The treasurer of cities and towns shall receive all money payable to the city or town, and disburse the same only on warrants drawn and signed by the proper officer, sealed with the city seal, and perform such other duties as may be prescribed by law or ordi-

nance. He shall keep in a book provided by the town a register and description of all warrants reported to him by the clerk. When a warrant drawn on the treasury is presented for payment, and not paid for want of money, he shall indorse the fact thereon, with the date of presentation, and sign it, and thereafter it shall draw interest at six per cent. per annum, unless issued under a resolution or contract providing that it shall not draw interest, or shall draw interest at a lower rate He shall keep a record of all warrants drawn upon the treasury and presented, in a book so ruled as to show in separate columns, as to each warrant, the number, date, principal, name of drawee, when paid, to whom paid, and the amount of interest paid, and all such warrants shall be paid in the order of their presentation. He shall issue calls for outstanding warrants at any time he may have funds on hand for the payment thereof; shall give notice of the number of the warrants which will be paid, by posting a written notice thereof in the mayor's office, and in the treasurer's office when there is one, and, at the expiration of ten days from the date of the posting, interest on the warrants so named shall cease. When a warrant which draws interest is taken up, he shall also indorse upon it the date and amount of interest allowed, and such warrants shall be canceled and not reissued. He shall make returns monthly, or oftener if required by the council, to the officer drawing such warrants, showing the warrants paid and amount of principal and interest paid. He shall make a written report under oath to the council at its first regular meeting in each month, showing the financial condition of the city. [22 G. A., ch. 3, § 2; 16 G. A., ch. 33, § 2; C. '73, §§ 532, 535; R., §§ 1103, 1106.]

Where there was no ordinance of a town providing by whom orders on the treasurer should be signed or on whose order the treasurer should make payment, *held*, that the recorder (now the clerk, see § 649), being the ministerial officer of the council, in the absence of any provision to the contrary, was the proper officer to sign orders authorized by the council to be drawn on the treasurer, and that the treasurer, as a ministerial officer was chargeable with those duties usually pertaining to his office and might therefore be compelled by *mandamus* to pay orders thus authorized and drawn: *Ireland v. Hunnel*, 90-98.

SEC. **661. Assessor—duties—deputies.** All assessors elected by cities and towns shall perform the same duties as township assessors. They may appoint such number of deputies as the council shall authorize, such appointments to be confirmed by the council. If any city or town is situated in two or more counties, the assessor shall make returns of the assessment to the proper county. [19 G. A., ch. 110; 18 G. A., ch. 201, §§ 1, 2; 16 G. A., ch. 6; C. '73, § 390.]

SEC. **662. Marshal—duties.** The marshal shall have the supervision and general direction of the police force; shall be the ministerial officer of the corporation, attend upon the sittings of the mayor's and police courts, execute within his county and return all writs and other process directed to him from the mayor or police court, suppress all riots, disturbances and breaches of the peace, arrest all disorderly persons in the city or town, and all persons committing any offense against the ordinances thereof, and forthwith bring such persons before the mayor, police court, or other competent authority, for examination or trial; shall diligently enforce all laws, ordinances and regulations for the preservation of the public welfare and good order, and have the same powers and be subject to the same responsibilities as constables in similar cases. He shall pursue and arrest any person fleeing from justice in any part of the state. [20 G. A., ch. 7, § 1; C. '73, §§ 515, 533, 536-7; R., §§ 1086, 1104, 1107.]

The marshal not being charged with any duty in respect to streets and sidewalks, notice to him of defective condition of a sidewalk will not be notice to the city: *Cook v. Anamosa*, 66-427.

A city marshal who has properly seized stock running at large within the city limits may keep it in such manner as he sees fit, and will not lose jurisdiction thereof by placing it in a pound beyond the city limits: *Pierce v. Evans*, 36-495.

SEC. **663. Deputy marshals—duties.** Deputy marshals may perform the duties of the marshal. [25 G. A., ch. 14; 20 G. A., ch. 7, § 1.]

SEC. **664. Policemen—powers and duties.** The officers and members of the police force shall have such powers and perform such duties as may be provided by law or ordinance, and shall have the same powers to make arrests and suppress riots, disturbances and breaches of the peace as marshals. [21 G. A., ch. 92; C. '73, §§ 525, 537; R., § 1695.]

SEC. **665. Police matrons—duties.** Police matrons shall have charge of all the women and children under arrest, accompanying such as may require such aid to court. They shall be subject to the authority of the marshal and the rules and regulations prescribed by his authority, and in stations, when on duty, shall be subject to the authority of the officers in command. In cities where workhouses are established for the detention of women, or where there are houses of detention, they shall have at all times the right of entering such establishments, and shall visit them whenever in their judgment such visits may be necessary. A suitable place shall be provided for the police matrons, when not on duty, for rest and refreshment. [25 G. A. ch. 15.]

SEC. **666. Other officers—powers and duties.** The solicitor, engineer, auditor, physician, superintendent of markets, street commissioner, wharf-master, harbor-master, port-warden, and such additional officers as may be provided for, shall have such powers and perform such duties as are prescribed by law or ordinance. [17 G. A., ch. 20, §§ 1, 2; 16 G. A., ch. 33, §§ 1, 2; C. '73, §§ 532, 535; R., §§ 1103, 1106.]

Where neither the duties nor the compensation of city solicitor are fixed by the council, he should, unless otherwise instructed, perform such duties within the usual scope of the authority of such officer as the interests of the city may require; and he may recover reasonable compensation therefor: *Kinnie v. Waverly*, 42–437; *Kinnie v. Waverly*, 42–486.

A city attorney, being required by ordinance to act for the city in any case brought by or against it, a contract with the city for additional compensation for services rendered in a particular case pending at the time of his election, *held* invalid under § 677: *Ryce v. Osage*, 88–558.

SEC. **667. Statement of supplies.** In all cities, each officer or board in charge of any department shall furnish and file in the city clerk's office, thirty days before the beginning of each fiscal year, which shall be the first day of April of each year, a sworn detailed statement of the supplies necessary for his or their department during the next fiscal year. [22 G. A., ch. 4, § 2.]

SEC. **668. City and town councils—powers and duties.** All legislative and other powers granted to cities and towns shall be exercised by the councils, except those conferred upon some officer by law or ordinance. They shall perform the duties required in this code including the following:

1. *Organization.* The members of such council shall, on the first Monday after their election, assemble and organize the council. [C. '73, § 522; R., § 1093.]

Under the provision in § 1093 of Revision that the council should be judge of the election returns and qualification of their own members, *held*, that the council might go behind the returns and decide questions arising in respect thereto. *It seems* also that it was the judge of the returns for all city officers, including mayor: *Ex parte Strahl*, 16–369, 376.

2. *Quorum.* In all cities or towns, a majority of the whole number of members to which such corporation is entitled, including the mayor, shall be necessary to constitute a quorum. [17 G. A., ch. 9; C. '73, §§ 511, 522; R., §§ 1081, 1093.]

3. *Meetings.* They shall determine the time and place of holding their meetings, which shall at all times be open to the public, and, in the absence of the mayor or clerk, shall appoint a temporary chairman or clerk from their own number, which appointment shall be entered of record. [C. '73, § 524; R., § 1095.]

4. *Special meetings.* The mayor or any three members of the council shall call special meetings by notice to each of the members, personally served, or left at his usual place of residence, of which service a record shall be made by the clerk. [C. '73 § 524; R., § 1095.]

5. *Rules—journal.* They shall determine the rules of their own proceedings, and keep a journal thereof, which shall be open to the inspection and examination of any citizen. [C. '73, § 522; R., § 1093.]

6. *Attendance of members.* They may compel the attendance of absent members in such manner and under such penalties as they may prescribe. [C. '73, § 522; R., § 1093.]

7. *Seal.* Each council shall cause to be provided a seal, in the center of which shall be the name of the city or town, and around the margin the words, "city seal" or "town seal," as the case may be, which shall be affixed to all transcripts, orders or certificates which it may be necessary or proper to authenticate. [C. '73, §§ 454, 523; R., §§ 1047, 1094.]

8. *Election of officers.* All appointments or elections of officers, except for the purpose of filling vacancies, in offices not filled by election by the council, shall be made *viva voce*, and the concurrence of a majority of the whole number of members of the council shall be required. On the vote resulting in an election or appointment, the name of each member and for whom he voted shall be recorded. [18 G. A., ch. 146, § 3; C. '73, § 493; R., § 1134.]

9. *Filling vacancies.* In selecting persons to fill vacancies in offices not filled by election by the council, it shall vote by ballot, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill such vacancy. [19 G. A., ch. 124, § 2.]

See *State v. Dickie*, 47–629.

10. *Terms of officers.* They shall fix by ordinance the terms of service, not exceeding one year, except in cities holding biennial elections, where such term shall not exceed two years, of all officers appointed or elected, whose terms are not prescribed by law. [C. '73, §§ 514, 524, 528; R., §§ 1084, 1095, 1098.]

11. *Powers of officers.* They shall prescribe by ordinance the powers to be exercised and duties to be performed by the officers appointed or elected, so far as such powers and duties are not defined by law. [C. '73, §§ 514, 524–5, 528; R., §§ 1084, 1095, 1098, 1695.]

12. *Police force.* They shall have power to establish a police force, and to organize the same under the general supervision of the marshal, and to provide one or more station-houses. [C. '73, §§ 525, 542; R., §§ 1116, 1695.]

13. *Control of finances.* They shall have the management and control of the finances and all the property, real and personal, belonging to the city or town. [C. '73, § 524; R., § 1095.]

14. *Members not interested.* No member of any council shall, during the time for which he has been elected, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the term for which he shall have been elected; nor shall he be interested, directly or indirectly, in any contract or job for work, or the profits thereof, or services to be performed for the corporation. [C. '73, § 490; R., § 1122.]

15. *Provide for custody of women and children.* In cities having a population of twenty-five thousand inhabitants or more, the council shall appropriate annually such sums as may be necessary for the arrangements needed to secure separate care and confinement in the station-houses of all women and children under arrest, and for the appointment, salary and maintenance of police matrons. [25 G. A., ch. 15, § 6.]

16. *Appropriations.* In cities of the first class, the council shall make the appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be

unlawful for it or any officer, agent or employe of the city to issue any warrant, enter into any contract, or appropriate any money, in excess of the amount thus appropriated, for the different expenses of the city, during the year for which said appropriation shall be made. Any such city shall not appropriate, in the aggregate, an amount in excess of its annual legally authorized revenue; but nothing herein shall prevent such cities from anticipating their revenues for the year for which such appropriation is made, or from bonding or refunding their outstanding indebtedness. The council of such cities shall advertise in at least two newspapers published in said cities for three weeks, two insertions for each week, for bids for furnishing all supplies of every kind for the several departments of the city, not required to be advertised for by the board of public works; said advertisements to be published two weeks before the beginning of each fiscal year. [22 G. A., ch. 4.]

SEC. **669. Compensation of councilmen.** Councilmen in cities of the first class shall be paid an amount prescribed by ordinance, not in excess of two hundred and fifty dollars per annum, which shall be in full compensation of all services of such councilmen of every character connected with their official duties; and in all other cities and towns they shall receive not to exceed one dollar each for every regular or special meeting, and in the aggregate not exceeding fifty dollars in any one year; but in such cities and towns the members shall be paid, in addition to the foregoing, for services as members of the board of review, an amount not exceeding one dollar for each session of not less than three hours. [22 G. A., ch. 24 § 1; C. '73, § 505; R., § 1095.]

A statute increasing the compensation of councilmen will not (under § 677) be applicable to those subsequently elected: *Council Bluffs v. Waterman*, 86-688.

Members of the city council are not entitled to additional compensation for their services on the board of equalization under the provisions of § 1370: *Ibid.*

SEC. **670. Fees of mayor.** Mayors of cities and towns, where no salary is provided by ordinance in lieu of fees, shall receive, for holding a mayor's or police court, or discharging the duties of a justice of the peace, the compensation allowed by law for similar services for such officers, to be paid in the same manner. [24 G. A., ch. 7, § 1; C. '73, §§ 519, 547; R., §§ 1091, 1121.]

Under former provisions the mayor was not entitled to compensation from the county in criminal cases when acting as a justice of the peace: *Howland v. Wright County*, 82-164.

SEC. **671. Fees of police judge.** The police judge shall be entitled, in all criminal cases prosecuted before him in behalf of the state, to the same fees, to be collected in the same manner, as a justice of the peace in like cases; in prosecutions before him in behalf of the city, to such fees, not exceeding those for services of like nature in state prosecutions, as the council may by ordinance prescribe. [C. '73, § 544; R., § 1118.]

It seems that it would not be proper for the council to provide that the police judge should only have fees in cases where judgment should be rendered in favor of the city: *Crane v. Des Moines*, 47-105.

As to allowing salary in lieu of fees see § 675.

SEC. **672. Compensation of police matrons.** Police matrons shall receive not less in any case than the minimum salary paid to policemen in the city in which they are appointed. [25 G. A., ch. 15, § 6.]

SEC. **673. Fees of marshal and deputy.** The marshal shall receive, in criminal cases arising under ordinances, the same fees as constables receive for similar services, payable from the treasury of the city or town; and in criminal cases arising under the state law, the same fees as constables receive for similar services, payable from the county treasury. In civil proceedings he shall receive the same fees as constables receive for similar services, payable in the same way. The deputy marshal shall receive the same fees for services performed as the marshal. [C. '73, §§ 515, 533, 536; R., §§ 1086, 1104, 1107.]

Under previous provisions the county was not liable to the city marshal for fees for for services in criminal cases, he being a city officer and presumably payable by the city: *Christ v. Polk County*, 48–302; and see *Guanella v. Pottawattamie County*, 84–36.

In cases where for the same services the fees allowed to sheriffs are greater than those allowed to constables, the marshal can only recover fees allowed constables: *Bryan v. Des Moines*, 51–590.

SEC. **674. Compensation of assessors and deputies.** City and town assessors and their deputies shall receive the same compensation as township assessors, which shall be determined in the same manner and payable from the county treasury. [C. '73, § 390.]

SEC. **675. Salaries in lieu of fees.** It may be provided by ordinance that any city or town officer elected or appointed shall receive a salary in lieu of all other compensation; and in such case such officer shall not receive for his own use any fees or other compensation for his services as such officer, but shall collect the fees authorized by law or ordinance, and pay the same as collected, or as prescribed by ordinance, into the city or county treasury, as the case may be. [17 G. A., ch. 56, §§ 1, 2.]

An ordinance changing the compensation of the officers named from fees to salary, as contemplated by this provision *held* not to affect such as were in office at the time of the passage of the act, during their term of office: *Bryan v. Des Moines*, 51–590.

This provision is not unconstitutional as delegating legislative authority to the city council: *Des Moines v. Hillis*, 55–643.

An officer having received a salary under an ordinance in pursuance of this section is estopped from claiming fees: *Bryan v. Des Moines*, 51–590.

It is immaterial that he has collected fees and paid them into the city treasury under protest: *Christ v. Des Moines*, 53–144.

The city may under this provision recover from the police judge fees received by him in criminal cases prosecuted in behalf of the state, whether received from defendants in such case or from the county: *Des Moines v. Hillis*, 55–643.

But the police judge may sue the county for such fees, it being his duty to collect and pay over fees due him: *Labour v. Polk County*, 70–568.

SEC. **676. Compensation of other officers.** All officers elected or appointed in any city or town, whose compensation is not fixed by law, shall receive such salary, compensation or fees for their services as the council may by ordinance from time to time prescribe. For all attested certificates and transcripts, other than those ordered by the council, the clerk shall be paid the same fees as are allowed to county officers for like services. [16 G. A., ch. 33, § 1; C. '73, §§ 523–4, 528; R., §§ 1094–5, 1098.]

SEC. **677. Compensation not changed.** The fees, salary, compensation or emoluments of any officer whose election or appointment is required or authorized by this chapter, shall not be increased or diminished during the term for which he shall have been elected or appointed; nor shall any change of compensation affect any officer whose office shall be created under the authority of this chapter during his existing term, unless the office be abolished. No person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed when, during the same time, the emoluments have been increased. [C. '73, §§ 491, 519; R., §§ 1091, 1122.]

A contract between a city and its solicitor for additional compensation for services in a particular case is invalid: *Ryce v. Osage*, 88–558.

A city officer cannot enter into a contract with the council binding himself to perform certain duties for less compensation than was allowed him by an ordinance of the city when he entered upon his office: *Purdy v. Independence*, 75–356.

A statute increasing the compensation of a particular class of officers does not, by implication, repeal this provision so as to affect those already in office: *Council Bluffs v. Waterman*, 86–688.

The term of office, as here contemplated, commences with the election and not with the qualification of the officer: *Cox v. Burlington*, 43–612.

SEC. **678. Contesting elections.** The election of any person to a city or town office may be contested upon the same grounds and in the manner provided for contesting elections to county offices, so far as applicable. The mayor shall be one of the court and the presiding officer thereof, and,

if his election is contested, the council shall select one of its members to act in his place.

SEC. **679. Tie vote.** In the event of a tie vote for any city or town office, the election shall be determined as provided in the chapter on elections.

CHAPTER 3.

OF ORDINANCES, COURTS AND FINES.

SECTION **680. Power to pass ordinances—penalties.** Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days. [C. '73, § 482; R., §§ 1071–3.]

In general: The provisions of ordinances must be fair and reasonable: *Des Moines v. Des Moines Waterworks Co.*, 64 N. W., 269; *State Center v. Barenstein*, 66–249; *Ottumwa v. Zekind*, 64 N. W., 646; *Burlington v. Unterkircher*, 68 N. W., 795; *Meyers v. Chicago, R. I. & P. R. Co.*, 57–555; *Bury v. Chicago, R. I. & P. R. Co.*, 90–106.

Under the authority here given, the city may provide for the punishment of intoxication: *Bloomfield v. Trimble*, 54–399; *Clinton v. Gusendorf*, 80–117.

But the city cannot, under this authority, fix fire limits and prevent the erection of wooden buildings therein. Such power can only be exercised as authorized by § 711: *Des Moines v. Gilchrist*, 67–210.

Fines: The right to enforce a city ordinance is limited to a pecuniary penalty unless there is some express act giving power to inflict other punishment: *Burlington v. Kellar*, 18–59.

A town cannot pass an ordinance creating a forfeiture unless clear and distinct authority be given therefor: *Gosselink v Campbell*, 4–296.

A fine cannot be enforced by forfeiture without trial and adjudication: *Ibid.*

The fact that the present statutes do not authorize forfeitures as a method of enforcing an ordinance does not prevent the city from providing that a license shall be forfeited on certain conditions, and enforcing such forfeiture; *Hurber v. Baugh*, 43–514.

A city may, for violation of the ordinance under which a license is granted, declare the same forfeited: *Ottumwa v. Schaub*, 52–515.

A city has no authority to pass an ordinance creating a forfeiture of goods and chattels as a penalty for violation of an ordinance, unless that power is expressly conferred: *Henke v. McCord*, 55–378.

No authority being expressly conferred by statute to punish, by forfeiture, the keeping of intoxicating liquors for sale, *held*, that an ordinance to that effect was invalid: *Ibid.*

An action to recover a fine imposed by ordinance may properly be brought in the name of the town: *Centerville v. Miller*, 51–712.

Prosecution: Proceedings to punish for violation of an ordinance constitute a criminal prosecution: *Jaquith v. Royce*, 42–406; *State v. Vail*, 57–103; *Creston v. Nye*, 74–369; *Davenport v. Bird*, 34–524; *Columbus City v. Cutcomb*, 61–672.

The regularity of the incorporation of a city or town, existing *de facto*, cannot be inquired into collaterally in an action brought for the violation of an ordinance: *Decorah v. Gillis*, 10–234.

The provision of the constitution (art. V, § 8) requiring prosecutions to be in the name of the state of Iowa refers to such criminal prosecutions as shall be instituted and prosecuted before a tribunal provided for in the constitution under the statutes of the state, and does not refer to prosecutions for violations of city ordinances: *Davenport v. Bird*, 34–524.

A proceeding for a violation of a city ordinance may be brought in the name of the city when so provided by law or ordinance; but if such prosecution is brought in the name of the state, without objection thereto until upon appeal, an objection upon that ground will not be sustained: *State v. King*, 37–462.

Void ordinance: The fact that a provision in an ordinance is void does not necessarily give a tax payer the right to an injunction against the exercise of power thereunder: *Dodge v. Council Bluffs*, 57–560.

A municipal corporation cannot be enjoined from passing an act because, if passed, it would be unconstitutional, or void: *Des Moines Gas Co. v. Des Moines*, 44–505.

SEC. **681. Adoption of ordinances.** No ordinance shall contain more than one subject, which shall be clearly expressed in its title; and no

ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section revised or amended, and the former ordinance or section shall be repealed. [C. '73, § 489; R., § 1122.]

Containing more than one subject: An ordinance defining and prescribing the punishment for certain offenses, and in which many such offenses are included, does not contain "more than one subject:" *State v. Wells*, 46-662.

The provision that an ordinance shall contain but one subject is a limitation on the power of the council to enact ordinances. It is mandatory, and an ordinance passed in violation of it is inoperative because of want of power in the council to enact it: *Dempsey v. Burlington*, 66-687.

But this provision does not forbid the enactment in a single ordinance of all the legislation which may be necessary to the accomplishment of a single object. Therefore, *held*, that an ordinance providing for the vacation of an alley and granting the ground covered by the vacated alley to a private person, was not void as containing more than one subject: *Ibid.*

Subject expressed in title: Where the title of an ordinance absolutely prohibiting the sale of vinous and malt liquors was "Regulating the use and sale of intoxicating liquors," *held*, that the subject of the ordinance was not clearly expressed in the title and that the ordinance was therefore void: *Cantril v. Sainer*, 59-26.

Amendment: Under the statutory provision requiring that an ordinance or section thereof shall not be revised or amended unless the new ordinance contains the entire ordinance or section revised or amended, *held*, that where but one section of an ordinance is amended that section alone need be contained entire in the amendment: *Decorah v. Dunstan*, 38-96.

Where a city, by ordinance, granted to a street railway the right to lay a single or double track over its streets, in pursuance of which a single track was laid, and afterwards the city, before the laying of a double track, amended the ordinance so as to prohibit the laying of such double track, *held*, that the amendment was a change in the terms of the contract entered into by the original ordinance, and was therefore void: *Burlington v. Burlington Street R. Co.*, 49-144.

Where a new ordinance does not attempt to amend the old by adding to or taking from one of its sections, but contains in full the section as it was designed to be when amended, that is a sufficient compliance with the statute: *Larkin v. Burlington, C. R. & N. R. Co.*, 85-492.

Repeal: An ordinance making provisions repugnant to a former one will operate to repeal it, though the former one be not contained in the latter: *Des Moines v. Hillis*, 55-643.

It seems that where it is required that a resolution for a particular purpose must be passed by a vote greater than a majority vote, a repeal thereof is sufficient if concurred in by a majority vote: *Chariton v. Holliday*, 60-391.

SEC. **682. Reading.** Ordinances of a general or permanent nature, and those for the appropriation of money, shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rule. [C. '73, § 489; R., § 1122.]

Under the provision requiring an ordinance to be read on three different days before its passage, it is not meant that the ordinance must be read at three general meetings. Where it appeared that an ordinance was read on three different days, *held*, that this was sufficient, although the last two of the meetings at which it was read were special meetings held by adjournment: *Cutcomp v. Utt*, 60-156.

It is not necessary that the three readings be before the same body. If one or more of them take place before the change of the council by reason of an election, and another afterward, that is sufficient. The council is deemed a continuing body: *McGraw v. Whitson*, 69-348.

It is not intended that all unfinished business pending before the council shall be dropped at each change of membership by reason of new members taking their seats: *Ibid.*

Where by less than the three-fourths vote required by the statutory provision above referred to the requirement of reading on three different days was dispensed with and the ordinance declared passed on the day of the first reading, *held*, that such ordinance was void: *Harner v. Rowley*, 51-610.

It is not necessary that the yeas and nays on a vote to suspend the rule requiring reading on three different days be recorded; and where a sufficient number of members to suspend the rule appear to have been present, and such motion is declared adopted, it will be presumed that a sufficient majority voted therefor: *State v. Vail*, 53-550.

The record reciting the suspension of a rule requiring three readings on separate days cannot be impeached, in a prosecution under an ordinance thus passed, by oral evidence showing that such suspension was not carried by the requisite majority: *Eldora v. Burlingame*, 62-32.

The provisions requiring three readings apply only to ordinances and not to resolutions: *Strohm v. Iowa City*, 47-42.

Where it appeared that by three-fourths vote the rules were suspended, so as to authorize the second and third readings on the same day, *held*, that such showing brought the case within the provisions of this section, "suspend" being equivalent to "dispense:" *Bayard v. Baker*, 76-220.

SEC. **683. Adoption—majority vote.** No resolution or ordinance for any of the purposes hereinafter set forth shall be adopted without the con-

currence of a majority of the whole number of members elected to the council, to wit:

1. To pass or adopt any by-law or ordinance;
2. To pass or adopt any resolution or order to enter into a contract;
3. To pass or adopt any ordinance for the appropriation or payment of money; but in towns, by-laws, ordinances, and the resolutions and orders set forth in this section, shall require for their passage or adoption a concurrence of four councilmen, or of three councilmen and the mayor. On the passage or adoption of every by-law, ordinance, and every such resolution or order, the yeas and nays shall be called and recorded. No money shall be appropriated except by ordinance. [18 G. A., ch. 146, §§ 2, 3; C. '73, §§ 489, 493; R., §§ 1122, 1134.]

Adoption: Under the language of § 489 of Code of '73, the words "for the appropriation or payment of money" limit "resolutions" as well as "orders," and other resolutions than those "for the appropriation or payment of money" (for instance, to change the boundaries of a city or town), did not require the concurrence of a majority of all the trustees: *Strohm v. Iowa City*, 47–42.

Where it appeared from the journal of the proceedings of the council that a certain resolution was adopted, the nature of which was such that under the statute a three-fourths vote was necessary to pass it, *held*, that it would be presumed that a sufficient number voted for it, as required by law: *Brewster v. Davenport*, 51–427.

Under the rule of the council of a city, providing that a member directly interested in any question could not vote thereon, *held*, that in a particular case a certain member was interested otherwise than as the general public in the making of an improvement, and that an ordinance in respect thereto, which only received a sufficient number of votes for its passage by counting the vote of such member, was not valid: *Buffington Wheel Co. v. Burnham*, 60–493.

Where it appeared that a resolution was offered at a council meeting, and was entered of record by order of the council as adopted by it, *held*, that its adoption would be inferred although the record failed to show that it was adopted: *Taylor v. McFadden*, 84–262.

The act of the mayor as presiding officer of the council, in announcing the vote of the council, is ministerial and not judicial. He cannot by an erroneous and arbitrary announcement qualify or render invalid the action of the council: *Chariton v. Holliday*, 60–391.

So where the mayor erroneously announced that a resolution was not adopted for a reason that it did not receive a three-fourths vote, when a majority vote was all that was necessary to its adoption, *held*, that the resolution was legally adopted: *Ibid.*

Under special provisions *held* the power of changing the grade of a street should be exercised by ordinance and not by resolution: *McManus v. Hornaday*, 68 N. W., 812.

The corporate authority in towns being vested in the mayor, recorder and six trustees, the record of the passage of an ordinance disclosing that five trustees and the mayor voted in favor of it, *held* sufficient to show its passage, although it did not appear that the nays were called, the record not disclosing that any other members of the council were present than those voting yea: *Bayard v. Baker*, 76–220.

Yeas and nays: Under a special charter not containing an express provision for the recording of the yeas and nays on the passing of an ordinance, *held*, that as the record showed that all of the aldermen voted for the ordinance that was sufficient to prove its adoption, without any record of the yeas and nays; *Preston v. Cedar Rapids*, 63 N. W., 577.

The requirement that the yeas and nays be called and recorded upon the passage of an ordinance is mandatory, and unless the record affirmatively shows such fact the ordinance will be invalid: *Olin v. Meyers*, 55–209.

Majority vote: Upon the passage of an ordinance the yeas and nays must be called and entered of record, and a majority of all the members elected to the council must vote in favor of the ordinance before it can be regarded as passed; but a resolution, unless it is proposed thereby to enter into a contract, may be lawfully passed by a majority of the members present: *Laughlin v. Washington*, 63 625.

Under prior statutes resolutions for the appropriation of money were required to be passed by a majority vote of all the members, but other resolutions only required the concurrence of a majority of those present: *Strohm v. Iowa City*, 47–42.

Contracts: This section defines how the order to contract shall be made and evidenced when directed by the council, but it is not a limitation on the power of the city to contract otherwise. Municipal corporations may, through their authorized agents, contract in parol the same as individuals: *Indianola v. Jones*, 29–282; *Duncombe v. Fort Dodge*, 38–281.

SEC. **684. Two-thirds vote.** No resolution or ordinance for any of the purposes hereinafter set forth, except as otherwise provided by law, shall be adopted without the concurrence of two-thirds of the whole number of the members elected to the council, to wit:

1. Directing the opening, straightening or widening of any street, avenue, highway or alley;
2. Directing the making of any improvement which will require proceedings to condemn private property;
3. Directing any improvement or repair of a street, avenue, highway or alley, the cost of which is to be assessed upon the property, or against the owners thereof, unless two-thirds of the owners to be charged therefor shall petition in writing for the same.

On the passage of every such ordinance or resolution, the yeas and nays shall be called and recorded. [C. '73, § 494; R., § 1135.]

Where an ordinance provided the kind, character and width of sidewalks, and the resolution directed the construction of a particular sidewalk in accordance with such ordinance, *held*, that this was a sufficient designation of the material, etc., of which the sidewalk was to be constructed: *Chariton v. Holliday*, 60-391.

Where a committee was appointed by the council to report on the propriety of establishing a certain sidewalk, but only one of the committee reported and the work was ordered, *held*, that in such matters the councilmen might act upon personal knowledge or otherwise, and the action was not invalid: *Brewster v. Davenport*, 51-427.

SEC. **685. Signing by mayor—veto—passing over veto.** The mayor shall sign every ordinance or resolution passed by the council before the same shall be in force, and, if he refuses to sign any such ordinance or resolution, he shall call a meeting of the council within fourteen days thereafter, and return the same, with his reasons therefor. If he fails to call the meeting within the time fixed above, or fails to return the ordinance or resolution, with his reasons, as herein required, such ordinance or resolution shall become operative without such signature, and the clerk shall record it in the ordinance book, with a minute of the facts making it operative. Upon the return of any such ordinance or resolution by the mayor to the council, it may pass the same over his objections, upon a call of the yeas and nays, by not less than a two-thirds vote of the council, and the clerk shall certify on said ordinance or resolution that the same was passed by a two-thirds vote of the council, and sign it officially as clerk. [20 G. A., ch. 192.]

Held that the provisions of the acts of 20 G. A., ch. 192, and the 22 G. A., ch. 2, requiring the mayor to sign every resolution passed by the city council before such resolution should take effect or be enforced, were mandatory, and bonds issued under such resolutions not so signed were void: *Heins v. Lincoln*, 71 N. W., 189.

SEC. **686. Recording—publishing.** All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council and the clerk; and all ordinances of a general or permanent nature, and those imposing any fine, penalty or forfeiture, shall be published in some newspaper of general circulation in the city or town; and it shall be sufficient defense to any suit or prosecution for such fine, penalty or forfeiture to show that no such publication was made; but if no such newspaper is published within the limits of the corporation, then such ordinances may be published by posting up copies thereof in three public places within the limits thereof, two of which places shall be the post-office and the mayor's office of such city or town. When the ordinance is published in a newspaper, it shall take effect from and after its publication; when published by posting, it shall take effect five days thereafter. Immediately following the record of every ordinance, the clerk shall append a certificate, stating therein the time and manner of publication thereof, which certificate shall be presumptive evidence of the facts therein stated. [26 G. A., ch. 15; C. '73, § 492; R., § 1133.]

Where it was required that a resolution for improvement of a street be published, *held*, that personal service on a party rendered publication unnecessary so far as he was concerned: *Chariton v. Holliday*, 60-391.

Where by ordinance a resolution for the making of improvements and assessing the expense thereof on abutting property is required to be published, a failure to make such publication will render the resolution

void: *Dubuque v. Wooton*, 28-571; *Starr v. Burlington*, 45-87.

Action to enjoin the enforcement and carrying out of an ordinance cannot be maintained on the ground that it has not been properly published as required by the charter, where such publication might be completed after the time when the action is brought: *Dodge v. Council Bluffs*, 57-560.

Where it is attempted to disprove the publication of an ordinance by way of a defense in a criminal prosecution thereunder, oral evidence is admissible to establish the fact of publication: *Eldora v. Burlingame*, 62-32.

The city council has no authority to direct the publication of their proceedings, aside from the ordinances enacted by them, and bind the city therefor: *Stidger v. Red Oak*, 64-465.

Where the ordinance of a municipal corporation is introduced in evidence, it is to be considered at least *prima facie* valid and in force without proof of publication. *State v. King*, 37-462.

Where it appeared that an ordinance of the town of Bayard was published in the "Bayard News," etc., *held*, that this was sufficient evidence of the publication, although the paper was not shown to be a newspaper of general circulation in the corporation, it being presumed that the town officers performed the duties with which they were charged with reference to such publication: *Bayard v. Baker*, 76-220.

A certificate of the town recorder to an ordinance introduced in evidence, that it was "a true copy of ordinance . . . as passed by the town council, at the meeting of . . .," *held* sufficient to raise the presumption that the ordinance was properly recorded, and that the copy to which it was attached was a true copy of the paper duly recorded: *Ibid.*

Where it was claimed in an action for injuries at a railroad crossing within city limits that the defendant's train was being operated at a rate of speed prohibited by the city ordinance, *held*, that an objection to the ordinance for want of publication being made it was error to admit it without proof of such publication. But in a prosecution under an ordinance the burden is on defendant to show want of publication: *Larkin v. Burlington, C. R. & N. R. Co.*, 85-492.

In a particular case, *held*, that the showing in regard to the inability to introduce in evidence the paper in which publication of the ordinance was made, or any record of such publication was sufficient to authorize the introduction of parol proof to show such publication: *Larkin v. Burlington, C. R. & N. R. Co.*, 91-654.

It has been said that parol proof of such publication is admissible as primary evidence: *Ibid.*; *Des Moines v. Casady*, 21-570.

A paper purporting to be a resolution passed by a city council levying a tax, marked on the back "adopted," such indorsement being in the handwriting of a person who was at the time city recorder, is not competent evidence of the action of the council. It is not such a record as the law requires: *Hintrager v. Kiene*, 62-605.

It is competent for the city, when not inconsistent with the restrictions of its charter, to prescribe by ordinance the steps to be taken in order to acquire jurisdiction over particular subjects. If these steps are not taken, and the requirements of the ordinance are mandatory, the act of the city in attempting to exercise its authority will be void: *Dubuque v. Wooton*, 28-571; *Starr v. Burlington*, 45-87.

Therefore, where an ordinance providing for improvement of streets required that such improvement should be ordered by resolution describing the streets and the improvement, and that notice be given by publication, *held*, that both these requirements were mandatory, and the record failing to show the passage of the resolution or its publication, the city acquired no jurisdiction of the subject-matter, and the sale of adjoining property for the making such improvements was void: *Starr v. Burlington*, 45-87.

SEC. **687. Published ordinances.** When any city or town shall cause or has heretofore caused its ordinances to be published in book or pamphlet form, such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the dates mentioned or provided for therein, in all courts and places, without further proof. When the ordinances are so published, it shall not be necessary to publish them in the manner provided for in the preceding section. [19 G. A., ch. 128, § 1.]

SEC. **688. Police court—jurisdiction.** The police court shall be a court of record, and have a seal to be provided by the council, with the name of the state in the center, and style of the court around the margin. It shall be held in suitable rooms to be provided by the council, and shall always be open for the dispatch of business. It shall have, in all criminal cases, the powers and jurisdiction of justices of the peace, and the jurisdiction of a mayor's court in the case of violation of the city ordinances. [C. '73, §§ 542, 543, 545; R., §§ 1116, 1117, 1119.]

The provisions of the Code of '73 relating to police courts, so far as they differed from the corresponding provisions of the Revision, *held* not applicable to cities under special charter: *Weir v. Allen*, 47-482.

SEC. **689. Clerk.** The clerk of the police court shall not be in any way concerned as counsel or agent in the prosecution or defense of any person before such court. [C. '73, § 542; R., § 1116.]

SEC. **690. Jurors.** Provisions shall be made by ordinance for selecting, summoning and impaneling jurors in the police court, who shall have the qualifications of jurors as provided by law, and for all other matters touching said court that may tend to make it efficient. [C. '73, § 542, 545; R., §§ 1116, 1119.]

While exercising the powers and jurisdiction of justices of the peace, juries may be necessary; but in the trial of offenses against an ordinance of the city the defendant has no right to a trial by jury. (See § 692): *Zelle v. McHenry*, 51–572.

SEC. **691. Jurisdiction of mayor.** The mayor shall have exclusive jurisdiction of all actions or prosecutions for violations of the city or town ordinances. He shall also have, in criminal matters, the jurisdiction of a justice of the peace, co-extensive with the county, and, in civil cases, the same jurisdiction within the city or town as a justice of the peace has within the township. None of the jurisdiction referred to in this section shall be exercised by the mayors in cities having a superior or police court. If the mayor or judge of the superior or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold his court in criminal proceedings, and receive the statutory fees, to be paid by the city or county, as the case may be. [24 G. A., ch. 6, § 2; 18 G. A., ch. 189, § 1; C. '73, §§ 506, 546; R., §§ 1085, 1102, 1105, 1120.]

As to ordinances: It being plainly provided that a mayor shall have exclusive jurisdiction for violation of a city ordinance, an action in the district court for such violation cannot be maintained: *Lansing v. Chicago, M. & St. P. R. Co.*, 85–215.

As justice of the peace: The civil jurisdiction of a mayor, like that of a justice of the peace, extends throughout the county: *Weber v. Hamilton*, 72–577.

The division of a county into two districts for judicial purposes does not operate to limit the jurisdiction of the mayor to a portion of the county: *Deere v. Council Bluffs*, 86 591.

The jurisdiction of the mayor is not exclusive under § 506 of Code of '73, but concurrent with that of justices of the peace: *Jaquith v. Royce*, 42–406.

Under prior statutes, although the mayor was clothed with the jurisdiction of justices of the peace, there was no provision for allowing him the same or any other fees in criminal cases when exercising such jurisdiction: *Upton v. Clinton County*, 52–311. But now see § 670.

The court of a mayor is not a court of record: *Santo v. State*, 2–165, 220.

SEC. **692. Procedure—appeal—judicial notice of ordinances.** The proceedings before a mayor or a police court shall be, as far as applicable, in accordance with the law regulating similar proceedings before a justice of the peace, unless otherwise provided; but there shall be no change of venue in actions or prosecutions under ordinances, and the trial shall be by the court without a jury, except on appeal; appeals and writs of error shall be taken from the mayor or the police court in the same time and manner, and subject to the same restrictions. If a city or town is situated in two or more counties, the appeal or writ of error shall be taken to or in the district court of the county in which the mayor's court or police court is held. On the hearing of such appeal, or writ of error, the court shall take judicial notice of the ordinances of the city or town. [18 G. A., ch. 77, § 1; C. '73, §§ 506, 546, 4707; R., §§ 1085, 1102, 1105, 1120, 5105.]

Procedure: Prior to the adoption of this express provision as to change of venue it was held that there could be no change of venue from the police court in prosecutions for violation of city ordinances: *Zelle v. McHenry*, 51–572.

Under prior provisions it was held that the rules governing changes of venue before justices were applicable in proceedings before a mayor: *Finch v. Marvin*, 46–384.

But the filing of a motion for a change of venue did not deprive the mayor of his jurisdiction, and if the motion was overruled the ruling was, at most, simply an error, and a judgment subsequently rendered was not void: *Ottumwa v. Schaub*, 52–515.

When a change of venue is granted in a criminal trial before a justice of the peace there is no authority to send it to the mayor of a city or town; it should be sent to the

next nearest justice: *State v. Jamison*, 69 N. W., 529.

Rules regulating appeals from justices in criminal cases are applicable to proceedings before the mayor: *State v. Hoag*, 46–337; or a police court: *Burlington v. Unterkircher*, 68 N. W., 675.

If appeal is taken to the district court, from a conviction in police or mayor's court for violating a city ordinance, the city may appeal from the district court to the supreme court, just as the state may in prosecutions by the state, (see § 5670): *Burlington v. Unterkircher*, 68 N. W., 795; *Columbus City v. Cutcomp*, 61–672.

Judicial notice of ordinances: The mayor of a city is required to take judicial notice of city ordinances in a prosecution for their violation, without their being pleaded: *Conboy v. Iowa City*, 2–90; *State v. Leiber*, 11–407; *Laporte City v. Goodfellow*, 47–572.

A district court cannot except under this provision take judicial notice of the ordinances of a city: *Garvin v. Wells*, 8–286; *Goodrich v. Brown*, 30–291; *Wolf v. Keokuk*, 48–129.

Courts will take judicial notice of the charter or laws under which a city is incorporated, and it is not therefore necessary, in an action for negligence in regard to its streets, to allege and prove the power possessed by the city over its streets under the laws of the city: *Stier v. Oskaloosa*, 41–353.

As the statute requires the court to take judicial notice of the fact of the incorporation of incorporated towns, it will take judicial notice of the acts by which a town becomes incorporated so far as they are made to appear upon public records provided by law for such purpose; and as the petition for the incorporation must describe the territory of the town accompanied by a plat and be presented to the circuit court of the proper county, the court will take judicial notice in what county the incorporated town is situated: *State v. Reader*, 60–527.

SEC. **693. Fines recovered.** Fines and penalties may in all cases, and in addition to any other mode provided, be recovered by action before a justice of the peace or other court of competent jurisdiction, in the name of the proper municipal corporation, for its use. In any such action, where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title and the date of its adoption or passage, and showing, as near as may be, the facts of the alleged violation. [C. '73, § 483; R., § 1074.]

This section has no reference to criminal prosecutions, and applies solely to civil actions for the recovery of a fine or forfeiture: *Goodrich v. Brown*, 30–291.

As to authority to impose fines and forfeitures, see § 680.

SEC. **694. Commitment.** Whenever a fine and costs imposed for the violation of any ordinance are not paid, the person convicted may, by the court having jurisdiction of the case, be committed to jail until the fine and costs are paid, not to exceed thirty days. [C. '73, § 484.]

CHAPTER 4.

OF GENERAL POWERS.

SECTION **695. Bodies corporate—name—authority.** Cities and towns are bodies politic and corporate, under such name and style as may be selected at the time of their organization, with the authority vested in the mayor and a common council, together with such officers as are in this title mentioned or may be created under its authority, and shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein, and they may sue and be sued, contract and be contracted with, acquire and hold real and personal property, and have a common seal. [C. '73, §§ 454–6, 517, 523–4; R., §§ 1047, 1056–7, 1090, 1094–5; C. '51, § 664.]

Extent of powers: Cities have no inherent jurisdiction to make laws or adopt regulations of government. They are governments of enumerated powers, acting by delegated authority, and are therefore different from state legislatures, which may exercise such powers of government coming within a certain designation of legislative power as the constitution does not expressly or impliedly prohibit; *Keokuk v. Scroggs*, 39–447.

Cities can exercise such powers as are expressly granted and such implied ones as are necessary to make available the powers expressly conferred and essential to effect the purposes of the corporation, and these powers are strictly construed: *Ibid.*

Only such powers and rights can be exercised under a grant of power to a municipal corporation as are clearly comprehended in the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant: *Clark v. Davenport*, 14–494.

A municipal corporation can possess and exercise the following powers and no others: first, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation: *Merriam v. Moody's Ex'rs*, 25–163; *Hanger v. Des Moines*, 52–193; *Clark v. Des Moines*, 19–199.

Any doubt or ambiguity arising from the terms used by the legislature in a grant of power to a municipal corporation must be resolved against the existence of the power and in favor of the public: *Clark v. Davenport*, 14–494; *Merriam v. Moody's Ex'rs*, 25–163; *State v. Smith*, 31–493; *Keokuk v. Scroggs*, 39–447; *Logan v. Pyne*, 43–524.

Power of a municipal corporation to provide for the accomplishment of certain results does not necessarily impose upon it a liability for their imperfect accomplishment: *Vanhorn v. Des Moines*, 63–447.

Cities and other municipal corporations can exercise only such authority as is expressly granted by their charters, or legislative acts creating them, or necessarily implied in such grant, or incident thereto; and reasonable doubts as to the existence of authority in such corporations are always to be resolved against it: *Brockman v. Creston*, 79–587.

Cities have power to dispose of their real property for purposes authorized by law, and for no other purpose: *Ibid.*

Therefore, where a city attempted to transfer to the county, for court-house purposes, property belonging to the city, and used as the city hall, *held*, that such transfer was without authority, and could be enjoined at the suit of a tax-payer: *Ibid.*

A nonresident tax-payer may maintain such action, and it is immaterial whether he is a tax-payer to a large amount or not: *Ibid.*

Municipal corporations have, and can only exercise, such powers as are expressly granted to them by law and such incidental ones as are necessary to make such powers available, and are essential to effectuate the purposes of the corporation, and those powers are strictly construed: *Becker v. Keokuk Water-works*, 79–419.

Therefore, *held*, that a city had no authority to insert in a contract with a water-works company a stipulation for indemnity to tax-payers for damages caused by failure of the company to furnish water in accordance with the terms of such contract: *Ibid.*

Liability for acts of officers: The city is not liable for neglect or non-feasance of its officers or agents in exercising the powers conferred: *Ogg v. Lansing*, 35–495.

A municipal corporation will not be liable for the acts of its officers which it has no power to authorize: *Field v. Des Moines*, 39–575.

A city is not liable for the acts of its officers in attempting to enforce police regulations. As it cannot authorize them to do an unlawful act, neither can it become liable for such act by ratification: *Calwell v. Boone*, 51–687.

The fact that the officers of a town engage in doing an act in violation of its ordinances, without effort being made to prevent their doing such act, will not render the corporation liable for damages: *Ball v. Woodbine*, 61–83.

The fact that an ordinance requiring a license to be taken out by transient merchants is void, does not render the city or town enacting such ordinance liable for the unlawful act of its officers in attempting to enforce such ordinance: *Easterly v. Irvin*, 68 N. W., 919; *Trescott v. Waterloo*, 26 Fed., 592.

As to liability of city for malfeasance or negligence of its officers in regard to street improvements, see notes to § 754.

As to liability for loss from failure of water supply, see notes to § 720.

SEC. **696. Prevention of nuisances—regulation of slaughter houses.** They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated; to provide for the destruction of weeds and other noxious growths upon any of the lots therein; to provide for the immediate seizure and destruction of tainted or unsound meat or other provisions; to establish all needful regulations as to the management of packing and slaughter houses, renderies, tallow chandleries and soap factories, bone factories, tanneries, and manufactories of fertilizers and chemicals, within the limits of such cities or towns; to regulate and restrain the deposit and removal of all offensive material and substances, and the engendering of offensive odors and sights therefrom, so as to protect the public against the same; to establish and regulate slaughter houses; and, in cities having five thousand or more inhabitants, to build and control the same. [22 G. A., ch. 16, § 1; 19 G. A., ch. 89, § 9; C. '73, §§ 456, 526; R., §§ 1057, 1096.]

The power to abate nuisances does not enable the council to determine conclusively that a particular thing constitutes a nuisance; and if it orders the removal of a thing

which is in fact not a nuisance, the person causing its removal will be individually liable in damages: *Cole v. Kegler*, 64–59.

The power given in relation to nuisances is to abate them, and in the exercise of this power a city cannot provide for the punishment by fine of one who maintains a nuisance: *Nevada v. Hutchins*, 59–506.

Under the authority of this section, a city cannot by ordinance provide for the imposition of fines against persons committing a nuisance. The power of the city is limited to the abatement of such nuisance: *Knoxville v. Chicago, B. & Q. R. Co.*, 83–636.

The power to suppress does not imply the power to punish, and must be exercised in such way that suppression shall be the direct, and not merely the incidental, result of the exercise of power: *Charlton v. Barber*, 54–360.

A municipal corporation is not authorized to bring an action in equity to enjoin and abate a nuisance on the ground that it is injurious to its citizens, and the authority given by this section must be exercised through the medium of an ordinance, and not by equitable proceedings in court: *Ottumwa v. Chinn*, 75–405.

SEC. **697. Burial of the dead—cemeteries.** They shall have power to regulate the burial of the dead; to provide, without the limits of the corporation, places for the interment of the dead; to cause any body interred contrary to such regulations to be taken up and buried in accordance therewith; to exercise over all cemeteries within their limits, and those without their limits established by their authority, the powers conferred upon township trustees with reference to cemeteries; and to authorize the establishment of crematories for the cremation of the dead, within or without the limits of such corporation, and to regulate the same. [C, '73, § 458; R., § 1060.]

As to cemeteries, see also §§ 583–589.

SEC. **698. Filling or draining lots.** They shall have power to cause any lot of land within their limits, on which water at any time becomes stagnant, to be filled up or drained in such manner and within such time as may be directed by resolution of the council. Service of a copy of said resolution shall be made upon the owner of such lot, if residing in the county where the same is situated; otherwise publication of such notice shall be made once each week for two consecutive weeks in a daily or weekly newspaper published within such city or town, or, if there be no such newspaper, then by publication of the same in a newspaper published in said county. On the failure of such owner to comply with such directions within the time fixed, it may be done by said city or town, and the costs and expenses thereof assessed against said lot, which shall be a debt due to said corporation from the owner of said lot, and shall, moreover, from the time of the adoption of such resolution, be a lien thereon as provided in case of special assessments. [C. '73, § 480; R., § 1070.]

The city has no authority to order such lots to be filled to grade where it appears that a much less amount of filling would prevent stagnant water standing thereon: *Bush v. Dubuque*, 69–233.

The word "lot" means any portion, piece or division of land: *Buell v. Ball*, 20–282.

Service by publication is sufficient under this section. Personal service is not necessary: *Independence v. Purdy*, 46–202.

SEC. **699. Drainage preserved.** They shall have power to require the owner or lessee of any lot or tract of ground within their limits, extending into, across or bordering upon any hollow or ravine which constitutes a drain for surface water, or a watercourse of any kind, who shall, by grading or filling such lot or tract of ground, obstruct the flow of water through such watercourse, to construct through such lot or land a sufficient drain or passageway for water, within such time as the council may designate, notice of which action shall be given as in the preceding section. Upon the failure of such owner or lessee to construct such drain or passageway within the time so fixed, the city or town may construct the same, and assess the costs and expenses thereof on such lot or tract of ground, and the same shall be a lien thereon as provided in case of special assessments. [16 G. A., ch. 116, § 18.]

SEC. **700. Regulations—licenses.** They shall have power to regulate, license and tax hotels, restaurants and eating houses; to define by ordi-

nance who shall be considered transient merchants; to regulate, license and tax their sales and those of auctioneers, bankrupt and dollar stores, and the like, but the exercise of such power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or any other person required by law to sell real or personal property; to regulate, license and tax peddlers, plumbers, bill-posters, itinerant doctors, itinerant physicians and surgeons, junk dealers, scavengers, pawnbrokers, and persons receiving actual possession of personal property as security for loans, with or without a mortgage or bill of sale thereon. [22 G. A., ch. 16, § 1; 19 G. A., ch. 89, § 1; 16 G. A., ch. 24; C. '73, §§ 462–3; R., § 1063.]

Power to license: Neither the power to tax nor the power to regulate gives the right to license. So held in case of taverns, etc., under former provisions: *Burlington v. Bumgardner*, 42–673.

But, *held*, that under the power to *prohibit* the sale of wine, beer, etc., the city might impose a license: *Keokuk v. Dressell*, 47–597.

The power to license does not authorize taxation for revenue. Licenses are a part of the police regulations and should be charged for as such; and while a court may interfere if the sum charged as license is unjust or oppressive, or levied for the purpose of raising revenue, yet where it does not appear that the charges fixed by the corporation for the expense and enforcement of the license and the protection of the person licensed, under police regulations connected with or growing out of the license, are not necessary and proper, the court will not interfere: *Burlington v. Putnam Ins. Co.*, 31–102.

The right to fix the charge for the license, which is vested in the city, will also authorize it to vary the amount with different parties as may be deemed prudent and just: *Ibid.*

Where the city has power to impose a license it may leave the amount thereof within certain limits to the discretion of the mayor: *Decorah v. Dunstan*, 38–96.

A municipal corporation can exercise no power of taxation unless it be expressly conferred by the legislature or absolutely necessary to carry out some other power expressly conferred, and in case of doubt the power will be denied: *State v. Smith*, 31–493.

Where a city is authorized to impose licenses on trades and occupations, such regulations are required to be reasonable, fair, and not oppressive: *Des Moines v. Des Moines Water Works Co.*, 64 N. W., 269; *Burlington v. Unterkircher*, 68 N. W., 795.

When a reasonable discretion in fixing a license has been exercised by the city the result reached is final and conclusive so long as the conditions remain substantially unchanged; but the reasonableness of the ordinance is usually for the court and not for the jury: *Burlington v. Unterkircher*, 68 N. W., 795.

The presumption in the first instance is that the ordinance is reasonable and valid and the burden is on the defendant prosecuted under such an ordinance to show that it is not: *Ibid.*

The power delegated to a town to regulate peddlers and transient merchants does not give it the right to impose a tax, but it will be presumed that in enacting an ordinance on the subject the intention was to exercise the power of regulation: *Easterly v. Irwin*, 68 N. W., 919.

In imposing a license the city is not limited to such fees as will cover the necessary expenses of issuing the license and supervising the business licensed: *Burlington v. Unterkircher*, 68 N. W., 795.

One who carries on a business for which a license is required without procuring such license acts illegally and cannot recover compensation for services rendered in the pursuance of such business: *Richardson v. Brix*, 63 N. W., 325.

Transient merchants: The legislature may confer upon a city power to tax transient merchants doing business in the city: *Mt. Pleasant v. Clutch*, 6–546.

This section gives general power to regulate and license sales by auctioneers, etc.: *Decorah v. Dunstan*, 38–96.

A resident merchant, engaged in selling goods at retail, who employs an auctioneer to sell part of his goods, is not an auctioneer in such sense that he can be compelled to pay a license under this section: *Oskaloosa v. Tulliss*, 25–440.

An ordinance discriminating in favor of resident merchants of the city as against other merchants of the state or nonresident merchants, or in favor of those selling goods of domestic manufacture and against those selling goods of foreign make, by imposing a license tax upon the latter which is not required of the former, is unconstitutional: *Marshalltown v. Blum*, 58–184; *Pacific Junction v. Dyer*, 64–38; *Stuart v. Cunningham*, 88–191.

An ordinance requiring a license fee from all transient merchants regardless of their place of residence is not invalid: *Ottumwa v. Zekind*, 64 N. W., 646.

But under former provisions *held*, that there was no power to tax transient merchants: *Ibid.*

Peddlers: One who goes from house to house delivering goods as agent for a person who has already taken orders therefor is not a peddler within the terms of an ordinance prohibiting unlicensed persons from selling or offering for sale or barter or exchange goods or other articles of value: *Stuart v. Cunningham*, 88–191.

A peddler is a person who travels about the country with merchandise for the purpose of selling it; but a person employed by a resident mercantile establishment, to call

on citizens with samples of goods and solicit their orders for the goods, is not a peddler, and is not subject to penalties under a city ordinance declaring such acts to be peddling: *Davenport v. Rice*, 75-74.

While the power to regulate and license peddlers is given to cities, such power can be exercised only under an ordinance, and if an ordinance is passed for such purpose, and is such that the court must, upon mere examination, declare it unreasonable, it is void: *State Center v. Barenstein*, 66-249.

A charter authorizing a city to license and tax peddlers, etc., and bankers, dealers in money and notes and other evidence of indebtedness, and warrants of all kinds, *held* not to authorize the city to impose a license on insurance agents: *State v. Smith*, 31-493.

Therefore, *held*, that an ordinance authorizing the mayor, at his discretion, to charge peddlers a license of from one to twenty-five dollars, without stipulating the terms of such license, was unreasonable and void: *Ibid.*

Taking orders for goods to be manufactured does not constitute the person taking such orders a peddler requiring a license under an ordinance for the licensing of peddlers: *Spencer v. Whiting*, 68-678.

Also, *held*, that a particular sale of articles to one person on his request, such articles not being offered in general, nor to other persons, did not constitute the seller a peddler: *Ibid.*

Regulation of sale of liquors: Previous to the adoption of the present prohibitory statute, *held*, that a city might prohibit the sale of liquors which were not prohibited by state law under the statute then existing: *Burlington v. Kellar*, 18-59.

And that the statutory provisions giving the power to regulate the sale of such liquors were neither special nor local laws, nor an improper delegation of leglislative authority: *State v. King*, 37-462.

Where a general law exists prohibiting the sale of intoxicating liquors, a charter giving to the city an exclusive authority to license the sale of liquors will not confer upon such city an exclusive power to punish the violation of the general statute: *State v. Gurlock*, 14-444.

A city or town has no authority to provide a penalty for the sale of intoxicating liquors, the sale of which is prohibited by statute: *Foster v. Brown*, 55-686; *New Hampton v. Conroy*, 56-498; *Cantril v. Sainer*, 59-26.

Where an ordinance prohibited the sale of liquors, some of which the municipality had the power to regulate the sale of, while the sale of others was prohibited by general statute, *held*, the ordinance would be supported and enforced so far as within the lawful authority of the corporation: *Eldora v. Burlingame*, 62-32.

Licenses for the sale of liquors not prohibited by general statute are not contracts between the city and the person licensed, but are merely temporary permits to do what would otherwise be an offense, issued in the exercise of police power and subject to the direction of government, which may revoke them as it deems fit: *Columbus City v. Cutcomp*, 61-672.

Whether in case of a revocation of the license the person licensed would, in a proper proceeding, be entitled to have refunded to him the *pro rata* proportion of the license paid, *quære*: *Ibid.*

A license tax paid to a city for the privilege of selling intoxicating liquors cannot, after the enjoyment of the license for the period stipulated therein, be recovered back upon the ground that the statute under which it was granted has been declared unconstitutional: *Kraft v. Keokuk*, 14-86.

While the passage of the prohibitory liquor law took away from the city the authority to regulate places for the sale of intoxicating liquors, yet under § 680 the city has power to enact an ordinance for the regulation of saloons of other kinds: *Clinton v. Grusendorf*, 80-117.

SEC. **701. Pawnbrokers—second-hand dealers.** They shall have power to prohibit pawnbrokers and junk or second-hand dealers purchasing or receiving from minors any property, without the written consent of their parents or guardians, and provide for the examination of the premises of such persons for the purpose of discovering stolen property. [19 G. A., ch. 89, § 1.]

SEC. **702. Billiard saloons—gaming.** They shall have power to regulate, license, tax or prohibit billiard saloons, billiard tables, pool tables, and all other tables kept for hire; bowling alleys and shooting galleries or places; to suppress, restrain or prohibit all gambling games or devices; to authorize the destruction of all instruments or devices used for the purpose of gaming or gambling, and to punish gambling. [19 G. A., ch. 136; 16 G. A., ch. 24; C. '73, §§ 456, 463; R., § 1057, 1063.]

The authority to destroy all instruments or devices used for the purposes of gaming does not confer power to punish any one or prescribe penalties for permitting gambling or engaging therein: *New Hampton v. Conroy*, 56-498.

Authority to suppress gambling does not give authority to punish such act as a misdemeanor: *Mt. Pleasant v. Breeze*, 11-399.

The power to suppress or restrain billiard tables may be exercised by way of license: *Burlington v. Lawrence*, 42-681.

SEC. **703. Circuses—theaters—shows.** They shall have power to regulate, license or prohibit circuses, menageries, theaters, theatrical exhi-

bitions, shows and exhibitions of all kinds; but lectures on scientific, historical or literary subjects shall not come within the provisions of this section. [16 G. A., ch. 24; C. '73, §§ 460, 463; R., §§ 1062–3.]

SEC. **704. Disorderly houses.** They shall have power to suppress, restrain and prohibit disorderly houses, houses of ill fame, opium or hop joints, or places resorted to for the use of opium or hasheesh, and punish the keepers thereof, and persons resorting thereto. [C. '73, § 456; R., § 1057.]

The authority to repress and restrain disorderly houses may be exercised by providing for the punishment of persons entering such houses or being found there: *State v. Botkin*, 71–87.

An ordinance providing for the punishment of persons found in disorderly houses is not invalid by reason of the fact that defendant might prove he was lawfully there. Such fact may be shown as a defense: *Ibid.*

Under prior provisions, *held*, that the power given to suppress and restrain houses of ill-fame, and, under § 680 to make ordinances to improve the morals, etc,, of the inhabitants, did not authorize a city to pass an ordinance to punish the keeping of a house of ill-fame: *Chariton v. Barber*, 54–360.

SEC. **705. Disturbances—parades.** They shall have power to prevent and suppress any riots, noise, disturbance or disorderly assemblies, and to provide that, before any association, company, society, order, exhibition or aggregation of persons shall parade or march upon the streets of any city, they shall first obtain from the mayor of such city a permit, when issued to be without charge, and the same shall state the time, manner and condition of such parade or march, and to punish any person engaged in riotous, noisy or disorderly conduct. [22 G. A., ch. 16, § 1; C. '73, § 456; R., § 1057.]

Under the authority here given to prevent riots, disturbances, disorderly assemblages, etc., the city may provide that the keeping of any houses within the city limits where loud or unusual noises are permitted, or where persons are permitted to congregate and engage in the use of profane and vulgar language to the disturbance of others, shall be considered and punished as a common nuisance: *Centerville v. Miller*, 57–56; *Centerville v. Miller*, 57–225.

An ordinance prohibiting processions or other displays calculated to cause public annoyance and requiring that in such case the procession or display be desisted from on order of the mayor or marshal, and that any person failing to obey such order shall be guilty of a misdemeanor, is valid: *Chariton v. Fitzsimmons*, 87–226.

SEC. **706. Animals running at large.** They shall have power to restrain and regulate the running at large of cattle, horses, swine, sheep and other animals or fowl, within the limits of the corporation, and to authorize the distraining, impounding and sale of the same for the penalty incurred and the costs of the proceeding. [C. '73, § 459; R., § 1061.]

Animals which are not permitted to run at large within a city, upon coming within its limits from without, may be taken up and dealt with in accordance with the ordinances of the city, although their owner may live outside the city and where such animals are permitted by law to be at large: *Gosselink v. Campbell*, 4–296.

SEC. **707. Dogs.** They shall have power to regulate, restrain, license or prohibit the running at large of dogs within their limits, and to require them to be kept upon the premises of the owners thereof, unless licensed to run at large, and to provide for the destruction thereof when found at large contrary to and in violation of the provisions of any ordinance or by-law passed pursuant to the power herein granted. [17 G. A., ch. 25; C. '73, § 459; R., § 1061.]

As to dog tax, see, also, § 889.

SEC. **708. Auction sales of animals.** They shall have power to regulate, license or prohibit the sale of horses or other domestic animals at auction in the streets, avenues, highways, alleys or public places thereof. [16 G. A., ch. 24; C. '73, § 463; R., § 1063.]

SEC. **709. Numbering of buildings.** They shall have power to require all buildings to be numbered by the owners or lessees thereof, and, in case of failure to comply with such requirement, to cause the same to be done, and to assess the cost thereof against the property or premises numbered. [19 G. A., ch. 89, § 2; 16 G. A., ch. 116, § 17.]

SEC. **710. Dangerous buildings.** They shall have power to provide by ordinance for the repair, removal or destruction of any building which is dangerous, or which may be liable to fall, and to levy and collect a special tax against the property and owner thereof for the expense thereof, as other special taxes are levied and collected. [21 G. A., ch. 93, § 5.]

SEC. **711. Fires—electric apparatus—fire limits.** They shall have power to make regulations against danger from accidents by fire or electrical apparatus, to establish fire limits, and to prohibit within such limits the erection of any building or addition thereto, unless the outer walls be made of brick, iron, stone, mortar, or other non-combustible material, with fire-proof roofs, and to provide for the removal of any structure erected contrary to such prohibition. [22 G. A., ch. 1, § 15; 22 G. A., ch. 21, § 1; C. '73, § 457; R., § 1058.]

An ordinance of the city authorizing the destruction of private buildings to prevent the spread of fire does not make the corporation liable for property so destroyed: *Field v. Des Moines*, 39–575.

An ordinance establishing fire limits, and prohibiting the erection of wooden buildings within such limits, cannot be legally passed except in accordance with the provisions of this section: *Des Moines v. Gilchrist*, 67–210.

Nor can the council prohibit the keeping or maintaining of lumber yards or wood yards within the fire limits: *Ibid.* [But now see § 715.]

An ordinance with reference to prevention of fires, *held*, in a particular case, to be beyond the powers conferred upon a city by special charter, with reference to providing against calamities by fire: *Keokuk v. Scroggs*, 39-447.

SEC. **712. Chimneys — manufactories — fireworks — fire escapes.** They shall have power to regulate and control the building, construction or erection of chimneys, stacks, flues, fireplaces, hearths, stovepipes, ovens, boilers, and all apparatus used for heating purposes, and the use of lights in stables, shops and other places; to regulate manufactories by providing against danger from fire; to regulate or prohibit bonfires, and the use of fireworks, fire-crackers, torpedoes, Roman candles, sky-rockets, and other pyrotechnic displays; to prevent the deposit of ashes and combustible matter in unsafe places; to require the construction of fire-escapes to buildings, and regulate and control the same; to cause all buildings, structures and inclosures that may be in such condition as to cause danger from falling to be fixed, or from fire to be immediately made safe or removed, and to provide for the collection of the costs and expenses incurred in any of the matters provided for in this or the preceding section, in the manner authorized for the collection of special assessments. [19 G. A., ch. 89, §§ 4–6.]

SEC. **713. Inspection of steam boilers and magazines.** They shall have power to provide for the inspection of steam boilers, and all places used for the storage of explosives or inflammable substances or materials, and to prescribe the necessary means and regulations to secure the public against accidents and injuries therefrom, and to assess the costs and expenses of such proceedings against the property and owners thereof in the manner provided for special assessments. [Same, § 7.]

SEC. **714. Keeping gunpowder—combustibles.** They shall have power to regulate the transportation and keeping of gunpowder, inflammable oils or other combustibles, and to provide or license magazines for storing the same, and prohibit their location or maintenance within a given distance of the corporate limits of such cities or towns. [22 G. A., ch 16, § 1; C. '73, § 456; R., § 1057.]

SEC. **715. Wood or lumber yards.** They shall have power to prohibit or regulate the piling or depositing of any kind of wood, lumber or timber upon any lot or property within the city limits within a distance of one hundred yards of any dwelling-house. [21 G. A., ch. 93, § 4.]

SEC. **716. Fire department.** They shall have power to organize, keep and maintain a fire department and fire companies; to purchase or

lease necessary ground and construct or lease buildings therefor; provide engines, apparatus, and such other instruments as may be necessary; pay for services rendered by members of the fire department at any fire; and cities having a population of five thousand or more may maintain a paid fire department. [23 G. A., ch. 8; 21 G. A., ch. 171, § 1; C. '73, § 525; R., § 1695.]

SEC. **717. Markets.** They shall have power to establish and regulate markets and scales, to build market houses and establish and regulate the same; to provide for the measuring or weighing of merchandise offered for sale, to prevent forestalling, and regulate or prohibit huckstering in the markets; to prescribe the kind and description of articles which may be sold in the markets, and the stands or places to be occupied by the vendors; to authorize the immediate arrest of any person violating its regulations, and the seizure and removal from the market of any article of produce in his possession. But no charge or assessment of any kind shall be made or levied on any wagon or other vehicle, or the horses attached thereto, or the owner thereof, bringing produce or provisions to any of the markets in the city, or through the streets contiguous thereto, for standing in or occupying a place in any of the market spaces, or in the streets contiguous thereto, on market days and evenings previous thereto. [22 G. A., ch. 16, § 1; C. '73, §§ 456, 526; R., §§ 1057, 1096.]

The power to erect markets implies the power to confer on, or delegate to, others authority to erect a public market: *Levis v. Newton*, 75 Fed., 884.

The power given to a city to establish and regulate markets necessarily carries with it the power to prohibit the sale of meat, etc., at other times and places than those provided for: *Davenport v. Kelley*, 7–102.

The city may authorize an individual to erect a market building upon private property and lease stalls therein, and treat such building as a public market, prohibiting sales at other places: *Le Claire v. Davenport*, 13–210.

The city may provide that any person who shall use or keep any stall in the market for the purpose of selling meat or provisions without authority of law shall be subject to a penalty: *State v. Leiber*, 11–407.

The lease of a stall in a city market may be made by the city without regard to the prohibitions or requirements relating to the sale of real estate by the city: *Dubuque v. Miller*, 11–583.

The power here given to regulate markets and provide for the measuring and weighing of articles for sale implies that the corporation is empowered to do all things essential and necessary to the proper exercise of the power expressly provided, and the corporation may therefore declare that certain scales shall be deemed city scales, appoint a weigh-master, and make it unlawful to sell certain articles unless weighed upon such scales: *Davis v. Anita*, 73–325.

The power to establish and regulate markets does not authorize the city to pass an ordinance to prevent the peddling of meats until it has established a meat market, and not then unless it may be as a regulation of the market: *Burlington v. Dankwardt*, 73–170.

As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities, and contains no limitations upon the powers granted, the time, manner and expediency of its measures are left to the discretion of the corporation and the judgment of its officers upon such matters cannot be controlled by the courts so long as they act within the scope of their authority: *Miller v. Webster City*, 62 N. W., 648.

SEC. **718. Wharfs, docks and piers.** They shall have power to establish, construct and regulate landing places, wharfs, docks, piers and basins; to use for such purposes any public building or any property belonging to or under the control of the city, and the shore or bank of any lake or river not the property of individuals, to the extent and in any manner that the state can grant such use or control, and fix the rates for landing, wharfage and dockage. [C. '73, § 528; R., § 1098.]

As to wharfage dues, see notes to § 752.

SEC. **719. Ferries.** They shall have the exclusive power to establish, regulate and license ferries from any landing place in such city; to impose reasonable terms and restrictions in relation to the keeping thereof, the time, manner and rates of the carriage and transportation of persons and property thereon; to provide for the revocation of any license, and for the punishment by fines and penalties of the violation of any ordinance prohibiting

unlicensed ferries, or regulating those established and licensed. [C. '73, § 529; R., § 1099.]

SEC. **720. Water or gas works—electric plants.** They shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew or extend the term of such grant; but no exclusive franchise shall be thus granted, extended or renewed. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. [26 G. A., ch. 13; 22 G. A., ch. 11, §§ 1, 2; 22 G. A., ch. 26; C. '73, §§ 471-3.]

Water supply: A city so indebted that a contract by it for the erection of water-works would be void may still contract to pay out of its ordinary revenues a sum as rent for the supplying of water to the city and its inhabitants as a part of ordinary expenses: *Grant v. Davenport*, 36-396; *Creston Waterworks Co. v. Creston*, 70 N. W., 739.

The amount which the city may contract to pay, *held* not to be limited to the proceeds of the special tax which may be levied (see § 894): *Creston Waterworks Co. v. Creston*, 70 N. W., 739.

An ordinance granting to a private company the right to build and operate such works, and providing that the city may, upon certain terms, purchase them, is not an incurring of an indebtedness within the meaning of art. XI, § 3 of the constitution: *Burlington Water Co. v. Woodward*, 49-58.

The power to make a contract with a water company as exercised in the passage of a certain ordinance upheld in a particular case: *Ibid.*

The fact that a water company, which has agreed to furnish water to the city for the extinguishment of fires, fails to do so, will not render it liable to an action by a property owner for damages for the destruction of his property by reason of such failure, there being no privity of contract between the property owner and the company: *Davis v. Clinton Water-works Co.*, 54-59.

The fact that a city is authorized to provide for a water supply will not render it liable for failure to make adequate provision for the extinguishment of fires, nor would the fact that it had a contract with the waterworks company to protect it against all actions which might be brought against it for malfeasance or neglect on the part of the company render it liable: *Vanhorn v. Des Moines*, 63-447.

A city has no authority to insert in a contract between it and a water-works company a stipulation that the company shall be liable to property owners for damages due to a failure of the supply of water, causing a loss to property by fire: *Becker v. Keokuk, Waterworks*, 79-419.

Where a company was authorized to erect water-works and charge certain rates for water furnished, with the privilege to the city of buying the works upon certain terms, *held*, that such water-works were not public property and were subject to taxation: *Appeal of the Des Moines Water Co.*, 48-324.

The buildings, machinery and mains of such a company are all real estate. The mains are appurtenant to the principal structure, and although they may extend into another township the whole property is taxable in the township where the works are situated: *Ibid; Oskaloosa Water Co. v. Board of Equalization*, 84-407. [But see now § 1343.]

A water-works company may make a contract with a private party to extend its mains to his premises, and locate hydrants there, for a compensation to be paid by him, in addition to the amount allowed by the city for hydrants: *Muscatine Water-works Co. v. Muscatine Lumber Co.*, 85-112.

Cities may authorize the construction of such works by foreign corporations, and in such case they may confer upon such foreign corporation the power to condemn private property: *Dodge v. Council Bluffs*, 57-560.

A contract between the water-works company and the city by which the former is required to filter the water supplied to the city may be enforced in an action by the city by proper decree, and if necessary the capital stock not fully paid may be assessed for a sum sufficient to comply with the order: *Burlington v. Burlington Water-works*, 86-266.

The fact that a company has authority from the city council to erect and operate water-works does not relieve it from liability for nuisance consisting in smoke or soot emitted from its chimneys to the annoyance of neighboring residents. *Churchill v. Burlington Water Co.*, 62 N. W., 646; *Foote v. Burlington Water Co.*, 62 N. W., 648.

Further as to water-works, see next chapter.

Electric lights: The general power given by § 464 of Code of '73 (see § 757) to provide for the lighting of streets, etc., *held* to include also the power, without regard to this section to contract for the lighting of the

streets and to grant the use of the streets for the construction and operation of gas and electric light plants: *Levis v. Newton*, 75 Fed., 884.

Although an ordinance granting the privilege to an electric light company to use the streets of the city provides that such privilege shall be permanent and perpetual the invalid provision as to the extent of time will not render the other provisions void: *Ibid.*

The great weight of authority seems to sustain the position that the furnishing of lights to the citizens generally is a sufficient public use to support a grant of the right to use the streets for the operation of the plant furnishing such light: *Ibid.*

As to electric light plants, see *Thompson-Houston Electric Light Co. v. Newton*, 42 Fed., 723.

SEC. **721. Question submitted.** The council may order any of the questions provided for in the preceding section submitted to a vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in the city, or of fifty property owners of any incorporated town. Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks. The party asking for a renewal or extension of such franchise shall pay the cost incurred in holding such election. [22 G. A., ch. 11, § 4.]

It is not necessary that the vote of the electors precede the passage of an ordinance for the establishment of water-works. While it is the approving vote that authorizes their erection, yet the council may provide beforehand as to the conditions on which the vote is asked. *Taylor v. McFadden*, 84–262.

Under the statutory provisions as to waterworks, the council may submit the proposition for the sinking of an artesian well and for voting a tax for that purpose: *Ibid.*

By a "majority of the voters of a city or town" is meant the majority of the voters casting their votes at the election: *Ibid.*

Where a contract for electric lighting was void because the question of establishing the electric light plant had not been submitted to vote, *held*, that the city could not recover damages of the company for failure to comply with its contract to furnish electric lights: *Keokuk v. Ft. Wayne Electric Co.*, 90–67.

SEC. **722. Condemning land.** They shall have power to condemn and appropriate so much private property as shall be necessary for the construction and operation of said works or plants, as provided for the condemnation of land for city purposes; to issue bonds for the payment of the cost of establishing the same, including the cost of land condemned on which to locate them, and to confer by ordinance the power to appropriate and condemn private property for such purpose upon any individual or corporation authorized to construct and operate such works or plants. [23 G. A., ch. 13, § 1; 22 G. A., ch. 10. § 1; 22 G. A., ch. 11, §§ 2, 3; C. '73, § 474.]

Under particular facts, *held*, that a railway track of nearly two miles in length to connect the water-works with the railway in order to facilitate transportation of materials for construction and fuel for operating the works was not a purpose for which land might be condemned under this section: *Creston Water-works Co. v. McGrath*, 89–502.

SEC. **723. Protection.** For the purpose of maintaining and protecting such works or plants from injury, and protecting the water of such water works from pollution, the jurisdiction of such city or town shall extend over the territory occupied by such works, and all reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants used in or necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken. [22 G. A., ch. 11, § 2; C. '73, § 472.]

SEC. **724. Rates—taxes.** They shall have power, when operating such works or plants, to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, gas, light or power, reasonable rents or rates fixed by ordinance, and to levy a tax, as hereafter provided, to pay or aid in paying the expenses of running, operating and repairing such works or plants owned and oper-

ated by such city or town, and the interest on any bonds issued to pay all or any part of the cost of their construction. [22 G. A., ch. 11, § 2; C. '73, § 475.]

SEC. **725. Regulation of rates and service.** They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light or power, and to supply said city or town with water for fire protection, and with gas, water, light or power for other necessary public purposes, and to regulate and fix the rent or rate for water, gas, light or power; to regulate and fix the rents or rates of water, gas and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract. [22 G. A., ch. 11, § 2; 22 G. A., ch. 16, § 1; C. '73, §§ 473, 475.]

The exclusive right having been granted to a water company to furnish water within the state for forty years with the stipulation that after the expiration of a certain period the rate for supplying private consumers might be adjusted by arbitration, *held*, that the provision as to adjustment by arbitration was void and that the council might by ordinance fix the rate, which rate however must be reasonable: *Des Moines v. Des Moines Water Works Co.*, 64 N. W., 269.

An ordinance giving a company the exclusive privilege for forty years of furnishing water to a city at a fixed rate without power of adjustment in the interests of the public would probably be invalid as in excess of the powers of the city: *Ibid.*

An ordinance giving an exclusive privilege to furnish water for a fixed period with conditions as to rates is binding on the company with reference to territory afterward annexed to the city: *Ibid.*

A contract authorizing a company to collect specified rates or reasonable rates that may be established by the grantee and approved by council, *held* not to preclude regulation of rates by the council and therefore not invalid: *Creston Waterworks Co. v. Creston*, 70 N. W., 729.

SEC. **726. Bonds.** Bonds issued under the provisions of this chapter shall mature in not more than twenty years, be in sums of not less than one hundred nor more than one thousand dollars each, and bear interest at a rate not exceeding six per cent. per annum, payable annually or semi-annually.

SEC. **727. Public library.** Cities and towns shall have power to provide for the formation and maintenance of a free public library, open to the use of all the inhabitants, under proper regulations, and may purchase land and erect buildings, or hire buildings or rooms, suitable for that purpose, and provide for the compensation of the necessary employes; may receive, hold or dispose of any and all gifts, donations, devises and bequests that may be made to them for the purpose of establishing, increasing or improving any such library; and the council may apply the profits, proceeds, interest and rents accruing therefrom in such manner as will best promote the prosperity and utility of such library; but no money can be appropriated for such purpose until the electors of such city or town shall, at a general or special election, have voted for the establishment of such library. [C. '73, § 461.]

SEC. **728. Library trustees.** In any city or town in which a free library has been established, there shall be a board of library trustees, consisting of nine members, to be appointed by the mayor, by and with the approval of the council. Of said trustees first appointed, one-third shall hold office for two, one-third for four, and one-third for six, years, from the first day of July following their appointment; and, at their first meeting, shall cast lots for the respective terms, reporting the result of such lot to the council. Biennially thereafter, before the first day of July, the mayor shall appoint, by and with the approval of the council, three trustees to succeed the trustees retiring on the following first day of July, each of whom shall hold office for six years from such first day of July, and until

his successor is appointed and qualified. Vacancies occurring in the board shall be filled by appointment by the mayor, such appointees to fill out the unexpired term for which the appointment is made. *Bona fide* citizens and residents of the city or town, male or female, over the age of twenty-one years, are alone eligible to membership. The removal of any trustee permanently from the city shall render his office as a trustee vacant. Members of said board shall receive no compensation for their services. [25 G. A., ch. 41, § 1.]

SEC. **729. Powers.** Said board of library trustees shall have and exercise the following powers: To meet and organize by the election of one of their number as president of the board, and by the election of a secretary and such other officers as the board may deem necessary; to have charge, control and supervision of the public library, its appurtenances and fixtures, and rooms containing the same, directing and controlling all the affairs of such library; to employ a librarian, such assistants and employes as may be necessary for the proper management of said library, and fix their compensation; but, prior to such employment, the compensation of such librarian, assistants and employes shall be fixed for the term of employment by a majority of the members of said board voting in favor thereof; to remove such librarian, assistants or employes by a vote of two-thirds of such board for misdemeanor, incompetency or inattention to the duties of such employment; to select and make purchases of books, pamphlets, magazines, periodicals, papers, maps, journals, furniture, fixtures, stationery and supplies for such library; to make and adopt, amend, modify or repeal by-laws, rules and regulations, not inconsistent with law, for the care, use, government and management of such library and the business of said board, fixing and enforcing penalties for the violation thereof; and to have exclusive control of the expenditures of all taxes levied for library purposes as provided by law, and of all other moneys belonging to the library fund. Said board shall keep a record of its proceedings. [26 G. A., ch. 50, § 1; 25 G. A., ch. 41, § 2.]

SEC. **730. Library fund.** All moneys received and set apart for the maintenance of such library shall be deposited in the treasury of such city or town to the credit of the library fund, and shall be kept by the treasurer separate and apart from all other moneys, and paid out upon the orders of the board of trustees, signed by its president and secretary. [25 G. A., ch. 41, § 3.]

SEC. **731. Report.** Said board of trustees shall each year make to the council a report for the year ending December thirty-first, a statement of the condition of the library, the number of books added thereto, the number circulated, the number not returned or lost, the amount of fines collected, and the amount of money expended in the maintenance thereof during such year, together with such further information as it may deem important. [Same, § 5.]

SEC. **732. Library tax.** The board of trustees shall, before the first day of August in each year, determine and fix the amount or rate, not exceeding one mill on the dollar in cities of the first class having a population of twenty-five thousand or over, and not exceeding two mills on the dollar in cities of the second class and in towns, of the taxable valuation of such city or town, to be levied, collected and appropriated for the ensuing year for the maintenance of such library; and in cities of the first class, having a population of twenty-five thousand or over, also the amount or rate, not exceeding three mills on the dollar of the taxable valuation of such city, to be levied, collected and appropriated for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness; and shall cause the same to be certified to the city council, which

shall levy the tax for each of said purposes so determined and fixed, and certify the per cent. thereof to the county auditor, with the other taxes for said year. [26 G. A., ch. 50, § 2; 25 G. A., ch. 41, § 4.]

SEC. **733. Infirmary—out-door relief.** Cities of the first class shall have the power to establish and maintain, either within or without the limits of the city, an infirmary for the accommodation of the poor of the city, and to provide for the distribution of outdoor relief. [C. '73, § 538; R., § 1111.]

SEC. **734. House of refuge—workhouse.** Cities shall have power to establish and maintain, either within their limits or within the county in which they are situated, a house of refuge, or a house of correction and a workhouse, or either of them, and place the same under the management and control of such doctors, superintendents and other officers as the council may by ordinance provide. Persons sentenced for violation of any ordinance, if children under sixteen years of age, may be committed to the city house of refuge, if there be one; if over sixteen years of age, to the house of correction and workhouse. [C. '73, § 539; R., § 1112.]

SEC. **735. Jail—station-house.** Cities and towns shall have power to erect, establish and maintain a city jail, which shall be in the keeping of the marshal, under such rules and regulations as the council shall provide. Any city or town shall have the right to use the jail of the county for the confinement of such persons as may be liable to imprisonment under the ordinances of such city or town, but it shall be liable to the county for the cost of keeping such prisoners. Cities of the first class shall have power to erect, lease, establish and maintain station-houses for the detention of persons arrested, which shall be under the control of the marshal. [19 G. A., ch. 154, § 1; C. '73, §§ 485, 542; R., § 1116.]

SEC. **736. Contracts for public works — protection of subcontractors.** Cities and towns shall have power to provide by ordinance, or by provisions in contracts for any work of public improvement, that the contractor shall, before receiving certificates or payment therefor, furnish the council, or board of public works, as the case may be, vouchers showing that all subcontractors and workmen who have furnished materials for or performed labor upon such improvement have been fully paid for such materials or labor.

SEC. **737. Plumbing—inspector.** They shall have power by ordinance to prescribe rules and regulations for all plumbing connecting any building with sewers, and may prescribe the kind and size of materials to be used in such plumbing, and the manner in which the same shall be done; and to appoint an inspector thereof, and define his duties and powers; and to prescribe penalties for the violation of such ordinance. Nothing herein shall be construed as authorizing the annulment of any rules or regulations relating to such plumbing made by the local or state board of health, but such ordinance shall conform to and enforce the same. [26 G. A., ch. 14.]

SEC. **738. Sewers in towns and smaller cities.** Cities having less than five thousand population, and incorporated towns, shall have power to construct sewers or tile drains along streets and alleys therein, and to levy special taxes for the same against abutting property and the owners thereof, whenever the resident owners of a majority of the linear front feet of the property subject to such assessment petition therefor. If the assessment is made against property on one side of the street or alley only, the sewer or drain shall be built on that side, and such property shall be entitled to the benefits thereof, but if made against property on both sides of the street or alley the same shall be so built and located as to be of the greatest benefit to all the property assessed therefor. [26 G. A., ch. 7, §§ 1, 2.]

SEC. **739. Regulations as to construction and use.** All owners of property assessed for such sewers or drains shall have the free use thereof,

under reasonable rules and regulations adopted by the city or town. Such city or town shall have power to regulate by ordinance the size, kind and manner of construction of any such sewer or drain, and to provide the terms and conditions under which the property not taxed therefor may have the benefit of the same. The method of assessment, levy, collection and payment of such special taxes shall be the same as in cities of over five thousand population, except that such tax shall not exceed one dollar per linear foot. The cost of constructing sewers and drains in excess of one dollar per linear foot, and across intersecting streets and alleys, shall be paid from the general fund. [Same, §§ 3–6.]

SEC. **740. Taking property by gift or bequest.** Counties, cities, towns and other municipalities are authorized to take and hold property, real and personal, derived by gifts and bequests; and when made for the establishing of institutions of learning or benevolence, and there is no provision made in the gift or bequest for the execution of the trust, the court having charge of the probate proceedings in the county shall appoint three trustees, residents of said county, who shall have charge and control the same, and who shall continue to act until removed by the court. And they shall give bond as required in case of executors, to be approved in the same manner as in case of executors' bonds, and said trustees shall be subject to the orders of said court. [26 G. A., ch. 20.]

A devise to a city may be valid although the purpose is one for which it is not authorized to levy taxes, if it is a purpose within the scope of its authority: *Phillips v. Harrow*, 61 N. W., 434.

SEC. **741. Use of barbed wire.** Cities and towns may, by ordinance, prohibit the use of barbed wire to inclose in whole or in part any lot or lots within the incorporate limits thereof, and to provide for the removal of such wire. [26 G. A., ch. 17.]

CHAPTER 5.

OF THE PURCHASE AND CONSTRUCTION OF WATER WORKS.

SECTION **742. Tax—sinking fund.** Cities of the first class shall have power to levy, in addition to the regular water tax authorized by law, a tax of two mills upon the dollar upon all the property within the corporate limits of said cities, excepting lots greater than ten acres in area, used for horticultural or agricultural purposes, for the purpose of creating a sinking fund, to be used as provided in this chapter for the purchase or erection of water works in such cities. The proceeds of such two-mill levy shall be deposited in one or more solvent banks or trust companies of the city making such levy, at a rate of interest not less than four per cent. per annum, compounded semiannually, and payable, principal and interest, on demand, after sixty days' notice in writing. The city treasurer depositing the proceeds of such tax shall exact from the bank or trust company wherein such money is deposited a satisfactory bond, payable to the city, to be approved by the treasurer and mayor of such city, and to be filed in the office of the city treasurer. [26 G. A., ch. 1, § 1.]

SEC. **743. Diversion of fund.** Any member of the city council, or any officer of any city levying and collecting taxes under the provisions of this chapter, who shall in any manner participate in or advise the diversion of any part of said tax to any other purpose than that provided for in this chapter, shall be deemed guilty of the crime of embezzlement, and shall be punished accordingly. [Same, § 2.]

SEC. **744. Purchase or erection.** Cities of the first class are hereby authorized to purchase or erect water works, under the provisions of this chapter, for the purpose of supplying said cities and the inhabitants thereof with water, and are authorized to continue the levy of the two-mill tax herein provided for until the purchase price, principal and interest, or the cost incurred in the erection of said works, is fully paid and discharged. [Same, § 3.]

SEC. **745. Contracts—bonds.** Cities levying such sinking fund tax are hereby authorized to contract for the purchase or erection of water works, and, upon the approval and adoption of such contract as hereinafter provided, to apply such sinking fund upon the cost thereof, and are authorized to pledge the proceeds of the continuing two-mill levy provided for in this chapter, and the regular water levy, and the net revenues derived from the operation of the water works, and shall have the right to mortgage or bond such works, to secure the payment of the purchase price or the cost of constructing such water works; but no part of the general fund of such city shall be applied upon such contracts, bonds or mortgage. In the payment thereof, the city and holders of said contracts, bonds or mortgages shall be restricted to the proceeds of the said taxes and the net revenues of the said water works, as hereinbefore provided; and such contract or bonds shall not bear a higher rate of interest than five per cent. per annum, payable semiannually. [Same, § 4.]

SEC. **746. Question submitted.** Said contract shall not be binding upon said city until the same shall have been approved by the city council at a regular meeting, or a special meeting called for such purpose, and shall have been adopted by a majority of the electors of said city voting at a special election, which shall have been duly called after thirty days' notice by said city. The proposition to be submitted at said election, and the form of ballot, shall be: "Shall the contract approved by the city council in relation to the water works be adopted?" The proposition shall be printed and placed on the ballots, and the voter shall designate his choice, and the election shall be conducted, in the manner provided in the chapter on elections. [Same, § 5.]

SEC. **747. Trustees.** The water works purchased or erected by such city shall be managed and operated by a board of water works trustees, which shall be composed of three electors, appointed for the term of six years by the district court of the county wherein such city is located. Upon the approval of the contract for the purchase or erection of water works by such city, the mayor of the city shall apply, within ten days thereafter, to the said district court for the appointment of such board of water works trustees, the first appointees thereto to hold office for the following terms, namely: One for two years, one for four years and one for six years. All vacancies occurring on such board, occasioned by expiration of term, by death, resignation or removal, shall be filled by appointment of the district court, upon application made by the mayor of such city. The appointment of such board shall be approved by a majority of the judges presiding over such district court. The compensation of the members of such board of trustees shall be fixed, upon the application of such board, by said district court, in such amounts as the court may deem reasonable and proper, and shall not be changed more frequently than once in two years. The district court shall require such trustees to execute to said city good and sufficient bonds, to be approved by said court, and, when executed and approved, to be filed and kept with the city treasurer. All such trustees shall be subject to removal by the district court for malfeasance in office. [Same, §§ 6, 7, 12.]

SEC. **748. Powers.** The said board of trustees shall have the power to carry into execution the contract for the purchase or erection of such water works, and to employ a superintendent and such other employes as

may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employes as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duty, such bonds to run in the name of the city and to be filed with the city treasurer and kept in his office. [Same, §§ 8, 9.]

SEC. **749. Fixing rates.** The said board of water works trustees shall from time to time fix the water rentals or rates to be charged for the furnishing of water, and such rates shall be sufficient, together with the proceeds of the five-mill water levy and the sinking fund levy of two mills, for the maintenance and operation of such works, the proper and necessary extension thereof, for all repairs, and for the payment of the purchase money or cost, principal and interest, incurred in the purchase or erection of such works, as the same falls due, according to the tenor of the mortgage and bonds given to secure the payment of such purchase price or cost. The said board of water works trustees shall make out and file in the office of the city clerk quarterly statements, giving full and complete reports of the receipts and disbursements handled and disbursed by them in the administration of their trust; such reports to be filed on the second Monday of January, April, July and October for the quarters preceding the first days of said months. Such reports shall be audited by the board of public works of such city. In the event, however, that said city may not have a board of public works, such reports shall be audited by the city council. [Same, §§ 10, 11.]

SEC. **750. Additional.** The powers conferred by this chapter are in addition to the powers elsewhere granted in this code in respect to water works.

CHAPTER 6.

OF STREETS AND PUBLIC GROUNDS.

SECTION **751. Establishment—improvement.** Cities and towns shall have power to establish, lay off, open, widen, straighten, narrow, vacate, extend, improve and repair streets, highways, avenues, alleys, public grounds, wharfs, landings and market places within their limits; but no street, avenue, highway, or alley which shall hereafter be dedicated to public use by the proprietor of the ground in any municipal corporation shall be deemed a public street, avenue, highway, or alley, or be under the use or control of such municipality, unless the dedication shall be accepted and confirmed by an ordinance or resolution specially passed for such purpose. The expenses of such repairs and improvements may be paid from the general fund, or from the highway or poll taxes of such cities or towns, or partly from each of such funds. [20 G. A., ch. 20, § 1; 18 G. A., ch. 96, § 1; 15 G. A., ch 6; 15 G. A., ch. 51, § 5; C. '73, §§ 464–5, 527; R., §§ 1064, 1095.]

Use of streets and public grounds; Wharfage: The streets of a city are fairly subject to use for many purposes to which a highway in the country would not be, and a street adjoining a navigable river may properly be used for the purpose of a wharf: *Haight v. Keokuk*, 4–199.

A paved street, terminating at the water's edge, at which boats can moor for loading and unloading, may constitute a wharf: *Keokuk v. Keokuk N. L. Packet Co.*, 45–196.

A city may establish wharves and provide that fees be paid for the use thereof, and in the exercise of this police power may designate the place where the boats shall receive and discharge freight and passengers: *Ibid.; Muscatine v. Keokuk N. L. Packet Co.*, 45–185.

Such regulations are not in conflict with the provisions of the constiutution of the United States with reference to commerce: *Ibid.*

An ordinance providing a charge for the landing of boats at places within the city limits where there are no wharves may be sustained in order to prevent boats from discharging and receiving freight where no wharves have been constructed, to the inconvenience of shippers and consignees: *Keokuk v. Keokuk N. L. Packet Co.*, 45-196.

Such provisions may be made applicable to the landing of boats within the city limits, even upon the the premises of the owner: *Dubuque v. Stout*, 32-47; *Dubuque v. Stout*, 32-80.

But the right to collect wharfage must follow and not precede the establishment of wharves: *Dubuque v. Stout*, 32-47; *Muscatine v. Hershey*, 18-39.

Where the ordinance fixes the fees to be paid by boats using the city wharves, such fees can be recovered unless it is shown that the charges are beyond the limit of just compensation: *Keokuk v. Keokuk N. L. Packet Co.*, 45-196.

But the person using the public wharves does not become liable to compensation therefor unless the rates of compensation have been fixed: *Muscatine v. Keokuk N. L. Packet Co.*, 45-185.

The erection of a wharf must be presumed to have been made for the use and benefit of the public, like the paving of a street or other public improvement, unless the contrary is shown: *Ibid.*

Where the city has permitted the erection and use for years of a private wharf, it cannot without compensation to the owner appropriate the benefits of such wharf by demanding wharfage from boats landing thereat: *Grant v. Davenport*, 18-179.

A riparian proprietor outside of the corporation limits may erect a wharf on the shore of a navigable stream, conforming to state regulations, if any, and without obstruction to navigation. But within the corporation limits the city has the paramount right in this respect, and may regulate, but not destroy, a private wharf: *Ibid.*

Location of streets: The action of a city council, in determining whether the location of a street is demanded by the public interest, cannot be questioned by judicial proceedings: *Cherokee v. Sioux City & I. F. Town Lot, etc., Co.*, 52-279.

Diversion of travel from other streets cannot be taken into consideration in estimating the damage to property from the opening of a street: *Ibid.*

The fact that a city has power to open and vacate streets will not render it liable for failure to keep a street open and in repair, whereby travel is diverted from a ferry outside of the city limits: *Prosser v. Ottumwa*, 42-509.

The power of the state to establish highways within the limits of cities or incorporated towns is not vested in the board of supervisors: *Gallaher v. Head*, 72-173.

After the passage of an ordinance by a town council establishing a street or avenue it will be presumed that it was established for public use as such, but the presumption may be overcome by proofs sufficient to show the facts otherwise; and where the real purpose was to furnish a right of way for a railroad, *held*, that it would not be considered an appropriation for "public purposes" within the meaning of the law as to the authority of the council in such cases: *Strahan v. Malvern*, 77-454.

Where a tract of land was laid out into lots with streets and a public square, but never opened to the public, and was subjected to taxation according to government subdivisions without regard to the dedication to public use, *held*, that the city was estopped from setting up any claim, under such dedication, to the streets and the square after adverse possession thereof for the statutory period: *Smith v. Osage*, 80-84.

In an action to recover for land sold to defendant town for the location of an avenue, where defendant claimed that the purchase of the land was the result of a fraudulent conspiracy between plaintiff and the council of the defendant town to indirectly secure a right of way for a railroad under a pretense of establishing an avenue, *held*, that the fact that the railroad company was endeavoring to obtain the right of way at the time was proper for consideration, and the record of condemnation proceedings, although the awards had not been paid, were competent to show that fact: *Strahan v. Malvern*, 77-454.

The action of the council in condemning property for a street can be tested by *certiorari* and therefore an injunction will not lie to restrain the opening of the street thus located: *Rockwell v. Bowers*, 88-88.

It is within the discretion of the city council to determine when or at what places street crossings shall be constructed and that discretion cannot be controlled as to the direction or location of a crossing by a property owner: *Brown v. Barstow*, 87-344.

It is competent for a city to extend a street through the depot grounds of a railroad company, under proceedings for condemnation: *Chicago, M. & St. P. R. Co. v. Starkweather*, 66 N. W., 87.

Change: Where the street had been improved and planted with trees in accordance with lines recognized by the city authorities, *held*, that its officers might be restrained from making a change in the line of such street which would result in the destruction of such trees and other improvements: *Delashmutt v. Oskaloosa*, 62 N. W., 16.

Vacation: The city council has authority to vacate streets and alleys, and may exercise such power simply by the enactment of an ordinance calculated to effect that object: *Dempsey v. Burlington*, 66-687.

The city council has the power to divert the ground covered by an alley which is vacated from a public to a private use by granting it to a private individual: *Ibid.*

Upon the vacation of a street by the city the title does not revert to the grantor: *Day v. Schroeder*, 46-546; *Pettingill v. Devin*, 35-344, 355.

The city council may vacate an alley for the purpose of allowing it to be devoted to a private use, if the power is in other respects

rightfully exercised, and no private rights are injuriously affected: *Marshalltown v. Forney*, 61–578.

Where the power to vacate streets is wisely and discreetly used, its exercise will not be restrained at the suit of a private individual claiming to be injured: *Gray v. Iowa Land Co.*, 26–387.

It seems that the general assembly may authorize a city to vacate streets, although under its charter as existing at the time of dedication of the streets no such power existed. It is doubtful, at least, if a property owner can have such vested interest in streets as to prevent such vacation: *Stubenrauch v. Neyenesch*, 54–567.

Action of the city council in vacating streets cannot be interfered with by proceedings in equity. *Certiorari* is the proper remedy: *Ibid; Rockwell v. Bowers*, 88–88.

The burden is upon the plaintiff seeking to enjoin the vacation of a street to prove that he had rights at the time the street was vacated which were abridged by such vacation: *Sawyer v. Meyer*, 45–152.

A city having authority to vacate streets cannot be made to respond in damages for injuries resulting therefrom to an adjoining property owner: *Barr v. Oskaloosa*, 45–275.

The vacation of a street is not such taking of private property as to entitle a property owner to compensation for any loss resulting therefrom: *Ibid.*

The power to vacate streets being vested in the city, it can be exercised only by the council or trustees; parol evidence of abandonment is not competent: *Lathrop v. Central Iowa R. Co.*, 69–105.

The power to narrow or widen or vacate a street is practically unlimited when it is exercised for the public good, but it cannot be arbitrarily exercised and is subject to equitable control. However, an abutting lot owner cannot upon slight grounds prevent the accomplishment of that which is a material benefit to the public, and the decision of the city council will ordinarily be conclusive as to the question whether the vacation of a street is for the public good. In a particular case, *held*, that the damage to abutting property owners was not such as to justify overruling the action of the city council: *Williams v. Carey*, 73–194.

The proper steps having been taken for vacation of streets by owners of property in a plat (as contemplated by § 918) such vacation becomes effective as against the city, subject only to the judicial determination as to whether the rights of private persons are affected. The city council cannot by subsequently directing such street to be opened, affect the validity of such vacation: *Conner v. Iowa City*, 66–419.

The fact that the vacation of a portion of a plat will close streets therein, and thus abridge the number of ways of access to the property of the proprietor of another portion of the plat, will not be ground for objecting to such vacation, if one or more ways are left, reasonably convenient, so that no substantial right is abridged: *Lorenzen v. Preston*, 53–580.

Diversion: As to diversion of streets or public grounds another use, see notes to § 880.

Abandonment of streets: A city cannot authorize streets dedicated to public use to be closed. This can only be done lawfully after they are vacated in the manner prescribed by law. The fact that, after dedication is made, the public does not use the streets, does not of itself authorize the party making the dedication to resume possession of the land: *Prince v. McCoy*, 40–533.

If streets are in such condition that they are incapable of use, an injunction cannot be maintained by one who has no other right than as one of the general public to prevent them from being temporarily inclosed for private purposes: *Ibid.*

Where plaintiff had held possession of property for thirty years under claim of right, and the city had made no attempt or claim to occupy the same as a street, *held*, that any right of the city to use the property for a street must be regarded as abandoned: *Simplot v. Dubuque*, 49–630.

The severance of a portion of the territory of a city, it would seem, would operate as an extinguishment of the rights of the corporation in the streets and alleys: *McKean v. Mt. Vernon*, 51–306.

The city council may authorize the laying of a railway track along an alley in accordance with statutory authority, although the effect thereof may be close the alley for other purposes: *Heath v. Des Moines & St. L. R. Co.*, 61–11.

As to title to streets, dedication, abandonment, etc., see notes to § 917; also notes to § 1410.

Improvements: A special assessment for street improvements is not a tax "for any city purpose" although it is levied under the general power to levy taxes: *Farwell v. Des Moines Brick Mfg. Co.*, 66 N. W., 176.

In general as to street improvements, see chapter 7.

SEC. **752. Width of street.** They shall have power to provide that the width of all streets, highways, avenues and alleys of all additions to any city or town shall conform to the width of the existing streets, highways, avenues and alleys of such cities and towns. [22 G. A., ch. 16, § 1.]

SEC. **753. Supervision—repair.** They shall have the care, supervision and control of all public highways, streets, avenues, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances. [C. '73, § 527; R., § 1095.]

Road taxes in city limits: Property within city limits is not subject to taxation by township trustees for highway purposes: *Marks v. Woodbury County*, 47–452; *Hawley v. Hoops*, 12–506.

Township trustees cannot include an in

corporated town in a road district (see § 753), and a road supervisor has no authority over its streets. For an accident resulting from acts of such supervisor in repairing such streets the town is liable: *Clark v. Epworth*, 56–462.

As to highway poll tax in cities and towns, see § 891.

Liability for failure to repair: Being clothed with the power to establish and keep in repair its streets, the exercise of such power is not discretionary, and a city is liable to an action for damages resulting from an injury caused by a failure in that respect, as, for instance, by reason of an obstruction from snow and ice: *Collins v. Council Bluffs*, 32–324; or by reason of an obstruction upon the sidewalk placed there by the adjoining owner: *Rowell v. Williams*, 29–210.

Further as to sidewalks, see below in this note.

Where the city makes improvements and property owners build, etc., with reference thereto, the city is liable for neglect to keep such improvements in repair, although they would not be liable originally for not making the improvements. So *held* in case of damages from the obstruction of a sewer: *Powers v. Council Bluffs*, 50–197.

A city is liable for injuries received by reason of a hole in its street of which the street commissioner has been notified prior to the injury: *Case v. Waverly*, 36–545.

The fact that the municipal corporation has no funds with which to make repairs, and that it is indebted beyond the constitutional limit, is no defense in an action against such city for damages received from defects in its sidewalks: *Rice v. Des Moines*, 40–638.

The question being whether the street commissioner had authority to make certain repairs, and use therein material for which the city should become liable, *held*, that there was an issue as to whether or not the city had authorized the repair in which the material was used, and it was for the jury to say whether the resolutions in regard to repairs related to those in question, or to those previously made: *Kemper v. Burlington*, 81–354.

In an action by the owner of rock which had rolled and fallen from his quarry upon the streets of a city, and which had been used by the city in making repairs on the streets, for the value of such material, *held*, that if the material was used upon the streets, not merely by way of abatement of the obstruction, but also for the betterment of the road, the city would be liable for the value of the material, less the cost of removal: *Ibid.*

In such case, *held*, that the jury were properly charged that the city had the right to the whole width of its streets, and was chargeable with the duty of keeping the same in good repair and reasonable condition, and had the right to remove any rock or material found upon any part of its streets and put there without its authority: *Ibid.*

Also *held*, that plaintiff was not entitled to recover anything for rock or material which could be shown to have been abandoned by him: *Ibid.*

The city is not liable for accidents not to be anticipated in the ordinary use of a bridge: *McClain v. Garden Grove*, 83–235.

As to damages from grading, defective drainage, surface water, etc., see notes to § 782.

Failure to make improvements: A city cannot obligate itself by contract to make an improvement which it has a right to make, nor render itself liable in damages for failure to make it, except in so far as it is necessary to make contracts and incur liabilities in the prosecution of the work: *Stewart v. Council Bluffs*, 50–668; *S. C.*, 58–642.

Negligence in making improvements: Where a municipal corporation has authority to make improvements in streets it is liable for damages occasioned by the improper and negligent manner in which such power is executed; *Wallace v. Muscatine*, 4 G. Gr., 373.

Where the city in making an improvement in front of the property of an abutting owner, does so in a negligent and unskillful manner, he may recover damages for injury occasioned thereby, but cannot treat the construction as a nuisance and proceed to abate it by his own acts: *McGregor v. Boyle*, 34–268.

Where a city makes improvements creating a necessity for a culvert, it would be guilty of negligence in failing to provide such culvert, and in doing so it must exercise reasonable care, judgment and skill in its construction: *Van Pelt v. Davenport*, 42 308.

The fact that the money for the making of an improvement was appropriated by the county will not release the city making the improvement from liability therefor: *Ibid.*

While the city has power to change the grade of streets, thereby reducing or elevating their natural surface, yet if in making such change it is negligent, so that adjacent lots are injured, the city is liable for damages: *Hendershott v. Ottumwa*, 46–658.

Therefore, *held*, that where, in raising the grade of a street by making an embankment, the earth deposited for that purpose rolled upon an adjoining lot, the city was liable: *Ibid.*

Allowing a water company to lay its mains will not render the city liable for damages to premises from water caused by the filling up of a ditch by such water company, the granting of such privilege not being in itself negligence: *Ross v. Clinton*, 46–606.

A party cannot recover damages caused to his property by the act of the city in diverting a stream of water against it, if he might, by ordinary diligence and at a moderate expense, have prevented the damage: *Hoehl v. Muscatine*, 57–444; *Fulleam v. Muscatine*, 57–457.

The party suffering injury from water by reason of erecting his building where a stream of water has been flowing for ten years cannot recover for injury to his building from such stream, whether he has ever consented to the flow of the stream or not: *Hoehl v. Muscatine*, 57–444.

Where negligent and reckless driving over a street that is out of repair causes an injury the driving is deemed the proximate cause and the city will not be liable for dam-

ages resulting: *De Camp v. Sioux City*, 74–392.

The township trustees cannot include an incorporated town in a road district, and the road supervisor has no authority over its streets. For an accident resulting from acts of such supervisor in repairing such streets the town is liable: *Clark v. Epworth*, 56–462.

Acts or negligence of officers: A municipal corporation is liable for the malfeasance or neglect of its agents in the construction of public works on the same principle that a natural person is liable for damages resulting from his carelessness, unskillfulness or wrongdoing: *Templin v. Iowa City*, 14–59; *Cotes v. Davenport*, 9–227.

If by mistake or error of judgment on the part of the proper officers who are competent and act in good faith an improvement is made in such manner that injury results therefrom the city will not be held responsible therefor: *Van Pelt v. Davenport*, 42–308.

Although the city acts through its officers in making improvements, and is bound by their negligence, yet it is not liable for a mere mistake or error of judgment in making an improvement, if reasonable skill, prudence and care be exercised; but it may be liable for negligence in allowing an obstruction to remain after it has been shown to be such: *Powers v. Council Bluffs*, 50–197.

The instruction that in constructing culverts, sewers, etc., a municipal corporation is only required to use ordinary care, and that if the city had an engineer competent to take charge of the work, and he planned the sewers, etc., and honestly believed them to be of sufficient capacity, the city would not be liable for mistakes therein, *held*, properly refused where there was no evidence to support it: *Parker v. Des Moines*, 53–679.

Where a municipal corporation is vested with full power to construct an improvement, and its location or the general plan adopted is within the exclusive control of the municipality, it cannot be held liable for improper exercise of judgment in the execution of the plan: *Wicks v. De Witt*, 54–130.

Where a municipal corporation in exercising the right to grade, protect and improve its streets and construct necessary bridges, etc., acts in good faith in the adoption of plans of skillful and competent engineers and workmen, it is not liable for an unforeseen and unexpected damage resulting from the diversion of a stream by reason of such improvement, where such damage results notwithstanding the exercise of reasonable caution, prudence and skill: *Fulleam v. Muscatine*, 57–457.

Proof of a custom in a certain city of barricading excavations in the streets in any particular manner is not receivable for the purpose of showing or rebutting negligence in the particular case. A custom will not render it necessary for the city to do more, nor excuse it for doing less, than is required in the exercise of ordinary care: *Koester v. Ottumwa*, 34–41.

A municipal corporation is not liable beyond the actual damage caused by its negligence. Exemplary, punitive or speculative damages cannot be given: *Collins v. Council Bluffs*, 35–432.

Obstructions: Where an obstruction from which an injury results is not the mere result of a defect, but is an object entirely foreign to the street itself, the duty of the city is, if it allows such obstruction to remain at all, to see that it is kept in such a situation as that the safety of travelers on the street is not endangered by it; and the fact that at the time the obstruction is first placed on the street it is sufficiently protected will not relieve the city from liability for an injury resulting from a change in the situation, although such change is not known to the city authorities: *Duffy v. Dubuque*, 63–171.

It is doubtful whether, under any circumstances, a village street should, in law, be regarded as obstructed by vehicles left by farmers along the sides of the street, where their teams are fed. At any rate, a sleigh standing for fifteen minutes at the side of the street, for the purpose of unloading goods, ought not to be regarded as such obstruction: *Sikes v. Manchester*, 59–65.

Adjacent property owners cannot maintain an action for injunction to prevent the city from changing the bed of a stream so as to make it run, in a part of its course, along a street, it not appearing that the work permanently obstructs the street: *McMahon v. Council Bluffs*, 12–268.

In an action for damages sustained by reason of injuries to a horse caused by an obstruction in the street, *held*, that it was proper to show that the origin and cause of the obstruction was the negligent construction of a culvert, that it might be determined whether defendant was negligent or not: *Hazard v. Council Bluffs*, 79–106.

Unlawful use of streets: The city is responsible for the use of its streets, and liable in damages for injuries resulting from an unlawful use thereof by it, although the council or officers, in permitting such use, did an unlawful act: *Stanley v. Davenport*, 54–463.

Obstruction of streets: Under an ordinance giving the cars of a street railway precedence over other vehicles, and providing that any person unnecessarily obstructing the running of such cars should be punished by fine, *held*, that where there was no impediment to the removal of a vehicle from the track of a street railway, the owner, failing to remove it, and thereby impeding the running of a car, was subject to a fine, although such removal would cause him inconvenience and the obstruction was intended to be but for a few moments: *State v. Foley*, 31–527.

The city council may require the removal of scales erected in the street for the purpose of carrying on a private business: *Emerson v. Babcock*, 66–257.

The council of a city or town may, under reasonable restrictions, authorize private parties to erect scales in a street whereby the public convenience will be served: *Spencer v. Andrew*, 82–14.

Under the jurisdiction which the council has over the streets, they may require the removal of a hedge which is within the limits of the street even though it does not interfere with public travel: *Philbrick v. University Place*, 88–354.

Shade trees which do not obstruct the

street are not to be removed in opposition to the wishes of the adjoining owner: *Everett v. Council Bluffs*, 46 66. And see § 1556 and notes.

Dangers adjoining streets: It is the duty of a municipal corporation to protect travelers against passing from its streets into dangers and obstructions, and it is a question for the jury to determine whether the defect or obstruction is so near the highway as to be dangerous to persons traveling thereon: *Manderschid v. Dubuque*, 29–73. And see *Blivens v. Sioux City*, 85–346.

Where children playing in a sand pit adjacent to the street were injured by the caving in of the bank, *held*, that the city was not liable unless the situation of the sand pit in such close proximity to the street and the condition of the pit as to its extent and all the surroundings were such as to require the authorities in the exercise of reasonable diligence to anticipate that children might be allured to the pit from the street for the purposes of play, and be thereby injured: *Talty v. Atlantic*, 92–135; *Hawley v. Atlantic*, 92–172.

The question whether the pit where the accident occurred was in the street or adjacent to it would not in such case be controlling. There might be liability although the accident happened outside the limits of the street. It would depend upon the situation of the pit with reference to the street, its extent and other circumstances: *Ibid.*

A city will be liable for injuries to one using the walk by reason of an excavation near a street crossing rendering the crossing unsafe and dangerous: *Hall v. Manson*, 68 N. W., 922.

Approaches to street: A city is not bound to provide a safe way, or any way, by which streets may be entered from private property; and where plaintiff was injured in passing along a private way on to a street where an excavation had been made, *held*, that the city was not liable: *Goodin v. Des Moines*, 55–67.

A person who is on the street in the ordinary course of business, although not passing along at the time, may recover for negligence of the city in allowing an obstruction thereon from which he receives an injury: *Duffy v. Dubuque*, 63–171.

So *held* where the person injured had stopped with one foot on the sidewalk and the other upon the ground of an adjoining lot for the purpose of procuring a drink from the hydrant: *Ibid.*

Defects in portion of the street not traveled: The liability of a city as to the safety of its streets exists not only as to the ordinary traveled part of such street, but also to the gutters and sidewalks; and where a city dug a ditch across a street, and constructed a bridge over the same, *held*, that it was not only liable for failure to keep the bridge in repair as far as built, but that it must afford a safe and convenient crossing for the ditch of the same width of the street: *Rusch v. Davenport*, 6–443.

If a street be opened for public travel for but a part of its width, and the other part is not in condition to be used by the public, the city will not be chargeable with negligence for failing to improve the whole of the street, or for accidents occurring to those attempting to use the part not improved; but where the whole street is open to use it is the duty of the city to keep it in a reasonably safe condition for the entire width, that is, from sidewalk to sidewalk: *Stafford v. Oskaloosa*, 57–748.

Where there is nothing in the character of the improvement upon a street to indicate that it is the intention of the city that travel shall be confined to a particular portion thereof, the city will not be relieved from the duty of keeping such street in repair for its entire width: *Stafford v. Oskaloosa*, 64–251.

Where a street is open for travel its entire width the city is bound to keep it in safe condition from sidewalk to sidewalk, and cannot by an excavation temporarily withdraw it from public use without using proper precaution to prevent travelers at night from driving thereon; and in an action for injuries resulting from the negligence of the city in leaving an excavation in the streets unprotected, it is not competent to show that there was no travel at the point where the excavation was made: *Crystal v. Des Moines*, 65-502.

The court is not prepared to say that it is the duty of the city to keep every street safe for travel throughout its entire width, regardless of its location, amount of travel and all other circumstances; and *held*, that the refusal of an instruction, that the law imposes on a municipal corporation the duty to keep its streets in a reasonably safe condition to the whole width of the street, was not error where the jury were instructed that if the street was not safe for persons passing over the same while using reasonable care, and the city had knowledge of the unsafe condition or should have had such knowledge, it was guilty of negligence: *Fulliam v. Muscatine*, 70–436.

Defects or obstructions in sidewalks: The city is liable for damages occasioned by injuries received by reason of an obstruction upon the sidewalk placed there by the adjoining property owner: *Rowell v. Williams*, 29–210.

It is the duty of the city to maintain its sidewalks in a reasonably safe condition, and this duty extends not merely to the street and sidewalk, but to things under its control endangering the safety of those using them: *Blivens v. Sioux City*, 85–346.

Damage from the falling of a bill-board which had been left in a defective and dangerous condition beside the sidewalk is an injury arising from the defect of the street or sidewalk, within the terms of § 3447 ¶ 1, requiring that action for such claims be brought within six months, unless notice be served upon the corporation within ninety days after the injury occurred: *Ibid.*

Whether a sudden change of level or steps between two portions of a sidewalk constitute such a defect as will entitle one injured thereby to recover is a question of fact under all the circumstances for the jury: *Patterson v. Council Bluffs*, 91–732.

The fact that a sidewalk is not constructed

in accordance with the requirements of the city ordinance is *prima facie* evidence of defective construction, while the fact that a sidewalk is constructed in accordance with such ordinance is *prima facie* evidence of care in its construction: *Smith v. Pella*, 86-236.

Where an injury results not merely from the dangerous and defective condition of the walk itself, but by reason of a defective scuttle covering constructed for private use of an adjoining property owner, either with or without the authority of the city, the property owner is liable for such injury: *Calder v. Smalley*, 66-219.

In such case it is immaterial that a tenant in possession of the premises has agreed with the owner thereof to keep the scuttle closed: *Ibid.*

The construction of ways in a sidewalk to the cellars of adjacent buildings is not necessarily negligence. If such ways are so constructed that when open they are sufficiently conspicuous to be seen by a pedestrian using the sidewalk, in the exercise of proper diligence, or are sufficiently lighted in the nighttime to disclose the danger to such person, it cannot be held that the mere omission to have barriers around them is *per se* evidence of negligence: *Day v. Mt. Pleasant*, 70-193.

In an action against a city for damages received from the existence of a cellar-way occupying a part of the sidewalk and left without railing, guard or protection. *held*, that the question whether the leaving of such cellar-way without other guard or protection than the door thereto was negligence was a question for the jury: *Ibid.*

Sidewalk constructed by property owner: An allegation in petition for the recovery of damages for injuries resulting from a defective sidewalk in which it is alleged that such sidewalk had been ordered and caused to be constructed by the corporation is sufficiently supported by proof that the work was done by the property owner. It is a fair presumption that it was done at least with the permission of the city: *Barnes v. Newton*, 46-567.

To hold a city liable for injuries received from a defective sidewalk it is not necessary to show by evidence that the city built the sidewalk or had assumed control over it: *Shannon v. Tama City*, 74-22.

Where a sidewalk is beside a public street it will be presumed that the city is liable for its condition: *Smith v. Des Moines*, 84-685.

Although a town may not be liable for failure to construct sidewalks, yet where it appears that a sidewalk has been constructed, the corporation becomes liable for failure to maintain it in repair, no matter by whom constructed: *Beazan v. Mason City*, 58-233.

Frequency of use: The liability of a municipal corporation for injury from a defective sidewalk should not be made dependent upon the probability or frequency of its use by persons not acquainted with its condition. The corporation is bound to maintain its sidewalks in a reasonably safe condition for the protection of such persons as may possibly use them contrary to such assumed probability: *Thomas v. Brooklyn*, 58-438.

Stepping off sidewalk: In determining whether the corporation was liable for injuries received from stepping off the sidewalk into a ditch, *held*, that the question was not whether the sidewalk was not reasonably safe for the traveling public, but whether, all things considered, it was reasonably safe for plaintiff at the time of the accident; and *held*, that under the circumstances the accident appeared to have been the result of want of ordinary care on the part of the plaintiff: *McLaury v. McGregor*, 54-717.

Difficulties: A city is charged with the duty of keeping its streets in reasonable repair, and the difficulties which may attend the performance of that duty will not relieve it from such performance: *Stafford v. Oskaloosa*, 64-251.

The extent of sidewalk in a city is not to be taken into consideration by the jury in deciding whether the city officer used proper diligence in removing the snow and ice: *Lindsay v. Des Moines*, 68-368.

Snow and ice: The duty to keep streets in repair requires the city to remove obstructions from deposits of snow. To repair means to restore to a good state after partial destruction. And *held*, that the city was liable for damages from an injury caused by snow and ice remaining upon a sidewalk after knowledge thereof by the proper officers of the city and sufficient opportunity to remove the same: *Collins v. Council Bluffs*, 32-324; *Huston v. Council Bluffs*, 69 N. W.. 1130.

The mere fact that a street is in a dangerous condition because of snow and ice rendering the walks and crossings slippery, due to the operation of natural causes, will not render the city liable, even if such snow and ice are not removed within a reasonable time. It is only when they are suffered to remain on the sidewalk in such an uneven and rounded form that a person cannot walk over it, while using due care, without danger of falling down, that such snow and ice constitute a defect for which the city is responsible: *Broburg v. Des Moines*, 63-523.

As to removal of snow and ice, see now § 781.

Evidence of former negligence: In an action against a city for negligence in permitting an obstruction in a street, *held*, that evidence that similar obstructions had often existed at the same place was admissible as showing the need of greater diligence on the part of the city: *Moore v. Burlington*, 49-136.

In such cases evidence may be introduced of such facts as tended to render the obstruction dangerous: *Ibid.*

It is the condition of the streets at the time of the injury which determines the city's liability; unsafe condition at a prior time cannot be shown to render it liable: *Cramer v. Burlington*, 42-315.

In an action to recover damages suffered by having stepped into an opening adjoining the sidewalk in the street, evidence that other parties had previously fallen into the same opening and that the adjoining property owner was aware of that fact is, under the previous rulings of this court, inadmissible for the purpose of holding such prop-

erty owner liable: *Mathews v. Cedar Rapids*, 80–459.

Evidence as to defective condition of the sidewalk prior to the injury is admissible when coupled with other evidence showing that the condition at the time of the injury was the same as that referred to by the witness: *Hunt v. Dubuque*, 65 N. W., 319.

Subsequent repairs: In an action for damages sustained from defect in a bridge, where the question is whether the bridge was a city bridge, and under the care and supervision of the city, evidence to show that the city reconstructed and repaired it after the injury occurred is not admissible to show the relation of the city to the bridge at the time of the injury: *Holmes v. Hamburg*, 47–348.

But a resolution of the council passed soon after the accident requiring repair of the walk in question is admissible as showing notice: *Butler v. Malvern*, 91–397.

The fact that a walk was repaired several months after the time of the alleged accident should not be admitted for the purpose of showing that it was probably defective at the time of such accident: *Parkhill v. Brighton*, 61–103.

Subsequent defective condition: Although the condition of a sidewalk soon after the accident, alleged to have been due to its defective condition, might be of such a character as to indicate that such condition had existed substantially at the time of the accident, yet, where the length of time intervening is such that evidence in respect to a subsequent defective condition would more probably lead to a wrong inference than a correct one, it ought not to be admitted: *Ibid.*

In an action to recover damages for injuries received from a defective sidewalk, it is improper to allow a witness who has no knowledge of the condition of the walk at the time of the accident to testify as to its condition afterwards: *Hoyt v. Des Moines*, 76–430.

In such case, *held*, also, that statements made by the sidewalk commissioner after the accident, when not acting officially or in the discharge of official duty, could not be shown for the purpose of proving knowledge on the part of the city of the defective condition: *Ibid.*

Evidence of a witness that he had fallen upon the same sidewalk from a defect therein, but was unable to state the exact place of the defect, *held* improperly admitted: *Ibid.*

Notice of defects: Evidence that a plank in a sidewalk was at various times out of place, *held* sufficient as showing the existence of a notorious defect so as to charge the city with notice thereof: *Hollenbeck v. Marshalltown*, 62-21.

If the defect is notorious and has remained so a sufficient length of time to enable the city, by reasonable diligence, to know of its existence and to repair it, the law conclusively presumes either that such diligence has been exercised and that the knowledge which such diligence would procure had been acquired, or that the city has been culpably negligent in not employing such diligence: *Rice v. Des Moines*, 40–638; *Montgomery v. Des Moines*, 55–101.

In an action to recover for injuries received by reason of a defective walk it is competent to show that the walk was old and in bad condition as tending to show that the officers of the city charged with the duty of keeping its walks in good condition by the exercise of ordinary diligence would have known of the defect in question: *Lorig v. Davenport*, 68 N. W., 717.

In an action for injuries caused by a defective sidewalk where the evidence tended to show that all walks constructed at the time the walk in question was built were improperly constructed, *held*, that defendant was chargeable with notice of the defects in the walk, even though it had no actual notice of its condition and such condition could not have been discovered with ordinary care: *Weber v. Creston*, 75–16.

And the fact that the sidewalk causing the injury was built in the customary manner adopted by the city for building sidewalks, *held* to be no defense in an action for negligence causing injury: *Ibid.*

In an action for personal injuries due to defect in sidewalk, experts may be allowed to testify as to how long the kind of lumber used in the sidewalk will last: *McConnell v. Osage*, 80–293.

For the purpose of showing that the city should have known of the condition of the walk where the injury occurred, the injured party may be allowed to prove the defective condition continuously along an entire block (following *Armstrong v. Ackley*, 71–76; distinguishing *Ruggles v. Nevada*, 63–185): *Ibid.*

Where the street commissioner had actual knowledge of the defective condition of a sidewalk, having been engaged recently before the accident in repairing it, and the defect consisting in original faulty construction as well as in its being out of repair, *held*, that the city was chargeable with notice of its condition: *Ledgerwood v. Webster City*, 61 N. W., 1089.

Evidence that other portions of the walk were in bad condition as well as that which caused the injury is admissible to show notice if relating to the same portion of the walk: *Ibid; Aryman v. Marshalltown*, 90–350; *Munger v. Waterloo*, 83–559; *Riley v. Iowa Falls*, 83–761; *Smith v. Des Moines*, 84–685.

Where an injury from the improper method of filling a ditch in the street resulted six weeks after the filling of such ditch, *held*, that the jury might properly find that if there was any defect it could have been discovered by the city in the exercise of reasonable diligence within that time: *Rosenberg v. Des Moines*, 41–415.

A municipal corporation is liable for injuries received by reason of a sidewalk having become out of repair and in an unsafe and dangerous condition, if it appears that, knowing it to be in that condition, it was allowed to remain for such length of time that it might, in the exercise of ordinary care and reasonable diligence, have been repaired before the injury: *Townsend v. Des Moines*, 42–657.

Where evidence showed that a barricade around an excavation in a sidewalk was in existence in the evening less than an hour before an accident occurred, and that at the time the accident occurred a portion of the barricade had been removed, *held*, that it not appearing that such removal was due to any act of the city, notice to the city of the defect in the barricade could not be inferred: *Theissen v. Belle Plaine*, 81-118.

The city is not chargeable constructively with notice of danger from an excavation which is left uncovered for a few minutes: *Jones v. Clinton*, 69 N. W., 418.

Where there is no actual notice, the liability of the city for injuries from obstructions in the streets will depend upon notoriety of the defect and the length of time of its continuance with reference to whether, in the exercise of reasonable observation and care, the proper officers of the city ought to have known of and remedied the defect or obstruction: *Hazzard v. Council Bluffs*, 87-51.

A municipal corporation cannot be held guilty of negligence on account of defects in a sidewalk not arising from its original construction, without express notice of the existence of the defect or obstruction has been brought home to it, or such defect or obstruction has been so notorious as to be observed by all: *Doulon v. Clinton*, 33-397; *Cramer v. Burlington*, 39-512.

Evidence is admissible in an action to recover for injuries from a defective sidewalk to show that complaints concerning the condition of the walk were made to the city council before the accident, the object of such evidence being to show that the city had notice of the defect: *Trapnell v. Red Oak Junction*, 76-744.

Therefore proof of the mere existence of a defect in a sidewalk is not enough to establish negligence on the part of the corporation; and in the absence of other evidence of negligence there can be no recovery for injuries received by reason of such defect: *Doulon v. Clinton*, 33-397.

It is not sufficient to charge the city with notice that two or more citizens of the city knew of the dangerous condition of the walk: *Cramer v. Burlington*, 39-512.

To render a municipal corporation liable for an injury arising from an obstruction in its streets it must be shown that through its officers it had notice of the obstruction, or that such obstruction had existed so long as to raise a presumption that knowledge thereof was possessed by such officers: *Sikes v. Manchester*, 59-65.

A city will be liable for injuries received from defects in a sidewalk which, originally constructed in a proper manner, has afterwards become out of repair, if it had actual knowledge of the defect in such time that with the exercise of reasonable diligence it might have repaired the defect and thereby prevented the injury, or if the defect was of such a nature and had existed for such a period of time that with the exercise of ordinary care and diligence in the discharge of its duty it would have learned of its existence in time to have prevented the injury: *Cook v. Anamosa*, 66-427

Where a defect is one which is not readily prevented the city will not be charged with notice thereof by reason of existing and apparent defects at a distance from the one which has caused the injury: *Ruggles v. Nevada*, 63-185; *Goodson v. Des Moines*, 66-255.

Neither can evidence be introduced against defendant's objection to show that after the accident loose boards were seen upon other parts of the sidewalk: *Goodson v. Des Moines*, 66-255.

The fact that the defective condition of a plank walk at one point is known to the officers of the city does not affect them with knowledge of its defective condition at a point half a block away, so as to render the city liable for damages resulting from the defective condition at the first point: *Conklin v. Marshalltown*, 66-122.

A city cannot be held guilty of negligence in not having knowledge that a street is dangerous by reason of accumulations of snow and ice where there is no evidence tending to show that any one observed that the street was in a dangerous condition prior to the time of the accident for which recovery is sought: *Broburg v. Des Moines*, 63-523.

The city marshal, not being charged by statute or ordinance with any duty with reference to the inspection and repair of streets or sidewalks, notice to him of a defect in a sidewalk is not notice to the city: *Cook v. Anamosa*, 66-427.

Notice to the mayor or council or the street committee, or the individual members thereof, will effect notice to the city of defects in its streets: *Ibid.; Owen v. Fort Dodge*, 67 N. W., 281.

In a particular case, *held*, that the defect was not so apparent that the city was negligent in failing to ascertain its existence before the occurrence of the injury: *Cook v. Anamosa*, 66-427.

Notice to members of the city council of the obstruction of a sewer, *held* sufficient to charge the city with notice thereof; and *held*, that it was not necessary to show that the council while in session expressly authorized the obstruction in order to charge the city with liability therefor: *Powers v. Council Bluffs*, 50-197.

While a city will be bound by notice of a defect communicated to a member of the city council, such notice must relate to the defect which caused the injury, and a notice to a member of the council of defects which have been repaired before the accident will not charge the city with notice of another defect which does cause the accident, although it occurs at the place where the repairs have been made: *Carter v. Monticello*, 68-178.

Notice to sidewalk commissioner is sufficient: *Smith v. Des Moines*, 84-685; *Ledgerwood v. Webster City*, 61 N. W., 1089.

The testimony of travelers or sojourners, as well as of citizens, is competent to show that defects in the streets were so notorious as to charge the city officers with knowledge thereof: *Varnham v. Council Bluffs*, 52-698.

An allegation in a petition charging notice of a defect in the sidewalk without stating whether it was actual or constructive, is sustained by proof of circumstances charg-

ing notice upon the city, although it does not show actual notice: *Hunt v. Dubuque*, 65 N. W., 319.

Contributory negligence of party injured: In an action for the recovery of damages for injuries due to a defective street, it is incumbent upon the plaintiff to prove freedom from contributory negligence, and therefore, under an issue raised by general denial in such case, it is proper for defendant to prove the fact of plaintiff's intoxication, as showing contributory negligence: *Fernbach v. Waterloo*, 76-598.

In such a case, it is competent for the defendant to prove an ordinance prohibiting immoderate driving, and that defendant was violating such ordinance at the time of receiving his injuries; therefore, the introduction of the ordinance in evidence is not erroneous, even though the fact of immoderate driving has not yet been established: *Ibid.*

All that can be demanded of a party in regard to obstructions in the street is ordinary care to avoid them: *Hanlon v. Keokuk*, 7-488.

A person injured cannot recover for injuries received from the defect in a sidewalk which could have been discovered by the exercise of ordinary care: *Cressy v. Postville*, 59-62.

In order to recover for an injury resulting from a defect in a street the plaintiff must show that the street was not safe, and that he was in the exercise of ordinary care. But the action may be supported, although the primary cause is an accident which prevents the exercise of care to avoid the injury, if it occurred without the fault of the person injured: *Manderschid v. Dubuque*, 25-108.

If the defective walk is one cause of the accident the fact that there is another cause for which neither party is responsible will not relieve the city from liability: *Langhammer v. Manchester*, 68 N. W., 688.

Where there is a defect such as a declivity in the street which is not guarded by railing, and which is so situated that it would be contributory negligence on the part of any one to drive his team over such declivity, and a horse, properly hitched in the street, breaks loose and is injured by running over such declivity, the city is not liable: *Moss v. Burlington*, 60-438.

Where a resident of a city, having knowledge of an excavation in an unused street, turned his mare at large and she was injured by falling into such excavation, *held*, that, as he had equal means of knowledge of the danger with the officers of the city, he was equally guilty of negligence, and could not recover: *Gribble v. Sioux City*, 38-390.

Sidewalks and cross-walks are constructed for foot travelers, and a person who, without some good and sufficient reason, walks elsewhere and is injured, should not be permitted to complain that he has been injured through the fault and negligence of the city: *O'Laughlin v. Dubuque*, 42-539.

On a subsequent trial of the case, *held*, that facts were shown sufficient to take the case out of the rule therein laid down: *O'Laughlin v. Dubuque*, 52-746.

Where a person undertakes to drive a horse in one direction, while looking and talking in another direction, and no special exigency is shown, such person must be considered as voluntarily assuming the risk of driving against any obstacle in the way, and he cannot be said to be in the exercise of due care, especially when outside of the usually traveled highway, and in the vicinity of a dwelling-house where more or less obstacles are to be found, and *held*, that it was error to instruct the jury in such case that they might consider the presence of other persons with whom the injured person was conversing, in determining whether such party was negligent in driving against the obstacle: *Tuffree v. State Center*, 57-538.

Where an obstruction in the street is in plain view of the driver of a vehicle, and his attention is in no manner diverted so as to excuse him from seeing it, and he drives against it, or into it, he is guilty of contributing proximately to any injuries which may result: *Yahn v. Ottumwa*, 60-429.

Where it appeared that plaintiff, without any reason for doing so, went out of his way into an alley where there was no sidewalk, it being dark, and fell into an unprotected stairway, *held*, that he could not recover from the city. Alleys are not generally intended for foot passage, especially at night: *Ely v. Des Moines*, 86-55.

If the plaintiff knew that it was imprudent to go over a walk, and there was another one by which he could have reached his destination, he is to be considered guilty of contributory negligence in attempting to walk, even cautiously, over it in the dark instead of taking the other way: *Parkhill v. Brighton*, 61-103.

One who is using a sidewalk is not required to use more than ordinary care and caution to avoid accident. *Langhammer v. Manchester*, 68 N. W., 688.

A person who is injured by reason of defects in the sidewalk cannot be defeated of recovery therefor by reason of knowledge of the defective condition of the walk, except as he has been guilty of negligence operating to his injury. He is not to be denied relief simply because he goes upon a street which he knows to be dangerous: *Rice v. Des Moines*, 40-638. And see *Walker v. Decatur County*, 67-307.

Knowledge by the party injured, previous to the injury, of the defect from which the injury results, will not defeat his claim for damages if he was not guilty of negligence: *Ross v. Davenport*, 66-548; *Kingsley v. Mulhall*, 64 N. W., 659; *Hall v. Manson*, 68 N. W., 922.

It is error, in an action for injuries from a defective walk, to refuse an instruction that if the jury find that plaintiff, at the time of passing over the walk, knew that it was unsafe and that it was imprudent to pass over it at that time, in consequence of darkness or any other cause, and that with this knowledge he still persisted in passing over it, though there was another walk which he might have taken going in the same direction he desired to go, then his own negligence contributed to the accident and he could not recover: *McGinty v. Keokuk*, 66-725.

It is not negligence to travel the streets of a city on a dark night without a lantern, or to walk rapidly therein: *Moore v. Burlington*, 49-136.

The same degree of care is required of the persons using the street whether by day or by night but it is not error to tell the jury that greater caution and watchfulness might be required at night than in the day time. What will constitute ordinary care will depend upon circumstances: *Hall v. Manson*, 90-585.

In determining whether a plaintiff who has been injured by a defect in a sidewalk has contributed to the injury by his own negligence, it is proper for the jury to take into consideration the hour of the night the injury was received, the darkness of the night, whether the plaintiff was under the influence of intoxicating liquors, etc: *Cramer v. Burlington*, 39-512.

In an action for personal injuries received from defects in a street, the jury may properly be instructed that the law demanded of plaintiff the exercise of ordinary care, and that in determining whether he exercised such care they should consider all the circumstances of the case, the hour of the night, etc., but it is not proper to instruct them that greater caution was demanded of plaintiff in passing upon a street after night than in day time. The degree of care to be used is the same at all times: *Stier v. Oskaloosa*, 41-353.

In order to constitute contributory negligence it is not necessary that plaintiff must have known of the danger and assumed the risk before it can be said that he was negligent. The true rule is that plaintiff should have used due care and caution to discover the danger; but *held* erroneous to charge the jury that in order to render plaintiff, suing for damages for injuries received from a defective sidewalk, chargeable with contributory negligence preventing his recovery, it must appear that he went voluntarily into apparent danger: *Munger v. Marshalltown*, 56-216.

The fact that a party in crossing a street has crossed a place which he knew to be dangerous when he might, without increasing the distance and without inconvenience, have crossed at another place, will not prevent his recovery; but if, knowing that the place was dangerous, he knew or ought to have known that it was not prudent to cross at such place, and there was another way which he might have taken without material inconvenience, he cannot recover: *Hartman v. Muscatine*, 70-511.

A person cannot be excused if he conciously incurs danger which there is no necessity for incurring: *Fulliam v. Muscatine*, 70-436.

A person is not as a matter of law guilty of contributory negligence because, knowing a walk to be unsafe, he does not cross the street, as he might do with safety, instead of taking the walk. Such question is for the jury: *Kendall v. Albia*, 73-241; *Owen v. Fort Dodge*, 67 N. W., 281.

The mere fact that plaintiff knew the place of the injury was dangerous and that there was another safe and convenient way will not necessarily preclude his recovery for injury received by reason of defects in the walk: *Nichols v. Laurens*, 65 N. W., 335.

In an action for damages caused by a defective street, where it appeared that plaintiff went upon the street knowing the place to be dangerous, *held*, that this was not evidence *per se* that he contributed to the injury, but that the fact of contributory negligence was a question for the jury: *Byerly v. Anamosa*, 79-204.

In such case knowledge on the part of the injured party of the condition of the sidewalk will not necessarily constitute contributory negligence: *Ibid; Traxel v. Vinton*, 77-90.

A person walking on a public street must, to avoid accident, act as a reasonably careful and prudent man would act considering all the circumstances surrounding him; but it is error to charge that as matter of law he should avoid all obstacles dangerous in their character which are plainly visible and not obscured: *Mathews v. Cedar Rapids*, 80-459.

Therefore, *held*, that where a passer on the sidewalk, attracted by a display in a shop window, stepped toward the window and fell into an area way left unprotected at the edge of the sidewalk, he was not, as matter of law, precluded from recovery by the fact that he might have noticed and avoided the opening if he had looked where he was stepping: *Ibid.*

The questions whether the town is liable for injury received by stepping into a cellar way which was at the time only partially protected and whether the plaintiff in thus stepping into the cellar way, of the existence of which he was aware, but from which his attention was for the time diverted, was guilty of contributory negligence, are for the jury: *Lichtenburger v. Meriden*, 91-45.

Where it appeared that plaintiff having knowledge of an opening in the sidewalk inadvertently stepped into it and was injured, *held*, that the question whether he was guilty of contributory negligence was a question for the jury: *Lichtenburger v. Meriden*, 69 N. W., 424.

One passing over a sidewalk is not bound at his peril to discover every defect, although it may be open to inspection. He has the right to assume that the corporation has done its duty and maintained its walks in a reasonably safe condition for travel. Nor is he to be held guilty of negligence as a matter of law if he passes over a walk which he knows or ought to have known to be dangerous. An unguarded, unbarricaded walk is an invitation to one to go upon it, and a city cannot be heard to say that one is guilty of negligence as a matter of law who accepts the invitation: *Barnes v. Marcus*, 65 N. W., 984.

A person using the sidewalk has a right to rely upon its being in a reasonably safe condition unless he knows otherwise. *Robinson v. Cedar Rapids*, 69 N. W., 1064.

Where a person passing along in the street steps upon ice, which is dangerous and he has knowledge of that fact, when he might have avoided such danger, he cannot recover for the injury: *Cosner v. Centerville*, 90-33.

In this case it appeared that plaintiff

might have avoided the danger by passing along the roadway of the street instead of over the ice and on the sidewalk: *Ibid.*

The burden of proving freedom from negligence in such case is on the plaintiff: *Ibid.*

Intoxication: Under evidence showing that plaintiff suing for injuries received from a defective sidewalk was intoxicated at the time of the accident, *held*, that the verdict of the jury allowing only nominal damages would not be interfered with on appeal: *Hubbard v. Mason City*, 64-245.

The fact of intoxication of the person injured, at the time of the injury, may be shown as tending to show contributory negligence: *Cramer v. Burlington*, 39-512.

Imputed negligence: Where it was sought to impute negligence to a party suing for injuries received from obstructions in a street while traveling thereon, *held*, that the fact that the owner of the team which plaintiff was driving knew that the team was unmanageable could not be imputed to plaintiff as negligence in the absence of such knowledge on his part: *Martin v. Algona*, 40-390.

One who is injured by reason of a defective sidewalk is not to be defeated in his recovery because the accident was occasioned by the act of a companion in stepping upon a loose plank, the city being liable for allowing the walk to be in a defective condition: *Barnes v. Marcus*, 65 N. W., 984.

Remedy over against property owner: The fact that the city has a remedy over against a private party who has so used a sidewalk, or left exposed a dangerous place, as to cause injury to a traveler, does not relieve the city of its duty towards such traveler to keep sidewalks in repair, and guard places of danger of which it has notice: *Rowell v. Williams*, 29-210.

Where a person places an obstruction in a street he cannot demand of the city that it shall remove the obstruction at its expense if it had knowledge of it, and in case of failure to remove it after such knowledge, that it shall be precluded from looking to him for indemnification for damages which it is compelled to pay for the injury caused by the obstruction. Such circumstances would not establish contributory negligence on the part of the city, defeating its right to recovery from the property owner: *Sioux City v. Weare*, 59-95.

If a person for his private advantage, under permission from the city, makes an excavation in the street, and the city erects a barrier on one side of it, the person making the excavation is not thereby relieved from the duty of erecting a barrier on the other side if the safety of travelers requires it: *Ottumwa v. Parks*, 43-119.

Where suit was brought against a city for damages sustained by reason of an excavation in the street made by a property owner, and such property owner employed an attorney to defend in such action against the city, *held*, that in the action by the city against the property owner to recover the amount of damages which it had been compelled to pay on account of such injury, the measure of damages was the amount of the judgment with interest and cost which had been recovered in the action against the city: *Ibid.*

Where joint judgment for injuries from negligence in the obstruction of a street is recovered against a municipal corporation and the party guilty of causing the obstruction, the corporation cannot require that plaintiff proceed first against the co-defendant, even though he has property subject to execution: *Palmer v. Stacy*, 44-340.

Even where the city directs sidewalks to be made or repaired, and assesses a special tax upon abutting lots to pay therefor, the lot owner failing to make the improvement, after being notified, does not become liable for injuries by reason of failure to make such improvement, or to make repairs, as the case may be: *Keokuk v. Independent Dist.*, 53-352.

The city cannot escape liability for the defective condition of its streets for the reason that a third person is under obligation to keep such portion in repair. So *held* with reference to defective crossings on the street put in by a railway company: *Fowler v. Strawberry Hill*, 74-644.

For provisions as to construction and repair of sidewalks, see §§ 777-779.

SEC. **754. Regulation of conveyances and transportation.** They shall have power to regulate, license and tax all carts, wagons, street sprinklers, drays, coaches, hacks, omnibuses, and every description of conveyance kept for hire; fix the rate and prices for the transportation of persons and property from one part of the city to another in the vehicles above named, and to require such persons to keep exposed to view, in or upon such vehicle, a printed table of the rates and prices so fixed; to establish stands for hackney coaches, cabs, omnibuses, drays and express wagons, and to enforce the observance and use thereof; to prescribe the width of the tires of all vehicles habitually used in the transportation of persons or articles from one part of the city to another, and require vehicles and bicycles to carry lamps giving sufficient light. [21 G. A., ch. 92; 16 G. A., ch. 24; C. '73, §§ 463, 537; R., § 1063.]

SEC. **755. Regulation of driving or riding.** They shall have power to restrain and regulate the riding and driving of horses, live stock, vehicles and bicycles within the limits of the corporation, and prevent and punish fast or immoderate riding or driving within such limits. [C. '73, § 456; R., § 1057.]

SEC. **756. Lighting.** They shall have power to light streets, avenues, alleys, highways, public places, grounds, buildings, landings, market places and wharfs. [C. '73, § 464; R., § 1064.]

The grant of power to a city to light its streets not only authorizes a city thus to furnish the lighting but also empowers it to contract with others to furnish such lighting: *Levis v. Newton*, 75 Fed., 884.

A city cannot be enjoined at the suit of a tax payer from contracting for electric lighting, although there is an existing contract for lighting by gas: *Searl v. Abraham*, 73-507.

In general as to gas works and electric light plants, see §§ 720-725. And as to regulation of electric light wires, see §§ 776, 777.

SEC. **757. Care, construction and repair of bridges.** Cities shall have the care, supervision and control of all public bridges and culverts within the corporate limits thereof; shall cause the same to be kept open and free from nuisances; and shall construct and keep in repair all public culverts within the limits of said corporations. They may aid in the construction of any county bridges within the limits of said city, or in the construction of any bridge contiguous to said city, on a highway leading to the same, or in the construction of any bridge across any unnavigable river which divides the county in which said city is located from another state, by appropriating a sum not exceeding ten dollars per linear foot therefor. [C. '73, § 527; R., § 1095.]

The county has the right to erect public bridges on public highways inside the limits of a city: *Bell v. Foutch*, 21-119; *Barrett v. Brooks*, 21-144.

The provisions of this section do not preclude the county from exercising its authority to build bridges at other places within city limits where the public good requires: *Oskaloosa Steam Engine Works v. Pottawattamie County*, 72-134.

The provision of § 527 of Code of '73 [not now retained] that bridges forty feet or more in length should be deemed county bridges was *held* applicable to bridges outside as well as within city limits, but it did not determine whether bridges less than forty feet in length were to be deemed county bridges: *Casey v. Tama County*, 75-655.

As to the liability of the county for injuries resulting from defects in bridges which it is under obligation to maintain, see notes to § 422, ¶ 18.

Before the repeal of the statute allowing cities to erect toll bridges, *held*, that a city might erect free or toll bridges at its option, and convert the one into the other: *Scott v. Des Moines*, 34-552.

The conveyance to a city for free and public use of a bridge built as a toll bridge by private enterprise and with the aid of individual subscriptions, in return for which the right of free passage was granted to such subscribers, *held* not to obligate the city to keep such bridge in repair, or prevent its erecting a new toll bridge on the site of the one purchased, and denying free passage thereon to the subscribers to the old bridge: *Ibid.*

The city is only required to keep bridges within its limits in reasonable and ordinarily good repair: *Holmes v Hamburg*, 47–348.

A municipal corporation is liable for material furnished by it for repairs upon a bridge for a county road within the corporate limits: *Tubbs v. Maquoketa*, 32-564.

As to bridge tax, see § 888.

SEC. **758. Bridge fund.** Cities of the first class shall have full control of the bridge fund levied and collected as provided by law, and shall have the right to use the same for the construction of bridges, culverts, and approaches thereto, repairing the same, and paying bridge bonds and interest thereon issued by such city, and shall be liable for defective construction thereof, and failure to maintain the same in safe condition as counties now are with reference to county bridges; and no county shall be liable for any such bridge or injuries caused thereby. [25 G. A., ch. 5, § 1; 23 G. A., ch. 2, § 1; 22 G. A., ch. 16, § 1; 18 G. A., ch. 45, § 1.]

SEC. **759. Aiding county bridge.** Cities and towns may vote to aid in the construction of any county bridge, when the estimated cost of the same is not less than ten thousand dollars, to the extent of one-half the estimated cost thereof, as fixed by the board of supervisors; and a city having a population of five thousand or more may vote a tax, not to exceed two per centum of the assessed value of the taxable property in such city, to construct, or aid any company which is or may be incorporated under the laws of this state in the construction of, a highway or combination bridge across any navigable boundary river of this state, commencing or terminating in

such city, suitable for use as highway, or for both highway and railway and street railway purposes. [25 G. A., ch. 19, § 1; 21 G. A., ch. 13, § 1; 21 G. A., ch. 98; 19 G. A., ch. 63, § 1.]

A tax in aid of the construction of a combination bridge by a private corporation will be invalid if the corporation is not organized under the laws of Iowa, or even if it is so organized, where it does not itself carry on the work contemplated, but assigns it to a foreign corporation: *Smith v. Omaha & C. B. R. & B. Co.*, 66 N. W., 1041.

SEC. **760. Question submitted.** Whenever a petition shall be presented to the council, signed by a majority of the resident freehold taxpayers thereof, asking that the question of constructing or aiding in the construction of a bridge, as provided in the preceding section, be submitted to the qualified electors, it shall be its duty to immediately give notice of a special election, by publication in some newspaper published therein, and also by posting copies of such notice in five public places therein, at least ten days before such election. [25 G. A., ch. 19, § 2; 21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 2.]

SEC. **761. Notice—conditions.** Such notice shall specify the time and place of holding the election, the proposed location of the bridge to be aided, the rate per cent. of tax to be levied, the amount which the board of supervisors is authorized to cause to be collected each year, and all the conditions in the petition. In case of proposed aid to a private corporation, the notice shall also state its name, the amount of work required to be done on such bridge, and any other conditions which are to be performed before said tax or any part thereof shall become due and payable. Such notice may also contain terms and conditions to be performed by said corporation receiving such aid after the completion of such bridge, which terms and conditions shall be obligatory and binding upon it, its successors and assigns. [21 G. A., ch. 13, § 2; 19 G. A., ch. 63, §§ 2–4.]

SEC. **762. Certificate.** At such election the question of taxation shall be submitted to the electors thereof. If a majority of the votes be for taxation, the clerk of such city or town shall forthwith certify to the county auditor of the proper county the result, the rate per cent. of the tax voted, the year or years during which the same is to be collected, the amount to be collected each year, the terms and conditions upon which the same when collected is to be paid, and, if aid is voted to a private corporation, its name, together with a copy of the notice under which the election was held. The certificate shall be filed with the county auditor, who shall cause the same to be recorded in the office of the recorder of deeds. The expenses of the giving of the notice and holding the election shall be audited and paid out of the county treasury as other claims against the county. [21 G. A., ch. 13, § 2; 19 G. A., ch. 63, §§ 2–6.]

SEC. **763. Tax levied.** After such certificate shall have been filed and recorded, the board of supervisors shall, at the time of levying the ordinary taxes, levy each year, on the taxable property of such city or town, the taxes voted as shown by said certificate. [21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 2.]

SEC. **764. Collection—payment.** Said taxes shall be collected in the same manner, subject to the same penalties for non-payment after delinquent, and to the same laws after they are collected or collectible, as other taxes, in conformity with the terms and conditions of the notice of election; when collected they shall be paid by the county treasurer, on the order of the board of supervisors, specifying the special bridge fund from which each order is payable; but in no case shall said board make such order until the conditions specified in the petition and notice have been complied with. Such taxes, when payable to the city or town, shall be paid over as other city or town taxes. When payable to a private corporation, they shall be paid over by the county treasurer to such corporation, upon the order of the president or a majority of the directors thereof, after said council shall

have certified to the county treasurer that the conditions required, as set forth in the notice for the special election at which the tax was voted, have been complied with, and the council, or a majority of its members, shall make such certificate whenever such conditions shall have been so performed. [25 G. A., ch. 19, § 3; 21 G. A., ch. 13, §§ 2, 3; 19 G. A., ch. 63, §§ 2, 4, 5.]

SEC. **765. Forfeiture.** Should any taxes levied under the provisions of the foregoing sections remain in the county treasury more than one year after the same shall have been collected, the right to them shall be forfeited, and they shall be refunded to the taxpayers, and the board of supervisors shall cause any remaining levy to be canceled and stricken from the tax books, which cancellation shall remove all liens created thereby, and it shall make no further levies under said certificate. [21 G. A., ch. 13, § 4.]

SEC. **766. Contract for use of bridge.** Cities situated on a river wholly in the state, or one forming its boundary line, and from which to the opposite shore a bridge has been or may be constructed by any railroad company, corporation or person, shall have power to contract with the railroad company, corporation or person owning such bridge for the use of the same as a public highway; which contract may be for the joint use of such bridge, or for the sole use of such portion thereof as may be devoted or adapted to highway travel; and may assume the sole liability, or any portion thereof, for damages to persons or property by reason of their being on any portion of said bridge or approach to either end thereof, caused by the running of cars or locomotives thereon by any corporation, company or person entitled to its use, whether the damage results from the negligence of the person engaged in running said cars or locomotives or otherwise, and to indemnify the owners of said bridge, and all others entitled to use the same, from liability or damage so caused, to the extent or proportion thereof assumed in the said contract; and the city may thereafter, and during the continuance of said contract, manage and control said bridge so far as necessary to regulate the highway travel thereon, and may regulate the same as a free or toll bridge, and prescribe such rates of toll as to it from time to time shall seem proper, and make all necessary police regulations for the government of the highway travel thereon, and levy the necessary tax, not exceeding in any one year ten mills on the dollar, for the purpose of carrying out the terms of such contract. [21 G. A., ch. 173, § 2; 15 G. A., ch. 5, § 1.]

Without regard to the provisions of this section taxpayers may, by action against a corporation to which such taxes have been unlawfully paid, recover the amount of taxes so received by it. Until the corporation becomes entitled to the tax it remains the property of the taxpayer held in trust to await the performance of the condition, and if the conditions are not performed the taxpayer may recover the money thus paid from the corporation wrongfully withholding it: *Smith v. Omaha & C. B. R. & B. Co.*, 66 N. W., 1041.

SEC. **767. Railway tracks—street railways.** Cities and towns shall have the power to authorize or forbid the construction of street railways within their limits and may define the motive power by which the cars thereon shall be propelled; and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public place upon which such railway track is proposed to be located and laid down has been ascertained and compensated for in the manner provided with reference to taking private property for works of internal improvement. [23 G. A., ch. 11, § 1; 18 G. A., ch. 96, § 1; 15 G. A., ch. 6; C. '73, § 464; R., § 1064.]

Right to locate railways upon streets: Since the change made in § 1262 of Code of '73, by 15 G. A., ch. 47 (see § 2017), the power to authorize the laying down of tracks for street and other railways, and the use of steam motors thereon, does not exist except as here given, the earlier case of *Milburn v. Cedar Rapids*, 12–246, and many cases following it, being no longer applicable: *Stanley v. Davenport*, 54–463; *Stange v. Hill & West Dubuque St. R. Co.*, 54–669.

The provisions of this section were not

originally applicable to cities acting under special charter: *Ibid; Simplot v. Chicago, M. & St. P. R. Co.*, 5 McCrary, 158.

An ordinance authorizing the construction of railway tracks upon city streets, without making the right to occupy such streets conditional upon payment of damages as required by statute, does not confer any rights upon the railway company: *Stange v. Dubuque*, 62-303.

Where the fee of the street is in the city for the use and benefit of the public, the general assembly has the control thereof, and may prescribe the terms and conditions under which the public may use such streets: *Sears v. Marshalltown St. R. Co.*, 65-742.

Consent by city council: The statute does not prescribe the manner by which authority may be granted to a railroad company to construct its track upon the streets of the city, and such authority may be given by resolution duly passed, or by vote duly taken, appearing in the proper records of the city: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70-105.

The city council may authorize the laying of a railway track over an alley, although the effect may be to prevent the use of the alley for other purposes. Whether the same rule would apply in case of a street, *quœre*: *Heath v. Des Moines & St. L. R. Co.*, 61-11.

But the city council is not authorized to devote an alley to a railway track for the private benefit of some individual; and the fact that leave has been granted to lay the track over an alley for purely private benefit will not prevent a subsequent grant of a right to a railway company to lay a track through such alley for public use: *Ibid.*

The city having been given by this section the power to grant the right to lay down a railway track over its streets, all else in connection therewith is a matter of detail and within the discretion of the city, subject only to equitable control and proper police regulations: *O'Neil v. Lamb*, 53-725.

Compensation to property owners: A railway which has been located over the streets of a city, at a time when compensation to adjacent property owners for such use of the street was not required, cannot lay new switches and side tracks in connection with such railway, without making compensation: *Drady v. Des Moines & Ft. D. R. Co.*, 57-393; *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70-105.

The statutory provisions requiring compensation apply to a railroad authorized by ordinance and partly constructed prior to the time that the change in the statute went into effect: *Mulholland v. Des Moines, A. & W. R. Co.*, 60-740; *Hanson v. Chicago, M. & St. P. R. Co.*, 61-588.

Where a railway company had commenced the use of its track constructed under permission granted by the city council before the statutory change requiring compensation, *held*, that it could not afterward be made liable for damages to abutting lot owners: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70-105.

When the road is located upon private property and not upon a street an abutting owner cannot recover damages resulting from the ordinary operation of the road: *Rinard v. Burlington & N. R. Co.*, 66-440. Nor can damages be recovered from the city in such a case for injuries from an embankment: *Callahan v. Des Moines*, 63-705.

The provisions as to making compensation for injury to property abutting on a street upon which a railway track is proposed to be located are only applicable to property owners whose property abuts upon the portion of the street occupied by the track, and not to owners of property abutting upon a street which is merely crossed by the track: *Morgan v. Des Moines & St. L. R. Co.*, 64-589.

Under the provisions of § 2017 a railway company has the right to cross a street with its track without paying damages to abutting property owners, where it does not occupy the street in front of abutting property. But if it crosses the street at an angle, so that a portion of the track is in front of abutting property, the provisions of this section as to consent of council and as to damages apply: *Enos v. Chicago, St. P. & K. C. R. Co.*, 78-28; *Gates v. Chicago, St. P. & K. C. R. Co.*, 82-518.

The damages to be allowed to an abutting property owner by reason of the construction of a track over a street are not limited to damages arising from a change of grade, but extend to all legitimate damages which are contemplated in other provisions for condemning the right of way: *Drady v. Des Moines & Ft. D. R. Co.*, 57-393.

In estimating the damages caused by the operation of a steam railway along a street where damages to the property owner have not been previously assessed and paid, the fact that such operation has diverted travel from the street may be shown in evidence as showing the manner in which the rental value of the property has been diminished, and for the purpose of ascertaining the measure of damage: *Stange v. Dubuque*, 62-303.

In an action for such damages all the facts attending the use and operation of the railroad may properly be given in evidence as bearing upon the effect of the operation of the road on the rental value of the property: such, for instance, as annoyance to the occupants of the property by noise, escape of fire from engines, etc.: *Wilson v. Des Moines, O. & S. R. Co.*, 67-509.

In a proceeding to assess damages to abutting property by reason of the location and operation of a railroad upon a street, the property owner is entitled to be compensated for injuries which he will sustain on account both of the laying down of the track in the street on which his property abuts, and of the appropriation of his land, if any, which is taken for right of way purposes: *McClean v. Chicago, I. & D. R. Co.*, 67-568.

The provisions of this section as to the manner of assessment of damages resulting from the location of a railway upon the streets of a city refer exclusively to the company and not to the abutting owner; such owner does not have any interest in the fee of the street, and he cannot take steps to have his damages assessed by a sheriff's jury according to the provisions applicable where property is taken for right of way; there-

fore, he may bring action for damages without such proceeding: *Mulholland v. Des Moines, A. & W. R. Co.*, 60-740.

The provision with reference to assessing damages for laying a railroad track through the streets refers exclusively to the railroad company and not to the abutting owner. The latter cannot have his damages assessed in that manner: *Stough v. Chicago & N. W. R. Co.*, 71-641.

As the abutting property owner is not authorized to cause his damages to be assessed, and the corporation alone can institute the proceedings, an action by the property owner may be maintained for damages accruing to him before the assessment is made: *Wilson v. Des Moines, O. & S. R. Co.*, 67-509.

The property owner cannot take advantage of the method of procedure pointed out by this section for the purpose of having his damages from the construction of a railway in the street determined, but can only resort to an action to recover judgment: *Harbach v. Des Moines & K. C. R. Co.*, 80-593.

After such an assessment has been made, if the damage is not paid the company may be enjoined from occupying the street on the ground that it is a trespasser and maintaining a nuisance: *Ibid.*

The fact that the land-owner has brought an action at law for damages and recovered judgment does not preclude him from having an injunction in a proper proceeding to restrain the use of the street by the company: *Ibid.*

The fact that the railway company is occupying the streets as the successor of another company under purchase of its franchise at foreclosure sale does not relieve it from being enjoined at the suit of a property owner who recovered judgment against the former company, and the successor cannot plead that the former company occupied by the consent of the land-owner, that defense having been merged in the judgment against such former company: *Ibid.*

A right of action for injuries to an abutting property owner accrues at once and is entire, and must be brought in five years. Such a right of action does not pass to the grantee under a conveyance made subsequently to the time when the right of action accrues, and, without an assignment of such cause of action to him, grantee can maintain no action for such injuries: *Pratt v. Des Moines N. W. R. Co.*, 72-249; *Jolly v. Des Moines N. W. R. Co.*, 72-759.

Where a railway track is under ordinance of the city laid in a street or alley without compensation being made to the abutting owner, his right of action for damages accrues at once, and the railroad cannot be regarded as a continuing nuisance. An action to recover damages for such an injury must be brought within the statutory period from the time the street or alley is occupied: *Fowler v. Des Moines & K. C. R. Co.*, 91-533.

An approach on a street to a railroad crossing is part of the railroad and the property owner in front of whose premises such embankment is constructed is entitled to recover damages, although the track itself does not run in front of his premises: *Hitchcock v. Chicago, St. P. & K. C. R. Co.*, 88-242.

In determining whether the street is occupied in front of abutting property, not only the track, strictly speaking, but also any embankment made for the purpose of constructing the track, is to be taken into account, and also any embankment in the street for the purpose of constructing the railroad crossing: *Gates v. Chicago, St. P. & K. C. R. Co.*, 82-518.

Embankments forming the road-bed and approaches to highways or street crossings, rendered necessary by the construction of a railroad, are a part of the railway track, within the meaning of this section, and an owner, in front of whose property such an approach is constructed in the street, is entitled to damages: *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84-27.

The compensation provided for in this section is not for property taken, but for damages to abutting property: *Ibid.*

Under this section the owner is entitled to recover for injury to the land as well as to his improvements: *Ibid.*

The rule of damage is the difference in the value of the property before and after the construction of the track, approaches, etc.: *Ibid.*

Where abutting lot owners join in an agreement that a railway track may be laid down in the street, and it is laid down and operated in accordance with that agreement, any such lot owner or grantee is estopped from questioning the right of the railroad to maintain such track: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 79-613.

Damages: A railway company which so negligently builds its track over the streets of a city, or so occupies such streets, as to create a nuisance, is liable in damages to any one suffering therefrom special injuries not common to the whole public: *Park v. Chicago & S. W. R. Co.*, 43-636; *Frith v. Dubuque*, 45-406.

It is immaterial in such case whether the party injured owns the fee in the street or not: *Cadle v. Muscatine Western R. Co.*, 44-11; *Frith v. Dubuque*, 45-406; *Cain v. Chicago, R. I. & P. R. Co.*, 54-255.

One who is not the owner of the fee in the street can recover only on proof of actual damages: *Cook v. Chicago, M. & St. P. R. Co.*, 83-278.

If a railway, therefore, be constructed in a careless, improper and negligent manner, to the injury of an abutting property owner, he may recover damages, provided his injury be special: *Cain v. Chicago, R. I. & P. R. Co.*, 54-255.

So the city may, by ordinance, make and enforce reasonable restrictions, and the use of the street in violation of such restrictions will be a nuisance for which a person sustaining special damage may recover: *Ibid.*

The benefits to the property may be taken into account but will not entirely preclude recovery: *Enos v. Chicago, St. P. & K. C. R. Co.*, 78-28.

In an action by a lot-owner for damages caused by a railway company constructing its road so that the rails were above the estab-

lished grade, being so constructed on the theory that under the ordinances of the city the company was entitled to lay its tracks on the grade, *held*, that the company could not object that damages were assessed on the theory that such obstruction was permanent: *Eslich v. Mason City & Ft. D. R. Co.*, 75–443.

A witness may be asked whether the annual premium for insurance would be higher: *Ibid.*

The city is not liable for damages resulting from the laying down of tracks, etc., under permission granted by it: *Frith v. Dubuque*, 45–406.

Although a railway company is liable for negligence in failing to keep its crossings where the track intersects the street in proper condition, such liability does not relieve the city from liability for injuries arising from such defects in its streets: *Fowler v. Strawberry Hill*, 74–644.

As to the measure of damages in such cases, see *Cadle v. Muscatine W. R. Co.*, 44–11; *Frith v. Dubuque*, 45–406; *O'Connor v. St. Louis, K. C. & N. R. Co.*, 56–735; *Kuchcman v. Chicago, C. & D. R. Co.*, 46–366.

Equitable control: The doctrine of equitable control over the use of the streets by railway companies, which was recognized when such companies had the right to use the streets of cities for railway purposes without compensation to property owners or consent of the city, has now no application: *Heath v. Des Moines & St. L. R. Co.* 61–11.

Street railways: Aside from any special provision in the city charter, it may be regarded as the doctrine of this state that the city may authorize the construction of a street railway in its streets: *Damour v. Lyons*, 44–276.

An elevated railway is not to be deemed a street railway within the provisions of this section, even though it receives and discharges passengers at street corners, and therefore damages for the construction of such railway must be paid to abutting property owners: *Freiday v. Sioux City Rapid Transit Co.*, 92–191.

The term street railway as used in the statute must be construed in accordance with the understanding of the use of such terms when the statute was enacted: *Ibid.*

The provision that a railway track can be located and laid down only upon damages to abutting owners being paid does not apply to street railways, and the city council may authorize the location of such tracks upon the streets without payment of damages caused thereby: *Sears v. Marshalltown St. R. Co.*, 65–742.

In the absence of special authority conferred by the legislature, the city has no power to authorize the use of a steam motor on a street railway, and it will be liable in damages for injuries resulting from the use of such motor on the streets under its permission: *Stanley v. Davenport*, 54–463.

As to right to permit use of streets by horse railway, see *O'Niel v. Lamb*, 53–725.

Under this section a city has the right to grant the exclusive privilege for a reasonable length of time to construct and operate a street railway over any and all streets of the city, but it could not make such exclusive grant in perpetuity. Such a grant to a company to operate a street railway by horse power will not, however, preclude the grant to another company of the right to operate a street railway by other power: *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 73–513.

The right to grant an exclusive privilege to operate a street railway did not exist prior to the enactment of § 464 of the Code of '73; but *held*, that an ordinance granting such exclusive privilege prior to that time was ratified by action of the city after this section was enacted: *Ibid.*

Under the decision as to the right of a street railway company under an exclusive charter to lay its track over the streets of a city, *held*, that acts of the officers of the city in attempting to prevent the company from doing so were a violation of the injunction in that case: *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 74–585.

A grant to a street railway company of the exclusive right to operate a street railway over streets of the city by animal power does not prevent the grant to another company of the right to operate street cars by other power: *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75–722.

Where a street railway was under its franchise operating in the middle of the street with a single track and the construction of a sewer in the same street was subsequently ordered, *held*, that a provision of the ordinance that such sewer should be constructed in the middle of the street was unreasonable in view of the fact that it might without serious inconvenience or injury to the abutting property be constructed at the side of the street and thus avoid interference with the plaintiff's track: *Des Moines St. R. Co. v. Des Moines*, 90–770.

SEC. **768. Street car vestibules.** On and after November 1, 1898, every person, partnership, company or corporation owning or operating a street railway in this state shall, from November first of each year to April first following, provide all cars, except trailers, used for the transportation of passengers, with vestibules inclosing the front platform on at least three sides, for the protection of employes operating such cars. Any violation of this section shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each day said cars are operated in violation hereof.

SEC. **769. Railway crossings—speed of trains.** Cities having a population of five thousand or more shall have power to compel railroad companies to erect, construct, maintain and operate, under such regulations as

may from time to time be provided by the council, suitable gates upon public streets at railroad crossings; and cities and towns shall have power to regulate the speed of trains and locomotives on railways running over the streets or through the limits of the city or town. [25 G. A., ch. 5; 22 G. A., ch. 16, § 1; C. '73, § 456; R., § 1057.]

An ordinance regulating the speed of trains must be reasonable in order to be valid, and the question of whether or not it is reasonable as applied to portions of the city where the track does not run through land platted and used for residence or business purposes is for the court: *Myers v. Chicago, R. I. & P. R. Co.*, 57–555.

And this rule is applicable to an ordinance under the express authority of this section: *Bury v. Chicago, R. I. & P. R. Co.*, 90–106.

In a particular case, *held*, that the ordinance limiting the speed of trains within the city limits to ten miles an hour would not be deemed unreasonable with reference to a crossing three-fourths of a mile from the depot, it not appearing but that the crossing was one in general use, and a dangerous one if a higher speed should be permitted: *Larkin v. Burlington, C. R. & N. R. Co.*, 85–492.

A railway company is liable for injuries to persons at crossings when such injury is due to the train being run at a greater speed than allowed by city ordinance: *Ward v. Chicago, B. & Q. R. Co.*, 65 N. W., 999.

In an action to recover damages against a railway company for negligently causing the death of a person on its track, the fact that the engine of defendant was being operated within city limits at a higher rate of speed than allowed by the ordinance may be shown without proof that the accident was directly due to the train being operated at excessive speed: *McMarshall v. Chicago, R. I. & P. R. Co.*, 80–757.

In an action for injury received at a railway crossing from a train running at an unlawful speed plaintiff may prove that he had knowledge of the ordinance: *Moore v. St. Paul & K. C. R. Co.*, 71 N. W., 569.

SEC. **770. Viaducts—when required.** Cities having a population of seven thousand or over shall have power to require any railroad company, owning or operating any railroad tracks upon or across any public streets of such city, to erect, construct, reconstruct, complete, and maintain, to the extent hereinafter provided, any viaduct upon or along such streets, and over or under such tracks, including the approaches thereto, as may be declared by ordinances of such city necessary for the safety and protection of the public. The approaches to any such viaduct shall not exceed a total distance of eight hundred feet, but no such viaduct shall be required on more than every fourth street running in the same direction, and no railroad company shall be required to build or contribute to the building of more than one such viaduct, with its approaches, in any one year; nor shall any viaduct be required until the board of railroad commissioners shall, after examination, determine the same to be necessary for the public safety and convenience, and the plans of said viaduct, prepared as hereinafter provided, shall have been approved by said board. [22 G. A., ch. 32, § 1.]

SEC. **771. Assessment of damages.** When a viaduct shall be by ordinance declared necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages which may be caused to any property by reason of the construction of the same and its approaches. The proceedings for such purpose shall be the same as are provided in case of taking private property for works of internal improvement, and the damages assessed shall be paid by the city out of the general bridge fund. [Same, § 2.]

SEC. **772. Specifications.** The width, height and strength of any viaduct and the approaches thereto, and the material and manner of construction thereof, shall be such as may be required by the board of public works and approved by the mayor and council, but if there is no board of public works, then such as may be required by the council. [Same, § 3.]

SEC. **773. Apportionment of cost—repairs.** When two or more railroad companies own or operate separate lines of track to be crossed by a viaduct, the proportion thereof, and the approaches thereto to be constructed by each, or the cost to be borne by each, shall be determined by the council. After the completion thereof, any revenue derived therefrom by the crossing thereon of street railway lines shall constitute a special fund, and shall be applied in making repairs to such viaduct. One-half of

all ordinary repairs to such viaduct or its approaches shall be paid out of such fund, or be borne by the city, and the remaining half by the railroad company; and if the track of more than one company is crossed, the costs of such repairs shall be borne by such companies in the same proportion as was the original cost of construction. [Same, § 4.]

SEC. **774. Refusal to comply.** If any railroad company neglects or refuses, for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions of this chapter, the city may construct or repair the viaduct or approaches, or any portion thereof, which such railroad company was required to construct or maintain, and recover the cost thereof from such company. [Same, § 6.]

SEC. **775. Regulations as to electric wires.** Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires, and the poles and other supports thereof, by general and uniform regulation, and to provide the manner in which, and places where, the same shall be placed upon, along or under the streets, roads, avenues, alleys and public places of such city or town, and may divide the city into districts for that purpose. [22 G. A., ch. 16, § 1.]

SEC. **776. Granting franchise—question submitted.** No franchise shall be granted, renewed or extended by any city or town for the use of its streets, highways, avenues, alleys or public places, for any of the purposes named in the preceding section, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. The council may order the question of granting, renewal or extension of any such franchise submitted to a vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in a city, or fifty property owners in any incorporated town. Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks. The clerk shall prepare the ballots, and the proposition shall be submitted as provided for in the chapter on elections. The party applying for the franchise, or for a renewal or extension thereof, shall pay all expenses incurred in holding the election.

SEC. **777. Temporary sidewalks.** They shall have power to provide for the laying, relaying and repairing of temporary plank sidewalks upon any street, avenue, public ground, wharf, landing or market place within the limits of such city or town, at a cost not exceeding forty cents a linear foot, to prescribe a uniform width thereof, and to regulate the grade of the same, and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid; and the city or town clerk shall certify the amount of such assessment to the county auditor, and it shall be collected the same as other taxes. [C. '73, § 468.]

SEC. **778. In front of agricultural property.** Cities of the first class shall have power to provide by ordinance for the laying of temporary sidewalks on public streets and highways, in front of property abutting thereon and used for purposes of agriculture or horticulture, and not divided into lots, and to assess a special tax, not to exceed forty cents per linear foot, upon said property to pay for same. Such assessment and improvement shall not be made or ordered to be made until three-fourths of the members of the council shall, by vote assent to the making thereof.

SEC. **779. Permanent sidewalks—special tax.** They shall have power to provide for the construction, reconstruction and repair of permanent sidewalks upon any street, highway, avenue, public ground, wharf, landing or market place within the limits of such city or town; but the construction of permanent sidewalks shall not be made until the bed of the same shall have been graded so that, when completed, such sidewalks will

be at the established grade; and to assess the cost thereof on the lots or parcels of land in front of which the same shall be constructed. Towns shall have the power to make the street improvements provided for in chapter seven of this title, and pay for the same, or any part thereof, out of the general fund, or to assess, levy and collect special taxes for the cost, or any part thereof, against the abutting property, in the manner provided in the said chapter. But unless the owners of a majority of the linear feet of the property fronting on the improvements referred to in this section petition the council therefor, the same shall not be made unless three-fourths of all the members of the council shall by vote order the making thereof. [20 G. A., ch. 20, § 1; C. '73, § 466.]

The construction of a sidewalk is a public rather than a private improvent, and the property is not subject to a mechanic's lien for the expense thereof: *Coenen v. Staub*, 74–32.

That the construction a sidewalk is a street improvement, see notes to § 792.

As to liabilility of city for injury from defective walks, see notes to § 754.

SEC. **780. Repair of sidewalks.** Cities and towns shall have power to repair sidewalks without notice to the property owner, and assess the expense thereof on the property in front of which such repairs are made, and the same shall be certified and collected as other taxes. [25 G. A., ch. 5; 22 G. A., ch. 15; 22 G. A., ch. 16, § 1; C. '73, § 467.]

SEC. **781. Removal of snow and ice.** They shall have power to remove snow, ice or accumulations from abutting property from the sidewalk, without notice to the property owner, if the same has remained upon the walk for the period of ten hours, and assess the expenses thereof on the property from the front of which such snow, ice or accumulations shall be removed; but the expense shall not exceed one and one-half cents per front foot of any lot, and the same shall be certified and collected as other special taxes. [25 G. A., ch. 5, § 1; 23 G. A., ch. 7, § 1; 22 G. A., ch. 16, § 1.]

As to liabity of city for injuries resulting from snow or ice in the streets, see notes to § 754.

SEC. **782. Grades and grading.** They shall have power to establish grades and provide for the grading of any street, highway, avenue, alley, public ground, wharf, landing or market place, the expense thereof to be paid from the general or grading fund, or from the highway or poll taxes of such city or town, or partly from each such funds. [23 G. A., ch. 9; 22 G. A., ch. 13, § 1; 20 G. A., ch. 20, § 1; 15 G. A., ch. 51, §§ 1, 5; C. '73, § 465.]

Establishing or changing grade: The grade of a street can only be established or changed by ordinance: *Kepple v. Keokuk*, 61-653; *McManus v. Hornaday*, 68 N. W., 812; *Blanden v. Fort Dodge*, 71 N. W., 411.

A grade cannot be established except by an ordinance, and the act of the city in otherwise adopting or establishing a grade, to the damage of a property owner, will render the city liable: *Trustees v. Anamosa*, 76–538.

As a rule the base line is to govern as to the grade, but a mistake may be shown in that as well as in other figures: *Freeland v. Muscatine*, 9–461.

The city is not liable in its corporate capacity for negligence of the engineer in establishing for a private person the grade of a street in accordance with the ordinances of the city: *Waller v. Dubuque*, 69–541.

A city may be rendered liable by the acts of its officers in making excavations below the established grade: *Ibid; Freeland v. Muscatine*, 9–461; *Blanden v. Fort Dodge*, 71 N. W. 411.

The city is not liable for damages resulting from the grading of its streets, if done in a careful and skillful manner: *Ellis v. Iowa City*, 29–229.

But the city is liable in such cases if the grading is done in an unskillful manner, as where the natural drainage is destroyed and no means is provided for the escape of surface water: *Ibid; Cotes v. Davenport*, 9–227; *Templin v. Iowa City*, 14–59; *Ross v. Clinton*, 46–606.

If the property owner erects buildings or otherwise improves his lots before the grade is established by the city council he cannot recover for any changes in the surface of the street made after such improvement pursuant to grade lines established by the council, provided such change of the surface be not negligently done: *Kepple v. Keokuk*, 61–653.

Where an ordinance provided that the grade line should be ascertained by or calculated for the middle of the street, *held*, that it was improper in improving streets to the grade established by the ordinance to take

the outer line of the street as the grade line. In determining whether there has been a change of grade the height of the surface of the street must govern, and it is wholly immaterial whether a change by which the surface is made to vary from the grade be by reason of earth or wood or iron. So *held* with reference to railroad tracks laid upon the street: *Given v. Des Moines*, 70–637.

Where the natural surface of the street is above or below the established grade line, the abutting property owners cannot require the city to excavate or fill up the street to grade; and therefore *held*, that where the track of the railroad was on a level with the natural surface of the street the railroad company could not be required to lower such track to the established grade so long as the street itself was not lowered to such grade: *Ibid.*

As to change of grade and liability for damages caused thereby, see § 785 and notes.

Defective drainage: A city is not liable to a civil action for wholly failing to provide drainage or sewerage, nor for any defect or want of efficiency in the plan of sewerage or drainage adopted: *Knostman & Petersen Co. v. Davenport*, 68 N. W., 887.

But if by reason of a defective plan or insufficiency of the drain the sewer water is cast upon premises which are up to grade and would not have been injured but for the improvement made by the city, the owner may recover even though the injury is due to defect in the plan adopted with reasonable care: *Ibid.*

It is the duty of the city, in case of obstructing the natural flow of surface water, to provide waterways sufficient to carry off the water that may reasonably be expected to accumulate, as well as that from floods, freshets, etc.: *Damour v. Lyons*, 44–276.

An adjoining property owner cannot be held guilty of contributory negligence in building his walls in reference to the grade of the street, nor in storing goods in a cellar which is not subject to being flooded if the city does not allow the street to become obstructed: *Ibid.*

A municipal corporation in raising the grade of a street is under obligation to provide at least temporary means of escape for surface water to prevent its being backed upon adjoining property: *Cotes v. Davenport*, 9–227.

How long this escape must be kept open, and whether the closing of the means so provided is an act of negligence, are questions of fact for the jury: *Ross v. Clinton*, 46–606.

It is the duty of the city to provide waterways sufficient to carry off the water that might reasonably be expected to accumulate, judging by such floods as have previously occurred; and where it appeared that there had been two previous storms of equal severity, *held*, that the finding that the rainfall was not unusual was not contrary to the evidence: *Powers v. Council Bluffs*, 50–197.

A city is not ordinarily, if ever, liable for failure to provide culverts or gutters adequate to keep the surface water off from adjoining lots below grade, particularly if the injury would not have occurred had the lots been filled up to a level with the street: *Freburg v. Davenport*, 63–119.

As between a property owner and the city, the property owner is required, in order to protect himself from accumulation of surface water, to raise his lot to grade, and the same principle must obtain between adjoining owners: *Phillips v. Waterhouse*, 69–199.

A city is under no obligation to raise the lots to the line of grade of the streets, nor chargeable with the duty of keeping such lots free from overflow of water. The lot owner may escape annoyance or loss by such overflow by filling his lot to grade, or constructing sewers and sluices, but the city is not liable for the failure to drain such lots: *Gilfeather v. Council Bluffs*, 69–310.

The owner of property cannot recover for injury from overflow of water occasioned by the construction of sewers and drains by the city if the overflow would not have occurred had the premises been brought up to grade: *Knostman & Petersen Co. v. Davenport*, 68 N. W., 887.

A city is not liable for damages resulting from obstruction of overflow water as it is from the obstruction of water flowing in the natural channel: *Morris v. Council Bluffs*, 67–343.

The supreme court has never gone further in maintaining the property owner in the right to protection against surface water than to hold that the city must provide temporary means of escape therefor. But it has on the other hand held that an owner of a lot below grade must take notice of any exposure by bringing the street to grade, and must exercise reasonable diligence to protect himself by bringing his own lot to a corresponding grade: *Ibid.*

A city cannot be enjoined from constructing a tile drain opening into a street the water from which will flow upon the premises of an owner unless by that means a greater amount of water is thrown upon the premises of the party complaining, or it is thrown upon his premises in such way as to be more injurious than if discharged in the natural manner: *Collins v. Keokuk*, 91–293.

SEC. **783. Uniformity of grade.** They shall have power to provide that the grading of all streets, highways, avenues, alleys, public grounds, wharfs, landings or market places of all additions to any city or town, shall be done in the same manner, and conform to existing streets, avenues, highways and alleys thereof. [22 G. A., ch. 16, § 1.]

SEC. **784. Embankments and fills.** Cities of the first class shall have power to construct embankments where streets cross ravines, or where it is necessary that fills should be made for the purpose of retaining the street

at grade to the full width of the remaining portions thereof. Such cities may purchase or condemn lands suitable for such purposes in the manner provided for condemning land by cities; but when the abutting property shall be brought to grade, such city shall reconvey the land so taken to the owner from whom the same was taken, or his grantees, upon the payment by him or them of the price originally paid by said city at the time said property was purchased or condemned. [25 G. A., ch. 4, §§ 1, 2.]

SEC. **785. Change of grade—damages.** When any city or town shall have established the grade of any street or alley, and any person shall have made improvements on the same, or lots abutting thereon, according to the established grade thereof, and such grade shall thereafter be altered in such a manner as to damage, injure or diminish the value of such property so improved, said city or town shall pay to the owner of such property the amount of such damage or injury. [C. '73, § 469.]

Change of grade: The grade is established within the meaning of this section by the passing of an ordinance for that purpose, and if buildings are erected with reference to the grade thus established a changing of grade will render the city liable although the new grade conforms practically to the natural surface, which has not been made to conform to the grade first established; provided the permanent improvement of the street is made in accordance with the new grade; *Ressegieu v. Sioux City*, 63 N. W., 184.

If the street is not permanently improved in accordance with the new grade it may perhaps be said that damage to the property owner has not resulted from such subsequent change: *Ibid.*

It is not the passage of an ordinance changing the grade which gives right of action to a property owner for damages, but the actual making of the physical changes therein contemplated: *Hempstead v. Des Moines*, 63-36.

There can be no recovery of damages for change of grade where the city has not attempted to change the physical surface of the street, and it will not be liable for such change made without authority by a street railway: *Stritesky v. Cedar Rapids*, 67 N. W., 271.

Macadamizing the street, thereby raising the surface about one foot, *held* not to constitute a change in grade, as it would be presumed, in the absence of proof to the contrary, that the street was left at the proper grade line to receive the material: *Warren v. Henly*, 31-31.

Alteration in the surface of the street due to an improvement, but without any substantial change in the grade of the surface as originally fixed, will not entitle the property owner to damages for change of grade: *Coates v. Dubuque*, 68-550.

The change of grade of a street necessarily effects a change of grade of cross streets intersecting the same: *Conklin v. Keokuk*, 73-343.

Liability for damages: A city has authority to change the grade of its streets, and the fact that a property owner has built in accordance with the established grade, and thereafter the grade is changed to his injury, will not entitle him to damages except as the statute gives compensation or his property has been injured by negligence or unskillfulness in making the change: *Russell v. Burlington*, 30-262.

Aside from statutory provisions the city is not liable for necessary damages done to property in consequence of establishing or changing the grade of streets, etc.: *Creal v. Keokuk*, 4 G. Gr., 47; and a party claiming the benefit of the remedy provided by statute must pursue the method pointed out: *Cole v. Muscatine*, 14-296; *Cotes v. Davenport*, 9-227. *Burlington v. Gilbert*, 31-356.

The right to compensation only arises when improvements have been made subsequently to the establishment of the grade, but the damages for which compensation is to be made are those accruing to the entire real estate, and not alone those accruing to the improvements: *Dalzell v. Davenport*, 12-437.

The filling up and grading of residence lots in accordance with the established grade of the street and preparing the same to be built upon constitutes the making of improvements as contemplated by this section: *Chase v. Sioux City*, 86-603.

The city is made liable in such cases not only for *injury* to the property, but for *damages* resulting from the value of the property being diminished. Such diminution is not to be estimated alone on the improvements erected subsequently to the establishment of the grade, but upon the whole property: *Hempstead v. Des Moines*, 52-303.

The improvements referred to in the statute, the making of which entitles the property owner to damages in case of change of grade, are those made on lots situated on a street the grade of which is changed: *Ibid.*

Where improvements are made to correspond with the street as constructed under an existing grade, it will be presumed, in assessing damages resulting from a change in such grade, that the street was constructed in accordance with the grade as previously established, and that the change in grade necessitated a corresponding change in the surface of the street: *Thompson v. Keokuk*, 61-187.

Property is to be deemed improved according to the established grade of the street within the meaning of this section whenever it is so improved that it can be comfortably and conveniently used for the purpose for which it is devoted, while the street upon

which it abuts is maintained at that grade. Such question is for the jury to decide, and it is error to instruct them that the question whether the improvements were made according to the grade depends entirely upon whether they were intentionally built above the line: *Conklin v. Keokuk*, 73–343.

When the council affirms the appraisement it determines that it will make the physical change necessary to conform the street to the grade established, and from that time the right of compensation constitutes a claim in favor of the owner of the property, and in case of his death his executor or administrator and not his heirs are the proper parties to prosecute and appear in the proceedings to collect such damages: *Ibid.*

Where the grade is changed and the street cut down from curb to curb, the right of action for the change of grade of the sidewalk as well as for the change in grade of the street accrues, and a subsequent and separate action for injuries resulting from the change of the grade of the sidewalk cannot be maintained: *Ibid.*

In estimating the damages opinions of witnesses may be received as to the value of the property before and after the change in grade: *Dalzell v. Davenport*, 12–437.

In determining the difference in value of property due to the change of grade the court should take into consideration the uses and purposes for which the building was erected and it is not error to allow the witness to testify as to the fair market value of the property before and after the change of grade for that purpose: *Preston v. Cedar Rapids*, 63 N. W., 577.

Where the effect of the change in grade is such as upon the whole to increase the value of the property, the owner cannot recover for incidental disadvantage or expense resulting therefrom: *Meyer v. Burlington*, 52–560.

In an action for damages for changing the grade the question to be determined by the jury is whether the alteration of the grade diminished the value of plaintiff's property. If the property is benefited more than it is injured by the change, there is no right to recover damages: *McCash v. Burlington*, 72–26.

Where, by filling the lot and raising the house to correspond to the grade as changed, the value of the property was made greater than before the change, *held*, that the cost of filling the lot and raising the house should be taken into account in determining the damage: *Thompson v. Keokuk*, 61–187.

In determining the damages by reason of change of grade, the rule is to consider the difference in the value of the property as it was just before the change and as it was just after, so far as such difference is due to the change. In such cases resulting benefits may be taken into account: *Stewart v. Council Bluffs*, 84–61.

Evidence as to the reasonable cost of putting the property in the same condition that it was before the change is admissible and proper to be considered; but the ultimate fact is the difference in the value caused by the change, and not the expense of putting the property into the same condition: *Ibid.*

The statute provides the steps to be taken by the city, when it proposes to change the grade, for the purpose of determining the damage to property owners, etc., and the city having failed to take such steps is liable to an action by a property owner for the damages, and he is not limited to injunction or *mandamus* to compel the city to pursue the statutory course: *Noyes v. Mason City*, 53–418.

As no appeal is provided for in the proceedings contemplated by statute for the assessment of damages and such assessment may be annulled by the city council, the lot owner is not confined to the remedy there provided, and may maintain an action for damages: *Hempstead v. Des Moines*, 52–303.

Where the city proceeds to alter the grade of a street without taking the proper steps for ascertaining damages, the property owner has no adequate remedy except to enjoin the city from making the alterations until it has the damages assessed, and pays or tenders the amount so ascertained. He may, however, if he sees fit, allow the city to make the alteration and then bring suit to recover the damages: *Phillips v. Council Bluffs*, 63–576.

A party who before the making of improvements waives, in writing, his claims for damages, cannot afterwards make a claim for damages when the city has acted in accordance with the plan to which he has thus given his assent: *Burlington v. Gilbert*, 31–356.

A property owner who petitions for the improvement of a street must be presumed to intend that such improvement shall be made in accordance with the grade as then established and is estopped from afterwards recovering damages against the city on account of the adoption of such grade as different from the grade existing at the time his property was improved: *Preston v. Cedar Rapids*, 63 N. W., 577.

SEC. **786. Appraisers.** The amount of such damage or injury shall be determined and assessed by three disinterested freeholders, one of whom shall be selected by the mayor, one by the owner of the property, and one by the two so appointed; or, in case of their disagreement, by the council. If the owner fails to select an appraiser within ten days from the time of receiving notice to select same, then the council shall select all such appraisers. [C. '73, § 469.]

SEC. **787. Notice.** The appraisers shall take an oath to faithfully and impartially discharge their duties. They shall give ten days' notice in writing to the owner of the property affected of the time and place of their

meeting to view the premises and make their assessment, if such owner resides in the county; which notice shall be served in the same manner as original notices in the district court. If the owner resides outside of the county, or his residence is unknown, notice shall be given by publication once a week for three weeks in some newspaper published in the city or town where the property is located. [C. '73, § 469.]

SEC. **788. Assessment.** The appraisers shall view the premises, and, in their discretion, receive evidence, and may adjourn from day to day. When the appraisement is completed, the appraisers shall sign and return the same to the council, which shall be done within thirty days from the date of their selection. [C. '73, § 469.]

SEC. **789. Confirmation—payment.** The council may, in its discretion, confirm or annul the appraisement, and, if annulled, all proceedings shall be void and of no effect; but, if confirmed, an order of confirmation shall be entered by the clerk in the record of the proceedings of the council. No alteration of grade shall be made until the damages assessed shall have been paid or tendered to the owner of the property so injured or damaged. [C. '73, § 469.]

SEC. **790. Appeal—costs.** Any person interested may appeal from the order of confirmation to the district court of the county in which such property is located, by giving written notice thereof to the mayor, within twenty days after the order of confirmation is entered. On the trial of the appeal, all questions involved in the proceedings, including the amount of damages, shall be open to investigation, and the burden of proof shall, in all cases, be upon the city or town to show that the proceedings are in accord with the provisions of this chapter. The cost of such proceedings, incurred prior to the order of confirmation or annulment of the appraisement, shall in all cases be paid by the city or town. If the person appealing recovers more damages than were awarded by the appraisers, he shall recover the costs of the appeal; if he recovers the same or less than the award, the costs of the appeal shall be taxed to him. [C. '73, § 469.]

The notice of appeal must be given to the mayor. If sufficient in form and given to the person who holds the office of mayor, it is immaterial whether directed to the mayor in his official capacity, or to the city or to the individual: *Conklin v. Keokuk*, 73-343.

On the trial of the appeal the city cannot challenge a taxpayer as juror: *Ibid.*

SEC. **791. Sewers.** They may provide for or authorize the construction, reconstruction and repair of sewers, and regulate their use, and pay therefor out of the general or sewer fund. [22 G. A., ch. 9; 21 G. A., ch. 116; C. '73, § 465.]

In general as to sewers, see next chapter.

CHAPTER 7.

OF STREET IMPROVEMENTS, SEWERS AND SPECIAL ASSESSMENTS.

SECTION **792. Assessing cost of improvements.** Cities shall have power to improve any street, highway, avenue or alley by grading, parking, curbing, paving, graveling, macadamizing and guttering the same or any part thereof, and to provide for the making and reconstruction of usch street improvements, and to assess the costs on abutting property as provided in this chapter; but the construction of permanent parking, curbing, paving, graveling, macadamizing or guttering shall not be done until after the bed therefor shall have been graded, so that such improvement, when fully completed, will bring the street, highway, avenue or alley up to the established grade: *provided* that only so much of the cost of the removal of

the earth and other material as lies between the sub-grade and the established grade shall be assessed to abutting property. [25 G. A., ch. 7, § 20; 23 G. A. ch. 9, § 1; 22 G. A., ch. 13, § 1; 22 G. A., ch. 16, § 1; 21 G. A., ch. 168, § 1; 20 G. A., ch. 20, § 1; C. '73, §§ 466, 527; R., § 1095.]

What improvements may be made: "Macadamizing" includes "trimming" and "guttering:" *McNamara v. Estes*, 22-246.

"To pave" may include all things necessary to make a level and convenient surface for horses, carriages and foot passengers of any convenient or practicable material: *Buell v. Ball*, 20-282, 290.

The authority to "pave," given in a special charter, *held* to include the power to macadamize and gutter: *Warren v. Henley*, 31-31.

A sidewalk is a part of the street and may be paved with brick or stone under the same authority which warrants the improvement of the rest of the street: *Ibid.*

The laying of a plank sidewalk is within the authority to cause streets to be paved or macadamized: *Burlington & M. R. R. Co. v. Spearman*, 12-112. As to sidewalks, see § 777-779; also, notes to § 754.

Where an improvement consisted in an entire raising and changing of the surface of the street, *held*, that it was an improvement for which a special tax might be levied under this section, and not "repairing" as contemplated by the preceding section, to be paid for out of the general funds: *Koons v. Lucas*, 52-177.

Where the improvement, such as paving or macadamizing becomes worn out, it may be renewed at the expense of the owners of abutting property: *Coates v. Dubuque*, 68-550.

The question whether an improvement is demanded by the public wants or necessities is to be determined by the city council, and their determination is conclusive except for want of authority or fraud or oppression: *Ibid.*

The statute confers no authority to assess abutting property for grading or filling a street: *Bucroft v. Council Bluffs*, 63-646; *Scofield v. Council Bluffs*, 68-695.

Such grading or filling as may be properly part of the work of paving may be charged upon abutting lots as a portion of the expense of paving, but any considerable filling or substantial change of the grade does not, in a proper sense, constitute a part of the work of paving: *Ibid.* As to grading, see § 782 and notes.

Where a city constructed a sewer through a street, rendering it necessary to tear up the macadamizing previously done and macadamize again, *held*, such expense was not one for which abutting property could be specially assessed, but that it was incident to the construction of the sewer, and might, as such, be paid out of the general fund: *Burlington v. Palmer*, 67-681.

The city may grade and macadamize less than the whole width of the street where it is not shown to be for the injury or oppression of owners of property adjacent thereto: *Morrison v. Hershire*, 32-271, 276. But the cost of such paving must be divided between the property owners on the opposite sides of the street even though the portion paved is on one side of the center: *Muscatine v. Chicago, R. I. & P. R. Co.*, 88-291.

Where the city is invested with power to make improvements the necessity for making such improvements is a matter for the exclusive determination of the city and the courts will not interfere with its action, in the absence of fraud or oppression: *Dewey v. Des Moines*, 70 N. W., 605.

The necessity for such improvements is not to be measured solely by the wants and necessities of the abutting lot owners: *Ibid.*

The city has no right to tax abutting property for the cost of street improvements which are not to be constructed in accordance with the established grade. Costs of temporary improvements are not to be so taxed: *McManus v. Hornaday*, 68 N. W., 812.

Taxing power: Making the cost of such improvements a charge upon abutting property is an exercise of the power of taxation and not of the right of eminent domain, and such a provision is not unconstitutional as being unequal, applying to particular individuals or classes, and not uniform: *Warren v. Henley*, 31-31.

The power to make special assessments is distinct from the power of general taxation; but both may be granted by the legislature: *Fairfield v. Ratcliff*, 20-396.

All expenses of street improvements may be, in accordance with the law, assessed upon abutting property without regard to the benefits to be conferred upon such property: *Gatch v. Des Moines*, 63-718.

When it is sought to charge a property owner for the cost of works of public improvement from which he acquires but little benefit except such as is shared by the public generally, the power must be exercised strictly in the manner prescribed by law: *Coggeshall v. Des Moines*, 78-235.

The powers given a city or town to make special assessments against abutting property for street improvements are usually strictly construed: *Bucroft v. Council Bluffs*, 63-646.

While such power must be clearly given, it will be enforced when it is within the reasonable construction of the law: *McNamara v. Estes*, 22-246.

The city council may provide the mode under which the taxes contemplated in this and the following section shall be assessed and authorize the city auditor to make such assessment: *Burlington v. Quick*, 47-222.

The word "lot," in prior provisions *held* to mean any portion, piece or division of land: *Buell v. Ball*, 20-282.

Who responsible for: An owner of a corner lot may be required to pay for the cost of macadamizing one-fourth of the square occupied by the intersection of the streets abutting his property: *Wolfe v. Keokuk*, 48-129.

Under prior provisions, *held*, that a special tax for the improvement of a street

could not be taxed to a street railway company occupying a portion of such street: *Koons v. Lucas*, 52–117; nor to a railway company having an easement in the street: *Muscatine v. Chicago, R. I. & P. R. Co.*, 88–291; but see now § 833.

Special assessments, under this section, *held* to be covered by the provisions of a lease requiring the tenant to pay all taxes assessed upon the property during such lease: *Cassady v. Hammer*, 62–359.

The assessment is to be made upon owners of property abutting upon the part of the street which is improved: *Kendig v. Knight*, 60–29.

The fact that the city issues warrants in payment of expenses of improvements on the street, greater in amount than the actual cost of the improvements, for the purpose of making up a deficiency caused by the warrants being below par, will not be a ground of objection to the assessment on the part of an adjoining property owner whose property is assessed for such improvements: *Warren v. Henly*, 31–31.

The fact that an improvement, made on two streets in pursuance of two different resolutions, is made the basis of one assessment on both streets does not render the tax illegal: *Kendig v. Knight*, 60–29.

Assessment of sidewalk taxes should be against lots separately and not *en masse*. *Royce v. Aplington*, 90–352.

The fact that in assessing the costs of improvements upon communicating streets the entire frontage of the corner lot upon both streets is made the basis of assessment does not amount to double assessment of such property: *Morrison v. Hershire*, 32–271.

Where a corner lot faced upon two streets, and the tenant thereof was under obligation to keep up sidewalks in front of the lot, etc, *held*, that he was liable for taxes assessed for the construction of sidewalks on each of the streets: *Des Moines v. Dorr*, 31–89.

An owner of a corner lot may be required to pay for the cost of macadamizing one-fourth of the square occupied by the intersection of the streets on which his property abuts: *Wolf v. Keokuk*, 48–129.

The assessment is to be made upon owners of property abutting upon the part of the street which is improved: *Kendig v. Knight*, 60–29.

Estoppel: Where the owner of abutting property knows that it is the intention to assess the cost of improvements of the adjoining street upon such property, and makes no objection, he will be estopped from questioning the regularity of the assessment: *Robinson v. Burlington*, 50–240. And see *Patterson v. Baumer*, 43–477.

But where a land owner protests against the work being done, and it is done notwithstanding his remonstrance, he is not estopped from contesting the regularity of the assessment, although he has not taken steps to enjoin the prosecution of the work: *Tallant v. Burlington*, 39–543.

A property owner is not estopped from objecting to the validity of an assessment on the ground that the method of making such assessment has not been complied with, by standing by and allowing the improvement to be made without objection, if he might have supposed that the improvement was to be paid for out of the general fund: *Hager v. Burlington*, 42–661.

Where proceedings for the levy of a special assessment for the improvement of a street are void for want of jurisdiction from the beginning, a property owner is not estopped to deny the validity of the assessment on the ground that he has made no objection to the proceeding while the improvement was in progress: *Starr v. Burlington*, 45–87.

Exemption from special assessment: School property is not exempt from liability for taxation by special assessment for improvement of streets, building of sidewalks, etc. Though, perhaps, such tax cannot be enforced by a sale of the property, it may be exacted in some other manner, probably by an action: *Sioux City v. Independent School Dist.*, 55–150.

But the city has no authority to assess expenses of constructing a sewer upon abutting property belonging to the state. It has such powers only with reference to taxing property for improvements as are conferred upon it by statute, and the power of subjecting the property of the state to the payment of such an assessment is not contemplated by statutory provisions: *Polk County Savings Bank v. State*, 69–24.

It is apparent from the provisions of this section that a special assessment for street improvements is not a tax for city purposes, and agricultural land within the city limits is liable therefor, although by statute it may be exempted from city taxation: *Farwell v. Des Moines Brick Mfg. Co.*, 66 N. W., 176.

SEC. **793. How ordered.** The construction or reconstruction of such improvement shall not be ordered made until three-fourths of all the members of the council shall by vote assent thereto, unless the same be petitioned for by the owners of the majority of the linear front feet of the property abutting thereon; but a majority of the council may provide for repairing said improvements. [25 G. A., ch. 7, § 19; 20 G. A., ch. 20, § 1; C. '73, §§ 466, 494; R., § 1135.]

Improvements may be ordered *either* when the proper petition is presented, *or* by three-fourths vote without such petition: *Tallant v. Burlington*, 39–543.

In ordering an improvement in the absence of a petition therefor, the council may act upon information furnished by the report of a committee as well as upon their own knowledge in determining the necessity of the improvement: *Brewster v. Davenport*, 51–427.

Under the provisions of a special charter somewhat similar to this section, *held*, that a party, who with others signed and presented

to the council a petition praying that certain improvements should be made, could not object to the proceedings thereunder on the ground that a sufficient number of property owners had not signed such petition. The proceedings would be binding as to him, although they might not be as to others who had not signed: *Burlington v. Gilbert*, 31-356.

Under this section improvements may be ordered by the city council either when the petition is presented, signed by the requisite number of property owners, or upon a three-fourths vote of the council without such petition: *Tullant v. Burlington*, 39-543.

In ordering an improvement in the absence of a petition therefor, the council may act upon information furnished by the report of a committee as well as upon their own knowledge in determining the necessity of the improvement: *Brewster v. Davenport*, 51-427.

A party who signs and joins in presenting to the council a petition praying for a certain improvement cannot afterwards object to the proceedings upon such petition on the ground that a sufficient number of property owners did not sign it. The proceedings would be binding as to him although they might not be as to others not signing: *Burlington v. Gilbert*, 31-356.

A property owner who petitions for the improvement of the street must be assumed to intend that the improvement shall be according to the grade as then established, and is estopped from recovering damages to his property by reason of the establishment of such grade although it varies from the grade established at the time his property was improved. *Preston v. Cedar Rapids*, 63 N. W., 577.

SEC. **794. Sewers.** They shall have power to provide for the making, reconstruction and repair of sewers and catch basins in any street, highway, avenue, alley, public ground or market place within the limits of said city, and may by ordinance divide such city into such sewer districts as the council may determine, numbering them consecutively, or the entire city may be included in one district; but such construction or reconstruction shall not be ordered made until three-fourths of all the members of the council shall by vote assent thereto, unless the same shall be petitioned for by the owners of a majority of the linear front feet of the property abutting on such sewer, and a majority of the owners of adjacent property benefited thereby and liable to assessment therefor; but a majority of the council may provide for their repair. Any city in which any state building may be situated shall permit the officers in charge thereof, or of their construction, to construct sewers therefor through or under any of the streets, highways, avenues, alleys or public places of said city, or to connect the same with the city sewer system, under the same regulations that are provided for private property owners. [25 G. A., ch. 7, § 19; 24 G. A., ch. 11; 23 G. A., ch. 10; 22 G. A., ch 8, §§ 1, 2; 22 G. A., ch. 16, § 1; 21 G. A., ch. 34; 21 G. A., ch. 168, § 20; 18 G. A., ch. 55, § 1; 17 G. A., ch. 162, § 1; 16 G. A., ch. 54, § 1; C. '73, § 465.]

Under prior provisions, *held*, that the city might create one sewerage district, comprising all its territory; that an ordinance having been duly passed providing for the construction of sewers, the city might, by resolution, exercise the authority, and apply it to any particular sewer; and that a call of yeas and nays was not essential on passage of such resolution: *Grimmell v. Des Moines*, 57-144.

Sewerage in a populous city is not merely a private matter for the convenience of a few persons, but is a matter of public concern affecting the health and lives of the inhabitants, and a city or town may, in pursuance of law, assess the expense of the construction of a sewer upon abutting property, without regard to the benefits conferred upon such property: *Gatch v. Des Moines*, 63-718.

The construction of one sewer leading through two or more connecting streets may be ordered in one proceeding, and the assessment made upon abutting property for the whole work: *Grimmell v. Des Moines*, 57-144.

Where a city had, prior to the passage of a statute authorizing special assessments on adjacent property, levied a tax for, and commenced the construction of, a sewer, which constituted a main artery in the system of sewerage of the city, *held*, that it could not change the mode of paying for further improvements, and require the adjacent property to pay the whole expense thereafter to be incurred; and further, *held*, that the legislature could not, by a legalizing act, render valid such improper action of the city: *Independent School Dist. v. Burlington*, 60-500.

SEC. **795. Condemning land for.** They shall have power, in order to carry off flowing water, or for other reasons, to follow ravines, and lay a main or lateral sewer to pass through private property, and condemn the same for the location thereof, in the manner provided for the condemnation of land for city purposes, the costs of which shall constitute a part of the

expenses of the sewer, and be assessed accordingly. ' [24 G. A., ch. 8, § 1; 16 G. A., ch. 107, § 2.]

SEC. **796. Cross sewers.** They shall have power to provide, by ordinance or resolution, terms and conditions on which cross sewers may be attached to or connected with main sewers; and, in cases where sewers have been constructed in whole or in part by special assessment, may pay to the parties who have been so assessed the money, or a part thereof, charged and collected for the privilege of attaching such cross sewers. [17 G. A., ch. 162, § 6.]

SEC. **797. Changing water courses.** They shall have power to deepen, widen, straighten, wall, fill, cover, alter or change the channel of any water course or part thereof, flowing through the limits of such city; to construct artificial channels, or covered drains, sufficient to carry the water theretofore flowing in such water course, and divert it from the natural channel, and conduct the same through such artificial channel or covered drain, and fill the old channel. [23 G. A., ch. 6, § 1; 19 G. A., ch. 89, § 3.]

SEC. **798. Plans.** When the council determines, by resolution or otherwise, to exercise the powers named in the preceding section, it shall direct the city engineer, if there is one, and if not one employed by it, to make the proper plans and specifications for doing the work, and prepare an estimate of the cost thereof. [23 G. A., ch. 6, § 2.]

SEC. **799. Question submitted.** If the council on receiving the plans, specifications, and estimate of the expenses to be incurred, referred to in the last preceding section, shall still be of the opinion that the work should be done as proposed, it shall call a special election to finally determine the same question, and also the question of levying a special tax, in addition to all other taxes now provided for by law, for that purpose. If the council shall determine that the estimated cost is greater than should be levied and collected in a single year, it may fix the yearly proportion, and determine in what years the same shall be levied and collected, and provide by ordinance or resolution the time of submitting the question to a vote. [Same, § 3.]

SEC. **800. Plat.** If a majority of the votes cast shall be in favor of the proposition, the council shall order the engineer to make a survey and plat of the stream or portion thereof proposed to be widened, deepened, straightened, walled, filled, altered, changed or diverted. The plat shall show its condition, position, location, boundaries and course at the time of the platting of the town site, as nearly as possible; its present condition, location and course; any changes that have occurred in its natural course since the platting of the town site; all the lots or tracts of land, by their description, abutting on said original or present channels, and the names of all the owners thereof; which plat and notes of the survey the engineer shall file in the office of the clerk, retaining a duplicate in his office. [Same, § 4.]

SEC. **801. Damages assessed.** After the plat and notes of the survey are made and filed, the council shall appoint five commissioners, resident freeholders of the city, not interested in any property abutting on said stream, who shall be sworn faithfully and impartially to perform the duties that may be required of them, either by this chapter or any ordinance passed in pursuance hereof, who shall determine what lot, lots or lands abutting on said stream will be benefited or damaged by doing the work, the amount of benefit or damages which will accrue to or be sustained by each and every lot, lots or lands, and the owners thereof, and make report in writing of their findings. In determining any question as to whether benefits accrue to or damages are sustained by such lot, lots or lands, or the owners thereof, the said commissioners shall consider the amount of land reclaimed or lost, the expense that will be incurred by the owners thereof in doing said work, and the advantages accruing from the removal of the easement of said water course, and any other matter that they may think

proper to be considered for such purpose, but no damages shall be awarded for the cost of filling said channel. The commissioners shall give notice of the time and place of their meetings to determine what lot, lots and lands are benefited or damaged, by publication thereof at least five days successively prior thereto, in some newspaper of general circulation in said city; and, for the purpose of enabling them to determine the fact of benefit or damage, may take any competent evidence which the owner of any property affected may see fit to offer. The findings of the commissioners shall be returned to the council, and it may approve, reject or modify the same. Notice of the hearing before the council, upon the report so made, shall be given by publication in a newspaper of general circulation in the city for five successive days, which last publication shall be ten days before such hearing, and if, after this hearing, it shall conclude to reject the report, it shall resubmit the matter to other commissioners, who shall proceed as in the first instance. If the council shall approve or modify this second finding, it shall proceed to assess the amount of benefits so found against said abutting lot, lots or lands, and the channel to be filled or reclaimed. Any person aggrieved by the action of the council in making said assessment may appeal therefrom to the district court of the county in which it is made, within twenty days from the date of the assessment, and also have the right to review the action of the council in said court in the manner now provided by law. [Same, § 5.]

SEC. **802. Filling channel—assessment of cost.** If it is proposed to divert a stream or part thereof from its course and conduct it through a new channel, or through a covered drain, the council shall have power to order the old channel filled up, and if any part is not so filled by the owner or owners within such time as may be prescribed by ordinance or resolution, the council may contract for filling the same or any part thereof, and shall have power to assess the cost thereof against the property abutting thereon, including that reclaimed therefrom, in proportion to the number of cubic yards of fill required and made upon, against and in front of each of said lots or tracts, and shall provide, by ordinance or resolution, the manner of ascertainment of said cost, and of adopting and making said assessments; notice to be given to said owners of the time and place of making the same; and it may also provide by ordinance or resolution when said special assessments for benefits and for the expense of filling the old channel shall become due and payable, whether in one payment or in installments, the number of installments, the rate of interest, not exceeding six per cent. per annum, the deferred payments shall draw, and the time when said special installments shall mature. Such assessments shall become a lien and be collected as in case of special assessments for sewers. [Same, §§ 6, 7.]

SEC. **803. Continuing streets.** Streets and alleys intersecting the stream or old channel shall be projected across it so as to make a continuous street or alley, and if such street or alley is shown upon the recorded plat as terminating on one side of such stream or old channel, the plat shall be corrected so as to show a continuous street or alley, and the expenses of filling all such streets and alleys shall be paid by the city. [Same, § 8.]

SEC. **804. Condemning land for.** Said cities may also condemn and appropriate so much private property as shall be necessary to carry into effect the provisions of this chapter relating to change of water courses, in the manner provided for condemning land for city purposes. [Same, § 10.]

SEC. **805. Construction.** After the report of the commissioners to the council and final action thereon by it, the council shall have authority to order the work of constructing a new channel or covered way or part thereof, as hereinbefore provided, and may authorize different portions of said work to be done in different years successively. [Same, § 11.]

SEC. **806. Special tax.** The cost of doing any work authorized, or any part thereof, except so much of the cost of filling an old channel as is to be

assessed against abutting property, the compensation for private property condemned and appropriated for such uses, and the damages sustained on account of such change in the channel of a stream, shall be paid by a special tax, by the collection of special assessments for benefits to lots and lands abutting upon the old water course, by other special assessments, if any, which may be made against the property adjacent to the streets and alleys on which the new channel or covered way is located and benefited thereby, and by appropriations from the general funds of the city available for that purpose; which special tax herein authorized the council shall have power to levy, payable yearly and in proportion as the proposed work is done. [Same, § 12.]

SEC. **807. Assessment to abutting property.** If a covered drain or new channel shall be constructed along any street or alley, and used by the city as a sanitary or storm water way, the council shall have power to assess upon the lots or lands adjacent to the line of such covered drain or new channel, and benefited thereby, a portion of the cost thereof, not exceeding the sum of two dollars per linear foot of such drain or channel; which assessment shall be made and levied in the manner provided by law relating to the cost of sewers. [Same, § 13.]

SEC. **808. Bonds.** They may issue bonds in anticipation of such special tax, in the manner authorized with reference to sewer and city improvement funds, not in excess, however, of the tax which shall have been levied. [Same, § 14.]

SEC. **809. Gas and water connections.** They shall have power to require the connections from gas, water and steam heating pipes, sewer and underground electric connections, to the curb line of adjacent property, to be made before the permanent improvement of the street, highway, avenue, alley, public ground or place whereon they are located; and, where such improvements have already been made, to regulate the making of such connections, and fix the charges therefor, and make all needful rules and regulations in relation to such connections and the use thereof. In case the owners of property on such streets shall fail to make such connections in the manner and within the time fixed by the council, it may cause the same to be made, and assess against the property in front of which they are made the cost and expense thereof. [22 G. A., ch. 9; 22 G. A., ch. 16, § 1; 21 G. A., ch. 116; 19 G. A., ch. 89, § 8; 16 G. A., ch. 107, § 3.]

SEC. **810. Street improvements and sewers—preliminary notice.** When the council of any such city shall deem it advisable or necessary to make or reconstruct any street improvement or sewer authorized in this chapter, it shall, in a proposed resolution, declare such necessity or advisability, stating the kind of material proposed to be used and method of construction, whether abutting property will be assessed, and, in case of sewers, the kind and size, and what adjacent property is proposed to be assessed therefor, and in both cases designate the location and terminal points thereof, and cause twenty days' notice of the time when said resolution will be considered by it for passage to be given by four publications in some newspaper of general circulation published in the city, the last of which shall be not less than two nor more than four weeks prior to the time fixed for its consideration, at which time the owners of the property subject to assessment for the same may appear and make objection to the contemplated improvement or sewer and the passage of said proposed resolution, at which hearing the same may be amended and passed, or passed as proposed. [25 G. A., ch. 7, § 20; 22 G. A., ch. 6, §§ 2, 3; 21 G. A., ch. 168, § 21.]

Under prior provisions, *held*, that there was implied a determination of the council, in advance of the publication of notice, of the kind of material to be used in the proposed work; and that without such determination the requirement with reference to notice could not be complied with. Therefore, *held*, that where the proposition and notice were for bids for various forms of pavement, the question as to the kind to be adopted to be settled in the acceptance of the bids, the contract was not valid, and the

abutting owners could not be required to pay certificates issued against their property: *Coggeshall v. Des Moines*, 78-235.

The fact that the property owner makes no objection until after a portion of the work has been done and expenses incident thereto incurred does not constitute an estoppel so as to prevent such property owner from contesting the validity of the assessment: *Ibid.*

SEC. **811. Resolution.** Upon compliance with the preceding section, the council may, by ordinance or resolution, order the making or reconstruction of such street improvement or sewer, but the vote shall be by yeas and nays, and entered of record, and the record shall show whether the improvement was petitioned for or made on the motion of the council. [25 G. A., ch. 7, § 19.]

Where the resolution of the council ordering a sewer adopts the plat of the engineer by reference thereto, and thus furnishes a means of obtaining precise knowledge of the tax assessed to each tract and individual and the total cost of the sewer, it is sufficiently definite: *Duttoe v. Davenport*, 74-66.

SEC. **812. Contract.** When the making or reconstruction of any such street improvement or sewer is ordered, the council, or board of public works where such board exists, shall contract for furnishing labor and material and for the making or reconstruction, either of the entire work in one contract, or for parts thereof in separate and specified sections; but no work shall be done under any such contract until a certified copy thereof shall have been filed in the office of the clerk. [25 G. A., ch. 7, §§ 2, 20; 22 G. A., ch. 5, § 1; 22 G. A., ch. 6, § 3; 21 G. A., ch. 168, § 2; 20 G. A., ch. 20, § 2; 17 G. A., ch. 162, § 2; 16 G. A., ch. 107, § 3; 15 G. A., ch. 51, § 2.]

SEC. **813. Bids.** All contracts for the making or reconstruction of street improvements and sewers shall be let in the name of the city, to the lowest bidder, by sealed proposals, upon giving notice for at least ten days by two publications in a newspaper published in said city, which notice shall state as nearly as practicable the extent of the work and the kind of materials for which bids will be received, when the work shall be done, the terms of payment fixed, and the time the proposals shall be acted upon; but all bids may be rejected and new bids ordered. All bids must be accompanied, in a separate envelope, with a certified check payable to the order of the treasurer, in a sum to be named in the notice for bids, as security that the bidder will enter into a contract for the doing of the work, and will give the bond required in the following section. All such checks, where the bid has not been accepted, shall be returned to the respective bidders. [25 G. A., ch. 7, § 3; 22 G. A., ch. 5, § 2; 22 G. A., ch. 6, § 1; 21 G. A., ch. 168, § 3; 20 G. A., ch. 20, § 2; 17 G. A., ch. 162, § 2; 15 G. A., ch. 51, § 2.]

As to prior provisions with reference to proposals for bids, see *Dewey v. Des Moines*, 70 N. W., 605.

SEC **814. Contractor's bond to repair.** All contracts for the making or reconstruction of street improvements or sewers shall contain a provision obligating the contractor and his bondsmen to keep such improvement or sewer in good repair for not exceeding one year after the acceptance of the same by the city, and the bond shall be so conditioned.

SEC. **815. Bond to perform.** Each contractor for street improvements and sewers shall give bonds to the city, with sureties to be approved by the council, or board of public works where such board exists, for the faithful performance of the contract, and suit on such bond may be brought in the county in which the council may hold its sessions. [25 G. A., ch 7, § 4; 21 G. A., ch. 168, § 4; 20 G. A., ch. 20, § 2; 17 G. A , ch. 162, § 2.]

SEC. **816. Lien of tax.** After a contract has been made by any city for the making or reconstruction of any street improvement or sewer, the clerk shall file with the auditor of the county, or each of the counties, in which said city is situated, a written or printed copy of the notice of the resolution provided for, with a true copy of the proof of publication thereof,

together with a certificate of the clerk that an ordinance or resolution has been adopted directing the making or reconstruction of said street improvement or sewer. Thereupon all special taxes for the cost thereof, or any part of said cost, which are to be assessed and levied against real property, or any railway or street railway, together with all interest and penalties on all of said assessments, shall become and remain a lien on such property from the date of the filing of said papers with the county auditor until paid, and shall have precedence over all other liens except ordinary taxes, which shall not be divested by any judicial sale; but such lien for street improvements in case of abutting property shall not cover to exceed one hundred and fifty feet in depth from the abutting line. Any such assessment against a railway or street railway shall be a first and paramount lien upon the track thereof within the limits of the city. [25 G. A., ch. 7, § 12; 21 G. A., ch. 168, § 3; 20 G. A., ch. 20, § 3; 20 G. A., ch. 25, § 9; 15 G. A., ch. 51, § 3.]

As to lien of the special tax under prior provisions see *Kendig v. Knight*, 60-29; *Eagle Mfg. Co. v. Davenport*, 70 N. W., 707.

SEC. **817. Cost at intersections.** The cost of any street improvement or sewer at the intersection of streets, highways, avenues and alleys, or any part of it, and one-half of the cost of the same at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, or any part thereof, may be paid, in case of sewers, from the city sewer fund or the district sewer fund of such sewer district, or the general revenue of said city, or as provided in the second following section; and, in case of street improvements, from the city improvement fund, except that part to be constructed by, paid for by, or assessed to railways and street railways; but the cost in whole or in part of such street improvement at the places designated in this section, excluding cost of that part embraced within the foregoing exception, may be assessed against the property abutting or fronting upon that portion of the street, highway, avenue or alley so improved in proportion to the linear front feet fronting or abutting upon such improvement. [26 G. A., ch. 9; 25 G. A., ch. 7, § 10; 25 G. A., ch. 8; 22 G. A., ch. 5, § 5; 22 G. A., ch. 7, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 168, § 10; 20 G. A., ch. 20, §§ 3, 5; 19 G. A., ch. 38, § 1.]

SEC. **818. Cost of improvements—how paid.** The cost of opening, widening, extending and grading any street, highway, avenue, alley, public ground or market place shall be paid in whole or in part from the grading fund. The cost of making or reconstructing any street improvement authorized in this chapter, except that embraced within the preceding section, and that hereinafter provided to be paid by and assessed to railways or street railways, shall be assessed as a special tax against the property abutting thereon, in proportion to the number of linear front feet of each parcel so abutting. [23 G. A., ch. 5, § 1; 22 G. A., ch. 5, § 5; 21 G. A., ch. 168, § 10; C. '73, § 466.]

SEC. **819. Cost of sewers.** The cost, or any part thereof, of making or reconstructing sewers, including that provided for in the second preceding section, may be paid from the district sewer fund of the sewer district in which the same is situated, or from the city sewer fund, or from the general revenue, and the portion thereof not so paid, and not in excess of three dollars per linear foot of sewer, shall be assessed against the property abutting on such sewer in proportion to the number of linear front feet of each parcel thereof, and upon adjacent property in proportion to the benefit thereto; but in estimating the benefits to result therefrom to adjacent property, no account shall be taken of improvements, and each lot or parcel of land shall be considered as wholly unimproved. The city may combine any or all of said methods of assessment. [25 G. A., ch. 7, § 21; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

SEC. **820. Assessment of cost.** When the making or reconstruction of any street improvement or sewer shall have been completed, or such part thereof shall have been completed as, under the contract, is to be paid for when done, the council, or board of public works where such board exists, shall ascertain the cost thereof, including the cost of the estimates, notices, inspection, and preparing the assessment and plat, and shall also ascertain what portion of such cost shall be, by law and the ordinance or resolution of the council under which such street improvement was made or sewer constructed, assessable upon abutting property; and, in case of sewers, also upon adjacent property, and what portion shall be assessed upon such abutting property, and in case of sewers, upon such abutting and adjacent property, for intersections and spaces opposite property owned by the city or the United States; and the council shall then assess such portions upon and against such property as provided by law. [25 G. A., ch. 7, §§ 10, 21; 22 G. A., ch. 5, § 5; 22 G. A., ch. 6, § 4; 21 G. A., ch. 168, § 10; 20 G. A., ch. 20, § 3.]

The statute having fixed the mode of procedure that mode must be followed and an assessment made not in pursuance of the ordinance on the subject but independently of it will be invalid: *Zelie v. Webster City*, 62 N. W., 796.

The improvement of one street may be under several contracts or of several streets under one contract and it is not necessary that the assessment be at the same rate per linear foot throughout: *Gilcrest v. Macartney*, 66 N. W., 103.

The fact that an improvement is made on two streets in pursuance of two different resolutions, but that in making the assessment the entire improvement on both streets is taken into consideration, does not render the tax illegal: *Kendig v. Knight*, 60–29.

SEC. **821. Plat and schedule.** In assessing that part of the cost of the making or reconstruction of any street improvement or sewer, or completed part thereof, which is assessable against the lots or parcels of ground abutting thereon, or, in case of sewers, adjacent thereto, the council, or board of public works where such board exists, shall cause to be prepared a plat of the streets, avenues, highways, alleys, or the part thereof on which the same shall have been made or reconstructed, showing the separate lots or parcels of ground, or specified portion thereof, subject to assessment for such improvement, the names of the owners thereof as far as practicable, and the amount to be assessed against each lot or parcel of ground, and against any railway or street railway, and shall file said plat and schedule in the office of the clerk, which shall be subject to public inspection. [25 G. A., ch. 7, § 20; 22 G. A., ch. 5, §§ 5, 6; 22 G. A., ch. 6, § 8; 21 G. A., ch. 168, §§ 10, 11; 20 G. A , ch. 20, § 6.]

SEC. **822. Estimates—city engineer.** The city engineer, or other person employed by the council to discharge the duties of such office, shall, under its direction, or that of the board of public works where such board exists, make or assist in making all estimates for street improvements and sewers, furnish the necessary grades and lines, see that the work conforms thereto and is in accordance with the ordinance or resolution of the council, and make or assist in making each required assessment, plat and schedule. [25 G. A., ch. 7, § 5; 23 G. A., ch. 14, § 5; 22 G. A., ch. 5, §§ 3, 5; 22 G. A., ch. 6, §§ 3, 8; 21 G. A., ch. 168, §§ 5, 10.]

SEC. **823. Notice of assessment.** After filing the plat and schedule, the council shall give at least ten days' notice by two publications in each of two newspapers published in the city, if there be that number, otherwise in one, and by handbills posted in conspicuous places along the line of such street improvement or sewer, that said plat and schedule are on file in the office of the clerk, and that within twenty days after the first publication all objections thereto, or to the prior proceedings, on account of errors, irregularities or inequalities, must be made in writing and filed with the clerk; and the council, having heard such objections and made the necessary corrections, shall then make the special assessments as

shown in said plat and schedule, as corrected and approved. [25 G. A., ch. 7, §§ 11, 18; 22 G. A., ch. 5, § 6; 22 G. A., ch. 6, § 5; 21 G. A., ch. 168, §§ 11, 19.]

Notice by publication is sufficient to warrant personal judgment against the property owner for the expense of filling up a lot according to a proper resolution: *Independence v. Purdy*, 46-202.

Although the statute does not in terms require notice of an assessment for special improvements to be given to the property owner, yet such notice is an indispensable requisite to the exercise of the taxing power, and an ordinance providing for such assessment without such notice and opportunity to the party assessed to appear and object to the assessment on his property is void: *Gatch v. Des Moines*, 63-718.

At least this is true where the statute or ordinance provides for an assessment according to the benefits, so that in making the assessment an opinion is to be formed and discretion exercised by the assessors: *Trustees of Griswold College v. Davenport*, 65-633.

So where an ordinance providing for the filling of lots, to prevent the standing of stagnant water thereon, made no provision for notice to the owner of the property, and no notice of the proceeding was in fact served upon him so as to give him opportunity to show that no such burdensome and extraordinary expenditure as contemplated by the resolution adopted under such ordinance was necessary for the abatement of the nuisance, *held*, that the proceedings were void: *Bush v. Dubuque*, 69-233.

It is immaterial, in such a case, that the lot owner has notice and an opportunity to be heard before the tax is assessed upon his lots. He has a right to have the council enjoined from involving the city in an unauthorized and illegal contract to fill his lots to a greater height than necessary, and to expend more money than they have a right to collect from him for such improvement: *Ibid.*

If the ordinance does not provide for giving to the property owner affected by the improvement notice of the assessment to which his property is subjected the proceeding thereunder will be void: *Zelie v. Webster City*, 62 N. W., 796.

Where the proportion of taxes to be levied upon abutting property is determined by the frontage of the property upon the street improved, and nothing is necessary to determine the amount of tax to be charged to the property owner except a mathematical computation, no discretion being left to the city council, no notice of the assessment is necessary: *Amery v. Keokuk*, 72-701.

Under an ordinance providing that a resolution for the improvement of streets and taxation of costs to abutting owners should be published before being acted upon, *held*, that such requirement was mandatory, and that proceedings under a resolution not thus published were void: *Roche v. Dubuque*, 42-250. Under prior provisions notice by publication as provided in the ordinance was held sufficient: *Lyman v. Plummer*, 75-353.

The fact that the statute authorizing incorporated towns to pave does not prescribe notice to property owners does not prevent sufficient notice being provided for by ordinance, by which owners of property have an opportunity to be heard in reference to the amount assessed against their land and lots: *Ford v. North Des Moines*, 80-626.

Where the amount of the assessment can be ascertained by a mere mathematical calculation, and where no judgment or discretion is required to be exercised, no notice of the assessment is necessary: *Ibid.*

The fact that the council is induced to order the paving of the streets at the expense of property owners by the proposition of parties interested that the grading shall be done without expense to the city does not render such arrangement for paving invalid: *Ibid.*

Where taxes for improvements, which might have been avoided on the ground that there was not proper notice of the assessment thereof, have been voluntarily paid, action cannot be maintained for the recovery thereof: *Newcomb v. Davenport*, 86-291.

SEC. **824. Objections.** All objections to errors, irregularities or inequalities in the making of said special assessments, or in any of the prior proceedings or notices, not made before the council at the time and in the manner herein provided for, shall be waived except where fraud is shown.

SEC. **825. Levy of assessment—installments.** The special assessments made in said plat and schedule, as corrected and approved, shall be levied at one time, by ordinance or resolution, against the property abutting on such street improvement or sewer, and, in case of sewers, upon adjacent property, and, when levied and certified, shall be payable at the office of the county treasurer. If the owner of any lot or parcel of land or railway or street railway, the assessment against which is embraced in any bond or certificate provided for in chapter eight of this title, shall, within thirty days from the date of such assessment, promise and agree in writing, indorsed on such bond or certificate, or in a separate agreement, that, in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assess-

ment or levy of such tax upon and against his property, and will pay said assessment with interest thereon at such rate, not exceeding six per cent. per annum, as shall by ordinance or resolution of the council be prescribed, such tax so levied against the lot or parcel of land or railway or street railway of such owner shall be payable in seven equal installments, the first of which, with interest on the whole assessment, shall mature and be payable on the date of such assessment, and the others, with interest on the whole amount unpaid, annually thereafter, at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such promise and agreement in writing shall be made by the owner of any lot or parcel of land or railway or street railway within said time, then the whole of said special assessment so levied upon and against the property of such owner shall mature at one time, and be due and payable, with interest, on the date of such assessment, and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All such taxes with interest shall become delinquent on the first day of March next after their maturity, and shall bear the same interest, with the same penalties, as ordinary taxes. [25 G. A., ch. 7, §§ 11–20; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 3, 6; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 3.]

SEC. **826. Filing certificate of assessment.** A certificate of levy of such special assessment, fixing the number of installments and time when payable, certified as correct by the clerk, shall be filed with the auditor of the county, or of each of the counties, in which such city is situated, and thereupon said special assessment as shown therein shall be placed on the tax list of the proper county. [22 G. A., ch. 5, §§ 6, 7; 20 G. A., ch. 20, § 3; 17 G. A., ch. 162, § 4.]

SEC. **827. Interest on installments.** Each installment of any special assessment shall bear interest from the date of the assessment, not to exceed six per cent. per annum, which shall become due and payable at the March semiannual payment of ordinary taxes. If certificates or bonds issued to pay for said street improvement or sewer bear a less rate of interest, the clerk shall certify to the auditor of said county or counties such fact, and the installments shall draw such rate of interest only. Upon the payment of any installment, there shall be computed and collected the installment, and interest on the whole assessment remaining unpaid up to the first day of April following. [25 G. A., ch. 7, § 11; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 3, 5, 6; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 3.]

SEC. **828. Payment.** The owner of any property against which a street improvement or sewer assessment has been levied shall have the right to pay the same, or the unpaid installments thereof, with all interest, as the case may be, up to the time of said payment, with any penalties and the cost of any proceedings for the sale of the property for such special assessment or installments. No part of the line of any railway or street railway shall be released from the lien for any part of any unpaid assessment which has been made against it for street improvements, until the whole assessment shall have been paid. If any owner of property subject to special assessment shall so divide the same that the feet fronting upon such street improvement or sewer are contained in two or more lots or parcels, he may discharge the lien in like manner upon any one or more of them, by payment of the amount unpaid, calculated by the ratio of square feet in area of such lot or lots or parcel or parcels to the area of the whole lot. [25 G. A., ch. 7, § 13; 21 G. A., ch. 168, § 14; 20 G. A., ch. 20, § 6.]

SEC. **829. Sale for assessment.** Property against which a special assessment has been levied for street improvement or sewers may be sold for any sum of principal or interest due and delinquent at any regular or adjourned tax sale, in the same manner, with the same forfeitures, penalties and right of redemption, and certificates and deeds on such sales shall

be made in the same manner and with like effect, as in case of sales for the non-payment of ordinary taxes. At any such sale, where bonds have been issued in anticipation of such special taxes and interest, the city may be a purchaser, and be entitled to all the rights of purchasers at tax sales. The purchaser at such sale shall take the property charged with the lien of the remaining unpaid installments and interest. The proceeds subsequently realized from sales of any property so purchased by a city shall be covered into the city improvement fund. [23 G. A., ch. 6, § 7; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 3, 6; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 3; 15 G. A., ch. 51, § 3.]

A city which has properly ordered special assessments for improvements, and paid the contractor for the same, may, in an action, recover from property owners the respective amounts with which they are chargeable: *Burlington v. Quick*, 47–222.

It seems that an action by the city to recover such assessment can only be brought after it has paid the contractor: *Ibid*, 229.

Proceedings for the collection of special assessments will not be reviewed upon appeal, except in case of manifest abuse resulting in substantial prejudice: *Des Moines v. Stephenson*, 19–507.

A municipal corporation which has the power to levy and collect a certain tax cannot delegate its powers so as to enable its assignee to collect such tax in his own name, either in an action at law or in equity, but the city may proceed to collect such tax after a void assignment thereof, and enforce its lien: *McInerny v. Reed*, 23–410.

Where a certificate of sidewalk assessments showed the levy of such tax upon lots *en masse* and they were so sold, *held*, that the sale was invalid: *Royce v. Aplington*, 90–352.

As to liability for penalty and collection fee under prior provisions, see *Tuttle v. Polk*, 84–12; *Muscatine v. Chicago, R. I. & P. R. Co.*, 88–291; *Ankeny v. Henningsen*, 54–29.

Under § 478 of Code of '73 there was express provision for personal liability for special assessments and such liability need not be provided for by ordinance: *Farwell v. Des Moines Brick Mfg. Co.*, 66 N. W., 176; *Dewey v, Des Moines*, 70 N. W., 605.

And, *held*, that the fact a statute with regard to special assessments did not declare that the land-owner should be personally liable therefor did not by implication repeal such provision as applicable to such assessment: *Farwell v. Des Moines Brick Mfg. Co.*, 66 N. W., 176.

But such an assessment is not a tax for city purposes and is enforcible against lands which are exempt from city taxes: *Ibid.*

Under the provisions of a special charter, *held*, that the city might maintain an action at law to recover a special tax assessed on abutting property for the expenses of paving the streets: *Muscatine v. Chicago, R. I. & P. R. Co.*, 79–645.

The section of Code of '73, in so far as it authorized the rendering of a personal judgment against the property owner, *held* not unconstitutional: *Burlington v. Quick*, 47–222, 226.

Under provisions of a special charter making costs of special improvements a lien upon abutting property, *held*, that the property owner was not individually liable for the tax for improvements assessed against his lot: *Buell v. Ball*, 20–282.

As to whether he could be constitutionally made individually liable for such taxes, *quœre: Ibid.*

In a proceeding to recover the costs of constructing sidewalks, under a city ordinance, *held* error to render personal judgment against parties not personally notified to make the improvements as required by ordinance, or who did not acquire ownership of the property until after the improvements were made: *Des Moines v. Casady*, 21–570.

Counter-claim: In an action by a city to recover from a property owner a special tax for improvement in streets, defendant cannot set up a counter-claim against the city for damages to his property by reason of the negligent performance of the work. Such a counter-claim, if established, would be payable out of the general fund of the city, and should not be allowed to be deducted from the special fund raised for the improvement: *Burlington v. Palmer*, 67–681.

Where a property owner brought action to restrain the sale of his property for the payment of a special tax, *held*, that the city might, by way of counter-claim, ask judgment for the amount of the tax, and was entitled to such relief: *Kendig v. Knight*, 60–29.

Recovery of illegal tax: Under an ordinance of a city under special charter, substantially the same in its provisions as the statute, with reference to county taxes illegally paid, *held*, that an illegal tax paid under protest might be recovered back: *Tallant v. Burlington*, 39–543.

Under such ordinance, *held*, that a person who had paid an illegal special assessment might recover the same in an action: *Robinson v. Burlington*, 50–240.

The discretion to be exercised by the court in regard to severing proceedings, as herein provided, will not be reviewed upon appeal, except in case of manifest abuse resulting in substantial prejudice: *Des Mones v. Stephenson*, 19–507.

After an entry of the municipal taxes upon the county books, sales are to be made therefor as though they were a part of the county taxes: *Morrison v. Hershire*, 32–271.

For mere irregularities in the levy and apportionment of taxes, injunction against their collection cannot be maintained against a city: *Ibid.*

A statute similar to this section, giving to cities organized under special charter power to collect taxes by certifying them to the county treasurer, was held not to take

away the right previously existing to provide for the collection of such tax by action in the courts: *City of Dubuque v. Harrison*, 34–163.

The levy and collection of special taxes upon particular property by a municipal corporrtion must follow the law authorizing them with the same degree of strictness as in other cases of taxation. Where an ordinance requires publication before such tax is due and payable, the tax cannot become due and payable until this requirement is complied with: *Dubuque v. Wooton*, 28–571.

SEC. **830. Levy for city improvement fund.** When the whole or any part of the cost of the making or reconstruction of any street improvement shall be ordered paid from the city improvement fund, to be levied upon all the property within any city, it shall have the power, after the completion of the work, by ordinance or resolution, to levy at one time the whole or any part of the cost of said improvement upon all the taxable property within such city, and determine the whole percentage of tax necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years, not exceeding ten, given for the maturity of each installment thereof; but no part of such cost shall be levied against property owned by the city or the United States. Certificates of such levies shall be filed with the auditor of the county or counties in which said city is located, setting forth the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all the property in said city, certified as correct by the clerk, and thereupon said tax shall be placed on the tax list of the proper county or counties. [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, § 3; 19 G. A., ch. 38, § 2.]

SEC. **831. Levy for sewer fund.** When the whole or any part of the cost of making or reconstructing any sewer shall be ordered paid from the sewer fund of any sewer district or from the city sewer fund, the council may, after the completion of the work, by ordinance or resolution, levy at one time the whole or any part of the cost of such sewer upon all the taxable real property within such sewer district or within the city, as the case may be, and determine the whole percentage of tax necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years, not exceeding ten, given for the maturity of each installment thereof; but no part of such cost shall be levied against property owned by the city or the United States. Certificates of such levies shall be filed with the auditor of the county or counties in which said sewer district or city is located, setting forth the amount or percentage and maturity of said tax, or each installment thereof, with a description of the boundaries of the particular sewer district, or a sufficient description of the real property of the sewer district or city upon which the tax is levied, duly certified as correct by the clerk, and thereupon said tax shall be placed on the tax list of the proper county or counties. [25 G. A., ch. 7, § 11; 21 G. A., ch. 34; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

SEC. **832. Cost of repairs.** The cost of the repair of any street improvement or sewer, or any part thereof, in case of sewers, may be paid from the city sewer fund, or the district sewer fund of the sewer district in which said repair is made, or from the general revenue of said city, or part from each of said funds; and in case of street improvements, may be paid from the city improvement fund, or the general revenue of said city.

SEC. **833. Assessments not to be diverted.** All special assessments levied against abutting property and railways and street railways, for the payment of the cost of making or reconstruction of street improvements or sewers, shall be used for or appropriated to no other purpose than the payment in whole or in part of the cost of such work, or in payment of bonds or certificates issued to pay such cost, with the interest thereon. [25 G. A., ch. 7, § 14; 21 G. A., ch. 168, § 15; 20 G. A., ch. 20, § 3; 20 G. A., ch. 25, § 9.]

SEC. **834. Assessments on railways and street railways.** All railway and street railway companies shall be required to make, reconstruct and repair all paving, graveling or macadamizing between the rails of their tracks, and one foot outside thereof, at their own expense, unless by ordinance of the city, or by virtue of the provisions or conditions of any ordinance of the city under which said railway or street railway may have been constructed or may be maintained, it may be bound to pave, gravel or macadamize other portions of said street, and in that case said railway or street railway shall make, reconstruct and repair the paving, graveling or macadamizing of that part of the street specified by such ordinance; and such improvement, or the reconstruction or repair thereof, shall be of the material and character ordered by said city, and shall be done at the same time that the remainder of said improvement is made, reconstructed or repaired. When the same is made or completed, said companies shall lay, in the best approved manner, such rail as the council may require. They shall keep the paving, graveling or macadamizing between said rails, and one foot outside thereof, or such other part as they are liable to construct or maintain, up to grade and in good repair, using for such purpose the same material as is used for the original paving, graveling or macadamizing, or such other material as the council may order. If the owner of said railway or street railway shall fail or refuse to comply with the order of the council to make, reconstruct or repair such paving, graveling or macadamizing, such work may be done by the city, and the cost and expense thereof shall be assessed upon the real estate and personal property of said railway or street railway company within the corporate limits of said city, and against such railway or street railway company, in the manner hereinbefore provided for the assessment of such cost against abutting property and the owners thereof. [25 G. A., ch. 7, § 10; 23 G. A., ch. 9, § 1; 22 G. A., ch. 16, § 1; 20 G. A., ch. 20, § 6.]

The provision requiring paving of portions of the street outside of the tracks is not unconstitutional as applied to street railways incorporated when the statute only required pavement within its tracks. Such a change is within the power of the legislature with reference to the regulation of corporate franchises: *Sioux City St. R. Co. v. Sioux City*, 78–367; affirmed, 138 U. S., 98.

The provisions of this section are not invalid as applicable to a street car company whose franchise was granted before the law took effect: *Sioux City St. R. Co. v. Sioux City*, 78–742.

Under prior provisions, *held*, that it was optional with the city to require of a street railway company that it should bear the expense of paving its tracks, and if the city did not make such requirements an abutting property owner could not on that account claim that the assessment for such paving as against his property is void: *Lacey v. Marshalltown*, 68 N. W., 726.

Also, *held*, that the city could not charge upon a street railway which had acquired the right to occupy the street the proportionate expense of paving already done: *Oskaloosa St. Ry. and Land Co. v. Oskaloosa*, 68 N. W., 808. [See now the provisions of the next section.]

SEC. **835. Cost of paving already laid.** Before any street railway company shall lay its track upon any street that has been paved, and which at the time is not being repaved, it shall pay into the city treasury the value of all paving between its tracks, and one foot outside thereof, which value shall be determined by the city council, but in no case shall exceed the original cost of the paving, and the money thus paid shall be refunded to the abutting property owners on said street in proportion to the amounts originally assessed against the property abutting thereon.

SEC. **836. Relevy.** When by reason of nonconformity to any law or ordinance, or by reason of any omission, informality or irregularity, any special tax or assessment hereafter levied is invalid, or is adjudged illegal, or in case of deficiencies, the council shall have the power to correct the same by resolution or ordinance, and may reassess and relevy the same, as also an amount to make up such deficiencies, with the same force and effect as if done at the proper time, in the proper amount, and in the manner provided by law or by the resolution or ordinance relating thereto. [22 G. A., ch. 6, § 7; 22 G. A., ch. 44, § 1; 20 G. A., ch. 20, § 3.]

Irregularities in the passing of the ordinance and resolution authorizing street improvements and assessing and levying taxes therefor may be cured by a legalizing act and such act may be applicable to a tax the validity of which is already in litigation: *Clinton v. Walliker*, 68 N. W., 431; *Windsor v. Des Moines*, 70 N. W., 214.

A special assessment for street improvements is regarded as a tax, and subject to the same rules in many respects, as ordinary taxation for revenue; and where an assessment had been held invalid by reason of non-compliance with the law with reference to the contract, and in pursuance of a subsequent statute legalizing the proceedings, re-assessment was made and notice given to the property owner, *held*, that the re-assessment was valid: *Tuttle v. Polk*, 84-12.

But warrants issued before the re-assessment will not draw interest until the second assessment: *Ibid.*

Where a re-assessment was made under the provisions of this section and certificates issued in accordance therewith, *held*, that such certificates were valid and became a lien upon the property subject to assessment for the improvements. *Tuttle v. Polk*, 92-433.

Although no basis of apportionment was adopted prior to the re-assessment, *held*, that no objection having been made to the assessment on that account, it could not be entertained: *Ibid.*

Under prior provisions, *held*, that if an improvement is such as the city was authorized to make, according to the true intent of the law, all errors and irregularities should be discarded and a recovery permitted for the proper proportion of the value of the work from the abutting property owner: *Burlington v. Quick*, 47-222, 228.

The fact that the cost of the improvement is not assessed on the owner of the property in the manner provided by ordinance is an informality which should be disregarded where it appears that after the improvement was made the cost was ascertained and the property owner notified of the amount due, and an opportunity was given him to pay it. Under such circumstances the formal assessment made against the property owner is not an essential requisite to a recovery: *Chariton v. Holliday*, 60-391.

The irregularity or defect which can be disregarded must be a mere error or omission to do something which in no manner affects the jurisdiction of the city. Unless jurisdiction has been acquired, the proceedings of the city will be void: *Ibid.*

Want of notice of the assessment and levy are formal irregularities which will not defeat recovery for the cost of the sewer. This right of recovery depends upon doing the work in the manner and for the purposes authorized by law and may be adopted at any time: *Dittoe v. Davenport*, 74-66.

SEC. **837. Correction.** When, in making any special assessment, any property is hereafter assessed too little or too much, the same may be corrected, and a reassessment and relevy made in conformity therewith; and any tax collected in excess of the proper amount shall be refunded to the persons paying the same. Such corrected assessment shall be a lien on the lots and parcels of land the same as the original, and shall be certified by the clerk to the county auditor in the same manner, and shall, so far as practicable, be collected in the same installments, draw interest at the same rate, and be enforced in the same manner as the original assessment. [22 G. A., ch. 44, §§ 1, 2; 20 G. A., ch. 20, § 3.]

SEC. **838. Time waived.** Any provision of law, resolution or ordinance specifying a time when, or the order in which, acts shall be done in a proceeding which may result in a special assessment, shall be taken to be subject to the qualifications of the two preceding sections. [22 G. A., ch. 44, § 3.]

SEC. **839. Appeal.** Any person affected by the levy of any special assessment provided for in this chapter may appeal therefrom to the district court within ten days from the date of such levy, by serving written notice thereof upon the mayor or clerk, and filing a bond for costs, to be fixed and approved by either of said officers. Upon such appeal, all questions touching the validity of such assessment, or the amount thereof, and not waived under the provisions of this chapter, shall be heard and determined. The appeal shall be tried as an equitable action, and the court may make such assessment as should have been made, or direct the making of such assessment by the council. The costs of the appeal shall be taxed as in other actions.

SEC. **840. Enforcing assessment against railways and street railways.** All special assessments made under this chapter against any railway or street railway shall be a debt due personally from such railway. Such special assessments and each installment thereof, and certificates issued therefor when due, may be collected in the district or superior court by action at law, in the name of the city or town against such railway or

street railway, or the lien thereof enforced against the property of such railway or street railway, on or against which the same has been levied, by action in equity, at the election of the plaintiff; and in any action at law where pleadings are required, it shall be sufficient to declare generally for work and labor done, or materials furnished, on the particular street, avenue, alley or highway, the levy of the tax and non-payment of the same; and in any action in equity, it shall be sufficient to aver the same matters, together with a particular description of the property, or parts thereof, against which such lien is sought to be enforced. Such action may be maintained in the name of the city or town, for the use of any person entitled thereto or any part thereof, upon filing a bond conditioned to pay all costs adjudged against the plaintiff and protect it from all liability therefrom or damages growing out of the same; the amount of the bond to be fixed by the court, or a judge thereof in vacation, and the sureties thereon to be approved by the clerk of said court. [20 G. A., ch. 20, § 3; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 4; 15 G. A., ch. 51, § 4; C. '73, § 478; R., § 1068.]

CHAPTER 8.

OF STREET IMPROVEMENT AND SEWER BONDS AND CERTIFICATES.

SECTION **841. Certificates issued.** The council may provide, by ordinance or resolution, for the issuance of street improvement and sewer certificates, payable to bearer, or to the contractors who have constructed any street improvement or sewer, or completed part thereof, within the meaning of chapter seven of this title, in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments, or a part thereof, made against the property, designating it, including railways and street railways, and the owners thereof liable to assessment for the cost of the same, and may negotiate the same. Such certificate shall transfer to the bearer, contractor or assigns, all the right and interest of the city in every such assessment or part thereof described therein, and shall authorize such bearer, contractor or assigns to collect and receive every assessment embraced in such certificate, by or through any of the methods provided by law for their collection, as the same mature. Said certificates shall bear interest at a rate not exceeding six per cent. per annum, payable annually or semiannually, as fixed by said council, and may be paid by the taxpayer to the county treasurer, who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. No certificate shall be issued or negotiated by the city for less than its par value, with accrued interest up to the date of the delivery or transfer thereof. [25 G. A., ch. 7, §§ 15, 16; 21 G. A., ch. 168, §§ 16, 17.]

The certificates here contemplated do not constitute an indebtedness of the city and therefore are not invalid, although the city indebtedness exceeds the constitutional limit: *Tuttle v. Polk*, 92–433.

Partial payments as the work progresses are contemplated, and the fact that the contract is not completed will not defeat the enforcement of certificates properly issued for work done: *Ibid.*

Where, in pursuance of a contract for improving a street, the city issued certificates of assessment against owners of abutting lots, which by the contract were to be taken by the contractor in full payment for the work performed, and by reason of the nature of the improvement it was not chargeable against abutting property, but might be contracted for by the city, and paid out of the general revenue, *held*, that a recovery against the abutting property owners not being possible, the city became liable: *Bucroft v. Council Bluffs*, 63–646; *Polk County Savings Bank v State*, 69–24.

Where the city issues its payment for work certificates of assessment upon abutting property, it thereby impliedly agrees that they are not invalid; and if it is shown that they are invalid the city becomes liable for the contract price of the work. *Scofield v. Council Bluffs*, 68–695.

The whole contract does not become void by reason of the invalidity of the certificates, but the contract price measures the right of recovery as against the city: *Ibid.*

SEC. **842. Bonds.** For the purpose of providing for the payment of the assessed cost of any street improvement or sewer which is to be or has been assessed upon property abutting thereon, including railways and street railways liable for the payment thereof, and, in case of sewers, also upon adjacent property, the council may, by ordinance or resolution, provide for the execution and delivery of bonds for the amount of so much of the assessed cost or any part thereof, in anticipation of the deferred payment of the assessments levied therefor, such bonds to be called "street improvement bonds" or "sewer bonds," and issued in amounts of one hundred dollars, or multiples thereof not exceeding one thousand dollars, except that one bond may be issued for the amount necessary to make up the exact amount of such cost, which shall not exceed one thousand dollars. Street improvement bonds shall not include any sewer assessments, nor sewer bonds any street improvement assessments. [25 G. A., ch. 7, § 6; 25 G. A., ch. 9, § 1; 22 G. A., ch. 5, § 4; 21 G. A., ch. 168, § 6; 20 G. A., ch. 25, § 10.]

Bonds issued for the making of improvements to be paid by special assessments on abutting property, do not constitute an indebtedness of the city: *Clinton v. Walliker*, 68 N. W., 431.

SEC. **843. Form.** Street improvement and sewer bonds, respectively, issued for any one levy, shall all bear the same date and be divided into as many series as there are installment payments of said special assessments, and each series shall be as nearly equal in amount as practicable. Each series of said bonds shall mature on the first day of April of the years in which the installments of said special taxes come due; shall bear the name of the street, avenue, highway, alley or district in which said street improvement or sewer is located, and shall bear interest at a rate not exceeding six per cent. per annum, payable annually or semiannually, and coupons for said interest shall be attached thereto. Said bonds and coupons shall be signed by the mayor, countersigned by the clerk, and sealed with the corporate seal, and shall be substantially in the following form, but subject to changes that will conform them to the ordinance (or resolution) of the council, to wit:

The city of....., in the state of Iowa, promises to pay as hereinafter stated, to the bearer hereof, on the.....day of....., the sum of .....dollars, with interest thereon at the rate of....per cent. per annum, payable.....annually, on the presentation and surrender of the interest coupons hereto attached. Both principal and interest of this bond are payable at the.....bank in the city of....., state of..... This bond is issued by the city of.....under and by virtue of chapter eight of title five, of the Code of Iowa, and the ordinance (or resolution) of said city, duly passed on the....day of....., 1.....

This bond is one of a series of bonds of like tenor, date and amount, numbered from....to....and issued for the purpose of defraying the cost of improving, curbing and paving a portion of.....street (or constructing a sewer on.....street), as described in said ordinance or resolution, in said city, which cost is payable by the abutting property along said improvements, and is made by said law a lien on all said abutting or adjacent property, and payable in seven annual installments, with interest on all deferred payments at the rate of six per cent. per annum, and this bond is payable only out of the.....fund created by the collection of said special tax, and said fund can be used for no other purpose.

And it is hereby certified and recited that all the acts, conditions and things required to be done, precedent to, and in the issuing of this series of bonds, have been done, happened and performed, in regular and due form, as required by said law and ordinance (or resolution); and for the assessment, collection and payment hereon of said special tax, the full faith and diligence of said city of.....are hereby irrevocably pledged.

In testimony whereof, the city of....., by its city council, has caused this bond to be signed by its mayor and countersigned by its city clerk, with the seal of said city affixed, this.....day of....., 1.....

....
City Clerk. Mayor.

No.....

On the....day of....., the city of....., Iowa, promises to pay to bearer, as provided in said bond, the sum of.....dollars, at the..... bank in the city of....., being.....months' interest due that day on its improvement bond No....., dated....., 1.....

.....
Countersigned. Mayor.

.....
City Clerk.

[25 G. A., ch. 7, § 6; 25 G. A., ch. 9, § 1; 22 G. A., ch. 5, § 4; 21 G. A., ch. 168, § 6; 20 G. A., ch. 25, § 10.]

SEC. **844. How issued.** When such bonds have been issued they shall be delivered to the clerk, who shall register them in a book or books to be kept for that purpose, countersign them, and then deliver the same to the city treasurer or some bank selected by the council, which may require of the treasurer or bank such security or such additional security as it may think necessary to secure the payment in full of the proceeds thereof. The city treasurer shall report to the clerk the number of bonds delivered by him, and the amount received therefor, or for which credit has been given by the contractor. [25 G. A., ch. 7, §§ 7, 8; 21 G. A., ch. 168, §§ 7, 8.]

SEC. **845. Sale.** The bonds may be sold at public or private sale, but shall not be sold or negotiated for less than their par value with accrued interest from date to the time of delivery thereof. All the proceeds of bonds and of certificates negotiated shall be paid to the city treasurer, and shall be used only to pay for the cost of street improvements or sewers included in the assessment or assessments pledged to the payment thereof. All money received by said treasurer as proceeds of said bonds or certificates shall be kept in the same manner and subject to all the regulations regarding other money of the city, except that he shall keep an account of each levy of such special assessments, and all interest received and paid shall be credited and charged to such fund. [25 G. A., ch. 7, §§ 8, 9; 25 G. A., ch. 9, § 2; 21 G. A., ch. 168, §§ 8, 9.]

SEC. **846. Certificate of completion of work.** No money received by the city treasurer from the sale of street improvement and sewer bonds or certificates shall be paid out, nor shall any certificate be issued to the contractor or sold, except upon the resolution of the council ordering the same, and no such resolution for the delivery of any bonds or certificates, or the payment of any of the proceeds of said bonds or certificates, shall be made until the certificate of the city engineer or other competent person selected, or board of public works where such board exists, has been filed, stating that the work contracted for or a completed part thereof, as the case may be, has been completed according to the terms and stipulations of the contract. [25 G. A., ch. 7, § 9; 21 G. A., ch. 168, § 9.]

SEC. **847. Bonds paid.** Such street improvement and sewer certificates, bonds and coupons shall be payable out of funds derived from the special taxes and interest thereon pledged to the payment of the same, and such certificates or bonds shall not be delivered in excess of the special taxes levied; but such certificates, bonds and coupons shall not make the city liable in any way, except for the proper application of said special taxes. If any interest shall become due on any of said bonds when there is no fund from which to pay the same, the council may make a temporary loan for the payment thereof, which loan shall be repaid from the special taxes and interest pledged to secure said bonds, but in case of purchase by the city at tax sale of the property on which such tax is levied, it shall then

be repaid from the city improvement fund. [25 G. A., ch. 7, §§ 6, 14; 25 G. A., ch. 9, §§ 1, 4; 21 G. A., ch. 168, § 15.]

SEC. **848. Refunding bonds.** Refunding bonds may be issued to pay off and take up bonds issued in payment for street improvements and sewers made under prior laws, or to refund any part thereof. Bonds thus issued shall substantially conform to the provisions of this chapter, and the face amount thereof shall be limited to the amount of the unpaid special assessments, with the interest thereon, applicable to the payment of the bonds so taken up. Sewer refunding bonds and street improvement refunding bonds thus issued must be kept separate. Said refunding bonds or their proceeds shall be used only to pay street improvement or sewer bonds so taken up. [25 G. A., ch. 9, § 2.]

SEC. **849. How paid.** When refunding bonds shall be issued to pay street improvement or sewer bonds issued under prior laws, all special assessments, taxes and sinking funds applicable to the payment of such bonds previously issued shall be applicable in the same manner and to the same extent to the payment of the refunding bonds issued hereunder, and all the powers and duties to levy and collect special assessments and taxes, to create liens upon property, and to establish sinking funds in respect of the bonds previously issued shall continue until all refunding bonds shall be paid. The city shall collect the special assessments out of which the said bonds are payable, and hold the same separate and apart in trust for the payment of said refunding bonds, but it shall be in no way liable except for the proper application of said assessments; but the provisions of this section shall not apply to assessments or bonds adjudicated to be void. [Same, § 3.]

CHAPTER 9.

OF PARK COMMISSIONERS AND BOARD OF PUBLIC WORKS.

SECTION **850. Election of park commissioners in certain cities.** There shall be elected at the regular city election in each city of the first class, containing a population of forty thousand or over, three park commissioners, whose terms of office shall be six years, one to be elected each even-numbered year, but at the first election three shall be elected, and hold their offices, respectively, for two, four and six years, who shall by lot determine their respective terms. [24 G. A., ch. 1, § 1; 24 G. A., ch. 2, § 1; 20 G. A., ch. 151, § 1.]

The statute does not create a corporation distinct from the city, and therefore the commissioners have no right to incur indebtedness, by the issuance of bonds or otherwise, which shall constitute an indebtedness on the part of the city in excess of the constitutional limitation: *Orvis v. Board of Park Commissioners*, 88-674.

SEC. **851. Qualification—organization—treasurer—compensation.** The commissioners shall, within ten days after their election, qualify by taking the oath of office, and organize as a board by the election of one of their number as chairman and one as secretary, but no bond shall be required of them. They shall also elect a treasurer, not one of their number, who shall give bonds in the sum of twenty-five thousand dollars, the penalty of which may be increased by the board. The treasurer shall receive and pay out all moneys under the control of said board as ordered by it, but shall receive no compensation for his services. Each of the commissioners shall receive, for services actually performed, compensation at the rate of five dollars per day, not to exceed one hundred days in any year, and be reimbursed for all actual expenses incurred or money paid out by him in connection with the discharge of his official duties. An itemized

statement of all expenses and moneys paid out shall be made under oath and filed with the secretary, and allowed only by the affirmative vote of the full board. [25 G. A., ch. 1, § 1; 24 G. A., ch. 1, § 2.]

SEC. **852. Tax certified—purposes.** The board shall, on or before the first Monday in September of each year, certify to the county auditor the per cent. of taxes it may fix for park purposes, not exceeding two mills on the dollar on all taxable property of the city, to be known as "park fund" and, when collected, to be paid over to the treasurer of the board, and by him paid out on its orders, which shall state the name of the payee and the amount, and the purposes for which such amount has been expended. No money of this fund shall be appropriated or expended for any purpose except as provided in this chapter. Such fund may be used in purchasing or acquiring real estate for park purposes, including streets or highways to connect one park with another, or to connect a park with streets or highways, or for other purposes necessary and incident to the establishment and maintenance of parks, and for the purpose of improving and maintaining the same and defraying necessary expenses connected therewith, including the compensation of the board, its officers and employes; but when any annual tax or part thereof has been pledged for the payment of any bonds or the interest thereon, such tax or part thereof shall be devoted to no other purpose. [25 G. A., ch. 1, § 2; 25 G. A., ch. 2, § 1; 24 G. A., ch. 1, §§ 3, 4; 20 G. A., ch. 151, §§ 3–5.]

SEC. **853. Acquisition of real estate—powers of board.** It may acquire real estate within the city for park purposes, by donation, purchase or condemnation, and take the title to the members thereof as a board and their successors in office in trust for the public, and hold the same exempt from taxation. It may sell or exchange any real estate acquired by it which shall be found unfit or not desirable for such purposes; shall keep a record of all transactions, and have exclusive control of all the parks and pleasure grounds acquired by it, and of any other ground owned by the city and set apart for like purposes; and may make contracts, sue and be sued, but shall incur no indebtedness in excess of the amount of taxes already levied and available for the payment thereof, except bonds hereby authorized. It shall make an annual detailed report of the amounts of money expended and the purposes for which used to the council at the regular November meeting, and annually publish in some newspaper in the city an itemized statement of all moneys paid out or expended by it, and of all sums owing by it. For the purpose of paying for real estate, it may issue bonds in such sums and amounts as found necessary, but the aggregate annual interest on all bonds issued by it and at any time outstanding shall not exceed four-fifths of the amount of the annual tax authorized by this chapter. [25 G. A., ch. 2, § 2; 24 G. A., ch. 1, §§ 4, 7; 20 G. A., ch. 151, § 2.]

In cities or towns having park commissioners, the power to condemn lands for park purposes belongs to them exclusively, but when there are no park commissioners such power may be exercised by the corporation through its council, under the provisions of § 880: *In re Cedar Rapids*, 85-39.

As the acquiring of property for park purposes as here provided does not necessarily involve an indebtedness, the validity of the proceeding cannot be questioned on the ground that the city is already indebted to its constitutional limit: *Ibid.*

SEC. **854. Bonds.** Bonds issued by the board shall mature in not less than twenty-five nor more than fifty years from date; shall be in sums of not less than one hundred nor more than one thousand dollars, bearing interest at a rate not exceeding six per cent. per annum, payable annually or semiannually. Said board, after the issuance of any of such bonds, shall each year, for fifteen years before the maturity thereof, set aside, out of the tax levied by it, a sum equal to one-fifteenth of the principal thereof, which sum shall be applied in payment of the principal whenever the

amount on hand shall be sufficient to pay one or more of said bonds. [25 G. A., ch. 1, § 3; 24 G. A., ch. 1, § 5.]

SEC. **855. Lien on property—mortgage.** Bonds issued under the provisions of this chapter shall be a lien upon all the real estate acquired by the commissioners therewith, or with the proceeds thereof, and such bonds or proceeds shall be used for the purchase of real estate only. The board shall have power to mortgage such real estate to a trustee for the purpose of securing the payment of said bonds, and after the issuance thereof there shall be pledged for the payment of the interest thereon so much of the annual tax levied by virtue of this chapter as shall be necessary to make such payment, and the residue of said tax may be used by the board in the purchase of real estate or improvement of the parks and pleasure grounds of the city. [25 G. A., ch. 1, § 4; 24 G. A., ch. 1, § 6.]

SEC. **856. Regulations.** The board may in writing prescribe rules and regulations for the government of the parks or public grounds under their control and persons resorting thereto, which rules and regulations shall be in force when entered in the record of the proceedings of the board, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such park or public grounds, and a wilful violation thereof shall be a misdemeanor, punishable by a fine not exceeding twenty-five dollars. Any one who shall cut, break or deface any tree or shrub growing in any such park or public ground, without authority, shall be guilty of a misdemeanor. [25 G. A., ch. 1, § 5.]

SEC. **857. Police protection.** The mayor on written request of the board shall furnish adequate police protection for such parks, and the city shall furnish such water supply as may be necessary therefor, and properly light the same at its expense. The board shall be entitled to the services of the city engineer, when requested, without expense to it. It shall have the power to regulate or forbid the erection of poles or the stretching of wire for electric light, street railway, or other corporations or persons in such parks or in or along streets, highways or over public places laid out or controlled by it. [Same, §§ 6, 7.]

SEC. **858. Park districts—condemnation of property.** Where any such city shall contain more than one organized township, at least one commissioner shall be a resident of each of said townships; and unless all of the commissioners shall agree upon the location of one park for a whole city, each township shall constitute a separate park district, and the proceeds of any bonds shall be apportioned to and expended in each district, in proportion to the tax levied thereon; and all funds received from taxes collected shall be expended in the same manner. If said board and the owners of any property desired by it for park purposes cannot agree as to the price to be paid therefor, it may cause the same to be condemned in the manner provided for taking land for city purposes. [24 G. A., ch 1, §§ 8, 9.]

SEC. **859. Park commissioners in other cities and towns.** All cities having a population under forty thousand and towns may provide by ordinance for the election of three park commissioners whose terms of office shall be three, four and five years, respectively, and their successors shall be elected for the full term of five years. Such commissioners shall be residents of the city or town, and each shall, before he enters upon the duties of his office, give a bond, with sureties to be approved by the council, to the use of the city in the penal sum of five thousand dollars conditioned for the faithful discharge of the duties of his office.

SEC. **860. Voting tax for park fund.** The council of such city or town may, by resolution, submit to the qualified electors of the same, at a regular or special election, the question whether there shall be levied upon the assessed property thereof a tax not exceeding two mills on the dollar for the purpose of purchasing real estate for parks, and the improvement of parks, or for either or both of such purposes. The proposition therefor

shall be submitted in the manner provided for similar propositions in the chapter on elections. The council shall, in the resolution ordering such election, specify the rate of taxation proposed and the number of years the same shall be levied. If a majority of the votes cast at such election on the proposition so submitted shall be in favor of the adoption of the proposition for taxation, the council shall levy the tax so authorized, which shall be collected and paid over to the treasurer of such city or town in the same manner as other taxes. Such taxes shall be known as "park fund," and shall be paid out on the order of the commissioners for the purposes contemplated in the next section, and for no other purpose whatever. [26 G. A., ch. 24.]

SEC. **861. Powers and compensation of commissioners.** Each of the commissioners shall receive for services performed compensation not exceeding one hundred dollars per annum to be paid out of the "park fund." They shall have exclusive control of the parks of the city or town, and shall manage, improve and supervise the same; they may use the "park fund" for improving the parks, or for purchasing additional grounds or laying out and improving avenues thereto; they may appoint one or more park policemen and pay them out of said fund, and may do all things necessary to preserve such parks. They shall keep, and make annually to the council, a full account of their disbursements, and all orders drawn on such fund shall be signed by at least two of their number.

SEC. **862. Protection of parks.** Any person who shall, except by the authority of such commissioners, cut, break or deface any tree or shrub growing in such park or parks, or any avenue thereto, shall be deemed guilty of a misdemeanor.

SEC. **863. Board of public works—election.** In any city having a population of thirty thousand or more the council may by ordinance establish a board of public works, to consist of two members, residents of the city, to be appointed by the mayor with the approval of the council. Upon the establishment of said board, one member shall be appointed for two years and one for three years, and their successors shall be appointed for three years. The members shall hold office until their successors are appointed and qualified. Vacancies shall be filled by the mayor with the approval of the council. No member of the council or city officer shall be a member of such board. [24 G. A., ch. 3, § 1; 22 G. A., ch. 1, § 1.]

Under the original statute, *held*, that the intention of the legislature was to establish definite terms of office for the members of the board of public works, and that a subsequent statute terminating the terms of office of elective officers was not applicable to the members of such board: *Sherman v. Des Moines*, 69 N. W., 410.

SEC. **864. Salary.** Each member of such board shall receive a salary of not less than fifteen hundred nor more than twenty-five hundred dollars, to be fixed by the council, and not to be reduced during his term of office. He shall, also, before entering upon the discharge of his duties, take an oath and give a bond to faithfully perform the duties of his office, which bond shall be in the sum of not less than twenty thousand dollars, with two or more sufficient sureties approved by the council. No such member shall be directly or indirectly interested in any contract entered into by the board on behalf of such city, nor in the purchase or sale of any material from or to the city, in connection with anything over which the board has any supervision or control. [22 G. A., ch. 1, § 2.]

SEC. **865. Consultation with city engineer.** The board shall consult the city engineer regarding the plans, specifications and advisability of doing or making contemplated improvements or work, and he shall from time to time furnish it with estimates of the cost of material and plans and specifications for any work to be ordered or advertised to be done, and report to the board when, and whether, such improvements or work is made and completed according to contract. [Same, § 3.]

SEC. **866. Contracts.** Contracts for all public works and improvements made by the board shall be drawn by the city solicitor, who shall charge not less than three nor more than ten dollars for each contract, including a copy thereof and specifications for the use of the contractor, to be collected by him from the contractor, and paid monthly to the city treasurer. [Same, § 4.]

SEC. **867. Bids.** It shall advertise for bids and make all contracts on behalf of the city for all work, and for material and work for public improvements in excess of two hundred dollars, whenever the same shall be ordered by the council or voted for at any election. Proposals for bids shall be published once each week for two weeks in two of the daily newspapers therein, which shall be completed at least two weeks before the making of any contract, which proposals shall state the amount and kinds of material to be furnished, the kind of improvement, and the time and conditions upon which bids will be received, all of which may be rejected. All contracts shall be made with the lowest responsible bidder, but it shall not be necessary before proposals are published or bids received to determine specifically the kind of material to be used. All contracts made by said board shall be subject to the approval of the council. [Same, §§ 5, 6.]

Under prior provisions, *held*, that the contracts of the board of public works were not required to be made subject to the approval of the city council: *Dewey v. Des Moines*, 70 N. W., 605.

SEC. **868. Disapproval of plans.** Whenever it shall disapprove of the plans, specifications or estimates furnished by the city engineer, it shall at once report the same in writing to the council, stating its reasons for such disapproval. [Same, § 8.]

SEC. **869. Superintend lighting.** It shall advertise for bids and make contracts for the lighting of the streets, alleys, public grounds and buildings and shall have entire control, management and direction of the lamps, lights, lighting material and persons charged with the care thereof. [Same, §§ 7, 9, 10.]

SEC. **870. Public works.** It shall superintend and take charge of all public work, the cleaning of streets and public places and the removal of garbage, all street improvements, sewers and other improvements, bridges, viaducts, and public buildings, and the entire erection, making, reconstruction and repair thereof, approve the estimates of the city engineer which may be made from time to time of the cost of such work as the same progresses, accept any building erected, work done or improvement made, when completed according to contract, and perform such other duties as may be required of it by ordinance or resolution. But where a preliminary notice is required, all proceedings prior to and including the passage of the resolution or ordinance shall be taken by the council, and the certificates of the city engineer that work has been done or material furnished shall be made to said board, and orders for the payment therefor shall be drawn and signed by it and approved as provided in the next section. [Same, §§ 6, 9, 10, 22.]

SEC. **871. Expenditures.** It shall control and direct all expenditures to be made by its department, and sign and draw orders for the same, and all orders given and bills and accounts created by it shall first be indorsed by each of the members thereof, or their reasons stated in writing for not doing so, and approved by the council, before the same shall be ordered paid. [Same, § 11.]

SEC. **872. Extra work.** It shall not order any extra work in excess of that contained in any contract, or pay out any money for extras, without submitting and recommending the same to the council and receiving its authority therefor. [Same, § 12.]

SEC. **873. Appointing powers.** It shall have power to appoint agents and employes, subject to the approval of the council, necessary for the doing

of its work, who shall be actually engaged in the construction or improvement of the public works, and shall not include any assistants, superintendents, bookkeepers or secretaries, the duties of which last named officers shall be performed by said board without extra compensation. [Same, § 13.]

The appointment of a superintendent with power to hire and discharge men and direct the prosecution of work for the board is within the scope of its authority, and a workman employed by such superintendent is in the employ of the city: *Hathaway v. Des Moines*, 66 N. W., 188.

SEC. **874. Plans for improvements.** It shall require plans and specifications for all buildings costing over five thousand dollars to be submitted for its approval, with the advice of the city engineer, and no such building shall be erected until the above requirements have been complied with. It shall require any person, before erecting any building or improvement within the city, to obtain a permit from it, and shall charge not more than one mill on the dollar of the cost of the construction thereof, based on the architect's or builder's estimate, and the money derived therefrom shall be paid monthly to the city treasurer. [Same, § 14.]

SEC. **875. Mains—connections—wires.** It shall, with the advice of the city engineer, superintend the laying of all water, gas and steam heating mains and all connections therefor, and stretching or laying of telephone, telegraph, district telegraph and electric wires, in the manner provided by the ordinances of such city. [Same, § 16.]

SEC. **876. Fire escapes.** It shall regulate the size, number and manner of construction of fire escapes, doors and stairways of theatres, tenement houses, audience rooms, and all public buildings, whether now or hereafter built, used for the gathering of a large number of people, so that there may be convenient, safe and speedy exit in case of fire. [Same, § 17.]

SEC. **877. Semiannual report.** It shall on the first days of April and December, and at the expiration of the term of office of any member, submit a full, complete and detailed statement to the council of all work done by it, giving the amount of expenditures, the names of the persons who have received pay, the amount of such pay, for what the same was paid, the number of permits issued and the amounts received therefor. The report shall also state that since the last report no member of said board has been directly or indirectly interested in any contract let by or work ordered or superintended by it, or in the sale or purchase of any material used in the erection, making, reconstruction or repair of said work or improvements, and that neither of them has received or expects to receive any presents or compensation from any contractor or other person interested in said work or improvement, and said report shall be sworn to by each member of said board. [Same, § 18.]

SEC. **878. Records—office.** It shall keep copies of all contracts, plans, maps, specifications, plats and records of every kind whatsoever growing out of any work or improvement made or superintended by it, the number of all building permits issued, and the location and cost of such buildings and improvements. All purchases of materials shall be made by written orders, signed by at least one member of the board. The board shall keep an office furnished with fuel, lights, stationery, apparatus, and all other needful utensils for the work, to be provided at the expense of the city. [Same, §§ 19, 21.]

SEC. **879. Removal of members.** Any member of such board may at any time be removed from office by a vote of two-thirds of the council for sufficient cause, and the proceedings in that behalf shall be entered in the records of the council, but the council shall previously cause a copy of the charges against such member or members sought to be removed to be served upon him or them, together with a notice of the time and place of hearing the same, at least ten days previous to the time assigned, and give him or them an opportunity to make defense thereto. [Same, § 20.]

CHAPTER 10.

OF CONDEMNATION AND PURCHASE OF LAND.

SECTION **880. For what purposes.** Cities and towns shall have power to purchase or provide for the condemnation of, pay for out of the general fund, enter upon and take any lands, within or without the territorial limits of such city or town, for the following purposes:

1. For parks, commons, cemeteries, crematories or hospital grounds;
2. For establishing, laying off, widening, straightening, narrowing, extending and lighting streets, avenues, highways, alleys, wharfs, landing places, public squares, public grounds, public markets and market places, and public slaughter houses;
3. For any other purposes provided in this title, and in all cases where such purchase or condemnation is now or may hereafter be authorized. [15 G. A., ch. 6; C. '73, §§ 464, 470; R., § 1064.]

Eminent domain: The city does not have the power of eminent domain except as expressly granted by statute: *Field v. Des Moines*, 39–575.

The purposes here enumerated are the only ones for which the city has power to take private property. It does not have the power of eminent domain except as expressly granted: *Ibid*, 39–575, 585.

Under the provisions of a city charter authorizing the appointment of commissioners to assess damages for taking private property by a city, *held*, that the city council could not, after having appointed commissioners for that purpose, set aside the report made by them, and appoint new commissioners to assess the same damages: *State ex rel. v. Keokuk*, 9–438.

A railway company, lessee of another company under a lease which may be perpetual at the election of the lessee, has such an interest in property owned by the lessor that it should be a party to proceedings to condemn such property for city purposes: *Storm Lake v. Iowa Falls & S. C. R. Co.*, 62–218.

It is competent for a city to extend a street through the depot grounds of a railroad company, under proceedings for condemnation: *Chicago, M. & St. P. R. Co. v. Starkweather*, 66 N. W., 87.

The question as to the necessity for the taking of land is to be determined by the municipal corporation and whether or not it has so determined is for the courts; the only question for the jury is the amount of compensation to be allowed: *Barrett v. Kemp*, 91–296.

The right to purchase or condemn lands for use as a park is here conferred without restriction as to the ability of the city or town to pay therefor. The land owner is not concerned in such ability to pay as he is not required to give credit, and as payment in full must be made, either upon purchase or condemnation. It cannot be said that the city by proceeding to acquire land for park purposes incurs an indebtedness. Therefore, proceedings cannot be held invalid, because the city is indebted to the constitutional limit: *In re Cedar Rapids*, 85–39. Further as to parks, see § 853.

Use for other purposes: A city has no authority to convey lands or other property for uses not contemplated by law; therefore, *held*, that a city could not transfer to the county its city hall for courthouse purposes: *Brockman v. Creston*, 79–587.

The act of 1864, (10 G. A., ch. 127) in so far as it was attempted thereby to confer upon cities and towns the power to sell and convey squares and parks therein, laid off and dedicated by individuals, *held* void as authorizing a perversion of a trust. Whether the corporation might not be given power to part with whatever interest it possessed in the property, *quære*: *Warren v. Mayor*, 22–351. And further, see notes to § 917.

A strip of land 200 feet wide along the Mississippi river retained by the government under a city plat for public use as a highway and for other public uses may be diverted to such other public purposes as a railway and a freight house and a way to reach such freight house without ground of complaint on the part of a lot owner fronting thereon, so long as a reasonable use for the purposes of necessary travel is preserved: *Burlington Gas Light Co. v. Burlington, C. R. & N. R Co.*, 91–470.

SEC. **881. Sewer outlets.** Cities shall have the power to acquire real estate within and without their territorial limits necessary for sewer outlets, by purchase or condemnation, as in this chapter provided, and the expense of such acquisition of real estate and outlets shall be paid out of the general fund, or out of the sewer fund of the sewer district of which the same is an outlet. [26 G. A., ch. 8.]

SEC. **882. Purchase at execution sale.** They shall have power to acquire real estate, or an interest therein, as a purchaser at an execution

sale, when judgment is entered in favor of such city or town, or it is otherwise interested in the proceeding. [18 G. A., ch. 89, § 1.]

SEC. **883. Disposal of lands acquired.** They shall have power to dispose of and convey lands unsuitable or insufficient for the purpose for which they were originally acquired, but when such lands are so disposed of enough thereof shall be reserved for streets to accommodate adjoining property owners. Conveyances executed in accordance with this section shall extinguish all the rights and claims of the city or town existing prior thereto. They shall have power also to dispose of the title or interest of such corporation in any real estate, or any lien thereon, or sheriff's certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, in such manner and upon such terms as the council shall direct. [18 G. A., ch. 89, § 1; C. '73, § 470.]

SEC. **884. Proceedings for condemnation.** Proceedings for condemnation of land as contemplated in this title shall be in accordance with the provisions relating to taking private property for works of internal improvement, except that the jurors shall have the additional qualification of being freeholders of the city or town. [C. '73, §§ 469, 476–7; R., §§ 1065–6.]

See title X, ch. 4.

SEC. **885. Donation of sites for depots.** They shall have power to acquire by purchase or condemnation for the purpose of donating and to donate to any railway company owning a line of railroad in operation or in process of construction in such city or town sufficient land for depot grounds, engine houses and machine shops for the construction and repair of engines, cars and other machinery necessary to the convenient use and operation of said railroad. [19 G. A., ch. 133, § 1.]

SEC. **886. Submission of question.** Such donation or appropriation of funds to procure lands therefor can only be made upon a petition to the council, signed by a majority of the resident freehold taxpayers of the city or town, asking the same and fixing the sum which shall be thus appropriated. Upon the presentation of the petition, the council shall call a special election, at which the question of the proposed donation shall be submitted to the voters. The clerk shall prepare the ballots and the election shall be held in the manner provided for in the chapter on elections. If there shall be a two-thirds majority in favor of the donation, the council shall determine the lands to be donated by metes and bounds, the amount to be appropriated for procuring the same, not exceeding the sum named in the petition, and in the name of the city or town may acquire the same by purchase, or by the payment of the estimated damages in case the same or any part thereof shall be taken in the name of the railway corporation under condemnation proceedings as authorized by law; and the council may also vacate and convey all streets and alleys within the boundaries of such site, and prescribe the terms and conditions upon which the grant is made, which shall be binding upon the company accepting it; but land set apart as a public park, square or levee shall not be thus donated, nor shall lands occupied with buildings used for business purposes or private residences be appropriated under the provisions of this section, without the consent of the owner or owners first obtained. [Same, § 2.]

CHAPTER 11.

OF TAXATION.

SECTION **887. General fund.** The council of each city or town shall levy a tax for the year then ensuing, for the purpose of defraying its gen-

eral and incidental expenses, which shall not exceed ten mills on the dollar. [C. '73, §§ 495–6; R., §§ 1123–4.]

The tax authorized by § 3973 to pay judgments may be in addition to the amount here authorized: *Rice v. Walker*, 44–458.

SEC. **888. City bridge fund.** Cities of the first class may annually levy a tax not exceeding three mills on the dollar, to be known as a city bridge fund. [25 G. A., ch. 5, § 1; 22 G. A., ch. 16, § 1; C. '73, § 796; R., § 710.]

Tax for county bridge fund is not to be levied within the city: See § 1303.

SEC. **889. Taxing dogs and other animals.** The council of any city or town shall have power to levy and collect a tax on dogs and other domestic animals not included in the list of taxable property for state and county purposes. [C. '73, § 499; R., § 1128.]

SEC. **890. Road taxes on agricultural land.** All property subject to taxation in any city or town which by law is not subject to taxation for general municipal purposes, and all personal property necessary for the use and cultivation of agricultural or horticultural lands, shall nevertheless be liable to taxation for road purposes, as may be provided by the council, not exceeding the rate of five mills upon the dollar of the assessed valuation thereof, but it shall not be liable for any other city tax. [22 G. A., ch. 46, § 1; 19 G. A., ch. 158, § 1.]

The provisions of this section do not authorize taxation for road purposes of property subject to general taxation, in excess of the ten-mill limit here fixed: *Illinois Cent. R. Co. v. Hamilton County*, 73–313.

A city has no power to levy a road tax upon property subject to taxation for general purposes, in excess of the limit of ten mills: *Ibid.*

Further as to road taxes, see § 1508.

SEC. **891. Labor on highways.** Any city or town shall have power to provide that all able-bodied male residents of the corporation between the ages of twenty-one and forty-five years, between the first day of January and the first day of November of each year, either by themselves or satisfactory substitute, shall perform two days' labor of eight hours each upon the streets, avenues, alleys, highways or public grounds within such corporation, at such times and places as the proper officer may direct, upon three days' notice in writing given, or pay in lieu thereof in money a sum to be fixed by such council, not exceeding one and a half dollars for each of such day's labor. For each day's failure to attend and perform the labor, or pay said sum of money, as required, at the time and place specified, unless excused by the supervisor of highways or street commissioner, the delinquent shall forfeit and pay the sum of two dollars, not exceeding four dollars in all. Any person excused shall be again notified to perform such labor or pay said sum of money in lieu thereof, at any time prior to September first of said year. All persons claiming to be exempt from labor under this section shall, within three days after receiving notice to perform such labor, furnish the mayor or other proper officer with an affidavit showing the extent and nature of the disabilities entitling him to such exemption. If he fails to do so he shall be liable to perform such labor or pay the penalty provided herein. [19 G. A., ch. 32; C. '73, § 487.]

SEC. **892. Enforcement of road tax.** In case of failure to pay said sum of money in lieu of said labor, together with such forfeit, to the supervisor of highways, street commissioner, or other officer of said corporation authorized to receive the same within ten days from the expiration of the time fixed for the performance of such labor, said corporation may recover the same by action brought in the name of such city or town before the mayor of said corporation, or before any justice of the peace in the proper township. No property or wages belonging to said person shall be exempt to the defendant on an execution issued for said judgment and costs. The tax and forfeit money so collected shall be expended upon the streets, avenues, highways, alleys or public grounds of said corporation. All of such tax and forfeit money remaining unpaid on the first day of September in

each year may be certified to the county auditor at any time before the following first day of December, and shall be entered by him upon the tax list of said county, and treated and collected as ordinary county taxes, and shall be a lien on all the real property of the delinquent. [19 G. A., ch. 32; C. '73, § 487.]

SEC. **893. Action.** But the entry of such tax and penalty upon the tax list shall not prevent an action being brought therefor as hereinbefore authorized. Such action, however, must be commenced within one year from the first day of October following the giving of notice to perform the labor. In event of judgment being rendered therefor and paid in whole or in part after the same has been certified to the county auditor, the court receiving such payment shall execute duplicate receipts, exclusive of costs, if so requested, and upon filing such receipt or duplicate with the county auditor he shall make the proper entries on the tax lists, showing the full payment of such tax and penalty, or part thereof, as the case may be. [19 G. A., ch. 32; C. '73, § 487.]

SEC. **894. Other taxes.** Any city shall have power to levy annually the following special taxes:

1. *Grading fund.* A tax not exceeding, in any one year, three mills on the dollar, for a grading fund, to be used for the purpose of opening, widening, extending and grading any street, highway, avenue, alley, public ground or market place; [23 G. A., ch. 5, § 1; 21 G. A., ch. 160, §§ 2, 3; 20 G. A., ch. 20, § 5.]

2. *Improvement fund.* A tax not exceeding, in any one year, five mills on the dollar, for a city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction or repair of any street improvements at the intersections of streets, highways, avenues or alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and for the purpose of paying the purchase price and subsequent taxes assessed against property purchased by the city at tax sale; [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, §§ 2, 3; 19 G. A., ch. 38, §§ 1, 2.]

3. *Sewer fund.* A tax not exceeding, in any one year, two mills on the dollar on the assessed valuation of all property therein, for a city sewer fund, when the entire city comprises one sewer district, to be used to pay the cost of the making, reconstruction or repair of any sewer at the intersection of streets, highways, avenues, alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and to pay the whole or any part of the cost of the making, reconstruction or repair of any sewer within the limits of said city; when a city has been divided into sewer districts, a tax not exceeding two mills on the dollar on the assessed valuation of all property in the sewer district, for a district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located and laid in that particular district; [25 G. A., ch. 7, § 11; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

Under prior provisions, *held*, that the limitation of two mills on the dollar applied only where the city was divided into sewage districts and the sewage tax was levied on the property within such districts without regard to its location with reference to the sewer: *Dittoe v. Davenport*, 74–66.

4. *Library tax.* In cities having a population of twenty-five thousand or over and towns which have, or may hereafter establish, a free public library, when the trustees of such library have made the certificate provided for in chapter four, of this title, a tax in the amount so certified, but not exceeding in any one year one mill on the dollar in such cities of the first class, and not exceeding two mills on the dollar in cities of the second class

and towns, to be used for the maintenance of such library; and in such cities of the first class, an additional tax not exceeding in any one year three mills on the dollar, for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness. In all other cities of the first class which have or may hereafter establish a free public library, a tax not exceeding in any one year one mill on the dollar for the maintenance thereof; [26 G. A., ch. 5; 25 G. A., ch. 43, § 1; 25 G. A., ch. 99, § 2; 22 G. A., ch. 18, § 1; C. '73, § 461.]

5. *Water works tax.* A tax not exceeding, in any one year, five mills on the dollar, which, with the water rates or rents authorized, shall be sufficient to pay the expenses of running, operating and repairing water works owned and operated by any city or town, and the interest on any bonds issued to pay all or any part of the cost of the construction of such works; but such tax shall not be levied upon property which lies wholly without the limits of the benefit and protection of such works, which limits shall be fixed by the council each year before making the levy; [C. '73, § 475.]

6. *Tax for gas works or electric plant.* A tax not exceeding, in any one year, five mills on the dollar, which, with the rates or rentals authorized, shall be sufficient to pay the expenses of running, operating and repairing gas works and electric light or power plants owned by any city or town, and the interest on any bonds issued to pay all or any part of the cost of the construction of such works or plants; but such tax shall not be levied upon property which lies wholly without the limits of the benefit of the same, which limits shall be fixed by the council each year before making the levy; [22 G. A., ch. 11, § 2; C. '73, § 475.]

7. *Water tax.* A tax not exceeding, in any one year, five mills on the dollar, for the purpose of paying the amount due or to become due to any individual or company operating water works for water supplied under any contract, the levy to be limited to the property as in subdivision five hereof; and if in cities of the first class the maximum tax is insufficient to pay such amount under contracts now in force, the deficiency shall be paid out of the general fund; [C. '73, § 475.]

Under prior provisions the amount which a city might contract to pay for water supply was not limited to the proceeds of the tax here authorized: *Creston Waterworks Co. v. Creston*, 70 N. W., 739.

An ordinance fixing the limits of taxation for water purposes to property within two thousand feet of any fire hydrant is not improper as it merely fixes a standard by which benefit and protection are to be furnished and the limits fixed and does not fix the limits: *Ibid.*

The proviso exempting from water-tax the property outside of the benefit of waterworks is not unconstitutional: *Grant v. Davenport*, 36-396, 405.

8. *Tax for gas or electric light or power.* A tax not exceeding, in any one year, five mills on the dollar, for the purpose of paying the amount due or to become due to any individual or company operating gas works or electric light or power plants for all gas, electric light or power supplied under any contract, the levy to be limited to the property as in subdivision six hereof; [22 G. A., ch. 11, § 2; C. '73, § 475.]

9. *Bond fund tax.* A tax for the purpose of creating a bond fund sufficient to pay the interest to accrue before the next annual levy on funding or refunding bonds outstanding, and such proportion of the principal that at the end of five years the sum raised shall equal at least twenty per cent. of the amount of the bonds issued, at the end of ten years at least forty per cent. of said amount, at the end of fifteen years at least sixty-five per cent. of said amount, and at or before the date of the maturity of said bonds a sum equal to the whole amount of the unpaid principal and interest, which tax shall be used to pay such principal and interest, and for no other purpose; [24 G. A., ch. 14, § 5; 23 G. A., ch. 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78, § 5.]

10. *Tax for water or gas works or electric plant bonds.* A tax as authorized in the preceding subdivision, to be levied in the proportions therein set forth, and to be used exclusively in payment of the principal of bonds issued for the construction of water and gas works and electric light and power plants, which tax shall not be levied upon property lying wholly without the limits of the benefit of such works or plants, which limits shall be fixed by the council each year before making the levy; [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1.]

11. *Cemetery tax.* A tax, not exceeding one-half of one mill on the dollar of the assessed valuation of the property within the corporate limits, for the care, preservation and adornment of any cemetery owned or controlled by the city.

SEC. **895. Levy by board of supervisors.** The board of supervisors shall, at the time of levying county taxes, levy on all property within the city the tax certified to them by the park commissioners for said city. If such commissioners fail to certify a tax or a sufficient tax for the purpose of paying the interest on bonds issued by the commissioners for park purposes that may be due or will mature within the fiscal year next ensuing, the board of supervisors shall levy such tax as shall be necessary to pay such interest; and if such commissioners each year for fifteen years before the maturity of bonds issued by them, as provided in chapter eight of this title, fail to certify a tax equal to one-fifteenth of the principal of such bonds over and above the amount necessary for the interest on the same, the board shall annually levy such tax as may be equal to one-fifteenth of the principal thereof, which tax shall be set aside by the commissioners in the same manner and for the same purpose as directed in said chapter eight. [24 G. A., ch. 1, § 7.]

SEC. **896. Tax voted for bridges.** The board of supervisors of the county in which a city or town is situated shall levy a special tax on the assessable property in such city or town to aid in the construction of highway or combination bridges, when such tax shall have been voted by the city or town under the provisions of the chapter on streets and public grounds. [25 G. A., ch. 19, § 2; 21 G. A., ch. 13, §§ 1, 2; 19 G. A., ch. 63, § 3.]

SEC. **897. Surplus of judgment or bond tax.** When a tax has been levied by any city or town to pay off a judgment against such municipality, or by any city or town or by the executive council, to pay the principal and interest, or either of them, of funding or refunding bonds issued by such municipality, such tax shall not be held invalid, if the rate of tax levied raises a sum in excess of the amount sought for such specific object, but the excess shall go into the general city or town funds. Money so raised is especially appropriated for such purposes, and constitutes a distinct fund in the hands of the treasurer until the obligation assumed is discharged. [25 G. A., ch. 6, § 1; C. '73, §§ 318, 319; R., §§ 259, 260; C. '51, §§ 123, 124.]

SEC **898. Loans in anticipation of revenue.** Loans may be negotiated or warrants issued by any municipal corporation in anticipation of its revenues for the fiscal year in which such loans are negotiated or warrants issued, but the aggregate amount of such loans and warrants shall not exceed the estimated revenue of such corporations for the fund or purpose for which the taxes are to be collected for such fiscal year. [21 G. A., ch. 108; 20 G. A., ch. 79; 16 G. A., ch. 95, § 1; C. '73, § 500; R., § 1129.]

Under prior provisions, *held*, that the city was not limited, in pledging its revenues, to the taxes of a single year: *Coggeshall v. Des Moines*, 78-235.

The loans here referred to may be by issuance of negotiable bonds, signed by any officer of the city thereunto authorized by it: *German Ins. Co. v. Manning*, 78 Fed., 900.

But, *held*, that the power to borrow money does not authorize the issuance of negotiable bonds in the absence of express authority: *Heins v. Lincoln*, 71 N. W., 189.

SEC. **899. Highways outside corporate limits—question submitted.** When a petition shall be presented to the council of any city or town, signed by one-third of the resident taxpayers thereof, asking that the

question of aiding in the construction or repair of any highway leading thereto be submitted to the voters thereof, the council shall immediately give notice of a special election by posting a notice in five public places in said city or town at least ten days before said election, which shall give the time and place of holding the election, the particular highway proposed to be aided, and the proportion of the highway tax then levied and not expended, or next thereafter to be levied, to be appropriated. At this election a proposition for an appropriation of a portion of the highway tax to aid in the construction or repair of the particular highway, and the proportion of such tax proposed to be so appropriated, shall be submitted to the voters of such city or town, and the clerk shall cause the proposition to be printed and placed upon the ballots and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the chapter on elections, and if a majority of the votes polled be for adoption of the proposition, then the council may aid in the construction or repair of said highway to the extent of said appropriation, which shall not exceed fifty per cent. of such tax, in the same manner as they otherwise would were said highway within the corporate limits of said city or town. No part of such tax shall be used or expended more than five miles from the limits of such city or town, and not more than twenty-five per cent. thereof more than two miles from such limits. [18 G. A., ch. 52; C. '73, § 488.]

SEC. **900. Warrants—how drawn.** The auditor, clerk, or other officer of cities and towns whose duty it is to draw the warrants thereof, shall not draw any such warrant except upon the vote of the council, and he shall draw no single warrant for an amount in excess of five hundred dollars. Warrants issued by any city or town shall not be received by the county treasurer in payment of the city or town taxes. [22 G. A., ch. 3, §§ 1–3.]

SEC. **901. List of warrants.** The officer drawing such warrants shall, on the first Monday of each month, furnish the council a sworn and complete list of all warrants, and the amount thereof, drawn by him during the preceding month, which list shall state on whose account and the object and purpose for which each warrant was drawn. [Same, § 1.]

SEC. **902. Assessments and taxes certified—collection.** All assessments and taxes of every kind and nature levied by the council, except as otherwise provided by law, shall be certified by the clerk on or before the first Monday in September, to the county auditor, and by him placed upon the tax list for the current year, and the county treasurer shall collect all assessments and taxes so levied in the same manner as other taxes, and when delinquent they shall draw the same interest and penalties. Sales for such assessments and taxes when delinquent shall be made at the same time and in the same manner as such sales are made for other taxes, and should there be other delinquent taxes or assessments due from the same person, and collectible by the county treasurer, the sale shall be for all such delinquent assessments and taxes, and all the provisions of law relating to the sale of property for delinquent taxes shall be applicable as far as may be to such sales. The county treasurer shall pay over to the treasurer of the municipality all moneys collected by him belonging thereto on the first Monday of each month. [25 G. A., ch. 1, § 2; 24 G. A., ch. 1, § 3; 21 G. A., ch. 13, §2; 19 G. A., ch. 63, § 2; C. '73, §§ 495, 498; R., §§ 1123, 1126.]

Certificate: Omission to certify a tax until after the date here fixed will not render the tax invalid, if it is certified in time to be placed upon the tax list: *Taylor v. McFadden*, 84-262.

This section does not cover assessments for street improvements; therefore the exemption of land within city limits used for agricultural purposes from taxes for city purposes will not constitute an exemption from liability for special assessments: *Farwell v. Des Moines Brick Mfg. Co.*, 66 N. W., 176.

As to certifying special assessments, see §§ 825–828.

Collection by county: Under this sec-

tion sales can be made by the county treasurer for city taxes as for other taxes: *Morrison v. Hershire*, 32–271.

Under a previous statute authorizing cities to sell real and personal property for delinquent taxes, and provide needful rules and regulations for the proper enforcement of their powers as to taxation, *held*, that such city might provide a penalty for non-payment of taxes, and for the sale of property for such taxes and penalties, and provide further that in redeeming from such sale a penalty be paid, in addition to the amount for which the property was sold: *Augustine v. Jennings*, 42–198.

Where a city for many years failed to bring forward on its tax books or attempt to collect taxes claimed to be delinquent although the same property was regularly assessed for subsequent taxes which were paid, *held*, that it would thereby be considered as having abandoned all claim to such tax: *Bradley v. Hintrager*, 61–337.

Recovery of tax by action: The grant of power to a municipal corporation to levy and collect a tax carries with it all the usual, ordinary and necessary means for the exercise of the power, and while the city may not have the right to collect such taxes by a sale of property, yet the lien may be enforced by an action in equity for that purpose: *McInerny v. Reed*, 23–410.

Action may be maintained to collect city taxes, although another remedy is provided by law: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633; *Dubuque v. Illinois Cent. R. Co.*, 39–56. *Burlington v. Burlington & M. R. R. Co.*, 41–134.

Where the charter of a city authorizes it to levy and collect taxes, the city council may, by ordinance, provide for the collection of such taxes by judicial proceedings in the courts, and the fact that by statute subsequent to the charter another method of collection is provided will not take away the right of resorting to legal proceedings: *Dubuque v. Harrison*, 34–163.

The power given to cities to provide by ordinance for the collection of taxes is cumulative merely, and does not, if adopted, deprive the city of other remedies: *Sioux City v. Independent School Dist.*, 55–150.

An action for the collection of taxes is subject to the same limitation as any action to recover a debt: *Burlington v. Burlington & M. R. R. Co.*, 41–134.

In an action to recover taxes, penalties provided by law for non-payment thereof may also be recovered: *Ibid.*

Vested right: The right of a city to taxes already accrued cannot be released by legislation: *Dubuque v. Illinois Cent. R. Co.*, 39–56.

SEC. **903. General provisions as to indebtedness and warrants.** All the provisions of chapter eleven of title four hereof shall be applicable to cities and towns, their officers and employes, subject only to such modification as may be necessary therefor.

SEC. **904. Diversion of funds.** Any councilman or officer of a city or town who shall participate in, advise, consent to, permit or allow any tax or assessment levied by such city or town, or by other lawful authority, for city or town purposes, to be diverted to any purpose other than the one for which it was assessed and levied, except as provided in subdivision seven, section eight hundred and ninety-four, of chapter eleven of this title, or shall in any way become a party to such diversion, shall be guilty of embezzlement. [24 G. A., ch. 14, § 8; 22 G. A., ch. 17, § 8; 21 G. A., ch. 78, § 8; 21 G. A., ch. 160, § 4.]

CHAPTER 12.

OF BONDS.

SECTION **905. Funding.** Cities and towns may settle, adjust, renew or extend the legal indebtedness they may have, or any part thereof, in the sum of one thousand dollars or upwards, whether evidenced by bonds, warrants or judgments, and may fund or refund the same and issue coupon bonds therefor, but no bonds shall be issued under this section for any other purpose than is above authorized. [26 G. A., chs. 3, 4, 16; 25 G. A., ch. 3; 24 G. A., ch. 14, § 1; 24 G. A., ch. 15, § 1; 23 G. A., ch. 4; 23 G. A., ch. 12; 22 G. A., ch. 17, §§ 1, 4; 21 G. A., ch 78, §§ 1, 4; 16 G. A., ch. 51, § 1.]

A municipal corporation may issue bonds to a judgment creditor in payment of a judgment. Possibly such bonds would be invalid if given in excess of the limitation, even if given for the extinguishment of an antecedent and valid indebtedness; but in an action by the city against a third person who is liable to the city for the indebtedness which it thus attempts to pay, such invalidity of the bonds cannot be set up to show

that the city has not been compelled to pay such indebtedness: *Sioux City v. Weare*, 59–95.

In general as to power to issue bonds, see *Heins v. Lincoln*, 71 N. W., 189.

SEC. **906. Form.** Such bond shall be issued in sums of not less than one hundred nor more than one thousand dollars each, running not more than twenty years, bearing interest not exceeding six per cent. per annum, payable annually or semiannually, and shall be substantially in the following form, but subject to changes that will conform them to the ordinance (or resolution) of the council, to wit:

The city (or town) of.....in the state of Iowa, for value received promises to pay to bearer.....dollars, lawful money of the United States of America, on....., with interest on said sum from the date hereof until paid at the rate of.....per cent. per annum, payable .....annually on the first day of.....and.....in each year, on presentation and surrender of the interest coupons hereto attached; both principal and interest payable at.....

This bond is issued by the city (or town) of....., pursuant to the provisions of section....., chapter....., title....., of the Code of Iowa, and in conformity to an ordinance (or resolution) of the council of said city (or town) duly passed. And it is hereby certified and recited that all acts, conditions and things required by the laws and constitution of the state of Iowa to be done precedent to and in the issue of this bond have been properly done, happened and been performed in regular and due form as required by law, and that the total indebtedness of said city, including this bond, does not exceed the constitutional or statutory limitations.

In testimony whereof said city (or town) by its council has caused this bond to be signed by its mayor and attested by its auditor (or clerk), with the seal of said city attached, this.....day of.....

.....

Mayor of the city (or town) of.....

ATTEST:

.....

Clerk of the city (or town) of.....

(Form of Coupon.)

The treasurer of the city (or town) of....., Iowa, will pay to bearer.....dollars, on....., at....., for.....annual interest on its.....bond, dated,..... No.....

.....

Mayor of the city (or town) of.....

ATTEST:

.....

Clerk of the city (or town) of.....

[26 G. A., ch. 18; 24 G. A., ch. 14, §§ 1, 2; 24 G. A., ch. 15, §§ 1, 2; 23 G. A., ch. 4, § 2; 22 G. A., ch. 17, §§ 1, 2; 21 G. A., ch. 78, §§ 1, 2.]

SEC. **907. Numbered and signed.** Said bonds shall be numbered consecutively, signed by the mayor, and attested by the auditor or clerk, as the case may be, with the seal of the city affixed. The interest coupons attached thereto shall be executed in the same manner. [24 G. A., ch. 14, § 3; 23 G. A., ch. 4, § 5; 22 G. A., ch. 17, § 3; 21 G. A., ch. 78, § 3.]

SEC. **908. Issuance.** All bonds issued under the provisions of this chapter shall be issued pursuant to, and in conformity with, a resolution adopted by the council of said city or town, which shall specify the amount authorized to be issued, the purpose for which issued, the rate of interest they shall bear, and whether payable annually or semiannually, the place where the principal and interest shall be payable, and when to become due, and such other provisions, not inconsistent with law, in reference thereto, as the council shall think proper, which resolution shall be entered of record upon the minutes of the proceedings of the council, and a true and complete copy thereof printed on the back of each bond, which resolution

shall constitute a contract between the city or town and the purchasers or holders of said bonds. [23 G. A., ch. 4, § 3.]

SEC. **909. Registration.** When bonds have been executed as aforesaid, they shall be delivered to the treasurer of the city or town, and his receipt taken therefor, who shall register the same in a book provided for that purpose, which shall show the number of each bond, its date, date of sale, amount, date of maturity, and the name and address of the purchaser, and, if exchanged, what evidences of debt were received therefor, which record shall at all times be open to the inspection of the citizens of said city or town. The treasurer shall thereupon certify upon the back of each bond as follows: "This bond duly and properly registered in my office this ..... day of .....

.....

Treasurer of the city (or town) of ....."

and shall stand charged on his official bond with all bonds so delivered to him, and the proceeds thereof. He shall report under oath to the council of said city or town, at each first regular session thereof in each month, a statement of all such bonds sold or exchanged by him since his last report, and the date of such sale or exchange, and, when exchanged, a description of the indebtedness for which exchanged. [24 G. A., ch. 14, § 3; 23 G. A., ch. 4, § 5; 22 G. A., ch. 17, § 3; 21 G. A., ch. 78, § 3.]

SEC. **910. Sale.** He shall, under a resolution and the direction of the council, sell the bonds for cash on the best available terms, or exchange them on like terms for legal indebtedness of the city or town evidenced by bonds, warrants or judgments outstanding at the date of the passage of the resolution authorizing the issue thereof, and the proceeds shall be applied and exclusively used for the purposes for which said bonds are issued. In no case shall they be sold or exchanged for a less sum than their face value and all interest accrued at the date of sale or exchange. After registration, the treasurer shall deliver said bonds to the purchaser thereof, and, when exchanged for indebtedness of said city or town, he shall at once cancel all warrants or bonds, or secure proper credits therefor on judgments. [24 G. A., ch. 14, § 3; 23 G. A., ch. 4, § 4; 22 G. A., ch. 17, § 3; 21 G. A., ch. 78, § 3.]

SEC. **911. Taxes to pay.** Cities and towns issuing funding or refunding bonds under this chapter shall levy taxes for the payment of the principal and interest thereof, in accordance with the provisions of the chapter relating to taxation. [24 G. A., ch. 14, § 5; 23 G. A., ch. 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78, § 5.]

SEC. **912. Certificates or bonds in anticipation of special taxes.** Any city may anticipate the collection of taxes authorized to be levied for the grading fund, city improvement fund, district sewer fund, and city sewer fund, and for that purpose may issue certificates or bonds with interest coupons, to be respectively denominated city grading certificates or bonds, city improvement certificates or bonds, district sewer certificates or bonds of the particular sewer district, and city sewer certificates or bonds of said city, and all the provisions of this chapter shall apply to such certificates, bonds and coupons, with such changes only as are necessary to adapt them thereto. Said bonds and interest thereon shall be secured by said assessments and levies, and shall be payable only out of the respective funds hereinbefore named pledged to the payment of the same, and no bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of said city to collect said several funds with interest thereon, and to hold the same separate and apart, in trust, for the payment of said bonds and interest, and to apply the proceeds of said funds pledged for that purpose to the payment of said bonds and interest. [22 G. A., ch. 7, § 2; 21 G. A., ch. 34; 19 G. A., ch. 38, §§ 3, 4; 17 G. A., ch. 162, § 1.]

SEC. **913. Limitation of action questioning legality.** No action shall be brought questioning the legality of any of the bonds authorized

by this chapter, water works bonds, gas works bonds, or electric light or power plant bonds, from and after three months from the time the same are ordered issued by the proper authority.

CHAPTER 13.

OF PLATS.

SECTION **914. For subdivisions or additions.** Every original proprietor of any tract or parcel of land, who has subdivided, or shall hereafter subdivide the same into three or more parts, for the purpose of laying out a town or city, or addition thereto, or part thereof, or suburban lots, shall cause a plat of such subdivisions, with references to known or permanent monuments, to be made, giving the bearing and distance from some corner of a lot or block in said town or city to some corner of the congressional division of which said town, city or addition is a part, which shall accurately describe all the subdivisions thereof, numbering the same by progressive numbers, giving their dimensions by length and breadth, and the breadth and courses of all the streets and alleys established therein. Description of lots or parcels of land in such subdivisions according to the number and designation thereof on said plat, in conveyances or for the purposes of taxation, shall be valid. The duty to file for record a plat as provided herein shall attach as a covenant of warranty, in all conveyances of any part or parcel of such subdivisions, by the original proprietors against any and all assessments, costs and damages paid, lost or incurred by any grantee or person claiming under him, in consequence of the omission on the part of said proprietor to file such plat. [18 G. A., ch. 53, § 3; C. '73, § 559.]

The fact that a plat is invalid does not affect a deed conveying lots according to a description in such plat, to which reference is made in the deed: *Young v. Cosgrove*, 83-682.

Where certain lots, supposed to constitute a block as laid out in a plat, were conveyed by number with reference to such block, and subsequently another plat was filed, by which such block contained another lot, and also a strip of land not designated by number, *held*, that the conveyance gave no right to any portion of such strip: *Ibid.*

SEC. **915. Acknowledgment and recording.** Every such plat shall be accompanied by a statement to the effect that the subdivision of (here insert a correct description of the land or parcel subdivided), as appears on this plat, is with the free consent and in accordance with the desire of the proprietor, which shall be signed and acknowledged by him before some officer authorized to take the acknowledgment of deeds. Such proprietor shall also procure from the treasurer of the county in which the land lies, and file with the recorder, a certified statement that the land laid out into lots, streets and alleys is free from taxes, and a certified statement from the recorder that the title in fee is in such proprietor, and that it is free from incumbrance; but if the parcel of land so laid out shall be incumbered with a debt certain in amount, and which the creditor will not accept with accrued interest to the day of proffered payment if it draws interest, or with a rebate of interest at the rate of six per cent. per annum if it draws no interest, or if the creditor cannot be found, then such proprietor, and, if a corporation, its proper officer or agent, may file with the recorder of such county an affidavit, stating either that such proprietor has offered to pay such creditor the full amount of his debt, with interest, or with a rebate of interest, as the case may be, and that he would not accept the same, or that he cannot be found, whereupon such proprietor may execute and file with the recorder a bond in double the amount of such incumbrance, with

three sureties who shall be freeholders of the county, to be approved by the recorder and clerk of the district court, which bond shall run to the county, and shall be for the benefit of the purchasers of any lots, and shall be conditioned for the payment of such incumbrance and the cancellation thereof of record as soon as practicable after the same becomes due, and for the holding of all purchasers and those claiming under them forever harmless from such incumbrance. When such affidavit and bond shall have been filed with the recorder, together with the certificate of approval of the council of the city or town in which such land is situated or which is proposed to be made an addition thereto and a certificate of the recorder that said land is free from all incumbrance except as secured by said bond, and that the title in fee is in such proprietor, and that of the treasurer that the land is free from taxes, said plat shall be admitted to record, and be as valid as if such proprietor had filed with the recorder the certificate of such officer that said land was free from all incumbrance. [18 G. A., ch. 53, § 1; C. '73, § 560.]

As the survey establishes the lines of a street, etc., while the plat is but a record of such survey, in case of any conflict the actual survey will govern: *Bradstreet v. Dunham*, 65–248.

Where there is a disagreement between the survey actually made and the plat, the former must control: *Root v. Cincinnati*, 87–202; *Jordan v. Ferree*, 70 N. W., 611.

SEC. **916. Approval by council.** All plats of additions to any city or town, or subdivisions of any part or parcels of lands lying within or adjacent to any city or town, shall be divided by streets into blocks, with alleys separating abutting lots, and such blocks, streets and alleys shall conform as nearly as practicable to the size of blocks and the width of streets and alleys in such city or town, and such streets and alleys shall be extensions of the existing system of streets and alleys thereof. All plats of such additions or subdivisions, except subdivisions of less than one block, before being recorded, shall be filed with the clerk of such city or town, and when so filed the council, within a reasonable time, shall consider the same, and, if it is found that such plat conforms to the provisions hereof, the council shall direct the mayor and clerk to certify its resolution of approval, which shall be affixed to the said plat before it shall be received for record by the county recorder.

In general as to the acquisition and control by the city of streets and public grounds, see § 752 and notes.

As to acceptance by city of dedication of streets, see notes to following section.

SEC. **917. Dedication to public.** When the statement and plat are accompanied with the certificates, affidavit and bond, when so required, and have been entered on the plat books in the auditor's office, they shall be admitted to record, and not otherwise, and shall be of no validity until so filed for record in the office of the recorder, and such acknowledgment and recording shall be equivalent to a deed in fee simple of such portion of the premises platted as is set apart for streets or other public use, or as is dedicated to charitable, religious or educational purposes. [18 G. A., ch. 53, § 2; C. '73, §§ 560, 561; R., § 1021; C. '51, §§ 561, 637.]

Rights acquired by the city: The title to land dedicated for streets, public squares, etc., is in the city, being in trust for the public, and such property cannot be taken on execution against the city, or for any other than trust purposes: *Ransom v. Boal*, 29–68.

The acknowledging and recording of a plat vests in the public whatever interest the grantor has, so far as the streets are concerned, but it does not establish the title of the public in the absence of a showing of title in the grantor: *Edenville v. Chicago, M. & St. P. R. Co.*, 77–69.

The purchaser of city or town property acquires no ownership of or interest in the streets adjoining such property other than that which is given to the whole public, the right of way over them; and he cannot object to the construction of a railroad over such streets on the ground that compensation for the right of way is not made to him: *Milburn v. Cedar Rapids*, 12–246.

In the cities of Keokuk and Dubuque, which were laid out by the United States, the fee in the streets is in the adjacent property owners, subject to the public use: *Haight v. Keokuk*, 4–199; *Dubuque v. Maloney*, 9–450.

There is no substantial difference be-

tween the streets in which the legal title is in individuals and those in which it is in the public as to the rights of the public therein. The construction of a permanent freight depot so as to obstruct the street is subversive and repugnant to the dedication, but not the occupation of the streets by tracks, pipes, etc., subject to the reasonable control of the state and city: *Barney v. Keokuk*, 94 U. S., 24 (affirming *S. C.*, 4 Dillon, 593).

The fee of the streets is in the city for the use of the general public, not the people of the city alone, and the legislature may authorize them to be used by a railroad company for the construction of its road without the consent of the city and without compensation: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24–455.

But a city has no authority to control or grant rights and privileges to, or in, its streets, unless it has so been authorized: *Stanley v. Davenport*, 54–463; and as to the right of railway companies to construct their tracks upon the streets of cities, see notes to § 767.

The city acquires as against adjoining owners and the original proprietor control over the whole street and not simply over the surface; and it may maintain an action for material, as coal, etc., removed therefrom, whther such material be superficial or subterraneous: *Des Moines v. Hall*, 24–234.

The nature of the property which a city acquires in its streets is different from that which it may have in real estate, such as it is authorized to acquire for other purposes: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24–455.

Rights of adjacent property owners: Although under the provisions as to statutory dedication the owners of lots do not own the fee of the adjacent street, yet they have a peculiar interest in the street, which neither the local nor general public can pretend to claim. This interest is an easement appurtenant to their lots and partakes of the nature of property: *Cadle v. Muscatine Western R. Co.*, 44–11.

Therefore, where a railway company having the right to construct its road over the streets of a city does so in a careless and negligent manner, the adjoining property owners may recover special damages resulting therefrom: *Ibid.*

Purchasers of lots in the portion platted acquire a right of way over the streets and alleys therein: *Yost v. Leonard*, 34–9.

Where a party filing a plat reserved therein the right to construct a mill-race across one of the streets, *held*, that he became bound to erect and maintain a bridge across the race at his own expense: *Waterloo v. Union Mill Co.*, 59–437.

Where the fee in the street is in the adjoining property owner, neither the city nor any individual has a right, against the will or consent of the owner of the adjoining lot, to construct a cistern under the street or sidewalk: *Dubuque v. Maloney*, 9–450.

An adjacent property owner cannot excavate areas under the sidewalk except with the consent of the city authorities: *Davis v. Clinton*, 50–585.

Platting of streets: Where a plat shows the dedication of two streets at right angles to each other, the square formed by their intersection will be presumed to be included in the dedication: *Yost v. Leonard*, 34–9.

Where the question was as to whether a street on a plat showing a dedication for depot grounds was continuous through such depot grounds or was interrupted thereby, *held*, that the fact that the street had the same name on the two sides of the grounds was not conclusive that it was continuous: *State v. Dubuque & S. C. R. Co.*, 88–508.

To make out a dedication of a street appearing on a plat, it is necessary to show, not only that the plat was laid out, but also that the party laying it out had title thereto: *Porter v. Stone*, 51–373.

Dedication in a town plat *held* sufficient, in a particular case, to convey the fee in a street indicated thereon: *Stange v. Hill & West Dubuque St. R. Co.*, 54–669.

Evidence in a particular case, *held* not sufficient to establish a dedication of a street which was shown by the last of three plats filed, but not by the first two, under which the rights of the parties attached: *Manchester v. Hoag*, 66–649.

When lots are sold on a plat bounded by a street or highway, that fact raises a strong presumption of the intent to pass the soil to the center of the street or highway, and it will so pass unless the highway be expressly excluded: *Dubuque v. Maloney*, 9–450.

But this rule is not applicable to land reserved for public use on the opposite side of the highway from the lots thus sold, and the lot purchaser acquires no title to the land thus reserved: *Cook v. Burlington*, 30–94.

Where the owner of land on both sides of a section line platted the portion on one side, locating a street on such line, *held*, that the dedication covered the entire width of the street: *McDunn v. Des Moines*, 34–467.

The existence of a plat, even though defective, and the sale of lots, bounded according to its descriptions, by the persons platting the land, establish the *animus dedicandi* as to the streets laid out on such plat, which, when shown, is sufficient to establish a way or street, even though there be no record of such plat made in the form prescribed by law: *Shea v. Ottumwa*, 67–39.

Dedication: A proprietor laying off an addition to an incorporated town or city, though he may grant only the use or easement in the streets, or reserve minerals therein (*Dubuque v. Benson*, 23–248), cannot confer upon some other public corporation rights in and control over the streets and alleys. Therefore, *held*, that the entry upon a plat that the proprietors "do hereby convey to Polk county for the use of the public the streets and alleys as marked on this plat, and dedicate the same to the public," was inoperative, and the platting, acknowledgment, recording, etc., being sufficient to constitute a statutory dedication, the fee of the streets vested in the city: *Des Moines v. Hall*, 24–234.

A grantor filing a plat and procuring the proper certificate thereto cannot afterwards object that it was not in accordance with law

and that the requirements of the statute have not been complied with: *Scott v. Des Moines*, 64–438.

And the grantor, or those claiming under him, cannot defeat a dedication made in such plat, on the ground that it was not recorded at once nor until after the grantor's death: *Ibid.*

Where a strip of land between a street and a river was not included in the plat, *held*, that it could not be considered as dedicated to the public: *Cowles v. Gray*, 14–1.

In order to show a dedication apart from the plat there must be an act of dedication within the prescribed limit of time and an acceptance thereof by the public: *Ibid.*

Where the plat of a town contained a square designated "public square," and lots were sold on the faith of such plat and afterwards another plat was duly made and recorded changing the designation of the square, with the representation to prior lot purchasers that it was for the public use and control, and the city took possession of the square as public property, *held*, that the corporation had the title to such square for the use of the public and in trust for it: *Pella v. Scholte*, 21–463.

Marking a square on the plat as "garden square," *held* not necessarily to express or imply a dedication to the public: *Pella v. Scholte*, 24–283.

Where a square was marked upon a plat as "market square," and thereafter treated by the city as public, and was for that reason omitted from taxation, which facts were known to the dedicator and those claiming under him, *held*, that the circumstances showed an intention to dedicate such square to the public: *Scott v. Des Moines* 64–438.

Also *held*, in such case, that the designation of the square as "market square" did not show an intention to impose on the dedication a condition that it be used only for market purposes and that a market building be erected thereon: *Ibid.*

A dedication of a portion of land covered by a city plat for public purposes, as by marking it "public square," which dedication is accepted by the city, imposes upon the city an obligation to hold the property in trust for the uses and purposes expressed, and the city cannot divert it to another and different use, as by selling it to private owners: *Warren v. Mayor of Lyons City*, 22–351.

Where a plat contained a square marked "church square," *held*, that such designation did not constitute a dedication to any particular church association, although but one such association existed at the time in the town: *Christian Church v. Scholte*, 2–27.

Under the evidence in particular cases, *held*, that subdivisions of plats marked as "square," or "public square," were dedicated to the public: *Livermore v. Maquoketa*, 35–358; *Bayliss v. Supervisors*, 5 Dillon, 549.

Where lots are sold with reference to a town plat, upon which certain land is dedicated to public use, the purchasers acquire, as appurtenant to their purchases, a vested right to the use of the land dedicated to public use, of which they cannot be divested by the owner who made the dedication or by the town in its corporate capacity: *Leffler v. Burlington*, 18–361.

Where lots were sold in accordance with a plat upon which a certain square was marked "public square," and afterwards "garden square," and with the representation that the square was for the public and was to remain forever an open and unoccupied space, and the value of lots sold was increased thereby, *held*, that a purchaser could enjoin the grantees of such square from platting lots and erecting buildings thereon: *Fisher v. Beard*, 40–625.

Where the certificate accompanying the plat referred to public grounds, streets and alleys and the plat showed strips of land through the blocks corresponding to alleys without their being named as such, *held*, that dedication of such strips as alleys was sufficiently shown: *Taraldson v. Lime Springs*, 92–187.

Where the general government as owner laid off land into lots, streets, squares, etc., for a city and sold lots according to such plan, *held*, that the sale and conveyance implied a grant or covenant to the purchasers of the lots that the streets and public squares should forever be open to the public, free from all claims of proprietors inconsistent with such use, but that the dedication did not operate as a grant to the city of the fee in the streets, and that such fee-title passed to the adjoining property-owners, subject to the easement of the public, with the power in the city to regulate the public use of such streets and squares, as the representative of the public, for the purpose of vindicating the public right: *Dubuque v. Maloney*, 9–450.

Where the county commissioners filed a plat of a town site showing a square marked for a public square and asserted no rights with reference to such square for many years having reserved and used other lots for county buildings and the public square having been under the jurisdiction of the city, *held*, that the title was in the city and that it and not the county was liable for expenses of street improvements. It is immaterial in such case whether technically the legal title has passed to the city or not: *Young v. Mahaska County*, 88–681.

Where, by act of congress, certain land in front of a street leading to a navigable river was reserved from sale for public use, with the declaration that it should remain forever free for highways and other purposes; *held*, that such dedication was in the nature of a contract which could not be afterwards abrogated or repealed, and that the municipal corporation, succeeding to the title of the land thus reserved, held it for the same purposes and could not divert it for other purposes: *Cook v. Burlington*, 30–94.

Where the owner of land laid out an addition to a city and by the plat donated and granted the "streets, alleys and public grounds, etc., for public purposes," and designated a tract of ground next to the river as "Reserved Landing," *held*, that the city did not by such donation acquire the right to the property so reserved: *Grant v. Davenport*, 18–179.

Acceptance of dedication: By accepting a charter making a platted addition to the city limits, *held*, that the city thereby accepted the addition and the dedication of the streets therein laid out: *Des Moines v. Hall*, 24-234.

Where, in the plat of an addition to the city, a street was laid out ninety feet in width, but was only opened to a width of sixty feet, fences being erected by lot owners upon the line of the street as thus improved and used, and the strip not used being thus inclosed for twenty-five years, *held*, that the city could not claim the strip thus inclosed, and that it would be presumed that the city had only accepted the dedication to the extent that the street had been opened: *Bell v. Burlington*, 68-296.

A city may accept a portion of a street as dedicated and not the balance, and therefore where an abutting owner claimed title to a line which was supposed by him to be the street line and made improvements with reference thereto, occupying for the period of prescription, *held*, that his title became perfect as against the city although the supposed boundary included a portion of the street as actually platted: *Johnson v. Burlington*, 63 N. W., 694.

There must be an acceptance of a dedication of lands for public purposes and while slight evidence is sufficient to establish it, yet some showing of acceptance is quite as essential as evidence of the dedication itself: *Cambridge v. Cook*, 66 N. W., 884.

A city or town may be estopped by reason of adverse possession of land dedicated as an alley for the statutory period from claiming the right to have such alley opened: *Ibid.*

Action of the city council in adopting the report of a committee recommending an acceptance of streets as dedicated on a plat not yet filed, *held* not to amount to an acceptance of such streets upon the subsequent filing of such plat: *Laughlin v. Washington*, 63-652.

Where a plat was filed for record, and the streets as designated thereby remained open to the public for two or three weeks, and were to some extent passed over and used by the public, but were afterwards closed, *held*, such facts did not constitute an acceptance by the city of the proposed dedication. Mere *user* will not be sufficient to constitute an acceptance; it must be shown to have been open and notorious, and continued for such a length of time that an acceptance can be presumed: *Ibid.*

Where a street had been used for a number of years as a public thoroughfare, and the city by ordinance had required such street to be improved and the adjacent land owners to build sidewalks, *held*, that, though there had been no formal dedication of the street and no acceptance of the same by ordinance, the facts were sufficient to charge the city with liability for neglect to keep it in a safe condition: *Byerly v. Anamosa*, 79-204.

Where the owner of land dedicates a right of way for a street, and it is by the municipal authorities ordered to be paved, such action amounts to an adoption and recognition of it as a street, and it becomes a public highway: *Ford v. North Des Moines*, 80-626.

Non-user: The right of the public in the streets and alleys accrues upon the acknowledgment and recording of the plat, and continues until it is either divested by some act of the public authorities, or lost by adverse possession, and it is immaterial as to the rights of the public whether such streets and alleys are improved or not. Therefore, a railway company has no right to fence its track where it crosses streets and alleys thus laid out, although they are not improved and used: *Lathrop v. Central Iowa R. Co.*, 69-105.

The occupation by a party dedicating, for ten years thereafter, will not bar the rights of the public, unless it appear that he held under claim of right adverse to the public: *McDunn v. Des Moines*, 34-467; *Livermore v. Maquoketa*, 35-358.

Diversion of streets or public grounds: The title to streets is vested in the city for the use of the public, and such use is to be controlled by the legislative power of the state. The city cannot grant the use of the streets for any purpose not thus authorized: *Stanley v. Davenport*, 54-463.

A city taking public lands which have been already dedicated to public use cannot devote the same to private uses, or convey them to others for such private use; and in an action by an adjoining lot owner having an interest in the preservation of the land for the uses for which it was originally dedicated, the city may be enjoined from making a conveyance thereof: *Cook v. Burlington*, 30-94.

Purchasers of lots abutting upon land dedicated by the original owner to a public use acquire such rights therein as will enable them to enjoin a diversion of it by the corporation to uses and purposes foreign to and inconsistent with the objects of the grant: *Ibid.*

Therefore, *held*, that while the grant of the right of way to a railway might not be inconsistent with the public use of lands reserved to the corporation for public purposes, yet a legal conveyance thereof in fee to a railway company was inconsistent with such use: *Ibid.*

But it does not follow that abutting owners may maintain an action for an obstruction in the street which does not affect them differently from the public generally: *Ingram v. Chicago, D. & M. R. Co.*, 38-669.

The city takes title to such portions of its territory as are dedicated for public purposes, subject to a trust to hold and use it for the purpose expressed, and cannot dispose it for other purposes: *Warren v. Mayor of Lyons*, 22-351.

A former statute attempting to confer upon cities and towns the power to sell and convey squares and parks therein laid off and dedicated by individuals, *held* void as authorizing a perversion of a trust. Whether the corporation might not be given power to part with whatever interest it possessed in the property, *quære*: *Ibid.*

As to diversion of public ground held by the city, see also notes to § 880.

Public squares dedicated to a city are held in trust for the public, and cannot be sold on execution to satisfy the debts of the city: *Ransom v. Boal*, 29–68.

Property dedicated as public grounds may be used for purposes varying according to the circumstances, to be judged by the proper legal authorities, but such property cannot be applied to private purposes: *Platt v. Chicago, B. & Q. R. Co.*, 74–127.

The fact that the use of a street is interrupted by an improper obstruction will not show an abandonment where the use is such as the public wants at the time require, nor will the city be estopped by virtue of such improper use from asserting its rights in the streets: *Waterloo v. Union Mill Co.*, 72–437.

The statute of limitations will not run to defeat the exercise by a city of its municipal powers in establishing and maintaining a street: *Ibid.*

Grants dedicated to public use can be used for the purposes expressed in the act of dedication only, and the grantor and even the proprietor of lots abutting may, by injunction, restrain a diversion to any other purpose resulting in an injury to him: *Pettingill v. Devin*, 35–344.

Reversion: It does not follow that the title reverts to the grantor upon a failure to use the land for the purposes indicated. Such a dedication passes the fee from the grantor without the contingent right of reversion, and any person injuriously affected may prevent the diversion from the purposes designated by injunction: *Ibid.*

Upon the vacation by the city of a street in the city plat the title of the property covered thereby does not revert to the original owner: *Day v. Schroeder*, 45–546.

SEC. **918. Vacation by proprietor.** Any such plat may be vacated by the proprietor thereof, at any time before the sale of any lots, by a written instrument declaring the same to be vacated, executed, acknowledged and recorded in the same office with the plat to be vacated, and the execution and recording of such writing shall operate to annul the plat so vacated, and to divest all public rights in the streets, alleys and public grounds described therein. In cases where any lots have been sold, the plat may be vacated as in this chapter provided by all the owners of lots joining in the execution of the writing aforesaid. [C. '73, § 563.]

The term "proprietors" as used in this and the following sections indicates the owners of the land and not alone the persons who originally plat the land. Owners who have acquired title from such original proprietors may exercise the powers conferred: *McGrew v. Lettsville*, 71–150.

The vacation of a plat does not obliterate it so far that it may not be resorted to for the purpose of describing land formerly embraced within it: *Chicago Lumber Co. v. Des Moines Driving Park*, 65 N. W., 1017.

But where such description was by lots and blocks without reference to the land included in the streets and alleys as platted, *held*, that such description did not cover the land included in the streets and alleys of such vacated plat: *Ibid.*

SEC. **919. Part of plat vacated.** Any part of a plat may be thus vacated, provided it does not abridge or destroy any right or privilege of any proprietor in said plat, but nothing contained in this section shall authorize the closing or obstruction of highways. When any part of a plat is vacated, the proprietors of the lots may inclose the streets, alleys and public ground adjoining them in equal proportion, except as provided in the next section. The recorder in whose office the plats are recorded shall write across that part of the plat so vacated, the word "vacated," and make a reference on the same to the volume and page in which the instrument is recorded. [C. '73, §§ 564–6.]

The fact that the vacation of a portion of a plat will close streets therein, and thus abridge the number of ways of access to the property of the proprietor of another portion of the plat, will not be ground for objecting to such vacation, if one or more ways are left reasonably convenient, so that no substantial right is abridged: *Lorenzen v. Preston*, 53–580.

The proper steps having been taken for the vacation of a street, such vacation becomes effective as against the city, subject only to the judicial determination as to whether the rights of private persons are affected. The city council cannot, by subsequently directing such street to be opened, affect the validity of the vacation: *Conner v. Iowa City*, 66–419.

This section contemplates the case of separate proprietors having distinct and separate interests, and they may vacate part of the town plat. The instrument of vacation, in a particular case, *held* certain as to the part affected. The authority conferred to vacate a part of the plat does not have the effect to limit the boundaries of an incorporated town and to take that part of which the plat is vacated out of the corporation. It therefore, does not affect the authority of the corporation over the lands covered by the part of the plat vacated. As to streets and alleys that were never opened, such vacation does not destroy any of the rights of any owner of land within the town: *McGrew v. Lettsville*, 71–150.

SEC. **920. Vacation by lot owners.** Whenever the owners of any tract of land which has been platted into town lots, and the plat of which has been recorded, shall desire to vacate the plat or a part thereof, a petition, signed by all the owners of it or the part to be vacated, shall be filed in the office of the clerk of the district court of the county in which the land is situated, returnable at the ensuing term, and notice thereof given at least four weeks, by posting notices in three conspicuous places in the town where the vacation is prayed, and one upon the door of the court-house of the county. At the term of court next following the filing of the petition and notice, the court shall fix a time for hearing the petition, and notice of the day so fixed shall be given by the clerk in some newspaper published in the county at least one week before the day appointed for the hearing. At the hearing of the petition, if it shall appear that all the owners of lots in the plat or part thereof to be vacated desire the vacation, and there is no valid objection thereto, a decree shall be entered vacating such portion of the plat, and the streets, alleys and avenues therein, and for all purposes of assessment such portion of the town shall be as if it had never been platted into lots; but if any street as laid out on the plat shall be needed for public use, it shall be excepted from the order of vacation and shall remain a public highway. Vacations made under this chapter shall not be construed to affect any lands lying within any city or town which have been dedicated or deeded to the public for parks or other public purposes. [15 G. A., ch. 61, § 1.]

SEC. **921. Replatting.** The owner of any lots in a plat vacated may cause the same and a proportionate part of the adjacent streets and public grounds to be replatted and numbered by the county surveyor in the same manner as is required for platting in the first instance, and when such plat is acknowledged by such owner, and is recorded in the recorder's office of the county, such lots may be conveyed and assessed by the numbers given them on such plat. [C. '73, § 567.]

Sec. **922. Plat by auditor.** Whenever the original proprietor of any subdivision of land has sold or conveyed any part thereof, or invested the public with any rights therein, and has failed and neglected to execute and file for record a plat as provided in this chapter, the county auditor shall by mail or otherwise notify some or all of such owners, and demand its execution. If such owners, whether so notified or not, fail and neglect for thirty days after the issuance of such notice to execute and file said plat for record, the auditor shall cause one to be made, making any survey necessary therefor. Said plat shall be signed and acknowledged by the auditor, who shall certify that he executed it by reason of the failure of the owners named to do so, and file it for record, and when so filed it shall have the same effect as if executed, acknowledged and recorded by the owners. A correct statement of the costs and expenses of such plat, survey and record, verified by oath, shall be by the auditor laid before the first session of the board of supervisors, which shall allow the same and order them paid out of the county treasury, and he shall at the same time assess the amount *pro rata* upon the several subdivisions of said tract, lot or parcel so subdivided, and it shall be collected in the same manner as general taxes, and shall go to the general county fund; or said board may direct suit to be brought in the name of the county to recover from the original proprietor such cost and expense. [C. '73, § 568.]

SEC. **923. Platting for assessment and taxation.** Whenever a congressional subdivision of land of forty acres or less, or any lot or subdivision, is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, he shall cause to be made and recorded a plat of such tract or lot with its several subdivisions in accordance with the provisions of this

chapter, proceeding as directed in the preceding section, and all of its provisions shall govern. [C. '73, § 569.]

SEC. **924. Insufficiency of description in deed.** Every conveyance of land in this state shall be deemed to be a warranty that the description therein contained is sufficiently definite and accurate to enable the auditor to enter the same on the plat book required to be kept; and when there is presented for entry on the transfer book any conveyance in which the description is not sufficiently definite and accurate, the auditor shall note such fact on the deed, with that of the entry for transfer, and shall notify the person presenting it that the land therein is not sufficiently described, and must be platted within thirty days thereafter. Any person aggrieved by the opinion of the auditor may within said thirty days appeal therefrom to the board of supervisors, by giving notice thereof in writing, and thereupon no further proceeding shall be taken by the auditor. At its next session the board of supervisors shall determine said matter and direct whether the plat shall be executed and filed, and within what time. If the grantor in such conveyance shall neglect for thirty days thereafter to file for record a plat thereof, and of the appropriate congressional subdivision in which the same is found, duly executed and acknowledged as required by the auditor, or, in case of appeal, as directed by the board of supervisors, then the auditor shall proceed as is provided in this chapter, and cause such plat to be made and recorded, and thereupon the same result shall follow as provided in the preceding section. Such plat shall describe said tract and any other subdivisions of the smallest congressional subdivision of which the same is part, numbering them by progressive numbers, setting forth the courses and distances, the number of acres, and such other memoranda as is necessary; and descriptions of such lots or subdivisions according to the number and designation thereon said plat shall be deemed sufficient for all purposes. [C. '73, § 570.]

SEC. **925. Resurvey of town plats.** In all cases where the original plat of any city, town or village, or any addition thereto, has been or may be lost or destroyed after the sale and conveyance of any subdivision, block or lot thereof by the original proprietor and before the same shall have been recorded, any three persons owning real property within the limits of such plat may have the same resurveyed and replatted, and such plat recorded as hereinafter directed, but in no case shall such replat be made and recorded without the consent in writing, indorsed thereon, of the original proprietor, if he be alive and his place of residence known. [15 G. A., ch. 54, § 1.]

SEC. **926. How made.** The county surveyor of any county in which is situated any city, town, village or addition thereto, as contemplated in this chapter, may, and upon payment of his legal fees by any person desiring the same, must, make a resurvey of such city, town, village or addition, or any portion, and plat thereof, which plat shall conform as near as may be with the original lines of the parcel or tract so resurveyed, and be made in all respects in accordance with the provisions of this chapter. In making a resurvey and plat, the surveyor may summon witnesses, administer oaths, and take and hear evidence touching the original plat lines and subdivisions, whether the original proprietor is dead, and any other matter which may assist in arriving at and establishing the true lines and boundaries; but no resurvey shall be made except upon four weeks' notice to be given by the surveyor by a publication of the contemplated resurvey in some newspaper printed in the county. [Same, § 2.]

SEC. **927. Plat certified and filed.** When the surveyor has completed the plat, he shall attach his certificate thereto, to the effect that it is a just, true and accurate plat of said city, town, village or addition so surveyed by him; which shall be filed for record in the office of the recorder of the proper county, and from the date of such filing it shall be treated in all

courts of this state as though the same had been made by the original proprietor thereof. [Same, § 3.]

SEC. **928. Contesting.** Any person may at any time within six months from the date of its filing for record commence an action in equity against the persons employing the surveyor, setting up his causes of complaint and asking that such record be canceled. If it appear on the trial that the city, town, village or addition was originally laid out and platted; that the original proprietor had sold any or all of the lots thereof, or that he intended to dedicate to the public the streets, alleys or public squares therein; that the plat thereof has never been recorded, but is lost; that the proprietor is dead or his place of residence unknown; and that the resurvey and plat filed for record is a substantially accurate survey and plat of the original plat of such city, town, village or addition, then the action shall be dismissed at the cost of the complainants, otherwise the court shall set aside said plat and cancel the same of record at the cost of defendants. [Same, §§ 3, 4.]

SEC. **929. Plats legalized.** None of the provisions of this chapter shall be construed to require replatting in any case where plats have been made and recorded in pursuance of law; and all plats heretofore filed for record and not subsequently vacated are hereby declared valid, notwithstanding irregularities and omissions in the required statement or plat, or in the manner or form of acknowledgment, or certificates thereof. [C. '73, § 571.]

SEC. **930. Penalty for failure to record.** Any person who shall dispose of or offer for sale or lease any lots in any town, or addition to any town or city, until the plat thereof has been acknowledged and recorded as provided in this chapter, shall forfeit and pay fifty dollars for each lot and part of lot sold or disposed of, leased or offered for sale. [C. '73, § 572; R., § 1027.]

As this section only imposes a penalty on the person selling and not on one buying lots, the plat of which is not acknowledged and recorded, the vendee may enforce against the vendor a contract for the sale of such lots, and as to such vendee the contract will not be void: *Watrous v. Blair*, 32–58. The contract of sale is not illegal; the vendor may recover the consideration of the sale and the vendee may enforce specific performance thereof: *Pangborn v. Westlake*, 6–546.

SEC. **931. Public squares used for school purposes.** The people of any town located wholly within an independent school district, wherein is situated a public square or plat of ground deeded or dedicated to the town or public, may transfer or rededicate to said school district such square or plat for the purposes of a public school lot, to be used for the erection thereon of a public school-house, or for play grounds in connection with such school-house. [21 G. A., ch. 75, § 1.]

SEC. **932. Manner of transfer.** When a plat or lot of the character described in the preceding section is located in such town, and one-half of the resident voters thereof, according to the last census, shall petition the mayor and council, asking them to submit to the voters of the town, at a general or special election, the question whether or not such public plat or lot shall be transferred to such independent district and dedicated and used for school purposes, they shall submit the question to the voters of the town, in accordance with the prayer of said petition, after giving ten days' notice in writing or printing thereof, in which the proposition submitted shall be clearly set forth and signed by the mayor, three of which notices shall be posted in public and conspicuous places in the town, and one published in the last two issues preceding such election of a weekly newspaper published therein, or, if there be none, then in the weekly newspaper published elsewhere in the county, having the largest circulation in said town. The notice shall also state the manner of voting, which shall be by ballot. The ballot shall contain the words: "Shall the proposition to transfer lot (or block, or square, as the case may be, describing it), for the purposes of a

public school-house lot, be adopted?" Such election shall be conducted as ordinary town elections are, under the supervision of the town authorities, who shall canvass the vote as provided in other cases. If it shall appear that two-thirds of the votes cast at such election are in favor thereof, then such transfer shall be complete, and the lot, block or square may be appropriated and used for the purposes indicated by said vote, and shall be no longer held for any other purpose. [Same, § 2.]

CHAPTER 14.

OF CITIES UNDER SPECIAL CHARTERS.

SECTION **933. General provisions not applicable.** The provisions of this chapter shall apply only to cities acting under special charter, and no provisions of this code, nor laws hereafter enacted, relating to the powers, duties, liabilities or obligations of cities or towns, shall in any manner affect, or be construed to affect, cities while acting under special charter, unless the same have special reference or are made applicable to such cities. [16 G. A., ch. 116, § 21.]

General statutes are not applicable to cities under special charter: *Bartemeyer v. Rohlf*, 71–582; *Keokuk v. Dressell*, 47–597; *Burlington v. Leebrick*, 43–252; *Burke v. Jeffries*, 20–145.

Therefore the mulct law was held not applicable to such cities: *Clark v. Riddle*, 70 N. W., 207.

The fact that general provisions are made applicable to cities under special charter does not effect a repeal of similar provisions peculiar to such cities: *Phillips v. Council Bluffs*, 63–576; *Arnold v. Council Bluffs*, 84–441. Additional powers may thus be granted to such cities: *Lytle v. May*, 49–224.

[Notes applicable to various sections relating to cities under special charter will be found under sections on the same general subject matter in the preceding chapters relating to cities and towns in general.]

SEC. **934. Powers.** Any city organized under special charter shall have and exercise, in addition to the provisions of such special charter, the rights, powers and privileges contained in this chapter.

SEC. **935. Extension of boundary—severance of territory.** All the provisions of chapter one of this title in relation to the extension of the boundaries of cities or towns, the annexation of territory thereto, the severance of territory therefrom, are made applicable to cities acting under special charter.

SEC. **936. Elections.** All elections held in such cities shall be governed by the general election laws.

SEC. **937. Council.** In any such city having a population of twenty thousand or more, as shown by the last state or national census, the council shall consist of a mayor, two aldermen-at-large, and one alderman from each ward. At the first annual city election after the taking effect of this code, there shall be elected two aldermen-at-large, and one alderman from each ward. Thereafter the successors of such aldermen shall be elected biennially. The aldermen in office at the time of taking effect of this code shall continue in office only until the election and qualification of the aldermen herein provided for.

SEC. **938. Marshal—policemen.** Cities under special charter shall have power to provide by ordinance for the appointment of a marshal by the mayor, or for his election by the electors thereof, or may dispense with such officer, and confer his duties upon any other officer. All policemen shall be appointed and may be removed by the mayor. [22 G. A., ch. 23, § 1; 18 G. A., ch. 24, § 1.]

SEC. **939. Assessors.** They shall provide by ordinance for the election of one or more assessors, who shall discharge the duties usually performed by township assessors, so far as applicable, and such as may be

required by ordinance. [22 G. A., ch. 27; 21 G. A., ch. 93, § 3; 16 G. A., ch. 90, § 1.]

SEC. **940. Other officers elected—terms.** They may provide by ordinance for the election, by the electors, of a marshal, recorder or clerk, treasurer, collector, auditor, attorney, and engineer; and all elective officers hereafter elected shall hold office for the term of two years, and until their successors are elected and qualified, and, when appointed, for such time as may be fixed by ordinance, not exceeding two years. [22 G. A., ch. 27; 21 G. A., ch. 93, § 3.]

SEC. **941. Estimates.** Each officer, board or committee shall file in the office of the clerk or recorder, thirty days before the beginning of each fiscal year, a detailed statement of the necessary labor, supplies and materials, and the work to be done by or through his or their department during the next fiscal year, and the estimated cost thereof. [22 G. A., ch. 4, § 2.]

SEC. **942. Appropriations.** The council shall make the appropriation for all the different expenditures for each fiscal year at or before the beginning thereof; and it shall be unlawful to issue any warrant, or to enter into any contract or appropriate any money, in excess of the amount thus appropriated, for the different expenses of the city during the year for which said appropriations shall be made. It shall not appropriate, in the aggregate, an amount in excess of its annual legally authorized revenue, but nothing herein shall prevent such cities from anticipating their revenue for the year for which such appropriations are made, or from bonding or refunding their outstanding indebtedness. [22 G. A., ch. 4, §§ 1, 2.]

SEC. **943. Compensation of aldermen—not to be interested.** Aldermen shall be paid an amount prescribed by ordinance, not in excess of three hundred dollars per annum, which shall be in full compensation for all services connected with their official duties. No member of the council shall, during the time for which he has been elected, or for one year thereafter, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the term for which he was elected, nor shall he be interested directly or indirectly in any contract for work or service to be performed for the corporation. [C. '73, § 490; R., § 1122.]

SEC. **944. No change of compensation.** The emoluments of any officer shall not be increased or diminished during the term for which he shall have been elected or appointed, nor shall any change of compensation affect any officer during his existing term, unless the office be abolished; and no person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed, when, during the same time, the emoluments have been increased. [C. '73, § 491; R., § 1122.]

SEC. **945. Compensation of mayor.** The mayor shall receive such salary as may be provided by ordinance, not exceeding one thousand five hundred dollars per annum, and in addition he shall receive for holding a mayor's or police court, or discharging the duties of a justice of the peace, the compensation allowed by law for similar services by such officers, to be paid in the same manner; which amount shall be in full compensation of all such services. [24 G. A., ch. 7, § 1; 23 G. A., ch. 16, § 1; C. '73, §§ 519, 547; R., §§ 1091, 1121.]

SEC. **946. Compensation of other officers.** Police judges, magistrates, marshals and police officers, in criminal cases under the ordinances, shall receive the fees allowed for similar services in criminal cases under the state law, payable out of the city treasury; and for criminal cases under the state law they shall be paid the same fees that justices and constables receive under the state law, and payable from the county treasury. When such officers are paid a salary, the same shall be in lieu of all fees, and such fees, when collected, shall be paid into the city treasury. They shall make, under oath, a monthly report of such fees to the council. [17 G. A.,

ch. 56, § 1; 13 G. A., ch. 12; C. '73, §§ 515, 533, 536, 544; R., §§ 1086, 1104, 1107, 1118.]

SEC. **947. Ordinances—fines.** Such cities shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this chapter, and the charters thereof, and such as are necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort and convenience of such cities and the inhabitants thereof; and to enforce obedience to such ordinances by a fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days. [C. '73, § 482; R., §§ 1071-3.]

SEC. **948. Prosecutions.** In any prosecution or proceeding for the violation of any ordinance, the defendant shall not be entitled to a trial by jury, or to a change of venue, except on appeal, but shall be tried by the court or magistrate before whom the action is commenced.

SEC. **949. Commitment for fines—execution.** Whenever a fine and costs imposed for the violation of any ordinance are not paid, the person convicted may be committed at hard labor until the fine and costs are paid, not to exceed thirty days, and, in addition thereto, such fine and costs may be collected by the issuance of an execution on such judgment against any property of the defendant, which execution shall have the same force and effect and be executed in the same manner as provided by law for the collection of judgments in civil suits by execution; and transcripts of such judgments may be filed in the district court of the proper county as in civil cases, and with the same force and effect, and execution may be issued thereon from such court.

SEC. **950. Limitation of prosecutions.** All suits for the recovery of fines, and prosecutions for the commission of offenses made punishable as herein provided, shall be barred in one year after the commission of the offense for which the fine is sought to be recovered or the prosecution is commenced. [C. '73, § 486; R., § 1075.]

SEC. **951. Publication of ordinances.** The council may authorize the revision and publication, in book or pamphlet form, of all ordinances, and such publication shall be a sufficient publication, and they shall be in force from and after such publication.

SEC. **952. Ordinances signed and published—general powers.** Sections six hundred and eighty-five, six hundred and eighty-six, six hundred and eighty-seven and six hundred and ninety-three of chapter three of this title, and sections six hundred and ninety-five to seven hundred and nineteen, seven hundred and twenty-two to seven hundred and thirty, inclusive, and section seven hundred and thirty-two of chapter four of this title, are hereby made applicable to cities acting under special charter.

SEC. **953. Library tax.** The board of library trustees, before the first day of August in each year, shall determine and fix the amount or rate, not exceeding one-half mill on the dollar, in any one year, of the taxable valuation of such city, to be levied, collected and appropriated for the ensuing year for the maintenance of such library, and shall cause the same to be certified to the council, which shall levy the tax with the other taxes for such year. [C. '73, § 461.]

SEC. **954. Evidence of ordinances.** The printed copies of the ordinances published by authority, and transcripts thereof, or of any official act or proceeding recorded in any book, or entries on any minutes or journal, and certified by the clerk or recorder, shall be received in evidence for any purpose for which the originals would be received, and with the same effect. The clerk or recorder shall furnish such transcript, and be entitled to charge therefor the same fees as the clerk of the district court for like services. [21 G. A., ch. 93, § 1; C. '73, § 3720; R., § 1076.]

SEC. **955. Water and gas works—electric light and power plants—street railway and telephone franchises.** Such cities shall have power

to establish, erect, purchase, lease, maintain or operate, within or without the corporate limits, water works, gas works, electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants; but no such works or plants shall be thus established, erected, purchased or leased unless a majority of the electors voting on such proposition shall vote in favor of the same, at a general or special election. They may also grant individuals or private corporations the authority to erect, maintain or purchase such works or plants, or railways, street railways or telephone systems, for the term of not more than twenty-five years, and may renew or extend the term of such grants for a period not exceeding twenty-five years; but no exclusive franchise shall be thus granted, extended or renewed, and no franchise shall be granted or authorized, until after notice of the application therefor has been published once each week for four consecutive weeks in some newspaper published in such city. [23 G. A., ch. 11, § 1; 22 G. A., ch. 11, §§ 1, 2; 22 G. A., ch. 26; 14 G. A., ch. 78, §§ 2–5; C. '73, § 471.]

SEC. **956. Question submitted.** The council may order any of the questions, including the granting to individuals or corporations authority to erect, maintain or purchase water or gas works, electric light or power plants, or street railway or telephone systems, provided in the preceding section, submitted to a vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in the city. Notice of such election shall be given in two newspapers published in said city, if there are two, if not, then in one, once each week for at least four consecutive weeks. The party asking for a renewal or extension of such franchise shall pay the cost incurred in holding such election. [22 G. A., ch. 11, § 4.]

SEC. **957. Infirmary—outdoor relief—bath-houses.** The council shall have power, by two-thirds vote of the whole council, to establish and maintain, either within or without the limits of the city, an infirmary for the accommodation of the poor of the city, and to provide for the distribution of outdoor relief, and a public bath-house or natatorium when declared by the board of health of such city to be essential to the preservation of the public health, and to regulate by ordinance the use of such baths and the conduct and maintenance of the same. The appropriation for the construction and maintenance of such bath-house or natatorium shall be paid from the general current revenues of said city not appropriated to other purposes. [C. '73, § 538; R., § 1111.]

SEC. **958. Other general powers.** Sections seven hundred and thirty-four to seven hundred and forty-one, inclusive, of chapter four; chapter five; and sections seven hundred and fifty-one to seven hundred and seventy-four, and seven hundred and seventy-seven to seven hundred and ninety-one, inclusive, chapter six, of this title are made applicable to cities acting under special charter.

SEC. **959. Regulation of electric wires.** Such cities shall have power to regulate telegraph, district telegraph, telephone, street car, electric light and power poles, subways and wires, and provide the manner in which and the places where the same shall be placed, including the right to construct subways under and erect poles upon and along the streets, alleys and public places; to compel companies having wires on the same street or alley to use the same poles or subways upon reasonable terms; to regulate the installations and connections of electric light or power wires and apparatus in public or private buildings, and forbid the use of such wires and apparatus for the use or transmissions of electric current until the same have been inspected and such installation approved by a competent electrician appointed by such city; and to fix the compensation or fees for such inspection and approval. [22 G. A., ch. 16, § 1.]

SEC. **960. Changing water courses.** They shall have power to deepen, widen, straighten, wall, fill, cover, alter or change the channel of any water course or part thereof flowing through the city; to construct artificial channels or covered drains sufficient to carry the water flowing in such water course, and divert it from the natural channel, and conduct the same through such artificial channels or covered drains, and fill old channels; and in doing such work, or in carrying off flowing water, or building main or lateral sewers through ravines or hollows, they shall have the right to pass through private property and condemn the same for such purposes; and the cost of such work, including the cost of the land condemned, shall be paid for as provided herein for the payment of the cost of constructing sewers. [24 G. A., ch. 8, § 1; 23 G. A., ch. 6, § 1; 19 G. A., ch. 89, § 3; 16 G. A., ch. 107, § 2.]

SEC. **961. Condemning property for.** They may condemn and appropriate so much private property as shall be necessary to carry into effect the provisions of this chapter relating to the change of water courses, the construction of sewers and of artificial channels in the manner provided for condemning land for city purposes. [23 G. A., ch. 6, § 10.]

SEC. **962. Street improvements.** Sections seven hundred and ninety-two, seven hundred and ninety-three, seven hundred and ninety-four, seven hundred and ninety-six and eight hundred and nine of chapter seven of this title are made applicable to cities acting under special charter.

SEC. **963. Assessing cost of new channel for water course.** If a covered drain or new channel of a water course shall be constructed along any street or alley, and used by the city as a sanitary or storm water way, the council shall have the power to assess upon the lots or land adjacent to the line of such covered drain or new channel the whole or a portion of the cost thereof, not exceeding the sum of two dollars per linear foot, in the manner provided for the assessment of the cost of sewers. [23 G. A., ch. 6, § 13.]

SEC. **964. Railways and street railways to maintain culverts and drains.** Such cities shall have power to order any railway or street railway to construct and maintain, under the direction and subject to the approval of the city engineer, culverts and drains across its right of way on any street, alley, highway or other public place as such council may deem necessary, and if any railway or street railway company neglect or refuse, for more than thirty days after such notice as may be prescribed by resolution, to comply with the requirements of any such order, the city may construct such culvert or drain and recover the cost thereof from such company.

SEC. **965. Street improvements and sewers.** Before the council orders any street improved or sewer constructed, it shall direct the engineer to prepare a plat, showing the location and general nature of the improvement, the extent thereof, the kind, or, in case of sewers, the size and kind of material to be used, and an estimate of the cost thereof, and the amount assessable upon any railway or street railway and upon each lot or parcel of land adjacent to or abutting on such improvement per front foot or square foot in area, and file such plat and estimate in the office of the clerk or recorder. Notice of its intention to make such improvement shall be published by the city clerk or recorder in three consecutive issues of a newspaper of such city, stating that such plat is on file, and, generally, the nature of the improvement, its location, kind of material to be used, and the estimate of its cost, and fixing the time before which objections thereto can be filed, which time shall be not less than five days after the last publication of such notice. The council, after considering such objections, shall determine what changes, if any, shall be made in the plan shown by such plat, and may, by resolution, order such improvement, prescribing generally the extent of the work, the kind, and, in case of sewers, the size and kind, of the materials to be used, when the work shall be completed, the terms of payment, and provide for the publication of notice asking proposals for

doing such work, and the time the same will be acted upon. [25 G. A., ch. 7, §§ 19, 20; 22 G. A., ch. 6, §§ 2, 3; 21 G. A., ch. 168, § 21.]

SEC. **966. Other provisions as to street improvements and sewers applicable.** Sections eight hundred and twelve, eight hundred and thirteen, eight hundred and fifteen, eight hundred and nineteen, eight hundred and twenty, eight hundred and twenty-one, eight hundred and twenty-two and eight hundred and twenty-four, chapter seven, of this title, are made applicable to cities acting under special charter.

SEC. **967. Cost at street intersections.** The cost of any street improvement or sewer at the intersection of streets, and half the cost of the same at spaces opposite streets intersecting but not crossing and at spaces opposite property owned by the city or state or any part thereof, may be paid, in case of sewers, from the city sewer or district sewer fund or general fund, or assessed against the property abutting or adjacent thereto; and, in case of street improvements, from the city improvement or general fund, or assessed against the property abutting or adjacent thereto, except that part to be constructed by, paid for, or assessed to railways and street railways. [26 G. A., ch. 9; 25 G. A., ch. 7, § 10; 25 G. A., ch. 8, § 1; 22 G. A., ch. 5, § 5; 22 G. A., ch. 7, § 1; 22 G. A., ch. 12; 21 G. A., ch. 168, § 10; 20 G. A., ch. 20, §§ 3, 5.]

SEC. **968. Abutting and adjacent property defined.** The terms "abutting or adjacent property" and "property abutting on," as used in this chapter, shall be held to include the easement and right of way of any railway company located along any street or on lands abutting on or adjacent thereto, in all cases where no property of any person, firm or corporation, except a municipal corporation, intervenes between such easement or right of way and the traveled portion of such street or highway.

SEC. **969. Cost of opening and grading.** The cost of opening, widening, extending or grading any street or market place shall be paid from the grading fund. The cost of making or reconstructing any street improvement, not ordered to be paid from the city improvement or grading fund, or by any railway or street railway, shall be assessed as a special tax against the property abutting thereon, in proportion to the linear front feet thereof. The term "street," wherever used in this chapter, shall be held to include avenue, highway, alley and public ground. [15 G. A., ch. 6; 14 G. A., ch. 45, § 1; 13 G. A., ch. 65; C. '73, §§ 464–5.]

SEC. **970. Road districts—cost at intersections.** The council shall divide the city into not less than three road districts, or may make each ward a separate road district, for the purpose of cleaning, sprinkling and repairing the streets, or for any of said purposes, and provide for the manner of doing the same, and for the payment of the cost thereof out of the district road fund, and shall determine the amount necessary for such purposes in each district, and make appropriations therefor at the time and in the manner in this chapter provided for making appropriations for other purposes; but the cost of making, reconstructing and repairing streets at the intersection of streets, and one-half of the space opposite streets intersecting and not crossing, and opposite city property in any district, shall be paid from the city improvement fund. [26 G. A., ch. 10.]

SEC. **971. Notice and levy of special assessments.** After filing the plat and schedule referred to in section eight hundred and twenty, chapter seven, of this title, the council shall direct the clerk or recorder to give ten days' notice, by publishing same three times in a newspaper published in said city, that such plat and schedule are on file in the office of the clerk, fixing a time within which all objections thereto or to the prior proceedings must be made in writing; and the council, having heard the objections and made necessary corrections, shall levy the special assessment as shown in such plat and schedule. [25 G. A., ch. 7, §§ 11, 18; 22 G. A., ch. 5, § 6; 22 G. A., ch. 6, § 5; 21 G. A., ch. 168, §§ 11, 19.]

SEC. **972. Payment.** The special assessments made in said plat and schedule, as corrected and approved, shall be levied at one time, by resolution, against the property abutting upon or adjacent to such street or sewer, and, when levied and certified, shall be payable as ordinary city taxes. If the owner of any lot or parcel of land or railroad or street railway, the assessment against which is embraced in any bond or certificate provided for in chapter eight, of this title, shall, within thirty days from the date of such assessment, promise and agree in writing, indorsed on such bond or certificate, or in a separate agreement, that, in consideration of having the right to pay his assessment in installments, he will not make any objections of illegality or irregularity, or to the assessment or levy of such tax upon and against his property, and will pay said assessment, with interest at a rate not exceeding six per cent. per annum, as shall by ordinance or resolution of the council be prescribed, then such tax so levied against the lot or parcel of land or railroad or street railway shall be payable in not less than five nor more than ten equal installments, the first of which may become due and payable, with interest on the whole amount, at a time fixed in the year in which the levy is made, or in the following year, and the other installments shall be due and payable, with interest on the whole amount unpaid, at intervals of one or two years, as fixed by the resolution making the levy, and all of such installments, with interest, shall mature in ten years or less from the time fixed for the payment of the first installment; but where no such agreement is made, then the whole of such assessment so levied shall mature at one time, and be due and payable, with interest from the date of such levy, as hereinafter provided. [25 G. A., ch. 7, §§ 11, 20; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 3, 6; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 3.]

SEC. **973. Collection.** Such assessments shall be duly entered on the tax books of the city, and shall be then due and payable at the office of the collector, or other officer authorized to collect city taxes, and shall be collected, like other special taxes, as provided by ordinance.

SEC. **974. Interest.** Such assessment shall bear interest from the date of levy at six per cent. per annum. Interest on the whole assessment unpaid shall become due and payable at the time fixed by resolution or ordinance for the payment of each installment. [25 G. A., ch. 7, § 11; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 3, 5, 6; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 3.]

SEC. **975. When delinquent—lien.** Such assessment, and each installment with the interest thereon, shall be paid with accrued costs, at the office of the collector or treasurer, by the owner of the property upon which it is levied, at or before the time said property is sold for taxes or interest or both, and each installment and all interest due and unpaid shall become delinquent at the time fixed by ordinance or resolution, and shall bear such interest from the time of becoming delinquent, as ordinary taxes. All special assessments shall be a lien upon the property against which the same are assessed, from the date of the resolution of the council ordering the construction or reconstruction of the street improvement, or sewer or other improvement, or work for which the assessment and levy are made, and shall be prior and superior to all other liens except ordinary taxes, and shall not be divested by any judicial sale of the property. [25 G. A., ch. 7, § 11; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 5, 6; 20 G. A., ch. 25; 17 G. A., ch. 162, § 3; 14 G. A., ch. 45, § 6; 13 G. A., ch. 14; 12 G. A., ch. 111; C.'73, §§ 478, 481; R., § 1068.]

SEC. **976. Sale for.** Property against which any special assessment has been levied for street improvements or sewers may be sold for any part of the principal or interest, due and delinquent, at any regular, adjourned or special tax sale, in the same manner and under the same forfeiture, penalty and right of redemption; and certificates and deeds of such sale shall be made in the same manner and with like effect as in sales of prop-

erty for non-payment of ordinary taxes, at which sale the city may be a purchaser, and be entitled to all the rights of purchasers at tax sales, with the right to sell and dispose of the same by the council. The purchaser at any such tax sale shall have the same rights as purchasers at ordinary tax sales, but shall take the property charged with the lien of the remaining unpaid installments and interest. [23 G. A., ch. 6, § 7; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 3, 6; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 3; 15 G. A., ch. 51, § 3.]

SEC. **977. Street improvement fund.** When the whole or any part of the cost of the making or reconstruction of any street improvement shall be ordered paid from the city improvement or grading fund, it shall have power, after the completion of the work, by resolution, to levy at one time the whole or any part of the cost of said improvement upon all the taxable property within such city, and determine the whole percentage of taxes necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years, not exceeding ten, given for the maturity of each installment thereof; but no part of such cost shall be levied against any property owned by the city, county or state. Certificates of such levies shall be filed with the collector or treasurer, setting forth the amount, percentage and maturity of said taxes and each installment thereof upon the assessed valuation of all the property in the city, certified as correct by the clerk or recorder, and thereupon said taxes shall be placed on the tax books and collected, as provided for the collection of other special taxes. [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, § 3; 19 G. A., ch. 38, § 2.]

SEC. **978. Sewer fund.** When the whole or any part of the cost of the making or reconstruction of any sewer shall be ordered paid from the district or city sewer fund, the council may, after the completion, by resolution, levy at one time the whole or any part of the cost of such sewer upon all taxable real property within such sewer district or within the city, and determine the whole percentage of taxes necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years, not exceeding ten, given for the maturity of each installment; but no part of such cost shall be levied against the property owned by the city, county or state. Certificates of such levies shall be filed with the collector or treasurer, setting forth the amount or percentage and maturity of said taxes and each installment thereof, with a sufficient description of the boundaries of the particular sewer district, and of the real property of the sewer district or city upon which taxes are levied, duly certified as correct by the clerk or recorder, and thereupon said taxes shall be placed on the tax books of the city and collected, as provided for the collection of other special taxes. [25 G. A., ch. 7, § 11; 21 G. A., ch. 34; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

SEC. **979. Other provisions as to special assessments.** Sections eight hundred and twenty-eight, eight hundred and thirty-two, eight hundred and thirty-three, eight hundred and thirty-four and eight hundred and thirty-five, chapter seven, of this title, are made applicable to cities under special charter.

SEC. **980. Relevy.** When, by reason of nonconformity to any law or ordinance, or by reason of any omission, informality or irregularity, any special tax or assessment is invalid, or is adjudged irregular, the council shall have power to correct the same by resolution or ordinance, including the reordering of the work, and the preliminary notice, and may reassess and relevy the same with the same effect and force as if done at the proper time, and in the manner provided by law or by resolution or ordinance relating thereto; and when so corrected it shall be a lien upon the property from the same time and in the same manner and to the same extent as if the original assessment and levy had been in all respects legal. [22 G. A., ch. 6, § 7; 20 G. A., ch. 20, § 3; 20 G. A., ch. 44, § 1.]

SEC. **981. Correction.** When, in making any special assessment, any property is assessed too high or too low, the same may be corrected and a reassessment and relevy made, and any taxes collected in excess of the proper amount shall be refunded. The corrected assessment shall be a lien on the lots and parcels of land the same as the original, and shall be certified by the clerk or recorder to the collector or treasurer in the same manner, and, so far as possible, be collected in the same installments, draw interest at the same rates, be enforced in the same manner as the original assessments. Any provisions of law, resolution or ordinance, specifying a time when or order in which acts shall be done in the proceedings which may result in any special assessment, shall be taken to be subject to the qualification of this and the preceding section. [22 G. A., ch. 44, §§ 2, 3; 20 G. A., ch. 20, § 3; 20 G. A., ch. 44, § 1.]

SEC. **982. Further provisions as to special assessments.** All special assessments, where no other provision is made, shall be levied by the council, and a copy filed with the clerk or recorder, and entered upon the tax book of the collector or treasurer, and be a lien upon the property against which the same is assessed from the date of the levy of such assessment, and shall be prior to all other liens except ordinary taxes, and shall not be divested by any judicial or tax sale. The lien of different special assessments shall take priority in the order of their levy. Special assessments shall bear interest at the rate of six per cent. per annum from the date of the levy, unless otherwise provided, and shall become delinquent thirty days after the levy, and be collected in the same manner, and, when delinquent, they shall bear the same interest, with the same penalties, as ordinary taxes. [14 G. A., ch. 45, § 6; 13 G. A., ch. 14; 12 G. A., ch. 111; C. '73, §§ 478, 481; R., § 1068.]

SEC. **983. Sale for.** The property upon which any special assessment is a lien, where not otherwise provided, shall be sold for delinquent assessments and interest in the same manner, and with the same force and effect, as property sold for ordinary delinquent city taxes; and tax sale certificates, certificates of redemption from tax sales, and tax deeds, shall be made in the same way and with the same force and effect as in sales for ordinary taxes. [16 G. A., ch. 116, § 3.]

SEC. **984. Personal debt—action to enforce.** All special assessments shall be a debt due personally from the owner of the property against which the same are levied. Such assessments, and each installment thereof, and certificates issued therefor, when due, may be collected in the district or superior court by action at law in the name of the city against such owner, or the lien thereof enforced against the real estate against which the same has been levied, by action in equity, at the election of the plaintiff; and in any action at law where pleadings are required, it shall be sufficient to declare generally for work and labor done or materials furnished on the particular street; and in any action in equity it shall be sufficient to aver the same matters, together with a particular description of the property, or parts thereof, against which such lien is sought to be enforced. [14 G. A., ch. 45, § 6; 12 G. A., ch. 111; C. '73, § 478; R., § 1068.]

SEC. **985. Proceedings.** Such action may be brought against any or all of the owners of such property or land, but may be severed, in the discretion of the court, for the purpose of trial, review or appeal, and the judgment or decree shall be rendered separately for the amount properly charged against each. Such action may be maintained in the name of the city or town, for the use of any person entitled thereto or any part thereof, upon filing a bond, approved by the clerk of the court, conditioned to pay all costs adjudged against the city, and to protect it from all liability therefrom or damages growing out of the same, in an amount to be fixed by the court or a judge thereof.

SEC. **986. Judgment.** The judgment or decree shall be rendered for all work done and material furnished, properly chargeable upon the prop-

erty, or any part thereof, notwithstanding any informality, irregularity, defect or omission on the part of the city or its officers. [12 G. A., ch. 111; C. '73, § 479; R, § 1069.]

SEC. **987. Street improvement or sewer bonds or certificates.** For the purpose of providing for the payment of the assessed cost of any street improvement or sewer which has been, or is to be, assessed upon the property abutting thereon or adjacent thereto, including railways or street railways liable for the payment thereof, the council is authorized from time to time, as the work progresses or is completed, to make requisition on the mayor for the issuance of bonds or certificates, as herein provided, in such denominations as shall be deemed best, in anticipation of the deferred payment of the taxes, levied or to be levied for such improvement. It shall be the duty of the mayor to make and execute bonds or certificates accordingly, to an amount not exceeding the cost and expense of such improvement to be actually assessed on the property liable for the payment of the same. The bonds shall bear the name of the street, place or district improved, or in which any sewer is constructed, which street or place shall be particularly described in the resolution authorizing such issue, and such bonds shall be signed by the mayor, countersigned by the clerk or recorder, and sealed with the corporation seal, and shall bear the same date and be payable at the time fixed in said resolution, and be redeemable at any time at the option of the city, and shall bear interest at a rate not exceeding six per cent. per annum, payable semiannually. The bonds shall be substantially in the following form:

The city of....., in the state of Iowa, promises to pay, as hereinafter stated, to the bearer hereof, on the.....day of....., or at any time before that date, the sum of.....dollars, with interest thereon at the rate of.....per cent. per annum, payable on the presentation and surrender of the interest coupons hereto attached. Both principal and interest of this bond are payable at the.....bank in the city of.....state of..... This bond is issued by the city of.....pursuant to and by virtue of the laws of the state of Iowa, and the ordinance of said city passed in accordance therewith, and in accordance with a resolution of the council of said city, duly passed on the.....day of....., A. D..... This bond is one of a series of bonds of like tenor, date and amount, numbered from.....to .....,and issued for the purpose of defraying the cost of improving, curbing and paving a portion of.....street or streets in said city (or constructing a sewer on.....street) as described in said resolution, which cost is assessable to and levied on the property along said improvements, and is made by said law a lien on all abutting or adjacent property, and payable in annual installments, with interest on all deferred payments at the rate of six per cent. per annum, and this bond is payable only out of the money derived from the collection of said special tax, and said money can be used for no other purpose. And it is hereby certified and recited that all the acts, conditions and things required to be done, precedent to and in the issuing of this series of bonds, have been done, happened and performed, in regular and due form, as required by said law and ordinance; and for the assessment, collection and payment hereon of said special tax, the full faith and diligence of said city of.....are hereby irrevocably pledged.

In testimony whereof, the city of....., by its city council, has caused this bond to be signed by its mayor and countersigned by its city clerk, with the seal of said city affixed, this.....day of....., A. D.....

.....
Mayor.

.....
City Clerk.

COUPON.

No..... $.....

On the.....day of.....the city of....., Iowa, promises to pay to bearer, as provided in said bond, the sum of..... dollars, at the.....bank in the city of....., being .....months' interest due that day on its improvement bond No....., dated....., A. D.....

.....
Mayor.

Countersigned.....
City Clerk.

It shall be the duty of the city, its council and officers, to comply with the requirements of this chapter in the issuance of said bonds or certificates, and to assess and levy upon the property liable therefor the cost and expenses of such improvement or improvements, and to collect the same, and to apply the proceeds to the redemption of such bonds and certificates, and to no other purpose; and they shall be payable only out of the fund derived from such assessment. The city shall not be obliged to appropriate money from any other fund to the payment of such bonds or certificates or any part of the same. [25 G. A., ch. 7, § 6; 25 G. A., ch. 9, § 1; 22 G. A., ch. 5, § 4; 21 G. A., ch. 168, § 6; 20 G. A., ch. 25, § 10; C. '73, §§ 846, 864.]

SEC. **988. Appropriation of proceeds.** No money received from the sale of street improvement or sewer bonds or certificates shall be paid out except upon the resolution of the council ordering the same, and no resolution for the delivery of any bonds or certificates shall be made until the certificate of the engineer, or other person selected therefor, has been filed, showing that work has been done or material furnished to the amount of such order. [25 G. A., ch. 7, §§ 6, 14; 25 G. A., ch. 9, §§ 1, 4; 21 G. A. ch. 168, § 9.]

SEC. **989. Limitation of action questioning.** No action shall be brought, questioning the legality of any street improvement or sewer certificates or bonds, from and after three months from the time the issuance of such certificates or bonds is ordered by the proper authority.

SEC. **990. Other provisions as to such bonds and certificates.** Sections eight hundred and forty-one, eight hundred and forty-four, eight hundred and forty-five, eight hundred and forty-seven, eight hundred and forty-eight and eight hundred and forty-nine, chapter eight, of this title, are made applicable to cities acting under special charter.

SEC. **991. Park commissioners.** Such cities may provide by ordinance for the election of three park commissioners and their compensation, and the terms thereof shall be three, four and five years, respectively, and their successors shall be elected for the full term of five years, and such park commissioners shall reside in the city. The commissioners shall have exclusive control of all city parks, and shall manage, improve and supervise the same. [20 G. A., ch. 151, §§ 1, 2.]

SEC. **992. Park tax.** The council may, by resolution, submit to the electors of such city, at a regular or special election, the question whether there shall be levied upon the assessable property thereof a tax, not exceeding two mills on the dollar, for the purpose of purchasing real estate for parks and the improvement of parks, or for either or both. [Same, § 3.]

SEC. **993. Parks used for library building.** Such cities shall have power to use any public park, square or plat of ground located within their corporate limits for erecting thereon a free public library building or buildings. [26 G. A., ch. 51.]

SEC. **994. Park fund.** The council shall, in the resolution ordering such election, specify the rate of taxation proposed, and the number of years the same shall be levied, and, if a majority of the votes cast on such question shall be in favor of such taxation, the council shall levy the tax so authorized, which shall be collected and paid over to the treasurer, and

shall be known as the "park fund," and shall be paid out on the order of the commissioners, and expended only for the purposes herein provided. [20 G. A., ch. 151, § 4.]

SEC. **995. Powers and duties of commissioners.** The commissioners may use such fund for improving the parks, for purchasing additional grounds, or laying out and improving avenues leading thereto, and do all things necessary to preserve such parks; and they may appoint one or more park policemen and pay such police force out of said fund. They shall keep an account of their disbursements, and orders drawn on said fund shall be signed by at least two of the commissioners. [Same, § 5.]

SEC. **996. Bond.** They shall each give a bond to the city in the sum of five thousand dollars before they shall be permitted to enter upon their duties, which shall be approved by the council, and be retained in the office of the clerk or recorder. [Same, § 6.]

SEC. **997. Protection of parks.** It shall be deemed a misdemeanor for any person to cut, break or deface any tree or shrub growing in any such park, or street leading thereto. [Same, § 7.]

SEC. **998. Board of public works.** Such cities shall have power to establish a board of public works, consisting of not more than three members. The members of the board shall consist of one commissioner appointed by the mayor with the approval of the council; when the board consists of two members, the associate member shall be the city engineer; when the board consists of three members, the associate members shall be the city engineer and street commissioner, and shall be appointed for such length of time, possess such qualifications, receive such compensation, be removed for such causes, possess such powers, perform such duties, be governed by such rules and regulations, as may be prescribed by ordinance. [24 G. A., ch. 4.]

SEC. **999. Condemnation of land.** They shall have power to purchase and provide for the condemnation of, and pay for out of the general or grading fund, or assess and levy the whole or part of the cost thereof upon the property benefited thereby, and enter upon and take any lands within or without the territorial limits of such city, for the following purposes:

1. For parks, commons, cemeteries, crematories, hospital grounds, natatoriums or public baths;

Provisions found in the charters of cities organized under special charter with reference to condemning lands for parks, *held* to continue in force, although the provisions of the general law with reference to the same matter were made specially applicable to such cities: *Arnold v. Council Bluffs*, 84–441.

2. For establishing, laying out, widening, straightening, narrowing, extending and lighting streets, avenues, highways, alleys, landing places, public squares, public grounds, public markets or market places and public slaughter houses;

3. For any other purpose, where such purchase or condemnation is herein, or in the charters of such cities, or may hereafter be, authorized. [15 G. A., ch. 6; 13 G. A., ch. 80; 10 G. A., ch. 127; C. '73, §§ 464, 470; R., § 1064.]

SEC. **1000. Purchase of real estate on execution.** They shall have power to acquire real estate, or any interest therein, as a purchaser at an execution sale, when judgment is entered in favor of the city, or when it has a lien thereon, or is otherwise interested therein. [18 G. A., ch. 89, § 1.]

SEC. **1001. Conveyance of land.** They shall have power, by a three-fourths vote of all members of the council, to dispose of and convey lands unsuitable, insufficient or unnecessary for the purposes for which they were originally acquired; but when such lands are disposed of, enough shall be reserved for streets to accommodate adjacent property owners; and to dispose of the title or interest of such city in any real estate, or any lien thereon, or share or certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, upon such terms as the council shall direct. Conveyance executed in

accordance with this section shall extinguish all the rights and claims of the city existing prior thereto. [13 G. A., ch. 80; 10 G. A., ch. 127; C. '73, § 470.]

SEC. **1002. Proceedings to condemn.** Proceedings for condemnation of land as contemplated in this chapter shall be in accordance with the provisions of this code relating to taking private property for works of internal improvement, except that the jurors shall have the additional qualification of being freeholders of the city, or as provided in the charters of said cities. [14 G. A., ch. 40; 13 G. A., ch. 80; C. '73, §§ 469, 476, 477; R., §§ 1065–6.]

SEC. **1003. Taxes—levy of.** The council shall levy a tax for the year then ensuing for the purpose of defraying its general or incidental expenses, which shall not exceed eight mills on the dollar of the assessed valuation of all taxable property in the city, but the aggregate of such levy, together with all levies for special purposes as hereinafter authorized, shall not exceed in any city in any one year sixteen mills, and in cities having a population of over twenty thousand as shown by the last state census, not exceeding twelve mills on the dollar, excluding city and district sewer tax, road district tax, and any tax levied to pay the principal or interest on any bonds issued by such city, or tax levied to pay judgments, or taxes authorized by vote of the people for library, park or bridge purposes.

SEC. **1004. Other provisions as to levying taxes.** Sections eight hundred and eighty-eight, eight hundred and eighty-nine, eight hundred and ninety, eight hundred and ninety-one, eight hundred and ninety-two and eight hundred and ninety-three, of chapter eleven, of this title are made applicable to cities under special charter, except that the words "city treasurer" or "collector," and "city" shall be substituted for "county auditor" or "county," wherever the same appear in said sections.

SEC. **1005. Special taxes.** They shall have power to levy annually the following taxes for special purposes:

1. *Grading fund.* A tax not exceeding three mills on the dollar for a grading fund, to be used for the purpose of opening, widening, extending or grading any street, public ground or market place; [23 G. A., ch. 5, § 1; 21 G. A., ch. 160, §§ 2, 3; 20 G. A., ch. 20, § 5.]

2. *Improvement fund.* A tax not exceeding three mills on the dollar for the city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction and repair of any street improvement at the intersection of streets, and spaces opposite streets intersecting but not crossing, and the spaces opposite property owned by the city or state; [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, §§ 2, 3; 19 G. A., ch. 38, §§ 1, 2.]

3. *Sewer fund.* A tax not exceeding three mills on the dollar on the assessed valuation of all property therein, for the city sewer fund, to be used to pay the cost of making, reconstructing or repairing any sewer at the intersection of streets, and all spaces opposite streets intersecting but not crossing, and at spaces opposite property owned by the city or state, or to pay the whole or any part of the cost of making, reconstructing or repairing any sewer within the limits of such city. When the city has been divided into sewer districts, a tax not exceeding five mills on the taxable real property in the sewer district, for the district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located or laid in that particular district: *provided* that, on petition of the owners of two-thirds in value of all the taxable real estate within such sewer district for the construction of a sewer in such district, then the maximum percentage of taxes that can be levied in any one year shall not be limited to five mills, but shall be such percentage of the valuation of such property as will produce at least one-tenth of the whole cost of such sewer assessable upon the real property in such district; [25 G. A., ch. 7, § 11; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34, § 1; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

4. *Fire fund.* A tax not exceeding three mills on the dollar for the purpose of creating a city fire fund, to be used for paying the expenses of organizing, keeping and maintaining a fire department, including the expenses of constructing, purchasing, leasing and maintaining the proper and necessary buildings, grounds and apparatus therefor; [26 G. A., ch. 27; 23 G. A., ch. 8, §§ 1, 2.]

5. *Road fund.* When any city is divided into road districts, a tax not exceeding two mills on the dollar on all taxable property in such road district, to be known as the district road fund, and to be used only to pay the cost of cleaning, sprinkling and repairing the streets and public places in such district;

6. *Library tax.* In cities which have established, or may establish, a free public library, a tax not exceeding one mill on the dollar, to be used therefor, and to pay the interest on any indebtedness for the purchase of the real estate, and the erection of a building or buildings thereon, for such free public library purposes; [25 G. A., ch. 43, § 1; 25 G. A., ch. 99, § 2; 22 G. A., ch. 18, § 1; 14 G. A., ch. 17; 13 G. A., ch. 45; C. '73, § 461.]

7. *Tax for water and gas works and electric plants.* A tax not exceeding five mills on the dollar, which, with the rates, rents or revenues derived therefrom, shall be sufficient to pay the expenses of running, operating and repairing, water and gas works, electric light and power plants, owned and operated by such city, and the interest on or principal of any bonds issued to pay the cost of the construction of such works; but such taxes shall not be levied upon the property which lies wholly without the limits of the benefits or protection of such works or plants, which limit shall be fixed by the council each year before making the levy; [22 G. A., ch. 11, § 2; C. '73, § 475.]

8. *Tax for water, gas and electric light or power.* A tax, not exceeding five mills on the dollar for the purpose of paying the amount due, or to become due, to any individual or company operating water or gas works or electric light power plants, for water, light, gas or power supplied to the city, the levy to be limited to the property benefited thereby; [22 G. A., ch. 11, § 2; C. '73, § 475.]

9. *Bond fund.* A tax for the purpose of creating a bond fund sufficient to pay the interest, to accrue before the next annual levy, on funding or refunding bonds outstanding, and to pay the principal of such funding or refunding bonds. In case of such bonds, the levy shall be so made that, dividing the principal into as many parts as the bonds have years to run, not less than one such part shall be levied each year, and shall be made so that the fund derived therefrom shall be available and sufficient to pay the bonds at their maturity; [24 G. A., ch. 14, § 5; 23 G. A., ch 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78.]

10. *Water and gas or electric light and power bonds.* A tax to be used exclusively in payment of the principal and interest of bonds issued for the construction of water and gas works, electric light and power plants, and which shall be levied in the manner provided in the preceding subdivision; [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1.]

11. *Park tax.* A tax not exceeding two mills on the dollar, as authorized by the vote of the electors, to purchase, improve and maintain public parks in such city; [24 G. A., ch. 1, § 7.]

12. *Special bridge tax.* A special tax to aid in the construction of bridges, when such tax has been voted by the electors of the city under the provisions of section seven hundred and seventy, of chapter six, of this title. [25 G. A., ch. 19, § 2; 21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 3.]

SEC. **1006. Excess of judgment or bond tax.** When a tax has been levied to pay any judgment against any such city, or the principal and interest of funding or refunding bonds issued by such city, or for any other special purpose, such tax shall not be held invalid if the amount received exceed the amount sought for such specific object, but the excess shall go

into the general fund. Money so raised is especially appropriated for such purposes, and shall constitute a distinct fund in the hands of the treasurer until the obligation is discharged. [25 G. A., ch. 6, § 1; C.'73, §§ 318, 319; R., §§ 259, 260; C.'51, §§ 123-4.]

SEC. **1007. Anticipating revenue.** Loans may be negotiated or warrants issued by any such city in anticipation of its revenues for the fiscal year in which such loans are negotiated or warrants issued, but the aggregate amount of such loans and warrants shall not exceed one-half the estimated revenue of such corporation for the fund or purpose for which the taxes are to be collected for such fiscal year. [21 G. A., ch. 108; 20 G. A., ch. 79; 16 G. A., ch. 95, § 1; C.'73, § 500; R., § 1129.]

In absence of express provision a city cannot issue bonds in exchange for warrants for current expenses: *Heins v. Lincoln*, 71 N. W., 189.

SEC. **1008. Other provisions as to taxes.** Sections eight hundred and ninety-nine, nine hundred and one and nine hundred and four, of chapter eleven, of this title are made applicable to cities acting under special charter.

SEC. **1009. Warrants.** The auditor, clerk, or other officer whose duty it is to draw warrants shall draw no warrant except upon the vote of the council, and no warrant for an amount in excess of five hundred dollars. [22 G. A., ch. 3, §§ 1-3.]

SEC. **1010. Levy and collection of taxes.** The council shall have power to levy and collect taxes for all general and special purposes in this chapter authorized, upon all property within the city not exempted from taxation by the general law of the state, and to fix the number of mills to be levied on the value thereof, which shall be ascertained by the assessor of said city, and the council shall provide by ordinance the time and manner of taking such assessment, when the same shall be equalized and returned to the auditor or recorder, and for the assessing and placing upon the tax list all property that may have been omitted, overlooked, brought into the city before the levy of said tax, or otherwise not returned by the assessor, and to fix the time when such officer shall make out and deliver a copy of the assessment and the taxes levied thereon to the collector or treasurer. The council may provide by ordinance for certifying all taxes and assessments to the county auditor, as provided in section nine hundred and two, chapter eleven, of this title, which shall be applicable to the city adopting the provisions thereof, and the taxes so certified shall be collected and paid over in the same way, with the same penalties, rights and liabilities, as in and for other cities to which such section is applicable.

SEC. **1011. Assessment.** All the property of individuals, companies, copartnerships and corporations shall be listed and returned by the assessor for city taxation; and the duty of the owner, officer, agent or individual having control of the same to assist the assessor in listing the same, and the penalties for his neglect or refusal so to do, shall be as provided in title seven of this code, so far as the same may be applicable and not in contravention of any of the provisions herein, or of the charters of such cities; but the equalization of all assessments shall be made by the council as provided by ordinance or the charters of said cities.

SEC. **1012. Sale.** Such cities shall have power and shall provide by ordinance when general or special taxes and assessments shall become delinquent, and the rate of interest which they shall thereafter bear, not exceeding ten per cent. per annum on the whole amount thereof, including penalty; and for the sale of both real and personal property for the collection of general and special delinquent taxes and assessments, on such terms as the council may determine; and in the sale of real property for taxes and assessments, the notice of the time and place of such sale shall be given by the treasurer or the collector, and shall contain the description of each separate tract to be sold, as taken from the tax list; the

amount of taxes for which it is liable, delinquent for each year, and the amount of penalty, interest, and cost thereon; the name of the owner, if known, or the person, if any, to whom it is taxable; by publication in some newspaper in the city once each week for three consecutive weeks, the last of which shall be at least one week before the date of such sale, and by posting a copy thereof at the door of the office of the collector or treasurer one week before the day of such sale. The compensation for such publication shall not exceed twenty cents for each description, and shall be paid by the city. The amount paid therefor shall be collected as a part of the costs of sale and paid into the treasury, and no irregularity or informality in the advertisement shall affect the legality of any sale or the title of any property conveyed, if it shall appear that said property was subject to taxation for the year or years for which the same was sold, and that the tax was due and unpaid at the time of sale; and in all cases such advertisement shall be sufficient notice to the owners and persons having an interest in or claiming title to any lot or parcel of real estate, of the sale of their property for delinquent taxes, and a failure of the collector to make personal demand of taxes shall not affect the validity of any sale or the title of any property acquired under such sale. [16 G. A., ch. 116, § 1.]

SEC. **1013. Adjournment of tax sale—intoxicating liquor law.** Section fourteen hundred and twenty-eight of chapter two, title seven, and chapter six, title twelve, of this code, are made applicable to cities acting under special charter.

SEC. **1014. Tax list.** All assessments and taxes levied by the council, except as otherwise provided by law, shall be placed by the auditor, clerk or recorder, as provided by ordinance, upon the proper tax book, to be known as the "tax list," properly ruled and headed with distinct columns to correspond with the assessment books, with a column for polls and one for payments, and he shall complete the same by carrying out the consolidated tax and all other taxes levied, and at the end of the list shall make an abstract thereof and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each, and certify the same to the collector or treasurer at or before the regular time for the collection and payment of taxes. [25 G. A., ch. 1, § 2; 24 G. A., ch. 1, § 3; 21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 2; 13 G. A., ch. 138, § 2; 10 G. A., ch. 25, § 3; C. '73, §§ 495, 498, 837, 839; R., §§ 745–6, 1123, 1126; C. '51, §§ 485–6.]

SEC. **1015. Lien of taxes.** Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title. As between vendor and vendee, such lien shall attach to real estate on the thirty-first day of December following the levy, unless otherwise provided in this chapter. Taxes upon stocks of goods and merchandise shall be a lien thereon, and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee, but the property of the seller thereof shall be first exhausted for the payment; and all of such taxes shall remain a lien on the property aforesaid from and after the date of the levy in each year. The collection of such taxes and the enforcement of such lien may be, in addition to the remedies herein provided, enforced by suit, as is authorized by sections nine hundred and eighty-four, nine hundred and eighty-five and nine hundred and eighty-six of this chapter.

1400,

Under previous provisions, *held*, that in cities acting under special charter in which city taxes were made a perpetual lien upon real estate, and the city collector was authorized to collect the same by sale, a sale for state and county taxes did not divest the property of the lien of city taxes, and the purchaser took subject thereto; nor did the sale for city taxes of one year divest the property of the lien of city taxes for former years: *Dennison v. Keokuk*, 45–266.

SEC. **1016. Tax receipt.** The collector or treasurer shall in all cases make out and deliver to the taxpayer a receipt, which receipt shall contain

the description and the assessed value of each lot and parcel of real estate, and the assessed value of personal property, and in case the property has been sold for taxes and not redeemed, the date of such sale and to whom sold, also the amount of taxes, interest and costs paid; and the collector or treasurer shall give separate receipts for each year; whereupon he shall make proper entries of such payments on the books of his office. The council may provide by ordinance that no person shall be permitted to pay taxes of any one year until the taxes for the previous years shall be first paid; and provide that the receipt herein contemplated shall be conclusive evidence that all taxes, and the costs of every kind against the property described in such receipt, are paid to the date of such receipt; and provide that for any failure or neglect on the part of the collector, or on the part of any one acting as collector, he and his bondsmen shall be liable to an action on his official bond for damages sustained by any person or the city for such neglect. [16 G. A., ch. 116, § 4.]

SEC. **1017. Sale.** The treasurer or collector of taxes, or person authorized to act as collector, shall make, sign and deliver to the purchaser of any real property sold for the payment of any taxes or special assessments authorized by the provisions of this chapter, or by any law applicable to such cities, a certificate of purchase, which shall have the same force and effect as certificates issued by county treasurers for the sale of property for delinquent county taxes. [Same, § 5.]

Where a city had authority under its charter to sell property for taxes, *held*, that it might enter into a compromise with the taxpayer for the redemption of his property, and that such compromise would be binding: *Hintrager v. Richter*, 85–222.

SEC. **1018. Redemption.** Real property sold under the provisions of this chapter, or by virtue of any power heretofore given, may be redeemed before the time of redemption expires, as hereinafter provided, by payment to the treasurer, collector or person authorized to receive the same, to be held by him subject to the order of the purchaser on surrender of the certificate, or in case the same is lost and destroyed, on his making affidavit of such fact, and of the further fact that it was not assigned, of the amount for which the same was sold, and ten per cent. of such amount immediately added as a penalty, with eight per cent. per annum of the whole amount thus made from the day of sale, and the amount of all taxes, either general or special, with interest and costs, paid at any time by the purchaser or his assignee subsequent to the sale, and a similar penalty of ten per cent. added as before on the amount of the payment made at any subsequent time, with eight per cent. interest per annum on the whole of such amount or amounts from the day or days of payment: *provided* that such penalty for the non-payment of the taxes at any subsequent time or times shall not attach, unless such subsequent tax or taxes shall have remained unpaid for thirty days after they became delinquent. The treasurer, collector or person authorized to receive the same, upon application of any party to redeem real property sold as aforesaid, and being satisfied that such person has a right to redeem the same, and on payment of the proper amount, shall issue to such party a certificate of redemption, in substance and form as provided for the redemption of property sold for state and county taxes, and shall make proper entry thereof in the sale book, which redemption shall thereupon be deemed complete without further proceedings. The provisions of sections fourteen hundred and thirty-nine, fourteen hundred and forty and fourteen hundred and forty-one, of chapter two, title seven, of this code, shall, so far as the same shall be applicable, and are not herein changed or modified, apply to sales of real estate for delinquent taxes herein contemplated; but where the words "auditor of the county" or "treasurer" are used in said sections the words "city clerk," "recorder," "auditor," or "person authorized to make out the tax list" and "city collector" or "city treasurer or officer authorized to receive same" shall be substituted. [17 G. A., ch. 174; 16 G. A., ch. 116, § 6.]

SEC. **1019. Deed.** Immediately after the expiration of ninety days from the date of service of the notice, as prescribed by sections fourteen hundred and forty-one and fourteen hundred and forty-two of chapter two, title seven, of this code, the treasurer, collector, or person authorized to act as collector of taxes, shall make out a deed for each lot or parcel of land sold and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase. Any number of parcels of real estate bought by one person may be included in one deed, if required by the purchaser. Deeds executed by the city treasurer, collector, or person authorized to act as collector, may be in form substantially as provided by section fourteen hundred and forty-three of chapter two, title seven, of this code, and shall be signed and acknowledged by him in his official capacity; and all deeds and conveyances hereafter made and executed on account of any general or special tax sale shall be of the same force and effect as deeds made by the county treasurer as provided in section fourteen hundred and forty-four of chapter two, title seven, of this code, for delinquent county taxes; and the purchaser as well as the owner of any real property sold on account of such general or special delinquent taxes or assessments shall be entitled to all the rights and remedies which are granted and prescribed by sections fourteen hundred and forty-five to fourteen hundred and fifty-one, inclusive, of chapter two, title seven of this code, but that wherever the words "county and county treasurer and auditor" are used, the words "city, city treasurer, city clerk, recorder, auditor, or collector or officer authorized to act as collector," shall be substituted.

The general provisions as to redemption notice are made applicable to tax sales in cities under special charter, and it is only where land was taxed by the county authorities to unknown owners that redemption notice is not required: *Crawford v. Liddle*, 70 N. W., 97.

SEC. **1020. Questioning deed—refund.** Sections fourteen hundred and forty-six, fourteen hundred and forty-seven and fourteen hundred and forty-eight, chapter two, title seven, of this code are hereby made applicable to cities acting under special charters except that, where the word "treasurer" is used, there shall be used the words "city collector or treasurer or deputy treasurer or deputy or officer authorized to collect city taxes."

SEC. **1021. Bonds.** That sections nine hundred and five, nine hundred and six, nine hundred and seven, nine hundred and eight, nine hundred and nine, nine hundred and ten, nine hundred and eleven and nine hundred and thirteen, chapter twelve, of this title, are made applicable to cities acting under special charters.

SEC. **1022. Certificates and bonds for special assessments.** Any city may anticipate the collection of taxes authorized to be levied for the grading fund, city improvement fund, district sewer fund, and city sewer fund, and for that purpose may issue certificates or bonds with interest coupons, to be respectively denominated city grading certificates or bonds, city improvement certificates or bonds, district sewer certificates or bonds of a particular sewer district, and city sewer certificates or bonds; and all provisions of chapter twelve, of this title, shall apply to such certificates or bonds and coupons, with such changes only as are necessary to adapt them thereto. And said bonds and interest thereon shall be secured by said assessment and levy, and shall be payable out of the respective funds hereinbefore named, pledged to the payment of the same, and no bonds shall be issued in excess of taxes authorized and levied or to be levied to secure the payment of the same. It shall be the duty of the collector or treasurer to collect said several funds, with interest thereon, and to hold the same separate and apart, in trust, for the payment of said bonds and interest, and to apply the proceeds of said funds pledged for that purpose to the payment of said bonds and interest. [22 G. A., ch. 7, § 2; 21 G. A., ch. 34; 19 G A.. ch. 38, §§ 3, 4; 17 G. A., ch. 162, § 1.]

SEC. **1023. Limitation of action questioning legality of bonds.** No action shall be brought questioning the legality of any of the bonds or certificates authorized by the preceding section, or section nine hundred and five of chapter twelve of this title before mentioned, or of any water works bonds, gas works bonds, or electric light or power plant bonds, or any other bonds or certificates authorized by this chapter, from and after three months from the time the same are ordered issued by the proper authority.

SEC. **1024. Plats.** Chapter thirteen of this title, so far as applicable, is made applicable to cities acting under special charter, except that in section nine hundred and fifteen thereof the word "treasurer" shall be held to mean "city collector or city treasurer."

SEC. **1025. Board of health.** There shall be appointed in every such city a local board of health consisting of five members, a majority of whom, including the mayor, shall be members of the city council. The mayor of the city shall be *ex officio* one of said members and the chairman thereof. The manner of appointment and duration of office of said board shall be determined by ordinance of said city. [19 G. A., ch. 168, § 1.]

SEC. **1026. Officers appointed—quorum.** The board of health shall appoint a physician to the board, who shall hold office during the pleasure of the board. The city clerk or recorder shall be clerk of the board, unless some other clerk may be provided by ordinance. The board of health shall appoint, with the consent of the council, all officers and agents necessary to carry their rules and orders into effect, and shall recommend the compensation or salaries to be paid such officers or agents, which shall be determined by the council. In cases of emergency, the board of health may employ persons to aid in the execution of its orders, and fix the compensation of such employes. The majority of the members of the board shall constitute a quorum for the transaction of all business and the exercise of powers conferred upon the board. [Same, § 2.]

SEC. **1027. Physician and clerk.** It shall be the duty of such clerk and physician to report at least once a year to the state board of health the proceedings of such board, and such other facts as may be required on blanks in accordance with instructions received from the state board. They shall also make special reports whenever required so to do by the state board. [Same, § 3.]

SEC. **1028. General powers.** The local board of health shall make such rules and regulations and orders respecting the connection of buildings and tenements with sewers, and the approval of plans for plumbing and the inspection thereof; and the inspection of milk, provisions, and of all food products sold within such city, and the condemnation and destruction of the same when impure or diseased; the collection and disposition of garbage; the condemnation of impure wells and cisterns; the prompt report of contagious or infectious diseases; nuisances, sources of filth and cases of sickness within their jurisdiction, and on all boats in its ports and harbors, or railroad cars passing through such city; and for the prevention of nuisances and the preservation of the public health, as said board may judge necessary for the public health and safety; and shall, from time to time, report to the city council ordinances for carrying such rules, regulations and provisions into effect, and for the appointment of the proper inspectors and officers necessary to enforce the same. [Same, § 4.]

SEC. **1029. Violation of regulations.** Such cities shall have power and may provide by ordinance for the punishment by fine and imprisonment of any person who shall knowingly violate or fail to comply with any rule, regulation or order of such local board of health, but the fine shall not exceed one hundred dollars, or the imprisonment thirty days. The prosecution for the violation of any rule, regulation or order of such board of health shall be in the name of the city appointing such board, and shall

be conducted in the same manner and before the same tribunals as other prosecutions for the violation of ordinances of such city. [Same, § 5.]

SEC. **1030. Sewer connections.** The board of health shall have power to compel all property owners owning property situated on streets along which sewers have been constructed, or within two hundred and fifty feet of any sewer, to make proper connections therewith, and to use the same for proper purposes; and in case such owner shall fail to make such connections within the time fixed by such board, they may cause such connections to be made, and report the cost and expense thereof to the city council, which shall assess the same against the property so connected, and such assessment shall be a lien on said property which the city council can enforce by the sale of same. [22 G. A., ch. 9; 21 G. A., ch. 116.]

SEC. **1031. Plumbing.** Such board shall have power to prescribe rules and regulations for all plumbing connections of buildings or tenements with any sewer, and for all plumbing, drainage and ventilation of any building or tenement, and may prescribe the kind and size of materials to be used in any plumbing, drainage and ventilation of buildings, and the manner in which plumbing shall be done, and compel the plans and specifications for the plumbing of any building to be submitted to and approved by said board before the same is installed, and that such work be done by a competent, licensed plumber, and provide for the inspection of the work done under such plans and specifications, and have the power to appoint, with the approval of the city council, an inspector of such plumbing, and define his duties and powers.

SEC. **1032. Nuisances.** Such board may order the owner or occupant of any property, place or building at his own expense to remove or abate any nuisance, source of filth or cause of sickness, to dispose of garbage, to destroy diseased or impure milk, provisions or food products, to purify, fill up, or cease from using any impure well or cistern, to report to the proper officer all contagious or infectious diseases found on his property, or property over which he has control, to make sewer connection, and do such acts as may be required. The board may in its discretion specify in its notice the time and manner of compliance with such order, and if such person neglect to comply with such order he may be punished in accordance with the provisions hereof, and the board may do or cause to be done whatever is required by the order. [19 G. A., ch. 168, § 6.]

SEC. **1033. Abatement.** Whenever the owner, occupant or person having the control or management of such property shall not be found in the city, or whenever the board may deem immediate action necessary, it may, without notice to such owner or occupant or person having the control or management of the same, immediately proceed to remove said nuisance, source of filth, or other cause of sickness, and the expense thereof shall be reported to the council and levied and assessed against the property, place or building, and collected as a special tax, and shall be a lien upon such property, place and building, or the same may be enforced in any court having jurisdiction, by the proper officer, in the name of the city. [Same, § 8.]

SEC. **1034. Enjoining.** Whenever any person or persons are engaged in a work, or doing things, or threatening to do things, which, in the opinion of the board, will result in a nuisance or endanger the public health, the board may forbid the doing or continuance thereof, and in case any such person shall fail to comply with any such order, after personal service of a notice thereof, he may be proceeded against and punished under the provisions hereof. [Same, § 9.]

SEC. **1035. Health regulations—how adopted.** Whenever any such board shall make or adopt any general rules and regulations for the public health, they shall be signed by the mayor or other presiding officer, and attested by the clerk, of such board, and, when so signed and attested, shall be published twice in the official newspaper of such city. When such

publication is completed, due proof thereof by affidavit shall be attached to said rules and regulations, and the same shall then be recorded by the clerk of such board in a book kept for such purpose, which record shall be certified to by the mayor or presiding officer and attested by the clerk. And such general rules and regulations shall be in force and effect from and after the completion of such record. [26 G. A., ch. 11; 19 G. A., ch. 168, § 10.]

SEC. **1036. Notices.** Any notice from the board may be served by any city officer, or by any other person whom the board of health may appoint or designate. [19 G. A., ch. 168, § 11.]

SEC. **1037. Premises unfit for habitation.** The board, when satisfied upon due examination that any cellar, room, tenement or building in said city, occupied as a dwelling-house, has become, by reason of the number of inhabitants or want of cleanliness or other cause, unfit for such habitation, and a cause of nuisance or sickness to the occupants thereof or to the public, may issue a notice to the occupants thereof or any of them, requiring the premises to be put into a proper condition as to cleanliness or health, or may require the occupants to remove from the premises, within such time as the board deems reasonable. If the persons so notified neglect or refuse to comply with the terms of the notice, the board may cause the premises to be properly cleaned at the expense of the owners or property, or the board may remove the occupants forcibly and close up the premises, and the same shall not again be occupied as a dwelling place until put in a sanitary condition to the satisfaction of the board. [Same, § 12.]

SEC. **1038. Contagious diseases.** Whenever by reason of the prevalence of smallpox, or other contagious or infectious disease, in any such city or the vicinity thereof, the board may deem it dangerous to permit the congregation together of people, the board may, with the consent of the council, by public proclamation published once in some newspaper of general circulation in the city, prohibit the congregation of people in schools, churches, theaters, and in all other buildings in said city, and it shall thereupon become the duty of the principals, teachers and other persons in charge of such places or building specified in said publication to keep the same closed, and to prevent the congregation of the people therein; and when smallpox is prevalent in said city or its vicinity, the said board of health may, with the consent of the council, by notice served upon the teachers or persons in charge of any of the public or private schools, prohibit the admission therein of any pupil until such pupil shall have proved, to the satisfaction of the board or the persons selected by it for that purpose, that such pupils have been vaccinated within five years prior thereto, or within such time as the board may designate; and said board may in like manner prevent the admission of persons not furnishing satisfactory proof of vaccination into churches, theaters or other buildings, by notifying the persons in charge thereof not to admit such persons. [Same, § 13.]

SEC. **1039. Warrant.** Whenever the board of health shall think it necessary for the preservation of the lives or the health of the inhabitants to enter a place, building or vessel within its jurisdiction, for the purpose of examining into and destroying, removing or preventing any nuisance, source of filth, or cause of sickness, and shall be refused such entry, any member of the board may make complaint, under oath, before any justice of the peace, or other judicial officer having jurisdiction to enforce the ordinance of such city, stating the facts of the case so far as he has knowledge thereof. Such officer shall thereupon issue a warrant, directed to the sheriff or any constable of the county, marshal or public officer, commanding him to take sufficient aid and, being accompanied by two or more members of said board, between the hours of sunrise and sunset, repair to the place where such nuisance, source of filth, or cause of sickness may be, and

destroy, remove or prevent the same under the direction of such members of the board. [Same, § 14.]

SEC. **1040. Removal of diseased person.** When any person coming from abroad or residing within such city shall be infected, or lately shall have been infected, with smallpox or other sickness dangerous to the public health, the board shall make provisions in the manner by them deemed best for the safety of the inhabitants, by removing such sick or infected person to a separate house, if it can be done without injury to his health, and by providing nurses and other assistance and supplies, which shall be charged to the person himself, his parents, or other person liable for his support, if able, otherwise to the county. [Same, § 15.]

SEC. **1041. Care of such person.** If any afflicted person cannot be removed without danger to his health, the board shall make provision for him, as directed in the preceding section, in the house in which he may be, and in such case they may cause the persons in the neighborhood to be removed, and take other means, as may be deemed necessary for the safety of the inhabitants. [Same, § 16.]

SEC. **1042. Warrant.** Any justice of the peace, or tribunal having jurisdiction to enforce the ordinance of such city, on application under oath, showing cause therefor, by any member of said board, shall issue his warrant, directed to the sheriff or constable of the county or marshal or police officer, commanding him, under the directions of the board, to remove any person infected with contagious disease, or to take possession of condemned houses and lodgings, and to provide nurses and attendants and other necessaries for the care, safety and relief of the sick. [Same, § 17.]

SEC. **1043. Meetings—report.** Every such board shall meet for the transaction of business at least once each month, and at such other times as occasion may require, and the clerk of the board shall transmit his annual report to the secretary of the state board within two weeks after the October meeting, and at such other time as may be required by the state board. Such report shall embrace a history of any epidemic disease which may have prevailed within the city. The failure of the clerk to make such report shall be considered a misdemeanor, for which he shall be subject to a fine of not more than twenty-five dollars. [Same, § 18.]

SEC. **1044. Powers of council—assessment of expenses.** The foregoing provisions in regard to boards of health shall not in any manner limit the powers of cities acting under special charters in relation to matters affecting the public health, and the city councils of such cities shall provide by ordinance for the manner of the exercise of the powers herein conferred upon such boards, and for the enforcement of the orders, rules and regulations thereof, and punishment for the violation of the same, as prescribed in this chapter, and shall also have power to provide and shall provide for the assessment of all expenses incurred by said board and by said cities, in consequence of the failure or neglect of any owner or occupant of property to comply with any order of such board, upon the real estate upon which such expenditures are made or expenses incurred, and it shall be a lien thereon from the time said work is done, and may be assessed, levied and collected as other special assessments, and may be collected and the lien enforced by civil action in any court of competent jurisdiction. [Same, § 19.]

SEC. **1045. Proceedings reported to council.** Boards of health shall report their doings and proceedings to the council from time to time as required by ordinance or resolution, and the council shall have supervision over the orders and proceedings of said board. [Same.]

SEC. **1046. Special provisions not to limit general powers.** The provisions of this chapter in regard to the police powers, sanitary regulations, and regulations for the prevention and spread of fires and of contagious diseases, shall not be construed as a limitation of the general powers of such cities. [Same.]

SEC. **1047. Amendment of charter.** On the presentation of a petition signed by one-fourth of the electors, as shown by the vote at the next preceding city election, of any city or town acting under a special charter or act of incorporation, to the governing body thereof, asking that the question of the amendment of such special charter or act of incorporation be submitted to the electors of such city, such governing body shall immediately propose sections amendatory of said charter or act of incorporation, and shall submit the same, as requested, at the first ensuing city or town election. At least ten days before such election the mayor of such city or town shall issue his proclamation setting forth the nature and character of such amendment, and shall cause such proclamation to be published in a newspaper published therein, or, if there be none, he shall cause the same to be posted in five public places in such city. On the day specified, the proposition to adopt the amendment shall be submitted to the electors thereof for adoption or rejection, in the manner provided by the general election laws. [C. '73, § 548; R., § 1141.]

This provision allowing cities to amend their charters, *held* not in conflict with the constitution, art. III, § 30, forbidding local or special laws for the incorporation of cities and towns: *Von Phul v. Hammer*, 29–222.

SEC. **1048. Proclamation of result.** If a majority of the votes cast be in favor of adopting said amendment, the mayor shall issue his proclamation accordingly; and the amendment shall thereafter constitute a part of said charter. [C. '73, § 549; R., § 1142.]

SEC. **1049. Special election.** The legislative body of said city may submit any amendment to the vote of the people as aforesaid at any special election, provided one-half of the electors as aforesaid petition for that purpose, and the proceedings shall be the same as at the general election. [C. '73, § 550; R., § 1143.]

SEC. **1050. Notice of unliquidated claim—limitation of action.** No suit shall be brought against any such city for any unliquidated claim or demand unless within three months from the time the same became due or cause of action accrued thereon, nor unless a written, verified statement of the general nature, cause and amount of same is filed with the clerk or recorder thirty days before the commencement of such suit.

SEC. **1051. Notice of claim for personal injury—limitation.** In all cases of personal injury or damage to property resulting from defective streets or sidewalks, or from any cause originating in the neglect or failure of any municipal corporation or its officers to perform their duties, no suit shall be brought against any such city after three months from the time of the injury or damage, and not then unless a written verified statement of the amount, nature and cause of such injury or damage, and the time when and the place where such injury occurred, and the particular defect or negligence of the city or its officers which it is claimed caused or contributed to the injury or damage, shall be presented to the council or filed with the clerk within thirty days after said alleged injury or damage was sustained. [22 G. A., ch. 25, § 1.]

SEC. **1052. Building permits.** Such cities shall require plans and specifications for all buildings costing over two thousand dollars, and all buildings to be erected within the fire limits of such cities, to be submitted for approval, and no such building shall be erected until such plans be approved by the board of public works, chief of fire department or other proper officer of such city. Such city shall require any person, before erecting any building or improvement within the city, to submit plans and specifications for the plumbing, drainage and ventilation and electric wiring of such building, for approval, and provide for the inspection of the construction thereof, and obtaining a permit for such erection or construction, which shall not be issued until such plans and specifications have been approved by the board of health or electrician, and may make reasonable charges for such approval and inspection, as provided by ordinance, and

the money derived therefrom shall be paid monthly to the treasurer or collector.

SEC. **1053. Notice to person liable over.** In case any action is brought against any such city for damages for injury to person or property claimed to have been caused by or through the negligence of said city, the city may notify in writing any person or corporation, by or in consequence of whose negligence it is claimed by said city the injury occurred or was caused, of the pendency of said suit, the name of the plaintiff and where pending, and the general nature of the claim, and that the city claims that the person or corporation so notified is liable to said city for any judgment obtained against said city, and asking such person or corporation to appear and defend; thereupon any judgment obtained in such suit shall be conclusive in any action by the city against any person or corporation so notified as to the existence of the defect or other cause of the injury or damage, and as to the liability of the city to the plaintiff in the first-named suit in consequence thereof, and as to the amount of the damage or injury occasioned thereby; and every such city is hereby empowered to maintain an action against the person or corporation so notified to recover the amount of any such judgment, together with all the expenses incurred by such city in such suit.

SEC. **1054. Public grounds.** Any such cities situated on the Mississippi river, having within their limits public grounds heretofore set apart or dedicated for levee, warehouse or other public purposes, and in which the use of such ground for such purposes has ceased or been abandoned in whole or in part, may use or provide for the use of such grounds otherwise than for levee and warehouse purposes, as said council of such cities may determine are for the public interests, and upon such terms and conditions as may be fixed by said council. [18 G. A., ch. 80, § 1.]

SEC. **1055. Repeal.** All general acts and parts of acts passed prior to the taking effect of this code, relating to cities acting under special charter, are hereby repealed, except so far as the same are contained in this chapter or referred to herein; but the charters of such cities, or any of the provisions of the same, are not hereby repealed, but shall continue in force and effect, except as changed or modified by the provisions of this chapter.

SEC. **1056. Saving clause.** All officers elected or appointed in such cities prior to the taking effect of this code shall continue in office until after the expiration of their term of office, unless otherwise provided in this chapter, and all ordinances in force in such cities, not inconsistent with the provisions of this chapter, shall continue in force until repealed. When the term of office of any elective officer shall expire after the first city election after this code takes effect and before the next biennial city election, the mayor, by and with the consent of the council, shall fill the office by appointment until such election.

TITLE VI.

OF ELECTIONS AND OFFICERS.

CHAPTER 1.

OF THE ELECTION OF OFFICERS AND THEIR TERMS.

SECTION **1057. General election.** The general election for state, district, county and township officers shall be held throughout the state on Tuesday, next after the first Monday of November, in each year. [19 G. A., ch. 115; C. '73, § 573; R., § 459; C. '51, § 237.]

See amendment to constitution at end of art. II.

SEC. **1058. Special election.** Special elections authorized by any law, or held to supply vacancies in any office to be filled by the vote of the qualified voters of the entire state, or of any district, county or township, may be held at the time designated by such law, or by the officer authorized to order such election. [C. '73, § 574; R., § 460.]

SEC. **1059. When officer to be chosen.** At the general election next preceding the expiration of the term of any officer his successor shall be elected. [C. '73, § 575; R., § 461.]

SEC. **1060. Term of office.** The term of office of all officers chosen at a general election for a full term shall commence on the first Monday of January next thereafter, except when otherwise provided by the constitution; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor. [16 G. A., ch. 72; C. '73, § 576; R., § 462.]

See Const., art. IV, § 15.

SEC. **1061. Proclamation.** At least thirty days before any general election, the governor shall issue his proclamation, designating all the offices to be filled by the vote of all the electors of the state, or by those of any congressional, legislative or judicial district, and, in the years required by article ten, section three, of the constitution, submitting the question: "Shall there be a convention to revise the constitution and amend the same?" and transmit a copy thereof to the sheriff of each county. [C. '73, § 577; R., § 462.]

SEC. **1062. Notice.** The sheriff shall give at least ten days' notice thereof, by causing a copy of such proclamation to be published in some newspaper printed in the county; or, if there be no such paper, by posting such a copy in at least five of the most public places in the county. [C. '73, § 578; R., § 463.]

Where the time of the regular election is fixed by law such time is to be taken notice of judicially: *Davis v. Best*, 2–96.

Failure to give proper notice of an election will not invalidate it. In matters of such public nature the observance of the particular requirement is not a prerequisite to validity, and the statutes as to notice are to be deemed directory. The people are not to be disfranchised or deprived of their voice by the omission of some duty by an officer: *Dishon v. Smith*, 10–212.

If an election has in fact been held at the proper time, and it is not alleged or shown that any portion of the electors failed in knowledge of the pendency of the question submitted at such election, or to exercise their franchise, it will not be held void on account of want of notice: *Ibid.*

SEC. **1063. Of special election.** A similar proclamation shall be issued before any special election ordered by the governor, designating the time at which such special election shall be held; and the sheriff of each county

in which such election is to be held shall give notice thereof, as provided in the last section. [C. '73, § 579; R., § 464.]

SEC. **1064. In odd-numbered years.** The governor, lieutenant-governor and superintendent of public instruction shall be chosen at the general election in each odd-numbered year, and shall hold office for two years. [C. '73, § 580; R., § 465.]

See Const., art IV, § 15.

SEC. **1065. In even-numbered years.** The secretary of state, auditor of state, treasurer of state and attorney-general shall be chosen at the general election in each even-numbered year, and their terms of office shall be two years. [C. '73, § 581; R., § 466.]

As to secretary, auditor and treasurer, see Const., art. IV, § 22. As to attorney-general, see Const., art. V, § 12.

SEC. **1066. Judges of supreme court.** One judge of the supreme court shall be chosen at the general election in each year, whose term of office shall continue for six years, but the term of the judge elected to fill a vacancy expiring on the first day of January, 1898, shall extend until the first day of January, 1899. [26 G. A., ch. 72; 25 G. A., ch. 69, § 2; 16 G. A., ch. 7, § 2; C. '73, § 582.]

See Const., art. V, §§ 3, 11.

SEC. **1067. Clerk and reporter of supreme court.** The clerk and reporter of the supreme court shall be chosen at the general election in the year 1898, and each fourth year thereafter, and their terms of office shall be four years. [C. '73, § 583.]

SEC. **1068. Railroad commissioners.** One railroad commissioner shall be chosen at the regular election in each year, whose term of office shall continue for three years. [22 G. A., ch. 29, § 2; 17 G. A., ch. 77, § 2.]

SEC. **1069. Judges of district court.** The judges of the district court shall be elected in each judicial district at a general election, and shall hold office for four years, except when elected to fill a vacancy, in which case it shall be only for the unexpired term. [21 G. A., ch. 134, § 4.]

SEC. **1070. Representatives.** Members of the house of representatives shall be elected in the respective representative districts in each odd-numbered year, and hold office for two years. [C. '73, § 587; R., § 470.]

See Const., art. III, § 3.

SEC. **1071. Senators.** Senators in the general assembly, to succeed those whose terms are about to expire, shall be elected in the respective senatorial districts in each odd-numbered year, for the term of four years. [C. '73, § 588; R., § 471.]

See Const., art. III, § 5.

SEC. **1072. County officers.** There shall be elected in each county, at the general election in each even-numbered year, a clerk of the district court, a recorder of deeds, an auditor and a county attorney; and, in each odd-numbered year, a treasurer, a sheriff, a coroner, a county superintendent and a surveyor; and each of said officers shall hold his office for the term of two years. [23 G. A., ch. 37, § 2; 21 G. A., ch. 73, § 1; C. '73, § 589; R., §§ 224, 472–3; C. '51, § 96.]

[Women are by § 2748 made eligible to school offices, and by § 493 to the office of county recorder.]

SEC. **1073. Justices and constables.** Two justices of the peace and two constables shall be elected by the voters of each township at the general election in each even-numbered year, and shall hold office for two years, and be county officers. [25 G. A., ch. 74, § 4; C. '73, §§ 389, 590, 592–3; R., §§ 443, 726, 474, 477–8; C. '51, §§ 221, 243.]

The ballots for justice of the peace should be canvassed by the board of supervisors under the provisons of § 1150: *Lynch v. Vermazen*, 61–76.

The constable is properly a township officer although he is to be voted for under this section like a justice of the peace as a county officer by the voters of his township: *State v. Bevans*, 37–178.

SEC. **1074. Township trustees.** There shall be elected in each township, annually, one trustee, who shall continue in office for three years. [17 G. A., ch. 12, §§ 1, 2; C. '73, § 591.]

SEC. **1075. Township clerk, assessor, highway supervisor.** At the general election in each even-numbered year, there shall be elected in each civil township one township clerk, and, where not otherwise provided, one assessor, and one road supervisor in each road district, to be elected by the voters of such district, who shall hold their offices for the term of two years. [18 G. A., ch. 161, § 1; C. '73, § 591.]

The offices of township trustee and clerk are abolished in some cases where the township constitutes a city or town: See §§ 560–562.

As to method of voting for road supervisor and assessor, see § 1130.

CHAPTER 2.

OF THE REGISTRATION OF VOTERS.

SECTION **1076. Board of registers.** In cities having a population of thirty-five hundred or more, not including the inmates of any state institution, the council, on or before the sixth Monday preceding each general election, shall appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election, from three names presented by each chairman of the city central political committee of such parties, to be registers in each election precinct in the city for the registration of voters therein, who shall be electors of the precinct in which they are to serve, of good clerical ability, speaking the English language understandingly, temperate, of good habits and reputation, who shall qualify by taking an oath or affirmation to the effect that they will well and truly discharge all of the duties required of them by law. They shall hold their office for one year, and receive compensation at the rate of two dollars and fifty cents for each calendar day engaged in the discharge of their duties, to be paid by the county, except in case of city elections, when they shall be paid by the city. If for any cause such registers, or any of them, shall not be appointed at or before the time above mentioned, or, if appointed, shall be unable for any cause to discharge the duties of such office, the mayor of such city shall forthwith, on similar recommendation, make such appointments and fill all vacancies. Should the mayor, upon the request of five freehold electors, fail for a period of three days to perform the duties aforesaid, he shall forfeit and pay, at the action of any such elector, the sum of one hundred dollars per day, for the equal benefit of the city and plaintiff. The provisions of this title shall apply to cities acting under special charters, with like effect as though said cities were acting under the general incorporation laws of the state. [26 G. A., ch. 62; 22 G. A., ch. 48, §§ 5, 12; 21 G. A., ch. 167, § 3.]

SEC. **1077. Registration.** The registers shall meet on the second Thursday prior to any general election, at the usual voting place in the precinct in which they have been appointed, and shall hold continuous sessions for two consecutive days, from eight o'clock in the forenoon until nine o'clock in the afternoon, and, in presidential years, such sessions shall be held for three days. Any person claiming to be a voter, or that he will be on election day, may appear before them in the election precinct where he claims he is or will be entitled to vote, and make and subscribe, under

oath, a statement in a registry book, to be provided by the clerk and furnished the registers, at the equal expense of the city and county, and kept open for public inspection and examination during the time fixed for the registration, which statement shall be in the following form and contain the following matter:

REGISTER OF VOTERS, ...PRECINCT, ...WARD.

						TERM OF RESIDENCE.										
Number.	Residence.	Name.	Age.	Nativity.	Color.	Precinct, street, number.	County.	State.	Naturalized.	Date of papers.	Court.	By act of Congress.	Qualified voter.	Date of application.	Last preceding place of residence.	SIGNATURE.
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....

The signature of the applicant shall be made at the right hand end of the line under the column "Signature," one of the registers having first administered to him this form of oath: "You do solemnly swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence, name, place of birth, your qualifications as an elector, and your right as such to register and vote under the laws of this state"; after which, the registers, or either of them, shall propound questions to the applicant for registration in relation to his name; his then place of residence, street and number; how long he has resided in the precinct where the vote is claimed; the last place of his residence before coming into that precinct; and also as to his citizenship, whether native or naturalized; if the latter, when, where, and in what court, or before what officer, or whether by act of congress; whether he came into the precinct for the purpose of voting at that election; how long he contemplates residing in the precinct; and such other questions as may tend to test his qualifications as a resident of the precinct, citizenship and right to vote at the poll; then, if the applicant appears to have the right to be registered, the registers shall fill out the above prescribed form of statement, which the applicant shall sign and swear to, as above provided. [22 G. A., ch. 48, § 1; 21 G. A., ch. 161, § 5.]

Former provisions for registry were held not in conflict with constitution, art. II, § 1, prescribing the qualifications of electors: *Edmunds v. Banbury*, 28-267. And an election without registry, where such was required by law, was held void, the provisions of the law being mandatory and imperative: *Nefzger v. Davenport & St. P. R. Co.*, 46-642.

SEC. **1078. Statements—registry books—school elections.** The statements thus made shall be dated and consecutively numbered, commencing with number one at each registration. At the close of each day's registration, the registry book shall be ruled off so as to prevent further entries, and, when not in use by the registers, shall be kept in the custody of the clerk until disposed of as provided by law. No person shall register at any other place or time than is designated in this chapter, and no regis-

tration of voters for school elections shall be required. [22 G. A., ch. 48, § 10; 21 G. A., ch. 161, §§ 6, 8.]

SEC. **1079. List of voters.** The registers shall, within three days after the registration made in the second week preceding the election, prepare two alphabetical lists, for their respective voting precincts, of the names of all persons registered, their residences, their last preceding places of residence, the dates of removal when removals occur within one year, nativity, color, term of residence in precinct, county and state, whether naturalized, date of papers, the naturalizing court, or place of naturalization if court is not known, whether naturalized by act of congress, date of application for registration; one of which lists they shall forthwith conspicuously post or cause to be posted at the usual place of holding elections in such precinct, for inspection of the public, and retain the other one in their possession. [22 G. A., ch. 48, § 12; 21 G. A., ch. 161, § 7.]

SEC. **1080. Correction of registry—lists delivered to judges.** On the Saturday before any election at which registration is required, the registers shall meet at the place where registration was last made, and hold a continuous session, from eight o'clock in the forenoon until nine o'clock in the afternoon, at which they shall revise and correct the registry book of voters, adding thereto, consecutively numbering them, the names of all applying for registration who on election day will be entitled to vote in that precinct, and by striking therefrom the name of any one not entitled to vote thereat. The registers shall revise and correct the alphabetical list in their possession to correspond therewith. When thus revised and corrected, it shall be certified and copied by the registers, who shall deliver, or cause to be delivered, such list and copy to the judges of the election of the proper precinct, and which delivery shall be made on election day, and before the opening of the polls. The copy thus delivered shall be preserved by the judges, and returned with the vote from that precinct, and the original to the clerk. At the opening of the polls and before any ballot shall be received, the judges of the election shall appoint one of their number, or one of the clerks, to check the name of each voter whose name is on the alphabetical lists, to whom a ballot is delivered. [22 G. A., ch. 48, §§ 1, 3, 4; 21 G. A., ch, 161, § 8.]

SEC. **1081. Appearance and hearing.** All proceedings of registers shall be public, and any person entitled to vote in a precinct shall have the right to be heard before them in reference to corrections of or additions to the lists of such precinct. No person shall be admitted to registry unless he appears in person, except as in this chapter provided, and, if demanded, he shall furnish to the registers such proofs of his right thereto as may by law be required by judges of election of any person offering to vote. If an elector is, by reason of sickness, unable to go to the place of registry on any day the registers may be in session, the registers shall, upon the filing before them, by a registered elector, of an affidavit to that effect, visit such sick elector at his place of residence on any day when not in session, and place his name on the registry book and alphabetical list, if found entitled thereto; at which time and place the registers may administer the oath hereinbefore provided to be taken by applicants for registry. [21 G. A., ch. 161, § 9.]

SEC. **1082. Registration on election day.** The registers shall also be in session on the day for the holding of each election, at some place convenient to, but not within one hundred feet of, the voting place, and during all the hours in which by law the polls are required to be kept open, for the purpose only of granting certificates of registration to persons who, being electors, are not registered. Such registration shall be allowed and certificate thereof granted only to a person who was absent from the city during all the days fixed for registration of voters for that election, or to a person who, being a foreigner, has received his final papers since the last preceding day for the registration of voters for that election, or to a person

whose name was, on the preceding Saturday, and in the absence of such person, stricken from registration, and who, on said day of election, shall prove to the satisfaction of said registers that he is a lawfully qualified elector of said voting precinct. These certificates of registration shall contain all the data showing the qualification of the voter as shown by the registration, and, in addition, the special matter showing the voter's right to such certificate under this section, and, before delivery to the applicant, shall be indorsed by the registers, to the effect that the person therein named is a qualified voter in that precinct, and that he is entitled to be registered as such. The proper statement shall be signed and sworn to by the voter before one of the registers, supported by the affidavit of a freeholder who is a registered voter in that precinct, who shall make oath to the qualification of the applicant as a voter in that precinct; and if the applicant be one whose name was stricken from registration, such affidavit of said freeholder shall contain the facts showing the right of said applicant to vote in that precinct. Registration in such cases shall be made in the manner required for regular registration. The certificate of registration shall be handed in to the judges of election when a ballot is delivered to him. The data therefrom, showing the voter's name and his qualification as a voter, shall be entered on the alphabetical lists by the judges and clerks of the election, under the appropriate headings, and the original certificate shall be returned to the city clerk, who shall carefully preserve it in the same manner and for the same time as the alphabetical list and poll book. [22 G. A., ch. 48, § 7.]

SEC. **1083. Striking off names.** The registers, prior to each election except presidential elections, and after completing their registration, shall certify the names of all persons by them registered to the registers of the ward or precinct of the same city, which the registration shows such persons gave as their last place of residence, and the names of such persons so certified shall be stricken from the registry lists of the ward or precinct in which they last resided, if found thereon. [25 G. A., ch. 58, § 1.]

SEC. **1084. New registry—how often.** A new registry of voters shall be taken in each year of a presidential election. For all other state or municipal elections, general or special, the registers shall prepare a new registry book in each year, by copying from the poll book of the preceding general election all the names found therein, adding thereto those of all persons registered and voting at any subsequent election, which new registry book shall show all the facts of qualification of each voter as they appear on the last preceding registry book, which, when thus made up, shall be used at each election until a new registry book is prepared as required by law. Every person thus registered shall be considered as entitled to vote at any election at which said registry book may be used, unless his name shall be dropped by the correction of registration, as authorized by law. [25 G. A., ch. 58, § 1; 22 G. A., ch. 48, §§ 2, 3.]

SEC. **1085. Notice.** The times and places of making registration of voters shall be published by the mayor in the two leading political party papers published in such city, except no publication shall be required for a special election. If there be but one such paper published in the city, publication of notice therein shall be sufficient. The publication shall be made for a period of three days prior to the opening of the registry book, if the paper is a daily paper, and for one week, if a weekly paper, and shall call the attention of the voters to the necessity of complying with the laws with reference to registration, in order to be entitled to vote at the ensuing election. [21 G. A., ch. 161, § 12.]

SEC. **1086. City clerk.** The city clerk shall carefully preserve all registry books and alphabetical lists and other papers pertaining to the registration, until destroyed as provided in the chapter on the canvass of votes. He shall, on the application of the registers, deliver to them, prior to their first meeting for each election, the registry book, alphabetical list

and poll book, which they require in order to properly prepare the necessary registry book for the next ensuing election; all of which shall be returned to him when they have completed their work for such election. [22 G. A., ch. 48, § 6.]

SEC. **1087. Penalty.** If any register shall fail to perform any duty required of him in this chapter, he shall forfeit the sum of one hundred dollars, to be recovered by any person in any court having jurisdiction; and if any register or judge of election shall wilfully neglect or disregard any duty imposed, or shall make, or permit to be made, any registration, statement or list, except at the time and place and in the manner herein authorized and prescribed, or shall knowingly make, or permit to be made, any false statement as aforesaid, or if any person shall wilfully make, or authorize to be made, any statement required to be made, false in any particular, or shall violate any of the provisions of this chapter, every such register or judge of election, person or persons, shall be guilty of a misdemeanor, and, upon conviction, fined in a sum not less than fifty nor more than two hundred dollars, or be imprisoned in the county jail not less than twenty days, nor more than six months, or both, at the discretion of the court. [21 G. A., ch. 161, § 10.]

CHAPTER 3.

OF ELECTIONS.

SECTION **1088. All elections except school.** The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections. [21 G. A., ch. 141, § 2.]

SEC. **1089. General and special.** The term "general election," as used in this chapter, shall apply to any election held for the choice of national, state, judicial, district, county or township officers; that of "city election" shall apply to any municipal election held in a city or town; and that of "special election" shall apply to any other election held for any purpose authorized or required by law. [24 G. A., ch. 33, § 2.]

SEC. **1090. Election precincts.** Each township, or, in case a township contains a city or a portion thereof, such portion of the township as is outside the limits of the city, and each ward of a city, shall, respectively, constitute an election precinct. But the board of supervisors or the council, as the case may be, shall have power to divide a township or part thereof, or a ward, into two or more precincts, or to change or abolish the same; or the board of supervisors and the council of any city of less than thirty-five hundred inhabitants, not including the inmates of any state institution, may combine any part of the township outside of such city with any or all the wards thereof as one election precinct, or change or abolish such precinct; or the council of such city may combine the several wards into one or more precincts. No precinct shall contain different townships or parts thereof. Each incorporated town shall constitute a precinct for town elections. No person shall vote in any precinct but that of his residence. [25 G. A., ch. 60; 21 G. A., ch. 141, § 2; C. '73, §§ 501, 603, 605; R., § 480; C. '51, § 245.]

Residence: By going into a township and remaining there for the sole purpose of voting, with no intention of remaining longer, one will not acquire sufficient residence to entitle him to vote; but if the removal is in good faith, no length of residence is necessary: *State v. Minnick*, 15–123.

Where the time, place and manner of holding elections are not prescribed by the constitution, but committed to the legislature, the reception of votes out of the precinct or the county of elector's residence may be constitutionally authorized: *Morrison v. Springer*, 15–304.

If no requirements as to length of residence were contained in the constitution, the legislature might fix such length of residence as it should see fit: *Ibid.*

The residence of a voter is the place of his domicile or place of abode, as distinguished from the residence acquired as a sojourner for business, education, or other temporary purpose. Therefore, *held*, that a student in the university at Iowa City, sent there and supported by his father, and making his father's home his "headquarters" during vacation, was not entitled to vote in Iowa City, though he had been there the requisite length of time and had no present intention of leaving there when he ceased to attend the university: *Vanderpoel v. O'Hanlon*, 53–246.

If the ballot of a voter is received it is no ground of complaint that an improper oath has been administered to him touching his qualifications: *State ex rel. v. O'Day*, 69–368.

Persons in military service: A soldier serving in the volunteer forces of the federal government does not thereby lose nor change his place of residence, which remains that of the county of his residence at the time of entering the service; and if he should be in such county on the day of election he would unquestionably have the right to vote, if otherwise qualified: *Morrison v. Springer*, 15–304.

And *held*, that the legislature may authorize the casting of ballots by soldiers at points where they are stationed outside the state: *Ibid.*

Under the statute authorizing persons absent from the state in military service to vote at general elections, *held*, that the submission of a proposition for the disposition of swamp lands at a special election at which persons in the military service could not vote was not illegal: *Cedar Rapids & M. R. R. Co. v. Boone County*, 34–45.

SEC. **1091. Polling places for country precincts.** Polling places for precincts outside the limits of a city, but within the township in which the city is in whole or in part situated, may, for the convenience of the voters, be fixed at some room or rooms in the court-house, or in some other building within the limits of the city, as the board of supervisors may provide. [21 G. A., ch. 161, § 14.]

SEC. **1092. Notice of boundaries of precincts.** The board of supervisors or council shall number or name the several precincts established, and cause the boundaries of each to be recorded in the records of said board of supervisors or council, as the case may be, and publish notice thereof in some newspaper of general circulation, published in such county or city, once each week for three consecutive weeks, the last to be made at least thirty days before the next general election. The precincts thus established shall continue until changed. [C. '73, § 604.]

SEC. **1093. Election boards.** Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors qualified and willing to act as such judge or clerk, and a member or members of opposite parties. In cities and towns, the councilmen shall be judges of election; but in case more than two councilmen belonging to the same political party or organization are residents of the same election precinct, the county board of supervisors may designate which of them shall serve as judges. In township precincts, the clerk of the township shall be a clerk of election of the precinct in which he resides, and the trustees of the township shall be judges of election, except that, in townships not divided into election precincts, if all the trustees be of the same political party, those two only whose terms expire in one and two years from the following January shall be judges of such precinct. The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented; but, in city and town elections, the powers given in this chapter and duties herein made incumbent upon the board of supervisors shall be performed by the council. If, at the opening of the polls in any precinct, there shall be a vacancy in the office of clerk or judge of election, the same shall be filled by the members of the board present, and from the political party which is entitled to such vacant office under the provisions of this chapter. The election board at any special election shall be the same as at the last preceding general election. In case of vacancies happening therein, the county auditor may make the appointments to fill the same when the board of supervisors is not in session. [26 G. A., ch. 68, § 3; C. '73, §§ 606–8; R., §§ 481–3; C. '51, §§ 246–8.]

SEC. **1094. Oath.** Before opening the polls, each of the judges and clerks shall take the following oath: "I, A. B., do solemnly swear that I will impartially, and to the best of my knowledge and ability, perform the duties of judge (or clerk) of this election, and will studiously endeavor to prevent fraud, deceit and abuse in conducting the same." [C. '73, § 609; R., § 484; C. '51, § 249.]

These provisions are directory. A failure of the officers mentioned to be sworn will not vitiate the election, and in a case in court involving the validity of an election, the fact that the officers were sworn may be proved *aliunde*. The return is not conclusive: *Dishon v. Smith*, 10–212.

SEC. **1095. How administered.** Any one of the judges or clerks present may administer the oath to the others, and it shall be entered in the poll books, subscribed by the person taking it, and certified by the officer administering it. [C. '73, § 610; R., § 485; C. '51, § 250.]

SEC. **1096. Polls open—proclamation.** At all elections the polls shall be opened at eight o'clock in the forenoon, except in cities where registration is required, when the polls shall be opened at seven o'clock in the forenoon, or in each case as soon thereafter as vacancies in the places of judges or clerks of election have been filled. In all cases the polls shall be closed at six o'clock in the evening. [24 G. A., ch. 33, § 32; C. '73, § 611; R., § 486; C. '51, § 251.]

SEC. **1097. Voting by ballot.** In all elections regulated by this chapter, the voting shall be by ballots printed and distributed as hereinafter provided, except as may be otherwise specially directed by law. [24 G. A., ch. 33, § 1.]

SEC. **1098. Nomination by convention.** Any convention of delegates, and any primary, caucus or meeting of qualified electors, representing a political party which, at the general election next preceding, polled at least two per cent. of the entire vote cast in the state, may, for the state, or any division or municipality thereof for which the same is held, make one nomination of a candidate for each office therein to be filled at the election, and any such convention, primary, caucus or meeting, representing a political party which, at the general election next preceding, polled at least two per cent. of the entire vote cast in any division or municipality of the state, may, for such division or municipality, or for any political subdivision thereof for which the same is held, make one such nomination for each office therein to be filled at the election. [Same, § 4.]

SEC. **1099. Certificates.** Certificates of nominations, made as provided in the preceding section, shall, besides containing the names of candidates, specify as to each:

1. The office to which he is nominated;
2. The party making such nomination, or political principle which he represents, expressed in not more than five words;
3. His place of residence, with the street and number thereof, if any.

In case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president may be added to the party or political name. Every such certificate of nomination shall be signed by the presiding officer and secretary of the convention, caucus or meeting of qualified electors, or by the board of canvassers to which the returns of such primary election are made, each of whom shall add to his signature his place of residence, and shall be sworn to by each signer thereof to be true to the best of his knowledge and belief, and a certificate of the oath shall be annexed to the certificate of nomination. The presiding officer and secretary of each convention, primary, caucus or meeting shall also certify, to the officer with whom the nomination certificates are filed, the names and addresses of each of the members of the executive or central committee appointed or elected by or representing it, and the provisions, if any, made by it for filling vacancies in nominations; and this may

be done in the nomination certificate, or by a separate certificate. [Same, §§ 4, 6.]

SEC. **1100. Nominations by petition.** Nominations for candidates for state offices may also be made by nomination paper or papers signed by not less than five hundred qualified voters of the state; for county, district or other division, not less than a county, by such paper or papers signed by not less than twenty-five qualified voters, residents of such county, district or division; and for township, city, town or ward, by such paper or papers signed by not less than ten qualified voters, residents of such township, city, town or ward; but the name of a candidate placed upon the ballot by any other method shall not be added by petition for the same office. Each elector so petitioning shall add to his signature his place of business and post-office address. [Same, § 5.]

Petitioners who have candidates placed on the ballot without a nominating convention are not entitled to have their ticket headed by the name of the party which they may claim to represent, when such party nominates a ticket by convention. The appellation of the ticket is a matter to be determined by the officers making up the ballot: *Lowery v. Davis*, 70 N. W., 190.

SEC. **1101. Withdrawals.** Any candidate named by either of the methods authorized in this chapter may withdraw his nomination by a written request, signed and acknowledged by him before any officer empowered to take the acknowledgment of deeds, and filed in the office of the secretary of state fifteen days, or the proper auditor or clerk eight days, before the day of election, and no name so withdrawn shall be printed upon the ballot. In case of a special election to fill vacancies in office, such withdrawal papers shall be filed with the secretary of state seven days, and with the proper auditor or clerk four days, before the day of such special election. [Same, § 8.]

SEC. **1102. Vacancies filled.** If a candidate declines a nomination, or dies before election day, or should any certificate of nomination or nomination paper be held insufficient or inoperative by the officer with whom it may be filed, or in case any objection made to any certificate of nomination, nomination paper, or to the eligibility of any candidate therein named, is sustained by the board appointed to determine such questions as hereinafter provided, the vacancy or vacancies thus occasioned may be filled by the convention, caucus, meeting or primary, or other persons making the original nominations, or in such a manner as such convention, caucus, meeting or primary has previously provided. If the time is insufficient for again holding such convention, caucus, meeting or primary, or in case no such previous provisions being made, such vacancy shall be filled by the regularly elected or appointed executive or central committee of the particular division or district representing the political party or persons holding such convention, primary, meeting or caucus, and certified as hereinbefore provided. The certificates of nominations made to supply such vacancies shall state, in addition to the facts hereinbefore required, the name of the original nominee, the date of his death or declination of nomination, or the fact that the former nomination has been held insufficient or inoperative, and the measures taken in accordance with the above requirements for filling a vacancy, and shall be signed and sworn to by the presiding officer and secretary of the convention, caucus, meeting or primary, or by the chairman and secretary of the committee, as the case may be. [Same, § 9.]

SEC. **1103. Objections.** All objections or other questions arising in relation to certificates of nomination or nomination papers shall be filed with the officer with whom the certificate of nomination or nomination papers to which objection is made are filed. Those with the secretary of state shall be filed not less than twenty days, and those with other officers not less than eight days, before the day of election, except that nominations to fill vacancies occurring after said time, or in case of nomination made to be voted on at a special election, objections shall be filed within three days

after the filing of the certificate or nomination papers. Objections filed with the secretary of state shall be considered by the secretary and auditor of state and attorney-general, and a majority decision shall be final; but if the objection is to the certificate or nomination papers of one or more of the above named officers, said officer or officers so objected to shall not pass upon the same, but their places shall be filled, respectively, by the treasurer of state, the governor, and the superintendent of public instruction. Objections filed with the county auditor shall be considered by the county auditor, clerk of the district court and county attorney, and a majority decision shall be final; but if the objection is to the certificate or nomination papers of one or more of the above named county officers, said officer or officers so objected to shall not pass upon such objection, but their places shall be filled, respectively, by the county treasurer, the sheriff and county superintendent. Objections filed with the city or town clerk shall be considered by the mayor and clerk and one member of the council chosen by the council by ballot, and a majority decision shall be final; but if the objection is to the certificate or nomination papers of either of said city or town officials, he shall not pass upon said objection, but his place shall be filled by a member of the council against whom no such objection exists, chosen as above provided. When any of the above objections are made, notice shall forthwith be given to the candidate affected thereby, addressed to his place of residence as given in the certificate or nomination papers, stating that objections have been made to his certificate or nomination papers, also stating the time and place such objections will be considered. [Same, § 10.]

SEC. **1104. Filing certificates and petitions.** Certificates of nomination and nomination papers of candidates for state, congressional, judicial and legislative offices shall be filed with the secretary of state, not more than sixty nor less than thirty days; those for all other officers, except for cities and towns, with the county auditors of the respective counties, not more than sixty nor less than twenty days; and for the offices in the cities and towns, with the clerks thereof, not more than forty nor less than ten days, before the day fixed by law for the holding of the election. Such certificates and nomination papers thus filed, and being apparently in conformity with law, shall be regarded as valid, unless objection in writing thereto shall be made, and, under proper regulations, shall be open to public inspection, and preserved by the receiving officer for not less than six months after the election is had. Any error found in such papers may be corrected by the substitution of another, executed as is required for an original nomination certificate or paper. In case of special election to fill vacancies in office, certificates of nomination or nomination papers, for nomination of candidates for office to be filled by the electors of a larger district than a county, may be filed with the secretary of state, not later than ten days before the time of election. Certificates of nomination or nomination papers, nominating candidates for office to be filled by the electors of a county, may be filed with the county auditor at any time not less than five days before the election. [26 G. A., ch. 68, §§ 1–2; 24 G. A., ch. 33, §§ 4, 7, 8, 10.]

SEC. **1105. Nominations transmitted to county auditor.** Not less than fifteen days before the election, the secretary of state must certify to the auditor of each county in which any of the electors have the right to vote for any candidate or candidates, the name and residence of each person nominated, whether an original nomination or to fill a vacancy, to be voted for at such election, and the order in which the tickets shall appear on the ballot. Should a vacancy in the nominations occur and be filled after this certificate has been forwarded, a like certificate shall at once issue and be sent the proper officer. In case of special election to fill vacancy in office, the certificate by the secretary of state to the county auditor may be made

at any time not later than seven days before the election. [26 G. A., ch. 68, §§ 1, 2; 24 G. A., ch. 33, §§ 11–13.]

SEC. **1106. Ballot—form.** The names of all candidates to be voted for in each election precinct shall be printed on one ballot, all nominations of any political party or group of petitioners being placed under the party name or title of such party or group, as designated by them in their certificates of nomination or petitions, or, if none be designated, then under some suitable title, and the ballot shall contain no other names, except that, in case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president may be added to the party or political designation. Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket. But the name of no candidate shall appear upon the ballot in more than one place for the same office, whether nominated by convention, primary, caucus or petition. Where two or more conventions, primaries or caucuses, or any two of them, may nominate the same candidate for any office, the name of such candidate shall be printed under the name of the party first filing nomination papers bearing such name, unless the candidate himself shall, in writing duly verified, request the officer with whom the nomination papers are filed to cause the name to be printed upon some other ticket. Each of the columns containing the list of candidates, including the party name, shall be separated by a distinct line. Said ballot shall be substantially in the following form:

○ REPUBLICAN.	○ DEMOCRATIC.	○ PROHIBITION.	○ UNION LABOR.
For Governor,	For Governor,	For Governor,	For Governor,
☐ A..... B..... of.....County.	☐ G..... H..... of.....County.	☐ M..... N..... of.....County.	☐ S..... T..... of.....County.
For Lieutenant Governor,	For Lieutenant Governor,	For Lieutenant Governor,	For Lieutenant Governor,
☐ C..... D..... of.....County.	☐ I..... J..... of.....County.	☐ O..... P..... of.....County.	☐ U..... V..... of.....County.
For Judge of Supreme Court,	For Judge of Supreme Court,	For Judge of Supreme Court,	For Judge of Supreme Court,
☐ E..... F..... of.....County.	☐ K..... L..... of.....County.	☐ Q..... R..... of.....County.	☐ W..... X..... of.....County.

When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon the ballot, after the list of candidates, preceded by the words, "Shall the following amendment to the constitution (or public measure) be adopted?" and upon the right hand margin, opposite these words, two spaces shall be left, one for votes favoring such amendment or public measure, and the other for votes opposing the same. In one of these spaces the word "yes" or other word required by law shall be printed; in the other, the word "no" or other word required, and to the right of each space a square shall be printed to receive the voting cross, all of which shall be substantially in the following form:

"Shall the following amendment to the constitution (or public measure) be adopted?"

(Here insert in full the proposed constitutional amendment or public measure.)

Yes.	
No.	

The elector shall designate his vote by a cross mark, thus X, placed in the proper square. [Same, §§ 14, 16.]

SEC. **1107. Printing.** For all elections held under this chapter, except those of cities or towns, the county auditor shall have charge of the printing of ballots in his county, and shall cause to be placed thereon the names

of all candidates which have been certified to him by the secretary of state, in the order the same appear upon the certificate issued by the secretary of state, together with those of all other candidates to be voted for thereat, whose nominations have been made in conformity with law. If a township election precinct includes a town or any part thereof, the names of nominees for township assessors shall not be placed upon the official ballot for that precinct. In city or town elections, the clerk shall have charge of the printing of the ballots, and shall cause to be placed thereon the names of all candidates to be voted for thereat, whose nominations have been made as provided in this chapter; and in either case such ballots shall be furnished the election judges at the polling place in each precinct not less than twelve hours before the opening of the polls on the morning of the election. [Same, § 15.]

Where the auditor refused to furnish ballots containing the names of persons who it was claimed had been properly put in nomination to be voted for at a town election and the officers of the town thereupon caused to be printed ballots containing such names which ballots were distributed by the officers of election and used by the voters, *held*, that these ballots were not such as were contemplated by law and that the election was wholly invalid, and that this must be the result whether the law in this respect is to be deemed mandatory or only directory: *State ex rel. v. Smith*, 63 N. W., 453. [But now see § 1122.]

SEC. **1108. Vacancies filled.** The name supplied for a vacancy by the certificate of the secretary of state, or by nomination certificates or papers for a vacancy filed with the county auditor, or city or town clerk, shall, if the ballots are not already printed, be placed on the ballots in place of the name of the original nominee, or, if the ballots have been printed, new ballots, whenever practicable, shall be furnished. Whenever it may not be practicable to have new ballots printed, the election officers having charge of them shall place the name supplied for the vacancy upon each ballot used before delivering it to the judges of election. If said ballots have already been delivered to the judges of election, said auditor or clerk shall immediately furnish the name of such substituted nominee to all judges of election within the territory in which said nominee may be a candidate, and such election officer having charge of the ballots shall place the name supplied for the vacancy upon each ballot issued before delivering it to the voter, by affixing a paster, or by writing or stamping the name thereon. [Same, §§ 11, 12.]

SEC. **1109. Method of printing.** The ballot shall be on plain white paper, through which the printing or writing cannot be read. The party name or title shall be printed in capital letters, not less than one-fourth of an inch in height; and a circle one-half inch in diameter shall be printed at the beginning of the line in which such name or title is printed. The names of candidates shall be printed in capital letters not less than one-eighth nor more than one-fourth of an inch in height, and, at the beginning of each line in which the name of a candidate is printed, a square shall be printed, the sides of which shall not be less than one-fourth of an inch in length. On the back or outside of the ballot, so as to appear when folded, shall be printed the words "official ballot," followed by the designation of the polling place for which the ballot is prepared, the date of the election, and a facsimile of the signature of the auditor or other officer who has caused the ballot to be printed. [Same, § 14.]

SEC. **1110. Delivery of official ballots to judges.** Ballots shall be printed and in the possession of the officer charged with their distribution at least two days before the election, and subject to the inspection of candidates and their agents. If mistakes are discovered, they shall be corrected without delay, in the manner provided in this chapter. The officers charged with the printing of the ballots shall cause to be delivered to the judges of election seventy-five ballots, of the kind to be voted in such precinct, for every fifty votes or fraction thereof cast therein at the last preceding election of state officers. Such ballots shall be put up in separate sealed packages,

with marks on the outside, clearly designating the polling place for which they are intended and the number of ballots inclosed, and receipt therefor shall be given by the judge or judges of election to whom they are delivered, which receipt shall be preserved by the officer charged with the printing of the ballots. Any officer charged with the printing and distribution of ballots shall provide and retain at his office an ample supply of ballots, in addition to those distributed to the several voting precincts, and if at any time the ballots furnished to any precinct shall be lost, destroyed or exhausted before the polls are closed, on written application, signed by a majority of the judges of such precinct, or signed and sworn to by one of such judges, he shall immediately cause to be delivered to such judges, at the polling place, such additional supply of ballots as may be required, and sufficient to comply with the provisions of this chapter. For general elections, the supply of ballots so retained shall only equal the number provided for the precinct casting the largest vote at the preceding general election, and shall include only the portions of the various tickets to be voted for throughout the entire county, with blank spaces in which the names of candidates omitted may be written by the voter, and with blank spaces in the indorsement upon the back of such ballots, in which the name of the precinct shall be written by the judges of election. [Same, § 15.]

SEC. **1111. Card of instructions.** The officer whose duty it is to have the ballots printed shall cause to be copied upon cards in large, clear type, under the heading "Card of Instructions," the following matters for the guidance of the voters:

1. The manner of obtaining ballots;
2. The manner of marking ballots;
3. That unmarked or improperly marked ballots will not be counted;
4. The method of gaining assistance in marking ballots;
5. That any erasures or identification marks, or otherwise spoiling or defacing a ballot, will render it invalid;
6. Not to vote a spoiled or defaced ballot;
7. How to obtain a new ballot in place of a spoiled or defaced one;
8. Upon the right of an employe to absent himself for two hours for the purpose of voting, by application for leave so to do made before the day of election, without deduction from his salary or wages;
9. Any other matters thought necessary.

Such instructions shall be prepared by the attorney-general and delivered to the secretary of state, who shall cause copies of the same to be furnished to the county auditor of each county. New or amended instructions may be so prepared from time to time, if thought necessary, and copies thereof furnished to the county auditors, who shall furnish to the judges of election a sufficient number of such cards of instruction as will enable them to comply with the provisions of this chapter. [Same, § 17.]

SEC. **1112. Cards posted—publication of ballot.** The judges of election shall cause at least one of each of such cards to be posted in each voting booth or apartment provided for the preparation of ballots, and not less than four, with an equal number of sample ballots, in and about the polling place, upon the day of election before the opening of the polls. The county auditor shall cause to be published, prior to the day of election, in two newspapers, if there be so many published in such county, selecting, if possible, papers representing the political parties which cast at the preceding general election the largest number and the next largest number of votes, a list of all the nominations made, as herein provided, and to be voted for at such election, as near as may be in the form in which they shall appear upon the general ballot, but such publication shall not include portions of the ballot relating to township, city or town officers. [Same, § 18.]

SEC. **1113. Polling places—voting booths.** In townships the trustees, and in cities and towns the mayor and clerk, shall provide suitable places

in which to hold all elections provided for in this chapter, and see that the same are warmed, lighted, and furnished with proper supplies and conveniences, including a sufficient number or supply of booths, shelves, pens, penholders, ink, blotters and pencils to enable the voter to prepare his ballot for voting, screened from all observation as to the manner in which he does so. A guard rail shall be so constructed and placed that only such persons as are inside such rail can approach within six feet of the ballot box, or of the booths. The voting booths shall be so arranged that they can only be reached by passing within said guard rail, and so that they shall be in plain view of the election officers, and both booths and ballot boxes shall be in plain view of persons outside of the guard rail. Each booth shall be at least three feet square, and have three sides inclosed, the side in front to open and shut by a door swinging outward, or closed with a curtain. Each side of the booth shall be seven feet high, and the door or curtain shall extend to within two feet of the floor, and shall be closed while the voter is preparing his ballot. Each booth shall contain a shelf at least one foot wide, at a convenient height for writing, and shall be well lighted. The booths and compartments shall be so built and arranged, if possible, as to be permanent, so that after the election they may be taken down and deposited with the township, city or town clerk, as the case may be, for safe keeping and for future use. The number of voting booths shall not be less than one to every sixty voters or fraction thereof who voted at the last preceding election in the precinct. In precincts outside of cities and towns the election shall, if practicable, be held in the public school building, for the use of which there shall be no charge, but all damage to the building or furniture shall be paid by the county. [Same, § 20.]

SEC. **1114. Ballot furnished to voter.** The judges of election of their respective precints shall have charge of the ballots and furnish them to the voters. Any person desiring to vote shall give his name, and, if required, his residence, to such judges, one of whom shall thereupon announce the same in a loud and distinct tone of voice, clear and audible. In precincts where registration is required, if such name is found on the register of voters by the officer having charge thereof, he shall likewise repeat such name in the same manner; if the name of the person desiring to vote is not found on the register of voters, his ballot shall not be received until he shall have complied with the law prescribing the manner and conditions of voting by unregistered voters. [Same, § 19.]

SEC. **1115. Challenges.** Any person offering to vote may be challenged as unqualified by any judge or elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified; and he shall not receive a ballot from a voter who is challenged, until such voter shall have established his right to vote. When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him under oath touching his qualifications as a voter. In all precincts where registration is not required, and in other precincts where the name of such voter is entered upon the registration lists, if the person challenged insists that he is qualified, and the challenge is not withdrawn, one of the judges shall tender to him the following oath: "You do solemnly swear that you are a citizen of the United States, that you are a resident in good faith of this precinct, that you are twenty-one years of age as you verily believe, that you have been a resident of this county sixty days, and of this state six months next preceding this election, and that you have not voted at this election," and if he takes such oath, his vote shall be received. [Same, § 21; C. '73, §§ 619, 620; R., §§ 493–4; C. '51, §§ 258–9.]

SEC. **1116. Method of voting.** Any voter entitled to receive a ballot under the provisions of this chapter shall be allowed to enter the space inclosed by the guard rail. One of the judges shall give him one, and only

one, ballot, on the back of which such judge shall indorse his initials, in such manner that they may be seen when the ballot is properly folded, and the voter's name shall immediately be checked on the registry list. The name of each person, when a ballot is delivered to him, shall be entered by each of the clerks of election in the poll-book kept by him, in the place provided therefor. [24 G. A., ch. 33, § 21; C. '73, § 621; R., § 495; C. '51, § 260.]

SEC. **1117. Depositing ballot.** On receipt of the ballot, the voter shall, without leaving the inclosed space, retire alone to one of the voting booths, and without delay mark his ballot, and, before leaving the voting booth, shall fold the same in such manner as to conceal the marks thereon, and deliver the same to one of the judges of election, but the number of the voter on the poll-books or register lists shall not be indorsed on the back of his ballot. One of the judges of election shall thereupon, in the presence of the voter, deposit such ballot in the ballot box, but no ballot without the official indorsement shall be allowed to be deposited therein. The voter shall quit said inclosed space as soon as he has voted. Any voter who, after receiving an official ballot, decides not to vote, shall, before retiring from within the guard rail, surrender to the election officers the official ballot which has been given him, and such fact shall be noted on each of the poll lists. A refusal to surrender such ballot shall subject the person so offending to immediate arrest and the penalties provided in this chapter. No voter shall vote or offer to vote any ballot except such as he has received from the judges of election in charge of the ballots. No person shall take or remove any ballot from the polling place before the close of the poll. No voter shall be allowed to occupy a voting booth already occupied by another nor remain within said inclosed space more than ten minutes, nor to occupy a voting booth more than five minutes, in case all of said voting booths are in use and other voters waiting to occupy the same, nor to again enter the inclosed space after having voted; nor shall more than two voters in excess of the whole number of voting booths provided be allowed at any one time in such inclosed space, except by the authority of the election officers to keep order and enforce the law. [24 G. A., ch. 33, §§ 20–2, 25; C. '73, § 617; R., § 492; C. '51, § 257.]

SEC. **1118. Assistance to vote.** Any voter who may declare upon oath that he cannot read the English language, or that, by reason of any physical disability, he is unable to mark his ballot, shall, upon request, be assisted in marking the same by two of the election officers of different political parties, to be selected from the judges and clerks of the precinct in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls. Such officers shall mark the ballot as directed by the voter, and shall thereafter give no information regarding the same. The clerks of election shall enter upon the poll lists, after the name of any elector who received such assistance in marking his ballot, a memorandum of the fact. Intoxication shall not be regarded as a physical disability, and no intoxicated person shall be entitled to assistance in marking his ballot. [24 G. A., ch. 33, § 23.]

SEC. **1119. Marking the ballot.** Upon retiring to the voting booth, the voter shall prepare his ballot by placing a cross in the square opposite the name of each candidate for whom he desires to vote, or, if he desires to vote for all the candidates upon any ticket, he may do so by placing a cross in the circle at the head of the ticket. The voter may also insert in writing, in the proper place, the name of any person for whom he desires to vote, making a cross opposite thereto. The unnecessary marking of a cross in a square below a marked circle shall not affect the validity of his vote. [Same, § 22.]

The ballot is not to be counted in favor of one whose name is written thereon unless the written name is preceded by a cross in the circle before it. This was a case where no

ticket was designated by a cross in the circle. *State v. Hagen*, 91–510.

Under prior provisions, *held*, that where a ticket was selected by a cross in the circle at the head of it the voter was not authorized to designate individual candidates on that ticket by crosses in the squares where two or more candidates were to be elected to the same office and that it was not practicable in such case to vote for one candidate for such office on another ticket, and have the vote counted for another candidate for that office on the ticket marked with a cross in the circle. The difficulty in such case was that it was impossible to determine who were the opposing candidates on the two tickets, and the ballot could be counted only in favor of the candidate on the opposing ticket whose name was indicated by a cross: *Ibid; Whittam v. Zahorik*, 91–23. [But there is now no provision for voting for a candidate on another ticket when one ticket is marked with a cross in the circle.]

It is only by the form of marking designated by the statute that the intention of the voter can be ascertained and under these statutory provisions the general rule that the ballot will be counted in accordance with the apparent intention of the voter is not applicable: *Whittam v. Zahorik*, 91–23.

As to the effect to be given to the discoverable intention of the voter under prior statutes, see *Wimmer v. Eaton*, 72–374; *Brown v. McCollum*, 76–479.

SEC. **1120. How counted.** Ballots marked as first provided in the preceding section shall be counted for the candidates designated by the marks in the squares. When a circle is marked, the ballot shall be counted for all the names upon the ticket beneath said circle. The making of a cross in the square of another ticket than the one marked in the circle shall not affect the validity of the ballot, except as to the office for which the person opposite whose name such cross was made is a candidate, and as to that office the vote shall not be counted. When more than one circle is marked, the ballot shall be rejected. When only one candidate for any office is to be elected, if the voter marks in squares opposite the names of more than one candidate therefor, such vote shall not be counted for such office, whether the circle is marked or not. When two or more officers of the same kind are to be elected, if more squares opposite the names of candidates for such office are marked than there are officers to be elected to such office, the ballot shall not be counted for any such candidates. If for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. Any ballot marked by the voter in any other manner than as authorized in this chapter, and so that such mark may be used for the purpose of identifying such ballot, shall be rejected. [Same, §§ 22, 27.]

Under provisions not now preserved as to the effect of identification marks, see *Whittam v. Zahorik*, 91-23; *Cook v. Fisher*, 69 N. W., 264.

SEC. **1121. Voting mark—spoiled ballots.** The voting mark shall be a cross in the circle or square. Any voter who shall spoil his ballot may, on returning the same to the judges, receive another in place thereof, but no voter shall receive more than three ballots, including the one first delivered to him. None but ballots provided in accordance with the provisions of this chapter shall be counted. [Same, §§ 22, 25.]

SEC. **1122. Defects in printed ballot.** No ballot properly marked by the voter shall be rejected because of any discrepancy between the printed ballot and the nomination paper or certificate of nomination, and it shall be counted for the candidate or candidates for such offices named in the nomination paper or certificate of nomination. No ballot furnished by the proper officer shall be rejected for any error in stamping or writing the indorsements thereon by the officials charged with such duties, nor because of any error on the part of the officer charged with such duty in delivering the wrong ballots at any precinct or polling place, but any ballot delivered by the proper official to any voter shall, if properly marked by the voter, be counted as cast for all candidates for whom the voter had the right to vote, and for whom he has voted.

The act of the judges in correcting the name of a candidate on the official ballots properly furnished to them, *held* not to render the ballots void. *Cook v. Fisher*, 69 N. W., 264.

The ballot law is mandatory in the sense that it requires in the preparation of the official ballot strict compliance with all its provisions, but not in the sense that the voter's right to exercise the elective fran-

chise will be lost because of some technical mistake in printing the names of candidates upon the ballot: *Ibid.*

While none but official ballots are to be used or counted, there is no affirmative declaration that the correction of official ballots will render them void: *Ibid.*

SEC. **1123. Employes.** Any person entitled to vote at a general election shall, on the day of such election, be entitled to absent himself from any services in which he is then employed for a period of two hours, between the time of opening and closing the polls, which period may be designated by the employer, and such voter shall not be liable to any penalty, nor shall any deduction be made from his usual salary or wages, on account of such absence, but application for such absence shall be made prior to the day of election. Any employer who shall refuse to an employe the privilege, conferred by this section, or shall subject such employe to a penalty or reduction of wages because of the exercise of such privilege, or shall in any manner attempt to influence or control such employe as to how he shall vote, by offering any reward, or threatening discharge from employment, or otherwise intimidating or attempting to intimidate such employe from exercising his right to vote, shall be punished by a fine of not less than five nor more than one hundred dollars. [24 G. A., ch. 33, § 24.]

SEC. **1124. Persons at polling place.** No persons shall, during the receiving and counting of the ballots at any polling place, loiter, or congregate, or do any electioneering or soliciting of votes, within one hundred feet of any outside door of any building affording access to any room where the polls are held, or of any outside door of any building affording access to any hallway, corridor, or stairway, or other means of reaching such room, nor shall any person interrupt, hinder or oppose any voter while approaching or leaving the polling place for the purpose of voting; but any person who is by law authorized to perform or is charged with the performance of official duties at the election, and any number of persons, not exceeding three from each political party having candidates to be voted for at such election, to act as challenging committees, who are appointed and accredited by the executive or central committee of such political party or organization, respectively, or of persons not exceeding three from each of such political parties, appointed and accredited in the same manner as above prescribed for challenging committees, to witness the counting of ballots, may be present at the polling place. [Same, § 26; 22 G. A., ch. 48, § 9; 21 G. A., ch. 161, § 13.]

SEC. **1125. Special policemen.** The city council shall detail and employ, on the nomination of the principal political committee of each political party recognized as the two leading parties, from citizens, or the police force of the city, from two to four special policemen for each precinct, and fully empower them for the special occasion of each election, who shall be men of good character and reputation, in equal numbers from each of the leading political parties, to prevent the violation of any of the terms, provisions or requirements of this chapter, or of any other command made in pursuance of any provisions hereof, and no other peace officer than those above named shall exercise his authority for preserving order at or within one hundred feet of such voting places, unless called in by an emergency. If no policeman be in attendance, the judges of election may appoint one or more specially, by writing, who shall have all the powers of such special policeman. [22 G. A., ch. 48, § 9; 21 G. A., ch. 161, § 13.]

SEC. **1126. Constables.** Except in voting precincts within any city, any constable of the township, who may be designated by the judges of election, shall attend at the place of election; if none attend, the judges of the election may, in writing, specially appoint one or more, who shall have all the powers of a regular constable. [C. '73, § 612; R., § 487; C. '51, § 252.]

SEC. **1127. Preserving order.** All special policemen and constables are authorized and required to preserve order and peace at all places of

election, and such special policemen, constables, and all other persons are authorized and required to obey the lawful orders and commands of said judges of election given to prevent violations of this chapter. [22 G. A., ch. 48, § 9; 21 G. A., ch. 161, § 13; C.'73, § 612; R., § 487; C.'51, § 252.]

SEC. **1128. Arrest of disorderly persons.** If any person conducts himself in a noisy, riotous, tumultuous or disorderly manner at or about the polls, so as to disturb the election, or insults or abuses the judges or clerks of election, or commits a breach of the peace, or violates any of the provisions of this chapter, the judges or clerks of the election, or any of them, shall order the arrest of any such person, and the constable or any special policeman may forthwith arrest him and bring him before the judges of election, and they, by a warrant under their hands, may commit him to the jail of the county for a term not exceeding twenty-four hours, but they shall permit him to vote. [22 G. A., ch. 48, § 9; 21 G. A., ch. 161, § 13; C.'73, § 613; R., § 488; C.'51, § 253.]

SEC. **1129. Expenses.** The expense of providing booths, guard rails, and other things required in this chapter shall be paid in the same manner as other election expenses. The printing and distributing of ballots and cards of instruction to the voters, described in this chapter, for any general election, shall be at the expense of the county, and shall be provided for in the same manner as other county election expenses. The printing and distribution of ballots for use in city elections shall be at the expense of the city or town in which the election shall be held. [24 G. A., ch. 33, §§ 2, 20.]

SEC. **1130. Ballot boxes.** The board of supervisors shall provide for each precinct in the county, for the purpose of elections, one box, with lock and key. The township trustees of each township shall cause to be prepared, for each election precinct in such township, a separate ballot box to receive the votes for supervisors of roads, with as many different compartments as there are road districts in the township or election precinct, and numbered accordingly. The vote for supervisor of roads shall be on a separate ballot, and the judges of election shall place such ballot in the compartment of such ballot box numbered to correspond with the number of the road district in which such voter resides. When any township precinct includes a town or part thereof, together with territory outside the limits of such town, the township trustees shall prepare a separate ballot box to receive the votes for township assessor, which shall be on separate ballots, and only the ballots of persons living outside of the limits of such town shall be placed in said ballot box. The judges of election shall place each ballot in its proper ballot box. The judges of election shall have the right to administer an oath to any voter, and to examine him under oath as to the road supervisor and assessor for whom such elector is entitled to vote. [17 G. A., ch. 71, §§ 2, 3; C.'73, § 614; R., § 489; C.'51, § 254.]

SEC. **1131. Voting by women.** At all elections where women may vote, no registration of women shall be required; separate ballots shall be furnished for the question on which they are entitled to vote; a separate ballot box shall be provided in which all ballots cast by them shall be deposited, and a separate canvass thereof made by the judges of the election, and the returns thereof shall show such vote. The right of any citizen to vote at any city, town or school election, on the question of issuing any bonds for municipal or school purposes, and for the purpose of borrowing money, or on the question of increasing the tax levy, shall not be denied or abridged on account of sex. [25 G. A., ch. 39.]

SEC. **1132. Registry and poll-books.** The county auditor shall prepare and furnish to each precinct two poll-books, having each of them a sufficient column for the names of the voters, a column for the number, and sufficient printed blank leaves to contain the entries of the oaths, certificates and returns; and also all books, blanks and materials necessary to

carry out the provisions of the chapter on registration of voters. [C.'73, § 615; R., § 490; C.'51, § 255.]

SEC. **1133. Penalty.** Any person violating or attempting to violate any provisions or requirements of this chapter, or failing or refusing to comply with any order or command of an election officer, made in pursuance of the provisions of this chapter, shall be punished by a fine of not less than fifty, nor more than two hundred dollars, or by imprisonment of not less than twenty days, nor more than six months, in the county jail. [22 G. A., ch. 48, § 9; 21 G. A., ch. 161, § 13.]

SEC. **1134. Interference with voters.** No person shall on election day do any electioneering or solicit votes within any polling place, or within one hundred feet therefrom, as defined in this chapter, or interrupt, hinder or oppose any voter while approaching the polling place for the purpose of voting; nor shall any voter, except as provided by law, allow his ballot to be seen by any person, or make a false statement as to his inability to mark his ballot; nor shall any person interfere or attempt to interfere with any voter when inside the inclosed space, or when marking his ballot, or endeavor to induce any voter, before voting, to show how he marks or has marked his ballot; nor shall any person mark, or cause in any manner to be marked, on any ballot any character for the purpose of identifying such ballot. Any violation of the provisions of this section shall be punished by a fine of not less than five nor more than one hundred dollars, or by imprisonment for not less than ten days nor more than thirty days in the county jail, or by both fine and imprisonment. [24 G. A., ch. 33, §§ 26, 27.]

SEC. **1135. Defacing posted lists or cards.** Any person who shall, prior to any election, wilfully destroy or deface any list of candidates posted in accordance with the provisions of this chapter, or who, during an election, shall wilfully deface, tear down, remove or destroy any card of instruction or specimen ballot printed and posted for the instruction of voters, or who shall, during an election, wilfully remove or destroy any of the supplies or conveniences furnished to enable voters to prepare their ballots, or shall wilfully hinder the voting of others, shall be punished by a fine of not less than ten nor more than one hundred dollars, or imprisonment for not less than ten nor more than thirty days, or by both fine and imprisonment. [Same, § 28.]

SEC. **1136. Forgery of papers or ballots.** Any person who shall falsely make, or wilfully destroy, any certificate of nomination or nomination papers, or any part thereof, or any letter of withdrawal, or file any certificate of nomination, or nomination papers, knowing the same or any part thereof to be falsely made, or suppress any certificate of nomination, or nomination papers, or any part thereof, which have been duly filed, or forge or falsely make the official indorsement on any ballot, or substitute therefor any spurious or counterfeit ballot, or make, use, circulate, or cause to be made or circulated as an official ballot, any paper printed in imitation or resemblance thereof, or wilfully destroy or deface any ballot, or wilfully delay the delivery of any ballots, shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the penitentiary not less than one nor more than five years, or by both fine and imprisonment. [Same, § 29.]

SEC. **1137. Official neglect or misconduct.** Any public officer upon whom a duty is imposed by this chapter, who shall wilfully neglect to perform such duty, or who shall wilfully perform it in such a way as to hinder the object thereof, or shall disclose to any one, except as may be ordered by any court of justice, the contents of any ballot, as to the manner in which the same may have been voted, shall be punished by a fine of not less than five nor more than one thousand dollars, or by imprisonment in the penitentiary for not less than one nor more than five years, or by both fine and imprisonment. [Same, § 30.]

CHAPTER 4.

OF THE CANVASS OF VOTES.

SECTION **1138. By judges.** When the poll is closed, the judges of election shall forthwith, and without adjournment, canvass the vote and ascertain the result of it, comparing the poll lists and correcting errors therein. Each clerk shall keep a tally list of the count. The canvass shall be public, and each candidate shall receive credit for the number of votes counted for him. The candidate receiving the highest number of votes, if for an office in that precinct alone, shall be declared elected, and judges shall issue certificates accordingly. [C.'73, §§ 622–3, 626; R., §§ 496–7, 501; C.'51, §§ 261–2, 266.]

SEC. **1139. Defective ballots.** If two or more marked ballots are so folded together as to appear to be cast as one, the judges shall indorse thereon "rejected as double." Such ballots shall not be counted, but shall be folded together and kept as hereinafter directed. Every ballot not counted shall be indorsed "defective" on the back thereof. Every ballot objected to by a judge or challenger, but counted, shall be indorsed on the back thereof "objected to," and there shall also be indorsed thereon, and signed by the judges, a statement as to how it was counted. All ballots indorsed as required by this section shall be inclosed and securely sealed in an envelope, on which the judges shall indorse "disputed ballots," with a statement of the precinct in which, and date of the election at which, they were cast, signed by the judges. [24 G. A., ch. 33, § 25; C.'73, § 623; R., § 497; C.'51, § 262.]

SEC. **1140. Excess of ballots.** If the ballots for any officer exceed the number of the voters in the poll lists, such fact shall be certified, with the number of the excess, in the return, and if the vote of the precinct where the error occurred would change the result as to a county officer, if the person appearing to be elected were deprived of so many votes, then the election shall be set aside as to him in that precinct, and a new election ordered therein; but no person residing in another precinct at the time of the general election shall be allowed to vote at such special election. If the error occurs in relation to a township officer, the trustees may order a new election or not, in their discretion. If the error be in relation to a district or state officer, it, with the number of the excess, shall be certified to the state canvassers, and if the error would affect the result, a new vote shall be ordered in the precinct where the error happened, and the canvass be suspended until such new vote is taken and returned. When there is a tie vote and such an excess, there shall be a new election. [C.'73, § 627; R., § 498; C.'51, § 263.]

The meaning of the word "error" as here used would be more accurately expressed by the use of the word "excess." The supervisors should not order a new election for a county officer unless it appears that there is an excess of ballots as to that office: *Rankin v. Pitkin*, 50–313.

Evidence as to a mistake in a count of the ballots as to one candidate is immaterial upon the question as to whether there was a mistake in the count as to another candidate: *McIntosh v. Livingston*, 41–219.

SEC. **1141. Return of ballots not voted.** Ballots not voted, or spoiled by voters while attempting to vote, shall be returned by the judges of election to the officer or authorities charged with their printing and distribution, and a receipt taken therefor, and they shall be preserved for six months. Such officer shall keep a record of the number of ballots delivered from each polling place, the name of the person to whom, and the time when, delivered, and enter upon such record the number and character of the ballots returned, with the time when and the person by whom they are returned. [24 G. A., ch. 33, § 25.]

SEC. **1142. Proclamation of result—preservation of ballots.** When the canvass is completed, the clerks shall announce to the judges the total number of votes received by each candidate. One or more of their number shall then proclaim in a loud voice the total number of votes received by each of the persons voted for, and the office for which he is designated, as announced by said clerks, and the number of votes for, and the number of votes against, any proposition which shall have been submitted to a vote of the people. Immediately after making such proclamation, and before separating, the judges shall fold in two folds, and string closely upon a single piece of flexible wire, all ballots which have been counted by them, except those indorsed "rejected as double," "defective," or "objected to," unite the ends of such wire in a firm knot, seal the knot in such a manner that it cannot be untied without breaking the seal, inclose the ballots so strung in an envelope, and securely seal such envelope. The judges shall at once return all the ballots to the officer from whom they were received, who shall carefully preserve them for six months. [Same; C.'73, § 630.]

Where the ballots are preserved as here required they are *prima facie* admissible in evidence in a contest as to the result of the election, but the opposite party may overcome this *prima facie* showing by proof of the alteration of the ballots after they were counted and it is not necessary that such alteration be pleaded in the proceedings under the contest: *Ferguson v. Henry*, 64 N. W., 292.

SEC. **1143. Destruction of ballots.** The parties to any contested election shall have the right, in open session of the court or tribunal trying the contest, and in the presence of the officer having them in custody, to have the ballots opened, and all errors of the judges in counting or refusing to count ballots corrected by such court or tribunal. If at the expiration of six months no contest is pending, the officer having the ballots in custody, without opening the package in which they have been inclosed, shall, in the presence of two electors to be designated by the chairman of the board of supervisors, one each from the two leading political parties, or, in municipal elections, by the mayor of the city or town in which they are kept, destroy the same by burning. If a contest is pending, the ballots shall be kept until the same is finally determined, and then so destroyed. [24 G. A., ch. 33, § 25.]

SEC. **1144. Return of board.** A return shall be made in each poll-book, giving, in words written at length, the whole number of ballots cast for each officer, except those rejected, the name of each person voted for, and the number of votes given to each person for each different office; which return shall be signed by the judges, and be substantially as follows:

At an election at the house of.....in.....township, or in..... precinct of .....township, in.....county, state of Iowa, on the..... day of .....A. D. ....., there were..... ....ballots cast for the office of (governor), of which

A..... B..... had .....votes.
C.....D..... had .....votes.

(and in the same manner for any other officer.)

A true return.

L.....M.....
N.....O..... } Judges of Election.
P.....Q.....

Attest:

R..... S.....
T..... U..... } Clerks of Election.

[19 G. A., ch. 163, § 14; C.'73, §§ 628, 661; R., §§ 502, 537; C.'51, §§ 261, 303.]

It is not fatal to the certificate that it does not contain full particulars of time and place. The caption and the certificate may be taken together: *Dishon v. Smith*, 10–212.

While the canvassers cannot adjudicate upon the sufficiency of returns, where the case comes into a court of justice the court or jury trying it may go behind the returns and even behind the ballot-box in some cases: *Ibid.*

SEC. **1145. Poll-books returned and preserved.** One of the poll-books containing such return, with the register of election attached thereto, shall be delivered by one of the judges of election, within two days, to the county

auditor. In township precincts, the other of said poll-books, with the register of election attached, shall be delivered by one of the judges of election to the township clerk. In city precincts, the other of said poll-books, with register of election attached, shall be delivered by one of the judges of election to the city clerk. In town elections, the other of said poll-books, with register of election attached, shall be delivered by one of the judges of election to the town clerk. In each case, the receiving officer shall file said books, and the registry books and lists and other papers pertaining to registration, in his office, and preserve the same for eighteen months, or until the determination of any contest then pending, after which they shall be destroyed. [22 G. A., ch. 48, § 6; C. '73, §§ 503, 629; R., §§ 333, 503, 1131; C. '51, § 268.]

SEC. **1146. Canvass of returns from precincts.** If there are two or more precincts in any township, city or ward, the trustees and clerk, or the mayor and clerk, as the case may be, shall, on the day after the election, meet and canvass the returns from all precincts for votes cast for officers to be elected by such township, city or ward. The returns shall be opened in the presence of all the canvassers, and an abstract of votes made and signed by them, and the result declared, and a certificate of election signed by them given the candidates elected. If the mayor shall have been a candidate at such election, a justice of the peace of the county, selected by the clerk, shall act with him in making the canvass. [C. '73, §§ 502–3, 631; R., § 1131.]

The board of supervisors and not the township trustees have authority to canvass the ballots for justice of the peace (see § 1150): *Lynch v. Vermazen*, 61–76.

SEC. **1147. Township, city and town officers notified.** Notice of the result of the election of the township, city and town officers shall be given by the township, city or town clerk, as the case may be, within five days thereafter, by posting, in three public places in the township, town or city, notices containing the names of persons declared elected, and requiring each of them to appear before the proper officer and qualify according to law. [C. '73, § 633; R., § 548; C. '51, § 317.]

SEC. **1148. Returns from precincts secured.** If the returns from all the precincts are not made to the county auditor by the third day after the election, on the fourth he shall send messengers to obtain such of them as are wanting, the expense of which shall be paid by the county. [C. '73, § 634; R., § 505; C. '51, § 270.]

SEC. **1149. Canvass by board of supervisors.** At their meeting on the Monday after the general election, at twelve o'clock, noon, the board of supervisors shall open and canvass the returns, and make abstracts, stating, in words written at length, the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office. [19 G. A., ch. 163, § 14; C. '73, §§ 632, 662; R., §§ 335, 506, 538–9; C. '51, §§ 271, 304–5.]

Returns: The action of the board in canvassing returns is ministerial rather than judicial. Nor is there any discretion to be exercised. The board has no authority to judge of the validity of returns or of votes. Its duty is to receive the returns and count them, provided they are sufficiently proved to be such, although irregular. (So *held* in regard to the canvass of votes at special election as to the relocation of a county seat under 5 G. A., ch. 46): *State ex rel. v. County Judge*, 7–186; *State v. Bailey*, 7–390.

The canvassers may reject improper returns, such as are not properly signed, or have not been in the proper custody, or have been mutilated or changed; and after they have declared the result they may, by *mandamus*, be compelled to re-assemble and re-canvass the vote to correct a mistake in improperly rejecting returns: *Price v. Harned*, 1–473; or in counting improper returns: *State ex rel. v. County Judge*, 13–139.

Where an officer was authorized to examine the returns of an election for a county seat, and, on being satisfied that either place voted for had a greater number of votes than the other, the record of such result was to be made, *held*, that he had no authority to inquire into the legality of the votes cast, but was bound by the returns as made to him: *United States ex rel. v. Commissioners*, Mor., 31.

In a case involving the validity of votes cast at an election the court is not precluded by the return, but may receive evidence as to the compliance with the law on the

part of the officers of election, and may therefore receive evidence that the officers were duly sworn, although such fact does not appear on the face of the return: *Dishon v. Smith*, 10–212.

Where two corresponding returns were made out by the judges of election, one of which was on its face informal and unauthenticated, and the other was formal and on its face duly authenticated, *held*, that the county board of canvassers could not refuse to receive evidence *aliunde* to establish the former, and yet receive such evidence to defeat the latter, but must count the votes as returned: *State v. Cavers*, 22–343.

Mandamus is the proper remedy to compel the canvassers to declare elected and certify to the election of the party receiving the highest number of votes: *Bradfield v. Wart*, 36–291.

A writ of *mandamus* will not issue to compel a canvassing board to re-assemble and canvass the return of the votes for an office and declare the candidate receiving a majority of the votes cast therefor to be elected, after the expiration of the term for which he was elected: *Potts v. Tuttle*, 79–253.

Where the canvass of votes at an election was to be made by the county judge calling to his assistance two justices of the peace, and an action by *mandamus* was instituted to compel a recanvass, *held*, that such *mandamus* properly issued to the judge alone and not to the board as originally constituted: *State ex rel. v. County Judge*, 7–186; *Rice v. Smith*, 9–570.

Where a writ of *mandamus* was granted to compel a re-assembling of the canvassing board of the county by the county judge for the purpose of recanvassing the returns, *held*, that the primary writ should issue to such county judge in his individual name, and that upon failure of the other members of the board summoned by him, in pursuance of law, to constitute such board and canvass such returns to comply with the writ, an *alias* writ might be directed to such other members and a proper canvass compelled: *State ex rel. v. Smith*, 9–334.

The duties imposed upon the members of the board of supervisors in relation to canvassing votes cast at elections may be enforced by *mandamus*, but an action of damages for their non-performance will not lie: *Jayne v. Drorbaugh*, 63–711.

Injunction: Although *mandamus* may have issued to compel a board of canvassers to count and record the votes contained in certain returns, yet an injunction restraining any action under the count as thus recorded will not be improper or inconsistent with the *mandamus* if it appears that the votes which the board is directed to canvass should not be counted owing to matters existing outside of the returns: *Dishon v. Smith*, 10–212.

Certificate: It is not fatal to the certificate that it does not contain full particulars as to the time and place of the election. The caption and the certificate may be taken together: *Ibid.*

Where it is required that a certificate of the election, at which a railroad aid tax was voted, should be certified by the clerks of the election, *held*, that a certificate signed by the judges and attested by the clerks was sufficient: *Casady v. Lowry*, 49–523.

The twenty days for filing statement of contest as to the election of a county officer commences to run from the date when the board of supervisors determined the result as here provided and not from the date of the counting of the ballots by the judges of election: *Clark v. Tracy*, 64 N. W., 290; *Ferguson v. Henry*, 64 N. W., 292.

SEC. **1150. Abstracts.** The abstract of the votes for each of the following classes shall be made on a different sheet:

1. Presidential electors;
2. Governor and lieutenant-governor;
3. All state officers not otherwise provided for;
4. Representatives in congress;
5. Senators and representatives in the general assembly for the county alone;
6. Senators and representatives in the general assembly by districts comprising more than one county;
7. Judges of the district court;
8. County officers. [C.'73, §§ 636, 662; R., §§ 507, 538–9; C.'51, §§ 272, 304–5.]

SEC. **1151. For congressmen, electors and state and district officers.** Abstracts of all the votes cast for congressmen, presidential electors, state or judicial district officers, shall be made in duplicate, and signed by the board of county canvassers, one of which shall be forwarded to the secretary of state, and the other filed by the county auditor. [C.'73, §§ 637, 662; R., §§ 507, 538–9; C.'51, §§ 272, 304–5.]

SEC. **1152. Declaration of election.** Each abstract of the votes for such officers as the county alone elects shall contain a declaration of whom the canvassers determine to be elected, except when two or more persons receive an equal and the greatest number of votes. [C.'73, § 639; R., § 509; C.'51, § 275.]

SEC. **1153. For senator or representative for district.** When a senator or representative in the general assembly is elected by a district composed of two or more counties, the several boards of canvassers therein shall, after the canvass of the vote, make and certify as many copies of the abstract of the votes for such office as there are counties in such senatorial or representative district, and one additional, and the auditor in each county shall seal up, direct and transmit one copy to the secretary of state, and one to the auditor of each other county in the district, who shall file the same in their respective offices, and he shall preserve one in his office. [C.'73, § 646.]

SEC. **1154. Returns filed.** When the canvass is concluded, the board shall deliver the original returns to the auditor, who shall file the same, and record each of the abstracts above mentioned in the election book. [C.'73, § 640; R., §§ 335, 510; C.'51, § 276.]

SEC. **1155. Certificate of election.** When any person is thus declared elected, there shall be delivered him a certificate of election, under the official seal of the county, in substance as follows:

STATE OF IOWA, }
.....County. }

At an election holden in said county on the.....day of....., A. D. ....., A.... B.... was elected to the office of.....of the said county for the term of.....years from the.....day of....., A. D. .....(or if he was elected to fill a vacancy, say for the residue of the term ending on the.....day of....., A. D.....), and until his successor is elected and qualified.

C..... D.....,
President of Board of Canvassers.

Witness, E..... F....., County Auditor (clerk).

which certificate shall be presumptive evidence of his election and qualification. [C.'73, § 641; R., §§ 511, 514; C.'51, § 277.]

SEC. **1156. Of senators and representatives.** The certificate of election of senators and representatives shall be in duplicate, and substantially in the form given, with such changes only as are necessary, one of which shall be delivered to the person entitled thereto, and the other forwarded to the secretary of state. [C.'73, § 642; R., § 512; C.'51, § 278.]

SEC. **1157. Abstracts forwarded to secretary of state.** Within ten days after the election, one of the abstracts of votes for governor and lieutenant-governor shall be sealed up by the auditor, indorsed "Abstract of votes for governor and lieutenant-governor from.....county (naming the county)," and be by him forwarded to the speaker of the house of representatives; those for presidential electors, representatives in congress, and all other state and district officers, shall be separately sealed up, indorsed in like manner, with necessary changes, and then all placed in one package and forwarded to the secretary of state. Abstracts of votes cast at special elections to fill vacancies in office shall be forwarded as soon as canvassed. [C.'73, §§ 645, 662; R., §§ 517, 518, 538–9; C.'51, §§ 283–4, 304–5.]

SEC. **1158. Returns procured from counties.** If the abstracts from any county are not received at the office of the secretary of state within fifteen days after the day of election, he shall send a messenger to the auditor of such county, who shall furnish him with them, or, if they have been sent, with a copy thereof, and he shall return them to the secretary without delay. [C.'73, §§ 649, 662; R., §§ 519, 538–9; C.'51, §§ 285, 304–5.]

SEC. **1159. Abstracts opened.** The abstracts received by the secretary of state shall be kept by him until the day fixed for their opening, and shall then be opened only in the presence of the state board of canvassers. [C.'73, § 650; R., § 520; C.'51, § 286.]

SEC. **1160. State board of canvassers.** The executive council constitutes a board of canvassers for the state, but no member thereof shall

take part in canvassing the votes for any office for which he himself is a candidate. [C. '73, § 651; R., § 521; C. '51, § 287.]

SEC. **1161. Time of state canvass.** On the twentieth day after the day of election, the board of state canvassers shall open and examine all of the returns. If they are not received from all the counties, it may adjourn, not exceeding twenty days, for the purpose of obtaining them, and, when received, shall proceed with the canvass. Returns of elections to fill vacancies in office shall be canvassed as soon as received. [C. '73, §§ 652, 663; R., §§ 522, 540; C. '51, §§ 288, 306.]

SEC. **1162. Canvass by state board.** The board of state canvassers shall open the abstracts for state senators and representatives transmitted to the secretary of state, and canvass the votes therein returned, at the time and in the manner of canvassing the state vote, or at such other time as they may fix, at least twenty days prior to the time fixed by law for the meeting of the next general assembly, and in case of a special election, within five days after the receipt of such abstracts, and shall immediately make out, certify, and transmit by mail to the county auditor of each county in the district, to be by him filed in his office, a copy of the abstract of such canvass required in the next section, which shall be recorded by him in the election book. [C. '73, § 647.]

SEC. **1163. Abstract of result.** It shall make an abstract stating, in words written at length, the number of ballots cast for each office, the names of all the persons voted for, for what office, the number of votes each received, and whom they declare to be elected; which abstract shall be signed by the canvassers in their official capacity and as state canvassers, and have the seal of the state affixed. [19 G. A., ch. 163, § 14; C. '73, §§ 653, 663; R., §§ 523, 540; C. '51, §§ 289, 306.]

SEC. **1164. Record of canvass.** The secretary of state shall file the abstracts when received, and record the same in a book to be kept by him for recording the result of state elections, to be known as the state election book. [C. '73, § 654; R., § 524; C. '51, § 290.]

SEC. **1165. Certificate of election.** Each person declared elected by the state board of canvassers shall receive a certificate thereof, signed by the governor, or, in his absence, by the secretary of state, with the seal of state affixed, attested by the other canvassers, to be in substance as follows:

STATE OF IOWA:

To A..... B....., Greeting: It is hereby certified that, at an election holden on the.....day of....., you were elected to the office of.....of said state, for the term of.....years, from and after the.....day of..... (or if to fill a vacancy, for the residue of the term, ending on the.....day of.....). Given at the seat of government this.....day of.....

If the governor be absent, the certificate of the election of the secretary of state shall be signed by the auditor. The certificate to members of the legislature shall describe, by the number, the district from which the member is elected. [C. '73, §§ 655, 657; R., §§ 524, 527; C. '51, §§ 290, 293.]

SEC. **1166. Representative in congress.** The certificate of the election of a representative in congress shall be signed by the governor, with the seal of the state affixed, and be countersigned by the secretary of state. [C. '73, § 658; R., § 528; C. '51, § 291.]

SEC. **1167. Certificates mailed.** The secretary of state shall deliver or mail certificates of election to the persons declared elected. [C. '73, §§ 648, 656, 658; R., §§ 526, 528; C. '51, §§ 291–2.]

SEC. **1168. Certificate to electors.** The governor, at the expiration of ten days from the completed canvass, shall issue to each presidential elector declared elected a certificate of his election, under his hand and the seal of state, the same, in substance, as required in other cases, and shall notify him to attend at the seat of government at noon on the second

Monday in January following his election, reporting his attendance to him. If there be a contest of the election, no certificate shall issue until it is determined. [22 G. A., ch. 50; C. '73, § 665; R., § 542; C. '51, § 308.]

SEC. **1169. Tie vote.** If more than the requisite number of persons, including presidential electors, are found to have an equal and the highest number of votes, the election of one of them shall be determined by lot. The name of each of such candidates shall be written on separate pieces of paper, as nearly uniform in size and material as possible, and placed in a receptacle so that the names cannot be seen. In the presence of the board of canvassers, one of them shall publicly draw one of such names, and such person shall be declared elected. The result of such drawing shall be entered upon the abstract of votes and duly recorded, and a certificate of election issued to such person, as provided in this chapter. [C. '73, §§ 632, 643–4, 664; R., §§ 515, 516, 541, 547; C. '51, §§ 281–2, 307, 316.]

SEC. **1170. Canvass public—result determined.** All canvasses of returns shall be public, and the persons having the greatest number of votes shall be declared elected. [C. '73, §§ 623, 638, 664; R., §§ 497, 508, 541; C. '51, §§ 262, 273, 307.]

SEC. **1171. Special elections—canvass and certificate.** In case a special election has been held, the board of county canvassers shall meet at one o'clock in the afternoon of the second day thereafter, and canvass the votes cast thereat. The county auditor, as soon as the canvass is completed, shall transmit to the secretary of state an abstract of the votes so canvassed, and the state board, within five days after receiving such abstracts, shall canvass the returns. A certificate of election shall be issued by the county or state board of canvassers, as in other cases. All the provisions regulating elections, obtaining returns, and canvass of votes at general elections, except as to time, shall apply to special elections. [C. '73, §§ 791–3; R., § 673.]

SEC. **1172. Messengers for election returns.** Messengers sent for the returns of elections shall be paid from the state or county treasury, as the case may be, ten cents a mile going and returning. [C. '73, § 3827; R., § 529; C. '51, § 296.]

CHAPTER 5.

OF PRESIDENTIAL ELECTORS.

SECTION **1173. Election of.** At the general election in the years of the presidential election, or at such other times as the congress of the United States may direct, there shall be elected one person from each congressional district into which the state is divided, as elector of president and vice-president, and two from the state at large, no one of whom shall be a person holding the office of senator or representative in congress, or any office of trust or profit under the United States. Such election shall be conducted, and the canvass of the votes and the returns thereof made, in the same manner as for state officers and representatives in congress. [16 G. A., ch. 23; C. '73, §§ 659, 660; R., §§ 535–6; C. '51, §§ 301–2.]

See U. S. Const., art. II, § 1.

SEC. **1174. Meeting—certificate.** The presidential electors shall meet in the capitol, at the seat of government, at noon of the second Monday in January after their election, or so soon thereafter as practicable. If, at the time of such meeting, any elector for any cause is absent, those present shall at once proceed to elect, from the citizens of the state, a substitute elector or electors, and certify the choice so made to the governor, and he shall immediately cause the person or persons so selected to be notified thereof. [22 G. A., ch. 50; C. '73, §§ 665–7; R., §§ 542–4; C. '51, §§ 308–10.]

SEC. **1175. Certificate of governor.** When so met, the said electors shall proceed, in the manner pointed out by law, with the election and the governor shall duly certify the result thereof, under the seal of the state, to the United States secretary of state, and as required by act of congress relating to such elections. [22 G. A., ch. 50; C. '73, § 668; R., § 545; C. '51, § 311.]

SEC. **1176. Compensation.** The electors shall each receive a compensation of five dollars for every day's attendance, and the same mileage as members of the general assembly. [C. '73, § 669; R., 546; C. '51, § 312.]

CHAPTER 6.

OF QUALIFICATION FOR OFFICE.

SECTION **1177. Oath and bond.** The several officers, before entering upon their duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the first Monday in January following their election, but city and town officers shall so qualify within ten days after their election has been declared by the board of canvassers. When, on account of sickness or the inclement state of the weather or other unavoidable casualty, an officer has been prevented from qualifying within the prescribed time, he may do so within ten days after the time herein fixed, and in case of a contest, within ten days after the decision. [21 G. A., ch. 54, § 1; C. '73, §§ 670, 685–6; R., §§ 549, 564; C. '51, §§ 319, 334.]

Where an officer elected is prevented from qualifying by an injunction and is competent to qualify within the time when he may be reasonably required to do so in view of such injunction, he is entitled to the office although he may have been subject to a disqualification at the time of his election and at the time when but for such injunction, he would have been required to qualify: *State ex rel. v. Van Beek*, 87–569.

SEC. **1178. Governor and lieutenant-governor.** The governor and lieutenant-governor shall each qualify within ten days after the result of the election shall be declared by the general assembly, by taking an oath in its presence, in joint convention assembled, administered by a judge of the supreme court, to the effect that he will support the constitution of the United States and the constitution of the state of Iowa, and will faithfully and impartially, and to the best of his knowledge and ability, discharge the duties incumbent upon him as governor, or lieutenant-governor of this state. [C. '73, §§ 671, 685; R., §§ 550, 564; C. '51, §§ 320, 334.]

SEC. **1179. Judges.** All judges of courts of record shall qualify by the first day of January following the election, by taking and subscribing an oath to the effect that they will support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection, or hope of reward, they will, to the best of their knowledge and ability, administer justice according to the law, equally to the rich and the poor. [C. '73, §§ 673, 685; R., §§ 552, 564; C. '51, §§ 322, 334.]

SEC. **1180. Other officers.** All other civil officers, elected by the people or appointed to any civil office, unless otherwise provided, shall take and subscribe an oath substantially as follows:

I,....., do solemnly swear that I will support the constitution of the United States and the constitution of the state of Iowa, and that I will faithfully and impartially, to the best of my ability, discharge all the duties of the office of.....(naming it) in (naming the township, town, city, county, district or state, as the case may be), as now or hereafter required by law. [C. '73, §§ 504, 514, 675–6; R., §§ 561–2, 1084, 1132; C. '51, §§ 331–2.]

SEC. **1181. Oath on bond.** Every civil officer who is required to give bond shall take and subscribe the oath provided for in the preceding sec-

tion, on the back of his bond, or on a paper attached thereto, to be certified by the officer administering it. [C. '73, § 675; R., § 561; C. '51, § 331.]

SEC. **1182. Bond not required.** The governor, lieutenant-governor, members of the general assembly, judges of courts, county supervisors, township trustees, aldermen, and councilmen of cities and towns, are not required to give bond. [C. '73, § 674; R., § 550, 4; C. '51, §§ 323–4.]

SEC. **1183. Bond required.** All other civil officers, except as especially otherwise provided, shall give bond with the conditions, in substance, as follows:

That as.....(naming the office), in.....(city, town, township, county or state of Iowa), he will render a true account of his office and of his doings therein to the proper authority, when required thereby or by law; that he will promptly pay over to the officer or person entitled thereto all moneys which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands at the termination of his office; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities, or other property appertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud or oppression, discharge all duties now or hereafter required of his office by law; and the sureties on such bond shall be liable for all money or public property that may come into the hands of such officer at any time during his possession of such office. [17 G. A., ch. 20, § 2; 16 G. A., ch. 33, § 2; C. '73, §§ 504, 514, 674; R., §§ 554, 1084, 1132; C. '51, §§ 323–4.]

Liability on bond: A bond given by an officer when not required by statute, where no benefit or advantage accrues to him by reason of its execution, cannot be enforced: *State v. Heisey*, 56–404.

The county treasurer is only held to a reasonable degree of care and diligence, and if, notwithstanding such care, moneys of the county are stolen from him, he is not liable: *Ross v. Hatch*, 5–149.

But where a county treasurer deposited the county funds in a bank, by the failure of which they were lost, *held*, that he was liable therefor, although no suitable place was in fact provided by the county for keeping the funds: *Lowry v. Polk County*, 51–50.

Where, subsequently to the giving of a treasurer's bond, he was by law made custodian of the school fund, *held*, that his sureties were liable for his default in the management of that fund: *Mahaska County v. Ingalls*, 14–170.

The remedy upon the bond of a defaulting officer is not exclusive, but the county may pursue its property in the hands of one who has it wrongfully, or recover its value from any one who has converted it to his own use: *Taylor County v. Standley*, 79–666.

As to liability of treasurers of school districts, see notes to § 2760.

Sureties: The sureties of a sheriff are liable for trespass committed by him in attempting to discharge the duties of his office: *Charles v. Haskins*, 11–329.

The sureties on the official bond of a constable are liable for damages resulting from an unauthorized sale by him of property exempt from execution: *Strunk v. Ocheltree*, 11–158; also, for unlawful acts in making an arrest in excess of his duty: *Clancy v. Kenworthy*, 74–740.

Where an officer assumes to act under a warrant or order which is unauthorized, and his acts under which are illegal, his sureties will be liable for damages sustained: *Tieman v. Haw*, 49–312.

Sureties on the coroner's bond are liable for his acts while serving as *ex officio* sheriff: *Ibid.*

A justice of the peace and his sureties are liable on his bond for his failure to deliver to his successor or to the owner notes placed in his hands as justice for collection: *Latham v. Brown*, 16–118; *Bessinger v. Dickerson*, 20–260.

Sureties upon a new bond are not liable for moneys coming into the principal's hands before the execution of such bond: *Ibid.*

As between sureties on different bonds, the liability for money coming into the hands of the officer is not dependent upon the time of making demand upon him therefor by the person entitled thereto, and his refusal to pay; but the proper inquiry is, when was the money received: *Thompson v. Dickerson*, 22–360.

Sureties are holden only for the term for which their bond was given, even though the bond does not express the limit of such term. The fact that the officer holds over beyond his term on account of failure to fill his office will not extend the liability of the sureties beyond the original term of office: *Wapello County v. Bigham*, 10–39.

Sureties on a treasurer's bond are not liable for money received prior to its execution, unless the defalcation took place after that time: *Warren County v. Ward*, 21–84.

The sureties for each term are liable for the deficit of that term, and the officer cannot during one term pay off deficiencies of a preceding term so as to throw the entire de-

ficiency on the sureties on his bond for the second term: *Myers v. Farmer*, 52–20.

Sureties on an additional bond are not liable for any default occurring before they became sureties, unless the bond is so specially drawn as to cover past as well prospective delinquencies: *Bessinger v. Dickerson*, 20–260.

The sureties in a new or additional bond of a county treasurer, which is not retrospective in its terms, will be bound for public moneys in the hands of their principal at the time of its execution, although a previous bond then existed with different sureties; but not for past derelictions of duty or misconduct: *Mahaska County v. Ingalls*, 16–81.

Sureties are not liable for money received by the officer and appropriated to his own use or otherwise disposed of prior to the execution of the bond on which they are sureties, so that at the time such bond is executed the money is not in the hands of the officer: *Independent School Dist. v. McDonald*, 39–564.

In an action on the official bond of a county treasurer, *held*, that it sufficiently appeared that the defalcation for which recovery was sought occurred subsequently to the giving of the bond sued on: *Carroll County v. Ruggles*, 69–269.

Where it appeared that at the semi-annual settlement preceding the giving of the bond there was no deficiency in the treasurer's account, *held*, that the sureties of the treasurer, insisting that a defalcation existed at the time of the giving of the second bond, had the burden of proving such fact: *Ibid.*

Where a holding-over officer executed a bond with sureties for the entire term under the mistaken belief that he was entitled to hold for the entire term, but at the next election he was duly elected to fill the vacancy, *held*, that the sureties on the first bond were not co-sureties with those on the bond given in pursuance of the last election for the period subsequent to such election, and could not be compelled to contribute for a defalcation occurring during that time: *Boone County v. Jones*, 58–373.

Sureties on the bond of a public officer are not liable for defalcations occurring prior to the execution of the bond upon which they become sureties: *Held v. Bagwell*, 58–139.

The sureties on an official bond will not be relieved of liability on the ground that blanks, existing in the bond at the time of its signature by them, were subsequently filled, if it appears that such bond was executed by them in the expectation that such blanks would be properly filled, which was afterwards done: *Wright v. Harris*, 31–272.

Where an official bond to which the names of several sureties are procured is signed by them, while the blank in which the names of the sureties are to be entered remains unfilled, and such blank is afterwards filled with the names of those who actually sign the bond, and it is delivered in this form, the sureties cannot avoid it by proof that they signed it upon condition that before delivery other names were to be procured as sureties which were not in fact procured: *Carroll County v. Ruggles*, 69–269.

The fact that the name of one of the persons signing as surety is not filled into the blank left for that purpose will not charge the officer accepting the bond with notice of any condition affecting the liability of other sureties: *Ibid.*

A bond signed by a surety will be binding upon him although his name is not filled into the blank left for that purpose in the body of the bond: *Moore v. McKinley*, 60–367.

Where persons, intending to become sureties for an officer upon his bond, signed different blank bonds, and afterward upon the amount of the bond which was required of him being determined he filled up one of such blanks with the proper amount, *held*, that the sureties thereby became bound, they having constituted him their agent and vested him with absolute power to do all that was necessary to make and deliver a binding official bond: *Lee County v. Welsing*, 70–198.

Where the sureties on the bond leave it with a third person with the direction that it shall be delivered only on certain conditions, such as securing additional sureties, etc., but such third person delivers the bond to the principal without the performance of such condition, and the principal delivers it to the board who approve it without knowledge of the conditions, the sureties are bound: *Taylor County v. King*, 73–153.

Where an officer being elected and failing to qualify was afterwards appointed to the same position, and filed a bond which had been previously prepared and signed to enable him to qualify under his election, *held*, that the sureties on such bond were not liable thereunder: *Winneshiek County v. Maynard*, 44–15.

In an action against the sureties it is not necessary to aver and prove in the first instance that they have been approved as required by law: *State v. Fredericks*, 8–553.

The fact that judgment is recovered against the officer on his bond will not bar the right to sue the sureties thereon. The action against principal and sureties may be joint, but need not necessarily be so: *Charles v. Haskins*, 11–329.

Where the estate of the principal obligor is insolvent there is no obligation upon the county for whose benefit the bond is given to file a claim for the amount due on the bond against the estate of the deceased obligor, but action may be brought at once against the sureties: *Pottawattamie County v. Taylor*, 47–520.

Where an officer is authorized to receive money in his official capacity he will be liable on his bond for failure to pay the same over to the parties entitled thereto: *Wright v. Harris*, 31–272.

Money received by the clerk of a court upon a judgment rendered thereunder comes into his hands by virtue of his office and his sureties are liable on his bond for failure to pay such money over to the proper parties: *Morgan v. Long*, 29–434.

The clerk of a court is liable upon his official bonds for money paid into court as a

tender and transferred to him by his predecessor, and the question whether the money so paid was legally tendered or not is immaterial: *Billings v. Teeling*, 40–607.

The sureties of a clerk are liable under his bond for the proceeds of a sale of property in partition proceedings which are by order of court deposited with the clerk to await proof of ownership: *Walters-Cates v. Wilkinson*, 92–129.

Under a statute directing redemption from execution sale to be made by payment of money to the clerk, *held*, that the sureties on the bond of the sheriff were not liable for money paid to him for the purpose of effecting redemption: *Sample v. Davis*, 4 G. Gr., 117.

The county treasurer and his sureties are liable on his bond for money received by him from taxpayers as part payment for taxes: *Warren County v. Ward*, 21–84.

Where an officer executed a bond for the disposition of certain public money for a specified purpose, *held*, that the sureties were liable on such bond, although the money had been paid over to him for that purpose in violation of law, that is, contrary to the requirements of law, the purpose for which it was to be used being lawful: *Muscatine County v. Carpenter*, 33–41.

Judgment and satisfaction thereof for official delinquencies prior to the execution, during the same term of office, of a second bond, will not bar recovery upon such second bond for delinquencies occurring after its execution, and the satisfaction will not bar contribution by sureties on the second bond against sureties on the first: *Warren County v. Ward*, 21–84.

The sureties on the bond of an officer who is re-elected and serves a second term are liable for balance of funds on hand at the beginning of such second term, but they are not precluded by a settlement as to the amount on hand when such settlement is made without the actual production of the money and where the settlement was made on the basis of a draft representing funds on hand which was false, being simply issued for the occasion and the officer having the authority to make the settlement had reason to suspect that the officer did not have the necessary funds, *held*, that such settlement would not preclude the sureties on the bond for the second term from showing that the defalcation had occurred during the prior term: *District Township v. Morris*, 91–198.

As to the effect of a settlement in case of an officer holding over, see notes to § 1193.

SEC. **1184. Penalty of bond.** The bond of the secretary of state shall be in the penal sum of not less than ten thousand dollars; the auditor of state in the sum of not less than ten thousand dollars; the treasurer of state in the sum of not less than three hundred thousand dollars; the state printer in the sum of not less than five thousand dollars; the state binder in the sum of not less than two thousand dollars; the attorney-general in the sum of not less than ten thousand dollars; each railroad commissioner in the sum of not less than five thousand dollars; the reporter of the supreme court in the sum of not less than ten thousand dollars; the clerk of the supreme court in the sum of not less than ten thousand dollars; and the superintendent of public instruction in the sum of not less than two thousand dollars. [22 G. A., ch. 29, § 2; 17 G. A., ch. 77, § 2; C. '73, § 678; R., §§ 128, 135, 165, 377, 556, 557; C. '51, §§ 326–7.]

SEC. **1185. County and municipal officers.** The bonds of the following county officers, viz., treasurers, clerks of the district courts, county attorneys, recorders, coroners, surveyors, auditors, superintendents of schools, sheriffs, justices of the peace and constables, and city, town and township assessors, shall each be in a penal sum to be fixed by the board of supervisors; but those of treasurers, clerks of the district courts, county auditors, sheriffs and county attorneys shall not be in a less sum than five thousand dollars each, and those of justices and constables, not less than five hundred dollars each. The bonds of all municipal officers who are required to give bonds shall each be in such penal sum as may be provided by law, or as the council shall from time to time prescribe by ordinance. [18 G. A., ch. 201, § 1; 17 G. A., ch. 20, § 2; 16 G. A., ch. 33, § 2; C. '73, §§ 390, 504, 514, 678; R., §§ 128, 135, 165, 377, 556–7, 1084, 1132; C. '51, §§ 326–7.]

SEC. **1186. Deputies.** Deputies of state, county, city and town officers, who are required to give bond, shall give bond in such amounts as may be fixed by the governor, board of supervisors, or the council, as the case may be, with sureties as required for the bonds of their principals, which shall be approved as the principal s bond, and filed with the same officer. But the giving of such bond shall not relieve the principal from liability for the official acts of the deputy. [22 G. A., ch. 36, § 1; 19 G. A., ch. 117; C. 73, § 766; R., §§ 421, 643, 645; C. '51, §§ 411, 414.]

SEC. **1187. Sureties.** No bond in this chapter required, except as hereinafter specified, shall be executed with less than two sureties, each of whom shall be a freeholder of the state; and the bond of the state printer with not less than three, and that of the state or county treasurer with not less than four, possessed of like qualifications. Any association or incorporation which does the business of insuring the fidelity of others, and which has authority by law to do business in this state, shall be accepted as surety upon bonds required by law, with the same force and effect as sureties above qualified. [C. '73, § 679; R., §§ 135, 165, 558, 559; C. '51, §§ 328-9.]

As to fidelity company being accepted as surety, see §§ 359, 360. As to liability of sureties, see notes to § 1183.

SEC. **1188. Form—approval.** All official bonds shall run to the state, and be for the use and benefit of any corporation, public or private, or person injured or sustaining loss, with a right of action in the name of the state for its or his use. Those given by state and district officers shall be approved by the governor; those of county officers, township clerk and assessor, by the board of supervisors; those of other township officers by the township clerk; and those of city officers by the mayor, or as may be provided by ordinance. All bonds shall be approved or disapproved within five days after their presentation for that purpose, and indorsed, in case of approval, to that effect and filed, and, unless otherwise provided by law, kept in the office of the approving officer. [C. '73, §§ 677, 680; R., §§ 367, 555, 560; C. '51, §§ 325, 330.]

Whether the state can maintain an action on the county treasurer's bond, *quœre*: *State v. Henderson*, 40–242.

The members of the board of supervisors are not liable for damages resulting from the approval of insufficient bond, when their action results from an honest mistake or error of judgment, whether of law or fact, but they are personally liable for neglect, carelessness and official misconduct in such matters: *Wasson v. Mitchell*, 18–153.

The provisions of § 1193 that the bond of an officer who is re-elected shall not be approved until such officer qualifies and has accounted for public funds and property which have been under his control imposes upon the officer authorized to approve the bond a duty to the public only, and neglect thereof will not render him liable to sureties on the new bond: *Held v. Bagwell*, 58–139; *District T'p v. McCord*, 54–346.

It is not necessary in an action on the bond to aver and prove in the first instance that the sureties have been approved as required by law: *State v. Fredericks*, 8–553.

The fact that approval of an official bond by the proper officer does not appear of record, or that it does not appear that the proper certificate was made as required by law that the officer had properly accounted for funds in his hands during a preceding term, cannot be urged as a defense to the bond: *Boone County v. Jones*, 54–699.

The board of supervisors being vested with the power to require an officer to give a bond or additional bond when deemed requisite, a bond required of an officer holding over, there being a doubt as to whether he was holding over by virtue of his former election and was still liable on his old bond, or was holding by virtue of a new election in pursuance of which the bond was required, *held* valid, irrespective of whether the new election was valid or not: *Ibid.*

Want of approval of a bond of a county officer by the board of supervisors does not render the bond invalid: *Moore v. McKinley*, 60–367.

SEC. **1189. Approval by county auditor.** When any official bond shall be presented after the final adjournment of the January session of the board of supervisors, except those of the county auditor and treasurer, the auditor may approve the same, reporting his actions in the premises to the board at its next session, and, unless disapproved by it, such bond shall continue in force as though approved by the board in the first instance; if disapproved, the new bond must be given within five days from the date of such decision, but this old bond shall stand good for all acts done up to the time of the approval of the new bond. [C. '73, § 680; R., §§ 367, 560; C. '51, § 330.]

SEC. **1190. Failure of board to approve—application to judge.** If the board of supervisors refuse or neglect to approve the bond of any county officer, he may within five days thereafter, or the expiration of the

time allowed for such approval, present the same for approval to a judge of the district court of the proper district, who shall fix a day for the hearing. Notice of such hearing shall be given the board of supervisors, and return made in the same manner as in a civil action, and the court or judge at the time fixed shall, unless good cause for postponement be shown, proceed to hear the matter and approve the bond, if found sufficient, and such approval shall have the same force and effect as an approval by the board of supervisors. [C. '73, § 681.]

SEC. **1191. Where filed.** The bonds and oaths of state officers shall be filed in the office of the secretary of state, except those of the secretary, which shall be filed and recorded in the office of the auditor; those of the county and township officers in the county auditor's office, except those of the county auditor, which shall be kept in the county treasurer's office, and those of justices of the peace, which shall be filed by the auditor in the office of the clerk of the district court, after the same have been approved and recorded. [C. '73, § 682; R., § 553; C. '51, § 333.]

SEC. **1192. Want of compliance.** No official bond shall be void for want of compliance with the statute, but it shall be valid in law for the matters contained therein. [C. '73, § 689; R., § 567; C. '51, § 337.]

A bond which is not good as a statutory obligation may be good as a bond at common law: *State v. Fredericks*, 8–553.

The fact that the bond of a public officer was acknowledged and sworn to before a person not qualified to administer oaths, *held* a mere irregularity which was waived by the acceptance and approval of the bond: *State v. Minton*, 49–591.

The giving of a bond to the "people of Woodbury county," instead of to the county, *held* not such a mistake as to vitiate the security: *Charles v. Haskins*, 11–329.

Where a bond was given by a county treasurer "unto the county of Warren and state of Iowa," *held*, that it was for the security of the county and not the state: *State v. Henderson*, 40–242.

Irregularity in the election in pursuance of which the officer claims the office and executes the bond cannot be urged as a defense to the bond, either on behalf of principal or surety: *Boone County v. Jones*, 54–699.

SEC. **1193. Accounting before approval.** When the incumbent of an office is re-elected, he shall qualify as above directed; but when the re-elected officer has had public funds or property in his control, under color of his office, his bond shall not be approved until he has produced and fully accounted for such funds and property to the proper person to whom he should account therefor; and the officer or board approving the bond shall indorse upon the bond, before its approval, the fact that the said officer has fully accounted for and produced all funds and property before that time under his control as such officer. [C. '73, § 690; R., § 568; C. '51, § 338.]

An officer when he enters upon a subsequent term must be presumed, in the absence of evidence to the contrary, to have on hand all the funds with which he is chargeable, and proof of the amount which should have been on hand at that time will be *prima facie* proof that it was on hand. The fact that his bond is approved without his having produced and accounted for all funds and property, as here required, will not exempt his sureties from liability: *District T'p v. McCord*, 54–346.

While it is the duty of the board of supervisors to require an officer to account for all public funds which have come into his hands under color of his office, before approving his bond for the second term, neither the failure to perform that duty, nor a false representation that it has been performed, will release the sureties on the bond from liability for a defalcation occurring subsequently to the approval of the board: *Palmer v. Wood*, 75–402.

The settlement with the county provided for by § 1458, in case of an officer holding over, is conclusive against him and the sureties on his new bond that he has the amount of money on hand which is shown by such settlement: *Boone County v. Jones*, 54–699.

But if such settlement is procured upon the production of checks, certificates of deposit, etc., without any effort to ascertain whether they really represent money, it is not binding upon the sureties, and they may show that the defalcation had taken place prior to the giving of their bond. But the treasurer himself is estopped from showing that he did not have the money on hand as he represented he had, even though the board knew of his fraud and participated therein: *Webster County v. Hutchinson*, 60–721. This estoppel, however, does not apply in a criminal prosecution for embezzlement, and the

treasurer may, notwithstanding his statements to the board, show that the embezzlement occurred during a previous term, and at such time as that the prosecution therefor is barred by the statute of limitations: *State v. Hutchison*, 69–478.

The provision of § 1458, for indorsement upon the bond of an officer, that he has accounted for public funds previously coming into his hands, is directory; and where it appeared that there was no defalcation at the previous semi-annual settlement, *held*, that the sureties insisting that such defalcation had taken place before the acceptance of the bond signed by them, had the burden of proving that fact: *Carroll County v. Rugles*, 69–269.

The term for which an incumbent holding over is to occupy the office and qualify is not a full term, but only until the vacancy can be legally filled by election: *Dyer v. Bagwell*, 54–487; *Boone County v. Jones*, 58–373.

When an officer was elected at a regular meeting of the directors of a school district, and the meeting adjourned to a certain day for the purpose of learning whether he would accept or not, and at the adjourned meeting he refused to accept, *held*, that his refusal was the same as if made at the regular meeting, and the board had the same power to elect another person as if no ballot had been cast; and the fact that such election was at an adjourned meeting would not give the incumbent a right to qualify and retain the office for another term: *Carter v. McFarland*, 75–196.

Where a holding-over officer executed a bond with sureties for the entire period of the term of the person in whose place he held over, under a mistaken belief that he was entitled to hold for the entire term of such officer, and at the next election was duly elected to fill the vacancy in such office, and executed a new bond, *held*, that the sureties on the first-named bond were not co-sureties with those on the second bond for the period subsequent to the last election, and could not be compelled to contribute for a defalcation occurring during that time: *Boone County v. Jones*, 58–373.

The duty of an officer not to approve the bond until the person qualifying has accounted as required in this section is a duty to the public only, and neglect thereof will not render such officer liable to the sureties on the new bond: *Held v. Bagwell*, 58–139.

A surety is not liable for defalcation prior to the giving of the bond on which he becomes surety: *Ibid.*

An officer holding over after re-election and failing to file a new bond is still an officer *de facto*, and not a person falsely assuming to be an officer under § 4901, at least until his office is declared vacant: *State v. Bates*, 23–96.

In an action to recover money belonging to the county, alleged to have been obtained by defendant by fraudulent collusion with the county treasurer, statements made by the treasurer at the time of his semi-annual settlements with the board of supervisors, though some of such statements were made prior to the last satisfactory settlement, *held* properly admitted in evidence as tending to show the amount of money for which the treasurer was liable at different times, and as tending to show, in connection with other facts, the dealings between the treasurer and defendant: *Taylor County v. Standley*, 79–666.

As to liability of sureties upon the original bond of an officer holding over after the expiration of his term, see note to § 1183.

SEC. **1194. Temporary officer.** Any person temporarily appointed to fill an office, during the incapacity or suspension of the regular incumbent, shall qualify, in the manner required by this chapter, for the office so to be filled. [C.'73, § 691.]

SEC. **1195. Officer holding over.** When it is ascertained that the incumbent is entitled to hold over by reason of the non-election of a successor, or for the neglect or refusal of the successor to qualify, he shall qualify anew, within the time to be fixed by the board or officer who approves the bond of such officer. After the adjournment of the board of supervisors, such time shall be fixed by the county auditor in all cases where such board, if in session, would have fixed such time. [C.'73, § 690; R., § 568; C.'51, § 338.]

SEC. **1196. Recording.** The auditor of each county shall keep in his office a book, to be known as the record book of officers' bonds, and record in said book the official bonds of all county officers, including justices of the peace, constables and assessors, filed in his county; and also keep an index to said book, in which, under the title of each office, shall be entered the names of each principal and his sureties, and the date of the filing of the bond. [C.'73, § 683.]

SEC. **1197. Penalty for not giving bond.** It shall be a misdemeanor for any officer who is required to give bond to act in such official capacity without giving such bond as is provided by law, and he shall be liable to a fine for an amount not exceeding the amount of the bond required of him. [C.'73, § 684.]

CHAPTER 7.

OF CONTESTING ELECTIONS.

SECTION **1198. Grounds of contest.** The election of any person to any county office, or to a seat in either branch of the general assembly, may be contested by any person eligible to such office; and the election of any person to a state office, or to the office of presidential elector, by any eligible person who received votes for the same office; and the grounds therefor shall be as follows:

1. Misconduct, fraud or corruption on the part of judges of election in any precinct, or of any board of canvassers, or any member of either board, sufficient to change the result;

2. That the incumbent was not eligible to the office at the time of election;

3. That the incumbent has been duly convicted of an infamous crime before the election, and the judgment has not been reversed, annulled or set aside, nor the incumbent pardoned, at the time of election;

4. That the incumbent has given or offered to any elector, or any judge, clerk or canvasser of the election, any bribe or reward in money, property or thing of value, for the purpose of procuring his election;

5. That illegal votes have been received or legal votes rejected at the polls, sufficient to change the result;

6. Any error in any board of canvassers in counting the votes, or in declaring the result of the election, if the error would affect the result;

7. Any other cause which shows that another person was the person duly elected. [22 G. A., ch. 49, § 1; C.'73, §§ 692, 718, 730, 737; R., §§ 569, 571, 598, 610, 617; C.'51, §§ 339, 341, 368, 380, 387.]

Since the enactment of the statute which authorizes women to hold school offices, a woman claiming to have been elected to such office may contest the election of another, although she is not an elector, within the terms of this and other sections relating to such contests. The statute making women eligible to such offices must be regarded as as having amended these sections in that respect: *Brown v. McCollum*, 76–479.

Where the disqualification for holding office is removed subsequently to the election to that office and prior to the entering upon the discharge of its duties, the person may properly hold the office: *State ex rel. v. Van Beek*, 87–569.

Where before election a candidate for a county office offered and held out as an inducement to obtain votes that he would perform the duties of the office for a less amount than the fees provided by law, and turn the balance of the fees into the county treasury, *held*, that this was the offer of a bribe by the officer to the electors, and his election might be contested under this section: *Carrothers v. Russell*, 53–346.

It does not constitute bribery at an election to relocate a county seat for persons interested in the location at a particular place to agree to give or furnish facilities for the convenience of the whole county, such as to agree to give property or money which will be for the advantage of the whole county, as, for instance, land on which to erect buildings, money for the erection of a bridge and high school building, etc.: *Dishon v. Smith*, 10–212; *Hawes v. Miller*, 56–395.

Where an agent authorized to represent a railway company in securing the adoption of a proposition to levy a tax in behalf of such railway held out as an inducement to voters to vote the tax that the company would pay them fifty per cent. on the dollar for their certificates when issued, and thereby influenced the action of some of the voters at such election, *held*, that the tax was thereby rendered illegal: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Where, at an election to pass upon a contract for the sale of swamp land, improper inducements by way of personal advantage were held out to the electors of the county, *held*, that the contract thus ratified by them could not be enforced: *Palo Alto County v. Harrison*, 68–81.

To constitute a fraud in the submission of a proposition at a special election there must be some showing of artifice to conceal material facts within the knowledge of the persons submitting the proposition to vote, and which are not open and obtainable by others. There cannot be deemed to be a fraudulent concealment of matters which are public, and can be as well known to the people and voters as to the officers submitting the question to vote: *Starr v. Board of Supervisors*, 22–491.

SEC. **1199. Incumbent.** The term "incumbent" in this chapter means the person whom the canvassers declare elected. [C.'73, § 693; R., § 570; C.' 51, § 340.]

SEC. **1200. Change the result.** When the misconduct, fraud or corruption complained of is on the part of the judges of election in a precinct, it shall not be held sufficient to set aside the election, unless the rejection of the vote of that precinct would change the result as to that office. [C.'73, § 694; R., § 572; C.'51, § 342.]

SEC. **1201. Court—how constituted.** The court for the trial of contested county elections shall be thus constituted: The chairman of the board of supervisors shall be the presiding officer, and the contestant and incumbent may each name a person who shall be associated with him. [C.'73, § 695; R., 573; C.'51, § 343.]

SEC. **1202. Clerk.** The county auditor shall be clerk of this court, and keep all papers, and record the proceedings in the election book, in manner similar to the record of the proceedings of the district court, but when the county auditor is a party, the court shall appoint a suitable person as clerk, whose appointment shall be recorded. [C.'73, § 696; R., § 571; C.'51, § 344.]

SEC. **1203. Statement of contest.** The contestant shall file in the office of the county auditor, within twenty days after the day when the incumbent was declared elected, a written statement of his intention to contest the election, setting forth the name of the contestant, and that he or she is qualified to hold such office, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which statement shall be verified by the affidavit of the contestant, or some elector of the county, that the causes set forth are true as he verily believes. The contestant must also file with the county auditor a bond, with security to be approved by said auditor, conditioned to pay all costs in case the election be confirmed, or the statement be dismissed, or the prosecution fail. When the auditor is a party, the clerk of the district court shall receive such statement and approve such bond. [C.'73, § 697; R., § 575; C.'51, § 345.]

It is the intention that the statement of contest must be filed within twenty days after the day when the canvass of the votes was made that determined the result as to the particular office in question: *Clark v. Tracy*, 64 N. W., 290; *Ferguson v. Henry*, 64 N. W., 292.

Therefore, *held* in a contest as to the office of county attorney that the twenty days commenced to run from the canvass of the returns by the board of supervisors and not from the canvass of the ballots by the judges of election: *Ibid.*

The contestant may, after the expiration of the twenty days allowed for filing written statement of contest, amend the grounds of contest stated: *Brown v. McCollum*, 76–479.

SEC. **1204. Names of voters.** When the reception of illegal or the rejection of legal votes is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, with the precinct where they voted or offered to vote, shall be set forth in the statement. [C.'73, § 698; R., § 576; C.'51, § 346.]

SEC. **1205. Trial—notice.** The chairman of the board of supervisors shall thereupon fix a day for the trial, not more than thirty nor less than twenty days thereafter, and shall cause a notice of such trial to be served on the incumbent, with a copy of the contestant's statement, at least ten days before the day set for trial. [C.'73, § 699; R., §§ 577, 579, 580; C.'51, §§ 347, 349, 350.]

SEC. **1206. Judges.** The contestant and incumbent shall each file in the auditor's office, on or before the day of trial, a written nomination of one associate judge of the contested election, who shall be sworn in manner and form as trial jurors are in trials of civil actions; if either the contestant or the incumbent fails to nominate, the presiding judge shall appoint for him. When either of the nominated judges fails to appear on the day of trial, his place may be filled by another appointment under the same rule. [C.'73, § 700; R., §§ 577–8; C.'51, §§ 347–8.]

SEC. **1207. Postponement.** The trial shall proceed at the time appointed, unless postponed for good cause shown by affidavit, the terms of which postponement shall be in the discretion of the court. [C.'73, § 701; R., § 583; C.'51, § 353.]

SEC. **1208. Procedure—powers of court.** The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers of the district court necessary to the right hearing and determination of the matter, to compel the attendance of witnesses, swear them and direct their examination, to punish for contempt in its presence or by disobedience to its lawful mandate, to adjourn from day to day, to make any order concerning intermediate costs, and to enforce its orders by attachment. It shall be governed by the rules of law and evidence applicable to the case. [C.'73, § 702; R., §§ 584, 588, 591; C.'51, §§ 354, 358, 361.]

The provisions of this and other sections plainly imply that contestant may, after the expiration of the twenty days allowed for filing statement of grounds of contest, amend such statement by setting out additional grounds: *Brown v. McCollum*, 76–479.

SEC. **1209. Testimony.** The testimony may be oral or by deposition, taken as in an action at law in the district court. [C.'73, § 703; R., § 581; C.'51, § 351.]

SEC. **1210. Subpœnas.** Subpœnas for witnesses may be issued at any time after the notice of trial is served, either by the clerk of the district court or by the county auditor, and shall command the witnesses to appear at....., on....., to testify in relation to a contested election, wherein A..... B..... is contestant and C..... D..... is incumbent. [C.'73, § 704; R., §§ 582, 586; C.'51, §§ 352, 356.]

SEC. **1211. Sufficiency of statement—amendment.** The statement shall not be dismissed for want of form, if the particular causes of contest are alleged with such certainty as will sufficiently advise the incumbent of the real grounds of contest. If any part of the causes are held insufficient, they may be amended, but the incumbent will be entitled to an adjournment, if he states on oath that he has matter of answer to the amended causes, for the preparation of which he needs further time. Such adjournment shall be upon such terms as the court thinks reasonable; but if all the causes are held insufficient and an amendment is asked, the adjournment shall be at the cost of contestant. If no amendment is asked for or made, or in case of entire failure to prosecute, the proceedings may be dismissed. [C.'73, § 705; R., §§ 585, 591; C.'51, §§ 355, 361.]

SEC. **1212. Process—fees.** The style, form and manner of service of process and papers, and the fees of officers and witnesses, shall be the same as in the district court, so far as the nature of the case admits. [C.'73, §§ 706, 724; R., §§ 586, 604; C.'51, §§ 356, 374.]

SEC. **1213. Place of trial.** The trial of contested county elections shall take place at the county seat, unless some other place within the county is substituted by the consent of the court and parties. [C.'73, § 703; R., § 587; C.'51, § 357.]

SEC. **1214. Sheriff to attend.** The court or presiding judge may direct the attendance of the sheriff or a constable when necessary. [C.'73, § 708; R., § 589; C.'51, § 359.]

SEC. **1215. Voters testify.** The court may require any person called as a witness, who voted at such election, to answer touching his qualifications as a voter, and, if he was not a qualified voter in the county where he voted, then to answer for whom he voted; and if the witness answer such questions, no part of his testimony on that trial shall be used against him in any criminal action. [C.'73, § 709; R., § 590; C.'51, § 360.]

SEC. **1216. Compensation of judges.** The judges shall be entitled to receive four dollars a day for the time occupied by the trial. [C.'73, § 710; R., § 593; C.'51, § 363.]

SEC. **1217. Costs.** The contestant and the incumbent are liable to the officers and witnesses for the costs made by them, respectively; but if the election be confirmed, or the statement be dismissed or the prosecution fail, judgment shall be rendered against the contestant for costs; and if the

judgment be against the incumbent, or the election be set aside, it shall be against him for costs. [C. '73, § 711; R., § 594; C. '51, § 364.]

SEC. **1218. How collected.** A transcript of the judgment, filed and recorded in the office of the clerk of the district court as provided in relation to transcripts from justices' courts, shall have the same effect as there provided, and execution may issue thereon. [C. '73, § 712; R., § 595; C. '51, § 365.]

SEC. **1219. Certificate withheld.** If notice of contesting the election of an officer is filed before the certificate of election is delivered to him, it shall be withheld until the determination of the contest. [C. '73, § 713; R., § 597; C. '51, § 367.]

SEC. **1220. Judgment.** The court shall pronounce judgment whether the incumbent or any other person was duly elected, and adjudge that the person so declared elected will be entitled to his certificate. If the judgment be against the incumbent, and he has already received the certificate, the judgment shall annul it. If the court find that no person was elected, the judgment shall be that the election be set aside. [C. '73, § 714; R., § 592; C. '51, § 362.]

Ineligibility at the time of election which may be and is removed before the person elected is required to enter upon the discharge of the office will not be a ground for contest: *State ex rel. v. Van Beek*, 87–569.

If such disqualification might be removed and is not, the effect will be the same as though the officer elected should fail to qualify in any other respect: *Ibid.*

SEC. **1221. How enforced.** When either the contestant or incumbent shall be in possession of the office, by holding over or otherwise, the presiding judge shall, if the judgment be against the party so in possession of the office and in favor of his antagonist, issue an order to carry into effect the judgment of the court, which order shall be under the seal of the county, and shall command the sheriff of the county to put the successful party into possession of the office without delay, and to deliver to him all books and papers belonging to the same; and the sheriff shall execute such order as other writs. [C. '73, § 715.]

SEC. **1222. Appeal.** The party against whom judgment is rendered may appeal within twenty days to the district court, but, if he be in possession of the office, such appeal will not supersede the execution of the judgment of the court as provided in the preceding section, unless he gives a bond, with security to be approved by the district judge, in a sum to be fixed by him, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that, if the judgment appealed from be affirmed, he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered. [C. '73, § 716.]

Whether notice of appeal in such case should be in writing, *quære;* but where verbal notice was given at the time the judgment of the court of contest was rendered, and the parties then agreed as to disposition to be made of the ballot-box, *held*, that the notice was sufficient under the circumstances: *McIntosh v. Livingston*, 41–219.

The fact of good faith and claim of right on the part of the officer *de facto* will not affect the right of the officer *de jure* to the emoluments of the office: *McCue v. Wapello County*, 56–698.

The contestant having assumed the burden of showing that he had received a greater number of votes than the incumbent and having put in evidence certain ballots relied upon by him as having with other ballots given him a majority of the votes, the proof that such ballots have been preserved as required by law makes out for him a *prima facie* case that they were the ballots cast for him at the election, but it is open to the opposite party to discredit this evidence by showing that such ballots have been changed since they were counted, and it is not necessary that such fact be alleged by way of pleading: *Ferguson v. Henry*, 64 N. W., 292.

The question of the genuineness of the ballots should be submitted to the jury on the trial in the district court in an appeal from the decision of the board of contest, but the jury are not to determine the validity of the ballots so far as such validity depends upon the marking thereof or the condition thereof when cast: *Ibid.*

SEC. **1223. Judgment on appeal.** If, upon appeal, the judgment is affirmed, the district court may render judgment upon the bond for the amount of damages, against the appellant and the sureties thereon. [C. '73, § 717.]

SEC. **1224. State court of contest.** The court for the trial of contested state elections, except of governor and lieutenant-governor, shall consist of three judges, not interested, of the supreme court or district court, or any of them, as may be convenient. [C. '73, § 719; R., § 599; C. '51, § 369.]

SEC. **1225. Clerk.** The secretary of state shall be the clerk of this court; but if the person holding that office is a party to the contest, the clerk of the supreme court, or, in case of his absence or inability, the auditor of state, shall be clerk. [C. '73, § 720; R., § 600; C. '51, § 370.]

SEC. **1226. Statement filed.** The statement must be filed with such clerk within thirty days from the day when incumbent was declared elected. [C. '73, § 721; R., § 601; C. '51, § 371.]

SEC. **1227. Time of trial—notice.** The clerk shall, as soon as practicable, ascertain which three of the judges residing nearest the seat of government can attend the trial, fix a time therefor, and notify the judges, and cause a copy of the statement and a notice of the time fixed for trial to be served upon the incumbent, and a notice of the time to be served upon the contestant, at least twenty days before the day of trial, and returns thereof to be made to him; when convenient, the service of the above papers may be made by the clerk of this court. The time for the trial shall not be set beyond the last Monday of January following the election. [C. '73, § 722; R., § 601; C. '51, §§ 371–2.]

SEC. **1228. Subpœnas—depositions.** The secretary of state, the several clerks of the supreme and district courts, under their respective seals of office, and either of the judges of the supreme or district courts, under their hands, may issue subpœnas for witnesses to attend this court; and disobedience to such process may be treated as a contempt. Depositions may also be taken as in the case of contested county elections. [C. '73, § 723; R., § 603; C. '51, § 373.]

SEC. **1229. Place of trial.** The trial shall take place at the seat of government, unless some other place be substituted by consent of the court and both parties. [C. '73, § 725; R., § 605; C. '51, § 375.]

SEC. **1230. Compensation of judges.** The judges shall be entitled to receive for their travel and attendance the sum of six dollars each per day, with such mileage as is allowed to members of the general assembly, to be paid from the state treasury. [C. '73, § 726; R., § 606; C. '51, § 376.]

SEC. **1231. Judgment filed—execution.** A transcript of the judgment rendered by such court, filed in the office of the clerk of the supreme court, shall have the force and effect of a judgment of the supreme court, and execution may issue therefrom in the first instance against the party's property generally. [C. '73, § 727; R., § 607; C. '51, § 377.]

SEC. **1232. Power of judge.** The presiding judge of this court shall have authority to carry into effect any order of the court, after the adjournment thereof, by attachment or otherwise. [C. '73, § 728; R., § 608; C. '51, § 378.]

SEC. **1233. Contest as to member of general assembly.** The contestant for a seat in either branch of the general assembly shall, within thirty days after the incumbent was declared elected, serve on the incumbent a statement as required in relation to county officers, except the list of illegal votes, which shall be served with the notice of taking depositions relative to them, and if no such deposition is taken, then twenty days before the first day of the next session. [C. '73, § 731; R., § 611; C. '51, § 381.]

SEC. **1234. Subpœnas.** Any judge or clerk of a court of record may issue subpœnas in the above cases, as in those before provided, and compel

the attendance of witnesses thereunder. [C.'73, § 732; R., § 612; C.'51, § 382.]

SEC. **1235. Depositions.** Depositions may be taken in such cases in the same manner and under the same rules as in an action at law in the district court, but no cause for taking the same need be shown. [C.'73, § 733; R., § 613; C.'51, § 383.]

SEC. **1236. Return of depositions.** A copy of the statement, and of the notice for taking depositions, with the service indorsed, and verified by affidavit if not served by an officer, shall be returned to the officer taking the depositions, and then, with the depositions, shall be sealed up and transmitted to the secretary of state, with an indorsement thereon showing the nature of the papers, the names of the contesting parties, and the branch of the general assembly before whom the contest is to be tried. [C.'73, § 734; R., § 614; C.'51, § 384.]

SEC. **1237. Statement and depositions—notice.** The secretary shall deliver the same unopened to the presiding officer of the house in which the contest is to be tried, on or before the second day of the session, regular or special, of the general assembly next after taking the depositions, and the presiding officer shall immediately give notice to his house that such papers are in his possession. [C.'73, § 735; R., § 615; C.'51, § 385.]

SEC. **1238. Power of general assembly.** Nothing herein contained shall be construed to abridge the right of either branch of the general assembly to grant commissions to take depositions, or to send for and examine any witness it may desire to hear on such trial. [C.'73, § 736; R., § 616; C.'51, § 386.]

SEC. **1239. Contest as to governor or lieutenant-governor.** The contestant for the office of governor or lieutenant-governor shall, within thirty days after the proclamation of the result of the election, deliver to the presiding officer of each house of the general assembly a notice of his intent to contest, and a specification of the grounds of such contest, as before directed. [C.'73, § 738; R., § 618; C.'51, § 388.]

See Const., art. IV, § 5.

SEC. **1240. Notice to incumbent.** As soon as the presiding officers have received the notice and specifications, they shall make out a notice, directed to the incumbent, including a copy of the specifications, which shall be served by the sergeant-at-arms. [C.'73, § 739; R., § 619; C.'51, § 389.]

SEC. **1241. Houses notified.** The presiding officers shall also immediately make known to their respective houses that such notice and specifications have been received. [C.'73, § 740; R., § 620; C.'51, § 390.]

SEC. **1242. Court—how chosen.** Each house shall forthwith proceed, separately, to choose seven members of its own body in the following manner:

1. The names of members of each house, except the presiding officer, written on similar paper tickets, shall be placed in a box, the names of the senators in their presence by their secretary, and the names of the representatives in their presence by their clerk;
2. The secretary of the senate in the presence of the senate, and the clerk of the house of representatives in the presence of the house, shall draw from their respective boxes the names of seven members each;
3. As soon as the names are thus drawn, the names of the members drawn by each house shall be communicated to the other, and entered on the journals of each house. [C.'73, § 741; R., § 621; C.'51, § 391.]

SEC. **1243. Powers and proceedings of committee.** The members thus drawn shall constitute a committee to try and determine the contested election, and for that purpose shall hold their meetings publicly at the place where the general assembly is sitting, at such times as they may

designate; and may adjourn from day to day or to a day certain, not more than four days distant, until such trial is determined; shall have power to send for persons and papers, and to take all necessary means to procure testimony, extending like privileges to the contestant and the incumbent; and shall report their judgment to both branches of the general assembly, which report shall be entered on the journals of both houses. [C.'73, § 742; R., § 622; C.'51, § 392.]

SEC. **1244. Testimony.** The testimony shall be confined to the matters contained in the specifications. [C.'73, § 743; R., § 623; C.'51, § 393.]

SEC. **1245. Judgment.** The judgment of the committee pronounced in the final decision on the election shall be conclusive. [C.'73, § 744; R., § 624; C.'51, § 394.]

SEC. **1246. Contest as to presidential electors.** The court for the trial of contested elections for presidential electors shall consist of the chief justice of the supreme court, who shall be presiding judge of the court, and four judges of the district court not interested, to be selected by the supreme court, two of whom, with the chief justice, shall constitute a quorum for the transaction of the business of the court. If the chief justice should for any cause be unable to attend at the trial, the judge longest on the supreme court bench shall preside in place of the chief justice; and any question arising as to the membership of the court shall be determined by the members of the court not interested in the question. The secretary of state shall be the clerk of the court, or, in his absence or inability to act, the clerk of the supreme court. Each member of the court, before entering upon the discharge of his duties, shall take an oath before the secretary of state, or some officer qualified to administer oaths, that he will support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection, or hope of reward, he will, to the best of his knowledge and ability, administer justice according to law and the facts in the case. [22 G. A., ch. 49, § 2.]

SEC. **1247. Statement.** The contestant shall file the statement provided for in this chapter in the office of the secretary of the state, within ten days from the day on which the returns are canvassed by the state board of canvassers, and, within the same time, serve a copy of the same, with a notice of the contest, on the incumbent. [Same, § 3.]

SEC. **1248. Trial.** The clerk of the court shall, immediately after the filing of the statement, notify the judges herein named, and fix a day for the organization of the court within three days thereafter, and also notify the parties to the contest. The judges shall meet on the day fixed, and organize the court, and make and announce such rules for the trial of the case as they shall think necessary for the protection of the rights of each party and a just and speedy trial of the case, and commence the trial of the case as early as practicable thereafter, and so arrange for and conduct the trial that a final determination of the same and judgment shall be rendered at least six days before the second Monday in January next following. [Same, § 4.]

SEC. **1249. Judgment.** The judgment of the court shall determine which of the parties to the action is entitled to hold the office of presidential elector, and shall be authenticated by the presiding judge and clerk of the court and filed with the secretary of state; and the judgment so rendered shall constitute a final determination of the title to the office, and a certificate of appointment shall be issued to the successful party as an elector. [Same, § 5.]

SEC. **1250. Provisions applicable.** All the provisions of this chapter in relation to contested elections of county officers shall be applicable, as near as may be, to contested elections for other offices, except as herein otherwise provided, and in all cases process and papers may be issued to and served by the sheriff of any county. [22 G. A., ch. 49, § 6; C.'73, §§ 729, 745; R., §§ 609, 626; C.'51, §§ 379, 396.]

CHAPTER 8.

OF REMOVAL FROM OFFICE.

SECTION **1251. Causes.** All county, township, city and town officers, elected or appointed, may be removed upon charges made in writing and trial thereunder, for the following causes:

1. For habitual or wilful neglect of duty;
2. For any disability preventing a proper discharge of the duties of his office;
3. For gross partiality;
4. For oppression;
5. For extortion;
6. For corruption;
7. For wilful misconduct or maladministration in office;
8. Upon conviction of a felony;
9. For a failure to produce and fully account for all public funds and property in his hands at any inspection or settlement. [C. '73, § 746; R., § 628; C. '51, § 397.]

SEC. **1252. Complaint.** Any resident of the county, township, city or town, of which the person to be charged is an officer, may make such complaint, by petition in the district court, in the name of the state, in which one or more charges against the same officer may be united, and which shall contain specifications under each charge, and may be amended as in ordinary actions. It shall state the name of the accuser, and the accused officer shall be named as defendant. The county attorney shall file such petition whenever he believes there is just cause therefor, and may be required to do so by the court or judge thereof upon the suspension of any officer by such court or judge. If the petition is filed by a person other than the county attorney, it shall be verified, and he shall file a bond for the costs, with sureties to be approved by the clerk. [C. '73, §§ 747, 749, 757; R., §§ 629, 631, 640; C. '51, §§ 398, 400, 409.]

SEC. **1253. Notice.** The original notice shall state, in substance, that the defendant is required to appear and answer a petition charging him with "official misdemeanors, "and shall be served as an original notice. [C. '73, § 750; R., § 632; C. '51, § 401.]

SEC. **1254. Trial.** The charges, when filed, shall be tried as a law action, and all the proceedings shall, as nearly as may be, conform to the rules governing the trial of such actions, and the costs shall be taxed against the losing party, unless otherwise ordered, but in no event shall they be taxed against the county attorney. The form of the general verdict shall be "guilty," or "not guilty," and, when "guilty," a judgment of removal from office shall be immediately entered against the accused, and a copy thereof shall be certified to the county auditor, who shall cause it to be entered in the election book. Either party may appeal to the supreme court, in the same manner and time as in other proceedings, which shall be heard and determined as a law action. [C. '73, §§ 748, 754, 755; R., §§ 630, 636–7; C. '51, §§ 399, 405–6.]

SEC. **1255. Clerk of court.** If the accused is clerk of the district court, the charge may be filed with the county auditor; both he and the deputy clerk may issue subpœnas for witnesses, and the county auditor shall deliver the papers to the judge of the district court on its sitting. [C. '73, § 751; R., § 634; C. '51, § 403.]

SEC. **1256. Suspension—clerk or sheriff summarily.** When charges are thus made, the district court of the proper district, or judge thereof, may suspend the accused from the function of his office until the determination of the matter, if sufficient cause appear from the testimony or affidavits presented, and, on his own motion, may suspend from office any clerk

of the district court, or sheriff of a county, for any of the causes mentioned in this chapter, coming to his own knowledge, or manifestly appearing from the papers or testimony in any proceeding in court. [C, '73, §§ 752, 756; R., §§ 635, 639; C.'51, §§ 404, 408.]

In case of suspension of sheriff the person appointed by the board as here provided, and not the deputy sheriff, is authorized to act: *McCue v. Circuit Court*, 51-60.

The board may so appoint in case an officer is suspended by the judge on his own motion: *Ibid.*

SEC. **1257. Temporary officer.** Upon such suspension, the board of supervisors in case of a county or township officer, and the council in case of a city or town officer, shall temporarily fill the office by appointment, and, in case of a suspension of a clerk or sheriff, the district court or judge thereof may supply such place by appointment until a temporary appointment shall be made by the board of supervisors. Such orders of suspension and temporary appointment of county and township officers shall be certified to the county auditor, and be by him entered in the election book; those of city and town officers, certified to the clerk and entered upon the records. [C.'73, §§ 752–3, 758; R., §§ 635, 638, 641; C.'51, §§ 404, 407, 410.]

SEC. **1258. Municipal officers.** Any councilman, marshal, police matron, or other officer of a city or town, may be removed from office for any of the foregoing causes, or when charged with the commission of any crime, upon charges preferred in writing to the council, and a hearing thereon, by a vote of five members of the town council or a two-thirds vote of all the members elected to the city council. The council may, by ordinance, provide as to the manner of preferring and hearing such charges. No person shall be twice removed by the council from the same office for the same cause, but proceedings before the council shall not be a bar to proceedings in the district court as in this chapter provided. [25 G. A., ch. 13, § 2; 25 G. A., ch. 15, § 5; 22 G. A., ch. 3, § 2; 22 G. A., ch. 16, § 1; 17 G. A., ch. 20, § 1; 16 G. A., ch. 33, § 1; C.'73, § 516; R., § 1087.]

CHAPTER 9.

OF SUSPENSION OF STATE OFFICERS.

SECTION **1259. Accounts examined by commission.** The governor shall, when of the opinion the public service requires it, appoint a commission of three competent accountants, who shall examine the books, papers, vouchers, moneys, securities and other documents in the possession or under the control of any state officer. Such accountants shall make out a full, complete and specific statement of the transactions of said officer with, for or on behalf of the state, showing the true balances in each case, and report the same to the governor, with such suggestions as they may think proper. [C.'73, § 759; R., §§ 46, 47, 55, 56.]

SEC. **1260. Powers.** Said commission shall have power, when in session, to issue subpœnas, call any person to testify in reference to any fact connected with their investigation, and require such person to produce any papers or books which the district court might require to be produced. [16 G. A., ch. 20; C.'73, § 765; R., § 54.]

SEC. **1261. Defalcation—suspension.** If it shall report that any officer has been guilty of any defalcation or misappropriation of the public money, or that his accounts, papers and books are improperly or unsafely kept, the governor shall forthwith suspend such officer from the exercise of his office, and require him to deliver all the moneys, books, papers and other property of the state to him, to be disposed of as hereinafter provided, and thereafter it shall be unlawful for such officer to exercise or

attempt to exercise any of the functions of his office until such suspension shall be revoked; and any attempt to exercise such office by the suspended officer shall be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both fine and imprisonment. [C. '73, §§ 760–1; R., §§ 48–9.]

These provisions contemplate suspension and not an entire removal of the officer, and the section is therefore not unconstitutional as applied to officers whose election and term of office are provided for by Const., art. IV, § 22: *Brown v. Duffus*, 66–193.

SEC. **1262. Temporary appointment.** In every such case, the governor shall appoint some suitable person to temporarily fill the office, who, having qualified as required by law, shall perform all the duties and enjoy all the rights belonging to the said office, until the removal of the suspension of his predecessor, or the appointment or election of a successor. [C. '73, § 762; R., § 51.]

SEC. **1263. Duty of governor.** When the governor shall suspend any public officer, he shall direct the proper legal steps to be taken to indemnify the state from loss. [C. '73, § 763; R., § 52.]

SEC. **1264. Compensation of commissioners.** The commissioners provided for in this chapter shall each receive the sum of three dollars per day for the time actually employed in the performance of their duties. [C. '73, § 764; R., § 53.]

CHAPTER 10.

OF VACANCIES IN OFFICE.

SECTION **1265. Holding over.** Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law. [C.'73, § 784; C. '51, § 241.]

An officer who holds over after his term on account of a failure to elect a successor only holds until the vacancy in the office can be legally filled by election: *Dyer v. Bagwell*, 54–487.

See Const., art. III, § 3; art. IV, §§ 2, 15, 22; art. V, §§ 3, 5, 12, 13.

Where the ballots supplied to voters at an election were not such as required by the Australian ballot law, *held*, that the election was entirely invalid and that the officers whose successors would be chosen at such election would hold over under this section. [It is assumed in the case without discussion that the corresponding section of Code of '73 was applicable to city and town officers as well as those of the state and county]: *State ex rel. v. Smith*, 63 N. W., 453.

SEC. **1266. What constitutes vacancy.** Every civil office shall be vacant upon the happening of either of the following events:

1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over;

A resignation in writing made to the proper officer creates a vacancy without any formal acceptance on the part of such officer: *Gates v. Delaware County*, 12–405.

The acceptance by an officer of another office which is incompatible with that which he holds would vacate the one first held; but the incompatability must be such as arises from the nature of the offices or their relation to each other; and *held*, that the office of captain in the military service of the United States was not so incompatible with that of district attorney as that an acceptance of the one should necessarily make a vacancy in the other. (Decided before the passage of 9 G. A., ch. 54, being subd. 7 of this section): *Bryan v. Cattell*, 15–538.

The legislature may add to or change the methods in which vacancies may occur, and make such changes applicable to existing offices and those holding them: *Ibid.*

2. A failure of the incumbent or hold-over officer to qualify within the time prescribed by law;

3. The incumbent ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised;

4. The resignation or death of the incumbent;
5. The removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant;
6. The conviction of incumbent of an infamous crime, or of any public offense involving the violation of his oath of office;
7. The acceptance by the incumbent of a commission to any military office, either in the militia of this state or in the service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the state for a period not less than sixty days. [C. '73, §§ 504, 686, 781; R., §§ 564, 662, 1132; C. '51, §§ 334, 429.]

SEC. **1267. Possession of office.** When a vacancy occurs in a public office, possession shall be taken of the office room, the books, papers, and all things pertaining thereto, to be held until the qualification of a successor, as follows: Of the office of the county auditor, by the clerk of the district court; of the clerk or treasurer, by the county auditor; of any of the state officers, by the governor, or, in his absence or inability at the time of the occurrence, as follows: Of the secretary, by the treasurer; of the auditor, or superintendent of public instruction, by the secretary; of the treasurer, by the secretary and auditor, who shall make an inventory of the money and warrants therein, sign the same, and transmit it to the governor; and the secretary shall take the keys of the safe and desks, after depositing the books, papers, money and warrants therein, and the auditor shall take the key of the office room. [C. '73, § 788; R., § 671; C. '51, § 444.]

SEC. **1268. Resignations.** Resignations in writing by civil officers may be made as follows, except as otherwise provided:
1. By the governor, to the general assembly, if in session, if not, to the secretary of state;
2. By state senators and representatives, and all officers appointed by the senate or house, or by the presiding officers thereof, to the respective presiding officers of the senate and house, when the general assembly is in session, and such presiding officers shall immediately transmit to the governor information of the resignation of any member thereof; when the general assembly is not in session, all such resignations shall be made to the governor;
3. By senators and representatives in congress, all officers elected by the qualified voters in the state or any district or division thereof larger than a county, or chosen by the general assembly, all judges of courts of record, all officers, trustees, inspectors, and members of all boards and commissions now or hereafter created under the laws of the state, and all persons filling any position of trust or profit in the state, for which no other provision is made, to the governor;
4. By all county and township officers, to the county auditor, except that of the auditor, which shall be to the board of supervisors;
5. By all councilmen and officers of cities and towns, to the clerk or mayor. [17 G. A., ch. 107, § 1; C. '73, § 782; R., § 663; C. '51, § 430.]

The county attorney, *held* to be a county officer whose resignation is to be made to the board of supervisors: *State v. Kovolosky*, 92–498.

SEC. **1269. Vacancy in general assembly.** When a vacancy shall occur in the office of senator or representative in the general assembly, except by resignation, the auditor of the county of his residence shall notify the governor of such fact and the cause. [C. '73, § 790.]

SEC. **1270. Vacancy in board of state institutions.** In case of a vacancy from any cause, other than resignation or expiration of term, occurring in any of the boards of trustees or directors of state institutions, the secretary thereof shall immediately notify the governor; but this section shall not apply to vacancies in the board of regents of the university. [17 G. A., ch. 107, § 2.]

SEC. **1271. Duty of governor.** An officer receiving any resignation, or notice of any vacancy, shall forthwith notify the general assembly,

board, tribunal or officer, if any, empowered to fill the same by appointment. If the general assembly is not in session, such notice shall be sent upon its next convening. [Same, § 3.]

SEC. **1272. Filling vacancies.** Vacancies in the offices of clerk and reporter of the supreme court shall be filled by the supreme court; in all other state offices, judges of courts of record, officers elected in districts larger than a county, except state senators and representatives, officers, trustees, inspectors, and members of all boards or commissions, officers chosen by the general assembly if the legislature is not in session, and all persons filling any position of trust or profit in the state, by the governor, except when some other method is specially provided, and he shall issue the proper commission to the appointee; in county offices, including those of justices of the peace and constables, by the board of supervisors; and in the membership of such board, by the clerk of the district court, auditor and recorder; and when by death, or otherwise, a vacancy occurs in the office of the clerk of the district court, said court, or judge thereof, may, by order entered of record in the court journal, appoint a suitable and proper person to act as clerk until the vacancy shall be filled in the manner provided by law; in all other township offices, including trustees, by the trustees, but where the offices of the three trustees are all vacant, the county auditor shall appoint; in the office of councilman or mayor of any city, and all other elective city offices, when there are sixty days of an unexpired term, by special election, to be called by the council as soon thereafter as practicable, and the council may appoint some qualified elector to act as mayor until the qualification of the officers elected at such special election; if such unexpired term is less than sixty days, except in case of councilmen, then such vacancy shall be filled by the council; in all city appointive offices, unless otherwise provided by law, in the same manner as the original appointment was made; in all town offices, by the council at its first regular meeting after such vacancy occurs, or as soon thereafter as practicable. [24 G. A., ch. 1, § 1; 23 G. A., ch. 3, § 2; 22 G. A., ch. 1, § 1; 19 G. A., ch. 124, § 1; C. '73, §§ 390, 530, 783, 794–5; R., §§ 664, 1101; C. '51, § 436.]

See Const., art. IV, § 10.

The governor has no power to create a vacancy for the purpose of filling it. There must be a vacancy before the right or power to fill it can exist: *Bryan v. Cattell*, 15–538.

Where an elective officer is appointed by the board of supervisors to fill a vacancy he is not subject to removal by such board at pleasure, but is entitled to hold for the residue of the unexpired term unless removed for cause: *State ex rel. v. Chatburn*, 63–659.

In case of failure of an officer to enter upon his office at the time provided by law there is a vacancy which should be filled by appointment. The incumbent is not entitled to hold over, and the sureties on his bond are not liable if he hold over after the term for which they are bound has ceased: *Wapello County v. Bigham*, 10–39.

SEC. **1273. Person removed not eligible.** No person can be appointed to fill a vacancy who has been removed from office within one year next preceding. [C. '73, § 787; R., § 669; C. '51, § 441.]

SEC. **1274. Appointments.** Appointments under the provisions of this chapter shall be in writing, and filed in the office where the oath of office is required to be filed. [C. '73, § 785; R., § 667; C. '51, § 439.]

SEC. **1275. Qualification.** Persons elected or appointed to fill vacancies, and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint or qualify, as provided in this chapter, shall qualify within ten days from such election, appointment, or failure to elect, appoint or qualify, in the same manner as those originally elected or appointed to such offices. [C. '73, § 786; R., § 668; C. '51, § 440.]

SEC. **1276. Successor chosen.** An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made

under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified; except that, when the office is one to be filled by the general assembly, the appointee shall hold only until the general assembly elects. [19 G. A., ch. 124, § 2; C.'73, §§ 530, 781, 785; R., §§ 662, 667, 1101; C.'51, §§ 429, 439.]

SEC. **1277. Officers to fill vacancies.** Officers elected to fill vacancies, either at a special or general election, shall hold for the unexpired portion of the term, and until a successor is elected and qualified, unless otherwise provided by law. [C '73, § 513; R., § 1083.]

SEC. **1278. Municipal officers.** If a vacancy occurs in an elective office in a city, town or township ten days, or a county office fifteen days, or any other office thirty days, prior to a general election, it shall be filled at such election, unless previously filled at a special election. [19 G. A., ch. 124, § 2; C.'73, §§ 530, 789, 794–5; R., §§ 672, 1101; C.'51, §§ 35, 431–5.]

SEC. **1279. Election to fill vacancies.** A special election to fill a vacancy shall be held for a representative in congress, or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order such special election at the earliest practicable time, giving ten days' notice thereof. [C.'73, § 789; R., § 672; C.'51, §§ 35, 431–5.]

CHAPTER 11.

OF ADDITIONAL SECURITY AND THE DISCHARGE OF SURETIES.

SECTION **1280. Additional security.** Whenever the governor shall deem it advisable that the bonds of any state officer should be increased and the security enlarged, or a new bond given, he shall notify said officer of the fact, the amount of new or additional security to be given, and the time when the same shall be executed; which said new security shall be approved and filed as provided by law. [C.'73, § 772; R., § 660.]

SEC. **1281. New bond.** Any officer or board who has the approval of another officer's bond, when of the opinion that the public security requires it, upon giving ten days' notice to show cause to the contrary, may require him to give such additional security by a new bond, within a reasonable time to be prescribed. [C.'73, § 773; R., §§ 349–50; C.'51, §§ 418–19.]

SEC. **1282. Effect.** If a requisition made under either of the foregoing sections be complied with, both the old and the new security shall be in force; if not, the office shall become and be declared vacant, and the fact be certified to the proper officer, to be recorded in the election book or township record. [C.'73, § 774; R., §§ 651, 661; C.'51, § 420.]

SEC. **1283. Sureties relieved.** When any surety on a bond required by law, except as otherwise provided, conceives himself in danger, and desires to be relieved of his obligation, he may petition the approving officer or board above referred to for relief, stating the ground of his apprehension. [C.'73, § 775; R., § 652; C.'51, § 421.]

SEC. **1284. Notice.** The surety shall give the principal at least twenty-four hours' notice of the presenting and filing of the petition, with a copy thereof. At the expiration of this notice the approving officer may hear the matter, or may postpone it, as justice requires. [C.'73, § 776; R., § 653; C.'51, § 422.]

SEC. **1285. Hearing—order—effect.** If, upon the hearing, there appears substantial ground for apprehension, the approving officer or board may order the principal to give a new bond and to supply the place of the petitioning surety within a reasonable time to be prescribed, and, upon such new bond being given, the petitioning surety upon the former bond

shall be declared discharged from liability on the same for future acts, which order of discharge shall be entered in the proper election book, but the bond will continue binding upon those who do not petition for relief. [C. '73, § 777; R., § 655; C.'51, § 424.]

Sureties upon the new bond are not liable for moneys coming into the principal's hands before such new bond was executed: *Thompson v. Dickerson*, 22–360.

SEC. **1286. Failure to comply.** If the new bond is not given as required, the office shall be declared vacant, and the order to that effect entered in the proper election book. [C. '73, § 778; R., § 656; C. '51, § 425.]

SEC. **1287. Justice of the peace.** If the proceedings relate to a justice of the peace, and he is removed from office, the county auditor shall notify the proper township trustees or clerk of the removal. [C. '73, § 779; R., § 657; C. '51, § 426.]

SEC. **1288. Subpœnas.** The approving officer may issue subpœnas in his official name for witnesses, compel them to attend and testify, in the same way an officer authorized to take depositions may. [C. '73, § 780; R., § 658; C. '51, § 427.]

CHAPTER 12.

OF GENERAL PROVISIONS AS TO COMPENSATION.

SECTION **1289. Salaries paid monthly.** The salaries of all officers authorized in this code shall be paid in equal monthly installments at the end of each month, and shall be in full compensation for all services, except as otherwise expressly provided. [C. '73, § 3780.]

SEC. **1290. Commissioners to appraise property.** Every appraiser or commissioner appointed or selected to appraise damages or property, unless otherwise provided, shall receive the same compensation and mileage as jurors in courts of record, but when called to appraise property taken on judicial process, shall receive twenty-five cents per hour. [C. '73, § 3813; R., § 4158; C. '51, § 2550.]

SEC. **1291. General fees.** Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:

1. For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents;
2. For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents;
3. For making out a transcript of any public papers or records under his control for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents. [C. '73, § 3819; R., § 4132; C. '51, § 2523.]

SEC. **1292. Conveying prisoner to jail.** Every officer or person who shall arrest any one with a warrant or order issued by any court or officer, or who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment, shall be allowed the same fees and expenses as provided for in case of such services by the sheriff. [C. '73, § 3820.]

SEC. **1293. Publication of legal notices.** The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation or other publication required or allowed by law, shall not exceed one dollar for one insertion, and fifty cents for each subsequent insertion, for each ten lines of brevier type, or its equivalent, in a column not less than two and one-sixth inches in width. For publication of the official ballot, forty cents for each ten lines of brevier or its equivalent may be charged, the space necessarily occupied thereby being measured as if it were in

brevier type set solid. In no case shall the cost of publishing the official ballot exceed thirty dollars for each of the two papers in which it shall be published, except in presidential years, when it shall not exceed the sum of fifty dollars for each of said papers. Weekly publications may be made in a daily or weekly newspaper. The plaintiff or executor, in all publications concerning actions, executions and estates, may designate the newspaper in which such publication shall be made. If any newpaper refuse to make publication thereof, when copy therefor, with the cost or security for payment of the cost, is tendered, such publication may be made in some other newspaper of general circulation at or nearest to the county seat, with the same effect as if made in the newspaper so refusing. [25 G. A., ch. 105; C.'73, § 3832.]

Under § 3832 of Code of '73 providing a rate of compensation for publication of legal notices based on a "square of ten lines of brevier type or its equivalent," *held*, that it was not proper to measure the space actually occupied by one such square and make that the unit of measure, regardless of the size of type or kind of matter. The square thus described is made the standard of compensation, and other kinds of printing are to be paid for accordingly. Thus the printing of tabulated matter would be paid for at a higher rate for the same space than if it were "straight" matter: *Brown v. Lucas County*, 62 N.W., 694.

The plaintiff has the right to designate the newspaper in which publication of original notices or notices of execution sales shall be made: *Herriman v. Moore*, 49–171. And see § 4024.

SEC. **1294. Receipt for fees paid.** Every person charging fees shall, if required by the person paying them, give him a receipt therefor, setting forth the items, and the date of each. [C.'73, § 3836; R., § 4157; C.'51, § 2549.]

SEC. **1295. When fees payable.** When no other provision is made on the subject, the party requiring any service shall pay the fees therefor upon the same being rendered, and a bill of particulars being presented, if required. [C.'73, § 3837; R., § 4164; C.'51, § 2557.]

Where an attorney in a case requires services, his client, and not the attorney, is liable therefor: *Doughty v. Paige*, 48–483.

If a justice of the peace has prepared and certified a transcript on appeal he cannot be required to deposit it with the clerk until his fees therefor are paid: *McKay v. Maloy*, 53–33. To the same effect as to clerk of court of record, see *Dickerson v. Shelby*, 2 G. Gr., 460.

If an officer, entitled to the remedy provided by this section, seeks to recover his fees by an ordinary action, he must bring his action within five years: *State Ins. Co. v. Griffin*, 84–602.

SEC. **1296. Setting up advertisements.** In all cases where an officer in the discharge of his duty is required to post an advertisement or notice, he shall, when not otherwise provided, be allowed twenty-five cents, and the same mileage as a sheriff, and if an advertisement is required to be published in a newspaper, the cost thereof shall be paid by the party, and may be taxed in the bill of costs. [C.'73, § 3838; R., § 4165; C.'51, § 2558.]

SEC. **1297. Taking higher fees.** Any officer who wilfully takes higher or other fees than are allowed by law is guilty of a misdemeanor. [C.'73, § 3840; R., § 4166; C.'51, § 2559.]

Any contract for higher fees than those provided, or for an amount which might prove to be higher, would be void: *Gilman v. Des Moines Valley R. Co.*, 40–200.

SEC. **1298. Fees paid in advance.** No officer or person is entitled to receive any fees in advance where the same grow out of a criminal prosecution, or where the fees or compensation is payable by the state or county, or when the orders, judgments or decrees of courts or justices of the peace are to be entered or performed, or their writs executed; but in all other cases he may do so, if he demand them. Witnesses subpœnaed for the defendant in criminal cases may demand their fees in advance as in civil cases, unless the subpœna shows that it is issued under the order of the judge. [C.'73, § 3842.]

An officer may waive the right to demand fees in advance: *Horne v. Pudil*, 88–533.

SEC. **1299. Fee bill.** After the expiration of sixty days from the rendition of a final judgment not appealed, removed or reversed, the clerk of the court, or a justice of the peace in whose office the judgment is entered, may, and, upon demand of any party entitled to any part thereof, shall, issue a fee bill for all costs of such judgment, which shall have the same force and effect as an execution issued by such officer, and shall be served and executed in the same manner. [Same.]

The party against whom the judgment is rendered is primarily liable for all the costs to the parties entitled thereto. They may issue their fee bill therefor, and failing in that they may, by motion, require the successful party to pay such of the costs as accrued at his instance, as provided in § 3855. The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered: *McConkey v. Chapman*, 58–281.

Where a justice, more than ten years after the rendition of judgment in his court, and after a transcript thereof had been filed in the clerk's office, caused a fee bill to issue, and on its return unsatisfied, commenced suit against the successful party to recover such costs, *held*, that the lapse of time barred any right to recover: *State Ins. Co. v. Griffin*, 84–602.

SEC. **1300. Fees payable by state or county.** In all cases where fees or compensation, except a fixed salary, are by the provisions of this code to be paid any officer or other person out of the county or state treasury, no part of the same shall be audited or paid until a particular account has been filed in the auditor's office of the county or state, verified by affidavit, and showing clearly for what services such fees or compensation is claimed, and when the same was rendered. [C.'73, § 3843.]

The account should show a claim against the county and in favor of the claimant and be verified by him: *Hegele v. Polk County*, 92–701.

A claim for the fees of a justice of the peace, in state cases, must be verified by himself. The successor of the justice entitled to the fees cannot make the certificate and verification required by § 4599: *Labour v. Polk County*, 70–568.

SEC. **1301. Report of fees.** All officers required by the provisions of this code to collect and pay over fines and fees shall, except as otherwise provided, on the first Monday in January in each year, make report thereof under oath to the board of supervisors of the proper county, showing the amount of fines assessed, and the amount of fines and fees collected, together with vouchers for the payment of all sums collected to the proper officer. [C.'73, § 3973; R., § 4314.]

SEC. **1302. Report of forfeited bonds.** Clerks of district, superior and police courts, mayors of cities and towns, and justices of the peace shall, on the first Monday in January in each year, make report in writing to the board of supervisors for their respective counties of all forfeited recognizances in their offices; of all fines, penalties and forfeitures imposed in their respective courts, which by law go into the county treasury for the benefit of the school fund; in what cause or proceeding, when and for what purpose, against whom and for what amount, rendered; whether said fines, penalties, forfeitures and recognizances have been paid, remitted, canceled or otherwise satisfied; if so, when, how and in what manner, and if not paid, remitted, canceled or otherwise satisfied, what steps have been taken to enforce the collection thereof. Such report must be full, true and complete with reference to the matters therein contained, and of all things required by this section to be reported, and be under oath, and any officer failing to make such report shall be guilty of a misdemeanor. [C.'73, § 3974.]

TITLE VII.

OF THE REVENUE.

CHAPTER 1.

OF THE ASSESSMENT OF TAXES.

SECTION **1303. Levy—amount of.** The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county:

1. For state revenue, such rate of tax as shall be fixed by the executive council as hereinafter provided;

2. For ordinary county revenue, not more than six mills on a dollar in counties having a population of less than twenty thousand, and in counties having a population of twenty thousand or more, four mills, with a poll tax in either case of fifty cents on each male resident over twenty-one years of age. But in any county in which the levy is limited to four mills the board of supervisors may, at any general election, submit the question of increasing such levy to six mills or less to a vote of the electors, and if such proposition is adopted the board of supervisors may make the next general levy at the proposed rate;

3. For support of schools, not less than one nor more than three mills on a dollar;

4. For making and repairing bridges, not more than three mills on a dollar; but such tax shall not be levied upon any property assessable within the limits of any city of the first class, and none of such bridge tax shall be used in the construction or repair of bridges within the limits of such city. [25 G. A., ch. 114; 22 G. A., ch. 43; 20 G. A., ch. 182; 18 G. A., ch. 13; 15 G. A., ch. 28; C.'73, § 796; R., § 710; C.'51, § 454.]

Authority: These provisions contain and confer the only power given by law to the board of supervisors to levy county taxes for any purpose, except under §§ 448, 449. Section 3973 does not authorize the levy of a tax in excess of the limit here imposed: *Iowa R. Land Co. v. Sac County*, 39–124.

What constitutes: As to what action of the board is sufficient to constitute a levy, see *West v. Whitaker*, 37–598.

A motion in a city council "to levy a tax," which is adopted, constitutes a present levy: *Snell v. Fort Dodge*, 45–564.

Where there is a sufficient levy of taxes, mere irregularities will not affect their validity: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Actual levy required: Where a tax is authorized by special vote it must be actually levied, the act of the electors in authorizing the levy not being alone sufficient: *Iowa R. Land Co. v. Woodbury County*, 39–172.

When to be made: The statutory provisions as to the time for making the levy are only directory, and a levy at a meeting preceding that at which the levy should be made will not be void, no prejudice having resulted to the party complaining: *Easton v. Savery*, 44–654.

So where a schoolhouse tax was not levied by the board of supervisors at the meeting at which it should have been levied, *held*, that it might be levied afterward with the annual levy of the next year; *Perrin v. Benson*, 49–325.

After a final adjournment of a meeting of the board of supervisors, the members have no power to assemble or to transact any business required to be transacted in session until the next regular meeting, unless they be convened in special session in the meantime in the manner prescribed by statute, and any action taken by them by way of making a levy without being so convened will be void: *Scott v. Union County*, 63–583.

Record: The record of a levy need not be signed individually by the persons authorized to make the levy. An entry of the action upon the proper record is sufficient: *Martin v. Cole*, 38–141.

It is not competent to prove the fact of levy by parol evidence where none appears of record: *Moore v. Cooke*, 40–290.

Absence of all record of a levy will not conclusively show that none was made, but absence of the record is a circumstance tending to show that none was made, and may be sufficient to overcome the *prima facie* evidence in favor of the levy which is af-

forded by a tax deed: *Hintrager v. Kiene*, 62–605.

The provision found in § 839 of Code of '73 directing that the levy should be recorded in the proper book [not retained in this Code], *held* directory, and that a record kept upon loose sheets of paper containing the essential facts of a levy and preserved in the proper office constituted a sufficient levy to support the tax: *Prouty v. Tallman*, 65–354. And see *Higgins v. Reed*, 8–298.

The record of the action of the board in a particular case showing a recommendation of the committee for the voting of a tax, and the adoption of such report, *held* sufficient to show a valid levy: *West v. Whitaker*, 37–598.

Where the records of a board of officers authorized to make a levy showed that they met on a certain date, forming a board to levy taxes for the year 1859, and "decided as follows," the number of mills of tax for special purposes being mentioned, *held*, that such record sufficiently showed the making of a levy for that year: *Tallman v. Cooke*, 43–330.

Effect: After the levy of taxes by a county to which another county is attached for revenue, and the placing of the tax lists in the treasurer's hands, the county thus attached cannot by subsequent separation acquire any rights in such taxes: *Hilliard v. Griffin*, 72–331.

SEC. **1304. Exemptions.** The following classes of property are not to be taxed:

1. The property of the United States and this state, including university, agricultural college and school lands, and all property leased to the state; the property of a county, township, city, town or school district or militia company, when devoted entirely to public use and not held for pecuniary profit; public grounds, including all places for the burial of the dead, crematoriums, the land on which they are built and appurtenant thereto not exceeding one acre, so long as no dividends or profits are derived therefrom; fire engines and all implements for extinguishing fires, with the grounds used exclusively for their buildings and meetings of the fire companies;

2. All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations or corporations for public use and not for private profit, and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred and sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from the assessment; the books, papers and apparatus belonging to the above institutions, used solely for the purposes above contemplated, and the like property of students in any such institution used for their education; moneys and credits belonging exclusively to such institutions, and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation;

3. The farm produce of the person assessed, harvested by him, and all wool shorn from his sheep, within one year previous to the listing; all poultry, ten stands of bees, all swine and sheep under six months of age; and all other domestic animals under one year of age not hereinbefore exempt; obligations for rent not yet due, in the hands of original payees, private libraries, professional libraries to the actual value of three hundred dollars; family pictures; household furniture to the actual value of three hundred dollars and kitchen furniture; beds and bedding requisite for each family; all wearing apparel in actual use; and all food provided for the family; but the exemptions allowed in this subdivision shall not be held to apply to hotels and boarding houses except so far as said exempted classes of property shall be for the actual use of the family managing the same;

4. The polls or estates, or both, of persons who by reason of age or infirmity may in the opinion of the assessor be unable to contribute to the public revenue, such opinion and the fact on which it is based being in all cases entered on the assessment roll, and subject to reversal by the board of review;

5. The farming utensils of any person who makes his livelihood by farming, the team, wagon and harness of the teamster or drayman who makes his living by their use in hauling for others, and the tools of any mechanic, not in any case to exceed three hundred dollars in actual value;

6. Government lands entered and located, or lands purchased from this state, for the year in which the entry, location or purchase is made;

7. The homestead, not to exceed eight hundred dollars in actual value, of the widow of any Union soldier or sailor who died during the late war while in service, or who has died since; also the homestead, not to exceed eight hundred dollars in actual value, of any honorably discharged Union soldier or sailor, unable to perform manual labor and dependent thereon for the support of himself and family; but the value of any other real estate owned by him shall be deducted from such exemption. In case of the living soldier or sailor, the assessor shall note the fact of the claim to exemption on the assessment roll, and the same shall be subject to reversal by the board of review. [26 G. A., ch. 29; 21 G. A., ch. 97; C. '73, § 797; R., § 711; C. '51, § 455.]

Public property: Lands held by the United States in trust for grantees are subject to taxation as property of such grantees. A valid legal title is not necessary to authorize taxation: *Stockdale v. Treasurer of Webster County*, 12-536.

Prior to the expiration of five years from the filing of a declaratory statement in case of an entry of public lands under the homestead law, a person seeking to avail himself of the provisions of the homestead act acquires no taxable interest in the land: *Moriarty v. Boone County*, 39-634.

Where public lands were entered by forged scrip, and the entry subsequently canceled on that account and a new entry allowed, *held*, that the lands were not taxable in the hands of the pre-emptor prior to the valid entry: *Reynolds v. Plymouth County*, 55-90.

If a party gets a land warrant from the government which, because of his own fraud, is canceled, but afterwards by a proper application gets a warrant giving him an equity in the land, he is not liable for taxes on the land for the time between the issue of the first and second warrants: *Bronson v. Kukuk*, 3 Dillon, 490; *Pitts v. Clay*, 27 Fed., 635.

In such a case the second warrant cannot be regarded as a substitute for the first, nor is there any estoppel against the party obtaining the warrant towards a purchaser under a tax sale from asserting the invalidity of the first warrant: *Ibid.*

One whose entry has been canceled but who, by rule of the land department is entitled to priority in order to make another entry if he sees fit to do so, does not have such title to the land as to subject the land to taxation. In such case the patent subsequently issued on a new entry would not relate back to the time of the original entry: *Durham v. Hussman*, 88-29; *Hussman v. Durham*, 165 U. S., 144.

A tract of land omitted by mistake in making entry under a certificate, and which was subsequently, by compromise, entirely omitted from such location, another tract being substituted in its place, *held* not subject to taxation: *Scott v. Chickasaw County*, 46-253.

The provisions of the act of congress admitting Iowa into the Union, exempting bounty lands granted for military services from taxation for a term of three years from the date of the patent, *held* not applicable to lands entered upon military land warrants by the assignees thereof: *Sands v. Adams County*, 11-577.

Under similar provisions, *held*, that the actual date of the patent when issued, and not the date of the entry under which title vested in the grantee, was to be considered in determining the time when the land became taxable in the hands of patentees: *Fisher v. Wisner*, 34-447.

Where lands granted by the United States to aid in the improvement of the Des Moines river were conveyed to the state, to be conveyed by it to the parties entitled thereto as the work should progress, *held*, that until such conveyance was actually made by the state the lands were not subject to taxation: *Des Moines Nav. & R. Co. v. Polk County*, 10-1.

Under the railroad land grant acts, by which, upon the completion of a twenty-mile section of road, the company became entitled to certain sections of public land as therein provided, *held*, that such land was taxable in the hands of the company from the time of the completion of the section of road, although certificates for it were not obtained until afterward: *Iowa Homestead Co. v. Webster County*, 21-221; *Dubuque & P. R. Co. v. Webster County*, 21-235.

Lands granted to a railroad on condition that it comply with certain terms in the construction of its road become taxable as soon as such terms are complied with, although the lands are not yet certified or patented: *Whitehead v. Plummer*, 76-181.

Public lands entered by a military land warrant continue exempt from state taxation under the statutes of this state until three years after the patent issues thereon, it being so provided by the act of congress admitting the state into the Union: *Churchill v. Sowards*, 78-472.

Facts in a certain case *held* to show that the lands were reserved and the title withheld by competent authority, and therefore *held*, that the lands were taxable: *Iowa R. Land Co. v. Fitchpatrick*, 52-244.

But where at the time the railroad became entitled to land under the grant it was occupied by a party claiming a homestead entry thereon, *held*, that it did not thereupon become subject to taxation, the United States holding it in trust for one or the other of the parties, and having still a duty to perform with reference thereto: *Dickerson v. Yetzer*, 53–681.

The fact that during nearly a month there was no adverse claim, and during that time the railroad company neglected to procure title, *held* not to render the land taxable to the company, in the absence of any showing that the neglect to procure title was for the purpose of escaping taxation: *Ibid.*

Railroad lands earned by the construction of the road, but not certified, and held by the government on account of conflicting claims, are not taxable while so withheld, and a tax title acquired at the sale thereof during such time is void: *Doe v. Iowa R. Land Co.*, 54–657; *Grant v. Iowa R. Land Co.*, 54–673.

Land which is held by the government to which a company or individual may ultimately acquire title by reason of a grant, but which has never been certified or set apart, and is incapable of identification, is not subject to taxation: *Cedar Rapids & M. R. R. Co. v. Woodbury County*, 29–247.

Under a grant of lands to a state to aid in the construction of a railway, which lands were by the state granted to the company, *held*, that a patent by the governor to the company was evidence that the lands conveyed thereby were then earned by such company, and that the patent issued as soon as the lands were earned, and that parol evidence was only admissible to show that the company had fraudulently prevented the issuance of a patent at the proper time for the purpose of avoiding payment of taxes upon the land earned: *McGregor & M. R. R. Co. v. Brown*, 39–655.

Where a railroad land grant provided that the property be patented by the governor to the company entitled to the same upon the completion of its road, *held*, that in the absence of any showing of fraud upon the part of the company in causing a delay in the conveyance of title, the land became subject to taxation only upon actual conveyance by the governor, although such conveyance was delayed beyond the time when the company was entitled to the same: *Iowa Falls & S. C. R. Co. v. Plymouth County*, 40–609. See also notes to § 1308.

The property of the state is not subject to special assessment for improvement of streets: *Polk County Savings Bank v. State*, 69–24.

Agricultural college lands leased for a term of years, with a provision for forfeiture on non-payment of rents, and with the privilege to lessee of purchasing at the expiration of the lease, *held* not subject to taxation: *Trustees of Agl. College v. Webster County*, 34–141. [But now see § 1351.]

Property of counties: The statutory provision that property of a county shall be exempt from taxation when devoted entirely to public use, and not held for pecuniary profit, amounts to a declaration that before there was such statutory provision lands held by one county situated within another were not subject to taxation: *Guthrie County v. Carroll County*, 34–108.

Taxes levied by the county upon lands to which it has an equitable title are void, and the purchaser thereof at tax sale, being affected with notice of such fact, acquires no title: *Gibson v. Howe*, 37–168.

Land acquired and held by a county in order to secure to it an amount due from a defaulting officer is not taxable: *Ibid.*

Where a county repudiates a contract of sale made by it, it cannot subject the land to taxation: *Moore v. Morledge*, 42–26.

Swamp lands owned by the county at the time of an assessment of real property are not subject to taxation as against a subsequent purchaser thereof: *Iowa R. Land Co. v. Story County*, 36–48.

And where the sale of such land did not embrace the entire amount thereof held by the county, and the portions of the land sold were not yet determined upon, *held*, that the portions afterwards conveyed in pursuance of such sale were not subject to taxation until they were designated: *Ibid.*

Swamp land is not liable to taxation so long as it is held and owned by the county. Where it is conveyed by the county after the close of the assessment, it should be passed as not subject to taxation for that year: *Sully v. Poorbaugh*, 45–453.

Swamp lands belonging to one county situated in another would be exempt from taxation were it not for the provision inserted in § 1308 declaring such lands taxable: *Guthrie County v. Carroll County*, 34–108.

Certain land being exempt from taxation, as swamp land belonging to the county, *held*, that acts of officers of the county in assessing it for taxation would not estop a subsequent purchaser of the county from asserting his title under the swamp land grant: *Hayes v. McCormick*, 83–89.

Property devoted to public use: Property devised to trustees of a town in trust for the improvement of a public park, to be held as a perpetual fund for that purpose, interest and revenues only to be used, is not exempt from taxation in the hands of such trustees. To be exempt, the property in such case must be devoted entirely to public use and not held for pecuniary profit: *Mitchellville v. Board of Supervisors*, 64–554.

The exemption of the property of a school district, used for school purposes, from taxation, by reason of its being property devoted to a public use, extends only to general taxes and does not relieve it from a special tax assessed by a municipal corporation within which it is situated for building sidewalks: *Sioux City v. Independent School Dist.*, 55–150.

The property of a water company which is authorized to furnish water to a city and its citizens, its rates being under the control of the council and its property being subject to be bought by the city at a certain price, is not public property in such sense as to be exempt from taxation: *Appeal of Des Moines Water Co.*, 48–324.

Property of educational and religious institutions: The residence of a professor owned by a college, and a parsonage owned by a church, are so devoted to the appropriate objects, of such institutions as to be exempt from taxation: *Trustees of Griswold College v. State*, 46-275.

Where the officiating pastor of a church held the legal title to certain lots in his own name, and allowed the same to be used by such church and the school connected therewith, without charge, *held*, that the property was not exempt from taxation: *Laurent v. Muscatine*, 59-404.

Property conveyed to a religious society as a gift, with no conditions as to the use to which it shall be devoted, remaining vacant and unimproved at the time of taxation and sale, is not exempt: *Kirk v. St. Thomas Church*, 70-287.

Where property was acquired by a religious institution under such circumstances as to be exempt from taxation, but had already been subject to taxation for seven months of the year, *held*, that its acquisition by such association did not relieve it from liability for the taxes of the year in which it was thus procured: *First Cong. Church v. Linn County*, 70-396.

The exemption from taxation in such a case was not intended to act retrospectively, and relieve from prior taxes or prior liability for taxes, but only to relieve the property from future liability: *Ibid.*

The word "public" as used in this section in regard to the exemption of libraries, grounds and buildings of literary, scientific and religious institutions, etc., designates a class of libraries and does not refer to the grounds and buildings of the institutions and societies named. A vacant lot which is unused cannot be deemed devoted solely to the appropriate objects of a literary institution and being held for sale with a view to pecuniary profit it is not exempt from taxation. *Foy v. Coe College*, 64 N. W., 636.

The fact that the title deed by which the property is held is filed for record as required by this section should be averred. There is no legal presumption in this respect in favor of the party claiming the exemption: *Nugent v. Dilworth*, 63 N. W., 448.

Lots purchased with the purpose of erecting a church building thereon but afterwards mortgaged to raise money with which to erect a church building elsewhere, and held for sale with the intention of applying any additional amount that may be realized therefrom towards the same purpose, are not exempt from taxation. The requirement of the statute is that the property which is exempt shall be directly and not indirectly devoted to the designated purpose: *Ibid.*

Church property leased for other purposes is subject to taxation: See § 2902.

Burying grounds: As to a certain portion of property in controversy, which it was shown was used as a burying ground, *held*, that it was exempt from taxation and a tax sale thereof was void: but as to the balance of the property, which was held in trust for a church but was not used as church property, *held*, that it was not exempt: *Mulroy v. Churchman*, 52-238.

Property of charitable and benevolent societies: Where a charitable society invested its "widows' and orphans' fund" in real property, which was leased for business purposes, the proceeds being strictly applied to the proper objects of the fund, *held*, that such property was not exempt from taxation: *Fort Des Moines Lodge v. Polk County*, 56-34.

Property of insane persons: Where the assessor omits to assess the land of an insane person on the ground that it is within the exemption of this section in favor of persons who, by reason of age or infirmity, are unable to contribute to the public revenue, the treasurer has no authority to enter such land for taxation, the act of the assessor being only reversible by the board of equalization: *Ordway v. Smith*, 53-589.

Tools: The term "tools" in this section, *held* to include the press, types, imposing stones and other implements of a printer necessary to carry on his business: *Smith v. Osburn*, 53-474.

Lands purchased from state or U. S.: The terms "entry" and "location" when applied to acquisition of lands from the government have a fixed and certain meaning, and cannot be applied to the grant of land by a congressional act, and therefore lands acquired by a congressional grant operating *in præsenti* to pass the title without conveyance or other assurance are not exempt from taxation under subd. 6 of this section: *Goodnow v. Wells*, 67-654; *Goodnow v. Litchfield*, 67-691.

It has not been decided by the courts of Iowa, in such cases, that government lands are not taxable until a year after they are patented. The time of patenting does not affect the question as to their taxability: *Ibid.* (Criticising *Litchfield v. Webster County*, 101 U. S., 773.)

Therefore, *held*, that lands claimed by railroad companies under grants from the state in 1858, by virtue of a supposed grant from congress, which grant was made effectual by act of congress in the year 1861, were taxable for that year: *Ibid.*

It was *held*, however, in a similar case by the supreme court of the United States, that such lands were not taxable until the year 1862: *Litchfield v. Webster County*, 101 U. S., 773.

Although the technical title to lands above the Raccoon forks, claimed under the Des Moines river grant, did not pass from the United States until the passage of the additional act of 1861, yet the claimants to such lands under the original grant had such title that the lands in their hands were subject to taxation before the passage of the later act. The confirmatory act of 1861 related back to the first grant and perfected the title from that date: *Stryker v. Polk County*, 22-131; *Litchfield v. Hamilton County*, 40-66.

The latter case was reversed, however, in the supreme court of the United States: *Litchfield v. Hamilton County*, 101 U. S., 781.

Prior to the enactment of subd. 6 of this section, *held*, that such lands acquired after the close of the assessment for the current year were not liable to taxation for that year: *Des Moines Nav. & R. Co. v. Polk*

County, 10–1; *Tallman v. Treasurer*, 12–531; *Sully v. Poorbaugh*, 45–453.

Construction of exemptions: The legislature having declared the liability of property to taxation, courts are not justified in indulging in fine distinctions in defeating the legislative will. The exemption must rest upon some clear and just ground: *Morseman v. Younkin*, 27–350.

A statute exempting property from execution or order of sale upon a judgment or decree of court cannot be construed to exempt it from taxes, or sale therefor: *Slane v. McCarroll*, 40–61.

If property taxable under a previous general statute is afterwards claimed to be exempted by a later statute, the exemption must be shown to be clearly and unequivocally expressed: *Davenport Nat. Bank v. Mittelbuscher*, 4 McCrary, 361.

An exemption from taxes being an exception is strictly construed; therefore, *held*, that such exemption applied only to general taxes and not to special assessments for local improvements: *Cassady v. Hammer*, 62–359.

Taxation is the rule, exemption is the exception, and the statute under which exemption is claimed should therefore be strictly construed: *Trustees of Griswold College v. State*, 46–275; *Sioux City v. Independent School Dist.*, 55–150.

Taxation is the rule and exemption is the exception; therefore strict construction of the statute under which the exemption is claimed is also the rule: *Farwell v. Des Moines Brick Mfg. Co.*, 66 N. W., 176.

Therefore, *held*, that a general exemption from taxation will not extend to and embrace special assessments for street improvements. *Ibid.*

Exemption from taxation is not in the nature of a contract between the state and the property owner, and does not prevent subsequent legislation altering the law and removing the exemption: *Shiner v. Jacobs*, 62–392.

Therefore, *held*, that an exemption to the owner of land by reason of the planting of trees thereon might be limited by a subsequent statute applicable to land planted before the passage of the later act: *Ibid.*

Tax sale of exempt property: The purchaser at tax sale of property exempt from taxation acquires no lien thereon for taxes voluntarily paid for subsequent years, although the property had passed to a third person who could not claim the exemption: *Byington v. Wood*, 12–479.

SEC. **1305. Valuation.** All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value. Such assessed value shall be entered in a separate column opposite each item, and is to be taken and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade.

SEC. **1306. Levy and indebtedness not to be increased.** Should the assessed valuation of the property of any county, township, city, town, district or other political or municipal corporation for the year 1898 or subsequent years exceed the average assessed valuation for the years 1896 and 1897, the maximum rates of levy for such corporation for each of the various purposes for which taxes are levied shall, until otherwise provided by law, be so reduced that the amount of taxes raised for each of said purposes shall not exceed the amount which might have been raised on the average assessed valuation for the years 1896 and 1897 under the maximum rates of levy then existing; and the percentage limitation of indebtedness of such corporation shall be so reduced that such indebtedness shall not exceed the amount which by law might have been incurred on the assessed valuation for the year 1897. The county auditor shall prepare an abstract of the average valuation for the years 1896 and 1897 for the entire county and for each township, city, town or district in the county, for the use of the board of supervisors, city and town councils for the year 1898 and subsequent years, and said board, city or town council shall, in making levies for county, city or town purposes, or other levies certified to them by the officers or boards of the several local districts, carefully examine and reduce any such levies or estimates of the required funds in such an amount as may be necessary to prevent a greater rate of levy than the maximum herein provided for. Where boundaries shall be changed after the assessment in the year 1897 and before the assessment in the year 1898, the county auditor shall make up said valuation from the separate real estate embraced in the assessment districts created by said change of boundaries, and from the personal property therein, so far as may be practicable. It shall be unlawful for any officers or boards charged with the duty of levying taxes

or issuing bonds in any county, township, city, town, district or other political or municipal corporation, to levy a higher rate of taxes for any one year than the maximum rate provided for above, or to incur indebtedness in excess of the amount herein allowed.

SEC. **1307. Remission in case of loss.** The board of supervisors shall have power to remit in whole or in part the taxes of any person whose buildings, crops, stock or other property has been destroyed by fire, tornado or other unavoidable casualty, if said property has not been sold for taxes, or if said taxes have not been delinquent for thirty days at the time of the destruction. But the loss for which such remission is allowed shall be such only as is not covered by insurance. [15 G. A., ch. 66; C. '73, § 800; R., § 818.]

Where a taxpayer makes application, after he has paid his taxes, to have them refunded under this section, the treasurer may refuse to pay such rebate on a simple order of the board that it be refunded without a direct order upon him to that effect: *Crosby v. Floete*, 65–370.

SEC. **1308. What taxable—lands of other counties.** All other property, real or personal, is subject to taxation in the manner prescribed, and this section is also intended to embrace: Ferry franchises and toll bridges, which, for the purpose of this chapter are considered real property; horses, cattle, mules and asses over one year of age; sheep and swine over six months of age; money whether in possession or on deposit; and credits, including bank bills, government currency, property or labor due from solvent debtors on contract or judgment, mortgages or other like securities, accounts bearing interest, property situated in this state belonging to any bank or company, incorporated or otherwise, whether incorporated in this or any other state; corporation shares or stocks not otherwise assessed or excepted; public or municipal bonds, stocks or loans; household furniture, beds and bedding made use of in hotels and boarding houses and not hereinbefore exempted; gold and silver plate, watches, jewelry and musical instruments; every description of vehicle, including bicycles; threshing machines; boats and vessels of every description, wherever registered or licensed, and whether navigating the waters of the state or not, if owned either wholly or in part by inhabitants of this state, to the amount owned in this state. All lands in this state which are owned or held by any other county or counties claiming title under locations with swamp land indemnity scrip, or otherwise, shall be taxed the same as other real estate within the limits of the county. [26 G. A., chs. 30, 31; C.'73, § 801; R., § 712; C. '51, § 456.]

What property is taxable: A valid legal title is not necessary to authorize taxation. Lands held by the United States in trust for grantees are subject to taxation as property of such grantees: *Stockdale v. Treasurer, etc.*, 12–536.

Title to public land may be acquired by a purchaser so as to render the land subject to taxation prior to the issuance of a patent: *Barrett v. Kevane*, 69 N. W., 1036.

A party who acquires a right to possession of property belonging to a city is to be regarded as the owner, and liable for the taxes thereof: *Muscatine v. Chicago, R. I. & P. R. Co.*, 79–645.

Under the railroad land grant acts by which upon the completion of a twenty-mile section of road the company became entitled to certain sections of public land as therein provided, *held*, that such land was taxable in the hands of the company from the time of the completion of the section of road, although certificates for it were not obtained until afterwards: *Iowa Homestead Co. v. Webster County*, 21–221; *Dubuque & P. R. Co. v. Webster County*, 21–235; *Whitehead v. Plummer*, 76–181. And see notes to § 1304.

Mortgages held by nonresidents are not taxable in this state: *Davenport v. Mississippi & M. R. Co.*, 12–539.

A purchase money mortgage is not exempt from taxation. To tax such security is not, at least as to the person owning the mortgage, double taxation: *McGregor v. Vanpel*, 24–436.

The taxation of a mortgage debt in the hands of the mortgagee, and also of the property in the hands of a mortgagor, is not double taxation: *Meyer v. Dubuque County*, 49–193.

Where, under a bond for a deed or instrument of a similar nature, the vendee goes into possession as owner and becomes liable for the taxes, the grantor should be taxed for the unpaid purchase money as moneys and credits: *Ibid.*

Under particular facts indicating that conveyance of real property to a taxpayer was intended as between the parties merely as security for a loan, *held*, that the board of equalization was authorized to assess the property to the former owner, and the purchase price to the presumed purchaser as moneys and credits: *Waller v. Jaeger*, 39–228.

Notes which are left in another state for safe keeping are still subject to taxation in this state to the owner residing here. The debts exist independently of the notes themselves and follow the owner, though as to moneys and credits under the control of an agent in another state for the purpose of investment for profit, the rule might be different. (See § 1320): *Hunter v. Board of Supervisors*, 33–376.

Manuscript books containing abstracts of title which are salable for a money value and are employed at a profit in the business of furnishing abstracts, are taxable: *Leon Loan Co. v. Equalization Board*, 86–127.

Where the owner of a farm had made an executory oral agreement to convey the same at a future time, a part of the consideration being paid, the balance to be paid at the time of conveyance, *held*, that the unpaid purchase money was a credit within the meaning of this section, although payment could not be demanded until conveyance was tendered: *Perrine v. Jacobs*, 64–79.

Railway property: The right of way of a railroad company, and land held by it for depot purposes, are subject to taxation. Although they are taken for public use they are the property of the corporation: *Burlington & M. R. R. Co. v. Spearman*, 12–112.

Therefore, *held*, under a statute providing for taxation of railway property only through the shares of stock of the company that its depot grounds might be subjected to a sidewalk tax: *Ibid.*

Under former statutes by which the property of corporations was taxable only through the shares of stock of its stockholders, *held*, that land owned by a railroad company was not taxable as real property: *Tallman v. Treasurer*, 12–531; *Dubuque & S. C. R. Co. v. Dubuque*, 17–120; *Faxton v. McCosh*, 12–527; *Davenport v. Mississippi & M. R. Co.*, 12–539. Also *held*, that the provision of the Code of '51, that stock owned by nonresident stockholders in railroad and similar corporations in this state should be taxable in the county where either terminus of the road was situated, was valid: *Faxton v. McCosh*, 12–527.

Under the Revision the property of railroads was to be assessed and taxed in the same manner as the property of individuals: *Iowa Homestead Co. v. Webster County*, 21–221; *Dubuque & P. R. Co. v. Webster County*, 21–235.

As to whether the track, depot grounds, buildings, etc., of a railway corporation, situated within the limits of a city, were under 9 G. A., ch. 173, which imposed a tax of one per cent. per annum upon the gross earnings in lieu of all taxes for any and all purposes, subject to municipal taxation, the supreme court were equally divided: *Davenport v. Mississippi & M. R. Co.*, 16–348; *Dubuque & S. C. R. Co. v. Dubuque*, 17–120.

But under 12 G. A., ch. 196, similar to the act last referred to, it was held that such property was subject to taxation for municipal purposes and that the one per cent. was only in lieu of state and county taxes: *Dunleith & Dubuque Bridge Co. v. Dubuque*, 32–427; *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633; *Dubuque v. Chicago, D. & M. R. Co.*, 47–196; and that 14 G. A., ch. 26, § 9, by which it was sought to release railway companies from such taxes previously levied, was unconstitutional: *Dubuque v. Illinois Cent. R. Co.*, 39–56.

As to whether, under the acts of 1862 and 1868 above referred to, the rolling stock of a railway corporation was subject to municipal taxation in the city where the company had its principal place of business, see the cases of *Davenport v. Mississippi & M. R. Co.; Dubuque & S. C. R. Co. v. Dubuque; Dubuque v. Illinois Cent. R. Co., supra.*

As to taxation of railway property under present law, see §§ 1334–1342.

Corporation property and stocks: Under prior provisions, *held*, that the real property of a private corporation for pecuniary profit is taxable as other property, and the shares of stock in such companies were also taxable under § 813 of Code of '73. As to whether both might be taxed at once, and whether that would be double taxation, *quære: Appeal of Des Moines Water-Works*, 48–324.

Although the taxation of the property of a corporation to the corporation, and the shares of its capital stock to its stockholders, may amount to double taxation, yet such a provision is not unconstitutional: *Cook v. Burlington*, 59–251.

Premiums received by an insurance company, being a gross income, are not taxable property so as to permit of a tax levy thereon by a municipal corporation under an authority to collect taxes upon "taxable property:" *Dubuque v. Northwestern L. Ins. Co.*, 29–9; *Burlington v. Putnam Ins. Co.*, 31–102.

Assets of a life insurance company consisting of loans, notes taken for premiums, bonds, cash, etc., were subject to taxation as belonging to the class of moneys and credits, but the company was entitled to deduct therefrom liability to its stockholders and policyholders: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

The assessment of stock in a mutual loan and building association cannot be diminished by the deduction of the debts of the owner: *Bridgman v. Keokuk*, 72–42.

As to the taxation of bank and corporation stock, see §§ 1322, 1323.

Swamp lands of another county: Prior to the enactment in 1873 of the provision as to lands held by a county under the swamp land grant, such lands were not liable to taxation in another county: *Guthrie County v. Carroll County*, 34–108; *Callanan v. Wayne County*, 73–709.

Further, see notes to § 1304.

SEC. **1309. Credits defined.** The term credit, as used in this chapter, includes every claim or demand due or to become due for money, labor or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage or otherwise; but pensions of the United States or any of them, or salaries, or payments expected for services to be rendered, are not included in the above term. [C.'73, § 802; R., § 713; C.'51, §457.]

The term "credits" as here used includes shares of corporate stock: *First Nat. Bank v. City Council of Albia*, 85–736.

In general as to the term "credits," see *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

SEC. **1310. Moneys—credits—annuities—bank notes—stock.** Moneys, credits and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed as provided in this chapter. [C.'73, § 813; R., § 721; C. '51, § 466.]

Although the taxation of the property of a corporation to the corporation, and the shares of its capital stock to its stockholders, may amount to double taxation, yet such a provision is not unconstitutional: *Cook v. Burlington*, 59–251.

The shares of stock of such companies are, under this section, taxable in the hands of the owners thereof. Whether both shares and property may be taxed, and whether that would amount to double taxation, *quære*: *Appeal of the Des Moines Water Co.*, 48–324.

The stockholder is taxable upon his interest in the corporate property, including surplus, as well as upon his capital stock: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

Under prior provisions the shares of stock of a stockholder in a bank incorporated under the general incorporation laws of the state were to be taxed to the owner as his individual property: *Henkle v. Keota*, 68–334. [But see § 1322.]

Under the provisions of the Code of '51, *held*, that a banking corporation doing business within the limits of a city was subject to the payment of municipal taxes: *McGregor v. McGregor Branch of State Bank*, 12–79.

Stock in a national bank should be assessed at its market value, whether that be above, below, or at par: *First Nat. Bank v. City Council of Albia*, 86–28.

Any portion of the capital of a bank which is invested in U. S. bonds should be exempted from taxation: *Ottumwa Savings Bank v. Ottumwa*, 63 N. W., 672; *Campbell v. Centerville*, 69–439; *German Am. Savings Bank v. Burlington*, 54–609.

While it may be true that one of the inducements for the purchase of such bonds is their non-taxable quality, yet it does not constitute fraud on the part of the bank that it thus invests its capital in such bonds, at least where it appears that such investment was a legitimate use of its funds: *Ottumwa Savings Bank v. Ottumwa*, 63 N. W., 672.

Where the property of the corporation is not otherwise assessed it is not error to assess it to the company under the mistaken designation of corporate stock: *Robbins v. Magoun*, 70 N. W., 700.

SEC. **1311. Deducting debts.** In making up the amount of money or credits which any person is required to list, or to have listed or assessed, including actual value of any building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of this section, and so much only of any liability of such person as security for another shall be deducted as he believes he will be compelled to pay on account of the inability of the principal debtor, and if there are other sureties able to contribute, then so much only as he in whose name the list is made will be bound to contribute; but no person will be entitled to any deduction on account of any deposit or security note given in aid of the organization of a mutual insurance company for the premiums of insurance, nor on account of any unpaid subscription to any institution, society,

corporation or company; and no person shall be entitled to any deduction on account of any indebtedness contracted for the purchase of United States bonds or other non-taxable property. [C. '73, § 814; R., § 722; C. '51, § 467.]

This provision for the deduction of debts is not in conflict with the constitutional prohibition against local or special laws for the assessment or collection of taxes: *Macklot v. Davenport*, 17–379.

One who is taxed as a merchant under § 1318 cannot deduct his debts: *McConn v. Roberts*, 25–152.

Where the taxpayer having been acting as an agent for a nonresident for the loaning of money, and having been taxed as agent for such money, executed notes to the persons who had been principals, by which he became personally liable as borrower for the money in his hands for investment, and then set off, as against such money in his hands, the amount of his individual indebtedness on the obligations thus executed, *held*, that it not appearing that there was any fraud or want of good faith, he was not subject to assessment for such property, the amount of his indebtedness being greater than the amount of his moneys and credits as thus estimated: *Hutchinson v. Board of Equalization*, 67–37.

Whether a taxpayer is entitled to have an acknowledgment of indebtedness entered into by him deducted from the amounts of moneys and credits which he is required to list for assessment depends upon whether it is founded upon an actual consideration. If it is founded upon such consideration, and evidences an actual indebtedness, he is entitled to have it deducted regardless of the motive which may have influenced him to incur the obligation: *Hutchinson v. Board of Equalization*, 67–182.

Where property of a nonresident was under the control and management of an agent in the state, within the provision of § 1320, *held*, that the fact that he gave a note to his principal for the amount of such notes for the purpose of exempting them from taxation, such note not representing any real indebtedness, would not entitle such agent to deduct from the amount of the notes under his control the amount of such fictitious indebtedness: *Hutchinson v. Board of Equalization*, 66–35.

Under prior provisions *held*, that stock in a corporation was not to be classed as credits under this section in such a sense that debts of the owner could be set off against its value for purposes of assssment: *Bridgman v. Keokuk*, 72–42. But *quære;* see *Primghar State Bank v. Rerick*, 64 N. W., 801.

To the contrary it has been held that the holder of stock in a national bank may set off against it indebtedness owing by him: *First Nat. Bank v. City Council*, 86–28; *Farmers & Traders Nat. Bank v. Hoffman*, 61 N. W., 418; *Richards v. Rock Rapids*, 31 Fed., 505. As to taxation of stock in national and state or savings banks respectively, see § 1322 and notes.

A corporation being bound to pay to its stockholders all its capital and profits upon the winding up of its affairs, the amount which the stockholders would receive were the corporation wound up is an indebtedness which may be deducted from the amount of moneys and credits belonging to the corporation. Therefore, *held*, that the assets of a life insurance company, consisting of securities, premium notes, cash, etc., were subject to deduction for the purpose of taxation, of the amount of liability of the corporation to its stockholders and also its liability to its policy-holders: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

So held, also, in case of a fire insurance company: *Hawkeye Ins. Co. v. Board of Equalization*, 75–770.

The obligation which a corporation owes to its stockholders to pay to them the surplus over and above the capital stock cannot be deemed an indebtedness which may be set off as against such surplus and thus relieve the corporation from taxation therefor: *Iowa State Savings Bank v. Burlington*, 61 N. W., 851.

In case of a banker the excess of deposits and bills payable over cash and bills receivable may be deducted from moneys and credits: *Campbell v. Centerville*, 69–439.

The moneys and credits of a corporation from which are to be deducted its liabilities do not include real estate and other property for which taxation is specifically provided: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

SEC. **1312. Listing—by whom.** Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed: The property of one under disability, by the person having charge thereof; that of a married woman, by herself or husband; that of a beneficiary for whom the property is held in trust, by the trustee, and the personal property of a decedent by the executor or administrator, or if there is none, by any person interested therein; that of a body corporate, company, society or partnership, by its principal accountant, officer, agent or partner, as the assessor may demand. Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor, unless listed by the mortgagee or lessee. [C. '73, § 803; R., § 714; C. '51, § 458.]

It is the duty of the mortgagor of real property to pay the taxes thereon: *Porter v. Lafferty*, 33–254; *Dayton v. Rice*, 47–429.

While property which is under mortgage or lease may be assessed to the mortgagor, the mortgage itself is to be assessed as personal property to the mortgagee, and if he be a nonresident it cannot be assessed in this state: *Davenport v. Mississippi & M. R. Co.*, 12–539.

Where a purchaser of real estate under contract for a deed takes possession thereof, he is liable for the taxes thereon, and on subsequently taking the deed cannot require the vendor to covenant against such taxes: *Miller v. Corey*, 15–166.

The personal property of a decedent should, as a rule, be assessed in the county of which he died a resident, and not in the county where the executor resides: *McGregor's Ex'rs v. Vanpel*, 24–436.

As to listing real property of decedent, to his heirs without naming them, see § 1353.

Where the administrator is a resident of the same county where decedent died, but of another township, the personal property coming into possession of the administrator should be assessed in the township where the administrator resides: *Cameron v. Burlington*, 56–320.

Where there are two executors both having actual possession of personal property of the decedent and both residing in the same county but in different taxation districts each should return to the assessor of his district or township such personal property of decedent as may be in his immediate possession in such township: *Burns v. McNally*, 90–432.

It does not follow that property which though in possession of an executor has a fixed and abiding place or location in another township than that of executor's residence will necessarily be assessable in the township of such residence: *Ibid.*

The personal property of a ward is to be assessed in the county where his guardian lives although the ward has a legal residence in another county: *Hinkhouse v. Wilton*, 62 N. W., 782.

SEC. **1313. Place of listing.** Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided, and except that, if personal property not consisting of moneys, credits, corporation or other shares of stock, or bonds, has been kept in another assessment district during the greater part of the year preceding the first of January, or of the portion of that period during which it was owned by the person subject to taxation therefor, it shall be taxed where it has been so kept.

Decisions prior to adoption of this Code: The rule as to the place of taxing movable property is hard to fix, but it is not dependent upon the location of the property: *Rhyno v. Madison County*, 43–632.

As a general rule personal property is taxed where the owner resides: *Ament v. Humphrey*, 3 G. Gr., 255.

Moneys and credits are assessable and taxable at the place of the owner's residence and not elsewhere, and an assessment at another place is void: *Barber v. Farr*, 54–57.

A debt of which a note is evidence is subject to taxation where the creditor resides, although the note itself is deposited in another state for safe keeping: *Hunter v. Board of Supervisors*, 33–376.

Where plaintiff had been residing with his family at Osceola, but afterwards went to Chicago, engaging in business there without removing his family, *held*, that he was still subject to taxation in Osceola: *Nugent v. Bates*, 51–77.

Facts in a particular case as to domicile and residence *held* sufficient to show that the property of plaintiff was not assessable in the township where he was assessed: *Babcock v. Township Board of Equalization*, 65–110.

Where the wife of a naval officer whose husband was absent from the state left the state to join him without intention of returning, still owning the home in which they had resided and some furniture therein, *held*, that she was not a resident of the state so as to be subject to taxation: *Remey v. Board of Equalization*, 80–470.

Property *in transitu* from or through a state cannot be taxed. Hence, corn cribbed in Iowa as an incident to its shipment through or from the state is not taxable. If, however, it is put in cribs with no purpose of immediate shipment, but to await the future course of the markets, or for the purpose of avoiding taxation, the transit will be considered as at an end: *Ogilvie v. Crawford County*, 2 McCrary, 148.

A stock of merchandise located within a district should be taxed there for school purposes, although the owner resides in a different district: *Ament v. Humphrey*, 3 G. Gr., 355; *Lemp v. Hastings*, 4 G. Gr., 448.

If personal property has no established locality, and is used in doing business in a county or district in which the owner does not reside, it is to be listed and assessed at the place at which the owner resides; but if it has a known locality, and is used in doing business in that locality, it must be listed and taxed in the county or district where it is thus used: *Lemp v. Hastings*, 4 G. Gr., 448.

Where a taxpayer sought by replevin to recover a horse seized for municipal taxes, *held*, that he could not recover in the absence of an averment that the personal property on which such tax was levied was not habitually used within the city: *Buell v. Schaale*, 39–293.

Where personal property within a city is owned by a nonresident the officer or agent who has control thereof stands in the place of the owner, and its *situs* as to taxation, unless otherwise prescribed, is his place of business: *Dubuque v. Illinois Cent. R. Co.*, 39–56, 67.

It is the province of the general assembly to determine what property actually in the

state is taxable. Money loaned and invested within the state and under the control and management of an agent here may be taxed under the provisions of statute: *Hutchinson v. Board of Equalization*, 66-35.

Notes which are left in another state for safe keeping are still subject to taxation in this state to the owner residing here. The debts exist independently of the notes themselves, and follow the owner, though as to moneys and credits under the control of an agent in another state for the purpose of investment for profit the rule might be different: *Hunter v. Board of Supervisors*, 33-376.

SEC. **1314. Who deemed owners—commission merchants.** Commission merchants, and all persons trading and dealing on commission, and assignees authorized to sell, and persons having in their possession property belonging to another subject to taxation in the assessment district where said property is found, when the owner of the goods does not reside in the county, are, for the purpose of taxation, to be deemed the owners of the property in their possession. [C. '73, § 804; R., § 715; C. '51, § 459.]

SEC. **1315. Grain, ice and coal dealers.** Each grain, ice or coal dealer shall be assessed upon the average amount of capital used by him in conducting his business. In estimating the amount of capital so used, there shall be taken into consideration the increase and decrease of the value of grain held in store, and upon the value of his warehouses, ice houses, granaries or cribs situated upon lands leased from railway companies or other persons, and upon the value, if any, of such leasehold interest.

SEC. **1316. Listing property of another.** Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs. [C. '73, § 805; R., § 716; C. '51, § 461.]

See notes to § 1312.

SEC. **1317. Business in different districts—partners.** When a person, firm or corporation is doing business in more than one assessment district, the property and credits existing in any one of such districts, or arising from business done in such district, shall be listed and taxed in that district, and the credits not existing in or pertaining especially to the business in any district shall be listed and taxed in that district where the principal place of business may be. The personalty, moneys and credits connected with or growing out of all business transacted directly or indirectly by or through the servants, employes or agents of any person, firm or corporation engaged in the banking business, having an office or agency in more than one assessment district for the transaction of business, shall be taxable as provided in this chapter for the taxing of private banks and bankers, in the assessment district where said branch business is done. An assessment made in such district shall be considered and proper deduction made in determining the taxable property of such person or firm, or shares of stock of such corporation, at its principal place of business. The stipulation for the payment of obligations growing out of the business of such agency, in another district than the place where such agency is located, shall not determine where the property or credits of such parties shall be taxed. Any individual of a partnership is liable for the taxes due from the firm. [C. '73, § 806; R., § 717; C. '51, § 463.]

A similar provision (§ 806 of Code of '73), *held* of somewhat doubtful application where the person was doing business in more than one county unless the business in the different counties was of the same kind. Capital invested in the manufacturing business located in one county by a person who resides in another is taxable where the business is located, though it may be temporarily suspended during a part of the year: *Dean v. Solon*, 66 N. W., 182. And see notes to § 1313.

SEC. **1318. Merchants.** Any person, firm or corporation owning, or having in his possession, or under his control within the state, with authority to sell the same, any personal property purchased with a view of its being

sold, or which has been consigned to him from any place out of this state to be sold within the same, or to be delivered or shipped by him within or without this state, shall be held to be a merchant for the purposes of this title. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory taken, and in the assessment roll shall state the date thereof, and if in the judgment of the assessor such is not correct, or if such time has elapsed since the inventory was taken that it shall have ceased to be reliable as to the value thereof, he shall appraise the same by personal examination. The assessment shall be made at the average value of the stock during the year next preceding the time of assessment, and, if the merchant has not been engaged in business so long, then the average value during such time as he shall have been so engaged, and, if commencing, then the value at the time for assessment, and the provisions of this section shall apply and constitute the method of taxation of a corporation whose business or principal business is of a like character, and shall be in lieu of any tax on the corporate shares. [C. '73, § 815; R., § 723; C. '51, § 468.]

Under the Revision which did not have in the following section the express provision as to packing of meats, *held*, that a person engaged in buying and packing pork was a merchant within the meaning of this section, and the fact that the property was held with a view of selling it out of the state did not affect the liability of the owner to taxation upon such property. And that the fact that the property was purchased on credit or on borrowed capital would not relieve the owner from taxation thereon. Debts can only be deducted from moneys and credits: *McConn v. Roberts*, 25–152.

If a person resides in one county and is conducting a mercantile business in another the stock of merchandise should be taxed in the county where the business is done: *Dean v. Solon*, 66 N. W., 182.

SEC. **1319. Manufacturers.** Any person, firm or corporation who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, packing of meats, refining, purifying, or by the combination of different materials, with a view to making gain or profit by so doing, and selling the same, shall be held a manufacturer for the purposes of this title, and he shall list for taxation such property in his hands; but the average value thereof to be ascertained as in the preceding section, whether manufactured or unmanufactured, shall be estimated upon those materials only which enter into its combination or manufacture. Machinery used in manufacturing establishments shall, for the purpose of taxation, be regarded as real estate. Corporations organized under the laws of this state for pecuniary profit, and engaged in manufacturing as defined by this section, and which have their capital represented by shares of stock, shall, through their principal accounting officers, list their real estate, personal property and moneys and credits in the same manner as is required of individuals. The owners of capital stock of manufacturing companies, as herein provided for, having listed their property as above directed, shall be exempt from assessment and taxation on such shares of capital stock. [18 G. A., ch. 57, §§ 1, 2; C. '73, § 816; R., § 724; C. '51, § 469.]

The property taxable under this section is such only as is held for the purpose of adding to the value thereof by the process of manufacturing and with a view to a gain of profit by such manufacture and the sale thereof. Such things as do not become a part of the commodity when ready for sale are excluded: *Dean v. Solon*, 66 N. W., 182.

A company manufacturing and selling sewer pipe and drain tile is a manufacturer within the provisions of this section and not a merchant under the preceding section: *Appeal of Iowa Pipe and Tile Co.*, 70 N. W., 115.

Fuel used in manufacturing is not to be estimated as part of the material entering into the manufacture: *Ibid.*

SEC. **1320. Agent personally liable.** Any person acting as the agent of another, and having in his possession or under his control or management any money, notes and credits, or personal property belonging to such other person, with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit, for himself or the owner,

shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same; and if he refuse to render the list or to swear to the same, the amount of such money, property, notes or credits may be listed and valued according to the best knowledge and judgment of the assessor. [C.'73, § 817; R., § 725.]

These provisions are not unconstitutional. The property involved being protected by the laws of the state to the same extent as any other property, and the rate of taxation being the same, it cannot be said that the property may, by such provision, be appropriated to public use without compensation: *Hutchinson v. Board of Equalization*, 66–35.

Although for some purposes the *situs* of moneys and credits is deemed to be where the owner resides, yet such property may be deemed within the state for the purpose of taxation and may be taxable as well as other kinds of personal property situated within the state under the control and management of an agent: *Ibid.*

An agent cannot escape taxation on the money thus under his management and control by executing to his principal a note for the amount of such money not representing any real indebtedness on the part of the agent. Such fictitious indebtedness would not be within the statutory provision allowing a setting off of debts as against moneys and credits: *Ibid.*

In a particular case, *held*, that the party did not have the possession, management and control of the property of another as agent in such sense as to make him liable for taxes thereon: *Hutchinson v. Board of Equalization*, 67–182.

Section applied: *Hunter v. Board of Supervisors*, 33–376.

SEC. **1321. Private bankers.** Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January first of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

3. The amount of all deposits made with them by others, and also the amount of bills payable;

4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits and of debts owing by such bank as provided in this chapter, and the aggregate actual value of bonds and stocks, after deducting the portion thereof exempt, or otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed at twenty-five per cent. of the actual value of the same, not including real estate, which shall be listed and assessed as other real estate. [15 G. A., ch. 63; C.'73, § 812; R., §§ 719, 720; C.'51, §§ 460, 465.]

Under § 812, of Code of '73, by which private bankers were taxable on the average value of their moneys and credits during the year, an assessment on average deposits was not authorized: *Branch v. Marengo*, 43–600.

SEC. **1322. National, state and savings banks.** Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to the individual stockholders. At the time the assessment is made, the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall

list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate, owned by them, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed. [23 G. A., ch. 39; 15 G. A., ch. 60, § 28; 15 G. A., ch. 63; C.'73, §§ 812, 818–20; R., §§ 719, 720; C.'51, §§ 460, 465.]

Previous statutory provisions as to taxation of shares in national banks *held* inoperative for the reason that the capital and not the shares of stock of state banking institutions were under the state statutes then existing subject to taxation, and therefore, under the national banking act, shares of stock in national banks could not be taxed: *Hubbard v. Board of Supervisors*, 23–130; *Olmstead v. Board of Supervisors*, 24–33; *Lauman v. Des Moines County*, 29–310.

But under subsequent state statutes, *held*, that shares in state banks became subject to taxation so that stock in national banks became taxable: *Morseman v. Younkin*, 27–350.

Under the act of congress with reference to the taxation of national banks, the shares of stock and the real estate of such banks are alone subject to taxation. Personal property belonging to such associations cannot be taxed: *National State Bank v. Young*, 25–311.

To render the assessment of shares of stock in national banks void, as in violation of R. S. of U. S., § 5219, it must be shown there is, in fact, a higher burden of taxation imposed upon the money thus invested than is assessed upon other moneyed capital. It is not sufficient to show that the method of taxation is different: *Richards v. Rock Rapids*, 31 Fed., 505.

The assessment against a shareholder does not authorize the seizure of property of the bank for its liquidation: *First Nat. Bank v. Hershire*, 31–18.

The bank is not absolutely liable for the taxes upon shares, but to render it liable it must be shown that it has, or has had, dividends or other money or property belonging to the delinquent shareholder: *Hershire v. First Nat. Bank*, 35–272.

A stockholder in a national bank cannot be taxed at a greater rate than is assessed on other moneyed capital, and this implies that the assessment of shares in national banks is to be to the stockholder and not to the bank, even though the bank is required to pay the tax out of money due the stockholder: *Farmers' & Traders' Nat. Bank v. Hoffman*, 61 N. W., 418.

The obligation of a national bank to pay the tax of the stockholder does not require that it use funds of its own, except such as may be fairly held to belong to the stockholder either as set apart to him as dividend or otherwise designated as his: *Ibid.*

The fact that stock in a national bank is assessed to the shareholder, whilst savings banks are taxed upon their capital stock and their shares are not taxable, does not render the tax on the national bank stock illegal, it not appearing that the tax in one case is greater than in the other: *Davenport Nat. Bank v. Board of Equalization*, 123 U. S., 83; S. C., 64–140. And see *Davenport Nat. Bank v. Mittelbuscher*, 4 McCrary, 361.

As to whether debts of the stockholder may be deducted from the assessment of bank stock, see notes to § 1311.

This provision for taxing shares of capital stock in a state bank to the bank is not unconstitutional even though there is no provision as there is with reference to the taxation of national bank stock that the bank shall be liable only to the extent to which it has dividends or other property of the stockholder which it may apply to such assessment and even though the owner of the stock should be thereby deprived of the privilege of setting off indebtedness in reduction of the tax on such stock: *Primghar State Bank v. Rerick*, 64 N. W., 801.

The capital of a state bank is really owned, by the stockholders and is itself reduced by the amount paid for taxes. The shareholders do in effect pay the taxes and equality of taxation to that extent exists as between the state bank and the national bank: *Ibid.*

In determining what is the capital stock, of a savings bank to be taxed to the bank, undivided profits or surplus is to be included: *Iowa State Savings Bank v. Burlington*, 61 N. W., 851; *Ottumwa Savings Bank v. Ottumwa*, 63 N. W., 672.

SEC. **1323. Shares of corporation stock.** The shares of stock of any corporation organized under the laws of this state, except those which are not organized for pecuniary profit, and except corporations otherwise provided for in this act, shall be assessed to the owners thereof, at the place where its principal business is transacted, the assessment to be on the

value of such shares on the first day of January in each year; but in arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them, either in this state or elsewhere, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation, except real estate situated within the state, shall not be otherwise assessed. Every such corporation annually, on or before the twenty-fifth day of January, shall furnish to the assessor of the assessment district in which its principal place of business is located a verified statement, showing specifically, with reference to the year next preceding the first day of January then last past:

1. Total authorized capital stock and number of shares thereof;
2. Number of shares of stock issued and par value of each;
3. Amount paid into the treasury on each share and the total capital paid in;
4. Description and value of each tract of real estate owned by said corporation;
5. Date, rate per cent. and amount of each dividend declared, and the amount of capital on which each such dividend was declared;
6. Gross and net earnings, respectively, during the year, and amount of surplus;
7. Amount of profit added to sinking fund;
8. Highest price of sales of stock between the first and tenth days of January of the current year;
9. Highest price of sales of stock during the preceding year, and average price of such sales.

For decisions as to taxation of corporate stock under prior provisions which contained no express direction on the subject, see notes to § 1308.

There is no distinction in the case of ordinary corporations between capital stock and surplus and the whole property of the corporation is liable to taxation as its capital, to be reached through taxation of its stock: *Iowa State Savings Bank v. Burlington*, 61 N. W., 851.

SEC. **1324. Valuation of corporation stock.** If the assessor is not satisfied with the appraisement and valuation furnished as provided in the preceding sections, he may make a valuation of the shares of stock based upon the facts contained in the statements above required, or upon any information within his possession, or that shall come to him, and shall, in either case, assess to the owners the stock at the valuation made by him. If the officers of any corporation refuse or neglect to make the statement required, the assessor shall make a valuation of the capital stock of the defaulting corporation from the best information obtainable. In deducting, under the provisions of this chapter, the value of real estate from the actual value of the properties, shares or capital stock of any person, firm, association or corporation, the actual value at which said real estate is valued by the assessor or other taxing officer or body where the same is assessed shall be the value thereof.

SEC. **1325. Corporation liable.** The corporations described in the preceding sections shall be liable for the payment of the taxes assessed to the stockholders of such corporations, and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stockholders thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter addressed

to the stockholder at his post-office address, as the same appears upon the books of the company, or is known by its secretary.

SEC. **1326. Stock of building and loan associations.** The shares of stock of mutual building and loan or savings and loan associations, exclusively engaged in such business, shall be assessed and taxed to the individual holders thereof at their place of residence. When such association maintains a reserve, expense or other fund, or its equivalent, the total amount of such fund or funds shall be subject to taxation at the principal place of business of the association, and shall be assessed against the association as other personal property, the tax of same to be paid by the association. It shall be the duty of such association to keep a correct list of the owners of the stock thereof, with their post-office addresses, and on or before the thirty-first day of January of each year the officers of all domestic and domestic local associations shall make the same verified statement as other corporations are required to make and furnish the assessors, and in addition thereto shall state the total amount of their reserve, expense or other fund, or its equivalent, and the actual value of its shares of stock, and furnish the same to the assessor of the assessment district in which its principal place of business is located. And on or before the fifteenth day of February of each year the secretary or president of such domestic or domestic local associations shall make, by mailing to them, postage prepaid, a verified statement to the county auditors of the name and post-office address of every stockholder of said associations residing in their respective counties, together with the number of shares owned by each person, and the actual value of each share of said stock on the first day of January preceding. The auditor of state shall, on or before the tenth day of February of each year, send to the county auditor of each county a statement of the name and post-office address of each stockholder of a foreign building and loan or savings and loan association residing in their respective counties, together with the number of shares owned by each person on the first day of January preceding, and the actual value of each share of stock on said first day of January, which facts shall be as reported to him by such associations under the law governing building and loan or savings and loan associations. It shall be the duty of the county auditor to immediately furnish to each assessor in his county the name of each stockholder in any such association residing in such assessor's district, together with the number of shares held by each person, and the actual value of each share on the first day of January preceding.

SEC. **1327. Real estate of corporations.** All real estate owned by corporations, returned in their statements as part of their assets for purposes of taxation, shall be valued therein for such assessment as other real estate, except as otherwise provided, and shall not be otherwise assessed.

Without any express provision on the subject, *held*, that where a portion of the capital stock of a national bank was invested in land which was subject to taxation, the bank might be taxed upon the actual value of its stock, diminished by the proportionate value of the real estate owned by the bank. *First Nat. Bank v. Council of Albia*, 86-28.

SEC. **1328. Telegraph and telephone companies.** Every telegraph and telephone company operating a line in this state shall, on or before the first day of May in each year, furnish to the auditor of state a statement verified by its president or secretary showing:

1. The total number of miles owned, operated or leased within the state, with a separate showing of the number leased;
2. The average number of poles per mile, and the whole number of poles on their lines in this state;
3. The total number of miles in each separate line or division thereof, also the average number of separate wires thereon;
4. The whole number of stations on each line, and the value of the same, including furniture;

5. The whole number of instruments on each separate line, and the gross rental charges per instrument, where the same are rented to patrons of the company making the return, together with the number of stations maintained, other than railroad stations;

6. The gross receipts and operating expenses of said company for the year ending December thirty-first next preceding on business originating and terminating in this state;

7. The gross receipts and operating expenses of said company for the year ending December thirty-first next preceding, and not included in the statement made under subsection six hereof;

8. The total capital stock of said company;

9. The number of shares of capital stock issued and outstanding, and the par or face value of each share;

10. The market value of such shares of stock on the first day of January next preceding, and if such shares have no market value, the actual value thereof;

11. All real estate and other property owned by such company and subject to local taxation within this state;

12. The specific real estate, together with the permanent improvements thereon, owned by such company and situated outside this state and taxed as other real estate in the state where located, with a specific description of each piece, where located and the purpose for which the same is used, and the actual value thereof in the locality where situated;

13. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof;

14. *a.* The total length of the lines of said company;

b. The total length of the lines of said company outside this state. [17 G. A., ch. 59, §§ 1, 2.]

Before the taxation of telephone companies' was expressly provided for it was held that the provisions as to taxing telegraph companies were applicable to them: *Iowa Union Telephone Co. v. Board of Equalization*, 67–250.

SEC. **1329. Failure to make statement.** Upon the receipt of said statements from the several companies, the auditor of state shall lay the same before the executive council, and if it shall deem the same insufficient and that further information is requisite, it shall require the officer making same to make such other or further statement as it may desire. In case of failure or refusal of any company to make out or deliver to the auditor of state the statements required in this chapter, such company shall forfeit and pay to the state of Iowa one hundred dollars for each day such report is delayed beyond the first day of May, to be sued and recovered in any proper form of action in the name of the state, and on the relation of the auditor of state, and such penalty, when collected, shall be paid into the general fund of the state. [Same, § 3.]

SEC. **1330. Assessment by executive council.** The executive council shall, at its meeting on the second Monday in July in each year, proceed to find the actual value of the property of such companies in this state, taking into consideration the information obtained from the statements above required, and any further information they can obtain, using the same as a means for determining the actual cash value of the property of such companies within this state; also taking into consideration the valuation of all property of such companies, including franchises and the use of the property in connection with lines outside the state, and making such deductions as may be necessary on account of extra value of property outside the state as compared with the value of property in the state, in order that the actual cash value of the property of the company within this state may be ascertained; and, after finding the actual cash value of the property of the company within this state, it shall deduct from the total amount of same the actual cash value of the property belonging to the company assessed for taxation in local taxing districts in this

state, and shall assess the property of such company at its taxable value as thus found.

SEC. **1331. Rate of tax—when due.** The council shall also at said meeting determine the rate of tax to be levied and collected upon said assessments, which shall be equal, as nearly as may be, to the average rate of taxes, state, county, municipal and local, levied throughout the state during the previous year, which rate shall be ascertained from the records and files in the auditor's office, and said tax shall be in full of all taxes, except on real estate and special assessments, and shall become due and payable at the state treasury on the first day of February following the levy thereof, and if not so paid the state treasurer shall collect the same by distress and sale of any property belonging to such company in the state, in the same manner as is required of the county treasurers in like cases; and the record of the executive council in such case shall be sufficient warrant therefor. [17 G. A., ch. 59, §§ 4, 5.]

SEC. **1332. Line operated by railroad.** No telegraph line shall be assessed which is owned and operated by any railroad company exclusively for the transaction of its business, and which has been duly reported as such in its annual report under the laws providing for the taxation of railroad property. [Same, § 6.]

SEC. **1333. Insurance companies.** Every insurance company or association organized or incorporated under the laws of any state or nation other than the United States, and every other insurance company whose charter may be owned or a majority of whose stock may be controlled or whose business shall be carried on in the interest or for the benefit of any insurance company or association incorporated under the laws of any state or nation other than the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes three and one-half per cent. of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. Every insurance company incorporated under the laws of any state of the United States other than the state of Iowa, not including associations operating under the provisions of chapter seven, title nine of this code, or fraternal beneficiary associations doing business in the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent. of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. Every other insurance company or association doing business in this state, not including those otherwise taxed under the provisions of this section, and not including county mutuals and fraternal beneficiary associations, shall at the time of making the annual statements as required by law, pay into the state treasury as taxes one per cent. of the gross amount received by it on assessments, fees, dues or premiums for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year, after deducting amounts actually paid for losses and the amount of premiums returned. At the time of paying said taxes, said companies and associations shall take duplicate receipts therefor, one of which shall be filed with the auditor of state, and upon filing of said receipt, and not till then, the auditor shall issue the annual certificate as provided by law, and the taxes provided in this section shall be in full for all taxes, state and local, against such corporations or associations, except taxes on real estate and special assessments. No deduction or exemption from the taxes herein provided shall be allowed for or on account of any indebtedness owing by any such insurance company or association. [C. '73, § 807; R., § 718; C. '51, § 464.]

SEC. **1334. Railway companies.** On the first Monday in March in each year, the executive council shall assess all the property of each railway corporation in the state, excepting the lands, lots and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice-president, general manager, general superintendent, receiver or such other officer as the council may designate, shall, on or before the fifteenth day of February in each year, furnish it a verified statement, showing in detail, for the year ended December thirty-first next preceding:

1. The whole number of miles of railway owned, operated or leased by such corporation or company within and without the state;

2. The whole number of miles of railway owned, operated or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;

3. A detailed statement, showing the amount of real estate owned or used by said railway in the operation thereof in each county within the state, including the right of way, roadbeds, bridges, culverts, depot grounds, station-houses, yards, section and tool houses, roundhouses, machine and repair shops, water tanks, turntables, gravel beds and stone quarries, and for all other purposes, and the estimated value thereof, in such manner as may be required by the council;

4. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed;

5. The total number of ties per mile used on all its tracks within the state;

6. The weight of rails per yard in main line, double tracks and side tracks;

7. The number of miles of telegraph lines owned and used within the state;

8. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight and other cars, including hand cars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately;

9. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

10. The gross earnings of the entire road, and the gross earnings in this state;

11. The operating expenses of the entire road, and the operating expenses within this state;

12. The net earnings of the entire road, and the net earnings within this state. [C.'73, §§ 810, 1317, 1318.]

Decisions under prior statutes: The sections relating to the taxation of railway property, *held* not unconstitutional as providing for the taxation of the property of a corporation otherwise than that of individuals: *Dubuque v. Chicago, D. & M. R. Co.*, 47–196.

But a former statutory provision releasing railway companies from payment of municipal taxes previously levied, *held* unconstitutional: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

However questionable may be the constitutionality of provisions exempting railway companies from all other burdens by the payment of a definite sum annually, whether that sum be greater or less than its share of taxation, it is clear that such an exemption does not render void the general tax levied on other property: *Muscatine v. Mississippi & M. R. Co.*, 1 Dillon, 536.

The order of the board of supervisors declaring the length of the main track and the assessed value of the railroad lying within each city, town, township or lesser taxing district in the county, and transmitted to the city council or trustees of each city or incorporated town or township, becomes the basis for the levy of taxes upon the railroad property without such property being placed

upon the assessment books of the township or city: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Although these sections relate to the assessment of the right of way, which is real property, and which, according to the general law as to assessments, would be assessed only once in two years, yet they are not unconstitutional, being applicable to all railway companies: *Central Iowa R. Co. v. Board of Supervisors*, 67–199.

The provisions of this section are applicable to railway bridges in general, but those of § 1342 apply to those therein mentioned: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283.

As to taxation of property not used in operating the road, and of railway bridges over the Mississippi or Missouri rivers, see § 1342.

As to taxation of railway property in general, see notes to § 1308.

SEC. **1335. Operating expenses—amended statement.** There shall not be included in said operating expenses any payments for interest or discount, or construction of new tracks except needed sidings, for raising or lowering tracks above or below crossings at grade in cities or towns, for new equipment except replacements, for reducing any bonded or permanent debt, nor for any other item of operating expenses not fairly and reasonably chargeable as such in railway accounts. The council may demand, in writing, detailed, explanatory and amended statements of any of the items mentioned in the preceding section, or any other items deemed by it important, to be furnished it by such railway corporation within thirty days from such demand, in such form as it may designate, which shall be verified as required for the original statement. The returns, both original and amended, shall show such other facts as the council, in writing, shall require. [C. '73, § 1318.]

SEC. **1336. Valuation.** The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, and shall include the right of way, road bed bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January first, preceding, and any and all other matters necessary to enable said council to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without this state. [C.'73, § 1319.]

SEC. **1337. Statement sent county auditors.** On or before the twenty-fifth day of March of each year, the council shall transmit to the county auditor of each county, through and into which any railway may extend, a statement showing the length of the main track within the county, and the assessed value per mile of the same, as fixed by a ratable distribution per mile of the assessed valuation of the whole property. [16 G. A., ch. 153; C.'73, § 1320.]

SEC. **1338. Levy and collection of tax.** At the first meeting of the board of supervisors held after said statement is received by the county auditor, it shall cause the same to be entered on its minute book, and make and enter therein an order stating the length of the main track and the assessed value of each railway lying in each city, town, township or lesser taxing district in its county, through or into which said railway extends, as fixed by the council, which shall constitute the taxable value of said property for taxing purposes; and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall transmit a copy of said order to the council or trustees of the city, town or township. [C.'73, § 1321.]

The order of the board becomes the basis for the levy of taxes on railway property for all purposes, and the assessment need not be placed upon the assessor's books: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168, 177.

The valuation upon which a railway com-

pany is to be taxed within any corporation or taxing district is to be determined from the number of miles of main track within the corporation or district, as determined by the order of the board of supervisors, and the value per mile as fixed by the executive council. The order of the board determining the number of the miles of track is not, in any sense, an assessment of valuation, and the provision of statute exempting agricultural and horticultural lands lying within the limits of incorporated towns and cities from taxation for city purposes have no application to railway property. The taxes due from the railroad company for such purposes cannot be reduced by reason of the fact that the track runs for a portion of the way within the city limits through land that is not platted or laid out into lots: *Illinois Cent. R. Co. v. Hamilton County*, 73-313.

SEC. **1339. Rate.** All such railway property shall be taxable upon said assessment at the same rates, by the same officers and for the same purpose as the property of individuals within such counties, cities, towns, townships and lesser taxing districts. [C. '73, § 1322.]

SEC. **1340. Number of sleeping and dining cars.** In addition to the matters required to be contained in the statement made by the company for the purposes of taxation, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, the value of each car so used, and also the number of miles each month said cars have been run or operated on such railway within the state, and the total number of miles said cars have been run or operated each month within and without the state. [17 G. A., ch. 114, § 1.]

SEC. **1341. Assessment by executive council.** The council shall, at the time of the assessment of other railway property for taxation, assess for taxation the average number of cars so used by such corporation each month, and the assessed value of said cars shall bear the same proportion to the entire value thereof that the monthly average number of miles such cars have been run or operated within the state shall bear to the monthly average number of miles such cars have been used or operated within and without the state. Such valuation shall be in the same ratio as that of the property of individuals, and shall be added to the assessed valuation of the corporation, fixed under the preceding sections. [Same, §§ 2, 3.]

Prior provisions as to taxation of sleeping cars *held* constitutional, and not an interference with interstate commerce: *Pullman Palace Car Co. v. Twombly*, 29 Fed., 658.

SEC. **1342. Real property of railways.** Lands, lots and other real estate belonging to any railway company, not used exclusively in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, and grain elevators, shall be subject to assessment and taxation on the same basis as property of individuals in the several counties where situated. [C. '73, § 808.]

The right of the railway company to use the government bridge over the Mississippi river at Davenport, *held* not taxable, except as railroad property under § 1334: *Chicago, R. I. & P. R. Co. v. Davenport*, 51-451.

The provisions of this section relate to the bridges mentioned, while those of § 1334 apply to other railway bridges. This section is not unconstitutional on the ground that it is not of uniform operation: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74-283.

These bridges are to be taxed as bridges and not as a part of the railroad, whether owned by the railroad or by private individuals: *Chicago, M. & St. P. R. Co. v. Sabula*, 19 Fed., 177.

While the United States supreme court has decided that it is the duty of the Union Pacific Railroad Company to operate its whole line, including the bridge at Council Bluffs, yet so much of the bridge as is in Iowa may be taxed under the Code of Iowa as a bridge, and not merely the bridge as a part of the road, more especially since that railroad enjoins in relation thereto all the substantial franchises of a bridge company: *Union Pacific R. Co. v. Pottawattamie County*, 4 Dillon, 497.

The portion of a railway bridge over the Mississippi river between Iowa and Illinois which is taxable in Iowa is determined by the middle of the main navigable channel or channel most used and not by the middle of the great bed of the stream as defined by the banks of the river: *Chicago & N. W. R. Co. v. Clinton*, 88-188.

SEC. **1343. Water and gas works—electric plants—street railways.** The lands, buildings, machinery and mains belonging to individuals or corporations operating water works or gas works; the lands, buildings, machin-

ery, tracks, poles and wires belonging to individuals or corporations furnishing electric light or power; the lands, buildings, machinery, poles, wires, overhead construction, tracks, cables, conduits and fixtures belonging to individuals or corporations operating railways by cable or electricity, or operating elevated street railways; and the lands, buildings, tracks and fixtures of street railways operated by animal power, shall be listed and assessed in the assessment district where the same are situated. But where any such property except the capital stock is situated partly within and partly without the limits of a city or town, such portions of the said plant shall be assessed separately, and the portion within the said city or town shall be assessed as above provided, and the portion without the said city or town shall be assessed in the district or districts in which it is located. All the personal property of such individuals and corporations used or purchased by them for the purposes of such gas or water works, electric light plants, electric or cable railways, elevated street railways or street railways operated by animal power, including the rolling stock of such railways and street railways, and the animals belonging to such street railways operated by animal power, shall be listed and assessed in the assessment district where usually housed or kept. The actual value of the capital stock over and above that of the above listed property shall be listed and assessed as prescribed in section thirteen hundred and twenty-three hereof.

SEC. **1344. Roadbeds and highways.** No real estate used by railway corporations for roadbeds shall be included in the assessment to individuals of the adjacent property, but all such real estate shall be the property of such companies for the purpose of taxation; nor shall any real estate occupied as a public road be assessed and taxed as part of adjacent lands. [C. '73, § 809.]

SEC. **1345. Express companies.** Any person or persons, joint stock association, company or corporation conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate, or other articles by express on contract with any railroad or steamboat company, or the managers, lessees, agent or receiver thereof, not including railroad or steamboat companies engaged in the ordinary transportation of merchandise and property in this state, shall be deemed to be an express company. [26 G. A., ch. 32, § 1.]

SEC. **1346. Statements.** Every such express company shall, on or before the first Monday in May of each year, make and deliver to the auditor of state a statement, verified by the oath of the officer or agent making such report, showing the entire receipts for business done within this state of each agent of such company doing business in this state, for the year then next preceding the first day of March, for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies; but nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Such company making statement of such receipts shall include as such all sums earned or charged for the business done within this state for such preceding year, whether actually received or not. Such statement shall contain an abstract of the amount received in each county, and the total amount received for all the counties. In case of the failure or refusal of such express company to make such statement before the first Monday of May, it shall then be the duty of each local agent of such express company within this state annually, between the first day of May and the first day of June, to make out and forward to the auditor of state a similar verified statement of the gross receipts of his agency for the year then next preceding the first day of March. When such statement is made, such express company shall, at the time of making the same, pay into the treasury of the state the sum of one dollar on each one hundred dollars of

such receipts. And any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided, and to pay the required taxes thereon, shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered by an action in the name of the state of Iowa on the relation of the auditor of state in any court of competent jurisdiction, and the attorney-general shall conduct such prosecution; and such express company so failing or refusing shall be prohibited from carrying on said business in this state until such payment is made. [Same, § 2.]

SEC. **1347. Peddlers—amount of tax.** Peddlers plying their vocation outside a city or town shall pay for the use of the county an annual tax of ten dollars; those with a vehicle drawn by one animal, twenty-five dollars; those with two and less than four animals, fifty dollars; and those with four or more animals, seventy-five dollars. But the board of supervisors of any county may remit the tax where it is deemed that the articles to be sold are of an educational nature, or where the parties desiring to peddle are, because of age or infirmity, incapacitated for manual labor. Nothing in this section shall be held to apply to parties selling their own work or production, either by themselves or employes, nor to persons who have served in the Union army or navy, or to persons selling at wholesale to merchants, nor to transient vendors of drugs. [15 G. A., ch. 62; C. '73, § 906; R., § 791; C. '51, § 510.]

SEC. **1348. License.** A certificate for one year shall be issued to any such peddler by the county auditor upon the presentation of a receipt showing the payment of the proper tax to the county treasurer, and any person peddling outside the limits of a city or town without such certificate, or after the expiration thereof, shall be guilty of a misdemeanor, whether he be the owner of the goods sold or carried by him or not, and, on conviction thereof, shall forfeit and pay into the county treasury, in addition to the penalty imposed therefor, double the amount of the tax for one year as fixed in the preceding section. The certificate shall be good only in the county in which issued, and shall not authorize peddling in cities and towns. [C. '73, § 907, R., § 792; C. '51, §§ 511, 512.]

SEC. **1349. Public shows.** No person shall exhibit any traveling show or circus, nor show any natural or artificial curiosity, or exhibition of horsemanship in a circus or otherwise for any price, gain or reward in any county outside the limits of a city or town, until he shall have obtained a license therefor from the county auditor, upon the payment to the county treasurer of such sum as may be fixed by the board of supervisors, not exceeding one hundred dollars for each place in the county at which such show or circus may exhibit, and any person exhibiting any such show without first having obtained such license shall be guilty of a misdemeanor, and shall also forfeit and pay to the county treasurer double the amount fixed for such license, for the benefit of the school fund. [16 G. A., ch. 131, §§ 1, 2.]

SEC. **1350. Personal property—real estate—buildings.** Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in each odd-numbered year, and in each year in which real estate is not regularly assessed the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; but if such buildings are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property. [15 G. A., ch. 63; C. '73, § 812; R., §§ 719, 720; C. '51, §§ 460, 465.]

Personal property: A tax based upon an assessment of personal property to the person owning the same at the time of assessment, but who did not own it on January 1st preceding, is illegal and its collection may be enjoined. Personal property brought into the state after January 1st is not taxable for that year: *Wangler v. Black Hawk County*, 56–384.

A person should not be assessed for any year upon personal property not owned by him on the 1st day of January of such year: *Tackaberry v. Keokuk*, 32–155.

The provision that "all taxable property shall be taxed each year, etc.," does not make it proper to assess property to one who is not the owner thereof: *Farmers' Loan and Trust Co. v. Newton*, 66 N. W., 784.

Real estate: Real estate not liable to assessment at the time the assessment is closed should be passed without assessment that year: *Sully v. Poorbaugh*, 45–453; *Des Moines Nav. & R. Co. v. Polk County*, 10–1; *Tallman v. Treasurer*, 12–531.

The land, buildings, machinery or water mains of a water company are all real estate and appurtenant to the lot on which the main works are located, and are to be assessed in that township although the mains extend into another township: *Appeal of Des Moines Water Co.*, 48–324.

Thus, also, gas mains and pipes are appurtenant to the lots on which the gas works are situated: *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51–31.

The entry by the assessor upon his list of town lots by number is a sufficient description to embrace not only the lots proper, but everything appurtenant thereto: *Ibid.*

Where waterworks were erected upon premises outside of the city, leased for use as long as needed for the purpose, *held*, that the entire plant, together with the mains, pipes, etc., was assessable as real property in the township in which the main works were located: *Oskaloosa Water Co. v. Board of Equalization*, 84–407.

Where a guardian under authority of court to make a sale of real property agreed with the proposed purchaser that the conveyance and purchase money mortgage should be dated back, and in such form the sale was confirmed by the court, *held*, that taxes on the property for the period between the date of the conveyance and the confirmance of the sale could not be assessed against such purchaser: *Ordway v. Smith*, 53–589.

There can be no new and independent valuation of real property by the assessor in even-numbered years, unless it be as to such as has been omitted in the previous assessment. Even as to such property it is doubtful whether the assessor has anything to do therewith. As a matter of convenience he might list it, but he is not required to do even this: *Snell v. Fort Dodge*, 45–564.

Land purchased from the government may become subject to taxation for the year in which land is not regularly assessed: *Barrett v. Kevane*, 69 N. W., 1036.

Under prior provisions Improvements made upon real estate during the first year after an assessment could not be taxed until the next regular assessment, although the personal property of the owner subject to taxation was decreased by that much. Notwithstanding the provision that "all taxable property shall be taxed each year," the enhanced value of real estate was not regarded as taxable property until the real estate was assessed in the manner provided: *Richards v. Wapello County*, 48–507.

A party cannot complain that he is prejudiced in the fact that his land and improvements thereon, which constitute a part of the realty, are assessed separately: *Robertson v. Anderson*, 57–165.

Nursery stock is not personal property, but a part of the realty, and should be included with the realty in making the assessments: *Wilson v. Cass County*, 69–147.

However, the rate of taxation upon realty and personalty being the same, *held*, that the valuation of such stock as personalty instead of realty under an aggregate valuation was an irregularity which should have been corrected by an application to the board of equalization, and did not authorize an injunction against the collection of such taxes: *Ibid.*

Provisions as to the assessment of real estate are not applicable to the assessment of the right of way of a railway company. The entire property of the railway company is to be assessed as personal property each year: *Central Iowa R. Co. v. Board of Supervisors*, 67–199. See § 1334.

The board of equalization has no authority to equalize assessments of real estate in the years when such assessments are notauthorized to be made: *Goold v. Lyon County*, 74–95.

SEC. **1351. Agricultural college lands.** In all cases where land belonging to any state institution has been leased and the leases renewed, containing an option of purchase, the interest of the lessees therein shall be subject to assessment and taxation as real estate. The value of such interest shall be fixed by deducting from the value of the lands and improvements the amount required by the lease to acquire the title thereto, which leasehold interest so assessed and taxed may be sold for delinquent taxes, and deeds issued thereunder as in other cases of tax sales, and the same rights shall accrue to the grantee therein as were held and owned by the tenant. [20 G. A., ch. 72, § 3; 19 G. A., ch. 169, § 1.]

SEC. **1352. Listing property—valuation.** Each assessor shall enter upon the discharge of the duties of his office immediately after the second Monday in January in each year, and shall, with the assistance of each person assessed, or who may be required by law to list property belonging to

another, enter upon the assessment rolls furnished him for that purpose the several items of property required to be entered for assessment. He shall personally affix values to all property assessed by him. [C. '73, § 822; R., § 733; C. '51, § 471.]

Valuation of real property: It is the duty of the assessor to value different pieces of real property in accordance with his own judgment, and it is not proper for the county board of equalization to fix the values upon different classes of real property: *Burnham v. Barber*, 70–87.

Therefore it is not proper for the board to fix the valuation each assessor shall place upon the different classes of real property, such as improved, unimproved, etc.: *Ibid.*

The assessor is not required to examine each forty-acre tract, but of necessity must arrive at the value from information derived from others, having regard to the elements of value prescribed by statute: *Beeson v. Johns*, 59–166.

Description of real property: A description of property as the "N. W. part of the N. E. ¼ of the N. E. ¼, containing three acres," is not sufficient to support a tax title: *Roberts v. Deeds*, 57–320.

Where it is admitted that property is subject to taxation and lawfully assessed, mere insufficiency in the description under which it is assessed to enable a stranger to identify it will not defeat the tax: *Shaw v. Orr*, 30–355.

Under a previous statute, *held*, that the fact of non-assessment might be shown to defeat the tax title; and if the description of the property assessed did not cover the description of the property conveyed in the deed, there was no assessment in fact: *Immegart v. Gorgas*, 41–439.

A town lot entered upon the assessment books by description carries with it mains, pipes, etc., of water or gas works situated thereon as appurtenances, although such mains and pipes extend beyond such lot or even into another township: *Appeal of the Des Moines Water Co.*, 48–324; *Capital City G. L. Co. v. Charter Oak Ins. Co.*, 51–31.

The description of the property is important, first, to advise the owner of the claim made upon such property; second, that the public in case of sale may know what land is offered, and third, that the purchaser may obtain a sufficient conveyance. If the description is sufficient under the first of these provisions, it is usually sufficient with respect to the others: *Rath v. Martin*, 61 N. W., 941.

Where the same land was assessed twice under different descriptions, in one description to the real owner, and under the other description to unknown owners, and the tax was paid by the owner, *held*, that the assessment to unknown owners was invalid, and would not support a sale: *Ibid.*

A mistake in designating the kind of property will not defeat a collection of taxes justly due: *Robbins v. Magoun*, 70 N. W., 700.

An assessment of land by the government description which has previously been assessed by lot and block in a town plat, such plat having been amended will not be erroneous: *Cahalan v. Van Sant*, 87–593.

Under the circumstances of a particular case, *held*, that the description of property in the assessment of a special tax thereon was sufficient: *Muscatine v. Chicago, R. I. & P. R. Co.*, 79–645.

As to sufficiency of description in general, see notes to § 1442.

Assessment essential: The assessment or recorded valuation of property by an officer having power to make such assessment or valuation is an indispensable step in the exercise of the taxing power. Such recorded valuation constitutes the basis of the levy, and without it there cannot properly be a levy. It is the taxpayer's right to have the amount of his tax entered upon the record provided by law for the same, that he may know in advance the amount which can be collected and govern himself accordingly. It is not enough that the alleged tax is a proportionate part of the burden which the property may be called upon to bear: *Worthington v. Whitman*, 67–190.

Therefore, *held*, that where the assessor had failed to assess the personal estate of a person deceased the treasurer could not recover the taxes on the property of the estate by presenting a claim therefor to the executor for allowance: *Ibid.*

The county cannot recover from the estate of a decedent under a claim that his property was not all assessed for taxation, the amount claimed not being based upon any actual assessment or levy: *Appanoose County v. Vermilion*, 70–365.

Time and manner: It is competent for the legislature to provide that one kind of property shall be assessed once in two years, and another kind assessed every year. It is also competent to provide that property belonging to railway companies shall be assessed in a different manner than the same kind of property belonging to other owners. or that the property of railway companies shall be assessed by a special tribunal provided by statute: *Central Iowa R. Co. v. Board of Supervisors*, 67–199.

Evidence: A book shown to be in fact the assessment book of the township is receivable in evidence, although it does not show the name of the assessor nor that he was sworn: *Brown v. Scott*, 34–575.

In the absence of any showing to the contrary, it will be presumed that the entry of taxes upon the tax list was made at the proper time and by lawful authority: *Silcott v. McCarty*, 62–161.

Where it was sought to show that a tax deed was void because the property had not been assessed for the year for which it was sold for taxes, *held*, that evidence that no assessment books for the year were found in the proper office twenty years afterward was not sufficient to overcome the presumption in favor of the regularity of the tax deed confirmed by the fact that the land appeared on the tax lists for that year: *Slocum v. Slocum*, 70–259.

Entries on the assessor's book are not competent evidence in a suit regarding the title to real property to show the ownership of such property: *Adams v. Hickox*, 55–632; *Hecht v. Eherke*, 64 N. W., 650; *Eherke v. Hecht*, 64 N. W., 652.

By wrong assessor: Where an assessor, elected for an incorporated town, assessed land not situated within the town limits, *held*, that the assessment so far as it included land outside of the town was illegal, even though the officer was an assessor *de facto*, and that a sale for taxes based upon such assessment was void: *Bailey v. Fisher*, 38–229.

Irregularity: The taxpayer will not be granted relief on account of irregularity in the assessment, where it does not appear that the assessment was excessive or unjust: *Litchfield v. Hamilton County*, 40–66.

The question as to what is a mere irregularity in exercising the taxing power is of such character that each case must be determined upon its own peculiar facts and circumstances: *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51–31.

Where personal property was owned jointly by several persons, the respective interests of each not being readily ascertainable, and was assessed to one of such owners alone, *held*, that no part of such assessment was illegal: *Meyer v. Dubuque County*, 49–193.

Curative act: *Held*, that a statute authorizing an assessment to be made in 1858 for the taxes of 1857 rendered valid an assessment made in that manner: *Peirce v. Weare*, 41–378.

Classification: Under provisions of § 821 of Code of '73, (not now retained) for classification of property by the board of supervisors, *held*, that such classification was for the guidance of the assessor: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283; *McCutcheon v. Board of Supervisors*, 63 N. W., 455.

The obvious purport of such provision was that like property should be put in the same class: *Cassett v. Sherwood*, 42–623.

The board of supervisors could not acting as a board of equalization, so change assessments that money and credits in all the townships should be taxed at their face value, while other property was taxed at only fifty per cent. of its value: *Manson Loan & Trust Co. v. Heston*, 83–377.

The purpose of this classification was that like property should be put in the same class. It must precede the assessment. Whether a classification of real property was authorized was not determined: *McCutcheon v. Board of Supervisors*, 63 N. W., 455.

SEC. **1353. Unknown or deceased owners.** When the name of the owner of any real estate is unknown, it shall be assessed without connecting therewith any name, but inscribing at the head of the page the words "owners unknown," and such property, whether lands or town lots, shall be listed as nearly as practicable in the order of the numbers thereof. No one description shall comprise more than one town lot, or more than the sixteenth part of a section or other smallest subdivision of the land according to the government surveys, except in cases where the boundaries are so irregular that it cannot be described in the usual manner in accordance therewith. The real estate of persons deceased may be listed as belonging to his estate or his heirs, without enumerating them. [C. '73, §§ 805, 826; R., §§ 716, 737; C. '51, § 461.]

It is doubtful whether the assessor is required to look to the records for the purpose of ascertaining the state of the title in order to assess real property in the name of the owner thereof. The fact that he assesses a tract described as the smallest governmental subdivision to unknown owners, when in fact the record shows that it is owned in two parcels by different owners, will not render the sale in pursuance thereof void: *Corning Town Co. v. Davis*, 44–622.

Where the same tract is assessed to "unknown owner" and also in the name of the real owner, the former assessment is invalid and a sale thereunder void: *Nichols v. McGlathery*, 43–189.

Land of a known owner need not be assessed in forties, but may be assessed in a body: *Corbin v. De Wolf*, 25–124; *Bulkley v. Callanan*, 32–461.

It would be presumed from the fact that the name of the owner is not shown by the assessment that the intention of the assessor was to assess the property to an unknown owner; *Burdick v. Connell*, 69–458; *Griffin v. Tuttle*, 74–219.

Where there are duplicate assessments of the same land for the same tax, one of which is in the name of the owner, and the other to unknown owners, the one in the name of the owner is valid, the other void: *Rath v. Martin*, 61 N. W., 941.

SEC. **1354. Duty of assessor—owner to assist.** The assessor shall list every person in his township, and assess all the property, personal and real, therein, except such as is heretofore exempted or otherwise assessed, and any person who shall refuse to assist in making out a list of his property, or of any property which he is by law required to assist in listing, or who shall refuse to make the oath required by the next section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not to exceed five hundred dollars. [C. '73, § 823; R., § 734.]

The assessment is not invalid, although the assessor may employ another to make the valuations of property, if they are afterwards submitted to him for correction and approval; and it is no objection that the mere clerical duty of listening was performed by another: *Snell v. Fort Dodge*, 45–565.

The assessor should not assess and need not list real property assessed the preceding year: *Ibid.*

The property which a party is required by law to assist in listing as distinguished from his own includes personal property which he holds in a fiduciary capacity as executor or trustee, and, therefore, property of decedent who was a resident of the county at the time of his death, in the hands of his executor, should be assessed in the township of the residence of such executor: *Cameron v. Burlington*, 56–320.

All property, personal and real, is subject to be listed for purposes of taxation except such as is exempted from taxation by statute: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

Under particular facts, *held*, that the person assessed was a resident of the county in which the assessment was made: *King v. Parker*, 73–757.

SEC. **1355. Oath.** The assessor shall administer the oath or affirmation printed on the assessment rolls hereinafter prescribed to each person assessed, and require the person taking such oath to subscribe the same, and in case any one refuses so to do, he shall note the fact in the column of remarks opposite such person's name. [C. '73, § 824; R., § 735; C. '51, §§ 474–5.]

Under prior provisions it was not required that the property owner subscribe to the oath. The statute being penal should be strictly construed. And, *held*, that a party who simply refused to sign a printedaffidavit did not render himself li able for the penalty provided: *Marion County v. Kruidenier*, 72–95.

Under prior provisions, *held*, that if a person was requested to make oath as provided, and refused, he was liable for the forfeiture. It was not necessary that the oath be actually administered to him and he could not escape liability by showing irregularities in the qualification of the assessor, if the officer was such *de facto*. The fact that the assessor was such officer and was acting in that capacity might be established by his own testimony: *Washington County v. Miller*, 14–584.

SEC. **1356. Notice of valuation.** The assessor shall, at the time of making the assessment, inform the person assessed, in writing, of the valuation put upon his property, and notify him, if he feels aggrieved, to appear before the board of review and show why the assessment should be changed. [18 G. A., 109, § 2.]

An assessor has no authority to require an oath or affirmation, or administer the same, until he has given information of the valuation placed upon the taxpayer's property, and advised him if he feels aggrieved, to appear before the board of equalization and show wherein the assessment should be changed. In an action to recover the penalty for refusing to make such oath or affirmation it must appear that the assessor gave such information and notice and had authority to administer the oath: *Marion County v. Galvin*, 73–18.

SEC. **1357. Refusal to furnish statement.** If any corporation or person refuse to furnish the verified statements in this chapter required, or to list his property, or to take or subscribe the oath in this chapter required, the executive council, or assessor, as the case may be, shall proceed to list and assess such property according to the best information obtainable, and shall add to the taxable valuation one hundred per cent. thereof, which valuation and penalty shall be separately shown, and shall constitute the assessment; and if the valuation of such property shall be changed by any board of review, or on appeal therefrom, a like penalty shall be added to the valuation thus fixed. [17 G. A., ch. 59, § 7; C. '73, §§ 823, 1318; R., § 734.]

SEC. **1358. False statement.** Any person making any verified statement or return, or taking any oath required by this chapter, who knowingly makes a false statement therein, shall be guilty of perjury.

SEC. **1359. Meeting of assessors.** The county auditor of each county shall, before the third day of January annually, issue a call to all the assessors of his county to meet at his office, or some other place at the county seat, within ten days for consultation, and to receive from such auditor such information as shall tend to the proper discharge by them of their official duties. It shall be the duty of each of such assessors to

attend such meeting, and they shall be allowed pay of one day for such attendance, and mileage at six cents per mile one way.

SEC. **1360. Assessment rolls and books.** The auditor shall procure and furnish to each assessor a supply of blank assessment rolls, on which to enter, separately, the names of all persons, partnerships, corporations or associations assessed, which rolls shall be made in duplicate, and separated by a perforated line, except that the oath form in the original shall be omitted and the following inserted in lieu thereof: "If you are not satisfied that the foregoing assessment is correct, you can appear before the board of review, which meets at.....on the first Monday of April next. Dated.....day of.....18..... ..... Assessor." Said duplicate shall be signed by the assessor, detached from the original, and delivered to the person assessed. He shall also furnish to each assessor a supply of blanks in this chapter described as "Assessment Roll, Form No. 2," which shall be in duplicate, and subject to the same conditions as the roll above provided for. The auditor shall also furnish to the assessor two assessment books, each page of which shall be headed "Assessor's book for.....township,.....County, Iowa, independent district of.....," and shall contain columns ruled and headed for the information required by this act, which rolls and books shall be substantially in the following form:

ASSESSMENT ROLL.

Name.....Age.....Address.....No. Dogs....male....female....

No. road district.	Name or number of school district.	PART OF SECTION OR NAME OF TOWN.	Section or lot.	Township or block.	Range.	Value of new buildings.	No. of acres improved.	No. of acres unimproved.	TOTAL NUMBER OF ACRES TAXABLE. Acres	100	LANDS. Actual value per acre.	Taxable value per acre.	Actual value.	Taxable value.	L'TS Actual value.	Taxable value.	Total taxable value of real estate.	EXEMPTIONS. For roads.	For homestead.	Net value of lands and lots.	No. of articles.	DESCRIPTION OF PERSONAL PROPERTY.		Actual value.	Taxable value.	Remarks.
																						Colts 1 year old				
																						Colts 2 years old				
																						Colts 3 years old				
																						Horses over 3 years old				
																						Stallions				
																						Mules and asses ov'r 1 year old				
																						Heifers 1 year old				
																						Heifers 2 years old				
																						Cows				
																						Steers 1 year old				
																						Steers 2 years old				
																						Steers 3 years old or over				
																						Bulls				
																						Work oxen				
																						Sheep over 6 months old				
																						Swine over 6 months old				
																						Vehicles				
																						Household furnit're of hotel and boarding house	$			
																						Moneys and credits from form No. 2..	$			
																						Merchandise	$			
																						Other pers'nal property	$			
																						Total actual value personal		$		
																						Total taxable value personal			$	
																						Total actual value real estate		$		
																						Total net taxable value real estate			$	

Total number of acres - - - - - - - - - -
Total actual value of real estate - - - - $ $ - -
Total taxable value of real estate - - - - $ $ $ - -
Total exemptions - - - - - - - - - - $ $
Net total value of lands and lots - - - - - - - - - - $

Date of Inventory.....

Report name of soldier or sailor; or widow of soldier or sailor, and names of persons who by reason of age or infirmity claim to be unable to contribute to public revenue.

Notice of right to appear before board of review given.....A. D.....

Changes by board of review are as follows:

STATE OF IOWA, }
..... COUNTY. } ss.

I, ...,do solemnly swear (or affirm) that I am the person assessed above, that I have read the foregoing assessment roll of property listed or assessed to me, and that the same is a full, true and correct list of my taxable property, both real and personal property, subject to taxation within this district, and all property which should be listed on this assessment roll to me or by me.

.....

Subscribed and sworn to (or affirmed) this.....day of.....A. D.....,
before me.

.....Assessor.

ASSESSOR'S BOOK.

..............................Township, ...County, Iowa.

Independent District of..............................

Owner's name.	Polls. Under 45.	Polls. Over 45.	Number of road district.	Name or number of school district.	Part of section or name of town.	Section or lot.	Township or block.	Range.	Number of acres improved.	Number of acres unimproved.	Total number of acres taxable. Acres.	Total number of acres taxable. 100.	Value of new buildings.	LANDS. Actual value per acre.	LANDS. Taxable value per acre.	LANDS. Actual value.	LANDS. Taxable value.	Lots. Actual value.	Lots. Taxable value.	Total value of real estate.	Exemption. For roads.	Exemption. For homestead.	Net value of lands and lots.	HORSES. Colts 1 year old. Number.	Colts 1 year old. Actual value.	Colts 1 year old. Taxable value.	Colts 2 years old. Number.	Colts 2 years old. Actual value.	Colts 2 years old. Taxable value.	Colts 3 years old. Number.	Colts 3 years old. Actual value.	Colts 3 years old. Taxable value.	Horses over 3 years old. Number.	Horses over 3 years old. Actual value.	Horses over 3 years old. Taxable value.	Stallions. Number.	Stallions. Actual value.	Stallions. Taxable value.	MULES Number.	MULES Actual value.	MULES Taxable value.

(CONTINUED)

CATTLE. Heifers 1 year old. Number.	Heifers 1 year old. Actual value.	Heifers 1 year old. Taxable value.	Heifers 2 years old. Number.	Heifers 2 years old. Actual value.	Heifers 2 years old. Taxable value.	Cows. Number.	Cows. Actual value.	Cows. Taxable value.	Steers 1 year old. Number.	Steers 1 year old. Actual value.	Steers 1 year old. Taxable value.	Steers 2 years old. Number.	Steers 2 years old. Actual value.	Steers 2 years old. Taxable value.	Steers 3 years old or over. Number.	Steers 3 years old or over. Actual value.	Steers 3 years old or over. Taxable value.	Bulls. Number.	Bulls. Actual value.	Bulls. Taxable value.	Work oxen. Number.	Work oxen. Actual value.	Work oxen. Taxable value.	SWINE. Number.	SWINE. Actual value.	SWINE. Taxable value.	Sheep over 6 months. Number.	Sheep over 6 months. Actual value.	Sheep over 6 months. Taxable value.	Vehicles. Number.	Vehicles. Actual value.	Vehicles. Taxable value.	H'sld furn'tre, hotel and b'rding h'se. Actual value.	H'sld furn'tre, hotel and b'rding h'se. Taxable value.	Moneys and credits. Actual value.	Moneys and credits. Taxable value.	Other personal property.	Total personal property. Actual value.	Total personal property. Taxable value.	Actual value of all property.	Taxable value.	Dogs. Male.	Dogs. Female.

ASSESSMENT ROLL—FORM NO. 2.

ASSESSMENT OF MONEYS AND CREDITS.

Of.....of.....township of .....state of Iowa, January 1, ...

NOTES, BONDS AND OTHER EVIDENCES OF CREDIT.	ACTUAL VALUE.	TAXABLE VALUE.
Aggregate amount of notes		
Aggregate amount of bonds		
Aggregate amount of other written evidences of credit		
Aggregate amount of money in bank		
Aggregate amount of other money		
Aggregate amount of book accounts—good		
Aggregate amount of book accounts—doubtful		
Aggregate amount of checks, drafts and other cash items		
Total moneys and credits		

LIABILITIES.			
Total amount of notes			
Total amount of accounts			
Total amount of other debts			
Total amount of debts			
Net amount of moneys and credits			

The party assessed need list only such of his liabilities as he may desire to have subtracted from his moneys and credits.

STATE OF IOWA, ... County, ss.

I,....., do solemnly swear (or affirm) that the above is a full, true and correct statement of all moneys and credits owned by me, and that the liabilities above given to be deducted therefrom are obligations in good faith actually owed by me.

Signed .. ..

Subscribed and sworn to (or affirmed) before me by.....

this.....day of.....

..... Assessor.

[C.'73, § 821; R., §§ 732-3.]

SEC. **1361. Schedules returned.** The assessor shall furnish to each person, partnership, corporation or association, except those otherwise assessed as provided by law, a blank known as "Assessment Roll—Form No. 2," as provided in the preceding section, upon which such person, partnership, corporation or association shall enter and set out all moneys and credits of whatsoever kind or nature belonging to such person, partnership, corporation or association, and such liabilities as they claim should be deducted from the total of their moneys and credits. The assessor shall carry the aggregate of taxable moneys and credits of such persons, partnerships, corporation or associations to the regular schedule. The assessor shall return all schedules with the assessment books to the county auditor as is provided in this chapter, and the county auditor shall carefully keep all schedules known and described in this chapter as "Assessment Roll—Form No. 2," for the period of five years from the time of filing of the same in his office.

SEC. **1362. Instructions.** The state board of review shall from time to time prepare and certify to each county auditor such instruction as to a uniform method of making up the assessment rolls as it thinks necessary to secure a compliance with the law and uniform returns, which shall be printed upon each assessment roll, and also prepare instructions for the same purpose as to making up the assessment books, which shall be printed therein.

SEC. **1363. Statistics.** In each odd-numbered year the county auditor shall deliver to each assessor the necessary blanks for recording, as to each person whose property is listed, statistics of the previous year as to the number of acres of winter wheat, spring wheat, corn, oats, barley, rye, flax,

potatoes, timothy, clover, prairie hay and pasturage, for publication in the official register. The assessor shall require each person whose property is listed to make answers to such inquiries as may be necessary to enable him to return the foregoing statistics; and said blanks with such entries shall be returned with the assessment book to the county auditor, who shall tabulate the same by townships, and forward the returns thereof to the secretary of state. The secretary of state shall provide and cause to be delivered to the county auditors on the first week in January of the proper years the blanks required by the two preceding sections. [24 G. A., ch. 57, § 1.]

SEC. **1364. Plat book.** The county auditor shall furnish to each assessor a plat book on which shall be platted the lands and lots in his assessment district, showing on each subdivision or part thereof written in ink or pencil, the name of the owner, the number of acres, or the boundary lines and distances in each, and showing as to each tract the number of acres to be deducted for railway right of way and for roads. [C. '73, § 821; R., §§ 732–3.]

SEC. **1365. Completion of assessment.** The assessment shall be completed by the first day of April, and the assessor shall attach to the assessment rolls his oath in the following form:

I, (A..... B.....), assessor of.....county of.....and state of Iowa, do solemnly swear (or affirm) that the actual and taxable values of all property, money and credits, of which a statement has been made and verified by the oath of the person required to list the same, is herein truly set forth in such statement; that in every case, where I have been required to ascertain the amount or value of any property, I have diligently, and by the best means in my power, endeavored to ascertain the true amount and value, and as I verily believe the actual and taxable values thereof are set forth in the annexed return; in no case have I knowingly omitted to demand of any person, of whom I was required to do so, a statement of the items of his property which he was required by law to list, nor to administer the oath to him, unless he refused to take it, nor in any way connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation.

Subscribed and sworn (or affirmed) to this.....day of.....A. D....., before me.

.....

[C. '73, § 825; R., § 736; C. '51, § 478.]

Real estate not liable to assessment at the time the assessment is closed should be passed without assessment for that year: *Sully v. Poorbaugh*, 45-453; *Des Moines Nav. & R. Co. v. Polk County*, 10-1; *Tallman v. Treasurer*, 12-531.

SEC. **1366. Assessors' books returned.** Such rolls shall be laid before the local board of review on or before the first Monday of April in each year for correction, and when such correction has been completed the assessor shall proceed to make up the assessor's books in duplicate from such assessment rolls, allotting a sufficient number of pages to each letter, footing each column of numbers and values on each page, and entering such footings in recapitulation sheets in said books, and not later than the fifteenth day of April return one of such books to the township clerk, and to the city or town clerk not later than the tenth day of May, and the other, together with the assessment rolls, plat book, and all statements which have been furnished to him in connection with the assessment, to the county auditor. [C. '73, § 825; R., § 736; C. '51, § 478.]

The object of the statute is to have the assessor's list before the council when sitting as a board of equalization and a taxpayer who has had an opportunity to be heard to object to his assessment can not complain that the assessor's book was not completed and delivered on the day fixed: *Burlington Gas Light Co. v. Burlington*, 70 N. W., 628.

SEC. **1367. Penalty.** If any assessor or member of any board of review shall knowingly fail or neglect to make or require the assessment of property for taxation to be of and for its taxable value as in this act provided or to

perform any of the duties required of him by this act, at the time and in the manner specified, he shall forfeit and pay the sum of five hundred dollars, to be recovered in an action in the district court in the name of the county and for its use, and the action against the assessor shall be against him and his bondsmen. [C. '73, § 827; R., § 738.]

SEC. **1368. Examination of assessors.** It shall be lawful for the boards of supervisors, the trustees of townships, and councils of cities and incorporated towns as boards of review to summon any assessor or assessors to appear before them, respectively, to be inquired of under oath with respect to the method by which he or they has or have ascertained and fixed any valuation or valuations returned by him or them, and as to the correctness of any such valuation or valuations, and to administer the oath by any one of their members to the assessor or assessors so summoned before them; and any assessor so summoned who shall fail without good cause to appear, or, appearing, shall refuse to submit to such inquiry, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished accordingly.

SEC. **1369. Publication of revenue laws.** The auditor of state shall publish in pamphlet form the revenue laws of the state, for the benefit of the assessors and boards of review, and distribute them to the county auditors, who shall distribute the same to the assessors and boards of their respective counties. [C. '73, § 828.]

SEC. **1370. Local board of review.** The township trustees shall constitute the local board of review for the township or the portion thereof not included within any city or town, and the city or town council shall constitute such board for such city or town. The board shall meet on the first Monday of April, at the office of the township, city or town clerk or recorder, and sit from day to day until its duties are completed, which shall be not later than the first day of May, and shall adjust assessments for the township, city or town by raising or lowering the assessment of any person, partnership, corporation or association as to any or all of the items of his assessment, in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value, and shall also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof, as the assessor should have done. [C. '73, §§ 829, 830.]

Dunk. 669

The township board possesses the power to equalize the assessments of persons to the same extent as it was possessed by the board of supervisors under Revision, § 739: *Keck v. Board of Supervisors*, 37-547.

The board is authorized to add to the assessment of the taxpayer's moneys and credits and increase his assessment as based thereon: *King v. Parker*, 73-757.

The board has no authority to equalize assessments of real property in even-numbered years: *Goold v. Lyon County*, 74-95.

The provisions of this section as to cities do not apply to cities acting under special charter (*arguendo*): *State v. Finger*, 46-25.

Under statutes relating to cities acting under special charter, *held*, that the city council was authorized to act as a board of equalization as in cities under the general incorporation law: *Kinsey v. Sweeney*, 63-254.

The irregular exercise of the powers here conferred upon the city council will not deprive a party of the right of appeal under § 1373: *Ingersoll v. Des Moines*, 46-553.

Under Revision, § 739, which gave the board of supervisors authority to equalize the assessments of individuals, *held*, that they might raise or lower the assessments of particular persons when they believed that the assessment was too low or too high; and that, while they might properly receive evidence before doing so, they were not required to receive evidence in all cases, and that their discretion in such matter could not be controlled by proceedings under writ of *certiorari*, but only upon appeal, if at all: *Smith v. Board of Supervisors*, 30-531.

A taxpayer is bound to know that his property has been assessed, and if he feels aggrieved thereby to appear before the board of equalization. In case of an over-assessment the taxpayer cannot first apply for its correction to the board of supervisors: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74-283.

Where the taxpayer attacks the action of the board of equalization in raising his assessment on the ground that it has not jurisdiction, it is for him to prove the fact upon which the alleged want of jurisdiction rests, for instance, that there was not a quorum present, or that the majority did not concur, or that there was no proper evidence to act upon: *King v. Parker*, 73-757.

The fact that a particular class of property is assessed to owners thereof at less than

is proper will not authorize the board to increase the assessment on such property in the case of one particular taxpayer. Such a change would increase rather than diminish the irregularity of assessment: *Ingersoll v. Des Moines*, 36-553.

Where, under previous statutes, the board of supervisors were given similar powers to be exercised at their "June meeting," *held*, that the provision specifying the meeting was directory only, and that the exercise of the power at a subsequent meeting was not void: *Easton v. Savery*, 44-654, 658; *Hill v. Wolfe*, 28-577.

Whether or not the board has a right to appoint a committee to hear complaints, the fact that it does appoint such committee can not be made an objection on the part of a taxpayer who had an opportunity to be heard by the board: *Burlington Gas Light Co. v. Burlington*, 70 N. W., 628.

Members of the city council acting as a board of equalization are not entitled to compensation in addition to that provided for them by law as members of the council: *Council Bluffs v. Waterman*, 86-688.

SEC. **1371. Clerk—correction of assessments.** The clerk or recorder of the township, city or town, as the case may be, shall be clerk of the board of review, and keep a record of its proceedings, and the assessor shall be present at its meeting and make upon the assessment rolls all corrections or additions directed by the board. At such meetings it shall be the duty of the assessor to read each and every taxpayer's name and assessment on the assessor's books, and, if the assessment is approved, pass to next name. After checking the same, the board shall then take up the unchecked names in alphabetical order, and raise or lower the same as in their opinion will be just; checking off each taxpayer as the same is adjusted. [18 G. A., ch. 109, § 1; C. '73, § 831; R., § 740.]

The provision as to the record of the action of the board is directory, and the fact that the record does not show any action on the part of the board will not prevent an appeal where there has been a controversy determined before them: *Hutchinson v. Board of Equalization*, 66-35.

SEC. **1372. Notice of assessments raised.** In case the assessed value of any specific property or the entire assessment of any person, partnership, corporation or association is raised, or new property is added by the board, the clerk shall give immediate notice thereof by mail to each at the post-office address shown on the assessment rolls, and at the conclusion of the action of the board therein the clerk shall post an alphabetical list of those whose assessments are thus raised and added, in a conspicuous place in the office or place of meeting of the board, and enter upon the records a statement that such posting has been made, which entry shall be conclusive evidence of the giving of the notice required. The board shall hold an adjourned meeting, with at least five days intervening after the posting of said notices, before final action with reference to the raising of assessments or the adding of property to the rolls is taken, and the posted notices shall state the time and place of holding such adjourned meeting, which time and place shall also be stated in the proceedings of the board. [18 G. A., ch. 109, § 3.]

Where the property owner appears before the board and is heard on the matter in controversy, he cannot afterward object to want of the notice here provided for. It was intended by this provision to give the taxpayer an opportunity to be heard before the assessment made by the assessor could be lawfully increased by the addition of supposed omitted property, or by an increase of the assessment, and such notice must be given before the board can act. A notice that the board has increased the assessment is not sufficient: *Henkle v. Keota*, 68-334.

If the taxpayer is present at the time of the action of the board, and is heard as to matters in controversy, he cannot afterwards object to want of notice: *Hutchinson v. Board of Equalization*, 66-35.

Where a board of equalization at their first meeting raised an assessment from fifteen dollars to fifty-three hundred and thirty-four dollars and entered the assessment as changed upon the records, and afterwards posted the notice of the change in the assessments, with time and place of hearing objections to the same, *held*, that as the entry upon the records at the first meeting was not designed to prevent plaintiff from having a hearing before final action was taken, and at best was a mere irregularity not affecting a substantial right, it should not be allowed to avoid the proceeding: *Rockafellow v. Board of Equalization*, 77-493.

Where the assessor decided to list certain bank stock of plaintiff for taxation, and it was agreed between him and the plaintiff that the question as to whether it should be taxed should be submitted by the assessor to the board of equalization, and such board thereupon included the stock in plaintiff's

assessment, *held*, that the case was not one of raising the assessment in such sense that plaintiff was entitled to notice: *Jackson v. Chizum*, 78–209; *Keihl v. Chizum*, 78–213.

SEC. **1373. Complaint to board of review—appeal.** Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly. [Same, § 1; C. '73, § 831; R., § 740.]

Other remedies; when allowable: Where the assessment is erroneous merely as being excessive, the only remedy is an application to the board of equalization, and if necessary an appeal therefrom. The fact that the party has no knowledge of the assessment until too late to make such application makes no difference: *Nugent v. Bates*, 51–77.

A mere error of the assessor in assessing, as personalty, property which should properly be included with the realty is such an error as must be corrected, if at all, by application to the board of equalization: *Wilson v. Cass County*, 69–147.

Failure to appear before the board of equalization to have an over-assessment corrected will not defeat the action of a party against an assessor for maliciously making such over-assessment, when the fact of the over-assessment was not known: *Parkinson v. Parker*, 48–667.

Where land was sold for taxes, a part of which was the personal tax of one not the owner of the land, and which was not a lien upon the land, *held*, that the owner might, after redeeming from the sale, sue for the recovery from the county of the part erroneously included in the sale, and it was not necessary that he should have gone before the board of equalization: *Brownlee v. Marion County*, 53–487.

In case of erroneous assessment, as, for instance, where property properly assessable to a firm in one county is also assessed to one of the partners in another county, the only remedy is by a proceeding before the board of equalization. An action to recover back taxes erroneously assessed cannot be maintained in such case: *Harris v. Fremont County*, 63–639.

Where the property owner does not appear before the board of equalization but appeals to the county treasurer for the refunding of the amount of taxes deemed excessive, he is entitled to no relief and any amount paid to him by the treasurer may be recovered by an action in the name of the county: *Polk County v. Sherman*, 68 N. W., 562.

Replevin: The right to levy taxes may be questioned by an action of replevin to recover back property claimed to be illegally seized for such taxes: *Buell v. Ball*, 20–282.

But in such an action the property owner cannot contest the tax by showing that the ordinance under which the tax was levied was procured by fraud: *Ibid.*

In an action of replevin against a county treasurer for property seized under a tax warrant, plaintiff, though erroneously assessed, cannot inquire into the regularity of a tax levied by a board having authority and jurisdiction: *Bilbo v. Henderson*, 21–56.

The taxpayer must apply for relief from erroneous taxation to the board of equalization, and without doing so cannot, in an action of replevin, recover for property seized for such taxes: *Buell v. Schaale*, 39–293.

Injunction: The proper remedy for an erroneous and excessive assessment is by application to the board of equalization and not by injunction. But in case the law authorizing the tax is unconstitutional or the levy is without authority or jurisdiction, other remedies may be pursued: *Macklot v. Davenport*, 17–379.

One who has failed to avail himself of his right to appear before the board of equalization and have an erroneous assessment corrected cannot afterwards take advantage of such error in an action to restrain the collection of the tax: *Smith v. Marshalltown*, 86–516.

Injunction is not the proper remedy for determining the distribution of taxation among the several townships. The board of supervisors being a board of equalization for that purpose their action can only be reviewed by *certiorari* or upon appeal: *District T'p v. Brown*, 47–25.

A court of equity will not interfere by injunction to release the taxpayer from a tax erroneously or irregularly levied, but may do so when the tax is wholly void, as, for in-

stance, when it is levied upon exempt property or under an unconstitutional law: *Powers v. Bowman*, 53-359; *Smith v. Osburn*, 53-474.

But an assessment against personal property not taxable in the county, being without authority of law, is void, and equity will entertain jurisdiction to enjoin its collection. The jurisdiction of the board of equalization in such cases is not exclusive: *Barber v. Farr*, 54-57.

The collection of taxes which are illegal may be enjoined by action in equity: *Wangler v. Black Hawk County*, 56-384.

Equity will not interpose to prevent the collection of a tax on account of mere irregularities. If the tax is unauthorized by law, or is imposed upon exempt property, or is fraudulently assessed, equity will relieve: *Conway v. Younkin*, 28-295.

For mere irregularities in the apportionment of the taxes of a municipal corporation, the collection of its revenues cannot be enjoined by a taxpayer: *Morrison v. Hershire*, 32-271.

A court of equity will not interfere to prevent the collection of taxes authorized by law, and to which the property is lawfully liable, on account of errors or irregularities in the assessment: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41-153.

In such cases, if it does not appear that there is a want of power to levy the tax or that the property is not justly liable thereto or that the tax is excessive, equity will not grant relief: *Litchfield v. Hamilton County*, 40-66.

If a tax is illegal and not merely irregular, its enforcement may be restrained by injunction. So *held* where the county board of equalization had exceeded its powers in raising an individual assessment: *Rood v. Board of Supervisors*, 39-444.

Injunction may properly be granted to restrain the enforcement of an illegal tax. An action of replevin to regain possession of property distrained for the payment of the tax is not a full and complete remedy at law, such as will deprive the taxpayer of his equitable remedy: *Spencer v. Wheaton*, 14-38.

A court of equity will not relieve a taxpayer from the payment of proper and just taxes against his property on account of irregularities in the manner of placing the tax upon the tax book: *Iowa R. Land Co. v. Soper*, 39-112.

It is not necessary in seeking relief from an unauthorized assessment to apply to the board of equalization in the first instance. The case is different from that of erroneous or excessive assessment. A proceeding to enjoin may be resorted to in such cases, and in such proceeding the county treasurer is a proper party defendant: *Hubbard v. Board of Supervisors*, 23-130.

In an action by taxpayers against the county officers to restrain the levying of a tax to pay railroad bonds, the bondholders must be made parties to the suit in order to bind them, though they may not be absolutely necessary parties: *Ex parte Holman*, 28-88.

Residents and taxpayers have such direct legal interest in the question of the validity of taxes that they are authorized to join in an action to declare them void: *Wilkinson v. Van Orman*, 70-230.

Mandamus: A party may by *mandamus* compel the board to act, but their discretion cannot be controlled by such action: *Meyer v. Dubuque*, 43-192.

Certiorari: Where the board orders a reduction of the taxation of an individual, but the assessor fails to make the correction in accordance with such order, and his books are turned over to the auditor, the taxpayer may maintain an action of *certiorari*, to have the error corrected: *Keck v. Board of Supervisors*, 37-547.

Where a county board of equalization acts in a case not within its jurisdiction *certiorari* is the proper remedy: *Royce v. Jenney*, 50-676.

But where the board has jurisdiction the exercise of its discretion cannot be reviewed in this manner: *Smith v. Board of Supervisors*, 30-531.

Where the board assessed for taxation a person who was not a resident of the state, *held*, that it acted without jurisdiction and that *certiorari* was the proper method of review: *Remey v. Board of Equalization*, 80-470.

If the board has jurisdiction its action cannot be reviewed by *certiorari*, no matter what the motive is under which an assessment is changed: *Polk County v. Des Moines*, 70-351.

A taxpayer is a proper party to maintain an action to question the validity of the proceedings of the city council acting as a board of equalization in reducing the taxes upon individual property: *Collins v. Davis*, 57-256.

The party seeking relief from an erroneous assessment must appear before the board of equalization and make known his grievance in order to be entitled to appeal, but no special form of complaint is required, and if the objections are called to their attention it is sufficient: *Burns v. McNally*, 90-432.

Where the board of equalization on its own motion raised the assessed value of a taxpayer's property, (there being at that time no provision as to notice such as is now found in the preceding section) *held*, that no appearance before the board to have such action corrected was necessary to entitle the taxpayer to appeal: *Ingersoll v. Des Moines*, 46-553.

In case of appeal from the action of a city council acting as a board of equalization, notice of the appeal may be served upon the mayor: *Farmers' Loan & Trust Co. v. Newton*, 66 N. W., 784.

Appearance cures any defect in the service of the notice of appeal: *Richards v. Rock Rapids*, 72-77.

No bond is required upon the taking of such appeal: *Ingersoll v. Des Moines*, 46-553.

The amendment limiting the right of appeal to the time specified took away such right in cases in which that time had elapsed without any appeal being taken prior to the taking effect of the amendment: *Slocum v. Fayette County*, 61-169.

Procedure: While the statute does not provide for any written pleadings on such appeal yet it does not say that such pleadings

when filed shall be stricken from the files. The lower court in the exercise of its discretion may allow such pleadings to be filed and in such case copy fees may properly be taxed: *Farmers' Loan & Trust Co. v. Newton*, 66 N. W., 784.

This section does not prescribe the formalities to be pursued, and when proper notice of appeal is served the court to which the appeal is taken acquires jurisdiction and may properly overrule any motion to dismiss the appeal for irregularity: *Bremer County Bank v. Bremer County*, 42-394.

Upon such an appeal evidence may be introduced by the parties in addition to the matter shown by the record, and the court becomes an assessing tribunal clothed with authority to determine anew the sum in which the taxpayer is to be assessed: *Grimes v. Burlington*, 74-123.

In such an appeal the property owner has no right to a jury trial. The duty of the court is to do what it is claimed the board failed to do, that is, make a just and equitable assessment. On appeal to the supreme court that court has the same duty and must weigh the evidence as an original question, as is done in equity cases, and determine therefrom what is the just and equitable value of the property for the purpose of taxation: *Davis v. Clinton*, 55-549; *Dunlieth, etc., Bridge Co. v. Dubuque County*, 55-558.

A taxpayer whose real property is assessed at more than its true cash value may still have redress, on appeal from the board of equalization, if his property is taxed as high as other property of greater value. And in a particular case, *held*, that under such circumstances the supreme court would, on appeal, reduce the valuation of plaintiff's real estate in order that it might correspond to other property: *Burham v. Barber*, 70-87.

The city council, while acting as a board of equalization, represents the city and may, if an appeal is taken from its action, support it in the appellate court, and the city solicitor may properly appear for the council in such matter: *Kinnie v. Waverly*, 42-437.

Upon appeal by a person seeking to have his assessment reduced the court has no authority to increase the assessment: *Appeal of Des Moines Water Co.*, 48-324; *German Am. Savings Bank v. Burlington*, 54-609.

Where plaintiff was assessed a certain sum, by the town council, upon merchandise, and appealed from the assessment on the ground that he had no goods and merchandise, and it appeared that he had sold his merchandise, *held*, that the court was not authorized to change the assessment from merchandise to moneys and credits, and could not try any other issue than that presented by the appeal: *Brown v. Grand Junction*, 75-488.

It is the duty of the district court upon the hearing of the appeal to make a just and equitable assessment of the property and it is in no way to be affected in its action by the action of the board of equalization: *Lyons v. Board of Equalization*, 70 N. W., 711.

The right of appeal is purely statutory and perhaps an appeal by the city or its board of equalization is not authorized, but under the general provisions as to appeal to the supreme court from the action of the district court the city may appeal from the district court to the supreme court as to a decision of the district court adverse to the action of the board of equalization: *Farmers' Loan & Trust Co. v. Newton*, 66 N. W., 784.

Where a corporation was assessed by the assessor, with its consent in the sum of $1,000 on moneys and credits, and subsequently the assessment was raised by the board, but on application to them, and on appeal to the district court it was finally reduced to that amount, *held*, that the corporation could not object, on appeal to the supreme court, that such assessment was not proper: *Phelps Mfg. Co. v. Board of Equalization*, 84-610.

An appeal to the supreme court from the district court in a proceeding to review the action of the board of equalization is triable *de novo: First Nat. Bank v. City Council of Albia*, 86-28; *Lyons v. Board of Equalization*, 70 N. W., 711.

SEC. **1374. Withholding property from assessment — penalty.** When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when apprised thereof, at any time within five years from the date at which such assessment should have been made, demand of the person, firm, corporation or other party by whom the same should have been listed, or to whom it should have been assessed, or of the administrator thereof, the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, together with six per cent. interest thereon from the time the taxes would have become due and payable had such property been listed and assessed, and upon failure to pay such sum within thirty days, with all accrued interest, he shall cause an action to be brought in the name of the treasurer for the use of the proper county, to be prosecuted by the county attorney, or such other person as the board of supervisors may appoint, and when such property has been fraudulently withheld from assessment, there shall be added to the sum found to be due a penalty of fifty per cent. upon the amount, which shall be included in the judgment. The amount thus recovered shall be by the treasurer apportioned ratably as the taxes would have been if they had been paid according to law.

SEC. **1375. County board of review.** The board of supervisors shall constitute a county board of review, and shall adjust the assessments of the several townships, cities and towns of their county at their regular meeting in June, and add to or deduct from the assessed value of the property substantially as the state board adjusts assessments of the several counties of the state. [C. '73, § 832; R., § 739.]

The action of the county board of equalization can only be reviewed upon appeal or by *certiorari*, not by injunction: *Macklot v. Davenport*, 17–379; *District T'p v. Brown*, 47–25.

The board of supervisors has not the authority to change assessments of moneys and credits so that such moneys and credits shall be taxed at their full value, while other property is assessed at fifty per cent. of its value: *Manson Land & Trust Co. v. Heston*, 83–377.

Action of the board once taken should not subsequently be rescinded by it by way of expunging from the records its resolution, without hearing from the parties interested, and upon the mere individual recollection of the members of the board: *Ridley v. Doughty*, 85–418.

The board has no power to raise or lower the assessment of an individual taxpayer: *Royce v. Jenney*, 50–676: and a tax based thereon is void: *Rood v. Board of Supervisors*, 39–444.

A taxpayer cannot apply to the board of supervisors for relief against an over-assessment: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283.

The board of supervisors have no jurisdiction to determine the right of a municipal corporation to assess taxes, and they cannot remit taxes on the ground of absence of such right: *District T'p v. Moore*, 39–605.

Where two townships, being included within the corporate limits of a city, constitute but one assessorial district, the board has no authority to increase the assessment of one of such townships. It may only equalize as between different assessorial districts: *Getchell v. Board of Supervisors*, 51–107.

Under the authority to equalize, *held*, that the board of supervisors might not raise the assessment of particular property, such as a particular kind of real estate, at least where such change was not based on a classification adopted before assessment under the provisions of § 821 of Code of '73 (not now retained): *McCutcheon v. Board of Supervisors*, 63 N. W., 455.

Therefore *held*, that an order of the board "raising the assessment on all farm lands inside of the limits of the incorporated town uf Rock Rapids one hundred per cent. above the valuation fixed by the assessor and board of equalization of said incorporated town" was invalid: *Ibid.*

The board may equalize by adding to, or deducting from, the valuation of different classes of property in the different townships, as well as by increasing or diminishing the aggregate valuation of all the property therein: *Harney v. Board of Supervisors*, 44–203.

While the township trustees have power to equalize assessments of taxpayers within their township, yet the board of supervisors may overrule their action for the purpose of securing uniform taxation throughout the county upon the different classes of property: *Cassett v. Sherman*, 42–623.

Therefore *held*, that where bank stock was assessed at sixty per cent. of its par value in all townships except one, the county board of equalization might raise the assessment of bank stock of holders thereof in that township to the same per cent: *Ibid.*

SEC. **1376. Appeals.** Appeals may be taken from any action or decision of a county board of review by the board of review of any city, town or township aggrieved thereby, within the same time and in the same manner as appeals are taken from the local board of review.

SEC. **1377. Abstract.** Each auditor shall, on or before the third Monday in June, make out and transmit to the auditor of state an abstract of the real and personal property in his county, in which he shall set forth:

1. The number of acres of land and the aggregate actual and taxable values of the same, exclusive of town lots, returned by the assessors, as corrected by the county board of review;
2. The aggregate actual and taxable values of real estate in each township, city and town in the county, returned as corrected by the county board of review;
3. The aggregate actual and taxable values of personal property;
4. An abstract as to the number and value of all animals as the same are returned by the assessor, showing the aggregate actual and taxable values and number of each kind or class, and such other facts as may be required by the state board of review. [C. '73, § 833; R., § 741.]

SEC. **1378. State board of review.** The executive council shall constitute the state board of review, and shall meet at the seat of government on the second Monday of July in each year. The auditor of state shall be

the clerk of the board, and shall lay before it the abstracts transmitted to him by the auditor, as required by the preceding section. [C. '73, § 834; R., § 742; C.'51, §§ 481–2.]

The state board has no power to equalize personal property: *Harney v. Board of Supervisors*, 44–203.

SEC. **1379. Adjusting valuation in counties.** It shall adjust the valuation of property of the several counties, adding to or deducting from the valuation of each kind or class of property such percentage in each case as will bring the same to its taxable value as fixed in this chapter. [Same.]

SEC. **1380. State levy.** It shall be the duty of the general assembly at each regular session, by statute or joint resolution, to definitely fix the amount to be expended for general state purposes during the biennial period next ensuing. The executive council shall annually fix the rate per cent. upon the valuation of the taxable property within the state to be levied to raise such amount, after deducting the receipts for the general revenue fund received from other sources, and certify such rate to the auditor of each county. [26 G. A., ch. 109; 25 G. A., ch. 114; C. '73, § 835; R., § 743.]

SEC. **1381. Levy to pay municipal bonds.** Whenever any municipal corporation, board or tribunal is charged with the duty of levying a tax to pay any bonds or interest thereon, and fails to make such levy, the holder thereof may, after obtaining final judgment thereon, in addition to any other remedies he may have, file a transcript thereof with the auditor of state, taking his receipt therefor, and the same shall be registered in his office, and the state board of review at its regular annual session shall levy upon the taxable property of the county, city, town or school district for which such bonds were issued a sufficient rate of taxation to realize the amount of interest, or principal and interest, due or to become due on the bonds so filed, prior to the next levy, and the money arising from such levy shall be known as the bond fund, and collected as a part of the state tax, paid into the state treasury, and placed to the credit of such county, city, town or school district for the payment of said bonds and interest, and shall be paid out as the interest installments or the principal may mature, by warrants drawn by the auditor of state in favor of the holder of such bonds, as shown by the register in his office, until the same shall be paid; and, when paid, the bonds and coupons shall be canceled and returned to the treasurer of the county, city, town or school district issuing the same, who shall receipt therefor. [24 G. A., ch. 14, § 7; 22 G. A., ch. 17, § 7; 21 G. A., ch. 78, § 7.]

SEC. **1382. Certifying result to county auditor.** The board shall keep a record of its proceedings, and finish its review and adjustment on or before the first Monday of August, and the auditor of state shall thereupon transmit to each county auditor a statement of the percentage to be added to or deducted from the valuation of each kind or class of property in its county, and shall certify the rate of state tax fixed as required by law. The county auditor shall thereupon add to or deduct from the valuation of each kind or class of property in his county the required percentage, rejecting all fractions of fifty cents or less in the result, and counting all over fifty cents as one dollar. [C.'73, § 836; R., § 743; C. '51, § 183.]

Where the board of equalization reduces the valuation of property, it is the duty of the auditor to enter in the tax list the valuation upon which the tax is estimated and collected, and upon his failure or neglect to do so, the owners of the property have a remedy by *mandamus: Ridley v. Doughty*, 77–226.

SEC. **1383. Tax list.** All taxes which are uniform throughout any township or school district shall be formed into a single tax, and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. Before the first day of January in each year, the county auditor shall tran-

scribe the assessments of the several townships, towns or cities into a book, to be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed, with distinct columns in which shall be entered the names of taxpayers, descriptions of lands, number of acres and value, number of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. At the end of the list for each township, town or city he shall make an abstract thereof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each. [C. '73, §§ 837–9; R., §§ 745–6; C. '51, §§ 485–6.]

Where the collection of a road tax was authorized, but owing to a change in the method of assessment of railway corporations no one was authorized to put the tax for a certain year upon the tax list, *held*, (under Rev., § 745) that such duty devolved upon the clerk of the board of supervisors: *Milwaukee & St. P. R. Co. v. Kossuth County*, 41-57, 66.

The auditor may correct errors found in the assessments upon transcribing them, and insert the name of an owner in the tax book: *Adams v. Snow*, 65-435.

Where property is duly assessed to the owner, the omission of the name of the owner in transcribing the tax upon the tax list will not invalidate the assessment: *Parker v. Cochran*, 64 757.

[The provision found in § 839 of Code of '73 as to levy of tax and making record thereof is not retained. It seems to be substantially covered by § 1303, which was § 796 of Code of '73.]

SEC. **1384. Tax for bonded indebtedness.** The board of supervisors shall not in any one year levy a tax of more than three mills on the dollar for the payment of any bonded indebtedness or judgments rendered therefor, except as provided in chapter one, of title four, of the code, unless the vote authorizing the issuance of the bonds fixes a higher rate. [C. '73, § 840.]

The limit here imposed does not apply to a levy to pay bonds issued in satisfaction of a judgment: *Sioux City & St. P. R. Co. v. Osceola County*, 52-26.

SEC. **1385. Errors corrected.** The auditor may correct any error in the assessment or tax list, and when such correction affecting the amount of tax is made after the books shall have passed into the hands of the treasurer, he shall charge or credit him, as the case may be, therefor, and report the same to the board of supervisors. [C. '73, § 841; R., § 747.]

Where a correction of the rate of taxation was authorized, but, owing to a change in the method of assessment of railway corporations, no one was authorized to put the tax for a certain year upon the tax list, *held*, that such duty devolved upon the clerk of the board of supervisors (now the auditor): *Milwaukee & St. P. R. Co. v. Kossuth County*, 41-57.

The auditor is authorized to correct errors found in the assessment upon transcribing it, and the name of the owner may be inserted by him in the tax book: *Adams v. Snow*, 65-435.

Where the assessor omitted to insert in his list the name of one of two joint owners of property, *held*, that the assessment book might properly be corrected in that respect: *Conway v. Younkin*, 28-295.

To authorize a correction in the assessment or tax book as to the valuation of property there must be an error or mistake shown. An averment that the valuation was not fair or reasonable is not sufficient to justify a change: *Jones v. Tiffin*, 24-190.

Where it appeared that the assessment roll had been corrected by some one, and that as so corrected it had remained on file as a record in the auditor's office, and been regarded in subsequent proceedings as correct, *held*, that a party objecting to the correction as not made by proper authority had the burden of showing that it was incorrect and that the taxes assessed were inequitable or unjust, it appearing that unless covered by such correction the land had been entirely omitted from assessment: *Beeson v. Johns*, 59-166.

Where the lands of nonresidents were not returned on the assessment rolls for a particular year, and at the time of transcribing the assessments such lands were entered on the tax list by the county auditor, who listed the lands and fixed the valuation thereof, and delivered the tax list, including such lands, to the county treasurer, upon which sales for delinquent taxes were made, *held*, that such assessment and sales thereunder were valid: *Robb v. Robinson*, 66-500.

The powers conferred upon the auditor to correct errors in the assessment include the power to insert property which has been omitted and is subject to taxation. The time within which the auditor may make this correction is not limited by statute, and it may be made after the levy of the tax: *Parker v. Van Steenburg*, 68-174.

The power here given to the auditor includes the power to determine when a mistake has been made: *Fuller v. Butler*, 72–729.

The authority given to the auditor to correct the tax books may be exercised after the books have passed into the hands of the treasurer: *Ridley v. Doughty*, 85–418.

This provision does not authorize the auditor to correct an error by which a taxpayer is assessed too much or too little on a particular piece of property. Such error is to be corrected by application to the board of equalization: *Polk County v. Sherman*, 68 N. W., 562.

SEC. **1386. Sale shown.** The auditor when making up the tax list, before it is placed in the hands of the county treasurer, shall designate each piece or parcel of real estate sold for taxes, and not redeemed, by writing opposite the same the year in which it was sold in a column made for that purpose and headed "sold in." [C. '73, § 842.]

A failure of the officer to so designate a parcel as sold and not redeemed when he should do so does not affect the sale previously made: *Playter v. Cochran*, 37–258.

SEC. **1387. Tax list delivered.** He shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a sufficient authority for the treasurer to collect the taxes therein levied. But no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes. [21 G. A., ch. 132; C. '73, § 843; R., § 748; C. '51, § 487.]

The tax list is a complete protection to the treasurer in making distress and sale thereunder: See § 1403.

The tax warrant provided for under the corresponding section of the Revision was held not essential, the power of the treasurer to sell being derived from the statute directly: *Parker v. Sexton*, 29–421; *Johnson v. Chase*, 30–308; *Hurley v. Powell*, 31–64; *Rhodes v. Sexton*, 33–540; *Madson v. Sexton*, 37–562; *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

After the tax duplicate is made out and is placed in the treasurer's hands it constitutes the best and only evidence in whose name any particulur tract of land is taxed, and it remains such at least until there is another assessment, which for the time, and until another tax duplicate is made out, becomes the evidence in whose name real estate is taxed: *Fuller v. Butler*, 72–729.

When tax books are placed in the hands of the county treasurer for collection he is charged with the taxes and is required to collect and account for them, and his duty to do so cannot be divested by separation of a portion of the territory over which the taxes have been assessed and levied: *Hillard v. Griffin*, 72–331.

SEC. **1388. Aggregate valuation certified.** At the time of delivering the list to the treasurer, the auditor shall furnish to the auditor of state a certified statement, showing separately the aggregate full and taxable valuations of the real and personal property in the county, and also the aggregate amount of each separate tax as shown by the tax list. [C. '73, § 844; R., § 748.]

SEC. **1389. Treasurer to enter delinquent taxes.** The treasurer, on receiving the tax list, shall enter upon the same in separate columns opposite each parcel of real estate or person's name, on which or against whom any tax remains unpaid for any preceding year, the year or years for which such delinquent tax so remains due and unpaid, and such tax shall not be or remain a lien on such real estate or upon other real estate of the owner, unless so brought forward; but to preserve such lien it shall only be necessary to enter such tax opposite such person's name, or any tract upon which it was a lien. Any sale for the whole or any part of such delinquent tax not so entered shall be invalid. [C. '73, § 845; R., § 750; C. '51, § 488.]

Under this section a personal tax which is a lien upon realty, as well as a real property tax, is to be brought forward and entered as against the property: *Cummings v. Easton*, 46–183.

The treasurer should thus bring forward any personal tax which has become a lien upon real property, and enter it opposite such real property, although the personal tax was not assessed against the person who was the owner of such property at the time the assessment was made, nor the person owning the property at the time of making the entry: *Ibid.*

Although under such provision any sale for the whole or any part of a delinquent tax not thus brought forward is declared to be invalid, the right to enforce a performance of the duty of entering upon the tax books taxes remaining unpaid for preceding years cannot be barred so long as the right to enforce the taxes exists. So *held* in an action to

compel the treasurer to enter up and collect a railroad tax: *Harwood v. Brownell*, 48–657.

Where a person purchases land against which no delinquent taxes appear, the treasurer cannot, by afterwards bringing forward delinquent taxes which had not been properly brought forward, make them a lien upon the property as against such purchaser. Taxes not thus brought forward cease to be a lien: *Jiska v. Ringgold County*, 57–630.

The provision of § 1417, for refunding to the purchaser at a tax sale taxes illegally exacted, are applicable to taxes not carried forward as thus required, and for which the sale is therefore illegal: *Parker v. Cochran*, 64–757.

The lien of previous taxes not included in the sale is divested by the sale, and such previous taxes cannot be enforced: See § 1418 and notes.

A tax sale for delinquent tax of previous years not carried forward on the tax books is invalid: *Gardner v. Early*, 69–42; *Barke v. Early*, 72–273; *Hooper v. Sac County Bank*, 72–280; *Buckley v. Early*, 72–289; *Sac County v. Hooper*, 77–435; *Snell v. Dubuque & S. C. R. Co.*, 88–442; *Nicodemus v. Young*, 90–423.

A sale for taxes not carried forward is not void but voidable, and advantage of the objection should be taken within five years under the provisions of § 1448: *Griffin v. Bruce*, 73–126; *Collins v. Valleau*, 79–626; *Lawrence v. Hornick*, 81–193: *Guthrie v. Harker*, 27 Fed., 586.

Even though the sale is for taxes which have remained unpaid for want of bidders, as provided in § 1425 it will be invalid if the taxes have not been brought forward as here required: *Paxton v. Boss*, 57 N. W., 428.

But under the Revision such sales were valid: *Hunt v. Gray*, 76–268.

Where personal property taxes were never carried forward except that they were entered in a separate book showing the names of persons so taxed and the amount of such taxes and the page on which the tax appeared on the tax lists in the office, *held*, that such entries did not constitute a carrying forward of the taxes as required by this section and that a sale therefor was invalid: *Dows v. Dale*, 74–108.

Failure to carry forward a delinquent tax will not make the sale invalid when the tax book was not in the hands of the treasurer before the sale: *Babcock v. Bonebrake*, 77–710.

In such a case entry on the books of the fact of sale is sufficient, for at the time of the entry the taxes have been paid by the sale: *Hoben v. Snell*, 62 N. W., 739.

SEC. **1390. Treasurer to collect.** The treasurer, after making the entry, shall proceed to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years. [C. '73, § 846; R., § 751.]

SEC. **1391. Penalty on taxes not brought forward.** No penalty or interest shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the treasurer's hands. [15 G. A., ch. 29, § 1.]

This provision does not release the treasurer from liability for not collecting such taxes, and is not therefore void as impairing the obligation of contracts. Nor is it a special law for the assessment and collection of taxes within the meaning of article III, § 30, of the constitution. Nor is it void as against public policy as encouraging delinquencies in the payment of taxes: *Beecher v. Board of Supervisors*, 50–538.

SEC. **1392. Notice of previous sale.** Each county treasurer, when any person offers to pay taxes on any real estate marked "Sold," shall notify him of such fact, and inform him for what taxes and when the sale was made. [C. '73, § 847.]

The neglect of the treasurer to thus notify a party paying taxes does not affect a sale already made nor authorize a redemption therefrom after the time for redemption has expired: *Playter v. Cochran*, 37–258.

SEC. **1393. Certificate of taxes due.** The county treasurer, when requested to do so by any one having an interest therein, shall certify in writing the entire amount of taxes and assessments due upon any parcel of real estate, together with all sales of the same for unpaid taxes or assessments shown by the books in his office, with the amount required for redemption from the same, if still redeemable, if he is paid or tendered his fees for such certificate at the rate of fifty cents for the first parcel in each township, town or city, and ten cents for each subsequent parcel in the same township, town or city, and in computing such fees each description in the tax list shall be reckoned a parcel. [C. '73, § 848.]

SEC. **1394. Effect.** Such certificate, with the treasurer's receipt showing the payment of all the taxes therein specified, and the auditor's certifi-

cate of redemption from the tax sales therein mentioned, shall be conclusive evidence for all purposes, and against all persons, that the parcel of real estate in said certificate and receipt described was, at the date thereof, free and clear of all taxes and assessments, and sales for taxes or assessments, except sales whereon the time of redemption had already expired, and the tax purchaser had received his deed. [C. '73, § 849.]

SEC. **1395. Treasurer liable.** For any loss resulting to the county, or any subdivision thereof, or to any tax purchaser, or taxpayer, from an error in said certificate or receipt, the treasurer and his sureties shall be liable on his official bond. [C. '73, § 850.]

SEC. **1396. Information as to taxes due.** The treasurer, when applied to by letter and receiving thirty cents in postage stamps or money, and ten cents additional for each tract of one hundred and sixty acres in excess of three hundred and twenty acres, in no case to exceed fifty cents, shall correctly answer the same by mail, giving the amount and interest of unpaid taxes and of any tax sales thereof as the same appear upon the tax list in his office, and upon the return of the letter or a copy, before the last day of the current month, with the demand due as shown therein, he shall pay the taxes and forward to the sender a tax receipt without further charge. [C. '73, § 3794.]

SEC. **1397. Penalty.** Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money or stamps inclosed as aforesaid, to answer the same fully as required in the preceding section, or who shall directly or indirectly receive or be concerned in receiving any greater compensation for the service mentioned than as above provided, shall forfeit to the person aggrieved, for each offense, the sum of fifty dollars, which may be recovered in a civil action. [C. '73, § 3795.]

SEC. **1398. Assessment of omitted property.** The treasurer shall assess any real property subject to taxation which may have been omitted by the assessor, board of review or county auditor, and collect taxes thereon, and in such cases shall note, opposite the tract or lot assessed, the words "by treasurer," but such assessment shall be made within four years after the tax list shall have been delivered to him for collection, and not afterwards, if the property is then owned by the person who should have paid the tax. [C. '73, § 851; R., § 752; C. '51, § 851.]

The omission of the words "by treasurer" does not render the assessment so made by him invalid, in view of the duty imposed upon the owner by the following section: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

SEC. **1399. Duty of owner.** In all cases where real estate subject to taxation has not been assessed, the owner, by himself or agent, shall have the same done by the treasurer, and pay the taxes thereon; and if he fails to do so the treasurer shall assess the same and collect the tax assessed as he does other taxes. And no failure of the owner to have such property assessed or to have the errors in the assessment corrected, and no irregularity, error or omission in the assessment of such property, shall affect in any manner the legality of the taxes levied thereon, or affect any right or title to such real estate which would have accrued to any party claiming or holding under and by virtue of a deed executed by the treasurer as provided by this title, had the assessment of such property been in all respects regular and valid. [C. '73, § 852; R., § 753.]

An error in assessments does not affect the validity of a tax sale: *Eldridge v. Kuehl*, 27–160, 172.

An error of the assessor under § 1353, in assessing land to unknown owner, is cured by this section: *Corning Town Co. v. Davis*, 44–622, 632.

This section is applicable to taxes levied for construction of drains, etc., under § 1946: *Patterson v. Baumer*, 43–477.

In view of the various provisions making it the duty of the owner or the proper officer to enter land on the assessment book, it will be presumed in support of a tax deed that land subject to taxation was so entered, until the contrary is made to appear: *Lathrop v. Irwin*, 65 N. W., 972.

If the real owner stands by, knowing that another is asserting rights to the property, such as seeing that the property is listed in his name, and paying the taxes thereon, he is estopped from maintaining ejectment for

the land: *Conklin v. Wehrman*, 38 Fed., 874.

Land acquired from the government should be entered for taxation for the year in which land is not regularly assessed, if it becomes subject to taxation for that year: *Barrett v. Kevane*, 69 N. W., 1036.

As to effect of illegality of part of a tax upon the sale, see notes to § 1417.

SEC. **1400. Lien of taxes.** Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title. As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year. Taxes upon stocks of goods or merchandise shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee. [21 G. A., ch. 133; 20 G. A., ch. 194, § 1; C. '73, §§ 853, 865; R., § 759; C. '51, § 495.]

Taxes are not, prior to the date specified, a lien against which the covenants of grantor's deed operate. Therefore, where a contract of sale was made prior to that date and a deed executed subsequently and in pursuance thereof, *held*, that such taxes were not covered by the covenants of the deed: *Sackett v. Osborn*, 26–146.

This provision does not necessarily relieve the vendor from personal liability for taxes upon property which is sold by him before the date specified. When a portion of the property on which the tax is levied remains undisposed of, the collector having no authority to apportion it, the vendor remains liable for all: *Shaw v. Orr*, 30–355.

Where land is conveyed after the date specified the grantor is liable under the covenants of his deed for the taxes assessed for that year, but is not liable to the purchaser of his grantee for personal taxes of the latter, for which, together with the realty tax due thereon, the land has been sold at tax sale and from which the last purchaser has redeemed: *Baldwin v. Mayne*, 42–131.

That taxes are a personal obligation see notes to § 1403.

A personal tax is not a mere personal claim against the person taxed, but is a charge upon his real property: *Garretson v. Schofield*, 44–35; *Cummings v. Easton*, 46–183; *Paulson v. Rule*, 49–576.

Personal property taxes become a lien on land acquired subsequently to the assessment: *Cummings v. Easton*, 46–183.

Such taxes do not become a lien upon real property of the taxpayer until they are due, and they cannot be deemed due before a levy thereof is made: *Castle v. Anderson*, 69–428.

Personal property taxes of a partnership being due from each partner become a lien upon the real estate of a member: *Bibbins v. Clark*, 90–230.

It is a general rule appertaining to the law of taxation that taxes are not a lien upon property of the taxpayer, unless a lien is expressly created or provided for by statute; and as no lien upon personal property is provided for, taxes are not a lien thereon: *Jaffray v. Anderson*, 66–718.

Taxes are not a lien upon personalty until distraint therefor is made after the mode pointed out by statute; hence a person purchasing personal property before distraint has been made for taxes is protected against a subsequent distraint for taxes assessed against his vendor, and a mortgagee of personal property who takes possession under his mortgage and sells the property, either directly or through a decree or order of the court, before any distraint is made is entitled to the proceeds so far as they may be necessary to pay his claim as against the taxes assessed against the mortgagor: *Maish v. Bird*, 22 Fed., 180.

Taxes are not a lien upon personal property and therefore do not have priority over other claims against such property when in the hands of a receiver. The special statutory provisions with reference to assignments for the benefit of creditors (§ 3078) are not applicable in such case: *Howard County v. Strother*, 71–683.

A lien for taxes on personal property of the owner of real estate does not take priority over existing mortgages on such real estate, and a purchaser at a sale of the real estate for such taxes acquires only the owner's equity of redemption. (Overruling *New England Loan & Trust Co. v. Young*, 81–732;) *Bibbins v. Clark*, 90–230; *Bibbins v. Polk County*, 69 N. W., 1007.

The lien of the tax provided for in the mulct law is subordinate to that of a pre-existing mortgage: *Smith v. Skow*, 66 N. W., 893.

As to priority of tax in case of assignment for benefit of creditors, see § 3078.

CHAPTER 2.

OF THE COLLECTION OF TAXES.

SECTION **1401. Payment.** Auditor's warrants shall be received by the county treasurer in full payment of state taxes, and county warrants shall be received by the treasurer of the proper county for ordinary county

taxes, but money only shall be received for the school tax. Road taxes, except the portion payable in money, may be discharged and road certificates of work done received, as provided by law. [C.'73, §§ 854, 1779; R., §§ 754, 2057, 2059; C.'51, § 489.]

SEC. **1402. What receivable.** The treasurer is authorized and required to receive in payment of all taxes by him collected, together with the interest and principal of the school fund, the circulating notes of national banking associations organized under and in accordance with the conditions of the act of the congress of the United States, entitled, "An act to provide a national currency secured by the pledge of the United States stocks, and to provide for the redemption thereof," approved February 25, 1863, and acts amendatory thereto, United States legal tender notes, and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency. [C.'73, § 855.]

SEC. **1403. Payment—installments.** No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full; or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following; but in all cases where the half of any taxes has not been paid before the first day of April succeeding the levy, the whole amount charged against such entry shall become delinquent from the first day of March after due; and in case the second installment is not paid before the first day of October succeeding its maturity, it shall become delinquent from the first day of September after due. In all cases where taxes are paid by installment, each of such payments, except road taxes, shall be apportioned among the several funds for which taxes have been assessed in their proper proportions. [C.'73, § 857; R., § 756; C.'51, § 492.]

The tax list is sufficient warrant, even when the tax is a special one, to protect the treasurer in his proceedings thereunder from liability for any irregular or illegal proceedings of the officers connected with the levy of the tax, provided such levy is authorized: *Games v. Robb*, 8–193.

Where a tax has been legally ordered by officers *de jure* certainly, if not *de facto*, against a person liable to be tae d, and the officer has been duly chosen and qualified to collect such tax, he will, in the absence of fraud on his part, be protected, and is not answerable for any irregularity in the proceedings: *Hershey v. Fry*, 1–593.

The tax a debt: A tax lawfully levied becomes a debt which may be recovered by action at law, even though its collection is otherwise provided for, unless the special remedies provided by statute are made exclusive: *Dubuque v. Illinois Cent. R. Co.*, 39–56.

Taxes are a personal indebtedness and constitute a claim which should be paid by the administrator of the estate of a deceased person. Therefore the devisee of property is entitled to have taxes which are a lien thereon paid out of the estate: *Findley v. Taylor*, 66 N. W., 744.

That special assessments for street improvements are a personal claim against the owner of the property, see notes to § 829.

Equitable remedy: Where the statutory remedy for collection of taxes is plain, adequate and speedy, a court of equity will not interfere to enforce their collection: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

Working out: The fact that a railroad has not been notified to work out the part of the road tax which might be paid in work will not authorize the restraining of the collection of the entire tax. Perhaps, upon a proper offer to work out the proportion which may be paid in work, the collection of that part might be enjoined: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Personal taxes: A tax upon personal property becomes a lien against the owner thereof from the time of his assessment at the place of his residence, and a subsequent removal before the payment of the tax will not relieve him from liability: *Toothaker v. Moore*, 9–468.

Payment by mortgagor: It is the duty of the mortgagor of real property to pay the taxes thereon: *Porter v. Lafferty*, 33–254; *Dayton v. Rice*, 47–429.

The mortgagor is the party primarily liable to pay the taxes on the mortgaged property, even after foreclosure sale, during the period of redemption, and any tax title acquired by the mortgagor during that time will be held as having been acquired by him in trust for the purchaser at the forclosure sale, and he cannot set up such title in opposition to the title of such purchaser: *Dayton v. Rice*, 47–429.

Lienholder: A mortgagee is entitled to pay taxes on the mortgaged property, and upon redemption being made from him by the holder of the junior lien, is entitled to have

such taxes reimbursed: *Strong v. Burdick*, 52–630.

A junior incumbrancer paying taxes due upon the premises acquires a first lien for the amount thereof: *Evans v. Burns*, 67–179.

Assignee for benefit of creditors: Where taxes were levied on property after an assignment for the benefit of creditors, *held*, that as by § 3078 the assignee was authorized to pay such taxes as a preferred claim, he should be required to pay to the mortgagee of lands upon which such taxes became a lien, and who had been required to redeem the land from sale for such taxes, the amount levied upon personal property covered by the assignment with six per cent. interest: *Brooks v. Eighmey*, 53–276.

No claim for taxes is required to be filed before the assignee, nor need any demand be made. The assignee must, at his peril, ascertain whether the property or fund in his hands is liable for assessments or levies of taxes: *Huiscamp v. Albert*, 60–421.

Application: Taxpayers are authorized to rely upon the county treasurer for the proper application of money given him for the payment of taxes, and they will not be allowed to lose their property through the mistake of such officer in a misapplication of payment: *Henderson v. Robinson*, 76–603.

Vendee: Where a purchaser of real estate under contract for a deed takes possession thereof, he is liable for the taxes thereon, and on subsequently taking the deed cannot require the vendor to covenant against such taxes: *Miller v. Corey*, 15 166.

While, as between vendor and vendee in possession under contract of sale, it is the duty of the latter to pay the taxes, yet the former may pay them to protect his title, and for any amount paid in removing tax incumbrances with six per cent. interest thereon, he is entitled to a lien upon the land after decree for a conveyance in performance of the contract: *Lillie v. Case*, 54–177.

Where the personal property taxes of a partnership became a lien on the real estate of one partner, *held*, that a subsequent grantee of such real estate being compelled to pay the taxes in order to protect the property might recover the taxes paid from his grantor but not from another member of the partnership, the payment as to other members being voluntary: *Bibbins v. Clark*, 90–230.

The vendor is not necessarily relieved from personal liability for taxes upon property sold by him before the time when taxes become a lien on real property, under § 1400. If a portion of the property on which a tax is levied remains undisposed of, the collector having no authority to apportion the tax, the vendor remains liable for all: *Shaw v. Orr*, 30–355.

The vendee being deemed in equity to be the owner and entitled to possession must pay his proportion of the taxes accruing upon the land from the date his right to possession arose: *Sherman v. Savery*, 2 McCrary, 107.

Where the title was wrongfully conveyed by the vendor to another, although he was held by a court of equity to be the trustee for the vendee proper, yet the payment of taxes by him was held not to be voluntary, and he was allowed to recover for taxes paid while the relation existed: *Ibid.*

Purchase subject to: The purchaser of land upon which taxes are due and unpaid takes subject to the lien of such taxes, but does not become personally liable therefor: *Ritchie v. McDuffie*, 62–46.

Under a lease providing that the tenant should pay all the taxes assessed against the property during the continuance of the lease, *held*, that he was liable for special assessments for local improvements, such as paving and curbing of adjacent streets: *Cassady v. Hammer*, 62–359.

A purchaser of land on which taxes are due does not become personally liable therefor: *Ritchie v. McDuffie*, 62–46.

Lien: This section does not make taxes upon personal property a lien thereon: *Jaffray v. Anderson*, 66–718.

As to the lien of taxes in general, see § 1400 and notes.

Payment by person not the owner: Taxes paid by one claiming title adversely to the real owner without his consent cannot be recovered back from the owner after the adverse title is declared void. The mere fact that the real owner knew that the adverse claimant was paying the taxes under claim of title is not sufficient ground for inferring a promise to repay: *Garrigan v. Knight*, 47–525; *Read v. Howe*, 49–65.

A party who pays tax upon land without any right to do so, and having no claim whatever to the property, cannot recover the taxes paid from the rightful owner who has purchased the land since the payment of such taxes. No request to pay can be presumed in such a case: *La Rue v. King*, 74–288.

A party who pays taxes upon the land of another, whose title is of record, cannot claim that the owner is thereby estopped from asserting his title: *Merrill v. Tobin*, 30 Fed., 738.

One who claims title without payment of taxes, allowing an adverse claimant who is in possession to continue for years the payment of taxes on the land, becomes thereby estopped from asserting as against the occupant his claim of title: *Knapp v. Paine*, 63 N. W., 575.

While a mere stranger has not the right to pay taxes, yet if payment be made by such an one, and received by the treasurer, the property cannot be afterward sold for such tax: *Iowa R. Land Co. v. Guthrie*, 53–383.

Payment by one not the owner made before the taxes become delinquent *held* not recoverable as against a subsequent owner of the land: *Iowa R. Land Co. v. Davis*, 71 N. W., 229.

Payment under supposed title: Where title to land was for a long time in litigation between parties claiming title under conflicting grants, and one of them paid the taxes, and it was finally decided that the title was in the other, *held*, that the one who paid the taxes might recover the amount so paid from the one adjudged owner of the land: *Goodnow v. Moulton*, 51–555; *Goodnow v. Plumbe*, 52–711; *Goodnow v. Wells*, 54–326; *Goodnow v. Stryker*, 61–261; *Goodnow v. Stryker*, 62–221; *Goodnow v. Wells*, 76–774; *S. C.* 78–760.

Under such circumstances, *held*, that the payment of taxes voluntarily made by the person claiming title to the property, with full knowledge of the adverse claimant of the title, and made under belief on the part of the person making such payment, arising from a mistake of law, that he had such title, might be recovered back from the adverse claimant upon the title being determined to be in the latter: *Goodnow v. Litchfield*, 63-275; *Iowa Homestead Co. v. Des Moines Nav. & R. Co.*, 63-285; *Goodnow v. Chapman*, 64-602; *Goodnow v. Wolcott*, 65-201; *Goodnow v. Oakley*, 68-25.

Although where one of two parties holding the title to property has paid the taxes, and the other afterwards establishes his title to the property, the one who has made payment cannot claim the right to recover from the other on account of such payment, yet, if the successful party accepts the benefit of such payment, an action to recover the payments may be maintained against him by the party making them: *Goodnow v. Stryker*, 61-261.

Where a company to which lands were certified under a railroad grant paid the taxes thereon, and subsequently the title was found to be in another under the swamp land grant, *held*, that the taxes paid by the former company under the belief that it had a legal title and in ignorance of the swampy character of the land, which fact alone defeated its title, could be recovered from the party holding the swamp land grant, who had made no offer to pay such taxes: *American Emigrant Co. v. Iowa R. Land Co.*, 52-323.

One who, while making an honest claim to be the owner of real estate, pays taxes thereon, it afterward being determined that the title is in another, is entitled to be reimbursed for such expenditure: *Fogg v. Holcomb*, 64-621; *Leather v. Ross*, 74-630.

In such case, the payments being made for the protection of the property and redounding to the benefit of the real owner, he ought and will be required to reimburse the person who made them for the amount paid: *Bradley v. Cole*, 67-650.

So *held* where the title to property was claimed under an execution sale and sheriff's deed which were afterwards held defective: *Ibid.*

Where the purchaser of property at execution sale makes redemption from a previous tax sale of the property he cannot recover from the former owner the amount paid: *Barr v. Patrick*, 59-134.

Where it appeared that at the time when taxes were paid by the plaintiff on premises subsequently decreed to belong to defendant, there was a controversy between plaintiff and defendant as to the title, which was only settled by such decree, *held*, that plaintiff might, in an action brought within five years after the rendition of such decree, recover the taxes paid by him on the premises, which defendant would have been required to pay under the title as claimed by him: *Wood v. Curran*, 76-560.

In an action to quiet title against one who claimed title under a judicial sale, which was adjudged to be void, and who had paid taxes under such claim, *held*, that she was entitled to recover the taxes with six per cent. interest from the time of the respective payments, and that the same should be a lien on the land: *Cassidy v. Woodward*, 77-354.

Where a nonresident claiming ownership paid taxes on the land, which was not inclosed, and the only assertion of adverse title was that made by cutting hay and stacking it upon the land, and such other acts of dominion over it as it was susceptible of in its wild state, *held*, that the nonresident claimant whose title was afterwards declared invalid by reason of a defect in the title of his grantor could recover the taxes paid by him from the one who was found to be the rightful owner of the land: *Merrill v. Tobin*, 82-529.

Also, *held*, that a grantee taking premises with full knowledge of all the facts in connection with the payment of taxes, it not appearing that any of the intervening grantors were innocent purchasers, took subject to the obligation to pay such taxes, and they should be made a lien upon the land: *Ibid.*

Where swamp lands were improperly listed for taxation and taxes were paid thereon, *held*, that a subsequent purchaser of such land from the county, asserting his title thereto as against a prior invalid grant, was not bound to refund to the adverse claimant taxes paid by the latter during the time when the land was not subject to taxation: *Hays v. McCormick*, 83-89.

The right of the person paying taxes on land which is afterwards adjudged not to belong to him, to have such taxes refunded and to a lien on the land therefor, is not a right passing with the land, so that the grantee of the person paying such taxes can establish a lien therefor upon the land against the purchaser in good faith from the real owner: *Brown v. Poole*, 85-412.

Where the payment of taxes is pleaded by defendant as a matter in defense of plaintiff's right to have his title quieted, and no affirmative relief is asked, the court will not give defendant judgment for such taxes, but leave the right thereto to be determined in another proceeding: *American Emigrant Co. v. Fuller*, 83-599.

Where there are two claimants to property and each pays the taxes thereon, the one who is adjudged not to be the owner cannot recover from the other the amount of taxes thus paid. A request by him to the other to make payment, which is the basis of recovery in such case, cannot be inferred under the circumstances: *Montgomery County v. Severson*, 68-451.

Where recovery is had by one claimant of property who has paid the taxes, against another who has been adjudged to be the legal owner, interest on the amount paid by the unsuccessful claimant at the legal rate may be recovered, commencing at the date of payment: *Goodnow v. Litchfield*, 63-275; *Iowa Homestead Co. v. Des Moines Nav. & R. Co.*, 63-285; *Goodnow v. Stryker*, 63-569; *Goodnow v. Plumbe*, 64-672; *Goodnow v. Wells*, 67-654; *Goodnow v. Oakley*, 68-25; *Leather v. Ross*, 74-630.

The amount which a party making payment of taxes is entitled to recover should be made a lien upon all the land collectively for the gross amount of the payments made: *Goodnow v. Litchfield*, 63–275; *Goodnow v. Stryker*, 63–569; *Goodnow v. Plumbe*, 64–672; *Goodnow v. Oakley*, 68–25; *Leather v. Ross*, 74–630.

The grantee of a person who is entitled to recover taxes thus paid is not, in the absence of express assignment of the right thereof, entitled to recover them from the person who has been adjudged the rightful owner of the property: *Seymour v. Shea*, 62–708.

A recovery of taxes thus paid cannot be had as against one who was not the owner of the premises at the time the payments were made, but has subsequently become such owner: *Fogg v. Holcomb*, 64–621; *Iowa R. Land Co. v. Davis*, 71 N. W., 229.

But the grantee of a person who has been adjudged to have been the real owner at the time the taxes were paid, and acquiring his title by quitclaim, stands in the shoes of his grantor, and the lands in his hands are subject to the claim or lien of the party thus paying the taxes; but such grantee is not to be held personally liable for the taxes paid before the purchase of the property by him: *Bradley v. Cole*, 67–650.

The relief which may be had by a party paying taxes by reason of a mistake respecting the title as against the person benefited is not valid as against a third person purchasing the land without notice that there is any claim thereon for taxes so paid, and the taxes so paid will not be a lien as against such purchaser: *Bowen v. Duffie*, 66–88.

The statute of limitations as against an action by a party who has paid taxes on land on a claim of ownership, but has been held not to be the owner, to recover such taxes from the party adjudged to be the owner, commences to run from the time the title to the property as between the claimants is judicially determined: *Goodnow v. Stryker*, 62–221; *Goodnow v. Litchfield*, 63–275; *Bradley v. Cole*, 67–650; *Goodnow v. Oakley*, 68–25.

A party cannot recover from the owner of the title taxes which he has paid on land more than five years prior to the time of bringing action to recover the same: *La Rue v. King*, 74–288; *Iowa R. Land Co. v. Davis*, 71 N. W., 229.

As to the claim made in some of these cases that there had been a previous adjudication of the right to recover the taxes, see *Goodnow v. Wells*, 67–654.

SEC. **1404. Lien on personal property of nonresident.** All personal property, the owner of which is a nonresident of the state, and which property is by the owner thereof intended for sale or consumption at a place or shipment to a place other than where said property is located, shall be assessed in the owner's name, if the owner is known, and if the owner is unknown or uncertain the same shall be assessed to "unknown owner," and shall be by the assessor sufficiently described so that said property may be identified. A lien for the tax upon said property as herein provided shall relate back to and exist from the first day of January of the year for which it is assessed, and if any one seeks to remove the said property from the county before the tax for said year shall be paid, the tax shall immediately become due and collectible. It shall be the duty of the assessor to notify the county auditor if said property is being, or is about to be, removed from the county. In such event, or if the knowledge of the removal of or intent to remove said property shall come to him in any other authentic manner, the said auditor shall certify such fact to the county treasurer, with a full description of the property as the same appears on the assessor's books, giving assessment district, where located, and the amount of said assessment, and the county treasurer shall thereupon proceed by distress to restrain the removal of said property and secure the lien of the tax due or to become due. If at the time of such distress the levy for the year is unknown, the auditor is authorized to release the lien of such tax upon a good and sufficient bond, with sureties resident of the county, being filed with said auditor, to be by him approved, which bond shall obligate all parties thereto to pay all taxes due on said property when same are payable. Upon the filing and approving of such bond, the auditor shall make a certificate releasing the said personalty from the lien of such tax. The payment of said tax shall be a bar against the collection of taxes for same year on said property in any other county in this state.

SEC. **1405. Receipt.** The treasurer shall in all cases make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each and costs if any, giving a separate receipt for each year; and he shall make the

proper entries of such payments on the books of his office. Such receipt shall be in full of the first or second half or all of such person's taxes for that year, but the treasurer shall receive the full amount of any county, state or school tax whenever the same is tendered, and give a separate receipt therefor. [C. '73, § 867; R., § 760.]

The receipt of a deputy collector should have the same force and effect as that of the treasurer: *Jones v. Welsing*, 52–220.

Payment of taxes may be proved by parol. So *held*, even under a statute requiring the taxpayer to take a duplicate receipt and file it with the county judge and obtain his indorsement upon the original, and providing that no receipt without such indorsement should be receivable in evidence: *Adams v. Beale*, 19–61.

Entry of payment by a county treasurer in his books does not operate to discharge the taxes, and only those misled by such entry, or who act upon the faith thereof, can in equity claim to be prejudiced by such entry, when the taxes are not in fact paid: *Amber v. Clayton*, 23–173.

Where a party in ignorance of a tax sale pays the taxes for which the sale was made and receives the treasurer's receipt therefor, such payment does not defeat the sale: *Jones v. Welsing*, 52–220.

A taxpayer has the right to direct the application of any sums paid by him to the payment of such taxes as he sees fit: *Iowa R. Land Co. v. Carroll County*, 39–151.

The stub of a tax receipt is evidence showing the payment of the tax such as to defeat a subsequent sale of the property: *Harrison v. Sauerwein*, 70–291.

In a particular case, *held*, that evidence did not sufficiently show previous payment of taxes to render the sale void: *Slocum v. Slocum*, 70–259.

In an action to set aside a tax sale and deed on the ground that the plaintiff had paid the taxes for which the land was sold, before the sale, and where, in support of his claim, he offered a tax receipt showing the payment of the taxes upon the lot in question with a number of other lots, *held*, that the evidence was sufficient to show the payment of the taxes, although the stub of the tax receipt failed to show either the description of the lot or the payment of the taxes: *Bright v. Slocum*, 77–27.

SEC. **1406. Sale of personal property.** If any one neglects to pay his taxes at or before maturity, the treasurer may collect the same by distress and sale of his personal property not exempt from taxation, and the tax list alone shall be sufficient warrant therefor. When the treasurer distrains goods, and the owner refuses to give a sufficient bond for the delivery of the same on the day of sale, he may keep them at the expense of the owner, and shall give notice of the time and place of their sale within five days after the taking, in the manner constables are required to give notice of the sale of personal property under execution. The time of sale shall not be more than twenty days from the day of taking, but he may adjourn the sale from time to time, not exceeding five days in all, and shall adjourn at least once when there are no bidders, and, in case of adjournment, he shall post up a notice thereof at the place of sale, announcing the time to which the adjournment is ordered. Any surplus remaining above the taxes, charges of keeping, and fees for sale, shall be returned to the owner, and the treasurer shall, on demand, render an account in writing of the sale and charges. [20 G. A., ch. 194, § 1; C. '73, §§ 857–8; R., §§ 756–7; C. '51, §§ 492–3.]

SEC. **1407. Collectors—sheriff.** Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent taxpayers, and for this purpose he may appoint one or more collectors to assist him in collecting the same. Each collector appointed shall receive for his services and expenses the sum of five per cent. on the amount of all taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest; and pay the same to the treasurer at the end of each month, and in the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five per cent., as constables are entitled to receive for the sale of property on execution. [C. '73, § 859.]

The fact that lands have been advertised for sale for taxes does not prevent a sale of personal property to pay the same. If the lands, however, had been actually sold to pay the taxes, personal property could not be subjected to their payment: *Emerick v. Sloan*, 18–139.

A failure of the treasurer to collect the taxes by distress and sale of personal property, when he might do so will not invalidate a subsequent sale of real property for such taxes: *Stewart v. Corbin*, 25–144.

The receipt of a deputy collector should have the same force and effect as that of the treasurer: *Jones v. Welsing*, 52–220.

A person appointed to collect taxes cannot recover from a private person additional fees for services performed under an alleged contract to pay such additional compensation in consideration of his remaining in office and performing the duties thereof: *Fawcett v. Eberly*, 58–544.

Where the treasurer had commenced to enforce the payment of taxes by distress of personal property of the taxpayer, and had discontinued such proceedings on the promise of one who was about to purchase said property, that he would become personally responsible therefor, *held*, that such promise was not binding, as the inducement thereto was the abandonment by the officer of the discharge of his legal duty: *Cass County v. Beck*, 76–487.

SEC. **1408. Resistance.** If the treasurer, his deputy, or collector is resisted or impeded in the execution of the duties of his office, he may require any person to assist him therein, and if such person refuses, he shall forfeit a sum not exceeding ten dollars, to be recovered by civil action in the name of the county, and the person resisting shall be punished as in the case of resisting an officer in the execution of legal process. [C.'73, § 860; R., § 758; C.'51, § 494.]

SEC. **1409. Taxes certified to another county.** In all cases of delinquent taxes in any county, where the person upon whose property the same were levied shall have removed into another county, leaving no property within the county where the taxes were levied out of which the same can be made, the treasurer of the county where said taxes are delinquent shall make out a certified abstract thereof, and forward the same to the treasurer of the county in which the delinquent resides or has property, when the treasurer transmitting said abstract has reason to believe that said taxes can be collected thereby. [C.'73, § 861.]

SEC. **1410. Collection in such case.** The treasurer forwarding and the one receiving said abstract shall each keep a record thereof, and, upon receipt and filing in the office of the treasurer to whom sent, it shall have the effect of a levy of taxes in that county, and the collection of the same shall be proceeded with in the same manner as in the collection of other taxes. [C.'73, § 862.]

SEC. **1411. Penalty.** The officer collecting taxes so certified into another county shall, in addition to the penalties on delinquent taxes, assess and collect the further penalty of twenty per cent. on the whole amount of such taxes, inclusive of the penalties thereon. [C.'73, § 863.]

SEC. **1412. Return.** The officer receiving said abstract shall, when in his opinion the taxes are uncollectible, return the same with the indorsement thereon "uncollectible," and, if collected, he shall remit the amount to the treasurer of the county where said taxes were levied, less the penalty provided by the preceding section. [C.'73, § 864.]

SEC. **1413. When taxes delinquent—penalties.** If the first installment of taxes shall not be paid by April first, the whole shall become due and draw interest as a penalty of one per cent. per month until paid from the first of March following the levy; and if the first half shall be paid when due, and the last half shall not be paid by October first following such levy, then a like interest shall be charged from the date such last half became delinquent; and the tax with all penalties shall be collected at the same time and in the same manner; but no interest as a penalty shall be added to taxes levied by any court to pay a judgment on county, city, town or school district indebtedness, other than the interest which such judgment may draw, nor upon taxes levied in aid of the construction of any railroad. All road taxes payable to the county treasurer shall be due with the first installment of other taxes, and subject to the penalty for non-

payment as other taxes. [20 G. A., ch. 194, § 1; C. '73, §§ 865–6; R., §§ 759–60; C. '51, §§ 495, 497.]

Interest and penalties on taxes should be computed only from the time such taxes are placed on the tax list, and not from the time when they should have been listed and were not: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

Where taxes, void when levied, are subsequently made valid by a curative act, penalties for non-payment attach for the period prior to the time that the act takes effect: *Iowa R. Land Co. v. Sac County*, 39–124; *Iowa R. Land Co. v. Carroll County*, 39–151.

If a valid tender is made of the amount due for any specified tax, such tender stops interest on that tax without reference to whether it is good as to other taxes or not: *Iowa R. Land Co. v. Carroll County*, 39–151.

Failure of the county to sell land for taxes when it may do so will not defeat its right to recover penalties thereafter accruing on the same taxes: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

The fact that the title to land is doubtful or in dispute will not be a ground for relieving a person asserting a right thereto from penalties for non-payment of taxes: *Litchfield v. Hamilton County*, 40–66.

Where the title of the owner to one portion of his estate is disputed by the state, and to the other by the United States, and the state in view of these facts assures him that no legal steps will be taken to enforce payment of taxes until his title is adjusted, he will not be compelled to pay more than the statutory interest allowed for the non-payment of ordinary debts, and not the penalty for the non-payment of taxes: *Litchfield v. Webster County*, 101 U. S., 773.

Where the state refuses payment for a series of years unless payment of taxes be made for the time between the entry and the quieting of the title by act of congress, penalties are not recoverable: *Ibid.*

Where a new revenue law was passed retrospective in its operations, *held*, that the method of collecting penalties already accrued should be in accordance with the previous law, and that penalties accruing under the new law on taxes previously levied should be enforced in accordance with such new law: *Bartruff v. Remey*, 15–257.

The repeal of a statute under which delinquent taxes have accrued, and the enactment of a new statute providing for the collection of taxes with interest, will not operate to remit the interest accrued, although the new law contains no express saving clause: *State ex rel. v. Stewart*, 11–251.

The right of a county to the penalty accrued on delinquent taxes is not impaired by the repeal of the statute providing for such penalties: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153; *Tobin v. Hartshorn*, 69–648.

But such repeal terminates the right to additional penalties: *Tobin v. Hartshorn*, 69–648.

So held in regard to the amendment of § 866 of Code of '73 by 20 G. A., ch. 194: *Ibid.*; *Chicago, M. & St. P. R. Co. v. Hartshorn*, 30 Fed., 541 (overruling *Snell v. Campbell*, 24 Fed., 880).

The last clause of the section relating to railroad aid taxes, *held* unconstitutional as applied to contracts executed before that provision took effect: *Lansing v. County Treasurer*, 1 Dillon, 522, 528.

SEC. **1414. Collection.** The treasurer shall collect all delinquent taxes by distress or sale of any personal property belonging to the person to whom such taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien, but he shall continue to receive the same until collected, and any owner or claimant of any real estate advertised for sale may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon, with accrued penalties, interest and costs to the time of payment. [20 G. A., ch. 194, § 1; C. '73, §§, 865–6, 879; R., §§ 759, 760, 769; C. '51, §§ 495, 497.]

SEC. **1415. Apportionment.** On or before the tenth day of each month, the treasurer shall apportion the consolidated tax of each township, city, town or school corporation collected during the preceding month among the several funds to which it belongs, according to the number of mills levied for each fund, and enter the same, with the other taxes collected during the same period, upon his cash account and report the amount of each tax to the county auditor, who shall charge him with the same. [C. '73, § 868.]

SEC. **1416. Separate funds.** The auditor shall keep a complete account with the treasurer, with each separate fund or tax by itself, and in each account he shall charge him with the amounts in his hands at the opening of such account whether it be delinquent taxes, notes, cash or other assets belonging to such fund, the amount of each tax for each year when the tax list is received by him, and all additions to each tax or fund, whether by additional assessments, interest on delinquent taxes, amount received for

licenses, or other items, and upon proper vouchers shall credit him for money disbursed for double and erroneous assessments, including all improper and illegal assessments the correction or remission of which causes a diminution of the tax, and for unavailable or uncollectible taxes, as directed by the board of supervisors. [C. '73, § 869; R., § 761.]

SEC. **1417. Refunding erroneous tax.** The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter, but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale. [C. '73, § 870; R., § 762.]

This section authorizes the refunding of illegal or erroneous taxes, though voluntarily paid, and even after they have been divided up and distributed among the state, school, road and other funds, and where the supervisors refuse to refund the same the sum may be recovered from the county: *Lauman v. Des Moines County*, 29–310; *Richards v. Wapello County*, 48–507; *Isbell v. Crawford County*, 40–102; *Tallant v. Burlington*, 49–543.

Where a tax is illegal through the erroneous action of the board in raising an assessment, it may be recovered back: *Dickey v. Polk County*, 58–287.

Failure to pursue remedies to arrest the collection of such taxes will not waive or forfeit the right to recover them: *Ibid.*

Taxes not brought forward as required by § 1389, and which are therefore erroneously included in the amount for which property is sold, may be recovered back by the tax purchaser from the county: *Parker v. Cochran*, 64–757.

Where relief is sought from a tax levy which is in excess of the limit imposed upon taxation, relief will be granted as against the excess of the tax over the constitutional limit, and the tax will be sustained to the extent to which it is valid. After the tax has been paid, such sums as are in excess of the limit, may be recovered back: *McPherson v. Foster*, 43–48.

Where property was sold for an amount of tax, part of which was not a lien thereon, *held*, that the owner might recover from the county the amount of such tax, with costs, interest and penalties, which he was compelled to pay in order to redeem: *Brownlee v. Marion County*, 53–487.

This section does not apply when the taxpayer has voluntarily redeemed from a sale absolutely void by reason of the taxes having been previously paid, and the money so paid in redemption cannot be recovered: *Morris v. Sioux County*, 42–416; *Sears v. Marshall County*, 59–603.

Where payment of taxes is voluntarily made with knowledge of all the facts, under the belief that by law the property belongs to the person paying the taxes, such person cannot afterward recover back the money so paid upon the title being adjudged to be in another. Such taxes cannot be deemed erroneous or illegal: *Dubuque & S. C. R. Co. v. Board of Supervisors*, 40–16.

Where, although the assessment is illegal, and the payment of the taxes could not be enforced, they have been voluntarily paid, the party thus paying them can not recover them back: *Newcomb v. Davenport*, 86–291.

Where a tax purchaser subsequently paid personal taxes of the previous owner which were a lien upon the land, but his tax title was not effective because of the insufficiency of the description of the land, *held*, that he was not entitled to recover back the subsequent taxes paid on the ground of mistake or error: *Lindsey v. Boone County*, 92–86.

One who has a lien upon property prior to the lien of personal property taxes of the owner and pays such taxes to protect his own interests as against a senior lienholder is to be deemed to have paid such taxes voluntarily and can not recover from the county the amount: *Bibbins v. Polk County*, 69 N. W., 1007.

Where a tax is not merely informal and irregular, but is illegal and void as being levied upon property not liable to taxation, and the owner of the property makes payment under protest, the rule is that he may recover it back, although there is no distraint or seizure of his property: *Winzer v. Burlington*, 68–279; *Thomas v. Burlington*, 69–140.

The holder of a tax title, which is adjudicated to be void, cannot recover from the county taxes paid by him upon the property subsequently to the acquisition of his tax title: *Scott v. Chickasaw County*, 53–47.

Where the purchaser of property at a tax sale paid taxes thereon for a subsequent year, but the sale was afterwards declared void for the reason that the property was not subject to taxation for the year for the taxes for which it was sold, *held*, that the subsequent tax was not erroneously or illegally exacted or paid in such sense that the county was under obligation to refund it: *Iowa R. Land Co. v. Guthrie*, 53–383.

The statutory provision for the recovery of illegal taxes paid is not applicable to a

case of erroneous assessment made in the exercise of lawful authority. The only relief in such cases is by application to the board of equalization: *Harris v. Fremont County*, 63-639.

Where a taxpayer had indebtedness which he might in a proper manner have offset against property for which he was taxed, but took no steps to have such deduction allowed, either by the assessor or by the board of equalization, and about two years after the payment of the taxes under the assessment, applied to have refunded to him the amount thus paid in excess of what would have been his proper assessment, *held*, that such application was too late, and that as there was no error or illegality in the assessment, the recovery of the amount could not be had: *Leonard v. Madison County*, 64-418.

Where an illegal tax has been collected for the benefit of the county and has been expended, it would be proper to refund it from other funds belonging to the county. So where an illegal tax has been collected for the state or for a school or road district, and has been paid over, it would be proper to refund it, if necessary to do so, from other funds belonging to the state or the school or road district which has thus received and enjoyed the benefit of the illegal tax: *District T'p v. District T'p*, 56-85.

Where it became necessary to refund a tax which had been paid over to a school district and it appeared that the original school district was no longer in existence, the territory having been divided into three districts, *held*, that the treasurer should have apportioned the tax among the districts formed out of the original territory and repaid the tax *pro rata* from the funds coming to each, and that having repaid it entirely from the funds of one of the districts, that district was entitled to maintain an action for contribution against the others: *Ibid.*

The money which is to be returned to the taxpayer should be taken from the particular fund or funds into which it went when the tax was collected: *Iowa R. Land Co. v. Woodbury County*, 64-212.

No judgment can be rendered against a county on account of taxes illegally or erroneously collected for any of the public organizations or corporations for whose benefit the county treasurer collects taxes, without proof that there remain in the treasury funds belonging to such organizations or corporations which might properly be applied to the extinguishment of such judgment: *Ibid.*

The board of supervisors has no authority to refund a road tax out of the county funds: *Stone v. Woodbury County*, 51-522.

Bridge taxes are to be collected and disbursed by the county and constitute a part of the county funds and should be refunded out of the county treasury: *Dickey v. Polk County*, 58-287.

Although a special tax cannot be refunded out of other taxes, yet where it was shown that there remained a sufficient amount in the treasury to refund out of a particular fund the amount illegally paid going to such fund, *held*, that a recovery was proper: *Ibid.*

Under similar provisions in a city charter, *held*, that taxes illegally exacted might be recovered back, although they had been paid over to the contractor who had made the improvements for which the tax was levied: *Tallant v. Burlington*, 39-543.

A special tax in aid of a railroad which has been paid over by the treasurer to the company cannot be refunded: *Butler v. Board of Supervisors*, 46-326.

In such case the tax cannot be refunded out of the county treasury, nor can the county devote other taxes collected for such company, and still in the treasury, to the paymegt of that illegally collected: *Des Moines & M. R. Co. v. Lowry*, 51-486.

A special tax voted in aid of a railway company should, when paid, be kept as a distinct fund subject to the rights of the company and taxpayer. In no event can the county acquire any beneficial interest therein, and the claim of the taxpayer to have such taxes refunded to him is a claim against the treasurer who has received the tax, and not against the county: *Barnes v. Marshall County*, 56-20.

The liability of the county for taxes illegally paid does not depend upon whether or not the money that has been collected has been paid out: *Eyerly v. Supervisors of Jasper County*, 77-470.

But this section has no application in cases where the tax is held as a trust fund for the benefit of a railroad and the money has been paid over: *Ibid.*

The board of supervisors can order the refunding of taxes only by the treasurer in office, not by a treasurer who has gone out of office. So *held* with reference to railroad aid taxes: *Eyerly v. Board of Supervisors*, 81-189.

The supervisors being authorized to require the treasurer to refund taxes illegally collected, a suit against the county for the recovery of such taxes cannot be maintained, the proper proceeding being against the officers to compel the proper action by them: *Eyerly v. Jasper County*, 72-149.

A claim against the county for refunding of taxes paid must be presented to the board of supervisors before action can be brought thereon whether such claim is liquidated or not: *Bibbins v. Clark*, 90-230.

The cause of action against the county for illegal or erroneous taxes paid accrues at the very moment of payment of taxes, if at that time the taxes are erroneous and illegal. The statute of limitations against such action commences to run then, and not from the time that the error or illegality is adjudicated: *Callanan v. Madison County*, 45-561; *Hamilton v. Dubuque*, 50-213; *Scott v. Chickasaw County*, 53-47.

A party cannot, by neglecting to demand the refunding of such tax, delay the running of the statute: *Beecher v. Clay County*, 52-140.

And the ignorance of plaintiff that the levy was illegal will not enable him to take advantage of the exception of the statute of limitations in case of fraud or mistake provided in § 3448: *Ibid.*

Where taxes have been paid but the land

is sold by the treasurer for such taxes by mistake, the owner has five years from the discovery of the mistake in which to bring the action: *Storm Lake Bank v. Buena Vista County*, 66-128.

By the latter part of this section a sale for aggregate taxes, only a part of which are illegal and erroneous, is valid: *Eldridge v. Kuehl*, 27-160: *Parker v. Sexton*, 29-421: *Sulley v. Kuehl*, 30-275; *Hurley v. Powell*, 31-64; *Rhodes v. Sexton*, 33-540; *Genther v. Fuller*, 36-604; *Madson v. Sexton*, 37-562.

A sale will be upheld if any portion of the tax for which the land is sold is valid; *Corning Town Co. v. Davis*, 44-622; *Parker v. Cochran*, 64-757.

As to recovery by person paying taxes on property, of which he is found not to be the owner, from the person who derives the benefit from such payment, see notes to § 1403.

SEC. **1418. Tax sale—when and how made.** Annually, on the first Monday in December, the treasurer shall offer at his office at public sale all lands, town lots or other real property on which taxes of any description for the preceding year or years are delinquent, which sale shall be made for the total amount of taxes, interest and costs due and unpaid thereon. But in counties having two county seats and divided into two districts for the collection of taxes, such sale may be made by the deputy treasurer and the recorder or his deputy at the county seat where the taxes for the district are collected, and the records thereof shall be kept thereat. Such deputy treasurer and the recorder or his deputy shall have all the powers conferred by law upon the treasurer and auditor in relation to the collection of the revenue, sales for delinquent taxes, redemption therefrom, the execution of tax deeds thereunder, and every other matter connected therewith. [20 G. A., ch. 194, § 2; 15 G. A., ch. 46; C. '73, § 871; R., § 763; C. '51, § 496.]

Whence power derived: The tax warrant provided for in the Revision was not essential to the power to sell, the power of the treasurer in that respect being derived from the statute directly: *Parker v. Sexton*, 29-421; *Johnson v. Chase*, 30-308; *Hurley v. Powell*, 31-64; *Rhodes v. Sexton*, 33-540; *Madson v. Sexton*, 37-562; *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41-153.

The power to make a tax sale is not derived from the tax list but from the statute. Under previous statutes, *held*, that the tax warrant was a material step, and the legislature could not make a tax deed conclusive as to the existence of such warrant: *Corbin v. Hill*, 21-70.

Also, *held*, that the clerk could sign a tax warrant as acting county judge: *Ibid.*

Also, *held*, that it was not essential that it appear from the warrant when signed by the clerk in place of the county judge that the latter was absent or incapacitated from acting: *Ibid.*; *Sully v. Kuehl*, 30-275.

Under the act of 1847 sale for delinquent taxes could only take place in pursuance of a judgment in the district court against the land for taxes due and unpaid for the term of two years from the first of January next after the delinquent tax list had been filed in his office: *Bleidorn v. Able*, 6-5.

Under the statutory provision of 1858 a sale for taxes delinquent less than two years was invalid: *Williams v. Gleason*, 5-284.

Further as to previous statutes on the same subject, see *Scott v. Babcock*, 3 G. Gr., 133.

The treasurer of a newly organized county has no authority to collect taxes which were delinquent before the organization of the county, and has no power to sell the land for such delinquent taxes: *Collins v. Storm*, 75-36.

Repeal of statute: Where a statute authorizing sale for taxes is repealed without any clause preserving the provisions at the time existing for the collection of taxes levied and delinquent and the new law contains no provision for selling land for taxes previously delinquent, a sale after such repeal for previous delinquent taxes will be invalid: *Bleidorn v. Able*, 6-5.

A sale takes place under the law in force at the time it occurs, and the legislature may modify and change the provision as to sale for taxes already delinquent: *Sully v. Kuehl*, 30-275.

Taxes in fact paid: The delinquency of the owner to pay the taxes is an essential fact upon which the power of sale rests, and proof that the taxes were in fact paid may be made for the purpose of defeating the sale; but under statutes providing for the foreclosure of a tax title by action in court, *held*, that the owner was precluded by the decree from afterwards setting up and proving the fact of such payment: *Gaylord v. Scarff*, 6-179.

A tax deed made pursuant to a sale for taxes which had been paid prior to the sale conveys no title: *Walton v. Gray*, 29-440.

In such case the sale is void: *Morris v. Sioux County*, 42-416; *Patton v. Luther*, 47-236.

And this is so whether payment has been made by the owner or by one having no interest in the land; so where the taxes were paid by one holding under a tax sale subsequently declared void, and the tax thus paid for that year was refunded, *held*, that the property could not afterwards be sold for the taxes for that year: *Iowa R. Land Co. v. Guthrie*, 53-383.

Where the same property is assessed under two descriptions, the one to the owner, and the other to unknown owners, and the assessment to the owner is paid, a sale under the other assessment will be invalid. *Rath v. Martin*, 61 N. W., 941.

In a particular case, *held*, that the evi-

dence showed that the tax for which the sale was made had been paid and the deed was therefore held void: *Harber v. Sexton*, 66-211.

In such case, *held*, that the holder of the tax title should be repaid by the holder of the legal title for taxes paid by him as the holder of such tax title, with six per cent. interest thereon from the time of payment, and that the right of recovery was not barred by the statutory limitation: *Ibid.*

Where a portion of the tax which should have been assessed upon certain real property was by mistake assessed as personal tax, and the part of the tax appearing as the part assessed against the property was paid, *held*, that a sale of such property for delinquent taxes due thereon was invalid. *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51-31.

The fact that the owner pays the taxes and takes receipt after sale of the property therefor does not invalidate the sale nor prevent a deed from issuing to the purchaser: *Jones v. Welsing*, 52-220.

Under the facts of a particular case, *held*, that taxes for the year for which sales in controversy were made belonged to Woodbury county and not to Sioux county, and consequently sales for such taxes by Sioux county were void and no titles passed thereunder: *Hilliard v. Griffin*, 72-331; *Pitts v. Lewis*, 81-51; *Ellsworth v. Nelson*, 81-57.

That a deed in pursuance of such sale is void, see § 1444 and notes.

For taxes not brought forward: Failure of the treasurer to enter on the tax list the fact of previous taxes being delinquent and unpaid, as required by § 1389, will render the sale for such delinquent taxes invalid and void. Such a sale is without authority and void, and yet it may be true that it would by lapse of time ripen into a perfect title: *Gardner v. Early*, 69-42.

It is the duty of the treasurer to sell for all the taxes of the years preceding which are due at the time of sale and the sale relieves the owner of the land from liability for any taxes already due not so included: *Phillips v. Wilmarth*, 66 N. W., 1053.

Failure to sell personal property: A failure of the treasurer to collect taxes by distress and sale of personal property, when he might do so, will not invalidate a subsequent sale of real property for such taxes: *Stewart v. Corbin*, 25-144.

The treasurer is not bound to seize and sell personal property for personal property tax, but he may sell real property therefor: *Garrettson v. Scofield*, 44-35.

Sale of personal property: The fact that lands have been advertised for sale for taxes does not prevent a sale of personal property to pay the same. If the lands, however, had been actually sold to pay the taxes, personal property could not be subjected to their payment: *Emerick v. Sloan*, 18-139.

Public sale: Where there was no offering for sale and no bidding, but the treasurer marked the land as sold, *held*, that there was no valid sale: *Besore v. Dosh*, 43-211.

A sale which is private instead of public is void, and is not such a one as is contemplated or required by the statute: *Chandler v. Keeler*, 46-596.

Where the treasurer on the date of the annual sale announced an adjournment from day to day, and posted notice of that fact, and several months afterward, without any intervening adjournment, and without further notice, sales were made to persons furnishing lists of land without publicly reading from the list or announcing the description, *held*, that the sale was not public and was void: *Butler v. Delano*, 42-350.

Where it appeared that lands were not bid off in separate parcels, nor publicly offered, but the sale was left open from day to day and not adjourned to any particular time, and there was no adjournment of the prior sale to the date at which the sale was claimed to have been made, which was not the legal date of sale, *held*, that the proof was sufficient to overcome the *prima facie* evidence of regularity presented by the deed, and that it sufficiently appeared that there was no sale and the deed was void: *Thompson v. Ware*, 43-455.

Where in such case it was shown that the agent of the purchaser applied at the treasurer's office and selected certain tracts of land which were marked and entered upon the books as having been sold to him and a certificate issued, *held*, that the sale was absolutely void, not being such a public sale as the statute requires: *Miller v. Corbin*, 46-150.

Where by arrangement between the treasurer and the land owner certificates were issued to the purchaser without any actual offering of the land or any payment of the taxes by the purchaser, *held*, that there was no sale: *Hogdon v. Green*, 56-733.

Where the sale was a public sale held in pursuance of law, and there was in fact a sale of the land in controversy without fraud, *held*, that an irregularity in the manner of sale and an error in the recital of the date on which it was made would not defeat the title acquired: *Phelps v. Mead*, 41-470.

Where there is something constituting a sale done at the proper time and place and in a public manner, the sale will not be deemed void, though irregular: *Slocum v. Slocum*, 70-259.

So *held*, where, at the proper time and place, the treasurer checked off to a party not present, but who had previously authorized him to do so, tracts of land as sold to such person and afterward issued to him a certificate therefor: *Ibid.*

Therefore, *held*, that although the evidence tended to show that no sale had been advertised to be held on the first Monday in October, and that the sale in question was not an adjourned sale, but that it was advertised to take place at the time it did, it was not void: *Ibid.*

That fraud of the officers, or of the purchaser, will avoid the sale, see § 1445 and notes.

For what taxes: There must be but one sale for the total amount of taxes due and unpaid. A second sale for taxes which were due, and delinquent at the time of a previous sale, would be void. Such taxes cease to be a lien: *Preston v. Van Gorder*, 31-250: *Bowman v. Thompson*, 36-505.

By a sale the lien of taxes for previous

years is extinguished: see notes to § 1444. And this is true as well in favor of the owner who redeems from such sale as the purchaser: *Hough v. Easley*, 47–330.

The same property cannot be twice sold at the same sale for the taxes of two different years; *Shoemaker v. Lacy*, 38–277: *S. C.*, 45–422.

The tax sale does not divest the owner of title, but it remains in him until the tax deed is executed. *Williams v. Heath*, 22–519; *Lake v. Gray*, 35–44.

Where taxes were levied by a county to which another county was annexed for taxing purposes, and afterwards the new county sold the land for the non-payment of such taxes, *held*, that the new county not having any right to collect the taxes, the sale was void, and the deed founded thereon conveyed no title: *Hilliard v. Griffin*, 72–331.

The fact that the land is not sold for all the delinquent taxes existing at the time of the sale is an irregularity merely which cannot defeat a sale after the execution and recording of the deed made in pursuance thereof: *Kessey v. Connell*, 68–430.

The provision of § 1425, for sale of land for a portion of the taxes due thereon, where, upon being offered for two years for the whole amount of the taxes due, it has remained unsold for want of bidders, does not imply that a sale in other cases for a portion of the tax delinquent at the time of the sale will be invalid: *Ibid.*

A subsequent sale for taxes subsequently becoming delinquent will not divest the rights of a previous purchaser unless a deed is issued in pursuance of such subsequent sale. If such sale is redeemed from, the rights of the prior tax purchaser remain unaffected: *Gray v. Coan*, 30–536.

Redemption from a subsequent tax sale will not defeat the lien of a prior sale: *Gray v. Coan*, 40–327.

Sale for taxes, a part of which are legal, is valid: See notes to § 1417.

Subsequent sale: The power to sell lands for delinquent taxes is not limited to the sale at which such lands are first subject to be sold for such taxes, but may be exercised at any subsequent sale: *Litchfield v. Hamilton County*, 40–66.

Where two tax sales are made of the same property for the same taxes, and the first is void on account of fraud committed at such sale, a second sale may be valid: *Mallory v. French*, 44–133.

A second sale for railroad taxes is legal: *Cowell v. Merrill*, 60–53.

A tax deed for property sold for state and county taxes does not convey to the purchaser a title free from the lien of unpaid city taxes, nor does the city tax deed, made in pursuance of a sale for city taxes of one year, divest the lien of the city for taxes for prior years: *Dennison v. Keokuk*, 45–266.

As to the tracts in which the sale shall be made, see § 1422 and notes.

As to sufficiency of description, see notes to § 1442.

SEC. **1419. Notice.** Notice of the time and place of such sale shall be given by the treasurer, and shall contain a description of each separate tract to be sold as taken from the tax list, the amount of taxes for which it is liable delinquent for each year, and the amount of penalty, interest and costs thereon, the name of the owner, if known, or the person, if any, to whom it is taxed, by publication in some newspaper in the county for three consecutive weeks, the last of which shall be at least one week before the day of sale, and by immediately posting a copy of the first publication thereof at the door of the court-house, if there be one, if not, at the door of the place where the last term of district court was held. The compensation for such publication shall not exceed twenty cents for each description, and shall be paid by the county. The amount paid therefor shall be collected as a part of the costs of sale and paid into the county treasury. If the treasurer can not procure the publication of the notice for the sum herein fixed, then the notice may be given by posting the same in four of the most public places in the county, to be selected by him, for four weeks, and filing a copy thereof with the auditor before the day of sale, with his verified statement thereon that it had been posted as and for the time herein required, and that he could not obtain a publication thereof at the legal rate. [20 G. A., ch. 194, § 3; C.'73, §§ 872–4, 3833; R., § 764; C.'51, § 498.]

Land should be advertised in the same tracts or parcels in which it is entered in the tax book and assessed: *Corbin v. De Wolf*, 25–124; *McClintock v. Sutherland*, 35–487; and should be sold and deeded by the same description as set out in the advertisement: *Martin v. Cole*, 38–141.

Town lots situated in the same block and lying contiguous may be assessed at a gross amount and advertised together: *McClintock v. Sutherland*, 35–487.

Under the provisions of a former statute requiring the treasurer in advertising lands taxed to unknown owners to embrace the largest quantity practicable in the description, *held*, that a sale in pursuance of advertising in that manner was valid: *Henderson v. Oliver*, 32–512.

The treasurer should so advertise as to incur as little expense as possible consistently with a due compliance with the law; therefore, *held*, that the whole or a part of a section of land in a contiguous body belonging to the same owner should be advertised as one tract and not in its smallest subdivisions: *Iowa R. Land Co. v. Sac County*, 39–124; *Cedar*

Rapids & M. R. R. Co. v. Carroll County, 41–153, 176.

This was formerly the provision also as to land assessed to unknown owners, but this provision was omitted in the Code of '73, the Code commissioners saying that it "is entirely inconsistent with the settled policy of our law in regard to such sales, under the decision of the supreme court 'that lands are to be advertised and sold under the descriptions and in the tracts or parcels in which they are entered in the tax book:'" See *Code Com'rs' Rep. of '73.*

Property is to be advertised but once, and the sale of such as is advertised may be made at a sale held any time thereafter pursuant to adjournments regularly made: *Hurley v. Street*, 29–429.

An omission to include certain lands in the advertisement, *held* not sufficient to defeat a deed made in pursuance of a sale thereof, the owner being bound to know that his taxes are delinquent: *Shawler v. Johnson*, 52–472.

The publisher of a newspaper cannot by *mandamus* compel the publication of the advertisement of sales in his newspaper, though it be the only one in the county: *Welch v. Board of Supervisors*, 23–199.

The tax deed is conclusive as to fact of advertisement: See notes to § 1444.

SEC. **1420. Certificate of publication.** The treasurer shall obtain a copy of the notice of sale, with a certificate of the publication thereof, from the printer or publisher, and file it in the office of the auditor, which certificate shall be substantially in the following form:

I, A ..... B....., publisher (or printer) of the ....., a newspaper printed and published in the county of ..... and state of Iowa, do hereby certify that the foregoing notice and list were published in said newspaper once in each week for three successive weeks, the last of which publications was made on the ..... day of ....., A. D....., and that copies of each number of said paper in which said notice and list were published were delivered by carrier or transmitted by mail to each of the subscribers to said paper, according to the accustomed mode of business in this office.

A..... B.....

STATE OF IOWA, }
..... County. } SS.

The above certificate of publication was subscribed and sworn to before me by the above named A..... B....., who is personally known to me to be the identical person described therein, on the..... day of....., A. D. .....

.....

[C. '73, 881; R., § 771.] Auditor ..... County, Iowa.

A failure to comply with the provisions of this section does not invalidate the tax deed: *Hurley v. Powell*, 31–64.

SEC. **1421. Advertisement.** In all entries required to be made by the auditor, treasurer or other officer, letters and figures may be used to denote townships, ranges, sections, parts of sections, lots, blocks, date, and the amount of taxes, interest and costs. No irregularity or informality in the advertisement shall affect the legality of the sale or the title to any real estate conveyed by the treasurer's deed under this chapter, and in all cases its provisions shall be sufficient notice to the owners of the sale thereof. [C. '73, § 880; R., § 770.]

SEC. **1422. Offer for sale.** The treasurer shall on the day of the sale, at ten o'clock in the forenoon, at his office, offer for sale, separately, each tract or parcel of real estate advertised for sale on which the taxes and costs shall not have been paid. [C. '73, § 875; R., § 765; C. '51, § 499.]

The sale should be in the same tracts or parcels in which the land is assessed and advertised: *Martin v. Cole*, 38–141.

Where the owners of land are known its assessment in larger tracts than the smallest government subdivision is authorized, and a sale in the tract in which it is thus assessed will be valid: *Corbin v. De Wolf*, 25–124; *Stewart v. Corbin*, 25–144; *Eldridge v. Kuehl*, 27–160; *Bulkley v. Callanan*, 32–461; *Smith v. Easton*, 37–584.

Where the law authorizes the assessment of land in larger subdivisions than forty-acre tracts it may be so sold: *Ware v. Thompson*, 29–65; *Johnson v. Chase*, 30–308.

Under a former statutory provision requiring the advertisement of land assessed to unknown owners, to be made in the largest

practicable quantities, *held*, that in such cases an entire section might be advertised, sold and deeded in one tract, the term parcel or tract being properly applicable to the whole section: *Martin v. Cole*, 38–141.

Where the use and nature of lots require them to be regarded as one parcel the law will so treat them, and the sale of such property as one lot will be held valid: *Weaver v. Grant*, 39–294.

Although a sale in gross of two separate tracts of land is *prima facie* void, and a deed made thereon showing such fact is also void upon its face, yet such sale and deed may be supported and shown to be valid by evidence that the two tracts were occupied and used as one parcel and for one purpose: *Greer v. Wheeler*, 41–85.

Where lands were sold *en masse*, *held*, that the objection that the sale was void on that account should not be considered upon appeal, where no objection was made in the petition attacking the tax title, and no relief was asked for upon that ground: *Wallace v. Berger*, 25–456.

As to deed of lands sold in gross, see notes to § 1444.

SEC. **1423. Bid—purchaser.** The person who offers to pay the amount of taxes which are a lien on any parcel of land or town lot for the smallest portion thereof shall be the purchaser, and when such purchaser shall designate the portion of any tract of land or town lot for which he will pay the whole amount of taxes for which it may be sold, the portion thus designated shall be an undivided portion. [C. '73, § 876; R., § 766; C. '51, § 501.]

Purchase by county: A county cannot become the purchaser of lands at tax sale: *Bruck v. Broesigks*, 18–393.

Bid: Under this section the bid of a purchaser is to be for an undivided portion of the entire tract, if for less than the whole, and he acquires that undivided interest in the whole tract: *Brundige v. Maloney*, 52–218:

Therefore, *held*, that an offer to pay taxes on a forty-acre tract offered for sale for "fourteen acres" was so uncertain as to render void a deed executed in conformity with such bid, and a notice given in pursuance thereof: *Poindexter v. Doolittle*, 54–52.

An undivided interest cannot be sold for taxes on the whole property: *Cragin v. Henry*, 40–158.

The sale of an undivided interest in land on which the taxes remain unpaid, the taxes having been paid upon the other undivided interest, is competent and proper: *Peirce v. Weare*, 41–378.

Where it appears that the sale is not for the whole amount of the tax it will be presumed in support of the deed, that the sale was made under the provisions of § 1425: *Griffin v. Tuttle*, 74–219.

Where the tax-sale record showed that certain bids upon lands sold for taxes were for fractions of the tracts, *held*, that the law would regard them as undivided interests, although from the list of lands advertised for sale it appeared that the bids were for acres and fractional parts of acres: *Jenswold v. Doran*, 77–692.

Description: Where the description of property to be sold was indefinite, *held*, that the owner of the land could not make objection, on that ground, to the sale of the premises for a valid tax: *Burlington & M. R. R. Co. v Spearman*, 12–112.

Sale by a municipal corporation for taxes, *held* invalid for the reason that the register of sales and the officer's certificate indicated that there was not a sufficient description of the property: *Vaughan v. Stone*, 55–213.

A description of property sold for taxes which does not designate what part of the property is sold is insufficient: *Cornoy v. Welmore*, 92–100.

But held that an insufficient description as to one tract would not vitiate the sale as to other tracts included in the same deed which were taxed separately: *Ibid.*

Further as to description see notes to § 1442.

Sale of homestead: Under a prior provision exempting the homestead from liability for any taxes except those due upon it exclusively, neither an officer making a tax sale nor the person purchasing thereat could extend the liability of the homestead by a sale and purchase of it in connection with other lands: *Penn v. Clemans*, 19–372.

Two or more lots jointly composing the homestead may be sold as one tract, and the sale will not be invalid as being in mass: *Weaver v. Grant*, 39–294.

Unless the homestead was listed separately all the taxes against the owner became liens thereon as upon any other real property: *Salter v. Burlington*, 42–531.

[The provision of § 876 of Code of '73 by which the homestead if separately listed was only liable for the taxes thereon, seems not to be retained.]

SEC. **1424. Sale continued.** The treasurer shall continue the sale from day to day as long as there are bidders, or until the taxes are all paid. [C. '73, § 877; R., § 767; C. '51, § 499.]

Whether it was illegal or even improper for the treasurer to regard all sales made under a continuance as of the date of the commencement of such sale, *quære: Phelps v. Meade*, 41–470; and the deed is conclusive that continuances were properly made, etc.: See notes to § 1444.

As to adjournments and sales on the first Mondays of subsequent months, see §§ 1428 and 1431.

SEC. **1425. Sale of property remaining unsold.** Each treasurer shall, on the day of the regular tax sale each year or any adjournment

thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale. Any taxes on such real estate, in excess of the amount for which the same was sold, shall be credited to the treasurer by the auditor as unavailable, and he shall apportion such excess among the funds to which it belongs, and if any of such excess belongs to the state, it shall be reported by him to the auditor of state as unavailable, who shall give the county credit therefor. [20 G. A., ch. 194, § 6; 16 G. A., ch. 79, §§ 1, 3.]

The deed being presumptive evidence that the sale was lawfully made it will be presumed that the sale was made under the provision of this section if it appears to have been for less than the whole amount of taxes due: *Griffin v. Tuttle*, 74-219.

A sale of this kind for taxes not brought forward is invalid as in other cases of tax sale in violation of § 1389: *Paxton v. Ross*, 89-661.

As to redemption from such sales see §1437.

SEC. **1426. Resale.** The person purchasing any parcel or part thereof shall forthwith pay to the treasurer the amount bid, and on failure to do so the same shall at once be again offered as if no such sale had been made. Such payments may be made in the funds receivable in payment of taxes. [C.'73, § 878; R., § 768; C. '51, § 502.]

SEC. **1427. Record of sales.** The auditor shall attend all sales of real estate for taxes, and keep a record thereof in a book to be kept by him for that purpose, therein describing each tract of real estate on which the taxes and costs were paid by the purchaser as they are described in the copy of the notice on file in his office, stating in separate columns the amount, as obtained from the treasurer's tax list, of each kind of tax, interest and costs for each tract, how much and what part of each parcel was sold, to whom, and date thereof. The treasurer shall also keep a book of sales in which he shall make the same record. He shall also note in the tax list, opposite the description of the property sold, the fact and date thereof. [C.'73, § 882; R., § 772.]

The record of sales is receivable in evidence: *McCready v. Sexton*, 29-356, 375; *Chandler v. Keeler*, 46-596.

A failure to make the record of the fact of sale as here required will not enable a subsequent purchaser at an execution sale to take title paramount to that of the tax purchaser, where the tax deed is recorded prior to the execution sale; but if such deed was not recorded, and the purchaser at execution sale had no notice, actual or otherwise, it would seem that he would be protected: *Negus v. Yancy*, 23-417.

SEC. **1428. Sale adjourned.** When all the real estate advertised for sale has been offered, and a part remains unsold for want of bidders, the treasurer shall adjourn the sale to some day not exceeding two months from adjournment, due notice of which day shall be given at the time thereof, and by keeping such notice posted in a conspicuous place in his office, and no further notice shall be necessary. On the day fixed by the adjournment, the same proceedings shall be had as in the first instance. Further adjournment shall be made from time to time, not exceeding two months, and the sales thus continued until the next regular annual sale, or until all the taxes are paid. [20 G. A., ch. 194, § 4; C. '73, § 883; R., § 773.]

While it may not be essential to the validity of a sale made at an adjournment to show that a record of the adjournment has been made, still it is proper that such an entry should be made on the register of sales, and the fact that no such entry appears thereon is a circumstance tending to show that there was no such adjournment. It is proper, therefore, on such a question, to admit the register of sales in evidence: *Chandler v. Keeler*, 46-596.

A written memorandum of the adjournment of a sale kept by the treasurer is not a record, and is incompetent to overthrow the presumption of regularity raised by the deed: *Clark v. Thompson*, 37-536.

An averment in an answer attacking the validity of a tax sale, that it was made on a day not authorized by law, precludes the supposition that it may have been made on a day authorized by reason of adjournment: *Plympton v. Supp*, 55-195.

The tax deed is conclusive that continuances were properly made: See notes to § 1444.

As to sales on the first Monday of succeeding months, see § 1431 and notes.

SEC. **1429. Penalty for misconduct of officers.** Any treasurer or auditor failing to attend a sale of lands in person or by deputy shall forfeit and pay the sum of one hundred dollars, to be recovered in an action in the name of the county and for its use. If such officer or deputy shall sell or assist in selling any real estate, knowing it is not subject to taxation, or that the taxes for which it is sold have been paid, or shall knowingly and wilfully sell or assist in selling any real estate for taxes to defraud the owner thereof, or shall knowingly and wilfully execute a deed for property so sold, he shall, upon conviction, be fined in a sum of not less than one thousand nor more than three thousand dollars, or imprisoned in the county jail not exceeding one year,, or both fined and imprisoned, and shall be liable to pay the injured party all damages sustained by him on account thereof, and all such sales shall be void. [C. '73, § 884; R., § 774.]

SEC. **1430. Fraud of officers.** If any treasurer or auditor shall be directly or indirectly concerned in the purchase of any real estate sold for the non-payment of taxes, he and his sureties shall be liable on his official bond for all damages sustained by the owner of such property, and all such sales shall be void. In addition thereto, the officer so offending shall, upon conviction, be fined in a sum of not more than one thousand dollars. [C. '73, § 885; R., § 775.]

The act of the treasurer in bidding off land as the agent of another for compensation constitutes sufficient fraud to invalidate the deed: *Corbin v. Beebee*, 36–336.

And where a party sent a sum of money to the treasurer with instructions to bid off for him the amount sent, for which services he was to be paid a commission, and the sale was thus made, *held*, that the treasurer was "concerned in the purchase," and the sale was void: *Everett v. Beebee*, 37–452.

Where it appeared that land was marked on the record of the tax sale as sold to a party who was not present and did not bid, and did not have knowledge of nor consent to the sale, and the certificate of sale was issued in the name of that party, but retained by the deputy treasurer making the sale, and afterward an assignment by such party to him was procured, and it appeared that the name of the party was used to enable the officer to acquire title, *held*, that the sale was void for fraud: *Ellis v. Peck*, 45–112.

Where the deputy treasurer as guardian of a minor son caused property to be bought in at a tax sale, and paid the amount of the bid out of the funds of such minor, causing a certificate of purchase to be assigned to him, *held*, that he was so far concerned in the purchase as to render the sale void: *Kirk v. St. Thomas Church*, 70–287.

The act of an employe in the treasurer's office in bidding in land for another in which he afterwards acquired an interest, he being at the time of the bid not a deputy, but merely employed in clerical services, *held*, not sufficient to render the sale invalid: *Lorain v. Smith*, 37–67.

In view of the lapse of time in a particular case and the expiration of the five-year limitation, *held*, that it was too late to question the right of the treasurer to buy in the certificate of a tax sale, and execute a deed to himself: *Guthrie v. Harker*, 27 Fed., 586.

Evidence in a particular case, *held*, insufficient to show fraud in a sale made twenty-two years before the action to set it aside was brought: *Easton v. Doolittle*, 69 N. W., 672.

Where the sale is void as provided in the last clause of this section, for fraud, the owner may set up and show such fraud to defeat the tax title in any action in which the holder thereof relies upon such title: *Corbin v. Beebee*, 36–336.

Where a combination of purchasers at the sale to defeat a tax title is relied on the burden is on the person resisting the title to show the alleged combination: *Krueger v. Walker*, 63 N. W., 320.

The word "void" is here used in the sense of voidable. A tax deed which might be void for fraud in the hands of the original purchaser will be good in the hands of a subsequent purchaser in good faith without notice of the fraud: *Ellis v. Peck*, 45–112.

The limitation of actions attacking tax titles (§ 1448) is applicable to an action attacking a deed for fraud of officers at the sale: *Lawrence v. Hornick*, 81–193; *Waggoner v. Mann*, 83–17.

And further as to fraud of officers or purchasers and the effect thereof, see § 1445 and notes.

SEC. **1431. Subsequent sale.** If from neglect of officers to make returns, or other good cause, real estate cannot be advertised and offered for sale on the first Monday of December, the treasurer shall make the sale on the first Monday of the next succeeding month in which the required notice can be given. [C. '73, § 886; R., § 776.]

A deed reciting a sale as made on the first Monday of a subsequent month to that on which the regular sale is directed to be made by statute will not be deemed void as showing a sale at a time not authorized by law: *Eldridge v. Kuehl*, 27–160.

A tax sale held subsequently to the first Monday in October will not be void although there is no record of a sale being commenced on the date required by law, nor of an adjournment from that date to the actual date of sale: *Easton v. Savery*, 44–654.

Where it appears from the deed that the sale was made on the first Monday of some month subsequent to October, it will be presumed that a proper cause existed for holding the sale at such time. The reason therefor need not appear of record: *Ibid.*; *Sully v. Kuehl*, 30–275; *Love v. Welch*, 33–192.

If the non-existence of these conditions can in any event be shown to defeat the tax title, the burden of proof is upon the party who assails it: *Love v. Welch*, 33–192.

SEC. **1432. Certificate of purchase.** The treasurer shall prepare, sign, and deliver to the purchaser of any real estate sold for the non-payment of taxes a certificate of purchase, describing it as shown in the record of sales, giving the part of each tract or lot sold, the amount of each kind of tax, interest and costs for each tract or lot as described in such record, and that payment has been made therefor. If any person is the purchaser of more than one parcel, he may have the whole included in one certificate, but each parcel shall be separately described. [C.'73, § 887; R., § 777; C.'51, § 503.]

The certificate does not pass the title to the purchaser, but it remains in the owner until the execution of a deed: *Williams v. Heath*, 22–519; *Lake v. Gray*, 35–44.

The purchaser of land at tax sale acquires no right or interest therein until he receives a deed. While the property is subject to redemption he has but a chattel interest, and such interest does not pass by an attempted conveyance of the property itself: *Rice v. Bates*, 68–393.

The certificate of purchase simply gives the purchaser a lien for the taxes, interest, costs and penalties, etc.: *Eldridge v. Kuehl*, 27–160; *Mallory v. French*, 38–431.

A certificate issued under a tax sale which omitted the name of the town or addition, but was correct in other particulars, *held*, competent and sufficient to prove that said premises were redeemed, in an action of right based upon such redemption: *Rice v. Nelson*, 27–148.

The fact that the description of the land in the tax list and in the certificate is so indefinite and uncertain that no title passes, does not entitle the purchaser to a refunding from the county of the amount paid. The tax purchaser buys at his own risk: *Lindsey v. Boone County*, 92–86. And as to description see § 1442.

The certificate is evidence of the facts recited therein, but in case it is found to be in conflict with the record of sales the latter will prevail: *McCready v. Sexton*, 29–356, 374; *Henderson v. Oliver*, 32–512.

Where the holder of a certificate of purchase at tax sale brought action for waste in removing a building from the premises sold, and got judgment which was made a lien upon the building and the premises to which it had been removed, *held*, that his lien upon the building thereby became junior to that of a mortgagee taking his mortgage subsequently to the sale but before judgment: *Phillips v. Myers*, 55–265.

The owner of the certificate may recover treble damages for waste or trespass: See §§ 4311, 4312.

The tax certificate and the stub book are sufficient evidence as to the amount paid at the tax sale: *Cornoy v. Wetmore*, 92–100.

SEC. **1433. Assignment.** The certificate of purchase shall be assignable by indorsement, and an assignment thereof shall vest in the assignee or his legal representatives all the right and title of the original purchaser; and the statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof. In case the certificate is assigned, the assignment shall be noted in the register of tax sales in the treasurer's office. [C.'73, § 888; R., § 778.]

A certificate of purchase at tax sale possesses none of the peculiar characteristics of negotiable paper, and the transferee is not protected as the indorsee of such instruments: *Watson v. Phelps*, 40–482.

One who takes by assignment a certificate of purchase of property at a tax sale acquires no greater right than the purchaser at the sale, and as to all the infirmities thereof stands in the shoes of the purchaser: *Light v. West*, 42–138; *Besore v. Dosh*, 43–211.

An assignee by indorsement of the certificate without notice of a prior transfer thereof acquires a better title thereunder than one who had previously taken the assignment of such original certificate: *Griswold v. Wilson*, 36–156.

Where the purchaser at tax sale did not pay the amount bid, but such amount was subsequently paid by another, and an assignment of the certificate by the bidder was thereupon procured to be made to such third person, *held*, that the bidder had no interest in the sale, and that the fact that prior to the assignment he had executed a deed for the property covered thereby under another title would not defeat the claim of the assignee of the certificate: *Lloyd v. Bunce*, 41–660.

Under the provision of the Revision of

1860, which did not require the recording of the assignment of a tax certificate, *held*, that the assignee from the tax purchaser after the assignment of such certificate to another was not protected: *Smith v. Stevenson*, 45–645.

Assignment of the certificate of purchase to a person who has purchased the property subsequently to the sale amounts to a redemption: *Bowman v. Eckstien*, 46–583.

A certificate of purchase of tax sale in the hands of an assignee is chargeable with all the defenses that would effect it in the possession of the original holder: *Doud v. Blood*, 89–237.

A purchase of such certificate by one who was under obligations to pay the taxes for which the sale was made amounts to a redemption from such sale and no tax title can be acquired thereunder: *Ibid.*

The fact that a party who has no right to redeem procures an assignment of the certificate of purchase under the representation that he is entitled to and will redeem, but does not do so, will not entitle persons adversely claiming title to any relief: *Curtis v. Smith*, 42–665.

The statute does not make the record of the assignment constructive notice of the rights of the assignee. The owner of the property may effect redemption by contract with the holder of the certificate instead of in the mode pointed out by statute. But if he elects to take that course he must know at his peril that the person with whom he deals is the owner of the certificate: *Swan v. Whaley*, 75–623.

If the treasurer executes a deed to the person entitled to the certificate of purchase, it will be valid though no written assignment is recorded: *Ibid.*

Where at the time a certificate was assigned there appeared indorsed thereon an agreement not to sell or transfer it, nor procure a treasurer's deed under it, the assignor having already sold and conveyed the same premises by warranty deed, *held*, that the title under such conveyance was superior to that acquired by a tax deed taken by the assignee of the certificate: *Soukup v. Union Inv. Co.*, 84–448.

A valid indorsement in blank of the certificate and the possession thereof by another than the purchaser is presumptive evidence of the assignment of such certificate: *American Exchange Nat. Bank v. Crooks*, 66 N. W., 168.

The statement in the treasurer's deed of the fact of the assignment is presumptive evidence thereof: *Ibid.*

SEC. **1434. Payment of subsequent taxes.** The treasurer shall also prepare, sign, and deliver to the purchaser of any real estate sold for taxes duplicate receipts for taxes, interest and costs paid by him after the date of his purchase for any subsequent year or years, one of which receipts shall be filed in the office of the auditor and noted on the register of sales therein. If such duplicate receipt is not so filed before redemption, such tax shall not be a lien upon the land, and the person paying the tax shall not be entitled to recover it of the owner of the real estate. [C.'73, § 889.]

Where the duplicate receipt for subsequent taxes paid by the tax purchaser is not filed, etc., the owner may redeem without paying such taxes: *Kennedy v. Bigelow*, 43–74.

This provision as to filing duplicate receipts does not apply to payment of taxes by purchaser or owner of the land after the execution of the tax deed: *Barke v. Early*, 72–273.

The purchaser cannot pay taxes for years previous to the sale which have not been included in the amount for which the property was sold, and thereby compel the owner, in redeeming, to pay such taxes: *Sheppard v. Clark*, 58–371.

These provisions as to filing the duplicate tax receipts are not applicable as to taxes paid after issuance of the deed: *Thode v. Spofford*, 65–294; *Elliott v. Parker*, 72–746.

Taxes paid by the purchaser after redemption is made by the owner cannot be recovered, and if he pays them upon the supposition that the redemption is illegal he does so at his peril: *Byington v. Allen*, 11–3; *Byington v. Walsh*, 11–27.

A purchaser of property exempt from taxation acquires no such interest by such purchase as will give him the right to a lien for taxes paid for subsequent years, though the property has passed to a third person who cannot claim the exemption: *Byington v. Wood*, 12–479.

Where tax purchaser paid personal taxes of the owner which were a lien upon the land purchased, but his tax title was found to be defective on account of insufficient description of the premises, *held*, that he was not entitled to recover from the county the subsequent tax thus paid. Such payment must be deemed voluntary: *Lindsey v. Boone County*, 92–86.

As to recovery of taxes paid under a sale which is not valid, see notes to §§ 1444, 1446.

SEC. **1435. School, agricultural college or university land.** When any school, agricultural college or university land sold on credit is sold for taxes, the purchaser shall only acquire the interest of the original purchaser therein, and no sale of any such lands for taxes shall prejudice the rights of the state, agricultural college or university. In all cases where the real estate is mortgaged or otherwise encumbered to the school, agricultural college or university fund, the interest of the person who holds the fee shall alone be sold for taxes, and in no case shall the lien or interest

of the state be affected by any sale thereof. The foregoing provision shall include all lands exempt from taxation by law, and any legal or equitable estate therein held, possessed, or claimed for any public purpose, and no assessment or taxation of such lands, nor the payment of any such tax by any person, or the sale and conveyance for taxes of any such lands, shall in any manner affect the right or title of the public therein, or confer upon the purchaser or person who pays such taxes any right or interest in such land. [25 G. A., ch. 110, § 2; 19 G. A., ch. 169, § 1; 17 G. A., ch. 101, §§ 1, 2.]

As against a mortgage to the school or university fund, only the interest of the person holding the fee-title can be sold for taxes: *Crum v. Cotting*, 22–411.

Such purchaser takes subject to the mortgage: *Jasper County v. Rogers*, 17–254.

And acquires only the right to redeem from such mortgage: *State v. Shaw*, 28–67, 76.

The state purchasing at foreclosure sale under such mortgage takes free from the lien of delinquent taxes, and a conveyance from it passes title to the purchaser discharged from such liens: *Helphrey v. Ross*, 19–40; *Miller v. Gregg*, 26–75.

Any purchaser at a foreclosure sale under such mortgage, equally with the state, takes free from the lien of delinquent taxes: *Lovelace v. Berryhill*, 36–379.

A purchaser at tax sale of premises covered by a school-fund mortgage has a lien thereon junior to that of the mortgage, and in an action to foreclose the school-fund mortgage must be made a party or his right of redemption will not be extinguished: *Ayers v. Adair County*, 61–728.

Where real estate is mortgaged to the school fund, the interest of the person who holds the fee shall alone be sold for the taxes, and the lien or interest of the school fund is not affected by such sale: *Winnebago County v. Brones*, 68–682.

A mortgage designed to be a security to the university fund is within the provisions of the statute relating to the sales of land in such cases, whether made directly to the institution or to its proper officer: *Lovelace v. Berryhill*, 36–379.

Where the surety of a note given for the purchase of school lands, who has a mortgage thereon for security, buys in the land at foreclosure sale under such mortgage, he acquires a title free from claims of a purchaser at the tax sale: *La Rue v. King*, 74–288.

SEC. **1436. Redemption—how effected.** Real estate sold under the provisions of this chapter may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and eight per cent. of such amount added as a penalty, with eight per cent. interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and eight per cent. per annum on the whole of such amount or amounts from the day or days of payment; but the penalty for non-payment of taxes of any subsequent year or years shall not attach, unless the same shall have remained unpaid until the first day of March after they become due and have become delinquent, nor shall said penalties apply to taxes voted in aid of the construction of any railroad. In redeeming from a sale of a leasehold interest in agricultural college land, the amount to be paid shall include any amount paid by the holder of the certificate as interest or principal due by the terms of the lease or otherwise to prevent a forfeiture thereof, as provided by law, and for which proper voucher shall have been filed with the auditor, with interest thereon at eight per cent. per annum from date of payment, which amount shall be paid by the auditor to the holder of the certificate, and the certificate of redemption shall show the amount so paid by the party redeeming. [19 G. A., ch. 45; C. '73, § 890; R., § 779; C. '51, § 505.]

Redemption of whole: Where a party, by reason of owning any interest in the property, has a right to redeem, he may redeem the whole, and the purchaser may require him to redeem the whole, if any: *Curl v. Watson*, 25–35; *Rice v. Nelson*, 27–148.

Redemption of part: A sale of several distinct subdivisions or parcels of land in gross is irregular, and neither the officer who makes the sale nor the purchaser thereat will be permitted to take advantage of such wrongful act so as to defeat the right of redemption to a portion of the land so sold: *Penn v. Clemans*, 19–372.

In such case the purchaser or the officer has the right to receive only the amount *pro rata* paid at the sale with the penalty and interest thereon, and this, too, whether the property was assessed and taxed for more or less than its actual or relative value: *Ibid.*

The owner of an undivided interest in property cannot be required to pay the taxes due upon the whole property, and if a sale is made for taxes upon the whole he may redeem his interest: *Cragin v. Henry*, 40-158.

Amount to be paid: Where the proper notice is not given of the expiration of the period of redemption, and the owner subsequently seeks to make redemption, the amount to be paid is the amount for which the land was sold and the penalties and interest provided by law. The fact that part of the taxes to be included in the amount to be paid in making redemption were paid more than five years before the time of redemption will not relieve the owner from the obligation to pay them. The redemption is from the sale and not from the claim for taxes: *Long v. Smith*, 67-22.

The owner in redeeming must pay the penalty upon the taxes paid by the purchaser subsequently to the sale, as well as upon the amount paid at the sale: *Mulligan v. Hintrager*, 18-171.

Under former provisions, *held*, that the holder of a certificate of purchase was not entitled to receive repayment of city taxes paid by him upon the property, but that the provision as to repayment of taxes paid by the purchaser related only to state and county taxes: *Byington v. Rider*, 9-566.

Where land was sold for a portion only of the taxes delinquent at the time of the sale, and the purchaser immediately thereafter paid the balance of the delinquent taxes, *held*, that the party redeeming must pay to the purchaser the amount of such taxes paid by him with six per cent. interest: *Kessey v. Connell*, 68-430.

Where the duplicate receipt for subsequent taxes paid by the tax purchaser is not filed, etc., the owner may redeem without paying such taxes: *Kennedy v. Bigelow*, 43-74.

Redemption can only be made by payment of the amount required by law. The auditor cannot issue a certificate which shall have the effect to cut off the right of the holder of the certificate of purchase when no money is paid. Therefore, *held*, that where the board of supervisors directed the auditor to draw a warrant upon the county treasurer for a sum sufficient to redeem the property of a pauper from tax sale, and the auditor, without having issued such warrant or received any money for the redemption, issued a certificate of redemption of the land to the county, such certificate was not valid: *Reeves v. Bremer County*, 73-165.

The provisions of this section and of § 1434 are simply that when a person entitled to redeem has paid to the auditor the amount necessary to effect the redemption as shown by the duplicate receipts on file in the auditor's office, the redemption is completed, and no other claim can be asserted against him or the land for taxes which have been paid by the purchaser of the property. But these provisions have no application to cases in which the redemption is effected by suit in equity, in which case the redemptioner is required to pay the interest and penalty provided by this section on each installment of taxes which has been paid by the purchaser, although, such taxes being paid after the issuance of the deed, no certificate thereof has been filed with the auditor: *Slyfield v. Barnum*, 71-245.

Where the owner applying to the auditor to redeem paid the amount stated by the officer to be necessary, *held*, that such redemption was effectual although the amount was by mistake of the officer less than required, and the redemptioner refused on subsequent application to pay the balance: *Hintrager v. Mahoney*, 78-537.

Where the holder of a tax certificate advised the owner as to the amount necessary to redeem, and received that amount from the owner, *held*, that his rights under the certificate would thereby terminate, and no valid tax title could be acquired by him or his assignees: *Hunt v. Seymour*, 76-751.

Where the officer receives an amount less than that required to make redemption and that amount is accepted by the purchaser, he can not afterwards recover from the redemptioner. *Darrow v. Union County*, 87-164.

Effect of redemption: The sale of land for taxes does not divest the title of the owner, and if redemption is made the title remains free from such lien in all respects as if the taxes had been paid before sale: *Lake v. Gray*, 35-44.

Redemption by one lienholder inures to the benefit of all, and after the redemption is made the title and liens stand in the same manner as though no sale had taken place: *Ellsworth v. Low*, 62-178.

Redemption from a subsequent tax sale does not defeat the lien of a prior sale: *Gray v. Coan*, 30-536; *S. C.*, 40-327.

Certificate of purchase; rights of holder: Until the execution of a tax deed the title to the property remains in the original owner, even though the period of redemption has expired without redemption being made, and such owner may maintain ejectment against the holder of a tax certificate whose title has not been perfected by the issuance of a deed: *Williams v. Heath*, 22-519.

Assignment of certificate; redemption by claimant of property: The assignment of a certificate of purchase to a tenant in common, or the husband of such tenant in possession receiving rents and profits, and therefore under obligation to pay the taxes, amounts to a redemption: *Burns v. Byrne*, 45-285.

The assignment of a tax certificate during the period for redemption to one who has purchased the land subsequently to the sale amounts to a redemption, and such purchaser does not hold the land free from the lien of prior taxes not included in such sale: *Bowman v. Eckstien*, 46-583.

Where one of two tenants in common in real property bid off the same for much less than the amount of taxes due, and afterwards conveyed his interest to his co-tenant and assigned to him his tax certificate, *held*, that money paid by the latter in satisfaction of the amount paid by his co-tenant and subsequent taxes, with the purpose of making redemption, and paid back to him as holder of the certificate, could be recovered from him by the county: *Emmet County v. Griffin*, 73-163.

The procuring of a tax title by one under

obligation to satisfy the taxes will be deemed a redemption from the sale: *Beacham v. Gurney*, 91–621.

By agreement: It is competent for a tax purchaser and the land owner to agree that redemption may be made after the time when the right of redemption has expired, and as to the rate of interest to be paid upon making such redemption: *Shoemaker v. Porter*, 41–197.

Where a similar provision was found in the charter of a city, *held*, that no right of action accrued against the auditor until he received the money under the arrangement for redemption, and that the fact that such money was received from a predecessor in office would not allow him to interpose the bar of the statute of limitations by reason of an action not having been brought against such predecessor: *Hintrager v. Richter*, 85–222.

And in such case, *held*, that the city might enter into a compromise with the taxpayer for the redemption of his property, and that such compromise would be binding: *Ibid.*

Voluntary: Money paid in redeeming land from a tax sale which is entirely void for the reason that no taxes were due on the property at the time of sale is voluntarily paid and cannot be recovered back: *Morris v. Sioux County*, 42–416.

Construction: The most liberal and benign construction is to be given to the statutory provisions for the redemption of real estate sold for taxes: *Burton v. Hintrager*, 18–348; *Penn v. Clemans*, 19–372; *Rice v. Nelson*, 27–148; *Corning Town Co. v. Davis*, 44–622; *Foster v. Bowman*, 55–237; *Burke v. Cutler*, 78–299.

SEC **1437. Redemption from sale for part of tax.** In case a redemption is made of any real estate sold for a less sum than the taxes, penalty, interest and costs, the purchaser shall receive only the amount paid and a ratable part of such penalty, interest and costs. In determining the interest and penalties to be paid upon redemption from such sale, the sum due on any parcel sold shall be taken to be the full amount of taxes, interest and costs due thereon at the time of such sale, and the amount paid for any such parcel at such sale shall be apportioned ratably among the several funds to which it belongs. Real estate so sold shall be redeemable in the same manner and with the same penalties as that sold for the taxes of the preceding year. [16 G. A., ch. 79, §§ 1, 2.]

Under this section the owner in making redemption must pay the amount due on the real estate at the time of sale, and that amount must be regarded as the full amount of interest, taxes, penalties and costs as provided by the existing law: *Soper v. Espeset*, 63–326. See § 1425.

SEC. **1438. Certificate of redemption.** The auditor shall, upon application of any party to redeem real estate sold for taxes, and being satisfied that he has a right to redeem the same upon the payment of the proper amount, issue to such party a certificate of redemption, setting forth the facts of the sale substantially as contained in the certificate thereof, the date of the redemption, the amount paid, and by whom redeemed, and make the proper entries in the book of sales in his office, and immediately give notice of such redemption to the treasurer. The certificate of redemption shall then be presented to the latter, who shall countersign it, noting such fact in the sale book opposite the entry of the sale, and no certificate of redemption shall be evidence of such redemption without the signature of the treasurer. [C. '73, § 891; R., § 780.]

Who may redeem: In construing the redemption laws providing as to who may redeem from a tax sale, the word "owner" is held to be a generic term which embraces the different species of interest which may be carved out of a fee simple estate: *Adams v. Beale*, 19–61.

A party having any right or interest in the property may redeem, but a mere stranger to the title cannot: *Byington v. Bookwalter*, 7–512.

A payment made under contract for conveyance of property will entitle the grantee to redeem from a tax sale thereof: *Lynn v. Morse*, 76 665.

A mere volunteer making payment in an attempt to redeem from a tax sale in which he has no interest is not entitled to recover from the owner of the land the amount paid: *Ellsworth v. Randall*, 78–141.

A person having no interest in the property has no right to redeem, and if he pays money for that purpose the act neither vests title in him nor divests that of the tax purchaser, nor does it inure to the benefit of one having the right to redeem: *Penn v. Clemans*, 19–372.

A purchaser at a tax sale may disregard a redemption by a stranger to the title, and at the expiration of the period of redemption demand the execution and delivery of the proper treasurer's deed. If, however, the tax purchaser should consent to the redemption being made by a stranger, and should accept payment of the redemption money from him, thereby intention-

ally giving up his claim to the land and receiving money paid in eqchange therefor, this would in effect be a redemption and would inure to the benefit of the true owner of the property: *Wood v. Welpton*, 29 Fed., 405.

The wife has such an interest in the homestead belonging to the husband as to entitle her to redeem: *Adams v. Beale*, 19-61.

The right of the wife to redeem from a tax sale of the homestead continues until one year after she becomes discovert: *Pfiffner v. Krapfel*, 23-37.

Wherever the right of dower will be cut off by a tax sale, the widow who is entitled to dower or her assignee may redeem, although the dower has not yet been assigned or admeasured: *Rice v. Nelson*, 27-148.

A lessee under a lease made subsequently to a sale may redeem the leased premises, even without the knowledge or consent of the owner: *Byington v. Rider*, 9-566.

Purchase of property under execution against the owner, whether made before or after a tax sale, gives the purchaser such an interest as to entitle him to redeem: *Byington v. Walsh*, 11-27.

Where a party buys land at execution sale which has been sold for taxes, he cannot, after making redemption, recover the amount so paid from the former owner: *Barr v. Patrick*, 59-134.

The holder of the patent title may redeem although there is an outstanding tax title acquired under a prior sale: *Lancaster v. County Auditor*, 2 Dillon, 478.

A person coming into possession under color of title after a tax sale and before the expiration of the period for redemption has such an interest in the property as to be entitled to redeem: *Foster v. Bowman*, 55-237.

An heir of a mortgagee has sufficient equitable interest to be entitled to redeem: *Burton v. Hintrager*, 18-348.

Where the guardian of a minor had, by order of the court, sold lands of his ward, taking a mortgage to secure deferred payments of purchase money; *held*, that the ward had such interest in the land so sold as to be entitled to redeem from a tax sale: *Witt v. Mewhirter*, 57-545.

The administrator of a party holding a mortgage upon real estate has a right to redeem: *Ellsworth v. Low*, 62-178.

An executor under the will of the deceased owner of real property, in which will disposition of the property is directed to be made by such executor, has a sufficient interest in the land to make redemption: *White v. Smith*, 68-313.

Title of party claiming right to redeem *held* sufficient: *Viele v. Van Steenberg*, 31 Fed., 249.

Act of officer in redemption: Failure of the treasurer to enter a memorandum of redemption on the list of sales will not make it invalid: *Byington v. Bookwalter*, 7-512.

If the owner pays the proper amount to redeem, such redemption is not defeated by error of the officer in issuing the certificate of redemption as to what sales or taxes are redeemed from: *Corbin v. Stewart*, 44-543.

Where land has been redeemed from sale, but by reason of failure of the officer to make proper entry thereof the fact of redemption does not appear, a deed issued in disregard of such redemption is void and passes no title to the purchaser: *Fenton v. Way*, 40-196.

The right of the auditor to allow a redemption cannot be questioned, nor the redemption set aside, in an action to compel the treasurer to make a deed. The treasurer cannot disregard the action of the auditor: *Hartman v. Anderson*, 48-309.

Where a certificate of redemption was issued by a person assuming to act as deputy but whose authority was not otherwise shown, and it appeared that such certificate was received by the land-owner from an agent of his authorized to make redemption, and who charged him with the amount paid therefor, the payment not being shown, however, by the proper record, *held*, that the fact of redemption was sufficiently shown to defeat the tax title: *Burke v. Cutler*, 78-299.

And in such case, *held*, that under the circumstances there had not been such laches in asserting the owner's right to the property as to defeat his action to have his title quieted against the holder of the tax title: *Ibid.*

The law authorizing redemption is to be liberally construed in favor of the landowner, and after payment of the money for redemption misconduct and neglect of public officers will not be allowed to divest the owner of his property: *Ibid.*

Discretion of officer: When one seeks to redeem from a tax sale under an equity or a claim not based upon a recorded title, which the law provides shall support the right of redemption, the county officers must permit the redemption if they are satisfied he in good faith relies upon such equity or claim. The county officers cannot eqercise judicial functions and cannot determine questions of title of this kind. Moreover, in cases wherein the county officers are authorized and required to permit redemption, the courts will allow and enforce the right. It cannot be possible that in a case wherein the officers would be required to permit redemption, the courts would deny the right: *Cummings v. Wilson*, 59-14.

Cancellation: A party who has taken the proper steps to make redemption is not bound by the action of the auditor in canceling the redemption certificate upon the stub thereof, unless he acquiesces therein and surrenders the certificate, and receives the money paid in making the redemption: *Ellsworth v. Low*, 62-178.

Stub as evidence: The stub of a redemption certificate is admissible in evidence to show the fact of redemption: *Ibid.*

Ratification: The acceptance by a tax sale purchaser of the amount of redemption money paid in to redeem operates as a ratification of the treasurer's act in issuing the certificate of redemption: *Byington v. Hampton*, 13-23.

SEC. **1439. Minors and lunatics.** If real property of any minor, lunatic or person of unsound mind is sold for taxes, it may be redeemed at

any time within one year after such disability is removed, in the manner specified in the following section, or redemption may be made by the guardian or legal representative under the third preceding section at any time before the delivery of the deed. [C.'73, § 892; R., § 779.]

The right of a minor or lunatic to redeem, under this section, is limited to his own interest in the property, and does not extend to that of other owners or tenants in common: *Jacobs v. Porter*, 34–341; *Stout v. Merrill*, 35–47; *Miller v. Porter*, 35–166.

The simple production from the custody of the guardian of a minor, who was a near relative, of an acknowledged conveyance, *held* not to make out a *prima facie* case of ownership in the minor entitling him to redeem: *Walker v. Sargent*, 47–448: *Harding v. Vaughn*, 36 Fed., 742.

Where a minor holds a mortgage upon land sold at tax sale, he may redeem to the extent of such interest: *Lloyd v. Bunce*, 41–660.

To entitle a minor to redeem after the general time of redemption has expired, he must have been the owner of the property sold at the time of the sale: *Burton v. Hintrager*, 18–348; *Tallman v. Cooke*, 39–402; *Pearsons v. American Investment Co.*, 83–358.

Where the rights of a minor in the property sold are acquired after the sale, whether by conveyance or descent, the time for redemption is not extended: *Stevens v. Cassady*, 59–113.

Where two minors were owners in common of land sold for taxes and one of them died before majority, *held*, that the other inheriting the interest of the deceased owner in common was only entitled to one year within which to bring action to redeem from tax sale, the exemption by reason of minority terminating one year after the death of the owner, and the other owner had no exemption by reason of her own minority as to the interest inherited by her: *McGee v. Bailey*, 86–513.

The grantee of a minor has only five years from his purchase of the property to bring the action: *McCaughan v. Tatman*, 53–508.

The extension of time for bringing the action in favor of the minor does not operate to the benefit of the purchaser as against such minor, and such purchaser must bring any action on his tax title within five years from the execution and recording of his deed: *Ibid.*

The disability of a minor is removed by his death, and the year within which redemption must be made commences to run from that time, and not from the time when he would have come of age: *Gibbs v. Sawyer*, 48–443.

The right of a minor to redeem is assignable and will pass by conveyance: *Stout v. Merrill*, 35–47, 57.

Redemption by a guardian may be made, before the execution of the tax deed, under the general provisions as to redemption, or after the execution of the deed, by equitable action: *Witt v. Mewhirter*, 57–545.

This section simply prescribes when the right to bring the action shall terminate, but does not provide that it can only be brought during the year after the minor comes of age. It may be brought by the guardian or the minor before the minor attains majority: *Ibid.*

The fact that a minor may redeem at any time within a year after the removal of disability will not entitle him to possession against the holder of a valid tax deed. His interest in the land is an equity to be enforced, if at all, in a court of equity: *McCaughan v. Tatman*, 53–508.

Where, in an equitable action to redeem on account of minority, plaintiff offers to redeem if he shall be required to do so, and defendant denies his right of redemption and claims to hold an absolute title, the costs should be taxed to defendant upon judgment being rendered in plaintiff's favor: *Strang v. Burris*, 61–375.

SEC. **1440. Equitable action.** Any person entitled to redeem lands sold for taxes after the delivery of the deed shall do so by an equitable action in a court of record, in which all persons claiming an interest in the land derived from the tax sale, as shown by the record, shall be made defendants, and the court shall determine the rights, claims and interest of the several parties, including liens for taxes and claims for improvements made on the land by the person claiming under the tax title. No person shall be allowed to redeem land sold for taxes in any other manner after the service of the notice provided for by the next section and the execution and delivery of the treasurer's deed. [C.'73, § 893.]

Mistake and other grounds: The fact that the owner of property was a citizen in North Carolina, residing there during the civil war, *held* sufficient to entitle him to redeem property sold at tax sale after the period of redemption had expired: *Finley v. Brown*, 22–538.

Equitable action to redeem, on the grounds of insufficient notice of expiration of time of redemption and service thereof may be maintained under this section: *Babcock v. Bonebrake*, 77–710; *Griffith v. Utley*, 76–292. The fact that other relief is asked in regard to the land will not take the case out of these provisions. Such an action cannot properly be brought under the statutory provisions with reference to quieting title, and therefore § 4205, with reference to new trials in actions to quiet title, under which no notice of motion for new trial is required, is not applicable to a motion for new trial in a case brought under this section, and notice of

such motion must be given: *Callanan v. Lewis*, 79–452.

The right to make equitable redemption on proper grounds is not cut off by service of expiration notice: *Lynn v. Morse*, 76–665.

A taxpayer is authorized to rely upon the treasurer for the correct application of the money sent to him to pay taxes, and his failure to pay taxes and to make such application is ground upon which the taxpayer may redeem from the tax sale for such delinquent taxes: *Henderson v. Robinson*, 76–603.

Where, through mistake of the officer, the owner failed to redeem from a valid sale, but redeemed from a subsequent invalid one, which he supposed was the only sale, he was allowed to redeem after the deed had been executed, it being held that the mistake lying at the door of the officer was sufficient ground for equitable relief: *Noble v. Bullis*, 23–559.

Where the record showed two different sales of the same property for taxes for the same year, and it appeared that the land owner had in good faith redeemed from one of the sales believing that was the only one, *held*, that he might in equity maintain an action to redeem from the deed issued in pursuance of the other sale, and should be permitted to do so by paying the amount for which the land sold at the other sale, with the legal interest and penalties, but without costs of sale: *Shoemaker v. Lacey*, 38–277.

A party making redemption may rely upon the representations of officers as to the facts of the sale, and their mistake, error or negligence is sufficient ground to support a right of redemption by action after the execution of the tax deed: *Corning Town Co. v. Davis*, 44–622.

Where a person making redemption from a tax sale paid the amount of subsequent taxes given him by the auditor as having been paid by the tax purchaser, and received a certificate of redemption, and supposed that by such redemption all the taxes upon the land were satisfied, when in fact one item of tax for one of the years was not paid, and the land was afterwards sold therefor, *held*, that such owner might have the deed under the latter sale set aside and be allowed to redeem therefrom: *Iowa Falls & S. C. R. Co. v. Storm Lake Bank*, 55–696.

Mere mistake on the part of the land owner in failing to pay his taxes when they become due and omitting to redeem from the tax sale is not sufficient ground to entitle him to redeem in equity: *Playter v. Cochran*, 37–258.

Where the purchaser at the sale made inquiry as to taxes upon the property but not as to tax sales, *held*, that he was not entitled to redeem from a deed issued in pursuance of such a sale: *Moore v. Hamlin*, 38–482.

Where defendant had asked the treasurer to offer a certain tract of land for sale, and he had refused on the ground that no taxes were delinquent thereon, which was a mistake, and the land was subsequently offered and bid in by plaintiff, after which, with knowledge of the tax sale and within the time to redeem, defendant had bought the patent title to the property, *held*, that there was no ground for setting aside plaintiff's tax title at the suit of defendant: *Gow v. Tidrick*, 48–284.

In a particular case, where a party claimed the right to redeem in equity from a tax deed on the ground of certain unsuccessful offers to make redemption before the expiration of the time, consisting of visits to the auditor's office, which was found closed, etc., *held*, that the fact that twenty-six days elapsed after the making of such offer, and before the expiration of the time for redemption, without further steps being taken, precluded equitable relief: *Harrison v. Owens*, 57–314.

Where an owner on applying to pay the taxes was told that such taxes had been paid but afterwards had knowledge that the property had been sold for such taxes, *held*, that after the expiration of the statutory period for redemption he was not entitled to any relief: *Easton v. Doolittle*, 69 N. W., 672.

Where the owner of land concealed his interest for twenty-eight years, and failed to pay the taxes and redeem the land from tax sale because he did not deem it of sufficient value to justify the expense, and others had expended money in acquiring title and improving the land, *held*, that he would be estopped by his own conduct from questioning the sufficiency of the tax deeds by which others had acquired title to the land: *Baird v. Ellsworth*, 81–629.

Inaccuracy of statement in a letter by the treasurer to a property owner as to the amount which would be necessary to redeem the property from the tax sale, *held*, not sufficient to entitle such property owner to redeem in equity after the expiration of the statutory period: *Ellsworth v. Cordrey*, 63–675.

Where taxes are by mistake paid on other land than that intended, and the land of the owner goes to sale without payment, such owner has no relief against his mistake: *Maxwell v. Hunter*, 65–121.

Where plaintiff sought to redeem from a tax sale after the time fixed by statute had expired, because of a mistake of the clerk in not stating such sale in response to a general offer to pay all taxes and redeem all property sold, *held*, that such general offer, without any request to redeem from the specific sale in question, and the mistake of the clerk or negligence of the owner in not having the sale in question redeemed from under such general offer, would not raise an equity in favor of plaintiff as against an innocent purchaser: *Bolinger v. Henderson*, 23–165.

Tender: In an action to redeem from a tax sale to avoid liability for the costs of the action tender should be made of the amount due defendant for taxes paid: *Curl v. Watson*, 25–35; *Poindexter v. Doolittle*, 54–52.

Where a party was allowed by equitable action to redeem from a tax sale after the deed had been issued, on the ground of a *bona fide* attempt to redeem in proper time, which was rendered unavailing by error of the officer, *held*, that he should pay in making redemption the amount which he should have paid at the time of the offer to redeem with six per cent. interest, and that as no offer to pay such amount had been made he should pay the costs of the action: *Corning Town Co. v. Davis*, 44–622.

Offer to pay: Where the party attacking a tax title at the same time offers to redeem therefrom, and afterwards succeeds in defeating such title on the issue made by the other party as to its validity, he should not be subjected to the costs of trial of that issue: *Broquet v. Sterling*, 56–357.

An offer on the part of one seeking to make equitable redemption to repay the holder of the tax title all the taxes which such holder is entitled to recover from the party seeking redemption will be sufficient: *Nicodemus v. Young*, 90–423.

In an equitable proceeding to redeem it is not required that there be actual tender of the amount to be paid, but an offer in the pleading to pay the amount found due is all that is required: *Crawford v. Liddle*, 70 N. W., 97.

Amount to be repaid: Where a party seeks relief from a tax title under which the purchaser has procured a deed and is in possession, such redemption will be allowed only upon payment of a sum which would be sufficient to pay all taxes if they had not been paid by the purchaser: *Thode v. Spofford*, 65–294.

The rule that a party who succeeds in defeating a tax deed must pay to the person holding under such deed the amount which the owner would have had to pay if such purchaser had not paid the taxes at the sale is not applicable where a party seeks by equitable action to redeem from an illegal sale before the tax deed is issued. The treasurer's certificate of sale does not vest in the purchaser the title and interest of the state and county. The amount which plaintiff should be required to pay in such a case is the taxes which the owner was legally bound to pay, with six per cent. interest: *Roberts v. Merrill*, 60–166.

In an equitable action to redeem after execution of the deed the party seeking to redeem should be required to refund to the purchaser the amount of taxes paid by him subsequently to the execution of the deed, with interest and penalty thereon, whether duplicate receipts for such taxes have been filed with the auditor or not: *Elliott v. Parker*, 72–746.

Where a sale was void for uncertainity, the bid being for the undivided eighteen acres of the tract offered, *held*, that the purchaser was not entitled to recover anything from the owner of the land, seeking to set aside such sale, the owner not being the person against whom the tax was assessed, but a subsequent purchaser of the property, not personally bound to pay such tax: *Smith v. Blackiston*, 82–240.

Where a party holding a tax deed appearing to be valid on its face had in good faith paid taxes for fifteen years, *held*, that the owner of the land redeeming from such tax sale in an action in equity should be required to repay the tax thus paid by the holder of the tax title: *Buck v. Holt*, 74–294.

There is to be a full equitable adjustment of the rights of the parties; and rents and profits, as well as claims for improvements, are to be taken into consideration in the action to redeem in equity. Where such rents and profits have been more than sufficient to repay all the taxes, interest and penalty which the law imposes, the owner may have his title quieted against the holder of the tax title without further redemption: *Strang v. Burris*, 61–375.

Where the tax purchaser has not received any rents and profits from the land, and the person making redemption has enjoyed its use, the holder of the title from whom redemption is made is entitled to the taxes paid with interest without deduction on account of rents and profits: *Cornoy v. Wetmore*, 92–100.

But the mere receipt of rents and profits, *held*, not sufficient to constitute redemption where they were derived largely from improvements: *Babcock v. Bonebrake*, 77–710.

The real owner recovering possession of premises detained from him under a void tax sale may have as damages the rental value of the land during such detention and not merely the amount actually received by the defendant during his possession: *Bradley v. Brown*, 86–359.

If the tax purchaser has enjoyed the use of the land, there should be no deduction for rents and profits: *Cornoy v. Wetmore*, 92–100.

Where the owner, prior to the expiration of the time of redemption, offers to redeem, and such offer is refused by the holder of the certificate, he may afterwards be allowed to redeem in equity by paying the amount due: *Butterfield v. Walsh*, 36–534.

Where the owner of an undivided one-half interest in property covered by a tax sale and deed was allowed to redeem therefrom in an equitable action, *held*, that such owner was properly required to pay one-half the value of improvements made by the tax purchaser, and entitled to be credited with the rental value of the property exclusive of the improvements while occupied by the tax purchaser; and in such case further *held* that as plaintiff could not have ascertained in advance and tendered the amount necessary to redeem, one-half the cost might properly be taxed to defendant: *Elliott v. Parker*, 72–746.

In an equitable action to redeem under this section the question of improvements is to be considered. It is not to be left to be determined under the occupying claimant law: *Serrin v. Brush*, 74–489.

In an action to quiet title, where the tax deed under which defendant claimed was declared void, *held*, that judgment should be entered quieting title in plaintiff upon payment of the amount paid by defendant for taxes and six per cent. interest; but the question as to improvements should be adjudicated in a subsequent action, as the case falls within the statute in regard to occupying claimants, and is not governed by this section: *Collins v. Storm*, 75–36.

Costs: Where in an equitable action to redeem on account of minority the plaintiff offers to redeem if he shall be required to do so, and defendant denies his right of redemption, and claims to hold an absolute title, the costs should be taxed to defendant upon judgment being rendered in favor of plaintiff: *Strang v. Burris*, 61–375.

The costs necessarily incurred in establishing plaintiff's right to redeem under this

section constitute part of the expense of redemption and ought to be paid by the party who exercises such right: *Serrin v. Brush*, 74-489.

As to the right of the party whose tax title is declared void to recover the taxes paid by him, see notes to § 1444.

Equitable redemption from parties holding in trust: A party charged with the payment of taxes as agent cannot acquire a tax title to his principal's land; and under the facts of a particular case, *held*, that the party acquiring a tax title was the agent of the owner, and therefore that his title was void: *Ellsworth v. Cordrey*, 63-675.

Where the guardian of a minor purchased a tax title by quitclaim deed from the purchaser at the sale, which deed was made to him as guardian, *held*, that the conveyance inured to his ward's benefit and that a purchaser from him was chargeable with notice thereof and could not hold the lands as against the ward; *Rankin v. Miller*, 43-11.

A guardian purchasing property of his ward at tax sale cannot, by transfer of such certificate, enable the transferee to acquire the title adversely to the ward: *Dohms v. Mann*, 76-723.

An attorney acquiring by assignment a tax certificate at the time when he was giving his client information with reference to the taxes to be paid on the land, and not advising him as to the sale, *held* to be the trustee as to the title acquired by such assignment, so that the owner of the land could redeem from a deed issued in pursuance of such certificate, even as against the grantees of the attorney: *Lynn v. Morse*, 76-665.

A vendee taking possession under title bond and enjoying the rents and profits is, as between himself and the vendor, liable for the payment of accruing taxes, and cannot therefore acquire, or cause to be acquired, a tax title as against his vendor: *Hunt v. Rowland*, 22-53.

Neither can a third person bid in the land for taxes at the dictation of such vendee, with the proceeds of produce from the land, and hold it as against the vendor: *Ibid.*

A mortgagor cannot acquire a tax title to the prejudice of a mortgagee; neither can a vendee who is in possession under a title bond, with the agreement to pay taxes, acquire as against the vendor a tax title under a sale made prior to the bond for a deed. The duty of the vendee under such circumstances would be to redeem the property, and money so paid would be applied as a payment on the purchase money: *Cowdry v. Cuthbert*, 71-733.

One who acquires the certificate of purchase on property on which he is under obligation to pay the taxes thereby in effect redeems from such sale and cannot acquire title under such certificate: *Doud v. Blood*, 89-237.

Where the money necessary to redeem from a tax sale was paid to the holder of a tax certificate on condition that the latter would procure a tax deed and transfer the title to the owner of the land, *held*, that such payment would be regarded in equity as a redemption, though not made in the manner or at the time prescribed by statute: *Leas v. Garverich*, 77-275.

One who owns the land at the time he acquires a tax certificate thereto, even though he was not the owner at the time of the tax sale, and holds it subject to the liens of others, is deemed to acquire such certificate by way of redemption and cannot perfect a transfer by tax title which shall take priority over the claims of such lien holders: *Manning v. Bonard*, 87-648.

It is the duty of the holder of a life estate to pay the taxes, and he cannot acquire a tax title against the reversioner: *Olleman v. Kelgore*, 52-38.

A purchaser of property at forclosure sale cannot afterwards acquire a valid tax title as against a junior mortgagee, and the latter may be allowed to redeem upon payment of the taxes paid by such purchaser: *Anson v. Anson*, 20-55.

The obligation to pay taxes due before the sale or mortgage of the property is upon the vendor or mortgagor, and does not pass to one who purchases with an agreement to pay off the mortgage: *Porter v. Lafferty*, 33-254.

But the vendee having knowledge of the mortgage and its covenants, and therefore knowing that his vendor was under obligation to pay the taxes, undertaking to discharge the mortgage, cannot afterwards acquire a valid tax title by purchase at tax sale for such unpaid taxes so as to defeat the mortgage: *Ibid.*

The mortgagor or his grantee who assumes the payment of the mortgage cannot acquire a valid tax title as against the lien of the mortgagee: *Bowen v. Kurtz*, 37-239.

A mortgagee having the right to pay taxes for the protection of his security, a purchase by him at a tax sale of the property will be regarded merely as a payment of the taxes made for that purpose, by which neither he nor any person holding under him can acquire a tax title: *Eck v. Swennumson*, 73-423.

A person in possession of and claiming title to land can acquire no additional right to a tax deed if the taxes were a lien upon the land when he took possession. It is the duty of the person acquiring the title and possession of land to pay the taxes, and he can acquire no right or title against the mortgagee by neglect of such duty: *Stears v. Hollenbeck*, 38-550.

One purchasing land subject to the lien of taxes, and releasing his grantor from obligation to pay the same, is presumed to have assumed their payment: *Ibid.*

The mortgagor or his grantees with knowledge of the mortgage cannot acquire a tax title as against the mortgagee: *Ibid.*; *Fair v. Brown*, 40-209.

Although the mortgagee is under no obligation to pay the taxes upon the premises, yet he is authorized to redeem from a tax sale, and cannot, by acquiring title through such a sale, defeat the lien of prior mortgages: *Fair v. Brown*, 40-209.

A junior mortgagee who has paid taxes on the property, upon redemption being made from him can recover only, as to taxes, the

amount paid with six per cent. interest. He is not entitled to recover statute penalties: *Garrettson v. Scofield*, 44–35.

Where a creditor takes a tax title to property of the debtor under the agreement that he is to hold the same as security, not only for advances before procuring it, but also for a judgment held by him against the debtor, such title will be deemed in equity as a mortgage, and the debtor will be allowed to redeem therefrom: *Jordan v. Brown*, 56–281.

In such cases, while the deed will not be absolute against the holder himself, it will be absolute against other claimants to the land who do not take advantage of the right to redeem: *Ibid.*

Tax deeds procured by fraud and collusion on the part of the mortgagor and the tax purchaser may be set aside at the suit of the mortgagee sought to be defrauded thereby: *Connolly v. Connolly*, 63–202.

Where plaintiff sought to subject lands occupied by defendant to a debt contracted by defendant's father, and defendant asked in a cross-bill to have the title quieted in her, it appearing that plaintiff had, pending litigation, redeemed the land from tax sale, *held*, that, upon confirming defendant's title, the latter must pay to plaintiff the amount paid in such redemption: *Semple v. McCrary*, 46–37.

An action which does not question the validity of the sale and deed, but attacks the right of the person claiming thereunder to acquire title thereby, is not barred by the provisions of § 1448: *Sorenson v. Davis*, 83–405.

As to the requirement that a party attacking a tax deed must show title, and the payment of taxes upon the property, see § 1445 and notes.

Persons not debarred from acquiring tax title: A person who is not in possession of real estate, but who claims title thereto under a void tax deed, can become a purchaser at a subsequent tax sale, procure a treasurer's deed, and thereunder claim title; *Neal v. Frazier*, 63–451.

While an owner of land, or one under obligation to pay taxes thereon, cannot acquire a tax title so as to defeat incumbrancers, or others setting up a title adverse to him, yet one who has no interest in the land and is under no obligation to pay the taxes, and is a stranger to the owner, may acquire a tax title thereon, even though he is in possession: *Curtis v. Smith*, 42–665.

A party who had held the legal title to premises, but whose title had been declared invalid, and who had executed a quitclaim deed, *held* not thereafter debarred from acquiring a tax title to such premises: *Seymour v. Harrison*, 85–130.

Acquiring tax title by tenant in common: A tax title acquired by a tenant in common upon the common property will inure to the benefit of his co-tenants. He cannot thereby defeat their title: *Weare v. Van Meter*, 42–128; *Flinn v. McKinley*, 44–68; *Fallon v. Chidester*, 46–588; *Shell v. Walker*, 54–386; *Smith v. Smith*, 68–608: *Clark v. Browne*, 70–139; *Van Ormer v. Harley*, 71 N. W., 241.

Where one of two or more tenants in common under a tax title is trustee of the legal title for the real owners, so that he cannot hold the tax title against such owners, his co-tenants are equally incapacitated from asserting such tax title: *Sorenson v. Davis*, 83–405.

A co-tenant who would be incapacitated originally from taking a tax title cannot afterwards purchase a tax title to the prejudice of his co-tenants: *Ibid.*

The grantee of a tenant in common cannot acquire a tax title against co-tenants of his grantor: *Austin v. Barrett*, 44–488.

The husband of a tenant in common in possession with his wife in the enjoyment of the profits cannot, by neglecting to pay the taxes and purchasing the property at tax sale, acquire a valid title as against her co-tenants: *Burns v. Byrne*, 45–285.

A tax deed acquired by a tenant in common is not sufficient in equity to divest the interest of a co-tenant, even though the holder of the deed may have acquired the tax certificate before becoming tenant in common: *Tice v. Derby*, 59–312; *Flinn v. McKinley*, 44–68.

Under particular facts, *held*, that a tax purchaser was to be considered a tenant in common of the property, and therefore that the other party interested therein might make redemption from him upon payment of the proper amount: *Conn v. Conn*, 58–747.

A tenant in common not in possession may purchase an outstanding tax title for his own benefit: *Alexander v. Sully*, 50–192.

While the tenant in common cannot acquire a tax title against his co-tenants nevertheless *held*, that such rule did not apply where by agreement of the co-tenants one of them was authorized to acquire and hold title to the premises in that manner: *Howe v. Howe*, 90–582.

Under the circumstances of a particular case, *held*, that defendant having purchased from one whom he knew to have an undivided interest and gone into possession, was a tenant in common with the owners of the remaining interest, and a tax title acquired by him would be presumed to be held for the benefit of all: *Shell v. Walker*, 54–386.

Relief against a tenant in common who has procured a tax title upon the common property is not barred by the statute of limitations as to actions on tax titles, the real ground of the remedy being fraud of the tenant in attempting to acquire a tax title against his co-tenant: *Austin v. Barrett*, 44–488.

Until the co-tenant who has acquired a tax title has demanded from his co-tenants payment of their respective portions and such payment has been refused the statute of limitations as to actions to set aside the tax deed (§ 1388) does not commence to run in favor of such co-tenant: *Phillips v. Wilmarth*, 66 N. W., 1053.

Contribution as to taxes paid by co-tenant: The tenant in common acquiring a tax title will be regarded as holding the title thus acquired in trust for his co-tenants until the presumption is rebutted by their refusal to contribute, and the tenant holding the title thus acquired can enforce contribution by action: *Weare v. Van Meter*, 42–128; *Phillips v. Wilmarth*, 66 N. W., 1053.

Where a person purchased an undivided

interest in real property without any notice or knowledge that any claim would be made for taxes previously paid by the owner of the other undivided interest, *held*, that the latter could not recover a portion of such taxes from the former, or make them a claim against the land: *Stover v. Cory*, 53-708.

Where a co-tenant pays the taxes upon the whole property he will be limited in his recovery of the proportionate share due from other co-tenants to the amount paid, with legal interest: *Oliver v. Montgomery*, 39-601.

A tenant in common paying taxes upon the common property acquires a lien thereon for reimbursement: *Oliver v. Montgomery*, 42-36.

Amount to be paid in redeeming in such cases: In making redemption from a tax title acquired by one whose relations to the owner are such that he cannot acquire a valid tax title against such owner, and who has paid subsequent taxes on the premises, the owner should pay to the holder of the title the same amount he would have to pay to the treasurer in case the taxes had not been paid by the claimant under the tax sale: *Ellsworth v. Cordrey*, 63-675.

Where plaintiff bought certain land at a tax sale, and defendant, with fraudulent intent procured from a former owner a quit-claim deed, and on the strength thereof redeemed the land from plaintiff just before the expiration of the period of redemption, it appearing that the property had passed from defendant to an innocent purchaser, *held*, that plaintiff, upon proving the fraudulent character of the transaction, might recover from defendant the value of the land at the time of redemption less the amount paid him to redeem: *Burgan v. Smith*, 47-286.

Estoppel: One who buys property at a tax sale cannot claim an estoppel against one who, holding a tax deed of the property sold, was present and bid against him and gave no notice of his title under the tax deed, unless the former can show that he was not fully aware of the latter's title, or that he relied upon his action, or was in some way deceived or injured thereby: *Case v. Albee*, 28-277.

Conclusive: A redemption by action to which all persons appearing of record to have an interest in the property are made parties is conclusive evidence, and will be binding upon an assignee of notes secured by a mortgage on the premises whose assignment is not recorded, although he is not a party: *Van Gorder v. Hanna*, 72-572.

SEC. **1441. Notice of expiration of right of redemption.** After two years and nine months from the date of sale, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided for the service of original notices, a notice signed by him, his agent or attorney, stating the date of sale, the description of the property sold, the name of the purchaser, and that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof. Service may be made upon nonresidents of the county by publishing the same three times in some newspaper of said county, or by personal service thereof elsewhere in the same manner original notices may be served; but any such nonresident may in writing appoint a resident of the county in which said land is situated an agent, and file said appointment with the treasurer of said county, who shall forthwith record the same in a record kept in his office therefor, and index the same, after which personal service of said notice shall be made upon said agent. Service shall be complete only after an affidavit has been filed with the treasurer, showing the making of the service, the manner thereof, the time when and place where made, and under whose direction the same was made; such affidavit to be made by the holder of the certificate or by his agent or attorney, and in either of the latter cases stating that such affiant is the agent or attorney, as the case may be, of the holder of such certificate; which affidavit shall be filed by the treasurer and entered upon the sale book opposite the entry of the sale, and said record or affidavit shall be presumptive evidence of the completed service of said notice, and the right of redemption shall not expire until ninety days after service is complete. Any person knowingly and wilfully swearing falsely to any fact or statement contained in said affidavit shall be guilty of perjury. The cost of serving the notice and affidavit of publication shall be added to the amount necessary to redeem. The fee for serving the notice shall be the same as for service of an original notice, including copy fee and mileage. The treasurer shall, upon the filing of proof of service and statement of costs, forthwith report the same in writing to the auditor, who shall enter it in the sale book against the proper tract of real estate. The holder of the certifi-

cate of sale or his agent may report in writing to the county auditor the amount of costs incurred in giving such notice, and the auditor shall enter the same in the sale book as aforesaid, and no redemption shall be complete until such costs are paid. [25 G. A., ch. 81; C. '73, § 894; R., § 781.]

Time for redeeming: The right to redeem is terminated after the expiration of ninety days from completed service of notice whether the deed be then executed or not: *Ellsworth v. Low*, 62-178.

Under former statutes, *held*, that redemption could not be made after the expiration of three years from the time of sale, although the deed had not been taken by the purchaser: *Pearson v. Robinson*, 44-413; *Scofield v. McDowell*, 47-129.

Under the same provisions, *held*, also, that the fact that the purchaser did not record his deed would not entitle the owner to redeem after the three years allowed, and that the fact that the purchaser went into possession and received rents and profits, before the recording of his deed, to an amount sufficient to satisfy the tax, interest and penalties, would not entitle the owner to redeem in an equitable action: *Spengin v. Forry*, 37-242.

The law in force at the time of sale regulates the time within which redemption may be made, and not that in force at the time of the assessment: *Negus v. Yancey*, 22-57.

Where the period allowed for redemption by the laws under which a tax sale was made was three years, *held*, that a statute enacted before the expiration of that time after the sale, extending the time to four years, was unconstitutional. Whether a statute reducing the time, or abrogating it entirely, would not likewise be unconstitutional, *quære: Adams v. Beale*, 19-61.

Where a statute gave to married women an extended time within which to redeem, *held*, that a repeal of such statute did not operate to take away the right of redemption from sales previously made: *Myers v. Copeland*, 20-22.

By express statutory provision (see § 1019) the requirements of this section are applicable to tax sales in cities under special charter: *Crawford v. Liddle*, 70 N. W., 97.

If land is taxed by county authorities to an owner, redemption notice must be served although the city has taxed the land to unknown owners. *Ibid.*

Persons under disability: Where a person has the right to redeem within a time given by the general clause of the statute, such person may, if within either of the classes of persons to whom, by reason of disability, a greater time is given, redeem within such additional time: *Adams v. Beale*, 19-61.

Further as to redemption by minors, lunatics, etc., see § 1439 and notes.

Notice of expiration of time for redemption; when necessary: The provision for service of notice of the expiration of the period of redemption is applicable only where such service is possible, and where it is impossible the time of redemption will expire without notice, as, for instance, where the property is assessed to an unknown owner and is not in the actual occupancy of any one, and in such cases a deed may issue in consummation of the sale after the expiration of the three years allowed for redemption: *Tuttle v. Griffin*, 64-455; *Chambers v. Haddock*, 64-556; *Meredith v. Phelps*, 65-118; *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 65-563; *Burdick v. Connell*, 69-458.

In such cases the right of redemption expires at the end of three years, and redemption can not afterward be made, although no deed has yet been executed: *Meredith v. Phelps*, 65-118.

When land is unoccupied and taxed to unknown owners, there is no person on whom notice can be served, and the authority of the treasurer to execute the deed is not dependent upon the service of notice: *Garmoe v. Sturgeon*, 65-147.

Where it is claimed that a tax deed was fraudulent because the notice was fraudulently served on a person who was not the owner, *held*, that notice being properly served on the person in possession, the other notice was immaterial, and the deed was valid: *Clifton Heights Land Co. v. Randell*, 82-89.

To necessitate notice, there must be some person in possession or the property must be taxed in the name of some person who resides in the county where the land is situated: *Brown v. Pool*, 81-455; *Cahalan v. Van Sant*, 87-593.

If the land is taxed to an unknown owner notice is not required. The fact that a blanket notice, which would be insufficient if notice were required, is served, will not defeat the sale: *Lawrence v. Hornick*, 81-193.

The fact that in an action based on such a sale it is claimed that notice was given will not estop the tax title purchaser from showing that notice was not required: *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 65-563.

No notice is required to be served upon persons not in possession of the property and in whose names the property is not taxed: *Burdick v. Connell*, 69-458.

The statute does not require the service of a notice to redeem upon the person who will at the proper time be entitled to receive the deed: *Knight v. Campbell*, 76-730; *Brown v. Pool*, 81-455; *Seymour v. Harrison*, 85-130.

These statutory provisions whereby parties may be deprived of their property must be fully complied with: *Medland v. Walker*, 64 N. W., 797.

The word "notice" used in this section means a written paper containing the statements or recitals necessary to inform the person notified of the facts required to be communicated or declared to him. It should be addressed to the person to be served, or his name in some manner should appear therein: *Steele v. Murray*, 80-336.

Person in possession: The provision as to notice to the person in possession does not depend in any way upon whether the prop-

erty is assessed in the name of any one: *Cahalan v. Van Sant*, 87-593.

Possession in the owner is presumed in the absence of evidence to the contrary: *Ibid.*

Where one is in possession, notice must be served upon him without regard to whether he is rightfully in possession or not: *Brown v. Pool*, 81-455.

Where a party herded cattle upon and over a range of uncultivated land, including the land in question, without any claim of right to do so, *held*, that his possession was not such as entitled him to notice: *Ibid.*

The requirement of this section in regard to service of notice upon the party in possession is absolute, and where notice was served personally upon the owner, but was not served on the person in actual possession, *held*, that a deed made in pursuance of such notice was absolutely void: *Bradley v. Bunn*, 75-180.

Notice of the expiration of time of redemption must be served upon the party in actual possession of the land, whether the possession is rightful or not, and where there were no buildings on the land, and the only evidence of occupancy or possession was a growing crop of corn, *held*, that this was evidence of a satisfactory kind, and sufficient to entitle the person raising the crop to notice: *Callanan v. Raymond*, 75-307.

Under the facts in a particular case, *held*, that a lot was sufficiently occupied in connection with other premises so that notice of redemption ought to have been given to the person thus occupying: *Shelley v. Smith*, 66 N. W., 172.

The requirement that the notice shall be served upon the owner in actual possession is not complied with by service of a notice upon a husband of the owner, she being in possession: *Medland v. Walker*, 64 N. W., 797.

Where a timber lot not suitable for cultivation is used by a person in such way as such land is ordinarily used, he is to be deemed in possession, and is to be served with notice: *Ellsworth v. Low*, 62-178.

Notice is only required to be given to persons in actual possession, not to one who is merely in constructive possession: *Parker v. Cochran*, 64-757.

Where property is taxed to unknown owners, and the owner thereof is not in possession at the time of the sale, notice is not required to be given to such owner, although he has, after the expiration of three years but prior to the execution of the deed, gone into possession of the property: *Meredith v. Phelps*, 65-118.

Where a railway company is in possession of a portion of the premises, condemned for right of way, it has the right of redemption, and such right cannot be cut off without notice of the expiration of the period for redemption. A tax deed executed without such notice would not extinguish the right of the company: *Garmoe v. Sturgeon*, 65-147.

A person who, at the time of the service of notice had no possession except such as had been exercised by ploughing two furrows on the land in question, without any right to do so being made to appear, *held* not sufficiently in possession to be entitled to notice: *Stoddard v. Sloan*, 65-680.

Acts of the owner of city property, actually occupied as such, in causing weeds to be cut and hauled therefrom, *held* sufficient to show that he was in possession and entitled to notice: *Sapp v. Walker*, 66-497.

Where a part owner of property was a member of the family of a brother residing upon the land, but had no control over it, *held*, that she was not in possession in such a sense that it was necessary to serve notice upon her. The possession contemplated by this section is actual and not constructive. It involves the occupying and controlling of the land and not mere residence upon it: *Rowland v. Brown*, 75-679.

That a person be in actual possession it is not necessary for him to live on the land or have some person representing him stay upon it. The owner of cultivated land who leases it, reserving part of the crop as rent, is in actual possession when it is surrendered to him, even though he does not remain on the land: *Whities v. Farsons*, 73-137.

Even though the petition of plaintiff asking to redeem on account of failure to give notice to him as the person in possession of the land does not aver that he was in possession, he may prove such fact under such allegation made by him in his answer to defendant's cross-petition: *Ibid.*

Where land was taxed to an estate as owner and it appeared that by the will of the deceased owner it was within the control and disposition of the executors of the estate, *held*, that notice of redemption was required, such notice to be given to the executor. Notice must be given in all cases where service is possible: *Crawford v. Liddle*, 70 N. W., 97.

Subsequent changes: If the notice is served on the proper person, the right of the holder to a deed at the end of ninety days after the proof of such service is filed cannot be affected by any changes which may occur as to the taxation of the property or its ownership, between the time of such service and the proof of service or issuance of the deed, even though there is delay in making the proof of service: *Rice v. Bates*, 68-393.

Mortgagee: The notice required to be served before a tax deed can be made need not be served on the mortgagee unless he is in possession: *Hall v. Guthridge*, 52-408.

Person to whom taxed: Where land is not taxed in the name of the owner, the omission to serve notice upon such owner not in possession will not invalidate the deed: *Parker v. Cochran*, 64-757; *Seymour v. Harrison*, 85-130.

Where at the time of the service of notice the land was listed and assessed for taxation to a purchaser of the same holding by a deed not recorded, and the assessor's book so showing was in the auditor's office, *held*, that notice must be served upon him although the land was still in possession of his grantor, upon whom notice was properly served: *Heaton v. Knight*, 63-686.

Notice should be addressed to the person in whose name the land is taxed even though taxed in his name by mistake: *American Ex-*

change National Bank v. Crooks, 66 N. W., 168; *Seymour v. Harrison*, 85–130.

A notice when served in an even-numbered year should be served upon the person in whose name the lots were taxed as appears on the tax list: *Medland v. Walker*, 64 N. W., 797.

A party cannot, by procuring a quitclaim to property on which he holds a certificate and having it assessed to himself and then collusively assigning his certificate to another, have valid notice served upon himself which shall entitle the assignee to a deed and give such assignee a title which he can then transfer to the original holder of the certificate: *Cummings v. Browne*, 61–385.

Where the junior motgagee bid in the property at forclosure, and then secured the purchase of the property at tax sale in the name of another for his benefit, and had notice of the expiration of the period of redemption served upon himself as the owner, *held*, that such notice was insufficient, and the tax deed should be set aside: *Frank v. Arnold*, 73–370.

The object of the law being to give notice to the owner of the land, it is the duty of a purchaser to examine the records and ascertain in whose name the land is taxed and give notice to such person. It may properly be considered that until it is listed for taxation it is taxed to the same person as in the previous year; but when it is listed for taxation in the name of another person and assessed to him, and the assessment returned to the auditor, then from the time of such listing it may properly be said to be taxed to that person: *Heaton v. Knight*, 65–434; *Adams v. Snow*, 65–435.

Where there is a conflict between the assessor's books and the tax duplicates placed in the treasurer's hands, the property is to be deemed taxed to the person whose name appears on the tax duplicate: *Fuller v. Butler*, 72–729.

Where no person is in possession of the land and it is taxed to an unknown owner, the tax purchaser is entitled to a deed without giving any expiration notice. He is not bound to look back of the assessment: *Griffin v. Tuttle*, 74–219.

Where the land was taxed to "H. Corlis," and the expiration notice was directed to "H. Corless," *held*, that the two names were substantially the same and the notice was sufficient: *Nycum v. Raymond*, 73–224.

Where the land was listed in the treasurer's office for the taxes of 1884 in the name of N. F. C., while for the taxes for 1885 it was listed by the assessor in the name of M. F. C., and the notice of the expiration of the time for redemption was published in July, 1885, and was directed to N. H. C., *held*, that such notice should have been directed to M. F. C., and was not sufficient: *Lynn v. Morse*, 76–665.

A name written by the auditor in the assessor's book in June, opposite the description of the land, *held*, not to constitute a correction of the name of the owner, even if the auditor had power to make such correction, as it was not placed in the column for owners' names: *Ibid.*

Where land was taxed to an unknown owner and the holder of a tax certificate had paid subsequent taxes and the treasurer had entered his name in the column marked "names of owners," merely as a matter of convenience, *held*, that the fact of his name being placed in such column would not justify the inference that the land had been taxed to him: *Irwin v. Burdick*, 79–69; *Irwin v. Dakin*, 79–72.

Where a party owned land appearing on the treasurer's books as taxed to persons unknown, but the records showed his ownership and that he had been owner for several years, during which the land had been taxed in his name, *held*, that the taxation in the name of such party held good until a subsequent taxation of the land in the name of some other party, and the subsequent taxation of the property to an unknown owner would not relieve the holder of the certificate from the obligation to give notice to such owner: *Hartley v. Boynton*, 5 McCrary, 453.

In an action to redeem from tax sale on the ground that proper notice of the expiration of the time of redemption was not given before the issuance of the tax deed, plaintiff should aver that the land was taxed in the name of some one for the year when the notice should have been given. If not taxed in the name of any owner at the time the notice is to be given, notice is not required: *Grove v. Benedict*, 69–346.

Where the notice was served upon the owner of the legal title, the land being assessed for that year to unknown owners, and it not appearing that any one else was in possession, *held*, that the owner of the legal title would be presumed to be in possession and that the service was sufficient: *Hall v. Guthridge*, 52–408.

Notice is to be given to the person in whose name the land is taxed, but it is not required that such person shall be the owner of the land: *Kessey v. Connell*, 68–430.

The tax deed being *prima facie* evidence of the regularity of all proceedings prior to its execution, it must be presumed in the absence of a showing to the contrary that the notice was served upon the person in whose name the land was taxed: *Soukup v. Union Inv. Co.*, 84–448.

Actual knowledge of the publication of notice will not obviate the necessity of service of notice in cases where such service is required by statute: *Reed v. Thompson*, 56–455.

Uncertainty of notice: Where the bid on which a forty-acre tract of land was sold was for "fourteen acres" thereof, and the notice so described it, *held*, that the notice was void for uncertainty in the description: *Poindexter v. Doolittle*, 54–52.

A notice sufficiently describing the land except that it designates it as containing thirty acres instead of forty acres, where the description would be complete without any designation of the quantity, will not be rendered insufficient by reason of such mistake: *Rowland v. Brown*, 75–679.

Who to give notice: To constitute a person the holder of the certificate of purchase

so as to authorize him to make affidavit as to the publication of notice to redeem, it is not necessary that he have physical possession of the instrument. By that term is meant the owner of it, or the one who at the proper time will be entitled to a deed under the sale, and where the holder of a certificate had surrendered it to the treasurer for cancellation upon the issuance of a treasurer's deed, which was without authority at the time, *held*, that he was not afterwards precluded from serving notice as holder of the certificate: *Rice v. Bates*, 68-393.

Also *held*, that the fact that such holder had executed a conveyance of the property covered by the certificate of purchase to a third person did not preclude his giving notice and receiving the deed, his right as purchaser before receiving a deed not being such an interest in the property as would pass by a conveyance thereof: *Ibid.*

By the expression "lawful holder" is meant one who in law is the holder of the certificate and entitled to the rights and benefits which may accrue under it. To make a person such lawful holder it is not necessary that he have the formal assignment of the certificate provided for in § 1433: *Swan v. Whaley*, 75-623.

Who may serve notice: Service made by the holder of the tax certificate in person is not prohibited and is sufficient: *Hall v. Guthridge*, 52-408.

The provision that the notice shall be served in the manner prescribed for the service of original notice relates to the mode of service and does not prescribe any rule as to the person or officer who shall make the service or as to the return Service can be made only by the holder of the certificate, his agent or attorney, and the affidavit of one of these parties as to service by him is the only competent method of proving such service: *Ellsworth v. Van Ort*, 67-222.

Notice by publication; name: If land is taxed by mistake in the wrong name, and the case is a proper one for giving notice of the expiration of the period of redemption by publication, the published name should be that of the person in which the land is taxed, and not that of the owner: *Hillyer v. Farneman*, 65-227.

The practice of writing only the initial letters of given names has become so common that a notice directed to a person in such manner should not be deemed on that account insufficient: *Stoddard v. Sloan*, 65-680.

The provision for serving notice by publication is permissive, and personal service in lieu of such publication is sufficient: *Seymour v. Harrison*, 85-130.

Blanket notice: The statute evidently contemplates that a notice shall be given by the holder of each certificate of purchase, and a fair construction of it requires that a separate notice shall be given to each person in possession or to whom each tract of land is taxed. A mere blanket notice covering numerous pieces of land, directed to different owners collectively, is not sufficient: *White v. Smith*, 68-313; *Adams v. Burdick*, 68-666.

Where the notice of the expiration of the time for redemption covered more than one sale of more than one tract, but was single as to the party who purchased the lands, and the person to whom they were taxed, *held*, that the notice was sufficient: *Jenswold v. Doran*, 77-692.

Proof of service: The affidavit required by statute to constitute proof of completion of service of notice must be by the holder of the certificate, his agent or attorney, and an affidavit by the proprietor of the paper in which the notice was published, in case of service by publication, is not sufficient: *American Missionary Ass'n v. Smith*, 59-704; *Ellsworth v. Cordrey*, 63-675; *Sweeley v. Van Steenburg*, 69-696; *Viele v. Van Steenburg*, 31 Fed., 249.

A mere request by the holder of a tax certificate to the foreman of a newspaper in which publication of notice is made, to make an affidavit and return it to the treasurer, will not constitute such foreman an agent of the holder so as to render the proof of publication sufficient: *Chambers v. Haddock*, 64-556.

Where the affidavit of proof of service referred to another affidavit, not proper to be received in itself to show service, *held*, that such service was sufficient to incorporate the latter into the former, and that the papers together showed proper service: *Stull v. Moore*, 70-149.

Where proof of the service of a notice consisted of an unverified return made thereon and an affidavit of the holder of the certificate stating that service had been made as shown by the return, that was held sufficient: *Rowland v. Brown*, 75-679.

Where there was a mistake in the affidavit as to the name of the land-owner, but reference was therein made to the notice attached thereto, which was the notice served by publication, and in such notice the name was correctly inserted, *held*, that the proof was sufficient: *Rice v. Haddock*, 70-318.

The proof of service of the notice need not show the county in which the service was made, the place of actual service not being material: *Rowland v. Brown*, 75-679.

An affidavit of the holder of the certificate that the publication was made for three consecutive weeks, but which did not state when the publication was made, *held* not sufficient: *Ellsworth v. Cordrey*, 63-675.

Where the affidavit stated the date of the first publication, and stated that three publications in a weekly newspaper had been made, *held*, that it was sufficient: *Stoddard v. Sloan*, 65-680.

Where the affidavit of publication showed that the paper in which the publication was made was "A weekly newspaper published in said county," *held*, that it sufficiently appeared that it was a newspaper printed in said county: *Nycum v. Raymond*, 73-224.

Where the publisher of the newspaper in which the notice is published makes an affidavit of publication, and the owner of the certificate makes affidavit in which reference is made to the notice and affidavit of the publisher, all of the papers may be considered together in determining whether the

proof of service is sufficient; and where the affidavit made by the holder of the certificate was on a separate sheet of paper attached to the affidavit of the publisher on which was pasted a slip containing a description of the premises and referred to such notice, *held*, that it was sufficient: *Smith v. Heath*, 80-231.

Affidavit in a particular case, *held* to sufficiently refer to the paper containing the notice: *Johnson v. Brown*, 71-609.

It is not necessary to attach a copy of the notice to the affidavit of service: *Knudson v. Litchfield*, 87-111.

Where the affidavit does not state where the newspaper in which such notice was inserted was published, nor the date of the publication of the notice, it is wholly insufficient to authorize the treasurer to issue the deed: *Kessey v. Connell*, 68-430.

It is the duty of a purchaser to make some showing which will authorize the treasurer to make a deed, and he should make such a record as upon its face shows authority for the treasurer to act: *Ibid.*

Failure to enter upon the record the affidavit showing service will not invalidate a deed. The notice itself as well as the record thereof is to be taken as evidence of the fact, and if the affidavit be lost it may be shown by copy duly proven, although not entered on the record: *Baker v. Crabb*, 73-412.

Where the return of service on the notice does not show on what date service was made, but contains a general statement only that the notice was served, a deed issued in pursuance of such notice will not be valid: *Wilkin v. Wilkin*, 91-652.

Failure to give notice: A deed issued without competent evidence being filed of the service of notice to redeem is without authority: *Rice v. Bates*, 68-393.

The requirement of notice is absolute and a failure to observe it will afford ground for setting aside a tax deed and the lapse of five years will not bar an action by the owner of the land to redeem under § 1448: *Shelley v. Smith*, 66 N. W., 172.

A treasurer's deed issued before expiration of ninety days from the filing of an affidavit of service of notice is invalid: *Swope v. Prior*, 58-412; *Cummings v. Wilson*, 59-14.

Until the statute with reference to notice is complied with, the statutory period of redemption cannot expire: *Cornoy v. Wetmore*, 92-100.

So *held* where notice upon one of the owners was not properly served: *Ibid.*

Where a deed is void because prematurely issued, the surrender and cancellation of the certificate is also void, and the certificate has the same force and effect as though it had never been surrendered. If, thereafter, proper notice is given, or the party is prevented by an injunction at the suit of the owner, to whom notice would be given, from giving such notice, the time of redemption will expire ninety days from the giving or attempting to give such notice: *Long v. Smith*, 62-329.

And if the person securing an injunction against the giving of notice and procuring a deed by the taxpayer neglects to make or offer to make redemption until after the time when a deed could have been procured if not prevented by such injunction, he will not be entitled to redeem at all: *Ibid.*

Evidence in a particular case *held* sufficient to justify the court in finding that the tax register showed, when examined by the agent or owner before making redemption, that the affidavit required by statute was filed at such a date as to make his redemption proper: *Ellsworth v. Green*, 59-622.

In ordinary cases mere lapse of time may not estop the owner of land from asserting his title against a tax deed issued upon insufficient notice; but where the owner for twenty-eight years concealed his interest in the land and stood silently by and allowed others to pay the taxes and expend money and labor in acquiring title and improving the land, *held*, that he was estopped by his own conduct from questioning the sufficiency of the tax deed: *Baird v. Ellsworth*, 81-629.

Effect of defective proof: Where there has been sufficient notice of the expiration of the time for redemption, but although there is an attempt to comply with the statute with reference to proof of service of notice, such proof is not in accordance with the statutory requirements by reason of not stating facts required to be stated, the period of limitation of five years will run in favor of the holder of a deed executed in pursuance of such defective notice. In such case the tax deed is not void in the sense that it is executed without authority: *Trulock v. Bentley*, 67-602.

Before the treasurer can properly issue a deed the facts essential to his authority to do so should appear in the files of his office and if the notice does not appear to be given by the tax purchaser the authority of the person giving the notice to do so should also appear. Parol evidence is not admissible to show such authority: *Stevens v. Murphy*, 91-356.

Where the proof of notice is not such as is required, but the deed is nevertheless issued, although it shows on its face that the proof was improper, yet the deed is not to be deemed void, and the period of limitation of an action to attack the same commences to run from the time of its execution: *Bolin v. Francis*, 72-619.

Where the description of the premises in the notice was that of an undivided portion of a tract, *held*, that the notice was insufficient for want of certainty, and the right to redeem was not thereby cut off: *Griffith v. Utley*, 76-292.

Further as to sufficiency of description, see notes to § 1442.

New proof of service: Where the affidavit of proof of service of the notice was not complete by reason of lacking the signature of the affiant, *held*, that the filing of new proof of service, and the expiration of the ninety days thereafter, without payment by the owner, of the amount required to redeem, did not cut off the rights of such owner, where it appeared that the owner had an equitable right to redeem, which he had been continuously asserting: *Lynn v. Morse*, 76-665.

Where the purchaser of land at a tax sale gave proper notice of the expiration of the

time for redemption, but failed to file sufficient proof of such notice in the treasurer's office, but a tax deed was issued by the treasurer; and where, more than four years after the tax deed was issued, the purchaser filed a second proof of service, and received new deeds from the treasurer, *held*, that the purchaser never having assigned his certificate was the proper person to file the second proof of the service of notice, although he had previously conveyed the land: *Babcock v. Bonebrake*, 77-710.

Presumption as to notice: The statute does not require that the affidavit shall show the facts necessary to justify service by publication, as, for instance, that a person served was a nonresident. It is only required to show the service and mode thereof. If the facts are such that the mode of service was not justifiable, the deed can be impeached, but it is made presumptive evidence of its own validity in that respect, and the party asserting it has the burden of showing the impeaching facts: *Stoddard v. Sloan*, 65-680.

The deed is *prima facie* evidence that the notice has been properly and sufficiently served on the right person: *Ellsworth v. Low*, 62-178; *Baker v. Crabb*, 73-412.

One who contests the title under a tax sale on the ground that the expiration notice was not sufficient has the burden of proof: *Knudson v. Litchfield*, 87-111.

The deed is at least *prima facie* evidence of the proper giving of notice, and the party attacking a deed for want of service of the required notice upon the owner must show that the land was assessed to some owner by name, and not to an unknown owner: *Fuller v. Armstrong*, 53-683.

Where the notice and proof of service on their face are regular, and a deed is issued in accordance therewith, the burden of overthrowing this *prima facie* evidence is upon the person attacking the deed: *Wilson v. Crafts*, 56-450.

In the absence of proof that the land was occupied or taxed to some person, it will be presumed in support of the deed that the facts were such as that service of notice was not required: *Chambers v. Haddock*, 64-556; *Garmoe v. Sturgeon*, 65-147.

Notice may be served personally or by publication; and where it appears that notice by publication is made, but is defective, a deed being presumptive evidence of sufficient service, it will be presumed in the absence of evidence to the contrary that personal notice was given: *Baker v. Crabb*, 73-412.

The presumption must obtain that the land was taxed to and notice served on a living person: *White v. Smith*, 68-313.

The tax deed is not conclusive evidence of the giving of notice as required: *Reed v. Thompson*, 56-455.

Where it appeared that the land was taxed to a known owner for the year for the taxes for which the sale was made, and that there was an attempt to serve notice of the expiration of the period of redemption upon such owner, which was insufficient, and an action to quiet title was brought against him, *held*, that it sufficiently appeared that the land was not taxed to an unknown owner to overcome the presumption in favor of the deed: *Ellsworth v. Cordrey*, 65-303.

Change of statute: Notice as required in this section of Code of '73 *held* not necessary where the sale was made before its enactment, although the deed was not executed until after that Code took effect: *Robinson v. First National Bank*, 48-354.

SEC. **1442. Deed executed.** Immediately after the expiration of ninety days from the date of completed service of the notice hereinbefore provided, the treasurer then in office shall make out a deed for each lot or parcel of land sold and unredeemed, and deliver it to the purchaser upon the return of the certificate of purchase. The treasurer shall receive twenty-five cents for each deed made by him, and may include any number of parcels of land purchased by one person in one deed, if desired by him. [C.'73, § 895; R., §§ 781-2; C.'51, §§ 503-4.]

When land has been redeemed: The treasurer has no authority to make a deed for land which has been redeemed, and such deed would be void: *Fenton v. Way*, 40-196.

Without notice to redeem: Unless a notice has been served on the person in whose name the land is taxed, the sheriff is not authorized to execute the deed. As long as the right of redemption exists there is no complete sale, and the period of limitation provided by § 1448 does not commence to run: *Slyfield v. Barnum*, 71-245.

If the notice to redeem, required by the statute, has not been served, or if the proof of the service of the notice required by law is not on file in the treasurer's office when the deed is executed, the land remains subject to redemption, but the deed is not void. It conveys title to the purchaser, who holds it subject to be defeated by the redemption of the land, when the right of redemption is established and exercised in the manner provided by law: *Ibid.; Bowers v. Hallock*, 71-218.

Second deed: When the first deed executed by the treasurer is so imperfect or informal as not to pass the title, he has the power and it is his duty to execute a second and corrected deed conveying the title: *McCready v. Sexton*, 29-356; *Parker v. Sexton*, 29-421; *Hurley v. Street*, 29-429; *Johnson v. Chase*, 30-308; *Gray v. Coan*, 30-536; *Genther v. Fuller*, 36-604.

If the sale is legal the purchaser has the right to be clothed with the legal title, which can only be done by the execution of a valid deed. If the deed executed is void from any cause existing in the form of the body of the deed, or of the acknowledgment, the treasurer has the right to execute a valid deed, provided he can do so in conformity with the actual facts of the sale: *Lorain v. Smith*, 37-67

Where the treasurer has made a valid deed he has no authority to make a second one, and if a second one should be made it could have no effect upon the title conveyed by the first: *Bulkley v. Callanan*, 32–461; *Martin v. Cole*, 38–141.

The authority to execute a second deed is conferred upon the treasurer in order to enable him to correct errors committed in the first. A second deed not executed to correct either mistake, misdescription, incorrect recital or other matter in the first deed in conflict with the facts, but for the object of perverting the truth and falsifying the tax record, will be void: *Gould v. Thompson*, 45–450.

A person who claims title to real estate of which he is not in possession, under a void tax deed, may become the purchaser at a subsequent tax sale and procure a treasurer's deed, and thereunder claim title: *Neal v. Frazier*, 63–451.

Description: The lot or parcel of land in which the property is to be described in the deed is to be the same as that under which it was advertised and sold: *Martin v. Cole*, 38–141.

Where a tax deed is given for several tracts which are taxed and sold separately, a description as to one will not vitiate the deed as to the others: *Cornoy v. Wetmore*, 92–100.

If the description is fatally defective the purchaser cannot recover from the county the taxes paid by him. He buys at his peril: *Lindsey v. Boone County*, 92–86.

Parol evidence is admissible to apply the description contained in the certificate of purchase to its subject-matter: *Judd v. Anderson*, 51–345.

Defective description in assessment and tax books, and deed, cannot be cured by extraneous evidence: *Roberts v. Deeds*, 57–320.

Uncertainty: Where the certificate of sale and the tax deed describe land having no necessary identity with that which has been taxed and is delinquent, they do not of themselves constitute sufficient evidence of a sale to uphold a tax deed, but rather negative it. Likewise, where the tax list shows that land is taxed by a description which is void for uncertainty, no title will pass under the sale or deed: *Blair Town Lot, etc., Co. v. Scott*, 44–143.

Where the purchaser at the sale offered to pay the tax on a forty-acre tract for "fourteen acres," and the land sold was thus described in the notice and deed, *held*, that the deed was void for uncertainty in its description, and in the notice required by statute to be served before its execution: *Poindexter v. Doolittle*, 54–52.

A description of property as the northwest part of the N. E. ¼ of the N. E. ¼, etc., containing three acres, *held* insufficient in an assessment and sale and tax deed to support a tax title, and that such title would be void for such defective description, although the sale was made for delinquent taxes of the owner of the property, which were a lien thereon. Such an objection goes to the validity of the tax title irrespective of the validity of the taxes: *Roberts v. Deeds*, 57–320.

A tax sale under an assessment of a certain number of acres in a certain corner of a subdivision can apply only to that number of acres in the form of a square, and a deed of the tract in any other form executed under such a sale will be valid only so far as the land conveyed therein is embraced in such square: *Immegart v. Gorgas*, 41–439.

Where a tax deed contained the following description of the land it attempted to convey: "The west fract. 1-2 quarter of the N. W. quarter of section 7, in township 96 north, of range 41 west," *held*, that the description was so indefinite that no title was conveyed by the deed: *Collins v. Storm*, 75–36.

Where the premises sold were described in the deed as "the undivided thirty-nine and one-half acres of the northeast quarter of the northeast quarter," etc., *held*, that the deed was invalid for uncertainty in the description: *Griffith v. Utley*, 76–292. To same effect, *Ellsworth v. Nelson*, 81–57.

"The undivided 18 acres" of a tract offered for tax sale is not a sufficient description in a tax deed to convey any interest to the purchaser: *Smith v. Blackiston*, 82–240.

Where the description was "west part, northeast quarter northwest quarter, twenty acres," *held*, that it was sufficiently definite: *Soukup v. Union Inv. Co.*, 84–448.

In a particular case, *held*, that the description was so indefinite that the sale was invalid: *Hintrager v. Nightingale*, 36 Fed., 847.

Abbreviations: Abbreviations such as are in general and common use in the description of land, and are not misleading, may be used in the deed: *Jenkins v. McTigue*, 22 Fed., 148.

Where there was no word or mark prefixed to the figures representing the value of the property upon the assessor's book, but it was not shown or claimed that the omission of the dollar mark in any way actually misled plaintiff, or prevented him from paying whatever sum was properly assessed against his property, *held*, that the figures occurring in the column headed "value of land" rendered the assessment sufficient: *Ibid.*

Specific performance: In an action in the nature of a proceeding to enforce specific performance of tax sale by the execution of a tax deed, *held*, that the amount bid for the property being a grossly inadequate price therefor, equitable relief would not be granted: *Harper v. Sexton*, 22–442.

Undivided interest: The treasurer has no authority to deed an undivided interest in property for taxes due upon the whole. *Cragin v. Henry*, 40–158.

Delay: Where property was sold for a city tax claimed to have been levied fourteen years prior, and it did not appear upon the book of delinquent taxes which the city had adopted as a standard, *held*, that the city must be considered as having abandoned such taxes, and that the tax title was void: *Bradley v. Hintrager*, 61–337.

Where a tax deed was not taken for eleven years after the party claiming under the sale was entitled thereto, if at all, *held*, that as against those dealing with the owner of the land it must be presumed that the right to the deed had been abandoned: *Ockendon v. Barnes*, 43–615.

Laches; Where the purchaser of land at tax sale neglects to secure a deed, and the

land is subsequently bid in by a purchaser at another sale who takes a deed under such sale, the rights of the first purchaser to a deed having become barred before the second deed is issued, the first purchaser cannot set up any rights under his certificate, to defeat the title of the second purchaser: *Johns v. Griffin*, 76–419.

SEC. **1443. Form of.** Deeds executed by the treasurer shall be substantially in the following form:

KNOW ALL MEN BY THESE PRESENTS, that the following described real estate, viz.: (here follows the description), situated in the county of..... and state of Iowa, was subject to taxation for the year (or years) A. D. ...., and the taxes assessed thereon for the year (or years) aforesaid remained due and unpaid at the date of the sale hereinafter named; and the treasurer of said county, having on the .... day of ....., A. D....., by virtue of the authority in him vested by law, at (an adjournment of) the sale begun and publicly held on the first Monday of December, A. D. ...., exposed to public sale at the office of the county treasurer in the county aforesaid, in substantial conformity with all the requirements of the statute, the real property above described, for the payment of the taxes, interest and costs then due and remaining unpaid on said property, and at the time and place aforesaid A..... B....., of the county of ..... and state of ....., having offered to pay the sum of .... dollars and .... cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, for (here follows the description of the property sold) which was the least quantity bid for, and payment of said sum having been made by him to said treasurer, the property was stricken off to him at that price; and the said A..... B..... did, on the .... day of ....., A. D. ...., duly assign the certificate of the sale of the property as aforesaid and all his right, title and interest to said property to E..... F..... of the county of ..... and state of .....; and by the affidavit of ....., filed in said treasurer's office on the .... day of ....., A. D. ...., it appears that notice has been given more than ninety days before the execution of these presents to ..... and ..... of the expiration of the time of redemption allowed by law; and three years having elapsed since the date of said sale, and said property having not been redeemed therefrom:

Now, I, C..... D....., treasurer of said county, for the consideration of said sum to the treasurer paid as aforesaid and by virtue of law, have granted, bargained and sold, and by these presents do grant, bargain and sell to the said A..... B..... (or E..... F.....), his heirs and assigns, the real property hereinbefore described, to have and to hold unto him (or E..... F.....), his heirs and assigns, forever; subject, however, to all the rights of redemption provided by law. In witness whereof, I, C..... D....., treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name on this.....day of....., A. D.....

.....

STATE OF IOWA, }
..... County. } ss.

I hereby certify that before me, ..., in and for said county, personally appeared the above named C..... D....., treasurer of said county, personally known to me to be the treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as treasurer of said county, and acknowledged the execution of the same to be his voluntary act and deed as treasurer of said county, for the purposes therein expressed.

Given under my hand (and seal) this.....day of....., A. D.....

[C. '73, § 896; R., § 783.]

.....

SEC. **1444. Effect of deed—vests title.** The deed shall be signed by the treasurer as such, and acknowledged by him before some officer authorized to take acknowledgments, and when substantially thus executed and recorded in the proper record in the office of the recorder of the county in

which the property is situated, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and all the right, title, interest and claim of the state and county thereto, and shall be presumptive evidence in all the courts of this state in all controversies and actions in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

1. That the real property conveyed was subject to taxation for the year or years stated in the deed;
2. That the taxes were not paid at any time before the sale;
3. That the real property conveyed had not been redeemed from the sale at the date of the deed;
4. That the property had been listed and assessed;
5. That the taxes were levied according to law;
6. That the property was duly advertised for sale;
7. That the property was sold for taxes as stated in the deed.

It shall be conclusive evidence of the following facts:

1. That the manner in which the listing, assessment, levy, notice and sale were conducted was in all respects as the law directed;
2. That the grantee named in the deed was the purchaser;
3. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in this section wherein the deed shall be presumptive evidence only. [C.'73, § 897; R., § 784; C.'51, § 503.]

I. FORM.

Acknowledgment is essential to the validity of the tax deed, and any defect therein is not cured by a general act legalizing defective acknowledgments: *Goodykoontz v. Olsen*, 54–174.

A statute legalizing acknowledgments by county auditors, *held* not operate to validate a tax deed acknowledged in that manner: *Long v. Schee*, 86–619.

Indexing: As to what is a sufficient indexing of the tax deed, see *Peirce v. Weare*, 41–378.

What law governs: The validity of acts affecting the assessment, levy and delinquency of taxes and tax sales is determined under the laws in force at the time the acts were done: *Penn v. Clemans*, 19–372.

II. WHAT VESTS IN PURCHASER.

Effect: The title conveyed by the tax sale is not derivative, but a new title in the nature of an independent grant by the sovereign authority, and the purchaser takes free from any incumbrances, claims or equities connected with the prior title: *Crum v. Cotting*, 22–411.

A title based upon a tax sale and deed is not derivative. It is a breaking up of all titles. When made in conformity with the requirements of the law it is available, not only against the owner of the patent title, but against all liens based upon the patent title: *Bull v. Gilbert*, 79–547; *Willcuts v. Rollins*, 85–247.

A tax title is not a derivative, but a new and independent title. A right of action for breach of warranty under a deed by which the owner holds the land does not pass to the tax purchaser: *Bellows v. Litchfield*, 83–36.

The tax deed conveys to the purchaser the lien of the state and county and if valid vests in him a new and independent title: *Hefner v. Northwestern Life Ins. Co.*, 123 U. S., 747.

A tax title is a perfect title and extinguishes a patent title, and the fact that a person making a contract to convey has only a tax title will not constitute a breach of such contract: *Kramer v. Ricke*, 70–535.

It is the deed, and not the sale, that vests the title in the purchaser: *Lake v. Gray*, 35–44.

Until the deed is executed the title remains in the original owner: *Williams v. Heath*, 22–519.

A tax deed issued to a person as holder of the certificate of sale who is already deceased conveys no title to him or his heirs: *Butterfield v. Walsh*, 36–534.

Rights of purchaser under: When plaintiff claiming title under a bond for a deed against which the statute of limitations had run was seeking to redeem from a tax deed made during his minority, *held*, that the tax deed conveyed to the defendant the right of interposing the statute of limitations against such title bond, as the holder of the legal title himself might have done in an action by plaintiff against him: *Byington v. Stone*, 51–317.

A purchaser by tax title takes all the chances. There is no warranty: *Hussman v. Durham*, 165 U. S., 144.

The purchaser buys at his own risk and a defect in the description such as to defeat

the title will not entitle him to recover from the county the amount paid: *Lindsey v. Boone County*, 92–86.

Taxes on personal property attach as a lien upon real property of the same owner subordinate to other existing liens (see § 1400 and notes), and a purchaser of the real property thus sold for personal property taxes gets no higher interest in the property than that of the owner for whose personal property taxes the real property is sold: *Bibbins v. Polk County*, 69 N. W., 1007.

Innocent purchaser: A purchaser under a tax deed which is void because of payment of the taxes before the sale cannot claim protection as an innocent purchaser as against the owner of the property: *Harrison v. Sauerwein*, 70–291.

Property assessed: The deed cannot be effectual as a conveyance beyond the property actually assessed: *Judd v. Anderson*, 51–345.

Taxes paid: If the taxes for which the sale is made have in fact been paid the deed is invalid: See notes to §1418.

Lien of prior taxes: The purchaser takes all the interest of the state and county in the property, and therefore takes it free from the liens of all taxes unpaid at the date of sale: *Bowman v. Thompson*, 36–505.

Such prior taxes cease to be a lien, and a subsequent sale therefor would be void: *Preston v. Van Gorder*, 31–250.

But where a party purchased land subsequently to a tax sale thereof, and then procured the assignment to himself of the tax certificate, *held*, that the land was not in his hands discharged from the lien of taxes due prior to the sale, and by mistake omitted in making such sale, but that the assignment of the certificate operated merely as a redemption from the sale: *Bowman v. Eckstien*, 46–583.

In a city acting under a special charter, which authorized a separate sale by the city for city taxes, *held*, that a sale for state and county taxes did not divest the property of the lien of such city taxes, and that the purchaser took subject thereto: *Dennison v. Keokuk*, 45–266.

Recovery of subsequent taxes paid under a void tax title: Subsequent taxes paid in good faith by the holder of a void tax title may be recovered of the owner: *Claussen v. Rayburn*, 14–136.

The tax purchaser may recover such taxes, whether paid for and on account of the holder of the patent title or his assignor or grantor: *Guise v. Early*, 72–283.

A tax purchaser may maintain an action after eviction against the real owner for taxes paid on the property in good faith, and if by such payment he has relieved the land from the lien of such taxes he should have a lien thereon for the amount paid. This is especially true where the owner asks and obtains affirmative relief by cancellation of the tax deed. Where a party asks equity he should be required to do equity: *Orr v. Travacier*, 21–68.

A tax purchaser whose title is held void may recover of the property owner the taxes paid by him in good faith subsequently to the acquisition of his title: *Stewart v. Corbin*, 38–571.

In such case the party who has paid the taxes may, in an action in which the invalidity of his deed is declared, have a decree against the owner for taxes paid with six per cent. interest thereon: *Harrison v. Sauerwein*, 70–291.

Where a party seeks in an equitable action to set aside a tax deed which is valid on its face he should be required to pay the amount of the taxes paid by the purchaser in pursuance of such sale: *Gardner v. Early*, 69–42.

Where a party failed to recover the property under his tax title because equity would not sustain it, *held*, that he still might recover the amount expended in the acquisition of the title and for taxes paid on the land: *Hunt v. Rowland*, 28–349.

A party who in a pleading asking the setting aside of a tax title, offers to repay to the holder of such title the amount paid by him, with interest, etc., should be required to pay that amount upon a judgment in his favor setting aside the tax title: *Corbin v. Woodbine*, 33–297.

Where, until the answer was filed, the record failed to show that plaintiff had any knowledge of the tax title set up therein, *held*, that it was sufficient to make an offer to refund the taxes in a replication to such answer: *White v. Smith*, 68–313.

The purchaser cannot pay taxes for years previous to the sale which have not been included in the amount for which the property was sold, and thereby compel the owner in redeeming, to pay such taxes: *Sheppard v. Clark*, 58–371.

Where a life estate was vested in the occupant of property with the provision that the owner of the fee should pay the taxes thereon, and the title of the owner of the fee was sold on foreclosure of a mortgage, *held*, that the purchaser at the foreclosure sale was under obligation to pay the taxes to the holder of the life estate who had paid them, and that upon the failure of the purchaser to make such payment they might be recovered back from such purchaser: *Iowa Loan & Trust Co. v. King*, 66–322.

Where the holder of a tax title conveyed the land with covenants of warranty, and the title was afterwards found to be invalid, but the holder of the tax title recovered judgment for the taxes paid, *held*, that the payment of the taxes did not give him an interest in the land, and his grantees by reason of the covenants of warranty did not obtain any interest in the money paid by their grantor for taxes, and which was repaid to him in pursuance of the decree: *Pierce v. Herrold*, 75–504; *Hooper v. Sac County Bank*, 72–280.

Where there are conflicting claims to property and one party allows the taxes to become delinquent, the other cannot, after enforcing his claim against the property and buying it in at execution sale, recover the amount of taxes which he is compelled to pay to redeem the property from the former owner: *Barr v. Patrick*, 59–134.

Taxes paid by the purchaser after re-

demption is made by the owner cannot be recovered, and if he pays them upon the supposition that the redemption is illegal he does so at his peril: *Byington v. Allen*, 11-3: *Byington v. Walsh*, 11-27.

A purchaser of property exempt from taxation acquires no such interest by such purchase as will give him the right to a lien for taxes paid for a subsequent year, though the title has passed to a third person who cannot claim the exemption: *Byington v. Wood*, 12-479.

A purchaser at tax sale who has in good faith paid the subsequent taxes on the property may, after eviction by the owner, recover the amount so paid: *Claussen v. Rayburn*, 14-136.

The fact that in an action upon a tax title such title is held void is not an adjudication defeating the tax purchaser's right to recover the taxes paid: *Stewart v. Corbin*, 38-571.

Where defendant acquiring title by assignment of a bond for a deed agreed to pay certain taxes, but bought the property in at tax sale for such taxes, and afterward at suit of the wife of the assignor, who did not join in the assignment, it was held void as being a conveyance of the homestead, *held*, that defendant could only recover the amount of taxes paid and interest at six per cent., and not a higher interest or penalty: *Stinson v. Richardson*, 48-541.

Where through his own laches a purchaser has failed to perfect his title within the requisite time, so that the deed does not convey the property, he cannot recover for taxes paid more than five years before he seeks reimbursement therefor, at least as against one who is not an owner of the property at the time the taxes were levied: *Hintrager v. Nightingale*, 36 Fed., 847.

Amount of recovery: In recovering for taxes subsequently paid the tax purchaser is entitled to only six per cent. interest: *Orr v. Travacier*, 21-68; *Early v. Whittingham*, 43-162; *Thompson v. Savage*, 47-522.

Where it was found in a proceeding to redeem from tax sales that the first sale was invalid while the other two were valid, it was decided that plaintiff should pay the amount of legal taxes upon the land which defendant had paid under the first sale and six per cent. thereon; and should also pay the statute penalty and interest upon the other sales, and also the subsequent taxes paid by the defendant: *Curl v. Watson*, 25-35.

As the tax deed vests in the purchaser all the right, title and interest of the state and county, the tax purchaser may, upon his deed being declared void on account of fraud or other defect in the sale for taxes due upon the property, recover from the owner the full amount which the owner would have to pay the treasurer to satisfy taxes for which the sale was made, and taxes subsequently paid, if they had not been paid by the purchaser: *Everett v. Beebe*, 37-452; *Light v. West*, 42-138; *Besore v. Dosh*, 43-211; *Sexton v. Henderson*, 45-160; *Miller v. Corbin*, 46-150; *Springer v. Bartle*, 46-688; *Crumb v. Davis*, 54-25; *Walker v. Beaver*, 50-504.

But this rule has no application where the land was not subject to taxation for the year for the taxes for which it was sold: *Sully v. Poorbaugh*, 45-453.

Nor does the rule apply where the title is void for the reason that there was no assessment, levy or sale: *Early v. Whittingham*, 43-162.

In cases where sales were or could have been lawfully made for taxes, but were rendered void by reason of fraud or other causes, the holder of the tax deed may recover the tax, interest and penalty provided by statute in the payment of delinquent taxes. Even if the taxes for which the land was sold were not a lien on the land, the purchaser may recover the taxes actually paid subsequently to the sale, with six per cent. interest thereon, and no more. The purchaser paying taxes due after the execution of the tax deed may recover on the ground that the land owner ought to reimburse him for the money he expended in good faith for the benefit of the land owner. Where the deed, assessment and other proceedings are void, the purchaser claiming under them can not recover for subsequent taxes paid by him, for the reason that the taxes were not a lien, and the owner was under no obligation to pay them: *Barke v. Early*, 72-273.

The sale and deed convey the interest of the state and county in the property, but not the tax itself, and a tax purchaser is not entitled to recover from the owner the tax paid where the sale and deed, owing to defective description, are void: *Roberts v. Deeds*, 57-320.

A tax title being held void for the reason that no taxes were levied for the year for which the land was sold, *held*, that a tax purchaser could not recover from the owner the amount of taxes paid at the sale, but could only recover taxes paid by him for years subsequent to the sale and within five years next preceding the commencement of an action to recover the same: *Thompson v. Savage*, 47-522.

Where the sale is void the purchaser is only subrogated to the rights of the county, and therefore his action against the owner to recover the taxes paid must be brought within five years after such taxes become delinquent: *Ibid.; Brown v. Painter*, 44-368; *Sexton v. Peck*, 48-250.

An action by the purchaser at a tax sale to recover for taxes paid by him is barred in five years; but *held*, that where plaintiff, in an action to set aside tax deeds under which defendant claimed, offered to pay defendant the amount of all taxes paid by him which might be found legally due from plaintiff to defendant, the plaintiff could not set up the bar of the statute as to the claim for taxes thus paid: *Barke v. Early*, 72-273.

Payment of taxes made more than five years before bringing suit to recover them back, and not made for the protection of the title in behalf of the rightful owner, but for the purpose of depriving him of title, cannot be recovered back: *Thode v. Spofford*, 65-294.

The statutory provisions requiring the filing of a certificate of taxes by the purchaser do not apply to taxes paid by him as owner after he acquires a tax deed: *Ibid.*

Where a tax title is at the suit of the holder of the legal title declared void on the ground that the taxes for which the sale was made had in fact been paid, the holder of the legal title should be required to repay to the holder of the tax title all the taxes paid by him on the land with six per cent. interest thereon, and such repayment should not be limited to taxes paid within five years. The obligation to repay being merely an incidental equity is not subject to the bar of the statute: *Harber v. Sexton*, 66-211.

The rule in regard to recovery of taxes paid, in case the sale is irregular or the deed is void by reason of some inherent invalidity which limits the recovery to taxes paid within five years prior to the bringing of action, does not apply where the owner seeks to redeem from a tax sale which has not culminated in a deed by reason of the failure of the tax purchaser to give notice of the expiration of the period of redemption. In such case the amount paid at the sale with the taxes and interest as provided by law must be paid without regard to the length of time which may have expired after the sale: *Long v. Smith*, 67-22.

Purchaser not subject to: Where a tax sale was held void and the title declared to be in the original owner, and thereafter the tax purchaser commenced action for taxes paid by him subsequent to the purchase, *held*, that an innocent purchaser of the land from such original owner after the judgment would not be deemed to have notice of the claim for the recovery of taxes paid: *Thompson v. Savage*, 47-522.

The record showing the payment by the holder of the tax title will not constitute constructive notice to such purchaser so as to charge him therewith: *Forey v. Bigelow*, 56-381.

Recovery by claimant of property of taxes paid thereon from person afterwards adjudged owner: See notes to § 1403.

III. DEED AS EVIDENCE.

Presumption: The tax deed may be made presumptive evidence of the regularity and validity of all prior proceedings; and as to minor matters relating to the mode or manner of exercising the power of taxation, which may be dispensed with, it may be made conclusive, but there are some indispensable requisits which must be observed, and as to these the deed cannot be made conclusive: *Allen v. Armstrong*, 16-508.

The corresponding section of the Revision (§ 784), which declared that the tax deed should be conclusive evidence of the regularity of all prior proceedings, *held*, unconstitutional in so far as it attempted to make the deed conclusive as to the existence of the essential prerequisites of the taxing power, such as assessment, levy, sale, etc., as depriving a person of his property without due process of law; but it was held that as to non-essentials, or matters simply directory, the deed may be made conclusive. Also *held*, that it was competent for the legislature to make such deed *prima facie* evidence of its own validity and the regularity of prior proceedings: *McCready v. Sexton*, 29-356, 385.

Under the same statutory provision, *held*, that the deed was *prima facie* evidence of those things of which it was improperly declared to be conclusive: *Hurley v. Woodruff*, 30-260.

Whether the legislature can make a tax deed, which is false in fact, conclusive evidence of the matters therein recited, *quære: Adams v. Beale*, 19-61.

The provisions of this section as to the effect of the deed as evidence apply in equity as well as at law: *Clark v. Thompson*, 37-536.

It is competent for the legislature to declare that the acts of *de facto* officers shall be valid: *Allen v. Armstrong*, 16-508.

The presumption is in favor of the validity of a tax deed: *Grove v. Benedict*, 69-346.

As evidence: One asserting title under a tax deed has but to introduce it in evidence and the law puts upon his adversary the burden of showing its invalidity. He will not be guilty of fraud in asserting title under it, only as he has actual knowledge that it was invalid, or introduces it in evidence with intent to accomplish some unlawful purpose: *Brownell v. Storm Lake Bank*, 63-754.

The tax deed is competent evidence of the assignment of the certificate of purchase to the grantee of the deed: *Stahl v. Roost*, 34-475.

A tax deed is *prima facie* evidence of title in the grantee, and where a vendor had agreed to make good title in his vendee, and introduced in evidence the tax deed to himself to show compliance with such contract, *held*, that the burden of proving any fact defeating such deed was upon defendant: *Hunt v. Gray*, 76-268.

Where by city charter under ordinance the collection of taxes is made presumptive evidence of the regularity of prior proceedings, a party claiming that a deed is void because of irregular assessment of a special tax must allege and prove the same: *McNamara v. Estes*, 22-246.

Where the special charter of a city under which property was sold for taxes provided that its collector's deed should have the same force and effect as a treasurer's deed, and also that a demand of the tax must be made before sale, *held*, that although the deed might be *prima facie* evidence of the regularity of prior proceedings it was not concluclusive as to the fact of demand, and might be overthrown by evidence on that point: *Lathrop v. Howley*, 50-39.

Prima facie evidence: The deed is *prima facie* evidence of assessment: *Madson v. Sexton*, 37-562. The fact that the assessment book does not show all the facts necessary to establish the assessment does not prove that such facts do not exist: *Genther v. Fuller*, 36-604.

The production of the treasurer's deed properly acknowledged and recorded makes out in favor of the holder a presumptive case that the land was assessed: *Mathews v. Burdick*, 38 Fed., 894.

And *held*, that negative evidence consisting of the fact that the assessment books or records for the year were not to be found, would not overcome such presumption: *Ibid.*

In view of the presumptive validity of a

tax deed it will be assumed that land subject to taxation was entered in some form upon the assessment books unless the contrary is made to appear: *Lathrop v. Irwin*, 65 N. W., 972.

The presumption in support of a tax deed will sustain a sale for taxes which might properly have been assessed on the property, it not appearing whether or not such property was assessed for taxation, the records on which such assessment would appear having been destroyed: *Barrett v. Kevane*, 69 N. W., 1036.

The deed is *prima facie* evidence as to the fact of sale: *Leavitt v. Watson*, 37-93.

A treasurer's deed is presumptive evidence of the fact that the property sold for taxes has been listed and assessed, and the introduction of the deed in the proper form casts upon the other party the burden of proving that in fact no legal assessment has been made: *Jenkins v. McTigue*, 22 Fed., 148.

The deed is presumptive evidence that the taxes for which the sale is made, if for prior years, have been properly brought forward, and if such objection is not made until the time within which the deed can be attacked has elapsed, the property owner cannot afterwards question the sale on that ground: *Guthrie v. Harker*, 27 Fed., 586.

The deed is *prima facie* evidence as to the fact of assessment, listing and levy, but it is conclusive as to the manner: *Robinson v. First Nat. Bank*, 48-354.

Where the tax deed shows a sale for less than the whole amount due it will be presumed that such sale was made under the provisions of § 1425: *Griffin v. Tuttle*, 74-219.

Where the deed shows on its face that it was made at a sale begun on the first Monday of a month subsequent to October, it is *prima facie* evidence that some of the reasons mentioned in § 1431 existed for commencing the sale at such subsequent day: *Lorain v. Smith*, 37-67.

A party attacking the deed on the ground that the sale was not made at the proper time must at least show that the facts which would have authorized a sale at the date when the sale appears to have been made did not exist: *Eldridge v. Kuehl*, 27-160; *Love v. Welch*, 34-192: *Bullis v. Marsh*, 56-744.

While the tax sale register is admissible in evidence, yet its failure to show the offering of the land on the first Monday of October, which is the regular day for tax sale, does not overcome the *prima facie* evidence of regularity arising from the deed itself: *Bullis v. Marsh*, 56-747.

The deed is presumptive evidence, not only of the fact of giving the expiration notice required by § 1441, but also that the notice was in due form: *Knudson v. Litchfield*, 87-111.

It will be presumed in the absence of a showing to the contrary that the redemption notice was served upon the person in whose name the land was taxed: *Soukup v. Union Inv. Co.*, 84-448.

The tax deed is at least *prima facie* evidence of the fact of service of notice of expiration of the period of redemption: *Ellsworth v. Low*, 62-178.

Even though the evidence of notice by publication shows that such publication was not sufficient it will be presumed that personal notice was given which was sufficient in the absence of evidence to the contrary: *Baker v. Crabb*, 73-412.

A party claiming adversely to the deed must prove that the land was assessed in some name in order to create a necessity for proof of service of notice on such person: *Fuller v. Armstrong*, 53-683; *Chambers v. Haddock*, 64-556.

Where such notice and proof of service appear on their face to be regular, and a deed is issued in accordance therewith, any person asserting the invalidity of the deed upon the ground that the service was not made as the proof shows, or that the person served was not the right person, has the burden of overcoming the *prima facie* evidence furnished by the papers: *Wilson v. Crafts*, 56-460.

May be rebutted: Where it appears that an essential step in the proceeding has not been complied with, the *prima facie* effect of the deed is overcome: *Rayburn v. Kuhl*, 10-92.

A failure to recite a certain fact in an attempt to recite the performance of all the requisite steps toward the execution of a tax deed is evidenced by implication that such fact did not exist, and repels the *prima facie* effect of the deed: *Long v. Burnett*, 13-28.

Evidence of a failure, after search, to find any record of a tax sale for the year in which the sale is claimed to have been made, throws upon the holder of the tax deed the burden of proving such essential step, and overcomes the *prima facie* evidence of the deed: *Ibid.*

Facts in a particular case *held* sufficient to overcome the presumption as to assessment arising from the deed: *Easton v. Savery*, 44-654.

Where a record is required to be made of any fact essential to the validity of the tax, parol evidence of the existence of that fact cannot be substituted. So in regard to a levy, where the records being introduced were found not to contain any evidence of a levy, *held*, that the presumption of levy arising from the execution and recording of the deed was overcome, and the burden of proving a levy in fact was thrown upon the party claiming under the deed, which he could sustain only by showing that a record once existed which had been lost or destroyed: *Moore v. Cook*, 40-290.

Where the evidence showed the entire absence of the records which would exist in case assessment of property, levy of tax, and sale for non-payment thereof, had been made, and it did not appear that such records had been lost or destroyed, *held*, that the *prima facie* evidence furnished by the deed was sufficiently overcome: *Early v. Whittingham*, 43-162.

When, upon the introduction of the assessment books, it appears that the description of the property is void for uncertainty, such evidence shows a want of assessment of the land described in the deed, and throws upon the party claiming under the deed the burden of proving that the property assessed was the same as that deeded: *Blair Town Lot, etc., Co. v. Scott*, 44-143.

A levy of the tax being essential to the validity of the sale, the deed is only presumptive evidence of such levy, and as a valid levy cannot be established by parol evidence, if no record of a levy can be found in the proper office, the presumption that there was a levy arising from the deed is overcome: *Prouty v. Tallman*, 65–354; *Williams v. Poor*, 65–410.

But in a particular case, *held*, that a sheet of paper containing an order of the properly authorized board making a levy was a sufficient record without having been recorded in a book: *Prouty v. Tallman*, 65–354.

Conclusive evidence: A deed reciting the fact of a lawful sale of the property is conclusive evidence of such sale: *Gould v. Thompson*, 45–450.

The fact that the treasurer does not proceed to collect the taxes by distress and sale will not render invalid a deed made in pursuance of a subsequent sale of land therefor; as to that matter the deed is conclusive: *Stewart v. Corbin*, 25–144.

Under the provisions of the Revision which authorized a warrant of sale being issued to the county treasurer under which the sale was to be made, *held*, that as such warrant was not an essential part of the taxing power and might have been dispensed with by the legislature, the tax deed might properly be held conclusive evidence of the regularity of such warrant: *Hurley v. Powell*, 31–64.

The tax deed is conclusive as to the notice or advertisement: *Allen v. Armstrong*, 16–508; *Madson v. Sexton*, 37–562; *Scofield v. McDowell*, 47–129; *Bullis v. Marsh*, 56–747.

That a certain tract of land, the taxes upon which are delinquent, is not contained in the advertisement will not render a sale thereof void. The owner being presumed to know that the taxes on his land were delinquent, and that such land was subject to be sold at the sale as advertised, cannot complain of want of notice: *Shawler v. Johnson*, 52–472.

The tax deed is conclusive as to the copy of the advertisement having been filed as required by statute: *Hurley v. Powell*, 31–64.

It is also conclusive as to the manner of assessment: *Easton v. Perry*, 37–681.

And as to the manner of sale: *Ware v. Little*, 35–234; *Smith v. Easton*, 37–584.

Where by the deed it appears that the sale was of an entire tract which might have been sold *en masse* if assessed to unknown owners, the deed will be conclusive evidence that the assessment was in such manner as that the proceedings were valid: *Easton v. Perry*, 37–681.

The deed is conclusive as to the regularity of prior proceedings: *Leavitt v. Watson*, 37–93; *Martin v. Cole*, 38–141.

And as to the regularity of the assessment, listing and levy: *Robinson v. First Nat. Bank*, 48–354.

It is conclusive that the sale was made at the proper time: *Clark v. Thompson*, 37–536; *Phelps v. Meade*, 41–470; *Shawler v. Johnson*, 52–472; *Slocum v. Slocum*, 70–259.

A mistake in the recital as to the date of sale will not invalidate the deed: *Hurlburt v. Dyer*, 36–474.

The assessment, levy and sale being admitted in fact, the deed is conclusive as to the manner thereof: *Bulkley v. Callanan*, 32–461.

Where a deed shows that a sale was made in a manner which, under some circumstances would be proper, those circumstances, are conclusively presumed to have existed and the deed is valid: *Ware v. Little*, 35–234.

If there has been a sale in fact the deed is conclusive as to the manner, for instance, as to the method of offering the lands for sale. So *held* where it appeared that lands were struck off to parties who had furnished written bids: *Leavitt v. Watson*, 37–93.

If there was a *bona fide* sale in substance and in fact, the tax deed is conclusive evidence that it was done at the proper time and manner, the provisions as to these matters being merely directory and not fundamental: *Phelps v. Meade*, 41–470; *Callanan v. Hurley*, 93 U. S., 387.

Where the assessor left off from the head of his book the words "owners unknown," but entered the lands without connecting them with any name, fixed the value of the lands for the purpose of taxation, and entered them with the proper valuation upon the tax list, and entered the amount of the various taxes properly therein, *held*, that such entry related to the manner in which property of unknown owners was to be listed and assessed and that, consequently, the treasurer's deed was conclusive: *Jenkins v. McTigue*, 22 Fed., 148.

The statutory provisions making a tax deed conclusive evidence as to certain facts is applicable in equity as well as at law, and a court of equity can not set the deed aside for matters as to which it is properly made conclusive evidence: *Clark v. Thompson*, 37–536.

Not conclusive: The deed cannot be made conclusive as to the fact of assessment: *Powers v. Fuller*, 30–476.

Although the tax deed is conclusive as to the regularity of the assessment, yet where land was assessed in the name of the owner, and also to owner unknown, *held*, that the latter assessment was entirely void, and a deed issued in pursuance of a sale thereunder was not valid: *Nichols v. McGlathery*, 43–189.

Recitals in the deed are not conclusive as to whether the property was in fact sold: *McNamara v. Estes*, 22–246.

A tax deed is not conclusive evidence that a sale, private in its nature, is a public sale such as is required. It is always competent to show fraud committed by the officers, or any arrangement between the officers and the purchaser which substitutes a private for a public sale such as the law contemplates. Such a purchase is a fraud upon the owner of the land and renders the sale invalid: *Butler v. Delano*, 42–350.

The deed is conclusive as to manner of sale to only a limited extent. It is always competent to defeat it by showing fraud of the officer or purchaser at such sale: *Ibid.; Thompson v. Ware*, 43–455; *Chandler v. Keeler*, 46–596.

The deed cannot be regarded as conclusive evidence of a sale which the treasurer had no power to make: *Gardner v. Early*, 69–42.

It is not conclusive evidence of the regularity of proceedings which are shown upon its very face to have been irregular, as, for instance, a sale in gross: *Boardman v. Bourne*, 20-134.

It is not conclusive evidence of the giving of notice of expiration of the time of redemption. The notice of which the statute makes a deed conclusive evidence is notice of sale: *Reed v. Thompson*, 56-455.

Sale in gross: A tax deed showing upon its face a sale of distinct tracts in gross is void: *Boardman v. Bourne*, 20-134; *Byam v. Cook*, 21-392; *Ferguson v. Heath*, 21-438; *Harper v. Sexton*, 22-442; *Ackley v. Sexton*, 24-320; *Hurlburt v. Dyer*, 36-474; *Gray v. Coan*, 30-536; *Royce v. Aplington*, 90 352.

Where several distinct and separate tracts of land are sold *en masse*, the sale and deed thereunder are void: *Rankin v. Miller*, 43-11.

In a particular case, *held*, that the recitals of the deed showed a sale in a quarter-section tract, although it also recited the amount of tax due on each forty-acre subdivision thereof: *Clark v. Thompson*, 37-536.

But the deed is not conclusive that the sale was made in gross, and the sale may be valid although the deed is void: *Ware v. Thompson*, 29-65.

That a tax certificate shows the sale to have been made in parcels does not estop the treasurer who has executed the deed from denying its validity: *Byam v. Cook*, 21-392.

A sale in gross of tracts larger than forties if assessed to a known owner is not void, and unless it appears from the deed that the owner was unknown that fact will not be presumed: *Smith v. Easton*, 37-584; *Bulkley v. Callanan*, 32-461.

Where a deed shows a sale in parcels it is conclusive, and proof that the sale was actually in gross will not be received: *Rima v. Cowan*, 31-125; *Sibley v. Bullis*, 40-429; *Clark v. Thompson*, 37-536; *Chandler v. Keiler*, 44-371.

The legislature having authorized sales in tracts larger than the smallest government subdivision in certain cases a tax deed is conclusive evidence as to the regularity of the sale in that respect: *Martin v. Cole*, 38-141.

No objection to the validity of the tax title can, after the expiration of five years from the time of sale, be made on the ground that the deed shows upon its face that several tracts of land were sold for a gross sum: *Monk v. Corbin*, 58-503.

As to sales *en masse* see also notes to § 1422.

Prior payment of taxes: Proof of payment of taxes before the sale will overcome the deed and defeat the purchaser's title: *Gaylord v. Scarff*, 6-179.

In such a case the deed is void: *Patton v. Luther*, 47-236.

If it be shown that the land was in fact redeemed the deed will be void, notwithstanding a failure of the officer to make proper entry of redemption: *Fenton v. Way*, 40-196.

In a particular case, *held*, that the evidence showed that the taxes for which the sale was made had been paid, and the deed was therefore held void: *Harber v. Sexton*, 66-211.

Further to the effect that the deed is void when the taxes have in fact been paid, see notes to § 1418.

SEC. **1445. Who may question.** In all actions involving the title to real estate claimed and held under a deed executed substantially as aforesaid by the treasurer, the person claiming title adverse to the title conveyed thereby shall be required to prove, in order to defeat the title, either that the real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale and that such redemption was had or made for the use and benefit of persons having the right of redemption, or that there had been an entire omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property; but no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title; but in any case where a person had paid his taxes, and through mistake in the entry made in the treasurer's books, or in the receipt, the land upon which the taxes were paid was afterward sold, the treasurer's deed shall not convey the title; and in all cases where the owner of the lands sold for taxes shall resist the validity of the tax title, he may prove fraud committed by the officer selling the same, or in the purchaser, to defeat the same, and, if fraud is established, the sale and title shall be void. [Same.]

Party must show title: The provision of this section that no person shall question the title acquired under a tax deed without first showing that he or the person under whom he claims had title to the property at the time of the sale, etc., is intended to prevent a stranger from questioning the tax title, but the holder of a prior tax title is not thereby prohibited from questioning the title of a subsequent tax purchaser: *Adams v. Burdick*, 68-666.

The object of the provision that no per-

son shall question a tax title without showing title in himself is to prevent a stranger from questioning the tax title and to make it secure against all except the true owner: *State v. Havrah*, 70 N. W., 618.

It cannot be presumed that by this provision the legislature intended to deprive any person of a remedy for actual fraud existing independently of the statute. While the section gives a remedy only to the owner of the land, it cannot be held to deny a similar remedy to others. If fraud has been committed, and by it some one has been injured, a remedy is provided by the general principles of equity jurisprudence: *Singer Mfg. Co. v. Yerger*, 2 McCrary, 583.

Where defendant claims under a treasurer's deed, upon its face sufficient to convey title, the court cannot consider any evidence of the invalidity of the deed, without finding that plaintiff was holder of the patent title: *Foster v. Ellsworth*, 71-262.

A legal title, though not of record, is sufficient to entitle the holder to defend against a tax title: *Chandler v. Keeler*, 46-596.

The provision that no person shall be permitted to question a tax title without first showing that he or his grantors had title at the time of sale has repeatedly been applied in accordance with the letter of it: *Baird v. Law*, 61 N. W., 1086.

Possession will not be sufficient to show title if it is by virtue of a void deed: *Ibid.*

Where the record on appeal does not show the instrument through which the party assailing the tax title claims it will not be presumed that such instruments were defective: *Medland v. Walker*, 64 N.W., 797.

Where the person taking a tax title shows title in himself by a chain of conveyance the fact that one of the conveyances in his chain of title does not show that the grantor was not married or that the premises were not a homestead will not be sufficient defect in his title to prevent a questioning of the sufficiency of the tax title: *Nicodemus v. Young*, 90-423.

One who has had no possession of the land, has paid no taxes thereon, and has acquired an apparent title thereto for speculative purposes only is not entitled to question the validity of a tax title to such land: *Krueger v. Walker*, 63 N. W., 320.

No person can question the title acquired by tax deed without first showing that he or the person under whom he claims had title to the property at the time of sale. The title required to be shown is such a one that a party claiming thereunder, if plaintiff, could recover on the strength thereof: *Lockridge v. Daggett*, 54-332.

Possession under a claim of right which is sufficient to constitute color of title for the statutory period of limitation is sufficient to show title required as a basis for attacking a tax deed: *Shelley v. Smith*, 66 N. W., 172.

One who would question the validity of a tax title acquired under a treasurer's deed must show that he has a title or interest in the lands in dispute: *Robinson v. Bailey*, 26 Fed., 219.

Where a person attacking a tax sale fails to establish a patent title in himself, he cannot have relief against such tax title: *Varnum v. Shuler*, 69-92.

Where plaintiff failed to introduce any evidence tending in any manner to prove that he had title to the land at the time of sale, *held*, that he could not be allowed to prove fraud committed at the sale for the purpose of defeating a tax title: *Pitt's Sons Mfg. Co. v. Beed*, 69-546.

Where the person calling in question the title acquired by a tax deed testifies that he is the owner of the property claimed by him, and this testimony is admitted without objection, it is *prima facie* sufficient to show title to the property authorizing him to question the validity of the deed: *Hintrager v. Kiene*, 62-605; *Pitts v. Seavey*, 88-336.

But the testimony of claimant that he owns under deed from another, who it appears has no title is not sufficient: *Baird v. Law*, 61 N. W., 1086.

A patent issued by the state, accompanied by a copy of the patent issued by the United States to the state, duly authenticated by the commissioner of the general land office, *held* sufficient evidence of title to warrant the person claiming such title in questioning the validity of a tax title: *Callanan v. Wayne County*, 73-709.

The transferee of a tax title cannot demand a decree quieting his title without showing that he is the grantee of the original holder of the tax title: *Krueger v. Walker*, 80-733.

On the other hand a person seeking to attack a tax title must show that he is the owner of the patent title; and where a party appeared to be the grantee of persons claiming to be heirs of the holder of the patent title, without any showing that the holder of the patent title was dead and that the grantors were his heirs, *held*, that the right of the grantee to question the tax title was not sufficiently shown: *Ibid.*

Where plaintiff in an action to quiet title alleges ownership of the premises under a tax deed, and defendant denies generally, the validity of the tax deed is thereby put in issue: *Pitts v. Lewis*, 81-51.

Proof of title in the party seeking to redeem *held* sufficient: *Bowers v. Hallock*, 71-218.

In an action to redeem in equity from a a tax sale the plaintiff need not show absolute title in himself as any right or interest in the property is sufficient to entitle him to make redemption: *Paxton v. Boss*, 89-661.

The word owner, used in an agreed statement of facts, *held* to mean a person having title as required by this section: *Frank v. Arnold*, 73-370.

One who has a certificate of purchase at tax sale which he has neglected to convert into a deed within the time allowed for that purpose has not such title that he may question the sufficiency of the tax title of a subsequent purchaser of the same land: *Johns v. Griffin*, 76-419.

In a particular case, *held*, that the title of the person seeking redemption from a tax deed was sufficiently shown to entitle him to attack the deed: *Henderson v. Robinson*, 76-603.

The provisions of this section as to who

may question a tax deed apply to formal defects therein as well as otherwise: *Lynn v. Morse*, 76-665.

And under the facts of a particular case, *held*, that plaintiff showed such title in the property as to entitle him to question the sufficiency of defendant's tax deed: *Ibid.*

Payment of taxes must be shown: One who has not paid taxes upon the land is not entitled to relief as against a tax deed: *Lathrop v. Irwin*, 65 N. W., 972.

The provisions of this section, that a person questioning the title acquired by the treasurer's tax deed shall first show that all taxes due upon the property have been paid by him or the person under whom he claims title, is applicable as to any taxes remaining unpaid and due to the state or county, but it does not require that the property owner seeking to question a tax title must first pay to the holder of the title all the taxes which the latter has paid, with interest and penalties. It is sufficient in such case that the person seeking to set aside the tax title shall aver his readiness and willingness to pay any amount of taxes which shall be found to have been paid by the holder of the tax title: *Taylor v. Ormsby*, 66-109; *Adams v. Burdick*, 68-666.

A defendant who has a right to demand from plaintiff the payment of taxes which it is claimed are unpaid must raise the objection that it does not appear that all the taxes due upon the property have been paid, by demurrer, or such objection will be deemed waived: *Adams v. Burdick*, 68-666.

It is a sufficient compliance with this provision requiring that a person attacking a tax title shall show that taxes due on the land have been paid, that the party acting for the plaintiff made a tender of the amount and an offer to pay taxes due on the land in controversy to the county auditor after the treasurer's deed was executed, and in his petition offers to pay whatever amount is found due: *Heaton v. Knight*, 63-686.

Where the taxes have all been paid by the holder of the tax title, the person seeking to attack it will not be precluded from doing so on the ground that he has not paid the taxes where he offers to pay the taxes paid by the tax title holder for which such holder is entitled to recover in case the person attacking the title is allowed to redeem therefrom. *Nicodemus v. Young*, 90-423.

The provision as to a party who has not paid the tax due upon the land not being allowed to question the validity of the deed, refers to the taxes due to the state, and county, and not to such taxes as have been paid by the tax sale purchaser. *Lynn v. Morse*, 76-665; *Wilkin v. Wilkin*, 91-652.

Where the party seeking relief against the deed has made every reasonable effort to pay all the taxes due upon the property, he will not be defeated by the fact that owing to the action of the officers, some of the taxes on the property have not been discovered, such party offering to pay any taxes which may be found due: *Cahalan v. Van Sant*, 87-593

The fact that taxes for years preceding the sale were not paid by the party seeking to set aside the deed will not be a bar to such action inasmuch as taxes not included in a subsequent sale are released: *Phillips v. Wilmarth*, 66 N. W., 1053.

Tender of the sum due is equivalent to payment, and if for any reason the amount cannot be ascertained, plaintiff may ask the court to ascertain and determine it, averring his readiness to pay the amount so ascertained. But it is not sufficient to aver that complainant is unable to ascertain the amount due without stating facts showing such inability and without offering any proof upon the subject: *Lawler v. Brett*, 20 Fed., 219.

The defense of fraud contemplated in the last proviso of this section may be shown to defeat the title whenever it is resisted by the owner, and it is not necessary for the owner to show in such case that the taxes have been paid: *Corbin v. Beebee*, 36-336; *Miller v. Corbin*, 46-150.

Such proviso is not applicable where the party claiming adversely to the tax purchaser seeks to defeat the tax deed on a ground which will render it invalid. It does not apply where the tax title is defeated by an estoppel which would have been equally effective as against any other title: *Bullis v. Noble*, 36-618.

Under the corresponding provisions of the Revision, *held*, that a land owner might set up the fact that there was no assessment in fact without showing payment of the taxes: *Immegart v. Gorgas*, 41-439.

Where a tax title is asserted under a deed which is void, the owner is not required to show that the sum necessary to redeem the land was tendered: *Adams v. Snow*, 65-435.

The purpose of the provision that no person shall question the title acquired by a treasurer's deed without showing that all taxes upon the property have been paid by him or the person under whom he claims is to enforce the payment of taxes and stimulate land owners to discharge the duty imposed on all citizens to pay taxes levied upon their lands. It is not sufficient in the petition attacking a tax title to offer to pay taxes if plaintiff is found to be entitled to redeem. This requirement applies to all action in which it is sought to redeem from a tax sale on the ground that the tax deed was issued without notice of the expiration of the time for redemption: *Maxwell v. Palmer*, 73-595.

Where the fact that plaintiff asking to redeem from a tax sale has not paid the taxes on the property appears on the face of the petition is not taken advantage of by demurrer, it cannot afterwards be relied on to defeat such action: *Medland v. Walker*, 64 N. W., 797.

If the objection is not raised by demurrer or answer it is waived: *Lynn v. Morse*, 76-665.

The taxes contemplated are those due when the action attacking the title is commenced: *Ibid.*

Fraud: Fraud of the purchaser as referred to in this section does not render the tax title absolutely void, but voidable only, and an attack thereon must be made within the period of limitation fixed by § 1448: *Waggoner v. Mann*, 83-17.

As to what constitutes fraud of officers and the effect thereof upon the sale, see § 1430 and notes.

As to what constitutes a public sale, see notes to § 1418.

Fraud of purchaser: A purchaser, either in person or by agent, at a sale where the bidders form themselves into a ring and take turns in bidding, is presumed to be a party to such unlawful proceeding, whether it is affirmatively shown that he entered into any agreement sanctioning it or not, and his title will be void: *Kerwer v. Allen*, 31–578.

Under the evidence in a particular case, *held*, that there had been such a combination at the sale as to render it void: *Easton v. Mawkinney*, 37–601.

A tacit understanding among bidders that they will not bid against each other will invalidate a sale: *Johns v. Thomas*, 47–441; *Singer Mfg. Co. v. Yarger*, 2 McCrary, 584; *Frank v. Arnold*, 73–370.

The fact that at the tax sale one person bids in property for two others, indicating the person for whom he bids, in each instance, does not amount to a combination constituting fraud in the absence of any fraudulent agreement between the purchasers for whom the bids are made, nor does the fact that at such sale two different agents make purchases for the same person constitute fraud: *Pearson v. Robinson*, 44–413.

The fact that the principal and his agent are both present at the tax sale bidding in the property will not render the purchase by the agent for the principal invalid: *Jury v. Day*, 54–573.

A tax title will not be affected by the fact that the agent who bought in the property for the principal himself stood in such relation to the property that he could not have purchased it: *Ibid.*

The fact that all the tracts sold at a tax sale were bought in for the full amount of the tract, *held* not to prove combination among the bidders: *Holsey v. Gordon*, 47–693.

It appearing that there were three bidders at a tax sale, and that they did not bid against each other, and this being the only evidence of a fraudulent combination, *held*, that it was not sufficient and that fraud could not be presumed: *Beeson v. Johns*, 59–166.

Facts in a particular case *held* not sufficient to show fraud in procuring a tax title so as to render it inferior to a prior mortgage: *Equitable L. Ins. Co. v. Wright*, 54–606.

Testimony of a witness in an action to defeat a tax sale, that the purchaser by his conduct prevented competition in reference to many pieces of land bid for by him, etc., *held*, to be immaterial and properly excluded, there being no offer to connect it with the piece in controversy: *Eldridge v. Kuchl*, 27–160.

Effect of fraud: Where the sale is void for fraud, under the provisions of statute, the owner may set up and show such fraud to defeat the tax title in any action in which the holder thereof relies upon such title: *Corbin v. Beebee*, 36–336.

A ring sale, being voidable but not void, cannot be questioned after the lapse of the five-year period of limitation: *Bullis v. Marsh*, 56–747.

Innocent purchaser not affected with fraud: A tax title which is void for fraud, as provided by statute, will nevertheless be held good in the hands of a purchaser for value without notice of such fraud, the word "void" being construed as voidable: *Van Shaack v. Robbins*, 36–201; *Sibley v. Bullis*, 40–429; *Ellis v. Peck*, 45–112; *Huston v. Markley*, 49–162.

A purchaser in good faith from the tax purchaser, without notice of irregularities, will not be affected by the fact that the sale was in gross, or not publicly made: *Martin v. Ragsdale*, 49–589.

Where assessment has been made and other essential jurisdictional steps have been taken the sale can not be regarded as absolutely void although fraudulent and the innocent purchaser is therefore protected; but where there is a fatal defect, as, for instance, a want of levy, the sale is absolutely void, and a good faith purchaser for value acquires no title. The defects of such a tax title appear of record, and the purchaser acquires no equity as against the land owner: *Ellis v. Peck*, 45–112.

Where the treasurer, in pursuance of a proposition made by a party before the sale opened, to take all lands not sold to others, made out certificates to such party after the sale was completed, there being no bids, such party not being present nor represented, and paying no money, but simply issuing receipts of the railroad company for whose benefit the tax was originally voted, *held*, that there was no sale, and that an innocent purchaser, under a tax deed issued in pursuance of such transaction, would not be protected: *Truesdale v. Green*, 57–215.

The title of a person who claims as grantee of one acquiring title by tax sale can not be attacked on the ground that the transfer to him is by deed without acknowledgment, the person attacking his title being the grantee under a quitclaim deed and having notice of the rights of the holder of the tax title: *Kreuger v. Walker*, 63 N. W., 320.

Purchaser by quitclaim: A grantee by quitclaim deed, of a party holding a tax title void for fraud takes subject to all equities against his grantor: *Watson v. Phelps*, 40–482; *Besore v. Dosh*, 43–211, 212; *Springer v. Bartle*, 46–688.

Burden of proof: The holder of title under a fraudulent tax sale, claiming to be a *bona fide* purchaser has the burden of proof as to that fact: *Light v. West*, 42–138.

Evidence in a particular case *held* sufficient to affect the purchaser of tax title without notice of fraud in the sale, both by circumstances sufficient to put him on his guard and by notice of the agent through whom the purchase was negotiated: *Crumb v. Davis*, 54–25.

The assignee of a certificate of tax sale takes it subject to all the infirmities by which it would have been affected in the hands of the tax purchaser: *Singer Mfg. Co. v. Yarger*, 2 McCrary, 584.

Estoppel: Where an owner supposes an adverse tax title on his property to be defective, but has reason to believe that persons claiming under such title have no knowledge of the defect, his silence will

estop him from asserting such defect as against the persons claiming under the tax title: *Mathews v. Culbertson*, 83–434.

Where the owner of the title has for many years failed to make objections to the validity of a tax title under which the claimant has gone into possession of the land he will be estopped from objection to such title and the claimant under the tax deed may have his title quieted: *Hewitt v. Morgan*, 88–468; *Pitts v. Seavey*, 88–336.

Where the land was unimproved and unoccupied, *held*, that omission of the party attacking a tax title thereon for several years to pay the taxes on the property was not such as to defeat his right to relief: *Nicodemus v. Young*, 90–423.

SEC. **1446. Sales wrongfully made—purchaser indemnified.** When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, or when land is sold in consequence of error in describing it in the tax receipt, the county shall hold the purchaser harmless by paying him the amount of principal, interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer and his bondsmen shall be liable to the county therefor to the amount of his official bond; or the purchaser, or his assignee, may recover the same directly of him and his bondsmen. [C.'73, § 899; R., § 785; C.'51, § 509.]

This authorizes the purchaser to recover from the county in such cases the amount paid by him with interest, but not the penalties which would have accrued subsequently to the time of sale if the tax had been legal and the sale had not been made: *Corbin v. Davenport*, 9–239; *Coulter v. Mahaska County*, 17–92.

The purchaser at tax sale may thus recover from the county the portion of taxes included in the amount for which the sale is made which could not be rightfully included therein by reason of not having been brought forward by the treasurer: *Parker v. Cochran*, 64–757.

Where a tax title is void, the holder thereof cannot recover from the county, taxes paid by him upon the property subsequently to the acquisition of such title: *Scott v. Chickasaw County*, 53–47.

The owner by voluntarily redeeming from such a sale does not become subrogated to the rights of the purchaser against the county: *Morris v. Sioux County*, 42–416, 418.

An action by the purchaser to recover from the county the taxes, interest and costs for which the sale is made in case the sale is void because no taxes were due by reason of mistake in the description, is not barred until five years from the discovery of the mistake: *Storm Lake Bank v. Buena Vista County*, 66–128.

A defect in the description of the premises sold such as to prevent title passing will not entitle the purchaser to a refund from the county of the amount paid. Such a case is not one of mistake or wrongful act: *Lindsey v. Boone County*, 92–86.

Nor in such case is the purchaser entitled to recover from the county subsequent taxes paid on the land: *Ibid.*

SEC. **1447. Land not subject to taxation.** When it shall be made to appear to the treasurer, before the execution of a deed for real estate sold for taxes, or if the deed be returned by the purchaser, that any tract or lot was sold which was not subject to taxation, or upon which the taxes had been paid, he shall make an entry opposite such tract or lot on the sale book that the same was erroneously sold, and such entry shall be evidence of the fact therein stated, and the purchase money shall be refunded to the purchaser. [C.'73, § 901; R., § 789.]

This section contemplates a return of taxes paid by purchaser at tax sale when it is disclosed that the land was not subject to taxation: *Hussman v. Durham*, 165 U. S., 144.

SEC. **1448. Limitation of actions.** No action for the recovery of real estate sold for the non-payment of taxes shall be brought after five years from the execution and recording of the treasurer's deed, unless the owner is, at the time of the sale, a minor, insane person or convict in the penitentiary, in which case such action must be brought within five years after such disability is removed. [C.'73, § 902; R., § 790.]

What statute applicable: A tax deed having been executed while the Revision was in force, *held*, that the provisions of the Revision and not of the Code of '73 should determine when the period of limitation against the tax title commenced to run: *Bailey v. Howard*, 65–290.

Constitutionality: This section is not unconstitutional: *Barrett v. Love*, 48–103.

In what cases applicable: The provision as to limitation of actions with reference to tax titles applies to a sale which is simply voidable but not void, and such sale cannot be questioned after the lapse of five years: *Bullis v. Marsh*, 56–747.

After the lapse of five years no objection to the validity of the tax title can be made on the ground that the deed shows upon its

face that several tracts of land were sold for a gross sum: *Ibid.; Monk v. Corbin*, 58-503.

This section does not apply to an action in equity by one tenant in common to redeem from a tax sale to his co-tenant on payment of his proper portion of the amount paid by the co-tenant: *Phillips v. Wilmarth*, 66 N. W., 1053.

A party relying on the bar of the statute must plead it: *Nicodemus v. Young*, 90-423.

If the failure of the treasurer to make proper entry of the years for which taxes are delinquent is not taken advantage of, and a deed issues, then the statute of limitations begins to run in favor of such deed, and after five years it cannot be questioned on account of such defect: *Guthrie v. Harker*, 27 Fed., 586.

This section applies only to cases where real property has been "sold for the nonpayment of taxes," and therefore the limitation does not run where there has been actually no sale whatever: *Case v. Albee*, 28-277.

Nor is the provision applicable where the taxes for which the sale was made had in fact been paid: *Patton v. Luther*, 47-236; *Rath v. Martin*, 61 N. W., 941.

Nor where the tax title is void by reason of there having been no assessment, levy or sale: *Early v. Whittingham*, 43-162; *Nichols v. McGlathery*, 42-189.

But the fact that the deed shows on its face irregularities in the manner of assessment, levy or sale will not prevent the limitation from running against it: *Thomas v. Stickle*, 32-71; *Douglass v Tullock*, 34-262; *Peirce v. Weare*,41-378; *Bullis v. Marsh*, 56-747.

Failure to carry forward taxes renders the sale not void but voidable, and does not operate to arrest the running of the statute: *Lawrence v. Hornick*, 81-193.

Where a tax title has been declared invalid because the delinquent taxes for which the land was sold were not brought forward, the running of time under the statute of limitations will not make the tax title valid, as the rights of the parties were fixed by the former adjudication: *Sac County Bank v. Hooper*, 77-435.

Where the tax title is absolutely void on account of fraud of the officers, or otherwise, the provisions of this section do not apply; but if there is an irregularity rendering the title voidable only, as, for instance, the fraud of the purchaser, this limitation can be pleaded: *Waggoner v. Mann*, 83-17.

An action which does not attack the validity of a tax sale and deed, but questions the capacity of a person claiming under such sale and deed, to acquire title thereby, is not barred under the provisions of this section: *Sorenson v. Davis*, 83-405.

The limitation applies to an action by the holder of the deed as well as to one brought by the original owner of the land: *Brown v. Painter*, 38-456; *Laverty v. Sexton*, 41-435; *Barrett v. Love*, 48-103.

The defense of the limitation of this section is not confined to actions for the recovery of the property, but is available to the holder of the tax title, not only against the owner of the patent title, but against all liens based thereon: *Bull v. Gilbert*, 79-547.

It is not intended by this section to secure to the owner five years within which to attack the tax title, and the holder of the tax deed may, within that time, institute proceedings to quiet his title against such owner: *Stevenson v. Bonesteel*, 30-286.

An action by a tax purchaser against the owner to recover taxes paid by the former upon his tax title is barred in five years from such payment: *Brown v. Painter*, 44-368; *Hamilton v. Dubuque*, 50-213.

The fact that the deed was executed and recorded more than five years before the commencement of the action does not constitute a valid objection to the introduction of the deed in evidence. Whether the party gains possession under such deed depends upon whether or not the owner of the patent title was in possession at the expiration of five years from the execution of the deed: *Monk v. Corbin*, 58-503.

Where the rights of the tax purchaser are barred he cannot assert any claim thereunder to have his tax title established as paramount to any other title, nor can he be permitted to redeem from a foreclosure sale: *La Rue v. King*, 74-288.

Where there is want of power to make a sale it is void and the limitation of this section does not apply, but where the sale is simply voidable it cannot be questioned after five years from the recording of the deed. A sale for taxes of past years not properly carried forward on the tax books is of the latter class: *Griffin v. Bruce*, 73-126.

A tax deed issued after redemption from the sale is actually made is void, and the title thereunder is not protected by virtue of the limitation contained in this section: *Burke v. Cutler*, 78-299.

Any defect in the proof of service of the notice of expiration of redemption is cured by the five years' limitation provided for by this section: *Bull v. Gilbert*, 79-547.

Where the tax deed is improperly executed by reason of the proof of service of notice not being such as is required by statute by reason of a mere defect in such proof, the service of notice having been actually made and a deed issued in pursuance of such notice, the holder of the tax title is protected after the expiration of five years from the execution of such deed: *Trulock v. Bentley*, 67-602; *Rice v. Haddock*, 70-318; *Bolin v. Francis*, 72-619; *Shelley v. Smith*, 66 N. W., 172.

But where there has been no notice the deed is void and the limitation does not validate it: *Wilson v. Russell*, 73-395; *Slyfield v. Healy*, 32 Fed., 2.

Where action to recover property claimed by a tax purchaser under an invalid sale was brought before the expiration of the period of redemption, *held*, that the filing of an amendment in such action after the period of limitation had elapsed for the purpose of alleging tender of taxes paid by defendant would not render the action subject to the bar of the statute: *Barke v. Early*, 72-273.

In mandamus: The right of action by *mandamus* to compel the execution of a deed is barred in three years, and such period

commences to run from the time when the holder of the certificate of purchase might, by proper steps on his part, become entitled to the execution of the deed. Therefore, *held*, that where by ordinance of a city a deed for property sold for municipal taxes might have been executed at a certain time by the giving of ninety days' notice, the failure to give such notice would not prevent the statutory period from commencing to run at the time when, by proper notice, the deed might have been procured: *Hintrager v. Traut*, 69–746.

When period commences to run: Under the Revision, which limited the action to five years from "the date of the sale," *held*, that the limitation did not commence to run until the sale was complete, that is, until the delivery and recording of the tax deed: *Eldridge v. Kuehl*, 27–160; *Henderson v. Oliver*, 28–20; *McCready v. Sexton*, 29–356, 373.

Under that provision the action of the purchaser for the recovery of the land was barred after five years from the time when the right of the purchaser to a deed became perfect: *Thornton v. Jones*, 47–397.

Also *held*, under that provision, that the purchaser could not, by his own act in failing to take a deed when he became entitled thereto, prevent the limitation commencing to run against him: *Hintruger v. Hennessy*, 46–600.

Under the provisions of the Code of '51 as to the limitation of actions to foreclose a tax deed, *held*, that the right of action accrued six months after the purchaser became entitled to his deed under the sale: *Atkins v. Paige*, 50–666.

The change in the language of this section from that of the corresponding section of the Revision in regard to the limitation of action in such cases was simply the adoption of the judicial construction put upon the law as it was contained in the Revision: *Griffith's Ex'r v. Carter*, 64–193.

The statute of limitations under this section begins to run against a purchaser at a tax sale at the time when he might obtain a deed; that is, three years after date of sale; and after five years after the time it begins to run not only is the tax title extinguished but all right dependent upon it: *Innes v. Drexel*, 78–253; *Doud v. Blood*, 89–237.

The tax purchaser cannot, by delaying, extend the time allowed by the statute for bringing the suit: *Hintrager v. Nightingale*, 36 Fed., 847.

To constitute a commencement of action under this section the notice must be actually served: *Ibid.*

Where it does not appear that the deed has been recorded the statute does not begin to run. The burden of showing the recording of the deed so that the statute has begun to run devolves upon the party relying upon the statutory bar: *Scroggs v. Garver*, 69–680.

The statute of limitations begins to run against the tax purchaser from the time he might have been entitled to a deed if he had pursued the course prescribed by statute: *La Rue v. King*, 74–288.

Although the limitation as against the holder of a tax deed commences to run from the time he becomes entitled to his deed, the same rule does not apply as against the owner, and he may assert his right to the land by taking possession within five years from the recording of the deed: *Griffith's Ex'r v. Carter*, 64–193; *Cassady v. Sapp*, 64–203.

Until some one is in actual possession of the land the purchaser at a tax sale is not required to bring an action to prove his right of possession. If the owner of the patent title takes possession within five years after the tax deed is executed and recorded, then if the holder of the tax title fails to bring action within five years from such time, his right of action is barred: *Adams v. Griffin*, 66–125.

Where the tax purchaser took his deed in 1876, but such deed was improperly issued for the reason that due proof of service of notice of expiration of the time of redemption had not been filed, and afterward, in 1883, such proof was filed, and in 1884 a deed was issued, and a few days thereafter the holder of the patent title took possession of the property which had before that time been unoccupied, *held*, that an action by the holder of the tax title to quiet his title being brought within five years from the filing of proper proofs, and the issuance of the second deed, was not barred: *Ibid.*

Where action was commenced by the holder of a tax title within five years after his deed was recorded, but more than five years after he was entitled to receive his deed, and after it was actually executed, and it appeared that defendant went into possession within five years after plaintiff was entitled to take it, *held*, that the action was not barred. The rule established is, that if the validity of a tax title is disputed within five years from the date when the treasurer's deed might have been taken, the one claiming thereunder must commence his action for the recovery of the land within that period. But this rule can have no application to a case where the validity of the title is disputed for the first time after the expiration of that period: *Francis v. Griffin*, 72–23.

The limitation commences to run at the execution and recording of the tax deed, irrespective of the question of possession, and if at that time the property is unoccupied, and during the five years the owner of the fee takes actual possession and holds it until the expiration of the period of limitation, the right of the holder of the tax title to recover under his deed is completely barred: *Barrett v. Love*, 48–103; *Barrett v. Holmes*, 102 U. S., 651.

But if the land remains unoccupied until the expiration of the period of limitation, the title of the holder of the tax deed becomes complete, and an action by him against the original owner taking possession after that time is not barred under the statute: *Moingona Coal Co. v. Blair*, 51–447; *Lewis v. Soule*, 52–11; *Bullis v. Marsh*, 56–747; *Goslee v. Tearney*, 52–455.

The holder of a tax deed to unoccupied land is presumed to have constructive possession thereof: *Rice v. Haddock*, 70–318.

When land is open, wild, and unoccupied

and remains in such condition till the expiration of the period of limitation the bar of the statute cannot be interposed as against the holder of the tax title: *Dorweiler v. Callanan*, 91-299.

But where it appeared that by the authority of the holder of the patent title another went upon the wild and unoccupied land and cut and stacked hay thereon and plowed a strip around the stacks for the purpose of protecting them from fire, such facts constituted an assertion of possession on the part of the holder of the title which would enable him to plead the limitation as against the tax title holder who had not taken possession within the five years: *Ibid.*

Where the land sold was unoccupied prairie of which the patent owner took actual possession after the recording of the deed, and an action was brought against him by the owner of the tax deed within five years from the date of its recording, *held*, that the action was not barred, although not brought within five years from the time of the execution of the deed: *Strabala v. Lewis*, 80-510.

There can be no constructive possession where the actual possession is in another. Therefore, where a person who owns an undivided half interest in land, and claims title to the whole, is in actual possession, his possession will not inure to the benefit of the holder of the tax title of the other half, they not being tenants in common: *Willcuts v. Rollins*, 85-247.

If the owner of the patent title is in the actual adverse possession of the land at the expiration of the five years from the time the tax purchaser had a right to a tax deed, the tax title is barred: *Beedle v. Cowley*, 85-540.

Where the premises constitute the homestead, the rights of the wife by virtue of the occupancy as a homestead for the period of limitation after the tax title purchaser becomes entitled to his deed will not be defeated by any act of the husband in leasing the land from the tax purchaser: *Ibid.*

Under the facts of a particular case, *held*, that the possession relied on by plaintiff to defeat defendant's rights under his tax title was sufficient: *Clifton Heights Land Co. v. Randell*, 82-89.

Before a party can claim that the holder of a tax title has forfeited his rights by failure to take possession within five years after the record of his deed or to bring action to recover possession in that time, it must appear that such party is the owner of the land: *Schee v. La Grange*, 78-101.

A tax deed is presumed to be valid in the absence of a showing to the contrary, and the holder is presumed to be in constructive possession of unoccupied land, and until the former owner does something indicating an intention to dispute his title and ownership of the property he has no cause of action against him: *Griffin v. Turner*, 75-250.

Therefore, where defendants claimed title to land by virtue of a tax deed and plaintiffs claimed the patent title, but made no claim to the land until two days before the expiration of five years from the recording of the tax deed, when he took possession of the land, *held*, that such entry upon the land was in the nature of a trespass, and defendants were not estopped from asserting their tax title as a defense: *Ibid.*

And if the owner of the patent title does not, either by taking actual possession or by bringing action, question the validity of the tax deed within the period of limitation, the bar of the statute becomes complete in favor of the holder of the tax deed, and possession taken by the former owner after the period of limitation has expired will be ineffectual: *Moingona Coal Co. v. Blair*, 51-447; *Lewis v. Soule*, 52-11; *Goslee v. Tearney*, 52-455; *Zent v. Picken*, 54-535; *Maxwell v. Hunter*, 65-121.

Possession of land necessary to bar an action under a tax title is not required to be of the adverse, hostile and exclusive character required under the general statute of limitations. Its validity depends not so much on the extent and character of the improvements of the land as on the possession which would enable the holder of the tax title to commence his action for the land: *Griffith's Ex'r v. Carter*, 64-193.

If the tax deed is absolutely void it works no change in the constructive possession which is considered to be in the holder of the patent title, and after five years have elapsed without the taking of possession, such void deed is barred by the statute of limitations and no rights can be asserted thereunder: *Patton v. Luther*, 47-236.

Where the original owner has been continuously in possession of property by reason of the exercise of such ownership thereover as the nature of the property admits of, no acts of control on the part of the tax purchaser, such as taking wood therefrom and the like, will constitute adverse possession in him: *Brett v. Farr*, 66-684.

In such cases the fact that by diligence or otherwise the tax purchaser has succeeded in paying the taxes on the property subsequently to the purchase before the owner has been able to do so will not constitute evidence of possession so as to support a plea of limitation under the statute: *Ibid.*

The holder of a tax deed has no occasion to take any action for the establishment of his right in the property until such right is disputed: *Francis v. Griffin*, 72-23.

As the right to redeem is not cut off until the service of notice required by § 1441, the period of limitation provided by this section does not commence to run, although the deed has been issued without the requirement as to notice being complied with: *Slyfield v. Barnum*, 71-245.

Quieting title: After the limitation has run against the tax title the original owner, remaining in possession, may maintain an action against the holder of such title to remove the cloud of the tax deed and quiet the title. Such action is not barred by the limitation provided in the statute: *Peck v. Sexton*, 41-566; *Laverty v. Sexton*, 41-435; *Wallace v. Sexton*, 44-257; *Patton v. Luther*, 47-236; *Tabler v. Callanan*, 49-362.

Where a party in possession under tax deed asks to have his title quieted against a party claiming adversely the latter cannot

rely upon the limitation to bar the action: *Wright v. Lacy*, 52–248.

Where plaintiff, in possession under a tax deed more than five years old, brought action to quiet title against defendant claiming under the patent title, *held*, that defendant in such action was barred by the statute of limitation from attacking the deed as fully as if it were attacking such deed in a direct action: *Shawler v. Johnson*, 52–472.

An action brought within five years for quieting title in the tax purchaser wherein a decree is rendered in his behalf, establishes his rights as fully as would taking possession, and a tenant of the premises who has previously been holding for the owner of the patent title may become the tenant of the holder of the tax deed: *Knudson v. Litchfield*, 87–111.

An action to quiet title as against a person holding under a tax deed on the ground that such deed is void, the holder of the title being in possession, cannot be maintained after the five years have expired: *Jeffrey v. Brokaw*, 35–505.

Where plaintiff, claiming under a tax title, brought action against the original owner to quiet his title, and the original owner, being then in possession, pleaded the limitation and also asked affirmative relief against the plaintiff's title, *held*, that the fact that defendant was barred affirmative relief would not prevent his defeating plaintiff's action by showing that plaintiff's title was void, and he was allowed thereupon to have his title quieted as against the plaintiff: *Miller v. Corbin*, 46–150.

In an action to quiet title, where defendant sets up a tax title, plaintiff may set up the bar of the statute: *Keokuk & D. M. R. Co. v. Lindley*, 48–11.

Where a licensee bought in a tax title more than five years after the execution of the tax deed, *held*, that as the possession of the licensee was that of his licensor, the holder of the patent title, and as the owner had thus been in possession more than five years, the tax title was barred and the licensee aquired no rights thereunder: *Ibid.*

A subsequent purchaser from the holder of a tax deed whose rights are barred, taking with notice of the possession of the owner, is bound thereby: *Thode v. Spofford*, 65–294.

The purchaser from a minor of land sold for taxes may avail himself of the exception of the statute limiting action to property sold at tax sale to five years from the execution and recording of the tax deed in favor of the minor, but such purchaser must bring his action within five years from the date of his purchase: *McCaughan v. Tatman*, 53–508.

But neither this extension nor the fact that the minor has a year after the removal of the disability in which to redeem from the sale will operate in favor of a person claiming under the tax title as against the minor, and such person must bring his action within five years as specified in the statute: *Ibid.*

Strangers to the title: The limitation as to the right of action applies only as between the tax purchaser and the owner at the time of sale or one deriving title from such owner. When a person not the owner and having mere color of title comes into possession, the holder of the tax title may have the same time as the holder of any other valid title to test the right of the occupant: *Lockridge v. Daggett*, 47–679; *S. C.*, 54–332.

A plaintiff who has failed to establish a competent title in himself cannot dispute the tax title, and have his title quieted upon the ground that the right of action of the holder of the tax title has become barred: *Varnum v. Shuler*, 69–92.

A party who has no title cannot defeat a tax title by five years possession: *Baird v. Law*, 61 N. W., 1086.

Where a conveyance of a tax title is made after the expiration of five years from the recording of the deed the grantee cannot assert the bar of the statute in support of such title, unless his grantors were entitled to rely upon such bar: *Knight v. Campbell*, 76–730.

The object of this section is to set at rest all questions between one claiming under a treasurer's deed and those who dispute his right thereunder. It has no application as to a stranger to the title, who during the period of limitation enters into possession of the property; but as against such a party, the right of action, for the recovery of the property continues until barred by the general statute of limitations: *Ibid.*

Laches: If the tax purchaser through his own laches permits the statutory period to expire without completing the requisite evidence of his purchase and bringing the necessary suit for possession, he can derive no benefit from his purchase at the tax sale. *Hintrager v. Nightingale*, 36 Fed., 847.

SEC. **1449. Officers de facto.** In all actions and controversies involving the question of title to real property held under a treasurer's deed, all acts of assessors, treasurers, auditors, supervisors and other officers *de facto* shall be of the same validity as acts of officers *de jure*. [C. '73, § 903; R., § 786.]

See *Peirce v. Weare*, 41–387.

The stub of a redemption certificate is admissible in evidence under this section: *Ellsworth v. Low*, 62–178.

The tax certificate and the stub book are sufficient evidence as to the amount paid at the tax sale: *Cornoy v. Wetmore*, 92–100.

SEC. **1450. Assessment to wrong person.** No sale of real estate for taxes shall be invalid on account of its having been taxed in any other name than that of the rightful owner, if it is in other respects sufficiently described. [C. '73, § 904; R., § 787.]

SEC. **1451. Certified copies of records.** The books and records belonging to the offices of the auditor and treasurer, or copies thereof properly

certified, shall be sufficient evidence to prove the sale of any real estate for taxes, the redemption thereof, or the payment of taxes thereon. [C.'73, § 905; R., § 788.]

SEC. **1452. Cancellation of sale.** After eight years have elapsed from the time of any tax sale, and no action has been taken by the holder of a certificate to obtain a deed, it shall be the duty of the county auditor and county treasurer to cancel such sales from their tax-sale index and tax-sale register.

CHAPTER 3.

OF THE SECURITY OF THE REVENUE.

SECTION **1453. County responsible to state.** Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments. [C.'73, § 908; R., § 793.]

SEC. **1454. Defaulting treasurer.** If any treasurer prove to be a defaulter to any amount of state revenue, such amount shall be made up to the state within the next three years by additional levies in such manner as to annual amounts as the board of supervisors may direct. [C.'73, § 909; R., § 794.]

Whether the state may have recourse to the treasurer's bond, *quære: State v. Henderson*, 40–242.

The provision of this section does not apply where a county treasurer fails to pay over or account for taxes collected to aid in the construction of railways. They constitute a special fund to be paid to the treasurer of the railway company, and the county is not liable therefor: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

SEC. **1455. Interest on warrants.** When interest is due and allowed by the treasurer of any county or the state treasurer on the redemption of auditor's warrants or county warrants, the same shall be receipted on the warrants by the holder, with the date of the payment, and no interest shall be allowed by the auditor of state or board of supervisors except such as is thus receipted. [C.'73, § 910; R., § 795.]

SEC. **1456. Discounting warrants.** If the state treasurer or any county treasurer, by himself or through another, discounts auditor's warrants, either directly or indirectly, he shall upon conviction be fined in any sum not exceeding one thousand dollars. [C.'73, § 911; R., § 796.]

The offense defined in this section and the following is different from that under § 4840. These sections are applicable to cases where no loss to the state or county occurs: *State v. Brandt*, 41–593, 612.

SEC. **1457. Loaning or depositing public funds.** A county treasurer shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county or other funds in his hands, except that, when permitted by the board of supervisors by resolution entered of record, he may deposit such funds in any bank or banks in the state, to any amount fixed by such resolution; but before such deposit is made such bank shall file a bond with sureties, to be approved by the treasurer and the board of supervisors, in double the maximum amount permitted to be deposited, conditioned to hold the treasurer harmless from all loss by reason of such deposit or deposits. Said bond shall be filed with the county auditor, and action may be brought thereon either by the treasurer or the county, as the board of supervisors may elect. And the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor. But nothing done under the provisions of this section shall alter or affect the liability of the treasurer or the sureties on his official bonds. [17 G. A., ch. 155; C.'73, § 912; R., § 797.]

Under this section a county treasurer is prohibited from depositing county funds in a bank, and where such deposit was made and funds lost by the failure of the bank the treasurer was held liable therefor. (Decided before the amendment of this section): *Lowry v. Polk County*, 51–50.

Where a bond is given under this section and allowed to stand it constitutes security not merely for the first deposit, but for other deposits which may subsequently be made: *Poor v. Merrill*, 68–436.

Demand upon the person in charge of the bank where the deposit is made is sufficient to show a breach of the bond: *Ibid.*

Where a certificate of deposit is issued for the repayment of the deposit when presented, but no objection to the payment of the money is made on the ground of the failure to return such certificate, the fact that it is not returned will not defeat the right to recover, it being afterwards surrendered: *Ibid.*

This section does not forbid the county treasurer to take other security in addition to the bond, if in his judgment it is demanded: *Richards v. Osceola Bank*, 79–707.

Money deposited under the provisions of this section is not to be deemed a special deposit. The bank becomes the debtor of the treasurer, and the sureties of the treasurer cannot insist on the money deposited being treated as a trust fund: *Cadwell v. King*, 84–288; *McHenry v. King*, 85–717.

SEC **1458. Settlement with treasurer.** At the meetings in January and June of each year, the board of supervisors shall make a full and complete settlement with the treasurer, and shall certify to the auditor of state all credits to him for double or erroneous assessments and unavailable taxes, and all dues for state revenue, interest, or delinquent taxes, sales of land, peddlers' licenses, and other dues, the amounts collected therefor, and revenues still delinquent, each year to itself, which reports shall be forwarded by mail. [C.'73, § 913; R., § 798; C.'51, §§ 157–8.]

This settlement with the county is conclusive upon the treasurer and his sureties, and they cannot show that it was fraudulent for the purpose of showing that the defalcation subsequently appearing had really occurred before such settlement: *Boone County v. Jones*, 54–699. See, also, notes to § 1193.

A settlement with the county treasurer on the basis of a draft or other evidence of money on deposit will not be sufficient where the board had reason to suspect that the accounts of the treasurer are short: *District Township v. Morris*, 91–198.

SEC. **1459. Payments to state treasurer.** The treasurer of each county shall, on or before the fifteenth day of each month, prepare a sworn statement of the amount of money in his hands on the last day of the preceding month belonging to the state treasury, and forward the same by mail to the auditor of state, and shall pay into the state treasury, on or before the fifteenth day of each month, all money due the state remaining in his hands on the last day of the preceding month; he shall also, at any time when directed by the auditor of state, forthwith pay into the state treasury, or treasury of any county, any or all the money due the state and remaining in his hands, and the treasurer of state or any county treasurer is hereby required to receive on such payments the same kinds of money and notes which the county treasurer is authorized and required by law to receive in payment of taxes. In case the treasurer of any county shall fail to prepare and forward the statement required in this section, he shall forfeit and pay for each and every failure a sum not less than one hundred nor more than five hundred dollars, to be recovered in an action brought in the name of the state auditor against him and his bondsmen. [20 G. A., ch. 194, § 5; 17 G. A., ch. 122, § 1; C.'73, § 914; R., § 799.]

SEC. **1460. Statement of account.** The state auditor shall prepare and transmit to each county auditor, on the first day of May of each year, a statement of the county treasurer's account with the state treasurer, which account shall be submitted by said auditor to the board of supervisors at its next meeting, and, if it finds the same to be incorrect, it shall forthwith certify the facts in relation to the same to the auditor of state. [C.'73, § 916; R., § 801.]

SEC. **1461. Settlement with county treasurer.** When a county treasurer goes out of office, he shall make a full and complete settlement with the board of supervisors, and deliver up all books, papers, moneys, and all other property pertaining to the office, to his successor, taking his receipt

therefor. The board of supervisors shall make a statement of state dues to the auditor of state, showing all charges against the treasurer during his term of office, and all credits made, the delinquent taxes and other unfinished business charged over to his successor, and the amount of money paid over to his successor, showing to what year and to what account the amount so paid over belongs. It shall also see that the books of the treasurer are correctly balanced before passing into the possession and control of the treasurer elect. [C.'73, § 917; R., § 802.]

The board of supervisors may accept from a treasurer who is in default a promissory note for the amount of his indebtedness; and such note will not be void for want of consideration: *Sac County v. Hobbs*, 72–69.

SEC. **1462. Each fund kept separate.** The state treasurer shall keep each fund coming into his possession as public money in a separate apartment of his safe, and at each quarterly settlement with the state auditor he shall count each fund in the presence of the auditor to see if the same agrees with the balance found on the books. The total amount acknowledged to belong to each fund shall be exhibited before the count. County treasurers shall account with such persons as the board of supervisors may direct in like manner, and a report of such accounting shall be made to the board at its next meeting by the person so appointed. [C.'73, § 918; R., § 804.]

SEC. **1463. Penalty for official delinquency.** If any auditor or treasurer or other officer shall neglect or refuse to perform any act or duty specifically required of him, such officer shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding one thousand dollars, and he and his bondsmen shall be liable on his official bond for such fine, and for the damages sustained by any person through such neglect or refusal. [C.'73, § 919; R., §§ 744, 749, 805.]

SEC. **1464. Refunding to counties.** The auditor of state shall draw his warrant on the state treasury in favor of any county in the state for the amount of any excess in any fund or tax due the state from said county, excepting the state taxes. [16 G. A., ch. 113, § 1.]

SEC. **1465. Warrant.** When it shall appear from the books in the office of the auditor of state that there is a balance due any county in excess of any revenue due the state, except state taxes, he shall draw his warrant for such excess in favor of the county entitled thereto, and forward the same by mail, or otherwise, to the county auditor of the county to which it belongs, and charge the amount so sent to such county. [Same, § 2.]

SEC. **1466. Delivered to treasurer.** The auditor to whom said warrant is sent shall immediately, upon receipt thereof, deliver it to the treasurer of his county, and charge the amount thereof to the treasurer, and shall acknowledge the receipt of the amount to the state auditor. [Same, § 3.]

CHAPTER 4.

OF ASSESSMENT AND COLLECTION OF COLLATERAL INHERITANCE TAX.

305.A. 43

SECTION **1467. Rate.** All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale or gift made or intended to take effect in possession or in enjoyment after the death of the grantor or donor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descend-

ant, adopted child, the lineal descendant of an adopted child of a decedent, or to or for charitable, educational or religious societies or institutions within this state, shall be subject to a tax of five per centum of its value, above the sum of one thousand dollars, after the payment of all debts, for the use of the state; and all administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift, made during the grantor's or donor's life, shall be respectively liable for all such taxes to be paid by them, respectively, except as herein otherwise provided, with lawful interest as hereinafter set forth, until the same shall have been paid. The tax aforesaid shall be and remain a lien on such estate from the death of the decedent until paid. [26 G. A., ch. 28, § 1.]

SEC. **1468. Lien.** It shall be the duty of the executor, administrator or trustee, immediately upon his appointment, to make and file a separate inventory, any will to the contrary notwithstanding, of all the real estate of the decedent liable to such tax, and to cause the lien of the same to be entered upon the lien book in the office of the clerk of the court in each county where each particular part of said real estate is situated, and no conveyance of said estate or interest therein, which is subject to such tax before or after the entering of said lien, shall discharge the estate so conveyed from the operation thereof. [Same, § 2.]

SEC. **1469. Appraisal.** All the real estate of the decedent subject to such tax shall, except as hereinafter provided, be appraised within thirty days next after the appointment of an executor, administrator or trustee, and the tax thereon, calculated upon the appraised value after deducting debts for which the estate is liable, shall be paid by the person entitled to said estate within fifteen months from the approval by the court of such appraisement, unless a longer period is fixed by the court, and, in default thereof, the court shall order the same, or so much thereof as may be necessary to pay such tax, to be sold. [Same, § 3.]

SEC. **1470. Remainders.** When any person whose estate, over and above the amount of his just debts, exceeds the sum of one thousand dollars shall bequeath or devise any real property to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, or lineal descendant of such child, during life or for a term of years, and the remainder to a collateral heir or to a stranger to the blood, the court, upon the determination of such estate for life or years, shall, upon its own motion or upon the application of the treasurer of state, cause such estate to be appraised at its then actual market value, from which shall be deducted the value of any improvements thereon, or betterments thereto, if any, made by the remainder man during the time of the prior estate, to be ascertained and determined by the appraisers, and the tax on the remainder shall be paid by such remainder man within sixty days from the approval by the court of the report of the appraisers. If such tax is not paid within said time, the court shall then order said real estate, or so much thereof as shall be necessary to pay such tax, to be sold. [Same, § 4.]

SEC. **1471. Life estate.** Whenever any real estate of a decedent shall be subject to such tax, and there be a life estate or interest for a term of years given to a party other than named in the preceding section, and the remainder to a collateral heir or stranger to the blood, the court shall direct the interest of the life estate or term of years to be appraised at the actual market value thereof, and, upon the approval of such appraisement by the court, the party entitled to such life estate, or term of years, shall within sixty days thereafter pay such tax, and in default thereof the court shall order such interest in said estate, or so much thereof as shall be necessary to pay such tax, to be sold. Upon the determination of such life estate or term of years, the same provision shall apply as to the ascertainment of the amount of the tax and the collection of the same on the real estate in remainder as in like cases is provided in the preceding section. Whenever any personal estate of a decedent shall be subject to such tax,

and there be a life estate or interest for a term of years given to a party other than named in the preceding section, and remainder to a collateral heir or stranger to the blood, the court shall inquire into and determine the value of the life estate or interest for the term of years, and order and direct the amount of the tax thereon to be paid by the prior estate and that to be paid by the remainder man, each of whom shall pay their proportion of such tax within sixty days from such determination, unless a longer period is fixed by the court, and in default thereof the executor administrator or trustee shall pay the same out of said property, and hold the same from distribution, and invest it at interest under the order of the court until said tax is paid, or until the interest on the same equals the amount of such tax, which shall thereupon be paid. [Same, § 5.]

SEC. **1472. Executors or trustees.** Whenever a decedent appoints one or more executors or trustees and in lieu of their allowance or commission, makes a bequest or devise of property to them which would otherwise be liable to said tax, or appoints them his residuary legatees, and said bequests, devises or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to such tax, and the court having jurisdiction of their accounts, upon its own motion or on the application of the treasurer of state, shall fix such compensation. [Same, § 6.]

SEC. **1473. Legacies charged upon land.** Whenever any legacies subject to said tax are charged upon or payable out of any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom and pay it to the executor, administrator, trustee or treasurer of state, and the same shall remain a charge and be a lien upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator, trustee or treasurer of state in his name of office, in the same manner as the payment of the legacy itself could be enforced. [Same, § 7.]

SEC. **1474. Payment by executor or trustee.** Every executor, administrator or trustee having in charge or trust any property subject to said tax, and which is made payable by him, shall deduct the tax therefrom, or shall collect the tax thereon from the legatee or person entitled to said property, and he shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon. [Same, § 8.]

SEC. **1475. Payment to state.** All taxes imposed by this chapter shall be payable to the treasurer of state, and those which are made payable by executors, administrators or trustees shall be paid within fifteen months from the death of the testator or intestate, or within fifteen months from assuming of the trust by such trustee, unless a longer period is fixed by the court. All taxes not paid within the time prescribed in this act shall draw interest at the rate of eight per centum per annum until paid. [Same, § 9.]

SEC. **1476. Method of appraisement.** All appraisements of real estate subject to such tax shall be made and filed in the manner provided for appraisement of personal property. When such real estate is situated in another county, the same appraisers may serve, or others may be appointed. [Same, § 10.]

SEC. **1477. Collection.** It is hereby made the duty of all executors, administrators or trustees charged with the management or settlement of any estate subject to the tax provided for in this chapter, to collect and pay to the treasurer of state the amount of the tax due from any devisee, grantee or donee of the decedent, except in cases falling under the provisions of sections fourteen hundred and seventy and fourteen hundred and seventy-one hereof, in which cases the treasurer of state shall collect the same. Applications may be made to the district court by such executor, administrator, trustee or state treasurer to sell the real estate subject to said tax in an equitable action, or, if made to the court having charge of the settlement of said estate, the proceedings shall conform as nearly as may be to

those for the sale of the real estate of a decedent for the settlement of his debts. [Same, § 11.]

SEC. **1478. Property certified to treasurer.** Whenever any real estate of a decedent shall so pass, either in possession and enjoyment or in remainder as to be subject to such tax, the executor, administrator or trustee, within six months after he has assumed the duties of his trust, shall file with the treasurer of state a description of such real estate, giving the name of the county where the same is situated, the name of the decedent, the name of the person or persons to whom it so passes, whether the same passes in possession and enjoyment in fee, for life or for a term of years (naming the term of years), and if a prior estate is created, he shall give the name of the remainder man. [Same, § 12.]

SEC. **1479. Copy of appraisement.** As soon as any such real estate is appraised it shall be the duty of the executor, administrator or trustee, if he has not been discharged, and if he has been finally discharged, then it shall be the duty of the clerk, to file with the treasurer of state a copy of such appraisement, stating also the amount of tax to be paid and within what time ordered to be paid. [Same, § 13.]

SEC. **1480. Settlements with executors or trustees.** No final settlement of the account of any executor, administrator or trustee shall be accepted or allowed unless it shall show, and the court shall find, that all taxes imposed by the provisions of this chapter upon any property or interest therein belonging to the estate to be paid by such executors, administrators or trustees, and to be settled by said account, shall have been paid, and the receipt of the treasurer of state for such tax shall be the proper voucher for such payment. [Same, § 14.]

SEC. **1481. Jurisdiction of court.** The district court having either principal or ancillary jurisdiction of the settlement of the estate of the decedent shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy or inheritance, or any grant or gift, under this chapter, subject to appeal as in other cases, and the treasurer of state shall in his name of office represent the interests of the state in any such proceeding. [Same, § 15.]

TITLE VIII.

OF ROADS, BRIDGES AND FERRIES, AND THE DESTRUCTION OF THISTLES.

CHAPTER 1.

OF THE ESTABLISHMENT, ALTERATION AND VACATION OF ROADS.

SECTION **1482. Jurisdiction over.** The board of supervisors has the general supervision of the roads in the county, with power to establish, vacate and change them as herein provided, and to see that the laws in relation to them are carried into effect. [C. '73, § 920; R., § 819; C. '51, § 514.]

The board of supervisors is given power to establish highways along streams where it is practicable to thus avoid bridging such stream: See §§ 427, 428.

Easement: A highway is nothing but an easement, comprehending the right of all the individuals in the community to pass and repass, with the incidental right of the public to do all acts to keep it in repair. The fee remains in the original owner: *Dubuque v. Maloney*, 9-450; *Overman v. May*, 35-89.

The prescriptive right to use material to keep the road in repair does not include the right to take material from the right of way for the repair of other public highways. Therefore, *held*, that the prescriptive right to span a river with a bridge, and use such bridge, did not include the right to quarry stone under the bed of the river under such bridge for general use in the repair of highways: *Overman v. May*, 35-89.

Nothing passes as incident to the grant of an easement but what is requisite to its fair and reasonable enjoyment. Therefore, where a party dedicating a street reserved the right to construct a mill-race across it, *held*, that the reservation should be construed in the same way as the grant of a like privilege, and that the party was under obligation to restore the street, as nearly as possible to its former condition by the construction and maintenance of a bridge across it: *Waterloo v. Union Mill Co.*, 59-437.

A public highway being presumed to be for the benefit of the land owner is not an encumbrance on the title from which recovery can be had by the grantee under a warranty deed making no exception of the highway: *Harrison v. Des Moines & Ft. D. R. Co.*, 91-114.

Where the highway becomes impassable the public has the right to go upon adjoining premises for the purpose of passing, and such act will not constitute trespass upon such adjoining premises: *Irwin v. Yeager*, 74-174.

The fact that a party has himself obstructed a highway so as to prevent its use in one direction in which it has fallen into disuse will not estop him from proceeding to abate as a nuisance and recover damages for obstructions placed by others in another portion of the highway which is capable of independent use: *Miller v. Schenck*, 78-372.

What constitutes: Something more than the mere right to use land for the purpose of travel is necessary to constitute a highway. It must be traveled or at least capable of use in that way to make it such: *State v. Shinkle*, 40-131.

By § 1572, bridges are a part of the public highway, and are therefore under the general supervision of the board of supervisors. The board cannot be compelled by *mandamus* to build, that being discretionary: *State ex rel. v. Morris*, 43-192.

Public highways: It is the duty of the legislature to establish public highways for the passage and intercourse of the people of the state. It may properly provide for the establishment of such highways as are necessary to enable every citizen to discharge his duties to the state, have access to market, school, church, etc., and in that case it may properly provide for the taking of private property, although in a particular case but one person is primarily or principally benefited: *Bankhead v. Brown*, 25-540.

A citizen has the right to have access to the public roads, and the public has the right to have access to him, and a road which is the only one between a citizen and the public may properly be deemed a public road, although he is the only person reached: *Johnson v. Board of Supervisors*, 61-89; *Pagels v. Oaks*, 64-198.

Private ways: A former statute (11 G. A., ch. 127), providing for the establishment of roads which were denominated private, to be established on the petition of the applicant alone, and at his cost, and which the public was not bound to work or keep in repair, and over which the party securing their establishment might exercise exclusive control, *held* unconstitutional as authorizing the taking of private property for a private and not a public use: *Bankhead v. Brown*, 25-540.

Where the sole object of a proposed way was to give the owner of a tract of land a more convenient outlet, he having already

access to his premises by a public highway, *held*, that such proposed way was a private way, and the establishment thereof under the provisions for public highways was unconstitutional: *Richards v. Wolf*, 82–358.

Jurisdiction: All the jurisdiction in relation to roads and highways formerly exercised by county judges is now conferred upon the board of supervisors: *Kennedy v. Dubuque, C. & M. R. Co.*, 34–421.

Under particular statutes, *held*, that the power to establish a highway within the corporate limits of a city existed in the same tribunal which had authority to establish highways outside of such corporate limits: *Knowles v. Muscatine*, 20–248.

A county has power to grade and improve its public roads, and issue warrants in payment therefor: *Long v. Boone County*, 32–181.

Boards of supervisors have no authority to establish highways within the corporate limits of cities or incorporated towns: *Gallaher v. Head*, 72–173; and see § 751.

Dedication: A highway may exist in this state arising from dedication and prescription, notwithstanding the provisions of the statute for the establishment of highways: *Mosier v. Vincent*, 34–478; *Baldwin v. Herbst*, 54–168.

A highway may be established by the dedication of land for that purpose and its acceptance by the public: *Casey v. Tama County*, 75–655.

Where acts indicating the intent of the party to dedicate for a highway are shown, the party should be allowed to explain the intention with which such acts were done: *Goodfellow v. Riggs*, 88–540.

So acts and declarations of the party may be shown on his own behalf for the purpose of negativing an intent which might otherwise be inferred from his acts: *Ibid.*

Where the dedication of right of way for a highway is claimed to have been made by the land owner, proof of use may be competent to show an acceptance, and the lapse of any particular period of time is unnecessary if the evidence is otherwise sufficient to show an intention to dedicate. If the owner of land knows for a series of years that the public are using and making a road thereon as a highway and expending money in its improvement, and he acquiesces in what they are doing, such facts will be considered evidence tending to show actual dedication: *State v. Birmingham*, 74–407.

The provisions of § 3004 as to the acquisition of easements by adverse possession relate to titles claimed by prescription and not to dedication, but evidence that the claimed highway was traveled to some extent by the public with the knowledge of the owner will not be sufficient to show a dedication where the land has not been thrown open and the road has remained practically impassable as a highway: *Gray v. Haas*, 67 N. W., 394.

The construction of a culvert and other work upon the highway fitting it for travel constitutes a sufficient acceptance: *Devoe v. Smeltzer*, 86–385.

Proof of use in connection with other facts is competent to prove title by dedication: *Duncombe v. Powers*, 75–185.

And *held* that knowledge of the use might be inferred from the use of the road by the public in such manner that a reasonable man would see and learn of it: *Ibid.*

Adverse possession: Failure of the public to assert any right to land by reason of a claim in regard to a highway for thirty years, and long-continued adverse use and occupation by plaintiff and his grantors in good faith, *held* sufficient to estop the public from asserting any right to such land as a highway: *Smith v. Gorrell*, 81–218.

Where a strip of land was recognized by the land-owner as a highway, by constructing bars at each end thereof for the use of the public, and by abstaining from cultivating the same, and was used for that purpose by the public without objection, *held*, that although it thus remained inclosed, the owner could not claim rights therein adversely to the public by reason of his possession: *Hempsted v. Huffman*, 84–398.

Where a survey has been accepted by the parties and the public as correct, and the highway used in accordance therewith for ten years, the lines of such survey will be recognized as binding: *Crismon v. Deck*, 84–344.

Where a highway had been used for more than twenty years and had been generally believed to be upon a certain line, though not upon that line, *held*, that the claim of the public was confined to the true line, and as the use must correspond to the claim of right, the public had gained no title by prescription: *Bolton v. McShane*, 79–26.

Under particular circumstances, *held*, that the fact that a road on the line, claimed by defendant to be the line of the public highway, was worked and traveled by the defendant for twenty-five years without objection on the part of the plaintiff, and the further fact that plaintiff built and so maintained his fences as to indicate an intention not to claim any of the land so used as against the public, raised a strong presumption in favor of defendant's claim, which was not overcome by the evidence; and *held* that, even had no steps been taken to establish a highway on the land in question in the manner provided by law, the court would be justified in finding that it had been established by the acts of the plaintiff and of the public, and by the lapse of time: *Sherman v. Hastings*, 81–372.

Where a highway was used for many years without being fenced, bridged or worked and houses were built with reference to it as traveled and it subsequently appeared that it was not on the line of the original location, *held*, that the line of travel would govern as against the record of the location, the original location being in dispute: *Tueger v. Riepe*, 90–484.

The fact that one who claims to have had possession of a highway adverse to the public for such length of time as to have acquired adverse title allowed the public to pass through his inclosed premises by letting down and putting up bars will not defeat the claim of adverse possession: *Neff v. Smith*, 91–87.

In a particular case, *held*, that the evidence did not show a sufficient adverse user

of the land in question to authorize a finding that the public had acquired a right to the same as a public highway: *Ladd v. Osborne*, 79–93.

A land-owner who signs the petition and accompanying deed of dedication for the land covered by the highway cannot be heard to say that so much of the road as passes over his land is not duly established where the road has been actually used from the time of such proceedings; and a grantee of such owner is in the same position: *Miller v. Schenck*, 78–372.

Where it appeared that a public highway had been claimed and used adversely to defendant for the statutory period, *held*, that a highway by prescription was thereby shown. *McAllister v. Pickup*, 84–65.

See, also, as to adverse possession, notes to § 3447.

The public may lose its right to all or part of a legally established highway by non-use: *Larson v. Fitzgerald*, 87–402.

SEC. **1483. Width.** Roads hereafter established, unless otherwise fixed by the board, shall be at least sixty-six feet wide, and in no case less than forty; within those limits they may be increased or diminished in width, altered in direction, or vacated, by pursuing the course herein prescribed. [C.'73, § 921; R., §§ 820, 821; C.'51, §§ 515, 516.]

The auditor has no power to establish a highway of less width than sixty-six feet, and if he attempt to do so the board of supervisors may set aside his action: *State v. Wagner*, 45–482.

Although the road is established by the auditor, and is less than sixty-six feet in width, if the record of his action is read over to and approved by the board, such action becomes substantially the action of the board, and is proper: *State v. Barlow*, 61–572.

The fact that the road as established is wider than authorized does not render the order establishing it void. It is an irregularity which cannot be taken advantage of in a collateral proceeding: *Knowles v. Muscatine*, 20–248.

The statute (§ 2026) authorizing street railways to extend their lines beyond the city limits over highways which are of the width of one hundred feet or more contemplates and authorizes the establishment of highways more than sixty-six feet in width: *Linn County v. Hewitt*, 55–505.

A road supervisor may be enjoined from erecting a bridge at the side of the highway where it will cause injury to a hedge of an adjoining land owner, and render necessary the destruction of shade trees in front of his premises, when it might, with some additional expense, be constructed in the middle of the highway without causing such damage: *Quinton v. Burton*, 61–471.

There is no presumption that a highway originating by prescription is of the width required in case of highways laid out under the statute. The width of such highway is a question of fact for the jury, to be determined from the facts and circumstances. The court cannot, as a matter of law, say that a road acquired by prescription or use is of any particular width beyond such portion as is actually used by the public: *Davis v. Clinton* 58–389.

Where, by agreement constituting dedication of a highway to public use, it was stipulated that the road should be established as it had been used, and the width as thus used was found to be twenty-six feet, *held*, that the highway as established by the dedication was properly determined to be of that width: *Hugh v. Haigh*, 69–382.

Where an order of the county court establishing a highway was based upon the plat of the commissioner, upon which plat it was described as thirty-three feet in width, *held*, that it must be presumed to have been intended to establish a highwav of that width although not so specified in the order of establishment: *State v. Schilb*, 47–611.

Non-use of a strip of land included within the highway and occupancy thereof by an adjoining owner will not bar the rights of the public in such strip. The adjoining owner is charged with knowledge that by law the highway is sixty-six feet in width: *Rae v. Miller*, 68 N. W., 899.

As to width of bridges, see § 1572 and notes.

SEC. **1484. Petition.** Any person desiring the establishment, vacation or alteration of a road shall file in the auditor's office of the proper county a petition, in substance as follows:

To the board of supervisors of ..... county:

The undersigned asks that a road commencing at ..... and running thence ..... and terminating at ..... be established, vacated, or altered (as the case may be). [C.'73, § 922.]

Before a highway can be lawfully established a petition asking its establishment must be presented to the board of supervisors. Until this is done the board has no jurisdiction or power to establish a highway, and if it does so its action is absolutely void. And where the petition asked for the opening and re-establishment of a highway, *held*, that proceedings thereunder to establish were not authorized. Also *held*, that in such cases the county could not be estopped by the acts of its auditor, and the board, from setting up the illegality of the proceeding: *Curtis v. Pocahontas County*, 72–151.

Where a petition with reference to a highway is blank as to what is asked it will not confer jurisdiction on the board and the action of the board in establishing a highway

in pursuance to such petition will be void: *Lehmann v. Reinhart*, 90-346.

While the establishment need not be asked in terms there must be something in the petition clearly indicating the relief sought: *Ibid.*

The petition for a highway need not follow the precise language of the statute: *McCollister v. Shuey*, 24-362.

If it asks for the appointment of a commissioner to locate a highway, etc., instead of for the establishment of the highway, it is not so materially defective as to invalidate the proceedings: *State v. Pitman*, 38-252.

It is not improper to ask in the petition the change of a highway instead of the location of a new highway and the vacation of one already established: *Harris v. Mahaska County*, 88-219.

Where the notice was that a petition would be presented for a new road, and the petition asked that a commissioner be appointed and the necessary steps taken to open the road, *held*, that there was a substantial compliance with the statute: *Stevens v. Board of Supervisors*, 41-341.

The petition need not specify the width of the proposed highway. Such specification is surplusage: *State v. Wagner*, 45-482.

A petition will not be insufficient to give the board jurisdiction merely because it runs to the county auditor, who is the clerk of the board, instead of to the board itself, or because it does not expressly ask for the establishment of the road, when its object is abundantly evident, in that it states that the road is needed and asks for the appointment of a commissioner: *State v. Barlow*, 61-572.

Under former statutes requiring that the petition for the establishment of a highway should be signed by at least twelve householders of the county, *held*, that the absence of an allegation that the petitioners were householders, or of a recital of such fact in the record, was not a fatal defect, if the road was otherwise a legal one: *Keyes v. Tait*, 19-123.

Where a petition for the establishment of a highway has been filed and the commissioner appointed has reported adversely, a subsequent request for the appointment of a new commissioner can not be considered a new petition in such sense as to render valid the action of the auditor or supervisors on a favorable report by a second commissioner thus appointed: *Devoe v. Smeltzer*, 86-385.

A proceeding to establish a public highway being in its nature public and for the benefit of the whole public, a contract by the party who has commenced such proceeding, for its abandonment, is contrary to public policy and void: *Jacobs v. Tobiason*, 65-245.

SEC. **1485. Bond.** Before filing such petition, the auditor shall require the petitioner to give a bond, with sureties to be approved by him, conditioned that all expenses growing out of the application will be paid by the obligors, in case the contemplated road is not finally established, altered or vacated, as asked in the petition. [C. '73, § 923; R., § 826; C. '51, § 521.]

A failure to require the bond here mentioned will not invalidate the proceedings: *Woolsey v. Board of Supervisors*, 32-130.

If the auditor allows the petition to be filed without a bond, and proceeds to act upon it, his action cannot be said to be without jurisdiction, the provision in regard to a bond being simply directory: *State v. Barlow*, 61-572.

SEC. **1486. Commissioner.** When the foregoing requirements have been complied with, the auditor shall appoint some suitable and disinterested elector of the county as commissioner, to examine into the expediency of the proposed establishment, alteration or vacation, and report accordingly. [C. '73, § 924; R., § 828; C. '51, § 523.]

SEC. **1487. Expediency.** The commissioner is not confined to the precise matter of the petition, but may inquire and determine whether that or any road in the vicinity, answering the same purpose and in substance the same, be required; but no road shall be established through any burying-ground, nor through any garden, orchard, or ornamental ground contiguous to any dwelling-house, or so as to cause the removal of any building, without the consent of the owner. [18 G. A., ch. 50; C. '73, § 925; R., § 830; C. '51, § 525.]

Under the corresponding section of Code of '51, *held*, that the commissioner had no authority to lay out a highway beyond the *termini* fixed in the petition, and the proceedings as to any such portion would be void: *State v. Molly*, 18-525.

In a particular case, *held*, that the evidence did not justify the finding that at the time the examination and report of the commissioner were made the highway extended through garden, orchard, or ornamental grounds contiguous to a dwelling house. Improvements afterwards placed in the proposed highway not being so placed in good faith and for a proper purpose, should not be permitted to defeat the establishment of the road: *Ballou v. Elder*, 64 N. W., 622.

SEC. **1488. Report.** In forming his judgment, he must take into account the public and private convenience, and the expense of the proposed road, and, if he thinks the public convenience requires it, shall proceed at

once to lay the same out, if the circumstances are such as to enable him to do so without having the same surveyed; but if, in his judgment, such road should not be established, or the alteration or vacation made, he shall proceed no further, and in either case shall, within thirty days after the day of his appointment, file his report in the auditor's office. [19 G. A., ch. 80; C.'73, §§ 926–8, 934; R., §§ 831–3, 840–1; C. '51, §§ 526–8, 535–6.]

An adverse report ends all proceedings under the petition, and the report of another commissioner appointed by the auditor would have no validity: *Cook v. Trigg*, 52–709.

A report against a road by the commissioner is an official determination, and the application cannot be considered as longer pending: *Morgan v. Miller*, 59–481.

Where it appeared that upon proper petition a commissioner was appointed to view and lay out a road, and that he made a survey and report, but that no further action was taken, *held*, that this was not sufficient to show the establishment of the highway: *Carey v. Weitgenant*, 52–660.

Where the commissioner reports against the establishment of a proposed highway the proceedings under the petition are terminated, and the appointment of another commissioner and his report in favor of its establishment will not give the auditor or supervisors any jurisdiction to act: *Devoe v. Smeltzer*, 86–385.

SEC. **1489. Survey made—commissioner sworn.** If the precise location of the road cannot otherwise be given, he must cause the line thereof to be surveyed and plainly marked out, and, if he is a person other than the county surveyor, must be sworn to faithfully and impartially discharge his duty, and, after thus qualifying, he shall have authority to swear any assistants employed, to faithfully and impartially perform their duties in aiding him in laying out or altering the road. [C.'73, §§ 929, 930; R., §§ 834–5; C. '51, §§ 529, 530.]

That the officer by whom the commissioner was sworn was not qualified to administer oaths is not such irregularity that the proceedings will be set aside on that account: *Woolsey v. Board of Supervisors*, 32–130.

SEC. **1490. Mile posts and stakes.** Mile posts must be set up at the end of every mile, and the distance marked thereon, and stakes must be set at each change of direction, on which shall be marked the bearings of the new course. Stakes must also be set at the crossing of fences and streams, and at intervals in the prairie not exceeding a quarter of a mile each; in the timber the course must be indicated by trees suitably blazed. [C. '73, § 931; R., § 836; C. '51, § 531.]

The provisions of this section and the one following are directory only, and the failure to comply with them will not render the proceedings illegal or void. Whether it is intended that they shall be followed when the commissioner proceeds to lay out the highway without the aid of a surveyor (under § 1488) may well be questioned: *McCollister v. Shuey*, 24–362.

SEC. **1491. Bearing trees—monuments.** Bearing trees must, when convenient, be established at each angle and mile post, and the position of the road relative to the corners of sections, the junction of streams, or any other natural or artificial monument or conspicuous object, must, as far as convenient, be stated in the field-notes and shown on the plat. [C. '73, § 932; R., § 837; C. '51, § 532.]

SEC. **1492. Plat and field-notes.** A correct plat of the road or alteration, together with a copy of the field-notes of the surveyor, if one has been employed, must be filed as a part of the commissioner's report. [C. '73, § 933; R., § 838; C. '51, § 533.]

SEC. **1493. Report—objections—claims for damages.** If the commissioner's report is in favor of the establishment, alteration or vacation of the road, it shall show the number of bridges required, and the probable cost thereof; and the auditor shall appoint a day, not less than sixty nor more than ninety days from such time, when the petition and report will be acted upon, on or before which day all objections to the establishment, alteration or vacation of the road, and all claims for damages by reason of its establishment or alteration, must be filed in the auditor's office. [19 G. A., ch. 80; C. '73, § 934; R., §§ 840–1; C. '51, §§ 535–6.]

Where final action appeared to have been had at a date subsequent to the one fixed, *held*, that it would be presumed that by proper resolution action was postponed to the day upon which it was had: *Woolsey v. Board of Supervisors*, 32–130.

The fixing of the date for final hearing less than sixty days distant is an irregularity which will not invalidate subsequent proceedings, nor render them subject to collateral attack: *State v. Kinney*, 39–226.

Where an auditor set a day for final hearing one day beyond the limit here fixed, and afterward, in a proceeding to enjoin the road supervisor from opening the road so laid out, there was a trial involving the validity of the road, and the opening of the same was perpetually enjoined, *held*, that the same was a binding adjudication that no road had ever been established: *Dicken v. Morgan*, 59–157.

A party whose claim is not filed within the time fixed has no constitutional right to damages: See notes to § 1501.

SEC. **1494. Day fixed.** The time for the commissioner to commence the examination shall be fixed by the auditor, and if he fails to so commence, or so report as prescribed in the preceding section, the auditor may fix another day, or extend the time for making such report, or may appoint another commissioner. [C. '73, § 935; R., § 829; C. '51, § 524.]

SEC. **1495. Notice served.** Within twenty days after the day is fixed by the auditor as above provided, a notice shall be served on each owner of land lying in the proposed road, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, in the manner provided for the service of original notices. If the owner of the land as thus shown does not reside in the county, similar notice shall be served upon any person who is in the actual occupancy of such land. In any case, notice shall be published for four weeks in some newspaper printed in the county. The notice may be in the following form:

To all whom it may concern: The commissioner appointed to locate, vacate, or alter (as the case may be) a road commencing at.....in..... county, running thence (describe in general terms all the points as in the commissioner's report, giving the names of the owners of the land through which the proposed road passes as they appear upon the transfer books of the auditor's office), and terminating at....., has reported in favor of the establishment, vacation, or alteration thereof, and all objections thereto, or claims for damages, must be filed in the auditor's office on or before noon of the.....day of....., A. D....., or such road will be established, vacated, or altered without reference thereto.

.....

County Auditor.

[19 G. A., ch. 109; C.'73, § 936.]

The provision authorizing the establishment of a road upon notice by publication is not in conflict with the constitution: *State v. Chicago, M. & St. P. R. Co.*, 80–586.

There is nothing in the statute requiring the seal of the auditor to the notice to be served by publication, and such seal is therefore not necessary: *Ibid.*

When notice is given to the persons appearing by the transfer books to be the unconditional owners of the land, and also by publication, the jurisdiction becomes complete. Notice to conditional owners, or others not shown by the transfer books (and not occupants), is not necessary: *Wilson v. Hathaway*, 42–173.

One whose ownership is not shown upon the transfer books and who does not appear to have been a resident of the county cannot complain of want of personal notice: *McKinney v. Baker*, 69 N. W., 683.

Such notice should be served personally upon the owner as shown by the transfer books, when he resides in the county, but if he be a nonresident, then upon the actual occupant of the land, although the name of such occupant does not appear from such books: *Alcott v. Acheson*, 49–569.

Under § 519 of the Code of '51, requiring that notice of the presentation of the petition for laying out a highway be posted for four weeks, *held*, that the notice appearing by the record being insufficient, it would not be presumed that there was other notice, but that the proceeding would be deemed invalid: *State v. Waterman*, 79–360.

Under the Code of '51, *held*, that a notice of presentation of a petition for a highway was fatally defective in failing to specify the time when the application would be made: *Ibid.*

A domestic corporation owning and operating a railway is in notorious occupation of its right of way and is entitled to notice, being deemed a resident of the county through which its line runs. This is true although its ownership of its right of way does not appear on the transfer books: *Chicago, R. I. & P. R. Co. v. Ellithorpe*, 78–415.

It is only residents of the state, in actual occupancy of land, who are entitled to personal notice. Notice need not be given to a foreign railway company across whose right of way the highway passes, by personal service upon its officers or agents. Publication of notice is sufficient in such case. Also *held*,

that as the railway company did not appear from the transfer books to be owner of its right of way, it was not entitled to notice: *State ex rel. v. Chicago, B. & Q. R. Co.*, 68–135.

Where a railway company does not appear by the transfer books to be the owner of land over which a highway is to be established, no personal notice to such railway is required, whether it be a domestic corporation or a foreign corporation which has filed its articles of incorporation with the secretary of state: *State v. Chicago, M. & St. P. R. Co.*, 80–586.

The provisions in regard to notice for the establishment of a highway have no application to the state: *Snyder v. Foster*, 77–638.

Where by the transfer books title is shown in one who is deceased, notice to one who by the records appears to be heir is not required: *Starry v. Treat*, 71 N. W., 350.

A railroad incorporated in the state and operating its road through the county is a resident of the county in such sense that notice should be served upon such company of the location of a highway across the company's right of way, it being in occupation of the land and the owner not being a resident of the county: *State ex rel. v. Iowa Cent. R. Co.*, 91–275.

Error in the description of the starting point of the highway in the petition and notice, *held* sufficient to render the proceedings thereunder void, although such error was discoverable by careful examination on the face of the petition and notice: *Butterfield v. Pollock*, 45–257.

Under a previous statute, requiring thirty days' notice to be given of the filing of a petition for the highway, but containing no provision requiring the recording of such notice and proof of posting thereof, *held*, that the court would be warranted from the evidence of the appointment of commissioners, and the giving of notice, and the long lapse of time during which the right of the public had remained unchallenged, in inferring that the requisite proof had been made and lost: *Keyes v. Tait*, 19–123.

Under such statute, *held*, that proof of the method of posting the notice might be made to the board of supervisors by parol evidence, and it would be presumed that proof in that manner was made, although the affidavits filed showing proof were not sufficient: *Woolsey v. Board of Supervisors*, 32–130; *Carr v. Fayette County*, 37–608.

In order to enable the auditor to act it is not necessary that there be filed formal proof of publication of the notice required by statute; his determination that notice has been duly published, while not conclusive, is sufficient to cast upon anyone questioning his action the burden of proving want of publication: *Pagels v. Oaks*, 64–198.

Under the Revision *held*, that a recital in the record that due notice had been given was *prima facie* evidence of that fact: *State v. Pitman*, 38–252.

The failure to give notice as required renders the action in establishing the highway void, and notice will not be presumed from the fact of establishment alone: *State v. Anderson*, 39–274; *State v. Weimer*, 64–243; *McBurney v. Graves*, 66–314; *Chicago, R. I. & P. R. Co. v. Ellithorpe*, 78–415.

The notice is jurisdictional and will not be presumed from the fact of the establishment but where the order of establishment rests upon a finding that the prerequisites of the law have been complied with it will be presumed that the board determined that the proper notice was given and this will be sufficient to show the fact of notice unless the contrary appears: *State v. Minneapolis & St. L. R. Co.*, 88–689.

Jurisdiction will be presumed if it be shown by the record that the tribunal establishing the road decided that sufficient notice had been given and that if the record shows that notices were posted it will be presumed that proper proof was introduced to show that they were put up in the manner required by law: *Larson v. Fitzgerald*, 87–402.

The giving of the notice required is necessary in order to confer jurisdiction on the board of supervisors to act in the matter: *Moffit v. Brainard*, 92–122.

Injunction to restrain the enforcement of the order in such a case is a proper remedy: *Ibid.*

Under the provisions of the Code of '51 requiring notice to be given at the time when the commissioner will make the examination, a failure to give such notice of the fact of the examination at the time specified will not render the subsequent establishment of the highway invalid: *Larson v. Fitzgerald*, 87–402.

The statutory provisions for vacation of highways requiring notice, etc., are not applicable to vacation of streets and alleys which by statute are under the control of the city council: *Dempsey v. Burlington*, 66–687.

SEC. **1496. Auditor may act—approved by board.** If no objections or claims for damages are filed on or before noon of the day fixed therefor, and the auditor is satisfied the provisions of the preceding section have been complied with, he shall proceed to establish, alter or vacate such road as recommended by the commissioner, upon the payment of costs. If such costs are not paid within ten days, the auditor shall report his action in the premises to the board of supervisors at its next session, who may affirm the action of the auditor, or establish such road at the expense of the county. [C. '73, § 937.]

The auditor has no power to fix the width of a highway established by him at less than sixty-six feet: See § 1483 and note.

Under 12 G. A., ch. 160, *held*, that the action of the auditor was subject to review by the board: *Brooks v. Payne*, 38–263; and that an appeal from the action of the auditor did not lie, but only from the action of the board: *Newell v. Perkins*, 39–244.

In order to enable the auditor to act, it

is not necessary that there be filed formal proof of publication of the notice required by the preceding section; his determination that notice has been duly published, while not conclusive, is sufficient to cast upon any one questioning his action the burden of proving want of publication: *Pagels v. Oaks*, 64–198.

SEC. **1497. New notice given.** If the auditor is satisfied that the notice has not been given, he shall appoint another day, and cause such notice to be served or published as required in the first instance, and thereafter proceed as provided above. [C. '73, § 938.]

SEC. **1498. Objections or claims.** If objections to the establishment of the road or claims for damages are filed, the further hearing of the application shall stand continued to the next session of the board of supervisors held after the commissioners appointed to assess the damages have reported. All claims for damages and objections to the establishment, alteration or vacation of the road must be in writing, and the statements in the application for damages shall be considered denied in all subsequent proceedings. [C. '73, §§ 939, 941; R., § 842; C. '51, § 537.]

The fact that the only claim for damages which is filed is paid will not authorize the auditor to establish the highway, but the hearing must be continued to the next meeting of the board: *Ressler v. Hershire*, 52–568.

This section and § 1501 do not provide in what cases damages shall be allowed, and do not authorize the recovery of damages, either by an adjacent property owner or any other person for the vacation of a highway: *Brady v. Shinkle*, 40–576; *Ellsworth v. Chickasaw County*, 40–571; *Grove v. Allen*, 92–519.

SEC. **1499. Appraisers appointed.** Upon the expiration of the time for filing claims for damages, if any are filed, the auditor shall appoint three disinterested electors of the county as appraisers, to assess the amount of damages any claimants may sustain by reason of the establishment or alteration of such road, and shall give them notice of their appointment, and fix a day and hour at which they shall meet at his office, or that of some justice of the peace, to qualify; and if they do not all appear at the time and place named, or within one hour thereafter, the auditor or justice, as the case may be, shall fill any vacancies by the appointment of others, and swear such appraisers to faithfully and impartially assess the damages claimed. Such appraisers shall proceed at once to perform their duties, and, after assessing the damages sustained by the claimants, respectively, shall report the amount sustained by each, in writing, to the auditor, within thirty days from the date of their appointment. [C. '73, §§ 940, 942–3; R., §§ 843–7; C. '51, §§ 538–42.]

Timber growing upon the land appropriated for the purpose of a public highway remains the property of the former owner, and is not to be taken into account in estimating his damages: *Deaton v. Polk County*, 9–594.

Where, upon failure of one of the appraisers to meet with the others on the day fixed, they adjourned instead of filling his place, *held*, that, in the absence of any proof of prejudice caused thereby, the proceedings would not be treated as erroneous upon a review by *certiorari*: *Johnson v. Board of Supervisors*, 61–89.

Claimants for damages have a direct interest in the appointment of appraisers and the statute intends that the appraisers shall be appointed on the day fixed for filing claims and an earlier appointment will constitute error: *Abney v. Clark*, 87–727.

Where, upon the absence of one of the appraisers, instead of his place being filled, action was postponed to another date, when he was present and acted, *held*, that in the absence of a showing of prejudice there was no error: *Johnson v. Supervisors*, 61–89.

SEC. **1500. Postponement—costs.** Should the report not be filed in time, or should any good cause for delay exist, the auditor may postpone the time for final action on the subject, and may, if necessary, appoint other appraisers. Should no damages be awarded the applicants therefor, all the costs growing out of their claims shall be paid by them. [C. '73, §§ 944–5; R., §§ 848, 850; C. '51, §§ 543, 545.]

SEC. **1501. Final action.** When the time for final action arrives, the board may hear testimony, receive petitions for and remonstrances against the establishment, vacation or alteration, as the case may be, of such road, and may establish, vacate or alter, or refuse to do so, as in their judgment,

founded on the testimony, the public good may require. Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment, vacation or alteration conditioned upon the payment, in whole or in part, of the damages awarded; or expenses in relation thereto. [C.'73, § 946; R., § 851; C.'51, § 546.]

Proceedings before the board: Where two applications are, in effect, for the same road, by different routes, they may be considered together: *Brown v. Ellis*, 26–85.

Where, in a proceeding before the board, one of the members refused to be sworn as a witness unless required to, but it appeared that his evidence, if given, would have been cumulative, and the action in the premises was not dependent upon it, *held*, that the discretion of the board in the matter would not be interfered with: *Ibid.*

Dismissal: The proceeding is not for the benefit of the person commencing it, but is by the state for the benefit and advantage of the public, and the petitioner acquires no rights or advantages by it. Therefore, an agreement by him for a consideration to abandon the proceeding is against public policy and void: *Jacobs v. Tobiason*, 65–245.

The fact that previous proceedings for establishment of a highway have been dismissed by the board will not bar their right to establish a highway over the same lines, upon a subsequent application: *Pagels v. Oaks*, 64–198.

Time for hearing: Where final action appeared to have been had at a date subsequent to the one fixed, *held*, that it would be presumed that, by proper resolution, action was postponed to the day upon which it was had: *Woolsey v. Board of Supervisors*, 32–130.

The fixing of the date for final hearing less than sixty days distant is an irregularity which will not invalidate subsequent proceedings, nor render them subject to collateral attack: *State v. Kinney*, 39–226.

Where, upon failure of one of the appraisers to meet with the others on the day fixed, they adjourned instead of filling his place, *held*, that, in the absence of any proof of prejudice caused thereby, the proceedings would not be treated as erroneous upon a review by *certiorari*: *Johnson v. Board of Supervisors*, 61–89.

Conditional establishment: Where the establishment is conditioned on the payment of the expenses thereof, it is not necessary that the time for such payment be fixed in the order: *Brown v. Ellis*, 26 85.

Where the proceedings did not definitely locate a portion of the highway upon the ground, but left it to be located by the petitioners, *held*, that such establishment as to the portion thus left to be located not being shown, the highway could not be deemed established in any part: *Barnes v. Fox*, 61–18.

Where a highway is established upon conditions, it is not to be regarded as fully established so as to become a legal highway until the conditions are complied with: *State v. Glass*, 42–56.

A final order once made as contemplated by statute acquires the character of an adjudication as to the establishment of the highway and the amount of damages, if any, and the parties cannot again litigate the question in a new proceeding. The judgment is conclusive until set aside: *Hupert v. Anderson*, 35–578.

Although the road is established on a different line from that requested and recommended, the action, while it may be erroneous, will not be void: *Davenport Mutual Savings, etc., Ass'n v. Schmidt*, 15–213.

If upon an appeal from the action of the board as to the amount of damages, the circuit court increase the amount allowed, the board may reconsider their action and refuse to establish the highway: *Nelson v. Goodykoontz*, 47–32.

An order for the establishment of the highway, conditioned upon payment of damages, etc., is such a final order as may be appealed from under § 1513. It is not necessary to wait for the unconditional order contemplated in the following section: *McNicols v. Wilson*, 42–385.

The statute does not authorize the board to reconsider its action at a previous meeting establishing a highway; and where a highway had been fully established, and at the second regular meeting of the board thereafter proceedings were taken to change such action, *held*, that such proceedings were invalid, being in the nature of new and independent proceedings taken to vacate a road duly established, and without due notice: *Miller v. Schenck*, 78–372.

Consent to the establishment of a highway will not confer jurisdiction to establish a particular line contemplated, and in the absence of proper notice the proceeding will be void: *Barnes v. Fox*, 61–18.

Where a highway was established by consent in pursuance of a written contract executed through mistake of fact, *held*, that a court of equity might reform and correct the written contract, and enjoin the laying out of the highway as established: *Mastelar v. Edgarton*, 44–495.

Record: The record with reference to the establishment of a road is admissible in evidence where it shows substantially the same route as petitioned for, and the petition need not be offered to render the record admissible, if it appears that it was presented, filed and acted upon: *State v. Lane*, 26–223.

Vacation of highway: Where the auditor acts improperly in establishing a highway, the board may set aside his action and vacate the highway thus improperly established: *State v. Wagner*, 45–482.

The statutory provisions by which the same steps are required to vacate as to establish a highway are not applicable to the vacation of streets and alleys. The city council has authority to vacate streets and alleys by ordinance: *Dempsey v. Burlington*, 66–687.

Where two roads were established on the same line, and upon due notice one of them was vacated, *held*, that such order of vacation would not operate upon both but only

upon the road as to which notice was given: *Larkin v. Harris*, 36-93.

Under the provisions of a former statute, that if money was advanced for the payment of damages caused by the location of a highway the highway could not be discontinued without repayment of such damages, and that the claim for the refunding of the damages was a lien on the land covered by the highway, *held*, that an action in equity to recover the amount paid to the land owner for a highway afterwards discontinued might be maintained: *Brown v. Bridges*, 36-279.

Where a highway was vacated upon certain conditions to be complied with, *held*, that it appeared that the board were of the opinion that the public good did not require such vacation, and that their action, in the absence of compliance with the conditions, did not affect the right of the public to treat the road as still existing: *Hayes v. Tyler*, 85-126.

Damages: In estimating the damages resulting from the fact that the location of a highway will render the construction of fences by the adjoining property owner necessary, the jury may be limited to considering the cost of constructing such fence as is proper under the circumstances, and should not estimate the cost of a fence sufficient to turn sheep and hogs, they not being permitted to run at large. The fact that a fence which will become necessary upon the establishment of a highway will be of advantage to the owner cannot be taken into consideration in estimating his damages: *Bland v. Hixenbaugh*, 39-532.

It is improper in estimating the damages to allow the owner as part of his compensation a certain amount for fence thereby made necessary. If by the establishment of the road the land is thrown open and left unfenced, this fact may enter into the consideration in determining the depreciation in value of the remaining premises. But the owner should not be allowed for the cost of fence, as such: *Hanrahan v. Fox*, 47-102.

One of the owners in common of land may recover damages caused by the establishment of a highway to the extent of his ownership, although no claim for damages is made by the other one: *Ibid.*

If the land owner, after the assessment of damages and pending an application to establish the road, erects a fence upon the proposed highway, he cannot have damages for the removal thereof allowed to him on appeal: *Holton v. Butler*, 22-557.

Timber growing upon the land appropriated for the purpose of a public highway remains the property of the former owner, and is not to be taken into account in estimating his damages: *Deaton v. Polk County*, 9-594.

It is the duty of the jury assessing the compensation for real estate appropriated to the use of the public as a street to personally examine the premises: *Des Moines v. Layman*, 21-153.

Damages for relocation: The true rule for estimating damages in case of relocation of a highway over land of the same party is to determine the amount which the damages for the new or relocated line would exceed the damages sustained by reason of the old one: *Jewett v. Israel*, 35-261.

And this rule is applicable whether damages for the location of the first line were allowed or not. But the damages by reason of the location of the new line are not to be diminished by reason of advantages and benefits which tend to increase the value of the land to be set off against damages caused by the relocation: *Israel v. Jewett*, 29-475.

Damages for vacation: A party whose right to the use of a highway is simply that enjoyed by the general public cannot recover damages for its vacation, whether his land abuts upon a part of the highway not vacated or upon a portion of the highway actually vacated: *Ellsworth v. Chickasaw County*, 40-571; *Brady v. Shinkle*, 40-576; *Barr v. Oskaloosa*, 45-275; *Grove v. Allen*, 92-519; *McKinney v. Baker*, 69 N. W., 683.

A claim for damages cannot be considered after the final order of establishment: *Smiths v. Dubuque County*, 1-492.

Where no claim for damages is filed, or the claim is disallowed because not filed within proper time, or if, upon consideration of the claim, no damages are allowed by the appraisers, a property owner cannot object to the establishment of the highway on the ground that his property is taken without compensation. While he has a constitutional right of compensation, it must be claimed and established in the manner pointed out by law: *McCrory v. Griswold*, 7-248; *Connolly v. Griswold*, 7-416; *Dunlap v. Pulley*, 28-469; *Abbott v. Board of Supervisors*, 36-354.

The land owner may, by appeal from the appraisement, have the amount of his damages assessed by a jury of twelve. If he fails to take such appeal and have such assessment, he cannot afterwards complain that his property is taken for public use without due process of law: *Tharp v. Witham*, 65-566.

Under the evidence in a particular case, *held*, that the amount allowed on the assessment of damages in behalf of the land owner on appeal from the action of the board of supervisors was not sufficient: *Adkins v. Smith*, 64 N. W., 761.

Review of proceedings: The board of supervisors is not a proper party in an action to enjoin the opening of a highway in accordance with their order establishing such highway. The action of the board in the establishment of highways is largely judicial: *Everett v. Board of Supervisors*, 61 N. W., 1062.

The question as to the propriety of establishing the road, and the legality of the proceedings to that end, may be reviewed by *certiorari*: *McCrory v. Griswold*, 7-248.

The discretion of the board in granting a change of the highway cannot be inquired into on *certiorari* where the board has jurisdiction to act: *Harris v. Mahaska County*, 88-219.

An order establishing a highway is a matter affecting the public only, and an individual can have no interest in that question such as to warrant him in appealing from the order of establishment, but he may be entitled to an appeal from the action of the board in regard to the allowance of damages:

Ball v. Humphrey, 4 G. Gr., 204; *Myers v. Simms*, 4–500.

Upon a writ of *certiorari* from the proceeding of the board, it is not proper to review its decision upon the question whether the public interests demand a proposed road, or whether it is practicable and expedient to establish it. The court can only determine whether the board is proceeding within its jurisdiction or not: *Tiedt v. Carstensen*, 61–334.

Where a *certiorari* proceeding is instituted against the board of supervisors, calling in question their action in establishing a highway, and such action is held to be illegal, the costs should be taxed, not against the board, but against the petitioners for the highway: *Tiedt v. Carstensen*, 64–131.

The action of the board in allowing or refusing damages can only be reviewed on appeal. See notes to § 1513.

Change of location by prescription: Where there have been proceedings to locate a highway and it has been established and used as such, pursuant to such proceedings, and by mistake the highway as used varies slightly from the one established, the use will not constitute a prescriptive right outside of the limits of the established highway: *State v. Welpton*, 34–144; *State v. Gould*, 40–372; *State v. Schilb*, 47–611.

Where by request of a land owner the supervisor, in opening an established highway, deflects therefrom upon the land of such owner, and the road so located is worked and used by the public, the action of the owner amounts to a dedication as to the portion outside of the established highway: *Ryan v. Kennedy*, 62–37.

Where the public have traveled and used a road different from the established highway for the period of prescription, it acquires a right by prescription in the road thus traveled: *Kelsey v. Furman*, 36–614.

A mistake as to the location of the line used, by reason of which it varies from the section line on which the land owner supposed he was allowing it to be used, will not give rise to a prescriptive right to the road as used, and the owner may correct the mistake and confine the travel to the intended line without being guilty of obstructing the highway: *State v. Crow*, 30–258.

The fact that a fence is built along a highway at the time it is laid out and thus remains for twenty years is sufficient evidence to show that it is not upon the highway, although by subsequent location from field-notes the fence appears to be within the limits of the highway: *Cattell v. Wilhelm*, 39–288.

See, also, notes to § 1482.

A curative act to render valid defective proceedings for the establishment of highways is constitutional: *Bennett v. Fisher*, 26–497.

SEC. **1502. Unconditional order.** In the latter case, a day shall be fixed for the performance of the condition, which must be before the next session of the board, and, if the same is not performed by that day, it shall at such session make some final and unconditional order in the premises. [C.'73, § 947; R., § 852; C.'51, § 547.]

SEC. **1503. Record.** Any order made or action taken in the establishment, alteration or vacation of a road shall be entered in the road record, distinguishing between those made or taken by the auditor and those by the board of supervisors. [C.'73, § 948.]

SEC. **1504. Plat and field-notes recorded—road opened.** After a road has been finally established or altered, the plat and field-notes must be recorded by the auditor, who shall certify the same to the township clerk, and the supervisors of roads shall be directed by him to have the same opened and worked, subject to the provisions of the next section. [15 G. A., ch. 19; C.'73, § 949; R., § 855; C.'51, § 550.]

SEC. **1505. Fences—crops.** A reasonable time must be allowed to enable the owners of land to erect the necessary fences adjoining the new road; and when crops have been planted or sowed before the road is finally established, the opening thereof shall be delayed until the crop is harvested. [C.'73, § 950; R., §§ 856–7; C.'51, §§ 551–2.]

A land owner is not liable to indictment for obstructing a highway in not removing the fences where a newly established highway crosses his land, at least until he has had reasonable notice from the supervisor to do so: *State v. Ratliffe*, 32–189.

SEC. **1506. Minors—insane persons.** The rights and interests of minors and insane persons in relation to the establishment, vacation and alteration of roads, and all matters connected therewith, are under the control of their guardians. [C.'73, § 951; R., § 860; C.'51, § 555.]

SEC. **1507. Streets in villages.** All public streets of villages are a part of the road; and all road supervisors or persons having charge of the same, in the respective districts or villages, shall work the same as provided by law. [C.'73, § 952.]

SEC. **1508. In cities or towns.** Such portions of all roads as lie within the limits of any city or town shall conform to the direction and grade and be subject to all regulations of other streets in such town or city. [C. '73, § 953; R., § 916.]

There is a clear distinction between streets and highways in cities and incorporated towns and in unincorporated towns; the latter are regarded as a part of the highways of the county, while the former are subject to the exclusive control of the officers of the municipality: *Gallaher v. Head*, 72–173.

See in general, § 751 and notes.

SEC. **1509. By trustees of state institutions.** The trustees or commissioners of the institutions belonging to the state may vacate, alter, change or establish public highways through the lands belonging to the state, and for the use of such institutions, as the said board of trustees or commissioners may deem for the best interests of the state and the public, subject, however, to the approval of the board of supervisors of the county, or the city council of the city, wherein such lands are situated. [26 G. A., ch. 45, § 1.]

SEC. **1510. County line roads.** The establishment, vacation or alteration of a road, either along or across a county line, may be effected by the concurrent action of the respective boards of supervisors in the manner above prescribed. The commissioners in such cases must act in concert, and the road shall not be established, vacated or altered in either county until it is so ordered in both. [C. '73, § 955; R., § 861; C. '51, § 556.]

SEC. **1511. General control—concurrent action.** All roads, whether established by the trustees of state institutions under the statute or by the county authorities, are subject to the provisions of this chapter, and those established by the joint action of boards of supervisors of two or more counties can be altered or discontinued only by the joint action of the boards of the counties in which situated. Subject to these provisions, they shall be in all other respects treated, managed and controlled as provided in this title. The term "road," as used in this code means any public highway, unless otherwise specified. [C. '73, § 956; R., § 879.]

SEC. **1512. Consent highways.** Roads may be established without the appointment of a commissioner, if the written consent of all the owners of the land to be used for that purpose be first filed in the auditor's office; and the board, if satisfied that the proposed road is of sufficient public importance to be opened and worked by the public, shall make an order establishing the same. If a survey is necessary, the board, before ordering the same, may require the parties asking such establishment to pay or secure the payment of the expenses thereof. [C. '73, §§ 957–8; R., §§ 858–9; C. '51, §§ 553–4.]

SEC. **1513. Appeals—from what taken.** Any applicant for damages caused by the establishment or alteration of any road may appeal from the final decision of the board to the district court of the county in which the land lies, notice of which appeal must be served on the county auditor within twenty days after the decision is made. If the road has been established or altered on condition that the petitioners therefor pay the damages, such notice shall be served on the four persons first named in the petition, if there be that many residing in the county, in the manner in which an original notice may be served. [C. '73, § 959; R., § 873.]

Appeal: The propriety of the action, with reference to the allowance of damages, can only properly be raised by appeal: *McCune v. Swafford*, 5–552; *Warner v. Doran*, 30–521.

Petitioners may properly be permitted to withdraw their appeal if they so desire: *Ellis v. Carpenter*, 89–521.

Upon an appeal, not only the amount of damages, but also the right to any damages, may be determined: *Spray v. Thompson*, 9–40.

An appeal brings up nothing for determination except the claim for damages. The action of the board of supervisors in establishing the road cannot be reviewed: *Pollard v. Dickinson County*, 71–438.

An appeal lies from the action of the board entirely rejecting a claim for damages: *Vancleve v. Clark*, 37–184.

Therefore, *held*, that an appeal from the action of the board in disallowing a claim for damages on the ground that claimant was not the owner of the land, but in which it was expressly stated that no objection was made to the amount of the damages assessed by the jury, properly raised the question as

to the correctness of the action of the board in rejecting the claim for damages: *Ibid.*

An order for the establishment of the highway conditioned upon the payment of damages is such a final order as may be appealed from. It is not necessary to wait for the unconditional order which follows the payment of the damages: *McNichols v. Wilson*, 42–385.

The fact that petitioners for the highway have renounced all right thereto that they might have by the action of the board in making the location conditional upon their payment of the damages assessed does not defeat the right of the claimant to prosecute his appeal from the assessment of damages, where petitioners do not entirely retire from the controversy and renounce all benefits which may arise from any action in the premises: *Ibid.*

Under previous statutory provisions allowing the county auditor to act in the matter of establishing highways, subject to the final approval of the board of supervisors, *held*, that an appeal would not lie from the order of such auditor, but only from the final action of the board: *Newell v. Perkins*, 39–244.

It appears from this section that no damages are to be allowed for vacation of a highway, inasmuch as no provision for an appeal in such a case is made: *Grove v. Allen*, 92–519; and see notes to § 1501.

Improper action of the auditor in appointing appraisers before the time fixed by statute for such appointment could not be raised on an appeal from the final action of a board of supervisors and therefore objection may be taken on that ground by *certiorari: Abney v. Clark*, 87–727.

As to reviewing the action of the board by *certiorari*, see notes to § 1501.

Notice of appeal: The twenty days within which notice of appeal may be served commences to run from the time of making the conditional order for the establishment of the highway, upon payment of damages, and not from the making of the final unconditional order, after such damages have been paid: *McNichols v. Wilson*, 42–385.

Where a claim for damages is disallowed by the commissioners, and its payment is not required by the order establishing the highway, it is not required that service of notice of an appeal by the claimant be made upon the petitioners: *Raymond v. Clay County*, 68–130.

The provision that notice shall be served on the four persons first named in the petition is mandatory and has no reference to the extent of the interest of the parties in the proposed highway, and a notice upon a less number, or upon others than the four first named, will not give the court jurisdiction: *Finke v. Zeigelmiller*, 77–251.

The record on appeal must in order to show jurisdiction make it appear that notice was served on the four persons who first signed the petition: *Ellis v. Carpenter*, 89–521.

Under § 959 of the Code of '73 the notice required was personal notice and notice by leaving a copy at the residence as provided for in the case of original notice was not sufficient: *Ibid.*

There does not appear to be any express provision as to the time which shall elapse between the service of notice of appeal and the first day of the term at which the case shall be deemed triable, but it seems it should be at least ten days: *Scott v. Lasell*, 71–180.

Appearance: Where the notice is served within twenty days, and the only objection is as to the sufficiency of proof of such service, an appearance and objection to the service confers jurisdiction: *Libbey v. McIntosh*, 60–329.

If the notice is not served upon the applicant within proper time he may appear and move to dismiss the appeal, and such appearance will not confer jurisdiction, nor waive his rights: *Spurrier v. Wirtner*, 48–486.

SEC. **1514. By petitioner.** An appeal may be taken by the petitioner as to amount of damages, if the establishment or alteration has been made conditional upon paying the damages, by serving notice thereof on the county auditor and applicant for damages, in the manner in which original notices are served, and within twenty days after the decision of the board, and filing a bond in the office of such auditor, with sureties to be approved by him, conditioned for the payment of all costs occasioned by such appeal, if the appellant fails to recover a more favorable judgment in the district court than was allowed him by such board. [C. '73, § 960; R., § 874.]

If the notice is not served upon the applicant within proper time he may appear and move to dismiss the appeal, and such appearance will not confer jurisdiction nor waive his rights (explaining *Robertson v. Eldora R. & Coal Co.*, 27–245): *Spurrier v. Wirtner*, 48–486.

SEC. **1515. Transcript filed.** When an appeal has been taken, the auditor shall, within ten days thereafter, make out and file in the office of the clerk of said court a transcript of the papers on file in his office, and proceedings of the board of supervisors in relation to such damages. The claimant for damages shall be plaintiff and the petitioners defendants, except the damages have been ordered paid out of the county treasury, in which case the county shall be defendant. [C.'73, § 961; R., § 873.]

Parties to the appeal: It is not proper to make the road itself defendant in the appeal: *Myers v. Old Mission, etc., Road*, 7–315.

The county is not a proper party to the appeal unless the damages have been ordered paid out of the county treasury, in which

case the statute provides that the county shall be defendant: *Deaton v. Polk County*, 9–594.

Although a claim for damages is disallowed and no order for its payment made in establishing the road, the county should be made defendant on an appeal by the claimant: *Raymond v. Clay County*, 68–130.

Transcript: The fact that the transcript is made out and filed with the clerk of the court before the service of the notice of appeal upon the auditor is a mere irregularity, in no manner affecting the jurisdiction of the court: *Libbey v. McIntosh*, 60–329.

Failure of the appellant to file notice of appeal with the auditor after the service thereof, until there are not ten days remaining between the service of notice and the first day of the next term, will not prevent the cause being triable at such term. It is the duty of the appellant to file the notice in time to allow a transcript to be filed: *Scott v. Lasell*, 71–180.

Filing fee: A rule of court providing that, upon failure of appellant to pay the filing fee, appellee might pay it and have the appeal dismissed, *held* not applicable where the appellant had paid the fee before motion to dismiss by appellee was filed: *Cole v. Laub*, 35–590.

The proceeding in which an appeal is taken may be denominated a civil case within the rule providing for payment of filing fee by appellant on the first day of the term: *Scott v. Lasell*, 71–180.

SEC. **1516. Proceedings in court.** The amount of damages the claimant is entitled to shall be ascertained by the court in the same manner as in actions by ordinary proceedings, and the amount ascertained shall be entered of record, but no judgment rendered therefor. The amount thus ascertained shall be certified by the clerk to the board of supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. [C.'73, § 962.]

Trial of the appeal: The owner of the land is entitled to have his damages assessed anew upon appeal although no damages whatever were allowed by the appraisers: *Deaton v. Polk County*, 9–594.

The question as to the amount of damages may be tried *de novo* upon appeal: *Prosser v. Wapello County*, 18–327.

The appellant is entitled to a new assessment of his damages by jury upon the appeal: *Des Moines v. Layman*, 21–153.

It is not necessary, in order to secure a hearing, upon appeal, as to the amount of damages, that a motion should have been made before the board to set aside the report of the appraisers: *Sigafoos v. Talbot*, 25–214.

It is necessary that the party claiming damages on the appeal, if he seeks to recover damages to the tract out of which the right of way is taken, should show that he is owner thereof, and if the evidence fails to establish title in him he can recover only for such immediate and necessary damages as result to him as an occupant of the land: *Costello v. Burke*, 63–361.

The damages herein referred to must be estimated with reference to the extent of the interest of the claimant in the property from which the appropriation is to be made, and the claimant must therefore allege and prove the extent of his interest: *Ibid.*

Damages must be ascertained, on appeal, in view of the rights of the parties as settled by the supervisors; and where by subsequent action of the supervisors, after the determination of his damages, the amount of damages was increased, *held*, that the claimant might, by amended pleadings on the appeal, claim additional damages. The claimant may on appeal plead as in an action by ordinary proceedings, and therefore he is entitled to amend so as to ask more than was claimed before the board: *Pollard v. Dickinson County*, 71–438.

If, pending an application to establish a road, and after the damages have been assessed, a land owner erects a fence upon the proposed highway, he cannot have damages for the removal of such fence allowed on appeal: *Holton v. Butler*, 22–557.

Final action after determining damages on appeal: When the amount of damages has been fixed by the trial of the appeal, the board of supervisors may proceed to final action as if that amount had been originally allowed by them: *McNichols v. Wilson*, 42–385.

If the amount of damages is increased on the appeal, the board may reconsider their action and refuse to establish the highway: *Nelson v. Goodykoontz*, 47–32.

The county cannot be prejudiced by the recovery by claimant on an appeal of damages greater than allowed by the supervisors, for the reason that the road cannot be established until the trial of the appeal. The supervisors may make the establishment of the road conditioned on the payment of the damages: *Pollard v. Dickinson County*, 71–438.

SEC. **1517. Costs.** If the appeal be taken by the petitioners, they shall pay the costs, unless the claimant recovers a less amount than was allowed them by the board. In all other cases the taxing of the costs shall rest in the discretion of the court. [26 G. A., ch. 44; C. '73, § 963; R., § 873.]

The recovery of costs by the claimant upon his appeal is not made contingent upon whether the amount of his damages is increased by the court: *Hanrahan v. Fox*, 47–102.

Neither the petitioner nor the county can be made to pay the costs of the appeal until the appeal has been determined and the costs have been adjudged. The appellant should advance the filing fee: *Scott v. Lasell*, 71–180.

SEC. **1518. Lost field-notes—resurvey.** When, by reason of the loss or destruction of the field-notes of the original survey, or of defective surveys or record, or of numerous alterations since the original survey, the location of any road can not be accurately determined, the board of the proper county may cause it to be resurveyed, platted and recorded, as hereinafter provided. [C.'73, § 964; R., § 913.]

Where the necessary steps were taken to establish a road, but the clerk failed to record the field-notes, and no record of the final order was found, *held*, a proper case for the supervisors to order a resurvey: *Balke v. Bailey*, 20–124. But where a highway has never been in fact establish a resurvey thereof is of no effect: *Carey v. Weitgenant*, 52–660.

The board cannot vary the line of road as originally surveyed to conform it to a way acquired by prescription. The alterations referred to in the provisions as to resurvey have reference to such changes in the road as have occurred by orders or surveys made after the original survey, and which tend to such confusion that the location of the road is not accurately defined or pointed out by the record: *Blair v. Boesch*, 59–554.

But it is competent for the board to hear evidence as to where the original survey was actually made, and being satisfied from the evidence that the resurvey is upon the line as originally surveyed, to approve and confirm such survey, although it does not conform to the original field-notes: *Ibid.*

Proceedings for resurvey will be void where there was no original establishment of the highway sought to be resurveyed. It is not the office of such proceedings to cure original proceedings which were fatally defective: *Barnes v. Fox*, 61–18.

Where a portion of the record of the establishment of a highway was lost, and the resurvey showed the highway to be not on the section line, as indicated by a portion of the record remaining, and the evidence showed that the resurvey corresponded with the original survey, *held*, that the resurvey was properly confirmed: *Ackerson v. Van Vleek*, 72–57.

SEC. **1519. Plat and field-notes filed—notice given.** A copy of the field-notes, together with the plat of any road surveyed under the provisions of the preceding section, shall be filed in the office of the county auditor, and thereupon he shall give notice, in some newspaper published within the county, that at some term of the board therein named, not less than twenty days from the publication, it will, unless good cause be shown against so doing, approve of such survey and plat, and order them to be recorded as in cases of the original establishment of a public road. [C.'73, § 965; R., § 914.]

SEC. **1520. Proceedings—record.** In case objection shall be made by any person claiming to be injured by the survey so made, the board shall have power to hear and determine the matter, and may, if thought advisable, order a change to be made in the survey. If, upon the final determination, the board shall find said survey is correct, it shall approve the same, and cause the field-notes and plat thereof to be recorded as in case of the establishment or alteration of roads, and thereafter such records shall be received by all courts as conclusive proof of its establishment according to such survey and plat. [C.'73, § 966; R., § 915.]

SEC. **1521. Road plat book.** If the same has not been heretofore done, the county auditor shall cause every road in his county, the legal existence of which is shown by the records and files in his office, to be platted in a book to be obtained and kept for that purpose and known as the "road plat book." Each township shall be platted separately, on a scale of not less than four inches to the mile, and such auditor shall have all changes in or additions to the roads legally established immediately entered upon said plat book, with appropriate references to the files in which the papers relating to the same may be found. The auditor shall, from time to time, notify the clerk of each township of all changes made in the roads thereof, and on receipt of such notice he shall immediately make corresponding changes on the highway plat book in his office, and shall, in case such plat book is lost or is found to be substantially inaccurate, procure a new one, or cause corrections to be made, at a reasonable expense, to be paid out of the general township fund. [C.'73, §§ 967–8; R., § 889.]

The clerk is to furnish the supervisor with a plat of his district: See § 1539.

SEC. **1522. Sidewalks on highways.** Any owner of land adjoining a public road outside the limits of a city or town may construct a sidewalk on and along said road, which shall not exceed four feet in width, and be located along the side thereof, of any material suitable for a foot-walk, but it shall not be so constructed as to interfere with the proper use and enjoyment of any lands or premises along which it is laid. The person building such walk shall keep the same in repair. [20 G. A., ch. 147, § 1.]

SEC. **1523. Penalty for injury to.** Any person who shall destroy, injure, drive or ride upon a sidewalk so constructed, except at road crossings, shall be guilty of a misdemeanor, and shall be fined not less than five dollars for each offense, and shall be liable to the party who has built or maintained said sidewalk for all damages caused thereby. [Same, § 2.]

SEC. **1524. Cattle-ways across highways.** Upon application to the board of supervisors of any county by any person for permission to construct a cattle-way across, over or under any public road, it may grant the same upon condition that such way shall not interfere with the public travel; that the grade of the road over the cattle-way shall not exceed one foot in ten feet; and that it shall not obstruct watering at any running stream. The applicant shall construct the same at his own expense, and be responsible for all damages that may arise from its construction, or from the same not being kept in repair. [16 G. A., ch. 111, § 1.]

One who constructs a cattle pass without permission is subject to the same liability as is here imposed: *Gould v. Schermer*, 70 N. W., 697.

SEC. **1525. Repairs.** If the person on whose land such cattle-way is constructed fails to keep the same in repair, it shall be the duty of the road supervisor to make all necessary repairs, and charge the same to the owner of the land upon which such way is constructed, and, upon his refusal or failure to pay, the supervisor shall recover the same in an action brought in his own name, which money, when collected, shall be expended in improving or repairing the public roads in the road district where such cattle-way is constructed. [Same, § 2.]

SEC. **1526. Application for.** Any person desiring to build a cattle-way across a public highway, under any township bridge, may apply to the board of trustees of the township wherein the same is to be located, at any meeting thereof, and it may grant such application, and prescribe such conditions in regard to the maintenance of said bridge as it may think proper. [22 G. A., ch. 92, § 1.]

SEC. **1527. Laying out public highways—fees.** The following fees shall be paid persons engaged in laying out and changing roads:

1. Commissioners, for each day, two dollars;
2. Surveyor, for each day, four dollars;
3. Chain carriers, markers, and other assistants, for each day, one dollar and fifty cents.

If the road extends into more than one county, such expenses when so adjudged shall be paid by the several counties in proportion to the length of time occupied on the road in each county. [C. '73, § 3824; R., §§ 872, 877.]

CHAPTER 2.

OF WORKING ROADS.

SECTION **1528. Powers and duties of trustees.** The township trustees of each township shall meet on the first Monday in April, or as soon thereafter as the assessment book is received by the township clerk, and on the first Monday in November, in each year. At the April meeting, said trustees shall determine:

1. The amount of property tax to be levied for roads, bridges, guideboards, plows, scrapers, tools, and machinery adapted to the construction and repair of roads, and for the payment of any indebtedness previously incurred for road purposes, and levy the same, which shall not be less than one nor more than four mills on the dollar on the amount of the township assessment for that year, which, when collected, shall be expended under the direction and order of the township trustees;

2. Whether any portion of said tax shall be paid in labor, and, if so, what portion;

3. The amount that will be allowed for a day's labor done by a man, and by a man and team, on the road. To certify to the board of supervisors the desire for an additional road tax, of not to exceed one mill, to be levied in whole or in part by the board of supervisors as hereinafter provided. At the November meeting, they may divide their respective townships into such number of road districts as may be necessary for the public good, and shall settle with the township clerk and supervisors of roads. [26 G. A., ch. 43; 25 G. A., ch. 22; C. '73, §§ 969, 971; R., §§ 880, 891, 895; C. '51, § 568.]

A road district cannot be sued: *White v. Road District*, 9-202; *Wilson v. Jefferson County*, 13-181.

The power of the trustees to divide the township into road districts does not extend to such portions as are embraced within a city. And they have no power to levy a road tax in such portions. The city council have control of the highways and streets of the city (§ 753): *Marks v. Woodbury County*, 47-455; *Hawley v. Hoops*, 12-506.

Township trustees have no authority to borrow money for the improvement of highways, or to make the improvements in one district a charge upon the other districts of the township: *Cass County Bank v. Conrad*, 81-482.

As incorporated towns are given power to provide for grading and repair of their streets (§§ 753, 782), they must have control over such streets, and the road supervisor and township trustees have no authority over them: *Clark v. Epworth*, 56-462.

Road tax may be levied upon the property of railway companies, although such property is not placed upon the assessor's book: *Sioux City & St. P. R. Co. v. Osceola County*, 45-168, 177.

SEC. **1529. General township fund—clerk to give bond—custody of implements.** The trustees shall set apart such portion of the tax provided in the preceding section as may be necessary for the purpose of purchasing the tools and machinery and paying for the guideboards mentioned therein, and the same shall constitute a general township fund; and they shall require the township clerk to give bond in such sum as they think proper, conditioned as the bonds of the county officers, which bond, and the sureties thereon, shall be approved by them. Said clerk shall have charge of and properly preserve and keep in repair such tools, implements and machinery as may be purchased, and may determine at what time the supervisors of the several road districts may have the use of the same or any part thereof, and he shall be responsible for the safe keeping of the same when not in the custody of some one of the supervisors, and shall receive such compensation as they shall provide, to be paid out of such fund. [C. '73, § 970.]

The "general fund" is the money set apart for that purpose as here contemplated, and does not embrace money received by the clerk from the county treasurer under § 1543: *Henderson v. Simpson*, 45-519.

The orders provided for by § 1567 are not payable out of the general fund contemplated by this section. The township trustees have no control over the road fund, except that part of it which may be set apart for general township purposes. The balance is to be expended by the road supervisors: *Bradley v. Love*, 76-397.

An order upon the township clerk signed by the township trustees payable out of the general township fund does not give rise to any personal liability on the part of such trustees, it being manifest from the whole instrument that there was no intention to assume a personal liability: *Willett v. Young*, 82-292.

The trustees have no authority to contract indebtedness for the purchase of tools and machinery, until a tax is levied and set apart for that purpose. "Indebtedness previously incurred," in the preceding section, does not refer to such indebtedness for tools and machinery. The trustees may, after the tax is levied and set apart, anticipate the collection of the tax and purchase tools and machinery upon credit: *Wells v. Grubb*, 58-384; *Hanks v. North*, 58-396; *Revolving Scraper Co. v. Tuttle*, 61-423.

The clerk might maintain an action for funds belonging to his township in the hands of third persons. If he deposits such

funds in his individual name, without notice to the banker of their character, such act amounts to a conversion. The deposit belongs to the clerk individually, and if seized by garnishee process under attachment on his individual debt, without notice of its character, cannot be recovered back as public funds: *Long v. Emsley*,57–11.

The township clerk is the proper party to bring an action against a road supervisor for moneys received by him belonging to the general township fund which he fails to pay over: *Wells v. Stomback*, 59–376.

And it seems that in such case the clerk might sue on the supervisor's bond: *Kellogg v. Bare*, 62–468.

As to taxation of property within a city or town for road purposes see § 890.

Each road district is required to keep up and repair its own roads, except that tools, scrapers, etc., are owned and controlled by the township at large. They are under the control of the township clerk, and he is required to determine at what time or times the supervisors of the several districts shall have the use of them: *Bradley v. Love*,76–397.

SEC. **1530. County road fund—how levied and paid out.** The board of supervisors of each county may, at the time of levying taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable property in its county, including all taxable property in cities and incorporated towns, which shall be collected at the same time and in the same manner as other taxes, and be known as the county road fund, and paid out only on the order of the board for work done on the roads of the county in such places as it shall determine; but so much of the county road fund as arises from property within any city or incorporated town shall be expended on the roads or streets within such city or town, or on the roads adjacent thereto, under the direction of the city or town council; and the county treasurer shall receive the same compensation for collecting this tax as he does for collecting corporation taxes. In case the board of supervisors do not make a levy for county road fund, or levy less than one mill for said county road fund, the board of supervisors shall levy such an additional sum for the benefit of such townships as shall have certified a desire for such additional levy, as provided for in section fifteen hundred and twenty-eight of this chapter; but the amount for the general township fund and the county road fund shall not exceed in any year five mills on the dollar. [25 G. A., ch. 22; 20 G. A., ch. 200, § 1.]

SEC. **1531. Expenditure.** It shall, at the regular meeting in April, determine from the auditor's and treasurer's books the amount of money collected and credited to said road tax fund. It shall also determine the manner in which said tax shall be expended, whether by contract or otherwise. [20 G. A., ch. 200, § 2.]

SEC. **1532. One road district plan.** The board of township trustees, at its regular meeting in April, may consolidate the road districts thereof into one road district, and it may, at such meeting, subdivide, returning to the former plan of road work, after a three years' trial of the single district system. If this system shall be adopted, the road fund belonging to the several road districts shall at once become a general township road fund, out of which all claims for work done or material furnished for road purposes prior to the change, and unsettled, shall be paid. [Same, §§ 4, 11.]

This provision is not mandatory. It devolves upon the board a discretionary duty after jurisdiction once attaches: *Dunham v. Fox*, 69 N. W., 436.

The taxpayer may maintain proceedings to set aside an illegal order of the board under these provisions without showing that he is specially prejudiced thereby: *Ibid.*

A board of trustees in acting under these provisions is a board exercising judicial functions and *certiorari* will lie to test the validity of its action: *Ibid.*

Before the petition is acted upon the petitioners have the right by remonstrance to express to the board the fact that they do not desire to be considered as petitioners: *Ibid.*

SEC. **1533. Duty of trustees.** Where the one road district plan is adopted, the board of township trustees shall order and direct the expenditure of the road funds and labor belonging or owing to the township; may let, by contract, to the lowest responsible, competent bidder, any part or all of the work on the roads for the current year, or may appoint a township superintendent of roads, with one or more assistants, to oversee, subject to the direction of the board, all or any part of the work, but it shall not incur an indebtedness for such purposes unless the same has been or shall at the

time be provided for by an authorized levy; and may order the township road tax for the succeeding year paid in money and collected by the county treasurer as other taxes. It shall cause both the property and poll road tax to be equitably and judiciously expended for road purposes in the entire road district; shall cause at least seventy-five per cent. of the township road tax to be thus expended by the fifteenth day of July in each year; shall cause the noxious weeds growing in the roads to be cut twice a year, when necessary, and at such times as to prevent their seeding, and it may allow any land owner a reasonable compensation for the destruction thereof, when growing in the roads abutting upon his land, and credit him therefor on his road tax for that year. If a superintendent of roads and an assistant are employed, it shall fix the term of office, which shall not exceed one year, and compensation, which shall not exceed three dollars a day; and no contract shall be made without reserving the right of the board to dispense with his services at its pleasure. [Same, §§ 5–10, 17.]

Prior to the enactment of this statute no authority was vested in the township trustees to expend any of the road tax excepting that part which constituted the general township fund: *Cass County Bank v. Conrad*, 81–482.

SEC. **1534. Qualification of officers.** The trustees shall require the township clerk, contractor and superintendent, contemplated in this plan, each to qualify as other township officers, and to execute a bond with approved sureties for twice the amount of money likely to come into their hands, respectively. [Same, § 12.]

SEC. **1535. Day's work.** Eight hours' service for a man, or man and team, shall be required for a day's work; but except on extraordinary occasions no person shall be required to go more than three miles from his place of residence to work, and, for the purposes of the one road district plan, the residence of a man with a family shall be construed to be where his family resides, and for a single man, it shall be at the place where he is at work. [Same, § 14.]

SEC. **1536. Contractors and superintendents.** The powers, duties and accountability imposed on road supervisors, so far as may be, under the one road district plan, shall apply to contractors, superintendents and assistants. [Same, § 15.]

SEC. **1537. Township system takes effect.** In all cases where the one road district plan for the township shall have been adopted, it shall be competent for the township trustees to designate when the same shall take effect as to the working of the roads. [Same, § 16.]

SEC. **1538. Compensation of trustees, treasurer and clerk.** The trustees shall receive the same compensation per day for time necessarily spent in looking after the roads as they do for other township business; the county treasurer shall receive the same per cent. for collecting the road taxes here contemplated that he does for collecting corporation taxes; and the township clerk shall receive two per cent. of all the money thus coming into his hands and by him paid out for road purposes. [Same, § 13.]

SEC. **1539. Furnish plat.** The township clerk shall furnish each road supervisor a copy of so much of the map or plat furnished him by the auditor as relates to the roads in his district, and from time to time shall mark thereon the changes in or additions to such roads as the same are certified to him by the auditor, which map or plat shall be transferred to his successor in office. [C. '73, § 972; R., § 890; C. '51, §§ 573–4.]

This map is not essential to the authority of the supervisor and gives him no additional power: *Mosier v. Vincent*, 34–478.

It is in no legal sense a process, and is no protection to him in opening a highway indicated thereon: *Campbell v. Kennedy*, 34–494.

Copy of plat book for the township to be furnished by the auditor to the township clerk: See § 1521.

SEC. **1540. Tax list.** He shall, within four weeks after the trustees have levied the property tax, make out a tax list for each road district in his township, which shall be in tabular form and alphabetical order, having

distinct columns for lands, town lots and personal property, and contain in a separate column the amount of the tax on each piece of land and town lot, and that on the amount of personal property, belonging to each individual, and in another column the amount of tax to be paid in money due from each individual. This list shall contain the names of all persons required to perform two days' labor upon the road as a poll tax. To enable him to make out such tax list, the assessor shall furnish the clerk of each township, on or before the first day of April in each year, a correct copy of the assessment lists of said township for that year, which shall be the basis of such tax list. The county auditor shall furnish the several township clerks of his county with the necessary printed blanks. [C.'73, § 973; R., § 892.]

SEC. **1541. Collection of tax.** He shall make an entry upon such tax list, showing what road district and year it is for, and attach thereto his warrant under his hand, in general terms requiring the supervisor of such district to collect the taxes therein charged, and no informality in the above requirements shall render any proceedings for the collection of such taxes illegal. He shall cause such lists to be delivered to the proper supervisors of his township within thirty days after the levy, and take receipts therefor; and such list shall be sufficient authority for the supervisor to collect all taxes therein charged against resident property holders in his district. [C.'73, § 974; R., § 893.]

SEC. **1542. Delinquent tax certified.** He shall, on or before the second Monday in November in each year, make out a certified list of all lands, town lots and personal property on which the road tax has not been paid, and the amount of tax charged on each parcel of land, town lot or personal property, designating the district in which the same is situated, and transmit the same to the auditor, who shall enter the amount of tax the same as other taxes, and deliver the same to the county treasurer, charging him therewith, which shall be collected by him in the same manner that county taxes are collected. In case the township clerk shall fail or neglect to make such return, he shall forfeit and pay to the township for road purposes a sum equal to the amount of tax on said land, which may be collected by an action on his bond. [26 G. A., ch. 43; C.'73, § 975; R., § 898.]

Irregularities in the making of returns by the township clerk, or in the manner of placing the taxes upon the treasurer's books, will not render the tax invalid: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153, 177; *Iowa R. Land Co. v. Sac County*, 39–124; *Same v. Carroll County*, 39–151, 154.

SEC. **1543. Taxes paid to clerk.** The county treasurer shall, on the last Monday in April and October in each year, pay to the township clerk all the road taxes belonging to his township which are at such time in his hands, taking the duplicate receipts of such clerk therefor, one of which shall be delivered by the treasurer to the trustees on or before the first Monday in May and November in each year. [22 G. A., ch. 45; C.'73, § 976; R., § 910.]

These taxes when collected become no part of the county fund and cannot be appropriated or disbursed by the county. If illegally collected, they cannot be refunded to the taxpayers out of the county revenue, and the county is not liable in an action for their recovery: *Stone v. Woodbury County*, 51–522.

The clerk may maintain an action for funds belonging to his township in the hands of third persons. If he deposits the funds in his individual name without notice to the banker of their character, such act amounts to conversion and the deposit belongs to him individually, and if seized by garnishment process under attachment on his individual debt, without notice as to the character of the fund, they cannot be recovered back: *Long v. Emsley*, 57–11.

The township clerk is the proper party to bring suit on the supervisor's bond for failure to account for taxes. Such duty does not pertain to the trustees: *Wells v. Stomback*, 59–376; *Keller v. Bare*, 62–468.

Road taxes collected by the county treasurer and paid over to the township clerk, except as far as they belong to the general fund, are to be distributed in the same manner as other road taxes, without any special action of the township trustees: *Henderson v. Simpson*, 45–519.

A road supervisor who fails to pay over the proportion of the road taxes collected by

him, which has been by the trustees apportioned to the general fund, is liable therefor in an action on his bond, although he may have expended for road purposes all the money collected by him: *Wells v. Stomback*, 59–376.

SEC. **1544. Road taxes apportioned.** The county auditor shall provide a column in the tax list, in which shall be shown the road districts to which the road taxes belong, and the treasurer, when he pays the same to the several township clerks, shall furnish each a statement, showing the district or districts to which the money belongs, and the amount to each. [18 G. A., ch. 36.]

SEC. **1545. Supervisor—qualification.** Each road supervisor shall give bond in such sum and with such security as the township clerk may require (but in no case shall a township trustee sign such bond as surety), conditioned that he will faithfully and impartially perform all the duties required of him, and devote all moneys that may come into his hands by virtue of his office, according to law. If a vacancy occurs in any road district, the clerk shall fill the same by appointment, but no person shall be required to serve as such supervisor who is exempt from performing labor on the roads. [16 G. A., ch. 167; C. '73, §§ 977–8; R., §§ 881, 884.]

The township trustees may redistrict the township, and if by such redistricting the supervisor of the district becomes a resident of another district than that for which he was elected, his office becomes vacant: *Mauck v. Lock*, 70–266.

A supervisor is subject to the same liability for improper or careless exercise of his powers as a city or town is in relation to its streets; and *held*, that he was personally liable for damages to an adjacent land owner resulting from the diversion of a stream of water from his land, by reason of alteration in the highway made by the supervisor: *McCord v. High*, 24–336.

A road supervisor may be guilty of trespass in removing an obstruction, as, for instance, a dwelling-house, if the act is not done for the purpose of opening the highway, but for the malicious purpose of injuring the owner: *Wilding v. Hough*, 37–446.

As incorporated towns are given power to provide for grading and repairing their streets, they must have control over such streets, and the road supervisors and township trustees have no power over them: *Clark v. Epworth*, 56–462.

A road supervisor may be restrained by injunction from repairing the highway in such a manner as to interfere with the rights or wishes of an adjoining owner: *Bills v. Belknap*, 36–583.

Further as to removing shade-trees, see § 1556.

The trustees have no authority to receive the taxes collected by the supervisor and are not the proper parties to bring suit on his bond for failure to account for such taxes. Such suit should be brought by the clerk: *Keller v. Bare*, 62–468.

SEC. **1546. Notice to—penalty for refusing to serve.** Within five days after his election or appointment, the township clerk shall notify the road supervisor elected or appointed thereof, and if he shall fail to appear and qualify, as required by law, he shall forfeit and pay the sum of five dollars, and in case of refusal to pay the same his successor shall collect it by action, and apply the same to the repairing of roads in his district. [C. '73, § 979; R., § 883.]

SEC. **1547. Posting tax list.** The road supervisor shall, within ten days after receiving the tax list, post up in three conspicuous places within his district written notices of the amount assessed to each taxpayer in said district. [C. '73, § 980; R., § 894.]

SEC. **1548. How tax expended.** The road supervisor shall cause all taxes collected by him to be expended for road purposes on or before the first day of November of that year, seventy-five per cent. of which shall be expended before the fifteenth day of July, except the portion set apart for a general township fund, which shall be by him paid over to the township clerk from time to time as collected, and his receipt taken therefor. [26 G. A., ch. 43; C. '73, § 981.]

A road supervisor who fails to pay over the proportion of the road taxes collected by him, which has been by the trustees apportioned to the general fund, is liable therefor in an action on his bond, although he may have expended for road purposes all the money collected by him: *Wells v. Stomback*, 59–376.

SEC. **1549. In each district.** The money tax levied upon the property in each district, except that portion set apart as a general township fund, whether collected by the road supervisor or county treasurer, shall be expended for road purposes in that district only. [C. '73, § 982; C. '51, § 578.]

Road tax collected by the county treasurer and paid over to the clerk, except so much thereof as belongs to the general fund (under § 1528), is to be distributed in the same manner as other road tax, without any special action of the trustees: *Henderson v. Simpson*, 45–519.

The supervisor is the collector of the road tax, and is not required to pay any part of it to the township clerk except the portion set apart as a general fund. The balance must be expended for highway purposes in the road district in which it was levied, and no part of it shall be expended for the benefit of another district: *Bradley v. Love*, 76–397.

Each road district is required to keep up and repair its own roads, except that tools, scrapers, etc., are owned and controlled by the township at large: *Ibid.*

One district cannot be compelled to expend its tax indirectly in another district, and therefore orders issued in pursuance of § 1567 are not payable out of the general fund of the whole township, but only out of the funds of the particular district on account of which they are issued: *Ibid.*

SEC. **1550. Who to perform labor.** The road supervisor shall require all able-bodied male residents of his district, between the ages of twenty-one and forty-five, to perform two days' labor upon the roads, between the first days of April and September of each year. [C. '73, § 983.]

SEC. **1551. Notice of time and place—receipts.** The road supervisor shall give at least three days' notice of the day or days and place to work the roads to all persons subject to work thereon, or who are charged with a road tax within his district, and all persons so notified must meet him at such time and place, with such tools, implements and teams as he may direct, and labor diligently under his direction for eight hours each day; and for such two days' labor the supervisor shall give to him a certificate, which shall be evidence that he has performed such labor on the public roads, and exempt him from performing labor in payment of road poll tax in that or any other road district for the same year. The road supervisor shall give any person who may perform labor in payment of his road tax a receipt, showing the amount of money earned by such labor, which shall be evidence of the payment of said tax to the amount specified in the receipt. [C. '73, § 984; R., §§ 886, 896; C. '51, § 588.]

A failure to notify the taxpayer to work out the portion of his tax which may be paid in work will not authorize the restraining of the collection of the entire tax: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168, 177.

A man who is not able-bodied is not liable to the penalty for not appearing to work on the highway when summoned. The fact that he does not make known his condition when summoned, or sends a substitute who is rejected as incompetent, will not deprive him of the benefit of his exemption: *Martin v. Gadd*, 31–75.

SEC. **1552. Penalty for failure to attend or work.** Each person liable to perform labor on the roads as poll tax, who fails to attend, either in person or by satisfactory substitute, at the time and place directed, with the tools, implements or teams required, having had three days' notice thereof, or, appearing, shall spend his time in idleness, or disobey the road supervisor, or fail to furnish him, within five days thereafter, some satisfactory excuse for not attending, shall forfeit and pay him the sum of three dollars for each day's delinquency; and in case of failure to pay such forfeit within ten days, he shall recover the same by action in his name as supervisor, and no property or wages belonging to such person shall be exempt from execution therefor. Such action shall be before any justice of the peace in the proper township. The money, when collected, shall be expended on the public roads. [16 G. A., ch. 21; C. '73, § 985; R., § 887.]

SEC. **1553. Compensation of supervisor.** The road supervisor shall be allowed the sum of two dollars per day for each day's labor, including the time necessarily spent in notifying the hands and making out his returns, which sum shall be paid out of the road fund, after deducting his two days' work. When there is no money in the hands of the clerk with which to pay

him, he shall be entitled to receive a certificate for the amount of labor performed, which shall be received in payment of his own road tax for any succeeding year. [20 G. A., ch. 200, § 3; C.'73. § 986; R., § 888; C. '51, § 2547.]

When there is no money in the hands of the clerk with which to pay the supervisor his compensation for labor he is not entitled to an order on the township fund payable out of such fund when collected in the future, but only the certificate which may be used by him in the payment of his taxes. It is only for expenses incurred by the supervisor that he is entitled to an order payable out of funds to be collected in the future; *Howegler v. Greiner*, 89-476.

SEC. **1554. Report.** The supervisors of the several districts of each township shall report to the township clerk on the first Monday of April and November of each year, which report shall embrace the following items:

1. The names of all persons in his district required to perform labor on the public road, and the amount performed by each;
2. The names of all persons against whom actions have been brought, and the amount collected of each;
3. The names of all persons who have paid their property road tax in labor, and the amount paid by each;
4. The names of all persons who have paid their property tax in money, and the amount paid by each;
5. A correct list of all lands and town lots belonging to nonresidents of the district on which the road tax has been paid, and the amount paid by each;
6. A correct list of all lands and town lots belonging to nonresidents of the district on which the road tax has not been paid, and the amount on each piece;
7. The amount of all moneys coming into his hands by virtue of his office, and from what sources;
8. The manner in which moneys coming into his hands have been expended, and the amount, if any, in his possession;
9. The number of days he has been employed in the discharge of his duty;
10. The condition of the roads in his district, and such other items and suggestions as he may wish to make, which report shall be signed and sworn to by him, and filed by the township clerk in his office. [26 G. A., ch. 43; C. '73, § 987; R., § 897; C. '51, § 580.]

SEC. **1555. Tax certified and collected.** If it appears from such report that any person has failed to perform the two days' labor required, or any part thereof, and that the road supervisor has neglected to collect the amount in money required to be paid in case of such failure, the clerk shall add the amount required to be paid to such person's property tax, and certify the same to the auditor, who shall enter it on the proper tax list, and the treasurer shall collect the same. [C. '73, § 988.]

SEC. **1556. Shade trees—timber—drainage.** The road supervisor shall not cut down or injure any tree growing by the wayside which does not obstruct the road, or which stands in front of any town lot, inclosure or cultivated field, or any ground reserved for any public use, and shall not enter upon any lands for the purpose of taking timber therefrom without first receiving permission from the owner or owners of said lands, nor destroy or injure the ingress or egress to any property, or turn the natural drainage of the surface water to the injury of adjoining owners; but it shall be the duty of the supervisor to use strict diligence in draining the surface water from the public road in its natural channel, and to this end he may enter upon the adjoining lands for the purpose of removing obstructions from such natural channel that impede the flow of such water. [26 G. A., ch. 49; 21 G. A., ch. 87, § 1; 16 G. A., ch. 28, § 1; C. '73, § 989; R., § 901; C. '51, § 587.]

Shade trees which do not obstruct the highway, and the removal of which is not necessary to properly improve it, are not to be removed in opposition to the wishes of an adjoining owner on whose portion of the highway the trees are growing: *Bills v. Belknap*, 36-583; *Everett v. Council Bluffs*, 46-66.

Shade trees at the side of the highway which would not obstruct or interfere with the traveled track, if it were located in the middle of the highway, should be permitted to stand: *Quinton v. Burton*, 61-471.

Where a hedge was planted after a highway was in use, and for the purpose of fencing between a field and the highway, *held*, that the planting and maintenance of the hedge amounted to a dedication of the land outside of the hedge for the purpose of the highway, although at the time the hedge was planted a fence for its protection wa maintained outside of the hedge: *Ibid.*

So long as shade trees do not obstruct the road and prevent its use, they should not be removed against the wishes of the owner: *Crismon v. Deck*, 84-344.

This section was designed to protect the owner in the use and enjoyment of his property, and prevent interference on the part of the road supervisor; but it is not intended to prevent necessary improvements in the highway, where they can be made without material injury to the adjacent property, even though some inconvenience might result to the owners of such property: *Randall v. Christiansen*, 76-169.

A supervisor is not to be held liable for treble damages under § 4306 for cutting down trees in the highway where it does not appear that the act was wanton and without reasonable excuse: *Werner v. Flies*, 91-146.

SEC. **1557. Liability for unsafe bridge or highway.** When notified in writing that any bridge or portion of the public road is unsafe, the road supervisor shall be liable for all damages resulting therefrom, after allowing a reasonable time for repairing the same. If there is in his district any bridge erected or maintained by the county, he shall, on receiving written notice of its unsafe condition, obstruct the passage thereon, and notify at least one member of the board of supervisors, in writing, of its condition. If he fails to obstruct and notify, he shall be liable for all damages growing out of the unsafe condition thereof, occurring after the time he is so notified and while he neglects to obstruct such passage. Any person who shall remove such obstruction shall be liable for all damages occurring to any person resulting therefrom, but nothing herein contained shall be construed to relieve the county from liability for the defects of said bridge. [17 G. A., ch. 52; C.'73, § 990; R., 902; C.'51, § 582.]

The road supervisor is required to build only such bridges as can be built from the limited means at his disposal. Other bridges are to be deemed county bridges: *Casey v. Tama County*, 75-655.

The degree of care required of a road supervisor in constructing a bridge is ordinary and reasonable care: *Gould v. Shermer*, 70 N. W., 697.

It is a question of fact for the jury to determine whether to construct a bridge without railings or barriers is negligence in view of its construction and the use to which it is put: *Ibid.*

It is not the duty of the supervisor to build bridges requiring a large expenditure of money, nor is he liable for failure to keep such bridges in repair when such repair would involve a considerable expense. Such matters are under the control of the board of supervisors: *Wilson v. Jefferson County*, 13-181. And see § 422 ¶ 18.

A highway supervisor, who in constructing a bridge violated the terms of the grant in pursuance of which the original bridge had been constructed, *held*, to be affected with notice of the terms of such grant, and liable in damages: *Ague v. Seitsinger*, 85-305.

SEC. **1558. Extraordinary repairs.** For making such repairs as are required in the preceding section, the road supervisor may call out any or all of the able-bodied men of the district in which they are to be made, but not more than two days at one time without their consent, and persons so called out shall be entitled to receive a certificate from him of the number of days' labor performed, which shall be received in payment for road tax for that or any succeeding year, at the rate per day established for that year. [C.'73, § 991; R., § 903; C.'51, §§ 583, 586.]

Where a township trustee borrowed money with which to repair the highways in his district, *held*, that such transaction was illegal, and the fact that the township used the highways, and thus received and enjoyed the benefits which the use of the money conferred, would not render the township liable: *Cass County Bank v. Conrad*, 81-482.

SEC. **1559. Penalty.** Any able-bodied man, duly summoned, who fails to appear and labor by himself or substitute, or send satisfactory excuse

therefor, or pay the value thereof in money before an action is brought, shall forfeit and pay ten dollars, to be recovered in an action in the name of the road supervisor, and for the use of the road fund of the district. [C.'73, § 992; R., § 904; C. '51, § 585.]

A man not able-bodied is not liable to the penalty here prescribed. The fact that he does not make known his condition when summoned, or sends a substitute who is rejected as incompetent, will not deprive him of the benefit of his exemption: *Martin v. Gadd*, 31–75.

SEC. **1560. Obstructions removed.** The road supervisor shall remove all obstructions in the roads, but must not throw down or remove fences which do not directly obstruct travel, until notice in writing, not exceeding six months, has been given to the owner of the land inclosed in part by such fence. [C. '73, § 993; R., § 905; C. '51, § 594.]

Notice: The statutory provision as to notice regarding removal of obstructions is applicable in case of obstructions placed in a highway after it is opened, and a fence directly obstructing travel cannot be thrown down without notice, although the party maintaining it may be liable to indictment for obstructing the highway: *Mosier v. Vincent*, 34–478.

Where a highway has been laid out but not yet opened, a person has not the right to take the law into his own hands and force his way over the land against the will of the owner; and *held*, that the act of such owner in forcibly opposing a person riding through his land under such circumstances did not constitute an assault: *State v. Stoke*, 80–68.

The reasonable notice required to be given by a supervisor in case of opening a highway is such notice and for such a length of time as, under all the facts and circumstances of the case, is reasonably proper to enable the party notified to perform the act which the notice is intended to give him opportunity to perform, and in the ordinary manner. It need not be six months in all cases: *Blackburn v. Powers*, 40–681.

The verdict in a particular case finding that a notice of three days for the removal of a fence was sufficient notice, *held*, not reversible error in the absence of the evidence on which the jury acted: *Mosher v. Vincent*, 39–607.

The notice here required is for the benefit of the land owner. One who seeks to hold the supervisors liable in damages for not having opened the road as required cannot complain if the notice to the land owner allows the full six months for opening the road: *Cook v. Gaylord*, 91–219.

Obstruction: The obstructions which the supervisor is authorized to remove in opening the highway are obstacles, impediments, or hindrances, or anything impeding progress thereon. They need not be such as to render the highway impassable: *Patterson v. Vail*, 43–142.

The supervisor may be compelled by *mandamas* to perform the duty of opening the highway as required by statute: *Ibid.*; *Larkin v. Harris*, 36–93.

Proof of a mutual mistake as to the line of a highway, as used, by which it varies from that intended, and that an obstruction in the highway, as used, is an attempt to correct such mistake, will make the obstruction legal: *State v. Crow*, 30–258.

If the right to use a way is acquired by the public, but its nature is such that the right cannot be exercised on account of natural obstacles, a person cannot be held guilty of the crime of obstructing such highway, as it cannot be said that the public are by his acts prevented from using it: *State v. Shinkle*, 40–131.

A party cannot be prevented by injunction from closing or obstructing a highway that is in such condition that it cannot be used by the general public: *Prince v. McCoy*, 40–533.

But where a highway was impassable as laid out, by reason of standing timber, and a track was used for the period of prescription, crossing the highway at different points, *held*, that the existence of such natural obstruction in the highway as laid out would not excuse the obstruction of the traveled track, whether upon the established highway or upon the line used by prescription: *State v. McGee*, 40–595.

Relief against unlawful obstruction: Equity will afford relief to one specially injured by the erection of an obstruction upon a highway, by directing and requiring its removal and enjoining its continuance. Such obstructions are public nuisances and will be abated and enjoined by a court of equity at the suit of a party agrieved thereby: *Houghan v. Harvey*, 33–203.

An unlawful obstruction of a public highway is a public nuisance not generally actionable, and a private person has a right of action only when he suffers an injury distinct from the public as a consequence of the wrongful act: *Ingram v. Chicago, D. & M. R. Co.*, 38–669.

A party does not, in an action for *mandamus*, show himself entitled to have a public highway opened by showing that such highway is located near his lands and that the public travel is upon his lands and not upon the highway. It would not follow that such travel would be upon the highway even if opened: *Moon v. Cort*, 43–503.

Criminal obstruction: The land owner is not liable to indictment for obstructing the highway by reason of his not removing fences where a newly established highway crosses his land, at least until he has had reasonable notice from the supervisor to do so: *State v. Ratliff*, 32–189.

Failure to remove an obstruction placed in a highway by another, for instance by a former owner, does not, at least in the absence of notice, constitute the offense of obstructing a highway: *State v. Robinson*, 52–228.

SEC. **1561. Condition—guide-boards.** The road supervisor shall keep the roads in as good condition as the funds at his disposal will permit, and shall place guideboards at cross roads and at the forks of the roads in his district, which shall be made out of good timber, well painted and lettered, and placed upon good substantial hard-wood posts, to be set four feet in, and at least eight feet above, ground. [C.'73, § 994; R., § 907; C.'51, § 577.]

While the public have a right to the full width of the highway they cannot use it so as to injure adjoining property, and if the construction of a bridge at one side of the road would cause injury to the property on that side the supervisor may be required to build it in the center of the highway: *Quinton v. Burton*, 61-471.

The judgment of the road supervisor must govern as to the construction, etc., of the highway, and no one has a right to make a material change in his plans without being guilty of defacing the highway within the meaning of the statute (§ 4808): *State v. Hunter*, 68-447.

The acts of a supervisor in the exercise of his ministerial duties in the construction of bridges, etc., are subject to control by an action to enjoin the improper exercise of his powers: *Quinton v. Burton*, 61-471.

Threatened illegal action of a supervisor in opening a highway, removing fences, interfering with water-courses, etc., in the discharge of his official duty, may be restrained by injunction: *Bolton v. McShane*, 67-207.

SEC. **1562. Canada thistle.** The road supervisor, when notified in writing that any Canada thistles or any other variety of thistles are growing upon any lands or lots within his district, vacant or owned by nonresidents, the owner, agent or lessee of which is unknown, shall cause the same to be destroyed, and make return in writing to the board of supervisors of his county, with a bill for his expenses or charges therefor, which in no case shall exceed two dollars per day for such services, which shall be audited and allowed by said board and paid from the county fund, and the amount so paid shall be entered up and levied against the lands or lots on which said thistles have been destroyed, and collected by the county treasurer the same as other taxes, and returned to the county fund. [24 G. A., ch. 45; C. '73, § 995.]

SEC. **1563. Russian thistle.** No owner or occupant of any land or lots, or corporation or association of persons owning, occupying or controlling land as right of way, depot grounds or other purposes, or public officer in charge of any street or road, shall allow to grow to maturity thereon the Russian thistle or salt wort (*salsoli kali*, variety *tragus*). It shall be the duty of every person or corporation so owning, occupying or controlling lands, lots or other real property, or any road supervisor or other public officer having charge of any street or road, to cut, burn or otherwise entirely destroy such thistle growing on said premises, right of way, road or street, before the same shall bloom or come to maturity; and any person, corporation or public officer neglecting to destroy all such thistles as aforesaid, after receiving notice in writing of their presence, shall be deemed guilty of a misdemeanor and be punished accordingly. It shall be the duty of any person knowing of the presence of Russian thistles upon any premises, lands, lots, street, roads or elsewhere, at any time after the first day of July, to give notice in writing to the owner, occupant, or person or corporation in possession or control thereof, and if not destroyed by such owner or occupant or person in possession in proper time to prevent maturity, to give notice in writing immediately to any member of the board of trustees of the township in which the said thistles are growing; or if within a city or town, then to give notice in writing to the mayor, recorder or clerk thereof; who shall within five days after the receipt of said notice cause their total destruction, the costs thereof, together with the costs of serving notice, to be paid out of the county fund upon the certificate of the township trustees or the council, as the case may be, to the board of supervisors; which board shall cause the sum so paid to be levied as a special tax against the premises upon which the thistles are growing, and against the person or corporation owning or occupying the same; which amount shall be collected by the county treasurer as other taxes, and paid into the county fund. Where

township trustees have received notice, as aforesaid, of the presence of such thistles upon lands owned by the United States or this state, it shall be their duty to cause their destruction, and the costs thereof, upon proper certificate of the amount, shall be paid out of the county fund. [26 G. A., ch. 78; 25 G. A., ch. 91, §§ 1–3.]

SEC. **1564. Information—bulletin.** A bulletin shall be prepared by the professor of agriculture of the agricultural college, briefly describing by words and cuts the Russian thistle, with the best known means of staying its progress and effecting its extermination, which shall be printed by the state printer at public expense, from time to time, in such numbers as the secretary of state and said professor of agriculture may direct to supply the demand. A sum of money sufficient to pay for the cost of printing and making suitable plates for illustrating said bulletin is hereby appropriated from any funds in the state treasury not otherwise appropriated. [25 G. A., ch. 91, § 4.]

SEC. **1565. Distribution.** The secretary of state shall furnish to the agricultural college such number of said bulletins as it may desire to circulate, and also to county auditors, on their requisition, such number as may be necessary to supply all township and town or city officers with copies, and a sufficient number to distribute to all farmers desiring the same. [Same, § 5.]

SEC. **1566. Settlement with supervisor.** The road supervisor shall, on the first Monday in November, meet the township trustees, at which time there shall be a settlement of their accounts connected with the road fund, and after payment the trustees may order such distribution of the fund remaining in the hands of the township clerk as may be expedient for road purposes, which shall be paid out as ordered by them. [26 G. A., ch. 43; C.'73, § 996; R., § 909.]

The fund here referred to is the balance of the general fund provided by the trustees under § 1529, and does not include moneys coming into the clerk's hands from the county treasurer as taxes collected by the latter, except so far as such moneys properly belong to the general fund: *Henderson v. Simpson*, 45–519.

The clerk is the proper party to bring suit on the supervisor's bond for failure to account for taxes: *Keller v. Bare*, 62–468.

The authority conferred by this section relates to the distribution of the general township fund: *Cass County Bank v. Conrad*, 81–482.

SEC. **1567. Orders issued.** If upon this final settlement there is no money in the treasury, the trustees shall direct the township clerk to issue orders for the amount due them. The orders so issued shall be numbered with that of the district to which they belong, and shall be received in payment of road tax in the district to which they are issued. [C.'73, § 997.]

Such orders are payable in money out of the general township fund. If such fund is not sufficient, the trustees may be compelled to levy a tax for their payment. The provision that they are receivable in payment of highway tax is merely an aditional method of payment, and the supervisors cannot be compelled to secure payment in that way: *Tobin v. Township of Emmetsburg*, 52–81.

The orders here authorized are not payable out of the general fund. The holder may use them in payment of road taxes or wait until such time as there are funds on hand belonging to the respective districts, with which they may be paid: *Bradley v. Love*, 76–397.

This section relates to the district fund and if the supervisor has incurred expenses for guide boards and other proper purposes out of such fund he is entitled to an order to be paid therefrom when collected. But he is not entitled to such an order out of the district fund for his per diem under § 1553 as amended: *Howeyler v. Greiner*, 89–476.

SEC. **1568. Neglect of duty—penalty.** A supervisor failing to perform the duties required of him by this chapter shall forfeit and pay, for the use of the road fund of his district, the sum of ten dollars, to be collected by an action by the township clerk in his name. [C.'73, § 998; R., § 900.]

SEC. **1569. Turning to right.** Persons on horseback or vehicles meeting each other on the public roads shall give one-half of the same, turning to the right. A failure in this regard shall make the delinquent liable for

all damages resulting therefrom, together with a fine not exceeding five dollars, which fine shall be devoted to the repair of the roads in the district where the violation occurred, but no prosecution shall be instituted except on complaint of the person wronged. [C.'73, § 1000; R., § 908.]

A person meeting another is entitled to one-half the full width of the highway, but it does not follow that in all cases where two persons approach each other on the highway with the intent of passing, it is the duty of each to use only the part of it which is on his right of the center, and if either should pass the other on the left of such line he would violate the statute. It is only in the case of meeting that the parties are to turn to the right. Either party has the right to use any portion of the highway not occupied or desired for the use of another: *Riepe v. Elting*, 89–92.

The general rule seems to be that where the collision occurs between the horse or vehicle of the person on the wrong side of the road and that of the person coming toward him the presumption is that it is caused by the negligence of the person who is on the wrong side, but his presence on that side may be explained and justified. Therefore where two persons on horseback heard a vehicle coming toward them in the darkness and separated one going to the left hand side of the road so far out of the way that under ordinary circumstances there would be ample room for the vehicle to pass but his horse was struck by the shafts of the vehicle and killed, *held*, that the rider of the horse was not in the wrong in such sense as to defeat recovery for the injury: *Ibid.*

SEC. **1570. Trimming hedges.** Owners of osage orange, willow, or any other hedge fence along the public road, unless the same shall be used as a wind-break for orchards or feed lots, shall keep the same trimmed, by cutting back within five feet of the ground at least once in every two years, and burn or remove the trimmings so cut from the road.

Upon a failure to comply with the foregoing provision, the road supervisor shall immediately serve notice in writing upon the owner of the hedge to trim the same, and if he fails to do so for sixty days thereafter, such supervisor shall cause the same to be done at a cost not exceeding forty cents per rod, which shall be paid for out of the road fund, and make return thereof to the township clerk, who shall, in certifying the lands upon which the road tax has not been paid, include the lands along which the hedge has been trimmed, together with the amount paid therefor, which shall be collected by the county treasurer in the manner other county taxes are collected.

Where the one district system is adopted as provided in this chapter, it shall be the duty of the township trustees to enforce the foregoing provisions. [26 G. A., ch. 48; 25 G. A., ch. 88, §§ 1, 2; 24 G. A., ch. 40.]

SEC. **1571. Steam engines on roads.** Whenever any engine driven in whole or in part by steam power is being propelled upon a public road, or is upon the same, the whistle thereof shall not be blown, and those having it in charge shall stop it one hundred yards distant from any person or persons with horses or other stock in or upon the same, and at a greater distance away if they exhibit fear on account thereof, until they shall have passed it, and a competent person shall be kept one hundred yards in advance of such engine to assist in any emergency arising from frightened animals, and to prevent accidents. In crossing any bridge or culvert in the public road, or plank street-crossing in any city or town, four sound strong planks not less than twelve feet long, each one foot wide and two inches thick, shall be used, by placing and keeping continuously two of them under the wheels. A failure to comply with either of the provisions of this section shall be a misdemeanor, and, in addition, all damages sustained may be recovered in a civil action against the violator, and in no case shall the county be liable for damages occurring to any engine or separator. [25 G. A., ch. 21, §§ 1, 2; 24 G. A., ch. 68, §§ 1–4.]

Sec. 1571

The requirement that a man is to be kept in front of the engine should not be construed to require that he shall always be in advance, and he should render assistance as to approaching teams from whichever direction they may come. The object of the statute is to make safe the passing of teams: *State v. Kowolski*, 65 N. W., 306.

The duty of keeping the man on the lookout is imperative and its disregard is a violation of the law: *Ibid.*

The statutory obligation to stop the en-

gine on the approach of a team is applicable to a team approaching from either direction and is not excused by the fact that the steam engine is in such condition that it cannot be stopped without risk of stalling: *Ibid.*

The failure to do the various acts required by this statute may be conjunctively charged in one indictment: *Ibid.*

There is no provision for the punishment of the violation of these requirements except on the part of the owner of such engine: *State v. Orr*, 89-613.

CHAPTER 3.

OF FERRIES AND BRIDGES.

SECTION **1572. Bridges—width.** Bridges erected or maintained by the public constitute parts of the road, and must not be less than sixteen feet in width. [C. '73, § 1001; R., § 822.]

Boards of supervisors have power to provide for the erection of bridges only on public highways where the use of the land has been secured in the manner provided by law, and are not authorized to erect bridges over navigable waters unless such power is expressly conferred by statute: *Snyder v. Foster*, 77-638.

Bridges are a part of the highway: *Brown v. Jefferson County*, 16-339; and are therefore under the general supervision of the board of supervisors, under § 1482. They can not be compelled by *mandamus* to build: *State v. Morris*, 43-192.

As to liability of county for defects in county bridges, etc., see notes to § 422, ¶ 18.

The statutory provision as to the width of bridges is not to be construed to mean that a bridge is not required to be constructed under any circumstances more than sixteen feet in width. If the circumstances require that it shall be of greater width, and it is so constructed, the liability for defects therein will not be limited to sixteen feet but extend to the whole width: *Rusch v. Davenport*, 6-443.

The act of a board of supervisors in contracting for a bridge of less than the statutory width, though erroneous, is not void, and such error will not defeat a recovery by the other parties to the contract in an action thereon: *Mallory v. Montgomery County*, 48-681.

Bridges in a public highway ought to be broad enough to permit all farm machinery to be drawn over them, and for the passage of all vehicles and machinery in use which are drawn upon the public highways: *Quinton v. Burton*, 61-471.

The trustees have no authority to fix the width of a bridge at less than sixteen feet. *Gould v. Schermer*, 70 N. W., 697.

Whether the use of a bridge by one who causes a steam engine and heavy machinery to pass over it is such negligence or improper use as to prevent a recovery by him for injury done due to the breaking down of the bridge is a question for the jury. *Yordy v. Marshall County*, 86-340.

SEC. **1573. Fast driving.** Any person riding, except on bicycles, or driving, faster than a walk, across any bridge maintained at the public charge, shall be subject to pay the following penalties: When the bridge is twenty-five feet in length and does not exceed one hundred, the sum of one dollar for each offense; when over one hundred and not exceeding two hundred feet, the sum of three dollars; when over two hundred and not exceeding three hundred feet, the sum of five dollars; and the further additional sum of one dollar for each offense for every hundred feet in length in excess of three hundred, to be recovered by civil action in the name of and for the county in which the bridge is situated. If the bridge is situated in more than one county, the action is maintainable in or by either. [C. '73, § 1002; R., § 823.]

SEC. **1574. Toll bridges—how established.** The board of supervisors may grant licenses for the erection of toll bridges across any water courses or other obstruction which justifies the establishment thereof, and which will require an expense too large for the county to bear. In granting such licenses, preference shall be given to the owner of the land on which the bridge is proposed to be located, if he applies for the privilege and is, in other respects, a competent person to erect the same. [C. '73, § 1003; R., § 1214; C. '51, § 726.]

If a person is given authority or license from the county to erect a toll-bridge, his failure to compensate the land owner for damages sustained on account of the property taken for the purpose of such erection would not warrant the land owner in tearing down and removing the bridge so erected. The remedy to the land owner would be complete and ample by legal proceedings: *Beebe v. Stutsman*, 5-271.

SEC. **1575. License—right of way.** When any corporation or individual shall obtain from the board of supervisors license for the construction of a toll bridge across any of the streams of this state, such corporation or individual may take and appropriate so much private property as shall be necessary for a right of way therefor and all approaches thereto, in such width as such corporation or individual may desire, not exceeding sixty feet. [C.'73, § 1004.]

SEC. **1576. Damages assessed.** If the owner of property over which such way extends shall refuse to grant the same, and the damages therefor cannot be settled by agreement, all damages which the owner, or any person having an interest in or improvement upon the property to be taken, will sustain by reason of the appropriation thereof shall be assessed and the right of way taken on the application of either party, under the provisions of this code for taking private property for works of internal improvement. [C.'73, § 1005.]

SEC. **1577. Between different counties or states.** Where the extremities of the bridge lie in different counties, a license must be procured from each, and if different rates of toll are fixed by the different boards of supervisors, each has power to fix the rates of travel which is going from its own county. A similar principle shall be observed where only one of the extremities of the bridge is within this state. [C.'73, § 1006; R., § 1216; C.'51, § 728.]

SEC. **1578. Limitation of license—tolls.** Such licenses may be granted to continue for any period, not exceeding twenty-five years, and the rate of toll may be fixed in the first instance in such a manner as to be inalterable within any stipulated period, not exceeding ten years; after that time, it shall be under the control of the board of supervisors. [C.'73, § 1007; R., § 1217; C.'51, § 729.]

SEC. **1579. Exclusive privilege.** The board of supervisors may stipulate in the license that no other bridge or ferry shall be permitted across the same stream or obstruction within any distance not exceeding two miles thereof, and for a period not exceeding ten years. Any violation of the terms of such stipulation is a nuisance, and the person causing it is guilty of a misdemeanor. [C.'73, § 1008; R., § 1218; C.'51, § 730.]

SEC. **1580. Failure of duty.** When, upon ten days' notice to the person licensed, it is made to appear to the board of supervisors that he fails in any material manner to perform his duties according to law, it may revoke his license. [C.'73, § 1009; R., § 1212; C.'51, § 724.]

SEC. **1581. Day or night—rate of toll.** Toll bridges must be regulated so as to allow persons to pass at all hours of the night or day, but the board of supervisors, in its discretion, in fixing the rates of toll, may permit a greater charge to be made during certain hours of the night. [C.'73, § 1010; R., § 1222; C.'51, § 734.]

SEC. **1582. Railway bridges across boundary rivers.** Any railway or bridge company incorporated under the laws of the state, or of Wisconsin, Illinois, Nebraska, Kansas or South Dakota, may construct a railway bridge across the Mississippi, Missouri or Big Sioux river, connecting with the eastern or western terminus, as the case may be, of any railway terminating on the Iowa bank of either of said rivers, at such place as shall be designated therefor by the board of supervisors of the county wherein such terminus is made, and extending toward a point on the opposite bank that may be selected by such company. [C.'73, § 1031.]

SEC. **1583. Plan to be approved.** No bridge shall be built under the provisions of the preceding section, until the plan thereof has been submitted to and approved by the board of supervisors of the county in which the bridge is to be partly located. [C.'73, § 1032.]

SEC. **1584. For teams and passengers—toll.** Any such company may, with the consent of the board of supervisors, construct such bridge with suitable roadways and footways for teams and foot passengers, and

charge such rates of toll therefor as may be approved by said board. [C. '73, § 1033.]

SEC. **1585. Railway ferry.** Any such company may establish a ferry across any of said rivers at or near the terminus of its road, for the sole purpose of crossing the freight and passengers of such roads until the bridge is ready for use. [C. '73, § 1034.]

SEC. **1586. Obstruction of navigation.** No bridge erected under the provisions of this chapter shall be so located or constructed as to unnecessarily impede, injure or obstruct the navigation of said rivers. [C.'73, § 1035.]

SEC. **1587. Bonds and stock.** Any such company may issue its bonds or obligations for an amount not exceeding the cost of such bridge, and of its roads in the state, and may secure the payment thereof by a mortgage on the same, and issue certificates of common and preferred stock; the preferred stock to be only on condition that the holders of the common stock give their written consent thereto. [C.'73, § 1036.]

SEC. **1588. Resident director—process.** Any company acting under the provisions of this chapter shall elect at least one director who shall be a citizen of and reside in this state, and such company shall be liable to be sued in any court of competent jurisdiction, and service of original notice on said resident director shall be sufficient notice to the company of the pendency of the action. [C. '73, § 1037.]

SEC. **1589. Ferries—license.** The board of supervisors may grant such ferry licenses as may be needed within its county, for a period not exceeding ten years, and prescribe the rates of ferriage, as well as the hours of the day or night during which the ferry must be attended, both of which may, from time to time, be changed at the discretion of the board. [C.'73, §§ 1011–12; R., §§ 1200–1; C. '51, §§ 712, 713.]

The rights of a riparian owner, at common law and under the statute, in relation to a ferry franchise, discussed; and *held* that a stranger has no right to land ferry-boats upon the soil of such owner, nor can he use a highway laid out across the land of such owner, without compensation to him: *Prosser v. Wapello County*, 18-327; *Prosser v. Davis*, 18-367.

A ferry franchise is not lost by the death of the party to whom it is granted, but passes to his personal representatives: *Lippencott v. Allander*, 27-460.

The revocation of a ferry license by a board of supervisors may be appealed from: *Lippencott v. Allander*, 25-445.

SEC. **1590. Exclusive privilege.** In granting a ferry license, the board of supervisors may make the privilege granted exclusive for a distance not exceeding one mile in either direction from it. After twenty days' notice to the person who has obtained such privilege, if it is made to appear to the board that the public good requires other ferries, a new license may issue therefor. The notice required must be served personally upon the owner, or on the person in charge of the ferry boat. [C.'73, § 1013; R., § 1202; C.'51, § 714.]

Grants of exclusive ferry licenses, even over navigable streams as the Mississippi river are upheld on grounds of public necessity or advantage: *Burlington, etc., Ferry Co. v. Davis*, 48-133; *United States ex rel. v. Fanning*, Mor., 348.

The grant of a ferry franchise necessarily implies the right to exclusive privileges within the prescribed limits: *Phillips v. Bloomington*, 1 G. Gr., 498.

If a ferry license does not purport to confer an exclusive privilege, an exclusive right cannot be inferred: *McEwen v. Taylor*, 4 G. Gr., 532.

The use of a navigable river for a public highway is of paramount importance and will prevail over a privilege granted for a ferry. If the mode of operating the ferry is such as to encroach upon the free navigation of the stream, the owner of the ferry must yield to such free navigation, although the owner of a boat navigating the stream would be liable for any wilful injury done to the ferry: *Steamboat Globe v. Kurtz*, 4 G. Gr., 433.

A person not possessing a franchise may, within the limits of an exclusive franchise granted to the owner of the ferry, transport his own teams and conveyances, for instance, where he is a carrier of the United States mails, but he cannot make such private individual right the medium or cover for carrying passengers whose transportation legally belongs to the owner of the franchise: *Weld v. Chapman*, 2-524.

SEC. **1591. Preference.** In granting a ferry license, preference must be given to the keeper of a previous ferry at the same point, and, if a new one, to the owner of the land; but if there is none such, or if, after giving the same notice as is required by the last section, he fails to make application therefor, or if, in the opinion of the board, he is an improper person to receive the same, it may be conferred on any other proper applicant. [C.'73, § 1014; R., § 1203; C.'51, § 715.]

SEC. **1592. Between different counties.** Where the opposite shores of a stream are in different counties, a license from either is sufficient, and the board of supervisors first exercising jurisdiction by granting a license will retain it during the term of such license. [C.'73, § 1015; R., § 1204; C.'51, § 716.]

SEC. **1593. Between different states.** Where but one shore of the river is within this state, the board of supervisors possesses the same power, so far as it is concerned, as though the river lay wholly within this state. [C.'73, § 1016; R., § 1205; C.'51, § 717.]

In such case the grant of a franchise gives no rights beyond the limits of the state: *Weld v. Chapman*, 2–524; *Burlington, etc., Ferry Co. v. Davis*, 48–133.

SEC. **1594. Bond.** The board of supervisors, upon being satisfied that the requirements of this chapter have been complied with, and that a ferry is needed at such place, and that the applicant is a suitable person to keep it, must grant the license; which, however, shall not issue until the applicant files a bond, with sureties to be approved by the board or auditor, in a penalty not less than one hundred dollars, with the condition that he will keep the ferry in proper condition for use, and attend the same at all times fixed by the board for running it; that he will neither demand nor take any illegal tolls; and that he will perform all other duties which are or may be enjoined on him by law, which shall be filed in the county auditor's office. [C.'73, § 1017; R., § 1207; C.'51, § 719.]

SEC. **1595. Public business—mail.** Every ferryman must transport the public expresses of the United States and of this state, and the United States mail, at all hours. [C.'73, § 1018; R., § 1209; C.'51, § 721.]

A public ferryman is a common carrier and charged with the duties and liabilities of such: *Slimmer v. Merry*, 23–90.

SEC. **1596. License recorded.** All licenses for ferries and toll bridges must be entered upon the records of the board of supervisors, and shall contain the rates of toll allowed. [C.'73, § 1019; R., § 1208; C.'51, § 720.]

SEC. **1597. Posting rates.** The rates of toll must be conspicuously posted up at each extremity of the bridge, or, if a ferry, on the boat, door of the ferry house, or some other conspicuous place near the ferry. [C.'73, § 1020; R., §§ 1210, 1220; C.'51, §§ 722, 732.]

SEC. **1598. Penalty.** The failure to have such list posted up as above provided will justify any person in refusing the payment of tolls, and where such failure is habitual, the proprietor of such bridge or ferry shall be liable to pay a penalty of twenty-five dollars, to be recovered in the name of the county against him, or against him and the sureties on his bond; which amount, when recovered, shall be paid into the county treasury and credited to the school fund. [C.'73, § 1021; R., §§ 1211, 1220; C.'51, §§ 723, 732.]

SEC. **1599. Notice of application.** Before a license can be granted for either a bridge or ferry, notice thereof must be posted up in at least three public places on each side of the river, if both are within the state, and in the township and neighborhood in which the proposed bridge or ferry is to be erected or kept, at least twenty days prior to the making of such application. [C.'73, § 1022; R., §§ 1206, 1219; C.'51, §§ 718, 731.]

SEC. **1600. Penalty for taking illegal toll.** The taking of illegal toll by any licensee shall subject the offender to a penalty of twenty-five dollars for every such offense, to be recovered by action on his bond, or against

him individually, by the person who paid the illegal toll, for his own benefit; or he may bring an action in the name of the county, in which case the proceeds shall go to the county treasury. [C.'73, § 1023; R., § 1236; C.'51, § 748.]

SEC. **1601. Forfeiture.** A failure in other respects to substantially comply with the terms fixed by the board shall work a forfeiture of any of the licenses herein authorized, and shall subject the party guilty of such failure to damages for all injury resulting therefrom, for which he shall be liable on his bond. [C.'73, § 1024; R., § 1237; C.'51, § 749.]

SEC. **1602. Refusal to pay tolls—penalty.** Any person who refuses to pay the regular tolls established and posted up in accordance with the provisions of this chapter, or who shall run through or pass around the toll gates with a view of avoiding their payment, shall forfeit the sum of five dollars for every offense, which, together with costs, may be recovered by the person entitled to such toll; but nothing herein contained shall prevent a person from fording a stream across which a toll bridge or ferry has been constructed. [C.'73, § 1025; R., § 1238; C.'51, § 750.]

SEC. **1603. Rules established.** The proprietor of any bridge or ferry authorized by this chapter may establish reasonable rules for the regulation of passengers, travelers, teams and freight passing or traveling thereon. [C.'73, § 1026; R., § 1239; C.'51, § 751.]

SEC. **1604. Franchise sold.** Any of the franchises contemplated in this chapter are subject to execution, and may be sold as personal property, and be subject to the same rights and consequences, except that the purchaser may take immediate possession of the property, and the sale thereof shall carry with it all the material, implements, rights of way and works of whatever kind necessary for or ordinarily used in the exercise of such franchise. [C.'73, §§ 1027–8; R., §§ 1240–1; C.'51, §§ 752–3.]

SEC. **1605. Free ferry.** Nothing in this chapter contained shall be so construed as to prevent any company, person, city, town or village from establishing a free ferry at any point where a license to keep a ferry has been granted, but when such free ferry is established, such company, person, city, town or village shall pay a reasonable compensation to the persons owning the same for all boats, ropes and other material, if the same be fit for use; and when a free ferry is established at a point at or near where a license has been granted to an individual, such individual shall be exonerated from any further obligation to maintain it. Bond and security shall be given in like manner by the person or company establishing the free ferry as required in this chapter. [C.'73, § 1029; R., § 1245; C.'51, § 757.]

SEC. **1606. Mill owners.** Nothing in this chapter shall be so construed as to prevent owners of mills from crossing themselves or customers free of charge. [C.'73, § 1030; R., § 1246; C.'51, § 758.]

TITLE IX.

OF CORPORATIONS.

CHAPTER 1.

OF CORPORATIONS FOR PECUNIARY PROFIT.

SECTION **1607. Who may incorporate.** Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided. [22 G. A., ch. 86, § 2; C. '73, § 1058; R., § 1150; C. '51, § 673.]

Under this section any number of people may become incorporated for the transaction of any legal business, including business as a mutual insurance company: *Corey v. Sherman*, 60 N. W., 232.

SEC. **1608. Single person.** Except as otherwise provided by law, a single person may incorporate under the provisions of this chapter, thereby entitling himself to all the privileges and immunities provided herein, but if he adopts the name of an individual or individuals as that of the corporation, he must add thereto the word "incorporated." [C. '73, § 1088; R., § 1179; C. '51, § 702.]

SEC. **1609. Powers.** Among the powers of such corporations are the following:

1. To have perpetual succession;
2. To sue and be sued by its corporate name;
3. To have a common seal, which it may alter at pleasure;
4. To render the interests of the stockholders transferable;
5. To exempt the private property of its members from liability for corporate debts, except as otherwise declared;
6. To make contracts, acquire and transfer property,—possessing the same powers in such respects as natural persons;
7. To establish by-laws, and make all rules and regulations necessary for the management of its affairs. [C. '73, § 1059; R., § 1151; C. '51, § 674.]

Powers: A corporation is presumed to be clothed with the usual powers necessary and proper to enable it as such to carry out the purposes of its existence: *Home Ins. Co. v. Northwestern Packet Co.*, 32–223.

Therefore, *held*, that an insurance company had authority to acquire, by assignment, the claims of a shipper of goods insured by it against the common carrier in whose hands they were destroyed: *Ibid.*

Corporations are invested with such powers only as are expressly conferred upon them and such other powers as are necessary to carry out those powers expressly granted: *Teachout v. Des Moines Broad Gauge St. R. Co.*, 75–722.

For the purpose of effecting the objects of a corporation its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited: *Thompson v. Lambert*, 44–239.

Where an agricultural society was organized for the proper objects of such a corporation, the power to borrow money and execute notes and mortgages not being expressly assumed or prohibited, *held*, that it had by implication authority to exercise such powers as to indebtedness created for the necessary and proper purposes of carrying out the objects of the corporation: *Ibid.*

The simple act of going surety for another is out of the line of the prosecution of any business: *Lucas v. White Line Transfer Co.*, 70–541.

For a proper purpose a corporation has power to borrow money by executing notes and mortgages: *Thompson v. Lambert*, 44–239.

The power to mortgage the property of the corporation is incident to the ordinary powers of such corporation: *Dunham v. Isett*, 15–284.

And where the power to borrow money may necessarily be implied, it may be exercised by issuance of negotiable bonds: *Des Moines Gas Co. v. West*, 50–16.

Under a charter by which a corporation had authority to purchase, etc., "any real

estate or other property," etc., *held*, that it was not beyond its power to purchase its own stock: *Iowa Lumber Co. v. Foster*, 49-25.

A corporation having the general powers provided for in this section has the right to deal in, acquire and possess shares of stock in another corporation: *Calumet Paper Co. v. Stotts Investment Co.*, 64 N. W., 782.

Where the articles of incorporation of a college did not expressly give it power to raise and control funds by taking endowment notes, *held*, by a divided court, that it had the power to accept and enforce payment of such notes: *Simpson Centenary College v. Bryan*, 50-293.

Unless restrained by statute, a corporation may sell or dispose of its property, and one corporation may purchase property from another corporation, both possessing in this respect the same power as individuals. It will not, therefore, constitute fraud upon creditors that the property of the corporation is conveyed by it to another corporation in which its stockholders own stock: *Warfield v. Marshall County Canning Co.*, 72-666.

A stockholder in a corporation may maintain an action to restrain the corporation from acts in excess of its corporate power: *Teachout v. Des Moines Broad Guage St. R. Co.*, 75-722.

Corporations of all kinds may be bound by contracts not under seal. They may make a binding contract in writing not under seal, and may also be held liable under verbal contracts. So, also, they may ratify and adopt as their own a contract made by an officer out of the usual scope of his duties: *Merrick v. Burlington, etc., Plank Road Co.*, 11-74.

The recital as to the making of a contract, not entered on the record at the time it was originally written, by the secretary, but at a subsequent meeting directed to be entered on the record, will not be receivable as against the other party to such contract: *Colfax Hotel Co. v. Lyon*, 69-683.

Where a party with the knowledge and consent of the directors of a corporation borrowed money on his individual note for the use of the corporation, which money was used by it in paying its debts, *held*, that the corporation was bound to repay to such party the money so borrowed by him: *Humphrey v. Patrons, etc., Ass'n*, 50-607.

Corporations may ratify contracts made without their authority and thus become bound thereby like natural persons. Thus an acceptance of payment for services rendered under a contract and in accordance with its terms may amount to a ratification of such contract: *Athearn v. Independent Dist.*, 33-105.

Where a corporation became the successor to an individual in the manufacture and sale of buggies, *held*, that it had authority to accept from the individual whom it succeeded an order accepted by him upon particular terms: *Cook Mfg. Co. v. Randall*, 62-244.

Held, that a corporation organized for the manufacture and sale of musical instruments, and not having the power to engage in the business of loaning money, might still take from its agent, in payment of an indebtedness due from him, the note of a third party belonging to him: *Western Organ Co. v. Reddish*, 51-55.

Corporations can make contracts and transfer property, possessing the same powers in such respects as private individuals. A corporation has therefore the right to prefer one creditor to another, and the fact that the preference is exercised in favor of a shareholder or director is immaterial, although the shareholder or director may have voted for the proposition, and the security given was to secure an indebtedness to himself: *Warfield v. Marshall County Canning Co.*, 72-636.

Power as to real property: The power of a railway corporation to whom public lands are granted to hold such lands is a question between the corporation and the government, and cannot be raised as against the corporation by a third party in an action by the company for possession of the lands so granted: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

The grant, by the law under which a corporation is organized, of the power to make contracts gives it the power to make a sale of its real property and convey the same: *Buell v. Buckingham*, 16-284.

A limitation upon the power to sell operates also as a limitation on the power to convey: *Middleton Savings Bank v. Dubuque*, 15-394.

Exemption of property of members from liability for debts: The corporation may exempt the private property of its members from liability for corporate debts: *Spense v. Iowa Valley Const. Co.*, 36-407; *Larson v. Dayton*, 52-597.

The only case in which the private property of members becomes liable for corporate debts is that specified in the statute relating to failure to take proper steps in organizing (§ 1616): *First Nat. Bank v. Davies*, 43-424, 436.

A stockholder can be made liable to the creditors of a corporation only to the extent of his unpaid subscription to the capital stock: *Warfield v. Marshall County Canning Co.*, 72-666.

Where a statute exempted from liability for corporate debts stockholders in corporations organized under the general incorporation laws, *held*, that in order that the stockholders of the corporation should be exempt from liability it must appear that the corporation was organized under such general statute: *Kaiser v. Lawrence Savings Bank*, 56-104.

A provision in articles of a mutual insurance company relieving members from liability for corporation debts is not applicable with reference to their liability for assessments, the assessments in such case not being a debt of the corporation but a debt of the individual members: *Montgomery County Farmers' Mut. Ins. Co. v. Milner*, 90-685.

Where a corporation is stockholder in another corporation, the stockholders of the former are not thereby individually stockholders in the latter, and cannot be held liable as such: *Langan v. Iowa & M. Const. Co.*, 49-317.

The power to sue and be sued: A corporation must sue and be sued in its corporate name: *Chicago, D. & M. R. Co. v. Keisel*, 43–39.

Corporate name: A variance from the true style of a corporation will not have the effect to defeat its contract if it appears that the corporation was intended to be bound by and described in the instrument: *Athearn v. Independent Dist.*, 33–105.

Where a note was made payable to the order of "The Equitable Life Insurance Company of Iowa at its office," and was dated at the "Office of the Equitable Life Insurance Company, Des Moines, Iowa," *held*, that although the two names were not identical, yet it was reasonably apparent that they referred to the same corporation: *Equitable L. Ins. Co. v. Gleason*, 56–47.

Where the name of the corporation consists of a number of words, the omission, alteration or transposition of any of the words in the name used, if the words in the name used are synonymous with the true name of the corporation, is not a misnomer: *Martin v. Central Iowa R. Co.*, 59–411.

The use of the word "railroad" instead of "railway" in naming a corporation in an indictment for embezzling the funds of such corporation, *held* not to be material: *State v. Goode*, 68–593.

A railroad company cannot, in a legal proceeding, be properly designated by the initial letters of the words constituting its name, even though it may be possible to show that it is popularly known by its initial letters: *Accola v. Chicago, B. & Q. R. Co.*, 70–185.

Change of name: Where a note given in aid of a corporation operating a college provided that upon the payment of a proportion of the note a scholarship in the college should be issued, and afterward the corporate name of the institution was changed, *held*, that the new corporation succeeding to the rights of the old might sue upon such note, and the maker would be entitled to a scholarship therein according to the same terms: *Trustees of Northwestern College v. Schwagler*, 37–577.

The corporate name is that which is adopted in the articles of incorporation. If the name is changed it must be done by changing the articles, and the best evidence as to the contents of the articles is the articles themselves; therefore, *held*, that parol evidence of a change of name was not sufficient: *Chicago, D. & M. R. Co. v. Keisel*, 43–39.

By-laws: One who has notice of a by-law, as for instance an officer of the corporation, is bound thereby: *Des Moines Nat. Bank v. Warren County Bank*, 66 N. W., 154.

SEC. **1610. Articles adopted and recorded.** Before commencing any business except their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor, and the recorder must, within five days thereafter, indorse thereon the time when the same were filed, and the book and page where the record will be found. Said articles thus indorsed shall then be forwarded to the secretary of state, and be by him recorded in a book kept for that purpose. Such corporation shall pay to the secretary of state, before a certificate of incorporation is issued, a fee of twenty-five dollars, and, for all authorized stock in excess of ten thousand dollars, an additional fee of one dollar per thousand. Should any corporation thereafter increase its capital stock, it shall pay a fee to the secretary of state of one dollar for each one thousand dollars of such increase, but in no event shall a fee in excess of three hundred and fifty dollars be charged under the provisions of this section. The recording fee shall be paid in all cases. Farmers' mutual co-operative creamery associations shall be exempt from the payment of the incorporation fee provided herein. [26 G. A., ch. 98; 17 G. A., ch. 23; C. '73, § 1060; R., § 1152; C. '51, § 675.]

A failure to file the articles of incorporation in the office of the secretary of state does not, under § 1616, render the stockholders individually liable (the section being discussed in the opinions of a divided court): *First Nat. Bank v. Davies*, 43–424; followed in *Eisfeld v. Kenworth*, 50–389.

Where a corporation failed to record its articles of incorporation as required by statute, and the directors borrowed money in excess of the capital stock, giving their note for the same, which, when the company became insolvent, they paid, in an action by the directors against the other shareholders for an accounting and for contribution of their *pro rata* share of the debt paid by plaintiffs, *held*, that, as between themselves, their contractual relation was to be determined by what they had adopted as their agreement, and therefore, though the articles of incorporation were unrecorded, its provisions were binding upon them; and where one of the articles limited the amount of indebtedness to sixty-five per cent. of the capital stock, the directors who violated this agreement were in no position to demand contribution from the shareholders: *Heard v. Owen*, 79–23.

One of the incorporators cannot rely by way of defense in an action against him for the assessment upon his stock, that the articles were not recorded in the office of the secretary of state: *State Bank Building Co. v. Peirce*, 92–668.

As to change of articles see § 1615 and notes.

SEC. **1611. Limit of indebtedness.** Such articles must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which in no case, except risks of insurance companies, and liabilities of banks not in excess of their available assets, not including their capital, shall exceed two-thirds of its capital stock. But the provisions of this section shall not apply to the bonds or other railway or street railway securities, issued or guaranteed by railway or street railway companies of the state, in aid of the location, construction and equipment of railways or street railways, to an amount not exceeding sixteen thousand dollars per mile of single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway or street railway actually constructed and equipped. Nor shall the provisions of this section apply to the debentures or bonds of any company incorporated under the provisions of this chapter, the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers thereof; such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon. [21 G. A., ch. 57; 20 G. A., ch. 22; C. '73, § 1061; R., § 1153; C.'51, § 676.]

The incurring of liabilities greater than herein provided does not render the stockholders individually liable: *Langan v. Iowa & M. Const. Co.*, 49–317.

A private corporation is liable, at least to the extent of the consideration received, for indebtedness contracted in excess of the limit imposed by the articles of incorporation. In such case the corporation is estopped from setting up the limit: *Humphrey v. Patrons', etc., Ass'n*, 50–607.

The debt of a corporation beyond the limits of its indebtedness is not invalid even though held by the director of the corporation. The director in this respect occupies no different position from that of any other creditor, if the debt was contracted in good faith: *Garrett v. Burlington Plow Co.*, 70–697; *Warfield v. Marshall County Canning Co.*, 72–666.

The theory of this section seems to be that if bonds of the corporation are secured upon real estate worth at least twice the amount loaned thereon, they will be paid out of this security, and thus there will be left for the benefit of other creditors the security derived from the capital stock of the corporation. *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed., 441.

Failure to make in the articles a statement of the highest amount of indebtedness to which the corporation may be subjected is such a failure to comply with the requisites in relation to the organization of the company as to render the stockholders liable under § 1616; *Heuer v. Carmichael*, 82–288.

It is a sufficient compliance with the requirements of this section that the articles provide the limit of indebtedness, except as shall be determined by a majority of the stockholders at a meeting: *Thornton v. Balcom*, 85–198.

SEC. **1612. Place of business—list of officers.** If the corporation transacts business in this state, the articles shall fix its principal place of business, which must be in this state, and in charge of an agent of the corporation, at which place it shall keep its stock and transfer books and hold its meetings. The corporation shall annually, in January, file with the secretary of state a list of its officers and directors, and any change in the location of its place of business made by a vote of the stockholders.

SEC. **1613. Notice published—what to contain.** A notice must be published for four weeks in succession in some newspaper as convenient as practicable to the principal place of business, which must contain:

1. The name of the corporation and its principal place of business;
2. The general nature of the business to be transacted;
3. The amount of capital stock authorized, and the times and conditions on which it is to be paid in;
4. The time of the commencement and termination of the corporation;
5. By what officers or persons its affairs are to be conducted, and the times when and manner in which they will be elected;
6. The highest amount of indebtedness to which it is at any time to subject itself;
7. Whether private property is to be exempt from corporate debts.

Proof of such publication, by affidavit of the publisher of the newspaper in which it is made, shall be filed with the secretary of state, and shall be evidence of the fact. [C.'73, §§ 1062–3; R., §§ 1154–5; C. '51, §§ 677–8.]

It seems that acts of a corporation will not be valid as corporate acts unless publication of notice of the organization is made as required by law: *Eisfeld v. Kenworth*, 50–389.

A failure to publish the statutory notice of incorporation does not invalidate indebtedness created within the statutory limits, but only renders the stockholders individually liable: *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed., 441.

Failure to state in the published notice the highest amount of indebtedness for which the corporation may be rendered liable is such a failure to comply with the law in regard to publicity as to render the stockholders liable under the provisions of § 1616: *Heuer v. Carmichael*, 82–288.

Where a notice specified that the indebtedness of the corporation should not exceed a certain sum, while the articles provided that it should not exceed that sum except as authorized by a vote of the majority of the stockholders at a meeting, *held*, that such notice was sufficient: *Thornton v. Balcom*, 85–198.

A statement that the limit of the company's indebtedness shall be "two-thirds of the amount of the capital stock prescribed" is a sufficient statement of the highest amount of indebtedness to which the corporation is at any time to subject itself: *Park v. Zwart*, 92–37.

The publication of the articles themselves is a sufficient compliance with this section if the articles contain all the required statements: *Ibid.*

Where the articles of incorporation did not state the principal place of business, or the time of commencement of business, *held*, that the publication of such articles was not sufficient notice, and that there was such failure to comply with this section as to render the stockholders individually liable under § 1616: *Clegg v. Grange Co.*, 61–121.

As to contracts in excess of the limit of indebtedness, see notes to § 1611.

SEC. **1614. May begin business.** The corporation may commence business as soon as the certificate is issued by the secretary of state, and its acts shall be valid if the publication in a newspaper is made within three months from the date of such certificate. [17 G. A., ch. 23; C. '73, § 1064; R., § 1156; C. '51, § 679.]

Failure to file articles in the office of secretary of state within three months does not render the acts of the corporation void, nor deprive it of its franchises without proceedings being instituted for that purpose: *First Nat. Bank v. Davies*, 43–424.

A corporation may lawfully commence business on compliance with the terms of this section. Its authority to do so is not made dependent upon all of its stock being subscribed: *Johnson v. Kessler*, 76–411.

The rights of parties are not made dependent upon the publication of notice required upon the filing of the articles. If the publication is inserted in a newspaper within three months, it seems that it ought not to be held a failure to substantially comply with the statute, though the last publication is not made within that time: *Thornton v. Balcom*, 85–198.

SEC. **1615. Change of articles.** Changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved, and published as the original articles are required to be. Such changes, however, need only be signed and acknowledged by such officers of the corporation as may be designated to perform such act by the stockholders. [22 G. A., ch. 88; C. '73, § 1065; R., § 1157; C. '51, § 680.]

A change in the articles made in the manner therein provided, and properly recorded and published, is as binding upon stockholders who do not as upon those who do consent thereto: *Burlington & M. R. R. Co. v. White*, 5–409.

If a corporation procures an alteration to be made in its charter by which a new and different business is superadded to that originally contemplated, such of the stockholders as do not assent to the alteration will be absolved from liability on their subscriptions to the capital stock: *Ibid.*

But where a change in the charter merely related to the time of payment of installments of subscriptions to stock, *held*, that by the subscription under the charter the subscriber assented to the change afterward made in pursuance of such provisions: *Ibid.*

Where the corporation has assumed to make a contract authorized by its amended articles, and has received the consideration therefor, it cannot escape liability upon the ground that such amended articles had not been recorded: *Humphrey v. Patron's, etc., Ass'n*, 50–607.

Articles of incorporation of a company organized for pecuniary profit can be amended only by an instrument signed and acknowledged by the person or persons duly authorized so to do and recorded: *Day v. Mill Owners' Mut. F. Ins. Co.*, 75–694.

A material or radical change in the objects of a corporation will release the subscriber of stock from liability thereon, but immaterial changes which cannot possibly prejudice such subscriber will not affect him: *Union Ag'l, etc., Ass'n v. Neill*, 31–95.

An amendment to a charter not materially changing the original purposes of the corporation, *held* not sufficient to excuse stockholder from liability for stock subscribed: *Peoria & R. I. R. Co. v. Preston*, 35-115.

Amendments to the articles of incorporation of a college in accordance with provisions made therein for amendment, affecting the method in which trustees were to be appointed, but not the general purposes and objects of the corporation, *held* not sufficient to release the maker of a scholarship note from his liability thereon: *Washington College v. Duke*, 14-14.

SEC. **1616. Individual property liable.** A failure to substantially comply with the foregoing requirements in relation to organization and publicity shall render the individual property of the stockholders liable for the corporate debts; but corporators and stockholders in railway and street railway companies shall be liable only for the amount of stock held by them therein. [C.'73, § 1068; R., §§ 1166, 1338; C.'51, § 689.]

Under this section, *held*, that a failure to file the articles did not alone render the stockholders individually liable: *First Nat. Bank v. Davies*, 43-424; *Eisfeld v. Kenworth*, 50-389; *Stokes v. Findlay*, 4 McCrary, 205.

Failure to state in the articles and in the published notice the highest amount of indebtedness or liability to which a corporation may be subjected will render the stockholders liable to a creditor under the provisions of this section: *Heuer v. Carmichael*, 82-288.

In the clause "in relation to organization *and* publicity," the word "and" should be construed as "or." A failure in either respect will render the stockholders individually liable: *Eisfeld v. Kenworth*, 50-389.

So *held* in case of a failure to publish any notice whatever: *Ibid.; Marshall v. Harris*, 55-182.

Failure to publish the statutory notice renders stockholders individually liable, but does not invalidate indebtedness created: *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed., 441.

The statement of the articles duly published that the indebtedness of the corporation shall not exceed "two-thirds of the amount of capital stock prescribed" is a sufficient compliance with the provisions of § 1613 to relieve the stockholder from liability under the provisions of this section: *Park v. Zwart*, 92-37.

The fact that a creditor has sought relief against the corporation on his claim will not estop him from recovering against the stockholders under the provisions of this section. These provisions are not limited to cases where the corporation has not a legal existence as such. After recovering a judgment against the corporation the creditor may pursue his remedy as against the stockholders: *Heuer v. Carmichael*, 82-288.

A provision in the articles as to the indebtedness for which the corporation may be made liable excepting "by a majority vote of the stockholders present" at a meeting is a sufficient statement under § 1611, and will not render the stockholders liable under this section: *Thornton v. Balcom*, 85-198.

Failure to secure subscriptions for stock to the full amount authorized by the articles will not render the stockholders liable where there is no requirement in the articles that all the stock shall be subscribed before the company commences business, nor that any definite sum shall be subscribed: *Ibid.*

But such a condition is precedent to the right to commence business and incur debts, unless it is provided in the articles that the corporation may do so when a specified amount of stock is subscribed. The fact that the stock is not all subscribed does not constitute a failure to comply substantially with the requirements in relation to organization and publicity: *Sweney v. Talcott*, 85-103.

Where the articles of incorporation did not state the principal place of business or the time of commencement of business, *held*, that the publication of such articles was not sufficient notice, and that there was such failure to comply with the requirements as to notice as to render the stockholders individually liable: *Clegg v. Grange Co.*, 61-121.

Failure to comply with the statutory requirements as to posting a copy of the by-laws and a statement of the amount of capital stock subscribed, etc., will not render the stockholders liable: *Langan v. Iowa & M. Const. Co.*, 49-317; *McKellar v. Stout*, 14-359.

A failure to properly keep the books, as required by statute, does not render the stockholders individually liable. If the books are fraudulently kept, those guilty of participation in the fraud may be held liable: *Langan v. Iowa & M. Const. Co.*, 49-317.

Nor does the incurring of liabilities greater than allowed by statute render the stockholders individually liable: *Ibid.*

While there may be irregularities or omissions to comply with provisions merely directory, which would be sufficient to sustain an action brought to declare a forfeiture, but are insufficient to sustain an action to enforce individual liability of a stockholder, yet if the attempt to incorporate is under a general law, and there is a material non-compliance therewith, then there is such want of incorporation that exemption from individual liability is not secured: *Kaiser v. Lawrence Savings Bank*, 56-104.

In case of suit against individuals claiming exemption from liability on the ground of their having become a corporation under a general statute, a stricter measure of compliance with the statutory requirements must be shown than in case the plea of *nul tiel corporation* is set up in a suit between the corporation and the stockholder or other individual, on liability contracted: *Ibid.*

Where a contract is made with an unincorporated association, or a part of the mem-

bers thereof, the other contracting party is bound thereby: *Reding v. Anderson*, 72–498.

Stockholders in railway companies are, by express provision, not liable beyond the amount of stock held by them in such companies: *First Nat. Bank v. Davies*, 43–424.

A construction company having power under its articles to construct and operate a railway is a railway corporation within the meaning of the statute: *Ibid.; Langan v. Iowa & M. Const. Co.*, 49–317.

SEC. **1617. Dissolution—notice of.** A corporation may be dissolved prior to the period fixed in the articles of incorporation, by unanimous consent, or in accordance with the provisions of its articles, and notice thereof must be given in the same manner and for the same time as is required for its organization. [C.'73, §§ 1066–7; R., §§ 1159–60; C.'51, §§ 682–3.]

The sale of the corporation business will not necessarily operate as a dissolution of the corporation, and if good ground for such sale exists it may be made by act of the majority of the stockholders and will not be restrained on a complaint of the minority. *Price v. Holcomb*, 89–123.

SEC. **1618. Duration—how renewed.** Corporations for the construction of any work of internal improvement, or for the transaction of the business of life insurance, may be formed to endure fifty years; those for other purposes, not to exceed twenty years; but in either case they may be renewed from time to time for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election, or special election called for that purpose, be in favor of such renewal, and if those wishing such renewal will purchase the stock of those opposed thereto at its real value. [C.'73, § 1069; R., § 1158; C.'51, § 681.]

Whether the provisions of this section as to renewal are applicable to such corporations as are described in § 1642, *quære: Byers v. McCartney*, 62–339.

SEC. **1619. Legislative control.** The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good. [C.'73, § 1090.]

The provisions of this section do not authorize a city council to amend or repeal an ordinance granting a franchise in the streets of the city for a public purpose: *Levis v. Newton*, 75 Fed., 884.

While the power to regulate corporate franchises is here provided for yet it seems that such regulation must be reasonable or they will be invalid: *Des Moines v. Des Moines Water Works Co.*, 64 N. W., 269.

A statute imposing upon a street railway company additional burdens in regard to paving its tracks is not unconstitutional: *Sioux City St. R. Co. v. Sioux City*, 78–742; *S. C.*, 78–367: affirmed, 138 U. S., 98.

SEC. **1620. Fraud—penalty for.** Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, shall be a misdemeanor, and shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud may also recover damages therefor against those guilty of participating in such fraud. [C.'73, § 1071; R., § 1163; C.'51, § 686.]

To render stockholders liable for fraud in deceiving the public as to the means or liabilities of the corporation, there must be something done with the fraudulent intention of deceiving. The intention to deceive is not sufficient. There must be some act fraudulently done: *Miller v. Bradish*, 69–278.

Fraud in such cases is not to be presumed. The fact that a person is a stockholder in an insolvent corporation does not, of itself, render him liable: *Spense v. Iowa Valley Const. Co.*, 36–407.

Where it is sought to recover from individual officers of a corporation the amount of a judgment against the corporation, under a claim that such officers have rendered themselves liable by fraud, proof of absence of intentional fraud and diversion of assets to their own use will relieve defendants from liability. This section applies only to officers or others guilty of intentional fraud: *Hoffman v. Dickey*, 54–135.

And *held*, that in an action for damages under this section, the particular respect in

which there was a failure to comply with the articles, etc., resulting in damage to plaintiff, or the particular act of deception, etc., must be specified: *White v. Hosford*, 37–566.

The rule that, when there is no principal who can be made legally responsible, the agent who attempts to act for and bind the principal will himself be personally chargeable, applied to the case of officers of a bank illegally organized: *Allen v. Pegram*, 16–163.

Where the directors of a mutual benefit association, without authority, merged the same into another association of the same character, it appearing that such directors had a reserve fund and also received money from the other company for such consolidation, *held*, that a certificate-holder in the original company could recover by way of damages from such directors the amount paid in on such certificate, but not the prospective value thereof: *Grayson v. Willoughby*, 78–83.

The fact that officers of an incorporation incur indebtedness in excess of the limit prescribed in the articles or published notice does not constitute such fraud as to render them liable to the persons giving such credit. The officers of the corporation are not agents or trustees of the creditors in such sense as to be answerable to them either for the management of the affairs of the company or the disposition of its property: *Frost Mfg. Co. v. Foster*, 76–535.

The fact that after credit is extended the officers mismanaged the corporate affairs so as to render it insolvent does not make them answerable to the creditors therefor: *Ibid.*

SEC. **1621. Diversion of funds.** The diversion of the funds of the corporation to other objects than those mentioned in its articles and in the notice published, if any person be injured thereby, and the payment of dividends which leaves insufficient funds to meet the liabilities thereof, shall be such fraud as will subject those guilty thereof to the penalties of the preceding section; and such dividends, or their equivalent, in the hands of stockholders, shall be subject to such liabilities. If the directors or other officers or agents of any corporation shall declare and pay any dividend when such corporation is known by them to be insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, all directors, officers or agents knowingly consenting thereto shall be jointly and severally liable for all the debts of such corporation then existing, but dividends made in good faith before knowledge of the occurring of losses shall not come within the provisions of this section. [C.'73, §§ 1072–3; R., §§ 1164–5; C.'51, §§ 687–8.]

To render officers liable for diversion of funds or paying dividends so as to leave insufficient funds to meet liabilities, it must appear that the entire property of the corporation is not sufficient to pay its indebtedness. A dividend may lawfully be declared although the corporation does not have cash on hand sufficient to pay all its liabilities: *Miller v. Bradish*, 69–278.

The word "liability" as used in this section means existing indebtedness the payment of which can be enforced, and does not include the corporate liability for payment of capital stock, such liability being remote and contingent. The amount of the capital stock is therefore not to be included in determining whether the liabilities of the corporation exceed its funds so as to render the declaration of a dividend illegal: *Ibid.*

If the corporation has sufficient assets to pay all its debts at the time a dividend is paid, then the payment of such dividend cannot be held illegal, nor a diversion of the funds to objects other than those authorized: *Ibid.*

As mutual insurance company funds are raised and to be used for specific purposes it cannot by contract with a similar company agree to use its funds for the payment of losses in such other company even by arrangement by which it is to acquire the membership of such other company: *Twiss v. Guaranty Life Asso.*, 87–733.

In the absence of express statutory authority courts of equity do not have jurisdiction to disolve corporations or wind up their affairs and the statutory provisions in this state give no such express authority: *Wallace v. Pierce-Wallace Pub. Co.*, 70 N. W., 216.

There are cases in which a receiver will be appointed for the property of the corporation, as for instance where the officers have been guilty of the misappropriation of the funds or a breach of trust in the discharge of official duties, but in general a receiver of a corporation will not be appointed while it is solvent and a going concern, merely on the ground of dissensions among the stockholders: *Ibid.*

SEC. **1622. Forfeiture.** Any intentional violation by the board of directors or the managing officers of the corporation of the provisions of the two preceding sections shall work a forfeiture of the corporate privileges, to be enforced as provided by law. If the indebtedness of any corporation shall exceed the amount of indebtedness permitted by law, the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess. [C.'73, §§ 1074–5; R., §§ 1167–8; C.'51, §§ 690–1.]

SEC. **1623. Keeping false accounts.** The intentional keeping of false books or accounts shall be a misdemeanor on the part of any officer, agent or employe of the corporation guilty thereof, or of any one whose duty it is to see that such books or accounts are correctly kept. [Same.]

SEC. **1624. By-laws posted.** A copy of the by-laws of the corporation, with the names of all of its officers, must be posted in the principal places of business subject to public inspection. [C. '73 § 1076; R., § 1161; C. '51, § 684.]

This provision is for the benefit of the public and it is the duty of the corporation to comply with it for the protection of persons who might be affected by the by-laws. Therefore, *held* that a purchaser of corporate stock, having no notice of a by-law providing that the corporation should have a lien on the stock for any indebtedness due from the stockholder, was not bound by such provision in a by-law when not posted as required by this section, even though such transfer was not entered on the books of the company, and the certificate of stock recited that it was subject to the by-laws and articles of incorporation of the company: *Des Moines Nat. Bank v. Warren County Bank*, 66 N. W., 154.

SEC. **1625. Statement of stock and indebtedness.** A statement of the amount of capital stock subscribed, the amount of capital actually paid in, and the amount of the indebtedness in a general way, must also be kept posted in like manner, which shall be corrected as often as any material change takes place in relation to any part of the subject-matter thereof. [C. '73, § 1077; R., § 1162; C. '51, § 685.]

A failure to comply with this, or with the preceding section, does not render the private property of stockholders liable: See notes to § 1616.

SEC. **1626. Transfer of shares.** The transfer of shares is not valid, except as between the parties thereto, until regularly entered upon the books of the company, showing the name of the person by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not exempt the person making it from any liability of said corporation created prior thereto. Its books must be so kept as to show the original stockholders, their interests, the amount paid on their shares, and all transfers thereof; which books, or a copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same. When any shares of stock shall be transferred to any person, firm or corporation as collateral security, such person, firm or corporation may notify in writing the secretary of the corporation whose stock is transferred as aforesaid, and from the time of such notice, and until written notice that said stock shall have ceased to be held as collateral security, said stock so transferred and noticed as aforesaid shall be considered in law as transferred on the books of the corporation which issued said stock, without any actual transfer on the books of such corporation of such stock. In such case, it shall be the duty of the secretary or cashier of the corporation or of the person or firm to which such stock shall have been transferred as collateral security at once, upon its ceasing to be so held, to inform the secretary of the corporation issuing such stock of such fact. The secretary of the company whose stock is transferred as collateral shall keep a record showing such notice of transfer as collateral, and notice of discharge as collateral, subject to public inspection. No holder of stock as collateral security shall be liable for assessments on the same. [26 G. A., ch. 81; C. '73, § 1078; R., § 1169; C. '51, § 692.]

The provision of statute as to the transfer of shares is intended as a protection to the company, and only applies where the sale or transfer in some way conflicts with the interests of the corporation: *Mooar v. Walker*, 46–164.

The transfer may between the parties be valid without it. No statute gives to the bank a lien upon its stock for liability of the stockholder and if such a provision is made by the by-laws it will be valid only where the by-laws are posted, as is required by § 1624: *Des Moines Nat. Bank v. Warren County Bank*, 66 N. W., 154.

A transfer of stock is not valid as against the levy of an execution until it is regularly entered upon the books of the company: *Moore v. Marshalltown Opera House Co.*, 81–45.

But in a particular case, *held*, that the transfer was sufficient to preclude an execution creditor from afterwards acquiring rights against the assignee, such transfer having been made before the written notice of the levy was served on the officers of the company: *Ibid.*

A provision of the by-laws of a corporation that no transfer of stock shall be valid unless approved by the board of directors, may be enforced to protect the rights of the corporation, but can not be used to defeat the rights of others and operate as a restraint upon the disposition of the stock. The transferee may hold the stock and enforce a transfer thereof in proper form in the absence of any right or lien of the company to or upon such stock: *Farmers', etc., Bank v. Wasson*, 48–336.

In the absence of any contract and provisions of the charter and by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it to secure such indebtedness, and a transfer of stock by such stockholder to secure his individual debt will not be fraudulent as to the corporation in the event that he is indebted to it, and will be valid although not assented to and approved by its directors as required by its by-laws: *Ibid.*

This section refers to the liability of the corporation for debts created prior to the transfer. It is not the liability of the stockholder under § 1631 which is intended. Therefore a stockholder is liable to corporate creditors after the corporate property is exhausted for corporate debts already incurred, to the amount remaining unpaid on his stock at the time of the transfer thereof: *White v. Greene*, 70 N. W., 182.

Bonds of the corporation not matured at the time of the transfer are nevertheless to be treated as liabilities of the corporation in determining the obligations of the stockholder: *Ibid.*

Where the corporation has not reserved any lien on stock for the indebtedness due from a stockholder it does not acquire priority over a pledgee of such stock by taking a subsequent assignment thereof, even thought he first transfer by way of pledge is not entered on the transfer book. In such case the second assignment to the corporation would entitle it only to a surplus after satisfying the claim of the pledgee under the first assignment: *Des Moines Loan & Trust Co. v. Des Moines Nat. Bank*, 66 N. W., 914.

Although the by-laws may give the corporation a lien on stock for indebtedness due from the stockholder yet such lien may be waived by the acts of officers of the corporation in allowing a third person to acquire a lien on such stock without asserting the claims of the corporation: *Ibid.*

Shares in the capital stock of the corporation are the property of and under the control of the shareholder. Even though the by-laws of the association require that in order to constitute a valid transfer the same must be entered upon the stock-book, yet this does not limit the absolute right of sale and alienation by the stockholder: *Hershire v. First Nat. Bank*, 35–272.

The written assignment and delivery of the certificates of stock, coupled with authority to transfer the same upon the books of the company, is sufficient to vest in the transferee the right to the stock: *Courtright v. Deeds*, 37–503.

The transfer of stock on the books of a corporation upon surrender of a previous certificate, without the issuance of a stock certificate in conformity therewith, is sufficient to bind the corporation and third persons to such transfer: *First Nat. Bank v. Gifford*, 47–575.

Although a transfer not entered on the books of the company is valid as between the parties thereto, it will not be valid as against an attaching creditor, who proceeds in the manner provided by § 3894, to attach the stock as the property of the person who appears on the books to be the owner thereof. If the attaching creditor or a purchaser had knowledge of the transfer it may be that a court of equity would protect the transferee's rights: *Ft. Madison Lumber Co. v. Batavian Bank*, 71–270.

Where a valid title to corporate stock has been acquired by attachment levied thereon and sale under execution, a transferee whose title does not appear on the books of the company cannot defeat it; but if it appears that the title asserted under the execution sale is not valid, the transfer may be good as between the parties thereto: *Commercial Nat. Bank v. Farmers', etc., Nat. Bank*, 82–192.

Where plaintiff agreed to purchase shares of stock in a corporation of a stockholder, and gave his promissory note for the same, and the certificate of stock was placed in the hands of a third party to be delivered to plaintiff when the note was paid, and where it appeared that the note had never been paid or the stock transferred, *held*, that while plaintiff had an interest in the stock, he never owned it, and was not liable to the corporation for unpaid assessments made on account of it: *Connac v. Western White Bronze Co.*, 77–32.

A failure to properly keep the books, as here provided, does not render the stockholders individually liable. If the books are fraudulently kept those guilty of participation in the fraud may be held liable under § 1620: *Langan v. L. & M. Const. Co.*, 49–317.

A stockholder is entitled to the inspection of the original record, and transfer books and the record of the financial condition of the company and to have his attorney and the clerk of such attorney assist him in making an examination of such books at reasonable times: *Ellsworth v. Dorwart*, 63 N. W., 588.

SEC. **1627. Amount paid in.** No certificate or shares of stock shall be issued, delivered or transferred by any corporation, officer or agent thereof, or by the owner of such certificate or shares, without having indorsed on the face thereof what amount or portion of the par value has

been paid to the corporation issuing the same, and whether such payment has been in money or property. Any person violating the provisions of this section, or knowingly making a false statement on such certificate, shall be fined not less than one hundred dollars nor more than five hundred dollars, and shall stand committed to the county jail until such fine and costs are paid.

SEC. **1628. Non-user.** Any corporation organized under this chapter shall cease to exist by non-user of its franchise for two years at any one time, but omission to elect officers or hold meetings at any time prescribed by its articles or by-laws shall not work a forfeiture, if such election is held within two years of the time appointed therefor. [C. '73, § 1079; R., § 1170; C. '51, § 693.]

Where a railroad company did not commence to build its road for more than two years after its incorporation, and the stockholders did not pay up their subscriptions or take certificates of stock, but during the time the company expended money and made persistent and continuous efforts to procure additional means to construct the road, *held*, that these acts were such an exercise of its franchises as to prevent a forfeiture: *Young v. Webster City & S. W. R. Co.*, 75–140.

SEC. **1629. Expiration.** Corporations whose charters expire by limitation or the voluntary act of the stockholders may nevertheless continue to act for the purpose of winding up their affairs. [C. '73, § 1080; R., § 1171; C. '51, § 694.]

A corporation will be kept alive by statute for the purpose of discharging its contracts and disposing of its property: *Muscatine Western R. Co. v. Horton*, 38–33, 45.

The voluntary dissolution of a corporation does not take away its power to act for the purpose of winding up its affairs, nor affect the right of a creditor, in equity at least, to be released from the inequitable consequences of such dissolution: *Muscatine Turnverein v. Funk*, 18–469.

SEC. **1630. Sinking fund.** For the purpose of repairs, rebuilding, enlarging, or to meet contingencies, or for the purpose of creating a sinking fund, the corporation may set apart a sum which it may loan, and take proper securities therefor. [C. '73, § 1081; R., § 1176; C. '51, § 699.]

SEC. **1631. Liability of stockholders.** Neither anything in this chapter contained, nor any provisions in the articles of corporation, shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them for the purpose of defrauding creditors; and execution against the company may, to that extent, be levied upon the private property of any such individual. In none of the cases contemplated in this chapter can the private property of the stockholders be levied upon for the payment of corporate debts while corporate property can be found with which to satisfy the same; but it will be sufficient proof that no property can be found, if an execution has issued on a judgment against the corporation, and a demand has been thereon made of some one of the last acting officers of the body for property on which to levy, and he neglects to point out any such property. In suits by creditors to recover unpaid installments upon shares of stock against any person who has in any manner obtained such stock of the corporation, the stockholder shall be liable for the difference between the amount paid by him to the corporation for said stock and the face value thereof. [C. '73, § 1082; R., § 1172; C. '51, § 695.]

Apportionment: In an action by a creditor of the corporation against a stockholder to compel payment of the balance due on stock, *held*, that under an allegation that the plaintiff was enforcing his claim unequally against different stockholders, and accepting settlements with others without crediting the payment thereof upon his claim, a receiver should be appointed and the prosecution of plaintiff's action be enjoined until the amounts due from all the stockholders could be ascertained and reported so that a *pro rata* apportionment might be made: *Hablitzel v. Latham*, 35–550.

Stock issued at less than par: The officers of the corporation cannot issue to a creditor stock of the corporation to be accepted by him at less than its par value in payment of his claim, with the agreement that it is to be paid up stock, and the creditor thus accepting stock becomes liable as the holder of unpaid stock to the extent that the par value exceeds the debt for which it is taken: *Jackson v. Traer*, 64–469.

A creditor thus accepting stock becomes a stockholder although he has not subscribed for stock. A subscription for stock is only necessary to render a person a stockholder where the stock is not delivered: *Ibid.*

The fact that the stock was, at the time of its issuance and acceptance, worthless, would not relieve a stockholder, accepting it, from liability. *Ibid.*

A corporation may dispose of its stock to a creditor for less than its par value in full payment of his debt without any liability on his part to other creditors for the excess of the par value above the amount of his debt. (Disapproving *Jackson v. Traer*, 64-469); *Clark v. Bever*, 139 U. S., 96; *S. C.*, 31 Fed., 670.

The officers of a corporation cannot, without express authority, sell the stock of the corporation at a less rate than its par value as fixed by the charter: *Oliphant v. Woodburn Coal, etc., Co.*, 63-332.

A creditor who accepts stock issued to him by the officers of the corporation below par in payment of his debt holds the same as unpaid stock to the extent that its par value exceeds his claim: *Jackson v. Traer*, 64-469.

The public has a right to assume, where the stock of a company has all been issued as full-paid stock, that it has been paid for in full, either in money or in property at a fair value; but while the fact that full-paid stock has been issued upon a partial payment of its face might be ground for proceeding in the interest of the public to wind up the company, it is not a ground upon which the stockholder who has received paid-up stock can object to the validity of the contract for the purchase of such stock: *Goff v. Hawkeye Pump, etc., Co.*, 62-691.

Unpaid installments: Where all the capital stock of a corporation outstanding was such as had been issued to stockholders who had conveyed to the corporation the patent-right for an article which the corporation was authorized to manufacture, and such patent-right had become worthless, *held*, that such stockholders could not claim that their stock was paid up, and were liable for the amount of their stock: *Chisholm v. Forney*, 65-333.

An action against a stockholder, even after the corporation has ceased to exist, need not be brought in equity, but may be brought at law: *Tama Water Power Co. v. Hopkins*, 79-653.

An action against a stockholder for an unpaid installment of stock is properly maintained at law and in such action the corporation, its creditors and other stockholders are not necessary parties: *National Park Bank v. Peavey*, 64 Fed., 912.

In an action by creditors of a bank located in South Dakota, brought in Iowa to charge defendants with a balance of unpaid stock of said bank, owned by them, it was held that as the statute of South Dakota fixed the liability of holders for unpaid stock, and did not provide a special remedy for enforcing such liability, such liability might be enforced in the courts of this state against persons over whom they have jurisdiction: *Latimer v. Citizens State Bank*, 71 N. W., 225.

Officers of the corporation cannot, by agreement with a stockholder, release him, to the prejudice of creditors, from his obligation to pay his subscription, unless the transaction is characterized by the utmost fairness. Therefore, *held*, that conveyances of real estate made to a corporation by directors and other stockholders in full payment of their stock, at a price largely in excess of its real value, did not release such stockholders from liability for the excess of their subscriptions over the real value of the property conveyed, even to creditors becoming such after the conveyance: *Osgood v. King*, 42-478.

Where the president of a corporation gave a mortgage to the corporation in payment of shares of stock to the amount of such mortgage, and the same was included in the statement of the company's assets, *held*, that he could not afterward surrender such stock and receive back the mortgage after insolvency of the company: *Burnham v. Northwestern Ins. Co.*, 36-632.

Although the mortgage in such case provided that it was payable in the capital stock certificates of the company, yet, *held*, that as those doing business with the company had not an opportunity to know the terms of the mortgage, it could not be discharged as to the creditors of the company by surrender of the identical shares of stock which had been issued therefor: *Ibid.*

It is not necessary to show a subscription for stock in the corporation to render an individual liable as a stockholder. It is sufficiet if stock has been actually issued to him, even though issued to be held as collateral security: *Calumet Paper Co. v. Stotts Investment Co.*, 64 N. W., 782.

Under the national banking act making stockholders liable, in case of failure of the bank, in an amount equal to the amount of stock held by them, a holder of stock at the time of the dissolution of the bank becomes liable for the indebtedness thus arising upon such stock, although he holds the shares as collateral security, or as a trustee: *Hale v. Walker*, 31-344.

Subscription payable in property: The fact that a subscription for stock was to be paid in property instead of money does not relieve the subscriber from liability, if the property was not turned over as agreed. The company cannot, by any arrangement or action upon its part, release the subscriber from his liability: *Singer v. Given*, 61-93.

Set-off: The subscriber cannot, as between himself and the creditor, set up claims for services, or for use of property, for which the corporation is indebted to him: *Ibid.*

Release of subscriber: A railroad corporation may make, if acting in good faith, a valid and binding contract, releasing a stockholder from liability upon his subscription to the stock of the corporation, either with or without the consent of the creditors and stockholders: *Gelpcke v. Blake*, 19-263.

Enforcement of liability: An execution against the company can only be levied on the private property of a stockholder after a judgment has been obtained against him as provided in § 1632: *Bayliss v. Swift*, 40-648; and see *Hampson v. Weare*, 4-13; *Bailey v. Dubuque Western R. Co.*, 13-97.

The primary object of these provisions is

to protect creditors of the company. Where by agreement between the company and the stockholders shares of stock were sold at much less than their par value and upon conditions by which the stockholders were not to be liable to any additional amount, and one of such stockholders became a creditor of the company for services rendered, and assigned his claim to plaintiff, on which plaintiff got judgment against the company, *held*, that plaintiff was not entitled to enforce, as against another of such conditional stockholders, payment on his stock contrary to the conditions on which it was purchased. The liability of the plaintiff's assignor on the stock held by him being as great as that of any other stockholder, his assignee should not be allowed to compel payment of the entire liability from the holders of stock: *Callanan v. Windsor*, 78-193.

Where there is a failure to comply with the requirements of the statute with reference to organization and publicity, such as to render the stockholder individually liable, he becomes primarily liable, and may be sued in the first instance. His relation to the creditor is not different from what it would have been if no attempt had been made at incorporation: *Marshall v. Harris*, 55-182.

Where stock is issued to a promotor and organizer for property which is taken at a gross overvaluation the transaction is fraudulent against creditors of the corporation if it be insolvent, and the stockholder who receives such stock with knowledge of the consideration paid for it will be liable to such creditors as to the stock he holds for the difference between its par value and the amount actually paid to the corporation for it, and this rule is applicable to those who acquire stock with knowledge of the facts as well as to the original stockholders: *Wishard v. Hansen*, 68 N. W., 691.

In a particular case, *held*, that statements on the back of the stock certificate showing that the stock was still subject to assessments although it purported to be fully made up, were sufficient to put the holder on inquiry: *Ibid.*

In a particular case, *held*, that although it appeared that stock was issued as fully paid up to a stockholder for property transferred to the corporation, nevertheless as a matter of fact the value of the property was understood to be only one-third of the par value of the stock issued, and that therefore the stockholder was liable to creditors of the corporation for the unpaid balance on his stock: *Boulton Carbon Co. v. Mills*, 78-460.

Where the stockholder has become a creditor of the corporation he cannot set off as against claims of other creditors for the unpaid balance due on his stock the amount of indebtedness of the corporation to him: *Ibid.*

SEC. **1632. Corporate property exhausted.** Before any stockholder can be charged with the payment of a judgment rendered for a corporate debt, an action shall be brought against him, in any stage of which he may point out corporate property subject to levy; and, upon his satisfying the court of the existence of such property, by affidavit or otherwise, the cause may be continued, or execution against him stayed, until the property can be levied upon and sold, and the court may subsequently render judgment for any balance which there may be after disposing of the corporate property; but if a demand of property has been made as contemplated in the preceding section, the costs of said action shall, in any event, be paid by the company or the defendant therein, but he shall not be permitted to controvert the validity of the judgment rendered against the corporation, unless it was rendered through fraud and collusion. [C.'73, §§ 1083–4; R., §§ 1173–4; C. '51, §§ 696–7.]

The fact of demand and refusal may be shown by the official return upon the execution. Such return, as between the corporation and the creditor, must be regarded as conclusive. Evidence may be introduced to show that no such return was made, but it is not competent to dispute it by showing that no demand was made as therein stated: *Singer v. Given*, 61-93.

Where the corporation is notoriously insolvent, and its assets have been seized upon legal process, and it had ceased to do business, creditors are not required to exhaust their remedy against it before pursuing their remedy against the stockholders: *Latimer v. Citizens' State Bank*, 71 N. W., 225.

An execution against the company can only be levied on the private property of a stockholder after a judgment has been obtained against him as provided by statute: *Bayliss v. Swift*, 40-648; and see *Hampson v. Weare*, 4-13; *Bailey v. Dubuque Western R. Co.*, 13-97.

The action against the stockholder, here contemplated, is an ordinary action, followed by an ordinary judgment; after which an execution against the corporation may, to the extent of such judgment, be levied upon the private property of the stockholder, as provided in § 1631: *Bayliss v. Swift*, 40-648.

An action against the stockholder to enforce in behalf of a creditor his liabilities for unpaid installments of stock is properly brought by ordinary proceedings: *Calumet Paper Co. v. Stotts Investment Co.*, 64 N. W., 782.

Where there had been a defective organization and an indebtedness incurred and subsequently a regular organization of the corporation, *held*, that judgment against the corporation was proper and was binding upon the stockholders: *Ibid.*

This section contemplates the rendition of a judgment against the stockholder, and not merely the awarding of an execution against him: *Singer v. Given*, 61-93.

A prior statute upon the same subject considered: *Donworth v. Coolbaugh*, 5-300.

To charge a stockholder it must appear that there was a valid claim against the corporation: *Corse v. Sanford*, 14-235.

SEC. **1633. Indemnity—contribution.** When the property of a stockholder is taken for a corporate debt, he may maintain an action against the corporation for indemnity, and against any of the other stockholders for contribution. [C. '73, § 1085; R., § 1175; C. '51, § 698.]

SEC. **1634. Franchise sold on execution.** The franchise of a corporation may be levied upon under execution and sold, but the corporation shall not become thereby dissolved, and no dissolution of the original corporation shall affect the franchise, and the purchaser becomes vested with all the powers of the corporation therefor. Such franchise shall be sold without appraisement. [C. '73, § 1086; R., § 1177; C. '51, § 700.]

It seems that this provision has reference to the franchise of a corporation obtained by the adoption of the articles of incorporation and not to a special franchise granted to a corporation, as for instance, a privilege of maintaining and operating waterworks in a city. A franchise of the latter character could be sold or transferred without statutory provision: *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed., 881.

SEC. **1635. Production of books.** In proceedings by or against a corporation or a stockholder to charge his private property, or the dividends received by him, the court may, upon motion of either party, upon cause shown for that purpose, compel the officers or agents of the corporation to produce the books and records of the corporation. [C. '73, § 1087; R., § 1178; C. '51, § 701.]

SEC. **1636. Estoppel.** No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense. [C. '73, § 1089; R., § 1181; C. '51, § 704.]

A party contracting with a corporation cannot deny its corporate existence: *Howe Machine Co. v. Snow*, 32-433; *Courtright v. Deeds*, 37-503, 511.

A person sued upon such contract cannot set up want of legal organization, etc.: *Washington College v. Duke*, 14-14.

Among acts which would constitute acting as a corporation, such as by statute would prevent the corporation from denying its legal existence, would be the adoption and use of a corporate seal, the taking of subscriptions and the issue of certificates of stock; but the acts of persons as members of a religious society in holding business meetings, and acquiring property, receiving and paying out money, appointing agents to make settlements, etc., *held* not sufficient to constitute such "acting as a corporation;" also *held*, that the passage of by-laws is not an assumption of distinctive corporate powers; nor is the attempt to incorporate: *Kirkpatrick v. United Presb. Church*, 63-372.

Where the corporation has assumed to make a contract authorized by its amended articles, and has received the consideration therefor, it cannot escape liability upon the ground that such amended articles had not been recorded: *Humphrey v. Patrons', etc., Ass'n*, 50-607.

The fact that a member of the board of directors has been irregularly elected constitutes no defense in an action against the corporation for indebtedness created: *Carrothers v. Newton Mineral Spring Co.*, 61-681.

When a corporation seeks to enforce the bequests in a will, duly admitted to probate, its claim cannot be resisted on the ground that it has not been legally organized. Such objection can be taken only by a proceeding by *quo warranto*: *Quinn v. Shields*, 62-129.

The estoppel provided for by this section certainly applies only to a body of men acting as a corporation for pecuniary profit. Whether the section can be applied to persons acting as a corporation other than for pecuniary profit, *quære: Kirkpatrick v. United Presb. Church*, 63-372.

SEC. **1637. Foreign corporation—filing articles—process.** Any corporation for pecuniary profit, other than for carrying on mercantile or manufacturing business, organized under the laws of another state, or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa since the first day of September, 1886, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with the secretary of state a certified copy of its articles of incorporation, duly attested, accompanied by a resolution of its board of directors or stockholders authorizing the

filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter. Before such permit is issued, the said corporation shall pay to the secretary of state the same fee required for the organization of corporations in this state, and if the capital of such corporation is increased, it shall pay the same fee as is in such event required of corporations organized under the law of this state. Any corporation transacting business in this state prior to the first day of September, 1886, shall be exempt from the payment of the fees required under the provisions of this section. The secretary of state shall thereupon issue to such corporation a permit, in such form as he may prescribe, for the transaction of the business of such corporation, and upon the receipt of such permit said corporation shall be permitted and authorized to conduct and carry on its business in this state. Nothing in this section shall be construed to prevent any foreign corporation from buying, selling and otherwise dealing in notes, bonds, mortgages and other securities. [21 G. A., ch. 76, § 1.]

SEC. **1638. Permit.** No foreign corporation which has not in good faith complied with the provisions of this chapter and taken out a permit shall possess the right to exercise the power of eminent domain, or exercise any of the rights and privileges conferred upon corporations, until it has so complied herewith and taken out such permit. [Same, § 2.]

SEC. **1639. Penalty.** Any foreign corporation that shall carry on its business in violation of the provisions of this chapter in the state of Iowa, by its officers, agents or otherwise, without having complied with this statute and taken out and having a valid permit, shall forfeit and pay to the state, for each and every day in which such business is transacted and carried on, the sum of one hundred dollars, to be recovered by suit in any court having jurisdiction; and any agent, officer or employe who shall knowingly act or transact such business for such corporation, when it has no valid permit as provided herein, shall be guilty of a misdemeanor, and for such offense shall be fined not to exceed one hundred dollars, or be imprisoned in the county jail not to exceed thirty days, or by both such fine and imprisonment, and pay all costs of prosecution. Nothing contained in this chapter shall relieve any person, company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon or required of it, or from the payment of any penalty or liability created by the statutes heretofore in force, and all foreign corporations, and the officers and agents thereof, doing business in this state shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. [Same, § 4.]

Where an Iowa corporation and a Nebraska corporation were organized to operate a joint enterprise and the Iowa corporation transferred its interest in the enterprise to the Nebraska corporation, which continued to operate the business in Nebraska and Iowa, *held*, that the Nebraska corporation was guilty of a violation of this statute in failing to procure a license under which to carry on the enterprise in Iowa, but that in view of the fact that it appeared not to have acted in bad faith it should have a reasonable time in which to comply with the statute before being ousted of its privileges and franchises: *State v. Omaha & C. B. R. & B. Co.*, 91–517.

The original statute containing a provision that the license should be forfeited on removal of a suit by the corporation to a federal court, *held* unconstitutional for the reason that it made the stipulation not to remove cases to the federal courts a condition for obtaining the permit to do business: *Barron v. Burnside*, 121 U. S., 186.

SEC. **1640. Dissolution—receiver.** Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the state of Iowa. An action therefor may be instituted by the attorney-

general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them.

SEC. **1641. Ownership of property.** Corporations organized in any foreign country, or corporations organized in this country the stock of which is owned in whole or in part by aliens or nonresidents, shall have the same rights, powers and privileges with regard to the purchase and ownership of real estate in this state as are granted to nonresident aliens in section twenty-eight hundred and ninety, chapter one, title fourteen, of this code.

CHAPTER 2.

OF CORPORATIONS NOT FOR PECUNIARY PROFIT.

SECTION **1642. Organization—purposes—name.** Any three or more persons of full age, a majority of whom shall be citizens of the state, may incorporate themselves for the establishment of churches, colleges, seminaries, lyceums, libraries, fraternal lodges or societies, temperance societies, trades' unions or other labor organizations, agricultural societies, farmers' granges, or organizations of a benevolent, charitable, scientific, political, athletic, military or religious character, by signing, acknowledging, and filing for record with the county recorder of the county where the principal place of business is to be located, articles of incorporation, stating the name by which the corporation or association shall be known, which shall not be the same as that of any such organization previously existing, its business or objects, the number of trustees, directors, managers or other officers to conduct the same, and the names thereof for the first year. [22 G. A., ch. 87; 21 G. A., ch. 71; C. '73, §§ 1091–2, 1095, 1100; R., §§ 1187–8, 1190–1, 1193, 1197; C. '51, §§ 708–9.]

For the purpose of effecting the objects of such corporation it has power to borrow money by executing notes and mortgages: *Thompson v. Lambert*, 44–239.

An agricultural society has not, in the absence of express authority in its articles, any power to employ persons to convey people to the fair held by such society, and is not liable for negligence of persons thus employed: *Bathe v. Decatur County Ag'l Soc'y*, 73–11.

The provisions of § 3270 which limit the power of associations or corporations not for pecuniary profit to take by will more than one-fourth of the estate of a person leaving a wife, child or parent surviving, are applicable to voluntary associations of that kind whether incorporated or not: *Byers v. McCartney*, 62–339.

Whether the provisions of § 1618, as to renewal of corporations, are applicable to corporations such as herein specified, *quære: Ibid.*

A corporation organized not for pecuniary profit such as a public library association may be for the public welfare and charitable, and the purposes of its creation may be germane to the objects of a municipal corporation, so that the latter may by devise take funds for the benefit of such association even though the municipal corporation could not appropriate public moneys to its support: *Phillips v. Harrow*, 61 N. W., 434.

SEC. **1643. Powers—duration.** Upon filing such articles, the persons signing and acknowledging the same, and their associates and successors, shall become a body corporate, with the name therein stated, and may sue and be sued. It may have a corporate seal, alterable at its pleasure, and may take by gift, purchase, devise or bequest real and personal property for purposes appropriate to its creation, and may make by-laws. Corporations so organized shall endure for fifty years, unless a shorter period is fixed in the articles, or they are sooner dissolved by three-fourths vote of all the members thereof, or by act of the general assembly, or by operation of law. [22 G. A., ch. 87; 21 G. A., ch. 71; C. '73, §§ 1070, 1091, 1096, 1101; R., §§ 1185, 1187, 1190–1, 1194, 1198; C. '51, § 708.]

SEC. **1644. For agricultural, horticultural, and cemetery purposes.** Corporations organized for agricultural or horticultural purposes, and cemetery associations, shall not own to exceed nine sections of land, and the

improvements and necessary personal property for the proper management thereof; and the articles of incorporation shall provide a mode by which any member may at any time withdraw therefrom, and also the mode of determining the amount to be received by such member upon withdrawal, and for the payment thereof to him, subject to the right of creditors of the corporation; and their duration shall be without limit, unless terminated by act of the general assembly. [C.'73, § 1070; R., § 1185.]

SEC. **1645. Dividend.** No dividend nor distribution of property among the stockholders shall be made until the dissolution of the corporation. [C.'73, § 1093; R., § 1188; C.'51, § 710.]

SEC. **1646. Degrees conferred.** Corporations of an academical character may confer the degrees usually conferred by such institutions. [C.'73, § 1094; R., § 1189; C.'51, § 711.]

SEC. **1647. Trustees or managers.** Such corporation may, annually or oftener, elect from its members its trustees, directors or managers, at such time and place and in such manner as may be specified in its by-laws, who shall have the control and management of its affairs and funds, a majority of whom shall constitute a quorum for the transaction of business. When a vacancy occurs in its governing body, it shall be filled in such manner as shall be provided by the by-laws. When the corporation consists of the trustees, directors or managers of any benevolent, charitable, scientific or religious institution which is or may be established in the state, and which is or may be under the patronage, control, direction or supervision of any synod, conference, association or other ecclesiastical body in any state established agreeably to the laws thereof, such ecclesiastical body may nominate and appoint such trustees, directors or managers, according to the usages of the appointing body, and may fill any vacancy which may occur among them; and when any such institution may be under the patronage, control, direction or supervision of two or more of such synods, conferences, associations or other ecclesiastical bodies, they may severally nominate and appoint such proportion of such trustees, directors or managers as shall be agreed upon by the bodies immediately concerned, and any vacancy occurring among such appointees last named shall be filled by the synod, conference, association or body having appointed the last incumbent. [C.'73, § 1097; R., § 1195.]

Where a corporation is organized for the purpose of holding and disposing of the property of a religious society, and its officers are elected by the members of the church, the courts will not interfere by *mandamus* to restore to membership in the corporation a person expelled from the church organization for an alleged offense where there are no property rights involved: *Sale v. First Regular Baptist Church*, 62–26.

The civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but will interfere with the action of such associations when rights of property or civil rights are involved: *Bird v. St. Mark's Church*, 62–567.

SEC. **1648. Academical—meetings.** Any corporation of an academical character, the membership of which shall consist of lay members and pastors of churches, delegates to any synod, conference or council holding its annual meetings alternately in this and one or more adjoining states, may hold its annual meetings for the elections of officers and the transaction of business in any adjoining state, at the place where such synod, conference or council holds its annual meeting; and the election and business transacted shall be of the same effect as if held and transacted at its place of business in this state. [C.'73, § 1098.]

SEC. **1649. Election of officers.** If an election of trustees, directors or managers shall not be made on the day designated by the by-laws, the society for that cause shall not be dissolved, but such election may take place on any other day directed in the by-laws. [C.'73, § 1099; R., § 1196.]

SEC. **1650. Reincorporation.** The trustees, directors, or members of any corporation organized under this chapter may reincorporate the same, and all the property and rights thereof shall vest in the corporation as reincorporated. [C.'73, § 1102; R., § 1199.]

SEC. **1651. Changing name.** Any corporation organized under this chapter may change its corporate name or amend its articles of incorporation by a vote of a majority of the members, in such manner as may be provided by its articles. If the trustees, directors or managers of such corporation are appointed by two or more synods, conferences, associations or other ecclesiastical bodies, such amendment or change shall not be made without the concurrence of a majority of those appointed by each such body. [15 G. A., ch. 40, §§ 1, 2.]

SEC. **1652. Record—effect.** The change or amendment provided for in the preceding section shall be recorded as the original articles are recorded. From the date of filing such change or amendment for record, the provisions of the previous section having been complied with, the change or amendment shall take effect as a part of the original articles, and the corporation thus constituted shall have the same rights, powers and franchises, be entitled to the same immunities, and liable upon all contracts to the same extent, as before such change or amendment. [Same, §§ 3, 4.]

CHAPTER 3.

OF AGRICULTURAL AND HORTICULTURAL SOCIETIES AND STOCKBREEDERS' ASSOCIATIONS AND STATE DAIRY ASSOCIATIONS.

SECTION **1653. Meeting of state agricultural society.** There shall be held annually at the seat of government, on the second Wednesday of January, a meeting of the board of directors of the state agricultural society, together with the president of each county society or a delegate therefrom accredited in writing, who shall be a resident of the county, and in counties where there are no agricultural societies the board of supervisors may appoint a delegate to represent the county, who shall be a resident of the county, who shall, for the time being, be members of the board, at which officers and directors shall be chosen, the place for holding the next annual exhibition determined, premiums on essays and field crops awarded, and all questions relating to the agricultural development of the state considered. [25 G. A., ch. 111; C.'73, § 1103; R., § 1701.]

SEC. **1654. Officers—terms.** The officers chosen at such meeting shall be a president, vice-president, secretary, treasurer and five directors. The president, vice-president, secretary and treasurer shall serve one year and be directors by virtue of their office. The other directors shall serve two years, so that the entire number shall always be ten, one-half of whom shall be chosen annually, and five of whom shall constitute a quorum. The president shall have power to call meetings of the board when necessary. [C.'73, § 1104; R., § 1700.]

SEC. **1655. Premium list.** The premium list and rules of exhibition shall be determined and published by the board of directors prior to the first of April in each year. [C.'73, § 1106; R., § 1702.]

SEC. **1656. Annual report.** The board shall annually report to the governor the proceedings of the society, its doings for the past year, a general view of the condition of agriculture throughout the state, accompanied with such recommendations and reports as to it may appear interesting or useful; which report shall be published by the state under the supervision of the society. One-half of such reports shall be bound in muslin covers in style uniform with the reports of the horticultural society, and the remainder in board covers similar in style to the acts of the general assembly. A financial committee consisting of three members shall be appointed by the executive council, whose duty it shall be to pass upon all financial business of the society prior to the annual meeting thereof, and make their report to the governor. No member of such committee shall be a director or officer of the society. [C.'73, § 1107; R., § 1703.]

SEC. **1657. Distribution of reports.** The secretary of state shall distribute ten copies of the printed report provided for in the preceding section to the state university, ten to the state library, ten to the agricultural college, one to each member of the general assembly, and the remainder to the secretary of the society, to be distributed by him to the county agricultural societies, and one to the board of supervisors of each county in which there is no such society. [C.'73, § 1108.]

SEC. **1658. County societies—premiums.** County agricultural societies may annually offer and award premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, articles of domestic industry, and such other articles and improvements as they may think proper, and so regulate the amount thereof and the different grades as to induce general competition. [C.'73, § 1109; R., § 1697.]

Such societies may offer a premium to the winner at a horse-race held on its grounds during its annual fair: *Delier v. Plymouth County Ag'l Soc'y*, 57–481.

SEC. **1659. List of awards.** Each county society shall annually publish a list of the awards, and an abstract of the treasurer's account, in one or more newspapers of the county, with a report of its proceedings during the year, and a synopsis of the awards. It shall also make a report of the condition of agriculture in the county to the board of directors of the state agricultural society, which shall be forwarded on or before the first day of December in each year to the secretary of said society. The auditor of state, before issuing a warrant in favor of such societies for any amount, shall demand the certificate of the secretary of the state society that such report has been made. [C.'73, § 1110; R., § 1698.]

SEC. **1660. Appropriation from county.** When a county agricultural society shall have procured in fee simple, free from incumbrance, land for fair grounds, not less than ten acres in extent, or hold and occupy such amount of land by virtue of a lease, and own and have thereon buildings and improvements worth at least two thousand dollars, the board of supervisors of the county may appropriate and pay to it a sum not exceeding one hundred dollars for every thousand inhabitants in the county, to be expended by it in fitting up or purchasing such fair grounds, but for no other purpose; but the aggregate amount so appropriated shall not exceed one thousand dollars to any one society. [C.'73, § 1111.]

SEC. **1661. State aid to district or county society.** When a county or district agricultural society composed of one or more counties has made its report to the state society as provided in this chapter, and raised during the year any sum of money for actual membership, it shall be entitled to an equal sum, not exceeding two hundred dollars, from the state treasury, upon filing with the auditor of state the affidavit of the president, secretary and treasurer, showing that such sum was raised for the legitimate purposes of the society during the current year, accompanied by the certificate of the secretary of the state society that it has reported according to law; but in case it shall be proven that any society has permitted gambling devices, or other violations of state law, they shall not be entitled to such appropriation. [C.'73, § 1112; R., § 1704.]

The benefit provided for in this section in behalf of agricultural societies under certain conditions is not limited to one society in each county, but two or more societies may receive the benefit provided for if they come within the conditions of the statute: *Poweshiek County Cent. Ag'l Society v. Shaffer*, 86 –377.

SEC. **1662. Report to supervisors.** Each society receiving such appropriation shall, through its secretary, make to the board of supervisors a detailed statement, accompanied with vouchers, showing the legal disbursement of all moneys so received. [C.'73, § 1113.]

SEC. **1663. Permits.** The president of a district or county agricultural society may grant a written permit to such persons as he thinks proper, to

sell fruit, provisions, and other articles not prohibited by law, under such regulations as the board of directors may prescribe. [C. '73, § 1115.]

SEC. **1664. Police power.** The president of any such society may appoint such number of peace officers as may be necessary, and may arrest or cause to be arrested any person violating any of the provisions of this chapter, and cause him to be taken before some justice of the peace to be dealt with as provided by law; and he may seize or cause to be seized all intoxicating liquors, wine, or beer of any kind, with the vessels containing the same, and all tools or other implements used in any gambling, and remove or cause to be removed all shows, swings, booths, tents, carriages, vessels, boats, or any other thing that may obstruct or cause to be obstructed, by collecting persons around or otherwise, any thoroughfare leading to the inclosure in which such agricultural fair is being held. Any person owning, occupying or using any of such things causing such obstruction, who shall refuse or fail to remove the same when ordered to do so by the president, shall be liable to a fine of not less than five nor more than one hundred dollars for every such offense. During the time the fair is being held, no ordinance or resolution of any city or town shall in any way impair the authority of the society, but it shall have sole and exclusive control over and management thereof. [23 G. A., ch 125; C. '73, § 1116.]

The society having no power to authorize the arrest of persons for any other offenses than selling intoxicating liquors, gambling and horse racing within its grounds an arrest by its officers and agents for any other offense, such as that of assault will not render the society liable: *Hern v. Iowa State Ag'l Society*, 91-97.

The society is an arm or agency of the state organized for the promotion of the public good and for the advancement of the agricultural interests of the state. Its funds should not be used to pay damages arising out of the commission of wrongful acts by its officers and servants who are in no way connected with the objects and purposes of its creation: *Ibid.*

SEC. **1665. Fraudulent entries of horses.** No person, partnership, company or corporation shall knowingly enter or cause to be entered any horse of any age or sex under an assumed name, or out of its proper class, to compete for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association, person or persons in the state, or drive any such horse under an assumed name, or out of its proper class, where such prize, purse, premium, stake or sweepstake is to be decided by a contest of speed. [24 G. A., ch. 67, § 1.]

SEC. **1666. Penalty.** Any person convicted of a violation of the preceding section shall be imprisoned in the penitentiary for a period of not more than three years, or in the county jail for not more than one year, and be fined in a sum not exceeding one thousand dollars. [Same, § 2.]

SEC. **1667. Entry under changed name.** The name of any horse, for the purpose of entry for competition in any contest of speed, shall not be changed after having once contested for a prize, purse, premium, stake or sweepstake, except as provided by the code of printed rules of the society or association under which the contest is advertised to be conducted, unless the former name is given. [Same, § 3.]

SEC. **1668. Class determined.** The class to which a horse belongs for the purpose of an entry in any contest of speed, as provided by the printed rules of the society or association under which such contest is to be made, shall be determined by the public record of said horse in any such former contest. [Same, § 4.]

SEC. **1669. Horticultural society—meetings.** The horticultural society shall hold its meetings each year for the transaction of business at such time as it may fix, at which a president, vice-president, secretary, treasurer and librarian shall be elected, who shall serve one year; also one-half of a board of directors, the full board not to exceed twelve in number, who shall serve two years, but vacancies may be filled for the unexpired term. [23 G. A., ch. 44; C. '73, § 1117.]

SEC. **1670. District and county societies.** The society shall encourage the organization of district and county societies, giving them representation therein, and in every way further the fruit and tree growing interests of the state. [C.'73, § 1118.]

SEC. **1671. Annual report.** The secretary shall make an annual report to the governor, containing the proceedings of the society, with an itemized account showing all the expenditures and the purpose for which the same were made during the year, the general condition of horticultural interests throughout the state, together with such statements and recommendations as he may think useful, to be published by the state, under the supervision of the society, on or before the fifteenth day of February of each year. [25 G. A., ch. 85; C.'73, § 1119.]

SEC. **1672. Printing and distribution.** There shall be printed four thousand copies of the report, which shall be bound, one-half in muslin covers, uniform in style with the reports heretofore made, and the remainder in board covers similar to the acts of the general assembly, which shall be distributed by the secretary of state, as follows: Six copies each to the governor, lieutenant-governor, secretary of state, auditor, treasurer, attorney-general, judges of the supreme court, and each member of the general assembly; one hundred to the agricultural college, five copies to the university, two to each incorporated college in the state, one to each auditor, and clerk of the district court, to be kept in his office, and one to each newspaper published in the state; the remainder to be distributed by direction of the society. [18 G. A., ch. 6; C.'73, § 1120.]

SEC. **1673. Appropriation for.** The sum of twenty-five hundred dollars is hereby appropriated annually for the use and benefit of said society, which shall be paid upon the warrant of the auditor of state, upon the order of the president of said society, in such sums and at such times as may be for the interests of said society. [20 G. A., ch. 128; C.'73, § 1121.]

SEC. **1674. Publication of proceedings of improved stock breeders' association.** The state shall print annually three thousand five hundred copies of the proceedings of the association of improved stock breeders, such publication not to exceed three hundred pages and to be bound in pamphlet form, which shall be distributed,—to the governor, lieutenant-governor, secretary of state, auditor of state, state treasurer, each member of the general assembly, state horticultural society, state agricultural society, state library, university, and agricultural college, each ten copies; to each county auditor, to be kept in the office, each public library, each incorporated college in the state, each president and secretary of each county and district fair, and each president and secretary of each dairymen's or stock growers' association, two copies; the remainder to be distributed under the direction of the association. [20 G. A., ch. 134.]

SEC. **1675. Farmers' institutes.** When forty or more farmers of a county organize a farmers' county institute, with a president, secretary, treasurer, and an executive committee of not less than three outside of such officers, and hold an institute, remaining in session not less than two days in each year, which institute may be adjourned from time to time and place to place in said county, the county auditor, upon proof of such organization and such institute having been held, together with an itemized statement, showing the manner in which the money herein appropriated has been expended, shall certify the same to the auditor of state, who shall remit to the treasurer of such county his warrant for not to exceed fifty dollars, and there is hereby appropriated, out of the moneys in the state treasury not otherwise appropriated, a sum not to exceed fifty dollars annually for such institute work in each county. No officer of any such farmers' institute shall receive, directly or indirectly, any compensation from said state fund for services as such officer. [24 G. A., ch. 58, § 1.]

SEC. **1676. Appropriation.** The money appropriated and paid into the county treasury shall be designated as a farmers' institute fund, and no

warrant shall be drawn thereon, except by an order signed by a majority of the members of the executive committee. In case two or more organizations shall claim recognition as farmers' institutes in any county, a bill shall be audited by the board of supervisors, who shall divide said state fund as nearly as possible equitably, but in no case shall more than three institutes be held in one year in any county under the provisions of this chapter. [Same, § 2.]

SEC. **1677. Weather and crop service.** There is established, under the supervision of the board of directors of the state agricultural society, a weather and crop service, which shall coöperate with the national weather bureau for the purpose of collecting weather and crop statistics and meteorological data, and disseminating the weather forecasts and storm and frost warnings among the people, and to promote the growth of knowledge of meteorological science and the climatology of the state. [23 G. A., ch. 29, § 2.]

SEC. **1678. Director.** The central station shall be at the seat of government, under the charge of a director and assistant, to be appointed by the governor for a term of two years, upon the recommendation of the board of directors of the state agricultural society; the assistant to be an officer of the United States weather bureau, if one shall be detailed for that purpose. [Same, § 3.]

SEC. **1679. Stations—bulletins.** The director shall coöperate with the board of directors of the state agricultural society to establish volunteer stations at one or more places in each county in the state, and in appointing observers thereat; to supervise such stations, receive reports of meteorological events and crop conditions therefrom, and tabulate the same for permanent record; to issue weekly weather and crop bulletins during the season from April first to October first, and to edit and cause to be published at the office of the state printer a monthly weather and crop review, containing meteorological and agricultural matter of public interest and educational value. The state printer shall print three thousand copies thereof, which shall be distributed from the office of said society. The directors may require a larger issue for such subscribers as will pay the expense thereof. The director shall have advisory power to coöperate with the farmers' institute organizations of the several counties of the state, for the purpose of arranging dates and providing speakers or lecturers, with a view to economy of time and travel in attending institutes; such institutes to be held as nearly as practicable in circuits, and at such dates as will enable speakers to attend two or more such institutes each week. [24 G. A., ch. 63, § 2; 23 G. A., ch. 29, § 4.]

SEC. **1680. Report.** The director shall compile and make an annual report to the governor, which shall contain a complete review and summary of the results of the service for the year, which may include articles and papers upon subjects of meteorological science and climatology, and extracts from approved works and publications on such subjects, which shall be printed and bound in such numbers as the executive council shall direct, the expenses to be paid as in case of other reports. [23 G. A., ch. 29, § 5.]

SEC. **1681. Appropriation.** There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of two thousand seven hundred dollars annually, to be drawn and expended upon the order of the president and secretary of the agricultural society, for such service, including the salary of the director, which shall not exceed fifteen hundred dollars per annum. [24 G. A., ch. 63, § 1.]

SEC. **1682. Publication of proceedings of state dairy association.** The annual proceedings of the Iowa state dairy association, including accepted essays and addresses, together with the reports of discussions, are hereby authorized and directed to be printed by the state under the supervision of the association, as the reports of the agricultural and horti-

cultural associations are published under the provisions of this chapter. [26 G. A., ch. 101, § 1.]

SEC. **1683. Distribution.** The number of copies so published shall be limited to thirty-five hundred annually, not to exceed three hundred pages each,—five hundred copies to be bound in cloth, the remainder in double-thick paper covers. They shall be distributed as follows: To the governor, lieutenant-governor, secretary of state, state treasurer, each member of the general assembly, the state horticultural society, the state agricultural society, the Iowa improved stock breeders' association, the state library, the university, and the agricultural college, each ten copies; to each county auditor, to be kept in the office, to each public library, to each incorporated college in the state, to each president and secretary of each county and district fair, two copies each; and to each county and district farmers' institute, ten copies each; the remainder to be distributed under the direction of the association. [Same, § 2.]

CHAPTER 4.

OF INSURANCE OTHER THAN LIFE.

SECTION **1684. Proceedings for incorporation.** Corporations formed for the purpose of insurance, other than life insurance, shall be governed by the provisions of chapter one of this title, except as modified by the provisions of this chapter. [C. '73, § 1122.]

SEC. **1685. Articles—approval.** Each such organization shall present to the auditor of state its articles of incorporation, which shall show its name, objects, location of its principal place of business and amount of its capital stock, who shall submit it to the attorney-general for examination, and if found by him to be in accordance with the provisions of this title, the laws of the United States, and the constitution and laws of the state, he shall certify such fact thereon and return the same to the auditor, and no articles shall be approved by the auditor or recorded unless accompanied with such certificate. [Same.]

SEC. **1686. Certificate—recording.** If the auditor approves them, he shall so certify, and the articles with the certificates of approval shall be recorded in the office of the secretary of state as articles of other corporations are, who shall indorse thereon his certificate thereof, as is required in case of other corporations for pecuniary profit. [C. '73, § 1123.]

SEC. **1687. Name.** If the auditor finds the name of the company to be so similar to one already appropriated by a corporation of the same character as to be likely to mislead the public or to cause inconvenience, he shall refuse his certificate to its articles on that ground. [C. '73, § 1122.]

SEC. **1688. Recording with state auditor.** The articles, when thus certified by the secretary of state as recorded in his office, or a copy thereof certified by him as such, shall be filed in the office of the auditor of state and remain therein. [C. '73, § 1123.]

SEC. **1689. Kind of company.** Every insurance company organized as provided in this chapter shall, if it be a mutual company, embody the word "mutual" in its title, which must appear upon the first page of every policy and renewal receipt; and every company doing business as a stock company shall, upon the face of its policies, express in some suitable manner that such policies are issued by a stock company. [C. '73, § 1140.]

SEC. **1690. Stock or mutual.** No company shall be organized to do business upon both stock and mutual plans; nor shall a company organized as a stock company do business upon the plan of a mutual company; nor shall a company organized upon the mutual plan do business or take risks upon the stock plan. [C. '73, § 1159.]

Where a company organized on a mutual plan issued policies of insurance on the stock plan, *held*, that such policies were invalid and that members of the company were not subject to assessment for losses under such policies: *Cory v. Sherman*, 64 N. W., 828.

SEC. **1691. Capital required.** No stock company shall be incorporated under the provisions of this chapter with a less capital than fifty thousand, nor larger than one million dollars, as may be specified in the articles of incorporation, which stock shall be divided into shares of one hundred dollars each, of which capital not less than twenty-five per cent., and in no case less than twenty-five thousand dollars, shall be paid up in cash. The balance of the capital may consist in the bonds or notes of solvent stockholders. [C.'73, § 1124.]

SEC. **1692. Premium notes of mutual company.** No mutual company shall commence business until agreements have been entered into for insurance with at least two hundred applicants, the premiums upon which shall amount to not less than twenty-five thousand dollars, of which at least five thousand dollars shall have been paid in cash, the balance of which may be in cash or secured notes or bonds in the possession of the company, which notes or bonds shall be of solvent parties, founded upon actual applications for insurance made in good faith. No one of the notes so received shall be for more than five hundred dollars, and no two thereof for the same risk, or made by the same person or firm, except where the whole amount does not exceed the sum of five hundred dollars; nor shall any note be regarded or represented as assets unless a policy be issued upon the same within thirty days after the organization of the company, taking the same upon a risk for no shorter period than twelve months. Each of said notes shall be payable, in whole or in part, at any time when the directors shall find the same necessary for the payment of losses and such incidental expenses as may be necessary for transacting the business of the company. [Same.]

While it is improper and unauthorized in a mutual company to make contributors to a guarantee fund members of the corporation and require directors to be selected from their number, yet it is not in itself illegal to create a guaranty fund and provide for the repayment of money so advanced by the contributors to such fund when it can be raised by assessments on the members, and the invalid provisions making such guarantors members of the company will not render the guaranty fund notes given by them void: *Berry v. Anchor Mut. F. Ins. Co.*, 62 N. W., 681.

Failure of a party giving such guaranty note to pay an assessment thereon without notice may by the terms of the contract forfeit prior payments made and credits received by him and defeat his right to recover such payments from the company: *Ibid.*

SEC. **1693. Certificate as to notes.** No note shall be accepted as part of the capital of a stock company nor as a premium note taken for the purpose of organization of a mutual company, unless accompanied by a certificate of the clerk of the district court or other court of record of the county in which the person executing it resides, to the effect that the person making it is in his opinion pecuniarily good and responsible therefor in property not exempt from execution. [Same.]

SEC. **1694. Subscriptions of stock—applications.** Having published the notice of incorporation contemplated by chapter one of this title, and filed the publisher's affidavit thereof with the auditor of state, together with the articles of incorporation as required in this chapter, the persons named in such articles as incorporators, or a majority of them, shall be authorized to open books for the subscription of stock to the company, if a stock company, or to take applications and premiums or premium notes for insurance, if a mutual company, to the extent hereinbefore required, at such times and places as to them may seem convenient, and keep them open until the full amount required is subscribed or taken. [C.'73, § 1125.]

SEC. **1695. Directors.** The affairs of a company organized under the provisions of this chapter shall be managed by not less than five nor more than twenty-one directors, all of whom shall be stockholders therein, if a

stock company, or policy holders, if a mutual company. Within thirty days after the subscription book shall have been filled, if a stock company, or after applications and premiums or premium notes for insurance, if a mutual company, shall have been taken to the extent hereinbefore required, a majority of the subscribers, or policy holders if a mutual company, shall hold a meeting for the election of directors, each share of stock or policy of insurance on separate property, as the case may be, entitling the holder thereof to one vote, and the directors then elected shall continue in office until their successors have been duly chosen and accepted the trust. [C. '73, § 1126.]

SEC. **1696. Annual meetings.** The annual meetings for the election of directors shall be held during the month of January, at such time as the by-laws of the company may direct; but if for any cause no election is held, or there is a failure to elect at any annual meeting, then a special meeting for that purpose shall be held on the call of a majority of the directors, or of those persons holding a majority of the stock, or of a majority of policy holders if a mutual company, by giving thirty days' notice thereof in some newspaper in general circulation in the county in which the principal office of the company is located, and the directors chosen at any such annual or special meeting shall continue in office until the next annual meeting, and until their successors are elected and have accepted. [C. '73, § 1127.]

SEC. **1697. Powers of directors—president.** The directors shall elect by ballot from their own number a president, and fill all vacancies occurring in the board or presidency thereof; and the board of directors thus constituted, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in them by this chapter. [C.'73, § 1128.]

SEC. **1698. Secretary and other officers—by-laws—records.** The board of directors shall have power to appoint a secretary and any other officers or agents necessary for transacting the business of the company, paying such salaries and taking such security of them as is reasonable; it may adopt such by-laws and regulations not inconsistent with law as shall appear to them necessary for the regulation and conduct of the business, and shall keep full and correct entries of their transactions, which shall at all times be open to the inspection of the stockholders if a stock company, or policy holders if a mutual company, and to the inspection of persons invested by law with the right thereof. [C.'73, § 1129.]

The directors of an insurance company organized under this chapter, whether doing business under the ordinary or mutual plan, have the right to ordain and establish by-laws and regulations. The parties may by contract mutually agree to the waiver of a by-law: *Houdeck v. Merchants' and Bankers' Ins. Co.*, 71 N. W., 354.

SEC. **1699. Funds invested.** Any company organized under this chapter may invest its capital and funds in notes or bonds, secured in either case by mortgage on unincumbered real estate in the state worth double the sum loaned thereon, exclusive of buildings, unless such buildings are insured in favor of the company to the amount at which such buildings are estimated in determining the value of such property; also in United States bonds, or treasury notes, or the bonds of this state, or any county or municipal corporation thereof, authorized by law, and it may loan the same upon pledge of like bonds, or notes or bonds secured by mortgage as aforesaid, and not otherwise, except that the surplus funds may be invested in or loaned upon the pledge of the stock or bonds or other evidences of indebtedness of any solvent dividend paying corporation organized under the laws of the state, or of the United States, worth at their current market value ten per cent. more than the amount at which they are estimated in determining the assets of the company, but such investment shall not be made in the company's own stock. [C. '73, § 1130.]

SEC. **1700. Examination by auditor—statement.** Upon receiving notification that the requirements of the preceding sections have been complied with, the auditor of state shall make or cause to be made by some disinterested person by him appointed an examination, and if it shall be found that the capital or assets herein required of the company named, according to the nature of the business proposed to be transacted by such company, have been paid in, and are possessed by it in money or such stock, notes, bonds and mortgages as are required by the preceding sections of this chapter, he shall so certify; but if the examination is made by another than the auditor, the certificate shall be by him, and under oath. The corporators or officers of any such company or proposed company shall be required to state to the auditor of state under oath that the capital or assets exhibited to the persons making the examination were actually and in good faith the property of the company examined. The certificate of examination of a mutual company shall be to the effect that it has received and is in the actual possession of the cash premiums, premium notes, actual contracts of insurance and other securities, as the case may be, to the extent and value hereinbefore required. The corporators or officers of such mutual company shall file the statement under oath required of stock companies, which shall also show the name and residence of the maker and amount of each premium note forming part of its proposed assets. The certificate and statement above contemplated shall be filed in the auditor's office, who shall thereupon deliver to the company a certified copy of the same, with his written permission for it to commence the business proposed in its articles of incorporation, which permission, being recorded by the recorder of the county in which the company is to be located, in the book provided for the recording of articles of incorporation, shall be its authority to commence business and issue policies. Such permission shall be renewed and recorded annually on the first day of March, a copy of which, certified by the auditor, shall be admissible in evidence for or against a company with the same effect as the original. [C. '73, § 1131.]

SEC. **1701. Capital increased.** When the directors of a stock company with less than the maximum capital allowed in this chapter desire to increase the amount, they shall, if authorized by the holders of a majority of the stock to do so, file with the auditor of state an amendment of its articles authorizing such increase, not exceeding the maximum authorized capital, and thereupon shall be entitled to have the increased amount of capital fixed by such amendment, and the examination of securities constituting the increased capital stock shall be made in the same manner as provided for the original capital stock. [C.'73, §1135.]

SEC. **1702. Dividends.** The directors or managers of a stock company incorporated under the laws of this state shall make no dividends, except from the profits arising from their business; and in estimating such profits there shall be reserved therefrom a sum equal to forty per cent. of the amount received as premiums on unexpired risks and policies, which amount so reserved shall be unearned premiums; and there shall also be reserved all sums due the corporation on bonds and mortgages, bonds, stocks and book account, of which no part of the principal or interest thereon has been paid during the year preceding such estimate of profits, and upon which suit for foreclosure or collection has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and on which interest has not been paid; and such judgment with the interest due or accrued thereon and remaining unpaid, shall also be reserved. Any dividend made contrary to these provisions shall subject the company making it to forfeiture of its franchise. [C. '73, § 1136.]

SEC. **1703. May own real estate.** No company organized under this chapter shall purchase, hold or convey any real estate, save for the purpose and in the manner herein set forth:

1. Such as shall be required for the transaction of its business;
2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for money due;
3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the legitimate business of the company, or for money due;
4. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debt, or obtained by redemption as junior judgment creditor or mortgagee; but it may convey real estate which shall be found in the course of its business not necessary therefor, and all such last mentioned real estate shall be sold and conveyed within three years after the same has been determined, by the auditor of state, unnecessary, unless the company shall procure a certificate from him that the interest of the company will materially suffer by a forced sale, in which event the sale may be postponed for such a period as he may direct in such certificate. [C. '73, § 1137.]

SEC. **1704. Premium notes in mutual company.** All premium notes deposited with any mutual insurance company at the time of its organization, as above provided, shall remain as security for all losses and claims until the accumulation of the profits from investments allowed by this chapter shall equal the amount of cash capital required to be possessed by stock companies organized thereunder, unless the obligation of the maker thereof, under the terms of the contract of insurance in said company, shall have sooner expired. [C. '73, § 1138.]

SEC. **1705. Policy holders members.** The directors of any mutual company shall have the right to determine the amount of the note to be given, in addition to the cash premium, by any person insured therein, and every person effecting such insurance, and his heirs, administrators and assigns continuing to be insured, shall be members of the company during the period of insurance, and bound to pay for losses and necessary expenses accruing to the company in proportion to his or their premium note. [Same.]

SEC. **1706. Settlement of losses.** The directors shall as often as necessary, after receiving notice of any loss or damage, determine the sums to be paid by the several members thereof as their respective portions of such loss, assess the same against them, respectively, and notify them thereof in such manner as they shall determine or the by-laws prescribe; but the sum to be paid by each member shall always be in proportion to the original amount of his premium note, and be paid to the officers of the company within thirty days after the giving of said notice. [C. '73, § 1139.]

SEC. **1707. Failure to pay assessments.** If any member shall neglect or refuse to pay the sum assessed upon him as his proportion of any loss, as provided in the preceding section, for thirty days after demand has been made by registered letter or personal notice, the directors may sue and recover the amount due from the member under such assessment. The bringing of such suit or the recovery of judgment thereunder shall not affect the liability of the member under his premium note for other assessments to pay subsequent losses, but no such member shall be held liable in the aggregate by assessments in a sum exceeding the amount of his premium note, and if from an assessment made to pay any particular loss sufficient is not realized therefor, the claimant for the loss shall receive only the proportional amount due under his policy which the sum realized shall be sufficient to pay. It may be provided by the by-laws of the company that failure to pay an assessment under the provisions of this section shall operate as a forfeiture of the insurance of the member failing to make such payment. But the premium notes given at the organization of the company, and estimated in determining whether such company is entitled to commence business, shall not be canceled or released within one year, and until all losses accruing during the continuance of the note are paid. [Same.]

SEC. **1708. Cash premiums.** Any mutual company organized under the provisions of this chapter may accept cash premiums in place of premium notes for any term of insurance not exceeding one year, the amount of cash to be paid to be determined by the directors of the company.

SEC. **1709. Kinds of insurance—limitation of risk.** Any company organized under this chapter or authorized to do business in this state may:

1. Insure houses, buildings and all other kinds of property against loss or damage by fire or other casualty, and make all kinds of insurance on goods, merchandise or other property in the course of transportation, whether on land or water, or any vessel or boat wherever the same may be;

2. Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal causes. None but stock companies shall engage in fidelity and surety business;

3. Insure the safe keeping of books, papers, moneys, stocks, bonds and all kinds of personal property, and receive them on deposit;

4. Insure horses, cattle and other live stock against loss or damage by accident, theft or any unknown or contingent event which may be the subject of legal insurance;

5. Insure against personal injuries, disablement or death resulting from traveling or general accidents by land or water, and insure employers against loss in consequence of accidents or casualties of any kind to employes or other persons, or to property resulting from any act of an employe, or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith, except such insurance as is provided for in the next paragraph;

6. Insure against loss or injury to person or property, or both, growing out of explosion or rupture of steam boilers. [25 G. A., ch. 32; 24 G. A., ch. 29; C. '73, § 1132.]

An association organized by a railroad company for the benefit of employes who participate therein by payment of indemnity in case of accident or death is not within the provisions of the statutes as to insurance: *Maine v. Chicago, B. & Q. R. Co.*, 70 N.W., 630.

SEC. **1710. Kind of risk—limitation.** No company organized by either of the methods provided in this chapter or authorized to do business in the state shall issue policies of insurance for more than one of the six purposes mentioned in the preceding section, or expose itself to loss on any one risk or hazard to an amount exceeding ten per cent. of its paid up capital, unless the excess shall be reinsured in some other good and reliable company. The restrictions as to the amount of risk a company may assume shall not apply to companies organized to guarantee the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and guarantee the safe keeping of books, papers, moneys and other personal property. [C. '73, § 1132.]

SEC. **1711. Loans—reinsurance.** Such company may lend money on bottomry or respondentia, and course itself to be insured against any loss or risk it may have incurred in the couse of its business, and upon the interest which it may have in any property on account of any such loan, and generally to do and perform all other matters and things proper to promote these objects. [Same.]

SEC. **1712. Policies.** All policies or contracts of insurance made or entered into by the company may be made either with or without the seal of said company, but shall be subscribed by the president, or such other officer as may be designated by the directors for that purpose, and be attested by the secretary thereof. [C. '73, § 1133.]

SEC. **1713. Transfer of stock.** Transfers of stock made by any stockholder or his legal representative shall be subject to the provisions of

chapter one of this title relative to transfer of shares, and to such restrictions as the directors shall establish in their by-laws, except as hereinafter provided. [C.'73, § 1134.]

SEC. **1714. Annual statement.** The president or the vice-president and secretary of each company organized or authorized to do business in the state shall annually, on the first day of January of each year or within thirty days thereafter, prepare under oath and file with the auditor of state a full, true and complete statement of the condition of such company on the last day of the preceding month, which shall exhibit the following items and facts:

First—The amount of capital stock of the company;

Second—The names of the officers;

Third—The name of the company and where located;

Fourth—The amount of its capital stock paid up;

Fifth—The property or assets held by the company, specifying:

1. The value of real estate owned by the company;
2. The amount of cash on hand and deposited in banks to the credit of the company, and in what bank deposited;
3. The amount of cash in the hands of agents and in the course of transmission;
4. The amount of loans secured by first mortgage on real estate, with the rate of interest thereon;
5. The amount of all other bonds and loans and how secured, with the rate of interest thereon;
6. The amount due the company on which judgment has been obtained;
7. The amount of bonds of the state, of the United States, of any county or municipal corporation of the state, and of any other bonds owned by the company, specifying the amount and number thereof, and par and market value of each kind;
8. The amount of bonds, stock and other evidences of indebtedness held by such company as collateral security for loans, with amount loaned on each kind, and its par and market value;
9. The amount of assessments on stock and premium notes, paid and unpaid;
10. The amount of interest actually due and unpaid;
11. All other securities and their value;
12. The amount for which premium notes have been given on which policies have been issued;

Sixth—Liabilities of such company, specifying:

1. Losses adjusted and due;
2. Losses adjusted and not due;
3. Losses unadjusted;
4. Losses in suspense and the cause thereof;
5. Losses resisted and in litigation;
6. Dividends in scrip or cash, specifying the amount of each, declared but not due;
7. Dividends declared and due;
8. The amount required to reinsure all outstanding risks on the basis of forty per cent. of the premium on all unexpired risks;
9. The amount due banks or other creditors;
10. The amount of money borrowed and the security therefor;
11. All other claims against the company;

Seventh—The income of the company during the previous year, specifying:

1. The amount received for premiums, exclusive of premium notes;
2. The amount of premium notes received;
3. The amount received for interest;

4. The amount received for assessments or calls on stock notes, or premium notes;

5. The amount received from all other sources;

Eighth—The expenditures during the preceding year, specifying:

1. The amount of losses paid during said term, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statement, and the amount at which such losses were estimated in such statement;

2. The amount paid for dividends;

3. The amount paid for commissions, salaries, expenses and other charges of agents, clerks and other employes;

4. The amount paid for salaries, fees and other charges of officers and directors;

5. The amount paid for local, state, national and other taxes and duties;

6. The amount paid for all other expenses, including printing, stationery, rents, furniture, or otherwise;

Ninth—The largest amount insured in any one risk;

Tenth—The amount of risks written during the year then ending;

Eleventh—The amount of risks in force having less than one year to run;

Twelfth—The amount of risks in force having more than one and not over three years to run;

Thirteenth—The amount of risks having more than three years to run;

Fourteenth—The dividends, if any, declared on premiums received for risks not terminated;

Fifteenth—Each accident insurance company, or company insuring against accidents, shall keep a register of tickets sold or policies issued by its officers or agents, which register shall show the name and residence of the person insured, the amount of insurance, the date of issue of such ticket or policy, and the time the same will remain in force; and the annual statement of each such company shall show the number of tickets sold and policies issued by it during the year, and the aggregate amount of insurance evidenced by such tickets and policies, classified as to the length of time for which such insurance is given. [C.'73, § 1141.]

SEC. **1715. Certificate refused.** The auditor of state shall withhold his certificate or permission of authority to do business from any company neglecting or failing to comply with the provisions of this chapter.

SEC. **1716. Annual statements of foreign company.** The annual statement of foreign companies doing business in this state shall also show, in addition to the foregoing matters, the amount of losses incurred and premiums received in the state during the preceding period, so long as such company continues to do business in this state. [C.'73, § 1146.]

SEC. **1717. Statement of stock and premium notes.** The statement of any stock company the capital of which is composed in whole or in part of notes shall, in addition to the foregoing, exhibit the amount of notes originally forming the capital, and also what proportion of said notes is still held by such company and considered capital. Each mutual company shall in its annual statement show the aggregate amount of premium notes held by it on which assessments may be made. [C.'73, § 1143.]

SEC. **1718. Inquiry by auditor.** The auditor of state shall address any inquiries to any insurance company in relation to its doings and condition, or any other matter connected with its transactions, which he may deem necessary for the public good, or for a proper discharge of his duties, and any company so addressed shall promptly reply in writing thereto. [C.'73, § 1142.]

SEC. **1719. Statements published—printed forms.** He shall cause to be prepared and furnished to each company organized under the laws of this state, and to the attorney or agent of each company incorporated in other states and foreign governments, who may apply therefor, printed

forms of statements required by this chapter, and may from time to time make such changes in the forms as shall seem to him best adapted to elicit from the companies a true exhibit of their condition in respect to the several points hereinbefore enumerated. [C. '73, § 1157.]

SEC. **1720. Auditor's report.** He shall cause the information contained in the statements required of the companies organized or doing business in the state to be arranged in a tabular form, and prepare the same in a single document for printing, which report shall be made to the governor on or before the first day of May of each year. [16 G. A., ch. 164; C. '73, § 1158.]

SEC. **1721. Foreign companies—capital required.** No insurance company, association or partnership incorporated, associated or organized under or by the laws of any other state or any foreign goverment, for the purposes specified in this chapter, shall directly or indirectly take risks or transact any business of insurance in the state, unless possessed of two hundred thousand dollars of actual paid up capital, exclusive of any assets deposited in other states and territories for the special benefit or security of the insured therein; but the provisions of this section shall not apply to mutual insurance companies or associations specifically organized for the purpose of and insuring a single class of property only; and companies organized to insure plate glass exclusively are not required to have a greater capital than one hundred thousand dollars; but such companies organized to insure against personal injury, disablement or death resulting from traveling or general accidents by land or water exclusively, having an actual paid up capital of one hundred thousand dollars and one hundred thousand dollars cash surplus safely invested, exclusive of any assets deposited in other states and territories for the special benefit or security of the insured therein, shall be deemed to be possessed of two hundred thousand dollars actual paid up capital within the meaning of this section. [21 G. A., ch. 145; 16 G. A., ch. 60; 15 G. A., ch. 55; C. '73, § 1144.]

SEC. **1722. Service of process—statement.** Any foreign company desiring to transact the business of insurance under this chapter, by an agent or agents in the state, shall file with the auditor of state a written instrument, duly signed and sealed, authorizing such auditor to acknowledge service of notice or process for and in behalf of such company in this state, and consenting that service of notice or process may be made upon the auditor of state, and when so made shall be taken and held as valid as if served upon the company according to the laws of this or any other state, and waiving all claim or right or error by reason of such acknowledgment of service. Such notice or process with a copy thereof may be mailed to the auditor of state at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereon on behalf of the defendant foreign insurance company by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed to him by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the person or corporation who shall be named or designated by such company in such written instrument. And such company shall also file with the auditor a certified copy of its charter or deed of settlement, together with a statement under oath of the president or vice-president or other chief officer and the secretary of the company for which they may act, stating the name of the company, the place where located, the amount of its capital, with a detailed statement of the facts and items required from companies organized under the laws of this state, and a copy of the last annual report, if any, made under any law of the state by which such company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by liabilities as specified in this chapter to the extent of twenty per cent. thereof, while such deficiency shall continue. [Same.]

Where a state prescribes conditions upon which a foreign corporation may do business within it, such corporation thereafter doing business in the state will be presumed to have assented to the conditions prescribed and will be bound accordingly: *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 63 N. W., 565.

It is within the power of a state to prescribe the method by which corporations doing business within its jurisdiction may be brought into court and to designate the officer or agent of such corporation upon whom the process necessary to commence an action may be served: *Ibid.*

The fact that a policy is issued and accepted in violation of a law prohibiting a company from doing business which has not complied with certain statutory requirements will not be void as between insured and the company, the latter not being allowed to take advantage of such objection, the penalty for violation of the law being imposed upon the company alone: *Pennypacker v. Capital Ins. Co.*, 80–56.

A foreign company has no right to take risks in this state without complying with the requirements of the law whether the contract for such risks are made in this state or not: *Seamans v. Zimmerman*, 91–363.

Premium notes taken by a company not authorized to do business in this state cannot be enforced in an action by a foreign receiver of such company in the courts of this state: *Barker v. Lamb*, 68 N. W., 686.

A company which has transacted business in the state cannot question the validity of service of notice upon it on the ground that it had not appointed agents, etc., as required by the statute: *Sparks v. National Masonic Acc. Assn.*, 69 N. W., 678.

By complying with these provisions as to the designation of an agent upon whom service may be made, the corporation becomes subject to the laws of the state, and to treatment in many respects as a domestic corporation, and liable to be sued in all respects as such a corporation would be: *German Bank v. American F. Ins. Co.*, 83–491.

Service of process may be made upon any agent of the company within the state: *Niagara Ins. Co. v. Rodecker*, 47–162.

SEC. **1723. Foreign mutual companies.** Any foreign mutual company possessed of cash assets safely invested, amounting to at least two hundred thousand dollars over and above all its liabilities, including the reserve for reinsurance required by the laws of the state, shall be held to be possessed of two hundred thousand dollars of actual paid up capital, within the meaning of the two preceding sections, and may be authorized to take risks and transact the business of insurance in the state on complying with the provisions of law applicable to them and relating to foreign insurance companies. [Same.]

SEC. **1724. Certificate.** When any foreign company has fully complied with the requirements of law and become entitled to do business, the auditor of state shall issue to such company a certificate of that fact, which certificate shall be renewed annually on the first day of March, if the auditor is satisfied that the capital, securities and investments of such company remain unimpaired, and the company has complied with the provisions of law applicable thereto. [C. '73, § 1146.]

SEC. **1725. Agent to have certificate of authority.** No agent shall directly or indirectly act for any insurance company referred to in this chapter, in taking risks or transacting business of insurance in the state, without procuring from the auditor of state a certificate of authority to the effect that such company has complied with all the requirements of this chapter. [C. '73, § 1145.]

SEC. **1726. Insurance notes.** All notes taken for policies of insurance in any company doing business in the state shall state upon their face that they have been taken for insurance, and shall not be collectible unless the company and its agents have fully complied with the laws of the state relative to insurance. [C. '73, § 1146.]

A negotiable note which does not state upon its face that it has been taken for insurance will not be subject, in the hands of an innocent holder, to the defense here indicated. The maker must have that fact appear upon the face of the note if he desires to rely upon such defense: *Cook v Weirman*, 51-561.

The provisions of this section with reference to notes given for policies of insurance are not applicable to the premium notes taken by a mutual benefit company for policies of insurance issued by them: *Corey v. Sherman*, 64 N. W., 828.

SEC. **1727. Forfeiture of policies.** No policy or contract of insurance provided for in this chapter shall be forfeited or suspended for non-payment of any premium, assessment or installment provided for in the policy, or in

any note or contract for the payment thereof, unless within thirty days prior to or on or after the maturity thereof the company shall serve notice in writing upon the insured that such premium, assessment or installment is due or to become due, stating the amount, and the amount necessary to pay the customary short rates, up to the time fixed in the notice when the insurance will be suspended, forfeited or canceled, which shall not be less than thirty days after service of such notice, which may be made in person, or by mailing in a registered letter addressed to the insured at his post-office as given in or upon the policy, and no suspension, forfeiture or cancellation shall take effect until the time thus fixed and except as herein provided, anything in the policy, application or a separate agreement to the contrary notwithstanding. [18 G. A., ch. 210, §§ 1, 2.]

It appears that the legislature intended to provide for constructive notice by mail, to be completed either when the registered letter is mailed or as soon thereafter as it shall be received at the office of its destination by due course of mail: *McKenna v. State Ins. Co.*, 73–453.

The time when the service of notice of forfeiture is complete is the time of mailing the letter in accordance with the provisions of the statute, and not the time when such letter would in due course of mail have reached its destination (*arguendo*): *Ross v. Hawkeye Ins. Co.*, 83–586; and see *Holbrook v. Mill Owners' Mut. Ins. Co.*, 86–255.

The notice is complete when registration of the letter is made under the rules of the post-office department which require that not only shall receipt have been given therefor but that it shall have been numbered: *Ross v. Hawkeye Ins. Co.*, 61 N. W., 852.

A notice which did not advise the insured that if the payment was not made the policy would be suspended, *held* not sufficient to entitle the company to take advantage of a forfeiture on account of such non-payment: *Marden v. Hotel Owners' Ins. Co.*, 85–584.

An insurance company seeking to declare a forfeiture of a policy by reason of the non-payment of the premium note must not only give the maker notice of the proposed suspension of his policy on account of such non-payment, but must also notify him of the amount necessary to pay the customary short rates, including the expense of taking the risk, up to the time the policy will be suspended, in order to cancel the policy: *Boyd v. Cedar Rapids Ins. Co.*, 70–325.

In a particular case, *held*, that an application by insured for extension of time, and the fact that it was not granted, did not waive the provision as to notice just referred to: *Ibid.*

The condition in a policy that it shall be suspended on failure of assured to pay the premium note cannot be disregarded except as provided by statute. This statutory provision simply prevents such condition taking effect until thirty days after the specified notice has been given: *Harle v. Council Bluffs Ins. Co.*, 71–401.

In general as to these provisions, see *Lewis v. Burlington Ins. Co.*, 71–97.

SEC. **1728. Cancellation of policy.** At any time after the maturity of a premium, assessment or installment provided for in the policy, or any note or contract for the payment thereof, or after the suspension, forfeiture or cancellation of any policy or contract of insurance, the insured may pay to the company the customary short rates and costs of action, if one has been commenced or judgment rendered thereon, and may then, if he so elect, have his policy and all contracts or obligations connected therewith, whether in judgment or otherwise, canceled, and they and each of them thereafter shall be void; and in case of suspension, forfeiture or cancellation of any policy or contract of insurance, the assured shall not be liable for any greater amount than the short rates earned at the date of such suspension, forfeiture or cancellation and the costs herein provided. [Same, § 3.]

The right of assured to cancel the policy and recover back premiums paid in excess of customary short rates cannot be exercised by assigning to another the right to cancel such policy and collect the unearned premium. The assignment would avoid the policy and terminate the right to recover. Nor can such unearned premium be recovered after the policy has been rendered void by taking other insurance: *Colby v. Cedar Rapids Ins. Co.*, 66–577.

If the company elects to enforce a premium note instead of cancelling the policy for non-payment as herein provided, it thereby waives a stipulation in the policy that the insurance shall be forfeited on failure to pay the note as agreed. By accepting payment in pursuance of legal proceedings, even after the loss the company waives the right to avail itself of the condition of forfeiture: *Bloom v. State Ins. Co.*, 62 N. W., 810.

It is optional with the company to allow a policy to remain uncanceled, and to accept payments when made, without waiving its right to insist upon prompt payment at any time thereafter: *Morrow v. Des Moines Ins. Co.*, 84–256.

SEC. **1729. Short rates.** The auditor of state shall prepare and publish a table of the short rates provided for in the two preceding sections, which, when published, shall be for the guidance of all companies covered in this chapter, and the rate to be given in the notice therein provided, and no greater sum than thus fixed shall be demanded or collected. A copy of said short rates shall be printed on or attached to each policy.

SEC. **1730. Policy restored—contract not valid.** At any time before cancellation of the policy for non-payment of any premium, assessment or installment provided for therein, or in any note or contract for the payment thereof, or after action commenced or judgment rendered thereon, the insured may pay to the insurer the full amount due, including court costs if any, and from the date of such payment, or the collection of the judgment, the policy shall revive and be in full force and effect, provided such payment is made during the term of the policy and before a loss occurs. No provision, stipulation or agreement to the contrary in or independent of the policy or contract of insurance shall avoid or defeat the right of any insured to pay short rates and costs of action, if any, and have the policy and all contracts connected therewith, including judgments rendered thereon, canceled. [18 G. A., ch. 210, § 3.]

SEC. **1731. Examination—dissolution.** The auditor of state shall, when he finds it expedient, appoint one or more persons, not officers, agents or stockholders of any insurance company doing business in the state, to examine into the affairs and condition of any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the auditor believes the public interest requires it. When it appears to the auditor from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent. below the paid up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney-general, who shall apply to the district court or if in vacation to one of judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor. The application of the attorney-general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge. [C. '73, § 1149.]

SEC. **1732. Requisition on stockholders.** Any company receiving such a requisition from the auditor shall forthwith call upon its stockholders for such amounts as will make its paid up capital equal to the amount fixed by this chapter or the articles of incorporation of said company; and in case any stockholder shall refuse or neglect to pay the amount called for after notice personally given, or by advertisement in such time and manner as the auditor shall approve, it shall be lawful for the company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificates for such number of shares as the said stockholder may be entitled to in the proportion that the ascertained value of the funds of the said company may be found to bear to its

original capital, the value of such shares for which new certificates shall be issued to be ascertained under the direction of the auditor, the company paying for the fractional parts of shares, and the directors of such company may issue new stock and dispose of the same, and issue new certificates therefor, to an amount sufficient to make up the original capital of the company. In the event of additional losses accruing upon new risks, taken after the expiration of the period limited by the auditor in the aforesaid requisition for the filling up of the deficiency in the capital of such company, and before said deficiency shall have been made up, the directors shall be individually liable to the extent thereof. [C. '73, § 1150.]

SEC. **1733. Mutual companies—dissolution.** If, upon such examination, it shall appear to the auditor that the assets of any company organized or operating upon the plan of mutual insurance under this chapter are insufficient to justify the continuance of such company in business, he shall proceed in relation to such company in the same manner as herein required in regard to stock companies; and the trustees or directors of such company are made personally liable for any losses which may be sustained upon risks taken after the expiration of the period limited by the auditor for filling up the deficiency in the assets or premium notes, and before such deficiency shall have been made up. [C.'73, § 1151.]

SEC. **1734. Transfers of stock pending investigation.** Any transfer of the stock of any company organized under this chapter, made pending any investigation above required, shall not release the party making the transfer from any liability for losses which may have accrued previous to such transfer. [Same.]

SEC. **1735. Revocation of certificate of foreign company.** The auditor of state shall be authorized to examine into the condition and affairs of any insurance company, as provided for in this chapter, doing business in this state, not organized under its laws, or cause such examination to be made by some person or persons appointed by him having no interest in any insurance company; and when it shall appear to his satisfaction that the affairs of any such company are in an unsound condition, he shall revoke the certificates granted in its behalf, and cause a notification thereof to be published in some newspaper of general circulation, published at the seat of government, and no agent or agents of such company after such notice shall issue policies or renew any previously issued. [C.'73, § 1152.]

SEC. **1736. Laws of other states—reciprocity.** When, by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits of money, securities or other obligations or prohibitions are imposed, or would be imposed, on insurance companies of this state doing or that might seek to do business in such other state, or upon their agents therein, so long as such laws continue in force the same obligations and prohibitions of whatever kind shall be imposed upon all insurance companies of such other state doing business in this state or upon their agents here. [C. '73, § 1154.]

Section applied: *State v. Fidelity & Casualty Co.*, 77-648.

SEC. **1737. Certificate of auditor published.** Every insurance company of the character provided for in this chapter, doing business in the state, organized under the laws of this or any other state or country, shall publish annually, before the first day of March, in two newspapers of general circulation, to be approved by the auditor of state, one of which shall be published at the seat of government, and, in case of companies organized in the state, one in the county where the principal office is located, a certificate from the auditor that such company has in all respects complied with the law of the state relating to insurance, and an affidavit of such publication made by the publisher or foreman of such newspaper shall be filed in the office of the auditor within thirty days from the date of such publication. Said certificate shall also contain a statement made up from the annual report of said company of the actual amount of paid up capital,

the aggregate amount of assets and liabilities at the date of such report, together with the aggregate income and expenditures of such company for the preceding year as shown by said report. [C. '73, § 1155.]

SEC. **1738. False statement of assets.** No company transacting the business of fire insurance within the state shall state or represent by advertisement in any newspaper, magazine or periodical, or by any sign, circular, card, policy of insurance or renewal certificate thereof or otherwise, any funds or assets to be in its possession and held available for the protection of holders of its policies unless so held, except the policy of insurance or certificate of renewal thereof may state as a single item the amount of capital set forth in the charter or articles of incorporation or association or deed of settlement under which it is authorized to transact business. [17 G. A., ch. 111, §§ 1, 3.]

SEC. **1739. Statement of capital and surplus.** Every advertisement or public announcement, and every sign, circular or card issued or published by any foreign company transacting the business of fire insurance in the state, or by any officer, agent or representative thereof, which shall purport to make known its financial standing, shall exhibit the capital actually paid in in cash, and the amount of net surplus of assets over all its liabilities actually held and available for the payment of losses by fire and for the protection of holders of fire policies, and shall also exhibit the amount of net surplus of assets over all liabilities in the United States actually available for the payment of losses by fire and held in the United States for the protection of holders of fire policies in the United States, including in such liabilities the fund reserved for reinsurance of outstanding risks, and the same shall correspond with the latest verified statement made by the company or association to the auditor of state. No such company shall write, place or cause to be written or placed any policy or contract for insurance upon property situated or located in this state except through its resident agent or agents. [Same, § 2.]

SEC. **1740. Penalty.** Any violation of the provisions of the two preceding sections shall for the first offense subject the company, association or individual guilty thereof to a penalty of five hundred dollars, to be recovered in the name of the state, with costs, in an action instituted by the county attorney, either in the county in which the company, association or individual is located or transacts business, or in the county where the offense is committed, and such penalty, when recovered, shall be paid into the school fund of the county in which action is brought. Every subsequent violation of said sections shall subject the company, association or individual to a penalty of one thousand dollars, to be sued for, recovered and disposed of in like manner. [Same, § 4.]

SEC. **1741. Copy of application.** All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option. [18 G. A., ch. 211, § 2.]

The provisions of this section are applicable to all kinds of insurance and policies, including those issued by benefit associations upon the mutual assessment plan: *Newman v. Covenant Mut. Ins. Ass'n*, 76–56; *McConnell v. Iowa Mut. Aid Ass'n*, 79–757. (See now § 1819.)

The requirements of this section as to attaching the application to or indorsing it upon the policy are applicable to fraternal

associations acting in a dual character involving the element of insurance, as well as mutual benefit associations: *Grimes v. Northwestern Legion of Honor*, 66 N. W., 183. (See now § 1826.)

This and the preceding section of this act apply to all kinds of insurance and not merely to fire insurance: *Cook v. Federal L. Ass'n*, 74–746.

It is incompetent, in defense to an action upon a policy, to plead or prove statements made in the application, where such statements are not reduced to writing and a copy thereof is not attached to or indorsed upon the policy: *Ellis v. Council Bluffs Ins. Co.*, 64–507. And see *Wallace v. Council Bluffs Ins. Co.*, 66–139.

Where one premium note was given for two policies on the same property, one against loss by fire and lightning, and one against loss by tornado, and a copy of the note was attached to the former and not to the latter, *held*, that in an action on the tornado policy, non-payment of the premium note as required could not be relied on: *Lewis v. Burlington Ins. Co.*, 80–259.

Where answers in the application are filled up by the agent taking such application from his own knowledge, the fact that a copy of the application is attached to the policy which is delivered to insured will not bind him to statements thus made, although he fails to notify the company of their falsity. The assured is not required to prove the statements made in the application to be true, and he is therefore not required to examine the copy of the application indorsed on the policy: *Donnelly v. Cedar Rapids Ins. Co.*, 70–693; and see *Bennett v. Council Bluffs Ins. Co.*, 70–600.

The conditions of the policy itself may be shown, although they are not contained in an application a copy of which is attached to the policy. Thus a failure to disclose the state of the title may be a representation appearing in the policy itself and may be shown though not appearing in the application attached to the policy: *McKinnon v. Mutual F. Ins. Co.*, 89-170.

The provisions of this section are broad enough to cover any renewal or reinstatement of the policy of insurance which has become invalid: *Goodwin v. Provident Savings Life Assurance Society*, 66 N. W., 157.

SEC. **1742. Evidence of value—proofs—action.** In any action brought in any court in this state on any policy of insurance for the loss of any building so insured, the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy: *provided*, the insurance company or association issuing such policy may show the actual value of said property at date of policy, and any depreciation in the value thereof before the loss occurred; but the said insurance company or association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount stated in the policy. And in an action on such policy it shall only be necessary for the assured to prove the loss of the building insured, and that he has given the company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred, so far as they are within his knowledge, and the extent of his loss. [Same, § 3.]

Evidence of value: It is error to instruct the jury with reference to the *prima facie* fact of the value of the property as stated in the policy, as applicable to personal property: *Warshawky v. Anchor Mut. F. Ins. Co.*, 67 N. W., 237.

A policy is not *prima facie* evidence as to the value of personal property insured. The provisions of this section as to presumption of value are applicable only to buildings: *Joy v. Security F. Ins. Co.*, 83–12; *Martin v. Capital Ins. Co.*, 85–643.

As to buildings covered by the insurance the burden is on the company to show that the property was not worth the amount for which it was insured: *Des Moines Ice Co. v. Niagara F. Ins. Co.* 68 N. W., 600.

The law fixes *prima facie* the measure of recovery in case of loss of a building and it is immaterial in making out plaintiff's case to show what the kind of building was or the material of which it was constructed or how long it had been in use: *Davis v. Anchor Mut. F. Ins. Co.*, 64 N. W., 687.

The policy being *prima facie* evidence of the value of the insured building, it is not incumbent upon the plaintiff in the first instance to prove such value, but evidence in respect to the value being introduced by the defendant, plaintiff may introduce evidence on that point in rebuttal: *Martin v. Capital Ins. Co.*, 85–643.

Under particular facts, *held*, that the evidence as to the value of the property was sufficient, in connection with the *prima facie* evidence supplemented by the valuation stated in the policy, to support the recovery: *Hagan v. Merchants', etc., Ins. Co.*, 81–321.

It seems that an appraisement agreement relating exclusively to the value of buildings can not be relied on by reason of the terms of this statute to prevent the bringing of suit on the policy: *Harrison v. German American F. Ins. Co.*, 67 Fed., 577.

Proofs of loss; notice: Proofs of loss which comply with the requirements of the statute are sufficient although they do not meet the requirements of the policy. Technical objections founded upon unreasonable requirements in the policy will not be considered: *Warshawky v. Anchor Mut. F. Ins. Co.*, 67 N. W., 237.

Proofs of loss in a particular case which did not give an account of the loss nor state how the fire originated nor state the actual cash value of the property destroyed were held not to constitute such proofs of loss as were required by the statute or by the terms of the policy: *Brock v. Des Moines Ins. Co.*, 64 N. W., 685.

While it may be sufficient in a suit on a policy to allege in general the performance of the conditions of such policy (see §§ 3626, 3628) and the failure to perform any particular condition must then be specifically alleged by defendant, yet if the plaintiff sets out specifically the furnishing of the proofs required, and the defendant denies in general the allegations of the petition an issue as to the sufficiency of the proofs is raised: *Ibid.*

Where a policy of insurance required that, if loss should occur, the assured should give the company immediate notice of the fact, and that as soon as possible after the fire proofs of loss under oath should be prepared and sent to the company, and in an action on the policy the petition showed that the proof of loss was not given within the time or in the manner required by statute, *held*, that a demurrer to the petition should have been sustained: *Von Genechtin v. Citizens' Ins. Co.*, 75-544.

Where the agent of an insurance company informed the assured that the loss would be adjusted, but it was not shown that such agent had any authority to adjust losses or bind the defendant in the adjustment of losses, *held*, that the promise of the agent that the loss would be adjusted was not a waiver of the condition as to proofs of loss: *Ibid.*

In an action upon a policy of insurance where the petition did not show the lapse of time for the maturity of the claim required by the policy nor that required by the statute, *held*, that it was sufficient ground for demurrer: *Ibid.*

An instruction that the jury must find that the notice of loss was given to the company within a reasonable time, although the policy required the notice to be given forthwith, *held* not erroneous, the terms being so nearly synonymous that no prejudice could have resulted therefrom: *Pennypacker v. Capital Ins. Co.*, 80-56.

The proofs of loss are not admissible on the trial to establish the facts connected with the loss; but in a particular case, *held*, that they were admissible to prove by an indorsement thereon the time of their receipt by the company: *Lewis v. Burlington Ins. Co.*, 80-259.

Formal proof of service of the proofs of loss is not required. All that is necessary is that they be given or rendered to the company; and if found in the possession of the company and produced by it upon the trial that is sufficient: *Runkle v. Hartford Ins. Co.*, 68 N. W., 712.

Where there is an issue as to whether notice and proofs of loss were given and there is no evidence in behalf of plaintiff on such question, it is error to submit the question to the jury: *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 64 N. W., 769.

Where the policy required the giving of notice to the secretary, *held*, that a notice to the company was a sufficient compliance: *Lewis v. Burlington Ins. Co.*, 80-259.

Evidence that notice and proofs of loss were deposited in the mail is admissible as showing that they were received, although their receipt is denied by the officers of the company: *Pennypacker v. Capital Ins. Co.*, 80-56.

The notice and affidavit required by this section are solely for the benefit of the insurer; and if, without objection to the sufficiency thereof, the company advises insured that it will proceed to settle the loss, it thereby waives any objection on account of defect in such proofs: *Harris v. Phœnix Ins. Co.*, 85-238.

Where insured stated by letter to the company that he had no knowledge of the particulars of the fire and its origin, but did not comply with the requirement as to the proof by affidavit, and the company made no objection on that ground, *held*, that it thereby waived its right to further proof: *Green v. Des Moines F. Ins. Co.*, 84-135.

It is not necessary that the notice and affidavit shall be attached together and delivered at the same time, but it is sufficient that they shall be both in the hands of the company within the time prescribed for giving notice: *Russell v. Fidelity F. Ins. Co.*, 84-93.

As to whether a stipulation in the policy requiring an appraisement as a condition precedent to the bringing of action thereunder would be valid, in view of the statute, *quære: Zalesky v. Home Ins. Co.*, 71 N.W., 566.

Waiver: Waiver of proofs of loss cannot be shown under an allegation that they have been furnished: *Welsh v. Des Moines Ins. Co.*, 71-337.

Under an allegation of the furnishing of proofs of loss evidence of the waiver of such proofs is not admissible: *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 64 N. W., 769.

Where insured was told by the secretary on requesting blank proofs of loss that such proofs were unnecessary and that there was nothing more for the owner to do but wait until he heard from the company, *held*, that this constituted a waiver of proofs of loss. *Scott v. Security F. Ins. Co.*, 66 N. W., 1054.

Requirements of the statute and of policies of insurance as to notice and proof of loss may be waived by the insurer through its authorized agents. *Held*, under the facts of this case, that the adjuster of the company bound the company by his acts and statements so far as they were authorized. The general manager of an insurance company, having full charge of its business in certain territory, may waive proofs of loss and notice, and also may waive a written indorsement required by the terms of the policy: *Ruthven v. American F. Ins. Co.*, 71 N. W., 574.

By furnishing proofs of loss the insured does not waive or abandon the right to rely on an alleged waiver of such proofs. He may plead both the fact of furnishing proofs and the fact of waiver, and rely upon whichever defense the evidence establishes: *Warshawky v. Anchor Mut. F. Ins. Co.*, 67 N. W., 237.

Under an allegation that proofs of loss have been furnished, it is not competent to introduce evidence showing the waiver of such proofs: *Heusinkveld v. Capital Ins. Co.*, 64 N. W., 594.

The provisions as to the *prima facie* effect of the value of buildings as stated in the policy is applicable in cases where there has been a waiver of proofs of loss as well as where proofs of loss have been made. *Scott v. Security F. Ins. Co.*, 66 N. W., 1054.

It may be that notice can be given to the agent who issued the policy, but such an agent would not have authority to waive the affidavit of loss: *Ruthven v. American F. Ins. Co.*, 92–316.

A special agent authorized to adjust losses could not delegate his authority to an adjuster of another company so that a waiver by the latter of proofs would be binding: *Ibid.*

SEC. **1743. Conditions.** Any condition or stipulation in an application, policy or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss: *provided*, however, that any condition or stipulation referring to any other insurance, valid or invalid, or to vacancy of the insured premises or the title or ownership of the property insured, or to liens or incumbrances thereon created by voluntary act of the insured and within his control, or to the suspension or forfeiture of the policy during default or failure to pay any written obligation given to the insurance company for the premium, or to the assignment or transfer of such policy of insurance before loss without the consent of the insurance company, or to the removal of the property insured, or to a change in the occupancy or use of the property insured, if such removal, change or use makes the risk more hazardous, or to the fraud of the insured in the procurement of the contract of insurance, shall not be changed or affected by this provision. No recovery on a policy or contract of insurance shall be defeated for failure of the insured to comply, after a loss occurs, with any arbitration or appraisement stipulation as to fixing value of property, unless it be pleaded and proved that the insurance company gave written notice to the insured of its election to determine the amount of loss by appraisement or arbitration as provided in the policy, and thereafter the insured failed to comply with such requirements. No arbitration shall take place except where the property was situated at the time of loss. Any agreement, stipulation or condition in any policy or contract of insurance by which any insurance company reserves or has the right to rebuild shall be void and of no effect in case of total loss. Nothing herein shall be construed to change the limitations or restrictions respecting the pleading or proving of any defense by any insurance company to which it is subject by law. The provisions of this section shall apply to all contracts of insurance on real and personal property.

SEC. **1744. Time of bringing action—provisions not affected by contract.** The notice of loss and proof thereof required in the preceding section, and the notice and proof of loss under oath in case of insurance on personal property, shall be given within sixty days from the time loss occurred, and no action for such loss shall be begun within forty days after such notice and proofs have been given to the company, nor shall the time within which action shall be brought be limited to less than one year from the time when a cause of action for the loss accrues. No provisions of any policy or contract to the contrary shall affect the provisions of this and the three preceding sections. [18 G. A., ch. 211, § 3.]

The limitation contained in this section as to the time for bringing the action pertains to the remedy, and cannot be controlled by stipulations in the policy of insurance: *Vore v. Hawkeye Ins. Co.*, 76–548; *Wilhelmi v. Des Moines Ins. Co.*, 86–326; *Worley v. State Ins. Co.*, 91–150.

The receipt of proofs of loss by the company and the assertion by it that the policy is void cannot be regarded as a waiver of this statutory provision as to the time in which action may be brought: *Vore v. Hawkeye Ins. Co.*, 76–548.

The fact that another action on the policy would be barred by reason of limitations in the policy as to time of bringing action will not estop the company from insisting that an action commenced within the prescribed period is prematurely brought, and that plaintiff cannot recover therein: *Ibid.*

These provisions as to the time when action may be brought for the loss, are applicable to actions for loss of goods as well as for loss by reason of damages to the realty: *Wilhelmi v. Des Moines Ins. Co.*, 86-326.

Action cannot be brought before the expiration of the time fixed, even on the refusal of the company to pay: *Quinn v. Capital Ins. Co.*, 71-615; *Finster v. Merchants & Bankers Ins. Co.*, 65 N. W., 1004.

Making proofs and giving notice within the prescribed time constitute conditions precedent to the right of action: *Ruthven v. American F. Ins. Co.*, 92-316.

The requirement of the statute as to the time within which an action on the policy may not be brought cannot be waived and a suit within the prescribed period is premature: *Blood v. Hawkeye Ins. Co.*, 69 N. W., 1141.

The effect of this provision as to the time when action may not be brought is to fix the time when the loss becomes due and payable. It does not affect the maturity of the contract, but is a legislative prohibition of the action before the time specified, and if action is brought before the expiration thereof it is prematurely brought and must fail. The objection may be raised by motion in arrest of judgment, without being pleaded as a defense: *Taylor v. Merchants' & Bankers' Ins. Co.*, 83-402.

Where an amended petition properly setting out the cause of action, was filed before the expiration of the time for bringing action and demurred to, *held*, that the company had sufficient notice of the amendment so that the cause of action set up therein must be deemed to have been brought within the proper time: *Jamison v. State Ins. Co.*, 85-229.

This section with reference to time after which action may be brought is applicable to life insurance: *Christie v. Life Indemnity, etc., Co.*, 82-360.

Therefore, *held*, that an action commenced on a certificate in a benefit company within sixty days after presenting notice of loss was prematurely brought and would be abated: *Ibid.*

Also *held*, that these provisions were not unconstitutional on the ground that the subject matter was not expressed in the title or that the act embraced more than one subject, or that it was not of uniform operation: *Ibid.*

If defendant claims that by reason of the proofs of loss not being sufficient the action is prematurely brought, he should set that out in a distinct division of his answer and not in connection with the defense that the defendant cannot recover by reason of defective proofs: *McComb v. Council Bluffs Ins. Co.*, 83-247.

The fact that a suit had been prematurely brought and is subsequently dismissed on that ground, does not entitle the plaintiff to institute another suit after the time limited by the policy for suing thereon, even though the second suit is within six months of the dismissal of the first. Section 3455 has no application to such a case: *Heusinkveld v. Capital Ins. Co.*, 64 N. W., 594; *Harrison v. Hartford F. Ins. Co.*, 71 N. W., 220.

The person who thus maintains an action prematurely brought is negligent, within the provisions of § 3455: *Wilhelmi v. Des Moines Ins. Co.*, 68 N. W., 782.

Where an action was brought in proper time upon a policy of insurance, but subsequently, on discovery that the property was misdescribed, such action was dismissed and an action in equity to reform the policy and recovery thereunder was commenced within a reasonable time, *held*, that such second action would not be barred under the provisions of the policy with reference to time for bringing action thereon: *Jacobs v. St. Paul F. & M. Ins. Co.*, 86-145.

The objection that the suit was prematurely brought may be raised by motion in arrest of judgment and is not waived by failing to interpose it earlier in the progress of the case: *Woodcock v. Hawkeye Ins. Co.*, 66 N. W., 764.

A provision in the policy for arbitration in case of disagreement as to the amount of loss does not make an arbitration a condition precedent to the bringing of an action: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N. W., 761.

But as to whether appraisement may be made an absolute condition to the right of action, *quære: Zalesky v. Home Ins. Co.*, 71 N. W., 566.

Where the court acquired jurisdiction of the action only by appearance of the defendant, *held*, that the action was to be deemed commenced only when defendant appeared: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N. W., 761.

The notice and proofs of loss herein contemplated include the affidavits showing the facts in regard to the loss which must accompany such notice and proofs and mere notice is not sufficient to determine the commencement of the period within which suit cannot be brought: *Wilhelmi v. Des Moines Ins. Co.*, 86-326.

Where a petition in an action on a policy of fire insurance stated that the loss occurred "on or about April 14, 1886," and that notice and proofs of loss were given "on or about June 19, 1886," *held*, that the petition did not show that more than sixty days had intervened between the loss and the notice and proof thereof: *District Tp. v. Des Moines Ins. Co.*, 75-647.

The time of limitation fixed by the policy is not extended where proofs are neither furnished nor waived: *Cornett v. Phenix Ins. Co.*, 67-388.

SEC. **1745. Forms of policies.** The auditor of state shall examine the form of policies issued or proposed to be issued by any insurance company doing business within the state, and shall refuse to authorize it to do business or to renew its permission to do business when the form of policy issued or proposed to be issued does not provide for the cancellation of the same at the request of the insured upon equitable terms, and the return to the

insured of any premium paid in excess of the customary short rates for the insurance up to the time of cancellation, or the release of the insured from any liability beyond such short rates, or for losses after the cancellation of the policy if the insurance be in a mutual company; and in case any company or association shall issue any policies not containing such provision, it shall be the duty of the auditor to revoke the authority of such company or association to do business. [17 G. A., ch. 39, § 1.]

SEC. **1746. Other insurance—prorating.** Any provision, contract or stipulation contained in any policy of insurance, issued by any insurance company doing business in the state under the provisions of this chapter, providing or stipulating that the insured shall maintain insurance on any property covered by such policy to any extent, or shall to any extent be an insurer of the property insured in such policy, or shall bear any portion of the loss on the property insured, shall be void; and the auditor of state shall refuse to authorize any such company to do business or to renew the authority or the certificate of any such company when the form of policy issued or proposed to be issued contains any such provision, contract or stipulation. No condition or stipulation in a policy of insurance fixing the amount of liability or recovery under such policy with reference to prorating with other insurance on property insured shall be valid except as to other valid and collectible insurance, any agreement to the contrary notwithstanding. [25 G. A., ch. 31.]

SEC. **1747. Doing business without compliance.** Every insurance company organized under the laws of or doing business in this state shall conform to all the provisions of this chapter and to other laws of this state, whether now existing or hereafter enacted, applicable thereto, and when necessary any existing company shall change its charter and by-laws so as to conform thereto, by a vote of a majority of its board of directors. Any officer, manager or agent of any insurance company or association who, with knowledge that it is doing business in an unlawful manner, or is insolvent, solicits insurance with said company or association, or receives applications therefor, or does any other act or thing towards procuring or receiving any new business for such company or association, shall be guilty of a misdemeanor, and for every such act, on conviction thereof, shall be adjudged to pay a fine of not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment. [C. '73, § 1147.]

This does not prevent the officers of a company which has not complied with the law from reinsuring their risks in another company and transferring to such company the premium notes received therefor: *Davenport F. Ins. Co. v. Moore*, 50–619.

SEC. **1748. Officers punished.** Any president, secretary or other officer of any company organized under the laws of this state, or any officer or person doing or attempting to do business in this state for any insurance company organized either within or without this state, failing to comply with any of the requirements of this chapter, or violating any of the provisions thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and be imprisoned in the county jail for a period not less than thirty days nor more than six months. [Same.]

SEC. **1749. Advertisements—soliciting agents.** Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which it is located, and the state or government under the laws of which it is organized. Any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding [C. '73, § 1148.]

SEC. **1750. Who deemed agent.** The term agent used in the foregoing sections of this chapter shall include any other person who shall in any manner directly or indirectly transact the insurance business for any insurance company complying with the laws of this state. Any officer, agent or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws or articles of incorporation of such company to the contrary notwithstanding. [18 G. A., ch. 211, § 1.]

One soliciting insurance and taking applications therefor is the agent of the company issuing the policy, without regard to any provisions found in the policy: *Continental L. Ins. Co. v. Chamberlain*, 132 U. S., 304.

This provision is applicable to life insurance companies: *Ibid.*

It is a matter of general knowledge that the soliciting agent as a rule prepares the application for the owner, and what he does in that respect is within his powers, and binds his principal: *Jamison v. State Ins. Co.*, 85–229.

An insurance company is chargeable with knowledge of facts made known to its agent at the time of taking the application, and an instruction requiring more proof of the agent's authority than was necessary, *held* not prejudicial to defendant, although erroneous: *Key v. Des Moines Ins. Co.*, 77–174.

Under these provisions, *held*, that the agent of one company, who, by authority of his customer, applied to an agent of another company authorized to issue policies, for insurance on the property of his customer, was the agent for the company issuing the policy, and a mistake as between him and the agent issuing the policy was chargeable to the company, and not to the person for whose benefit the policy was issued: *St. Paul F. & M. Ins. Co. v. Shaver*, 76–282.

If the laws of the state make the agent soliciting or negotiating insurance the agent of the company issuing the policy no condition in the policy in terms making such agent the agent of the assured only, will be valid: *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 63 N. W., 565.

Where an insurance agent in Wisconsin negotiated for insurance on property in that state through an insurance agent in another state without designating the company in which the insurance should be taken and the second agent placed the insurance in a foreign company, *held*, that the first agent became, under the laws of Wisconsin, the agent of the company in which the insurance was placed in such sense that notice of the suit against the company might be served upon such agent so as to give the Wisconsin courts jurisdiction of such suit: *Ibid.*

SEC. **1751. Provisions applicable to associations.** The provisions of the foregoing sections relative to insurance companies shall apply to all such companies, partnerships, associations or individuals, whether incorporated or not. [C. '73, § 1147.]

SEC. **1752. Fees.** There shall be paid to the auditor of state for services required under the provisions of this chapter the following fees, which shall be accounted for by him in the same manner as other fees received in the discharge of the duties of his office:

1. For filing and examination of the first application of any company and accompanying articles of incorporation for organization in this state, and the issuing of the permission to do business, ten dollars;
2. For filing application of any foreign company for certificate to do business in this state, and the accompanying certified copy of charter or article of incorporation, twenty-five dollars;
3. For permission to foreign company to do business in this state, or certified copy thereof, two dollars;
4. For filing annual statement of a domestic company, and issuing the renewal of the permission required by law to authorize continuance in business, three dollars;
5. For filing annual statement of a foreign company, and issuing renewal of permission, twenty dollars;
6. For each certificate of authority to agent of foreign company, two dollars;
7. For each certificate of authority to agent of domestic company, fifty cents;

8. For official examination of either domestic or foreign company, the actual expense incurred;

9. For every copy of any paper filed, the sum of twenty cents per folio, and for affixing the official seal to such copy and certifying the same, one dollar. [C. '73, § 1153.]

SEC. **1753. Expenses of examination.** The necessary expenses of any examination of any insurance company made or ordered to be made by the auditor of state under this chapter shall be certified to by him, and paid on his requisition by the company so examined; and in case of failure of the company to make such payment, the auditor shall suspend such company from doing business in this state until such expenses are paid. If such expenses are not paid by the company, they shall be audited by the executive council and paid out of the state treasury. But in no case shall any foreign insurance company be examined except by order of executive council. [16 G. A., ch. 37; C. '73, § 1156.]

SEC. **1754. Combinations.** It shall be unlawful for two or more fire insurance companies doing business in this state, or for the officers, agents or employes of such companies, to make or enter into any combination or agreement relating to the rates to be charged for insurance, the amount of commissions to be allowed agents for procuring the same, or the manner of transacting the fire insurance business within this state; and any such company, officer, agent or employe violating this provision shall be guilty of a misdemeanor, and on conviction thereof shall pay a penalty of not less than one hundred dollars nor more than five hundred dollars for each offense, to be recovered in the name of the state for the use of the permanent school fund. [26 G. A., ch. 22, § 1.]

SEC. **1755. Revocation of authority.** The auditor of state is authorized to summon before him, for examination under oath, any officer, agent or employe of any such company suspected of violating any of the provisions of the preceding section, and, on complaint to him in writing by two or more residents of this state charging such company under oath upon their knowledge or belief with violating the provisions of the preceding section, he shall summon any officer, agent or employe of said company before him for examination under oath; if upon such examination, and that of any other witness produced and examined, he shall determine that such company is guilty of a violation of any of the provisions of the preceding section, or if any such officer, agent or employe after being duly summoned shall fail to appear or submit to examination, the auditor shall forthwith issue an order revoking the authority of such company to transact business within this state, and it shall not thereafter be permitted to do the business of fire insurance in this state at any time within one year therefrom. [Same, § 2.]

SEC. **1756. Appeal.** Either party may appeal from the decision of the auditor, made pursuant to the preceding section, to the district court of the county where the same was made, within twenty days from the time of the rendition of such decision, by serving a written notice of such appeal on the opposite party and on the auditor, and filing with the clerk of said court a good and sufficient bond for the payment of all costs on the appeal in case the decision shall be affirmed. On such appeal said court shall try the case *de novo*, as equitable causes are tried, and on such evidence as either party may produce, and may reverse, modify or affirm the decision of the auditor. [Same, § 3.]

SEC. **1757. Evidence.** The statements and declarations made or testimony given by any such officer, agent or employe in the investigation before the auditor, or upon the hearing and trial before the district court, as provided in the two preceding sections, shall not be used against the person making the same in any criminal prosecution against him. [Same, § 4.]

SEC. **1758. Insurance in unauthorized companies.** No action shall be maintained in any court in the state upon any policy or contract of fire insurance issued upon any property situated in the state by any

company, association, partnership, individual or individuals that have not been authorized by the auditor of state to transact such insurance business, unless it shall be shown that the insurer or insured, within six months after the issuing of such policy or contract of insurance, has paid into the state treasury two and one-half per cent. of the gross premium paid or agreed to be paid for such policy or contract of insurance. [26 G. A., ch. 23.]

CHAPTER 5.

OF MUTUAL FIRE, TORNADO AND HAILSTORM ASSESSMENT INSURANCE ASSOCIATIONS.

SECTION **1759. For what purposes.** Any number of persons may, without regard to the provisions of the preceding chapter, enter into contracts to and with each other for their insurance from loss or damage from fire, tornadoes, lightning, hailstorms, cyclones or windstorms, but such associations of persons shall in no case insure any property not owned by one of their own number, except such school or church property within the territory in which they do business as may be approved, and the reinsurance of risks of similar associations. [22 G. A., ch. 93; 20 G. A., ch. 11; 17 G. A., ch. 104; 16 G. A., ch. 103; C. '73, § 1160.]

Under § 1160 of Code of '73, mutual companies were contemplated which should not be subject to other provisions of the general chapter on insurance: *Corey v. Sherman*, 64 N. W., 828.

Where the articles of incorporation showed that the company was organized to do a mutual insurance business and insure only the property of its members, *held*, that the articles contained no authority to insure the property of any one not a member, and that the issuance of policies of insurance on the stock plan was invalid: *Ibid.*

Even though the relation between such mutual association and a member thereof is a personal one, not passing to the legal representative, yet the association may ratify and confirm it in the hands of the personal representative of the deceased member, and will be held to do so if it makes assessments of such personal representative as a member: *Harl v. Pottawattamie County Mut. F. Ins. Co.*, 74–39.

Companies organized to do business on the mutual plan cannot issue policies of insurance on the stock plan (§ 1690), and the members of a mutual company are therefore not liable for the payment of losses under such policies: *Corey v. Sherman*, 64 N. W., 828.

Where it is not required by the articles and by-laws, notice of assessment need not be given before the assessment is made: *Ibid.*

The members of a mutual insurance company are presumed to have knowledge of its articles of incorporation and by-laws, and general misstatements as to the solvency of the company and its method of doing business will not constitute such fraud as to relieve the members from their obligation to pay assessments on their deposit notes: *Ibid.*

SEC. **1760. County and state associations.** Any association incorporated under the laws of this state for the purpose of furnishing insurance as provided for in this chapter, doing business only within the county in which is situated the town or city named in its articles of incorporation as its principal place of business, or the counties contiguous thereto, shall, for the purposes of this chapter, be deemed a county mutual assessment association; all other associations operating hereunder shall, for the purposes of this chapter, be deemed state mutual assessment associations.

SEC. **1761. When authorized to do business.** No association organized for the purpose of doing business under this chapter shall issue policies until applications for insurance to the amount of one hundred thousand dollars have been made if the same be a state mutual assessment association, and fifty thousand dollars if the same be a county mutual assessment association, and their articles of incorporation and form of policy submitted to the auditor of state, and a certificate of approval received from him.

SEC. **1762. Annual report.** Each association doing business under the provisions of this chapter shall annually, in January, report to the auditor of state the following facts:

1. Name and objects of company;
2. Place of doing business;
3. Names of president and secretary;
4. Address of president and secretary;
5. Date of commencing business;
6. Amount of risks in force at beginning of year;
7. Amount of risks written during year;
8. Amount of risks expired and canceled during the year;
9. Amount of risks in force at the end of the year;
10. Amount of losses paid during the year;
11. Amount received by agents for services during the year;
12. Amount received by officers and employes during the year;
13. Amount of other expenses;
14. Total expenses during the year;
15. Amount of losses adjusted but not yet paid;
16. Number and amount of losses resisted or in litigation;
17. Cost per thousand during the year;
18. Cost per thousand for the past five years;
19. The amount of receipts from assessments;
20. Receipts from all other sources. [17 G. A., ch. 104; C.'73, § 1160.]

SEC. **1763. Publication.** The report referred to in the preceding section shall be tabulated by the auditor, the county companies, the state companies, and the companies doing an exclusive tornado or an exclusive hailstorm business, being separately classified and published by him in his annual report on insurance, one copy of which shall be sent by him to each such company. [17 G. A., ch. 39.]

SEC. **1764. Fees—certificates.** Such associations shall pay the same fees for annual reports and annual certificates of authority as are required to be paid by domestic companies organized and doing business under the preceding chapter, which certificate shall expire March 1st of the year following the date of its issue. [17 G. A., ch. 104; C.'73, § 1160.]

SEC. **1765. Fees and assessments.** Such associations may collect policy and survey fees and such assessments as may be provided for in their articles of incorporation and by-laws, and provide for such expenses and losses as may be necessary in the conduct of their business. [Same.]

SEC. **1766. Inquiries by auditor—examinations—expenses.** The auditor of state may address inquiries to any association in relation to its doings and condition, and any association so addressed shall promptly reply, in writing, thereto. And the auditor of state, whenever he may deem it necessary, may personally, or by some person or persons not officers, agents or stockholders of any insurance company doing business in the state, to be designated by him, examine the conditions, affairs, character, business methods and books of any state association operating under this chapter, at the home office. If the auditor appoints some one not receiving a regular salary in his office to make the examination provided for in this section, he shall be entitled to receive five dollars per day for his services, in addition to his actual traveling and hotel expenses, but if a regular employe of his office, he shall be paid only his actual traveling and hotel expenses, to be paid by the association examined, or by the state upon the approval of the executive council, if the association fails to pay the same. If it should appear to the satisfaction of the auditor, after due examination, that the affairs of any such association are in an unsound condition, or that it is doing an unauthorized business, he shall revoke its certificate of authority. Receiving new business after the revocation of its certificate will subject each of the officers of said company or association to a fine not exceeding one thousand dollars, or imprisonment in the county jail not exceeding six months.

SEC. **1767. State companies—bonds of officers.** Any state company or association contemplated by this chapter, before being authorized to do

business in the state, shall require its secretary and treasurer to each give bond in such sum as the directors shall deem sufficient, which bond shall be given to the association, and shall not be for a less sum than ten thousand dollars, and which bond, after being approved by the president of such company or association and the auditor of state, shall be deposited with the auditor of state, to be security for the faithful performance of the duties of the secretary and treasurer in handling the funds of such company or association. Should the auditor consider the surety on said bonds, or the amount thereof, insufficient, he may require additional security to be furnished or the amount of the bond to be increased within thirty days after notice has been given to the association, and, on failure to give such additional surety or increase the bond, the auditor may revoke its certificate.

CHAPTER 6.

OF LIFE INSURANCE COMPANIES.

SECTION **1768. On level premium plan.** Every life insurance company upon the level premium or the natural premium plan, created under the laws of this or any other state or country, shall, before issuing policies in the state, comply with the provisions of this chapter applicable to such companies. [C.'73, § 1161.]

SEC. **1769. Stock companies—capital.** Stock companies organized under the laws of this state shall have not less than one hundred thousand dollars of capital subscribed, twenty-five per cent. of which shall be paid up and invested in bonds of the United States or this state, or in bonds and mortgages upon unincumbered real estate in the state, worth, exclusive of improvements, at least double the sum loaned thereon, which securities shall be deposited with the auditor of state, and upon such deposit, and evidence by affidavit or otherwise satisfactory to the auditor that the capital is all subscribed in good faith, and that the company is the actual and unqualified owner of the securities representing the paid up capital, he shall issue to such company the certificate hereinafter provided for, but no part of the twenty-five per cent. aforesaid shall be loaned to any stockholder or officer of the company. The remainder of such capital shall be paid within such time as the directors or trustees of the company may order, and until paid it shall be secured by the notes of the stockholders of the company. [C.'73, § 1162.]

SEC. **1770. Mutual companies—conditions.** Level premium and natural premium life insurance companies organized under the laws of this state upon the mutual plan shall, before issuing any policies, have actual applications on at least two hundred and fifty lives for an average amount of one thousand dollars each, a list of which, giving the name, age, residence, amount of insurance, and annual premium of each applicant shall be filed with the auditor of state, and a deposit made with him of an amount equal to three-fifths of the whole annual premium on said applications, in cash or the securities required by the foregoing section; and on compliance with the provisions of this section, the auditor shall issue to such mutual company the certificate hereinafter prescribed. [C.'73, § 1163.]

SEC. **1771. Stock or premium notes.** No note shall be accepted as part of the capital of a stock company, nor as a premium note for the purpose of organizing a mutual company, unless accompanied by a certificate of the clerk of the district court or other court of record, of the county in which the person executing it resides, to the effect that the person making it is in his opinion pecuniarily good and responsible therefor in property not exempt from execution.

SEC. **1772. Foreign companies—capital or surplus—investments.** No company incorporated by or organized under the laws of any other state or government shall transact business in this state unless it is possessed of the actual amount of capital required of any company organized by the laws of this state, or, if it be a mutual company, of surplus equal in amount thereto, and the same is invested in bonds of the United States or of this state, or in interest paying bonds, when they are at or above par, of the state in which the company is located, or of some other state, or in notes or bonds secured by mortgages on unincumbered real estate within this or the state where such company is located, worth double the amount loaned thereon, which securities shall, at the time, be on deposit with the superintendent of insurance, auditor, controller or chief financial officer of the state by whose laws the company is incorporated, or of some other state, and the auditor of this state is furnished with a certificate of such officer, under his official seal, that he as such officer holds in trust and on deposit for the benefit of all the policy holders of such company the securities above mentioned. This certificate shall embrace the items of security so held, and show that such officer is satisfied that such securities are worth one hundred thousand dollars. Nothing herein contained shall invalidate the agency of any company incorporated in another state by reason of its having exchanged the bonds or securities so deposited with such officer for other bonds or securities authorized by this chapter, or by reason of its having drawn its interest and dividends on the same. [C. '73, § 1164.]

SEC. **1773. Annual statement.** The president or vice-president and secretary or actuary or a majority of the directors of each company organized hereunder shall annually, by the first day of March, prepare under oath and file in the office of the auditor of state a statement of its affairs for the year terminating on the thirty-first day of December preceding. Showing:

1. The name of the company and where located;
2. The names of officers;
3. The amount of capital, if a stock company;
4. The amount of capital paid in, if a stock company;
5. The value of real estate owned by the company;
6. The amount of cash on hand;
7. The amount of cash deposited in banks, giving the name of the bank or banks;
8. The amount of cash in the hands of agents, and in the course of transmission;
9. The amount of bank stock, with the name of each bank, giving par and market value of the same;
10. The amount of bonds of the United States, and all other bonds and securities, giving names and amounts, with the par and market value of each kind;
11. The amount of loans secured by first mortgage on real estate, and where such real estate is situated;
12. The amount of all other bonds, loans, how secured, and the rate of interest;
13. The amount of premium notes and their value on policies in force, if a mutual company;
14. The amount of notes given for unpaid stock, and their value in detail, if a stock company;
15. The amount of assessments unpaid on stock or premium notes;
16. The amount of interest due and unpaid;
17. The amount of all other securities;
18. The amount of losses due and unpaid;
19. The amount of losses adjusted but not due;
20. The amount of losses unadjusted;

21. The amount of claims for losses resisted;
22. The amount of money borrowed and evidences thereof;
23. The amount of dividends unpaid on stock;
24. The amount of dividends unpaid on policies;
25. The amount required to safely reinsure all outstanding risks;
26. The amount of all other claims against the company;
27. The amount of net cash premiums received;
28. The amount of notes received for premiums;
29. The amount of interest received from all sources;
30. The amount received from all other sources;
31. The amount paid for losses;
32. The amount of dividends paid to policy holders, and the amount to stockholders, if a stock company;
33. The amount of commissions and salaries paid to agents;
34. The amount paid to officers for salaries and other compensation;
35. The amount paid for taxes;
36. The amount of all other payments and expenditures;
37. The greatest amount insured on any one life;
38. The amount deposited in other states or territories as security for policy holders therein, stating the amount in each state or territory;
39. The amount of premiums received in this state during the year;
40. The amount paid for losses in this state during the year;
41. The whole number of policies issued during the year, with the amount of insurance effected thereby, and total amount of risk;
42. All other items of information necessary to enable the auditor to correctly estimate the cash value of policies, or to judge of the correctness of the valuation thereof. [15 G. A., ch. 2, § 2; C. '73, § 1167.]

SEC. **1774. Valuation of policies.** As soon as practicable after the filing of such statement, the auditor shall ascertain the net cash value of every policy in force upon the basis of the American table of mortality and four and one-half per cent. interest, or actuaries' combined experience table of mortality and four per cent. interest, in all companies organized under the laws of this state. For the purpose of making such valuation he may employ a competent actuary, who shall be paid by the company for which the service is rendered; but the company may make such valuation and it shall be received by the auditor upon satisfactory proof of its correctness. The net cash value of all policies in force in any such company being ascertained, the auditor shall notify it of the amount, and within thirty days thereafter the officers thereof shall deposit with the auditor the amount of the ascertained valuation in the securities specified in section eighteen hundred and six, chapter eight, of this title. No stock company organized under the laws of this state shall be required to make such deposit until the cash value of the policies in force, as ascertained by the auditor, exceeds the amount deposited by it as capital. [21 G. A., ch. 169; 17 G. A., ch. 47; C. '73, § 1169.]

This section recognizes the existence of a debt from the company to its policy-holders: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

SEC. **1775. Annual certificate.** On receipt of such deposit and statement, and the statement and evidence of investment of foreign companies, all of which shall be renewed annually, by the first day of March, the auditor shall issue a certificate setting forth the corporate name of the company, its home office, that it has fully complied with the laws of the state and is authorized to transact the business of life insurance for the ensuing year, which certificate shall expire on the first day of April of the ensuing year, or sooner upon thirty days' notice given by the auditor of the next annual valuation of its policies. Such certificate shall be renewed annually, upon the renewal of the deposit and statement by a domestic company, or of the statement and evidence of investment by a foreign company, and

compliance with the conditions above required, and be subject to revocation as the original certificate. [15 G. A., ch. 2, § 3; C. '73, § 1170.]

SEC. **1776. Penalty—dissolution.** Upon a failure of any company organized under the laws of this state to make the deposit or file the statement in the time herein stated, the auditor shall notify the attorney-general of the default, who shall at once apply to the district court of the county where the home office of such company is located, if the court is in session, if not, to any judge thereof, for an order requiring the company to show cause upon reasonable notice, to be fixed by the court or judge, as the case may be, why its business shall not be discontinued. If, upon the hearing, no sufficient cause is shown, the court shall decree its dissolution. Companies organized and chartered by the laws of a foreign state or country, failing to file the evidence of deposit and statement within the time fixed, shall forfeit and pay the sum of three hundred dollars, to be collected in an action in the name of the state for the use of the school fund, and their right to transact further new business in this state shall immediately cease until the requirements of this chapter have been fully complied with. [15 G. A., ch. 2, § 4; C. '73, § 1171.]

SEC. **1777. Examination by auditor—receiver.** The auditor at any time may make a personal examination of the books, papers, securities and business of any life insurance company doing business in this state, or authorize any other suitable person to make the same, and he or the person so authorized may examine under oath any officer or agent of the company, or others, relative to its business and management. If upon such examination the auditor is of the opinion that the company is insolvent, or that its condition is such as to render its further continuance in business hazardous to the public or holders of its policies, he shall advise and communicate the facts to the attorney-general, who shall at once apply to the district court of the county or any judge thereof, where the home office of a domestic company or an agency of a foreign company is located, for an injunction to restrain the company from transacting further business except the payment of losses already ascertained and due, until further hearing, and for the appointment of a receiver, and, if a domestic company, for the dissolution of the corporation. The judge of such court may grant a preliminary injunction with or without notice, as he may direct, and the court, on the final hearing, may make decree subject to the provisions of the following section as to the appointment of a receiver, the disposition of the deposits of the company in the hands of the auditor, and its dissolution, if a domestic company. [C. '73, § 1172.]

In an action to close the business of a corporation for failure to comply with the provisions of chapter 5, title IX, of the Code of '73, *held*, that it must be assumed that the corporation was duly organized: *State ex rel. v. Iowa Mutual Aid Association*, 59–125.

SEC. **1778. Securities.** The securities of a defaulting or insolvent company, or a company against which proceedings are pending under the preceding section, on deposit shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same shall, by the order of the court upon final hearing, be divided among the holders thereof in the proportion of the last annual valuation of the same, or at any time be applied to the purchase of reinsurance for their benefit. [C. '73, § 1173.]

SEC. **1779. Change of securities.** Companies shall have the right at any time to change the securities on deposit by substituting a like amount of the character required in the first instance. If the annual valuation of the policies in force shows them to be less than the amount of security deposited, then the company may withdraw such excess, but twenty-five thousand dollars must always remain on deposit. [C. '73, § 1174.]

SEC. **1780. Interest collected.** Companies having on deposit with the auditor bonds or other securities may collect the dividends or interest thereon, delivering to their authorized agents the coupons or other evidence

of interest as the same become due, but if any company fails to deposit additional security when and as called for by the auditor, or pending any proceedings to close up or enjoin it, the auditor shall collect such dividends or interest and add the same to such securities. [C. '73, § 1175.]

SEC. **1781. Auditor's report.** Before the first day of May the auditor shall make an annual report to the governor of the general conduct and condition of the companies doing business in the state, and include therein an aggregate of the estimated value of all outstanding policies in each of the companies, and in connection therewith prepare a separate abstract thereof as to each company, and of all the returns and statements made to him by them. [C. '73, § 1176.]

SEC. **1782. Discriminations.** No life insurance company shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes; nor shall any such company or agent thereof make any contract of insurance agreement, other than as plainly expressed in the policy issued; nor shall any such company or agent pay or allow, directly or indirectly, as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy or contract of insurance. [23 G. A., ch. 33, § 1.]

SEC. **1783. Penalty.** Every corporation, officer or agent thereof who shall knowingly violate any of the provisions of the preceding section shall forfeit and pay a sum not exceeding five hundred dollars, to be recovered by an action in the name of the state for the benefit of the school fund, and the license may be revoked for three years, in the discretion of the court. [Same, § 2.]

CHAPTER 7.

OF STIPULATED PREMIUM AND ASSESSMENT LIFE INSURANCE ASSOCIATIONS.

SECTION **1784. Defined.** Every corporation organized upon the stipulated premium plan or assessment plan, for the purpose of insuring the lives of individuals or furnishing benefits to the widows, heirs, orphans or legatees of deceased members, or accident indemnity, shall be styled an association, and any corporation doing business under this chapter which provides for the payment of policy claims, accumulation of a reserve or emergency fund, the expense of management and prosecution of the business, by payment of stipulated premiums, assessments or periodical calls, as provided in the contracts, and wherein the liability of the insured to contribute to the payment of policy claims is not limited to a fixed amount, shall be deemed to be engaged in the business of life insurance upon the stipulated premium plan, or assessment plan, and shall be subject to the provisions of this chapter, and chapter eight, of title nine. [21 G. A., ch. 65, § 1.]

Under the constitution of the association known as the Ancient Order of United Workmen, *held*, that such association, notwithstanding its fraternal character was in effect a mutual insurance company, and that the supreme lodge of that corporation, being incorporated under the laws of Kentucky, was not authorized to exercise any powers or do business in Iowa without compliance with the laws of Iowa with reference to life insurance companies: *State ex rel. v. Miller*, 66–26.

Where one of the objects of an association is to pay to the beneficiaries a sum of money upon the death of a member which is to be raised by assessments upon other mem-

bers it is to be deemed an insurance company: *Grimes v. Northwestern Legion of Honor*, 64 N. W., 806.

Former provisions of this character, *held* applicable to a fraternal society such as the Ancient Order of United Workmen, having life insurance and insurance against sickness and disability as its main object: *State ex rel. v. Nichols*, 78–747.

Mutual aid associations organized to furnish financial aid and benefits to the families of deceased members on the payment of membership fees, dues and assessments, *held*, not to be within the former provisions as to life insurance companies: *State ex rel. v. Iowa Mut. Aid. Ass'n*, 59–125. And see § 1798.

A railroad relief association organized by the railroad company for the benefit of employes who participate therein is not a life insurance company: *Maine v. Chicago, B. & Q. R. Co.*, 70 N. W., 630.

An employe, member of such association who has accepted the benefits provided for by his contract of membership is bound by the terms of such contract: *Ibid.*

SEC. **1785. Articles of incorporation—certificates.** "Certificates of membership" or "certificate," when used in this chapter with respect to the insurance of the members, shall be taken to mean and include policy of insurance. The articles of incorporation of any such association shall show its plan of business, and be submitted to the auditor of state and the attorney-general, and if they are found by those officers to comply with the provisions of this title, chapter and of law, they shall approve the same. When the articles are thus approved, they shall be recorded in the office of the secretary of state, and a notice published within ninety days in the manner and for the time provided in the general incorporation laws. [Same, § 2.]

SEC. **1786. Name.** No such association shall take any name in use by another organization, or one so closely resembling it as to mislead the public as to its identity. [Same, § 3.]

The action of the auditor in determining the name under which the association may do business is not conclusive as to another association claiming a prior right to the use of the same or a similar name: *Grand Lodge v. Graham*, 65 N. W., 837.

Therefore *held*, that plaintiff, an association of the character contemplated in this section and authorized to do business under the name of the Grand Lodge of the Ancient Order of United Workmen of Iowa, could not enjoin an unincorporated society or voluntary association from using the name, it appearing that defendant had a prior right to the use of such name: *Ibid.*

SEC. **1787. Conditions for commencing business.** Before issuing any policy or certificate of membership, if the association at the time has not a membership sufficient to pay the full amount of its certificate or policy on an assessment, it shall cause all applications for insurance to have printed in red ink, in a conspicuous manner along the margin thereof, the words: "It is understood that the amount of insurance to be paid under this application, and certificate or policy issued thereon, shall depend upon the amount collected from an assessment therefor." It must have actual applications upon at least two hundred and fifty lives for at least one thousand dollars each; and it shall file with the auditor of state satisfactory proof that the president, secretary and treasurer have each given a good and sufficient bond for five thousand dollars for the faithful discharge of their duties as such officers, sworn copies of which shall be filed with him. It shall also file with him a list, verified by the president and secretary, of the applications, giving the name, age and residence of each applicant, the amount of insurance applied for by each, together with the annual dues and the proposed assessments thereon. [Same, § 4.]

SEC. **1788. Assessments.** The articles and by-laws of each such association and its notices of assessment shall state the objects to which the money to be collected is to be devoted, and no part of the proceeds thereof shall be applied to any other purpose than as stated, and the excess, if any, beyond payment of the benefit, shall be set aside and applied only to like purposes. [Same, § 6.]

The liability of a member of a mutual benefit company is to be determined by an assessment on the basis of membership at the time of the loss and not at the time an assessment is made by order of court to pay such loss: *Collins v. Bankers' Acc. Assn.*, 64 N. W., 778.

Even though the association has on hand enough money to pay a death loss, it is not proper to render judgment against it for the

amount of the loss but only to compel an assessment to pay such loss: *Courtney v. United States Masonic Ben. Ass'n*, 53 N. W., 238.

Where provisions are made for canceling certificates upon failure to pay assessments after actual notice, the obligation to give such notice is upon the company and the obligation to pay the assessments does not attach until the notice is given: *Ibid.*

Therefore, where the certificate holder, at the time notice was sent to him by mail, was not in such condition that he could understand such notice, *held*, that notice was not effectual: *Ibid.*

Provisions as to the method of giving notice of assessments for the purpose of fixing a forfeiture, which are provided for at the time of the issuance of the certificate cannot be subsequently changed without the consent of the insured unless there is a stipulation providing that insured shall be bound by such subesquent provisions: *Ibid.*

Where it was provided that the failure to pay assessments did not work an absolute forfeiture till the expiration of six months, *held*, that the receipt of intermittent dues during the six months was not a waiver of the default where the member did not, during the six months, take the steps necessary for reinstatement: *Leffingwell v. Grand Lodge A. O. U. W.*, 86-279.

Where the contract was between the subordinate lodge and the member, *held*, that the member had no right to offset, as against dues, compensation due him under a contract with the Grand Lodge: *Ibid.*

SEC. **1789. Insurable age—beneficiary—assignment of policy.** No association organized or operating under this chapter shall issue a certificate of membership to any person under fifteen nor over sixty-five years of age, nor unless the beneficiary named in the certificate is the husband, wife, relative, legal representative, heir, creditor or legatee of the insured member, nor shall any such certificate be assigned. Any certificate issued or assignment made in violation of this section shall be void. The beneficiary named in the certificate may be changed at any time at the pleasure of the assured, as may be provided for in the articles or by-laws, but no certificate issued for the benefit of a wife or children shall be thus changed so as to become payable to the creditors. [Same, § 7.]

A "relative" for whose benefit a certificate may be taken includes a stepfather, after the death of the wife, on whom the relationship depends: *Simcoke v. Grand Lodge A. O. U. W.*, 84-383.

The provision that the beneficiary may, by the consent of the society, be changed without the consent of the person who has been such beneficiary, is in accordance with the law previously existing with reference to the effect of such certificates: *Brown v. Grand Lodge A. O. U. W.*, 80-287; *Carpenter v. Knapp*, 70 N. W., 764.

The provisions of § 1741, requiring the application of the assured to be indorsed on or attached to the policy, applies to all policies and contracts for life insurance, including those of mutual benefit associations issued upon the assessment plan: *McConnell. v Iowa Mut. Aid Ass'n*, 79-757; *Grimes v. Northwestern Legion of Honor*, 64 N. W., 806. And see now §§ 1819, 1826.

Where it was provided in the certificate of a mutual benefit society that it should be void in case the beneficiary named was not a natural heir of the member taking the certificate, *held*, that knowledge on the part of the society that the beneficiary named was not an heir of the member taking the certificate without objection on the part of the society, and continuing to collect assessments, and continuing to treat the certificate as valid, constituted a waiver of such condition. (Decided prior to the enactment of these provisions): *Lindsey v. Western Mut. Aid Soc.*, 84-734.

Also *held*, that where such certificate was forfeited for non-payment of dues after the taking effect of the statute, but payment was subsequently accepted by the company, and the member was restored, such restoration did not amount to the making of a new contract, but was a waiver of the forfeiture, and the former certificate continued in force: *Ibid.*

Also *held*, that statements of the member with reference to good health, on which such restoration was made, were not false in such sense as to render such restoration void: *Ibid.*

SEC. **1790. Report to auditor of state—examination.** The annual business of such association organized under the laws of this state shall close on the thirty-first day of December of each year, and it shall within sixty days thereafter prepare and file in the office of the auditor of state a detailed statement, verified by its president and secretary, giving its assets, liabilities, receipts from each assessment and all other sources, expenditures, salaries of officers, number of contributing members, death losses paid and amount paid on each, death losses reported but not paid, and furnish such other information as the auditor, who shall provide blanks for that purpose, may require, so that its true financial condition may be shown, and shall pay, upon filing each annual statement, the sum of ten dollars.

He shall publish such annual statement in detail in his report, and for the purpose of verifying it he may make or cause to be made an examination of the affairs of any such association at its expense, which shall be, if done by him or his clerk, necessary hotel and traveling expenses only, if by a person not regularly employed in his office, the actual cost thereof, not exceeding five dollars per day for the time required, and actual expenses. If the auditor regards it necessary for the safety of the funds of the association, he may require the bonds of the officers to be increased to an amount not exceeding double the sum for which they are accountable, and he may also require supplemental reports from such association at such time and in such form as he may direct, and it shall be the duty of its officers to furnish the bonds and reports when thus required. [Same, § 8.]

SEC. **1791. Investment of accumulations.** Any association accumulating any moneys to be held in trust for the purpose of the fulfillment of its policy or certificate, contract, or otherwise, shall invest such accumulations in the securities provided in section eighteen hundred and six, chapter eight, of this title, and deposit the same with the auditor of state, as therein provided. But such association may invest in real estate in Iowa such a portion of said accumulation as is necessary for its accommodation in the transaction of its business to be owned by said association, and in the erection of any building for such purpose may add thereto rooms for rental.

SEC. **1792. Change of securities.** Such association may at any time change its securities on deposit by substituting a like amount in other securities of the same character, and the auditor shall permit a withdrawal of the same, upon satisfactory proof in writing filed with him that they are to be used for the purpose for which they were originally deposited. [Same, §§ 10, 11.]

SEC. **1793. Collection of interest.** The auditor shall permit the associations owning the bonds or other securities to collect and retain the interest accruing thereon, delivering to them the evidences of interest as the same become due; but on default of any association to make or enforce such collection, he may collect the same and add it to the securities in his possession, less the expense thereof. [Same, § 12.]

SEC. **1794. Foreign companies.** Any association organized under the laws of any other state to carry on the business of insuring the lives of persons, or of furnishing benefits to the widows, orphans, heirs or legatees of deceased members, or of paying accident idemnity, or surrender value of certificates of insurance, upon the stipulated premium plan or assessment plan, may be permitted to do business in the state by complying with the requirements hereinafter made, but not otherwise. It shall file with the auditor of state a copy of its charter or articles of incorporation, duly certified by the proper officers of the state wherein it was organized, together with a copy of its by-laws, application and policy or certificate of membership. It shall also file with the auditor a statement, signed and verified by its president and secretary, which shall show the name and location of the association, its principal place of business, the names of its president, secretary and other principal officers, the number of certificates or policies in force, the aggregate amount insured thereby, the amount paid to beneficiaries in the event of death or accident, the amount paid on the last death loss and the date thereof, the amount of cash or other assets owned by the association and how invested, and any other information which the auditor may require. The statement, papers and proofs thus filed shall show that the death loss or surrender value of the certificate of insurance or accident indemnity is in the main provided for by assessments upon or contributions by surviving members of such association, and that it is legally organized, honestly managed, and that an ordinary assessment upon its members or other regular contributions to its mortuary fund are sufficient to pay its maximum certificate to the full limit named therein. Upon its complying with the provisions of this section, and of section eighteen hundred

and eight, chapter eight, of this title, and the payment of twenty-five dollars, the auditor shall issue to it a certificate of authority to do business in this state, provided the same right is extended by the state in which said association is organized to associations of the same class in this state. When the auditor doubts the solvency of any foreign association, and the failure to pay the full limit named in its certificate or policy shall be such evidence of its insolvency as to require the auditor to investigate it, he shall for this or other good cause, at the expense of such association, cause an examination of its books, papers and business to be made, and if upon such examination he finds that the association is not financially sound, or is not paying its policies or certificates in full, or is conducting its business fraudulently, or if it shall fail to make the statement required by law, he may revoke its authority and prohibit it from doing business until it shall again comply with the provisions of this chapter. If the auditor appoints some one not receiving a regular salary in his office to make this examination, such examiner shall receive five dollars per day for his services in addition to his actual traveling and hotel expenses, to be paid by the association examined, or by the state on the approval of the executive council, if the association fails to pay the same. [Same, § 13.]

SEC. **1795. Proceedings to control or wind up.** When any association organized under this title and chapter fails to make its annual statement on or before the first day of March, or is conducting its business fraudulently or not in compliance with law, or is not carrying out its contracts with its members in good faith, the auditor shall promptly communicate the fact to the attorney-general, who shall at once commence action before the district court of the county in which such association has its principal place of business, giving it reasonable notice thereof, and if upon a hearing it is found to be advantageous to the holders of certificates of membership therein, said court or judge may remove any officer or officers, and appoint others in their place until the next annual election. If it is advantageous to the holders of certificates that the affairs of said corporation be wound up, the court or judge shall so direct, and for that purpose may appoint a receiver who shall treat all legal claims for death benefits as preferred. The receiver may also, with the approval of the court or judge, transfer the members of such association who consent thereto to some like solvent association of the state, or divide the surplus accumulated in proportion to the share due each certificate at the time. [Same, § 16.]

The fact that a mutual benefit association is doing business without complying with the law cannot be taken advantage of in an action against it by another association to restrain the use by defendant of a name common to the two, it appearing that plaintiff has no prior right to the use of such name: *Grand Lodge v. Graham*, 65 N. W., 837.

SEC. **1796. Certificate.** Upon compliance with the provisions of this chapter by any association, the auditor shall issue to it a certificate setting forth: *First*, the corporate name of the association; *second*, its principal place of business; *third*, the number of certificates or policies in force at the date of its last report; *fourth*, the sum of money which an ordinary assessment for payment of a single certificate or policy would produce in each class; *fifth*, the amount paid on its last death loss as evidenced by proof on file in his office, and the date of such payment; *sixth*, the amount of securities deposited in his office, and for what purpose; *seventh*, that it has fully complied with the provisions of this chapter, and is authorized to transact business for a period of one year from April first of the year of its issue, which certificate shall be published by the association once a week for four weeks in a newspaper of general circulation published at its principal place of business. [Same, § 18.]

SEC. **1797. Distribution of surplus—surrender value.** Any association which provides in the main for the payment of death losses or accident indemnity by assessments upon its members, or stipulated premium plan, may provide for the equitable distribution of any surplus or advance insur-

ance fund accumulated in the course of its business, which may be paid in cash or applied in the reduction or payment of future premiums, paid up or extended insurance, as its rules or contracts may provide, and for an equitable surrender value upon the cancellation of a certificate or policy, provided the terms and conditions thereof are set forth in such policy or certificate of membership, and such surrender value shall in the main be accumulated during the term of such policy or certificate. [Same, § 20.]

Since the enactment of this provision a mutual life company has no authority to stipulate in its policies that an assessment shall be made for the purpose of paying an endowment: *Dishong v. Iowa Life & Endowment Ass'n*, 92–163.

And where prior to the passage of this statute endowment contracts had been made by such a company, and the risks of such company were afterward reinsured in another mutual company, which issued a different policy, *held*, that the second company was under no obligation to make an assessment for the payment of such endowment: *Ibid.*

SEC. **1798. Benevolent societies.** Nothing in this chapter shall be construed to apply to any association organized solely for benevolent purposes and composed wholly of members of any one occupation, guild, profession or religious denomination, but any such society may, by complying with the provisions hereof, become entitled to all the privileges thereof, in which event it shall be amenable to the provisions of this chapter so far as they are applicable. [Same, § 21.]

CHAPTER 8.

OF PROVISIONS APPLYING TO LIFE INSURANCE COMPANIES AND ASSOCIATIONS.

SECTION **1799. Annual statement.** Every company or association organized under the laws of any other state or country and doing business in this state shall annually, by the first day of March, file with the auditor of state a statement of its affairs for the year terminating on the thirty-first day of December preceding, in the same manner and form provided for similar companies or associations organized in this state. The auditor may amend the form of the annual statement required to be made by companies or associations doing business in this state, and propose and require such additional matter to be covered therein as he may think necessary to elicit a full exhibit of the standing of any such company or association. [15 G. A., ch. 2, § 1; C.'73, § 1166.]

SEC. **1800. Agent's certificate.** No person shall, directly or indirectly, act within this state as agent, or otherwise, in receiving or procuring applications for insurance, or in doing or transacting any kind of life insurance business, for any company or association contemplated in the two chapters preceding, except for the purpose of taking applications for organizations, unless the company or association for which he is acting has received a certificate from the auditor of state authorizing it to transact business therein, nor until he shall have received from said auditor a certificate showing that such company or association has complied with the provisions of law, and that such person is authorized to act for it. [Same.]

SEC. **1801. Penalty for acting without certificate.** Any such company or association that does or solicits new business without the certificates required by the two preceding chapters shall forfeit five hundred dollars for every day's neglect to procure the same. Any person knowingly soliciting applications or making insurance for any company or association having no such certificate from the auditor as required, shall forfeit and pay the sum of three hundred dollars, and any person acting for any company or association authorized to transact business without having the agent's certificate prescribed in the preceding section in his possession,

shall be liable to pay twenty-five dollars for each day's neglect to procure the same during the time he thus acts. [15 G. A., ch. 2, § 5; C.'73, § 1177.]

SEC. **1802. Recovery of penalties.** Actions brought to recover any of the penalties provided for in this chapter shall be instituted in the name of the state by the county attorney of the county, under the direction and authority of the auditor of state, and may be brought in the district court of any county in which the company or association proceeded against is engaged in the transaction of business, or in which the offending person resides, if it is against him. The penalties, when recovered, shall be paid into the state treasury for the use of the school fund. [15 G. A., ch. 2, § 6; C.'73, § 1178.]

SEC. **1803. Real estate.** No such company or association organized under the laws of this state shall purchase, hold or convey real estate, except for the purposes and in the manner herein set forth:

1. Such as is required for its use in the transaction of its business;
2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted in the course of its dealings;
3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings;
4. Such as shall have been purchased at sales under execution issued upon judgments and decrees based upon debts due it, or obtained by redemption as junior judgment creditor or mortgagee. [C.'73, § 1180.]

SEC. **1804. When to be sold.** All real estate acquired which is not necessary for such company or association in the convenient transaction of its business shall be sold within five years after it acquired title thereto, unless it procures a certificate from the auditor of state that its interests will suffer by a forced sale thereof, in which event the time may be extended as the auditor shall direct in said certificate. [C.'73, § 1181.]

SEC. **1805. Policy exempt from execution.** A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors. The proceeds of an endowment policy payable to the assured on attaining a certain age shall be exempt from liability for any of his debts. Any benefit or indemnity paid under an accident policy shall be exempt to the assured, or in case of his death to the husband or wife and children of the assured, from his debts. The avails of all policies of life or accident insurance payable to the surviving widow shall be exempt from liability for all debts of such beneficiary contracted prior to the death of the assured, but the amount thus exempted shall not exceed five thousand dollars. [24 G. A., ch. 28; 18 G. A., ch. 5; C.'73, §§ 1182, 2372; R., § 2362; C.'51, § 1330.]

This section contemplates a case where the policy is payable to deceased, or his or her legal representatives, and not a case where the policy is payable to another person for his use and benefit, in which case it can not be otherwise disposed of by will: *McClure v. Johnson*, 56–620.

Where the contract of insurance provides the method by which insured may change the beneficiary entitled to the proceeds of the policy, and such method is not pursued, a direction in the will of the assured making such change will be without effect: *Stephenson v. Stephenson*, 64–534.

Where absolute power is given to a member of a mutual benefit association to designate who the beneficiary shall be, such direction can not be disregarded, although the articles of incorporation of the association provide that its object shall be to provide for the widows and orphans of deceased members, and the beneficiary designated is not a widow or child of the deceased member: *Mitchell v. Grand Lodge*, 70–360.

The assured can not by direction in his will provide for payment of the proceeds of a policy on his life to another beneficiary than the one mentioned in the policy. The contract with the company can not thus be altered without its consent: *Wilmaser v. Continental L. Ins. Co.*, 66–417.

The assured can not change the beneficiary by will unless it is so provided in the contract of insurance: *Wendt v. Iowa Legion of Honor*, 72–682.

Where a decedent left a wife but no children, *held*, that the proceeds should go to the wife alone, and not be divided among all the distributees of his estate: *Rhode v. Bank*, 52–375.

The proceeds of life insurance are exempt to heirs generally and not merely to wife

and children, to whom they are distributed free from the debts of the deceased: *Larrabee v. Palmer*, 70 N. W., 100.

The proceeds of the policy when realized by the person entitled thereto, are not exempt from execution for the debts of such person. The exemption exists only as to the debts of the person insured: *Smedley v. Felt*, 43–607; *Murray v. Wells*, 53–256.

This section does not exempt the avails of a policy of insurance from the debts of a beneficiary when such beneficiary is a person other than the assured: *Murdy v. Skyles*, 70 N. W., 714.

Therefore a benefit payable to the member of an association and by him transferred to his wife is not exempt from the debts of the wife: *Ibid.*

The exemption to the wife as against her own antecedent debts relates only to cases of death of the husband who is the assured: *Ibid.*

Under a policy of insurance for the use and benefit of the wife of assured, the sum stipulated being payable to said assured or her legal representatives "or if the said assured be not then living the said sum shall be payable to her children or to their children if under age," *held*, that the wife and the children being dead before the death of insured the proceeds of the policy were payable to the grandchildren and were not subject to the debts of the deceased wife: *In re Conrad's Estate*, 89–396.

Where a certificate of insurance in a mutual benefit company was made payable to the "legal" heirs of assured, *held*, that the widow of assured was not within such description, but that the proceeds of such certificate should go to the children of deceased: *Phillips v. Carpenter*, 79–600; but see now § 3313.

In a particular case *held*, that the evidence did not show a contract to subject the proceeds of a life policy to the payment of a debt: *Herriman v. McKee*, 49–185.

Where the proceeds of a policy of life insurance are used to release other property from a claim under which it is held, the property so released becomes subject to the payment of debts: *Friedlander v. Mahoney*, 31–311.

The proceeds of a life policy are assets of the estate, and only differ from other assets in the manner of their distribution: *Kelley v. Mann*, 56–625.

Further as to disposition of proceeds as assets of the estate, see § 3313.

SEC. **1806. Investment of funds.** The funds required by law to be deposited with the auditor of state by any company or association contemplated in the two chapters preceding, and the funds or accumulations of any such company or association organized under the laws of this state, held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and no other:

1. The bonds of the United States;
2. The bonds of the state or of any other state when such bonds are at or above par;
3. Bonds and mortgages and other interest bearing securities being first liens upon real estate within the state or any other state in which such company or association is transacting an insurance business, worth at least double the amount loaned thereon and secured thereby exclusive of improvements, or two and one-half times such amount including the improvements thereon, if such improvements are constructed of brick or stone; but no such improvements shall be considered in estimating the value unless the owner shall contract to keep the same insured in some reliable fire insurance company or companies authorized to do business in the state, during the life of the loan, in a sum at least double the excess of the loan above one-half the value of the ground exclusive of the improvements, the insurance to be made payable in case of loss to the company or association investing its funds, as its interests may appear at the time of loss;
4. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state in which such company is transacting an insurance business, where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council;
5. In the stock of solvent national banks organized under the laws of the United States, but not more than five per cent. of the assets of such company or association shall be thus invested;
6 Loans upon its own policies, in an amount not to exceed the net terminal reserve or advance insurance fund against the same, as shown by the valuation thereof made under the direction of the auditor of state; but no such loans shall be made on policies of insurance that have not been issued

and in force three years. If such a loan is made, the company shall leave with the policy holder a copy of his policy and of the writing which evidences such loan. All such securities shall be deposited with the auditor of state, who shall furnish the company or association depositing them a certificate, under the seal of his office, showing the purpose of the deposit and to what fund the same is to be applied when paid. [25 G. A., ch. 33; 24 G. A., ch. 30; 21 G. A., ch. 65, § 9; 21 G. A., ch. 169; 17 G. A., ch. 47; C. '73, § 1179.]

SEC. **1807. Investment in land and buildings.** Such organization may purchase such real estate in the state with a portion of its accumulations as may be necessary for its use in the transaction of its business, and in the erection of a building thereon for such purpose, to which rooms for rent may be added. [21 G. A., ch. 65, § 9.]

SEC. **1808. Service of process.** Every life insurance company and association organized under the laws of another state or country shall, before receiving a certificate to do business in this state or any renewal thereof, file in the office of the auditor of state an agreement in writing that thereafter service of notice or process of any kind may be made on the auditor of state, and when so made shall be as valid, binding and effective for all purposes as if served upon the company according to the laws of this or any other state, and waiving all claim or right of error by reason of such acknowledgment of service. Such notice or process, with a copy thereof, may be mailed to the auditor of state at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereon on behalf of the defendant foreign insurance company by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed to him by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the person or corporation who shall be named or designated by such company in such written instrument. [21 G. A., ch. 65, § 13; C. '73, § 1165.]

SEC. **1809. Provisions additional.** The provisions of the preceding section are merely additions to the general provisions of law on the subjects therein refered to, and are not to be construed to be exclusive.

SEC. **1810. Laws of other states—reciprocity.** If by the laws of any state, or the rulings or decisions of the appropriate officers thereof, any burden, obligation, requirement, disqualification or disability is put upon any company or association of any class organized in this state affecting its freedom to do business in that state, then the same or like burden, obligations, requirement, disqualification or disability shall be put upon every such company or association of the same class from that state doing or seeking to do business in this state; and the auditor of state shall enforce the provisions of this section, and in doing so may refuse or revoke the certificate of such company or association of such other state; and it shall be unlawful for the auditor of state to impose upon companies or associations organized under chapter seven of this title any rules or regulations, requirements or limitations, that shall not be imposed with equal force upon like companies or associations from other states doing a like business in this state. [21 G. A., ch. 65, § 13.]

SEC. **1811. Defenses to actions on policies—intoxication.** In any action pending in any court of the state on any policy or certificate of life insurance, wherein the defendant seeks to avoid liability upon the alleged ground of the intemperate habits or habitual intoxication of the assured, it shall be a sufficient defense for the plaintiff to show that such habits or habitual intoxication of the assured was generally known in the community or neighborhood where the agent of the defendant resided or did business, if thereafter the company continued to receive the premiums falling due thereon. [16 G. A., ch. 55, § 1.]

SEC. **1812. Physician's certificate.** In any case where the medical examiner, or physician acting as such, of any life insurance company or association doing business in the state shall issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company or association or its agent under the rules and regulations of such company or association, it shall be thereby estopped from setting up in defense of the action on such policy or certificate that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the assured. [Same, § 2.]

SEC. **1813. Misrepresentation of age.** In all cases where it shall appear that the age of the person insured has been misstated in the proposal, declaration or other instrument upon which any policy of life insurance has been founded or issued, then and in such case the person or company issuing such policy shall, upon the discovery of such misstatement, be permitted to demand and collect the difference of premium, if any, which would be due, with interest not to exceed six per cent. per annum, and payable on account of the true age of the assured, from year to year, according to the rates of premium of such person or company upon which such policy was issued; or such person or company so issuing the policy may, after the decease of the assured, deduct from the amount payable by such policy the difference of premium, if any, with interest, which would so have been payable from year to year, by reason of any difference of age at time of issuance of such policy; and no other defense or deduction by such person or company issuing such policy shall be permitted, after the death of the person assured, on account of such misstatement of age of the assured, notwithstanding any warranty of such statement of age by terms of policy or otherwise, except when it be shown by the person or company insuring that the policy was procured by fraud in fact. [Same, § 3.]

Section applied: *Seiverts v. National Benefit Assn.*, 64 N. W., 671.

In an action in this state on a policy issued in another state it will be presumed in the absence of a showing to the contrary that statutes in the other state contain a similar provision with reference to the age of the assured: *Ibid.*

SEC. **1814. Illegal business.** Any officer, manager or agent of any life insurance company or association who, with knowledge that it is doing business in an unlawful manner or is insolvent, solicits insurance with said company or associations, or receives applications therefor, or does any other act or thing towards procuring or receiving any new business for such company or association, shall be guilty of a misdemeanor, and for every such act, on conviction thereof, shall be adjudged to pay a fine of not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment. All contracts, promises and agreements made by any person to or with any such company or association concerning any premium, policy or certificate of new business, after the revocation of its certificates or denial of authority to do business, shall be null and void, and all payments of premium or assessments advanced or made by any person on account of any such policy, certificate of new business, or upon any arrangement therefor, may be recovered from such company or association, or its agent to whom payment was advanced or made, or from both of them, and in addition thereto plaintiff may recover an equal amount as liquidated damages, together with a reasonable fee to plaintiff's attorney for services in the case.

SEC. **1815. Advertisements—who deemed agent.** The provisions of sections seventeen hundred and forty-nine and seventeen hundred and fifty of chapter four, of this title, shall apply to life insurance companies and associations. [18 G. A., ch. 211, §§ 1, 2.]

SEC. **1816. Penalty for fraud in procuring insurance.** Any agent, physician or other person who shall knowingly, by means of concealment

of facts or false statements, procure or assist in procuring from any life insurance organization any policy or certificate of insurance, shall be punished by a fine of not to exceed one thousand dollars or by imprisonment in the county jail not to exceed one year, or by both, in the discretion of the court. [21 G. A., ch. 165, § 19.]

SEC. **1817. Conspiracy to defraud.** If two or more persons conspire to defraud or obtain any money from any life insurance company or association by means of false statements as to the death of any person insured, or the false appearance of the death of any such person, each shall be punished by imprisonment in the penitentiary not to exceed ten years. Any person who by such means obtains any money or property on the policy or certificate of the person so insured shall be punished by imprisonment in the penitentiary not to exceed fifteen years. Any person who thus attempts to obtain money from any such company or association shall be punished by like imprisonment not to exceed seven years.

SEC. **1818. Fees.** When not otherwise provided, each life insurance company doing business in this state, except those organized under the laws thereof, shall pay to the auditor of state the following fees:

1. Upon filing declaration or certified copy of the charter or articles of incorporation, twenty-five dollars;
2. Upon filing the annual statement, twenty dollars;
3. For each certificate of authority and certified copy thereof, two dollars;
4. For each agent's certificate, two dollars;
5. For every copy of any paper filed, the sum of twenty cents per folio, and for certifying and affixing the official seal thereto, one dollar;
6. For valuing policies, ten dollars for each million dollars of insurance or fraction thereof.

Companies organized under the laws of the state shall pay the following fees:

1. For filing an examination of the first application and the issuance of certificate thereon, ten dollars;
2. For filing each annual statement and issuance of renewal certificate, three dollars;
3. For each agent's certificate, fifty cents.

The provisions of the chapter on insurance other than life shall apply as to fees under this and the two preceding chapters, except as modified by this section. [C. '73, § 1183.]

SEC. **1819. Copy of application.** All life insurance companies or associations organized or doing business in this state under the provisions of the preceding chapters shall, upon the issue of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy, or, upon reinstatement of a lapsed policy, shall attach to the renewal receipt a true copy of all representations made by the assured upon which the renewal or reinstatement is made. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option.

See notes to § 1741.

SEC. **1820. Limitation of action.** No stipulation or condition in any policy or contract of insurance or beneficiary certificate issued by any com-

pany or association mentioned or referred to in this chapter, limiting the time to a period of less than one year after knowledge by the beneficiary within which notice or proofs of death or the occurrence of other contingency insured against must be given, shall be valid.

SEC. **1821. Taxes, how paid.** In case this or any other state shall impose or levy any tax on any company or association, the same may be paid from any surplus or emergency fund of such company or association.

CHAPTER 9.

OF FRATERNAL BENEFICIARY SOCIETIES, ORDERS OR ASSOCIATIONS.

SECTION **1822. Defined.** A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, and having a lodge system, with ritualistic form of work and representative form of government. Such association shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as a result of disease, accident or old age, provided the period of life at which payment of physical disability benefits on account of old age commences shall not be under seventy years, subject to the compliance by members with its constitution and laws. But the provisions of this chapter shall not be construed to include fraternal orders which only provide for sick and funeral benefits. [26 G. A., ch. 21, § 1.]

For decisions having some application to such associations see notes to §§ 1784, 1788, 1789.

SEC. **1823. Assessments.** The fund from which the payment of such benefits shall be made and the expenses of such association defrayed shall be derived from beneficiary calls, assessments or dues collected from its members. [Same, § 2.]

SEC. **1824. Insurable age—beneficiary.** No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such member. [Same, § 3.]

SEC. **1825. Statutes applicable.** Such associations shall be governed by this chapter, and shall be exempt from the provisions of the statutes of this state relating to life insurance companies, except as hereinafter provided. [Same, § 4.]

SEC. **1826. Copy of application.** All such associations shall, upon the issue or renewal of any beneficiary certificate, attach to such certificate or indorse thereon a true copy of any application or representation of the member which by the terms of such certificate are made a part thereof. The omission so to do shall not render the certificate invalid, but if any such association neglects to comply with the requirements of this section it shall not plead or prove the falsity of any such certificate or representation or any part thereof in any action upon such certificate, and the plaintiff in any such action, in order to recover against such association, shall not be required to either plead or prove such application or representation. [Same, § 5.]

SEC. **1827. Where suable.** Such associations may be sued in any county in which is kept their principal place of business, or in which the beneficiary contract was made, or in which the death of the member occurred; but actions to recover old age, sick or accident benefits may, at

the option of the beneficiary, be brought in the county of his residence. [Same, § 6.]

SEC. **1828. Exemption of proceeds.** The proceeds of any beneficiary certificate issued by any such association, and of any claims for benefits, shall be exempt from execution and attachment, to the same extent as the proceeds of any policy of life or endowment insurance, as is now or may hereafter be provided by the laws of this state. [Same, § 7.]

SEC. **1829. Foreign companies.** Any such association organized under the laws of any other state shall be permitted to do business in this state, when it shall have filed with the auditor of this state a duly certified copy of its charter and articles of association, and a copy of its constitution or laws, certified to by its secretary or corresponding officer, together with an appointment of the auditor of this state as a person upon whom process may be served as hereinafter provided, if such association shall be shown to be authorized to do business in the state in which it is incorporated or organized. The auditor of state may personally, or by some person to be designated by him, examine into the conditions, affairs, character and business methods, accounts, books and investments of such association at its home office, which examination shall be at the expense of such association, and shall be made within thirty days after demand therefor; and the expense of such examination shall be limited to five dollars per day and the necessary expenses of travel and for hotel bills. If the auditor, after such examination, is of the opinion that no permit should be granted to such association, he may refuse to issue the same. [Same, § 9.]

SEC. **1830. Report.** Every such association doing business in this state shall, on or before the first day of March of each year, make, and file with the auditor of state, a report for the year ending on the thirty-first day of December immediately preceding. All reports shall be upon blank forms to be provided by the auditor of state, or may be printed in pamphlet form, and shall be verified under oath by the authorized officers of such association, and shall be published, or the substance thereof, in the annual report of the auditor of state under the separate title "Fraternal Beneficiary Associations," and shall contain answers to the following questions:

1. Number of certificates issued during the year, or members admitted;
2. Amount of indemnity effected thereby;
3. Number of losses or benefit liabilities incurred;
4. Number of losses or benefit liabilities paid;
5. The amount received from each assessment for the year;
6. Total amount paid members, beneficiaries, legal representatives or heirs;
7. Number and kind of claims for which assessments have been made;
8. Number and kind of claims compromised or resisted, and brief statement of reason;
9. Does association charge annual or other periodical dues or admission fees;
10. How much on each one thousand dollars annually, or *per capita*, as the case may be;
11. Total amount received, from what source, and the disposition thereof;
12. Total amount of salaries, fees, per diem, mileage, expenses paid to officers, showing amount paid to each;
13. Does the association guarantee, in its certificates, fixed amounts to be paid regardless of amount realized from assessments, dues, admission fees and donations;
14. If so, state amount guaranteed, and the security of such guarantee;
15. Has the association a reserve or emergency fund;
16. If so, how is it created, and for what purpose, the amount thereof, and how invested;
17. Has the association more than one class;
18. If so, how many, and amount of indemnity in each;

19. Number of members in each class;
20. If voluntary, so state, and give date of organization;
21. If organized under the laws of this state, under what law and at what time, giving chapter and year and date of passage of the act;
22. If organized under the laws of any other state, territory or province, state such fact and the date of organization, giving chapter and year and date of passage of the act;
23. Number of certificates of beneficiary membership lapsed during the year;
24. Number in force at beginning and end of year; if more than one class, number in each class;
25. Names and addresses of its presidents, secretary and treasurer, or corresponding officers.

The auditor of state is empowered to make any additional inquiries of any such association relative to the business contemplated by this act, and such officer of such association as the auditor of state may require shall promptly reply in writing, under oath, to all such inquiries. [Same, § 10.]

SEC. **1831. Service of process.** Any such association permitted to do business within this state, and not having its principal office within this state, and not organized under the laws of this state, shall appoint, in writing, the auditor of state to be attorney in fact, on whom all process in any action or proceeding against it shall be served, and in such writing shall agree that any process against it which is served on said attorney in fact shall be of the same validity as if served upon the association, and that the authority shall continue in force so long as any liability remains outstanding in this state. Copies of such certificate, certified by said auditor of state, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original. Service upon such attorney shall be deemed sufficient service upon such association. When legal process against any such association is served upon said auditor of state, he shall immediately notify the association of such service by letter, postage prepaid, directed and mailed to its secretary or corresponding officer, and shall within two days after such service forward in the same manner a copy of the process served on him to such officer. The auditor of state shall keep a record of all processes served upon him, which record shall show the day and hour when such service was made. [Same, § 11.]

SEC. **1832. Annual certificate.** The auditor of state shall, upon the application of any such association, issue to it a permit in writing, authorizing it to do business within this state for a period of one year from April first of the year of its issue, for which certificate and all proceedings in connection therewith such association shall pay to said auditor the fee of twenty-five dollars, and for each annual renewal thereof a like sum shall be paid. [Same, § 12.]

SEC. **1833. Agents.** Such association shall not employ paid agents in soliciting or procuring members, except in the organization or building up of subordinate bodies, or granting members inducements to procure new members. [Same, § 13.]

SEC. **1834. Changing beneficiary.** No contract between a member and his beneficiary that the beneficiary or any person for him shall pay such member's assessments and dues, or either of them, shall deprive the member of the right to change the name of the beneficiary. [Same, § 14.]

SEC. **1835. Meetings in other states.** Any such association organized under the laws of this state may provide for the meetings of its legislative or governing body in any other state, territory or province wherein such association shall have subordinate bodies, and all business transacted at such meetings shall be valid, in all respects, as if such meetings were held within this state; and where the laws of any such association provide for the election of its officers by votes to be cast in its subordinate bodies, the

votes so cast in its subordinate bodies in any other state, territory or province shall be valid, as if cast within this state. [Same, § 15.]

SEC. **1836. Proceedings for violations of statute.** Any such association refusing or neglecting to make the report as provided in this chapter shall be excluded from doing business within this state. The auditor of state must, within sixty days after failure to make such report, or in case any such association shall exceed its powers, or shall conduct its business fraudulently, or shall fail to comply with any of the provisions of this chapter, give notice in writing to the attorney-general, who shall immediately commence an action against such association to enjoin the same from carrying on any business. No association so enjoined shall have authority to continue business until such report shall be made, or overt act or violation complained of shall have been corrected, nor until the costs of such action be paid by it, provided the court shall find that such association was in default, as charged; whereupon the auditor of state shall reinstate such association, and not until then shall such association be allowed to again do business in this state. Any officer, agent or person acting for any such association or subordinate body thereof within this state, while such association shall be so enjoined or prohibited from doing business pursuant to this chapter, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court. [Same, § 16.]

SEC. **1837. Illegal business—agents.** Any person who shall act within this state as an officer, agent or otherwise for any such association which has failed, neglected or refused to comply with or which has violated any of the provisions of this chapter, or shall have failed or neglected to procure from the auditor of state proper certificate of authority to transact business as provided for by this chapter, shall be subject to the penalty provided in the last preceding section for the misdemeanor therein specified. [Same, § 17.]

SEC. **1838. False representations by officers or agents.** Any officer, agent or member of such association, who shall obtain any money or property belonging thereto by any false or fraudulent representation, shall be fined not more than five hundred dollars and costs, and stand committed until such fine and costs are paid, or may be imprisoned in the county jail not more than six months. [Same, § 18.]

SEC. **1839. Physician's certificate.** Every applicant for membership in any association organized in this state shall first be examined by a physician holding a certificate from the state board of medical examiners. [Same, § 19.]

CHAPTER 10.

OF SAVINGS BANKS.

SECTION **1840. How formed.** Corporations designated savings banks may be formed by not less than five persons of lawful age, a majority of whom shall be citizens of the state, and must be organized as provided in this chapter. [15 G. A., ch. 60, §§ 1, 3.]

SEC. **1841. Business.** Savings banks may receive on deposit the savings and funds of others, preserve and invest the same, pay interest or dividends thereon, and transact the usual business of such institutions, but shall not have power to issue bank notes, bills or other evidences of debt for circulation as money. [Same, §§ 2, 16.]

SEC. **1842. Articles of incorporation.** The articles of incorporation of a savings bank shall be signed and acknowledged by the corporators

before some officer authorized to take acknowledgment of deeds, and give the corporate name, the object for which it is formed, the amount of capital, the time of its existence, which shall not exceed fifty years, the number of its directors, the name and post-office address of each person or officer who shall manage its affairs until the first election, and the name of the city, town or village, and the county, in which the principal place of business is to be located. Such articles shall be filed and recorded in the office of the recorder of deeds of the county of the principal place of business, and in the office of the secretary of state. Notice of its incorporation shall be given by publication in some newspaper published in the county wherein the bank is located, for four consecutive weeks, which notice shall state, in substance, the matters required to be given in the articles of incorporation. [Same, § 3.]

SEC. **1843. Capital.** The paid up capital of any savings bank shall not be less than ten thousand dollars in cities, town or villages having a population of ten thousand or less, nor less than fifty thousand dollars in cities having a greater population. The corporation may commence business when its first directors or officers named in its recorded articles of incorporation shall have furnished the auditor of state proof, under oath, that the required capital has been paid in and is held in good faith by said bank, and he has satisfied himself of such fact, for which purpose he may make a personal examination, or cause it to be made, at the expense of such bank, and he is also satisfied that the preceding sections of this chapter have been complied with, and has issued a certificate to that effect, naming therein its first board of directors, notice of which certificate shall be given by the publication thereof for four consecutive weeks in some newspaper printed in the county where its articles are recorded, at the expense of such bank, and proof of such publication by the oath of the publisher or his foreman filed with such auditor. [Same, §§ 2, 3.]

SEC. **1844. Powers.** The corporators and their successors shall be a body corporate with the right of succession for the period limited, and shall have power:

1. To sue and be sued;
2. To have a corporate seal and alter it at pleasure;
3. To purchase, hold, sell, convey, and release from trust or mortgage such real and personal estate as provided for in this chapter;
4. To appoint such officers, agents, employes and servants as the business of the corporation shall require, to define their powers, prescribe their duties, fix their compensation, and to require of them such security as may be proper for the performance of their duties;
5. To loan and invest the funds of the corporation, to receive deposits of money, to loan and invest the same as provided in this chapter, and to repay such deposits without interest, or with such interest as the by-laws or articles may provide;
6. To make by-laws for the management and regulation of the corporation, its property and affairs, prescribing the condition on which the deposits will be received and interest paid thereon, and the time and manner of dividing the profits, and for carrying on all business within its power. [Same, § 5.]

SEC. **1845. Management—officers—meetings.** The business and property of such banks shall be managed by a board of directors of not less than five nor more than nine, all of whom shall be shareholders, and at least three-fourths of the directors must be citizens of the state. No person shall be eligible as director of any savings bank, nor can he qualify or serve as such, unless he owns in his own right shares of stock in such bank, as follows: In those having a capital of less than twenty thousand dollars, one share; in those having a capital of twenty thousand dollars or over, but less than thirty thousand dollars, two shares; in those having a capital of thirty thousand dollars or over, but less than forty thousand dollars, three shares;

in those having a capital of forty thousand dollars or over, but less than fifty thousand dollars, four shares; in those having a capital of fifty thousand dollars or over, five shares. Each director, before acting as such, shall take an oath that he will diligently, faithfully and impartially perform the duties imposed upon him by law, that he will not knowingly violate or willingly permit to be violated any of its provisions, that he is the *bona fide* owner in his own right of the number of shares of stock required to be owned by him as provided in this chapter; that the same is not hypothecated nor in any manner pledged as security for any loan obtained or debt owing by him,—which oath shall be signed by each director and certified by the officer before whom it is taken, and filed with and preserved in the office of the auditor of state. The call for the first meeting of the directors or trustees shall be signed by one or more persons named in the auditor's certificate, stating the time and place of meeting, and be delivered personally to each director, or published at least ten days in some newspaper in the county wherein the principal place of business of the corporation is located.

At their first meeting, and as often thereafter as the by-laws require, they shall elect from their number a president and one or more vice-presidents for the ensuing year, and appoint a treasurer or cashier, and such other officers and employes as may be required, who shall hold their office during the pleasure of the board, and give such security for the faithful performance of their duties as may be required of them by the by-laws. [22 G. A. ch. 89; 15 G A., ch. 60, § 6.]

SEC. **1846. Directors.** All vacancies in the board of directors shall be filled at its next regular meeting after such vacancy shall arise from among the stockholders, and the person receiving a majority of the votes of the whole number of directors shall be duly elected to fill such vacancy. The directors to succeed those named in the auditor's certificate shall be elected at the first annual meeting thereafter, at such time and place, in such manner and upon such notice as shall be provided by the by-laws, and shall hold office until their successors are elected and qualified, which shall be annually thereafter. All such elections shall be by ballot, and the persons receiving the greater number of votes cast shall be directors. If an election of directors shall not be held on the day designated, it may be held on any other day, after giving the notice required by the by-laws. A majority of directors shall constitute a quorum for the transaction of business, but in no case shall a measure be declared carried unless receiving three affirmative votes. [Same.]

SEC. **1847. Stockholders' meetings.** At all stockholders' meetings, and all elections held thereat, each share of stock shall be entitled to one vote. Any stockholder may vote upon his shares in person, or by proxy in writing. Shares belonging to an estate may in like manner be voted by the administrator thereof, and shares belonging to a corporation, association or society may be voted by any person authorized by its board of directors to do so, but no stockholder shall be entitled to vote who owes the bank any past due indebtedness. [22 G. A., ch. 89; 15 G. A., ch. 60, §§ 6, 13, 14.]

SEC. **1848. Deposits.** All savings banks organized under this chapter may receive on deposit money equal to ten times the amount of its paid up capital, and no greater amount of deposits shall be received without a corresponding increase of paid up capital, which capital shall be a guaranty fund for the better security of depositors, and invested in safe and available securities. The deposits so received shall be paid to such depositor or his representative, when requested, with such interest and under such regulations as the board of directors shall, from time to time, prescribe, not inconsistent with the provisions of this chapter, which shall be printed and conspicuously exposed in the business office of the bank, in some place accessible and visible to all; and no alteration which may at any time be made in such rules and regulations shall affect the rights of depositors acquired previously thereto in respect to deposits or interest thereon. Savings banks

may require sixty days' written notice of the withdrawal of deposits, but when there are sufficient funds on hand the officers thereof may, in their discretion, waive this requirement. They may close any account, upon such written notice as may be provided for in the by-laws, directing a depositor to withdraw his deposits, after which it shall cease to draw interest. But nothing in this chapter shall prevent such banks, in their discretion, issuing certificates of deposit payable upon demand. [15 G. A., ch. 60, § 7.]

SEC. **1849. Limitation as to interest.** All accounts upon which no deposit or drafts shall be made for a period of ten years in succession shall be so far closed that neither the sum deposited, nor the interest that shall have accrued thereon, shall be entitled to any interest after the expiration of the ten years from the date of the last deposit or draft. This provision, however, shall not apply to endowments for children, to trust estates, nor to other cases where special provision is made therefor at the time of the deposit thereof. [Same, § 8.]

SEC. **1850. Investment of funds.** Each savings bank shall invest its funds or capital, all moneys deposited therein and all its gains and profits, only as follows:

1. In bonds or interest bearing notes or certificates of the United States;
2. In bonds or evidences of debt of this state, bearing interest;
3. In bonds or warrants of any city, town, county or school district of this state, issued pursuant to the authority of law; but not exceeding twenty-five per cent. of the assets of the bank shall consist of such bonds or warrants;
4. In notes or bonds secured by mortgage or deed of trust upon unincumbered real estate in this state, worth at least twice the amount loaned thereon;
5. It may discount, purchase, sell and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security, but shall not purchase, hold or make loans upon the shares of its capital stock;
6. In all cases of loans upon real estate, all the expenses of searches, examination and certificates of title, or the inspection of property, appraisals of value, and of drawing, perfecting and recording papers, shall be paid by such borrowers; if buildings are included in the valuation of real estate upon which a loan shall be made, they shall be insured by the mortgagor for at least two-thirds of their value, in some solvent company, and the loss, if any, under the policy of insurance shall be made payable to the bank or its assigns, as its interests may appear. When the mortgagor neglects to procure the insurance as above provided, the mortgagee may procure the same in the mortgagor's name for its benefit, and the premium so paid therefor shall be added to the mortgage debt. [Same, § 9.]

SEC. **1851. Real estate.** A savings bank may purchase, hold and convey real estate only as follows:

1. The lot and building in which its business is carried on;
2. Such as shall have been purchased at sales upon foreclosure of mortgages owned by it, or upon judgments or decrees obtained or rendered for debts due it, or such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or such as it may obtain by redemption as junior mortgagee or judgment creditor, and which shall be sold by said bank within ten years after the title shall be vested in it. [Same, § 10.]

SEC. **1852. Interest—dividends.** No dividend shall be declared or paid to stockholders, save out of the surplus on hand after paying or setting apart sums sufficient for the payment of all expenses in operating the bank, and of interest to depositors according to the rate fixed therefor by the board of directors from time to time. The bank shall pay interest to the depositors, when due, upon presentation of deposit book or certificate. [Same, § 11.]

SEC. **1853. Shares.** The capital of savings banks shall be divided into shares of one hundred dollars each, issued or acquired only upon full payment of the sums represented by them, transferable on the books of the corporation in such manner as shall be prescribed by law and in its by-laws. Stock owned by any corporation, association or society may be transferred by any person authorized to do so by its board of directors or trustees. [Same, §§ 12, 14.]

SEC. **1854. Deposits by executors, minors, etc.** Deposits made by a person as executor, administrator, or in any other official capacity, shall be payable to him as such official; if personally made by a minor, to him, although he have no guardian, or his guardian shall not have authorized such payment, and the check, receipt or acquittance of the minor therefor shall be valid and binding. If a deposit be made in her own name by a woman, then or afterwards married, payment shall be made to her upon her check or receipt; if made by any corporation, association or society, to any person authorized by its board of directors or trustees to receive the same. [Same, §§ 14, 15.]

SEC. **1855. Indebtedness.** No savings bank, its directors or trustees shall contract any debt or liability against the bank for any purpose whatever, except for deposits and the necessary expenses of managing and transacting its business, and to pay obligations incurred for the purpose of obtaining money with which to pay deposits. [Same, § 16.]

SEC. **1856. Increasing capital stock.** The capital of savings banks may be increased by an affirmative vote of two-thirds of the shares thereof, at a stockholders' meeting, called upon a notice signed by the officers of the bank and a majority of its directors, specifying the object of the meeting, its time and place, and the amount of the proposed increase, published once a week for four consecutive weeks before the time fixed in some newspaper of the county where the bank is located. If at such meeting the required vote is given, a certificate of the proceedings showing compliance with the foregoing provisions, the amount of capital paid in, the amount to which it is to be increased, and the manner thereof, shall be signed and verified by the affidavit of the chairman and secretary of the meeting, certified to by a majority of the board of directors, and filed and recorded in the office of the recorder of deeds of the proper county, and with the secretary of state, and a certificate shall thereupon be issued by him in the manner required in the original organization of the bank. When this is done, the stock shall be increased to the amount stated in the certificate. [Same, § 29.]

SEC. **1857. Dissolution.** Savings banks may be dissolved prior to the period fixed in the certificate of incorporation, by the affirmative votes of the stockholders holding three-fourths of the capital, at a meeting of stockholders to be called for this purpose in the manner and after publication of notice as required in case of the increase of its capital. In case of dissolution of the bank or proceedings to close the same as authorized in this chapter, no receiver appointed thereunder shall be allowed to sell the assets thereof at forced sale, but he shall collect the same with all diligence, and make distribution of the proceeds from time to time to those entitled thereto. [Same, § 30.]

SEC. **1858. Reorganization.** Any bank existing under any law of the state may be reorganized under the provisions of this chapter, by filing with the recorder of deeds of the county in which the business is to be conducted articles of incorporation as required for the organization of savings banks, or such amendment of its articles as will comply with the provisions of this chapter; but such articles or amendment shall be signed by a majority of the directors of such bank, acknowledged before some officer authorized to take the acknowledgment of deeds, and recorded in the office of the proper recorder of deeds and secretary of state, as if the original articles, whereupon the auditor of state shall issue his certificate, as in case of the

original organization of savings banks, which, when received and published as in such cases required, shall authorize it to transact business, and all the provisions relating to savings banks shall apply to banks thus reorganized, and all its securities, real estate, or property may be then transferred to such new organization; but such reorganization shall not discharge the original bank, its directors or stockholders from any liability to its depositors or any other person; and such new savings bank shall be liable for every claim or demand existing against such former organization. [Same, § 31.]

SEC. **1859. Unauthorized use of name.** Any bank, banking association, private banker or person, not incorporated under the provisions of this chapter, or any officer, agent, servant or employe thereof, who shall advertise, issue or circulate any card or other paper, or exhibit any sign as a savings bank or savings institution, and any savings bank advertising in any way a greater amount of capital than it has actually paid in, shall forfeit and pay one hundred dollars for each day the offense is continued, to be recovered in a suit brought in the name of the state, by the county attorney, of and for the use of the school fund of the county where such bank is located, and, in addition thereto, shall be guilty of a misdemeanor for each day the same is done or continued. [Same, §§ 20, 21, 32.]

SEC. **1860. Reserve.** Savings banks doing a commercial business, located in towns having a population of less than three thousand inhabitants, shall at all times keep a cash reserve fund equal to fifteen per cent. of their commercial deposits, and eight per cent. of their savings deposits, and all such banks located in cities and towns having a population of three thousand or over shall at all times keep a cash reserve fund equal to twenty per cent. of their commercial deposits, and eight per cent. of their savings deposits. Savings banks doing an exclusive savings bank business shall at all times keep a cash fund equal to eight per cent. of their deposits. Three-fourths of such reserve fund provided for in this section may be kept on deposit, subject to call, with other banks organized under state or national laws.

CHAPTER 11.

OF STATE BANKS.

SECTION **1861. Name.** Associations organized under the general incorporation laws of this state for transacting a banking business, buying or selling exchange, receiving deposits, discounting notes and bills, other than savings banks, shall be designated state banks, and shall have the word "state" incorporated in and made a part of the name of such corporation; and no such corporation shall be authorized to transact business unless the provisions of this code have been complied with. [21 G. A., ch. 72, § 1.]

SEC. **1862. Others not to use.** No partnership, individual or unincorporated association engaged in buying or selling exchange, receiving deposits, discounting notes and bills, or other banking business, shall incorporate or embrace the word "state" in its name, but this section shall not apply to associations organized under the laws of the United States. [Same, § 3.]

SEC. **1863. Articles.** State banks may be hereafter organized by not less than five persons of lawful age, who shall, prior to the commencement of business, sign and acknowledge articles of incorporation before some officer authorized to take acknowledgments of deeds. Such articles of incorporation shall state:

1. The object of the incorporation and the name by which it shall be known;
2. The principal place of business;

3. The time of the commencement and termination of the corporation, which shall in no case exceed twenty years;

4. The amount of capital stock authorized, and the times and conditions in which it shall be paid in;

5. By what officers and persons the affairs of the corporation are to be conducted, and the times at which they will be elected;

6. The highest amount of indebtedness to which the corporation may at any time subject itself;

7 Whether private property, in addition to the liability fixed by law, shall be liable for corporate debts;

8. The name and post-office address of each officer or person who shall manage the affairs of the corporation until the first election;

9. Such other provisions, not contrary to law, which the corporation may adopt for the conduct of the business of the corporation;

10. Such articles shall be filed and recorded, and notice of incorporation given, as provided in section eighteen hundred and forty-two of chapter ten of this title, in reference to savings banks.

SEC. **1864. Capital—certificate.** No state bank shall be organized under the provisions of this chapter with a less amount of paid up capital than fifty thousand dollars, except in cities or towns having a population not exceeding three thousand, where such association may be organized with a paid up capital of not less than twenty-five thousand dollars. But no such association shall have the right to commence business until its officers or its stockholders shall have furnished to the auditor of state a sworn statement of the paid up capital, and, when the auditor of state is satisfied as to that fact, he shall issue to such association a certificate authorizing it to commence business, and it shall cause said certificate to be published in some weekly newspaper printed in the city or town where the association is located, for at least four weeks, or, if no newspaper is published in such city or town, then in a weekly newspaper published nearest thereto in the county.

SEC. **1865. Shares.** The capital of state banks hereafter organized shall be divided into shares of one hundred dollars each, issued or acquired only upon full payment of the sum represented by them.

SEC. **1866. Directors.** The business and property of each state bank shall be managed by a board of directors of not less than five, all of whom shall be shareholders. No person shall be eligible as director of any state bank, nor shall he qualify or serve as such, unless he owns in his own right shares of stock in such bank, as follows: In those having a capital of twenty-five thousand dollars or over, but less than thirty thousand dollars, two shares; in those having a capital of thirty thousand dollars or over, but less than forty thousand dollars, three shares; In those having a capital of forty thousand dollars or over, but less than fifty thousand dollars, four shares; in those having a capital of fifty thousand dollars or over, five shares. Each director, before acting as such, shall take an oath that he is the *bona fide* owner in his own right of the number of shares of stock required in this chapter; that the same is not hypothecated nor in any manner pledged as security for any loan or debt; which oath shall be signed by each director and certified by the officer before whom it is taken, and filed with and preserved in the office of the auditor of state.

SEC. **1867. Reserve.** All state banks located in cities and towns having a population of less than three thousand inhabitants shall at all times maintain a reserve of not less than ten per cent. of their total deposits, and all such banks located in cities and towns having a population of three thousand or more shall at all times maintain a reserve of not less than fifteen per cent. of their total deposits. Three-fourths of said reserve may be kept on deposit subject to call with other banks organized under state or national laws.

CHAPTER 12.

OF BANKS.

SECTION **1868. Misnomer.** The misnomer of any savings or state bank in any instrument shall not vitiate or impair the same, if such bank be sufficiently described to ascertain the intention of the parties. [15 G. A., ch. 60, § 19.]

SEC. **1869. Pay of and loans to officers.** Officers of savings and state banks may receive for their services a reasonable compensation, to be fixed from time to time in the by-laws, or by vote of the board of directors, but no director, as such, shall be paid for his services. No officer or employe of the bank shall in any manner, directly or indirectly, use its funds or deposits, or any part thereof, except for the regular business transactions of the bank, and no loan shall be made by it to them except upon the express order of the board of directors, made in the absence of the applicant, duly entered in the records of the board proceedings, and only upon the same security as required of others. Any officer or employe of the bank violating the provisions of this section shall be deemed guilty of embezzlement. [25 G. A., ch. 30, § 1; 15 G. A., ch. 60, § 17.]

SEC. **1870. Limit of liabilities.** The total liabilities to any savings or state bank of any person, corporation, company or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed twenty per cent. of the actually paid up capital of such bank; but the discount of *bona fide* bills of exchange drawn against actually existing value, and the discount of commercial or business paper actually owned by the person or persons, corporation, company or firm negotiating the same, shall not be considered money so borrowed. [25 G. A., ch. 30, § 2; 15 G. A., ch. 60, § 18.]

SEC. **1871. Examinations.** The board of directors of each savings and state bank shall, at its annual meeting, appoint from its members an examining committee of not less than two, which shall examine the condition of the bank, at least every quarter, and report the same in writing duly signed to the board, who shall cause said report to be recorded in the directors' minute book of the bank. Members of such examining committee shall receive for their services a reasonable compensation, to be fixed by the board at its annual meeting, but in no case shall such compensation exceed five dollars per day for each day's actual service to each member. [25 G. A., ch. 30, § 4.]

SEC. **1872. Quarterly statements.** All savings and state banks shall make a full, clear and accurate statement of the condition of the bank, verified by the oath of the president, vice-president, cashier, or assistant cashier, and attested by the signatures of at least three of the directors, or verified by the oath of two of its officers and attested by two of the directors, which statement shall contain:

1. The amount of capital actually paid in;
2. The amount of debts of every kind due to banks, bankers, or persons other than regular depositors;
3. The amount due depositors, including sight and time deposits;
4. The amount subject to be drawn at sight then remaining on deposit with solvent banks or bankers of the country, specifying each city and town and the amount deposited in each and belonging to such bank;
5. The amount of gold and silver coin and bullion belonging to such bank at the time of making such statement;
6. The amount then on hand of legal tender and national bank notes and subsidiary coin;
7. The amount of drafts and checks on other solvent banks, and other cash items not dishonored, then on hand and belonging to such bank;

8. The amount of bills, bonds and other evidences of debt discounted or purchased by such bank, and then belonging to the same;

9. The value of real or personal property owned by such bank, specifying the amount of each;

10. The amount of undivided profits, if any, then on hand;

11. The total amount of liabilities to such association on the part of the directors thereof.

Which statement shall be transmitted to the auditor of state within ten days after the receipt of a request or requisition therefor from him, and by him filed in his office. [15 G. A., ch. 60, § 22; C. '73, § 1570; R., § 1636.]

SEC. **1873. Examination by auditor.** The auditor of state may, at any time he may see proper, make or cause to be made an examination of any savings or state bank, or he shall call upon it for a report of its condition upon any given day which has passed, as often as four times each year, which report shall contain the information under the preceding section, and the auditor shall cause it to be published in one regular issue in some daily or weekly newspaper in the city or town where such bank is located, or, if there be none in such city or town, then, in one regular issue of some daily or weekly newspaper printed in said county, and the expense of such publication shall be paid by the bank. [15 G. A., ch. 60, § 23; C. '73, § 1571.]

SEC. **1874. Special reports.** The auditor of state shall also have power to call for special reports from savings and state banks whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of their condition, which reports shall be verified and attested in the same manner as required in this chapter.

SEC. **1875. Examiners.** The auditor of state may appoint one or more bank examiners, to hold office at his pleasure, who shall give bond to the state, conditioned for the faithful discharge of their duties, in the sum of two thousand dollars, which shall be filed with and the sureties therein approved by said auditor. [23 G. A., ch. 50, § 1.]

SEC. **1876. Costs.** Each of such banks shall pay the expense of its examination, which, when made by the auditor of state, shall be his necessary expenses only; when such examination is made by an examiner, he shall receive, from banks having a paid up capital of fifty thousand dollars or under, the sum of fifteen dollars; from banks possessing a paid up capital of more than fifty thousand and under one hundred thousand dollars, twenty dollars; from banks possessing a paid up capital of one hundred thousand and under two hundred thousand dollars, twenty-five dollars; and from banks possessing a paid up capital of two hundred thousand dollars or over, thirty dollars. [Same, § 2.]

SEC. **1877. Proceedings against by state—receivers.** When it shall appear to the auditor of state that any savings or state bank has refused to pay its deposits in accordance with the terms on which such deposits were received, or has become insolvent, or that its capital has become impaired, or has violated the law, or is conducting its business in an unsafe manner, he shall, by an order addressed to such bank, direct a discontinuance of such illegal or unsafe practices, and require conformity with the law. The auditor of state may appoint an examiner to investigate the affairs of any savings or state bank, who shall have power to administer oaths to any person whose testimony may be required on such examination, and to compel his attendance for the purpose thereof, by subpœna or attachment, in the manner now authorized in respect to witnesses in the courts of the state, and all books and papers which it may be found necessary to inspect on the examination so ordered shall be produced, and their production may be compelled in like manner; all expenses thereof shall be paid by the banks examined, in such amount as the auditor of state shall certify to be just and reasonable, but costs taxed as such shall not exceed those allowed for like services in the district court. If any such bank shall fail or refuse to

comply with the demands made by the auditor of state, or if the auditor of state shall become satisfied that any such bank is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may authorize a bank examiner appointed by him to take possession of any such bank, whereupon the right of levy, of execution, or attachment against such bank or its assets shall be suspended, and the auditor of state may, forthwith, with the assent of the attorney-general, apply to the district court or judge thereof for the appointment of a receiver for such bank, and its affairs shall be wound up under the direction of the court, and the assets thereof ratably distributed among the creditors thereof, giving preference in payment to depositors. The auditor of state, with the assent of the attorney-general, shall have authority to apply for the appointment of receivers of savings and state banks, who shall be residents of the county where the bank is located; and no general assignment for the benefit of creditors shall be of any validity. [15 G. A., ch. 60, § 25; C. '73, § 1572.]

A court of equity may appoint a receiver at the suit of a stockholder: *Dickerson v. Cass County*, 64 N. W., 395.

A creditor cannot, by obtaining judgment, interfere with distribution by the receiver. *Richards v. Osceola Bank*, 79–707.

SEC. **1878. Assessments.** Should the capital stock of any state or savings bank become impaired by losses or otherwise, the auditor of state may require an assessment upon the stockholders, and shall address an order to the several members of the board of directors of such bank, fixing the amount of assessment required, and the board of directors shall, within thirty days after the receipt of such order, cause such deficiency to be made good by a ratable assessment upon the stockholders for the amount of stock held by them, by giving such stockholders notice in writing, signed by the president or vice-president, attested by the cashier or secretary of the bank, under its seal, if it have one, and deposited in the post-office, addressed to the last known residence of the stockholders, proof thereof to be made by the affidavit of the person so making the deposit, which notice shall state the entire sum to be raised, and the amount due from the addressed stockholder. [25 G. A., ch. 29, § 1.]

SEC. **1879. How enforced.** Should any stockholder neglect or refuse to pay his assessment within ninety days from the date of mailing notice thereof, the board of directors shall cause a sufficient amount of the capital stock held by such stockholder to be sold at public auction to make good the deficiency, after giving thirty days' notice thereof by posting the same in the bank, and publishing it in some newspaper of the county in which the bank is located, which notice shall recite the assessment made, the amount due thereunder from the stockholder, and the time and place of sale; proof of all which may be made in the manner provided in the preceding section. After such deficiency is made good, the balance of the proceeds of said sale, if any, shall be paid to the delinquent stockholder. [Same, § 2.]

SEC. **1880. Directors liable.** Should the board of directors of such bank having an impaired capital neglect or refuse to proceed as above provided for a period of thirty days after receipt of such order from the auditor of state, they shall become severally liable for any deficiency, which liability may be enforced at law by any creditor of or stockholder in the bank, or receiver appointed to wind up its affairs. [Same, § 3.]

SEC. **1881. Auditor to report.** It shall be the duty of the auditor of state to communicate to the governor in his biennial report a statement of the condition of every bank from which reports have been received for the preceding year, and to suggest any amendments in the law relative thereto which, in his judgment, may be necessary or proper to increase the security of depositors. [15 G. A., ch. 60, § 24.]

SEC. **1882. Liability of shareholders.** All stockholders of savings and state banks shall be individually liable to the creditors of such corporation of which they are stockholders over and above the amount of stock by

them held therein and any amount paid thereon, to an amount equal to their respective shares, for all its liabilities accruing while they remained such stockholders; and should any such association or corporation become insolvent, its stockholders may be severally compelled to pay such deficiency in proportion to the amount of stock owned by each, not to exceed the extent of the additional liability hereby created. The assignee or receiver of any such corporation, or in case there is none, or of his failure or refusal to act, any creditor thereof, may maintain an action in equity to determine the liability of the stockholders, and the amount to which each creditor shall be entitled; and all parties interested shall be brought into court. [18 G. A., ch. 208, §§ 1, 3; 15 G. A., ch. 60, § 12.]

The provisions of the constitution, art. VIII, § 9, rendering stockholders in a banking corporation or institution individually liable to an amount equal to their respective shares, is held to apply to banks of issue, and not to banks merely of discount and deposit: *Allen v. Clayton*, 63–11.

Under such constitutional provisions the liability of a stockholder in a bank is not limited in an action against him by a creditor to the proportional sum that can be collected from another stockholder, nor is it affected by the fact of fraudulent acts of the receiver or officers of the bank, nor can such stockholder delay the collection of the amount for which he is liable in order to secure contribution from other stockholders also liable: *Stewart v. Lay*, 45–604.

The court may make an assessment on the stockholders in an *ex parte* proceeding in connection with the appointment of a receiver subject to the right of each stockholder to contest his liability to such assessment when a demand is made to enforce it against him: *State ex rel v. Union Stock Yards State Bank*, 70 N. W., 752.

The liability of the stockholders is not directly to the creditor but arises on the insolvency of the bank and an assessment may be made in the discretion of the court for the payment by the receiver of the bank's indebtedness: *Ibid.*

The stockholder in a bank who by virtue of these provisions would become liable in the event of the insolvency of the bank may maintain a suit in equity for the appointment of a receiver of such bank when it becomes insolvent and is being operated at a loss: *Dickerson v. Cass County Bank*, 64 N. W., 395.

SEC. **1883. Distribution of proceeds.** Should the whole amount for which the stockholders are made individually responsible, as provided by the preceding section, be found in any case to be inadequate to the payment of all the debts of any such association or corporation, after the application of its assets to the payment of such debts, then the amount due from such stockholders, on account of their individual liability created by said section, as such, shall be distributed equally among all the creditors of such corporation in proportion to the several sums due them. [18 G. A., ch. 208, § 2.]

SEC. **1884. Deposits not to be received by insolvent bank.** No bank, banking house, exchange broker, deposit office, firm, company, corporation, or person engaged in the banking, brokerage, exchange or deposit business, shall, when insolvent, accept or receive on deposit, with or without interest, any money, bank bills or notes, United States treasury notes or currency, or other notes, bills, checks or drafts, or renew any certificate of deposit. [18 G. A., ch. 153, § 1.]

These statutory provisions as to fraudulent banking are applicable to national as well as to state banks: *State v. Fields*, 62 N. W., 653.

SEC. **1885. Penalty.** If any such bank, banking house, exchange broker, deposit office, firm, company, corporation or person shall receive or accept on deposit any such deposits, as aforesaid, when insolvent, any owner, officer, director, cashier, manager, member or person knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit, or connive at receiving or accepting on deposit therein, or thereby, any such deposits, or renew any certificate of deposit, as aforesaid, shall be guilty of a felony, and, upon conviction, shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment in the penitentiary for a term of not more than ten years, or by imprisonment in the county jail not more than one year, or by both fine and imprisonment. [Same, § 2.]

On an indictment under this provision against partners doing a banking business for receiving a deposit while insolvent, evidence is admissible that such deposit was received by a duly authorized agent in the conduct of the business; and it is not necessary to aver

in the indictment the fact that such deposit was received by an agent: *State v. Cadwell*, 79–432.

It is a crime under this section to receive, after insolvency, money on time deposit, for which a certificate of deposit is issued, as well as to receive general deposits: *Ibid.*

An assignment for the benefit of creditors, made five months after the receipt of the deposit, is admissible in evidence, for the purpose of showing in connection with other facts that the bank was insolvent at the time the deposit was made: *Ibid.*

The opinion of an expert book-keeper, based on the examination of the books which are in evidence, as to the fact of insolvency, is admissible: *Ibid.*

Where the defendants were a firm carrying on two banks, *held*, that, for the purpose of showing insolvency at the time of the receipt of a deposit, the condition of both banks was properly inquired into: *Ibid.*

Any bank whose affairs are so situated that it cannot meet its demands in the usual course of business, is, within the meaning of the law prohibiting the receipt of deposits, insolvent; and if deposits are received with the knowledge of such condition, a crime is committed: *Ibid.*

The crime consists in the deposit being received "therein or thereby" and is committed by the receipt of money on deposit if taken outside the bank rooms as well as within them: *State v. Yetzer*, 66 N. W., 737.

If an officer of the bank with knowledge of its insolvency directs a clerk without such knowledge to receive deposits and they are so received the ignorance of the clerk does not affect the guilt of the officer. It is not in such case the act of the clerk in receiving the deposit that constitutes the crime, but the act of the officer in directing it: *Ibid.*

A banker knowingly accepts and receives a deposit which is received by his clerk without authority if after having knowledge of such receipt he does not offer to return the deposit: *State v. Eifert*, 65 N. W., 309; *S. C.*, 71 N. W., 248.

If the money is deposited for the owner by another the owner is to be deemed the depositor and may be so named in the indictment: *Ibid.*

The language of the section is such as to be applicable to any officer *or* managing party. An officer is within the scope of the section although he is not a managing party: *State v. Yetzer*, 66 N. W., 737.

SEC. **1886. Neglect of officers.** Any officer or officers whose duty it is to make statement of the condition of its bank, and make publication of same, who shall wilfully neglect or refuse to perform such duties imposed upon them or either of them, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not less than three months nor more than three years in the penitentiary.

SEC. **1887. Penalty for false statements.** Any owner, director, officer, agent, employe or clerk of any bank, who shall knowingly subscribe or make any false statements or false entries in the books thereof, or knowingly subscribe or exhibit false papers with intent to deceive any person authorized to examine its condition, or shall knowingly subscribe and make false reports, or shall knowingly divert the funds of the bank to other objects than those authorized by law, shall be punished by a fine not exceeding ten thousand dollars, and be imprisoned in the penitentiary not less than two nor more than five years, and be forever after barred from holding any office created by this chapter. [25 G. A., ch. 30, § 3; 15 G. A., ch. 60, § 26.]

SEC. **1888. Intentional fraud.** Any owner, director, officer, agent, employe or clerk of any bank, who is guilty of intentional fraud, or of deceiving the public or individuals in relation to the means or liabilities of such bank, or who aids, assists or consents to the payment of dividends which leave insufficient funds with which to meet the liabilities of the bank, shall be punished by a fine of not less than five hundred dollars, or imprisonment of not less than one year, or both such fine and imprisonment, at the discretion of the court; and such act shall cause a forfeiture of all the privileges of said bank, and the court may proceed to close the same in the manner prescribed by law. [15 G. A., ch. 60, § 27.]

SEC. **1889. Statement—doing business—loan and trust companies.** The president and cashier of every savings and state bank shall cause to be kept at all times a full and correct list of the names and residences of the officers, directors, examining committee, and of all the stockholders in the bank, and the number of shares held by each, in the office where its business is transacted. Said list shall be subject to the inspection of all the stockholders and creditors of the bank during business hours of each day

in which business may be legally transacted. A copy of such list, verified by the oath of the president or cashier, shall be transmitted to the auditor of state within ten days after each annual meeting. No corporation shall engage in the banking business, receive deposits, and transact the business generally done by banks, unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits and issue drafts on their depositaries, but such companies shall be subject to examination, regulation and control by the auditor of state, like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in section eighteen hundred and eighty-two of this chapter for stockholders in savings and state banks. Any corporation violating this section shall forfeit its charter at the suit of the attorney-general, and said corporation, its officers, directors and agents, shall be punished by a fine of not less than five hundred dollars, or imprisonment of not less than two years in the penitentiary, or by both such fine and imprisonment, at the discretion of the court; provided that loan and trust companies organized under the general incorporation laws of the state, which were engaged in the banking business prior to the first day of January, 1886, and have continued therein since said date, may, by the proper additions to their articles of incorporation, become state banks within the provisions of this title, without incorporating the word "state" in the names of such corporations.

CHAPTER 13.

OF BUILDING AND LOAN ASSOCIATIONS.

SECTION **1890. Defined.** Corporations organized for the purpose of furnishing money to their members upon sufficient security shall be known as building and loan or savings and loan associations. Domestic local building and loan or savings and loan associations shall include corporations, societies, organizations or associations incorporated under the laws of this state for the purpose of and doing business only within the county in which is situated the town or city named in its articles of incorporation as its principal place of business: *provided* that, where the town or city named in its articles of incorporation as the principal place of business is situated in more than one county, and the business of the association is restricted to the town or city and to the county within which is located its principal office, said association shall be deemed a domestic local building and loan or savings and loan association within the meaning of this chapter. Domestic building and loan or savings and loan associations shall include corporations, societies, organizations or associations incorporated under the laws of this state for the purposes herein provided, the business of which is not restricted to the county in which is situated the town or city named in its articles of incorporation as its principal place of business. Foreign building and loan or savings and loan associations shall include corporations, societies, organizations or associations incorporated under the laws of another state, territory, country or nation for the purposes specified herein. [26 G. A., ch. 85, § 1.]

SEC. **1891. Organization.** Any number of persons not less than five, residents of the state of Iowa, may become incorporated as building and loan or savings and loan associations under the general incorporation laws of this state, except as otherwise herein provided, and upon complying with the provisions of this chapter. [Same, § 2.]

SEC. **1892. Capital.** The capital named in the articles of incorporation shall be taken to mean the authorized capital, and the association may commence business when one hundred shares thereof have been subscribed and

the other provisions of this chapter in relation thereto have been complied with. Such associations shall be governed by a board of directors who shall be elected annually by the stockholders, and who shall hold their office for not less than one nor more than five years, and, if for a longer period than one year, it shall be so arranged that the terms of an equal number thereof, as nearly as may be, shall expire each year. [Same, § 3.]

SEC. **1893. Articles.** The articles of incorporation shall show:

1. The names and residences of the incorporators;
2. The name of the association and its principal place of business;
3. The purpose for which such association is formed;
4. The terms and plan of becoming and continuing a member;
5. The plan of making loans;
6. The plan of distributing profits;
7. The plan of equalizing losses;
8. The plan and terms of withdrawal of members;
9. The plan of providing for payment of expenses;
10. The number of shares into which capital stock is to be divided;
11. The classes into which its capital stock is to be divided, and the terms of paying for the same by subscribers;
12. The term of corporate existence;
13. The manner of electing officers and filling vacancies. [Same, § 4.]

SEC. **1894. Certificate of executive council—amendment of articles.** Such articles of incorporation with the by-laws of the association shall be presented to the executive council, and if it finds they are in conformity with the law, and based upon a plan equitable in all respects to its members, it shall attach thereto its certificate of approval, and thereupon such articles and by-laws shall be filed in the office of the auditor of state, who shall issue a certificate authorizing the association to transact business. Amendments to such articles may be made from time to time at any regular or special meeting of the stockholders, and shall in like manner be submitted to the executive council and approved by it. The council shall keep a record of its proceedings with reference to such associations. [Same, § 5.]

SEC. **1895. Bonds of officers—liability of directors.** The officers of any domestic building and loan or savings and loan association who sign or indorse checks or handle any funds or securities of such association shall give such bonds or fidelity insurance for the faithful performance of their duties in such sum as the board of directors may require, and no such officer shall be deemed qualified to enter upon the duties of his office until his bond is approved by the board of directors and by the state auditor. Said bond shall be deposited and filed with the auditor of state. All such bonds shall be increased or additional securities required by the board of directors or the auditor of state when it becomes necessary to protect the interests of the association or its members, and no director shall be accepted as surety on such bonds, and no person shall be accepted as surety on the bond of more than one officer of said association. The directors shall be individually liable for loss to the association or its members caused by their failure to require a compliance with the provisions of this section. [Same, § 6.]

SEC. **1896. Same.** The officers of any domestic local building and loan or savings and loan association who sign or indorse checks or handle any funds or securities of said association shall give such bonds or fidelity insurance for the faithful performance of their duties in such sum as the board of directors may require, and no such officer shall be deemed qualified to enter upon the duties of his office until his bond is approved by the board of directors and the clerk of the district court of the county of the principal place of business of said association. Said bonds shall be deposited with the said clerk, and it is hereby made the duty of the said clerk to approve said bonds and to receive the same as herein provided. No person shall be accepted as surety on the bond of more than one officer of said association. All such bonds shall be increased or additional securities required by the

board of directors or by the clerk of said district court when it shall be deemed necessary to protect the interests of the association or its members. The directors shall be individually liable for loss to the association or to its members caused by their failure to require a compliance with the provisions of this section. [Same, § 7.]

SEC. **1897. Banking prohibited.** It shall be unlawful for any building and loan or savings and loan association to receive deposits of money without issuing shares of stock for the same, or to transact a banking business. [Same, § 8.]

SEC. **1898. Nature of business—statement.** All building and loan or savings and loan associations, upon receiving the certificate from the auditor, shall have power, subject to the terms and conditions contained in their articles of incorporation and by-laws, to issue stock to members to be paid for in single, stated, or monthly payments, but not more than ten thousand dollars of stock, computed at par value, of any kind shall be issued to one person; to assess and collect from members such dues, membership fees, fines, premiums, and interest on loans as may in the articles of incorporation and by-laws have been provided, and the same shall not be held to be usurious; to permit members, other than holders of guarantee stock, to withdraw all or a part of their stock deposits upon such terms and at such times as the articles of incorporation and by-laws may provide; to acquire, hold, encumber and convey such real estate and personal property as may be necessary for the transaction of their business; to make loans to members on such terms, conditions and securities as the articles of incorporation and by-laws provide; said loans to be made only on real estate security, or on the security of their own shares of stock, not to exceed ninety per cent. of the withdrawal value thereof. It shall be the duty of the secretary of every such association doing business in this state to prepare, on or before February fifteenth of each year, a duly verified statement, showing the book value and withdrawal value of a share of each class of stock in said association, for each monthly period up to January first preceding, and file the same with the auditor of state, which shall be preserved in his office. And the said association shall, on or before February fifteenth of each year, mail to each shareholder a written or printed copy of the same. In case of foreclosure, the borrower shall be charged with the full amount of the loan made to him, together with the dues, interest, premium and fines for which he is delinquent, and he shall be credited with the same value of his pledged shares as if he had voluntarily withdrawn the same. In event that judgment is obtained against a borrower from a building and loan association, no greater recovery shall be had than the net amount of principal actually received, with interest thereon at a rate not greater than twelve per centum per annum on the net amount of loan actually received by and paid to borrower, with statutory attorney fees; no evasion of this provision shall be had by means of any dues, membership fees, premiums, fines, forfeitures or other charges, any agreement to the contrary notwithstanding. [Same, § 9; C.'73, §§ 1185, 1186.]

Former provisions as to such associations *held*, not to authorize the taking of interest upon the premium bid for the loan. If the interest charged is more than lawful interest upon the amount actually loaned, the contract is usurious: *Hawkeye Benefit and Loan Ass'n v. Blackburn*, 48–385; *Burlington Mut. Loan Ass'n v. Heider*, 55–424.

SEC. **1899. Investment of funds.** All funds, except those necessary to defray the expenses of the association, shall be invested for the benefit of the shareholders. For every loan made a non-negotiable note or bond secured by first mortgage on real estate shall be given, unless the prior mortgage is to the same association; then a second mortgage may be taken to secure said note, except when such loan is on the withdrawal value of stock only. Said note or bond shall be accompanied by the transfer of the shares of stock of the borrower to the association, to be held as collateral security. [26 G. A., ch. 85, § 10.]

SEC. **1900. Voting shares of stock.** Each member shall have one vote for each one hundred dollars of stock par value owned and held by him at any election, and may vote the same by proxy, but no person shall vote more than ten per cent. of the outstanding shares at the time of said election. Any one depositing or transferring stock to the association as collateral security shall be deemed the owner of such stock within the meaning of this section. [Same, § 11.]

SEC. **1901. Guardians—executors—trustees.** Any guardian, executor, administrator or trustee shall have the right to vote, manage and control the shares held by him in his representative capacity. [Same, § 12.]

SEC. **1902. Expenses—dividends.** The expenses of every such association shall be paid from the earnings, or from a fixed charge provided for in the by-laws, and said expenses shall not exceed eight dollars for the maturing of every one hundred dollars of installment stock, said sum to be equitably distributed over the maturity period; and two dollars per year for every one hundred dollars for full paid or prepaid stock. The net earnings of such association shall be apportioned as a dividend, annually, semiannually or quarterly, to members, in such manner as the articles of incorporation and by-laws may provide. Membership fees and expenses incurred in making loans shall not be deemed a part of the expenses of the association. [Same, § 13.]

SEC. **1903. Dues—premiums—losses.** Dues, fines, premiums, and interest less current expenses, shall accrue to the shareholders, and any net loss shall be deducted before declaring any dividend. [Same, § 14.]

SEC. **1904. Examination.** At least once in each year the auditor of state shall, by himself or some competent person appointed by him, make an examination of all domestic and foreign building and loan and savings and loan associations doing business in this state, and may examine under oath any officer, agent or employe of the association, or other person, and may compel the production of its books and papers, and for this purpose such examiner shall have the same power as the district court to secure the attendance of witnesses and the production of such books and papers, and to punish as for contempt. If the examination is made by the auditor in person, he shall receive his actual expenses. If by another, his actual expenses and five dollars per day, which in either case shall be paid by the association examined: *provided*, the expense charged for such examination to any one association shall not exceed two hundred dollars for any one year. A record of such examination shall be kept in the auditor's office, showing in detail as to each association all matters connected with the conduct of the business, its financial standing and everything touching its solvency, plan of business, and integrity. If the report is made by another than the auditor, it shall be under oath. Examinations may be made at such other times as the auditor may order. If any such association refuse to submit to such examination, the auditor shall revoke its certificate of authority. [Same, § 15.]

SEC. **1905. At request of shareholders.** When twenty shareholders of any domestic local building and loan or savings and loan association shall in writing request the auditor of state, he shall have the same authority and shall proceed to make an examination of the affairs of such association in the manner provided in this chapter for the examination of domestic associations, and the costs and penalties shall be the same. [Same, § 16.]

SEC. **1906. Auditor's report.** The auditor shall, in his biennial report to the governor, state the general conduct and condition of the building and loan or savings and loan associations doing business in the state, with such suggestions as he may deem expedient. Such report shall also include the information contained in the statements of the associations, arranged in tabulated form, with the names and compensations of the clerks employed by him, the entire income, the source whence derived, and the expense

during the year ending on the thirty-first day of December, in detail. [Same, § 17.]

SEC. **1907. Proceedings against, by state.** When any building and loan or savings and loan association is conducting its business illegally, or in violation of its articles of incorporation or by-laws, or is practicing deception upon its members or the public, or is pursuing a plan of business that is injurious to the interests of its members, or its affairs are in an unsafe condition, the auditor of state shall notify the directors thereof, and, if they shall fail to put its affairs upon a safe basis, he shall advise the attorney-general thereof, who shall take the necessary steps to wind up its affairs in the manner provided by law. [Same, § 18.]

SEC. **1908. Foreign companies.** If any foreign building and loan or savings and loan association, as herein defined, desires to transact business within this state, it shall furnish to the executive council a certified copy of its articles of incorporation, or charter and by-laws, and a certified copy of the state laws under which it is organized, together with a report for the year next preceding, verified by its president, vice-president, secretary, and at least three directors, which report shall show:

1. The amount of its authorized capital stock and the par value of each share;
2. The number of shares sold during the year;
3. The number of shares canceled or withdrawn during the year;
4. The number of shares in force at the end of the year;
5. A detailed statement of all funds received during the year and all disbursements;
6. The salaries paid each of its officers;
7. A detailed statement of its assets and liabilities at the end of such year and the nature thereof;
8. Any other matters of fact which the council may require. Upon receipt of such report the council, if it finds therefrom that the association is properly managed, that its financial condition is satisfactory, and that its business is conducted upon a safe and reliable plan and one equitable to its members, shall so certify upon such copy and statement, and, the same being filed with the auditor, he shall issue a like certificate as in the case of domestic associations. [Same, § 19.]

SEC. **1909. Securities deposited.** Every such foreign building and loan or savings and loan association, before the state auditor shall issue to it a certificate, shall comply with the following provisions:

1. It shall deposit with the auditor of state one hundred thousand dollars, either in cash, or bonds of the United States or of the state of Iowa, or of any county or municipal corporation of the state of Iowa, or notes secured by first mortgage on real estate, or a like amount in such other security as shall be satisfactory to said auditor.
2. Such foreign association may collect and use the interest on any securities so deposited as long as it fulfills its obligations and complies with the provisions of this chapter. It may also exchange them for other securities of equal value and satisfactory to said auditor. [Same, § 20.]

SEC. **1910. Liability for claims.** The deposit made with the auditor shall be held as security for all claims of resident shareholders of the state of Iowa against said association, and shall be liable for all judgments or decrees thereon, and subject to the payment of the same. [Same, § 21.]

SEC. **1911. Service of process.** Such foreign association shall also file with the auditor of this state a duly authenticated copy of a resolution adopted by the board of directors of such association, stipulating and agreeing that, if any legal process or notice affecting such association be served on the said state auditor, and a copy thereof be mailed, postage prepaid, by the party procuring and issuing the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process or notice shall have the same effect as personal service on said

association within this state. When proceedings have been commenced against or affecting any foreign building and loan or savings and loan association, as contemplated herein, and notice has been served upon the auditor of the state, the same shall be by duplicate copies, one of which shall be filed in his office, and the other mailed by him, postage prepaid, to the home office of such association. [Same, § 22.]

SEC. **1912. Filing amendments to articles.** All foreign building and loan or savings and loan associations shall file with the auditor of state, within ten days after their adoption, a duly certified copy of any amendment or amendments to their articles of incorporation or by-laws that may have been adopted. [Same, § 23.]

SEC. **1913. Fees.** Foreign building and loan or savings and loan associations shall pay to the auditor of state the following fees, which shall be paid by him into the state treasury: For each application to do business in this state, one hundred dollars; for each certificate of authority and each annual renewal thereof, fifty dollars; for filing each annual statement of the assets of the association, as shown by the statement filed, amounts to fifty thousand dollars or less, three dollars; if more than fifty thousand dollars and less than one hundred thousand dollars, five dollars; if more than one hundred thousand dollars and less than two hundred and fifty thousand dollars, ten dollars; if more than two hundred and fifty thousand dollars, and less than five hundred thousand dollars, twenty dollars; if more than five hundred thousand dollars and less than one million dollars, thirty dollars; and if more than one million dollars, fifty dollars. Domestic building and loan or savings and loan associations shall pay to the auditor of state the sum of twenty-five dollars for each certificate of authority and each renewal thereof, and for filing each annual statement, ten dollars. Domestic local building and loan or savings and loan associations shall pay to the auditor of state for filing each annual statement the sum of five dollars. [Same, § 24.]

SEC. **1914. Annual statement.** All building and loan or saving and loan associations doing business in this state shall, on or before the first day of February of each year, file with the auditor of state a detailed report and financial statement of their business for the year ending the thirty-first day of December next preceding, and such report shall be verified by the president and secretary or by three directors of the association, and such report shall show:

1. The date when the association was incorporated and the par value of each share of stock;
2. The number of shares sold during the year;
3. The number of shares canceled or withdrawn during the year;
4. The number of shares in force at the end of the year;
5. A detailed statement of receipts and disbursements, showing specifically from what source received and in what manner applied;
6. A statement of the assets and liabilities at the end of the year;
7. The salary paid to each of its officers during the year;
8. All foreign building and loan or savings and loan associations shall, in addition to the above, report the name of each shareholder of such association residing within the state of Iowa, together with the post-office address of each, and the number of shares owned by each of said persons on the first day of January preceding, and the cash value of each of said shares on said date. [Same, § 25.]

SEC. **1915. Penalty.** If an association shall fail or refuse to furnish to the auditor of state the report above required, it shall forfeit the sum of twenty-five dollars for every day such report shall be withheld, and the auditor of state may maintain an action in the name of the state to recover such penalty, and the same shall be paid into the treasury of the state. [Same, § 26.]

SEC. **1916. Laws of other states—reciprocity.** When by the laws of any other state, territory, country or nation, or by the decision or rulings of the appropriate and proper officers thereof, any greater taxes, fines, penalties, licenses, fees, deposits of money or other securities, or other obligations or prohibitions, are demanded of building and loan or savings and loan associations of this state, as a condition to be complied with before doing business in such other state, territory, country or nation, or their agents therein, than are imposed upon foreign associations doing business in this state, so long as such laws continue in force, the same requirements, obligations and prohibitions of whatever kind shall be imposed on all building and loan or savings and loan associations of such other state, territory, country or nation doing business in this state, and upon their agents. It is hereby made the duty of the auditor of state to enforce the provisions of this section. [Same, § 27.]

SEC. **1917. Revocation of certificate.** If a certificate of authority to do business shall have been issued to any association, and it shall violate any of the provisions of this chapter, the auditor of state shall revoke the same. [Same, § 28.]

SEC. **1918. False statements.** If any officer, director or agent of any building and loan or savings and loan association shall knowingly and wilfully swear falsely to any statement in regard to any matter in this chapter required to be made under oath, he shall be guilty of perjury. If any director of any such association shall vote to declare a dividend greater than has been earned; or if any officer or director or any agent or employe of any such association shall issue, utter, or offer to utter, any warrant, check, order or promise to pay of such association, or shall sign, transfer, cancel or surrender any note, bond, draft, mortgage, or other evidence of indebtedness belonging to such association, or shall demand, collect or receive any money from any member or other person in the name of such association without being authorized to do so by the board of directors in pursuance of its lawful power; or if any such officer, director, agent or employe shall embezzle or convert to his own use, or shall use or pledge for his own benefit or purpose, any moneys, securities, credits, or other property belonging to the association, or shall knowingly do or attempt to do any business for such association that has not procured and does not hold the certificate of authority therefor as in this chapter provided, or shall knowingly make or cause to be made any false entries in the books of the association, or shall, with the intent to deceive any person making an examination in this chapter required to be made, exhibit to the person making the examination any false entry, paper or statement, or shall knowingly do or solicit business for any building and loan or savings and loan association which has not procured the required certificate therefor, he shall be fined in any sum not exceeding ten thousand dollars, or imprisoned in the penitentiary not exceeding ten years, or punished by both such fine and imprisonment. [Same, § 29.]

SEC. **1919. Associations in existence.** All building and loan or savings and loan associations having heretofore transacted business in this state, which shall not have complied with the provisions of this chapter, shall have the right to close up their business and fulfill their contracts heretofore entered into with the residents of this state, without being subject to the penalties prescribed in this chapter. [Same, § 32.]

SEC. **1920. Taxation of shares.** Shares of stock issued by building and loan or savings and loan associations shall be classified as moneys and credits for the purposes of taxation. [Same, § 33.]

TITLE X.

OF INTERNAL IMPROVEMENTS.

CHAPTER 1.

OF MILL DAMS AND RACES.

SECTION **1921. Petition.** Any person who owns land on one or both sides of a water course, and desires to erect or heighten any dam thereon, or construct or enlarge a race therefrom, for the purpose of propelling any mill or machinery, erected or to be erected thereon, by the water thereof, may file in the office of the clerk of the district court of the county in which such mill or machinery is, or is to be erected, a petition, designating himself as plaintiff and the owners of lands affected thereby as defendants, and describing with reasonable certainty the locality where such mill or machinery is or is to be erected, with that of such dam or race, and also of the lands that will be overflowed or otherwise affected thereby. [C. '73, §§ 1188–9; R., §§ 1264–5, 1274.]

The action here contemplated is to be commenced by the mill-owner. The land owner is left to his common-law remedy or his remedy in equity. And the mill-owner may, after proceedings are commenced, dismiss them without the consent of the other party: *Hunting v. Curtis*, 10–152.

The statute does not require that the petition should be sworn to: *Gammell v. Potter*, 2–562.

The dam, when erected in accordance with these provisions, will not be a nuisance, but may be so erected and maintained as to become such: *State v. Close*, 35–570.

This and the following sections are not unconstitutional: *Burnham v. Thompson*, 35–421; the *use*, though for private profit, is such a public one as to authorize the taking of public property therefor (*arguendo*): *Stewart v. Board of Supervisors*, 30–9.

Before the utilization of steam, the establishment of mills and manufactories and the use of water-power was deemed a public necessity for which private property might properly be condemned. If such statutes were now enacted for the first time it is possible, if not probable, that they would not be sustained: *Fleming v. Hull*, 73–598.

There is no limitation as to the purpose for which the mills and other machinery are to be used: *Burnham v. Thompson*, 35–421.

The proceedings need not necessarily be had before the work is commenced, but may be instituted while it is in progress: *Ibid.*

In the proceeding compensation for damages arising after the filing of the petition and before the assessment by the jury should be allowed: *Ibid.*

It is only injuries to lands which will be directly affected by the erection of the dam which are contemplated. And the owner of lands remote from the dam and not fronting upon the river need not be made party to the proceedings and cannot afterwards recover for injuries suffered, as, for instance, saturation by percolation: *Wilson v. Hanthorn*, 72–451.

SEC. **1922. Order for a jury—notice.** The clerk shall thereupon issue an order, with a copy of the petition attached, directed to the sheriff, commanding him to summon a jury of twelve disinterested electors of his county to meet on a day fixed therein, and upon the lands described, which order, including the copy of the petition, shall be served on the defendants in the same manner and for the same length of time previous to the day fixed in the order as is required for the service of original notices. When service is made upon a minor or insane person having no guardian, the clerk at the time of issuing the order shall, by indorsement made thereon, appoint a suitable person to make defense for him. [C. '73, § 1190; R., §§ 1266, 1270.]

Where the husband is made party to the proceeding as the owner of the land the fact that he afterwards has the title vested in his wife collusively will not enable him to bring action for damages in disregard of proceedings for condemnation: *Lummery v. Braddy*, 8–33.

If, upon motion, the writ is quashed, the court should award another, no original notice of such second writ being necessary: *Burnham v. Thompson*, 35–421.

SEC. **1923. Lands in another county.** If any of the lands are situated in a different county than that in which the petition is required to be filed, the proceedings shall apply thereto to the same extent as if such lands were situated in the county where it is filed. [C. '73, § 1191; R., § 1270.]

SEC. **1924. Action of jury.** The jury shall be sworn to, and shall, impartially and to the best of their skill and judgment view the lands described in the petition, and ascertain and appraise the damages each of the defendants will sustain by reason of such lands being overflowed or otherwise injuriously affected by the dam or race, or heightening or enlarging the same, and ascertain whether the dwelling-house, outhouse, orchard, or garden of any defendant will be so affected, and, if so, whether the same has been placed there for that purpose. [C.'73, § 1192.]

It is not necessary that the inquisition of the jury shall say how far the lands of the claimant may be affected by the overflow: *Gammell v. Potter*, 2–562.

The overflow of agricultural land and the consequent damage is not the only matter to be looked at in estimating the damages. The flooding of a coal bed or stone quarry, or loss of a spring, or the destruction of a ford, should be taken into consideration: *Walters v. Houck*, 7–72.

SEC. **1925. Evidence—report.** The jury may, in addition to examining the premises, hear and examine witnesses, and shall report their findings in writing, and attach the same to the order, which shall be returned by the sheriff to the clerk. [C.'73, § 1193.]

Failure of the jury to estimate damages which should be included must be taken advantage of either in an application to the court to set aside the verdict and award a new inquiry, or else under the provision giving a right of action to the applicant for any loss or damage resulting, but not actually foreseen by the jury, nor estimated by them on the inquest: *Gammell v. Potter*, 6–548.

SEC. **1926. Appeal.** Either party may appeal from such assessment of damages to the district court within thirty days after the assessment is made, in the manner, and the proceedings on such appeal shall be, as provided in case of appeals from assessment of damages in taking property for works of internal improvement. [15 G. A., ch. 22, C. '73, § 1194.]

SEC. **1927. Cause shown.** When the report of the jury is filed, the clerk shall issue an order, directed to the defendants, requiring them to appear at the next term of court and show cause why a license should not be granted to construct or heighten the dam, or construct or enlarge the race; which order shall be served in the same manner as the original order in the proceeding. [C. '73, § 1195; R., § 1268.]

SEC. **1928. Objections filed—pleadings—another jury.** On or before the day fixed in the order to show cause, the defendants may file any objections they see proper to the prior proceedings, or to granting the license. The petition and objections shall constitute the pleadings, and may be amended upon such reasonable terms as the court may order; and if the proceedings of the jury are found defective in substance, it may direct a new jury to be impaneled and prescribe the terms of the notice to be given. The return of the sheriff may be amended at any stage of the proceedings in accordance with the facts. [C. '73, § 1196.]

A defendant may plead and prove, by way of objection, facts tending to show that the granting of the license would be unreasonable or not for the public benefit; but he cannot thus set up matters legitimately involved in the question of damages submitted to the jury, and pertinent only to an application to set aside their finding and award a new inquiry. Until set aside their ascertainment must be considered conclusive: *Gammell v. Potter*, 6–548.

The overruling by the court of a motion to set aside the verdict of the jury and quash the writ may be appealed from, without any final judgment having been rendered: *Burnham v. Thompson*, 35–421.

SEC. **1929. Evidence taken.** Evidence may be taken, to be introduced on the final hearing before the court, in the same manner as in equitable actions. [C.'73, § 1197.]

SEC. **1930. License granted.** If the court shall find that neither the dwelling-house outhouse, garden or orchard of any defendant will be

overflowed or injuriously affected, or that the same were placed on the premises for the purpose of being thereby overflowed or injuriously affected, and the same is reasonable and for the public benefit, license shall be granted to construct such dam or race thereon, the plaintiff paying to the rightful parties the damages found by the jury and decreed by the court. [C. '73, § 1193, 1198; R., § 1269.]

SEC. **1931. Forfeiture of.** If the plaintiff does not begin within one year from the granting of the license to construct said dam or race, and finish and have in operation the mill or machinery within three years thereafter, and afterwards keep it in good repair for the accommodation of the public, or, in case it or the machinery is destroyed, he shall not begin to repair or rebuild the same within one year, and finish it within three years, the license shall be forfeited. [C.'73, § 1199; R., § 1269.]

SEC. **1932. Continuance.** If the order shall not be executed by the sheriff on the day therein mentioned, he may, from time to time, appoint another day, notice thereof being given to the parties interested as hereinbefore provided; and if the inquest cannot be completed in one day, the sheriff shall adjourn the same from day to day until it is. [C. '73, § 1200; R., § 1270.]

SEC. **1933. No bar to action.** No proceedings under this chapter shall bar an action which could have been maintained if this chapter had not been enacted, unless the prosecution or action was actually foreseen and estimated upon the inquest. [C. '73, § 1201; R., § 1271.]

This section does not bar an action for damages accruing before the proceeding. But where the jury found that certain land would be affected, but allowed no damages, *held*, that nevertheless, an action for damages subsequently suffered must have been foreseen and estimated, and that such action was therefore barred: *Watson v. Van Meter*, 43–76.

The fact that the land owner is entitled to recover damages not foreseen and estimated by the jury does not entitle him to maintain an injunction to restrain the maintenance of the claim: *Lummery v. Braddy*, 8–33.

SEC. **1934. New party.** Any owner of land affected by any proceedings under this chapter, who has not been made a party thereto, may be brought in by proper proceedings at any time before final decree. [C. '73, § 1202; R., § 1272.]

SEC. **1935. Costs.** Costs and fees under this chapter shall be the same as in other cases for like services, and shall be paid by the plaintiff. [C. '73, § 1203; R., § 1273.]

SEC. **1936. Right to repair.** Where the water backed up by any dam belonging to any mill or machinery is about to break through or over the banks of the stream or race, or to wash a channel, so as to turn the water of such stream or race, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be materially injured or affected, the owner or occupant of such mill or machinery, if he does not own such banks or the land lying contiguous thereto, may, if necessary, enter thereon, and erect and keep in repair such embankments and other works as may be necessary to prevent such water from breaking through or over the banks, or washing a channel as aforesaid; such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay all damages which the owner of the lands may actually sustain by reason thereof. [C. '73, § 1204; R., §§ 1275–6.]

SEC. **1937. Penalty for injuring embankment.** If any person shall injure, destroy or remove any such embankment or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason thereof. [C. '73, § 1205; R., § 1277.]

SEC. **1938. Fall below dam.** Any person owning and using a water power for the purpose of propelling machinery shall have the right to acquire, maintain and utilize the fall below such power for the purpose of improving the same, in like manner and to the same extent as provided in this chapter for the erection or heightening of mill dams. After such

right has been acquired, the fall shall be considered part and parcel of said water power or privilege, and the deepening or excavating of the stream or tail race, as herein contemplated, shall in no way affect any rights relating to such water power acquired by the owner thereof prior to such change. [C. '73, § 1206.]

CHAPTER 2.

OF LEVEES, DRAINS, DITCHES AND WATER COURSES.

SECTION **1939. Supervisors to locate.** The board of supervisors of any county may locate and cause to be constructed levees, ditches or drains, or change the direction of any water course in such county, whenever the same will be conducive to the public health, convenience or welfare. [19 G. A., ch. 44, § 1; 16 G. A., ch. 140, § 1; C. '73, § 1207.]

The provisions of this chapter are constitutional: *Hatch v. Pottawattamie County*, 43–442.

The work is not to be undertaken for private advantage, but for the public good: *Patterson v. Baumer*, 43–477.

The county is not liable for damages to land caused by a ditch becoming obstructed: *Dashner v. Mills County*, 88–401.

The remedy of the person damaged in such case would be to make application for the repair of the ditch and to have a special assessment made for that purpose: *Ibid.*

SEC. **1940. Proceedings—bond—survey—notice.** A petition signed by a majority of the persons resident in the county, owning land abutting upon such proposed improvement, shall be first filed in the office of the county auditor, setting forth the necessity for the same, the starting point, route and terminus, together with a bond, with sufficient sureties to be approved by him, conditioned to pay all costs and expenses incurred in case the supervisors refuse to grant the prayer of the petition. The auditor shall thereupon place a copy of the petition in the hands of the county surveyor or a competent engineer, who shall make a survey of the proposed improvement, and return a plat and profile thereof to the auditor; which return shall set forth a full and detailed description thereof, its availability, necessity and probable cost, with a description of each tract of land owned by different persons, through or abutting upon which the improvement is proposed to be located, how it will be affected thereby, and its situation and elevation as compared with that of adjoining lands, with such other facts as he may deem material. The auditor shall immediately thereafter cause notice in writing to be served on the owner of each tract of land, through or abutting upon which the proposed improvement is to be located, who is a resident of the county, of the pendency and prayer of said petition, and the session of the board of supervisors at which the same will be heard, which notice shall be served ten days prior to said session in the same manner that original notices are required to be served. In case any such owner is a non-resident of the county, such notice as to him shall be published for two consecutive weeks in some newspaper published in the county, proof thereof being made by affidavits as in case of legal notices published in newspapers, which proof shall be filed with the board. [19 G. A., ch. 44, § 2; C. '73, § 1208.]

1952

A petition to the court signed by the residents interested in the improvements as prescribed in this section is a jurisdictional matter. Unless the requirements of the statute in this respect are complied with the supervisors can obtain no jurisdiction. In the absence of a showing by the record of the board or in some other manner authorized by law, no presumption will be exercised of the existence of the jurisdictional facts necessary to show that the supervisors acquired authority to act, such as that the petition was signed by the required number of residents: *Richman v. Board of Supervisors*, 70–627.

A person who signs a petition and afterwards a remonstrance must be regarded not as a petitioner but as a remonstrant: *Ibid.*

The petition must be signed by a majority of the persons residing in the county

owning land adjacent to the proposed improvement, otherwise the board will not have the jurisdiction to levy taxes: *Shaw v. Supervisors of Johnson County*, 72–763.

Where the proceedings of a board of supervisors for the construction of a levee were void for want of jurisdiction because a petition was not filed in the office of the county auditor, signed by a majority of the persons residents of the county owning lands adjacent to the improvement, setting forth the necessity for the same, and the starting point, route and *termini*, *held*, that as the legislature might have dispensed with this requisite in the first instance, it was within its power to do so by a subsequent curative act: *Richman v. Supervisors of Muscatine County*, 77–513.

Action by *certiorari* to review the action of the board of supervisors in levying a tax to pay for the construction of a ditch, the proceedings for the establishment of which are void, may be brought within one year after the levy of the tax: *Shepard v. Supervisors of Johnson County*, 72–258.

SEC. **1941. Location—damages.** The board, at the session set for hearing said petition, shall thereupon proceed to hear and determine the petition, and, if necessary, view the premises, and if they find such improvement conducive to the public health, convenience or welfare, and no claims shall have been made for damages as provided in the next section, they shall locate and establish the same on the route specified in the plat and return of the county surveyor or engineer. But if any such claim has been made, further proceedings shall be adjourned to the next regular session, and the county auditor shall forthwith appoint appraisers to assess such damages, who shall proceed in the manner provided by law for the assessment of damages in the opening of roads; and the sum so assessed in favor of said claimant shall be paid in the first instance by the parties benefited by such improvement, or secured to be paid upon such terms and conditions as the county auditor may deem just and proper; and the board shall, at the next regular session after such damages have been assessed and paid, or secured, as aforesaid, proceed to locate and establish the improvement as hereinbefore provided, and place a competent engineer in charge of the work. [19 G. A., ch. 44, § 3; C. '73, § 1209.]

SEC. **1942. Claim for damages.** Any person claiming damages as compensation for land required for the construction of such improvement, or for injury sustained by the change of direction of any such water course, shall make his application in writing therefor to the board of supervisors, on or before the first day of the session at which the petition has been set for hearing, and on failure to make the same shall be held to have waived his right thereto. [19 G. A., ch. 44, § 4; 16 G. A., ch. 140, § 2; C. '73, § 1210.]

SEC. **1943. Work divided.** When the board shall have established any such improvement, it shall divide the same into suitable sections, not less in number than the number of tracts of land of different owners through which the same may be located, and prescribe the time within which work upon each section shall be completed. [19 G. A., ch. 44, § 5; C. '73, § 1211.]

SEC. **1944. Letting work—payment.** The auditor shall cause notice to be given of the time and place of letting, the kind and approximate amount of work to be done on each section, and the time fixed for its completion, by publication for thirty days in some newspaper printed in said county, and shall let it upon each separate section to the lowest bidder therefor, who shall be required to execute a bond, with sufficient sureties, in an amount equal to ten per cent. of the estimated cost of the work so let, or deposit such amount in cash with the auditor, as security for the performance of his contract. The engineer in charge of the construction shall furnish the contractor monthly estimates of the amount of work done on each section, and upon the filing of the same with the auditor, he shall draw a warrant in favor of the contractor for eighty per cent. of the value of the work done, according to the estimate; and when said improvement is completed to the satisfaction of the engineer in charge, and so certified by him to the auditor, he shall draw a warrant in favor of said contractor upon the levee or drainage fund for the balance due, as provided in the following section. If any person to whom any portion of said work has been let shall fail to perform the same as, and in the time, specified in his contract, the

cash deposited by him shall be forfeited to, or the penalty named in the bond may be recovered in an action thereon by, the county auditor, for the benefit of the levee or drainage district, on said contract, as liquidated damages, and it shall be relet by the auditor in the manner hereinbefore provided. [19 G. A., ch. 44, § 6; 18 G. A., ch. 85, § 8; 16 G. A., ch. 140, § 1; C. '73, § 1212.]

SEC. **1945. Costs and fees—how paid.** The auditor and engineer shall each be allowed for their services such sum as may be fixed by the board of supervisors, and all other fees or costs shall be the same as is provided by law for like services in other cases, and if the county surveyor performs service in relation thereto, the same as is provided by law; all of which, together with damages assessed, shall be paid out of the county treasury from the fund collected for that purpose, upon the order of the county auditor. [16 G. A., ch. 140, § 3; C. '73, § 1213.]

A payment out of the general funds contrary to the provisions of this section does not render the tax provided by the next section invalid: *Patterson v. Baumer*, 43–477, 481.

SEC. **1946. Assessment of costs and damages.** When any levee, ditch, drain, or change of direction of any water course shall have been located and established, as provided in this chapter, or when it shall be necessary to cause the same to be repaired or reopened, the auditor shall appoint three persons, one of whom shall be a competent civil engineer, and two who shall be resident freeholders of the county, not living within the township or townships where the improvement is or is to be located, and not interested therein or in a like question, nor related to any party whose land is affected thereby, who shall within twenty days after such appointment personally inspect and classify as "dry," "low," "wet," or "swamp" all the land benefited by the location and construction of the improvement, or the repairing or reopening of the same, and shall make an equitable apportionment of the cost, expenses, cost of construction, fees, and damages assessed for the construction of any such improvement, or of repairing or reopening the same, and make report thereof in writing to the board of supervisors; which apportionment shall be assessed among the owners of the land along or in the vicinity of such improvement and to be benefited thereby, in proportion to the benefit to each of them, and levied upon the lands of the owners so benefited in said proportions, and collected in the same manner as other taxes are levied and collected for county purposes; which fund so collected shall be kept separate from other county funds, and shall be paid out only for purposes properly connected with the improvement, on the order of the county auditor, on claims properly certified by the engineer in charge of the improvement as in this chapter provided, or on the order of the board of supervisors. The engineer shall receive for each day's service, while so engaged, five dollars, and the other commissioners shall each receive two dollars per day, to be paid out of the funds so collected. [21 G. A., ch. 139; 19 G. A., ch. 44, § 7; 16 G. A., ch. 140, § 4; C. '73, § 1214.]

"Vicinity," as used in this section, does not mean adjoining to or abutting on, but near by, close by, or neighboring country. The board being vested with the power to determine what land in the vicinity should be assessed has a large discretion as a local tribunal and may assess one parcel of land more, another less, and others not at all: *Lambert v. Mills County*, 58–666.

As the county has thus ample power to provide for the payment of a debt incurred for the construction of a ditch by the levy of a special tax therefor, a judgment may be rendered against it upon a warrant issued, payable out of the special fund for the construction of such improvement. Demand on the board to levy a tax to pay such warrant is not necessary before maintaining such action. It seems, however, that the creditor, after obtaining judgment on such warrant, could not by *mandamus* compel the treasurer to pay such judgment out of the general funds of the county, a method of raising funds for the payment of such claims being provided by statute: *Mills County Nat. Bank v. Mills County*, 67–697.

Where the board of supervisors makes an equitable apportionment of the cost of a ditch and levy a tax therefor, an original petition for an injunction to restrain its collection, when the only ground of complaint is that the ground is not benefited is not the

proper remedy: *Hatch v. Pottawattmie County*, 43–442.

By ordering payment the board of supervisors determines that the work has been completed, and this is a matter within their authority to determine, and their action can not be reviewed in a proceeding to enjoin the collection of taxes: *Patterson v. Baumer*, 43–477.

Irregularity in letting of one contract should not render the tax levied by the county for payment of a ditch constructed void, when the tax levied was to pay for the entire work: *Ibid.*

Land owners in the vicinity of an improvement must be presumed to have notice of the action of the county in ordering the work and causing it to be prosecuted, and of any irregularities in the letting of the contracts therefor, and by failure to object before the expenditure of money and labor by the county and the contractors, they will be estopped from objecting to the collection of the taxes: *Ibid.*

The statute does not prescribe that in proceedings for the reopening and repair of a ditch a petition shall be presented asking that the work be ordered, etc. These things are required when the ditch is first established and the work done, but not in case of repairs ordered: *Yeomans v. Riddle*, 84–147.

The supervisors, by the petition, notice and other prior proceedings, acquired jurisdiction of the matters involved, and of the lands and land holders, and the ditch having been constructed, the statute empowers them to keep it in existence in the manner prescribed in this section: *Ibid.*

When it becomes necessary to reopen or repair a ditch, the auditor has power, without petition, and without direction of the supervisors, to appoint the commissioners contemplated by this section, who shall make an apportionment of the expenses and report to the board, whose duty it then becomes to assess such expenses and costs upon the owners of the lands benefited: *Ibid.*

The repair of the ditch may involve work to be done elsewhere than in or at it. Its faults and imperfections may be removed by subsequent repairs and changes. It may become necessary to seek a new outlet and terminus in order to find the necessary fall: *Ibid.*

The assessment under this section for repairs is in the nature of a tax, and the taxpayer is not entitled to notice of the levy. The right to appeal protects his interests: *Ibid.*

The provisions of this section cover an assessment for the repairing or reopening a ditch as well as for its original construction and one whose property is likely to be damaged by obstructions in the ditch should take proper proceedings to have the ditch repaired by an assessment for that purpose: *Dashner v. Mills County*, 88–401.

Lands which are indirectly benefited by a levee, by the improvement of means of access by roads, and by the reclaiming of low, wet lands in the vicinity, may be assessed a proper proportion of the cost of the construction of the levee: *Chambliss v. Johnson*, 77–611.

After the assessment is made, it is not allowable, upon appeal, to show that the lands assessed were not benefited by the improvement, the only question which can be raised being as to whether or not they were assessed in the proper proportion: *Ibid.*

SEC. **1947. Appeals.** An appeal may be taken to the district court from the order of the board of supervisors in fixing the assessment upon lands, in the same manner appeals may be taken in the location of roads, and within the same time. But on such appeal it shall not be competent to show that the lands assessed were not benefited by the improvement. The petitioners, or any of them, and claimants for damages as compensation for lands taken or injuries sustained in any such proceedings, may in like manner appeal from the order locating and establishing such improvement, or refusing so to do, or from the amount of damages allowed, and the county auditor shall keep a full and complete record of all proceedings in each case, and, upon an appeal being taken, shall make out transcripts thereof as provided in appeals taken from the assessment of damages in cases of the location of roads. [21 G. A., ch. 139; 19 G. A., ch. 44, §§ 7, 8, 11; 18 G. A., ch. 85, § 4; 16 G. A., ch. 140, §§ 4, 5; C. '73, §§ 1214–16.]

After the assessment is made the only question which may be raised as to the assessment is whether the land in question has been assessed in its proper proportion: *Chambliss v. Johnson*, 77–611.

No appeal from the action of the board in assessing the cost of the improvement upon land in the vicinity is provided for in behalf of the party whose land is assessed: *Lambert v. Mills County*, 58–666.

SEC. **1948. Nuisance.** Any ditch, drain or water course which is now or may hereafter be constructed so as to prevent the surplus and overflow waters from the adjacent land from entering the same, is hereby declared a nuisance, and the same may be abated as such; and the diverting, obstructing, impeding, or filling up of such ditches, drains, or water courses, or breaking down of such levees in any manner by any person, without legal authority, is hereby declared a nuisance, criminally punishable as such. [21 G. A., ch. 139; 19 G. A., ch. 44, § 7; 16 G. A., ch. 140, § 4; C. '73, §§ 1214, 1216.]

SEC. **1949. Through two or more counties.** When the improvement petitioned for extends into or through two or more contiguous counties, or parts thereof, the boards of supervisors of each of the counties, upon the presentation of the petition, shall appoint a commissioner, and the commissioners thus appointed, within twenty days after the selection of the one last named, shall meet and locate the same through or into said counties. They shall appoint a competent engineer, who shall have charge of the construction of the work, and with him shall make a survey of the proposed levee, ditch, drain, or change of water course, and make written return thereof to the county auditors of the several counties in which the location shall be made in whole or in part; which return shall in all respects be the same as is required in case of the location of such improvement in but a single county; and thereafter all subsequent proceedings relating to the condemnation or taking of land, the compensation therefor, damages on account of the work, assessment of lands for taxation, and in every other matter and thing, shall in all respects be the same as in like cases where the improvement is situated in but one county. Appeals in such case may be taken to the district court of the county where the land is situated. [19 G. A., ch. 44, §§ 9–11; 18 G. A., ch. 85, §§ 2–5; 17 G. A., ch. 121.]

The provisions of this section do not dispense with the necessity for a petition signed by a majority of the residents interested in the improvement: *Richman v. Board of Supervisors*, 70-627.

SEC. **1950. Apportionment of assessments.** If the first assessment made by the board of supervisors of the several counties is insufficient to pay the cost of construction, additional assessment may be made in the same ratio as the first; and they shall make additional assessments in like manner for repairing said improvements, when needed; if a greater amount is collected in either county by such assessments than is required to pay for the work actually done therein, or if more work be done than the equitable tax in that county will pay for, then the boards of supervisors of the counties interested shall jointly meet and ascertain in which the excess and deficiency exist, and the excess shall be transferred to the county having a deficit, or, if there be more than one, then ratably to such counties. [19 G. A., ch. 44, § 11; 18 G. A., ch. 85, §§ 6, 7.]

SEC. **1951. Levees, ditches or drains in public highway.** Levees, ditches, drains and embankments may be located and constructed within the limits of public highways, on either or both sides of and along the same, to be so built as not materially to interfere with the public travel thereon, by taxation and assessment under the provisions of this chapter, and, when constructed, shall be under the control of the board of supervisors of the county in which they are situated; and it shall have power to grant a right of way thereon to any railway that will maintain them while used by it, subject to any claim for damages against the company in any condemnation proceedings which shall be instituted, and the damages awarded, paid, or secured to be paid before possession shall be given, but the county shall not be required on account thereof or otherwise to keep up such improvements at its expense. [20 G. A., ch. 186, § 1.]

The board acquires jurisdiction of the proceedings to establish such drainage within the territory and through the land in question as it deems proper to effect the object of reclaiming all swamp and overflowed land in the locality to be drained: *Butts v. Monona County*, 69 N. W., 284.

If the right of appeal exists when the tax is levied the statute is not unconstitutional as to such tax: *Ibid*: *Yeomans v. Riddle*, 84-147.

SEC. **1952. Petition for drain—proceedings.** When the petition of one hundred voters of the county, setting forth that any body or district of land in said county, described by metes and bounds or otherwise, is subject to overflow, or too wet for cultivation, and the public health, convenience or welfare will be promoted by draining, ditching or leveeing the same, or changing a water course, and also a bond conditioned as required in case of

proceedings for the location of levees, drains, ditches, and changes of water courses shall be filed with the county auditor, he shall appoint a competent engineer or commissioner, who shall proceed to examine the lands described, and may survey and locate such improvement as may be necessary for the reclamation of such lands or any part thereof, and for the public health, convenience or welfare, and shall make substantially the same report, and the same proceedings shall be had, as is provided by law for the location and construction of ditches, drains, and changes in water courses, and two or more counties may in the same manner unite in such work. [Same, § 2.]

The jurisdiction of the board to act attaches as of the date of the filing of the petition, and if the signatures to the petition are sufficient to confer such jurisdiction, the subsequent filing of a remonstrance signed by a portion of the petitioners will not deprive the board of jurisdiction to act: *Seibert v. Lovell*, 92-507.

It is not required that the petitioners should reside near or be interested in the proposed improvement: *Ibid.*

SEC. **1953. Drainage bonds.** If the board of supervisors shall determine that the estimated cost of reclamation of such district of lands is greater than should be levied in a single year upon the lands benefited, it shall fix the proportion that should be levied and collected each year, and may issue drainage bonds of the county, bearing not more than eight per cent. annual interest, and payable in the proportions and at the times when such taxes so apportioned will have been collected, and may devote the same at par to the payment of the work as it progresses, or may sell the same at not less than par and devote the proceeds to such payment; and should the cost of such work exceed the estimate, a new apportionment of taxes may be made, and other bonds issued and used in like manner; but in no case shall the bonds run longer than fifteen years, and at least ten per cent. in amount of those issued on the first estimate shall be payable annually. The board may divide the land to be benefited into drainage districts, which shall be accurately described and numbered, and such drainage bonds shall be in sums of not less than fifty dollars each, numbered consecutively, and issued as other county bonds are, and shall specify that they are drainage bonds, and designate by number the drainage district on account of which they are issued. In no case shall the amount of the bonds issued exceed fifty per cent. of the value of the lands in the drainage district, as shown by the last assessment for taxation. Each bond so issued shall express on its face that it shall only be paid by taxes assessed, levied and collected on the lands within the district so designated and numbered, and for the benefit of which district such bond was issued. In no case shall any tax be levied or collected for the payment of such bond or bonds, or the interest thereon, on any property outside of the district so numbered, designated and benefited. [22 G. A., ch. 97; 20 G. A., ch. 186, § 3.]

SEC. **1954. Tax to pay bonds.** The board shall levy each year on the lands benefited a tax sufficient to pay the interest on such bonds, and so much of the principal as falls due in the succeeding year; and such tax shall be collected in the same manner as other county taxes, and carried to the credit of the drainage district on account of which the bonds are issued, and be used to pay the principal and interest of said bonds as the same fall due, and any surplus may be devoted to payment for works of reclamation in said district, or repairs thereof. [20 G. A., ch. 186, § 4.]

SEC. **1955. Drains through land of another—application—notice.** When any person who is the owner of any swamp, marsh or wet land which, on account of its condition, may endanger the public health, or is not for that reason in a proper condition for cultivation, shall desire to construct any open ditch, tile or other underground drain for the purpose of draining such swamp land through the land of another, and shall be unable to agree in regard thereto with the owner of such land through whose land he desires to construct the same, he may file with the clerk of the township in which

said land is situated an application therefor, giving a description of the land through which it is desired to construct said drain, and the general course, character, size and depth of the same. The township clerk shall forthwith notify the trustees of the township of such application, who shall fix a time for the hearing of the same, not more than forty nor less than ten days distant. They shall cause the clerk to notify the parties, or their agents if the parties are not in the county, of the time and place of such hearing. In case a party is absent from the county and has no agent therein, service may be had by posting written notices in three public places in the township, at least thirty days before the hearing, one of which places shall be upon the said land. Whenever any railroad crosses the land of any person or persons who desire to drain their land for any of the purposes set forth in this section, the party or parties desiring such drain or drains shall notify the railroad company by leaving a written notice with the nearest station agent, stating in such notice the starting point, route and termination of such drain or drains, and if the railroad company refuse or neglect for the space of thirty days to dig across their right of way a drain of equal depth and size of the one dug by the party who wishes to drain his land, then the party who desires to drain the land may proceed to dig such drain, and the railroad company shall be liable for the cost of the construction of such drain, to be collected in any court having jurisdiction. [22 G. A., ch. 96, §§ 1, 6; 20 G. A., ch. 188, §§ 1, 6.]

Provisions authorizing proceedings by which a land owner may acquire the right to locate underground drains through the land of another in other cases than where such drainage is required in the interest of the public health by reason of land being wet or swampy would be unconstitutional: *Fleming v. Hull*, 73-598.

SEC. **1956. Hearing—action of trustees.** At the time set for said hearing, if the trustees are satisfied that the provisions of the preceding section have been complied with, they shall proceed to hear and determine the merits of said application, objections thereto, and claims for damages that may be occasioned by the improvement contemplated. They shall have power to issue subpœnas for witnesses, examine them under oath, and enforce their attendance, in the same manner as a justice of the peace; said witnesses to be paid the same fees as are allowed witnesses before justices of the peace. They shall adjourn from day to day, if to them it shall seem advisable, but no adjournment shall be for a longer period than fifteen days. At the conclusion of the hearing, or so soon thereafter as practicable, the trustees shall make a decision in said matter, and, if they shall find that it will be beneficial to the public for said drain to be constructed, shall locate the same, and fix the points of entrance and exit on said land, the course of the same through the said land, the size and depth thereof, when it shall be constructed, how kept in repair, what connections may be made therewith, what compensation, if any, shall be made to the owner of such land for damages by reason of such construction, and any other question arising in connection therewith. They shall reduce their decision to writing, which shall be filed with the clerk of said township, who shall record it in his book of records and cause it to be recorded in the office of the recorder of deeds of the county in which said land is situated, and said decision shall be final, unless appealed from as hereinafter provided. [Same, §§ 2, 3.]

All the different facts enumerated as calling for a ditch should exist in a given case to justify its establishment; and where the record does not show that the township trustees found that the lands to be drained were a source of disease, and that their drainage would promote the public health, the establishment of the ditch will be invalid: *Hull v. Baird*, 73-528.

The presumption will be that there was not a finding by the trustees upon any fact not made of record: *Ibid.*

SEC. **1957. Appeal.** Either party may appeal to the district court from any such decision by causing to be served, within ten days from the time it was filed with the clerk, a notice in writing upon the opposite party of the taking of such appeal, which notice shall be served in the same manner

as is provided for the service of original notices. If the appellant is the party petitioning for the drain, he shall also file a bond, conditioned to pay all costs of appeal that may be assessed against him, which bond, if good and sufficient, shall be approved by the township clerk. The cause shall be tried in the district court by ordinary proceedings, upon such pleading as the court may direct, each party having the right to offer such testimony as shall be admissible under the rules of law. If the appellant does not recover a more favorable judgment in the district court than he received in the decision of the trustees, he shall pay all the costs of appeal. [Same, § 7.]

A prior statute provided for an appeal only in case damages were awarded, and was therefore unconstitutional because it denied the land owner the right of trial by jury and deprived him of his property without due process of law: *Fleming v. Hull*, 73-598.

SEC. **1958. Transcript.** In case of appeal, the township clerk shall certify to the district court a transcript of the proceedings before the trustees, which shall be filed in said court with the appeal bond, the party appealing paying for said transcript and the docketing of said appeal, as in other cases. The party claiming damages shall be the plaintiff, and the applicant shall be the defendant; and the court shall render such judgment as shall be warranted by the verdict, the facts, and the law upon all the matters involved, and make such orders as will cause the same to be carried into effect. [Same, § 8.]

SEC. **1959. Costs and damages paid.** The applicant shall pay the costs of the trustees and clerk and for the serving of notices for hearing, the fees of witnesses summoned by the trustees on said hearing, and the recording of the finding of said trustees by the county recorder. He shall pay all damages awarded, before entering on the construction of the drain through the land of another. If, after the decision of the trustees locating said drain, the party applying therefor shall pay to the party through whose land said drain is to be constructed the damages awarded to said party, or shall pay the same to the trustees for his use, he may proceed to construct said drain in accordance with the decision of the trustees, and the taking of an appeal shall not affect his right to proceed with the construction of the same. [Same, § 9.]

SEC. **1960. Repairs.** In case any dispute shall thereafter arise as to the repair of any such drain, the same shall be determined by said trustees upon application in substantially the same manner as in the original construction thereof. [Same, § 10.]

SEC. **1961. Penalty for obstructing.** Any person who shall dam up, obstruct or in any way injure any ditch or drain so constructed, shall be liable to pay to the person owning or possessing the swamp, marsh or other low lands, for the draining of which such ditch or ditches have been opened, double the damages that shall be sustained by the owner, and, in case of a second or subsequent offense by the same person, treble such damages. [C.'73, § 1227.]

SEC. **1962. Connecting drains.** When any water course or natural drainage line crosses the boundary line between two adjoining land owners, and both parties desire to drain the land along such water course or natural drainage line, but are unable to agree as to the junction of the lines of drainage at the boundary line aforesaid, the township trustees shall have full power and authority, upon the application of either party, to hear and determine all questions arising between such parties, after giving due notice to each of the time and place of such hearing, and may render such decision thereon as to said trustees shall seem just. [22 G. A., ch. 96, § 4; 20 G. A., ch. 188, § 4.]

SEC. **1963. Along highways.** Any person shall have the right to go upon any public road to construct an outlet to a drain, but he shall leave the road in as good condition as it was before the drain was constructed, the question as to such condition to be determined by the supervisor of roads of the district where the work is done. [Same, § 5.]

SEC. **1964. Drains across highways.** When any water course or natural drain crosses any public road in the state, and the adjoining or abutting land owner wishes to cross said road with an underground tile drain, he shall notify the road supervisor having supervision over the road to be crossed, in writing, specifying the depth of drain and size of tile to be used in crossing said road, and give the road supervisor twenty days' time to construct said underground drain. [21 G. A., ch. 55, § 1.]

SEC. **1965. Supervisor shall construct.** When the road supervisor receives said written notice, he shall order said drain constructed across said road, and pay for the tile and construction of the same out of any money or fund in his hands. [Same, § 2.]

SEC. **1966. Construction by owner.** If the supervisor fails to construct said drain within twenty days' time, then the abutting or adjoining land owner may go upon the road and construct the same across said road, and he shall receive pay for constructing the same, including tile used in crossing said road, out of any money or fund belonging to such road district; provided he shall leave the road in as good condition as it was before the drain was constructed. [Same, § 3.]

DRAINAGE OF COAL LANDS OR LEAD MINES.

SEC. **1967. Damages assessed.** Any person or corporation owning or possessing any land underlaid with coal, who is unable to mine the same by reason of the accumulation of water in such mine, may drain the same through, over or under the surface of land belonging to another person, and if such person or corporation and the owner of the land cannot agree as to the amount of damages that will be sustained by such owner, the parties may proceed to have the necessary right of way condemned and the damages assessed in the manner provided for taking private property for works of internal improvement. [C. '73, § 1228.]

SEC. **1968. Compensation.** Any person or corporation who by machinery, such as engines or pumps, or by making drains or adit levels, or in any other way, shall rid any lead bearing mineral lands or lead mines of water, thereby enabling the miners and the owners of mineral interest in said lands to make them productive and available for mining purposes, shall receive one-tenth of all the lead mineral taken from said lands as compensation for said drainage. [C. '73, § 1229.]

SEC. **1969. Setting apart.** The owners of the mineral interest in said lands, and persons mining upon and taking lead mineral from said lands, shall jointly and severally set apart and deliver from time to time, when demanded, the said one-tenth part of the mineral taken from said lands to the person or corporation entitled thereto, and the owners of the mineral interest therein shall allow the party entitled to such compensation and his agents at all times to descend into and examine said mines, and to enter any building occupied for mining purposes upon any of said lands, and examine and weigh the mineral taken therefrom. [C. '73, § 1230.]

The provision giving one-tenth of the lead mineral as compensation in such cases is not unconstitutional as depriving the owner of his property without due process of law: *Ahern v. Dubuque, etc., Mining Co.*, 48–140.

SEC. **1970. Penalty.** Upon the failure or refusal of any owner of the mineral interest in said lands, or of any person taking the mineral therefrom, to comply with the provisions of the preceding section, the person or corporation entitled to said compensation may recover the value of said mineral. And if it shall appear that the defendant obstructed the plaintiff in the exercise of the right to examine such mines, and to weigh such mineral, or concealed or secretly carried away any mineral taken from them, the court shall render judgment for double the amount proved to be due from such defendant. [C. '73, § 1231.]

SEC. **1971. Notice to smelters.** The person or corporation entitled to said drainage compensation may at any time leave with any smelter of lead mineral in this state a written notice, stating that said person or corporation claims of the persons named in said notice the amount to which said person or corporation may be entitled, which notice shall have the effect of notices in garnishment, and also authorize the said smelter to retain, for the use of the person entitled thereto, the one-tenth part of the mineral taken from said land and received from the person named in said notice. The payment or delivery of the one-tenth part of the mineral taken from any of said lands by any one of the persons whose duty it is hereby made to pay or deliver the same, shall discharge the parties liable jointly with him, except liability to contribute among themselves. [C.'73, § 1232.]

SEC. **1972. Right of way.** Any person or corporation engaged as aforesaid in draining such mines and lead bearing mineral lands, when he or they shall find it necessary for the prosecution of their work, shall have the right of way upon, over or under the surface of such mineral lands, and the contiguous and neighboring lands, for the purpose of conveying the water from said mineral lands by troughs, pipes, ditches, water races or tunnels, and the right to construct and use shafts and airholes in and upon the same, doing as little injury as possible in making said improvements. [C.'73, § 1233.]

SEC. **1973. Damages.** If the said person or corporation engaged in draining as aforesaid, and the owner of any land upon which said right of way may be deemed necessary, cannot agree as to the amount of damages which will be sustained by the owner by reason thereof, the parties may proceed to have the same assessed in the manner provided for taking private property for works of internal improvement. [C. '73, § 1234.]

SEC. **1974. Consent of owners.** The foregoing provisions shall not be construed to require the owners of the mineral interest in any of said lands to take mineral therefrom, or to authorize any other person to take the mineral from said lands without the consent of the owners. [C. '73, § 1235.]

UNITED STATES LEVEES.

SEC. **1975. Assistance by counties.** In any case where the United States may have undertaken, or may hereafter undertake, the work of building a levee along or near the bank of a navigable stream forming a part of the boundary of this state, the board of supervisors of any and every county through which the same may pass shall have the right and power to aid in procuring the right of way for the same, maintaining the same, and providing a system of internal drainage made necessary or advisable by the construction of such levee, whenever in their judgment such work will be conducive to the public health, convenience or welfare. [26 G. A., ch. 46, § 1.]

SEC. **1976. Proceedings.** Proceedings as contemplated by the preceding section may be begun by filing with the county auditor a petition asking the board of supervisors to form a drainage district, for any of the purposes in section nineteen hundred and seventy-five hereof specified, of the lands in the petition described, which shall also be shown on a map or plat to be filed with such petition. This petition shall be signed by not less than twenty-five owners of lands lying within the limits of such proposed district, as shown by the transfer books in the auditor's office; and a bond with satisfactory sureties shall also be filed with the county auditor and approved by him, conditioned for the payment of all costs and expenses incurred, in case the board of supervisors shall refuse to grant the prayer of the petition. [Same, § 2.]

SEC. **1977. Commission.** At their next regular session held after the filing of such petition, or at a special session called for the purpose, the board of supervisors shall, if the foregoing provisions have been complied

with, appoint a commission of three disinterested freeholders of the county, one of whom shall be, if practicable, a competent civil engineer or surveyor. This commission shall, after being duly sworn, proceed to examine the lands within such proposed district, lay out the work required, and make an estimate of the probable cost of the same. They shall make a full report to the board of supervisors, and may recommend that such district be formed as prayed, or that it be enlarged or diminished, as in their judgment will best subserve the general good and promote the general welfare. They shall also classify the lands within the limits of such district as they recommend, grading the same as "dry," "low," and "wet," making such classification. so far as practicable, in forty-acre tracts, by government subdivisions. [Same, § 3.]

SEC. **1978. Notice.** Upon the filing of the report of the commissioners, the county auditor shall fix a time, not less than twenty days thereafter, when the board of supervisors will proceed to take final action on the petition. At least ten days' notice of such hearing shall be given to each owner of land lying within such proposed district, as shown by the transfer books in the auditor's office. Such notice shall be over the hand and seal of the county auditor, shall state in brief the substance of the petition, the recommendation of the commissioners, and the time when the board of supervisors will proceed to a hearing on the same. This notice shall be served by the sheriff, if the person named can be found in the county, but, if the sheriff shall return that any such person cannot be found in the county, the notice shall then be served by posting two copies thereof at least fifteen days before the time fixed for the hearing, one to be posted at the front door of the court-house, and the other at some public place in the township within which such lands are situated, and within the limits of such proposed drainage district; a copy of such notice, with an affidavit of the posting of the same, to be filed with the county auditor before the hearing: *provided*, however, that service of such notice may be acknowledged in the manner provided for the service of an original notice, and substituted service of such notice may be made under the circumstances and in the manner provided for substituted service of an original notice. [Same, § 4.]

SEC. **1979. Hearing.** At the time named, or at such other time to which the board of supervisors may adjourn the matter, they shall proceed with the hearing, and any of the parties interested may appear in person or by counsel and be heard, and may file written pleadings. The board of supervisors shall hear and determine the matter, and if they determine against the formation of such district, they shall dismiss the proceedings at the cost of the petitioners. If they shall decide to form such district, they shall proceed and fix the boundaries of the same, and shall classify the lands as "dry," "low," and "wet," according to the evidence, making such classification, as far as practicable, in forty-acre tracts and in government subdivisions, and they shall enter their findings and classification on their records. At such hearing the recommendation of the commissioners shall be competent evidence, but shall not be conclusive. [Same, § 5.]

SEC. **1980. Appeal.** Any person aggrieved by such action of the board of supervisors may, within twenty days after such action is taken, appeal to the district court of the county in which such lands are situated, where such appeal shall be heard on its merits, regardless of technicalities, and appeal may be taken from the district to the supreme court, but under and subject to the restrictions now imposed by law upon appeals generally. The appeal to the district court shall be taken by serving notice of such appeal on the county auditor and the three persons first named among the signers to the petition specified in section nineteen hundred and seventy-six hereof. If the appeal is taken by the petitioners, notice of such appeal shall be served on the county auditor and any three of the successful remonstrants, if there be so many, but on all if they be less than three. Upon service of

notice of such appeal, the county auditor shall file with the clerk of the district court a copy of the petition, written objections filed by the parties complaining, or complained against, and of the action taken by the board of supervisors, all certified by him; these may constitute the pleadings, and the clerk of the district court shall docket the same, as in case of any other action brought, entitling the same in the names of the three first signing the petition, on behalf of all, and against the remonstrants who are successful, or who appeal, as the case may be. Such appeal, however, shall not interfere with the board of supervisors in the prosecution of the work, unless the same shall have been taken by not less than one-half of the acreage lying within the limits of such proposed district, but if so taken by not less than one-half such acreage, then the board of supervisors shall so enter upon their records, and shall also enter an order suspending all proceedings pending the final disposition of such appeal. [Same, § 6.]

SEC. **1981. Work carried on—land condemned.** After entering the order as provided in section nineteen hundred and seventy-nine hereof, unless further proceedings are suspended as provided in section nineteen hundred and eighty hereof, the board of supervisors shall proceed and adopt such plan or system as in their judgment is proper and best under all the circumstances, and cause the work to be done, causing such ditches to be dug, channels opened, embankments erected, fills made, and such other work done as in their judgment will most efficiently promote the general good and the public welfare. They shall have power, in the manner now provided by law, chapter four of title ten, of this code, to condemn any land which they deem it necessary to take or use in the prosecution of such work, including any that may be required to aid the United States in completing such levee, the costs and expenses of which shall be paid out of the drainage fund pertaining to such district as hereinafter provided. In the doing of this work the board of supervisors shall have power to employ such help and assistance as they deem necessary, and to fix compensation for the same. All the work to be done which shall involve an estimated expenditure of five hundred dollars or over shall be let by contract, after advertising the same for three weeks in some newspaper of general circulation published in the county, to the lowest bidder who shall furnish satisfactory security for the performance of the contract: *provided*, however, that the board of supervisors may reject all bids, and do the work themselves whenever, in their judgment, the work can be so done at a substantial saving. [Same, § 7.]

SEC. **1982. Costs assessed.** The entire costs and expenses incurred under this chapter shall be assessed against the lands lying within such drainage district on the following basis: The lands classed as "low" shall be assessed twice as much per acre as the lands classed as "dry," and the lands classed as "wet" shall be assessed twice as much per acre as the lands classed as "low," and in tracts as classified by the board of supervisors, as provided in section nineteen hundred and seventy-nine hereof. The commissioners provided for in section nineteen hundred and seventy-seven hereof shall be allowed three dollars a day, each, which shall be included as part of the expenses of such work: *provided*, that if the petition shall be dismissed by the board of supervisors then the compensation of such commissioners shall be paid by the petitioners. [Same, § 8.]

SEC. **1983. Collection of tax.** The assessment required under section nineteen hundred and eighty-two hereof shall be made by the board of supervisors at the time of levying general taxes, after the work has been authorized, and the same shall be entered on the records of the board of supervisors, then entered on the tax books by the county auditor as drainage taxes, and shall be collected by the county treasurer at the same time, in the same manner, and with the same penalties, as general taxes; and if the same is not paid he shall sell all such lands upon which such assessment remains unpaid, at the same time, and in the same manner, as

is now by law provided for the sale of lands for delinquent taxes, including all steps up to the execution and delivery of the tax deed for the same. The land owners shall take notice of and pay such assessments, without other or further notice than such as is provided for in this chapter. The funds realized from such assessments shall constitute the drainage fund, as contemplated in this chapter, and shall be disbursed on warrants drawn against that fund by the county auditor, on the order of the board of supervisors. [Same, § 9.]

SEC. **1984. Installment.** If the amount required under section nineteen hundred and eighty-two hereof shall not exceed a rate based on twenty-five cents per acre on the "wet" lands, it shall be levied and paid in one year; if it shall be over twenty-five cents, and under fifty cents per acre on such basis, it shall be payable one-half in one, and one-half in two years, and if it shall exceed fifty cents per acre on such basis, then it shall be divided into three equal annual payments. [Same, § 10.]

SEC. **1985. Bonds.** If the entire amount required under this chapter cannot be collected in one year, the board of supervisors of such county shall have the power to issue drainage bonds for all which cannot thus be provided for in one year, in substantially the manner and form as provided in section nineteen hundred and fifty-three, chapter two, title ten, of this code, such issue to be determined upon by them before the levy, and an amount sufficient to pay the interest on such bonds shall be estimated and included in the assessment. [Same, § 11.]

SEC. **1986. Cost of maintaining.** The board of supervisors shall have the right and power to keep up and maintain any such levee, ditches, drains, or system of drainage, either in whole or in part, as may in their judgment be required, and to levy the expense thereof upon the real estate within such drainage district as herein provided for, and collect and expend the same: *provided*, however, that no such work which shall impose a tax at a rate exceeding one based on ten cents per acre on the "wet" lands shall be authorized by them, unless the same is first petitioned for and authorized in substantially the manner required by this chapter for the inauguration of new work. [Same, § 12.]

SEC. **1987. Districts.** The petitioners who proceed under section nineteen hundred and seventy-six hereof may ask that the lands described in the petition be formed into more than one drainage district, and, whether they do so or not, the board of supervisors shall have the right and power to arrange said lands, or the lands which they shall finally determine to bring within the provisions of this act, into two or more districts, the boundaries of which shall be so fixed as will, in the judgment of the board, tend to a more equitable and just apportionment of the burdens to be imposed. It shall be the duty of the commissioners provided for in section nineteen hundred and seventy-seven hereof to report whether, in their judgment, there should be more than one such district formed, and to make their plans and estimates according to such districts as they recommend. [Same, § 13.]

SEC. **1988. Apportionment of cost.** In case more than one such district is created as provided in section nineteen hundred and eighty-seven hereof the board of supervisors shall require separate accounts to be kept of the costs and expenses incurred in each, making an equitable apportionment of such as is not susceptible of exact division, and the lands in each drainage district shall be liable to assessment for the costs and expenses incurred in such district only. [Same, § 14.]

SEC. **1989. Through two or more counties.** The boards of supervisors of any two or more adjoining counties may carry on the work provided for in this chapter concurrently; provided that they first agree upon a plan or system, and a basis of equitable apportionment of the work to be done, and the share of the cost and expenses of the same to be borne by each of such counties. [Same, § 15.]

CHAPTER 3.

OF WATER POWER IMPROVEMENTS.

SECTION **1990. Taking land for.** Any person, or any corporation organized for the purpose of utilizing and improving any water power within this state, or in the streams lying upon the borders thereof, may take and hold so much real estate as may be necessary for the location, construction and convenient use of its canals, conduits, mains and water ways, or other means employed in the utilization of such water power, and for the construction of such buildings and their appurtenances as may be required for the purposes aforesaid. Such person or corporation may also take, remove and use, for the construction and repair of its said canals, water ways, buildings and appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken. Compensation shall be made for the lands and materials so taken and used by such person or corporation, to the owner, in the manner provided for taking private property for works of internal improvement. [C. '73, § 1236.]

SEC. **1991. Use of highways.** Such person or corporation may use, raise or lower any road for the purpose of having its said canals, water ways, mains and pipes pass over, along or under the same, and in such case shall put such road, as soon as may be, in good repair and condition for the safe and convenient use of the public. Any such person or corporation may construct and carry its canals, conduits, water ways, mains or water pipes across, over or under any railway, canal, stream or water course, when it shall be necessary for the construction or operation of the same, but shall do so in such manner as not to impede the travel, transportation or navigation upon, or other proper use of, such railway, canal or stream. But the powers conferred in this section can only be exercised in cities and towns with the consent and under the control of the council. [C. '73, § 1237.]

SEC. **1992. Public lands.** Such person or corporation is authorized to pass over, occupy and enjoy any of the school, university and saline or other lands of this state, whereof the fee or any use, easement or servitude therein is in the public, making compensation therefor. But no more of such land shall be taken than is required for its necessary use and convenience. [C. '73, § 1238.]

SEC. **1993. Powers.** Such corporation, in addition to other powers, shall have the following: To borrow money for the purpose of constructing, renewing or repairing its works; to make, execute and deliver contracts, bonds, notes, bills, mortgages, deeds of trust, and other conveyance charging or incumbering its property, including its franchises, or any part or parcel thereof; to erect, maintain and operate canals, conduits, mains, water ways, mills, factories, and other buildings and machinery, including water ways, sluices and conduits for the purpose of carrying waste water off from said premises to the stream from which the same was taken, or other convenient place; to let, lease, or sell and convey, any portion of their water supply, and any of the buildings, mills or factories, or machinery, for such sums, prices, rents, tolls and rates as shall be agreed upon between the parties; and to lay down, maintain and operate such water-mains, conduits, leads and service pipes as shall be necessary to supply any building, village, town or city with water; and the grantee of any such person or corporation, or purchaser of said property, franchise, right and privileges under and by virtue of any judicial sale, shall take and hold the same as fully as the same were held and enjoyed by such person or corporation. [C. '73, § 1239.]

SEC. **1994. Completion of work—legislative control.** Such person or corporation shall take, hold and enjoy the privilege of utilizing and improving the water power and the rights, powers and privileges aforesaid, and shall proceed in good faith to make the improvements and employ the

powers above conferred, and shall, within two years from the date of acquiring such powers, provide the necessary capital, complete the preliminary surveys, and actually commence the work of improving and utilizing the water power and furnishing the supply of water as contemplated; and said water works and canals shall be completed within five years thereafter. The rights, powers, and priveleges conferred by this chapter shall be at all times subject to legislative control. [C. '73, § 1240.]

CHAPTER 4.

OF TAKING PRIVATE PROPERTY FOR WORKS OF INTERNAL IMPROVEMENT.

SECTION **1995. By railway—limit of.** Any railway corporation organized in this state, or chartered by or organized under the laws of the United States or any state or territory, may take and hold under the provisions of this chapter so much real estate as may be necessary for the location, construction and convenient use of its railway, and may also take, remove and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken. The land so taken, otherwise than by the consent of the owners, shall not exceed one hundred feet in width, except for wood and water stations, unless where greater width is necessary for excavation, embankment or depositing waste earth. [17 G. A., ch. 126; C. '73, § 1241; R., § 1314.]

Provisions constitutional: The use for which land appropriated for a right of way is taken is a public one although it is for private profit, and the provisions authorizing the taking of private property for such purpose upon compensation being made are therefore constitutional: *Stewart v. Board of Supervisors*, 30-9.

Nature and extent of right: The railway company procuring the right of way is the owner of its right of way so long as it is used for railway purposes, and the owner of the land taken has no right to go thereon for the construction of fences or other purposes: *Heskett v. Wabash, St. L. & P. R. Co.*, 41-467.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary implied under this section relates to the quantity of land to be taken: *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

It would seem that the company may sink wells on its right of way, for the purpose of supplying its engines with water, and would not be liable in damages for thus diverting percolating water from a spring upon the adjoining land of the person granting the right of way: *Hougan v. Milwaukee & St. P. R. Co.*, 35-558.

Timber standing upon the property taken for right of way, other than that necessary for the construction of the railway, remains the property of the owner of the land: *Preston v. Dubuque & P. R. Co.*, 11-15.

The statute by express language authorizes the taking of material for the construction and use of the railway, but under a right of way deed granting an easement "for all purposes connected with the construction, use and occupation of the railway," *held*, that the railway company was not authorized to take sand for use in constructing a roundhouse, but the owner might take such sand so far as not interfering with the use of the land for railroad purposes: *Vermilya v. Chicago, M. & St. P. R. Co.*, 66-606.

By the condemnation proceedings a corporation acquires the right to the exclusive use of the surface of the land, and the condemnation is made on the theory that this use of the surface will be perpetual: *Hollingsworth v. Des Moines & St. L. R. Co.*, 63-443; *Cummings v. Des Moines & St. L. R. Co.*, 63-397; *Clayton v. Chicago, I. & D. R. Co.*, 67-238.

The conveyance to a railway of a right of way conveys only an easement: *Brown v. Young*, 69-625.

Constitutes an incumbrance: The right of way over land for a railway is an incumbrance for which a grantee of the land may recover on a covenant against incumbrances, although he knew of the existence of such right of way at the time of purchasing: *Barlow v. McKinley*, 24-69; *Jerald v. Elly*, 51-321; *Flynn v. White Breast Coal, etc., Co.*, 72-738.

The doctrine that the right of way for a railroad is an encumbrance on the premises from which it is taken for which a grantee may recover under a warranty deed though he has knowledge of such incumbrance is not applicable to a public highway: *Harrison v. Des Moines & Ft. D. R. Co.*, 91-114.

The mere use and exercise of a right of way over the property is not sufficient to establish such right or raise a presumption of its existence: *Jerald v. Elly*, 51-321.

Subject to foreclosure proceedings: Where a railway company takes a deed for a right of way, and enters into possession pending foreclosure proceedings against the property, it is bound by decree and sale thereunder, though not made a party: *Jackson v. Centerville, M. & A. R. Co.*, 64-292.

Width which may be taken: Under the statutory provision allowing the condemnation of a strip of land one hundred feet in width, the company is not limited to fifty feet on each side of its track, but the track may be located anywhere on the tract taken: *Stark v. Sioux City & P. R. Co.*, 43-501.

Additional width: Where a company has the power to build an additional lateral road auxiliary to the original road, the construction and maintenance of which is possible only upon an independent right of way, the right of way statute, limiting the width of right of way to one hundred feet, does not prevent the condemnation of land for such additional road; and the same power may be exercised by another corporation, even though it derives all its means from the first, and builds the road with the express design of leasing it: *Lower v. Chicago, B. & Q. R. Co.*, 59-563.

Where a company entered into possession of and constructed its road over a right of way thirty feet in width acquired by deed, and subsequent proceedings to condemn a right of way seventy feet wide were instituted, *held*, that the subsequent preceedings must be considered as intended to secure a right of way in addition to that acquired by deed: *Gray v. Burlington & M. R. R. Co.*, 37-119.

When a railway company applies for a hundred feet or less in width for a right of way, it must be conclusively presumed that the amount applied for is necessary, and the fact that the company owns land on one side of such right of way will not limit the amount which it may condemn: *Stark v. Sioux City & P. R. Co.*, 43-501.

Depot grounds: Under a previous statute, *held*, that a company had no right to condemn additional land for depot grounds, and that therefore any proceedings for that purpose might be enjoined: *Forbes v. Delashmutt*, 68-164. See now § 1998.

Use by another road: Where right of way over land has been acquired by one railroad the owner cannot have an injunction against another road for using such right of way under agreement with the road to which it belongs: *Holbert v. St. Louis, K. C. & N. R. Co.*, 38-315.

Appropriation of right of way by another company: The easement acquired by a railroad company is acquired to public use, and is in the nature of a grant from the state for the uses and purposes provided by law, and when the company fails to carry out the purposes of the grant, the legislature may transfer the easement to another company upon making compensation to the former company: *Noll v. Dubuque, B. & M. R. Co.*, 32-66; *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57-249.

Transfer to another road: Where a right of way has been deeded to one railway company in consideration of the benefit to be derived from the construction of its line, such right of way cannot be transferred by that company to another proposing to construct a different line not running in the same direction: *Crosbie v. Chicago, I. & D. R. Co.*, 62-189.

Who entitled to condemn: It is sufficient under the statute to allege that the party seeking to secure a right of way is a corporation duly organized, and engaged in building a railroad: *Chicago, N. & S. W. R. Co. v. Mayor of Newton*, 36-299.

A foreign corporation could not, before the amendment of this section, procure right of way by condemnation proceedings, and might be restrained by injunction from using property for right of way until the right was in some other manner procured: *Holbert v. St. Louis, K. C. & N. R. Co.*, 45-23.

Before the change in the statute allowing foreign corporations to condemn land for right of way, *held*, that where nothing appeared to the contrary it would be presumed that the condemnation was properly made on behalf of a corporation duly authorized to institute the proceedings: *Kostendader v. Pierce*, 37-645.

Horse railways: The provisions for condemning right of way for the use of railway companies are applicable to railways operated by animal power as well as those operated by steam: *Clinton v. Clinton & L. H. R. Co.*, 37-61.

Railways in cities: By § 767 the method of assessing damages for right of way is made applicable to damages caused to abutting owners from the construction of a railway upon the streets of a city, and such proceedings can be instituted only by the company and not by the property owner, who may have an action for damages without regard to the method of assessment thus provided: *Mulholland v. Des Moines, A. & W. R. Co.*, 60-740.

Further as to the rights of railway companies to construct their tracks over the streets of cities and towns, see notes to § 767.

Parol license: Where the company by parol license enters upon ground to construct its railway the subsequent payment of the damages assessed gives it an easement by contract, which, though arising upon parol, cannot be revoked: *Slocumb v. Chicago, B. & Q. R. Co.*, 57-675.

In such case a subsequent purchaser takes subject to the right of way, whatever it is, if it does not exceed the statutory width, and cannot set up non-user by the company of a portion, and adverse possession thereof, to defeat its rights: *Ibid.*

Presumption: Where a railway company is conceded to be in rightful possession of a right of way it will be presumed that it has an easement acquired either by condemnation or purchase: *Drake v. Chicago, R. I. & P. Co.*, 63-302.

Subsequent condemnation: Where the compensation for the right of way has not only been agreed upon, but also paid to the land owner by the corporation, and he has conveyed the right of way, proceedings to condemn such right of way cannot be insti-

tuted, and would be entirely void for want of jurisdiction: *Council Bluffs & St. L. R. Co. v. Bentley*, 62–446.

In an action against a railroad by an adjacent owner for damages for the occupation of a street in which such adjacent owner holds the fee, it is error to reject a deed from such owner to the company for right of way over his premises: *Frith v. Dubuque*, 45–406.

The occupation of premises taken for right of way cannot be enjoined for failure to pay therefor under proceedings which have been declared void where the company has a deed granting it a right of way substantially the same as that occupied: *Bentley v. Wabash, St. L. & P. R. Co.*, 61–229.

Where a railway company having a right of way thirty feet in width instituted proceedings to condemn a right of way seventy feet in width, *held*, that such proceedings must be considered as intended to secure an additional right of way, and that payment of the damages assessed in such proceedings did not cancel the obligationentere d into by the company in accepting the deed: *Gray v. Burlington & M. R. R. Co.*, 37–119.

SEC. **1996. For reservoirs.** It may also take and hold additional real estate at its water stations, for the purpose of constructing dams and forming reservoirs of water to supply its engines. Such real estate shall, if the owner requests it, be set apart in a square or rectangular shape, including all the overflowed land, by the commissioners as hereafter provided; but the owner of the land shall not be deprived of access to the water or the use thereof, in common with the company, on his own land. And the dwelling, outhouse, orchards and gardens of any person shall not be overflowed or otherwise injuriously affected by any proceeding under this section. [C.'73, § 1242.]

SEC. **1997. Pipes.** Any such railway corporation may lay down pipes through any land adjoining the track of the railway, not to a greater distance than three-fourths of a mile therefrom, unless by consent of the owners of the land through which the pipes may pass beyond that distance, and maintain and repair such pipes, and thereby conduct water for the supply of its engines from any running stream; and shall, without unnecesasry delay after laying down or repairing such pipes, cover the same so as to restore the surface of the land through which they may pass to its natural grade, and, as soon as practicable, replace any fence that it may be necessary to open in laying down or repairing such pipes; and the owner of the land through which the same may be laid shall have a right to use the land through which such pipes pass in any manner so as not to interfere therewith. Said pipes shall not be laid to any spring, nor be used so as to injuriously withdraw the water from any farm. Such corporation shall be liable to the owner of any such land for any damages occasioned by laying down, regulating, keeping open or repairing such pipes, to be recoverable, from time to time, as they may approve. [C.'73, § 1243.]

SEC. **1998. Additional depot grounds.** Any railway corporation owning or operating a completed railway shall have power to condemn lands for necessary additional depot grounds in the same manner as is provided by law for the condemnation of the right of way. Before any proceedings shall be instituted therefor, the company shall apply to the railway commissioners, who shall give notice to the land owner, and examine into the matter, and report by certificate, to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for the reasonable transaction of the business, present and prospective, of such company; whereupon the company shall have the power to condemn the lands so certified by the commissioners. [20 G. A., ch. 190, § 1.]

The railroad commissioners are authorized to allow the condemnation of additional land for depot purposes although there be no depot or station yet established at that place and therefore as yet no "depot grounds:" *Jayer v. Dey*, 80–23.

It is competent for a city to extend a street through the depot grounds of the railroad company, under proceedings for condemnation: *Chicago, M. & St. P. R. Co. v. Starkweather*, 66 N. W., 87.

SEC. **1999. Manner of condemnation.** If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real

estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county, not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises. [C. '73, §§ 1244–5; R., §§ 1317–18.]

Measure of damages: The damages contemplated are the "just compensation" provided for by Const., art. I, § 18. The owner is to have a fair equivalent in money for the injury done him by the taking of his property. It is the right of way which is appropriated, not the fee in the land: but the right of way is such as is peculiar to a railroad, and is the right to all freedom in locating, constructing, using and repairing such road and its appurtenances, and taking and using for that purpose only, any earth, gravel, stone, timber, etc., on or from the land taken, and the right to make cuts, embankments, etc., and includes the rights incident to rapid locomotion as against the owner of the fee. It seems that the right of way is intended to be in perpetuity: *Henry v. Dubuque & P. R. Co.*, 2-288.

The question as to the proper measure of damages in such cases discussed and the true measure declared to be the difference between the market value of the land entire, and its market value after the right of way is carved out: *Ibid.; Sater v. Burlington, etc., Plank Road Co.*, 1-386.

The amount of damage to be allowed is what will compensate plaintiff for the appropriation of the right of way. It may be more or less than the value of the property taken: *Gear v. Chicago, C. & D. R. Co.*, 39-23.

Where the damages to a leasehold estate are to be assessed, the proper measure of damages is the difference in value of the annual use of the property, before taking and after: *Renwick v. Davenport & N. W. R. Co.*, 49-664.

The land owner is entitled to the full and fair value of the land appropriated, and, in addition thereto, to such sum as will compensate him for the depreciation in value of his adjoining land by reason of the right of way, irrespective of any benefits of the road to the land; but speculative, contingent or future damages, not affecting the market value, cannot be allowed: *Smalley v. Iowa Pacific R. Co.*, 36-571.

Increased danger of injury to or destruction of the property by reason of exposure to fire or other dangers incident to the operation of a railroad are elements of damage for which compensation should be made: *Small v. Chicago, R. I. & P. R. Co.*, 50-338, 334; *Dreher v. Iowa Southwestern R. Co.*, 59-599; *Dudley v. Minnesota & N. W. R. Co.*, 77-408. But increase in rate of insurance on farm buildings should not be considered: *Pingery v. Cherokee & D. R. Co.*, 78-438.

It is error to take into account the value of special property, such as a grove or house, which might be destroyed by fire: *Lance v. Chicago, M. & St. P. R. Co.*, 57-636.

The value of growing crops upon the right of way to be taken may be considered in assessing the compensation: *Ibid.*

The question whether, because of the construction of the road, the land is made more wet than it otherwise would be is a proper one, it not being sought to show that such damages were a result of the improper construction of the road: *Britton v. Des Moines, O. & S. R. Co.*, 59-540.

The fact that the road-bed is constructed in a cut is a proper fact to be shown in estimating damages: *Cummins v. Des Moines & St. L. R. Co.*, 63-397.

While the land owner is not entitled to prove the proximity of the depot or the number of tracks as independent elements of damage, yet such evidence may be admissible in determining the extent to which the company would probably use the ground taken in carrying on its business: *Ibid.*

As the company acquires the right to occupy and use the whole of the right of way, it cannot have the damages assessed on the theory that it will in fact use but part, and therefore that the occupation of buildings situated upon the right of way will not be disturbed: *Ibid.*

Unless it appears that the reversionary right of the land owner is of some value, as, for instance, by reason of the land being underlaid by coal or mineral, it is not error to disregard such reversionary interest and assess the damages at the market value of the property taken: *Ibid: Hollingsworth v. Des Moines & St. L. R. Co.*, 63-443.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary, implied under this section, relates to the quantity of land to be taken: *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

Although the right of way taken is an easement and the fee remains in the owner, yet, unless it is made to appear that the fee burdened with the easement is of some determinable value, the assessment of damages should be based on the full value of the land actually taken, and it is not error to re

fuse to instruct the jury on the theory that the fee remains in the owner, and that at some time in the future the land may cease to be used for railway purposes and revert to such owner: *Clayton v. Chicago, I. & D. R. Co.*, 67-238.

Where a railway company was seeking to condemn a right of way between the property of a riparian owner and the Mississippi river, *held*, that the owner was entitled to damages caused to an embankment constructed by him extending out to a crib in the river: *Renwick v. Davenport & N. W. R. Co.*, 49-664.

The owner is not invested with the right to cross the right of way after its appropriation at his pleasure. Whatever right he has in that respect is subservient to that of the company using the road for the running of its trains: *Ibid.*

The question of the right of passage, as affected by the taking of the right of way, may be shown as affecting the damages: *Bell v. Chicago, B. & Q. R. Co.*, 74-343.

Various items of damage *held* properly taken into account by a witness in testifying as to the market value of land after taking the right of way: *Smalley v. Iowa Pacific R. Co.*, 36-571.

The prices at which other lands in the vicinity of the premises had been sold about the time of the commencement of the proceedings is not receivable in the absence of evidence that there was any similarity between the lots in question and those which it was claimed had been sold: *Cummins v. Des Moines & St. L. R. Co.*, 63-397: *Hollingsworth v. Des Moines & St. L. R. Co.*, 63-443.

It is proper for the court to state the law governing damages in such cases as found in the constitution and statutes of the state, no matter what evidence is introduced: *Ball v. Keokuk & N. W. R. Co.*, 74-132.

The recovery of the property owner is not limited to the damages which he has sustained if the property were to be used only for the purposes to which it is devoted when such proceedings are had, but the value of the property for any purpose for which it is available may be considered. Therefore, *held*, that the value of the land as coal land might be taken into account, it not being attempted to show the value of the coal underlying the right of way: *Doud v. Mason City & Ft. D. R. Co.*, 76-438.

Damages which have resulted from an improper construction of the road cannot be considered in assessing the damage for right of way already taken. Therefore, *held*, that in such case the fact that the railroad company had excavated for a considerable distance through plaintiff's premises outside of its right of way could not be shown: *Ibid.*

The damages contemplated by the law to be allowed are the same before as after the road was built, except that in the latter case interest may be allowed: *Ibid.*

The proper rule in estimating the amount of damages is to confine the damages recoverable to those which naturally result from the taking and rightful use of the right of way and the proper construction of the road: *Ibid.*

The fact that different portions of the land are adapted to different uses, and only one of such portions is covered by the right of way, will not preclude the whole of the premises being considered in determining the damages: *Ibid.*

Market value: In determining the damages the proper rule is to first ascertain the fair market value of the premises over which the proposed improvement is to pass, irrespective of the improvement, and also the like value of the same in the condition in which the premises will be after the land for the improvement has been taken, irrespective of the benefit which will result from the improvement, and the difference in value will constitute the measure of compensation: *Sater v. Burlington, etc., Plank Road Co.*, 1-386.

The owner may be a witness generally as to the value of the land before and after appropriation, leaving the opposite party, by his right of cross-examination, to learn the ability of the witness to judge in the premises and what he takes into consideration in making up his judgment: *Ibid.*

It is improper to ask the plaintiff what the damage was to him by the taking of the right of way. A witness who is shown to be properly qualified may be allowed to give an opinion as to the value of property, but not as to the amount of damage: *Hartley v. Keokuk & N. W. R. Co.*, 85-455.

In determining the amount of damage the witness may be allowed to testify as to the value immediately before the right of way was taken and immediately after, not taking into consideration the benefit to the land: *Harrison v. Iowa Midland R. Co.*, 36-323.

The opinion of a witness as to the value before taking is admissible: *Henry v. Dubuque & P. R. Co.*, 2-288, 311.

It is usual to take the testimony of the witness upon questions of the value of property when he states under oath that he knows its value or that he knows the value of like property: *Ball v. Keokuk & N. W. R. Co.*, 74-132.

Witnesses who were shown to be farmers, and acquainted with the land in question and the value of lands in that county, *held* to be competent to testify as to the value of land before and after location of the road: *Pingery v. Cherokee & D. R. Co.*, 78-438.

Evidence as to the value of land which is taken for right of way is to be considered in assessing the damages: *Ibid.*

Evidence as to the character of netting or screens used in the smoke-stacks of the company's engines is not admissible: *Ibid.*

Evidence as to the belief of the company or its mistake with reference to the ownership of the land is immaterial: *Ibid.*

The question as to whether the company will or will not furnish proper and suitable crossings cannot be considered: *Ibid.*

It is not proper in such proceedings to show by evidence at what price the purchase of right of way from adjoining tracts has been secured, unless it is shown that such tracts were of like character or that the right of way had a uniform and marketable

value in that neighborhood: *King v. Iowa Midland R. Co.*, 34–458.

In ascertaining the damages to land used, improved and occupied together as one farm, witnesses cannot be asked as to the value of detached parcels: *Winklemans v. Des Moines N. W. R. Co*, 62–11.

Witnesses who were jurors for the assessment of damages in the first instance cannot be required to state on a trial of the case on appeal whether their report of the assessment made to the sheriff correctly expressed their judgment as to the amount of damages sustained: *Ibid.*

The fact that on the prior assessment the land owner made no claim for damages which were afterwards assessed upon appeal, *held* not objectionable, as it did not appear on the original assessment that such damages would result from the taking of the right of way: *Ibid.*

While it is competent to show the situation and general surroundings of the land, its character and the roads leading thereto, etc., yet where the land was situated beyond the limits of a city and was not in the market as residence property, *held*, that evidence as to the character of improvements being made upon the street leading toward the land, but which would not if extended come within eighty yards of it, was improper in determining the damages caused to the land: *La Mont v. St. Louis, D. M. & N. R. Co.*, 62–193.

The inquiry is not as to any special value of the property to the owner growing out of ownership of other distinct and separate property, nor that of the particular premises over which the road passes as intended to be put in the future to a particular use in connection with other distinct and separate pieces of land. Regard must be had to the immediate and not the remote damages of the appropriation: *Fleming v. Chicago, D. & M. R. Co.*, 34–353.

Evidence of increased fire risk in connection with the use of the premises intended to be made in the future cannot be taken into account: *Ibid.*

It is not competent to show the assessed valuation of the property, and although the assessor may be a competent witness, he must be introduced as such: *Dudley v. Minnesota & N. W. R. Co.*, 77–408.

And in a particular case a verdict of $1,700 damages to a farm of three hundred and eighty acres, *held* not excessive: *Ibid.*

Entire premises: Damages to the entire premises necessarily and properly used by the owner in his business should be estimated, although such premises are divided by a street or highway: *Renwick v. Davenport & N. W. R. Co.*, 49–664.

Where the right of way passes through a farm the owner may show as damages depreciation in value of the whole farm, and is not limited to the damages to the governmental subdivision through which the road runs: *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52–613; *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

The whole tract is to be taken into account in the consideration of the damages, although the notice may specify only a portion of such tract: *Ellsworth v. Chicago, & I. W. R. Co.*, 91–386.

Although the property is unimproved it may have a special value as a whole and there may be occasion to take into account the damages to the whole tract although the right of way covers only one subdivision thereof. Whether or not there are such special damages to the whole tract will be a question for the jury: *Ibid.*

Evidence showing the effect which the building of a railway will have upon a tract as a farm and the manner of carrying it on, may be competent, and, therefore, evidence showing the cuts and fills which the construction of the railroad will require and their effect upon farming operations is admissible: *Ibid.*

The doctrine that where a portion of a tract of land which is owned and used together is taken for right of way the damages are to be assessed with reference to the injury to the entire tract is not applicable to a case where the right of way of a railway is crossed at one or more points by the track of another company and the former company is not entitled by way of damages to the depreciation in value of its entire right of way due to the construction of the second road: *Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 86–500.

If a railway company applies to have the damages assessed, and, in its application, designates the land known as the farm of the adverse party, or if the jury is called under an agreement of both parties, and it is therein specified that the damages to the land owner in consequence of the location across his farm shall be assessed, the railway company will afterwards be estopped from confining the assessment to the immediate portion of land over which the railroad crosses, and also from denying defendant's ownership of such land, the damages to which they have agreed shall be assessed: *Mississippi & M. R. Co. v. Byington*, 14–572.

Where different portions of land belonging to the same owner were adapted to different uses, and only one of such portions was crossed by the right of way, *held*, that the portion not crossed could not be taken into consideration in determining the damages: *Haines v. St. Louis, D. M. & N. R. Co.*, 65–216.

Several parcels: Where farm land is crossed by a railroad, the owner is not limited in his right of recovery to the subdivision of land crossed or touched by the right of way, but the entire farm, if it is in one tract, may be considered in the assessment of damages and the same rule is applicable to town lots: *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

And where plaintiff, in an application for the appraisement of damages, asked that they might be assessed on his lots, caused by the location of the railroad of defendant across certain lots designated by number, *held*, that he asked the assessment of all legal damage resulting therefrom and did not limit his claim to the damage to the lots designated: *Ibid.*

Where plaintiff owned all the lots in a block, and several of them were crossed by the railroad, *held*, that he was entitled to recover for damage to the whole block, and testimony tending to show such damage was properly admitted: *Ibid.*

Where a right of way through parcels of real estate treated as an entirety is sought to be taken by statutory proceedings, the landowner's right of recovery is not limited to the land through which the right of way is to pass, but extends to all the tracts as a whole: *Peden v. Chicago, R. I. & P. R. Co.*, 78-131.

Therefore, *held*, by analogy, that where a right-of-way deed for a strip of land through a certain eighty-acre tract provided that the grantee should carry off the water in a certain manner, a breach of such contract entitled the grantor or his grantees to damages to the entire tract of which the eighty acres formed but a part: *Ibid.*

Where two lots are improved and used as one property and a notice of proceedings to condemn a right of way to one lot only is given, and the right of way is taken entirely from such lot, nevertheless the commissioners may properly include both lots in their assessment and return: *Cummins v. Des Moines & St. L. R. Co.*, 63-397.

In such cases it will be presumed that the title to both lots is in the owner against whom the proceedings with reference to one lot is instituted, without proof on his part of that fact, the finding of the commissioners as to the ownership of the property not having been questioned on appeal: *Ibid.*

Cost of fencing: The cost of building additional fence and keeping the same in repair should not be allowed as part of the damages: *Henry v. Dubuque & P. R. Co.*, 2-288; *Kennedy v. Dubuque & P. R. Co.*, 2-521; *Hanrahan v. Fox*, 47-102.

Although the cost of fencing is not to be taken directly into account, yet, if the land was before fenced, and, by the taking of the right of way, it is thrown open and left in a manner unfenced, this fact will be taken into consideration in arriving at the depreciated value of the remaining premises: *Henry v. Dubuque & P. R. Co.*, 2-288, 310.

Damages for improper construction: The damages to be awarded include those only from the appropriation and lawful use of the premises taken, and do not embrace injuries which may result from unlawful acts for which the company would be liable to the party injured: *Fleming v. Chicago, D. & M. R. Co.*, 34-353.

Damages consequent upon the negligent construction of the road are not to be considered. Only such damages are to be included as arise from its proper construction: *King v. Iowa Midland R. Co.*, 34-458; *Miller v. Keokuk & D. M. R. Co.*, 63-680.

Obstruction of highway: The obstruction of a public highway is not a proper element of compensation to the owner of the property in this proceeding: *Gear v. Chicago, C. & D. R. Co.*, 43-83; *Fleming v. Chicago, D. & M. R. Co.*, 34-353.

Trespass: If a subcontractor in constructing the road, without authority from the company, goes outside of the right of way and commits trespass on land not condemned, the company is not thereby rendered liable. In order to render the company liable it must be made to appear, in some way, that it consented to the trespass or had such knowledge of it at the time it was done that its consent might be presumed: *Waltemeyer v. Wisconsin, I. & N. R. Co.*, 71-626.

Diversion of watercourse, etc.: The right which the owner of land has to a watercourse flowing over it is a freehold right which cannot be taken from him for public use either directly or by diminution or diversion from its natural channel, without adequate compensation: *McCord v. High*, 24-336.

The fact that a right of way is asked across land crossed by a stream of water does not authorize the assessment of damages for the diversion of the stream from its natural channel when such diversion would not be absolutely necessary. The mere fact that such diversion would be convenient or advantageous in the construction of the road will not authorize the implication that the company desires to acquire the right to make such diversion and pay the damage therefor rather than construct its road by bridging or otherwise, so as to render such diversion unnecessary: *Stodghill v. Chicago, B. & Q. R. Co.*, 43-26.

The right to obstruct the passage of surface water is not presumed to be acquired in a condemnation proceeding, and the damages assessed do not cover damages resulting from such stoppage. The owner is not presumed to have been paid therefor, upon the theory that the company preferred to protect him against this incidental injury, and the enjoyment of the easement carries with it from day to day the obligation to furnish this protection: *Drake v. Chicago, R. I. & P. R. Co.*, 63-302. And see *S. C.*, 70-59.

Where in violation of the stipulations of a right of way deed the surface water was thrown by the railway company upon plaintiff's premises, *held*, that it was competent to show by witnesses how much more the land of plaintiff would have been worth if the water had been kept off plaintiff's land: *Peden v. Chicago, R. I. & P. R. Co.*, 78-131.

Damages resulting from overflows caused by the negligent construction of a culvert cannot be considered as having been included in the damages for right of way: *Hunt v. Iowa Cent. R. Co.*, 86-15.

Interference with wells: Where a railway company had acquired right of way over land, *held*, that in connection with such right of way it might dig wells and would not be liable for thereby interfering with the percolation of water supplying springs upon the premises of the land owner: *Hougan v. Milwaukee & St. P. R. Co.*, 35-558.

The fact that the construction of a railway destroys a valuable spring may be shown in evidence in determining the amount of damages. It will not be presumed that the spring was unnecessarily destroyed in the absence of evidence to that effect: *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

Consequential damages: Regard must be

had only to the immediate and not to the remote consequences of the appropriation. The value of the remaining premises is not to be depreciated by heaping consequence on consequence: *Sater v. Burlington, etc., Plank Road Co.*, 1-386.

Damages are not limited to the value of the land taken, but include such damages as result proximately from the use for which it is taken: *Kucheman v. Chicago, C. & D. R. Co.*, 46-366, 376.

Obstructing a view or interfering with the owner's privacy, and the noises of approaching trains, are matters for which the land owner may have compensation. As to such matters he is not injured merely as a member of the community in general: *Ham v. Wisconsin, I. & N. R. Co.*, 61-716.

Evidence in regard to how the railroad affects a farm over which it passes, aside from the mere value of the land taken, is admissible: *Dreher v. Iowa Southern R. Co.*, 59-599.

Incidental injury from smoke and dust and the noise of moving trains gives no right for the recovery of damages where there is no other injury to which the smoke, etc., is incident. So *held* where the land condemned had not yet been actually occupied or interfered with by the railway company: *Dimmick v. Council Bluffs & St. L. R. Co.*, 58-637.

Damages not connected with the taking of land: Whatever inconveniences a property owner may suffer by the construction of a railway upon the property of another, no carelessness or negligence in such construction appearing, such injuries will not entitle such property owner to compensation in damages: *Barr v. Oskaloosa*, 45-275.

When assessment proper: While the statute only contemplates an assessment where the owner refuses to grant the right of way, or when the parties cannot agree as to the compensation, yet where it appears that the land owner contests the right of the company to take his land on the terms fixed by the appraisers and attacks the regularity of the proceedings of such appraisers, and that the appraisers were only to assess damages in cases where the owners had refused to grant the right of way, *held*, that the refusal to grant the right of way sufficiently appeared to show the jurisdiction of the court: *Mississippi & M. R. Co. v. Rosseau*, 8-373.

Where the compensation for the right of way has not only been agreed upon, but also paid to the land owner by the corporation, and he has conveyed the right of way, proceedings to condemn such right of way cannot be instituted, and would be entirely void for want of jurisdiction: *Council Bluffs & St. L. R. Co. v. Bentley*, 62-446.

The phrase "owner of any real estate" includes a mortgagee, and if not made a party to the proceedings he is not bound thereby: *Severin v. Cole*, 38-463.

This section refers to land taken and appropriated for right of way. The provisions of § 767, with reference to assessing damages to the abutting property owner by reason of the construction of a railroad track along the streets of a city, do not authorize such abutting property owner to have his damages assessed in this manner: *Stough v. Chicago & N. W. R. Co.*, 71-641.

Respective interests of joint owners: Where the respective interests of tenants in common appear of record or can be conveniently ascertained, the company, if it applies for the appointment of commissioners to assess damages, should by its application cause such damages to be assessed separately to each owner: *Ruppert v. Chicago, O. & St. J. R. Co.*, 43-490.

A sheriff's jury cannot apportion the damages between the owner and the person holding a mortgage upon the land. They are to estimate the right of way only, and where the mortgagee is not made a party he may voluntarily assert his right to the money in the hands of the sheriff: *Sawyer v. Landers*, 56-422.

Who may recover: Where land is mortgaged and the mortgage debt remains unpaid and the land is not sufficient to pay it and the mortgagor is insolvent, damages assessed for a right of way may be recovered by the mortgagee, and the lien of the mortgagee is superior to that of an attaching creditor: *Schafer v. Schafer*, 75-349.

Where a party in interest appears in the proceeding and prosecutes an appeal he cannot object for want of notice served upon him or upon the person from whom he derives his right to the property: *Ellsworth v. Chicago & I. W. R. Co.*, 91-386.

Under particular circumstances, *held*, that the claimant for damages was the owner of the property in such sense as to be entitled to receive whatever the company was liable to pay for the right of way: *Hartley v. Keokuk & N. W. R. Co.*, 85-455.

Foreclosure of railroad mortgage: Also *held*, that it did not appear that the company had ever acquired a right of way by virtue of proceedings commenced by another company: *Ibid.*

Also *held*, that the foreclosure deed made to defendant while the proceeding was pending, the claimants in such proceeding not having been made parties to the foreclosure, was of no effect as determining the rights of such parties: *Ibid.*

Enforcement of payment: Where it had been agreed that the compensation to be paid for the right of way should be fixed by a third person, and under such agreement the railway company went into possession, but the amount of compensation was never fixed, *held*, that the land owner might, by condemnation proceedings, enforce payment of the compensation to which he was entitled: *Corbin v. Wisconsin, I. & N. R. Co.*, 66-269.

The agreement between the parties in such case as to the amount of damages might be interposed as a defense to the claim for damages in excess of the amount agreed upon, but such agreement need not be specially pleaded: *Ibid.*

New assessment: Where, upon condemnation of a right of way over agricultural college land, the damages assessed were deposited with the sheriff, *held*, that without

return of the amount thus deposited the grantee of the land could not have another assessment of damages for the use of the premises by another railway company without a return of the money thus deposited: *Chicago, M. & St. P. R.Co. v. Bean*, 69-257.

Even though the land owner is seeking to set aside a deed previously made, on the ground of fraud or otherwise, he cannot disregard the previous transaction and have a new assessment: *Council Bluffs & St. L. R. Co. v. Bentley*, 62-446.

A land owner who has received compensation which has not been refunded by him cannot recover the second time: *Dubuque & D. R. Co. v. Diehl*, 64-635.

Homestead exemption: Damages assessed for a right of way over the homestead are exempt from execution to the same extent that the homestead is: *Kaiser v Seaton*, 62-463.

Liability of commissioners: The commissioners should not be put to costs for doing in a regular and legal way what they are required to do, and in a *certiorari* proceeding to review their action an answer setting out the notice in the proceeding under which they are acting is sufficient: *Forbes v. Delashmutt*, 68-164.

Nature of proceeding: Where plaintiff sought to enjoin defendants from prosecuting an *ad quod damnum* proceeding to recover the value of certain land occupied in the construction of plaintiff's railroad, *held*, that plaintiff had an adequate remedy at law, as all questions involved in the issue could have been determined in the *ad quod damnum* proceeding: *Keokuk & N. W. R. Co. v. Donnell*, 77-221.

A refusal by the owner to grant a right of way is not necessary to confer upon the sheriff and jury power to act. The land owner is authorized to institute a proceeding after the railway has completed its road, and when there is no intention of treating the company as a mere trespasser, and it is sufficient in such case to allege that the owner and the company could not agree upon the compensation to be paid: *Hartley v. Keokuk & N. W. R. Co.*, 85-455.

Dismissal of proceedings: Where the company has not entered upon the land to construct the road, no right to the amount of damages assessed becomes vested in the land owner until the decision on the appeal, and pending the appeal the company may dismiss the proceedings: *Burlington & M. R. Co. v. Sater*, 1-421.

A proceeding for the condemnation of land for a railway simply fixes the price upon payment of which, within a reasonable time, the company may take the right of way. The company cannot be compelled to pay the damages and take the way, but may waive the rights acquired by the proceedings, being liable, however, for costs and for any damages actually suffered by the land owner: *Gear v. Dubuque & S. C. R. Co.*, 20-523.

Judgment for the amount of damages, even though entered in the usual form of a judgment in an action of debt, passes no title to the company before payment, nor does it compel the acceptance of or payment for the land: *Ibid.*

Where, in proceedings to assess the damages for a right of way already occupied, the amount assessed is paid to the sheriff, and an appeal is afterwards taken, the railroad company cannot, by abandoning its right of way, defeat the land owner's right to the amount so paid, but such abandonment may be considered in determining the damages to which the land owner shall be entitled upon the trial of such appeal, and it would be error to enter a judgment for additional damages contingent upon the re-occupation of the land by the company; and *held*, that such re-occupation should not be made without a new assessment of damages: *Hastings v. Burlington & M. R. R. Co.*, 38-316.

A proceeding instituted by a railway company to condemn a right of way may be dismissed as any other action without prejudice, and will not defeat a subsequent proceeding of the same character to condemn the right of way over such property: *Corbin v. Cedar Rapids, I. F. & N. W. R Co.*, 66-73.

Remedies of land owner. The proceedings may be instituted by the land owner after the railway iscompleted: *Hibbs v. Chicago & S W. R. Co*,39-340.

The method provided for ascertaining and compelling the payment of the damages is exclusive, and none other can be pursued. But the owner is not deprived of his right to bring action for the possession of his property when taken withoutcompensation: *Daniels v. Chicago & N. W. R. Co.*, 35-129.

A party has, by appeal, an adequate remedy against any irregularities which may occur in the proceedings or any injustice which may be done him in the award, and if he has personal notice this remedy is exclusive as to all such matters, and he cannot rely upon irregularities as a ground for restraining the construction of the road in accordance with such proceedings: *Phillips v. Watson*, 63-28.

If the company enters upon the land before the damages are paid it may be treated as a trespasser. The owner is not compelled to resort to an injunction or an action for the amount: *Henry v.Dubuque & P. R.Co* , 10-540.

Where the occupancy of a right of way is commenced and continued without right, the company is a mere trespasser, and the land owner or his grantee may maintain an action for damages for the occupation of the land: *Donald v. St. Louis, K. C. & N. R. Co.*, 52-411.

If the company enters before payment of the damages assessed it may be held liable in damages as for a tort: *Dimmick v. Council Bluffs & St. L. R. Co.*, 62-409.

In an action to recover possession of land occupied without condemnation by the company, plaintiff may recover damages for the use of the premises. It is not necessary that such damages be assessed in a condemnation proceeding: *Birge v. Chicago, M. & St. P. R. Co.*, 65-440; *Rush v. Burlington, C. R. & N. R. Co.*, 57-201.

On failure of the company which is already in possession and use of the premises for right of way to pay the amount assessed, it may be restrained by injunction from further using the premises: *Henry v. Dubuque & P. R. Co.*, 10-540; *Richards v. Des Moines Valley R. Co.*, 18-259.

The question whether the land is subject to condemnation for right of way may be raised in the condemnation proceedings and [illegible] an injunction to prevent such proceedings being instituted against the premises on the ground that they are otherwise appropriated to the public use will not lie: *Waterloo Water Co. v. Hoxie*, 89–317.

While equity will not interfere by injunction with condemnation proceedings where the right of the parties can be properly determined in such proceeding, yet where by such proceeding one railway was seeking to secure the right to cross another at grade, *held* that a court of equity might interfere upon a showing that such crossing would improperly obstruct the business of the company and might make provision for an under or over crossing: *Chicago, B. & Q. R. Co. v. Chicago, Ft. M & D. M. R. Co.*, 91–16.

The same right to an injunction will accrue to the land owner in case he institutes proceedings for assessing the damages: *Hibbs v. Chicago & S. W. R. Co.*, 39–340.

The land owner is not estopped from maintaining proceedings to recover compensation for land taken for right of way by the fact that he has allowed the railway company to go upon and use his land for that purpose, and make improvements thereon: *Ibid.*

In such cases he may maintain an injunction restraining defendant from further using the right of way without making compensation, or maintain ejectment for the possession of the premises, if it appears that damages have been assessed and nothing but payment is wanting to entitle the company to the continued use of its right of way. It is proper to provide that no execution for the possession of the premises under such circumstances shall issue in the action of ejectment if the damages are paid within a limited time: *Conger v. Burlington & S. W. R. Co.*, 41–419.

By agreement of parties an appeal was taken from the assessment of damages and judgment for the amount assessed was entered in such appeal, and execution thereon was stayed for two years, and the railroad was constructed through the property without objection. *Held*, that upon failure to pay the amount of the judgment at the time specified, the owner could proceed by injunction to restrain any further use of his property until compensation should be made: *Irish v. Burlington & S. W. R. Co.*, 44–380.

A railway company may be dispossessed of its right of way by a judicial sale in a proceeding to enforce the land owner's right. So *held* where the owner of land had agreed to give the right of way in consideration of the performance of certain conditions by the company which had not been performed, and action was brought by the owner to foreclose his vendor's lien. Also, *held*, that the vendor's lien in such case was superior to the title of the purchaser of the railroad at foreclosure sale: *Varner v. St. Louis & C. R. R. Co.*, 55–677.

No provision is made for the determination of the question whether the owner refuses to grant the right of way or whether the owner and the corporation cannot agree upon the compensation to be paid. If the parties appear in the condemnation proceedings it is an indication that they could not agree; but at any rate the finding in the condemnation proceeding cannot be attacked on the ground that these preliminary facts did not exist: *Carlile v. Des Moines & K. C. R. Co.*, 68 N. W., 784.

Deposit of damages assessed: The fact that the company deposits the sum found due with the sheriff will not prevent the land owner from recovering, on appeal, the actual damage to the property and interest thereon from the time it is taken, even though the amount of the original damages is found to be less than that assessed by the sheriff's jury: *Noble v. Des Moines & St. L. R. Co.*, 61–637.

The sheriff, in receiving the money deposited as security cannot be regarded as the agent of the owner, but he is the agent of the railway company, and if, through the unfaithfulness or mistake of the sheriff, the money is lost before reaching the hands of the land owner, such loss does not fall upon him but upon the company making the deposit: *White v. Wabash, St. L. & P. R. Co.*, 64–281.

For moneys paid to a sheriff by the company the land owner may maintain action against him at any time after the expiration of the thirty days allowed for appeal. The statute of limitations, therefore, runs against such an action from that time, and the fact that the land owner has refused the money and attempted by injunction to restrain the taking of his land will not prevent the running of the statute: *Lower v. Miller*, 66–408.

SEC. **2000. Assessment of damages—notice.** The freeholders appointed shall be the commissioners to assess all damages to the owners of real estate in said county, and said corporation, or the owner of any land therein, may, at any time after their appointment, have the damages assessed in the manner herein prescribed, by giving the other party ten days' notice thereof in writing, if a resident of this state, specifying therein the day and hour when such commissioners will view the premises, which shall be served in the same manner as original notices. [C. '73, § 1245; R., § 1318.]

Where a mortgage upon the property appears of record, notice must be given to the mortgagee, or he will not be bound by the proceedings: *Severin v. Cole*, 38–463. And see *Cochran v. Independent School Dist.*, 50–663.

Where the proceedings are based upon the assumption that the owner is a nonresi-

dent and unknown, such assumption will be deemed true on *certiorari* unless the contrary is made to appear: *Everett v. Cedar Rapids & M. R. R. Co.*, 28–417.

The notice must name the person whose land is affected by the proceedings. It is not sufficient that it be directed to all persons having an interest in certain described property: *Birge v. Chicago, M. & St. P. R. Co.*, 65–440.

Where a right of way over agricultural college land in possession of a lessee was condemned in proceedings to which the college was a party, and afterwards, the lessee's right being forfeited, the premises were sold to another, *held*, that the condemnation proceedings were binding on the subsequent purchaser of the premises: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

SEC. **2001. Minor or insane owner.** If the owner of any lands is a minor, insane, or other person under guardianship, the guardian of such minor, insane or other person may, under the direction of the judge of the district court, agree and settle with said corporation for all damages by reason of the taking of such lands for any of the purposes aforesaid, and may give valid conveyances of such land. [C.'73, § 1246; R., § 1316.]

SEC. **2002. Nonresident owner.** If the owner of such lands is a nonresident of this state, no demand of the land for a right of way or other purpose shall be necessary, except the publication of a notice, which may be in the following form:

Notice for the appropriation of lands for railway purposes.

To (here name each person whose land is to be taken or affected) and all other persons having any interest in or owning any of the following real estate (here describe the land by its congressional numbers in tracts not exceeding one-sixteenth of a section, or, if the land consists of lots in a town or city, by the numbers of the lot and block).

You are hereby notified that the.....has located its railway over the above described real estate, and desires the right of way over the same, to consist of a strip or belt of land.....feet in width, through the center of which the center line of said railway will run, together with such other land as may be necessary for bermes, waste banks and borrowing pits, and for wood and water stations (or desires the same for any other purpose for which property is authorized by this chapter to be taken), and unless you proceed to have the damages as to the same appraised on or before the .....day of....., A. D..... (which time must be at least four weeks after the publication of the notice), said company will proceed to have the same appraised on the.....day of.....A. D.....(which must be at least eight weeks after the first publication of the notice), at which time you can appear before the appraisers that may be selected.

By.....Attorney, or.....Agent, ...Railway Company.

[C.'73, § 1247.]

Where proceedings were based upon the assumption that the owner was a nonresident and unknown, *held*, on *certiorari*, that the contrary not being made to appear, the proceedings were not irregular: *Everett v. Cedar Rapids & M. R. R. Co.*, 28–417.

The notice must name the person whose land has been taken or affected. It is not sufficient that it is directed to all other persons having an interest in the property described: *Birge v. Chicago, M. & St. P. R. Co.*, 65–440.

SEC. **2003. Notice published.** Said notice shall be published in some newspaper in the county, if there is one, if not, then in a newspaper published in the nearest county through which the proposed railway is to be run, for at least eight successive weeks prior to the day fixed for the appraisement at the instance of the corporation. [C.'73, § 1248.]

SEC. **2004. Appraisement.** At the time fixed for either of the aforesaid notices, the appraisement of the lands described may be made and returned; but the appraisement and return may be in parcels larger than forty acres belonging to one person and lying in one tract, unless the agent or attorney of the corporation or the commissioners have actual knowledge that the tract does not belong wholly to the person in whose name it appears of record; and in case of such knowledge the appraisement shall be made of the different portions as they are known to be owned. [C. '73, § 1249.]

That damages to the entire premises of a property owner, and not merely to the government subdivision through which the road passes, are to be assessed, see notes to § 1999.

SEC. **2005. Dwelling-house, garden, or orchard.** If it appears from the finding of the commissioners that the dwelling-house, outhouse, orchard or garden of the owner of any land taken will be overflowed or otherwise injuriously affected by any dam or reservoir to be constructed as authorized by this chapter, such dam shall not be erected until the question of such overflowing or other injury has been determined in favor of the corporation upon appeal. [C. '73, § 1250.]

SEC. **2006. Vacancies filled.** In case of the death, absence, neglect or refusal of any of said freeholders to act as commissioners as aforesaid, the sheriff shall summon other freeholders to complete the panel. [C. '73, § 1251; R., § 1319.]

SEC. **2007. Costs.** The corporation shall pay all the costs of the assessments made by the commissioners and those occasioned by the appeal, including reasonable attorney fees to be taxed by the court, unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the commissioners. [C.'73, § 1252; R., § 1317.]

Where the damages allowed on the appeal are less than those awarded in the assessment, in the absence of any showing that either party has made an offer, the costs should be apportioned: *Noble v. Des Moines & St. L. R. Co.*, 61-637.

If, on the trial of an appeal by the land owner, a less amount of damages is given than was awarded by the commissioners, the court is not bound to tax all the costs of appeal to him, but may distribute them according to the general rules of law without reference to this section: *Jones v. Mahaska County Coal Co.*, 47-354.

The purchaser of a railroad pending an appeal from allowance of damages for right of way becomes liable for the payment of costs incurred in such proceeding: *Frankel v. Chicago, B. & P. R. Co.*, 70-424.

Where the costs were taxed to one party, and the court was not asked to make an apportionment, *held*, that the order of the court would not be disturbed upon appeal: *Cox v Mason City & Ft. D. R. Co.*, 77-20.

SEC. **2008. Report recorded.** The report of the commissioners, where the same has not been appealed from, and the amount of damages assessed and costs has been deposited with the sheriff, or if an appeal is taken, and the amount of damages assessed on the trial thereof has been paid to the sheriff, may be recorded in the records of deeds in the county where the land is situated, and such record shall be presumptive evidence of title in the corporation of the property so taken, and shall constitute constructive notice of the rights of such corporation therein. [C.'73, § 1253.]

The company cannot be compelled to pay the damages assessed and take the right of way, but may waive the rights acquired by the proceedings, being liable, however, for costs, and any damages actually suffered by the land owner: *Gear v. Dubuque & S. C. R. Co.*, 20-523.

The recording of the award, if done by mistake, does not pass any title to the company so as to raise an implied contract to pay the amount of the award; certainly not until the fact of the mistake has become known to the company and it has had a reasonable time to correct it: *Dimmick v. Council Bluffs & St. L. R. Co.*, 58-637.

Where a portion of plaintiff's land was included in the right of way condemned, but the road was not actually constructed over any portion of his land, which remained fenced and was not entered upon, *held*, that an appropriation did not appear, and title to the right of way did not pass to the company until it had made payment: *Ibid.* And see *S. C.*, 62-409.

SEC. **2009. Appeals—how taken.** Either party may appeal from such assessment to the district court, within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant. [C.'73, § 1254; R., § 1317.]

Waiver: Objections to the jurisdiction of the sheriff's jury are not waived by appearance on appeal: *Stough v. Chicago & N. W. R. Co.*, 71-641.

Exclusive remedy: The remedy by appeal is conclusive of all other remedies as to the manner and method of taking advantage of irregularities in the proceeding: *Phillips v. Watson*, 63-28.

An appeal is a plain, adequate and speedy

remedy when the claim is that insufficient damages are given. Irregularities in the proceding cannot be corrected by *certiorari: Cedar Rapids, I. F. & N. W. R. Co. v. Whelan*, 64-694.

Joint assessment: Where the damages are assessed jointly in favor of two owners, one of them cannot properly prosecute an appeal without joining the other as appellant or making him a party to the proceedings by notice. Upon failure to do so the appeal should be dismissed on motion: *Chicago, R. I. & P. R. Co. v. Hurst*, 30-73.

A subsequent settlement with a part of the owners in common where the assessment is not apportioned, will not defeat an appeal by those not settled with: *Ruppert v. Chicago, O. & St. J. R. Co.*, 43-490.

By mortgagee: The owner may take an appeal without joining a mortgagee therein, although an award has been made in favor of the owner and mortgagee jointly: *Lance v. Chicago, M. & St. P. R. Co.*, 57-636.

Where damages for right of way are awarded jointly to the owner and the mortgagees of the land, upon notice to all of them, the mortgagor may maintain an appeal from the award without making the mortgagees parties thereto: *Dixon v. Rockwell, S. & D. R. Co.*, 75-367.

By person not party: A person not a party to the proceedings, although interested in the property, cannot appeal. Such person might perhaps, make himself a party before the commissioners, but he cannot make himself a party merely by appealing: *Connable v. Chicago, M. & St. P. R. Co.*, 60-27; *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R. Co.*, 60-35.

Whether, where publication of notice is authorized to be made to parties interested, all persons interested are to such extent parties as that they may appeal, *quœre: Ibid.*

As to part of damages: Where the assessment covers the entire damage to two contiguous tracts used together and owned by the same person, an appeal cannot be taken from an assessment as to one tract only: *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R. Co.*, 60-35.

The sheriff is not a party to the condemnation proceedings, and is not disqualified from serving notice of appeal therein: *Ibid.*

Notice: Whether the giving of notice to the deputy-sheriff would be sufficient, *quœre: Waltmeyer v. Wisconsin, I. & N. R. Co.*, 64-688.

But where it appeared that notice was brought to the sheriff's attention and he directed the deputy to accept service, *held*, that the notice was sufficient: *Ibid.*

Notice of appeal may be properly served on the engineer in charge of the survey and location of the railroad, and transacting business connected with securing the right of way in the county where the appeal is taken: *Jamison v. Burlington & W. R. Co.*, 69-670.

Where the notice of appeal describes the premises in the same way as they are described in the application for condemnation, the land owner is not limited in his recovery of damages accruing to the portion of his premises described, but may show the damages to his entire farm: *Dudley v. Minnesota & N. W. R. Co.*, 77-408.

The time for taking the appeal begins to run from the time the assessment is in fact made, reduced to writing, and made public, or in some legitimate manner comes to the knowledge of the parties interested: *Ibid.*

Upon motion being made to dismiss the appeal because not taken in time, affidavits of jurors for making the assessment are receivable to show when the assessment was actually made: *Ibid.*

Filing papers: Where the appeal has properly been taken by notice, the appellant should not be prejudiced by a failure of the officer to file the papers at the time required by statute: *Robertson v. Eldora R., etc., Co.*, 27-245.

Change of venue may be had on the appeal the same as in civil actions: *Whitney v. Atlantic Southern R. Co.*, 53-651.

Assessment of damages on appeal: On appeal the question of damages is to be determined upon its merits, and the regularity of prior proceedings, such as the selection of commissioners, etc., is not to be called in question. That can only be done by *certiorari: Mississippi & M. R. Co. v. Rosseau*, 8-373. And see *Runner v. Keokuk*, 11-543.

The assessment of damages upon appeal is to be made without any reference to that appealed from: *Hahn v. Chicago, O. & St. J. R. Co.*, 43-333.

The notice of apppeal is presumptive evidence of an assessment from which an appeal can be taken: *Ibid.*

An appeal by the land owner from the assessment of the commissioners cures any defect in regard to giving notice of the assessment to such owner: *Borland v. Mississippi & M. R. Co.*, 8-148.

In the proceedings on appeal an offer to confess judgment may be made with the consequences provided in § 3818, with reference to costs: *Harrison v. Iowa Midland R. Co.*, 36-323.

The company may dismiss the proceedings at any time before judgment upon payment of costs: *Burlington & M. R. Co. v. Sater*, 1-421.

It would seem that a land owner appealing need not give bond; but even if that be necessary, the failure to give bond at the time the appeal is taken ought not to work the dismissal of the appeal: *Robertson v. Eldora R., etc., Co.*, 27-245.

Judgment: Where, under the provisons of a previous statute, general judgment was rendered against the company on the appeal, *held*, that it could have no greater effect than an assessment of damages: *Gear v. Dubuque & S. C. R. Co.*, 20-523.

Allowance of interest: In case of an appeal by the railway company the proper measure of damages is the value of the land at the time of its appropriation, with interest thereon to the date of judgment: *Daniels v. Chicago, I. & N. R. Co.*, 41-52.

Interest may be allowed on the damages awarded from the time of condemnation, provided the damages are greater than those allowed by the sheriff's jury: *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52-613.

Interest on the assessment does not begin to run from the time of assessment, but only from the time of taking possession: *Haye v. Chicago, M. & St. P. R. Co.*, 64-753.

In estimating the damages upon appeal the jury may consider the injury as originally sustained, and the interest which the original sum would have borne during the delay: *Noble v. Des Moines & St. L. R. Co.*, 61-637.

Where the court simply directed the jury to allow plaintiff the market value of the land taken at the time that it was taken, *held*, that such instruction was proper, and that interest should be allowed on the amount of the verdict from the time of the appropriation: *Hollingsworth v. Des Moines & St. L. R. Co.*, 63-443.

The damages are to be assessed as of the date of the assessment by the sheriff's jury, and then upon the rendition of the verdict the court should make the proper order touching the question of interest. Such order should fix the date when the interest begins to run, which should be when the company deprives the property owner of the use of his property: *Reed v. Chicago, M. & St. P. R. Co.*, 25 Fed., 886.

After a final adjudication of the claim for damages on an appeal to the district court and payment of the amount awarded the claimant cannot maintain an original action to recover interest on the amount thus awarded nor can the cause be redocketed for that purpose: *Jamison v. Burlington, & W. R. Co.*, 87-265.

In the proceeding all the rights of the parties should be adjusted, and the land owner is not entitled after appeal to bring another action to recover interest on the money deposited in accordance with the condemnation proceedings: *Jamison v. Burlington & W. R. Co.*, 78-562.

SEC. **2010. Deposit—Acceptance.** An appeal shall not delay the prosecution of work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed. The sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof. An acceptance by the land owner of the damages awarded by the commissioners shall bar his right to appeal. [C. '73, §§ 1255-6; R., § 1317.]

If an appeal is taken to the lower court and the damages awarded are greater than were allowed by the commissioners, the company desiring to appeal to the supreme court must deposit the additional amount with the sheriff, and is not relieved from the obligation to do so by giving a *supersedeas* bond: *Downing v. Des Moines N. W. R. Co.*, 63-177.

The right of the owner to receive the amount so deposited is suspended until the appeal is decided. The property is not taken, in an absolute sense, until the final assessment is paid, and the section is, therefore, not unconstitutional: *Peterson v. Ferreby*, 30-327.

The sheriff holds the deposit not as agent of the owner, but as agent of the company, and if it does not come into the hands of the owner, or is for any reason lost or misappropriated, such loss must be sustained by the company: *White v. Wabash, St. L. & P. R. Co.*, 64-281.

For moneys paid to a sheriff the land owner may maintain action against him at any time after the expiration of thirty days allowed for appeal. The statute of limitations, therefore, runs against such action from that time, and the fact that the land owner has refused the money and has attempted by injunction to restrain the taking of his land will not prevent the running of the statute: *Lower v. Miller*, 66-408.

The fact that the owner of the property accepts the money awarded will defeat an appeal by him, but not an appeal of the company; on an appeal by the latter the owner is not estopped from claiming any increased amount of damage to which he may appear to be entitled: *Burns v. Chicago, Fort M. & D. M. R. Co.*, 70 N. W., 728.

Before there was any statutory provision on the subject, it was held that acceptance of the damages awarded would bar an appeal by the land owner: *Mississippi & M. R. Co. v. Byington*, 14-572.

SEC. **2011. Trial—judgment—costs.** On the trial of the appeal, no judgment shall be rendered except for costs. The amount of damages shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff, before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the land owner, reasonable attorney's fees, to be taxed by the court. [C. '73, § 1257.]

Under the Revision (which contained no similar provision), *held*, that where a general judgment was rendered against the company on appeal, it could have no greater effect than an assessment of damages as contemplated by the statute: *Gear v. Dubuque & S. C. R. Co.*, 20-523.

Interest may be allowed on the damages awarded from the time of condemnation, provided such damages are greater than as found by the sheriff's jury: *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52-613.

Further as to interest, see notes to § 2009.

In such a proceeding no judgment can be

rendered except for costs. After the assessment, the company, by paying the costs and damages, may relieve itself from further liability. Therefore the statute of limitations does not apply to such a proceeding: *Hartley v. Keokuk & N. W. R. Co.*, 85-455.

SEC. **2012. Additional deposit.** If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on, or using or controlling, the premises. The sheriff, upon being furnished with a certified copy of the assessment, may remove said corporation, and all persons acting for or under it, from said premises, unless the amount of the assessment is forthwith paid or deposited with him. [C.'73, § 1258.]

Where the amount of damages awarded by the commissioners is paid to the sheriff and the company enters upon the land, if upon appeal by the land owner a larger sum is awarded, the company may be enjoined from further use of the property until it pays such further sum: *Richards v. Des Moines Valley R. Co.*, 18-259.

The federal court will not order its marshal to oust the railway company from the possession of the premises for non-payment of damages for the right of way fixed in that court on appeal, when the remedy of the statute, by application to the sheriff, is open to the property owner: *Reed v. Chicago, M. & St. P. R. Co.*, 25 Fed., 886.

If appeal is taken from the award and the damages awarded are greater than were allowed by the commissioners, the company desiring to appeal to the supreme court must deposit the amount with the sheriff, and is not relieved from the obligation by giving a *supersedeas* bond: *Downing v. Des Moines N. W. R. Co.*, 63-177.

SEC. **2013. Damages reduced.** If the amount awarded by the commissioners is decreased on the trial of the appeal, the reduced amount only shall be paid the land owners. [C. '73, § 1259.]

SEC. **2014. Channels or ditches along right of way.** In any case where it would have the right to dig a channel or cut a ditch, so as to change and straighten the course of a stream or water course too frequently crossed by such road, for the purpose of protecting the right of way and road-bed, or promoting safety and convenience in operation of the road, it may, if it cannot agree with the owners of the land to be crossed by such channel or ditch, either as to its location or the price to be paid for land taken, condemn an amount sufficient and convenient for such purpose, in the same manner that lands for the right of way for the road-bed may be condemned; and such condemnation shall be made with the same rights of appeal as in other cases of condemnation of land for right of way uses. Nothing in this section shall give the corporation the right to change the course of any stream or water course where such right does not otherwise exist, nor to turn such stream or water course off from any cultivated meadow, or pasture lands, when it only touches such lands at one point, unless the owner or owners thereof consent to such diversion. [18 G. A., ch. 191.]

This section, at least in so far as it applies to cases where the right of way is taken, as provided for the purpose of promoting the safety of the traveling public, is not unconstitutional as authorizing the taking of private property for other than a public purpose: *Reusch v. Chicago, B. & Q. R. Co.*, 57-687.

SEC. **2015. Non-user of right of way.** Where a railway constructed in whole or in part has ceased to be operated for more than five years; or where the construction of a railway has been commenced and work on the same has ceased and has not, in good faith, been resumed for more than five years, and remains unfinished; or where any portion of any such railway has not been operated for four consecutive years, and the rails and rolling stock have been wholly removed therefrom; it shall be treated as abandoned, and all rights of the person or corporation constructing or operating any such railway, over so much as remains unfinished or from which the rails and rolling stock have been wholly removed, may be entered upon and appropriated as provided in the next section. If the railway or any part thereof shall not be used or operated for a period of eight years, or if, its construction having been commenced, work on the same

has ceased and has not been in good faith resumed for eight years, the right of way, including the road-bed, shall revert to the owner of the land from which said right of way was taken. [18 G. A., ch. 15; 15 G. A., ch. 65; C.'73, § 1260.]

This section defines what shall be regarded as an abandonment of a right of way, and nothing less than non-user for eight years will authorize the owner of the land from whom the right of way was taken to retake possession. If he does so, the company may at any time within eight years enter upon the land again and resume its use: *Fernow v. Chicago, M. & St. P. R. Co.*, 75–526.

These provisions apply to the case of a railroad which has been commenced and abandoned before the enactment of the statute. The time which had expired before the enactment and after the abandonment of the work is to be taken into account in computing the eight years. A railroad company has no vested right by contract to hold a right of way which it has abandoned, and the section is not unconstitutional in that respect: *Skillman v. Chicago, M. & St. P. R. Co.*, 78-404.

In the absence of statute non-user for any length of time would not work a forfeiture, but if without intention to resume the use it would constitute an abandonment; and therefore under this section mere non-user, without other evidence of intention to abandon, will not constitute an abandonment unless it has continued for eight years when it will constitute an abandonment without regard to the intent: *McClain v. Chicago, R. I. & P. R. Co.*, 90–646.

But the statute does not apply to an agreement between the parties for forfeiture upon other terms than those provided in it and a stipulation that abandonment shall follow if the grantor shall cease permanently to use the right of way for the purposes for which it is conveyed will be effectual without regard to the length of time of non-use: *Ibid.*

The easement being acquired by express grant is not barred by a failure to use the same for ten years, and a possession of the property, during that time, by the original owner, in the absence of any act of his preventing the use: *Barlow v. Chicago, R. I. & P. R. Co.*, 29–276; *Noll v. Dubuque, B. & M. R. Co.*, 32–66.

A land owner who has received damages for a right of way and has entered into an agreement by which another company has taken and used such right of way is not in position to rely on an abandonment by the first company: *Marling v. Chicago, C. R. & N. R. Co.*, 67–331.

A portion of a line may become abandoned. Whether it is so or not is a question of fact: *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57–249.

SEC. **2016. Condemning abandoned right of way.** In case of abandonment, as provided in the preceding section, any other corporation may enter upon such abandoned work, or any part thereof, and acquire the right of way over the same, and the right to any unfinished work or grading found thereon, and the title thereto, by proceeding as near as may be in the manner provided in this chapter; but parties who have previously received compensation in any form for the right of way on the line of such abandoned railway, which has not been refunded by them, shall not be permitted to recover the second time. The value of such road-bed and right of way, excluding the work done thereon, when taken for a new company, shall be assessed for the benefit of the former company or its legal representative. [C.'73, § 1261.]

Where, upon condemnation of a right of way over agricultural college land, the damages assessed were deposited with the sheriff, *held*, that without return of the amount thus deposited the grantee of the agricultural college could not have another assessment of damages for the use of the premises by another railway company: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

A land owner who has received compensation which has not been refunded by him cannot recover the second time: *Dubuque & D. R. Co. v. Diehl*, 64–635.

SEC. **2017. Raising or lowering highways.** Any such corporation may raise or lower any turnpike, plank road or other road for the purpose of having its railway cross over or under the same, and in such cases said corporation shall put such road, as soon as may be, in as good repair and condition as before such alteration. [19 G. A., ch. 122; 15 G. A., ch. 47; C. '73, § 1262; R., § 1321.]

This section as it originally stood, authorizing a railway corporation to raise or lower a highway "for the purpose of having its railway pass over or under the same," was construed to confer upon railway companies the right to construct their tracks upon the public highways, including the streets of a city, without compensation to an abutting property owner, where he did not own the fee in the highway or street: *Milburn v. Cedar Rapids*, 12–246; *Gear v. Chicago, C. & D. R. Co.*, 39–23.

But as now amended, by substituting "cross" for "pass," it cannot be construed

as authorizing such use of highways or streets without other express legislative authority: *Stanley v. Davenport*, 54–463.

The objection imposed by the statute upon a railway company constructing and operating its railway, to construct at all points where the highway crosses it sufficient and safe crossings, is binding upon all corporations using railways in the state: *Farley v. Chicago, R. I. & P. R. Co.*, 42–234.

The embankment constructed as a necessary approach to the crossing is a part of the crossing and the company is required to keep it in repair: *Ibid.*

The company is bound to keep crossings in a safe condition, and this obligation extends to the approaches to a bridge: *Newton v. Chicago, R. I. & P. R. Co.*, 66–422.

The company is under obligation to build and keep in repair an overhead crossing and the approaches thereto, provided the grade crossing is unsuitable and the overhead crossing is necessary to put the street in proximately as good repair and condition as before the railroad was built: *Ibid.*

The burden of putting the highway into proper condition is imposed upon the railway company and attaches when the railway is constructed and the burden is so connected with the right to maintain and operate the railway that liens acquired by creditors on the railway property are subject to it: *Ft. Dodge v. Minneapolis & St. L. R. Co.*, 87–389.

In a proceeding by mandamus to compel the railroad company to put in an overhead crossing, the company being in the hands of a receiver appointed by the same court, may be directed by the court as to the plans and specifications in accordance with which such crossing shall be constructed: *Ibid.*

As the railway has the right to raise or lower highways at crossings, an indictment charging the company with obstructing the public highway with digging, plowing and scraping such highway, throwing up embankments and making excavations, etc., at points where the railway crosses such highway, does not state facts sufficient to constitute the crime of obstructing the highway: *State v. Chicago, B. & P. R. Co.*, 63–508.

In an action for personal injuries received at a public crossing, the fact that the crossing is not as good as the highway was before the construction of the railway is admissible for the purpose of showing what vigilance was required of the railway as to the use of signals and the operation of trains in approaching such crossing: *Funston v. Chicago, R. I. & P. R. Co.*, 61–452,

Where by reason of there not being sufficient service of notice a highway which is located across the right of way is not legally established the company is not under obligation to put in a crossing: *State ex rel. v. Iowa Cent. R. Co.*, 91–275.

The company has no right to cross a street in a city or town diagonally without making compensation to abutting property owners for damages as required by § 767: *Enos v. Chicago, St. P. & K. C. R. Co*, 78–28.

A railroad may cross a street in a city without the consent of the city council required by § 767: *Gates v. Chicago, St. P. & K. C. R. Co.*, 82–518.

The company may raise or lower the highway for the purpose of having its road cross over or under the same, but not for the purpose of making a grade crossing higher or lower than the grade of the highway: *Ibid.*

While the company may raise a highway crossing for the purpose of having its railway pass under, it is required to put such highway in as good condition as before the alteration. This authority does not exempt the company from damages for which it is otherwise liable under the provisions of § 767, with reference to the construction of railways in streets: *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84–27.

The owner of property abutting on a street over which a railway is constructed under the provisions of § 767, not being the owner of the fee of the street, cannot recover unless he can show actual damages: *Cook v. Chicago, M. & St. P. R. Co.*, 83–278.

And see notes to § 767, as to damages to abutting owners where the track is laid in a street.

The railway has no right to fence its track where it crosses streets or alleys properly laid out, whether they have been improved and used by the public or not: *Lathrop v. Central Iowa R. Co*,. 69–105. And see notes to § 2055.

Highways may be laid out across the right of way: *Chicago, M. & St. P. R. Co. v. Starkweather*, 66 N. W., 87.

But the company cannot be compelled to construct a viaduct crossing: *Albia v. Chicago, B. & Q. R. Co.*, 71 N. W., 541.

SEC. **2018. Further repairs.** If the supervisors, trustees, city council, or other person having jurisdiction over such road, require further or different repairs or alterations made thereon, or if the same, in their opinion, is unsafe, they shall give notice thereof in writing to any agent or officer of the corporation, and, if the parties are unable to agree respecting the same, either may apply by petition, setting out the facts, to the district court or judge thereof, and such court or judge shall cause reasonable notice to be given the adverse party of the application. The petition shall be filed in the clerk's office, and may be answered as in other cases. The court shall determine the matter in a summary way, and make the necessary orders in relation thereto, giving such corporation, if found at fault, a reasonable time to comply therewith, and, upon failure to do so, it may enjoin the corporation from using so much of its road as interferes with any such roads,

and may award costs in favor of the prevailing party. [C.'73, § 1263; R., §§ 1322-3.]

SEC. **2019. Temporary ways.** Every such corporation, when employed in raising or lowering any road, or in making any other alteration by means of which the same may be obstructed, shall provide and keep in good order suitable temporary ways to enable travelers to avoid or pass such obstructions. [C.'73, § 1264; R., § 1324.]

SEC. **2020. Crossing railways, canals, etc.** Any such corporation may construct and carry its railway across, over or under any railway, canal or water course, when it may be necessary in the construction of the same, and in such cases it shall so construct its crossings as not unnecessarily to impede the travel, transportation or navigation upon the railway, canal or stream so crossed. Said corporation shall be liable for the damages occasioned to any person injured by reason of said crossing. [C.'73, § 1265; R., § 1325.]

The requirement of § 2073, that trains shall come to a full stop at crossings of other railroads, necessarily renders crossings on grade an impediment, to some extent, to travel and transportation, but the inconvenience and delay arising from their use must be borne by the company. The company constructing an intersecting line is required to so construct the crossing as not to unnecessarily interfere with the crossing of the other road. Whether such crossing shall be made at grade, or over or under the other, must depend upon circumstances; and under particular facts, *held*, that a requirement that an under-crossing be constructed was not unreasonable: *Humestone & S. R. Co. v. Chicago, St. P. & K. C. R. Co.*, 74-554.

The right of a railway to cross another is subject to the limitation that the crossing shall be so made as not unnecessarily to interfere with the use of the railway crossed and where such interference is plain it is within the jurisdiction of a court of equity to prescribe the method and conditions under which such crossing may be made: *Chicago, B. & Q. R. Co. v. Chicago, Ft. M & D. M. R. Co.*, 91-16.

SEC. **2021. Bridges—damages.** Every such corporation shall maintain and keep in good repair all the bridges, with their abutments, which it may construct for the purpose of enabling its railway to pass over or under any turnpike, road, canal, water course or other way, and shall be liable for all damages sustained by any person in consequence of any neglect or violation of the provisions of this chapter. [C.'73, §§ 1266–7; R., §§ 1326–7.]

The provisions of this section do not extend the liability of the corporation to the acts of those not its agents or servants: *Callahan v. Burlington & M. R. R. Co.*, 23-562.

SEC. **2022. Private crossings.** When any person owns land on both sides of any railway, the corporation owning the same shall, when requested so to do, make and keep in good repair one cattle-guard, and one causeway or other adequate means of crossing the same, at such reasonable place as may be designated by the owner. [C.'73, § 1268; R., § 1329.]

When required: It is evident that the provisions of this section are not intended to apply to streets in cities and towns: *Gates v. Chicago, St. Paul & K. C. R. Co.*, 82-518.

The company need not provide a crossing unless the landowner requires it: *Henderson v. Chicago, R. I. & P. R. Co.*, 48-216.

The obligation to erect a private crossing by reason of the provisions of this section, and not under contract between the parties, is a public obligation of such a nature that the board of railroad commissioners has jurisdiction to investigate the question and make an order with reference thereto: *State v. Mason City & Ft. D. R Co.*, 85-516.

The remedy by *mandamus* in such a case is not exclusive: *Ibid.*

The duty of the company to construct a private crossing may be enforced by *mandamus*: *Boggs v. Chicago, B. & Q. R. Co.*, 54-435.

And in the particular case, *held*, that a request of the person owning land on both sides of the railway track, for an open crossing at a particular point, was not unreasonable, and compliance therewith might be enforced: *Ibid.*

The owner of land is authorized to designate the place where the crossing for his benefit shall be made, and the limitation put upon his choice of location is that the place designated shall be a reasonable one: *Van Vrankin v. Wisconsin, I. & N. R. Co.*, 68-576.

The location and character of a crossing must be determined with due regard for all the interests involved in its construction and maintenance, and the reasonable use which the land owner desires to make of it, its expense and the effect it will have upon the operation of the railroad and the safety of life and property, and in a particular case, *held*, that while a crossing would be a great convenience to the land owner, yet the in-

convenience and danger to the operation of trains by the company was such that it should not be required: *Truesdale v. Jensen*, 91-312.

Where the only means a citizen has of reaching a highway is across the railway, he may insist that an open crossing be provided for him by means of which he may reach the highway without stopping to open gates or remove bars: *Gray v. Burlington & M. R. R. Co.*, 37-119.

Where a party owning land on opposite sides of a highway maintains a lane and fences in such manner as to indicate that he prefers an open crossing instead of one closed by gates, the company will not be liable to him for failure to maintain such gates: *Tyson v. Keokuk & D. M. R. Co.*, 43-207.

Where a railroad passes through a pasture the owner is not, as a matter of course, entitled to an open crossing for his stock, regardless of any other means of crossing. To entitle him to such a crossing it must appear that there is no provision for passing from one part of the field to the other, which is adequate under the circumstances: *Curtiss v. Chicago, M. & St. P. R. Co.*, 62-418.

The words "one cattle guard" do not mean a single structure on one side of the causeway, but such guard as will prevent stock from going over the causeway on to the track on either side: *State ex rel. v. Burlington, C. R. & N. R. Co.*, 68 N. W., 819.

One grade crossing for each land owner whose land is divided by the right of way with gates and grade is the rule in this state and it is only when a grade crossing is inadequate that other or additional means may be ordered. Therefore, *held*, that where the only objection to such crossing was the inconvenience of opening and closing the gates it was error for the commissioners to order the railroad to construct an under grade crossing: *Ibid.*

While there may be cases where an overhead crossing can properly be required, yet in view of the fact that grade crossings are the rule, it would require a strong case to warrant the court in holding an overhead crossing to be reasonable and just: *State v. Chicago, M. & St. P. R. Co.*, 86-304.

A company required to maintain and construct proper cattle-guards cannot by contract with another company, whose road it purchases, relieve itself from the right or obligation to do so: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96. As to cattle-guards, see also notes to § 2054.

Gates and bars at private crossings: If the company undertakes to and does construct fences, gates, crossings and cattle-guards, etc., for a private owner, a request for their construction may be presumed, and the company will be required to keep them in repair: *Miller v. Chicago, R. I. & P. R. Co.*, 66-546.

Under the provisions of a previous statute, differing from the present one as to private crossings, *held*, that a company had a right to construct fences at such crossings, but must provide the same with gates: *McKinley v. Chicago, R. I. & P. R. Co.*, 47-76, 78.

The duty to maintain gates at private crossings is a part of the duty to fence, and the company will be liable for damages to stock injured by reason of failure to construct such gates or keep them in repair: *Ibid.; Mackie v. Central R. of Iowa*, 54-540.

Where the claim was that stock escaped upon the track by reason of the gate at a private crossing being insufficient, as originally constructed, *held*, that no evidence of knowledge of the defective condition was necessary, as it would have been in the case of a failure to repair: *Morrison v. Burlington, C. R. & N. R. Co.*, 84-663.

A land owner driving cattle in through the gate at one crossing and along the right of way for the purpose of turning them out at the gate at another crossing is guilty of negligence; and in a particular case, *held*, that there was not such negligence on the part of the employes of the company after they were aware of the cattle being on the track as to render them liable for damage in killing some of the cattle: *Davidson v. Central Iowa R. Co.*, 75-22.

As to the liability for failure to fence in general, see § 2055.

Where it is the duty of a railway company to keep closed a gate in a fence of its right of way it will be liable for injury to stock due to negligence in performing that duty: *Manwell v. Burlington, C. R. & N. R. Co.*, 89-708.

The obligations imposed upon the company to fence and to provide private crossings are correlative, and if it does each as well as it can consistently with the other it is not liable: *Henderson v. Chicago, R. I. & P. R. Co.*, 39-220.

Where the company is required to put in a private crossing and erect proper gates and bars, it will not be liable for negligence of a person for whom the crossing is constructed in habitually leaving such gates or bars open, further than that it must use reasonable diligence and care in keeping them closed: *Ibid.*

But the company is not responsible in the absence of negligence, although it knows that the land owner or other persons are in the constant or usual habit of leaving the gates open: *Henderson v. Chicago, R. I. & P. R. Co.*, 43-620.

Where the company nailed up the gates at a private crossing for the reason that they had been habitually left open, and the land owner tore down the fence so that the gates should be open, *held*, that it was error to instruct the jury as to the effect of the abandonment by the land owner of his crossing: *Ibid.*

The sufficiency of the gates provided at a private crossing is a question of fact for the jury; and *held*, that it was error to instruct the jury that such gates were sufficient in view of the fact that the land owner gave no notice to the company of objection thereto, and himself believed them sufficient: *McKenly v. Chicago, R. I. & P. R. Co.*, 43-641.

Under particular facts, *held*, that it was not sufficiently shown that injury to stock resulted from defect in the gate through which they escaped upon the track: *Bothwell v. Chicago, M. & St. P. R. Co.*, 59-192.

In an action for injuries to stock from failure to maintain a gate a at private cross-

ing in good condition, evidence of the condition of the gate two or three days after the accident, it not being shown that its condition as to security was different from what it was at the time of the accident, was held proper: *Mackie v. Central R. of Iowa*, 54–540.

Where the company constructs a gate at a private crossing without fastenings, and in such manner that it may be blown open by the wind, it is not proper to charge the jury that the responsibility for keeping the gate closed is upon the person for whose convenience it is constructed, and that he cannot recover for injuries to his stock coming upon the track through such gate: *Hammond v. Chicago & N. W. R. Co.*, 43–168.

Where it appeared that a gate at a private crossing had been constructed without fastenings and the wind had sometimes blown it open, *held*, that it was improper to exclude from the jury the question as to whether the company was guilty of negligence in thus constructing it, and that the proof of the habit of an adjoining owner to leave the gate open would not preclude recovery on account of such negligence in the original construction, it not appearing that it had been left open by such owner in the particular instance when the damage occurred: *Ibid.*

A company may be liable without knowledge of the defect in the fence if, in the exercise of reasonable care, such knowledge would have been acquired. If the fence was originally defective the company is chargeable with knowledge thereof without express notice: *Ibid.*

The company is only liable for negligence in failing to put up the bars at a private crossing, which have been left down, after acquiring knowledge of their condition, or in not ascertaining their condition, and the burden of proving such negligence is upon the plaintiff: *Perry v. Dubuque Southern R. Co.*, 36–102.

Proof of the mere fact that bars have been left down by some person, and that through them cattle have strayed upon the track and been injured, does not make a *prima facie* case of liability on the part of the company. Such liability, if it exists at all, arises from the conduct of the company after the bars have been left down, either in failing to put them up after acquiring knowledge that they were down, or in neglecting to use reasonable diligence to ascertain such condition: *Ibid.*

Where the employes have closed a gate at a crossing they may assume that it will not be opened by persons passing through without right and the company is not liable for injuries to stock escaping on the track through such gate subsequently left open, the employes not having notice as to such gate being open: *Harding v. Chicago, M. & St. P. R. Co.*, 69 N. W., 1019.

And as to a like rule in regard to failure to repair fences, see notes to § 2055.

It is erroneous to instruct the jury that a person whose stock has been injured upon the track makes a *prima facie* case against the company by showing that the gate through which stock came upon the track was out of repair previous to the accident. Proof of such fact does not cast upon defendant the burden of showing that the accident did not result by reason of the gate being open. Such fact would be a circumstance tending to show that it was open through defendant's fault which might have much or little weight according to circumstances; but the burden of proof would remain upon plaintiff to show negligence of defendant causing the injury: *Johnson v. Chicago, R. I. & P. R. Co.*, 55–707.

The fact that the bars are left down by the land owner will not as to third persons discharge the company from its obligation to keep them closed: *Bartlett v. Dubuque & S. C. R. Co.*, 20–188.

But the land owner could not recover for injuries resulting therefrom, and might be liable to a third person injured by such bars being open: *Russell v. Hanley*, 20–219.

If, by reason of the act of the land owner in wrongfully removing a gate at a private crossing on his land, stock of a third person gets upon the track and is injured, and the company is held liable therefor, it may recover from such land owner the amount which it has been compelled to pay: *Chicago & N. W. R. Co. v. Dunn*, 59–619.

SEC. **2023. Right of way for canal, turnpike, or bridge.** When any corporation or person desires to construct a canal, turnpike, graded, macadamized or plank road, or a bridge, such corporation or person may take such private property as may be necessary for right of way, not exceeding one hundred feet in width, by pursuing the course prescribed in this chapter. [C. '73, § 1269; R., §§ 1278–88; C. '51, §§ 759–779.]

This section does not authorize the taking of private property for landings for a public ferry: *Sandford v. Martin*, 31–67.

SEC. **2024. State may condemn.** Whenever in the opinion of the governor the public interest requires the taking of any real estate for the making or construction of any drain, sewers, yards, walls, buildings or other improvements or conveniences for the use or benefit of the penitentiaries, hospitals for the insane, or other institutions of the state, upon or across private property, the same proceedings may be had in the name of the state as provided in this chapter, and the proceedings shall be conducted by the county attorney of the county in which the land is situated, whenever directed by the governor, or he may appoint some other person for that purpose. [16 G. A., ch. 75; C. '73, § 1271.]

SEC. **2025. Damages.** When the amount of the damages is finally determined, the sheriff or clerk, as the case may be, shall certify the amount thereof to the governor, who shall, by an order indorsed thereon, direct the payment of the same, and the auditor of state shall issue a warrant on the treasury for the amount, which shall be paid with any money not otherwise appropriated, and when paid to the sheriff or person entitled thereto, the state, through its proper officer or agent, may enter on the premises and construct the desired work. [C. '73, § 1272.]

SEC. **2026. Street railways over highways.** Any corporation organized under the laws of this state to operate a street railway in any city or town may, for the purpose of extending its railway beyond the limits thereof, locate, build and operate, by animal or other power, its road over and along any portion of the public road which is one hundred feet or more wide. It shall as soon as practicable put the road in as good repair as it was before its use for such railway. Boards of supervisors are authorized to accept for road purposes conveyances of land adjoining any such road or part thereof sufficient to increase the same to the width of one hundred feet; but in any county in which such company desires to operate its line of railway over a road not less than sixty feet in width, for a distance not over two miles beyond the limits of a city or town to any state institution, the board of supervisors may grant the right to it to operate its line over said road, not exceeding two miles, under such rules and regulations as said board may prescribe. The board shall have the power to rescind or modify such grant, rules and regulations at any time. [18 G. A., ch. 32, § 1.]

SEC. **2027. Damages to abutting owners.** Unless the owners of the land abutting each side of said road shall consent to such use, the railway company shall pay all damages sustained by the land owners caused by building said road, which shall be ascertained and paid in the same manner as is provided for taking private property for works of internal improvement, and it shall also be liable for all damages resulting from the carelessness of its officers, agents or servants in the construction or operation of its railway. [24 G. A., ch. 22; 23 G. A., ch. 21; 18 G. A., ch. 32.]

The last provision of this section would be unnecessary if § 2071 were to be construed as applicable to street railways, but that section and other sections of the same chapter were evidently enacted without having in contemplation their application to street railways: *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed., 82.

SEC. **2028. Ways to lands which have none.** Any person, corporation or copartnership owning or leasing any land not having a public or private way thereto, may have a public way to any railway station, street or highway established over the land of another, not exceeding forty feet in width, to be located on a division line or immediately adjacent thereto, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through inclosed lands, be fenced on both sides by the person or corporation causing it to be established. [25 G. A., ch. 18; 15 G. A., ch. 34, § 1.]

No authority is given by this act to construct a private way. The way, when condemned, is to be a public one, and the act is therefore not invalid: *Jones v. Mahaska, etc., Coal Co.*, 47–35.

A road or way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the manner in which roads and highways are ordinarily used by it, and the mine owner who procured it to be established must use the special privilege which the act confers on him in such a way as not to destroy this right of the public or prevent its enjoyment, and the statute is therefore constitutional. Nor can the construction of the railway in accordance with these provisions be enjoined on the ground that it prevents the owner of the land from constructing a railway thereon for his own use: *Phillips v. Watson*, 63–28.

11 G. A., ch. 127, which provided for the establishment of private ways was held unconstitutional; but, *held*, *arguendo*, that to afford an outlet to a citizen or acess to mineral wealth, a public way might properly be established: *Bankhead v. Brown*, 25–540.

SEC. **2029. Proceedings to condemn.** If the owner of any real estate necessary to be taken refuses to grant the right of way, or if he and the person, partnership or corporation asking its establishment cannot agree

upon the compensation to be paid therefor, the sheriff of the county in which said real estate is situated shall, upon the application of either party, appoint six freeholders of the county, not interested in the same or a like question, who shall assess the damage which said owner will sustain, and make report thereof in writing to the sheriff, and, if the applicant for such way shall, before entering upon said real estate for the purpose of constructing such way, pay to the sheriff for the use of the owner the sum assessed, said road may be at once constructed and maintained. [15 G. A., ch. 34, § 2.]

SEC. **2030. Provisions applicable.** The application to the sheriff, and all other proceedings relating thereto, the result of non-user, and the rights and duties as to other roads, shall be the same as provided in this chapter in relation to the taking of private property for the right of way of railroads, the effect of non-user or abandonment of such rights of way and road-beds, and in the chapter or chapters of this code relating to roads, except that the report of the commissioner and the record thereof shall confer no title upon the applicant for the land so taken, but shall be presumptive evidence of the establishment of such way. [Same, § 3.]

SEC. **2031. Railway established.** Any owner, lessee or possessor of lands having coal, stone, lead or other mineral thereon, who has paid the damages assessed for roads established as above provided, may construct, use and maintain a railway thereon, for the purpose of reaching and operating any quarry or mine on such land and of transporting the products thereof to market. In giving the notices required in such cases, the applicant shall state whether a railway is to be constructed and maintained on the way sought to be established, and, if it be so stated, the jury shall consider that fact in the assessment of damages. [Same, § 4.]

SEC. **2032. Rights of riparian owners.** All owners and lessees of lands or lots situated upon the Iowa banks of the Mississippi or Missouri rivers, upon which any business is carried on which is in any way connected with the navigation of either of said rivers, or to which such navigation is a proper or convenient adjunct, are authorized to construct and maintain, in front of their property, piers, cribs, booms and other proper and convenient erections and devices for the use of their respective pursuits, and the protection and harbor of rafts, logs, floats and other water crafts, in such manner as to create no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property. [15 G. A., ch. 35, § 1.]

SEC. **2033. Construction of railroad.** No person or corporation shall construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless the injury and damages to owners or lessees occasioned thereby shall be first ascertained and compensated in the manner provided in this chapter for taking private property for works of internal improvement. [Same, § 2.]

Whether the preceding section is in conflict with act of congress (U. S. Rev. Stat., § 5254), relating to the construction of cribs, piers, etc., on the Mississippi river, *quære.* But even if it is, this section is not thereby rendered void. If a riparian owner is engaged in business connected with the navigation of the river it is not essential to his right to recover under this section that he should have erected a crib or pier in front of his property. The rule recognized in *Tomlin v. Dubuque, B. & M. R. Co.*, 32-106, is no longer applicable, Revision, § 1328, being now repealed: *Renwick v. Davenport & N. W. R. Co.*, 49-664: *S. C.* 102 U. S., 108.

CHAPTER 5.

OF THE CONSTRUCTION AND OPERATION OF RAILWAYS.

SECTION **2034. Change of name.** Any corporation organized under the laws of this state for the purpose of constructing and operating a rail-

way may, with the consent of two-thirds of all the stockholders in interest, change the corporate name thereof, but no such change shall be complete until the president and secretary shall file in the office of the secretary of state a statement under oath showing the consent of the stockholders thereto and the new name adopted, with a certified copy of the proceedings in relation thereto as appears in the records thereof, and from that time the corporation by its new name shall be entitled to all the rights, powers and franchises that it possessed under the old one, and by such new name shall be liable upon all contracts and obligations entered into by or binding upon such corporation under the old name to the same extent and in the same manner as if no change had been made. [C.'73, § 1273.]

SEC. **2035. Record.** The secretary of state shall immediately record in the proper book in his office matter filed under the preceding section, making references to the record of the articles of incorporation. [C.'73, § 1274.]

SEC. **2036. May join or consolidate.** Any such corporation may join, intersect and unite its railway with that of any other corporation at such point upon the boundary line of this state as may be agreed upon, and, with the consent of three-fourths in interest of all the stockholders, by purchase, sale or otherwise, may merge and consolidate the stock, property, franchises and liabilities of such corporations, making the same one corporation, upon such terms as may be agreed upon, not in conflict with law. [C.'73, § 1275; R., § 1332.]

A railroad corporation organized under the general law may, after constructing a line, sell the property and continue the object of its incorporation by the construction of a new line: *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28-437.

Where the articles of incorporation of the company provided for the sale of the property with the limitation that "no sale shall be valid until all debts of the company shall be paid or arranged for," *held*, that the indebtedness being a very inconsiderable sum, if anything, and the purchaser having inquired if there were any debts, and being always ready to pay any that might be established, a sale under such circumstances was valid: *Ibid.*

Where a railway company through its directors sold its property to another company and the directors and stockholders of the former stood by with knowledge of all the facts and saw the latter company make large expenditures on the property, *held*, that they were estopped from seeking a recovery of the property because of an irregularity in the sale: *Ibid.*

A company buying in the franchise of property of a railroad at a foreclosure sale does not become privy to any agreement on the part of the original company except so far as it may be incorporated into the deeds of conveyance under which the title is held: *Close v. Burlington, C. R. & N. R. Co.*, 64–149.

Where two railroad companies were consolidated under the arrangement that stock in the new company should be issued to stockholders in the old companies, and the new company should acquire the property of the old, *held*, that a stockholder in one of the old companies did not, by such transfer of property, acquire a vendor's lien thereon: *Cross v. Burlington & S. W. R. Co.*, 58–62.

The purchaser of a railway at foreclosure sale acquires no better rights than the company whose franchise it purchases, and where the predecessor had occupied the streets of a city by its track without having paid damages assessed to an abutting property owner, and such property owner had recovered judgment for damages, *held*, that he might maintain an action against the successor to enjoin it from the use of the streets until payment of such judgment: *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

The fact that the previous company was allowed to occupy the street by the property owner without payment of damages would be a favor to it only and not a right passing to its successor by a foreclosure sale: *Ibid.*

SEC. **2037. Connections.** Any such corporation which has constructed or may construct its railway so as to meet or connect with another railway in an adjoining state at the boundary line of this state, may make such contracts and agreements therewith for the transportation of freight and passengers, or the use of its railway, as the board of directors may see proper, and not inconsistent with law. [C.'73, § 1276; R., § 1334.]

SEC. **2038. Extension.** Any such corporation organized for the purpose of constructing a railway from a point within the state may construct or extend the same into or through any other state, under such regulations as may be prescribed by the laws of such state, and its rights and privileges over said extension in the construction and use thereof, and in con-

trolling and applying the assets, shall be the same as if its railway was constructed wholly within the state. [C. '73, § 1277; R., § 1333.]

SEC. **2039. Duties and liabilities of lessees.** All the duties and liabilities imposed by law upon corporations owning or operating railways shall apply to all lessees or other persons owning or operating such railways as fully as if they were expressly named herein, and any action which might be brought or penalty enforced against any such corporation by virtue of any provisions of law may be brought or enforced against such lessees or other persons. [C. '73, § 1278.]

The obligation to fence (under § 2055) rests upon the lessee as much as upon the lessor, and the lessee is liable to damages done by its train, although as between it and the lessor the duty of fencing rests upon the latter: *Clary v. Iowa Midland R. Co.*, 37–344.

Where the owner and a lessee each runs trains over the road, each is liable only for stock injured by its own trains by reason of the failure to fence: *Stephens v. Davenport & St. P. R. Co.*, 36–327.

The remedy given against the lessees by statute is merely cumulative, and the right of action for negligence causing the injury of a passenger exists as against the company in whose name the road is being operated, although it may, in fact, have been leased to and be under the control of a lessee: *Bower v. Burlington & S. W. R. Co.*, 42–546.

Prior to express statutory provision, *held*, that the statute imposing a liability for injuries to stock where the right of way is not fenced was applicable to a lessee: *Liddle v. Keokuk, Mt. P. & M. R. Co.*, 23–378.

But further, *held*, under the same statutory provision, that where the lessee had the exclusive right to run, operate and control the road, and had built and maintained fences along the road, and had the same power to protect itself that the lessor would have, it was liable for injury to stock to the same extent as though it were owner of the road: *Stewart v. Chicago & N. W. R. Co.*, 27–282.

The company whose engines set out fire are liable for damages from the fire thus set out, although the line is owned and operated by another company and fire starts on the right of way by reason of combustible material allowed to accumulate thereon by such other company: *Slossen v. Burlington, C. R. & N. R. Co.*, 60–215.

Where a railway company incorporated under the laws of Iowa leases its road to a foreign corporation, the lessor is a necessary party to an action for breach by the lessee of a contract entered into originally with the lessor. The statutory provision as to the liability of a lessee does not discharge lessor from liability, but in effect makes both the lessor and the lessee jointly liable: *Chicago & N. W. R. Co. v. Crane*, 113 U. S., 424.

A lessee of a railroad can exercise no right that its lessor could not, and if the lessor was subject to injunction against operating its road at the suit of the land owner whose property had been taken without compensation, the lessee is subject to the same restriction: *Hibbs v. Chicago & S. W. R. Co.*, 39–340.

The company owning a railroad, and in whose name it is being operated, is liable in an action for personal injuries received thereon, although the road is leased to and operated by a lessee: *Bower v. Burlington & S. W. R. Co.*, 42–546.

Where a railroad was leased to defendant under a contract by which he was to manage the same and apply the profits, after paying operating expenses, to the payment of certain advances made by him, etc., *held*, that he was a trustee and was not individually liable as lessee for operating expenses: *United States Rolling Stock Co. v. Potter*, 48–56.

The receiver of a railroad, and not the company, is liable for injuries to stock, under the provisions of § 2055: *Brockert v. Central Iowa R. Co.*, 82–369; *Schurr v. Omaha & St. L. R. Co.*, 67 N. W., 280.

A receiver operating a railway under direction of the court is liable to judgment for personal injuries received by an employe from the negligence of other employes engaged in the operation of the road, under the statutory provision on such subject: *Sloan v. Central Iowa R. Co.*, 62–728.

For similar provisions, see § 2066.

SEC. **2040. Offices.** The offices of secretary and treasurer or assistant treasurer and general superintendent of railway corporations organized under the laws of the state shall be where its principal place of business is or is to be, in which the original record, stock and transfer books and all the original papers and vouchers thereof shall be kept. Such treasurer or assistant treasurer shall keep a record of the financial condition of the corporation, which shall be open to inspection by any stockholder, or any committee appointed by the general assembly, at all reasonable times. It may keep a transfer office in any other state, with a duplicate transfer book, but no transfer of shares of stock shall be legal or binding until the same is entered in the one kept in the state. The secretary and treasurer or assistant treasurer and general superintendent shall reside in this state. [C. '73, § 1279.]

It is the absolute right of any person under this section to examine the stock and transfer books of a company, whether he shows himself interested therein or not and especially has a stockholder the right at all reasonable hours to inspect the records showing the financial condition of the corporation. Perhaps he has not the right to examine the original papers and vouchers, but as to the original record, stock, and transfer books and the record of the financial condition of the company the right is unquestionable, unless it clearly appears that the purpose of asking such examination is to perplex, annoy, or harass the officers of the company having the records in charge. The stockholder may have the assistance of his attorney and the clerk of such attorney in making examination of such records: *Ellsworth v. Dorwart*, 63 N. W., 588.

SEC. **2041. Bonds—mortgages.** Any such corporation may issue its bonds for the construction and equipment of its railway in sums of not less than fifty dollars, payable to bearer or otherwise, with interest not exceeding eight per cent. per annum, and making them convertible into stock, and sell the same at such prices as is thought proper. If such bonds are sold below par they shall, nevertheless, be valid, and no plea of usury shall be allowed in any action or proceeding brought to enforce the collection thereof. Such corporation may also secure the payment of the bonds by mortgages or deeds of trust upon the whole or any part of its property and franchises. [C.'73, § 1283; R., § 1339.]

SEC. **2042. After-acquired property.** Such mortgages or deeds of trust may by their terms include and cover not only the property of the corporation making them, owned at the time of their date, but all property real and personal which may thereafter be acquired, and they shall be as valid and effectual for that purpose as if the property was in possession at the time of their execution. [C. '73, § 1284; R., § 1340.]

SEC. **2043. Execution of mortgages.** They shall be executed in the manner the articles of incorporation or the by-laws of the corporation may provide, and be recorded in each county through which the railway of the company may be located, or in which any property mortgaged or conveyed may be situated, and when recorded shall be constructive notice of the rights of all parties thereunder, and for this purpose the rolling stock and personal property of the company belonging to the road shall be deemed a part thereof, and such mortgages and deeds so recorded shall protect the lien of the mortgagee or grantee upon the personal property to the same extent that it does upon real estate thus mortgaged or conveyed. [C. '73, § 1285; R., § 1341.]

The rolling stock of a railroad is not personal property in such sense as to be subject to a landlord's lien under a lease of terminal facilities used by such railroad: *Trust Co. v. Manhattan Trust Co.*, 77 Fed., 82.

Whether the rolling stock of a railroad is subject to a landlord's lien in favor of the owner of terminal facilities which are leased to the company owning the rolling stock, *quære*: *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 68 Fed., 72.

SEC. **2044. Preferred stock.** Any such corporation, with the consent of the holders of two-thirds of all its stock, having no funds with which to pay the interest on its bonded debt or the principal thereof, or of other debts, may issue preferred stock equal to its bonded debt and ten thousand dollars per mile upon its completed road, and exchange the same for its bonds at par, and pay its other debts therewith at par, and such stock shall be entitled to such annual dividends as the directors may determine, not exceeding eight per cent., payable from the net profits of the business of the road each year; but the earnings of any one year shall not be used in whole or in part to pay dividends on any past or future year, nor shall the dividends be paid thereon until all the interest on its interest bearing indebtedness not represented by such stock shall have been paid. The dividends at the rate determined by the directors shall be paid on such stock before any can be paid on the common stock. [15 G. A., ch. 20; C. '73, § 1286.]

SEC. **2045. Conversion into common stock.** Such preferred stock and any income or mortgage bond of the corporation shall, at the option of the holder, be convertible into common stock on such terms as the board of

directors may prescribe, but the aggregate amount of the common and preferred stock shall not exceed the total amount of stock which the corporation may be authorized by law, or the articles of incorporation, to issue. [C.'73, § 1287.]

SEC. **2046. Selection of directors by bondholders.** Any railway corporation organized under any law of the state, including consolidated corporations created pursuant to the laws of this and any adjoining state, may in such manner, under such regulations, and to such an extent as may be prescribed by its board of directors, and consented to by at least two-thirds of the capital stock then outstanding, confer upon the holders of its bonds or other evidences of indebtedness, or upon the holders of any particular class of such bonds or evidences of indebtedness, the right to vote for directors thereof, one or more of whom may be chosen from among such bondholders. [25 G. A., ch. 23.]

SEC. **2047. Corporation may own stock.** Any railway corporation organized under the law of the state, or operating a road therein under the authority of the laws thereof, may acquire, own and hold either the whole or any part of the stock, bonds or other securities of any other railroad company of this or any adjoining state. [25 G. A., ch. 24.]

SEC. **2048. Foreign railway companies—privileges.** Any railway corporation organized or created by or under the laws of any other state, owning and operating a line or lines of railroad in such state, may build its road or branches into this state, and shall possess all the powers and privileges, and be subject to the same liabilities, as like corporations organized and incorporated under the laws of this state, if it shall file with the secretary of state a copy of its articles of incorporation, if incorporated under a general law of such state, or a certified copy of the statute incorporating it where the charter thereof was granted by statute. [18 G. A., ch. 128.]

A foreign railroad company doing business in Iowa may be sued in the federal courts in Iowa as a foreign corporation, service of process being made upon an agent of the company: *Dinzy v. Illinois Cent. R. Co.*, 61 Fed., 49.

A railway company complying with these requirements is not entitled to personal service of notice in a proceeding to locate a highway over its land where its ownership thereof does not appear by the transfer books. It is no better position than a domestic railway company in this respect: *State v. Chicago, M. & St. P. R. Co.*, 80–589.

SEC. **2049. Bonds secured by mortgage.** Any railway corporation organized under the laws of the state may mortgage its property and franchises, in whole or in part, to secure bonds issued by it to pay or refund its indebtedness, to improve or develop its property, or for the purpose of effecting the object of its incorporation, to be issued in such amounts, run for such length of time, be payable within or without this state, and bear such rate of interest, not to exceed the legal rate in the state at the time of issue, as the company issuing the same shall determine. [25 G. A., ch. 26, § 1.]

SEC. **2050. Mortgage to secure bonds of lessee.** Any railway corporation organized under the laws of the state may mortgage its property and franchises, in whole or in part, to secure bonds issued by any other railway corporation of this or any other state, which, at the time, is operating the road of such mortgagor under lease thereof, such bonds to be issued to refund or to secure the means to pay the indebtedness of such lessor, or improve or develop its property, for the purpose of effecting the object of its incorporation. Such bonds may be issued in such amounts, run for such length of time, be made payable within or without the state, and bear such rate of interest, not exceeding the legal rate in this state at the time they are issued, as may be determined by and be acceptable to such lessee. The lessee may secure the bonds issued by it for any of the purposes aforesaid by a mortgage of its leasehold interest in the property and franchises of the lessor. [Same, § 2.]

SEC. **2051. Conditional sale or lease of equipment or rolling stock.** In any contract for the sale of railroad or street railway equipment or rolling stock it may be agreed that the title thereto, although possession thereof be delivered immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money. In any contract for the leasing or hiring of such property, it may be stipulated for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee; but no such contract shall be valid as against any subsequent judgment creditor, or subsequent *bona fide* purchaser for value without notice, unless:

1. The same shall be evidenced by an instrument executed by the parties and acknowledged by the vendee, or lessee, or bailee, as the case may be, in the same manner as deeds are acknowledged or proved;
2. Such instrument shall be filed for record in the office of the secretary of state;
3. Each locomotive engine or car sold, leased or hired as aforesaid shall have the name of the vendor, lessor or bailor plainly marked on each side thereof, followed by the word "owner," "lessor" or "bailor," as the case may be. [25 G. A., ch. 28, § 1.]

SEC. **2052. Recording.** The contracts herein authorized shall be recorded by the secretary of state in a book of records to be kept for that purpose, and, on payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect may be made by the vendor, lessor or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument, to be acknowledged by the vendor, lessor or bailor, or his or its assignee, and recorded as aforesaid. For such services the secretary of state shall be entitled to a fee of one dollar for recording each of the contracts and each of said declarations, and a fee of one dollar for noting such declaration on the margin of the record. [Same, § 2.]

SEC. **2053. Prior contracts.** The two preceding sections shall not be held to invalidate or affect in any way any contract of the kind referred to in the last preceding section but one, made prior to April 24, 1894, and any such contract made before said date may, upon compliance with these provisions, be recorded as herein provided. [Same, § 3.]

SEC. **2054. Cattle-guards—crossings—signs.** Every corporation constructing or operating a railway shall make proper cattle-guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public road good, sufficient and safe crossings and cattle-guards, and erect at such points, at a sufficient elevation from such road as to admit of free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railway, and warn persons of the necessity of looking out for trains. Any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such refusal or neglect, and it shall only be necessary, in order to recover, for the injured party to prove such neglect or refusal. [C.'73, § 1288; R., § 1331.]

Cattle-guards: This section makes it necessary that cattle-guards be constructed not only where the track goes through outside fences but also at division fences: *Smith v. Chicago, C. & D. R. Co.*, 38–518.

Where the track passes through the lands of two owners fenced in common, and subsequently a division fence is constructed, it is the duty of the company upon notice to put in a cattle-guard, and it will be liable for the

value of crops destroyed by reason of the failure to do so: *Donald v. St. Louis, K. C. & N. R. Co.*, 44-157.

Where a railroad is constructed across unimproved or uninclosed land, and the land is afterwards improved or inclosed, the railway company is under obligation to construct cattle-guards just as it would have been under obligation to do if the land had been inclosed at the time the road was constructed: *Heskett v. Wabash, St. L. & P. R. Co.*, 61-467.

Whether notice of the company to construct cattle-guards is necessary after the land has been thus inclosed, *quære;* but, if necessary, the service of notice upon the station agent is sufficient: *Ibid.*

This provision as to cattle-guards applies to cases where the corporation fences its right of way. When it does so there is fenced land, and, upon entering or leaving, the law requires a cattle-guard: *Robinson v. Chicago, R. I. & P. R. Co.*, 67-292.

The statute is imperative, and the court will not engraft an exception upon it relieving a company from obligation to put in a cattle-guard on the ground that it is not fit, proper and suitable to do so in a particular case: *Mundhenk v. Central Iowa R. Co.*, 57-718.

Where it appeared that plaintiff's horses were put temporarily in a field, from which they escaped through a defective fence, and were injured by reason, as alleged, of an insufficient cattle-guard, in a county where cattle were not allowed to run at large, *held*, that the facts did not necessarily show contributory negligence defeating plaintiff's right to recover: *Timins v. Chicago, R. I. & P. R. Co.*, 72-94.

There is nothing in this section requiring a company to make cattle-guards at a *private* crossing: *Bartlet v. Dubuque & S. C. R. Co.*, 20-188. (But see § 2022.)

A railroad company is required to use ordinary care and diligence to keep the cattle-guards on its track free from snow and ice, after it has notice, or could have acquired notice in the exercise of ordinary care, that they are obstructed thereby: *Grahlman v. Chicago, St. P. & K. C. R. Co.*, 78-564; *Robinson v. Chicago, C. I. & P. R Co.*, 79-495; *Giger v. Chicago & N. W. R. Co.*, 80-492.

Method of construction: The term cattle-guard as used in the statute imports a guard or protection extending the whole width of the right of way. The owner is under no obligation to construct a fence up to the track upon the right of way: *Mundhenk v. Central Iowa R. Co.*, 57-718: *Heskett v. Wabash, St. L. & P. R. Co.*, 61-467.

The fact that an animal passes over the cattle-guard is not of itself evidence of improper construction or insufficiency: *Barnhart v. Chicago, M. & St. P. R. Co.*, 66 N. W., 902.

Under the facts of a particular case, *held*, that there was no negligence shown in the construction of a cattle-guard of ties laid on stringers over a pit, although such cattle-guards may be no longer in general use: *Strong v. Chicago & N. W. R. Co.*, 63 N. W., 699.

The duty of connecting a cattle-guard with the right of way fence devolves upon the company, and is implied in the duty to construct the guard itself: *Miller v. Chicago, R. I. & P. R. Co.*, 66-546.

Where the right of way and public highway intersect obliquely, the company should fence to the point where the highway crosses the track, and construct the cattle-guard there, and not at the point where the highway intersects the right of way: *Andre v. Chicago & N. W. R. Co.*, 30-107.

As to liability of company for defect in cattle-guard causing injury to employe, see *Ford v. Chicago, R. I. & P. R. Co.*, 71 N. W., 332.

Further as to cattle-guards, see notes to § 2022.

Crossings: Where a railway impinged upon a highway some twenty rods from the place where it finally crossed it, *held*, that all the intervening highway was not to be deemed a part of the crossing, within the meaning of this section: *Beatty v. Central Iowa R. Co.*, 58-242.

It is the duty of the company to repair the crossings and keep them in a safe condition: *Farley v. Chicago, R. I. & P. R. Co.*, 42-234.

The embankment constructed as a necessary approach to the crossing is a part of the crossing, and the company is required to keep it in repair: *Ibid.*

These provisions have reference to grade crossings and do not require the company to construct a viaduct where a highway crosses its track: *Albia v. Chicago, B. & Q. R. Co.*, 71 N. W., 541.

Purchasers of a road at judicial sale take subject to any oral obligations to maintain crossings, etc., made by the former company in connection with the acquisition of the right of way: *Swan v. Burlington, C. R. & N. R. Co.*, 72-650.

Negligence: Where plaintiff's cow was injured by a wild-train at a highway crossing, *held*, that it was a question for the jury whether it was negligence in the plaintiff to allow his cow to be at such crossing at the time when no regular train was due: *Courson v. Chicago, M. & St. P. R. Co.*, 71-28.

While the language of this section seems to preclude proof of contributory negligence as a defense in an action to recover for personal injuries at a defective highway crossing (that is, negligence of plaintiff contributing, with that of defendant, to cause the injury), it does not preclude defendant from showing that the injury was due to plaintiff's fault and not to the defective condition of the crossing: *McKelvy v. Burlington, C. R. & N. R. Co.*, 84-455.

Contributory negligence is a defense in an action brought for injuries at a crossing where the company has been guilty of neglect in maintaining a safe crossing, or in operating its trains: *Reeves v. Dubuque & S. C. R. Co.*, 92-32.

In an action for an injury received by reason of a defective crossing defendant has the right to show negligence of the injured party as a defense to the action: *McKelvy v. Burlington, C. R. & N. R. Co.*, 58 N.W., 1068.

Perhaps the degree of care required of one in attempting to cross a street railway track is not the same as that required in crossing steam railways and what would amount to negligence in the latter case might not be so regarded in the former. In the former case the question is peculiarly one of fact for the jury: *Orr v. Cedar Rapids & M. C. R. Co.*, 62 N. W., 851.

Evidence in a particular case, *held* sufficient to sustain a verdict against a railroad company for injury to a horse at a cattle-guard: *Meade v. Kansas City, St. J. & C. B. R. Co.*, 45-699.

Evidence in a particular case that the crossing was so constructed as to permit the hoof of a horse to catch between the rail and the plank, *held*, sufficient to support a verdict for damages for the death of a horse killed at such crossing: *Criss v. Chicago N. W. R. Co.*, 88-741.

Where the sufficiency of a cattle-guard was in question, *held*, that the fact that a similar guard situated on other premises was sufficient to, and did, keep out stock, was not material or relevant: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

Under the evidence in a particular case, *held*, that it was for the jury to say whether or not the cattle-guard was reasonably sufficient for the purpose for which it was constructed: *Timins v. Chicago R. I. & P. R. Co.*, 72-94.

Measure of damages: As the owner of the land has no legal right to construct cattle-guards across the track, he is not bound to do so in order to protect himself from damages for want thereof, but may recover whatever damages he may sustain by reason of his land being left open and unfenced: *Raridon v. Central Iowa C. Co.*, 65-640; *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

To make out a *prima facie* case against the railway under this section for an animal killed at a crossing, it must appear that the animal was killed at such crossing and not at a place where the company had the right to fence, and unless such fact is shown the company is not liable, even if it should appear that the crossing is defective: *Croddy v. Chicago, R. I. & P. R. Co.*, 91-598.

The fact that stock has previously been killed at the same crossing prior to the accident in question, is not admissible: *Ibid.*

Measure of damages for failure to erect a cattle-guard at a partition fence between two fields, one of which might have been used for pasture, *held* to be the difference between the value of the pasture in the condition in which the inclosure was left by the company and what the value would have been if the cattle-guards had been maintained: *Raridan v. Central Iowa R. Co.*, 69-527.

Where the land owner seeks to recover the entire value of a crop which he alleges to have been totally lost by reason of the failure of the company to construct cattle-guards, the question of how much less value the crop is by reason of such failure is a question of proof. The fact that a claim is made for the entire loss will not prevent the owner from recovering whatever loss is suffered: *Raridon v. Central Iowa R. Co.*, 65-640.

The measure of damage for crops destroyed by reason of failure to put in a cattle-guard where a partition fence is erected subsequently to the completion of the road is the value of the crop destroyed by reason of such failure; *Donald v. St. Louis, K. C. & N. R. Co.*, 44-157.

Double damages: A cattle-guard is not to be deemed a part of the fence required by other statutory provisions, and the company is not liable in double damages for failure to construct such cattle-guard as it is in case of failure to construct a fence: *Moriarity v. Central Iowa R. Co.*, 64-696; *Rhines v. Chicago & N. W. R. Co.*, 75-597.

Contract: A company required to maintain and construct proper cattle-guards cannot, by contract with another company whose road it purchases, relieve itself from the right or obligation to do so: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

Signs: This section only renders the company liable for damages sustained by reason of the failure to erect such signs: *Lang v. Holiday Creek R. etc., Co.*, 49-469.

The failure to erect a sign renders the company absolutely liable in a case wherein it is shown that a person was injured at a crossing. Evidence of the injury and of the company's neglect to erect the sign establishes its liability, and it is not necessary for plaintiff to show his own care. (As the case arose, however, under a previous statute, this point was not involved): *Payne v. Chicago, R. I. & P. R. Co.*, 44-236.

Under a previous statute which did not contain the provision that proof of the neglect to erect a sign should be sufficient to entitle the injured party to recover for injuries received at such crossing, *held*, that proof of failure to erect a sign established negligence on the part of the company, but did not relieve plaintiff of the necessity of showing that his own negligence did not contribute to the injury: *Dodge v. Burlington, C. R. & M. R. Co.*, 34-276; *Correll v. Burlington, C. R. & M. R. Co.*, 38-120; *Payne v. Chicago, R. I. & P. R. Co.*, 39-523; *S. C.*, 44-236.

SEC. **2055. Failure to fence—liability for stock killed—speed at depots.** Any corporation operating a railway, and failing to fence the same against live stock running at large and maintain proper and sufficient cattle-guards at all points where the right to fence or maintain cattle-guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle-guards for the full amount of the damages sustained by the owner on account thereof, unless it was occasioned by his wilful act or that of his agent; and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. If such corporation fails or neglects to pay such damages within thirty days after notice in

writing that a loss or injury has occurred, accompanied by an affidavit thereof, served upon any officer or station or ticket agent employed by said corporation in the county where such loss or injury occurred, such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him. No law of the state or any local or police regulations of any county, township, city or town, relating to the restraint of domestic animals, or in relation to the fences of farmers or land owners, shall be applicable to railway tracks, unless specifically so stated in such law and regulation. Upon depot grounds necessarily used by the public and the corporation, the operating of trains at a greater rate of speed than eight miles an hour where no fence is built shall be negligence, and shall render such corporation liable for all damages occasioned thereby, in the same manner and to the same extent, except as to double damages, as in cases where the right to fence exists. [C. '73, § 1289.]

Failure to fence: This section makes the fact of the injury or destruction of stock on the railway track *prima facie* evidence of negligence on the part of the corporation, and the burden of proof is upon the defendant to establish the building of a good and sufficient fence: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

In order to render the company liable for injury to stock, negligence must be shown, but it is sufficient to make out a *prima facie* case to show the injury and that it occurred by reason of the omission to fence. Thereupon the burden is upon the company to show freedom from negligence in the matter of a fence: *Small v. Chicago, R. I. & P. R. Co.*, 50-338.

It is error to instruct the jury with reference to negligence of the agents or employes of a railroad company when the question is simply as to whether the stock was killed by reason of the failure to fence: *Wall v. Des Moines & N. W. R. Co.*, 89-193.

The statute is not designed to dispense with all proofs on the part of the owner excepting as to injury or destruction of his property, and it is error to quote the language of the statute in such way as to give that impression to the jury: *Ibid.*

If a railroad company fails to fence its road it is absolutely liable for stock injured, in the absence of wilful act of the owner: *Aylesworth v. Chicago, R. I. & P. R. Co*, 30-459.

Liability for injury under this section attaches where the want of a fence in connection with some act of the company is the proximate cause of the injury. If it is claimed that defendant is liable for negligence in so constructing a bridge as to render it dangerous for stock running at large, such negligence must be directly alleged: *Asbach v. Chicago, B. & Q. R. Co.*, 74-248.

Before the enactment of this statute it was held that to permit cattle to run at large did not impute negligence on the part of the owner, and that cattle would not be trespassers if found upon the unfenced track of a railway; that if the track was unfenced the company would be held to the use of ordinary care and diligence in running its trains to avoid injuring such stock, but if its track was fenced it would only be liable for injury resulting from gross or wilful negligence: *Cussell v. Hanley*, 20-219; *Alger v. Mississippi & M. R. Co.*, 10-268.

The railroad company is required to fence its track for the protection of "crazy" horses as well as for the protection of animals possessing good "horse sense." The fact that the animal is injured by reason of failure to leave the track through want of natural intelligence will not show that the injury did not result from want of a fence: *Liston v. Central Iowa R. Co.*, 70-714.

This section does not require railway companies to fence their roads, but subjects them to certain liabilities if they fail to do so. Failure to fence cannot, therefore, be imputed to the company as negligence in a case where a child, playing on an unfenced track of a road, is run over by one of the company's trains: *Walkenhauer v. Chicago, B. & Q. R. Co.*, 3 McCrary, 553.

A railway company does not owe to its employes the duty to fence its right of way, and employes are supposed to contract to operate the road in its unfenced condition so far as it is unfenced. Any additional exposure on that account must be presumed to have been taken into consideration upon entering into the employment: *Patton v. Central Iowa R. Co.*, 73-306. (By §§ 2057-8 fencing is now obligatory).

Animals not struck by train: It may be said that an animal is injured by reason of the failure of the company to fence when the want of a fence in connection with the acts of the defendant is the proximate cause of the injury. Therefore, where a horse going upon a track where there was a failure of the company to fence, being frightened by a coming train, ran upon a bridge and was injured, there being no other practicable means of escape for the animal, *held*, that the company was liable: *Young v. St. Louis, K. C. & N. R. Co.*, 44-172.

Circumstantial evidence in a particular case *held*, sufficient to show that an animal found dead on the right of way had been killed by being struck by defendant's train. *Kennedy v. Chicago & N. W. R. Co.*, 90-754.

Under the circumstances of a particular case, *held* that although there was no direct evidence of the injury of the animal by the train, yet the jury were justified in finding that the death of the animal was caused in that manner: *Anderson v. Chicago, R. I. & P. R. Co.*, 61 N. W., 1058.

Liability of the company exists without regard to negligence. It is only the wilful act of the owner or his agent that will exempt the company from liability: *Ibid.*

It is for the jury to say whether or not in a particular case an animal injured upon the track without being struck by the train was injured by defendant's negligence: *Kraus v. Burlington, C. R. & N. R. Co.*, 55–338.

The fact that the train does not strike the animal does not relieve the company of liability for the injury: *Liston v. Central Iowa R. Co.*, 70–714.

The absence of a collision of the train with the stock will not relieve the railway company from liability if the death of the animals results from the want of a fence: *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80–620.

Under the evidence of a particular case, *held*, that it sufficiently appeared that the death of the animal was due to defendant's train: *Ibid.*

In an action to recover the value of a mare alleged to have been killed by defendant's train, where it appeared that the animal was found in a cattle-guard so injured that she afterwards died, *held*, that there was an absolute want of evidence to show that she was injured by the train in any way: *Brockert v. Central Iowa R. Co.*, 75–529.

In an action to recover damages for the killing of an animal by defendant in the operation of its railroad, where the evidence for plaintiff was wholly circumstantial, while defendant's employes testified that no accident had occurred, *held*, that the jury were authorized in finding that the injury occurred by reason of contact with the train in some way: *Cox v. Burlington & W. R. Co.*, 77–478.

Under the facts of a particular case, *held*, that there was sufficient evidence of the fact that the animal in question had been killed in the operation of the railroad to support the verdict against the company: *Brockert v. Central Iowa R. Co.*, 82–369.

Negligence: Plaintiff may ask recovery for stock killed, on the ground that the road was not fenced, pleading the facts entitling him to such recovery, and also on the ground of the negligent manner in which the train was operated, and he may then introduce evidence to sustain both or either of these causes of action: *Scott v. Chicago, M. & St. P. R. Co.*, 68–360.

Where it is claimed that stock was injured by reason of defective fence plaintiff may without proof of that fact recover the value of the stock killed if it is shown that the injury of the stock was due to negligence of the employes of the company operating the train: *Baker v. Chicago, B. & Q. R. Co.*, 73–389.

The fact that cattle have previously been found at a crossing does not make it incumbent upon the railroad company to run its trains at such rate of speed as to subsequently avoid injury of stock at such crossing. An owner who allows his stock to frequent a crossing is responsible for recurring accidents at such place: *Connyers v. Sioux City C. P. R. Co.*, 78–410.

Recovery under this section will not be defeated by mere negligence on the part of the owner of the stock, but the act must be one immediately connected with the injury: *Moody v. Minneapolis & St. L. R. Co.*, 77–29.

Therefore, where plaintiff's cow, being at large, strayed upon defendant's unfenced railroad track, and defendant did all in its power to stop the train, but failed to do so, and when plaintiff knew that the animal had gone upon the track and had both the opportunity and power to prevent the injury, he wilfully neglected to do so, *held*, that his act was a "wilful act" connected with the injury, and he was not entitled to recover: *Ibid.*

The burden of proof is upon plaintiff to show that the injury occurred at a place where defendant had a right to fence and did not, and that it was caused by defendant's negligence: *Comstock v. Des Moines Valley R. Co.*, 32–376.

An agreement with the land owner by which he undertakes to erect and maintain a fence will not prevent liability on the part of the company to other persons for double damages for stock injured where such land owner has failed to fence or repair, even though the owner of the stock has placed them for pasture upon the landof the person agreeing to maintain the fence: *Warren v. Keokuk & D. M. R. Co.*, 41–484.

Negligence of land owner: Where a company is compelled to pay for injuries to animals of a third person which have got upon the track through a gate at a private crossing, wrongfully removed by the land owner for whom the gate was constructed, it may recover from such land owner the amount so paid: *Chicago & N. W. R. Co., v. Dunn*, 59–619.

The fact that there were two gaps in a railroad fence within four hundred feet of each other, made by the plaintiff in the prosecution of work connected with such railroad, *held*, not to preclude the owner from recovering damages for injuries to his stock by their escape upon the railroad track through a gap in the fence intermediate the two made by him and for which he was not responsible: *Accola v. Chicago, B. & Q. R. Co.*, 70–185.

The land owner may by his conduct release the railway company from liability for its failure to build and maintain a fence, and a tenant who has a right to occupy and use the land jointly with the owner, with knowledge of such facts, acquires no greater rights than the lessor himself: *Manwell v. Burlington, C. R. & N. R. Co.*, 80–662.

Sufficiency of fence: The fence contemplated is such as is reasonably sufficient to prevent live-stock from going on the railroad track. It is error to charge the jury that when fences are constructed along the right of way by the company they must, in order to relieve it from liability for injuries to stock, be such as to absolutely prevent stock from getting under, through or over the same: *Shellabarger v. Chicago, R. I. & P. R. Co.*, 66–18.

The company is required to do no more than erect such fence as under ordinary circumstances will keep live-stock from its track, and it is not rendered liable by the fact that snow-drifts cover the fence so that it no longer restrains stock from passing over. It is not required to remove such drifts: *Patten v. Chicago, M. & St. P. R. Co.*, 75–459.

Where it appeared that the fence was in good condition in the evening and stock

escaped through it during the night, *held*, that there was not negligence in failing to repair: *Davidson v. Central Iowa R. Co.*, 75-22.

Where the land owner in the evening opened the wire fence along the right of way at a place which was not a crossing, in order to put his animals into a field, and during the night the animals escaped at the same place and some of them were killed, *held*, that the company was not liable, and if the fence was insufficient at that place by reason of the lowest wire being too high from the ground, plaintiff could not recover after having himself taken down the wire and replaced it in its original position: *Ibid.*

While there may be facts justifying the opening of the fence along the right of way at a place not a crossing, yet where plaintiff does not make the claim in his petition as a ground of negligence on the part of the company that the crossing is defective, he cannot afterwards show that there was a ditch in such crossing as a reason for taking down the fence: *Ibid.*

In a particular case, *held*, that it did not appear that the employes of a railway were negligent, after discovering animals which had come upon the track through the fence, in not avoiding injury to such animals: *Ibid.*

Where the claim was that stock escaped upon the track by reason of the gate at a private crossing being insufficient, as originally constructed, *held*, that no evidence of knowledge of the defective condition was necessary, as it would have been in the case of failure to repair: *Morrison v. Burlington, C. R. & N. R. Co.*, 84-663.

While it is not necessary that the railroad company fence all of its right of way yet where it leaves a portion unfenced and in such form as to prove a trap to animals outside of the fence it may be liable in damages for injury resulting therefrom: *McCracken v. Chicago, R. I. & P. R. Co.*, 91-711.

The fence must not only be sufficient to turn horses and cattle, but must be sufficient to turn swine, or the company will be liable for swine killed: *Fritz v. Milwaukee & St. P. R. Co.*, 34-337.

The fence must be sufficient to turn live-stock of any kind in order to exonerate the company from liability for injuries to such live-stock. It is not sufficient that the fence be such as is described by statute as a lawful fence: *Lee v. Minneapolis & St. L. R. Co.*, 66-131.

A bluff, a hedge, a trench, a wall, a trestle, or the like, may constitute a sufficient fence. The question whether the fence is sufficient is for the jury: *Hilliard v. Chicago & N. W. R. Co.*, 37-442.

The fact that the fences and track are so constructed that stock having once entered upon the right of way cannot, when frightened and driven before the engine, find a safe place to leave the track will not render the company liable: *Gilman v. Sioux City & P. R. Co.*, 62-299.

The fact that the fastening of a gate in the fence is placed on the inside may be a proper matter to be considered by the jury in determining whether the fence is sufficient: *Butler v. Chicago & N. W. R. Co.*, 71-206.

As to negligence of company with reference to gates at private crossings, see notes to § 2022.

Replacing fences destroyed: The allegation that the road is unfenced at the time of the accident is supported by proof of the removal or destruction of the fence before the accident: *Fritz v. Kansas City, C. B. & St. J. R. Co.*, 61-323.

Where the fences were swept away by a flood, failure to rebuild them within two months after the road was repaired and operated, *held* sufficient to render the company liable: *Ibid.*

If a fence constructed by the company falls by reason of its insufficiency, it is immaterial that it was not down such length of time before the animal passed through that the company might, in the exercise of due diligence, have had knowlege thercof: *Libby v. Chicago, M. & St. P. R. Co.*, 60-323.

Where a railway was fenced only upon one side, and the animal injured was confined in a field inclosed in part by such fence, and escaped therefrom by reason of the fence being blown down by a storm, *held*, that the railroad not being fenced as required, the company was liable without regard to whether it was negligent in repairing the fence which was blown down, for the reason that the road was not properly fenced, and the animal after escaping from the inclosure was running at large: *Tredway v. Sioux City & St. P. R. Co.*, 43-527.

Failure to repair fences: While the company is liable for stock injured or killed on its track by reason of its failure to keep in repair the fences which it has erected on the line of its road, yet before such liability will attach the company must have knowledge, either express or implied, that the fence is out of repair, and a reasonable time after such notice to put it in repair: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459; *Hilliard v. Chicago & N. W. R. Co.*, 37-442.

Knowledge that the fence is out of repair may be shown by the lapse of such time as to afford reasonable presumption thereof: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459; *Davis v. Chicago, R. I. & P. R. Co.*, 40-292.

The company having constructed a sufficient fence is only liable for failure to exercise reasonable care and diligence in maintaining it: *Lemmon v. Chicago & N. W. R. Co.*, 32-151.

It is error to instruct the jury that the company would be liable if it failed to erect and maintain a fence sufficient to keep cattle from its right of way, and the cattle were injured by reason of such failure. The jury must be allowed to consider whether the defect in the fence was occasioned by want of repair, and if so, whether the company had discovered that it was out of repair, or should have discovered it in the exercise of reasonable care, and had had a reasonable time afterward to make the repair: *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

Where the track has been properly fenced and the fence has been destroyed, the company is liable, in case of a failure to use reasonable and ordinary diligence and care in rebuilding it. Reasonable time must be

allowed: *McCormick v. Chicago, R. I. & P. R. Co.*, 41-193.

Burden of proof: Liability of the company for injuries caused by bars being left down at private crossings exists, if at all, either in failing to put them up after acquiring knowledge that they are down, or neglect to use reasonable diligence in ascertaining such condition, and the burden of proving these facts is upon the plaintiff seeking to recover damages for such negligence: *Perry v. Dubuque Southwestern R. Co.*, 36-102.

In case of an injury to stock by reason of a gate being open the burden is on plaintiff to show that the gate became open by defendant's fault. The fact that the gate was defectively constructed, unless it became open by reason of such construction, is not sufficient to entitle plaintiff to recover: *Butler v. Chicago & N. W. R. Co.*, 71-206.

A railway is required to exercise due care to keep gates closed and obtain knowledge of their condition. If it fails to exercise such care and through its negligence remains ignorant of the fact that a gate is open, it will be chargeable with having knowledge of that fact which due care would have given it. It is the duty of the company in such cases to close a gate after gaining knowledge that it is open, whether left open by its own employes or others. The question whether it should have had knowledge is for the determination of the jury: *Wait v. Burlington, C. R. & N. R. Co.*, 74-207.

Further as to gates and bars at private crossings, see § 2022 and notes.

An instruction to the effect that defendant was not liable unless there was neglect in failing to repair the fence within a reasonable time after notice of the defective condition, *held* proper, as the jury must have understood therefrom that the burden of showing neglect rested upon the party seeking to recover: *Dunn v. Chicago & N. W. R. Co.*, 58-674.

Where issue is taken upon the facts as to the place where the stock was killed or injured, and the right to fence at such place, and whether the stock was running at large, the burden is on the plaintiff to sustain the averments of his petition by proofs: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76-753.

But where defendant in an action for such damages admitted that six of the seven animals claimed to have been injured were killed by trains operated on its road, and added a general denial as to the facts not admitted, pleading a tender as to the animals killed, *held*, there was no issue except as to the injury of the seventh animal: *Ibid.*

Instructions in a particular case as to what the jury must find in order to return a verdict for plaintiff, *held* to sufficiently indicate the rule as to burden of proof: *Scott v. Chicago, M. & St. P. R. Co.*, 78-199.

Evidence of the condition of the fence subsequent to the time of the injury is admissible only where it is shown that there had been no change in the condition: *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

Evidence of the condition of the fence at the time of the accident is admissible for the purpose of showing that the company was negligent in allowing it to get out of repair, and such evidence need not be confined to the particular portion of the fence through which the stock escaped: *Lemmon v. Chicago & N. W. R. Co.*, 32-151.

Where damages are claimed by reason of the injured stock having escaped upon the right of way by reason of the fastening of a gate in the fence of the company being defective, evidence is admissible to show that other like fastenings have proved insufficient, and it is not competent for defendant to show that the fastening used was of the kind generally in use: *Payne v. Kansas City, St. J. & C. B. R. Co.*, 72-214.

Facts in a particular case considered on the question whether the animals killed were struck on a crossing or on a portion of the track where the company had the right to fence: *King v. Chicago, R. I. & P. R. Co.*, 88-704; *Daugherty v. Chicago, M. & St. P. R. Co.*, 87-276.

Ownership of stock: In an action against a railway company for damages for stock killed by its train, the ownership of the stock is an issuable fact, and while possession might make out a *prima facie* case of ownership, yet there must be such proof of possession or other proof of ownership to entitle plaintiff to recover: *Welch v. Chicago, B. & Q. R. Co.*, 53-632.

The administrator of the estate is the owner of the animals belonging to the estate, within the meaning of this section: *Morrison v. Burlington, C. R. & N. R. Co.*, 84-663.

Proof of tender by the company made to plaintiff, *held* sufficient to show plaintiff's ownership: *Scott v. Chicago, M. & St. P. R. Co.*, 78-199.

Stock running at large: The company is only liable for injuries to stock "running at large," and not when it is in charge of the owner and being driven by him at the time of the injury: *Smith v. Chicago, R. I. & P. R. Co.*, 34-96.

Where the driver of a team became so intoxicated that he had no control over the animals, and they wandered out of the road and upon a railway track, where it was not fenced as it should have been, *held*, that the animals were not running at large in such sense that the owner could recover double damages: *Grove v. Burlington, C. R. & N. R. Co.*, 75-163.

Where colts escaped from a pasture through a defective gate upon defendant's track, the gate having been carelessly and negligently constructed by defendant, in an unskillful manner and of unsound and unsafe material, *held*, that such colts were running at large within the provisions of this section: *Morrison v. Burlington, C. R. & N. R. Co.*, 84-663.

Stock which escapes from the inclosure of the owner upon the track of the company is "running at large:" *Hinman v. Chicago, R. I. & P. R. Co.*, 28-491.

And so, too, is stock which is in a field through which the railway passes and where the company has failed to fence: *Swift v. North Missouri R. Co.*, 29-243.

The words "running at large" mean "not under control of the owner." A mule which had escaped from its owner, and which he was unable to catch, *held*, to be running at large: *Hammond v. Chicago, & N. W. R. Co.*, 43–168.

Allegations in a petition that the animal injured escaped upon the railroad track, *held* to be in effect an allegation that he was running at large: *Liston v. Central Iowa R. Co.*, 70–714.

A horse may be regarded as running at large where he has escaped from the control of his owner and cannot be caught by him. So *held* where the horse injured had on a bridle and an untied halter rope: *Welsh v. Chicago, B. & Q. R. Co.*, 53–632.

Where a person in charge of a herd of cattle left them temporarily, and before the person who was to succeed him in their care took possession of them one of them escaped from the herd and was very soon afterwards killed on defendant's railway track, not having been missed from the herd, *held*, that such animal was running at large within the meaning of this section: *Valleau v. Chicago, M. & St. P. R. Co.*, 73–723.

A suckling colt may be considered as running at large within the provisions of the statute, although its mother is under the control of the owner: *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58–622.

A team of horses hitched to a wagon and which have escaped from the control of their owner are, within the terms of this statute, "live-stock running at large:" *Inman v. Chicago, M. & St. P. R. Co.*, 60–459.

It is error to instruct the jury that it is the duty of the company to build and maintain fences sufficient to keep cattle off the track under all ordinary circumstances, and that it is liable for all injury to cattle occasioned by its failure to perform that duty. The instructions should be qualified by limiting the liability to injuries caused to animals running at large: *Brentner v. Chicago, M. & St. P. R. Co.*, 68–530.

Proof of injury: When stock is killed at a place where the company has failed to fence, it will be presumed, *prima facie*, that the injury occurred "by reason of the want of such fence:" *Spence v. Chicago & N. W. R. Co.*, 25–139.

The evidence in a particular case as to stock killed by a train, having been struck by the train going in a particular direction and carried upon a bridge, *held* sufficient to support a verdict for damages: *Martin v. Central Iowa R. Co.*, 59–411.

In an action against the company for injury to stock, there being no direct evidence as to whether the injury was caused by defendant's train, the jury may consider the character of the injury for that purpose, but evidence that when animals are struck by moving trains there is always some indication left along the track of the collision is not proper: *Clark v. Kansas City, St. L. & N. R. Co.*, 55–455.

To entitle the stock owner to recover, he must do more than merely prove the injury or destruction to his property, but the statute enables him to make a *prima facie* case by proving fewer facts than would be necessary were it not for the statutory provision: *Karr v. Chicago, R. I. & P. R. Co.*, 87–298.

It is the duty of the plaintiff in an action for injury to stock to allege and prove *prima facie* the failure of the company on which reliance is placed for recovery. It is not sufficient to prove merely that the stock went upon the company's right of way and was there killed by a locomotive: *Schmitt v. Chicago, St. P. & K. C. R. Co.*, 68 N.W., 715.

Where from the evidence it appears that the gate through which the stock injured came upon the right of way was open and it does not appear that the gate was in any way defective, liability of the company is not shown: *Koenigs v. Chicago, M. & St. P. R. Co.*, 65 N.W., 314; *S. C.* 67 N.W., 399.

Double damages; constitutionality: The provision as to double damages is constitutional. It is uniform in its operation as to all persons or companies pursuing a particular business: *Jones v. Galena, & C. U. R. Co.*, 16–6; *Welsh v. Chicago, B. & Q. R. Co.*, 53–632.

The provision as to double damages is not unconstitutional as authorizing a person to be deprived of his property without due process of law or denying him the equal protection of the law: *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S., 26.

The provision for double damages being penal in its character will not be considered as applicable to any case not coming clearly within its provisions. Therefore, *held*, that double damages could not be recovered for injuries resulting from failure to construct and keep in repair a proper cattle-guard as required by the statute with reference to cattle-guards: *Chines v. Chicago & N. W. R. Co.*, 75–597.

Nor does such provision deny to railway companies, or persons operating railways, equal protection of the laws: *Tredway v. Sioux City & St. P. R. Co.*, 43–527.

Where the owner of stock expends time and money in proper efforts to heal the injured animals he is entitled to recover double damages with reference to such injuries, as well as with reference to the loss in value: *Manwell v. Burlington, C. R. & N. R. Co.*, 80–662.

This provision does not conflict with the constitutional guaranties for the protection of property; *Mackie v. Central Railroad of Iowa*, 54–540.

Payment: Where the owner of stock killed and the agent of the railroad company agreed as to the amount of damages, and the agent gave to the owner a due-bill for that amount, which he said would be paid in a few days, and the due-bill remained unpaid, and no demand of payment thereof was made, *held*, that the owner could not maintain an action against the company for double damages, and in such action no recovery could be had on the due-bill: *Shaw v. Chicago, R. I. & P. R. Co.*, 82–199.

There is no obligation upon the person claiming damages for injuries to stock, who has served his notice upon the company, to remain in readiness for each of the thirty days elapsing after the giving of the notice to meet the agent of the company and nego-

tiate a settlement of such loss. The fact that the agent of defendant calls at the residence of claimant to pay the amount of damage, and does not make such payment by reason of not finding him at home, does not excuse the defendant as against the claim for double damages: *Hammans v. Chicago, R. I. & P. R. Co.*, 83-287.

Not a penalty: The statute giving the owner double damages is not unconstitutional, as in conflict with the provision that all fines and penalties shall be paid into the school fund. Such damages are not a fine or penalty, and the legislature may determine the measure of damages to be recovered as in other particular cases: *Ibid.*

No part of the double damages is a statute penalty in such sense as to bring the action therefor within the provisions of the statute of limitations as to actions to recover such penalties. The period of limitation for such action is five years: *Koons v. Chicago & N. W. R. Co.*, 23-493.

Not applicable in other cases: The provision for double damages being penal in its character will not be considered as applicable to any case not coming clearly within its provisions. Therefore, *held*, that double damages could not be recovered for injuries resulting from failure to construct and keep in repair a proper cattle-guard as required by the section with reference to cattle-guards; *Moriarty v. Central Iowa R. Co.*, 64-696.

Neither can the provision be construed so as to authorize the recovery of double damages for injuries to stock on depot grounds where the company has no right to fence, caused by negligence in operating trains thereon: *Miller v. Chicago & N. W. R. Co.*, 59-707.

Double damages can be recovered only when stock has been injured or killed by reason of the want of a fence, and not when the injury results by reason of the company having fenced where it should not: *Davis v. Chicago, R. I. & P. R. Co.*, 40-292.

For failure to repair: A railway company is liable in double damages for injuries caused by negligence in failing to keep a fence in repair as well as by reason of failure to fence: *Bennett v. Wabash, St. L. & P. R. Co.*, 61-355; *Payne v. Kansas City, St. J. & C. B. R. Co.*, 72-214.

In a particular case, *held*, that there was negligence on the part of the railroad in not putting its fences in repair after the destruction thereof by a storm: *Peet v. Chicago, M. & St. P. R. Co.*, 88-520.

Interest: As this statutory provision establishes the measure of recovery in the cases contemplated, the court or jury cannot, in addition to the damages authorized, allow interest on the amount of recovery from the time of the accident, or from the time of the expiration of the thirty days allowed after notice in which to pay the damages: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Assignment: The right of the owner to recover double damages may be assigned, and the assignee may serve the notice and affidavit required to authorize such recovery: *Everett v. Central Iowa R. Co.*, 73-442.

Laws of another state: An action for double damages may be maintained in the courts of this state for injury occurring in another state which has a statute authorizing the recovery of such double damages: *Boyce v. Wabash R. Co.*, 63-70.

Tender: Where stock was killed and before suit tender was made and kept good of a sum less than the value of the stock as found by the jury on the trial, such tender being made as in full payment, *held*, that plaintiff was entitled to double damages in the full amount found by the jury, and that a tender to be sufficient must be of an amount large enough to discharge defendant's full liability: *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

Where a gross sum is tendered by the railway company in payment of damages caused by injuries to two different animals of the same owner, but it does not make a separate tender as to each, and the jury find the aggregate damage to be greater than the amount tendered, such tender cannot be considered as sufficient for either: *Shuck v. Chicago, R. I. & P. R. Co.*, 73-333.

Notice and affidavit: The written notice required by statute to entitle the owner to recover double damages is only necessary when double damages are sought: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

The statute is silent as to the method of service, and such service may be made by reading the original and delivering a copy: *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80-620.

The notice should advise the corporation of the loss of which complaint is made and of the demand of the person injured on account of it, and in an action in such a case to recover double damages plaintiff's recovery should be limited to double the amount named in the notice: *Manwell v. Burlington, C. R. & N. R. Co.*, 80-662.

The service of a notice in a particular case, *held* sufficient; and *held*, that there being no conflict as to the facts, the question of whether the service of notice was sufficient or not was for the court and not for the jury: *Brockert v. Central Iowa R. Co.*, 82-369.

The affidavit required to entitle a party to double damages may be made by any one acquainted with the facts: *Henderson v. St. Louis, K. C. & N. R. Co.*, 36-387.

It is not necessary that the affidavit designate the place of the injury: *Mundhenk v. Central Iowa R. Co.*, 57-718.

The notice and affidavit need not be separate. If the notice contains the statements necessary in the affidavit, and is sworn to, that is sufficient: *Mendell v. Chicago & N. W. R. Co.*, 20-9.

It is only necessary that the notice be such as to inform the company of the injury. It need not be stated therein that the animals were running at large or were destroyed without the wilful act of the owner: *Mackie v. Central R. of Iowa*, 54-540.

The fact that the amount claimed in the notice is greater than the value of the animal as stated in the petition is not sufficient in itself to show bad faith. If defendant claims that plaintiff's demand was made in bad

faith such fact should be pleaded and issue joined thereon, and the same submitted to the jury: *Valleau v. Chicago, M. & St. P. R. Co.*, 73–723.

A notice addressed to the company by the initials of its name, the body of which however states the name of the company in full is sufficient: *Anderson v. Chicago, R. I. & P. R. Co.*, 61 N. W., 1058.

A return stating service of the notice upon a person named, "being the station agent of said road," etc., sufficiently shows service upon the station agent "employed in the management of the business of the corporation," as provided for by statute: *Welsh v. Chicago, B. & Q. R. Co.*, 53–632; *Schlengener v. Chicago, M. & St. P. R. Co.*, 61–235.

An amendment to an affidavit for the purpose of perfecting the jurat may be allowed, but the company will not become entitled to the thirty days after the amendment in which to pay the claim and escape double damages, where it is clear that there was a *bona fide* attempt on the part of the owner to bring himself within the provisions of the statute, and it was so understood by defendant: *Mundhenk v. Central Iowa R. Co.*, 57–718.

The original of the affidavit and notice of loss should be delivered to the agent upon whom service is made. The delivery of a copy is not sufficient: *McNaught v. Chicago & N. W. R. Co.*, 30–336; *Campbell v. Chicago, R. I. & P. R. Co.*, 35–334.

The original of the affidavit must be served upon the company or its agent and a copy thereof introduced in evidence. The introduction in evidence of a paper similar to that served upon the company is not sufficient: *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56–207.

The officer making service may, by oral testimony show that he served the original, although his return states the service of a copy: *Liston v. Central Iowa R. Co.*, 70–714.

Service of the affidavit and notice should be made by delivering them to the agent of the company. It is not necessary to read them and deliver a copy: *Mendell v. Chicago & N. W. R. Co.*, 20–9.

As the statute does not prescribe the manner of service, a service by simply delivering the notice and affidavit to the person upon whom service is to be made is sufficient: *Brentner v. Chicago, M. & St. P. R. Co.*, 68–530.

Service of the affidavit may be made by the claimant or any other person: *Mundhenk v. Central Iowa R. Co.*, 57–718.

Whether proof of service of notice and affidavit upon the company can be made by an *ex parte* affidavit, *quære*: *Brentner v. Chicago, M. & St. P. R. Co.*, 58–625.

The notice and affidavit will be admissible as proof of service if the return of the officer serving the same be regularly indorsed thereon: *Brandt v. Chicago, R. I. & P. R. Co.*, 26–114.

Evidence that a paper was read and given to the agent similar to that introduced in evidence is a sufficient proof of service of the notice of which the paper introduced is a copy: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56–440.

The original of notice and affidavit of loss which have been served upon defendant's agent are not evidence of such service in such sense that notice upon the defendant to produce them must be shown before other evidence thereof can be introduced to show double liability of the company: *Brentner v. Chicago, M. & St. P. R. Co.*, 58–625; *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58–622; *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69–320.

Pleading: In an action before a justice of the peace for killing stock for which the company is liable in double damages, the notice and affidavit may be introduced in evidence though not mentioned in the pleadings, as no petition need be filed: *Brandt v. Chicago, R. I. & P. R. Co.*, 26–114.

On the trial of an action against the company to recover double damages, the fact that the notice required by statute was not attached to the petition must be raised by demurrer, if at all, and cannot be raised as an objection when the notice is offered in evidence: *McKinley v. Chicago, R. I. & P. R. Co.*, 47–76.

Where the case is tried on the theory that defendant was liable if its employes had failed to close a gate after it was left open by some unknown person, the sufficiency of such statement of the cause of action not having been raised by demurrer, cannot be afterward questioned: *Foley v. Hamilton*, 89–686.

While a railroad is not liable for stock killed by reason of its failure to properly fence where the stock is not running at large, yet where that fact is assumed and no objection on account of the failure to plead or prove it is taken, it will be deemed waived: *Daugherty v. Chicago, M. & St. P. R. Co.*, 87–276.

Question for jury: Although the sufficiency of the service of the notice is a question of law for the court, yet where the fact of service is in issue its determination may properly be left to the jury: *Cole v. Chicago, & N. W. R. Co.*, 38–311.

Fencing at depot grounds: The company is not required to fence where it would not, in view of public convenience, be fit, proper or suitable for it to do so. Depot and station grounds may be left uninclosed when the business of the road and the interests of the public so require: *Latty v. Burlington, C. R. & N. R. Co.*, 38–250; *Smith v. Chicago, R. I & P. R. Co.*, 34–506; *Davis v. Burlington, & M. R. R. Co.*, 26–549; *Rogers v. Chicago & N. W. R. Co.*, 26–558; *Durand v. Chicago, & N. W. R. Co.*, 26–559.

Whether the public convenience and interest of the road require that grounds used in connection with the depot but not the ordinary place for receiving and delivering freight shall be left uninclosed is a question of fact properly submitted to the jury: *Rhines v. Chicago & N. W. R. Co.*, 75–597.

In the absence of proof of want of ordinary care, a company is not liable for stock killed on depot grounds: *Packard v. Illinois Cent. R. Co.*, 30–474.

Where it appeared that stock was killed one and one-fourth miles from a station, *held*, that it might be presumed that the

place at which it was killed was not within depot grounds in the absence of any evidence upon the question: *Smith v. Chicago, M. & St. P. R. Co.*, 60–512.

The burden is upon the company to show that the place where stock is injured and where there is no fence is a portion of the station grounds. The fact that a switch is there maintained will not necessarily give it that character: *Comstock v. Des Moines Valley R. Co.*, 32–376.

Where the company has its depot grounds surveyed and definitely allotted, the survey or allotment and use constitute a very strong presumptive proof of their necessary boundaries: *Cole v. Chicago & N. W. R. Co.*, 38–311.

The fixing of cattle-guards at long distances beyond the switches and failing to fence between such guards and the switches cannot be regarded as setting apart that part of the main line as station or depot grounds, unless it be necessary for the purpose of transaction of business with the public that such part of the line remain unfenced. It is no reason for not fencing beyond such switch that in the operation of trains it would be inconvenient and possibly more hazardous to couple and uncouple cars if the track beyond the switches was fenced and provided with a cattle-guard: *Peyton v. Chicago, R. I. & P. R. Co.*, 70–522.

Negligence at depot grounds: As between the owner of cattle and the company, the latter cannot be required to keep a watch or guard at depot grounds, any more than it can be required to fence the same: *Smith v. Chicago, R. I. & P. R. Co.*, 34–506.

Speed at depot grounds: By this section a railroad company is liable for all stock killed on depot grounds by trains when running at a rate of speed greater than eight miles per hour; but if the stock is killed at a place where the company has a right to fence, although nearly adjacent to the depot grounds, the provisions as to the rate of speed have no application, and it is not negligence in the company that its trains are running at a higher rate of speed, even at such rate that they must necessarily enter on the depot grounds running faster than eight miles an hour: *Monahan v. Keokuk & D. M. R. Co.*, 45–523.

The provision making the company liable for stock killed on depot grounds by trains running at a greater rate of speed than eight miles an hour applies only to cases where the stock is killed on such grounds: *Ibid.*

The fact that a train running at a higher rate of speed than is allowed at depot grounds runs into a team which is being driven across the track in such grounds will not render the company liable in double damages: *Johnson v. Chicago & N. W. R. Co.*, 75–157.

Evidence in a particular case *held* sufficient to show that the train of defendant causing injury to stock was running at the depot grounds at a greater rate of speed than eight miles per hour: *Story v. Chicago, M. & St. P. R. Co.*, 79–402.

If by excessive speed upon the station grounds animals are stampeded and run upon the track, and without checking the speed are run down and killed, the cause and effect are so closely connected that it may be said that the unlawful speed of the train is the proximate cause of the injury, although the animals are not actually killed or injured upon the depot grounds: *Ibid.*

If the train comes upon the depot grounds at a greater rate of speed than eight miles per hour, a verdict for damages for stock killed may be sustained, although at the time of the injury to the stock the train had nearly stopped. The jury might be authorized in such case to find that the train would have been stopped entirely if it had entered the grounds at a speed not exceeding the lawful rate: *Miller v. Chicayo & N. W. R. Co.*, 59–707.

The provisions in this section with reference to speed at depot grounds have reference only to cases where there is injury in such depot grounds to animals running at large by reason of the running of trains at a greater speed than that specified and do not render the company liable for injuries to persons or animals not running at large by reason of the greater rate of speed where such rate is not in itself negligent. The regulation of speed at depot grounds for other purposes than with reference to animals running at large is for the city under § 769: *Cohoon v. Chicago, B. & Q. R. Co.*, 90–169.

As to what rate of speed will be negligent aside from statutory provisions is a question of fact under the circumstances of each case: *Ibid.*

An ordinance regulating the rate of speed of cars within city limits is applicable to the switch yards of the company, and is not to be limited to places where the public have a right to travel: *Crowley v. Burlington, C. R. & N. R. Co.*, 65–658.

Fencing at highway crossings: The company is not required to fence where its track crosses a public highway, whether such highway be one *de jure* or only *de facto*: *Soward v. Chicago & N. W. R. Co.*, 33–386.

The company has no right to fence its line so as to obstruct a public street, whether such street is actually opened for public travel or not: *Long v. Central Iowa R. Co.*, 64–657.

A railway company has not the right to fence across platted streets and alleys within city or town limits, even though such streets or alleys are not opened or used: *Lathrop v. Central Iowa R. Co.*, 69–105.

A railroad corporation does not have a right to fence its track in cities and towns where it is intersected and crossed by streets and alleys: *Blanford v. Minneapolis & St. L. R. Co.*, 71–310.

But the company has the right to fence within the corporate limits of a town so far as its line runs through lands situated beyond streets or other highways, and it will be liable in damages for injuries to stock at such places if it has failed to fence: *Coyle v. Chicago, M. & St. P. R. Co.*, 62–518.

In a particular case, *held*, that an instruction that if the animal killed was the property of plaintiff, was running at large, and was injured by defendant outside of the sta-

tion grounds, plaintiff would be entitled to recover, was erroneous, it not appearing but that the animal might have been killed at some point outside of the station grounds where defendant had no right to fence: *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622.

Negligence at highway crossings or depot grounds: The company is bound to use ordinary and reasonable care to avoid injuring stock at points where it is not required to fence: *Whitbeck v. Dubuque & P. R. Co.*, 21-103; *Balcom v. Dubuque & S. C. R. Co.*, 21-102.

The company is not liable in double damages under the statute for cattle killed at a place where it has no right to fence its track: *Soward v. Chicago & N. W. R. Co.*, 30-551.

Where an animal is killed on the depot grounds, negligence must be shown on the part of the company in order to make it liable: *Cleveland v. Chicago & N. W. R. Co.*, 35-220; *Plaster v. Illinois Cent. R. Co.*, 35-449.

In an action to recover for stock killed upon a railway the burden rests upon plaintiff to show that the injury was caused at a point where the company is required to fence its track: *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56-207; *Comstock v. Des Moines Valley R. Co.*, 32-376.

Evidence considered and *held* sufficient to show that the animal killed was struck at a highway crossing, and not in the field where the marks of blood were found: *Sullivan v. Wabash, St. L. & P. R. Co.*, 58-602.

In case of the killing of stock at a point where the railway has not the right to fence, the burden of proof is upon plaintiff to show negligence of the company: *Schneir v. Chicago, R. I. & P. R. Co.*, 40-337.

The failure to give signals at crossings does not in itself establish negligence on the part of the company nor render it liable for stock killed at such crossings. In such cases it is necessary, in order to hold the company liable, that the jury find that the failure to give signals, under the circumstances, constituted negligence, and also that such negligence, if any, was the cause of the injury: *Jackson v. Chicago & N. W. R. Co.*, 36-451.

Under particular facts, *held*, that the company was not guilty of any negligence in connection with the injury received from its train to stock, at its crossing, and was, therefore, not liable: *Plaster v. Illinois Cent. R. Co.*, 35-449; *Schneir v. Chicago, R. I. & P. R. Co.*, 40-337.

In a particular case, *held*, that there was not such absence of proof of negligence causing the injury to stock at a crossing, on the part of the company, as to require the setting aside of a verdict against it for damages: *Lawson v. Chicago, R. I. & P. R. Co.*, 57-672.

The fact that an engineer, in the exercise of his judgment, believes he can frighten stock from the track without reversing his engine or stopping the train, will not show that there is not negligence unless it appears that he possesses and exercises ordinary judgment: *Parker v. Dubuque Southwestern R. Co.*, 34-399.

In an action for negligence causing injuries to stock at a place where the company was not entitled to fence, *held*, that it was not improper to instruct the jury that, if defendant's employes saw the animal upon the track, and so near that it might reasonably be supposed, under all the circumstances, that the animal would be in danger, and could, by the use of ordinary care and prudence, have avoided the injury, and did not do so, the defendant was liable: *Edson v. Central R. Co.*, 40-47.

The question whether negligence is shown under such circumstances is one of fact for the jury: *Ibid.*

Negligence or wilful act of stock owner: Contributory negligence of stock owner, not amounting to a wilful act, will not defeat his right to recover for stock injured where the company has a right to fence: *Inman v. Chicago, M. & St. P. R. Co.*, 60-459.

The mere fact that the owner, by his voluntary act, exposes the animal to danger, will not necessarily make the act wilful. If the act of the owner was for a lawful purpose, and the danger was merely incidental, it should not be considered wilful so as to defeat recovery: *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622.

The provisions of this section of the statute exclude all defenses in such cases except such as arise from the wilful act of the owner. This implies something more than mere negligence. It is an act in some way connected with the injury, such as driving live-stock upon the track, or permitting the animals to escape for the purpose of going upon the track: *Ibid.*

The fact that the owner of swine allows the animals to run at large on his premises, in close proximity to the railroad track, does not constitute a wilful act such as to defeat his recovery: *Lee v. Minneapolis & St. L. R. Co.*, 66-131.

The act of the owner in permitting stock to run at large is not evidence of contributory negligence: *Whitbeck v. Dubuque & P. R. Co.*, 21-103; *Evans v. Burlington & M. R. R. Co.*, 21-374; *Stewart v. Burlington & M. R. R. Co.*, 32-561; *Searles v. Milwaukee & St. P. R. Co.*, 35-490.

The liability of the company for stock killed where it has a right to fence exists regardless of the negligence of the owner. It is only upon a showing that the injury is the result of the wilful act of the owner or his agent that the company is excused from liability: *Spence v. Chicago & N. W. R. Co.*, 25-139.

It is contributory negligence on the part of the owner of cattle to allow them to frequent places of danger such as depot grounds: *Smith v. Chicago, R. I. & P. R. Co.*, 34-506.

But where plaintiff allowed a blind horse to run at large and it was killed by defendant's train on its depot grounds, *held*, that the question whether plaintiff was guilty of contributory negligence was for the jury, and that such act was not, as a matter of law, negligence sufficient to defeat recovery: *Hammond v. Sioux City & P. R. Co.*, 49-450.

The fact that a party knowingly allows his animals to be upon and frequent depot

and station grounds does not necessarily constitute contributory negligence such as to defeat recovery for injury to such animals: *Miller v. Chicago & N. W. R. Co.*, 59–707.

That a stock owner allows his stock to run at large with the knowledge that a crossing is dangerous, and that his animals frequent such crossing, does not constitute negligence even though the statute makes the owner liable for all damage resulting from his animals being at large: *Kuhn v. Chicago, R. I. & P. R. Co.*, 42–420.

Where the owner of stock turned it loose upon the portion of his farm which was fenced, and it broke through the fence and strayed upon the railroad track, and it did not appear that the fence was reasonably sufficient, *held*, that plaintiff having no knowledge that his animals had escaped until they were killed, could not be considered guilty of contributory negligence: *Moriarty v. Central Iowa R. Co.*, 64–696.

Stock unlawfully at large: The fact that sheep and swine are not allowed to run at large will not defeat the owner's right to recover for injuries to such animals: *Spence v. Chicago & N. W. R. Co.*, 25–139; *Stewart v. Chicago & N. W. R. Co.*, 27–282; *Fernow v. Dubuque & S. W. R. Co.*, 22–528; *Lee v. Minneapolis & St. L. R. Co.*, 66–131.

Where animals allowed to run at large in violation of a city ordinance, come upon the track they are trespassers, and the company owes no duty with reference to them and is not liable for injuries received by them, even though occasioned by a train running at greater speed than eight miles per hour, it not appearing that such improper speed was wanton or reckless: *Vanhorn v. Burlington, C. R. & N. R. Co.*, 59–33; *S. C.*; 63–67.

To defeat recovery from a railroad company for killing on its depot grounds an animal which it is unlawful to allow to run at large, it is necessary to show that the animal is at large by the owner's sufferance: *Pearson v Milwaukee & St. P. R. Co.*, 45–497.

The fact that plaintiff's horse was at large in the night-time on the premises of another in violation of the herd law in force in the county, and was killed by defendant's train without fault or negligence of defendant, at a point where defendant had a right to fence, but did not, *held* not sufficient to defeat plaintiff's right of recovery: *Krebs v. Minneapolis & St. L. R. Co.*, 64–670.

It is not contributory negligence sufficient to defeat the owner's right of recovery that the animal is at large within the city limits in violation of an ordinance of the city, if it is at large by accident and not intentionally: *Doran v. Chicago, M. & St. P. R. Co.*, 73–115.

Operation of the road; construction train: The railway company is liable for stock killed by a construction train by reason of the failure to fence, although the road is not completed: *Glandon v. Chicago, M. & St. P. R. Co.*, 68–457.

Receiver: Where a railroad is being operated by a receiver, the receiver, and not the company, is liable under the provisions of this section: *Brockert v. Central Iowa R. Co.*, 82–369; *Schurr v. Omaha & St. L. R. Co.*, 67–280.

SEC. **2056. Damages by fire.** Any corporation operating a railway shall be liable for all damages sustained by any person on account of loss of or injury to his property occasioned by fire set out or caused by the operation of such railway. Such damages may be recovered by the party injured in the manner set out in the preceding section, and to the same extent, save as to double damages. [C.'73, § 1289.]

Setting out fires: The effect of this section is not to make the company absolutely liable for damages from fires set out, but to render the injury *prima facie* proof of negligence on part of the company, which may be rebutted by showing freedom from such negligence: *Small v. Chicago, R. I. & P. R. Co.*, 50-338; *Slosson v. Burlington, C. R. & N. R. Co.*, 51–294; *Libby v. Chicago, R. I. & P. R. Co.*, 52–92.

The negligence of the company is presumed if the fire proceeds from one of its engines, and it is not necessary for the plaintiff in the first instance to prove more than that it did so proceed: *Rose v. Chicago & N. W. R. Co.*, 72–625.

Plaintiff in the reasonable attempt to save the property of another from destruction by a fire set out by defendant's negligence received severe personal injuries. *Held*, that such injuries were so far the proximate result of defendant's negligence in setting out the fire that recovery could be had therefor: *Liming v. Illinois Cent. R. Co.*, 81–246.

In an action to recover damages for destruction of property by fire set out by an engine of a railroad company, *held*, that the question to be determined was whether the engine of the defendant set out the fire, and if so, whether it was properly constructed and operated, and in good condition: *Metzgar v. Chicago, M. & St. P. R. Co.*, 76–387.

And *held*, that the duty of the railroad company to use the best devices available to prevent the escape of fire would not depend in any manner upon the usage of other roads; and evidence that the same kind of an engine as that setting out the fire was in general use on other roads was not admissible: *Ibid.*

In an action to recover for loss of property destroyed by fire from an engine, *held*, that the petition need not allege negligence on the part of the defendant, as the fact that the fire was set out in the operation of its railroad was *prima facie* evidence of negligence sufficient to authorize a recovery in the absence of evidence overcoming the legal presumption: *Seska v. Chicago, M. & St. P. R. Co.*, 77–137.

In case of damages from fires, the presumption is that the corporation operating the road is guilty of negligence. It is not necessary for plaintiff to allege negligence, nor will such unnecessary allegation of neg-

ligence change the rule of proof: *Engle v. Chicago, M. & St. P. R. Co.*, 77-661.

Where part of an instruction, considered alone, appeared to hold a railroad company liable for the consequences of slight negligence in setting out a fire, but where the whole instruction considered together expressed the rule that it was held only to ordinary care and diligence, *held*, that the objectionable clause was no ground for reversal: *Ibid.*

It is sufficient for plaintiff suing in such cases to set forth in his pleading simply the occurrence of the injury. The presumption of liability arising from the occurrence itself is not necessarily overcome by the proof merely that the company was not guilty of negligence in the matters which were the immediate cause of the injury, as permitting combustible material to accumulate and remain on the right of way. The burden of proving such fact is not upon plaintiff even though he may allege it in his petition: *Ibid.*

This *prima facie* evidence may be rebutted by defendant, the effect of the statute being simply to change the burden of proof. As to whether the rebutting evidence showing due care, etc., on the part of the company is sufficient is a question for the jury and not for the court: *Babcock v. Chicago & N. W. R. Co.*, 62-593.

The good condition of the engine, the diligence of defendant's employes and other facts are evidence of care. When such evidence is introduced on the part of the defendant after the fact of the injury is proven by plaintiff, a conflict in the evidence arises which may be determined by the jury: *Ibid.*

The burden is upon defendant, upon proof that the fire originated from its engine, to show that it was free from negligence and in a particular case, *held*, that the evidence was not sufficient to show such fact: *Hockstedler v. Dubuque & S. C. R. Co.*, 88-236.

The fact that the right of way is procured from the owner of the land does not preclude recovery of damages for fires set out in the operation of the railway to fences not then built and timber situated a mile from the track. Such damages could not have been considered in estimating damages in proceedings for condemning the right of way: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

A railroad company is liable for damages from fire communicated by its negligence to a building of a third person and from such building to buildings of plaintiff, and negligence of the third person owning the intermediate building in not keeping it in the proper condition will not defeat plaintiff's right to recover: *Small v. Chicago, R. I. & P. R. Co.*, 55-582.

This section does not render invalid a contract between the railroad company and a person who is given a license to erect any building on its right of way relieving the railroad company from liability for injury to such building by fire caused by negligence of its employes: *Griswold v. Illinois Central R. Co.*, 90-265.

Company operating road: The company whose engine sets out the fire is liable for the damages resulting, although it is operating a line owned and used by another company, and the fire originates on the right of way by reason of combustible matter allowed to accumulate thereon by such other company: *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

Contributory negligence: If, by plowing around stacks in a field or otherwise protecting them, the owner could have prevented destruction of them by reason of fire originally set out by sparks from a locomotive spreading to such stacks, and the omission to protect them was negligence, then plaintiff cannot recover for their destruction; the question whether failure to thus plow around the stacks for their protection was negligence being a question for the jury: *Kesee v. Chicago & N. W. R. Co.*, 30-78.

It is not, as a matter of law, contributory negligence on the part of the owner of grain stacked upon the open prairie to fail to take certain precautions to guard against the approach of fire, as by plowing around it, etc. The question whether such omission constitutes negligence in a particular case is one of fact for the jury: *Garrett v. Chicago & N. W. R. Co.*, 36-121.

The right of recovery for an injury caused by fire set out in the operation of a railroad is not defeated by the mere contributory negligence of the injured party: *West v. Chicago & N. W. R. Co.*, 77-654; *Engle v. Chicago, M. & St. P. R. Co.*, 77-661.

Whether, under the section as it now stands, differing from the provisions under which preceding cases were decided, it is necessary for plaintiff suing to recover damages to his property for fire set out by an engine to prove absence of contributory negligence on his part, *quære: Ormond v. Central Iowa R. Co.*, 58-742.

Evidence as to whether other farmers had plowed around their stacks at the time plaintiff's stacks were destroyed by fire, *held* not admissible: *Ibid.*; *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

Held, also, that it was error to instruct the jury in such cases that plaintiff's act in stacking his wheat in a field where it was grown and adjacent to a railroad, without plowing around his stacks, would not constitute negligence defeating his recovery unless the act was such as ordinarily prudent and cautious men would not have done in like manner under similar surrounding circumstances: *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

The party from whose land the right of way is taken would not be negligent, as a matter of law, in sowing wheat upon the right of way and allowing the stubble to remain there after the wheat was removed: *Ibid.*

Constitutional: These peculiar provisions as to liability of railway companies for damages from fires are not in conflict with the constitution, being applicable alike to all persons or companies engaged in such business: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

Evidence: The frequent occurrence of fires caused by the same engine on the same

trip may be shown for the purpose of proving that it was defective in its construction, or that it was out of repair or negligently handled: *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215; *Lanning v. Chicago, B. & Q. R. Co.*, 68-502; *West v. Chicago & N. W. R'y Co.*, 77-654; *Johnson v. Chicago & N. W. R. Co.*, 77-666.

But, in such a case, it is not competent to show that other fires occurred along the right of way in the same vicinity shortly after the engine passed over the road and before the fire that destroyed plaintiff's property: *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

Plaintiff, in introducing evidence to rebut the evidence of the railway company tending to show want of negligence on its part causing fire set out by its locomotives, may do so by facts of a circumstantial character, as it is not usually possible to introduce witnesses who can testify from personal knowledge. Therefore evidence which might not be free from difficulties in other cases open to clearer proofs, might be considered sufficient: *Babcock v. Chicago & N. W. R. Co.*, 62-593.

There being no question as to where and how the fire originated, and it not being alleged as negligence that the right of way was in an improper condition, *held* error to refuse an instruction to the effect that the question as to whether or not the right of way was clean and free from grass and other combustible matter was immaterial: *Comes v. Chicago, M. & St. P. R. Co.*, 78-391.

In an action to recover damages from defendant for fire claimed to have been communicated to plaintiff's premises, either directly or indirectly from defendant's engine, *held*, that evidence that charred shingles, after the fire and on the same day, were found a quarter of a mile beyond the house burned and in the direction the wind was blowing, was admissible to show that the fire was communicated from the defendant's engine, or burning timbers on defendant's right of way about four hundred feet distant: *Knight v. Chicago, R. I. & P. R. Co.*, 81-310.

Where it was shown that large cinders were thrown out through the smoke-stack of the engine, and that the spark-arrester of the engine, permitting such cinders to escape, was out of repair, *held*, that the jury might infer that the employes operating the engine observed such cinders and sparks and were thereby informed of the defective condition of the engine: *Ibid.*

Proof that fire started in a field about one hundred and sixteen feet from the railroad track a few minutes after a train had passed, *held* evidence that such fire originated from such engine: *Greenfield v. Chicago & N. W. R. Co.*, 83-270.

Proof of damage in such case is *prima facie* evidence of negligence on the part of the company: *Ibid.*

In order that the company may negative its negligence in such case so as to escape liability, it must negative every fact the proof of which would justify the finding of negligence: *Ibid.*

Evidence of the occurrence of the fire may be sufficient to discredit the testimony of the engineer as to the engine being in good condition: *Ibid.*

Evidence in a particular case, *held* sufficient to sustain a verdict for damages caused by fire on the theory that such fire was set out by the locomotive engine of the defendant: *Hemmi v. Chicago G. W. R. Co.*, 70 N. W., 746.

Where there is a *prima facie* case of negligence on the one side and the direct evidence of the defendant as to care and diligence on the other, the conflict should be submitted to the jury: *Ibid.*

Sufficiency of evidence in particular cases considered: *Johnson v. Chicago & N. W. R. Co.*, 77-666; *Fish v. Chicago, R. I. & P. R. Co.*, 81-280.

As to admissibility of the record of inspection of engines, see *Tyler v. Chicago & N. W. R. Co.*, 71 N. W., 536.

Measure of damages: The measure of damage for property destroyed by such a fire is the difference between the value before and the value after the fire, so that in regard to damage to growing timber, *held*, that it was the loss of value of the growing timber as growing, and not the value it would have had as cut up into cord-wood, that was the measure of damage: *Greenfield v. Chicago & N. W. R. Co.*, 83-270.

In an action to recover the value of trees destroyed by fire set out by defendant's engines, *held*, that a witness was properly permitted to testify that it would be difficult to grow trees in the place of those destroyed, by reason of the shade of other trees, as such evidence would have a bearing upon the value of the trees destroyed: *Leiber v. Chicago, M. & St. P. R. Co.*, 84-97.

Where damages were claimed for injuries to meadow, grass and trees, *held*, that evidence might properly be received as to the depreciation in value of the meadow, trees, etc., by reason of the fire, and that the cost of restoration was not the proper measure: *Hamilton v. Des Moines & K. C. R. Co.*, 84-131.

The measure of damages to an orchard destroyed by fire, is the difference between the fair market value of the farm upon which it is situated, immediately before the fire, and such value immediately after the fire. In such a case plaintiff may, in an examination in chief of a witness, show the value of the land before and after the fire; and may, at his election, show the facts upon which the witness based his judgment as to such values: *Rowe v. Chicago & N. W. R. Co.*, 71 N. W., 409.

Since the enactment of the provision relating to liability for damages from fires, contributory negligence of the person injured cannot be shown as a defense: *West v. Chicago & N. W. R. Co.*, 77-654; *Engle v. Chicago, M. & St. P. R. Co.*, 77-661; *Johnson v. Chicago & N. W. R. Co.*, 77-666.

Title of property: Where it appeared that plaintiff had as a trespasser cut and stacked hay upon the land of another which he had no title to, and of which he was not in possession, *held*, that he could not maintain an action against a railroad company for its negligence

resulting in the destruction thereof by fire: *Murphy v. Sioux City & P. R. Co.*, 55-473; *Lewis v. Chicago, M. & St. P. R. Co.*, 57-127; *Comes v Chicago, M. & St. P. R. Co.*, 78-391.

Where hay destroyed in such a fire had been cut by plaintiff upon uninclosed prairie land, under a license, *held*, that he had sufficient title to recover damages for the destruction thereof although the license was given by one who had no authority to convey an interest in the land: *Metzgar v. Chicago, M. & St. P. R. Co.*, 76-387; *Bullis v. Chicago, M. & St. P. R. Co.*, 76-680.

Where plaintiff suing to recover for destruction of hay by fire set out by defendant in the operation of its road showed that such hay was cut and stacked upon land leased by him from the person claiming to be owner thereof, *held*, that he was entitled to recover without proving title in his landlord, there being no adverse claim made: *Johnson v. Chicago & N. W R. Co.*, 77-666.

In an action by the tenant to recover the value of a crop destroyed by fire set out by the company's engines, it appearing that plaintiff did not pay cash rent, *held* error to refuse to allow plaintiff to be cross-examined as to whether he was to give a share of the grain for rent: *Ormond v. Central Iowa R. Co.*, 58-742.

Where it does not appear that title to the premises injured is in dispute, oral evidence of such title not objected to may be sufficient to show plaintiff's title to recovery, and an objection to such evidence of plaintiff's title, not made until by motion to take the case from the jury, is too late: *Fish v. Chicago, R. I. & P. R. Co.*, 81-280.

Negligence: Before the enactment of this statutory provision, it was held that the burden of proof in an action against the company for such damages was upon plaintiff to show negligence of the company, and that proof of the injury alone was not sufficient to make out a *prima facie* case: *Gandy v. Chicago & N. W. R. Co.*, 30-420; *McCummons v. Chicago & N. W. R. Co.*, 33-187; *Garrett v. Chicago & N. W. R. Co.*, 36-121.

But in such case, *held*, that as in the nature of the case plaintiff must labor under difficulties in making proof of the fact of negligence, and as that fact itself is always a relative one, it might be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, and which might not be satisfactory in other cases, free from difficulty and open to clear proof: *Gandy v. Chicago & N. W. R. Co.*, 30-420.

A party using a dangerous instrument, body or element will be held to use greater care and prudence than when using a less destructive agency. Fire being a destructive element, persons using it are required to exercise all reasonably careful precautions against its spread, and the care and prudence required by law to prevent the spread of fire from a locomotive are not deemed to be exercised unless some proper precautions are used for that purpose: *Jackson v. Chicago & N. W. R. Co.*, 31-176.

Ordinary care and prudence require the use of the best contrivances known, and unless such are used it will be considered negligence; but what amounts to negligence in such cases is a question of fact for the jury: *Ibid.*

Also *held*, that to allow dried grass, weeds, and other matter, the natural accumulations of the soil, to remain upon the right of way, was not negligence *per se*, but that there might be such peculiar or unusual circumstances in a given case as that such acts would amount to negligence in fact, and that when such circumstances existed they might properly be submitted to the jury to establish the fact of negligence: *Kesee v Chicago & N. W. R. Co*, 30-78.

Also *held*, that the question of negligence, such as to render the company liable for damages resulting from such fires, was to be determined by the jury, and that it was not proper to enumerate facts and circumstances which as matter of law would be sufficient to charge the company with negligence: *McCormick v. Chicago R. I. & P R. Co.*, 41-193.

SEC. **2057. Fences required.** All railway corporations owning or operating a line of railway within the state shall construct, maintain and keep in repair a suitable fence of posts and barb wire or posts and boards, or any other fence which the fence viewers shall determine to be equivalent thereto, on each side of the track thereof, so connected with cattle-guards at all public road crossings as to prevent cattle, horses and other live stock from getting on the railroad tracks. Such tracks shall be fenced within six months after the completion of the same or any part thereof. Such fences, when of barb wire, shall be of five wires securely fastened to posts set not more than twenty feet apart, the top wires to be not less than fifty-four inches high; or of five boards securely nailed to posts set not more than eight feet apart, the fence to be not less than fifty-four inches high. Fences repaired or rebuilt shall conform to the foregoing provisions. Nothing in this or the two following sections shall be construed to compel a railway company operating a third-class line to fence its road through the land of any farmer or other person who, by written agreement with such company, waives the fencing thereof. [22 G. A., ch. 30, § 1.]

Where the only repairs made after 1888 in a railroad fence which had never been fifty-four inches high, consisted in nailing on loose boards and replacing defective boards with others brought from another portion of the fence, *held*, that such acts did not constitute

a repairing of the fence within the meaning of this section so as to render it necessary that the fence should be made of the statutory height: *Moeckley v. Chicago & N. W. R. Co.*, 92–748.

As to fencing in general see notes to § 2055.

SEC. **2058. Penalty—killing of stock.** If the corporation, officer thereof or lessee owning or engaged in the operation of any railroad in the state refuses or neglects to comply with any provision of this chapter relating to the fencing of the tracks, such corporation, officer or lessee shall be guilty of a misdemeanor, and upon conviction fined in a sum not exceeding five hundred dollars for each offense, and every thirty days' continuance of such refusal or neglect shall constitute a separate and distinct offense; but nothing herein contained shall be construed to relieve the corporation from liability arising from the killing or maiming of live stock on said track or right of way by its negligence or that of its employes, nor shall anything in this chapter interfere with the right of open or private crossings, or with the right of persons to such crossings, nor in any way limit or qualify the liability of any corporation or person owning or operating a railway that fails to fence the same against live stock running at large for any stock injured or killed by reason of the want of such fence. [23 G. A., ch. 20; 22 G. A., ch. 30, §§ 2, 3.]

SEC. **2059. Railway crossings near Mississippi river.** When, in the construction of a railway, it becomes necessary to cross another railway near the shore of the Mississippi river, each shall be so constructed and maintained at the point of crossing that the respective road-beds thereof shall be above high water in such river, but where the crossing occurs within the limits of cities containing six thousand or more inhabitants, the council thereof may establish the crossing grade. [C. '73, § 1290.]

SEC. **2060. Interlocking switches.** When in any case two or more railroads cross each other at a common grade, or a railroad crosses a stream by swing or draw bridge, they may be equipped thereat with an interlocking switch system, or other suitable safety device rendering it safe for engines or trains to pass thereover without stopping, and if such interlocking switch system or other safety device shall have been approved by the railroad commissioners, then the engines and trains of such railroad or railroads may pass over such crossings or bridge without stopping, the provisions of any other law to the contrary notwithstanding, and the provisions of the three following sections also are not applicable in such a case. [25 G. A., ch. 25, §§ 1, 6.]

SEC. **2061. Proceedings to establish.** In any case where the tracks of two or more railroads cross each other at a common grade, any company owning one of such tracks and desiring to unite with others in protecting the crossing with interlocking or other safety device, and being unable to agree with such others thereon, may file in the district court of the county in which the crossing is located a petition, stating the facts and asking the court to order such crossing to be protected by interlocking or other safety device. Said petition shall be accompanied by a plat showing the location of all tracks and switches, and upon the filing thereof notice shall be given by the petitioner to every other company or person owning or operating any track involved in such crossing. The court, or a judge thereof if the petition is filed in vacation, shall thereupon appoint a commissioner to examine into the necessity for such system, and report the facts and his recommendation in such time as the court or judge may direct, and, as soon as practicable thereafter, the court or judge shall appoint a time and place for the hearing of such petition. The proceedings shall be in equity, and subject to all the rules of equity practice, except that the court shall require the issues to be made up at the first term after the petition is filed, and give the proceeding precedence over other civil business and try the action thereat, if possible. [Same, § 2.]

SEC. **2062. Decree.** After allowing all parties full opportunity to show cause why such system should or should not be ordered thereat, the court

shall, if it is found the plaintiff should prevail, enter its decree ordering the establishment of such system as it may prescribe, the time within which it shall be begun and finished, and the proportion of the expense thereof to be paid by each company or person interested in the crossing, and make such division of the costs as may be equitable. [Same, § 2.]

SEC. **2063. Proposed crossing.** In case one railway company desires to cross with its tracks those of another at grade, and such companies cannot agree to the terms thereof, the company desiring to cross shall, upon the application of the company whose track it is desired to cross, in a proceeding instituted as provided in the two preceding sections, be compelled to interlock such crossing, and the court therein shall make such orders and decree as may be required to secure public safety and the preservation of the properties of the roads, and prescribe the terms upon which such crossing shall be maintained after being made. The provisions of this and the two preceding sections shall not apply to side tracks. [Same, § 3.]

SEC. **2064. Apportionment of costs.** If in any case contemplated in the three preceding sections the crossings shall be of two railroads only, then the court shall not apportion to either less than one-third of the cost, and if more than two roads are involved, the court shall not apportion to any one less than two-thirds of an equal share of such cost. [Same, § 4.]

SEC. **2065. Modification of decree.** Any decree made pursuant to the four preceding sections shall be subject to changes or modifications at any subsequent term, on due cause shown therefor, upon a petition filed in the same proceedings, setting forth the reasons therefor and arising subsequent to entry of the decree therein. [Same, § 5.]

SEC. **2066. Sale or lease of railroad property—joint arrangement.** Any railway corporation may sell or lease its property and franchises to, or make joint running arrangements not in conflict with law with, any corporation owning or operating any connecting railway, and any corporation operating the railway of another shall be liable in the same manner and extent as though such railway belonged to it. [C. '73, § 1300.]

Where a line of road has been built by aid of taxes levied for that purpose, the line in aid of which the tax is voted must be operated as a whole, and a portion thereof cannot be leased and operated separately to the injury of any locality on the line. Any railroad company availing itself of such aid assumes relations to the public different from those resulting from a mere private contract: *State v. Central Iowa R. Co.*, 71–410.

Further as to this section, see *Treadway v. Chicago & N. W. R. Co.*, 21–351; and, in general, notes to § 2036.

SEC. **2067. Mortgage of contract or lease.** Any contract, lease or benefit derived under the authority given in the preceding section may be mortgaged for the purpose of securing construction bonds in the same manner as other property of the corporation. [C. '73, § 1301.]

Where a railroad has been constructed by the aid of taxes the obligation to operate it as an entire line attaches to it in the hands of a purchaser thereof at sale under foreclosure: *State v. Central Iowa R. Co.*, 71–410.

Where a railroad was bought in by a new corporation at foreclosure sale under a mortgage, *held*, that such purchaser could be compelled to comply with the decree rendered against the former company, while in the hands of a receiver, directing the operation of its road between certain points: *State v. Iowa Cent. R. Co.*, 83–720.

Under a contract for the transfer of a line of railroad from one company to another, *held*, that the transferee assumed any liability existing against the transferrer for injury to an employe: *Knott v. Dubuque & S. C. R. Co.*, 84–462.

SEC. **2068. Effect of change of name.** If any railway company is organized under a corporate name, and has made contracts for payments to it upon delivery of stock therein, and shall subsequently thereto change its corporate name, or if the real ownership in the property, rights, powers and franchises has passed legally or equitably into any other company, no such contracts shall be enforced until tender or delivery of stock in such last named corporation or company is made. [C. '73, § 1302.]

Cases are contemplated in this section where payments are to be made to the company upon delivery of stock, and it also contemplates that the ownership of property

rights, powers and franchises may legally pass to another company while such contracts for payments exist. The section embraces obligations for payment of taxes voted, and also voluntary conveyances by one company to another, in which the delivery of stock to taxpayers shall be provided for. Therefore, *held*, that a transfer by the company in whose favor a tax was voted to another company did not forfeit the tax voted, stock in the new company of equal or greater value than that of the company to whom the tax was voted being offered to the taxpayer: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

SEC. **2069. Report.** When any railway has been completed and opened for use, the corporation owning, operating or constructing it shall report under oath to the next general assembly the total cost thereof, specifying the amount expended for construction, engines, cars, depots and other buildings, and the amount of all other expenses, together with the length of the railway, the number of planes with their inclination to the mile, the greatest curvature, the average width of road-bed, and the number of ties per mile. [C. '73, § 1303.]

SEC. **2070. Rights reserved.** All contracts, stipulations and conditions regarding the right of controlling and regulating the charges for freight and passengers upon railways, heretofore made in granting land and other property or voting taxes to aid in the construction of or franchises to railway corporations, are expressly reserved, continued and perpetuated in full force and effect, to be exercised by the general assembly whenever the public good or the public necessity requires such exercise thereof. [C. '73, § 1306.]

SEC. **2071. Liability for negligence or wrongs of employes.** Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employes thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. [C.'73, § 1307.]

In general: Without this statutory provision the company would not be liable to an employe for injuries resulting from negligence of a co-employe, and the intention of the statute is merely to give to the employe a right of action in such cases, and not to change the degree of care necessary, which is, as between master and servant, that of ordinary care and diligence only: *Hunt v. Chicago & N. W. R. Co.*, 26–363.

The company is liable to an employe for damages resulting from the negligence of a co-employe whose duty it was to keep a bridge in order, in the performance of such duty: *Locke v. Sioux City & P. R. Co.*, 46–109.

A railway company cannot avoid liability for the negligence of its employes by requiring of an employe injured by reason of such negligence more than reasonable care in the discharge of his duties: *Scagel v. Chicago, M. & St. P. R. Co.*, 83–380.

It seems that this section is not applicable to street railways: *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed., 82.

These provisions are entirely immaterial as applied to a case where the evidence fails to show any negligence on the part of the railroad company: *Hamilton v. Chicago, R. I. & P. R. Co.*, 61 N. W., 415.

Person or company operating railway: A receiver who is managing a railway under the direction of a court is within this section and may be charged, and a recovery obtained against him, as a person operating a railway. And though his liability could not be personal, a judgment against him might be satisfied out of the property in his hands if the court by whom he was appointed should so direct: *Sloan v. Central Iowa R. Co.*, 62–728.

The fact that a lessee may be held liable under this section does not prevent recovery against the owner of the road. The actions are cumulative: *Bower v. Burlington & S. W. R. Co.*, 42–546.

The running of special trains over the railway by a construction company in constructing it is operating a railroad within the meaning of the statutory provision: *McKnight v. Iowa & M. R. Constr. Co.*, 43–406.

Persons not employes: The language of the section is so broad that it includes any and all persons, employes and others, who may be injured by the negligence of the agents or servants of the railway company or persons operating the railway: *Rose v. Des Moines Valley R. Co.*, 39–246.

If the act of the employe is within the scope of his authority the company is liable for injuries therefrom to a third person even though the act is wilfully wrongful: *Marion v. Chicago, R. I. & P. R. Co.*, 64–568.

If the employes perform their duty in operating a train in a manner so unusual or reckless as to endanger lives of persons

upon the train they are guilty of negligence, and if in direct consequence of such negligence a person is injured the company will be liable even though the person was on the train without right. This section renders the company liable for all damages sustained by any person in consequence of the neglect of agents, etc.: *Way v. Chicago, R. I. & P. R. Co.*, 73–463.

It is not material that plaintiff, claiming to recover by virtue of this section, was not employed in the operation of the road. It is sufficient if it appears that he was injured by the operation of the road and by negligence of the parties charged with responsibility with respect to the movement of trains: *Pierce v. Central Iowa R. Co.*, 73–140.

One riding on a train by fraud or stealth without payment of fare takes upon himself all the risk of the ride and if injured by an accident not due to recklessness and wilfulness on the part of the company, he cannot recover notwithstanding the provisions of this section: *Condran v. Chicago, M. & St. P. R. Co.*, 67 Fed., 522.

Employes engaged in operating road: This section affords a remedy only to such employes as are employed, at the time of receiving the injury, in the business of operating a railroad: *Malone v. Burlington, C. R. & N. R. Co.*, 65–417.

So that to entitle an employe to recover against the company for injuries which he has sustained, he must show, first, that he belonged to the class of employes to whom the statute affords a remedy, and second, that the company which occasioned the injury was of a class of companies for which the remedy is given: *Ibid.*

Therefore, *held*, that an employe whose duty was to wipe off engines, open and close the doors of the engine house, and remove snow from the turn-table and tracks and operate the turn-table, and who was injured by reason of the negligence of a co-employe causing the door of the engine house to fall upon him, was not engaged in the operation of the road in such a sense as to be within the statutory provisions: *Ibid.*

The change from the common law made by this section extends no further than to employes engaged in the business of operating a railway, and not to persons employed by the corporation without regard to the nature of their employment. Such corporation may be engaged in any other business, which may be within the scope of their organization, but not at all, or very remotely, connected with the use of their road, and in such cases employes by whom such affairs are conducted acquire no rights under the statutory provision, as their occupation does not expose them to the hazards incident to the use of railways, and the statute was not designed for their protection and benefit: *Schroeder v. Chicago, R. I. & P. R. Co.*, 41–344.

It is error for the court to instruct the jury that, as a matter of law, the nature of plaintiff's service and employment bring him within the terms of the statute. The character of his employment, whether in connection with the use of defendant's railroad, or whether thereby he is brought within the provisions of the statute, are questions of fact to be determined by the jury: *Ibid.*

These provisions apply no further than to employes engaged in the business of operating a railroad, and do not apply to employes in a machine-shop of the company. In such case the common-law rule exempting the employer from liability for injury to an employe resulting from the negligence of a co-employe is still in force: *Potter v. Chicago, R. I. & P. R. Co.*, 46–399.

The words "where such wrongs are in any manner connected with the operation or use of any railway" apply not only to wilful wrongs, but also to negligence of agents, etc., and in order to entitle an employe to recover for injuries received from a co-employe, it must appear that he was engaged in a service connected with the use and operation of the railroad: *Foley v. Chicago, R. I. & P. R. Co.*, 64–644.

Therefore, *held*, that an employe whose duty it was to repair cars while standing upon the track and side track of the company, while not in motion, and who was sometimes required to ride on the trains of the company from place to place for the purpose of making such repairs at different places, was not employed in the operation of the road in such sense as to bring him within the protection of the provision: *Ibid.*

Injuries to one employe by reason of negligence of another, both engaged in the work of repairing a track, such injury not resulting from the operation of the railroad, *held* not within the provisions of the statute: *Matson v. Chicago, R. I. & P. R. Co.*, 68–22.

Employes engaged in hoisting coal in a coal-house for the purpose of filling a car are not so engaged in the hazardous business of operating a railroad as that one can recover for injuries caused by the negligence of the other: *Luce v. Chicago, St. P., M. & O. R. Co.*, 67–75.

In order to render a company liable for injuries to an employe by reason of negligence of a co-employe, the negligence complained of must be that of an employe and affect a co-employe, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, or superintending, directing or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may may be done away from the train, is not connected with its movement: *Stroble v. Chicago, M. & St. P. R. Co.*, 70–555.

Therefore, *held*, that where employes were engaged about elevating coal to a platform to supply the engine, their duties were not so connected with the use and operation of the railroad as that one of them could recover for injuries received from negligence of the other: *Ibid.*

Where a section hand was injured by the negligence of a co-employe while engaged in loading a car, *held*, that it did not sufficiently appear that his employment was of such character as to entitle him to recover: *Smith v. Burlington, C. R. & N. R. Co.*, 59–73.

Where an employe was injured by appli-

ances connected with the round house, *held*, that it was not error to instruct the jury that if they found it was a part of plaintiff's duty to keep such appliances in a safe condition, or that it was the duty of another employe of the same kind to do so, and that they both, or either of them, neglected to do so, then the plaintiff could not recover, the employes not being engaged in the operation of the road: *Manning v. Burlington, C. R. & N. R. Co.*, 64–240.

An employe in the round house engaged in putting a spring into an engine is not engaged in the operation of the road within the meaning of this section: *Hathaway v. Illinois Central R. Co.*, 92–337.

One who is employed in a round house as clinker man, and in the course of his duty is injured while coupling together tanks in the round house, moved by engines, is within the terms of this section and can recover for injury done to him, due to the negligence of a co-employe: *Butler v. Chicago, B. & Q. R. Co.*, 87–206.

A person engaged in working on a bridge of the company and required, in the course of his employment, to ride on its trains, is within the statutory provision: *Schroeder v. Chicago, R. I. & P. R. Co.*, 47–375.

And so is a section hand: *Frandsen v. Chicago, R. I. & P. R. Co.*, 36–372.

And so is a hand engaged in shoveling gravel from a gravel train: *McKnight v. Iowa & M. R. Constr. Co.*, 43–406.

Or a hand engaged in connection with the operation of a dirt train: *Deppe v. Chicago, R. I. & P. R. Co.*, 36–52.

Where the plaintiff was employed on a train used for hauling sand, and was injured by the falling of a bank of sand where he had been shoveling, *held*, that the case was within the provisions of this section: *Handelun v. Burlington, C. R. & N. R. Co.*, 72–709.

An employe required to go upon a train for the purpose of unloading cars is within the scope of this section and may recover for injuries received by reason of negligence of a co-employe: *Raben v. Central Iowa R. Co.*, 73–579.

Where the employe was injured while engaged in operating a derrick situated on a flat car, the operation of which involved the movement of the car upon the track, *held*, that he was within the scope of this section: *Nelson v. Chicago, M. & St. P. R. Co.*, 73–576.

A section foreman whose work is along and on a track on which trains are operated, and has reference to train movements in the keeping of the track in repair and in condition therefor, is engaged in the operation of the road in such sense as to come within the provisions of this section: *Haden v. Sioux City & P. R. Co.*, 92–226.

A private detective injured while walking along the track, in accordance with directions of the company, to a certain place where he was to try to detect persons accustomed to place obstructions on the track, and who, while so walking to the place designated, was prostrated by sunstroke on the track and negligently run over and injured by defendant's engine, *held* to be so engaged as to subject him to the hazard peculiar to the business of operating the railway, and to be within the protection of the statutory provision: *Pyne v. Chicago, B. & Q. R. Co.*, 54–223.

Where a "wiper" is in temporary charge of an engine, the railroad company is liable for his negligence resulting in injury to a brakeman in coupling cars: *Whalen v. Chicago, R. I. & P. R. Co.*, 75–563.

And it is immaterial in such case whether the train was being made up at the usual and proper time or not: *Ibid.*

A workman employed to shovel snow for the clearing of the track, and being transported on defendant's train for the purpose of performing such service, is engaged in the operation of the road in such sense as entitles him to recover for injuries received by reason of negligence of employes operating the train: *Smith v. Humeston & S. R. Co.*, 78–583.

A section-hand, while riding on a hand-car holding a shovel for the purpose of clearing snow from the rail, is engaged in the operation of the road within the provision of this section, so as to be entitled to recover for injuries received by reason of negligence of the foreman in charge of the car: *Chicago, M. & St. P. R. Co., v. Artery*, 137 U. S., 507.

This statute is upheld on the ground that it is applicable to all employes of a certain class; that is, those engaged in employment which exposes them to the peculiar dangers and perils of the operation of a railroad and it has not been limited to train crews only. It applies to section men who have nothing to do with the movement of trains by which they are injured, and to other like employes: *Keatley v. Illinois Central R. Co.*, 63 N. W., 560.

Therefore, *held* that it was applicable in case of injury to one of the gang of section men engaged in constructing an abutment who was injured by the employes of the defendant negligently running a train at a dangerous rate of speed upon an unfinished, insecure and unsafe bridge, by reason of which the cars left the track and caused the death of such employe: *Ibid.*

Recovery by an employe for injuries due to negligence by co-employe is not limited to cases where the injury was received by movement of cars or engines on the track, nor even to cases where the employe who was injured was engaged in the operative department of the road: *Canon v. Chicago, M. & St. P. R. Co.*, 70 N. W., 755.

Therefore, *held*, that a car inspector whose business was to inspect the cars of a train while standing on the track might recover for injuries caused by the cars being moved while he was discharging his duty and that his right of recovery was not defeated by the fact that he had consented that some of the cars of the train might be taken out: *Ibid.*

Injury to foreman from negligence of subordinate: The fact that an employe of a railroad company is the foreman of a crew of workmen with power to direct the men under him in their work and to hire and discharge them at will does not prevent his being a co-employe with such workmen,

within the meaning of this section, and he may recover for injuries received from the negligence of the men in his employ: *Houser v. Chicago, R. I. & P. R. Co.*, 60–230.

Contributory negligence: This statutory provision does not exonerate the injured party from the necessity of exercising reasonable care. Its purpose is to extend the liability of railroads to injuries to employes for which, at the common law, they were not liable: *Murphy v. Chicago, R. I. & P. R. Co.*, 45–661.

In case of death: Where the injury results in death, the company is liable to the personal representatives of deceased: *Philo v. Illinois Cent. R. Co.*, 33–47.

Constitutionality: This provision is not unconstitutional, as subjecting railroad corporations to penalties and liabilities other than those imposed on other business corporations engaged in a like business: being applicable to all persons or corporations engaged in a peculiar business it is not open to such objection: *McAunich v. Mississippi & M. R. Co.*, 20–338; *Deppe v. Chicago, R. I. & P. R. Co.*, 36–52; *Bucklew v. Central Iowa R. Co.*, 64–603; *Pierce v. Central Iowa R. Co.*, 73–140; *Raben v. Central Iowa R. Co.*, 73–579.

Liability of company for negligence of superior or inferior employe: If the employe of a railroad company is injured while riding on a hand-car, through the negligence of the boss in charge thereof, the company is liable: *Hoben v. Burlington & M. R. R. Co.*, 20–562.

Instructions based upon the hypothesis that a person for whose death damages were sought to be recovered from the company for injuries received while acting in obedience to the directions of an employe having authority to control him, *held* applicable where deceased was a fireman accompanying the engineer and discharging his duty while upon the engine under the control of such engineer: *Cooper v. Central R. of Iowa*, 44–134.

Where an accident by which an employe is injured is caused by the act of an inferior employe acting under the direction of such superior, the latter cannot recover for an injury received: *Dewey v. Chicago & N. W. R. Co.*, 31–373.

Where the foreman of a crew of men employed by the company in the repair of bridges brought action against the company for injury received from negligence of one of the men under his control, *held*, that the fact that he was in charge of the workman did not defeat his right to recover for such negligence under this section, giving a right of action for the negligence of a co-employe: *Houser v. Chicago, R. I. & P. R. Co.*, 60–230.

It may be that a mere foreman, as the word is generally understood, that is, a laborer with power to superintend the labor of those working with him, is a co-employe so far as his own mere labor is concerned, but it is error to exclude from the jury the consideration of the question whether there is negligence of such foreman, acting as a superior: *Baldwin v. St. Louis, K. & N. R. Co.*, 68–37.

A person who has charge and full control of a timber-yard of a railroad company is to be regarded as a vice-principal, and one who has the care and management of the business in his absence is a temporary vice-principal, and the railroad company is liable for injuries to a subordinate employe caused by the negligence of either of these persons: *Baldwin v. St. Louis, K. & N. W. R. Co.*, 75–297.

And notice to the person temporarily in charge of the yard of the defective piling of the timber which caused the injury would be notice to the company, regardless of the fact as to whether or not such person in charge of the business was charged with any duty in regard to piling the timber: *Ibid.*

Release of claim: A written release of all claim for damages resulting from an injury, executed for a consideration will be binding on the person injured in the absence of fraud, even though it is not read over by him before signing it: *Gulliher v. Chicago, R. I. & P. R. Co.*, 59–416.

Contract: A written contract between a company and an employe by which he agrees to hold the company harmless for injuries received in doing certain acts which he is advised are dangerous is admissible for the purpose of showing the existence of the rule on the subject, and notice of it to the employe and also notice to the employe of such danger: *Sedgwick v. Illinois Cent. R. Co.*, 73–158.

A contract between the employe and the company by which a privilege which the employe has of enjoying, on payment of dues, participation in a benefit fund conditioned on his not prosecuting an action against the company for injuries received in its employ, is not a contract which is invalid under this section. Such contract does not limit the right of action against the company, but relates only to the participation in the benefit fund: *Donald v. Chicago, B. & Q. R. Co.*, 61 N. W., 971.

The conditiou on which the benefit of the fund is to be enjoyed operates against the legal representatives of one whose death is caused by injuries as well as against the beneficiary himself: *Ibid.*

SEC. **2072. Signals at road crossings.** A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; but at street crossings within the limits of cities or towns the sounding of the whistle may be omitted, unless required by ordinance or resolution of the council thereof; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect. Any officer or employe of any railway

2054

company violating any of the provisions of this section shall be punished by fine not exceeding one hundred dollars for each offense. [20 G. A., ch. 104.]

This section imposes a duty, the omission of which is negligence; but before the person injured by it can recover, he must show that his negligence did not contribute to the injury: *Sala v. Chicago, R. I. & P. R. Co.*, 85–678.

Where there is failure to ring the bell upon approaching a crossing and an injury results, such failure will be negligence for which defendant will be liable unless exonerated by some negligence of plaintiff: *Reed v. Chicago, St. P., M. & O. R. Co.*, 74–188; *Cuse v. Chicago, M. & St. P. R. Co.*, 69 N. W., 538.

The whistle should be sounded and the bell rung as a warning before reaching the crossing and a danger signal after the danger to a person attempting to cross is discovered is not sufficient: *Hughes v. Chicago, St. P. & K. C. R. Co.*, 88–404.

The ringing should be continued from the time of reaching the sixty-rod limit until the crossing is reached: *Lapsley v. Union Pacific R. Co.*, 50 Fed., 172.

A party about to cross the railroad track has the right to proceed upon the assumption that the signals for the highway crossings will be given: *Harper v. Barnard*, 68 N. W., 599.

The signal is not only for the benefit of persons who are on or about to cross the track, but for those who are lawfully using teams near the track: *Lonergan v. Illinois Cent. R. Co.*, 87–755; *Ward v. Chicago, B. & Q. R. Co.*, 65 N. W., 999.

If a traveler about to cross the track, who has looked and listened within a reasonable distance from the crossing without seeing or hearing an approaching train is run upon and injured by reason of negligence to blow the statutory whistle, the company is liable: *Winey v. Chicago, M. & St. P. R. Co.*, 92–622.

SEC. **2073. Stopping at railway crossings.** All trains run upon any railroad in this state which intersects or crosses any other railroad upon the same level shall be brought to a full stop at a distance of not less than two hundred nor more than eight hundred feet from the point of intersection or crossing, before such intersection or crossing is passed, except as otherwise provided in this chapter. Any engineer violating the provisions of this section shall forfeit one hundred dollars for each offense, to be recovered in an action in the name of the state for the benefit of the school fund, and the corporation on whose road such offense is committed shall forfeit the sum of two hundred dollars for each offense, to be recovered in like manner. [20 G. A., ch. 163.]

SEC. **2074. Contract or rule limiting liability.** No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into. [C. '73, § 1308.]

A contract such as is prohibited by this section is void whether it is with or without consideration: *Brush v. Sabula, A. & D. R. Co.*, 43–554.

A contract limiting the amount of recovery for loss of baggage is invalid: *Davis v. Chicago, R. I. & P. R. Co.*, 83–744.

Where a bill of lading was executed in Dakota, valid according to the laws of Dakota, for the transportation of goods from that state into Iowa, *held*, that stipulations therein relating to liability for loss of the goods would be recognized in an Iowa court with reference to the loss occurring in Iowa, although contrary to the Iowa statute: *Hazel v. Chicago, M. & St. P. R. Co.*, 82–477.

Whether this section would be applicable to a contract made in Iowa but to be wholly performed in another state, *quære;* but it was held applicable to a contract to transport cattle from Clinton, Iowa, to Chicago, on the ground that it was to be partly performed in Iowa: *McDaniel v. Chicago & N. W. R. Co.*, 24–412.

This section is not invalid as to a contract made within the state although such contract relates to transportation of a person to a point without the state: *Solan v. Chicago, M. & St. P. R. Co.*, 63 N. W., 692.

A company is not prohibited from providing by contract that it shall not be liable beyond the terminus of its road: *Mulligan v. Illinois Cent. R. Co.*, 36–181, 187.

The common law liability of a common carrier attaches to a carrier of live-stock, so far as the rule is not inapplicable by reason of the peculiar character of the property. Responsibility for the carriage of stock cannot, therefore, be restricted by contract: *McCoy v. Keokuk & D. M. R. Co.*, 44–424.

A rule or custom limiting liability for injury to all stock, including such as is of especial value as being blooded, to the value of common stock, is void: *McCune v. Burlington, C. R. & N. R. Co.*, 52–600.

This section does not render the carrier liable for loss occurring by the act of the owner: *Hart v. Chicago & N. W. R. Co.*, 69–485.

Whether a carrier, in the absence of any statute restricting his powers, can, by rule, regulation or contract, limit the amount for which he will be liable in case of loss of the property, *quære.* But the statutory provis-

ion prohibits the making of such contract: *Ibid.*

This statutory provision is applicable to contracts for transportation from a point within to a point without the state, and is not unconstitutional in that respect: *Ibid.*

This section has no application to the case where the railroad company grants to a person a license to erect a building on its right of way for business purposes with the stipulation that it shall not be liable for injury to such building by fire caused by negligence in its employes in the operation of its road: *Griswold v. Illinois Central R. Co.*, 90–265.

SEC. **2075. Lien of judgment.** A judgment against any railway corporation, or any street railway corporation or copartnership, for an injury to any person or property shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, 1862, and prior and superior to the lien of any street railway mortgage or trust deed executed after the adoption of this code. [C. '73, § 1309.]

Where action is brought for recovering from the company damages for breach of a contract under which the right of way was conveyed to it, the judgment may be made a lien on the portion of the line conveyed: *Varner v. St. Louis & C. R. R. Co.*, 55–677.

A judgment for damages for breach of contract by a railway company for failure to fence its right of way and construct cattle-guards becomes a lien on the property of the company, but the party is not entitled to such lien for damages caused by negligent construction of the road causing an overflow of his land, nor for trespass in going upon his land outside the right of way: *Hull v. Chicago, B. & P. R. Co.*, 65–713.

A right of action, or an action pending for such injury, is not a lien, and a purchaser of the road before the rendition of judgment takes it free from the lien of such judgment when rendered: *Burlington, C. R. & N. R. Co. v. Verry*, 48–458; *White v. Keokuk & D. M. R. Co.*, 52–97.

This section is not applicable to street railways: *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed., 82.

A company buying in a railroad at foreclosure sale, does not take it subject to any obligation to pay debts of the former company not reduced to judgment, nor in any way preserved at the time the deed is made, nor does the receipt from the receiver of the former company of the balance of the proceeds of the management of the property under the receivership, render the new company liable for such claim although reduced to judgment against the receiver before the payment by him of the balance of the funds in his hands: *Brockert v. Iowa Central R. Co.*, 61 N. W., 405.

On foreclosure of the mortgage the new company became entitled to the funds in the receiver's hands as a portion of the property: *Ibid.*

This section is not unconstitutional: *Central Trust Co. v. Sloan*, 65–655.

SEC. **2076. Rates of fare and freight.** All railway corporations doing business in this state, their trustees, receivers or lessees shall be limited in their maximum charges to the rates of compensation for the transportation of passengers and freight herein prescribed. All railroads in the state shall be classified according to the gross amount of their several annual earnings within the state, per mile, for the preceding year, as follows: Class "A" shall include those whose gross annual earnings per mile shall be four thousand dollars or more; class "B" shall include those whose gross annual earnings per mile shall be three thousand dollars or any sum in excess thereof less than four thousand dollars; class "C" shall include those whose gross annual earnings per mile shall be less than three thousand dollars. [15 G. A., ch. 68, § 1; C. '73, § 1305.]

The state cannot by statute regulate rates of transportation under one entire contract from a point within to a point without the state. Such regulation would be an interference with the power of the federal government to regulate interstate commerce: *Carton v. Illinois Cent. R. Co.*, 59–148; *Keiser v. Illinois Cent. R. Co.*, 5 McCrary, 496.

Where the railway obligates itself to carry to another point within the state and deliver to a connecting carrier, its contract is not one for transportation to a point beyond the state: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63–732.

The regulation by a board of railroad commissioners that rates of transportation from a point without to a point within the state shall conform to like distances within the state is unconstitutional and interferes with interstate commerce: *State v. Chicago & N. W. R. Co.*, 70–162.

Where a contract for transportation by a carrier provided for transportation of the goods from one point within the state to another point also within the state, and the rates of transportation were in excess of those fixed by statute, *held*, that the excess of charges paid might be recovered back, although it was shown that the intention was that the property should be delivered by the carrier receiving it to a connecting carrier and continuously transported to a point with-

out the state, and although the charge for the entire transportation would have been a reasonable one: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63–732.

Where the statute defines the charges which can lawfully be made by a railway company, charges in excess of those prescribed are unlawful and may be recovered back in an action for the excess. The amount fixed by statute will be conclusively presumed to be the limit of reasonable compensation: *Ibid.*

The enactment of a statute imposing penalties for excessive charges recoverable by the party injured, and providing a punishment against the agent of a carrier for exacting and collecting excessive charges, does not take away the right existing at common law to recover money paid in excess of a reasonable charge: *Ibid.*

In such case an action will not be barred in two years under the provision relating to suits to recover a statute penalty, but will stand on the same footing as any action on implied contract: *Ibid.*

In an action to recover excessive charges paid, the plaintiff need not show objection or protest prior to or at the time of making payment which is in excess of a reasonable compensation: *Ibid.*

Under a statute imposing upon any railway company charging excessive rates a forfeiture to be recovered by the person injured, and providing that any agent or officer of such corporation violating or being a party to the violation of any of the provisions of the act should be guilty of a misdemeanor and punished accordingly, *held*, that where an agent was himself a shipper and accounted and turned over to the company charges for shipments made by him at illegal rates, he and the company were *in pari delicto* as to such charges, and that he could not recover the same in an action against the company: *Steever v. Illinois Cent. R. Co.*, 62–371.

Such regulations, *held* not an impairment of the charter of a railroad granted before its enactment, for the reason that as the charter of the company did not establish the maximum charges, it was competent for the legislature to do so afterwards. Nor is such legislation unconstitutional by reason of not being of uniform operation: *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S., 155.

SEC. **2077. Maximum rates of fare.** All railroad corporations according to their classifications as herein prescribed shall be limited to compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: Class "A" three cents; class "B" three and one-half cents; class "C" four cents, and for children twelve years of age or under, one-half the rate above prescribed. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train. [15 G. A., ch. 68, § 2.]

The regulation that a passenger shall pay full rate upon failure to procure and present a ticket which he might have purchased from the agent at a reduced rate is not unreasonable: *State v. Chovin*, 7–204.

The carrier may make a regulation requiring passengers to procure a ticket before taking passage in a caboose car attached to a freight train, and may eject from the car, in a proper place and manner, any person failing to comply with such regulation: *Law v. Illinois Cent. R. Co.*, 32–534.

A railway company is allowed to collect an additional sum over the regular rate of fare from passengers who fail to purchase tickets, and the reasonableness of such regulation is not a question for the jury: *Hoffbauer v. Davenport & N. W. R. Co.*, 52–342.

In an action to recover for being ejected from a train for want of a ticket, where the plaintiff claimed that he was not able to procure such ticket on account of the failure of the company to have its ticket office open before the starting of the train, *held*, that it was proper to allow defendant to introduce evidence of the character of the station and whether the facilities extended to the traveling public to purchase tickets were such as required for the convenience of the public. While it is required that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other, yet it is not required that the office shall remain open up to the instant the train moves off. Unfitness of the station cannot be relied on as an excuse for not procuring a ticket, that reason not having been alleged to the conductor: *Everett v. Chicago, R. I. & P. R. Co.*, 69–15.

The failure of the company to sell a ticket to a passenger before entering the cars cannot be made a ground for recovery of damages where the passenger afterward tenders with his fare to the conductor the extra amount required on account of not having a ticket: *Curl v. Chicago, R. I. & P. R. Co.*, 63–417.

SEC. **2078. Annual statement.** Each railway corporation operating a railroad in the state shall annually, during the month of January, make and return to the governor a statement, verified by its president and superintendent, showing the gross receipts on its entire road within the state for the preceding year ending with the thirty-first day of December, and a detailed

exhibit of the entire receipts for transporting freight and passengers, and all other sources of income of the road. A failure to comply with this section shall subject the corporation to a penalty of one hundred dollars per day for each and every day after the report is due until it is made, to be recovered in an action in the name of the state for the benefit of the school fund. If the executive council upon examination shall be satisfied of its correctness, it shall be the duty of the council to classify the different railroads as hereinbefore provided, and the governor, when there shall be any change in classification, shall issue a certificate to any corporation or corporations affected by such change, certifying the class to which they are respectively assigned; and any change of rates by any railroad corporation pursuant to any change of classification shall take effect and be in force from and after the fourth day of July following such changes. [Same, § 7.]

As to annual statement for purposes of taxation, see § 1334.

Automatic Couplers and Brakes.

Sec. **2079. On new or repaired cars.** No corporation, company or person operating any line of railroad within this state, or any car manufacturer or transportation company using or leasing cars therein, shall put in use any new car or any old one that has been to the shop for general repairs to one or both of its drawbars, that is not equipped with automatic couplers so constructed as to enable any person to couple or uncouple them without going between them. [24 G. A., ch. 23, § 1; 23 G. A., ch. 18, § 1.]

Sec. **2080. On all cars.** After January 1, 1898, no corporation, company or person, operating a railroad, or any transportation company using or leasing cars, shall have upon any railroad in this state any car that is not equipped with such safety automatic coupler. [Same, § 2.]

Sec. **2081. Driver brake on engines.** No corporation, company or person operating any line of railroad in the state shall use any locomotive engine upon any railroad or in any railroad yard in the state that is not equipped with a proper and efficient power brake, commonly called a "driver brake." [Same, § 3.]

Sec. **2082. Power brake on cars.** No corporation, company or person operating a line of railroad in the state shall run any train of cars that shall not have therein a sufficient number of cars with some kind of efficient automatic or power brake to enable the engineer to control the train without requiring brakemen to go between the ends or on the top of the cars to use the hand brake. [Same, § 4.]

Sec. **2083. Penalty.** Any corporation, company or person operating a railroad in this state and using a locomotive engine, or running a train of cars, or using any freight, way or other car contrary to the provisions of the four preceding sections, shall be guilty of a misdemeanor, and shall be subject to a fine of not less than five hundred nor more than one thousand dollars for each and every offense; but such penalties shall not apply to companies hauling cars belonging to railroads other than those of this state which are engaged in interstate traffic. Any railway employe who may be injured by the running of such engine, train or car contrary to the provisions of said sections shall not be considered as waiving his right to recover damage by continuing in the employ of the corporation, company or person operating such engine, train or cars. [23 G. A., ch. 18, § 6.]

Taxes in Aid of Railroads.

Sec. **2084. May be voted.** Taxes not exceeding five per cent. on the assessed value of any township, town or city may be voted to aid any railway company which is or may become incorporated under the laws of the state, to aid in the construction of a projected railroad within the state, as hereinafter provided. [25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 2.]

Constitutionality: Under the constitution of 1846, *held*, that counties might, by a public vote, be authorized to issue bonds in aid of a railway to be constructed through the county: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

Also, *held*, under the provisions of Code of '51, that counties had authority by popular vote to issue bonds in subscription for the stock of a railway: *Clapp v. Cedar County*, 5–15; *Ring v. Johnson County*, 6–265.

Where such bonds were issued, *held*, that they were valid in the hands of a purchaser, and he need not go behind the records of the county to ascertain whether authority had been properly conferred upon the county officers to issue such bonds: *Clapp v. Cedar County*, 5–15.

Under the cases holding that the county had authority to subscribe for stock in aid of railway corporations, *held*, that irregularities in submitting the proposition to subscribe to such stock to the electors of the county might be cured by a legalizing act of the legislature: *McMillen v. Boyles*, 6–304; *S. C.*, 6–391.

Held, also, that the county might vote taxes in aid of railroads: *Games v. Robb*, 8–193.

Where a county voted the issuance of bonds in aid of a railroad under the agreement that the county should receive certificates of stock of like amount, *held*, that delivery of such certificates was not a condition precedent to the delivery of the bonds: *State ex rel. v. County Judge*, 9–288.

It was held also that the power to subscribe for stock of a railroad and issue bonds in payment therefor might be conferred upon the county by the legislature, and, if conferred, the bonds issued in pursuance of such authority, or duly legalized if issued originally without authority, would be valid: *Stokes v. Scott County*, 10–166.

But, *held*, that a county had no authority without legislative grant to issue bonds in subscription for stock of a railway company: *Ibid.*

And, *held*, that the case above cited, upholding the authority of the county to issue bonds or vote a tax in aid of railroads, were erroneously decided, and that such power was not conferred by the provisions of the Code of '51: *Ibid.*

Therefore, *held*, that where, in the pursuance of the submission of such a proposition to vote, and the adoption thereof by the voters of the county, bonds were being issued which had not yet passed into the hands of purchasers, an injunction should be granted to restrain their issuance: *Ibid.*; *State ex rel. v. Wapello County*, 13–388.

Further, *held*, that the legislature had no constitutional power to authorize the levy of taxes by counties, cities or townships in aid of railroads: *State ex rel. v. Wapello County*, 13–388; *McMillan v. Boyles*, 14–107; *Smith v. Henry County*, 15–385; *Ten Eyck v. Mayor of Keokuk*, 15–486; *Hanson v. Vernon*, 27–28; *King v. Wilson*, 1 Dillon, 555.

But under a subsequent similar statute, *held*, that such provisions were not unconstitutional, overruling the previous cases: *Stewart v. Board of Supervisors*, 30–9; *McGregor & S. C. R. Co. v. Birdsall*, 30–255; *Bonnifield v. Bidwell*, 32–149; *Renwick v. Davenport & N. W. R. Co.*, 47–511.

The present statute to the same effect is also upheld: *Snell v. Leonard*, 55–553; *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

The fact that the company in favor of which the tax is voted is organized as a railroad and telegraph company will not affect its validity: *Snell v. Leonard*, 55–553.

Repeal of statute: Where, prior to the repeal of the act authorizing the levy of taxes in aid of a railroad in pursuance of a popular vote, the company in favor of which the tax is voted has expended money in constructing its road, relying upon such tax, it has a right, notwithstanding the repeal of the statute, to have the tax levied and collected in its favor: *Burges v. Mabin*, 70–633.

Where a tax was voted in December, 1883, and the law under which it was voted was repealed in April following, and after the voting of the tax the company engaged as actively in the preparation for the work of construction as it could well do at that season of the year, and in the opening of the spring prosecuted its works with energy and complied with the contract on its part, *held*, that the expenditures and work on the faith of the tax voted were sufficient to entitle the company to such tax: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

The right to the tax and penalties and interest thereon is not taken away by the repeal of the statute under which the tax is voted, but repeal of the statute terminates the right to additional penalties: *Tobin v. Hartshorn*, 69–648.

The statute of limitations, as against an action to enforce a tax voted under a statute afterwards repealed, *held* to commence to run only in accordance with provisions of new statute: *Harwood v. Brownell*, 48–657.

Where a railroad was constructed by another corporation than that in whose behalf the tax was voted, and it did not appear that such construction was made in reliance upon the tax voted, or that the right to the tax was transferred to the other contracting road, *held*, that such tax could not be levied or collected after repeal of statute under which it was voted: *Barthel v. Meader*, 72–125.

Cities under special charter may vote a tax as here provided: *Bartemeyer v. Rohlfs*, 71–582.

As to taxation of railroads, see §§ 1334–1341.

SEC. **2085. Petition—notice—submission—certificate—levy—collection.** When a petition is presented to the trustees of any township or the council of any town or city, signed by a majority of the resident freehold taxpayers of such township, town or city, asking that the question of aiding any railroad company incorporated under the laws of the state in the construction of a projected railroad within it be submitted to the voters

thereof, it shall be the duty of the trustees or council, as the case may be, immediately to give notice of a special election, by publication in some newspaper printed in said township, town or city, if any there be, and, if not, then in some newspaper published in the county, and also by posting copies of said notice in five public places in such township, town or city at least ten days before such election, which shall state the time and place of holding the same, the name of the company, and the line of the road proposed to be aided, the rate per cent. of the tax to be levied, whether one-half thereof shall be collected the first year and one-half the following year, or whether the whole is to be collected in one year, the amount of work required to be done and when and where the same shall be done, to what point said railroad shall be fully completed, and any other conditions which shall be performed before such tax or any part thereof shall become due; and in no case shall such tax become due until such railroad is fully completed according to the conditions in said notice. The trustees or council, as the case may be, shall cause to be prepared the form of the proposition to be submitted. The proposition shall be printed and placed upon the ballots and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the chapter on elections; and if a majority of the votes polled be for the adoption of the proposition, then the clerk of the township, city or town, or the clerk of election, shall forthwith certify to the county auditor the result thereof, the rate per cent. of tax voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms and conditions upon which the same, when collected, is to be paid under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds; the expense thereof, and of publishing the notice, and all the expenses of the election, shall be paid by the railway company to which it is proposed to vote the tax. When such certificate has been made and recorded, the board of supervisors of the county shall, at the time of levying the ordinary tax next following, levy such taxes as are voted under the provisions hereof, as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, town or city, indicating in their order thereupon when and in what proportion the same are to be collected, and upon what conditions the same are to be paid to the railway company, a certified copy of which order shall accompany the tax lists. The taxes shall be collected at the time or times specified in the order, and in the same manner, and subject to the same laws after they are collectible, as other taxes, or as may be stated in the petition and notices for the election, except as otherwise provided. [20 G. A., ch. 159, § 3.]

Petition for tax: A resident taxpayer of the township may sign the petition for an election by the township to vote a tax in aid of a railroad, although he is also a resident and a voter of an incorporated town or city within the limits of such township: *Ryan v. Varga*, 37–78.

Under a previous statute, *held*, that one-third of the taxpayers and not one-third of the resident taxpayers must sign the petition: *Zorger v. Township of Rapids*, 36–175.

Action of trustees: The action of the township trustees in calling an election in pursuance of the petition, *held* to be of a judicial or *quasi*-judicial character, so that the question whether such action was illegal or without jurisdiction might be determined on *certiorari*: *Jordan v. Hayne*, 36–9.

The trustees may decide this question upon their own knowledge: *Ibid.*

Where a proper petition was presented and acted upon at a called meeting of the trustees of which one member had no notice on account of being out of the township, *held*, that the action of the majority was valid: *Young v. Webster City & S. W. R. Co.*, 75–140.

Although the petition is not signed by the requisite number of taxpayers, if the trustees have decided it to be sufficient and ordered an election, and the tax has been voted and levied, the validity of the tax cannot be assailed for such defect in the petition. The defect can only be taken advantage of in some method provided for direct review: *Ryan v. Varga*, 37–78; *West v. Whitaker*, 37–598.

But where the finding of the trustees was that the petition was signed by one-half of the resident freehold taxpayers, when the statute required that it be signed by a majority, *held*, that although they ordered an election, subsequent proceedings were void: *Slack v. Blackburn*, 64–373.

Township embracing incorporated town: If the township embraces an incorporated town, and it is proposed that a township shall aid in the construction of the road, the voters in the corporation are entitled to vote at such election: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Notice: The statute provides that the notice shall specify to what point the road shall be fully completed before the tax can be collected, and if the notice does not so specify the election will be void: *Allard v. Guston*, 70–731.

The statute prescribes no time during which the publication shall be made; it is to be done immediately, but the time will depend upon the day of the issue of the paper. The statute does not require the newspaper publication to be made ten days before the election: *Johnson v. Kessler*, 76–411.

Where the notice specified that the road should be built between a certain city and a point on another road so as to make a continuous line of railroad from said city to certain coal mines of the latter road, *held*, that the construction of a road from the city to the junction with the other road was all that was required: *Young v. Webster City & S. W. R. Co.*, 75–140.

Where the notice does not state to what point the road is to be fully completed before the tax shall become due and payable, it is not sufficient: *Kleise v. Galusha*, 78–310.

Ballots: Where the ballots upon the question of voting a tax in aid of a railroad were "taxation" and "no taxation," *held*, that the form of ballots was sufficient: *West v. Whitaker*, 37–598.

In a particular case, *held*, that the ballots were sufficient although they contained matter not necessary: *Cattell v. Lowry*, 45–478.

Undue influence at election: Where it appeared that an agent authorized by the company for whom the tax was being voted to represent it in procuring the voting of the tax for a compensation agreed upon made promises to voters that all resident taxpayers who voted for the tax would receive fifty cents on the dollar on their certificates when issued, and thereby induced some of the voters to change their minds as to the vote which they would cast with reference to such tax, *held*, that the tax was thereby rendered illegal: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Where the submission of the proposition and its adoption are procured by false statements and fraudulent representations of the company and its agents the tax cannot be enforced: *Sinnett v. Moles*, 38–25.

Expenses of election in townships for the purpose of voting aid to railroads are not chargeable to the county: *McBride v. Hardin County*, 58–219.

Certificate as to result of election: The certificates of the clerk of election required by the statute in order to authorize the board of supervisors to levy a tax should set out the conditions under which the tax was voted, and it is not sufficient to attach and refer to the notice of the election in which such conditions are stated: *Minnesota & I. S. R. Co. v. Hiams*, 53–501.

Where the township clerk filed with the county auditor such records of proceedings as showed what was required to be certified by such clerk, *held*, that the certificate was sufficient to support the tax, although not contained in one paper; a substantial compliance with the law being deemed sufficient: *Shontz v. Evans*, 40–139.

Where there is a certificate which is defective, and the board of supervisors has determined that the certificate sufficiently complies with the law, the correctness of such decision cannot be collaterally attacked by an action to enjoin the collection of the tax: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Where by mistake of the clerk the certificate has been improperly issued the collection of the tax may be restrained by injunction: *Cattell v. Lowry*, 45–478.

Levy: Where certain taxes were properly voted and certified, and the board of supervisors levied "all . . . railroad taxes that have been certified according to law," and the railroad tax in question was accordingly placed upon the tax list, *held*, that the levy was sufficient: *Casady v. Lowry*, 49–523.

The levy of a railroad aid tax *held* sufficient in a particular case, it being mentioned in the resolution enumerating the different taxes as "railroad tax," and being made certain as to amount by reference to the proper records of proceedings of the township for voting such tax: *Shontz v. Evans*, 40–139.

Where a committee of the board of supervisors recommended in a report that certain taxes be levied, which included the tax in question, and it appeared from the record that the report was adopted, the names of those voting in favor thereof being given, *held*, that the levy was sufficient: *West v. Whitaker*, 37–598.

A levy of taxes in different townships is to be considered as distinct, even though such separate levies are made by one resolution: *Woodworth v. Gibbs*, 61–398.

The action of the board in making the levy is not judicial but purely ministerial; their action in so doing may be questioned in a collateral proceeding, and held void for want of power to do it at the time it was done: *Scott v. Union County*, 63–583.

Authority to vote and levy the tax rests upon a substantial compliance with the requirements of the statute in the performance of the conditions upon which the authority is granted: *Allard v. Guston*, 70–731.

Under 12 G. A., ch. 48, *held*, that no levy by the board of a tax properly voted by a township was necessary, and that therefore such levy could not be compelled by *mandamus: Chicago, D. & M. R. Co. v. Olmstead*, 46–316.

Where a tax in aid of a railway was voted in March, *held*, that the levy was properly made upon the assessment of the same year, although the books were not returned until after that date: *Parsons v. Childs*, 36–108.

Without fixing any definite rule for all cases the court *held* (by a majority opinion) that where a tax was voted in December, 1883, it was properly levied on the assessment

of that year: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

As to levy, see *Bartemeyer v. Rohlfs*, 71–582.

Entry of tax on tax list, *held* not necessary under 12 G. A., ch. 48: *Harwood v. Brownell*, 48–657.

Validity: Where the validity of such a tax has been adjudicated in an action against the treasurer and the board of supervisors by parties claiming the tax, it cannot, in the absence of collusion or fraud, be again called in question in an action by a taxpayer against the treasurer to enjoin its collection: *Lyman v. Faris*, 53–498.

Collection of tax: Although it may be the duty of the treasurer to proceed to collect the tax when due, he could not, under previous statutes, be compelled by the company to do so until it had showed itself entitled thereto: *Harwood v. Case*, 37–692.

Under a subsequent statute the tax did not become delinquent until the company was entitled to the tax and the whole amount thereof, and as to taxes levied before the passage of such act, *held*, though retrospective, it was not invalid: *Ibid.*

Where it appeared that the company was entitled to only a part of the tax, and such part was not claimed merely as an installment, *held*, that the part claimed would not be regarded as an installment. but in satisfaction of the whole tax, and as such might be collected: *Casady v. Lowry*, 49–523.

The county has no interest in the tax collected, and if it is to be refunded it should be refunded by the treasurer without any warrant or order of the board of supervisors. In the case of misappropriation by the treasurer the loss would not fall upon the county: *Barnes v. Marshall County*, 56–20.

A claim for the refunding of a portion of the tax is against the fund and not against the county: *Ibid.*

The county cannot be made liable for any part of a railroad tax paid into the county treasury. Where a railroad tax illegally collected remains in the treasury the proper officer may be compelled to refund the same by an action against him, but an action for the amount cannot be maintained against the county: *Eyerly v. Jasper County*, 72–149.

Where such taxes do not remain in the hands of the treasurer as a distinct fund, but have been placed in the general fund and expended in paying ordinary indebtedness of the county, judgment may be rendered against the county therefor: *Merrill v. Marshall County*, 74–24.

In an action of *mandamus* to compel a county treasurer to pay over to plaintiff certain taxes collected for its use by his predecessor in office, and transferred by such predecessor to the county fund by order of the board of supervisors, *held*, that the transfer to the county fund was such an appropriation of the money as to release defendant from all liability to plaintiff on account of it: *Minneapolis & St. L. R. Co. v. Becket*, 75-183.

As to the effect of alienation of the road upon the right to a tax, see notes to § 2088.

Conditions and stipulations: No contract, stipulation or reservation could, under the previous act, be set up to defeat the tax unless it was in writing; *Muscatine Western R. Co. v. Horton*, 38–33; *Harwood v. Quinby*, 44–385.

The omission to state in the levy the condition upon which it is to be paid to the company will not render the levy invalid when the condition was complied with before the levy: *Burges v. Mabin*, 70–633.

Where a condition on which the taxes in aid of a railroad was that "the road should be built and in operation" by the time fixed, *held*, that such condition was sufficiently complied with if the trains were running by the time specified, although it was necessary in order to the completion of the road that it be ballasted and additional ties put in: *Muscatine Western R. Co. v. Horton*, 38–33.

Where the road is completed in accordance with the conditions of a written contract between the company and the township voting the tax, a failure of the company to comply with the just expectations of the voters which have not been embodied in such contract will not forfeit the tax: *Ibid.*

Where one of the conditions on which a tax was voted was that the road should be constructed and operated, and a depot located within a town named, on or before a certain day, and by that date the depot was partially erected and a track was laid for the distance of a mile from such depot, and the road was operated, although not in a first-class manner, the track not being ballasted, *held*, that there was a sufficient compliance with the conditions of the tax to entitle the railway to the same: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

In a particular case, *held*, that the construction of the road was not such as to constitute a compliance with the conditions on which the aid tax had been voted: *Cox v. Forest City & S. R. Co.*, 66–289.

Where a tax was voted to be expended in three townships mentioned, *held*, that it appearing that more than the amount of tax voted had been expended in the township in question, the company was entitled to the tax in that township although nothing had been expended in the other two townships: *Merrill v. Welsher*, 50–61.

Also, *held*, that the fact that the line of the road was changed so that it did not pass through one of the townships specified, would not prevent the collection of the tax in the township through which it did pass: *Ibid.*

Also, *held*, under a special statute that a mere suspension of work and failure to build the road for the period of four years mentioned in such statute was not the nonfulfillment of a special contract or agreement as therein specified, and did not amount to a forfeiture of the tax: *Ibid.*

Where the articles of incorporation of the company declared its purpose to be to construct a railroad by the way of Newton, in Newton township, and the petition and notice for the voting of a tax in that township specified that it was for the purpose of aiding in the construction of the road to be expended in Newton and another township named, *held*, that without the construction

of the line to Newton the tax in Newton township could not be enforced, although double the amount of such tax had been expended in the other township: *Lamb v. Anderson*, 54–190.

Where the articles of a corporation in whose favor a tax was voted specified its objects to be to construct, operate and maintain a railroad from Dubuque in a westerly and northwesterly direction through Iowa, Minnesota and Dakota to a junction with the Northern Pacific, and the road was accordingly constructed, extending from Dubuque to St. Paul, the reaching of the point specified not being a condition of the payment of the tax, *held*, that there was not such failure to comply with conditions as to work a forfeiture: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

It is a sufficient designation of the terminal point of a proposed line to state that it is to run in a certain direction to the connection with another line. It is sufficient completion of the line that the track is laid and cars run thereon: *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72–556.

Where a paper was signed by the president of a company, bearing the seal of the corporation, and was circulated among the electors on the day of election, containing certain stipulations in regard to the construction of the road for which the tax was being voted, *held*, that the provisions of such paper became binding upon the company: *Meeker v. Ashley*, 56–188.

Where the president of the company made statements at a public meeting called to discuss the voting of a tax in aid of a railway, which tended to induce taxpayers to believe that the road, if built, would be located upon a line already surveyed and known to them, and afterwards the road was built upon a different line, less advantageous to the taxpayers, *held*, that the collection of the tax could be enjoined: *Curry v. Supervisors*, 61–71.

A taxpayer cannot restrain the collection of taxes voted in aid of the construction of the road on the ground that the company has not complied with the conditions of the notice, and completed the road within the time prescribed: *Johnson v. Kessler*, 76–411.

When a railroad company expends large sums of money in the construction of its road, taxpayers, before the completion of the road, having made no objection, are estopped to deny the validity of the tax: *Ibid.*

As to notice, see *Bartemeyer v. Rohlfs*, 71–582.

Narrow gauge: Where a tax was voted in aid of a railroad between certain *termini* and a narrow gauge road was constructed, *held*, that that fact would not defeat the company's right to the tax, it not having been specified in the notice of election what the gauge of the road should be, and it appearing that the road as constructed answered the purpose of the taxpayers: *Meader v. Lowry*, 45–684.

And in such case, *held*, that the township trustees were not guilty of any fraud in certifying the construction of the road as contemplated in the notice submitting the question of levying the tax: *Ibid.*

The construction of a narrow gauge road having sufficient capacity for all the business to be done, and capable of doing it as economically as a road of any other gauge, is a sufficient compliance with the provisions for the voting of the tax, where no stipulation as to the gauge is made, to entitle the company to the tax voted: *Casady v. Lowry*, 49–523.

Estoppel: Where conditions and representations have not been complied with, the taxpayer will not be estopped from enjoining the collection of the tax by the fact that the road has been built, where it appears that notice was given to the company before the construction of the road upon the new line that the tax would be contested on the ground of fraud and false representations: *Curry v. Supervisors*, 61–71.

Where it is not shown that the party objecting to the validity of a railroad aid tax had any knowledge thereof at the time it was expended, he will not be estopped from questioning its validity afterward: *Truesdell v. Green*, 57–215.

Purchase or leasing of another road: The leasing or purchase and operation of a line of road as a part or whole of the line for the construction of which the tax is voted will not constitute a compliance with the agreement to construct such road: *Lamb v. Anderson*, 54–190; *Meeker v. Ashley*, 56–188; *Iowa, M. & N. P. R. Co. v. Schenck*, 56–628; *Lawrence v. Smith*, 57–701.

Alienation: Where the company to which a tax has been voted has, upon the faith of the tax, constructed the road and put it in operation, such company becomes entitled to the tax, and this right is not forfeited by a subsequent alienation of the road to another company: *Parsons v. Childs*, 36–108.

The fact that a road in aid of which taxes are voted is sold at or before the time of its completion to another company will not defeat the right of the company in whose favor the tax is voted to receive the same: *Muscatine Western R. Co. v. Horton*, 38–33.

The alienation of the road before the payment of the tax, so that shares of stock in the road for which the tax was voted can no longer be issued to those holding certificates for the payment of such taxes as provided by statute, is a ground for setting such tax aside and releasing the taxpayer from his burden: *Manning v. Mathews*, 66–675; *Blunt v. Carpenter*, 68–265.

The right of the taxpayer to receive such certificates of stock in exchange for his receipts for taxes paid cannot be set aside by agreement or waiver: *Blunt v. Carpenter*, 68–265.

But a consolidation under terms securing to the taxpayer equivalent stock in the consolidated company will not avoid the tax (see § 2068): *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

But the lease of the road in favor of which the tax is voted in perpetuity to another road, by which the latter agrees to operate the line and pay the lessor company a per cent. of the gross earnings, it not appearing that the con-

tract of lease is inequitable or not beneficial to the company constructing the road, will not deprive the company of the right to the tax: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

The county having collected a railroad aid tax cannot resist payment of it to the company on the ground that the company has sold and conveyed its property and franchises. Such a defense can only be interposed by the taxpayer: *Merrill v. Marshall County*, 74–24.

Change of line: The fact that, after a tax in aid of a railroad is voted, the location of the line in a part of its course is changed, which change, however, is not in conflict with any of the conditions upon which the tax is voted, will not affect its validity: *Shontz v. Evans*, 40–139.

A private individual cannot, on account of private injuries to him alone, maintain an action of *mandamus* to compel a railway company which has received the benefit of taxes voted by the public to operate its line as it was originally located: *Crane v. Chicago & N. W. R. Co.*, 74–330.

SEC. **2086. Notice—conditions—limit of tax.** The stipulations and conditions in the notices prescribed in this chapter must conform to those set forth in the petition asking for the election; and the aggregate amount of tax voted in any city, town or township shall not exceed five per cent. of the assessed value of the property therein, respectively. [25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 4.]

Under the statutory provision that a township, town or city, having voted a tax to the amount of five per centum upon its taxable property in aid of railroads, cannot impose another tax upon property for that purpose, *held*, that the power conferred to levy such taxes ceases upon a levy of taxes to that amount, but that taxes duly levied which have been abandoned or become uncollectible cannot be taken into account: *Dumphy v. Supervisors of Humboldt County*, 58–273.

An increase in value of taxable property after levy of the five per centum of taxes does not confer the power to make an additional levy: *Ibid.*

Taxes levied under a prior act providing for such taxation, although such act contained the same limitation as the present act, cannot be taken into account in determining whether the limit fixed in the present act has been exceeded: *Scott v. Union County*, 63–583.

Where, at the time of voting the tax under one act, a prior tax of five per cent. stood uncanceled, but before the levy of the tax thus voted the prior tax was canceled, *held*, that the second tax was valid. The statute should be construed as if it provided that the aggregate amount of tax to be voted and levied shall not exceed five per cent.: *Williams v. Poor*, 65–410.

Penalties accruing on a railroad aid tax are not to be taken into account in determining whether the amount of the tax exceeds the limit fixed by statute: *Tobin v. Hartshorn*, 69–648; *Chicago, M. & St. P. R. Co. v. Hartshorn*, 30 Fed., 541.

SEC. **2087. Money paid out—certificate.** The moneys collected under the provisions of this chapter shall be paid out by the county treasurer to the treasurer of the railway company for whom the same was voted, upon the orders of the president or managing director thereof, at any time after the trustees of such township or council of such town or city voting the same, or a majority thereof, shall have certified to the county treasurer that the conditions required of the railway company and set forth in the notice for the special election have been complied with, which certificate said township trustees or council of such town or city shall make when conditions have been sufficiently complied with to entitle the railway company thereto, or when the conditions are fully complied with on the part of the railway company; but if the costs and expenses of holding the election and of recording the certificates have not been paid, then the treasurer shall first deduct from the moneys collected the amount thereof, and pay same to the parties entitled thereto. [20 G. A., ch. 159, § 5.]

Fee for collection: The treasurer is not authorized to deduct from the tax collected three per cent. for its collection. Sec. 490 does not authorize such deduction: *Merrill v. Marshall County*, 74–24.

Certificate: The certificate of the township trustees of the compliance of the company with the terms on which the tax is voted need only be properly signed. It need not appear that there is a previous resolution or order authorizing its issuance: *Merrill v. Welsher*, 50–61.

Under a certificate in such case that the company had "so complied with the act as to entitle it to draw the sum of," etc., *held*, that as the company could not have been entitled to draw any sum until it had complied with the act, the certificate was sufficient: *Casady v. Lowry*, 49–523.

The certificate of the trustees is not a judicial act and is not conclusive, its only purpose being to authorize the treasurer to pay over the funds collected. It has nothing to do with the treasurer's right to collect the tax: *Lamb v. Anderson*, 54–190.

The duty of the trustees as to giving a certificate of completion of a road is only to determine whether it is completed, and

they should not refuse to give it on the ground of fraud in the election, or in the certificate of the engineers: *Harwood v. Quinby*, 44–385.

An action to enforce the duty imposed on the trustees to make such certificate does not become barred as to a tax already voted until three years after the passage of the act limiting the time for making such certificate: *Ibid.*

The fact that the certificate of the trustees is given at a place outside of their township will not render it absolutely void: *Meader v. Lowry*, 45–684.

Also, *held*, that the proper trustees to make the certificate were those of the township which had voted the tax, although afterward portions of the township were organized into or transferred to another township: *Ibid.*

Assignment: The claim for a railroad aid tax is assignable: *Merrill v. Welsher*, 50–61.

The assignment of such a tax does not discharge the assignee of the equities between the company in favor of which the tax was voted and the taxpayers, and in a suit by a taxpayer to invalidate such a tax because of the non-fulfillment of conditions precedent on the part of the railroad company, the company in whose favor the tax was voted and the assignee of such tax are necessary parties. So, also, the township trustees and the county treasurer are to be made parties defendant: *Sully v. Drennan*, 113 U. S., 287.

Trust fund: Where money is paid in aid of the construction of railroads, such money in the hands of the treasurer is a trust fund, and the taxpayer and the railroad company are beneficiaries: *Eyerly v. Supervisors of Jasper County*, 77–470.

And where an action was commenced to test the legality of a tax as voted in aid of a railroad, *held*, that while such action was pending, the statute of limitations did not commence to run against an action of *mandamus* to compel the supervisors to refund the money: *Ibid.*

A railroad company entitled to the proceeds of a tax paid into the treasury may recover the amount thereof on the bond of the treasurer to whom the money is paid. The company cannot maintain *mandamus* against the successor of such treasurer, who has never received the money collected: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

SEC. **2088. Certificates of taxes exchangeable for stock or bonds.** The county treasurer when required shall, in addition to a tax receipt, issue to each taxpayer, on the payment of any taxes voted under the provisions of this chapter, a certificate showing the amount of tax paid, the name of the railway company entitled thereto, and when the same was paid; and he may charge twenty-five cents for each certificate issued. Said certificates shall be assignable, and, when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid, as shown by such certificates, in sums of one hundred dollars or more of taxes, it shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes, to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of stock, then the holder thereof shall be entitled to receive the full number of shares of stock covered by said certificates, and may make up in money the balance of any share when the certificates held by him are not equal to one full share of such stock, which stock for such purpose shall be estimated at par. When it shall be proposed in the petition and notice calling an election to issue first mortgage bonds not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, and not exceeding the sum of eighteen thousand and five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge in lieu of stock, it shall be lawful to issue bonds of the denomination of one hundred dollars, in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal thereof. [23 G. A., ch. 19, § 1; 20 G. A., ch. 159, § 6.]

If the company to which a tax has been voted transfers its property and franchises so that the taxpayer cannot secure the stock to which he is entitled, the collection of the tax cannot be enforced. The taxpayer cannot be compelled to take stock in another corporation, even though more valuable: *Manning v. Matthews*, 66–675; *Blunt v. Carpenter*, 68–265.

The taxpayer must be held to a knowledge of the law at the time the tax was voted by which (§ 2068) the company has the right to transfer the road, and therefore the obligation of payment by taxpayers will depend upon the readiness of the purchasing company to deliver the stock, where there is a condition in the contract of transfer by which stock in the consolidated line of equal or

greater value than that in the company in whose favor the tax is voted is to be issued: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

An action by taxpayers who are entitled to stock for taxes paid to declare stock and bonds issued by the company fraudulent must be brought within five years after knowledge of the issuance of such stock and bonds; and as to the bonds a recording of the mortgage securing them will impart notice of their issuance: *Allen v. Wisconsin, I. & N. R. Co.*, 90–473.

SEC. **2089. Liability of directors.** The board of directors of any railway company receiving taxes voted in aid thereof under the provisions of this chapter, or any member thereof, who shall vote to bond, mortgage or in any manner incumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, or exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge, not including in either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount, estimated at its par value, of the stock by him held, if the same should be rendered of less value or lost thereby. [23 G. A., ch. 19, § 2; 20 G. A., ch. 159, § 7.]

Incumbrances placed on a road prior to the payment of taxes by the taxpayers might be a ground for refusing to pay such taxes, but are not prohibited by this section, which is intended to apply to cases where bonds are issued in excess of the limits named after the company has received taxes voted in its aid, and in which, therefore, the stockholder has no other remedy: *Walker v. Birchard*, 82–388.

Under particular facts, *held*, that any fraud on the part of the officers of the company in issuing stock or bonds might have been discovered by due diligence of taxpayers who were entitled to stock and that delay in bringing action for the statutory period would bar recovery: *Allen v. Wisconsin, I. & N. R. Co.*, 90–473.

SEC. **2090. Forfeiture of tax.** Should the taxes voted in aid of any railroad under the provisions of this chapter remain in the county treasury for more than one year after the same have been collected, the right to them by the railroad company shall be forfeited, and the persons who paid the same entitled to receive back from the county treasurer their *pro rata* shares thereof remaining, and in all cases where any taxes have been voted or levied upon the real or personal property in any township, town or city to aid in the construction of any railroad, and the road in aid of which they were voted or levied has not been built, completed or operated into or through such township, town or city, it shall be the duty of the board of supervisors of the county where said taxes have been voted and levied and still remain on the tax books to give the railway company in aid of which the tax was voted at least thirty days' notice in writing, to be served like original notices, of their intention to cancel such taxes, and thereupon to cause the same to be canceled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy thereof. In all cases where the railway company to whom taxes have been voted neglects or refuses to receive such taxes, or to require or permit the same to be collected and certificates therefor to be issued, for the period of one year after they become due and collectible, and in all cases where taxes have been voted in aid of any railroad, and the conditions upon which the same were voted have not in fact been complied with, and the time in which said conditions were to be fulfilled has expired, the same shall be forfeited, and the county officers of the county in which they have been levied and entered upon the tax books shall enter cancellation thereof upon the proper records; and in all cases where any taxes to aid in the construction of any railroad may be voted upon the inducement or promise offered on the part of said railroad company, or any duly authorized agent thereof, for any rebates or exemptions from said tax or any part thereof, or any agreed price to be paid for the stock that may be issued in lieu of said tax, or a division of said tax, or any portion or percentage thereof, with any of the voters or taxpayers as an inducement to procure said tax to be voted, all taxes so procured to be voted shall be void. [20 G. A., ch. 159, § 8.]

The fact that a portion of the tax voted in aid of the railroad has been paid, and, after having lain in the treasury two years uncalled for, has been refunded to the taxpayer as provided by statute, does not operate as a forfeiture of taxes not so paid: *Merrill v. Welsher*, 50–61.

Where the road has been completed and there has been a continuing demand of taxes received by the treasurer, the right to recover taxes received will not be defeated by the fact that they have remained in the treasury more than two years. The provision was intended to secure the speedy and prompt building of the road: *Merrill v. Marshall County*, 74–24.

Under a former statute, *held*, that the county had no interest in the tax collected; that it was to be paid to the county treasurer, and in proper case should be refunded by him without any warrant or order of the board of supervisors; that in case of misappropriation by the county treasurer the loss would not fall upon the county, and that the claim of plaintiff for the refunding of his proportion of the tax forfeited was strictly against the fund, and not against the county: *Barnes v. Marshall County*, 56–20.

In a particular case, *held*, that the evidence did not show that taxpayers were induced to sign the petition and to vote for the tax, upon any offer or promise of exemption from payment: *Young v. Webster City & S. W. R. Co.*, 75–140.

Where the county treasurer, having in his hands money paid by the taxpayers under the levy of a railroad aid tax, disbursed the same in part to the railroad company and in part to a person claiming to be the assignee of such company and then went out of office, *held*, that an action of *mandamus* against the board of supervisors was not the proper remedy, the taxes not having been paid into the county fund nor used by the county: *Eyerly v. Board of Supervisors*, 81–189.

Under a previous statute, *held*, that the provision that taxes remaining in the treasury more than two years after collection should be deemed forfeited was applicable equally in a case where the company had complied with the conditions of the vote, by building its road, as to a case where such taxes remained uncalled for by reason of a failure to perform such conditions: *Cedar Rapids, I. F. & N. W. R. Co., v. Elseffer*, 84–510.

Held, also, that the courts would not hesitate in upholding such a provision on the ground that it was in the nature of a forfeiture, it not being a forfeiture in the usual signification of that term: *Ibid.*

Also *held*, that under the facts of the case, the company could not be relieved from the provisions of the statute on the ground of a mistake on the part of the officers of the company as to its being entitled to the tax: *Ibid.*

Also *held*, that this provision of the statute was not repealed by a subsequent statute on the same subject: *Ibid.*

SEC. **2091. Taxes paid in labor or supplies.** Nothing contained in this chapter shall preclude any taxpayer who may contract with a railroad company for which taxes may be voted to pay his tax, or any part thereof, in labor upon the line of said railroad, or in material for its construction, or supplies furnished or money paid for the construction thereof, in pursuance of the terms and conditions stipulated in the notices of election, in lieu of a payment to the county treasurer. Upon presenting to the county treasurer a receipt from such railroad company or its duly authorized agent, specifying the amount of such payment, the same shall be credited by the treasurer on his tax, with the same effect as though paid to him in money, and when such receipts have been presented and credited they shall have the same validity in his settlement with the board of supervisors as the orders from the railroad company provided for in this chapter. Laborers shall have a lien upon any tax voted in aid of a railroad company for the amount due them for labor performed in the construction of said railroad. [Same, § 9.]

Where the company issued to a taxpayer a receipt for taxes paid directly to the company, to be presented to the county treasurer in payment of the taxes, *held*, that such receipts were in the nature of advance receipts for the taxes, and that no action thereon against the company or the assignor of such instrument could be maintained thereon, at least until demand has been made on the treasurer that they be received for taxes: *Lisle v. Iowa, M. & N. P. R. Co.*, 54–499.

RELOCATION OF LINE.

SEC. **2092. Petition.** Any railroad desiring to change or remove the line of its road, after the same has been permanently located and constructed, may file a petition in the district court in any county wherein the change or removal is proposed to be made, describing with reasonable accuracy that portion of its line which it seeks to have changed or removed,

and asking the court to grant authority to make such change or removal. All trustees, mortgagees and other lien holders, and all townships, cities and counties which have aided by taxation to build the road, must be made defendants and served with notice as in other actions. [16 G. A., ch. 118, § 1.]

SEC. **2093. Notice.** A public notice to all whom it may concern of the time of filing such petition, the object thereof, and the term of court at which the application will be made for authority to make the change, and requiring all persons desiring the repayment of money or return of property, as in this chapter provided, to appear and present their claims therefor, must be published in a newspaper printed in each county in which the change is to be made, for a period of ten successive weeks before the term of court at which the application is to be heard. The court may order any additional notice or publication that it may think proper. [Same, § 2.]

SEC. **2094. Conditions.** No railway company shall be allowed to change or remove its line of road, after a permanent location and construction, without repaying all moneys, and restoring all property, or its value, which were donated to the company building the same exclusively in consideration of said railroads being located and constructed on such line, to the parties donating the same, their heirs or assigns, nor without first procuring the consent of all parties having liens upon the railroad, and of any township, city or county that by taxation or by the issuing of bonds has contributed money to aid in the construction thereof; but the consent of such township, city or county shall be necessary only with reference to the change to be made within its own territorial limits. [Same, § 3.]

The obligation to operate a railway is incurred by accepting taxes: *State v. Central Iowa R. Co.*, 71–410.

SEC. **2095. Order of court.** If the court finds that notice has been given, and the consent of the proper parties has been obtained, it shall ascertain the amount of money or property contributed to the company by any person or party thereto or appearing therein that was so contributed exclusively in consideration that the road should be located on the line from which it is proposed to remove it, which shall be repaid in case of money, and returned if property, or its value fixed, and in either case shall render judgment therefor, and may also enter a decree authorizing, if the public interest demands it, the removal of or change in the line of said road upon condition that all judgments above provided for be first paid or satisfied, and foreclosing all persons or parties not appearing in the action, and forever barring them from asserting any claim against such company on account of the contributions or donations herein mentioned. [Same, § 4.]

SEC. **2096. Effect.** All mortgage liens or other incumbrances on the line of road which the company is authorized by the court to change shall attach to the line to which said road is removed, and have the same priority over other liens that they held on the original line. [Same, § 5.]

SEC. **2097. Notice to township trustees—vested rights.** For the purpose of this chapter, the trustees of each township shall be served with notice and shall represent and act for it. No vested right of any person or persons living on and along the line of any railroad thus removed shall be defeated or affected by the removal. [Same, § 6.]

SEC. **2098. Cuts and banks.** When any railway company shall take up its track and relocate the same under the provisions of this chapter, it shall within two years therefrom fill up the cuts and level down the banks, or cause the same to be done; but the provisions of this section shall not apply to any railroad which has its initial point in any town upon the Mississippi river, and which had in the year 1859 sixty-three miles and no more of completed track from such initial point, and this exemption shall only apply to the sixty-three miles of road from the initial point thereof. [17 G. A., ch. 152, § 1; 16 G. A., ch. 118, § 7.]

UNION RAILWAY DEPOTS.

SEC. **2099. Corporations formed.** Any number of persons or railway corporations, or both persons and railway corporations, may form a body corporate under the laws of this state relating to corporations for pecuniary profit, for the purpose of acquiring, establishing, constructing and maintaining at any place in the state union station-houses or depots for freight or passengers, or both, with necessary offices for express, baggage or postal rooms in the same or separate buildings, and railroad tracks and other appurtenances of such depots. Any railroad company operating a road in the state, or interested therein, whether organized under its laws or elsewhere, may become a stockholder in such corporation. A copy of the by-laws, if any are adopted, shall be posted in the passenger or waiting rooms of the depot and in the office of the company. [20 G. A., ch. 139, § 1.]

SEC. **2100. Powers.** Every corporation formed under the provisions of the preceding section shall have power to take and hold, for the purposes therein mentioned, such real estate as may be found necessary by the railroad commissioners for the location of its depot and approaches, which it may acquire by purchase or condemnation as provided for the taking of private property for works of internal improvement. [Same, § 2.]

SEC. **2101. Connecting tracks.** Such corporations, with the consent of the council of any city or town in which any such depot is located, shall have the right to lay its tracks to make necessary connection with all railways desiring to use such depot, upon the streets or alleys of such city or town, and, by and with the consent of the council, may erect such depot upon or across any street or alley; but no railway track can thus be located, nor can any such depot be so erected, until after the injury to property abutting upon the streets or alleys thus appropriated has been ascertained and paid in the manner provided for taking private property for works of internal improvement. [Same, § 3.]

SEC. **2102. Liability for damages.** Nothing in this chapter contained, or in the articles of incorporation or by-laws of such corporation, shall release the railroad companies using such union depots, tracks or appurtenances from the same liability for all damages on account of injuries to persons, stock, baggage or freight, or for the loss of baggage or freight in or about such union depot grounds, as they would be under if said depot tracks and appurtenances belonged to and were operated by the railway companies using the same. [Same, § 4.]

STATION-HOUSES AT CROSSINGS.

SEC. **2103. At joint expense—connecting tracks.** All railway corporations shall, at all points of connection, crossings or intersection with the roads of other corporations, unite therewith in establishing and maintaining suitable platforms and station-houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage or freight, whenever the same shall be ordered by the railroad commission; and shall, when ordered by it, keep such depot or passenger house warmed, lighted and opened a reasonable time before the arrival, and until after the departure, of all trains carrying passengers; and said railway companies shall stop all trains at said depots for the transfer of passengers, baggage and freight when so ordered by the commission. The expense of constructing and maintaining such station-houses and platforms shall be paid by such corporations in such proportions as may be fixed by the commission. Such corporations whose roads so connect or intersect shall, when ordered by the commission, so unite and connect the tracks of the several roads as to permit the transfer of cars from the track of one to that of the other. [20 G. A., ch. 24, § 1; 15 G. A., ch. 18; C.'73, §§ 1292–6.]

The provisions of 20 G. A., ch. 24, § 1, leaving the matter to the discretion of the commissioners' superseded prior provisions on the subject: *Smith v. Chicago, R. I. & P. R. Co.*, 86–202.

As to whether the commissioners have authority to require the establishment or maintenance of stations elsewhere than at crossings, *quære*: *State v. Des Moines & K. C. R. Co.*, 87–644.

SEC. **2104. Penalty.** Any railway corporation or company which, after having received ninety days' notice from the commissioners, shall neglect or refuse to comply with the provisions of the preceding section shall, for every day it fails, neglects or refuses to comply therewith, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state for the use of the school fund of the county wherein such crossing or intersection is situated, and the county attorney of such county shall prosecute the same. [20 G. A., ch. 24, § 2.]

CHANGING NAMES OF STATIONS.

SEC. **2105. By commissioners.** In all cases where any railway company shall fail or refuse to make the name of the railway station conform to the name of the village, incorporated town or city within the limits of which it is situated, it shall be the duty of the railway commissioners of the state to order a change of the name of said railway station to effect such uniformity, within sixty days after a petition in writing by the town council of said incorporated town or city, or, in the case of a village, by the township trustees, asking for such order, is filed with said railway commissioners. [26 G. A., ch. 35; 24 G. A., ch. 26; 22 G. A., ch. 31, § 1.]

SEC. **2106. Notice.** When the commissioners shall order a change in the name of a railway station, they shall give the company owning or operating the same notice of such order, and if it is not complied with within thirty days from the date of service of such notice, the commissioners shall notify the attorney-general thereof, who shall begin proceedings in the proper court to compel the enforcement of said order. [22 G. A., ch. 31, § 2.]

SEC. **2107. Penalty.** A failure to comply with the order of the commissioners within thirty days from service of such notice shall also be a misdemeanor, for which said company shall be subject to a fine of one thousand dollars, and non-compliance for each thirty days thereafter shall constitute a separate and distinct offense, subject to a fine of one thousand dollars. [Same, § 3.]

TERMINAL OFFICES.

SEC. **2108. General offices.** All railroads terminating in the state shall establish and maintain at such terminus general freight and passenger offices, and express or telegraph offices when operating an independent express or telegraph company, at localities accessible and convenient to the public, and there keep for sale tickets over their respective roads, and, in advertising, correctly set forth their true connections, starting or terminal points, time-tables, and freight tariffs. [16 G. A., ch. 68, § 1.]

SEC. **2109. For sale of sleeper tickets.** All railroad and sleeping car companies, running or operating sleepers or sleeping cars within the state upon railroads terminating therein, shall establish, maintain and keep open to the public, at such termini, ticket offices at accessible and convenient places, in which they shall keep a diagram of the berths and staterooms in such sleepers or sleeping cars, and shall at all times during the daytime keep them open for the sale of tickets for such berths and staterooms. [18 G. A., ch. 169, § 1.]

SEC. **2110. Penalty.** If any officer, agent or employe of any such company, or any lessee, engaged in operating any sleeper or sleeping car line terminating or operated within the state, shall neglect or refuse to comply with any of the provisions of the two preceding sections, he shall be guilty of a misdemeanor, and, upon conviction thereof, fined in a sum not exceeding five hundred dollars, and imprisoned not more than six months. [18 G. A., ch. 169, § 2; 16 G. A., ch. 68, § 2.]

CHAPTER 6.

OF THE BOARD OF RAILROAD COMMISSIONERS.

SECTION **2111. Election—organization.** The board of railroad commissioners shall consist of three persons having the qualifications of electors, who shall be elected in the same manner as other state officers, and shall each hold his office for three years. Immediately after the new member has qualified, the board shall organize by electing one of its members as chairman, and appointing a secretary who shall take the same oath as the commissioners; but this, or a part of this, may be done at a subsequent meeting. Any person ineligible to the office of commissioner shall be ineligible to the office of secretary of the board. The board shall have power to employ such additional clerical help as it may find necessary. No person in the employ of any common carrier, or owning any bonds, stock or property in any railroad company, or who is in any way or manner pecuniarily interested in any railroad corporation, shall be eligible to the office of railroad commissioner, and the entering into the employ of any common carrier, or the acquiring of any stock or other interest in any common carrier by any officer under this chapter, after his election or appointment, shall disqualify him to hold the office and to perform the duties thereof. [22 G. A., ch. 29, § 2; 17 G. A., ch. 77, § 2.]

SEC. **2112. Supervision.** The board shall have the general supervision of all railroads in the state operated by steam, express companies, car companies, sleeping car companies, freight and freight line companies, and any common carrier engaged in the transportation of passengers or freight by railroad, street railroads excepted, and shall investigate any alleged neglect or violation of the laws of the state by any railroad corporation doing business therein, or by the officers, agents or employes thereof. [17 G. A., ch. 77, § 3.]

SEC. **2113. Powers and duties.** It shall from time to time carefully examine into and inspect the condition of each railroad, its equipment, and the manner of its conduct and management with regard to the public safety and convenience in the state; make semiannual examination of its bridges, and report the condition thereof to the company to which they belong; and if found by it unsafe it shall immediately notify the railroad company whose duty it is to put the same in repair, which shall be done by it within ten days after receiving such notice. If any corporation fails to perform this duty, the board may forbid and prevent it from running trains over the same while unsafe. When, in the judgment of the board, any railway corporation fails in any respect to comply with the terms of its charter or articles of incorporation or the laws of the state; or when in its judgment any repairs are necessary upon its road; or any addition to its rolling stock, or addition to or change in its stations or station-houses, or change in its rates of fare for transporting freight or passengers, or change in the mode of operating its road or conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the board shall serve a notice upon such corporation, in the manner provided for the service of an original notice in a civil action, which notice shall be signed by its secretary, of the improvements and changes which it finds to be proper; and a report of such proceedings shall be included in its annual report to the governor as provided in the next section; but nothing in this section shall be so construed as relieving any railroad company from its present responsibility or liability for damage to person or property. [Same.]

While there is here no provision for commissioners making orders other than in an advisory way, yet the commissioners have authority to consider whether a railroad should put in a private crossing for a land owner whose land is divided by the right of way: *State v. Mason City & Ft. D. R. Co.*, 85–516.

The commissioners may act on a matter within their jurisdiction on the petition of a party aggrieved or on their own motion and in the absence of any complaint, but whether their action is based on complaint or upon facts within their knowledge, their record should show what the complaint is so the company may be able to make answer thereto and the court before which an action is brought to enforce the order of the commissioners in such matter may be properly advised as to the subject of the investigation. New grounds of complaint are not to be introduced into the proceeding in the court: *State v. Chicago, M. & St. P. R. Co.*, 86-641.

SEC. **2114. Report.** The board shall annually, on or before the first Monday in December, make a report to the governor of its doings for the preceding year, containing such facts, statements and explanations as will disclose the working of such systems of railroad transportation in the state, and their relation to the general business and prosperity of the citizens thereof, with such suggestions and recommendations in respect thereto as may to the board seem appropriate. Said report shall also contain, as to every railroad corporation doing business in this state:

1. The amount of its capital;
2. The amount of its preferred stock, if any, and the condition of its preferment;
3. The amount of its funded debt and the rate of interest;
4. The amount of its floating debt;
5. The cost and actual present cash value of its road equipment, including permanent way, buildings and rolling stock, all real estate used exclusively in operating the road, and all fixtures and conveniences for transacting its business;
6. The estimated value of all other property owned by it, with a schedule of the same, not including lands granted in aid of its construction;
7. The number of acres originally granted it by the United States or this state in aid of the construction of its road;
8. The number of acres of such land remaining unsold;
9. A list of its officers and directors, with their respective places of residence;
10. Such statistics of the road and of its transportation business for the year as may, in the judgment of the commissioners, be necessary and proper for the information of the general assembly or as may be required by the governor;
11. The average amount of tonnage that can be carried over each road in the state with an engine of given power.

Which report shall exhibit and refer to the condition of such corporation on the first day of July of each year, and the details of its transportation business transacted during the year ending June thirtieth. [Same, § 4.]

SEC. **2115. Examinations.** The board shall have power, in the discharge of its duties, to examine any of the books, papers or documents of any railway corporation, or to examine, under oath or otherwise, any officer, director, agent or employe thereof; to issue subpœnas,—the cost thereof as well as of the investigation to be first paid by the state, upon the certificate of the board,—and to enforce obedience thereto in the performance of its duties as courts of law may. Any person who shall wilfully obstruct it or its members in the performance of their duties, or who shall refuse to give any information within his possession that may be required by them within the line of their duty, shall be guilty of a misdemeanor, and upon conviction be fined not exceeding one thousand dollars, in the discretion of the court. [Same, § 9.]

SEC. **2116. Duty of railroad to transport.** Every railway corporation shall, when within its power to do so, and upon reasonable notice, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch, and provide and keep suitable facilities for the receiving and handling thereof at any depot on the line of its road; and shall also receive and transport in like manner the empty or

loaded cars furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged or reloaded and returned to the road so connecting; and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for a similar service. [Same, § 10.]

The duty of one railway to transport the cars of another road may be enforced by mandatory injunction, and the fact that the receiving of such cars by the former road will cause a strike of its employes will constitute no defense: *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.*, 34 Fed., 481.

A railroad company, being under obligations to carry animals when offered on proper terms is not liable in damages for bringing into the state an animal affected with Texas fever where it does so without negligence, § 5021 making such action a misdemeanor and rendering the company liable for damages resulting only makes the act *prima facie* proof of negligence which may be rebutted by the company: *Furley v. Chicago, M. & St. P. R. Co.*, 90–149.

For construction of prior provisions, see *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

SEC. **2117. Examination of rates.** The board shall, upon the application of the mayor and council of any city or town, or the trustees of any township, make an examination of the rate of passenger fare or freight tariff charged by any railroad company, and of the condition or operation of any railroad, any part of whose location lies within the limits of such city, town or township; and if twenty-five or more voters in any city, town or township shall by written petition request the mayor and council of such city or town, or the trustees of such township, to make the said complaint and application, and they refuse, they shall state the reason therefor in writing upon the petition, and return the same to the petitioners, who may thereupon, within ten days from the date of such refusal and return, present the same to the board of commissioners, who shall, if it thinks the public good demands the examination, proceed to make it in the same manner as if called upon by the mayor and council of any city or town, or the trustees of any township. Before proceeding to make such examination, it shall give to the petitioners and the corporation reasonable notice, in writing, of the time and place of entering upon the same. If, upon such an examination, it shall appear to the board that the complaint is well founded, it shall, within ten days, inform the corporation operating such railroad of its finding, and shall report its doings to the governor. [Same, § 15.]

SEC. **2118. Cumulative.** Nothing in this or the succeeding chapter shall be construed to estop or hinder any persons or corporations from bringing action against any railway company for any violation of the laws of the state for the government of railroads. [Same, § 17.]

SEC. **2119. Orders of commissioners enforced.** The district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions and orders, the rulings, orders and regulations affecting public rights, made or to be made by the board, such as are now, or may hereafter be, authorized to be made by them for the future direction and observance of railroads in this state. The proceedings therefor shall be by equitable action in the name of the state of Iowa, and shall be instituted by the attorney-general, whenever advised by the board that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order or regulation made by the board, and applicable to such railroad or person. It shall be the duty of the court in which any such cause shall be pending to require the issue to be made up at the first term of the court to which such cause is brought, which shall be the trial term, and to give the same precedence over other civil business. If the court shall find that such rule, regulation or order is reasonable and just, and that in refusing compliance therewith said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction, compelling obedience to and compliance with such rule, order or regulation by said railroad company, or other person, its officers, agents, servants and employes, and may grant such other relief as may be deemed

just and proper. All violations of such decree shall render the company, persons, officers, agents, servants and employes who are in any manner instrumental in such violation, guilty of contempt of court, and the court may punish such contempt by a fine not exceeding one thousand dollars for each offense, and may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom. And such decree shall continue and remain in effect and be enforced until the rule, order or regulation shall be modified or vacated by the board. [20 G. A., ch. 133, § 1.]

The statute clearly contemplates that only such orders of the railroad commissioners as are reasonable and just shall be enforced. And the reasonableness and justness of such an order can only be for the determination of the courts, when it is made by the commissioners, and proceedings are taken for its enforcement. The proceeding in the courts for the enforcement of such an order is an equitable one, and the reasonableness or the justness of the order is to be determined from equitable considerations. So far as the public are concerned, the judgment of the commissioners is conclusive: *State v. Des Moines & Ft. D. R. Co.*, 84-419.

In a particular case, *held*, that an order of commissioners requiring the rebuilding of a portion of the track of a road which had received a land grant for the construction of such road was unreasonable, where it appeared that by means of the operation of a leased track, parallel with the track washed away, the road was furnishing the same accommodations to the public that it would furnish if such portion of its track should be rebuilt: *Ibid.*

Where a decree was entered during the time a railroad was in the hands of a receiver, compelling such railroad and its officers, etc., to operate a certain part of the line, and afterwards another company purchased the franchise and property on the foreclosure of a mortgage, *held*, that the decree could be enforced as against such purchaser: *State v. Iowa Central R. Co.*, 83-720.

A decision of the railroad commissioners with reference to the obligation of a company to put in a private crossing for one whose land is divided by the right of way is a ruling affecting a public right within the meaning of this section: *State v. Mason City & Ft. D. R. Co.*, 85-516.

While *mandamus* is a proper remedy in such a case it is not exclusive: *Ibid.*

The finding of the railroad commissioners in a particular case that an overhead crossing was proper and should be constructed, *held* not supported by sufficient evidence, such crossing not being usual: *State v. Chicago, M. & St. P. R. Co.*, 86-304.

Where the case presented to the commissioners is not such as to call for any exercise of their powers, an order made by them should not be enforced on application to the court: *Ibid.*

The court being required to determine whether the orders of the commissioners are just and equitable must do so upon the record presented to it in an action to enforce such orders although the commissioners may have had in mind and acted upon facts not appearing in such record: *Ibid.*

In general as to enforcement of orders, see *State v. Central Iowa R. Co.*, 71-410.

SEC. **2120. Costs—attorney's fees.** Whenever a decree shall be entered against a railroad company or person under the preceding section, the court shall render judgment for costs, and attorney's fees for counsel representing the state. [Same, § 2.]

SEC. **2121. Salaries.** The board shall keep an office in the capitol at the seat of government, and each commissioner shall receive a salary of twenty-two hundred dollars a year. The secretary of the board shall receive a salary of fifteen hundred dollars a year. [17 G. A., ch. 77, § 6.]

CHAPTER 7.

OF THE REGULATION OF CARRIERS BY RAILWAY.

SECTION **2122. To what applicable.** The provisions of this chapter shall apply to the transportation of passengers and property, and to the receiving, delivering, storing and handling of property wholly within this state, and shall apply to all railroad corporations, express companies, car companies, sleeping car companies, freight or freight line companies, and to any common carrier engaged in this state in the transportation of passengers or property by railroad therein, and to shipments of property made from any point within the state to any point within the state, whether the transportation of the same shall be wholly within this state or partly

within this state and partly within an adjoining state. The term "railroad" and "railway" as used in this chapter shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation, receiver, trustee or other person operating a railroad, whether owned or operated under contract, agreement, lease or otherwise; and the term "transportation" shall include all instrumentalities of shipment or carriage; and the term "railway corporation" shall mean all corporations, companies or individuals owning or operating any railroad in whole or in part in this state; and the provisions of this chapter shall apply to all persons, firms and companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers upon any of the lines of railway in this state, street railways excepted, the same as to railroad corporations herein mentioned. [22 G. A., ch. 28, § 1; 17 G. A., ch. 77, § 16.]

The jurisdiction of the commissioners extends to regulating rates for the transportation of goods between two places in the state over a line of railroad which between those points passes out of the state: *Campbell v. Chicago, M. & St. P. R. Co.*, 86–587.

SEC. **2123. Charges to be reasonable.** All charges made for any service rendered or to be rendered in the transportation of passengers or property in this state, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [22 G. A., ch. 28, § 2.]

In an action to recover overcharges from a railway company where it appears that the rates in fact charged did not exceed the rates specified in the commissioners' schedule of rates, but were, in fact, excessive, it was held that the rates fixed by the commissioners were, both as to the shipper and carrier, only presumptively reasonable, and if such commissioners' rates are in fact excessive, such overcharges may be recovered by the shipper: *Barris v. Chicago, B. & Q. R. Co.*, 71 N. W., 339.

The law requires reasonable rates, and the defendant may show that the rate fixed by the commission is unreasonable. The *prima facie* evidence that it is reasonable will not prevail when it is shown that it is in fact not so: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

SEC. **2124. Unjust discrimination.** If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; but this section shall not be construed as prohibiting a less rate per one hundred pounds in a car-load lot than is charged, collected or received for the same kind of freight in less than a car-load lot. [Same, § 3.]

As to construction of provisions against unjust discriminations in a former statute, see *Paxton v. Illinois Cent. R. Co.*, 56–427.

Under prior provisions, *held*, that a cause of action to recover unreasonable and excessive charges accrued when the charges were paid and not when the discrimination was discovered: *Carrier v. Chicago, R. I. & P. R. Co.*, 79–80.

But where the company had fraudulently concealed the fact that the amount paid by plaintiff was unreasonable and in excess of that paid by other shippers, *held*, that the statute of limitations did not begin to run until the fact was discovered: *Ibid.*

As to treble damages see § 2130.

SEC. **2125. Undue preferences—switching charges.** It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular person, company, firm, corporation or locality, or any particular description of traffic,

to any prejudice or disadvantage in any respect whatsoever; but this shall not be construed to prevent any common carrier from giving preference as to time of shipment of live stock, uncured meats, or other perishable property. All common carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and switching of cars, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and to and from other lines and places connected therewith; and shall not discriminate in their accommodations, rates and charges between such connecting lines. Any common carrier may be required to switch and transfer cars for another, for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the board of railroad commissioners. [Same, § 4; 15 G. A., ch. 18; C.'73, §§ 1292–6.]

Switching charges cover movement of cars within the yard limits or outside of such limits where the engine and cars may be run without orders from the train dispatcher but such service does not include the running of switch engine and cars on the main track where they must be controlled by the regulations relating to the operation of regular and special trains: *State v. Chicago, M. & St. P. R. Co.*, 88-445.

SEC. **2126. Long and short haul—fair rate.** It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers or a like kind of property for a shorter than for a longer distance over its railroad, all or any portion of the shorter haul being included within the longer, and shall charge no more for transporting freight to or from any point on its railroad than a fair and just rate, compared with the price it charges for the same kind of freight transportation to or from any other point. [22 G. A., ch. 28, § 5.]

SEC. **2127. Pooling contracts.** It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freight of different and competing railroads, or divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be a separate offense. [22 G. A., ch. 28, § 6; C.'73, §§ 1297–9.]

SEC. **2128. Schedules of rates and fares.** Every common carrier subject to the provisions of this chapter shall print and keep for public inspection schedules showing the rates, fares and charges for the transportation of passengers and property which it has established, and which are in force at the time upon its railroad. The schedules shall plainly state the places upon its roads between which property and passengers will be carried, and shall contain the classification of freight in force upon such road, stating separately any terminal charges, and any rules and regulations which in anywise change, affect or determine any part of the aggregate of such rates, fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and a copy for the use of the public shall be kept in every freight office and passenger station on such road, where it can be conveniently inspected; and it shall keep a printed notice posted in every such freight office and passenger station indicating where therein the same can be found. No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any common carrier except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedules then in force, and the time when the increased rates, fares or charges will go into effect; which proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reduction in such published rates, fares or charges

may be made without previous public notice, but, when made, notice thereof shall be immediately and publicly posted, and such changes made public by printing new schedules, or be plainly indicated upon the schedules at the time in force and kept for public inspection. When any such common carrier shall have established and published its rates, fares and charges, it shall not charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force. Every common carrier subject to the provisions of this chapter shall file with the board of railroad commissioners copies of its schedules of rates, fares and charges established and published, and shall promptly notify said board of all changes made in the same. Every such common carrier shall also file with the board copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party. If passengers and freight pass over continuous lines or routes in this state, operated by more than one common carrier, and the several common carriers operating such lines or routes have established joint tariffs of rates, fares or charges for such continuous lines or routes, copies of such joint tariffs shall also be filed with the board. Such joint rates, fares and charges on such continuous lines shall be made public by such common carriers, when directed by said board, in so far as in its judgment may be practicable, and it shall from time to time prescribe the measures of publicity which shall be given to such rates, fares and charges, or to such part thereof as it may think practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier, party to any such joint tariff, shall be liable for the failure of any other party thereto to observe and adhere to the rates, fares or charges thus made and published. If any such common carrier shall neglect or refuse to file or publish its schedule or tariffs of rates, fares and charges, or any part of the same, it shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any district court of this state in the judicial district wherein its principal office is situated, or wherein such offense may be committed. If such common carrier be a foreign corporation, then such writ may be issued by any district court in the judicial district where it accepts traffic and has an agent to perform such service, to compel compliance with the provisions of this section—such writ to issue in the name of the state, at the relation or upon the petition of the board of railroad commissioners; and the failure to comply with its requirement shall be punishable as for a contempt, and shall make said corporation liable to a penalty of five hundred dollars for each day's failure to comply therewith; and when any such writ of mandamus shall be applied for no bond shall be required. [22 G. A., ch. 28, § 7; C.'73, § 1304.]

A former statute, similar to this section, considered and *held* not to be in conflict with the U. S. Const., as being an attempt to regulate commerce between the states: *Fuller v. Chicago & N. W. R. Co.*, 31–187.

Under such statute, *held*, also, that the receiving of higher rates than those posted, subjected the company to the penalties imposed by the statute without it being shown that such overcharge was wilful: *Fuller v. Chicago & N. W. R. Co.*, 31–211.

SEC. **2129. Continuous shipments.** It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or, by other means or device, the carriage of freights from being continuous from place of shipment to the place of destination in the state; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or

interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this chapter. [22 G. A., ch. 28, § 8.]

SEC. **2130. Penalty in treble damages.** In case any common carrier subject to the provisions of this chapter shall do, cause, or permit to be done anything herein prohibited or declared to be unlawful, or shall omit to do anything in this chapter required to be done, it shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence, together with costs of suit, and a reasonable attorney's fee to be fixed by the court, on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; but in all cases demand in writing shall be made for the money damages sustained before action is brought for a recovery under this section, and no action shall be brought until the expiration of fifteen days after such demand. [Same, § 9; 17 G. A., ch. 77, § 13.]

This section is not applicable to interstate commerce: *Cook v. Chicago, R. I. & P. R. Co.*, 75–169.

In an action brought to recover excessive charges for interstate transportation, *held*, that plaintiff might by amendment abandon the claim therefor under this section and ask the relief to which he would be entitled at common law: *Ibid.*

The legislature may constitutionally prescribe rules permitting recovery of attorney's fees in a particular class of cases and denied in all others: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

In an action to recover excessive charges evidence is not admissible showing the charges for carrying like commodities on other roads: *Hopper v. Chicago, M. & St. P. R. Co.*, 91-639.

While juries are allowed to give three times the actual damage, they are not to include in the verdict an additional sum: *Ibid.*

In an action for unjust and unreasonable charges under the common law, aside from statute, plaintiff cannot recover on proving that another person carrying on a similar business in connection with the railroad was allowed to have goods carried free: *Kelley v. Chicago, M. & St. P. R. Co.*, 61 N. W., 957.

The penalty in treble damages is not applicable to a case of refusal to furnish under § 2116: *Bond v. Wabash, St. L. & P. R. Co.*, 67-712.

As to the penalty this provision is not to be extended by implication: *Ibid.*

As to recovery of excessive charges paid, see notes to § 2123.

SEC. **2131. Remedy—evidence.** Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the board of railroad commissioners, or may bring action in his own behalf for the recovery of damages for which any such common carrier may be liable under the provisions hereof; but he shall not have the right to pursue both of said remedies at the same time. In any such action, the court before whom the same shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company defendant in such suit to attend as a witness and to testify, and may compel the production of the books and papers of such corporation or company; and the claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse him from testifying or producing said books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise; provided that no person so testifying shall be exempted from prosecution and punishment for perjury committed in so testifying. [22 G. A., ch. 28, § 10.]

SEC. **2132. Criminal liability.** Except as otherwise specially provided for in this chapter, and unless relieved from the consequences of a violation of the law as provided herein, any common carrier subject to the provisions hereof, or, when such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who, alone or with any other corporation, company, person or party shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done any act, matter or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet

therein, or shall wilfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter or thing, so directed or required by the provisions of this chapter to be done, not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of the provisions of this chapter, or shall aid or abet therein, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not more than five thousand nor less than five hundred dollars for each offense. [Same, § 11.]

SEC. **2133. Inquiry by commissioners.** The board of railroad commissioners shall inquire into the management of the business of all common carriers subject to the provisions of this chapter, and keep itself informed as to the manner and method in which the same is conducted, and have the right to obtain from them full and complete information necessary to enable the board to perform its duties and carry out the object for which it was created; shall have power to require the attendance and testimony of witnesses, the production of all books, papers, tariffs, schedules, contracts, agreements and documents relating to any matter under investigation; and may invoke the aid of any court of this state in requiring the attendance and testimony of witnesses and the production of books, papers and documents; and any court within the jurisdiction of which such inquiry is carried on shall, in case of refusal to obey a subpœna or other proper process issued to any common carrier or person subject to the provisions hereof, issue an order requiring such carrier or person to appear before said board and produce books and papers, if so ordered, and testify touching, or in relation to, the matter in question; and a failure to obey such orders of the court shall be punished as for a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving it shall not excuse him from testifying, but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce evidence, documentary or otherwise; provided that no person so testifying shall be exempted from prosecution and punishment for perjury committed in so testifying. [Same, § 12.]

SEC. **2134. Complaint.** Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention thereof, may apply to said board by petition, briefly stating the facts; whereupon a copy of the complaint with the damages, if any are claimed, shall be forwarded by the board to such carrier, who shall be requested to satisfy the complaint, or answer the same in writing within a reasonable time to be fixed by the board. If such carrier within the time specified shall make reparation for the injury alleged to have been done, or shall correct the wrong complained of, it shall be relieved of liability to the complainant for the particular violation complained of. If it shall not satisfy the complaint within the time fixed, or there shall appear to be any reasonable ground for investigating the complaint, the board shall inquire into the matters complained of in such manner and by such means as it shall think proper. Whenever it has sufficient reason to believe that any carrier is violating any of the provisions of this chapter, it shall at once institute an inquiry, as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. [Same, § 13.]

The grounds of complaint, whether made to the commissioners or considered by the commissioners on their own motion, must appear in their record. The mere statement that the complainant desires a portion of the right of way for coal sheds, without showing the facts entitling him thereto, does not show any ground of complaint against the company, and if other grounds do not appear on the commissioners' records, the proceeding in court to enforce an order of the commissioners, based on such defective complaint, can not be maintained: *State v. Chicago, M. & St. P. R. Co.*, 86-641.

SEC. **2135. Investigations—report.** When an investigation is made by the board after notice, it shall make a report in writing, stating its conclusions, which shall include the findings of fact upon which the conclusions are based, together with its recommendations or orders as to what reparation, if any, shall be made by the carrier to any party who may be found to have been injured; and such finding shall thereafter in all judicial proceedings be *prima facie* evidence of every fact found. All reports of investigations made by the board shall be entered of record, and a copy furnished to the party who complained, and any other person directly interested, and to any carrier that may have been complained of. [Same, § 14.]

SEC. **2136. Orders.** If in any case in which an investigation shall be made by the board it shall be made to appear to the satisfaction of such board, either by the testimony of witnesses or other competent evidence, that anything has been done or omitted to be done, in violation of the provisions of this chapter, or of any law cognizable by the board, by any common carrier, or that any injury or damage has been sustained by the party complaining, or by other parties, in consequence of any such violation, it shall be the duty of the board forthwith to cause a copy of its report in respect thereto to be delivered to such carrier, together with a notice to it to cease from such violation, or to make reparation for the injury found to have been done, or both, within a reasonable time, to be fixed by the board. And if within the time fixed it shall be made to appear to the board that such carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the board, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by it, and the carrier shall thereupon be relieved from further liability or penalty for such particular violation of law. [Same, § 15.]

SEC. **2137. Enforcement of orders.** Whenever any common carrier as defined in this chapter shall violate or refuse or neglect to obey any lawful order or requirement of the board, it shall be the duty of the board, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the district or superior court in any county of this state in which the common carrier complained of has its principal office, or in any county through which its line of road passes or is operated, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents or servants, as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and, to this end, such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of the board shall be *prima facie* evidence of the matter therein, or in any order made by them, stated; and if it be made to appear to such court on such hearing, or on the report of any such person or persons, that the order or requirement of the board drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of the board, and enjoining obedience to the same, and in case of any disobedience of any writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue a writ of attachment, or any other process of said court incident or

applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and, if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay any sum of money, not exceeding for each carrier or person in default the sum of one thousand dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall, upon order of the court, be paid into the treasury of the county in which the action was commenced, and one-half thereof shall be transferred by the county treasurer to the state treasury; and the payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order, in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court, saving to the board and any other party or person interested the right of appeal to the supreme court of the state, under the same regulations now provided by law in relation to appeals to said court as to security for such appeal, except that in no case shall security for such appeal be required when the same is taken by the board; but no appeal to said supreme court shall operate to stay or supersede the order of the court, or the execution of any writ or process thereon; and such court may in every such matter order the payment of such costs and attorney and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented, or be prosecuted by the board, or by their direction, it shall be the duty of the attorney-general of the state to prosecute the same, and in such prosecution he shall have the right to have the assistance of any county attorney of the county in which any such proceedings are instituted, and it is hereby made the duty of any such county attorney to render such assistance; and the costs and expenses, on the part of the board, of any such prosecution shall be paid out of the appropriations for the expenses of the board. [Same, § 16.]

In all cases instituted by the board of railroad commissioners to enforce orders and rulings made by them, the action should be brought in the name of the state: *State v. Chicago, B. & Q. R. Co.*, 90–594.

But in a particular case, *held*, that the fact that the action was brought by the commissioners would be disregarded, they being permitted to amend by substituting the state as plaintiff: *Ibid.; Smith v. Chicago, M. & St. P. R. Co.*, 86–202.

The owners of the road should not be interfered with in regard to the location and change of stations unless it appears that the patrons of the road have been deprived of reasonable facilities for transacting business with it: *State v. Des Moines & K. C. R. Co.*, 87–644.

SEC. **2138. Commissioners' schedules of rates—effect.** The schedules of reasonable maximum rates of charges for the transportation of freight and cars, together with the classification of such freights now in effect, shall remain in force until changed by the board according to law, which, in all actions brought against railway corporations, wherein there are involved the charges thereof for the transportation of any freight or cars, or any unjust discrimination in relation thereto, shall be taken as *prima facie* evidence in all courts that the rates fixed therein are reasonable and just maximum rates of charge for which said schedules have been prepared. The board shall from time to time, and as often as circumstances may require, change and revise such schedules, but the rates fixed shall not be higher than established by law. The board shall give notice of its intention to revise or change such schedules, by publishing a notice thereof in two weekly newspapers published at the seat of government, for two consecutive weeks, and the last publication of such notice shall be at least ten days before the time fixed for considering the matter, and such notice shall contain, in general terms, a statement of the matters the board proposes to

consider, and the date when and the place where the matter will be taken up, and shall be addressed to all persons interested therein. When any schedule is thus revised the board must cause notice thereof to be published for two successive weeks in some public newspaper printed at the seat of government, which shall state the date of the taking effect thereof, and it shall take effect at the time so stated. A printed copy of such revised schedule shall be conspicuously posted by said common carrier in each freight office and passenger depot upon all lines affected thereby, and, when certified by the board that the same is a true copy prepared by it for the railway company or corporation therein named, and that notice thereof had been published as required by law, shall be received in evidence in all actions as *prima facie* the schedule of such board. [Same, § 17.]

A schedule of rates having been adopted by the commissioners remains in force until the publication of a change in rates as herein provided: *Hopper v. Chicago, M. & St. P. R. Co.*, 91–639.

The certificate provided for to authorize the receipt in evidence of the schedule may be made by the secretary of the commission under its seal: *Ibid.*

The original schedule went into effect without publication of notice: *Ibid.*

As to whether the schedule of rates established under the previous provisions on the subject were valid and could be enforced, see *Chicago & N. W. R. Co. v. Dey*, 35 Fed., 866; *Chicago, B & Q. R. Co. v. Dey*, 38 Fed., 656.

SEC. **2139. Complaint of violation of schedule.** When any person in his own behalf, or in behalf of a class of persons similarly situated, or a firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, shall make complaint to the board of railway commissioners that the rate charged or published by any railway company, or the maximum rates fixed by the board in the schedule of rates made by it, or the maximum rate fixed by law, is unreasonably high or discriminating, the board shall investigate the matter, and, if the charge appears to be well founded, fix a day for hearing the same, giving the railway company notice of the time and place thereof by mail, directed to any division superintendent, general or assistant superintendent, general manager, president or secretary of such company, which notice shall contain the substance of the complaint, also the person or persons complaining. [Same, § 18.]

SEC. **2140. Hearing—evidence.** Upon the hearing the board shall receive any evidence and listen to any arguments offered or presented by either party relevant to the matter under investigation, and the burden of proof shall not be upon the person or persons making the complaint; but it shall add to the showing made at such hearing whatever information it may then have, or can obtain from any source, including schedules of rates actually charged by any railway company for substantially the same kind of service, in this or any other state. The lowest rates published or charged by any railway company for substantially the same kind of service whether in this or another state, shall, at the instance of the person or persons complaining, be accepted as *prima facie* evidence of a reasonable rate for the services under investigation; and if the railway company complained of is operating a line of railroad beyond the state, or has a traffic arrangement with any such railway company, the same shall be taken into consideration in determining what is a reasonable rate; if it be operating a line of railway beyond the state, the rate charged or established for substantially a similar or greater service by it in another state shall also be considered. [Same, § 19.]

SEC. **2141. Determination.** After such hearing and investigation, the board shall fix and determine the maximum charges to be thereafter made by the railroad company or common carrier complained of, which charge shall in no event exceed the one now or hereafter fixed by law; and the board shall render their decision in writing, and shall spread the same at length in the record to be kept for that purpose; such decision shall specifically set out the sums or rate which the railroad company or common

carrier so complained of may thereafter charge or receive for the service therein named, and including a classification of such freight; and the board shall not be limited in their said decision and the schedule to be contained therein to the specific case or cases complained of, but it shall be extended to all such rates between points in this state, and whatever part of the line of railway of such company or common carrier within this state may have been fairly within the scope of such investigation; and any such decisions so made and entered on record of the board, including any such schedules and classifications, shall, when duly authenticated, be received and held in all suits brought against any such railroad corporation or common carrier, wherein is in any way involved the charges of any such corporation or carrier mentioned in said decisions, in any of the courts of this state, as *prima facie* evidence that the rates therein fixed are reasonable maximum rates, the same as the schedule made by the board as provided in section twenty-one hundred and thirty-eight hereof; and the rates and classifications so established, after such hearing and investigation, shall, from time to time thereafter, upon complaint duly made, be subject to revision by the board, the same as any other rates and classifications. [Same, § 20.]

SEC. **2142. Proceedings of commissioners.** The board may in all cases conduct its proceedings, when not otherwise prescribed by law, in such manner as will best conduce to the proper dispatch of business and the attainment of justice. A majority of the board shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. It may from time to time make or amend such general rules or orders as may be necessary for the preservation of order and the regulation of proceedings before it, including forms of notice and the service thereof, which shall conform as nearly as may be to those in use in the courts of the state. Any party may appear before it and be heard in person or by attorney. Every vote and official action thereof shall be entered of record, and, upon the request of either party or person interested, its proceedings shall be public. It shall have a seal, of which courts shall take judicial notice. [Same, § 21.]

SEC. **2143. Annual reports from companies.** The board shall require annual reports from all common carriers subject to the provisions of this chapter to be made at the same time they make report to the executive council, to cover the same period, and prescribe the manner in which specific answers to all questions upon which it may need information shall be made. Such report shall show in detail the amount of capital stock issued, the amounts paid therefor, and manner of payment; the dividends paid; surplus fund, if any; number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipment; the number of locomotive engines and cars used in the state, and the number supplied with automatic safety couplers, and the kind and number of brakes used, and the number of each; the number of employes and the salaries paid each class; the amounts expended for improvements each year, how and where expended and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balance of profit and loss, and a complete exhibit of the financial operations thereof each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements or contracts with other carriers, and other statistics of the road and its transportation, as the board may require; and it may prescribe uniformity and methods of keeping accounts, as near as may be, and fix a time when such regulations shall take effect. The board may also require of any and all common carriers subject to the provisions of this chapter such other reports, and fix the time for filing the same, as in its judgment shall be necessary and reasonable, which reports shall be in such form, and concerning such subjects, and be

from such sources as it shall direct, except as otherwise provided herein. Any corporation, company or individual owning or operating a railway within the state, neglecting or refusing to make the required reports by the date fixed, or fixed by the board, shall be subject to a penalty of one hundred dollars for each and every day of delay in making the same after the date thus fixed. [24 G. A., ch. 27; 23 G. A., ch. 18; 22 G. A., ch. 28, § 22; 17 G. A., ch. 77, §§ 5–7; C.'73, §§ 1280–2.]

SEC. **2144. Extortion—penalty.** If any railway corporation or carrier subject to the provisions of this chapter shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railway car upon its track or any of the branches thereof, or upon any railroad within the state which it has the right, license or permission to use, operate or control, or shall make any unjust and unreasonable charge prohibited in this chapter, it shall be deemed guilty of extortion, and be dealt with as hereinafter provided; and if any such railroad corporation or common carrier shall be found guilty of any unjust discrimination as defined in this chapter, it shall, upon conviction thereof, be dealt with as hereinafter provided. [22 G. A., ch. 28, § 23; 17 G. A., ch. 77, §§ 12, 13.]

SEC. **2145. Discrimination—punishment.** If any such railway corporation shall charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class, over a greater distance of the same railway; or if it shall charge, collect or receive at any point upon its road a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity than it shall at the same time charge, collect or receive at any other point upon the same railway; or if it shall charge, collect or receive for the transportation of any passenger or freight of any description over its railway a greater amount as toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger or like quantity of freight of the same class being transported in the same direction over any portion of the same railway of equal distance; or if it shall charge, collect or receive from any person a higher or greater amount of toll or compensation than it shall at the same time charge, collect or receive from any other person for receiving, handling or delivering freight of the same class and like quantity at the same point upon its railway; or if it shall charge, collect or receive from any person for the transportation of any freight upon its railway a higher or greater rate of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for the transportation of the like quantity of freight of the same class being transported from the same point in the same direction over equal distances of the same railway; or if it shall charge, collect or receive from any person for the use and transportation of any railway car or cars upon its railroad for any distance, a greater amount of toll or compensation than is at the same time charged, collected or received from any other person for the use and transportation of any railway car of the same class or number, for a like purpose, being transported in the same direction over a greater distance of the same railway; or if it shall charge, collect or receive from any person for the use and transportation of any railway car or cars upon its railway a higher or greater compensation in the aggregate than it shall, at the same time, charge, collect or receive from any other person for the use and transportation of any railway car or cars of the same class for a like purpose, being transported from the same original point in the same direction, over an equal distance of the same railway; all such discriminating rates,

charges, collections or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be received as *prima facie* evidence of the unjust discriminations prohibited by this chapter; and it shall not be a sufficient excuse or justification thereof on the part of said railway corporation that the station or point at which it shall charge, collect or receive less compensation in the aggregate for the transportation of such passenger or freight, or for the use and transportation of such railway car the greater distance than for the shorter distance, is a station or point at which there exists competition with another railway or other transportation line. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight or passenger rates. The provisions of this section shall apply to any railway, the branches thereof, and any road or roads which any railway corporation has the right, license or permission to use, operate or control, wholly or in part, within this state; but shall not be so construed as to prevent railway corporations from issuing commutation, excursion or thousand-mile tickets, if the same are issued alike to all applying therefor. [22 G. A., ch. 28, § 24.]

SEC. **2146. Discrimination as to quantity.** No such common carrier shall charge, collect, demand or receive more for transporting a car of freight than it at the same time charges, collects, demands or receives per car for several cars of a like class of freight over the same railway, for the same distance, in the same direction; nor charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of freight under a car-load of a like class over the same railway, for the same distance, in the same direction; nor charge, collect, demand or receive more for transporting a hundred pounds of freight than it charges, collects, demands or receives per hundred for several hundred pounds of freight, under a ton, of a like class, over the same railway, for the same distance, in the same direction; and all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be received as *prima facie* evidence of the unjust discrimination prohibited by this chapter; but for the protection and development of any new industry within the state, such railway company may grant concessions or special rates for any agreed number of car-loads, which rates shall first be approved by the board of commissioners, and a copy thereof filed in its office. [Same, § 25.]

SEC. **2147. Penalty for discrimination.** Any such corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railway cars, or in receiving, handling or delivering freights, shall, upon conviction thereof, be fined in any sum not less than one thousand nor more than five thousand dollars for the first offense, and for each subsequent offense not less than five thousand nor more than ten thousand dollars,—such fine to be imposed in a criminal prosecution by indictment; or shall be subject to the liability prescribed in the next succeeding section, to be recovered as therein provided. [Same, § 26.]

SEC. **2148. Forfeiture.** Any such railway corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railway cars, or in receiving, handling or delivering freights, shall forfeit and pay to the state not less than one thousand nor more than five thousand dollars for the first offense, and not less than five thousand nor more than ten thousand dollars for each subsequent offense, to be recovered in a civil action in the name of the state; and the release from liability or penalty provided for in this chapter shall not apply to a criminal prosecution under the last preceding section, or to a civil action under this section. [Same, § 27.]

SEC. **2149. Suits by commissioners.** When the board has reason to believe that any railway corporation or carrier subject to the provisions of

this chapter has been guilty of extortion or unjust discrimination, it shall immediately cause actions to be commenced and prosecuted against such railway corporation or carrier, which may be brought in any county of the state through or into which the line of the corporation sued may extend, and it may on behalf of the state employ counsel to assist the attorney-general in conducting such actions. No actions thus commenced shall be dismissed unless they and the attorney-general consent thereto. The court in its discretion may give preference to such actions over all other business, except criminal cases. [Same, § 28.]

SEC. **2150. Free transportation or reduced rates.** Nothing in this chapter shall apply to the transportation, storage or handling of property free or at reduced rates for the United States, this state, or municipal governments, by common carriers, nor for charitable purposes, or to and from fairs and expositions for exhibition thereat, nor for the employes thereof or their families, or private property or goods for the family use of such employes, nor from giving reduced rates to the quartermaster-general of Iowa for the transportation of officers or enlisted men of the Iowa national guard, when traveling under the orders of the commander-in-chief, or to ministers of religion, nor from giving free transportation to their own officers and employes, and their families dependent upon them for support, nor to persons in charge of live stock being shipped, from point of shipment to destination and return, nor to prevent the officers of any railway company from exchanging passes or tickets with other railroad companies for their officers and employes; and nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions thereof are in addition to such remedies. [26 G. A., ch. 34; 22 G. A., ch. 28, § 29.]

SEC. **2151. Commissioners transported free.** The commissioners and their secretary shall be carried free, while performing their duties, on all railroads and trains in the state, and may take with them experts or other agents, who shall be carried free. [22 G. A., ch. 28, § 30.]

SEC. **2152. Joint rates.** The preceding sections of this chapter shall not be construed to prohibit the making of rates by two or more railway companies for the transportation of property over two or more of their respective lines within the state; and a less charge by each of said companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state shall not be considered a violation of said chapter, and shall not render such company liable to any of the penalties thereof; but the provisions of this section shall not be construed to permit railway companies establishing joint rates to make thereby any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by this chapter. [23 G. A., ch. 17, § 1.]

SEC. **2153. Connecting lines.** All railway companies doing business in this state shall, upon the demand of any person or persons interested, establish reasonable joint through rates for the transportation of freight between points upon their respective lines within this state, and shall receive and transport freight and cars over such route or routes as the shipper shall direct. Car-load lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading into other cars shall be done without charge therefor to the shipper or receiver of such cars lots, and unless such transfer be made without unreasonable delay; and less than car-load lots shall be transferred into the connecting railway's cars at cost, which shall be included in and made a part of the joint rate adopted by such railway companies, or established as provided in this chapter. [Same, § 2.]

This provision relating to the establishment of joint rates over connecting lines within the state, *held* not unconstitutional: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

It will be presumed that the railroad commissioners will rightly discharge their duties, and will fix reasonable and just joint through rates. If these officers fail in their duty, from errors of judgment or from other causes, the railroads may cause their action to be reviewed and corrected: *Ibid.*

The railroad companies are not compelled to enter involuntarily into contract relations with each other, but the statute simply provides that in case of failure to adopt joint rates, the railroad commissioners shall prescribe them, and the company shall not be permitted to charge more: *Ibid.*

SEC. **2154. Reasonable through rates—no discrimination.** When shipments of freight to be transported between different points within the state are required to be carried by two or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or state traffic as they give to interstate traffic over their lines of road. [Same, § 2.]

SEC. **2155. Schedules of joint rates.** In the event that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners, upon the application of any person interested, to establish such rates for the shipment of freight and cars over two or more connecting lines of railroad in the state; and in the making thereof, and in changing or revising the same, they shall be governed, as nearly as may be, by the provisions of the preceding sections of this chapter, and shall take into consideration the average of rates charged by said railway companies for shipments within this state for like distances over their respective lines, and rates charged by the railway companies operating such connecting lines for joint interstate shipments for like distances. The rates established by the board shall go into effect within ten days after the same are promulgated, and from and after that time a schedule thereof shall be *prima facie* evidence in all the courts of this state that the rates therein fixed are just and reasonable for the joint transportation of freight and cars upon the railroads for which such schedules have been fixed. [24 G. A., ch. 25; 23 G. A., ch. 17, § 3.]

The joint rates fixed by commissioners are not absolute, but *prima facie* evidence only of their reasonableness and justness: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

A rate fixed to govern two or more roads as to the shipment which passes over all of them is in legal effect a joint rate and a schedule for such rates is to be adopted in pursuance of the provisions of these sections and not under other sections authorizing the commissioners to establish a general schedule: *State v. Chicago, B. & Q. R. Co.*, 90-594.

Therefore a schedule of such joint rates can be adopted on notice only as required by these sections and cannot be treated as an amendment or modification of the schedule of rates under the general sections providing for a schedule even though the rates under the joint rate schedule are simply a proportion of the rates under the general schedule: *Ibid.*

SEC. **2156. Division of joint rates.** Before the promulgation of such rates, the board shall notify the railroad companies interested of the schedule of joint rates fixed, and give them a reasonable time thereafter to agree upon a division of the charges provided for therein. If such companies fail to agree upon a division, and to notify the board thereof, it shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by it shall, in all controversies or actions between the railway companies interested, be *prima facie* evidence of a just and reasonable division thereof. [23 G. A., ch. 17, § 4.]

SEC. **2157. Unreasonable charges—penalty.** Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this state is prohibited, and every company making such unreasonable and unlawful charges, or otherwise violating the provisions of this chapter, shall be punished as provided in this chapter for the making of unreasonable charges for the transportation of freight and cars over a single line of railroad by a single railway company. [Same, § 5.]

CHAPTER 8.

OF TELEGRAPH AND TELEPHONE LINES.

SECTION **2158. Right of way.** Any person or firm, and any corporation organized for such purpose, within or without the state, may construct a telegraph or telephone line along the public roads of the state, or across the rivers or over any lands belonging to the state or any private individual, and may erect the necessary fixtures therefor. When any road along which said line has been constructed shall be changed, the person, firm or corporation shall, upon ninety days' notice in writing, remove said lines to said road as established. The notice may be served upon any agent or operator in the employ of such person, firm or corporation. [19 G. A., ch. 104; C.'73, § 1324; R., § 1348; C.'51, § 780.]

Both telegraph and telephone are used for distant communication by means of wire stretched over different jurisdictions. The fundamental principle in each, by which communication is procured, is the same, and prior to any mention of telephone companies it was held that the statutes with reference to telegraph companies were in general applicable to telephone companies: *Iowa Union Telephone Co. v. Board of Equalization*, 67–250; *Franklin v. Northwestern Telephone Co.*, 69–97.

As to taxation of such companies, see §§ 1328–1332.

SEC. **2159. How constructed.** Such fixtures shall not be so constructed as to incommode the public in the use of any road or the navigation of any stream; nor shall they be set up on the private grounds of any individual without paying him a just equivalent for the damage he thereby sustains. [C.'73, § 1325; R., § 1349; C.'51, § 781.]

SEC. **2160. Damages assessed.** If the person over whose lands such telegraph or telephone line passes claims more damages therefor than the proprietor of such line is willing to pay, the amount thereof may be determined in the same manner as provided for taking private property for works of internal improvement. [C.'73, § 1326; R., § 1350; C.'51, § 782.]

SEC. **2161. Liability for refusing to transmit messages.** If the proprietor of any telegraph or telephone line within the state, or the person having the control and management thereof, refuses to furnish equal facilities to the public and to all connecting lines for the transmission of communications in accordance with the nature of the business which it undertakes to carry on, or to transmit the same with fidelity and without unreasonable delay, the law in relation to limited partnerships, corporations, and to the taking of private property for works of internal improvement, shall not longer apply to them, and property taken for the use thereof without the consent of the owner may be recovered by him. [C.'73, § 1327; R., § 1351; C.'51, § 783.]

SEC. **2162. Penalty.** Any person employed in transmitting messages by telegraph or telephone must do so with fidelity and without unreasonable delay, and if any one wilfully fails thus to transmit them, or intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or his agent or attorney, or wilfully and wrongfully takes or receives any telegraph or telephone message, he is guilty of a misdemeanor. [C.'73, § 1328; R., § 1352; C.'51, § 784.]

This does not excuse an operator from producing the telegrams which have passed between parties when subpœnaed as a witness in an action between them as to the transaction to which they relate: *Woods v. Miller*, 55–168.

SEC. **2163. Liable for mistakes.** The proprietor of a telegraph or telephone line is liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law, the

provisions of any contract to the contrary notwithstanding. [C. '73, § 1329; R., § 1353; C. '51, § 785.]

A telegraph company enjoys a public use and eminent domain may be exercised in its behalf, and its rates may be regulated by legislation. Also it is bound to serve all alike and to exercise due care in the discharge of its duties: *Mentzer v. Western Union Tel. Co.*, 62 N. W., 1.

While it is not an insurer of the delivery of messages, it is liable for negligence in transmitting or delivering, and this liability is either in contract or tort: *Ibid.*

Whether the action against the company is founded in contract or in tort, it is liable for mental suffering which could reasonably have been anticipated as the consequence of the negligent failure to deliver a message: *Ibid.*

A company may insert, in a contract under which a message is sent, a condition exempting it from liability for mistake made from unavoidable causes, provided proper instruments have been used and proper care and skill exercised by the company's employes to avoid or prevent mistake; but it cannot make general printed regulations which shall have the effect to relieve it from liability for improper conduct or negligence of its servants: *Sweatland v. Ill. & Miss. Tel. Co.*, 27-433; *Manville v. Western Union Tel. Co.*, 37-214.

Where the company has been released from liability except for its own negligence the party seeking to recover from it must make out such negligence: *Ibid.*

A telegraph company may contract to restrict its liability, but it cannot contract against its own negligence in failing to transmit and deliver a message: *Harkness v. Western Union Tel. Co.*, 73-190.

A telegraph company, cannot, by contract, excuse itself from liability for negligent failure to transmit a message: *Garrett v. Western U. Tel. Co.*, 83-257.

Where the company failed to send a message directing that the markets be forwarded to the sender, he being a cattle buyer, *held*, that the company was liable for loss of the sender incurred in the purchase of cattle by reason of not being advised as to the market price: *Ibid.*

To entitle a party to recover for a mistake in the transmission of a message he must prove something more than mistake and damage. He must show that the mistake was caused by the fault of the company, and that it might have been avoided if defendant's instruments had been good ones and its agents had been skillful operators and exercised the proper diligence in respect to the transmission and receipt of the message in question: *Aikin v. Western Union Tel. Co.*, 69-31.

An instruction imposing liability upon a company upon proof of a mistake without evidence of negligence, and also the burden of proving that there was no negligence by reason of the mistake occurring through uncontrollable causes, *held* erroneous: *Ibid.*

In an action to recover damages for mistake in the transmission of a message, *held*, that the plaintiff to whom the message was delivered might testify as to what the message directed, as tending to show his good faith in acting thereunder, such evidence bearing upon the question whether the plaintiff, in the exercise of ordinary diligence and intelligence was authorized to interpret the language of the dispatch as he did: *Ibid.*

An action for mistake in the transmission of a message from a broker to his principal may be brought by the principal in his own name: *Ibid.*

Where an agent sends or receives a telegram for the benefit and use of an undisclosed principal, such principal may recover damages sustained by reason of the negligence or delay of the company in delivering it, and the recovery cannot be limited to the amount which the agent could have recovered for damages sustained by him individually: *Harkness v. Western Union Tel. Co.*, 73-190.

The action against a telegraph company for non-delivery of a message may be brought by the person to whom the message is addressed: *Mentzer v. Western Union Tel. Co.*, 62 N. W., 1.

The person to whom a dispatch is sent, even though sent by one under no obligation to send it may recover from the telegraph company damages caused by delay in the transmission: *Herron v. Western Union Tel. Co.*, 90-129.

Knowledge that a telegram relates to a proposed sale of property will charge the company with notice of any damages resulting from failure or delay to deliver it: *Ibid.*

The property proposed to be sold not having a market value, the damage will be the difference between what the property might have been sold for if the telegram had been promptly delivered and what it was actually sold for afterward in the exercise of reasonable diligence to effect a sale, the expense of keeping the property until such sale is effected being added: *Ibid.*

Failure to deliver promptly under the circumstances of the case, *held*, to have been the result of negligence on the part of the agent charged with delivering it: *Ibid.*

Where a person telegraphed a commission firm with which he was in the habit of doing business and with which he had an arrangement that when he telegraphed for market reports a failure to respond should indicate that there were no changes since the previous report, *held*, that there having been negligence on the part of the company in failing to deliver the telegram and the market having fallen the company was liable for the loss estimated on the basis of the fall of the market price, it having been known to the agent of the company that the plaintiff was in the business of buying cattle and was in the habit of telegraphing for the price on which to base such purchases: *Garrett v. Western Union Tel. Co.*, 92-449.

Also *held*, that the damage should be based on the difference in price in the Chi-

cago market for which the cattle were bought and not on the prices in the Kansas City market where the cattle were actually purchased: *Ibid.*

SEC. **2164. Negligence presumed—notioe of claim.** In any action against any telegraph or telephone company for damages caused by erroneous transmission of a message, or by unreasonable delay in delivery of a message, negligence on the part of the telegraph or telephone company shall be presumed upon proof of erroneous transmission or of unreasonable delay in delivery, and the burden of proof that such error or delay was not due to negligence upon its part shall rest upon such company; but no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company, officer or agent thereof, within sixty days from time cause of action accrues. [26 G. A., ch. 108.]

CHAPTER 9.

OF EXPRESS COMPANIES.

SECTION **2165. Subject to regulations.** All express companies operating and doing business in this state are hereby declared to be common carriers, and all laws, so far as applicable, now in force or hereafter enacted, regulating the transportation of property by railroad companies, shall apply with equal force and effect to express companies. [26 G. A., ch. 33, § 1.]

As to taxation of such companies, see §§ 1345, 1346.

SEC. **2166. Supervision by railroad commissioners—schedule of rates.** The railroad commissioners of this state shall have general supervision of all express companies operating and doing business in this state; and shall inquire into any unjust discrimination, neglect or violation of the laws of this state governing common carriers, by any express company doing business therein, or by the officers, agents or employes thereof; and said railroad commissioners are empowered and directed to make for each express company doing business in this state, as soon as practicable, a schedule of reasonable maximum charges or rates for transporting any kind of property carried by such express company. [Same, § 2.]

TITLE XI.

OF THE MILITIA.

CHAPTER 1.

OF THE MILITIA.

SECTION **2167. Who constitute—exemptions.** The military force of the state shall consist of all able-bodied male citizens between the ages of eighteen and forty-five years, not exempt from such service under the laws of the United States, except honorably discharged soldiers, sailors and marines of the United States, who shall be exempt from military service in this state at their option. The assessors shall return to the auditor with the annual assessment a complete enumeration of such persons, which may be revised and corrected by the board of supervisors at its June session in each even-numbered year, or at such other time as the governor may direct, and the auditor shall certify to the adjutant-general a true copy of such corrected list, and in each odd-numbered year he shall certify the number of names on the list. But no person having conscientious scruples against bearing arms shall be compelled to do military duty in time of peace. [26 G. A., ch. 102, § 1; 18 G. A., ch. 74, §§ 1, 2.]

SEC. **2168. Iowa national guard.** The active militia shall be designated "The Iowa National Guard," hereinafter referred to as "the guard," recruited by volunteer enlistments, and shall consist of four regiments of infantry, and, at the discretion of the commander-in-chief, of two batteries of artillery and two troops of cavalry, and the necessary staff departments, with such other officers and enlisted men as are hereinafter prescribed. [26 G. A., ch. 102, § 6; 24 G. A., ch. 31, § 2; 20 G. A., ch. 65, § 1; 18 G. A., ch. 74, § 9.]

SEC. **2169. Governor to call out.** When a requisition shall be made by the president of the United States for troops, the governor, as commander-in-chief, shall order into service the national guard of the state, or such portion thereof as may be necessary, and, if insufficient, so many of the militia as is required, designating the same by draft if a sufficient number shall not volunteer, and shall organize the same and commission officers therefor; and while so in service the national guard and militia shall be subject to the same regulations and receive from the state the same compensation and subsistence as the army of the United States receives. [26 G. A., ch. 102, § 2; 24 G. A., ch. 31, § 1; 18 G. A., ch. 74, § 3.]

SEC. **2170. When.** The commander-in-chief shall have power in cases of insurrection, invasion or breaches of the peace, or imminent danger thereof, to order into the service of the state such of its military force as he may think proper, and under the command of such officers as he shall designate. [26 G. A., ch. 102, § 3; 18 G. A., ch 74, § 4.]

If the national guards are called out by the governor to prevent breaches of the peace, their compensation and expenses are to be paid out of the state treasury by the order of the executive council. (See § 170): *Prime v. McCarthy*, 92–569.

SEC. **2171. Sheriff may call.** In case of any breach of the peace, tumult, riot or resistance to process, or imminent danger thereof, the sheriff of any county may call for aid upon the commanding officer of any military company within his county, immediately notifying the governor of such action, and such officer shall order into service the military force, or any

part thereof under his command, in aid of the civil authority. [26 G. A., ch. 102, § 4; 18 G. A., ch. 74, § 5.]

SEC. **2172. Command.** The command of any force called into service under this chapter shall devolve upon the senior officer of such force, unless otherwise ordered by the commander-in-chief. [26 G.A., ch. 102, § 5; 18 G. A., ch. 74, § 6.]

SEC. **2173. Brigades—enlistments.** The guard shall be organized into not more than two brigades, each to be commanded by a brigadier-general, to which the commander-in-chief shall assign all regiments, battalions and companies. All enlistments therein shall be for three years, and re-enlistments for one, two or three years, as the soldier may elect, and made by signing enlistment papers prescribed by the adjutant-general and taking the following oath or affirmation, which may be administered by the enlisting officer, to wit: "You do solemnly swear (or affirm) that you will bear true allegiance to, and that you will support, the constitution of the United States and that of the state of Iowa, and will, as a member of the Iowa national guard, serve the state of Iowa faithfully during your term of service, unless sooner discharged, or you cease to be a citizen thereof, and that you will obey the orders of the commander-in-chief and of such officers as may be placed over you, and the laws governing the military forces of Iowa." [26 G. A., ch. 102, § 7; 24 G. A., ch. 31, § 3; 18 G. A., ch. 74, § 10.]

SEC. **2174. Staff of commander-in-chief.** The staff of the commander-in-chief shall consist of an adjutant-general, quartermaster-general, inspector-general, commissary-general, a surgeon-general, a judge-advocate-general, a general inspector of small arms practice, a chief of engineers, a chief signal officer, a military secretary, and seven aides. They shall be appointed and commissioned by the commander-in-chief, and shall hold office until their successors are appointed and commissioned. The adjutant-general shall have rank of brigadier-general. In time of peace, the chiefs of departments shall have rank of colonel, the military secretary shall have rank of major, and the aides shall have rank of colonel. [26 G. A., ch. 102, § 8; 24 G. A., ch. 31, § 4; 22 G. A., ch. 82, § 43; 18 G. A., ch. 74, § 11.]

SEC. **2175. Adjutant-general.** The adjutant-general shall issue and transmit all orders of the commander-in-chief, and shall keep a record of appointments, of all officers commissioned by the governor, of all general and special orders and regulations, and of such matters as pertain to the organization of the military force and his duties. He shall reside at the capital and hold his office at the pleasure of the governor; except in times of war or public danger, he shall perform the duties of quartermaster-general. He shall have charge of the state arsenal and grounds, and receive and issue all ordnance stores and camp equipments on the order of the commander-in-chief. The adjutant-general shall furnish at the expense of the state such blanks and forms as shall be approved by the commander-in-chief. He shall in each odd-numbered year make out a detailed report for the preceding two years of the transactions of his office, the expenses thereof, and such other matters as shall be required by the governor, who may at any time require a similar report. [26 G. A., ch. 102, § 9; 24 G. A., ch. 31, § 4; 22 G. A., ch. 82, § 43; 18 G. A., ch. 74, § 11.]

SEC. **2176. Generals—election and staff of.** The brigadier-general of each brigade shall be elected by the officers and enlisted men thereof, and shall hold his office for five years, or until his resignation shall have been accepted or he is dismissed by sentence of court-martial. On recommendation of the brigade-commander, the governor shall appoint and commission two aides, with rank of first lieutenant, as the personal staff of the brigade-commander. The commander of each brigade shall appoint by warrant, countersigned by the assistant adjutant-general, such non-commissioned staff officers as the commander-in-chief may think proper, and may enlist

two men to serve as orderlies. [26 G. A., ch. 102, § 10; 24 G. A., ch. 31, § 5; 18 G. A., ch. 74, § 12.]

SEC. **2177. Regiments—officers of.** A regiment shall consist of not less than eight nor more than twelve companies. A colonel and lieutenant-colonel of the regiment and a major for each battalion shall be elected by the officers and enlisted men of the regiment, and each officer shall hold office for five years, or until his resignation shall have been accepted or he is dismissed by sentence of court-martial. [26 G. A., ch. 102, § 11; 24 G. A., ch. 31, § 6; 20 G. A., ch. 65, § 2; 18 G. A., ch. 74, § 13.]

SEC. **2178. Regimental staff—band.** The regimental staff shall be appointed and commissioned by the governor on recommendation of the regimental commander, and shall consist of an adjutant, with rank of captain; a chaplain, with rank of captain; a quartermaster, with rank of first lieutenant; a commissary of subsistence, with rank of first lieutenant; and an adjutant, with rank of first lieutenant for each battalion. The commander of each regiment shall appoint by warrant, countersigned by the adjutant, the non-commissioned staff, consisting of a regimental sergeant-major, and a sergeant-major for each battalion, a quartermaster-sergeant, a commissary-sergeant, a color-sergeant, an ordnance-sergeant, and a chief trumpeter. The commissions of regimental staff officers shall expire when the officer nominating them, or his successor, shall make new nominations for their respective offices, and such nominations shall be confirmed by the commander-in-chief. Each regimental commander may cause to be enlisted and organized a band composed of a chief musician, two principal musicians, a drum major, and not more than twenty privates, under the leadership of such chief musician. The members of such bands shall be subject to the same regulations as other enlisted men. The regimental commander, on the recommendation of the captain, shall appoint the non-commissioned officers of each company, by warrant countersigned by the adjutant. [26 G. A., ch. 102, §§ 12, 13; 24 G. A., ch. 31, § 6; 20 G. A., ch. 65, § 2; 18 G. A., ch. 74, § 13.]

SEC. **2179. Company—officers of.** A company shall consist of a captain, a first lieutenant, a second lieutenant, five sergeants, four corporals, two musicians, and not less than forty nor more than sixty-four privates and non-commissioned officers. A company of cavalry or artillery shall have the same officers and non-commissioned officers, and a commissary-sergeant, a veterinary sergeant, and a saddler sergeant. In time of war or public danger the commander-in-chief may increase the enlisted strength of such companies as he may deem necessary. The company officers shall be elected by the officers and enlisted men of the company, and shall hold office for five years, unless their resignation shall have been accepted or they are dismissed by sentence of court-martial. [26 G. A., ch. 102, § 14; 24 G. A., ch. 31, § 8; 18 G. A., ch. 74, § 15.]

SEC. **2180. Elections of officers.** All elections of company officers shall be ordered by the regimental commander. All elections of field and general officers shall be ordered by the commander-in-chief. Such orders shall be sent to the commanding officer of the company in which said election is ordered, who shall issue his order for such election, giving at least six days' notice thereof, by posting in three public places accessible to the members of his command, and, where practicable, the same shall be published in one or more newspapers in the county where said company is located. All voting shall be in person and by ballot, and a majority of all votes cast shall elect. The senior officer present at such election shall preside. The returns of elections attested by the presiding officer shall be made within five days from the date thereof to the commanding officer of the regiment, who shall promptly forward the same through military channels to the adjutant-general, who, upon approval of the commander-in-chief, shall issue commissions accordingly. At the organization of a new company, the election shall be conducted under such regulations as the adjutant-

general shall prescribe. [26 G. A., ch. 102, § 15; 24 G. A., ch. 31, § 8; 18 G. A., ch. 74, § 15.]

SEC. **2181. Medical and staff departments.** The medical department, in addition to the surgeon-general, shall consist of a deputy surgeon, with rank of lieutenant-colonel, for each brigade; one surgeon, with rank of major and an assistant surgeon for each regiment, and an additional assistant surgeon for each twelve-company regiment. Assistant surgeons for the first five years of commission shall have rank of first lieutenant, after which they shall have rank of captain. The enlisted men of the medical department shall consist of a hospital steward for each regiment, and one acting hospital steward for each assistant surgeon, and such number of privates as the commander-in-chief may prescribe. The other staff departments, in addition to the heads of departments and personal aides and regimental staff, shall be as follows: an assistant adjutant-general, with rank of major; an assistant inspector-general, with rank of major; a judge-advocate, with rank of major; an inspector of small arms practice, with rank of major; an engineer officer, with rank of captain; a signal officer, with rank of captain; a quartermaster, with rank of captain; and a commissary of subsistence, with rank of captain, for each brigade; and an inspector of small arms practice, with rank of captain; an engineer officer, with rank of first lieutenant; a signal officer, with rank of first lieutenant, for each regiment, and such non-commissioned officers and enlisted men as the commander-in-chief may prescribe, for engineer and signal departments. The commander-in-chief shall detail the officers and enlisted men of the staff department for duty with the brigades and regiments upon recommendation of their respective chiefs. All staff officers except heads of departments, aides to the commander-in-chief, regimental staff and personal aides to brigadier-general, shall be appointed and commissioned by the commander-in-chief for five years on the recommendation of the chiefs of their respective departments, selected by examination under such rules as the chiefs may prescribe. [26 G. A., ch. 102, §§ 30, 43–5.]

SEC. **2182. Rules.** Every company and regimental band may make rules for its own government, not in conflict with this chapter and general orders or regulations, subject to the approval of the regimental commander. [26 G. A., ch. 102, § 16; 18 G. A., ch. 74, § 16.]

SEC. **2183. Term of service—resignation—discharge.** Every officer of the guard shall be held to duty for the full term of his commission, unless his resignation shall have been sooner accepted, or he shall have been dismissed by sentence of court-martial. Every enlisted man of the guard shall be held to duty for the full term of his enlistment from the time he becomes an active member thereof, unless regularly discharged for good and sufficient cause by the regimental commander, approved by the commander-in-chief. All members thereof, serving the full term for which they are commissioned or enlisted in the guard, shall, on application, be entitled to an honorable discharge exempting them from military duty except in time of war or public danger. [26 G. A., ch. 102, § 17; 24 G. A., ch. 31, § 9; 18 G. A., ch. 74, § 17.]

SEC. **2184. Parades—encampments.** The guard may parade for encampment or drill not less than three nor more than ten days annually, by company, battalion, regiment or brigade as ordered by commander-in-chief. [26 G. A., ch. 102, § 18; 24 G. A., ch. 31, § 10; 20 G. A., ch. 65, § 4; 18 G. A., ch. 74, § 21.]

SEC. **2185. Transportation.** The quartermaster-general shall provide transportation to and from the encampments and points of active service. [26 G. A., ch. 102, § 19; 24 G. A., ch. 31, § 10; 20 G. A., ch. 65, § 4; 18 G. A., ch. 74, § 21.]

SEC. **2186. Discipline.** The organization, equipment, discipline and military regulations of the guard shall conform to the regulations for the government of the army of the United States, except as otherwise provided.

The commander-in-chief may at any time change the organization of regiments, battalions or companies so as to conform as nearly as practicable to the organization of the United States army, or that prescribed by the authorized military authority of the United States, or by authority of congress. [26 G. A., ch. 102, § 20; 18 G. A., ch. 74, § 18.]

SEC. **2187. Field duty.** The commanding officer of any force of the guard in active service, or at any encampment, may require those under his command to perform any field or camp duty. [26 G. A., ch. 102, § 21; 18 G. A., ch. 74, § 22.]

SEC. **2188. Penalties.** Any person who shall trespass on the encampment grounds or the camp grounds of the guards in active service or interrupt, molest or interfere with any member of the guard in the discharge of his duties, or sell any malt, spirituous or other intoxicating liquors within one mile of such encampment or camp, except under permit already issued by lawful authority, shall be guilty of a misdemeanor, and the commanding officer of such force may order the arrest of such person and cause him to be delivered to a peace officer or magistrate as soon as practicable. [26 G. A., ch. 102, § 22; 18 G. A., ch. 74, § 22.]

SEC. **2189. Special duty—drill.** The commander-in-chief may, whenever the exigencies of the public service require it, detail any officer or soldier for special duty, and the expenses and proper compensation therefor may be paid under such provisons as the commander-in-chief may prescribe. The regimental commander may order semimonthly or weekly day or evening drill by the companies of his command, but the members shall receive no compensation therefor. [26 G. A., ch. 102, § 23; 24 G. A., ch. 31, § 11; 18 G. A, ch. 74, § 20.]

SEC. **2190. Arms, equipments and ammunition.** Upon the organization of any company or regiment of the guard, on the requisition of its commanding officer and the approval of the governor, the adjutant-general shall issue necessary arms, equipments and ammunition, and the commanding officer shall deliver to the adjutant-general a bond therefor, payable to the state, in sufficient amount, with sureties to be approved by the governor, conditioned for their proper use, and, upon request of the proper officer, for their return in good order, wear, use, unavoidable loss and damage excepted. All arms and other property issued by the state shall be kept at the company or regimental armory. [26 G. A., ch. 102, § 24; 18 G. A., ch. 74, § 24.]

SEC. **2191. Inspection—school of instruction.** Such inspections and schools of instruction for officers and enlisted men of the guard shall be held as the commander-in-chief may from time to time direct. [26 G. A., ch. 102, § 25; 24 G. A., ch. 31, § 12; 18 G. A., ch. 74, § 25.]

SEC. **2192. Embezzlement of state property.** Any officer or soldier of the guard knowingly making any false certificate or muster or false return of state property in his hands, or wilfully neglecting or refusing to apply all money drawn from the state treasury for the purpose named in the requisition therefor, shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine in the amount of money not so applied, or both such fine and imprisonment, and all costs of prosecution. [26 G. A., ch. 102, § 26; 18 G. A., ch. 74, § 26.]

SEC. **2193. Uniforms.** The guard shall adopt the uniform of the army of the United States, subject to such modifications as shall be prescribed by the commander-in-chief. The field, staff and company officers thereof shall provide themselves with the uniform prescribed within ninety days from the date of commission. [26 G. A., ch. 102, § 27; 24 G. A., ch. 31, § 13; 18 G. A., ch. 74, §§ 27, 28.]

SEC. **2194. Penalty for failure to return arms, etc.** Every member of the guard who shall wilfully neglect to return to the armory of the company, or place in charge of the commanding officer of the company to which he belongs, any arms, uniform or equipment, or portion thereof,

belonging to the state within six days after being notified by said commanding officer to do so, shall be fined not more than fifty dollars or imprisoned not more than thirty days. [26 G. A., ch. 102, § 28; 18 G. A., ch. 74, § 29.]

SEC. **2195. Fines for absence or misconduct—suit for.** Every soldier absent from any tour of active service, parade, drill or encampment, without leave or sufficient excuse, shall be fined two dollars for each day of absence; and for any unsoldierly conduct during any such service he may be fined not more than ten dollars. Such fines shall be collected by civil action in the name of the state for the use of the company to which the soldier fined belongs; but in no case shall the state pay the costs of such action. Any company or band may impose such fines upon its members as it may think proper in its by-laws, which may be enforced in the manner above provided. [26 G. A., ch. 102, § 29; 18 G. A., ch. 74, § 31.]

The fine here provided for is to be assessed by the court and not by the superior officer, and the court has the power to determine whether sufficient excuse existed for absence from duty: *State v. Ryan*, 69 N. W., 1123.

SEC. **2196. General courts-martial.** Any member of the guard charged with a military offense as defined in this chapter or in the articles of war and general regulations governing the army of the United States, or any regulations promulgated by the commander-in-chief under authority of this chapter, may be tried by a general court-martial ordered and appointed by the commander-in-chief. The organization of the court and the forms of procedure shall, as far as practicable, be those prescribed in said articles of war and regulations. The punishment fixed in the sentence shall not be other than dismissal or dishonorable discharge from the service, reduction to the ranks if a non-commissioned officer, suspension from duty and forfeiture of compensation, or confinement for a period named in the sentence, or reprimand, according to the gravity of the offense. Witnesses duly served with subpœna, signed by the judge-advocate, shall appear and testify as if duly served with subpœnas to appear and testify in the district court, and shall receive the same fees and mileage therefor, to be taxed as costs, which, with other necessary expenses of the judge-advocate and the court, shall be taxed and certified by the president of the court-martial, and paid by the state treasurer upon the auditor's warrant issued therefor to the judge-advocate, who shall pay the expenses of the trial. [26 G. A., ch. 102, § 31; 18 G. A., ch. 74, §§ 22, 33, 44.]

SEC. **2197. Inferior courts-martial.** Inferior courts-martial are hereby authorized, and the constitution, composition, jurisdiction and proceedings thereof shall be assimilated to courts of the same nature in the army of the United States, but no stoppage of pay or confinement shall exceed that provided for in similar courts by the United States army regulations. [26 G. A., ch. 102, § 32.]

SEC. **2198. Sentence.** The proceedings of all general courts-martial shall be submitted to the commander-in-chief, who shall approve or disapprove the same, or he may mitigate or remit any punishment imposed by the sentence of said court. The proceedings of inferior courts-martial shall be approved or disapproved by the commanding officer, who may in like manner mitigate or remit the punishment fixed in the sentence. In all cases, the record of the proceedings of the court-martial, with the order of the commander-in-chief or commanding officer accompanied therewith, shall be preserved as a permanent record in the office of the adjutant-general. [26 G. A., ch. 102, § 33; 18 G. A., ch. 74, § 34.]

SEC. **2199. Military board.** An examining board of three or more competent officers, appointed by the commander-in-chief, shall convene at such times and places as he shall direct, whose duty it shall be to examine into the capacity, qualifications, propriety of conduct and efficiency of commissioned officers who shall be ordered before it, and, upon the report of said board, if adverse to such officer and approved by the commander-in-

chief, the commission of such officer shall be vacated. No officer shall be eligible to sit on such board whose rank or promotion would in any way be affected by the proceedings, and two members at least shall be of equal or superior rank to the officer examined. If any officer shall refuse to report himself before said board when directed, the commander-in-chief may, upon the report of such refusal by such board, vacate his commission. [26 G. A., ch. 102, § 34; 24 G. A., ch. 31, § 14; 18 G. A., ch. 74, § 35.]

SEC. **2200. Military organizations.** It shall be unlawful for any body of men, other than the regularly organized volunteer militia of this state and the troops of the United States, to associate themselves together as a military company or organization within the limits of this state without the written permission of the governor, which he may at any time revoke; but this provision shall not prevent civic, social or benevolent organizations from wearing uniforms and swords. [26 G. A., ch. 102, § 35; 18 G. A., ch. 74, § 36.]

SEC. **2201. Payment for uniforms.** Uniforms in kind may be issued by the state under such provisions as the commander-in-chief may direct, or, in lieu thereof, there may be annually paid to each officer and soldier of the guard the sum of four dollars to be paid under like provisions, but in no event will the state be liable for the payment of any money in lieu of uniforms, or for any purpose contemplated in this chapter, unless such payment can be made without exceeding the annual appropriation provided by this chapter. [26 G. A., ch. 102, § 36; 24 G. A., ch. 31, § 15; 18 G. A., ch. 74, §§ 37, 38.]

SEC. **2202. To belong to state.** All uniforms and other military property furnished by the state, or for which an allowance has been made, shall belong to the state, and shall be used for military purposes only, and each officer and soldier, upon receiving a discharge, or otherwise leaving the military service of the state, or upon demand of his commanding officer, shall forthwith surrender such state military property in his possession to said commanding officer. [26 G. A., ch. 102, § 37; 24 G. A., ch. 31, § 15; 18 G. A., ch. 74, § 39.]

SEC. **2203. Allowance for headquarters.** There shall be allowed annually for postage, stationery and office incidentals to each brigade headquarters the sum of twenty-five dollars; to each regimental headquarters the sum of twenty-five dollars, and to each company headquarters the sum of ten dollars. [26 G. A., ch. 102, § 38; 18 G. A., ch. 74, § 40.]

SEC. **2204. Allowance for company and band.** There shall be allowed annually to each company and band for armory rent, fuel, lights and like necessary expenses, the sum of two hundred dollars. [26 G. A., ch. 102, § 39: 24 G. A., ch. 31, § 17; 18 G. A., ch. 74, § 41.]

SEC. **2205. Regulations.** The commander-in-chief is authorized to make and publish regulations for the government and discipline of the guard, not in conflict with existing laws. [26 G. A., ch. 102, § 40; 18 G. A., ch. 74, § 43.]

SEC. **2206. Companies may be disbanded.** The commander-in-chief shall disband any company of the guard when it shall fall below a proper standard of efficiency, and he may order special inspections with a view of determining such efficiency. [26 G. A., ch. 102, § 41; 20 G. A., ch. 65, § 3; 18 G. A., ch. 74, § 45.]

SEC **2207. Words construed.** In this chapter the word "soldier" shall include musicians and all persons in the guard or in the militia when called into service, except commissioned officers, and the word "company " shall include battery of artillery and troop of cavalry. [26 G. A., ch. 102, § 42; 24 G. A., ch. 31, § 18; 18 G. A., ch. 74, § 46.]

SEC. **2208. Loan of arms to schools and colleges.** Subject to such regulations as the governor may direct, the adjutant-general may loan the surplus arms and accouterments of the state to military schools and colleges in good standing within the state which include military drill in

their course of instructions; but when any arms or accouterments are delivered to such an institution, the proper officers thereof shall deliver to the adjutant-general a bond to the state in such amount and with such sureties as the governor approves, conditioned for the proper use of such arms and accouterments and the return of the same in good order, wear and use excepted, upon the request of the adjutant-general. [26 G. A., ch. 102, § 46; 24 G. A., ch. 32.]

SEC. **2209. Exemptions and privileges.** Every officer and soldier of the guard shall be exempt from jury duty and poll tax during his term of service, and, except in cases of treason, felony or breach of the peace, be privileged from arrest during his attendance at drill, parades, encampments, active service, election of officers, and in going to and in returning from the same. The uniform, arms and equipments of every member of the guard shall be exempt from attachment, execution or sale for debt or taxes. [26 G. A., ch. 102, § 47; 18 G. A., ch. 74, § 19.]

SEC. **2210. Penalty for injuring or disposing of arms, etc.** Every person who shall wilfully or wantonly injure or destroy any article of uniform, arms, equipment or other military property of the state, and refuse to make good such injury or loss, or who shall sell, dispose of, secrete or remove the same with the intent to sell or dispose of it, or shall unlawfully break or enter any armory or place where any such arms or equipments are stored, with the intent to remove the same therefrom, shall be punished by a fine not exceeding two hundred dollars, or imprisonment in the county jail not exceeding two months, or by both fine and imprisonment. [26 G. A., ch. 102, § 48; 18 G. A., ch. 74, § 30.]

SEC. **2211. Compensation of adjutant-general and assistants.** The adjutant-general shall receive an annual salary of fifteen hundred dollars. Such assistance shall be employed in the adjutant-general's and quartermaster-general's department as shall, in the opinion of the commander-in-chief, be actually necessary, and any person so employed shall receive for the time actually and necessarily on duty such compensation as the commander-in-chief may prescribe. [26 G. A., ch. 102, §§ 49, 50; 22 G. A., ch. 82, § 43; 18 G. A., ch. 74, § 11.]

SEC. **2212. Compensation of officers and men.** The military force, when in the active service of the state in time of insurrection or invasion or immediate danger thereof, shall be paid the following compensation for every day actually on duty: Each general, field and staff officer, four dollars; every other commissioned officer, two dollars and fifty cents; every non-commissioned officer, two dollars; every other enlisted man, one dollar and fifty cents; and necessary transportation, subsistence and quarters; the same to be paid out of any money especially appropriated for that purpose. When in actual service of the state in case of riot, tumult or breach of the peace or imminent danger thereof, pursuant to the order of the governor, they shall receive the same compensation, transportation, subsistence and quarters, to be paid out of the state treasury, and for such services rendered upon the call of the sheriff, they shall receive the same compensation, transportation, subsistence and quarters, to be paid from the treasury of such county; claims being audited and allowed in the former cases by the executive council, and in the latter by the board of supervisors, at its next session. [26 G. A., ch. 102, § 51; 18 G. A., ch. 74, §§ 7–8.]

This section does not provide for subsistence of troops in actual service, but only the *per diem* to be paid for services in time of insurrection or invasion or immediate danger thereof. It does not embrace services rendered in suppressing or preventing breaches of the peace, and in such case the compensation and expenses are to be paid out of the state treasury by the executive council under the provisions of § 170: *Prime v. McCarthy*, 92-569.

Compensation is to be paid by the county when military forces within the county are called upon by the sheriff to render services pursuant to his order. If called out by the governor, the county is not liable: *Ibid.*

SEC. **2213. Compensation during encampments.** For the time spent in each annual encampment or drill, compensation to be paid under such

provision as the commander-in-chief may direct, and graded according to length of continuous service therein, shall be allowed as follows: To each officer and soldier of less than three years' continuous service, one dollar per day; to each officer and soldier of more than three years', and less than five years', continuous service, one dollar and fifty cents per day; to each officer and soldier of more than five years' continuous service, two dollars per day. [26 G. A., ch. 102, § 52; 20 G. A., ch. 65, § 4; 18 G. A., ch. 74, § 21.]

SEC. **2214. Appropriation.** There is appropriated out of any moneys in the treasury not otherwise appropriated the sum of fifty thousand two hundred dollars per annum, or so much thereof as may be necessary, for the support of the guard under the provisions of this chapter not applying to active service, which shall be drawn by a warrant, drawn by the auditor of state on the state treasurer, upon the certificates of the adjutant-general approved by the governor, showing for what purpose each draft is to be or has been used, and no indebtedness shall be created in excess of such annual appropriation. [26 G. A., ch. 102, § 53; 26 G. A., ch. 103; 20 G. A., ch. 65, § 5; 18 G. A., ch. 74, § 51.]

The appropriations here made are not intended to cover the expense involved in the employment of the national guards to suppress breaches of the peace. When the guards are called out by the sheriff for that purpose the expense is to be paid by the county, otherwise it may be paid out of the state treasury by the order of the executive council under the provisions of § 170: *Prime v. McCarthy*, 92-569.

SEC. **2215. Time of taking effect.** That part of the military code affecting the reorganization of the staff departments shall not take effect until the expiration of the present term of office of the commander-in-chief.

TITLE XII.

OF THE POLICE OF THE STATE.

CHAPTER 1.

OF THE SETTLEMENT AND SUPPORT OF THE POOR.

SECTION **2216. Who liable to maintain.** The father, mother and children of any poor person, who is unable to maintain himself or herself by labor, shall jointly or severally relieve or maintain such person in such manner as, upon application to the township trustees of the township where such person has a residence or may be, they may direct. [C. '73, § 1330; R., § 1355; C. '51, § 787.]

A child is not liable for the support of a parent except as provided by statute, and such liability can be enforced only in the manner specified; but the obligation of a parent to support a child until maturity is a perfect common-law duty: *Dawson v. Dawson*, 12–512.

Where one was afflicted with disease and cruelly treated by the members of his family, so that he was driven from home, *held*, that he was a poor person within the meaning of this section, although he had property which was appropriated and withheld from him by such family; and therefore that his son was liable to an action by the county for support furnished to him, and that the county, although having the right of action against the wife, might waive it and enforce recovery against the son: *Jasper County v. Osborn*, 59–208.

SEC. **2217. Same.** In the absence or inability of nearer relatives, the same liability shall extend to grandparents, if of ability without personal labor, and to the male grandchildren who are of ability by personal labor or otherwise. [C. '73, § 1331; R., § 1356; C. '51, § 788.]

SEC. **2218. Proceeding to compel.** Upon the failure of such relatives so to relieve or maintain a poor person who has made application for relief, the township trustees may apply to the district court of the county where such poor person resides or may be, for an order to compel the same. [C. '73, § 1333; R., § 1357; C. '51, § 789.]

SEC. **2219. Notice—hearing—order—appeal.** At least ten days' notice in writing of the application shall be given to the parties sought to be charged, service thereof to be made as of an original notice, in which proceedings the county shall be plaintiff and the parties served defendants. No order shall be made affecting a person not served, but, as to such, notice may be given at any stage of the proceedings. The court may proceed in a summary manner to hear all the allegations and proofs of the parties, and order any one or more of the relatives who shall be able, to relieve or maintain him or her, charging them as far as practicable in the order above named, and for that purpose may bring in new parties when necessary. The order may be for the entire or partial support of the applicant, may be for the payment of money or the taking of the applicant to a relative's house, or may assign him or her for a certain time to one and for another period to another, as may be just and right, taking into view the means of the several relatives liable, but no such assignment shall be made to one who is willing to pay the amount necessary for support. If the order be for relief in any other form than money, it shall state the extent and value thereof per week, and the time such relief shall continue; or the order may make the time of continuance indefinite, and it may be varied from time to time by a new order, as circumstances may require, upon application to the court by the trustees, the poor person, or the relative affected, ten days' notice thereof being given to the party or parties concerned. When money

is ordered to be paid, it shall be paid to such person as the court may direct. If support be not rendered as ordered, the court, upon such fact being shown by the affidavit of one or more of the proper trustees, may render judgment and order execution for the amount due, rating any support ordered in kind at the valuation previously made. An appeal may be taken from the judgment rendered to the supreme court. Support for later periods under the same order may be, as it becomes due, applied for and obtained in the same manner. [C.'73, §§ 1334–42; R., §§ 1358–66; C.'73, §§ 790–8.]

SEC. **2220. Abandonment—order as to property.** Whenever a father or mother abandons children, husband his wife, or wife her husband, leaving them a public charge or likely to become such, the trustees of the township, upon application to them, may make complaint to the clerk of the district court or judge thereof in the county in which such abandoned person resides, or in which any property of such father, mother, husband or wife is situated, for an order to seize such property, and, upon proof of the facts alleged, the clerk or judge shall issue an order, directed to the sheriff of the county, to take and hold possession of said property, subject to the further orders of the court, which order shall be executed by taking possession of chattel property wherever found, and shall entitle the officer serving the same to collect and hold the rents accruing upon real property. Statement of the issuance of the order and a description of any real estate sought to be affected thereby, shall be entered in the incumbrance book, and from the date thereof shall be superior in right to any conveyance or lien created by the owner thereafter, and return shall be made of said order to the proper court, where the order of seizure, upon investigation, may be discharged or continued; if continued, the entire matter shall be subject to the control of the court, and it shall from time to time make such orders as to the disposition of the personal property seized, and the application of it or the proceeds thereof, as it may seem proper, and of the disposition of the rents and profits of the real estate. Should the party against whom the order issued thereafter resume his or her support of the person abandoned, or give bond with sureties, to be by the clerk approved, conditioned that such person shall not become chargeable to the county, the order shall be by the clerk discharged and the property remaining restored. [C.'73, §§ 1343–8; R., §§ 1367–72; C.'51, §§ 799–804.]

SEC. **2221. Trial by jury.** In all cases the party sought to be charged with the support of another may demand a jury trial upon the question of his obligation and ability to render such support, the alleged abandonment, and the liability of the person abandoned to become a public charge; such trial to be had upon demand, which may be made at the time of the hearing of the application for the order, or at such other time as may be directed by the court, upon notice to the defendant. [C.'73, § 1349; R., § 1373; C.'51, § 805.]

SEC. **2222. Recovery by county.** Any county having expended any money for the relief or support of a poor person, under the provisions of this chapter, may recover the same from any of his kindred mentioned herein, from such poor person should he become able, or from his estate; from relatives by action brought within two years from the payment of such expenses, from such poor person by action brought within two years after becoming able, and from such person's estate by filing the claim as provided by law. [C.'73, § 1350; R., § 1374; C.'51, § 806.]

The kindred may be made liable as here provided without any proceedings having been instituted under § 2218 *et seq.*: *Boone County v. Ruhl*, 9–276.

Under the Code of '73 there was no provision making a pauper liable to the county for aid furnished him as such, and he could not be held liable on an implied promise: *Bremer County v. Curtis*, 54–72.

Nor could the county recover from his estate for such aid; and this was true notwithstanding the provision as to the liability of relatives: *Ibid.*

A poor person may be a county charge although the county may be able to recover from the relatives the sum charged as paid for his support: *Tweedy v. Fremont County*, 68 N. W., 921.

SEC. **2223. By relative.** A more distant relation, who may have been compelled to aid a poor person, may recover from any one or more of the nearer relatives, and one so compelled to aid may recover contribution from others in the same degree, and a recovery may be had against the poor person or his estate, if, after such aid or support has been given, the person aided or supported becomes able to repay the same; but proceedings to recover therefor must be brought within two years from the time a cause of action accrues. [C.'73, § 1351; R., § 1375; C.'51, § 807.]

SEC. **2224. Settlement—how acquired.** A legal settlement once acquired continues until lost by acquiring a new one, and may be acquired as follows:

1. Any person having attained majority, and residing in this state one year without being warned as hereinafter provided, gains a settlement in the county of his residence;

2. A married woman follows and has the settlement of her husband, if he have any within the state, and if she had a settlement at the time of the marriage it is not lost by the marriage;

3. A married woman abandoned by her husband may acquire a settlement as if she were unmarried;

4. Legitimate minor children follow and have the settlement of their father, if he has one, but if he has none, then that of the mother;

5. Illegitimate minor children follow and have the settlement of their mother, or, if she has none, then that of their putative father;

6. A minor whose parent has no settlement in this state, and a married woman living apart from her husband and having no settlement, and whose husband has no settlement in this state, residing one year in any county, gains a settlement in such county;

7. A minor bound as an apprentice, immediately upon such binding, gains a settlement where his master has one. [C.'73, §§ 1352–3; R., §§ 1376–7; C.'51, §§ 808–9.]

The residence contemplated in this section is his "personal presence in a fixed, permanent abode:" *Cerro Gordo County v. Wright County*, 50–439.

Facts considered as showing what was the county of residence of the person receiving relief: *Cerro Gordo County v. Hancock County*, 58–114.

A *prima facie* case of settlement is made by proving residence, unless it be proven or conceded that the party is a married woman; in such case it might be necessary to prove either that her husband resides in the same county or that she has been deserted by him: *Scott County v. Polk County*, 61–616.

The provisions of this section are applicable to the case of an insane person who becomes a county charge: *Ibid.*

A person choosing a residence while sane, and removing there, acquires a settlement as provided in this section, although he becomes insane and is removed to the hospital before the expiration of the year. Such removal to the hospital is not an interruption of his residence: *Washington County v. Mahaska County*, 47–57.

A person who is insane and helpless and does not voluntarily change his place of residence, but is a simple, passive subject without exercise of volition, does not acquire a settlement upon being removed from one county to another at the expense of the former: *Fayette County v. Bremer County*, 56–516.

If taken from one county to the other at the suggestion of the former county, merely that the charge of the person may remain with the same party who has had such charge, the settlement will remain as though no such change had been made: *Ibid.*

The fact that a minor is emancipated does not enable him to acquire by residence a settlement distinct from that of his father: *Clay County v. Palo Alto County*, 82–626.

SEC. **2225. Foreign paupers.** A person coming from another state, and not having become a citizen of nor having a settlement in the state, applying for relief, may be sent to the state whence he came, at the expense of the county, under an order of the district court or judge; otherwise he is to be temporarily relieved in the county where he applies. [C.'73, § 1354; R., § 1379; C.'51, § 811.]

SEC. **2226. Warning to depart.** Persons coming into the state, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township or city in which such persons are found warning them to depart therefrom. After such warning, such persons cannot

acquire a settlement except by the requisite residence of one year without further warning. [C.'73, § 1355; R., § 1380; C. '51, § 812.]

SEC. **2227. How served.** Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors, which, if not made by a sworn officer, must be verified by affidavit. [C. '73, § 1356; R., § 1381; C.'51, § 813.]

A warning for the purpose of preventing a pauper coming into the county from obtaining a settlement may be served upon the order of the trustees of the township, but the service of such warning signed by the trustees themselves does not constitute a sufficient order by them: *Bremer County v. Buchanan County*, 61–624.

SEC. **2228. Contest as to settlement.** When relief is granted by a county to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice, such auditor shall inform the auditor of the county granting relief if the claim of settlement is disputed. If it is not, the poor person, if able, may be removed to the county of his settlement, or, at the request of the auditor or board of supervisors of the county of his settlement, he may be maintained where he then is at the expense of such county, and without affecting his legal settlement. If the alleged settlement is disputed, then, within thirty days after notice thereof as above provided, a copy of the notices sent and received shall be filed in the office of the clerk of the district court of the county against which claim is made, and a cause docketed without other pleadings, and tried as an ordinary action, in which the county affording the relief shall be plaintiff, and the other defendant, and the burden of proof shall be upon the county granting the relief or making the removal. [C.'73, §§ 1357, 1359–60; R., §§ 1382, 1384–5; C.'51, §§ 814, 816–17.]

Notice by one county to another that a poor person having a settlement in the latter has become a county charge in the former, and is receiving relief, and that the county of settlement will be held responsible, imposes on the latter county the duty of making an order for removal. It is, in such case, not obliged to serve upon the other county notice of intention to contest the order for removal. If, instead of making the order for removal, the county furnishing the relief gives notice that the pauper has become a county charge and is receiving relief, and that the county of settlement will be held responsible, it may recover of the county of settlement, but the burden is upon it to show that the person relieved had a settlement in the defendant county: *Winneshiek County v. Allamakee County*, 62–558.

In the petition in an action by one county to recover from another the expenses of the support of a pauper it must be averred that the defendant county is the county of the pauper's settlement. An averment that plaintiff is informed that the pauper has a settlement in defendant county is not sufficient: *Ibid.*

Notice from the auditor of one county to the auditor of the other that relief was being furnished to a poor person having a residence in the latter county, *held* sufficient: *Cerro Gordo County v. Wright County*, 50–439.

It does not follow that, because a person is obliged to apply to the county for relief where he has no settlement, he should be removed at once to the county of his settlement regardless of distance, expense or other circumstances. The county furnishing the relief should have a right of action upon the county of the settlement for relief so furnished, without obligating the supervisors of the latter county to make an order of removal; and it should be allowable in such cases to give notice of such claim for relief furnished, without requiring removal. The county auditor may give such notice, but the notice for the order of removal can only be given by the township trustees or county supervisors: *Scott County v. Polk County*, 61–616.

Where a party removes from one county to another, and, before obtaining a settlement in the new county, receives assistance, the county from which the person removes is liable therefor, although the person to whom the relief is furnished did not have a "pauper record" prior to such removal: *Hardin County v. Wright County*, 67–127.

The county applied to for relief may make an order of removal to the county of the pauper's settlement, and give notice thereof, or it may give to the county of the settlement notice that such pauper has become a county charge. In the latter case the county notified is not under obligation to give notice of its intention to contest the removal: *Winneshiek County v. Allamakee County*, 62–558.

Under the section as it stood before the abolition of the circuit court that court had exclusive jurisdiction, and the case could not be taken to the district court even by consent of parties: *Ibid.*; *Cerro Gordo County v. Wright County*, 59–485.

SEC. **2229. County of settlement liable.** The county where the settlement is shall be liable to the county rendering relief for all reasonable

charges and expenses incurred in the relief and care of a poor person, and for the charges of removal and expenses of support incurred after notice is given. [C.'73, § 1358; R., § 1383; C.'51, § 815.]

Action cannot be brought by one county against another for charges, etc., as here contemplated, until the claim is presented to the board of supervisors of the county liable, and payment demanded as provided in § 3528: *Cerro Gordo County v. Wright County*, 50–439.

Ignorance of the fact of the pauper's settlement will not prevent the statute of limitations from running against such claim: *Washington County v. Mahaska County*, 47–57.

In the petition in an action by one county to recover from another the expenses of the support of a pauper it must be averred that the defendant county is the county of the pauper's settlement. An averment that plaintiff is informed that the pauper has a settlement in defendant county is not sufficient: *Winneshiek County v. Allamakee County*, 62–558.

The fact that the county furnishing support does so without the claim therefor being approved by the township trustees does not preclude such county from recovering from the county of the settlement: *Clay County v. Palo Alto County*, 82–626.

SEC. **2230. Relief by trustees—overseer of the poor.** The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county poor-house. But where a city is embraced, in whole or in part, within the limits of any township, the board of supervisors may appoint an overseer of the poor, who shall have within said city, or part thereof, all the powers and duties conferred by this chapter on the township trustees. The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. They may require any able-bodied person to labor faithfully on the streets or highways at the rate of five cents per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways. When medical services are rendered by order of the trustees or overseers of the poor, no more shall be charged or paid therefor than is usually charged for like services in the neighborhood where such services are rendered. No supervisor, trustee or overseer shall be directly or indirectly interested in any supplies furnished the poor. [18 G. A., ch. 133; C.'73, § 1361.]

5'60 - 5'61
30 Ia, 1, 15

Where a board of supervisors appoints an overseer of the poor for a city of the first or second class the power conferred upon such overseer is exclusive of that of the trustees of the township in which such city is located: *Hoyt v. Black Hawk County*, 59–184.

The township trustees having provided relief, the board of supervisors cannot limit the amount of such relief unless they establish a limit before the relief is rendered as may be done by § 2232. If no limit is established the board must pay the reasonable value of the services rendered: *Hunter v. Jasper County*, 40–568.

"Medical attendance" is not restricted to the services of a physician, but may include nursing, etc., and the expense thereof is not limited to two dollars per week: *Scott v. Winneshiek County*, 52–579.

The board of supervisors have power to determine under § 2234 whether they will continue or deny the relief thus granted: *Ellison v. Harrison County*, 74–494.

SEC. **2231. Soldiers or families.** No person who has served in the army or navy of the United States, or their widows or families, requiring public relief shall be sent to the poor-house, when they can and prefer to be relieved to the extent above provided, and other persons and families may, at the discretion of the board, also be so relieved. [17 G. A., ch. 37; 16 G. A., ch. 26; C.'73, § 1362.]

SEC. **2232. County expense.** All moneys expended as contemplated in the two preceding sections shall be paid out of the county treasury, after the proper account rendered thereof shall have been approved by the boards of the respective counties, and in all cases the necessary appropriations therefor shall be made by the respective counties. But the board may limit the amount thus to be furnished. [C.'73, § 1363.]

Any limit to the amount of relief to be furnished must be fixed in advance, otherwise the board must pay the reasonable value of the services rendered: *Hunter v. Jasper County*, 40–568.

SEC. **2233. Township trustees—duty.** The trustees in each township, in counties where there is no poor-house, have the oversight and care of all poor persons in their township, and shall see that they receive proper care until provided for by the board of supervisors. [C. '73, § 1364; R., § 1387; C. '51, § 819.]

SEC. **2234. Application for relief—action of supervisors.** The poor must make application for relief to the trustees of the township where they may be, and, if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such relief, subject to the approval of the board of supervisors, as the necessities of the person require, and shall report the case forthwith to the board of supervisors, who may continue or deny relief, as they find cause. The board of supervisors may examine into all claims, including claims for medical attendance, allowed by the township trustees for the support of the poor, and, if they find the amount allowed by said trustees to be unreasonable, exorbitant or for any goods or services other than for the necessaries of life, they may reject or diminish the claim as in their judgment would be right and just, and this act shall apply to all counties in the state, whether there are poor-houses established in the same or not. This act shall apply to acts of overseers of poor in cities as well as to township trustees. [22 G. A., ch. 101; C. '73, § 1365; R., § 1388; C. '51, § 820.]

Under prior provisions the township trustees might bind the county for medical services rendered at their instance to poor sick persons in their township while the board of supervisors was not in session. Whether the physician employed by the trustees had a right to compensation for services rendered after the trustees ought to have reported to the board, though he was not notified of their failure to do so, *quære*: *Coolridge v. Mahaska County*, 24–211.

With the trustees rests, in the first instance, the determination of the question whether a poor person needs aid, and the nature of the relief to be given, and if made in good faith it binds the board of supervisors (so held under the Revision): *Armstrong v. Tama County*, 34–309.

Where the board of supervisors, as a matter of precaution and in the interest of economy, employ a convenient and competent physician, in advance, to furnish to all poor persons of the county all medicines and medical aid that they may require, the trustees cannot disregard such employment and render the county liable for services rendered by a physician employed by them: *Mansfield v. Sac County*, 59–694; *Gawley v. Jones County*, 60–159.

When the trustees authorize aid to be furnished to a poor person, it may be continued, if done in good faith, until the board of supervisors otherwise order, even though the trustees fail to report the case to the board; and the trustees, in such case of failure to report, will be held liable to the county for damages arising from continuance of aid to persons not properly entitled to it: *Mansfield v. Sac County*, 60–11.

Recovery cannot be had for aid furnished before application is made to the trustees, and the furnishing of such aid is authorized by them: *Ibid.*

The board have the authority to continue or deny the relief to persons to whom relief has been granted by the township trustees under the provisions of § 2230: *Ellison v. Harrison County*, 74–494.

Written orders of the township trustees for relief upon which the board of supervisors act are valid although not made of record as required in general with reference to the action of the trustees by § 576: *Bremer County v. Buchanan County*, 61–624.

The duty of the township trustees when applied to for relief for the poor is not to be determined by very rigid rules; they must, in the exercise of a wise discretion, grant relief where they judge that humanity requires it. Where they act in good faith, or without abuse of discretion, their action is not subject to review: *Hardin County v. Wright County*, 67–127.

The fact that the party to whom relief is furnished has, in fact, property, will not render the furnishing of relief necessarily improper: *Ibid.*

A pauper resident of one township who receives an injury while temporarily in another township may lawfully receive aid by order of the trustees of the latter: *Mussel v. Tama County*, 73–101.

In a particular case, *held*, that the application for support made by another in behalf of the person by whom the support was furnished was sufficient: *Clay County v. Palo Alto County*, 82–626.

SEC. **2235. Payment of claims.** All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that

they are reasonable and proper, they shall be paid out of the county treasury. In no case shall a trustee, or either of the trustees, nor overseer of the poor, draw an order upon himself, or upon either of the board, for supplies for the poor, except such trustees or overseer has a contract to furnish such supplies. [22 G. A., ch. 101; C.'73, § 1365–6; R., §§ 1388–9; C.'51, §§ 820–1.]

The obligation of the county to support the poor is purely statutory: *Cooledge v. Mahaska County*, 24-211.

Under prior statutes, *held* that neither the county judge nor county court had jurisdiction over the settlement or support of the poor, such jurisdiction being vested in the board of supervisors: *Lucas County v. Ringgold County*, 21-83.

The action of the board in allowing claims for care and support is of a *quasi*-judicial character, but the claimant having presented his bill is not limited to an appeal from the action of the board, but may bring suit against the county by ordinary proceedings: *Armstrong v. Tama County*, 34-309.

The certificate of the trustees required by that section to be presented with the claim to the board need not be made at a regular meeting: *Hunter v. Jasper County*, 40-568.

The board of supervisors may waive such certificate: *Collins v. Lucas County*, 50-448; *Bradley v. Delaware County*, 57-552.

A recommendation by the trustees that a bill be paid is not equivalent to the certificate required, and is not sufficient to entitle claimant to payment of his claim from the county: *Mansfield v. Sac County*, 60-11.

A certificate signed by the trustees, to the effect that they had ordered the services specified in claimant's bill for medical service to poor persons, but not stating that the charges were correct, *held* not a sufficient certificate as required by statute: *Sloan v. Webster County*, 61-738.

The duty of determining who are to be relieved at the public expense pertains to the trustees and cannot be delegated to a physician or any other person; and where blank certificates were filled out by two trustees and left with a third person in order to be filled up by the physician [illegible] services to poor persons as he should [illegible]nate, *held*, that such certificates were not sufficient to entitle the physician to recover from the county: *Ibid.*

Where the liability of the county is directly put in issue, a member of the board of supervisors cannot be regarded as having waived the certificate: *Ibid.*

A certificate of the trustees showing that the aid was furnished at their request and by their order is conclusive in that respect, and cannot be contradicted by parol evidence: *Mussel v. Tama County*, 73-101.

The provision that bills shall be certified by the township trustees is not a limitation upon the right of the board to allow the claim without such certificate, and in such case, the county paying the claim is not precluded from recovery therefor from the county of the settlement of the poor person: *Clay County v. Palo Alto County*, 82-626.

SEC. **2236. Allowance.** If a poor person of mature years and sound mind is likely to become a charge, the board may pay him such an annual allowance as will not exceed the cost of maintenance in the ordinary way. [C.'73, § 1367; R., § 1390; C.'51, § 822.]

SEC. **2237. Appeal to supervisors.** If any poor person, on application to the trustees, is refused the required relief, he may apply to the board of supervisors, who, upon examination into the matter, may direct the trustees to afford relief, or it may direct specific relief. [C.'73, § 1368; R., § 1391; C.'51, § 823.]

SEC. **2238. Contracts for support.** The board of supervisors may make contracts with the lowest responsible bidder for furnishing any or all supplies, medical attendance or services required for the poor, for a term not exceeding one year, or it may enter into a contract with the lowest responsible bidder, through proposals opened and examined at a regular session of the board, for the support of any or all the poor of the county for one year at a time, and may make all requisite orders to that effect, and shall require all such contractors to give bonds in such sum as it believes sufficient to secure the faithful performance of the same. [C.'73, § 1369; R., § 1393; C.'51, § 825.]

SEC. **2239. Supervision.** When a contract is made for the support of any or all the poor, the board shall, from time to time, appoint some person to examine and report upon the manner the poor are kept and treated, which shall be done without notice to the person contracting for their support, and if upon due notice and inquiry, the board find that the poor are not reasonably and properly supported and cared for, it may, at a regular or special session, set aside the contract, making proper allowances for the time it has been in force. [C.'73, § 1370; R., § 1394; C.'51, § 826.]

SEC. **2240. Employment.** Any such contractor may employ a poor person in any work for which he is physically able, subject to the control of the board of supervisors, who may place said contractor under the supervision of the township trustees. [C.'73, § 1371; R., § 1395; C.'51, § 827.]

SEC. **2241. Poor-house established.** The board of supervisors of each county may order the establishment of a poor-house in such county whenever it is deemed advisable, and also the purchase of such land as may be deemed necessary for the use of the same, and may make the requisite contracts and carry such order into effect, provided the cost of said poor-house and land, if in excess of five thousand dollars, shall be first estimated by said board and approved by a vote of the people. [C.'73, § 1372; R., § 1396; C.'51, § 828.]

SEC. **2242. Contracts—government.** The board of supervisors, or any committee appointed by it for that purpose, may make all contracts and purchases requisite for the poor-house, and may prescribe rules or regulations for the management and government of the same, and for the sobriety, morality and industry of its occupants. [C.'73, § 1373; R., § 1401; C.'51, § 833.]

SEC. **2243. Steward appointed.** The board may appoint a steward of the poor-house, who shall be governed in all respects by the rules and regulations of the board and its committees, and may be removed by the board at pleasure, and who shall receive such compensation, perform such duties, and give such security for his faithful performance as the board may direct. [C.'73, § 1374; R., § 1402; C.'51, § 834.]

The steward of the poor-house is also steward of the poor-farm: *State v. Platner*, 43–140.

The board cannot make such contract with the steward as to deprive themselves of the power of removal at pleasure: *Ibid:*

SEC. **2244. Admission to poor-house—labor.** The steward shall receive into the poor-house any person producing an order as hereafter provided, and enter in a book to be kept for that purpose the name and age, and the date of the reception of such person; he may require of persons so admitted such reasonable and moderate labor as may be suited to their ages and bodily strength, the proceeds of which, together with the receipts of the poor-farm, shall be appropriated to the use of the poor-house in such manner as the board may determine. No person shall be admitted to the poor-house except upon the written order of a township trustee or member of the board of supervisors, and relief is to be furnished in the poor-house only, when the person is able to be taken there, unless in the cases hereinbefore otherwise provided. [C.'73, §§ 1375–7; R., §§ 1403–5; C.'51, §§ 835–7.]

SEC. **2245. Discharge.** When any inmate of the poor-house becomes able to support himself, the board must order his discharge. [C.'73, § 1379; R., § 1408; C.'51, § 840.]

SEC. **2246. Visitation of poor-house.** The board shall cause the poor-house to be visited at least once a month by one of its body, who shall carefully examine the condition of the inmates and the manner in which they are fed and clothed and otherwise provided for and treated, ascertain what labor they are required to perform, inspect the books and accounts of the steward, and look into all matters pertaining to the poor-house and its inmates, and report to the board. [C.'73, § 1380; R., § 1410; C.'51, § 842.]

SEC. **2247. Expenses—tax.** The expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements for county purposes; and in case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy a poor tax, not exceeding one mill on the dollar, to be entered on the tax list and collected as the ordinary county tax. [21 G. A., ch. 10; 17 G. A., ch. 166; C.'73, § 1381; R., § 1412; C.'51, § 844.]

SEC. **2248. Letting out.** The board is invested with authority to let out the support of the poor, with the use and occupancy of the poor-house and

farm, for a period not exceeding three years. [C.'73, § 1382; R., § 1415; C.'51, § 847.]

SEC. **2249. Education of children.** Poor children, when cared for at the poor-house, shall attend the district school for the district in which such house is situated, and a ratable proportion of the cost of the school, based upon the attendance of such poor children to the total number of days' attendance thereat, shall be paid by the county into the treasury of such school district, and charged as part of the expense of supporting the poor-house. [17 G. A., ch. 166; C.'73, § 1381; R., § 1412; C.'51, § 844.]

SEC. **2250. Illegitimates.** The word "father" in this chapter includes the putative father of an illegitimate child, and the question of parentage may be tried in any proceeding to recover for or compel the support of such a child, and like proceedings may be prosecuted against the mother independently of or jointly with the alleged father. [C.'73, § 1332; R., § 1356; C.'51, § 788.]

The county is not required to thus proceed against the father of an illegitimate child before proceeding against the mother: *McAndrew v. Madison County*, 67-54.

After recognition of an illegitimate child the father is chargeable with its support, ths same as with that of a legitimate child: *State v. Hastings*, 74-574.

SEC. **2251. Who deemed trustee.** The word "trustees" in this chapter shall be construed to include and mean any person or officer of any county or city charged with the oversight of the poor. [C.'73, § 1333; R., § 1357; C.'51, § 789.]

SEC. **2252. "Poor person" defined.** The word "poor" and "poor person" as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public.

CHAPTER 2.

OF THE CARE OF THE INSANE.

SECTION **2253. Hospitals—trustees.** The hospital for the insane at Mount Pleasant shall be known by the name of "The Hospital for the Insane at Mount Pleasant"; the one at Independence, "The Hospital for the Insane at Independence"; the one at Clarinda, "The Hospital for the Insane at Clarinda"; and the one at Cherokee, "The Hospital for the Insane at Cherokee"; each of which shall be under the management of five trustees, two of whom may be women, one of whom shall be a resident of the place in which the hospital is located. [25 G. A., ch. 80; 22 G. A., ch. 75, §§ 1, 2; C. '73, § 1383.]

SEC. **2254. Meetings—officers.** The several boards of trustees shall hold at the respective hospitals an annual meeting on the second Wednesday in July, at which one of their number shall be chosen president and one secretary, and shall elect a treasurer who shall be a resident of the county in which the hospital for which he is treasurer is situated. Each shall hold his position for the ensuing year and until a successor is elected and qualified. Said board shall hold quarterly meetings on the second Wednesdays in October, January and April. [20 G. A., ch. 66; 17 G. A., ch. 100, § 1; C.'73, § 1384.]

SEC. **2255. Visitation—reports—management.** Each board of trustees, or a majority thereof, shall inspect the hospital under its charge at each quarterly meeting, but a committee may visit the hospital monthly; it shall make a record of its proceedings in books kept for the purpose, and, at the annual meeting preceding the regular session of the general assembly,

make a report to the governor of the condition and wants of the hospitals, which shall be accompanied by full and accurate reports of the superintendents and treasurers, with an account of all money received and disbursed; have the general control and management of the hospitals under their charge; make all regulations necessary for the government of the same, and conduct the affairs of the institutions in accordance with the rules and regulations thereof; shall appoint a superintendent, and, upon the nomination of the superintendent, shall appoint an assistant physician or physicians, who shall reside in the hospital, and a steward and a matron, and they shall be styled resident officers of the same, and be governed by and subject to all regulations for the government thereof. The same person shall not hold the office of superintendent and steward. Each board may also, in its discretion and upon the nomination of the superintendent, appoint a chaplain and prescribe his duties; and shall, from time to time, fix the salaries and wages of the officers and other employes of the hospital, and certify the same to the auditor of state, and may remove any officer of such institution. [15 G. A., ch. 53, § 1; C.'73, §§ 1385–6.]

SEC. **2256. Trustees ineligible.** No trustee of the hospitals shall be eligible to the office of steward or superintendent thereof during the term for which he was elected, nor within one year after his term shall have expired. [C.'73, § 1389.]

SEC. **2257. Treasurer—requisitions.** The treasurer shall execute a bond to the state of Iowa for the use of the hospital (naming which), in double the highest amount of money likely to come into his hands, and with such securities as the executive council shall require, conditioned that he will faithfully perform the duties of his office, and pay over and account for all money that shall come into his hands, and the same shall be filed with the secretary of state, and he shall serve without compensation. Upon authority granted by the board, he may draw upon the state treasury, out of money not otherwise appropriated, upon his order, approved by the superintendent and not less than two of the trustees, and under seal of the hospital, a sufficient amount quarterly in advance for the purpose of defraying the current expenses of the hospital, but the amount of each requisition shall in no case exceed fourteen dollars per month for each public patient in the hospital, taking the number of such patients on the fifteenth day of each month for the previous three months as the average number on which the estimate shall be made, the number then in the hospital to be certified to the auditor of state by the superintendent and steward, which certificate shall accompany the requisition. But no part of the money so drawn for current expenses shall be used in making improvements. Upon the presentation of such order to the auditor of state, he shall draw a warrant upon the treasurer of state for the amount therein specified, not exceeding the amount for each patient hereinbefore specified. But no requisition shall be issued earlier in any one quarter of the year than the first day of February, May, August and November. [26 G. A., ch. 56; 17 G. A., ch. 100, § 2; C.'73, § 1390.]

SEC. **2258. Superintendent.** The superintendent shall be a physician of acknowledged skill and ability in his profession, and authorized to practice medicine in the state. He shall be the chief executive officer of the hospital, and shall hold his office for six years, unless sooner removed. He shall have the entire control of the medical, mental, moral and dietetic treatment of the patients, and shall see that the several officers of the institution faithfully and diligently discharge their respective duties. He shall employ attendants, nurses, servants, and such other persons as may be necessary for the efficient and economical administration of the affairs at the hospital, assign them their respective places and duties, and may at any time discharge any of them from service, and provide an official seal, upon which shall be inscribed the name of the hospital under his charge, and the name of the state. He shall keep a book in which shall be entered all moneys

or supplies received for account of any patient, and a detailed account of disposition of the same. He shall annually, in the month of December, make to the county auditors of the respective counties from which he has patients a report of the mental and physical condition of each patient, and the probable safety of removing any patient to the county hospital. The salary of the superintendent shall in no case exceed three thousand dollars per annum. [C.'73, §§ 1391, 1393.]

SEC. **2259. Steward.** The steward, under the direction of the trustees and superintendent, shall make all purchases for the hospital on the best terms that can be made, keep the accounts, pay all employes, and have a personal superintendence of the farm; and shall take duplicate vouchers for all purchases made and for all wages paid by him, which he shall submit to the trustees at each of their quarterly meetings for their examination and approval. Such settlement of accounts shall be made by the board of trustees in open session, and shall not be intrusted to a committee. The trustees shall, after examining and approving such vouchers, file one set of them with the auditor of state. The books and papers of the steward and treasurer shall at all times be open to the inspection of any one of the trustees, state officers, or members of the general assembly. [15 G. A., ch. 53, § 1; C. '73, § 1392.]

SEC. **2260. Assistant physicians.** The assistant physicians shall be of such character and qualifications as to be able to perform the ordinary duties of the superintendent during his absence or inability to act. [C.'73, § 1394.]

SEC. **2261. County commissioners of insanity.** In each county there shall be a board of three commissioners of insanity, and in counties having two places where district court is held there shall be one such board of commissioners at each place, consisting of the clerk of the district court, or his deputy, who shall be clerk of the same, also one physician in actual practice and of good professional standing in the community, and one lawyer in actual practice and of good standing in his profession and in the community, residing as convenient as may be to the county seat, to be appointed by the judge of the district court. Such appointment may be made during a session of the court, or in vacation; if made in vacation, it shall be by written order, signed by the judge and recorded by the clerk. The appointment shall be for two years, and so that the term of one commissioner shall expire every year. The appointment of successors may be made at any time within three months prior to the expiration of the term of the incumbent. In the temporary absence or inability to act of two commissioners, the commissioner present may call to his aid temporarily a person possessed of the qualification required for a member, who, after qualifying as in other cases, may act in the same capacity. But if one of the absent members is a clerk, his deputy shall act. The record in such cases must show the facts. The members shall organize by choosing one of their number president, and hold their meetings at the office of the clerk, unless for good reasons they shall fix on some other place, and shall also meet on notice from the clerk or his deputy. [26 G. A., ch. 53; C. '73, §§ 1395–6.]

SEC. **2262. Clerk.** The clerk of said board, or in his absence his deputy, shall sign and issue all notices, appointments, warrants, subpœnas or other process required to be given or issued by the board, affixing thereto his seal as clerk of the court; shall file and preserve in his office all papers connected with any inquest by the commissioners and properly belonging to his office, with all notices, reports and other communications; and shall keep separate books in which to minute the proceedings of the board, and his entries therein shall be sufficiently full to show, with the papers filed, a complete record of its findings, orders and transactions. The notices, reports and communications herein required to be given or made may be sent by mail, unless otherwise expressed, and the facts and

date of such sending and their reception must be noted on the proper record. [C. '73, § 1397.]

SEC. **2263. Jurisdiction and power.** The commissioners shall have cognizance of all applications for admission to the hospital, or for the safe keeping otherwise of insane persons within their respective counties, except in cases otherwise specially provided for. For the purpose of discharging the duties required of them, they shall have power to issue subpœnas and compel obedience thereto, to administer oaths, and do any act of a court necessary and proper in the premises. [C. '73, § 1398.]

SEC. **2264. Admission to hospital.** Applications for admission to the hospital must be made in the form of an information, verified by affidavit, alleging that the person in whose behalf the application is made is believed by the informant to be insane, and a fit subject for custody and treatment in the hospital, and that such person is found in the county, and shall also state the place of residence of such person, or where it is believed to be, or that the same is not known, according to the facts. [C. '73, § 1399.]

SEC. **2265. Investigation—certificate of physician.** On the filing of such information, the commissioners may examine the informant and other witnesses under oath, and, if satisfied that there is reasonable cause therefor, at once investigate the grounds thereof, and may require that the person for whom such admission is sought be brought before them, and that the examination be had in his presence. They may issue their warrant therefor, and provide for the custody of such person until their investigation shall be concluded, which warrant may be executed by the sheriff or any constable of the county; or, if they shall be of the opinion from such preliminary inquiries as they make that such course would probably be injurious to such person, or attended with no advantage, they may dispense with such presence. In their examination, they shall hear testimony for and against such application, if any is offered. Any citizen of the county, or relative of the person alleged to be insane, may appear and resist the application, and the parties may appear by counsel, if they elect. The commissioners, whether they dispense with the presence before them of such person or not, shall appoint some regular practicing physician of the county to visit him and make a personal examination touching the truth of the information and his actual condition, who shall forthwith report to them thereon. He may or may not be of their number, and shall certify that he has made a careful, personal examination as required, and that he finds the person in question insane, if such is the fact, and if otherwise, not insane; and, in connection with his examination, shall endeavor to obtain from the relatives of the person, or from others who know the facts, correct answers, so far as may be, to the interrogatories hereinafter required to be propounded, which interrogatories and answers shall be attached to his certificate. [C. '73, § 1400.]

The interrogatories and answers appended to the certificate of the physician are not competent evidence as to whether the party was insane previous to the examination: *Butler v. St. Louis L. Ins. Co.*, 45–93, 96.

The law contemplates the presence of the person whose insanity is sought to be established in all cases unless upon inquiry it is made to appear that such presence would probably be injurious to the person, or attended with no advantage to him. The fact that the proceeding may be had without the presence of defendant in the cases specified does not render the statute unconstitutional, and it will be assumed that the absence of the person was justified by the facts: *Chavannes v. Priestley*, 80–316.

SEC. **2266. Finding of commissioners—warrant—confinement.** On the return of the physician's certificate, the commissioners shall, as soon as practicable, conclude their investigation and find whether the person is insane; whether, if insane, a fit subject for treatment in the hospital; whether the legal settlement of such person is in their county, and, if not, where it is, if ascertained. If they find such person is not insane, they shall order his immediate discharge, if in custody, but if insane, and a fit

subject for custody and treatment in the hospital, they shall order his commitment to the hospital in the district in which the county is situated, and unless he or some one in his behalf shall appeal therefrom, shall forthwith issue their warrant and a duplicate thereof, stating such finding, with the settlement of the person, if found, and, if not found, their information, if any, in regard thereto, authorizing the superintendent of the hospital to receive and keep him as a patient therein. Said warrant and duplicate, with the certificate and finding of the physician, shall be delivered to the sheriff, who shall execute the same by conveying such person to the hospital, and delivering him, with such duplicate and physician's certificate and finding, to the superintendent, who shall, over his official signature, acknowledge such delivery on the original warrant, which the sheriff shall return to the clerk of the commissioners, with his costs and expenses indorsed thereon. If the sheriff and his deputy are both otherwise engaged, the commissioners may appoint some other suitable person to execute the warrant, who shall take and subscribe an oath faithfully to discharge his duty, and shall be entitled to the same fees as the sheriff. The sheriff, or any person appointed, may call to his aid such assistance as he may need to execute such warrant; but no female shall thus be taken to the hospital without the attendance of some other female or some relative. The superintendent, in his ackowledgment of delivery, must state whether there was any such person in attendance, and give the name or names, if any. But if any relative or immediate friend of the patient, who is a suitable person, shall so request, he shall have the privilege of executing such warrant, in preference to the sheriff or any other person, without taking such oath, and for so doing shall be entitled to his necessary expenses, but no fees. No person who shall be found to be insane shall, during investigation or after such finding, and pending commitment to the hospital, or when on the way there, be confined in any jail, prison or place of solitary confinement, except in cases of extreme violence, when it may be necessary for the safety of such person or of the public; and if such person be so confined, there shall, at all times during its continuance, be some suitable person or persons in attendance in charge of such person; but at no time shall any female be placed in such confinement without at least one female attendant remaining in charge of her. [22 G. A., ch. 68, § 1; 18 G. A., ch. 152, § 6; C. '73, § 1401.]

The provisions made for appeal, and the further provisions contained in §§ 2304 and 2306, allowing subsequent investigation of the question of sanity, prevent this section from being in conflict with the constitutional guaranties against deprivation of personal liberty without due jury trial: *Black Hawk County v. Springer*, 58–417.

An adjudication by the commissioners of insanity raises at least a presumption of the fact, and such finding may be shown in evidence in a divorce case to establish the fact of insanity: *Tiffany v. Tiffany*, 84–122.

SEC. **2267. Appeal from finding.** Any person found to be insane in proceedings herein authorized may appeal from such finding to the district court by giving the clerk thereof, within ten days after such finding has been made, notice in writing that an appeal is taken, which may be signed by the party, his agent, guardian or attorney, and, when thus appealed, it shall stand for trial anew. [18 G. A., ch. 152, §§ 1, 2.]

The actual fact as to insanity may be inquired into on a *habeas corpus* proceeding, and if in such proceeding it is determined that the person is insane, it is not necessary to reinvestigate that question in an appeal from the action of the commissioners: *In re Bresee*, 82–573.

On such appeal the court can take judicial notice of the proceedings in a *habeas corpus* case before a judge of the court and filed in the court as required by law: *Ibid.*

SEC. **2268. Custody pending appeal.** If an appeal shall be taken, the appellant, pending the appeal, shall be discharged from custody, unless the commissioners find that he cannot with safety be allowed to go at large, in which case they shall require him to be suitably provided for in the manner hereinafter specified. [Same, § 4.]

SEC. **2269. Final order.** If upon the trial of the appeal such person is found sane, he shall be immediately discharged, if in custody. If found insane, and a fit subject for custody and treatment in the hospital, an order of commitment shall be entered, and the clerk shall issue a warrant therefor, and the proceedings thereunder shall be as provided in cases before the board. [Same, § 5.]

SEC. **2270. Settlement in another county.** If the commissioners find that the person committed to the hospital has or probably has a legal settlement in some other county, they shall, after the time allowed for an appeal, or, in case an appeal is taken, after the same is finally disposed of, immediately notify the auditor of such county of such finding and commitment, and the auditor so notified shall thereupon inquire and ascertain if possible whether the person in question has a legal settlement in that county, and shall immediately notify the superintendent of the hospital and the commissioners of the county from which such person was committed of the result of such inquiry. If the legal settlement of a person committed cannot for a time be ascertained, and is afterwards found, the notices required shall then be given. The residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission therein. [24 G. A., ch. 24, § 2; C. '73, § 1402.]

Notice to the county of settlement is a condition precedent to the right of recovery: *Poweshiek County v. Cass County*, 63–244.

SEC. **2271. Custody outside hospital.** If any person found to be insane and a fit subject for custody and treatment in the hospital cannot at once be admitted therein, or, in case of appeal from the finding of the commissioners, if such person cannot with safety be allowed to go at liberty, the commissioners shall require that such person shall be suitably provided for otherwise until such admission can be had, or until the occasion therefor no longer exists. Such patients may be cared for as private patients whose relations or friends will obligate themselves to take care of and provide for them without public charge. In such case, the commissioners shall in writing appoint some suitable person special custodian, who shall have authority to, and shall in all suitable ways, restrain, protect and care for such patient in such manner as to best secure his safety and comfort, and to best protect the persons and property of others. In the case of public patients, the commissioners shall require that they be in like manner restrained and protected and cared for by the board of supervisors at the expense of the county, and they may, accordingly, issue their warrant to such board, who shall forthwith comply with the same. If there is no poor-house for the reception of such patients, or if no more suitable place can be found, they may be confined in the jail of the county in charge of the sheriff; but no female may be confined in such poor-house or jail unless at all times under the personal care of a suitable female attendant, who shall hold a key of the apartment in which said person is confined. [22 G. A., ch. 68, § 2; C. '73, § 1403.]

Where an adult is adjudged insane and a fit subject to be treated in the hospital, but cannot be admitted there, and is otherwise maintained and treated, his father is not liable for the expense of his maintenance although he is appointed custodian: *Speedling v. Worth County*, 68–152.

SEC. **2272. Same.** On application to the commissioners in behalf of persons alleged to be insane, whose admission to the hospital is not sought, made substantially in the manner above prescribed, and asking that provision be made for their care as insane, either public or private, within the county, and on proof or their insanity and need of care, the commissioners may provide for their restraint, protection and care, as in case of other applications. [C. '73, § 1404.]

SEC. **2273. In case of need.** On information laid before the commissioners of any county that an insane person in the county is suffering for

want of proper care, they shall forthwith inquire into the matter, and, if they find that such information is true, they shall make all needful provisions for the care of such person as provided in other cases. [C.'73, § 1405.]

SEC. **2274. Transfer to hospital.** Insane persons who have been under care, either as public or private patients, outside of the hospital, by authority of the commissioners of any county may, on application, be transferred to the hospital, whenever they can be admitted thereto, on the warrant of such commissioners. Such admission may be had without another inquest, at any time within six months after the inquest already had, unless the commissioners shall think further inquest advisable. [C.'73, § 1406.]

SEC. **2275. Application for admission to hospital.** In each case of application for admission to the hospital, correct answers to the following interrogatories, so far as they can be obtained, shall accompany the physician's certificate; and if, on further examination after the answers are stated, any of them are found to be erroneous, the commissioners shall cause them to be corrected:

1. What is the patient's name and age? Married or single? If any children, how many? Age of youngest child?
2. Where was the patient born?
3. Where is his (or her) place of residence?
4. What has been the patient's occupation?
5. Is this the first attack? If not, when did the others occur, and what was their duration?
6. When were the first symptoms of this attack manifested, and in what way?
7. Does the disease appear to be increasing, decreasing or stationary?
8. Is the disease variable, and are there rational intervals? If so, do they occur at regular periods?
9. On what subjects or in what way is derangement now manifested? State fully.
10. Has the patient shown any disposition to injure others?
11. Has suicide ever been attempted? If so, in what way? Is the propensity now active?
12. Is there a disposition to filthy habits, destruction of clothing, breaking of glass, etc.?
13. What relatives, including grandparents and cousins, have been insane?
14. Did the patient manifest any peculiarities of temper, habits, disposition or pursuits before the accession of the disease?—any predominant passion, religious impressions, etc.?
15. Was the patient ever addicted to intemperance in any form?
16. Has the patient been subject to any bodily disease; epilepsy, suppressed eruptions, discharges of sores, or ever had any injury of the head?
17. Has restraint or confinement been employed? If so, what kind, and how long?
18. What is supposed to be the cause of the disease?
19. What treatment has been pursued for the relief of the patient? Mention particulars and effects.
20. State any other matter supposed to have a bearing on the case. [C.'73, § 1407.]

SEC. **2276. Discharge from hospital.** On the application of the relations or immediate friends of any patient in the hospital who is not cured, and who cannot be safely allowed to go at liberty, the commissioners of the county where such patient belongs, on making provisions for the care of such patient within the county as in other cases, may authorize his discharge therefrom; but no patient who may be under criminal charge or conviction shall be discharged without the order of the district court or judge, and notice to the county attorney of the proper county. [C.'73, § 1408.]

SEC. **2277. Discharge from custody.** Whenever it shall be shown to the satisfaction of the commissioners of insanity of any county that cause no longer exists for the care within the county of any person as an insane patient, they shall order his immediate discharge, and shall find if such person is sane or insane at the time of such discharge, which finding shall be entered of record by the clerk of the commission. [C.'73, § 1409.]

SEC. **2278. Warrant and certificate.** The warrant of the commissioners of insanity, authorizing the admission of any person to the hospital as a patient, accompanied by a physician's certificate as herein provided, shall shield the superintendent and other officers of the hospital against all liability to prosecution of any kind on account of the reception and detention of such person in the hospital in accordance with law and the regulations for its management, but no person shall be detained therein who is by the superintendent thereof found to be sane or cured. [C.'73, § 1411.]

SEC. **2279. Insane prisoners—inquiry—confinement.** On a written application made by any citizen, stating under oath that a person confined in any prison within the county, charged with a crime but not convicted thereof nor on trial therefor, is insane, the commissioners shall cause said prisoner to be brought before them, and if they find that he is insane they shall direct his removal to and detention in one of the hospitals for the insane, issuing their warrant therefor, and stating therein that he is under criminal charges, and the superintendent of the hospital designated in such warrant shall receive and keep such prisoner as a patient. The warrant shall be executed by the sheriff or his deputy by delivering the prisoner to the superintendent in person. After an investigation such as contemplated in this section, the commissioners shall not entertain a like application within six months on behalf of said person. [C '73, § 1412; R., §§ 1458–9.]

SEC. **2280. Notice of recovery.** When any insane person shall be confined in either hospital under the preceding section, the superintendent in whose charge he may be shall, as soon as such person is restored to reason, issue his warrant to the sheriff of the county from which such person is received, directing him to return such person to the jail of said county, which shall be done by said sheriff as soon as practicable, when the accused shall be returned to the jail of the proper county to answer to the charge against him. The sheriff shall make his return of service in writing thereon, and deliver such warrant and return to the clerk of the district court of his county, who shall forthwith make a copy of the warrant and return, and mail the same to said superintendent, who shall file and preserve it. [C.'73, § 1413; R., § 1460.]

SEC. **2281. Expenses—county of settlement liable.** When the superintendent of the hospital has been notified that a patient sent to the hospital from one county has a legal settlement in another county, he shall thereafter hold and treat such patient as from the latter county; and such holding shall apply to expenses already incurred in behalf of such patient and remaining unadjusted. [C.'73, § 1417.]

SEC. **2282. Recovery.** Expenses incurred as hereinafter provided by one county, on account of an insane person whose legal settlement is in another, shall be refunded, with lawful interest, by the county of such settlement, and shall be presented to the board of supervisors of the county sought to be charged, allowed, and paid the same as other claims. If the settlement is denied by the latter board, it may serve a notice similar to that provided for in cases of removal in the chapter relating to poor persons, and all the provisions of that chapter in regard to the determination of the disputed claim upon an order of removal shall apply to the change of settlement of an insane person. [C.'73, § 1418.]

Before the abolition of the circuit court it did not have exclusive jurisdiction of this action, although it did of the action provided for by § 2228: *Winneshiek County v. Allamakee County*, 62–558.

As to liability of county of settlement, see notes to § 2228.

SEC. **2283. At expense of state.** Patients in a hospital having no legal settlement in the state, or whose legal settlement cannot be ascertained, shall be supported at the expense of the state. If a person has a legal settlement within another state, the commissioners of insanity may direct the sheriff to remove such person to the place of his legal settlement, and the sheriff shall receive as compensation therefor three dollars per day and his actual expenses, which shall be itemized and sworn to and filed with the county auditor, and the same shall be paid as other claims against the county. The trustees of any asylum may authorize the superintendent to remove any patient who has no legal settlement within the state. The cost of such removal to be paid directly from the state treasury, upon a sworn statement of the superintendent and the approval of the trustees appended to each voucher. [21 G. A., ch. 47; C.'73, § 1419.]

SEC. **2284. Special care.** All patients in a hospital shall stand upon an equal footing, and the several patients, according to their different conditions of mind and body, and their respective needs, shall be provided for and treated with equal care; but if the relatives or friends of any patient shall desire it, and shall pay the expense thereof, such patient may have special care and may be provided with a special attendant, as may be agreed upon with the superintendent. In such cases, the charges for such special care and attendance shall be paid quarterly in advance. [C.'73, § 1420.]

SEC. **2285. Expenses paid by relatives.** The relatives or friends of any patient in a hospital shall have the privilege of paying any portion or all of the expenses, and the superintendent shall cause his or her account to be credited with any sum so paid. [C.'73, § 1421.]

SEC. **2286. Discrimination in reception.** If at any time it is necessary to discriminate in the general reception of patients in a hospital, a selection shall be made as follows:

1. Cases of less duration than one year shall have the preference over all others;
2. Chronic cases, where the disease is of more than one year's duration, presenting the most favorable prospect for recovery, shall be next preferred;
3. Those for whom application has been longest on file, other things being equal, shall be next preferred;
4. Where cases are equally meritorious in all other respects, the indigent shall have the preference. [C.'73, § 1422.]

SEC. **2287. Escape.** If any patient shall escape from a hospital, the superintendent shall cause immediate search to be made for him, and if he cannot soon be found, shall cause notice of such escape to be forthwith given to the commissioners of the county where he belongs, and, if found in their county, the commissioners shall cause him to be returned, and shall issue their warrant therefor, as in other cases, unless the patient shall be discharged, or unless for good reasons they shall provide for his care otherwise, of which they shall notify the superintendent. [C.'73, § 1423.]

SEC. **2288. Discharge when cured.** Any patient who is cured shall be immediately discharged by the superintendent, who shall furnish him with a certificate to that effect, and forward a copy thereof at once to the clerk of the district court of the county from which the patient was committed, and he shall record the same at length in the insane record in connection with the record of commitment. Such record shall be *prima facie* evidence of the recovery of such person, and restore him to all his civil rights. Upon such discharge the superintendent shall furnish him, unless otherwise supplied, with suitable clothing and a sum of money not exceeding twenty dollars, which shall be charged with the other expenses of such patient in the hospital. The relatives of any patient not susceptible of cure by remedial treatment in the hospital, and not dangerous to be at large, shall have the right to take charge of and remove him by the con-

sent of the board of trustees. In the interim of the meetings of the board, the consent of two trustees shall be sufficient. [C.'73, § 1424.]

SEC. **2289. Discharge of incurables.** The board of trustees shall order the discharge or removal from the hospital of incurable and harmless patients whenever it is necessary to make room for recent cases. In the interim between the meetings of the board, the superintendent, in connection with two trustees, shall possess and exercise the same power. [C.'73, § 1425.]

SEC. **2290. Notice to commissioners.** When patients are discharged from the hospital by the authorities thereof without application therefor, notice of the order of discharge shall at once be sent to the commissioners of the county where they belong, and the commissioners shall forthwith cause them to be removed, and shall at once provide for their care in the county as in other cases, unless such patients are discharged as cured. [C.'73, § 1426.]

SEC. **2291. Compensation for keeping.** The trustees for the hospital shall, from time to time, fix the monthly sum, not exceeding fourteen dollars, for the board and care of patients therein; which sum shall be paid therefor, when certified by the superintendent under the attestation of the hospital seal, and this certificate shall be competent evidence of the amount due for the time therein stated. [17 G. A., ch. 84; C.'73, § 1427.]

SEC. **2292. Charged to counties—tax levied.** Each superintendent shall certify to the auditor of state on the first day of January, April, July and October the amount, not previously certified by him, due to the hospital under his charge from the several counties having patients chargeable thereto, and said auditor shall pass the same to the credit of the hospital, and thereupon notify the county auditor of each county so owing of the amount, and charge the same to said county; and the board of supervisors shall levy a tax therefor, and pay the amount due the state into the state treasury. Should any county fail to levy such tax, the auditor of state shall charge the delinquent county with a penalty of three per cent. per month upon the indebtedness six months due, until the debt and penalty be paid. If any county shall fail for one year to levy a tax, at the time of levying other county taxes, to meet any debt thus created, it shall be the duty of the attorney-general, upon request of the executive council, to bring an action in the name of the state and against the county to compel the same. Taxes thus levied and collected cannot be used for any other purpose, and the amount of indebtedness for which such levy was made shall be paid over to the state treasurer at the time and in the manner required for the payment of state taxes. [17 G. A., ch. 183, §§ 1–3; 16 G. A., ch. 28; C.'73, § 1428.]

Under an early statute, *held*, that no authority was given to the board of supervisors to levy an independent or special tax for the purposes here specified: *Iowa Land Co v. Carroll County*, 39–151.

SEC. **2293. Fees of superintendent as witness.** When the superintendent of the hospital, in obedience to a subpœna, attends any court of the county in which the hospital is situated, as a witness for either party in the case of a person on trial for criminal offense, and the question of the sanity of such person is raised, he shall be allowed on such account his necessary and actual expenses, and such daily pay as is allowed to other witnesses, which shall be paid by the state. When compelled so to attend in civil cases, he shall be entitled to the same compensation, to be paid by the party requiring his attendance. [C.'73, § 1429.]

SEC. **2294. Seal.** The superintendent shall affix the seal of the hospital to any notice, order of discharge, or other paper required to be given by him or issued. [C.'73, § 1430.]

SEC. **2295. Blanks.** The trustees of the hospital shall provide for furnishing the commissioners of the counties entitled to send patients to

the hospital with such blanks for warrants, certificates and other papers as will enable them with regularity and facility to comply with the provisions of this chapter, and also with copies of the regulations of the hospital, when printed. [C.'73, § 1431.]

SEC. **2296. Rules.** The superintendents of the hospitals and the governor of the state shall adopt such regulations as they may deem expedient in regard to which patients or class of patients shall be admitted to and provided for in the respective hospitals; or from what portion of the state patients, or certain classes of patients, may be sent to any hospital, and in regard to the transfer of patients from one hospital to another, whenever such transfer becomes proper or necessary; they may change such regulations from time to time as they think best, and shall make such publication of these regulations as necessary for the information of those interested, and the regulations so adopted shall be conformed to by the parties interested. [24 G. A.; ch. 48, § 1; 22 G. A., ch. 76; C.'73, § 1432.]

SEC. **2297. Estates of patients liable.** The provisions herein made for the support of the insane at public charge shall not be construed to release the estates of such persons nor their relatives from liability for their support; and the auditors of the several counties, subject to the direction of the board of supervisors, are authorized and empowered to collect from the property of such patients, or from any person legally bound for their support, any sums paid by the county in their behalf, as herein provided; and the certificate from the superintendent, and the notice from the auditor of state, stating the sums charged in such cases, shall be presumptive evidence of the correctness of the sums so stated. If the board of supervisors in the case of any insane patient who has been supported at the expense of the county shall deem it a hardship to compel the relatives of such patient to bear the burden of his support, or charge the estate therewith, they may relieve such relatives or estate from any part or all of such burden as may seem to them reasonable and just. The estates of insane or idiotic persons who may be treated or confined in any county asylum or poor-house, and the estates of persons legally bound for their support, shall be liable to the county for the reasonable expense, or so much thereof as may be determined by the board of supervisors. [26 G. A., ch. 52; 15 G. A., ch. 26; C.'73, § 1433.]

The "relatives" contemplated in § 1433 of Code of '73 (which is here substantially reenacted) were only such as were legally bound for the support of the insane person. A father is not legally bound to support his adult children. The provisions of § 2216 *et seq.*, as to the support of paupers, have no application under this section: *Monroe County v. Teller*, 51–670.

Under 15 G. A. ch. 26, a husband was not liable for the expense of treating an insane wife sent to the hospital by the commissioners of insanity. Such expense is not a family expense within the meaning of § 3165: *Delaware County v. McDonald*, 46–170.

The claim of the county becomes a lien from the commencement of the suit by the county for the expense of support, and collection is to be made like any other claim by action, judgment and execution. There is no lien until it is allowed by the court: *Thode v. Spofford*, 65–294.

Pension money of an insane person received from the United States, after the taking effect of 20 G. A., ch. 23 (§ 4009), cannot be appropriated to reimburse the county for expenses incurred and paid by the county for the support of such person. Whether such money can be appropriated by an order providing for expenses to be thereafter incurred for the support of such insane person, *quære: Fayette County v. Hancock*, 83–694.

Neither can pension money received after such act took effect be appropriated for expenses incurred and paid by the county for the support of an insane pensioner before that time: *Ibid.*

The liability of the estate is to the county for what the county has paid in its behalf. There is no relation between the estate and the state, and the statute of limitations commences to run from the time of the payment by the county to the state: *Harrison County v. Dunn*, 84–328.

Although the board may relieve the estate, the failure to do so will not affect the operation of the statute of limitations: *Ibid.*

There is no common law liability on the part of the estate of an insane person for the support of such person either in the state institution or under provisions made by the county, and where the statute declared liability only as to support in the state institution, *held*, that there could be no recovery by the county for support furnished at the county poor house: *Jones County v. Norton*, 91–680.

The certificates and notices provided for in this section are presumptive evidence of the correctness of the sums so charged in an action by a county against the estate of an insane person even though such certificates are not made until the time of bringing suit: *Cedar County v. Sager*, 90–11.

The estate of the insane person is liable for his support and remains so until the board of supervisors releases it by action taken for that purpose and notice of the consideration of the question by the board is not required: *Ibid.*

SEC. **2298. Meaning of terms "insane" and "idiot."** The term "insane" as used in this chapter, includes every species of insanity or mental derangement. The term "idiot" is restricted to persons foolish from birth, supposed to be naturally without mind. No idiot shall be admitted to a hospital. [C. '73, § 1434.]

A person who, of sound mind until nine years of age, then became affected with epilepsy and gradually lost her mind until she was unable to take the slightest care of herself, *held* insane within the meaning of this section: *Speedling v. Worth County*, 68–152.

SEC. **2299. Visiting committee.** There shall be a visiting committee of three, at least one of whom shall be a woman, appointed by the governor, to visit the insane asylums of the state at their discretion, and without giving notice of their intended visit, and one visit by at least one member shall be made each month, who may, upon such visit, go through the wards unaccompanied by any officer of the institution, with power to send for persons and papers, and to examine witnesses under oath to ascertain whether any of the inmates are improperly detained in the hospital, or unjustly placed there, and whether the inmates are humanely and kindly treated, with full power to correct any abuses found to exist; and any injury inflicted upon the insane shall be treated as a criminal offense, as the like offense would be regarded when inflicted upon any other citizen outside of a hospital. They shall have power to discharge any attendant or employe who is found to have been guilty of an offense meriting such discharge; and, in all these trials of misdemeanor, offense or crime, the testimony of patients shall be taken and considered for what it is worth, and no employe at a hospital shall be allowed to sit on any jury before whom these cases are tried. Said committee shall make an annual report to the governor. [C. '73, §§ 1435, 1441.]

A visiting committee has no authority to punish witnesses for contempt in refusing to testify before it: *Brown v Davidson*, 59–461.

SEC. **2300. Inmates allowed to write.** The names of this visiting committee and their post-office addresses shall be kept posted in every ward in each hospital, and every inmate therein shall be allowed to write once a week what he pleases to this committee and to any other person he may choose; but the superintendent in his discretion may send letters addressed to other parties to the visiting committee for inspection before forwarding them to the individual addressed. Any member of this committee who shall neglect to heed the call of a patient to him for protection, when proved to have been needed, shall be discharged by the governor. [15 G. A., ch. 53, § 2; C. '73, § 1436.]

SEC. **2301. Writing material furnished.** Every person confined in any hospital shall be furnished by the superintendent or party having charge of such person, at least once in each week, with suitable materials for writing, inclosing, sealing and mailing letters, if he requests the same, unless otherwise ordered by the visiting committee, which order shall continue in force until countermanded by said committee. [C. '73, § 1437.]

SEC. **2302. Letters to and from inmates.** The superintendent, or the party having charge of any person under confinement, shall receive, if requested to do so by the person so confined, at least one letter in each week, addressed to one of the visiting committee, without opening or reading the same, and without delay deposit it in a post-office, with a proper postage stamp affixed thereto, and deliver to said person any letter or writing addressed to him. But such letters written to the person so confined may

be examined by the superintendent, and if, in his opinion, the delivery of such letters would be injurious to the person so confined, he shall return the letters to the writer with his reasons for not delivering it. [15 G. A., ch. 53, § 2; C. '73, § 1438.]

SEC. **2303. Inquest.** If a death shall occur suddenly and without apparent cause, or a patient die and his relatives so request, a coroner's inquest shall be held as provided by law, but in the latter case the relatives making the request shall be liable for the expenses of the same, and payment therefor may be required in advance. [C. '73, § 1439.]

SEC. **2304. Commission of inquiry—appointment by court.** On a statement in writing, verified by affidavit, addressed to a judge of the district court of the county in which the hospital is situated, or of the county in which any person confined in a hospital has his legal settlement, alleging that such person is not insane and is unjustly deprived of his liberty, such judge shall appoint a commission of not more than three persons, in his discretion, to inquire into the merits of the case, one of whom shall be a physician, and if two or more are appointed, another shall be a lawyer. Without first summoning the party to meet them, they shall proceed to the hospital and have a personal interview with such person, so managed as to prevent him, if possible, from suspecting its object; and they shall make any inquiries and examinations they may deem necessary and proper of the officials and records of the hospital, touching the merits of the case. If they shall judge it prudent and advisable, they may disclose to the party the object of their visit, and, either in his presence or otherwise, make further investigation of the matter. They shall forthwith report to the judge making the appointment the result of their examination and inquiries, such report to be accompanied by a statement of the case, made and signed by the superintendent. If on such report and statement, and the hearing of testimony if any is offered, the judge shall find a person not insane, he shall order his discharge; if the contrary, he shall so state, and authorize his continued detention. The finding and order of the judge, with the report and other papers, shall be filed in the office of the clerk of the court over which such judge presides, who shall enter a memorandum thereof on his record, and forthwith notify the superintendent of the hospital of the finding and order of the judge, and the superintendent shall carry out the order. The commissioners appointed as provided in this section shall be entitled to their necessary expenses and a reasonable compensation, to be allowed by the judge, and paid by the state out of any funds not otherwise appropriated; but the applicant shall pay the same if the judge shall find that the application was made without probable ground, and shall so order. [C. '73, § 1442.]

Whether the supreme court could, under any circumstances, under the provisions of this section, appoint a commission to inquire into the sanity of a person confined in the hospital for the insane, *quære*. But, *held*, that where the case before the court was an appeal from the finding of commissioners, no such proceeding was necessary: *In re Bresee*, 82–573.

SEC. **2305. How often.** The commission above provided for shall not be repeated oftener than once in six months in regard to the same person; nor shall such commission be appointed in the case of any patient within six months of the time of his admission. [C. '73, § 1443.]

SEC. **2306. Habeas corpus.** All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing. If the judge shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person has been restored to reason. [C. '73, § 1444.]

Where a finding of insanity had been made by the commissioners, and upon *habeas corpus* before the judge of the district court the whole question had been investigated and the insanity of the party determined, *held*, that, on appeal from the action of the com-

missioners, it was not necessary to re-investigate the case, but the action of the judge in the *habeas corpus* proceeding might properly be accepted as conclusive: *In re Bresee*, 82–573.

SEC. **2307. Punishment for cruelty or official misconduct.** If any person having the care of an insane person, and restraining him, whether in a hospital or elsewhere, with or without authority, shall treat him with unnecessary severity, harshness or cruelty, or in any way abuse him, or if any officer required by the provision of this chapter to perform any act shall wilfully refuse or neglect the same, or if any member of a board of supervisors or any county treasurer shall violate any provision of this chapter, he shall be guilty of a misdemeanor, and fined not to exceed five hundred dollars, or be imprisoned in the county jail not to exceed three months, and pay the costs of prosecution, or be both fined and imprisoned at the discretion of the court; and if any member of the visiting committee, superintendent of the hospital, or other person in charge of an insane person confined in the hospital, shall knowingly and wilfully violate any provision of this chapter by failing and refusing to furnish material for writing, failing or refusing to allow a party to write letters, to mail letters written, to receive and deliver letters written as provided herein to such person so confined, or in any other way, he shall be imprisoned in the penitentiary not to exceed three years, or pay a fine not to exceed one thousand dollars, or be both fined and imprisoned. [17 G. A., ch. 183, § 4; C.'73, §§ 1415–16, 1440, 1445.]

SEC. **2308. County insane fund.** The board of supervisors, when levying taxes for general purposes, shall include therein a tax of one-half mill or less, as may be necessary, for the purpose of raising a fund for the support of such insane persons as are cared for and supported by the county in the insane ward of the county poor-house, or elsewhere outside of any state hospital for the insane, which shall be known as the county insane fund, and shall be used for no other purpose than the support of such insane persons.

SEC. **2309. Compensation and fees.** The commissioners of insanity shall be allowed at the rate of three dollars per day, each, for all the time actually employed in the duties of their office. They shall also be allowed their necessary and actual expenses, not including charges for board. The clerk, in addition to what he is entitled to as commissioner, shall be allowed one-half as much more for making the required record entries in all cases of inquest and of meetings of the board for any purpose, and for the filing of any papers required to be filed. He shall also be allowed twenty-five cents for each notice or process given or issued under seal, as herein required. The examining physician shall be entitled to the same compensation as a commissioner, and to mileage at the rate of five cents per mile each way; but if such examining physician be a member of the board of commissioners, he shall be entitled to no other fee than the pay as such commissioner. Witnesses shall be entitled to the same fees as witnesses in the district court. Fees on appeal shall be the same as in ordinary actions. The compensation and expenses provided for above, and the fees of the sheriff provided for in such cases, shall be allowed and paid out of the county treasury in the usual manner. Whenever the commissioners issue their warrant for the admission of a person to the hospital, and funds to pay the expenses thereof are needed in advance, they shall estimate the probable expense of conveying such person to the hospital, including the necessary assistance, and not including the compensation allowed the sheriff, and on such estimate, certified by the clerk, the auditor of the county shall issue an order on the county treasury for the amount, as estimated, in favor of the sheriff or other person intrusted with the execution of such warrant; the sheriff or other person executing such warrant, shall accompany his return with a statement of the expenses incurred, and the excess or deficiency may be deducted from or added to his compensation, as the case may be. If funds are not so advanced, such expenses shall be certified and paid in the man-

ner above prescribed on the return of the warrant. When the commissioners order the return of a patient, compensation and expenses shall be in like manner allowed. [C.'73, §§ 1410, 3825.]

The fees of the clerk not held additional to his salary: *Moore v. Mahaska County*, 61-177: and see § 297.

SEC. **2310. Compensation of visiting committees.** Members of all visiting committees to the hospitals shall be allowed four dollars for each day actually and necessarily engaged in the performance of their official duties, and mileage at the same rate as is allowed members of the general assembly. The disbursing officer of each hospital shall pay the per diem and mileage allowed such visiting committee, and each member of such visiting committee shall certify under oath to such disbursing officer the number of days he has served and the number of miles traveled. [C.'73, § 3826.]

CHAPTER 3.

OF DOMESTIC ANIMALS.

SECTION **2311. Meaning of terms.** As used in this chapter, the term "owner," used with reference to animals, means any one entitled to the present possession thereof, the one having care or charge of them, and the person holding the legal title to them, and as to land the person having title thereto, or the lessee or occupant thereof; the term "stock" means cattle, horses, mules and asses; the term "animals" means all animals which may be distrained under this chapter; and "trespassing stock or animals" means those unlawfully upon land, or running at large contrary to law or police regulations. [15 G. A., ch. 70, §§ 4, 7; C.'73, §§ 1450, 1453.]

The provision that the word stock shall include cattle, horses, mules and asses is only applicable in the connection in which it is used, and is not to be deemed a limitation upon the meaning of the word as found in other statutes. As generally used it includes swine as well as the animals referred to: *State v. Clark*, 65-336.

SEC. **2312. Male animals running at large.** The owner of any stallion, jack, bull, boar or buck shall restrain the same, and any person may take possession of any such animal running at large in the county in which such person resides, or in which he occupies or uses real estate, and give notice thereof to any constable in the county where taken, who shall sell the animal so taken at public auction to the highest bidder for cash, having given ten days' notice of the time and place of sale, describing the property, by posting the same in three public places in the township wherein such animal was found at large. Out of the proceeds of sale he shall pay all costs and any damage done by said animal, to be investigated and determined by him, and pay the remainder into the county treasury for the use of the county. If legal proof be made to the county auditor by the owner of said animal of his right thereto at any time within twelve months from the sale, he shall order the proper amount to be paid to the owner out of any money in the treasury not otherwise appropriated. If the owner, or any person for him, shall, on or before the day of sale, pay the costs thus far made, and all damages, to be determined by the constable if the parties cannot agree, and make satisfactory proof of his ownership, the constable shall release the animal to him. [C.'73, § 1447; R., §§ 289, 1522.]

Under a somewhat similar provision it was said that the law did not contemplate that the officer should have a process in order to make the sale provided for: *Dalby v. Wolf*, 14-228.

The provisons as to stallions is not applicable to colts until they are of such age as to be troublesome to mares or dangerous to be at large: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459.

SEC. **2313. Distraint damage feasant—recovery.** Any animal trespassing upon land fenced as provided by law may be distrained by the owner of such land, and held for all damages done thereon by it, unless it

escaped from adjoining land in consequence of the neglect of such land owner to maintain his part of a lawful partition fence. The owner of the land from which such animal escaped shall also be liable for such damages if it escaped therefrom in consequence of his neglect to maintain his part of a lawful partition fence, or if the trespassing animal was not lawfully upon his land, and he had knowledge thereof. If there be no lawful partition fence, and the line thereof has not been assigned either by the fence viewers or by agreement of the parties, any animal trespassing across such partition line shall not be distrained, nor shall there be any liability therefor. [15 G. A., ch. 70, § 3; C. '73, §§ 1448-9; R., §§ 1548-9; C. '51, §§ 913-14.]

In this state, aside from statute, cattle are free commoners, and may lawfully be permitted to run at large, and the rule of the common law that every man is bound to keep his cattle within his own inclosure or be responsible in damage for injuries arising from their being abroad is not applicable to the condition and circumstances of the people and is not in force: *Wagner v. Bissell*, 3-396; *Heath v. Coltenback*, 5-490; *Alger v. M. & M. R. Co.*, 10-268; *Russell v. Hanley*, 20-219; *Smith v. C., R. I. & P. R. Co.*, 34-506. Therefore, unless stock is prohibited from running at large, the owner of land can only maintain an action for trespass by cattle by showing that his fence was such as is required by statute: *Farzier v. Nortinus*, 34-82. But if cattle, after breaking over a sufficient fence into one field, go thence into another of the same owner, through a fence which is not sufficient, the action for their trespass upon the second field will lie: *Herold v. Meyers*, 20-378.

Cattle being free commoners, the mere fact of permitting them to run at large is not a ground of imputing negligence to the owner: *Haughey v. Hart*, 62-96.

The right of the owner of cattle or other stock to pasture them upon the commons is a permissive and not an abstract right. And while the owner of an inclosure cannot maintain an action for trespass against the owner of cattle entering thereon from the commons unless his fence is such as is required by statute, yet there is no obligation on his part to fence, and there can be no recovery for injuries to the cattle from feeding upon growing crops: *Herold v. Meyers*, 20-378.

If animals, though lawfully on adjoining land, escape therefrom and do damage, and their escape is not in consequence of the neglect of the person suffering the damage, their owner is liable therefor. It is not necessary that the fence surrounding the land of the person injured is throughout a lawful fence, if it is shown to have been such at the place where the cattle broke through. And this will be true where the owner of the adjoining land and the owner of the cattle are the same person and the fence broken through belongs to him: *Noble v. Chase*, 60-261.

It is only persons whose lands are inclosed by a lawful fence who are authorized to distrain domestic animals injuring their premises (where stock are not prohibited from running at large). If lands are not so inclosed there is no right to distrain, and possession acquired by such distraint is unlawful. The rightfulness of the distraint may therefore be inquired into in an action of replevin; it is not a matter for the exclusive determination of the fence viewers. But if the distraint is found to be legal the property may be remanded to the distrainor, and the damages may be assessed by the township trustees subject to the right of appeal as provided for in §§ 2318 and 2319: *Syford v. Schiver*, 61-155.

Cattle, when they of their own accord go upon the unfenced land of another, do not render their owner liable to an action by the owner of the land, and the owner of the cattle may rightfully enter to remove them; and if they have crossed the unfenced land of one and gone on to that of another they may be driven back across the land they crossed in entering: *Camp v. Flaherty*, 28-520.

Where plaintiff, claiming to own certain real estate, sought to recover damages from defendant for maliciously, wrongfully and unlawfully breaking down and destroying the fence and turning his cattle upon such land without plaintiff's consent, *held*, that an instruction, in substance, that if the land was the property of plaintiff, as to which the jury were directed to inquire, and if they found the land was fenced and the defendant broke down the fence and thereby allowed the cattle to go upon the land, or if the land was fenced and the fence was broken down without defendant's fault, and he drove his cattle upon the land, the plaintiff would be entitled to recover, was not erroneous: *Erbes v. Wehmeyer*, 69-85.

The owner of the land may have his remedy by action against the owner of the stock as here provided, or by distraining the animals as provided in § 2314 *et seq.* If he pursue the former course the ordinary rules as to proof, etc., apply, and he need not have the damages ascertained by the township trustees, as provided in § 2317: *Quinton v. Van Tuyl*, 30-554.

A land owner in a county where stock is prohibited from running at large is not relieved of his obligation to maintain partition fences, and if stock rightfully in an adjoining inclosure escape upon his land by reason of his failure to maintain such fence he cannot recover damages from the owner of the stock: *Duffees v. Judd*, 48-256.

The servant of a land owner, who distrains stock as agent of such owner, may justify as such agent in an action of replevin brought against him to recover the stock: *Bearinger v. O'Hare*, 26-250.

As to damage from bull unlawfully at large, see note to § 2314.

SEC. **2314. What animals not permitted to run at large.** Swine, sheep and goats at all times, and, during the time and as required by a

Goslar v Cook, 179 N.W. 621
- 623

police regulation adopted according to law, stock shall be restrained from running at large. Animals thus prohibited from running at large, when trespassing on land, or a road adjoining thereto, may be distrained by the owner of such land, and held for damages done by them, and for the costs provided in this chapter; but stock shall not be considered as running at large so long as it is upon unimproved lands and under the immediate care and efficient control of the owner, or upon the public roads for travel or driving thereon under like care and control. But where a partition fence is required by law to be erected or maintained, stock escaping across such partition line shall be dealt with as provided in the preceding section. [18 G. A., ch. 188, § 1; 15 G. A., ch. 70, §§ 2, 3, 6; C. '73, §§ 1446, 1448, 1452.]

Held that the original section as contained in 13 G. A., ch. 26, was applicable without a submission to vote of the question of restraining stock from running at large, and that it was immaterial whether the premises were inclosed with a lawful fence or not: *Little v. McGuire*, 38-560; *Hallock v. Hughes*, 42-516.

The owner of a thoroughbred cow, which is got with calf by an ill-bred and unpedigreed bull, unlawfully running at large, may recover damages from the owner of such bull, which are to be measured by the difference in the value of the cow, for the purpose of breeding of fine stock, before meeting such bull and afterwards: *Crawford v. Williams*, 48-247.

The fact that an eighty-acre tract of land is surrounded by a single ploughed furrow, and includes a few acres under cultivation, will not render it all improved or cultivated land within the meaning of this section; but in such cases the owner of the land may recover damages from the owner of cattle who herds and confines them upon such land: *Otis v. Morgan*, 61-712.

While trespass is not committed when cattle running at large enter upon uninclosed land in counties where the herd law is not in force, yet the act of herding and pasturing cattle upon such uninclosed land against the consent of the owner will constitute trespass for which the wrong-doer may be liable in damages: *Harrison v. Adamson*, 76-337.

In an action for damages against defendant for having herded his cattle upon plaintiff's uninclosed and unimproved land without plaintiff's consent, it appearing that other persons herded cattle upon the land during the time it was used by defendant, and there being no evidence as to how long the land was so used by defendant, and how many cattle he had herded, and the value of such use, *held*, that any verdict, except for nominal damages, would have been without evidence, and therefore the action of the court in refusing to submit the case to the jury for a verdict, and in directing a verdict for the defendant, would not be reversed on appeal: *Williams v. Brown*, 76-643.

In an action for damages from an animal running at large, it is not necessary to show that the road in which he is at large is a legal highway, but it is sufficient to show that it is open to the public; and an animal loose in such highway is running at large, and if vicious the owner is liable for injuries inflicted by such animal on a person passing by: *Meier v. Shrunk*, 79-17.

The fact that stock is running at large in violation of the provisions of the herd law does not absolutely preclude recovery from a railway company for injuries to such stock, caused by the operation of a train upon station grounds at an unlawful rate of speed: *Story v. Chicago, M. & St. P. R. Co.*, 79-402.

In an action for damages by reason of personal injury to plaintiff by defendant's bull running at large, *held*, that evidence that defendant frequently permitted the animal to run at large in the road was admissible on the question as to whether he was at large with defendant's permission when plaintiff was injured; that evidence as to the character and general reputation of the animal as being vicious was admissible to show whether the attack on plaintiff was without provocation, or was due, as claimed by defendant, to plaintiff's negligently provoking the animal, and that plaintiff's information as to the disposition of the animal might be shown to indicate whether he acted negligently: *Meier v. Shrunk*, 79-17.

Whether in such case it was negligent in plaintiff to strike the animal with his cane would depend upon attending circumstances as to his reasonable belief that he would thereby avoid danger: *Ibid.*

SEC. **2315. Recovery of damages.** Instead of distraining trespassing stock or animals, the injured person may recover all damages caused thereby in an action against the owner thereof, and may join therein the owner of the land from which it escaped, if he is liable therefor. If distrained stock or animals escape or are released without the consent of the distraining party, he may recover his damages as above provided, with costs, and the costs of distraint made prior to such escape or release. [15 G. A., ch. 70, § 3; C. '73, § 1448.]

SEC. **2316. Apportionment of damages.** If there is more than one owner of distrained stock or animals, each may pay his ratable share of the damages and costs, and release his animals. If the injured party elects to

sue therefor, he may join in one action all or any of such owners who have not paid their proportion of the damages and costs. [18 G. A., ch. 188, § 1; 15 G. A., ch. 70, § 6; C. '73, § 1452.]

SEC. **2317. Assessment of damages—sale.** Within twenty-four hours after an animal has been distrained, Sunday not included, the person distraining, or his agent, shall notify the owner of the animal thereof, and, if he fails to satisfy the damages and costs, such person shall within twenty-four hours after such notice to the owner, verbally or in writing, request the township trustees to appear upon the premises to view and assess the damages. When two or more trustees have met, one of them having previously informed the owner of the animal of the time and place of meeting, they shall assess the damages and costs. If the owner of the distrained animal refuses or neglects for two days thereafter to pay the amount thus assessed, one of said trustees shall put up in three conspicuous places in the township notices, describing the property, and naming a time and place of sale, which place shall be where the property is distrained, and time not less than five nor more than ten days thereafter, that said property will be sold between the hours of one and three o'clock in the afternoon. At the time and place of sale, one of said trustees shall offer for sale and sell the property at public outcry to the highest bidder for cash, but no sale shall be made after having realized a sufficient sum with which to pay the damages and costs, any remaining animals unsold to be at once returned to the owner, and also the surplus remaining, if any, out of any sold. If for any reason a trustee cannot sit, the remaining trustees may appoint any disinterested citizen having the qualifications of a juror to act in his place. [C.'73, § 1454.]

Upon the hearing before fence viewers to assess the damages caused by stock running at large, the question as to whether the stock was improperly at large, as well as the amount of damage done, is before the fence viewers, and such question may also be considered on appeal from their action: *Duffees v. Judd*, 48-256.

This section does not confer special authority upon the township trustees to inquire into and determine the lawfulness of the fence inclosing the injured premises, and that matter may be determined in an action of replevin to recover the property from the person making distraint, when it is claimed that his premises are not surrounded by a lawful fence: *Syford v. Schiver*, 61-155.

Failure to serve notice upon one of the trustees, who might have been served, will render the action of the other two entirely void, as being without jurisdiction: *Barrett v. Dolan*, 71-94.

Notice to the owner of the stock of the amount of damages assessed by the trustees, and the demand from him that he pay such damages, are not necessary to warrant a sale: *Miller v. Dale*, 72-470.

Where a party distrained a trespassing animal and gave notice to the person who had charge of the animal and the one who owned the farm on which it was usually kept, *held*, that the notice was sufficient to authorize the trustees to assess the damages: *Lyons v. Van Gorder*, 77-600.

A trespassing animal should not be treated as an estray, where the party distraining knows who has charge of the animal and where it is kept, although the owner is unknown: *Ibid.*

SEC. **2318. Assessment made—appeal.** The trustees shall make their assessment in writing, and file the same with the township clerk, which shall be recorded by him. Any person aggrieved by the action of the trustees may appeal to the district court of the county. The appeal bond, conditioned to pay all costs and damages, shall be filed with and the sureties approved by the township clerk, in a penalty double the value of the property distrained, or, if the value of the property exceeds the amount of the damages claimed, then double the amount of the damages and costs. Notice of such appeal shall be given within five days, and in the same manner as in appeals from a judgment of a justice of the peace. The appellant shall file an appeal bond within three days, Sunday not included, from the filing of the finding of the trustees, and, when an appeal is thus taken by the claimant, the distrained stock or animals shall be held for the satisfaction of such judgment as may be rendered on appeal, but the owner of said stock or animals may release the same at any time, before judgment, by filing with the township clerk before the appeal is certified, or with the clerk of the district court thereafter, a bond with sufficient

sureties to be approved by the clerk with whom filed, conditioned to pay all damages and cost recovered in said cause on appeal. The clerk receiving such bond shall file the same, and forthwith certify the fact to the person having charge of the distrained stock or animals, who shall thereupon release the same to the owner. Where the owner appeals and files a bond, as herein provided, it shall operate as a supersedeas, and the distrained stock or animals shall be released to him. Within five days after the taking of the appeal, the township clerk shall make out a certified transcript of the record of the finding of the trustees, and file the same, together with the notice of appeal, if in writing, and the bond with the clerk of the district court. [C.'73, § 1455.]

Under provisions for appeal to the circuit court, *held*, that not only the amount of damages, but also the question whether the stock were in fact trespassers, and the sufficiency of the fences, might be reviewed: *Duffees v. Judd*, 48-256.

Where the assessment of damages caused by a trespassing animal had been filed with the township clerk, but the original could not be found, *held*, that the record of the original made by the township clerk was admissible to prove the award of the trustees: *Lyons v. Van Gorder*, 77-600.

SEC. **2319. Escape or release—recapture.** If any distrained animal escape or is unlawfully released, the injured person may recapture the same, and proceedings under this chapter shall continue until the assessment of damages is made, which shall be conclusive, unless appealed from. Notice of the sale of such animal shall be given by the trustees as soon as possession thereof is regained by the distrainor, and the property sold accordingly, unless he regains such possession before the day of sale as originally fixed, in which event the property shall be sold under the first notice.

SEC. **2320. Punishment for unlawful release.** If any one, without leave of the person having any animal under distraint, release the same, he shall be guilty of a misdemeanor. [18 G. A., ch. 188, § 2.]

SEC. **2321. Estrays.** Any animal of an unknown owner running at large or trespassing within a lawful inclosure is an estray, and may be taken up by any householder in the county, except an unbroken animal between the first day of May and the first day of November, where such unbroken animal is not required to be restrained by a police regulation. [C. '73, §§ 1456, 1464.]

A distinction is here contemplated between a broken and an unbroken animal. The former may be taken up if found running in the highway: *Knudson v. Gieson*, 38-234.

An animal stolen from its owner and afterwards abandoned by the thief may lawfully be treated as an estray: *Kinney v. Roe*, 70-509.

SEC. **2322. Taking up.** If any animal, liable to be taken up as an estray, comes upon any householder's premises, any person may notify him of the fact, and, if he fail to take up such estray for more than five days thereafter, any other householder in the same township may take it up and proceed with it as if taken upon his own premises, if he shall produce proof to a justice of the peace of the service of such notice. All persons taking up stray animals shall state under oath before said justice where the same were taken up. [C. '73, § 1465.]

An estray is an animal whose owner is unknown, and therefore a person cannot take up an animal as an estray when the owner of such animal is known to him. In such case the owner may replevin without tendering costs: *Walters v. Glats*, 29-437.

SEC. **2323. Notices posted.** Any person taking up an estray shall within five days thereafter post up a written notice in three of the most public places in the township, which notice shall contain a full description of said animal, and a statement as to where the same was taken up. Unless such estray shall have been previously claimed by the owner, the person taking it up shall within ten days go before a justice of the peace in the township in which the estray was taken up, or, in case there is no justice in the township, then before the next nearest justice in the county, and

make oath to the correctness of said notice, together with a statement attached thereto as to whether the marks or brands of said animal have been altered to his knowledge, either before or after the same was taken up, which notice shall be recorded by the justice in his estray book, and within five days forwarded by him to the county auditor, who shall enter the same in the estray book in his office, and shall cause a copy of said notice to be posted at the court-house door. [C.'73, § 1466.]

SEC. **2324. Publication.** If the estray is stock, the auditor shall cause the notice to be published once each week for three weeks in some newspaper in the county. [C.'73, § 1468.]

SEC. **2325. Fees and expenses.** The person taking up an estray shall pay the fee of the justice for administering the oath, recording the notice in his estray book, and forwarding the notice to the auditor, and shall also pay to the justice, to be transmitted to the auditor, the fee of the auditor for entering the notice in his estray book, and for posting a copy of the notice, and also, if the estray is stock, the sum of one dollar and fifty cents to cover the expense of publishing the notice, which amount so paid in advance for fees and expenses, together with the compensation allowed by law, shall be refunded to the person taking up such estray by the owner of it, in case restitution is made to him. If two or more estrays are taken up at the same time by the same person, they shall be included in one notice, and but one fee shall be paid therefor, and if only a part of the stock thus included is restored to the owner, a proportionate amount of such fees and expenses shall be refunded. [C.'73, §§ 3822–3; R., § 1520.]

SEC. **2326. Property vests when.** If the estray be stock, and be not claimed by the owner within one year, or, being any other domestic animal, be not claimed by the owner within six months from the time it is taken up, the property therein shall vest in the taker-up, if he has complied with the provisions of this chapter. [C.'73, §§ 1471–2.]

SEC. **2327. Recovery by owner.** At any time before the property in the estray vests in the person who has taken it up, the owner shall be entitled to recover possession of it on paying to the person who has taken it up the compensation to which he is entitled by law, and the fees and expenses which he has paid out in advance, together with any reward which has been offered by the owner, and a reasonable allowance for the expenses of keeping such estray, taking into account the use which the person taking up has had of it, which allowance shall be made by the justice of the peace before whom a proceeding to recover the animal shall be brought in the event the owner and the taker-up cannot agree with reference thereto. [C.'73, § 1474.]

SEC. **2328. Value recovered.** At any time within six months after the property in an estray has vested in the taker-up, the owner shall be entitled on demand to be paid by the said taker-up the value of the estray, not including any increased value which has accrued since it was taken up, after deducting therefrom the compensation, reward, fees and expenses referred to in the preceding section; or the taker-up may, at his option, elect to surrender the estray, if still in his possession, in which case the owner must pay such compensation, reward, fees and expenses. [C.'73, § 1475.]

SEC. **2329. Use or appropriation.** Any person legally taking up an estray may use or work it, if he does so with care and moderation, and does not abuse or injure it. But if any person unlawfully take up any estray, or take up any estray and fail to comply with any of the provisions of this chapter, or use or work it in any manner contrary to this chapter, or work it before having it appraised, or keep it out of the county for more than five days at any one time before he acquires a title to it, he shall forfeit to the county twenty dollars, to be sued for by any person in the county; and the owner of the estray may also recover of such offender double the amount

of the injury sustained, with costs. Estrays adapted thereto may be bred and milked by the taker-up. [C.'73, § 1473.]

SEC. **2330. Finder not liable.** If any estray, legally taken up, escape from the finder or die without any fault on his part, he shall not be liable for the loss. [C.'73, § 1476.]

SEC. **2331. Penalty against finder.** If any person shall sell, trade or take out of the state any estray before the legal title shall have vested in him, he shall forfeit to the owner double its value, and shall also be guilty of a misdemeanor. But the auditor may authorize the taker-up to transfer the estray to another, who shall take the place of his predecessor. [C.'73, § 1477.]

SEC. **2332. Penalty against officer.** If any printer, auditor or justice of the peace fail to perform the duties enjoined upon him in this chapter in relation to estrays, he shall forfeit to the county not less than five nor more than fifty dollars, to be sued for by any person in the county. [C.'73, § 1478.]

SEC. **2333. Bond to release.** Before any property held under this chapter vests in the taker-up it may be released at once upon the owner giving to the holder a bond to be approved by the justice of the peace before whom the proceedings concerning the property have been had, conditioned to pay to the holder of the property, within twenty days after such approval, all costs and damages to which he is entitled on account of his action and loss in the matter. [C.'73, § 1486.]

SEC. **2334. Marks and brands.** The board of supervisors of each county shall procure, at the expense of the county, a book for each civil township, to be in the custody of the township clerk, in which to record the marks and brands of horses, sheep, hogs and other animals. [C.'73, § 1479.]

SEC. **2335. Record.** Any person wishing to mark or brand his domestic animals with any distinguishing mark may adopt his own mark, and have a description thereof recorded by the clerk of the township in which the owner lives, for which such clerk shall receive a fee of twenty-five cents. [16 G. A., ch. 61; C.'73, § 3809; R., §§ 909, 911.]

SEC. **2336. Mark previously recorded.** No person shall adopt a mark or brand previously recorded to another person residing in the same township, nor shall the clerk record the same one to two persons, unless on their joint application. [C.'73, § 1481; R., § 1557; C.'51, § 922.]

SEC. **2337. Abandoned animals.** Any person may take charge of any animal whose owner has abandoned it, or fails to properly take care and provide for it, and may furnish the same with proper shelter, nourishment and care at the owner's expense, and shall have a lien on such animal for the same, which, at the expiration of three months, shall become a perfect title to the property. [C.'73, § 1482.]

SEC. **2338. Food and water supplied.** In case any animal impounded or otherwise confined shall be without necessary food or water for more than twelve successive hours, it shall be lawful for any person, as often as necessary, to enter the pound, inclosure or building, and supply it with necessary food and water so long as it shall remain so confined, and the reasonable cost of the same may be collected by him of the owner of the animal. [C.'73, § 1483.]

SEC. **2339. Diseased animals killed.** The sheriff, constable, police officer, officer of any society for the prevention of cruelty to animals, or any magistrate shall destroy any horse or other animal disabled and unfit for further use. [C.'73, § 1484.]

SEC. **2340. Dogs killed.** It shall be lawful for any person to kill any dog caught in the act of worrying, maiming or killing any sheep or lamb, or other domestic animal, or any dog attacking or attempting to bite any person, and the owner shall be liable to the party injured for all damages

done by his dog, except when the party is doing an unlawful act. The provisions of this section shall not apply to any damage done by a dog affected with hydrophobia. [25 G. A., ch. 84; C. '73, § 1485.]

To justify the killing of a dog under this section he must be not only trespassing but actually engaged in one of the acts mentioned: *Marshall v. Blackshire*, 44–475.

A person who has a dog in his possession or harbors him on his premises, as owners usually do with their dogs, is to be considered the owner within the meaning of this section. In determining the question of ownership the jury must consider the party's former treatment of the animal, his declarations concerning him, and the habits of the dog as to staying at such person's place: *O'Harra v. Miller*, 64–462.

Aside from this provision a person who has in his charge a vicious dog, knowing his character, and fails to restrain him is absolutely liable for an injury inflicted. It makes no difference whether the person has charge of the animal as owner or only as bailee: *Marsel v. Bowman*, 62–57.

The owner of a dog who wilfully and maliciously and with full knowledge of his ferocious and vicious habits and practices makes no effort to restrain him or protect the public from his attacks, is liable to damages caused by the running away of a team frightened by such animal: *Cameron v. Bryan*, 89–214.

It is competent to show the general reputation of the animal as being vicious and dangerous as tending to raise an inference that the owner had knowledge of his vicious propensities: *Ibid.*

This section does not create an absolute liability. Contributory negligence of the person injured may constitute a defense, and therefore in an action to recover damages on account of such an injury, the plaintiff must aver and prove his own care, that is, freedom from contributory negligence: *Gregory v. Woodworth*, 61 N. W., 962; *Stuber v. Gannon*, 67 N. W., 105.

Dogs may be personal property and have value, and such value may be shown in an action for injury thereto: *Anson v. Dwight*, 18–241.

Under provisions not now retained by which a tax on dogs was collected and held as a fund from which to pay damages caused by dogs, *held*, that it was only when the owner was unknown or unable to respond in damages that the injured party was entitled to indemnity out of the special fund, and then not because of any common law liability upon the part of the county. The claims were not strictly claims against the county but against the fund, therefore allowance could be made only by the board of supervisors, and no action could be maintained therefor: *Hodges v. Tama County*, 91–578.

SEC. **2341. Registration of pedigrees.** Any owner or keeper of a stallion or bull for public service, who represents him to be pure bred, thoroughbred, or standard bred, of any breed of horses or cattle that has a stud or herd book for the registration of pedigrees, shall place a copy of a certificate of registration on the door of the stall or stable where such animal is usually kept, giving the registration number, name of breeder, name of animal, and the volume and page of the stud or herd book in which such animal is recorded, and, when requested to do so, shall give to any patron a copy of such certificate. Any violation of the provisions of this section shall be a misdemeanor. [22 G. A., ch. 102.]

SEC. **2342. Publishing false pedigrees.** Any person who shall post or publish or cause to be posted or published, or shall cause to be recorded in any public record kept as a record of pedigrees, any false pedigree of any horse, cattle, sheep or swine shall be guilty of a misdemeanor, and punished by a fine of not less than fifty dollars and costs, and be imprisoned in the county jail till said fine is paid, but not exceeding three months. [24 G. A., ch. 66.]

SEC. **2343. Sheep inspector.** The board of supervisors of any county, when notified in writing by five or more sheep owners of such county that sheep diseased with scab, or any other malignant, contagious disease, exist in such county, shall, at any regular or special meeting, appoint a suitable person as county sheep inspector, who shall take the oath of office, whose duties shall be as hereinafter prescribed, and whose term of office shall be for two years and until his successor is appointed and qualified. [24 G. A., ch. 49, § 1.]

SEC. **2344. Treatment of diseased sheep.** It shall be the duty of the sheep inspector, upon the complaint of three or more sheep owners that any sheep within his jurisdiction have the scab or any other malignant, contagious disease, to immediately inspect and report in writing the result of his inspection to the county auditor, to be filed by him for reference by the

board of supervisors or any party concerned. And if he deem it necessary, in order to prevent the spread of the disease to the sheep of the other owners, he shall command the owner or agent to dip or otherwise treat such diseased sheep, and shall inspect such diseased sheep every month thereafter until such disease shall be eradicated. [Same, § 2.]

SEC. **2345. Expenses.** It shall be the duty of the sheep inspector to dip or otherwise treat such diseased sheep, should the owner or agent refuse to do so, and all costs, expenses and charges, together with a per diem of three dollars per day, shall be charged against the owner of such sheep, and shall be a lien thereon, and may be recovered in an action. [Same, § 4.]

SEC. **2346. Compensation of inspector.** Such compensation for the inspector shall be three dollars per day, and shall be paid by the owner of the sheep, or his agent, if the disease is found to exist. In case no disease is found to exist, the complainants shall pay such fee. [Same, § 5.]

SEC. **2347. Inspection of sheep from outside the state.** Upon the arrival of any flock of sheep within the state from a distance of more than twenty miles outside the boundaries of the state, the owner or agent shall notify the inspector of the county in which such sheep are being held, and he shall inspect the flock at the expense of the owner or agent; and if the sheep are found sound shall furnish the owner or agent a certificate, which shall be a passport to any part of the state; but sheep in transport on board of railroad cars, or passing through the state on such cars, shall not come within the provisions of this section. Any violation of, or failure to comply with, the provisions of this and the four preceding sections by the owner of any sheep shall subject him to a forfeiture of not to exceed one hundred dollars, which shall be a lien on such sheep, and shall be recovered in an action by the county attorney in the name and for the use of the county. [Same, §§ 3, 6.]

SEC. **2348. Bounties.** A bounty of five dollars shall be allowed on the skin of an adult wolf, two dollars on that of a cub wolf, and one dollar on that of a lynx or wild cat, to be paid out of the treasury of the county in which the animal was taken, upon the certified statement of the facts, together with such other evidence as the board of supervisors may demand showing the claimant to be entitled thereto. The person claiming the bounty shall produce such statement, together with the whole skin of the animal, to the auditor of the county wherein such wolf, lynx or wild cat was taken and killed, and he shall destroy or deface the same so as to prevent their use to obtain for the second time the bounty herein provided. Any person who shall demand a bounty on any of the above mentioned animals killed or taken in another state or county, or on a domesticated animal, shall be fined not more than one hundred nor less than fifty dollars. [24 G. A., ch. 37; C. '73, §§ 1487, 1488; R., §§ 2193–5.]

In an action to recover from the county additional bounty offered for wolf scalps, *held*, that the certificate of a justice of the peace showing the delivery to him of the scalps and that he had destroyed the same was sufficient evidence of the fact that such wolves were caught and killed in the county, and that the scalps had ears: *Murray v. Jones County*, 72–286.

SEC. **2349. Compensation under this chapter.** The compensation for services under this chapter shall be as follows:

1. For distraining stock, fifty cents for each head not exceeding two, and twenty-five cents for each additional head taken on one distraint;

2. For distraining each stallion, jack or bull, one dollar; for distraining each boar or buck, fifty cents;

3. For distraining any other animals, twenty-five cents each, not exceeding four, and ten cents for each additional head;

4. For keeping male stock named in section twenty-three hundred and twelve of this chapter, fifty cents a day, and all other stock twenty-five cents a day, from the time the same is taken up;

5. For keeping any other animals, ten cents a day from the time the same is taken up;

6. For posting notices and selling male animals, the same fees as are allowed constables for like services upon execution;
7. For taking up as an estray one head of stock, fifty cents, and twenty-five cents for each additional head at one time;
8. For taking up any other kind of estray animals, fifteen cents each;
9. To the justice of the peace, for all services in each case of taking up estrays, fifty cents;
10. To the county auditor, for all services in each case of estrays, including posting and publishing notice, but not including the fee of the printer, fifty cents;
11. To the township trustees, for posting notices, twenty-five cents, and services not otherwise provided for, the same fees as are allowed in assessing damages done by trespassing animals, with five cents mileage each way;
12. To the township clerk, ten cents per each hundred words entered of record, the same fees for a copy thereof, and in addition twenty-five cents for his certificate thereto, and fifty cents for filing and approving an appeal bond. [C.'73, §§ 3821, 3822; R., § 1520.]

Eradication of Hog Cholera.

[The next five sections constitute a special act entitled: "*An act to co-operate with the United States in eradication of hog cholera or swine plague.*" It took effect by publication May 4, 1897.]

Sec. **2350. Regulations accepted.** The governor is hereby authorized to accept, on behalf of the state, any rules and regulations prepared by the secretary of agriculture of the United States for the eradication of hog cholera or swine plague, in one or more counties of this state, and he, together with the state veterinary surgeon, may coöperate with the government of the United States for the objects of this act.

Sec. **2351. Federal inspectors.** The inspectors of the bureau of animal industry of the United States department of agriculture shall have the right of inspection, quarantine and condemnation of animals affected with hog cholera or swine plague, or suspected to be so affected, or that have been exposed to this disease, and for these purposes are hereby authorized and empowered to enter upon any ground or premises. It is hereby made the duty of sheriffs, constables and peace officers to assist such inspectors when so requested; and said inspectors shall have the same powers and protection as peace officers while engaged in the discharge of their duties.

Sec. **2352. Diseased animals destroyed—compensation.** Whenever any swine in the district specified in the regulations are found to be affected with or to have been exposed to hog cholera or swine plague, said swine may be condemned and destroyed; and the owners of all swine destroyed under the provisions of this act shall be entitled to receive a reasonable compensation therefor, but not more than the actual value in the condition when condemned. In case of failure on the part of the inspector and the owner to agree as to the amount of compensation, the swine shall be appraised by a board of citizens of this state, one of whom may be appointed by the inspector, one by the owner of the swine, and the two thus appointed shall select a third, and these together shall proceed to appraise the amount to be paid to the owner for the animals destroyed. Such appraisal shall be made under oath, and shall be final when the value of the animals does not exceed one hundred dollars, but in all other cases either party shall have the right of appeal to the district court, but such appeal shall not delay the destruction of the diseased or exposed animals.

Sec. **2353. Expenses.** All expenses of quarantine, condemnation and destruction of swine under the provisions of this act, and the expenses of any and all measures that may be used to eradicate hog cholera, shall be

paid by the United States, and in no case shall this state be liable for any damages or expenses of any kind under the provisions of this act.

SEC. **2354. Penalty.** Any person violating any order of quarantine made under this act, or any regulations prescribed by the secretary of agriculture and accepted by the governor of this state for the eradication of hog cholera, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars.

CHAPTER 4.

OF FENCES.

SECTION **2355. Partition fences.** The respective owners of adjoining tracts of land, except timber land not used otherwise than for the timber thereon, from which each derives any revenue or benefit, shall be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year, and if said fence be hedge, the owner thereof shall trim or cut it back once in two years to within five feet from the ground, unless such owners otherwise agree in a writing to be filed with and recorded by the township clerk. [25 G. A., ch. 104; 22 G. A., ch. 95; C. '73, §§ 1489, 1494–5, 1508; R., §§ 1526, 1531–2; C. '51, §§ 895, 900–1.]

There is no provision in the statute for delivering formal possession of a partition fence, and where a contract with reference to such a fence was made, and the person agreeing to pay for his share thereof adopted and acknowledged the benefits of the fence, *held*, that the contract was sufficiently performed to take it out of the statute of frauds: *Bodell v. Nehls*, 85–164.

The partition fences required by this section are only lawful fences. If one desires the fence to be made tight as against sheep and swine he should follow the provision of § 2367: *Panther v. Trauman*, 89–101.

SEC. **2356. Powers of fence viewers.** The fence viewers shall have power to determine any controversy arising under this chapter, upon giving five days' notice in writing to the opposite party or parties, prescribing the time and place of meeting to hear and determine the matter named in said notice. Upon request of any land owner, the fence viewers shall give such notice to all adjoining land owners liable for the erection, maintenance, rebuilding, trimming or cutting back, or repairing of a partition fence, or to pay for an existing hedge or fence. At said time and place the fence viewers shall meet and determine by written order the obligations, rights and duties of the respective parties in such matter, and assign to each owner the part which he shall erect, maintain, rebuild, trim or cut back, or pay for, and fix the value thereof, and prescribe the time within which the same shall be completed or paid for, and, in case of repair, may specify the kind of repairs to be made. [C. '73, §§ 1490, 1492, 1496, 1503; R., §§ 1527, 1529, 1533, 1540; C. '51, §§ 896, 898, 902, 909.]

The duty of maintaining partition fences as provided in this chapter being one created solely by statute, the method prescribed by the statute for enforcing such duty must be followed. A party cannot proceed by action in court instead of by application to the fence viewers: *Lease v. Vance*, 28–509.

It is not necessary that the complaint to the fence viewers be in writing and made matter of record: *Tubbs v. Ogden*, 46–134.

Unless due notice is given to the adverse party of the meeting of the fence viewers to examine the fence the subsequent proceedings cannot constitute the basis of a recovery against him: *Lookhart v. Wessels*, 46–81. As to what is due and sufficient notice, see *Tubbs v. Ogden*, 46–134.

Fence viewers have jurisdiction only when a controversy arises between the respective owners of land about the partition fences: *Anderson v. Cox*, 54–578.

Where the parties have agreed to maintain a certain kind of fence the trustees may determine whether such agreement has been performed and decide as to time and manner of performance: *Huber v. Wilkinson*, 46–458.

The evidence of fence viewers is competent in regard to a matter upon which they are authorized to form an opinion: *Phillips v. Oystee*, 32–257.

An apportionment of the obligation to maintain a partition fence, made after the adoption of the herd law, which is acquiesced

in and complied with by both parties, remains binding on them until in some manner the parties are relieved therefrom: *Barrett v. Dolan*, 71–94.

Where a party has complied with the finding of the fence viewers, he should not be heard to question their jurisdiction to make the finding on the ground of insufficiency of notice to him; at any rate, he should not, in an action on the finding, be allowed to question such jurisdiction without showing that he had no knowledge of the proceedings by reason of the notice not having been served on him: *Brown v. Petrie*, 86–581.

The finding assigning to each his share, etc., need not be in writing, though it would be the better practice to put it in that form: *Talbot v. Blacklege*, 22–572; *Gantz v. Clark*, 31–254.

And *held*, that a party at whose house the viewers met, and who was verbally notified by them of making a division, and, on being asked whether he had received notice, admitted that he had, could not object to want of a written notice. Also *held*, that where parties were verbally notified, and knew of the action and decision of the fence viewers, and such decision was reduced to writing and duly recorded, objection as to want of notice thereof could not be considered: *Talbot v. Blacklege*, 22–572.

Under a former statutory provision, *held*, that notice of a meeting of the fence viewers to determine the value of a fence erected in pursuance of their direction, not being expressly required, was not necessary: *Ibid.*

When exercising power granted to them, the proceedings of fence viewers are to be considered by the court as to all matters of form with at least the same tender and indulgent consideration which is extended to proceedings before a justice of the peace: *Ibid.*

The decision of the fence viewers is not conclusive as to the true division line, and in an action by one land owner against an adjoining owner to recover the proportion of the cost of building a partition fence, in accordance with the direction of the fence viewers, the defendant may show, as a defense, that the fence was not erected upon the true line: *Peschongs v. Mueller*, 50–237.

The adjoining owner is only under obligation to contribute towards the portion of the fence of a neighboring proprietor which is used in common between them and if the action of the fence viewers in apportioning liability is based on an estimate which includes fence not thus in common, it is invalid: *Farmer v. Young*, 86–382.

SEC. **2357. Assignment of portions.** In case a land owner desires to erect a partition hedge or fence when the owner of the adjoining land is not liable to contribute thereto, the fence viewers may assign to each owner the part which he shall erect, maintain, rebuild, and repair, trim or cut back, by pursuing the method provided in the preceding section; but the adjoining owner shall not be required to contribute thereto until he becomes liable so to do, as elsewhere in this chapter provided. [22 G. A., ch. 95, § 1; C. '73, § 1495; R., § 1532; C. '51, § 901.]

Adjoining owners could not be considered as occupying their premises in severalty, within the meaning of § 1496 of the Code of '73, unless there was a partition fence of such character that the proprietor was able to keep his stock upon his own premises. Therefore, *held*, that a hedge which had not attained sufficient perfection to prevent stock from passing through it did not constitute a partition fence, and the owners were therefore holding in common within the meaning of the statute: *Miner v. Bennett*, 45–635.

Where one of the owners of adjacent property inclosed in common intentionally put his animals into the common inclosure, by which the property of the other owner was injured, *held* that he was liable therefor, and it was immaterial whether the fence inclosing the common inclosure was a lawful fence or not: *Broadwell v. Wilcox*, 22–568.

One who purposely turns his cattle upon his land, from which they go upon the land of another, inclosed in common, and do damage, is liable, though there was no intention that they should go upon his neighbor's land. And where the land trespassed upon is inclosed in common with that of the owner of the cattle, without partition fence, by agreement, the liability is the same as though their lands were separated by a lawful partition fence. The agreement stands as and for the fence: *Winters v. Jacobs*, 29–115.

In counties where a herd law is in force a party desiring to use his ground for purposes not requiring a fence in such county, for instance, for raising crops alone, cannot be compelled to contribute to the erection of a partition fence between his land and that of an owner who desires to use his premises for purposes requiring fencing, as, for instance, raising stock: *Syas v. Peck*, 58–256.

Land is to be deemed as not used in common where the use is such that means must be taken to preserve the crops. Where there is no regulation prohibiting stock from running at large, the party desiring to use his land for the raising of crops which must be protected from such stock must contribute to a partition fence. Where it did not appear that stock was not prohibited from running at large, *held*, that such fact would not be presumed for the purpose of establishing error in the judgment below: *Hewit v. Jewell*, 59–37.

SEC. **2358. Default—double damages.** If the erecting, rebuilding or repairing of such fence be not completed within thirty days from and after

the time fixed therefor in such order, the adjoining owner may do or complete the same, and the value thereof may be fixed by the fence viewers, and unless the sum so fixed, together with all fees of the fence viewers caused by such default, as taxed by them, is paid to the land owner so erecting, rebuilding, trimming or cutting back or repairing such fence, within ten days after the same is so ascertained; or when ordered to pay for an existing fence, and the value thereof is fixed by the fence viewers, and said sum, together with the fees of the fence viewers, as taxed by them, remains unpaid by the party in default for ten days, the person entitled thereto may recover double said sum, together with the fees so taxed, in an action by ordinary proceedings. [C.'73, §§ 1491, 1493, 1496, R., §§ 1528, 1530, 1533; C.'51, §§ 897, 899, 902.]

The action of the fence viewers is conclusive where they have jurisdiction; but they cannot conclude a party by determining that to be a partition fence which, in fact, is not: *Bills v. Belknap*, 38-225.

The adjudication by the trustees as to the sufficiency of the fence should be by them sitting as a board, and as a result of personal inspection, but the inspection need not be made by them in a body. A record of the adjudication should be made by the clerk, but it is not necessary that such adjudication be reduced to writing and certified by them. The certificate of the viewers as to the value of the fence should be filed with the clerk and will then be sufficient evidence of complainant's rights and notice to the adverse party: *Tubbs v. Ogden*, 46-134.

Prior to the present Code there was no appeal from the action of fence viewers, but the fact that prior statutes thus made decisions of the fence viewers conclusive did not render the statutes unconstitutional: *McKeever v. Jenks*, 59-350.

The statute does not make the fence viewers sole judges of the sufficiency of the fence in an action brought for damages caused by trespassing cattle. The sufficiency may be proved like any other fact: *Noble v. Chase*, 60-261.

Where a party, without availing himself of the provisions of the statute as to fence viewers, gave notice to an adjoining land owner to build one-half the fence between their lands, and such adjoining owner, in compliance with his demands, built his one-half the fence and afterwards built the remainder of the fence, which should have been built by the party giving the notice, *held*, that the party thus building the fence might recover, from the party serving the notice, the value of one-half the fence built: *Schnare v. Gehman*, 9-283.

SEC. **2359. Service of notice.** The notices by the fence viewers provided for in this chapter may be served upon any owner nonresident of the county where his land is situated, by publication thereof for two consecutive weeks in a newspaper printed in the county in which the land is situated, proof of which shall be made as in case of an original notice and filed with the fence viewers, and a copy delivered to the occupant of said land, or to any agent of the owner in charge of the same.

SEC. **2360. Orders—notice.** All orders and decisions made by the fence viewers shall be in writing, signed by at least two of them, and filed with the township clerk. All notices in this chapter required to be given shall be in writing, and return of service thereof made in the same manner as notices in actions before a justice of the peace. Such orders, decisions, notices and returns shall be entered of record at length by the township clerk, and said record, or a copy thereof, certified to be such by such township clerk, shall be competent evidence in all courts.

SEC. **2361. Division recorded.** The several owners may, in writing, agree upon the portion of partition fences between their lands which shall be erected and maintained by each, which writing shall describe the lands and the parts of the fences so assigned, be signed and acknowledged by them, and filed and recorded in the office of the recorder of deeds of the county or counties in which they are situated. [C.'73, § 1499; R., § 1536; C. 51, § 905.]

The agreement here referred to is one between the owners as to the amount of fence each shall maintain; and *held*, that an agreement that there should be a lane and no partition fences need not be in writing: *Bills v. Belknap*, 38-225.

[But § 1506 of Code of '73, under which this decision was made, is not now retained.]

SEC. **2362. How far binding.** Any order made by the fence viewers, or any agreement in writing between adjoining land owners, when recorded

as in this chapter provided, shall bind the makers, their heirs and subsequent grantees, except, if the land of either shall cease to be used as a means for revenue or benefit, the same shall be inoperative while not thus used. [Same.]

SEC. **2363. Lands in different townships.** When the adjoining lands are situated in different townships in the same or different counties, the clerk of the township of the owner making the application shall select two trustees of his township as fence viewers, and the clerk of the other township one from his township, who shall possess, in such case, all the powers given to fence viewers in this chapter, but all orders, notices and valuations and taxation of costs made by them must be recorded in both townships. [C.'73, § 1500; R., § 1537; C.'51, § 906.]

SEC. **2364. Fence on another's land.** When a person has made a fence or other improvement on an inclosure, which is found to be on land of another, such person may enter upon the land of the other and remove his fence or other improvement and material, upon his first paying, or offering to pay, the other party for any damage to the soil which may be occasioned thereby, and the value of any timber used in said improvement taken from the land of such other party, if any; and if the parties cannot agree as to the damages, the fence viewers may determine them as in other cases; such removal shall be made as soon as practicable, but not so as to expose the crops of the other party. [C.'73, §§ 1501-2; R., §§ 1538-9; C.'51, §§ 907-8.]

SEC. **2365. Line fences.** A person building a fence may lay the same upon the line between him and the adjacent owners, so that it may be partly on one side and partly on the other, and the owner shall have the same right to remove it as if it were wholly on his own land. [C.'73, § 1504; R., § 1541; C.'51, § 910.]

SEC. **2366. Fence on one side of line.** The provisions concerning partition fences shall apply to a fence standing wholly upon one side of the division line. [C.'73, § 1505; R., § 1542; C.'51, § 911.]

If parties use a fence as a partition fence between their farms, it is wholly immaterial whether it is on the exact boundary line, so far as the obligation to maintain the fence or contribute to its construction is concerned: *Card v. Dale*, 67-552.

One of the adjacent proprietors cannot evade the law or defeat it by purposely making his fence a few feet from instead of upon the dividing line: *Talbot v. Blacklege*, 22-572.

Where defendant in inclosing his premises left a private way entirely on his own land, next to his neighbor's, *held*, that he could not be required, in addition to fencing such right of way over the remainder of his own land, to construct his share of the partition fence between such right of way and his neighbor's land: *Bland v. Hixenbaugh*, 39-532.

A party who fences across a public alley in a village, separating his lot from his neighbor's, so as to make use of his neighbor's fence, does not thereby make such fence a partition fence, nor render himself liable to pay for a share thereof: *Anderson v. Cox*, 54-578.

SEC. **2367. Lawful fence defined.** A lawful fence shall consist of three rails of good substantial material, or three boards not less than six inches wide and three-quarters of an inch thick, such rails or boards to be fastened in or to good substantial posts, not more than ten feet apart where rails are used, and not more than eight feet apart where boards are used, or wire either wholly or in part, substantially built and kept in good repair, or any other kind of fence, which, in the opinion of the fence viewers, shall be equivalent thereto, the lowest or bottom rail, wire or board not more than twenty nor less than sixteen inches from the ground, the top rail, wire or board to be between forty-eight and fifty-four inches in height, and the center rail, wire or board not less than twelve inches nor more than eighteen inches above the bottom rail, wire or board; or it shall consist of three wires, barbed with not less than thirty-six iron barbs of two points each, or twenty-six iron barbs of four points each, on each rod of wire, or of four wires, two thus barbed and two smooth, the wires to be firmly fastened to posts not more than two rods apart, with not less than two stays between posts, or with posts not more than one rod apart, without such stays, the top wire to be not more than fifty-four nor less than forty-eight inches in height. All partition fences may be made tight by the party desiring it,

and, at his election, the added material may be removed. In case adjoining owners or occupants of land shall use the same for pasturing sheep or swine, each shall keep his share of the partition fence in such condition as shall restrain such sheep or swine. Upon the application of either owner, after notice given as prescribed in this chapter, the fence viewers shall determine all controversies arising under this section, including the use of partition fences made hog and sheep tight. [18 G. A., ch. 47; 17 G. A., ch. 124; 16 G. A., ch. 101; C. '73, § 1507; R., § 1545.]

A bluff, a hedge, a trench, a wall, a trestle or the like may be held to be in fact a lawful fence: *Hilliard v. Chicago & N. W. R. Co.*, 37-442.

The evidence of fence viewers is competent in regard to a matter upon which they are authorized to form an opinion: *Phillips v. Oystee*, 32-257.

Rev., § 1544, construed in regard to height there required: *Ibid.*

There is no obligation as to the public resting upon the owners of growing crops to fence them; and in an action by the owner of an ox which had broken through an insufficient fence into a cornfield, and died from the effects of eating the corn, brought against the owner of the field for damages, *held*, that defendant was not liable: *Herold v. Meyers*, 20-378.

A party desiring to have a partition fence made tight as against swine and sheep has the right to do so at his own expense and may whenever he chooses restore the fence to the condition of a lawful fence: *Panther v. Trauman*, 89-101.

As to obligation to fence generally, see notes to § 2313.

Prior provisions as to hedges, *held* not to be so construed as to defeat recovery by a party on the ground that on some point on his line a hedge could not be grown for a short distance: *McKeever v. Jenks*, 59-300.

SEC. **2368. Where stock restrained.** This chapter shall be construed the same in counties where stock is restrained from running at large as where not so restrained. [25 G. A., ch. 104; 22 G. A., ch. 95, § 2.]

SEC. **2369. Appeal.** An appeal may be taken to the district court from any order or decision of the fence viewers by any person affected, in the same manner appeals are taken from justices of the peace, except that the appeal bond shall be approved by the township clerk, in which event the township clerk, after recording the original papers, shall file them in the office of the clerk of the district court, certifying them to be such, and the clerk shall docket them, entitling the applicant or petitioner as plaintiff, and it shall stand for trial as other cases.

SEC. **2370. Record kept—fees of clerk.** The township clerk shall enter all matters herein required to be made of record in his record book, and shall receive ten cents for each one hundred words in entering of record and making certified copies of the matters herein provided for, and twenty-five cents additional for his certificate thereto when required.

Before the incorporation of this provision, *held*, that an assignment made by the fence viewers was binding upon the parties thereto without being recorded: *Gantz v. Clark*, 31-254.

CHAPTER 5.

OF LOST GOODS.

SECTION **2371. Taking up rafts, logs and lumber.** If any person shall stop or take up any vessel or water craft, or any raft of logs, or part thereof, or any logs suitable for making lumber or hewn timber, or sawed lumber, found adrift within the limits or upon the boundaries of this state, of the value of five dollars or upwards, including the cargo, tackle, rigging and other appendages of such vessel or water craft, such person, within five days thereafter, provided the same shall not have been previously proved and restored to the owner, shall go before some justice of the peace in the township where such property is found, and make affidavit setting forth the exact description of such property; where and when the same was found; whether any, and if so what, cargo, tackle, rigging or other

appendages were found on board or attached thereto; and that the same has not been altered or defaced, either in whole or in part, since the taking up, either by him or by any other person to his knowledge; and the said justice shall thereupon issue his warrant, directed to some constable of his township, commanding him to summon three respectable householders of the neighborhood, who shall proceed without delay to examine and appraise such property, including cargo, tackle, rigging and other appendages if any there be, and to make report thereof under their hands to the justice issuing such warrant, who shall enter the same, together with the affidavit of the taker-up, at large in his estray book, and within five days shall transmit a certified copy thereof to the county auditor of the proper county, to be by him recorded in his estray book and filed in his office. [C. 73, §§ 1509, 1512; R., § 1506.]

SEC. **2372. Advertisement—title vests—sale.** In all cases where the appraisement of any such property shall not exceed the sum of twenty dollars, the taker-up shall advertise the same on the door of the court-house, and in three other of the most public places in the county, within five days after the appraisement, and if no person shall appear to claim and prove such property within six months of the time of taking up, it shall vest in the taker-up; but if the value thereof shall exceed the sum of twenty dollars, the county auditor, within five days from the time of the reception of the justice's certificate at his office, shall cause an advertisement to be posted on the door of the court-house, and at three other of the most public places of the county, and also a notice to be published for three weeks successively in some public newspaper printed in this state; and if such property be not claimed or proved within ninety days after the advertisement of the same, as aforesaid, the taker-up shall deliver the same to the sheriff of the county wherein it was taken up, who shall thereupon proceed to sell it at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of sale; and the proceeds of all such sales, after deducting the costs and other necessary expenses, shall be paid into the county treasury. [C. '73, § 1513; R., § 1507.]

SEC. **2373. Lost goods—money.** If any person shall find any lost goods, money, bank notes or other things of any description whatever, of the value of five dollars and upwards, such person shall inform the owner thereof, if known, and make restitution thereof without compensation, except the same be voluntarily given; but if the owner be unknown, such person shall, within five days after such finding, take such goods, money, bank notes or other things before some justice of the peace of the county where the property was found, and make affidavit of the description thereof, the time and place when and where the same was found, and that no alteration has been made in the appearance thereof since the finding; whereupon the justice shall enter a description of the property and the value thereof, as nearly as he can determine it, in his estray book, together with the affidavit of the finder, and shall also within five days transmit to the county auditor a certified copy thereof, to be by him recorded in his estray book. [C. '73, § 1514; R., § 1508.]

A trespassing animal should not be treated as an estray, when the party distraining knows who has charge of the animal and where it is kept, although the owner is unknown: *Lyons v. Van Gorder*, 77–600.

SEC. **2374. Disposition of property unclaimed.** In all cases where such lost goods, money, bank notes or other things shall not exceed the sum of ten dollars in value, the finder shall forthwith advertise the same on the door of the court-house and in three other of the most public places in the county where the same was found; and if no person shall appear to claim and prove such money, goods, bank notes or other things within twelve months from the time of such advertisement, the right to such property, when the same shall consist in goods, money or bank notes, shall be vested in the finder; but if the value thereof shall exceed the sum of ten

dollars, the county auditor, within five days from the receipt of the justice's certificate, shall cause to be posted upon the court-house door, and in three of the most public places in the county, a notice thereof, which shall also be published for three weeks successively in some public newspaper printed at the county seat; and if the said goods, money, bank notes or other things be not reclaimed within six months after the finding, the finder, if the same shall consist in money or bank notes, shall deliver the same to the county treasurer, after deducting the necessary expenses hereinafter provided for; if in bills, notes of hand, patents, deeds, mortgages, or other instruments of value, the same shall be delivered to the county auditor to be preserved in his office for the benefit of the owner when an applicant shall prove his title thereto; if in goods or merchandise, the same shall be delivered to the sheriff of the county, who shall thereupon proceed to sell the same at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of such sale; and the proceeds of such sale, after deducting the costs and other expenses, shall be paid into the county treasury. [C.'73, §§ 1510, 1515; R., § 1509.]

SEC. **2375. Advertisement—title vests.** In all cases where any vessel, water craft, logs or lumber shall be taken up, or any goods, money or bank notes shall be found as aforesaid, which shall be of a value less than five dollars, the finder shall advertise the same by posting a notice of such finding in three of the most public places in the neighborhood; but in such cases he shall keep and preserve the same in his possession, and shall make restitution thereof to the owner, without fee or reward, except the same be given voluntarily when the owner claims the same, provided it shall be done in three months from such taking up or finding; but, if no owner shall claim such property within the time aforesaid, the exclusive right to it shall be vested in the finder or taker-up. [C.'73, § 1516; R., § 1510.]

SEC. **2376. Ownership settled.** In any case where a claim is made to property found or taken up, and the ownership of the property cannot be agreed upon by the finder and claimant, they may make a case before any justice of the peace in the county, who may hear and adjudicate it, and if either of them refuses to make such case the other may make an affidavit of the facts which have previously occurred, and the claimant shall also verify his claim by his affidavit, and the justice may take cognizance of and try the matter on the other party having one day's notice, but there shall be no appeal from the decision. This section does not bar any other remedy given by law. [C.'73, § 1517; R., § 1504.]

SEC. **2377. Compensation.** As a reward for the taking up of boats and other vessels, and for finding lost goods, money, bank notes and other things, before restitution of the property or proceeds thereof shall be made, the finder shall be entitled to ten per cent. upon the value thereof, and for taking up any logs or lumber, as hereinbefore described, twenty-five cents for each log not exceeding ten, twenty cents for each exceeding ten and not exceeding fifty, fifteen cents for each exceeding fifty, and fifty cents per thousand feet for sawed lumber; in addition to which allowance the owner shall also be required to pay to the taker-up or finder all such costs and charges as may have been paid by him for services rendered as aforesaid, including the cost of publication, together with reasonable charges for keeping and taking care of such property, which last mentioned charge, in case the taker-up or finder and the owner cannot agree, shall be assessed by two disinterested householders of the neighborhood, to be appointed by some justice of the peace of the proper county, whose decision, when made, shall be binding and conclusive on all parties. [C.'73, §§ 1511, 1518; R., § 1514.]

SEC. **2378. Proceeds.** The net proceeds of all sales made by the sheriff, and all money or bank notes paid over to the county treasurer, as directed in this chapter, shall remain in the hands of the county treasurer in trust for the owner, if any such shall apply within one year from the time the same shall have been paid over; but, if no owner shall appear

within such time, the money shall be forfeited, and the claim of the owner thereto forever barred, in which event the money shall remain in the county treasury for the use of the common schools in said county. [C. '73, § 1519; R., § 1516.]

SEC. **2379. Taker-up not accountable.** If the taker-up of any water craft, logs or lumber, or finder of lost goods, bank notes or other things, shall take reasonable care of the same, and any unavoidable accident happens thereto without the fault or neglect of the finder or taker-up before the owner shall have an opportunity of reclaiming the same, such taker-up or finder shall not be accountable therefor, if in cases of accident as aforesaid he within ten days thereafter shall certify the same to the county auditor, who shall make an entry thereof in his estray book. [C. '73, § 1520; R., § 1517.]

The sole object of this notice to the auditor is to advise the owner of the property, when examining the estray book, of the loss or accident, and when he has actual knowledge of the loss without such notice there is no necessity for it: *Howes v. Carver*, 3–257.

SEC. **2380. Penalty for selling.** If any person shall trade, sell, loan or take out of the limits of this state any such property taken up or found as aforesaid, before he shall be vested with the right to the same according to the foregoing provisions, he shall forfeit and pay double the value thereof, to be recovered by any person in an action, one-half of which shall go to the plaintiff and the other half to the county. [C. '73, § 1521; R., § 1518.]

SEC. **2381. Penalty for failure to comply.** If any person shall take up any boat or vessel, or any logs or lumber, or shall find any goods, money, bank notes or other things, and shall fail to comply with the requirements of this chapter, he shall forfeit and pay the sum of twenty dollars, to be recovered in an action by any person who will sue for the same, one-half for the use of the person suing and the other half to be deposited in the county treasury for the use of the common schools; but nothing herein contained shall prevent the owner from having and maintaining his action for the recovery of any damage he may sustain. [C. '73, § 1522; R., § 1519.]

A failure to take the steps here contemplated will not render the finder guilty of larceny under § 4839, where the owner was not known at the time of the taking: *State v. Dean*, 49–73.

CHAPTER 6.

OF INTOXICATING LIQUORS.

SECTION **2382. Manufacture, sale or keeping for sale prohibited.** No one, by himself, clerk, servant, employe or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employe or agent engaged or aiding in any violation of this chapter shall be charged and convicted as principal. [23 G. A., ch. 35, § 2; 22 G. A., ch. 71, § 1; 20 G. A., ch. 8, § 1; 20 G. A., ch. 143, §§ 10, 11; 17 G. A., ch. 119, § 4; C.'73, §§ 1523, 1540–2, 1554–5; R., §§ 1559, 1562, 1581, 1587; C.'51, §§ 929–31.]

What liquors: The sale of cider when intoxicating is forbidden. These provisions include intoxicating liquors of every kind: *State v. Hutchinson*, 72-561.

The inference from these provisions is that there is but one kind of beer and that it is intoxicating, and a liquor denominated beer, without anything in its name tending to show it is not to be intoxicating, may be refused by the common carrier for tranportation: *Milwaukee Malt Extract Co. v. Chicago, R. I. & P. R. Co.*, 73-98.

The statute classes beer as an intoxicating liquor; and if there are kinds of beer not in fact intoxicating, the burden is upon the person charged with the sale of such liquor to show that it is not in fact that kind, if he so claims: *State v. Cloughly*, 73-626.

The term intoxicating liquors includes beer without regard to the question whether or not beer is an intoxicating beverage: *State v. Lindoen*, 87-702.

Alcohol is an intoxicating liquor, and however it may be diluted it is within the terms of the statute, when used as a beverage. Proof that liquor in question contains alcohol is sufficient to show that it is an intoxicating liquor: *State v. Intoxicating Liquors*, 76-243.

So long as liquors retain their character of intoxicating liquors capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall within the provisions of the statute prohibiting the sale of such liquors. But when they are so compounded with other substances as to lose the character of intoxicating liquors and are no longer desirable for use as a stimulating beverage, and are, in fact, medicine, then their sale is not prohibited: *State v. Laffer*, 38-422.

Under former provisions by which the manufacture and sale of beer, cider from apples, or wine from grapes, currants or other fruits grown in this state, was not prohibited, *held*, that wine was presumed to be an intoxicating liquor, unless it was shown that it was manufactured from grapes or fruit grown in this state: *Worley v. Spurgeon*, 38-465.

Held, also, that, in an indictment for the sale of wine made from fruit grown out of the state, an allegation that it was intoxicating was mere surplusage: *State v. Curley*, 33-359.

The distinction formerly made between wine made from native and that from foreign grapes, did not render the regulations as to sale of the latter void, as an improper regulation of interstate commerce in violation of the federal constitution: *State v. Stucker*, 58-496.

The meaning put by former provisions upon the term intoxicating liquors, so as to include those that were spirituous and vinous, excluding malt liquors, *held* to be purely arbitrary, as the latter are known to be in fact intoxicating: *Jewett v. Wanshura*, 43-574.

Also *held*, that the limitation in regard to the place where the materials were grown did not apply to beer: *State v. Brindle*, 28-512.

A defendant relying upon such proviso as to beer and native wine must allege and prove the facts bringing him within its provisions, and it was not necessary that the prosecution charge and prove, in the first instance, that the case did not fall within the proviso: *State v. Stupp*, 29-551; *State v. Curley*, 33-359; *State v. Miller*, 53-84. See § 2424.

The statute does not make knowledge on the part of the seller of the character of the liquor an element of the offense. If liquor which is in fact intoxicating is sold intentionally by one having no authority to sell the offense provided for by the statute is committed: *State v. Valure*, 64 N. W., 280; *State v. Lindoen*, 87-702.

Statutes constitutional: The provisions of the Code of '51 prohibiting the sale of intoxicating liquors by the glass, *held* constitutional: *Zumhoff v. State*, 4 G. Gr., 526.

The provisions of the prohibitory liquor law are not in conflict with the constitution nor laws of the state nor the United States: *Santo v. State*, 2-165; *State v. Carney*, 20-82; *State v. Baughman*, 20-497; *State v. Jordan*, 72-377.

As to the effect of United States internal revenue license, see notes to § 2427.

The statute prohibiting the sale of intoxicating liquors cannot be said to deprive the owner of his property therein without compensation in violation of constitutional guaranties, unless such property was owned by him prior to the prohibitory act of 1855: *McLane v. Leicht*, 69-401.

The power of the legislature to enact laws for the suppression of the general traffic in intoxicating liquors within the state has been recognized and affirmed by this court for more than twenty-five years. It has uniformly been held that the state, in the exercise of its police power, might regulate the traffic, or prohibit it entirely; and when the power to prohibit the traffic is recognized, the power to enact whatever laws may be necessary to make the prohibition effectual follows necessarily: *McLane v. Bonn*, 70-752.

The effect of the statute is to prohibit manufacture of intoxicating liquors for sale outside the state. And in this respect it is not unconstitutional as a regulation of interstate commerce: *Kidd v. Pearson*, 128 U. S., 1.

The state may prohibit or restrict the manufacture of intoxicating liquors within her limits and prohibit all sale and traffic in them within the state, without abridging the liberties or immunities of citizens of the United States or depriving any person of property without due process of law: *Ibid.*

Laws regulating the sale of intoxicating liquors are regarded as police regulations, and the state may in its discretion prohibit the sale of one kind of liquor and allow the sale of another kind, and the fact that it prohibits the sale of wine from foreign grapes, while permitting the sale of native wine, will not render the legislation unconstitutional as an improper regulation of interstate commerce: *State v. Stucker*, 58-496.

The restrictions as to the sale of intoxicating liquors were adopted not for the purpose of securing an undue advantage to the

citizens of the state, but for the purpose of preventing violations of the prohibitory laws of the state, and although, in effect, the citizens of other states are debarred from selling in Iowa liquors to be resold for legal purposes, this is but an incidental result of a valid exercise of police power by the state, and no provision of the federal constitution is thereby violated: *Kohn v. Melcher*, 29 Fed., 433.

The prohibitory law as amended so as to cover manufacture and sale of beer which was previously legal is constitutional. (Following *Mugler v. Kansas*, 123 U. S., 623): *Kaufman v. Dostal*, 73–691.

Prior provisions prohibiting sales within two miles of city limits, *held* constitutional: *State v. Shroeder*, 51–197; *Centerville v. Miller*, 51–712; *Toledo v. Edens*, 59–352. And as to such statutory provisions see, also, *Albia v. O'Harra*, 64–297.

What selling or keeping prohibited: A sale of liquor to be used as a beverage is a violation of law, regardless of the quantity to be used and the extent to which it is to be diluted. Therefore, *held*, that the sale of beer by one having a permit for use in manufacturing a beverage not intoxicating was illegal: *State v. Yager*, 72-421.

One having no authority to sell to any person for any purpose cannot show by way of justification that the liquors were sold for an innocent purpose. The allegation in an indictment of sales "as a beverage" *held* to be surplusage so far as the purpose was stated: *Craig v. Plunket*, 82–474.

When liquors are so compounded with other substances as to lose their characteristics as intoxicating liquors, and are no longer desirable for use as a stimulating beverage, their sale is not prohibited; but if, notwithstanding other ingredients have been mixed therewith, they retain their character and are capable of use as a beverage, they fall under the ban of the law. The question is one for the jury: *State v. Leffer*, 38–422.

Even when manufacturing was lawful, the manufacturer was not authorized to sell at retail without a permit: *Becker v. Betten*, 39–668.

No one holding a permit has any right to sell or dispense intoxicating liquors for any purpose, and physicians are not excepted, though selling as a medicine in good faith and according to the needs of their patients: *State v. Benadom*, 79–90. [But now see § 2401.]

Any person has the right to own and keep liquors unless he owns and keeps them with intent to sell without lawful authority: *Wakeman v. Chambers*, 69–169.

The offense under this section and that under § 2384 are not the same, and a conviction for one will not bar a prosecution for the other: *State v. Graham*, 73–553.

As the keeping of intoxicating liquors for sale within the state is unlawful in itself, unless the party thus keeping and offering for sale is authorized to sell, an indictment charging the keeping of intoxicating liquors in the state with intent to sell the same will be sufficient, and the indictment need not negative the authority to sell: *State v. Collins*, 11–141.

Held, that the expression in an indictment, "kept intoxicating liquors to sell," was sufficient to charge the offense: *Vaughan v. State*, 5–369.

An indictment charging that "defendant did keep and was concerned, etc., in owning and keeping intoxicating liquors to sell," *held*, to charge but one offense: *Ibid.*

An information charging defendant with keeping intoxicating liquors "for the purpose of sale," instead of "with intent to sell the same," as provided in the statute, *held* sufficient to support a conviction: *State v. Mohr*, 53–261.

One who acts as agent or clerk of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished under this section: *State v. Mercer*, 32–405.

Where a druggist has a permit to sell intoxicating liquors, but makes unlawful sales, the fact that the owning and keeping is with intent to make unlawful sales, and therefore unlawful in itself, may be presumed: *State v. Sartori*, 55–340.

To authorize the forfeiture of liquors it must be shown that they are kept with intent to sell in violation of law: *State v. Harris*, 36–136.

The keeping of intoxicating liquors with no intent to sell within the state in violation of law is not forbidden. In the absence of such intention the possession is lawful and will be protected: *Niles v. Fries*, 35–41.

This section prohibits the manufacture and sale of intoxicating liquors except as permitted or authorized by statute, and manufacture for exportation from the state not being permitted or authorized, such manufacturing is illegal even though the manufacturer holds a permit to manufacture for lawful purposes: *Pearson v. International Distillery*, 72–348. And see *Craig v. Werthmueller*, 78–598.

Since the passage of the prohibitory liquor law cities have no power to pass laws regulating the business of keeping saloons for the sale of intoxicating liquors, but they may regulate saloons kept for other purposes: *Clinton v. Grusendorf*, 80–117.

Original packages: Prior to the passage of the act of congress known as the Wilson bill subjecting liquor imported into a state to state regulations, a state had no power to prohibit the sale of intoxicating liquors, sold by the importer in the original packages in which they were brought into the state (overruling *Collins v. Hills*, 77–181; *Grousendorf v. Howot*, 77–187; *Leisey v. Hardin*, 78–286; *State v. Zimmerman*, 78–614; *State v. Bowman*, 79–556): *State v. Caldwell*, 81–759; *Leisey v. Hardin*, 135 U. S., 100.

Under the facts in a particular case, *held*, that bottles of liquor constituted original packages; *State v. Coonan*, 82–400.

In a particular case, *held*, that a barrel of liquor addressed to defendant, being transported for delivery by a carrier, was an original package: *State v. Corrick*, 82–451.

A sale of beer in bottles which are imported into the state in cases is a sale in the original package: *State v. Miller*, 86–638.

Where liquors were sold in bottles, which were opened by the purchasers, the contents

being drunk on the premises, *held*, that this was not a sale in original packages: *Stommel v. Timbrel*, 84-336.

Where it appeared that defendant had liquor brought into the state in bottles, and sold it by the bottle to customers, who opened and drank it on the premises, *held*, that the case was not one of selling in original packages, but of keeping a saloon, and defendant was properly convicted: *Hopkins v. Lewis*, 84-690.

The decision in *Leisey v. Hardin*, 135 U. S., 100, did not declare the state prohibitory law invalid *in toto*, and upon the passage of the the Wilson bill it became effectual, without re-enactment, as applied to liquors sold in original packages: *In re Spickler*, 43 Fed., 653; *In re Jordan*, 49 Fed., 238. And see *In re Rahrer*, 140 U. S., 545.

The act of congress so far changes the law under which *Leisey v Hardin supra* was decided as to make liquors brought into the state a part of the general property of the state and subject to the state law: *Fred Miller Brewing Co. v. Stevens*, 71 N. W., 186.

Buyer not punished: The statutes punishing the illegal sale of intoxicating liquor are applicable to the seller and not to the buyer of such liquors, and the buyer is not guilty of a crime as accessory to the sale in such sense that he may be excused from testifying as to his purchase of such liquor on the ground that such testimony would tend to criminate him: *Wakeman v. Chambers*, 69-169. And see § 2424.

One who buys intoxicating liquor from a person illegally selling the same does not become an accomplice in the crime of the illegal sale, and therefore the speaking of words charging a person with such purchase does not constitute slander actionable *per se: Sterling v. Jugenheimer*, 69-210.

Property in intoxicating liquors: While the commerce in intoxicating liquor as an article of beverage is unlawful, its character as property is not thereby destroyed; and where such liquor was seized on execution for the debt of one not its owner, *held*, that the owner might recover it by replevin, although it was kept for sale in violation of the statute: *Monty v. Arneson*, 25-383.

That intoxicating liquors are held for an unlawful purpose is no answer to an indictment for stealing the same: *State v. May*, 20-305.

That liquors are unlawfully kept is not a defense to an action of trespass for destroying them: *Turner v. Hitchcock*, 20-310.

Where liquor had been seized by an officer under an information which had subsequently been held defective and a return of the liquor ordered, *held*, that in an action by the owner against such officer to recover damages for a failure to return the property as so ordered, the plaintiff could not recover without proving that he owned and kept the liquor with a lawful intent: *Walker v. Shook*, 49-264.

In an action against a common carrier to recover the value of intoxicating liquors lost or destroyed by it, it is necessary for plaintiff to prove that he owned or possessed such liquors with lawful intent: (Overruling *Bowen v. Hale*, 4-430): *Sommer v. Cate*, 22-585.

Intoxicating liquors cannot be recovered by the owner unless he shows that they were in his possession with lawful intent, and that he was illegally deprived of them: *Funk v. Israel*, 5-438, 452.

The keeping of intoxicating liquors with no intent to sell within the state in violation of law is not forbidden. In the absence of such intention the possession is lawful, and will be protected. And it is immaterial that they were bought of one not authorized to sell: *Niles v. Fries*, 35-41.

Any person has the right to own and keep liquors unless he owns and keeps them with intent to sell them without lawful authority: *Wakeman v. Chambers*, 69-169.

As to contracts and payments for intoxicating liquors, see § 2423.

Venue: The jury may find from facts and circumstances testified to by the witnesses that the illegal sale of liquor was in the county of the prosecution although the evidence as to that fact is not explicit: *State v. Hopkins*, 62 N. W., 656.

Where orders for intoxicating liquors are taken by an agent in one county, subject to approval by the principal in another county, the sale in either county being illegal, the offense is partly committed in each county (under § 5157), and the courts of either have jurisdiction of the offense: *State v. Kriechbaum*, 81-633.

Without permit: This section contains the only provision under which a party can be punished criminally for an act of sale of intoxicating liquors, and by its express language it is applicable only to persons not holding permits. Persons holding permits are subject to the penalties prescribed for owning or keeping liquors with unlawful intent, or for keeping or maintaining a place in which such liquors are sold or kept for sale unlawfully: *State v. Douglass*, 73-279. [See § 2399.]

Sales by clerks: Under provisions for the punishment of the illegal sale of intoxicating liquors, *held*, that the fact that defendant acted as the clerk of another or as volunteer and without pecuniary reward would be no defense, clerks being liable equally with their principals. Nor would it be any defense that the principal has been convicted for the same act: *State v. Finan*, 10-19.

One who acts as agent or clerk of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished under this section: *State v. Mercer*, 32-405; *Cantril v. Sainer*, 59-26.

The holder of a permit is liable for illegal sales made by his clerk: *State v. McConnel*, 90-197.

Where the only evidence of illegal sale was the testimony of a clerk in defendant's drug store that he sold at that store a half-pint of liquor to a certain person, it not appearing that defendant knew of such sale or kept intoxicating liquors for sale, or that there were any such in his possession or kept by him for any purpose, *held*, that the conviction could not be sustained: *State v. Findley*, 45-435.

The provision of this section does not make an agent liable under § 2423 for money paid for intoxicating liquors, sold in violation of law, where the agent does not actually receive such money or purchase price: *Schober v. Rosenfield*, 75–455.

An agent who solicits orders for intoxicating liquors in one county, subject to the approval of his principal in another county, is subject to prosecution for illegal sales, although such sales are not complete, and regardless of whether or not the principal holds a permit: *State v. Kriechbaum*, 81–633.

Where orders for liquor were taken in this state for a firm doing business in another state who reserved the right to accept or refuse such orders, *held*, that the sales were not made in Iowa, and that the person taking such order was not punishable for illegal sales: *State v. Colby*, 92–463.

Giving: Under a similar statutory provision, *held*, that the giving of intoxicating liquor to another was not an offense unless it was "in consideration of the purchase" of other property as specified in the statute, and that the fact that the liquors were so given, if such was the case, should be averred: *State v. Finan*, 10–19.

There is no provision making a gift of intoxicating liquors not in consideration of the purchase of any other property illegal, except the provisions of the section with reference to minors: *State v. Hutchins*, 74–20. [See § 2403.]

SEC. **2383. Penalty—second offense.** Whoever is found guilty of violating any of the provisions of the preceding section, for the first offense shall pay a fine of not less than fifty nor more than one hundred dollars, and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense he shall pay upon conviction thereof a fine of not less than three hundred dollars nor more than five hundred dollars, and costs of prosecution, or be imprisoned in the county jail not to exceed six months. [20 G. A., ch. 143, §§ 1, 10, 11; C. '73, §§ 1525, 1540, 1542; R., §§ 1561–2.]

Under a previous act, *held*, that while a person holding a permit was liable on his bond for selling for improper purposes, he was also liable to a criminal prosecution: *State v. Adams*, 20–486.

A person selling without a license may also be punished for the crime of keeping a nuisance under § 2384, either independently of or in addition to the punishment for the illegal sale: *State v. Waynick*, 45–516.

Where a previous conviction was not shown, *held*, that it was erroneous to impose a greater fine than authorized for the first offense: *Walters v. State*, 5–507.

But where, on appeal, the prosecution offered to remit the excess, the supreme court modified the judgment in accordance with such offer and affirmed it: *State v. Shaw*, 23–316.

Under the section as it now stands the length of imprisonment for non-payment of a fine is as provided generally in § 5440: *Ex parte Tuicher*, 69–393.

The provision that defendant shall stand committed until the fine and costs are paid does not take the offense out of the jurisdiction of a justice of the peace. Although such imprisonment may extend beyond thirty days, it is not as a punishment for the offense but only as a method of enforcing the payment of the fine: *Albertson v. Kriechbaum*, 65–11.

This section so far as it provides for imprisonment for failure to pay the costs of a prosecution is not unconstitutional as authorizing imprisonment for debt in a civil action: *Boyer v. Kinnick*, 90–74.

SEC. **2384. Nuisance—penalty—abatement—attorney's fee.** Whoever shall erect, establish, continue or use any building, erection or place for any of the purposes herein prohibited, is guilty of a nuisance, and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and the building, erection or place, or the ground itself, in or upon which such unlawful manufacture or sale or keeping with intent to sell, use or give away said liquors is carried on or continued or exists, and the furniture, fixtures, vessels and contents, are also declared a nuisance, and in addition to the penalties hereinbefore affixed, shall be abated as hereinafter provided. [21 G. A., ch. 66, § 4; 20 G. A., ch. 143, § 12; C. '73, § 1543.]

What constitutes nuisance: The act of selling, or keeping with intent to sell, in a building or place, as here defined, is a nuisance, while the keeping with intent to sell and selling, as defined by § 2382 is not a nuisance: *State v. Harris*, 64–287.

In order to convict for a nuisance it must be shown that the liquors were sold or kept with intent to sell in a building or place frequented by persons desiring to procure intoxicating liquors: *Ibid.*

This section provides a punishment for keeping nuisances for the sale of intoxicating liquors, which is a different crime from that of the unlawful sale, and the first as well as subsequent offenses are punishable by indict-

ment: *State v. Howarth*,70-151; *State v. Adams*, 81-595.

It is illegal for any person to sell for any purpose intoxicating liquors without a permit from the board of supervisors, and the use of a building for such illegal sales is a nuisance. So *held* as to a druggist selling intoxicating liquors for medicinal purposes: *State v. Waynick*, 45-516.

To constitute the offense of nuisance it is not sufficient that defendant used and kept a place with the intent and for the purpose of selling intoxicating liquors therein contrary to law. It must be charged and shown that he manufactured, or sold, or owned and kept with intent to sell, contrary to law. The presence of the liquor in the building is essential: *State v. Hass*, 22-193; *State v. Harris*, 27-429; *State v. Tierney*, 74-237.

A previous conviction or acquittal of the crime of owning or keeping with intent to sell will not bar a prosecution for a nuisance: *State v. Harris*, 64-287.

An instruction that any building where any kind of intoxicating liquors is kept for the purpose of sale or is sold is a nuisance is erroneous as not referring to lawful sales under permit. But such error will be without prejudice where it does not appear that defendant had any permit to sell: *State v. Wambold*, 74-605.

To constitute the crime of nuisance in unlawfully keeping for sale and selling intoxicating liquors, the existence of intoxicating liquors in the place described is essential; but where there was no question on the trial that liquors were thus kept, *held*, that an instruction was not erroneous which did not call the attention of the jury to the necessity of proving that fact: *State v. Shank*, 79-47.

To constitute an offense under this section, it is not necessary that the intent be to sell in and from the building where kept. But a keeping for illegal sale elsewhere within the state will be sufficient. If one house is used for the sale of liquors which are kept in another, both are nuisances: *State v. Viers*, 82-397.

This section is designed to prevent and punish the erection, maintenance and use of buildings or other places for the purpose of doing therein those things which are prohibited by the preceding section. It does not require that such places be resorted to by persons desiring to buy intoxicating liquors in order to constitute the crime of a nuisance, and the offense may therefore be committed in a place kept and resorted to for other purposes: *State v. McEnturff*, 87-691.

Proof of a single unlawful sale within the building is sufficient to make out a place kept for that purpose and therefore a nuisance: *State v. Russell*, 64 N. W., 281.

An instruction which stated to the jury that "under the law of this state, any person who, without a permit, sells intoxicating liquors in a building or place, or keeps intoxicating liquors in such place with intent to sell the same, is guilty of a nuisance," *held* not to state the law accurately, as it is the keeping of the place, rather than the doing of the acts, which constitutes the offense; but in view of the evidence and other instructions, the jury could not have been misled, and defendant was in no manner prejudiced by the instruction: *State v. Price*, 75-243.

The giving away may constitute a nuisance if an invasion of the law :*State v. Fleming*, 86-294.

Pharmacists: In an action to enjoin a liquor nuisance, where it was shown that defendant, a registered pharmacist, had made illegal sales himself, and that as a man possessed of ordinary intelligence and business tact he must have known that his clerk had made illegal sales, *held*, that the fact that the clerk who had made the sales was discharged a few weeks before the commencement of the suit to enjoin the nuisance, when no other change in the business was shown, would not defeat the action on the ground that no nuisance existed when it was commenced: *Elwood v. Price*, 75-228.

Where a witness testifies that he purchased liquor of a registered pharmacist, the state should be allowed to interrogate him further as to the object for which the purchase was made, and inquire into the facts for the purpose of showing that the alleged object was a mere pretense, and that the seller knew or had grounds for knowing that fact: *State v. Cummins*, 76-133.

It is for the jury to determine, in a prosecution against a pharmacist for illegal sales, whether from the frequency of sales to the same persons, and from the appearance of the persons to whom the sales were made, and from the fact as to whether the sales were with or without a prescription of a physician, it appears the sales were or were not for the actual necessities of medicine: *State v. Huff*, 76-200.

Where defendant was indicted and convicted for keeping a nuisance, and it appeared that he held a certificate as pharmacist and a valid permit to sell intoxicating liquors for lawful purposes, and where there was no evidence tending to establish unlawful sales, *held*, that the verdict should have been set aside upon defendant's motion: *State v. Flusche*, 79-765.

Where a registered pharmacist was convicted of keeping a nuisance, and it appeared that he held a permit under a statute authorizing registered pharmacists to sell intoxicating liquors for medicines only, without having obtained a permit from the board of supervisors, *held*, that sales for any other purpose were forbidden and punishable under this section: *State v. Salts*, 77-193.

Under the evidence, *held*, that it sufficiently appeared that the place of business of defendant as a registered pharmacist was commonly resorted to for the purpose of procuring intoxicating liquors as a beverage, and that it was properly suppressed as a nuisance: *State v. Oder*, 92-767.

One holding a permit, but selling for unlawful purposes, is subject to punishment under this section: *State v. Webber*, 76-686. And see § 2399.

Sales by clerk: A barkeeper or clerk, having no interest in the business, may be convicted of the crime of nuisance for the

mere sale by him of intoxicating liquors in a building used for that purpose: *State v. Stucker*, 33–395.

Where liquors are lawfully kept for sale and with intent to sell them for lawful purposes, an illegal sale by an agent without the knowledge or consent of the principal will not render such principal criminally liable for keeping a nuisance: *State v. Hayes*, 67–27.

Under particular facts, *held*, that the defendant was not interested as principal in the business of which complaint was made, but that his only connection therewith was that of a wholesale seller to the person who kept the place where the liquors were sold, and that a decree against defendant was improper: *State v. Hart*, 84–215.

One who voluntarily and as an accommodation makes illegal sales of liquor for another is guilty of nuisance under this section: *State v. Herselus*, 86–214.

Owner of premises: The allegation of knowledge of the purpose for which the premises were being used not being denied by the owner of the premises, no evidence of that fact is necessary in order to sustain the decree against him: *Overton v. Schindele*, 85–715.

Where it appeared that the owner of premises had knowledge of and permitted the violation of an injunction by an occupant of a building, *held*, that he was properly punishable for contempt: *DeFrance v. Traverse*, 85–422.

In a particular case, *held*, that there was nothing to require the court to assume the existence of a homestead right in the premises, and they were properly subjected to a lien for the fine: *Ibid.*

Where it appeared that the owner knew of the unlawful use to which his premises were being put, or was wilfully ignorant thereof, *held*, that an injunction might properly be granted against him: *State v. Grim*, 85–415.

In a particular case, *held*, that the evidence showed that the building complained of as a nuisance was built upon the defendant's lot, without his knowledge or consent, and had not been occupied under a lease, and that defendant had no knowledge that it was being used for illegal sales of liquors: *State v. Lawler*, 85–564.

In a particular case, *held*, that there had not been such knowledge and consent on the part of the owner of the premises as to render him liable: *Morgan v. Koestner*, 83–134.

In such case the premises where the liquors are kept and sold should be declared a nuisance, and the nuisance abated regardless of the liability of the owner: *Ibid.*

Where it appeared that defendant and his family occupied parts of the premises as a residence and the evidence left no doubt but that defendant was conducting the illegal business that was there carried on, *held*, that the court did not err in refusing to receive in evidence a deed for the premises from defendant to his wife, as such deed would not raise the presumption that the wife and not the defendant was the proprietor of the business illegally conducted: *State v. Neeson*, 64 N. W., 409.

Indictment: The offense of nuisance may be committed by the manufacture, or the sale, or the keeping with intent to sell, contrary to law. While an indictment charging the offense as committed in any of these three ways would be sufficient, yet one charging its commission by any two, or all three, of the specified unlawful acts, charges but one offense, and is not bad for duplicity: *State v. Becker*, 20–438; *State v. Baughman*, 20–497.

The indictment may charge selling and keeping for sale where both charges have reference to the same building: *State v. Niers*, 87–723.

An indictment charging the establishing, continuing and using "a building, erection, place and railroad car with intent," etc., charges the keeping in a building also in a railroad car and is therefore objectionable on the ground of duplicity as charging distinct offenses: *State v. Chapman*, 62 N. W., 659.

Two indictments charging the offense as committed in two different ways charge the same and not two separate offenses; and the fact that the acts set out in the indictments are charged as committed at different times is not conclusive that the offenses are separate and not the same, since the time need not be proved as alleged: *State v. Layton*, 25–193.

An allegation that a certain building was used by defendants as a place for the sale of intoxicating liquors, and that they did then and there keep said intoxicating liquors for sale in said building with intent to sell, *held* sufficient without further averment that said building was under their control: *State v. Schilling*, 14–455.

An indictment charging the offense as committed by using and keeping a room and place for the purpose of selling and by selling therein intoxicating liquors in violation of § 2382, *held* sufficient: *State v. Freeman*, 27-333.

And so *held*, also, where the indictment, similar to the foregoing, charged the acts as "contrary to law," without specifying the section: *State v. Allen*, 32–248.

It is not necessary that the nuisance should continue up to and exist at the time of the indictment to make it punishable: *State v. Schilling*, 14–455.

An indictment charging the keeping and using of a "certain building or place," or "a certain frame building," for the purposes prohibited, is sufficiently definite: *Ibid.; State v. Kreig*, 13–462.

A matter of local description, though it need not have been stated, must be proved as laid: *State v. Crogan*, 8–523.

But on the trial of an indictment under this section, which charged the use of a building, etc., "next door west of Chamber's store," etc., while the proof was that the building was next door west from "Chamberlain's store," the court was equally divided as to whether the variance was fatal: *State v. Verden*, 24–126.

In an indictment for the crime of nui-

sance under this section it is not necessary that the premises be particularly described, although such description may be necessary where an order of abatement is desired: *State v. Waltz*, 74-610; *State v. Arnold*, 67 N. W., 252.

Where the indictment charged that the nuisance consisted in keeping a place for the illegal sale of liquors consisting of a three-story brick building, and the proof showed that the three-story part on the first floor was used as a cigar stand and restaurant, while the one-story addition used in connection with the three-story part as a kitchen was the place where the liquors were kept, *held*, that there was not a fatal variance between the allegations and the evidence: *State v. Gurlagh*, 76-141.

The indictment need not state the names of the persons to whom liquor was sold: *State v. Becker*, 20-438; *State v. Jordan*, 39-387.

The statute which prohibits the sale of beer and the keeping of that liquor for sale did not take effect until July 4, 1884, and where an instruction stated that defendant might be convicted if the evidence showed that he maintained a nuisance within three years before the finding of the indictment, March 24, 1887, *held*, that it was erroneous as permitting a conviction of defendant on proof that he did an act which was not prohibited by law when done: *State v. Jacobs*, 75-247.

An indictment for maintaining a nuisance which charged that defendant did unlawfully establish, keep, use and maintain a certain building and place in which he owned and kept intoxicating liquor with intent to sell and give the same away in violation of law, and did at the aforesaid times and place so unlawfully sell and give away such intoxicating liquor, *held*, to sufficiently charge the keeping of the place in which the forbidden acts were done: *State v Price*, 75-243.

Where two indictments were returned for the crime of nuisance as here described, one for maintaining such nuisance prior to the date of the taking effect of the act of the Twenty-first General Assembly amending this section, and the other for a time subsequent to such amendment, *held*, that an acquittal under an indictment for the time subsequent to the taking effect of the statute would not bar a prosecution under the other indictment: *State v. Webber*, 76-686.

The allegation in the indictment of a certain time within which the nuisance was maintained will not limit the prosecution to proof of maintenance of the nuisance during the time specified, but evidence is admissible as to the nuisance prior to the time specified but within the statutory limitation: *State v. Arnold*, 67 N. W., 252.

Venue: Where an indictment charged the keeping of a certain building as a nuisance on a certain date and on divers other days and times between that date and the finding of the indictment, and then stated that "the building *is* situated in Franklin county, Iowa," *held*, that the indictment alleged with sufficient certainty that the offense was committed in Franklin county: *State v. Jacobs*, 75-247.

The provisions of § 5157 as to public offenses committed within five hundred yards of the boundary line of adjoining counties are applicable to this offense: *State v. Rockwell*, 82-429.

Evidence: Proof of the manufacture, sale, or keeping with intent to sell, in violation of law, is presumptive proof of the offense of nuisance: *State v. Guisenhause*, 20-227; *State v. Baughman*, 20-497.

And this is true even though the sale be secret and by clerk: *State v. Freeman*, 27-333. Proof of actual sale is presumptive evidence of illegal sale, and the burden of proving that the sales made were legal is upon defendant: *Shear v. Green*, 73-688.

The proof of a single sale will warrant a conviction for nuisance. Such sale will show unlawful intent as well as keeping: *State v. Reyelts*, 74-499,

Evidence as to the control of the place in question by defendant, and that bottles, glasses, etc., were there found, *held* sufficient to warrant conviction of defendant for the crime of keeping a nuisance: *State v. Wambold*, 74-605.

Unlawful intent may be presumed from unlawful sales, and it is not sufficient for a registered pharmacist to show that sales were made on written applications stating that the purchaser was not a minor or in the habit of becoming intoxicated and that the liquor was desired for use as a medicine: *State v. Thompson*, 74-119.

The fact that defendant believed in good faith that he had the right to sell for the purposes for which sales were made will not constitute a defense in a prosecution for keeping a place where illegal sales were made: *State v. Mullenhoff*, 74-271.

As proof of the finding of liquor in the possession of accused, in any place except the private dwelling, is by § 2427 presumptive evidence that such liquor is illegally held for sale, the proof of such finding will be sufficient evidence of a nuisance committed by "keeping with intent to sell:" *State v. Norton*, 41-430.

The state is not bound to show affirmatively that the liquors were not kept in the original vessels or packages, or that they were not sold for proper purposes, these being proper matters of defense: *State v. Becker*, 20-438.

Certificates on which sales of liquors by a pharmacist have been made are admissible in evidence, even though they are not shown to be public records, when they are identified by the witnesses as certificates on which they purchased liquors from defendant. They constitute evidence in the nature of admissions by defendant that he made the sales of which they purport to be certificates: *State v. Huff*, 76-200; *State v. Cummins*, 76-133.

In such case the burden is on defendant to show that such sales are legal: *State v. Cummins*, 76-133.

In an action to enjoin a nuisance where the testimony showed that defendant kept a public eating-house and restaurant, that he paid an internal revenue tax as a retail liquor dealer, and that the reputation of his place

was that of a place where intoxicants were kept and sold, *held*, that the evidence as to actual sales, added to the presumptions which arise under the statute from these facts, fully established the allegations of the petition, and an injunction should issue and judgment for costs and an attorney's fee: *State v. Matheison*, 77–485.

For the purpose of showing whether sales under a permit have been illegal, the extent of the business done cannot be taken into account: *Craig v. Werthmueller*, 78–598.

In a prosecution for maintaining a nuisance by selling and keeping with intent to sell intoxicating liquors in a blacksmith shop, *held*, that the fact that defendant was there receiving money and giving orders for liquors to be delivered elsewhere would show that he was selling intoxicating liquors and using the shop for that purpose, that being the place where the business was transacted, and an instruction directing the jury that they might consider such facts as evidence tending to show the offense as charged was not erroneous: *State v. Briggs*, 81–585.

An instruction that in such case it was unlawful to give away any intoxicating liquor to be used as a beverage, *held* erroneous: *Ibid.*

Evidence that liquors seized at a time prior to the finding of the indictment were restored by the officer, *held* not admissible, it not appearing that the violation of the law charged in connection with the prior seizure was the same as that charged in the indictment: *State v. Zimmerman*, 78–614.

The right to transport liquor into the state under the constitutional provisions as to interstate commerce does not extend to the sale in the state for illegal purposes: *Ibid.*

The mere fact that the only evidence showing the illegal keeping for sale and selling of intoxicating liquors is the uncorroborated testimony of a witness employed and paid for procuring evidence, and who is by reason of a stipulation of the parties not put on the stand and subjected to cross-examination, will not justify the court in refusing to grant an injunction, the evidence of such witness not being contradicted nor impeached: *Dickinson v. Bentley*, 80–482.

The fact that a witness in a prosecution for illegal keeping and selling of intoxicating liquors testifies to having bought liquor of defendant does not necessarily prevent an injunction being granted on his evidence alone. If the witness had induced the defendant to do the acts which rendered his place a nuisance, with a view to prosecution, the case might be different; but where the evidence as to the purchase was simply for the purpose of disclosing the character of the place, it will not render it improper to act thereon: *Ibid.*

Evidence of sales in appurtenant buildings is admissible: *State v. Arnold*, 67 N. W., 252.

Evidence in a particular case, *held* sufficient to show that defendant was employed or engaged in unlawfully selling or keeping for sale intoxicating liquors on the premises in question: *State v. Wright*, 68 N. W., 440.

Evidence in a particular case including proof of conversations and declarations of defendant as to the business he was carrying on, *held* sufficient to show that he was keeping a liquor nuisance: *State v. Cleary*, 66 N. W., 724.

In a prosecution for maintaining a saloon nuisance, it appearing that defendant illegally kept for sale and sold intoxicating liquors at his place of business, *held*, that evidence of finding intoxicating liquors on other premises where defendant resided with his father was admissible: *State v. Illsley*, 81–49.

Evidence of the reputation of the place is not admissible in a prosecution under this section: *State v. Fleming*, 86–294. [But such evidence is admissible in an action to enjoin the keeping of the place as a nuisance. See § 2406.]

Further as to evidence in liquor prosecutions see § 2427 and notes.

Punishment: The punishment for the crime of nuisance, as defined in this connection, is that provided in § 5081 for the crime of nuisance generally: *State v. McGrew*, 11-112; *State v. Collins*, 11–141; *State v. Schilling*, 14-155; *State v. Little*, 42–51, 54; *State v. Dean*, 44–648.

A party may be punished for the offense of keeping a nuisance either independently of or in addition to the punishment for illegal selling: *State v. Waynick*, 45–561.

A pharmacist may be indicted and punished for illegal sales as constituting a nuisance: *State v. Mullenhoff*, 74–271.

This section authorizes commitment until both fine and costs are paid in case of a conviction for nuisance, but not in case of punishment for contempt: *Goetz v. Stutsman*, 73–693.

Under an indictment not specifying whether the offense was committed before or after the date of the change of this section, *held*, that evidence was admissible to prove the commission of the offense prior to such change, and that defendant was properly sentenced under the law as then in force; *State v. Reyelts*, 74–499.

Attorney's fee: In the absence of some showing that an attorney fee as taxed by the court is excessive, the court's action will not be interfered with; therefore *held*, that an allowance of sixty dollars to the attorney for the prosecution would not be set aside on appeal: *State v. Arnold*, 67 N. W., 252.

The fee is to be taxed by the court and the amount assessed is to be reasonable, depending upon the skill, time and labor the attorney has properly devoted to the case. Where there is a controversy in regard to the value of the services, it should be determined upon the record of the case and the evidence which may be submitted. In a particular case, *held*, that an allowance of twenty-five dollars was too small: *State v. McEnturff*, 87–691.

SEC. **2385. Permits.** Persons holding permits may sell and dispense intoxicating liquors, not including malt liquors for pharmaceutical and medical purposes, and to permit holders for use and resale by them, only

for the purposes authorized in this chapter; they may also sell and dispense alcohol for specified chemical and mechanical purposes, and wine for sacramental uses. Registered pharmacists, physicians holding certificates from the state board of medical examiners and manufacturers of proprietary medicines may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage, but nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form or device, which may be used as a beverage, and which is intoxicating in its character. [26 G. A., ch. 60; 25 G. A., ch. 63; 23 G. A., ch. 35, §§ 2, 13; 22 G. A., ch. 71, §§ 1, 15.]

SEC. **2386. Pharmacists—manufacturers of proprietary medicines.** If any such registered pharmacist or manufacturer of proprietary medicines shall sell, barter, give, exchange, dispose of or use intoxicating liquors in any manner or for any purpose other than authorized in the preceding section, he shall be liable to all the penalties and proceedings provided for in this chapter, and, upon proof of such violation by a registered pharmacist, the clerk of the district or superior court shall transmit to the commissioners of pharmacy a certified copy of the record thereof within ten days after its entry, and upon receipt of such certified copy said commissioners shall strike his name from the list of registered pharmacists and cancel his certificate. The commissioners of pharmacy are empowered to make such further rules and regulations, not inconsistent with law, with respect to the purchase, keeping and use of intoxicating liquors by registered pharmacists and manufacturers of proprietary medicines, as they shall think proper to prevent abuses of the privilege, and shall revoke the certificate of registration of any pharmacist for repeated violations of this chapter. Said commissioners are authorized to draw from the state treasury an amount not exceeding fifty per cent. of the clear proceeds of all fees collected and paid into the treasury of any county on account of violations of the provisions of this chapter or the chapter regulating the practice of pharmacy, prosecuted by the commissioners, the amount so drawn to be used solely in prosecutions instituted by them for failure to comply with the provisions of such chapters. The court or clerk thereof, before whom any prosecution is instituted or prosecuted by the commissioners of pharmacy, shall certify to the auditor of state all such cases, and the amount of fees imposed and collected therein. The expenses thus incurred by the commission shall be audited by the executive council, and the amount thereof shall be drawn from time to time upon the warrants of the state auditor. [23 G. A., ch. 35, §§ 13, 17; 22 G. A., ch. 71, § 18.]

SEC. **2387. Application for permit.** All applications for a permit to sell intoxicating liquors for the purposes allowed in this chapter shall be by petition, signed and sworn to by the applicant, and filed in the office of the clerk of the district or superior court of the county or city in which the buying and selling is to be carried on, at least ten days before the term at which the matter is to be for trial, which petition shall set out the name of the applicant, his residence and business and that for the two previous years, the place, particularly describing it, where the business is to be conducted, that he is a citizen of the United States and of this state, that he is a registered pharmacist, that now and for the six months last past he has been lawfully conducting a pharmacy in the township, town or city wherein he proposes to engage in the business under the permit applied for, that he has not been adjudged guilty of any violation of the law relating to intoxicating liquors within the two years next preceding the making of his application, is not the keeper of a hotel, eating house, saloon, restaurant or place of public amusement, and that he is not addicted to the use of intoxicating liquors as a beverage, and desires a permit to buy, keep and sell liquors for lawful purposes only. If the applicant has previously held a permit which has been revoked, his petition, in addition to the foregoing

requirements, shall state that he has not, within the last two years next before making the application, knowingly been engaged, employed or interested in the unlawful manufacture, sale or keeping with intent to sell of intoxicating liquors. [23 G. A., ch. 35, §§ 4, 20; 22 G. A., ch. 71, §§ 3, 9.]

SEC. **2388. Notice.** Notice of an application for a permit must be published for three consecutive weeks in a newspaper regularly published and printed in the English language, and of general circulation in the township, town or city where the applicant proposes to conduct the business, or, if none be regularly published therein, then in one of the papers selected by the board of supervisors for the publication of its proceedings, the last publication of which shall be not less than ten nor more than twenty days before the first day of the term at which the hearing is to be had. This notice shall state the name of the applicant, with the firm name, if any, under which he is doing business, the purpose of the application, the particular location of the place where the proposed business is to be carried on, and that the required petition is or will be on file in the clerk's office of the court (naming it) at least ten days before the first day of the term (naming it) when the application will be made. A copy of such notice shall be served upon the county attorney in the same manner and for the same length of time as is required of original notices in said courts. [23 G. A., ch. 35, § 3; 22 G. A., ch. 71, § 2.]

Where the application stated that the business was to be conducted in a certain brick building situated upon a lot and block named and the notice described the place as a certain building on the same lot and block, *held*, that the notice was sufficient although there were two buildings on such lot and one of the buildings contained two store rooms. The object of the statute in requiring the particular place to be named is that the public may know the location of the place so that remonstrances may be interposed if it is thought that the place is an improper one for that business or that there are other grounds for opposing the application. The applicant being in possession of the room in question the notice was sufficient to identify the place referred to: *Whitlock v. Bartholemew*, 91-246.

SEC. **2389. Hearing—remonstrances.** Upon the return day of the notice, the court having, from an inspection of the record, ascertained that due and timely service thereof has been made, shall, if no remonstrance has been or is offered to be filed, unless for cause postponed to some other day in the term, proceed to hear and try the application. Any remonstrance against or objection to the granting of the permit must be in writing and filed in the clerk's office by noon of the first day of the term, unless further time be given, and shall be so filed before the date fixed for the trial. Such remonstrance or objections may be made by any citizen of the county wherein the application is made, specifically stating the reasons therefor, and the court shall fix a day in the term for the trial, and all applications shall be tried at the first term after completed service has been made of the required notice, if the business of the court shall allow. No permit shall be granted unless the court shall find from competent evidence that all the averments in the petition are true, that the reasonable convenience and necessities of the people, considering the population and all the surroundings, make the granting of the permit proper, and that the applicant is possessed of the character and qualifications required, worthy of the trust to be reposed in him, and likely to discharge the same with fidelity. The county attorney shall appear in such cases, and any number of persons, not less than five, filing any remonstrance or objection, may also appear by counsel and resist the application. If more than one permit is applied for in the same locality, the applications shall be heard at the same time, unless for cause shown it be otherwise ordered. If for any reason the application can not be tried in term time, the same may be heard by the judge in vacation, at a time to be fixed by the court and made of record, and in all applications for permits the court may grant or refuse any or all applications, as will best subserve the public good. [23 G. A., ch. 35, § 6; 22 G. A., ch. 71, §§ 5, 6.]

The provision of a former statute that a permit should be granted only to a person of good moral character was held not unconstitutional: *In re Ruth*, 32–250.

Under a former statute, *held*, that any citizen of the county who appeared to resist the granting of a permit might make a showing with reference to either of the questions which the board of supervisors was required to determine in granting such permit, and might introduce evidence to negative either of the facts which the statute provided must be proven before the permit should be granted. He, in effect, became a party to the proceeding and had sufficient interest in the matter to authorize him to institute a proceeding by *certiorari* to have any errors and irregularities by the board in granting the permit reviewed: *Darling v. Boesch*, 67–702.

SEC. **2390. Bond.** No permit shall issue until the applicant shall execute to the state a bond in the penal sum of one thousand dollars, with good and sufficient sureties to be approved by the clerk of the court, conditioned that he will well and truly observe and obey the laws of the state now or hereafter in force in relation to the sale of intoxicating liquors, that he will pay all fines, penalties, damages and costs that may be assessed or recovered against him for a violation of such laws during the time for which the permit is granted, and the principal and sureties in said bond shall be liable thereon, jointly and severally, for all civil damages and costs that may be recovered against the principal in any action brought by a wife, child, parent, guardian, employer or other person under the provisions of this chapter. The bond, after being approved by the clerk, shall be deposited with the county auditor, and suit may be brought thereon at any time by the county attorney, or by any person for whose benefit the same is given. The clear proceeds of all other money which may be collected for breaches of the bond shall go to the school fund of the county. If at any time the sureties on the bond shall file with the court or clerk a written request for release, or become insolvent, or be deemed insufficient by the court granting the permit, or its clerk, such court or clerk shall require a new bond to be executed within a reasonable time to be fixed. If the permit holder fails or neglects to furnish a new bond within the time so fixed, the permit shall from that date become null and void. [23 G. A., ch. 35, § 5; 22 G. A., ch. 71, § 4.]

In an action on such bond under former provisions, *held*, that the assignment of a breach thereof by selling intoxicating liquors to divers persons whose names were unknown, to be by them used as a beverage, etc., was sufficient: *Jones County v. Sales*, 25-25.

In case of a sale for purposes not specified in the permit, the defendant is not only liable on his bond, but also to a criminal prosecution for selling in violation of law: *State v. Adams*, 20–486; *State v. Stutz*, 20–488.

Under the provisions of the Code of '73, it was held that action on the bond might be brought by any citizen of the county: *State ex rel. v. Martland*, 71–543.

Under previous provisions, *held*, that the law did not require the bond to specify the purposes for which the permit should authorize liquors to be sold, nor the place of sale; and the fact that the bond was altered by inserting words indicating such purpose and place would not constitute a material alteration, such as to relieve the surety from liability: *Starr v. Blatner*, 76–356.

SEC. **2391. Oath of applicant.** In addition to giving the bond required, the applicant shall take and subscribe the following oath, which shall be indorsed upon the bond: "I,....., do solemnly swear (or affirm) that I will well and truly perform all and singular the conditions of the within bond, and keep and perform the trust confided in me to purchase, keep and sell intoxicating liquors. I will not sell, give or furnish to any person any intoxicating liquors otherwise than as provided by law, and especially I will not sell or furnish any intoxicating liquors to any person who is not known to me personally, or duly identified, nor to any minor, intoxicated person, or persons who are in the habit of becoming intoxicated; and I will make true, full and accurate returns of all certificates and requests made to or received by me as required by law; and said returns shall show every sale and delivery of such liquors made by me, or for me, during the months embraced therein, and the true signature to every request received and granted; and such returns shall show all the intoxicating liquors sold or delivered to any and every person, as returned." [23 G. A., ch 35, § 5; 22 G. A., ch. 71, § 7.]

SEC. **2392. Permit issued.** Upon taking said oath and filing said bond, the clerk of the court granting the same shall issue a permit to the applicant, authorizing him to keep and sell intoxicating liquors as in this chapter provided. The permit so issued shall specify the building, give the street and number or location in which intoxicating liquors may be sold by virtue of the same, and the length of time the same shall be in force, unless sooner revoked. [23 G. A., ch. 35, §§ 5, 16; 22 G. A., ch. 71, § 7.]

A permit issued to a member of a partnership will not authorize sales made by another member who has no permit: *State v. McConnell*, 90–197.

Liquors held for the purpose of lawful sale under a permit are not subject to seizure, and the possession thereof may be lawful although they be bought of one not authorized to sell: *Niles v. Fries*, 35–41.

An indictment for unlawful sale need not negative the authority of defendant to sell under a permit. Such authority must be pleaded in defense: *State v. Beneke*, 9–203; *State v. Collins*, 11–141.

Under former provisions a person having a permit to sell was only bound to exercise due diligence and act in good faith in determining whether the person buying intended to use the liquors for a lawful purpose: *Taylor v. Pickett*, 52–467; *State v. Blair*, 72–591.

Selling without a permit may be punished both under § 2382 and § 2384: *State v. Waynick*, 45–516.

The legislature may change a law under which a permit has been granted so as to impose other regulations upon the holder of such permit. A permit is not a vested right: *State v. Mullenhoff*, 74–271.

SEC. **2393. Record—costs.** The clerk of the court granting the permit shall preserve as a part of the record and files in his office all petitions, bonds and other papers pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded The books shall be furnished by the county like other public records. Whether said permit be granted or refused, the applicant shall pay the costs incurred in the case, and, when granted, he shall make payment before any permit issue, except the court may tax the cost of any witnesses summoned by private persons resisting said application, and the fees for serving such subpœnas, to such persons, when it is shown that such witnesses were summoned maliciously, or without probable cause to believe their evidence material. The fees in such cases shall be as provided in actions at law in the district court. [23 G. A., ch. 35, § 9; 22 G. A., ch. 71, § 10.]

SEC. **2394. Requests to purchase.** Before selling or delivering any intoxicating liquors to any person, a request must be signed by the applicant, in his true name, truly dated, stating the applicant is not a minor, his residence, for whom and whose use the liquor is required, and his true name and residence, and, where numbered, by street and number if in a city, the amount and kind required, the actual purpose for which the request is made, and for what use desired, and that neither the applicant nor the person for whose use requested habitually uses intoxicating liquors as a beverage, and attested by the permit holder who receives and fills the request. The request shall be refused unless the permit holder has reason to believe the statement to be true, and in no case granted unless the permit holder filling it personally knows the person applying is not a minor, intoxicated, nor in the habit of using intoxicating liquors as a beverage; or, if the applicant is not so personally known, before filling the order or delivering the liquor, he shall require identification, and the statement in writing of a reliable and trustworthy person, of good character and habits, known personally to him, that the applicant is not a minor, nor in the habit of using intoxicating liquors as a beverage, and is worthy of credit as to the truthfulness of the statements in the application; and this statement so made shall be signed by the witness in his own name, stating his residence correctly. [23 G. A., ch. 35, § 10; 22 G. A., ch. 71, § 12.]

SEC. **2395. Penalties.** If any person shall make any false or fictitious signature, or sign any name other than his own to any paper required to be signed, or make any false statement in any paper or application signed to procure liquors, the person so offending shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars and costs of

prosecution, and shall be committed until said fine and costs are paid, or shall be imprisoned not less than ten nor more than thirty days. If any permit holder or his clerk shall make false oath touching any matter required to be sworn to, the person so offending shall be punished as provided by law for perjury. If any person holding a permit under this chapter shall purchase or procure any intoxicating liquor otherwise than as herein authorized, or make any false return to the county auditor, or use any request for liquors for more than one sale, he shall be guilty of a misdemeanor and punished accordingly. [23 G. A., ch. 35, § 18; 22 G. A., ch. 71, § 19; C. '73, § 1559; R., § 1577.]

SEC. 2396. **Transportation by permit holder.** Every permit holder is hereby authorized to ship to registered pharmacists and manufacturers of proprietary medicines intoxicating liquors to be used by them for the purposes authorized by law. All railway, transportation and express companies and other common carriers are authorized to receive and transport the same upon presentation of a certificate from the clerk of the district or superior court of the county where the permit holder resides, that such person is permitted to ship intoxicating liquors under the law of this state. [23 G. A., ch. 35, § 14.]

SEC. 2397. **Returns by permit holder.** On or before the fifteenth day of January, March, May, July, September and November of each year, each permit holder shall make full returns to the county auditor, under oath, of all requests filled by him and his clerks during the two preceding months, which oath shall be in the following form: "I, ..., being duly sworn, on oath state that the requests for liquors herewith returned are all that were received and filled at my pharmacy (or place of business) during the months of....., A. D.....; that I have carefully preserved the same, and that they were filled up, signed and attested at the date shown hereon, as provided by law; that said requests were filled by delivering the quantity and kinds of liquors required, and that no liquors have been sold or dispensed under color of my permit during said months except as shown by the requests herewith returned, and that I have faithfully observed and complied with the conditions of my bond and oath taken by me thereon indorsed, and with all the laws relating to any duties in the premises. [23 G. A., ch. 35, § 11; 22 G. A., ch. 71, § 13.]

The provisions of § 1537 of Code of '73 (now repealed), as it originally stood, with reference to the time when the report of sales by a person having a permit should be made, where directory, and a failure to file such report at the time specified would not subject such person to the penality provided, if it was in fact filed before action for the penalty was commenced: *Abbott v. Sartori*, 57–656.

But after the amendment of that section so as to require the return to be made on the day specified or within five days thereafter, *held*, that the provisions as to the penalty must be regarded as mandatory, and a failure to make return within the time would render a party liable for the statutory penalty: *State ex rel. v. McEntee*, 68–381; *State ex rel. v. Chamberlin*, 74–266.

Under provisions of the Code of '73, now repealed, *held*, that it was the duty of a pharmacist holding a permit to make returns of prescription sales as well as of others: *State ex rel. v. Chamberlin*, 74–266. Also, that failure to make reports and selling at illegal profit would not render the seller liable to punishment for illegal sales which were otherwise lawful: *State v. Von Haltschuherr*, 72–541.

SEC. 2398. **Account of purchases and sales.** Every permit holder shall keep strict account of all liquors purchased or procured by him in a book kept for that purpose, which shall be subject at all times to the inspection of the commissioners of pharmacy, the county attorney, any grand juror, sheriff or justice of the peace of the county, and such book shall show of whom such liquors were purchased or procured, the amount and kind, the date of receipt and amount sold; also the amount on hand of each kind for each two months, and at the same time he returns requests to the county auditor he shall file a statement of such account with such auditor, except that the items of sales need not be embraced therein, but the aggregate amount of each kind shall be, and such statement shall be

verified. All forms necessary to carry out the provisions of this chapter not otherwise provided for shall be as may be provided by the commissioners of pharmacy. [23 G. A., ch. 35, § 11.]

Applications for the purchase of liquor produced by the county auditor and signed by the person to whom it is claimed the illegal sales were made, and addressed to defendant, *held* admissible in a particular case, although not accompanied with the sworn certificate of the defendant: *State ex rel. v. Oeder*, 80–72.

Certificates on which sales of liquors by a pharmacist have been made are admissible in evidence even though they are not shown to be public records, when they are identified by the witness as certificates on which liquors have been purchased from defendant. They constitute evidence in the nature of admissions by defendant that he made the sales of which they purport to be certificates: *State v. Huff*, 76–260; *State v. Cummins*, 76–133.

SEC. **2399. Illegal sales by permit holder—evidence.** Every permit holder or his clerk shall be subject to all the penalties, forfeitures and judgments, and may be prosecuted by all the proceedings and actions criminal and civil, whether at law or in equity, provided for or authorized by this chapter, and the permit shall not shield any person who abuses the trust imposed by it or violates the law. In case of conviction in any proceeding, civil or criminal, the liquors in possession of the permit holder shall by order of the court be destroyed, and on the trial of an action or proceeding against any person for manufacturing, selling, giving away or keeping with intent to sell intoxicating liquors in violation of law, or for any failure to comply with the conditions or duties imposed by law, the requests for liquors and returns made to the auditor, the quantity and kinds of liquors sold, or kept, purchased or disposed of, the purpose for which liquors were obtained by or from him and for which they were used, the character and habits of sobriety or otherwise of the purchasers, shall be competent evidence, and may be considered, so far as applicable to the particular case, with any other recognized, competent and material facts and circumstances bearing on the issues involved in determining the ultimate facts. In any suit, prosecution or proceeding under this chapter, the court shall compel the production in evidence of any books or papers required to be kept, and shall compel any permit holder, his clerk, or any person who has purchased liquors of either of them, to appear and give evidence, but such oral evidence shall not be used against such person or witness on the trial of any criminal proceeding against him. [23 G. A., ch. 35, § 12; 22 G. A., ch. 71, § 14.]

Where a party who was a registered pharmacist was convicted of keeping a nuisance by the unlawful sale of intoxicating liquors, and a fine of one thousand dollars imposed, and where there was evidence of sales, but none that such sales were unlawful, *held*, that the statute did not require the highest penalty to be fixed in such cases; and *held* also, that the evidence was not sufficient to justify the finding that defendant had abused his trust: *State v. Hoagland*, 77–135.

Evidence in a particular case as to sales to a person in the habit of becoming intoxicated, *held* sufficient to identify the sales as made to such person and to warrant a conviction: *State ex rel. v. Oeder*, 80–72.

It is for the jury to say whether the taking of applications, showing that the purchaser desires the liquor for a lawful purpose, is evidence tending to show proper care and caution on the part of the seller, and the disposition to obey the law: *State v. Aulman*, 76–624.

It is proper to instruct the jury that in deciding whether sales under a permit are lawful, they may take into consideration the habits of the purchasers as to the use of liquors as a beverage as known to the seller, and the business or condition of the purchaser as known to the seller. In a particular case, *held*, that there was evidence to justify the finding of the jury that the defendant knew that sales of liquor made by him were not for a lawful purpose: *Ibid.*

It is permissible to show the habits of the witness who has bought liquor with reference to the use of intoxicating liquor: and the use of liquor other than that bought from the defendant may be shown: *State v. McConnell*, 90–197.

A witness who is shown to have made frequent purchases may be asked whether he was in the habit of buying intoxicating liquors as a drink for the purpose of showing that he belonged to a class to which sales could not legally be made and other evidence as to the habits of such witnesses may be introduced: *Ibid.*

As to the purpose and effect of the provisions of this section with reference to "the character and habits as to sobriety or otherwise," *quære: State v. Fleming*, 86–294.

SEC. **2400. Revocation of permit.** Permits shall be deemed trusts reposed in the recipients, and may be revoked upon sufficient showing by order of a court or judge. Complaint may be presented at any time to the district or superior court, or a judge thereof, which shall be in writing and signed and sworn to by three citizens of the county in which the permit was granted. A copy of the complaint shall, with a notice in writing of the time and place of hearing, be served on the accused five days before the hearing, and if the complaint is sufficient, and the accused appear and deny the same, the court or judge shall proceed without delay, unless continued for cause, to hear and determine the controversy. If continued or appealed at the instance of the permit holder, his permit may, in the discretion of the court, be suspended pending the controversy. The complainant and accused may be heard in person or by counsel, or both, and proofs may be offered by the parties; and if it shall appear upon such hearing that the accused has in any way abused the trust, or that liquors are sold by the accused or his employes in violation of law, or dispensed unlawfully, or he has in any proceeding, civil or criminal, since receiving his permit, been adjudged guilty of violating any of the provisions of this chapter, the court or judge shall revoke and set aside the permit; the papers and order in such case shall be immediately returned to and filed by the clerk of the court, and, if heard by a judge, the order shall be entered of record as if made in court; and if in this or any other proceeding, civil or criminal, it shall be adjudged by the court or judge that any registered pharmacist, proprietor or clerk has been guilty of violating any provision of this chapter, such adjudication may be by the commissioners of pharmacy regarded as sufficient, if repeated, to work a forfeiture of his certificate of registration. It shall be the duty of the clerk to forward to the commissioners of pharmacy transcripts of such judgments or orders without charge therefor, and as soon as practicable after final judgment or order has been made and entered. [23 G. A., ch. 35, § 7; 22 G. A., ch. 71, § 8.]

In a proceeding to revoke a permit, defendant is not entitled to trial by jury. The permit is not property in such sense that by its revocation the party is deprived of his property without due process of law: *State v. Schmidtz*, 65–556.

The proceeding to revoke a permit is not a criminal proceeding, but a special proceeding of a civil nature. The revocation, therefore, cannot be suspended by giving bail, nor by a *supersedeas* bond on appeal, for the reason that the judgment is self-executing and no process is necessary in order to carry it out. A *supersedeas* bond would, however, suspend the execution of the judgment for costs: *Ibid.*

A judgment revoking a permit, being a final order in a special proceeding affecting a substantial right, may be appealed from: *Ibid.*

SEC. **2401. How business conducted—clerks—physicians.** A permit holder may employ not more than two registered pharmacists as clerks to sell intoxicating liquors in conformity to the permit and the law; but in such cases the acts of clerks in conducting the business shall be considered the acts of the permit holder, who shall be liable therefor as if he had personally done them, and in making returns, the verification of such requests as may have been received, attested and filled by the clerk must be made by such clerk, and the clerk who transacted any of the business under the permit must join in the general oath required of the employer, so far as relates to his own connection therewith. If for any cause a registered pharmacist who holds a permit shall cease to hold a valid and subsisting certificate of registration or renewal thereof, his permit shall be forfeited and be null and void. Nothing contained in this chapter shall be construed to prevent licensed physicians from in good faith dispensing liquors as medicines to patients actually sick and under their treatment. In case a permit holder shall die, his personal or legal representative may continue the business, subject to the provisions hereof, through the agency of any reputable registered pharmacist, upon the approval of the court granting such permit, or the clerk thereof, and the giving of a bond as hereinbefore provided. [23 G. A., ch. 35, §§ 2, 15; 22 G. A., ch. 71, § 16.]

The holder of the permit is liable for illegal sales made by his clerk: *State v. McConnell*, 90–197.

The statute requires that licensed physicians shall dispense liquor as medicine only to patients actually sick and in that respect the physician must act at his peril: *State v. Field*, 89–34.

SEC. **2402. Intoxication punished.** If any person shall be found in a state of intoxication he is guilty of a misdemeanor, and any peace officer shall, without a warrant, take him into custody and detain him in some suitable place until an information can be made before a magistrate, and a warrant of arrest issued, under which he shall at once be taken before the magistrate issuing the same, or, if for any reason he cannot act, to the next nearest one, where he shall be tried, and, if found guilty, shall be fined in the sum of not less than five nor more than twenty-five dollars and costs of prosecution, or imprisoned in the county jail not more than thirty days. The penalty, or any portion of it, may be remitted by the magistrate before whom the trial is had, and the accused discharged from custody, upon his giving information in writing and under oath, stating when, where and of whom he purchased or received the liquor which produced the intoxication, and the kind and character of this liquor, and, in addition, giving bail for his appearance before any court to give evidence in any action or complaint to be commenced or preferred against such party for furnishing the same. [15 G. A. ch. 37; C.'73, § 1548; R., §§ 1568, 1586.]

The word "drunkenness," in warrant of commitment, *held* to have the same legal signification as the word "intoxication:" *Smith v. Bigelow*, 19–459.

An instruction defining "intoxication" discussed: *State v. Huxford*, 47–16.

A person is drunk in a legal sense when he is so far under the influence of intoxicating liquor that his passions are visibly excited and his judgment impaired: *State v. Pierce*, 65–85.

A person found in a state of intoxication may be lawfully arrested under this section, although he may be also liable to arrest under the ordinances of a city for being intoxicated in a public place: *State v. Garrett*, 80–589.

SEC. **2403. Selling or giving to minor or intoxicated person or person in the habit of becoming intoxicated.** No person by himself, agent or otherwise, shall sell or give any intoxicating liquors to any minor for any purpose, except upon written order of his parent, guardian or family physician, or sell the same to any intoxicated person or one in the habit of becoming intoxicated. Any person violating the provisions of this section shall forfeit and pay the sum of one hundred dollars, to be collected by action against him, or, if a permit holder, against him and the sureties on his bond. Such action may be brought by any citizen of the county. One-half of the amount so collected shall go to the informer and one-half to the school fund of the county. [20 G. A., ch. 143, § 9; C.'73, § 1539.]

This section applies not only to persons having permits to sell liquors, but to all persons: *Cobleigh v. McBride*, 45–116, 120.

To constitute the offense it is not necessary that defendant should have known that the person to whom sale was made was a minor. Knowledge of such fact need neither be charged nor proved: *Jamison v. Burton*, 43–282. So, in case of sale to a person in the habit of becoming intoxicated, it is immaterial whether the seller knew the habits of such person. He sells at his peril: *Dudley v. Sautbine*, 49–650.

A defendant charged with such sales cannot excuse himself on the ground of his ignorance of the fact that the person to whom such sales were made was a minor or an inebriate: *State v. Ward*, 75–637; *State v. Thompson*, 74–119.

In case of sale to a minor the consent of the parent will be no defense unless it is in writing: *State v. Coeman*, 48–567.

The principal is liable for a sale made by an agent in violation of this section, although the agent was positively forbidden to sell to such persons generally, or to the particular person to whom sale was made: *Dudley v. Sautbine*, 49–650.

The sale of wine or beer to one of the classes of persons here mentioned, resulting in injury such as is contemplated in § 2418, will give a right of action under that section: *Jewett v. Wanshura*, 43–574.

Under § 2431, this section is to be construed as prohibiting the giving as well as the sale to an intoxicated person: *Church v. Higham*, 44–482.

The action for the benefit of the school fund may be brought by a citizen as well as by the treasurer: *Ibid.*

Under this section the seller of liquor to an intoxicated person will be liable, although the liquor is bought and paid for by a third person by way of treating such intoxicated person: *State v. Hubbard*, 60–466.

Evidence of intoxication at a period subsequent to the sale of the liquor should not be received to prove that the person to

whom it was furnished was intoxicated at the time of such sale: *Ibid.*

No section of the statute save this forbids the giving away of intoxicating liquors, except it is done as an evasion of the penalties for selling or as a subterfuge to conceal unlawful sales: *State v. Hutchins*, 74–20.

A corporation is a person within the meaning of this section. Therefore, *held*, that where the defendant corporation ordered and conducted a ball at which the principal officer and member of the managing committee and other officers thereof sold beer, the proceeds of which were received by the corporation, the action provided by this section might be maintained against it: *Stewart v. Waterloo Turn Verein*, 71–226.

Sales of liquors to the class of persons enumerated in this section are not by its terms declared to be misdemeanors, and the penalty imposed by it can be enforced only by civil action by a citizen of the county: *State v. Douglass*, 73–279.

Whether allegation of plaintiff's citizenship is sufficiently put in issue by a mere general denial of the allegation of the petition, *quære: Kirk v. Litterst*, 71–71. But in actions under § 2406, it is held that a general denial does not put in issue plaintiff's citizenship as alleged in the petition: See notes to that section.

Where action is brought to recover the penalty for breach of the bond, and such action is settled, the informer is entitled to a share of the proceeds in the same way as though the action had proceeded to judgment: *Hull v. Welsh*, 82–117.

The provisions as to penalty are applicable to an action on the bond of a pharmacist for the illegal sale of liquors: *Ibid.*

SEC. **2404. Club room.** Every person who shall, directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist or abet in keeping or maintaining, any club room, or other place in which intoxicating liquors are received or kept for the purpose of use, gift, barter or sale, or for distribution or division among the members of any club or association by any means whatever, and every person who shall use, barter, sell or give away, or assist or abet another in bartering, selling or giving away, any intoxicating liquors so received or kept, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months. [20 G. A., ch. 143, § 15.]

SEC. **2405. Action to abate nuisance — injunction — contempt.** Whenever a nuisance is kept, maintained or exists, as defined in this chapter, any citizen of the county may maintain an action in equity to perpetually enjoin and abate the same. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the court or judge, by evidence in the form of affidavits, depositions, oral testimony or otherwise, as the plaintiff may elect, unless the court or judge, by previous order, shall have directed the form and manner in which it shall be presented, that the nuisance complained of exists. Three days' notice in writing shall be given the defendant of the hearing of the application, and, if then continued at his instance, the writ as prayed shall be granted as a matter of course. When an injunction has been granted, it shall be binding on the defendant throughout the judicial district in which it was issued, and any violation of the provisions of this chapter by manufacturing, selling or keeping for sale of intoxicating liquors anywhere in said district shall be punished as a contempt, as provided in this chapter. [22 G. A., ch. 73, §§ 3, 4; 21 G. A., ch. 66, § 2; 20 G. A., ch. 143, § 12; C.'73, § 1543.]

Injunction; constitutionality: The provision for an injunction in such cases in an action in equity is not unconstitutional as depriving defendant of the right of trial by jury: *Littleton v. Fritz*, 65–488; *State v. Jordan*, 72–377.

An action to enjoin a nuisance caused by the selling and keeping for sale of intoxicating liquors contrary to law, *held* not to involve a federal question in such sense as to authorize a removal of the cause to the federal court: *Lemen v. Wagner*, 68–660; *Schmidt v. Cobb*, 119 U. S., 286 (the supreme court of the United States being equally divided).

While the penalty of five hundred dollars for the violation of an injunction in such cases is extraordinary, the statute imposing such a penalty is not unconstitutional: *Jordan v. Circuit Court*, 69–177.

The state has jurisdiction of actions commenced under this section to enjoin a liquor nuisance, although the property is held by an assignee in bankruptcy appointed by the federal court in a foreign state: *Radford v. Thornell*, 81–709.

An allegation in a petition for injunction that defendant had established and was maintaining a place for the sale of intoxicat-

ing liquors contrary to the statutes of the state, and that he kept such liquors for sale contrary to law and there sold the same unlawfully, not being controverted must be deemed true: *Bloomer v. Glendy*, 70-757.

Temporary injunction: It was held before the statutory provision expressly authorized it, that a preliminary injunction might be granted as in other proceedings for an injunction: *Littleton v. Fritz*, 65-488.

A temporary injunction should not be awarded against the premises. The injunction against the occupant and owner is all that is contemplated at that stage of the proceedings: *Gray v. Stienes*, 69-124.

Where it appears that defendant has been maintaining a nuisance which would warrant the granting of an injunction, the fact that on the application for a temporary injunction he testifies that he has a few days previously quit the business will not be sufficient ground for refusing the application: *Judge v. Kibs*, 71-183.

Where by consent of defendant a temporary injunction was issued and subsequently a permanent injunction was granted, which defendant claimed was issued without proper proceedings, *held*, that in a proceeding to punish for the violation of the injunction, the defendant's objection was immaterial, as the violation would be punishable under the temporary writ, even though no permanent injunction was properly awarded: *Cunningham v. Gaynor*, 87-449.

Where the petition and affidavit make proper showing for preliminary injunction, and there is no order of the court in regard to the evidence on which such injunction will be issued, the injunction should be granted: *Tibbetts v. Burster*, 76-176.

The filing of an answer denying that the defendant is at the time of answering maintaining a nuisance as alleged, but not denying the maintenance of such nuisance at the time of the filing of the petition, is not sufficient to show a defense: *Ibid.*

Owner of the property: Where leased property is being used as a place for the unlawful sale of liquors, the landlord may be made a party defendant to the action to abate such place as a nuisance without regard to his previous knowledge of such use. The building becomes a nuisance and its continuance as such may be enjoined and prevented: *Martin v. Blattner*, 68-286.

The owner of the building in which unlawful sales of liquor are conducted, permitting such sales by a tenant, may properly be enjoined from further permitting such use: *Gray v. Stienes*, 69-124.

A decree abating premises as a nuisance and providing for the destruction of property should not be entered when some of the owners of the property are not parties to the suit: *Shear v. Green*, 73-688.

If persons not parties to the suit have an interest in the real property involved therein a decree should not be made for removal and sale of fixtures constituting a part of the realty: *Danner v. Hotz*, 74-389.

Facts in a particular case, *held* sufficient to warrant a decree against the owner of the property: *Littleton v. Harris*, 73-167.

Where premises are leased for a lawful purpose, to render the owner liable to the penalties herein provided, it is not sufficient to show that he knew of their unlawful use without taking steps to prevent it, but it must appear that, after he became aware of such illegal use, he did some act or made some declaration affirmatively assenting thereto: *State v. Ballingall*, 42-87.

In an action to enjoin the use of leased premises as a liquor nuisance, where it appeared that the lessors knew that the building was fitted up with a bar and other appliances for the sale of drinks, *held*, that such evidence was sufficient to authorize an injunction against them, in the absence of any showing that they acted in good faith in leasing the property: *State v. Douglass*, 75-432.

When the owner of the building has knowledge of the character of the business conducted therein, an injunction is properly granted against such owner as well as against the person carrying on the business: *Ibid.; McQuade v. Collins*, 61 N. W., 213.

Judgment should not be rendered in an injunction proceeding against the owner of the premises who has not had knowledge of and permitted the unlawful acts. The reputation of the place will not be sufficient to charge the owner with such knowledge if the owner is not so situated as to have knowledge of such reputation: *State v. Price*, 92-181.

Where the owner of the premises had knowledge that intoxicating liquors were being kept on the premises and sold in violation of the law and the place was shown to have been notoriously used as a saloon for such a length of time that in reason the owner would as a citizen have known the fact and notice of the fact was left at his house, *held*, that he had such knowledge that an injunction might be granted against him: *Hamilton v. Baker*, 91-100.

Under particular facts, *held*, that while the owner of the premises was not shown to have actual knowledge of the illegal business conducted therein he had such reason to believe that the business was illegal as to warrant the granting of an injunction against him with reference to maintaining a nuisance on the premises: *State v. Williams*, 90-513.

Where the owner had frequently been in and about the building and appeared to occupy a room in it, and the general reputation of the place was that intoxicating liquors were sold and drank there, *held*, that such knowledge on the part of the owner was shown as to warrant the issuance of an injunction: *Carter v. Steyer*, 61 N. W., 956.

As to what knowledge on the part of the owner is sufficient to render the property subject to a judgment against the occupant, see § 2422.

Permanent injunction: An injunction should not be issued against a building in which a nuisance has been maintained by a tenant when the owner of the building upon being informed of the nuisance has taken steps to have it abated, and there is nothing tending to show that this was not done in good faith: *Shear v. Brinkman*, 72-698.

The fact that the owner of property ceases to use it for improper purposes only about the time the case is reached for trial does not render it erroneous to enter a decree for abating the property as a nuisance: *Danner v. Hotz*, 74–389.

Where the evidence shows that a nuisance is being maintained in the building the personal property used about the premises is subject to sale upon the judgment. A violation of the law works a forfeiture of the permit, and the premises used for the purpose of illegal manufacture may be closed even for the purposes of legal manufacture: *Pearson v. International Distillery*, 72–348.

In an action to enjoin a liquor nuisance, where the findings of the court are fully sustained by the evidence and warrant the granting of a permanent injunction, it is error not to grant the injunction: *Farley v. O'Malley*, 77–531.

An injunction declaring premises to be a nuisance will not be set aside on appeal because of doubt as to whether defendant had been guilty of illegal sale of liquors thereon where he has by his own conduct permitted the surroundings of his premises to be such as to furnish ground for believing that he is maintaining a nuisance thereon: *Nichols v. Thomas*, 89–394.

Where an appeal is taken from a final order granting a perpetual injunction, it will not be reversed because the court granted a temporary injunction without notice: *State v. Douglass*, 75–432.

Where plaintiff sought to enjoin defendant from keeping a saloon for the sale of intoxicating liquors, and defendant admitted facts sufficient to entitle plaintiff to a decree, but pleaded in abatement the pendency of a former action, *held*, that, as defendant failed to sustain his plea in abatement, an injunction should be granted: *Farley v. Hollenfeltz*, 79–126.

A writ which enjoined defendant from unlawfully selling intoxicating liquors on "part of lot number two, in the northeast quarter of the northwest quarter of section twenty-three," *held* not void for uncertainty, as the writ prohibited the doing of certain acts, and would be violated by doing them upon any part of the lot: *Ver Straeten v. Lewis*, 77–130.

Effect of injunction: The provisions of this section making the injunction binding on the party throughout the judicial district are applicable to an injunction granted in an action commenced before the taking effect of the statute. An injunction is not a *quasi* punishment for an act done, the punishment is for the violation of the injunction after it is granted: *McGlassen v. Johnson*, 86–477.

In order that the decree shall be binding throughout the judicial district as provided in this statute, it is not necessary that the decree shall so provide: *Ibid.*

An injunction against the defendant does not operate upon the property and a subsequent purchaser cannot be punished for contempt in making unlawful use of it, although he has knowledge of the injunction: *Buhlman v. Humphrey*, 86–597; *Newcomer v. Tucker*, 89–486.

One who is restrained by an injunction from keeping a liquor nuisance upon his premises is guilty of contempt in allowing such nuisance to be maintained upon his premises with his knowledge and assent: *England v. Johnson*, 86–751.

SEC. **2406. How brought and tried—evidence—attorney's fee.** Actions to enjoin nuisances may be brought in the name of the state by the county attorney, who shall prosecute the same to judgment, or any citizen of the proper county may institute and maintain such a proceeding in his name. The action when brought shall be triable at the first term of court after due and timely service of notice of the commencement thereof has been given; and in such action evidence of the general reputation of the place described in the petition shall be admissible for the purpose of proving the existence of such nuisance. If plaintiff is successful in the action, an attorney's fee of twenty-five dollars shall be taxed as costs in his favor. [21 G. A., ch. 66, § 1.]

Citizenship of plaintiff: The action by a citizen to obtain an injunction, although prosecuted in the name of such citizen as a private party, is for the public benefit, and it cannot be maintained except by a citizen of the county. A wife who has been injured in her means of support by illegal sales cannot maintain the action for an injunction if she is a resident of another county: *Applegate v. Winebrenner*, 66–67.

In an action to restrain a liquor nuisance, *held*, that a Methodist clergyman who resides in a county of the state for the purpose of preaching there for one year, but subject to removal at any time, is a citizen of the county within the meaning of this statute: *Fuller v. McDonnell*, 75–220.

An allegation that plaintiff is a citizen of the county is not put in issue by a general denial, but only by specially alleging facts showing the allegation of the petition in this respect not to be true: *Littleton v. Harris*, 73–167: *Shear v. Green*, 73–688.

Averment by defendant of want of knowledge or information sufficient to form a belief as to plaintiff's citizenship is not sufficient to put that matter in issue: *Craig v. Hasselman*, 74–538.

While the right to institute proceedings is dependent upon residence or citizenship of the plaintiff in the county, yet when that right has attached and the suit has been instituted, the right to prosecute it to judgment does not terminate by plaintiff's removal to another county: *Judge v. Kahl*, 74–486.

Upon the death of a party in whose name

a suit to abate a liquor nuisance has been maintained, his administrator or heirs are not entitled to substitution in his place, but, on the application of a person duly authorized, the name of the state may be substituted. And *held*, that the same principle was applicable where suit was brought to set aside the decree rendered in such action: *Geyer v. Douglass*, 85–93.

A citizen maintaining an action under this section has the right to employ counsel not only in the original proceeding but in a subsequent proceeding to punish for contempt in the violation of the injunction: *Maloney v. Traverse*, 87–306.

It is not necessary in an action by a citizen in his own name to allege notification to the county attorney and failure on his part to bring the suit: *Wood v. Baer*, 91–475.

Suits brought by private persons to enjoin the maintenance of liquor nuisances are in behalf of the public and defendant cannot set up by way of defense improper motives which have actuated the plaintiff in the institution of the proceeding: *McQuade v. Collins*, 61 N. W., 213.

The proceeding, although brought by a citizen, is of a public nature and for the public benefit: *Cameron v. Kapinos*, 89–561.

An action to make the fine imposed in a contempt proceeding a lien upon the real estate of one knowingly permitting the premises to be used in violation of the injunction may properly be brought also in the name of a citizen: *Ibid.*

So long as a former decree enjoining defendant from keeping and maintaining a nuisance by unlawfully selling liquors on certain premises is in force, a second suit for abatement of the same nuisance, brought by another citizen, should not be allowed in the absence of any showing that the former decree was obtained by collusion with the intent of defeating the purposes of the law: *Dickinson v. Eichorn*, 78–710; *Steyer v. McCauley*, 71 N. W., 194.

While an injunction may be granted against the defendant which will be valid throughout the judicial district, yet where after such injuction was granted, another action was brought to enjoin defendant as keeper and another person as owner of premises from maintaining a nuisance on such premises, *held*, that the former injunction would not bar the subsequent action: *Carter v. Steyer*, 61 N. W., 956.

Method of trial: Whether this statute changes the general rule as to the method of trial of equity causes in this class of cases or not, it is error to continue a case for the purpose of taking depositions without making an order for the trial of the cause upon depositions: *Ellwood v. Price*, 73–84.

Evidence: The provisions of this section permitting evidence of the reputation of the place are not applicable to prosecutions for maintaining a nuisance under § 2384: *State v. Fleming*, 86–294.

Attorney's fees are taxable against the defendant in all cases for the enjoining or abatement of a liquor nuisance, whether such action is prosecuted in the name of the state or of a private citizen of the county: *State v. Douglass*, 75–432; *State v. Boyd*, 85–740.

The provisions of this section as to general reputation and attorney's fees and closing the building, *held* applicable to actions which were pending at the time they went into effect: *Farley v. O'Malley*, 77–531; *Farley v. Geisheker*, 78–453; *Drake v. Jordan*, 73–707.

Under former provisions the attorney was entitled to reasonable fees for services rendered in the case, not less than $25 in any court, and where an action was commenced in the district court, removed to the federal court, appealed to the supreme court of the United States and remanded to the district court where it was instituted, *held*, that an attorney's fee of $350 was not unreasonable: *Farley v. O'Malley*, 77–531.

In a particular case where it appeared that action was brought and a trial was had, involving, however, only the introduction in evidence of the answer filed by defendant, *held*, that an attorney fee of $25 was sufficient: *Farley v. Geisheker*, 78–453.

The allowance is to the plaintiff and not to his attorney, and an attorney acts for the plaintiff and not in his own right in receiving the fee allowed: *Root v. Heil*, 78–436.

Acceptance by the attorney for the plaintiff of the amount taxed in favor of plaintiff as attorney fees, *held* to constitute a waiver of plaintiff's right to appeal: *Ibid.*

Where there was no controversy as to the amount of attorney's fees, *held* that the judge might, upon the record and his own knowledge of the services in the case, fix the amount without testimony; but that where there was a contention as to the amount to be taxed, testimony should be heard and the amount determined on the record and testimony alone: *Craig v. Werthmueller*, 78–598.

The allowance of the attorney fee was not to be limited to services in the trial court but might be made also for services in the supreme court: *Hamilton v. Baker*, 91–100.

As to the services in the supreme court, the court might judge of their value without necessity for the introduction of evidence: *Ibid.*

Under this section, attorney's fees are taxable, whether the suits are prosecuted in the name of the state, or in the name of a citizen of the county: *Newman v. Des Moines County*, 85–89.

Such fees are a part of the costs, and if not recoverable from defendant are to be paid by the county, as other costs in criminal cases: *Ibid.*

This provision as to attorney fees relates to civil proceedings by a citizen to secure an injunction: *State v. McEnturff*, 87–691.

As to the method of assessing the fee in criminal prosecutions, see note to § 2384, and in general as to attorney's fees in such cases, see § 2429.

SEC. **2407. Violation of injunction.** In case of the violation of any injunction granted under the provisions of this chapter, the court, or in vacation a judge thereof, may summarily try and punish the offender. The

proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment. [21 G. A., ch. 66, § 3.]

This section expressly authorizes the examination in court of witnesses in contempt proceedings. In such case it is sufficient if the evidence is taken down by the shorthand reporter and filed with the certificate of the judge thereto, followed at a later time by the filing of the reporter's transcript of his shorthand notes certified to by him: *Goetz v. Stutsman*, 73-693.

The proceeding to punish a contempt of the process of a court is criminal in its nature and by it a disobedience to civil authority is punished. It is merely incidental to the original proceeding and need not be entitled as of the original cause. It is properly brought in the name of the state as plaintiff, and a party making the original affidavit as the basis of the proceeding is competent to do so although not a citizen: *Fisher v. Cass County District Court*, 75-232.

It is erroneous for the court on rendering judgment of a fine for violating an injunction to include in such judgment a provision for the suspension of execution at the pleasure of the court: *State v. Voss*, 80-467.

It is not error to refuse to consider affidavits where a demand that the witness be brought before the court for examination is not complied with: *Cotant v. Hobson*, 67 N. W., 255.

The provision for punishment for contempt without a jury trial is not in violation of the federal constitution: *Eilenbecker v. Plymouth County*, 134 U. S., 31.

A party may be punished for contempt in the violating of an injunction resting upon property with reference to its use for the sale of intoxicating liquors, although he was not a party to the injunction proceedings, and had no knowledge thereof. The decree granting the injunction is a restriction upon the use of the property which follows it as a burden into whosesoever hands it may come: *Silvers v. Traverse*, 82-52.

An order imposing a fine and imprisonment for contempt in violating an injunction may be made by the judge in vacation: *McLane v. Granger*, 74-152.

An order punishing, or refusing to punish, under this section is reviewable upon *certiorari*, and not on appeal: *Currier v. Mueller*, 79-316; *State v. District Court*, 84-167.

Where the district court refused to punish for a violation of an injunction restraining a liquor nuisance on the ground that an appeal and filing of a *supersedeas* bond prevented a punishment for contempt, *held*, that the proceeding could be reviewed by *certiorari*: *Lindsay v. Clayton District Court*, 75-509.

The only means of reviewing an order of court punishing a person for contempt for violating an injunction issued under this section is by *certiorari*, and the district court does not have authority to admit the defendant to bail pending such proceeding. Such authority is possessed only by the court which can issue a writ of *certiorari*: *State v. District Court*, 84-167.

A *supersedeas* bond given on appeal to the supreme court from a decree granting an injunction does not suspend the injunction nor prevent a violation thereof from being punishable: *Lindsay v. Clayton District Court*, 75-509.

The punishment for contempt in the violation of an injunction is not *quasi*-criminal in such sense that the party is entitled to the time provided for in criminal procedure before pronouncing judgment: *McGlasson v. Johnson*, 86-477.

The fact that an act in violation of an injunction is done in good faith, in consequence of the advice of counsel, is no defense in a proceeding to punish for contempt. The statute gives to the court no discretion where the violation of an injunction is shown, except as to the amount of fine or term of imprisonment: *Lindsay v. Hatch*, 85-332.

Prior provisions imposing a fine of not less than $500 for contempt in violating an injunction, *held* constitutional: *Johnson v. Circuit Court*, 69-177; *Grier v. Johnson*, 88-99.

SEC. **2408. Abatement.** If the existence of the nuisance be established in a civil or criminal action, an order of abatement shall be entered as a part of the judgment in the case; which order shall direct the destruction of the liquor, the removal from the building or place of all fixtures, furniture, vessels or movable property used in any way in conducting the unlawful business and sale thereof, in the manner provided for the sale of chattels under execution, and the effectual closing of the building, erection or place against its use for any purpose prohibited in this chapter, and so keeping it for a period of one year, unless sooner released. If any one shall break or use a building or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling

the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. [22 G. A., ch. 73, § 1; 21 G. A. ch. 66, § 5; 20 G. A., ch. 143, § 12; C.'73, §§ 1523, 1543; R., § 1559.]

A judgment, upon a conviction for maintaining a liquor nuisance, ordering the destruction of the liquor found on the premises and ordering its removal and the sale of all furniture and fixtures and all movable property used in or about the premises in carrying on the unlawful business, and ordering the closing of the building as against its use for saloon purposes for one year unless sooner released, is fully authorized by this section: *State v. Adams*, 81–595.

Such an action is against the thing as well as the person, and as the person has had notice and his day in court upon which to defend the forfeiture of his property as well as the punishment of himself, the provision for forfeiture is not unconstitutional: *Craig v. Werthmueller*, 78–598.

A writ for the seizure and destruction of whatever property may be found on the premises on which the illegal business is carried on is sufficiently definite: *Ibid.*

Where a brewery was used without permit for the manufacture of beer, *held*, that it could be closed under these provisions: *Ibid.*

In an action to restrain and abate a liquor nuisance, where a nuisance is found, it is error for the court to refuse to provide for the abatement of the nuisance in the decree: *McClure v. Braniff*, 75–38.

The decree should order the abatement of the nuisance even though it should appear that the owner of the premises is not responsible therefor: *Morgan v. Koestner*, 83–134.

Where leased premises were used for the unlawful sale of intoxicating liquors, but without the knowledge of the lessors, who were nonresidents, and who, upon learning of such unlawful use, in good faith caused the premises to be vacated a few days after the action to enjoin the nuisance was commenced, and they were thereafter used only for lawful purposes, *held*, that it was error to perpetually enjoin the lessors from maintaining a nuisance on said premises and render a judgment against them for costs: *Eckert v. David*, 75–302.

Where an action was commenced to enjoin a liquor nuisance, but was not tried for more than a year and a half afterwards, and defendant continued to maintain the nuisance until three or four days before the trial, *held*, that a reformation of so brief a duration was not sufficient to justify a refusal to grant an injunction restraining the nuisance and abating it: *Halfman v. Spreen*, 75–309.

In a particular case, *held*, that an agreement to dismiss the prosecution was not sufficiently established to make a subsequent decree erroneous: *Geyer v. Douglass*, 85–93.

The provisions as to abatement of the nuisance are applicable to acts committed before the enactment of those provisions: *McLain v. Bonn*, 70–752; *Drake v. Jordan*, 73–707.

SEC. **2409. Proceeds—how applied.** The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied, first, in payment of the costs of the action and abatement; secondly, to the satisfaction of any fine and costs adjudged against the proprietor of the premises and keeper of said nuisance, and the balance, if any, shall be paid to the defendant. [21 G. A., ch. 66, § 6.]

Where a judgment provided that the proceeds of the personal property should be used to pay the fine and costs adjudged against defendant, and that the balance, if any, should be paid to him, *held*, that the provision was authorized by this section: *State v. Adams*, 81–595.

SEC. **2410. Abatement by owner.** If the owner appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, auditor and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or, in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law. [21 G. A., ch. 66, § 7.]

A decree of abatement should be rendered against the premises even though the owner is not responsible for the nuisance. He may under the provisions of this section, release the property from the effect of such decree: *Morgan v. Koestner*, 83–134.

SEC. **2411. Second offense.** Any person who shall have been convicted of keeping a nuisance under this chapter, or who shall have been enjoined as herein provided, and shall again directly or indirectly engage in keeping a nuisance or selling intoxicating liquors in violation of this chapter, in any county in this state, shall, upon conviction thereof, be punished by imprisonment in the county jail not less than three months nor more than one year. But no equitable proceeding, order or judgment shall be construed as a conviction under the provisions of this section. [Same, § 9.]

SEC. **2412. Prepayment of fees not required—costs taxed to plaintiff.** In an action brought by a citizen to enjoin a nuisance, as defined in this chapter, no officer or witness shall be entitled to receive in advance fees for service or attendance. If the prosecution fails, or the costs cannot be collected of the defendant, they shall be paid in the same manner as in criminal causes. If, however, the court shall find that the case was commenced without probable cause, or was maliciously brought, it may tax the costs to the plaintiff. [22 G. A., ch. 73, § 2.]

Failure to pay or secure in advance the fees of the clerk for a transcript on appeal in such case will not defeat the appeal: *Searles v. Lux*, 86-61.

The costs here provided for are to be paid by the county under the terms of § 512 and such costs include the attorney's fees, which may be taxed under the provisions of § 2406: *Newman v. Des Moines County*, 85-89.

Where the prosecution is not actuated by malice or without probable cause the costs should not be taxed to the plaintiff: *Clark v. Riddle*, 70 N. W., 207.

SEC. **2413. Search warrant—seizure.** If any credible resident of any county shall, before a justice of the peace for the same county, make written information, supported by his oath or affirmation, that he has reason to believe, and does believe, that any intoxicating liquor, described as particularly as may be in said information, is in said county, in any place described as particularly as may be in said information, owned or kept by any person named or described in said information as particularly as may be, and is intended by him to be sold in violation of the provisions of this chapter, said justice shall, upon finding probable cause for such information, issue his warrant of search, directed to any peace officer in the county, describing as particularly as may be the liquor and the place described in said information, and the person named or described in said information as the owner or keeper of said liquor, and commanding the said officer to search thoroughly said place, and to seize the said liquor, with the vessels containing it, and to keep the same securely until final action be had thereon; whereupon the said peace officer to whom such warrant shall be delivered shall forthwith obey and execute, as effectually as possible, the commands of said warrant, and make return of his doings to said justice, and shall securely keep all liquors so seized by him and the vessels containing them until final action be had thereon. If the place to be searched be a dwelling-house in which any family resides, and in which no tavern, eating house, grocery or other place of public resort is kept, such warrant shall not be issued unless said complainant shall, on oath or affirmation, declare before said justice that he has reason to believe and does believe that within one month next before the making of said information intoxicating liquor has been, in violation of this chapter, sold in said house, or in some dependency thereof, by the person accused in said information, or by his consent or permission; nor unless, from the facts and circumstances disclosed by such complaint, the said justice shall be of the opinion that said complainant has adequate reason for such belief. [C.'73, § 1544; R., § 1565.]

Information: Although the section requires that the information be filed by "a credible resident of" the county, it is not necessary that either the information or the warrant should state that it is made by such a person. That fact may be found by the justice before whom information is filed, upon proof independent of the information, or from personal knowledge: *State v. Thompson*, 44-399; *Weir v. Allen*, 47-482; *State v. Blair*, 72-591.

Warrant: Proceedings under a warrant will not be rendered invalid by the fact that the officer searched for and seized the liquor

before having such warrant. Nor is it material whether the liquor was in possession of the person claiming to be owner thereof, it appearing that the owner had no right to keep or sell such liquor: *State v. Ward*, 75-637.

What subject to seizure: It is only liquors which are kept with the intention of selling the same in violation of law that may be seized: *State v. Harris*, 36-136.

The fact that the owner has been selling liquors in violation of law is not a ground for their condemnation, and is simply evidence of the unlawful intent with which they were kept: *State v. Blair*, 72-591.

The information must charge some specific person as owner or keeper of the intoxicating liquor with an illegal intent, and the liquor cannot be destroyed unless the evidence shows that the person who is charged as owner or keeper had such intent: *State v. Intoxicating Liquors*, 64-300.

If a pharmacist sells liquors for purposes other than as medicine, search and seizure of liquors owned by him may be made as provided in this section: *State v. Ward*, 75-637.

It will not be presumed that the place to be searched is a dwelling-house, etc., from the mere fact that the information avers that the liquors are kept in "a certain house or place, known," etc: *Sanders v. State*, 2-230, 277.

If a pharmacist who holds a permit sells liquor for any other purpose than medicine which is actually necessary as such, he is liable to the utmost rigors of the law in force at the time the sales were made, and search may be made for and the liquor seized: *State v. Ward*, 75-637.

Even though liquors be not subject to seizure, yet an action of replevin cannot be maintained to recover possession thereof from an officer holding them under a search warrant in a proper proceeding: *Lemp v. Fullerton*, 83-192.

Although prior to the passage of the so-called Wilson bill authorizing the regulation by the states of intoxicating liquors shipped from one state into another, the statutory provisions for seizure of liquor were unconstitutional as to liquor shipped from one state into another, yet an officer acting in good faith under such statutes was not liable for such act: *Anheuser-Busch Brewing Assn. v. Hammond*, 61 N. W., 1052.

A previous conviction of the owner of the liquors for selling the same will not bar a proceeding, under this section, against the liquors themselves: *Ibid.*

The jurisdiction here conferred upon justices of the peace is not exclusive, but may also be exercised by police justices in cities acting under special charter: *Weir v. Allen*, 47-482.

Seizure: Liquors seized as here contemplated cannot be taken from the officer by replevin: *Funk v. Israel*, 5-438; *State v. Harris*, 38-242; *Weir v. Allen*, 47-482; *Fries v. Porch*, 49-351.

Liquor in the hands of the sheriff by virtue of a search warrant cannot be recovered on replevin: *Schoenhofen Brewing Co. v. Armstrong*, 89-673.

Nor can the owner recover their value from such officer by way of damages in an action of trespass, unless he show that he possessed them with lawful intent, and was unlawfully deprived of them: *Plummer v. Harbut*, 5-308.

Liquors in the hands of an officer by virtue of a seizure cannot be taken from him by writ of replevin from a federal court: *Senior v. Pierce*, 31 Fed. 625.

A judgment rendered against the officer holding the liquor by stipulation on his part should be set aside on motion of the attorney representing the prosecution in the case against the liquors: *Fries v. Porch*, 49-351

Where intoxicating liquors held for sale are seized in the custody of an express company, in a proceeding to condemn them it is immaterial whether the officers of the company knew the character of the property and the use to which it was to be put. It is the duty of such company, under the statute, to know whether goods it receives for shipment are such as the law authorizes to be bartered and sold: *State v. United States Ex. Co.*, 70-271.

Such a proceeding is not a criminal one against the express company, and it becomes a party voluntarily, if at all, to the case: *Ibid.* As to property in intoxicating liquors see notes to § 2382.

Proceeding criminal: These proceedings for the condemnation of intoxicating liquors illegally kept with intent to sell are criminal in their nature, and the defendant has the rights of the defendant in a criminal prosecution. For instance, a verdict of the jury for defendant should not be set aside upon motion in arrest of judgment in behalf of the prosecution: *State v. Harris*, 40-95.

A proceeding for the seizure, condemnation and destruction of intoxicating liquors kept for sale in violation of law is a criminal action, and the jurisdiction of the justice does not, therefore, depend on the amount in controversy: *State v. Arlen*, 71-216.

SEC. **2414. Information for search warrant—defects.** The information and search warrant in such case shall describe, with reasonable particularity, the place to be searched, as well as the liquors to be seized. When any liquors shall have been seized by virtue of any such warrant, the same shall not be discharged or returned to any person claiming the same by reason of any alleged insufficiency of description in the warrant of the liquor or place, but the claimant shall only have a right to be heard on the merits of the case. [C. '73, § 1545.]

The expression "as particularly as may be" conveys the idea of the greatest degree of certainty, and this section is therefore not in conflict with Const., art. I, § 8, as

authorizing a search warrant to issue without the particularity of description there required; nor as authorizing unreasonable search and seizure: *Santo v. State*, 2–165, 212.

SEC. **2415. Notice—trial—judgment—appeal.** In the event of a seizure under said warrant, the officer shall forthwith make a return of his acts thereunder, and within forty-eight hours thereafter the justice who issued the warrant shall cause to be left at the place where said liquor was seized, if said place be a dwelling-house, store or shop, posted in some conspicuous place on or about said buildings, and also to be left with or at the last known and usual place of residence of the person named or described in said information as the owner or keeper of said liquor, if he be a resident of this state, a notice, summoning such person, and all others whom it may concern, to appear before said justice at a place and time named in said notice, which time shall not be less than five nor more than fifteen days after the posting and leaving of said notices, and show cause, if any they have, why said liquor, together with the vessels in which the same is contained, should not be forfeited; and said notice shall, with reasonable certainty, describe said liquor and vessels, and shall state where, when and why the same were seized. At the time and place prescribed in said notice, the person named in said information, or any other person claiming an interest in said liquor and vessels, or any part thereof, may appear and show cause why the same should not be forfeited. If any person shall so appear, he shall become a party defendant in said case, and said justice shall make a record thereof. Whether any person shall so appear or not, said justice shall, at the prescribed time, proceed to the trial of said case, and said complainants or either of them may, and upon their default the officer having such liquor in custody shall, appear before said justice and prosecute said information, and show cause why such liquor should be adjudged forfeited. The proceeding in the trial of such case may be the same, substantially, as in cases of misdemeanor triable before justices of the peace, and if any person shall appear and be made a party defendant as herein provided, and shall make written plea that said liquor, or a part thereof claimed by him, was not owned or kept with intent to be sold in violation of this chapter, such party defendant may, at his option, demand a jury to try the issue, and if, upon the evidence presented, the said justice or jury, as the case may be, shall, by verdict, find that said liquor was, when seized, owned or kept by any person, whether said party defendant or not, for the purpose of being sold in violation of this chapter, the said justice shall render judgment that said liquor, or said part thereof, with the vessels in which it is contained, is forfeited. If no person be made defendant in manner aforesaid, or if judgment be in favor of all the defendants who appear and are made such, then the costs of the proceeding shall be paid as in ordinary criminal prosecutions where the prosecution fails. If the judgment shall be against only one party defendant appearing as aforesaid, he shall be adjudged to pay all the costs of proceedings in the seizure and detention of the liquor claimed by him, and trial, up to the time of judgment. But if such judgment shall be against more than one party defendant claiming distinct interests in said liquor, then the costs of said proceedings and trial shall be, according to the discretion of said justice, equitably apportioned among said defendants, and execution shall be issued on said judgments against said defendants for the amount of the costs so adjudged against them. Any person appearing and becoming party defendant as aforesaid may appeal from said judgment of forfeiture, as to the whole or any part of said liquor and vessels claimed by him and so adjudged forfeited, to the district court, as in ordinary cases of misdemeanor. [C. '73, § 1546.]

Even though a search is fruitless, the officer making the search is entitled to his fee therefor, which is to be paid by the county as in other criminal prosecutions when the prosecution fails: *Byram v. Polk County*, 76–75.

SEC. **2416. Destruction of liquor and vessels.** Whenever it shall be finally decided that liquor seized as aforesaid is forfeited, the court ren-

dering final judgment of forfeiture shall issue to the officer having said liquors in custody, or to some other peace officer, a written order, directing him forthwith to destroy said liquor and vessels containing the same, and immediately thereafter to make return of said order to the court whence issued, with his doings indorsed thereon. Whenever it shall be finally decided that any liquor so seized is not liable to forfeiture, the court by whom such final decision shall be rendered shall issue a written order to the officer having the same in custody, or to some other peace officer, to restore said liquor, with the vessels containing the same, to the place where it was seized, as nearly as may be, or to the person entitled to receive it, which order the officer shall obey, and make return thereon to the court of his acts thereunder, and the costs of the proceeding in such case attending the restoration, as also the costs attending the destruction of such liquor in case of forfeiture, shall be taxed and paid in the same manner as is provided in case of ordinary criminal prosecutions where the prosecution fails. [C.'73, § 1547.]

SEC. **2417. Liability for care of intoxicated person.** Any person who shall by the manufacture, sale or giving away of intoxicating liquors, contrary to the provisions of this chapter, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and one dollar per day in addition thereto for every day such intoxicated person shall be kept, in consequence of such intoxication, which sums may be recovered in a civil action before any court having jurisdiction thereof [C.'73, § 1556.]

A physician called to attend a person for an injury received, or for sickness resulting from intoxication, has no claim against the person selling the liquor, as contemplated by this section: *Sansom v. Greenough*, 55–127.

SEC. **2418. Civil action for damages by wife, parent, child, etc.** Every wife, child, parent, guardian, employer or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person who shall, by selling or giving to another contrary to the provisions of this chapter any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages; and a married woman shall have the same right to bring suits, prosecute, and control the same and the amount recovered, as if a single woman; and all damages recovered by a minor under this section shall be paid either to such minor or his parent, guardian or next friend, as the court shall direct, and all suits for damages under this section shall be by civil action in any court having jurisdiction thereof. [C.'73, § 1557.]

Right of action: The cause of action is the selling of the liquors, yet the foundation of the action is the wrongful act of defendant in causing the intoxication of the husband, father or other person, which is a personal injury to him, and the action is one for injury to the person in such sense that it must be brought within two years as provided by the statute of limitations in reference to that class of actions: *Emmert v. Grill*, 39–690.

In an action by a plaintiff suing as wife, the fact of marriage is not essential, and she may recover without proof thereof: *Kearney v. Fitzgerald*, 43–580.

By the provisions of this section a right of action was given for the sale of wine and beer to minors or intoxicated persons when sales of those liquors were in general not prohibited: *Jewett v. Wanshura*, 43–574.

Before the passage of the present law prohibiting entirely sales of wine and beer there was no cause of action for injuries due to the sale of beer, unless it was sold in violation of § 2403, prohibiting the sale to minors, intoxicated persons, etc.; *Myers v. Conway*, 55–166.

And before the enactment of that statutory provision there was no liability whatever to civil damages for injury resulting from the sale of beer: *Woody v. Coenan*, 44–19.

Giving: Damages arising from the giving as well as from the sale of intoxicating liquors may be recovered: *Welch v. Jugenheimer*, 56–11.

Under circumstances indicating that liquor furnished to plaintiff's husband was for a pecuniary compensation, although not directly paid for nor charged to him, *held*, that it was not error to allow the wife to re-

cover damages for such act: *Rafferty v. Buckman*, 46-195.

It seems that the giving of intoxicating liquors to a person already intoxicated would subject the giver to liability under this section for damages resulting: *Miller v. Hammers*, 61 N. W., 1087.

For what injuries: The wife may recover damages resulting from the death of her husband caused by intoxication: *Ibid.*

In order that a right of action may exist, the liquor sold must cause or contribute to intoxication, and the wife must sustain some injury by the intoxication: *Welch v. Jugenheimer*, 56-11.

The damages sustained "in person" as contemplated by the statute mean in body, and threatening language, vulgar conduct, etc., directed towards plaintiff by her husband, but not resulting in physical injury or impairment of health, will not entitle her to either actual or exemplary damages as against the person causing the intoxication of her husband: *Calloway v. Laydon*, 47-456; *Welch v. Jugenheimer*, 56-11.

For wounded feelings, disgrace, etc., not resulting from injury to the person, no recovery can be had, but for mental anguish, shame or suffering resulting from violence to the person, plaintiff is entitled to recover: *Ward v. Thompson*, 48-588.

Plaintiff may recover for injuries to person, property and means of support, but not for wounded feelings or disgrace or loss of standing in society: *Jackson v. Noble*, 54-641.

The occupation and business capacity of the husband may be shown, and the manner in which he supported plaintiff previous to the intoxication, as showing of what plaintiff was deprived by reason of such intoxication: *Ibid.*

If it is shown that defendant has deprived plaintiff of the assistance of her husband in the support of herself and family by causing his frequent intoxication, her means of support would thus be shown to have been injured to that extent without reference to her condition before such injury: *Woolheather v. Risley*, 38-486.

The fact that plaintiff's husband has been for a long time habitually drunk cannot be shown in evidence for the purpose of affecting the wife's damages, but evidence as to the previous habits of the husband was material in such cases under the statute by which sale of beer was legal, except to persons in the habit of becoming intoxicated: *Huff v. Aultman*, 69-71.

Exemplary damages: This statutory provision gives a new and peculiar remedy not only for actual but also for exemplary damages. The injury is of a peculiar character not recognized or redressed by the common law: *Dunlavey v. Watson*, 38-398.

Exemplary damages may be allowed although no tort or breach of the peace has resulted: *Goodenough v. McGrew*, 44-670.

Under this section exemplary damages are to be given as a matter of right in case actual damage is found: *Thill v. Pohlman*, 76-638.

If actual damages are given, the jury must allow exemplary damages. They are the sole judges of the amount of exemplary damages to be allowed, keeping in view the object of punishing the wrong done, and making it an example that will prevent others from doing a like wrong in the future: *Miller v. Hammers*, 61 N. W., 1087.

While threatening language and vulgar conduct by the husband towards the wife may result in the impairment of health, and thus amount to an injury for which damages might be recovered, yet such words and conduct unaccompanied with physical injury will not entitle her to actual damages, and therefore they cannot be a ground for exemplary damages, even where damages on other grounds are recovered. The exemplary damages in such case must be such as are called for under the circumstances under which the actual damages are sustained: *Calloway v. Laydon*, 47-456.

Where it appeared that defendant sold plaintiff's husband intoxicating liquor when he was in a state of intoxication, and continued to sell him liquors, knowing that he was in the habit of becoming intoxicated, *held*, that a verdict for exemplary damages was not erroneous: *Weitz v. Ewen*, 50-34.

Exemplary damages may be awarded in every case brought under this section where there has been a wilful violation of the statute which has occasioned injury for which a right of action is given. The party injured is entitled to exemplary damages in a proper case, and the awarding of them is not left to the discretion of the jury: *Fox v. Wunderlich*, 64-187.

No special prayer for exemplary damages is required: *Gustafson v. Wind*, 62-281.

Who liable: The right of action is given against any person who actually makes the sale of the intoxicating liquor, whether he be the owner, or the son, clerk or servant of such owner: *Worley v. Spurgeon*, 38-465.

It is sufficient to hold a defendant liable if it be shown that liquor sold by him contributed to the intoxication complained of: *Woolheather v. Risley*, 38-486.

A party is liable if he contributes to actual specific fits of intoxication as a direct result of liquor sold by him in part, even if the intoxication had become habitual, but not for contributing to the habit of drinking without intoxication, but leading to other drinking resulting in intoxication: *Cox v. Newkirk*, 73-42; *Arnold v. Barkalow*, 73-183.

In an action for damages for selling plaintiff's husband intoxicating liquor, *held*, that if defendant furnished the intoxicating liquor to plaintiff's husband under the direction of a third party, or furnished it to others from whom the plaintiff's husband obtained it, this was sufficient to maintain the action: *Judge v. Jordan*, 81-519.

In an action by a wife to recover damages for the sale of intoxicating liquors to her husband, the husband having testified in a former trial, *held*, that, although the wife called him as a witness in the former trial, that did not obligate her to call him in this, nor commit her to the statements in his former testimony: *Ibid.*

Joint liability: A joint action will not lie against several defendants having independ-

ent places of business, where the injuries are successive and not the result of one particular intoxication. Section 3463 is not applicable to such cases: *La France v. Krayer*, 42–143.

Where a joint action will not lie, each party is liable for the damages which he occasions, and a settlement with one does not bar an action against another: *Jewett v. Wanshura*, 43–574.

But defendant may show that plaintiff has brought actions and obtained judgments against others for causing the same habitual intoxication, not by way of defense or mitigation of damages, but to show the actual extent of the damage caused by defendant's own act, and that he was not responsible for the entire damage resulting from such intoxication: *Ibid.*; *Ennis v. Shiley*, 47–552; *Engleken v. Webber*, 47-558.

The fact that plaintiff has brought another action against another person covering injuries caused in the same manner, and during the same time, is not a matter which may be shown by way of defense: *Ward v. Thompson*, 48–588.

While defendant in such action may show that he was only liable for part of the injuries resulting from the intoxication on the ground that plaintiff received compensation in other suits for injuries from the same intoxication, he should prove that such sales for which the other suits were brought were made during the same time as those sued for during the pending action, and if defendant desires to rely upon such partial defense, it is questionable whether he should not set it up in his answer; *Jackson v. Noble*, 54–641.

Where the intoxication causing the damages sued for was produced on some occasions by defendant and at other times by others, the defendant should only be held liable for the damages to which he contributed, and the difficulty of thus apportioning the damages will not render him liable for the whole: *Huggins v. Kavanagh*, 52–368.

If the damage is the proximate result of a particular intoxication, all parties contributing thereto are jointly liable, but not if it is the result of a besotted condition: *Hitchner v. Ehlers*, 44–40.

Where a wife sued for damages from the suicide of her husband caused by intoxication, *held*, that if the act resulted from the particular intoxication during which it was committed, all persons who contributed to such intoxication by selling him liquor were jointly liable for the injuries she sustained in her means of support, but if it resulted not alone from that particular intoxication but from a besotted condition, those contributing to such besotted condition but not to the immediate intoxication would not be jointly liable with those who did contribute to such particular intoxication: *Ibid.*

Where plaintiff did not rely on or prove any specific act or acts of intoxication, but it appeared that her husband had been in the habit of becoming intoxicated for many years, procuring liquor from any person who would let him have it, *held*, that the several persons who had sold him liquor could not be considered as joint wrong-doers, but that each was severally liable for the damage caused by his own acts: *Richmond v. Shickler*, 57–486.

Persons who have contributed to habitual intoxication are not to be held responsible as joint wrong-doers, but each is liable for the part of the damages caused by his acts: *Ennis v. Shiley*, 47–552; *Flint v. Gauer*, 66–696.

Plaintiff contributing to injury: The wife cannot recover damages where she has herself contributed to her husband's intoxication: *Engleken v. Hilger*, 43–563; *Kearney v. Fitzgerald*, 43–580.

The fact that during the period covered by the wife's action for damages for sale of intoxicating liquors to her husband she herself bought liquors for him will not be such contribution on her part to the injury as to defeat her recovery if she had reason to believe that she would thereby keep him away from saloons and prevent the injuries for which she sues: *Ward v. Thompson*, 48–588.

In such case the fact that the wife has contributed to the condition of the husband by at times giving him permits to buy liquor will not absolutely defeat her recovery. Such connivance or assent will only defeat recovery for damages resulting from or caused by intoxication contributed to or connived at by her: *Rafferty v. Buckman*, 46–195.

The fact that the wife gives to the husband at his request sums of money belonging to him and placed by him in her custody, with knowledge on her part that portions thereof will be used for the purpose of procuring intoxicating liquors, will not necessarily constitute a voluntary contribution on her part to the intoxication of her husband, so as to defeat her right of recovering damages against the persons causing such intoxication: *Huff v. Aultman*, 69–71.

Evidence: In an action by the wife for damages for a sale of intoxicating liquors to her husband, the burden of proof is upon plaintiff to establish the fact that defendant sold liquor to the husband, and also that such liquor produced or contributed to produce the intoxication complained of: *Macleod v. Geyer*, 53-615.

In an action by the wife, *held* not error to allow the husband as a witness to state about how much money he had paid defendant for liquor, such fact being material as tending to show the injury to plaintiff's means of support, but not otherwise: *Ward v. Thompson*, 48–588.

Held, that in such cases indictments against defendant and convictions thereon for illegal sales of intoxicating liquors were not admissible in evidence against defendant, at least where it was not shown that the indictments were founded upon unlawful sales made to plaintiff's husband: *Applegate v. Weinbrenner*, 67–235.

Evidence of an assault committed upon the wife by the husband, *held* not admissible in an action by the wife against defendant for the recovery of damages for illegal sale of liquors to the husband, it not appearing that at the time of the assault the husband was intoxicated, nor that his intoxication, if any, was contributed to by defendant: *Ibid.*

The evidence necessary or competent to establish the injury and its extent is not confined within the bounds admissible to establish a common-law tort: *Dunlavey v. Watson*, 38-398.

Evidence as to the age, condition, circumstances, etc., of the husband, his habits of industry and his ability to support his wife before and after the acts complained of, may be received: *Ibid.*

It is error, in an action by the wife, to allow evidence as to number, age, etc., of children: *Huggins v. Kavanagh*, 52-368; *Welch v. Jugenheimer*, 56-11.

The wife may show the number and ages of her children belonging to her family if she also shows that defendant had knowledge of the facts, and that they were in danger of being injured or compelled to leave home, and after such knowledge wantonly continued to sell liquor to the husband, by reason of which the right of action arose, such evidence being pertinent to the question of exemplary, not of actual, damages: *Ward v. Thompson*, 48-588.

Life tables: It is doubtful whether the Carlisle life tables are admissible as evidence in determining the amount of damages in such an action, the measure of actual damage being the amount which would, from a pecuniary point of view, compensate the wife for the injury: *Rafferty v. Buckman*, 46-195.

SEC. **2419. Transportation to one not holding permit.** If any express or railway company, or any common carrier, or person, or any one as the agent or employe thereof, shall transport or convey to any person within this state any intoxicating liquors, without first having been furnished with a certificate from the clerk of the court issuing the permit, showing that the consignee is a permit holder and authorized to sell liquors in the county to which the shipment is made, such company, common carrier, person, agent or employe thereof, shall, upon conviction, be fined in the sum of one hundred dollars for each offense and pay the costs of prosecution, including a reasonable attorney's fee to be taxed by the court. The offense herein created shall be held committed and complete and to have been committed in any county in the state in which the liquors are received for transportation, through which they are transported, or in which they are delivered. The defendant in a prosecution under this section may show by a preponderance of the evidence as a defense that the character, circumstances and contents of the shipment were not known to him, or that the person to whom the shipment was made had complied with the provisions of this chapter relating to the mulct tax. [22 G. A., ch. 73, § 6; 21 G. A., ch. 66, § 10; 20 G. A., ch. 143, § 14; C. '73, § 1553; R., § 1580.]

A prior similar provision was held unconstitutional so far as it applied to the bringing of liquor from another state because an interference with interstate commerce: *Bowman v. Chicago & N. W. R. Co.*, 125 U. S., 465.

The statute does not forbid the transportation of liquors out of the state, but it does forbid the manufacture of liquors for purposes other than for sale according to the provisions of the statute. This construction does not render the statute unconstitutional as an interference with interstate commerce: *Pearson v. International Distillery*, 72-348.

A person employed by a wholesale dealer, not as a mere servant, but as the owner of means of transportation, to deliver liquor sold to purchasers, is a carrier within the meaning of this section: *State v. Campbell*, 76-122.

The right to bring liquor into the state in pursuance of interstate commerce involves also the right to sell the same in original packages: *Leisy v. Hardin*, 135 U. S., 100. As to selling in original packages, see notes to § 2382.

Liquors which are in the hands of the carrier for transportation into the state cease to be exempt from seizure, as a part of interstate commerce, when they are placed by the carrier in its warehouse for delivery to consignee: *State v. Creeden*, 78-556.

Where it appears that a railway agent received at the railway platform and put into the depot a package which he had reasonable grounds to believe contained intoxicating liquor not shipped according to law, *held*, that he was properly convicted under this section: *State v. Rhodes*, 90-496.

Under the statute of the United States liquor shipped from another state becomes subject to state legislation with reference to the keeping and sale of intoxicating liquor the moment it crosses the boundary and enters the state: *Ibid.*

SEC. **2420. False statements.** If any person, for the purpose of procuring the shipment, transportation or conveyance of any intoxicating liquors within this state, shall make to any company, corporation or common carrier, or to any agent thereof, or other person, any false statements as to the character or contents of any box, barrel or other vessel or package containing such liquors; or shall refuse to give correct and truthful information as to the contents of any such box, barrel or other vessel or package so

sought to be transported or conveyed; or shall falsely mark, brand or label such box, barrel or other vessel or package in order to conceal the fact that the same contains intoxicating liquors, for the purposes aforesaid; or shall by any device or concealment procure or attempt to procure the conveyance or transportation of such liquors as herein prohibited, he shall, upon conviction, be fined for each offense one hundred dollars and costs of prosecution, and the costs shall include a reasonable attorney fee to be taxed by the court, which shall be paid into the county fund, and be committed to the county jail until such fine and costs are paid. Any peace officer of the county under process or warrant to him directed shall have the right to open any box, barrel or other vessel or package for examination, if he has reasonable ground for believing that it contains intoxicating liquors, either before or while the same is being so transported or conveyed. [21 G. A., ch. 66, § 11.]

SEC. **2421. Packages labeled.** It shall be unlawful for any common carrier or other person to transport or convey by any means, within this state, any intoxicating liquors, unless the vessel or other package containing such liquors shall be plainly and correctly labeled or marked, showing the quantity and kind of liquors contained therein, as well as the name of the party to whom they are to be delivered. And no person shall be authorized to receive or keep such liquors unless the same be marked or labeled as herein required. The violation of any provision of this section by any common carrier, or any agent or employe of such carrier, or by any other person, shall be punished the same as provided in the second preceding section, and liquors conveyed or transported or delivered without being marked or labeled as herein required, whether in the hands of the carrier or some one to whom they shall have been delivered, shall be subject to seizure and condemnation, as liquors kept for illegal sale. [22 G. A., ch. 73, § 7.]

SEC. **2422. Lien of judgments—liability of sureties—costs—evidence.** For all fines and costs assessed or judgments rendered of any kind against any person for a violation of any provision of this chapter, or costs paid by the county on account of such violation, the personal and real property, whether exempt or not, except the homestead, as well as the premises and property, personal and real, occupied and used for the purpose, with the knowledge of the owner or his agent, by the person manufacturing, selling, giving, contrary to the provisions of this chapter, or keeping with intent to sell intoxicating liquors contrary to law, shall be liable, and the same shall be a lien on such real estate until paid. And where any one is required under the provisions of this chapter to give a bond, the principals and sureties shall be jointly and severally liable for all civil damages and costs which may be adjudged against the principal for any violation of any of the provisions of this chapter. Costs paid by the county for the prosecution of actions or proceedings, civil or criminal, under this chapter, as well as the fines inflicted or judgments recovered, may be enforced against the property upon which the lien attaches by execution, or by action against the owner of the property to subject it to the payment thereof. In actions under this section, evidence of the general reputation of the place kept shall be admissible on the question of knowledge of the owner, and written notice given him or his agent by any citizen of the county shall be sufficient to charge him with the same. [21 G. A., ch. 66, § 12; C. '73, §§ 1552, 1558; R., § 1579.]

The right to make the judgment a lien upon the property where the business is carried on rests in the exercise of the police power and not in the right of eminent domain: *Polk County v. Hierb*, 37–361.

Property can only be made liable after it has been established in a competent court by a legal jury that it was used for the illegal purpose with the knowledge or consent of the owner, and the statute does not, therefore, authorize the taking of private property without a trial: *Ibid.*

That under this section a party is liable to a pecuniary forfeiture does not constitute the act or omission so punished a crime. This section is not an *ex post facto* law, nor does it impair vested rights: *Ibid.*

Method of proceeding: The party injured by the illegal sale may bring action against the seller alone, and by subsequent action against the owner enforce the judgment previously obtained; or may join the seller and the owner of the building in the same action: *La France v. Krayer*, 42–143.

An action to make a fine imposed in a contempt proceeding for violation of an injunction a lien upon the premises may properly be brought by a citizen under § 2406: *Cameron v. Kapinos*, 89-561.

Such action may be maintained although the owner of the real estate was not a party to the injunction or contempt proceedings if the illegal use was with the owner's knowledge: *Ibid.*

The action for damages against the person selling may be joined with that against the person owning the premises in which sales are made and against which it is sought to have the judgment established as a lien: *Loan v. Hiney*, 53-89.

If a joint action is brought, either party is entitled to a jury trial on the question of the illegal sale and the damages, and the owner is entitled to a jury trial also on the question as to whether such use of the premises was with his consent and knowledge: *Ibid.*

Where plaintiff brought action for damages for sale of intoxicating liquors against three defendants jointly as sellers, and joined with them as defendant the owner of the property in which the business was carried on, and two separate judgments were rendered at separate trials against two sellers respectively, and at a third trial the judgments were made a lien against the property of the owner, *held*, that on appeal of the owner from final judgment against him, he could not set up the fact of recovery of the former judgment against another one of the sellers by default: *Putney v. O'Brien*, 53-117.

In such case, *held*, that plaintiff might elect which judgment she would enforce and the other would be treated as satisfied: *Ibid.*

Where it is sought to subject property alleged to have been fraudulently conveyed for the purpose of evading the lien of a judgment to the payment of the same, the action against the grantee is equitable in its nature, and the defendant cannot demand a jury trial: *Buckham v. Grape*, 65-535.

In such an action against the holder of the legal title, who was not a party to the original action in which judgment was recovered, the record of the judgment in the former action may be introduced in evidence for the purpose of showing that the plaintiff has recovered judgment against the defendant in such former action, but not as evidence of the amount for which the lien should be established, except that in no event can the lien be established for any greater amount: *Ibid.*

The court establishing the lien of a judgment for illegal sale of liquors against the premises in which the same were sold should ascertain specifically the property upon which the lien shall attach. Such a judgment should not be entered where there is no evidence on the trial showing the title to be in defendant, and that fact is only shown by an affidavit filed after the verdict: *Flint v. Gauer*, 66-696.

The court should specifically ascertain and fix the property upon which the lien shall attach: *Engleken v. Webber*, 47-558, 561.

In a proceeding to have a judgment for fine and costs decreed a lien, under this section, it is not necessery to show that the indictment and judgment of conviction describe the premises sought to be charged. Parol evidence is admissible to identify the place where the nuisance is actually kept: *State v. Manatt*, 84-621.

The statute does not contemplate that judgment against the wrong-doer may be split up and a part only charged as a lien upon the premises. It is sufficient that the landlord furnished the liquor seller, in part, the means of committing the injury: *Arnold v. Barkalow*, 73-183.

Knowledge of owner: A judgment in a proceeding to recover penalties for illegal sales to minors or intoxicated persons is not a lien upon the premises where such sales were made, unless the owner had knowledge of and consented to illegal sales of that character. His knowledge of and consent to sales without permit would not be sufficient. The owner should be shown to have had knowledge of and to have consented to the unlawful act on account of which the judgment was recovered: *Cobleigh v. McBride*, 45-116; *Meyers v. Kirt*, 64-27.

Both knowledge and assent, on the part of the owner of the premises unlawfully used, must be shown to render them subject to the lien of the judgment: *Meyers v. Kirt*, 57-421.

Facts in a particular case *held* to show knowledge and assent on the part of the owner of the building: *Putney v. O'Brien*, 53-117.

The consent of the owner need not be shown by any positive or affirmative act, but may be inferred from circumstances and knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection: *Loan v. Etzel*, 62-429.

Knowledge and consent of the owner of the property cannot be inferred from circumstances tending to show knowledge alone: *Cox v. Newkirk*, 73-42.

In a particular case, *held*, that there was not such knowledge on the part of the owner as to render the premises liable for the costs of a proceeding for the abatement of a nuisance: *Morgan v. Koestner*, 83-134.

In a particular case, *held*, that the evidence was sufficient to show that a wife who owned the property in which a saloon was openly and notoriously kept was chargeable through her husband, who acted as her agent in the management of the property, with a knowledge of its improper use, so as to render it liable under the provisions of this section: *Johnson v. Grimminger*, 83-10.

Where the owner by reason of absence from the state was not aware of the improper use being made of his building, and so soon as he became aware of such use removed the tenant, *held*, that he was not liable for costs: *Drake v. Kingsbaker*, 72-441.

The provisions of this section permitting evidence of the reputation of the place are not applicable to prosecutions for maintaining a nuisance under § 2384: *State v. Fleming*, 86-294.

The knowledge to which the owner is entitled may be shown by proving the general

reputation of the place or by proving that a written notice by any citizen of the county was given to him or his agent. The propery is only liable for fines, costs and judgments assessed or rendered for violations of the law occurring after the owner is chargeable with knowledge that the property is being used for prohibited purposes: *Judge v. O'Connor*, 74-166.

It is sufficient, in order to make out a *prima facie* case, to show that the unlawful use was with the knowledge of the owner. If, notwithstanding that fact, the property is not liable, the burden of showing it is on the owner: *Ibid.; Judge v. Flournoy*, 74-164.

When the property of one not a party to the suit is seized on process issued on a judgment on the ground that the property was used with the knowledge of the owner for purposes in violation of statute, the officer makes such seizure at his peril, but is protected if he can show that the property has been so used that under the law it is liable: *Snedaker v. Jones*, 74-235.

The effect of this section is to subject the property to a judgment when the unlawful act or business on which it was based was done and carried on with the knowledge or consent of the owner or his agent. And if the whole business is in violation of law the property will be subject to judgment, without knowledge on the part of the owner of the particular illegal sale causing the damage: *Wing v. Benham*, 76-17.

There is no liability of the landlord in civil damages for the sale of intoxicating liquors on premises owned by him other than the subjection of his property to the payment of the judgment: *McVey v. Manatt*, 80-132.

In a proceeding to subject the property of a landlord to the lien of a judgment for civil damages, if he resists the relief asked costs may be taxed against him personally, although he is not liable to personal judgment for damages: *Ibid.*

Lien attaches when; conveyance subject to: A purchaser of the property occupied and used for purposes of illegal sale, who purchases pending an action against the seller and the owner, in which it is sought to make any judgment recovered a lien upon the property, takes subject to the lien of any such judgment. The doctrine of *lis pendens* applies: *O'Brien v. Putney*, 55-292.

The lien of the judgment upon the premises attaches only on the rendition thereof, and is subordinate to that of a mortgage previously executed: *Goodenough v. McCoid*, 44-659.

Judgments for fines rendered in justice courts under this section do not become liens on real estate until a transcript of the judgment is certified and filed in the office of the clerk of the district court: *State v. McCulloch*, 77-450.

Where a conveyance of property on which it is sought to establish a lien is made pending the action, that fact is no defense for the original owner, against whom a lien is sought to be established: *Myers v. Kirt*, 68-124.

Where a party takes a deed or mortgage of property, after an action is begun against the owner for the unlawful sale of intoxicating liquors on the premises, the grantee or mortgagee takes the same subject to any judgment which may be rendered against the owner in the action: *McClure v. Braniff*, 75-38.

The homestead: Where a homestead owned by a husband is used by him for the unlawful sale of intoxicating liquors, it is liable for fines, costs and judgments rendered against him for such illegal sale, and the fact that the unlawful use is without the consent of the wife will not exempt the homestead from such liability, when the husband is owner: *Ibid.*

The homestead when not used for the purpose of the violation of the liquor law is exempt from judgment therefor; but when used or kept for such purpose, with the consent of the owner, it is subject to such judgment: *Arnold v. Gotshall*, 71-572.

The fact that a portion of the homestead is illegally used for the sale of intoxicating liquors will not subject it to sale under judgment in favor of a creditor: *Groneweg v. Beck*, 62 N.W., 31.

Extent of lien: Where it appeared that no portion of the premises was occupied as a homestead, *held*, that the lien for costs should attach to the whole house and not merely to the portion of the cellar in which the liquors were illegally kept for sale: *Cameron v. Gminder*, 89-298.

SEC. **2423. Payments—contracts—negotiable paper.** All payments or compensation for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money or anything else whatsoever, shall be held to have been received in violation of law, and to have been received upon a valid promise and agreement of the receiver to pay on demand to the person furnishing such consideration the amount of said money, or the just value of such other thing. All sales, transfers, liens and securities of every kind which either in whole or in part shall have been made for or on account of intoxicating liquors sold in violation of this chapter shall be null and void against all persons, and no rights of any kind shall be acquired thereby. No action shall be maintained for intoxicating liquors or the value thereof, sold in any other state or country, contrary to the law of said state or country, or with intent to enable any person to violate any provision of this chapter, nor shall any action be maintained for the recovery or possession of any intoxicating liquor, or the

value thereof, except in cases where persons owning or possessing such liquor with lawful intent may have been illegally deprived of the same. Nothing, however, in this section shall affect in any way negotiable paper in the hands of holders thereof in good faith for valuable consideration, without notice of any illegality in its inception or transfer, or the holders of land or other property who may have taken the same in good faith, without notice of any defect in the title of the person from whom the same was taken, growing out of a violation of the provisions of this chapter. [C. '73, § 1550; R., § 1571.]

Recovery of payments: The statutory provision as to recovery of money paid for intoxicating liquors is not unconstitutional on account of being in any way a regulation or restriction of commerce among the states: *Connolly v. Scarr*, 72–223.

A claim for money paid for intoxicating liquors may be set up by way of counterclaim in an action on account: *Tolman v. Johnson*, 43–127.

In an action by way of counterclaim by such buyer against the seller for previous payments made for such illegal sales, *held*, that seller was not entitled to offset as against the buyer's counterclaim the value of kegs, packages, etc., not returned by the seller to the buyer in accordance with the terms of the contract of sale: *Gipps Brewing Co. v. De France*, 91–108.

A manufacturer not being allowed to sell without permit, even to one having such permit, *held*, that money paid on such sale might be recovered back: *Becker v. Betten*, 39–668.

The giving of a note for liquors does not constitute payment, even when it has been sold and transferred by the payee, and until it is actually paid the maker cannot maintain an action for the amount thereof: *Carlin v. Heller*, 34–256.

The action to recover money paid will not be barred until five years from time of payment: *Woodward v. Squires*, 41–677.

One who has exchanged property for liquors sold in violation of law may, instead of suing upon a promise to pay therefor, treat the transaction as void and sue for the value of the property; and if accord and satisfaction is then set up as a defense, he may, in reply, set up the illegal nature of the transaction: *Smith v. Grable*, 14–429.

The action to recover money paid is civil, and not *quasi*-criminal in character: *Woodward v. Squires*, 39–435.

A party who has made payments for illegal sales of liquors and is entitled to recover back the purchase money paid, being garnished for the indebtedness thereupon arising to him from the person to whom the payments were made, it must be shown, in order to warrant judgment against him as garnishee, that the liquors were intoxicating and sold in violation of law: *Church v. Simpson*, 25–408.

The provisions for recovery of money paid do not apply to a non-resident selling liquor without permit to a registered pharmacist for lawful purposes and receiving payment therefor in another state: *Kohn v. Melcher*, 29 Fed., 433.

An agent who sells intoxicating liquors in violation of law, but who does not receive the money or purchase price, is not liable for the amount of the purchase price, at the suit of the purchaser: *Schober v. Rosenfield*, 75–455.

An action cannot be maintained for the recovery of money paid for intoxicating liquors sold in violation of law, without first making demand for the money thus paid: *Ibid.*

The claim for money paid is assignable: *Sellers v. Arie*, 68 N.W., 814.

Sales, securities, etc., void: Under the provision with reference to sales, securities, etc., being void, *held*, that the word securities includes promissory notes: *Taylor v. Pickett*, 52–467.

A promissory note given in part for intoxicating liquors is wholly void: *Ibid.; Braitch v. Guelick*, 37–212.

A note, part consideration of which is the sale of intoxicating liquors, is entirely void: *Koster v. Seney*, 68 N. W., 824.

But where a note was given for the amount due on an account, some of the items of which were legal and others illegal as being for intoxicating liquors, and the account was continued and payments afterwards made on accounts generally, *held*, that the note being void, the legal items of account included therein should be regarded as still due on account and the subsequent payments applied thereto: *Quigley v. Duffey*, 52–610.

An assignment of a contract against a third person, made for intoxicating liquors sold in violation of law, is void, and the assignee cannot recover against such third person thereon: *Davis v. Slater*, 17–250.

A judgment recovered on a claim founded upon the illegal sale of intoxicating liquors is not void. The defense must be interposed before judgment or it is lost: *Smith v. Leddy*, 50–112.

A person who has sold another intoxicating liquor in violation of law cannot, on the ground that the sale is void, recover them back in an action of replevin from attaching creditors of his vendee. Being *particeps criminis*, the law will leave the seller where it finds him: *Marienthal v. Shafer*, 6–223.

In an action on a note in which defendant pleaded that it was given to him for liquors sold in violation of law, *held*, that an indictment against him for nuisance committed in the sale of intoxicating liquors was not competent evidence in his behalf: *Taylor v. Pickett*, 52–467.

In an action to foreclose a mortgage where the defense was that the notes were given for intoxicating liquors sold in violation of law, *held*, that the burden of proof was on defendant to show the alleged ille-

gality, and having failed to do so, it was unnecessary to decide whether this section is applicable to a case of this kind or not: *Ressegieu v. Van Wagenen*, 77-351.

In an action on the bond of an agent for the sale of liquors in Iowa on behalf of a principal in Wisconsin, *held*, that as the agent had no authority to sell under the laws of Iowa, the bond was void: *Fred. Miller Brewing Co. v. Stevens*, 71 N. W., 186.

Bona fide purchasers: A party claiming the benefit of the provision in such section protecting *bona fide* holders for value has the burden of showing that he is such holder without notice: *Rock Island Nat. Bank v. Nelson*, 41-563.

An assignee after maturity is not protected: *Barlow v. Scott's Adm'rs*, 12-63.

Sale made in another state: A contract for the sale of liquors, made in another state, with the intention of violating the laws of this state, will not be enforced in our courts, although good where made: *Davis v. Bronson*, 6-410.

Where the contract of sale is made outside of the state, it must, to render the contract void, be made to appear affirmatively that the vendor intended thereby to enable the vendee to violate the laws of this state: *Whitlock v. Workman*, 15-351.

It must be shown not only that the vendor knew of the laws of this state, but that he made the sale with the intention of enabling the purchaser to violate them: *Second Nat. Bank v. Curren*, 36-555.

But while mere knowledge on the part of the vendor that the purchaser intends to violate the liquor law of this state may not vitiate the sale, yet it is a fact from which the jury might infer the intent to enable the buyer to violate such law: *Tegler v. Shipman*, 33-194, 200.

Evidence that one of the partners in the firm making the sale had been in this state before the sale was made and had knowledge of the existence of the law in this state with reference to the suppression of intemperance, *held* admissible in order to show that he must have known that under the circumstances stated to him the sale of the liquor by the purchaser in Iowa would be illegal: *Rindskoff v. Curran*, 34-325.

A sale of intoxicating liquors in violation of law, made in this state by an agent of a firm in another state, is void: *Second Nat. Bank v. Curren*, 36-555; *Taylor v. Pickett*, 52-467; *Schuenfeldt v. Junkermann*, 20 Fed., 357.

If the order for liquor is taken in this state by such agent, but subject to the approval or disapproval of his principal, the sale will be held as made in the state where the principal resides, and will be enforceable in Iowa unless made with intent to violate its laws: *Tegler v. Shipman*, 33-194; *Schuenfeldt v. Junkermann*, 20 Fed., 357.

Where a sale was made in another state, but notes in payment of the purchase money were executed in Iowa and forwarded to the seller, *held*, that the place where the contract and delivery was made, and not the place where the notes were executed, was the place of contract: *Whitlock v. Workman*, 15-351.

Where liquors are ordered by mail by a resident of one state, the contract is deemed made in the place where the order is received and the goods delivered to the carrier for shipment; and the same rule applies to a contract taken by an agent at the place of residence of the buyer, but subject to the approval of the principal in another state from which the goods are to be shipped in case of the approval of the contract: *Engs v. Priest*, 65-232.

Where it appears that the contract for sale of liquor was made in Iowa it will be presumed that payment therefor was intended to be made and was afterwards made at the place where the contract was entered into: *Connolly v. Scarr*, 72-223.

An order or conditional agreement for liquor to be executed and filled in another state is not a contract in violation of the laws of Iowa: *Fred Miller Brewing Co. v. De France*, 90-395.

If the sale in pursuance of which the money is paid was made in another state, the money paid cannot be recovered although the seller intended to assist the buyer in the violation of the laws of this state. The contract for such a sale would be invalid, but the sale is not in violation of the laws of this state as provided by this section: *Wind v. Iler*, 61 N. W., 1001.

With reference to sales of liquor sent into Iowa from another state prior to the taking of effect of the act of congress, which subjected such commerce to state regulations, this section would not be applicable as it would be an interference with interstate commerce: *Ibid.* But now see *Fred Miller Brewing Co. v. Stevens*, 71 N. W., 186.

Where the proposition of a seller in another state to the proposed buyer living in Iowa was to furnish beer at certain prices on the track at the city of the buyer's place of business, *held*, that an acceptance of such a proposition made a contract to be performed in Iowa and therefore illegal, the buyer having no right to engage in the sale of such liquors: *Gipps Brewing Co. v. De France*, 91-108.

Sales under permits: Where orders were taken in different parts of the state by a firm having authority to sell within a particular county, *held*, that it would be presumed that the sale was made in that county, and was completed when the orders were taken, unless the contrary was made to appear: *Gross v. Scarr*, 71-656.

Where orders for liquors sent to a druggist were filled by a third person having a permit to sell intoxicating liquors, and that fact was known to the purchaser, *held*, that he could not recover from the druggist money paid for liquors the sale of which to him was illegal: *Hurlburt v. Fyock*, 73-477.

This section refers to sales in violation of the liquor law, and not to illegal sales by pharmacists. The provision is not for the benefit of the vendee: *Kohn v. Melcher*, 43 Fed., 641.

Property in intoxicating liquors and the recovery thereof: While the commerce in intoxicating liquor as an article of beverage is unlawful, its character as property is not thereby destroyed; and where such liquor was seized on execution for the debt of one

not its owner, *held*, that the owner might recover it by replevin, although it was kept for sale in violation of the statute: *Monty v. Arneson*, 25–383.

That intoxicating liquors are held for an unlawful purpose is no answer to an indictment for stealing the same: *State v. May*, 20–305; nor to an action of trespass for destroying them: *Turner v. Hitchcock*, 20–310.

Where liquor had been seized by an officer under an information which had subsequently been held defective and a return of the liquor ordered, *held*, that in an action by the owner against such officer to recover damages for a failure to return the property as so ordered, the plaintiff could not recover without proving that he owned and kept the liquor with a lawful intent: *Walker v. Shook*, 49–264.

In an action against a common carrier to recover the value of intoxicating liquors lost or destroyed by it, it is necessary for plaintiff to prove that he owned or possessed such liquors with lawful intent (overruling *Bowen v. Hall*, 4–430): *Summer v. Cate*, 22–585.

Intoxicating liquors cannot be recovered by the owner unless he shows that they were in his possession with lawful intent, and that he was illegally deprived of them: *Funk v. Israel*, 5–438, 452; and as to action of replevin or trespass against officer seizing liquors, see notes to §§ 2382 and 2413.

SEC. **2424. Requisites of indictment or information—testimony of purchaser.** In any indictment or information under this chapter, it shall not be necessary to set out exactly the kind or quantity of intoxicating liquors manufactured, sold, given in evasion of the statute, or kept for sale, nor the exact time of manufacture, sale, gift or keeping for sale, but proof of the violation by the accused of any provision of this chapter, the substance of which violation is briefly set forth, within the time mentioned in said indictment or information, shall be sufficient to convict such person; nor shall it be necessary in any indictment or information to negative any exceptions contained in the enacting clause or elsewhere, which may be proper ground of defense; and, in any prosecution for a second or subsequent offense, as provided herein, it shall not be requisite to set forth in the indictment or information the record of a former conviction, but it shall be sufficient briefly to allege such conviction; nor shall it be necessary in every case to prove payment in order to prove a sale within the true meaning and intent of this chapter, and the person purchasing any intoxicating liquor sold in violation of this chapter shall in all cases be a competent witness to prove such sale. [C.'73, § 1549; R., § 1569.]

Indictment or information: An information charging defendant with selling intoxicating liquors is sufficient: *Foreman v. Hunter*, 59–550.

It is not necessary in an indictment for the illegal sale to specify the kind of liquor sold: *State v. Whalen*, 54–753.

However, if the kind of liquor is specified it must be proven as charged: *State v. Hesner*, 55–494.

An information charging defendant with selling, etc., is sufficient without stating the method in which the sale was accomplished. A selling committed in any of the different methods referred to by statute constitutes one and the same offense: *Devine v. State*, 4–443.

Any information for the offense of illegal sales should charge that defendant sold, etc., to some person, giving the name, if known: *State v. Allen*, 32–491.

An indictment charging defendant with keeping for sale and selling intoxicating liquors is good without the allegation that they were so kept and sold in violation of law: *State v. Jordan*, 39–387.

Where the information charges the sales of liquor to different persons named, on certain dates, the jury may convict on proof of sales to any of the persons named at any time within the statute of limitation and prior to the filing of the information: *State v. Johnson*, 69–623.

Negativing exceptions: For applications of the general principle that it is not necessary in the indictment to negative exceptions, but that they must be proved by way of defense, see *State v. Becker*, 30–438; *State v. Miller*, 53–84; *State v. Curley*, 33–359; *State v. Stapp*, 29–551; *State v. Collins*, 11–141; *State v. Benecke*, 9–203.

Subsequent convictions: Before defendant can be found guilty of the offense of a second sale he must be charged, convicted and fined for the first offense of selling: *State v. Leis*, 11–416.

Under an information charging a second or third offense and a former conviction, defendant may be found guilty of a first offense: *State v. Ensley*, 10–149; *State v. Gaffeny*, 66–262.

In such case the offense of a first sale may be regarded as included in the offense of a second sale charged in the indictment: *Ibid.*

Purchaser as witness: The purchaser is a competent witness to prove the illegal sale: *Wakeman v. Chambers*, 69–169; *Sterling v. Jugenheimer*, 69–210.

SEC. **2425. Several counts—second conviction.** Informations or indictments under this chapter may allege any number of violations of its provisions by the same party, but the several charges must be set out in separate counts, and the accused may be convicted and punished upon each

one as on separate informations or indictments, and a separate judgment shall be rendered on each count under which there is a finding of guilty. The second or subsequent convictions provided for in this chapter shall be convictions on separate informations or indictments, and, unless shown in the information or indictment, the charge shall be held to be for a first offense. [23 G. A., ch. 35, § 12; 22 G. A., ch. 71, § 14; 20 G. A., ch. 143, § 10; 17 G. A., ch. 119, § 7; C.'73, § 1540; R., § 1562; C.'51, § 930–1.]

Any number of violations may be charged in separate counts and a separate conviction had on each: *Walters v. State*, 5–507.

Under an ordinance providing a punishment for the sale of spiritous, vinous or malt liquors not prohibited by statute, *held*, that more than one offense might be included in the same complaint: *Jackson v. Boyd*, 53–536.

But the first and second, or second and third, offenses cannot be charged in the same indictment or information: *State v. Leis*, 11–416.

The separate counts should show that the offense charged in each is different from those charged in the others, and where a number of counts were identical in language so that the charge in each would be proven by the same evidence, which would establish that alleged in any of the others, *held*, that a demurrer to the information should have been sustained, or the state should have been restricted in the introduction of evidence to such as was intended to sustain a single sale: *State v. Van Haltschuherr*, 72–541.

An attorney entitled to recover the fee provided by § 2428 can recover but one such fee for each prosecution, although several counts for different offenses are embraced in the same information or indictment: *Schulte v. Keokuk County*, 74–292.

Where an information for selling intoxicating liquors contained several counts and defendant was tried before a justice of the peace and found guilty on the first count, *held*, that by legal inference he was acquitted on the other counts, and upon an appeal to the district court could only be tried on the first count: *State v. Severson*, 79–750.

SEC. **2426. Termination of lease.** Upon a violation of any provision of this chapter committed upon real estate occupied by a tenant, his agent, servant, clerk, employe or any one claiming under him, the landlord of such premises, by himself or agent, within thirty days after a judgment therefor is entered of record in any case, civil or criminal, may, in writing, notify such agent, tenant, or the person in possession of said leased premises, to the effect that he has terminated such lease and demands possession thereof within three days after the giving of such notice, and, after the expiration of said three days, may recover possession thereof in an action of forcible entry and detainer, without further notice to quit, upon proof of the record of such judgment and of the giving of such notice, but such termination of the lease shall not divest the property of any lien which has attached by reason of said judgment. [21 G. A., ch. 66, § 5; 17 G. A., ch. 119, § 8.]

SEC. **2427. Evidence of illegal selling or keeping—license.** In all actions, prosecutions and proceedings under the provisions of this chapter, proof of the actual manufacture, sale or gift in evasion of the statute of intoxicating liquors by a person not authorized to manufacture, sell or give the same shall be presumptive evidence of illegal manufacture or sale, and the finding of intoxicating liquors in the possession of one not legally authorized to sell or use the same, except in a private dwelling-house which does not include or is not used in connection with a tavern, public eating house, restaurant, grocery, or other place of public resort, or the finding of the same in unusual quantities in a private dwelling-house or its dependencies of any person keeping a tavern, public eating house, grocery, or other place of public resort, shall be presumptive evidence that such liquors are kept for illegal sale. The fact that any person not authorized to keep for sale and to sell intoxicating liquors for lawful purposes, engaged in any kind of business, has or keeps posted in or about his place of business a receipt or stamp showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malt or fermented liquors, or shall have paid such special tax for the sale of such liquors in this state, shall be presumptive evidence that the person owning or controlling such receipt or stamp, or having paid such special tax, is engaged in keeping for sale or selling intoxicating liquors contrary to the provisions of this chapter. [21 G. A., ch. 66, § 8; 21 G. A., ch. 113, § 1; 20 G. A., ch. 143, § 11; C.'73, § 1542; R., § 1583.]

Evidence: On proof of the sale of intoxicating liquors in defendant's place of business, the burden is upon him to prove that the sales were lawful: *State v. Cloughly*, 73-626.

In a prosecution for the illegal sale it is proper to ask a witness whether he purchased such liquor of defendant and whether he knows of defendant selling such liquor to any one. It is also proper to ask a witness what defendant's business was: *State v. Roben*, 39-424.

The testimony of a witness in a prosecution for illegal sale that he bought and drank in defendant's saloon what, in his opinion, was whisky, *held* not incompetent as being merely an opinion. A man who resorts to a saloon for intoxicating liquors may be presumed to be qualified to express an opinion as to the liquor supplied him: *State v. Miller*, 53-84.

In a prosecution for the illegal sale of liquors, against a party holding a permit, the fact of sales being made not being questioned, *held*, that the burden of proof was upon defendant to show that the sales were for authorized purposes, and as no such evidence was offered, it would be presumed that the sales were unlawful: *State v. Kriechbaum*, 81-633.

The provision that the finding, etc., shall be presumptive evidence, etc., is not unconstitutional: *Santo v. State*, 2-165, 214. But it would seem that such presumption would not attach to liquor *in transitu*, and it is doubtful whether it may be made except upon the trial of an indictment or information. In an action against a carrier for damages for the loss of liquor delivered to it for transportation, *held*, that the carrier could not set up as a defense that the keeping of such liquor was unlawful: *Bowen v. Hale*; 4-430; but see *Sommer v. Cate*, in notes to § 2423.

An instruction that the fact that liquors are kept by a person not legally authorized to make sales and not in a private dwelling house is presumptive evidence of keeping for illegal sale, *held* proper, although defendant was a registered pharmacist and entitled at the time, by law, to keep liquors for use in his business, that fact being properly explained in another portion of the charge: *State v. Shank*, 79-47.

Held, also, that it was proper for the jury to consider the quantity of liquor kept by defendant in connection with the legitimate demands of his business in determining whether or not such liquors were kept for unlawful purposes: *Ibid.*

Instruction in a particular case with reference to the presumption from the finding of liquors, *held* correct: *State v. Illsley*, 81-49.

The finding of intoxicating liquors in a room occupied and used by defendant is evidence tending to connect him with the illegal owning and keeping for sale: *State v. Hale*, 91-367.

The presumption from the finding of intoxicating liquors is applicable in a prosecution for maintaining a nuisance as well as one for illegal sale: *Ibid.*

The finding of liquors in the possession of a person not authorized to sell them is presumptive evidence that they are kept for sale in violation of law: *State v. Farley*, 87-22.

Where liquor is found in premises not a dwelling house which are in the possession of one engaged in the business of unlawfully selling the presumption is that such liquors are illegally kept for sale and it is not necessary for the prosecution to show that defendant assented to the illegal use of the property over which he had control for the keeping of such liquors nor that they were kept upon his premises with his knowledge and consent: *State v. Arie*, 64 N. W., 268.

A person may make a place of public resort of his private dwelling and when he does so, the finding of intoxicating liquors there is presumptive evidence that they were kept for illegal sale: *State v. Fleming*, 86-294.

The presumption from the keeping of liquors in a place of public resort, without a right to sell, is that they are kept for unlawful sale: *State v. Severson*, 88-714.

License: Before this act, *held* no defense in a prosecution for selling in violation of the state law that defendant held a United States internal revenue license to retail liquors. Such license does not authorize the holder to violate the law of the state: *State v. McCleary*, 17-44; *State v. Carney*, 20-82; *State v. Stutz*, 20-488; *State v. Baughman*, 20-497.

Nor was the holding of such license a circumstance tending to show a violation of the state law: *State v. Stutz*, 20-488.

Where defendants claimed to have paid a United States revenue tax for the purpose of protecting themselves in the sale of liquor not intoxicating, but it appeared that they had paid such special license while engaged in selling intoxicating liquors, and had paid it again for the time when they claimed to have ceased to sell the intoxicating liquors and to be engaged only in the sale of liquors not intoxicating, *held*, that payment of the tax was sufficient evidence of keeping intoxicating liquors with intent to sell in violation of law: *State v. Schultz*, 79-478.

SEC. **2428. Duty of peace officers.** Peace officers shall see that all provisions of this chapter are faithfully executed within their respective jurisdictions, and when informed, or they have reason to believe, that the law has been violated, and that proof thereof can be had, they shall file an information to that effect against the offending party before a magistrate, who shall thereupon proceed according to law. Upon trials of such causes, the county attorney shall appear for the state, unless some other attorney, selected by the peace officer who filed the information, shall have previously appeared. Any peace officer failing to comply with the provisions of this section shall pay a fine of not less than ten nor more than fifty dollars, and a

conviction shall work a forfeiture of his office. Every peace officer shall give evidence, when called upon, of any facts within his knowledge tending to prove a violation of the provisions of this chapter, but his evidence shall in no case be used against him in any criminal prosecution. The attorney selected by a peace officer in accordance with the provisions of this section shall receive, for prosecuting such charge before a justice of the peace, five dollars, to be taxed as costs in the case. [20 G. A., ch. 143, § 13; 17 G. A., ch. 91; C.'73, §§ 1551, 3829; R., §§ 1578, 4168; C.'51, § 2561.]

It is only a peace officer who files an information for the violation of the liquor law that is authorized to select an attorney other than the public attorney to prosecute the same and receive fees therefor from the county: *Foster v. Clinton County*, 51-541.

A special constable is not such peace officer as that he is authorized to employ an attorney at the expense of the county under such circumstances: *Ibid.*

The county is not liable for the fees of an attorney in prosecutions upon information by a private person for illegal sales, but only for those commenced by peace officers: *Blair v. Dubuque County*, 27-181.

A peace officer may select another attorney than the county attorney, and the attorney thus selected will be entitled to the fees authorized: *Work v. Wapello County*, 73-357; *Nichols v. Polk County*, 78-137.

The sheriff, who serves the writ, has no authority except that ordinarily pertaining to an officer in a civil suit in the name of the state through the county attorney to secure an injunction against the maintaining of a nuisance, and his representation to the landlord, who is joined as defendant, that the proceedings will not be continued against him will not justify the landlord in relying thereon: *Seddon v. State*, 69 N.W., 671.

SEC. **2429. Attorney's fees.** In all actions in equity against persons charged with keeping a nuisance, and to abate the same, and all proceedings for a contempt for violating any injunction, temporary or permanent, issued or decreed therein, the court or judge before whom the same shall be heard and determined shall allow the attorney prosecuting such cause a reasonable sum for his services, and in case a fine shall be assessed, he shall be allowed ten per cent. of the fine collected. [22 G. A., ch. 73, §§ 5, 6; 21 G. A., ch. 66, §§ 1, 4, 10, 11; 20 G. A., ch. 143, § 14; C.'73, § 1553; R., § 1580.]

The attorney in the case in which attorney's fees are taxed is the real party in interest with reference to such fees: *Farr v. Seaward*, 82-221.

Where the county attorney prosecutes such action he is entitled to the attorney's fees taxed, in addition to his other compensation as county attorney: *Ibid.*

The attorney's fee provided for in this section is not a charge against the county: *Sims v. Pottawattamie County*, 91-442.

As to attorneys' fees in prosecutions for nuisance and in equitable actions for an injunction, see §§ 2384 and 2406.

SEC. **2430. No release from imprisonment.** No person sentenced to be imprisoned for non-payment of fines and costs, or either of them, under the provisions of this chapter, shall be released from such imprisonment under the provisions of this code for the liberation by the sheriff of persons sentenced to pay fines and costs only, and to stand committed until sentence be performed. [21 G. A., ch. 66, § 4; 20 G. A., ch. 143, §§ 10–12; C.'73, §§ 1540, 1542–3; R., §§ 1562, 1583; C.'51, §§ 930–1.]

See *Hanks v. Workman*, 69-600.

SEC. **2431. Evasions.** Courts and jurors shall construe this chapter so as to prevent evasion. [C.'73, § 1554; R., § 1581; C.'51, § 929.]

Applied: *Woolheather v. Risley*, 38-486, 491; *Church v. Higham*, 44-482, 484.

It is proper to instruct a jury that a licensed pharmacist selling intoxicating liquors must use the utmost good faith and ordinary caution, and show that liquor is only sold by him as medicine, and that his license will not protect him for artful sales of liquor for other purposes than medicine: *State v. Harris*, 64-287.

As to evasion by giving, see notes to §§ 2382, 2384.

MULCT TAX.

SEC. **2432. Payment of—lien.** Every person, partnership or corporation, except persons holding permits, carrying on the business of selling or keeping for sale intoxicating liquors, or maintaining a place where intoxicating liquors are sold or kept with intent to sell, shall pay an annual tax, to be

called a "mulct tax," of six hundred dollars, in quarterly installments as hereinafter provided, which tax shall be a lien upon the real property wherein or whereon the business is carried on, or where the place for selling or keeping for sale is maintained, from the time each installment of tax as hereinafter provided shall become due and payable. In case the person carrying on the business or maintaining the place is a different person from the owner of the real property wherein or whereon the business is carried on or the place maintained, then the tax shall be payable by the person conducting such business or maintaining such place. But such owner may pay such tax at any time after the same becomes due and payable for the purpose of releasing his property therefrom. Any permit holder selling intoxicating liquors as a beverage shall pay the tax provided for in this section. [25 G. A., ch. 62, § 1.]

The tax may be collected by an ordinary action: *Marshall County v. Knoll*, 69 N.W., 1146; *S. C.*, 71 N.W., 571.

The lien of the tax does not take priority over that of the pre-existing mortgage: *Smith v. Skow*, 66 N.W., 893.

The sum which is provided to be paid is not in fact a tax as the term is generally used. It is in reality a charge or license exacted for the privilege of carrying on the business of vending liquors: *Ibid.*

The provisions of the mulct law as originally enacted were not applicable to cities under special charter: *Clark v. Riddle*, 70 N.W., 207. [But now see § 2448.]

SEC. **2433. Return by assessor.** In the months of December, March, June, and September of each year, and before the twentieth day of each of said months, the assessor of each township, town or city, or assessment district thereof, shall return to the county auditor a list of persons who are, or since the last quarterly return have been, engaged in carrying on within said township, town, city or assessment district the business of selling or keeping for sale intoxicating liquors, or maintaining any place where such liquors are sold or kept for sale, and also a description of the real property wherein or whereon such business is carried on or such place is maintained, with the name of the occupant or tenant and owner or agent. Any assessor wilfully failing to comply with the provisions of this section shall pay a fine of fifty dollars and costs for each offense. [Same, § 2.]

SEC. **2434. Blanks.** The county auditor shall furnish to each assessor the necessary blanks on which shall be returned the list of places where intoxicating liquors are sold, with names of the occupants, tenants and owners, and also the name of the agent, if there is an agent, of the property. [Same, § 8.]

SEC. **2435. Statement by citizens.** Should the assessor for any reason fail to perform his duty, any three citizens of the county can, by verified statement on information and belief, addressed to the county auditor, procure the listing of names and places as above provided, with the same force and effect as if done by the assessor. [Same, § 3.]

SEC. **2436. Quarterly installments—lien—penalty.** On the first day of January, of April, of July, and of October of each year there shall be due and payable from each person returned to the county auditor by the assessor, or by three citizens as aforesaid, as a person carrying on the business of selling or keeping for sale intoxicating liquors, or maintaining a place where such liquors are sold or kept for sale, a quarterly installment of the mulct tax herein provided for, and the tax due from any person so returned by the assessors, or by three reputable citizens, shall be a lien upon the real property wherein or whereon such business is returned as being carried on or such place maintained, whether the person carrying on such business, or maintaining such place, is correctly described or not. If the installments of tax due and payable as aforesaid are not paid within one month after the same become due and payable, then a penalty of twenty per cent. shall be added thereto, together with one per cent. per month thereafter until paid. Whoever is assessed under the provisions of this chapter shall be liable at least for one quarterly installment of the tax herein provided for, notwithstanding any such person may discontinue the business

when so assessed, and notwithstanding the fact he may have been in the business for a less period than three months; and if he shall continue therein for a longer period than three months, he shall be liable for an additional quarterly installment, subject to abatement on account of discontinuance of the business before the expiration of such second or subsequent quarter. [Same, § 11.]

SEC. **2437. List certified to treasurer.** On the last day of December, of March, of June, and of September in each year, the county auditor shall certify to the county treasurer a complete list of the names of persons returned to him by the assessors, or entered on the sworn statements made to him by citizens as aforesaid, together with a description in each case of the real property wherein or whereon the business is carried on or the place maintained, and the name of the occupant or tenant, and the owner or agent of such property. [Same, § 10.]

SEC. **2438. Entry of tax.** The county treasurer shall thereupon enter upon a book known as the "mulct tax book" a quarterly installment of the mulct tax, as due and payable by the person carrying on such business or keeping such place, and as a lien and charge upon and against the real property wherein or whereon such business is carried on or such place maintained. [Same, § 10.]

SEC. **2439. When delinquent—sales for.** After the expiration of one month from the date when such tax becomes due and payable, if not paid, it shall be delinquent and collectible by the treasurer in the same method as that in which other delinquent taxes are collectible, and all the provisions as to the collection of other delinquent taxes shall apply. Tax sales for such delinquent taxes shall also be made on the first Monday in June of each year, in the same manner and to the same effect as on the first Monday in December, and all the provisions of law as to tax sales in December shall apply to such sales in June. When real estate offered at tax sale under this section shall be passed for want of bid covering amount of tax due thereon, it shall be advertised and sold by the treasurer at next semiannual tax sale to the highest bidder. [Same, §§ 12, 13.]

SEC. **2440. Collection by selling personal property.** At any time after the quarterly installment of such taxes becomes delinquent, the treasurer may collect the same by seizing and selling any personal property used in connection with the business or in maintaining the place. [Same, § 13.]

SEC. **2441. Application for remission.** At the meeting of the board of supervisors next following the listing as aforesaid, application may be made to remit the tax, by petition duly verified and filed with the county auditor at least eight days before the time set for the consideration of the case, and notice for the same length of time must be served on the county attorney in writing. The averments of the petition shall be deemed denied, and witnesses may be examined, and the chairman of the board, or, in his absence or inability to act, any member of the same may administer an oath in the same form and of the same effect as to penalties for testifying falsely as if administered in court. [Same, § 4.]

SEC. **2442. Hearing—evidence—appeal.** On the application to remit the tax, the owner of the property may be heard in support of the same, and evidence of the general reputation of the place shall be admissible, and if upon the hearing of the case it shall be shown that the petitioner, his agent or tenant has paid a retail liquor dealer's internal revenue tax to the United States, covering any portion of the time and premises as set forth in the listing of said real estate, it shall be *prima facie* evidence that the person and property are subject to the tax. If upon said hearing it be found by a majority vote of the board of supervisors that the tax is proper, it shall stand, otherwise it shall be remitted, and the board shall enter its order on its record. Either the petitioner or the county attorney may appeal to the district court, and if the petitioner appeals he shall be required to give bond for the costs which have accrued, or may accrue in the further progress of the case.

Notice of the appeal shall be served upon the appellee or his attorney, and upon the county auditor, within ten days after the decision by the board of supervisors; whereupon the auditor shall file a full and complete transcript of the record of the proceedings in said cause, together with the original papers, in the office of the clerk of the district court in said county. In case the finding of the board of supervisors shall be against the tax, and the county attorney shall fail to take an appeal to the district court within ten days from such finding as above provided, any three citizens of the county may take such appeal within ten days thereafter, upon giving a good and sufficient bond for costs, and the same proceeding shall be had as if the appeal had been taken by the county attorney. The auditor shall charge and tax as fees for the transcript and writing up of the record ten cents per hundred words. [Same, § 5.]

SEC. **2443. Remission entered—costs.** If the tax is remitted by the board of supervisors, and no appeal from such action is taken, or if on an appeal to the district court the tax is ordered to be remitted, the auditor shall certify the fact to the treasurer, who shall mark the tax on his books as remitted, and shall not collect the same, and if an installment of tax has already been paid, it shall be refunded by the board of supervisors. If any sale of real property has been made for a tax which is afterwards remitted, the title of the purchaser shall become void and the amount paid by such purchaser shall be refunded by the county. If any application for the remission of the tax is refused by the board of supervisors, and no appeal therefrom is taken, or if on appeal to the district court the tax is confirmed, the costs of the whole proceeding shall be certified by the auditor to the treasurer, and by him added to the tax, and collected as the remainder of such tax. [Same, § 5.]

SEC. **2444. Trial on appeal—judgment against property.** On the appeal the trial shall be conducted as an equitable cause, and the first term shall be the trial term. Should it appear, either on the trial before the board of supervisors or in the district court, that there have been sales of intoxicating liquors made in or upon the premises listed for taxation, the tax shall be confirmed against the person, corporation or partnership conducting the business, and if it appears that the wrong name or an *alias* has been used, then the record and assessment list may be amended and the true name inserted; and if it shall appear at such trial that the owner or his agent knew, or by the use of reasonable care or diligence might have known, of the sales of intoxicating liquors as aforesaid, the tax shall be confirmed against the property by an order of record, and the clerk of the district court shall certify such fact to the county auditor, with the amount of costs made in the trial of the case. [Same, § 6.]

SEC. **2445. Tax divided and apportioned.** The revenue derived from the tax provided for in this chapter shall be paid into the county treasury, one-half to go into the general county fund, and the remainder to be paid over to the municipality in which the business taxed is conducted. If such business is conducted outside the limits of a city or town then the tax now in hands of county treasurers, or that shall hereafter be collected from such business, shall be apportioned as follows: One-half to the general county fund and the other one-half to the clerk of the township in which such business is conducted. The clerk of the township shall apportion the amount so received by him equally among the road supervisors of the territory of the township outside of the city or town, to be by said road supervisors expended for the improvement of the roads of the districts. In counties where a tax on the traffic in intoxicating liquors is paid into and belongs to the county treasury, and when there is a surplus in the general fund, the board of supervisors may transfer such surplus, not exceeding the amount of such liquor taxes, to the county road fund, and expend the same upon the roads of the county. [26 G. A., ch. 25; 25 G. A., ch. 62, § 14.]

[The provision in brackets was enacted by a special statute which took effect by publication ...., 1897, and it is added to section 2445 as pertaining to the same subject matter.]

In the original act there was an omission to provide the disposition that should be made of one half of the revenue when the place taxed was not within a city or town and a school district township was not entitled to such portion of the tax, not being a "municipality" although a public corporation: *District T'p v. Frahm*, 70 N.W., 721.

SEC. **2446. Duty of county attorney.** It shall be the duty of the county attorney of each county to see that the provisions of this chapter relating to the mulct tax are enforced, and the district court or any judge thereof shall suspend or remove from office any county attorney who shall wilfully refuse or neglect to perform any such duty. Such suspension or removal may be made upon application of any citizen residing in the county, but shall not take place except upon due notice to said officer and trial in court, and the provisions of this section shall apply to assessors, county treasurers and members of boards of supervisors whose duty it is to enforce them. [25 G. A., ch. 62, § 15.]

SEC. **2447. Effect of payment.** Nothing contained in this chapter so far as it relates to the mulct tax shall be in any way construed to mean that the business of the sale of intoxicating liquors is in any way legalized, nor as a license, nor shall the assessment or payment of any tax for the sale of liquors as aforesaid protect the wrongdoer from any penalty now provided by law, except as provided in the next section. [Same, § 16.]

The business of selling liquor in conformity with the provisions of the mulct law is a lawful business and a landload who pays the mulct tax on failure of the tenant to do so as required by the terms of the lease can recover the amount of the tax paid in an action against the tenant: *McKeever v. Beacom*, 70 N. W., 112.

By violating the provisions of the mulct law as to selling on Sunday the seller subjects himself to the penalties of the prohibitory law: *Cotant v. Hobson*, 67 N. W., 255.

The prohibitory law has not been repealed and the burden is upon the seller to show facts which constitute a bar to a proceeding for violation of such law: *Ritchie v. Zalesky*, 67 N. W., 399.

In a proceeding to enjoin the maintenance of a liquor nuisance, it is not necessary to plead or prove that the mulct law by which the penalties of the prohibitory law are suspended under certain circumstances is not in force in the particular locality in which the nuisance is alleged to exist, nor is it necessary to plead or prove that some of the provisions of such law have been violated. The penalties, forfeitures and rigors of the prohibitory law are suspended only upon certain conditions, the existence of which defendant must plead and prove: *State v. Van Vliet*, 61 N. W., 241.

The word "penalties" as employed in this section is not used in a technical sense, but covers all of the prohibitory features of the law before in force, for the suppression of the saloon, whether by way of fines and an imprisonment or by injunction and fines for violation thereof: *Ibid.*

SEC. **2448. When a bar—conditions.** In any city, including cities acting under special charters, of five thousand or more inhabitants, no proceeding shall be maintained against any person who has paid the last preceding quarterly assessment of mulct tax, nor against any premises as a nuisance on account of the selling or keeping for sale therein or thereon, by such person, of such liquors, provided the following conditions are complied with; and in any city of over twenty-five hundred and less than five thousand inhabitants, when a written statement of consent that intoxicating liquors may be sold in such city, signed by eighty per cent. of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor, and shall by the board of supervisors at a regular meeting, or at a special meeting called for that purpose, have been held sufficient, and its findings entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated until revoked, said city shall come within the provisions of this section:

1. *Statement of consent—action of supervisors.* A written statement of general consent that intoxicating liquors may be sold in such city, signed by a majority of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been

filed with the county auditor and shall, by the board of supervisors, at a regular meeting, have been held sufficient, and its finding entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated, until revoked, as hereinafter provided.

2. *Resolution of council—consent of property owners—officers barred—limits.* The person appearing to pay the tax shall file with the county auditor a certified copy of a resolution regularly adopted by the city council, consenting to such sales by him, and a written statement of consent from all the resident freeholders owning property within fifty feet of the building where said business is carried on. But in no case shall said business be conducted by any person holding any township, town, city or county office, or within three hundred feet of any church building or school-house, nor within one-half mile of the place where any agricultural fair is being held.

3. *Bond.* He shall file with the county auditor, to be approved by the clerk of the district court, a bond to the county, in the sum of three thousand dollars, conditioned upon the faithful observance of all the provisions of this chapter relating to the mulct tax, and for the payment of all damages that may result from the sale of intoxicating liquors upon the premises occupied by the obligor. Said bond shall be signed by himself as principal, and by two sureties who shall qualify each in double the amount of the bond, and neither of whom shall be surety on any other like bond.

4. *Place of sale.* Said selling or keeping for sale of intoxicating liquors shall be carried on in a single room having but one entrance or exit, and that opening upon a public business street. The bar where liquors are furnished shall be in plain view from the street, unobstructed by screens, blinds, painted windows or any other device. There shall be no chairs, benches, nor any other furniture in front of the bar, and only such behind the bar as is necessary for the attendants. A list of names of all persons employed about the place shall be filed with the county auditor, and no persons shall be permitted behind the bar except those whose names are so listed.

5. *Conduct.* The place shall be conducted in a quiet, orderly manner.

6. *Gaming and amusements.* There shall be no gambling or gaming with cards, dice, billiards or any other device, nor any music, dancing or other form of amusement or entertainment, either in the room where said business is carried on or in any adjoining room or building controlled by the person, partnership or corporation carrying on said business.

7. *Obscene pictures.* There shall be no obscene or impure decorations, inscriptions, placards or any such thing in the place.

8. *Females.* No female shall be employed in the place.

9. *Opening and closing.* The place shall not be open nor any sales be made earlier than five a. m. nor later than ten p. m. on any day. It shall not be open at all, nor shall any sales be made, on the first day of the week, commonly called Sunday, nor on any election day or legal holiday, nor on the evening of such days.

10. *Minors, drunkards, intoxicated persons.* No minor, drunkard or intoxicated person shall be allowed in the room, and no sales of intoxicating liquors shall be made to any minor, drunkard or intoxicated person, or knowingly to any person who has taken any of the so-called "cures for drunkenness."

11. *Written notice not to sell.* No sale of intoxicating liquors shall be made to any person whose wife, husband, parent, child, brother, sister, guardian, ward over fourteen years of age, or employer, shall by written notice forbid such sales.

12. *Payment of tax.* If the name of a person desiring to carry on the business of selling or keeping for sale intoxicating liquors, or maintaining a place where such liquors are sold or kept for sale, has not been entered by the auditor on the list of such persons as hereinbefore provided for, or if the property wherein or whereon such business is to be conducted has not likewise been entered by the auditor on such list, then the name of such person and the description of such property shall be entered upon such list by

the treasurer, and a quarterly installment of tax shall be paid as though the name of such person and the description of such property had been duly entered upon such list at the last preceding quarterly assessment for such purpose. [Same, § 17; 18 G. A., ch. 82; 18 G. A., ch. 147; 17 G. A., ch. 119, § 2; C.'73, § 1114.]

Constitutionality: This statute is not unconstitutional on the ground that it involves a delegation of legislative authority to the people, nor on the ground that its purpose is not sufficiently expressed in the title, nor on the ground that it is a local law and one not of uniform operation: *State ex rel. v. Forkner*, 62 N. W., 772.

The statute is not unconstitutional as an infringement of the pardoning power of the governor. It is competent for the legislature to provide that under certain conditions criminal proceedings shall be barred: *Ibid.*

Statement of consent: The signing of a petition of consent by a majority of the electors in a city does not of itself bar the prosecution for violation of the prohibitory law but is simply a condition precedent to the authority of the city council to act in the matter. After such consent is obtained the council may grant permission to sell under the conditions imposed by the statute and other conditions imposed by the council as it may see fit: *Ibid.*

The requirement as to a written statement of consent sigued by the majority of the voters, etc., *held* complied with by a statement entitled "petition and consent under § 17 known as the mulct law" addressed to the county auditor and reciting that "the undersigned residents and voters of, etc., respectfully petition and consent that said city of etc., shall be put under the operation of the provision of said law as early as practicable:' *State v. Mateer*, 62 N. W., 684.

Sufficiency of statement: The duty is not imposed upon the auditor of determining before filing a statement of consent that it is sufficient. The filing of the statement is not conclusive adjudication of its sufficiency by the auditor, and one who relies upon such consent must allege and prove the fact that it complies with the requirements of the law. The act of the auditor has no judicial significance but is merely ministerial. Neither is the auditor required to make collateral inquiries as to whether the signatures are genuine or the number of names is sufficient. *State v. Ashert*, 63 N. W., 557.

The law seems to contemplate that statement of consent shall be signed by those only who voted at the last general election in the state: *Ibid.*

The filing by those who have already signed a petition for consent withdrawing such consent throws no duty upon the auditor: *Ibid.*

The statement of consent does not operate to relieve parties who have complied with the conditions from the payment of taxes. Nothing excuses the seller from the payment of such taxes. The observance of these provisions only operates as a bar to prosecutions under the provisions of prior laws: *Ibid.*

Consent of adjacent property owners: The provision as to statement of consent from resident freeholders owning property within fifty feet of the premises where said business is carried on, refers to the premises actually used for the sale of intoxicating liquors and not to the whole building in which a saloon is situated if other portions of the building or lot are used for a distinct purpose: *State v. Mateer*, 62 N.W., 684.

The "resident free-holders" referred to in such provision are owners of property living within the limits of the city, it is not necessary that they reside upon premises within fifty feet of the place used as a saloon: *Ibid.*

The "resident freeholders" owning property within fifty feet of the place of business who are required to sign written consent include only freeholders resident in the city by which the license is granted: *State v. Greenway*, 61 N.W., 239.

Proximity to church or school-house: The three hundred feet referred to are to be measured in a straight line between the two buildings and not by the nearest and most direct way of getting from one to the other: *State v. Greenway*, 61 N.W., 239.

Bond: The bond required by this section binds an obligor for the payment of the tax assessed: *Marshall County v. Knoll*, 69 N W., 1146.

Regulations: The requirement that the keeping for sale and selling shall be in a single room having but one entrance and exit is applicable to wholesale as well as retail dealers, at least so far as such wholesale dealers sell or give away liquor by the glass: *Ritchie v. Zalesky*, 67 N. W., 399.

If sales are made on Sunday, the seller is subject to the penalties of the prohibitory law: *Cotant v. Hobson*, 67 N. W., 255.

SEC. **2449. Cities under five thousand and towns.** In order that any city or town or city acting under special charter of less than five thousand inhabitants may come within the provisions of the preceding section, except as is otherwise provided, the following additional condition must be complied with: A written statement of general consent shall be filed with the county auditor, signed by sixty-five per cent. of all of the legal voters who voted at the last preceding general election, as shown by the poll list of said election, residing within such county and outside of the corporate limits of cities having a population of five thousand or over; but no such statement

of general consent shall be construed as a bar to proceedings against persons selling intoxicating liquors in towns situated in townships of which less than a majority of the voters of the township, including the town, have signed the statement of general consent; nor shall it be construed as a bar in any town in which a majority of the voters do not sign said statement. [25 G. A., ch. 62, § 18.]

SEC. **2450. Sufficiency of statement—finding—appeal.** All statements of general consent, filed with the county auditor as provided in the two preceding sections, shall be publicly canvassed by the board of supervisors, at a regular meeting, at least ten clear days notice of such intended canvass having been previously published by the county auditor in the official newspapers of the county, and its finding as to the result in the city having over five thousand inhabitants, or the county, as the case may be, and the various towns and townships therein, shall be entered of record. And such finding shall be effectual for the purpose herein contemplated until revoked as herein provided. If the board shall find the statement sufficient, any citizen of the county may, within thirty days thereafter, upon filing a sufficient bond for the costs, file with the clerk of the district court a general denial as to the statement of general consent, or any part thereof, whereupon the county attorney shall cause notice thereof to be served upon the person or persons filing said statement of consent with the county auditor, and said party shall within ten days file with said clerk a bond conditioned to pay the costs of the hearing in the district court, in a sum to be fixed by the clerk of said court. If such bond be filed, then the auditor shall certify the statement of consent and all papers and records to the district court, where the matter shall be tried *de novo*, the county attorney appearing for the state, but if no bond be filed, then the order of the board of supervisors finding the statement of general consent sufficient shall be considered and treated as set aside and null and void. The costs in all cases of appeal shall be taxed against the losing party. Should the board of supervisors find the statement of general consent insufficient, any party aggrieved may appeal therefrom to the district court by filing, within thirty days thereafter, with the clerk of said court a sufficient bond for the costs. Upon the filing and approval of said bond, the auditor shall certify the statement of consent and all papers and records to the district court, where the matter shall be tried *de novo*. All costs shall be taxed against the appellant, whether the finding of the board is sustained or reversed, and in such actions the county attorney shall appear and defend the finding of the board. Only one statement of general consent from any county, city or town, or city or town acting under special charter, therein entitled to file the same, shall be canvassed by the board of supervisors in any one year.

SEC. **2451. Forfeiture or revocation.** Whenever any of the conditions of the third preceding section shall be violated, or whenever the council of the city or town or city acting under special charter shall by a majority vote direct it, or whenever there shall be filed with the county auditor a verified petition, signed by a majority of the voters of the said city, town, or city acting under special charter, or county, as the case may be, as shown by the last general election, requesting it, then the bar to proceedings as provided in the second preceding section shall cease to operate, and the persons engaged in the sale of intoxicating liquors shall be liable to all of the penalties provided in this chapter. [25 G. A., ch. 62, § 19.]

SEC. **2452. False signatures—time of signing.** The signing the name of another to any statement of general consent provided for in the sections of this chapter relating to the mulct tax shall be punishable as forgery, and every such statement shall be accompanied by the affidavit of some reputable person, showing that said person personally witnessed the signing of each name appearing thereon, and any false statement contained in such affidavit shall be punishable as perjury, and all provisions of law

relative to the bribery of voters are hereby made applicable to the bribery of signers to any such statement of general consent. All statements of general consent shall show the voting precinct of the signers thereof, and date of signing, and no name shall be counted that was not signed within thirty days prior to the filing of said statement of general consent. [Same, § 20.]

SEC. **2453. Inspection of papers.** The county auditor shall keep, for inspection by any citizen who may desire it, all papers required by the sections of this chapter relating to the mulct tax to be filed with him, and any failure or refusal on his part to do so shall be punished by a fine of one hundred and fifty dollars for each offense. [Same, § 21.]

SEC. **2454. Assessment or payment not evidence—place of prosecution.** The assessment and the payment of the mulct tax shall not be used as evidence against such person, partnership or corporation in any suit, either at law or equity, in any of the courts of this state or of the United States. The exclusive jurisdiction for punishment of all offenses under this chapter shall be in the county wherein the crime may have been committed. [Same, § 23.]

SEC. **2455. Additional taxes and regulations.** For the purpose of protecting the property of the municipality and its inhabitants, and of preserving peace and good order therein, cities and towns and cities acting under special charters shall have power to levy and collect additional taxes, and to adopt from time to time rules and ordinances for further regulating and controlling such traffic, not in conflict with the provisions of this chapter. [Same, § 24.]

Inasmuch as this section evidently confers additional powers on cities it indicates that the intention of the legislature was that the whole statute as originally enacted should not be applicable to cities under special charter, inasmuch as statutes relating to cities organized under the general incorporation act are not to be construed as affecting cities under special charter unless specially so provided: *Clark v. Riddle*, 70 N. W., 207.

[But now cities under special charter are specifically included; see § 2448.]

PERMISSION TO MANUFACTURE.

SEC. **2456. Granted on statement of consent.** Whenever the council of any city containing a population of five thousand or more shall, upon a written statement of consent of fifty per cent. of the legal voters who voted at the preceding general election, grant its consent to manufacture within the limits of such city, for sale, spirituous, malt and vinous liquors as hereinafter provided; or, whenever the board of supervisors of any county shall, upon a written statement of consent of sixty-five per cent. of the legal voters who voted at the preceding general election, residing in said county and without the limits of any such city, grant consent to manufacture, within the limits of any city or town of less than five thousand population in such county, spirituous, malt or vinous liquors for sale as hereinafter provided, any person, partnership or corporation within such city, containing a population of five thousand or more, or any city or town containing a population of less than five thousand, as the case may be, manufacturing or selling any spirituous, malt or vinous liquors at wholesale and to dealers only, or any carrier transporting the same, shall be exempt from any and all penalties now provided by law for manufacturing, selling or transporting spirituous, malt or vinous liquors; but no spirituous or malt liquors shall be sold or shipped in quantities of less than four gallons or an eighth of a barrel, contained in a single case, vessel or package; and no such vinous liquors shall be sold or shipped in less quantities than two dozen pints or one dozen quarts in any one case or package.

SEC. **2457. In cities under five thousand or towns.** Manufacturing of liquors, mentioned in the preceding section, shall not be carried on in any city or town of less than five thousand inhabitants unless fifty per cent.

of the legal voters who voted at the preceding election have signed such statement of consent.

SEC. **2458. Sufficiency of statement—finding—appeal.** Any city council or board of supervisors, as the case may be, at any special or regular meeting, shall determine the legality and sufficiency, as herein provided, of any such written statement of consent to manufacture such liquors, and from such determination such person, partnership or corporation, or county attorney, may appeal to the district court, in which the matter shall be tried and disposed of as an equitable action.

SEC. **2459. Limits—obligations enforced.** No establishment or building for manufacturing any of such liquors herein contemplated shall be erected within three hundred feet of any school-house or building commonly used for school purposes, or academy, or college, or of any church or usual place of worship of any religious organization, and all obligations incurred by reason of the manufacture, sale or transportation of any liquors as specified in the third preceding section of this chapter shall be enforceable in the courts of this state.

SEC. **2460. Drinking or retailing on premises.** Any person, partnership or corporation operating any brewery, distillery or place where wine is manufactured, permitting any drinking of such products or selling the same at retail upon the premises of any such manufacturing establishment, shall forfeit the exemption hereby contemplated to be granted.

SEC. **2461. Only in cities and towns where selling permitted.** Such consent to manufacture shall be granted only in such cites or towns as shall have granted permit to sell spirituous, malt and vinous liquors under the provisions of this chapter.

CHAPTER 7.

OF FIRE COMPANIES.

SECTION **2462. Exemptions.** Any person while an active member of any fire engine, hook and ladder, hose, or any other company for the extinguishment of fire, or the protection of property at fires, under the control of the corporate authorities of any city or town, shall be exempt from the performance of military duty and labor on the roads on account of poll tax, and from serving as a juror. Any person who has been an active member of such company in any city or town as aforesaid, and has faithfully discharged his duties as such for the term of ten years, shall thereafter be exempt from military duty in time of peace, from serving as a juror, and from labor on the roads. [C.'73, § 1560; R., § 1763.]

SEC. **2463. Certificate of ten years' service.** Any person who has thus served in any company for the term of ten years shall receive from the foreman of the company of which he shall have been a member a certificate to that effect, and on its presentation to the clerk he shall file the same in his office and give his certificate, under the corporate seal, to such person, setting forth the name of the company of which such person was a member and the duration of such membership, which certificate shall be received in all courts as evidence that the person legally holding the same is entitled to such exemption. [C.'73, § 1561; R., § 1764.]

SEC. **2464. Certificate of exemption from working roads.** To entitle a person to exemption from labor on the roads before the expiration of the term of ten years, he shall, on or before the first day of April of each year, file with the clerk of the city or town a certificate, signed by the foreman of the company of which he is a member, that the holder thereof is an active member of said fire company, and thereupon the clerk shall enter said exemption upon the street tax list for that year. [C.'73, § 1562.]

SEC. **2465. Misrepresentation or false certificate.** Any person who shall by misrepresentation, or by the use of a false certificate or the certificate of any other person, endeavor to avail himself of the benefits of this chapter, upon conviction thereof, shall be imprisoned in the county jail for a period of not more than six nor less than one month, and pay a fine of not less than ten nor more than one hundred dollars. [C. '73, § 1563; R., § 1765.]

SEC. **2466. Injury to fire apparatus.** If any person willfully destroy or injure any engine, hose carriage, hose, hook and ladder carriage, or other thing used and kept for the extinguishment of fires, he shall, upon conviction, be imprisoned in the penitentiary for a period of not less than one nor more than three years. [C. '73, § 1564; R., § 1766.]

SEC. **2467. Removal of fire apparatus.** No person shall remove any engine or other apparatus for the extinguishment of fire from the house or other place where it is kept or deposited, except in time of fire or alarm thereof, unless authorized so to do by the president, director or foreman of the company to whom the same shall belong. Any person violating the provisions of this section shall forfeit and pay a sum of not less than five dollars, nor more than twenty dollars, to be sued for and recovered in the name of the state for the use of the school fund, before any mayor or magistrate of the city or town wherein the offense was committed. [C. '73, § 1565; R., § 1767.]

SEC. **2468. False alarms.** If any person or persons cause or give a false alarm of fire, by setting fire to any combustible material, or by crying or sounding an alarm, or by any other means, without cause, he shall forfeit and pay a sum of not less than five nor more than twenty dollars, to be recovered for the use and in the manner provided in the preceding section. [C. '73, § 1566; R., § 1768.]

CHAPTER 8.

OF THE BUREAU OF LABOR STATISTICS.

SECTION **2469. Commissioner.** The bureau of labor statistics shall be under the control of a commissioner, biennially appointed by the governor by and with the advice and consent of the executive council, whose term of office shall commence on the first day of April in each even-numbered year and continue for two years, and until his successor is appointed and qualified. He may be removed for cause by the governor, with the advice of the executive council, record thereof being made in his office; any vacancy shall be filled in the same manner as the original appointment. He shall give bonds in the sum of two thousand dollars with sureties to be approved by the governor, conditioned for the faithful discharge of the duties of his office, and take the oath prescribed by law. He shall have an office in the capitol, safely keep all records, papers, documents, correspondence, and other property pertaining to or coming into his hands by virtue of his office, and deliver the same to his successor, except as hereinafter provided. [20 G. A., ch. 132, §§ 1–4.]

SEC. **2470. Duties—report.** The duties of said commissioner shall be to collect, assort, systematize and present in biennial reports to the governor statistical details relating to all departments of labor in the state, especially in its relations to the commercial, social, educational and sanitary conditions of the laboring classes, and to the permanent prosperity of the mechanical, manufacturing and productive industries of the state; and he shall, as fully as practicable, collect such information and reliable reports from each county in the state, the amount and condition of the mechanical and manufacturing interests, the value and location of the various manufacturing and coal productions of the state, also sites offering natural or

acquired advantages for the profitable location and operation of different branches of industry; he shall, by correspondence with interested parties in other parts of the United States, impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers; and in said biennial report he shall give a statement of the business of the bureau since the last regular report, and shall compile and publish therein such information as may be considered of value to the industrial interests of the state, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics' and apprentices' wages earned, the savings from the same, with age and sex of laborers employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, the restrictions, if any, which are put upon apprentices when indentured, the proportion of married laborers and mechanics who live in rented houses, with the average annual rental, and the value of property owned by laborers and mechanics; and he shall include in such report what progress has been made with schools now in operation for the instruction of students in the mechanic arts, and what systems have been found most practical, with details thereof. Such report shall not contain more than six hundred printed pages, and shall be of the number, and distributed in the manner, provided by law. [Same, § 5.]

SEC. **2471. Power to secure evidence.** The commissioner of the bureau of labor statistics shall have the power to issue subpœnas, administer oaths and take testimony in all matters relating to the duties herein required by said bureau, said testimony to be taken in some suitable place in the vicinity to which testimony is applicable. Witnesses subpœnaed and testifying before the commissioner of the bureau shall be paid the same fees as witnesses before a justice's court, such payment to be made out of the contingent fund of the bureau in advance, but such expense for witnesses shall not exceed one hundred dollars annually. Any person duly subpœnaed under the provisions of this section, who shall wilfully neglect or refuse to attend or testify at the time and place named in the subpœna, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine not exceeding fifty dollars and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days: *provided*, however, that no witness shall be compelled to go outside the county in which he resides to testify. [26 G. A., ch. 86, § 2; 20 G. A., ch. 132, § 6.]

SEC. **2472. Right to enter premises.** The commissioner of the bureau of labor statistics shall have the power, upon the complaint of two or more persons, or upon his failure to otherwise obtain information in accordance with the provisions of this chapter, to enter any factory or mill, workshop, mine, store, business house, public or private work, when the same is open or in operation, upon a request being made in writing, for the purpose of gathering facts and statistics such as are contemplated by this chapter, and to examine into the methods of protection from danger to employes, and the sanitary conditions in and around such buildings and places, and make a record thereof; and any owner or occupant of such factory or mill, workshop, mine, store, business house, public or private work, or any agent or employe of such owner or occupant, who shall refuse to allow any officer or employe of said bureau to so enter, or who shall hinder him, or in any way deter him from collecting information, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine of not exceeding one hundred dollars and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days. [26 G. A., ch. 86, § 3.]

SEC. **2473. Meaning of terms.** The expressions "factory," "mill," "workshop," "mine," "store," "business house," and "public or private

work," as used in this chapter, shall be construed to mean any factory, mill, workshop, mine, store, business house, public or private work, where five or more wage-earners are employed for a certain stipulated compensation. [Same, § 4.]

SEC. **2474. Reports to bureau.** It shall be the duty of every owner, operator or manager of every factory, mill, workshop, mine, store, business house, public or private work, or any other establishment where labor is employed, as herein provided, to make to the bureau, upon blanks furnished by said bureau, such reports and returns as said bureau may require for the purpose of compiling such labor statistics as are comtemplated in this chapter; and the owner, operator or business manager shall make such reports or returns within sixty days from the receipt of blanks furnished by the commissioner, and shall certify under oath to the correctness of the same. Any owner, operator or manager of such factory, mill, workshop, mine, store, business house, public or private work, as herein stated, who shall neglect or refuse to furnish to the commissioner of labor such reports or returns as may be required by the following blank, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars and costs of prosecution, or imprisoned in the county jail not exceeding thirty days.

BLANK.

Name of firm or corporation? ..... Number of hands employed during year ending December thirty-first?..... Males?..... Females? ..... Apprentices? ..... Total amount of wages paid during year ending December thirty-first? $..... Total amount of wages paid previous year? $..... Any general increase or reduction of wages during the past year? If so, what per cent. of increase or reduction? ..... Cause of increase or reduction? ..... Any increase or decrease of business during past year? ..... What means are provided for the escape of employes in case of fire? ..... What measures are taken to prevent accident to employes from machinery? ..... How are buildings ventilated? ..... Are separate water-closets and wash-rooms provided for the different sexes? ..... Number of weeks during past year business was run on full time with full force? ..... Number of weeks during past year business was run on short time or with reduced force?..... Number of weeks during past year business was suspended? ..... Number of strikes during year ending December thirty-first? ..... Number involved? ..... Alleged cause? ..... Result? ..... How many days did strike continue, and what was loss of wages in consequence thereof? ..... Was any property destroyed, and, if so, its value? ..... [Same, § 5.]

SEC. **2475. Use of information.** In the reports of the commissioner no use shall be made of names of individuals, firms or corporations supplying the information called for by sections twenty-four hundred and seventy and twenty-four hundred and seventy-one of this chapter, such information being deemed confidential and not for the purpose of disclosing personal affairs; and any officer or employe of the bureau of labor statistics violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not exceeding five hundred dollars and costs of prosecution, or by imprisonment in the county jail not exceeding one year. [Same, § 6.]

SEC. **2476. Reports and records preserved.** No report or return made to said bureau in accordance with the provisions of this chapter, and no schedule, record or document gathered or returned by its officers or employes, shall be destroyed within two years of the collection or receipt thereof. At the expiration of two years all records, schedules or papers accumulating in said bureau during said period that may be considered of

no value by the commissioner may be destroyed, provided the authority of the executive council be first obtained for such destruction. [Same, § 7.]

SEC. **2477. Compensation and expenses.** Said commissioner shall receive a salary of fifteen hundred dollars per annum, and shall be allowed a deputy at a salary of one thousand dollars per annum in lieu of clerk hire, payable monthly, and necessary postage, stationery and office expenses; the said salary and expenses to be paid by the state as the salaries and expenses of other state officers are provided for. The commissioner, or any officer or employe of the bureau of labor statistics, shall be allowed, in addition to their salaries, their actual and necessary traveling expenses while in the performance of their duties; said expenses to be audited by the executive council and paid out of the general fund of the state upon a voucher verified by the commissioner; provided that the total of such expenses for officers and employes shall not exceed five hundred dollars per annum. [Same, § 1; 20 G. A., ch. 132, §§ 1-4.]

CHAPTER 9.

OF MINES AND MINING.

SECTION **2478. Inspectors.** The governor shall appoint three mine inspectors from those receiving certificates of competency from the board of examiners hereinafter provided for, who shall hold their office for two years and until their successors shall be appointed and qualified, subject to removal by him for cause, their term to commence on the first Monday of April of each even-numbered year. Any vacancies occurring shall be filled in the same manner, the appointee to hold for the unexpired term only. Each inspector shall be in no way connected with or interested in mines or mining in the state, and shall, before entering upon the discharge of his duties, take an oath, to be indorsed upon his bond, faithfully and impartially to perform the same, and also give a bond in the sum of two thousand dollars with sureties, to be approved by the secretary of state, conditioned in accordance with the tenor of the oath, which shall be filed and, with the oath and commission, recorded in the office of the secretary of state. [21 G. A., ch. 140, §§ 1, 3, 5; 20 G. A., ch. 21, §§ 1, 3, 5.]

SEC. **2479. Board of examiners.** The executive council shall appoint a board of five examiners, two of whom shall be practical miners, two mine operators, and one a mining engineer, each of whom shall have had at least five years' experience in his profession, each of whom shall hold office for two years, and shall qualify by taking an oath to the effect that he will faithfully and to the best of his ability perform the duty of examining candidates for the office of mine inspector, and truly try any charges made against any such inspector, and that, in recommending candidates, he will be governed by the evidence of qualification to fill the position under the law, without fear, favor or political or personal considerations, and will grant certificates of competency to candidates according to their merits and the requirements of law. [22 G. A., ch. 52, § 22.]

SEC. **2480. Meetings—compensation.** Said board shall meet in the office of the state mine inspectors in the capitol on the first Monday in March of each even-numbered year for the examination of applicants; notice of which examination shall be published in at least one newspaper in each mining district not less than fifteen days preceding the date of such examination; and shall be furnished with the necessary stationery and other material for the examination in the same manner as other state officers are provided with supplies. The members shall receive as compensation for their services the sum of five dollars per day for the time actually employed, with necessary traveling expenses, which shall be audited and paid in the manner provided

for the salaries of other state officers, but in no case shall the per diem exceed fifty dollars a session to each member. [Same, § 23.]

SEC. **2481. Examination—qualification of candidates.** The examination shall consist of oral and written questions in theoretical and practical mining and mine engineering, on the nature and properties of noxious and poisonous gases found in mines, and on the different systems of working and ventilating coal mines. During the progress of the examination, books, memoranda or notes shall not be allowed or used, and the board shall issue to those examined and found to possess the requisite qualifications certificates of compentency for the position of mine inspector; but certificates shall be granted only to persons of twenty-five years of age or over, of good moral character, citizens of the state, and with at least five years' experience in the practical working of mines, and who have not been acting as agent or superintendent of any mines for at least six months next preceding such examination. [Same, §§ 24, 25; 21 G. A., ch. 140, § 1; 20 G. A., ch. 21, § 1.]

SEC. **2482. Inspection districts—powers and duties of inspector.** The governor shall divide the state into three inspection districts, and assign one inspector to each district, who shall devote his entire time to his work, and, before entering thereon, procure, to be paid for by and to belong to the state, all instruments necessary for the discharge of his duties, including a complete set of standards, balances and other means of adjustment in testing any and all apparatus used in weighing, and shall examine, test and adjust, as often as occasion demands, all scales, beams and other apparatus used in weighing coal at the mines. He shall examine all the mines in his district as often as the time will permit, keep a record of the inspections made, showing date, the condition in which the mine is found, the extent and manner in which the laws relating to the government of mines and their operation are observed and obeyed, the progress made in improvements for the better security to health and life, number of accidents happening and their character, the number employed, and such other and further matters as may be of public interest and connected with the mining industries of the state. He shall have the right at all reasonable times, by night or by day, to enter any mine in his district, or any district to which he may be sent by the governor, for the purpose of ascertaining its condition and the manner of its operation, by making personal examination and inquiry in relation thereto, but not so as to unnecessarily obstruct or impede the working of the mines; and to this end the mine owner or person in charge shall furnish such mine inspector all assistance in his power, and forthwith, upon the happening of any accident to any miner in or about the mine by reason of the working thereof which causes loss of life, shall report the same, by mail or otherwise, to the mine inspector and the coroner of the county. Each inspector shall have and maintain, at some suitable place in his district, to be approved by the governor, an office, and shall reside in the district and remain therein, unless otherwise engaged in the conduct of his official duties. [22 G. A., ch. 54, § 2; 21 G. A., ch. 140, §§ 1, 2, 6; 20 G. A., ch. 21, §§ 1, 2, 6.]

SEC. **2483. General office—report to governor—compensation.** The three inspectors shall maintain a general office in the capitol, and keep therein all records, correspondence, documents, apparatus or other property pertaining to their office; they shall meet in said office biennially on or before August fifteenth preceding the regular session of the general assembly, and make report to the governor of their official doings, including therein all matters which by this chapter are specially committed to their charge, adding such suggestion as to needed future legislation as in their opinion may be important. Each inspector shall receive for his services the sum of twelve hundred dollars per annum and actual traveling expenses, not exceeding five hundred dollars yearly, the traveling expenses to be paid quarterly upon an itemized statement duly verified and audited by the

state auditor. [22 G. A., ch. 52, § 1; 21 G. A., ch. 140, §§ 3, 4; 20 G. A., ch. 21, §§ 3, 4.]

SEC. **2484. Removal of inspector.** Charges of gross neglect of duty or malfeasance in office against any inspector may be made in writing, sworn to and filed with the governor, and must be made by five miners, or one or more mine operators; they shall be accompanied with a bond in the sum of five hundred dollars, running to the state, executed by two or more freeholders, approved and accepted by the clerk of the district court of the county of their residence, conditioned for the payment of all costs and expenses arising from the investigation of the charges, and thereupon the governor shall convene the board of examiners at such time and place as he may designate, giving the inspector and the person whose name first appears in the charges ten days' notice thereof. The board, at the time and place fixed, shall proceed to hear, try and determine the matter, and for this purpose shall summon any material witness desired by either party, and may administer the proper oath to all witnesses. Evidence may also be taken by deposition as in other cases, and continuances of the hearing may be granted in the furtherance of justice and upon the application of either party. After the evidence has been fully heard, the board shall report to the governor the results of its investigation, and if the charges are sustained the inspector shall be forthwith removed by the governor, and in any event the costs and expenses of the hearing shall be awarded against the inspector or the bondsmen as the case may be. [21 G. A., ch. 43; 20 G. A., ch. 21, § 16.]

SEC. **2485. Maps of mines—surveys—double damages.** The owner or person in charge of any mine shall make or cause to be made an accurate map or plan of the same, on a scale of not less than one hundred feet to the inch, showing all the area mined or excavated, and on or before the first day of September of each year cause to be made a statement and plan of the progress of the working of the mine up to date, which progress shall be clearly indicated upon the map hereinbefore required; a failure to comply with this provision for sixty days shall authorize the inspector of the district to cause the same to be done at the expense of the owner, which may be recovered in an action against him by the person doing the work, and the map so made shall include and cover the entire mine. All maps shall be kept exposed in the office of the mine, and said maps shall be subject to public inspection. The owner of any mine which is worked out or abandoned, or his agent, shall deliver a correct map thereof to the inspector to be filed in his office. Upon affidavit of any adjoining land owner in the vicinity of said mine, or his agent, that it is necessary for the protection of his property to know how near his land the excavations in the mine extend, the inspector shall make an examination, employing a surveyor therefor if necessary, to determine the length and direction of entries leading toward the land of the applicant and the extent of excavation of same on all of his land, if any, and make report of the same to him. The necessary expenses, including compensation of five dollars per day each to the inspector and surveyor, shall be paid by the applicant, except when it shall be shown that said applicant's property has been undermined, in which case the expense shall be paid by the mine owner or operator. Any owner or person operating a mine, who, without permission, takes coal from adjoining lands, shall be liable in double damages therefor and for all expenses caused thereby. [20 G. A., ch. 21, § 7.]

SEC. **2486. Escape and air shafts.** The owner or person in charge of any mine operated by shaft, or one having a slope or drift opening in which five or more men are employed, shall construct and maintain at least two distinct openings for each seam of coal worked, which in shaft mines shall be separated by natural strata of not less than one hundred feet in breadth and in slope or drift mines not less than fifty feet in breadth, through which ingress and egress at all times shall be unobstructed to the employes, and

slope or drift mines shall be provided with safe and available traveling-ways; all traveling-ways and escapes to be kept free from water and falls of roof. All escape-shafts not provided with hoisting appliances as hereinafter provided shall have stairs at an angle of not more than sixty degrees in descent, kept in safe condition, with proper landings at easy and convenient distances apart. He shall provide all air-shafts where fans are used with working fans for ventilation, and those used for escapes with suitable appliances for hoisting underground workmen, at all times ready for use while the men are at labor, and no combustible material shall be allowed to be or remain between any escape-shaft and hoisting-shaft, save as it may be absolutely necessary in the operation of the mine. A furnace-shaft, if large enough, may be divided into an escape and a furnace-shaft, the partition to be of incombustible material for a distance of not less than fifteen feet from the bottom thereof, and so constructed throughout as to exclude the heated air and smoke from the side used as an escape-shaft. Where two or more mines are connected underground, the several owners, by joint agreement, may use the hoisting-shaft or slope of the one as an escape for the other. In all cases where escape-shafts are constructed less than one hundred feet from the hoisting-shaft, there shall be built and maintained an underground traveling-way from the top of the escape-shaft, so as to furnish the proper protection from fire for a distance of one hundred feet from such hoisting-shaft. No escape-shaft shall be located or constructed without first giving notice to the district inspector, who shall determine the distance it shall be from the main shaft, and without his consent it shall not be less than three hundred feet, nor shall any building except the fan-house be placed nearer than one hundred feet of the escape; but the provisions of this chapter relating to escape-ways shall not apply to mines where the same are lost or destroyed by reason of the drawing of pillars preparatory to the abandonment of the mine, and in such mine not more than twenty persons shall be employed at one time. [22 G. A., ch. 56, §§ 1, 2; 20 G. A., ch. 21, §§ 8, 9.]

These provisions appear to have been enacted for the protection of miners in case of accident, and to require open and unobstructed means of escape. They do not require that all entries in the mines shall be propped or roofed with timber or other materials: *Fosburg v. Phillips Fuel Co.*, 61 N. W., 400.

SEC. **2487. Time for constructing outlets.** In all mines there shall be allowed one year to make outlets as provided for in section twenty-four hundred and eighty-six, but not more than twenty men shall be employed in such mine at any one time until the provisions of section twenty-four hundred and eighty-six are compiled with; and after the expiration of the period above mentioned, should said mine not have the outlets aforesaid, it shall not be operated until made to conform to the provisions of section twenty-four hundred and eighty-six.

SEC. **2488. Ventilation.** The owner or person in charge of any mine shall provide and maintain, whether the mine be operated by shaft, slope or drift, an amount of ventilation of not less than one hundred cubic feet of air per minute for each person, nor less than five hundred cubic feet of air per minute for each mule or horse employed therein, which shall be so circulated throughout the mines as to dilute, render harmless and expel all noxious and poisonous gases in all working parts of the same; to do this, artificial means by exhaust-steam, forcing-fans, furnaces, or other contrivances of sufficient capacity and power, shall be kept in operation. If a furnace is used, it shall be so constructed, by lining the up-cast for a sufficient distance with incombustible material, that fire cannot be communicated to any part of the works. When the mine inspector shall find the air insufficient, or the men working under unsafe conditions, he shall at once give notice to the mine owner or his agent or person in charge, and, upon a failure to make the necessary changes within a reasonable time, to be fixed by him, he may order the men out, to remain out until the mine is put in proper condition. [22 G. A., ch. 56, § 3; 20 G. A., ch. 21, § 10.]

SEC. **2489. Safety appliances—competent engineers—boys not employed.** The owner or person in charge of any mine shall in all mines operated by shaft or slope, where the voice cannot be distinctly heard, provide and maintain a metal speaking-tube or other means of communication, kept in complete order from the bottom or interior to the top or exterior, also a sufficient safety catch and proper cover over head on all cages, and an adequate brake to all drums or other devices used for lowering or hoisting persons, an approved safety gate at the top of each shaft, springs at the top of each slope, and a trail attached to each train used therein. He shall not knowingly place in charge of any engine used in or about the operation of the mines any but experienced, competent and sober engineers, who shall not allow any one but those designated for that purpose to handle or in any way interfere with it or any part of the machinery, nor shall more than ten persons be allowed to descend or ascend in any cage at one time, or such less number as may be fixed by the district mine inspector, nor any one but the conductor on a loaded cage or car. He shall not allow a boy under twelve years of age to work in the mines, and, when in doubt regarding the age of one seeking employment, shall, before engaging him, obtain the affidavit of the applicant's parent or guardian in regard thereto. He shall at all times keep a sufficient supply of timber to be used as props, convenient and ready for use, and shall send such props down when required and deliver them to the places where needed. [20 G. A., ch. 21, §§ 11–13, 18.]

As to an employe not chargeable with the duty of looking after the safety of the entries in which he is employed, the mine owner does not discharge his duty by simply providing props for use, but is responsible for the general safety of the entry: *Corson v. Coal Hill Coal Co.*, 70 N. W., 185.

SEC. **2490. Scales and weighers—records—payment in money.** The owner or operator shall, if the miners are paid by weight, provide the mine with suitable scales of standard make, and require the person selected to weigh the coal delivered from the mine to be sworn before some person authorized to administer oaths, to the effect that he will keep the scales correctly and truly balanced, and accurately weigh and a true record keep of each car delivered, which oath, with that of the check-weighman hereinafter provided for, shall be conspicuously displayed with record of weights at the place of weighing, which record shall carry the account of each miner by itself, be open to the inspection at all proper times of miners and all others having a pecuniary interest in the mine, and all damages sustained on account of a failure to weigh and credit to the proper person any coal mined shall be recoverable in an action brought within two years from the time the right thereto accrued, and a knowledge of a violation of this provision by the miner shall not be a defense thereto. The miners employed and working in any mine may furnish a competent check-weighman, who, before entering upon his duties, shall make and subscribe to an oath to the effect that he is duly qualified and will faithfully discharge his duties as check-weighman, and he shall at all proper times have access to and the right to examine the scales, machinery or apparatus used in weighing and seeing all measures and weights of coal mined and the accounts kept thereof; but not more than one person on the part of the miners collectively shall have this right, and such examination and inspection shall be so made as to create no unnecessary interference with the use of such scales, machinery or apparatus. The owner or agent shall, where the miner is by contract to be paid by the ton or other quantity, unless otherwise agreed upon in writing, weigh the coal before screening, and the miner shall be credited at the rate of eighty pounds to the bushel and two thousand pounds to the ton, but no payment shall be demanded for sulphur, rock, slate, black-jack, slack, dirt or other impurities which may be loaded or found with the coal. Where ten or more miners are employed, such owner or agent shall not sell, give, deliver or issue, directly or indirectly, to any person employed, in payment for labor due or as advances for labor to be performed, any script, check, draft, order or other

evidence of indebtedness payable or redeemable otherwise than in money at the face value, and he shall not compel or in any manner endeavor to coerce any employe to purchase goods or supplies from any particular person, firm, company or corporation; but all wages shall be paid in money upon demand semimonthly. A failure or refusal to make payment within five days after demand shall entitle the laborer to recover the amount due him, and one dollar per day additional for each day such payment is neglected or refused, not exceeding the sum due, and in any action therefor the court shall tax as a part of the costs a reasonable attorney fee to plaintiff's attorney. [25 G. A., ch. 98; 22 G. A., ch. 53, §§ 1–3; 22 G. A., ch. 54, §§ 1, 3; 22 G. A., ch. 55, § 1.]

SEC. **2491. Penalties.** The owner or person in charge of any mine, who shall have or use any scales or other appliances for weighing the output of coal so arranged that false or short weighing may be done thereby, or shall knowingly resort to or employ any means whatever by which the coal is not correctly weighed, reported and recorded as in this chapter provided, or any weighman or check-weighman who shall falsely weigh, report or record the weights of coal, or connive at or consent to such false weighing, reporting or recording, or any such owner or agent who shall fail to comply with the provisions of this chapter, or either of them, or shall obstruct or hinder the carrying out of its requirements, or any one who shall or shall attempt to compel or coerce any employe of any owner or person operating a mine to purchase goods from any particular person, shall be punished by imprisonment in the county jail not exceeding sixty days, and by a fine not exceeding five hundred dollars; or if any miner, workman or other person shall knowingly injure or interfere with any air course or brattice, or obstruct or throw open doors, or disturb any part of the machinery, or disobey any orders given in carrying out the provisions of this chapter, or ride upon a loaded car or wagon in the shaft or slope, except as herein provided, or do any act whereby the lives and health of the persons or the security of the mines and machinery is endangered, or shall neglect or refuse to securely prop or support the roof and entries under his control, or neglect or refuse to obey any order given by the superintendent in relation to the safety of the mine in that part under his charge and control, he shall be punished by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days. [22 G. A., ch. 53, §§ 4, 5; 22 G. A., ch. 55, § 2; 20 G. A., ch. 21, §§ 15, 19.]

Under a prior statute making it criminal without exception for anyone to ride on a loaded car, *held*, that a conductor thus riding in the discharge of his duty was not to be held guilty of wrong in so doing: *Crabell v. Wapello Coal Co.*, 68–751.

SEC. **2492. Failure to provide for safety of employes.** In addition to any and all other remedies, if any owner or person in charge of any mine shall fail to provide any of the appliances herein required for the safety of the employes, or the appliances provided do not conform to the requirements herein specified, or such owner or agent shall neglect, for twenty days after notice given in writing by the district mine inspector of such failure, to remedy the same, such inspector may apply to the district court, or any judge thereof, in an action brought in the name of the state, for a writ of injunction to restrain the working of the mine with more persons at the same time than are necessary to make the improvements needed, save as may be required to prevent waste, until such appliances have been supplied, and in case an injury happens to those engaged in work because of such failure, the same shall be held culpable negligence. [22 G. A., ch. 56, § 4; 20 G. A., ch. 21, § 14.]

PROVISIONS AS TO ILLUMINATION.

SEC. **2493. Purity of oil.** Only pure animal or vegetable oil, paraffine or electric lights shall be used for illuminating purposes in any mine in this state, and for the purpose of determining the purity of oils the state board of health shall fix a standard of purity and establish regulations for test-

ing said oil, and said standard and regulations, when so determined, shall be recognized by all the courts of the state. [26 G. A., ch. 92, § 1; 26 G. A., ch. 93.]

SEC. **2494. Penalty.** Any person, firm or corporation, either by themselves, agents or employes, selling or offering to sell for illuminating purposes in any mine in this state any adulterated or impure oil, or oil not recognized by the state board of health as suitable for illuminating purposes as contemplated in this chapter, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense; and any mine owner or operator or employe of such owner or operator who shall knowingly use, or any mine operator who shall knowingly permit to be used, for illuminating purposes in any mine in this state any impure or adulterated oil, or any oil the use of which is forbidden by this chapter, shall, upon conviction thereof, be fined not less than five dollars nor more than twenty-five dollars. [26 G. A., ch. 92, § 2.]

SEC. **2495. Testing oil.** It shall be the duty of the state mine inspector, whenever he has reason to believe that oil is being used or sold, or offered for sale, in violation of the provisions of this chapter, to take samples of the same and have them tested or analyzed, and if they are found to be impure he shall make complaint to the county attorney of the county wherein the offense is committed, who shall forthwith commence proceedings against the offender in any court of competent jurisdiction. All reasonable expenses incurred in testing or analyzing oil under the provisions of this section shall be paid by the owner of the oil whenever it shall be found that he is selling or offering to sell impure oil in violation of the provisions of this chapter. Such costs may be recovered in a civil action, and in criminal prosecutions such expense shall be taxed as part of the costs. [Same, §§ 3, 4.]

SEC. **2496. Provisions applicable.** The provisions of this chapter shall apply only to coal mines. [Same, § 5.]

CHAPTER 10.

OF THE GEOLOGICAL SURVEY.

SECTION **2497. Board.** The geological survey of the state shall be under the direction of the geological board, consisting of the governor, the auditor of state and the presidents of the agricultural college, the state university and the Iowa academy of sciences. [24 G. A., ch. 71, § 1.]

SEC. **2498. State geologist and assistants.** Such board shall appoint a state geologist and such expert assistants, recommended by him, as may be necessary, and annually furnish for publication a report of the operations of the survey. [Same, § 2.]

SEC. **2499. Survey—cabinet.** The state geologist shall be director of the survey and make a complete survey of the natural resources of the state in all their economic and scientific aspects, including the determination of the order, arrangement, dip and comparative magnitude of the various formations; the discovery and examination of all useful deposits, their richness in mineral contents and their fossils; and the investigation of the position, formation and arrangement of the different ores, coals, clays, building stones, glass sands, marls, peats, mineral oils, natural gases, mineral and artesian waters, and such other mineral or other materials as may be useful, with particular regard to the value thereof for commercial purposes and their accessibility; the characters of the various soils and their capacities for agricultural purposes; and the growth of timber, and other scientific and natural history matters that may be of practical impor-

tance and interest. A complete cabinet collection may, at the option of the board, be made to illustrate the natural products of the state, and the board may also furnish suits of materials, rocks and fossils for colleges and public museums within the state, providing it can be done without impairing the general state collection. [Same, § 3.]

SEC. **2500. Detailed reports.** He shall make detailed maps and reports of counties and districts as fast as the work is completed, which shall embrace such geological, mineralogical, topographical and scientific details as are necessary to make complete records thereof, and, when the information obtained warrants it, the results of any special investigation made by him may be brought together in a report for publication, accompanied by proper illustrations and diagrams. He shall, before the first day of January of each year, make to the geological board a full report of the work in the preceding year, together with such minor reports and papers as may be considered desirable for publication. [Same, § 4.]

SEC. **2501. Annual report—bulletins.** The annual report, together with such special bulletins containing important information necessary for the immediate use of the people at large, shall be published by the state under the direction of the board, and disposed of as other published reports of state officers when no special provision is made, but the copies remaining in the control of the board after such distribution, after retaining a sufficient number to supply probable future demands, shall be sold to persons making application therefor at the cost price of publication, the money thus accruing to be turned into the treasury of the state. [Same, § 5.]

SEC. **2502. Expenses.** The members of the board shall be allowed actual expenses incurred in attending to the duties assigned to them by this chapter. Postage, stationery and office expenses of the state geologist shall be paid by the state, as are the expenses of the other state officers, but all other expenses of the survey shall be audited and allowed by the board; and the entire expenses provided for under this chapter, aside from the above exception relating to office supplies and expenses, and that of the publication and distribution of reports and bulletins, shall not exceed the sum of five thousand dollars per annum, which amount is hereby appropriated annually, to be paid out on warrants of the state auditor on the presentation of bills duly audited and allowed as provided in this section. [25 G. A., ch. 159; 24 G. A., ch. 71, §§ 6-7.]

CHAPTER 11.

OF INSPECTION OF PETROLEUM PRODUCTS.

SECTION **2503. Inspectors.** The governor shall appoint such number of inspectors of the products of petroleum as may be determined by the state board of health, not to exceed fourteen in number. Each inspector shall be a resident of the state, and not interested directly or indirectly in the manufacture or sale of products of petroleum. His term of office shall begin on the first day of July in each even-numbered year. He shall give bond to the state in the penal sum of five thousand dollars, conditioned for the faithful performance of his duties, with sureties who shall, in addition to the usual justification, make oath, entered on the bond, that they are not directly or indirectly interested in the manufacture or sale of products of petroleum for illuminating purposes, which bond shall be for the benefit of all persons injured through the failure of the inspector to perform his duties, and shall be filed with, and the sureties thereon approved by, the secretary of state. [21 G. A., ch. 149, § 4; 20 G. A., ch. 185, §§ 1, 3, 12, 14.]

SEC. **2504. Regulations.** The state board of health shall make rules and regulations for the inspection of petroleum products, for the govern-

ment of inspectors, and prescribe the instruments and apparatus to be used. Such rules and regulations shall be approved by the governor, and, when so approved, shall be binding upon all inspectors. [20 G. A., ch. 185, § 2.]

SEC. **2505. Inspection—branding—fees.** Each inspector shall be furnished, at reasonable expense to the state, with the necessary instruments and apparatus for testing, and shall promptly make inspection, and test and brand all illuminating oils kept for sale, and for such purpose may enter upon the premises of any person. He shall reject all oils for illuminating purposes which will emit a combustible vapor at a temperature of one hundred and five degrees, standard Fahrenheit thermometer, closed test, not less than one-half pint of oil to be used in the flash test. If upon test and examination the oil shall meet the requirements, he shall brand over his official signature and date the barrel or package holding the same, "Approved, flash test....degrees," inserting in the blank the number. Should it fail to meet the requirements, it shall be branded under his official signature and date, "Rejected for illuminating purposes." All inspection shall be made within the state, and paid for by the person for whom the inspection is made, at the rate of ten cents per barrel, fifty-five gallons for this purpose constituting a barrel, which charge shall be a lien upon the oil inspected, and be collected by the inspector, reported and paid into the state treasury, except as otherwise provided in this chapter. For the purposes of this act, gasoline, benzine and naptha shall be deemed illuminating oil. No gasoline shall be sold, given away or delivered to any person in this state until the package, cask, barrel or vessel containing the same has been plainly marked "gasoline." [26 G. A., ch. 94; 24 G. A., ch. 52, § 1; 21 G. A., ch. 149, §§ 1, 2, 4; 20 G. A., ch. 185, §§ 1, 2, 4, 14.]

SEC. **2506. Record and report.** Each inspector shall keep an accurate record of all oils inspected and branded, the number of gallons, the number and kind of barrels or packages, the date and number of gallons approved, the number rejected, the name of the person for whom inspection was made, and the amount of money received therefor, the necessary traveling expenses incurred, the amount expended for instruments and apparatus, and the expenses incurred in prosecutions, which record at all reasonable times shall be open to public inspection. A copy of this record for the preceding month shall be filed with the secretary of state on or before the fifteenth day of each month, and no item of expenses shall be allowed and paid not shown in such reports. [24 G. A., ch. 52, §§ 1, 4; 22 G. A., ch. 82, § 38; 20 G. A., ch. 185, § 5.]

SEC. **2507. Compensation of inspectors—expenses.** Each inspector shall be allowed as full compensation for his services all fees and commissions earned and collected by him up to fifty dollars per month, and twenty-five per cent. of any sum collected in any one month in excess of fifty dollars, but in no case shall his compensation exceed one hundred dollars per month. He shall be allowed such other sum as he necessarily expends for prosecutions incurred in the discharge of his duties and for necessary help in branding barrels. All money collected by the inspector in excess of the allowance herein provided shall, on or before the fifteenth day of each month, be paid to the state treasurer. Should any inspector pay out more money in any one month for necessary expenses incurred, for prosecutions for the violation of the provisions of this chapter, or for necessary help in branding barrels, than fees collected, such excess shall be refunded to him on his filing a sworn itemized statement with the governor, showing fees collected and expenses paid or incurred, which statement must be approved by the governor. [24 G. A., ch. 52, §§ 2–4.]

SEC. **2508. Penalties—damages.** If any person, company or corporation, or agent thereof, shall sell, or attempt to sell, any product of petroleum for illuminating purposes which has not been inspected and branded as in this chapter provided, or shall falsely brand any barrel or package containing such petroleum product, or shall refill with products of petroleum bar-

rels or packages having the inspector's brand thereon, without erasing such brand and having the contents thereof inspected, and the barrel or package rebranded, or shall purchase, sell or dispose of any empty barrel or package without thoroughly removing the inspection brand, or shall knowingly or negligently sell, or cause to be sold, or shall use or cause to be used, any product of petroleum mentioned in this chapter not inspected and tested, except as otherwise authorized herein; or if any person shall adulterate with any substance for the purpose of sale or use any product of petroleum to be used for illuminating purposes in such a manner as to render it dangerous, or shall sell or offer for sale, or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of less than one hundred and five degrees, standard Fahrenheit thermometer, closed test, except as otherwise provided in this section for illuminating railway cars, boats and public conveyances, and except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum at a specific gravity of not less than seventy nor more than seventy-five degrees, when used in the Welsbach hydro-carbon incandescent lamp, and for street light by street lamps, or if any common carrier shall receive for transportation or transport in the state as freight any oil or fluid, whether composed wholly or in part of petroleum or its products, or of any substance which will ignite at a temperature of three hundred degrees Fahrenheit thermometer, open test; or if any such carrier of passengers shall burn any oil or fluid which will ignite at a temperature of three hundred degrees, for lighting any lamp, vessel or fixture of any kind in any railway passenger, baggage, mail or express car, or boat or street railway car, stage coach, or other means of public conveyance; or if any inspector shall falsely brand any barrel or package, or shall practice any fraud or deceit in office, or be guilty of any official misconduct or culpable negligence to the injury of another, or shall deal or have any pecuniary interest, directly or indirectly, in any oils or fluids sold for illuminating purposes while holding such office, he or such person, company, corporation or agent shall be liable in a civil action for all damages which may be sustained on account thereof, and each such inspector shall be fined in a sum not less than ten dollars nor more than one thousand dollars, or imprisoned in the county jail not exceeding six months, or be punished by both fine and imprisonment. [21 G. A., ch. 149, § 3; 20 G. A., ch. 185, §§ 1, 6, 7, 8, 10, 11, 13.]

To render an inspector liable in damages for injury resulting from falsely branding oil as of a certain grade when it was of a lower grade, it must appear that the inspector acted wilfully or negligently: *Hatcher v. Dunn*, 71 N.W., 343.

SEC. **2509. Removal of inspectors.** It shall be the duty of the governor to remove from office an inspector who is incompetent or unfaithful in the discharge of his official duty or, having knowledge of the violation of any of the provisions of this chapter, shall neglect or refuse to prosecute the offender. [20 G. A., ch. 185, § 9.]

SEC. **2510. Reports by secretary of state.** The secretary of state shall make and deliver to the governor a report, for the fiscal year ending on the thirtieth day of June in each odd-numbered year, of all inspections made, the receipts and expenditures therefor, and such other items as are by this chapter required to be made of record.

CHAPTER 12.

OF THE INSPECTION OF PASSENGER BOATS.

SECTION **2511. Inspectors.** The governor shall appoint one or more suitable persons as inspectors of passenger boats, to hold office for two years

from the first Monday in May in each even-numbered year, unless sooner removed, who shall qualify by taking an oath, to be indorsed upon the certificate of appointment, faithfully and honestly to discharge the duties of the office. [22 G. A., ch. 107, § 2.]

SEC. **2512. Certificates—fees.** Any inspector, on the request of the owner, agent or master of any sail or steamboat upon the inland waters of the state having a carrying capacity of five or more passengers, shall carefully and thoroughly inspect such boat, its appliances and machinery, and, if found in proper condition and safe for the carriage of persons or passengers, give his certificate thereof, including therein the number of persons or passengers that may be carried, and on what waters; which certificate, or a copy thereof, shall be posted in a conspicuous place on the boat, and any boat so inspected and certified shall be entitled to run for the season following the date thereof. In like manner, upon the request of any pilot or engineer for a license as such, the inspector shall forthwith investigate the competency of the applicant, his acquaintance with and experience in his business, his habits as to sobriety, and other qualifications, and, if found capable of performing well his duties, and of good habits, he shall issue his certificate authorizing him to act as pilot or engineer, as the case may be, for five years from the date thereof, unless sooner revoked for cause, which revocation when made shall take effect upon approval by the governor. The inspector may charge and require advance payment for inspection, for each sailboat, one dollar, each steamboat with a capacity of not more than twenty persons, five dollars, those of greater capacity, ten dollars, and for each applicant for license as pilot or engineer, three dollars. [Same, §§ 3–5.]

SEC. **2513. Penalties.** If any owner, agent or master of any sail or steamboat, having a capacity of carrying five or more persons, plying the inland waters of the state, shall hire, or offer to hire, such sail or steamboat for the carrying of persons, or receive persons thereon for hire, without first obtaining annually, before the boating season, a certificate as in this chapter required, or if such owner, agent or master, having obtained such certificate, shall permit or receive for carriage on such boat a greater number of persons than authorized therein, or if any person shall act as pilot or engineer on any boat mentioned for which inspection and license are herein required, without first obtaining a license therefor, or if, having such license, he continues to follow such avocation after the same has been revoked, or has expired, he shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or punished by both fine and imprisonment; but the provisions of this chapter shall not apply to vessels licensed by authority of the United States. [Same, §§ 1, 3, 4.]

SEC. **2514. Reports.** Each inspector annually, on or before the first day of January, shall report to the governor the number and date of licenses granted pilots or engineers, to whom issued, the date thereof, the number of sail and steamboats inspected, the time and place of inspection, upon what waters to be used, and such other matters as may be considered useful or of general interest, with the total amount of fees received from all sources. [Same, § 6.]

CHAPTER 13.

OF THE DAIRY COMMISSIONER AND IMITATION DAIRY PRODUCTS.

SECTION **2515. Appointment, bond, powers and duties of commissioner—report.** On or before the first day of April of each even-numbered year, the governor shall appoint a dairy commissioner, who shall have a practical knowledge of and experience in the manufacture of dairy products, and hold his office for two years from the first day of May following his

appointment, and until his successor is appointed and qualified, subject to removal by the governor for inefficiency, neglect or violation of duty. He shall give bond in the sum of ten thousand dollars, conditioned for the faithful performance of his duties, with sureties to be approved by and filed with the secretary of state. He shall keep on hand a supply of standard test tubes or bottles and milk measures or pipettes adapted for use by each milk testing machine, the manufacturers or dealers of which have filed with the dairy commissioner a certificate from the director of the Iowa agricultural experiment station, which shall certify that said milk testing machine, when properly and correctly operated, will produce accurate measurements of butter fat, and furnish to any person or corporation desiring the same for testing milk one such tube or bottle, and such milk measure or pipette for each factory, of the kind adapted for the machine operated therein, upon request therefor, certifying it to be accurate, reliable and standard, placing thereon the letters "D. C." as a permanent mark; the tubes or bottles and pipettes to be furnished at the actual cost thereof. He shall have and keep an office in the capitol, and preserve therein all correspondence, documents, records and property of the state pertaining thereto, and may, when necessary, employ a clerk at an expense of not more than seventy-five dollars per month. During his term of office he shall hold no other official position nor any professorship in any state educational institution, and on or before the first day of November shall make annual report to the governor, which shall contain a detailed account of all his doings as commissioner, and the receipts and disbursements of his office since the preceding report, with such facts and statistics in regard to the production, manufacture and sale of dairy products, with such suggestions, as he may regard of public importance connected therewith. In the conduct of his office, he shall have power to issue subpœnas for witnesses, enforce their attendance, and examine them under oath by him to be administered, such witnesses to be allowed fees as in justices' courts, to be paid by the commissioner as part of the expenses of his office, and do such other acts and things as are necessary and proper in the enforcement of the provisions of this chapter. [25 G. A., ch. 47; 24 G. A., ch. 50, § 6; 23 G. A., ch. 52, § 5; 22 G. A., ch. 98, § 1; 21 G. A., ch. 52, §§ 11–14.]

SEC. **2516. Imitation butter or cheese.** Every article, substitute or compound, save that produced from pure milk or cream from milk of cows, made in the semblance of or designed to be used for and in the place of butter, is imitation butter; and every article, substitute or compound, save that produced from pure milk or cream from milk of cows, made in the semblance of or designed to be used for and in the place of cheese, is imitation cheese. No one shall manufacture, have in his possession, offer to sell or sell, solicit or take orders for delivery, ship, consign or forward by any common carrier, public or private, and no common carrier shall knowingly receive or transport, any such imitation butter or cheese, except in the manner and subject to the regulations in this chapter provided. [25 G. A., ch. 46, §§ 2, 5; 21 G. A., ch. 52, §§ 1, 3; 19 G. A., ch. 170, § 4.]

SEC. **2517. Substitute for butter or cheese—regulations as to sale and use—transportation.** A substitute for butter and cheese, not having a yellow color nor colored in imitation of butter and cheese as prohibited in the next section, may be manufactured, kept in possession, offered for sale, sold, shipped, consigned or forwarded by common carriers, public or private, if each tub, firkin, box or other package in which the same is kept, offered for sale, sold, shipped, consigned or forwarded shall have branded, stamped or marked on the side or top thereof in the English language, in a durable manner, the words, "Substitute for butter" or "Substitute for cheese," as the case may be, the letters of the words to be not less than one inch in length by one-half inch in width. The defacing, erasure, canceling or removal of this brand or mark, with intent to mislead, deceive, or violate any provision of this chapter, is prohibited. Such substitute for butter or

cheese may be kept, used or served as a food or for cooking in hotels, restaurants, lunch counters, boarding houses or other places of public entertainment, only in case the proprietor or person in charge of such place shall display and keep constantly posted a card opposite each table or other place where the guests or others are served with the same, which card shall be white, at least ten by fourteen inches in size, the words, "Substitute for butter used here," or "Substitute for cheese used here," as the case may be, printed in black Roman letters of the same size as herein required to be placed upon the tubs, firkins, boxes or other package in which substitute for butter or cheese is kept, and no other words or figures shall be printed thereon. No substitute for butter or cheese shall be offered for sale in the manufacturer's original package under the name of or for true butter or cheese made from the milk or cream of cows, nor shall any substitute for butter or cheese be offered for sale or sold unless the purchaser at the time was informed thereof, and, in addition, furnished with a printed statement in the English language in prominent type that the substance sold is such substitute, and giving the name and place of business of the maker. Nothing herein contained, however, shall be so construed as to prohibit the transportation of imitation butter or cheese through and across the state. [25 G. A., ch. 46, §§ 4, 7, 8; 25 G. A., ch. 45, § 1; 21 G. A., ch. 52, §§ 2, 5, 6, 9.]

SEC. **2518. Coloring—adulteration.** No one shall color with any matter whatever any substance intended as a substitute for butter or cheese, so as to cause it to resemble true dairy products, or combine any animal fat, vegetable oil or other substance with butter or cheese, or combine with any substance whatever, intended as a substitute for butter or cheese, anything of any kind or nature for the purpose or with the effect of imparting to the compound the color of yellow butter or cheese, the product of the milk or cream from cows, or use, solicit orders for delivery, keep for sale or sell any such substance so colored and disguised as a substitute for butter or cheese; but nothing in this chapter shall be construed to prohibit the use of salt, rennet, or harmless coloring matter in making butter or cheese from such milk or cream. [25 G. A., ch. 46, § 3.]

SEC. **2519. Package branded.** No one shall have in his possession or under his control, except for the actual consumption of himself or family, any substance designed as a substitute for butter or cheese, unless the tub, firkin, box or package holding the same is branded or marked as in this chapter required. Any person having in his possession or under his control such substance, not so branded or marked, shall be presumed to know its true character and name. [Same, § 6; 21 G. A., ch. 52, §§ 4, 8.]

SEC. **2520. Contracts invalid.** No action shall be maintained in any of the courts of the state upon any contract or sale made in violation of or with the intent to violate any provision of this chapter by one who was knowingly a party thereto. [21 G. A., ch. 52, § 7.]

SEC. **2521. Search warrants—samples.** Whoever shall have in possession or control any imitation butter or cheese, or any substance designed to be used as a substitute for butter or cheese contrary to the provisions of this chapter, shall be held to have possession of property with intent to use it as a means of committing a public offense, and all the provisions of the chapter relating to search warrants and proceedings thereon shall apply, except the officer serving the warrant, in addition to his duties as therein required, shall deliver to the dairy commissioner, or to a person by him authorized in writing to receive the same, a perfect sample of each article seized by virtue of such warrant, for the purpose of having the same analyzed, and forthwith return to the person from whom it was taken the remainder of each article seized. If any sample is found to be imitation butter or cheese, or substance designed to be used as a substitute for butter or cheese, it shall be returned to and retained by the magistrate for the purposes contemplated in said chapter on "search warrants and proceedings thereon," but if any sample be found not imitation butter or cheese, or a substance designed to

be used as a substitute therefor, the value of the same shall be paid by the dairy commissioner as part of the expenses of his office, to the person from whom it was taken. [25 G. A., ch. 46, § 10; 21 G. A., ch. 52, § 15.]

SEC. **2522. Milk dealers—manufacturers and packers—reports.** Every city milk dealer, or every person furnishing milk or cream to such dealer, or the employe of such milk dealer, and every person or corporation, or the employe of such person or corporation, who operates a creamery, cheese or condensed milk factory, or re-works or packs butter, shall maintain his premises and utensils in a clean and hygienic condition, and shall make, upon blanks furnished by the dairy commissioner, such reports and statistics as may be required for the purpose of compiling statistics authorized by this chapter, and such dealer, owner, operator or business manager shall make such returns and reports in the manner and in the time prescribed by the commissioner, and certify to the correctness thereof.

SEC. **2523. Milk test.** Any person or corporation, or the employe of such person or corporation, who operates a creamery or cheese or condensed milk factory, and uses a chemical milk test to determine the quantity of butter fat in milk purchased, used or received, shall so use only such tests as shall be clear oil, free from any foreign substance, and produce correct measurements of butter fat, and every such person or corporation using a milk test shall procure from the dairy commissioner for each factory so operated one standard tube or bottle, and one standard measure or pipette, for testing milk, certified and marked by him as in this chapter provided, which shall be kept for inspection by the patrons and used by such person or corporation in testing or verifying test tubes or bottles and milk measures or pipettes used. In any action arising between any such operator and patron, the burden of establishing the use of reliable tests and the results therefrom, equivalent to the standard herein provided, shall be upon the operator. [25 G. A., ch. 47, § 1.]

SEC. **2524. Samples collected.** The commissioner may appoint agents in any city having over ten thousand inhabitants to collect from each dealer, not more than four times each month, samples of milk offered for sale therein. The agent shall make an accurate test of each sample received by him, and keep a true record thereof, with the name and location of the person from whom it was obtained, and report his work in detail to the commissioner, the compensation therefor not to exceed three dollars for each day actually employed therein. [24 G. A., ch. 50, §§ 4, 5.]

SEC. **2525. Permits.** Any person or corporation who shall sell milk or cream from a wagon, depot or store, or sell or deliver milk or cream to a hotel or restaurant or boarding house, or any public place in any such city, shall be considered a city milk dealer. No such city milk dealer shall sell milk or cream from a wagon, depot or store in any such city without a written permit from the commissioner for each wagon, depot or store operated by him, for which he shall pay annually one dollar. All permits shall expire on the fourth day of July of each year, and no permit shall be issued for less than one dollar. [Same, § 7.]

SEC. **2526. Inspection.** He or his agent may open any can or vessel containing milk or cream offered for sale in such city, and inspect its contents and take samples therefrom for testing or analysis. And any city milk dealer, or employe of such milk dealer, or any other person who shall resist or interfere with the commissioner or his agent in the performance of his duties in executing any of the requirements of this chapter, shall be guilty of a misdemeanor and punished as provided in this chapter. [Same, § 8.]

SEC. **2527. Penalties.** Whoever shall violate any provision of this chapter shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment, at the discretion of the court. [25 G. A., ch. 46, § 9; 21 G. A., ch. 52, § 10.]

SEC. **2528. Compensation—expenses.** The commissioner shall be allowed necessary postage, stationery and office supplies, and shall receive an annual salary of fifteen hundred dollars and necessary expenses, which shall not exceed three thousand dollars per year; such expenses to be itemized, verified by him, and, when examined and approved by the executive council, to be paid upon a warrant of the state auditor drawn upon the state treasurer. The salary of the clerk shall be paid in the same manner. [21 G. A., ch. 52, § 12.]

CHAPTER 14.

OF STATE VETERINARY SURGEON.

SECTION **2529. Appointment—qualification.** The state veterinary surgeon shall be appointed by the governor, subject to removal by him for cause, who shall hold office for three years. He shall be a graduate of some regularly established veterinary college, skilled in that science, and shall be by virtue of his office a member of the state board of health. [20 G. A., ch. 189, § 1.]

SEC. **2530. Powers—regulations.** He shall have supervision of all contagious and infectious diseases among domestic animals in, or being driven or transported through, the state, and is empowered to establish quarantine against animals thus diseased, or that have been exposed to others thus diseased, whether within or without the state, and, with the concurrence of the state board of health, may make such rules and regulations as he may regard necessary for the prevention and suppression, and against the spread, of said disease or diseases, which rules and regulations, the executive council concurring, shall be published and enforced, and in the performance of his duties he may call for the assistance of any peace officer. [Same, § 2.]

SEC. **2531. Penalty for interfering with.** Any person who wilfully hinders, obstructs or resists said veterinary surgeon, his assistants, or any peace officer acting under him or them, when engaged in the duties or exercising the powers herein conferred, or violates any quarantine established by him or them, shall be guilty of a misdemeanor. [Same, § 3.]

SEC. **2532. Report.** Said surgeon shall biennially make a full and detailed report of his doings since his last report to the governor, including his compensation and expenses, which report shall not exceed one hundred and fifty pages of printed matter. [22 G. A., ch. 82, § 39; 20 G. A., ch. 189, § 4.]

SEC. **2533. Duties—deputies.** Whenever a majority of any board of supervisors or township trustees, or any city or town council, whether in session or not, shall in writing notify the governor of the prevalence of, or probable danger from, any of said diseases, he shall notify the veterinary surgeon, who shall at once repair to the place designated in said notice and take such action as the exigencies may demand, and the governor may, in case of emergency, appoint a substitute or assistants with like qualifications, and with equal powers and compensation. [20 G. A., ch. 189, § 5.]

SEC. **2534. Destruction of stock—compensation—appeal.** Whenever in the opinion of the state veterinary surgeon the public safety demands the destruction of any stock, the same may be destroyed upon the written order of such surgeon, with the consent of the owner, or upon approval of the governor, and by virtue of such order such surgeon, his deputy or assistant, or any peace officer, may destroy such diseased stock, and the owner thereof shall be entitled to receive its actual value in its condition when condemned, to be ascertained and fixed by the state veterinary surgeon and the nearest justice of the peace, who, if unable to agree, shall

call upon the nearest or other justice of the peace upon whom they agree as umpire, and their judgment shall be final when the value of the stock, if not diseased, would not exceed twenty-five dollars; but in all other cases either party shall have the right of appeal to the district court, but such appeal shall not delay the destruction of the diseased animals. The veterinary surgeon shall at once file with the governor his written report thereof, who shall, if found correct, indorse his finding thereon, whereupon the auditor of state shall issue his warrant therefor upon the treasurer of state, who shall pay the same out of any moneys at his disposal under the provisions of this act, but no compensation shall be allowed for stock destroyed while in transit through or across the state, and the word "stock," as herein used, shall be held to mean cattle, horses, mules and asses. [Same, § 6.]

A certificate given by a deputy veterinary surgeon to the owner of a horse showing him to be affected with glanders, *held* not admissible as evidence that he was so affected at the time of his purchase, more than a year previous to the giving of such certificate: *Welch v. Norton*, 73–721.

SEC. **2535. Coöperation with United States.** The governor, with the veterinary surgeon, may coöperate with the government of the United States for the objects of this chapter, and the governor may accept and receipt for any moneys receivable by the state under the provisions of any act of congress which may at any time be in force upon this subject, and pay the same into the state treasury to be used according to the act of congress and the provisions of this chapter as nearly as may be. [Same, § 7.]

SEC. **2536. Appropriation.** There is annually appropriated out of any moneys, not otherwise appropriated, the sum of three thousand dollars, or so much thereof as may be necessary, for the uses and purposes herein set forth. [Same, § 8.]

SEC. **2537. Compensation of assistants.** Any person, except the veterinary surgeon, called upon under the provisions of this chapter, shall be allowed and receive two dollars per day while actually employed. [Same, § 9.]

SEC. **2538. Compensation of veterinary surgeon.** When engaged in the discharge of his duties, the veterinary surgeon shall receive the sum of five dollars per day and his actual expenses, the claim therefor to be itemized, verified, accompanied with written vouchers, and filed with the state auditor, who shall allow the same and draw his warrant upon the treasury therefor. [Same, § 1.]

CHAPTER 15.

OF THE CARE AND PROPAGATION OF FISH AND THE PROTECTION OF BIRDS AND GAME.

SECTION **2539. Warden—compensation—duties.** There is hereby created the office of state fish and game warden. The warden shall be appointed by the governor, and hold his office for three years from the first day of April of the year of his appointment. He shall receive a salary of twelve hundred dollars annually to be paid out of the state treasury. He shall have charge and management of the state fish hatcheries, which shall be used in stocking the waters of the state with fish native to the country and to the extent of the means provided by the state. He shall impartially and equitably distribute all fry raised by or furnished to the state, or for it through other sources, in the streams and lakes of the state; shall faithfully and impartially enforce obedience of the provisions of this chapter, and shall make a biennial report to the governor of his doings, together with such information upon the subject of the culture of fish and the protection of game in the country as he may think proper, accompanied with an itemized statement monthly to the executive council under oath of all moneys

expended and for what purpose, and of the number and varieties of fish distributed, and in what waters. [23 G. A., ch. 34, § 12; 17 G. A., ch. 80, §§ 1, 4.]

SEC. **2540. Fishing—what permitted.** Between the first days of November and March, no one shall take from the waters of the state any salmon or trout, nor between the first day of April and the fifteenth day of May any bass, pike, croppies, or other game fish, nor shall any one fish for or by any means catch any fish in any stream, which has been stocked with breeding trout one or two years old, within one year from the date of the stocking thereof, if notice of such fact is by the authority of the warden posted where a public road crosses such stream; nor shall any one at any time take from the waters of the state any fish, except minnows for bait, unless by hook and line; but any person may, between the fifteenth day of May and the first day of December, use not more than one trot line in streams only, and extending not more than half-way across; nor shall any one place, erect or cause to be placed or erected, any trot line, seine, net, trap, dam or other device or contrivance in the water in such manner as to hinder or obstruct the free passage of fish, up, down or through the same for the purpose of catching them, except as provided in the next section; nor shall any one place in the water any lime, ashes, or drug of any kind or other substances, or shoot any gun, explode dynamite, guncotton, giant powder, or other compound or preparation, or use electricity in any way, with the intent to kill or so to affect any fish that it may be taken; nor have, erect or use, while fishing on or through the ice, any house, shed or other protection against the weather, or have or use any stove or other means for creating artificial heat. The possession of a spear or seine in or upon any of the public waters of the state, or upon the ice of the same, or on the shore within a limit of ten rods, shall be *prima facie* evidence of the intent to violate the provisions of this section, against spearing and seining fish. But this presumption shall not exist against fishing in the excepted waters, as provided in section twenty-five hundred and forty-seven of this chapter. [26 G. A., ch. 80, § 1; 25 G. A., ch. 65; 23 G. A., ch. 34, §§ 2, 3, 6, 7; 17 G. A., ch. 80, §§ 5, 6; 16 G. A., ch. 70, § 6.]

The provisions of 23 G. A., ch. 34, § 6, did not prohibit the catching of fish by a trot line, as this is the catching with a hook and line. It was only the placing of a trot line across a river so as to hinder or obstruct the free passage of fish which was prohibited by that statute: *Collins v. Bankers' Acc. Assn.*, 64 N.W., 778.

SEC. **2541. Minnows for bait.** In taking minnows for bait, a three-eighths inch mesh seine not exceeding five yards in length may be used, and if any of the fish enumerated in the preceding section shall be taken, they shall at once be restored unharmed to the water whence taken, and the word "minnows" as used in this chapter does not include young bass, pike, croppies, trout, salmon, or fry of any game fish, native or otherwise. [23 G. A., ch. 34, § 2.]

SEC. **2542. Two lines.** No person shall use more than two lines, with one hook upon each line, in still fishing, or otherwise, except that a trot line as above provided, or in trolling a spoon-hook composed of three hooks fastened together, may be used. [26 G. A., ch. 80, § 2.]

SEC. **2543. Buying or selling.** No person shall knowingly buy, sell, offer for sale, have in possession for sale or transportation, or for any other use or purpose, any fish unlawfully taken under the provisions of this chapter. [23 G. A., ch. 34 § 4.]

SEC. **2544. Penalty.** Any one who shall violate any provisions of the four preceding sections shall, upon conviction, pay a fine of not less than five nor more than fifty dollars and costs of prosecution for each offense, or be imprisoned in the county jail for not less than one day nor more than thirty days, and the taking of each fish in violation of law shall be a separate offense. [26 G. A., ch. 80, § 3; 23 G. A., ch. 34, §§ 5, 8, 9; 16 G. A., ch. 170, §§ 4, 7.]

SEC. **2545. Private fishing.** Persons who raise or propagate fish upon their own premises, or who own premises on which there are waters having no natural inlet or outlet through which such waters may become stocked or replenished with fish, are the owners of the fish therein and may take them as they see fit, or permit the same to be done. Any person taking said fish without the consent of such owner shall be guilty of a misdemeanor, and be prosecuted and punished as provided in the preceding section, and such owner may recover three times the value thereof from the person so taking them. [23 G. A., ch. 34, § 10; 16 G. A., ch. 70, § 4.]

SEC. **2546. Taking by warden.** The warden may take from any of the public waters of the state, at any time and in any manner, any fish for the purpose of propagating or restocking other waters, or exchanging with fish commissioners or wardens of other states or of the United States. [23 G. A., ch. 34, § 2.]

SEC. **2547. Rivers excepted—dams.** Nothing herein contained shall be held to apply to fishing in the Mississippi, Missouri or the Big Sioux rivers, nor to so much of the Des Moines river as forms the boundary line between this state and Missouri, nor to forbid the erection of dams across the waters of the state for manufacturing or other lawful purposes, subject to the provisions of the following section. [Same, § 11; 18 G. A., ch. 92; 16 G. A., ch. 70, § 10.]

SEC. **2548. Fish ways.** No dam or obstruction across any river, stream or other waters in this state shall be erected or maintained which is not provided with a fish-way of suitable capacity and facilities to afford a free passage for fish up and down the same, while the water is running over such dam or obstruction. Any dam or obstruction which is not so constructed is a public nuisance, and may be abated accordingly. A violation of this section is a misdemeanor, and, in addition to the remedy in this section provided, the offender may be punished by fine of not less than one hundred dollars or imprisonment in the county jail not less than fifteen days nor more than thirty days. [17 G. A., ch. 188.]

SEC. **2549. Fish dams—condemning property for.** Any city or town, bounded in whole or in part by any meandered lake or chain of lakes, or the board of supervisors of the county in which such waters are situated, may construct and maintain across the outlet or inlet thereof a dam to obstruct the passage of fish, the same to be of earth, masonry or other material to the natural and ordinary level of the lake, above and across the entire width to be an open network of bars or wire with the necessary supports, so arranged as to prevent as far as may be the escape of fish. For this purpose, upon the petition of a majority of the resident taxpayers of any city or town, so much land as is situated within the corporate limits as may be necessary may be purchased or condemned in the same manner provided for the appropriation of private property for streets and other municipal uses, and paid for out of the general fund. [24 G. A., ch. 46; 22 G. A., ch. 108; 21 G. A., ch. 63, §§ 1, 2.]

SEC. **2550. Penalty for injuring or destroying.** Whoever shall wilfully injure or destroy such dam so erected or maintained, shall be guilty of a misdemeanor, and, upon conviction, shall pay a fine of not less than one hundred nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty nor more than one hundred days, and pay the costs of prosecution. [21 G. A., ch. 63, § 3.]

SEC. **2551. Game protected.** No person shall trap, shoot or kill any pinnated grouse or prairie chicken between the first day of December and the first day of September next following; any woodcock, between the first day of January and the tenth day of July; any ruffed grouse or pheasant, wild turkey or quail, between the first day of December and the first day of October; any wild duck, goose or brant, between the fifteenth day of April and the first day of September; or any gray or fox squirrel or timber squirrel, between the first day of January and the first day of June, provided that it

shall be unlawful to kill any ruffed grouse or wild turkey prior to January 1, 1900. Shooting or killing quail on the public highway shall be in violation of law. No person shall kill any of the birds mentioned in this section from any artificial ambush of any kind or with the aid or use of any sneak boat or sink box or other device used for concealment in the open water, nor use any artificial light, battery or any other deception, contrivance or device whatever, with the intent to attract or deceive any of the birds mentioned in this chapter, except that decoys may be used in hunting wild geese and ducks, but no person shall at any time hunt or shoot from any boat, canoe, contrivance or device whatever on any of the waters of this state between sunset and sunrise. [20 G. A., ch. 67; 18 G. A., ch. 193; 17 G. A., ch. 156, § 2.]

SEC. **2552. Killing for traffic—destroying eggs or nests.** No person shall at any time, or at any place within this state, trap, shoot or kill for traffic any pinnated grouse or prairie chicken, woodcock, quail, ruffed grouse or pheasant; nor shall any one person shoot or kill during any one day more than twenty-five of either kind of said named birds; nor shall any one person, firm or corporation have more than twenty-five of either kind of said named birds in his or their possession at any one time, unless lawfully received for transportation; or catch or take or attempt to catch or take, with any trap, snare or net any of the birds or animals named in the preceding section; or in any manner wilfully destroy the eggs or nests of any of the birds named in this and the preceding section. [18 G. A., ch. 193, § 2; 17 G. A., ch. 156, § 3.]

SEC. **2553. Trapping.** It shall be unlawful for any person to kill, trap or ensnare any beaver, mink, otter or muskrat between the first day of April and the first day of November, except where such killing, trapping or snaring may be for the protection of private or public property. [17 G. A., ch. 156, § 4.]

SEC. **2554. Having in possession.** It shall be unlawful for any person, company or corporation to buy or sell, or have in possession, any of the birds or animals named in this chapter, during the period when the killing of such birds or animals is prohibited, except during the first five days of such prohibited period; and the possession by any person, company or corporation of any such birds or animals during such prohibited period, except during the first five days thereof, shall be presumptive evidence of a violation of the provisions of this chapter relating to game. [17 G. A., ch. 156, § 5.]

SEC. **2555. Shipping out of state.** No person, company or corporation shall at any time ship, take or carry out of this state any of the birds or animals named in this chapter; but it shall be lawful for any person to ship to any person within this state any game birds named, not to exceed one dozen in any one day, during the period when the killing of such birds is not prohibited; but he shall first make an affidavit before some person authorized to administer oaths that said birds have not been unlawfully killed, bought, sold or had in possession, are not being shipped for sale or profit, giving the name and post-office address of the person to whom shipped, and the number of birds to be so shipped. A copy of such affidavit, indorsed "a true copy of the original" by the person administering the oath, shall be furnished by him to the affiant, who shall deliver the same to the railroad agent or common carrier receiving such birds for transportation, and the same shall operate as a release to such carrier or agent from any liability in the shipment or carrying of such birds. The original affidavit shall be retained by the officer taking the same, and may be used as evidence in any prosecution for violation of the sections of this chapter relating to game. Any person knowingly and wilfully swearing falsely to any material fact of said affidavit shall be guilty of perjury. [17 G. A., ch. 156, § 6.]

SEC. **2556. Penalty.** If any person use any device, kill, trap, ensnare, buy, sell, ship, or have in his possession, or ship, take or carry out of the state, contrary to the provisions of this chapter, any of the birds or animals named or referred to herein, or shall wilfully destroy any eggs or nests of the birds named or referred to in the preceding sections, he shall be punished by a fine of ten dollars for each bird, beaver, mink, otter, or muskrat; and ten dollars for each nest and the eggs therein, so killed, trapped, ensnared, bought, sold, shipped, had in possession, destroyed, or shipped, taken, or carried out of the state, and shall stand committed to the county jail for thirty days unless such fine and costs of prosecuting are sooner paid. [17 G. A., ch. 156, § 7.]

SEC. **2557. Receiving for transportation.** If any railway or express company or other common carrier, or any of their agents or servants, receive any of the fish, birds or animals mentioned or referred to in this chapter for transportation or other purpose, during the period hereinbefore limited and prohibited, or at any other time except in the manner provided in this chapter, he or it shall be punished by a fine of not less than one hundred nor more than three hundred dollars, or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment.

SEC. **2558. Using swivel-gun or poison.** If any person shoot or kill any wild duck, goose or brant with any swivel-gun, or any kind of gun except such as is commonly shot from the shoulder, or shall use medicated or poisoned food to capture or kill any of the birds named in this chapter, he shall be fined twenty-five dollars for each offense, and shall stand committed to the county jail for thirty days, unless such fine and costs of prosecution are sooner paid. [17 G. A., ch. 156, § 9.]

SEC. **2559. Prosecutions—attorney's fee.** In all prosecutions under this chapter, any number of violations may be included in the information, but each one shall be set out in a separate count, and upon conviction there shall be taxed as a part of the costs in the case a fee of five dollars to the informant, and a like fee of five dollars to the attorney prosecuting the case, upon each count upon which there is a plea or verdict of guilty and judgment of conviction; but in no event shall this fee be paid out of the county treasury. Prosecutions for violations of any provision of this chapter may be brought either in the county in which the offense was committed, or in any other county where the person, company or corporation complained of has had or has in his or their possession any fish, birds or animals named herein and bought, sold, caught, taken, killed, trapped or ensnared in violation hereof. [Same, § 11.]

SEC. **2560. Hunting upon cultivated or inclosed land.** No person shall hunt with dog or gun upon the cultivated or inclosed lands of another without first obtaining permission from the owner, occupant or agent thereof. Any person violating the provisions of this section shall be punished by a fine of not more than ten dollars and costs of prosecution, and shall stand committed until such fine and costs are paid, for each and every offense, but no prosecution shall be commenced under this section except upon the information of the owner, occupant or agent of such cultivated or inclosed lands. [25 G. A., ch. 64.]

SEC. **2561. Protection of birds.** No person shall destroy the nests or eggs of, or catch, take, kill or have in possession or under control for any purpose whatever, except specimens for use of taxidermists, at any time, any whippoorwill, night-hawk, bluebird, finch, thrush, linnet, lark, wren, martin, swallow, bobolink, robin, turtle-dove, catbird, sandpiper, snowbird, blackbird, or any other harmless bird except bluejays and English sparrows, but nothing herein shall be construed to prevent the removal of nests from buildings, and the keeping of song birds in cages as domestic pets. Any person violating any of the provisions of this section shall be fined not less than one dollar nor more than twenty-five dollars and costs of prosecution, and may be committed to the county jail until such fine and costs are paid.

SEC. **2562. Deputy warden.** The fish and game warden may appoint such number of deputies as he may deem necessary, who shall serve without expense to the state, and whose duties shall be to report to the warden all violations of the fish and game laws and aid him in the enforcement thereof.

SEC. **2563. Fish commissioner.** The office of fish commissioner is hereby abolished and the present fish commissioner shall be fish and game warden.

CHAPTER 16.

OF STATE BOARD OF HEALTH.

SECTION **2564. Appointment—meetings—officers.** The state board of health shall consist of the attorney-general and the state veterinary surgeon, who shall be members by virtue of their offices, one civil engineer and seven physicians, to be appointed by the governor, each to serve for a term of seven years and until his successor is appointed; vacancies to be filled by the governor for the unexpired term. But no one of the seven physicians hereafter appointed shall be an officer or member of the faculty of any medical school, and the governor shall have the power to remove any member of said board for good cause shown. It shall meet semiannually in May and November, and at such other times as it may decide upon, such meetings to be held at the seat of government; suitable rooms therefor to be provided by the custodian of the capitol. At the meeting held in May, a president from their number, and a secretary who shall be a physician not of their number, shall be elected, and the latter have an office in the capitol. [26 G. A., ch. 91; 20 G. A., ch. 173; 18 G. A., ch. 151, §§ 1, 9, 10, 12.]

SEC. **2565. Powers—regulations—reports.** The board shall have charge of and general supervision over the interests of the health and life of the citizens of the state; matters pertaining to quarantine, registration of marriages, births and deaths; authority to make such rules and regulations and sanitary investigations as it from time to time may find necessary for the preservation and improvement of the public health, which, when made, shall be enforced by local boards of health and peace officers of the state. It shall prepare and furnish, through its secretary, to the clerks of the several counties such forms for the record of marriages, births and deaths as it may determine upon, and by its secretary make biennial reports to the governor, which shall include so much of its proceedings, such information concerning vital statistics, such knowledge respecting diseases, and such instruction upon the subject of hygiene, as may be thought useful for dissemination among the people, with such suggestions as to further legislation as may be thought advisable. [22 G. A., ch. 82, § 37; 18 G. A., ch. 151, §§ 2, 4, 11.]

SEC. **2566. Registration of births and deaths.** It shall be the duty of all assessors, at the time of making assessment, to obtain and report to the clerk of the district court, upon blanks adopted by the state board of health and furnished by the county auditor, such registration of births and deaths as occur within their respective districts for the year ending December thirty-first immediately preceding.

A former statute authorizing the board of health to require a physician to report information as to births and deaths, *held* not unconstitutional. Its objects were within the authority of the state, and might be attained in the exercise of its police power: *Robinson v. Hamilton*, 60–134.

SEC. **2567. Clerk of court to keep registry.** The clerk of the court in each county shall keep a book in which shall be recorded all marriages occurring within the county, together with such data respecting the same as shall be required by the state board of health, and shall report to the

secretary of the state board of health on or before the first day of June in each year such data respecting such marriages for the year ending December thirty-first immediately preceding. The clerk of the district court of each county shall keep a book in which shall be recorded all births and deaths occurring within the county as shown by the returns filed in his office by the assessor, as provided in section twenty-five hundred and sixty-six; and on or before the first day of June in each year shall furnish to the secretary of the state board of health a report of such births and deaths. [19 C. A., ch. 140; 18 G. A., ch. 151, § 3.]

SEC. **2568. Local board of health—quarantine.** The mayor and council of each town or city, or the trustees of any township, shall constitute a local board of health within the limits of such towns, cities or townships of which they are officers. The town, city or township clerk shall be clerk of the local board, which board shall appoint a competent physician as its health officer, who shall hold office during its pleasure. It shall regulate all fees and charges of persons employed by it in the execution of health laws and its own regulations and those of the state board of health; have charge of all cemeteries dedicated to public use not controlled by other trustees or incorporated bodies, and the burial of the dead; make such regulations as are necessary for the protection of the public health respecting nuisances, sources of filth, causes of sickness, rabid animals and quarantine, not in conflict with any regulations of the state board of health, which shall also apply to boats or vessels in harbors or ports within their jurisdiction; to proclaim and establish quarantine against all infectious or contagious diseases dangerous to the public, and maintain and remove the same, as may be required by regulations of the state board; may, when satisfied upon due examination that any cellar, room, tenement building, or place occupied as a dwelling or otherwise has become, or is by reason of the number of occupants, uncleanliness or other cause, unfit for such purpose, or a cause of nuisance or sickness to the occupants or the public, issue a notice in writing to such occupants or any of them, requiring the premises to be put in proper condition as to cleanliness, or requiring the occupants to remove or quit such premises within a reasonable time to be fixed; and, if the persons so notified or either of them neglect or refuse to comply therewith, may by order cause the premises to be properly cleaned at the expense of the owner or owners, or may forcibly remove the occupants and close the premises, and peace and police officers shall execute such orders, which premises so closed shall not be again occupied as a dwelling place without written permission of the board. The quarantine authorized by this section in case of infectious or contagious diseases may be declared or terminated by the mayor of any city or town, or the township clerk outside of such city or town, in cases required by regulations of the state board of health, upon written notice given by any practicing physician of the existence of such disease, or termination of the cause for quarantine, as the case may be. [24 G. A., ch. 59; 18 G. A., ch. 151, §§ 13, 14, 16–19; C.'73, §§ 415, 417, 418.]

The city is not responsible to individuals for the neglect or non-feasance of its agents or officers in executing the powers here conferred: *Ogg v. Lansing*, 35–495.

Prior provisions as to local boards of health were repealed by provisions establishing a state board: *Staples v. Plymouth County*, 62–364; *Tweedy v. Fremont County*, 68 N. W., 921.

The board will not be bound by the action of the individual members in authorizing a physician to render services. Such action must be by the board as a body: *Young v. Black Hawk County*, 66–460.

SEC. **2569. Abatement of nuisance.** The local board may with its physician, when of the opinion it is necessary for the preservation of the lives or health of the inhabitants, enter a building, vessel or place for the purpose of examining into, preventing, removing or destroying any nuisance, source of filth or cause of sickness, and, in case its members or physician shall be refused such entry, make complaint through any member under oath to any magistrate of the county, whether a member of the board or not, stating the facts so far as known, and the magistrate shall

thereupon issue his warrant, directed to any peace officer of the county, commanding him between the hours of sunrise and sunset, accompanied by two or more members of the board, to prevent, remove or destroy such nuisance, source of filth or cause of sickness, which shall be executed by the officer under the direction of such members of the board, and it may order the owner of any property, building or place to remove at his own expense, within twenty-four hours, or such other time as may be fixed by it, after notice has been served upon such owner, occupant or other person in charge thereof, any nuisance, source of filth or cause of sickness found thereon, and if such person fails or neglects to comply with the order and make such removal, it may cause the same to be done at the expense of the owner or occupant. [18 G. A., ch. 151, §§ 20, 21.]

Where the mayor and aldermen of a city constituting a board of health made a regulation that no hog-pen nor inclosure wherein swine were kept and fed otherwise than for purpose of commerce should be allowed within the city limits, *held*, that such regulations might be enforced by the city: *State v. Holcomb*, 68–107.

Exclusive jurisdiction to determine what constitutes a nuisance and to abate nuisances is not conferred upon the local board of health. A private action for damages may be maintained against a person keeping a nuisance by one specially injured thereby without regard to the action of the board: *Baker v. Bohannan*, 69–60.

The action of the board of health finding a structure to be a nuisance does not entitle a private party claiming to be injured thereby to maintain a proceeding for the abatement thereof. The finding of the board of health is not conclusive of the facts in such private action: *Kallsen v. Wilson*, 80–229.

SEC. **2570. Care of infected person.** When any person shall be infected, or shall have been recently infected, or sick with smallpox or other disease dangerous to the public health, whether a resident or otherwise, it may make such provisions as are best calculated to preserve the inhabitants against danger therefrom, by removing such person to a separate house, when it may be done without injury to his health, and provide nurses, needful assistance and supplies, which shall be charged to the person, or those liable for his support, if able; if unable, it shall be done at the expense of the county. If such person cannot be removed, he shall be cared for in the same manner as in cases of removal with like results as to charges therefor, and in addition it may cause the people in the neighborhood to remove from the vicinity of the infected house, and take any and all other needed action to insure the safety of the citizens. The removal or care of infected persons, as herein provided, shall be effected by an application made to a civil magistrate in the manner provided for the removal and abatement of nuisances, who shall issue his warrant, as directed in such cases, requiring the officer to remove such person, or take possession of condemned houses or lodgings, and provide nurses, attendants and other necessities for the care, safety and relief of the sick, which warrant shall be executed under the direction of the board of health. [Same, §§ 22, 23.]

The board of health may, under this section, erect a temporary building to which infected persons may be removed for isolation, and the county will be liable for the expenses thereof in case of the inability of the infected person or persons to pay such charge. Whether the infected person would be liable for such expenses in any event, doubted: *Staples v. Plymouth County*, 62–364.

The sick person is properly chargeable with all expenses which may be incurred, including expenses of removal, if that plan is adopted, or isolation, if that is adopted; and in the latter case the expense of food furnished to the entire family during the period of isolation may be included; also, the supplying of clothing in place of clothing worn by the family which is burned. For all such expenses which the sick person or those liable for his support are unable to pay the county is ultimately liable: *Clinton v. Clinton County*, 61–205.

It is the imperative duty of the local board of health to provide for a sick person, regardless of his settlement—as where the person is a foreigner, not yet having acquired a settlement. The sick or afflicted person must in such case be deemed to belong to the county where the relief becomes necessary: *Ibid.*

The county is liable for the care of sick persons under said statute only in case they or the persons liable for their support are not able to make compensation therefor. The liability of the county can be established only by showing that the facts exist

which are contemplated by the statute as rendering the county liable, and the burden of proving these facts is therefore upon the party seeking to establish such liability: *Gill v. Appanoose County*, 68–20.

The board will not be bound by the actions of individual members in authorizing a physician to render services. Such action must be by the board as a body: *Young v. Black Hawk County*, 66–460.

The county may be made liable only when the person assisted and his parents or other persons liable for his support are unable to pay for the service rendered and supplies furnished, therefore before a physician who has rendered services to such a patient can recover against the county it must appear that the person assisted and the other persons liable for his support were unable to pay the claim. The fact that the person assisted is a pauper and a county charge does not show that there is no relative who is liable and able to pay: *Tweedy v. Fremont County*, 68 N.W., 921.

SEC. **2571. Meetings of local board — regulations — reports — expenses—tax.** Local boards of health shall meet for the transaction of business on the first Mondays of April and October in each year, and at such other times as may seem necessary. They shall give notice of all regulations adopted, by publication thereof in some newspaper printed and circulated in the town, city or township, or, if there is none, by posting a copy thereof in five public places therein, and through their physician or clerk shall make general report to the state board at least once a year, and special reports when it may demand them, of its proceedings and such other facts as may be required, on blanks furnished by and in accordance with instructions from it. All expenses incurred in the enforcement of the provisions of this chapter, when not otherwise provided, shall be paid by the town, city or township; in either case all claims to be presented and audited as other demands. In the case of townships, the trustees shall certify the amount required to pay such expenses to the board of supervisors of the county, and it shall advance the same, and, at the time it levies the general taxes, shall levy on the property of such township a sufficient tax to reimburse the county, which, when collected, shall be paid to and belong to the county. [22 G. A., ch. 65; 18 G. A., ch. 151, §§ 15, 24; C.'73, §§ 416, 420.]

The fees of a physician employed by the board of health are to be fixed by the board and the action of such board is binding on the county in cases where such fees become payable by the county. The board of supervisors does not have the right to regulate the fees and charges of persons employed by the local boards of health: *Tweedy v. Fremont County*, 68 N.W., 921.

The township trustees and clerk are not entitled to bring action in their names for the recovery from the county of money due for expenses of the local board of health: *Sanderson v. Cerro Gordo County*, 80–89.

SEC. **2572. Regulations of state board.** Local boards of health shall obey and enforce the rules and regulations of the state board; and peace and police officers within their respective jurisdictions, when called upon to do so by the local boards, shall execute the orders of such board.

SEC. **2573. Failure to comply with orders or regulations.** Any person being notified to remove any nuisance, source of filth or cause of sickness, as in this chapter provided, who fails, neglects or refuses to do so after the time fixed in such notice, or knowingly fails, neglects or refuses to comply with and obey any order, rule or regulation of the state or local board of health, or any provision of this chapter, after notice thereof has been given as herein provided, shall forfeit and pay the sum of twenty dollars for each day he refuses such obedience, or for each day he knowingly fails, neglects or refuses to obey such rule or regulation, or knowingly violates any provision of this chapter, to be recovered in an action in the name of the clerk of the board, and, when collected, to be paid to the clerk of the town, city or township, as the case may be, and for its benefit; and, in addition thereto, any one so offending, or knowingly exposing another to infection from any contagious disease, or knowingly subjecting another to the danger of contracting such disease from a child or other irresponsible person, shall be liable for all damages resulting therefrom, and guilty of a misdemeanor. [24 G. A., ch. 59; 18 G. A., ch. 151, §§ 16, 17; C.'73, § 419.]

SEC. **2574. Compensation of secretary.** The secretary of the state board of health shall receive such salary as the board shall fix, not to exceed

twelve hundred dollars yearly, payable upon the certificate of the president to the state auditor, who shall issue his warrant for the amount due upon the state treasurer. Each member of the board shall receive only actual traveling and other necessary expenses incurred in the performance of his duties, such expenses to be itemized, verified, certified, audited, and a warrant drawn therefor in the same manner as the secretary's salary. [20 G. A., ch. 173; 18 G. A., ch. 151, § 10.]

SEC. **2575. Annual appropriation.** The sum of five thousand dollars, or so much thereof as may be necessary, is annually appropriated to pay the salary of the secretary, expenses of the board, contingent expenses of the secretary's office, and all costs of printing; all such contingent and miscellaneous expenses to be itemized, verified, certified, audited and paid as other expenses of the board. [20 G. A., ch. 173; 18 G. A., ch. 151, § 12.]

CHAPTER 17.

OF THE PRACTICE OF MEDICINE.

SECTION **2576. Board of medical examiners—examinations—certificates.** The state board of medical examiners shall consist of the physicians of the state board of health, and the secretary of the board of health shall be secretary thereof. It shall hold regular meetings in May and November and special ones as may be necessary, due notice thereof being given, at which it shall discharge the duties contemplated by this chapter. All examinations shall be in writing, each candidate for examination in any school of medicine being given the same set of questions, covering anatomy, physiology, general chemistry, pathology, surgery and obstetrics. In materia medica, therapeutics and the principles and practice of medicine, a set of questions shall be used corresponding to the school of medicine which the applicant desires to practice. The examination papers, when concluded, shall be marked upon a scale of one hundred, each candidate for examination first to pay to the secretary of the board a fee of twenty dollars therefor. The average required to pass shall be fixed by the board prior to the examination. Each applicant shall, upon obtaining an order for examination, receive from the secretary a confidential number which he shall place upon his work when completed, so that the board, in passing thereon, shall not know by whom it was prepared. All matters connected therewith shall be filed with the secretary and preserved for five years as a part of the records of the board, during which time they shall be open to public inspection. If the examination is satisfactory to five members of the board, it shall issue its certificate, under its seal, signed by its president, secretary, and not less than three other members, who may, in the absence of the others, act as an examining board, and the different schools of medicine represented in the board of health shall be represented in said number. The certificate, while in force, shall confer upon the holder the right to practice medicine, surgery and obstetrics, and be conclusive evidence thereof. Graduates from legally authorized medical schools, which in the opinion of the board are of good standing, holding genuine diplomas therefrom, upon presentation of the same, accompanied by a fee of five dollars, and such proof as may be required touching the genuineness and ownership of the diploma and the character and standing of the school issuing it, shall be by the board granted certificates, signed as above provided, conferring the right to practice as under certificates issued upon examination. In all examinations made or proceedings had pursuant to the provisions of this chapter, any member of the board may administer oaths and take testimony in any manner authorized by law. Any one failing in his examination shall be entitled to a second one, within three months thereafter, without further fee. If any person shall by notice

in writing apply to the secretary of the board for an examination or a re-examination, and it fails or neglects for three months thereafter to give him the same, he may, notwithstanding any provision of this chapter, practice medicine until the next regular meeting of the board without the required certificate. [22 G. A., ch. 66; 21 G. A., ch. 104, §§ 1–3.]

Under prior provisions, *held*, that the board of medical examiners having recognized a medical college as qualified to issue diplomas which should be recognized by the board, could not without hearing or an opportunity for hearing deprive such college of its standing and deny to one who had received its diploma a certificate to practice medicine, but it might after full investigation determine to refuse to recognize its future diplomas: *Iowa Eclectic Medical College v. Schrader*, 87–659.

An action of *certiorari* to review the action of the board of examiners in refusing to recognize a college as in good standing should be brought in the county where the action of the board was taken. A superior court has jurisdiction of such action: *College of Physicians and Surgeons v. Guilbert*, 69 N. W., 453.

SEC. **2577. Recording certificate.** Every certificate issued under this chapter shall show whether it was granted upon examination or diploma, and the school of medicine the holder practices under. He shall, before engaging in the practice of medicine, file the same for record in the office of the recorder of the county in which he resides, who shall record it in a book provided for that purpose, which record shall be open to public inspection, and for which service the recorder may charge a fee of fifty cents, to be paid by the certificate holder. The same record must be made of the certificate in any county to which the holder may remove and in which he proposes to practice. [21 G. A., ch. 104, §§ 4, 5.]

SEC. **2578. Refusal of certificate—revocation.** The board of medical examiners may refuse to grant a certificate to any person otherwise qualified, who is not of good moral character, and for like cause, or for incompetency, or habitual intoxication, or upon satisfactory evidence by affidavit or otherwise that a certificate had been granted upon false and fraudulent statements as to graduation or length of practice, may revoke a certificate by an affirmative vote of at least five members of the board, which number shall include one or more members of the different schools of medicine represented in said board; nor shall the standing of a legally chartered medical college, from which a diploma may be presented, be questioned, save by a like vote. After the revocation of a certificate, the holder thereof shall not practice medicine, surgery or obstetrics in the state. [Same, § 7.]

The board, after granting a certificate, even to a physician who had been in practice five years before the taking effect of the statute, can, in some manner, make inquiry as to the competency of the holder, and, if palpably incompetent, revoke it. As they might revoke the certificate after issuing it to one who had been in practice for five years before the taking effect of the statute, so they might refuse to issue a certificate to such practitioner if he should appear to be incompetent: *State v. Mosher*, 78–321.

SEC. **2579. Who deemed practitioner.** Any person shall be held as practicing medicine, surgery or obstetrics, or to be a physician, within the meaning of this chapter, who shall publicly profess to be a physician, surgeon or obstetrician, and assume the duties, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal; but it shall not be construed to prohibit students of medicine, surgery or obstetrics, who have had not less than two courses of lectures in a medical school of good standing, from prescribing under the supervision of preceptors, or gratuitous service in case of emergency, nor to prevent the advertising, selling or prescribing natural mineral waters flowing from wells or springs, nor shall it apply to surgeons of the United States army or navy, nor of the marine hospital service, nor to physicians or midwives who have obtained from the board of examiners a certificate permitting them to practice medicine, surgery or obstetrics without a diploma from a medical school or examination by the board, nor to physicians, as defined herein, who have been in practice in this state for five consecutive years, three years of which time shall have been in one

locality, nor to filling prescriptions by a registered pharmacist, nor to the advertising and sale of patent or proprietary medicines. [Same, § 8.]

In order that a physician may bring himself within the exceptions of this section relating to five years' practice before the statute took effect, he must comply with the proviso and present to the board the proper certificate of such fact: *State v. Mosher*, 78–321.

SEC. **2580. Penalties.** Any person who shall present to the board of medical examiners a fraudulent or false diploma, or one of which he is not the rightful owner, for the purpose of procuring a certificate as herein provided, or shall file, or attempt to file, with the recorder of any county in the state the certificate of another as his own, or who shall falsely personate any one to whom a certificate has been granted by such board, or shall practice medicine, surgery or obstetrics in the state without having first obtained and filed for record the certificate herein required, and who is not embraced in any of the exceptions contained in this chapter, or who continues to practice medicine, surgery or obstetrics after the revocation of his certificate, is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than three hundred dollars, nor more than five hundred dollars, and costs of prosecution, and shall stand committed to the county jail until such fine is paid; and whoever shall file or attempt to file with the recorder of any county in the state the certificate of another with the name of the party to whom it was granted or issued erased, and the claimant's name inserted, or shall file or attempt to file with the board of medical examiners any false or forged affidavit of identification, shall be guilty of forgery. [Same, §§ 3, 9, 10.]

The prescribed qualification to practice is to be fixed by the board, even where a physician had been in practice for five years before the taking effect of the statute; and a physician who, though he had thus been in practice for five years, has not a certificate, is punishable under this section for practicing without a license: *State v. Mosher*, 78–321.

SEC. **2581. Itinerant physician.** Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal diseases, ailments or injuries by any medicine, appliance or method, who goes from place to place, or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant physician; and any such itinerant physician shall, in addition to the certificate elsewhere provided for in this chapter, procure from the state board of medical examiners a license as an itinerant, for which he shall pay to the treasurer of state, for use of the state of Iowa, the sum of two hundred and fifty dollars per annum. Upon payment of this sum, the secretary shall issue to the applicant therefor a license to practice within the state, as an itinerant physician, for one year from the date thereof. The board may, for satisfactory reasons, refuse to issue such license, or may cancel such license upon satisfactory evidence of incompetency or gross immorality. Any person practicing medicine as an itinerant physician, as herein defined, without having procured such license shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than three hundred dollars, nor more than five hundred dollars, and costs, and shall be committed to the county jail until such fine is paid: *provided*, however, that nothing herein shall be construed to prevent any physician otherwise legally qualified from attending patients in any part of the state to whom he may be called in the regular course of business, or in consultation with other physicians.

SEC. **2582. Examination and diploma required.** From and after January 1, 1899, all persons beginning the practice of medicine in the state of Iowa must submit to an examination as set forth in this chapter, and, in addition thereto, shall present diplomas from medical colleges recognized as in good standing by the state board of medical examiners, and all persons receiving their diplomas subsequent to January 1, 1899,

shall present evidence of having attended four full courses of study of not less than twenty-six weeks each, no two of which shall have been given in any one year.

SEC. **2583. Fees — compensation.** Each member of the board of examiners shall receive, out of the fund created by the payment of fees by applicants for examination or certificates, the sum of eight dollars for each day, and necessary traveling expenses, for the time he is actually engaged in the discharge of his duties as a member of the board, and the secretary shall receive his necessary expenses incurred for services which cannot be performed at the capitol. Any balance of said funds remaining shall be turned over to the state treasurer for the use of the school fund. [22 G. A., ch. 66; 21 G. A., ch. 104, § 6.]

CHAPTER 18.

OF PRACTICE OF PHARMACY.

SECTION **2584. Commissioners—powers.** The commission of pharmacy shall consist of three competent pharmacists who have been for the preceding five years residents of the state and engaged in practicing pharmacy, one of whom shall be annually appointed by the governor and hold office for three years and until his successor is appointed and qualified. The commission shall have power to make all needed regulations for its government and for the proper discharge of its duties under this chapter, the same to be done without expense to the state, save the necessary blanks and stationery which shall, upon requisition, be furnished by the secretary of state, and make such other regulations not inconsistent with law and as authorized in this code, respecting the purchase, keeping and use of intoxicating liquors by registered pharmacists, not permit holders, as may be required for the prevention or abuse of the trust reposed in them, and such other matters as may be hereinafter specifically enumerated. [23 G. A., ch. 35, § 13; 21 G. A., ch. 83, § 1; 18 G. A., ch. 75, § 3.]

These provisions are proper as a delegation of power: *Hildreth v. Crawford*, 65–339.

SEC. **2585. Secretary and treasurer.** The commissioners of pharmacy shall annually, on the first Monday in May, elect a suitable person, who shall not be a member of said board, and who shall be known as secretary and treasurer; said secretary and treasurer shall enter upon the discharge of his duties as soon as he shall have filed with the secretary of state a good and sufficient bond in the penal sum of three thousand dollars signed by at least two sureties, who shall justify in the aggregate to double the amount of said bond, and which shall bear upon its face the approval of the governor. The salary of said secretary and treasurer shall not exceed fifteen hundred dollars per annum. [26 G. A., ch. 59, § 1.]

SEC. **2586. License fees.** The secretary and treasurer shall keep in his office a book known as the "Commissioners of Pharmacy License Fee Book," which shall be made with ruled columns and printed headings showing the date, the name of the person paying, and the amount of each license and fee paid, in which he shall enter all fees for licenses received by him, and on the first Monday of each month he shall file with the auditor of state a true statement thereof for the previous month, properly sworn to by him. and shall quarterly pay into the state treasury, on the first day of January, April, July and October of each year, the amount of license fees payable by law into such treasury. [Same, § 2.]

SEC. **2587. Records—compensation.** The books, accounts, vouchers and funds belonging to or kept by said board of pharmacy shall at all times be open or subject to the inspection of the governor, or any committee

appointed by him. Each commissioner of pharmacy shall receive as full compensation for his services the sum of five dollars for each day actually employed in the discharge of his official duties, together with his actual traveling expenses in performing said duties, all of which shall be paid from the fees of the office, and each commissioner shall file with the auditor of state, at the end of each quarter of his official year, an itemized statement under oath of his actual time in days employed in the discharge of his duty, and traveling expenses incurred in the performance of his duty, for such quarter. [Same, § 3.]

SEC. **2588. Registered pharmacists.** No person not a registered pharmacist shall conduct the business of selling at retail, compounding or dispensing drugs, medicines or poisons, or chemicals for medicinal use, or compounding or dispensing physicians' prescriptions as a pharmacist, nor allow any one who is not a registered pharmacist to so sell, compound or dispense such drugs, medicines, poisons or chemicals, or physicians' prescriptions, except such as are assistants to and under the supervision of one who is a registered pharmacist, and physicians who dispense their own prescriptions only; but no one shall be prohibited by anything contained in this chapter from keeping and selling proprietary medicines and such other domestic remedies as do not contain intoxicating liquors or poisons, nor from selling concentrated lye or potash having written or printed on the package or parcel its true name and the word "poison," sales of which need not be registered. Whoever violates either provision of this section, for the former shall pay five dollars for each day of its violation, to be recovered in an action in the name of the state, brought by the county attorney under the direction of the commission, and for the latter shall be guilty of a misdemeanor, and punished accordingly. In actions or prosecutions under this chapter it need not be proven that the defendant has not a pharmacist's certificate, but such fact shall be a matter of defense. [22 G. A., ch. 71, § 21; 22 G. A., ch. 81; 21 G. A., ch. 83; 19 G. A., ch. 137, § 4; 18 G. A., ch. 75, §§ 1, 2, 12.]

A non-registered clerk may aid a pharmacist under his supervision, but the pharmacist must have immediate personal direction and supervision of the work: *State v. Mullenhoff*, 74–271.

It is not criminal for one to own a drug store even though he may not be a registered pharmacist. He may have it conducted by those who are competent for such work and thus fully meet all the requirements of the law: *Erb v. German Ins. Co.*, 68 N.W., 701.

The provisions of this chapter do not prohibit the conducting of places for the sale of other articles than those enumerated which may properly be included in a stock of merchandise kept and sold in drug stores. If it does not appear that the owner compounded, dispensed or sold medicines or poisons or that his place of business was conducted for that purpose the business is not unlawful: *Erb v. Fidelity Ins. Co.*, 69 N. W., 261.

Where a father made an arrangement with his son, who was engaged in business as a pharmacist, to pay the debts of the son and take the business, but allowed the son to remain in charge of the business and carry it on in his own name so as to avoid the provisions of the pharmacy law, *held*, that the transfer to the son was in evasion of law, and the father lost the right to reclaim the property: *McIntosh v. Wilson*, 81–339.

The provision of this section as to sale of drugs by registered pharmacists has no reference to sales of stock of goods under foreclosure or judicial sale: *Cocke v. Montgomery*, 75–259.

The authority to sell proprietary medicines does not make it lawful to itinerate for the purpose of making such sales, and one who does so will be within the provisions of § 2594: *Snyder v. Closson*, 84–184; *State v. Gouss*, 85–21.

SEC. **2589. Examinations—registration.** The commission, at such times and places as it may select and in such manner as it may determine upon, shall examine all persons desiring to engage in and conduct business as registered pharmacists as contemplated in the preceding section, and, if found competent, the applicant's name shall be entered in the registry book of certificate holders. Graduates of pharmacy holding a diploma from the university, or an incorporated school or college which requires a practical experience in pharmacy of not less than four years before granting such diploma, may be registered without examination. Pharmacists thus registered have the sole right to keep and sell all medicines and poisons, except

intoxicating liquors. [22 G. A., ch. 71, § 20; 21 G. A., ch. 83, § 2; 18 G. A., ch. 75, §§ 5, 8.]

Where liquors are dispensed by a physician, not upon his judgment as to the needs of the patients, but upon the demands of his customers, such transaction is not protected: *State v. Cloughly*, 73-626.

This section does not authorize a physician to sell intoxicating liquors to his patients, though such sales are made in good faith and according to the needs of the patients: *State v. Benadom*, 79-90.

The provision that it shall be unlawful for a licensed druggist to retail alcoholic liquors as a beverage applies to the sale in any form of intoxicating liquor as a beverage which is not authorized by statute, either at retail or wholesale: *Torbert v. Clough*, 72-220.

The provision of a former statute that druggists who abused their trust with regard to sales of liquor should be subject to the utmost rigors of the law relating to the sale of intoxicating liquors, *held* not necessarily to require the highest penalty to be fixed in cases of illegal sales by druggists: *State v. Hoagland*, 77-135.

Before the passage of 21 G. A., ch. 83, pharmacists could not sell intoxicating liquors without permits obtained in accordance with the statutes regulating the sale of such liquors: *State v. Mercer*, 58-182; *State v. Bissell*, 67-616; *State v. Knowles*, 57-669.

But that act made special provision for permits to pharmacists, and superseded other statutes on that subject, and under it no bond was required, and the permit was not limited to one year: *State v. Courtney*, 73-619; *State v. Mullenhoff*, 74-271. [The provisions of this act with reference to permits were repealed by 22 G. A., ch. 71, § 20.]

A pharmacist having been authorized under former statutes to keep intoxicating liquors without a permit for dispensing as medicine, it is error in a prosecution for keeping a nuisance to allow evidence of the keeping of the intoxicating liquor at such time when it was lawful: *State v. Shank*, 74-649.

Under former statutes it was held that an unregistered pharmacist could not defend, in a prosecution for unlawfully keeping liquors for sale, on the ground that sales were made by a clerk who was registered, and for medicinal purposes only: *State v. Norton*, 67-641.

Also *held* that a licensed pharmacist selling intoxicating liquors must use the utmost good faith and ordinary caution, and show that the liquor was only sold by him as medicine; and his license would not protect him for artful sales of liquor for other purposes than as medicine: *State v. Harris*, 64-287; *State v. Knowles*, 57-669.

If sales are for unlawful purposes a pharmacist has no protection in the pharmacy statute, and the question of his guilt is to be determined according to the rules applicable to other offenders; and a written statement by the purchaser that he is one to whom a sale may properly be made, and that the liquor is desired for proper purposes, will not protect the pharmacist in case of an unlawful sale: *State v. Thompson*, 74-119.

A pharmacist is liable for illegal sales as well as any other person: *State v. Mullenhoff*, 74-271.

If it is proven that persons drank intoxicating liquors in defendant's pharmacy, that fact would be presumptive evidence that the liquors so drank had been unlawfully sold or given to the party by defendant: *State v. Cloughly*, 73-626.

Under the provisions of 21 G. A., ch. 83, now repealed, with reference to sales to minors or persons in the habit of becoming intoxicated, it was held that a pharmacist was not excusable for ignorance of the fact that the person to whom sale was made was a minor or in the habit of becoming intoxicated: *State v. Ward*, 75-637.

A registered pharmacist being now required to hold a permit and make monthly reports, such permit does not prevent his being prosecuted and convicted for illegal sales, and his reports are admissible in evidence for the purpose of showing the fact of illegal sales: *State v. Smith*, 74-580.

Failure to make reports or selling at an illegal profit will not subject defendant to punishment for unlawful sales where the sales are otherwise legal: *State v. Von Haltschuherr*, 72-541.

SEC. **2590. Registration and examination fees.** Each person furnished a certificate and registered without examination shall pay to the commission two dollars, and each and every person whom they examine orally, or whose answers to a schedule of questions are returned subscribed to under oath, the sum of five dollars, which shall be in full for all services. And in case the examination of said person shall prove defective and unsatisfactory, and his name not be registered, he shall be permitted to present himself for re-examination within any period not exceeding twelve months next thereafter, and no charge shall be made for re-examination. The said commissioners are authorized to administer oaths pertaining to their said office, and take and certify the acknowledgments of instruments in writing. After registration, an annual fee of one dollar for a renewal certificate shall be paid on or before the twenty-second day of March by all pharmacists who continue in business, and the conduct of such business without such renewal shall be a misdemeanor. [22 G. A., ch. 71, § 22; 22 G. A., ch. 106; 19 G. A., ch. 137, § 1; 18 G. A., ch. 75, §§ 4, 6.]

A pharmacist who was in business before the law took effect and was registered without examination, and then removed to another place, and had for two years failed to submit to an examination, *held* not entitled to a new certificate without such examination: *Braniff v. Weaver*, 72–641.

SEC. **2591. Registry book—certificate displayed.** The commission shall keep a registry book in which shall be recorded the names and places of residence of all certificate holders, with the date of such certificates, which shall hold good for one year, and no longer without renewal. Renewals shall be granted upon the payment of the annual fee fixed in the preceding section. Should a certificate holder change his residence, upon notice thereof such change shall be noted in the registry book. Each certificate holder shall keep displayed in his place of business his registration certificate. A failure to comply with this requirement shall be a misdemeanor. [26 G. A., ch. 36; 22 G. A., ch. 71, § 22; 22 G. A., ch. 106; 19 G. A., ch. 137, § 1; 18 G. A., ch. 75, § 4.]

SEC. **2592. Sale of adulterated drugs.** Registered pharmacists shall be responsible for the quality of all drugs, chemicals and medicines which they may sell or dispense, except those sold in the original packages of the manufacturer, and those known as patent medicines. If any such pharmacist shall knowingly adulterate or cause to be adulterated any drugs, chemicals or medical preparations by him kept for sale or sold, he shall be guilty of a misdemeanor. [18 G. A., ch. 75, § 7.]

SEC. **2593. Sale of poisons.** No person shall sell at retail any poisons enumerated in schedules A and B, except in dispensing poisons in usual quantities or doses upon the prescription of a physician as follows:

SCHEDULE A. Arsenic and its preparations, corrosive-sublimate, white precipitate, red precipitate, biniodide of mercury, cyanide of potassium, hydrocyanic acid, strychnia and other poisonous vegetable alkaloids and their salts, essential oil of bitter almonds, opium and its preparations except paregoric and other preparations of opium containing less than two grains to the ounce;

SCHEDULE B. Aconite, belladonna, colchicum, conium, nux vomica, henbane, savin, ergot, cotton root, cantharides, creosote, digitalis, and the pharmaceutical preparations, croton oil, chloroform, chloral hydrate, sulphate of zinc, mineral acids, carbolic acid and oxalic acid;

Unless the package containing such poisons has placed thereon, and also on the outside wrapper or cover, the name of the article, the word "poison," and the name and place of business of the seller; nor sell or deliver such poison unless, upon due inquiry, it be found that the party receiving it is aware of its character and represents it is to be used for proper purposes; nor sell or deliver any of the poisons included in schedule A without also, before delivering the same, causing an entry to be made in a book kept for that purpose of the date of sale, the name and address of the purchaser, the name of the poison, the purpose for which it was represented to be required, and the name of the dispenser, which book shall be open to inspection by the proper authorities and preserved for at least five years, the entry of each such sale to be signed by the dispenser. Any person violating any of the provisions of this section, except as otherwise provided by law, shall be adjudged guilty of a misdemeanor and be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or by both fine and imprisonment, in the discretion of the court. [18 G. A., ch. 75, § 9; C.'73, § 4038; R., § 4374; C.'51, § 2728.]

SEC. **2594. Itinerant vendors of drugs.** Any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind for the treatment of any disease or injury, and all those who by any method publicly profess to treat or cure diseases, injury or deformity, shall pay to the treasurer of the commission of pharmacy an annual fee of one hundred dollars, upon

the receipt of which the secretary of the commission shall issue a license for one year from its date. Two thousand dollars annually of the money arising from the license fund, or so much as may be needed, shall be devoted to defraying expenses of the commission, and any balance remaining shall be paid into the state treasury. Said commission shall, on the first day of January of each year, make a verified and itemized statement in writing to the auditor of state of all receipts and expenditures of moneys coming into their hands by virtue of their office. Any violation of this section shall be a misdemeanor, and any person shall, upon conviction thereof, pay a fine of not less than one hundred dollars, nor more than two hundred dollars. In actions or prosecutions under this chapter it need not be proven that the defendant has not a license, but such fact shall be a matter of defense. [21 G. A., ch. 83, § 3; 19 G. A., ch. 137, § 2; 18 G. A., ch. 75, § 10.]

To constitute an itinerant vendor it is not necessary that the person should travel constantly, and have no fixed place to sell. He may have a place of business where he sells his goods during a part of the time, and travel for the sale of his medicines at other times, and he may therefore be within the provisions of this section: *Snyder v. Closson*, 84–184.

This section is not unconstitutional as not being of uniform operation. It does not involve any discrimination in favor of citizens of one city as against those of another, nor against resident merchants: *State v. Gouss*, 85–21. It is not unconstitutional even as applied to the sale of medicine manufactured in another state and sold in the original package: *State v. Wheelock*, 64 N. W., 620.

A physician's certificate entitling him to practice medicine does not exempt one who is an itinerant vendor, as provided in this section, from its provisions: *State v. Gouss*, 85–21.

The provisions of 18 G. A., ch. 75, § 12, with relation to the sale of patent medicines are repealed and this section is now applicable, without exception, to the sale of such medicines by an itinerant vendor: *State v. Burk*, 88–661.

One who advertises himself as a physician, but does not advertise or propose to vend or sell anything, is not within the provisions of this statute as to itinerant vendors of drugs. The provision was not intended to apply to the regular medical practitioner, but to such itinerant vendors as go from place to place advertising or selling proprietary medicines and the like: *State v. Bonham*, 65 N. W., 154. [But now see § 2581.]

The offense of publicly professing to treat diseases without a license does not consist in the selling or offering for sale of drugs, but in the fact of being an itinerant vendor of drugs, and then publicly professing to cure or treat diseases by any drug: *State v. Blair*, 92–28.

This section is designed to guard against evil consequences liable to result from the acts prohibited, and is not unconstitutional as prohibiting or abridging liberty of the press: *Ibid.*

An indictment charging the offense substantially in the language of the statute is sufficient: *Ibid.*

SEC. **2595. Penalty for false representations.** If any person shall procure or attempt to procure a certificate of registry for himself or another by means of false representations or device, or without being a registered pharmacist shall conduct a place for retailing, compounding or dispensing drugs, medicines or chemicals, or for compounding or dispensing physicians' prescriptions, or shall use or exhibit the title of registered pharmacist, he shall be guilty of a misdemeanor, and each several day a place shall be so used shall be held to be a separate and several offense. [19 G. A., ch. 137, § 3; 18 G. A., ch. 75, § 11.]

SEC. **2596. Revocation of certificate.** When a registered pharmacist has been convicted of a violation of the provisions of this chapter, in addition to the other penalties provided by law, the commission, in its discretion, may revoke his certificate of registry.

CHAPTER 19.

OF THE PRACTICE OF DENTISTRY.

SECTION **2597. Board of examiners—officers—meetings—examinations—license—reports.** The board of dental examiners shall consist

of five practicing dentists, who shall have been engaged in the continuous practice of their profession in the state for five years or over, one of whom shall be appointed annually by the governor, and hold his office for five years from and after the first day of August following and until his successor is appointed; all vacancies occuring to be filled in like manner, the appointee to hold for the unexpired term. It shall organize by the selection of one of its members as president and one as secretary and treasurer, and meet at least once in each year and oftener, as may be necessary, at such times and places as it may select, and a majority shall constitute a quorum; such meetings at all reasonable times shall be open to the public. It shall at any regular meeting examine each applicant touching his knowledge and skill in dental surgery, and, if found qualified to practice dentistry, issue a license therefor; a like license shall be issued without an examination, upon the payment of a fee of two dollars, to any regular graduate of a reputable dental school or department of a college or university, or to those who have been in regular practice of dentistry in this state for six years. The license shall be signed by each member of the board, attested by the president and secretary, and, when thus signed and attested, shall be presumptive evidence of the right of the holder to practice in this state. Each applicant for examination shall pay a fee of ten dollars, and, out of any funds received by the board as authorized in this chapter, each member shall receive the sum of five dollars for each day he is actually engaged in the duties of his office. Any one who desires to continue the practice of dentistry shall, on or before May fifteenth of each year, pay to the board of examiners the sum of one dollar, for which he shall receive a renewal of his certificate, unless his name has been stricken from the register for violation of law. Any person continuing to practice dentistry who shall fail or neglect to procure his annual renewal of registration shall, for each such offense, be liable to a fine of ten dollars for each calendar month during which he is so delinquent; but in no event shall any compensation or expenses be paid from any other source. Any sum remaining after the payment of such compensation and expenses shall be paid into the state treasury on or before the first day of August of each year, by the treasurer, who shall, on assuming his office, file with the secretary of state a good and sufficient bond in the penal sum of one thousand dollars. The board shall make report biennially to the governor of its proceedings, with an account of all money received or disbursed. [23 G. A., ch. 52, § 4; 19 G. A., ch. 36, §§ 2, 3, 6, 9.]

SEC. **2598. Temporary license.** Each member of the board may issue a temporary license to practice dentistry, upon the presentation of proper evidence of the qualifications required, which shall remain in force until the adjournment of the next regular meeting of the board occurring thereafter. [19 G. A., ch. 36, § 7.]

SEC. **2599. License required—registration.** No person shall engage in the practice of dentistry without a license from the board of examiners, as above required, except those who are registered practitioners of dentistry under laws heretofore in force, but this shall not be so construed as to prevent licensed or registered physicians and surgeons extracting teeth. Each person so licensed shall, before engaging in the practice in any county in the state, cause his license to be registered in the office of the clerk of the district court of such county, for which the clerk may charge twenty-five cents. A failure to so register for six months shall work a forfeiture of the license, which shall not be restored by the board except upon payment to it of the sum of twenty-five dollars as penalty therefor. [Same, §§ 1, 5, 10, 11.]

SEC. **2600. Penalty.** Any person who shall violate any of the provisions of this chapter shall be punished by a fine not exceeding two hundred dollars, or imprisonment in the county jail not exceeding forty days. [Same, § 8.]

CHAPTER 20.

OF THE SOLDIERS' HOME.

SECTION **2601. Object—trustees—compensation—bond.** The Iowa soldiers' home, located at Marshalltown, shall be maintained for dependent honorably discharged Union soldiers, sailors and marines, their dependent widows, wives and mothers, and dependent army nurses, and shall be under the management and control of five trustees who served in the Union army or navy, who shall be appointed by the governor of the state by and with the consent of the senate, and not more than three of whom shall belong to the same political party, and no two of whom shall be from the same congressional district. No member of the general assembly shall be eligible to the office of trustee. The members of the board shall hold their office for the term of five years, or until their successor shall be appointed and qualified. The compensation allowed shall be four dollars per day for the time necessarily employed, and mileage at the rate of five cents per mile each way over the nearest traveled route. In case of a vacancy in the board of trustees by death or any other cause, the appointing power provided for shall have power to fill the vacancy for the unexpired portion of the term. Three members of the board shall constitute a quorum for the transaction of business: *provided*, that, for the adoption of plans and letting of contracts for buildings, and for the selection of a commandant for said home, the affirmative vote of a majority of the entire board shall be required.

Before entering upon his office, each member of the board of trustees shall take and sign an oath and execute a bond in the general sum of ten thousand dollars for the use of the state of Iowa, to be approved by the executive council and filed in the office of secretary of state, conditioned for the faithful performance of his duties. [21 G. A., ch 58, §§ 2, 4.]

SEC. **2602. Admission.** All persons named in section twenty-six hundred and one of this act, not having sufficient means for his or her own support, who are disabled by disease, wounds, old age or otherwise, who served in Iowa regiments or batteries, or were accredited to the state of Iowa, or who have been residents of the state for three years next preceding the date of application, shall be eligible to admission into said home. [Same, § 2.]

SEC. **2603. Meetings—officers—regulations—report.** The board of trustees shall meet annually on the second Wednesday in May and organize by electing from their number a president, secretary, and shall elect a treasurer who shall not be a member of the board and shall serve without compensation, each of whom shall hold his office for one year, or until his successor shall be elected and qualified. The treasurer shall give a bond, which shall be approved by the executive council, for double the amount of money liable to come into his hands at any one time, and said bond shall be filed with the secretary of state. The board shall also meet on the second Wednesday in August, November and February, and at such other times as may be necessary. It shall adopt a seal, have power to determine the eligibility of applicants for admission to the home, and adopt all needed rules for the preservation of order, enforcement of discipline, the preservation of the health of the members, and for the government of the home, and control of the grounds surrounding the same. It shall biennially, on October first, prior to the meeting of the general assembly, make a full and detailed report to the governor of the state, showing the condition of the home, the number of members, the order and discipline enforced, and of its condition, financial and otherwise, together with an itemized statement of all money paid the trustees, and any and all other matters of importance. [Same, §§ 2, 4, 15.]

SEC. **2604. Commandant—inferior officers.** The board of trustees shall appoint a commandant to serve during the pleasure of the board, and

who shall be one who has an honorable discharge from the United States army or navy, and whose salary shall not exceed eighteen hundred dollars per year, and use and occupancy of the commandant's house with lights, fuel and water, which shall include all allowances. The commandant may appoint, subject to the approval of the board, the adjutant, quartermaster and surgeon, of like qualifications, as to service in the army or navy, with himself, and also a matron and other necessary subordinate employes, and they shall be subject to removal by him for misconduct or incompetency, but in the case of every removal a detailed statement of the cause shall be reported at once to the board of trustees and subject to its approval. The board shall fix the compensation to be paid the subordinate officers and employes of the home, not to exceed that paid for like services in similar institutions. [Same, § 16.]

SEC. **2605. Residence of discharged inmate.** When a member of the home is discharged therefrom, or voluntarily leaves the same, or is adjudged insane, his residence shall be that of the county in which he was residing at the time of his admission. [24 G. A., ch. 24, § 1.]

SEC. **2606. Rules for admission.** The board of trustees may receive into the home dependent honorably discharged Union soldiers, sailors or marines, and their wives, if married prior to the year 1885, under such rules and regulations and subject to such conditions as the said board may prescribe, and permit such husband and wife to occupy a cottage on the grounds, or such other quarters as may be specifically set apart for such: *provided*, such soldiers shall have the qualifications for membership prescribed in sections twenty-six hundred and one and twenty-six hundred and two of this act. Subject to the same rules and regulations, such army nurses and the mother or widow of any Union soldier, sailor or marine as would be eligible to admission to the home, and as are unable to support themselves, may be admitted therein, and be supported and maintained, and receive the same allowance from the state as is granted to other members of the home. [24 G. A., ch. 95, §§ 4, 5.]

The board has the power to determine the circumstances under which a soldier may be admitted to the home and to say how much of the income he may receive, if any, he shall contribute toward his support while enjoying its benefits, and the courts should not interfere with the action of the board in establishing rules unless it is plainly manifest that the board has abused the discretion with which it is vested. Therefore, *held*, that a rule that any person admitted to the home having a pension shall surrender all thereof in excess of six dollars per month to be paid to his relatives if he have any, otherwise to be credited to the support fund, was not invalid: *Ball v. Evans*, 68 N.W., 435.

Such a rule is not in violation of the provisions of the federal statute with reference to an exemption of pension money: *Ibid.*

SEC. **2607. Officers not to be interested in contracts.** No trustee or officer of the Iowa soldiers' home shall be in any way interested in any contract for the erection or purchase of any buildings or lands, for furnishing any materials or supplies of any kind whatsoever for the use of said home; and if any such trustee or officer shall be so interested he shall be deemed guilty of a misdemeanor and, on conviction, be fined in any sum not exceeding five thousand dollars.

SEC. **2608. Annual appropriation—support.** There is hereby appropriated out of any money in the treasury the sum of thirteen thousand dollars per annum, or so much thereof as may be required, for the salaries and wages of the officers and employes of said home. For the general support of said home, there is hereby appropriated the sum of ten dollars per month for each member, or so much thereof as may be necessary, to be estimated by the average number for the preceding quarter. These appropriations to be drawn monthly on the requisition of the board of trustees of the home in the usual manner, and then only in such amounts as the wants of the home may require. [23 G. A., ch. 58; 22 G. A., ch. 121.]

CHAPTER 21.

OF REGENTS AND TRUSTEES OF STATE INSTITUTIONS.

SECTION **2609. Election—number—terms.** The general assembly shall elect the following regents and trustees of the state institutions, all of whom on any one board shall not be of the same political party:

1. For the university, one regent from each congressional district, who shall hold office for six years; [21 G. A., ch. 181; 16 G. A., ch. 147; C.'73, § 1587.]

2. For the agricultural college, one trustee from each congressional district, who shall hold office for six years; [20 G. A., ch. 76, § 1; C.'73, § 1604; R., § 1714.]

3. For the college for the blind, each of the hospitals for the insane, and the industrial school, five trustees each, who shall hold office for six years; [22 G. A., ch. 75, § 3; C.'73, §§ 1383, 1644, 1664.]

4. For the normal school, six trustees, who shall hold office for six years; [22 G. A., ch. 64, § 1; 16 G. A., ch. 129, § 2.]

5. For the institution for the feeble-minded, the orphans' home, the industrial home for the blind, and the school for the deaf, three trustees each, who shall hold office for six years; [24 G. A., ch. 51, § 5; 22 G. A., ch. 74; 19 G. A., ch. 40, § 2; 17 G. A., ch. 136, § 5; 16 G. A., ch. 94, § 10, C.'73, §§ 1623, 1685; R., §§ 2157–8.]

6. For the soldiers' home, five trustees to be appointed by the governor by and with the consent of the senate, who shall hold office for the term of five years. [21 G. A., ch. 58, § 4.]

SEC. **2610. Classes.** The term of each regent and trustee shall commence on the first day of May following the election; those holding for a term of six years shall be divided as nearly as may be into three equal classes, the terms of one class ending each two years; those for four years into two classes, the terms of one class ending each two years. [24 G. A., ch. 51, § 5; 22 G. A., ch. 64, § 1; 22 G. A., ch. 74; 21 G. A., ch. 58, § 4; 20 G. A., ch. 76, § 2; 19 G. A., ch. 40, § 2; 17 G. A., ch. 136, § 1; 16 G. A., ch. 94, § 10; 16 G. A., ch. 129, § 2; C.'73, §§ 1383, 1588, 1605, 1623, 1644, 1664.]

SEC. **2611. Terms end.** If the term of any regent or trustee now holding office expires prior to the first day of May in the even-numbered year, he shall hold until that time; terms of new regents or trustees shall commence on the expiration of the terms of the present incumbents ending on the first day of May of the even-numbered year. [Same.]

SEC. **2612. Oath.** Each regent, trustee, president, secretary, and treasurer of the university and each state institution and all other officers thereof required to give bond shall, before entering upon his duties, take the oath of office required of civil officers in the chapter upon qualifications for office, which shall be filed with the secretary of state or indorsed upon his bond. [24 G. A., ch. 51, § 6; 21 G. A., ch. 58, § 5; C.'73, §§ 1593, 1615, 1627, 1645.]

SEC. **2613. Members of general assembly ineligible.** Members of the general assembly shall be ineligible to the office of regent or trustee of any of the institutions of the state. [C.'73, §§ 1603, 1625, 1665.]

SEC. **2614. Requisitions for appropriations.** All requisitions upon the state treasurer for appropriations made for any state institution, unless otherwise provided, shall be presented quarterly on or after February fifteenth, May fifteenth, August fifteenth and November fifteenth, except appropriations already made for the erection of buildings now in the course of construction or under contract, as provided by law. [22 G. A., ch. 121, § 3; 20 G. A., ch. 73; 19 G. A., ch. 40, § 105; 19 G. A., ch. 166, § 1; 18 G. A., ch. 203; 17 G. A., ch. 72, § 2; 17 G. A., ch. 76, §§ 1, 3; 17 G. A., ch. 97, § 1; 17 G. A., ch. 98, § 2; 15 G. A., ch. 21, § 1; C.'73, §§ 1630, 1676.]

SEC. **2615. Quorum.** A majority of the regents or trustees shall constitute a quorum and may transact any business properly coming before them. [21 G. A., ch. 58, § 4; C.'73, §§ 1607, 1667, 1687; R., § 2146.]

SEC. **2616. Regulations.** Each board of regents and trustees, when organized, may adopt such rules for its regulation and government and for the regulation and government of the institution in its charge, not inconsistent with law, as may seem just and proper. [24 G. A., ch. 51, § 4; 21 G. A., ch. 58, § 4; 21 G. A., ch. 181; 19 G. A., ch. 40, § 5; 17 G. A., ch. 142, § 2; 16 G. A., ch. 119; 16 G. A., ch. 129, § 5; 16 G. A., ch. 147; 15 G. A., ch. 53, § 1; C.'73, §§ 1386, 1587, 1606, 1624, 1647, 1686; R., § 2158.]

SEC. **2617. Compensation.** Regents and trustees shall be allowed four dollars for each day actually and necessarily engaged in the performance of official duties, not exceeding thirty days in any one year, and mileage at the same rate as is allowed members of the general assembly. The limitation of thirty days shall not apply to building committees, which shall not consist of more than three members, but such committees shall not charge for or receive compensation for more than sixty days in any one year. [24 G. A., ch. 51, § 7; 22 G. A., ch. 64, § 2; 22 G. A., ch. 77, § 2; 21 G. A., ch. 58, § 4; 20 G. A., ch. 66; 19 G. A., ch. 40, § 5; 17 G. A., ch. 92, §§ 1, 2; 17 G. A., ch. 100, § 1; 16 G. A., ch. 129, § 3; C.'73, §§ 1384, 1602, 1608, 1625, 1646, 1668.]

SEC. **2618. Claims for compensation and mileage.** All claims of members of boards of trustees or of regents for attendance upon meetings of the board for time actually and necessarily spent in official duties shall be itemized, showing the date of such service and the nature thereof, and shall be sworn to by the claimant and certified to by the president and secretary of the board. It shall then be filed with the auditor of state, who shall compute the mileage due each claimant by the nearest traveled route from his home to the place of meeting, and shall enter said mileage upon the claim, and, if it be found in due form of law, the auditor shall draw his warrant upon the treasurer of state for the amount of said attendance and mileage. No compensation shall be allowed any member of such boards except as provided in this chapter. [22 G. A., ch. 121, § 3; 20 G. A., chs. 66, 73; 19 G. A., ch. 105; 18 G. A., ch. 203; 17 G. A., ch. 98, § 2; 17 G. A., ch. 100, § 1; 15 G. A., ch. 7, § 1; C.'73, §§ 1384, 1602, 1693.]

SEC. **2619. Blanks.** The secretary of state shall, upon request, furnish proper blanks prepared in accordance with this chapter for the purpose of making claims by members of boards of trustees of state institutions for compensation.

SEC. **2620. Report of auditor.** The auditor shall include in his report to the governor the amount paid for such services and mileage, and to whom paid.

TITLE XIII.

OF EDUCATION.

CHAPTER 1.

OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

SECTION **2621. Office—records—deputy.** The superintendent of public instruction shall have an office in the capitol, in which shall be filed and kept separately all papers, reports and documents transmitted to him each year by the several county superintendents, and open to inspection by the governor or a committee of either house of the general assembly whenever required. He shall keep a record of all matters and things done in his office, which, together with all other papers and documents, at the conclusion of his term, shall be turned over to his successor. He may appoint a deputy, who shall qualify in like manner as his principal, and who, in the absence or inability of the superintendent, shall perform his duties. [C. '73, §§ 766–7, 770, 1578; C. '51, §§ 416, 1078.]

SEC. **2622. Duties—teachers' conventions and institutes.** He shall be charged with the general supervision of all the county superintendents and the common schools of the state; may meet county superintendents in convention at such points in the state as may be most suitable for the purpose, at which proper steps may be taken looking toward securing a more uniform and efficient administration of the school laws. He shall appoint, upon the request of county superintendents, the time and place for holding teachers' institutes, such institutes to be called when it is probable that not less than twenty teachers will be present, and remain in session not less than six working days, of which time and place of meeting he shall give notice to the county superintendent of the proper county. He shall attend teachers' institutes thus called in the several counties of the state, so far as consistent with his official duties, and assist in their management and instruction. [C. '73, §§ 1577, 1584; C. '51, § 1080.]

SEC. **2623. Opinions—appeals.** He shall render opinions in writing upon request of any school officer regarding the school law, its administration, and the duty of such officer, and shall determine all cases brought before him on appeal from the decisions of the county superintendents. [C. '73, § 1577; C. '51, § 1080.]

If the superintendent should announce a decision differing from the decision actually rendered, he possesses the power to recall such announcement and publish the decision correctly, or if mistakenly he should render the decision, he could, before rights had been acquired under it and within proper time, upon discovering his mistake, recall it and decide rightly. If the decision is recalled and a different one rendered it will be presumed, in the absence of any showing on the subject, that it was done for a proper cause and within a proper time and that no rights had been acquired under his decision. The second decision is to be regarded as the final judgment rendered: *Desmond v. Independent Dist.*, 71–23. As to appeals, see §§ 2818–2821 and notes.

SEC. **2624. Publication of school laws.** He shall every four years, if deemed necessary, cause to be printed and bound in cloth all school laws in force up to that time, with such notes, forms, rulings and decisions as may be of value in aid of school officers in the proper discharge of their duties, reference being made to previous laws amended or changed, so as to indicate the effect of such amendment or change; one copy of which shall be sent to each county superintendent, and one to each district and independent district in the state, to be distributed by the several county

superintendents. Volumes bound in paper covers shall be furnished to each school director, to be distributed by the county superintendent, which shall be turned over by the director to his successor in office. Should he deem it unnecessary at any time to prepare a volume as above provided, the superintendent may cause to be published in pamphlet form such amendments to the school laws as have been passed by the general assembly, which shall be distributed in the manner and to the parties hereinbefore provided. He may subscribe for a sufficient number of copies of some educational school paper, printed and published in the state, to furnish one to each county superintendent; but no paper shall be selected which will not publish each decision made by him relating to the school law, and which he may regard of general importance; and the certificate of having thus subscribed shall be sufficient authority for the auditor of state to issue his warrant upon the state treasurer for the amount of the subscription. [22 G. A., ch. 59; 18 G. A., ch. 150, §§ 1, 2; C.'73, §§ 1579, 1581.]

SEC. **2625. Reports.** He shall on the first day of January report to the auditor of state the number of persons in each county between the ages of five and twenty-one years, and biennially to the governor; which report shall contain a statement of the condition of the common schools in the state, the number of school townships and districts therein, number of independent districts, number of teachers, number of schools, number of school-houses and value thereof, number of persons of school age, number of scholars in each county attending school the previous year, number of books in district libraries, the value of all apparatus in schools, and such other statistical information as may be of public importance, plans matured or adopted for the more perfect organization and efficiency of the common schools; and any suggestions he may deem important, regarding further legislation, which will strengthen the common schools of the state. [22 G. A., ch. 82, § 29; C. '73, §§ 1582-3; C. '51, § 1086.]

SEC. **2626. Appropriations for institutes.** To defray the expenses of county teachers' institutes, there is hereby appropriated out of any moneys in the state treasury not otherwise set apart a sum not to exceed fifty dollars annually for each institute held in each county, which sum the superintendent shall receive from the state treasurer, upon the warrant of the state auditor, to be issued to him upon his certificate; which amount, when drawn, shall be forthwith remitted to the proper county superintendent. If any balance remains of this sum after paying the expenses of the institute, it shall be covered into the county treasury of the proper county and credited to the institute fund. [C. '73, § 1584.]

SEC. **2627. Salary and expenses.** The salary of the superintendent of public instruction shall be twenty-two hundred dollars per annum, and that of his deputy fifteen hundred dollars, to be paid monthly upon the warrant of the state auditor, and, in addition thereto, the state superintendent shall receive two hundred and fifty dollars annually, or so much thereof as may be necessary, to pay actual traveling expenses incurred in the performance of official duties, to be allowed upon an itemized and verified account filed with the state auditor, who shall draw his warrant upon the state treasurer for the amount allowed. [22 G. A., ch. 109, § 1; 21 G. A., ch. 118, § 5; C.'73, § 3760.]

CHAPTER 2.

OF THE BOARD OF EDUCATIONAL EXAMINERS.

SECTION **2628. Members.** The educational board of examiners shall consist of the superintendent of public instruction, president of the university, principal of the normal school, and two persons to be apointed by the governor, one of whom shall be a woman, the appointees to hold office for a

term of four years and be ineligible as his or her successor, the superintendent of public instruction to be by virtue of his office president of the board. [19 G. A., ch. 167, § 1.]

SEC. **2629. Meetings—examinations.** The board shall meet for the transaction of business at such times and places as the president may direct, and shall annually hold at least two public examinations of teachers, at which one member of the board shall preside, assisted by not more than two qualified teachers to be selected by it. All examinations shall be conducted in accordance with rules and regulations adopted by the board, not inconsistent with the laws of the state, and a record shall be kept of all of its proceedings. It may issue state certificates and state diplomas to such teachers as are found upon examination to possess a good moral character, thorough scholarship and knowledge of didactics, with successful experience in teaching. The examination for certificates and diplomas shall cover orthography, reading, writing, arithmetic, geography, English grammar, bookkeeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of the state, and didactics; those for diplomas, in addition to the foregoing, geometry, trigonometry, chemistry, zoology, geology, astronomy, political economy, rhetoric, English literature, general history, and such other studies as the board may require. [Same, §§ 2–4.]

SEC. **2630. Certificates and diplomas.** It may also issue such certificates to graduates of any state normal school in the state possessed of like qualifications, upon proof of thirty-six weeks' successful experience in teaching, and a diploma when five years' such experience is shown. It may also, at discretion, issue a certificate or a diploma to any one holding a diploma issued by a state normal school, or a certificate issued by a state superintendent or a state board of education, of any other state, when the same is in all respects of as high a grade as the corresponding certificate or diploma issued in Iowa, upon proof of experience as herein provided. It may also issue a certificate to any primary school teacher in the state of sufficient experience, and who shall pass such examination as the board may designate in branches and methods which pertain especially to that kind of work. Such certificate shall be known as a primary teacher's certificate, and shall not be valid as a teacher's certificate for any other department. It shall keep a complete register of all persons to whom certificates or diplomas are issued. [23 G. A., ch. 22.]

SEC. **2631. How long valid—revocation—fees.** A state certificate shall authorize the holder to teach in any public school in the state for five years thereafter, and a diploma shall confer such authority for life; but any certificate or diploma may be revoked by the board for sufficient cause, or such cause as would, if known at the time, have prevented issuance thereof, provided the holder of such certificate or diploma shall have due notice, and shall be allowed to be present and make his defense. For each certificate issued the applicant shall pay three dollars, and for each diploma five dollars, which may be required before the examination is commenced. If the applicant fails in the examination, and the fees have been advanced, one-half of the sum shall be returned; all moneys obtained from this source to be paid into the state treasury. [19 G. A., ch. 167, §§ 5, 6.]

SEC. **2632. Registration.** Each holder of a state certificate or diploma shall register the same with the county superintendent of the county in which he or she is to teach, before entering upon the work, and the county superintendent, in his annual report to the superintendent of public instruction, shall include therein an account thereof. [Same, § 7.]

SEC. **2633. Account of moneys.** The board shall keep an accurate and detailed account of all money received and expended, which, with a list of those receiving certificates or diplomas, shall be published by the superintendent of public instruction in his annual report. [Same, § 9.]

SEC. **2634. Compensation.** Each member of the board, and person appointed to assist in conducting examinations, shall receive for the time actually employed in such service his necessary expenses, and those not salaried officers shall be paid in addition three dollars a day, the amount to be certified by the superintendent of public instruction to the state auditor, who shall draw his warrant upon the state treasurer therefor; but the aggregate amount to be paid in any one year shall not exceed six hundred dollars. [25 G. A., ch. 36; 19 G. A., ch. 167, § 8.]

CHAPTER 3.

OF THE STATE UNIVERSITY.

SECTION **2635. Board of regents—powers.** The state university shall be governed by a board of regents, of which the governor and superintendent of public instruction shall be members by virtue of office, and the governor president, which shall meet at such times as it may appoint, and the governor may call special meetings when found expedient, or they may be called by the secretary of the board upon the written request of any three members thereof. It shall elect a secretary and treasurer, who shall hold their offices at the pleasure of the board. It shall have power to appoint a president and the requisite number of professors and tutors, with such other officers as it may deem expedient, and fix the compensation to be paid them, including that of the secretary and treasurer, and the amount to be paid for tuition. It shall have power to remove any officer or employe connected with the university when in its judgment the good of the institution so requires. [21 G. A., ch. 181; 16 G. A., ch. 147; C. '73, §§ 1587, 1590, 1592–3, 1596; R., § 1934.]

The state university is not a corporation and cannot be sued: *Weary v. State University*, 42–335.

A statute making appropriation for the support of the state university construed in view of the character of the institution and the intention of the legislature with reference thereto: *State v. Sherman*, 46–415.

SEC. **2636. Secretary.** The secretary shall keep a record of the proceedings of the board; also of the university lands sold, when and to whom sold, the price and terms of sale, the portion of the purchase money paid, and date thereof, the amount due on each sale, from whom, how secured, and when payable, the lands remaining unsold, where situated, their appraised value if appraised, if not, their estimated value, the permanent fund of the university and how invested, the amount of each kind of bond, if any, with the date thereof and when due, the interest thereon and when and where payable, the amount of each note, if any, when made, to whom payable, how secured, the rate of interest, and when and where payable. All conveyances or other instruments, when made, shall be recorded in the manner above set forth, and he shall countersign and register all orders drawn upon the treasurer, keeping an accurate record thereof. He shall give bond in such sum as the board may require for the faithful discharge of his duties, with sureties to be approved by and filed with the secretary of state. [C. '73; § 1592.]

SEC. **2637. Treasurer.** The treasurer, before entering upon the duties of his office, shall take and subscribe an oath to the effect that he will faithfully perform the same, and render a full and complete account of his doings therein, and turn over to his successor all money, books or other property belonging thereto, and shall give a bond in the penalty of at least fifty thousand dollars, conditioned, in substance, the same as the required oath, with sureties to be approved by and filed with the secretary of state. He shall keep a true and faithful account of all money received and paid out, keep a set of books in which shall be recorded full and complete state-

ments connected with the sale or disposition of university lands, the management of the fund arising therefrom, the parts and portions of lands sold, the prices obtained, to whom sold, how the proceeds have been invested, the security for the investment, the lands remaining unsold, where situated, and the estimated value. He shall, on the first day of June and of December, notify each person, in writing, in default of payment of either principal or interest of any funds loaned by or due to the university, and shall cause action to be commenced against such delinquents, if found advisable, and lapse of time shall in no case be a bar to such action. [C. '73, §§ 1593–5, 2542; R., § 1937.]

SEC. **2638. Sale of lands.** No sale of university lands shall be made, save upon the order of the board of regents, made at a regular meeting or one called for that purpose, and then in such manner and upon such terms as the board shall prescribe. No member of the board shall be directly or indirectly interested in the purchase of any of the lands, nor shall the secretary or treasurer or other officer of the institution. Any portion of the permanent endowment fund not otherwise invested, and any surplus income not immediately required for other purposes, may be invested by the treasurer, upon the order or direction of the board, in bonds of the United States or this state, or by note and mortgage on unincumbered real estate worth double the amount of the sum loaned after deducting the value of perishable improvements thereon, and hold the same either as a permanent fund or as an income to defray current expenses, as said board may direct, but in no event shall any part of the permanent fund be used to defray the ordinary expenses of the institution. [C. '73, § 1599; R., § 1398.]

Where the purchaser of state university land failed for three years to pay instalments of interest under the contract of sale, and the trustees of the university thereupon, and in accordance with its terms, forfeited the contract, and afterward resold the land to a third party for less than was owing thereunder, *held*, that the first purchaser was estopped by his own laches from demanding a specific performance of such contract or from recovering payments made thereunder: *Henn v. State University*, 22–185.

And *held*, that the repeal of § 1052 of the Code of '51, which authorized such forfeiture, did not deprive the university of its equitable rights: *Ibid.*

SEC. **2639. Apparatus—library—cabinet of natural history.** The board of regents may from time to time expend of the income of the university fund such portion as it may find expedient in the purchase of apparatus, library, and a cabinet of natural history, to provide suitable means to preserve and keep the same, and in procuring other necessary facilities for giving instruction. For the purpose of supplying a cabinet of natural history, all geological and mineralogical specimens which are now or may hereafter be collected by the state geologists, or by others appointed by the state to investigate its natural history and physical resources, shall belong to and be the property of the university, under the charge of the professors of those departments. [C. '73, §§ 1597–8; R., §§ 1931, 1935.]

SEC. **2640. Object—departments—degrees.** The university shall never be under the exclusive control of any religious denomination. Its object shall be to provide the best and most efficient means of imparting to men and women, upon equal terms, a liberal education and thorough knowledge of the different branches of literature and the arts and sciences, with their varied applications. It shall include a collegiate, law, and such other departments, with such courses of instruction and elective studies, as the board of regents may determine, beginning the same in its collegiate department, so far as practicable, at the points where the same are completed in high schools; and no one shall be admitted who has not completed the elementary studies in such branches as are taught in the common schools throughout the state. Graduates in each of the several courses shall receive such degrees and diplomas or other marks of distinction as the board of regents may determine and such as are usually conferred and granted by other universities. [C. '73, §§ 1585–6, 1589; R., §§ 1926, 1930; C. '51, § 1020.]

SEC. **2641. Reports.** On the first day of October preceding the meeting of the general assembly, the president of the university shall make a report to the board of regents, which shall exhibit the condition and progress of the institution, the different courses of study pursued, the branches taught, the means and methods of instruction adopted, the number of students, their names, classes, and residences, with such other matters as he may regard important. The board of regents, on the fifteenth day of October in each odd-numbered year, shall make report to the governor, which report shall show the number of professors, tutors, and other officers, the compensation of each, the condition of the university fund, the income received therefrom, the amount of expenditures with the items thereof, and such other information and such recommendations as it shall regard important. [22 G. A. ch. 82, § 29; C.'73, §§ 1600–1.]

SEC. **2642. Executive committee.** The board of regents shall appoint an executive committee, consisting of three of its members, which shall select one of its number as chairman, which committee shall audit all claims against the university, the chairman shall draw orders upon the treasurer for all claims allowed, which orders, being countersigned by the secretary of the university, shall be paid; and a record of all matters involving the expenditure of money shall be kept by the secretary of the university, as secretary of the committee, and be submitted to the board of regents at each of its regular sessions. [C.'73, § 1591.]

SEC. **2643. Appropriation.** There shall be and is hereby appropriated out of any funds in the state treasury, not otherwise appropriated, for the further support of the state university in its several departments and chairs, and in aid of the income fund and for the development of the institution, the sum of sixty-five thousand five hundred dollars annually hereafter, said sum to be payable in quarterly installments on the order of the board of regents. [26 G. A., ch. 144; 25 G. A., ch. 152; 20 G. A., ch. 115, § 1; 17 G. A., ch. 76, § 1.]

SEC. **2644. Tax for buildings.** For the purpose of providing for the erection, improvement and equipment of such necessary buildings as shall be determined upon by the board of regents of the state university, there shall be levied a special tax of one-tenth of a mill on the dollar upon the assessed valuation of the taxable property of the state for the erection of buildings for the state university; and the proceeds thereof shall be carried into the treasury to the credit of said state university, said levy to commence with the levy made by the executive council in August, 1896, and the same levy shall be made annually after said first levy for the four successive years thereafter. Any amount in excess of the sum of fifty-five thousand dollars raised by any one of such levies shall be paid into the state treasury. The money realized from such levy shall be held by the treasurer of state, and drawn as provided by law. The amount so realized by said levies shall be in lieu of all appropriations for the erection of buildings for said state university during said period of five years. [26 G. A., ch. 114.]

CHAPTER 4.

OF STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS.

SECTION **2645. Grant accepted.** Legislative assent is given to the purposes of the various congressional grants to the state for the endowment and support of a college of agriculture and mechanic arts, and an agricultural experiment station as a department thereof, upon the terms, conditions and restrictions contained in all acts of congress relating thereto, and the state assumes the duties, obligations and responsibilities thereby imposed.

All moneys appropriated by the state because of the obligations thus assumed, and all funds arising from said congressional grants, shall be invested or expended in accordance with the provision of such grant, for the use and support of said college located at Ames. [24 G. A., ch. 6; 20 G. A., ch. 76, § 1; C.'73, § 1604; R., § 1714.]

SEC. **2646. Board of trustees.** The college shall be under the management and control of a board of trustees, but neither the president nor other officer or employe of the college and farm shall be eligible to membership therein. [20 G. A., ch. 76, § 1; C.'73, § 1604; R., § 1714.]

SEC. **2647. Powers.** The board of trustees shall have power:

1. To elect a chairman from their number, a president of the college, secretary, treasurer, professors and other teachers, superintendents of departments, steward, librarian, and such other officers as may be required for the transaction of its business, fix the salaries of officers, prescribe their duties, and appoint substitutes who shall discharge the duties of such officers in their absence;
2. To manage and control the property of the college and farm, whether real or personal;
3. To arrange courses of study and practice and establish professorships, as may seem best to carry into effect the provisions of this chapter, and prescribe conditions of admission to the college;
4. To grant diplomas upon the recommendation of the faculty to any students who have completed any of the courses of study prescribed by it, or an equivalent thereof;
5. To remove any officer by a majority vote of all its members;
6. To direct the expenditure of all the appropriations the general assembly shall from time to time make to said college and farm, and the income arising from the congressional grants and all other sources;
7. To keep a full and complete record of their proceedings, and do such other acts as are necessary to carry out the intent of this chapter;
8. To institute and prosecute to final judgment any action found necessary for the protection of the property interests intrusted to their care. [25 G. A., ch. 112; 16 G. A., ch. 119; C.'73, § 1606.]

SEC. **2648. Courses of study.** There shall be adopted and taught practical courses of study, embracing in their leading branches such as relate to agriculture and the mechanic arts, and such other branches as are best calculated to thoroughly educate the agricultural and industrial classes in the several pursuits and professions of life, including military tactics, and, as a separate department, a school of mines, in which a complete course in theoretical and practical mining in its different branches shall be taught. [25 G. A., ch. 107; 20 G. A., ch. 27; C.'73, § 1621.]

SEC. **2649. Tuition—admission.** Tuition in the college herein established shall be forever free to pupils from the state over sixteen years of age, who have been residents of this state six months previous to their admission. Each county in this state shall have a prior right to tuition for three scholars from such county; the remainder, equal to the capacity of the college, shall be by the trustees distributed among the counties in proportion to the population, subject to the above rule. Transient scholars otherwise qualified, may at all times receive tuition. [C.'73, § 1619.]

SEC. **2650. Annual meetings—school year—report.** Annual meetings of the board of trustees shall be held at the college on the second Wednesday following the first Monday of November. The college year shall begin on the following Thursday and end on the second Wednesday after the first Monday of November of the following year. The board shall make a biennial report to the governor. [16 G. A., ch. 159, § 9; C.'73, §§ 1609–10.]

SEC. **2651. President.** The president shall manage and control the affairs of the college and farm, subject to such rules as may be prescribed by the board of trustees, and shall report to it at its annual meeting, and

at such other times as it directs, all his acts and the condition of the several departments, with his recommendations for the future management thereof. [C.'73, § 1611.]

SEC. **2652. Secretary.** The secretary shall keep a record of the proceedings of the board, and all documents and papers connected with the office, and conduct the correspondence. All acts of the board relating to the management, disposition or use of the lands, funds or other property of the institution shall be entered of record, and show how each member voted upon each proposition. He shall also prepare the biennial report of the board to the governor; and report to the executive council annually, and at such other times as may be required by it, all loans made since his last report to it; and also, to the board, all loans made since its last meeting, unless otherwise ordered; but such reports must be made at least quarterly. Upon the election of any person to any office under the board, he shall give notice thereof to the secretary of state. He shall also keep an account with the treasurer, charging him with all money paid him, and crediting him with the amounts paid out upon the order of the board of audit, which account shall be balanced monthly. [20 G. A. ch. 193, § 4; C. '73, § 1612.]

SEC. **2653. Auditing committee.** The president and secretary shall constitute an auditing committee which, subject to the rules of the board of trustees, shall examine and audit all bills presented for payment for which an appropriation has been made, and a minute of such auditing shall be indorsed upon each bill and signed by both members of such committee. No bill shall be paid without such joint indorsement, unless allowed by the board. It shall examine the treasurer's books and vouchers monthly, and at such other times as it shall consider necessary, and all its proceedings shall be reported by the secretary to the board at its next meeting. [C.'73, § 1613.]

SEC. **2654. Treasurer.** The treasurer shall receive and keep all notes and other evidence of indebtedness, contracts, and money arising from the income of the congressional grant, appropriations of the general assembly, sales of the products of the farm, payments by students, and all other sources, and pay out the same upon bills for which appropriation has been made, when audited as above prescribed, and retain such bills with receipts for their payment as his vouchers. He shall keep an accurate account of the revenue and expenditures of the college from all sources, so that the receipts and disbursements of each of its several departments shall be apparent at all times, and report to the board of trustees at their annual meeting and such other times as they may direct. He shall execute duplicate receipts for all money received by him, specifying the source and the fund to which it belongs, one of which must be filed with the secretary, and no receipt shall be valid unless the duplicate is so filed. He shall be elected annually, and give bond in double the highest amount of money likely to be in his hands at any one time, which bond shall be filed with and the sureties thereon approved by the secretary of state. He may appoint a deputy, who shall receive such compensation as the board of trustees shall fix, and for whose acts he shall be responsible on his official bond. [C. '73, § 2614.]

SEC. **2655. Offices.** The president and secretary shall have their offices in, and the deputy treasurer shall reside at, the college. [C. '73, §§ 2614–15.]

SEC. **2656. Sale of lands.** The board of trustees may sell the lands granted to the state by act of congress, and any lands acquired by purchase or otherwise, for cash, or upon partial credit not exceeding ten years, at such price as shall be fixed by the board; deferred payments to draw interest at the rate of eight per cent. per annum, payable annually in advance. Upon a failure to pay the interest or principal within sixty days after it becomes due, and sixty days after notice thereof shall have been given in writing, by mail or otherwise, by the board or the land agent of the college

to the holder of the lease, such holder shall forfeit all claim to said land and the improvements made thereon and all sums paid on said contract, unless an extension of time has been or is granted by said board. [20 G. A., ch. 72, §§ 1, 5.]

Proceedings had for the condemnation of a right of way over agricultural college land, to which the trustees of the college are properly made parties, will be binding upon a subsequent purchaser of such property: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

Although lands belonging to the agricultural college are required to be sold on time, in order to provide a fund for the college arising from the interest, the college may receive the principal when its interest will be promoted thereby, and it will be presumed that the officers acted rightly and for the interests of the college when the principle is received: *Burtis v. Humboldt County Bank*, 77–103.

SEC. **2657. Leases.** It may lease such lands for a term not exceeding ten years, at an annual rent equal to eight per cent. per annum upon the appraised value of the tract, payable annually in advance, granting the lessee, his heirs or assign the privilege of purchasing at the expiration of the lease at the appraised value stated therein, or it may lease said lands without granting the privilege of purchase. A lessee failing to pay the annual rent or interest within sixty days after it becomes due, and sixty days after notice thereof shall have been given in writing, by mail or otherwise, by the board or the land agent of the college to the holder of the lease, shall forfeit the same, with the interest paid thereon and all improvements made. [Same, § 2.]

The legislature can fix and enforce the terms and conditions of a lease or sale of lands of the agricultural college belonging to the state: *Smith v. Trustees*, 28–500.

A stipulation in a lease of agricultural college lands entitling the lessee to purchase on terms stipulated, does not convey an interest which may be levied on and sold under execution and such interest is not susceptible to mortgage: *Conn v. Towner*, 86–577.

SEC. **2658. Accepting advance payment.** It may at its option cause to be received the purchase price of the land sold or leased, before the same becomes due, upon such terms and conditions of payment as it may regard for the best interests of the institution, and may renew leases as they expire. [Same, § 3.]

SEC. **2659. Sale for taxes.** After any leasehold interest has been sold for delinquent taxes, the holder of the tax sale certificate may pay any interest or principal due by the terms of the lease, or do any other act necessary to prevent a forfeiture of the lease, and the proper voucher for such payment shall be filed with the auditor of the county where the land is situated. [19 G. A., ch. 169, § 2.]

SEC. **2660. Tax deed.** Where any leasehold interest has been sold for delinquent taxes, and a treasurer's deed issued thereon, the grantee therein, his heirs or assigns, shall be entitled to purchase the land so conveyed, at the price and on the terms specified in the lease, and receive a patent therefor. If such lease expires before the holder of the tax sale certificate will be entitled to a treasurer's deed, such certificate holder may pay the amount required by the terms thereof to acquire the title thereto, and receive a conveyance of the same. [Same, § 3.]

SEC. **2661. Right of tax purchaser.** The right of the tax sale purchaser or his assigns to pay any amount due by virtue of any lease shall be shown by a copy of the certificate of tax sale or treasurer's deed thereunder, duly certified by the officer executing the same, and if no tax deed has been issued, the auditor shall certify that redemption from the sale has not been made. Such copy and certificate shall be filed with the secretary of the board of trustees and become a part of the records of his office. [Same, § 4.]

SEC. **2662. Leases taxed.** The board of trustees shall certify to the auditor of each county in which leased college lands are situated, on or before the fifth day of January of each year, a list thereof subject to taxa-

tion, with the name of each lessee, the date and terms of each lease, the amounts to be paid thereunder, and the dates of maturity thereof. Each auditor shall deliver to the assessor of each township containing any of said lands, on or before the fifteenth day of January, such list, together with a statement of the names of the lessees of each tract, the amounts to be paid thereon, and the dates of payment. [Same, § 5.]

SEC. **2663. Assignment of leases.** All leases and renewals thereof shall be assignable, and the owner, whether holding one or more leases or renewals, who has made the annual payments therein required, shall be entitled to all the benefits thereof and have the privilege of purchasing the tract or tracts of land as provided therein, and upon the payment of such purchase money shall be entitled to a patent for the land described in said lease or leases. [20 G. A., ch. 72, § 4.]

SEC. **2664. Conveyance of lands sold.** When a sale is made of any lands, the president shall execute to the purchaser a certificate, countersigned by the secretary, stating the fact of purchase, the name of the purchaser, the description of the land and its fixed value. Upon payment of the purchase price to the state treasurer, the buyer or his assigns will be entitled to a patent or patents therefor, and upon presentation of such certificate to the secretary of state, with the receipt of the treasurer showing full payment, stating the amount, he shall issue to the purchaser, or his assigns, one or more patents for the tract or tracts of land therein described, signed by the governor and secretary of state, as other patents or deeds of land conveyed by the state, which shall vest in the purchaser all the right and title and interest of the state and of said college therein. [Same, § 6.]

SEC. **2665. Endowment fund.** The principal of all money so collected must be paid to and held by the treasurer of state, and shall be drawn out only for the purpose of investment, upon the order of the board of trustees. The interest or rental collected must be paid at the end of each month to the treasurer of the college, and the agent collecting the same must at the same time file with the secretary of the board of trustees an itemized report of the amount collected. [Same, § 7.]

SEC. **2666. How invested.** The board shall manage and invest the endowment fund, which may be done in the bonds of the United States or this state, or in some other safe bonds yielding not less than five per cent. on the par value thereof, but the proposed investment shall be submitted to and approved by the executive council before being consummated. [20 G. A., ch. 193, § 1.]

SEC. **2667. Loans.** It may loan said funds upon approved real estate security, subject to the following regulations:

1. Each loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board, not less than six per cent. per annum, payable annually;

2. Each loan shall be secured by a mortgage paramount to all other liens upon improved farm lands in the state, the loan not to exceed fifty per cent. of the cash value thereof, exclusive of buildings;

3. Principal and interest shall be payable to the order of the board at the office of the state treasurer, the notes and mortgages to provide for the payment by the borrower of all expenses, attorney fees and costs incurred in collecting the same;

4. A register containing a complete abstract of each loan, and showing its actual condition, shall be kept by the secretary of said board, and be at all times open to inspection. The attorney-general, under the direction of the executive council, shall prepare the necessary blanks, forms and instructions to carry into effect the provisions of this section and to keep such loans secure and unimpaired. [25 G. A., ch. 110, § 1; 20 G. A., ch. 193, § 2.]

SEC. **2668. Financial agent.** Subject to approval by the executive council, the board may appoint a financial agent to negotiate loans in accordance with the provisions of this chapter, and take charge of the foreclosure of mortgages and collections from delinquent debtors to said fund, when so directed by it. Such agent shall hold his office during the pleasure of the board, and, before entering upon the discharge of his duties, take the oath required of civil officers, and give bond in a penal sum to be determined and with sureties to be approved by said board, conditioned for the faithful performance of the duties of his agency and the payment into the state treasury of all funds which shall come into his hands in connection therewith. Such bond shall be in a sum at least double the amount of funds liable to come into his hands at any time, and be for the use and benefit of said college, and actions for breach of its conditions may be brought in the name of said board. [22 G. A., ch. 58, §§ 1, 2; 20 G. A., ch. 193, § 3.]

SEC. **2669. Compensation.** The financial agent shall receive a compensation to be fixed by the board of trustees, not exceeding the sum of twelve hundred dollars annually, and eight hundred dollars annually in addition for assistants and sub-agents and all necessary expenses connected with the discharge of his duties, to be paid as that of other officers out of the treasury of the state. [20 G. A., ch. 193, § 6.]

SEC. **2670. Foreclosure.** The foreclosure of any mortgage belonging to said college may be made in the name of the board of trustees, and, in case of sale upon execution under foreclosure, the premises may be bid off in the name of the college, and if a deed therefor is executed, the premises shall be held for the benefit of the college, and such lands shall be subject to lease or sale the same as its other lands. [Same, § 5.]

SEC. **2671. Funds collected.** Money collected from delinquents shall at once be paid into the state treasury, the principal of the fund to be there kept and drawn out for the purpose of investment as above provided, subject to such restrictions as may be imposed by the executive council. The state treasurer shall make monthly reports to the secretary of the board of trustees, showing all payments of principal and interest made, and remit to the treasurer of the college. All interest in his hands, as shown by such report shall be loaned as other funds, or used to defray the expenses of the college. [Same, § 7.]

SEC. **2672. Agents.** The board of trustees may appoint agents, or do any other act necessary to carry out the provisions of the preceding sections, where no such authority has already been given; but no agent shall be permitted to receive money until he has executed a bond in a sum double the amount he will be likely to receive, which bond, with the sureties, shall be approved by the board. Such agent shall make monthly itemized statements to the secretary of the board of the amount of money received by him, and at the same time transmit to the treasurer of the college all funds in his hands. [C. '73, § 1618.]

SEC. **2673. Sale of liquors.** No person shall open, maintain or conduct any shop or other place for the sale of wine, beer or spirituous liquors, or sell the same at any place within a distance of three miles from the agricultural college and farm: *provided* that the same may be sold for sacramental, mechanical, medical or culinary purposes; and any person violating the provisions of this section shall be punished, on conviction by any court of competent jurisdiction, by a fine not exceeding fifty dollars for each offense, or by imprisonment in the county jail for a term not exceeding thirty days, or by both such fine and imprisonment. [C. '73, § 1620.]

SEC. **2674. Appropriation.** For the repairs, general improvements and current expenses of the state college of agriculture and mechanic arts, in its several departments and chairs, and in aid of the income fund, the sum of eighteen thousand five hundred dollars is annually appropriated out of any money in the state treasury not otherwise appropriated. [25 G. A., ch. 145, § 1.]

CHAPTER 5.

OF THE NORMAL SCHOOL.

SECTION **2675. Board of trustees—officers.** The normal school at Cedar Falls, for the special instruction and training of teachers for the common schools, shall be under the management and control of a board of trustees, of which the superintendent of public instruction shall be, by virtue of office, a member and president. It shall meet annually on or before June fifteenth, at the call of the president, and organize by the election of one of its members vice-president, and a secretary and treasurer, neither of the latter to be a member of the board. The treasurer shall give bond in the sum of twenty thousand dollars, with good and sufficient sureties, to be filed with and approved by the secretary of state, which bond shall be conditioned for the safe keeping and proper disbursement of all money coming into his hands by virtue of his office. [16 G. A., ch. 129, §§ 1, 4.]

SEC. **2676. Powers of board—admissions—fees.** The board shall have power to employ a sufficient number of suitable and competent teachers and other assistants; fix their compensation; make all necessary rules and regulations for the management of the school, the admission of pupils from the several counties in the state, giving to each county its proper representation therein in proportion to the population thereof, and to all teachers in the state equal rights, requiring that each one received as a pupil shall furnish satisfactory evidence of good moral character and the honest intention of following the business of teaching school in the state; and make such arrangements as it may for the lodging and boarding of pupils, which shall be paid for by them. It may charge a fee for contingent expenses not to exceed one dollar monthly, and a tuition fee of not more than six dollars a term, if necessary for the proper support of the institution, and shall determine what part of the year the school shall be open, its sessions to continue, however, for at least twenty-six weeks of each year. [17 G. A., ch. 142, § 2; 16 G. A., ch. 129, § 5.]

SEC. **2677. Branches of study.** Physiology and hygiene shall be included in the branches of study regularly taught to and studied by all pupils in the school, and special reference shall be made to the effect of alcoholic drinks, stimulants and narcotics upon the human system, and the board of trustees shall provide the means for the enforcement of the provisions of this section and see that they are obeyed. [21 G. A., ch. 1, § 1.]

SEC. **2678. Contract with school districts.** The board of trustees may contract with the board of directors of the school township or independent district in which the school is situated, and those contiguous thereto, for a period not exceeding two years at a time, to receive the pupils thereof into the normal school and furnish them with instruction, payment therefor to be made out of the teachers' fund of such townships or districts, which shall not exceed fifty cents, weekly, for each pupil; the contract to be in writing, and a copy filed with the county superintendent. [25 G. A., ch. 40, §§ 1-3.]

SEC. **2679. Teacher's reports—tuition.** If such a contract is entered into, all reports required by law to be made to the board of directors of such townships or districts and the county superintendent, by the teachers thereof, shall be made by the principal of the normal school, and all sums paid for tuition shall go to its contingent fund. [Same, §§ 3, 4.]

SEC. **2680. Report to governor.** The board shall biennially, through its secretary, make a detailed report to the governor of its proceedings during the preceding two years, which report shall show the number of teachers employed, the compensation of each, the number of pupils and classification, an itemized statement of receipts and expenditures, and such further information with such recommendations as may be regarded important to the interests of the institution, and with reference to its connection

with the educational work of the state. [22 G. A., ch. 64, § 2; 16 G. A., ch. 129, § 9.]

SEC. **2681. Compensation of officers.** The secretary of the board shall receive such compensation as may be fixed by it, not exceeding one hundred dollars annually, with actual traveling expenses. The treasurer shall be allowed only his actual traveling expenses, the claim for which, as well as that of the secretary, to be itemized and verified before it is allowed and paid, which shall be done out of the state treasury upon the warrant of the state auditor. [22 G. A., ch. 64, § 1; 16 G. A. ch. 129, § 2.]

SEC. **2682. Appropriation.** There is hereby appropriated the sum of seventeen thousand five hundred dollars annually as an endowment fund for the payment of the teachers of said normal school, and the further sum of three thousand dollars annually as a contingent fund therefor. The amount herein appropriated shall be drawn and paid quarterly on the first days of March, June, September and December, on the requisition of the board of trustees of the school.

CHAPTER 6.

OF ORPHANS' HOME AND HOME FOR DESTITUTE CHILDREN.

SECTION **2683. Trustees and officers.** The orphans' home and home for destitute children, located at Davenport, shall be under the management and control of three trustees, one of whom shall be a resident of Scott county. They shall at their meeting in May after the regular session of the legislature elect a president and secretary from their number, and shall elect a treasurer who shall be a resident of the county in which the home is situated, and he shall serve without compensation. The treasurer shall give a bond in a sum to be fixed by the board, with good and sufficient sureties, to be filed with and approved by the secretary of state, and conditioned for the faithful discharge of his duties and the safe keeping and proper disbursement of all money coming into his hands by virtue of his office. The secretary shall keep full and accurate minutes of the doings of the board, the meetings of which shall be held at the home. The board of trustees shall examine all applications for admission, and reject any for good and sufficient cause. It shall appoint a superintendent, who shall hold his or her office at its pleasure and subject to its direction. The superintendent, subject to the board, shall have charge of the institution and its conduct, and the board shall make biennial reports to the governor of the condition of the home, financial and otherwise. [22 G. A., ch. 74; 22 G. A., ch. 82, § 30; 16 G. A., ch. 94, §§ 4, 10; C. '73, §§ 1623–4, 1629, 1632.]

SEC. **2684. Superintendent.** The superintendent shall give a bond in such sum as shall be fixed by the board of trustees, conditioned for the faithful performance of his or her duties, which shall be filed and approved as in case of the treasurer. He or she may appoint such assistants as the work may require, subject to removal by the trustees for incompetency or other sufficient cause and make all needed purchases for the home, and quarterly settlements therefor, which settlements shall be conducted by the resident trustee and county recorder. All accounts shall be itemized, verified, and accompanied with the original bills of purchase and all otner bills or vouchers; which accounts, thus presented, with the accompanying bills and vouchers, shall be filed and kept as a part of the records of the home. The recorder shall be allowed three dollars daily for his services in making such settlement. [C. '73, §§ 1624, 1628.]

SEC. **2685. Admissions.** All children of soldiers residents of the state, orphans of soldiers under fifteen years of age who are destitute or unable

to care for themselves, and such other destitute children of like age who have a legal settlement in the state, and whose applications for admission are approved by the board of supervisors or a judge of a court of record, shall be received into the home, but none in the latter class shall be so admitted as long as there are applicants denied in the former; all applications to be made to a judge in the district of the applicant's residence, or the board of supervisors of the county in which the applicant is living. [21 G. A., ch. 111; 16 G. A., ch. 94, §§ 1, 2.]

SEC. **2686. Enumeration of soldiers' orphans.** When making the biennial assessment, the assessor shall take an enumeration of the children of deceased soldiers who were in the military service of the government, naming the company or organization to which the soldiers belonged, with the age and sex of the children, and make return thereof with the report of the assessment made by him. For this purpose the auditors of the several counties shall furnish the assessors with the proper blanks for taking such lists. The lists so returned shall be revised from time to time, as may be necessary, by the board of supervisors, and a record made of such action. [C.'73, §§ 1635–7.]

SEC. **2687. Orphan's fund.** The board of supervisors may levy a tax, not exceeding one-half mill on the dollar in any one year, on all the taxable property in its county, at the same time other taxes are levied, and to be collected in the same manner, to aid in and for the maintenance and education of destitute orphans. The fund thus raised shall be called the "county orphan fund," and shall be expended in such sums and manner as the exigencies of each case may demand. If there are such children who are without guardian, or, having one, are neglected, they shall be cared for through some suitable person to be appointed by the board. [C.'73, §§ 1638–41.]

SEC. **2688. Regulations.** All children admitted to the home shall be subject to the rules and regulations of the same, and, subject to the approval of the trustees, may be expelled by the superintendent for disobedience and refusal to submit to proper discipline. They shall also be discharged upon arriving at the age of fifteen years, or sooner if possessed of sufficient means to provide for themselves. [16 G. A., ch. 94, § 3; C.'73, § 1634.]

SEC. **2689. Instruction.** Children admitted to the home shall be provided with the means of obtaining, during the time they are inmates, a common school education, and have regular employment furnished them in some useful pursuit, and after discharge therefrom the trustees and superintendent shall assist them in finding a home and employment. The children shall also be instructed in physiology and hygiene as taught in the common schools. Any profits arising from labor at the home shall be placed at interest in some savings bank, and each inmate paid, when discharged, in proportion as his or her labor contributed to the fund. [21 G. A., ch. 1, § 1; 16 G. A., ch. 94, § 7.]

SEC. **2690. Adoption of orphans.** Any child in the home, with the consent of its parents or guardian, may be adopted by any citizen of the state, subject to the approval of the board of trustees. Any child thus adopted shall be returned to the home when such board is satisfied that he is not being properly educated and cared for by the person adopting; the order therefor being entered upon the minute of its proceedings, and which order so entered shall operate to cancel the articles of adoption. [C.'73, § 1634.]

SEC. **2691. Appropriation—salaries.** For the support of the home, there is appropriated, out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, ten dollars monthly for each child actually supported, and, in addition, the expense of his transmission to the home, payable upon the sworn statement of the superintendent filed with the state auditor, who shall draw his warrant upon the state treasury therefor; the number of children to be ascertained by taking the

average attendance for the preceding month. The salary of the superintendent and assistants shall be fixed by the board of trustees, subject to the approval of the executive council. [16 G. A., ch. 94, § 5; C. '73, §§ 1630-1.]

SEC. **2692. Counties liable.** Each county shall be liable for all sums paid by the home in support of its children, which shall be charged to the county, and collected when and as a part of the taxes due the state, and paid by it at the same time state taxes are paid. [16 G. A., ch. 94, § 6.]

CHAPTER 7.

OF THE INSTITUTION FOR FEEBLE MINDED CHILDREN.

SECTION **2693. Trustees—officers.** The institution located at Glenwood shall be known as the institution for feeble minded children and be maintained for the training, instruction, care and support of feeble minded children, and shall be under the management and control of three trustees, who shall organize as a board by the election of a president and secretary from their own number, and shall elect a treasurer, who shall be a resident of the county in which the institution is located, and he shall serve without compensation. The treasurer shall give bond in such sum as the board shall direct, to be filed with, and the bond and the sureties thereon to be approved by, the secretary of state. It shall meet at the institution quarterly, on the first Wednesday in October, in January, in April and in July, and at such other times as any two of its members may decide upon. It shall have the general management of the affairs of the institution, and may adopt such forms of application for admission as may be needed, and shall biennially make to the governor a full report of the disbursements of the institution and its condition, financial and otherwise. [22 G. A., ch. 82, § 36; 19 G. A., ch. 40, §§ 2, 3, 5, 8. 13.]

SEC. **2694. Superintendent.** The board of trustees shall appoint a superintendent, who, subject to its direction, shall have full charge of the institution, and shall give bond in such sum as the board may require, which bond shall be approved and filed in the same manner as the bond of the treasurer. He shall make quarterly settlements, and file with the treasurer sworn and itemized statements of all financial transactions had by him, accompanied with proper vouchers therefor, and, with the approval of said board, may employ such assistants as may be necessary, and with like approval may discharge them. [19 G. A., ch. 40, §§ 4, 14.]

SEC. **2695. Admissions.** Every child and youth residing within the state, between the ages of five and twenty-one years, who by reason of deficient intellect is rendered unable to acquire an education in the common schools, is entitled to receive the physical and mental training and care of this institution at the expense of the state. The county superintendent in each county shall, on the first day of October, report to the superintendent of the institution the name, age and post-office address of every person in his county of such age who, by reason of feeble mental and physical condition, is deprived of a reasonable degree of benefit from the common schools, and state therein whether or not such person has ever attended school, and if so how long, and also give the post-office address of the parents, guardian or nearest friend of such person. [Same, § 6.]

SEC. **2696. Application.** Application for admission into the institution for such children shall be made by the father and mother, or either of them if the other be dead or adjudged insane, or by the guardian, or, if there be no guardian, by the board of supervisors or county attorney of the county in which the child or youth resides; and it shall by the duty of such board of supervisors or county attorney to make such application for any

such child or youth who has no living, sane parent or guardian in the state, unless otherwise comfortably provided for. [Same, § 7.]

SEC. **2697. Expenses.** Pupils not otherwise provided with clothing shall be supplied by the superintendent, the cost of which, if any there be, with that of the transportation of the pupil, shall stand as an account against him or his parent or guardian, and, being duly certified to by the superintendent, shall be presumed to be correct in all courts. A certified account thereof shall be transmitted to the county auditor of the county of the pupil's residence, who shall proceed to collect it in the name of the county, and pay the same to the state treasurer. At the same time the account is forwarded to the auditor, a duplicate shall be sent to the state auditor, who shall credit the institution with the amount, and at the same time charge it to the proper county. If it is made to appear by the affidavits of three disinterested persons of such county, not of kin to an inmate, his parents or guardian, that the same ought not to be collected from them or either of them because of their financial condition, then the auditor shall credit the same to the state and report that fact to the board of supervisors, which board shall direct its payment to the state out of the county fund. [Same, §10.]

SEC. **2698. Inmates returned.** Any inmate of the institution, by order of the board of trustees made at any time, may be returned to his parents or guardian. [Same, § 11.]

SEC. **2699. Idiotic children.** The term "feeble minded" as used in connection with this institution shall be so construed as to include idiotic children, and it shall provide a custodial department for the care of such as cannot be benefited by educational training. [Same, § 12.]

SEC. **2700. Support.** For the support of the institution, there is appropriated out of any money in the state treasury, not otherwise appropriated, the sum of ten dollars monthly for each inmate therein supported by the state, counting the actual time such person is an inmate and so supported. Upon the presentation to the state auditor of a sworn statement of the average number of inmates supported in the institution by the state for the preceding month, he shall draw his warrant upon the state treasurer for such sum. For the ordinary expenses of the institution, including furniture, books, school apparatus and compensation of officers, teachers and other employes, the sum of twenty-two thousand dollars, not otherwise appropriated, or so much thereof as may be necessary, is annually appropriated, which may be drawn quarterly upon the order of the trustees. [23 G. A., ch. 56; 19 G. A., ch. 40, § 9.]

SEC. **2701. Compensation.** The superintendent and assistants shall be allowed such compensation as is fixed by the board of trustees, which shall not exceed that paid in other like institutions for similar services. [19 G. A., ch. 40, § 5.]

CHAPTER 8.

OF THE INDUSTRIAL SCHOOL.

SECTION **2702. Board of trustees—officers.** The industrial school located at Eldora, with a department for girls at Mitchellville, shall be under the management and control of a board of five trustees, which shall meet quarterly on the second Wednesday in January, April, July and October, and at the April meeting it shall select from its members a president, secretary and treasurer, whose duties shall severally consist in the performance of such services as usually devolve upon like officers. [18 G. A., ch. 171, § 1; 16 G. A., ch. 38, § 1; C.'73, §§ 1643-5, 1647.]

SEC. **2703. Powers—treasurer's bond.** It shall have power to enact by-laws, rules and regulations for the government of the institution and

maintenance of strict discipline therein; to appoint a superintendent, steward, teacher or teachers, and such other officers and employes as may be needed, and may prescribe their several duties and the salaries to be paid them, and fix the amount of the bond to be given by the treasurer, which bond shall be conditioned for the faithful performance of his duties, the safe keeping of all money coming into his hands as such, and the surrender of the same to his successor in office, which bond shall be filed with and the bond and sureties thereon approved by the secretary of state. [C. '73, § 1647.]

SEC. **2704. Removal of officers—binding out boys and girls.** It shall have power to remove all officers appointed by it and appoint others in their stead. With the consent in writing of their parents or guardians, as the case may be, if they have any, it may bind out boys and girls committed to the school, to the end of their term or any less time, by written indenture as provided in law in cases of apprenticeship and under like conditions, and shall keep a care and watch over any boy or girl thus indentured, and if the obligation shall not be faithfully observed, may cancel the indenture and receive the party so bound into the school. [C. '73, § 1649.]

SEC. **2705. Visits—reports.** It shall cause each department of the school to be visited at least once in each month by one or more of its members, who shall examine the pupils in their school-room, inspect the register and accounts of the superintendent, keep a record of such visits in his books, and at least once a year, and oftener if necessary, examine the school in all of its departments, including the vouchers, documents, and everything connected with the superintendent's office and all employes under him, the discipline enforced in the school, and everything connected with the management of the school and its condition, and with the superintendent make to the governor separate biennial reports, which shall include a list of the officers and their salaries, with an estimate of the value of the personal property of the state in connection with the school. [22 G. A., ch. 82, § 31; C. '73, § 1650.]

SEC. **2706. Instruction—employment.** It shall cause the boys and girls in the school to be instructed in piety and morality, in such branches of useful knowledge as are adapted to their age and capacity, and in some regular course of labor, either mechanical, agricultural or manufactural, as is best suited to their age, strength, disposition and capacity, and promises best to secure the reformation and future well being of the pupils. Instruction shall also be given in physiology and hygiene with special reference to the effect of alcoholic drinks, stimulants and narcotics upon the human system. [21 G. A., ch. 1, § 1; C. '73, § 1648.]

SEC. **2707. Superintendent.** The superintendent, with such subordinate officers and employes as the board of trustees may appoint, shall have charge and custody of the inmates of the school. The superintendent, before entering upon his duties, shall give a bond to the state in such sum as may be fixed by the board of trustees, which bond shall be filed with, and bond and sureties thereon be approved by, the secretary of state, conditioned that he will faithfully perform all of his duties and account for all money received by virtue of his office. He shall discipline, govern, instruct, employ, and use his best endeavors to reform the pupils in his care, so that, while preserving their health, he may promote, as far as possible, moral, religious and industrious habits, regular, thorough and progressive improvement in their studies, trade and employment. He shall have charge of all the property of the institution, shall keep in suitable books complete accounts of such property, and of his receipts and expenditures, so as to show the entire income and expenses of the institution; which books, with all documents relating to the school, shall at all times be open to the inspection of the board of trustees or any member of it, and shall keep a register, containing the name, age and circumstances of the early history of each boy and girl committed to the institution, adding thereto such matters and facts

as shall come to his knowledge relating to his or her history, while at the school and after leaving it. [C.'73, §§ 1651–2.]

SEC. **2708. Commitment.** When a boy or girl over the age of seven years and under sixteen, of sound mind, shall be found guilty in any court of record of any crime excepting that of murder, the court in its discretion may, instead of entering judgment of conviction, order and direct the party to be sent to the industrial school, if a boy to the department at Eldora, if a girl, to that at Mitchellville, which order, certified by the clerk of the court and under its seal, shall be sufficient authority for his or her transfer to and confinement in said school. If such a boy or girl is convicted before any inferior court of a crime, or shall be found to be guilty of being a disorderly person, he or she may be forthwith sent by the court, accompanied with all the papers filed in his office upon the subject, in custody of an officer, to a judge of a court of record, who shall thereupon issue an order, directed to the parent or guardian of the party, or to such person as may have him or her in charge, or with whom he or she last resided, or one known to be nearly related to him or her, or if he or she be alone and friendless, then to any person the judge may appoint to act as guardian for the purposes of the case, requiring him or her to appear at a time and place stated and show cause why the party should not be committed to the industrial school, which order shall be served by an officer by delivering a copy to the party to whom it is addressed, or by leaving it with some person of full age at the residence or place of business of said party, and immediate return shall be made to the judge of the service. At the time and place mentioned in the order, or to which the hearing may be adjourned, on the appearance of the parent or guardian, or, in case of their failure to appear, then after the appointment of some suitable person as guardian for the purposes of the case, the judge shall proceed to take the voluntary examination of the boy or girl, to hear the statements of the party appearing for him or her, and such testimony in relation to the case as may be produced, and if upon such examination and hearing he shall be satisfied that the boy or girl is a fit subject for the industrial school, he may commit him or her to said school, until he or she arrives at majority, by warrant, which warrant shall state the place in which the party resided at the time of arrest, and his or her age, as near as can be ascertained, and shall command the officer to take and deliver without delay to the superintendent of said school or other person in charge thereof the said boy or girl, and the statement as to residence or age shall be conclusive thereof for the purposes of this chapter. With the warrant, the judge shall also transmit a statement of the nature of the complaint, and such other particulars concerning the accused as he may be able to ascertain. If the judge is of the opinion that the boy or girl is not a fit subject for the school, or if said boy or girl shall appeal from the decision of the court in which the conviction was had, he shall remand him or her to the custody of the officer who had him or her in charge, to be returned to the magistrate before whom the conviction was had, to be dealt with according to law. [16 G. A., ch. 38, §§ 2–4; C.'73, §§ 1653–8.]

The same fee should be allowed for conveying a prisoner to the reform school as for conveying a convict to the penitentiary (see § 511): *Bringolf v. Polk County*, 41–554, 559.

SEC. **2709. Complaint by parent or guardian.** If any parent or guardian shall make complaint to a judge of a court of record that any boy or girl, the child or ward of such parent or guardian, is habitually vagrant, disorderly or incorrigible, said judge shall issue a warrant to the sheriff or a constable to cause said boy or girl to be brought before him at such time and place as he may appoint, when and where he shall examine the parties, and if in his judgment the boy or girl is a fit subject for the industrial school, he may issue an order, with the consent of said parent or guardian indorsed thereon, to executed by the sheriff or a constable, committing said boy or girl to the custody of the superintendent of said school for reformation and instruction until he or she attains the age of majority; but secu-

rity for the payment of the expenses of said complaint, commitment and transportation to the school, and the expenses of board thereat, may, in the discretion of the judge, be required of said parent or guardian before such order is executed. [19 G. A., ch. 150; C.'73, § 1659.]

SEC. **2710. Return to county.** If any person convicted of a crime and committed to the industrial school shall prove unruly or incorrigible, or if his or her presence shall be manifestly and constantly dangerous or detrimental to the welfare of the school, the trustees may order his or her removal to the county from which he or she came, and deliver to the jailor of such county, where proceedings shall be resumed as if no committal had been made to the industrial school. [C.'73, § 1662.]

SEC. **2711. Discharge—parole.** No one shall be committed to the industrial school for a longer term than until he or she attains the age of majority, and the board of trustees may at any time after one year's service order the discharge or parole of any inmate as a reward for good conduct. If paroled upon satisfactory evidence of reformation, the order may remain in effect or terminate under such rules and regulations as the board may prescribe. The binding out or the discharge of an inmate as reformed, or having arrived at the age of majority, shall be a complete release from all penalties incurred by the conviction for the offense upon which he or she was committed to the school. [25 G. A., ch. 106; 19 G. A., ch. 150; C.'73, §§ 1660–1.]

SEC. **2712. Assisting to escape.** Whoever unlawfully aids or assists any inmate lawfully committed to the industrial school in escaping or attempting to escape therefrom, or knowingly conceals such inmate after escape, shall be punished by a fine not exceeding one thousand dollars, or imprisonment in the penitentiary not exceeding five years. [C.'73, § 1663.]

SEC. **2713. Support.** For the support of the industrial school there is appropriated out of any money in the state treasury not otherwise appropriated, or so much thereof as may be necessary, ten dollars monthly for each boy, and eleven dollars monthly for each girl, actually supported in said school, counting the average number therein for each month; each monthly statement to be verified by the superintendent and presented to the state auditor, who shall draw his warrant upon the state treasurer for the same, such warrant to be payable to the treasurer of the board of trustees, and for the amount shown to be due by such sworn statement. [23 G. A., ch. 54; 19 G. A., ch. 92, § 1; 17 G. A.. ch. 97, § 1; 15 G. A., ch. 21, § 1.]

CHAPTER 9.

OF THE COLLEGE FOR THE BLIND.

SECTION **2714. Board of trustees—officers—government.** The college for the blind at Vinton shall be under the management and control of a board of five trustees. It shall meet annually on the second Wednesday in June, and organize by the election from its members of a president. They shall also elect a treasurer, who shall be a resident of Benton county, but not a member of the board, and who shall receive no compensation. The treasurer shall give bond in the sum of thirty thousand dollars, which shall be filed with, and bond and sureties thereupon approved by, the secretary of state, which bond shall be conditioned for the faithful performance of his duties and the proper disbursement and accounting for all money or property coming into his hands by virtue of his office. The board may adopt all proper and necessary rules for the government of the institution, provide teachers and other necessary employes, and fix their compensation, which in no event shall be in excess of the appropriation made to it. One of the teachers shall be principal, and the assistants nominated to the board

by this principal, and they shall be responsible to him for the faithful performance of their duty, and he to the board for himself. It shall appoint a steward and fix his compensation, who, under their direction, shall purchase all the supplies for the institution, and it may remove any appointee for cause, such removal to be first approved by the governor. [C.'73, §§ 1664, 1666, 1669–71, 1673; R., §§ 2145, 2150, 2154.]

SEC. **2715. Admission.** All blind persons, residents of the state, of suitable age and capacity, shall be entitled to an education in this institution at the expense of the state, and nonresidents may also be entitled to the benefits thereof, if they can be accommodated therein, upon paying to the treasurer fifty-four dollars quarterly in advance. [17 G. A., ch. 72, § 1; C.'73, §§ 1672, 1680; R., §§ 2147–8.]

SEC. **2716. Expenses.** When pupils are not supplied with clothing, they shall be furnished therewith by the principal, who shall make out an account therefor against the parent or guardian, if the pupil be a minor, and against him or her, if he or she has no parent or guardian, or has attained the age of majority, which shall be certified to be correct by him, and, thus certified, shall be presumptive evidence of its correctness in any of the courts, and he shall forthwith send such account to the auditor of the proper county, who may proceed to collect the same by action, if necessary, in the name of the college, and, when collected, pay the same into the state treasury. He shall also at the same time forward a duplicate of the account to the state auditor, who shall credit the amount thereof to the college, charging the proper county therewith, and it shall be paid out of the county fund. [C.'73, § 1678.]

SEC. **2717. Report.** On or before the fifteenth day of August in each odd-numbered year, the principal of the college shall report to the governor the number of pupils in attendance, the name, age, sex, residence, place of nativity and cause of blindness, with the studies pursued, trades taught, and a complete statement of the expenditures made, and the number, kind and value of articles manufactured and sold. [22 G. A., ch. 82, § 32; C.'73, § 1677.]

SEC. **2718. Appropriation—support.** For the support of the college, and to meet the ordinary expenses thereof, including furniture, books, maps, compensation of the principal, teachers and other employes, and to provide for contingencies, there is appropriated out of any money in the state treasury not otherwise appropriated ten thousand dollars annually, or so much thereof as may be needed; and to meet the current expenses there is in like manner appropriated so much as is necessary, not to exceed forty dollars quarterly for each resident pupil, the appropriation to be drawn quarterly upon the warrant of the state auditor, and only as required to meet the wants of the institution; all sums for clothing furnished pupils to be drawn in like manner upon the order of the board of trustees, and all warrants to be issued in the name of the college. [19 G. A., ch. 166; 18 G. A., ch. 165; 17 G. A., ch. 72, § 2; C.'73, §§ 1675–6, 1679.]

CHAPTER 10.

OF THE INDUSTRIAL HOME FOR THE BLIND.

SECTION **2719. Objects.** The industrial home for the blind, located at Knoxville, shall be maintained for the instruction of the adult blind of the state in some suitable trade or vocation, and furnish a working home for such blind as have learned a trade or vocation and desire to remain or be employed therein; and it shall be open to every such blind person who has a legal residence in the state and is physically and mentally able to per

form such labor as may be required in the trades or vocations carried on therein; and every indigent adult blind person of the state having such residence may be admitted, each inmate being subject to such reasonable rules and restrictions as may be adopted by the board of trustees for the government of the same. [24 G. A., ch. 51, §§ 1-3.]

SEC. **2720. Trustees—officers.** The home shall be under the management and control of three trustees, one of whom may be a woman. They shall meet annually on the first Monday of May, and organize by the election of a president, secretary and treasurer. The treasurer shall be a resident of the county in which the industrial home is situated, and shall serve without compensation, and shall give a bond in such sum as may be fixed by the board, conditioned for the faithful accounting for all money coming into his hands by virtue of his office, which bond shall be filed with, and bond and sureties thereon approved by, the secretary of state. [Same, §§ 4, 8.]

SEC. **2721. Government.** The board of trustees shall adopt for the government of the home and its inmates and their own government such by-laws, rules and regulations, not inconsistent with law, as may be deemed expedient, elect a superintendent and matron, fill all vacancies therein, fix their salaries and prescribe their duties, act as an auditing board, employ or direct the employment of such help as may be needed, fix their compensation as well as that to be allowed the inmates for labor that may be performed by them, determine the amount such inmates shall pay for their board and maintenance, direct or order the purchase of supplies for the home or material for use in the manufactures carried on therein, provide for the marketing of all products of the labor of the inmates, prescribe the terms and conditions of admission into the home and discharge therefrom, and direct the expenditure of all appropriations made for it by the general assembly and the proceeds from the sale of articles manufactured therein. [Same, § 6.]

SEC. **2722. Secretary—report.** The secretary of the board shall keep a full and complete record of its proceedings, including receipts and expenditures, and biennially make report thereof to the governor. [Same, § 9.]

CHAPTER 11.

OF SCHOOL FOR THE DEAF.

SECTION **2723. Trustees—officers.** The school for the deaf at Council Bluffs shall be under the management and control of three trustees. They shall meet annually on the first Wednesday in May, and organize by the selection of one of their number as president and one as secretary. They shall also elect a treasurer, who shall be a resident of Pottawattamie county, but not a member of the board, who shall act without compensation. The treasurer shall give a bond with good and sufficient sureties in such a sum as the board shall direct, conditioned that he will faithfully keep and pay over all money belonging to the institution as directed by the board, and properly account for all money coming into his hands by virtue of his office, which bond shall be filed with, and bond and sureties thereon approved by, the secretary of state. Meetings of the board may be held at such other times as may be necessary, and the transaction of all business, with the proceedings of each meeting, shall be recorded in a minute book, signed by each trustee present, and preserved with all papers and documents belonging to the institution. It shall appoint a superintendent, employ teachers and servants to do any other act or thing necessary and proper to be done to carry into effect the objects of the institution, fix the salary to be paid

the superintendent and other employes, which salary may include residence in the institution, and board from the funds or supplies of the institution, —no such allowance, however, to be made, save by express contract in advance,—and may utilize the labor of any inmate on the farm, in the workshops, in the erection of buildings belonging to the institution, or domestic service thereof, so far as practicable, without interference with their proper education. [24 G. A., ch. 65; 17 G. A., ch. 136, §§ 1, 2, 4, 5; C. '73, §§ 1685–7, 1690; R., §§ 2157–9, 2162.]

The trustees are not liable in damages at the suit of a teacher or superintendent whom they have employed, for wrongfully, unjustly and illegally refusing to allow him to enter upon his employment: *Chamberlain v. Clayton*, 56–331.

SEC. **2724. Admission.** Every resident of the state, of school age and suitable capacity, who is deaf and dumb, or so deaf as to be unable to acquire an education in the common schools, shall be entitled to receive an education in the institution at the expense of the state, and nonresidents similarly situated may be entitled to an education therein, upon the payment of forty dollars quarterly, in advance. Each superintendent of common schools, on or before the first day of November, shall report to the superintendent of the institution the name, age and post-office address of each deaf and dumb person, or person so deaf as to be unable to acquire an education in the common schools, between the ages of five and twenty-one years and residing in his county. [C. '73, §§ 1688–9; R., §§ 2156, 2160.]

SEC. **2725. Report.** The superintendent of the institution shall biennially report to the governor the number of pupils in attendance, their names, age, sex, residence, place of nativity and cause of deafness, if known, the studies pursued, trades taught, with a full detailed statement of all money received, expenditures made, the salaries paid to each officer and teacher, and the kind, number and value of articles manufactured and sold. [22 G. A., ch. 82, § 32; C. '73, § 1694.]

SEC. **2726. Expenses—charge to county.** When pupils are not supplied with clothing or transportation, it shall be furnished by the superintendent, and a bill of the cost presented the parent or guardian, if the pupil is a minor, and to the pupil, if he or she has attained the age of majority or has no parent or guardian, which bill shall be certified by him to be correct, and shall be presumptive evidence thereof in all courts. He shall transmit a duplicate copy thereof by mail to the auditor of the county of the pupil's residence, who may proceed to collect the same by action, if necessary, in the name of the county, and pay the same, when collected, to the state treasurer. At the same time the superintendent shall also transmit by the same method a duplicate thereof to the state auditor, who shall credit it to the account of the institution and charge the proper county with it. [23 G. A., ch. 55, § 1; C. '73, § 1695.]

SEC. **2727. Support.** For the purpose of meeting the current and ordinary expenses of the institution, including furniture, books, school apparatus and compensation of employes, except officers and teachers, there is hereby appropriated the sum of thirty-five dollars per quarter for each pupil in said institution, based upon the average number of pupils in attendance during each quarter. But where the quarter occurs in vacation, then upon the average number of pupils in attendance during the last preceding quarter. There is hereby further appropriated the sum of twenty-one thousand dollars, or so much thereof as may be necessary, for the payment of salaries of officers and teachers in said institution, the same to be drawn quarterly at the end of each quarter. The above mentioned appropriations, including the accounts for clothing and transportation, shall be drawn quarterly on the requisition of the trustees of the institution in the usual manner, and in such amounts only as the wants of the institution may require. [23 G. A., ch. 55, § 2; 20 G. A., ch. 73; 19 G. A., ch. 105; 18 G. A., ch. 203; 17 G. A., ch. 98; C. '73, § 1696.]

CHAPTER 12.

OF COUNTY HIGH SCHOOLS.

SECTION **2728. How established.** Any county may establish a high school in the following manner: When the board of supervisors shall be presented with a petition signed by one-third of the electors of the county as shown by the returns of the last preceding election, requesting the establishment of a county high school at a place in the county named therein, it shall submit the question at the next general election to be held in the county, or at a special one called for that purpose, first giving twenty days' notice thereof in one or more newspapers published in the county, if any be published therein, and by posting such notice, written or printed, in each township of the county, at which election the vote shall be by ballot, for or against establishing the high school, the vote to be canvassed in the same manner as that for county officers. Should a majority of all the votes cast upon the question be in favor of establishing such school, the board of supervisors shall at once appoint six trustees, residents of the county, not more than two from the same township, who, with the county superintendent of common schools as president, shall constitute a board of trustees for said high school. [C. '73, §§ 1697-9, 1701.]

High schools are deemed a part of the common school system of the state, though they are not to derive any support or assistance from the school fund: *High School v. Clayton County*, 9-175.

SEC. **2729. Trustees—officers.** The trustees, within ten days after appointment, shall qualify by taking the oath of civil officers, and giving bond in such sum as the board of supervisors may require, with sureties to be approved by it, and shall hold office until their successors are elected and qualified, who shall be elected at the general election following. The trustees, then elected, shall be divided into three classes of two each, and hold their office one, two and three years, respectively, their several terms to be decided by lot, and thereafter two trustees shall be annually elected, the trustees so elected to qualify in the same manner and at the same time as other county officers and all vacancies occurring to be filled by appointment by the board of supervisors, the appointee to hold the office until the next general election, and a majority of which trustees shall constitute a quorum for the transaction of business. At the first meeting held in each year, the board shall appoint a secretary and treasurer from their own number, who shall perform the usual duties devolving upon like officers. The treasurer, in addition to his bond as trustee, shall give one as treasurer, in such sum and with such sureties as may be fixed by the board, and receive all moneys from all sources belonging to the funds of the school, and pay them out as directed by the board of trustees, upon orders drawn by the president and countersigned by the secretary; both of which officers shall keep an accurate account of all moneys received and paid out, and at the close of each year, and whenever required by the board, shall make a full itemized and detailed report. [C. '73, §§ 1699, 1700, 1704, 1711.]

SEC. **2730. Site—tax.** As soon as convenient after the organization of the board, it shall proceed to select the best site that can be obtained without expense to the county, at the place named in the petition upon which the vote was taken, for the erection of the necessary school buildings, the title to be taken in the name of the county, and shall also make an estimate of the amount of funds needed for building purposes, the payment of teachers' wages and contingent expenses, which shall be presented to the board of supervisors, with a certified estimate of the rate of tax required, which in no case shall exceed in any one year five mills on the dollar upon the taxable property of the county, and shall not exceed two mills on the dollar when the tax is levied for the payment of teachers' wages and con-

tingent expenses only; the tax to be levied and collected in the same manner as other county taxes, and paid over by the county treasurer in the same manner as school funds are paid to district treasurers. [C.'73, §§ 1702–3, 1705.]

SEC. **2731. Buildings—management.** As soon as it has procured a building site and the board of supervisors has levied a tax for the purpose, it shall make such purchases of building material, and such contracts for the erection of school and appurtenant buildings as may be necessary to effectuate the purposes of this chapter, but shall make no purchases, nor enter into any contracts in any year, in excess of the funds on hand and to be raised by the levy of that year. It shall employ, when suitable buildings have been furnished, a competent principal teacher to take charge of the school, and such assistant teachers as may be necessary, and fix the salaries to be paid them, and in the conduct of the school may employ advanced students to assist in the work. Annual reports shall be made by the secretary to the board of supervisors, which report shall give the number of students, with the sex of each, who have been in attendance during the year, the branches taught, the text-books used, number of teachers employed, salary paid to each, amount expended for library, apparatus, buildings, and all other expenses, the amount of funds on hand, debts contracted, and such other information as may be deemed important, and this report shall be printed in at least one newspaper in the county, if any is published therein, and a copy forwarded to the superintendent of public instruction. And for their services the trustees shall each receive the sum of two dollars per day for the time actually employed in the discharge of official duties, claims for services to be presented, audited, and paid out of the county treasury, in the same manner as other accounts against the county. [C.'73, §§ 1705–6, 1710, 1712.]

SEC. **2732. Regulations.** The principal of any such high school, with the approval of the board of trustees, shall make such rules and regulations as is deemed proper in regard to the studies, conduct and government of the pupils; and any pupil who will not conform to and obey such rules may be suspended or expelled therefrom by the board of trustees. [C.'73, § 1709.]

SEC. **2733. Admission.** Subject to such rules and regulations as may be adopted by the board of trustees in regard to age and grade of attainments necessary to entitle pupils to admission in the school, it shall be open to all persons in the county without charge for tuition. If at any time there shall be more applicants for admission than may be accommodated, then each district in the county shall be entitled to representation proportioned to the number of pupils which such district may have, as shown by the last report to the county superintendent, and in all such cases the school boards of the respective districts shall designate the pupils that may attend. If the school shall not be filled by pupils from the county, others may be received, upon the payment of such sum by way of tuition as may be fixed by the board of trustees, but pupils so received shall not be allowed to continue in the school to the exclusion of any resident of the county in which the school is situated. [C.'73, §§ 1707–8.]

CHAPTER 13.

OF THE COUNTY SUPERINTENDENT.

SECTION **2734. Qualifications—deputy.** The county superintendent, who may be of either sex, shall be the holder of a first-class or state certificate or diploma and, shall during his term be ineligible to the office of school director or member of the board of supervisors. If for any cause he is

unable to attend to his official duties, he may appoint a deputy, who may act in his stead, except in visiting schools and trying appeals. [16 G. A., ch. 136, § 2; C. '73, §§ 1765, 1770; R., § 2069.]

There is nothing in the constitution prohibiting women from holding such offices and, *held*, that the legislature had power to make good, retroactively, the election of a woman although such election, when had, was unauthorized: *Huff v. Cook*, 44–639.

As to eligibility of women, see also *Brown v. McCollum*, 76–479.

SEC. 2735. Duties—examinations. He shall at all times comply with the directions of the superintendent of public instruction in all matters within that officer's jurisdiction, and serve as the organ of communication between him and school township, district or independent district authorities, and transmit to them or the teachers thereof all blanks, circulars or other communications designed for them. He may, at his discretion, visit the different schools in his county, and shall, upon the request of a majority of the directors of any school township, district or independent district, visit any school therein, at least once during its term. On the last Friday and Saturday in each month, he shall meet and, with such assistants as he may select, examine all applicants for a teacher's certificate, and transact such other business as may come before him. Such examination shall be held at the county seat in a suitable room, which shall be provided for that purpose by the board of supervisors. Special examinations may be held elsewhere in the county at the discretion of the county superintendent. Any school officer or other person may be present at any examination. [19 G. A., ch. 161, § 2; 17 G. A., ch. 143; C. '73, §§ 1766, 1768, 1774; R., §§ 2066, 2068, 2073; C. '51, § 1148.]

There is no authority for the superintendent charging the county for examining teachers on any other days than those here specified: *Farrell v. Webster County*, 42–248.

SEC. 2736. Subject. The examination shall include competency in and ability to teach orthography, reading, writing, arithmetic, geography, grammar, history of the United States, and physiology and hygiene, which latter, in each division of the subject, shall include special reference to effects of alcohol, stimulants and narcotics upon the human system. Candidates for examination in special studies need be examined in such branches only; but no special teacher shall be employed to teach any study not included in the certificate. A record shall be kept of all examinations made, and the names, ages and residence of the applicants, with the date and result thereof. [21 G. A., ch. 1, §§ 1, 3; 17 G. A., ch. 143; C. '73, §§ 1766, 1768; R., §§ 2066, 2068; C. '51, § 1148.]

SEC. 2737. Certificate—revocation. If the examination is satisfactory, and the applicant is of good moral character, of which fact the superintendent shall require proof unless he has a personal knowledge thereof, and is in all other respects possessed of the necessary qualifications as an instructor, a certificate to that effect shall issue for a term not to exceed one year. But to applicants passing an examination in the following additional branches: didactics, elementary civics, elementary algebra, elements of physics, and elementary economics, a certificate shall issue for a term of two years, upon proof of thirty-six weeks' successful experience in teaching. A certificate must be revoked at any time, for any cause which would have justified a refusal to grant the same, after an investigation of the facts, of which the teacher shall have personal notice and an opportunity to be present and make defense. The superintendent shall revoke the certificate of any teacher who shall fail or neglect to comply with the provisions of law relating to the teaching of physiology and hygiene, and such teacher shall be disqualified for teaching in any public school for one year thereafter. [26 G. A., ch. 39; 21 G. A., ch. 1, § 3; C. '73, §§ 1767, 1771; R., §§ 2067, 2070.]

It is discretionary with the superintendent to grant a certificate, and he cannot be compelled to do so by *mandamus: Bailey v. Ewart*, 52–111.

The superintendent cannot, by injunction, restrain a teacher whose certificate he has revoked, from teaching school, nor the officers from paying for such services; but it seems a resident of the district might do so: *Perkins v. Wolf*, 17–228.

SEC. **2738. Normal institute.** The county superintendent shall hold, annually, a normal institute for the instruction of teachers and those who may desire to teach, and, with the concurrence of the superintendent of public instruction, procure such assistance as may be necessary to conduct the same, at such time as the schools in the county are generally closed. To defray the expenses of said institute, he shall require the payment of a registration fee of one dollar from each person attending the normal institutes, and the payment in all cases of one dollar from every applicant for a certificate: *provided* that, if the applicant is granted a two-years' certificate, he shall pay one dollar additional. He shall monthly, and at the close of each institute, transmit to the county treasurer all moneys so received, including the state appropriation for institutes, to be designated the "institute fund," together with a report of the name of each person so contributing, and the amount. The board of supervisors may appropriate out of the general fund such additional sum as it may find necessary for the further support of such institute. All disbursements of the institute fund shall be upon the order of the county superintendent, and no order shall be drawn except for bills presented to and approved by him for services rendered or expenses incurred in connection with the institute. [17 G. A., ch. 54; 15 G. A., ch. 57; C.'73, § 1769.]

SEC. **2739. Reports.** The county superintendent shall annually, on the first Tuesday in October, make a report to the superintendent of public instruction, giving a full abstract of the several reports made to him by the secretaries and treasurers of school boards, stating the manner in and extent to which the requirements of the law regarding instruction in physiology and hygiene are observed, and such other matters as he may be directed by the state superintendent to include therein, or he may think important in showing the actual condition of the schools in his county. At the same time, he shall file with the county auditor a statement of the number of persons of school age in each school township and independent district in the county. He shall also report, as provided by law, to the superintendent of the college for the blind, the name, age, residence and post-office address of every person, resident of the county, so blind as to be unable to acquire an education in the common schools; to the superintendent of the institution for the deaf and dumb, with the same detail, all persons of school age whose faculties in respect to hearing or speaking are so deficient as to prevent them from acquiring an education in such schools; and to the institution for the feeble minded, all persons of like age who, because of mental defects, are entitled to admission therein. [21 G. A., ch. 1, § 2; C.'73, §§ 1771, 1772; R., § 2070.]

SEC. **2740. Enforcing laws.** The county superintendent shall see that all provisions of the school law, so far as it relates to the schools or school officers within his county, are observed and enforced, specially those relating to the fencing of school-house grounds with barb wire, and the introduction and teaching of such divisions of physiology and hygiene as relate to the effects of alcohol, stimulants and narcotics upon the human system, and to this end he may require the assistance of the county attorney, who shall at his request bring any action necessary to enforce the law or recover penalties incurred. [21 G. A., ch. 1, § 2; 20 G. A., ch. 103, § 2.]

SEC. **2741. Penalty.** Should he fail to make the report herein required of him to the superintendent of public instruction or the county auditor, he shall forfeit to the school fund of his county the sum of fifty dollars, to be recovered in an action brought by the county for the use of the school fund, and in addition shall be liable for all damages occasioned thereby. [C.'73, § 1773; R., § 2072.]

SEC. **2742. Compensation.** He shall receive four dollars per day for the time actually engaged in the performance of his duties, the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims

therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor; and the board of supervisors may allow him such further sum by way of compensation as may be just and proper. [19 G. A., ch. 161, § 1; C. '73, § 1776; R., § 2074.]

The sworn statement of the superintendent is not conclusive upon the board, and it cannot be compelled by *mandamus* to allow the amount so shown to be due: *Bean v. Board of Supervisors*, 51–53.

CHAPTER 14.

OF THE SYSTEM OF COMMON SCHOOLS.

SECTION **2743. School districts—corporate powers.** Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained. [C. '73, §§ 1713, 1716; R., §§ 2022, 2026; C. '51, § 1108.]

It is contemplated that school districts shall coincide in boundary with civil townships. The only exception is found in the provisions (§ 2791) for the case where, by reason of streams or other natural obstacles, a portion of the inhabitants of a township cannot with reasonable facility enjoy the advantages of any school in their township; but no such restriction exists upon the formation of independent districts: *District T'p v. Independent Dist.*, 41–30.

The adoption of this provision in the Code of '73 did not have the effect to divide all subdistricts already formed from territory belonging to two or more townships. Where a portion of territory of one township had been attached to another for school purposes, this section did not work its restoration, but it remained in its former connections until restored by the provisions now embodied in § 2792: *Hancock v. District T'p*, 78–550.

A school district already created out of territory in different townships was not dissolved by the adoption of the Code of '73 by the provisions of which, it would not have been competent to thus unite such territory: *Russell v. District T'p*, 66 N. W., 771.

Where land had for thirty years been taxed as included within a school district and treated as a part of it, *held*, that school taxes might properly be collected from the owner of such property: *Independent Dist. v. Taylor*, 69 N. W., 1009.

A school district is a body corporate with power to acquire and hold real estate for school-house sites. (See § 2814): *Independent Dist. v. Fagen*, 63 N. W., 456.

A school district is a body corporate with the power to hold property and be a party to suits and contracts: *Baker v. Chambles*, 4 G. Gr., 428.

A district township is a political corporation within the meaning of Const., art. XI, § 3, fixing the limit of indebtedness of political and municipal corporations: *Winspear v. District T'p*, 37–542.

The school district, being a public corporation or *quasi*-corporation, is not liable for personal injuries sustained on account of the negligent construction of its school-houses, or negligence in keeping them in repair: *Lane v. District T'p*, 58–462.

Whether a district township can be made liable for unlawful acts of officers in converting the property of others, *quære;* but where such officer allowed lumber, levied on under attachment but subsequently released, to be used in a school building, *held*, that the district township was not liable for its conversion: *Charnock v. District T'p*, 51–70.

A school-house, being public property, is not subject to execution and is therefore not subject to a mechanic's lien: *Ibid.*

The property of school districts in cities and towns is not exempt from special taxation, for improvement of streets, laying of sidewalks, etc.: *Sioux City v. Independent School Dist.*, 55–150.

SEC. **2744. Names.** District townships now existing shall hereafter be called school townships, subdivisions of which shall be called subdistricts. School corporations shall be designated as follows: The school township of (naming civil township), in the county of (naming county), state of Iowa; or, the independent school district of (naming city or incorporated town, and if there are two or more districts therein, including some appropriate name or number), in the county of (naming county), state of Iowa; or, the rural independent school district of (some appropriate name or number), township of (naming township), in the county of (naming county), state of Iowa. [C. '73, § 1716; R., § 2026; C. '51, § 1108.]

SEC. **2745. Directors.** The affairs of each school corporation shall be conducted by a board of directors, the members of which in all independent school districts shall be chosen for a term of three years, and in all subdistricts of school townships for a term of one year. [26 G. A., ch. 40; 18 G. A., ch. 143; 17 G. A., ch. 113; 15 G. A., ch. 27; C.'73, § 1802; R., §§ 2099, 2100, 2106.]

SEC. **2746. Annual meeting of corporation.** A meeting of the voters of each school corporation shall be held annually on the second Monday in March for the transaction of the business thereof. Notice in writing of the place, day, and hours during which the meeting will be in session, specifying the number of directors to be elected, and the terms thereof, and such propositions as will be submitted to and be determined by the voters, shall be posted by the secretary of the board in at least five public places in said corporation, for not less than ten days next preceding the day of the meeting. The president and secretary of the board, with one of the directors, shall act as judges of the election. If any judge of election is absent at the organization of the meeting, the voters present shall appoint one of their number to act in his stead. The judges of election shall issue certificates to the directors elected. [19 G. A., ch. 51; 18 G. A., ch. 7, § 1; 18 G. A., ch. 63; C.'73, §§ 1717, 1719; R., §§ 2027–8, 2031, 2033; C.'51, §§ 1111, 1114–15.]

SEC. **2747. Electors.** To have the right to vote at a school meeting a person must have the same qualifications as for voting at a general election, and must be at the time an actual resident of the corporation or subdistrict. In any election hereafter held in any school corporation for the purpose of issuing bonds for school purposes or for increasing the tax levy, the right of any citizen to vote shall not be denied or abridged on account of sex, and women may vote at such elections the same as men, under the same restrictions and qualifications, so far as applicable. [25 G. A., ch. 39.]

SEC. **2748. Officers—qualifications.** A school officer or member of the board may be of either sex, and must at the time of election or appointment be a citizen and a resident of the corporation or subdistrict, and over twenty-one years of age, and, if a man, he must be a qualified voter of the corporation or subdistrict. [16 G. A., ch. 136.]

As to eligibility of women, see notes to § 2734.

SEC. **2749. Powers.** The voters assembled at the annual meeeting shall have power:

1. To direct a change of text-books regularly adopted;
2. To direct the sale or make other disposition of any school-house or site or other property belonging to the corporation, and the application to be made of the proceeds of such sale;
3. To determine upon added branches that shall be taught, but instruction in all branches except foreign languages shall be in English;
4. To instruct the board that school buildings may or may not be used for meetings of public interest;
5. To direct the transfer of any surplus in the school-house fund to the teachers' or contingent fund;
6. To authorize the board to obtain, at the expense of the corporation, roads for proper access to its school-houses;
7. To vote a school-house tax, not exceeding ten mills on the dollar in any one year, for the purchase of grounds, construction of school-houses, the payment of debts contracted for the erection of school-houses, not including interest on bonds, procuring libraries for and opening roads to school-houses.

The board may, or, upon the written request of five voters of any rural independent district, or of ten voters of any school township, or of twenty-five voters of any city or town independent district having a population of five thousand or less, or of fifty voters of any other city or town independent district, shall, provide in the notice for the annual meeting for submitting

any proposition authorized by law to the voters. All propositions shall be voted upon by ballot in substantially the following form: "Shall a change of text-books be directed?" (or other question as the case may be); and the voter shall designate his vote by writing the word "yes" or "no" in an appropriate place on the ballot. [21 G. A., ch. 131, § 1; 19 G. A., ch. 51; 18 G. A., ch. 63; C.'73, §§ 1717, 1807; R., §§ 2027-8, 2033; C.'51, §§ 1114, 1115.]

It is not necessarily improper for the electors to vote a tax for the erection of a school-house where one school-house already exists in the district. It may be that the school-house existing is unfit for further use or unfit for the purpose: *Casey v. Independent Dist.*, 64-659.

The electors of a district township have no power under this section, or otherwise, to authorize the discharge of a debtor of the district without consideration: *District T'p v. Thomas*, 59-50.

The electors may provide that music shall be taught in the schools of the district: *Bellmeyer v. Independent Dist.*, 44-564.

Under the power to direct the sale or other disposition of the school-house, etc., as given in § 1717 of Code of '73, *held*, that the electors might authorize the use of such house for purposes of religious worship, Sabbath-schools, etc.: *Davis v. Boget*, 50-11; *Townsend v. Hagan*, 35-194.

A contract to repair a school-house may be made by the board without a previous vote of the electors (§ 2779): *Williams v. Peinny*, 25-436.

The taxes for contingent and teachers' funds are to be estimated and certified by the board of directors under § 2806, and a vote of such tax by the electors, under this section, is not valid: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41-153.

Where the electors made an appropriation and voted a tax for the erection of a school-house, and such tax had been collected, and action commenced to compel the erection of the house by the board of directors, *held*, that the electors could not, at a subsequent annual meeting, rescind their previous action, the right of the parties interested in the erection of the school-house having become vested: *Benjamin v. District T'p*, 50-648.

In such action, *held*, that the directors might be compelled, by *mandamus*, to carry out the vote of the electors by the erection of a school-house, and that appeal to the county superintendent was not such speedy and adequate remedy as to deprive the plaintiff of his right to an action by *mandamus*: *Ibid.*

The board of directors may incur indebtedness, etc., in carrying out the vote of the township: See note to § 2778.

Where a board of school directors exceeded the authority conferred upon them by the electors, by entering into a contract different from the one authorized, which subsequently was the occasion of a controversy between the district and the other parties to the contract, *held*, that the action of the board of directors might be ratified by the district, and the action of the electors authorizing the settlement of the controversy was a ratification: *Everts v. District T'p*, 77-37.

While the power to fix and relocate school-house sites is vested in the board, the district meeting may make disposition of an old school-house other than by its removal to a new site: *Peters v. Warner*, 81-335.

Where a tax was voted for the erection of a new school-house at the center of the district, the old school-house, situated some distance from the center, being not entirely unfit for use but unsuitable for removal, *held*, that the tax was not illegal: *Seaman v. Baughman*, 82-216.

Held, also, that it was no objection to the tax that the new site had not been secured when it was voted: *Ibid.*

Under prior provisions as to independent districts, *held*, that the vote of the school-house tax must be by ballot: *Ibid.*

After the electors have conferred upon the board of directors authority to expend money in the procuring of a highway, the board still have a discretion in the matter: *Bogaard v. Independent Dist.*, 61 N.W., 859.

The right to procure a highway is not limited to cases where there is no highway reaching the school grounds, nor to cases where property owners refuse to allow access to such grounds across their premises, and *held*, that the expenditure of money in procuring a highway crossing the highway on which the school-house was situated at some distance from the school-house, was proper: *Ibid.*

The provisions as to securing, at the expense of the district, highways for proper access to the school-house, were under § 1806 of Code of '73, applicable to independent districts: *McShane v. Independent Dist.*, 76-333; *Independent Dist. v. Kelley*, 55-568.

The correctness of the record of a meeting of the electors of a school district cannot be questioned in a collateral action: *Everts v. District T'p*, 77-37.

The limitation of taxation to ten mills does not limit the amount which may be voted to pay interest upon a bonded debt created for school-house purposes by vote of the electors; and where the electors have failed to vote a sufficient tax to pay interest on the outstanding bonds, it is lawful for the supervisors to levy such tax: *Richards v. Supervisors*, 69-612.

Where a levy of a three per cent. tax was made, it was held valid to the extent of one per cent. and void as to the excess: *McPherson v. Foster*, 43-48, 73.

SEC. 2750. Special meeting. The board of directors may call a special meeting of the voters of any school corporation by giving notice in the same manner as for the annual meeting, whenever the corporation has lost the use

of a school-house by fire or otherwise, which shall have the powers given to a regular meeting with reference to the sale of school property and the application to be made of the proceeds, and to vote a school-house tax for the purchase of a site and the construction of a necessary school-house, and for obtaining roads thereto. [24 G. A., ch. 21; 18 G. A., ch. 84.]

SEC. **2751. Subdistrict meeting.** The meeting of the voters of each subdistrict of a school township shall be held annually on the first Monday in March, and shall not organize earlier than nine o'clock a. m., nor adjourn before twelve o'clock m. Notice in writing of the time and place of such meeting and the amount of school-house tax to be voted shall be given by its director, or if there is none by the school township secretary, by posting in three public places in the subdistrict for five days next preceding the same. The voters shall select a chairman and secretary of the meeting who shall act as judges of election, and shall also elect a director for the subdistrict by ballot. The vote shall be canvassed by the judges of election, and the person receiving the highest vote shall be declared elected. [22 G. A., ch. 51; 18 G. A., ch. 7, § 1; C. '73, §§ 1718–19, 1789; R., §§ 2030–1; C. '51, § 1111.]

The proceedings here contemplated are a meeting, and also an election; and where the polls were kept open only forty minutes, and after the meeting had formally adjourned, and while the officers and electors were still present, electors who applied to vote were refused permission to do so, *held*, that the election was invalid: *State ex rel. v. Wollem*, 37–131.

So where, at such an election, the polls were only kept open for thirty minutes, and soon after they were closed voters appeared and offered their votes, the other electors being still present, *held*, that it was error to refuse such votes, although the meeting had by formal motion adjourned: *State ex rel. v. Woolem*, 39–380.

See also notes to § 2754.

SEC. **2752. Number of directors.** The board of directors of a school township shall be composed of one director from each subdistrict. But when there are only two subdistricts a third director shall be elected at large by all the voters of the school township. When the school township is not divided into subdistricts, a board of three directors shall be elected at large, on the second Monday in March, by all the voters of the school township. [15 G. A., ch. 27; C. '73, §§ 1720–1; R., §§ 2031, 2035, 2075–6; C. '51, §§ 1112, 1721.]

SEC. **2753. Special school-house tax.** At the annual subdistrict meeting, or at a special meeting called for that purpose, the voters may vote to raise a greater amount of school-house tax than that voted by the voters of the school township, ten days' previous notice having been given, but the amount so voted, including the amount voted by the school township, shall not exceed in the aggregate the sum of fifteen mills on the dollar. The sum thus voted shall be certified forthwith by the secretary of said subdistrict meeting to the secretary of the school township, and shall be levied by the board of supervisors only on the property within the subdistrict. [C. '73, § 1778; R., §§ 2033–4, 2037, 2088.]

Prior to the adoption of this express provision it was held that the power to vote such a tax was implied in § 1778 of the Code of '73: *Wood v. Farmer*, 69–533.

SEC. **2754. Elections in independent districts—tie vote.** At the annual meeting in all independent districts members of the board shall be chosen by ballot. In any district including all or part of a city of the first class, or a city under special charter, the board shall consist of seven members, three of whom shall be chosen on the second Monday in March, 1898, two on the second Monday in March, 1899, and two on the second Monday in March, 1900. In all other independent city or incorporated town districts the board shall consist of five members, one of whom shall be chosen on the second Monday in March, 1898, two on the second Monday in March, 1899, and two on the second Monday in March, 1900. In all rural independent districts the board shall consist of three members, one of whom shall be chosen on the second Monday in March, 1898, and one each year

thereafter. In districts composed in whole or in part of cities or incorporated towns, a treasurer shall be chosen in like manner, whose term shall begin on the third Monday in March and continue for one year, or until his successor is elected and qualified. The term of office of the incumbent treasurer in said districts shall expire on the third Monday in March, 1898. In such districts the polls must remain open not less than five hours, and in rural independent districts and school townships not less than two hours. In each case the polls shall open at one o'clock p. m., except as provided in section twenty-seven hundred and fifty-six of this chapter. A tie vote for any elective school office shall be publicly determined by lot forthwith, under the direction of the judges. [22 G. A., ch. 51; 18 G. A., ch. 7, § 2; C.'73, §§ 1789, 1808.]

Under prior provisions by which in districts of less than five hundred population only three directors were to be elected, *held*, that where by reason of decrease in population the number fell below five hundred the number of directors should be decreased accordingly: *State v. Simpkins*, 77-676; *State ex rel. v. Vreeland*, 79-466.

The treasurer is an officer of the district, and service of notice upon him will be good: *Kennedy v. Independent School Dist.*, 48-189.

Where an election is not ordered and held during the hours specified, the action of the electors thereat is void: *District Tp v. Independent Dist.*, 34-306.

Where it appeared that the polls were kept open for only fifteen minutes and electors who were present and offered to vote soon after the expiration of that time were refused permission to do so, *held*, that the election was invalid: *Hinkle v. Saddler*, 66 N. W., 765.

Further, as to how long polls shall be kept open, see notes to § 2751.

SEC. **2755. Election precincts—register of voters—notice.** Each school corporation having five thousand or more inhabitants may be divided into not more than five precincts, in each of which a poll shall be held at a convenient place, fixed by the board of directors, for the reception of the ballots of voters residing in such precinct. A separate register of the voters of each precinct shall be prepared by the board from the register of the electors of any city included within such school corporation, and for that purpose a copy of such register of electors shall be furnished by the clerk of the city to the board of directors. Before each annual meeting these registers shall be revised and corrected by comparison with the last register of elections of such cities, and shall have the same force and effect at school meetings held under this section, in respect to the reception of votes thereat, as the register of election has by law at general elections; but nothing in this section shall be construed to prohibit women from voting at all elections at which they are entitled to vote. The secretary must post a notice of the meeting in a public place in each precinct at least ten days before the meeting, and by publication for two weeks preceding the same in some newspaper published in the corporation, such notice to state the time, respective voting precincts and the polling place in each precinct, and also to specify what questions authorized by law, in addition to the election of director or directors, shall be voted upon and determined by the voters of the several precincts. [18 G. A., ch. 8, §§ 1-4.]

SEC. **2756. Conduct of elections.** As judges of the election referred to in the preceding section, the board shall appoint one of its number and two voters of the precinct, one of whom shall act as clerk, who shall be sworn as provided in case of a general election. If any person so appointed fails to attend, the judge or judges attending shall fill the place by the appointment of any voter present, and like action shall follow a refusal to serve or to be sworn. Should all of the appointees fail to attend, their places shall be filled by the voters from those in attendance. The board shall provide the necessary ballot box and poll-book for each precinct, and the judges shall make and certify a return to the secretary of the corporation of the canvass of the votes for office and upon each question submitted. On the next Monday after the meeting the board shall canvass the returns made to the secretary, ascertain the result of the voting with regard to every matter voted upon, declare the same, cause a record to be made

thereof, and at once issue a certificate to each person elected. At all meetings held under this and the next preceding section, the polls shall be kept open from nine o'clock a. m. until seven o'clock p. m. [Same, §§ 5, 6.]

As to how long polls shall be kept open, see notes to §§ 2751, 2754.

SEC. **2757. Meetings of directors—election of officers.** The board of directors shall meet on the third Monday in March and September, and may hold such special meetings as may be fixed by the board or called by the president, or the secretary upon the written request of a majority of the board, upon notice specifying the time and place, delivered to each member in person, but attendance shall be a waiver of notice. Such meetings shall be held at any place within the civil township in which the corporation is situated. At the regular March meeting the board shall organize by the election of a president from its members, who shall be entitled to vote as a member. At the regular September meeting it shall elect from outside the board a secretary and a treasurer, except as provided in section twenty-seven hundred and fifty-four of this chapter, but in independent districts no teacher or other employe of the board shall be eligible as secretary. Upon the organization of any corporation the board shall elect a secretary to hold until the September meeting following. All such officers shall be elected by ballot, and the vote shall be recorded by the secretary. [18 G. A., ch. 176; 15 G. A., ch. 27; C.'73, §§ 1721–2; R., §§ 2035–6, 2076; C. '51, § 1721.]

Where the members of the board separated without completing the business of election of secretary and subsequently on the same day reassembled and made such election, *held*, that the election was valid, the separation of the board being deemed merely a recess: *State ex rel. v. Powell*, 70 N. W., 592.

Under prior provisions, *held*, that a treasurer might be elected at an adjourned meeting: *Carter v. McFarland*, 75–196.

SEC. **2758. Qualification of directors—vacancies.** Any member of the board may administer the oath of qualification to any member elect, and to the president of the board. Each director shall qualify on or before the third Monday in March by taking an oath to support the constitution of the United States and that of the state of Iowa, and that he will faithfully discharge the duties of his office; and shall hold the office for the term to which he is elected, and until a successor is elected and qualified. In case of a vacancy, the office shall be filled by appointment by the board until the next annual meeting. [C.'73, §§ 1752, 1790; R., §§ 2032, 2079; C.'51, §§ 1113, 1120.]

Prior to express provision being made for qualification of directors, *held*, that they might qualify on or before the day fixed for the next regular meeting of the board, by appearing before some officer authorized to administer oaths and taking the oath of office, and that failure to appear at the meeting of the board next ensuing did not prevent such qualification being valid: *Bennett v. District T'p*, 53–687.

The written evidence of such qualification was not required to be filed with the secretary: *Ibid.*

Prior provisions as to qualification of directors, *held* applicable to independent districts: *State ex rel. v. Powell*, 70 N. W., 592.

But, *held*, that the failure to qualify at the time required, if the act was subsequently performed, would not render their action as *de facto* directors invalid: *Ibid.*

Therefore, *held*, that where two of three directors, having attempted to qualify at the proper time by taking the oath of office before a person not authorized to administer oaths, qualified at the September meeting at which a secretary and treasurer were elected, the election of such officers was not invalid: *Ibid.*

SEC. **2759. President—employment of counsel.** The president of the board of directors shall preside at all of its meetings, sign all warrants and drafts, respectively, drawn upon the county treasurer for money apportioned and taxes collected and belonging to his school corporation, and all orders on the treasurer drawn as provided by law, sign all contracts made by the board, and appear in behalf of his corporation in all actions brought by or against it, unless individually a party, in which case this duty shall be performed by the secretary. In all cases where actions may be instituted by or against any school officer to enforce any provision of law, the board may

employ counsel, for which the school corporation shall be liable. [19 G. A., ch. 46; C.'73, §§ 1739–40; R., §§ 2039–40; C.'51, §§ 1122–3, 1125.]

It is not essential that a judgment against a school district should specify the fund from which it is to be paid. The board must satisfy the same by orders drawn on the proper funds. It is the duty of the board to specify the fund from which payment is to be made or the amount to be paid from each fund, and the fact that plaintiff does not specify the fund or that it is difficult to apportion the claim among different funds, is no defense: *District T'p v. Board of Directors*, 52–287.

Where a warrant was given by one district township to another in settlement of a claim for taxes, *held*, that there was sufficient consideration therefor, and the receipt by plaintiff of a portion of the taxes, in lieu of which the warrant was given, would not estop plaintiff from suing on the warrant: *District T'p v. District T'p*, 52–153.

A school order is not a negotiable instrument: *Shepherd v. District T'p*, 22–595; *School Dist. v. Lombard*, 2 Dillon, 493.

The president and secretary are not personally liable at the suit of an assignee of an order drawn by them on the treasurer, without authority, when they are induced to issue the same through fraud of the payee: *Boardman v. Hayne*, 29–339.

An assignee of an order is bound, at his peril, to ascertain whether or not officers issuing the same had authority to do so: *Ibid.*

A defense that warrants sued upon were issued to an amount in excess of the indebtedness for which they were issued may be urged against a *bona fide* assignee for value: *Eastman v. District T'p*, 40–438.

A school district may be sued, and a judgment recovered on an order properly drawn and not paid. *Mandamus* is not the only, even if the proper, remedy: *Cross v. District T'p*, 14–28.

Where the board of directors makes a contract, the only authority of the president and secretary is to see that it is properly reduced to writing and to sign the same when drawn up in accordance with the resolution of the board. They cannot bind the district by stipulations in the contract not assented to by the board: *Weir Furnace Co. v. Independent School Dist.*, 68 N. W., 584.

A school board has no authority to make a contract fixing the place of payment at another place than its treasury: *Ibid.*

Neither has the board authority to agree to pay attorney's fees in case of action brought on the contract: *Ibid.*

The president is not authorized to employ counsel to represent the board in case of appeal from an order of the board; *Templin v. District T'p*, 36–411.

The president does not have authority to bring suits in the name of the corporation on his own motion: *Independent Dist. v. Wirtner*, 85–387.

While in the proper performance of their duties school directors should be provided with counsel in case of suits brought against them, they are not entitled to the benefit of these statutory provisions when a suit is brought against them by reason of their own corrupt and illegal acts, and an order for attorneys' fees and stenographers' fees in such a suit cannot be enforced: *Scott v. Independent Dist.*, 59 N. W., 15.

SEC. **2760. Bonds of secretary and treasurer.** The secretary and treasurer shall each give bond to the school corporation in such penalty as the board may require, and with sureties to be approved by it, which bond shall be filed with the president, conditioned for the faithful performance of his official duties, but in no case less than five hundred dollars. Each shall take the oath required of civil officers, which shall be indorsed upon the bond, and shall complete his qualification within ten days. In case of a breach of the bond, the president shall bring action thereon in the name of the school corporation. [15 G. A., ch. 27; C.'73, §§ 1721, 1731; R., §§ 2035, 2037, 2076; C.'51, §§ 1144.]

The treasurer of a school district is absolutely liable for money coming into his hands by virtue of his office, regardless of the cause or circumstances of the loss. Proof of a special deposit of such money in a bank which afterwards becomes insolvent will not excuse him: *District T'p v. Hardinbrook*, 40–130.

The treasurer is absolutely liable on his bond for the performance of the duties of holding and paying out money, and will not be excused for loss by showing the exercise of due diligence and care: *District T'p v. Morton*, 37–550.

Nor will he be excused upon showing that the money was destroyed by inevitable accident: *District T'p v. Smith*, 39–9.

The treasurer is liable for all money coming into his hands, even though stolen without fault, or accidently lost or destroyed: *Independent Dist. v. King*, 80–497.

Where a school district treasurer deposited money in his own name but not with his own funds, and the bank knew the nature of the deposit, *held*, that such deposit constituted a trust fund, and that to the extent of any money on hand at the time of the failure of the bank, the district township was entitled to reimbursement in preference to other depositors and creditors: *Ibid.; Bunton v. King*, 80–506.

SEC. **2761. Duties of secretary.** The secretary shall file and preserve copies of all reports made to the county superintendent, and all papers

transmitted to him pertaining to the business of the corporation; keep a complete record of all the proceedings of the meetings of the board and the voters of the corporation in separate books; keep an accurate, separate account of each fund with the treasurer, charge him with all warrants and drafts drawn in his favor, and credit him with all orders drawn on each fund; and he shall keep an accurate account of all expenses incurred by the corporation, and present the same to the board for audit and payment. At the annual meeting he shall record, in a book provided for that purpose, the names of all persons voting thereat, the number of votes cast for each candidate, and for and against each proposition submitted. [C. '73, §§ 1741, 1743; R., §§ 2041–2; C. '51, § 1128.]

Held, that a similar provision in the Code of '51, as to keeping records, was directory merely, and that the fact that the records were kept on loose sheets of paper would not render the proceedings void: *Higgins v. Reed*, 8–298.

SEC. **2762. Warrants.** He shall countersign all warrants and drafts upon the county treasurer drawn or signed by the president; draw each order on the treasurer, specify the fund on which it is drawn and the use for which the money is appropriated; countersign and keep a register of the same, showing the number, date, to whom drawn, the fund upon which it is drawn, the purpose and the amount; and at the March and September meetings furnish the board with a copy of the same. [19 G. A., ch. 46; C. '73, §§ 1739, 1782; R., §§ 2039, 2061; C. '51, §§ 1122–3.]

SEC. **2763. Notice of meetings.** He shall give ten days' printed or written notice of all meetings of the voters, posted in at least five public places in the corporation, but a notice shall be posted at the door of each school-house, also at or near the last place of meeting, and each notice shall state the date, hour and place of meeting, and the object. [18 G. A., ch. 59; C. '73, §§ 1742, 1822; R., § 2043; C. '51, § 1129.]

SEC. **2764. Register of persons of school age.** He shall, between the first day of September and the third Monday in September of each year, enter in a book made for that purpose, the name, sex and age of every person between five and twenty-one residing in the corporation, together with the name of the parent or guardian.

SEC. **2765. Reports.** He shall notify the county superintendent when each school is to begin and its length of term, and, within five days after the third Monday in September of each year, file with the county superintendent a report which shall give the number of persons in the corporation, male or female, of school age, the number of schools and branches taught, the number of scholars enrolled and average attendance in each school, the number of teachers employed and the average compensation paid per month, distinguishing the sexes, the length of school in days, and the average cost of tuition per month for each scholar, the text-books used, number of volumes in library, the value of apparatus belonging to the corporation, the number of school-houses and their estimated value, the name, age and post-office address of each deaf and dumb or blind person in the corporation between the ages of five and twenty-one years, and this shall include those who are so blind or deaf as to be unable to obtain an education in the common schools, a like report as to all feeble minded children of and between such ages, and the number of trees set out and in a thrifty condition on each school-house ground. [19 G. A., ch. 23, § 3; 16 G. A., ch. 112, § 1; C. '73, §§ 1744–5; R., § 2046; C. '51, §§ 1127–8.]

SEC. **2766. Officers reported.** He shall report to the county superintendent, auditor and treasurer the name and post-office address of the president, treasurer and secretary of the board as soon as practicable after the qualification of each. [C. '73, § 1736.]

SEC. **2767. Certifying tax.** Within five days after the board has fixed the amount required for the contingent and teachers' fund, he shall certify to the board of supervisors the amount so fixed, and at the same time shall certify the amount of school-house tax voted at any regular or special meet-

ing. In case a school-house tax is voted by a special meeting after the above certificate has been made and prior to the first day of September following, he shall forthwith certify the same to the board of supervisors. He shall also certify to such board any provision made by the board of directors for the payment of principal or interest of bonds lawfully issued. [C. '73, §§ 1777, 1823; R., §§ 2037, 2044.]

SEC. **2768. Duties of treasurer—payment of warrants.** The treasurer shall receive all moneys belonging to the corporation, pay the same out only upon the order of the president countersigned by the secretary, keeping an accurate account of all receipts and expenditures in a book provided for that purpose. He shall register all orders drawn and reported to him by the secretary, showing the number, date, to whom drawn, the fund upon which drawn, the purpose and amount. The money collected by tax for the erection of school-houses and the payment of debts contracted therefor shall be called the school-house fund; that for rent, fuel, repairs, and other contingent expenses necessary for keeping the school in operation, the contingent fund; and that received for the payment of teachers, the teachers' fund; and he shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied. Whenever an order cannot be paid in full out of the fund upon which it is drawn, partial payment may be made. All school orders shall draw lawful interest after being presented to the treasurer and by him indorsed as not paid for want of funds. [C. '73, §§ 1747-50; R., §§ 2048-50; C. '51, §§ 1138-40.]

The treasurer of a school district is an officer thereof in such sense that service of notice upon him is binding on the district: *Kennedy v. Independent School Dist.*, 48-189.

The treasurer of a district township has no authority to bind the township by his contract or admissions: *Carpenter v. District Tp*, 58-335.

The board of directors have no authority to make a contract by which school orders shall draw interest prior to their presentation nor at a higher rate than six per cent: *Phelps v. District T'p*, 90-53.

The provision as to partial payment applies to orders drawn to pay a judgment. The holder thereof cannot insist on its being satisfied in full to the exclusion of the other creditors: *Chase v. Morrison*, 40-620.

SEC. **2769. Financial statement.** He shall render a statement of the finances of the corporation whenever required by the board, and his books shall always be open for inspection. He shall make an annual report to the board on the third Monday in September, which shall show the amount of the teachers' fund, the contingent fund, and the school-house fund held over, received, paid out, and on hand, the several funds to be separately stated, and he shall immediately file a copy of this report with the county superintendent. [16 G. A., ch. 112, § 2; C. '73, § 1751; R., § 2051; C. '51, § 1141.]

SEC. **2770. Surrendering office to successor.** Each school officer, upon the termination of his term of office, shall immediately surrender to his successor all books, papers and moneys pertaining or belonging to the office, taking a receipt therefor. [C. '73, § 1791; R., § 2080.]

SEC. **2771. Quorum of board—filling vacancies.** A majority of the board of directors of any school corporation shall constitute a quorum for the transaction of business, but a less number may adjourn from time to time. Vacancies occurring among the officers or members shall be filled by the board by ballot, and the person receiving the highest number of votes shall be declared elected, and shall qualify as if originally elected or appointed. [24 G. A., ch. 19; C. '73, §§ 1730, 1738; R., §§ 2037-8.]

Assent by a majority of the members of the board acting individually will not be binding. See notes to § 2778.

SEC **2772. Temporary officers—course of study—regulations.** The board shall appoint a temporary president and secretary, or either of them, in the absence of the regular officers, and shall prescribe a course of study for the schools of the corporation, make rules and regulations for its own government and that of the directors, officers, teachers and pupils, and

the care of the school-house, grounds and property of the school corporation, and aid in the enforcement of the same, and require the performance of duty by said persons not in conflict with law and said rules and regulations. [C.'73, §§ 1730, 1737; R., § 2037.]

SEC. **2773. School-house site—division of district—length of school.** It may fix the site for each school-house, taking into consideration the geographical position, number and convenience of the scholars, provide for the fencing of school-house sites, determine the number of schools to be taught, divide the corporation into such wards or other divisions for school purposes as may be proper, determine the particular school which each child shall attend, and designate the period each school shall be held beyond the time required by law. Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, and each school regularly established shall continue for at least twenty-four weeks of five school days each, in each school year commencing the third Monday in March, unless the county superintendent shall authorize the board to shorten this period in any one or more schools, when in his judgment there are sufficient reasons for so doing. No school shall be in session during the time of holding a teachers' institute except by written permission of the county superintendent. [19 G. A., ch. 172, § 21; 17 G. A., ch. 54; 15 G. A., ch. 57; C. '73, §§ 1724, 1727, 1769; R., §§ 2023, 2037.]

Changing site: The power given to fix the site of each school-house carries with it the power to change the school-house site, and where the board acts within its jurisdiction in the matter an appeal to the county superintendent and not an injunction is the proper remedy to correct errors in the exercise of the power: *Vance v. District T'p*, 23–408, *Atkinson v. Hutchinson*, 68-161.

In determining such an appeal all considerations proper to be taken into account in determining whether the change should be made or not, and existing at the time of the decision of the appeal, may be considered: *Atkinson v. Hutchinson*, 68-161.

Upon the reversal of the action of the board in changing the site, it becomes their duty to restore the school-house to the original site unless they are excused from doing so for some reason occurring after the appeal was taken: *Ibid.*

Where changes relied on to justify the action of the board occur before the decision of the appeal, and are such as to render the new site the proper one, they should be shown upon a hearing of the appeal, and the appeal may be determined according to the propriety of the action at that time: *Ibid.*

It is the duty of the board to comply with orders of the state superintendent, in his decision upon an appeal from an action of the board, and such orders may be enforced by *mandamus: Newby v. Free*, 72-379.

Action of the board in improperly locating or relocating school-houses cannot be made the basis of an action by a taxpayer in the name of the district against members of the board individually for damages: *Independent Dist. v Gookin*, 72-387.

In a particular case, *held*, that the disposition of the old school-house, other than its removal to a new site, was within the power conferred by the statute upon the district meeting, and that the power conferred upon the board, with reference to the location of the school-house, involved the exercise of discretion on the part of the board, and that they might take into consideration the condition of the district funds, the difficulty and expense of relocating the school-house and the convenience and best interests of all persons concerned: *Peters v. Warner*, 81-335.

The controlling considerations in changing the site of a school-house are the geographical position of the existing site, if one has been fixed, of the proposed site, and the convenience of the people of each portion of the district The wishes of a majority of the voters are not necessarily controlling: *Carpenter v. Independent Dist.*, 63 N. W., 708.

When a change has been made by the board and on appeal has been approved by the state superintendent, the board has no authority in the absence of a change of conditions to reconsider its action and retain the former site: *Ibid.*

Although the board has authority to change the site they may be enjoined from using the proceeds of bonds voted for a school building on the old site in the erection of a building on a new site: *Rodgers v. Independent School Dist.*, 69 N. W., 544.

School privileges: The board cannot discriminate between white and colored children and require the latter to attend a separate school: *Clark v. Board of Directors*, 24–266; *Smith v. Directors*, 40-518; *Dove v. Independent School Dist.*, 41-689.

The board has authority to direct that no school shall be taught in a certain subdistrict during a particular period, and a contract for the employment of a teacher made by the director in violation of such provision will be void: *Potter v. District T'p*, 40–369.

The board may provide a school for less than twenty-four weeks in the year, with the assent of the county superintendent, and such assent may be obtained after the action of the board is had: *Herrington v. District T'p*, 47-11.

Though a person over twenty-one years

of age is not entitled to attend school, yet if such person does attend he assumes all the duties of a scholar, and is as fully subject to discipline as one under that age: *State v. Mizner*, 45–248.

SEC. **2774. Renting room—instruction in other schools—transportation of children.** It may, when necessary, rent a room and employ a teacher, where there are ten children for whose accommodation there is no schoolhouse; and when the board is released from its obligation to maintain a school, or when children live at an unreasonable distance from their own school, the board may contract with boards of other school townships or independent districts for the instruction of children thus deprived of school advantages, in any school therein, and the cost thereof shall be paid from the teachers' fund. And when there will be a saving of expense, and children will also thereby secure increased advantages, it may arrange with any person outside the board for the transportation of any child to and from school in the same or in another corporation, and such expenses shall be paid from the contingent fund. [21 G. A., ch. 124; 16 G. A. ch. 109; C. '73, § 1725.]

The power of a board to rent a room and employ a teacher is discretionary, and their action in refusing to exercise such power cannot be questioned, except by appeal to the county superintendent: *Aananson v. Anderson*, 70–102.

Where a district fails to provide school for the prescribed period, children residing therein may attend school in another district, by consent of the directors of the latter, and the district in which they reside will be reponsible for their tuition: *District T'p v. District T'p*, 49–231. And see § 2803.

SEC. **2775. Instruction as to stimulants, narcotics and poisons.** It shall require all teachers to give and all scholars to receive instruction in physiology and hygiene, which study in every division of the subject shall include the effects upon the human system of alcoholic stimulants, narcotics and poisonous substances. The instruction in this branch shall of its kind be as direct and specific as that given in other essential branches, and each scholar shall be required to complete the part of such study in his class or grade before being advanced to the next higher, and before being credited with having completed the study of the subject. [21 G. A., ch. 1.]

SEC. **2776. Higher schools—union schools.** It shall have power to maintain in each district one or more schools of a higher order, for the better instruction of all in the district prepared to pursue such a course of study, and it may establish graded or union schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the superintendent of public instruction; and it may select a person who shall have general supervision of the schools in any district subject to the control of the board. [C. '73, § 1726; R., § 2037.]

SEC. **2777. Kindergarten department.** The board may establish within any independent school district, in connection with the common schools, kindergarten departments for the instruction of children, to be paid for in the same manner as other grades and departments. Any teacher in kindergartens shall hold a certificate from the county superintendent certifying that the holder thereof has been examined upon kindergarten principles and methods, and is qualified to teach in kindergartens. [26 G. A., ch. 38.]

SEC. **2778. Contracts—election of teachers.** The board shall carry into effect any instruction from the annual meeting upon matters within the control of the voters, and shall elect all teachers and make all contracts necessary or proper for exercising the powers granted and performing the duties required by law. Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five school days or month of four weeks, and such other matters as may be agreed upon, signed by the president and teacher, and filed with the secretary before the teacher commences to teach under such contract. [22 G. A., ch. 60; C. '73, §§ 1723, 1757; R., §§ 2037, 2055.]

Powers of directors: Lightning-rods are not such an expense as may be paid for out of the contingent fund, and an order for that purpose drawn upon such fund is *prima facie*

invalid: *Wolf v. Independent School Dist.*, 51-432; *Monticello Bank v. District T'p*, 51-350.

Under prior provisions the board of directors had no authority to bind the district township for insurance of building, furniture, etc.: *American Ins. Co. v. District T'p*, 55-606. (But see now § 2783.)

The directors had authority, before any legislation on the subject (see now § 2749), to bind the district for expenses incurred in procuring a highway to run by a school-house in case such house is not located upon a highway: *Independent Dist. v. Kelly*, 55-568.

The board cannot employ one of its members to complete an abandoned contract and allow him compensation therefor: *Moore v. Independent Dist.*, 55-654.

A board of directors cannot make a contract of employment with one of its number for services to be rendered in connection with the erection of school buildings; for instance, as a local superintendent of construction. The duties of director and those of a person thus employed would necessarily be inconsistent: *Weitz v. Independent Dist.*, 78-37.

Where a contract was made by the directors with one of their own number to supervise in the erection of a school-house and notwithstanding an action being brought by a taxpayer to enjoin the performance of such contract, the director thus designated by the board completed the contract and received the compensation agreed upon, *held*, that the court, in the final determination of the case, should have ordered the repayment by the director of the compensation thus received: *Weitz v. Independent Dist.*, 87-81.

The directors cannot, by any acts, render the district liable upon an implied contract, or make valid by ratification a contract which they have no authority to make directly; and the use in the schools of apparatus, etc., the purchase of which is without authority, will not render the district liable: *Taylor v. District T'p*, 25-447; *Manning v. District T'p*, 28-332.

A school district may, through officers having authority to contract for it, adopt any contract of officers acting *de facto;* and thus officers, after legal incorporation, may ratify an act done before such incorporation: *Dubuque Female College v. District T'p*, 13-555.

Where the evidence shows that the directors and other officers knew of the services rendered and the materials furnished in constructing buildings under a parol contract not binding on the district, *held*, that acquiescence therein by such officers, and appropriation thereof to the use of the township, constituted a ratification binding upon such township: *Bellows v. District T'p*, 70-320.

While use of the buildings by school children may not alone authorize the finding of a ratification, yet that fact is evidence to be considered with other matters from which ratification may be presumed: *Ibid.*

Buildings in question being outbuildings in connection with the school-house, built under a valid contract, *held*, that if the acceptance of the main building was not intended to include the acceptance of the outbuildings the officers should, by some proper act, have prohibited the use of them: *Ibid.*

The board of directors acting for a school district has power to change a contract already made, even though such change operates to release sureties on the contract: *Independent Dist. v. Reichard*, 50-98.

A contract which the board of directors is authorized to make will not be void because no record thereof is made. Within the scope of their powers they may be bound by verbal contracts: *Bellmeyer v. Independent Dist.*, 44-564; *Athearn v. Independent Dist.*, 33-105.

The board of directors has no authority to release a lawful claim of the district against an officer for money coming into his hands: *District T'p v. Morton*, 37-550.

The assent of a majority of the members of the board of directors of the district township individually to a proposition will not bind the district. An action to be binding must be that of the board as a body: *Herrington v. District T'p*, 47-11.

Action of the majority of the directors when not assembled and acting as a board will not bind the district: *Forcum v. Independent Dist.*, 68 N. W., 802.

Neither will silence of members of the board with the knowledge on the part of some of them that work under contract is not being done in accordance with the contract, estop the district from claiming damages on account thereof: *Ibid.*

Where individual members of the board were procured to sign their names individually to a contract for school supplies, conditioned that it should be binding when signed by a majority of the members of the board, *held*, that such contract was in contravention of the policy of the law and void, where it was procured by misrepresentation as to the fact that the president of the board had agreed to sign such contract: *Mills v. Collins*, 67-164.

Contracts which the directors of an independent district are authorized to make will be binding upon the district, although executed by them individually and not while acting as a board. Their powers are the same as those of a subdirector: *Athearn v. Independent Dist.*, 33-105.

A contract signed by the directors in their official capacity and attested by their secretary, *held* binding upon the district and not upon the directors individually: *Independent Dist. v. Reichard*, 50-98.

Where the language of a note was, "We, the undersigned, directors of school district No. 4,.....promise to pay," etc., and it was signed by the directors in their individual names, without official designation, *held*, that the note was binding on the district, and the directors were not individually liable: *Baker v. Chambles*, 4 G. Gr., 428.

So *held*, also, where the note read, "We, the board of school district No. 1,..... promise to pay," and was signed by the directors with their individual names: *Lyon v. Adamson*, 7-509.

A contract for the purchase of charts purporting to bind the directors and not the district, *held* not capable of ratification: *Western Pub. House v. District T'p*, 84-101

The directors or trustees are not liable to a personal action for damages at the suit of a teacher whom they have employed, for wrongfully, unjustly and illegally refusing to allow him to enter on his duties: *Chamberlain v. Clayton*, 56–331.

[In Code of '73 there was a general provision (§ 1806) giving to the boards of independent districts the same powers as those possessed by boards of district townships. This section has been omitted, the general provisions as to powers being now applicable to all boards of directors.]

School-houses: The directors of a school district may, in a proper case (see now § 2774) as where the public school-house is out of repair or insufficient, and in other cases where the best interests of the school would be subserved thereby, cause the school to be taught in a rented house instead of the public school building. Their action in doing so cannot be reviewed by *mandamus: Scripture v. Burns*, 59–70.

It being the duty of a school district to maintain schools, it may maintain injunction to prevent the wrongful removal of school-houses, and is not limited to an action at law for damages in such case: *District T'p v. District T'p*, 54–115.

A contract to repair a school-house may be made by the board of directors without a previous vote of the electors: *Williams v. Peinny*, 25–436.

A board of directors has no authority to employ one of its number for a compensation to oversee the completion of a school-house abandoned by the contractor: *More v. Independent Dist.*, 55–654.

A failure of the board to select a site or to receive proposals for the erection of a building will not render void the tax voted therefor: *Casey v. Independent Dist.*, 64–659.

Where a proposal for bids stated that the right to reject any and all bids was reserved by the board, *held*, that a bidder could not by *mandamus* compel the contract to be awarded to him as being the lowest responsible bidder: *Hanlin v. Independent Dist.*, 66–69.

The board of directors of a school district having the power to make contracts for the erection of school-houses in subdistricts may, by its acts in respect thereto, ratify a contract made by a subdirector for a like purpose: *Stevenson v. District T'p*, 35–462.

The board may proceed to the erection of a school-house in advance of the collection of the tax voted therefor under § 2749. For this purpose they may incur indebtedness not to exceed the limit fixed by the township meeting, and may, by negotiable note, borrow money to pay such indebtedness. But they cannot bind the township by borrowing money to pay a debt contracted after the limit fixed by the township has been reached. And for money borrowed to pay a legitimate debt the board can only bind the township to pay six per cent. interest: *Austin v. District, etc.*, 51–102.

There is no provision that one school district shall have but one school-house. If it be necessary, in order to maintain more than one school in a subdistrict, to build another house, the authority to erect it is implied from the authority to maintain more than one school: *Wood v. Farmer*, 69–533.

Contracts with teachers: The approval of the president is essential, and a resolution of the board for the employment of a teacher will not be binding, nor amount to a valid ratification of a previous contract: *Gambrel v. District T'p*, 54–417.

A contract of directors with a teacher, even though originally not binding, because not properly executed, will be ratified and become binding by partial payment to the teacher who has properly performed his contract. such payment being in accordance with the terms of the contract for services rendered under it with knowledge of the facts and without dissent: *Athearn v. Independent Dist.*, 33–105.

Where a verbal contract of employment of a teacher was partly performed on each side, *held*, that there was such ratification by the district as to be binding upon it: *Cook v. Independent School Dist.*, 40–444; *Place v. District T'p*, 56–573.

Where the services were rendered after notification by the president that he would not approve the contract, and there was no proof that the services were accepted or the contract ratified, *held*, that the mere rendering of the services would not entitle plaintiff to recover: *Place v. District T'p*, 56–573.

Under prior provisions, *held*, that it was the duty of the president to determine whether the contract of the subdirector conformed to the provisions of law, and give or withhold his approval accordingly: *Ibid.*

Where the director making the contract is also president of the board and the contract is left with him, his approval of the contract will be presumed: *Benson v. District T'p*, 69 N. W., 419.

Where the contract was signed the day school commenced and left with the subdirector, *held*, that it was his duty to file it with the president and secure his approval, and the teacher being permitted to enter upon the performance of her duties might presume that it was approved; and that the absence of such approval would not deprive her of the right to recover compensation thereunder: *Conner v. District T'p* 35–375.

A contract of a teacher with a person assuming to be a subdirector, but not so either *de facto* or *de jure*, as the teacher knew or had reason to believe, *held* not to be binding upon the district: *Bennett v. District T'p*, 53–687.

In case of an independent district, *held*, that the contract was to be made with the board of directors and the president of the board had no authority to overrule the action of the board: *Independent Dist. v. Rhodes*, 88–570.

In a particular case, *held*, that authority having been given the president to employ teachers with the consent of the board, it appeared that the consent involved was the individual consent of the members, and that the teacher having entered upon the discharge of her duties. under a contract with the president, and with the knowledge of the members of the board, implied from their want of objection, the contract was binding: *Hull v. Independent Dist.*, 82-686.

Also, *held*, that although the rule of the board that only teachers having first-class certificates should be employed was known to the teacher making such contract, yet that as the possession of such a certificate was relevant only to the question of competency, the contract was not thereby rendered void: *Ibid*

SEC. 2779. Erection or repair of school-house. It shall not erect a school-house without first consulting with the county superintendent as to the most approved plan for such building and securing his approval of the plan submitted, nor shall any school-house be erected or repaired at a cost exceeding three hundred dollars save under an express contract reduced to writing, and upon proposals therefor, invited by advertisement for four weeks in some newspaper published in the county in which the work is to be done, and the contract shall be let to the lowest responsible bidder, bonds with sureties for the faithful performance of the contract being required, but the board may reject any and all bids and advertise for new ones. [C. '73, § 1723; R., § 2037.]

Repairs proper may be contracted and paid for out of the contingent fund without being previously authorized by a vote of the electors; but where they amount to remodeling or rebuilding they should not be undertaken unless authorized by such vote: *Williams v Peinny*, 25–436.

The award of a contract to a bidder whose bid does not comply with the requirements of statute is not binding: *Weitz v. Independent Dist*, 79–423.

The conditions of the bond here provided for are not prescribed by law, and the court may require such bond as shall protect third parties who furnish material or work in the performance of the contract, and action thereon may be brought by such parties: *Baker v. Bryan*, 64–561.

SEC. 2780. Allowance of claims—settlements—compensation of officers. It shall audit and allow all just claims against the corporation, and no order shall be drawn upon the treasury until the claim therefor has been audited and allowed; it shall from time to time examine the accounts of the treasurer and make settlements with him; shall present at each regular meeting of the electors a full statement of the receipts had and expenditures made since the preceding meeting, with such other information as may be considered important; and shall fix the compensation to be paid the secretary and treasurer. But no member of the board shall receive compensation for official services. [C. '73, §§ 1732–3, 1738, 1813; R., §§ 2037–8; C. '51, §§ 1146, 1149.]

It is not a breach of duty on the part of the board to draw orders for a claim which has been audited and allowed, although the services for the claim as presented may not have been rendered: *State v. Stiles*, 40–148.

As no order can properly be drawn until the claim has been audited and allowed by the board, and as the board cannot audit and allow a claim until it has been presented, the presentation of the claim to the board is a condition precedent to the right of action thereon: *District T'p v. District T'p*, 56–85.

An order issued on a claim which has not been audited and allowed is void: *National State Bank v Independent Dist*, 39–490.

The objection that a claim has not been presented to the directors must be taken advantage of in the proper way or it will be deemed waived: *Weir Furnace Co* v. *Independent School Dist*, 68 N. W., 584.

Although the compensation of the treasurer is not fixed until after the expiration of his term, still he is bound by the amount allowed by the board, and cannot recover on the basis of a reasonable compensation. *Wilson v. Independent Dist.*, 34–471.

Where no compensation has been allowed to the treasurer of a school district the sureties on his bond cannot, in an action against them for default of their principal, offset any claim for compensation on his part: *Independent School District v. McDonald*, 39–564.

As to orders, see notes to § 2759.

Where the settlement is made according to law it will be deemed *prima facie* to have been sufficient and the burden of showing that improper credits were allowed to the officer is upon the district township: *District T'p v Bickelhaupt*, 68 N. W., 914.

The sureties for the second term are not precluded by a settlement made with the treasurer by the directors at the beginning of such second term based upon a false showing as to the amount on hand, where they have had reason to suspect that he has not on hand the amount required by his accounts: *District T'p v. Morris* 91–198.

The provision that members of the board shall receive no compensation renders it illegal for the board to employ a member for compensation to superintend the construction of a school-house. See notes to § 2778.

SEC. 2781. Financial statement. It shall publish in each independent city or town district two weeks before the annual school election, by one insertion in one or more newspapers, if any are published in such dis-

trict, or by posting up in writing in not less than three conspicuous places in the district, a detailed and specific statement of the receipts and disbursements of all funds expended for school and building purposes for the year preceding such annual election. And the said board of directors shall also at the same time publish in detail an estimate of the several amounts which, in the judgment of such board, are necessary to maintain the schools in such district for the next succeeding school year. [C. '73, §§ 1734–5, 1756; R., §§ 2037, 2054; C. '51, §1147.]

SEC. **2782. Visiting schools—regulations—discharge of teacher—expulsion of scholar.** It shall provide for visiting the schools of the district by one or more of its members and aid the teachers in the government thereof, and enforcing the rules and regulations of the board. It may, by a majority vote, discharge any teacher for incompetency, inattention to duty, partiality, or any good cause, after a full and fair investigation made at a meeting of the board held for that purpose, at which the teacher shall be permitted to be present and make defense, allowing him a reasonable time therefor. It may by a majority vote expel any scholar from school for immorality or for a violation of the regulations or rules established by the board, or when the presence of the scholar is detrimental to the best interests of the school, and it may confer upon any teacher, principal or superintendent the power temporarily to dismiss a scholar, notice of such dismissal being at once given in writing to the president of the board. When a scholar is dismissed by the teacher, principal or superintendent, as above provided, he may be re-admitted by such teacher, principal or superintendent, but when expelled by the board he may be re-admitted only by the board or in the manner prescribed by it. [Same.]

Rules: A board of directors has no authority to punish a scholar by suspension for acts which are not contrary to any rules of the school, and are not in themselves immoral. Therefore, *held*, that the acts of the pupil in making a publication out of school tending to bring ridicule upon the board of directors was not such as to warrant the suspension of the pupil: *Murphy v. Board of Directors* 30–429.

Rules of a board of directors providing for the suspension of a pupil for a certain number of absences or cases of tardiness, unexcused, are reasonable and may be enforced, even if the absence or tardiness is by the consent or direction of the parent: *Burdick v. Babcock*, 31–562.

Acts out of school hours which are detrimental to the best interests of the school may be forbidden: *Ibid.*

Such rules are constitutional as a delegation to school boards of the power given the legislature under Const., art. IX, § 8. (Per Cole, J.): *Ibid.*

Where the parent and the pupil united in the request that the pupil be excused from attendance during a certain part of the day, and from a certain study, *held*, that the teacher was not authorized to punish the pupil for failure to attend such part of the day, or to pursue such study, the only remedy being the expulsion of the pupil: *State v. Mizner*, 50–145.

A rule providing for expulsion of a pupil for failure to pay for damages done by him to school property, when his default is no breach of good order or good morals, is beyond the authority of school officers to promulgate or enforce: *Perkins v. Board of Directors*, 56–476.

Powers of teachers: The general doctrine is that the teacher may, for the maintenance of his authority and the enforcement of discipline, legally inflict chastisement upon a pupil: *State v. Mizner*, 45–248.

In a criminal prosecution against a teacher for assault and battery in punishing a scholar, the court should permit the defendant to prove that the whipping was a reasonable chastisement of the prosecuting witness as a pupil for misconduct, and leave it to the jury to determine whether or not the whipping was, under the circumstances, reasonable: *Ibid.*

Although it is only scholars between the ages of five and twenty-one years who have the right to attend public schools yet if a person over that age is allowed to become a scholar by sufferance or through misrepresentation, he thereby waives any privilege that his age confers, and the teacher has the same right of chastisement as to him that he has as to any other scholar: *Ibid.* ..

In a particular case, *held*, that it was proper to instruct the jury that in the absence of all proof the law presumes that a teacher punishes a pupil for a reasonable cause in a moderate and reasonable manner, but this presumption may be rebutted by the proof. Also that the legal object and purposes of punishment in school are like the object and purposes of the state in punishing a citizen. They are threefold: first, the reformation and the highest good of the pupil; second, the enforcement and maintenance of correct discipline in school; third, as an example to like evil-doers. And in no case can a punishment be justifiable unless it is inflicted for some definite offense which the pupil has committed and the pupil is

given to understand what he is being punished for: *State v. Mizner*, 50–145.

Dismissal of teacher: Under a contract by which a teacher agreed to faithfully and impartially govern and instruct, etc., and to strictly conform to the rules and regulations established by the board, etc., and that the subdirector should have power to dismiss the teacher for a violation of any of the stipulations of the contract, *held*, that the teacher might be dismissed by the subdirector for failure to properly manage and control the school although not unfaithful in efforts to do so: *Eastman v. District T'p*, 21–590.

Where the teacher has a valid contract for a definite period he can not be discharged without an opportunity for a hearing: *Benson v. District T'p*, 69 N.W., 419.

The action of a board of directors in discharging a teacher is judicial, and not ministerial: *Smith v. District T'p*, 42–522.

Where a teacher is discharged by the board without a full and fair investigation of the case at a meeting convened for that purpose, at which the teacher is permitted to be present and make defense as here required, the remedy of the teacher is by appeal to the county superintendent, and if he does not pursue such appeal he cannot recover in an action for damages for such improper discharge: *Kirkpatrick v. Independent Dist.*, 53–585.

The power and duty imposed upon a board of directors with reference to the discharge of a teacher partakes of a judicial character, and the teacher who has been discharged by the board has no remedy in court until it has been determined by the county superintendent that the discharge was wrongful or unlawful. The parties are concluded as to the question involved in the controversy by the decision which shall be officially made in the proceedings: *Park v. Independent School Dist.*, 65–209.

Pending the appeal by the teacher from the decision of the board discharging him, and the further appeal by the board from the decision of the county superintendent declaring such discharge invalid, the teacher is under no obligation to perform or offer to perform services required by his contract, but upon final decision by the superintendent of public instruction declaring the discharge illegal, he should perform or tender the performance of the duties remaining due from him under the contract in order to enable him to recover for breach of contract for that time: *Ibid.*

The provision for discharging a teacher only after a hearing does not apply where the board seeks to exclude the teacher from carrying out a contract which it is claimed has never been lawfully made: *Hull v. Independent Dist.*, 82–686.

SEC. **2783. Use of contingent fund—free text-books.** It may provide and pay out of the contingent fund to insure school property such sum as may be necessary, and may purchase dictionaries, library books, maps, charts and apparatus for the use of the schools thereof to an amount not exceeding twenty-five dollars in any one year for each schoolroom under its charge; and may furnish school books to indigent children when they are likely to be deprived of the proper benefits of school unless so aided; and shall, when directed by a vote of the district, purchase and loan books to scholars, and shall provide by levy of contingent fund therefor. [26 G. A., ch. 37; 25 G. A., ch. 34; 21 G. A., ch. 107; 19 G. A., ch. 149, § 1; C. '73, § 1729.]

An order cannot properly be issued on the contingent fund if there is no money in that fund subject to such order: *District T'p v. Bickelhaupt*, 68 N. W., 914.

The contingent fund is designed for rent, fuel, repairs and all other expenses necessary for keeping the school in operation. The board cannot use money on hand for the purchase of maps and charts and go in debt for other necessary expenses. The law appropriates the contingent fund on hand or available to the necessary expenses of keeping the school in operation, so far as it is necessary for that purpose: *Yaggy v. District T'p*, 80–121.

A purchase of maps and charts must be from a contingent fund in the treasury; that is, it must be a cash fund, with money on hand unappropriated for other purposes; therefore, where a warrant payable in the future was issued for such purpose, and the money on hand was necessary for other purposes which must be provided for out of the contingent fund, *held*, that such warrant was not valid: *Ibid.*

Where an order is drawn payable in the future for maps and charts, the burden is on the party claiming under it to show that it had support in the condition of the contingent fund when issued: *Ibid.*

The salaries of secretary and treasurer are part of the necessary expenses of keeping the school in operation, to which purpose the contingent fund should be applied before the purchase of maps and charts: *Ibid.*

The obligation to teach physiology and hygiene with special reference to the effects of narcotics (§ 2775) is not paramount to the provisions of this section with reference to the use of the contingent fund: *Ibid.*

The district board has the authority to determine what apparatus shall be used in the schools of the district, and the director cannot prevent the use of such apparatus in the schools in his district on the ground that the contract for the purchase thereof is unauthorized, or that it is worthless: *District T'p v. Meyers*, 83–688.

The board of directors of a district township are without power to make contracts to purchase apparatus, maps, charts, etc., thereby creating an indebtedness, without being first authorized thereto by the vote of the electors: *Taylor v. District T'p*, 26–281; *Manning v. District T'p*, 28–332.

Although by statute the board cannot

contract indebtedness for apparatus, etc., but are limited to the use of unappropriated contingent funds on hand for such purposes, yet a contract for the purchase of such apparatus, to be paid for in the future, does not necessarily imply that there is no such fund, and such credit is not necessarily void: *Bellmeyer v. Independent Dist.*, 44–564.

An independent district has power to determine that music shall be taught in the school as a branch of education, and if it does so determine, the board may properly contract for the purchase of a musical instrument out of any unappropriated funds in their hands: *Ibid.*

An unauthorized purchase of maps, apparatus, etc., will not bind the district, nor will the use thereof in the schools be a ratification of such action, so as to make the district liable. A ratification to be binding would have to be by formal action of the electors: *Taylor v. District T'p*, 25–447.

Lightning-rods are not such an expense as may be paid for out of the contingent fund, and an order for that purpose drawn upon such fund is *prima facie* invalid: *Wolf v. Independent School Dist.*, 51–432; *Monticello Bank v. District T'p*, 51–350.

The payment of money out of the contingent fund to secure a highway to a schoolhouse is not unlawful: *Independent Dist., v. Kelley*, 55–568; *McShane v. Independent Dist.*, 76–333; *Bogaard v. Independent Dist.*, 61 N. W., 859.

As to the use of the contingent fund in purchasing text-books and supplies, see §§ 2824, 2825; and in providing free text-books, see § 2836.

SEC. **2784. Water-closets.** It shall give special attention to the matter of convenient water-closets or privies, and provide one very school-house site, not within an independent city or town district, two separate buildings located at the farthest point from the main entrance to the school-house, and as far from each other as may be, and keep them in wholesome condition and good repair. In independent city or town districts, where it is inconvenient or undesirable to erect two separate outhouses, several closets may be included under one roof, and if outside the school-house each shall be separated from the other by a brick wall, double partition, or other solid or continuous barrier, extending from the roof to the bottom of the vault below, and the approaches to the outside doors for the two sexes shall be separated by a substantial close fence not less than seven feet high and thirty feet in length. [25 G. A., ch. 3.]

SEC. **2785. Duties of director—contracts.** The board of directors of a school township may authorize the director of each subdistrict, subject to its regulations, to make contracts for the purchase of fuel, the repairing or furnishing of school-houses, and all other matters necessary for the convenience and prosperity of the schools in his subdistrict. Such contracts shall be binding upon the school township only when approved by the president of the board, and must be reported to the board. Each director shall, between the first and tenth days of September in each year, prepare a list of the heads of families in his subdistrict, the number and sex of all children of school age, and by the fifteenth day of said month report this list to the secretary of the school township, who shall make full record thereof. The powers specified in this section cannot be exercised by individual directors of independent districts. [C. '73, §§ 1753–5; R., §§ 2052–3; C. '51, §§ 1124, 1142.]

The district is bound by the contracts of the director. (So *held* as to independent districts under § 1806 of Code of '73, which is superseded by general provisions): *Athearn v. Independent Dist.*, 33–105.

Directors in the exercise of the powers conferred upon them are to act in subordination to the board or its president. A director has no authority to refuse to allow apparatus to be used in the schools of his subdistrict on the ground that the board had not power to purchase it or that it is worthless: *District T'p, v. Meyers*, 83–688.

As to control of director over use of school-house for purposes of religious worship, under prior provisions, see *Davis v. Boget*, 50–11. [Now see § 2749, ¶ 4.]

As to powers of director in regard to making contracts with teachers, under prior provisions, see *Thompson v. Linn*, 35–361; *Porter v. District T'p*, 40–369.

SEC. **2786. Industrial exposition.** The board of any school corporation or the director of any subdistrict deeming it expedient may, under the direction of the county superintendent, hold and maintain an industrial exposition in connection with the schools of such district, such exposition to consist in the exhibit of useful articles invented, made or raised by the pupils, by sample or otherwise, in any of the departments of mechanics, manufacture, art, science, agriculture and the kitchen, such exposition to

be held in the schoolroom, on a school day, as often as once during a term, and not oftener than once a month, at which the pupils participating therein shall be required to explain, demonstrate or present the kind and plan of the articles exhibited, or give its method of culture; and work in these several departments shall be encouraged, and patrons of the school invited to be present at each exhibition. [15 G. A., ch. 64.]

SEC. **2787. Shade trees.** The board of each school corporation shall cause to be set out and properly protected twelve or more shade trees on each school-house site where such trees are not growing. The county superintendent, in visiting the several schools of his county, shall call the attention of any board neglecting to comply with the requirements of this section to any failure to carry out its provisions. [19 G. A., ch. 23.]

SEC. **2788. Teacher—qualifications.** No person shall be employed as a teacher in a common school which is to receive its distributive share of the school fund without having a certificate of qualification given by the county superintendent of the county in which the school is situated, or a certificate or diploma issued by some other officer duly authorized by law, and no compensation shall be recovered by a teacher for services rendered while without such certificate or diploma. [C. '73, § 1758; R., § 2062.]

SEC. **2789. Keep register—report.** Each teacher shall keep a daily register which shall correctly exhibit the name or number of the school, the district and county in which it is located, the day of the week, month, year, and the name, age and attendance of each scholar, and the branches taught; and when scholars reside in different districts separate registers shall be kept for each district, and a certified copy of the register shall immediately at the close of the school be filed by the teacher in the office of the secretary of the board. The teacher shall file with the county superintendent such reports and in such manner as he may require. [C. '73, §§ 1759-60; R., § 2062.]

SEC. **2790. New township.** When a new civil township is formed, the same shall constitute a school township, which shall go into effect on the first Monday in March following the completed organization of the civil township. The notices of the first meeting shall be given by the county superintendent, and at such meeting a board of three directors shall be chosen. [C. '73, § 1713.]

SEC. **2791. Attaching territory to adjoining corporation.** In any case where, by reason of natural obstacles, any portion of the inhabitants of any school corporation in the opinion of the county superintendent cannot with reasonable facility attend school in their own corporation, he shall, by a written order, in duplicate, attach the part thus affected to an adjoining school corporation, the board of the same consenting thereto, one copy of which order shall be at once transmitted to the secretary of each corporation affected thereby, who shall record the same and make the proper designation on the plat of the corporation. Township or county lines shall not be a bar to the operation of this section. [C. '73, § 1797.]

There is now no authority for attaching territory situated within one district township to another district township for school purposes except as here provided: *Large v. District Tp*, 53-663.

The same rule existed prior to 11 G. A., ch. 143, § 16; and *held*, that the portion of that statute which legalized the organization of subdistricts previously formed in accordance therewith only legalized the incorporation of territory of one district township into the subdistrict of another township where streams or other obstacles existed, and that where no such ground was shown, the action of the directors of two townships in attaching part of one to another would not be valid, and the township to which territory was attached could not recover from the other township taxes collected within such territory: *District Tp v. District Tp*, 53-667.

To warrant the action of the county superintendent in attaching a portion of a district township to another township, the consent of the directors of the township from which the territory is detached, and the existence of natural obstacles, must both appear. Otherwise such action is unauthorized and void. Such action may, however, be legalized by a curative act. But the district township cannot be deprived, by such curative act, of taxes already levied on the territory at the time the transfer was made: *Independent Dist. v. Independent Dist.*, 62-616.

Whether a portion of one district town-

ship which is annexed to another district township for school purposes is properly so annexed or not, taxes levied and collected upon the certificate of the township to which the territory is attached should be paid to such township, and not to the township to which the territory properly belongs: *District T'p v. Floete*, 59–109.

The adoption of the provisions of the Code of '73 including this section did not operate to dissolve a district previously formed out of territory embracing different townships although the ground for attaching the territory of one township to that of another was not that required herein: *District T'p v. Independent Dist*, 80–495; *Russell v. District T'p*, 66 N. W., 771.

Such district remains as organized until the territory is restored as provided in the next section: *Hancock v. District T'p*, 78–550; *District T'p v. Independent Dist.*, 82–10.

The policy of our law is, that the territory once organized for school purposes must always remain within some jurisdiction, and that it may not be detached from the jurisdiction to which it belongs without at the same time becoming a separate jurisdiction or a part of another jurisdiction for school purposes: *District T'p v. Independent Dist.*, 82–10.

Therefore, *held*, that territory which had been for years a part of an independent district could not be, on petition of residents of such territory, set off by the board of the independent district for the purpose of establishing a new school district: *Ibid.*

The question as to whether certain territory shall be deemed part of the district township so that the district township is bound to furnish school facilities to such territory may be determined by action of *mandamus: Hancock v. District T'p*, 78–550.

SEC. **2792. Restoration.** Where territory has been or may hereafter be set off to an adjoining school township in the same or another county, or attached for school purposes to an independent district so situated, it may be restored to the territory to which it geographically belongs upon the concurrence of the respective boards of directors, and shall be so restored by said boards upon the written application of two-thirds of the electors residing upon the territory so set off or attached, together with a concurrence of the county superintendent and the board of the school corporation which is to receive back the territory. [19 G. A., ch. 160; 18 G. A., ch. 111; C. '73, § 1798.]

If one of the townships has no district board, the restoration cannot be made even upon the written application here provided for, as the concurrence of the board is necessary though they are given no discretion: *Independent Dist. v. Durland*, 45–43.

Where a restoration of territory is agreed to and no time fixed therefor, it will be considered as taking place the first of March following; and taxes collected prior to that time should be paid to the township to which the territory had previously been attached: *District T'p v. Floete*, 59–109.

The provision for restoration of territory applies as well to territory incorporated into an independent district at the time of its organization as to such as is subsequently attached thereto: *Albin v. Board of Directors*, 58–77.

This provision seems to be peremptory; and when two-thirds of the electors ask it to be done, or when the school-house has been removed, or when the territory is inhabited, it shall remain under the jurisdiction and form a part of the district township to which it geographically belongs, and the respective boards of directors in either case shall divide their districts accordingly. The refusal to make such divisions may be corrected on appeal: *Barnett v. Directors*, 73–134.

Under a statute providing that a school district formed of parts of two or more civil townships should become disorganized and the portions of the different townships should fall to the jurisdiction of the townships to which they belong upon the removal of the school-house, *held*, that the tearing down or removal of the school-house in such a district for the purpose of the erection of another was not a removal such as would work the disorganization of the district: *State v. McCormick*, 37–142.

When the application is duly made, each board is required to pass the order making the change. The fact that the board of one district, after having ordered the change, has rescinded its action and refuses to act does not release the other board from the obligation to make such order, and the compliance of either board with the application when properly made, can be enforced by *mandamus: Odendahl v. Russell*, 86–669.

The requirement of 19 G. A., ch. 160 (not now retained), as to the existence of a school-house before the order for the restoration of the territory was made, *held* to relate to a school-house in the district to which the territory was to be restored and not to a school-house in the territory to be restored: *Ibid.*

SEC. **2793. Boundary lines changed.** The boundary lines of contiguous independent districts within the same civil township may be changed by the concurrent action of the respective boards of directors at their regular meetings in September, or at special meetings thereafter called for that purpose. The independent district from which territory is detached shall after the change contain not less than four government sections of land,

and its boundary lines shall conform to the lines of congressional divisions of land. [22 G. A., ch. 62, § 1.]

Prior to the enactment of this provision the board of directors of an independent district had no power to change its boundaries. *Eason v. Douglass*, 55-390; *Independent Dist. v. Independent Dist.*, 65-590.

As to change of boundaries between independent district and district township from which it has been taken, see (under prior provisions) *Hightower v. Overhaulser*, 65-347; *District T'p v. Independent Dist.*, 72-687; *Independent Dist. v. District T'p*, 82-169.

SEC. **2794. Formation of independent district.** Upon the written petition of any ten voters of a city, town or village of over one hundred residents to the board of the school township in which the portion of the town plat having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district, including therein all of the city, town or village, and also such contiguous territory as is authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district, in not smaller subdivisions than entire forties of land, in the same or any adjoining school townships, as may best subserve the convenience of the people for school purposes, and shall give the same notices of a meeting as required in other cases, at which meeting all voters upon the territory included within the contemplated independent district shall be allowed to vote by ballot for or against such separate organization. When it is proposed to include territory outside the town, city or village, the voters residing upon such outside territory shall be entitled to vote separately upon the proposition for the formation of such new district, by presenting a petition of at least twenty-five per cent. of the voters residing upon such outside territory, and if a majority of the votes so cast is against including such outside territory, then the proposed independent district shall not be formed. [19 G. A., ch. 118, § 1; 18 G. A., ch. 139; C.'73; §§ 1800-1; R., §§ 2097, 2105.]

It is a prerequisite that there shall be the specified number of inhabitants, and that matter may be inquired into by *quo warranto: State v. Independent School Dist.*, 29-264.

No village of less than the requisite number of inhabitants within its limits may be organized into an independent district. The inhabitants of contiguous territory are not to be added to the village proper in order to increase the number to two hundred: *Allen v. District T'p*, 70-436.

An independent district may be formed from territory lying in adjoining townships, either in the same or different counties, and no concurrent action of the school authorities of the two townships is necessary: *Independent School Dist. v. Board of Supervisors*, 25-305; *District T'p v. Independent Dist.*, 41-30.

The contiguous territory need not be in the same county: *District T'p v. Independent Dist.*, 41-30.

It is not essential that the boundaries of the city and the school district should coincide, and the extension of the limits of the city does not have the effect of enlarging the limits of the school district before existing: *State v. Independent School Dist.*, 46-425.

The extent of the territory which may be included with the city or town in the independent district is not limited: *Ft. Dodge City School Dist. v. District T'p*, 15-434.

Whether territory is so contiguous to a town as to be properly included with it in the same independent district is a question to be settled, at least in the first instance, by the school officers: *Independent Dist. v. Board of Supervisors*, 51-658.

Territory of the district township out of which an independent district has been formed may subsequently be annexed thereto by proper action of the respective boards: *Independent Dist. v. District T'p*, 82-169.

An election upon the question as to the organization of an independent district must be conducted as to the time of opening the polls, etc., according to the provisions as to other school elections, and if not so conducted the proceedings will be void: *District T'p v. Independent Dist.*, 34-306.

Where the question of a separate organization, was submitted only to the voters within the city, and not to those within the territory included in the contemplated district, but outside of the city, the election was held void although the majority in the city was greater than the total number of voters in such other territory: *Fort Dodge City School Dist. v. District T'p*, 17-85.

Where territory is included in each of two independent districts the one first taking steps to organize is entitled to it: *Independent Dist. v. Board of Supervisors*, 51-658.

SEC. **2795. Organization.** If the proposition to establish an independent district carries, then the same board shall give the usual notice for a meeting to choose a board of directors. Two directors shall be chosen to

serve until the next annual meeting, two until the second, and one until the third annual meeting thereafter. The board shall organize by the election of officers in the usual manner. [15 G. A., ch. 27; C.'73, § 1802; R., §§ 2099, 2100, 2106.]

SEC. **2796. Taxes certified and levied.** The organization of such independent district shall be effected on or before the first day of August of the year in which it is attempted, and, when completed, all taxes certified for the school township or townships of which the independent district formed a part shall be void so far as the property within the limits of the independent district is concerned, and the board of such independent district shall fix the amount of all necessary taxes for school purposes, including school-house taxes, at a meeting called for such purpose at any time before the third Monday of August, which shall be certified to the board of supervisors on or before the first Monday of September, and it shall levy said tax at the same time and in the same manner that other school taxes are required to be levied. [C.'73, § 1804.]

Whether the organization of an independent district will render void taxes levied prior to such organization to pay debts for the erection of a school-house therein, *quære;* but such organization cannot prejudice the rights of a party having a valid claim against the whole district prior to such organization: *Stevenson v. District T'p*, 35–462.

SEC. **2797. Rural independent districts.** At any time before the first day of August, upon the written request of one-third of the legal voters in each subdistrict of any school township, the board shall call a meeting of the voters of the subdistrict, giving at least thirty days' notice thereof by posting three notices in each subdistrict in each school township, at which meeting the voters shall vote by ballot for or against rural independent district organization. If a majority of the votes cast in each subdistrict shall be favorable to such independent organization, then each subdistrict shall become a rural independent district, and the board of the school township shall then call a meeting in each rural independent district for the choice of three directors, to serve one, two and three years, respectively, and the organization of the said rural independent district shall be completed. [22 G. A., ch. 61.]

The formation of a subdistrict into an independent district cannot prejudice the rights of persons holding claims against the district township for compensation for building school-houses in the original subdistrict. So far as such creditors are concerned the district township is to be treated as if no part of it had been organized into independent districts: *Stevenson v. District T'p*, 35–462.

When a district township is thus divided into independent districts, the old district township ceases to exist: *District T'p v. Independent Dist.*, 36–220.

The new independent district is not liable for the debts of the original subdistrict from which it is formed. Such debts, being claims against the district township, may be enforced by action against all the independent districts which have been formed out of it, and a judgment may be rendered against them jointly, which may be enforced against any one of them, leaving the question as to the apportionment of such judgment to be settled between the districts themselves: *Knoxville Nat. Bank v. Independent Dist.*, 40–612; *Independent School Dist. v. District Court*, 48–182; *Kennedy v. Independent School Dist.*, 48–189; *District T'p v. District T'p*, 52–73.

Where a subdistrict had been formed but no director elected, and in pursuance of steps taken before the formation of the new district the subdistricts of the township, including the new one, voted for organization into independent districts, and the new subdistrict then properly completed its organization as an independent district, *held*, that it was properly organized: *Independent School Dist. v. Independent School Dist.*, 48–157.

Where the legislature legalized the organization of an independent district, *held*, that such legalization did not operate to make a part of the district territory which had previously been organized into a separate independent district: *Ibid.*

SEC. **2798. Subdivision of independent districts.** Independent districts may subdivide for the purpose of forming two or more independent districts, or have territory detached to be annexed with other territory in the formation of an independent district or districts, the board of directors of the original independent districts to establish the boundaries of the districts thus formed, such new districts to contain not less than four government sections of land each; but in case a stream or other obstacle shall debar a number of children of school privileges, an independent district may be

thus organized containing less territory; or, if such new district shall include within its territory a town or village with not less than one hundred inhabitants, it may in like manner be made up of less territory; but in neither case shall the new district contain less than two government sections of land, nor be organized except on a majority vote of the electors of each proposed district, and the proceedings for such subdivision shall in all respects be like those provided in the section relating to organizing cities and towns into independent districts, so far as applicable. [18 G. A., ch. 131; 17 G. A., ch. 133, §§ 1–4.]

SEC. **2799. Uniting independent districts.** Independent districts located contiguous to each other may unite and form one and the same independent district in the manner following: At the written request of any ten legal voters residing in each of said independent districts, or, if there be not ten, then a majority of such voters, their respective boards of directors shall require their secretaries to give at least ten days' notice of the time and place for a meeting of the electors residing in each of such districts, by posting written notices in at least five public places in each of said districts, at which meeting the electors shall vote by ballot for or against a consolidated organization of said independent districts, and, if a majority of the votes cast at the election in each district shall be in favor of uniting said districts, the secretaries shall give similar notice of a meeting of the electors as provided for by law for the organization of independent districts including cities and towns. [22 G. A., ch. 63, § 1; C. '73, § 1811.]

Where there is no written request of electors no proper action of the board of directors looking toward the consolidation of independent districts, and the notice of election does not properly specify its object, an election on the question of consolidation will be void, and the original and independent districts will be still in existence: *State v. Leverton*, 53–483.

SEC. **2800. Rural independent districts united into school township.** A township which has been divided into rural independent districts may be erected into a school township by a vote of the electors, to be taken upon the written request of one-third of the legal voters residing in such civil township. Upon presentation of such written request to the township trustees, they shall call a meeting of the electors at the usual place or places of holding the township election, upon giving at least ten days' notice thereof by posting three written notices in each rural independent district in the township, and by publication in a newspaper, if one be published in such township, at which meeting the said electors shall vote by ballot for or against a school township organization. If a majority of the votes cast at such election be in favor of such organization, each rural independent district shall become a subdistrict of the school township, and shall organize as such on the first Monday in March following by the election of a director, notice of which shall be given as in other cases by the secretary of each of the rural independent districts, and the directors so elected shall organize as a board of directors of the school township on the third Monday in March following. [16 G. A., ch. 155; C. '73, §§ 1815–20.]

As bearing upon prior provisions of similar character, see *State v. Independent School Dist.*, 29–264.

SEC. **2801. Division of school township into subdistricts.** The board of any school township may by a vote of a majority of all the members thereof, at the regular meeting in September, or at any special meeting called thereafter for that purpose, divide the school township into subdistricts such as justice, equity and the interests of the people require, and may make such alterations of the boundaries of subdistricts heretofore formed as may be deemed necessary, and shall designate such subdistricts and all subsequent alterations in a distinct and legible manner upon a plat of the school township provided for that purpose, and shall cause a written description of the same to be recorded in the records of the school township, a copy of which shall be delivered by the secretary to the county

treasurer and also to the county auditor, who shall record the same in his office. The boundaries of subdistricts shall conform to the lines of congressional divisions of land, and the formation or alteration of subdistricts as contemplated in this section shall not take effect until the first Monday in March thereafter, at which time a director shall be elected for any subdistrict newly formed. [21 G. A., ch. 124; 16 G. A., ch. 109; C. '73, §§ 1725, 1738, 1796; R., § 2038.]

The district board may in the exercise of its discretion change the subdistricts and dispense with a new district previously created, if, it finds such action to be to the best interest of all parts of the district: *Morgan v. Wilfley*, 70-238.

The provision as to change of boundaries of subdistricts does not apply to independent districts; the boundaries of which can be changed, if at all, only under other statutory provisions: *Eason v. Douglass*, 55-390; *Independent Dist. v. Independent Dist.*, 65-590.

Where a restoration of territory is agreed to, and no time fixed therefor, it will be considered as taking place the first of March following; and taxes collected prior to that time should be paid to the township to which the territory had previously been attached: *District T'p v. Floete*, 59-109.

Subdistricts which were formed prior to the enactment of this provision under the general authority of the school fund commissioner to unite portions of different civil townships or counties into one subdistrict for the convenience of the inhabitants, were not by the adoption of this section dissolved and the parts restored to their respective townships even though there were no natural obstacles which under § 2791 would be a ground for attaching part of a township to another township for school purposes: *Russel v. District T'p*, 62 N. W., 661.

SEC. **2802. Changes of boundaries—division of assets and liabilities.** When any changes are made in the boundaries of any school corporations, the boards of directors in office at the time shall continue to act until the next regular school election, when the new corporations shall organize by the election of directors in accordance with the new boundaries, whereupon the new boards shall make an equitable division of all assets and liabilities of the corporations affected; and, if they cannot agree, the matters upon which they differ shall be decided by disinterested arbitrators, one selected by each board having an interest therein, and if the number thus selected is even then one shall be added by the county superintendent, and the decision of the arbitrators shall be made in writing, either party having the right to appeal therefrom to the district court. [C. '73, § 1715.]

The directors constitute a special tribunal to make division of assets and liabilities. Their jurisdiction for that purpose is exclusive and their decision cannot be collaterally attacked: *Independent School Dist. v. Independent School Dist.*, 43-444; *District T'p v. District T'p*, 45-104.

If this tribunal fails to act it may be compelled to do so by *mandamus*, but appeal from its decision cannot be had to the courts: *Ibid.*

The adjudication of the directors in the division of assets is final and conclusive until reversed by proper proceedings. Appeal in such case lies from their action to the county superintendent: *Independent School Dist. v. Independent School Dist.*, 45-391.

The failure to agree referred to in this section is a disagreement of the directors acting as a tribunal and not a failure of the new districts to agree: *Ibid.*

In making the division, school-houses and real estate used for school purposes are to be taken into account, but such division need not result in the partition of the real estate: *District T'p v. District T'p*, 36-216.

Where the boards of the two districts appoint arbitrators to make division of assets and liabilities, a court of equity has jurisdiction to set aside their award for gross error in computation, etc. In such a case an appeal would not lie to the county superintendent: *District T'p v. District T'p*, 54-286.

The arbitration here contemplated is a statutory arbitration (see §§ 4385-4401), and a court cannot enter up judgment for a different amount than that taxed in the award: *District T'p v. Independent Dist.*, 60-141.

Where it appears that the respective boards of directors have met and failed to agree, *mandamus* may be maintained to compel a choice of arbitrators, but not to compel the making of equitable division: *Case v. Blood*, 68-486.

A person who has ceased to be a resident of the district and a patron of the school, but is still a taxpayer, may bring action to compel the board of directors to make the apportionment here required: *Case v. Blood*, 71-632.

Where a portion of an independent district is severed and restored to a district township, to which it geographically belongs, it seems that bonds issued by the independent district must be taken into account in apportioning the liabilities between it and the district township, although the district township cannot issue such bonds: *Albin v. Board of Directors*, 58-77.

Where the proper board of directors has made a division of assets and liabilities upon

the organization of subdistricts into independent districts and then has ceased to exist, an action in equity may be maintained to effect such division, where it appears that the one originally made was inequitable and unjust, and there was no negligence on the part of the plaintiff in not having a proper division made by the board while in existance: *Independent School Dist. v. Independent School Dist.*, 41-321.

After the division of a district township the old district township goes out of existance entirely, and action by the new township for division of assets may be brought against the independent districts formed out of the other portion of the old district township. In such case an action against the old district could be of no avail and no jurisdiction would be acquired thereby: *District T'p v. Independent Dist.*, 63-188.

The provisions as to division of assets in case of division of boundary or division of the district township are not applicable in case of an action by one district township against another: *District T'p v. District T'p*, 52-73.

SEC. **2803. Attending school in another corporation.** A child residing in one corporation may attend school in another in the same or adjoining county if the two boards so agree. In case no such agreement is made, the county superintendent of the county in which the child resides and the board of such adjoining corporation may consent to such attendance, if the child resides nearer a school-house in the adjoining corporation and one and one-half miles or more from any public school in the corporation of his residence. But before granting such consent the county superintendent shall give notice to the board where the child resides and hear objections, if any. In case such consent is given, the board of the district of the child's residence shall be notified thereof in writing, and shall pay to the other district the average tuition per week and an average proportion of contingent expenses for the school or room thereof in which such child attends. If payment is refused or neglected, the board of the creditor corporation shall file an account thereof certified by its president with the auditor of the county of the child's residence, who shall, at the time of the making of the next semiannual apportionment, deduct the amount from the sum apportioned to the debtor district, and cause it to be paid to the corporation entitled thereto. [17 G. A., ch. 41; 16 G. A., ch. 64; C. '73, § 1793; R., § 2024; C. '51 § 1143.]

When a district failed to provide school for the period prescribed in § 2773, *held*, that children residing therein might attend school in another district as here provided, and the district where they resided would be liable for their tuition; and where, upon being notified in writing, the directors of the district where children resided, at a meeting called to consider the question, determined not to pay such tuition, *held*, that demand on them before filing the account with the auditor was unnecessary: *District T'p v. District T'p*, 49-231.

SEC. **2804. School age—nonresidents.** Persons between five and twenty-one years of age shall be of school age. Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine. The parent or guardian whose child or ward attends school in any independent district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid. [C. '73, § 1795.]

SEC. **2805. Bible not excluded.** The bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian. [C. '73, § 1764; R., § 2119.]

It is a matter of individual option with school teachers as to whether they will read the Bible in school or not, such option being restricted only by the provision that no pupil shall be required to read it contrary to the wishes of his parent or gurdian, and such provision is not unconstitutional: *Moore v. Monroe*, 64-367.

SEC. **2806. School taxes.** The board of each school corporation shall at its regular meeting in March, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in May, estimate the amount required for the contingent fund, not exceeding five dollars for each person of school age, but each school corporation may estimate not exceeding seventy-five dollars for each school

thereof; and also such additional sum as may be authorized in the chapter on uniformity of text-books; also such sum as may be required for the teachers' fund, which, including the amount received from the semiannual apportionment, shall not exceed fifteen dollars for each person of school age therein, but each corporation may estimate not exceeding two hundred and seventy dollars, including such apportionment, for each regular school therein. No tax shall be estimated by the board after the third Monday in May in each year. School corporations containing territory in adjoining counties may vote and estimate all taxes for school purposes in mills. The board shall apportion any tax voted by the annual meeting for school-house fund among the several subdistricts in such a manner as justice and equity may require, taking as the basis of such apportionment the respective amounts previously levied upon said subdistricts for the use of such fund. [15 G. A., ch. 67, § 1; C. 73, §§ 1738, 1777–8, 1780; R., §§ 2033–4, 2037–44, 2088.]

The directors are only to determine and certify what amount of contingent fund is necessary to meet contracts which they are authorized to make; but they cannot include therein an amount to meet a contract for apparatus for which they are not authorized to contract any debt: *Manning v. District T'p*, 28–332.

The duty of the board of supervisors to levy the tax so certified is purely ministerial. When each of two districts claims certain territory, and asks a levy accordingly, the board cannot investigate as to the legality of organization, etc., but must make the levy asked by the one first taking steps to organize: *Independent Dist. v. Board of Supervisors*, 51–658.

The board of directors, and not the electors, are authorized to fix the rates to be levied for the teachers' and contingent fund. Action of the latter in such matter is void: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153, 179.

Although the tax must be levied by the board of supervisors, their action is based solely upon the action of the board of directors, and if the action of the board of directors is void because made after the date specified, the levy by the supervisors will be of no effect: *Standard Coal Co. v. Independent Dist.*, 73–304.

A tax which is illegal because levied after the time specified may be rendered valid by a curative act: *Chicago, R. I. & P. R. Co. v. Independent Dist.*, 68 N. W., 881.

Such a curative act will not be unconstitutional as a special statute because it applies to only one district and not to other districts in which illegal taxes may have been levied under the same circumstances: *Ibid.*

Where certain lands in one township were set over into another for school purposes and both townships certified a percentage of tax for school purposes differing in amount, and the township in which the lands were situated received the money under its levy and the other levy was never collected, *held*, that as the tax collected was not the one levied by the township to which the lands were attached, the latter could not maintain an action for money had and received against the former on account of the tax collected: *District T'p v. District T'p*, 27–323.

Where territory has been attached to a district township for school purposes, the district township is entitled to the taxes collected in such territory, and if such taxes are received by another district may recover in an action at law the amount thus received within the statutory period of limitations: *District T'p v. Independent Dist.*, 80–495.

Where for thirty years land had been taxed as included within an independent district, *held*, that further taxes regularly levied thereon for such district were valid and that the board of supervisors had no authority to refund such taxes to the taxpayer: and the independent district could recover from the taxpayer the taxes thus refunded, the presumption being that the land was properly included within the limits of the district: *Independent Dist. v. Taylor*, 69 N.W., 1009.

It seems that where a district township has exercised jurisdiction over certain territory claimed by another district, by collecting taxes therefrom and providing schools for the children therein for several years, during a portion of which time the other district has withheld its school privileges from such children and made no claim to said territory, the latter will be estopped from afterward asserting a claim to the territory in dispute: *Independent School Dist. v. Hobson*, 25–275.

Where one school district is organized out of part of the territory included in another, and the entire amount of the taxes is received by the old district, an action for money had and received can be maintained against it by the new district: *District T'p v. District T'p*, 11–506.

Where, in the division of a school district, it was provided that one district should recover taxes due from property included in another district, *held*, that the district entitled to such taxes might draw the same, and that the other district, in wrongfully drawing them from the county treasurer, did not become trustee of an express or implied trust: *District T'p v. District T'p*, 62–62.

Two other school districts having been carved out of an original school district, and the agreement being that the original school district should collect taxes then due and make certain application thereof, *held*, that it was entitled to the proceeds of a railroad tax which should have been assessed prior to that time by the county board of supervisors, but was not in fact assessed until afterward: *District T'p v. District T'p*, 49–183.

Where the treasurer in refunding a school

district tax illegally exacted improperly refunded it all out of the taxes due to one of three districts, which had been formed out of the territory of the original district to which the illegal tax had been paid, *held*, that such district might maintain an action for contribution against the other districts: *District T'p v. District T'p*, 56–85.

The duty of determining what is a just and equitable apportionment of the school-house fund rests, at least in the first instance, upon the board. They can be compelled to act, but their discretion cannot be controlled: *Cooper v. Nelson*, 38–440, 445.

The provision with reference to taxes voted by electors of subdistricts for school-house purposes, *held* to give implied authority to vote such taxes, although the power was not elsewhere expressly conferred: *Wood v. Farmer*, 69–533.

SEC. **2807. Levy by board of supervisors.** The board of supervisors shall at the time of levying taxes for county purposes levy the taxes necessary to raise the various funds authorized by law and certified to it under this chapter, but if the amount certified for any such fund is in excess of the amount authorized by law it shall levy only so much thereof as is authorized by law. If a school-house tax is voted at a special meeting and certified to said board after the regular levy is made, it shall at its next regular meeting levy such tax and cause the same to be forthwith entered upon the tax list to be collected as other school taxes. It shall also levy a tax for the support of the schools within the county of not less than one nor more than three mills on the dollar on the assessed value of all the taxable property within the county. [C.'73, §§ 1779–80; R., §§ 2057, 2059.]

The provision as to the levy of the tax by the board of supervisors is directory, and if the levy is not made at the proper time it may be made at the time fixed for making the succeeding tax levy: *Perrin v. Benson*, 49–325.

The limit of taxation for school-house fund of ten mills on a dollar includes the tax to pay judgments, as provided for under § 2811, and that section does not authorize the levying of a tax beyond the limit of this section: *Sterling School Furniture Co. v. Harvey*, 45–466.

The limitation of taxation to ten mills does not limit the amount which may be voted to pay interest upon a bonded debt contracted for school-house purposes by vote of the electors of an independent district; and where the electors have failed to vote a sufficient tax to pay interest on the outstanding bonds it is lawful for the supervisors to do so: *Richards v. Supervisors*, 69–612.

There is no fixed limit to the rate of taxation when it is necessary to raise funds to meet the interest and principal of bonds lawfully issued under authority of a vote of the electors of the school district. The supervisors may be compelled to levy any tax for that purpose certified to by the directors: *United States ex rel. v. Board of Directors*, 20 Fed., 294.

Where a new township was formed in March and a tax levied therein, *held*, that in the absence of proof that said tax exceeded the limit imposed by statute it was legal, although the report of the county superintendent, being made before the creation of the township, did not show the number of pupils therein: *Milwaukee & St. P. R. Co. v. Kossuth County*, 41–57.

SEC. **2808. Apportionment.** The county auditor shall, on the first Monday in April and the fourth Monday in September of each year, apportion the school tax, together with the interest of the permanent school fund to which the county is entitled, and all other money in the hands of the county treasurer belonging in common to the schools of the county and not included in any previous apportionment, among the several corporations therein, in proportion to the number of persons of school age, as shown by the report of the county superintendent filed with him for the year immediately preceding. He shall immediately notify the president of the board of each corporation of the sum to which it is entitled by such apportionment, and shall issue his warrant for the same to accompany said notice, and shall authorize the treasurer thereof to draw the amount due from the county treasurer. [C. '73, §§ 1781–2, 1841; R., §§ 1966, 2060–1.]

In an action upon the bond of a county treasurer to recover plaintiff's share of the general school fund, where it was shown by the evidence that the treasurer had received the money, and that in his settlement with the board of supervisors he represented that he had paid it to the plaintiff, and that he held a voucher for it issued by the county auditor in favor of plaintiff but not countersigned by plaintiff's president and secretary, and that such warrant was delivered to the treasurer at his request a few days before the expiration of his term of office, and that plaintiff had never received the money, *held*, that an order directing a verdict for the defendant was not justified on the ground that an apportionment of the fund by the auditor had never been made, because the treasurer had represented to the supervisors that such apportionment had been made by claiming

credit for the amount, and as to him the representation should be taken, *prima facie*, as true. And *held*, also, that such order was not justified by a showing that plaintiff had received in the aggregate for the years included in the treasurer's term of office and the succeeding year its full share of the fund, as the fact that plaintiff was overpaid would be a matter for adjustment between it and the county: *District T'p v. Espeset*, 75–500.

SEC. **2809. Auditor to report.** He shall forward to the superintendent of public instruction a certificate of the election or appointment and qualification of the county superintendent, and shall also, on the second Monday in February and August of each year, make out and transmit to the auditor of state, in accordance with such form as said auditor may prescribe, a report of the interest of the school fund then in the hands of the county treasurer and not included in any previous apportionment, and also the amount of said interest remaining unpaid. [C. '73, § 1783.]

SEC. **2810. Taxes paid over.** Before the third Monday of January, April, July and October in each year, the county treasurer shall give notice to the president of the board of each school corporation in the county of the amount collected for each fund to the first day of such month, and the president of each board shall draw his draft therefor, countersigned by the secretary, upon the county treasurer, who shall pay such taxes to the treasurers of the several school boards only on such draft. He shall also keep the amount of tax levied for school-house purposes separate in each subdistrict where such levy has been made directly upon the property of the subdistrict, and shall pay over the same quarterly to the treasurer of the school township for the benefit of such subdistrict. [C. '73, §§ 1784–5.]

SEC. **2811. Judgment tax.** When a judgment shall be obtained against a school corporation, its board shall order the payment thereof out of the proper fund by an order on the treasurer, not in excess, however, of the funds available for that purpose. If the proper fund is not sufficient, then, unless its board has provided by the issuance of bonds for raising the amount necessary to pay such judgment, the voters thereof shall at their annual meeting vote a sufficient tax for the purpose. In case of failure or neglect to vote such tax, the school board shall certify the amount required to the board of supervisors, who shall levy a tax on the property of the corporation for the same. [18 G. A., ch. 132, § 6; C. '73, § 1787; R., § 2095.]

The issuance of the order on the treasurer does not satisfy the judgment. The district is required to vote a tax to pay such orders, but if it fail to do so the board of directors of the district may be compelled by *mandamus* to levy such tax: *Boynton v. District T'p*, 34–510.

The issuance of an order upon the treasurer does not amount to a payment of a debt or judgment of the school district, but where an order has been issued to pay a demand upon the district and there are no funds in the treasury to pay such order, the board may be compelled by *mandamus* to take measures for the levy of a tax to provide the necessary funds: *Stevenson v. District T'p*, 35–462.

The recovery of a judgment against a school district does not entitle the creditor to have all the funds of the district applied to his judgment to the exclusion of other creditors. He can only have a *pro rata* allowance out of such funds, but he may, by *mandamus*, compel the levy of a special tax up to the maximum limit for the payment of his judgment: *Chase v. Morrison*, 40–620.

This section contemplates the right of a creditor to a judgment against a school district, and the issuance to him of an order in payment of his claim does not prevent his obtaining judgment, nor is he required to resort first to an action of *mandamus* to enforce the levying and collection of a tax: *Cross v. District T'p*, 14–28.

That the board cannot accurately specify the amount which should be paid from each fund is no excuse for not issuing orders in payment of a judgment: *District T'p v. Board of Directors*, 52–287.

The issuance of an order under this section does not constitute a payment of the judgment. Such orders do not constitute an independent evidence of indebtedness: *Richards v. Independent Dist.*, 46 Fed., 460.

This section does not authorize the levy of a tax in excess of the ten-mill limit: See § 2807 and notes.

SEC. **2812. Bonds.** The board of directors may issue bonds in the name of the school corporation to pay any judgment against it, or any matured indebtedness under bonds lawfully issued, and the board of an independent city or town district may issue bonds to pay any matured

indebtedness for money borrowed by it as authorized by law, or for money borrowed for the erection or completion of school-houses, when authorized by the voters at the regular meeting or a special meeting called for that purpose, which bonds shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the action of the board providing therefor, shall not run more than ten years, be in denominations of not more than one thousand nor less than one hundred dollars, and bear a rate of interest not exceeding six per cent. per annum, payable semiannually, to be signed by the president and countersigned by the secretary, and shall not be disposed of for less than par value, nor issued for other purposes than in this section provided. They shall be payable, respectively, at the pleasure of such corporation at any time after the expiration of five years, but may be sooner paid if so nominated in the bonds, be registered in the office of the county auditor, numbered consecutively, and redeemable in the order of their issuance. Upon being issued they shall be delivered to the treasurer thereof, the president taking receipt therefor, and thereupon the treasurer shall stand charged on his official bond with their amount. He shall sell the bonds for not less than par value and apply the proceeds thereof in payment of outstanding indebtedness, and for no other purpose than in this section authorized, or he may exchange the new bonds for outstanding bonds without discount, the cost of engraving and printing the bonds to be paid out of the contingent fund. The treasurer shall keep a record of the name and post-office address of all persons to whom bonds are sold. The provisions relating to payment of county bonds and notice to the owner thereof shall also apply to school bonds issued under this section. [21 G. A., ch. 95; 18 G. A., ch. 51, §§ 1, 3; 18 G. A., ch. 132, §§ 1–5; 16 G. A., ch. 121; C.'73, §§ 1821–2.]

Where bonds are issued in payment of a judgment or a decree which is satisfied they are not valid in the hands even of an innocent purchaser: *First Nat. Bank v. District T'p*, 86–330

In an action on bonds it will be presumed, until the contrary appears, that they are within the limit of indebtedness, and issued in proper manner and for proper purpose: *Mosher v. Independent Dist.*, 42–632. But if issued in excess of the limit, such bonds are void, even in the hands of an innocent holder for value: *McPherson v. Foster*, 43–48, 55.

If bonds are sold for the purpose of using the proceeds in the extinguishment of other bonds, the new issue creates an additional indebtedness, and if in excess of the constitutional limit they will be void (reversing 42 Fed., 644): *Doon Township v. Cummins*, 142 U. S., 366.

Refunding bonds issued under this statute in excess of the constitutional limitation of liability are not valid unless in fact used to retire or refund a pre-existing enforcible indebtedness: *Shaw v. Independent Dist.*, 62 Fed., 911.

If it is claimed that bonds which are apparently in excess of the constitutional limit are valid because issued for the payment of judgments, the particular judgment not being specified in the bonds, it is incumbent on the holder to show that the proceeds of his bonds were used in the satisfaction of such judgments: *Independent Dist. v. Society for Savings*, 67 N.W., 370.

And see notes to Const., art. XI, § 3.

A statute authorizing bonds in payment of judgments rendered prior to the passage thereof, *held* applicable to judgments rendered between the approval of the act and the time of its taking effect: *Thompson v. Independent School Dist.*, 70 N. W., 1093.

Bonds refunding a judgment which is in excess of the constitutional limit but rendered for a valid indebtedness will be valid to the extent of the amount of the judgment with lawful interest payable semi-annually: *Ibid.*

Where the proposition submitted was as to the issuance of bonds to build a school-house on the old site and such proposition was carried, *held*, that the board might be enjoined from using the proceeds to erect a building on a new site although it was unnecessary to refer to the site in the submission of the proposition and the board had the authority to change the site: *Rodgers v. Independent School Dist.*, 69 N. W., 544.

SEC. **2813. Tax to pay bonds or money borrowed.** The board of each school corporation shall, at the same time and in the same manner as provided with reference to other taxes, fix the amount of tax necessary to be levied to pay any amount of principal or interest due or to become due during the next year on lawful bonded indebtedness or in an independent city or town district of any money borrowed for improvements after a vote thereof authorizing the same, which amount shall be certified to the board of supervisors as other taxes, and levied by them on the property therein

as other school taxes are levied, but such tax shall not exceed five mills upon the dollar of the assessed valuation of such property for money borrowed for improvements. [18 G. A., ch. 51, § 2; 18 G. A., ch. 132, § 6; C.'73, § 1823.]

SEC. **2814. School-house sites—acquisition.** Any school corporation may take and hold so much real estate as may be required for school-house sites, for the location or construction thereon of school-houses and the convenient use thereof, but not to exceed one acre, except in a city or incorporated town it may include one block exclusive of the street or highway, as the case may be, for any one site, unless by the owner's consent, which site must be upon some public road already established or procured by the board of directors, and shall, except in cities, incorporated towns or villages, be at least forty rods from the residence of any owner who objects to its being placed nearer, and not in any orchard, garden or public park. [C. '73, §§ 1825–6.]

A school district may acquire and hold real estate for school-house sites, and therefore by occupation of land for that purpose under a claim of right thereto may acquire title by adverse possession although no former conveyance to it has ever been made: *Independent District v. Fagen*, 63 N. W., 456.

The acre authorized to be set apart may be so measured as not to include any portion of the highway: *Salisbury v. School Dist.*, 70 N. W., 706.

SEC. **2815. Condemnation.** If the owner of the real estate desired for a school-house site, or a public road thereto, refuses or neglects to convey the same, or is unknown or cannot be found, the county superintendent of the proper county, upon the application of either party in interest, shall appoint three disinterested referees, unless a less number shall be agreed upon, who shall take and subscribe an oath to the effect that they will faithfully and impartially discharge the duties laid upon them, due notice having been given by the superintendent to the owner of the time and place of making the assessments of damages as and for the length of time required for the commencement of actions in the district court; such referees shall inspect the grounds proposed to be taken, fix the damages sustained as near as may be on the basis of the value of the real estate so appropriated, and report in writing to the superintendent their doings and findings, which report shall be filed and preserved in his office; and upon the amount found by the referees being deposited with the county treasurer, for the use of the owner, possession may at once be taken and the necessary building or buildings erected and occupied. From the assessment so made either party may appeal to the district court by giving notice thereof as in case of taking private property for works of internal improvement within twenty days after receiving notice of the award made. If such appeal is not taken, the assessment shall be final; if taken, the board may proceed with the construction of improvements, if the deposit hereinbefore provided has been or shall be made. Upon such appeal the school corporation shall not be liable for costs unless the owner shall be allowed a greater sum than given by the referees; all costs in making the referees' assessment to be paid by the school corporation. [C.'73, § 1827.]

The holder of a tax certificate upon property sought to be condemned under these provisions is an "owner" in such sense that he is entitled to notice: *Cochran v. Independent School Dist.*, 50–663.

Notice by publication is not sufficient as against a party residing in the county: *Ibid.*

SEC. **2816. Reversion.** In the case of non-user for school purposes for two years continuously of any real estate acquired for a school-house site it shall revert, with improvements thereon, to the owner of the tract from which it was taken, upon repayment of the purchase price without interest, together with the value of the improvements, to be determined by arbitration, but during its use the owner of the right of reversion shall have no interest in or control over the premises. [C.'73, § 1828.]

Even if the provisions of this section as to reversion apply to sites obtained from a sale by the owner voluntarily made as well as by condemnation proceedings, such rever-

sion will not take place until payment to the school district of the amount paid for the property together with the value of the improvements erected thereon by the district *Independent Dist. v. Fagen*, 63 N. W., 456.

SEC. **2817. Use of barbed wire.** Barbed wire shall not be used to inclose any school buildings or grounds, nor for any fence or other purpose within ten feet of any such grounds. Any person violating the provisions of this section shall be punished by fine not exceeding twenty-five dollars. [20 G. A., ch. 103.]

SEC. **2818. Appeal to county superintendent.** Any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may, within thirty days after the rendition of such decision or the making of such order, appeal therefrom to the county superintendent of the proper county; the basis of the proceedings shall be an affidavit filed with the county superintendent by the party aggrieved within the time for taking the appeal, which affidavit shall set forth any error complained of in a plain and concise manner. [C.'73, §§ 1829-31; R., §§ 2133-5.]

This section does not clothe the superintendent with judicial powers: *School Dist. T'p v. Pratt*, 17-16.

Mandamus to compel action by a district board will not lie where the aggrieved party has a right of appeal to the county superintendent: *Marshall v. Sloan*, 35-445.

An appeal is authorized from the decision or order of the directors. It cannot be taken where they simply refuse or neglect to act where they should do so: *Case v. Blood*, 71-632.

Where a positive, official duty is enjoined upon a board of directors, which is not discretionary, an appeal from the board is not such a plain, speedy and adequate remedy that such duty may not be enforced by *mandamus: Benjamin v. District T'p*, 50-648.

A teacher claiming that he is wrongfully discharged by the board for incompetency without being heard, should appeal. He cannot, without doing so, maintain an action for his salary on the ground that such dismissal is void: *Kirkpatrick v. Independent School Dist.*, 53-585.

Cases wherein the jurisdiction and power of directors are brought in question, and wherein questions arise involving the construction of statutes conferring power upon school officers, may properly be brought in the courts, as by *mandamus*, for instance, without prosecuting the appeal here provided. So *held* as to power of directors to make certain rules, under which plaintiff was excluded from school: *Perkins v. Board of Directors*, 56-476.

An appeal will lie from an action of the board in refusing in a proper case to attach a portion of a district township to an independent district for school purposes. If the board refuses to act upon the application action can be compelled by *mandamus: Hightower v. Overhaulser*, 65-347.

Appeal from action of directors in apportioning the assets and liabilities of new districts under § 2802, may be taken as here provided, and the final judgment of the county superintendent enforced by action: *Independent School Dist. v. Independent School Dist.*, 45-391.

Although a county superintendent cannot, on appeal, render a judgment, his action in a proper case is conclusive upon the parties. The remedy for the collection of the amount awarded where money is claimed would be by action: *Ibid.*

The action of the board of directors in determining to expend money in procuring a highway under authority given them by vote of the electors is in the exercise of a discretion and may be reviewed on appeal to the county superintendent, and cannot be called in question by an injunction: *Bogaard v. Independent Dist.*, 61 N. W., 859.

An appeal to the county superintendent lies from an order of the district board changing the site of the school-house: *Atkinson v. Hutchinson*, 68-161.

In determining an appeal the superintendent is not confined to the exact record made, but may look into the situation as it is at the time of the hearing, and upon new evidence or such information as he sees fit to consider, may make such determination as will do justice at the time: *Ibid.*

It seems that an appeal will lie from the action of the board of directors of an independent district as well as from similar action by the directors of the district township: *Barnett v. Directors*, 73-134.

These provisions for appeal are not necessarily applicable to all school questions, and where the action of the school board in locating the school-house site was claimed to be erroneous it was held that a suit in equity to enjoin the use of the proceeds of bonds for the erection of a school building on another site was proper: *Rodgers v. Independent School Dist.*, 69 N. W., 544.

An appeal to the superintendent is not the only remedy where the board conducting a school election have not complied with the statute as to the length of time for keeping open the polls: *Hinkle v. Sadler*, 66 N. W., 765.

SEC. **2819. Hearing and decision.** The county superintendent shall, within five days after the filing of such affidavit in his office, notify the secretary of the proper school corporation in writing of the taking of such appeal; the latter shall, within ten days after being thus notified, file in the

office of the county superintendent a complete transcript of the record and proceedings relating to the decision complained of, which transcript shall be certified to be correct by the secretary; after the filing of the transcript aforesaid the county superintendent shall notify in writing all persons adversely interested of the time and place where the matter of the appeal will be heard by him. At the time fixed for the hearing, he shall hear testimony for either party, and he shall make such decision as may be just and equitable, which shall be final unless appealed from as hereinafter provided. [C. '73, §§ 1832–4; R., §§ 2136–8.]

SEC. **2820. Appeal to state superintendent—no money judgment.** An appeal may be taken from the decision of the county superintendent to the superintendent of public instruction in the same manner as provided in this chapter for taking appeals from the board of a school corporation to the county superintendent, as nearly as applicable, except that thirty days' notice of the appeal shall be given by the appellant to the county superintendent, and also to the adverse party. The decision when made shall be final. Nothing in this chapter shall be so construed as to authorize either the county or state superintendent to render judgment for money; neither shall they be allowed any other compensation than is now allowed by law. All necessary postage must first be paid by the party aggrieved. [C. '73, §§ 1835–6; R., §§ 2139–40.]

The decision of the superintendent of public instruction in questions properly before him on appeal is final and cannot be reviewed by the courts: *Wood v. Farmer*, 69–533. It may be enforced by *mandamus*: *Newby v. Free*, 72–379.

The decision of the state superintendent affirming the action of the board in changing the school-house site is final and the board has no authority in the absence of a change of conditions to rescind its action and retain the former site: *Carpenter v. Independent Dist.* 63 N. W., 708.

SEC. **2821. Witnesses—fees.** The county superintendent in all matters triable before him shall have power to issue subpœnas for witnesses, which may be served by any peace officer, compel the attendance of those thus served, and the giving of evidence by them, in the same manner and to the same extent as the district court may do, and such witnesses and officers may be allowed the same compensation as is paid for like attendance or service in such court, which shall be paid out of the contingent fund of the proper school corporation, upon the certificate of the superintendent to and warrant of the secretary upon the treasurer; but if the superintendent is of the opinion that the proceedings were instituted without reasonable cause therefor, or if, in case of an appeal, it shall not be sustained, he shall enter such findings in the record, and tax all costs to the party responsible therefor. A transcript thereof shall be filed in the office of the clerk of the district court and a judgment entered thereon by him, which shall be collected as other judgments.

SEC. **2822. Penalties.** Any school officer wilfully violating any provision of this chapter, or wilfully failing or refusing to perform any duty imposed by law, shall forfeit and pay into the treasury of the particular school corporation in which the violation occurs the sum of twenty-five dollars, action to recover which shall be brought in the name of the proper school corporation, and be applied to the use of the schools therein. [C. '73, §§ 1746, 1786; R., §§ 2047, 2081; C. '51, § 1137.]

SEC. **2823. Provisions apply to all corporations—issuance of bonds.** The provisions of this chapter shall apply alike to all districts, except when otherwise clearly stated, and the powers given to one form of corporation, or to a board in one kind of corporation, shall be exercised by the other in the same manner, as nearly as practicable. But school boards shall not incur original indebtedness by the issuance of bonds until authorized by the voters of the school corporation.

CHAPTER 15.

OF THE UNIFORMITY, PURCHASE AND LOANING OF TEXT-BOOKS.

SECTION **2824. Adoption—contract—agent.** The board of directors of each and every school corporation in the state of Iowa is hereby authorized and empowered to adopt text-books for the teaching of all branches that are now or may hereafter be authorized to be taught in the public schools of the state, and to contract for and buy said books and any and all other necessary school supplies at said contract prices, and to sell the same to the pupils of their respective districts at cost, and said money so received shall be returned to the contingent fund. The books and supplies so purchased shall be under the charge of the board, who may select one or more persons within the county to keep said books and supplies for sale, and, to insure the safety of the books and moneys, the board shall require of each person so appointed a bond in such sum as may seem to the board to be desirable. [25 G. A., ch. 35; 23 G. A., ch. 24, §§ 1, 2.]

SEC. **2825. Use of contingent fund—additional tax.** All the books and other supplies purchased under the provisions of this chapter shall be paid for out of the contingent fund, and the board of directors shall annually certify to the board of supervisors the additional amount necessary to levy for the contingent fund of said district to pay for such books and supplies. But such additional amount shall not exceed in any one year the sum of one dollar and fifty cents for each pupil residing in the school corporation, and the amount so levied shall be paid out on warrants drawn for the payment of books and supplies only, but the district shall contract no debt for that purpose. [Same, § 2.]

SEC. **2826. Purchase—exchange.** In the purchasing of text-books it shall be the duty of the board of directors or the county board of education to take into consideration the books then in use in the respective districts, and they may buy such additional number of said books as may from time to time become necessary to supply their schools, and they may arrange on equitable terms for exchange of books in use for new books adopted. [Same, § 3.]

SEC. **2827. Suit on bond.** If at any time the publishers of such books as shall have been adopted by any board of directors or county board of education shall neglect or refuse to furnish such books when ordered by said board in accordance with the provisions of this chapter, at the very lowest price, either contract or wholesale, that such books are furnished any other district or state board, then said board of directors or county board of education may and it is hereby made their duty to bring suit upon the bond given them by the contracting publisher. [Same, § 4.]

SEC. **2828. Bids.** Before purchasing text-books under the provisions of this chapter, it shall be the duty of the board of directors, or county board of education, to advertise, by publishing a notice for three consecutive weeks in one or more newspapers published in the county; said notice shall state the time up to which all bids will be received, the classes and grades for which text-books and other necessary supplies are to be bought, and the approximate quantity needed; and said board shall award the contract for said text-books and supplies to any responsible bidder or bidders offering suitable text-books and supplies at the lowest prices, taking into consideration the quality of material used, illustrations, binding, and all other things that go to make up a desirable text-book; and may, to the end that they may be fully advised, consult the county superintendent, or, in case of city independent districts, with city superintendent or other competent person, with reference to the selectien of text-books: *provided* that the board may reject any and all bids, or any part thereof, and re-advertise therefor as above provided. [Same, § 5.]

SEC. **2829. Change—question submitted.** It shall be unlawful for any board of directors or county board of education, except as provided in section twenty-eight hundred and twenty-seven of this chapter, to displace or change any text-book that has been regularly adopted or re-adopted under the provisions of this chapter, before the expiration of five years from the date of such adoption or re-adoption, unless authorized to do so by a majority of the electors present and voting at their regular annual meeting in March, due notice of said proposition to change or displace said text-books having been included in the notice for the said regular meeting. [Same, § 6.]

SEC. **2830. Samples—lists—bonds.** Any person or firm desiring to furnish books or supplies under this chapter in any county shall, at or before the time of filing his bid hereunder, deposit in the office of the county superintendent samples of all text-books included in his bid, accompanied with lists giving the lowest wholesale and contract prices for the same. And said samples and lists shall remain in the county superintendent's office, and shall be delivered by him to his successor in office, and shall be kept by him in such safe and convenient manner as to be open at all times to the inspection of such school officers, school patrons and school teachers as may desire to examine the same and compare them with others, for the purpose of use in the public schools. The board of directors and county board of education mentioned shall require of any person or persons with whom they contract for furnishing any books or supplies to enter into a good and sufficient bond, in such sum and with such conditions and sureties as may be required by such board of directors or county board of education, for the faithful performance of any such contract. But bonds of surety companies duly authorized under the laws of Iowa shall be accepted. [Same, § 7.]

SEC. **2831. County board of education—question as to county uniformity.** The county superintendent, the county auditor and the members of the board of supervisors shall constitute a county board of education. When petitions shall have been signed by one-half the school directors in any county, other than those in cities and towns, and filed in the office of the county superintendent of such county at least thirty days before the annual school elections, asking for a uniform series of text-books in the county, then such county superintendent shall immediately notify the other members of the county board of education in writing, and within fifteen days after the filing of the petitions said board of education shall meet and provide for submitting to the electors at the next annual meeting the question of county unifority of school text-books. [Same, §§ 8, 9.]

SEC. **2832. Selection of books—depositories.** Should a majority of the electors voting at such elections favor a uniform series of text-books for use in said county, then the county board of education shall meet and select the school text-books for the entire county, and contract for the same under such rules and regulations as the said board of education may adopt. When a list of text-books has been so selected, they shall be used by all the public schools of said county, except as hereinafter provided, and the board of education may arrange for such depositories as it may deem best, and may pay for said school books out of the county funds, and sell them to the school districts at the same price as provided for in section twenty-eight hundred and twenty-four of this chapter, and the money received from said sales shall be returned to the county funds by said board of education monthly. The boards of school officers, who are hereby made the judges of the school meetings, shall certify to the board of supervisors the full returns of the votes cast at said meetings the next day after the holding of said meetings, who shall, at their next regular meeting, proceed to canvass said votes and declare the result. [Same, § 9.]

SEC. **2833. Proceedings of county board.** The county superintendent shall in all cases be chairman of the county board of education, and the county auditor shall be the secretary, and a full and complete record shall be

kept of their proceedings in a book kept for that purpose in the office of the county superintendent. A list of text-books so selected, with their contract prices, shall be reported to the state superintendent with the regular annual report of the county superintendent. [Same, §10.]

SEC. **2834. Officers not to be agents.** It shall be unlawful for any school director, teacher or member of the county board of education to act as agent for any school text-books or school supplies during such term of office or employment, and any school director, officer, teacher or member of the county board of education who shall act as agent or dealer in school text-books or school supplies, during the term of such office or employment, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than ten dollars nor more than one hundred dollars, and pay the costs of prosecution. [Same, § 11.]

SEC. **2835. City schools.** The provisions of sections twenty-eight hundred and thirty-one, twenty-eight hundred and thirty-two and twenty-eight hundred and thirty-three of this chapter shall not apply to schools located within cities or towns, nor shall the electors of said cities or towns vote upon the question of county uniformity; but nothing herein shall be so construed as to prevent such schools in said cities and towns from adopting and buying the books adopted by the county board of education at the prices fixed by them, if by a vote of the electors they shall so decide. [Same, § 12.]

SEC. **2836. Free text-books—question submitted.** Whenever a petition signed by one-third or more of the legal voters, to be determined by the school board of any school corporation, shall be filed with the secretary thirty days or more before the annual meeting of the electors, asking that the question of providing free text-books for the use of pupils in the public schools thereof be submitted to the voters at the next annual meeting, he shall cause notice of such proposition to be given in the call for such meeting. [26 G. A., ch. 37, § 1.]

SEC. **2837. Loaning—discontinuance.** If, at such meeting, a majority of the legal voters present and voting by ballot thereon shall authorize the board of directors of said school corporation to loan text-books to the pupils free of charge, then the board shall procure such books as shall be needed, in the manner provided by law for the purchase of text-books, and loan them to the pupils. The board shall hold pupils responsible for any damage to, loss of, or failure to return any such books, and shall adopt such rules and regulations as may be reasonable and necessary for the keeping and preservation thereof. Any pupil shall be allowed to purchase any text-book used in the school at cost. No pupil already supplied with text-books shall be supplied with others without charge until needed. The electors may, at any election called as provided in the last section, direct the board to discontinue the loaning of text-books to pupils. [Same, §§ 2–6.]

CHAPTER 16.

OF THE SCHOOL FUND.

SECTION **2838. Permanent fund.** The permanent school fund, the interest of which only can be appropriated for school purposes, shall consist of five per cent. of the net proceeds of the public lands of the state, which shall be paid to the state treasurer and be apportioned by the state auditor among the several counties, taking into consideration the amount of the permanent school fund already in possession of and constantly loaned in said county; the proceeds of the sale of the five hundred thousand acres of land granted the state under the eighth section of an act of congress passed September fourth, A. D. 1841, entitled: "*An act to appropriate the proceeds of all sales of public lands, and to grant pre-emption rights*"; the pro-

ceeds of all intestate estates escheated to the state; and the proceeds of the sales of the sixteenth section in each township, or lands selected in lieu thereof. The proceeds of all lands sold, and all sums due from escheats, shall be payable to the treasurer of the county in which the lands or escheated estates are situated or found. [C. '73, §§ 1837, 1839–40; R., §§ 1962, 1964–5.]

The school fund belongs to the state, which has solemnly pledged itself to maintain the same inviolate: *Des Moines County v. Harker*, 34-84.

The state is the legal owner of the school fund, and actions for the benefit of such fund are to be conducted in accordance with the rules pertaining to actions by the state: *Ibid.*

SEC. **2839. Temporary fund.** The temporary school fund, which shall be received and appropriated annually in the same manner as the interest of the permanent fund, shall consist of all forfeitures which are authorized to be made for the benefit of the school fund, the proceeds of all fines collected for violation of the penal laws, for the non-performance of military duty, and the proceeds of the sale of lost goods and estrays; which several funds shall be payable to the county treasurer of the several counties in which they arise, accounted for to the board of supervisors, and apportioned by it among the several school townships and independent districts of the county as provided by law. [C. '73, §§ 1838, 1841; R., §§ 1963, 1966.]

A prosecution to recover a fine should be in the name of the state and not in the name of the treasurer of the county to which the fine would go when recovered: *Rogers v. Alexander*, 2 G. Gr., 443.

The statute giving the owner of stock killed by a railroad company double damages does not conflict with the provision that all fines and penalties shall go to the school fund. Such damages do not constitute fines or penalties: *Mackie v. Central R. of Iowa*, 54-540.

See further as to fines and forfeitures, Const., art. IX, § 4 and § 4338.

The board of supervisors cannot make an agreement as to the time of paying the fine payable to the school fund. The governor alone can remit fines: *State v. Stewart*, 74-336.

SEC. **2840. Division and appraisement.** The board of supervisors may, at such time as it may fix, and as preliminary to a sale, authorize the trustees of any township, where the sixteenth section or land selected in lieu thereof has not been sold, to lay out the same into such tracts as in their judgment will be for the best interests of the school fund, conforming, as far as the interests of said fund will permit, to the legal subdivisions of the United States surveys, and appraise each tract at what they believe to be its true value, and certify to it the divisions and appraisements made by them. Said division and appraisement shall be approved or disapproved by said board at its first meeting after such report, and in case it disapproves the same it may at once order another division and appraisement. If the board of supervisors approves, the county auditor shall make and keep a record of such division, appraisement and approval; but no school lands of any kind shall be sold for less than the appraised value per acre, except as hereinafter provided; nor shall any member of the board of supervisors, county auditor, township trustee, or any person who was engaged in the division and appraisement of said land, be directly or indirectly interested in the purchase thereof; and any sale made, where such parties or any of them are so interested, shall be void. [18 G. A., ch. 12, § 4; C. '73, §§ 1845–7; R., §§ 1970–1.]

SEC. **2841. Notice—sale.** When the board of supervisors shall offer for sale the sixteenth section or lands selected in lieu thereof, or any portion of the same, or any part of the five hundred thousand acre grant, the county auditor shall give at least forty days' notice, by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated, and also publish a notice of said sale for four weeks preceding the same in a newspaper published in the county, describing the land to be sold and the time and place of such sale. At such time and place, or at such other time and place as the sale

may be adjourned to, he shall offer to the highest bidder, subject to the provisions of this chapter, and sell, either for cash, or one-third cash and the balance on a credit not exceeding ten years, with interest on the same at the rate of not less than six per cent. per annum, to be paid at the office of the county treasurer of said county on the first day of January in each year, delinquent interest to bear the same rate as the principal. [23 G. A., ch. 23; 18 G. A., ch. 12, § 4; C.'73, § 1846; R., § 1971.]

SEC. **2842. Sale without appraisement.** When the board of supervisors of any county has once offered for sale any school lands in compliance with the requirements of this chapter, and they remain unsold, and it is unable to obtain therefor the appraised value thereof, and in the opinion of said board it is for the best interests of the school fund that the same be sold for a less price, it may instruct the auditor to transmit to the secretary of state a certified copy of its proceedings in relation to the order of sale thereof and subsequent proceedings in relation thereto, including the action of the township trustees, and the price per acre at which the land had been appraised, which transcript the secretary of state shall submit to the executive council; and if it approves of a sale at a less sum it shall certify such approval to the auditor of the county from which said transcript came, which certificate shall be transcribed in the minute book of the board of supervisors, and thereupon said land may again be offered and sold to the highest bidder, after notice given as in case of sales in the first instance, without being again appraised. [C.'73, § 1849.]

SEC. **2843. Sale on credit—taxation—waste.** When lands are sold upon a partial credit, the contract therefor shall be at once reduced to writing, signed by the proper parties, recorded in the county where the land is situated, and immediately thereafter filed in the office of the county auditor. Any purchaser or his assigns may at any time pay the full amount for lands with accrued interest, and receive from the county auditor a certificate of purchase, which shall be at once transmitted to the state land office, and will entitle the holder to a patent for the lands, to be issued by the governor. All school lands sold in pursuance of law shall be subject to taxation from and after the execution and delivery of a contract of purchase. All sales made, where the full price is not paid, shall be subject to the law relative to the prevention or punishment of waste, and in all such cases the township trustees in each township are charged with the duty of preventing the commission of waste upon any school lands lying in their township, and, if attempted, they shall apply by petition for an injunction to stay the same, and if granted the writ shall issue without bond, and the court issuing it may make such order in the premises as shall be equitable and best calculated to prevent threatened injury, and may adjudge damages for any injury done, the costs to abide the event of the action, and the damages adjudged shall be paid to the county treasurer and become a part of the permanent school fund. [C.'73, §§ 1851-2, 1856-8; R., §§ 1972-3, 1976-8.]

SEC. **2844. Sale of lands bid in.** When lands have been sold and bid in by the state in behalf of the school fund upon a judgment in favor of such fund, the land may be sold in like manner as other school lands, and when lands have been conveyed to the counties in which they are situated for the use of the school fund, instead of to the state, such conveyance shall be valid and binding, and upon proper certificates of sales patents shall issue in like manner as in cases where the conveyances were properly made to the state. [C.'73, § 1850.]

This section applies to land purchased upon judgments recovered upon mortgages or contracts, such as the county authorities are authorized to take or make with relation to the school fund. Where the school fund was loaned by the state under the provision of a special statute, and not by the county under the general statutes, *held*, that the county had no authority to bid in such land at the sale thereof under foreclosure of such mortgage: *Carter v. Sherman*, 63-689.

SEC. **2845. Cash or collateral security.** When, in the judgment of the board of supervisors, any school lands are of such a character that a sale upon partial credit would be unsafe or incompatible with the interest of the school fund, and especially in the case of timbered lands, the board of supervisors may in its discretion exact the whole of the purchase money in advance; or if it sells such land upon a partial credit, as hereinbefore prescribed, it shall require good collateral security for the payment of the part upon which credit is given. [C. '73, § 1853; R., § 1974.]

SEC. **2846. Default in interest.** In all cases where money is due to the university or school fund, either for loans or deferred payments of the purchase price of land sold, the interest shall be made payable on the first day of January of each year, and if the debtor fails to pay the interest within six months thereafter, the entire amount of both principal and interest shall become due, and in case of the university fund, the treasurer thereof shall make report of the delinquent to the county attorney of the county where the debtor resides, or where the real estate given as security is situated, and in case the delinquent is a purchaser or borrower from the school fund, the county auditor shall make a like report to the county attorney, who shall immediately commence action for the collection of the amount reported to him as due, and this section, and each provision thereof, is hereby declared to be a part of every contract made by virtue of this chapter, whether expressed therein or not. [C. '73, §§ 1854–5; R., §§ 1975, 1979.]

SEC. **2847. Losses made good—apportionment of interest.** The state auditor shall keep the school fund accounts in books provided for that purpose, separate and distinct from the revenue books; he shall audit all losses to the permanent school or university fund which shall have been occasioned by the defalcation, mismanagement or fraud of the agents or officers controlling and managing the same, and for this purpose shall prescribe such regulations for those officers as may be necessary to ascertain such losses, and when any sum not less than one thousand dollars shall be so audited and so become a debt of the state to the fund, as provided by the constitution, he shall issue the bond or bonds of the state in favor of the fund, bearing six per cent. interest, payable semiannually on the first day of January and July after issuance, and the amount to pay the interest as it becomes due is appropriated out of any funds in the state treasury. Immediately after making the apportionment in the interest of the permanent school fund, he shall notify the auditor of each county of the sum to which his county is entitled, and, if a county has less thereof than it is entitled to under the apportionment, he shall authorize the treasurer of any such county to transfer enough of the state revenue to said fund to cover such deficiency, which notice shall be filed by the treasurer, and be a sufficient voucher for the amount so transferred. If a county has an excess of such interest above the amount apportioned to it, the notice shall direct the treasurer to transfer the excess to the state revenue and charge it to the interest fund, which notice shall be by him filed, and be a sufficient voucher therefor, and such excess shall be paid into the state treasury. [C. '73, §§ 1842–4; R., § 1969.]

SEC. **2848. Management of funds and lands in each county.** The board of supervisors shall hold and manage the securities given to the school fund in its county, and all judgments and lands belonging to said fund. It may have any part of the school lands surveyed when necessary, and employ the county surveyor therefor, who shall be paid out of the county treasury upon proof made of the request and performance of the service. All actions for and in behalf of said fund may be brought in the name of the county for the use of the school fund, by the county attorney or such other attorney as the board may select. Each county shall be liable for all losses upon loans of the school fund, principal or interest, made in such county, unless the loss was not occasioned by reason of any

default of its officers or by taking insufficient or imperfect securities, or from a failure to bid at an execution sale the full amount of the judgment and costs. All claims for exemption from liability on account of losses shall be examined into and adjusted by the state auditor, upon proof submitted to him in writing in behalf of the county within three months after the county auditor shall be advised by the state auditor of his readiness to receive the proof. In the absence of evidence, or if that submitted is insufficient, the loss may be charged against the county and be conclusive, but if found sufficient, the state auditor shall present the facts in his report to the next general assembly. [C. '73, § 1859–60; R., § 1980.]

As the lien of a school fund mortgage is superior to that of a tax title subsequently acquired on the property, the county has no authority to buy in such tax title, such an act not being necessary for the protection of the fund; and *held*, that it had no authority to buy in such title for the purpose of defeating the lien of a mortgage held by a third party and prior to the one in favor of the fund: *Miller v. Gregg*, 26–75.

The county being liable for all losses upon loans of the school fund made in the county may sue in behalf of such fund, in its own name, as trustee of an express trust: *Madison County v. Tullis*, 69–720.

In the management of the school fund the board of supervisors have authority to do acts which, in the exercise of wisdom and care, men of affairs ordinarily do for the security and collection of debts. Therefore, *held*, that a compromise, in a particular case, of a claim in behalf of the school fund was valid: *Poweshiek County v. Buttles*, 70–246.

SEC. **2849. Loans.** The permanent school fund shall be loaned out by the county auditor, as it comes into the hands of the county treasurer, in sums of one thousand dollars or less to one person or company, in case it is found impracticable to keep the whole amount of funds loaned in sums of five hundred dollars or less to one person or company. In the event it can be kept loaned out in sums of five hundred dollars or less to one person or company, then no loan shall exceed five hundred dollars, nor shall a loan of said fund be made to or be carried by the county auditor, treasurer or member of the board of supervisors. Each loan shall be made for at least one and not more than five years, evidenced by promissory notes bearing six per cent. per annum, payable annually, and delinquent interest to draw the same rate, to be secured by a mortgage on unincumbered real estate, situated in the county in which the loan is made, and appraised, as hereinafter provided, for at least double the sum borrowed; the appraisement to be made by three persons under oath, selected by the county auditor, who shall not in making the valuation take into consideration the buildings upon the lands, for which service each shall be allowed fifty cents, to be paid by the borrower, who shall also pay for recording the mortgage. [23 G. A., ch. 23; 19 G. A., ch. 174, § 2; 18 G. A., chs. 1, 2, 6; C. '73, §§ 1861–3; R., §§ 1981–3.]

A loan made by an officer out of the school fund, without first taking the security provided by the statute, may be repudiated by the proper authorities and the officer and his sureties held liable, or the loan may be ratified and its collection enforced against the borrower and sureties on the note given for the money: *Bremer County v. Barrick*, 18–390.

SEC. **2850. Applications—taking up incumbrances.** All applications to borrow from the permanent school fund shall be made to the auditor of the county in which the land is situated which it is proposed to mortgage as security, who shall cause the proper appraisement to be made, and, if satisfactory, shall examine any abstract of title which the proposed borrower may submit, or he may cause an abstract to be prepared at such proposed borrower's expense. If the title is found to be perfect, and the lands unincumbered, he shall certify this fact and submit the application and all the papers connected therewith to the board of supervisors at its next meeting, regular or called, at which meeting the loan shall be approved or disapproved. If the application is accepted, the auditor shall complete the contract by taking a note payable to the county, and a mortgage upon the lands securing the same, and certify the same to the treasurer, who shall pay over to the borrower the amount named in the note, less a fee of two dollars to be paid to the auditor for his services. The board may reject the

application for any good cause. And if it shall happen that a loan is made upon real estate which is in fact incumbered other than for taxes, the board of supervisors may, when necessary for the safety of the loan, appropriate out of any school fund on hand, if such incumbrance does not exceed one-half the real value of the lands, so much as may be needed to take up and purchase the same, and may also at any meeting, by resolution, assign without recourse, upon payment of the amount due, any school fund note and mortgage to one holding a subsequent lien upon the mortgaged real estate. [C.'73, §§ 1864, 1868–9, 1875; R., § 1984.]

The board of supervisors has power over the management of the school fund, but the auditor has the custody of the securities thereof: *Madison County v. Tullis*, 69–720.

It is the duty of the auditor to preserve and safely keep the notes and mortgages, and when he fails to do so without sufficient excuse he becomes liable on his bond: *Ibid.*

SEC. **2851. Loans reported—examination—additional security.** Each loan made, when fully completed, shall be by the auditor reported to the board of supervisors, and a minute of such report shall be entered upon its records, and from time to time, and at least once a year, all loans, with the security given, shall be carefully examined and report made to the board, which examination shall be conducted by a member thereof, or some competent person selected by it. When a report shows that the security in a given case has for any cause depreciated so that it is no longer sufficient, or it appears that there was a prior incumbrance thereon which materially affects the value of the security, the board shall order the debtor to furnish additional security, and fix a reasonable time within which the same shall be given, and if the party so ordered fails to comply therewith for thirty days after service upon him of a copy of the order, the entire debt shall become due, and an action may be brought to enforce the collection thereof, and these provisions shall enter into and form a part of all contracts of loans, whether incorporated therein in words or not. [C.'73, §§ 1866, 1870; R., § 1985.]

SEC. **2852. Renewal—limitation of action.** When a loan has been made, and the borrower desires to renew the same for one or more years, it may be done in the same manner as the loan was made in the first instance, but no new abstract, except a continuation of the same down to the time, nor examination of title prior to the original loan, nor new mortgage, need be given, unless the mortgage is to be given upon other lands. The time of payment, without further security, may be extended in writing, to be recorded as the original security was, and before maturity of the claim, when the board of supervisors for cause shall so order; but such extension of time shall not operate to release any security held, and lapse of time shall in no case be a bar to any action to recover any part of the school fund, nor shall it prevent the introduction of evidence in such an action, any provision in this code to the contrary notwithstanding. [C.'73, §§ 1871, 1879, 1880, 2542; R., § 1993.]

The right to reborrow the principal must be exercised under such regulations as the board of supervisors may establish by virtue of § 2848. Such right cannot be set up as a defense in an action for the principal sum, but may be enforced, if it exists, by action of *mandamus* against the auditor: *Emmet County v. Skinner*, 48–244.

Where money intended to be given in place of bail was paid to the sheriff, who was not authorized to receive it, *held* that, upon a forfeiture of bail, such money did not become a part of the school fund, and an action to recover the same would be barred by lapse of time: *State v. Farrell*, 83–661.

SEC. **2853. Payments—accounts—settlements.** All payments to the school fund upon contracts, or loans of any other nature, shall be made to the treasurer of the county upon a certificate from the auditor showing the amount due; and the auditor shall, when the debt is paid, release any mortgage or issue a certificate of purchase, as the case may be, and report the same to the board of supervisors at its next meeting, which report shall be carried into the records of the board. The auditor shall also keep in his office, in books to be provided for that purpose, an account to be known as

the "school fund account," in which a memorandum of all notes, mortgages, bonds, money, and assets of every kind and description which may come into his hands and those of the treasurer shall be entered, and separate accounts of principal and interest be kept; and the county treasurer shall keep a like account and record of all school funds coming into his hands. Settlements of such account shall be made with the board of supervisors at its January and June sessions, which settlements shall be recorded with the proceedings of the board. [C. '73, §§ 1867, 1876–7; R., §§ 1986, 1990–1.]

The county auditor is not authorized to receive money paid into the school fund: *Mahaska County v. Searle*, 44–492; *Mahaska County v. Ruan*, 45–328.

Where, although money is paid to the auditor, it appears that it was paid over by the auditor to the treasurer and thus came into the treasurer's hands, the debtor will not be required to pay again: *Poweshiek County v. Allen*, 90–195.

The fact that the clerk of the court had previously made payment of money collected for the school fund to the auditor, *held*, not sufficient to relieve him from liability for a subsequent payment, made in the same manner, which did not reach the treasurer: *Mahaska County v. Searle*, 44–492.

The auditor has no authority to release a portion of the premises covered by a school-fund mortgage upon the payment of the *pro rata* amount secured thereby: *Madison County v. Kridler*, 56–32.

SEC. **2854. Suits—attorneys' fees—purchase on execution.** When outstanding contracts for the sale of school lands or notes for money of the school fund loaned, or interest thereon, are due, the auditor shall by mail at once notify the debtor to make payment thereof within three months. If such debtor shall neglect to comply with such notice, the auditor shall report the same to the county attorney, who shall bring an action to recover the same, and an injunction may issue for cause, without bond when so prayed, and there shall be allowed in the judgment, entered and taxed as a part of the costs in the case, a reasonable sum as compensation to plaintiff's attorney, not exceeding the amount as provided by law for attorneys' fees. Upon a sale of lands under an execution founded upon a school fund claim or right, the auditor shall bid such sum as the interests of the fund require, and, if struck off to the state, it shall be thereafter treated in all respects the same as other lands belonging to said fund. [18 G. A., ch. 12, § 5; C. '73, §§ 1872–4.]

The provision of this section as amended relating to attorney's fees pertains to the mere question of costs, and is therefore not unconstitutional as referring to mortgages executed prior to its passage: *Kossuth County v. Wallace*, 60–508.

SEC. **2855. Lands bid in—losses—county liable for interest.** When land has been bid in by the county under foreclosure proceedings, the county auditor shall at once notify the state auditor, who shall give the county credit for the amount of the original amount of the notes remaining unpaid. When a re-sale is made, and the state auditor through the county auditor has notice thereof, he shall charge the county with the full amount of re-sale, and if the land shall be purchased by a third party for a less amount than due, the loss shall be sustained by the county. County auditors shall on the first day of January report to the state auditor the amounts of all sales and re-sales of the sixteenth section, five hundred thousand acres grant and escheated estates made the year previous, who shall charge the same to the counties, with interest upon the same from the date of such sales or re-sales, at the rate of five per cent. per annum. He shall also on the first day of January charge up to each county having permanent school fund under its control, interest on the whole amount in said county, at the rate of five per cent., payable semiannually on the first day of January and July of the year following, and include it in the semiannual apportionment of interest collected for the year, which shall be taken as the whole sum due from each county. Any surplus collected over the five per cent. charged shall be paid into the county treasury. If any county fails to collect the amount of interest due the state, the deficiency shall be advanced from the county treasury. Any county delinquent in the payment of the state interest account shall be charged one per cent. per month on the amount delinquent, until paid. County auditors

shall, upon the first days of January and July, report to the auditor of state the amount of interest collected, which amount so reported shall be added to the semiannual apportionment of interest hereinbefore provided for. [23 G. A., ch. 23, § 3; 18 G. A., ch. 12, § 3; C. '73, §§ 1881–2, 1884.]

SEC. **2856. Transfer of funds.** When there are funds belonging to the permanent school fund in any county, amounting to one thousand dollars, that cannot be loaned, the county auditor may certify the fact to the auditor of state, who shall order a transfer thereof to some other county or counties, where in his opinion it can be loaned. Upon such transfer being made, he shall give the county making the transfer credit for the amount, and shall charge the county or counties to which the transfer is made with the amount transferred, and shall afterwards charge interest on the actual amount in possession of each county. [C. '73, § 1883.]

SEC. **2857. Penalty against county auditor.** Any county auditor, failing or neglecting to perform any of the duties which are required of him by the provisions of this chapter, shall be liable to a penalty of not less than one hundred nor more than five hundred dollars, to be recovered in an action brought in the district court by the board of supervisors, the judgment to be entered against the party and his bondsmen, and the proceeds to go to the school fund. [C. '73, § 1878; R., § 1992.]

CHAPTER 17.

OF THE STATE LIBRARY AND HISTORICAL COLLECTIONS.

SECTION **2858. Board of trustees—librarian—curator—regulations.** The state library shall be under the management and control of a board of trustees, consisting of the governor, judges of the supreme court, secretary of state, and superintendent of public instruction, of which the governor shall be president. They shall, on and after May the first, 1900, appoint a librarian, and a curator of historical collections who shall act as secretary of the board during its sessions relating to the historical department, and the board shall have full power to make and carry into effect such rules and regulations, not in conflict with law, for the management and care of the books, maps, charts, papers and furniture contained therein, and for the arrangement and safe keeping of the same, as it may think proper. And shall have the power to remove such officers, by a two-thirds vote of said board, for immorality, incompetency or inattention to their duties. The governor, in 1898, may appoint the librarian and curator, to continue in office until May the first, 1900. [25 G. A., ch. 17, § 1; C. '73, §§ 1885–6, 1890.]

SEC. **2859. Taking out books.** Members of the general assembly and congress, judges of the supreme and federal courts, state officers, and when the supreme court is in session the attorneys of said court, shall be permitted, under proper restrictions, penalties and forfeitures, and upon executing a receipt therefor, to take from the library any books, save those which the trustees may determine ought not to be removed; but no book, map, chart or paper belonging to it shall at any time or under any authority be taken from the capitol building, except as hereinafter provided. [18 G. A., ch. 69, § 1; C. '73, §§ 1887–8.]

SEC. **2860. Librarian—term of office—bond.** The librarian shall hold office for the term of two years, commencing on the first day of May in each even-numbered year, and until a successor shall be appointed and qualified. Before entering upon the duties of the office, he shall give a bond with good and sufficient sureties, in the penal sum of five thousand dollars, conditioned for the performance of all the duties required by law and for the observance of all the rules prescribed by the trustees, which shall be filed with and approved by the secretary of state. [C '73, § 1890.]

SEC. **2861. Duties.** The librarian shall have charge of the library, and shall give his personal attention to it, keep it open every day, except Sundays and legal holidays, during such hours as the trustees shall direct, and perform such other duties as shall be imposed upon him by law or prescribed by the rules and regulations of the trustees. [C.'73, §§ 1889–1891.]

SEC. **2862. Catalogue.** He shall label and catalogue the books of the library and additions thereto, as the trustees shall direct, and prepare for publication any such catalogue or supplementary catalogue as they may order, and publish the same. [C.'73, §§ 1892–3.]

SEC. **2863. Report of books taken out by members of legislature.** He shall report to the governor, five days before the adjournment of any session of the general assembly, the number of books taken out of the library by the members thereof, giving the names of all members that have any books at the date of such report, with the title and number of such book. [C.'73, § 1894.]

SEC. **2864. Fines.** All fines, penalties and forfeitures imposed by the rules and regulations of the library for any violation of the same may be recovered in an action in the name of the state and applied to the use of the library, under the direction of the trustees. [C.'73, § 1895.]

SEC. **2865. Liability for lost books.** Any person injuring, defacing, destroying or losing a book shall pay to the librarian twice the value thereof; if it be one of a series, he shall be liable to pay the value of such series, and the librarian shall prosecute therefor, unless, within a reasonable time to be fixed by him, such person shall replace the book so injured or lost. [C.'73, § 1896.]

SEC. **2866. Reports by librarian.** The librarian shall report to the trustees semiannually, or oftener if required, a list of books and other property missing from the library, an account of fines and forfeitures imposed and collected, the amount uncollected, a list of the accessions to the library since the last report, and all other information required by them. He shall also make a full and specific report biennially to the governor as required by law. [22 G. A., ch. 82, § 33; C.'73, § 1897.]

SEC. **2867. Appropriation for library.** The trustees may expend annually, in the purchase of new books or in binding or re-binding books already on hand, the sum of five thousand dollars, or so much thereof as may be needed, and said sum is annually appropriated for said purposes, to be paid out of any money in the state treasury not otherwise appropriated. [25 G. A., ch. 44; 20 G. A., ch. 191, § 3; 19 G. A., ch. 13; 19 G. A., ch. 113; 18 G. A., ch. 194; C.'73, § 1899.]

SEC. **2868. Associate libraries.** Any public, incorporated school or college library in the state may, upon compliance with the provisions of the rules prescribed by the board of trustees of the state library, become an associate library with the state library, and be entitled to all the privileges accorded by this act to associate libraries. It shall be the duty of the state librarian to issue to any eligible library complying with such rules a certificate of association, showing that such library has become an associate library. The associate relationship may be terminated at any time by a surrender of said certificate and the return of all books and other property belonging to the state library, whereupon the state librarian shall return to such associate library any bonds or deposit held for the security of said books or other property. The associate relationship may also be terminated by a violation of such rules as may be prescribed by said board of trustees for the regulation and management of said associate libraries. [26 G. A., ch. 49, § 1.]

SEC. **2869. Reports of associate libraries.** The librarian, committee or other persons having the management and control of said associate library shall make an annual report to the state librarian of the names of its officers, trustees or managers, the number of volumes contained in such library, the number of volumes drawn therefrom during the preceding year,

and such other facts and statistics regarding the same as may be required by said state librarian. Such report shall be made at such time as may be fixed by the state librarian. Such associate librarian, committee or other persons aforesaid shall also report at once any changes made in the officers, trustees or management of such associate library during the year. [Same, § 2.]

SEC. **2870. Loans of books.** Under such reasonable rules and regulations as may be prescribed therefor by said board of trustees and the state librarian, said state librarian, upon the requisition of such associate library, may lend to such associate library books or collections of books from the duplicate department of said state library, or from books especially procured for such purpose, or any books in the state library; but this section shall not authorize the removal of such books, pamphlets, papers, maps or documents as in the discretion of said board of trustees and the state librarian cannot, consistent with the best interests of the state library, be allowed to be taken therefrom; but all expense of transportation shall in all cases be paid by the associate library borrowing such book or other property. [Same, § 3.]

SEC. **2871. Instructions.** The officers, directors, managers or librarian of any such associate library shall be entitled to ask from the state librarian any needed advice or instruction as to buildings, furniture, equipment, management, service, rules for readers, selections of books, buying, cataloguing, shelving, binding books, or other matter pertaining to the establishment, organization or administration of a public library. It shall be the duty of the state librarian to impart such advice or instruction, whenever so requested, consistent with his other duties. [Same, § 4.]

SEC. **2872. Privileges forfeited.** If the responsible officers or managers of any associate library shall disregard, violate or refuse to comply with such rules and regulations as may be made under the provisions of this chapter, such associate library shall be debarred the privileges herein granted. [Same, § 5.]

SEC. **2873. Records, reports and regulations.** The state librarian shall keep a complete record of such associate libraries and of the transactions therewith, and shall include in his annual report a summary of the facts of public interest and value in relation thereto. It shall also be the duty of the state librarian to provide lists of the books, or collections of books, which may be thus available for such purposes, which shall be furnished upon application, together with such requisites, rules and regulations as may be prescribed for the obtaining and management of the same. [Same, § 6.]

SEC. **2874. Loans to colleges or associations.** Where no such library exists, and whenever twenty-five resident taxpayers petition therefor, such books, or collection of books, may be lent to any college, school, university, extension center, chautauqua circle, literary society, reading course, study club, or other association approved by the rules prescribed by said board of trustees of the state library, under such rules, securities and guarantees for the preservation, care, control and management of the same as may be prescribed by said board of trustees. [Same, § 7.]

SEC. **2875. Curator of historical department.** The curator of historical collections shall hold his office for six years and until his successor is appointed and qualified. It shall be his duty, under the direction and authority of the board of trustees of the state library, to collect and arrange books, maps, charts, public documents, manuscripts and other papers and materials illustrative of the history of the state in particular, and of the west generally; to procure from early pioneer settlers narratives of their experiences, exploits, perils and adventures; to procure facts and statements relative to the history, progress and decay of the Indian tribes, so as to exhibit as far as practicable the antiquities of the past; to procure books relating to the history and natural history of the state, and of the central region of the continent of which it forms a part; to subscribe for and pre-

serve files of at least two papers in each county of the state containing the official publications, and cause the same to be bound at the end of every four years; to thoroughly catalogue all such collections for convenient reference, and biennially prepare for publication a report of all collections made under authority of this chapter. County histories and files of newspapers in the state library may, in the discretion of the board of trustees, be transferred to the library of the historical department. [25 G. A., ch. 17, § 2; 24 G. A., ch. 56, §§ 1, 2.]

SEC. **2876. Collection of memorials and mementos.** The curator shall, with the approval of the trustees, collect memorials and mementos of the pioneers of Iowa and the soldiers of all our wars, including portraits, specimens of arms, clothing, army letters, commissions of officers, and other military papers and documents. [24 G. A., ch. 56, § 3.]

SEC. **2877. Ethnology and archæology.** He shall also receive and arrange in cases, to be provided for that purpose, objects illustrative of the ethnology and prehistoric archæology of this and surrounding states, all duplicate specimens to be divided as equally as possible between the university, agricultural college and normal school. [Same, § 4.]

SEC. **2878. Rooms for historical collection.** The custodian of the capitol, under the direction of the trustees of the library, shall provide rooms in the capitol for the historical collection as they may be needed therefor. The curator shall keep the rooms and collections open to the free inspection of the people during such hours each day, Sundays and legal holidays excepted, as the trustees of the library may direct, and Sunday afternoons during the sessions of the general assembly. [Same, §§ 5, 6.]

SEC. **2879. Appropriation for historical department.** There is appropriated annually, for the support of the historical department, the sum of six thousand dollars, out of which shall be paid all of the expenditures of said department, all accounts to be audited by the executive council, after being approved by the trustees of the library. [Same, § 7.]

SEC. **2880. Compensation of curator—expenses.** The curator shall be paid an annual salary of twelve hundred dollars, and allowed such assistants, postage, stationery and incidental expenses as the trustees may authorize. [Same, § 8.]

SEC. **2881. Compensation of librarian—assistants.** The state librarian shall be paid an annual salary of twelve hundred dollars, and may employ for his aid one first assistant at an annual salary of six hundred dollars, one second assistant at an annual salary of five hundred dollars, and one third assistant at an annual salary of four hundred dollars. [24 G. A., ch. 60; 21 G. A., ch. 158; 20 G. A., ch. 191, § 4; 17 G. A., ch. 75; C. '73, § 3762.]

CHAPTER 18.

OF THE STATE HISTORICAL SOCIETY.

SECTION **2882. Appropriation—objects.** There is annually appropriated for the support of the state historical society at Iowa City, in connection with and under the auspices of the university, out of any money in the state treasury not otherwise appropriated, one thousand dollars, or so much thereof as may be needed, to be expended by that society in collecting, embodying, arranging, and preserving in authentic form, a library of books, pamphlets, maps, charts, manuscripts, papers, paintings, statuary, and other materials illustrative of the state and its history, to save from oblivion the memory of its early pioneers, to obtain and preserve narratives of their exploits, perils and hardy adventures, to secure facts and statements relative to the history, genius and progress or decay of our Indian tribes, to exhibit faithfully the antiquities and past and present resources

of the state, and to aid in the publication of such of the collections of the society as it from time to time regards of value and interest, to aid in binding its books, pamphlets, manuscripts and papers, and in paying other necessary and incidental expenses of the society. [18 G. A., ch. 71; C. '73, § 1900; R., § 1959.]

SEC. **2883. Board of curators—meetings.** The board of curators of the society shall consist of eighteen persons, nine of whom shall be appointed by the governor, and nine elected by members of the society. Their term of office shall be two years, and they shall receive no compensation. The governor shall make his appointments on or before the last Wednesday in June in each even-numbered year, and the terms of the persons appointed shall commence on that day; and, at the annual meeting of the society in each odd-numbered year, the others shall be elected by ballot from the members of the society, for the term next ensuing, which annual meeting shall be held at Iowa City on the Monday preceding the last Wednesday in June. [C. '73, §§ 1901, 1903.]

SEC. **2884. Members.** Members may be admitted to the society at any time under such rules as may be adopted by the board of curators. [C. '73, § 1902.]

SEC. **2885. Officers.** The board shall appoint annually, or oftener if need be, a corresponding secretary, recording secretary, treasurer and librarian from the members of the society outside of their own number, who shall hold office for one year, unless sooner removed by a majority vote of the board. Said officers shall hold the same position in the society as upon the board of curators, and their respective duties shall be determined by said board. No officer of the society or board shall receive any compensation from the state appropriation thereto. [C. '73, § 1904.]

SEC. **2886. President.** It shall also appoint from its members a president, who shall be the executive head of the board, and hold office for one year and until his successor is elected. [C. '73, § 1905.]

SEC. **2887. Executive board.** The curators, a majority of whom shall reside in the vicinity of the university, and five of whom shall constitute a quorum, shall be the executive board of the society, and have full power to manage its affairs. It shall keep a full and complete account of all of its doings, and of the receipt and expenditure of all funds collected or granted for the purposes of the society, and shall annually report the same to the governor on or before the fifteenth day of August. [22 G. A., ch. 82, § 34; C. '73, § 1906.]

SEC. **2888. Reports and documents furnished.** Twenty copies of the reports of the supreme court and all other books and documents published by the state or upon its order shall be delivered to the society for the purpose of effecting exchanges with similar societies in other states and countries, and for preservation in its library, or other purposes of the society. [C. '73, § 1907.]

PART SECOND.

PRIVATE LAW.

TITLE XIV.

OF RIGHTS OF PROPERTY.

CHAPTER 1.

OF THE RIGHTS OF ALIENS.

SECTION **2889. Nonresident aliens—acquiring and holding real estate.** Nonresident aliens, or corporations incorporated under the laws of any foreign country, or corporations organized in this country one-half of the stock of which is owned or controlled by nonresident aliens, are prohibited from acquiring title to or holding any real estate in this state, except as hereinafter provided, save that the widow and heirs and devisees, being nonresident aliens, of any alien or naturalized citizen who has acquired real estate in this state, may hold the same by devise, descent or distribution, for a period of twenty years; and if at the end of that time such real estate has not been sold to a *bona fide* purchaser for value, or such alien heirs have not become residents of this state, such land shall escheat to the state: *provided* that nothing in this act contained shall prevent aliens from having or acquiring property of any kind within the corporate limits of any city or town in the state, or lands not to exceed three hundred and twenty acres in the name of one person, or any stock in any corporation for pecuniary profit, or from alienating or devising the same. The provisions of this chapter shall not affect the distribution of personal property, and shall apply to real estate heretofore devised or descended when no proceedings of forfeiture have been commenced. [26 G. A., ch. 104; 25 G. A., ch. 82; 22 G. A., ch. 85, §§ 1, 2.]

Right of alien to own and hold property: The provisions of Const., art. I, § 22, that foreigners who are or may hereafter become residents of the state shall enjoy the same rights in respect to the possession, enjoyment and descent of property as native-born citizens, does not change the common-law rule as to nonresident aliens, and a resident alien, to take advantage of its provisions, must be such at the time of descent cast: *Stemple v. Herminghouser*, 3 G. Gr., 408.

But this provision does not restrict the power of the legislature to extend the same privileges to other foreigners than those named: *Purczell v. Smidt*, 21–540.

It confers upon resident aliens the right to transmit as well as to acquire real property by descent: *Ibid.*

At common law an alien could not acquire real estate by purchase so as to convey a good title to his vendee: *Ibid.*

The act of 1858, respecting aliens (Rev., §§ 2488–2493), so far as it relates to personal property, is probably only declarative of the common law, and in this state, as at common law, aliens are capable of acquiring, holding and transmitting movable property in like manner as citizens: *Ibid.; Greenheld v. Morrison*, 21–538.

It is within the power of the state to declare and regulate the property rights of aliens with respect to property within the state: *Estate of Gill*, 79–296.

Taking by descent or devise: Prior to the adoption of the state constitution of 1846 the common-law rule was in force, and although it was then provided by statute that real property should descend in equal shares to the children, nevertheless an alien child had no inheritable blood and could not take by descent; and the subsequent constitutional provision above referred to only changed the

rule as to aliens who were aliens at the time of descent cast: *Stemple v. Herminghouser*, 3 G. Gr., 408; *Krogan v. Kinney*, 15-242.

Also, *held*, that the provisions of the Revision above referred to were intended to apply only to residents in this state or the United States, except in the single instance of a devise by will to a nonresident alien who should afterwards become a resident; *Krogan v. Kinney*, 15-242; *Rheim v. Robbins*, 20-45.

Such provision giving aliens, wherever resident, the right to take or acquire property by bequest or devise, upon condition, in case of nonresidents, that they shall become residents of this state, was retrospective as well as prospective: *Purczell v. Smidt*, 21-540.

The judges of the court were divided on the question as to the capacity of a nonresident alien so acquire real estate in this state by descent under the statutory provisions above referred to: *Greenheld v. Stanforth*, 21-595.

Such statutory provisions gave aliens resident in the United States who had declared their intention of becoming citizens, and all aliens resident in this state, the right to acquire real property by descent or purchase, the word purchase meaning acquisition by bargain and sale for a consideration; and this provision was prospective: *Purczell v. Smidt*, 21-540.

This statutory provision also gave every alien, wherever resident, the right to acquire real estate by bargain or sale from persons holding an absolute title, provided he in good faith sold the same within ten years to a person capable of holding an absolute title. And the heirs at law of the nonresident alien purchaser took a valid title subject to the same necessity of selling. This provision was retrospective: *Ibid.*

Subsequently to this decision the court united in adhering to the doctrine that under the statutory provision referred to a nonresident could not inherit: *Brown v. Pearson*, 41-481.

Under the statutory provisions just referred to, under which it was decided that an alien nonresident could not take lands in this state by inheritance, *held*, that the nonresident alien heirs of such owner could not inherit any share of such property, but that the whole would pass to heirs who were resident citizens of the state: *King v. Ware*, 53-97.

Under these provisions an alien resident could take nothing by will unless subsequently to the making of the bequest, he became a resident: *Ware v. Wisner*, 4 McCrary, 66.

Dower: The provisions of the Revision gave an alien married woman the same rights of dower as if a resident, provided her husband was capable at the time of his decease, of holding an absolute title to lands in this state: *Purczell v. Smidt*, 21-540.

Granting of lands to: The disposal of the public land within the state being expressly reserved to the United States, a grant by the United States to an alien will confer upon him an inheritable estate: *King v. Ware*, 53-97.

Under present statutes: A resident alien cannot inherit through his father living, who is a nonresident alien, from an uncle or a brother who at the time of his death was also a resident alien. This statute deprives the father in such case of the right to inherit but does not confer such right upon the son: *Furenes v. Mickleson*, 86-508; *Opel v. Shoup*, 69 N. W., 560.

Inheritance from a brother is direct and will not be cut off by the fact that the parents, previously deceased, were nonresident aliens: *Wilcke v. Wilcke*, 71 N. W., 201.

The exception as to "widow and heirs of aliens" in the original act, by which, as here, such widow and heirs might take and hold for a limited time, *held* applicable to widow and heirs of resident as well as nonresident aliens, as to land already acquired: *Easton v. Huott*, 64 N. W., 408.

Relatives who cannot inherit by reason of alienage may still be "heirs" within the meaning of that term as used in a will: *Furenes v. Severtson*, 71 N. W., 196.

Under provisions of 22 G. A., ch. 85, § 2, by which a nonresident alien might acquire land to the extent of three hundred and twenty acres provided that within five years "from the date of purchase" he place the same in the actual possession of a relative "of such purchaser," etc., *held*, that acquisition by purchase included a devise or any method of acquisition other than by operation of law: *Bennett v. Hibbert*, 88-154; *Opel v. Shoup*, 69 N. W., 560; but not descent: *Burrow v. Burrow*, 67 N. W., 287.

Effect of treaty: Disabilities imposed upon aliens as to the ownership of property will be invalid so far as they conflict with provisions in treaties made by the United States with foreign governments in respect to the rights of subjects of such governments: *Opel v. Shoup*, 69 N. W., 560; *Wilcke v. Wilcke*, 71 N. W., 201; *Doehrel v. Hillmer*, 71 N. W., 204.

SEC. **2890. Holders of liens.** The provisions of this chapter shall not prevent the holder of any lien upon or interest in real estate, acquired before or after the date mentioned in the last section, from taking or holding a valid title to the real estate in which he has such interest, or upon which he has such lien; nor shall it prevent any nonresident alien enforcing any lien or judgment for any debt or liability which may have been created subsequently to said date, or which he may hereafter acquire, nor from becoming a purchaser at any sale by virtue of such lien, judgment or liability, if all real estate so acquired shall be sold within ten years after the title shall be perfected in such alien under such sale. Any real estate owned or held by any nonresident alien, as provided in this and the

preceding sections and not disposed of as therein required, shall escheat to the state. [22 G. A., ch. 85, § 6.]

SEC. **2891. Escheat.** The county attorney of any county in which any real estate subject to escheat is situated shall proceed by petition in the name of the state against the owner thereof. The court shall hear and determine the issues presented in said petition, and declare such real estate escheated, or dismiss the petition, as the facts may require. When such escheat is decreed by the court, the clerk shall notify the governor that the title to such real estate is vested in the state by the decree of said court, and present to the auditor of state a bill of the costs incurred by the county in prosecuting such action, under his official certificate and seal, who shall issue a warrant payable to said clerk, drawn on the state treasurer, to pay the costs so incurred. Any real estate, the title to which shall be acquired by the state under the provisions of this chapter, shall be sold in the manner provided for the sale of school lands, and the proceeds of such sales shall become a part of the permanent school fund. [Same, § 3.]

SEC. **2892. Proceedings.** Any citizen of the state, knowing of lands which have escheated under the provisions of this chapter, may file a motion or petition in the district court, praying an order directing the county attorney to commence the proceeding provided for in the preceding section; and if, after hearing such proofs as may be offered, it finds there is reasonable ground to believe that any land has escheated, shall direct the county attorney to proceed as provided in this chapter. If in any such case the county attorney is adversely interested, the court may appoint an attorney to prosecute such action, and fix a reasonable attorney's fee therefor, to be paid as other costs in the case.

SEC. **2893. Limitation.** No action for the recovery of real estate, the title to which is acquired by the state under the provisions of this chapter, shall lie, after the execution and recording of a patent or conveyance thereof by the state, unless such action shall have been commenced within five years after the title became vested in the grantee of the state; but a minor or person of unsound mind shall have the right to bring an action therefor at any time within five years after his disability ceases. The defendant in any action brought under the provisions of this chapter, if the decree is for the plaintiff, shall be entitled to the benefit of the provisions of this chapter relating to occupying claimants. [22 G. A., ch. 85, § 4.]

CHAPTER 2.

OF TITLE IN THE STATE OR COUNTY.

SECTION **2894. Conveyance.** When it becomes necessary, to secure the state or any county or other municipal corporation thereof from loss, to take real estate on account of a debt by bidding the same in at execution sale or otherwise, the conveyance shall vest in the grantee as complete a title as if it were a natural person. [C. '73, § 2910.]

SEC. **2895. Bidding in at execution sale.** Such real estate shall be bid in, if for the state, by the attorney-general, if for the county, by the county attorney, and if any other municipal corporation, by its attorney or agent appointed for that purpose, the proceeds of any such real estate, when sold, to be covered into the state, county or municipal treasury, as the case may be, for the use of the general or the special fund to which it rightfully belongs. [C.'73, § 1911.]

SEC. **2896. Amount of bid.** When real estate is sold as above provided, the fair and reasonable value shall be bid therefor, unless in excess of the judgment, interest, costs and accruing costs, in which case the bid shall be for such sum only. [C.'73, § 1912.]

SEC. **2897. Costs and expenses.** In all cases in which the state becomes the purchaser of real estate under the provisions of this chapter, the costs and expenses attending such purchases shall be audited and allowed by the executive council, and paid out of any money in the state treasury not otherwise appropriated, upon the auditor's warrant, and charged to the fund to which the indebtedness belonged upon which such real estate was taken. If the real estate is purchased by a county, the costs and expenses shall be audited by the board of supervisors and paid out of the county treasury, upon a warrant drawn by the auditor on the treasurer, from the fund to which the debt belonged upon which said real estate was purchased. If the real estate is purchased by any other municipal corporation, then the costs shall be audited and paid by it in the same manner as other claims against it are audited and paid. [C.'73, § 1913.]

SEC. **2898. Management by executive council.** When the title to any real estate is vested in the state under this chapter, the executive council shall have the management and control thereof; may lease the same, while so owned, upon such terms and for such rental as it shall deem for the best interests of the state, and such rents shall be paid into the state treasury and credited to the fund to which the debt belonged upon which it was taken. It shall keep all valuable buildings thereon insured against loss by fire and lightning in some responsible insurance company in the name of the state, and the premiums therefor shall be paid out of the fund to which such real estate belongs, on the order of the said council and warrant of the state auditor drawn thereon; it may sell the same for such sum and upon such terms as to it seems best, and for any deferred payments of the purchase price thereof it may take such adequate security as it sees proper, and the proceeds of such sales shall be paid into the state treasury, and credited to the fund to which such real estate belonged; it shall cause to be executed by the governor, and attested by the secretary of state, such contracts, patents or other instruments as may be necessary to complete such sales or leases, and take such notes, mortgages and other securities in relation thereto as may be proper, running to the state. [C.'73, §§ 1914–16, 1919.]

SEC. **2899. By board of supervisors.** When a county holds such real estate, it shall be controlled, managed and sold by the board of supervisors, and while so held may be leased upon such terms as may seem for the best interests of the county, and all rents received therefrom shall be paid into the county treasury and credited to the fund to which the debt belonged on which such real estate was taken; the board shall keep any valuable buildings thereon insured in some responsible insurance company, and cause the premiums therefor to be paid by directing the auditor of the county to draw his warrant on the treasurer therefor, which shall be paid out of the fund to which the debt belonged on which the real estate was taken; it shall have power to sell and convey any such real estate for such price and upon such terms as to it seems for the best interest of the county, take such portion of the purchase price in cash as to it seems best, and notes secured by mortgage on the same or other real estate for the residue, or other adequate security, in its discretion, payable to such county, and the proceeds of such sales shall be paid into the county treasury and credited to the fund to which the debt belonged on which such real estate was taken. Any such lease or sale shall be made by resolution in writing, regularly adopted by said board, and spread upon its minutes, with the yea and nay vote by which the same was adopted, and the date thereof; such resolution shall show the price paid for such real estate in case of sale, and the rental in case of lease, and give the description thereof; and a transcript of such resolution and action of the board thereon, including the yea and nay vote on its adoption, certified by the county auditor and under the seal of said board, shall be sufficient to pass the title or leasehold of such real estate to the purchaser or lessee, and such transcript shall be entitled to be recorded in

the same manner and with the same effect as a deed executed by a natural person. [C.'73, §§ 1914–19.]

SEC. **2900. In other cases.** In case property is thus purchased by any other municipal corporation as contemplated in this chapter, the power of control and disposal thereof shall be vested in the governing board or body of such corporation, to be exercised substantially and as nearly as may be in accordance with the provisions of the preceding section.

CHAPTER 3.

OF PERPETUITIES AND GIFTS.

SECTION **2901. Disposition of property.** Every disposition of property is void which suspends the absolute power of controlling the same, for a longer period than during the lives of persons then in being, and twenty-one years thereafter. [C.'73, § 1920; R., § 3199.]

A lease for nine hundred and ninety-nine years *held* not invalid under this section: *Todhunter v. Des Moines I. & M. R. Co.*, 58–205.

A lease of railroad property for one hundred years does not render invalid a subsequent mortgage of the lessor's interest: *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed., 441.

This section is intended as a provision against perpetuities, and it is not to be given an essentially different construction from that which has long been recognized as the law of England: *Phillips v. Harrow*, 61 N. W., 434.

Therefore, if the estate has vested, the fact that it is subjected to a trust which is to continue for a longer time than contemplated by this section, is immaterial. The statute applies to the vesting of the estate and not to its continuance after it has vested: *Ibid.*

In general the rule of perpetuities does not apply to devises for charitable purposes: *Ibid.*

Where it was claimed that a devise was void because in violation of the terms of this section, but it appeared that the terms of the will had not resulted in a violation of the law, *held*, that the court would not imagine improbable contingencies which have never happened in order to defeat testator's will: *Jordan v. Woodin*, 61 N. W., 948.

Where by the provisions of a will the title to property was vested in trustees, the property to be used by them as directed for the benefit of the *cestui que trust* and no provision was made for the ultimate disposition of the property, *held*, that on the death of the *cestui que trust* her heirs or representatives would become entitled absolutely to the property and that therefore the provisions in the will were not in violation of this section: *Meek v. Briggs*, 87–610.

This section applies to personal as well as real property: *Ibid.*

SEC. **2902. Churches may lease—taxation.** Church organizations, occupying real property granted to them by the territory or state, may lease the same for business purposes, and occupy other real property with their church edifices, but all of the income derived from such leased real property shall be devoted to maintaining the religious exercises and ordinance of the church to which the grant was originally made, and to no other purpose; and such churches and their affairs shall remain in the control of boards of trustees regularly chosen in accordance with their charters; but real property so leased shall in all cases be subject to taxation, the same as the real property of natural persons. [C.'73, § 1921.]

SEC. **2903. Property in trust.** A gift, devise or bequest of property, real or personal, may be made to the state, or to any county or other municipal corporation, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state, or the governing board or body in behalf of a municipal corporation, as the case may be. [26 G. A., ch. 66, § 1; 25 G. A., ch. 108, § 2; C.'73, § 1387.]

SEC. **2904. Acceptance.** If gifts are made to the state or a county or municipal corporation in accordance with the preceding section, for the benefit of an institution thereof, the property, if accepted, shall be held and man-

aged in the same way as other property of the state, county or corporation acquired for or devoted to the use of such institution; and any conditions attached to such gifts shall become binding upon the state, county or corporation upon the acceptance thereof. [26 G. A., ch. 66, § 2; 25 G. A., ch. 108, § 4.]

CHAPTER 4.

OF THE TRANSFER OF PERSONAL PROPERTY.

SECTION **2905. Conditional sales—recording.** No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages. [C. '73, § 1922.]

Prior to the passage of the act embodied in this section it was held that if the purchaser of personal property acquired possession under such a sale, but failed to acquire title by reason of failure to comply with the conditions on which the sale was to become absolute, the purchaser from him, although in good faith and without notice, acquired no title to the property as against the original owner unless the original transaction was fraudulent: *Bailey v. Harris*, 8-331; *Robinson v. Chapline*, 9-91; *Baker v. Hall*, 15-277; *Moseley v. Shattuck*, 43-540; *National Cash Register Co. v. Maloney*, 64 N. W., 618.

Therefore, *held*, that where property was delivered to vendee under a contract reserving to the vendor the title in the property until paid for, the vendee had a claim thereon prior to that of an assignee for the benefit of creditors, at least in a case where the assignee had actual knowledge of the conditions of the sale: *Warner v. Jameson*, 52-70.

It was doubtless to prevent the injustice that parties were sometimes enabled to practice under the rules established by these cases that this statutory provision was enacted. To bring a case within this statute and take it out of the former rule there must be a purchaser from or creditor of the vendee who, at the time his interest in the property accrued, had neither actual nor constructive notice of the interest reserved in the vendor by the condition of the contract, and the vendee must, at the time the interest accrued, have been in actual possession under the contract. Therefore, where the vendee was not in actual possession of the property, but it was still in the possession of a common carrier, through whom it had been shipped to the vendee, *held*, that the provisions of the statute were not applicable: *Warner v. Johnson*, 65-126.

The statute is intended to prevent the injustice to subsequent purchasers which would result by reason of the transfer of the possession of property by way of sale with a secret reservation of the title in the seller, and to protect not only the original purchaser but purchasers from him; therefore where the purchaser under the conditional sale transferred to another purchaser who had knowledge of the condition under which he held the property but the second purchaser sold to a third who paid consideration without notice of the condition attached to the title, there being no record of the conditional sale, *held*, that such third purchaser would be protected in accordance with the intention of the statute the same as though he had purchased directly from the first purchaser under the conditional sale: *National Cash Register Co. v. Maloney*, 64 N.W., 618.

The absence of notice, etc., does not render the sale invalid as to creditors and others. It is only the condition that is void: *Pash v. Weston*, 52-675.

Where one sold a wind-mill to a railroad company on condition that the seller should retain possession, and it was not alleged that the contract under which the sale was made was in writing, *held*, that the presumption was that it was not in writing, and was not valid against creditors without notice: *Taylor v. Burlington, C. R. & N. R. Co.*, 4 Dillon, 570, 580.

Mortgagees are creditors within the protection of the statutory provision above referred to: *Ibid.*

A conditional sale, although not binding as to subsequent creditors because not in writing or recorded, is nevertheless the taking of security so as to defeat the right of a mechanic's lien: *Ibid.*

A mortgage covering after acquired property does not take priority over the claim of a vendor under a conditional sale of property which comes within the scope of the description in the mortgage: *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 76 Fed., 658.

Where a horse power corn sheller was sold and delivered under a conditional sale with reservation of title in the seller till the purchase price should be paid and was left for a time on the premises of another, where the sheller had been in use by the purchaser, and subsequently was taken and operated by another person as the agent of the purchaser, *held*, that the sheller continued in the pos-

session of the purchaser in such sense as to render the conditional sale invalid as against an attachment levy made without actual notice thereof: *Vorse v. Loomis*, 86-522.

This statutory provision is applicable in favor of execution or attaching creditors, but not in favor of a general creditor or a prior mortgagee: *Myer v. Car Co.*, 102 U. S., 1.

Where a contract of sale is to be fully executed by both parties at a subsequent time, and until fully executed the title to the property is not to pass, the fact that the intended vendee gains possession of the property does not bring the case within the statutory provision: *Budlong v. Cottrell*, 64-234.

Where a party has possession of property under a contract of conditional sale, by the terms of which the ownership of the property is not to be vested in him until it is paid for, such contract or conditional sale will be invalid as against a purchaser having no notice thereof, it not being acknowledged and recorded: *Moline Plow Co. v. Braden*, 71-141.

Where property was in the possession of a party on trial, with the agreement that at the expiration of a certain time he should have the privilege of buying, if satisfactory, *held*, that until the expiration of that time there was no conditional sale or contract such as would render the property liable for his debts; that the "contract" referred to in the statutory provision is one creating the relation of vendee or lessee: *Mowbray v. Cady*, 40-604.

It is competent to show by parol evidence that a written lease of a sewing machine, providing for perodical payments, is part of a transaction in which it was contemplated that upon completion of payments the title should vest in the lessee, and such transaction would constitute, therefore, a conditional sale, which cannot be enforced against a purchaser or lienholder without notice, in the absence of the execution and recording of a written instrument evidencing such transaction: *Singer Sewing Machine Co. v. Holcomb*, 40-33.

One who has had possession of a sewing machine under lease, with contract to become its owner upon fulfillment of certain conditions which have not been performed, cannot maintain replevin to recover possession as against the original owner: *Hunt v. Winkel*, 55-623.

The delivery of property by a vendor to a vendee with the understanding that the vendee may, if he sees fit, make use of the property in exchange, coupled with a condition that the vendor shall not lose his title to such property until payment is made, is a conditional sale within the provisions of this section although there is no obligation on the part of the vendee to accept and pay for the property unless he makes use of it in such exchange. Such a transaction is not a mere bailment: *Wright v. Barnard*, 89-166.

The statutory provision does not apply to a transaction in which property is placed by the principal in the hands of his agent for disposition, no transfer of the title being made, and in such case a purchaser from the agent without knowledge of the agency is not protected: *Conable v. Lynch*, 45-84.

Where lumber was shipped to a person to be sold by him in his own name, as agent, he to receive, as compensation for his services, a share of the profits, *held*, that until a sale was made there was no transfer of the property from the original owner, and that after the sale the title passed to the purchaser, and that the transaction was not a conditional sale to be recorded in order to be valid as against a purchaser without notice: *Crooker v. Brown*, 40-144.

This section is not retrospective and does not apply to conditional sales made before it took effect: *Knoulton v. Redenbaugh*, 40-114; *Moseley v. Shattuck*, 53-540.

SEC. **2906. Sales or mortgages—recording.** No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides. No incumbrance of personal property which may be held exempt from execution by the head of a family, if a resident of this state, under the provisions of law, shall be of any validity as to such exempt property only, unless the same be by written instrument, and unless the husband and wife, if both be living, concur in and sign the same joint instrument. But incumbrances on the property sold, given to secure the purchase price, need only be signed and acknowledged by the purchaser. [26 G. A., ch. 84; C. '73, § 1923; R., § 2201; C. '51, § 1193.]

Change of possession: A change in the "actual possession," which will be sufficient under the statute to render the mortgage valid as to third persons without recording, must be something to indicate the change of ownership; if the property be left with the seller, whose relations to it continue unchanged, so far as the world may know from the acts of the parties, the possession will be regarded as continuing in him: *Boothby v. Brown*, 40-104; *Sutton v. Ballou*, 46-517; *Hickok v. Buell*, 51-655; *McAfee v. Busby*, 69-328.

Therefore, *held*, that where cattle were bought and separated from others on the range and then left with the balance of the herd in care of the same party to be herded, there was not such change of possession as to constitute a notice to creditors and purchasers, and the transaction was void as to them: *Sutton v. Ballou*, 46-517.

The possession of the person claiming

personal property, as against a subsequent purchaser, must be visible, apparent and actual to strangers to the transaction: *Horslcy v. Hairsine*, 77-141.

Therefore, where colts were purchased by defendant from his mother, but left in her possession on her farm, *held*, that the circumstances of the sale were not such as would indicate to a stranger that a change of ownership had taken place, and *held* also, that a failure to submit that question to the jury was prejudicial error: *Ibid.*

Where a sewing machine was sold to B. and put in his house and by him sold to plaintiff, his servant, who allowed it to remain there, *held*, that in the absence of a recorded bill of sale such transfer would not be valid against a creditor: *Hickok v. Buell*, 51-655.

Under this section actual possession means a true, real, genuine, positive and certain possession, and not a virtual or theoretical possession. The mortgagor is in actual possession when he retains the property under his immediate personal supervision and control, though he employs others to aid in that control; but when the property is intrusted to the custody and control of another, although such person be his agent, if it is without the immediate personal supervision of the mortgagor, then the actual possession is in that other and not in the mortgagor, and in such case the mortgage will be valid without recording: *King v. Wallace*, 78-221.

Where plaintiff sought to recover possession of certain personal property under a chattel mortgage, and defendant's claim to the property was based on a chattel mortgage of prior date given by the plaintiff's mortgagor, and it was claimed that the first mortgage was invalid because the property had not changed possession at the time the mortgage was given to plaintiff, *held*, that as the question as to change of possession was being tried, defendant's mortgage was properly admitted in evidence: *Lansley v. Van Alstyne*, 81-476.

Where an arrangement was made between father and son, by which the father was to assume the son's debts and take the stock of the son's business, but the son remained in possession and carried on the business the same as before, *held*, that defendant, who acquired rights with reference to the property without knowledge of such arrangement, was not affected by such transfer: *McIntosh v. Wilson*, 81-339.

A party not having actual possession of property of which he becomes owner by bill of sale should cause the bill of sale to be acknowledged and recorded as a protection against other persons acquiring claims on the property: *McMurray v. Hughes*, 82-47.

If the property sold was in the possession of the seller just before the sale, and no instrument evidencing the sale is properly recorded, evidence as to what there was afterwards to indicate a change of possession should go to the jury: *Wessels v. McCann*, 85-424.

The use of the term "actual possession" implies that a change of possession sufficient to constitute a delivery and pass the property as between the parties may not be sufficient to impart notice to others. To take a case out of the statute, something must be done to impart such notice. Therefore, where there was a sale of a field of corn standing on the farm of the vendor, the vendee not taking immediate charge of the corn nor control of the field, *held*, that the vendor retained actual possession within the meaning of the section: *Smith v. Champney*, 50-174; *Nuckolls v. Pence*, 52-581.

In the absence of a recorded instrument of conveyance, there must be a change of actual possession of such nature as will impart notice: *Harris v. Pence*, 61 N. W., 927; *McKay v. Clapp*, 47-418.

The statute requires such transfer of dominion over the property as to imply notice to persons dealing with reference to the property that the title has been transferred; or such possession as will put such persons in possession of facts leading to inquiry as to the ownership. The possession need not necessarily be such as to imply notice to the public generally, but it is sufficient if it implies notice to those who intend to purchase the property or deal with reference to it: *Deere v. Needles*, 65-101.

The question of possession of property in any case must of necessity depend upon its peculiar facts. All articles of personal property cannot be subject to the dominion and control of the owner in the same manner and to the same extent. When the owner exercises control over the property in the manner and to the extent usual in case of property of like character, and holds possession over it to the extent to which it is capable of being possessed according to the ordinary manner of using and handling such things, it is to be regarded as in his legal possession: *Pope v. Cheney*, 68-563.

Therefore, where the purchaser of corn in the crib was given formal possession thereof by the seller, who proceeded to nail up openings in the crib, *held*, that there was a sufficient change of possession under the statutory provision: *Ibid.*

An instrument assigning a judgment need not be recorded to be valid as to third parties. The *chose in action* so assigned cannot be regarded as in the possession of the assignor at the time of the transfer, or as retained in his possession afterward: *Howe v. Jones*, 57-130.

Not necessary where property is in the hands of third persons: Where the property is not in the actual possession of the mortgagor or vendor, or in his custody so that there may be manual delivery, an actual delivery is not necessary to the validity of the transaction. If the property is placed in the power of the purchaser that is sufficient: *Barrows v. Harrison*, 12-588.

Where personal property is not in the possession of the vendor, but in that of a third party, the statutory provision requiring a change of possession or notice to render the sale valid as to creditors or purchasers does not apply: *Case v. Burrows*, 54-679.

If the property at the time of the sale or mortgage is in the possession of a lessee, and

remains in his possession, the vendor does not retain the "actual possession" of the property, so as to render recording necessary: *Thomas v. Hillhouse*, 17-67.

So *held*, also, where the goods were in the hands of a common carrier: *Alsberg v. Latta*, 30-442.

The requirements of the statute are not applicable where a mortgagor does not have actual possession of the property nor retain it after the mortgage; so *held* with reference to an assignment of money and notes: *Dorsey v. Banks*, 88-595.

Where the property at the time of the sale is in actual possession of a third person as lessee or the like, a sale without notice and without change of possession is valid, and it is wholly immaterial in such cases whether or not the owner has the right to the immediate possession: *Campbell v. Hamilton*, 63-293.

Where a landlord assigned his lease to his creditor, who thereupon became entitled to the landlord's share of the crops on the premises, *held* such assignment was valid without record as to creditors and purchasers from the assignor without notice of the assignment, there being no retention of possession by the landlord: *Lufkin v. Preston*, 57-28.

Retention of possession by mortgagor not fraudulent: The retention of the mortgaged property by the mortgagor does not, as matter of law, render the mortgage fraudulent and void: *Torbert v. Hayden*, 11-435; *Jessup v. Bridge*, 11-572; *Fromme v. Jones*, 13-474; *Wilhelmi v. Leonard*, 13-330; *Smith v. McLean*, 24-322, 330.

Possession retained by vendor or mortgagor after recording the instrument is strictly lawful and not fraudulent or a badge of fraud, unless such retention is a part of the consideration of the sale: *Jordan v. Lendrum*, 55-478.

To make a bill of sale, duly recorded, valid as against subsequent purchasers as contemplated by statute, it is not necessary that it contain any express stipulation that the vendor is to retain possession of the property. Being recorded, the instrument is to have the same effect as if accompanied by actual delivery: *Kuhn v. Graves*, 9-303.

The mere retention of the possession of personal property by the mortgagor thereof, when the mortgage is duly recorded, is no longer either *per se* fraudulent or a badge of fraud in law, although it may be a circumstance with others to prove fraud in fact: *Hughes v. Cory*, 20-399.

The right given by statute to the mortgagor to retain possession of personal property implies the right to a reasonable use thereof, especially when the act of using does not necessarily consume it: *Ibid.*

Right to sell in ordinary course of trade: A chattel mortgage which contains a reservation by the mortgagor of the right to sell the mortgaged property in the usual course of retail trade, with an agreement to keep up the stock to its original value, and a reservation of the right to retain the avails of the sales under an agreement to apply a portion thereof to the payment of the mortgage, is not fraudulent *per se*, as a matter of law, and whether fraudulent in fact, or not, must be decided upon all the evidence: *Hughes v. Cory*, 20-399; *Meyer v. Gage*, 65-606; *Maish v. Bird*, 22 Fed., 576.

Where goods were covered by a chattel mortgage with privilege to mortgagee to sell in the ordinary course of business, it was held, that a sale of a considerable amount of said goods to a creditor who had persistently been attempting to secure payment of his claim in cash but without success, was a sale in the ordinary course of business, it appearing that such creditor was in the habit of buying, but not from mortgagee, merchandise of the kind taken by him in the satisfaction of such claim, it appearing also that the amount of merchandise taken by him exceeded the amount of his claim and that he became indebted to the mortgagee for the balance: *Starker v. McCosh Iron & Steel Co.*, 62 N.W., 848.

Where the mortgaged property is left in the mortgagor's possession with power to sell in the usual course of business upon credit, the mortgagee cannot follow the property into the hands of a purchaser and recover the property or its value: *Byam v. Johnson*, 61 N.W., 970.

Nor does the fact that the mortgage provides that the debtor shall remain in possession of the goods, receiving the proceeds and paying the same to the creditor's banker, render the mortgage void. Such fact might be considered in determining the question of fraud, but it is not fraud *per se: Adler v. Claflin*, 17-89.

The provision that the mortgagor shall have the right to retain possession and carry on the business in the usual retail way for one year, paying costs and expenses of running the business and keeping up the stock to about what it was at the time of the execution of the mortgage, *held* not sufficient to render the mortgage fraudulent in law, although no provision was made for an application of the profits to the satisfaction of the mortgage debt. It might be otherwise if the mortgage should provide for sales that would exhaust the stock without any provision for such application: *Jaffray v. Greenbaum*, 64-492.

The fact that there is no agreement to account to the mortgagee for the proceeds of sales of the mortgaged property in the course of trade does not affect the validity of the mortgage: *Clark v. Hyman*, 55-14.

Reservation of the right to sell in the ordinary course of trade and apply the proceeds to the mortgagor's own use will not render the mortage fraudulent in law: *Sperry v. Ethridge*, 63-543; *Meyer v. Evans*, 66-179.

Nor will the fact that the chattel mortgage containing such agreement with reference to reservation of possession and right to sell in the ordinary course of trade and apply the proceeds to mortgagor's own use, if given after the mortgagor becomes insolvent, render the mortgage necessarily fraudulent: *Sperry v. Ethridge*, 63-543.

In the federal courts it is held that a mortgage of chattels which permits the

mortgagor to remain in possession until default in payment of the debt secured, with power to sell the goods as theretofore, is fraudulent and void in law, and cannot be enforced by a court of equity. This being a matter outside the state statute, the decisions of the United States supreme court will be followed independently of the state decisions: *Crooks v. Stuart*, 2 McCrary, 13; *Wells, v. Langbein*, 20 Fed., 183.

Although the rule in the federal courts is that reservation by mortgagor of the right to sell in the usual course of trade renders the mortgage fraudulent and void as to creditors, yet a plaintiff who in proceedings in the federal courts levies upon such mortgaged property as that of the mortgagor, treating the mortgage as invalid, becomes liable in the state court to an action for trespass: *Meyer v. Gage*, 65–606.

If the mortgagee consents to the sale of the mortgaged property he has no lien upon the proceeds by virtue of his mortgage: *Smith v. Crawford County State Bank*, 68 N. W., 690.

Circumstances indicating fraud: The provisions as to application of the proceeds and the fact of insolvency may be considered as tending to prove that a mortgage reserving right of sale to mortgagor was executed with the intent to defraud or delay other creditors: *Sperry v. Ethridge*, 63–543.

The mere fact that creditors who are secured by chattel mortgages are intimate friends or relatives of the debtor does not necessarily show that their mortgages are fraudulent: *Jaffray v. Greenbaum*, 64–492.

Fraud in fact: Compliance with the provisions of the recording acts does not preclude the transaction being attacked on the ground that it is actually fraudulent as against creditors: *Singer v. Sheldon*, 56–354.

If the parties to the mortgage have a fraudulent intent, in creating the loan, to hinder and delay other creditors, and thereby confer advantages upon the mortgagor which he would not otherwise possess, this will be a fraud in fact which will render the mortgage void. The fact of fraudulent intent must, however, be shown by extrinsic evidence and found by the verdict of the jury. It cannot be inferred from the mere provisions of the mortgage: *Torbert v. Hayden*, 11–435.

If possession by mortgagor is accompanied by the power of disposition or use in any way inconsistent with the object of securing the rights of the mortgagee, that fact would be a badge of fraud, not absolute, but *prima facie*, requiring explanation. Whether possession by the mortgagor with a right to deal with the property as his own is fraudulent constitutes a question of intent, and will depend entirely upon the circumstances explaining such acts of ownership: *Ibid.*

The fact that a chattel mortgage is filed for record by the mortgagor, if under circumstances showing good faith, is not evidence of fraud: *Mason v. Franklin*, 58–506.

The fact of a variance between the true consideration and that expressed in the instrument is at most but a badge of fraud, proper to be submitted to the consideration of the jury as a fact bearing upon the question of fraudulent intent: *Ibid.*

The fact that a mortgage is given by an insolvent person for more than is due, and that such insolvency is known to the mortgagee, is a badge of fraud, but not conclusive: *Wood v. Scott*, 55–114.

That fact, however, casts on the mortgagee the burden of showing that the mortgage was executed in good faith and for an honest purpose, and of satisfactorily explaining why the amount named was greater than the actual indebtedness: *Lombard v. Dows*, 66–243.

A chattel mortgage in a certain case, given by a debtor to his brother to secure existing indebtedness, *held* not fraudulent as to other creditors: *Clark v. Hyman*, 55–14.

The burden of establishing the invalidity of the chattel mortgage is upon the one who opposes its enforcement. This may be done by showing either that the provisions of the mortgage are such as to prove that the parties thereto intended to commit a fraud upon the rights of others, or by showing that the acts of the parties have been such that fraud is the necessary inference: *Maish v. Bird*, 22 Fed., 576.

Delay in recording the mortgage was held to be sufficiently explained by the fact that the mortgagor was trying to secure a large loan in New York, and if successful in so doing was then to pay off the mortgage before it was put on record, the mortgage debt not being created by the mortgage, but already existing: *Ibid.*

Failure to record a chattel mortgage taken on a stock of goods, whereby other creditors are misled to give the mortgagor a credit which does not belong to him, will invalidate the mortgage as against such creditors without notice: *Simon v. Openheimer*, 20 Fed., 553.

A mortgage which is withheld from record for the purpose of enabling the mortgagor to get credit is invalid as against creditors who became such while the mortgage is thus withheld: *Goll & Frank Co. v. Miller*, 87–426.

The fact that the mortgage was withheld from record for the purpose of not injuring the mortgagor's credit constitutes fraud as to creditors who subsequently give credit to the mortgagor without knowledge of such mortgage: *Snouffer v. Kinley*, 64 N. W., 770.

After an assignment by the debtor, such mortgagee is on a like footing with other creditors without notice, of a date prior to the recording of the mortgage: *Rumsey v. Town*, 20 Fed., 558.

The federal courts do not differ from the state courts in regard to the effect of the state statute, but even under the state decisions actual fraud, which may be inferred as matter of law from the facts of the case including the provisions of the mortgage, will render it void. Delay of mortgagee to put his mortgage on record, or his allowing mortgagor to sell the property and apply the proceeds to his own use instead of reducing the mortgage debt, so as to defraud creditors, will constitue fraud such as to deprive the mortgagee of the priority of his

claim: *Lyon v. Council Bluffs Savings Bank*, 29 Fed., 566.

Failure to record a mortgage will not render the mortgage fraudulent as to subsequent mortgagees in the absence of any showing that the withholding of the mortgage from record was by virtue of an agreement between the parties or at the request of the mortgagor: *Mull v. Dooley*, 89–312.

Subsequent purchasers: A mortgagee of chattel property is a purchaser within the protection of these provisions requiring the recording of bills of sale or chattel mortgages: *Manny v. Woods*, 33–265.

Innocent purchaser: Where the purchaser issued notes for the price, which were afterwards taken up, and new notes issued to the creditor of the payee of such notes, the original indebtedness of such payee to the creditor being extinguished, *held*, that such purchaser thus became a purchaser for value: *Norton v. Lumpkin*, 83–335.

Creditor without notice: The term "existing creditors" applies not only to creditors existing at the time the sale or mortgage of the chattel was made, but also to those who become such before change of possession, recording of the instrument, or giving of notice: *Fox v. Edwards*, 38–215.

The words "without notice" apply as well to creditors as to purchasers, and an unrecorded chattel mortgage is valid as against existing creditors with notice thereof at the time of its execution: *Allen v. McCalla*, 25–464; *Miller v. Bryan*, 3–58; *Crawford v. Burton*, 6–476.

The validity of a chattel mortgage is not made to depend solely on the fact of its being recorded before levy by the creditor; actual notice to the creditor is sufficient to give the mortgagee, by virtue of his unrecorded mortgage, duly executed, a preference over the claims of such creditor: *McGavran v. Haupt*, 9–83.

Such actual notice is just as effectual as due record of the instrument in charging the creditor or the officer making the levy with notice of the prior right of mortgagee: *Gordon v. Hardin*, 33–550.

Persons who become creditors of the vendor by a levy before change of possession or recording of the written instrument of sale or actual notice given are protected as existing creditors: *McAfee v. Busby*, 69–328.

A creditor who does not secure a levy under attachment or execution before notice of an unrecorded sale or mortgage is not protected: *Allen v. McCalla*, 25–464; *Cragin v. Carmichael*, 2 Dillon, 519; *Crooks v. Stuart*, 2 McCrary, 13.

The phrase "without notice" contemplates not only actual notice of the contents of the instrument, but also any notice sufficient to put a reasonable man upon inquiry: *Allen v. McCalla*, 25–464.

Notice such as will render a transaction valid without recording must be either actual or constructive. Such notice as to put a party on inquiry is actual notice; but if he does not have actual notice, negligence on his part in failing to make inquiry is immaterial unless, possibly, it amounts to fraud. A party is not to be affected by notice for the reason that he could have obtained knowledge of the transaction by the exercise of diligence: *Moline Plow Co. v. Braden*, 71–141.

If the bill of sale or chattel mortgage is executed or duly filed for record before levy under attachment or execution the creditor is affected with notice thereof: *Kuhn v. Graves*, 9–303.

To bind an officer levying an attachment with notice of an existing unrecorded mortgage thereon, it is not necessary that such notice be received by him subsequently to the writ being placed in his hands: *Stewart v. Smith*, 60–275.

The right of a creditor without notice of a sale or chattel mortgage not evidenced by recorded instrument, and where possession remains in vendor or mortgagor, attaches when he levies upon the property covered thereby, and notice after levy and before sale will not defeat his right to hold the property or transfer title thereto by a sale under such levy: *Boothby v. Brown*, 40–104.

Where a claim is asserted to property by reason of a purchase thereof, the right of the property as against the former owner is dependent upon the single fact of the sale; but, as against the creditors of such owner, who have caused it to be seized under process, it is dependent upon not only the fact of sale, but also the fact of notice of sale to the creditor before seizure, and the claimant of the property is not entitled to recovery in replevin against the sheriff who has seized it under process until he has established each of these facts: *West v. St. John*, 63–287.

An attaching creditor who makes a levy without notice of an unrecorded mortgage is protected against such mortgage although he received notice thereof before the sale under his levy. (Overruling *Kessey v. McHenry*, 54–187): *Bacon v. Thompson*, 60–284.

An attaching creditor has no lien upon goods attached, prior to the levy, and if he has actual notice of an unrecorded mortgage before the levy, he is bound thereby: *Kern v. Wilson*, 82–407.

Notice to a sheriff, before levying an attachment on the property, of the existence of an unrecorded mortgage, charges the attaching creditor with notice thereof: *Hibbard v. Zenor*, 82–505.

Where a chattel mortgage was given on an interest of a partner in a partnership, and the existence of such mortgage was known to a subsequent purchaser of such interest, *held*, that the chattel mortgagee had priority over such purchaser: *Cook v. Gilchrist*, 82–277.

Where it is claimed that a party who would otherwise have priority over a chattel mortgage had actual notice of such mortgage, the burden is on the one who relies on such fact to prove it by preponderance of evidence: *Carson & Rand Lumber Co. v. Bunker*, 83–751.

Where it is claimed that a party levying on property by attachment has actual notice of a chattel mortgage thereon, the mortgage is admissible in evidence, under an offer to follow it with proof of such notice: *Ordway v. Kittle*, 83–752.

Although the description of property in a

mortgage is not sufficient to constitute constructive notice to others, it may be valid as against subsequent creditors levying on the property with actual notice to the creditor or the officer that the identical property is covered by the mortgage: *Coleman v. Reel*, 75-304; *American Well Works v. Whinery*, 76-400; *Cole v. Green*, 77-307; *Luce v. Moorehead*, 77-376; *Citizens Nat. Bank v. Johnson*, 79-290; *Plano Mfg. Co. v. Griffith*, 75-102.

And where a mortgage described "all crops growing and to be grown" on the land specified, and the land was afterwards sold, the purchaser having actual knowledge of the mortgage and the crop it was designed to cover, *held*, that the mortgage was good against the purchaser: *Luce v. Moorehead*, 77-367.

And where it appeared that during the negotiations for the sale plaintiff's agent had been furnished a statement showing certain mortgages on crops grown on the land, which were given to persons not parties to the action, and had full knowledge of such mortgages, *held*, that they were so much a part of the negotiations that they were properly introduced in evidence: *Ibid.*

And where plaintiff's attorney examined the chattel mortgage records before the contract of purchase was completed, and stated to her "the tenor and effect of the chattel mortgages," *held*, that she had actual notice of such mortgages: *Ibid.*

Although a mortgage is given to secure an existing indebtedness, and no extension of time of payment is given, yet, if the mortgagee enter immediately into possession, he assumes a new responsibility, and the mortgage is not deemed to be without consideration: *Clark v. Barnes*, 72-563.

Where a mortgage is executed in accordance with a prior agreement and delivered to a third person for the mortgagee, such third person not being the agent of the mortgagee, the mortgagee will not be affected by knowledge possessed by such third person as to a prior unrecorded mortgage: *Reynolds v. Black*, 91-1.

With notice: A chattel mortgagee having knowledge affecting him with notice of the ownership of the property by a third person cannot assert his claims as against the rights of such third person: *Bray v. Flickinger*, 69-167.

Actual notice of a mortgage void for uncertainty will not affect a person with liens or claims thereunder: *Barr v. Cannon*, 69-20.

Reference in a mortgage of both real and personal property to a mortgage of record in another county, *held* not sufficient to put mortgagee on inquiry as to an unrecorded bill of sale: *Clark v. Barnes*, 72-563.

A recital in a chattel mortgage that it is subject to a prior mortgage will prevent the recording of the second giving it precedence: *Simon v. Openheimer*, 20 Fed., 553.

Facts in a particular case, *held* sufficient to affect the attachment creditor with notice of a chattel mortgage before the levy of his attachment: *Jaffray v. Thompson*, 65-323.

Where a manufacturer of buggies made a chattel mortgage upon buggies in his possession not quite finished, *held*, that the mortgagee acquired thereby a prior claim to that of a person for whom one of such buggies was being manufactured, and who advanced the purchase price thereof, the chattel mortgagee having notice that the buggy was being manufactured for such person, but not that the price had been paid. *Hesser v. Wilson*, 36-152.

Where the description is insufficient so that the record does not impart notice, the mortgagee relying upon actual notice has the burden of proving it: *State Bank v. Felt*, 68 N.W., 818.

Although the party relying on the mortgage alleges that it was duly recorded and does not allege actual notice, yet if the answer alleges want of actual or constructive notice, plaintiff may prove actual notice to sustain his action: *Waterhouse v. Black*, 87-317.

Where mortgagee actually takes possession of the property any defect in the recording of the instrument will be immaterial: *Liggett & Myers Tobacco Co. v. Collier*, 89-144.

Such subsequent delivery to the mortgagee cures any defect there may be by reason of an insufficient description of the property: *Ibid.*

Sufficiency of description: That description which will enable third persons aided by inquiries which the instrument indicates and directs, to identify the property is sufficient: *Smith v. McLean*, 24-322; *Gilchrist v. McGhee*, 67 N.W., 392; *Andregg v. Brunskill*, 87-351; *Sandwich Mfg. Co. v. Robinson*, 83-567.

Where the description in a chattel mortgage is correct as far as it goes but fails fully to point out and identify the property intended to be conveyed a subsequent purchaser or incumbrancer is bound to make every inquiry which the instrument itself should reasonably be deemed to suggest: *Yant v Harvey*, 55-421; *Gilchrist v. McGhee*, 67 N.W., 392.

A description which is destitute of means of identification such as ownership, possession and location, is insufficient: *State Bank v. Felt*, 68 N.W., 818.

The execution of the mortgage does not in itself indicate that the person executing it is the owner of the property: *Ibid.*

It is seldom that descriptions in chattel mortgages are so far identical that the decision of one case is conclusive as to another. The general principle is that the description will be sufficient if by it the mind is directed to evidence whereby it may ascertain the precise thing conveyed, if thereby absolute certainty may be attained: *Taylor v. Gilbert*, 92-587.

Where the property was described as certain three stacks of hay belonging to the mortgagor and located on certain described land, *held*, that an error in the number of the township in the description of said land would not defeat the mortgage, the description being sufficient, rejecting the false recital, to identify the property by means of inquiries which the instrument itself suggested: *King v. Howell*, 62 N.W., 738.

So *held*, also, as to the description of a

mower as "one McCormick mower and all farm machinery now owned and kept by me": *Ibid.*

But *held*, that a description of "all corn now growing on the above described land," the description of the land being erroneous, was not a sufficient description to protect the mortgagee against an attaching creditor, even though the creditor had notice of the mortgage before levying upon the corn: *Ibid.*

Where the description of the property covered by the mortgage was "all the cut and growing and having grown on the" premises described, *held*, that the description was too uncertain to be of any validity against an officer who had levied upon the property, and that the court would not insert or understand the word "crops" for the purpose of curing the defect: *Cray v. Currier*, 62–535.

The description of the mortgaged property as "one oscillation thresher, size 6, 30-inch cylinder, and also one Chicago Pitts ten-horse power," *held* insufficient: *Hayes v. Wilcox*, 61–732.

Where a chattel mortgage described the mortgaged property as "one six 1-2 foot cut Plano harvester and binder," without other words of description, *held*, that it was insufficient to charge third persons with constructive notice: *Plano Mfg. Co. v. Griffith*, 75–102.

A mortgage which is so indefinite as to the description of property that the record thereof would not constitute sufficient notice to a purchaser may, nevertheless, be valid as between parties who are aware of the facts. Therefore, *held*, that a description of the property in the mortgage as "eleven Smith farm wagons, four Ketchum farm wagons," was sufficient as between parties who were aware of the facts, it appearing that the mortgagor had only that number and description of wagons at that time: *Clapp v. Trowbridge*, 74–550.

It is not a sufficient location of property to say that it is in a county named: *Warner v. Wilson*, 73–719.

A chattel mortgage upon a horse, making no reference to future earnings, *held* not to cover earnings by way of premiums at a fair: *McArthur v. Garman*, 71–34.

A mortgage of crops already growing is not void of uncertainty in failing to designate the year in which the crops are to be grown: *Luce v. Moorehead*, 73–498.

A mortgage on crops to be grown in the future may be valid when the crops come into existence: *Norris v. Hix*, 74–524.

While a chattel mortgage will not be deemed to cover after-acquired property unless the intention that it should is clearly expressed, yet where the property is described as all crops grown during certain years on premises specified, and it is executed at such a time that no crops could be completely grown at that time, it will be sufficient to cover crops grown during that year: *Ibid.*

A chattel mortgage may be valid as to property sufficiently described and void for uncertainty of description as to other property: *Luce v. Moorehead*, 73–498.

The description of a bill of sale of a stock of goods and other personal property, *held* sufficient to cover property situated outside of the building in which the stock was included, but on the same lot, such description being sufficient to suggest inquiry which would lead to a knowledge of the existence of the goods in question, and it being the intent of the parties that such goods should be covered: *Towslee v. Russell*, 76–525.

A chattel mortgage upon "sixty head of hogs," without other description, does not contain anything which would justify inquiry leading to the identification of the property, and therefore the record of such mortgage is not notice to a subsequent purchaser of the property intended to be mortgaged: *Everett v. Brown*, 64–420.

A description of property in a mortgage as "one sorrel horse three years old," *held* not to be sufficient as against a purchaser of the property sought to be charged with constructive notice, even though the mortgage contained a recital as to the mortgagor's place of residence: *Barrett v. Finch*, 76–553.

Where the case was tried on the theory that the mortgagee's right to the property depended upon whether the record of his mortgage imparted constructive notice, he having alleged that the mortgage was duly recorded before plaintiff's purchase, *held*, that the burden of proof was not upon plaintiff to prove that he did not have actual notice of the existence of the mortgage: *Ibid.*

If the description contained in the mortgage is such that the mind is directed to evidence, whereby it may ascertain the precise thing conveyed, with absolute certainty, the instrument is valid, otherwise it is void as to third persons for uncertainty: *City Bank v. Ratkey*, 79–215.

Therefore where a mortgage described "eighteen head of two-year-old steers of various colors" by name as registered in the American Short-Horn Herd Book, and stated the place where such cattle were kept, *held*, that the description was sufficient to put third persons on inquiry that would have discovered the precise property: *Ibid.*

And where certain cattle were taken under a chattel mortgage, and a question was raised as to their identity with those described in the mortgage, the testimony of the person who took them from the farm, and of the owner as to the ages of the cattle, *held* to be sufficient to justify the submission of the question to the jury: *Ibid.*

Where the description of animals consisted in the names of the animals given as the same purported to be recorded in the herd book, and it appeared that in such herd book names were often duplicated, and that numbers were not given to the entries in the herd book until the end of the year when the numbers would become the definite designation, *held*, that the description was not sufficient as against a subsequent mortgage: *Taylor v. Gilbert*, 61 N.W., 203.

Where a mortgage shows by implication where the property is situated and who is the owner thereof at the time of the execution of the mortgage, a description of the animal by marks and age will be sufficient. The de-

scription is sufficient if it directs the mind of the inquirer to facts and evidence from which he may ascertain the property mortgaged with absolute certainty: *Shellhammer v. Jones*, 87–520.

A description in a chattel mortgage of certain horses by color, age and weight, and of vehicles by name, with a statement of where such property was kept, *held* to be a sufficient description: *Citizens' Nat. Bank v. Johnson*, 79–290.

If a chattel mortgage describes a certain number of head of cattle, giving the ownership, possession and location, it will be sufficient, although in fact there are not so many cattle corresponding to the description as the mortgage calls for: *Kenyon v. Tramel*, 71–693; *Iowa State Nat. Bank v. Taylor*, 67 N.W., 677.

The recording of a chattel mortgage upon animals described by color, age and name, but not stating the present or past ownership thereof, nor the place where they are or have been kept, will not impart notice: *Warner v. Wilson*, 73–719; *Andregg v. Brunskill*, 87–351.

The question as to the sufficiency of such a description is for the court: *Andregg v. Brunskill*, 87–351.

If from the description contained in the mortgage the mind is directed to evidence whereby it may ascertain the precise thing conveyed, if thereby absolute certainty may be attained, the instrument is valid, otherwise it is void as to third persons for uncertainty: *Haller v. Parrott*, 82–42.

A party to the mortgage may testify as to whether the property in controversy is the same property upon which the mortgage was given for the purpose of identifying the property, and not for the purpose of aiding a defective description as against third persons: *Ibid.*

The description in a chattel mortgage of personal property belonging to a partnership, *held* sufficiently specific in a particular case, as between the parties to an instrument, and to all parties having notice of it: *Cook v. Gilchrist*, 82–277.

Where a chattel mortgage was given upon a "drug stock," *held*, that the court properly directed the jury that the mortgage covered all articles usually included in that term: *Kern v. Wilson*, 82–407.

Where the description of a chattel mortgage included a general stock, and all other goods now on hand, or to be purchased and used in the business of a general millinery store, *held*, that such language included only such millinery goods as were on hand, or might be purchased for sale: *Chapin v. Garretson*, 85–377.

A description in the mortgage of "all the fixtures of every name and nature contained in the store room where said stock is located" is sufficient in connection with parol testimony identifying the property as of that character: *Myers v. Snyder*, 64 N. W., 771.

A description, in a chattel mortgage, of an undivided two-thirds interest in certain crops, *held* sufficient: *Johnson v. Rider*, 84–50.

The description may be helped and rendered sufficient by reference to the description in another mortgage: *Thompson v. Anderson*, 63 N.W., 355.

Where a second chattel mortgage contains a reference to a former mortgage on the same property, such reference is sufficient to put a subsequent judgment creditor upon inquiry and affect him with notice of the lien of such second mortgage upon the property described in the first although the description of the property in the second mortgage standing alone may not be technically sufficient: *Kneller v. Kneller*, 86–417.

After-acquired property: A chattel mortgage will not be deemed to cover after-acquired property unless the intention that it should is clearly expressed: *Iowa State Nat. Bank v. Taylor*, 67 N.W., 677.

A chattel mortgage on property not owned by the mortgagor or even not yet in existence may be effectual when the property is acquired by him: *Thompson v. Anderson*, 63 N.W., 355.

A mortgage on the increase of live stock is valid: *Ibid.*

Book-accounts: This section does not apply to assignments of accounts and such an assignment will be valid as to subsequent parties without recording: *Laurence v. McKenzie*, 88–432.

But accounts may be mortgaged: *Ibid.*; *Sandwich Mfg. Co. v. Robinson*, 83–565; *Davis v. Pitcher*, 65 N.W., 1005.

A chattel mortgage of "the threshing machine accounts which we shall earn, or shall become due us by the work of the" machine, also covered by the mortgage, *held* not sufficient to create any lien upon the unearned accounts, there being nothing to show the county or state in which they were to be earned, or the persons against whom they might accrue: *Sandwich Mfg. Co. v. Robinson*, 83–567.

A chattel mortgage upon property including "our accounts," *held* to be too indefinite in its description of such accounts to constitute notice to a party taking such accounts by assignment: *Sperry v. Clarke*, 76–503.

A description of such accounts as "book accounts" or "book accounts for goods sold" is not sufficient. There should be a schedule thereof showing the names of the several parties and the accounts they severally owe: *Laurence v. McKenzie*, 88–432.

A description in a mortgage on a stock of merchandise which includes therein "all books of account and accounts and notes contracted and to be contracted from the sale of merchandise," *held* sufficient as to third parties as well as between the parties themselves: *Davis v. Pitcher*, 65 N. W., 1005.

While a description in a chattel mortgage of notes and books of account may be insufficient as to a third person without notice, it may be good between the parties to the mortgage, and in such case if the mortgagee, before being served with notice of garnishment, has taken possession of the property and has caused the same to be sold and has bid it in, the defective description in the mortgage is cured as against the party garnisheeing: *Kelley v. Andrews*, 71 N. W., 251.

Mortgage of fixtures: Whether fixtures which are a part of the realty as between the vendor and vendee are, in law, severed and made personalty by the execution of a chattel mortgage thereon, *quære*. But the chattel mortgage, when recorded and indexed as such, does not constitute constructive notice to a subsequent purchaser of the realty: *Bringholff v. Munzenmaier*, 20–513.

Where a chattel mortgage was given on an elevator, machinery, etc., such elevator not being a part of the realty and being, therefore, treated as a chattel, *held*, that the term "fixture" used in the description of the property included a track scale, in connection with which were appliances for loading and unloading cars on such scale from the elevator: *McGorrisk v. Dwyer*, 78–279.

Where a saw-mill was erected upon leased ground, the boiler being encased in brick and the shed covering the mill resting on blocks, it being possible to remove both shed and mill without injury to the realty, and the mill was then mortgaged as personal property, *held*, that as between the mortgagor and his grantees and the mortgagee and his assignees, the mill must be regarded as personal property, and that the fact that the owner of the land became owner of the mill after the execution of the mortgage thereon would not merge the ownership of the mill with that of the realty so as to defeat the chattel mortgage: *Denham v. Sankey*, 38–269.

Where the owner of real property executes a mortgage upon chattels, which may properly be made fixtures, and subsequently affixes them to the realty, a person purchasing or acquiring a lien upon such real property with knowledge of the facts takes subject to the mortgage; and *held*, that the mechanic who attached such fixtures to the realty was affected with notice by the recording of such chattel mortgage, and his lien was subject thereto: *Sowden v. Craig*, 26–156.

Where a chattel mortgage is executed on machinery not yet annexed to the mill in which it is intended to be placed, it becomes a prior lien as against a mortgage of the realty: *Miller v. Wilson*, 71–610.

Growing crop: A chattel mortgage on crops of grain to be grown, executed and recorded before the planting of the crops, continues to cover the grain after it is harvested and threshed, and the mortgagee can follow it into the hands of a purchaser to whom it has been sold in the ordinary course of business, and without notice of the lien, except such as is imparted by the record: *Wright v. Dickey Co.*, 83–332.

Where the owner of land executed a mortgage on crops afterward to be grown, and subsequently before the planting of the crop in question lets the land to a tenant who planted a crop, held that the mortgage given by the lessor did not attach to the crop planted by the lessee: *Knaebel v. Wilson*, 92–536.

The landlord's prospective share of crops to which he is to become entitled under the terms of the lease will be bound by a chattel mortgage from the time his share is set apart; and such mortgage will take priority over the claims of an attaching creditor who garnishes the tenant after such mortgage has been executed: *Riddle v. Dow*, 66 N.W., 1066.

Nursery trees planted by the owner of real estate become a part of the realty, and pass as such to the purchaser at the foreclosure of a mortgage executed by the owner, although the trees were planted after the execution of the mortgage: *Price v. Brayton*, 19–309.

A mortgagee of real property on which nursery trees are standing, who purchases such property at foreclosure sale, is entitled to the trees as against a chattel mortgage thereon given subsequently to the execution of the real property mortgage, but recorded before the foreclosure sale: *Adams v. Beadle*, 47–439.

Place of recording: The mortgage must be filed in the county where the mortgagor resides. It is not sufficent that it is filed in the county where the property is situated: *Stewart v. Smith*, 60–275; *Haller v. Parrott*, 82–42.

Where the mortgaged property is in the possession of an agent of the mortgagee, an officer levying an attachment thereon is bound to take notice of the possession of such mortgagee, although the mortgage is not properly filed for record: *Stewart v. Smith*, 60–275.

A chattel mortgage will be valid in any county to which the property is removed, although not recorded there, if duly recorded in the county where the owner of the property resides. And the same holds true where a mortgage is duly recorded in another state, and the property is subsequently brought into this state and sold: *Smith v. Maclean*, 24–322.

In determining the validity of a chattel mortgage made in another state upon property in that state, the courts will follow the interpretation which the courts of that state give to its statutes in relation to the validity of such mortgages: *Fisher v. Friedman*, 47–443.

A mortgage of personal property, properly executed and recorded in another state where the property is, has the same force when the property is removed to this state as under the laws of the state where executed, and will be enforced here, and the possession of the property by the mortgagor beyond the time stipulated, against the consent of the mortgagee, and in spite of his efforts to recover it, will not defeat his rights thereto: *Simms v. McKee*, 25–341.

Acknowledgment: An acknowledgment is not essential to the validity of a mortgage as between the parties to it or against a person having notice of it: *Gammon v. Bull*, 86–754; *Waterhouse v. Black*, 87–317; and see notes to § 2926.

Effect of recording: Mere recording will not constitute a delivery, and the lien of the mortgage will not attach until there is an acceptance: *National State Bank v. Morse*, 73–174.

No presumption arises from the execution of a mortgage that the mortgagee owns the property therein described or that such property is in existence: *Warner v. Wilson*, 73–719.

An unrecorded bill of sale or mortgage

is admissible in evidence against a subsequent purchaser, it being proper to introduce it for the purpose of following it with proof of notice: *Scharfenberg v. Bishop*, 35–60.

The fact that under the statute requiring the recording of a bill of sale it is defective on the ground of uncertainty will not preclude its being received in evidence: *Singer v. Sheldon*, 56–354.

Priority: Where one member of a partnership executed a mortgage upon his undivided one-half interest in the partnership property, to secure an individual debt, and subsequently purchased the other undivided one-half, of his partner, giving a mortgage upon the whole stock of goods to secure the purchase price, and the stock was afterwards attached by other creditors and sold and the proceeds, which were less than the claims under the mortgages, placed in the hands of a receiver, *held*, that one-half the proceeds of the sale should be applied upon such claim: *Burdette v. Woodworth*, 77–144.

Where a horse power covered by a chattel mortgage securing the payment of two notes was given in exchange for a steam-engine, whereby the first of the two notes was at least partially paid, such note thereafter being transferred to the plaintiff, the last note having before maturity and prior to such exchange been transferred to defendant, a purchaser in good faith, *held*, that the claims of defendant were superior to those of plaintiff under the mortgage with reference to a threshing machine also covered by such chattel mortgage: *Massachusetts Loan & Trust Co. v. Moulton*, 81–155.

An unrecorded chattel mortgage of a building erected on leased premises will not take priority over a mortgage on the landlord's interest in the premises, it appearing that the building was erected with the intention that it should remain as a permanent improvement: *Fletcher v. Kelly*, 88–475.

What instruments: A policy of insurance is not property in such sense that a transfer thereof is to be recorded under this section: *Aultman v. McConnell*, 34 Fed., 724.

The provisions of a lease subjecting exempt property to the landlord's lien are valid only as a chattel mortgage, and the instrument must be recorded as required in this section, to make it effectual against creditors and purchasers without notice: *Sioux Valley State Bank v. Honnold*, 85–352.

A written instrument by which the mortgagor of personal property pledges his interest to a third person, giving him power to sell the same and apply the proceeds on certain indebtedness, will not entitle such person to the possession of the mortgaged property as against the mortgagee: *Parker v. Loan & Trust Co.*, 81–458.

In a particular case, *held*, that an instrument transferring certain property, including books of account, for the purpose of securing an indebtedness, was a chattel mortgage as to such books of account, as well as with reference to the other property, and not, as to them, an assignment only: *Sperry v. Clarke*, 76–503.

By partner: A mortgage made and signed by two of three members of a firm, and given to secure a partnership debt, where the third member makes no objection to the transaction, is valid between the parties even though it does not purport to be a mortgage by the partnership and the mortgagee believed the makers to be the only members of the firm: *Citizens Nat. Bank v. Johnson*, 79–290.

And where it appeared that all the members of the firm assented to the giving of the mortgage, *held*, that the power of one member to bind the firm could only be questioned by the other partners or by some one claiming through them: *Ibid.*

By purchaser under contract: Where it appeared that mortgagor was in possession at the time of executing a mortgage under a contract giving him the right to purchase, but there was no evidence that he had exercised such right, *held*, that the mortgagee did not thereby acquire a lien as against the owner: *Bray v. Flickinger*, 79–313.

SEC. **2907. Index.** The recorder must keep an index book for instruments of the above description, having the pages thereof ruled so as to show in parallel columns, in the manner hereinafter provided in case of deeds for real property:

1. Each mortgagor or vendor;
2. Each mortgagee or vendee;
3. The date of filing the instrument;
4. The date of the instrument;
5. Its nature;
6. The page and book where the record is to be found. [C. '73, § 1924; R., § 2202; C. '51, § 1194.]

A party is not charged with constructive notice of a mortgage until the proper entries are made by the recorder in the index, and the fact that it is a custom of the recorder, when instruments are delivered to him to be recorded near the close of business on one day, not to enter them upon the record until the next day, will not change the rule as to notice: *Hibbard v. Zenor*, 75–471.

[As to indexing, recording, etc., see notes to § 2936.]

SEC. **2908. Time of filing noted.** Whenever any written instrument of the character above contemplated is filed for record, the recorder shall note thereon the day and hour of filing the same, and forthwith enter in his

index book all the particulars required in the preceding section, except the sixth; and from the time of said entry the sale or mortgage shall be deemed complete as to third persons, and have the same effect as though it had been accompanied by the actual delivery of the property sold or mortgaged. [C.'73, § 1925; R., § 2203; C.'51, § 1195.]

The certificate indorsed on the back of the mortgage as here required is *prima facie* evidence that the mortgage has been indexed and recorded as provided by law: *Thompson v. Anderson*, 63 N.W., 355.

The duty to index required by this section is one which is to be performed as soon as it can be done with reasonable exertion and should not be postponed by the recorder on account of other work in his office and where it appeared that he might have indexed the chattel mortgage on the day when it was filed and also have indexed all the other instruments filed on that day but in fact the indexing of that instrument was not done till the next morning, attachments having been levied in the meantime on the property whereby the mortgagee lost his lien, *held*, that the recorder was liable in damages: *First Nat. Bank v. Clements*, 87–542.

And the presumption of negligence arises from the fact that the recorder does not index the instrument at once and upon proof of damages sustained in consequence of the delay, there is a *prima facie* right to recover: *Ibid.*

SEC. **2909. Transfers by person acting in representative capacity.** In indexing transfers of personal property made by an administrator, executor, guardian, referee, receiver, sheriff, commissioner or other person acting in a representative capacity, the recorder shall enter upon such index book the name and capacity of each person executing such instrument, and the owner of the property, if disclosed therein.

SEC. **2910. Recording.** The recorder shall, as soon as practicable, record such instrument, and enter in his index book in its proper place the page and book where the record may be found. [C.'73, § 1926; R., § 2204; C.'51, § 1196.]

SEC. **2911. Mortgagee entitled to possession.** In the absence of stipulations in the mortgage, the mortgagee of personal property is entitled to the possession thereof, but the title shall remain in the mortgagor until divested by sale as provided by law. [C.'73, § 1927; R., § 2217; C.'51, § 1210.]

The mortgagee under a chattel mortgage is not, in this state, the absolute and unqualified owner of the mortgaged property before default in payment of the money secured by the mortgage: *Kern v. Wilson*, 73–490.

Under Revision, § 2217, providing that the mortgagee should hold the legal title as well as the right to possession, *held*, that the legal title was in him for the purpose of enabling him to enforce his lien, but that the ownership remained in the mortgagor: *Hubbard v. Hartford Fire Ins. Co.*, 33–325, 333, 341. Also *held*, that the mortgagor of personal property had no interest therein which could be levied upon and sold under execution: *Campbell v. Leonard*, 11–489; *Gordon v. Hardin*, 33–550; *Porter v. Knight*, 63–365; *McConnell v. Denham*, 72–494. But see §§ 3905, 3979.

Prior to the passing of the statute now embodied in §§ 3779–90, chattel property in the hands of the mortgagor with the right of possession in the mortgagee was not subject to process by creditors of the mortgagor nor was the mortgagee in possession amenable to attachment by garnishment as to the property thus held except as to surplus remaining after payment of the mortgage debt, but notwithstanding such provisions the creditor who claims that the mortgage is fraudulent as against the debt due to him may seize the property on attachment or may garnish the mortgagee in possession and thereby reach the entire value of the property and not merely the surplus over and above the mortgage: *Citizens State Bank v. Council Bluffs Fuel Co.*, 89–618.

If mortgagee has the right to take possession, he may do so even after levy, and leave no interest in the mortgagor subject to levy: *Wells v. Chapman*, 59–658.

The mortgagee is the owner of property covered by the mortgage and entitled to possession thereof in the absence of stipulations to the contrary: *Warder-Bushnell, etc., Co., v. Harris*, 81–153.

A chattel mortgage of property, the possession of which remains in the mortgagor, does not transfer an absolute and unqualified ownership: *Hollingsworth v. Holbrook*, 80–151.

A chattel mortgage is but a security for a debt, and the ownership remains in the mortgagor: *Taylor v. Merchants' & Bankers' Ins Co.*, 83–402.

A chattel mortgagee may maintain an action for possession under his chattel mortgage without producing the note secured thereby. Oral evidence of the indebtedness will be sufficient: *Hibbard v. Zenor*, 82–505.

Where persons were in possession of mortgaged personal property belonging to the mortgagor, as his agent, and were attached as garnishees, and after the garnishment another mortgage was given on the property, and it was then taken from the garnishees by virtue of the first mortgage, *held*, that the garnishees were properly dis-

charged from liability, as they were under no obligation to pursue the property after it had been taken from them by due authority. *Booth v. Gish*, 75–451.

Under stipulations giving the mortgagee the right to take possession of the mortgaged property whenever he "shall choose so to do," his motive or purpose in taking possession cannot be questioned: *Richardson v. Coffman*, 87–121.

Where it was stipulated in the mortgage that the mortgagee might have possession of the property whenever he "shall choose to do so," and that he might "sell the same at public or private sale, or so much thereof as will be sufficient to pay the amount due him or to become due, as the case may be," *held*, that the stipulation contemplated the right of the mortgagee to sell the property before the maturity of the mortgage debt and apply the proceeds in its extinguishment. (Distinguishing *Bank v. Taylor*, 67–572): *Robison v. Gray*, 90–699.

The mortgagor of exempt personal property may maintain an action for damage where the same has been wrongfully seized and sold upon execution: *Evans v. St. Paul Harvester Works*, 63–204.

A mortgagor of personal property has a right to redeem, even after condition broken, and the mortgagee, although in possession after such breach, is liable to garnishment by creditor or mortgagor for any surplus remaining in his hands, in case of a sale of the property, beyond what is necessary to pay his claim: *Doane v. Garretson*, 24–351. But a mortgagee not in possession cannot be garnished. See note to § 3935.

The equity of redemption of the mortgagor of personal property after conditions broken is subject to sale or transfer as other property, and passes under a general assignment. After such general assignment the assignee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*, 58–414. So, also, where, by agreement between mortgagor, mortgagee and an attaching creditor, it was agreed that the mortgaged property be sold in bulk and the proceeds, after satisfying the mortgage, be applied upon the attachment, *held*, that this agreement transferred the mortgagor's equity of redemption and took priority over a subsequent attachment of such proceeds by another creditor: *Phelps v. Winters*, 59–561.

CHAPTER 5.

OF REAL ESTATE.

SECTION **2912. Who deemed seized.** All persons owning real estate not held by an adverse possession shall be deemed to be seized and possessed of the same. [C.'73, § 1928; R., § 2207; C.'51, § 1199.]

The presumption of seizin continues until the owner is disseized: *Barrett v. Love*, 48–103.

SEC. **2913. Estate in fee simple.** The term "heirs" or other technical words of inheritance are not necessary to create and convey an estate in fee simple. [C.'73, § 1929; R., § 2208; C.'51, § 1200.]

Applied: *Barlow v. Chicago, R. I. & P. R. Co.*, 29–276.

SEC. **2914. Conveyance passes grantor's interest.** Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used. [C.'73, § 1930; R., § 2209; C.'51, § 1201.]

A conveyance passes any equitable interest the grantor may have in the land, although he have no legal interest: *White v. Butt*, 32–335, 345.

The dower interest of a wife is relinquished by a deed in which she joins with her husband in the granting clause and covenants, although there is no express relinquishment of dower: *Edwards v. Sullivan*, 20–502.

The fact that a conveyance is voluntary does not create a trust in the grantee in favor of the grantor: *Butler v. Nelson*, 72–732.

A landlord's interest may be mortgaged and a mortgage thereof will cover a building erected on the premises with the intention that it should be a permanent improvement: *Fletcher v. Kelly*, 88–475.

SEC. **2915. After-acquired interest.** Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee. But if the wife or husband of such grantor joins in such conveyance for the purpose of relinquishing dower or homestead only, and subsequently acquires an interest therein as above defined, it shall not be held to inure to the benefit of the grantee. [C.'73, § 1931; R., § 2210; C.'51, § 1202.]

This provision does not apply where a deed conveys the estate which the grantor at the time actually possessed, and he subsequently acquires a greater estate: *Collamer v. Kelley*, 12–319, 326.

Where the title which the grantor claimed when the first conveyance was made was absolutely void by reason of facts of which the grantee was affected with notice, *held*, that a court of equity was not bound to consider a subsequently acquired title as having inured to such grantee, who never made any claim to it, rather than to a subsequent grantee: *Viele v. Van Steenberg*, 31 Fed., 249.

In order that a conveyance may operate to pass an after-acquired title, it must be so executed that it would have passed such title at the time of execution if the grantor had then had such title: *Heaton v. Fryberger*, 38–185.

Where the wife simply joins with the husband in a conveyance for the purpose of relinquishing her dower, an interest afterward acquired by her will not inure to the benefit of the grantee in such conveyance. (See § 2921): *Childs v. McChesney*, 20–43[1]. *O'Neil v. Vanderburg*, 25–104.

Where the intention was only to convey an undivided interest in the property at the time belonging to the mortgagor and that intention was understood by the grantee, it is not proper to give the grantee a larger interest afterwards acquired by the mortgagor: *Cook v. Prindle*, 66 N. W., 781.

Where A. conveyed property to B. without having title thereto, and subsequently C., the owner of the title, conveyed to A., taking from him a mortgage for a part of the purchase money, *held*, that although the title thus conveyed to A. vested at once in B., nevertheless C. would be allowed to enforce his mortgage against the property in B.'s hands: *Morgan v. Graham*, 35–213.

A mortgage will attach to an after-acquired title: *Rice v. Kelso*, 57–115.

Section applied, generally: *Rogers v. Hussey*, 36–664; *Bellows v. Todd*, 39–209, 217; *Prouty v. Tallman*, 65–354; *Nicodemus v. Young*, 90–423.

SEC. **2916. Adverse possession.** Adverse possession of real estate does not prevent any person from selling his interest in the same. [C. '73, § 1932; R., § 2211; C. '51, § 1203.]

As things in action are assignable under our law the reason of the common-law rule, which prohibited a sale of property in the adverse possession of another, ceases, and it may well be doubted whether the rule itself, independently of this section, should longer apply: *Foster v. Young*, 35–27, 40.

SEC. **2917. Future estates.** Estates may be created to commence at a future day. [C. '73, § 1933; R., § 2212; C. '51, § 1204.]

A grant of an estate to commence *in futuro* would give the grantee a present interest in the property; therefore, *held*, that an instrument purporting to convey premises in the usual form of a deed, but containing the stipulation that the grantee "shall have no interest in the said premises as long as the said grantor shall live," did not transfer any estate to the grantee: *Leaver v. Gauss*, 62–314.

SEC. **2918. Declarations of trust.** Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law. [C. '73, § 1934; R., § 2213; C. '51, § 1205.]

An agreement of the trustee of a resulting trust to hold as such, though not in writing, will not deprive such trust of the character imposed upon it by law: *Cotton v. Wood*, 25–43.

The conveyance of real property to a partnership in the name of the partners creates a resulting trust in such partners for the benefit of the partnership: *Paige v. Paige*, 71–318.

Parol evidence to establish an express trust is not admissible: *Richardson v. Haney*, 76–101; *Andrew v. Concannon*, 76–251; *Brown v. Barngrover*, 82–204.

An express trust cannot be established by parol evidence and such evidence to establish a resulting trust must be clear and satisfactory: *Rogers v. McFarland*, 89–286.

A party who seeks to show that he furnished to another money with which to buy in property at execution sale under assignment of a decree and hold the property for the benefit of the former is attempting to establish an express trust, which can only be done by written evidence: *Hempstead v. Wheeler*, 69 N. W., 521.

It is not competent under the provisions of this section to establish an express trust by parol and verbal evidence tending to show an express trust is incompetent: *Maroney v. Maroney*, 66 N. W., 911.

A distinction is sometimes made between resulting or presumptive and constructive trusts, but neither class includes a case of fraud consisting in the refusal to perform a parol agreement creating a trust. There can be no resulting trust where an express agreement is relied on, for an express trust cannot be established by parol: *Dunn v. Zwilling*, 62 N. W., 746.

Parol evidence is not admissible to show that a conveyance was in trust: *Shaffer v. McCrackin*, 90–578.

Where a note and mortgage were executed by a parent to a third person with the parol agreement that it should be held for

the benefit of the child of the mortgagor, *held*, that a trust was thereby created which was not affected by this statutory provision. A trust relating to a chose in action, and not to real estate, is not within the purview of this section. In such case the person for whose benefit the trust is made might maintain action thereon in his own name: *Patterson v. Mills*, 69–755.

Where one person purchases the certificate of a sheriff's sale for another who has the right to redeem from such sale and who advances a portion of the purchase price to the person buying the certificate advancing the balance and agreeing to accept payment of the amount advanced and convey to the other, such trust may be enforced although in parol: *Byers v. Johnston*, 89–278.

The conveyance of land to be converted into money, and the entire proceeds to be paid out by the grantor, creates a trust in the grantee, and an agreement as to the disposal of the proceeds should be in writing: *McGinness v. Barton*, 71–644.

A conveyance of land which is intended merely as a security for the payment of money will be regarded in equity as a mortgage and in such case the courts are not limited to the written instruments executed by the parties, but all the facts and surrounding circumstances will be taken into consideration: *Iowa State Savings Bank v. Coonrod*, 66 N.W., 78.

Though the conveyance to the trustee is absolute in form, a purchaser from the trustee, with knowledge of the trust, takes subject thereto: *Sleeper v. Iselin*, 62–583.

Section applied: *McHenry v. Painter*, 58–365.

SEC. **2919. Conveyances by married women.** A married woman may convey or encumber any real estate or interest therein belonging to her, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons. [C. '73, § 1935; R., § 2215; C. '51, § 1207.]

A married woman may incumber or convey real property owned in her own separate right: *Sanborn v. Casady*, 21–77.

The mortgage of a married woman upon her separate property, to secure her husband's debt, if executed for a valuable consideration, would be binding: *Green v. Scranage*, 19–461.

Previously to the present statutory provision (§ 3157) declaring that a conveyance, transfer or lien executed by either husband or wife in favor of the other shall be valid to the same extent as between other persons, it was held that a conveyance from wife to husband in connection with an agreement to separate, for the relinquishment of dower, would be upheld if supported by a consideration and free from fraud: *Robertson v. Robertson*, 25–350.

But it was also held that, aside from an agreement to separate, neither husband nor wife had any interest in the property of the other which could be the subject of conveyance between them: *McKee v. Reynolds*, 26–578.

And by § 3154, any agreement between husband and wife, relative to any contingent interest of either in the property of the other, is void: *Linton v. Crosby*, 54–478.

The power of a married woman to acquire by purchase, and contract with reference to real property, discussed and previous cases cited: *Shields v. Keys*, 24–298.

For the history of previous legislation as to the power of a married woman to convey, and the method of executing instruments in such cases, see *Simms v. Hervey*, 19–273.

Where husband and wife agreed to sell the wife's interest in certain real estate, after which the husband alone executed, without delivering, a deed thereto, and received payment of the consideration with the wife's knowledge and consent, and she, after the husband's death, voluntarily executed and delivered the deed, *held*, that the wife's title was thereby divested: *Pursley v. Hayes*, 22–11.

Where the title is in the wife, and she joins her husband in a warranty deed conveying it, the addition of a clause releasing her right of dower will not limit the estate conveyed by her to her dower interest: *Grapengether v. Fejervary*, 9–163.

A wife joining with her husband in a conveyance of his property merely to relinquish her dower right does not become bound by the covenants of such deed: *Childs v. McChesney*, 20–431, 436; *Lyon v. Metcalf*, 12–93.

And, therefore, an after-acquired title of the wife does not inure to the grantee in a previous deed of the husband without title, in which deed the wife has simply joined to relinquish dower: *Childs v. McChesney*, 20–431; *O'Neil v. Vanderburg*, 25–104; *Thompson v. Merrill*, 58–419; *Edwards v. Davenport*, 4 McCrary, 34.

Since the enactment of the Code of '51, conveyances by married women are to be executed as in other cases, and acknowledgment is not necessary to their validity: *Simms v. Hervey*, 19–273.

Under this section it seems that a wife may contract with the purchaser of property from her husband to relinquish her dower interest by a separate contract from that of the conveyance: *Dunlap v. Thomas*, 69–358.

SEC. **2920. Conveyances by husband and wife.** Every conveyance made by a husband and wife shall be sufficient to pass any and all right of either in the property conveyed, unless the contrary appears on the face of the conveyance. [C. '73, § 1936; R., § 2255.]

Where the title is in the wife and she joins her husband in a warranty deed conveying it, the addition of a clause releasing her right of dower will not limit the estate conveyed by her to her dower interest: *Grapengether v. Fejervary*, 9–163.

10052

SEC. **2921. Covenants.** Where either the husband or wife joins in a conveyance of real estate owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance, unless it is expressly so stated on the face thereof. [C.'73, § 1937.]

As to the wife, this is the rule generally recognized, aside from statute: *Childs v. McChesney*, 20–431, 436.

The wife should not be held liable for breach of warranty in a conveyance in which she joins with her husband where it does not expressly appear that she was to be bound by the warranty: *Moore v. Graves*, 65 N. W., 1008.

The fact that the land conveyed is not owned by the husband does not render the wife liable to any greater extent under the covenants of the deed than if it had been owned by him, in case the title is not in her, and such covenants will not work an estoppel as to her: *Thompson v. Merrill*, 58–419.

Under a conveyance made prior to the enactment of this provision, in which the husband joined with his wife in conveying property of the wife, *held*, that the husband was liable on the covenants of the deed: *Bellows v. Litchfield*, 83–36.

Section applied: *Lyon v. Metcalf*, 12–93.

SEC. **2922. Title and possession of mortgagor.** In absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereto. [C.'73, § 1938; R., § 2217; C.'51, § 1210.]

The interest of the mortgagor in lands mortgaged is an estate of inheritance: *White v. Rittenmeyer*, 30–268.

The mortgaged property in the mortgagor's hands possesses all the incidents of real estate. It may be sold, will descend to heirs, and is subject to dower: *Barrett v. Blackmar*, 47–565.

The mortgagee does not have an estate in the land, but simply a specific lien or charge thereon to secure his debt: *Newman v. De Lorimor*, 19–244; *McHenry v. Cooper*, 27–137, 144.

A mortgagee is, at common law, entitled to the benefit of covenants running with the land, and that right is not affected by this section: *Devon v. Hendershott*, 32–192.

The mortgagor is not by this section placed in any different position nor has he any greater rights than he had or would have independently of these provisions: *Porter v. Green*, 4–571.

Section applied: *Watts v. Creighton*, 85–153.

SEC. **2923. Tenancy in common.** Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed. [C.'73, § 1939; R., § 2214; C.'51, § 1206.]

When an estate is held by two or more in their own right, nothing being expressed to the contrary, the tenancy is in common, and this rule applies in case of husband and wife: *Hoffman v. Stigers*, 28–302.

Where property is deeded to a partnership in the individual names of the partners it is held by them in trust for the firm: *Paige v. Paige*, 71–318.

A conveyance to father and son will constitute them tenants in common of the property conveyed: *Bolton v. Oberne*, 79–278.

10061

10063

SEC. **2924. Vendor's lien.** No vendor's lien for unpaid purchase money shall be enforced in any court of this state after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit by the vendor, his executor or assigns to enforce such lien. But nothing herein shall be construed to deprive a vendor of any remedy now existing against conveyance procured through the fraud or collusion of the vendees therein, or persons purchasing of such vendees with notice of such fraud or lien. [C.'73, § 1940.]

How reserved: A contract to convey does not defeat a vendor's lien under this section: *Noyes v. Kramer*, 54–22; *Thropshire v. Lyle*, 31 Fed., 694.

A mortgage by vendee is not a conveyance in such sense as to prevent the enforcement of the vendor's lien. In such case the mortgage will take priority, but the vendor's lien may be enforced against the equity of redemption: *Tinsley v. Tinsley*, 52–14.

In particular cases, *held*, that there was not sufficient reservation of the vendor's lien to preserve it: *Rotch v. Hussey*, 52–694; *Dean v. Scott*, 67–233.

An assignment for the benefit of creditors is a conveyance within the meaning of this section, and cuts off any vendor's lien not preserved therein: *Prouty v. Clark*, 73–55.

When the vendor of real estate makes a conveyance and delays taking his mortgage for the purchase money until after a mortgage is made to another party without notice, the vendor's mortgage will be postponed to the other: *Davis v. Lutkiewiez*, 72–254.

This provision limiting the vendor's lien, as against third persons, to cases where it is reserved in a deed or mortgage, is unconstitutional so far as it applies to liens exist-

ing before its enactment: *Jordan v. Wimer*, 45-65; *Webster v. McCullough*, 61-496.

The right to this lien being limited to unpaid purchase money, it will not be sustained when the purchase price has been so blended with other considerations by the contract, or otherwise, that its precise amount cannot be ascertained. Therefore *held*, that an amount due on the settlement of various claims, including the purchase price of real estate, although such balance did not exceed the amount of the purchase price, could not be enforced and made the basis of a vendor's lien: *Erickson v. Smith*, 79-374.

Priority: A mortgagee having knowledge that the purchase money was unpaid could not, before the enactment of this section, acquire a prior lien to that of vendor for such purchase money, whether he knew how much there was unpaid or not, it being his duty to inquire and ascertain the amount unpaid: *Jordan v. Wimer*, 45-65.

A mortgage made subsequently to a deed, for money advanced by a third party to pay the purchase price of the property, does not confer priority over a judgment existing against vendee at the time of the purchase of the property. The mortgagee is not entitled in such case to be subrogated to the rights of the vendor. Whether a simple vendor's lien is paramount to the lien of a judgment obtained without notice of the rights of the vendor, *quære*: *Gilman v. Dingeman*, 49-308.

Where the legal title is held subject to an agreement to convey, in the nature of a title bond, a judgment against the holder of such legal title does not become a lien thereon: *Scott v. Mewhirter*, 49-487.

The vendor's lien does not have priority over the lien of a judgment against vendee, in favor of a party who has no notice of the vendor's rights: *Cutler v. Ammon*, 65-281.

A purchaser under foreclosure of a vendor's lien, which was not commenced until after the execution of a mortgage of the property by vendee, which was recorded subsequently to the commencement of the foreclosure, but prior to sale thereunder, *held* not to have acquired priority over such mortgage: *Henry County v. Bradshaw*, 20-355.

The vendor's lien is superior to the claim of the widow of vendee for dower: *Noyes v. Kramer*, 54-22.

Cancellation of a bond for a deed, and sale of the property to another, will defeat any claim of the person from whom the property was purchased under such bond, as against the subsequent purchaser: *McMillen v. Rose*, 54-522.

A quitclaim deed is sufficient to bar a vendor's lien not evidenced by writing: *Chrisman v. Hay*, 43 Fed., 552.

Assignment: A lien passes to the assignee of notes given for the purchase money as an incident thereof: *Blair v. Marsh*, 8-144; *Rakestraw v. Hamilton*, 14-147; *Paramore v. Nabers*, 42-659.

And such lien will be sufficient consideration for a mortgage executed in recognition thereof, and to make it a matter of record: *Reynolds v. Morse*, 52-155.

Waiver: The taking of a mortgage on the same property is a merger or waiver of the vendor's lien: *Stuart v. Harrison*, 52-511; *Escher v. Simmons*, 54-269.

The taking of a mortgage upon other property to secure unpaid purchase money is a presumptive waiver of the vendor's lien, and casts upon the vendor the burden of proving that no waiver was intended. Evidence in a particular case, *held* not sufficient to overcome such presumption of waiver: *Gnash v. George*, 58-492.

The taking of distinct security is evidence that the vendor does not rely upon his lien, but intends to waive it, and this is true where the vendor accepts the note of a third person indorsed by the vendee, even though it afterwards appears that at the time the maker of such note was insolvent, if the parties supposed the security to be good at the time of the purchase: *Kendrick v. Eggleston*, 56-128.

Where the vendor of real estate takes collateral security for the purchase money he thereby waives presumptively his vendor's lien, and the fact that the security thus taken is of no value, or afterwards becomes valueless, does not defeat the waiver: *Akers v. Luse*, 56-346.

Where the vendor, without relying upon his lien, obtains judgment at law for the purchase money, and buys in the property at a sale thereof under execution, he does not thereby lose his superiority over liens that are inferior to his, but may, by an action in equity against such lienholders, have his title quieted: *Patterson v. Linder*, 14-414.

The fact that vendor's claim for purchase money has been presented to the administrators of vendee's estate, and a portion of the amount thereof has been received, will not operate as a waiver of the lien: *Hayes v. Horine*, 12-61.

Where the vendor conveyed title to the vendee, accepting payment of the debt in money and negotiable securities, which he transferred, *held*, that the vendor's lien was waived and could not be enforced by the purchaser of such securities: *Porter v. Dubuque*, 20-440.

In equity an unpaid vendor who has not waived it will be entitled to a lien, and no waiver obtained by fraud will be effectual to destroy such lien. Accordingly *held*, that in an exchange of lands, the consideration having failed in part by reason of fraudulent representations as to the land exchanged, a vendor's lien could be enforced against the land for which it was taken as payment: *McDole v. Purdy*, 23-277.

The taking of a note upon which, through fault of vendee, nothing is realized, does not constitute a waiver of the vendor's lien: *Johnson v. McGrew*, 42-555.

Where, as part consideration of a conveyance of real property, a bond for a deed was taken for the conveyance by the vendee to the vendor of another piece of real property, and subseqently the obligor in such bond induced the obligee to accept a valueless railroad bond in lieu thereof, *held*, that the delivery of such bond did not satisfy the purchase price of the property first conveyed, which was to have been satisfied by the conveyance of the property covered by the bond

for a deed, and that the obligee in such bond might enforce a vendor's lien on the land originally conveyed by him: *Brown v. Byam*, 65–374.

Under particular circumstances, *held*, that a mortgage never accepted by the vendor would not defeat his right to a vendor's lien: *Huff v. Olmstead*, 67–598.

Against whom available: Aside from statutory provisions, the right of vendor to a lien for unpaid purchase money is well settled. It is an equitable mortgage and does not contemplate any writing to evidence it. It follows the property into the hands of the heir or future vendee with notice: *Pierson v. David*, 1–23.

A vendor's lien for unpaid purchase money may be enforced against the vendee and his heirs and other privies in estate as well as against subsequent purchasers, even where the title has passed to the vendee, and much more readily will this relief be granted when the title is still in the vendor, who has only given title bond for conveyance. Purchasers of vendee's right to the title bond are purchasers of an equity only and take with notice of the vendor's lien: *Blair v. Marsh*, 8–144.

Prior to the adoption of the Code of '73 vendor had a lien upon the premises for any part of the purchase money which he might enforce against any purchaser with notice: *Webster v. McCollough*, 61–496.

In a particular case, *held*, that the evidence did not charge the grantee of property with knowledge of the existence of the vendor's lien thereon: *Harkleroad v. Waterhouse*, 69–702.

After the execution of a conveyance by the vendee the lien ceases to exist even though the grantee knew that the purchase money had not been paid. This is because the grantee has the right to presume that the vendor's lien as to him is waived: *Fisher v. Shropshire*, 147 U. S., 133.

But the filing of a petition in a suit to enforce the lien charges a subsequent grantee with notice thereof: *Ibid.*

The doctrine of a vendor's lien arising by implication is recognized in the courts of Iowa: *Ibid.*

Nature of the right: Under the statutes existing prior to the Code of '73, the vendor's lien was recognized, and was not limited to cases where a bond for a deed had been executed: *Johnson v. McGrew*, 42–555; *Jordan v. Wimer*, 45–65.

The fact that by agreement vendor continues to reside upon the premises during life will not deprive him of his lien, it appearing that there was no reservation in his favor of any interest in the land: *Webster v. McCollough*, 61–496.

Where a party claims the vendor's land under an agreement or contract which is not a technical mortgage, a court of equity will recognize and sustain it, whenever it appears from the contract that it was so intended: *Whiting v. Eichelberger*, 16–422.

The provisions of this section are not applicable to cases where the vendor's lien is based on a contract enforceable in equity, and such a lien will take precedence of a judgment: *Devin v. Eagleson*, 79–269.

Where a party orally agreed to give a mortgage for the purchase price of real estate, in which it was provided that the mortgagor should pay the accruing taxes, and in consideration of such agreement the property was conveyed to him, but he failed to execute the mortgage or to pay the taxes, which were paid by the vendor, *held*, that there was such a part performance as to take the case out of the statute of frauds; and *held*, also, that as between the parties the vendor was entitled to a lien according to the terms of the mortgage for the unpaid purchase-money and interest and the taxes paid by the vendor: *Ibid.*

And where third parties claimed to have extended credit to the purchaser on the faith of his property and without any knowledge of the lien, *held*, that the claim was not well founded, as it appears that the deed to the purchaser was not recorded until long after the date of the last item of the account: *Ibid.*

A vendor's lien upon real estate is not based upon contract, nor is it an equitable mortgage, nor a trust resulting to the vendor from non-payment of purchase money. It is a simple equity raised by courts of chancery, and not depending upon any particular facts: *Porter v. Dubuque*, 20–440.

A vendor's lien is a mere naked equity raised and administered by courts, to be enforced between the parties, where no counter-equities arise, but it is never to be allowed to override or take priority of equities or rights of third persons which have attached in ignorance of such vendor's equity: *Allen v. Loring*, 34–499.

A consolidation of railroad companies by which the stockholders in one acquire stock in the other, and real property belonging to one is transferred to the otner, does not entitle such stockholders to a vendor's lien on such real property: *Cross v. Burlington & S. W. R. Co.*, 58–62.

The interest of vendor in real estate conveyed is not real estate but personal estate, and in case of his death it will descend to his administrators, and not to his heirs: *Baldwin v. Thompson*, 15–504.

In proposing this section commissioners of the Code of '73 say: "The so-called vendor's lien owes its existence to peculiarities of the English law of real estate which have never been adopted by us; and it not only lacks any reason for its perpetuation, but is directly at variance with the whole spirit and interest of our system of land records. On these grounds it has been refused recognition by some American courts even without legislative interposition, and although it has been sustained in Iowa ever since the important case of *Pierson v. David*, 1 Iowa, 23, yet the objections to it have been strongly stated in the recent case of *Porter v. City of Dubuque*, 20 Iowa, 440. Most of the Iowa cases usually cited to sustain it are not authorities for the vendor's lien in the proper sense of the words, but only for the right which a vendor has to enforce payment after he has delivered possession, but before conveyance. With this latter right we of course do not propose to interfere. The amendment suggested only cuts off the

secret lien, after an absolute conveyance, enforced in equity. The language of the court in *Porter v. City of Dubuque* certainly throws enough doubt over the doctrine to call for the interposition of the legislature to settle the question one way or the other, and we think there cannot be much hesitation in which way this should be:" *Code Com'rs' Rep. of '73*, p. 62.

CHAPTER 6.

OF THE CONVEYANCE OF REAL ESTATE.

10105

SECTION **2925. Recording.** No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the same lies, as hereinafter provided. [C. '73, § 1941; R., § 2220; C. '51, § 1211.]

I. EFFECT OF RECORDING.

Not essential to validity: Recording is not essential to the validity of the instrument, as to parties and those having notice, nor to its competency as evidence: *Clark v. Connor*, 28–311.

The recording laws were not designed for the benefit of the immediate parties to a conveyance, but as a protection and shield to third persons: *Hopping v. Burnam*, 2 G. Gr., 39.

As between the parties a mortgage of real property is binding without being recorded: *Brewer's Estate v. Crow*, 4 G. Gr., 520.

After the delivery of a properly executed conveyance the title of the vendor is completely and entirely divested, although the instrument is not recorded: *Norton v. Williams*, 9–528.

As to effect of instruments not properly acknowledged, see notes to next section.

Presumption from recording: The presumption is that a deed, beneficial to the grantee, properly acknowledged and recorded, has been delivered, and the knowledge and assent necessary to a valid delivery will be presumed in the absence of a negative showing: *Robinson v. Gould*, 26–89.

In such a case the burden of proof is upon the party claiming non-delivery to clearly rebut the presumption arising from the acknowledgement and recording: *Craven v. Winter*, 38–471.

Therefore, *held*, that delivery of a deed of voluntary conveyance to the wife of grantee, who was a son of grantor, would be presumed to be a delivery to the son: *Ibid.*

While the recording of a conveyance is not proof of its delivery, yet execution of the instrument and delivery to the recorder in good faith and at the instance of the grantee, may constitute a delivery; but the presumption of delivery would not arise from the fact that the instrument is found recorded, if the grantee has done no act recognizing its existence or validity: *Foley v. Howard*, 8–56.

The fact that a grantor in a deed delivers it to the recorder for record may be a circumstance, with others, tending to show fraud, but does not of itself, as a matter of law, make the deed fraudulent or void: *Ward v. Wehman*, 27–279.

Assent of the grantee to the conveyance will not relate back to the delivery of the deed to the recorder for record where it was without the knowledge of the grantee, and without previous agreement to execute a conveyance of the property referred to: *Day v. Griffith*, 15–104.

Subsequent acceptance by the grantee of an instrument delivered to the recorder without his knowledge will not relate back to such delivery so as to cut out the rights of an intervening attaching creditor: *Ibid.*

Filing a deed for record cannot be considered as a delivery unless it is filed in pursuance of a previous agreement: *Deer v. Nelson*, 73–186.

Record notice: The fact that a purchaser is charged with record notice of one lien does not affect him as to others not recorded. Though not a *bona fide* purchaser as to the one he may be as to the others: *Koons v. Grooves*, 20 373.

A fraudulent deed acquires no validity by recording, and does not bind a subsequent purchaser who has not actual notice: *Gardner v. Cole*, 21–205.

A grantor who becomes liable on covenants running with the land is charged with notice of subsequent conveyances or incumbrances of record, and cannot, by settlement with his immediate grantee, cut off the claims of subsequent parties: *Devin v. Hendershot*, 32–192.

The filing for record is notice to the world of grantee's rights, and a party claiming a right of action as against the conveyance on account of fraud is deemed to have had notice of such fraud from the date of the recording: *Laird v. Kilbourne*, 70–83.

The record of a deed is notice to other persons claiming title in the property that the claim is made by the person in whose favor the deed is recorded: *Mohlis v. Trauffler*, 91–751.

A person having constructive notice of an instrument is affected with all that it contains, and if thereby put upon inquiry he is bound to take notice of all that he might have learned by pursuing the path indicated: *Thomas v. Kennedy*, 24–397.

The rights conferred by an instrument of which a subsequent purchaser has constructive notice only are to be determined

by the instrument itself as recorded and indexed, and not by facts *aliunde* or other instruments not recorded: *Miller v. Ware*, 31–524; *Disque v. Wright*, 49–538.

II. WHAT INSTRUMENTS.

Assignment of mortgage: The recording laws are applicable to transfers of mortgages as well as to the mortgages themselves, and the assignee of a mortgage must record his assignment in order to protect himself against the act of the mortgagee in releasing the lien of such mortgage or subordinating it to the lien of another mortgage: *Parmenter v. Oakley*, 69–388; *Bank of Indiana v. Anderson*, 14–544; *McClure v. Burris*, 16–591; *Cornog v. Fuller*, 30–212; *Bowling v. Cook*, 39–200; *Van Gorder v. Hanna*, 72–572.

The assignment of a mortgage is such an instrument as may be recorded under this section: *Kenosha Stove Co. v. Shedd*, 82–540.

The written assignment of a bond and mortgage is an instrument conveying real estate within the meaning of the recording act: *Nashua Trust Co. v. W. S. Edwards Mfg. Co.*, 68 N.W., 587.

The assignee of a debt secured by mortgage whose transfer is not recorded does not take preference over subsequent purchasers or mortgagees without notice of the transfer: *Jenks v. Shaw*, 68 N.W., 900.

Where there is no recorded assignment of a mortgage, payment of the debt to the mortgagee will satisfy the mortgage although it has been transferred with the note secured by it to another person: *Quincy v. Ginsbach*, 92–144.

Where an assignment of a mortgage is not recorded, and a subsequent purchaser of the premises releases a mortgage which he holds upon other land in consideration of the release by the mortgagee of the mortgage which has been assigned, such release will extinguish the mortgage as to the property, and it cannot be foreclosed by the assignee: *Daws v. Craig*, 62–515.

Although a release by the mortgagee who appears by record to be still the owner of the mortgage will be binding upon the assignee of the mortgage or a note secured thereby, yet the mere payment to the mortgagee, who has ceased to be the owner of the notes and mortgage, will not extinguish the mortgage to that extent. A mortgagor can, by taking ordinary care, protect himself by requiring the mortgagee to produce and account for the notes upon which payment is made: *Brayley v. Ellis*, 71–155.

Although it is held that one who purchases property after satisfaction of the mortgage thereon has been entered of record by the mortgagee takes it discharged of the claims of the assignee of the mortgage, if the assignment was not recorded at the time of the purchase and he had no actual notice of the rights of the assignee, yet this rule is not applicable where there is no change in the relation of the parties in reliance upon the satisfaction of record: *Rand v. Barrett*, 66–731.

Where the attorney of a party foreclosing a mortgage has knowledge before the foreclosure is terminated that a third person holds, by assignment, one of the notes secured by mortgage, such plaintiff should make such assignee a party to the proceedings or the decree will not bar the equity of redemption in such assignee: *Walker v. Schreiber*, 47–529.

Agreement as to real property: The record of an agreement reserving to mortgagor's grantor a continued interest in the land covered by the mortgage, which is indexed in the name of the mortgagor as grantor and the former owner as grantee, imparts constructive notice to the mortgagee: *Paige v. Lindsey*, 69–593.

Public land claims: The provisions of the state registration law have no application to conflicting entries of public lands. The recording of a certificate of purchase from the United States or of a transfer thereof is unnecessary. The regulations established by congress will govern until the title has passed from the government by patent: *Klein's Heirs v. Argenbright*, 26–493; *David v. Rickabaugh*, 32–540; *Harmon v. Clayton*, 51–36.

III. SUBSEQUENT PURCHASERS.

Independent title: The term subsequent purchaser in this section is used to describe purchasers claiming under some common grantor, that is, under the same chain of title. The recording laws have no application as against an independent title distinct from that upon which the recorded instrument is based: *Rankin v. Miller*, 43–11.

The record of a deed from a person not connected with the record chain of title will not charge a subsequent purchaser with notice of the rights of such grantor: *Huber v. Bossart*, 70–718.

The holders of a void title cannot take advantage of want of notice of a valid conveyance: *Chase v. Kaynor*, 78–449.

Mortgagee: A mortgagee of real property is a purchaser within the meaning of the provisions relating to recording: *Porter v. Green*, 4–571; *Seevers v. Delashmutt*, 11–174; *Hewitt v. Rankin*, 41–35; *Koon v. Tramel*, 71–132; *Estate of Gill*, 79–296; *Weare v. Williams*, 85–253.

From the moment the mortgagee parts with his money on the strength of the mortgage he is considered as occupying as high ground as an absolute purchaser, and is within the protection of the statute as a purchaser: *Barney v. McCarty*, 15–510.

So, where a prior mortgage, given to secure a joint note of mortgagor and another who was in fact a surety, was paid off by such surety, *held*, that although between the surety and the mortgagor the former was entitled to subrogation under such mortgage, yet a subsequent mortgagee without knowledge of that fact had a right to regard the payment by the surety as satisfaction, and such subsequent mortgagee would be protected against the mortgage: *Patton v. Eberhart*, 52–67.

Mechanic's lien holder: A mechanic's lien holder is not a subsequent purchaser in such sense as to be protected against an unrecorded conveyance or mortgage of which he had no notice: *Fletcher v. Kelly*, 88–475.

It is only when he has bid in the prop-

erty under a foreclosure decree that he becomes a subsequent purchaser entitled to protection: *Nashua Trust Co. v. W. S. Edwards Mfg. Co.*, 68 N.W., 587.

Attaching creditor: An attachment lien does not take precedence over a prior unrecorded conveyance of which the creditor had no notice: *Norton v. Williams*, 9–528; *Savery v. Browning*, 18–246; *First Nat. Bank v. Hayzlett*, 40–659; *Eldred v. Drake*, 43–569.

It is otherwise as to chattel mortgages: See notes to § 2906.

Judgment creditor: The holder of a judgment lien is not a purchaser, and his claim is subject to prior equities and unrecorded instruments: *Norton v. Williams*, 9–528; *Bell v. Evans*, 10–353; *Seevers v. Delashmutt*, 11–174; *Hays v. Thode*, 18–51; *Chapman v. Coats*, 26–288; *Stuart v. Hines*, 33–60, 100.

A judgment lien does not take priority over an unrecorded mortgage, even though such unrecorded mortgage, by mistake, does not describe the land therein intended to be mortgaged: *Welton v. Tizzard*, 15–495.

A judgment creditor who purchases real estate at a sale under execution, in the absence of notice of an outstanding equity, is an innocent purchaser for value and is entitled to protection as such: *Ettenheimer v. Northgraves*, 75–28.

A deed unacknowledged and unrecorded conveys title paramount to a subsequent judgment, and the same rule applies to an assignment for the benefit of creditors not acknowledged or recorded. A creditor cannot set up the fact of the want of registry of the deed of assignment to defeat assignee's title, for the reason that invalidity on that ground arises only as against a subsequent purchaser for value without notice: *Munson v. Frazer*, 73–177.

A judgment creditor or the assignee of a judgment is not protected against a prior equity if an action to enforce it is brought before the sale: *Rider v. Kelso*, 53–367.

Under a statute providing that no deed should be valid except between the parties, or between those having actual notice thereof until recorded, *held*, that the levy of an attachment or the lien of a judgment would take priority over an unrecorded conveyance: *Brown v. Tuthill*, 1 G. Gr., 189; *Hopping v. Burnam*, 2 G. Gr., 39.

An unrecorded deed will take precedence over a subsequent attachment or judgment, though the creditor had no notice thereof: *Moorman v. Gibbs*, 75–537.

Mere creditors cannot object on account of failure to record: *Weare v. Williams*, 85–253.

The purchaser at a judicial sale is bound to take notice of instruments recorded up to date of sale, although they may have been executed prior to the levy: *Chapman v. Coats*, 26–288; *Thomas v. Kennedy*, 24–397; *Norton v. Williams*, 9–528.

A third person purchasing at a sale under a judgment is protected as fully as if he had purchased and taken a deed from the judgment debtor: *Evans v. McGlasson*, 18–150; *Jones v. Brandt*, 59–332.

The judgment creditor purchasing at the sale is entitled to protection as any other purchaser: *Weaver v. Carpenter*, 42–343.

At least this is true in the absence of any controlling equities: *Evans v. McGlasson*, 18–150; *Halloway v. Platner*, 20–121; *Butterfield v. Walsh*, 21–97; *Wallace v. Bartle*, 21–346; *Walker v. Elston*, 21–529; *Gower v. Doheney*, 33–36.

If strong and controlling equities intervene they may perhaps be recognized by a court of equity as against the judgment creditor purchasing at his sale: *Walker v. Elston*, 21–529.

But this rule by which a purchaser at judicial sale is protected applies only in case of a sale of the legal title. When the sale is of an equity, the purchaser takes only such equity, if any, as the defendant may actually have: *Wallace v. Bartle*, 21–346; *Churchill v. Morse*, 23–229.

Heir: A purchaser from the heir is protected against a prior unrecorded deed of the ancestor: *McClure v. Tallman*, 30–515.

The heir himself is not protected against unrecorded deeds of his ancestor: *Morgan v. Corbin*, 21–117; *Magee v. Allison*, 62 N.W., 322.

The heir takes subject, also, to an unrecorded contract to convey, made by his ancestor: *Montgomery v. Gibbs*, 40–652.

Devisees of the owner of the naked legal title, who have full knowledge of the possession of the property by one having the equitable title thereto, can occupy no better position than their testator, and will take subject to the same equities existing against him: *Peters v. Jones*, 35–512.

IV. FOR VALUABLE CONSIDERATION.

Purchasers for a consideration: This section implies that, except as to subsequent purchasers for a valuable consideration, instruments affecting real estate are not rendered invalid for the reason that they have not been recorded. To entitle a purchaser to priority over a prior purchaser who has failed to record his deed, the subsequent grantee must have purchased for a valuable consideration and without notice of the rights of the first purchaser: *Sillyman v. King*, 36–207.

A purchaser in good faith for a cash consideration cannot be held subject to a claim against his grantor to enforce a parol trust with reference to the land conveyed: *Richardson v. Haney*, 76–101.

Payment before notice: In order that the purchaser may hold property discharged of a prior lien or charge he must have paid the purchase money before notice: *Cummings v. Tovey*, 39–195.

A subsequent mortgagee will have priority over an earlier mortgage only where he has not had notice of such prior mortgage until after the completion of the contract or the payment of the money. The fact that the terms of the transaction have been agreed upon before notice is received by him will not entitle him to protection: *English v. Waples*, 13–57.

Extension of time: Where a purchase money mortgage, by reason of defective description, did not affect a subsequent mortgagee with notice, and such subsequent mortgagee, although taking his mortgage for a precedent debt, in consideration thereof extended the time of payment, and also bought in another mortgage on the same

property, *held*, that the second mortgage had a prior lien: *Port v. Embree*, 54–14.

Where a mortgage is given as security for an antecedent debt, and the time is extended, such extension will be sufficient consideration to constitute the mortgagee a purchaser for value, and entitle him to protection: *Sullivan Savings Institution v. Young*, 55–132; *Davis v. Lutkieweitz*, 72–254; *Koon v. Tramel*, 71–132.

Surrender of security: The surrender of a security for an indebtedness due from the grantor to the grantee is sufficient to make the grantee a purchaser for value as against third parties: *Seymour v. Harrison*, 20–592.

Pre-existing indebtedness: Where a mortgage is given to secure a pre-existing indebtedness and not in consideration of any extension of time, the mortgagee, even without notice of a prior unrecorded mortgage, does not acquire any rights superior thereto: *Phelps v. Fockler*, 61–340.

The mere expense of recording the mortgage will not be sufficient to render the holder thereof a holder for value: *Ibid.*

Actual payment is in general necessary to the character of a *bona fide* purchaser for value. The giving of security and executing a bond is not sufficient: *Kitteridge v. Chapman*, 36–348.

The execution of notes and a mortgage securing them will not constitute payment if the notes, though negotiable, remain in the hands of the person from whom title was acquired: *Rush v. Mitchell*, 71–333.

One who purchases property agreeing to pay a mortgage thereon as a part of the purchase money does not thereby acquire priority over the lien of a judgment upon the premises, even though such lien is subsequent to that of the mortgage paid: *First Nat. Bank v. Thompson*, 72–417.

Payment after notice: A purchaser of property who gives a mortgage back for the entire purchase money, and before making any payment thereon has notice of the title of a prior purchaser by unrecorded deed, cannot be protected as against such title. He is in a condition to refuse payment, and if he makes payment must be regarded as having made it voluntarily and with notice: *Brady v. Otis*, 40–97.

The fact that a purchaser in good faith has paid only a part of the purchase price cannot render him liable in any manner different from the liability which he assumed as to his grantor, but he may as to the purchase money unpaid, upon being indemnified against any liability, be required to pay the consideration to the person equitably entitled thereto: *Macomber v. Peck*, 39–351.

A party claiming under one who has assumed and paid a mortgage as part of the purchase price of the land cannot set up such claim as against the lien of a judgment of which the parties both had constructive notice: *Goodyear v. Goodyear*, 72–329.

Partial payment of the purchase money before notice, although not sufficient to vest the vendee with the character of a *bona fide* purchaser as regards the entire estate, will entitle him to invoke the aid of equity to the extent of reimbursement for the amount actually paid: *Kitteridge v. Chapman*, 36–348.

The claimant of a lien who has not paid any value therefor cannot be regarded as a good faith purchaser, but if he has paid a portion of the amount for which he claims a lien he may assert his lien to the extent of the sum paid: *O'Brien v. Harrison*, 59–686.

Recital of consideration in deed: The grantee of a fraudulent purchaser has the burden of proof cast upon him to show that he purchased in good faith and for a valuable consideration, and the recital of a valuable consideration in the deed is not evidence of payment thereof as against the person relying upon the fraud to defeat the conveyance. Such a recital is evidence only as between the parties and parties claiming through or under them: *Sillyman v. King*, 36–207; *Falconbury v. McIlravy*, 36–488; *Rush v. Mitchell*, 71–333.

The recital in a warranty deed that a consideration named was paid by grantee to grantor is not sufficient as against the holder of a prior title, who is a stranger to the conveyance, to show that the grantee is a purchaser for value: *Hogdon v. Green*, 56–733.

Burden of proof as to payment of consideration: Where the grantee of one who has purchased in fraud of the rights of a prior purchaser claims to be a *bona fide* purchaser without notice and for value, the burden of proving the payment of the consideration before notice of the fraud is upon him: *Sillyman v. King*, 36–207; *Throckmorton v. Rider*, 42–84; *Light v. West*, 42–138; *Anderson v. Buck*, 66–490.

So where plaintiff relied upon an unrecorded deed, and alleged that defendant, a subsequent purchaser, had notice thereof, *held*, that plaintiff's deed made a *prima facie* case, and that the burden was upon defendant to show that he paid a valuable consideration in order to defeat plaintiff's title: *Nolan v. Grant*, 53–392.

A purchaser claiming protection against a previous conveyance not properly recorded has the burden of proving that he is an innocent purchaser for value: *Fogg v. Holcomb*, 64–621.

If a purchaser is affected with notice the burden is upon his vendee, claiming to be an innocent purchaser, to show his own good faith and that he paid value: *Davis v. Nolan*, 49–683; *Hume v. Franzen*, 73–25.

A party claiming to be an innocent purchaser for value without notice has the burden to prove such facts: *Gardner v. Early*, 72–518.

Where in an action to foreclose a mortgage a subsequent grantee is made a party, and he, by cross-bill, sets up the fact that he had no notice, actual or constructive, of the existence of the mortgage, and the plaintiff in answering such cross-bill avers that the mortgage was properly acknowledged and recorded, and that defendant had notice thereof, the fact that defendant was a purchaser for value, not being put in issue, will be presumed in the absence of evidence to the contrary on the part of the plaintiff: *Jones v. Berkshire*, 15–248.

Also *held*, that if it had been alleged by plaintiff that defendant, the subsequent purchaser, was not a purchaser for value, and the answer had denied such allegation, the

burden of proof would have been upon the plaintiff to establish it: *Ibid.*

Where by mistake a mortgage is executed upon different property than that intended to be covered, so that it cannot be enforced against the property intended until corrected by the parties or reformed in equity, the mortgagee under a subsequent mortgage upon the property does not have the burden of proving consideration and want of notice in order to establish his priority over the mortgage intended to have been executed on the same property: *Davis v. Lutkieweiz*, 72-254.

V. WITHOUT NOTICE.

Actual notice: A person having actual knowledge of an unrecorded instrument is bound thereby as fully as if the same were properly recorded: *Dussume v. Burnett*, 5-95, 104; *Wilson v. Holcomb*, 13-110; *Coe v. Winters*, 15-481.

Actual notice of an outstanding conveyance takes the place of an acknowledgment and recording: *Miller v. Chittenden*, 2-315, 360.

A grantee having actual notice of an outstanding mortgage cannot take advantage of any defects in the recording thereof: *Coe v. Winters*, 15-481.

A purchaser who, upon examination of the records, would have seen that the party from whom he purchased had no title to convey, and that the attorney in fact who attempted to convey had no power to do so, *held*, not to be an innocent purchaser: *Switz v. Black*, 45-597.

In order that a purchaser may be protected against a proceeding to set aside the conveyance of the property to his grantor as being in fraud of creditors, he must not only have paid a valuable consideration, but must have bought in good faith and without notice of the defects in the title: *Cooley v. Brown*, 30-470.

A mortgagee with knowledge of the existence of a prior unrecorded mortgage cannot by assignment of his own mortgage, after the record of such prior mortgage, confer upon his assignee equities superior to that of the prior mortgage: *Sims v. Hammond*, 33-368.

The fact that a mortgagee placed his own mortgage on record before the recording of an earlier one gives him no priority if he has actual notice of such prior mortgage: *Bell v. Thomas*, 2-384.

Where a purchaser of land from one having the apparent title had notice of a mortgage executed to such person, by another, upon the same land, *held*, that by such knowledge he was affected with notice of an unrecorded conveyance to the person by whom such mortgage was executed: *Clark v. Holland*, 72-34.

What sufficient notice: A purchaser will be affected by such notice as would be sufficient to put a reasonable man upon inquiry: *English v. Waples*, 13-57.

Notice is either knowledge or having the means of knowledge, although such means may not be used: *Ætna L. Ins. Co. v. Bishop*, 69-645.

Statements made to a grantee by parties claiming to have prior unrecorded deeds to the property will constitute notice, although such statements are not believed: *Hamilton v. Smith*, 57-15.

Facts in a particular case, *held* sufficient to impute notice to a subsequent mortgagee that the indebtedness under a prior mortgage, though changed in form, was not paid: *Heively v. Matteson*, 54-505.

Facts in a particular case, *held* sufficient to prove that a purchaser had notice of a prior unrecorded conveyance: *Davis v. Nolan*, 49-683.

In a particular case, *held*, that the fact that the grantee had notice that another person set up a claim to the premises, although not informed of its precise extent and nature, was sufficient to affect him with notice of a resulting trust in favor of such person: *Zuver v. Lyons*, 40-510.

The fact that a party takes a mortgage upon property from one claiming to be the owner of such property under an unrecorded deed will not put him upon inquiry as to the rights of other persons in the premises: *Davis v. Lutkieweiz*, 72-254.

With notice: Where a conveyance of land was executed and acknowledged in another state, but the form of acknowledgment was not sufficient in this state, *held*, that subsequent purchasers, claiming under a second deed from the same grantor, who had actual knowledge of the prior conveyance, and who paid nothing for their interest, or took as security for a prior debt, would not be protected against those claiming under the first deed: *Walker v. Abbey*, 77-702.

Where a person having a homestead right in property conveyed the same to his daughter, without the signature of his wife to the deed, and after the death of the parents the daughter conveyed the same to plaintiff, who had been acquainted with the family for a number of years, and knew that the premises had been occupied as a homestead, and where it appeared that plaintiff had required a quitclaim deed from the other heirs, and knew of the unsatisfied claim of defendants, in an action by defendants to subject the land to the lien of a judgment, *held*, that plaintiff was not entitled to protection as an innocent purchaser: *Bolton v. Oberne*, 79-278.

A mortgagee in possession of such facts as would put a reasonably prudent man upon inquiry will be bound by whatever such inquiry would have disclosed, but the proof must be clear and decisive: *Weare v. Williams*, 85-253.

Where a prospective purchaser has actual knowledge of the record and of facts that would suggest to an ordinarily careful and prudent man that there was a mistake in the record, he is affected thereby, although he would not be bound if he had only constructive knowledge of the record: *Shoemake v. Smith*, 80-655.

One purchasing property subject to a right of way created by a grant containing a stipulation, *held*, to have such notice of possible changes in the terms of the stipulation as to put him on his guard against sub-

sequent modifications of such agreement between the parties; *Peterson v. Pierson*, 89-104.

The recording of a real estate mortgage will not give constructive notice of a provision therein that the rents of the property are pledged to the payment of a debt: *Trulock v. Donahue*, 76-758.

Vague rumors and suspicions, or general assertions made by strangers to the title, upon hearsay, will not be sufficient. The notice must be such as to bind the conscience of the party and put him upon such inquiry as would lead to the knowledge of the rights with which he is to be affected. But if he know of such rights, or fraudulently abstain from knowing them, he is not a *bona fide* purchaser: *Wilson v. Miller*, 16-111.

A simple disclaimer, by execution defendant, of having any interest in the property levied upon as his, will not put the officer upon inquiry as to its ownership: *West v. St. John*, 63-287.

Under a former statute making an unrecorded instrument valid only as between the parties thereto and such persons as should have actual notice thereof, *held*, that something more than mere rumor or knowledge of facts calculated to put a party on inquiry was required to constitute actual notice: *Wihelm v. Mertz*, 4 G. Gr., 54.

And under the statute last referred to, *held*, that the actual notice therein required could only be communicated by express information to, or personal service upon, the party interested in the notice, and that constructive or implied notice from possession or acts of ownership were not sufficient: *Hopping v. Burnam*, 2 G. Gr., 39.

Further as to what constitutes notice, see notes to § 2906.

Attachment: A purchaser in good faith for value from one to whom property has been fraudulently conveyed is not affected by an attachment in a suit against the grantor in such fraudulent conveyance: *Eldred v. Drake*, 43-569.

An entry in the incumbrance book of an attachment of an equitable interest in land, which interest does not appear of record, will not constitute notice to a vendee or mortgagee of the person holding the legal title: *Farmers' Nat. Bank v. Fletcher*, 44-252.

Grantee of bona fide purchaser: A purchaser from a grantee who has taken a conveyance in good faith for value without notice of equities or defenses will be protected even though he himself had notice of such equities or defenses: *Ashcraft v. De Armond*, 44-229.

One who holds title as an innocent purchaser free from equities as against his grantor may convey to a purchaser who has knowledge of such equities as good a title as he himself has: *Mast v. Henry*, 65-193; *Chambers v. Hubbard*, 40-432; *Rogers v. Hussey*, 36-664; *East v. Pugh*, 71-162.

To affect a purchaser with fraud in a conveyance through which he claims title, it must appear that the respective grantees intervening between the fraudulent conveyances and the grantee in question had notice of such fraud: *Brace v. Reid*, 3 C. Gr., 422.

Assignee of mortgage: A mortgagee with knowledge of the existence of a prior unrecorded mortgage cannot, by assignment of his own mortgage after the record of such prior mortgage, confer upon his assignee equities superior to those of the prior mortgagee: *Sims v. Hammond*, 33-368.

Purchaser by quitclaim: A purchaser by quitclaim deed is not entitled to be considered a *bona fide* purchaser, and does not, therefore, acquire priority over equities or unrecorded conveyances which are valid against his grantor: *Smith v. Dunton*, 42-48; *Wightman v. Spofford*, 56-145; *Kaiser v. Waggoner*, 59-40; *Laraway v. Larue*, 63-407; *Fogg v. Holcomb*, 64-621; *Butler v. Barkley*, 67-491; *Bradley v. Cole*, 67-650; *Postel v. Palmer*, 71-157; *Rush v. Mitchell*, 71-333. But apparently *contra*, see *Pettingill v. Devin*, 35-344, 354.

A quitclaim deed conveys only the interest of the grantor and a party acquiring his rights under such a deed is deemed to take with notice of prior unrecorded instruments and is not protected with reference thereto: *Steele v. Sioux Valley Bank*, 79-339; *Wickham v. Henthom*, 91-242; *Knapp v. Paine*, 63 N. W., 575.

Therefore *held*, that a purchaser by quitclaim would not be protected as against a prior unrecorded bond for a deed given as security (overruling *Pettingill v. Devin*, 35-353): *Steele v. Sioux Valley Bank*, 79-339.

A quitclaim deed is sufficient to cut off a vendor's lien not evidenced in writing as required by § 2924: *Crisman v. Hay*, 43 Fed., 552.

A purchaser under a deed which purports only to convey the interest of the grantor will not be entitled to a greater interest than such grantor actually had, although by the records it may appear that his interest is greater than it actually was. The purchaser in such case is not entitled to rely upon the recording laws as showing the extent of his grantor's interest: *Rogers v. Chase*, 89-468.

A purchaser by quitclaim from the holder of a tax title which is void for fraud cannot claim protection against such fraud as an innocent purchaser: *Watson v. Phelps*, 40-482; *Besore v. Dosh*, 43-211; *Springer v. Bartle*, 46-688.

A party holding under a quitclaim deed is chargeable with notice of all the infirmities of the title acquired thereby: *Besore v. Dosh*, 43-211.

A party purchasing simply the right which his grantor has takes subject to all claims against such grantor: *Arnold v. Grimes*, 2-1.

A purchaser of property receiving conveyance of it by quitclaim deed for a consideration very much less than its value, with notice at the time that the land is claimed by another who has paid taxes thereon from the date of his conveyance, which is of record, takes with notice of such conflicting conveyance: *Ross v. Loomis*, 64-432.

A quitclaim deed to a person who knows that his grantor has no title to or interest in the property does not vest in the grantee any right whatever: *Curtis v. Smith*, 42-665.

A purchaser by quitclaim deed for an amount much less than the actual value of

the property is not protected as a *bona fide* purchaser. Neither is the purchaser from him thus protected who has knowledge of the nature and consideration of the deed under which his grantor holds: *Hume v. Franzen*, 73-25.

A deed which does not purport to convey the property, but quitclaims the grantor's right, title, interest and estate therein, is a quitclaim deed, and the grantee therein cannot be regarded as a purchaser without notice of equities affecting grantor's title: *Wightman v. Spofford*, 56-145.

Purchaser by warranty from quitclaim purchaser: A purchaser by warranty deed from the grantee in a quitclaim deed is entitled to protection, and is not affected by unrecorded conveyances or outstanding equities of which he has no notice: *Winkler v. Miller*, 54-476; *Raymond v. Morrison*, 59-371; *Huber v. Bossart*, 70-718.

Notice to agent: Notice acquired by an agent previous to the time of agency and while negotiating with reference to property for himself, and not shown to be present in the mind of the agent at the time of acting as such, in reference to the same property, will not be deemed notice to the principal: *Lunt v. Neeley*, 67-97; *Yerger v. Barz*, 56-77.

The person for whom land is purchased by an agent or trustee is charged with notice of equities with which the agent or trustee is affected: *Butler v. Barkley*, 67-491.

Knowledge or notice of facts acquired by an attorney or agent when engaged properly in the business of his client or principal becomes, in law, the knowledge or notice of such fact to client or principal: *Shoemake v. Smith*, 80-655.

Notice imparted by possession; rights and equities of possessor: One who purchases land while it is in the actual possession of another takes it with notice of all the existing rights and equities of the person in possession: *Sears v. Munson*, 23-380; *Eli v. Gridley*, 27-376; *Harper v. Perry*, 28-57; *White v. Butt*, 32-335; *Phillips v. Blair*, 38-649; *Day v. Lown*, 51-364; *Benbow v. Boyer*, 89-494.

The possession of a vendee under parol contract of purchase operates as constructive notice of his rights. *Baldwin v. Thompson*, 15-504; *Watrous v. Blair*, 32-58.

A purchaser of real estate in the possession of a third person is bound to take notice of such person's title to the possession, whether such title be legal or equitable: *Moore v. Pierson*, 6-279.

The principle upon which one buying real estate in actual possession of a third person takes it subject to his equities is that good faith and reasonable prudence in dealing require the purchaser to inquire of such person what claim he asserts to the property, and the law conclusively presumes that the purchaser has acquired all the information which a timely and prudent inquiry would have given him: *Rogers v. Hussey*, 36-664.

Where a mortgagee took his mortgage with knowledge of possession by a third person, and of the fact that deeds were missing from the chain of title as shown by the record, *held*, sufficient to affect him with notice that the title was not perfect: *Jewell v. Reddington*, 57-92.

The purchaser of land in the possession of one who holds an equitable title thereto, and has erected valuable improvements thereon, has constructive notice of the latter's rights and equities: *Van Orman v. Merrill*, 27-476.

A subsequent purchaser is affected with notice of the title of a person in possession, although the conveyance under which he claims, by mistake in the record, does not afford constructive notice: *Hubbard v. Long*, 20-149.

Possession under a deed is constructive notice to all parties of the rights of the grantee to the same extent as if the deed had been duly placed on record: *Simmons v. Church*, 31-284.

Possession by grantee under an unrecorded deed, *held* sufficient notice to a subsequent mortgagee of grantor, whose mortgage by mistake covered the premises conveyed: *Gum v. Equitable Trust Co.*, 1 McCrary, 51.

What sufficient possession: Possession of a portion of a tract of land imparts notice of the claim to the whole tract covered by the title or equity under which the land is held: *Watters v. Connelly*, 59-217; *Nolan v. Grant*, 51-519.

Possession of a tract of prairie land under a conveyance covering such land and a small tract of uninclosed woodland, *held* not to amount to constructive possession of the woodland: *Zent v. Picken*, 54-535.

L. sold two lots to D., and executed his bond for a deed, which was not recorded; D. built a house upon one lot, and a shed or stable in the alley near the line of the other; neither lot was fenced, and both were used together; while the property was in this condition L. sold the two lots to T., who had no actual notice of the rights of D.; *held*, that there was no constructive notice to T. of D.'s equities in the unimproved lot: *Dickey v. Lyon*, 19-544.

There may be possession in fact of unimproved and uninclosed land: *Langworthy v. Myers*, 4-18.

Where a person claiming land exercises acts of ownership over it, by the use of it for the purposes to which it is adapted, such possession is sufficient to affect a purchaser with notice of his rights: *Clement v. Perry*, 34-564.

Where a person claiming land goes upon it and plows a furrow around it, which act is regarded as an assertion of claim in the neighborhood, he has such possession as to constitute notice to a subsequent purchaser: *Buck v. Holt*, 74-294.

Timber land: In a particular case, *held*, that the circumstances were such as to affect a subsequent purchaser with notice of the rights of an owner in timber land not actually occupied by him, the conveyance of which did not constitute constructive notice by reason of a mistake in the deed and record: *Hubbard v. Long*, 20-149.

Facts in a particular case, such as that plaintiff drove trespassers from timber land, took wood cut by them, etc., *held* sufficient

to establish possession in him which would operate as notice to subsequent purchasers: *Nolan v. Grant*, 51–519.

Such use of timber land as it is susceptible of, such as cutting timber therefrom, etc., is sufficient possession to constitute notice: *Spitler v. Schofield*, 43–571.

Possession by a tenant is sufficient to put a subsequent purchaser upon inquiry as to the rights and equities of the landlord: *Nelson v. Wade*, 21–49.

Possession by a tenant is constructive notice of the title of the landlord: *Dickey v. Lyon*, 19–544.

Right of lessee in possession: Under particular facts, *held*, that a party contracting with reference to real property was affected with notice of the rights of a lessee in possession: *Leebrick v. Stahle*, 68–515.

Possession by lessee under a mining lease, indicated by his having windlasses, tools, etc., on the premises for the prosecution of his business, *held* sufficient to constitute notice to a purchaser; and *held* further, that leave obtained by such lessee from such purchaser, to work the mine to a limited extent, did not amount to a relinquishment of his full rights under the lease, such consent having been obtained on account of a threat of the purchaser to stop further work: *Chamberlain v. Collinson*, 45–429.

Possession notice of what: Possession under a recorded conveyance is not notice of rights existing prior to and independent of the conveyance: *Rogers v. Hussey*, 36–664.

Therefore, *held*, that a purchaser at judicial sale under a judgment antedating the conveyance of the legal title from the judgment debtor to the party in possession, was not affected with notice of an equitable title in the party in possession, existing prior to the judgment: *Bonnell v. Allerton*, 51–166.

Where a vendee of property in the possession of another made inquiry of the party in possession as to the claims upon the property, and such party disclaimed any right or interest therein, and the fact of such possession was accounted for by facts stated by the vendor showing no interest or right of possession in such party, *held*, that the vendee was not affected with notice of any equity in such possessor: *Cavin v. Middleton*, 63–618.

While possession of realty is notice to purchasers at least so far as to put the vendee upon inquiry to ascertain upon what right the occupant holds, this rule is not extended so far as give notice of the defects in his title nor of the defects in the title paramount to the person in possession: *Suiter v. Turner*, 10–517.

Possession after foreclosure: Where a party originally holding under a deed was found in possession after the sale of the property under foreclosure of a mortgage and the expiration of the time for redemption, *held*, that such possession was sufficient notice of a claim adverse to the deed made in pursuance of the sale: *Wrede v. Cloud*, 52–371.

Under conveyance from tenant in common: Although possession is to be construed with reference to the right under which the person in possession claims to hold, yet where a grantee from one tenant in common of a portion of the common premises by metes and bounds had shown by unequivocal acts that he understood and claimed his right to the premises to be absolute, *held*, that a purchaser from the tenant in common with knowledge of the facts and circumstances was affected with notice of the adverse claim of the person in possession: *Laraway v. Larue*, 63–407.

Continuance in possession by a party who, as owner, has executed a conveyance, will not constitute notice of his want of capacity to make such conveyance: *Ashcraft v. De Armond*, 44–229.

The rule that possession is constructive notice of the rights of the party in possession applies only to a case where the equities of the parties are independent of or adverse to the legal title or record, and possession by the grantor after a full conveyance is not constructive notice to subsequent purchasers of any right reserved in the land of the grantor: *Koon v. Tramel*, 71–132.

Possession by a grantor after full conveyance is not constructive notice to subsequent purchasers of any right reserved in the land by the grantor, and where one is in possession under some right which appears of record, his possession is not constructive notice of another or different right, but is referable to that right: *May v. Sturdivant*, 75–116.

Therfore, where several co-tenants were in possession of land and purchased the interest of another co-tenant, who had never been in possession, but failed to record the deed, and there was no change in the possession after the purchase, except that certain improvements were made upon the land, *held*, that such possession was not sufficient to give constructive notice of the additional right acquired under the deed: *Ibid.*

Possession by member of family: Where the purchaser of real estate pays the purchase money and enters into actual possession of the property, a subseqent mortgagee of the vendor will be charged with notice of the rights of such purchaser, whether such possession be by the husband or wife: *Humphrey v. Moore*, 17–193.

Where the husband is in possession and control of land, such possession will not constitute notice of a claim of the wife to the land, although he is, in fact, acting as her agent: *Thomas v. Kennedy*, 24–397.

Where the grantee was the mother-in-law of the grantor, and residing in his family, and to some extent carrying on the business of the farm, *held*, that her possession of the farm was not such as to give notice to third persons of rights acquired by her under a conveyance thereof unrecorded: *Elliot v. Lane*, 82–484.

Possession by married woman: The rule that a wife's possession jointly with her husband will not impart notice of equities which she holds against him, to one acquiring title from the husband, does not apply to a possession by a married woman where another member of the family, such as a son, holds the legal title. Such possession will be notice of her rights: *Iowa Loan & Trust Co. v. King*, 58–598.

Easement: Where at the time of the purchase of land a ditch was being constructed thereon by a railway company for the improvement of its right of way, *held*, that a purchaser was affected with knowledge of the contract between his grantor and the railway company: *Cook v. Chicago, B. & Q. R. Co.*, 40-451.

Recitals in title deeds: A purchaser is charged with notice of anything appearing in any part of the deeds or instruments which prove and constitute the title, which is of such nature that if brought directly to his knowledge it would amount to actual notice: *State v. Shaw*, 28-67; *Clark v. Stout*, 32-213.

A grantee is charged with notice of the recitals and conditions of the deed under which his grantor claims title, although there is a mistake in such recitals, provided it contains enough to put a prudent man upon inquiry: *Mosle v. Kuhlman*, 40-108.

The mortgagee is bound to know of recitals in the conveyances to the mortgagor, affecting the title of such mortgagor, whether the mortgagee see such conveyances or not: *Ætna L. Ins. Co. v. Bishop*, 69-645.

The reference in a mortgage by way of exception to another mortgage of a certain amount affects the mortgagee with notice of a prior mortgage for that amount, although the prior mortgage is not recorded: *Clark v. Bullard*, 66-747.

Where the conveyance by which a mortgagor holds title refers to a contract, the mortgagee will be held affected with notice of the terms of such contract and any equity arising therefrom: *Hall v. Orvis*, 35-366.

Where property was incorrectly described in a conveyance under which a grantor claimed title, but was there designated by the same description as in a prior recorded mortgage upon the property, *held*, that the grantee of such grantor had notice of the identity of the property in both instruments, and was therefore affected with notice of the mortgage: *State v. Shaw*, 28-67.

The fact that one of the notes covered by a mortgage is omitted in the record thereof will not relieve the purchaser from the lien of the mortgage as to the amount of such note, where the aggregate amount of the lien as recited in his deed referring to such mortgage is correct: *Dargin v. Beeker*, 10-571.

The grantee is affected with notice of a stipulation in a conveyance to his grantor that such conveyance is made subject to the lien of a mortgage, which the grantee in such prior conveyance does not undertake personally to pay: *Iowa Loan & Trust Co. v. Mowery*, 67-113.

Recitals not constituting notice: Where a deed recited the existence of a trust deed upon the property, and that it was paid and satisfied, *held*, that such recital did not charge the grantee with notice of a lien arising under such trust deed: *Newman v. Samuels*, 17-528.

The fact that a mortgage contains covenants of warranty does not amount to notice that it is to have priority of lien over another mortgage which is prior in time and first recorded: *Vandercook v. Baker*, 48-199.

A statement in a deed that it was made "per agreement of" a certain date does not constitute a sufficient incorporation of such agreement into the deed as to make the terms of the agreement binding upon a subsequent grantee of the property conveyed: *Close v. Burlington, C. R. & N. R. Co.*, 64-149.

Purchaser without notice: A *bona fide* purchaser for a valuable consideration without notice may acquire an interest in land free from any equity or trust with which it was charged in the hands of the grantor: *Hewitt v. Rankin*, 41-35.

One who purchases from the holder of the legal title and takes a conveyance without notice of outstanding equities, paying a valuable consideration, takes the property divested of such equities or any liens thereon. So *held*, as to a vendee from the holder of the legal title subsequent to a judgment against the equitable owner, but without notice of such equitable ownership: *Farmers' Nat. Bank v. Fletcher*, 44-252.

Under evidence in a particular case, *held*, that the purchaser of real property from the vendee thereof took without notice of fraud in the original conveyance from vendor to vendee, and should be protected: *McDonald v. Hardin*, 55-620.

Under the facts in a particular case, *held*, that the assignee of a mortgage which was in fact, and as shown by the record, filed prior to the filing of another mortgage which by agreement of the parties was to have been the first recorded and treated as a first lien, was not chargeable with notice of the agreement between such parties, and was entitled to priority: *Cook v. Stone*, 63-352.

The failure to record a town plat until after the date and record of a mortgage on lots therein, *held* not sufficient to put a party upon his inquiry so as to charge him with knowledge of facts within the possible range of such inquiry: *Stewart v. Huff*, 19-557.

The fact that the grantee in a conveyance, made in accordance with a plat not yet recorded, has knowledge of a change in the plat before the recording thereof, does not estop him from claiming the land originally conveyed: *Watrous v. Blair*, 32-58.

A mortgage subsequent in date will take priority over any earlier mortgage unless the mortgagee had notice of such prior mortgage. Facts in a case considered and *held* insufficient to prove notice: *Brazleton's Adm'r v. Brazleton*, 16-417.

Deed absolute in form: A purchaser from the grantee under a deed absolute upon its face, who takes without knowledge of any equities between the original parties, is protected, although the instrument itself merely constituted a trust: *Gray v. Coan*, 40-327.

A purchaser with notice of equities in a third party takes subject to such equities: *Harris v. Stone*, 15-273.

A purchaser with notice of a right in another is in equity liable to the same extent and in the same manner as the person from whom he made the purchase: *Phillips v. Blair*, 38-649.

One who purchases an estate after notice of a prior equitable right thereto makes himself a *mala fide* purchaser, and will not be

enabled by getting the legal title to defeat the equitable interest: *Mitchell v. Peters*, 18-119.

A purchaser will not be protected against a prior deed which misdescribes the property, if he had actual notice of the prior grantee's equities, or such notice as would put a prudent man upon inquiry: *Nelson v. Wade*, 21-49.

Trusts: The purchaser of land with notice that his grantor holds the same in trust takes subject to the trust, and will be required to restore the estate for the purposes thereof: *Zuver v. Lyons*, 40-510.

Though the conveyance to a trustee is absolute in form, a purchaser from the trustee, with knowledge of the trust, takes subject thereto: *Sleeper v. Iselin*, 62-583.

Where a trustee has authority upon payment of the notes secured by deed of trust, to release the same, it will be presumed in the absence of notice to the contrary that when he enters satisfaction of the instrument upon the records after the notes secured thereby have matured, that such notes are paid, and a good faith purchaser of the land, who buys relying upon this satisfaction, will be protected against the claims of assignees of the notes secured by the deed of trust: *Day v. Brenton*, 71 N. W., 538.

Mortgage: One purchasing subject to a mortgage of which he has knowledge, and the amount of which is dependent upon the amount of the indebtedness remaining unpaid after the exhaustion of a prior mortgage, cannot claim to be an innocent purchaser free from the lien of such mortgage: *Kellogg v. Frazier*, 40-502.

A subsequent mortgagee with notice of the prior mortgage does not acquire priority by the fact that the mortgagor fraudulently applies the money received from such junior mortgagee to the satisfaction of another mortgage of which the junior mortgagee has no notice, instead of to the mortgage of which he has notice: *Barber v. Lyon*, 15-37.

A mortgage not canceled of record may be continued or revived as a lien prior to a subsequent mortgage notwithstanding the bar of the statute of limitations: *First Nat. Bank v. Woodman*, 62 N. W., 28.

But one who, for a valuable consideration takes a mortgage upon property on which there has been a prior mortgage securing a claim which has become barred by the statute of limitations is not subordinate to a revival of the indebtedness secured by such prior mortgage of which he had no notice: *Cook v. Prindle*, 66 N.W., 781. And see notes to § 3456.

In an action by a junior mortgage holder for the foreclosure of his mortgage and for permission to redeem from prior mortgages, where it appeared that the time of payment had been extended on both the senior mortgages, and it did not appear that the plaintiff had notice of these extensions of time either when he took the mortgage or before the action was commenced, *held*, that the relief asked by plaintiff should be granted, as the holders of the prior incumbrances would not be permitted to unite with the mortgagor and so change the contract that it would prejudice subsequent incumbrancers, having neither actual nor constructive notice of the change: *Wheeler v. Menold*, 81-647.

Notice of invalid claim: One who acquires a legal title to land with notice of an equity held by another holds the land subject to such equity, and conversely one who acquires a legal title without notice of an outstanding equity, holds the land free from the equitable title; but one who acquires an invalid legal title will not hold the land against another who has a valid legal title accompanied by the right in equity to the land on the ground that the first had no notice of the legal title and equity of the last: *Fallon v. Chidester*, 46-588.

Burden of proof as to notice: A party claiming to be protected as an innocent purchaser without notice and for value has the burden of proving such allegation: *Kibby v. Harsh*, 61-196.

Where the defendant in an action to foreclose a mortgage set up a prior unrecorded mortgage, alleging that the plaintiff had notice of such prior mortgage, *held*, that the defendant alleging the fact of notice had the burden of proof: *McCormick v. Leonard*, 38-272.

In a contest between a mortgagee claiming to have taken his mortgage without notice of a prior unrecorded mortgage, and the prior mortgagee, the burden of showing notice on the part of the subsequent mortgagee is upon such prior mortgagee: *Hoskins v. Carter*, 66-638.

A similar principle is applicable as between the mortgagee and the holder of a mechanic's lien whose statement has not been filed within the time required by law: *Ibid.*

The burden of showing bad faith on the part of a purchaser by warranty deed sufficient to affect him with notice of unrecorded conveyances is upon the party asserting such bad faith: *Raymond v. Morrison*, 59-371.

The evidence in a particular case, *held* not sufficient to show bad faith: *Ibid.*

Whether, if payment of consideration is shown by a subsequent purchaser claiming to be without notice of a prior conveyance, want of notice will be presumed, *quære: Nolan v. Grant*, 53-392.

Where a purchaser has taken with actual notice of a prior unrecorded deed, the burden of proof is upon his vendee, claiming to be an innocent purchaser without notice, to show his own good faith and that he paid value: *Davis v. Nolan*, 49-683.

VI. County of Recording.

Where Palo Alto county was attached to Boone county for all purposes and by subsequent statute attached to Webster county for election, revenue and judicial purposes, *held*, that as it appeared from similar provisions in other cases the later statute was intended to be an annexation for all purposes of county government, the recording in Webster county of a conveyance of land in Palo Alto county was proper and that it was not required that such deed should be

recorded in Boone county: *Meagher v. Drury*, 89–366.

In such case, *held*, that it was not necessary when Palo Alto county was separated from Webster county that the deed already recorded in Webster county should be entered on record in Palo Alto county: *Ibid.*

SEC. **2926. Acknowledgment.** It shall not be deemed lawfully recorded, unless it has been previously acknowledged or proved in the manner hereinafter prescribed. [C. '73, § 1942; R., § 2221; C. '51, § 1212.]

While the acknowledgment is necessary for the admission of the instrument to record, it is not essential to its validity as between the parties, or as to persons having notice in fact: *Gould v. Woodward*, 4 G. Gr., 82; *Miller v. Chittenden*, 2–315, 360; *Blain v. Stewart*, 2–378; *Dussaume v. Burnett*, 5–95, 104; *Brinton v. Seevers*, 12–389; *Haynes v. Seachrest*, 13–455; *Carleton v. Byington*, 18–482; *Simms v. Hervey*, 19–273, 287; *Lake v. Gray*, 30–415; *Morse v. Beall*, 68–463; *McMacken v. Niles*, 91–628; *Krueger v. Walker*, 63 N. W., 320.

And as to chattel mortgages, see § 2906.

As to what is sufficient to constitute notice in fact, see notes to preceding section.

If an instrument is defective in the acknowledgment the recording thereof does not impart constructive notice: *Willard v. Cramer*, 36–22; *Woods v. Banks*, 34–599; *Reynolds v. Kingsbury*, 15–238; *Brewer's Estate v. Crow*, 4 G. Gr., 520.

The fact that the recorder, in recording an acknowledgment which is defective by reason of the omission of an essential word, inserts such word so that the record appears perfect, will not cure the defect: *Newman v. Samuels*, 17–528.

The want of an acknowledgment cannot be made the ground for objecting to the introduction of the instrument in evidence. It would be valid as between the parties and also as to third parties, provided notice could be brought home to such third party: *Jones v. Berkshire*, 15–248.

SEC. **2927. Transfer and index books.** The county auditor shall keep in his office books for the transfer of real estate, which shall consist of a transfer book, index book and plat book. [C. '73, § 1948.]

SEC. **2928. Form of.** Said transfer book shall be ruled and headed substantially after the following form; and entries thereupon shall be in numerical order, beginning with section one:

SECTION NO....., TOWNSHIP....., RANGE.....

GRANTEE.	GRANTOR.	DATE OF INSTRUMENT.	DESCRIPTION.	PAGE OF PLATS.
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

The index book thus:

NAMES OF GRANTEES.	PAGES OF TRANSFER BOOK.
.....	.....
.....	.....
.....	.....

[C. '73, § 1949.]

SEC. **2929. Book of plats.** The auditor shall keep the book of plats so as to show the number of lot and block, or township and range, divided into sections and subdivisions as occasion may require, and shall designate thereon each piece of real estate, and mark in pencil the name of the owner thereon, in a legible manner; which plats shall be lettered or numbered so that they may be conveniently referred to by the memoranda of the transfer book, and shall be drawn on the scale of not less than four inches to the mile. [C. '73, § 1950.]

The plat book here referred to is not admissible in evidence for the purpose of establishing title in the party whose name is entered on the plat as the owner of the premises in controversy: *Heinrich v. Terrell*, 65–25.

SEC. **2930. Entries of transfers.** Whenever a deed of unconditional conveyance of real estate is presented, the auditor shall enter in the index book, in alphabetical order, the name of the grantee, and opposite thereto the number of the page of the transfer book on which such transfer is made; and upon the transfer book he shall enter in the proper columns the name of the grantee, the grantor, date and character of the instrument, the descrip-

tion of the real estate, and the number or letter of the plat on which the same is marked. [C.'73, § 1951.]

SEC. **2931. Judgments.** Upon receipt of a certificate from the clerk of the district or supreme court, that the title to real estate has been finally established in any named person by judgment or decree of said court, or by will, the auditor shall enter the same upon the transfer books, upon payment of a fee of twenty-five cents. [25 G. A., ch. 90, § 2.]

SEC. **2932. Indorsement.** After the auditor has made the entries contemplated in the preceding sections, he shall indorse upon the instrument the following words: "Entered for taxation this.....day of.....A. D. .....," with the proper date inserted, and sign his name thereto. [C.'73, § 1952.]

SEC. **2933. Corrections of books.** The auditor from time to time shall correct any error appearing in the transfer books. [C.'73, § 1954.]

SEC. **2934. Essential to recording.** The recorder shall not file for record any deed or other instrument unconditionally conveying real estate until the proper entries have been made upon the transfer books in the auditor's office, and indorsed upon the deed or other instrument. [C.'73, § 1953.]

SEC. **2935. Index.** The recorder must keep an index book, the pages of which are so divided as to show in parallel columns:

1. Each grantor;
2. Each grantee;
3. The time when the instrument was filed;
4. The date of the instrument;
5. The nature of the instrument;
6. The book and page where the record thereof may be found;
7. The description of the real estate conveyed. [C.'73, § 1943; R., § 2222; C.'51, § 1213.]

See notes to next section.

SEC. **2936. Indorsement—entries.** He must indorse upon every instrument properly filed in his office for record the time when it was filed, and shall forthwith make the entries provided for in the preceding section, except that of the book and page where the record of the instrument may be found, and from that time such entries shall furnish constructive notice to all persons of the rights of the grantees conferred by such instruments. [C.'73, § 1944; R., § 2223; C.'51, § 1214.]

Failure to index or record: Although the instrument is filed, yet if, through fault of the officer or otherwise, it is not indexed or duly recorded, it will not constitute notice: *Barney v. McCarty*, 15-510; *Barney v. Little*, 15-527; *Whalley v. Small*, 25-184; *Miller v. Bradford*, 12-14; *Noyes v. Horr*, 13-570.

The language of the acts of 1839 and 1840, providing that from the time the instrument "is filed in the recorder's office for record," it shall constitute notice, simply fixed the time from which notice should date, but did not render the filing alone sufficient to affect third persons with notice in case the further steps of indexing and recording, as required by statute, were not taken: *Ibid.*

Indexing; what sufficient: If the grantor's and grantee's names are given in the index with the book and page where the instrument is recorded, and the instrument is in fact there recorded, this, so far as the object of the recording act is concerned, is a substantial, though it may not be in all respects a literal, compliance with the law. The record book and the index book are not to be considered as detached and independent books, and if the index makes the requisite reference the party will be affected with notice of any facts which either book contains with respect to the title of the proposed grantor: *Barney v. Little*, 15-527.

If an ordinarily diligent search of the records will bring to the inquirer knowledge of a prior incumbrance or alienation, he is presumed to know of it, assuming the instrument to be one which may properly be recorded. The law charges the proposed purchaser with a knowledge of all facts which ordinary examination of the records would have made him cognizant of: *Ibid.*

Where the instrument is sufficiently indexed the defendants are charged with constructive notice of whatever appears of record, provided the instrument is one which, according to the statute, can be deemed lawfully recorded: *Greenwood v. Jenswold*, 69-53.

Failure to index: Where there is an entire failure to index, the filing and recording will not constitute notice: *Barney v. McCarty*, 15-510; *Gwynn v. Turner*, 18-1.

Mistake in reference: But where there

was a mistake in the reference in the index to the page of the record, and the examination of the index and the page of the record referred to would have led to a discovery of the correct page of the record, *held*, that the record would constitute notice: *Barney v. Little*, 15-527.

Description in the index: It is not essential to the validity of the indexing that a particular description of the property should be entered in the column for that purpose. An entry, such as "see record," or "part of lot," etc., will be sufficient: *Calvin v. Bowman*, 10-529; *Bostwick v. Powers*, 12-456; *White v. Hampton*, 13-259; *Hodgson v. Lovell*, 25-97; *Peirce v. Weare*, 41-378.

If the instrument covers two or more pieces of property, and in the column of the index for description only one of them is entered, the record will not be constructive notice as to the piece or pieces not entered or referred to: *Noyes v. Horr*, 13-570; *Stewart v. Huff*, 19-557.

Where an agreement, by which A. was to convey his interest in certain lands to B. was duly recorded, A. being named in the index as grantor and B. as grantee, and in the column headed "Character of Instrument" the entry was "Agreement," and in the column headed "Description" the entry was "with regard to swamp and overflowed lands," *held*, that such indexing affected a subsequent purchaser with notice: *American Emigrant Co. v. Call*, 22 Fed., 765.

Mistake in description: Where the index misstates the section, township, or range, the record will not constitute notice even though in addition to the statement of the index a reference is made to the record for a fuller description: *Breed v. Conley*, 14-269.

So where a mortgage contained an entirely mistaken description and the index contained the same description, *held*, that a purchaser might rely upon the index and was not chargeable with notice of the mortgage although there were recitals therein which showed that it related to the land purchased: *Scoles v. Wilsey*, 11-261.

If a party is not charged with constructive notice by what appears in the index book he is not bound to look further and is not affected by what appears of record. So *held* as to a judgment lien where there was a mistake in the entry of the name in the index of judgments: *Thomas v. Desney*, 57-58.

Where the index erroneously describes the property, a subsequent purchaser will not be affected with notice, even though the examination of the record of the instrument would have disclosed facts which might have put him upon inquiry: *Peters v. Ham*, 62-656.

Names in index: Where the legal title was in W. T. B., the wife, and both husband and wife joined in a mortgage, which was indexed under the name of W.H. B., the husband, as grantor, *held*, that the index was sufficient to put a searcher of title upon inquiry, and therefore would impart notice: *Jones v. Berkshire*, 15-248.

A conveyance signed J. A. S. was indexed and entitled in the caption of the record as made by A. J. S., and it appeared that the property was conveyed to the party as A. J. S., and she was in the habit of signing her name in either way. *Held*, that the record constituted notice: *Huston v. Seeley*, 27-183.

A mortgage executed by "Furman" was indexed in the name of "Freeman;" *held*, that the record did not constitute notice, and that a purchaser need not look beyond the index: *Howe v. Thayer*, 49-154.

"Helen" and "Ellen" are not the same Christian name, and an index entry in the name of one does not impart notice of a lien against the other: *Thomas v. Desney*, 57-58.

In case of a conveyance of the homestead, in which the wife joins, it is not necessary that the index show the name of the wife as well as that of the husband: *Hodgson v. Lovell*, 25-97.

Indexing without recording: Where a mortgage, after being filed with the recorder and indexed, was withdrawn and not recorded for two years, *held*, that the indexing alone did not impart constructive notice to persons acquiring liens without other notice thereof. The index alone only amounts to constructive notice for the time intermediate the indexing and recording in the usual manner, while the instrument remains on file with the recorder: *Yerger v. Barz*, 56-77.

Sufficiency of recording: See notes to § 2938.

Priority: Where two mortgages are delivered to the recorder by substantially the same act the secret intention that the one first delivered shall have priority will not give it that effect, there being no prevailing equities in favor of such mortgage, and the two mortgages will be entitled to their *pro rata* share in the proceeds of the property; nor will the fact that the record of one of the mortgages is defective give priority to the other: *Koevenig v. Schmitz*, 71-175.

Where two mortgages were executed on the same day, and subsequently one of them was transferred to plaintiff before maturity of the note secured thereby, and at the time of such transfer both mortgages were recorded, the mortgage thus transferred having been recorded first, it not appearing from the record which mortgage was first executed, *held*, that plaintiff, as transferee of the mortgage first recorded, had priority over the other mortgage, there being nothing to indicate that the mortgage last recorded was intended to have priority in lien: *Powers v. Lafler*, 73-283.

Mortgages which are executed at the same time, recorded at the same hour, and foreclosed on the same day, are equal liens in point of time, neither taking priority over the other: *Stanbrough v. Daniels*, 77-561.

Where land previously mortgaged was conveyed to plaintiff in consideration of an antecedent debt before the recording of the mortgage, but where there was evidence that he had actual knowledge of its existence and where he was negligent in asserting his rights for more than thirty years, allowing others to acquire title under the mortgage, *held*, that all the circumstances of the case would give rise to a strong presumption against him and he would not be permitted to claim title adverse to those claiming under the mortgage: *Withrow v. Walker*, 81-651.

One who takes a conveyance with pay-

ment of purchase-money partly in cash and partly by note secured by mortgage takes priority over a former vendee under an executory contract to purchase, to whom no deed has been executed; and it is immaterial that the acknowledgment of the conveyance to the latter purchaser is defective: *Walker v. Cameron*, 78–315.

Where two mortgages were executed and recorded at the same time, one of them being made in pursuance of a prior arrangement for the borrowing of money, and being delivered to the mortgagee named therein, who thereupon loaned the money thereon without knowledge of the existence of the other mortgage, and such other mortgage was, subsequently to the time the money was advanced on the one first made, delivered to the mortgagee, who, without any prior agreement to do so, made a loan of money thereon, with knowledge that the mortgage first named was in existence, *held*, that the mortgage first named took priority: *Utley v. Dunkelberger*, 86–469.

One who takes a negotiable note by indorsement, secured by a mortgage or trust deed but no assignment of the mortgage or trust deed is put on record, will not be protected against a release of such mortgage or trust deed made by the mortgagee or trustee, a subsequent mortgagee having relied upon such release in taking his mortgage upon the property: *Livermore v. Maxwell*, 87–705.

The fact that a subsequent mortgage is executed and recorded before release of the prior mortgage or trust deed is put on record will not prevent the second mortgagee from claiming priority by virtue of such release, the execution of his mortgage having been but one step in a transaction and the execution of the release being a condition for the advancement of the money secured by the subsequent mortgage: *Ibid.*

Effect of notice by record: The recording of a deed is notice of any fraud involved therein so as to start the statute of limitations to running as to an action for such fraud under the provisions of § 3448: *Mickle v. Walraven*, 92–423; *Sims v. Gray*, 61 N.W., 171.

The statute makes the filing of a conveyance notice to all persons of the rights of grantee thereunder but it does not constitute notice to insurance company of the existance of the instrument recorded so that a failure to object will be a waiver of the right to claim a forfeiture of the policy by virtue of the conveyance or incumbrance in violation of the terms of its policy: *Wicke v. Iowa State Ins. Co.*, 90–4.

In general, as to who is charged with notice, see notes to § 2925.

SEC. **2937. Arranged alphabetically.** The entries in such book shall show the names of the respective grantors and grantees, arranged in alphabetical order. When such instrument is executed by an administrator, executor, guardian, referee, commissioner, receiver, sheriff, or other person acting in a representative capacity, the recorder shall enter the same upon the index book in the manner required for the entry thereon of transfers of personal property similarly made. [C. '73, § 1945; R., § 2224; C. '51, § 1215.]

SEC. **2938. How recorded.** Every such instrument shall be recorded, as soon as practicable, in a suitable book to be kept by the recorder for that purpose, after which he shall complete the entries aforesaid, so as to show the book and page where the record is to be found. [C. '73, § 1946; R., § 2225; C. '51, § 1216.]

What sufficient recording: It is not essential that the record should be a literal copy, in every respect, of the instrument in order to constitute notice, but it is essential that it should embody every material part of the instrument, and that the language of the instrument be so nearly copied into the record as that the subject-matter can be identified with certainty from the record itself: *Fogg v. Holcomb*, 64–621.

In a particular case, *held*, that although there was an omission of a portion of the instrument in the record, yet as the words omitted were not material the record was sufficient to constitute notice: *Ibid.*

But if essential parts are omitted, then the record imparts notice, if at all, only of an invalid instrument. If the instrument itself is valid, then the recording is defective and does not impart notice: *Greenwood v. Jenswold*, 69–53.

Knowledge of the record of a prior mortgage on real estate, with the same description except as to one word, *held*, if not of itself actual notice of the mortgage of the land correctly described, at least sufficient to put an ordinarily prudent person upon inquiry and to charge him with notice of facts which such inquiry would develop: *Jones v. Bamford*, 21–217.

In recording an instrument, the record of the filing may as well be made in the margin of the record as preceding or following the record of the instrument, and the recorder, in giving a certified copy of the record, may authenticate the whole, including the record of the filing: *Laird v. Kilbourne*, 70–83.

Mistake in recording: Where the instrument is erroneously transcribed it will constitute notice only as recorded. Although the deed will itself, during the reasonable time between the date of filing and recording, constitute notice, yet when recorded it is the record which is the notice: *Miller v. Bradford*, 12–14.

Recording defective instrument: Where a chattel mortgage is not valid by reason of insufficient description, and delivery of the property to the mortgagee is not made, the mortgagee acquires no rights which will prevail as against persons having no notice of the transaction: *Barr v. Cannon*, 69–20.

Failure to transcribe: Under the provi-

sions of the Code of '51, requiring the filing and record of plats, *held*, that failure on the part of the officer to record a plat until the lapse of some years, and until after the death of the grantor, would not enable those claiming under him to defeat a dedication therein made: *Scott v. Des Moines*, 64–438.

Erroneous description: A subsequent purchaser acquires priority over the lien of a prior mortgage in which the property is described by an erroneous description, and of which the subsequent purchaser had no actual notice: *Halloway v. Platner*, 20–121.

The record of an instrument in which property was described as "Lot and six," *held* not sufficient to impart constructive notice to a purchaser of "Lot one, block six:" *Nelson v. Wade*, 21–49.

A purchaser in a particular case, *held* not charged with constructive notice of a mortgage covering certain lots upon a town plat not recorded, which lots were described by different numbers in a plat subsequently recorded: *Stewart v. Huff*, 19–557.

That a lot described in a mortgage was occupied by a building of a certain description, *held* not sufficient to charge the mortgagee with notice of a senior mortgage upon the same lot and building in which the building was generally described, the lot being described by a different number, and the evidence not showing that the building was the only one answering to the same description in the town: *Ibid.*

The recorded instrument imparts constructive notice only of what might have been learned by an examination of the record. If the description is defective, third persons will not be bound although they did not read the record and were therefore not misled by the description: *Ivins v. Hines*, 45–73.

Where the claimant of property traced title to one Teufel, but the record of the conveyance was ambiguous in the spelling of the name, and might be read Temple, but there was no showing that the opposite party had been misled by the condition of the record, *held*, that the title of the claimant was sufficiently established: *Sorenson v. Davis*, 83–405.

Instrument blank as to grantee: The recording of a mortgage in which the name of the mortgagee is left blank does not constitute notice: *Disque v. Wright*, 49–538.

Impeaching record: The record may be impeached by oral testimony, but will be held false and fraudulent only upon clear and satisfactory evidence: *Vandercook v. Baker*, 48–199.

Purchaser not affected with facts aliunde: The rights conferred by an instrument of which a subsequent purchaser has constructive notice only are to be determined by the instrument itself as recorded and indexed, and not by facts *aliunde* or other instrument not recorded: *Miller v. Ware*, 31–524.

Therefore, where the description in an instrument gave the number of the lot, and the addition in which it was situated, but did not give the number of the block in that addition, *held*, that the record did not impart constructive notice, although an examination of the other records in the recorder's office would have shown that two of the five blocks in that addition had been vacated, and of the other three only one contained a lot of the number given in the instrument: *Disque v. Wright*, 49–538.

But a person having constructive notice of an instrument is affected with all that it contains, and if thereby put upon inquiry he is bound to take notice of all that he might have learned by pursuing the path indicated: *Thomas v. Kennedy*, 24–397.

As to the effect of record notice, see, further, notes to § 2925.

Entry of decree of cancellation: It is not error in a decree canceling a deed to direct the entry of such fact on the margin of the record of such deed in the recorder's office: *Fenton v. Way*, 44–438.

SEC. **2939. Recording land grants.** Every railroad company which owns or claims to own real estate in this state, granted by the government of the United States or this state to aid in the construction of its railroad, where it has not already done so, shall place on file and cause to be recorded, in each county wherein the real estate granted is situated, evidence of its title or claim of title, whether the same consists of patents from the United States, certificates from the secretary of the interior, or governor of this state, or the proper land office of the United States or this state. Where no patent was issued, reference shall be made in said certificate to the act or acts of congress, and the acts of the legislature of this state, granting such lands, giving the date thereof, and date of their approval under which claim of title is made; but where the certificate of the secretary of the interior or the patents contain real estate situated in more than one county, the secretary of state shall, upon the application of any railroad company or its grantee, prepare and furnish, to be recorded, a list of all the real estate situated in any one county so granted, patented or certified; and all such evidences of title shall be entered by the auditor upon the index, transfer and plat books. [18 G. A., ch. 186, § 1.]

SEC. **2940. Notice.** Such evidence of title shall be filed with the recorder of deeds of the county in which the real estate is situated, who shall record the same, and place an abstract thereof upon the index of deeds, so as to show the evidence of title; and the recording thereof shall be con-

structive notice to all persons, as provided in other cases of entries upon said index, and the recorder shall receive the same fees therefor as for recording other instruments. [Same, § 2.]

SEC. **2941. Town lots.** The recorder shall index and record all deeds, mortgages and other instruments affecting lots in cities, towns or villages, the plats whereof are recorded, in separate books from those in which other conveyances of real estate are recorded. [C.'73, § 1947; R., § 2241.]

SEC. **2942. Acknowledgment of conveyances or incumbrances.** The acknowledgment of any deed, conveyance or other instrument in writing by which real estate in this state shall be conveyed or incumbered, if made within this state, must be before some court having a seal, or some judge or clerk thereof, or some county auditor or his deputy, or justice of the peace within the county, or notary public within the county of his appointment or in an adjoining county in which he has filed with the clerk of the district court a certified copy of his certificate of appointment. [25 G. A., ch. 52; 22 G. A., ch. 99; C.'73, §§ 277, 1955; R., §§ 201, 2226; C.'51, § 1217.]

[For acts legalizing acknowledgments defective under prior statutes, see McClain's code, 1888, §§ 3139 to 3143, inclusive; also an act of 26 G. A., extra session, not yet published, entitled "An act to legalize acknowledgments of instruments in writing heretofore taken by notaries public."]

What sufficient: An acknowledgment before a deputy clerk acting in the name of his principal is good: *Abrams v. Ervin*, 9–87.

An acknowledgment certified to by an officer interested therein (as a member of the firm of grantees) is void, and the record of such instrument will not impart notice: *Wilson v. Traer*, 20–231; *City Bank v. Radtke*, 87–363.

An acknowledgment of a mortgage taken by a notary public who is a stockholder in the corporation to which the mortgage is given is not valid: *Smith v. Clark*, 69 N. W., 1011.

While the acknowledgment of an instrument taken before the grantee as an officer will not be valid, yet the mere fact that the person for whom the acknowledgment is taken has an interest in the property conveyed will not necessarily render the acknowledgment void, although it might be a circumstance tending to show fraud: *Dussaume v. Burnett*, 5–95.

A county officer executing a conveyance under authority of law for the county may acknowledge such conveyance in a county other than that for which he is acting: *Henderson v. Robinson*, 76–603.

An acknowledgment by an officer mentioned in § 277 of Code of '73 as amended, who was not named in § 1955 of Code of '73, *held* valid, as the two sections were to be construed together: *Long v. Schee*, 86–619.

The legalizing act as to acknowledgments taken by county auditors, *held* not a legislative construction that such acknowledgments were not valid: *Ibid.*

A notary's certificate of acknowledgment to a deed must be authenticated by his seal: *Pitts v. Seavey*, 88–336.

The requirements as to notary's seal, etc., will be presumed to be the same in another state as in this state until the contrary is shown: *Hewitt v. Morgan*, 88–468. And see notes to § 374.

Legalizing defective acknowledgments: An act curing defective acknowledgments is not unconstitutional as interfering with vested rights, but it can only affect rights of third persons accruing after its passage and not those prior thereto: *Brinton v. Seevers*, 12–389; *Newman v. Samuels*, 17–528; *Ferguson v. Williams*, 58–717.

The phrase "duly recorded" in such an act, *held* not to mean legally recorded but actually recorded: *Brinton v. Seevers*, 12–389.

In a particular case, *held*, that the instrument was duly recorded so as to be within the effect of the legalizing act, although some immaterial words were omitted in the recording: *Fogg v. Holcomb*, 64–621.

Notwithstanding the fact that a conveyance by the grantor to a third person is executed before the taking effect of the curative act, the burden is upon such purchaser to prove that he is an innocent purchaser of the premises for value, in order to defeat the previous conveyance defectively recorded: *Ibid.*

Before an instrument can be regarded as duly recorded under such a statute it must appear from the record of the instrument that every material part of it has been transcribed into the record, and where the record fails to show a valid conveyance because no consideration is expressed for it, and it is not signed by the grantor, such defect will not be cured by such provisions. If it should appear from extrinsic evidence that the instrument was duly signed, then the record would be invalid, because the instrument had not been duly recorded: *Greenwood v. Jenswold*, 69–53.

A deed, the acknowledgment of which is legalized by such a statute, is to be regarded as having the same effect from the day of its record that it would have had if it had been properly acknowledged: *East v. Pugh*, 71–162.

As the act to legalize defective acknowledgments applies only to cases where there was a legal deed antecedent to any attempt to acknowledge, it has no effect to render valid a tax deed which was previously invalid for want of acknowledgment: *Goodykoontz v. Olsen*, 54–174.

For other cases in which such statutes

were applied, see *Buckley v. Early*, 72–289; *Henderson v. Robinson*, 76–603; *Collins v. Valleau*, 79–626.

Similar sections in Revision held only to apply to instruments acknowledged before they took effect: *Reynolds v. Kingsbury*, 15–238; *Jones v. Berkshire*, 15–248.

Where it is claimed that under such a legalizing act a defective acknowledgment is made valid because it was made in accordance with the laws of the state where it was executed, its sufficiency under the laws of such state must be shown: *Kreuger v. Walker*, 80–733.

Where the statutes of the state in which the acknowledgment was taken had not prescribed the form of acknowledgment it will be necessary to show that the acknowledgment was in accordance with usage there: *Krueger v. Walker*, 63 N.W., 320.

SEC. **2943. Out of state.** When made out of the state but within the United States, it shall be before a judge of some court of record, or officer holding the seal thereof, or some commissioner appointed by the governor of this state to take the acknowledgment of deeds, or some notary public or justice of the peace; and when made before a judge, notary public or justice of the peace, a certificate, under the official seal of the clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state of the state or territory, within which such acknowledgment was taken, under the seal of his office, of the official character of said judge, notary public or justice, and of the genuineness of his signature, shall accompany said certificate of acknowledgment. [C. '73, § 1956; R., § 2245.]

When no seal of the officer or certificate as to his official character is attached to the certificate of acknowledgment, as here contemplated, it is not valid: *Jones v. Berkshire*, 15–248.

SEC. **2944. Same.** The proof or acknowledgment of any deed or other written instrument required to be proved or acknowledged in order to enable the same to be recorded or read in evidence, when made by any person without this state and within any other state, territory or district of the United States, may also be made before any officer of such state, territory or district authorized by the laws thereof to take the proof and acknowledgment of deeds, and, when so taken and certified as herein provided, shall be entitled to be recorded in this state, and may be read in evidence in the same manner and with like effect as proofs and acknowledgments taken before any of the officers now authorized by law to take such proofs and acknowledgments, and whose authority so to do is not intended to be hereby affected.

SEC. **2945. Certificate of authority.** To entitle any conveyance or written instrument, acknowledged or proved under the preceding section, to be read in evidence or recorded in this state, there shall be subjoined or attached to the certificate of proof or acknowledgment signed by such officer a certificate of the secretary of state of the state or territory in which such officer resides, under the seal of such state or territory, or a certificate of the clerk of a court of record of such state, territory or district in the county in which said officer resides or in which he took such proof or acknowledgment, under the seal of such court, stating that such officer was at the time of taking such proof or acknowledgment duly authorized to take acknowledgments and proofs of deeds of lands in said state, territory or district, and that said conveyance and the acknowledgment thereof are in due form of law, and that said secretary of state or clerk of court is well acquainted with the hand writing of such officer, and that he verily believes that the signature affixed to such certificate of proof or acknowledgment is genuine.

SEC. **2946. Form.** The following form of authentication of the proof or acknowledgment of a deed or other written instrument, when taken without this state and within any other state, territory or district of the United States, or any form substantially in compliance with the foregoing provisions of this chapter, may be used:

(Begin with a caption specifying the state, territory or district, and county or place where the authentication is made.)

I, ..., clerk of the ..... court in and for said county, which court is a court of record, having a seal (or I, ..., secretary of state of such state or territory), do hereby certify that ....., by and before

whom the foregoing acknowledgment (or proof) was taken, was at the time of taking the same a notary public (or other officer) residing (or authorized to act) in said county, and was duly authorized by the laws of said state (territory or district) to take and certify acknowledgments or proofs of deeds of land in said state (territory or district), and that said conveyance and the acknowledgment thereof are in due form of law; and, further, that I am well acquainted with the hand writing of said ....., and that I verily believe that the signature to said certificate of acknowledgment (or proof) is genuine. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (or state) this ..... day of ....., A. D. ....

SEC. **2947. When out of the United States.** When the acknowledgment is made without the United States, it may be before any ambassador, minister, secretary of legation, consul, vice-consul, charge d'affaires, consular agent, or any other officer of the United States in a foreign country who is authorized to issue certificates under the seal of the United States. Said instruments may also be acknowledged or proven before any officer of a foreign country who is authorized by the laws thereof to certify to the acknowledgments of written documents; but the certificate of acknowledgment by a foreign officer must be authenticated by one of the above named officers of the United States, whose official written statement that full faith and credit is due to the certificate of such foreign officer shall be deemed sufficient evidence of the qualification of said officer to take acknowledgments and certify thereto, and of the genuineness of his signature, and seal if he have any. [C.'73, § 1957.]

SEC. **2948. Certificate of acknowledgment.** The court or officer taking the acknowledgment must indorse upon the deed or instrument a certificate setting forth the following particulars:

1. The title of the court or person before whom the acknowledgment was made;

2. That the person making the acknowledgment was known to the officer taking the acknowledgment to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness, naming him;

3. That such person acknowledged the execution of the instrument to be his voluntary act and deed. [C.'73, § 1958; R., § 2227; C.'51, § 121.]

Form of certificate; what sufficient: The exact language of the statute need not be followed by the officer in his certificate, but words of the same import are sufficient: *Wickersham v. Reeves*, 1–413; *Tiffany v. Glover*, 3 G. Gr., 387; *Cavender v. Smith's Heirs*, 5–157.

Therefore, *held*, that the words "well known" were sufficient in place of "personally known," and the words "the within named," etc., sufficiently referred to the parties as being "the identical persons whose names are affixed," etc.: *Bell v. Evans*, 10–353.

A certificate which does not state that the party acknowledging the instrument was "personally known" to the officer "to be the identical person," etc., or use words of similar import, is fatally defective: *Reynolds v. Kingsbury*, 15–238; *Brinton v. Seevers*, 12–389.

The omission of the word "personally" before "known" renders the certificate defective: *Gould v. Woodward*, 4 G. Gr., 82.

But such omission is not fatal where the other words used necessarily imply personal knowledge in the official: *Todd v. Jones*, 22–146; *Rosenthal v. Griffin*, 23–263. [See now the forms given in § 2959.]

The word "voluntary" is of the essence of the acknowledgment, and in the absence of that or an equivalent word the certificate will be invalid: *Wickersham v. Reeves*, 1–413; *Newman v. Samuels*, 17–528; *Krueger v. Walker*, 80–733.

But the fact that the party acknowledged the instrument to be his voluntary act and deed may be shown by the tenor and form of the certificate, as well as by the use of the very words of the statute: *Dickerson v. Davis*, 12–353.

The essentials of a certificate of acknowledgment considered generally: *Bell v. Evans*, 10–353.

The omission of even an essential word, where it is apparently a mere clerical error, will not invalidate the certificate: *Scharfenburg v. Bishop*, 35–60.

The certificate is not to the genuineness of the signature, but to the fact that the party *acknowledged* the instrument, and the acknowledgment is sufficient although the signature may have been written by another for the grantee: *Morris v. Sargent*, 18–90.

No specified form of acknowledgment is required where one member of a firm mortgages property to secure a partnership debt; and in a particular case, *held*, that an acknowledgment by "Frank Johnson, a member of the firm of A. T. Johnson Son Co.," was a sufficient acknowledgment: *Citizens' Nat. Bank v. Johnson*, 79–290.

Where the certificate of acknowledgment, otherwise in the usual form, was blank as to the name of the person making the acknowledgment as follows, "personally came..... to me known to be the identical person whose name is affixed," *held*, that such certificate sufficiently referred to the person whose name was signed to the instrument as the one who appeared and acknowledged the same and was valid: *Milner v. Nelson*, 86–452.

A certificate of acknowledgment of an instrument purporting to be executed by M. Thompson and certifying to its acknowledgment by Michael Thompson is sufficient: *Paxton v. Ross*, 89–661.

Evidence: The certificate is *prima facie* evidence of the fact of acknowledgment, but is not conclusive, and may be overcome by other evidence, the burden being upon the party seeking to rebut the effect of the certificate: *Morris v. Sargent*, 18–90; *Van Orman v. McGregor*, 23–300; *Borland v. Walrath*, 33–130.

If a mortgage is duly acknowledged, the introduction thereof in evidence, accompanied by the notes referred to therein as executed by the same party, is *prima facie* sufficient to establish the execution of the mortgage and also of the notes: *Mixer v. Bennett*, 70–329.

The certificate of the officer, and his testimony as to the acknowledgment, are entitled to great weight. The presumption is very strong in his favor: *Bailey v. Landingham*, 53–722.

The certificate of the notary public as to the acknowledgment by the grantor, and the positive testimony of such officer as to the fact of such acknowledgment, will prevail over the denial, on the part of the grantor, of the fact of making such instrument. Deeds, mortgages and other instruments requiring an acknowledgment before an officer should not be set aside without clear and satisfactory evidence, and the seal and acknowledgment of the officer should in such cases be given proper consideration: *Herrick v. Musgrove*, 67–63.

Parol evidence: It is not proper to show by parol evidence, for the purpose of sustaining an acknowledgment, that matters required by statute to be done were done, although not shown by the certificate: *O'Ferrall v. Simplot*, 4–381.

But parol evidence may be introduced to show fraud in obtaining an acknowledgment, or when the certificate is alleged to be false, to show that the deed never was acknowledged: *Ibid.*

If the certificate does not recite the essential facts it is not competent to prove such facts by extrinsic evidence: *Ibid.*

Therefore, under the provisions of the act of 1846, requiring the certificate of acknowledgment by a married woman to show that she was made acquainted with the contents of the conveyance, and that she relinquished her dower, *held*, that a conveyance by a married woman, in which the acknowledgment did not show such facts, was void as to her, and that the requisite facts could not be shown by parol testimony: *O'Ferrall v. Simplot*, 4 G. Gr., 162.

Official title: The official title of a notary public is "A. B., a notary public for ——— county," etc., and a failure to set forth the name of the county renders the certificate void. The fact that the name of the county appears from the impression of the seal will not remedy the defect: *Willard v. Cramer*, 36–22.

Notaries public in this state have jurisdiction only within the respective counties for which they are appointed, and the title of each must be defined to be a notary public of some county, naming it. The certificate must show the county of the notary public making it, and the failure of the certificate to so state will not be cured by the fact that the county appears in the seal, which is not required to show that fact: *Greenwood v. Jenswold*, 69–53.

But this rule does not apply to the official signature to the jurat of an affidavit: *Stoddard v. Sloan*, 65–680.

While the certificate should set forth the title of the court or officer before whom the acknowledgment is made, there is no requirement that the name of the officer shall be set out in the body of the certificate: *Fogg v. Holcomb*, 64–621.

Where the body of the certificate recites that the officer is a notary public in and for the county named it is not necessary that the name of the county be appended to his signature: *Colby v. McOmber*, 71–469.

When no seal of the officer or certificate as to his official character is attached to the certificate of acknowledgment, as contemplated by statute, it is not valid: *Jones v. Berkshire*, 15–248.

Amendment of certificate: Whilst a notary continues in office it is competent for him to amend his certificate of acknowledgment to supply a defect by making a new one, provided it is in accordance with the real facts: *Chicago, B. & Q. R. Co. v. Lewis*, 53–101.

Attorney in fact: Prior to the act of 1858 an acknowledgment of a chattel mortgage by an attorney in fact as his voluntary act and deed would be the acknowledgment, in law, of his principal: *Sowden v. Craig*, 26–156.

Municipal officer: Where a deed offered in evidence purported to have been executed by one Q., as mayor of the city of D., having the seal of the city affixed and duly attested by the recorder, and was properly acknowledged and recorded, the certificate of the officer taking the acknowledgment showing that Q. was personally known to him as the identical person whose name was affixed to the deed as president *pro tempore* of the city council, and acting mayor of the city of D., *held*, that such deed was *prima facie* proof that Q. was at the time acting mayor of the city, and, coupled with what the court might take judicial notice of on this subject, rendered the introduction of the deed in question competent without further proof as to the official character of the said Q.: *Middleton Savings Bank v. Dubuque*, 19–467.

Officers of corporation: Where an assignment of a judgment in favor of a bank was signed by persons designating themselves as president and secretary, but the acknowledgment thereof did not state that

they were such officers, *held*, that the assignment was not sufficient to establish the official character of the persons whose names were attached thereto or show that they had authority to act for the bank: *Klemme v. McLay*, 68–158.

By married woman: Where the certificate of acknowlegment to a trust deed appeared regular and in due form, but the evidence showed that the notary had certified to the acknowledgment of the same by the wife without requiring her personal presence, but upon a previous verbal authority given by her, *held*, that the validity of the deed could not be questioned for that reason by the wife as against parties who had loaned money upon the strength of the security, regular upon its face: *McHenry v. Day*, 13–445.

As evidence of date: The date of an acknowledgment will be accepted as that of the execution of the instrument: *Henry County v. Bradshaw*, 20–355.

A strong presumption exists in favor of the certificate of acknowledgment as indicating the date of the execution of the instrument: *Bird v. Adams*, 56–292.

In a particular case, *held*, that the date of the certificate of acknowledgment should prevail over oral evidence of loose and random conversations and admissions in determining the date of the execution: *Ibid.*

Effect: That acknowledgment is only necessary in order that the instrument may be recorded and import constructive notice, and is not essential to its validity as between the parties, see notes to § 2926.

SEC. **2949. Proof of execution and delivery.** Proof of the due and voluntary execution and delivery of a deed or other instrument may be made before any officer authorized to take acknowledgments, by one competent person other than the vendee or other person to whom the instrument is executed, in the following cases:

1. If the grantor dies before making the acknowledgment;
2. If his attendance cannot be procured;
3. If, having appeared, he refuses to acknowledge the execution of the instrument. [C. '73, § 1959; R., § 2228; C. '51, § 1220–1.]

SEC. **2950. Certificate—must state what.** The certificate indorsed by the officer upon a deed or other instrument thus proved must state:

1. The title of the officer taking the proof;
2. That it was satisfactorily proved that the grantor was dead, or that for some other reason his attendance could not be procured in order to make the acknowledgment, or that, having appeared, he refused to acknowledge the same;
3. The name of the witness by whom proof was made, and that it was proved by him that the instrument was executed and delivered by the person whose name is thereunto subscribed as a party. [C. '73, § 1960; R., § 2230; C. '51, § 1222.]

SEC. **2951. Form.** The certificate of proof or acknowledgment may be given under seal or otherwise, according to the mode by which the officer making the same usually authenticates his formal acts. [C. '73, § 1961; R., § 2231; C. '51, § 1223.]

SEC. **2952. Attorney in fact.** The execution of any deed, mortgage or other instrument in writing, executed by any attorney in fact, may be acknowledged by the attorney executing the same. [C. '73, § 1962; R., § 2251.]

SEC. **2953. Certificate.** The person taking the acknowledgment must indorse upon such instrument a certificate, setting forth the following particulars:

1. The title of the person before whom the acknowledgment was taken;
2. That the person making the acknowledgment was known to the officer taking the acknowledgment to be the identical person whose name is subscribed to the instrument as attorney for the grantor therein named, or that such identity was proved to him by at least one credible witness, to him personally known and therein named;
3. That such person acknowledged said instrument to be the act and deed of the grantor therein named, by him, as such attorney thereunto appointed, voluntarily done and executed. [C. '73, § 1963; R., § 2252.]

SEC. **2954. By officers of corporation.** If the acknowledgment is made by the officers of a corporation, the certificate shall show that such persons as such officers (naming the office of each person) acknowledged the execution of the instrument as the voluntary act and deed of such corporation, by each of them voluntarily executed.

SEC. **2955. Liability of officer.** Any officer, who knowingly misstates a material fact in either of the certificates above contemplated shall be liable for all damages caused thereby, and shall be guilty of a misdemeanor, and fined any sum not exceeding the value of the property conveyed or otherwise affected by the instrument on which such certificate is indorsed. [C. '73, § 1964; R., § 2232; C. '51, § 1224.]

The fact that a notary makes a false certificate as a result of negligence will not render him liable. Whatever liability there is exists by reason of statute: *Scotten v. Fegan*, 62–236.

In an action against a notary for damages under the statute, it must be alleged that he knowingly misstated a material fact: *Ibid.*

The officer is only liable for such damages as are caused by his wrongful act and necessarily connected with it: *Wyllis v. Haun*, 47–614.

Where it does not appear that the officer taking the acknowledgment knowingly misstated a material fact, as, for instance, that the person making the acknowledgment was the identical person whose name was affixed to the instrument, the officer will not be liable. The law does not make the officer taking the acknowledgment a guarantor that the person signing the instrument is the person who is the owner of the land referred to therein: *Browne v. Dolan*, 68–645.

SEC. **2956. Subpœnas.** Any officer having power to take the proof above contemplated may issue the necessary subpœnas, and compel the attendance of witnesses residing within the county, in the manner provided for the taking of depositions. [C. '73, § 1935; R., § 2233; C. '51, § 1225.]

SEC. **2957. Power of attorney—recording—revocation.** All instruments containing a power to convey, or in any manner relating to real estate, shall be held to be instruments affecting the same; and no such instrument, when certified and recorded as above prescribed, can be revoked as to third parties by any act of the parties by whom it was executed, until the instrument containing such revocation is acknowledged and filed for record in the same office in which the instrument containing such power is recorded. Affidavits explaining any defect in the chain of title to any real estate may be recorded as instruments affecting the same, but no one except the owner in possession of such real estate shall have the right to file the same. [C. '73, § 1969; R., § 2234; C. '51, § 1226.]

SEC. **2958. Forms of conveyances.** The following or other equivalent forms, varied to suit circumstances, are sufficient for the purposes therein contemplated:

FOR A QUITCLAIM DEED.

For the consideration of ..... dollars, I hereby quitclaim to A. B. all my interest in the following tract of real estate (describing it).

FOR A DEED IN FEE SIMPLE WITHOUT WARRANTY.

For the consideration of ..... dollars, I hereby convey to A. B. the following tract of real estate (describing it).

FOR A DEED IN FEE WITH WARRANTY.

The same as the last preceding form, adding the words: "And I warrant the title against all persons whomsoever" (or other words of warranty, as the party may desire).

FOR A MORTGAGE.

The same as deed of conveyance, adding the following: "To be void upon condition that I pay, etc." [C. '73, § 1970; R., § 2240; C, '51, § 1232.]

The general covenant of warrant specified in the form for a warranty deed includes and implies the usual covenants in a deed of conveyance in fee-simple, including one against incumbrances: *Funk v. Cresswell*, 5–62.

And under this covenant the grantee has all the rights he would have had if the conveyance had contained express covenants of seizing, freedom from incumbrance, right to convey, and the like: *Van Wagner v. Van Nostrand*, 19–422.

The general warranty provided for in the form here given is the same in legal effect as the common law covenant of general warranty, and much the same as a covenant for quiet enjoyment. Such a covenant does not protect the grantee against every adverse claim or suit, however unfounded, for which the grantor is not responsible, but only against persons making adverse claims based on a legal foundation: *Meservey v. Snell*, 62 N. W., 767.

The instrument here given as a conveyance without warranty contemplates a conveyance only of the interest of the grantor, whatever it may be, and a purchaser by such conveyance takes with notice of any prior unrecorded instruments, or equities, available against his grantor: *Steele v. Sioux Valley Bank*, 79-339.

A deed purporting only to convey the interest of the grantor will not transfer a greater interest than he actually has, although it may appear from the records that his interest is greater than that which he really possesses: *Rogers v. Chase*, 89-468.

A quit claim by the husband and wife jointly, in which the wife also releases dower, conveys to the grantee any interest which the wife may have in her own right: *Cahalan v. Van Sant*, 87-593.

That a purchaser by quit claim is not protected against a prior unrecorded deed, see notes to § 2925.

SEC. **2959. Forms of acknowledgment.** The following forms of acknowledgment shall be sufficient in the cases to which they are respectively applicable. In each case where one of these forms is used, the name of the state and county where the acknowledgment is taken shall precede the certificate, and the signature and official title of the officer shall follow it as indicated in the first form, and the seal of the officer shall be attached when necessary under the provision of this chapter.

1. In the case of natural persons acting in their own right:

STATE OF..... } ss.
County of..... }

On this..... day of....., A. D....., before me personally appeared A. B. (or A. B. and C. D.), to me known to be the person (or persons) named in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) voluntary act and deed.

.....
Notary Public in and for said county.

2. In the case of natural persons acting by attorney:

On this..... day of....., A. D....., before me personally appeared A. B., to me known to be the person who executed the foregoing instrument in behalf of C. D., and acknowledged that he executed the same as the voluntary act and deed of said C. D.

3. In the case of corporations or joint stock associations:

On this..... day of....., A. D....., before me appeared A. B., to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees), and said A. B. acknowledged said instrument to be the voluntary act and deed of said corporation (or association).

(In case the corporation or association has no corporate seal, omit the words "the seal affixed to said instrument is the corporate seal of said corporation (or association), and that," and add, at the end of the affidavit clause, the words "and that said corporation (or association) has no corporate seal.")

(In all cases add signature and title of the officer taking the acknowledgment.)

SEC. **2960. By married women.** The acknowledgment of a married woman, when required by law, may be taken in the same form as if she were sole, and without any examination separate and apart from her husband.

SEC. **2961. Records transcribed.** The board of supervisors of any county, or one formerly attached to another, when necessary, may have

copied, indexed and arranged any deed, probate, mortgage, court or county record, or government survey belonging or relating to said county, and have a complete index thereof made; and may have correctly copied any index of deeds, mortgages or other records. [18 G. A., ch. 142; C.'73, § 1971–2; R., § 2259.]

SEC. **2962. Compensation.** The board of supervisors may employ any suitable person to perform the labor contemplated in the preceding section, the amount of compensation therefor to be previously fixed by them, not exceeding six cents for each one hundred words of the records proper, and twelve and one-half cents for each one hundred words of indexing; such compensation to be paid out of the treasury of the county for which the records are copied, to be audited as other claims. [C.'73, § 1973; R., § 2260.]

SEC. **2963. Effect.** When any such records are copied, the officer to whose office the original records belong shall compare the copy so made with the original, and, upon the same being found correct, shall attach his certificate in each volume or book of such copied records, to the effect that he has compared such copies with the original and they are true and correct, and such copied records shall have the same force and effect in all respects as the original records. [18 G. A., ch. 142; C.'73, §§ 1974–5; R., §§ 2261–2.]

This section will not authorize the making of a new set of tax books for the purpose of enabling officers in territory which has been separated from the county to which it was annexed for taxing purposes to collect such taxes: *Hilliard v. Griffin*, 72–331.

Duly certified copies of records, etc., receivable in evidence, see § 4635.

CHAPTER 7.

OF OCCUPYING CLAIMANTS.

SECTION **2964. Proceedings.** Where an occupant of real estate has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the plaintiff in possession of the same, after the filing of a petition as hereinafter provided, until the provisions of this chapter have been complied with. [C.'73, § 1976; R., § 2264; C.'51, § 1233.]

Occupant: It is not necessary in order that the party be an "occupant of the land" that he be in personal possession, a possession by tenant being sufficient: *Parsons v. Moses*, 16–440.

But a party out of possession cannot maintain the action. The right is lost by yielding the occupancy: *Webster v. Stewart*, 6–401; *Claussen v. Rayburn*, 14–136.

To entitle a claimant to the benefit of these provisions the possession under and during which the improvements were made must have been adverse to the holder of the paramount title: *Keas v. Burns*, 23–235.

Good faith: Constructive notice of an adverse claim, especially such as is imparted by a *lis pendens* or record, does not exclude good faith in the claimant: *Read v. Howe*, 49–65.

It is sufficient if the claimant has an honest belief that he has a good title and has no actual notice of an adverse claim: *Ibid.*

Purchaser pendente lite: One who purchases land pending an action with constructive notice thereof is bound by the judgment, and must at his peril take notice of the service of the writ of possession and make his claim for improvements at the proper time: *Blanchard v. Ware*, 43–530.

The effect of these statutory provisions is to make an occupant of land practically the owner of his improvements, even though he be not the owner of the land on which they were made. The occupant in such a case is not to be considered a mere trespasser wantonly thrusting himself or his property in the way of danger. In an action for the injury of such property, it is immaterial, therefore, who was the owner of the land: *Milwaukee, etc., R. Co. v Kellogg*, 94 U. S., 469.

Counter-claim: Claims for improvements cannot be pleaded by way of counter-claim, but only after the question of title has been fully adjudicated: *Walton v. Gray*, 29–440; *Fogg v. Holcomb*, 64–621; *Buck v. Holt*, 74–294.

In an equitable action to redeem from tax sale under § 1440, the question of improvements is to be determined in the case: *Serrin v. Brush*, 74–489.

Claimant under pre-emption certificate: A party who, by satisfactory showing to the land office, has received a certificate that he is entitled to pre-empt land, has color of title thereto. One believing that he has title and making improvements on the land makes

them in good faith and is consequently entitled to receive the value thereof: *Wells v. Riley*, 2 Dillon, 566.

So *held* as to occupants of Des Moines river lands: *Ibid.; Litchfield v. Johnson*, 4 Dillon, 551.

Occupant with notice: One who, cognizant of the facts, occupies land under title bond given by the assignee of a title bond from the original owner, is not entitled after foreclosure and sale under the first bond to the benefit of the occupying-claimant act for improvements made thereon: *Jones v. Graves*, 21-474.

Color of title, who deemed to have, see § 2967, and notes.

For what improvements allowed: The claim for improvements is assignable, and the occupant may recover for improvements made by those under whom he claims: *Crayton v. Wright*, 16-133; *Parsons v. Moses*, 16-440.

The occupying claimant is not entitled to compensation for improvements made after judgment against him in the main action, and after his proceedings under the occupying-claimant law are commenced: *Crayton v. Wright*, 16-133.

An occupying claimant is to be allowed the amount which the improvements have actually augmented the value of the property and not their cost: *Childs v. Shower*, 18-261.

Setting off rents and profits: As against the claim for improvements, the owner may set off rents and profits of the land accruing prior to the six years to which his recovery in the action for the possession of the property is limited by § 4198, and also rents and profits subsequent to the judgment in such action, and pending the action by the occupying claimant for improvements: *Parsons v. Moses*, 16-440.

The occupant is not to be charged with the rent of improvemens made by him, but with the rent of the land, estimated, however, not upon its rental value as he took it, but upon what the land has heen worth to him, as brought into cultivation and made suitable for raising crops by his labor: *Dungan v. Von Puhl*, 8-263; *Wolcott v. Townsend*, 49-456.

As against the claimant for improvements, the owner is entitled to sue for the value of the use and occupation of the land by the claimant prior to the rendition of the judgment, no allowance for such use and occupation having been made in the original judgment: *Welles v. Newsom*, 76-81.

In determining the value of the improvements, the claimant should have, not what the improvements cost, but the value thereby imparted to the land: *Ibid.*

Removal: The proceeding by the occupying claimant is ancillary to the main suit, and cannot be removed to the federal court as separate from such main action: *Chapman v. Barger*, 4 Dillon, 557.

Appeal: Plaintiff having obtained judgment for possession and the defendant having filed his claim for improvements, *held*, that plaintiff was not entitled to writs of possession in disregard of the petition for improvements, although defendant had taken the case by writ of error from the state supreme court to the supreme court of the United States, where it was still pending: *Chicago, R. I. & P. R. Co. v. Tharnish*, 54-690.

Remedy exclusive: A party who has made improvements upon the land of another cannot recover the value thereof from the owner, even when made by him in good faith and under color of title. His only remedy is under the statutory provisions in behalf of occupying claimants, which provisions are not available to a party not in possession. But if the owner has wrongfully taken possession, the claimant may recover such possession by action of forcible entry and detainer, and then against any legal proceedings to dispossess him may assert his right to compensation for improvements: *Webster v. Stewart*, 6-401.

By the common law there was no liability on the part of the property owner to pay for improvements made by an occupying claimant of property who had no title thereto when they were made. All improvements annexed to the freehold become part thereof and pass with its recovery. The right to recover for improvements thus made is based entirely upon statute: *Lunquest v. Ten Eyck*, 40-213.

If, therefore, an occupying claimant asks to recover for improvements made upon the land of another, he must see that the steps provided by statute to entitle him to such recovery are taken: *Blanchard v. Ware*, 43-530.

Where defendant built a house on certain lots owned by another with the understanding that a contract of sale might be completed, but which never was completed, and the owner of the lots afterwards sold them to plaintiff's grantor for their value without the house, and plaintiff purchased them for a still smaller sum, both plaintiff and his grantor purchasing with full knowledge of all the facts, *held*, that defendant's remedy was not by proceeding under the law applicable to occupying claimants, but that equity could give full relief and quiet the title to the lots in plaintiff, and defendant would be given thirty days in which to remove the house: *Green Bay Lumber Co. v. Ireland*, 77-636.

A court of equity having acquired jurisdiction in an action for partition has power to afford equitable relief to one of the parties who has made improvements for which he is entitled to compensation as occupying claimant: *Killmer v. Wuchner*, 79-722.

Where plaintiff had judgment for recovery of premises from defendant under a tax deed, and defendant appealed from such judgment, claiming it to be erroneous because the action was barred by the statute of limitations, *held*, that although the judgment was sustained on the appeal, the action of the lower court in refusing to issue a writ of execution was not erroneous and that the cause would be remanded, and that defendant would have the opportunity to interpose his claim for improvements: *Strabala v. Lewis*, 80-510.

The rule of this and the following sections as to the valuation of improvements

has no application to a case where redemption is made by one who has taken possession of and improved property under a conveyance which is afterwards adjudged to be a mortgage: *Gleiser v. McGregor* 85–489.

SEC. **2965. Petition—issues—appraisement.** Such petition must set forth the grounds on which the defendant seeks relief, stating as accurately as practicable the value of the real estate, exclusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements. The issues joined thereon must be tried as in ordinary actions, and the value of the real estate and of such improvements must be separately ascertained on the trial. [C.'73, §§ 1977–8; R., §§ 2265–6; C.'51, §§ 1234–5.]

The court in this proceeding has no authority to render a personal judgment against the owner of the land for the value of the improvements: *Dungan v. Von Puhl* 8-263; *Wolcott v. Townsend*, 49–456.

SEC. **2966. Payment—tenants in common.** The plaintiff in the main action may thereupon pay the appraised value of the improvements and take the property, but should he fail to do this after a reasonable time, to be fixed by the court, the defendant may take the property upon paying its value, exclusive of the improvements. If this is not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the real estate, including the improvements, each holding an interest proportionate to the values ascertained on the trial. [C.'73, §§ 1979–81; R., § 2267; C.'51, §§ 1236–8.]

During the time when the owner has the election to pay for the improvements the claimant in possession is a tenant at will: *Reilly v. Ringland*, 39-106.

The occupying claimant is entitled to have possession of the land until his claim is paid, for such uses as he may deem proper, but without making any additional improvements thereon: *Webster City & C. C. R. Co. v. Newson*, 70-355.

A prior statute relating to the same subject, which authorized a money judgment against the owner of the land for the value of the improvements, on which, if not paid within three years, a general execution might issue, *held* unconstitutional: *Childs v. Shower*, 18-261.

The right of an occupant when once established under the statute becomes an absolute legal right of equal dignity with the right of the owner, to be paid the appraised value of the land. They are tenants in common in proportion to the value of their respective interests, with the sole right of possession in the occupant so long as the joint tenancy continues. Partition may be had in a court of equity which may decree sale of the property and distribution of the proceeds: *Leighton v. Young* 52 Fed.. 439.

SEC. **2967. Color of title.** A purchaser in good faith at any judicial or tax sale, made by the proper person or officer, has color of title within the meaning of this chapter, whether such person or officer has sufficient authority to sell or not, unless such want of authority was known to such purchaser at the time of the sale; and his rights shall pass to his assignees or representatives. Any person has also color of title who has occupied a tract of real estate by himself, or by those under whom he claims, for the term of five years, or who has thus occupied it for less time, if he or those under whom he claims have, at any time during such occupancy, with the knowledge or consent, express or implied, of the real owner, made any valuable improvements thereon, or if he or those under whom he claims have, at any time during such occupancy, paid the ordinary county taxes thereon for any one year, and two years have elapsed without a repayment or offer of repayment of the same by the owner thereof, and such occupancy is continued up to the time at which the action is brought by which the recovery of the real estate is obtained; but nothing in this chapter shall be construed to give tenants color of title against their landlords. [C.'73. §§ 1982–3; R.. §§ 2268–9; C.'51, §§ 1239–40.]

The grantee is an "assignee" within the meaning of this section: *Childs v. Shower*, 18-261.

When the tax deed relied on to show color of title shows a sale in gross of distinct tracts, evidence *aliunde* may be received to show that the several tracts were not sold for a gross sum: *Ibid.*

A tax deed void on its face is sufficient to give color of title: *Colvin v. McCune*, 39–502.

Occupancy in the claimant's own right for a term of five years gives the color of

title required by this section. Such possession need not be based on any kind of right or title to the land: *Lundquest v. Ten Eyck*, 40–213.

A lessee of premises from one holding a life estate does not have color of title as against the reversioner, nor will the payment of taxes give him such color of title if made in accordance with the terms of the lease: *Wiltse v. Hurley*, 11–473.

The vendee of real estate holding under a bond for a deed cannot take advantage of these provisions to recover from the vendor the value of improvements made while so holding: *Jones v. Graves*, 21–474.

A claimant having color of title by five years' occupancy at the time judgment is recovered against him may recover for his improvements, although they were made before the expiration of the period of possession necessary to constitute such color of title: *Litchfield v. Johnson*, 4 Dillon, 551.

Where defendant occupied the land when judgment was obtained, and at that time more than two years had elapsed since he had paid the tax on the land, and plaintiff at no time offered to pay the taxes, *held*, that defendant had color of title: *Finnegan v. Campbell*, 74–158.

Where a person in possession seeks to recover for improvements made on the premises of another, and his only color of title is that acquired by reason of such occupation must have continued for five years before the bringing of the action in which the improvements are claimed: *Welles v. Newsom*, 76–81.

Neither is claimant entitled to compensation for improvements put upon the land after the filing of the petition in the action in which compensation for improvements is sought, such claimant having had notice of the commencement of the action. Improvements made after such notice cannot be regarded as made in good faith under color of title based on possession only: *Ibid.*

Evidence as to the value of improvements made by the occupant before acquiring color of title by occupation, even though he remains in occupation long enough to acquire color of title afterwards, is not admissible. Such improvements become the property of the owner of the land and the occupant cannot recover their value: *Snell v. Mechan*, 80–53.

SEC. **2968. Settlers.** When any person has settled upon any real estate, and occupied the same for three years under or by virtue of any law or contract with the proper officers of the state for the purchase thereof, or under any law of, or by virtue of any purchase from, the United States, shall have made valuable improvements thereon, and shall be found not to be the owner thereof, or not to have acquired a right to purchase the same from the state or the United States, such person shall be an occupying claimant within the meaning of this chapter. [C. '73, § 1984.]

SEC. **2969. Waste by claimant.** In the cases above provided for, if the occupying claimant has committed any injury to the real estate by cutting timber or otherwise, the plaintiff may set the same off against any claim or improvements made by the claimant. [C. '73, § 1985; R., § 2270; C. '51, 1241.]

As to setting off rents and profits, see notes to § 2964.

SEC. **2970. Execution.** The plaintiff is entitled to an execution to put him in possession of his property in accordance with the provisions of this chapter, but not otherwise. [C. '73, § 1986; R., § 2272; C. '51, § 1243.]

SEC. **2971. Removal of improvements.** Any person having improvements on any real estate granted to the state in aid of any work of internal improvement, whose title thereto is questioned by another, may remove such improvements without injury otherwise to such real estate, at any time before he is evicted therefrom, or he may claim and have the benefit of this chapter by proceeding as herein directed. [C. '73, § 1987.]

CHAPTER 8.

OF THE HOMESTEAD.

SECTION **2972. Exempt.** The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary. [C. '73, § 1988; R., § 2277; C. '51, § 1245.]

Who entitled to exemption: The surviving widow of the owner of the homestead is as much the head of the family and entitled to control the rents and profits of the homestead as was the husband when living: *Floyd v. Mosier*, 1–512.

A widower without children acquiring and occupying property as a homestead for himself and mother, whom he supported, *held* to be entitled to the homestead right: *Parsons v. Livingstone*, 11-104.

So *held*, also, as to an unmarried woman who had accepted, protected and was providing for the children of a deceased sister: *Arnold v. Waltz*, 53-706.

The exemption is to "every family" and not to "the head of a family" as in § 4008, with reference to exemption of personal property. Therefore a woman who occupies property as a homestead, and marries, does not upon her marriage cease to be entitled to it as a homestead although she is not the head of the family, and *held*, that in such case a temporary absence from the homestead with the intention to return and reside thereon with her husband did not constitute an abandonment of the homestead even though in the meantime she was residing with her husband on other premises occupied by him under a lease: *Reeseman v. Davenport*, 65 N.W., 301.

The fact that a divorce is granted to the wife, allowing her the custody of the only child, will not deprive the husband of the right to hold a homestead exemption: *Woods v. Davis*, 34-264.

In what property: Purchase, payments, and possession under a bond for deed, constitute sufficient ownership to make the property the homestead of such purchaser: *Stinson v. Richardson*, 44-373, 375.

The fact that a vendor retains the legal title as security for unpaid purchase money does not defeat the vendee's claim of homestead in the property: *Lessell v. Goodman*, 66 N.W., 917.

A tenant in common may have a homestead right in his interest in the undivided premises: *Thorn v. Thorn*, 14-49; *Bolton v. Oberne*, 79-278.

And this is true even when he has only an equitable title thereto: *Hewitt v. Rankin*, 41-35, 44.

There may be a homestead right in a leasehold interest in real estate so as to render the assignment of the lease, by the husband alone, invalid: *Pelan v. De Bevard*, 13-53.

Where there is an exchange of homesteads, and one of the parties remains temporarily, after the exchange, in his former homestead, at the will of the other party, his right is less than and antagonistic to the possession required to constitute a homestead: *Windle v. Brandt*, 55-221.

One partner cannot acquire a homestead exemption in real estate belonging to the firm in which he is a member as against either the claims of firm creditors or copartners, even though he holds the legal title of the property: *Drake v. Moore*, 66-58; *Hoyt v. Hoyt*, 69-174.

In determining the solvency of a partnership doing a banking business, *held*, that the homesteads of the partners, reserved by them from an assignment for the benefit of creditors, were not to be taken into account as assets: *State v. Cadwell*, 79-432.

One who purchases a pre-emption claim to public lands and takes possession thereof does not, before acquiring title from the government, have such an interest in the property as to support a homestead exemption: *De Land v. Day*, 45-37.

Where the house used as a home is situated upon lands of the wife the homestead may also include land owned by the husband. It is entirely immaterial whether the legal title be in the husband or wife, or whether one of them holds the title to one tract and the other to another tract, where the two tracts are used as a homestead: *Lowell v. Shannon*, 60-713.

A conveyance of the homestead property by the husband to the wife does not destroy its character as a homestead nor change the time to which the exemption dates: *Green v. Farrar*, 53-426.

Where two brothers, one of them married, entered and occupied large tracts of land as owners in common, and subsequently became indebted as partners in a distinct transaction, and the portion of the premises not included in the homestead were sold in payment of debts, and the unmarried brother conveyed to the widow of the married brother his interest in the portion occupied by the latter as a homestead, *held*, that such premises were not subject to partnership debts: *Fordyce v. Hicks*, 80-272.

Nature of interest: The wife's homestead interest in property owned by the husband is present, fixed and substantial, and not merely possible, remote and contingent, and is not in general liable to be affected by the omission, neglect or default of the husband: *Adams v. Beale*, 19-61.

Her interest in the husband's property used as a homestead is real property within the meaning of a former statute providing for the redemption from tax sale of the property of a married woman: *Ibid.*

The right of the wife in the homestead is of a higher character, and more in the nature of a vested interest or title, than is the dower right in the other real estate of her husband: *Chase v. Abbott*, 20-154.

The wife's interest in the homestead is an existing right which she is entitled to protect. She may redeem the premises from execution sale and may enforce a contract under which another makes such redemption in trust for her: *Byers v. Johnston*, 89-278.

A homestead right of the spouse is more in the nature of a vested interest and title than is a dower right: *Green v. Root*, 62 Fed., 191.

The legal title to the homestead, upon actual occupancy by the husband and wife, does not vest jointly in them. The homestead title is one of exemption rather than one conferring affirmative rights: *Burns v. Keas*, 21-257.

In an action to subject a homestead owned by the husband to the payment of a judgment, the wife has such an existing interest as entitles her to intervene and protect the homestead by claiming the exemption: *McClure v. Braniff*, 75-38.

The rights of the wife in the homestead are such that she may maintain an action to recover possession thereof if such possession

is surrendered by the husband under a contract of sale in which she has not joined, and if she does not bring such action within the statutory period the adverse possession will bar any action by her: *Boling v. Clark*, 83-481.

Where the husband alone is made party to a foreclosure proceeding and fails to set up therein a homestead right he cannot do so in an action of forcible entry and detainer, in which it is sought to get possession of the premises in pursuance of such foreclosure. The fact that the wife was not a party to the foreclosure will not give to the husband any greater right to make defense than he would have had in the original foreclosure proceeding: *Dodd v. Scott*, 81-319.

Pertains to remedy: The homestead exemption is a part of the remedy, and is not to be regulated by the law of the place of contracting: *Helfenstein v. Cave*, 3-287.

Exemption, part of the contract: The homestead law in force at the time a contract is made enters into and becomes a part of it, and a subsequent repeal of the law will not impair the rights of parties thereunder: *Bridgman v. Wilcut*, 4 G. Gr., 563.

Exemption: A judgment under which a homestead is not liable to sale does not attach as a lien thereon, and a conveyance of such homestead to a third person passes title free from such judgment: *Lamb v. Shays*, 14-567; *Cummings v. Long*, 16-41.

But when, by abandonment, the homestead loses its character, the liens of prior judgments attach in the same manner as the lien of a judgment attaches to property subsequently acquired by the judgment debtor: *Lamb v. Shays*, 14-567.

The fact that due notice is given of an execution sale of the homestead will not prevent the owner asserting his right thereto as against a purchaser at such sale: *Jones v. Blumenstein*, 77-361.

A voluntary conveyance of the homestead will not be fraudulent as to creditors having no lien thereon: *Delashmut v. Trau*, 44-613; *Officer v. Evans*, 48-557; *Griffin v. Sheley*, 55-513; *Addicken v. Humphal*, 56-365; *Aultman v. Heiney*, 59-654; *Butler v. Nelson*, 72-732; *Wheeler & Wilson Mfg. Co. v. Bjelland*, 66 N.W., 885; *Green v. Root*, 62 Fed., 191.

As to debts which are not enforcible against the homestead, a conveyance of the homestead from husband to wife will not be deemed fraudulent: *Payne v. Wilson*, 76-377; *Beyer v. Thoeming*, 81-517; *Wells v. Anderson*, 66 N.W., 102.

Nor is a conveyance of such homestead to one creditor in payment of his claim any fraud on other creditors: *Wells v. Anderson*, 66 N.W., 102.

As to liability for purchase money and antecedent debts, also under written contract, see notes to § 2976.

Proportional liability: Where a husband has contributed a portion of the purchase price of a homestead, the title of which is in the wife, the creditors of the husband under claims antedating the acquisition of the homestead may subject such property, to the extent of the husband's contribution thereto, to the payment of their claims, such proportion being treated as equitable assets and sold to satisfy judgments on such claims: *Croup v. Morton*, 49-16; *S. C.*, 53-599; *Hamill v. Henry*, 69-752.

Earnings of the wife not derived from separate property or business, but acquired in connection with her husband's property and in the management of the family affairs, do not become the wife's separate property in such sense that when invested in a homestead that proportion thereof thus procured is exempt from indebtedness to which the homestead in the hands of the husband is liable: *Hamill v. Henry*, 69-752.

The law undertakes to guard the homestead for the family, not alone for the owner; and where the homestead was liable for a portion of an indebtedness because it was contracted prior to its acquisition, *held*, that in the application of payments to such indebtedness, in the absence of any application by the parties, the law would relieve the homestead from liability: *First Nat. Bank v. Hollinsworth*, 78-575.

Taxes and repairs: A husband who occupies with his family a homestead owned by his wife may pay taxes and interest on incumbrances thereon, as well as make expenditures for repairs, without becoming a creditor of the wife and acquiring any claim against the property which can be enforced by his creditors: *Hamill v. Henry*, 69-752.

Decree for divorce: Where a decree of divorce merely gives the wife a personal judgment for alimony, the homestead, which the husband still continues to occupy as the head of the family, cannot be sold to satisfy the judgment: *Byers v. Byers*, 21-268; *Whitcomb v. Whitcomb*, 52-715.

The homestead is for the benefit of the family and not of the husband alone, and the law of homestead has no application in a suit for divorce and alimony. The court in adjusting the rights of the parties may make such provision or disposition of it as may appear just and equitable, and the attachment authorized in actions for alimony (§ 3178) may therefore be levied on the homestead: *Daniels v. Morris*, 54-369.

Violation of liquor law: By reason of the provision of § 2422 the homestead, or that part of it used as a saloon, is subject to judgment obtained for violation of the laws against the sale of intoxicating liquors: *Arnold v. Gotshall*, 71-572.

Where a homestead owned by a husband is used by him for the unlawful sale of intoxicating liquors, it is liable for all fines, costs and judgments rendered against him for such illegal sale, and the fact that the unlawful use is without the consent of the wife will not exempt the homestead from such liability, when the husband is the owner: *McClure v. Braniff*, 75-38.

Exemption of proceeds: Where a portion of the homestead is, by proper proceedings, condemned for right of way, the damages allowed are exempt from execution. Whether the proceeds of a voluntary conveyance by the husband of a portion of the homestead for right of way would be exempt, *quære: Kaiser v. Seaton*, 62-463.

The right of action against a railway company for damages caused to the homestead property by fire negligently set out by such company is exempt from execution for a reasonable time, to the same extent that the homestead is, and the railway company cannot be garnished for such indebtedness under a judgment which could not be enforced against the homestead: *Mudge v. Lanning*, 68–641.

The proceeds of the sale of the homestead are not exempt from execution unless the sale is for the purpose of procuring a new homestead (under § 2981): *Huskins v. Hanlon*, 72–37.

The homestead exemption does not cover rents and profits accrued from land during its occupancy as a homestead: *Clark v. Raymond*, 86–661.

Rents accruing under a lease of the homestead of the tenant are exempt from execution: *Morgan v. Rountree*, 88–249.

Exemptions of property from the payment of debts are purely statutory and courts may not enlarge the exemptions, but such laws are to be maintained in their spirit as well as letter and to be liberally construed in favor of those claiming their benefit: *Ibid.*

Construction: The homestead law is always to be liberally construed: *Schuttloffel v. Collins*, 67 N.W., 397; *Green v. Root*, 62 Fed., 191.

Pension money: As to exemption of homestead procured with pension money, see § 4010.

SEC. **2973. Family defined.** A widow or widower, though without children, shall be deemed a family within the meaning of this chapter, while continuing to occupy the real estate used as a homestead at the death of the husband or wife, and such right shall continue to the party to whom it is adjudged in a decree of divorce, during continued personal occupancy. [C. '73, § 1989; R., § 2278; C.'51, § 1246.]

Granting a divorce to the wife and giving her the custody of the children, *held* not to render the homestead in the hands of the husband liable to sale on execution: *Woods v. Davis*, 34–264.

SEC. **2974. Conveyance or incumbrance.** No conveyance or incumbrance of or contract to convey or incumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not, but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or incumbrancer. [C.'73, § 1990; R., § 2279; C.'51, § 1247.]

Consent of both husband and wife necessary: Neither the husband nor the wife can by any separate act affect the homestead rights of the other and change the homestead character of the property. When the right of a homestead has once attached to the property it can be relinquished or divested only by a joint conveyance or by an abandonment of the property as a homestead by both husband and wife: *Lunt v. Neeley*, 67–97.

But the subsequent purchaser without notice that property conveyed by the husband or wife holding the legal title thereto was made at a time when the property was invested with the homestead character is not affected with notice of the invalidity of such conveyance, and will be protected: *Ibid.*

The wife having an interest in the homestead and a conveyance thereof being impossible without her consent, a conveyance of other property to the wife in consideration of her joining in conveyance of the homestead, cannot be set aside by the husband or children, though a divorce by the wife from the husband has been subsequently procured: *Rogers v. McFarland*, 89–286.

Where an unmarried man, owning and occupying property as a home, made application for a loan secured by mortgage upon the land, and before the execution of the mortgage, but without the knowledge of the lender, was married, *held*, that the mortgage was subsequent to the wife's homestead right: *Tolman v. Leathers*, 1 McCrary, 329.

A mortgage upon the homestead by the husband alone, even though give to secure a debt antedating the homestead, *held* void, and the record thereof not sufficient to constitute notice to a subsequent purchaser. The creditor whose claim antedates the homestead right has no lien as against a purchaser without notice until he recovers judgment on his claim: *Higley v Millard*, 45–586.

A sale and conveyance of the homestead by husband and wife will transfer a valid title to the purchaser as against a prior sale by the husband alone, although the second purchaser had knowledge of the first conveyance: *Garlock v. Baker*, 46–334.

A contract by the husband to convey property which has been acquired by him in exchange for the homestead, with the intention of occupying it for a new homestead within the period reasonably required for making a removal, will be void, although the property acquired has not yet been actually occupied: *Cowgell v. Warrington*, 66–666.

Where the homestead right exists in property, the whole of which is greater in amount than can be claimed under the homestead law, the boundaries of the homestead not having been established, the owner of the fee cannot, by conveying a portion of the property by an instrument in which the other does not join, limit the homestead

right to another portion thereof. No valid sale of any portion can be made until the provisions of law as to platting have been complied with: *Goodrich v. Brown*, 63-247.

The rights of the wife and family in the homestead cannot be affected by the fraudulent acts of the husband: *Eli v. Gridley*, 27-376.

In an action to declare a certain mortgage null and void on the ground that at the time it was signed by plaintiff and delivered to defendant it contained no description of any property, and that the husband of plaintiff afterwards inserted the description of their homestead, *held*, that the validity of the mortgage could not be questioned, as plaintiff failed to show by a preponderance of the evidence that the mortgage did not contain a description of the homestead when she signed and acknowledged the same: *Harding v. Des Moines Nat. Bank*, 81-499.

The subsequent adoption of property as a homestead will not affect conveyances previously made: *Yost v. Devault*, 3-345.

Where, prior to the execution of a mortgage on real estate, no part thereof is occupied as a homestead, and an adjoining tract is used and held out as such, third persons being influenced by such representations, the mortgagor's wife, though not joining in the mortgage, cannot afterwards set out the homestead by plat, and record it so as to include part of the mortgaged premises: *Lucas v. Pickel*, 20-490.

An agreement to convey a portion of a tract of land which might be a part of the homestead, the homestead not having been platted, is not valid unless husband and wife join therein: *Woolcut v. Lerdell*, 78-668.

Where co-tenants conveyed land, in which one of them had a homestead right, to a third party, and the wife of the party owning the homestead right failed to join in the deed, *held*, that the conveyance of the undivided interest was of no validity, and any one interested in the property it attempted to convey might question it: *Bolton v. Oberne*, 79-278.

In a particular case, *held*, that a mortgage on the homestead was sufficiently definite without reformation to be effectual, and that therefore the question as to whether such an instrument could be reformed in equity did not arise: *Shoemake v. Smith*, 80-655.

The wife has the right to assert her homestead claim independently of the acts of the husband, and such right cannot be taken from her by any act of the husband in recognizing the title of an adverse claimant—for instance, one who claims to hold a tax title: *Beedle v. Cowley*, 85-540.

Incumbrances: Under a statute not forbidding the incumbrance of the homestead, but only the conveyance thereof by one party alone, *held*, that a mortgage was a conveyance: *Babcock v. Hoey*, 11-375.

The mortgagee of the homestead may increase the amount secured by such mortgage although without the consent of the wife of the mortgagor, where it is necessary to do so in order to preserve other securities and thus to that extent save the homestead. Such payment will be regarded as beneficial to the homestead rather than prejudicial: *Blake v. McCosh*, 91-544.

Assignment, lease or contract: Where premises held under a lease are occupied as a homestead, an assignment of the lease by the husband alone will not be valid: *Pelan v. De Bevard*, 13-53.

The rights of a wife in the homestead cannot be prejudiced by a lease made by her husband or by a holding by him in recognition of a mortgagee's title as against him: *Morris v. Sargent*, 18-90.

Where the title to the homestead is held under a contract of purchase, the husband having such contract cannot, without the consent of the wife, make an assignment thereof so as to divest the homestead right: *Drake v. Moore*, 66-58.

The assignment by the wife of a contract under which she holds premises occupied by herself and husband as a homestead and in the assignment of which the husband does not join will not constitute a valid transfer of the contract, and the fact of subsequent abandonment of the homestead will not make such assignment valid: *Belden v. Younger*, 76-567.

Possession taken under a contract of sale of the homestead, made with the husband, and continued for the statutory period, will become a perfect title as against the wife: *Boling v. Clark*, 83-481.

A transfer of the homestead, assented to by both husband and wife, followed by change of possession and the performance of the agreement under which the transfer is made, operates to transfer an equitable title, and is an abandonment of the homestead: *Winkleman v. Winkleman*, 79-319.

So *held*, where land was by a father, with the consent of his wife, transferred to his son as an advancement, and occupied and improved by the son, as such: *Ibid.*

Where plaintiff, a married woman, under an oral contract, took possession of her mother's house and furnished support to the mother and mother's husband during the mother's life, in consideration that she should have the property at her mother's death, *held*, that by the act of occupancy by plaintiff, the property became her homestead, and her mother's homestead rights terminated, and the oral contract consummated on the mother's part by abandonment was sufficient to convey the homestead: *Drake v. Painter*, 77-731.

The subsequent act of the husband alone in making a new promise to carry out a contract as to the homestead in which the wife did not join will not be valid: *Guion v. Giller*, 70 N. W., 201.

The verbal assent of the wife to a conveyance of the homestead or an assignment of the title bond under which it is held will not make it binding: *Donner v. Rodenbaugh*, 61-269; *Stinson v. Richardson*, 44-373.

An oral agreement by the parties to execute a mortgage upon the homestead for money borrowed to redeem the same from execution, cannot be specifically enforced, nor can the money so advanced be made a lien upon the premises by judicial decree: *Clay v. Richardson*, 59-483.

The fact that the wife has knowledge of and approves the sale of the homestead, and even an express agreement on her part to convey the same, if it is not in writing, will not render a contract of sale by the husband alone valid: *Anderson v. Culbert*, 55–233.

Ratification: Where there is an attempt to execute a proper instrument, which, however, is void by reason of defects in form, the parties may bind themselves by a ratification of such instrument, either express, or presumed from their acts: *Spafford v. Warren*, 47–47.

Where it was attempted to show ratification by the wife of a parol contract to convey the homestead, made during the lifetime of her husband, *held*, that mere acceptance of the benefits of such parol contract during the three or four weeks of ill health following the death of the husband was not sufficient to prove such parol ratification; *Clark v. Evarts*, 46–248.

The fact that after the execution of a mortgage of the homestead by the husband alone without the wife joining, she joins in a subsequent mortgage in which the prior mortgage is recognized, does not constitute such ratification of the prior mortgage as to make it valid: *Seiffert & Wiese Lumber Co. v. Hartwell*, 63 N. W., 333.

Where a farm was owned by a wife and she and her husband occupied a dwelling-house on the premises for several months, when the husband left the state because of some criminal offense, and the wife afterwards conveyed the farm by warranty deed to plaintiff's grantor, the husband conveying his interest by quitclaim deed after his return to the state, and both husband and wife subsequently conveyed the property to defendant by a joint quitclaim deed, and where it appeared that there never had been any claim that the property was regarded as a homestead, that no homestead plat had been made, and that plaintiff purchased the land for a full consideration and took and held possession for more than three years before the defendant had acquired any interest therein, and that defendant had full knowledge of all these facts before the conveyance to himself, *held*, that the separate conveyances from the husband and wife were sufficient to convey their title to the land, and that defendant having notice of plaintiff's rights acquired no title to the property by the joint conveyance: *Corbin v. Minchin*, 81–682.

Duress: Where the concurrence of a wife in the mortgage of a homestead is procured by duress it cannot be enforced: *First Nat. Bank v. Bryan*, 62–42.

Insanity: Where the wife is insane at the time of a conveyance in which she attempts to join for the purpose of conveying the homestead, it will be void for want of her consent: *Alexander v. Vennum*, 61–160.

The fact that the wife, at the time of making a note secured by mortgage on the homestead, was mentally unsound, will not defeat the mortgage in the ordinary course of business, if the transaction is fair and reasonable, and the mental condition of the wife was not known to the other party: *Abbott v. Creal*, 56–175.

Fraud: If the wife actually signs an instrument of conveyance or incumbrance, she will not be allowed to dispute its validity on the ground that she was ignorant of its contents or that she was induced to do so by fraud or deception of her husband, in the absence of a showing that the grantee or mortgagee was cognizant of such deception and fraud: *Edgell v. Hagens*, 53–223; *Van Sickles v. Town*, 53–259; *Rubleman v. Rummel*, 72–40.

The fact that a wife's signature to a mortgage of the homestead is obtained by fraud and misrepresentation on the part of her husband will not defeat the mortgage, where no knowledge of the fraud can be imputed to the mortgagee: *Ætna L. Ins. Co. v. Franks*, 53–618; *Miller v. Wolbert*, 71–539.

Where the husband, to whom the wife owning the fee of the homestead intrusted the entire control of the business, secured a loan thereon upon the representation that he would furnish a valid mortgage upon the property signed by the wife and himself, and afterwards furnished such security, *held*, that the wife was estopped by his action from relying upon a defense to such mortgage based upon erasures and interlineations claimed by her to have been made by her husband, but not readily apparent upon inspection: *Sawyer v. Perry*, 62–238.

Where prior to his marriage the owner of premises for the purpose of defrauding creditors conveyed the same to another, and then upon marriage occupied the premises under lease as a homestead, and executed mortgages thereon by virtue of a power of attorney from the grantee, *held*, that the wife of such grantor could not object to the conveyance as not having been joined in by her: *Johnston v. McPherran*, 81–230.

In such case, *held*, also, that a conveyance by the husband and wife to the original grantee, made after the execution of the mortgages, for the purpose of correcting the former conveyance, was sufficient to convey the wife's homestead interest: *Ibid.*

Mortgage for husband's debts: The wife may join in a mortgage of the homestead for the payment of a note of her husband and will be bound thereby to the extent of the property mortgaged, but she would not thereby become entitled to the proceeds of the loan effected or property purchased therewith: *Rock v. Kreig*, 39–239.

The homestead is bound by a mortgage executed by the husband and wife to secure their joint note, it being expressly stipulated that the intention is to bind the homestead: *Low v. Anderson*, 41–476.

A purchase-money mortgage given at the time of the acquisition of the homestead, to the vendor, is valid, though executed alone by the party taking the legal title: *Christy v. Dyer*, 14–438.

B. having become bound as surety for one L. L. to A. L., and being at the same time indebted by mortgage for the purchase money of land which included the homestead, an arrangement was made by which B. assumed the payment of the debt to A. L., securing it by a mortgage on the same property, and the amount thus assumed was, by the procurement of L. L., indorsed upon the purchase money notes; *held*, that A. L.

could not claim to be the assignee of a portion of the purchase money, or of the vendor's rights, and took the mortgage subject to the unpaid residue of the first mortgage and subject to the homestead rights of B.'s wife, who had not joined in the mortgage: *Burnap v. Cook*, 16–149.

The renewal by the husband of a debt, by an admission or new promise sufficient to take the case out of the statute of limitations, will also keep in force a mortgage given on the homestead to secure the same, although such renewal is without the wife's consent: *Mahon v. Cooley*, 36–479.

A conveyance for right of way by the husband, owner of the legal title of the homestead, in which the wife does not join, is not necessarily invalid: *Chicago & S. W. R. Co. v. Swinney*, 38–182.

A husband can convey the right of way over the homestead without the concurrence or signature of the wife to the deed, if it does not defeat the enjoyment of the homestead as such: *Ottumwa, C. F. & St. P. Ry. Co. v. McWilliams*, 71–164.

Damages assessed for the taking of a right of way through the homestead are exempt from execution. Whether the proceeds of a voluntary conveyance by the husband for that purpose would be exempt, *quaere*: *Kaiser v. Seaton*, 62–463.

A license to mine upon the homestead, executed by the owner alone without concurrence of the wife, is not necessarily invalid, and even if her assent should be considered necessary, it would be presumed from knowledge on her part that work was being done thereunder or expenses incurred to which she made no objection: *Harkness v. Burton*, 39–101.

A lease to a mining company of the right to mine coal from the homestead does not constitute a severance such as to subject the unmined coal to judicial sale: *Sibley v. Lawrence*, 46–563.

How conveyance made: An instrument in which the wife only joins for the purpose of releasing her dower is not such a joint instrument as is required to convey or incumber the homestead: *Sharp v. Bailey*, 14–387; *Fuller v. Hunt*, 48–163; *Wilson v. Christopherson*, 53–481; *Eisenstadt v. Cramer*, 55–753; apparently *contra*: *Reynolds v. Morse*, 52–155.

It is not necessary that the conveyance or incumbrance should specifically state that the property sought to be conveyed or incumbered is the homestead: *Babcock v. Hoey*, 11–375; *O'Brien v. Young*, 15–5; *Reynolds v. Morse*, 52–155; *Van Sickles v. Town*, 53–259; *Waterman v. Baldwin*, 68–255.

A conveyance of the homestead property from the husband to the wife will not vest in her such title that she alone can make a valid conveyance thereof: *Spoon v. Van Fossen*, 53–494.

In a conveyance of the homestead by the husband to the wife, joinder of the wife is not necessary: *Harsh v. Griffin*, 72–608.

As to the rule under a different statutory provision, see *Luther v. Drake*, 21–92.

Effect of conveyance or contract by one party alone: An agreement to convey, made by the husband or wife alone, is absolutely void, and a specific performance thereof cannot be enforced: *Yost v. Devault*, 9–60.

A mortgage upon the homestead executed by the husband alone while his wife is living is not binding upon him even after the death of the wife: *Larson v Reynolds*, 13–579.

Where one party alone enters into a contract to convey the homestead no damages can be recovered for the breach of such contract from the party executing it: *Barneit v. Mendenhall*, 42–296; *Clark v. Evarts*, 46–248; *Cowgell v. Warrington*, 66–666.

Where the husband enters into a contract to convey, to which both parties expect to secure the assent of the wife, but such assent is not secured, the purchaser cannot recover from the husband the excess in the value of the land over the purchase price. The case is not one of fraud, and it is doubtful whether anything can be recovered except the purchase money paid and interest: *Donner v. Rodenbaugh*, 61–269.

A contract of the husband alone for conveyance of property which has been impressed with the homestead character is of no validity, and will not sustain an action for damages against the husband for breach of contract to convey: *Mann v. Corrington*, 61 N. W., 409.

Where the premises were taken possession of and occupied as a homestead under a contract of conveyance made by the husband, *held*, that an acknowledgment by the husband in which the wife did not join, was not valid as showing a forfeiture, as against the homestead right, of the interest acquired by the contract of purchase: *Lessell v. Goodman*, 66 N. W., 917.

The invalidity of a mortgage on the homestead executed by the husband alone may be set up by a junior mortgagee, in a proceeding to foreclose the senior mortgage, although such defense is not interposed by the owners: *Alley v. Bay*, 9–509.

Where the wife joins in a deed conveying the property to a third person in trust for the husband she has no longer any interest in the property as against a conveyance made by the direction of the husband in pursuance of such trust: *Des Moines Ins. Co. v. McIntire*, 68 N. W., 565.

Specific performance: Where the husband caused the homestead to be advertised for sale at auction and it was sold, *held*, in the absence of any consent to such sale by the wife, specific performance could not be enforced: *Garlock v. Baker*, 46–334.

The fact that the premises constitute a homestead will not be ground for refusing specific performance of a contract made by the husband alone to convey such premises, the homestead character not having been set up or put in issue: *Wilson v. Riddick*, 69 N. W., 1039.

Subsequent abandonment of the homestead will not make a conveyance or mortgage by the husband alone, while the property was occupied as a homestead, valid: *Bruner v. Bateman*, 66–488; *Lunt v. Neeley*, 67–97.

Improvements by purchaser in good faith: Where a party takes possession of a homestead under a void transfer thereof,

but in good faith, believing that he has acquired a good title, and makes improvements which are judicious and necessary and not inconsistent with the circumstances of the owner, he is entitled to allowance for such improvements: *Stinson v. Richardson*, 44-373.

Rents and profits: Whether in such case the wife of the party who has attempted to convey the homestead can maintain action for rents and profits against the person thus taking possession under such conveyance, *quære;* but *held*, in a particular case, that a decree applying such rents and profits on a judgment against the homestead was proper: *Ibid.*

Where plaintiff's husband before his death assigned to defendant a bond for a deed by which he held a tract of land, including the homestead, defendant agreeing to pay certain judgments and other considerations, in which assignment plaintiff did not join, *held*, that upon this being set aside, at the suit of plaintiff, and defendant declared entitled to be subrogated to the rights of the holder of the judgments which he had paid off in a supplemental proceeding by the wife after the husband's death, the rents and profits of the portion of the premises which was the homestead should be applied to the satisfaction of these judgments, but not the rents and profits from the portion not a part of the homestead, and that a like application should be made of the value of a horse given to defendant by plaintiff's husband in the trade: *Stinson v. Richardson*, 48-541.

SEC. **2975. Subject to mechanics' liens.** The homestead is subject to mechanics' liens for work, labor or material done or furnished exclusively for the improvement of the same. [C.'73, § 1991; R., § 2280; C.'51, § 1248.]

A provision of § 876 of Code of '73 by which the homestead, if listed separately, was only liable for the taxes thereon, is omitted: See § 1423.

SEC. **2976. Liable for debts antedating purchase—by written contract.** The homestead may be sold on execution for debts contracted prior to its acquisition, but in such case it shall not be sold except to supply any deficiency remaining after exhausting the other property of the debtor liable to execution. It may also be sold for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt. [C.'73, §§ 1992–3; R., § 2281; C.'51, § 1249.]

Unpaid purchase money: The homestead right is subordinate to the right of the vendor for unpaid purchase money: *Christy v. Dyer*, 14-438; *Cole v. Gill*, 14-527; *Burnap v. Cook*, 16-149; *Hyatt v. Spearman*, 20-510; *Campbell v. Maginnis*, 70-589.

In such case a general judgment and execution is the proper method of enforcing the vendor's lien: *Bills v. Mason*, 42-329.

The assignment of a note given for the purchase money of property constituting a homestead carries with it the vendor's lien and all the equities and rights which the vendor would have had if he had never parted with the debt: *Ibid.*

The satisfaction of a part of the judgment for the purchase money does not affect the lien of such judgment so far as the amount remaining unpaid is concerned: *Campbell v. Maginnis*, 70-589.

Fraud: Where the title to property has its inception in fraud, its homestead character cannot be set up to defeat the claims of the person from whom it was obtained: *Muir v. Bozarth*, 44-499.

Debts contracted prior to acquisition: The homestead is liable, under the statute, for debts contracted prior to its acquisition and occupancy as such, provided no other property is found subject to execution: *Greeley v. Sample*, 22-338.

A homestead may be sold for debts contracted prior to its acquisition, unless it is acquired with the proceeds of a prior homestead: *Lamb v. McConkey*, 76-47.

Where the owner of the homestead sought to enjoin the sale thereof for an indebtedness due the bank, from which he had procured the money to purchase such homestead, *held*, that the deposit by such debtor of trust funds on general account in excess of the overdraft for money used in purchasing such homestead constituted payment, the nature of the fund being known to the bank and it having accepted it without objection, and that therefore the homestead was exempt: *Hale v. Richards*, 80-164.

The provision that "the homestead may be sold for debts contracted prior to the purchase thereof" means that it may be thus sold for debts contracted prior to the time when the homestead right attaches by virtue of actual occupancy as a homestead. Debts contracted after the purchase of the property, but before it acquires the homestead character by occupancy as such, may be enforced against the property: *Hale v. Heaslip*, 16-451; *Hyatt v. Spearman*, 20-510; *Elston v. Robinson*, 23-208.

The entry of land under the United States homestead laws, which is afterwards occupied as a homestead, constitutes the purchase of the homestead within the meaning of this section. The exemption dates from such entry and not from the issuance of a patent: *Green v. Farrar*, 53-426.

A homestead is liable to foreign as well as domestic debts created prior to its acquisition: *Laing v. Cunningham*, 17-510; *Brainard v. VanKuran*, 22-261.

Where a debt contracted prior to the acquisition of the homestead has become barred, and is renewed by a new note given subsequently to such acquisition, the homestead remains liable: *Sloan v. Waugh*, 18–224.

Where a party has derived a pecuniary advantage from a wrong done by him, and it is competent for the person suing thereon to waive the tort and maintain action on an implied promise, the obligation to pay is a debt within the meaning of the statutory provision above referred to, from the time of the wrong; but if the wrong results in no pecuniary advantage and the action must be in tort, and sound only in damages, then the obligation is not a debt until ascertained by judgment: *Warner v. Cammack*, 37–642.

The homestead being liable for debts created before its acquisition, the execution of a mortgage thereon to secure such a debt creates no additional burden so far as the rights of the wife are concerned, and, therefore, such mortgage executed by the husband alone would be valid as to the wife, but it would not be valid as to innocent purchasers before judgment on the debt secured, and the recording of such a mortgage would therefore not affect them with notice: *Higley v. Millard*, 45–586.

The liability of the homestead to debts contracted before it acquires the homestead character attaches at the time they are contracted, and not merely from the time judgment is rendered thereon: *Bills v. Mason*, 42 –329.

Where a voluntary conveyance of the homestead was made to another, but such conveyance was not fraudulent as to creditors for the reason that their claims were not liens thereon, and afterward, the premises having remained in the possession of the grantor, they were reconveyed to him by quitclaim, *held*, that such homestead was liable for debts contracted prior to such reconveyance: *Butler v. Nelson*, 72–732.

The conveyance of a homestead by the husband to his wife does not render it liable for the debts of the wife contracted prior to such converance. The property becomes the homestead of the wife as well as of the husband when it acquires the homestead character in the husband's hands, and the conveyance to the wife would not divest it of that character as to the wife: *White v. Kinley*, 92–598.

Where the widow, having elected to occupy the homestead for life, acquired by inheritance from an heir an undivided share of the reversion, *held*, that such undivided share was subject to execution for her debts, the homestead exemption extending only to her life interest: *Strong v. Garrett*, 90–100.

Lien of judgments: As between the parties, or as against persons chargeable with notice of the character of the debt, a judgment upon a debt contracted prior to the time when the property acquired a homestead character, although not rendered until after that time, becomes a lien upon the homestead, and a party claiming under the homestead right (as by mortgage) is bound to ascertain when such right began, and whether it was prior to the debt on which the judgment was rendered: *Hale v. Heaslip*, 16–451.

And where it does not appear from the judgment itself that the debt was contracted prior to the acquisition of the homestead, that fact may be shown by evidence *aliunde*: *Delavan v. Pratt*, 19–429; *Phelps v. Finn*, 45–447.

A judgment defendant who is surety for his co-defendant has such an interest, as against his co-defendant, that he may show that the judgment is for a debt antedating the acquisition of the homestead of his principal: *Delavan v. Pratt*, 19–429.

It is not sufficient, in order to make a judgment a lien upon the homestead otherwise than as a mechanic's lien, to show that it was for material furnished and labor performed upon the homestead property, unless the indebtedness arose before its acquisition as a homestead: *Ibid.*

A judgment for a debt antedating the homestead right is a lien on the homestead in such sense that the holder thereof may redeem from an execution sale by a senior creditor, and, as against such senior creditor purchasing at his own sale, may show by evidence *aliunde* that his debt antedates the homestead: *Phelps v. Finn*, 45–447.

A creditor whose claim antedates the homestead has no lien as against a purchaser without notice until the recovery of his judgment: *Higley v. Millard*, 45–586.

The homestead being subject to the lien of a judgment for a debt contracted before its acquisition from the time such judgment is rendered, a purchaser after the lien attaches takes subject thereto, and in case of sale of the property under such judgment has no other right than that of making statutory redemption from the sale: *Kimball v. Wilson*, 59–638.

That judgments in general are not liens on the homestead, see notes to § 2972.

Exhausting other property: It is the policy of the law to require all other property of the defendant in execution to be exhausted before the sale of the homestead: *Twogood v. Stephens*, 19–405.

The phrase "other property of the debtor liable to execution" applies to his interest in partnership property: *Lambert v. Powers*, 36–18.

Where the homestead is sold before other property is exhausted the sale may be set aside and a resale ordered: *Lay v. Gibbons*, 14–377.

Where the holder of a senior mortgage on property, including the homestead, took a conveyance of the entire property without releasing his mortgage or otherwise indicating his intention that it should be merged in his legal title, *held*, that as to junior mortgages he had the right to have his mortgage debt satisfied first, if possible, out of the portion not included in the homestead, to the exclusion of junior liens which were not a lien upon the homestead: *Linscott v. Lamart*, 46–312.

Where a mortgage upon land, a portion of which constituted a homestead, was foreclosed and the land was all sold together, *held*, that a judgment lienholder whose judg-

ment was a lien upon a portion of the property constituting the homestead, and who was not made a party to the foreclosure, could redeem the portion of the land on which his judgment was a lien upon paying the amount bid for the whole premises less the value of the homestead: *Sutherland v. Tyner*, 72-232.

A party claiming that the homestead is not liable because other property has not been exhausted must make such fact appear. It is not necessary to negative that fact in the first instance in order to make the sale valid: *Hale v. Heaslip*, 16-451; *Stevens v. Myers*, 11-183.

The fact that a judgment creditor, under a claim prior to the homestead, has delayed until the other property of the debtor has been otherwise exhausted, will not release the homestead from his claim: *Denegre v. Haun*, 14-240.

The right to compel a creditor to exhaust other property subject to his mortgage before subjecting the homestead does not exist in favor of a third person who has purchased the homestead after the execution of the mortgage under which the sale is had: *Barker v. Rollins*, 30-412; *Kemerer v. Bournes*, 53-172.

If the mortgagor has sold the other property which might have been applied to the satisfaction of the debt, he cannot require that it be proceeded against in the hands of of a third party before the homestead is sold: *Dilger v. Palmer*, 60-117.

When a mortgage is given covering the homestead and other land, and then a second mortgage is executed upon the same land so far as not included in the homestead, and the second mortgage is foreclosed and the land covered by it sold to the mortgagee therein, such mortgagee cannot insist that the homestead be first subjected to the payment of the first mortgage, but the mortgagor may insist, on the foreclosure of the senior mortgage, that the property covered thereby not included within the homestead shall first be applied to the satisfaction of such mortgage: *Equitable L. Ins. Co. v. Gleason*, 62-277.

Although by § 4292 a junior mortgagee is entitled to pay off a senior mortgage covering the same premises and other property, and have an assignment thereof and enforce it first as against the property not covered by his junior mortgage, yet if the property thus embraced in the senior mortgage and not covered by the junior is the mortgagor's homestead, the junior mortgagee is not entitled to such assignment, as the homestead cannot be first subjected to the satisfaction of the senior mortgage: *Grant v. Parsons*, 67-31.

Where the sheriff at a sale on foreclosure of a mortgage covering the homestead and other tracts offers the land not included in the homestead in separate tracts without receiving bidders, that is a sufficient exhausting of other property as required by statute, and a subsequent sale of the entire property including the homestead is not irregular: *Burmeister v. Dewey*, 27-468; *Eggers v. Redwood*, 50-289; *Brumbaugh v. Shoemaker*, 51-148.

If the officer's return of the execution recites the sale of the whole for a certain sum, but does not state whether the portion not included in the homestead was first offered separately, it will be presumed that the officer did his duty, and that the portion not included in the homestead was first offered: *Eggers v. Redwood*, 50-289.

Where fifty-five acres of land were sold under a judgment for a debt contracted prior to the occupancy of the land as a homestead, and where plaintiff before the sale designated forty acres as the homestead, and the fifteen acres were sold first, *held*, that the sale was valid, although the sheriff's return failed to show which parcel was first offered for sale: *Smith v. De Kock*, 81-535.

The debtor cannot restrain the sale of the homestead under execution upon the ground that his other property has not been exhausted without an averment or showing that he has other property: *Stevens v. Meyers*, 11-183.

The right to compel a sale of other property before the homestead is sold is not to be enforced by a cross-action, but by a special direction in the execution, and the right may be set up in the answer or obtained upon a summary supplemental showing: *Barker v. Rollins*, 30-412.

Where a party who has the right to insist that other property before the homestead shall be applied to the satisfaction of the debt has notice of the proposed sale of the homestead and makes no objection thereto he will be regarded as acquiescing, and cannot afterwards object to the sale on that ground: *Foley v. Cooper*, 43-376.

The fact that land not included within the homestead, which is offered for sale, is bid in for a sum much below its value, will not entitle the parties to have the sale set aside in an action in equity: *Sigerson v. Sigerson*, 71-476.

Where a party attacked a judicial sale of his property on the ground that he owned no interest subject to execution, and it appeared incidentally merely that part of the premises were occupied as a homestead, but it did not appear whether the homestead right was acquired subsequently to the date upon which the judgment was rendered or not, *held*, that the sale of the property in a lump without setting off the homestead was not void: *McCleary v. Ellis*, 54-311.

Where it does not appear that defendant has other property subject to execution the sale of the homestead which is liable to the indebtedness will be valid unless defendant points out other property: *Owens v. Hart*, 62-620.

As to platting before sale on execution, see § 2979 and notes.

Written contract: The phrase "created by written contract" has reference to the manner in which the creation of the debt is to be evidenced rather than to the time when the liability arises. This section applies as well to debts evidenced by written contract subsequently to their creation as to debts so evidenced at the very time they are contracted: *Stevens v. Myers*, 11-183.

The written contract here specified need not be a mortgage or other conveyance; any

writing containing necessary stipulations and executed by the proper persons is sufficient: *Foley v. Cooper*, 43–376.

The homestead cannot be rendered liable for the debts of its owner by mere verbal agreement to charge it with the payment thereof and to execute a writing to that effect, which by mistake is not done: *Rutt v. Howell*, 50–535.

A provision in a confession of judgment that execution might be issued thereon "against any property belonging to said defendants, homestead included," *held* not sufficient to render the homestead liable: *Ibid.*

The fact that the husband and wife execute a mortgage upon their homestead to secure a particular creditor does not subject it to the payment of the claims of other creditors, nor can a general creditor be subrogated to the rights of the mortgagee. If the owner afterwards makes a general assignment for the benefit of creditors, the holder of the mortgage is entitled to a *pro rata* share with the other creditors, and the homestead is only liable for the balance remaining unpaid: *Dickinson v. Chorn*, 6–19.

Provisions in a note waiving homestead exemptions are not valid: *Maguire v. Kennedy*, 91–272.

Foreclosure of incumbrances against the homestead: The wife cannot be affected by any decree foreclosing a mortgage on the homestead to which she is not made a party: *Burnap v. Cook*, 16–149.

The lien of a mortgage of the homestead, executed by the owner before marriage, is prior to any claim the wife may have by the subsequent marriage; but in a foreclosure suit the wife must be made a party in order that the judgment be binding upon her, and that a sale thereunder may cut off her dower rights: *Chase v. Abbott*, 20–154.

Where a mortgage is invalid because not joined in by the wife, who afterwards dies, and the mortgagor, at the time of foreclosure, has a second wife, her rights cannot be cut off unless she is made a party: *Larson v. Reynolds*, 13–579.

But the wife is not a necessary party in every action affecting the homestead: *Ibid.*

Even where more property than can be held as a homestead is occupied, no foreclosure can be had as to any part thereof under a mortgage not joined in by the wife; and therefore a foreclosure of such a mortgage cannot be had against the husband alone: *Goodrich v. Brown*, 63–247.

Where the occupancy of property as a homestead commences subsequently to the commencement of an action to foreclose a mortgage executed by the husband, before the property acquired the homestead character, a sale under such foreclosure cuts off the wife's homestead rights, although she is not made a party thereto. She has no rights in such homestead which she can assert as against the mortgage, even to compel plaintiff to first exhaust other property: *Kemerer v. Bournes*, 53–172.

Where a mortgage covered a tract of land belonging to the husband and also a tract belonging to the wife, that of the husband being the homestead, *held*, that a release by mortgagor of the land of the wife, it being greater in value than the amount of the mortgage debt, would preclude the foreclosure of the mortgage on the homestead: *Bockholt v. Kraft*, 78–661.

Where a mortgage on the homestead together with mortgages on other property are given to secure the same indebtedness, all of them may be foreclosed in one action and the decree ordering the homestead to be sold only for any deficiency after the application of the property covered by the other mortgages sufficiently secures the homestead. It is not necessary that the other mortgages be first foreclosed: *Blake v. McCosh*, 91–544.

Receiver: An application for the appointment of a receiver pending proceedings to foreclose a mortgage on a homestead may properly be refused where the amount due under the mortgage is in dispute: *Callanan v. Shaw*, 19–183.

Whether in any case a receiver should be appointed to take possession and charge of a mortgagor's homestead pending proceedings to foreclose, *quære: Ibid.*

Failure to set up homestead right in the foreclosure proceedings bars any such right: *Larson v. Reynolds*, 13–579.

And it cannot afterwards be set up against the purchaser at a sale under the judgment recovered under such proceeding: *Haynes v. Meek*, 14–320.

Where a defendant failed to set up his homestead right in an action to charge his property with a lien, *held*, that he could not, after judgment, maintain an action to prevent the enforcement of such lien on the ground that he was ignorant of his rights; and *held* also that his minor children had no interest which could be interposed in that manner: *Collins v. Chantland*, 48–241.

Where a homestead was sold under special execution and the surplus in the sheriff's hands was applied upon other executions against the defendant, and it was shown that such other executions were not upon judgments which could be enforced against the homestead, but such application of the surplus was made without objection on the part of plaintiff, *held*, that he could not recover such surplus in an action against the sheriff: *Brumbaugh v. Zollinger*, 59 384.

Where, in an action for divorce, the wife asked alimony, and a certain amount was granted and made a special lien on land otherwise involved in the suit, which land was afterwards sold to satisfy the decree, *held*, that the husband could not afterwards contest the sale on the ground that the property was his homestead. The homestead right should have been set up before the decree: *Hemenway v. Wood*, 53-21.

SEC. **2977. What constitutes.** It must embrace the house used as a home by the owner, and, if he has two or more houses thus used, he may select which he will retain. It may contain one or more contiguous lots or

tracts of land, with the building and other appurtenances thereon, habitually and in good faith used as part of the same homestead. [C.'73, §§ 1994–5; R., §§ 2282–3; C.'51, §§ 1250–1.]

Separate tracts: Where a house occupied by the family as a home was situated partly on a tract of forty acres belonging to the husband and partly on another tract belonging to the wife, *held*, that the forty-acre tract belonging to the husband could not be held exempt in its entirety as the homestead: *Henderson v. Rainbow*, 76–320.

The homestead may contain tracts not contiguous, but it must appear that they are "used as part of the same homestead." It is not sufficient for that purpose to show that the owner "used, worked and occupied them:" *Reynolds v. Hull*, 36–394.

Occupancy: There must be actual occupancy to give the homestead character: *First Nat. Bank v. Hollingsworth*, 78–575.

The exemption of the homestead is based upon its actual occupancy as such, and is not dependent upon the marking out and platting: *Yost v. Devault*, 9–60.

Such marking and platting alone do not give property the character of a homestead; use by the family as a home is essential: *Cole v. Gill*, 14–527.

Assent of the wife to the action of a husband in fixing the homestead is not essential. If he adopts it as his home, the fact of absence of his wife will not make it any the less his homestead: *Williams v. Swetland*, 10–51.

The homestead character does not attach to property until it is actually occupied and used by the family as a home. The mere intention to occupy, though subsequently carried out, does not make the premises a homestead until there is actual residence: *Charles v. Lamberson*, 1–435; *Christy v. Dyer*, 14–438; *Elston v. Robinson*, 23–208; *Givans v. Dewey*, 47–414.

A mere intention to occupy does not give the property the character of a homestead before it is actually occupied, but there is an exception to this rule in the case of unoccupied premises acquired in exchange for a homestead and in such case the property taken in exchange will be exempt if held with the intention of subsequent occupancy: *Mann v. Corrington*, 61 N. W., 409.

But where a portion of the furniture was placed in a house which was undergoing repairs, and the family moved to the neighborhood expecting to occupy it, but on account of repairs not being completed did not actually sleep and eat in the building, *held*, that it became invested with the homestead character: *Neal v. Coe*, 35–407.

Property acquired as a homestead in exchange for another homestead will remain exempt for a reasonable time for the purpose of effecting the removal of the family from the old homestead, although the new one is not yet actually occupied: *Cowgell v. Warrington*, 66–666.

If under the same roof with the homestead there shall be a floor or floors, room or rooms, which are not used for the purpose of a homestead, they are no more exempt than if under another roof; and if a portion of the building shall come within the definition of a homestead, and a portion not, then the one portion may be exempt and the other not. The use of other portions of the building cannot make that portion liable which would otherwise be exempt: *Rhodes v. McCormick*, 4–368.

So where the upper story or stories of a building in a city are used by the owner as a home and the first story is rented for store purposes, the portion rented as store-rooms may be sold under execution, while the portion used as a home will be exempt: *Ibid.; Mayfield v. Maasden*, 59–517.

Where the owner of a lot and building thereon used the first and fourth floors and the cellar for business purposes, the value of such portion of the premises being greatly in excess of the value of the shop which he would be entitled to hold exempt in connection with the homestead under § 2978, and occupied the second and third stories for a residence, *held*, that the portions occupied for business purposes might be sold under execution: *Johnson v. Moser*, 66–536.

In such case, *held*, that the purchaser of the portion of the premises including that part of the cellar not used as the homestead could not have an action of partition to determine the respective rights of himself and the owner of the homestead: *Johnson v. Moser*, 72–523.

A part of a building may be subjected to the payment of a judgment while the remainder is exempt as a homestead: *McClure v. Braniff*, 75–38.

After a portion of a building has thus been sold and the owner remains in occupancy of the other portion as a homestead, the owners of the two portions are not tenants in common but are adjoining tenants possessing separate and distinct interests: *McCormick v. Bishop*, 28–233.

Where a two-story frame building, with cellar, was originally erected for a dwelling-house and occupied exclusively by the owner, who used the first floor for business purposes and the cellar jointly in connection with his business and residence, *held*, that the whole building was exempt: *Wright v. Ditzler*, 54–620.

In such case the exemption of the portion used for business is allowed on the same principle as where a shop situated within the requisite distance of the dwelling of the person occupying it is exempt as a part of the homestead: *Smith v. Quiggans*, 65–637.

In such case *held*, also, that the fact that the use of the lower story for business purposes passed to another person than the owner, the stock being taken possession of to be sold out by such other person, would not defeat the homestead exemption in such lower story, the intention of the owner being to abandon its use for business purposes and occupy it as a part of the residence: *Ibid.*

The building and the lot on which it is situated may be partly a homestead and

partly subject to execution, depending on the purpose for which the respective parts are used: *Arnold v. Gotshall*, 71-572.

Occupancy of rooms in a building in connection with the keeping of a hotel is not inconsistent with their occupancy by the family for the purposes of a homestead: *Cass County Bank v. Weber*, 83-6.

Where portions of the building not used as a homestead are accessible only through the part that is exempt as a homestead, the portion not thus used cannot be sold under execution, as the purchaser would get but a barren right. The court could not in such case compel the owner of the homestead to allow a right of access to the portion of the premises not exempt: *Ibid.*

Under particular facts, *held*, that there was such occupancy of the premises as to invest them with a homestead character: *Woolcut v. Lerdell*, 78-668.

Where the cellar and first floor of a building were used for business purposes and the second floor as a residence, but a partial use of the cellar and first floor were essential to the occupancy of the second floor as a residence, *held*, that the lower story could not be sold under execution: *Groneweg v. Beck*, 62 N. W., 31.

So *held*, even where the first floor was used for the illegal sale of intoxicating liquors: *Ibid.*

But as to an annex thus used and not essential to the enjoyment of the premises as a residence, *held*, that it was subject to execution: *Ibid.*

Abandonment: An actual removal from the homestead with no intention to return will forfeit the homestead right, even though no new homestead be acquired; but where the removal is temporary and with intention to return, unless others have been misled thereby to their prejudice, it will not work a forfeiture of the homestead right. Facts discussed, *held* to indicate an intention to return: *Fyffe v. Beers*, 18-4.

An averment that the party has abandoned the homestead and is a nonresident, and a resident of another state, is sufficient to make out a *prima facie* case of abandonment; such fact would not be conclusive if there were an intention of returning, but such intention should be set up in the answer and need not be negatived in the petition: *Orman v. Orman*, 26-361.

However, the premises do not lose the homestead character by being left for a merely temporary purpose: *Davis v. Kelley*, 14-523.

In such case they will remain exempt even though in the absence of the owner they are rented to a tenant: *Robb v. McBride*, 28-386.

A removal from the homestead for a temporary purpose will not amount to abandonment where no prejudice has resulted therefrom: *Morris v. Sargent*, 18-90.

In a particular case, *held*, that the fact that the wife left the homestead with the husband for a temporary purpose, with the intention of returning and occupying, did not constitute an abandonment by her: *Bradshaw v. Hurst*, 57-745.

In such case, *held*, also, that the intention to return must have existed and would be presumed to continue until a contrary intent was shown: *Ibid.*

The length of time of the absence is not conclusive as to abandonment, but it is an important fact in determining the intention to return, where there are no other acts or circumstances indicating such intention: *Dunton v. Woodbury*, 24-74.

Stronger proof of abandonment is required, where the lien set up is claimed to have attached during actual occupancy, than where it arises when the party claiming the premises was not in actual possession: *Ibid.; Davis v. Kelley*, 14-523.

Absence of the husband while working at his trade, and the wife while boarding their only child during his attendance upon school, the homestead farm being in the meantime leased with the reservation of two rooms for storing household goods, there being an intention to return, *held* not to constitute an abandonment of the homestead: *Shirland v. Union Nat. Bank*, 65-96.

Where plaintiff left her homestead and went to visit her daughter, remaining away eight months, in the meantime renting her home in which she had left part of her furniture, *held*, that there was not an abandonment in the absence of testimony that plaintiff ever expressed an intention not to return to the homestead: *Jones v. Blumenstein*, 77-361.

Evidence as to what third parties had said as to plaintiff's intention to return to the property and what the purchaser believed about it when he purchased it, *held* inadmissible against the owner to prove abandonment: *Ibid.*

The fact that the head of the family is absent from home does not deprive the property occupied by the family during his absence of the character of a homestead: *Griffin v. Sheley*, 55-513.

The homestead exemption being for the benefit of the family, so long as the family desires to retain the homestead as such, and does actually occupy it, it remains exempt, although the head of the family may have gone to another state and acquired property and a residence there with the intention of subsequently removing his family: *Saviugs Bank v. Kennedy*, 58-454.

The removal of the husband, even with intent to abandon the property, does not affect the homestead right so long as the wife, having the right to occupy, remains in such occupancy: *Lunt v. Neeley*, 67-97.

A subsequent abandonment will not render valid a conveyance by the husband or wife alone: *Ibid.; Bruner v. Bateman*, 66-488.

A conveyance by the husband to the wife does not destroy its character as a homestead nor change the time to which the exemption dates: *Green v. Farvar*, 53-426.

Conveyance of the homestead standing in the husband's name by the husband and wife to a third party in trust, to be reconveyed to the wife, is not an abandonment or fraudulent conveyance rendering the homestead subject to debts contracted subsequent to its acquisition and before such transfer: *Hugunin v. Dewey*, 20-368.

Where the husband, being the owner of the fee, conveyed the homestead to a third party who afterwards reconveyed it to the wife, the occupancy remaining unchanged, *held*, that such conveyance amounted to an abandonment, it not appearing that the conveyance was for the purpose of vesting the title in the wife and without intention of abandoning the homestead right: *Jones v. Currier*, 65-533.

A conveyance of the homestead in the form of a deed, but which is in fact a mortgage, as security for money borrowed of the grantee, does not affect the homestead rights of the husband and wife: *McClure v. Braniff*, 75-38.

Where the family did not cease to occupy the homestead, but another party took possession of a portion thereof under a transfer which was invalid, *held*, that the facts did not constitute an abandonment: *Stinson v. Richardson*, 44-373.

Leasing the homestead with the intention of returning thereto after the expiration of the lease does not constitute an abandonment of the homestead: *Zwick v. Johns*, 89-550.

Where a wife, holding the title to a homestead under a voluntary conveyance from her husband, which is void for fraud as to creditors, dies, and the husband and children afterwards abandon the homestead, it becomes liable to the claims of such creditors: *Gardner v. Baker*, 25-343.

Where the owner leaves the premises and acquires a new home it will be presumed that he intended to abandon the old homestead: *Davis v. Kelley*, 14-523.

An actual removal from the homestead, with no intention to return, will amount to a forfeiture of the homestead right as against purchasers and creditors, even when a new homestead has not been gained: *Newman v. Franklin*, 69-244.

While the length of a person's absence may not be conclusive proof of his intention to abandon his homestead, yet where such absence is continued for some years, and there is no circumstance or act which indicates his intention to return and occupy the homestead, in such case the length of his absence may become a controlling circumstance: *Ibid.*

Two absences under different circumstances and for different purposes with an interval of occupancy between them are not to be considered together in determining whether there has been an abandonment: *Painter v. Steffen*, 87-171.

The fact of taking legal advice as to the effect of a proposed absence on the homestead right and acting under such advice will tend to show a purpose not to abandon the homestead: *Ibid.*

Continuance of partial possession is important as tending to show a purpose to retain the homestead: *Ibid.*

The courts will not decree the forfeiture of a homestead right merely because of a contingent purpose to change in the future: *Ibid.*

Absence from the homestead for about three years without any manifest intention to return, with repeated offers to sell or trade the property and frequent expressions of a purpose not to return to it, one of these being made at the time of the incurring of liability, *held* sufficient to constitute an abandonment as to the party to whom such liability was incurred: *Dunton v. Woodbury*, 24-74.

Where it appeared that a party owning and occupying a farm as a homestead moved to town to practice law, with the intention of pursuing his profession permanently if he was able to make a living by it, *held*, that the intention was such as to constitute an abandonment of the homestead: *Kimball v. Wilson*, 59-638.

Where the owner, though absent from the premises for seven years, had during that time retained possession of a portion of the house for the storage of household goods, *held*, that his absence did not constitute abandonment: *Repenn v. Davis*, 72-548.

Where the owner with his family removed permanently from the property, resided in different places, voted at elections where so residing, and had no definite intention of returning to the property, but intended to exchange it for another homestead when possible, *held*, that the facts showed an abandonment. Abandonment may be shown without proof of the acquisition of a new homestead: *Cotton v. Hamil*, 58-594.

Where the husband abandoned the homestead and became a citizen of another state, remaining there continuously with his wife and family for several years without a definite time or plan for return, *held*, that an abandonment was shown: *Perry v. Dillrance*, 86-424.

The owner of a farm, having rented it, removed to a city and registered and voted therein. While residing in the city he bargained away the farm. *Held*, that the act of voting, while not conclusive, was a significant circumstance tending to show an abandonment: *Conway v. Nichols*, 71 N. W., 183.

The fact that the owner removed with his family to another county and repeatedly voted there, *held* conclusive evidence of the abandonment of the homestead: *Ross v. Hellyer*, 26 Fed., 413.

Where property claimed as a homestead had been sold under execution, and it was established that plaintiff ceased to occupy the property three years before the sale and that he directed the sheriff to levy upon and sell it; that he did not commence the action to set aside the sheriff's deed until five years after the same was made, the purchaser in the meantime collecting the rents, and that he had established his home elsewhere before the commencement of the action, *held*, that the facts were sufficient to constitute an abandonment, notwithstanding his testimony that he did not intend to abandon his home: *Wilson v. Daniels*, 79-132.

Where after sale of the homestead under execution and foreclosure of mortgage of the same in which the wife joined the husband accepted a lease of the premises from the purchaser and the wife acquiesced therein, *held*, that there was such abandonment of the

homestead as to prevent the wife from objecting to the sale after the execution of the deed thereunder, on the claim that there had been no platting of the premises sold including the homestead: *Bradshaw v. Remick*, 90-409.

Testimony of the party claiming a homestead right as to his intention to return is admissible and entitled to consideration, though not conclusive as to such intent. If the homestead is left for the purpose of obtaining support for the family, an intent to abandon permanently should not be inferred. An intent to return must always exist when the removal was made for a temporary business purpose: *Boot v. Brewster*, 75-631.

While the mere expression of an intention to return will not show that there has been no abandonment in contradiction of acts indicating such abandonment, yet where the acts are not inconsistent the expression of intent should be given weight: *Benbow v. Boyer*, 89-494.

And where in such case the homestead was sold after the lien of a judgment which would have attached thereto if it was not exempt had expired, and before levy was made, *held*, that the judgment could not be enforced against the premises: *Ibid.*

Upon sale of the portion of the homestead upon which the house is situated, without intention to build upon and occupy the residue as a homestead, the remaining portion loses its homestead character: *Givans v. Dewey*, 47-414; *Windle v. Brandt*, 55-221.

The mere intention to place the remainder of the property in condition for occupancy at a future time will not continue the homestead character: *Givans v. Dewey*, 47-414.

Continuing to occupy the house as a tenant at will after its conveyance will not continue the homestead right: *Windle v. Brandt*, 55-221.

Evidence that at the execution of a mortgage upon property which had been the homestead, by the wife alone, she being owner of the fee, she stated that she was not living upon it and did not intend to do so, *held* admissible to show that at the execution of a subsequent mortgage the homestead right did not exist, there having been no occupation of the premises in the meantime as a homestead: *Van Bogart v. Van Bogart*, 46-359.

Where the wife, while absent from the homestead, requested a creditor of the husband to levy an attachment thereon, *held*, that she thereby abandoned her homestead right and could not insist upon it as against such attachment: *Parsons v. Cooley*, 60-268.

A lease to a mining company of the right to mine coal from the homestead does not constitute such severance of the unmined coal as to subject it to judicial sale: *Sibley v. Lawrence*, 46-563.

Where defendant sets up a homestead right the burden of proving abandonment is upon plaintiff: *Bradshaw v. Hurst*, 57-745.

But where it is claimed that surrender of possession is not voluntary and does not constitute an abandonment, the burden of proof is upon the party claiming the homestead right to establish his intention to return: *Newman v. Franklin*, 69-244.

A homestead when acquired will be presumed to continue until the contrary appears, the burden in this respect being on the general creditor seeking to show abandonment. In case a judgment which is sought to be enforced against a homestead on the ground of its abandonment was rendered during the time the premises were occupied as a homestead, the proof of the intent to abandon should be clearer and more satisfactory than when the judgment relied on was obtained after the homestead had ceased to be actually used as such: *Boot v. Brewster*, 75-631.

Where another home was purchased and occupied for a short time, but no payments thereon were made, *held*, that this fact did not show an abandonment as against the clear preponderance of evidence that the party did not intend such abandonment: *Ayres v. Grill*, 85-720.

Under the facts of a particular case, *held*, that by leasing the homestead and then abandoning such lease and accepting other provisions made in an ante-nuptial contract, the widow abandoned her homestead right: *Ditson v. Ditson*, 85-276.

Where a divorce is granted to a wife, even with the custody of the children, the homestead in the husband's hands remains exempt: *Woods v. Davis*, 34-264.

Facts in particular cases, as bearing upon the question of abandonment, considered: *Stewart v. Drand*, 23-477; *Leonard v. Ingraham*, 58-406; *Baker v. Jamison*, 73-698.

SEC. **2978. Extent—dwelling—appurtenances—value.** If within a city or town, it must not exceed one-half acre in extent, otherwise it must not contain in the aggregate more than forty acres, but if, in either case, its value is less than five hundred dollars, it may be enlarged until it reaches that amount. It must not embrace more than one dwelling-house, or any other buildings except such as are properly appurtenant thereto, but a shop or other building situated thereon, actually used and occupied by the owner in the prosecution of his ordinary business, and not exceeding three hundred dollars in value, is appurtenant thereto. [C. '73, §§ 1996-7; R., §§ 2884-5; C. '51, §§ 1252-3.]

The value is to be ascertained on the basis of the fee-simple title. The fact that a person claiming a homestead has less than the fee-simple title does not authorize the exemption of his interest in a larger amount of property: *Yates v. McKibben*, 66-357.

The statutory limitation as to the size of a homestead within a town plat does not apply unless the homestead is situated within the platted portion of a town, and if it is within the limits of a town, but remains unplatted, it may be of the same extent as

though not within town limits: *McDaniel v. Mace*, 47–509.

So *held* where the limits of a town were so extended as to include a homestead previously existing and which was not platted: *Finley v. Dietrick*, 12–516.

To constitute a town plat in this sense the plat must be that of a city or incorporated village. The plat of an unincorporated village is not a town plat so as to limit the homestead right therein to one-half acre: *Truax v. Pool*, 46–256.

In an action attacking a sale on the ground of homestead exemption in the property sold, the party setting up the exemption must make such allegations as to the value of the property, and its not being within the limits of a city or town plat, as are necessary to show its exemption as a homestead: *Helfenstein v. Cave*, 3–287; *Helfenstein v. Cave*, 6–374.

Where the owner seeks to have exempt a tract of more than one-half acre within a town plat the burden is upon him to show that its value is less than five hundred dollars: *Boot v. Brewster*, 75–631.

A homestead consisting of between four and five acres of land, part of which is within the city limits, but is not platted into town lots, is not subject to execution: *Beyer v. Thoeming*, 81–517.

A lot, within the provisions of this section as to the extent of the homestead, is a tract of land designed for use for town purposes, and not one which is by the platting reserved for further subdivision: *Frost v. Rainbow*, 85–289.

The policy of the statute has been not to place restrictions on the value of the homestead within the limitations here allowed, and *held*, that in determining the application of payments so as to relieve the homestead from liability for the portion of an indebtedness contracted prior to its acquisition, which was also a lien on other property, the extent and value of the homestead would not be taken into account: *First Nat. Bank v. Hollinsworth*, 78–575.

A stable kept for domestic use, in connection with the house, is appurtenant to the homestead, and exempt without regard to value: *Wright v. Ditzler*, 54–620.

The homestead cannot include buildings used as shops, etc., rented to tenants and a source of revenue: *Kurz v. Brusch*, 13–371.

A building or a portion of the building used in the prosecution of the business of keeping a saloon cannot be deemed exempt as a part of the homestead, under this section: *Arnold v. Gotshall*, 71–572.

A portion of the dwelling, used by the owner for business purposes, may be exempt on the same principle as a shop is exempt: *Smith v. Quiggans*, 65–637.

Where there were three rooms in the first story of a building, and the front room was used exclusively for business purposes and the middle room partly for business and partly for family use, while the back room and the entire upper story were used by the family, *held*, that the front and middle rooms were so far devoted to business purposes as to lose the homestead character, except as they were appurtenant to the homestead: *McClure v. Braniff*, 75–38.

SEC. **2979. Selecting—platting.** The owner, husband or wife, may select the homestead and cause it to be platted, but a failure to do so shall not render the same liable when it otherwise would not be, and a selection by the owner shall control. When selected, it shall be marked off by permanent, visible monuments, and the description thereof shall give the direction and distance of the starting point from some corner of the dwelling, which description, with a plat, shall be filed and recorded by the recorder of the proper county in the homestead book, which shall be, as nearly as may be, in the form of the record books for deeds, with an index kept in the same manner. [C. '73, §§ 1998–9; R., §§ 2286–7; C. '51, §§ 1254–5.]

Failure to plat and record the homestead does not defeat the homestead right: *Sargent v. Chubbuck*, 19–37; *Nye v. Walliker*, 46–306; *Linscott v. Lamart*, 46–312.

Nor does the failure to plat deprive the parties of the right to claim more than forty acres by reason of the value not reaching the statutory limit: *Green v. Farrar*, 53–426.

To render a selection and platting of the homestead valid the plat must be recorded: *White v. Rowley*, 46–680.

A sale under execution of a tract of land in a lump, which includes the homestead or a part of it, without the homestead being platted by the owner or by the officer making the sale, is void: *Linscott v. Lamart*, 46–312; *Goodrich v. Brown*, 63–247; *Visek v. Doolittle*, 69–602.

A sale by the officer of any portion of the property which might have formed a part of the homestead without such platting is invalid: *White v. Rowley*, 46–680; *Lowell v. Shannon*, 60–713; *Green v. Root*, 62 Fed., 191.

It is immaterial in such cases that no objection to the sale of the homestead *en masse* without platting is made: *Owens v. Hart*, 62–620.

The fact that the sale is made under a special execution is immaterial in this respect: *Ibid.*

Failure of the owner and the sheriff to select and designate the homestead before execution sale of property in which the homestead is included does not render the sale void. The statute is directory: *Newman v. Franklin*, 69–244.

It may be that in such case the sale is voidable; but where it appeared that after the sale the homestead was abandoned, *held*, that the trustee of the owner of the homestead could not maintain an action to set it aside: *Ibid.*

Where a portion of defendant's farm, upon which he resided, was sold without platting a homestead, but the dwelling and more than enough land for a homestead were left, *held*,

that the sale might be set aside as between the parties, but was not void: *Martin v. Knapp*, 57–336.

Failure to plat the homestead on sale under execution of property embracing the same on mortgage foreclosure, *held* not to defeat the sale where the homestead had been abandoned after the sale by the defendant in executions, accepting a lease of the premises from the executions purchaser: *Bradshaw v. Remick*, 90–409.

And this applies to the wife's interest in the homestead, she having joined in the mortgage and acquiesced in such abandonment: *Ibid.*

Where a tract of land including the owner's homestead was sold on special execution in a lump, after first having been offered in forties, *held*, that there was no prejudice to the owner resulting from failure of the sheriff to mark out and plat the homestead: *Brumbaugh v. Zollinger*, 59–384.

Even though a homestead right may exist in the undivided interest of a tenant in common, yet, in case of an execution sale of such tenant's interest, it is not proper for the officer to set off any specific portion as a homestead: *Farr v. Reilly*, 58–399.

Failure to plat a homestead will be immaterial in case of a conveyance thereof, in which the husband and wife both join: *Quinn v. Brown*, 71–376.

The husband and wife have the same right to select the homestead on the land of the wife, if it be occupied for homestead purposes, as they have to select it when the husband's land is occupied for such purpose; therefore, where the house occupied by the family as a home was situated in part on a forty-acre tract belonging to the husband, and in part on another tract belonging to the wife, *held*, that the entire tract belonging to the husband could not be claimed as exempt, but the homestead must be selected and marked out upon both: *Henderson v. Rainbow*, 76–320.

Where the homestead is not platted a conveyance of a portion of the tract which might be a part of the homestead will not be valid unless both husband and wife join therein: *Woolcut v. Lerdell*, 78–668.

It is not necessary that the premises selected as a homestead correspond with a government subdivision of forty acres, but the selection may be made in such way from a larger tract as to include the buildings used in connection with the homestead, although they be on different subdivisions: *Schlarb v. Holderbaum*, 80–394.

Where forty acres of land and fifteen acres adjoining, all of which was occupied as a homestead by plaintiff, were sold under an execution, and plaintiff served a notice on the sheriff before the sale, claiming the forty-acre tract as a homestead, *held*, that the notice was, under the law, as definite as a platting would have made it, and an omission to plat the homestead was without prejudice and would not invalidate the sale: *Smith v. De Kock*, 81–535.

SEC. **2980. By court.** Upon application made to the district court by any creditor of the owner of the homestead, or other person interested therein, such court shall hear the cause upon the proof offered, and fix and establish the boundaries thereof, and the judgment therein shall be filed and recorded in the manner provided in the preceding section.

SEC. **2981. Changes.** The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or vacate it, but such changes shall not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead, made without the concurrence of the husband or wife, shall affect his or her rights, or those of the children. The new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been. [C. '73, §§ 2000–1; R., §§ 2288–9; C. '51, §§ 1256–7.]

A change of the homestead is permitted, and the new homestead will be exempt from execution to the extent in value of the old, as against an indebtedness contracted during the occupation of the latter, but such change cannot prejudice previous liens and conveyances: *Sargent v. Chubbuck*, 19–37.

The lien of a judgment which has already attached cannot be affected by a change of the homestead to property upon which it is a lien: *Elston v. Robinson*, 21–531.

Where the owner of two pieces of property changed his homestead from one to the other, *held*, that a judgment lien existing on the second would become a lien on the first; but that the homestead, right in the second would be superior to such judgment lien, to the same extent that it was in the first: *Furman v. Dewell*, 35–170.

Where a party sells his homestead with the intention of purchasing a new one, he will be allowed a sufficient time within which to exercise that right, and, if he does not gain credit on account of the transaction, debts contracted in the interim cannot be enforced against the new homestead: *Benham v. Chamberlain*, 39–358.

The acts of acquiring a new homestead and moving into it cannot be simultaneous. After the purchase the owner should be allowed a reasonable time to make the change and to remove the family to his new home, and during the time intervening between the purchase of the new house and actual occupation it is exempt as a homestead: *Cowgell v. Warrington*, 66–666.

The new homestead is liable for debts contracted prior to the acquisition of the old one: *Dills v. Mason*, 42–329.

But not for those contracted subsequently

and not put in judgment before the acquisition of the new one: *Pearson v. Minturn*, 18–36; *Robb v. McBride*, 28–386.

The purchase of a second homestead with the proceeds in part of the first and other means entitles the owner to hold it exempt from debts contracted subsequently to the occupancy of the old homestead, where the value of the second homestead does not exceed that of the first: *Lay v. Templeton*, 59–684; *Benham v. Chamberlain*, 39–358.

It is not necessary that the old homestead be sold for cash which is immediately invested in a new one. The sale may be on time, and if the intention is to invest the proceeds, when realized, in the new, such proceeds will be exempt: *State v. Geddis*, 44–537.

Where plaintiff owned a homestead and also a half-interest in other property subject to execution, and exchanged the homestead for the other half-interest in such property, *held*, that the half-interest originally owned remained liable to be sold under execution on a judgment for a debt existing at the time of the exchange: *Thompson v. Rogers*, 51–333.

Where defendant relies upon the fact that his homestead was procured with the proceeds of a previous homestead in order to establish its exemption from a claim which antedates the last homestead, the burden of proof to establish the fact is upon him: *First Nat. Bank v. Baker*, 57–197; *Paine v. Means*, 65–547; *First Nat. Bank v. Thompson*, 72–417.

Where the new homestead is purchased with a portion of the proceeds of a tract of land including the former homestead, the proportion thus invested not exceeding the reasonable value of the portion of the tract which might have been claimed as a homestead, the new homestead will be exempt: *White v. Kinley*, 92–598.

Where a farm exceeding in extent the amount which could be held exempt, and incumbered for a portion of its value, was exchanged for another tract of land no greater in value than was capable of exemption as a homestead, and the latter was occupied as such, *held*, that as it was not practicable to establish what portion of the value of the original tract was exempt, no portion of the new homestead could be held exempt from a debt existing at the time of the exchange: *Paine v. Means*, 65–547.

Although mere intention to occupy property as a home does not give it that character before actual occupancy, yet where unimproved property is taken in exchange for the homestead with the intention of subsequently occupying it as such the property thus taken in exchange is exempt as homestead property: *Mann v. Corrington*, 61 N. W., 409.

The proceeds of the homestead when invested in a new homestead in another state do not remain exempt. Therefore, where a party sold his homestead in Iowa and purchase done in Missouri, and thereafter sold his homestead in Missouri and invested the proceeds in a homestead in Iowa, *held*, that he could not hold the last homestead in Iowa exempt from debts existing at the time of its purchase, even though they did not antedate the first homestead: *Rogers v. Raisor*, 60–355.

Where the proceeds of the sale of a homestead are invested in land in another state, which land is subsequently exchanged for land in Iowa, the property thus acquired in Iowa is not covered by the homestead exemption: *Dalton v. Webb*, 83–478.

Where a debtor holding his homestead exempt from execution for his debts exchanged the same for other property which he procured to be conveyed directly to his wife, *held*, that the property thus conveyed to the wife did not become subject to payment of his debts, and that such conveyance to the wife was not fraudulent: *Jones v. Brandt*, 59–332.

The change of metes and bounds which is authorized by statute has no reference to a conveyance or mortgage of a portion of the land which may be claimed as a homestead, and a change cannot be effected in that way without the consent of the husband or wife, unless it be for the acquisition of a new homestead: *Goodrich v. Brown*, 63–247.

Under particular facts, *held*, that a new homestead, practically of the same value as the old, remained exempt, but that other property, acquired and used in connection with the homestead, but not procured with the proceeds of the former homestead, was not exempt from prior indebtedness: *Atkinson v. Hancock*, 67–452.

Under particular facts, *held*, that the intention to change the homestead was not shown: *Coad v. Neal*, 55–528.

Money arising from the sale of the homestead is not exempt from garnishment unless the sale was in pursuance of a design to purchase another homestead: *Huskins v. Hanlon*, 72–37.

If the intention of the husband and wife is to use the proceeds of the sale of the homestead for the acquisition of a new homestead such proceeds are exempt from the claims of the creditors of the husband: *Schuttloffel v. Collins*, 67 N. W., 397.

The fact that the husband dies before the proceeds are re-invested and that if he had lived they might have been invested in another state, will not defeat the exemption: *Ibid.*

Where the proceeds of a homestead are by the husband with the knowledge and consent of the wife invested in the husband's business, he cannot afterwards procure a new homestead which shall be exempt from debts already contracted in such business: *Peninsular Stove Co. v. Roark*, 63 N. W., 326.

There may be a change of the homestead as occupied by the surviving spouse who has elected to retain the homestead for life. Such survivor is an "owner" within the language of this section: *Green v. Root*, 62 Fed., 191. But contra, see *Size v. Size*, 24–580.

SEC. **2982. Referees to determine exemption.** When a disagreement takes place between the owner and any person adversely interested, as to

whether any land or buildings are properly a part of the homestead, the sheriff shall, at the request of either party, summon nine disinterested persons having the qualifications of jurors. The parties then, commencing with the owner, shall in turn strike off one person each, until three remain. Should either party fail to do so, the sheriff may act for him, and the three as referees shall proceed to examine and ascertain all the facts of the case, and report the same, with their opinion thereon, to the next term of court from which the execution or other process may have issued. [C.'73, §§ 2002–3; R., §§ 2290–1; C.'51, §§ 1258–9.]

The reference here contemplated is not for the purpose of making a selection of the homestead, but to determine whether certain land claimed to be exempt really is so: *White v. Rowley*, 46–680, 682.

This section contemplates the case where it is conceded that the claimant of the homestead rights has rights of that character which he is entitled to set up, but there is a controversy as to where the line is to be drawn between what is exempt and what is not. It does not apply to a case where it is a question as to whether the debtor has any homestead rights at all as against the claims of the creditor: *McCrackin v. Weitzel*, 70–723.

SEC. **2983. Referring back—marking off—costs.** The court in its discretion may refer the whole or any part of the matter back to the same or other referees, to be selected in the same manner, or as the parties agree, giving them directions as to the report required of them. When the court is sufficiently advised in the case, it shall make its decision, and may, if expedient, direct the homestead to be marked off anew, or a new plat and description to be made and recorded, and take such further steps in the premises as in its discretion may appear expedient for attaining the objects of this chapter. It shall also award costs in accordance with the practice in other cases, as nearly as may be. [C.'73, §§ 2004–5; R., §§ 2292–3; C.'51, §§ 1260–1.]

These provisions apply where the party claims more than forty acres exempt as a homestead: *Green v. Farrar*, 53–426.

SEC. **2984. Change of circumstances.** The extent or appurtenances of the homestead thus established may be called in question in like manner, whenever a change in value or circumstances will justify such new proceedings. [C.'73, § 2006; R., § 2294; C.'51, § 1262.]

SEC. **2985. Occupancy by surviving spouse—descent.** Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law, but the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is herein contemplated. The survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased; but if there be no survivor, the homestead descends to the issue of either husband or wife according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents or their own, except those of the owner thereof contracted prior to its acquisition. [C.'73, §§ 2007–8; R., §§ 2295–6; C.'51, §§ 1263–4.]

Occupancy by survivor: Upon the death of the wife the husband is entitled to possess and occupy the whole homestead regardless of whether he or the wife is owner of the fee, or whether or not there is issue of the marriage: *Burns v. Keas*, 21–257.

Upon the death of the husband the wife, though she marries again, may continue to occupy the whole homestead, and it is not liable to partition at the suit of the husband's heirs at law: *Nicholas v. Purczell*, 21–265.

A survivor electing to retain the homestead in lieu of the distributive share has only the right to use and occupancy during life, and has no interest which can survive to a second husband or wife: *Stevens v. Stevens*, 50–491.

The survivor thus occupying cannot change the homestead for another: *Size v. Size*, 24–580; *contra*, *Green v. Root*, 62 Fed., 191.

The surviving widow is entitled to control the rents and profits of the homestead while she remains in possession thereof: *Floyd v. Mosier*, 1–512.

A widow continuing to occupy the homestead belonging to her former husband has such right to occupancy as to entitle her to sue for injuries to her enjoyment of the property by a wrong-doer, although it may not appear but that her right to the property is subject to be divested at any time: *Cain v. Chicago, R. I. & P. R. Co.*, 54–255.

The rights of occupancy and possession on the part of the survivor do not confer any

title which can be conveyed or can become subject to the lien of a judgment: *Meyer v. Meyer*, 23-359; *Butterfield v. Wicks*, 44-310; *Smith v. Eaton*, 50-488.

Where a husband elected to retain a life estate in the homestead, *held*, that he might convey to the heirs entitled to the property after the expiration of the life estate, his life interest free from claims of his creditors: *Green v. Root*, 62 Fed., 191.

A judgment against a surviving wife, recovered after the death of the husband, does not become a lien upon the homestead in her hands: *Briggs v. Briggs*, 45-318; *Nye v. Walliker*, 46-306.

The right of the wife to occupy the homestead after the death of the husband is not a right or interest in his estate which she takes by inheritance, but a mere personal right unaccompanied by title or property interest: *Mahaffy v. Mahaffy*, 63-55.

Therefore, *held*, that a stipulation in an ante-nuptial contract, by which the wife accepted the provision therein made in lieu of dower and inheritance, did not constitute a relinquishment of the right to occupy and possess the homestead during her life: *Ibid.*

The right of the survivor may be lost by abandonment of the homestead: *Butterfield v. Wicks*, 44-310.

And after such abandonment it ceases to have the homestead character, and the survivor becomes a tenant in common with other heirs: *Orman v. Orman*, 26-361.

And partition among such heirs may then be had: *Size v. Size*, 24-580.

While the survivor is entitled to occupancy the heirs cannot interfere therewith, nor claim partition: *Dodds v. Dodds*, 26-311.

The right to redeem the homestead from execution sale is an equitable estate subject to dower or other right of the survivor: *Dexter v. Hayes*, 88-493.

Setting off distributive share: The right of occupying the homestead or any part of it cannot be retained *in addition* to the distributive share: *Meyer v. Meyer*, 23-359 (explaining *Nicholas v. Purczell*, 21-265); *Butterfield v. Wicks*, 44-310.

The survivor has only the right to retain such occupancy in lieu of so much of the distributive share, or such share may be set off to include the homestead: *Whitehead v. Conklin*, 48-478.

The homestead right does not become extinct until the distributive share has been finally set off: *Burdick v. Kent*, 55-583.

Commencement by the heirs of action for partition of the estate, and the execution of a will by the widow devising her share, and her subsequent death, *held* not to constitute such a setting apart of the distributive share that it would pass to devisee: *Mobley v. Mobley*, 73-654.

Election to hold in lieu of dower: The survivor is entitled to occupy the homestead for a reasonable time in which to make an election whether to retain such possession for life, or take a distributive share of the property: *Cunningham v. Gamble*, 57-46.

During occupancy for such reasonable time the survivor should be allowed to receive the income and profits therefrom. So *held* as to rent of coal mine on premises: *Ibid.*

Where the entire homestead exceeds in extent the dower interest of the wife, and she continues occupying it for ten years without making claim to have dower admeasured, she will be regarded as having elected to take the homestead for life in lieu of the distributive share: *Conn v. Conn*, 58-747.

The occupancy of the property as a homestead will be considered as an election to hold it as a homestead and not merely a part of it as dower: *Butterfield v. Wicks*, 44-310.

The acts of a surviving husband in retaining possession of the homestead after his wife's death, where its value was greater than his one-third interest in her property would have been, *held* an election to occupy the homestead during life in lieu of dower: *Stevens v. Stevens*, 50-491.

While continued occupany of the homestead in the absence of an election to take dower will be deemed an election to hold the homestead, the widow ought not to be compelled to make such election until the question of the indebtedness of the estate is determined, and it is known whether any portion, and if so how much, of the real property must be sold for debts, so that she may know what her distributive share would amount to. And proceedings among the heirs for partition or for admeasurement of dower should be postponed until the estate, as to the debts against it and legacies, may be found upon adjudication to be fully settled: *Thomas v. Thomas*, 73-657.

While the surviving husband is occupying the homestead in the absence of an election to take a distributive share, it is not competent for a court to dispose of his right to occupancy by forcing upon him in lieu thereof a distributive share. His continued occupancy as a survivor will be deemed an election to occupy as survivor, even though the distributive share should appear to be the more valuable: *Holbrook v. Perry*, 66-286.

The occupancy of a homestead under a devise of a life estate of land including the homestead will not be considered as an election defeating the widow's right to dower: *Blair v. Wilson*, 57-177.

Occupancy of the homestead by the surviving husband or wife will be regarded as an election to retain the homestead for life in lieu of dower, until the distributive share of such survivor is set apart: *McDonald v. McDonald*, 76-137.

Until a distributive share is set apart, a surviving husband or wife occupying the homestead must be regarded as having elected to take it as a homestead and not to take a distributive share or the provisions made for her in a will. In such event the widow has not any interest or estate in the homestead such as will pass to her heirs at her death: *Schlarb v. Holderbaum*, 80-394.

The fact that the occupancy includes premises in addition to the homestead will not show that the occupation is not intended to be that of the homestead, nor will the failure to have the homestead platted affect such occupancy: *Ibid.*

The mere fact of occupancy of the homestead does not defeat the widow's right to her

distributive share. Unless it is disposed of the widow may continue to occupy it: *Whited v. Pearson*, 87-513.

The primary right is to have the distributive share, and that right continues until it is superseded and set aside by an election to take the homestead in lieu thereof. And the occupancy of the homestead for a reasonable time under circumstances making removal therefrom impracticable will not constitute an election to retain the homestead in lieu of dower: *Egbert v. Egbert*, 85-525.

A binding election may be made by the widow to take her distributive share before it is actually set off and while she is still in possession of the homestead; and where the widow executed a mortgage on her distributive share and afterwards filed a petition to have it set off, *held*, that she could not dismiss such proceedings electing to retain the homestead for life, although she had not surrendered possession of such homestead. *Wilcox v. Wilcox*, 89-388.

When under all the circumstances it appears that the survivor has occupied the homestead for a reasonable time in which to make an election and has failed to have a distributive share set apart or otherwise to make any election to take such distributive share, the presumption of election to retain the homestead arises and such presumption will then prevail unless overcome by proof showing election to the contrary. The fact of having first begun proceedings to have a distributive share set apart, which proceedings have been abandoned, or the execution of a deed to the distributive share as security with the expression of a purpose to mortgage such distributive share, will not necessarily overcome the presumption of an election to retain the homestead arising from occupancy thereof as above specified. This case is distinguishable from *Wilcox v. Wilcox, supra*, on the ground that in that case an election to take a distributive share had in fact been made and it was sought to withdraw it after the widow had mortgaged such share: *Zwick v. Johns*, 89-550.

The mere election to have the distributive share set off is not sufficient to extinguish the homestead right, nor will proceedings instituted for that purpose, however, for they may have progressed short of a final order setting off the distributive share, have that effect: *Hornbeck v. Brown*, 91-316.

Where the survivor does not occupy nor intend to occupy the premises as a homestead, he cannot hold them as exempt till the setting off of a distributive share, but the undivided interest of such survivor therein will become liable to execution: *Ibid.*

Where under the provisions of the will the widow is entitled to a life estate in the homestead or in property including the homestead, the occupation of such property will not constitute an election to take the homestead right for life instead of the provisions of the will: *Hunter v. Hunter*, 64 N. W., 656.

Occupancy of the homestead which is in accordance with the provisions of a devise will not be considered as an election to retain the homestead right in lieu of any other interest in the estate: (*In re Franke's Estate*, 66 N.W., 918.

When the survivor has occupied the homestead for a reasonable time without indicating an intention to take a distributive share of the estate of the deceased spouse, the presumption arises that there has been an election to retain the homestead for life. But what occupation will authorize such a presumption will depend on all the facts in the case, and when the presumption arises it may be rebutted: *Stephens v. Hay*, 66 N. W., 1048.

Therefore, *held*, that the act of the widow in executing an absolute conveyance of the undivided one-third of the property was evidence of a very satisfactory character of the intention to take a distributive share rather than retain the homestead for life, her occupation of the premises not having been for such a length of time as that an application for admeasurement of dower would be barred under § 3369: *Ibid.*

As to how election shall be made of rec ord, see now § 3377.

The survivor electing to retain the homestead for life relinquishes his distributive share, but such relinquishment applies only to the one-third which the survivor is entitled to, where there are children or other descendants entitled to inherit, and not to the additional portion (one-sixth) which the survivor may be entitled to as heir at law, where there are no children: *Smith v. Zuckmeyer*, 53-14.

If the widow is entitled as heir at law to one-half her husband's property the other heirs cannot, in the partition of the realty, insist that she include the homestead in her share: *Nicholas v. Purczell*, 21-265.

Where a widow has her distributive share in the real property of her deceased husband set out to her from the homestead she can continue to hold the same free from the lien of a judgment against her, not antedating the original homestead right: *Briggs v. Briggs*, 45-318; *Knox v. Hanlon*, 48-252.

Where a testator gave his wife an undivided one-third of the homestead property, and the remaining two-thirds to his daughter, *held*, that it was evidently not the intention of the testator to give his wife one-third in fee-simple, in addition to the right which she might claim to occupy the premises as her homestead during her lifetime: *Larkin v. McManus*, 81-723.

Where the widow, having elected to occupy the homestead for life, acquired by inheritance from an heir an undivided share of the reversioner, *held*, that such undivided share was subject to execution for her debts, the homestead exemption extending only to her life interest: *Strong v. Garrett*, 90-100.

Descent: The legal title of the homestead property, upon the death of the owner thereof, descends to the heirs of such owner, subject to the right of occupancy in the surviving husband or wife: *Burns v. Keas*, 21-257; *Cotton v. Wood*, 25-43.

Minor children have no such interest in their parents' homestead during the life of the latter as the law will enforce against the

contracts or acts of the parents: *Collins v. Chantland*, 48–241.

Devise: A wife may devise the homestead in which she holds the legal title, and the right thereto will pass to the devisee subject to the rights of the surviving husband: *Stewart v. Brand*, 23–477.

A mortgage given by the devisee creates a lien and may be foreclosed, subject, however, to the homestead rights of the surviving husband or wife: *Ibid.*

Exemption in hands of heirs: The heir holds the property free from any debts of the ancestor which could not have been enforced against it in his lifetime, but it remains liable to debts contracted by the ancestor prior to its acquisition as a homestead: *Moninger v. Ramsey*, 48–368.

The heirs hold a homestead free from the debts of the ancestor, which in his lifetime could not be enforced against it, and also hold it exempt from their own debts contracted prior to the death of the ancestor, and they so hold it even though they do not take possession of and occupy it: *Kite v. Kite*, 79–491.

The exemption of the interests of the heirs in the homestead from liability is not because of any homestead right they have in the premises, but because of the homestead right of their ancestor: *Ibid.*

Although the distributive share of the widow is by § 3367 to be set out so as to include the homestead, yet where the real property of deceased is sold for the purpose of setting off the widow's interest under § 3375, creditors have not the right to compel the widow's share to be taken entirely from or to entirely include the proceeds of, the homestead for the purpose of preventing the exemption of such proceeds in the hands of the heirs: *Ibid.*

A homestead descends to the heirs of the owner exempt from the debts of the ancestor. While the homestead may be included in the distributive share of the surviving husband or wife, yet if it is not included in such share it nevertheless remains exempt even in the hands of the heirs: *In re Coulson's Estate*, 64 N. W., 755.

It remains exempt in the hands of the heirs even from charges and expenses of the last sickness and funeral expenses: *Knox v. Hanlon*, 48–252.

Occupancy of such property by the heirs as a homestead is not essential to its exemption in their hands from antecedent debts: *Johnson v. Gaylord*, 41–362; *Baker v. Jamison*, 73–698.

A nonresident adult heir is entitled to hold his share in the homestead exempt from his own debts or the debts of the ancestor. Occupancy of the homestead by the heir is not material: *Maguire v. Kenedy*, 91–272.

Where the widow abandons the homestead it descends as free from the debts of the ancestor as if there had been no widow: *Johnson v. Gaylord*, 41–362.

Where, at the time of the death of the wife, owning the fee of the homestead, she and the husband were absent from the homestead, but without having as yet abandoned it, *held*, that there could not subsequently be an abandonment by the husband of his life interest, except by a setting off of a distributive share, and that upon his death the property descended to the heirs free from his debts: *Bradshaw v. Hurst*, 57–745.

After the death of the husband or wife there cannot be an abandonment of the homestead by the survivor, if the title was in the deceased, except by setting off the distributive share of said survivor in the real estate of the deceased: *Darrah v. Cunningham*, 72–123.

Where the husband or wife surviving the owner of the fee elects to take a distributive share instead of the right of occupancy as a homestead during life, but such distributive share is not yet set off and the possession of the homestead continues in the survivor until death, the property descends or passes by devise free from the debts of such survivor: *Burdick v. Kent*, 52–583.

Where a conveyance of the homestead was made by the husband and wife to their son, subject to the right of either grantor to occupy during life, and the husband surviving resided until death with his son, who did not reside on the homestead, *held*, that the son did not acquire the property as a homestead and that it was not exempt from his debts: *Reifenstahl v. Osborne*, 66–567.

SEC. **2986. Sale for debts.** If there is no such survivor or issue, the homestead is liable to be sold for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead. [C.'73, § 2009; R., § 2297; C.'51, § 1265.]

SEC. **2987. Devise.** Subject to the rights of the surviving husband or wife, the homestead may be devised like other real estate of the testator. [C.'73, § 2010; R., § 2298; C.'51, § 1266.]

CHAPTER 9.

OF LANDLORD AND TENANT.

SECTION **2988. Apportionment of rent.** The executor of a tenant for life who leases real estate so held, and dies on or before the day on which the rent is payable, and a person entitled to rent dependent on the life of

another may recover the proportion of rent which had accrued at the time of the death. [C.'73, § 2011; R., § 2299; C.'51, § 1267.]

SEC. **2989. Tenant holding over.** A tenant giving notice of his intention to quit leased premises at a time named, and afterwards holding over, and a tenant or his assignee wilfully holding over after the term, and after notice to quit, shall pay double the rental value thereof during the time he holds over to the person entitled thereto. [C.'73, § 2012; R., § 2300; C.'51, § 1268.]

SEC. **2990. Attornment to stranger.** The payment of rent, or delivery of possession of leased premises, to one not the lessor, is void, unless made with his consent, or in pursuance of a judgment or decree of court or judicial sale. [C.'73, § 2013; R., § 2301; C.'51, § 1269.]

A tenant will not, during the existence of the tenancy, be allowed to deny the title of his landlord. He may contest the title of the lessor if he has been evicted or has yielded the possession to one having a paramount title, but not when the adverse title has been asserted by his own procurement or bad faith: *Stout v. Merrill*, 35–47.

A tenant cannot, before the expiration of his lease, and while in possession under it, deny his landlord's title: *Bowdish v. Dubuque*, 38–341.

Where a party has possession as a mere respasser, and afterwards, by compromise, accepts a lease of the premises of the real owner, his possession is to be deemed derived from the landlord in such sense that he cannot afterwards set up title against the landlord in an action for possession of the premises: *Ibid.*

In an action on a note given in consideration of a lease defendant may show that there was no consideration for the reason that plaintiff had no title to the leased premises, and defendant did not and could not have obtained possession under such lease. Such defense is not precluded by the rule that defendant cannot dispute the landlord's title: *Andrews v. Woodcock*, 14–397.

As the mortgagor has the right of possession until foreclosure and the expiration of the right of redemption, the tenant cannot attorn to the mortgagee until the expiration of that time. "After the mortgage has been forfeited" means after the right of possession of the mortgagor has been cut off by the expiration of the period of redemption: *Mills v. Hamilton*, 49–105; *Mills v. Heaton*, 52–215.

A tenant holding under an executor, and having, as tenant, paid rents to such executor, is estopped from denying the executor's right to recover a balance due on rent: *Sullivan v. Finn*, 4 G. Gr., 544.

Fraud on the part of the landlord in obtaining the lease cannot be set up for the purpose of defeating the landlord's title: *Simons v. Marshall*, 3 G. Gr., 502.

A tenant is under no obligation to pay rent after the premises have been sold, and a sheriff's deed issued under foreclosure of a mortgage which has priority over the title of such landlord, and he is bound to account for pasturage and crops converted by him after the purchaser becomes entitled to possession under his sheriff's deed: *Stanbrough v. Cook*, 83–705.

SEC. **2991. Tenant at will—notice to quit.** Any person in the possession of real estate, with the assent of the owner, is presumed to be a tenant at will until the contrary is shown, and thirty days' notice in writing must be given by either party before he can terminate such a tenancy; but when, in any case, a rent is reserved payable at intervals of less than thirty days, the length of notice need not be greater than such interval. In case of tenants occupying and cultivating farms, the notice must fix the termination of the tenancy to take place on the first day of March, except in cases of mere croppers, whose leases shall be held to expire when the crop is harvested; if the crop is corn, it shall not be later than the first day of December, unless otherwise agreed upon. But where an agreement is made fixing the time of the termination of the tenancy, whether in writing or not, it shall cease at the time agreed upon, without notice. When a tenant cannot be found in the county, the notice above required may be given to any subtenant or other person in possession of the premises, or, if the premises be vacant, by affixing the notice to any outside door of the dwelling-house thereon, or other building, if there be no dwelling-house, or in some conspicuous position on the premises, if there be no building. [C.'73, §§ 2014–16; R., §§ 2216, 2218; C.'51, § 1208.]

Tenant at will: The presumption obtaining at common law that a party holding over after the expiration of his lease becomes a tenant from year to year is overcome by this statutory provision making him a tenant at will: *O'Brien v. Troxel*, 76–760.

Continuance in possession by the tenant with consent of the landlord after the ex-

piration of his term of years implies, in the absence of express agreement, that the premises are held on the former terms, but want of consent on the part of the landlord prevents the application of this rule. A tenant in possession under an agreement to lease, without having paid rent, is a tenant at will, and so is one who, after his lease has expired, is permitted to continue in possession pending a treaty for a further lease: *Dubuque v. Miller*, 11–583.

Where property is bought in at execution sale under such circumstances that there is no right of redemption, but the execution defendant is allowed to remain in possession during the year following the sale and thereafter, he becomes a tenant at will: *Dobbins v. Lusch*, 53–304; *Munson v. Plummer*, 59–120.

All the right and interest of a tenant is terminated by judicial sale without right of redemption made under a judgment which was a lien on the premises prior to the lease, and if the tenant continues in possession after the sale and notice to him by the purchaser, he does so not as tenant under his lease, but as tenant at will of the purchaser, and is liable to account to the latter for the use of the premises after the sale: *Kane v. Mink*, 64–84.

Where notice was served to terminate a tenancy at will, but the defendant continued in possession for some years thereafter, *held*, that he did not stand in any different position after such notice: *Newell v. Sanford*, 13–191.

A person in possession not recognizing the owner as landlord cannot be regarded as a tenant at will: *Martin v. Knapp*, 57–336.

Possession of premises by grantor after execution of conveyance thereof, though such conveyance be voluntary, is presumed to have been under a tenancy at will: *Butler v. Nelson*, 72–732.

Notice to quit: Where a tenancy is to cease at an agreed time, the tenant is not entitled to thirty days' notice to quit: *Shuver v. Klinkenberg*, 67–544.

Where a tenant was in possession under an agreement to occupy as long as he was in the employ of the landlord, *held*, that after leaving such employ he was a tenant holding over after the expiration of his lease and not a tenant at will, and therefore was only entitled to three days' notice to quit before action of forcible entry and detainer: *Grosvenor v. Henry*, 27–269.

A tenant holding over at the expiration of his lease does not become entitled as tenant at will to thirty days' notice to terminate the tenancy, but only three days' notice before expulsion by action of forcible entry and detainer: *Kellogg v. Groves*, 53–395.

Where defendant claimed under a verbal lease for three years, which was invalid on account of the statute of frauds, *held*, that he was not thereupon entitled to be considered a tenant at will, and possession could be recovered from him by the landlord without thirty days' notice: *Burden v. Knight*, 82–584.

A notice to quit the house is sufficient notice to quit the land upon which the house is situated: *Kuhn v. Kuhn*, 70–682.

Where notice was served to terminate a tenancy at will, but the defendant continued in possession for some years thereafter, *held*, that he did not stand in any different position after such notice: *Newell v. Sanford*, 13–197.

A person in possession under a parol license to mine is a tenant at will and entitled to the thirty days' notice to terminate the tenancy required in other cases: *Bush v. Sullivan*, 3 G. Gr., 344; *Beatty v. Gregory*, 17–109; *Harkness v. Burton*, 39–101.

The provision that a field tenant's lease shall terminate not later than the first day of December does not establish a rule for the government of parties in making their contract, but simply fixes the time at which, in the absence of express agreement to the contrary, the lease shall terminate. The time thus fixed by statute for the termination of the lease does not become a part of the contract with reference to the time for the payment of rent where no express time is stipulated, *Johnson v. Shank*, 67–115.

The provision regarding a notice to fix the termination of the tenancy of agricultural lands on the first day of March has no application where there is an express agreement as to the termination of the tenancy: *Waller v. Vermitt*, 66 N. W., 763.

A field tenant, or cropper, has no right of pasturage either before or after the crop is harvested: *Kyte v. Keller*, 76–34; *Tantlinger v. Sullivan*, 80–218.

Where in an action to recover possession of real property defendant set up a lease which plaintiff claimed to be void, *held*, that plaintiff could not recover even though the lease should be void, because it did not appear that the right of possession of defendant had been terminated by proper notice: *Lee v. Lee*, 83–565.

SEC. **2992. Landlord's lien.** A landlord shall have a lien for his rent upon all crops grown upon the leased premises, and upon any other personal property of the tenant which has been used or kept thereon during the term and not exempt from execution, for the period of one year after a year's rent, or the rent of a shorter period, falls due; but such lien shall not in any case continue more than six months after the expiration of the term. In the event that a stock of goods or merchandise, or a part thereof, subject to a landlord's lien, shall be sold under judicial process, order of court, or by an assignee under a general assignment for benefit of creditors, the lien of the landlord shall not be enforcable against said stock or portion thereof, except for rent due for the term already expired, and for rent to be paid for the use of demised premises for a period not exceeding six months after date of sale, any agreement of the parties to the contrary notwithstanding. [C. '73, § 2017; R., § 2302; C. '51, § 1270.]

Rent is a certain profit either in money, provision, chattels or labor issuing out of lands and tenements in retribution or return for their use, and a lease is a contract by which one person divests himself of and another takes the possession of, lands or chattels for a term, whether long or short. Therefore, *held*, that an agreement for the exclusive right to mine coal under certain land for a fixed term including the use of a portion of the surface of the land and the right to prosecute mining operations under the surface in consideration of the payment of a certain royalty per ton of the coal mined, not to fall below a fixed amount per year, created the relation of landlord and tenant under which the owner of the land had a landlord's lien: *Lacey v. Newcomb*, 63 N. W., 704.

Possession: The same virtue exists under statutory liens in which the possession does not pass as under common-law liens accompanied by possession: *Grant v. Whitewell*, 9–152.

To what property applicable: The provisions as to landlords' liens apply to leases of town property as well as to those of agricultural land: *Ibid.*

Lien covers what: The phrase "used on the premises" is only intended to imply such use as is incident to the nature and purpose of the occupation of the premises and the object of the tenancy: *Ibid.*

Therefore, *held*, that the lien attached to cloths and goods of a merchant tailor, used for the purpose of selling and making up into garments for customers: *Ibid.*

A landlord has no lien upon property of third persons, although it may have been used by the tenant upon the premises during the term of the lease. So *held* as to household property belonging to the wife used in a hotel leased by her husband: *Perry v. Waggoner*, 68–403.

A lien attaches to all crops grown upon the demised premises, whether grown by the tenant or by others claiming under him: *Houghton v. Bauer*, 70–314.

Subtenants having knowledge that their lessor is a tenant are chargeable with knowledge of the terms by which he holds the premises and are bound by them; and where the original lease gave to the landlord a lien upon crops grown upon the premises for rent at any time remaining unpaid, *held*, that such lien attached to crops grown by the subtenant: *Foster v. Reid*, 78–205.

Where a grocer used horses and wagons in connection with his business, but did not keep them on the premises leased for a grocery, *held*, that the landlord owning such premises did not have a lien upon such horses and wagons: *Van Patten v. Leonard*, 55–520.

The landlord does not, under the statute, acquire a lien upon notes, drafts, accounts, etc., kept upon the leased premises: *Ibid.*

The rolling stock of a railway is not subject to a landlord's lien under a lease of terminal facilities for the railroad using such rolling stock: *Trust Co. v. Manhattan Trust Co.*, 77 Fed., 82.

The purpose of the statute is to give the landlord a lien upon crops grown by his tenant upon his premises and upon all other personal property of the tenant not exempt from execution, to the maintenance or improvement of which the use of his premises has contributed, as well as upon the work, animals, tools and machinery with which the premises, when farm lands, have been cultivated. If the sale of stock is not incident to the business for which the premises were leased the lien does not attach to stock thus kept for sale; nor would the lien attach to stock thus kept for sale, if that was the business to which the premises were put, if no action to enforce the lien was brought before the sale: *Thompson v. Anderson*, 86–703.

In a particular case, *held*, that stock covered by landlord's lien was not kept on the leased premises for sale only, in such sense that the lien would not be effectual against the purchaser thereof: *Thompson v. Anderson*, 63 N. W., 355.

While the wife may be liable for the rent of premises leased to the husband, on the ground that such rent constitutes a family expense, her property cannot be taken under a landlord's attachment by virtue of such lease for rent not yet accrued: *Shurz v. McMenamy*, 82–432.

Priority: A creditor of the tenant cannot, by levy on a growing crop, acquire priority over the landlord's lien for rent: *Atkins v. Womeldorf*, 53–150.

Where the rent is payable in a share of the crops the landlord has a lien for such share, and when the tenant is to gather such share and does not, the landlord has a lien, also, for the value of the labor necessary to gather the same: *Secrest v. Stivers*, 35–580.

While the right of property in growing crops planted on the shares is, as between landlord and tenant, in the tenant until division is made, yet a creditor of the tenant cannot seize upon the whole crop to the exclusion of the landlord's lien for rent: *Atkins v. Womeldorf*, 53–150.

The lien of the landlord is inferior to that of a recorded mortgage of personal property executed before such property is brought or used upon the leased premises, even when the mortgagee took his mortgage with notice that the property was to be so used: *Jarchow v. Pickens*, 51–381; *Rand v. Barrett*, 66–731.

Where, at the time of the acquisition by the tenant of title to chattel property used by him upon the leased premises, the landlord had notice of a mortgage thereon, *held*, that his lien for rents was inferior to the lien of the mortgage: *Perry v. Waggoner*, 68–403.

Where a chattel mortgage was executed by the tenant during the term of the lease, and afterwards, before the expirtion of the term, a new lease was executed covering the remainder of the term and an additional period, *held*, that for rent accruing during the unexpired term of the old lease, the landlord's lien remained paramount to the chattel mortgage: *Rollins v. Proctor*, 56–326.

A landlord cannot claim a lien prior to that of a mortgage, where he did not at the time of the execution of the mortgage have a subsisting contract by virtue of which the rent claimed was to accrue: *Thorpe v. Fowler*, 57-541.

The fact that the landlord consents to the substitution as lessee of a party who has been guarantor of a note of the first lessee, secured by chattel mortgage on the property prior to the landlord's lien, such mortgage appearing to be canceled but being in fact the property of the guarantor who has paid it, will not entitle him to priority over such mortgage: *Rand v. Barrett*, 66-731.

If at the time when the use of the property on the leased premises begins it is subject to a mortgage lien, such mortgage is not displaced by, or subordinated to, the lien of the landlord: *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 68 Fed., 72.

Even though the landlord has a contract lien under the lease he may still have a statutory lien which is not merged therein: *Smith v. Dayton*, 62 N.W., 650.

A landlord cannot, by collusion with the tenant and antedating the lease, render his lien prior to that of a deed of trust previously executed upon the tenant's property: *Grey v. Hudson*, 5-554.

A provision in a lease creating a lien on property exempt from execution is in its nature and effect a mortgage and not a mere waiver of the right to claim an exemption, and, as a mortgage, such lease must be recorded, in order to be valid against existing creditors or subsequent purchasers without notice: *Sioux Valley State Bank v. Honnold*, 85-352.

Following property into hands of purchaser: A lien exists upon crops raised by the tenant, and such crops may be followed by the landlord into the hands of the purchaser: *Holden v. Cox*, 60-449.

The lien of the landlord can be enforced against a purchaser from the tenant of property which in the ordinary course of business of the tenant is kept for use and not for sale, such as the team of horses used in cultivating a farm: *Richardson v. Petersen*, 58-724.

Where it appeared that the property of the tenant was purchased from him at a time when he was not in arrears for rent, and when he was not, in fact, upon the premises, although he had been there before, and there was no evidence of fraudulent purpose or knowledge on the part of the purchaser, who paid a consideration, *held*, that he took the property free from the landlord's lien: *Nesbitt v. Bartlett*, 14-485.

In case of a stock of goods kept for sale the lien is upon the stock *en masse* and not in detail, and does not attach to such goods as are sold in the ordinary course of business: *Grant v. Whitwell*, 9-152; *Gilbert v. Greenbaum*, 56-211.

Where the landlord knows that grain raised on the premises and covered by his lien is being sold to an innocent purchaser and makes no objection, he will be estopped from asserting his lien as against such purchaser: *Wright v. Dickey Co.*, 83-464.

One who, with knowledge of the fact buys from the tenant corn produced upon the leased premises, such corn having been sold by the tenant without the knowledge of the landlord, is liable to the landlord for the value of such corn to the extent of the landlord's lien thereon: *Evans v. Collins*, 62 N.W., 810.

One who purchases from the tenant crops grown on the premises is liable to the landlord for conversion thereof in disregard of the landlord's lien, unless it appears that the lien was waived or the landlord is estopped from asserting his lien against such purchaser: *Blake v. Counselman*, 63 N.W., 679.

The fact that grain which is subject to the landlord's lien is sold in separate wagon loads does not extinguish the lien as to the purchaser. The case is not analogous to that of a merchant who sells separate articles from his stock of goods: *Frorer v. Hammer*, 68 N.W., 564.

Where the landlord sues a third party who has purchased from the tenant grain grown upon the leased premises for conversion thereof in violation of the landlord's lien, the defendant is not exonerated in showing that in a previous suit by the landlord against the tenant for rent such purchaser was garnished and exonerated himself from liability as garnishee by turning over the property of the tenant in his hands. The liability of such purchaser to the landlord is not measured by his liability to the tenant: *Kramer v. Adams*, 63 N.W., 180.

The sale or transfer of property which is subject to a lien will not affect the lien: *Neeb v. McMillan*, 68 N. W., 438.

When the lien attaches: The lien of the landlord is a security existing beforehand for the payment of the rent as it comes due. It attaches at the commencement of the lease or when the property is brought on the demised premises, and not simply on the commencement of an action or on maturity of the rent: *Grant v. Whitwell*, 9-152; *Carpenter v. Gillespie*, 10-592; *Doane v. Garretson*, 24-351; *Gilbert v. Greenbaum*, 56-211.

For entire term: Under the statute the landlord acquires a lien for the rent of the entire term from the commencement of the lease upon all the property of the tenant then upon the premises, and upon all other property of his afterwards brought thereon, commencing as soon as it is brought: *Martin v. Stearns*, 52-345.

The lien of a landlord attaches to the property of a tenant used upon the premises for the rent of the entire term: *Gilbert v. Greenbaum*, 56-211.

However, the landlord can only enforce his lien for rent due: *Merritt v. Fisher*, 19-354.

Continuance of lien: While the claim for rent is held by the landlord, and within the term of one year after it falls due, the lien is in force for his benefit: *Farwell v. Grier*, 38-83.

Assignment of lien: The assignment of a lease carries with it the lien of the landlord, and all the remedies for its enforcement: *Haywood v. O'Brien*, 52-537: *Lufkin v. Preston*, 52-235.

Waiver of lien: The taking of personal security merely raises the presumption of a

waiver of the landlord's lien, which may be rebutted by evidence that the landlord still relied upon the lien as security and did not intend to waive it: *Rollins v. Proctor*, 56–326.

A landlord's lien is not waived or forfeited by taking security which is such that it cannot be enforced against third parties, it appearing that such lien was not relied upon: *Pitkin v. Fletcher*, 47–53.

Negotiation of a note which is given for rent does not prevent the landlord (payee), who is afterward compelled to take up the note as indorser, from enforcing his lien for the rent for which the note was given: *Farwell v. Grier*, 38–83. And see *German Bank v. Schloth*, 59–316, 323.

If the landlord proceeds under the general attachment law for rent not due, he will be confined to the remedy there given, and cannot claim the benefit of his landlord's lien: *Clark v. Haynes*, 57–96.

Where the landlord agreed with the tenant that the latter should sell stock, grain and other property on which the landlord had a lien, the proceeds to be paid to the landlord in extinguishment of his claim for rent, *held*, that the purchasers of such property were not subject to garnishment for the price thereof at the suit of the creditor: *Bergman v. Guthrie*, 89–290.

Where the landlord has liens on property of the tenant still remaining upon the premises and other property of the tenant which has been sold and removed, he cannot release his lien on the property still belonging to the tenant and remaining on the premises without thereby releasing the property which has been sold. The purchaser of the portion sold has the right to have the balance of the property first subjected to the payment of the landlord's claim: *John V. Farwell Co. v. Stick*, 65 N. W., 565.

The landlord has a right to file his claim against a tenant under an assignment for the benefit of creditors without enforcing it against the property subject to his lien, and such filing will stop the running of the statute as against the enforcement of the lien. The filing of the claim will not waive any right which the landlord may have to have it established as a prior lien: *Lacey v. Newcomb*, 63 N. W., 704.

One who becomes a surety upon a lease is released from his obligation by neglect of the landlord to enforce his lien: *Mingus v. Daugherty*, 87–56.

The lien and remedy for its enforcement are purely statutory and are to be strictly construed, and if the claim of the landlord is not for rent only but he has by his contract with his tenant become entitled to payment of mone yother than for rent, and by the contract the compensation due for rent is so blended with that due on other grounds that it is impossible to say what part of the sum due the landlord is for rent and what is due on other account, the landlord's lien will be deemed waived: *Smith v. Dayton*, 62 N. W., 650; *Crill v. Jeffrey*, 64 N. W., 625.

While the taking of a mortgage may perhaps not alone be conclusive as a waiver of the landlord's lien, at least that fact is corroborative of other facts tending to show waiver: *Smith v. Dayton*, 62 N. W., 650.

Remedy for enforcement: The landlord may have an injunction to restrain the tenant from any wrongful or fraudulent acts tending to destroy his security, as by removing or disposing of property on the demised premises: *Garner v. Cutting*, 32–547.

But the fact that the landlord has a lien upon a stock of goods does not necessarily give him the right to have the goods held until the end of the term of the lease, or sold only in the course of retail trade. A court of equity has jurisdiction to make such order with reference to the disposal of the goods as will protect the plaintiff's right and at the same time do no injustice to other parties interested; and where such goods were the property of a partnership in the hands of a surviving partner who was proceeding to wind up the business, he himself being amply responsible, *held*, that an injunction to restrain the sale of the stock otherwise than in the usual course of trade should not be allowed: *Milner v. Cooper*, 65–190.

The right of the landlord to an injunction to prevent the removal of property to the diminution of his lien, *held* not to be applicable to a case where the property consisted of machinery of a water-works company which was about to be removed to other premises, and would still remain subject to proceedings by the landlord to enforce his lien when the rent for which the lien was claimed should fall due: *Carson v. Electric Light & Power Co.*, 85–44.

A landlord cannot have an injunction against the tenant to prevent disposal of property to secure rent already due, he having already a right under such circumstances to an attachment: *Rotzler v. Rotzler*, 46–189.

The landlord may maintain an action at law for the wrongful conversion of property on which he has a lien for the security of his rent: *Scallan v. Wait*, 64–705.

The landlord may set up a claim to property under his lien in a replevin suit therefor, brought by a third party against the tenant: *Edwards v. Cottrell*, 43–194.

Where the claim for a landlord's lien was set up in the answer to a replevin suit within six months after the termination of the lease, *held*, that this constituted an assertion of such lien within the proper time: *Ibid.*

Failure to bring an action within six months after the expiration of the term against a person who has bought from a tenant property subject to the lien will defeat any such action: *Nickelson v. Negley*, 71–546.

Where a landlord by his own action terminates a lease he has six months within which to bring an action to enforce his lien: *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 68 Fed., 72.

As to the remedy by attachment, see notes to the next section.

SEC. **2993. Attachment.** The lien may be effected by the commencement of an action, within the period above prescribed, for the rent alone, in which action the landlord will be entitled to a writ of attachment, upon filing

with the clerk or justice a verified petition, stating that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the petition; and the procedure thereunder shall be the same, as nearly as may be, as in other cases of attachment, except no bond shall be required. If a lien for rent is given in a written lease or other instrument upon additional property, it may be enforced in the same manner and in the same action. [C.'73, § 2018; R., § 2303; C.'51, § 1271.]

The remedy by attachment is strictly statutory and takes the place of the common-law right of distress. It only applies to real property, and cannot be used to enforce a claim for damages for failure to till, for breach of covenants, etc.: *Merritt v. Fisher*, 19–354.

A landlord's lien may be enforced by attachment against all property subject thereto, whether belonging to the tenant or others: *Houghton v. Bauer*, 70–314.

The word "effected," as used in this section must be regarded as the same as "enforced:" *Nickelson v. Negley*, 71–546.

The landlord may bring his action for rent and have his lien established without asking or having an attachment: *Bartlett v. Gaines*, 11–95.

Where it appears that nothing was due at the time of suing out the landlord's attachment, the party whose property is seized is entitled to recover the damages sustained: *Harger v. Spofford*, 46–11.

A landlord's attachment against a tenant will not give the court jurisdiction against the property of an assignee of such tenant not made party to the suit: *Wells v. Seguin*, 14–143.

If within the period of one year the landlord's claim is filed under an assignment for the benefit of creditors made by the tenant, such filing is "the commencement of an action within the period" prescribed by law and prevents the claim becoming barred: *Lacey v. Newcomb*, 63 N.W.,704.

The action for malicious prosecution in wrongfully suing out a landlord's attachment is not contemporaneous with the commencement of the action in which the attachment is sought and cannot be interposed as a counter-claim in such action: *Youngerman v. Long*, 63 N. W., 674.

Nor will the fact that plaintiff subsequently amends his petition so as to seek the foreclosure in equity of his landlord's lien render such counter-claim available in the subsequent progress of such action: *Ibid.*

CHAPTER 10.

OF WALLS IN COMMON.

SECTION **2994. Resting wall on neighbor's land.** Where building lots have been surveyed and plats thereof recorded, any one who is about to build contiguous to the land of another may, if there be no wall on the line between them, build a brick or stone wall thereon, when the whole thickness of such wall above the cellar wall does not exceed eighteen inches exclusive of the plastering, and rest one-half thereof on the adjoining land, but the adjoining owner shall not be compelled to contribute to the expense of building said wall. [C.'73, § 2019; R , § 1914.]

The provisions of this chapter give to the owner, building upon his own land, an easement upon the land of his neighbor for the purpose of resting one-half his wall thereon, and give to the other party an easement in the wall upon paying one-half its value, but until such payment by the latter the original builder is the owner of the entire wall. The party building and owning the wall cannot so deal with it as to diminish its capacity for serving as a wall in common without the consent of his neighbor upon whose land it partly rests, and he cannot, therefore, make openings in it: *Sullivan v. Graffort*, 35–531.

The resting of one-half of a party wall upon a vacant lot does not constitute an incumbrance thereon. In such a case it will be presumed that the wall belongs to the party building and using it, but when the owner of such lot builds thereon and makes use of the wall it will be presumed on conveyance that he has paid for his share thereof: *Bertram v. Curtis*, 31–46.

Where the owner of a lot on which a party wall is partially rested by an adjoining owner, who makes use of such wall without making payment therefor, afterwards conveys to a grantee who has knowledge that the amount due by the grantor for such wall has not been paid, such grantee will be liable for the payment of the amount: *Pew v. Buchanan*, 72–637.

The right to the one-half of the wall which stands on the neighboring lot, when the owner thereof has not contributed to its erection or paid for it, is a right not per-

sonal with the builder, but passes by a conveyance of the lot on which the building is erected, and such grantee, and not the original builder, may maintain action for the value of a half interest in the wall against the owner of the adjoining lot, who subsequently makes use thereof: *Thomson v. Curtis*, 28–229.

A pilaster may constitute a portion of a party wall: *Molony v. Dixon*, 65–136.

It is probable that a party who has erected a party wall may prevent an adjoining owner from making use of such wall until payment for one-half the value is made; but if such use is permitted without payment and without objection, and the adjoining owner recognizes the rights of the proprietor of the wall by paying for the use thereof, the statute of limitation against an action to recover does not commence to run until the owner's rights are denied: *Crapo v. Cameron*, 61–447.

A party building a wall is not bound to build it stronger than sufficient to support another building like his own: *Gilbert v. Woodruff*, 40–320.

The provision authorizing the construction of party walls was evidently intended to apply to the party who desires to erect a building on the lot adjoining a lot which is vacant, so that when a building shall be erected on the vacant lot the wall may be used in common. And it does not authorize the erection of such a wall where, if erected, it will destroy a stairway or other improvement on the adjoining land: *Cornell v. Bickley*, 85–219.

An agreement by which a cellar wall may be erected on the line, *held* not to imply the right to carry the wall of the building above the ground so as to destroy a stairway already existing in the adjoining building: *Ibid.*

A wall may be made a wall in common by the adjoining owner contributing one-half of the expense of building the wall at the time, or paying one-half of the appraised value afterward. The mere incidental benefit or protection afforded by the wall of one proprietor to the wall of his adjoining proprietor, by reason of which the latter is preserved and may be constructed of inferior material, is not such use as to make a wall in common: *Sheldon Bank v. Royce*, 84–288.

While a most important use of party walls is to give support to the buildings to which it is common and to bear the weight of floors and roof, this is not the only use, and where the roof and sides of an adjoining building were attached to a party wall which constituted one side of such adjoining building, thereby affording protection to the property in the building, *held*, that it was a party wall for which the adjoining owner who made such use of it was under obligation to make payment: *Deere v. Weir-Shugart Co.*, 91–422.

If the use to which the adjoining proprietor has put the wall is of so slight and temporary a character that it cannot reasonably and inferentially be said he intended to appropriate or to utilize the wall permanently, he should not be charged with the burden imposed by the statute: *Beggs v. Duling*, 70 N. W., 732.

The use of a portion of the wall will not justify the taxing to the abutting proprietor one-half the value of the entire wall. In such a case a cause of action for one-half the value of the entire wall will not be deemed to have accrued at the time the partial use begins and a purchaser of the adjoining premises after such partial use will not thereby be relieved from liability for an additional use: *Ibid.*

Plaintiffs built a wall upon the dividing line between the lot owned by them and the one owned by the defendant, with the knowledge and consent of the defendant, and with the promise on his part to pay one-half the cost thereof as soon as he should use it. *Held*, that without reference to the party wall statute, plaintiff was a licensee, and having rested half his wall on the defendant's land, under an express promise by defendant to pay therefor when he should use it, there is no reason why recovery cannot be had upon the promise: *Swift v. Calnan*, 71 N. W., 233.

These provisions as to party walls are constitutional: *Ibid.*

The party building the wall is not entitled to a mechanic's lien on the adjoining property for the value of one-half the wall: *Ibid.*

The right to build a wall in common is limited to one who is about to build. It is not enough that one "intends" to build: *Switzer v. Davis*, 66 N. W., 174.

These provisions as to party walls are probably but declaratory of the common law: *Zugenbuhler v. Gilliam*, 3–391.

This chapter as to walls in common is taken from the civil code of Louisiana: See note to *Bertram v. Curtis*, 31–46.

SEC. **2995. Contribution by adjoining owner.** If the adjoining owner contributes one-half of the expense of building such wall, then it is a wall in common between them, but if he refuses to contribute, he shall have the right to make it a wall in common by paying to the person who erected or maintained it one-half of its appraised value at the time of using it. [C.'73, § 2020; R., § 1915.]

SEC. **2996. Openings—presumption.** No wall shall be built by any person partly on the land of another with any openings therein, and every separating wall between buildings shall, as high as the upper part of the first story, be presumed to be a wall in common, if there be no titles, proof or mark to the contrary, and if any wall is erected which, under the provisions of this chapter, becomes, or may become, at the option of another,

a wall in common, such person shall not be compelled to contribute to the expense of closing any openings therein, but this shall be done at the expense of the owner of such wall. [C.'73, § 2021; R., § 1916.]

SEC. **2997. Repairs—expense apportioned.** The repairs and rebuilding of walls in common are to be made at the expense of all who have a right to them, and in proportion to the interest of each therein, but every co-proprietor of a wall in common may be exonerated from contributing to the same by giving up his right in common, if no building belonging to him is actually supported by such wall. [C.'73, § 2022; R., § 1917.]

SEC. **2998. Beams, joists and flues.** Every co-proprietor may build against a wall held in common, and cause beams or joists to be placed therein; and any person building such a wall shall, on being requested by his co-proprietor, make the necessary flues, and leave the necessary bearings for joists or beams, at such height and distance apart as shall be specified by his co-proprietor. [C.'73, § 2023; R., § 1918.]

This section indicates that to use a wall in common is to make it in some way a part of the building for which it is used, and not simply a protection to an adjoining wall: *Sheldon Bank v. Royce*, 84–288.

SEC. **2999. Height of wall—rebuilding.** Every co-proprietor may increase the height of a wall in common at his sole expense, and he shall repair and keep in repair that part of the same above the part held in common. If the wall so held in common cannot support the wall to be raised upon it, one who wishes to have it made higher must rebuild it anew and at his own expense, and the additional thickness of the wall must be placed entirely on his own land. The person who did not contribute to the heightening of a wall held in common may cause the raised part to become common by paying one-half of the appraised value of raising it, and half the value of the ground occupied by the additional thickness thereof, if any ground was so occupied. [C.'73, §§ 2024–6; R., §§ 1919–21.]

SEC. **3000. Paying for share of adjoining wall.** Every proprietor joining a wall has the right of making it a wall in common, in whole or in part, by repaying to the owner thereof one-half of its value, or one-half of the part which he wishes to hold in common, and one-half of the value of the ground on which it is built, if the person who has built it has laid the foundation entirely upon his own ground. [C.'73, § 2027; R., § 1922.]

Where the owner of one lot uses as a party wall one built upon the adjoining lot by the owner thereof, he may be required to contribute to the expense of its construction although the wall may not be upon nor adjoining the division line. The agreement that the wall should be used as a party wall may be implied by the conduct and acts of the parties: *Molony v. Dixon*, 65–136.

If the party building into and using the wall already erected offers to pay one-half the expense, and the parties are unable to agree, then appraisers may be appointed to ascertain the cost of one-half of the wall, and the cost thus ascertained may be tendered, and thereupon persons making the tender will be authorized to use the wall: *Ibid.*

But where the wall has already been used, an action may be brought against the person thus using it for one-half the cost thereof, and no appraisement is necessary: *Ibid.*

A contract in a particular case with reference to a wall in common, considered, and *held* not to be designed as a substitute for the statute, but to be in harmony therewith: *Freeman v. Herwig*, 84–435.

A person building a wall on the line, having extended his cornice across the entire front of the wall, *held*, that the adjoining owner, on becoming entitled to one-half of the wall, might cut the cornice off at the dividing line: *Ibid.*

SEC. **3001. Openings—fixtures.** Adjoining owners of walls held in common shall not make openings or cavities therein, nor affix nor attach thereto any work or structure, without the consent of the other, or upon his refusal, without having taken all necessary precautions to guard against injury to the rights of the other, to be ascertained by persons skilled in building. [C.'73, § 2028; R., § 1923.]

SEC. **3002. Disputes—delay—bonds.** No dispute between adjoining owners as to the amount to be paid by one or the other, by reason of any of the matters provided in this chapter, shall delay the execution of the pro-

visions of the same, if the party on whom the claim is made shall enter into bonds, with security, to the satisfaction of the clerk of the district court of the proper county, conditioned that he shall pay to the claimant whatever may be found to be his due on the settlement of the matter between them, either in a court of justice or elsewhere; upon the presentation of such a bond, the clerk shall indorse his approval thereon, and retain the same until demanded by the party for whose benefit it is executed. [C.'73, § 2029; R., § 1924.]

SEC. **3003. Agreements.** This chapter shall not prevent adjoining proprietors from entering into special agreements about walls on the lines between them, but no evidence thereof shall be competent unless in writing, signed by the parties thereto or their lawfully authorized agents, or the guardian of either, if a minor, who shall have full authority to act for his ward in all matters relating to walls in common without an order of court therefor. [C.'73, § 2030; R., § 1925.]

A contract which is the same in fact as that which the law makes for the parties is not within the meaning of this section: *Wickersham v. Orr*, 9–253.

A contract the same in fact as that which the law makes for the parties is not void because in parol: *Swift v. Calnan*, 71 N.W., 233.

If an arrangement between the parties with reference to the wall is not such as the law in the absence of such agreement would have made, it is special, and is within the rule of this section: *Price v. Lien*, 84–590.

An adjoining lot owner is not, by the contract which the law makes for him, required to join in the construction of such a wall: *Ibid.*

Part performance as contemplated in § 4626 will not validate a parol agreement which would not be valid under the provisions of this section. A special agreement in regard to a party wall cannot be deemed a contract for the creation of an interest in land under that section: *Ibid.*

It is the legislative intent that agreements as to walls in common shall be those arising by the operation of the statute, in the absence of those written and signed by the parties: *Ibid.*

It would seem that under this section parole evidence of an agreement as to a wall in common is not admissible: *Marcus v. Dohany*, 89–658.

Section applied: *Crapo v. Cameron*, 61–447.

CHAPTER 11.

OF EASEMENTS IN REAL ESTATE.

SECTION **3004. Adverse possession—use.** In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims. [C.'73, § 2031.]

Use of a highway, following a dedication thereof, will be presumed to be under the dedication, and therefore adverse: *Gerberling v. Wunnenberg*, 51–125.

It is not sufficient, in order to prove a highway by prescription, to establish use alone. The fact of adverse possession must be shown by evidence distinct from and independent of the use, and it must be shown that the person against whom the claim is made had express notice thereof: *Zigefoose v. Zigefoose*, 69-391; *State v. Mitchell*, 58–567.

The statutory provision that use shall not be admitted as evidence of adverse possession does not apply to highways existing by prescription before the statute took effect: *Baldwin v. Herbst*, 54–168.

An instruction as to the amount of use necessary to establish prescription and dedication, to the effect that no particular amount of travel would be necessary, and that the use would be sufficient if the highway was traveled as much or about as much as it would have been had it been laid out according to statute, and traveled as much as the circumstances of the surrounding population and their business required, *held* correct: *Ibid.*

The effect of this section is to require proof that the use of the real estate by the party claiming an easement was adverse and under a claim of right, and it provides that the use itself is not competent evidence of such fact: *State v. Birmingham*, 74–408.

Where a dedication of a highway is claimed to have been made by the owner of the land over which it passes, proof of use may be considered competent to show an acceptance, and such proof is admissible although the use has not extended to ten years, in connection with other facts such as the conduct of the land owner tending to show dedication: *Ibid.*

To establish a highway by prescription under this section the fact of adverse possession must be established by evidence distinct from and independent of the use, and by evidence that the party against whom the claim of adverse user and possession is made had express notice of such user and claim of possession. It is not enough to show mere use even though the owner had actual knowledge thereof: *Gray v. Haas*, 67 N. W., 394.

Proof of use may show dedication as well as prescription, and where both were claimed as showing a highway, *held*, that evidence of the use was proper: *Duncombe v. Powers*, 75–185.

Where plaintiff turned water from his land so that it flowed upon the land of the defendant to his injury, *held*, that plaintiff had acquired no right to the flow of water, as changed, by prescription, although the stream was diverted more than ten years before the action was commenced, in the absence of evidence that defendant had express notice, other than the mere use, that plaintiff's claim was adverse: *Preston v. Hull*, 77–309.

This section is applicable to a claim of a prescriptive right to continue a nuisance based on the fact of the continuance of such nuisance for more than five years and such prescriptive right will not be established by adverse possession or use alone: *Churchill v. Burlington Water Co.*, 62 N. W., 646.

This and the four following sections are taken from a statute in force in Massachusetts and Rhode Island: *Code Com'rs' Rep.* of '73.

SEC. **3005. Light and air.** Whoever has erected, or may erect, any house or other building near the land of another person, with windows overlooking such land, shall not, by the mere continuance of such windows, acquire any easement of light or air, so as to prevent the erection of any building on such land. [C.'73, § 2032.]

SEC. **3006. Footway.** No right of footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time. [C.'73, § 2033.]

An adverse possession which had ripened into a perfect easement before the adoption of this provision, *held* not to be affected thereby: *Agne v. Seitsinger*, 64 N. W., 836.

SEC. **3007. Use terminated by notice.** When any person is in the use of a way, privilege or other easement in the land of another, the owner of the land in such case may give notice in writing to the person claiming or using the way, privilege or easement of his intention to dispute any right arising from such claim or use, which notice, when served and recorded as hereinafter provided, shall be an interruption of such use, and prevent the acquiring of any right thereto by the continuance thereof; which notice, signed by the owner of the land, his agent or guardian, may be served in the same manner as in a civil action, upon the party, his agent or guardian, if within this state, otherwise on the tenant or occupant, if there be any, and it, with the return thereof, shall be recorded within three months thereafter in the recorder's office of the county in which the land is situated; and a certified copy of such record of said notice and the officer's return thereon shall be evidence of the notice and the service thereof. [C.'73, § 2034.]

SEC. **3008. Effect of.** When notice is given to prevent the acquisition of a right to a way or other easement, it shall be considered so far a disturbance thereof as to enable the party claiming to bring an action for disturbing the same in order to try such right, and if the plaintiff in the action prevails, he shall recover costs. [C.'73, § 2035.]

TITLE XV.

OF TRADE AND COMMERCE.

CHAPTER 1.

OF WEIGHTS, MEASURES AND INSPECTION.

SECTION **3009. Standard.** The standard weights and measures now in charge of the secretary of state, furnished by the government of the United States, shall be the standard of weights and measures throughout the state. [C.'73, § 2037.]

SEC. **3010. Length and surface.** The unit or standard measure of length and surface, from which all other measures of extension, whether they be lineal, superficial or solid, shall be derived and ascertained, shall be the standard yard now in possession of the secretary of state, furnished by the government of the United States. It shall be divided into three equal parts called feet, and each foot into twelve equal parts called inches, and for the measure of cloths and other commodities commonly sold by the yard, it may be divided into halves, quarters, eighths and sixteenths. The rod, pole or perch shall contain five and a half such yards, and the mile, one thousand seven hundred and sixty such yards. [C.'73, §§ 2038–9.]

SEC. **3011. Land measure.** The acre for land measure shall be measured horizontally and contain ten square chains, and be equivalent in area to a rectangle sixteen rods in length and ten in breadth, six hundred and forty such acres being contained in a square mile. The chain for measuring land shall be twenty-two yards long, and be divided into one hundred equal parts, called links. [C.'73, §§ 2040–1.]

SEC. **3012. Weight.** The units or standards of weight, from which all other weights shall be derived and ascertained, shall be the standard avoirdupois and troy weights, as furnished this state by the United States. The avoirdupois pound, which bears to the troy pound the ratio of seven thousand to five thousand seven hundred and sixty, shall be divided into sixteen equal parts called ounces; the hundred weight shall consist of one hundred avoirdupois pounds, and twenty hundred weight shall constitute a ton. The troy ounce shall be equal to the twelfth part of a troy pound. [C.'73, §§ 2042–3.]

SEC. **3013. Liquids.** The unit or standard measure of capacity for liquids, from which all other measures of liquids shall be derived and ascertained, shall be the standard gallon and its parts, as furnished this state by the government of the United States. The inch or gauge of cream shall be one-half of a standard gallon. The barrel shall be thirty-one and a half gallons, and two barrels shall constitute a hogshead. [21 G. A., ch. 50; C. '73, §§ 2044–5.]

SEC. **3014. Substances not liquids.** The unit or standard measure of capacity for substances not liquids, from which all other measures of such substances shall be derived and ascertained, shall be the standard half-bushel, furnished this state by the United States, and the peck, half-peck, quarter-peck, quart and pint measures, for measuring commodities not liquids, shall be derived from the half-bushel by successively dividing that measure by two. [C.'73, §§ 2046–7.]

SEC. **3015. Contracts—construction.** All contracts hereafter made within this state for work to be done, or for anything to be sold or delivered, by weight or measure, shall be taken and construed according to the standards of weight and measure hereby adopted as the standard of this state. [C.'73, § 2048.]

Where a written contract for masonry work stipulated that it should be done at a certain price "per perch," *held*, that it was not proper to show a custom that a perch should be reckoned at sixteen and one-half cubic feet: *Harris v. Rutledge*, 19–388.

SEC. **3016. Bushel by weight.** A bushel of the respective articles hereafter mentioned will mean the amount of weight in this section specified:

Wheat ..... sixty pounds;
Shelled corn ..... fifty-six pounds;
Corn in the cob ..... seventy pounds;
Rye ..... fifty-six pounds;
Oats ..... thirty-two pounds;
Barley ..... forty-eight pounds;
Potatoes ..... sixty pounds;
Beans ..... sixty pounds;
Bran ..... twenty pounds;
Clover seed ..... sixty pounds;
Timothy seed ..... forty-five pounds;
Flax seed ..... fifty-six pounds;
Hemp seed ..... forty-four pounds;
Buckwheat ..... fifty-two pounds;
Blue grass seed ..... fourteen pounds;
Castor beans ..... forty-six pounds;
Dried peaches ..... thirty-three pounds;
Dried apples ..... twenty-four pounds;
Onions ..... fifty-seven pounds;
Salt ..... fifty pounds;
Stone coal ..... eighty pounds;
Charcoal ..... twenty pounds;
Coke ..... thirty-eight pounds;
Sweet potatoes ..... forty-six pounds;
Lime ..... eighty pounds;
Sand ..... one hundred and thirty pounds;
Hungarian grass seed ..... forty-eight pounds;
Millet seed ..... forty-eight pounds;
Osage orange seed ..... thirty-two pounds;
Sorghum saccharatum seed ..... thirty pounds;
Broom corn seed ..... thirty pounds;
Apples, peaches or quinces ..... forty-eight pounds;
Cherries, grapes, currants or gooseberries ..... forty pounds;
Strawberries, raspberries or blackberries ..... thirty-two pounds.

[18 G. A., ch. 21; 17 G. A., ch. 42; 16 G. A., chs. 52, 89; C.'73, § 2049; R., §§ 1778, 1781–4; C.'51, § 940.]

SEC. **3017. Mason work or stone.** The perch of mason work or stone consists of twenty-five feet cubic measure. [C.'73, § 2050; R., § 1777; C.'51, § 939.]

Aside from statute the amount of a perch is quite uncertain. The express provisions of the statute as to quantity control local custom: *Harris v. Rutledge*, 19–388.

SEC. **3018. Hop boxes.** The standard size for all boxes used in packing hops shall be thirty-six inches long, eighteen inches wide, and twenty-three and one-fourth inches deep, inside measurement. [C.'73, § 2051.]

SEC. **3019. Superintendent.** A superintendent of weights and measures for the state, who shall possess sufficient learning and mechanical skill to perform the duties of the office, shall be appointed by the governor from the board of professors of the university, who shall hold his office during the pleasure of the governor, and give a bond in the penal sum of five thousand dollars conditioned for the faithful discharge of his duties, which bond shall be filed with, and it with the sureties thereon approved by, the secretary of state. [C.'73, § 2052.]

SEC. **3020. Duties—original standards.** He shall have charge of the standards adopted, and keep them in the building furnished by the state,

from which they shall in no case be removed. He shall provide the several counties with such standards, balances, and other means of adjustment as may be ordered by them, and as often as once in ten years compare the same with those in his possession, and have a general supervision of the weights and measures of the state. He shall procure and keep for the state a complete set of copies of the original standard of weights and measures, which shall be used for adjusting the county standards, and in no case shall the original standards be used for any other purpose than the adjustment of this set of copies. He shall also procure such apparatus and fixtures as are necessary in the comparison and adjustment of county and town standards. He shall cause to be impressed upon all standards of weights and measures furnished by him the word "Iowa," and such other devices as he shall direct for the particular county, city or town, and the county sealers shall see that, in addition to the above device, there is impressed on the town and city standards such other device as the board of supervisors shall direct for them. [C.'73, §§ 2053–5.]

The state superintendent of weights and measures may testify as to the falsity of a particular weight although he has not made a comparison thereof with the standard weight in his custody. A witness who states that he knows whether the weight is false or not may testify as to that fact, his competency to give such testimony being open to investigation by cross-examination: *State v. Frolick*, 64 N. W., 264.

SEC. **3021. Delivery to successor.** When the superintendent shall resign, be removed from office, or remove from Iowa City, or when any city, county or town sealer shall resign, be removed from office, or remove from the county, city or town in which he shall have been appointed or elected, the person so resigning, removed or removing shall deliver to his successor in office all the standard beams, weights and measures in his possession. [C.'73, § 2056.]

SEC. **3022. Sealer—duties.** The board of supervisors of any county may, at any regular meeting, provide for obtaining from the state superintendent of weights and measures such standards of weights and measures as it may deem necessary for its county, and in case it orders such standards it shall appoint a county sealer of weights and measures, who shall hold his office during the pleasure of the board. The county sealer shall take charge of the county standards and standard balances, and provide for their safe keeping, and provide cities and towns with such standard weights and measures and standard balances as may be wanting, and compare them with those in his possession as often as once every five years. [C.'73, §§ 2057–8.]

SEC. **3023. Sealer for cities and towns.** A sealer of weights and measures may be appointed in any city or town by the council thereof, who shall hold his office during its pleasure, and it may obtain from the sealer of weights and measures of the proper county such standards of weights and measures as may be necessary; in case the board of supervisors of a county in which any city or town is situated has not obtained such standards, then its council may do so. Each sealer in cities and towns shall take charge of and provide for the safe keeping of the town or city standards, and see that the weights, measures, and all apparatus used for determining the quantity of commodities used throughout the town or city, which shall be brought to him for that purpose, agree with the standards in his possession. [C.'73, §§ 2059–60.]

SEC. **3024. Expenses.** All expenses directly incurred in furnishing the several counties, cities and towns with standards, or in comparing those that may be in their possession, shall be borne by them. [C.'73, § 2061.]

SEC. **3025. Delivery to successor—penalty.** In case of the death of any sealer of weights and measures, his representatives shall deliver to his successor in office such beams, weights and measures, and, in case of refusal or neglect to do so, the successor in office may maintain an action against the person so refusing or neglecting, and recover for the use of such county, city or town double the value thereof, and in every such action in which

judgment shall be rendered for the plaintiff he shall recover double costs. [C.'73, §§ 2062–3.]

SEC. **3026. Using false weights or measures—comparison.** If any person shall hereafter use any weights, measures, beams or other apparatus for determining quantity of commodities, which shall not be conformable to the standards of this state, in any counties whose standards have been obtained by the board of supervisors, or in any city or town after such standards have been obtained therein, whereby any person shall be injured or defrauded, he shall pay five dollars for each offense, to be collected by the county, city or town sealer, and shall be liable to the person defrauded in treble damages and costs. Every person keeping any store, grocery or other place for the sale or purchase of such commodities as are usually sold by weight or measure shall, once in each year, procure the weights and measures used by him to be compared with the standard herein provided, and be subject to a penalty of five dollars for every neglect to comply with this provision, to be recovered by any one who shall prosecute therefor. [C.'73, § 2064.]

SEC. **3027. Weighmasters of public scales.** All persons keeping public scales, before entering upon their duties as weighmasters, shall be sworn, before some person having authority to administer oaths, to keep their scales correctly balanced, to make true weights, and to render a correct account to the person having weighing done. Every scale shall be a public one for the use of which a charge is made. [C.'73, § 2065.]

SEC. **3028. Correct weights—standard for testing.** Weighmasters are required to make true weights and keep a correct register of all weighing done by them, giving the amount of each weight, date thereof, and the name of the person or persons for whom done, and give, upon demand, to any person having weighing done, a certificate, showing the weight, date, and for whom weighed. Weighmasters or keepers of public scales kept for the purpose of weighing stock or grain shall keep a standard of weight, not less than fifty pounds avoirdupois, for the purpose of testing such scales, and at least once a month, or oftener, if requested, make a satisfactory test of the correctness thereof. [C.'73, §§ 2066–7.]

SEC. **3029. Penalty.** Any weighmaster or keeper of public scales, violating any of the provisions of the two preceding sections, shall be guilty of a misdemeanor, and fined in any sum not over twenty nor less than five dollars for each offense, and be liable to the person injured for all damages sustained. [C.'73, § 2068.]

SEC. **3030. Inspection of shingles and lumber.** The board of supervisors of each county, as often as may be necessary, shall appoint one inspector of lumber and shingles, who shall have power to appoint one or more deputies, for whose conduct he shall be liable. [C. '73, § 2069; R., § 1906.]

SEC. **3031. Oath—bond.** Before any inspector or deputy shall enter upon the duties of his office, he shall take an oath or affirmation that he will faithfully and impartially perform the duties required of him by law, and each inspector shall give bond, with sureties to be approved by the county auditor, in such sum as the board of supervisors may require, payable to the state, which shall be deposited with the treasurer of the county, conditioned for the faithful and impartial performance of his duties; and any person who suffers injury by the incapacity, neglect or misconduct of such inspector or his deputy may recover damages therefor in an action on such bond, but such action shall be commenced within one year after the cause of action accrues. [C.'73, §§ 2070–1; R., §§ 1907–8.]

SEC. **3032. Duties—counterfeiting brand.** The inspectors or their deputies, within their respective counties, shall inspect all lumber, boards and shingles, when applied to for that purpose, and, when inspected, stamp on the same, with branding irons made for that purpose, the name of the state and county where inspected, and the kind and quality of the article inspected, which iron shall be made and lettered as directed by the board

of supervisors, and every inspector shall make, in a book kept for that purpose, distinct entries of all articles inspected by him or his deputies, with the names of the persons for whom said articles were inspected; and any person who shall counterfeit said brands or marks, or either of them, shall be guilty of forgery, and be punished accordingly. [C.'73, §§ 2072–3; R., §§ 1909, 1911.]

SEC. **3033. Size of shingles—qualities of lumber.** A shingle shall be sixteen inches in length, four inches wide, half an inch thick at the butt, clear of sap, designated as first and second quality, and each bundle branded with the quality and the name of the inspector. All lumber shall be divided into four qualities and designated as clear, first common, second common, and refusal. [C.'73, § 2074; R., § 1912.]

SEC. **3034. Compensation of superintendent.** The salary of the superintendent of weights and measures shall be fifty dollars per annum. [C.'73, § 3763.]

SEC. **3035. Compensation of sealer.** Each sealer of weights and measures shall receive the following fees:

1. For sealing and marking every beam, ten cents;
2. For sealing and marking measures of extension, at the rate of ten cents per yard, not to exceed fifty cents for any one measure;
3. For sealing and marking every weight, five cents;
4. For sealing and marking liquid and dry measures, five cents for each measure;
5. He shall also be entitled to a reasonable compensation for making weights and measures conform to the standards in his possession. [C.'73, § 3802.]

SEC. **3036. Compensation of inspector.** The inspector of lumber and shingles shall receive:

1. For inspecting and measuring lumber, for each thousand feet, board measure, fifteen cents;
2. For inspecting shingles, for each thousand, fifteen cents. [C.'73, § 3803; R., § 1913.]

CHAPTER 2.

OF MONEY OF ACCOUNT AND INTEREST.

SECTION **3037. How expressed.** The money of account of this state is the dollar, cent and mill, and all public accounts, and the proceedings of all courts in relation to money, shall be kept and expressed in the above denominations. Demands expressed in money of another denomination shall not be affected by the provisions of this section, but in any action or proceeding based thereon it shall be reduced to and computed by the denominations given. [C.'73, §§ 2075–6; R., §§ 1785–6; C.'51, §§ 943–4.]

SEC. **3038. Rate of interest.** The rate of interest shall be six cents on the one hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest not exceeding eight cents on the hundred by the year:

1. Money due by express contract;
2. Money after the same becomes due;
3. Money loaned;
4. Money received to the use of another and retained beyond a reasonable time, without the owner's consent, express or implied;
5. Money due on the settlement of accounts from the day the balance is ascertained;
6. Money due upon open accounts after six months from the date of the last item;

7. Money due, or to become due, where there is a contract to pay interest, and no rate is stipulated. [23 G. A., ch. 40; C. '73, § 2077; R., § 1787; C. '51, § 945.]

When recoverable: Interest is chargeable upon all debts, unless exempted therefrom by contract. When money is paid for the use of another, imposing an obligation upon the party who receives the benefit of the payment to reimburse the party paying, interest is recoverable from the date of the payment: *Goodnow v. Litchfield*, 63–275; *Goodnow v. Wells*, 67–654.

When the payment exceeds the interest, calculate interest on the principal up to the date of payment, add this interest to the principal and then deduct the payment. If the payment falls short of the interest due, calculate the interest on the principal up to the time when the payments will exceed the interest due on the principal debt, and then deduct the payment, so as to avoid taking interest upon interest: *Huner v. Doolittle*, 3 G. Gr., 76.

To recover interest on an account it should be averred in the declaration and specified in the bill of particulars: *David v. Conard*, 1 G. Gr., 336.

As to whether a debt due from a resident of a loyal state to a resident of a state in secession continued to draw interest while payment was rendered impossible by reason of the war, the court were equally divided: *Griffith v. Lovell*, 26–226.

An attorney who receives money for his client, and neither puts it upon deposit nor keeps it ready for demand, but uses it as his own, will be chargeable with interest thereon: *Mansfield v. Wilkerson*, 26–482.

Where money was paid into court to await its order, and there detained because of the erroneous order of the court, *held*, that the party finally found entitled thereto could not recover interest for the time of detention, it not appearing that the opposite party had not acted in good faith: *Van Gordon v. Ormsby*, 60–510.

Where it was agreed by the mortgagee that the mortgaged premises should be reconveyed to him in satisfaction of the mortgage, and by fraud of the mortgagee's agent, and without wrong on the part of the mortgagee, such reconveyance was made to the agent instead of to the mortgagee, *held*, that although the reconveyance was void and the mortgage still in force, yet the mortgagee could not recover interest subsequent to the date that the reconveyance was made: *Hait v. Ensign*, 61–724.

In an action against a railway company for double damages for stock killed, it is error to allow interest in addition to the damages allowed: *Brentner v. Chicago, M. & St. P. R. Co.*, 58–625.

A debtor under a deed of trust was found to have assented to certain settlements made during the existence of the trust deed, by which settlements he allowed compound interest at short rests, and also certain attorneys' fees, for the purpose of preventing a sale of the trust property at inopportune times and at a sacrifice. *Held*, that the debtor was not concluded by the settlements so made, but that he should be charged with simple interest compounded only according to the legal rule at each payment exceeding the interest then due: *Fockler v. Beach*, 32–187.

As the consideration of a note, illegal interest, unlike usury, cannot be urged against an innocent assignee before maturity: *Burrows v. Cook*, 17–436.

Where damages result from breach of a contract of bailment, the value of property lost becomes an indebtedness from the day of the loss, and interest is recoverable thereon: *Mote v. Chicago & N. W. R. Co.*, 27–22.

This is so where the amount of damages is capable of exact computation, as in the case of destruction of grain of a certain grade and quality: *Arthur v. Chicago, R. I. & P. R. Co.*, 61–648.

Where notes had been given for the purchase price of personal property and had passed out of the possession of the vendor, *held*, that the rate of interest to be allowed on a sum recovered for breach of warranty in such sale was that borne by the notes: *Pitsinowsky v. Beardsley*, 37–9.

Interest is a common and legitimate element of damage, and, in the absence of proof to the contrary, it will be presumed that the jury took it into consideration in computing the damages resulting from false representations in the sale of real estate as to its location and quality, when the fact of such false representations is set up by defendant as a counter-claim in the foreclosure of a purchase-money mortgage: *McNally v. Shobe*, 22–49.

In an action for unliquidated damages, interest should not be allowed *eo nomine* and assessed as a part of the damage but may be considered as an element of damage under the rule which permits its allowance in order to arrive at that which will be a just and lawful compensation for the injury sustained: *Richmond v. Dubuque & S. C. R. Co.*, 33–422, 502.

While the jury in assessing damages in an action for injury to property caused by negligence of a railway company may include interest in their verdict, it is error in the court to render judgment for an amount additional to the verdict for the purpose of including interest: *Garrett v. Chicago & N. W. R. Co.*, 36–121.

Interest upon interest: Where the interest upon a note is made payable annually, each installment of interest will draw interest at six per cent. from the time it is payable: *Mann v. Cross*, 9–327; *Preston v. Walker*, 26–205; *Burrows v. Stryker*, 47–477; *White v. Savery*, 50–515.

If the interest is not made payable annually or at a specified time it will not draw interest even from the time of the maturity of the principal: *Aspinwall v. Blake*, 25–319.

The parties may, by contract, stipulate that interest which is made payable annually, quarterly or otherwise, shall bear interest at the lawful rate from the time it is due: *Ragan v. Day*, 46–239.

A contract providing for interest at the

lawful rate payable semi-annually, and that the semi-annual installments of interest should draw interest at that rate after they become due, *held* not usurious: *Hawley v. Howell* 60-79.

Interest upon annual installments of interest may be collected under the decisions of this state, and it matters not that the contract itself was made under the laws of a state where interest on installments of interest was not allowed or collectible: *Burrows v. Stryker*, 47-477.

Rate: Parties may agree orally to pay a higher rate than six per cent., and where this is done and the amount afterwards ascertained and an obligation in writing given therefor, such obligation may be enforced between the parties, and if valid as to them no one else can complain: *First Nat. Bank v. Fenn*, 75-221.

And in such case the parol promise to pay is a sufficient consideration for the written obligation: *Ibid.*

A note providing for interest at a specified rate per annum from date draws interest at that rate after as well as before maturity: *Hand v. Armstrong*, 18-324; *Lucas v. Pickel*, 20-490.

Where it was provided in a contract that a sum of money advanced and invested in behalf of one party by the other should be repaid within one year with interest thereon, *held*, that upon a subsequent waiver of the provisions of the contract requiring repayment to be made within a year, the sum of money advanced continued to draw interest at the same rate until repaid: *Warren v. Ewing*, 34-168.

Where a party holding a bond for a deed accepted, in conditional payment of the purchase money provided for therein, obligations of third parties which were not paid, and afterwards brought suit against the other party to the bond to recover the amount thus remaining unpaid, *held*, that he might thus recover the rate of interest stipulated in the bond: *Huse v. McDaniel*, 33-406.

School orders, after presentation for payment, draw interest at six per cent. as here provided, and the board cannot make a contract by which they shall draw a higher rate: *Phelps v. District T'p*, 90-53.

Where a note stipulated that if interest was not paid annually the same should become a part of the principal and bear the same rate of interest, and the mortgage contained the condition that if default should be made in the payment of the sums of money specified therein or any part thereof, principal or interest, then the whole amount of the indebtedness should become due, *held*, that payment of annual interest was not required, and that the whole amount of the indebtedness did not become due on failure to pay such interest annually: *Wood v. Whisler*, 67-676.

In an action on a bond to indemnify an officer for a levy of an execution upon property claimed by a third person, the measure of liability is the value of the interest of claimant in the property at the tie them damages are paid, and the judgment should therefore bear the rate of interest borne by notes secured by mortgages upon the chattels sold: *Rand v. Barrett*, 66-731.

Contract in writing: Although the contract to pay more than six per cent. is required to be in writing, yet an oral contract for a higher rate will not be usurious if not for more than the legal contract rate and may be enforced to the extent of six per cent.: *Brockway v. Haller*, 57-368: *Brown v. Cass County Bank*, 86-527.

When commences to run: When money is paid for the use of another, imposing an obligation upon the party who receives the benefit of the payment to reimburse the party paying, interest from the date of the payment is recoverable: *Goodnow v. Litchfield*, 63-275; *Goodnow v. Wells*, 67-654.

When county warrants or orders are drawn with words of limitation as to payment, interest is allowed thereon from date; but if payable out of a particular fund not otherwise appropriated, interest will not commence to run until after such fund shall be exhausted: *Brown v. Johnson County*, 1 G. Gr., 486.

A note providing for "ten per cent. interest if not paid when due" draws interest from date if not paid at maturity: *Parvin v. Hoopes*, Mor., 294.

Where a promissory note provided for interest "to be paid annually," with a further stipulation that "on failure to pay said interest when due the same shall become part of the principal and draw interest accordingly," *held*, that installments of annual interest became due at the end of each year, and that the maker did not have the option either to pay annual installments or to permit them to continue at the same rate of interest as the principal until the maturity of the note: *Carter v. Carter*, 76-474.

The custom of a creditor, known and acquiesced in by the debtor, to charge interest on accounts after the end of the year, may be shown as evidence of an agreement to pay interest: *Veiths v. Hagge*, 8-163, 182.

The custom of banks that interest shall be charged on balances due the bank from the dates of monthly settlements will be upheld where known to the debtor, and such computation will not be objectionable on the ground of allowing compound interest, even though the interest on the previous balance is carried into the next month's account: *Isett v. Oglevie*, 9-313.

While it may be that the presentation of an account showing a balance due to which the person charged makes no objection will raise a presumption of its liquidation, and that interest thereon will be chargeable afterwards, yet continuous dealings represented in one account cannot be divided into separate accounts, which will be presumed liquidated simply by presenting bills of items covering parts of the transaction so that interest will run on the balance of such separate bills: *Raymond v. Williams*, 40-117.

A party entitled to receive a portion of the proceeds of sales would doubtless be entitled to interest on the various sums from the time they came into the hands of defendant or his agents; but where such times

are not shown, interest can only be allowed from the time of the commencement of the suit: *Hubenthal v. Kennedy*, 76–707.

Where a contract of sale provided for payment partly by cash on delivery and partly by note, with a stipulation that the balance (for which the note was to be given) should be payable in six months with interest at a higher rate than six per cent. after maturity, *held*, that no note having been given, plaintiff suing for balance of purchase price was entitled to interest from the end of the six months at the rate stipulated in the contract upon the portion which should have been paid in cash as well as upon the portion for which a note should have been given: *Bradley v. Palen*, 78–126.

In a controversy between a chattel mortgagee and creditors of the mortgagor claiming a mortgage to be invalid, *held*, that upon the allowance to the mortgagee of the amount of his claim, he was not entitled to reco er interest subsequent to the date of the garnishment: *Southern White-Lead Co. v. Haas*, 76–432.

Where certain mortgages provided for interest, and payment was delayed by defendant's resistance to the claim, *held*, that interest was properly allowed: *Stickney v. Stickney*, 77–699.

For labor performed: In an action for money due on contract or for labor performed the amount should draw interest from the filing of the petition: *Swails v. Cissna*, 61–693.

SEC. **3039. On judgments and decrees.** Interest shall be allowed on all money due on judgments and decrees of courts at the rate of six cents on the hundred by the year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding eight cents on the hundred by the year, which rate must be expressed in the judgment or decree. [C.'73, § 2078; R., § 1789; C.'51, § 946.]

It is necessary that the rate of interest be "expressed in the contract" in order to authorize a judgment bearing a greater rate of interest than six per cent.; therefore, *held*, that, although, as it seems, coupons made in Iowa but payable in New York, in which no rate of interest is specified, would draw interest from maturity at seven per cent. (the rate in the latter state), yet a judgment in Iowa upon such coupons could only draw interest at the rate of six per cent.: *Rogers v. Lee County*, 1 Dillon, 529.

Judgment on a contract stipulating for the payment of interest will draw interest at the same rate as that stipulated in the contract: *Wilson v. King*, Mor., 106.

But so far as the judgment covers interest only, in the absence of any agreement in the contract that interest shall draw interest, the judgment will draw interest only at six per cent.: *Burkhardt v. Sappington*, 1. G. Gr., 66.

A higher rate than six per cent. should not be allowed upon a judgment where the contract specifies no rate: *Easley v. Redpath*, 9–300.

Where a member of a partnership which had previously been dissolved paid a portion of a judgment against a partnership which the other partner, by the terms of the dissolution, was bound to pay, and then sought to recover from such other partner the amount so paid, *held*, that the rate of interest to be allowed was not the rate drawn by the judgment paid, but merely the legal rate, there being no evidence of an agreement to pay any particular rate: *Myers v. Smith*, 15–181.

Unless a different rate of interest is expressed in the judgment or the decree, but six per cent. can be collected thereon, although the contract on which the judgment is rendered bears a higher rate. If the failure to express the higher rate of interest in the judgment is owing to mistake or oversight of the clerk, the judgment may be corrected in that respect by timely and proper proceedings. But after the amount of judgment with six per cent. interest thereon has been paid, the judgment cannot be enforced for an additional amount against the property upon which it was a lien: *Rice v. Hulbert*, 67–724.

Prima facie the rate of interest upon a foreign judgment is governed by the law of this state. If it is claimed that the rate of interest is different in the state in which the judgment is rendered that fact must be averred and proved: *Crafts v. Clark*, 38–237.

It is incompetent for the court to allow a higher rate than six per cent., even as damages on a money demand, unless the parties otherwise agree in writing: *Vennum v. Gregory*, 21–326.

Where the jury are directed to allow interest, without any instruction as to the amount, it will be presumed that they understand that interest is to be allowed at six per cent.: *Davis v. Walter*, 70–465.

Affidavits of jurors are receivable to show whether or not the jury included interest in their verdict: *Swails v. Cissna*, 61–693.

SEC. **3040. Illegal rate prohibited.** No person shall, directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any sale or loan of real or personal property, than is in this chapter prescribed. [C.'73, § 2079; R., § 1790.]

In contracts of sale: This section applies not only to contracts for loans, but also to any contract of purchase or sale of property where an unlawful rate of interest is provided for: *Callanan v. Shaw*, 24–441.

But a party may lawfully sell on time for

a larger sum than his cash price, with lawful interest thereon to the time of payment, would amount to; therefore, *held*, that a sale of sheep for a sum to be paid at a future day, wherein it was agreed to pay annually two pounds of wool per sheep until time of payment (the value of the wool being greater than legal interest on the sum to be paid), was not usurious, in the absence of any showing that there was any intention to evade the usury law: *First Nat. Bank v. Owen*, 23-185; *Gilmore v. Ferguson*, 28-220.

Assuming debt: The contract by a party who assumes the debt of another and himself becomes the debtor, to pay illegal interest, constitutes usury: *Heffner v. Brownell*, 82-104.

Penal: The law of usury is in its nature penal, and is therefore to be strictly construed: *Dickerman v. Day*, 31-444.

Intent: Where there is no evidence of an intent or agreement to contract for usurious interest, a jury would not be justified in finding usury: *Jones v. Berryhill*, 25-289.

Sale of commercial paper: Statutes against usury are aimed against the receiving or contracting to receive a greater rate of interest than authorized upon a loan or forbearance of money, and do not apply to the sale of a note or any other vendible commodity which may, in good faith, be sold or transferred for any price fixed by agreement of the parties. Where the contract is neither a loan nor a contract for extension of time on a note already due, but a sale of commercial paper without any corrupt or unlawful intent, it cannot be held usurious simply because the paper is an accommodation note: *Dickerman v. Day*, 31-444.

Purchase and repurchase of realty: Where land was purchased by A. without any previous agreement to hold it for B., and afterwards A. agreed to sell it to B. at an agreed time for an amount which was more than the purchase price with the legal rate of interest, *held*, that such a contract of sale would not amount to usury: *Casady v. Scallen*, 15-93.

Contract to reconvey: Where an absolute conveyance was made as security and the grantee executed an agreement to reconvey on payment of the debt at maturity, *held*, that an indorsement on the contract by which the grantee agreed to receive payment at thirty-seven and one-half per cent. on the face of the bond from its date to time of payment, without any other evidence or explanation, though both parties were witnesses, would not raise the presumption of usury: *Brush v. Peterson*, 54-243.

A *bona fide* purchaser of a note or bond may take it at any rate of discount without violating the statute of usury, but if the note is made to be negotiated, and the intention is to arrange the transaction so as to place the subsequent transferee who has knowledge in the position of an innocent holder, and thus avoid the statute of usury, the payee giving no consideration and being a mere go-between, the contract will be deemed usurious if the amount of the discount is greater than lawful interest, and is taken for the purpose of usury: *Nichols v. Levins*, 15-362.

Under particular facts, *held*, that a deed absolute in form was intended as a mortgage and included usurious interest: *Johnson v. Smith*, 39-549.

Evidence in an action in which usury was set up *held* not sufficient to sustain the specific findings of the jury: *First Nat. Bank v. Elliott*, 54-419.

Under particular facts, *held*, that a note given for overdrafts in plaintiff's bank did not include usury: *First Nat. Bank v. Moore*, 83-740.

Where usury exacted by a national bank in violation of the federal statute is included in a note taken by such bank for overdrafts, the maker of the note cannot, by way of counter-claim, recover the penalty imposed by such statute, the action provided for being by separate suit to recover such penalty: *Ibid.*

Under the circumstances of a particular case, *held*, that it appeared that certain notes were given for usury, and recovery thereon was therefore denied: *Seekel v. Norman*, 78-254.

Where it was stipulated in a contract to build a house for a specified sum for which notes were given, payable at different times, and it was further agreed that in case the maker of the notes died within ten years and had paid all of the notes due at the date of his death, then the payee should surrender and cancel all the notes unpaid, *held*, that such stipulation did not render the notes usurious: *Missouri, K. & T. Trust Co. v. Gantt*, 62 N. W., 794.

Exchange: The charging of exchange in addition to the legal interest in discounting foreign bills of exchange is not usury unless resorted to for the purpose of covering up a usurious transaction, but it is otherwise as to domestic bills: *Burrows v. Cook*, 17-436.

Additional loan: Where a party, in order to raise an additional loan of money, agreed that if the person who already held his note and mortgage for a certain sum would sell it and then take another loan under a mortgage for a similar amount, the bearer would repay him whatever discount he was compelled to suffer in selling the first note and mortgage, *held*, that such a transaction was not usurious: *Comstock v. Wilder*, 61-274.

Usurious balance: A note given in payment of a balance due on a usurious note is itself usurious: *National Bank v. Eyre*, 52-114; *Callanan v. Shaw*, 24-441; *Garth v. Cooper*, 12-364.

Extension of time: Where the maker of a note drawing lawful interest after maturity desired an extension of time, which was granted for a definite period upon the execution of a note, in addition to the lawful per cent. embraced in the original note, as consideration for the extension of time, it was held that the note given in extension was usurious: *Ferrier v. Scott's Adm'rs*, 17-578.

The extension of time of a loan is a loan within the meaning of the usury laws, and a new note given by the surety to obtain an extension of time on the original undertaking would be usurious: *Kendig v. Linn*, 47-62.

An agreement after the maturity of the

note to pay more than a legal rate of interest for forbearance does not, alone, affect the note, but such contract itself is usurious, and anything applied thereon will be applied as a general payment on the note: *Mallett v. Stone*, 17–64.

Partial revival: Where a usurious indebtedness has been paid in full and discharged, notes subsequently given in partial revival of such indebtedness will not be usurious: *Hoopes v. Ferguson*, 57–39.

Note including usurious interest: Facts in a particular case, *held* sufficient to show that the maker of a note bearing the highest legal rate executed and delivered the same in consideration of a loan of a less amount of money, and that the transaction was therefore usurious: *Goodhue v. Teetshorn*, 65–403.

The fact that notes were dated and bore interest from a time preceding the receipt of the money thereon by the mortgagor will not be sufficient to show usury, it appearing that the date of the notes corresponded to the time of negotiating and making the loan, and it not appearing what was the cause of the delay in paying the money nor that there was any corrupt agreement: *Waterman v. Baldwin*, 68–255.

Renewed promise: Where a note is given for money advanced, to be used in the repurchase of property, which has been sold under a mortgagecovering usurious interest, and the property has been bought in by the mortgagee, the note is subject to the defense of usury: *Switz v. Platts*, 15–298.

Where the plaintiffs purchased a usurious note, and subsequently the defendant, who was the maker, promised plaintiffs to pay the same, *held*, that such promise did not estop the maker from setting up the defense of usury in an action on a promise to pay the note, plaintiffs having parted with nothing on the strength of the promise: *Allison v. Barrett*, 16–278.

Transfer from old to new firm: Where there was a change in the membership of a firm and a settlement made of plaintiff's account, which was transferred to the new set of books, and paid by the new to the old firm, it was held that this did not affect the question of usury between the parties prior to the change: *Burrows v. Cook*, 17–436.

Money borrowed to pay usury: If A. executes a security to B., for the purpose of raising money to pay C. a usurious debt, B. will not be affected by the question of usury. Nor would the case be altered by an agreement between A., B. and C., that in case the paper is not sold, B. shall retain it as evidence of that amount of indebtedness to C: *Ibid.*

If money be borrowed to pay off a usurious debt, the lender, even if with notice, is not affected with usury in the original debt: *Wendlebone v. Parks*, 18–546; *Mason v. Searles*, 56–532; *Cottrell v. Southwick*, 71–50.

Where the promisor in a usurious contract makes it the consideration of a new contract with a third party, not party to the original contract or to the usury paid or reserved, if the new contract is not a contrivance to evade the statutes against usury, it will not be illegal or usurious: *Call v. Palmer*, 116 U. S., 98.

Where the maker of a usurious note, which was secured by a deed of trust, borrowed money of a third person to pay the same, and, instead of executing new securities for the money so borrowed, caused the note to be transferred by the payee to the lender as evidence and security of the new debt, *held*, that the note was not tainted with usury in the hands of the second holder: *Ibid.*

An instruction in regard to any scheme, artifice or device to conceal usury, and also that, if the note in question was made payable to plaintiff to enable the party who acted as plaintiff's agent to exact more than a legal rate of interest, it was usurious, *held* proper. But *held*, that, where the money borrowed from plaintiff was used in paying off an indebtedness to another, the existence of usury in the debt paid would not render the note to plaintiff usurious, even though the agent of plaintiff in the transaction knew of the usury in the debt paid: *Trimble v. Thorson*, 80–246.

The fact that the payee of a note knows that the money for which it is given is to be used in the payment of usury to a third person does not render the note usurious in his hands: *Brown v. Cass County Bank*, 86–527.

Nor does the fact that the money borrowed from a bank on a note and passed to the credit of the borrower is used in paying usury in other transactions with the bank subject such note to a deduction of the amount of the usurious note paid: *Ibid.*

One will not be chargeable with usury in loaning money to be used in a separate and independent transaction in which usury is involved: *France v. Smith*, 87–552.

Attorneys' fees: A stipulation for reasonable attorneys' fees, to be taxed up as a part of the costs in case of suit, does not constitute usury: *Nelson v. Everett*, 29–184; *Weatherby v. Smith*, 30–131.

Commissions to agent: The act of an agent for a loan in exacting a commission for himself beyond the legal rate of interest, without authority or consent of his principal, will not render the loan usurious: *Gokey v. Knapp*, 44–32; *Brigham v. Myers*, 51–397.

But a party making a loan to another in person cannot, under the name of commission, exact more than a legal rate of interest: *Pond v. Waterloo Agl. Works*, 50–596.

Where a party retained $21 out of a loan of $700, taking notes therefor bearing the highest rate of interest, *held*, that the contract was usurious: *Lombard v. Gregory*, 81–569.

Under the facts in a particular case, *held*, that a note in suit did not appear to be given for usurious interest, but for advances and commissions to maker's agent, and was not therefore usurious: *Wyllis v. Ault*, 46–46.

Where a person loans money for another party, retaining a sum in addition to legal interest for his own services, the transaction is not usurious. But where a person contracts with the debtor to pay interest coming due on such loan, and takes notes in excess of the amount of interest so paid and legal

interest thereon, the transaction is usurious, and the additional amount cannot be considered as commission: *White v. Lucas*, 46–319.

A commission paid or agreed to be paid to an uninterested party acting as agent for both parties in a negotiation of a loan and without the knowledge of the lender will not affect the lender with usury: *Richards v. Purdy*, 90–502.

The payment of the lender's traveling expenses in going to view the property offered as security will not constitute usury: *Smith v. Wolf*, 55–555.

The fact that the agent of the lender divides the commission received by him in excess of the legal interest with the agents of the borrower will not constitute usury: *Dickey v. Brown*, 56–426.

Where the plaintiff negotiated the loan in person, and under the guise of commission exacted more than the legal rate of interest, *held*, that he was chargeable with usury: *Pond v. Waterloo Agl. Works*, 50–596.

Facts in a particular case considered, and *held* not to show usury in connection with the payment of commission to a loan agency: *Hawley v. Howell*, 60–79.

Usury by agent; principal's knowledge: When an agent who is authorized by his principal to lend money for lawful interest exacts more than the legal rate without the authority or knowledge of his principal, the loan is not thereby rendered usurious. It is immaterial in such a case whether the agent discloses his authority or not: *Call v. Palmer*, 116 U. S., 98.

Where a charge is made by the agent for his own benefit, in excess of the authorized rate of interest, the transaction is not tainted with usury, if the principal did not authorize the charge, and the fact that such charge is made by the agent will not give rise to the presumption of usury, but the burden rests on the borrower to show that the charge was authorized by the principal: *Greenfield v. Monaghan*, 85–211.

Where the agent is the husband of the principal, although knowledge on the part of the wife would perhaps be assumed on slighter evidence than in other cases, yet the same rule is applicable, and knowledge on her part will not be presumed without evidence: *Brigham v. Myers*, 51–397.

The facts in a particular case *held* not sufficient to show that the party with whom the usurious transaction was had was the agent of the party whose money was loaned: *Weiser v. McKay*, 51–417.

Where a note for borrowed money is given to an agent without knowledge of the agency, but supposing the agent to be the lender, it will be usurious if it includes illegal interest, although it might not be usurious between the borrower and the principal if the principal had been disclosed: *Erickson v. Bell*, 53–627.

Where the borrower believes that the person from whom money is obtained is the principal in the transaction, although he is in fact only the agent, the defense of usury may be interposed against the real principal to the same extent that it might have been interposed against the agent if he had been principal: *Glick v. Bramer*, 78–568.

Where the borrower knows that the person from whom he secures the money is acting as agent, and that he is exacting a commission for making the loan for him, such commission will not constitute usury: *Ammerman v. Ross*, 84–359.

If the loan is made by one acting as agent without authority, but is ratified, the principal is chargeable with usury therein: *Trimble v. Thorson*, 80–246.

Gold premium: A note and mortgage given for a loan of gold coin, in which a greater per cent. premium was allowed for gold than its market value, *held*, under the circumstances, to have been a cloak for usury: *Austin v. Walker*, 45–527.

Agreement to pay more than debt: A transaction in a particular case by which one party redeemed certain property from sale and gave title bond to the wife of the original owner, *held* to be in the nature of a loan, and that the amount mentioned in the title bond being greater than the amount paid in redemption with the legal interest, the transaction was usurious: *Wormley v. Hamburg*, 46–144.

Penalty for non-payment: A note providing for an illegal rate of interest from and after the maturity of the indebtedness is not usurious: *Wight v. Shuck*, Mor., 425; *Shuck v. Wight*, 1 G. Gr., 128; *Gower v. Carter*, 3–244: *Wilson v. Dean*, 10–432; *Conrad v. Gibbon*, 29–120.

But in such cases the court will not allow a recovery, either by way of penalty or liquidated damages, for more than the legal rate of interest for failure to pay when due: *Gower v. Carter*, 3–244; *Vennum v Gregory*, 21–326.

A provision in a note that, if not paid when due, theprincipal shall draw the highest lawful rate from date, will not constitute usury unless it be shown that interest is included in the face of the note. But if interest is so included, the parties will not be allowed, by thus liquidating the damages for the mere non-payment of money, to evade the usury law: *Fisher v. Anderson*, 25–28.

As to interest on premium in building association, see notes to § 1898.

As to interest on interest, see notes to § 3038.

Purging usury: A usurious contract may be purged of usury by the parties to it: *Kassing v. Ordway*, 69 N. W., 1013.

Before petitioner in a court of equity can obtain relief upon a contract including usury he must aver and show a willingness to abandon the usurious part of the contract: *Phelps v. Pierson*, 1 G. Gr., 121.

If by consent of both parties to a usurious contract the unlawful interest already paid is refunded with the agreement that thereafter lawful interest only shall be charged, the contract is thereby purged of usury: *Phillips v. Columbus City Building Ass'n*, 53–719.

The word contract, as used in this section, refers to the entire transaction in which usurious interest has been reserved. The substitution of one contract for another, or

the substitution of a new note for the old one, will not purge the usury: *Smith v. Coopers*, 9-376; *Campbell v. McHarg*, 9-354.

However it may be covered by changes and substitutions, if usury be found to exist in the contract, directly or indirectly, its taint continues and affects all the parts through which it runs. The substitution of one contract for another, or the taking of a new note for an old one, will not purge it: *Garth v. Cooper*, 12-364.

If it satisfactorily appears that the parties at the time of making the second note intended to purge the contract of its usurious taint, and to so reform and correct it that no part of the original illegal consideration entered into the new note, such new note will not be affected by the previous usury; but if it is designed merely to cover up the usury the taint attaches to it: *Ibid.*

Consent of debtor: A contract may be purged of usury only by making substantially a new contract with the consent of the debtor. The indorsement of usurious interest on the note as a payment, without the assent of the debtor, will not have that effect: *National Bank v. Eyre*, 52-114.

Usurious payments: Usurious interest voluntarily paid cannot be recovered back: *Nichols v. Skeel*, 12-300; *Quinn v. Boynton*, 40-304.

Where there is no contract for an illegal rate of interest the mere receiving of such interest will not render the contract itself usurious, but the receiving of the usurious interest is itself unlawful, and the amount so received will be presumed to be applied to the payment of the debt and legal interest thereon: *Sexton v. Murdock*, 36-516.

Whether, after the lapse of two years from the payment of usurious interest, an action can be maintained to recover it back, or an application thereof to the extinguishment of the principal debt can be enforced, *quære: National Bank v. Eyre*, 52-114.

If money is paid on a usurious indebtedness it shall be applied on the discharge of what the debtor was owing legally, and not that which (so to speak) he was owing illegally. Therefore, where it appears in a usurious transaction that there has been a renewal of notes, in which interest was included, and also that at the time separate notes were given for usurious interest, all the payments will be applied to the extinguishment of the legal indebtedness: *Smith v. Coopers*, 9-376.

Usury once paid cannot be recovered back. If two notes are given in separate transactions, both usurious, and one is paid, the unlawful interest thus paid cannot be set up in an action on the note remaining unpaid: *Phillips v. Gephart*, 53-396.

A note given in payment of a balance due on a usurious note is itself usurious, for the debtor has the right to have all the payments made on the original note in discharge of usurious interest applied upon the principal: *National Bank v. Eyre*, 52-114; *Callanan v. Shaw*, 24-441; *Garth v. Cooper*, 12-364.

Where deposits were made from time to time by a debtor with his cretitor, such creditor being a bank which held his notes, and from time to time balances were struck and new notes were given, usurious interest being included in the computation, *held*, that the deposits must be regarded, in the absence of evidence to the contrary, as having been applied *pro rata* upon interest and principal, notwithstanding the entry upon the books of the bank showing application of such payments to the extinguishment of the interest: *Kinser v. Farmers' Nat. Bank*, 58-728.

Usurious interest paid on a note afterwards put in judgment cannot subsequently be applied as payment on other notes. In the absence of collusion or attempt to cover usury a judgment is conclusive between parties and privies: *Philips v. Gephart*, 53-396.

Where usurious indebtedness has been paid in full and discharged, notes subsequently given in partial revival of such indebtedness will not be usurious: *Hoopes v. Ferguson*, 57-39.

If, after payment of the valid portion of the indebtedness, a note is given, which includes usurious interest, such note does not represent any legal indebtedness. If the other notes were given for the purchase price of real property, the purchaser will be entitled to a conveyance of the property without payment of the note given solely for usurious interest: *Knight v. Judd*, 34-483.

Conflict of laws: Where a contract is made in one state to be performed in another, the interest will be computed according to the law of the place of performance, but the parties may stipulate that interest shall be calculated according to the laws of the place where the contract is made: *Butters v. Olds*, 11-1.

In such cases the parties may adopt the rule of either state as to interest; and where the note was executed in one state, to be performed in another, and the maker resided in still another state, and the property pledged as security was there situated, *held*, that the law of that state might be adopted as to interest, provided such provision was not resorted to merely as a means of evading the usury law: *Arnold v. Potter*, 22-194.

While the courts of this state will not enforce the penal statutes of another state, yet where a contract made with reference to the laws of another state is usurious there, the forfeiture provided by such laws will be enforced: *Ibid.*

A note executed and dated in Missouri, but delivered and the consideration thereof received in Iowa, is an Iowa contract and subject to the Iowa law of usury: *Hart v. Wills*, 52-56.

Where a resident of Iowa negotiated a loan in Massachusetts from a resident thereof, executing a promissory note dated in Iowa and payable in New York, securing the same by a trust deed on real estate in Iowa to a trustee there resident, *held*, that if the parties in good faith, without intending to evade the usury laws, stipulated for the rate of interest allowable in Iowa, although greater than the legal rate in Massachusetts or New York, the contract should be enforced: *Arnold v. Potter*, 22-194.

In such case the form of the transaction is immaterial, the cardinal inquiry being, did the parties resort to it as a means of disguising usury in violation of the laws of the state where the contract was made or to be executed: *Ibid.*

A note is presumed payable at the place named as that of its execution; and if the rate of interest is not usurious at that place, the agreement will be deemed valid unless it shows that it was delivered elsewhere, and that it is intended by the transaction to avoid the usury laws: *Bigelow v. Burnham*, 83–120.

Effect on contract: A contract reserving usurious interest is not void: *Haggard v. Atlee*, 1 G. Gr., 44; *Shuck v. Wight*, 1 G. Gr., 128.

SEC. **3041. Usury—penalty.** If it shall be ascertained in any action brought on any contract that a rate of interest has been contracted for, directly or indirectly, in money or in property, greater than is authorized by this chapter, the same shall work a forfeiture of eight cents on the hundred by the year upon the amount of the principal remaining unpaid upon such contract at the time judgment is rendered thereon, and the court shall enter final judgment in favor of the plaintiff and against the defendant for the principal sum so remaining unpaid without costs, and also against the defendant and in favor of the state, for the use of the school fund of the county in which the action is brought, for the amount of the forfeiture; and in no case where unlawful interest is contracted for shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not. [C. '73, § 2080; R., § 1791.]

Who may set up usury: The defense of usury is personal to the debtor, and cannot be interposed by one who is not a party nor privy to the usurious contract: *Drake v. Lowry*, 14–125; *Sternburg v. Callanan*, 14–251; *Carmichael v. Bodfish*, 32–418; *Miller v. Clarke*, 37–325.

An agent with whom money is deposited by his principal, to be loaned on terms constituting usury, cannot set up usury by way of defense in an action by his principal for the balance in his hands: *Sternburg v. Callanan*, 14–251.

The defense of usury cannot be set up by one who has converted a note and collected the full amount, when sued by the true owner for the amount so collected: *Allison v. King*, 25–56.

The grantee of land mortgaged to secure a usurious debt cannot interpose the defense of usury in an action to foreclose: *Green v. Turner*, 38–112; *Greither v. Alexander*, 15–470; *Hollingsworth v. Swickard*, 10–385; *Frost v. Shaw*, 10–491; *Perry v. Kearns*, 13–174; *Burlington Mut. Loan Ass'n v. Heider*, 55–424.

The grantee of mortgaged land who assumes the payment of the mortgage cannot set up the defense of usury: *Sullivan Savings Institution v. Copeland*, 71–67.

A judgment creditor of an insolvent cannot set up usury in behalf of his debtor in a proceeding to which he is not a party: *Carmichael v. Bodfish*, 32–418.

A junior mortgagee, in an action to redeem from the judgment in a foreclosure proceeding to which he was not made a party, and in which usury was not pleaded, cannot set up the defense of usury and compel the holder of the judgment to accept less than the amount of his lien: *Powell v. Hunt*, 11–430.

In an action on a co-partnership note, either partner, without the consent of the other, may set up usury, and so may a partner who has undertaken to pay the firm debts, in a suit brought against him alone after dissolution. If usury is set up by either partner the penalty should be enforced against both: *Machinists' Bank v. Krum*, 15–49.

A renewal of a partnership note by one of the partners will not deprive him of the right to set up usury as to such note: *Ibid.*

Whether the usurer is liable to any one but his immediate assignee, discussed but not decided: *Brown v. Wilcox*, 15–414.

In an action to foreclose a mortgage, a subsequent purchaser of the premises cannot plead usury, but he may show payment of the debt, and hold the mortgagee liable for neglect in collecting rents: *Huston v. Stringham*, 21–36.

In an action to foreclose a mortgage upon the homestead, given by the husband and wife to secure a note of the husband, the plea of usury may be set up by the wife: *Lyon v. Welsh*, 20–578.

Where R., having mortgaged certain premises, conveyed the same to O., who agreed to pay the mortgage debt, *held*, that O. could not set up usury in an action to foreclose, where personal judgment against R. was expressly waived by the mortgagee. The fact that O. had an action pending against R. for the purpose of setting aside the mortgage as fraudulent, *held* not to alter the case: *National L. Ins. Co. v. Olmstead*, 52–354.

A surety may avail himself of the defense of usury to the same extent that the principal can, and so may a guarantor, guarantors being deemed sureties: *Conger v. Babbett*, 67–13; *Kendig v. Linn*, 47–62.

But the surety may pay the usurious debt when it becomes due, and need not wait until suit is brought, so as to set up usury; and, in an action by him to recover from the principal the amount so paid, the principal cannot plead usury: *Culver v. Wilbern*, 48–26.

However, a surety who has paid a portion of the original usurious debt, and given his own note for the balance, cannot as against his own note interpose the plea of usury: *Ibid.*

Where the surety takes up the note of his

principal and gives his own note it must be regarded as payment or purchase and not as a renewal, and the surety cannot in such case interpose the plea of usury to such new note: *Ibid.*

Action by national bank: Although no penalty can be enforced against a national bank for taking usury except as provided by the national banking act, and that perhaps only in a federal court, yet, in an action by such bank in a state court, the defendant may deny the validity of a claim by showing that it is for usurious interest: *National Bank v. Eyre*, 52-114.

Affirmative relief: Usury may not only be relied upon as a defense, but may in proper circumstances be made a ground of affirmative relief, and in such case the party is not required to tender the principal sum and legal interest. (Overruling *Phelps .v Pierson*, 1 G. Gr., 121): *Morrison v. Miller*, 46-84.

Neither the rights of the defendant nor the duty of the court to enter up judgment in favor of the school fund should depend upon the form of the proceeding: *Ibid.*

As affecting third parties: Usury may be pleaded against a *bona fide* holder for value of a negotiable instrument as well as against the payee: *Bacon v. Lee*, 4-492.

But illegal interest as a consideration, unlike usury, cannot be urged against an innocent transferee before maturity: *Burrows v. Cook*, 17-436.

A *bona fide* purchaser of a note or bond may take it at any rate of discount without violating the statute of usury, but if the note is made to be negotiated, and the intention is to arrange the transaction so as to place the subsequent transferee who has knowledge in the position of an innocent holder, and thus avoid the statute of usury, the payee giving no consideration and being a mere go-between, the contract will be deemed usurious if the amount of discount is greater than lawful interest and is taken for the purpose of usury: *Nichols v. Levins*, 15-362.

The payee of a promissory note, who has acquired the right to sue the maker thereof, may dispose of it at any rate of discount from its face, and the purchaser will have the right to enforce its full amount against the maker without any defense on the ground of usury: *Dickerman v. Day*, 31-444.

No defense of usury can be set up against the purchaser of an accommodation note taken at a greater amount of discount than legal interest, unless such purchaser have knowledge of the character of the paper: *Ibid.*

Where a creditor is enforcing collection of collaterals pledged to him for the security of a usurious debt, the debtor may enjoin him from transferring such collaterals as are not necessary for the security of the legal indebtedness: *Binford v. Boardman*, 44-53.

Where the assignee of a usurious note procured the same to be taken up by the maker and a new note made payable to him directly, and then transferred it to another, *held*, that the last assignee was limited in his right to recover to his immediate assignor, and could not recover from the assignor of the first note: *Brown v. Wilcox*, 15-414.

An indorsee who takes with knowledge that the note is tainted with usury is not to be protected by § 3042, which protects *bona fide* assignees without notice of the usury: *Ibid.*

Under the facts of a particular case, *held*, that the transferee of a note which included usurious interest had knowledge of the fact of usury, although the maker advised him that the note was all right, and that no defenses to it existed: *Watson v. Hoag*, 40-142.

Where the holder of a note takes it upon the representations of the maker that it is not usurious, the latter will be estopped from setting up the plea of usury against such holder: *French v. Rowe*, 15-563; *Callanan v. Shaw*, 24-441.

But if the transaction is merely a device to evade the usury law, to which the assignee is privy, he will not be protected: *Nichols v. Levins*, 15-362.

How pleaded: Where usury is apparent upon the face of a bill in equity, and a decree including usury is prayed for, a demurrer to the bill will lie: *Phelps v. Pierson*, 1 G. Gr., 121.

Usury may be set up as a defense in an equitable action without first tendering the amount legally due. The maxim, "He who seeks equity must do equity," is not applicable in such case: *Kuhner v. Butler*, 11-419; *Cox v. Douglas*, 12-185.

The question of usury may be raised in a proceeding for the foreclosure of a chattel mortgage, which is by action of injunction transferred to the court: *Hanlin v. Parsons*, 33-207.

Usury cannot be shown as a defense in the foreclosure of a mortgage, when the debt itself is reduced to judgment: *Kendig v. Marble*, 58-529.

Where an action is dismissed before answer, there is no right, either in the behalf of the defendant or of the school fund, to interpose a plea of usury: *Tufts v. Bauserman*, 46-241.

Evidence: The burden of establishing the defense of usury is upon the party setting it up: *Hough v. Hamlin*, 57-359.

Where the execution of a lost note is shown, and there is a conflict in the evidence as to the rate of interest stipulated therein, the burden of proving that the rate was usurious is upon the party affirming it: *Richards v. Burden*, 59-723.

Evidence of a usurious contract is admissible under an answer which alleges that the payee of a note received a greater rate of interest than the law allows: *Kurz v. Holbrook*, 13-562.

Evidence of the intemperance and financial embarrassment of the borrower and of the lender's acknowledgment thereof is not competent and relevant on the subject of usury: *Woodford v. Blood*, 32-600.

The indorser of a promissory note is a competent witness to prove usury in the inception of the note: *Richards v. Marshman*, 2 G. Gr., 217.

The fact that a contract is usurious should not be left to conjecture, and where it did not appear what amount of usury was paid, *held*, that the defense of usury would not be sustained: *Yetzer v. Appleyate*, 83-726.

The party pleading usury should establish his defense by a preponderance of the evidence: *Ammerman v. Ross*, 84-359.

Usury, as other frauds, may be shown by any evidence, in other respects competent, tending to establish the real character of the transaction. The conditions, covenants and recitals of any and all instruments under which usury is hidden may be contradicted, impeached and assailed by evidence, parol or written, in order to disclose the real facts and uncover the usury: *Seekel v. Norman*, 71-264.

Under the provisions of Revision, § 1791, that the person contracting to pay unlawful interest should be a competent witness to prove that the contract was usurious, such witness was competent, notwithstanding the provisions of Revision, § 3982, which rendered the party incompetent to testify in a proceeding when the adverse party was the executor of a deceased person and the facts to be proved transpired before the death of such deceased person: *Rhinehart v. Buckingham*, 34-409.

But this section as enacted in the Code of '73 omits the provision of Revision, § 1791, as to the person contracting being a competent witness to testify. If he falls within the provisions of § 4604, relating to actions by or against executors, administrators, etc., he is not now competent: *Wormley v. Hamburg*, 40-22.

In such cases the party agreeing to pay the usurious interest should pay what he agreed to, rather than make an exception to the general rule: *Code Com'rs' Rep. of '73.*

Forfeiture: In computing the forfeiture, the per cent. of penalty should be reckoned on the balance of the original sums loaned remaining unpaid, in the same manner as if the interest was going to the plaintiff, and not upon the entire sum originally loaned: *Smith v. Coopers*, 9-376.

Where it appears that the entire amount of the principal sum and more than enough interest to equal the forfeiture authorized by the statute has been paid, the court should not render judgment for a penalty in favor of the school fund: *Seekel v. Norman*, 78-254.

And where payments have been made upon a usurious contract, in rendering judgment against the borrower in favor of the school fund, the amount upon which the interest should be computed should be ascertained by deducting the payments from the amount of the loans: *Lombard v. Gregory*, 81-569.

The amount of forfeiture on account of usury is to be ascertained by computing the per cent. of penalty on the amount of the loan remaining after deducting therefrom the payments made and without regard to the change in the evidence of indebtedness: *Brown v. Cass County Bank*, 86-527.

It should be computed up to the date of judgment and not simply to the maturity of the contract: *Ficklin v. Zwart*, 10-387.

Computation should be made from the time the money was borrowed, notwithstanding the fact that the form of the indebtedness has been changed to that of a note bearing a later date: *Drake v. Lowry*, 14-125.

In computing the penalty which is to go to the school fund, the amount due is to be calculated exactly as between the borrower and the lender, and proper indorsements of credit allowed: *Sheldon v. Mickel*, 40-19.

The forfeiture is not a lien upon the premises mortgaged to secure the usurious debt, but becomes a lien only from date of judgment therefor: *Lewis v. Barmby*, 14-88.

In an action on a co-partnership debt, if usury is set up by either partner, the penalty should be enforced against both: *Machinists' Bank v. Krum*, 15-49.

It is not on the plea or for the benefit of the borrower that the court decrees a forfeiture; but whenever usury is brought to its knowledge: *Ibid.*

And when the usury is found, the penalty in favor of the school fund will be enforced although the parties agree in asking a different judgment: *Burrows v. Cook*, 17-436.

The judgment in favor of the school fund for the penalty should be against the surety as well as against the principal, and it seems that the surety, if compelled to pay, may have action against the principal for reimbursement of such penalty, or against his cosurety for contribution, and may be subrogated to the rights of the state with respect to the judgment and any security held by it: *McIntosh v. Likens*, 25-555.

The state, representing the school fund, has no absolute or vested right to the forfeiture. Its right is qualified and incidental, and accrues only when an unpaid usurious contract is brought before the court for adjudication, and the usury is in a legitimate way brought to the knowledge of the court. Where suit was brought for a balance of usurious interest, the principal and legal interest having been paid, *held* erroneous to render a judgment against the defendant in favor of the school fund for penalty on the amount originally loaned: *Easley v. Brand*, 18-132.

It is not competent for parties to settle a suit in which usury appears, in such a manner as to deprive the state of a judgment on account of the usury: *Reynolds v. Babcock*, 60-289.

While the courts of this state will not enforce the penal statutes of another state, yet where a contract made with reference to the laws of another state is usurious there, the forfeiture provided by such laws will be enforced: *Arnold v. Potter*, 22-194.

Judgment: On appeal in an action in which usury was pleaded, *held*, that plaintiff might, in the supreme court, remit the usury and have judgment entered there for the principal, judgment being also entered there in favor of the school fund for the penalty, and the costs in the court below, and on appeal being taxed to the plaintiff: *Thompson v. Parnell*, 10-205.

Usurious interest paid on a note afterwards put in judgment cannot subsequently be applied as a payment on other notes. In the absence of collusion or intent to cover usury a judgment is conclusive as between parties and privies: *Philips v. Gephart*, 53-396.

The proceedings and adjudication with reference to the judgment in favor of the

school fund may be subsequent to the rendition of judgment against the debtor in favor of the creditor. If the case is reversed for error in the judgment as between the parties and is remanded for new trial, the question of liability to judgment in favor of the school fund will again arise if the issues of the case involve the question of usury: *Seekel v. Norman*, 71–264.

Where suit is brought on a usurious contract, the plaintiff is entitled to judgment for the principal without interest, and where payments have been made upon the contract, he will be entitled to judgment for the difference between the amount paid and the amount legally due: *Lombard v. Gregory*, 81–569.

Confession of judgment: The defense of usury must be set up before judgment, and a judgment by confession cannot be attacked on the ground that usurious interest is included therein: *Troxel v. Clarke*, 9–201; *Twogood v. Pence*, 22–543; *Miller v. Clarke*, 37–325.

But a confession of judgment entered into for the purpose of evading the usury laws is void as between the parties so far as the amount in excess of the sum the plaintiff may lawfully recover is concerned: *Mullen v. Russell*, 46–386; *Ohm v. Dickerman*, 50–671.

If a judgment is confessed merely as a means of evading the usury law, notes given for such judgment are open to the defense of usury, but the burden of proving that the judgment was of a usurious character is upon the defendant: *Stoddard v. Lloyd*, 79–11.

The answer of the defendant in an action on a confession of judgment alleging that the confession was of a fraudulent device to evade the statute against usury, *held* sufficient on demurrer. It matters not at what time the confession is made so that it be a device or part of a plan for evading the statute: *Kendig v. Marble*, 55–386.

The existence of usury in the note, upon which a judgment by confession is rendered, does not alone authorize the conclusion that the parties caused the judgment to be entered for the purpose of concealing it or evading the statute against it: *Kendig v. Marble*, 58–529.

A written statement authorizing entry of judgment upon a note does not, before judgment is entered, estop the party making it from setting up the plea of usury: *Lyon v. Welsh*, 20 578.

Costs: Costs are not to be recovered by the party making the loan: *Binford v. Boardman*, 44–53.

Although there is no declaration that judgment shall be rendered against the plaintiff for costs, yet where the defendant on the issue joined as to usury is successful, the costs may be taxed to plaintiff. It was not intended to leave each party to pay his own costs in such cases: *Garth v. Cooper*, 12–364.

Attorney's fee: The plaintiff in an action on a usurious note should not be allowed to recover an attorney's fee provided therein: *Miller v. Gardner*, 49–234.

SEC. **3042. Assignee.** Any assignee of a usurious contract, becoming such in good faith in the usual course of business and without notice of such fact, may recover of the usurer the full amount of the consideration paid by him therefor, less any sum that may have been realized on the contract, anything in this chapter contained to the contrary notwithstanding. [C. '73, § 2081; R., 1792.]

An assignee cannot have recourse against his assignor in such cases until he has sustained loss by reason of the usurious character of the note: *Culver v. Wilbern*, 48–26.

Whether the usurer is, under this section, liable to any one but his immediate assignee, discussed but not decided: *Brown v. Wilcox*, 15–414.

CHAPTER 3.

OF NOTES AND BILLS.

SECTION **3043. Promissory notes negotiable.** Promissory notes made and signed by any person, agreeing to pay to another person, or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange, according to the commercial law. The person to whom such sum of money is made payable may maintain an action against the maker, and any person to whom such note is indorsed or delivered may maintain an action in his own name against the maker or indorser, or both of them. [C. '73, §§ 2082–3; R., §§ 1794–5; C. '51, §§ 947–8.]

A provision in a note making it negotiable and payable at a certain place does not restrict its negotiability elsewhere, nor is demand at the specified place necessary in order to charge the maker: *Scoharie, etc., Bank v. Bevard*, 51–257.

Where a note payable to payee or order is transferred without indorsement, the transferee, although he may bring action in his own name (§ 3459), is not an indorsee, but an assignee, and as such is subject to equities existing against his assignor (§ 3461):

Younker v. Martin, 18-143; and see note to § 3044.

As to what the transferee after maturity takes subject to, see notes to § 3461.

Indorsement of bills of exchange: The indorser of a note becomes liable in the same manner as the indorser of inland bills of exchange under the provisions of this section: *Davis v. Miller*, 88-114.

This is a re-enactment of the statute of Anne giving to promissory notes the same character as bills of exchange under the law merchant: *Culbertson v. Nelson*, 61 N.W., 854.

SEC. **3044. Assignment of non-negotiable instruments.** Bonds, due bills, and all instruments by which the maker promises to pay another, without words of negotiability, a sum of money, or by which he promises to pay a sum of money in property or labor, or to pay or deliver any property or labor, or acknowledges any money, labor or property to be due, are assignable by indorsement thereon, or by other writing, and the assignee shall have a right of action thereon in his own name, subject to any defense or counter-claim which the maker or debtor had against any assignor thereof before notice of such assignment. [C.'73, § 2084; R., § 1796; C.'51, § 949.]

The indorsement of a non-negotiable note is equivalent to the making of a new note, and is a direct undertaking, and not a conditional one. Demand on the original maker, and notice thereof, are not necessary in order to charge such assignor, and the holder may write an absolute guaranty or a waiver of demand and notice over the blank indorsement of the assignor and hold him thereunder: *Wilson v. Ralph*, 3-450; *Long v. Smyser*, 3-266.

Blank indorsement of a non-negotiable instrument is in fact the making of a new contract by which the indorser undertakes to pay the amount due as provided in the instrument and is not a mere transfer of the property: *Lynch v. Mead*, 68 N. W., 579.

Where parties on the one part in a contract, without notice of any assignment, make an agreement with the original parties of the other part for the alteration of the terms of such contract, such agreement will be binding upon the assignees of the latter parties. The want of such notice is a matter to be shown as a matter of defense by the parties claiming to have been relieved from liability by the new contract, when their liability, under the terms of the old contract is sought to be established by such assignees: *Steele v. Mills*, 68-406.

The assignee of a judgment takes subject to equities against his assignor: *Burtis v. Cook*, 16-194; *Ballenger v. Tarbell*, 16-491.

The assignee of a non-negotiable note is subject to any defense or counter-claim which the maker had against the assignor before notice of the assignment: *Sayre v. Wheeler*, 31-112.

The assignee of negotiable paper stands in the same position as the assignee of a non-negotiable instrument and is subject to the same defenses: *Franklin v. Twogood*, 18-515.

And therefore such assignee is subject to any defense or set off existing in favor of the maker against the assignor at the time of notice of assignment: *Younker v. Martin*, 18-143.

As to defenses available against an assignee of negotiable paper transferred after maturity, see notes to § 3461.

If, after an assignment of which the debtor has no notice, another person obtains a second assignment, and first gives notice of his right, he will be preferred to the first assignee: *Merchants' etc., Bank v. Hewitt*, 3-92.

An instrument of guaranty is assignable: *First Nat. Bank v. Carpenter*, 41-518, 521.

So is an attachment bond: *Moorman v. Collier*, 32-138.

So is a judgment: *Burtis v. Cook*, 16-194; *Ballinger v. Tarbell*, 16-491.

A policy of insurance, the assignment of which is expressly prohibited, is assignable after loss, the same as any other debt: *Walters v. Washington Ins. Co.*, 1-404; *Mershon v. National Ins. Co.*, 34-87.

Although a mining lease makes no provision for assignment, it is nevertheless assignable: *Steele v. Mills*, 68-406.

An assignment of a lease carries with it all the rights of the grantee, as well where the words "or assigns" are omitted after the grantee's name as where they are inserted: *Frederick v. Callahan*, 40-311.

In a particular case, *held*, that a certain contract did not import or contain a promise on the part of one of the makers to pay to the other any money or property, and was therefore not assignable: *Sales v. Kier*, 50-699.

A time-check, drawn in the form of an account against a railroad company in favor of a contractor, signed by a subcontractor, and indorsed, does not transfer to the indorsee any claim against the contractor: *Nash v. Chicago, M. & St. P. R. Co.*, 62-49.

A license to keep a grocery store under statute requiring such licenses, and providing that it should be issued only upon giving bond, etc., *held* not assignable: *Lewis v. United States*, Mor., 199.

The statutory provisions do not limit the assignability of claims to those specifically mentioned: *Weire v. Davenport*, 11-49.

The law will permit a person to assign what is his either in possession or by right of action, but it does not authorize him to transfer his obligations to a third party without the consent of his obligee: *Rappleye v. Racine Seeder Co.*, 79-220.

Therefore where defendants entered into a contract with Y. Bros., by which the latter were to buy a number of machines and pay for them when ordered, by giving their promissory notes, in consideration of which

Y. Bros. were to have the exclusive sale of the machines in certain territory, and Y. Bros. proceeded to fulfill their contract by canvassing the territory assigned them, and selling a large number of machines, but before completing the contract became insolvent and made an assignment for the benefit of creditors, *held*, that, without reference to the assignment for the benefit of creditors, the contract could not be assigned without the consent of defendant: *Ibid.*

Notice of assignment is not necessary to its validity: *Hirschl v. Clark*, 81–200.

Therefore, *held*, that where a certificate in a mutual benefit association authorized a change of beneficiary by the assured, notice of such change to the company was not necessary to its validity unless required by the contract of insurance, and that the execution of the instrument changing the beneficiary operated as an equitable assignment, although the certificate remained in the possession of the former beneficiary: *Ibid.*

SEC. **3045. Payable in money or labor—due bills.** Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property, labor or money to be due to another, are negotiable instruments, with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words "order" or "bearer" alone will not manifest such intent. [C.'73, § 2085; R., § 1797; C.'51, § 950.]

The use of the words "without defalcation," *held* sufficient to manifest the intent of the maker that the instrument should be negotiable: *Council Bluffs Iron Works v. Cuppey*, 41–104.

A note payable "in currency" or "in current funds" is not *prima facie* a negotiable instrument, even though made payable at a banking house: *Rindskoff v. Barrett*, 11–172; *Huse v. Hamblin*, 29–501; but it may be shown by parol evidence that by those words the parties meant "money," and that therefore the instrument is negotiable: *Haddock v. Woods*, 46–433.

The use of the words "or bearer" *held* not sufficient to make the instrument negotiable: *Peddicord v. Whittam*, 9–471; and so *held*, also, in regard to the use of the words "or order" in a receipt for corn: *Merchants', etc., Bank v. Hewitt*, 3–93.

There is nothing in this section to modify the rule requiring certainty as to the payee in order that the note may be negotiable: *Gordon v. Anderson*, 83–224.

The fact that the instrument is payable to order and recites that it is given for value received does not make it a negotiable instrument where there is uncertainty as to the amount to be paid: *Culbertson v. Nelson*, 93–187.

SEC. **3046. When assignment prohibited.** When by the terms of an instrument its assignment is prohibited, an assignment thereof shall nevertheless be valid, but the maker may avail himself of any defense or counterclaim against the assignee which he may have against any assignor thereof before notice of such assignment is given to him in writing. [20 G. A., ch. 183, § 1; C.'73, § 2086; R., § 1798; C.'51, § 951.]

The assignment of a policy of insurance, by the terms of which an assignment thereof is expressly prohibited, would, under this section, be valid: *Mershon v. National Ins. Co.*, 34–87.

A stipulation in an agreement to convey, that no assignment of the premises by the vendor should be valid unless indorsed on the agreement and countersigned by the vendee or his assignee, *held*, to be for the benefit of the vendee and not enforceable by his assignees: *Wilson v. Reuter*, 29–176.

This section does not render assignable a railway ticket issued to a particular person by name and expressly made non-transferable, and another person attempting to ride upon such ticket would be guilty of fraud: *Way v. Chicago, R. I. & P. R. Co.*, 64–48.

The assignee of a cause of action is not entitled to recover anything which the assignor could not have recovered: *Callanan v. Windsor*, 78–193.

One who takes a claim by assignment takes subject to any defense or counter-claim which the holder may have against the assignor before notice of the assignment is given in writing to the holder, even though he has previous information that such assignment has been made and acquires claims against the assignor for the purpose of setting them off against his indebtedness: *Franzen v. Hutchinson*, 62 N.W., 698.

As to what causes of action are assignable, see notes to § 3443.

SEC. **3047. Open account assignable.** An open account of sums of money due on contract may be assigned, and the assignee will have a right of action thereon in his own name, subject to such defenses and counterclaims as are allowed against the instruments mentioned in the preceding section, before notice of such assignment is given to the debtor in writing by the assignee. [20 G. A., ch. 183, § 2; C.'73, § 2087; R., § 1799; C.'51, § 952.]

Under similar provisions of Code of '51 *held* that the assignment of an open account must be in writing, and an assignment by delivery or in parol would not be sufficient: *Andrews v. Brown*, 1–154; *Williams v. Soutter*, 7–435, 448.

The mere drawing and delivery of an order by one person upon another for money due will not constitute an assignment, giving the right of action against the drawee, in the absence of any acceptance or even presentment: *Poole v. Carhart*, 71–37.

Save for this section, an open account is not assignable, and it was therefore wholly immaterial under the section, as it stood prior to the amendment (adding the last clause), whether a debtor had a defense against an assignor, when he received notice of the assignment, or whether such defense arose afterwards, for the reason that the statute created no right by reason of notice. The point of time fixed by the statute was the commencement of suit. If at that time the debtor had a defense against the assignor he might interpose it against the assignee: *Wing v. Page*, 62–87; *Zugg v. Turner*, 8–223; *Reynolds v. Martin*, 51–324.

While a check may amount to an equitable assignment of a fund in bank, it does not cut off the right of the bank to a set off as to the depositor's note in an action against it on the check, it having had no notice of such check until after the drawer's insolvency: *Thomas v. Exchange Bank*, 68 N. W., 780.

While the debtor under such statute may voluntarily pay the assignor at any time before action brought, and thus avoid liability to the assignee, he is not under obligation to do so, and the assignor cannot enforce such payment: *Bailey v. Union Pacific R. Co.*, 62–354.

The claims of a party under a mining lease, providing for monthly payments of royalty, do not constitute an open account under the statutory provisions referring to the assignment of such account: *Steele v. Mills*, 68–406.

Under the statute the assignment of an open account for money due on contract passes to the assignee the legal title to the account assigned: *Knadler, v. Sharp*, 36–232.

The assignor of an account loses all legal interest therein: *Platt v. Bedge*, 8–392.

As to what is an account, see notes to § 3449.

SEC. **3048. Assignor liable.** The assignor of any of the above instruments not negotiable shall be liable to the action of his assignee without notice. [C.'73, § 2088; R., § 1803; C.'51, § 956.]

This section does not limit the action of an assignee in such cases to his immediate assignor: *Huse v. Hamblin*, 29–501.

A guarantor by written instrument, as well as an assignor, is liable without notice: *Henderson v. Booth*, 11–212.

SEC. **3049. Blank indorsement by one not party.** The blank indorsement of an instrument for the payment of money, property or labor by a person not a payee, indorsee or assignee thereof, shall be a guarantee of the performance of the contract. To charge such guarantor, notice of non-payment by the principal must be given within a reasonable time, but the guarantor is chargeable without notice, if the holder shows affirmatively that he has received no detriment from the want thereof. A guarantor as contemplated in this section is also liable to the action of an indorsee, assignee or payee, if due diligence in the institution and prosecution of an action against the maker or his representative has been used. [C.'73, §§ 2089–91; R., §§ 1800–2; C.'51, §§ 953–5.]

Blank indorsement: This section does not apply to an express guaranty entered into otherwise than by the blank indorsement of a person not a party to the instrument: *Peddicord v. Whittam*, 9–471.

An indorsement *in full*, made by one who is not payee, indorser or assignee, makes such person an indorsee within the rules of commercial paper, and not a guarantor as here contemplated: *Stout v. Noteman*, 30–414; and so of an indorsement not in blank and made by an indorsee: *Greene v. Thompson*, 33–293.

An indorsement such as is here referred to imports a consideration: *Veach v. Thompson*, 15–380; and an accommodation indorser, although not bound in the absence of consideration as between the immediate parties, cannot raise the defense of want of consideration as against a good-faith purchaser for value, even when such party took with full knowledge of that fact: *Jones v. Berryhill*, 25–289.

The provisions of this section are not applicable to a blank indorsement by the payee of the note: *Iowa Valley State Bank v. Sigstad*, 65 N. W., 407; *Farmers Savings Bank v. Wilka*, 71 N. W., 200.

The contract of guaranty here contemplated is different from that of suretyship: *Robinson v. Reed*, 46–219.

These provisions are not applicable to other forms of guaranty: *Griffin v. Seymour*, 15–30; *Peddicord v. Whittam*, 9–471; *Sabin v. Harris*, 12–87.

This statutory provision is not affected by § 3050 as to notice of non-payment of negotiable paper: *Sibley v. Van Horn*, 13–209.

Where a person becoming guarantor by blank indorsement of an instrument to which he was not a party, afterward indorsed an extension of time on such guaranty, *held*, that such second indorsement did not change the nature of his liability: *Picket v. Hawes*, 14–460.

In the absence of such statutory provision

such an indorsement renders the indorser liable in accordance with the contract, in pursuance of which the indorsement is made, and the blank indorsement may be filled up accordingly. If that contract is one of guaranty, proof of demand and notice is not necessary, but want of demand and notice may be set up as a defense, to the extent to which such guarantor can show himself to have been injured by want of such demand and notice: *Fear v. Dunlap*, 1 G. G., 331.

Where there is testimony tending to show affirmatively that the guarantor by blank indorsement of an instrument to which he is not a party received no detriment from want of notice, that question should be left to the jury: *Mt. Pleasant Branch, etc., Bank v. McLeran*, 26-306.

Section applied: *Rodabaugh v. Pitkin*, 46-544.

Demand and notice: Demand of the maker is not necessary to hold the guarantor: *Marvin v. Adamson*, 11-371; *Knight v. Dunsmore*, 12-35.

Proof of the maker's insolvency at maturity of the note and continuously afterwards is *prima facie* sufficient to show that the guarantor has received no detriment from want of notice: *Knight v. Dunsmore*, 12-35.

This section only applies to a person deemed a guarantor as here contemplated. A guarantor generally is liable without proof of demand and notice, or of diligence, but he may show by way of defense that he has been damaged by the want of such notice or the failure to use diligence in prosecuting the claim: *Sabin v. Harris*, 12-87; *Griffin v. Seymour*, 15-30.

The provisions of this section as to notice are not modified by § 3050: *Sibley v. Van Horn*, 13-209.

Due diligence, in the absence of peculiar facts, would require the assignee of the note to bring suit at the first regular term of court after maturity, and obtain judgment and execution thereon as soon as practicable by the ordinary rules and practice of the court: *Vorhies v. Atlee*, 29-49.

The facts constituting due diligence must be averred: *Leas v. White*, 15-187.

SEC. **3050. Grace—notice.** Grace shall be allowed upon negotiable bills or notes payable within this state, according to the principles of the law-merchant; and notice of non-acceptance or non-payment, or both, of said instruments shall be required according to the rules and principles of the commercial law. [C. '73, § 2092; R., § 1843.]

Where exemption from liability on a bill of exchange was asserted under a statute of another state which changed the rule of the law merchant as to days of grace, *held*, that the defendants must show themselves within such statute to obtain its exemption: *Mt. Pleasant Branch, etc., Bank v. McLeran*, 26-306.

Notes payable in property are not entitled to days of grace, unless they are negotiable within the provisions of § 3045, allowing such notes to be made negotiable in terms: *McCartney v. Smalley's Adm'rs*, 11-85; *Peddicord v. Whittam*, 9-471.

A note is not overdue until days of grace are passed. Therefore, *held*, that a transfer on the second day of grace was before maturity: *Goodpaster v. Voris*, 8-334.

An action on a prommissory note brought before the expiration of the days of grace cannot be maintained: *Seaton v. Hinneman*, 50-395; *Whitney v. Bird*, 11-407.

A note payable in current funds is not *prima facie* negotiable; but evidence of custom or an understanding among the parties that by such term is meant money may be received to impart to it the attributes of negotiability. And thereby it will become subject to days of grace: *Haddock v. Woods*, 46-433.

The law merchant having generally been recognized by courts of this country will be considered as existing until it is shown not to prevail. The courts will take notice of the usage of allowing three days of grace, and in the absence of proof to the coutrary will presume that such was the understanding of the parties: *Hudson v. Matthews*, Mor., 94.

SEC. **3051. What entitled to grace.** All bills of exchange, drafts and orders payable within this state, except those drawn payable on demand, shall be entitled to grace. [16 G. A., ch. 81.]

A draft or bill in which no time for payment is mentioned, is payable on demand and therefore not affected by this statute, and is not entitled to grace: *First Nat. Bank v. Price*, 52-570.

SEC. **3052. Demand.** A demand at any time during the days of grace will be sufficient for the purpose of charging the indorser. [C. '73, § 2093; R., § 1804; C. '51, § 957.]

SEC. **3053. Holidays.** The first day of the week, called Sunday, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the twenty-fifth day of December, the day of the general election, and any day appointed or recommended by the governor of this state or by the president of the United States as a day of fasting or of thanksgiving, shall be regarded as holidays for all purposes relating to the presentation for payment or accept-

ance, and the protesting and giving notice of the dishonor of bills of exchange, drafts, bank checks, orders and promissory notes, and any blank or mercantile paper falling due on any of the days above named shall be considered as falling due on the succeeding business day. [23 G. A., ch. 45; 18 G. A., ch. 31; C.'73, § 2094.]

SEC. **3054. Notice of protest.** In case of a demand of payment of any promissory note, bill of exchange or other commercial paper by a notary public, and a refusal by the maker, drawer or acceptor, the notary making said demand may inform the indorser or any party to be charged, if in the same town or township, by notice deposited in the nearest post-office to the parties to be charged, on the day of demand, and no other notice shall be necessary to charge such party. [C.'73, § 2095; R., § 213.]

Aside from this statutory provision, a notice sent by mail to a party living in the same town is not good unless it appears that he actually received it: *Grinman v. Walker*, 9–426.

But an agreement between parties that notice through the mails should be deemed sufficient may be shown by proving usage to that effect known to the party to whom notice is to be given: *Ibid.*

Where a notary after making demand, instead of notifying an indorser residing in the same place, either personally or by notice deposited in the post-office there, returned to a neighboring town and from there mailed a notice to the indorser, *held*, that the notice was not sufficient under this section: *Fahnestock v. Smith*, 14–561.

This section adds another method of giving notice when the party resides in the same town: *Ibid.*

SEC. **3055. Damages—exchange.** The rate of damages to be allowed and paid upon the non-acceptance or non-payment of bills of exchange, drawn or indorsed in this state, when damage is recoverable, shall be, if the bill is drawn upon a person at a place out of the United States, five per cent. of the principal specified in the bill, with interest on the sum from the time of protest, and if drawn on a person at any place in the United States other than in this state, three per cent., with interest. A provision in any instrument for the payment of exchange in addition to the amount of principal and interest shall not render it non-negotiable. [C.'73, § 2096; R., § 1812; C.'51, § 965.]

This section relates to foreign and not inland bills: *First Nat. Bank v. Owen*, 23–185.

SEC. **3056. When demand necessary.** No cause of action shall accrue upon a contract for labor or the payment or delivery of property other than money, where the time of performance is not fixed, until a demand of performance has been made upon the maker and refused, or a reasonable time for performance thereafter allowed. [C.'73, § 2097; R., § 1806; C.'51, § 959.]

If the time of payment is fixed, the property should be tendered, as provided in the next section, and no demand is necessary: *Barker v. Brink*, 4 G. Gr., 59.

Where an order is given by one pereon upon another for property, demand thereof must not only be made of the drawee, but also of the drawer, before suit can be brought thereon against the latter: *Whipple v. Abbott*, 4 G. Gr., 66.

Where the time and place of delivery are fixed in the contract, if the debtor set apart the property at the time and place stipulated, although the creditor is not there to receive, or refuses to accept the property tendered, the title passes to him, and the debt is discharged: *Games v. Manning*, 2 G. Gr., 251; *Hambel v. Tower*, 14–530.

Where the instrument provided for the payment of a certain sum in cabinet furniture at the maker's shop, no date for the payment being specified, *held*, that action thereon could not be maintained without demand being shown: *Frederick v. Remking*, 4 G. Gr., 56.

Where a lease to a field tenant provided that the tenant should pay a portion of the crop raised as rent, but there was no stipulation as to the time when such payment should be made, *held*, that there could be no action for a money judgment upon failure of the tenant to deliver the portion of the crop due as rent until demand therefor had been made, even though by the terms of statute such a lease terminates upon the first day of December of the year for which the lease is made: *Johnson v. Shank*, 67–115.

SEC. **3057. Tender of labor or property.** When a contract for labor, or for the payment or delivery of property other than money, does not fix a place of payment, the maker may tender the labor or property at the place where the payee resided at the time of making the contract, or at the resi-

dence of the payee at the time of performance of the contract, or where any assignee of the contract resides when it becomes due, but if the property in such case is too ponderous to be conveniently transported, or if the payee had no known place of residence within the state at the time of making the contract, or if the assignee of a written contract has no known place of residence within the state at the time of performance, the maker may tender the property at the place where he resided at the time of making the contract. [C. '73, §§ 2098–9; R., §§ 1807–8; C. '51, §§ 960–1.]

Where the defendant notified plaintiff of his readiness to deliver the property as provided in the contract, and plaintiff refused to receive it, *held*, that by such refusal defendant was released from the necessity of any further tender: *Williams v. Triplett*, 3–518.

The word "payment" in the phrase "does not fix a place of payment" necessarily includes in its meaning both "payment" and "delivery," and in the same way the word "payee" means the person to whom property is to be delivered: *Holtz v. Peterson*, 62 N.W., 19.

The statute provides, not the consequences to follow a failure to pay in or to deliver property so that the money demand may follow, but what the party required to make such payment or to deliver property may do to preserve his rights: *Ibid.*

SEC. **3058. When contract assigned.** When the contract is contained in a written instrument which is assigned before due, and the maker has notice thereof, he shall make the tender at the residence of the holder if he resides in the state, and no farther from the maker than the payee did at the making thereof. [C. '73, § 2100; R., § 1809; C. '51, § 962.]

SEC. **3059. Effect of tender.** A tender of the property, as above provided, discharges the maker from the contract, and the property becomes vested in the payee or his assignee, and he may maintain an action therefor as in other cases. But if the property tendered be perishable, or requires feeding, or other care, and no person is found to receive it when tendered, the person making the tender shall preserve, feed or otherwise take care of the same, and shall have a lien thereon for his reasonable expenses and trouble in so doing. [C. '73, §§ 2101–2; R., §§ 1810–11; C. '51, §§ 963–4.]

This section gives the right to a lien only after tender of the property, but a lien would not depend under all circumstances upon an actual tender. If when the time for delivery should arrive, the person to whom delivery was to be made should give the other person to understand that the tender would be useless, the law would not require the mere formality of doing the things essential to a tender, and the party would be estopped to take advantage of the omission, and the lien would attach as though the tender had been made: *Holtz v. Peterson*, 62 N. W., 19.

SEC. **3060. When holder absent from state.** When the holder of an instrument for the payment of money is absent from the state when it becomes due, and the indorsee or assignee of such an instrument has not notified the maker of such indorsement or assignment, the maker may tender payment at the last residence or place of business of the payee before the instrument becomes due, and if there be no person there authorized to receive payment and give proper credit therefor, the maker may deposit the amount due with the clerk of the district court in the county where the payee resided at the time it became due, and the maker shall not be liable for interest from that date. [C. '73, § 2103; R., § 1805; C. '51, § 958.]

CHAPTER 4.

OF TENDER.

SECTION **3061. Offer in writing.** An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, if not accepted, is equivalent to the actual tender of the money, instrument or property, subject, however, to the condition contained in the following section; but if the party to whom the tender is made desires an

inspection of the instrument or property tendered, other than money, before making his determination, it shall be allowed him on request. [C.'73, § 2105; R., § 1816; C.'51, § 967.]

This statutory provision simply dispenses with the production and actual tender of the money. In other respects the rule of the common law prevails and the tender must be unconditional. If it be in full of all demands, or condition that a receipt be given, or if it be offered by way of bonus with a denial that any debt is due, or accompanied by a threat of consequences to follow upon its refusal, cannot be regarded as sufficient: *Kuhns v. Chicago, M. & St. P. R. Co.*, 65–528.

The offer here contemplated must be in writing; otherwise it does not dispense with the necessity of producing the money: *Cassady v. Bossler*, 11–242.

As the tender may be made in writing, a person knowing the residence and address of another may make him a tender although he is beyond the state: *Crawford v. Paine*, 19–172.

A party making a tender in writing, if sued, must, to keep his tender good, pay the money into court: *Shugart v. Pattee*, 37–422. And see notes to preceding section.

Where defendant in a cross-petition offers to pay a sum of money, it amounts to a tender, and judgment should be rendered against him for that amount: *Corbin v. Woodbine*, 33–297, 301.

Where a contract for the delivery of butter provided that such delivery should be made within a specified time upon demand, *held*, that in the absence of demand within the time specified, a written order in accordance with this provision was sufficient, although the party making the offer had not at the time any butter on hand with which to fill the offer: *Holt v. Brown*, 63–319.

Where defendant notified plaintiff of his readiness to deliver the property as provided in the contract, and plaintiff refused to receive it, *held*, that by such refusal defendant was released from the necessity of any further tender: *Williams v. Triplett*, 3–518.

Where the time and place of delivery are fixed in the contract, if the debtor set apart the property at the time and place stipulated, although the creditor is not there to receive, or refuses to accept the property tendered, the title passes to him and the debt is discharged: *Games v. Manning*, 2 G. Gr., 251; *Hambel v. Tower*, 14–530.

Under the plea of tender in the contract for the delivery of property, coupled with an averment of readiness and willingness to perform, the party may introduce evidence to show that the property was set apart for the use of the promisee: *Hambel v. Tower*, 14–530.

SEC. **3062. When not accepted.** When a tender of money or property is not accepted by the party to whom it is made, the party making it may, if he sees fit, retain it in his possession; but if afterwards the party to whom the tender was made concludes to accept it and gives notice thereof to the other party, and the subject of the tender is not delivered to him within a reasonable time, the tender shall be of no effect. [C.'73, § 2104; R., § 1815; C.'51, § 966.]

What constitutes: A mere readiness or proposition to pay a certain sum does not, without more, amount to a tender: *Eastman v. District T'p*, 21–590.

One who pleads tender must prove a tender in full. So, where it was proposed to prove that defendant had in good faith tendered what was believed to be the value of a colt killed on its track, *held*, that such evidence was properly rejected: *Helphrey v. Chicago & R. I. R. Co.*, 29–480.

Evidence of a mere offer to pay is not sufficient to establish a tender: *Collins v. Jennings*, 42–417.

A tender to be valid must be without other condition than that the party to whom it is made will do all which it is his legal obligation to do: *Kennedy v. Moore*, 91–39.

But where claim was on a note payable to payee or order and a mortgage securing the same, there being no written assignment to the holder, *held*, that the maker in tendering payment might properly require as a condition that the holder should furnish an assignment of the note and mortgage or a written release of the mortgage which would satisfy it of record: *Ibid.*

How kept good: A tender is lost by a subsequent demand and refusal: *Hambel v. Tower*, 14–530.

A tender once made will not stop interest accruing thereafter unless it be shown that defendant was always ready and willing to pay: *Jones v. Mullinix*, 25–198.

To keep a tender good after suit brought the money must be paid into and remain in court. The statutory provision as to tender does not change the rule in that respect: *Johnson v. Triggs*, 4 G. Gr., 97; *Freeman v. Fleming*, 5–460; *Mohn v. Stoner*, 11–30; *S. C.*, 14–115; *Warrington v. Pollard*, 24–281; *Shugart v. Pattee*, 37–422.

Where, however, the indebtedness is conditional and dependent, and the party is under no obligation to make payment until the performance of some act on the part of the other party, the showing of readiness and ability tc perform is sufficient without the tender being kept good by the deposit of the money in court: *McDaneld v. Kimbrell*, 3 G. Gr., 335.

A tender of property to plaintiff in an action of replevin is not sufficient unless it is continued and the property brought into court or placed under its control and subject to its order: *Hayden v. Anderson*, 17–158.

A reasonable time is to be allowed defendant for bringing the money into court in order to keep his tender good; and where a tender had been properly made in an action

before a justice of the peace, and on appeal the justice failed to turn over the amount in his hands to the clerk, *held*, that the appellant was not in fault for such failure of the justice in the absence of any showing that he did not exercise reasonable diligence in procuring an order upon the justice to send up the money: *Waide v. Joy*, 45–282.

Where a tender is pleaded, the party pleading it must show a continued readiness to pay, and that the money is brought into court to keep the tender good: *Long v. Howard*, 35–148.

Tender must be specially pleaded. Such a plea must not only aver an offer to pay, but show a continued readiness to keep good the tender made: *Barker v. Brink*, 5–481.

An objection that a plea of tender is not supported by payment of money into court should be raised before going to trial and not for the first time on the final hearing: *Freeman v. Fleming*, 5–460.

In equity: The rule that in order to entitle a party to rely upon a tender he must bring the money into court is of questionable propriety in view of the statutory provisions, even in a case at law. In an equitable proceeding such a rule is not applicable: *Hayward v. Munger*, 14–516.

In an equity action it is sufficient to aver that plaintiff is ready and willing to perform without making an actual tender: *Clapp v. Greenlee*, 69 N. W., 1049.

There is not the same necessity for tender in actions in equity as at law, and a court of equity having control over the subject may so mould the decree as to costs and the conditions under which relief will be granted as to fully guard and protect the interests of all parties, although no formal tender is made before the bringing of suit: *Jones v. Hartsock*, 42–147.

In equitable actions a formal tender of performance by plaintiff of that which he is required to do before he is entitled to performance from defendant is not thought necessary. It is sufficient that a readiness and willingness to perform be averred: *Taylor v. Ormsby*, 66–109.

In an equitable action the party who offers and avers willingness to pay whatever is found due in order to redeem securities from a usurious loan may recover, although he does not make actual tender in advance: *Binford v. Boardman*, 44–53.

A party entitled to redeem who does not show a tender of the amount necessary, but merely expresses readiness and willingness to pay such amount, will be required to pay the costs of the action to recover possession of the land, which is defeated by the establishment of the right to redeem from the title therein set up by the plaintiff: *Shoemaker v. Porter*, 41–197.

In the foreclosure of an equitable interest in real estate existing under an agreement to convey, tender of deed before suit brought is not essential when the decree gives authority to execute one upon payment of the purchase money: *Barrett v. Dean*, 21–423.

Unliquidated damages: As to whether the provisions as to tender apply in an action for unliquidated damages, *quære: Guengerich v. Smith*, 36–587.

Legal tender: Whatever is constitutionally made a legal tender for all debts by congress must be received in payment of a debt, and a party cannot, by inserting an obligation to pay in one rather than another of such legally equivalent values, compel payment in the coin or currency so named: *Wornibold v. Schlicting*, 16–243.

An offer to pay in bank bills and not in legal tender is not a tender, and when made in payment of a note does not entitle the one who offers the money to demand the delivery of the note to him: *Jones v. Mullinix*, 25–198.

Where the lease of a market stall was sold by a city at auction, with the stipulation that the payment should be made in cash, *held*, that the tender of city scrip was not a compliance with the contract: *Dubuque v. Miller*, 11–583.

Costs: A tender after suit brought, which does not include costs then accrued, is not sufficient: *Freeman v. Fleming*, 5–460; *Warrington v. Pollard*, 24–281; *Barnes v. Greene*, 30–114; *Young v. McWaid*, 57–101.

In order to make a sufficient tender after action brought, the amount tendered should be sufficient to cover the sum admitted to be due and costs accrued at the time: *Martin v. Whistler*, 62–416.

Effect: A tender does not operate to discharge the debt: *Mohn v. Stoner*, 11–30.

But if kept good, tender stops interest and saves cost: *Johnson v. Triggs*, 4 G. Gr., 97.

A tender may be kept good if the party making it retains the money in his own possession: *Loughridge v. Iowa Life, etc., Ass'n*, 84–141.

The party relying on the tender must not only prove that such tender was made but also that it was kept good, by bringing the money into court: *Deacon v. Central Iowa Investment Co.*, 63 N.W., 673.

Where defendant deposited with the clerk a sum sufficient for the payment of a judgment and costs entered against him, *held*, that it was the duty of the clerk, at the request of defendant, to so apply the money in his hands, and defendant was entitled to an injunction preventing issuance of execution on such judgment: *Fisher v. Moore*, 19–84.

Admits indebtedness: A tender admits plaintiff's cause of action to the amount of the tender, and plaintiff is entitled to judgment for that amount: *Johnson v. Triggs*, 4 G. Gr., 97; *Phelps v. Kathron*, 30–231; *Gray v. Graham*, 34–425; *Sheriff v. Hull*, 37–174; *Frink v. Coe*, 4 G. Gr., 555; *Babcock v. Harris*, 37–409; *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76–753.

Therefore, where plaintiff sued for injury to animals by defendant in the operation of its railroad, *held*, that a plea of tender by defendant admitted the ownership of the animals injured to be in plaintiff: *Scott v. Chicago, M. & St. P. R. Co.*, 78–199.

A tender has the effect of establishing the liability of the party making such tender, but it does not extinguish the indebtedness; and where an administrator made tender to a person entitled to a distributive share, of the amount assumed by him to be due such person, and subsequently without authority

made a deposit of the same in a bank to such person's credit, where the money was lost by the bank's failure, *held*, that in an action against the administrator and his bondsmen the tender established the administrator's liability for the amount: *Rainwater v. Hummel*, 79–571.

Where before or at the commencement of suit defendant makes a tender of an amount he believes to be due he is bound thereby; and if a trial ensues plaintiff is entitled to recover at least the amount of the tender, but without costs: *Fisher v. Moore*, 19–84.

A tender may not be in the way of a compromise or settlement of a disputed claim, but for the discharge of the obligation under the contract and for the payment of the indebtedness arising thereon. Such tender is an admission of liability to the amount of the indebtedness: *Rand v. Wiley*, 70–110.

A tender is an admission that the amount tendered is due to the party in whose favor the tender is made, and it is error not to render judgment in favor of such party to the amount of such tender: *Wright v. Howell*, 35–288; *Rump v. Schwartz*, 56–611; *Brayton v. Delaware County*, 16–44.

A judgment against the party making the tender in favor of the party to whom it is made, for the amount tendered cannot be questioned: *Wilson v. Chicago, M. & St. P. R. Co.*, 68–673.

Where a tender is pleaded plaintiff is entitled to a verdict for that amount, and in a particular case, *held*, that a verdict by a jury which failed to award to plaintiff the amount due was cured by judgment of the court for that amount, and that the error in the verdict was therefore without prejudice: *Sheriff v. Hull*, 37–174.

Where a tender is pleaded as to one branch of a counter-claim, leaving undetermined the original action and another branch of the counter-claim, there is no ground for rendering judgment for defendant on such tender: *Wolmerstadt v. Jacobs*, 61–372.

The pleading of a tender by defendant does not admit allegations of plaintiff's petition, but only that the amount is due on a cause of action included in the suit: *Griffin v. Harriman*, 74–436.

SEC. **3063. Receipt—objection.** The person making a tender may demand a receipt in writing for the money or article tendered, as a condition precedent to the delivery thereof. The person to whom a tender is made must, at the time, make any objection which he may have to the money, instrument or property tendered, or he will be deemed to have waived it. [C. '73, §§ 2106–7; R., §§ 1817–18; C. '51, §§ 968–9.]

By "objection to the money" is meant objection to the kind of money, and the phrase has no reference to the amount. Want of objection as to the amount would not preclude recovery of the amount actually due: *Chicago & S. W. R. Co. v. Northwestern U. Packet Co.*, 38–377.

A party making no objection to the amount of the tender cannot afterwards set up that the tender was insufficient: *Sheriff v. Hull*, 37–174.

A tender of less than the amount due will be sufficient as a tender unless objection be made to the amount, and will relieve the party from liability for interest and costs, but will not prevent a recovery by the other party for the actual amount due: *Hayward v. Munger*, 13–516; *Guengerich v. Smith*, 36–587.

Where the party to whom the tender is made does not object to the amount, it will be presumed that the amount tendered was that which the party making the tender offered to pay: *McDaneld v. Kimbrell*, 3 G. Gr., 335.

The party objecting to the terms of an instrument tendered must specify what terms he requires: *Gilbert v. Mosier*, 11–498.

The clerk of the court is liable for money paid into court by way of tender whether it was paid in legal tender money or not. The objection to the kind of money can be raised only by the party against whom the tender is sought to be established: *Billings v. Teeling*, 40–607.

CHAPTER 5.

OF SURETIES.

SECTION **3064. May require creditor to sue.** When any person bound as surety for another for the payment of money, or the performance of any other contract in writing, apprehends that his principal is about to become insolvent or remove permanently from the state without discharging the contract, he may, if a cause of action has accrued thereon, by writing, require the creditor to sue upon the same, or permit the surety to commence an action in such creditor's name and at the surety's cost. [C. '73, § 2108; R., § 1819; C. '51, § 970.]

The statutory provisions as to notice to the creditor to sue are in abrogation of the common law. A surety relying upon a discharge by reason of them should show that he has complied with the statute with reasonable strictness: *Hill v. Sherman*, 15–365; *Moore v. Peterson*, 64–423.

Therefore a notice given by the surety to the creditor to begin suit against the principal debtor for the amount due, or notice to permit such surety to begin suit in the name of the creditor, is not enough. The notice should require the creditor to bring suit upon the contract against the parties liable thereon (including the surety) or permit such suit to be brought: *Moore v. Peterson*, 64–423; *Harriman v. Egbert*, 36–270.

Where notice was given by the surety as here contemplated, and in pursuance thereof authority was given to the surety by the creditor to bring suit against the principal, but the suit brought under such authority was afterwards dismissed, *held*, that such proceeding did not deprive the creditor of the right to prosecute his claim before the assignee of the principal debtor, in an assignment for the benefit of creditors: *In re Assignment of Hobson*, 81–392.

Under this provision a creditor cannot hold the surety without instituting suit against the principal, or allowing the surety to do so, although the principal may have removed from the state: *Hayward v. Fullerton*, 75–371.

Under the above section there must be a request or notice to bring suit, but where the guarantor's attorney merely requested the creditor to send a copy of the bond guaranteed, and stated that if the creditor did not have an attorney or collector to collect the indebtedness the writer would do so, *held*, that this was not notice to sue as required by the statute: *Davis Sewing Machine Co. v. McGinnis*, 45–538, 545.

The notice by the surety must be in writing: *Stevens v. Campbell*, 6–538.

Failure to object to oral evidence of a notice to the creditor to sue does not waive the requirement of the statute: *Davis v. Payne*, 45–194.

The creditor has the right of election to sue in his own name or permit the surety to do so. A notice requiring him to sue will not release the surety if such notice is not complied with: *Hill v. Sherman*, 15–365.

A joint maker of a note who is in fact a surety may have the benefit of these provisions: *Piper v. Newcomer*, 25–221.

Before a right of action has accrued on the contract against the principal the provisions of these sections are not applicable: *Dennison v. Sopcr*, 33–183.

Where a principal makes a note payable at a fixed future time as collateral to a bond, and the creditor reserves his right to an immediate action on the bond, and it is expressly agreed that the remedy on the bond is not suspended by the note, the sureties can, notwithstanding the acceptance of the note, require the creditor to commence suit on the bond as provided under the above sections: *Jones v. Sarchett*, 61–520.

The fact that before the giving of the notice by the surety to the creditor the principal has been insolvent, and has removed from the state, will not defeat the object of the notice, it not appearing that the principal is insolvent at the time the notice is given: *Graham v. Rush*, 73–451.

Under these provisions a surety may, by giving proper notice, compel the creditor to sue, and § 3967 gives him the right, when he and the principal are joined in a suit, to have the judgment on his motion specify him as surety, the effect of such judgment then being to exempt the surety's property from execution until the principal's property is exhausted. But where a surety has failed to act under either of these provisions, and both principal and surety are joined in a suit, the creditor may dismiss as to the principal, and pursue the surety alone: *Dorothy v. Hicks*, 63–240.

If a creditor makes a representation to a surety as to the condition of the indebtedness, or if he promises to look alone to the principal for payment, and the surety, relying upon such representation or promise, surrenders securities, or omits to procure security, or otherwise changes his position toward the principal, he is thereby discharged: *Auchampaugh v. Schmidt*, 77–13.

But where there was no misrepresentation as to existing facts, but merely a promise to look to the principal alone for payment, and it was shown that the relation of the surety to the principal remained unchanged, *held*, that the surety was not discharged: *Ibid.*

These provisions have no application to cases where sureties are released by express act of the creditor: *Wolf v. Madden*, 82–114.

SEC. **3065. Refusal or neglect.** If the creditor refuses or neglects to bring an action for ten days after request, and does not permit the surety to do so, and furnish him with a true copy of the contract or other writing therefor, and enable him to have the use of the original when requisite in such action, the surety shall be discharged. [C. '73, § 2109; R., § 1820; C. '51, § 971.]

After making the demand upon the principal in writing, the surety has nothing further to do, and, if not notified by the principal within due time of his permission to sue, he is discharged: *First Nat. Bank v. Smith*, 25–210.

The fact of the surety's apprehension of his principal's insolvency cannot be put in issue. The existence of the fact of insolvency or removal is not necessary to give the surety the right to make the demand upon the creditor: *Ibid.*

The personal right of a surety to be discharged from a note upon failure of the creditor to sue upon notice cannot be taken away by his official relation to the creditor, it not appearing that it was his official duty to institute suit, or that he had custody of the

note, or was guilty of fraud or negligence in the transaction: *Ibid.*

The election to sue or to allow the surety to sue is a right of the creditor incident to the debt itself, and passes to an agent authorized to collect the debt. If not exercised by him on notice from the surety it is lost and the surety discharged: *Thornburgh v. Madren*, 33–380.

When the surety serves his notice on the creditor to sue, the creditor must see that suit is actually commenced within the time fixed by statute, otherwise the surety will be discharged. Thus where a creditor, on receipt of a notice from the surety, directed a justice to bring suit and the justice failed to do so within the ten days, *held*, that the creditor was chargeable with the neglect of the justice and the surety was discharged: *German Am. Bank v. Denmire*, 58–137.

A showing of injury is not necessary to release the surety where he has given proper notice to the creditor who has not elected one or the other of the steps pointed out by statute: *Shenandoah Nat. Bank v. Ayres*, 87–526.

SEC. **3066. Surety may sue.** When the surety commences such action, he shall give a bond to pay such costs as may be adjudged against the creditor, and the action shall be brought against all the obligors, but those joining in the request to the creditor shall make no defense thereto, but may be heard on the assessment of the damages. [C. '73, § 2110; R., § 1821; C. '51, § 972.]

SEC. **3067. Executor—official bonds.** The provisions of this chapter extend to the executor of a deceased surety and holder of the contract, but not to the official bonds of public officers, executors or guardians. [C. '73. § 2111; R., § 1822; C. '51, § 973.]

CHAPTER 6.

OF PRIVATE SEALS.

SECTION **3068. Abolished.** The use of private seals in written contracts, except those of corporations, is abolished; and the addition of a private seal to an instrument in writing shall not affect its character in any respect, but in the execution of instruments conveying, incumbering or affecting real estate, a corporation shall attach its corporate seal. [C. '73, § 2112; R., § 1823; C. '51, § 974.]

A corporation may make a valid written contract without the use of a seal: *Muscatine Water Works Co., v. Muscatine Lumber Co.*, 85–112.

A mortgage not being now an instrument under seal, parol evidence is admissible to show whether an executor is bound thereby individually or in his representative capacity: *Ames v. Holderbaum*, 44 Fed., 224.

SEC. **3069. Consideration implied.** All contracts in writing, signed by the party to be bound or by his authorized agent or attorney, shall import a consideration. [C. '73, § 2113; R., § 1824; C. '51, § 975.]

A consideration is implied in a written contract, and none need be expressed: *Peddicord v. Whittam*, 9–471.

A written contract implies a consideration, and want or failure of consideration must be averred and shown by way of defense: *Goodpaster v. Porter*, 11–161.

Such a contract imports a consideration in the same manner that sealed instruments formerly did: *Jones v. Berryhill*, 25–289, 297.

So *held* as to a written guaranty: *Sabin v. Harris*, 12–87.

A covenant in writing imports a consideration: *Arnold v. Kleutzer*, 67–214.

A deed implies a consideration unless there is evidence to the contrary: *Brockway v. Harrington*, 82–23.

A written instrument imports a consideration and the burden is upon the party defending against such instrument to show that it was without consideration: *French v. French*, 91–140.

A contract in writing purports a consideration and it is not essential that the writing be made or signed by the person to be charged if it is executed under his authority: *First Methodist Episcopal Church v. Donnell*, 64 N. W., 412.

It is not ground of demurrer to a petition on a written instrument that no consideration is alleged or appears on the face thereof. Such objection must be set up as a defense: *Linder v. Lake*, 6–164; *Towsley v. Olds*, 6–526; *Goodpaster v. Porter*, 11–161; *Henderson v. Booth*, 11–212; *State v. Wright*, 37–522.

The consideration need not appear upon the face of the contract; it may be proved by parol, or inferred from the terms and obvious import of the agreement: *Attix v. Pelan*, 5–336.

Parol evidence is admissible to show a consideration other than that expressed on the face of the contract: *Taylor v. Wightman*, 51–411.

The consideration of a written contract may be shown by parol, and if such consideration is found in an unwritten agreement it may be proved by oral testimony: *Simpson Centenary College v. Bryan*, 50–293.

Where the consideration is embraced and fully stated in unmistakable language in the written instrument it is not competent or admissible to add to, change or vary the consideration by parol evidence: *De Goey v. Van Wyk*, 66 N. W., 787.

This rule will not, however, make the recital of consideration in a mortgage binding on the person for whose benefit the mortgage is given if he is not primarily a party thereto: *Ibid.*

While a written instrument imports a consideration, yet a receipt stipulating that on payment of a portion of the indebtedness the debtor is released from the balance does not give rise to the presumption of a consideration in opposition to its own terms in such sense as to be valid: *Bender v. Been*, 78–283.

Where a sheriff levied upon certain property under an execution in favor of A. and against B., and P. claimed to own said property and entered into a contract with A. by which he agreed to hold the property subject to the levy, the rights of A. and of the sheriff being in no wise prejudiced, *held*, that the contract being in writing imported a consideration: *Allen v. Pratt*, 79–113.

In a suit upon certain drafts, *held*, that they imported a consideration, and it was unnecessary for plaintiff to either plead or prove it in the first instance, that the averments in the answer as to want of consideration were denied by operation of law without a reply, and that it was competent for plaintiff to show that the drafts were given in settlement of a disputed claim: *Gafford v. American Mortgage & Investment Co.*, 77–736.

In an action upon a promissory note where the signature is established, the burden of proof is upon the defendant to show that the note was without consideration, where that is the defense upon which defendant relies: *McCormick v. Jacobson*, 77–582.

An assignment being in writing is presumed to have been made for a consideration and an allegation that the assignment was in writing is to be construed as alleging that it was for a consideration and not by way of a gift: *Gary v. Northwestern Mut. Aid Assn.*, 87–25.

SEC. **3070. Failure of—fraud.** The want or failure, in whole or in part, of the consideration of a written contract may be shown as a defense, total or partial, except to negotiable paper transferred in good faith and for a valuable consideration before maturity, but if such paper has been procured by fraud upon the maker, no holder thereof shall recover thereon of the maker a greater sum than he paid therefor, with interest and costs. [22 G. A., ch. 90; C.'73, § 2114; R., § 1825; C.'51, § 976.]

While a written contract imports a consideration, it is competent to aver and prove that there was in fact no consideration: *Briggs v. Downing*, 48–550; *Byers v. Harris*, 67–685.

Although a written contract imports a consideration, it is competent to show a failure of consideration to defeat the contract, the burden of proof being upon the defendant: *University of Des Moines v. Livingston*, 57–307.

The phrase "value received" does not necessarily import a consideration, and evidence is competent to show that no consideration has been in fact received: *Osgood v. Bringolf*, 32–265.

Extrinsic evidence of a consideration to a written contract adverse to that expressed upon the face thereof is incompetent: *Gelpcke v. Blake*, 19–263.

A defendant relying on want of consideration in a written contract must aver and show not only that he did not receive the consideration specified therein, but also that he did not receive any other consideration: *Taylor v. Wightman*, 51–411.

This section relates to the remedy, and is not unconstitutional as impairing a contract when applied to an instrument made in another state, where the common-law rule as to the conclusiveness of a seal upon the question of consideration is still in force: *Williams v. Haines*, 27–251.

Under this section as amended, the purchaser of a note procured by fraud, although he has purchased for value before due, without notice, is not entitled to recover a greater sum than that paid for the note, with interest and costs, and it is proper, therefore, to introduce evidence to show the amount paid in such cases, and that question can properly be submitted to the jury in the absence of evidence of notice of fraud: *Richardson v. Monroe*, 85–359.

CHAPTER 7.

OF ASSIGNMENTS FOR CREDITORS.

SECTION **3071. Must be without preferences.** No general assignment of property by an insolvent person, firm or corporation, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all the creditors in proportion to the amount of their

respective claims; and in every such assignment the assent of the creditors shall be presumed. [C.'73, §§ 2115–16; R., §§ 1826–7; C.'51, §§ 977–8.]

What valid: A trust deed executed in another state, making disposition of property in trust for the benefit of creditors, *held* to be an assignment for the benefit of creditors within the meaning of the statute: *Schee v. La Grange*, 78–101.

An assignment for the benefit of creditors where preferences are given is invalid because it is fraudulent, and it is the fraud which vitiates the transaction; and in a particular case, where the court found that certain mortgages were in effect a general assignment, but not for the benefit of creditors, *held*, that it was merely a finding of fraud: *Wise v. Wilds*, 77–586; *Arnold v. Wilds*, 77–593.

Where the assignment on its face purports to be an assignment for the benefit of all the creditors, the mere designation of persons as creditors in the schedule who may not have valid claims does not render the assignment void: *Hamilton-Brown Shoe Co. v. Mercer*, 84–537.

It is not questioned, however, but that a creditor may disregard it and treat it as void and proceed to attach the property, if it is made for a fraudulent purpose or is for the benefit of only a portion of the creditors: *Ibid.*

The fact that the assignment does not cover property exempt from execution does not render it invalid: *Bradley v. Bischel*, 81–80.

Also *held*, that the fact that the assignment, being of partnership property, specified only the payment of partnership debts without provision for application of a residue to payment of individual debts, would not render the assignment invalid, as the law would, without any special provisions, make such application: *Ibid.*

The fact that the assignor supposes that he will escape further liability for his debts by making such assignment will not render the assignment void: *Ibid.*

The fact that some of the creditors are attempting to defraud the others under the assignment will not render the assignment void, the remedy being on application to the proper court to prevent such fraud: *Ibid.*

Where a debtor, knowing that an execution is to be taken out against him, sells his property to a vendee having knowledge of the facts, for the express purpose of avoiding a levy or receiving a consideration which cannot be reached by execution, the conveyance will be invalid as against a creditor although it is executed upon a good consideration; at least unless the creditor has received the benefit of the consideration. And a mortgage or conveyance to one creditor in security or satisfaction of his claim will be valid though it operates to bar other creditors from obtaining satisfaction of their debts: *Davis v. Schwartz*, 155 U. S., 631.

A direction to the assignee to sell the property when convenient, and as soon as it can be done without material sacrifice, will not constitute conclusive badge of fraud: *Wooster v. Stanfield*, 11–128.

An assignment executed for the payment of debts "as fast as they become due," *held* not to necessarily imply a payment otherwise than *pro rata* and therefore not void: *Meeker v. Sanders*, 6–61.

It seems that a provision in the assignment authorizing the assignee to sell for credit will render it void, but authority to dispose of property upon such terms as in his judgment seem best will not have that effect: *Ibid.; Berry v. Hayden*, 7–469.

Nor will a provision authorizing the assignee to compound with debtors render the assignment void: *Berry v. Hayden*, 7–469.

A creditor or a co-debtor may be made assignee: *Wooster v. Stanfield*, 11–128.

The fact that the the assignee is offering to sell the goods on credit or to exchange them will not render the conveyance void. No neglect of duty by the assignee, and no misapplication of the trust fund by him can have that effect. The remedy for such negligence or misfeasance is by application to the court: *Meeker v. Sanders*, 6–61.

Failure of the assignee to report the amount and condition of the assets will not affect the validity of the assignment: *Savery v. Spaulding*, 8–239.

The fact that the grantor in a deed of assignment is employed in the business by the assignee in the capacity of clerk will not in itself be evidence of fraud in making the assignment: *Ibid.*

Delivery of the assignment to the attorney of the assignor with direction to file it for record is, in effect, delivery to the assignee: *American v. Frank*, 62–202.

A general assignment directing the application of the property of the insolvent to the payment of his debts does not defeat the right that any creditor may have to priority: *In re Carter*, 67 N. W., 239.

Where a contract of sale is made for property to be delivered on credit, the same to be paid for by notes of the purchaser, who becomes insolvent before delivery, and makes an assignment for the benefit of creditors, the seller has a right to rescind the contract, even though the assignee may be both able and willing to fully execute it: *Rappleye v. Racine Seeder Co.*, 79–220.

It has been held by our supreme court as sound in principle, and in the absence of an authoritative adjudication by the United States supreme court, in accordance with the weight of authority, that the enactment of the federal bankrupt law did not operate to nullify, supersede or suspend the insolvent laws of the states: *Reed v. Taylor*, 32–209.

It is competent for the assignor after making a deed of assignment to make a new promise in writing which will have the effect of reviving a debt barred by the statute of limitations and subject the property assigned to the payment of such debt: *Hellman v. Kiene*, 73–448.

Where a debtor transferred a note to a creditor, with the understanding that he should collect it and apply so much of the proceeds as should be necessary for the sat-

isfaction of his own claim, and pay the balance upon another claim, *held*, that the provision in favor of the second creditor as to the balance did not constitute an assignment to him, he not being a party to the agreement, and therefore the excess remained in the hands of the first assignee liable to garnishment by other creditors: *Witter v. Little*, 66-431.

Transfer in payment: Whether or not certain acts would constitute an assignment is a question to be determined by the intention of the parties: *Roberts v. Press*, 66 N. W., 756.

Partial assignments: This statute in no manner affects the common-law right of an insolvent to make a partial assignment for the benefit of creditors: *Loomis v. Stewart*, 75-387.

A debtor may make a partial assignment for the benefit of any or all his creditors, and the provisions of the statute with reference to a general assignment do not apply to such a case: *Buck v. Chase*, 85-296.

The statutory provisions relate to general assignments, not to partial assignments: *Bock v. Perkins*, 139 U. S., 628.

The debtor may, if he acts without fraud, transfer property in payment of debts to certain creditors before making a general assignment, and such transfer will be valid even though made in contemplation of insolvency: *Lampson v. Arnold*, 19-479; *Van Patten v. Burr*, 52-518.

A mortgage given by a debtor upon all his property, not for the benefit of all his creditors, and reserving a right of redemption, will not be deemed invalid: *Younkin v. Collier*, 47 Fed., 571.

An insolvent debtor may lawfully mortgage all his property for the security of a portion of his debts, even though nothing is left for the payment of those unsecured: *Rollins v. Shaver Wagon, etc., Co.*, 80-380.

The fact, that some of the claims for which a mortgage was given are fraudulent will not invalidate the instrument: *Ibid.*

A sale of property to a creditor in payment of his debt is valid, although other creditors remain unpaid: *Hutchinson v. Watkins*, 17-475.

The statutory provision has no application where a debtor, without fraud, sells property to a creditor absolutely for a fixed consideration, a portion of which is the discharge of a debt due such creditor, and the balance is money paid to the debtor and to other creditors in discharge of debts due them. *Johnson v. McGrew*, 11-151.

An absolute sale in good faith for a valuable consideration of the entire property of an insolvent corporation will not be held to be void as a general assignment: *Buell v. Buckingham*, 16-284.

A debtor may in good faith secure the claims of a creditor at any time without reference to the claims of other creditors, and for that purpose may give a chattel mortgage: *Fromme v. Jones*, 13-474.

A trust deed not purporting to be a general assignment, made to secure a present loan of money, *held* not void: *Whittaker v. Lindley*, 14-598.

A debtor may give all his property in payment or security to one of his creditors without violating the statutory provision, provided the transaction is free from fraud. *Davis v. Gibbon*, 24-257; *Farwell v. Howard*, 26-381.

Knowledge by the creditor who is preferred that other creditors are left unprovided for will not render the transaction void: *Cowles v. Ricketts*, 1-582.

The transfer of all property in the payment of a pre-existing debt is not fraudulent, even though the transferee may have knowledge of other creditors and of the insolvency of the debtor: *Butler v. Diddy*, 83-533.

The execution of mortgages by an insolvent debtor with the *bona fide* intention of securing particular creditors does not operate as a general assignment: *Ibid.*

The intention on the part of the debtor to transfer all of his property to one creditor to the exclusion of other creditors, and the knowledge to that effect of the creditor, will not render such transfer invalid. Such transaction does not constitute a general assignment: *Stewart v. Mills County Nat. Bank*, 76-571.

The fact that the creditor to whom property is thus transferred displays great haste in getting the conveyance on record for the purpose of maintaining priority over other creditors will not show fraud such as to render the transaction invalid: *Ibid.*

A partial assignment in good faith, preferring certain creditors, is not void: *Gray v. McCallister*, 50-497; *Cole v. Dealham*, 13-551.

While preferences in a general assignment are forbidden, yet a sale or mortgage to secure *bona fide* debts is not invalid although it gives a preference: *Davis v. Schwartz*, 155 U. S., 631.

A debtor in failing circumstances may mortgage the whole of his property for the security of a portion of his creditors, even though the effect of the transaction is to defeat the collection of his debts: *Southern White Lead Co. v. Haas*, 73-399.

A mortgage of property in this state is not rendered invalid by the fact that a general assignment of all the debtor's property is on the same day executed in another state: *Lyon v. McIlrane*, 24-9.

Where an insolvent debtor made transfers of specific portions of his property, and for the payment and security of specified creditors respectively, who accepted the provisions thus made for them, and on the following day made a general assignment, *held*, that such transfers were valid: *Bolles v. Creighton*, 73-199.

If the assignment does not cover all the insolvent's property it will not be a general assignment, even though it purports to be general: *Meeker v. Sanders*, 6-61.

Several instruments: Where several instruments are executed consecutively, each one subject to those preceding, and together constituting a disposition of all the debtor's property, for the benefit of his creditors, but not in proportion to the amount of their claims, the various instruments will be considered as constituting one transaction and as therefore void under the statute: *Burrows v. Lehndorff*, 8-96.

So *held*, also, as to mortgages and a gen-

eral assignment executed at the same time: *Cole v. Dealhman*, 13–551; *Van Patten v. Burr*, 51–518.

So *held*, also, as to an assignment and a deed in fee executed on the same day: *Moore v. Church*, 70–208.

Where a general assignment is made, and as a part of the same transaction, and for the purpose of giving a preference, a mortgage is executed by the same party, the assignment and mortgage will both be void: *Rock Island Plow Co. v. Breese*, 83–553.

But where the mortgage was made pending the execution of the assignment, for the purpose of preventing the levy of an attachment, which would have defeated the making of an assignment, *held*, that such mortgage did not render the assignment void: *Ibid.*

An intention to make a general assignment, known to a creditor to whom a bill of sale is given in payment of his claim prior to such assignment, together with other circumstances indicating that the two instruments are parts of one transaction, will render such bill of sale and assignment void: *Falker v. Linehan*, 88–641.

This section does not prohibit partial assignments, and while several instruments executed about the same time may under some circumstances be construed together as a general assignment, they are not necessarily so construed, the question depending upon the character of the instruments, the circumstances of the case and the intent of the parties: *South Branch Lumber Co. v. Ott*, 142 U. S., 622.

A transfer for the benefit of one creditor will not render a subsequent general assignment invalid, even though the result of the two transactions is that such creditor reaps a benefit at the expense of other creditors, if a general assignment was not contemplated when the transfer was made: *McCandless v. Hazen*, 67 N.W., 256.

If the debtor in giving security to part of his creditors does so without intending to make a general assignment for the benefit of all of them, the transaction is valid even though within a brief time thereafter, and on the same day, he forms and executes the purpose of making such assignment: *Clement v. Johnsou*, 85–566.

The fact that the debtor executes a mortgage to one creditor and immediately after makes a general assignment does not necessarily invalidate the latter. It must appear that the debtor at the time of giving the mortgage had the intention of disposing of his property for the benefit of his creditors, and with that intention gave the mortgage to secure one or more of his creditors, completing a transfer of his property by the execution of the deed of assignment: *Farwell v. Maxwell*, 34 Fed., 727.

Where chattel mortgages and the assignment of books of account were executed to different creditors, and within an hour after their execution a general assignment was made, and it was shown that the general assignment was not contemplated at the time of the execution of the other instruments, but that such general assignment was executed when the debtor was advised that the recording of the prior instruments would probably cause a levying of attachment, *held*, that the various instruments should be deemed valid: *Gage v. Parry*, 69–605.

In a particular case, *held*, that the transactions immediately preceding the making of an assignment for benefit of creditors were not made in contemplation of such assignment or as a part thereof in such sense as to render the assignment invalid: *Le Moyne v. Braden*, 87–739.

Where a debtor conveyed a stock of merchandise to his wife, who thereupon, and in consideration thereof, executed a chattel mortgage upon the same to secure the payment of her husband's indebtedness, in which mortgage certain creditors were preferred to others, *held*, that the transaction was in the nature of a general assignment and therefore void: *Van Horn v. Smith*, 59–142.

Intention: In determining whether a disposition of property constitutes such a general assignment as to be void, because not made for the benefit of all creditors, the intention of the parties will control: *Letts v. McMaster*, 83–449.

Where the assignment is made to a creditor and secures to him a less proportion of the property than he would be entitled to under a general distribution, it cannot be said to be void as giving preferences: *Cleveland, etc., Stove Co. v. Wilson*, 80–697.

The law does not defeat an assignment because it does not cover all the assignee's property. Whatever is not assigned may be pursued by the creditors, but the assignee cannot be made liable as garnishee for property never coming into his hands: *Ibid.*

Where a debtor executed a deed of assignment of his personal property for the benefit of creditors, and a short time before had conveyed his real estate in payment of a debt, *held*, that an instruction to the jury that if the deed was executed according to a definite, prior agreement, in such sense as to be a distinct transaction from that of the assignment, and independent of it, the assignment was valid, was not objectionable in that it failed to instruct the jury as to the essentials of a valid contract, as the question was whether the act was so connected in point of time and intention with the execution of the other instrument as to form a part of that transaction and with it constitute a general assignment, which was to be determined from the circumstances surrounding the execution of the instruments and the motives and intentions of the debtor in executing them: *Loomis v. Stewart*, 75–387.

The fact that an assignor has withheld certain of his personal property and appropriated it to the payment of his debt to a particular creditor will not invalidate the assignment, as the assignee can yet recover the property, and evidence of such facts is properly excluded, when the question to be determined is the validity of the assignment: *Ibid.*

Where chattel mortgages and assignments to secure particular creditors are followed by a general assignment and it appears that the instruments were executed with the *bona fide* intention of securing such

creditors, the law will not give to such acts a different character from that intended: *Gage v. Parry*, 69-605.

To justify the court in finding that a mortgage may be taken in connection with some other instrument as constituting an assignment, it should appear that the mortgagor, at the time he made the mortgage, had the intention to make an assignment: *Perry v. Vezina*, 63-25.

The fact that mortgages and an instrument purporting to be a general assignment were all made on the same day, acknowledged before the same officer, and delivered to the recorder by the same person, *held* not sufficient to show that the mortgages were a part of the assignment, it being proved by positive evidence that the mortgages were executed in the forenoon, when the party did not contemplate making the assignment, and that the purpose to do so was conceived after noon, when the parties to whom the mortgages were given had separated. To render the instruments in such cases void as constituting a general assignment not for the equal benefit of all creditors it must appear that they were all parts of the same transaction: *Farwell v. Jones*, 63-316.

Where a party executes a chattel mortgage to secure creditors under the belief that the property will be more than sufficient to satisfy the claims of such creditors, even though it may appear that in this respect he was mistaken, he cannot be deemed by such chattel mortgage to have made complete disposition of his property nor to have thereby intended a general assignment: *Van Patten v. Thompson*, 73-103.

The question whether a chattel mortgage given for the security of particular creditors is to be considered as a general assignment and therefore invalid, is to be determined by the intention of the parties, as it may be ascertained from the circumstances of the transaction. And where it appeared that the mortgagor was not at the time insolvent and that the mortgage was not executed in contemplation of insolvency, *held*, that the transaction should not be construed as a general assignment: *Bradley v. Hopkins*, 67 N.W., 261.

A chattel mortgage is not to be deemed part of an assignment where at the time the mortgage was executed there was no thought of insolvency and no intention of making an assignment: *In re Bloomfield Woolen Mills*, 70 N.W., 115.

If the execution of a mortgage and the making of a general assignment are one transaction and both done in pursuance of an intention to make a general assignment they amount to a general assignment with a preference and the mortgage is void under the statute: *Creglow v. Creglow*, 69 N.W., 446.

Where trust deeds and mortgages were executed by an insolvent partnership and also by a corporation of which the partners were controlling members, *held*, that the whole transaction should be taken together as an assignment and was void on account of preferences: *Elwell v. Kimball*, 69 N.W., 286.

Transfers and mortgages made without reference to the making of an assignment and without an intent to do so are not to be deemed portions of a subsequent assignment for the benefit of creditors, although but a short time intervenes between the execution of such instruments and the assignment: *Farwell v. Cunningham*, 86-67.

A general assignment may be made by deed of assignment with mortgages and conveyances executed at practically the same time and with the intent that all taken together should amount to a general assignment, the question of construing such instruments together being one as to the intention of the debtor. If the general assignment thus contemplated is not for the benefit of all creditors in proportion to the amount of their respective claims but gives some a preference over others, it is void and the property is subject to attachment and execution without regard to such assignment. Such an assignment does not place the property *in custodia legis: Bradley v. Bailey*, 64 N. W., 758.

But a debtor may make a partial assignment which will be valid as against creditors, and such partial assignment will not be invalid by reason of a subsequent general assignment not intended when the partial assignment is made: *Ibid.*

The fact that conveyances are executed at or about the same time as the making of a deed of general assignment is not necessarily controlling. It is the intention of the debtor which determines the question: *Ibid.*

Where prior to the making of an assignment the debtor had executed chattel mortgages on a portion of the property, *held*, that as such mortgages were executed without the intent to make an assignment they did not render the assignment invalid and that it was immaterial whether or not a portion of the mortgages were so delivered as to become valid liens: *Farwell v. Weber*, 91-122.

The question whether a conveyance by a debtor of all his property for the benefit of a portion of his creditors shall be regarded as an assignment for the benefit of creditors or a mortgage for the security of particular debts is to be determined by the intention as it may be ascertained from the circumstances of the transaction. If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title of the property, but of all control over it, for the purpose of securing the distribution of all his property among his creditors, or a portion of them, it is an assignment for the benefit of creditors, no matter what name the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as void, even though the debtor is insolvent at the time and it covers all his property, and but a portion of his debts are secured by it: *Cadwell's Bank v. Crittenden*, 66-237.

A chattel mortgage, though executed by an insolvent person, and covering all his

property, is not necessarily an assignment. Whether it is to be construed as such or not depends upon the intent with which it is made. It is not to be considered an assignment where there is nothing to indicate that the mortgagor intended anything but the giving of security: *Kohn v. Clement*, 58-589.

A chattel mortgage given to one creditor to secure his claim will not operate as a general assignment, it appearing that none of the parties intended at the time that it should have such an operation, and that it does not include all of the property of the debtor: *Carson v. Byers*, 67-606.

An insolvent debtor may lawfully make such a disposal of the property as to entitle one or more creditors to a preference over others. This he may do by mortgage, sale or conveyance, and the fact that such mortgages, sales and conveyances embrace all his property does not necessarily constitute the transaction a general assignment. And where the creditors secured by mortgages and deeds were *bona fide* creditors, whom the parties had contemplated securing from the time their debts were contracted, and who accepted the security offered, *held*, that the transaction was valid: *Aulman v. Aulman*, 71-124.

The execution of a mortgage by the directors of a corporation to secure its indebtedness, although at a time when the corporation had become insolvent, *held* not to constitute a general assignment for the benefit of creditors so as to be void because not for the benefit of all: *Garrett v. Burlington Plow Co.*, 70-697.

The fact that in an instrument or instruments making general disposition of all the debtor's property for the benefit of his creditors no trustee is appointed will not prevent its being an assignment, and therefore void as such, if not made for their benefit proportionally: *Burrows v. Lehndorff*, 8-96.

Under the facts in a particular case, *held*, that mortgages to creditors were not shown to be intended as a full disposition of the debtor's property, and therefore were not to be treated as an assignment: *Jaffray v. Greenbaum*, 64-492.

That a conveyance of real estate to one creditor in payment or security of his debt was executed by the debtor at the same time he executed a general assignment for the benefit of his creditors does not make the two conveyances parts of one transaction: *Lamson v. Arnold*, 19-479.

The fraudulent intent of the assignor in a general assignment for the benefit of creditors will render the assignment invalid, notwithstanding the assignee was not a party to such intent: *Ibid.*

In order to render void an instrument of general assignment on the ground that it was made to defraud creditors, it is not necessary to show knowledge of the fraud on the part of the assignee: *Ruble v. McDonald*, 18-493.

To render a sale to a creditor invalid, as constituting a preference, it must appear not only that the debtor was insolvent, but also that the sale was with intent to give such preference: *Graves v. Alden*, 13-573.

If it appears that the debtor has kept back a portion of his property not exempt from execution, the assignment will be treated as void although sufficient in form: *Moss v. Humphrey*, 4 G. Gr., 443.

Conditions: An assignment for benefit of creditors containing a provision requiring the creditors to accept a *pro rata* share of the proceeds of the property in full satisfaction of their claims is not unconditional, and is, therefore, void upon its face: *Sperry v. Gallaher*, 77-107.

No assignment is valid which contains a reservation or condition for the benefit of the assignor, such as requiring an absolute discharge upon part payment or partial distribution: *Williams v. Gartrell*, 4 G. Gr., 287.

An assignment is not rendered invalid by the fact that a reservation is therein made as to property exempt from execution: *Perry v. Vezina*, 63-25.

Form: Where the intention of the grantor can be ascertained with reasonable certainty, the want of minute accuracy of language and the disregard of the usual forms will not render the instrument void: *Meeker v. Sanders*, 6-61.

The fact that the deed contains no schedule of the debts intended to be secured, that no inventory is given of the property intended to be conveyed, that the rights of the creditors are not distinctly defined, and that no specific directions are given to the trustee as to the time within which the property is to be converted into money, will not be sufficient to render the deed void: *Ibid.*

An assignment regular on its face, cannot be collaterally attacked: *McCandless v. Hazen*, 67 N. W., 256.

Where the assignment did not, in terms, refer to real estate, but was evidently designed to be a general assignment for the benefit of creditors under the statute, it will be presumed until the contrary appears that it was designed to include all the property subject to the assignment that the assignor then owned: *Loomis v. Griffin*, 78-482.

Insolvency: The question as to what constitutes insolvency discussed under the statute making it criminal for a bank to receive deposits while insolvent: and *held*, that in such case a bank might be deemed insolvent whose affairs are so situated that it cannot meet its demands in the usual course of business: *State v. Cadwell*, 79-432.

One who is unable to meet his just obligations according to the usage of trade and unable to proceed with his business without making some general arrangement with his creditors, is insolvent so far as to justify the making of an assignment for the benefit of creditors: *McCandless v. Hazen*, 67 N. W., 256.

A person is solvent when he possesses assets of sufficient value to pay within a reasonable time all his liabilities through his own agencies: *In re Bloomfield Woolen Mills*, 70 N. W., 115.

The fact that a party is unable to pay his debts according to the usage of trade, or proceed in business without general arrangement with his creditors or indulgence by

way of extension of time of payment, is sufficient to constitute an insolvency, so that he may rightfully make an assignment for the benefit of creditors: *Savery v. Spaulding*, 8-239.

An assignment may be void as made in contemplation of insolvency if it is not for the benefit of all the creditors proportionally, although the assignor was not at the time actually insolvent: *Loving v. Pairo*, 10-282.

Conflict of laws: The validity of assignments, so far as they affect real property, must be judged by the law of the place where the property is situated: *Ibid.; Moore v. Church*, 70-208; *King v. Glass*, 73-205.

An assignment made in another state and in accordance with the laws of that state will not be recognized by the courts of this state with reference to property or rights in this state if it does not conform to the requirements of our statutes as to such assignments and any person interested in the assignment may raise the objection: *Franzen v. Hutchinson*, 62 N. W., 698.

An assignment made in accordance with the laws of another state where it is given the effect of an assignment in bankruptcy and affects a release of a debtor from his debt will not be enforced in this state: *Ibid.*

A deed of assignment for the benefit of creditors may be made in a sister state by a nonresident of this state, and if executed and acknowledged in accordance with our statutes it is valid, and the powers of the assignee being derived directly from the assignor, and not by reason of the appointment of the court, may be exercised outside of the state in which it was made: *King v. Glass*, 73-205.

By partners: Where a conveyance was made by a firm covering their entire property with full power of disposition and conversion by the trustee, and for the benefit of creditors, and providing for benefit of certain creditors, *held*, that such conveyance constituted an assignment and was not changed in its effect by chattel mortgages executed the next day in pursuance of the same general plan for preferring the creditors named in the conveyance, and that as such conveyance was invalid as to creditors, it did not prevent attachment of the property by the creditor to whom the second chattel mortgage was given, such mortgage being entirely ineffectual: *King v. Gustafson*, 80-207.

One partner has no power to execute a general assignment of the firm property without the assent, express or implied, of the co-partner: *Osborne v. Barge*, 35 Fed., 92.

An assignment by one partner without the assent of his co partner, who might be consulted and is capable of giving assent or dissent, is void, and does not prevent attachment by a creditor, although no proceedings are taken by the partner not consenting to set the assignment aside: *Loeb v. Pierpoint*, 58-469.

But if both partners have agreed to an assignment it will be valid though signed by but one: *Osborne v. Barge*, 29 Fed., 725.

Assent. The assent of the creditors to a general assignment for their benefit will be presumed: *Price v. Parker*, 11-144.

The assent of creditors will not be presumed to a conditional assignment: *Williams v. Gartrell*, 4 G. Gr., 287.

Where certain accounts were by the debtor assigned to a trustee to be collected and applied *pro rata* to the payment of debts due certain creditors, *held*, that the trustee in such assignment was not subject to garnishment at the suit of other creditors, and that assent of the creditors of the assignor would be presumed, they having been notified of the arrangement and having made no objection thereto: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56-245.

SEC. **3072. How made—inventory—effect—recording.** Every such assignment shall be by an instrument in writing, setting forth the name of the assignor, his residence and business, the name of the assignee and his residence and business, and, in a general way, the property assigned and its location, and the purpose of the assignment; it shall be signed and acknowledged in the manner prescribed for the execution and acknowledgment of deeds, and recorded in the office of the recorder of the county where the assignor resides, and in any other county in the state in which he has real property to be assigned thereby, in the records of deeds, and indexed in the proper index books. The assignor shall annex to such instrument an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, and a list of his creditors and the amount of their respective demands, but such inventory shall not be conclusive as to the amount of the debtor's estate; and such assignment shall vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment, not exempt from execution. As soon as such assignment is recorded, it shall be filed, with the inventory and list of creditors, in the office of the clerk of the district court, as shall all subsequent papers connected with such proceedings. [C.'73, § 2117; R., § 1828.]

Recording: The provision as to recording the assignment is intended for the protection of subsequent purchasers. Where the assignment was duly executed and acknowledged, and the assignee consented to accept the trust before the levy of an attachment, the failure to record it until thirty seconds after the writ of attachment came into the sheriff's hands, *held*, not to render it invalid: *American v. Frank*, 62-202.

An assignment for the benefit of creditors

though unacknowledged and unrecorded takes priority over a judgment rendered after its execution: *Munson v. Frazer*, 73-177.

What passes by assignment: The right of action for damages for the wrongful suing out of an attachment upon property subsequent to a general assignment thereof is in the assignee, and not in the person making the assignment: *Rumsey v. Robinson*, 58-225.

The equity of redemption of a mortgagor of personal property passes by an assignment: *Gimble v. Ferguson*, 58-414.

The assignee may maintain an action for possession of personal property of the assignor as against third parties, although it is covered by a chattel mortgage conferring upon the mortgagee the right of possession: *Goldsmith v. Willson*, 67-662.

By a general assignment, the property of which the assignor is at the time possessed is passed to the assignee for the benefit of creditors; therefore, *held*, that such general assignment would destroy a partial assignment by an instrument intended to secure a creditor and made prior to the execution of the general assignment, but not delivered until after general assignment: *Gage v. Parry*, 69-605.

A deed of assignment headed "General Assignment," and deeding "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed and marked Schedule A," etc., *held*, an assignment of the property mentioned in the schedule merely, and not to include property not mentioned therein; so that if any property of the assignor was omitted from the schedule the assignment was not a general but a special one: *Bock v. Perkins*, 28 Fed., 123.

An assignment for the benefit of creditors is a conveyance cutting off any vendor's lien not preserved therein as provided by § 2924: *Prouty v. Clark*, 73-55.

Failure to describe in the instrument of assignment the property intended to be assigned will not render the assignment invalid: *LeMoyne v. Braden*, 87-739.

Rights of assignee. The assignee and the creditors have no higher rights under the assignment than the assignor had. The assignee cannot question a prior chattel mortgage on the ground that it was given to secure an antecedent indebtedness: *Meyer v. Evans*, 66-179.

The assignee is to represent the creditors, and it is his duty to devote the assets of the assignor to the payment of his debts, but his claims are no higher than the rights of the creditors themselves: *Davenport Plow Co. v. Lamp*, 80-722.

And *held*, that where the treasurer of a corporation had, without authority, loaned the funds of such corporation to another corporation, which afterwards made an assignment for the benefit of creditors, the former corporation had the right to trace the funds into the hands of the assignee, and to reimbursement thereof in preference to the claims of general creditors: *Ibid.*

The assignee may maintain an action to set aside a fraudulent conveyance by his assignor and subject the property thus conveyed to the payment of the creditors' claims. The debtor who has made a fraudulent conveyance must be deemed, as to the creditors, to have an interest in the property which passes to the assignee: *Schaller v. Wright*, 70-667.

While an assignee cannot, either at the common law or under the statute, set aside a conveyance made by his debtor on the ground of fraud, he may defeat the enforcement of a mortgage against the realty of the assignor, the title of which is in the assignee, by showing that the mortgage is a mere sham, given without consideration and in fraud of creditors: *Sandwich Mfg. Co. v. Wright*, 22 Fed., 631; *Rumsey v. Town*, 20 Fed., 558.

A deed of assignment for the benefit of creditors does not confer upon the assignee the right to enforce special equities on behalf of one or more creditors, so as to deprive a creditor of his right to assert, in his own name and right, such equity against a third party: *Rumsey v. Town*, 20 Fed., 558.

An assignee holding under a deed of assignment cannot deny and defend against the validity of chattel mortgages which, though not recorded, yet represent a valid subsisting indebtedness, in the interest of general creditors. Such right is confined to creditors having a lien upon the property, or having a judgment at law with a right to perfect their lien upon property they may discover: *Simon v. Openheimer*, 20 Fed., 553.

SEC. **3073. Assignee—inventory and appraisement—removal.** The assignee shall forthwith file with the clerk of the district court where such assignor resides a true and full inventory and valuation of said estate under oath, so far as the same has come to his knowledge, and shall then enter into bonds to said clerk, for the use of the creditors, in double the amount of the inventory and valuation, with one or more sureties to be approved by said clerk, for the faithful performance of said trust, and the assignee may thereupon proceed to perform any duty necessary to carry into effect the purpose of said assignment. [C.'73, § 2118; R., § 1830.]

If an assignee take possession of property it is evidence of an acceptance, and he may bring action in relation to such property even before filing an inventory and bond: *Price v. Parker*, 11-144.

Where the assignee filed a valuation, signed and sworn to by other disinterested persons, instead of by himself as required by statute, *held*, that such inventory should not be treated as a nullity: *Drain v. Mickel*, 8-438.

The court can appoint another assignee only where the one appointed refuses to serve: *Ibid.*

Jurisdiction of proceedings to test the validity of an assignment is not exclusive in the court in which the assignee files his bond and inventory, but exists in any court, state or federal, of otherwise competent jurisdiction: *Kohn v. Ryan*, 31 Fed., 636.

Where an assignee had agreed orally to accept an assignment for the benefit of creditors, before the assignment was executed, and after the assignment was filed for record an attachment was levied on the property, *held*, that the acceptance was sufficient to make the assignment take effect before the levy of the attachment: *Singer v. Armstrong*, 77-397.

And evidence of the oral acceptance being admissible, there was no error in admitting the assignment itself in evidence: *Ibid.*

The fact that in a garnishment proceeding the assignee is directed to pay over the funds in full satisfaction of one creditor's claim which is given priority over the claim of other creditors does not render the assignment invalid in such sense as to release the sureties on the assignee's bond: *Oppenheimer v. Hamrick*, 86-584.

SEC. **3074. Notice.** The assignee shall forthwith give notice of such assignment by publication in some newspaper in the county, which shall be continued at least six weeks, and forthwith send a notice by mail to each creditor of whom he shall be informed, directed to his usual place of residence, requiring him to present to him within three months thereafter his claims under oath. [C.'73, § 2119; R., § 1829.]

The assignee should give the creditor sufficient opportunity to present proof of his claim within the time allowed, but that duty is discharged if the assignee is at his usual place of business during business hours and receives all proofs of claims presented to him during that time. If the plaintiff relies upon the mail for the delivery of his proof of claim he does so at his own risk, and the receipt of the letter containing such proof of claim directed to the assignee at the post-office of the latter after business hours, and not received by or delivered to him until the next day and after expiration of the time for filing claims, will not entitle the creditor to have his claim allowed in the same class with those filed within proper time: *Conlee Lumber Co. v. Meyer*, 74-403.

Notice by mail to a creditor is not necessary to make it obligatory upon him to file his claim, within the provisions of § 3083: *Carter v. Lee*, 82-26.

A party invoking the aid of the statute is entitled to relief only according to its provisions, and if his claim is not filed within three months he is not entitled to payment until the claims which have been filed within that time are settled. He cannot insist that the assignment is invalid and at the same time claim to share *pro rata* with the creditors whose demands were filed in time: *Loomis v. Griffin*, 78-482.

A creditor under a general assignment, who has a special security, may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid after exhausting the property upon which he has such special lien: *Wurtz v. Hart*, 15-515.

Where a claim filed after the period of limitation was but a mere restatement on the basis of a former claim filed within due time, *held*, that it was entitled to be considered: *In re Assignment of Rea*, 82-231.

The provisions as to requiring security for costs from a nonresident plaintiff are not applicable in proceedings under an assignment for the benefit of creditors: *Meyer v. Evans*, 66-179.

The three months for filing claims under § 3083 commences to run from the date of the first newspaper publication: *Scott v. Thomas*, 62 N. W., 790. [See now the provisions of the next section.]

SEC. **3075. Claims filed.** The claims of all creditors, clearly and distinctly stated and sworn to by the claimant, or by some person acquainted with the facts, shall be filed with the assignee within three months from the date of the first publication provided for in the preceding section, unless the court extends such time for all or some of such claimants, which it may do in its discretion where peculiar circumstances seem to justify such extension, but in no case shall such time be extended beyond nine months. [25 G. A., ch. 93.]

SEC. **3076. List of creditors.** At the expiration of three months from the time of first publishing notice, the assignee shall report and file with the clerk of the court a true and full list, under oath, of all such creditors of the assignor as shall have claimed to be such, with a statement of their claims, an affidavit of publication of notice, and a list of the creditors, with their places of residence, to whom notice has been sent by mail, and the date of mailing the same. [C.'73, § 2120; R., § 1831.]

The report and proof by assignee of the service of notice can be taken notice of by the court without its being formally introduced in evidence: *Conlee Lumber Co. v. Meyer*, 74-403.

Where the wife was surety on an obligation of the husband, *held*, that she was as to such contingent liability a creditor within the meaning of this section, and entitled to compel the satisfaction of the obligation by

the assignee of her husband: *In re Assignment of Rea*, 82-231.

Where plaintiff delivered a letter of credit to a bank for collection, and the bank made an assignment for the benefit of creditors, after the same was collected, but before it had been paid over to plaintiff, *held*, that plaintiff by filing his claim with the assignee did not thereby waive his right to payment of the full amount of the claim: *Nurse v. Satterlee*, 81-491.

The failure of the assignee to perform his duty should not be permitted to prejudice the rights of a claimant, and if from the fault of the assignee a claim is not presented and filed with the clerk and is therefore not included in the distribution order the report of the assignee and the order of distribution should be set aside and the claimant given a hearing: *Lacey v. Newcomb*, 63 N. W., 704.

The filing by a landlord with the assignee of the tenant of his claim for rent due preserves his lien. Such filing is a commencement of action for the rent within the provisions of § 2992, requiring action to enforce the lien to be brought within one year: *Ibid.*

One who files his claim with the assignee does not thereby estop himself from insisting on the invalidity of the assignment of the debtor who seeks no more than would be due him in case such assignment was invalid and the assignee is induced to do no act in reliance on his waiver of objection to such assignment: *Franzen v. Hutchinson*, 62 N.W., 698.

This section and the following must be construed together. The statement filed by the assignee must show such facts in regard to claims filed as will enable any person interested to investigate the same and reach conclusions in regard to their validity: *In re Cadwell's Bank*, 82-533.

SEC. 3077. Claims contested. Any person interested may appear within three months after such report is filed and contest the claim or demand of any creditor by written exceptions thereto filed with the clerk, who shall forthwith cause notice thereof to be given to the creditor, which shall be served as in case of an original notice and returnable at the next term, at which term the court shall proceed to hear the proofs and allegations of the parties in the case, and render such judgment thereon as shall be just, or it may allow a trial by jury. [C.'73, § 2121; R., § 1832.]

There being no provision for pleadings in contesting claims, further than exceptions by creditors objecting to claims of other creditors, it is quite probable that no further pleadings are required by the statute: *In re Assignment of Guyer*, 69-585.

The court having jurisdiction of proceedings in an assignment for the benefit of creditors has authority to determine priority among creditors, and a party objecting to the right of the creditor should make such objection in that proceeding. An order of the court as to the jurisdiction of the property will be an adjudication, binding in a collateral proceeding, although erroneous: *Perry v. Murray*, 55-416.

An original and independent action in equity may be brought in the same or another court for the purpose of determining equities and priorities of the creditors to the fund in court under the assignment. Therefore, *held*, that where the validity of a chattel mortgage was involved in determining the rights of creditors, an independent action with reference thereto might be brought in another court and transferred to a federal court, and that the adjudication of the federal court on such question, of which it had jurisdiction, would be final: *Knoxville Nat. Bank v. Hamrick*, 67-583.

Whether, in view of the powers conferred by this section, a motion can properly be sustained transferring equitable issues to the equity side of the docket, *quære: In re Assignment of Hobson*, 81-392.

The fact that a deed of assignment has been executed, and that the assignee gives bond and files the proper schedules and inventory in the state court, does not *ipso facto* confer upon that court the exclusive jurisdiction to hear and determine all questions existing between the creditors of the assignor: *Rumsey v. Town*, 20 Fed., 558.

A creditor having under this section ample protection against the application of the property to the payment of unauthorized claims cannot treat the assignment as void on the ground that in the list of creditors are included persons who have no valid claim against the estate, and attach the property: *Hamilton-Brown Shoe Co. v. Mercer*, 84-537.

The rule that a person cannot claim property under two inconsistent rights at the same time, or pursue different and inconsistent remedies, does not prevent a creditor who has given the surety authority to sue the principal in pursuance of the notice contemplated by § 3064, from also prosecuting his claim before the assignee, the action by the surety having been subsequently dismissed: *Ibid.*

Where a claim was allowed against an estate of an insolvent debtor and his assignee, and the wording of the judgment was as follows: "that such be and is hereby established as a claim against the estate of Young Bros. and against the said Rappleye as their assignee," *held*, that the judgment did not establish a personal claim against the assignee and would only be subject to *pro rata* payment like the other claims: *Rappleye v. Racine Seeder Co.*, 79-220.

Anyone whose legal rights are affected thereby may contest the validity of an assignment, and to that end invoke the aid of the state courts; and if he is a citizen of another state, and the amount exceeds the jurisdictional amount, he may invoke the aid of the United States circuit court: *Fleisher v. Greenwald*, 20 Fed., 547.

An order made by a state court in an action of replevin, wherein it was found that

several mortgages were valid liens upon the property, paramount to the assignment, and entitled to be first paid out of the proceeds realized from a stock of goods, *held* not an adjudication binding on the complainants in the federal court who were not parties to the proceedings in the state court, whose right to contest the validity of the mortgages was not derived from the deed of assignment, and was not represented by the assignee: *Ibid.; Rumsey v. Town*, 20 Fed., 565.

An order made by a court having control of assignment proceedings, approving payment of a mortgage debt by the assignee, is not an adjudication of the validity of the mortgage as against creditors not appearing in the assignment proceedings, and whose rights, as against the mortgage, are not conferred by the deed of assignment: *Rumsey v. Town*, 20 Fed., 558.

The court is to render such judgment as shall be just and where the assignee of both partnership and individual funds had paid out of the individual funds of one partner some partnership claims in full, there being other such claims equally chargeable to such partner, *held*, that the court would not approve such payment: *In re Cadwell's Bank*, 89–533.

SEC. 3078. Priority of taxes. In all assignments of property for the benefit of creditors, assessments thereof or taxes levied thereon, whether under the laws of the state or ordinances of municipal corporations, shall be entitled to priority, and paid in full by the assignee, and claims therefor need not be filed with him. [16 G. A., ch. 14.]

A tax levied upon personal property, at least if subsequent to the assignment, should be paid by the assignee, rather than allowed to become a lien upon real property as against a mortgagee: *Brooks v. Eighmey*, 53–276.

It is the duty of the assignee, to the extent of the property which comes into his hands, to devote the same to the payment of taxes, subject possibly to the payment of expenses of executing the trust. No claim for taxes is required to be filed, nor need any demand be made. The assignee must, at his peril, inquire whether the property or fund in his hands is liable for assessments or levies of taxes: *Huiscamp v. Albert*, 60-421.

Under this provision, although its primary object is the protection of the public revenue, it would doubtless be the duty of the assignee to protect the purchaser of the property of the estate against taxes levied upon it before the sale. It would also be his duty to protect the mortgagee of real estate against taxes upon other property of the estate which under the law have become a lien upon the mortgaged property. But it clearly would be competent to sell the property subject to the lien of the taxes: *Brown v. Kiene*, 72-342.

This statute does not apply to property in the hands of a receiver: *Howard County v. Strother*, 71-683.

SEC. 3079. Claims for services preferred—dividends—report—compensation. If the claim of any creditor is for personal services rendered the assignor within ninety days next preceding the execution of the assignment, it shall be paid in full. Subject to the provisions contained in this and the preceding section, if no exception be made to the claim of any creditor, or if the same has been adjudicated, the court shall order the assignee to make, from time to time, fair and equal dividends among the creditors of the assets in his hands in proportion to their claims, and as soon as may be to render a final account of said trust to said court, which may allow such compensation to said assignee in the final settlement as may be considered just and right. If, upon making the final dividend to the creditors, the assignee shall be unable, after reasonable efforts, to ascertain the place of residence of any creditor, or any person who is authorized to receive the dividend due him, he shall report the same to the court, with evidence showing diligent attempts to find such creditor or person authorized to receive the dividend, whereupon the court may, in its discretion, order the distribution of the unclaimed dividend among the other creditors. [20 G. A., ch. 124; C.'73, § 2122; R., § 1833.]

The court may direct the assignee as to the payments he should make, and the order in which they should be made, without a formal application by either party: *In re Assignment of Hooker*, 75–377.

It is the duty of the court without a formal application to order the assignee to make fair and equal dividend among the creditors: *In re Carter*, 67 N.W., 239.

SEC. 3080. Settlement. The assignee shall be at all times subject to the order and supervision of the court or judge, and from time to time may be compelled by citation or attachment to file reports of his proceedings and of the situation and condition of the trust, and to proceed in the execution of the duties required by this chapter; and he shall dispose of all per-

sonal property and divide the proceeds of the same among creditors as they may be entitled thereto within six months from the date of the assignment, and shall dispose of real estate within one year from such date, and make full settlement by that time, unless the court or judge, for good reason shown, shall extend the time within which such disposition or settlement shall be made. [25 G. A., ch. 93; 21 G. A., ch. 115, § 2; C.'73, § 2123; R., §§ 1834, 1842.]

Any failure of duty on the part of the assignee to reach the property of the insolvent may be dealt with by the court: *McCandless v. Hazen*, 67 N.W., 256.

The assignee being an officer of the court in the management and disposal of the property, a creditor claiming that the assignment is fraudulent should attack it in the assignment proceedings, and cannot levy an attachment upon the property in an action against the assignor: *Hamilton-Brown Shoe Co. v. Mercer*, 84–537.

Where the assignment is regularly made, and the assignee is in possession of the property for the settlement of the estate, such property is in the custody of the law, but this might not be so if the assignment were invalid or void: *Ibid.*

Where the assignment covered partnership and individual property, *held*, that the assignee should take notice of claims against the partnership in disposing of the property of the partner and that he was not authorized to pay some partnership debts in full out of the personal estate leaving insufficient to pay other partnership debts: *In re Cadwell's Bank*, 89–533.

The assignee is not required to pay an illegal claim merely because no objection to it is made by creditor: *Ibid.*

The assignee will not be protected in a payment made under an order merely authorizing equitable distribution of the money where such payment is not just and proper: *Ibid.*

SEC. **3081. Assignment not void—citation to debtor.** No assignment shall be declared fraudulent or void for want of any list or inventory, as provided in this chapter. The court or judge may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, or at the next term, to answer under oath such matters as may be inquired of him, and such debtor may be fully examined under oath as to the amount and situation of his estate, and the names of the creditors and amounts due to each, with their places of residence, and may be compelled to deliver to the assignee any property or estate embraced in the assignment. [C.'73, § 2124; R., § 1835.]

The assignment is not void for want of inventory: *Wooster v. Stanfield*, 11–128; *Price v. Parker*, 11–144.

A creditor who has filed his claim with the assignee may contest the validity of other claims but he cannot obtain priority over other claims by equitable action under the provisions of § 4087: *Mehlhop v. Ellsworth*, 64 N.W., 638.

The assignee may maintain an action to set aside a fraudulent conveyance of an assignor made before the assignment and the adjudication of such a proceeding will be binding on the creditors. The assignee represents the creditors who recognize the assignment: *Ibid.*

SEC. **3082. Additional inventory.** The assignee shall, from time to time, file with the clerk of the court an inventory and valuation of any additional property which may come into his hands under said assignment after the filing of the first inventory, and the clerk may thereupon require him to give additional security. [C.'73, § 2125; R., § 1836.]

SEC. **3083. Claims not due—filed after three months.** Any creditor may claim debts to become due, as well as debts due, but on debts not due a reasonable rebate shall be made when the same are not drawing interest, and all creditors who shall not file their claims within three months from the publication of notice, as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term, and allowed by the court, unless the court has extended the time for filing such claims, except as provided by this chapter. [25 G. A., ch. 93; C.'73, § 2126; R., § 1837.]

The provisions of this section are not limited to creditors who have received notice by mail of the making of an assignment as provided for in § 3074: *Carter v. Lee*, 82–26.

Claims entitled to share in the first dividends are only those filed within three months from the first publication of notice: *In re Assignment of Holt*, 45–301.

The time herein specified for filing a claim commences to run with the first newspaper publication of the notice: *Scott v. Thomas*, 62 N.W., 790.

But where the notice by mail referred to a printed notice, copy of which was inclosed, it was held that the time commenced to run from the first publication of that notice and not from the publication of a prior notice, the assignee and the other creditors being estopped from relying upon such prior notice: *Ibid.*

It is the duty of the assignee to resist the payment of a claim filed after the expiration of three months until the claims filed within that time are fully paid, although no objection or exception to such claim is made by any creditor: *Conlee Lumber Co. v. Meyer*, 74–403.

A claim filed after the expiration of the time allowed cannot share in the divisions of the estate with the claims filed in time, although it is actually presented to the assignee in time to be considered with the other claims: *Ibid.*

Where the claim is not filed within the requisite time after the publication of notice and after the report of the assignee, the creditor cannot participate in the benefits of the assignment, and there is no provision by which such a creditor can have equitable relief from the bar thus created: *Ibid.; McKindley v. Nourse*, 67–118. [Now see § 3075.]

An application to have a claim already filed made a preferred one may be presented after three months: *In re Knapp*, 70 N. W., 626.

The proceeding under such an application is merely to fix the character of the claim regardless of whether there are funds from which it can be paid: *Ibid.*

A creditor having collateral security for his claim need not file his claim with the assignee: *Satterlee v. Kirby*, 86–518.

Therefore a contract with the assignee by which he pays the full amount of the claim for the purpose of procuring a return of the collateral is valid: *Ibid.*

Where the members of a partnership joined in an assignment of their partnership and individual property for the benefit of partnership and individual creditors, *held*, that claims filed within the statutory time by creditors of the partnership took precedence over a claim filed by an individual creditor of one of the partners after the expiration of three months, although the individual property of such member was more than sufficient to pay his individual debts, claims against the partnership being also claims against the individual members: *Budd v. King*, 83–97.

SEC. **3084. Sale of property.** The assignee may dispose of and sell all the estate assigned, real and personal, which the debtor had at the time of the assignment, may sue for and recover in his name everything belonging or appertaining to said estate, and generally do whatever the debtor might have done in the premises; but no sale of real estate belonging to said trust shall be made without notice, published as in case of sales of real estate on execution, unless the court or judge shall otherwise order, and no such sales shall be valid until approved by such court or judge. [C. '73, § 2127; R., § 1838.]

The sale of real property by an assignee is a judicial sale, and cuts off contingent right of dower in the property: *Stidger v. Evans*, 64–91.

Where defendants had foreclosed a chattel mortgage, invalid as to the general creditors of the mortgagor, who had made an assignment for the benefit of his creditors, *held*, that a decree in equity would be rendered declaring the mortgage void, and estopping the defendants from any prior right to the proceeds of the sale of the mortgaged property at the suit of a creditor, who, without delay, after the assignment, procured judgment at law against the mortgagor and brought his action in equity against the mortgagees, although the mortgagees would thereby be deprived of all security for their debt: *Rumsey v. Town*, 20 Fed., 558.

If the assignee procures money for the purpose of paying creditors by a pledge or mortgage of the property assigned, the assignor has no right to complain, provided, as between him and the assignee, such a power under the assignment existed and the proceeds thereof have been properly applied, and it was for the interest of the assignor that the money should be so procured instead of by a sale of the property: *Waterman v. Baldwin*, 68–255.

Where the assignee sold real property of the assignor to a person who held a mortgage for purchase-money thereon for the amount of such mortgage, which was satisfied, and such purchaser subsequently conveyed the land to one of the partners in the partnership making the assignment, *held*, that the transaction was valid and that the creditors could not attach such property, it appearing that the land was not worth more than the amount of the mortgage which was released as a consideration of its transfer: *Lynch v. Simmons Hardware Co.*, 80–503.

Under an assignment of a mutual insurance company the assignee is subject to the control of the court as to what assessments of the members are required and as to the making of such assessments: *Corey v. Sherman*, 64 N.W., 828.

In general, as to rights of assignee, see notes to § 3072.

SEC. **3085. Removal of assignee.** Upon a written application of two-thirds of the creditors in number, and two-thirds in amount, the court shall remove the assignee and appoint in his stead a person approved by the creditors in the same number and amount, and the person so removed shall

immediately turn over to the clerk of the district court, or any person appointed by the court, all moneys and property of the estate in his hands. If an assignee shall reside out of the state, or become insane or otherwise incapable of discharging the trust, the court may, upon ten days' notice to him or his attorney, remove him and appoint another in his stead. [21 G. A., ch. 115, § 1; C.'73, § 2118; R., § 1830.]

Expense of attorneys' fees in resisting a motion for the removal of an assignee which is overruled, *held* properly taxable to the estate: *In re Cadwell's Bank*, 89–533.

SEC. **3086. Death of assignee—failure to act—misconduct.** If an assignee dies before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment to file an inventory and valuation, and give bond as required by this chapter, the district court, or any judge thereof, of the county where such assignment may be recorded, on the application of any person interested, shall appoint some person to execute the trust, who shall, on giving bond with sureties as required of an assignee, have all of the powers of the assignee first appointed, and be subject to all the duties hereby imposed. In case any bond or surety is found to be insufficient, or, on complaint before the court or judge, it shall be made to appear that any assignee is guilty of wasting or misapplying the trust estate, such court or judge may require additional security, may remove the assignee and appoint another in his place, and such person so appointed, on giving bond, shall execute such duties, and may demand and sue for all estate in the hands of the person removed, and recover the amount and value of all moneys and property or estate wasted and misapplied, from such person and his sureties. [C.'73, § 2128; R., § 1839.]

Where the inventory is merely imperfect or defective, the court does not possess the power to appoint another assignee. The statute only contemplates cases where there is such failure as to amount to a refusal to accept: *Drain v. Mickel*, 8–438.

Appointment of a new assiguee may be made upon the application of the assignee himself. Having become vested with a qualified title to the property he is a party interested within the language of this section: *Brown v. Parker*, 73 Fed., 762.

In such case it is not necessary that the court or judge wait for a period of twenty days before naming a new assignee: *Ibid.*

SEC. **3087. Power of judge in vacation.** Any judge of the district court in vacation shall have power in cases under this chapter to issue citations and attachments, order the sale of personal or real property, and approve sales and deeds thereof.

CHAPTER 8.

OF MECHANICS' LIENS.

SECTION **3088. Collateral security.** No person shall be entitled to a mechanic's lien who, at the time of making or executing a contract for furnishing material or performing labor, or during the progress of the work, erection, building or other improvement, shall take any collateral security on such contract. But after the completion of such work, and when the contractor or other person shall have become entitled to claim or establish a lien, the taking of such or other security shall not affect the right thereto, unless such new security shall, by express agreement, be given and received in lieu of such lien. [16 G. A., ch. 100, § 2; C.'73, § 2129; R., § 1845; C.'51, § 1009.]

Collateral security may be a separate obligation guarantying the performance of a contract, or a transfer of property or other contracts to insure such performance: but the contract, promise or property must have been intended and accepted as collateral security: *Mervin v. Sherman*, 9–331.

Taking a mortgage on the same property upon which the lien is claimed will not defeat the right to a lien, unless it appears to

have been the intention to look to such security and not to the lien: *Gilcrest v. Gottschalk*, 39-311; *Hale v. Burlington, C. R. & N. R. Co.*, 2 McCrary, 558.

Nor will the taking of a promissory note, in the absence of an express agreement to the contrary, have that effect: *Ibid.; Greene v. Ely*, 2 G. Gr., 508; *Mix v. Ely*, 2 G. Gr., 513; *Logan v. Attix*, 7-77.

But if the note be actually negotiated, the lien will be lost: *Scott v. Ward*, 4 G. Gr., 112.

The mere attempt, however, to negotiate such note will not discharge or waive the lien: *Hawley v. Warde*, 4 G. Gr., 36.

Where the person entitled to a lien takes a negotiable note for the amount of his claim and negotiates it, but upon its dishonor is compelled, as indorser, to take it up, he may enforce his original right to a lien: *German Bank v. Schloth*, 59-316.

The acceptance of bonds of a railway company, secured by a mortgage upon a branch line covering rolling stock, is a waiver of a mechanic's lien for the construction of such branch line: *Hale v. Burlington, C. R. & N. R. Co.*, 2 McCrary, 558.

Where one who holds a mechanic's lien participates by petition of intervention in a foreclosure sale, alleging therein that "no mechanic's lien is claimed," purchasers will be justified in assuming that none will be claimed: *Ibid.*

The statute expressly permits the taking of security if the work is completed and the contractor is entitled to claim or have the lien: *Atlantic Trust Co v. Carbondale Coal Co.*, 68 N.W., 697.

A mechanic's lien is waived by taking security in the form of a conditional sale, although the instrument is not recorded so as to be valid as to creditors or purchasers: *Taylor v. Burlington, C. R. & M. R. Co.*, 4 Dillon, 570, 580.

Where, in accordance with stipulations in a contract under which machinery was furnished, a sum of money was deposited as security, *held*, that such stipulation, acted upon by the parties, waived a mechanic's lien for such machinery: *Harrison, etc., Iron Co. v. Council Bluffs Water Works Co.*, 25 Fed., 170.

Facts in a particular case, *held* to show the taking of collateral security defeating a lien: *Shickle, etc., Iron Co. v. Council Bluffs Water Works Co.*, 33 Fed., 13.

Provision in a contract for the building of a railroad, that all the money specified should be paid by the citizens of the county through which the road was to be built, *held* not to amount to taking collateral security: *Delaware R. Const. Co. v. Davenport & St. P. R. Co.*, 46-406; *Meyer v. Construction Co.*, 100 U. S., 457.

Where a contract was made for the wife owning the land by her husband for the erection of a building, and the contractor took a joint note of the husband and wife, *held*, that this did not constitute taking collateral security such as would waive a lien: *Bissell v. Lewis*, 56-231.

The object of the provision that collateral security shall not be taken until after the completion of the work and the party has become entitled to a lien is doubtless to prevent anyone from obtaining a lien who takes security for the amount due or to become due at any time before he completes his contract. Where the material to be furnished by the contract of a person agreeing to furnish material had all been delivered, *held*, that the taking of collateral security at that time did not waive the lien, although the building remained still incomplete: *Ibid.*

The statutory provision against taking collateral security may be waived by agreement, or the owner of the building may by his acts estop himself from objecting to a lien on that account: *Getchell v. Musgrove*, 54-744.

The fact that a mechanic agrees to take his pay in property will not defeat his right to a lien: *Reiley v. Ward*, 4 G. Gr., 21.

SEC. 3089. Who may have lien. Every person who shall do any labor upon, or furnish any materials, machinery or fixtures for, any building, erection or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement, and those engaged in grading any land or lot by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done, or material, machinery or fixtures furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated, or upon the land or lot so graded, to secure payment for such labor done or material, machinery or fixtures furnished. [25 G. A., ch. 16; 16 G. A., ch. 100, § 3; C.'73, § 2130; R., § 1846; C.'51, §§ 981, 1010.]

Under contract with the owner: If there has been no contract with the owner of the land, no lien can attach by virtue of labor done or material furnished in the erection of a building thereon. The amount of interest held by the owner does not seem to be material, but the lien will attach only to such interest: *Redman v. Williamson*, 2-488.

The statute gives no mechanic's lien upon any interest except by virtue of a contract between the mechanic and the owner of such interest, and the acceptance by the owner of land of improvements placed thereon under a contract with a person having no interest therein does not give the right to a lien as against such owner, the improvements having been made for the benefit of the person in possession and not for the benefit of the owner: *Wilkins v. Litchfield*, 69-465.

It is not necessary to support a lien that the contract be made before the material is furnished. A promise to pay for the material after a portion of it is furnished will have relation to the act of furnishing it and

will bind the owner as though it were done then. If the owner intends to pay for the material and appropriates it to his own use, the law will imply a contract binding him to pay for it: *Carney v. Cook*, 80–747.

To entitle a party to a mechanic's lien it is essential that there should be a contract with the owner. And where it appeared that the person claiming the mechanic's lien was the owner of the land at the time the claimed contract was made, *held*, that he was entitled to no lien, although he held title to the land as trustee, with the purpose of conveying it to a corporation which should subsequently be formed, it not appearing that the parties who became beneficially interested in such corporation ever owned a legal or equitable title to the property: *Littleton Sav. Bank v. Osceola Land Co.*, 76–660.

Under particular facts, *held*, that the acts of the owner in contracting for improvements made by his tenant were such as to render the property liable to a lien for improvements: *Bray v. Smith*, 87–339.

It is only under contract with the owner that a party can be allowed a lien as an original contractor: *Templin v. Chicago, B. & P. R. Co.*, 73–548.

The contract under which the services were performed or material furnished should be set forth in the petition to enforce the lien: *Logan v. Attix*, 7–77.

It must be shown that the materials for which a lien is claimed were furnished upon a contract especially for the purpose of being used for or about a building; but the particular building for which they were to be used need not be mentioned or understood: *Cotes v. Shorey*, 8–416.

Parol evidence is admissible to show the purpose for which the material was furnished, even where the contract is in writing: *Neilson v. Eastern Iowa R. Co.*, 51–184.

Implied contract: In order to entitle a party furnishing material to a lien it is not necessary that it appear that there was an express contract that the material should be furnished, or that it should be used in the construction of the building or improvement on which the lien is claimed: *Ibid.*

While the work must be performed or the material furnished under a contract it is not necessary that every item should be contemplated and specifically named: *Jones v. Swan*, 21–181; *Stockwell v. Carpenter*, 27–119.

It need not be expressly understood that the mechanic is to have a lien: *Jones v. Swan*, 21–181.

Improvements on wife's land by contract with husband: Where the title to land is in the wife, a mechanic cannot have a lien thereon for material furnished the husband, without the acquiescence of the wife, to erect a building upon such land; and it will not be presumed from the marital relation alone that the husband is authorized to act in the matter as the agent of the wife: *Miller v. Hollingsworth*, 33–224; *S. C.*, 36–163; *Price v. Seydel*, 46–696; *Nelson v. Cover*, 47–250.

A wife's premises cannot be charged with a lien for improvements erected thereon by her husband against her protest. If she knows or has reason to suspect that material is being bought by her husband in her name, it may be her duty to notify the person from whom it is bought that she repudiates the agency, but where the material is bought by her husband in his own name, she is under no obligation to take any action: *Getty v. Tramel*, 67–288.

In such case the person furnishing the material can have no lien upon the improvements: *Ibid.*

Where a chattel mortgage on brick appeared to be a mere floating mortgage to cover brick on hand, and not precluding sales by mortgagor, *held*, that the holder of such mortgage was not entitled to a mechanic's lien for bricks furnished by mortgagor for a building on premises of mortgagor's wife: *Meredith v. Kunze*, 78–111.

Where it appeared that lightning rods were put upon the wife's premises under a contract with the husband, and that she was consulted in regard to the improvement and agreed thereto and saw the rods put up without objection, *held*, that a mechanic's lien might properly be enforced against her premises: *Frank v. Hollands*, 81–164.

Where a wife owns land and her husband erects a dwelling-house thereon, the establishment of a mechanic's lien on the building is not inconsistent with the wife's ownership of the land: *Estabrook v. Riley*, 81–479.

Where one person owns land and another has such an interest in it that he may erect a building thereon for his own use and benefit, the beneficiary is the "owner" under the provisions of this section: *Ibid.*

A wife who knows that her husband is acting and contracting in his own name with reference to her property, and acquiesces therein, renders her property liable to a mechanic's lien for improvements thereon under contract with her husband: *Bartlett v. Mahlum*, 88–329.

Knowledge on the part of the wife that materials purchased by her husband on credit are being used in the construction of a building on her land does not subject the premises to a mechanic's lien for such material: *Young v. Swan*, 69 N.W., 566.

If the wife's acquiescence is shown, an equitable lien may be established: *Miller v. Hollingsworth*, 36–163.

A subcontractor having no direct contract with the wife on whose property the labor and material are used, and who has not taken the steps required by statute for securing his mechanic's lien, cannot assert an equitable lien against the property of the wife: *Nelson v. Cover*, 47–250.

However, if the material is furnished for the use and benefit of the wife, and at the request of her husband acting as her agent, a lien may be had upon the property of the wife: *Kidd v. Wilson*, 23–464; *Burdick v. Moon*, 24–418.

The property of a married woman will be subject to a mechanic's lien for improvements made under a contract with herself and husband jointly: *Greenough v. Wiggington*, 2 G. Gr., 435.

Where a contract is made for the wife holding the legal title by her husband acting as her agent, a lien may be established as against her property: *Bissell v. Lewis*, 56–231.

In a particular case, *held*, that the evi-

dence did not show that the husband was contractor for the erection of the building for the wife on her property, and plaintiff a material man under such contractor, but rather that plaintiff furnished the material under contract made with the husband and wife jointly or with the husband as agent for the wife: *Rand v. Parker*, 73-396.

Co-tenant: Where defendant had a life estate and a one-third interest in fee, *held*, that he could create a mechanic's lien against the property only to the extent of his right and interest therein: *Conrad v. Starr*, 50-470.

Who deemed owner: A party in possession under contract of purchase, or a bond for a deed, is an "owner," as contemplated by the statute: *Monroe v. West*, 12-119; *Stockwell v. Carpenter*, 27-119.

Proof that defendant contracted for material for the erection of a building, and procured it to be erected or has since its erection used it as a place of residence, is sufficient as against him to constitute *prima facie* evidence of ownership: *Lewis v. Saylors*, 73-504.

The owner is not of necessity the one who has the legal or equitable title, but may be one for whose immediate use and benefit the improvement is made. So *held* where the person for whom the improvement was made had a power of attorney from the real owner to buy and sell, execute mortgages on the land, occupy it himself, and hold the same in all respects as if he were the absolute owner, the deed in such case not having been recorded and the person furnishing the material having no knowledge of the condition of the title: *Knapp v. Greenwood*, 83-1.

One who has a contract for the purchase of land under agreement to erect a building thereon is the owner with reference to the erection of such building, although by the contract his title to the building will be forfeited by breach of the contract as to payment: *Jameson v. Gile*, 67 N. W., 396.

Ratification: Facts in a particular case, *held* sufficient to show acquiescence in improvements made thereon by contract with another, and the adoption and recognition of his contract for the material as made in behalf of the owner: *Burdick v. Moulton*, 53-761.

Lien upon improvements. Although material furnished for or labor performed upon an improvement upon land, under contract with one having no interest therein nor authority to contract for the owner, will not give any lien upon the land, the right of a lien upon the improvements may exist in such case, and for that purpose it is immaterial whether or not the person with whom the contract was made had any right to improve the land: *Lane v. Snow*, 66-544.

Where a purchaser of land under a bond for a deed which stipulated that the seller might declare the contract forfeited on failure of the buyer to make payments, and that the buyer should until payments were made be deemed a tenant, procured material from plaintiff for the erection of improvements, *held*, that the making of improvements being evidently contemplated by the parties, the person furnishing material was entitled to a lien on the improvements made, notwithstanding the forfeiture declared by the vendor for failure of the purchaser to make the payments, the improvement consisting of a building erected upon blocks: *Oliver v. Davis*, 81-287.

A mechanic's lien is allowed for the labor upon a building erected as an improvement upon the land. It is not granted merely for the labor upon the land. Therefore an architect who has prepared plans and made measurements for a building which is not erected has no lien upon the premises for his charge: *Foster v. Tierney*, 91-253.

Equitable interest: A mechanic's lien will attach upon an equitable title, and will follow the title into whosesoever hands it may pass, and a mere substitution of another contract for that under which the property is held will not defeat the lien if the new contract was given as evidence of the same rights which were held under the old: *Clark v. Parker*, 58-509.

Extent of lien: A lien which has attached to the land will remain thereon after the materials have been destroyed or removed: *Ibid.*

The lien attaches to the building and not to the material furnished; a purchaser of such material, even with knowledge that it is not paid for, takes free from any lien: *Heaton v. Horr*, 42-187.

A party furnishing material for a building or improvement under contract has a lien for all the material furnished whether used or not: *Neilson v. Iowa Eastern R. Co.*, 51-184; *S. C.*, 51-714.

The rolling stock of a railway is not a part of the realty, and a party furnishing ties for the construction of the road does not acquire any lien upon such rolling stock: *Ibid.* (But the statute now provides otherwise.)

Public buildings or improvements: The provisions of the statute are only intended to apply to property which may be sold on execution, and a mechanic's lien cannot be enforced against public property, such as public buildings, bridges, etc., which are exempt from execution sale under § 4007: *Loring v. Small*, 50-271; *Lewis v. Chickasaw County*, 50-234; *Charnock v. District Tp*, 51-70; *Whiting v. Story County*, 54-81; *Breneman v. Harvey*, 70-479.

It is not proper, where it is attempted to enforce a lien against a public building or improvement, to render a judgment not a lien, to be enforced in the usual way by a tax. The lien can be enforced only in the manner prescribed: *Loring v. Small*, 50-271; *Whiting v. Story County*, 54-81.

As to whether a mechanic's lien can be placed upon the property of a private water company engaged in supplying the inhabitants of a city with water, *quære: Harrison, etc., Iron Co. v. Council Bluffs Water Works Co.*, 25 Fed., 170.

As to provisions for enforcing claims of contractors or subcontractors for work or materials on public buildings or bridges, see §§ 3102-4.

For what improvements or materials: Breaking the sod is not such "improvement

upon land," as to entitle the person performing such labor to a mechanic's lien: *Brown v. Wyman*, 56-452.

A person who furnishes and erects lightning-rods attached to a house or other structure is entitled to a mechanic's lien therefor: *Harris v. Schultz*, 64-539.

A mechanic or material-man does not acquire a mechanic's lien upon property by doing work upon and furnishing material for a sidewalk upon a street in front of such property: *Coenen v. Staub*, 74-32.

The owner of land who under contract with an adjoining owner erects a party wall partly on the land of the latter, is not entitled to a mechanic's lien for the agreed proportion of the expense of such wall: *Swift v. Calnan*, 71 N. W., 233.

While it is not necessary that there be an express agreement for labor and material nor that any item furnished should be specifically in contemplation at the time of the making of the agreement, yet to bring articles furnished within any particular agreement of the parties it must appear that they were within the general purport of such agreement; and in a particular case, *held*, that certain articles furnished were not within an agreement in question and while they might be such as to entitle the person furnishing them to a lien they did not entitle him to a lien under such contract and therefore did not entitle him to priority of lien over certain other claims upon the property: *Chase v. Garver Coal & Mining Co.*, 90-25.

To whom lien allowed: Proof of performance of labor upon a building is sufficient to entitle a party to a lien; he is not required to show a special agreement that the labor was to be performed about that building. An implied contract will support a lien: *Foerder v. Wesner*, 56-157.

A party should not be denied a lien for labor performed merely from the fact that, in addition to the performance of the labor, he rendered services as overseer of the work: *Ibid.*

A laborer employed for days' wages in the construction of a railroad is entitled to a lien on the road for such wages: *Mornan v. Carroll*, 35-22.

A subcontractor under a subcontractor is also entitled to a lien: *Mears v. Stubbs*, 45-675.

Where a railroad is a unit in every respect except in its construction, a subcontractor who builds only a part of the road has nevertheless a right to a lien on the whole road: *Brooks v. Railway Co.*, 101 U. S., 443.

A creditor is not entitled to a lien for money paid out for the use of a debtor, although embraced in the same account with charges for services rendered: *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 65-513.

Indebtedness for work or material: Where there was an exchange of property, and one party agreed to build a house for the other as a part of the contract, while the latter undertook to satisfy a mortgage, *held*, that upon failure of the latter to satisfy the mortgage, the former could not claim a mechanic's lien for the building of the house, the indebtedness not being for the work or material, but for failure to perform the contract with reference to the mortgage: *Brown v. Rodocker*, 65-55.

Nature of the interest: A mechanic's lien is an insurable interest: *Carter v. Humboldt F. Ins. Co.*, 12-287.

A mechanic's lien is not an interest in real estate; it is the right to a remedy against the property whereby the real estate may be subjected to a specific lien for the payment of the claim: *Andrews v. Burdick*, 62-714.

Prior statutes: Liens arising prior to the taking effect of the statutory provisions embodied in these sections were held to be enforcible under the prior statutes: *Brodt v. Rohkar*, 48-36; *Conrad v. Starr*, 50-470.

SEC. **3090. Extent of lien—leasehold interest.** The entire land upon which any such building, erection or other improvement is situated, including that portion not covered therewith, shall be subject to all liens created by this chapter to the extent of the interest therein of the person for whose benefit such labor was done or things furnished; and when such interest is only a leasehold the forfeiture of such lease for the non-payment of rent, or for non-compliance with any of the other conditions therein, shall not forfeit or impair such liens upon such improvements, but the same may be sold to satisfy such liens, and be moved away by the purchaser within thirty days after the sale thereof. [16 G. A., ch. 100, § 4; C. '73, § 2140; R., § 1854.]

Separate buildings: Where material is furnished for the erection of two buildings, and the person furnishing it is not able to designate what items were sold for one and what for the other, all the material being sold under a single contract for the two buildings, a lien on both buildings for the entire amount may be claimed: *Bowman Lumber Co. v. Newton*, 72-90.

It is not necessary for plaintiff to designate either in his sworn statement of the account or in his petition the particular material which goes into each of two or more buildings for which material is furnished. It is, however, not thereby intended that a person furnishing material will be entitled to a lien upon one building for material which it is shown went into another; all that is intended is that, so far as the question is of any materialty to the defendant, the burden is upon him to show in what building the materials were used: *Lewis v. Saylors*, 73-504.

There is nothing to prevent the granting of a mechanic's lien on several houses jointly for material furnished for all of them: *Williams v. Judd-Wells Co.*, 91-378.

But where the claimant of the lien amended by specifying the amount of ma-

terial furnished for each house, *held*, that there was no error in creating a particular lien as to each: *Ibid.*

While a lien may be sustained as against separate properties owned by the same person, where the contract for furnishing materials embraces all buildings upon the different properties, it is not competent to establish a lien for material furnished under one contract for buildings in connection with properties belonging to different owners in severalty: *Bartlett v. Bilger*, 92–732.

Where material is furnished for the erection of a house upon a lot upon which is situated another house such lot in fact having been divided and the material man not being advised as to any intention to make such division the lien is only upon the building for the erection of which the material is furnished or labor done, and upon the land upon which it actually rests and in addition thereto upon other land properly appurtenant to the building: *Ewing v. Allen*, 68 N. W., 702.

Where material is furnished for several buildings the burden of proof is upon the party claiming a lien on a particular building to show what part of the material went into such building: *Roose v. Billingsley, etc., Com. Co.*, 74–51.

Where defendants, lessees of a mill under verbal lease for five years, put in machinery and fixtures, and afterward gave a chattel mortgage thereon, *held*, that the plaintiffs who furnished such machinery, and filed their statement within proper time, had a mechanic's lien upon such machinery, and were prior to the claims of the chattel mortgagee. Although, as between lessor and lessee, such machinery and fixtures were chattel property, yet in connection with a leasehold interest they were subject to the lien: *Nordyke v. Hawkeye Woolen Mills Co.*, 53–521.

As to lien on improvements in case of forfeiture of contract of sale for failure of vendee to perform, see notes to last section.

SEC. **3091. Lien on work of internal improvement.** When such material has been furnished or labor performed in the construction, repair or equipment of any railroad, canal, viaduct or other similar improvement, the lien therefor shall attach to the erections, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, and the rolling stock and other equipment belonging to any such railroad, canal, viaduct or other company; all of which, except the easement or right of way, shall constitute the building, erection or improvement provided and mentioned in this chapter. [16 G. A., ch. 100, § 5.]

SEC. **3092. Filing statement.** Every person, whether contractor or subcontractor, who wishes to avail himself of the provisions of this chapter, shall file with the clerk of the district court of the county in which the building, erection or other improvement to be charged with the lien is situated a verified statement or account of the demand due him, after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien, which statement or account must be filed by a principal contractor within ninety days, and by a subcontractor within thirty days, from the date on which the last of the material shall have been furnished or the last of the labor was performed; but a failure to file the same within said periods shall not defeat the lien, except against purchasers or incumbrances in good faith, without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed; but where a lien is claimed upon a railway, the subcontractor shall have sixty days from the last day of the month in which such labor was done or material furnished within which to file his claim therefor. [Same, § 6; C.'73, § 2137; R., § 1851.]

What statement sufficient: A simple statement that a sum is due the person claiming a lien is not the "statement or account" required by statute to be filed. It should show the account whereon the demand is founded. The claim should show that the party is entitled to a lien, and the nature of the demand and the time when it accrued should therefore appear: *Valentine v. Rawson*, 57–179.

Where the statement shows the essential facts the lien will not be defeated by want of technical accuracy as to the time when the labor was performed or the material furnished: *Bangs v. Berg*, 82–350.

Unnecessary matter in the statement or petition will not defeat the lien: *Ibid.*

It is not required that the name of the owner of the property against which the lien is claimed should be mentioned in the statement. Where the owner had died before the filing of the statement for a lien, *held*, that the statement was sufficient if made out against the estate, though the names of the heirs owning the property were not mentioned: *Welch v. McGrath*, 59–519.

Where the claim shows a contract between a contractor and the owner of property for the building of a house thereon,

and the purchase by the contractor of the lumber to be used in building the house and the furnishing of such lumber by the party claiming the lien, such claim sufficiently shows the use of the lumber in building the house: *Ewing v. Folsom*, 67–65.

The statement for the mechanic's lien should contain a bill of particulars: *Greene v. Ely*, 2 G. Gr., 508.

If the bill of particulars is as definite as the circumstances of the case will allow it will be sufficient: *Mix v. Ely*, 2 G. Gr., 513.

If all the items constitute in fact parts of one account, that is, relate to one and the same transaction, respecting which the contract to furnish material was made, they may be included in one statement, although intermediate balances may have been struck in the account: *Lamb v. Hanneman*, 40–41.

Where the last item of an account for material furnished for the construction of a house consisted of one blind, which was afterwards returned, *held*, that if the blind was furnished in good faith, it properly constituted an item from the date of which the time for filing a mechanic's lien should be reckoned: *Hug v. Hintrager*, 80–239.

A statement of an account for materials used in the construction of a building, which describes such materials in language peculiar to the trade is a sufficient compliance with the requirement that a statement of a claim for a mechanic's lien shall be accompanied by an account of items forming the basis of the claim: *Wetmore v. Marsh*, 81–677.

One who furnishes material to a contractor to be used in making an improvement may make a claim in a single lien for all the material furnished for a single building, although the work performed by the contractor upon such building may be under different contracts. It would be a great hardship upon a subcontractor to require him to take notice of, and bear in mind at his peril, precisely where, in the construction of a building and use of material, one contract ends and the other begins. In such cases service of notice by subcontractors made within thirty days after the furnishing of the last material is sufficient: *Jones, etc., Lumber Co. v. Murphy*, 64–165.

One who works on a building from time to time not continuously is not necessarily required to ask a lien for each separate period but one statement for the whole period may be sufficient, there being no distinct and separate employment: *Merritt v. Hopkins*, 65 N.W., 1015.

The statement for mechanic's lien, *held* sufficient in a particular case: *Novelty Iron Works v. Capital City Oatmeal Co.*, 88–524.

Application of payments: Where a contractor, indebted to a lumber dealer on two accounts for material furnished for two different buildings on premises of distinct owners, made a payment which was at first applied by the creditor on one account, but afterward charged to the other, *held*, that it not appearing that the first application was made by mistake, the lien under the first account was thereby released to that extent as to the property covered thereby, and was not revived by the subsequent change in the application: *Chicago Lumber Co. v. Woods*, 53–552.

What part of account: Where the account for material amounted to $800 and had been carried along with a reasonable continuity, and afterwards an item of $4.45 was charged more than seven months after the other items, *held*, that such item was not to be deemed a part of the account: *Gilbert v. Tharp*, 72–714.

Sufficiency of affidavit: An affidavit for a mechanic's lien commencing "A. B., agent for C. D., being duly sworn, says that on, etc., he made a parol contract, etc., to furnish material, etc., for which he claims a mechanic's lien," etc., *held* sufficient to support a mechanic's lien in behalf of C. D.: *Lamb v. Hanneman*, 40-41.

It is required that the statement shall be verified by affidavit, but it is not provided that such affidavit shall be by the claimant for the lien, and an affidavit made by an employe of the firm, having authority to make contracts for them and having personal knowledge of the transaction, *held* sufficient: *Hug v. Hintrager*, 80–359.

Where a statement of an account was filed with the clerk with a claim for a mechanic's lien, and the jurat of the affidavit was signed, "L. A. Wilkinson, Clerk," *held*, that the signature of the clerk was sufficient, as it would be understood that he was the clerk of the court in which the action was pending: *Wetmore v. Marsh*, 81–677.

Incorrect statement: The party filing the statement for the mechanic's lien should be held to the strictest exercise of good faith, and if it appears that he has included within his statement items of account for which he is not entitled to a lien, for the purpose of securing a lien for such items, his entire claim for the lien should be rejected: *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 65–513.

Therefore, where items for money expended were included in an account in such way as to make it appear that they were for services rendered, *held*, that the plaintiff was not entitled to a lien, even for services which he had rendered: *Ibid.*

The fact that items of charge are included in a statement for which the creditor is not entitled to a lien under such statement does not render invalid the statement as to items of charge properly included therein: *Chase v. Garver Coal & Mining Co.*, 90-25.

The filing of a statement containing an insufficient description or the failure to file any statement at all will not defeat the lien: *Chicago Lumber Co. v. Des Moines Driving Park*, 65 N.W., 1017.

The lien, even though no statement is filed within the ninety days is good as against incumbrancers unless their rights accrue after the ninety days and before the filing of any claim for the lien: *Ibid.*

The notice by virtue of the filing of the lien is not broader than the claim for a lien upon tracts of land not described in such statement: *Ibid.*

Under this section any description of the property which can be said to charge those interested therein or who may thereafter

become so interested with notice as to the particular tract of land sought to be charged with the lien, will be sufficient: *Chicago Lumber Co. v. Des Moines Driving Park*, 65 N. W., 1017.

Therefore, *held*, that a description in accordance with the lots and blocks named in a certain plat which however had been previously vacated, was sufficient: *Ibid.*

But *held*, that such description would not cover the streets and alleys in such vacated plat: *Ibid.*

Mistake in description of property: The fact that in the statement a lien is claimed upon a larger tract of land than that owned by the person contracting for the improvement, but including the tract upon which the improvement is made, and owned by the person making the contract, will not defeat the lien as to the property properly subject thereto: *Bissell v. Lewis*, 56–231.

A mistake in the description of the property in the account filed is not irremediable, and a lien may still be claimed by filing a new account containing a correct description. The foreclosure of a lien misdescribing the property will not so merge the account but that it may furnish the basis for a claim for a lien upon the property for which the material was furnished: *Gray v. Dunham*, 50–170.

As a failure to file a statement does not defeat a lien except as against purchasers and incumbrancers, such statement, even if filed, will not limit the right of recovery against the person with whom the contract is made: *Neilson v. Iowa Eastern R. Co.*, 51–184.

Where the filing of a statement is not necessary to a lien, the filing of an incorrect statement will not defeat it: *Bissell v. Lewis*, 56–231.

Unintentional mistakes in the account will not defeat the lien. It is only when the account is erroneously stated with intent to defraud that the lien is defeated by reason of errors: *Green Bay Lumber Co. v. Miller*, 62 N. W., 742.

In an action to foreclose a mechanic's lien against a landlord and tenant, where there was a mistake in the description of the land in the claim filed for the lien, *held*, that the error would not defeat the lien against the landlord, as it appeared that he had actual knowledge of the improvements and that plaintiff claimed a lien on them: *National Lumber Co. v. Bowman*, 77–706.

The description of the property to be charged as "thirty lengths of corn-cribbing at Mills Station," *held* too indefinite: *Roose v. Billingsly, etc., Com. Co.*, 74–51.

Who may file statement: The holder of a claim which in his hands may constitute the foundation of a lien, or one bound by a contract to furnish labor or material, may do all things necessary to enforce the lien allowed by law; therefore, *held*, that where a firm made a contract to furnish, and did furnish, materials, and a part of the members of the firm afterward transferred their interest in the partnership to others, one of such members had authority, in the name of the original firm, to perfect the lien for the material so furnished, and the assignee of such firm might enforce the lien thus perfected: *German Bank v. Schloth*, 59–316.

An assignee for the benefit of creditors may enforce a mechanic's lien existing in favor of the assignor: *Ibid.*

Whether a statement filed subsequently to the assignment of the claim, but in the name of the assignor, would be sufficient, *quære: Ford v. Independent Dist.*, 46–294.

Method of filing: Under the statutory provisions for filing, requiring the clerk to make an abstract of the statement in a book by him to be kept for that purpose and properly indexed, *held*, that the requirement that the clerk's abstract shall contain the name of the person against whose property the lien was filed amounts to no more than that it shall contain the name of the person against whom the account is filed and the claim for the lien is made, and it does not require, by inference, that the claim shall state the name of the owner of the property against whom the lien is claimed: *Welch v. McGrath*, 59–519.

Therefore, *held*, that where the person against whom the lien existed was dead the claim for a lien was properly filed against the administrator of the estate without naming the heirs who were the owners of the property against whom it was sought to establish a lien: *Ibid.*

Where it appears by the signature of the clerk that the claim is filed, and by a jurat to the claim that the person thus filing it is the clerk of the district court it is sufficiently shown that the claim is filed in the district court: *Ewing v. Folsom*, 67–65.

Time for filing statement: The proviso that, where a lien is claimed upon a railway, a subcontractor shall have sixty days from the last day of the month in which the labor was performed or material furnished in which to file his claim for a lien, means that he shall have sixty days from the last day of the calendar month: *Sandval v. Ford*, 55–461.

But this distinction between railroad subcontractors and others as to time for filing claims does not release the former from the other provisions of the statute as to the time within which such subcontractors must serve notice upon the owner of the filing of their claims: *Ibid.*

The time for filing statement in order to effect notice is not within ninety days from the time of each item of work done or material furnished, but from the time of completion of the entire contract: *Jones v. Swan*, 21–181.

Where a lien is claimed on the ground that material furnished was used in a particular building within ninety days prior to the time of asserting the lien, such claim cannot be enforced against the purchaser of the property without proof that the material was used in the particular building as claimed: *Roose v. Billingsly, etc., Com. Co.*, 74–51.

But for the limitation imposed in the second section following, the thirty-day limitation as to filing statement would not have any application as between the owner and the subcontractor; but by the terms of that sec-

tion the subcontractor's lien which is effected by filing the statement and giving of notice after the expiration of thirty days, is effectual only as to the amount due from the property owner to the contractor at the time the notice is given: *Thompson v. Spencer*, 63 N. W., 695.

The statute of limitations begins to run from the expiration of the thirty or ninety days allowed by statute for the filing of the statement for a lien, whether the statement be filed within that time or not: *Squier v. Parks*, 56-407; *Dimmick v. Hinkley*, 57-757.

Failure to file a statement does not defeat the lien as against the owner: *Kidd v. Wilson*, 23-464: *Taylor v. Burlington, C. R. & M. R. Co.*, 4 Dillon, 570.

One who has actual notice at the time of taking a conveyance that material has been furnished for building on the premises and has not been paid for, cannot take advantage of the negligence on the part of the claimant to file the statement for the lien: *Lee v. Hoyt*, 70 N.W., 95.

An incumbrancer acquiring a lien upon the property within the ninety days allowed for filing a statement for a lien takes subject to the mechanic's lien, though no statement thereof has been previously filed; until the expiration of the ninety days no record notice of a mechanic's lien is necessary: *Evans v. Tripp*, 35-371; *Lamb v. Hanneman*, 40-41.

Judgment lien: Failure to file a statement for a lien within the ninety days allowed by statute will not defeat the lien as against a judgment creditor whose judgment was rendered after the commencement of the improvement and before the expiration of the ninety days: *Curtis v. Broadwell*, 66-662.

Notice: By failing to file his claim within the time provided by statute, the claimant loses his preference or priority over a purchaser or incumbrancer whose rights have accrued subsequently to the time within which the statement is directed to be filed, and who had no actual notice of the claim: *Noel v. Temple*, 12-276.

Notice to officer of corporation: A corporation purchasing a railroad at a foreclosure sale, *held*, not to be affected with a notice of the claim for labor and material furnished prior to the mortgage under which the sale was had, but which had not been filed as a lien, although such claim appeared on the books of the receiver of the road, who afterwards became an officer of the corporation purchasing: *Bear v. Burlington, C. R. & M. R. Co.*, 48-619.

Burden of proof: As between a party claiming a mechanic's lien, who has not filed his statement until after the expiration of the ninety days allowed therefor, and a prior mortgagee whose mortgage was not executed until after the expiration of such period, the burden of proving that the mortgagee had notice at the time of taking his mortgage of the existence of a mechanic's lien is upon the person claiming such lien: *Hoskins v. Carter*, 66-638.

So a person claiming a mechanic's lien upon an open account has the burden of showing that his statement was filed within the ninety days, or that the mortgagee taking his mortgage after the expiration of the ninety days had notice at the time of the execution of the mortgage: *Ibid.*

Purchaser for value: A lien filed after the expiration of the ninety days cannot be enforced against one purchasing after the ninety days without notice, even though he has made no actual payment, but only executed his note for the purchase price. *Weston v. Dunlap*, 50-183.

SEC. **3093. Notice by subcontractor—lien discharged.** To preserve his lien against the owner, and to prevent payments by the latter to the principal contractor or to intermediate subcontractors, but for no other purpose, the subcontractor must, after commencing such labor or furnishing such material, and within thirty days after the completion thereof, serve upon such owner, or his agent or trustee, a written notice of the filing of such claim, which notice may be served by any person, and if the party to be served, his agent, or trustee, is out of the county wherein the property is situated, a return of that fact by the person charged with making such service shall constitute sufficient service from and after the time it was filed with the clerk. The lien of the subcontractor may be vacated and discharged at any time by the owner, contractor or intermediate subcontractor filing with the clerk of said court a bond, in twice the amount of the sum for which the claim for the lien is filed, with two or more sureties to be approved by the clerk, conditioned for the payment of any sum for which the claimant may obtain judgment upon the demand for which such statement or account has been filed. But if no claim for a lien is filed within the periods hereinbefore provided, and the notice thereof is not served, or if these things are done and the bond above provided is filed, then the owner or contractor may thereafter proceed, make payments and adjust claims, without regard to the lien of the subcontractor; and nothing in this chapter shall be construed to require the owner to pay a greater amount, or in any other manner, or at earlier dates, than those provided in his contract. [16 G. A., ch. 100, § 7; 15 G. A., ch. 49; C. '73, § 2131.]

The provisions requiring notice to the owner by the subcontractor are intended to protect the owner from the payment of any sum greater than that contemplated in his contract. The lien of the subcontractor can be enforced against any sum due from the owner at the time of service of the notice provided for or thereafter becoming due under the contract: *Cutler v. McCormick*, 48–466; *Brooks v. Railway Co.*, 101 U. S., 443.

Where a contractor has received payment in full before an agreement is made with a subcontractor for materials, the subcontractor can have no lien against the owner of the property: *Mallory v. Marion Water Works Co.*, 77–715.

Where a contractor has been paid without knowledge of any claims for liens by subcontractors, such payment relieves the owner from any further liability: *Parker v. Scott*, 82–266.

The subcontractor, to be entitled to a lien, should show such indebtedness on the part of the owner to the contractor, either at the time the subcontractor's account commenced, or later, as will justify a court in decreeing a lien: *Ibid.*

Although the claim of the subcontractor is not filed and notice given within thirty days from the completion of the work, yet if, at the time a statement is filed and notice given, there is money due or to become due from the owner to the principal contractor, the lien will attach to the amount due or to become due to the contractor not to exceed the amount due to the subcontractor: *Hug v. Hintrager*, 80–359.

Where the subcontractor has filed his statement and given notice thereof within thirty days, the owner makes payment to the principal contractor at his own risk and subject to the right of the subcontractor to assert his lien: *Ibid.*

Where the owner knew that material was being furnished by a subcontractor, *held*, that the claim therefor was a lien, although the owner, assuming that the material was to be furnished by the contractor personally, had made payment in full: *Ibid.*

The filing of a claim by a subcontractor after thirty days and the giving of notice thereof to the property owner effects a lien only as to any balance due from the owner to the contractor at the time of the service of such notice, and if even within the thirty days payment has been made by the owner to the contractor such payment is effectual as to the claim of a lien made by a subcontractor after the expiration of the thirty days allowed to him for that purpose: *Thompson v. Spencer*, 63 N. W., 695.

A laborer employed by a subcontractor cannot enforce a lien except so far as the contractor may be indebted to the subcontractor, even though the owner be still indebted to the contractor: *Utter v. Crane*, 37–631.

In the absence of an averment that something is due from the subcontractor to the laborer claiming a lien, the latter cannot recover in an action to foreclose his mechanic's lien as against the owner: *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 62–280.

The owner cannot be made liable to a subcontractor in any other manner than he is, under his contract, liable to the principal contractor, and if, by his contract, the indebtedness is to be satisfied in property, the subcontractor is bound by such arrangement: *Kilbourne v. Jennings*, 38–533.

Where the contract between the owner and contractor stipulates that a claim by the owner against the contractor for professional services shall be accepted as part payment on such contract, such agreement is binding upon the subcontractor: *Ewing v. Folsom*, 67–65.

Where the contractor has the right under his contract to take note and mortgage in part payment of his claim, and does so, the subcontractor cannot claim a lien inconsistent with the exercise of such a right by the contractor: *Jones, etc., Lumber Co. v. Murphy*, 64–165.

If the principal contractor by the terms of his contract is entitled to compensation in full before the work is completed, and this compensation is fully paid to him before that time, and without any notice of claims for liens, no liens can be enforced against the property owner or the property: *Roland v. Centerville, M. & A. R. Co.*, 61–380; *Nash v. Chicago, M. & St. P. R. Co.*, 62–49.

If a subcontractor stand by and permit the owner to make full payment to the contractor without asserting his claim he will be estopped from afterwards setting up a claim for a lien: *Vreeland v. Ellsworth*, 71–347.

The subcontractor is chargeable with notice of the contract between the owner and the principal contractor, and is bound by any payments made, even within the thirty days given him by statute to file his lien, if such payments are made according to the terms of the contract: *Stewart v. Wright*, 52–335.

If nothing is due the contractor under the terms of the contract there can be no recovery by the subcontractor: *Wickham v. Monroe*, 89–666.

A subcontractor is bound by the terms of his contract between his principal and the owner: *Blanding v. Davenport, I. & D. R. Co.*, 88–225.

If by reason of breach of the contract between the owner and the principal contractor, there is nothing due the principal contractor there can be no recovery by the subcontractor: *Hazzard v. Council Bluffs*, 87–51.

Knowledge on the part of the owner that material or labor has been furnished by a subcontractor is immaterial for the purpose of holding the owner liable to the subcontractor if he has paid the contractor according to the terms of the contract, provided there is no provision in the contract for the owner using money due the contractor, in discharging his obligations to subcontractors. The subcontractor must be held to assent to the payment to the contractor in accordance with the terms of the contract and cannot be heard to say that as to him such payments were not properly made: *Epeneter v. Montgomery County*, 67 N. W., 93.

When the contract between the owner

and contractor provides that subcontractors shall be paid by orders drawn by the contractor on the owner, and the owner knows that subcontractors have furnished material, he is liable for any liens of subcontractors of which he is duly notified before the expiration of the thirty days, although previous to the expiration of that period he has paid the contractor without actual knowledge of the indebtedness of the contractor to such subcontractor: *Winter v. Hudson*, 54–336.

Until the expiration of thirty days the owner has no right as against subcontractors to make payment to the contractor except in accordance with the specific terms of his contract: *Merritt v. Hopkins*, 65 N. W., 1015.

Where an owner seeks to escape liability to a subcontractor of whose claim he has notice within the thirty days, on the ground that, before notice of such claim, he had settled with such contractor in accordance with the terms of his contract, the question as to whether he is to be protected in having made such settlement with the contractor is determined by whether he could probably, in the exercise of reasonable diligence, have discovered that the subcontractor was entitled to a lien; and where it appeared that the owner knew that the contractor had to buy material, although he did not know from whom he bought it, *held*, that if he might have ascertained that fact from inquiry, he should have done so, and would not be protected: *Gilchrist v. Anderson*, 59–274; *Martin v. Morgan*, 64–270.

It appearing that the owner of property before making the last payment under a contract had knowledge that the contractor had procured the materials used from the plaintiff, *held*, that as such owner could, in the exercise of ordinary care, have obtained knowledge of plaintiff's claim by inquiring whether the material had been paid for, the subcontractor might have his lien for materials furnished: *Fay v. Orison*, 60–136.

The court, liberally construing the statute so as to protect the owner, who in good faith pays the contractor within the thirty days in accordance with the agreement between them, has held that such payment to the contractor, made without knowledge of the claim of the subcontractor, will defeat the lien of the latter; but that if payment is made within the thirty days, with knowledge of the subcontractor's claim, even though such knowledge be merely through verbal notice, the lien of the subcontractor is not defeated: *Andrews v. Burdick*, 62–714.

Delay in the completion of the work under a contract, with acquiescence of the owner, will delay the time of the payment until the work is done and accepted. Where the contract provides for payment at the completion of the work, in case no time is fixed for payment, the price becomes due when the building as contracted is completed and accepted: *Ibid.*

Notwithstanding no notice has been served by the subcontractor before payment under the contract, and within the thirty days, the owner is not justified in making payment, if he has knowledge of the labor and material having been furnished by a subcontractor, or has knowledge of facts which should put him upon inquiry, and he is not thereby relieved from liability to the subcontractor: *Othmer v. Clifton*, 69–656: *Chicago Lumber Co. v. Woodside*, 71–359.

Where payments are made in strict accordance with the contract, prior to the filing of the lien by a subcontractor or materialman or service of notice that a lien is claimed, the owner is not liable for material purchased merely upon knowledge that the contractor had procured material from some person unknown unless it is stipulated in the contract that he has a right to pay liens of subcontractors or material-men: *Fullerton Lumber Co. v. Osborn*, 72–472.

It is immaterial whether such payment is made directly to the contractor or to other subcontractors who might establish liens if they had not been paid: *Ibid.*

After the expiration of the thirty days, if no notice be served upon the owner by a subcontractor, he may, of course, proceed to pay off the contractor, whatever his knowledge may be as to the claims of such subcontractor, for he will be justified in assuming that the right to the lien is waived: *Jones, etc., Lumber Co. v. Murphy*, 64–165.

Where a contractor is under obligation to pay all subcontractors, and the owner has paid such contractor in full according to the contract, a subcontractor who has served no notice of claim for a lien upon the owner until after the settlement and expiration of the time given by statute cannot recover from such owner: *Robinson v. State Ins. Co.*, 55–489.

The lien of the subcontractor is statutory and it matters not what knowledge the owner may have as to the labor or material furnished by the subcontractor, there must be a notice to the owner as required by the statute; constructive notice is not recognized: *Frost v. Rawson*, 91–553; *Walker v. Queal*, 91–704.

The owner is supposed to be aware of the terms of the contract between him and the principal contractor and the filing of the full statement may not be material as between them, but the owner may not know of the agreement between the principal and the subcontractor nor the payments made nor amount due, and the subcontractor is therefore required to give the statutory notice in order to inform the owner of the claims to preserve his lien as against him: *Walker v. Queal*, 91–704.

A subcontractor in order to enforce his demand against the property must take the steps pointed out by the statute to perfect and preserve a lien. Therefore, the statutory notice must be given and it matters not what knowledge of the claim the owner may have, it will not be sufficient to render him liable in the absence of such notice: *Steele v. McBurney*, 65 N.W., 332.

Where the subcontractor in the construction of a railroad claimed to be relieved from failure to give notice of his lien on account of a waiver of such notice by the railroad, *held*, that under the circumstances he was chargeable with knowledge that the officer

on whose action he relied as showing a waiver was not authorized to bind the company in that respect: *Wolf v. Davenport, I. & D. R. Co.*, 61 N.W., 847.

Failure to serve written notice on the owner that the lien has been filed defeats the lien of the subcontractor. The commencement of an action to enforce such lien in which an original notice is served is not sufficient to constitute the notice here required. (Distinguishing *Bissell v. Lewis*, 56–240, which was a case of a principal contractor and not a subcontractor): *Merritt v. Hopkins*, 65 N.W., 1015.

A mortgagee taking a mortgage upon premises upon which improvements have been made, and having no knowledge of any agreement on the part of the mortgagor to pay to the subcontractor an indebtedness due him from a contractor notwithstanding the failure of the subcontractor to file his lien within the statutory period, does not take subject to the claim of such subcontractor: *Missouri River Lumber Co. v. Finance Co.*, 61 N. W., 913.

If the service of the notice by subcontractor is made upon the person who is entrusted with the business of adjusting the claims of the contractor and subcontractor it is sufficient: *Wickham v. Monroe*, 89–666.

In such case the notice may properly be addressed to the principal and not to the agent: *Ibid.*

The notice by the subcontractor should be in writing: *Jeure v. Perkins*, 29–262.

If the owner is not served with "written notice of the filing of said claim" he is not affected thereby, whatever notice he may have otherwise: *Lounsbury v. Iowa, M. & N. P. R. Co.*, 49–255; *Frost v. Rawson*, 91–553.

Where a subcontractor undertakes to enforce a lien against the owner he should show in his petition such indebtedness on the part of the owner to the contractor, either at the time the subcontractor's account commenced, or later, as will justify a court in decreeing a lien: *Martin v. Morgan*, 64–270.

Where the contractor gave bond for the discharge of his contract, and the owner paid him in full before the expiration of the time for filing liens by subcontractors, and was afterwards compelled to pay additional sums to satisfy such liens, *held*, that the owner could not recover such additional sums from the sureties on the contractor's bond, for the reason that the owner was guilty of laches in paying the contractor until the time for filing subcontractor's liens had expired: *Lucas County v. Roberts*, 49–159.

A failure to give a copy of the settlement to the owner and contractor at the time of performing the work, as required by a former statute, would not defeat the laborer's lien, the filing of the claim for a lien, which includes a copy of the statement, being sufficient notice to them: *Bundy v. Keokuk & D. M. R. Co.*, 49–207.

Under the same statute, also, *held*, that a lien claimed by a subcontractor upon the making and giving to the owner of his own statement could not be enforced when it appeared that the contractor had not refused to make such statement: *Mears v. Stubbs*, 45–675.

Where material is furnished which the owner promises to pay for, the person furnishing the material is entitled to a lien without regard to the provisions with reference to subcontractors *Carney v. Cook*, 80–747.

Where a lien is claimed as a principal contractor there must be recovery on that ground or not at all. There cannot be an enforcement of a lien as a subcontractor: *Blanding v. Davenport, I. & D. R. Co.*, 88–225.

SEC. **3094. Subcontractor's claim after thirty days.** A subcontractor may, at any time after the expiration of said thirty days, file his claim for a lien with the clerk of the district court. and give written notice thereof to the owner, or his agent or trustee, as above provided, and from and after the service of such notice his lien shall have the same force and effect, and be prosecuted or vacated by bond, as if filed within the thirty days, but shall be enforced against the property or upon the bond, if given by the owner, only to the extent of the balance due from the owner to the contractor at the time of the service of such notice upon him, his agent or trustee; but if in such case the bond is given by the contractor, or person contracting with the subcontractor filing the claim for a lien, such bond shall be enforced to the full extent of the amount found due the subcontractor. [16 G. A., ch. 100, § 8; 15 G. A., ch. 49; C.'73, § 2133.]

See notes to preceding section.

SEC. **3095. Priority.** The liens provided for by this chapter shall take priority as follows:

1. As between persons claiming mechanics' liens upon the same property, according to the order of the filing of the statements and accounts therefor;

2. They shall take priority of all garnishments of the owner for the contract debts, whether made prior or subsequent to the commencement of the furnishing of the material or performance of the labor, without regard to the date of filing the claim for such lien;

3. They shall be preferred to all other liens and incumbrances which may attach to or upon such buildings, erections or other improvements, and to

the land upon which they are situated, made subsequently to the commencement of said buildings, erections or other improvements, but the rights of purchasers, incumbrancers, and other persons who acquire interests in good faith and for a valuable consideration, and without notice, after the expiration of the time for filing claims for liens, shall be prior to the claims of all contractors or subcontractors who have not, at the dates such rights and interests were acquired, filed their claims for such liens;

4. The liens for the material or work aforesaid, including those for additions, repairs and betterments, shall attach to the buildings, erections or improvements for which they were furnished or done, in preference to any prior lien, incumbrance or mortgage upon the land upon which such erection, building or improvement belongs, or is erected or put. If such material was furnished or labor performed in the erection or construction of an original and independent building, erection or other improvement commenced since the attaching or execution of such prior lien, incumbrance or mortgage, the court may, in its discretion, order and direct such building, erection or improvement to be sold separately under execution, and the purchaser may remove the same in such reasonable time as the court may fix. But if the court shall find that such building should not be sold separately, it shall take an account of and ascertain the separate values of the land, and the erection, building or other improvement, and order the whole sold, and distribute the proceeds of such sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanics' lien priority upon the building, erection or other improvement. If the material furnished or labor performed was for additions to, repairs of, or betterments upon buildings, erections or other improvements, the court shall take an accounting of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs or betterments, and, upon the sale of the premises, distribute the proceeds of such sale so as to secure to the prior mortgagee or lien-holder priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien, and to the mechanic's lien-holder priority upon the enhanced value caused by such additions, repairs or betterments. In case the premises do not sell for more than sufficient to pay off the prior mortgage or other lien, the proceeds shall be applied on the prior mortgage or other liens. [16 G. A., ch. 100, § 9; C. '73, §§ 2139-41; R., §§ 1853-5; C. '51, § 981.]

Order of filing: The liens take priority in the order of their filing: *Robertson v. Barrack*, 80-538.

Lien covers entire structure: Liens for material furnished or labor performed in the erection of a building attach in their order upon the whole structure, and not upon the particular part of the work performed or material furnished. So, if machinery is furnished to be attached to and used in the building, the person furnishing it acquires a lien upon the whole improvement, and does not retain a separate lien upon the machinery: *Equitable L. Ins. Co. v. Slye*, 45-615.

Leasehold interest: Where plaintiff furnished machinery to defendant to be attached to and used in connection with real property, of which defendant had possession under a verbal lease for five years, *held*, that plaintiff was entitled to a mechanic's lien on such interest, including the machinery, and might enforce such lien against an incumbrance executed within the ninety days after furnishing the machinery: *Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co.*, 53-521.

As to rights of lessor where a lien is sought to be enforced on improvements made by lessee, see *Oswold v. Buckholz*, 13-506 [decided under former statutory provisions].

Portion of railway line: Where a contract for material was for a projected line, a part only of which was constructed, and a lien was claimed only on that part, *held*, that the road was not in such sense an entirety as that a lien on that part constructed might not be granted: *Neilson v. Iowa Eastern R. Co.*, 51-184.

Priority over chattel mortgage: Where defendants, lessees of a mill under verbal lease for five years, put in machinery and fixtures, and afterward gave a chattel mortgage thereon, *held*, that the plaintiffs who furnished such machinery, and filed their statement within proper time, had a mechanic's lien upon such machinery, and were prior to the claims of the chattel mortgagee. Although, as between lessor and lessee, such machinery and fixtures were chattel property, yet in connection with a leasehold interest they were subject to the lien: *Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co.*, 53-521.

A mechanic's lien for materials furnished for improvements on leased premises is superior to the landlord's lien for rent and to

a chattel mortgage taken by the landlord on the improvements, before the proceeding for the establishment of the mechanic's lien is commenced: *National Lumber Co. v. Bowman*, 77-706.

Mortgage: Priority of a mechanic's lien over the lien of a mortgage cannot be maintained unless it appears that the person with whom the contract was made was the owner of the property. Proof of possession alone will not be sufficient: *Dierks v. Walrod*, 66-354.

The mechanic's lien is subject to an existing mortgage on the premises: *Fletcher v. Kelley*, 88-475.

A mechanic's lien holder is not a purchaser in such sense as to be protected against an unrecorded conveyance of which he had no notice: *Ibid.*

Where a mortgage is given and filed for record prior to the time of the beginning of the improvements upon the property, the mechanic's lien for such improvements will be subordinate to the mortgage: *Bartlett v. Bilger*, 92-732.

Where materials were furnished for the construction of a building on mortgaged premises, *held*, that the person furnishing such material had a prior lien on the building as against a mortgagee of the land, and upon foreclosure of the mechanic's lien, as between the holder of such lien and the owner, the building might be treated as personal property and sold separately without right of redemption, and the mortgagee allowed a reasonable time in which to redeem the building before removal: *Luce v. Curtis*, 77-347.

Interest and attorneys' fees: Where the contract on which a lien is claimed does not provide for interest or attorneys' fees, the parties cannot enter into a contract covering such items which shall be binding upon a mortgage executed after the lien attaches and prior to the making of such supplemental contract: *Bissell v. Lewis*, 56-231.

Vendor's lien: If a party goes into possession of property subject to a vendor's lien, a mechanic's lien for material subsequently furnished for improvements, does not take priority of the lien of the vendor: *Logan v. Taylor*, 20-297.

Under a statute giving priority to the mechanic's lien as to the improvements, a vendor's lien for purchase money takes priority as to the land, but as to the building erected is inferior to the mechanic's lien: *Stockwell v. Carpenter*, 27-119.

A mechanic's lien does not take priority over a mortgage given in renewal of a vendor's lien existing at the time that the mechanic's lien accrues: *Thorpe v. Durbon*, 45-192.

Under peculiar facts, *held*, that a contract to convey, being prior to the filing of a statement for a lien, took priority over such lien: *Frost v. Clark*, 82-298.

Where a building was erected for one in possession under a contract of purchase, *held*, that the mechanic's lien attached to the building prior to any right of the vendor under the contract by which the rights of the vendee including his right to the building might be forfeited on failure to make payments as stipulated; *Jameson v. Gile*, 67 N. W., 396.

Where a plaintiff furnished materials to erect a house and barn on certain land under an agreement with some of the defendants that if he would furnish the material for the buildings his lien should be prior to any interest of theirs, and in pursuance of said agreement he furnished said material, *held*, that he was entitled to a mechanic's lien against the property prior to the lien of plaintiffs. Such an agreement is not open to the objection that it is within the statute of frauds, nor is evidence to establish it incompetent on the theory that the contract was for the transfer of an interest in real estate. No interest in the land was transferred: *Townsend v White*, 71 N. W., 337.

Merger of lien: If the holder of a mechanic's lien buys in the property at judicial sale under his judgment on such lien, the lien is not merged so as to render it subordinate to an intervening mortgage: *Delaware R. C. Co. v. Davenport & St. P. R. Co.*, 46-406.

When the lien attaches: The mechanic's lien attaches at the commencement of his work, and the time for notice expires ninety days from the conclusion thereof: *Jones v. Swan*, 21-181; *Delaware R. Const. Co. v. Davenport & St. P. R. Co.*, 46-406, 413.

The commencement of a building is the first work done upon the ground which is made the foundation thereof, and is to form part of the work suitable and necessary for its construction: *Conrad v. Starr*, 50-470.

Priority over liens acquired during progress of work: The mechanic's lien dates from the day that he commences work under his contract, or furnishes material, and attaches for all the work done and material furnished under such contract, whether before or after liens subsequently acquired by third persons, provided the work or delivery was commenced before: *Monroe v. West*, 12-119.

A mechanic's lien may attach under a contract to complete a partially erected building, which shall be superior to a prior mortgage executed upon the premises at a time when the building is in an incomplete condition: *Bissell v. Lewis*, 56-231.

A mechanic's lien has priority over a mortgage which was executed subsequently to the commencement of any building, erection or other improvement, though the particular work for which the lien is claimed was subsequent to such mortgage: *Neilson v. Iowa Eastern R. Co.*, 44-71; *Taylor v. Burlington, C. R. & M. R. Co.*, 4 Dillon, 570; *Myer v. Construction Co.*, 100 U. S., 457; *Brooks v. Railway Co.*, 101 U. S., 443; *Meyer v. Hornby*, 101 U. S., 728.

The statement being filed within ninety days from the furnishing of the last item, the whole being furnished under one contract, a lien accrues binding the property, as against the mortgagee, for all the material furnished under the contract from the time of the furnishing of the first item, and such lien will be prior to a mortgage executed after the furnishing of the first item: *Iowa Mortgage Co. v. Shanquest*, 70-124.

Where one mortgage was executed less than ninety days after the last item, and a subsequent mortgage more than ninety days after such item, the last mortgage was held to be the first lien to the extent of the mechanic's lien, the measure of the rights of the first mortgage being a lien upon the property after the satisfaction of the mechanic's lien: *Gilbert v. Tharp*, 72-714.

Where the owner of certain water lots proceeded to fill them under requirement of the city in order that they should case to be a nuisance and continued such filling above the water line with the idea of making them valuable subsequently for building purposes and afterward commenced the erection of a building thereon, *held*, that the filling could not be deemed a part of the improvement so that the lien should take effect from the time such filling was commenced: *Kiene v. Hodge*, 90-212.

Lien upon improvements: Under the provision that the lien should attach to the building, erection or improvement for which they were furnished or done, in preference to any prior lien or incumbrance upon the land upon which the same was erected or put, and that the person enforcing the lien might have the building, erection, or other improvement sold under execution, *held*, that the word improvement there used referred to an independent erection upon the land, and not to an addition or betterment of the building, and that the lien for such addition or betterment was subject to a prior mortgage on the premises: *Getchell v. Allen*, 34-559: *O'Brien v. Pettis*, 42-293.

And that a party furnishing material, etc., for the repair and enlargement of a building would get a lien subject to any liens already existing thereon, even though but little of the original building remained: *Equitable L. Ins. Co. v. Slye*, 45-615.

Under the same statute, *held*, that a mechanic's lien for repairs, such as new piers and abutments in a railroad bridge, which became integral parts of the road, would not attach to such bridge, piers, etc., as prior to a mortgage previously given on the whole road: *Bear v. Burlington, C. R. & M. R. Co.*, 48-619.

If a prior mortgage applies to land, rolling stock and buildings of a railroad, any lien of mechanics or material-men for repairs attaches from the time repairs are begun, and attaches against the prior mortgagee at the same time as against the owner. Repairs on a completed railroad do not give rise to a lien which will override a prior mortgage: *Taylor v. Burlington, C. R. & M. R. Co.*, 4 Dillon, 570 and 579.

The statutory provision for a lien upon improvements superior to the lien of a prior mortgage upon the land has no application where the mortgage has been foreclosed and the premises sold thereunder before the materials for which the lien is claimed have been furnished; in such case the statutory right to redeem is the only right which can be enforced: *Shepardson v. Johnson*, 60-239.

The provision giving priority of lien as to improvements, *held*, not to be limited in its application to cases where improvements are made by a tenant on leased premises: *Stockwell v. Carpenter*, 27-119.

Sale and removal of improvements: Under a statute providing for enforcing the priority of a mechanic's lien as to the improvement by sale and removal, that is the only method allowed, and if the nature of the improvement is such that it cannot be removed, the lien of the mechanic must be postponed to that of prior incumbrances upon the land: *Conrad v. Starr*, 50-470.

Where, in a suit to foreclose a mortgage, certain parties were made defendants who had mechanics' liens upon buildings erected subsequently to the giving of the mortgage, and where the rights of all the parties accrued under the Revision, by which the rights of the holder of a mechanic's lien were to be determined by an action at law, *held*, that it was erroneous to decree a sale of the land and buildings together and the payment of a certain portion of the proceeds to the holders of the mechanics' liens. It seems that the same would be true under present provisions, although the proceedings to enforce a mechanic's lien are now to be brought in equity: *Brodt v. Rohkar*, 48-36.

One asking the sale and removal of a building has the burden of showing that it would be proper, in view of all the circumstances: *Miller v. Seal*, 71-392.

Where the mechanic's lien attaches to the land as well as the building, and there is no prior incumbrance, it is the right of the owner to have the whole property sold for the satisfaction of the debt so that he may have opportunity of redeeming as in other cases of sale of real property, and it is error in such case to order the sale of the building alone, and its removal from the premises: *Early v. Burt*, 68-716.

Where a party had two liens, one prior and the other equal to a lien held by another, and foreclosed, making the other lien holder a party, and it was decreed that the plaintiff should take the property, if not redeemed, subject to the other lien, *held*, that the other lien holder should have the same right to redeem, and for the same time, as if not made a party, and that the latter had not a right to elect, instead of redeeming, to claim a proportionate share of the amount for which the property was sold above the amount of the first lien, the pleadings not being framed with a view to such relief: *Phelps v. Pope*, 53-691.

Sale upon execution against a lot and the building thereon, under a judgment on a mechanic's lien, *held* improper where the lien was the upon the building alone: *Wilson v. Reuter*, 29-176.

Apportionment: If the premises do not sell for more than enough to pay for the prior mortgage or other lien, the accounting or distribution of proceeds of sale is not required, and the entire proceeds are to be applied to the prior lien: *German Bank v. Schloth*, 59-316; *Miller v. Seal*, 71-392.

Were it not for the provision giving the mechanic's lien priority as to the improvement, and providing for an apportionment of the proceeds, where the court does not deem it expedient to allow the removal of

the building or improvement, a prior mortgage would prevail in all cases against a subsequent mechanic's lien for buildings or improvements, which become a part of the realty, under the plain language of the statute. The same rule applies alike to improvements, betterments or additions to buildings, and to new and independent structures, and if the amount for which the property sells does not exceed the amount of the lien of the prior mortgage, no apportionment between the mortgagee and the holder of a mechanic's lien is required: *Curtis v. Broadwell*, 66–662.

In a case where the statute provided for enforcement of the mechanic's lien as a superior claim on the improvement as against a prior mortgage upon the land only by removal of the improvement, *held*, that it was error to decree the sale of the property as an entirety and the apportionment of the proceeds: *First Nat. Bank v. Elmore*, 52–541.

Where additions or betterments are made the law is designed to enable the laborer or material furnisher to secure the advantage of the added value but not to require that the sale of the property shall be with the view of satisfying all liens in the order of their priority; and if sale under the mechanic's lien foreclosure is ordered to be made subject to the lien of the prior mortgage the decree will not be open to the objection that it does not provide for an apportionment: *Eagle Iron Works v. Des Moines Suburban R. Co.*, 70 N. W., 193.

An order for the removal of a building separate from the real estate and from the mortgage thereon is to be made only in the discretion of the court and where there was a finding of equities requiring such order and where the mortgage which preceded the erection of the building was embraced not alone on the value of the property without a building but on the agreement of the other to erect such building which should constitute an additional security to the mortgagee under his mortgage, *held*, that the case was not one for ordering a separate sale of the building under the lien: *Kiene v. Hodge*, 90–212.

SEC. **3096. Definition of "owner."** Every person for whose use or benefit any building, erection or other improvement is made, having the capacity to contract, including guardians, shall be included in the word "owner" as used in this chapter. [16 G. A., ch. 100, § 10; C.'73, § 2144; R., § 1866; C.'51, § 982.]

A party in possession under contract of purchase, or a bond for a deed, is an "owner" as here contemplated: *Monroe v. West*, 12–119; *Stockwell v. Carpenter*, 27–119.

One is an owner who has possession with right to construct an improvement under a contract of purchase: *Jameson v. Gile*, 67 N. W., 396.

In general, see notes to § 3089.

SEC. **3097. Definition of "subcontractor."** All persons furnishing materials or doing work provided for in this chapter shall be considered subcontractors, except such as have contracts therefor directly with the owner, his agent or trustee. [16 G. A., ch. 100, § 11; C.'73, § 2146; R., § 1871.]

A laborer employed by a subcontractor, when the latter has been paid in full by the contractor, cannot enforce a lien against the owner, although such owner be still indebted to the contractor. The rights of the parties in such cases are the same as though the subcontractor had contracted directly with the owner: *Utter v. Crane*, 37–631.

In general, see notes to § 3093.

SEC. **3098. Action to enforce lien.** Any person having filed a claim for a lien by virtue of this chapter may at once bring an action to enforce the same, or upon any bond given in lieu thereof, in the district or superior court of the county wherein the property is situated. [16 G. A., ch. 100, § 12; 15 G. A., ch. 44; C.'73, § 2142; R., § 1856.]

Foreclosure; petition: A mechanic's lien should not be decreed where the pleadings contain no averment that plaintiff furnished material or performed work for or upon the improvement, or that anything is due: *Roberts v. Campbell*, 59–675.

In an action in equity to enforce a mechanic's lien the court may render judgment on the account even though it does not find that the plaintiff is entitled to an equitable remedy: *Green Bay Lumber Co. v. Miller*, 62 N. W., 742.

Redemption: A party who is entitled to a lien at the time of the foreclosure of a previous lien, and is not made party to such foreclosure, may maintain an equitable action to redeem from such prior lien; and this is true although the claim for a lien be not filed before the bringing of the action to foreclose the prior lien. So *held* where the action to foreclose was brought within the ninety days in which the mechanic might have filed his lien, and his lien was afterward filed within the ninety days: *Jones v. Hartsock*, 42–147.

Joinder of actions: It is improper in an action on a promissory note to allow an amendment joining therewith an action to foreclose a mechanic's lien, and in such case plaintiff may be required to elect on which cause of action he will proceed, or on his failure to do so the amendment may be stricken from the files: *Sweetzer v. Harwick*, 67–488.

Parties: Where the owner of property on which there is a mechanic's lien conveys it, taking a mortgage to secure the purchase money, and dies, his administrator and not the heir is the proper party defendant to a proceeding to enforce the lien. Where suit was brought to enforce a mechanic's lien against property which had been conveyed by the owner subject to the lien, and a mortgage was taken for the purchase money, the administrator of the grantor being party defendant, *held*, that judgment in that action would estop such administrator from selling the property under a judgment of foreclosure of the junior mortgage, he having failed to assert the rights of a mortgagee in the action enforcing the mechanic's lien: *Shields v. Keys*, 24-298.

The owner of the property is a necessary party to an action to foreclose a mechanic's lien: *Keller v. Tracy*, 11-530.

The principal contractor is a necessary defendant in an action by subcontractor against owner: *Vreeland v. Ellsworth*, 71-347.

In an action to foreclose a mechanic's lien against the mains, etc., of a water company the city is a necessary party: *Harrison, etc., Iron Co. v. Council Bluffs Water Works Co.*, 25 Fed., 170.

Where, as in the above case, the contract was made with a construction company, and assigned to the water company, *held*, that the construction company was not a necessary party: *Ibid.*

Where the holder of a lien prior to the mechanic's lien was made a party to the foreclosure thereof, *held*, that plaintiff should have been required to pay off such prior lien free from costs before proceeding with the sale of the property, and in the event of failure to pay within a time to be named the lien should have been declared barred: *Millard v. West*, 50-616.

Time for bringing action: Under a statute requiring that action to enforce a mechanic's lien be brought by the person claiming it within thirty days after service upon him of notice by owner or contractor requiring him to so proceed, *held*, that where an attempt to commence action within the thirty days was made, but the steps taken were not sufficient by reason of defect in the notice of the action, another notice served after the expiration of the thirty days, to which defendant appeared, would not constitute a compliance with the statutory requirement, and a lien could not be established in such action: *Jones, etc., Lumber Co., v. Boggs*, 63-589.

Change of statute: Where the statute as to the mode of enforcing mechanics' liens was changed, *held*, that liens arising prior to the change should be enforced in accordance with the previous statute: *Brodt v. Rohkar*, 48-36; *Conrad v. Starr*, 50-470.

Evidence: Where, in the statement and affidavit filed for the purpose of preserving a mechanic's lien, it was alleged that the buildings upon which the labor was performed were situated on certain described lands, and that the person against whom the lien was claimed owned said lands, and in an action to foreclose such lien such allegations were denied, introduction in evidence of the statement and affidavit without proof that the buildings therein referred to were situated on the land described, or that defendant owned such land, *held* not sufficient to entitle plaintiff to foreclosure of his lien: *Hutton v. Maines*, 68-650.

Evidence in a particular case, *held* sufficient to identify the property on which the lien was claimed as that upon which the work for which the lien was claimed was performed: *Pease v. Thompson*, 67-70.

An appeal from the judgment establishing a mechanic's lien and the filing of a *supersedeas* bond do not destroy or impair the lien: *Julien Gas-light Co. v. Hurley*, 11-520.

Limitation of action: A failure to enforce the mechanic's lien until it is barred by the statute of limitations will not defeat the right of the lien holder upon the debt which he has against any person bound therefor: *Black v. Howell*, 56-630.

As to time for bringing action, see § 3447, ¶ 4, and notes.

SEC. **3099. Demand for bringing suit—assignment.** Upon the written demand of the owner, his agent or contractor, served on the person claiming the lien, requiring him to commence action to enforce such lien, such action shall be commenced within thirty days thereafter, or the lien shall be forfeited, and all benefits derived therefrom. Mechanics' liens are assignable, and shall follow the assignment of the debt for which they are claimed. [16 G. A., ch. 100, § 13; 15 G. A., ch. 44.]

Where an attempt to commence action within the thirty days was made, but the notice served was void because not stating the term at which defendant was required to appear, *held*, that another notice served after the expiration of the thirty days, to which defendant appeared, would not constitute a compliance with this section, and a lien could not be established in such action: *Jones, etc., Lumber Co. v. Boggs*, 63-589.

Before the enactment of the statutory provision that the lien shall be transferable and assignable, it was held that the assignment of the debt alone would not operate to transfer the lien: *First Nat. Bank v. Day*, 52-680.

Under the statutory provision making the lien assignable, it was held that the mere assignment by a subcontractor of an order for one installment of his claim before the completion of his main contract did not carry with it the right to a lien for such portion: *Merchant v. Ottumwa Water Power Co.*, 54-451.

Under a statute declaring that the lien is assignable and shall follow the assignment of the debt, *held*, that it is the lien which is assignable and follows the debt, and not the mere right to a lien which the mechanic has not yet availed himself of by filing a claim therefor as required by statute: *Brown v. Smith*, 55-31: *Langan v. Sankey*, 55-52.

The drawing of a draft by the holder of a mechanic's lien, upon a person lawfully bound for the payment of the lien, which draft is transferred to a third person and accepted by the drawee, does not constitute an assignment to such third person of the lien: *First Nat. Bank v. Day*, 64–118.

SEC. **3100. Filing of statements.** The clerk of the court shall indorse upon every account or statement filed in his office the date and hour of its filing, and make an abstract thereof in a book kept for that purpose and properly indexed, containing the date and hour of its filing, the name of the person filing the same, the amount of the lien, the name of the person against whom it is filed, and a description of the property to be charged therewith. [16 G. A., ch. 100, § 14; C. '73, § 2138; R., § 1852.]

Under the provisions of Revision, § 1852, similar to this section, *held*, that the requirement that the clerk's abstract shall contain the name of the person against whose property the lien was filed really amounts to no more than that it shall contain the name of the person against whom the account was filed and the claim for lien was made, and that it did not require, by inference, the claim should state the name of the owner of the property against which the lien was claimed. Therefore, *held*, that where the person against whom the claim existed was dead, the claim for a lien was properly filed as against the administrator of his estate, without naming the heirs, who were owners of the property against which it was sought to establish the lien: *Welch v. McGraff*, 59–519.

SEC. **3101. Acknowledgment of satisfaction.** Whenever a lien has been claimed by filing a statement therefor in the clerk's office, and is afterwards paid, the claimant shall acknowledge satisfaction thereof upon the proper book in such office, or otherwise in writing, and, if he neglects to do so for thirty days after demand in writing, he shall forfeit and pay twenty-five dollars to the owner or contractor, and be liable to any person injured to the extent of his injury. [16 G. A., ch. 100, § 15; C. '73, § 2145; R., §§ 1867–9.]

SEC. **3102. Public buildings or bridges—claim of subcontractor.** Every mechanic, laborer or other person who, as subcontractor, shall perform labor upon or furnish materials for the construction of any public building, bridge or other improvement not belonging to the state, shall have a claim against the public corporation constructing such building, bridge or improvement for the value of such services and material, not in excess of the contract price to be paid for such building, bridge or improvement, nor shall such corporation be required to pay any such claim before or in any different manner from that provided in the principal contract. Such claim shall be made by filing with the public officer through whom the payment is to be made an itemized sworn statement of the demand, within thirty days after the performance of the last labor or the furnishing of the last of the material, and such claims shall have priority in the order in which they are filed. [20 G. A., ch. 179, §§ 1, 2.]

Aside from these provisions there is no proceeding authorized for subjecting the indebtedness of the county to the contractor to the claim of the subcontractor or laborer for work done upon a county building or bridge under the contract. There is no mechanic's lien in such case: *Breneman v. Harvey*, 70–479.

A statement filed after the expiration of thirty days will not entitle the party filing it to any lien under this section: *Ibid.*

If the corporation pays its contractor in accordance with the terms of the contract it will not become liable by virtue of the provisions of this section except for the amount which becomes due to the contractor and which is not thus paid: *Epeneter v. Montgomery County*, 67 N.W., 93.

The claimant must file an itemized and sworn statement of his demand, but the fact that he claims a lien which by statute he is not entitled to does not nullify his proceeding: *Ibid.*

Sureties on a contractor's bond are not liable for claims against the contractor on account of materials furnished for which the material men have no lien against the building: *Hunt v. King*, 66 N.W., 71.

This section requires that the itemized statement must be one which shows on its face that it is a sworn statement: *McGillivray v. District T'p*, 65 N.W., 974.

A prior statute (15 G. A., ch. 23) intended to give a lien on buildings erected by a municipal corporation in excess of its constitutional limit of indebtedness in behalf of the contractor was *held* unconstitutional: *Mosher v. Independent Dist.*, 44–122.

SEC. **3103. Adjudication of claims.** Any party in interest may cause an adjudication of the amount, priority and mode and time of payment of

such claim, by an equitable action in the district court of the proper county. In such action the court may assess a reasonable attorney's fee against the party failing, in favor of such corporation. [Same, § 3.]

SEC. **3104. Release of claim.** The contractor may at any time release such claim by filing with the treasurer of such corporation a bond for the benefit of such claimant, in sufficient penalty and with sureties to be approved by such treasurer, conditioned for the payment of any sum which may be found due such claimant. Such contractor may prevent the filing of such claims by filing in like manner a bond conditioned for the payment of persons who may be entitled to file such claims, and actions may be brought on any such bond by any claimant within one year after his cause of action accrues, and judgment shall be rendered on said bond for the amount due such claimant. [Same, § 4.]

The bond herein contemplated will not be invalid because executed to the parties interested instead of to the public corporation, or because it does not specify a penal sum, when its terms are such as to cover the claims to be secured: *Carnegie v. Hulbert*, 70 Fed., 209.

Such a bond even though not good under the provisions of the statute may be good as a common law bond: *Ibid.*

Where a suit on the bond was brought in the federal court within one year, but by reason of insufficient averments of citizenship a judgment was reversed on appeal and the case remanded for dismissal, but proper averments of citizenship were then made by amendment, *held*, that such amendment did not constitute the bringing of a new action and that the proceeding was not barred: *Ibid.*

SEC. **3105. Liens of miners.** Every laborer or miner who shall perform labor in opening, developing or operating any coal mine shall have a lien upon all the property of the person, firm or corporation owning or operating such mine, and used in the construction or operation thereof, including real estate and personal property, for the value of such labor, to the full amount thereof, to be secured and enforced as mechanics' liens are. [23 G. A., ch. 47.]

CHAPTER 9.

OF LIMITED PARTNERSHIP.

SECTION **3106. Authorized.** A limited partnership may be formed by two or more persons for the transaction of business in the state. It may consist of one or more persons to be known as the general partners, and a like number as special partners, which latter shall contribute a specific sum as capital, and shall not be liable for the debts of the firm beyond the amount so contributed; the former alone to transact its business, have power to bind it by contract, and be liable for its debts. [C.'73, §§ 2147–9; R., §§ 1874–6.]

SEC. **3107. Certificate.** The persons forming such partnership shall make and sign a certificate, which shall contain:

1. The firm name under which such partnership is to be conducted;
2. The general nature of the business to be transacted;
3. The names of the general and special partners interested therein, specifically stating which are general and which special, with the residence of each;
4. The amount of capital which each special partner has contributed;
5. The time at which the partnership is to commence and when it will terminate. [C.'73, § 2150; R., § 1877.]

SEC. **3108. Recording.** It shall be acknowledged by the several partners before some officer authorized to take acknowledgments of deeds, and filed in the office of the clerk of the district court of the county in which its principal place of business is situated, who shall record the same in a book kept for that purpose. If the partnership has places of business in different

counties, a transcript of the certificate and acknowledgment thereof, certified by the clerk in whose office it is filed, shall be filed and recorded in the office of the clerk of the district court of every such county. At the time of filing the certificate, an affidavit of one or more of the general partners shall be attached thereto, showing that the sum specified in the certificate as having been contributed by each of the special partners has been actually paid in cash, and if any false statement be made in such certificate or affidavit, all the persons interested therein shall be liable for all the contracts thereof. [C.'73, §§ 2151–4; R., §§ 1878–81.]

SEC. **3109. Publication.** Upon filing the certificate and affidavit, a notice containing all the facts set out in the certificate shall be published for six weeks in two newspapers in the senatorial district in which the business is to be conducted, to be designated by the clerk of the court of the county in which such certificate is filed, proof of which publication may be made by the publishers in the same manner as original notices in ordinary actions, and filed with said clerk, which, when thus made, shall be presumptive evidence of the facts therein contained. If the required publication is not made, the partnership shall be general. [19 G. A., ch. 8; C.'73, §§ 2155–6; R., §§ 1882–3.]

SEC. **3110. Renewals.** Every renewal of such partnership beyond the time originally fixed shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given, in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued shall be a general one. [C.'73, § 2157; R., § 1884.]

SEC. **3111. Alterations.** Any alteration made in the name of the partners, the nature of the business, the capital, shares, or any other matter specified in the certificate, shall work a dissolution of the partnership, and if the business shall thereafter be carried on it shall be a general partnership, according to the provisions of the last preceding section. [C.'73, § 2158; R., § 1885.]

SEC. **3112. Firm name.** The business of the partnership shall be conducted under a firm name, in which the names of the general partners only shall appear, without the addition of the word "company" or other general term, and if the name of any special partner is used therein with his privity, he shall be a general partner. [C.'73, § 2159; R., § 1886.]

SEC. **3113. Actions.** Actions in relation to the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partners. [C.'73, § 2160; R., § 1887.]

SEC. **3114. Capital not withdrawn.** No part of the sum which any special partner shall have contributed to the capital shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits or otherwise, during the continuance of the partnership, but he may take lawful interest thereon if the payment thereof shall not reduce the original amount of such capital, and if, after the payment of such interest, any profits shall remain to be divided, he may also receive his portion thereof. If, after the payment of interest or profits, it is found that the capital has been reduced, the partner receiving the same shall immediately restore the amount necessary to make good his share of the capital, with interest. [C.'73, §§ 2161–2; R., §§ 1888–9.]

SEC. **3115. Special partners—powers.** A special partner may, from time to time, examine into the state of the partnership concerns, and advise as to its management, but shall not transact any business on account of the partnership, nor be employed for that purpose in any capacity. If he shall interfere, contrary to these provisions, he shall be a general partner. [C.'73, § 2163; R., § 1890.]

SEC. **3116. Accounting—penalty.** The general partners shall be liable to account to each other and to the special partners, and, if guilty of fraud

in the affairs of a partnership, shall be liable to the party injured, and be guilty of a misdemeanor. [C.'73, §§ 2164–5; R., §§ 1891–2.]

SEC. **3117. Assignment.** Every sale, assignment or transfer of any of the property or effects of such partnership, made when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment confessed, lien created or security given by such partnership under like circumstances and with like intent, shall be void as against the creditors of such partnership. [C.'73, § 2166; R., § 1893.]

SEC. **3118. Preferences void.** Every such sale, assignment or transfer of any of the property or effects of a general or special partner, when insolvent or in contemplation of insolvency, or after, or in contemplation of, the insolvency of the partnership, with the intent of giving to any creditor of his own or of the partnership a preference over creditors of the partnership, and every judgment confessed, lien created or security given by any such partner, under like circumstances and with like intent, shall be void as against the creditors of the partnership. [C.'73, § 2167; R., § 1894.]

SEC. **3119. Liability of special partners.** Every special partner who shall violate any provision of the two preceding sections, or who shall concur in or assent to any such violation by the partnership, or by an individual partner, shall be liable as a general partner. [C.'73, § 2168; R., § 1895.]

SEC. **3120. Insolvency.** In case of the insolvency of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor until the debts of all the other creditors of the partnership shall be satisfied. [C.'73, § 2169; R., § 1896.]

SEC. **3121. Dissolution.** No dissolution of such partnership by the acts of the parties shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice thereof shall have been filed and recorded in the office of the clerk of the district court in which the original certificate was recorded, and published once in every week for four weeks in a newspaper printed in each of the counties where the partnership has places of business. [C.'73, § 2170; R., § 1897.]

CHAPTER 10.

OF WAREHOUSEMEN, CARRIERS, HOTELKEEPERS, LIVERY STABLE KEEPERS AND HERDERS.

SECTION **3122. Elevator or warehouse certificates.** All persons, firms or corporations engaged in owning or dealing in grains, seeds or other farm products; the slaughtering of cattle, sheep and hogs, and dealing in the various products therefrom; the buying or selling of butter, eggs, cheese, dressed poultry or other commodities; who own or control the buildings wherein any such business is conducted, or such commodities stored, may issue elevator or warehouse certificates for any of such commodities actually on hand and in store, the property of the person, firm or corporation issuing such certificate, and may by such method sell, assign, transfer, pledge or incumber such commodity to the amount described in such certificate. Such certificates shall contain the name and address of the person, firm or corporation issuing them, and the name and address of the party to whom issued, the location of the elevator, warehouse, building or other place where the commodity therein described is stored, the date of the issuance of such certificate, the quantity of each commodity therein mentioned, the brands or marks of identification thereon, if any, and be signed by the person or firm issuing the same, unless issued by a corporation, in which case they shall

be signed by such corporation by its secretary or business manager, if it has such manager other than its secretary. [25 G. A., ch. 48; 24 G. A., ch. 44, § 1; 21 G. A., ch. 165, § 1.]

SEC. **3123. Declaration.** Before any such person, firm or corporation is authorized to issue such elevator or warehouse certificates, he or it must file in the office of the recorder of deeds, in the county where any such elevator, warehouse or other building is situated, a written declaration, giving the name and place of residence or location of such person, firm or corporation, that he or it designs keeping or controlling an elevator, warehouse, crib or other place for the sale and storage of commodities mentioned in the preceding section, an accurate description of the elevator, warehouse, crib or other building to be kept or controlled, and where the same is or is to be located, the name or names of any person, other than the one making such declaration, who has any interest in such elevator, warehouse or other building, or in the land on which it is situated, such declaration to be signed and acknowledged by the party making the same before some officer authorized to take acknowledgments of instruments, and recorded in the chattel mortgage record, the party making such declaration to be treated as the vendor in indexing such declaration, and the public as vendee. [21 G. A., ch. 165, § 1.]

SEC. **3124. Effect of certificate—assignment.** Each certificate issued by any person, firm or corporation shall have printed on the back thereof a statement that the party issuing it has complied with the requirements of the preceding section, giving the book, page and name of the county where the record of such declaration may be found; and, when such certificate is so issued and delivered, it shall have the effect of transferring to the holder thereof the title to the commodities therein described or enumerated, and shall be assignable by written indorsement thereon, signed by the lawful holder thereof, which shall transfer the title of commodities therein enumerated, and be presumptive evidence of ownership in such holder. No record or other notice shall be necessary to protect the rights of the holder of the certificate as against subsequent purchasers of the property. [24 G. A., ch. 44, §§ 1, 4; 21 G. A., ch. 165, § 2.]

SEC. **3125. Registration of certificates and transfers.** All certificates given under the provisions of this chapter shall be registered by the party issuing them in a book kept for that purpose, showing the date thereof, the number of each, the name of the party to whom issued, the quantities and kinds of commodities enumerated therein, and the brands or other distinguishing marks thereon, if any, which book shall be open to the inspection of any person holding any of the certificates that may be outstanding and in force, or his agent or attorney; and when any commodity enumerated in any such certificate is delivered to the holder thereof, or it in any other manner becomes inoperative, the fact and date of such delivery or other termination of such liability shall be entered in such register, in connection with the original entry of the issuance thereof. [24 G. A., ch. 44, § 2; 21 G. A., ch. 165, § 3.]

SEC. **3126. Property subject to certificate.** No person, firm or corporation shall issue any elevator or warehouse certificate for any of the commodities enumerated in this chapter unless such property is actually in the elevator or warehouse or other building mentioned therein as being the place where such commodity is stored, and it shall remain there until otherwise ordered by the lawful holder of such certificate, subject to the conditions of the contract between the warehouseman and the person to whom such certificate was issued, or his assignee, as to the time of its remaining in store; and no second certificate shall be issued for the same property or any part thereof while the first is outstanding and in force, nor shall any such commodities be by the warehouseman sold, incumbered, shipped, transferred or removed from the elevator, warehouse or other building where the same was stored at the time such certificate was issued, without the written

consent of the holder thereof. [24 G. A., ch. 44, § 5; 21 G. A., ch. 165, § 4; C. '73, §§ 2172-4.]

Under similar provisions, *held*, that a warehouse receipt for grain, issued merely as collateral security for a loan of money, was in contravention of the statute and invalid: *Sexton v. Graham*, 53-181.

Whether a warehouse receipt will be valid if the intention in executing it is to create a mere lien, *quære: Lowe v. Young*, 59-364.

SEC. **3127. Damages.** Any one injured by the violation of any of the provisions of this chapter may recover his actual damages sustained on account thereof, and if, wilfully done, in addition thereto, exemplary damages in any sum not exceeding double the actual damages, which actual damages shall be found and returned by special verdict. [24 G. A., ch. 44, § 6; C. '73, § 2176.]

SEC. **3128. Penalties.** Any person who shall wilfully alter or destroy any register of certificates provided for in this chapter, or issue any receipt or certificate without entering and preserving in such book the registered memorandum; or who shall knowingly issue any certificate herein provided for when the commodity or commodities therein enumerated are not in fact in the building or buildings it is certified they are in; or shall, with intent to defraud, issue a second or other certificate for any such commodity, for which, or for any part of which, a former valid certificate is outstanding and in force; or shall, while any valid certificate for any part of the commodities mentioned in this chapter is outstanding and in force, sell, incumber, ship, transfer, or remove from the elevator, warehouse or building where the same is stored, any such certified property, or knowingly permit the same to be done, without the written consent of the holder of such certificate; or if any person knowingly receives any such property or helps to remove the same,—he shall, upon conviction, be punished by fine not exceeding ten thousand dollars, or by imprisonment in the penitentiary not exceeding five years. [24 G. A., ch. 44, §§ 2, 3, 5; 21 G. A., ch. 165, §§ 3-5; C. '73, § 2175.]

Where a depositor received only scale tickets showing the amount of grain weighed, but did not receive any warehouse receipt, and the warehouseman shipped away the grain deposited until there was no grain remaining to answer for the claim of the depositor, *held*, that such scale tickets were not warehouse receipts, and that a person taking an assignment of the depositor's claim would be subject to the warehouseman's right to set off against the depositor's claim an indebtedness due from such depositor, which he could not have done if receipts had been issued and transferred: *Cathcart v. Snow*, 64-584.

SEC. **3129. Certificate as evidence—lien.** All warehouse certificates or other evidences of the deposit of property, issued by any warehouseman, wharfinger or other person engaged in storing property for others, shall be in the hands of the holder thereof presumptive evidence that the title to the property therein described is in the holder of such instrument. Such property shall remain in store until otherwise ordered by the holder of such certificate or other evidence of deposit, and shall not be removed by such warehouseman, or knowingly suffered to pass from his control, without the written consent of the depositor or his assignee, and shall be subject to all just charges for storage thereof; and such warehouseman or other depositary shall have a lien thereon for such charges, and may retain possession thereof until they are paid. [C. '73, §§ 2171, 2173.]

A warehouse receipt which expresses a contract of bailment cannot be varied by parol evidence of a custom or usage or understanding for the purpose of showing that the intention of the parties was that the transaction should be regarded as a sale: *Marks v. Cass County Mill, etc., Co.*, 43-146; *Sexton v. Graham*, 53-181.

SEC. **3130. Unclaimed property—lien for charges.** Property transported by, or stored or left with, any forwarding and commission merchant, express company, carrier or bailee for hire shall be subject to a lien for the lawful charges thereon for the transportation and storage thereof, or charges and services thereon or in connection therewith; and if any such property shall remain in the possession, unclaimed, of any of the persons named

in this section for three months, with the just charges thereon due and unpaid, such person shall first give notice of the amount of the charges thereon to the owner or consignee thereof, if his whereabouts is known, if not, he shall go before the nearest justice of the peace and make an affidavit, stating the time and place where such property was received, the marks or brands by which the same is designated, if any, and, if not, then such other description as may best answer the purpose of indicating what the property is, and the probable value of the same, and to whom consigned, also the charges paid thereon, accompanied by the original receipt for such charges and by the bill of lading, also any other charges due and unpaid, and whether the whereabouts of the owner or consignee is known to the affiant, and whether such notice was first given to him as herein provided; which affidavit shall be filed by the justice for the inspection of any one interested therein, and an entry made in the estray book of the substance of the affidavit, and a statement when, where and by whom made. [26 G. A., ch. 107; C.'73, §§ 2177-8.]

As to lien of livery-stable keepers, see § 3137.

SEC. **3131. Sale—notice.** If the property remains unclaimed and the charges unpaid, the person in possession, if the probable value does not exceed one hundred dollars, shall advertise the same for fourteen days, by posting notices in five of the most public places in the city or locality where said property is held, giving such description as will indicate what is to be sold; if the goods exceed the probable value of one hundred dollars, the length of notice shall be four weeks, and there shall be a publication thereof for the same length of time in some newspaper of general circulation in the locality where the property is held, if there be one, and, if not, then in the next nearest newspaper published in that neighborhood, at the end of which period, if the property is still unclaimed or charges unpaid, it may be sold by him at public auction, between the hours of ten o'clock a. m. and four o'clock p. m., for the highest price the same will bring, which sale may be continued from day to day, by public announcement to that effect at the time of the adjournment, until all the property is sold; and from the proceeds thereof all charges, costs and expenses of the sale shall be paid, which sale shall be conducted after the manner of sheriffs' sales, and like costs taxed for like services. [C. '73, § 2179.]

SEC. **3132. Perishable property.** Fruit, fresh fish, oysters, game and other perishable property thus held shall be retained twenty-four hours, and, if not claimed within that time and charges paid, after the proper affidavit is made as required by the second preceding section, may be sold either at public or private sale, in the discretion of the party holding the same, for the highest price that the same will bring, and the proceeds of the sale disposed of as provided in the last preceding section. In either case, if the owner or consignee of said unclaimed property resides in the same city, town or locality in which the same is held, and is known to the agent or party having the same in charge, then personal notice shall be given to him in writing that the goods are held subject to his order on payment of charges, and that, unless he pays the same and removes the property, it will be sold as provided by law. [C. '73, § 2180.]

SEC. **3133. Disposition of proceeds.** After the charges on the property and the costs of sale have been taken out of the proceeds, the seller shall deposit the excess with the county treasurer of the county where the goods were sold, subject to the order of the owner, take a receipt therefor, and deposit the same with the county auditor. At the same time he shall also file a verified schedule of the property with the treasurer, giving the name of the consignee or owner, if known, of each piece of property sold, the sum realized from the sale of each separate package, describing the same, together with a copy of the advertisement hereinbefore provided for, and a full statement of the receipts of the sale, and the amount disbursed

to pay charges and expenses of sale, which shall all be filed and preserved in the treasurer's office for the inspection of any one interested in the same. [C.'73, § 2181.]

SEC. **3134. Duty of treasurer—refunding to owner.** If the money remains in the hands of the treasurer unclaimed, he shall place the same to the credit of the county in his next settlement, and if it so remains unclaimed for one year, it shall be paid to the school fund; but any claimant therefor may at any time within ten years appear before the board of supervisors and establish his right to the same by competent legal evidence, in which case the original sum deposited shall be paid him out of the county treasury. [C.'73, § 2182.]

SEC. **3135. Common carriers—liability for baggage.** Omnibus and transfer companies or other common carriers, and their agents, shall be liable for damages occasioned to baggage or other property belonging to travelers through careless or negligent handling while in the possession of said companies or carriers, and, in addition to the damages, the plaintiff shall be entitled to an allowance of not less than five dollars for every day's detention caused thereby, or by action brought to recover the same. [C.'73, § 2183.]

This section gives a remedy for damages to baggage, and for detention caused thereby. It does not authorize a recovery on account of detention of baggage or failure to deliver the same, nor for detention of the traveler unless it be on account of damages done to baggage: *Anderson v. Toledo, W. & W. R. Co.*, 32–86.

SEC. **3136. Cannot limit liability.** No contract, receipt, rule or regulation shall exempt any corporation or person engaged in transporting persons for hire from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made. [C.'73, § 2184.]

See, also, § 2074, applicable to railway companies.

SEC. **3137. Liens of livery stable keepers, etc.** Livery and feed stable keepers, herders, feeders and keepers of stock for hire shall have a lien on all stock and property coming into their hands, as such, for their charges and the expense of keeping, when received from the owner or any other person, subject to all prior liens of record. Any claimant of the property may release the lien by tendering the party in possession a bond, in a penal sum of three times the amount for which the lien is claimed, signed by two sureties, residents of the county, who shall justify as is required in other cases, and conditioned to pay any judgment the lien-holder may obtain for such charges. If such charges and expenses are not sooner paid, the lien-holder may sell said property at public auction, after giving to the owner or claimant ten days' notice in writing of the time and place of such sale, if found within the county, and also by posting written notices thereof in three public places in the township where said stock was kept or let. And out of the proceeds of such sale he shall pay all of said charges and expenses of keeping said stock, together with the costs and expenses of said sale, and the balance, if any, shall be paid to the owner or claimant of said property. [18 G. A., ch. 25.]

In the absence of statutory provision, a livery-stable keeper has no lien for the care and feeding of horses left with him, and no such lien is given by § 3130, which confers a lien upon personal property left with a depositary for the just and lawful charges thereon: *McDonald v. Bennett*, 45–456.

One who keeps and trains a horse under a contract with the owner has a lien at common law for the labor, skill and expense bestowed and which has enhanced the value of the horse: *Scott v. Mercer*, 67 N. W., 108. And see same question discussed in *Bray v. Wise*, 82–581.

This statute is not enacted for the benefit of creditors who furnish pasturage and feed without having possession and control of the stock pastured and fed. It is dependent on the right of possession: *Wright v. Waddell*, 89–350.

Where services in keeping a horse at a livery-stable commenced before the enactment of these provisions, and continued afterward, *held*, that there being no express contract, the livery-stable keeper might assert his lien for charges after the statute took effect, but not for charges previously incurred: *Munson v. Porter*, 63–453.

If, under any circumstances, the lien should be deemed forfeited by the assertion of a claim for a lien for too large an amount, the assertion should be clear and distinct, and operate to interfere in the present with a claimed right on the part of the owner: *Ibid.*

Where the animal is surrendered to the bailor the bailee's lien cannot be subsequently revived by agreement for the purpose of defeating the claims of another person to the property: *Shellhammer v. Jones*, 87–520.

By § 3059 a person who makes a tender of animals which it is his duty to deliver, has a lien thereon for the expense of keeping them without regard to this section: *Holtz v. Peterson*, 62 N. W., 19.

SEC. **3138. Hotel and innkeepers—liability—lien.** Keepers of hotels, inns and eating houses, who shall provide and keep therein a good and sufficient vault or safe for the deposit of money, jewels and other valuables, and shall provide a safe and commodious place for the baggage, clothing and other property belonging to their guests and patrons, and keep posted up in a conspicuous place in the office or other public room, and in the guests' apartments therein, printed notices, stating that such places for safe deposit are provided for the use and accommodation of the inmates thereof, shall not be liable for the loss of any money, jewels, valuables, baggage or other property not deposited with them, unless such loss shall occur through the fault or negligence of such landlord or keeper, or his agent, servant or employe, but nothing herein contained shall apply to such reasonable amount of money, nor to such jewels, baggage, valuables or other property as is usual, fit and proper for any such guests to have and retain in their apartments or about their persons. Hotel, inn or eating house keepers shall have a lien upon, and may take and retain possession of, all baggage and other property belonging to or under the control of their guests, which may be in such hotel, inn or eating house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished, such guest, and such property so retained shall not be exempt from attachment or execution to the amount of the reasonable charges of such hotel, inn or eating house keeper, against such guest, and the costs of enforcing the lien thereon. [18 G. A., ch. 181.]

TITLE XVI.

OF THE DOMESTIC RELATIONS.

CHAPTER 1.

OF MARRIAGE.

SECTION **3139. Contract.** Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise declared. [C.'73, § 2185; R., § 2515; C.'51, § 1463.]

SEC. **3140. Age.** A marriage between a male of sixteen and a female of fourteen years of age is valid; but if either party has not attained the age thus fixed, the marriage will be a nullity or not, at the option of such party, made known at any time before he or she is six months older than the age thus fixed. [C.'73, § 2186; R., § 2516; C.'51, § 1464.]

The statute declaring the ages after which parties may contract a valid marriage does not repeal the common-law rule fixing the age of marriage consent for males at fourteen and females at twelve years of age. The statute is merely cumulative in its operation: *Goodwin v. Thompson*, 2 G. Gr., 329.

SEC. **3141. License—consent of parent.** Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to be solemnized. Such license must not be granted in any case where either party is under the age necessary to render the marriage valid, nor where either party is a minor, without the previous consent of the parents, or the survivor if one be dead, or the guardian of such minor if both parents are dead, nor where either party is disqualified from making any other civil contract. [C.'73, §§ 2187–8; R., §§ 2517–18; C.'51, §§ 1465–6.]

The rule of the common law that any mutual agreement between the parties to be husband and wife, *in presenti*, followed by cohabitation, constitutes a valid binding marriage, if there is no legal disability on the part of either to contract matrimony, is still in force. The statute providing punishment for solemnizing marriages otherwise than in the form prescribed by law does not make such marriages void: *Blanchard v. Lambert*, 43–228.

Cohabitation does not of itself constitute marriage, but it is sufficient if the parties cohabitating intend marriage, and it is immaterial how the intention is expressed: *McFarland v. McFarland*, 51–565.

SEC. **3142. Proof of age—record.** Unless the clerk is acquainted with the age and qualification of the parties for the marriage of whom the license is asked, he must take the testimony of competent and disinterested witnesses on the subject. He must make an entry of each application made for the issuance of a license, stating that he was acquainted with the parties and knew them to be competent to contract a marriage, or that the requisite proof of such fact was made to him by one or more witnesses named, in a book kept for that purpose, which shall constitute a part of the records of his office. [C.'73, §§ 2189–90; R., §§ 2519–20; C.'51, §§ 1467–8.]

A false writing delivered to the clerk, purporting to communicate the consent of a parent to the marriage of his daughter, but stating that she was of age, *held*, not to constitute the crime of uttering a forged instrument under § 4854: *State v. Rhine*, 84–169.

SEC. **3143. Proof of consent of parent.** If either applicant for a license is a minor, a certificate in writing of the parents or guardian, as the case may be, of consent, as provided in the second preceding section, must be filed in the office of the clerk, and be acknowledged by them or proven to be genuine, and a memorandum thereof entered in the license book. The

false making of such certificate shall be punishable as forgery. [C.'73, § 2191; R., § 2521; C.'51, § 1469.]

SEC. **3144. Penalty.** If the clerk issues a license in violation of the provisions of the preceding section, or if a marriage is solemnized without its being procured, the clerk so issuing the same, and the parties married, and all persons aiding them, are guilty of a misdemeanor. [C.'73, § 2192; R., § 2522; C.'51, § 1470.]

Punishment for the misdemeanor here described is provided in § 4906, and a justice of the peace has not jurisdiction to try such offense (§ 5575): *White v. State*, 4–449.

The solemnizing of a marriage without a license being first procured subjects the parties to punishment for a misdemeanor, but not to the fine of fifty dollars provided in § 3147: *Ibid.*

SEC. **3145. Who may solemnize.** Marriages must be solemnized:

1. By a justice of the peace, or the mayor of the city or town wherein the marriage takes place;
2. By some judge of the supreme, district or superior court of the state;
3. By some minister of the gospel, ordained or licensed according to the usages of his denomination. [21 G. A., ch. 4; C.'73, § 2193; R., § 2524; C.'51, § 1472.]

SEC. **3146. Certificate—return—record.** After the marriage has been solemnized, the officiating minister or magistrate shall give each of the parties a certificate, and make return thereof to the clerk of the district court, who shall record the same in the book required to be kept in the chapter relating to the state board of health. [C.'73, §§ 2194, 2197; R., §§ 2525, 2528; C.'51, §§ 1473, 1476.]

The marriage register is sufficient evidence to establish the marriage without other proof that the person solemnizing the marriage was officially authorized, and it is permissible to show a mistake in the wife's name: *Verholf v. Van Houwenlengen*, 21–429.

The record may be introduced to establish the marriage of parties charged with incest under § 4936: *State v. Schaunhurst*, 34–547.

The law makes marriage a matter of public record, and the record is evidence of the fact of marriage, which may be introduced in a prosecution for bigamy: *State v. Matlock*, 70–229.

To prove a marriage contract in a state where the law requires the officiating minister or officer to return a certificate of the fact, which is to be recorded, an exemplification of the certificate and not of the clerk's record is the proper evidence: *Niles v. Sprague*, 13–198.

In an action for criminal conversation, marriage may be proven by the testimony of the parties or others. Record evidence is not necessary: *Kilburn v. Mullen*, 22–498.

The same is true in a prosecution for bigamy: *State v. Williams*, 20–98; *State v. Hughes*, 58–165.

In a prosecution for adultery or bigamy, record evidence is not indispensable, but the marriage may be proven by the testimony of either the husband or the wife, corroborated by cohabitation: *State v. Wilson*, 22–364; *State v. Nadal*, 69–478.

In a prosecution for adultery, evidence of admissions of defendant as to the fact of marriage, if voluntary, is admissible: *State v. Sanders*, 30–582.

The evidence of marriage in a particular case, *held* sufficient: *Gilman v. Sheets*, 78–499.

SEC. **3147. Forfeiture.** Marriages solemnized, with the consent of parties, in any other manner than as herein prescribed, are valid; but the parties thereto, and all persons aiding or abetting them, shall forfeit to the school fund the sum of fifty dollars each; but this shall not apply to the person conducting the marriage ceremony, if within ninety days thereafter he makes the required return to the clerk of the district court. [C.'73, §§ 2195–6; R., §§ 2526–7; C.'51, §§ 1474–5.]

Solemnizing a marriage without license does not subject the parties to the forfeiture here provided. See note to § 3144.

As to marriages by consent only, see notes to § 3141.

SEC. **3148. Peculiar mode.** The provisions of this chapter, so far as they relate to procuring licenses and to the solemnizing of marriages, are not applicable to members of any particular denomination having, as such, any peculiar mode of entering the marriage relation. [C.'73, § 2198; R., § 2529; C.'51, § 1477.]

SEC. **3149. Husband responsible for return.** When a marriage is consummated without the services of a clergyman or magistrate, the required

return thereof shall be made to the clerk by the husband. [C. '73, § 2199; R., § 2530; C. '51, § 1478.]

SEC. **3150. Issue legitimatized.** Illegitimate children become legitimate by the subsequent marriage of their parents. [C. '73, § 2200; R., § 2531; C. '51, § 1479.]

SEC. **3151. Void marriages.** A marriage between persons prohibited by law, or between persons either of whom has a husband or wife living, is void; but, if the parties live and cohabit together after the death or divorce of the former husband or wife, such marriage shall be valid. [C. '73, § 2201.]

Such marriages as are here contemplated confer no rights upon either party as to the property of the other: *Carpenter v. Smith*, 24–200.

Where a woman, after marriage with a man having a wife living, again married, *held*, that the first marriage was absolutely void and the second valid, and that in such cases no proceedings to have the first marriage declared void by law are necessary: *Drummond v. Irish*, 52–41.

SEC. **3152. Fee.** Any person authorized to solemnize marriage may charge two dollars in each case for officiating and making return. [C. '73, § 3828; R., § 4159; C. '51, § 2551.]

CHAPTER 2.

OF HUSBAND AND WIFE.

SECTION **3153. Property rights of married women.** A married woman may own in her own right real and personal property, acquired by descent, gift or purchase, and manage, sell and convey the same, and dispose thereof by will, to the same extent and in the same manner the husband can property belonging to him. [C. '73, § 2202.]

Where the husband and wife take property jointly they take as tenants in common: *Hoffman v. Stigers*, 28–302.

Where property is owned jointly by husband and wife the interest of the husband may be sold on execution for his debts, and the wife cannot have an injunction to entirely prevent the sale: *McTighe v. Bringolf*, 42–455.

When household furniture, pictures and the like property are used in the house occupied by the husband and wife, such property is considered as being in the possession of the husband, and under his control: *Smith v. Hewitt*, 13–94; *Odell v. Lee*, 14–411; *Miller v. Steel*, 39–527.

The fact that the wife claims to own personal property and treats it as her own, and her husband has knowledge thereof and acquiesces therein, is sufficient to establish her title thereto: *Woolheather v. Risley*, 38–486.

The husband is, as matter of law, the head of the family, and a wife having a husband who is not under disability cannot hold property exempt from execution under § 4008: *Van Doran v. Marden*, 48–186.

SEC. **3154. Interest of either spouse in other's property.** When property is owned by the husband or wife, the other has no interest therein which can be the subject of contract between them, nor such interest as will make the same liable for the contracts or liabilities of the one not the owner of the property, except as provided in this chapter. [C. '73, § 2203.]

This section renders invalid an agreement between husband and wife, even in contemplation of a separation, for the relinquishment of their respective interests, including dower interest in each other's real property: *Linton v. Crosby*, 54–478.

Conveyances between husband and wife intended to cut off the interests of either in specified portions of the estate of the other, thus making a division between them, are void, and convey no title or interest to the respective parties: *Shane v. McNeill*, 76–459.

And in such case, *held*, that the fact that the wife took possession of real property conveyed to her under such arrangement and retained possession thereof, after the death of her husband, did not constitute a ratification such as to render binding upon her the agreement to release her dower in the property of the husband: *Ibid.*

The husband and wife may contract with each other with reference to division of the property on the dissolution of the marriage relation by divorce, provided the contract is reasonable, fair and just: *Nieukirk v. Nieukirk*, 84–367.

This section relates to the interest which the husband or wife holds in the lands of the other and which arises or is created under the marriage relation. It has no application to any property interest which the husband or wife may have in the land of the other based upon contracts with third persons or derived from sources other than the marriage relation: *Baxter v. Hecht*, 67 N. W., 407.

The wife's right to alimony in case of divorce is not property within the meaning of the statutory provision above referred to, and a contract between the husband and wife to convey property to the wife in lieu of alimony may be valid: *Martin v. Martin*, 65-255.

Before the enactment of this statutory provision it was held that, while the law would not sanction an agreement between husband and wife contemplating a future separation, nor enforce an agreement to separate if one of the parties was unwilling to do so, yet an agreement fairly entered into under a resolution of present separation as to property rights and terms of separation, and partly executed in good faith, would be upheld against the other party, where justice should demand it: *McKee v. Reynolds*, 26-578.

And *held*, that a conveyance by wife to husband under an agreement of separation, relinquishing her right of dower in his real estate and releasing all claim for support and maintenance, would be upheld in the absence of fraud when supported by a consideration: *Robertson v. Robertson*, 25-350. See notes to § 3366.

Held, also, that a deed of separation by which, in consideration of a release from liability of the wife's debts and relinquishment by her of claim of dower, the husband undertakes to pay the wife a sum by way of maintenance, couched in such language as not to be calculated to encourage separation, might be supported, and an action for the maintenance agreed upon might be maintained: *Goddard v. Beebe*, 4 G. Gr., 126.

Where a husband has contributed to the purchase and improvement of property standing in the name of the wife, his interest therein, proportionate to the amount of such contribution, may be subjected to the payment of his debts to the extent to which his money has been invested therein: *Croup v. Morton*, 49-16; *S. C.*, 53-599; *Hamil v. Henry*, 69-752.

A husband who occupies with his family a homestead owned by his wife may pay taxes and interest on incumbrances thereon, as well as expenditures for repairs, without becoming a creditor of the wife or rendering her property liable to that extent for his debts: *Hamil v. Henry*, 69-752.

Creditors of the husband have no lien upon the land of the wife by reason of improvements made thereon by him to the extent of the money thus invested if she is not guilty of collusion or fraud, although she has knowledge of, and assents to, the expenditure: *Corning v. Fowler*, 24-584.

The increase of the personal property of the wife belongs to her, and is not subject to her husband's debts, although he expends labor and care in the keeping thereof: *Russell v. Long*, 52-250.

Any device whose object is to enable a married woman to accumulate property in her own name through the labor of her insolvent husband will be looked upon with suspicion, and may, under proper circumstances, be considered to indicate an intent to defraud the husband's creditors; but the mere fact that the insolvent husband performs labor upon the farm owned or rented by his wife will not necessarily evince such intent. An insolvent man should, as a matter of duty, provide himself and family with food and clothing, and if the design of performing labor upon the farm owned or rented by his wife is merely to furnish reasonable family support, the intention will not be considered fraudulent: *Carn v. Royer*, 55-650.

The wife may buy in a mortgage upon the homestead standing in the name of the husband and hold such mortgage against the homestead: *Knox v. Moser*, 69-341.

The property of the wife cannot be taken in payment of the husband's debts, even where it is reduced to the possession of the husband and the creditor has no notice of the wife's ownership: *Schmidt v. Holtz*, 44-446.

But in so far as this section rendered property of the wife which would, under the previous provisions, have been liable to execution on a judgment against the husband, exempt therefrom, it did not apply to contracts made before its taking effect: *Ibid.*

Previous provisions *held* not applicable to a case where the creditor had become such after the taking effect of the present provision: *Jones v. Brandt*, 59-332.

SEC. **3155. Remedy by one against the other.** Should the husband or wife obtain possession or control of property belonging to the other before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried. [C. '73, § 2204.]

Where a wife knowingly permits her property to be applied by her husband to payment of debts contracted for family expenses for which it would be liable under § 3165, she does not thereby become a creditor of her husband for the amount so applied: *Courtright v. Courtright*, 53-57.

If property or money of the wife in the husband's hands is used by him with her knowledge and consent, for purposes connected with the support of the family or in his business without any agreement to repay her, she cannot recover therefor from his estate: *Patterson v. Hill*, 61-534; *Hayward v. Jackman*, 64 N.W., 667.

This section was not intended to give a husband or wife the right to recover from the other as against the claims of creditor's

property which the one seeking to recover had given the other and on faith of the ownership of which credit had been extended. *Porter v. Goble*, 88–565.

This section does not give to the husband or wife the right to an action against the other for tort: *Peters v. Peters*, 42–182.

SEC. **3156. Husband not liable for wife's torts.** For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist. [C.'73, § 2205.]

The common-law presumption, that a criminal act committed by the wife in the presence of her husband was done under his compulsion, is recognized in this state: *State v. Kelly*, 74–589.

Prior to the enactment of this section the husband was liable for torts of the wife as at common law: *McElfresh v. Kirkendall*, 36–224, *Luse v. Oaks*, 36–562.

SEC. **3157. Conveyances to each other valid.** A conveyance, transfer or lien, executed by either husband or wife to or in favor of the other, shall be valid to the same extent as between other persons. [C.'73, § 2206.]

An antenuptial contract freely and voluntarily entered into, without any fraud or imposition, by which it is provided that each party is to retain control of his or her own property, and also making provision for descent of the property to children by a former marriage, upheld in a particular case: *Jacobs v. Jacobs*, 42–600.

Under an antenuptial contract, by which it was agreed that each should have the untrammeled and sole control of his or her own property, real and personal, as though no such marriage had taken place, *held*, that the dower right of the wife was completely waived: *Ibid.*

An antenuptial contract cannot be enforced by a wife who after marriage abandons her husband and lives apart from him without his consent and without lawful cause, that is, without cause which would be a good ground for divorce. In so doing the wife does not discharge the duties and obligations of a wife: *York v. Ferner*, 59–487.

An antenuptial contract, by which the proposed wife, in consideration of an agreed sum to be paid out of the estate of the proposed husband on his death, relinquishes and renounces all rights of dower and inheritance, *held* not sufficient to bar the right which she had to the occupancy of the homestead after the death of the husband: *Mahaffy v. Mahaffy*, 66–55.

Facts in a particular case, *held* not sufficient to show fraud in an antenuptial contract by which the proposed wife accepted a sum of money in lieu of dower: *Ibid.*

The terms of an antenuptial contract considered, as to whether the provisions made for the wife were in lieu both of dower and of her distributive interest in personalty: *Ditson v. Ditson*, 85–276.

Conveyances before marriage: A voluntary settlement or conveyance of property by husband or wife in favor of a third person prior to marriage will be held fraudulent as to the marital rights of the other party to the marriage only when made in contemplation of matrimony and pending a treaty of marriage between the parties: *Gainor v. Gainor*, 26–337.

A wife cannot, on account of the marriage relation, set aside and overthrow the husband's contracts and conveyances made by him before marriage, and of which by the registry laws she is chargeable with notice: *Patterson v. Mills*, 69–755.

Contracts between husband and wife: The promise by the husband to pay or give money to his wife to induce her to again live with him is not binding, especially where it does not appear that she had any ground for not living with him: *Owen v. Owen*, 22–270.

A contract between the husband and wife, by which the husband, in consideration of the faithful performance by the wife of the obligations incident to the marriage relation, agrees to pay the wife sums of money at stated intervals, is against public policy and without consideration, and suit cannot be maintained thereon by the wife to compel payment of the sums stipulated: *Miller v. Miller*, 78–177.

A contract for the purpose of enabling the husband to obtain a divorce without having any legal cause for it will confer no rights upon the wife enforcible at law against the husband. If the wife agrees for a consideration that she will interpose no defense to an action for divorce by her husband, he having a legal cause of divorce, and then makes defense, she cannot enforce the contract against the husband: *Pearson v. Cummings*, 28–344.

Where a deed from the husband to the wife was given in consideration of a dismissal by the wife of a proceeding for divorce, *held*, that, no fraud being made to appear, the deed was valid: *Chew v. Chew*, 38–405.

Where a wife places money in the hands of her husband upon an agreement by him to account to her for it the transaction creates a debt between them which will constitute a valid consideration for a conveyance of real estate by the husband to the wife, if made before any lien thereon attached: *Jones v. Brandt*, 59–332.

The wife cannot insist in a court of equity, as against *bona fide* creditors whose rights have intervened, upon a secret, parol agreement with her husband to repay money received from her, and, under such agreement, receive and hold his estate for their mutual benefit. As between husband and wife the rule is otherwise: *Hatch v. Gray*, 21–29.

Where the legal title to the homestead was in the husband, and means derived from the wife's father had gone towards the pur-

chase and improvement thereof, *held*, that an agreement between the husband and wife, by which she joined in the mortgage thereof, and was to have the residue remaining after the incumbrance was paid out of the proceeds of the sale, was valid, and could be enforced against the creditors of the husband as well as himself: *Wright v. Wright*, 16–496.

While courts of equity recognize the rule that contracts between husband and wife after marriage are a mere nullity, yet they will, under particular circumstances, give full effect and validity to such contracts, although they are not executed by the intervention of a trustee; but to sustain such contract as against the wife the husband must be held to the utmost good faith. A slight circumstance of fraud or circumvention would be sufficient to render it invalid: *Blake v. Blake*, 7–46.

Therefore, *held*, that a contract between husband and wife, by which the latter, for a valuable consideration, after decree of divorce, released to the former all her dower interest in his real estate, was binding: *Ibid.*

The wife may make a loan of money which she has in her own right to her husband, and take security therefor upon land owned by him: *Doyle v. McGuire*, 38–410.

A post-nuptial contract is valid as to parties and creditors, if made for an honest purpose and a good consideration: *Butler v. Rickets*, 11–107.

Transfers of property between husband and wife: While, in dealings between husband and wife with reference to her property, by which the wife's property passes into the husband's hands, the husband will be held to the strictest fairness and integrity, yet if no fraud, circumvention or undue influence appears, the transaction will be upheld: *McCrory v. Foster*, 1–271.

If the husband purchases land and takes the title in the name of the wife, or if he permits the wife to use his money in the purchase in her own name, the presumption is very strong, if not conclusive, as between them, and as between the wife and the heirs of the husband, that it was intended as an advancement and provision for the wife and not as a trust in favor of the husband: *Sunderland v. Sunderland*, 19–325.

A secret parol transfer of notes by the husband to the wife will not necessarily be void if for a consideration: *Nicholas v. Higby*, 35–401.

Where land is bought by the husband and the legal title taken in the wife's name, and the purchase money paid from products of the estate, such facts will not give the wife an equity or claim thereto paramount to that of existing creditors from whom the property is sought to be secreted: *Ticonic Bank v. Harvey*, 16–141.

Transactions between husband and wife to the prejudice of creditors are to be scanned closely, and their *bona fides* must be clearly established, and where a husband by borrowing money and carrying on business in his wife's name sought to exempt from his own debts the proceeds of his personal industry, skill and judgment in carrying on the business of furnishing board for railroad construction hands, *held*, that the proceeds of such business were not exempt from liability: *Hamill v. Augustine*, 81–302.

The wife may acquire title to exempt property from her insolvent husband without the payment of a consideration, and she may acquire title from him to property that is not exempt, by paying its full value, in good faith: *Gollobitsch v. Rainbow*, 84–567.

Where a wife takes title to property through an exchange in lieu of her interest in other property owned by herself and husband jointly, she will be protected therein as against the husband's creditors, if it appears that the transaction was in good faith and not for the purpose of defrauding such creditors: *Deering v. Lawrence*, 79–610.

Where it appeared that a transaction between husband and wife was part of a plan to allow the wife to profit by a claim which was without merit, *held*, that such claim of the wife should be disregarded: *Shaver Wagon & Carriage Co. v. Halsted*, 78–730.

Where a wife sought to foreclose a chattel mortgage, and the defendant and certain intervenors claimed that the note and mortgage did not belong to the plaintiff but to her husband, *held*, that the evidence was insufficient to establish that the note was the property of the plaintiff, but to the extent of the money she claimed to have contributed to the purchase of the note it belonged to her husband: *Gardner v. Connelly*, 75–205.

Under the circumstances of a particular case, *held*, that money claimed by the wife as her separate property was not shown to be such, and that she could not therefore hold it exempt from her husband's debts: *Estey v. Fuller Implement Co.*, 82–678.

Where a husband conveyed property to his wife in consideration of future support and because he was growing old, *held*, that such conveyance was invalid as to existing creditors: *Shaw v. Manchester*, 84–246.

Where a note is given by the husband, who is insolvent, to the wife, in order to lay the foundation for a claim to the husband's property, in view of legal embarrassment, a deed made in consideration of the amount due on such note will not be valid as against the creditors: *Jons v. Campbell*, 84–557.

Under particular circumstances, *held*, that a mortgage by a husband to a wife, securing a note executed by him for a previous indebtedness, was not without consideration, nor fraudulent: *Meyer v. Houck*, 85–319.

Under particular circumstances, *held*, that there was sufficient consideration to support a conveyance from a husband to a wife, and that it was not executed for the purpose of defrauding creditors, even though the wife had knowledge of her husband's obligations at the time of such conveyance: *Davis v. Garrison*, 85–447.

A voluntary transfer of property in contemplation and under promise of marriage is fraudulent, and may be set aside in an action by the wife after marriage: *Beere v. Beere*, 79–555.

In a particular case, *held*, that a conveyance made by a man who anticipated the probability of being compelled to marry a

woman to avoid a prosecution for seduction was fraudulent, and might be set aside in an action by his wife by such marriage, although it was made to his mother, to whom he was indebted, and was claimed to have been in payment of such indebtedness, it appearing, however, that the indebtedness was not the primary cause inducing the making of the conveyance nor its acceptance: *Ibid.*

A husband may discharge a *bona fide* indebtedness to his wife by a conveyance to her, but such a transaction cannot be sustained against creditors of the husband without satisfactory evidence of actual contractual relations between them with reference to her separate property: *Iseminger v. Criswell*, 67 N. W., 289.

Money advanced by the wife to the husband without agreement for repayment will not support a conveyance from the husband to the wife to the prejudice of creditors: *Carbiener v. Montgomery*, 66 N. W., 900; *Peninsular Stove Co. v. Roark*, 63 N. W., 326; *Letz v. Smith*, 62 N. W., 745.

In a particular case, *held*, that a conveyance to the wife was not in consideration of any pre-existing debt and was therefore invalid as against the husband's creditors: *Letz v. Smith*, 62 N. W., 745.

Sale of goods to wife, credited on an indebtedness of the husband to her will be upheld as against his creditors: *John V. Farwell Co. v. Steck*, 61 N. W., 565.

A conveyance to the wife for a valid debt, *held* good, although the deed was not delivered until after recovery of judgment by a creditor against the husband: *Gaar v. Klein*, 61 N. W., 918.

Exempt earnings of the husband can be transferred to the wife free from claims of creditors: *Nash v. Stevens*, 65 N. W., 825.

SEC. **3158. Abandonment of either—proceedings.** In case the husband or wife abandons the other for one year, or leaves the state and is absent therefrom for such term, without providing for the maintenance and support of his or her family, or is confined in jail or the penitentiary for such period, the district court of the county where the abandoned party resides may, on application by petition setting forth the facts, authorize the applicant to manage, control, sell and incumber the property of the guilty party for the support and maintenance of the family and for the purpose of paying debts. Notice of such proceedings shall be given as in ordinary actions, and anything done under or by virtue of the order or decree of the court shall be valid to the same extent as if the same was done by the party owning the property. [C.'73, § 2207.]

This section does not affect the common-law rule of agency by which the wife, being abandoned by her husband without her fault, may pledge his credit for necessaries, and if left by him in the management of his business, may make all contracts reasonably incident to such management. Therefore, *held*, that a wife thus abandoned by her husband could make a valid sale of a cow belonging to him for the purpose of procuring support, the cow being of such character as not otherwise to furnish family support, and that this might be done before the destitution of the family became complete and absolute: *Rawson v. Spangler*, 62–59.

The wife of an absconding husband holding property which was exempt in his hands may sell the same and appropriate the proceeds, free from any claim for his debts, in the same manner that he might have done: *Waugh v. Bridgeford*, 69–334.

The wife cannot recover from the husband for expenses of supporting the children after abandonment. See notes to § 3165.

SEC. **3159. Contracts and sales binding.** All contracts, sales or incumbrances made by either husband or wife under the provisions of the preceding section shall be binding on both, and during such absence or confinement the person acting under such power may sue and be sued thereon, and for all acts done the property of both shall be liable, and execution may be levied or attachment issued accordingly. No action or proceeding shall abate or be affected by the return or release of the person absent or confined, but he or she may be permitted to prosecute or defend jointly with the other. [C.'73, § 2208.]

SEC. **3160. Decree set aside.** The husband or wife affected by the proceedings contemplated in the two preceding sections may obtain an annulment thereof, upon filing a petition therefor and serving a notice on the person in whose favor the same was granted, as in ordinary actions; but the setting aside of such decree or order shall not affect any act done thereunder. [C.'73, § 2209.]

SEC. **3161. Attorney in fact.** A husband or wife may constitute the other his or her attorney in fact, to control and dispose of his or her property for their mutual benefit, and may revoke the appointment, the same as other persons. [C.'73, § 2210.]

The husband may act as agent for the wife, but in order to bind her he must be previously authorized to so act, or she must subsequently, with express or implied knowledge of his act, ratify it. The evidence necessary to establish such ratification must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of her acts as his agent, or as between independent parties: *McLaren v. Hall*, 26-297.

A wife who has knowledge of the fact that debts are contracted by her husband for the improvement of her separate property, and acquiesces in the appropriation of the property purchased to the improvement of her own separate estate, subjects her property to an equitable lien for the value of the material furnished: *Miller v. Hollingsworth*, 36-163.

While the husband is not, by virtue of the marital relation, agent of the wife in respect to the wife's property, yet as to the shipment or preservation of the household goods jointly used by them, something may be inferred from the marital relation, and the agency of the husband may be inferred from slighter circumstances than would be necessary to establish agency on the part of a stranger. In such case, it is error to charge the jury that the proof of agency must be of the same character and the same weight as between husband and wife as is required to show agency in any other person: *Furman v. Chicago, R. I. & P. R. Co.*, 62-395.

Where the husband delivered household goods of a wife to a railroad company for shipment, taking a bill of lading in the name of the wife, and transacted with the company the entire business relating to the shipment, and afterwards had such bill of lading in his possession and exhibited it to the agent of the company, and gave directions as to the reshipment of the goods, *held*, that such facts were entitled to consideration as tending to prove the authority of the husband to act for the wife in the premises, and that under such circumstances the company had the right to consider the husband as the wife's duly authorized agent in regard to the shipment, unless notified to the contrary: *Ibid.; S. C.*, 68-219.

Where a husband rendered services to his wife in connection with her property, *held*, that it might properly be found that he was her agent in its management: *Johnson v. Grimminger*, 83-10.

SEC. **3162. Wages of wife—actions by.** A wife may receive the wages for her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property, as if unmarried. [C.'73, § 2211.]

Wife's earnings: Where the husband is resting under no disability, he, and not the wife, is, as a matter of law, the head of the family. He is bound for her support and entitled to her earnings when she is not engaged in business on her own account: *Van Doran v. Marden*, 48-186.

The wife is entitled to her wages for services performed for others, but the husband is entitled to her labor and assistance in the discharge of those duties and obligations which grow out of the marriage relation: *Mewhirter v. Hatten*, 42-288.

The wife is entitled to no claim against the husband or his estate for services rendered him, such as caring for him during insanity, etc., and a contract for such services would be void: *Grant v. Green*, 41-88.

The wife cannot recover wages from a third party for work performed for the husband, as boarding hands, etc., under a contract between the husband and such party. The husband may, under such circumstances, contract for the services of his wife and receive compensation in discharge thereof without her consent: *Lyle v. Gray*, 47-153.

Where boarding for a prisoner, whom it was impracticable, by reason of his condition, to confine in the county jail, was furnished in the family of the sheriff, *held*, that the sheriff, as husband, had authority to claim and collect the charges for the services of his wife as well as himself in the boarding of such prisoner, and that an assignment of the claim of the wife for her services was not necessary: *Miller v. Dickinson County*, 68-102.

While it is the duty of the wife to attend without compensation to all the ordinary household duties and labor faithfully to advance her husband's interests, it is not her duty, unless she desires to incur it, to perform other services which will be to the pecuniary advantage of the husband but which are outside of the household affairs; therefore, *held*, that a contract between a county sheriff and his wife by which she should attend to boarding of the prisoners and receive from him as her compensation therefor the amount realized in that way, was valid, and the amount so realized was her property free from her husband's debts: *Carse v. Reticker*, 63 N. W., 461.

The wife's earnings, unless acquired in carrying on an independent business of her own, cannot be made the basis of a claim against the husband which will support a conveyance by him to the prejudice of his creditors: *Triplett v. Graham*, 58-135.

The wife cannot regard earnings made in connection with her husband's property in the management of family affairs, where she has no separate property, as her individual earnings, and where such earnings are expended in the purchase of property it does not become exempt from her husband's debts: *Hamill v. Henry*, 69-752.

Under former statutory provisions, *held*, that while the property of the wife owned by her at the time of the marriage, and such as was subsequently acquired by her by gift or inheritance, was not subject to the debts of her husband, yet that property acquired by her during marriage, whilst she was re-

ceiving the protection and support of her husband, vested in him, and if taken by her in her own name was held in trust for her husband and his creditors: *Duncan v. Roselle*, 15-501.

Where the wife has separate property, she may use it for trading in real estate without subjecting the re-invested profits to seizure for the payment of the husband's debts: *Mitchell v. Sawyer*, 21-582.

Where a wife kept boarders and accumulated money which she loaned to her husband, and he afterwards repaid it, by furnishing money which the wife invested in real estate, *held*, that her title to the property could not be attacked on the ground that it had been conveyed to her in fraud of creditors of her husband: *Gilbert v. Glenny*, 75-513.

The keeping of boarders by a married woman is such business, independent of her duties as a wife, as authorizes her to hold the proceeds of her employment as her own: *Ibid.*

Section 2499 of the Revision, providing that, when a wife allows her husband to use her personal property, she must place notice of her ownership on record in order to avoid surrendering her interest to her husband's creditors, has no application in the case of creditors who became such after the repeal of that section by the enactment of the Code of 1873: *Ibid.*

Where property was purchased by the wife, partly with her earnings and partly with the income from her separate property, *held*, that so far as her earnings (which by the law then existing belonged to her husband) had been used in the purchase, the property was liable to the payment of the husband's debts: *McTighe v. Bringolf*, 42-455.

Recovery for tort: The provisions of the statutes with reference to rights of married women would seem to effect their complete emancipation from the disabilities of coverture to which they were subjected by the common law with respect to the rights of property, its freedom from control of the husband or its liability for his debts and the right to sue and be sued in respect thereto. The right of action in favor of the wife, whether arising upon contract or tort, is hers in the same sense that it would be if she were unmarried, and is to be prosecuted in her own name without the joinder of her husband. So *held* in case of an action for malicious prosecution: *Musselman v. Galligher*, 32-383.

So *held* also in case of libel: *Pancoast v. Burnell*, 32-394.

In a suit by the wife for personal injuries, it is not necessary that the husband join with her as plaintiff: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-518.

When the wife has a separate and independent employment, which she habitually follows and for which she receives compensation from her employers, she may be deemed to have a business or occupation independent of her husband, and may recover in an action in her own name for loss of time occasioned by personal injuries: *Fleming v. Shenandoah*, 67-505.

However, the husband is still entitled to the labor and assistance of the wife, and may recover in his own right for any injury to her which deprives him thereof: *Mewhirter v. Hatten*, 42-288.

He may recover for loss of time caused by injury to her unless she is engaged in the prosecution of a separate business, which thereby suffers detriment; and therefore, in an action by a married woman, not carrying on a separate business, to recover damages for personal injuries, loss of time cannot be shown as an element of damages: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-518; *Nichols v. Dubuque & D. R. Co.*, 68-732.

Instructions in an action by a wife against a railway company to recover damages for personal injuries, *held* to sufficiently limit the recovery to such damages as were strictly personal to the wife, and for which she might recover: *Tuttle v. Chicago, R. I. & P. R. Co.*, 48-236.

Unless a married woman has a separate business, the averments of the inability to work and labor by reason of the injuries sustained by the negligence of defendant will render her petition liable to be assailed as claiming elements of damage for which her husband alone is entitled to recovery: *Dickens v. Des Moines*, 74-216.

Damages resulting from the death of the wife are damages to her estate, and the right of action therefor exists only in favor of her administrator, but for loss of services, loss of society and expenses of treatment, the husband may recover: *Mowry v. Chany*, 43-609.

The damages accruing to the estate of a married woman because of a wrongful act which causes her death should not be assessed on the same basis as though she were unmarried, even though she may have been engaged to some extent in a separate business. Damages should not be allowed in such case for services which would have been rendered for the benefit of her husband and family: *Stulmuller v. Cloughly*, 58-738.

At common law it was a well-settled rule that for injuries to the wife during coverture she must join with the husband in an action. But whenever the injury was such that the husband received special damage, such as loss of society or expense, he might sue in his own name: *McKinney v. Western Stage Co.*, 4-420.

The husband may recover for medicine and medical attendance and expenses incurred on account of the injury to the wife. But if the husband authorizes the wife to prosecute a suit for such expenses, and aids her therein, and permits her to recover and receive the amount recovered, he will be estopped afterwards to claim recovery for the same matters: *Neumeister v. Dubuque*, 47-465.

In such case, the fact that the wife has claimed in a former action to have been carrying on a separate business in her own name, and has sought to recover for a loss occasioned to her in such business by the injury, will not preclude the husband from setting up loss of services of the wife: *Ibid.*

In an action by the husband to recover for loss of services of the wife resulting from

an injury to her he may show the inability of the wife to perform labor or service resulting from the injury and the value of the service thus lost: *Ibid.*

The husband and wife each have the right to the affection and companionship of the other, and whoever wrongfully deprives either of that right may be held responsible in damages. This is a valuable property right of the wife with reference to the husband as well as of the husband with reference to the wife, and there may be a recovery by the wife on that ground: *Price v. Price*, 91-693.

Action by wife against husband: Under a former statutory provision giving a married woman the right to sue in her own name, when the action concerned her separate property, *held*, that a wife, compelled to leave her husband for cause, or driven away by him without cause, might maintain an action of replevin against him in her own name to obtain possession of her separate property: *Jones v. Jones*, 19-236.

The fact that there has been a separation of the husband and wife without cause will not authorize the wife to maintain an action against the husband to recover property owned by her before marriage: *McMullen v. McMullen*, 10-412.

Whether an action at law will lie during coverture by the wife against the husband for the recovery of a money judgment, *quære: Owen v. Owen*, 22-270.

The statutory provision authorizing the wife to sue in her own name does not give a right of action generally against her husband. Such right of action exists only under § 3155, which authorizes the husband or wife to maintain an action against the other for the recovery of property, or for any right growing out of the same: *Peters v. Peters*, 42-182.

Therefore the husband or wife has no right of action against the other for tort: *Ibid.*

Claims of the one against the estate of the other: Where the husband borrows the separate money of the wife and promises to repay it, especially where the promise is reduced to writing and the rights of creditors are not prejudiced or defeated, equity will enforce the contract against him, or, if he is deceased, against his estate: *Logan v. Hall*, 19-491.

So where the wife loaned to the husband money out of her separate estate, with the expectation and promise that it should be repaid to her, and the husband afterwards executed and delivered to her notes for the amount received, *held*, that such notes constituted a valid and binding claim against the husband, which after his death could be enforced against his estate: *Ibid.*

But in such case, *held*, that the wife was not entitled to interest on the sum loaned: *Ibid.*

Where the wife took from her husband while sick a large sum of money, subsequently evading his request to return it except as to a small portion, and after her death the husband's assignee filed a claim for the same against her estate, *held*, that the possession of the money by the wife was the possession of the husband during her life, and after her death the husband or his assignee might assert the right to its possession as against her executor: *Davidson v. Smith*, 20-466.

Where the wife gives the husband money for the purpose of aiding in purchasing a homestead, which is so used, his estate cannot be held liable for the money advanced: *Garrett v. Baldwin*, 40-688.

SEC. **3163. Liability for separate debts.** Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, and, except as herein otherwise declared, they are not liable for the debts of each other contracted after marriage; nor are the wages, earnings or property of either, nor is the rent or income of the property of either, liable for the separate debts of the other. [C.'73, § 2212; R., § 2505; C.'51, § 1453.]

The husband is liable on an implied undertaking for necessaries supplied to the wife. Whatever is suitable and proper for the wife, considering her station in life, is included in necessaries, and that term is not confined to the supply of things demanded for her sustenance, apparel and health, but extends to whatever is necessary for her happiness, comfort and enjoyment in the station she occupies as to wealth and fashion: *Porter v. Briggs*, 38-166.

Therefore, *held*, that the husband was liable for services rendered to the wife by an attorney in establishing her innocence of the charge of adultery made by the husband in an action for divorce: *Ibid.*

And see as to attorney's fees in such cases, notes to § 3180.

It is erroneous to instruct that the husband is in law not bound to furnish board and necessaries to the wife at any place other than that of his own choosing and that it is the duty of the wife to accomodate herself to the surroundings and conditions of the husband, and that the husband is not liable for the board of the wife unless the person claiming to recover for such board from the husband shows affirmatively that the husband refuses to maintain his wife elsewhere or at all, inasmuch as the husband might insist on taking his wife to or providing for her keeping at a place where no respectable woman would make her home: *Tibbetts v. Wadden*, 62 N. W., 693.

In order to enable a party to recover against a husband for necessaries furnished to the insane wife, it need only be shown that she was compelled to leave the husband's house on account of cruel treatment or improper conduct on his part. In such case the husband is presumed to extend to his wife a general credit for necessaries, such as meat, drink, clothes, medicine, etc., suitable to his degree and circumstances: *Descelles v. Kadmus*, 8-51.

Before the adoption of the Code of '73 it

was held that the husband was liable for the torts of the wife as at common law, notwithstanding the statute embodied in this section: *McElfresh v. Kirkendall*, 36–224; but now see § 3156.

Under the statute embodied in this section, *held*, that the property of the wife was not liable for the debts of the husband contracted before marriage, even though she did not take the steps then required by statute to prevent her property left in his hands from becoming liable for his debts contracted after marriage: *Patterson v. Spearman*, 37–36.

Where a wife let her husband have money while the Revision was in force, but failed to file in the proper office a notice of her claim as required by § 2500 of the Revision, parties who became creditors of the husband after the repeal could not object to a mortgage given by him to his wife, after such repeal, to secure the money and interest: *First Nat. Bank v. Fenn*, 75–221. And see notes to § 3157.

SEC. **3164. Contracts of wife.** Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her, to the same extent and in the same manner as if she were unmarried. [C.'73, § 2213; R., § 2506; C.'51, § 1454.]

By this section, by which the wife is clothed with the same property rights and charged with the same liabilities as the husband, she is completely emancipated from all the bonds recognized by the common law, save those of affection and moral obligation. Being clothed with all the natural rights enjoyed by the husband, which she may exercise free from his control, she is subject to the same rules which restrict and control the rights of the husband and enforce his obligations assumed by contract and imposed by law for the protection of other members of society. As she has all the rights of the husband, she must assume all his obligations as well by implied as by express contract: *Spafford v. Warren*, 47–47.

Therefore, *held*, that the conveyance of a homestead, in which the wife joined with the husband, but which was void as being an absolute deed instead of a mortgage as contemplated when it was executed and also for the reason that the name of the grantee and the description of the property were left blank at the time of the execution and subsequently filled in by the husband, was ratified by her subsequent action in reference thereto and thus became valid and binding upon her: *Ibid.*

A married woman may make a valid contract for the purchase of real property. Previous cases in Iowa upon the power of a married woman to contract, discussed: *Shields v. Keys*, 24–298.

A married woman may execute a valid mortgage upon her property as security for the debt of another in the same manner as though unmarried: *Low v. Anderson*, 41–476.

A married woman may estop herself by her acts as she may bind herself by her contract: *Mohler v. Shank's Estate*, 93–273.

Therefore, *held*, that while a wife could not by contract divorce herself from her husband, yet where she had accepted alimony and had remarried under a decree of divorce, which was void, she was estopped afterwards from asserting any right in the estate of the insane husband: *Ibid.*

SEC. **3165. Family expenses.** The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or of either of them, and in relation thereto they may be sued jointly or separately. [C.'73, § 2214; R., § 2507; C.'51, § 1455.]

Although this section provides that the family expenses are chargeable upon the property of both husband and wife, it has been treated the same as if it provided that both shall be personally liable for family expenses. The evident object and purpose of the statute is that the property and means of the husband and wife shall be devoted to the support of the family so far as necessary for that purpose: *Devendorf v. Emerson*, 66–698.

In the absence of fraud and collusion between the husband and the creditor, the acts, agreements and promises of the husband in relation to family expenses, etc., are binding upon the wife without any express consent or action on her part. The husband may change the form of indebtedness, as by giving a new note, without releasing her: *Lawrence v. Sinnamon*, 24–80.

A change by the husband, contracting the indebtedness, of the evidence thereof from oral contract to note, and from note to judgment, will not terminate the liability of the wife, and the debt will continue enforcible against her property as long as the right of action against the husband exists: *Frost v. Parker*, 65–178.

The giving of a note by the husband to whom the necessaries are sold for the amount thereof fixes the wife's liability and the action as against her becomes barred when it becomes barred against the husband: *Morse v. Minton*, 70 N.W., 691.

The statute of limitations commences to run in favor of the wife only from the maturity of the indebtedness as contracted by the husband, and the action against the wife is not barred as long as it subsists against the husband: *Lawrence v. Sinnamon*, 24–80; *Davidson v. Biggs*, 61–309; *Waggoner v. Turner*, 69–127.

This rule applies even where the note for the indebtedness has been put in judgment against the husband: *Phillips v. Kirby*, 73–278.

The fact that a creditor has brought an action against the husband alone, and obtained judgment thereon by consent, does not extend the statute of limitations as against the wife until the judgment shall become barred: *Polly v. Walker*, 60–86.

Where the husband, after the indebtedness was contracted, gave a note therefor, drawing interest at ten per cent. and providing for an attorney's fee, *held*, that a recovery could not be had against the wife for the attorney's fee nor for interest at that rate: *Fitzgerald v. McCarty*, 55–702.

The wife is liable although the vendor made the contract with, and extended the credit to, the husband alone: *Smedley v. Felt*, 41–588.

In the cases contemplated in this section, the wife is jointly liable with the husband and the indebtedness is the debt of both: *Smedley v. Felt*, 43–607; and she may be sued thereon alone: *Farrar v. Emery*, 52–725.

A personal judgment may be rendered against the wife where she is sued jointly with the husband for family expenses, notwithstanding the husband has a discharge in bankruptcy: *Jones v. Glass*, 48–345.

A creditor may, if he sees proper, join the wife and husband in the same action. The allowance of a separate action to be brought against the wife is simply an additional remedy which may or may not be adopted: *Waggoner v. Turner*, 69–127.

The remedy against the wife for family expenses incurred by the husband is not limited to a personal judgment. By a proper proceeding her property may be pursued without such judgment being had: *Frost v. Parker*, 65–178.

Where the proceeding against the wife is brought by an assignee of the claim against the husband for family expenses, the remedy against the property of the wife will not be defeated by the fact that no assignment of the claim against the wife is shown: *Ibid.*

"Expenses of the family" are not limited to necessary expenses. Any expenditure is contemplated which is incurred on account of articles to be used in the family; and the purchase of a piano, *held*, to be a family expense: *Smedley v. Felt*, 41–588.

So *held* as to the purchase of an organ: *Frost v. Parker*, 65–178.

So the purchase of a cook stove and fixtures comes properly under the head of family expenses: *Finn v. Rose*, 12–565; but the purchase of a reaping machine, used by the husband in prosecuting his business of farming, by which he supports his family, is not a family expense: *McCormick v. Muth*, 49–536; nor is the purchase of a plow: *Russell v. Long*, 52–250. The expense of treatment of a wife at a hospital for the insane, *held* not to be a family expense: *Delaware County v. McDonald*, 46–170.

Where the husband purchased a watch and chain and other jewelry, a part of which was presented to his wife and the remainder used in the family, the wife was held liable therefor as family expenses, although she had no knowledge that they were not paid for until sometime afterwards: *Marquardt v. Flaughter*, 60–148.

While the property of the wife may be liable for rent of premises leased to the husband as a dwelling for the family, it cannot be seized under landlord's attachment by virtue of such lease for rent not yet accrued: *Schurz v. McMenamy*, 82–432.

It is error to limit the liability under this section with reference to medical services to such as are necessary and proper. The averment in the petition that the expenditure sued for was a necessary family expense will not oblige the plaintiff to prove that the expense was necessary: *Schrader v. Hoover*, 80–243.

Medical service rendered to the husband constitutes a family expense for which the wife is liable: *Murdy v. Skyles*, 70 N. W., 714.

The wife is not liable under this section for the rent of a farm leased by the husband for farming purposes, although a house located thereon is occupied by the family, and the supplies of the family are drawn to some extent from the produce and crops of said farm: *Hecht v. Gilch*, 82–596.

Where the plaintiff sought to recover from the husband items of family expense under a contract made with the wife, since deceased, *held*, that the plaintiff could not testify with reference to such contract: *Galvin v. Bischoff*, 80–605.

To constitute a family expense it is essential that the thing for which the expenditure was incurred should have been used or kept for use in the family: *Fitzgerald v. McCarty*, 55–702.

Where it is sought to hold the wife liable for an indebtedness contracted by the husband on the ground that it is for family expenses, the plaintiff should prove that the goods alleged to have been purchased by the husband were such as might be regarded as a family expense and that they were actually kept for use in the family: *Way v. Cross*, 63 N. W., 691.

Therefore where the plaintiff's books of account did not show for what the charges were made against the husband, *held*, that the wife would not be liable therefor: *Ibid.*

A father not being liable for necessaries furnished an adult son or daughter who lives with him, is not liable for such necessaries as being part of the family expenses. The purpose of this section is not to declare what charges or expenditures would be regarded as expenses of the family, but to provide a remedy therefor against both husband and wife: *Blachley v. Laba*, 63–22.

The children of the wife by a former husband may be members of the family while the husband and wife live together, but if the husband leaves the wife and lives elsewhere he is not liable for the support of such step-children as family expenses: *Menefee v. Chesley*, 66 N. W., 1038.

Where the wife has purchased goods of a merchant with whom the husband has no account, and to whom he has given notice in writing not to sell goods to his wife and charge them to him, it not appearing but that the husband otherwise provides necessaries for the family, the merchant cannot hold the husband liable as for family expenses: *Devendorf v. Emerson*, 66–698.

A party who furnishes money to the husband to pay indebtedness for family expenses has no right of action against the wife therefor, where the money is not furnished at her request nor upon an assignment of the account: *Sherman v. King*, 51–182.

Money borrowed for and used in purchasing articles which, if obtained on credit, would constitute proper items of family expense, cannot itself be treated as a family expense: *Davis v. Ritchey*, 55-719.

An action to make an indebtedness for family expenses a lien upon real property of the wife may be brought in the county where the property is situated: See § 3493 and notes.

If the duty of supporting the family is performed by the wife, she cannot claim reimbursement from him for the money expended. This duty is cast equally upon both: *Johnson v. Barnes*, 69-641.

That the wife cannot recover from the husband or his estate money or property of hers used by him or otherwise devoted to payment of family expenses, see notes to § 3155.

The husband cannot bind the property of the wife against her will and notwithstanding her protest known to the party with whom the contract was made, in purchasing articles which are used by the family but are not necessaries: *Haggard v. Holmes*, 90-308.

SEC. **3166. Removal from homestead—custody of children.** Neither husband nor wife can remove the other nor the children from the homestead without the consent of the other, and if the husband abandons the wife she is entitled to the custody of the minor children, unless the district court, upon application for that purpose, shall otherwise direct. [C.'73, § 2215; R., § 2514; C.'51, § 1462.]

SEC. **3167. Insanity of either spouse—conveyance of property.** Where either the husband or wife is insane and incapable of executing a deed, relinquishing or conveying his or her right to the real property of the other, the other may petition the district court of the county of his or her residence, or of the county where the real estate to be conveyed is situated, setting forth the facts, and praying for an order authorizing the applicant or some other person to execute a deed and relinquish the interest of the insane person in said real estate. [C.'73, § 2216; R., § 1500.]

SEC. **3168. Proceedings.** The petition shall be verified by the petitioner, and filed in the office of the clerk of the district court of the proper county, notice of which shall be given as in other cases. Upon completed service, the court shall appoint some responsible attorney thereof guardian for the person alleged to be insane, who shall ascertain the propriety, good faith and necessity of the prayer of the petitioner, and may resist the application by making any legal or equitable defense thereto, and he shall be allowed by the court a reasonable compensation to be paid as the other costs. [C.'73, § 2217; R., § 1501.]

SEC. **3169. Decree.** Upon the hearing of the petition, the court, if satisfied that it is made in good faith by the petitioner, and he is a proper person to exercise the power and make the conveyances, and it is necessary and proper, shall enter a decree authorizing the execution of the conveyance, for and in the name of such husband or wife, by such person as the court may appoint. [C.'73, § 2218; R., § 1502.]

SEC. **3170. Conveyances—revocation.** All deeds executed as provided in this chapter shall convey the interest of such insane person in the real estate described, but such power shall cease and be revoked as soon as he or she shall become of sound mind and apply to the court therefor, but such revocation shall not affect conveyances previously made. [C.'73, § 2219; R., § 1503.]

CHAPTER 3.

OF DIVORCE, ANNULLING MARRIAGES, AND ALIMONY.

SECTION **3171. Jurisdiction.** The district court in the county where either party resides has jurisdiction of the subject-matter of this chapter. [C.'73, § 2220; R., § 2532; C.'51, § 1480.]

Jurisdiction; residence: The action is not local, but transitory, and the court being satisfied of the residence of plaintiff, has power to try the case irrespective of the residence of defendant: *Smith v. Smith*, 4 G. Gr., 266.

The residence on the part of plaintiff required by statute is a legal and not merely an actual residence; such a residence as that, when a man leaves it, he has an intention of returning to it: *Hinds v. Hinds*, 1-36.

A mere temporary sojourn for a season, without intention of domiciliation and citizenship, is insufficient: *Smith v. Smith*, 4 G. Gr., 266; *Whitcomb v. Whitcomb*, 46-437, 443. And see *Rush v. Rush*, 48-701.

A Utah divorce obtained without jurisdiction, or where neither party was resident of the territory, is absolutely void: *State v. Fleak*, 54-429.

It is competent to establish by parol that a decree of divorce rendered in another state is void for want of jurisdiction in the court rendering it, for the reason that neither plaintiff nor defendant were residents of the state where the decree was rendered as required by the laws of that state: *Neff v. Beauchamp*, 74-92.

The rule that the domicile of the wife and children is to be considered the same as that of the husband is subject to the exception that, in a proceeding for a divorce, the law recognizes the husband and wife as having separate domiciles, and a valid divorce may be decreed in a suit where only one of the parties resides: *Kline v. Kline*, 57-386.

Where the proceeding is brought by the husband in one state against the wife living in another state, and jurisdiction is acquired by service of publication, the court may declare the *status* of the parties and grant the decree, but it cannot make a valid decree as to the custody of the children, who are nonresidents of the state where the divorce proceedings were had: *Ibid.*

Under particular facts, *held*, that a supplementary decree of a court of another state, fixing the amount of alimony to be paid under a decree of divorce previously rendered in that state, was with jurisdiction, and would be recognized in this state: *Alderson v. Alderson*, 84-198.

Jurisdiction as to children: The provisions as to the custody of a child, made in the decree of divorce regularly obtained and still in force in another state, such child being within the jurisdiction of the court at the time the decree was rendered, will be regarded as binding and conclusive by the courts of this state, when the right to the custody of the child is called in question here, until such decree is modified or reversed or set aside for cause shown to the jurisdiction which rendered it: *Wakefield v. Ives*, 35-238.

Waiver of want of jurisdiction: Want of jurisdiction of a court to entertain an action for divorce, owing to the nonresidence of plaintiff, cannot afterwards be interposed by such plaintiff as an objection to the decree, where it appears that plaintiff authorized the cause to be prosecuted and received the money allowed as alimony: *Ellis v. White*, 61-644.

Decree against nonresident: Where the action for divorce is brought by a resident of one state, in the courts of that state, against a nonresident, and service is had by publication only, without appearance by defendant, the court acquires jurisdiction only to declare the *status* of the parties before it, but cannot render a valid decree as to the custody of minor children who are nonresidents of the state where the decree is rendered: *Kline v. Kline*, 57-386.

The policy and laws of the two states of Nebraska and Iowa being substantially the same as to the mode of procedure that may be adopted to obtain a divorce, it being provided in both states that a divorce may be obtained in some other state or country, *held*, that a divorce granted in Nebraska in accordance with its laws to a resident of that state and against a resident of Iowa, upon personal service, being valid in the state where it was granted, would be recognized as valid in Iowa: *Van Orsdal v. Van Orsdal*, 67-35.

Presumption: Where parties who have been husband and wife, separate and the former lives with a woman claiming to be, and held out by him to be, and reputed to be, his wife, the presumption will be entertained that such cohabitation is legal, and that he has been divorced from his former wife, and this presumption will be entertained when the legality of a subsequent marriage by such former wife is called in question: *Blanchard v. Lambert*, 43-228.

Where acts are shown which would amount to a crime if a divorce from a previous marriage had not been obtained, such proof will be admissible to support an allegation of divorce, where by reason of destruction of records the record itself cannot be produced: *In re Estate of Edwards*, 58-431.

The law presumes a second marriage to be lawful and not criminal and if it appears that the consort by a former marriage is living so that the second marriage would be unlawful but for a prior divorce, such prior divorce will be presumed where the consort by the first marriage has knowledge of the second marriage and makes no objection thereto: *Leach v. Hall*, 64 N. W., 790.

The presumption of divorce, in the absence of any record evidence thereof, can only be invoked in aid of innocence and the legitimacy of offspring, nor does it always obtain even in such cases; but such rule is not applicable in any case where neither party has been married again or has lived in cohabitation with another person as husband or wife. Therefore, *held*, that the mere fact of long separation would not give rise to a presumption of divorce such as to defeat the wife's dower right: *Cruize v. Billmire*, 69-397.

Legislative divorces: The courts have no inherent common-law jurisdiction over the matter of divorce. All the authority they can exercise in that respect is derived from legislative enactment. In England, at the time the common law was adopted in this country, a marriage could not be dissolved for any cause without special act of parliament. And after the independence of the states there was no method of obtaining a divorce except by virtue of general or special legislative enactment. Therefore, *held*, that the legislatures of the states are deprived of the power to grant divorces only so far as that power has been conferred on the courts of the state: *Levins v. Sleator*, 2 G. Gr., 604.

SEC. **3172. Petition.** Except where the defendant is a resident of this state, served by personal service, the petition for divorce, in addition to the facts on account of which the plaintiff claims the relief sought, must state that the plaintiff has been for the last year a resident of the state, specifying the township and county in which he or she has resided, and the length of such residence therein after deducting all absences from the state; that it has been in good faith and not for the purpose of obtaining a divorce only; and in all cases it must be alleged that the application is made in good faith and for the purpose set forth in the petition. [C.'73, § 2221; R., § 2533; C.'51, § 1481.]

The fact that the plaintiff is not a resident of the state cannot be taken advantage of by her for the purpose of defeating the judgment, where it appears that she authorized suit to be brought and accepted alimony allowed by the decree: *Ellis v. White*, 61-644.

SEC. **3173. Verification—evidence—hearing.** The petition must be verified by the plaintiff, and its allegations established by competent evidence. If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the court; and no divorce shall be granted on the testimony of the plaintiff alone. All such actions shall be heard in open court upon the oral testimony of witnesses, or depositions taken as in other equitable actions or by a commissioner appointed by the court. [C.'73, § 2222; R., § 2533; C.'51, § 1481.]

Verification: That a petition for a divorce is not sworn to does not deprive the court of jurisdiction or render subsequent proceedings invalid; *McCraney v. McCraney*, 5-232, 254.

Defects in the verification of the petition are not jurisdictional and cannot be urged in a collateral attack: *Ellis v. White*, 61-644.

This provision as to the verification of the petition by plaintiff is doubtless mandatory and intended to prevent looseness of practice in actions of divorce, and its requirements should be strictly enforced. The fact that defendant answers the petition without objecting to a want of verification will not constitute a waiver of such requirement, for the reason that it is enacted not for the benefit of defendant, but as a hindrance to easy divorce, and therefore cannot be waived. But such provision does not relate to the jurisdiction of the court. It prescribes a rule of action intended only to govern as to the final judgment in the case. Therefore the fact that the petition is not verified will not deprive the court of jurisdiction to make an order as to temporary alimony: *Van Duzer v. Van Duzer*, 65-625.

While the verification of the petition is not jurisdictional, it is evidently contemplated that the action shall be prosecuted by the injured party in his or her personal capacity, and such an action cannot be instituted by the guardian of one of the parties to the marriage relation, who is insane: *Mohler v. Shank's Estate*, 93-273.

The judgment of divorce entered in such a suit would be void but where the defendant accepted the benefits of a decree in such suit against her by receiving payment of alimony provided for in her behalf and by marrying, *held*, that she was thereby estopped from afterwards asserting any claim in the estate of the insane husband: *Ibid.*

Method of trial: The provision that the trial is to be in open court is not complied with by trial to referee, and a subsequent hearing of the report of such referee on exceptions thereto. A reference in such cases cannot be made even by consent, but the testimony taken by such referee, appointed in such case, may be treated as taken before a commissioner in accordance with the provisions in this section, and the evidence so taken may be used on the trial in court: *Hobart v. Hobart*, 45-501.

As the parties to a proceeding for divorce had the right under the Revision to a jury trial, such right was not taken away by the Code of '73 in proceedings commenced before its adoption: *Wadsworth v. Wadsworth*, 40-448.

Consent of parties will not warrant the granting of a divorce unless proper ground therefor is shown: *Lyster v. Lyster*, 1-130.

SEC. **3174. Causes.** Divorces from the bonds of matrimony may be decreed against the husband for the following causes:

1. When he has committed adultery subsequent to the marriage;
2. When he wilfully deserts his wife and absents himself without a reasonable cause for the space of two years;
3. When he is convicted of a felony after the marriage;
4. When after marriage he becomes addicted to habitual drunkenness;
5. When he is guilty of such inhuman treatment as to endanger the life of his wife. [C.'73, § 2223; R., § 2534; C.'51, § 1482.]

In general: To justify the granting of a divorce it must appear that defendant has been guilty of some of the acts mentioned in the statutes as grounds therefor. It is not

sufficient that the court finds defendant's conduct is such as to manifest a disregard on his part of the marriage vows and his obligations to plaintiff: *Miller v. Miller*, 43–325.

The causes enumerated in the statute are the only ones which will justify either party to the marriage in refusing to live with the other: *York v. Ferner*, 59–487.

Where the ground for divorce is a continuing one, although it may have begun before the enactment of the statute providing for a divorce on that ground, yet if continued afterward for the period required, it will be sufficient to justify the divorce: *McCraney v. McCraney*, 5–232, 254.

Impotency, insanity and idiocy are not grounds for divorce: *Wertz v. Wertz*, 43–534.

The violation of an antenuptial contract is not a ground for divorce: *Owen v. Owen*, 90–365.

Under a previous statute providing for divorce, when it was made fully apparent to the court that the parties could not live in peace and happiness together, and that their welfare required a separation, *held*, that it must be made fully apparent to the court, not only that the parties could not live in peace and happiness, but also that their welfare required their separation: *Inskeep v. Inskeep*, 5–204.

Further, *held*, that a divorce on this ground could not be granted to the wrongdoer: *Ibid.*

It is probably correct to say that a decree in an action for divorce is an adjudication of all causes for divorce then existing: *Rivers v. Rivers*, 65–568.

Adultery is the voluntary sexual intercourse of a married person with one not the husband or wife: *Aitchison v. Aitchison*, 68 N. W., 573.

Where divorce is sought on the ground of adultery, it is not necessary to prove the direct fact of adultery, but it may be inferred from the circumstances. These, however, must be such as would lead the guarded discretion of a just mind to the conclusion of the truth of the facts. If the adulterous disposition of the parties is once established the crime may be proven from their afterward being together under circumstances authorizing such inference: *Inskeep v. Inskeep*, 5–204.

The circumstances are to be taken together and when combined must tend to establish the criminal disposition of the party charged, a like disposition of the alleged *particeps criminis*, and an opportunity to commit the act: *Ibid.; Aitchison v. Aitchison*, 68 N. W., 573.

In a particular case, *held*, that the conduct of defendant though suspicious was capable of explanation on a theory consistent with his innocence, and there was therefore not sufficient ground for divorce: *Aitchison v. Aitchison*, 68 N. W., 573.

Adultery can seldom be proven by other than circumstantial evidence, and evidence thereof is sufficient when the circumstances proved lead naturally and fairly to the conclusion of guilt, and are inconsistent with any rational theory of innocence: *Names v. Names*, 67–383.

Evidence of adultery in a particular case, *held* sufficient to warrant a divorce on that ground: *Ibid.*

In a particular case, *held*, that the evidence did not establish adultery on the part of the wife, nor cruel and inhuman treatment on her part such as to entitle the plaintiff to divorce: *Peavey v. Peavey*, 76–443.

In a particular case, *held*, that the evidence did not sufficiently establish the truth of the charge of adultery: *Haggard v. Haggard*, 62–82.

Evidence of adultery is sufficient when the circumstances proven lead naturally and fairly to the conclusion of guilt and are inconsistent with any theory of innocence: *Carlisle v. Carlisle*, 68 N. W., 681.

Under the evidence in a particular case, *held*, that adultery was not established: *Ibid.*

When the wife deserts the husband without reasonable ground, and before she has been absent long enough to entitle him to a divorce he commits adultery, the wife is entitled to divorce and alimony: *Wilson v. Wilson*, 40–230: *Dupont v. Dupont*, 10–112.

While the adultery of plaintiff will debar her from procuring a divorce on the ground of a like crime on the part of defendant, yet where the marriage of plaintiff, which was claimed to be adulterous, was contracted in ignorance of the fact that defendant was alive, and in fact he had not been heard of for ten years, *held*, that such marriage on the part of plaintiff would not defeat her action against defendant for divorce: *Smith v. Smith*, 64–682.

Desertion: A reasonable cause for desertion must be one which would *prima facie* entitle the party so deserting to a divorce: *Pierce v. Pierce*, 33–238.

Whether the desertion and absence must both be without reasonable cause, *quære;* though it may well be questioned whether the true meaning of the statute is not "when the defendant wilfully deserts her without reasonable cause and absents himself for two years." But the reasonable cause here contemplated is wrongful conduct on the part of the wife, amounting to a good excuse for the husband's desertion and absence. No other cause can be shown than one arising from the fault of the wife. The statute does not require that the absence shall be wilful, and therefore, *held*, that if the desertion occurred while the defendant was sane, his subsequent insanity was no excuse: *Douglass v. Douglass*, 31–421.

In case of application for a divorce on the ground of desertion, the petition must state that such desertion was "without reasonable cause:" *Pinkney v. Pinkney*, 4 G. Gr., 324.

Where the parties mutually agree to separate, neither one is entitled to divorce on the ground of the absence of the other until such party offers to and expresses a willingness to live with the other, and such offer must appear to be made in good faith: *Farber v. Farber*, 64–362.

Where there is desertion of the husband by the wife on account of inhuman treatment which in itself is a ground for divorce, such desertion cannot be made a basis of divorce by the husband: *Doolittle v. Doolittle*, 78–691.

Desertion to be a ground of divorce must

have continued for two years and be without a reasonable cause: *Owen v. Owen*, 90-365.

The law requires a husband to do all he reasonably can to protect his wife from insult and abuse, and failing to do so, she is, in a proper case, justified in leaving him, and such leaving will not constitute legal desertion. So *held*, where the insult and abuse were from children of the husband by a former marriage: *Day v. Day*, 84-221.

Also *held*, in such case of desertion, if the husband desired to give the wife an opportunity to return to him, his offer should not only be made in good faith, but should not be coupled with improper conditions, such as to require her to part with a possible interest in his estate: *Ibid.*

Also *held*, that the treatment of the wife in such case by the children of her husband was such as to directly tend to impair her health, and that a divorce was properly granted: *Ibid.*

Where a separation is by mutual agreement, there can be no divorce on the ground of wilful desertion; but the fact that the wife lives apart from the husband and accepts support from him will not show consent to separation: *Ibid.*

To constitute an excuse for desertion of the husband by the wife, so as to prevent the same being a ground for divorce on the part of the husband, there must exist such facts as would in themselves authorize an action, on the part of the wife, for divorce: *Taylor v. Taylor*, 80-29.

Under particular facts, *held*, that alleged cruelty on the part of the husband was not such as to justify desertion of him by the wife and prevent such desertion from being a ground of divorce at the suit of the husband: *Packard v. Packard*, 90-765.

Facts in a particular case, *held* sufficient to constitute a wilful desertion of the husband on the part of the wife: *Pilgrim v. Pilgrim*, 57-370; *Lane v. Lane*, 67-76.

In another case, *held*, that the evidence was not sufficient: *Atkinson v. Atkinson*, 67-364.

A conviction of felony from which an appeal has been prosecuted and which is liable to reversal is not sufficient ground for a divorce. The conviction must be final and absolute: *Vinsant v. Vinsant*, 49-639.

Where it appeared that defendant was convicted on an indictment for felony, but the cause was appealed, and at the time of the trial in the divorce suit such appeal was undetermined, *held*, that there was no ground for divorce upon such conviction: *Rivers v. Rivers*, 60-378.

But in such case, *held*, that after the affirmance of such conviction a new action for divorce might be brought on the ground of such conviction, and would not be barred by the first action: *Rivers v. Rivers*, 65-568.

Habitual drunkenness: To constitute a person an habitual drunkard it is not necessary that he be in that condition during business hours: *Wheeler v. Wheeler*, 53-511.

In an action by a wife for divorce upon the ground of the habitual drunkenness of her husband, where there was no direct corroboration of the evidence of the wife that defendant had acquired the habit of drunkenness after marriage, but the evidence of other witnesses was such as to show that the fits of intoxication became more frequent in later years, and that towards the last he was in a continuous state of intoxication, *held*, that this was a sufficient corroboration of plaintiff's testimony: *Lewis v. Lewis*, 75-200.

Inhuman treatment: In order to constitute inhuman treatment within the statutory provision there must be two ingredients: first, such treatment must be inhuman, and, second, it must be such as to endanger life: *Freerking v. Freerking*, 19-34.

To constitute a cause for divorce on the ground of cruel and inhuman treatment, the treatment must not only be inhuman but must be such as to injure the health and endanger life: *Aitchison v. Aitchison*, 68 N. W., 573; *Carlisle v. Carlisle*, 68 N. W., 681.

It must not be such as is due to the fault of the complaining party: *Carlisle v. Carlisle*, 68 N. W., 681.

In an action for divorce on the ground of inhuman treatment, past treatment is not of itself a ground, and is material only as showing a just foundation for the apprehended danger to life. Threats of violence, where there is danger of harm to the life, will be sufficient; but threatened injury, causing apprehension of bodily harm merely, will not be sufficient. The question is whether there is reasonable apprehension of danger to the life: *Beebe v. Beebe*, 10-133.

Although it is not shown that any act has been done in the way of an attempt to inflict the apprehended injury, yet the court may see that there is danger in such case as well as though there had been many attempts: *Ibid.*

There may be inhuman treatment endangering life, although no physical injury is shown to have been sustained. Therefore, *held*, that where the husband had searched for a revolver with the intention of killing his wife, her life had been in danger within the meaning of the statute, and her husband had exhibited such a criminal disposition that her life would continue to be in danger if she continued to live with him, and she was entitled to a divorce: *Sackrider v. Sackrider*, 60-397.

Treatment calculated to affect the mind of plaintiff so as to destroy her health and ultimately endanger her life, or which involves by natural consequence a permanently injurious and prejudicial effect upon her health, will be sufficient: *Caruthers v. Caruthers*, 13-266; *Cole v. Cole*, 23-433.

Cruel treatment will not justify a divorce unless it be such as to furnish reasonable ground to apprehend physical danger in the further continuance of the marriage relation, and must not be such as is caused by the party's own misconduct: *Knight v. Knight*, 31-451.

The acts complained of must be of such a nature as to justify a belief that the continuance of cohabitation would be dangerous to her life and health: *Vanduzer v. Vanduzer*, 70-614.

Persistent abuse of the wife in the presence of her children, and also in the presence of neighbors and others, by applying to her epithets imputing to her unchastity, must

necessarily wound the feelings and utterly destroy her peace of mind in such sense as to impair her bodily health. *Wheeler v. Wheeler*, 53–511.

A long continued course of ill treatment, even without physical violence, may be such as to endanger the life of a wife who is subjected thereto: *Doolittle v. Doolittle*, 78–691.

The habitual use of vile epithets by the husband towards the wife, accompanied with threats of physical violence and occasional acts of violence, *held* sufficient under the circumstances to entitle the wife to a divorce: *Douglass v. Douglass*, 81–258.

In a particular case, *held*, that insulting and abusive language and acts of violence, were not sufficient to warrant a decree of divorce on the ground of cruel treatment: *Potter v. Potter*, 75–211.

In an action for divorce on the ground of inhuman treatment endangering life, in a particular case, *held*, that the evidence failed to show that the conduct complained of by plaintiff had any serious or permanent effect upon her health and a divorce was properly denied: *McKee v. McKee*, 77–464.

In a particular case, *held*, that the evidence did not show such cruel and inhuman treatment as to entitle the wife to a divorce: *Gilbertson v. Gilbertson*, 78–755.

In an action for divorce upon the ground of inhuman treatment, where the testimony showed frequent contentions and disputes for which both were to blame, but failed to sustain the charge of inhuman treatment, *held*, that a divorce was properly denied: *Edgerton v. Edgerton*, 79–68.

In a particular case, *held*, that while the husband had been coarse and brutal, yet the wife had shown such lack of regard for his feelings that the court could not consider her nature so sensitive to harsh and even obscene language that her life had been put in danger by hearing it: *Evans v. Evans*, 82–462.

Proof that the husband at the time of the inhuman treatment complained of was insane will defeat divorce on that ground: *Tiffany v. Tiffany*, 84–122.

Where the cruelty complained of was personal violence and it appeared that such violence was used in resistance to violence by plaintiff, *held*, that there was no ground for divorce: *Owen v. Owen*, 90–365.

Charges by the husband against the wife of unchastity, based upon conduct on the part of the wife warranting a belief on the husband's part of their truth, do not constitute such cruelty as to entitle the wife to divorce: *Coulthard v. Coulthard*, 91–742.

Conduct of a wife towards a husband in a particular case not involving violence, *held* not to be such as to entitle him to a divorce for inhuman treatment. While there may be inhuman treatment without physical violence, yet conduct due to ill health, weakness, or disease, or mere inexcusable whim, or caprice, not involving intentional injury cannot be so construed: *Ennis v. Ennis*, 92–107.

Under the evidence in a particular case, *held*, that there was such showing of personal violence as to warrant a decree of divorce to the wife and to show reason for the wife's leaving the husband so that her desertion was not a ground of divorce to the husband: *Schichtl v. Schichtl*, 88–210.

Evidence in a particular case, *held* not sufficient to show such cruelty on the part of the husband as to entitle the wife to divorce, the acts of cruelty complained of having been committed two years prior to the separation of the parties: *Felton v. Felton*, 62 N. W., 677.

To constitute cruel and inhuman treatment such as to be a cause for divorce the conduct must not only be inhuman but such as to injure health. But where a continuation of cohabitation under the circumstances would impair the health and imperil the life of the wife she is entitled to a divorce: *Prather v. Prather*, 68 N.W., 806.

Where it appeared that from the time differences arose between husband and wife he was continually neglectful of his social duties to his family, was not helpful in caring for the children, was sullen, reserved in his communications with his wife, harsh in his language when angry, not at all thoughtful as to the health and comfort of his wife as he should have been, and exacting and dictatorial, *held*, that there was sufficient showing for divorce on the ground of cruel and inhuman treatment. Treatment by the husband calculated to affect the mind of the wife so as to destroy her health and ultimately endanger her life and which involves by natural consequences a permanently injurious and prejudicial effect upon her health perilous to life, will be sufficient: *Aitchison v. Aitchison*, 68 N. W., 573.

Facts considered and *held* insufficient to establish cruel and inhuman treatment. Under the facts, *held*, that the plaintiff had deserted her husband: *Briggs v. Briggs*, 71 N. W., 198.

In an action for divorce on the ground of cruel and inhuman treatment endangering life, *held*, that the facts established by the only corroborating witness in connection with the testimony of plaintiff were not such as to entitle her to a divorce: *Potter v. Potter*, 75–211.

Inhuman treatment which is the result of insanity will not be a ground of divorce: *Wertz v. Wertz*, 43–534.

Acts of cruelty, coupled with failure to furnish suitable food and clothing, *held* sufficient, in a particular case, to constitute ground for divorce: *Harnett v. Harnett*, 55–45.

Evidence in a particular case, *held* sufficient to show cruel and inhuman treatment on the part of the husband entitling the wife to divorce: *Platner v. Platner*, 66–378; *Sesterhen v. Sesterhen*, 60–301.

In a particular case, *held*, that the evidence was not sufficient to show such cruel and inhuman treatment as to entitle the wife to a divorce: *Rivers v. Rivers*, 60–378; *Whaley v. Whaley*, 68–647; *Maben v. Maben*, 72–658.

Failure of the husband to contribute or to offer to contribute anything to the support of the wife and child considered as bearing on the question of cruel and inhuman treatment: *Hart v. Hart*, 74–487.

The facts showing the treatment is inhuman, and such as to endanger life, must be stated. General allegations to that effect will not be sufficient: *Freerking v. Freerking*, 19–34.

To entitle complainant to a divorce on the ground of inhuman treatment it is enough to show that fact, although the specifications of the petition are not proved as laid: *Cole v. Cole*, 23–433.

Misconduct of plaintiff: While plaintiff may be denied relief on the ground of misconduct, notwithstanding the wrong charged on the part of defendant, yet, in a particular case, *held*, that the misconduct of plaintiff was not such as to show that she was not entitled to relief: *Marsh v. Marsh*, 64–667.

Condonation: Sexual intercourse of a wife with her husband after suit was commenced against the husband on the ground of cruel treatment endangering life, *held*, not to be a condonation, where it was procured by the husband without the wife's voluntary consent: *Harnett v. Harnett*, 55–45.

The fact that a wife seeking divorce remains in the same house with her husband and does the household work for the husband does not amount to condonation sufficient to defeat her action: *Harnett v. Harnett*, 59–401.

And *held*, that the wife would not be required to reconvey the property conveyed to her under the agreement, especially as she claimed nothing in the way of alimony: *Ibid.*

In a particular case, *held*, that cohabitation after commencement of suit for divorce did not constitute a condonation such as to defeat the action, in view of subsequent conduct of defendant: *Douglass v. Douglass*, 81–258.

The rule that cohabitation constitutes a condonation is of very doubtful merit in cases of cruelty, and unless the court is satisfied that the danger which is the basis for the separation no longer exists. The doctrine should be applied with caution where the object of the decree is safety to life: *Ibid.*

In a particular case, *held*, that the condonation of the wife in regard to adultery of the husband was not such as to show assent thereto on her part: *Cochran v. Cochran*, 35–477.

Where an action by the wife for divorce was dismissed upon an agreement of the husband to convey to plaintiff certain property, and to abstain from the use of intoxicating liquors, and the contract was reduced to writing, but the agreement to abstain was, by an oversight, omitted; and the property was conveyed, but the promise to abstain from drinking was not kept by defendant, who again became habitually intoxicated, in a new action for divorce upon the same ground *held*, that the condition to abstain from drinking should be regarded as part of the contract, and that such agreement was no bar to the second action for divorce: *Lewis v. Lewis*, 75–200.

Facts in a particular case, *held* not sufficient to show condonation: *Sesterhen v. Sesterhen*, 60–301.

SEC. **3175. Husband from wife.** The husband may obtain a divorce from the wife for like cause, and also when the wife at the time of the marriage was pregnant by another than the husband, of which he had no knowledge, unless such husband had an illegitimate child or children then living, which at the time of the marriage was unknown to the wife. [C.'73, § 2224, R., § 2535; C.'51, § 1483.]

Where a woman is pregnant by another man at the time of their marriage, and such fact is unknown to the husband, he is under no legal obligation to live with his wife: *Brannum v. O'Conner*, 77–632.

SEC. **3176. Cross-petition.** The defendant upon a cross-petition may obtain a divorce for either of the causes stated in the second preceding section, and if the husband is defendant he may, in addition to those causes, have a like decree for the cause stated in the last section. [C.'73, § 2225.]

The cross-petition here contemplated may be based on causes of divorce occurring subsequently to the commencement of the original action: *Wilson v. Wilson*, 40–230.

The cross-petition for a divorce by defendant is to be regarded as a counter-claim: *Ibid.*

SEC. **3177. Maintenance during litigation.** The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action. [C.'73, § 2226.]

Temporary alimony: To warrant an order granting temporary alimony the fact of marriage between the parties must be admitted or proved: *York v. York*, 34–530.

In a proceeding to vacate a decree of divorce the court has no power to require defendant to pay plaintiff a sum of money to enable her to prosecute the action. To authorize such an order it is essential that the marriage relation should exist: *Wilson v. Wilson*, 49–544.

But the acts of the parties in living together again as husband and wife, after a divorce, were held sufficient to establish such marital relation as to justify the granting of an order for temporary alimony: *McFarland v. McFarland*, 51–565.

The proof of marriage in a particular case,

held sufficient to authorize the allowance of temporary alimony: *Smith v. Smith*, 61–138.

Upon the question of an allowance of suit money plaintiff is not bound to show that she is entitled to a divorce. The making of such allowance is a matter of discretion, and the appellate court will not set it aside unless it shall appear that the discretion has been abused: *Campbell v. Campbell*, 73–482.

Orders made for temporary alimony for support of the wife and for attorney's fees cannot be regarded as a final adjudication as to the rights of the parties: *Clyde v. Peavy*, 74–47.

Temporary alimony is not allowed in an action in the nature of a proceeding to set aside a voidable decree of divorce: *Shaw v. Shaw*, 92–722.

By court, not judge: The power to make the order for temporary alimony is conferred upon the court, and not upon the judge in vacation: *Prosser v. Prosser*, 64–378.

In a proceeding for support: Where the wife brings action for support without divorce, a temporary allowance may be made for the prosecution of the action in the same manner as provided by statute in proceedings for divorce: *Finn v. Finn*, 62–482; *Simpson v. Simpson*, 91–235.

Application; allowance: If the application for temporary alimony does not fairly present the facts necessary to enable the court understandingly to pass upon it, all the inferences and presumptions which naturally arise out of the defect of such application will be indulged in against the party making it. But the opposite party cannot, by motion for more specific statement, require the number, names and residences of witnesses, and facts expected to be proved by each, to be shown to the court in determining the proper amount to be allowed for the purpose of enabling the cause to be tried. In a particular case, *held*, that the allowance for temporary alimony was excessive: *Champlin v. Champlin*, 42–169.

The court may have jurisdiction to make an order as to temporary alimony, although the averments of the petition are not verified as required by § 3173: *Van Duzer v. Van Duzer*, 65–625.

Temporary alimony may be granted to either party in a divorce proceeding as against the other; and, in a particular case, where the husband sought a divorce from the wife, *held*, that an allowance of temporary alimony to the wife was proper: *Small v. Small*, 42–111.

An allowance to the wife of the means of defraying expenses of a suit in which she is plaintiff may properly be made: *Briggs v. Briggs*, 36–383.

But *held*, that the amount allowed in a particular case was excessive: *Ibid.*

In a particular case, *held*, that an allowance of three hundred dollars for attorneys' fees for the prosecution of the action, and two hundred dollars for the payment of witness fees and other expenses, to be paid over to the clerk and used for that purpose, together with an allowance of twenty-five dollars per month for the support of plaintiff during the action, was not excessive: *Van Duzer v. Van Duzer*, 65–625.

Where an allowance was made on the application of the wife as defendant, to enable her to prosecute an appeal from a decree denying her a divorce on her cross-petition, and no such appeal was prosecuted by her, *held*, that on an appeal of the husband the allowance to the wife would be set aside: *Peavey v. Peavey*, 76–443.

In a particular case, *held*, that allowance for support pending appeal was not proper, and that the allowance made in the case was excessive: *Miller v. Miller*, 43–325.

In a particular case an allowance to the wife was upheld: *Maben v. Maben*, 67–284.

The husband cannot offset as against the amount which he is required to pay as temporary alimony the value of household goods appropriated by the wife: *Dayton v. Drake*, 64–714.

An agreement for division upon separation will not preclude the wife in a suit for divorce from having an allowance of suit money: *Cambell v. Campbell*, 73–482.

Marriage essential: As a general rule allowance of alimony either temporary or permanent is based upon the existence of the marital relation, and if such relation is not admitted or established by satisfactory evidence, no allowance can be made: *Shaw v. Shaw*, 92–722.

The court may upon the pleadings, affidavits and other proofs presented pass upon the existence of the marriage for the purposes of the application, and is not bound by the allegations of the petition and the denials of the answer. If the proofs taken together make out a fair presumption of the existence of the marriage relation, alimony may be granted: *Ibid.*

In an application for an allowance of temporary alimony, defendant set up a divorce procured in another state, the decree therein reciting the necessary notice by publication; *held*, that this showing was not sufficiently overcome by the mere allegations and denials made by plaintiff on oath, and that there was not such showing of the existence of the marriage relation as to sustain the order for an allowance of temporary alimony: *Ibid.*

Failure to pay: While failure of plaintiff to pay a sum ordered by the court to be paid to defendant to enable her to defend and to establish her innocence may well be punished by dismissing the action or striking the petition from the files, a similar failure of defendant to pay a sum similarly ordered to plaintiff should only in extreme cases be punished by striking the answer from the files. A full investigation of the merits should not thus be prevented, if the party can show a good excuse, such as misfortune or poverty, for failure to comply with the order: *Peel v. Peel*, 50–521.

Failure to pay money awarded as temporary alimony, and for which judgment has been rendered, does not constitute contempt depriving defendant of the right to file a pleading in the case: *Bailey v. Bailey*, 69–77; *Allen v. Allen*, 72–502.

Custody and support of children: Pending a proceeding for divorce the court has power to provide for the custody and maintenance of children, and may take them from

the custody of the father, defendant, if he is shown to be an unfit person: *Green v. Green*, 52–403.

An appeal may be taken from an order allowing temporary alimony: *Blair v. Blair*, 74–311.

Attorneys' fees: See notes to § 3180.

SEC. **3178. Attachment.** The petition may be presented to the court or judge for the allowance of an order of attachment, who, by indorsement thereon, may direct such attachment and fix the amount for which it may issue, and the amount of the bond, if any, that shall be given. Any property taken by virtue thereof shall be held to satisfy the judgment or decree of the court, but may be discharged or released as in other cases. [C. '73, § 2227.]

The provisions as to attachment in ordinary actions are not applicable to the attachment here authorized: *Smith v. Smith*, 61–138.

In a particular case, *held*, that an attachment without a bond was properly allowed: *Ibid.*

The remedy by attachment is not exclusive of that by injunction, to restrain the disposition of property by the defendant: *Wharton v. Wharton*, 57–696.

The attachment may be levied on the homestead: *Daniels v. Morris*, 54–369.

Such an attachment may be granted in a suit to annul a legal marriage as well as in one for a divorce: *Ibid.*

This attachment will not affect a lien of a creditor of the husband whose judgment is obtained prior to the decree; nor can the decree be dated back to the time of attachment so as to cut out intervening judgments: *Daniels v. Lindley*, 44–567.

It is not improper to allow an attachment to compel the performance of an order to pay temporary alimony, on the ground that it interferes with the power of defendant to comply with the order for alimony, it appearing that the means of defendant are ample without taking into consideration the property attached: *Van Duzer v. Van Duzer*, 65–625.

A conveyance of property made and accepted with the purpose of putting such property beyond the reach of an attachment for temporary alimony is fraudulent and invalid: *Picket v. Garrison*, 76–347.

The filing of a petition for divorce and asking judgment for alimony and that it be made a lien on defendant's real estate does not create a lien on particular property, nor is it sufficient to give notice to third parties: *Scott v. Rogers*, 77–483.

Upon a proper showing, the party seeking divorce will be entitled to an injunction to restrain the other party from disposing of property until the final disposition of the action: *Dullard v. Phelan*, 83–471.

SEC. **3179. Showing.** In making such orders, the court or judge shall take into consideration the age and sex of the plaintiff, the physical and pecuniary condition of the parties, and such other matters as are pertinent, which may be shown by affidavits, in addition to the pleadings or otherwise, as the court or judge may direct. [C. '73, § 2228.]

SEC. **3180. Alimony—custody of children—changes.** When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right. Subsequent changes may be made by it in these respects, when circumstances render them expedient. [C. '73, § 2229; R., § 2537; C. '51, § 1485.]

Custody of children: A provision under a decree giving to one of the parties the custody of children ceases to have any effect upon the death of such party. The right of such custody cannot survive the death of the party entitled thereto, nor be transferred to any other person, and upon such death, the other parent stands in such relation to such children as he would have occupied had such decree never been made: *Barney v. Barney*, 14–189.

Where the parents were divorced, and it appeared that the mother was not a proper person to have the custody of her child, *held*, that it was error to intrust the child to the custody of a brother of the mother, where there was no evidence to show that he was a proper person, or that the father was not a suitable person, to have the custody of the child: *Farrer v. Farrer*, 75–125.

Under the circumstances of a particular case, *held* proper to give the custody of children four and five years of age to the mother on a decree of divorce in her favor against the father: *Atchison v. Atchison*, 68 N. W., 573.

As to provisions for custody of children in particular cases, see *Hunt v. Hunt*, 4 G. Gr., 216; *Cole v. Cole*, 23–433; *Zuver v. Zuver*, 36–190.

Permanent alimony: The power to allow alimony is an incident of the power to grant a divorce, and such relief may be given in an action for divorce, although there is no statement in the original notice of any claim therefor: *McEwen v. McEwen*, 26–375.

And this is true although service of notice is had by publication only; and in such case the court may declare and enforce a lien for alimony against real estate of the defendant situated in another county: *Harshberger v. Harshberger*, 26–503.

Alimony, custody of the children, etc., may be regulated by order of the court, although no reference thereto is made in the pleadings: *Zuver v. Zuver*, 36–190.

The party to whom the divorce is granted

cannot have any further right or interest in the property of the other party than that which is given under this section, and cannot claim any share by way of dower in case of survival: *Marvin v. Marvin*, 59-699; *Boyles v. Latham*, 61-174.

An agreement for settlement in view of separation will not bar a claim for alimony in a subsequent action for divorce: *Wilson v. Wilson*, 40-230. But such agreement may be taken into account in determining the amount of alimony to be allowed: *Campbell v. Campbell*, 73-482.

Alimony is an allowance out of the estate of the husband for the maintenance of the wife after the dissolution of the marriage relation. The right to alimony is not property in itself, and a contract between the husband and the wife by which the wife accepts a provision in lieu of alimony may be binding: *Martin v. Martin*, 65-255.

The relation of husband and wife must exist either *de jure* or *de facto* to justify an order for alimony: *Blythe v. Blythe*, 25-266.

In a particular case, *held*, that an allowance of $2,500 as permanent alimony in favor of the wife, on a decree of divorce against the husband, who was shown to be well to do, was proper: *Day v. Day*, 84-221.

Amount of alimony in particular cases, *held* not excessive under the circumstances: *Doolittle v. Doolittle*, 78-691; *Douglass v. Douglass*, 81-258.

The liability of the wife to the husband for the payment of a debt cannot be set off against her claim for alimony in a divorce proceeding: *Parker v. Albee*, 86-46.

Therefore, a husband will not be barred from setting up such claim against the wife, in a subsequent suit brought by an assignee of the wife, on the judgment granting such alimony: *Ibid.*

When allowance of alimony proper: Where the wife, without sufficient excuse, had left the husband, and the latter had afterwards committed adultery, for which a divorce was granted the wife, *held*, that she was also entitled to alimony: *Dupont v. Dupont*, 10-112.

Where a divorce is granted the husband on account of the adultery of the wife, she will not be entitled to alimony unless under peculiar circumstances: *Fivecoat v. Fivecoat*, 32-198.

Alimony is rarely and only under peculiar circumstances granted to the party in fault, even when that party is the wife; and where a suit was brought by the husband against the wife for divorce on the ground of inhuman treatment, and the wife in a cross-petition asked divorce from the husband on the same ground, and divorce was granted to the wife and denied to the husband, *held*, that it was error to allow to the husband a sum as alimony and make it a lien on the homestead which was in the wife's name and acquired from her separate means: *Barnes v. Barnes*, 59-456.

Under particular facts where the wife procured divorce from her husband for intoxication and adultery, *held*, that although the wife at the time of marriage and also at the time of divorce was the owner of property and the husband was and remained without property there was no ground for giving the husband alimony: *Abel v. Abel*, 89-300.

As to the amount and kind of alimony proper to be allowed under particular circumstances, see *Abey v. Abey*, 32-575; *Farley v. Farley*, 30-353.

Allowance in a particular case, *held* not excessive: *Sesterhen v. Sesterhen*, 60-301.

In a particular case, *held*, that the divorce had been improperly granted, but no objection to the divorce being raised on appeal, but only an objection to the alimony, the amount thereof was disallowed: *Ensler v. Ensler*, 72-159.

Allowing specific property: The court may give the wife as alimony a specific portion of the husband's property in fee: *Jolly v. Jolly*, 1-9. But see *contra*, *Russell v. Russell*, 4 G. Gr., 26.

While it is entirely competent for the court to give to the wife a portion of the husband's property absolutely and in her own right, this should not be done if the husband is in condition to pay money, unless there is something in the condition of the wife which would render it equitable and just to give her the property in lieu of money: *Inskeep v. Inskeep*, 5-204, 221.

It is competent for the court to set apart for the plaintiff a specific portion of the defendant's estate as alimony, and this may be done even though no prayer to have this specific property set off as alimony is contained in the petition, and notice of the action is served by publication only: *Twing v. O'Meara*, 59-326.

The various cases in Iowa relating to the proportion of the husband's property which can be given to the wife as alimony discussed, and *held*, that in no case had more than about one-third of such property been set apart in that manner, and that where the wife was the defendant against whom divorce was decreed, the proportion should be less: *Zuver v. Zuver*, 36-190.

Liability of homestead: The court may, in rendering judgment for alimony in an action for divorce, declare such judgment a lien upon the homestead of the opposite party; but such lien cannot be extended to cover the costs taxed in the case: *Wilson v. Wilson*, 40-230.

Where the husband was given the custody of the children and a general judgment for alimony was rendered in favor of the wife, *held*, that such judgment could not be enforced against the homestead which the husband and children continued to occupy: *Byers v. Byers*, 21-268.

But where the decree makes the alimony a lien upon specific property, the fact that such property is a homestead cannot be taken advantage of after decree. It should be set up in the action: *Hemenway v. Wood*, 53-21.

Lien of judgment: Under peculiar facts indicating fraud on the part of the mortgagee under a mortgage in which the wife did not join, *held*, that a decree directing the allowance of alimony should be a lien upon the premises prior to such mortgage: *Sesterhen v. Sesterhen*, 60-301.

A judgment for alimony declared a lien as against property of defendant in another county will take priority over a subsequent attachment of such property, although the attachment is prior to the filing of a transcript ot the lien in the county where the property is situated: *Harshberger v. Harshberger*, 26-503.

Setting aside decree: A decree of divorce may be set aside for fraud in obtaining it, although plaintiff has remarried and the rights of subsequent innocent parties have intervened: *Whitcomb v. Whitcomb*, 46-437; *Rush v. Rush*, 46-648; *S. C.*, 48-701.

A decree of divorce which is subsequently declared void for fraud in its procurement is no defense to a prosecution for adultery in cohabiting with a woman to whom the party securing the divorce was married after the divorce was granted and before it was set aside. Such a decree is void, not merely from the time of setting aside, but from the beginning: *State v. Whitcomb*, 52-85.

Where a wife procured a decree of divorce in this state by publication, and defendant, after having known for nearly a year of such decree and having himself procured a decree of divorce from his wife in another jurisdiction, and after the wife had remarried, commenced proceedings to set aside the wife's divorce on the ground of fraud and obtained a new trial, *held*, that he had no interest in the matter entitling him to any relief, especially in view of the fact that he had taken no steps after learning of the decree to assert any rights as against it until after the remarriage of the former wife: *Webster v. Webster*, 54-153.

Costs; attorneys' fees: The court may tax an attorney's fee as part of the costs in favor of the successful party, but such item of costs cannot be made a lien upon the homestead of the opposite party: *Wilson v. Wilson*, 40-230.

The attorney for the wife defending a divorce suit may recover his fees from the husband as for necessaries furnished the wife: *Porter v. Briggs*, 38-166. But see *contra*, *Johnson v. Williams*, 3 G. Gr., 97.

An attorney who brings an action for divorce in behalf of the wife against the husband may recover attorneys' fees from the husband upon showing that he acted in good faith, and that there was no collusion or oppression in the bringing of the action. He is not required to establish that the wife was entitled to a divorce: *Preston v. Johnson*, 65-285.

The law does not imply liability of the husband as to attorney's fees for services rendered to the wife in a divorce proceeding brought by her in which she is unsuccessful and which was not necessary for her protection: *Sherwin v. Maben*, 78-467.

The supreme court may, on appeal, allow to the wife a reasonable attorney's fee for prosecuting the case on an appeal of the husband from a decree of divorce in her favor: *Doolittle v. Doolittle*, 78-691.

An allowance of temporary alimony to the wife will not defeat recovery by her attorney from the husband of an additional sum: *Clyde v. Peavy*, 74-47.

Abatement by death: Upon the death of the defendant, a proceeding for divorce abates, and with it all claim for alimony: *O'Hagen v. O'Hagen's Ex'r*, 4-509; *Barney v. Barney*, 14-189.

Suit for alimony without divorce: A court of equity will entertain a suit for alimony alone, without divorce, where the wife is separated from the husband on account of misconduct on his part justifying the separation: *Graves v. Graves*, 36-310; *Whitcomb v. Whitcomb*, 46-437; *Finn v. Finn*, 62-482; *Farber v. Farber*, 64-362; *Platner v. Platner*, 66-378.

A wife who without fault is not supported by her husband in accordance with their means and station in life may maintain an action for such support without asking for divorce: *Simpson v. Simpson*, 91-235.

A wife resident in Iowa, against whom a valid decree of divorce is rendered in another state according to the laws of that state, cannot afterwards maintain an action in Iowa for alimony out of property not belonging to her former husband at the time of the granting of such divorce: *Van Orsdal v. Van Orsdal*, 67-35.

An action for alimony cannot be maintained as an independent proceeding after the divorce of the parties: *Wilde v. Wilde*, 36-319.

Subsequent changes: The provision as to allowance of alimony, etc., is doubtless declaratory of the common law, but the portion of the section authorizing subsequent changes to be made by the court in these respects, when circumstances render them expedient, doubtless effectuates a change in the law or at least in the method of enforcing it: *Fivecoat v. Fivecoat*, 32-198.

The right to a change in a previous decree as to alimony does not exist after the death of the party against whom the change is sought, and proceedings already commenced therefor abate upon the death of such party: *O'Hagan v. O'Hagan's Ex'r*, 4-509.

The power of the court to modify the decree is not limited to one year after the rendition thereof, but it retains jurisdiction for that purpose as long as the original judgment remains unexecuted and under its control, and even though the parties may have removed from the state: *Andrews v. Andrews*, 15-423.

The time and manner of application for subsequent changes are left largely within the discretion of the court: *Jungk v. Jungk*, 5-541.

The provisions in the original decree as to alimony, custody of children, etc., are conclusive as to the circumstances of the parties at that time, and it is only upon a change in such circumstances that the power to make subsequent changes in the decree is to be exercised. The power to make such changes is not a power to grant a new trial or retry the same case: *Blythe v. Blythe*, 25-266; *Wilde v. Wilde*, 36-319.

Where plaintiff in a former action had procured a divorce and the custody of her child, and a definite amount as alimony, and where it was shown that prior to the decree of divorce the parties had agreed that in case a divorce was granted plaintiff should have

the custody of the child, and the amount decreed as her share of the property, *held*, in a subsequent action, that she was not entitled to an additional amount to be paid at stated intervals toward the support of the child, where it was not shown that there had been any change in the circumstances of the parties: *White v. White*, 75–218. And see *Reid v. Reid*, 74–681.

Where the matter of alimony has once been fairly settled, an application for a change ought to be carefully scrutinized, and where an alteration of circumstances is alleged, the court will consider whether it has been brought about by improper conduct of the party asking the change: *Fisher v. Fisher*, 32–20.

Where a divorce was granted after due acceptance of service by defendant and upon default, and no alimony was claimed or intended to be claimed, *held*, that defendant could not, in a subsequent proceeding, have a modification of the decree, so as to allow alimony: *Rouse v. Rouse*, 47–422.

Whether any other court than the one granting the divorce can make subsequent changes in the provisions of the decree, *quære*. But the jurisdiction of the court granting the divorce is not exclusive in such sense that a judge of another court cannot make an order in a *habeas corpus* proceeding as to the custody of a child, and the judge of the court granting the divorce cannot interfere with such order in the *habeas corpus* proceeding: *Shaw v. McHenry*, 52–182.

The statutory provision as to subsequent change of decree evidently contemplates a proceeding brought for the purpose of obtaining such change. In the absence of this being done, a decree entered must amount to an adjudication. Therefore, *held*, that the rights of a parent to the custody of the children as provided for in the decree of divorce not having been waived or surrendered, and the parent still being in condition to take care of and have the custody of the children, such decree could not be attacked or changed in a collateral proceeding for such custody: *Jennings v. Jennings*, 56–288.

The facts in a particular case, *held* sufficient to show that the father, to whom the custody of children was given in a decree of divorce against him, was not a proper person to have charge of them, and a change in the decree was made, giving the custody of the children to the wife and awarding her alimony for their keeping: *Boggs v. Boggs*, 49–190.

Circumstances of a particular case, *held* sufficient to justify modification of a decree of divorce, so as to change the custody of a child from one parent to another: *Sherwood v. Sherwood*, 56–608.

The provision allowing subsequent changes in the decree, *held* applicable under previous statutes to divorces *a vinculo matrimonii*, as well as those *a mensa et thoro*: *Jungk v. Jungk*, 5–541.

A judge has no authority in vacation without notice to change the terms of a decree and an attempt to do so may be corrected by *certiorari*: *Hamman v. Van Wagenen*, 62 N. W., 795.

SEC. **3181. Forfeiture of rights.** When a divorce is decreed the guilty party forfeits all rights acquired by the marriage. [C.'73, § 2230; C.'51, § 1486.]

A decree of divorce against the wife as the guilty party bars any claim to dower in the property of the husband: *McCraney v. McCraney*, 5–232, 250.

SEC. **3182. Annulling illegal marriages—causes.** Marriage may be annulled for the following causes:

1. Where the marriage between the parties is prohibited by law;
2. Where either party was impotent at the time of marriage;
3. Where either party had a husband or wife living at the time of the marriage, provided they have not, with a knowledge of such fact, lived and cohabited together after the death of the former spouse of such party;
4. Where either party was insane or idiotic at the time of the marriage. [C.'73, § 2231.]

Husband or wife living: The presumption of death of the husband does not arise until he has been absent without intelligence concerning him for seven years. Whether cohabitation by the wife with a husband, under a marriage celebrated before the expiration of this period, continued until after such expiration, will constitute a valid marriage, *quære: State v. Henke*, 58–457.

A marriage which is void *ab initio*, by reason of a former wife of the husband being alive, has no effect upon the property rights of the parties, and they stand in the same relation as though it had never occurred: *Carpenter v. Smith*, 24–200.

Effect of void marriage: Marriage of a person having a husband or wife living is void, and therefore where a woman having married a man having a wife living, subsequently married a husband who afterwards died, *held*, that she was the widow of such deceased: *Drummond v. Irish*, 52–41.

Fraud: A marriage contract rests upon the consent of the parties thereto, and if one of them is legally incapable of consenting, or by the exercise of fraud or force the marriage was celebrated without his or her consent, it is void, and may be so declared by a court of chancery, but the force or fraud relied upon must be clearly established. Mere false representations by one of the parties as to his fortune, character or social standing will not avoid the marriage: *Wier v. Still*, 31–107.

Even in the absence of any statutory provision, a marriage may be declared void for

fraud and force which induced its consummation: *Shaw v. Shaw*, 92–722.

Action to annul: Where a marriage is by provision of law absolutely void, and not merely voidable, it is not necessary that an action to annul it be brought before a subsequent legal marriage can be made: *Drummond v. Irish*, 52–41.

Impotency, insanity and idiocy are not grounds for divorce: *Wertz v. Wertz*, 43–534.

SEC. **3183. Petition.** A petition shall be filed in such cases as in actions for divorce, and all the provisions of this chapter in relation thereto shall apply to such cases, except as otherwise provided. [C. '73, § 2232.]

SEC. **3184. Validity determined.** When the validity of a marriage is doubted, either party may file a petition, and the court shall decree it annulled or affirmed according to the proof. [C. '73, § 2233.]

SEC. **3185. Children—legitimacy.** When a marriage is annulled on account of the consanguinity or affinity of the parties, the issue shall be illegitimate; if because of the impotency of the husband, any issue of the wife shall be illegitimate; but when on account of non-age, insanity or idiocy, the issue will be legitimate as to the party capable of contracting the marriage. [C. '73, § 2234.]

SEC. **3186. Prior marriage.** When a marriage is annulled on account of a prior marriage and the parties contracted the second marriage in good faith, believing the prior husband or wife to be dead, that fact shall be stated in the decree of nullity, and the issue of the second marriage begotten before the decree of the court will be the legitimate issue of the parent capable of contracting. [C. '73, § 2235.]

SEC. **3187. Alimony.** In case either party entered into the contract of marriage in good faith, supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree, and the court may decree such innocent party compensation as in cases of divorce. [C. '73, § 2236.]

In an action to annul a marriage plaintiff may have alimony as in an action for divorce. In a proper case an attachment may issue as provided in § 3178 in cases of divorce: *Daniels v. Morris*, 54–369.

One who enters into the marriage relation with another under the belief that the latter is sane cannot be held to be affected with notice of insanity by reason of the record of the proceedings for the appointment of a guardian for such person as insane: *Barber v. Barber*, 74–301.

The question of the provision for compensation in a particular case, considered: *Ibid.*

CHAPTER 4.

OF MINORS.

SECTION **3188. Majority.** The period of minority extends in males to the age of twenty-one years, and in females to that of eighteen years; but all minors attain their majority by marriage. [C. '73, § 2237; R., § 2539; C. '51, § 1487.]

The disability of minority is terminated by death, and the year which by § 1439 is allowed a minor for redeeming his land from tax sale after his disability is removed commences from that time and not from the time he would have become of age: *Gibbs v. Sawyer*, 48–443.

If by reason of the minor having attained majority by marriage or by the provisions of § 3190 he is entitled to his own time and earnings, he may, in a suit for injuries, recover damages for loss of time prior to reaching the age of majority: *Nelson v. Chicago, R. I. & P. R. Co.*, 38–564.

SEC. **3189. Contracts—disaffirmance.** A minor is bound not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority, except as otherwise provided. [C. '73, § 2238; R., § 2540; C. '51, § 1488.]

The rule respecting the contract of an infant is, that when the court can pronounce it to be to the infant's prejudice, it is void, and when to his benefit, as for necessaries, it is good, and when of uncertain nature, it is voidable at the election of the infant only: *Green v. Wilding*, 59–679.

At common law the general rule was that the minor was not bound unless by some act he had positively affirmed the contract, but under the statute a disaffirmance within a reasonable time is necessary to release him from obligation: *Wright v. Germain*, 21–585; *Murphy v. Johnson*, 45–57.

What will be a reasonable time within which to disaffirm must be determined by the peculiar circumstances of each case: *Stout v. Merrill*, 35–47.

As to what is a "reasonable time," see *Jenkins v. Jenkins*, 12–195; *Wright v. Germain*, 21–585; *Weaver v. Carpenter*, 42–343.

Where a minor made a contract releasing his prospective share in his father's estate, and upon his becoming of age, by marriage, did not disaffirm such contract within four months following and prior to his father's death, nor until two months after that time, *held*, that the disaffirmance was not within a reasonable time, and that the contract was binding: *Jones v. Jones*, 46–466.

A disaffirmance, after the expiration of six months from the time of attaining majority, *held* not to be within a reasonable time, no circumstances being averred to excuse delay in the disaffirmance: *Hoover v. Kinsey Plow Co.*, 55–668.

Disaffirmance by an action brought three or four years after plaintiff, a female, attained her majority, the only excuse offered for the delay being that she was informed by her mother and neighbors that she could not disaffirm the contract until her minor brother became of age, *held* not within a reasonable time, especially in view of the further facts that she did not ask legal advice, and delayed at least three months after she was informed that she could disaffirm the contract before bringing action: *Green v. Wilding*, 59–679.

In case of the marriage of the minor, a reasonable time for disaffirmance commences to run from the time of such marriage: *Jones v. Jones*, 46–466.

The right of an infant to avoid his contracts is absolute and paramount to all equities in favor of third persons, even purchasers without notice: *Jenkins v. Jenkins*, 12–195.

The restoration of the fruits of the contract is essential to the disaffirmance thereof: *Stout v. Merrill*, 35–47.

But the minor is only bound to restore money or property received by virtue of the contract remaining under his control after attaining majority: *Jenkins v. Jenkins*, 12–195.

The statute makes no distinction as between property and money remaining under the control of the minor. He may disaffirm without tendering back either property or money under his control unless it is the identical property or money received by him by virtue of the contract: *Hawes v. Burlington, C. R. & N. R. Co.*, 64–315.

The agreement of an infant for the repayment of money of which he has had and retains the benefit, not having been disaffirmed within a reasonable time after attaining majority, is binding: *Stucker v. Yoder*, 33–177.

A minor may disaffirm a chattel mortgage by selling the mortgaged property before he comes of age; and if the mortgaged property be taken from his possession under the mortgage without his consent, he may reclaim the same upon the disaffirmance of the contract: *Leacox v. Griffith*, 76–89.

In such cases it is not necessary that the minor return or offer to return the borrowed money, if it is no longer under his control, on becoming of age. He is not required to return money or property received from other sources: *Ibid.*

A disaffirmance of which notice was given to the opposite party within thirty-two days after the infant attained his majority, *held* to be within a reasonable time under the facts of the case: *Ibid.*

The minor may disaffirm his contract before attaining majority. (Overruling *Murphy v. Johnson*, 45–57) *Childs v. Dobbins*, 55–205.

A minor is bound by his deed unless he disaffirms it within a reasonable time after he becomes of age: *Weaver v. Carpenter*, 42–343.

Where a person, many years after becoming of majority, claimed the right to disaffirm, *held*, that he was not entitled to disaffirm upon showing that the deed was procured by fraud, diligence to discover the fraud not being shown: *Ibid.*

Where an infant holds title in trust and is compellable to convey, a voluntary conveyance by him will bind him and cannot be disaffirmed: *Prouty v. Edgar*, 6–353.

The provision as to disaffirmance of a minor's contract has no application to a contract made by a minor as trustee and at the instance of his *cestui que trust: Des Moines Ins. Co. v. McIntire*, 68 N. W., 565.

A minor who is a member of a partnership may disaffirm obligations imposed upon him by contracts of the partnership with others without disaffirming the contract of partnership itself: *Mehlhop v. Rae*, 90–30.

These provisions about disaffirmance have no application to an agreement by a female under majority to accept money paid in settlement with the father of her illegitimate child so as to prevent in such case a proceeding by the state to compel the support of such child: *State v. Baker*, 89–188.

A conveyance by an infant is voidable and not void. If founded on a valuable consideration, it is a valid contract until regularly avoided: *Jenkins v. Jenkins*, 12–195.

A minor who has made a voluntary conveyance of his estate which does not correctly describe the land to be conveyed cannot be held to the execution of a corrected conveyance upon a promise to do so made after his attaining his majority. Such promise being without consideration, the transaction stands as an uncompleted gift: *Oxley v. Tryon*, 25–95.

Where it appeared that defendant, having while a minor made a contract of lease

of a farm, failed to work the farm under the lease, and before and after attaining majority gave notice of the rescission, and plaintiff thereafter took possession of the farm and leased it to another and received the produce, *held*, that the plaintiff could not recover for breach of the contract of lease: *Harrison v. Burns*, 84–446.

SEC. **3190. Misrepresentations—engaging in business.** No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting. [C. '73, § 2239; R., § 2541; C. '51, § 1489.]

The cases enumerated in this section are exceptions to those contracts which may be affirmed as provided in the preceding section: *Oswald v. Broderick*, 1–380.

The fact that an infant is engaged in business as an adult does not make his contracts binding unless the party with whom he contracts is thereby deceived and believes that he is of age. If the fact of minority is known to the other party the minor is not bound: *Beller v. Merchant*, 30–350.

The exception here made as to the power of a minor to disaffirm his contracts by reason of his having engaged in business as an adult applies not only to contracts made by him in the conduct of such business, but to all contracts. The fact that the minor is engaged in business as an adult is evidence authorizing one dealing with him to conclude that he is an adult: *Jaques v. Sax*, 39–367.

Therefore, *held*, that a minor who was a member of a partnership, but without capital invested, and rendering his services only, as his contribution to the capital of the firm, was still to be considered as engaged in business as an adult: *Ibid.*

Where a minor is entitled to his own time and earnings he may recover damages for personal injury prior to the time of attaining majority: *Nelson v. Chicago, R. I. & P. R. Co.*, 38–564, 568.

Emancipation does not enable a minor to acquire by residence a settlement within the provisions of the poor law distinct from that of his father: *Clay County v. Palo Alto County*, 82–626.

SEC. **3191. Payments.** Where a contract for the personal services of a minor has been made with him alone, and the services are afterwards performed, payment therefor made to him, in accordance with the terms of the contract, is a full satisfaction therefor, and the parent or guardian cannot recover a second time. [C. '73, § 2240; R., § 2542; C. '51, § 1490.]

The provisions of this section do not change the rule that the father has the right to the custody, control and services of the minor, and may recover damages against another who deprives him of such right, unless the minor has been emancipated; and even after emancipation the father may reassert his control. The emancipation sets the son free and gives him capacity to manage his own affairs as if of age, and may be shown by circumstances as well as by direct proof: *Everett v. Sherfey*, 1–356.

Where a minor with the consent of the father has engaged in business for himself his earnings are not subject to his father's debts: *Walcott v. Rickey*, 22–171.

A minor may recover under a contract for personal services, and if payment has been made to the minor under such contract it is a full satisfaction for such services and precludes a second recovery by the parent or guardian: *Murphy v. Johnson*, 45–57.

In such case, his next friend has no more right to recover a second time for such services than a parent or guardian has: *Ibid.*

If a minor has been paid for his personal services according to contract, his parent or guardian cannot recover a second time therefor: *Nixon v. Spencer*, 16–214.

Where a contract is made with a minor under the belief that he is of age and payment is made to him, the parent may be still entitled to recover the amount so paid, although as against the minor the contract is binding: *Darling v. Noyes*, 32–96.

Where a parent contracted with another for the custody and support of his minor child, *held*, that the minor might bring suit for breach of the contract to support, the parent, suing as next friend of the minor, thereby waiving any right of action in his own behalf: *Gooden v. Rayl*, 85–592.

CHAPTER 5.

OF THE GUARDIANSHIP OF PERSONS AND PROPERTY.

SECTION **3192. Natural guardian.** Parents are the natural guardians of the persons of their minor children, and equally entitled to their care and custody. [C. '73, § 2241; R., § 2543; C. '51, § 1491.]

Natural guardians: A minor is not bound by any contract made for him by his parent as natural guardian, without formal guardianship having been granted: *Jones v. Jones*, 46–466.

A step-father of minor children who are

members of his family stands *in loco parentis* to such children: *Latham v. Myers*, 57–519.

But such stepfather, although the natural guardian, is under no obligation to preserve their property by paying off incumbrances thereon, and is not debarred from acquiring title to such property under foreclosure proceedings: *Otto v. Schlapkahl*, 57–226.

The mother as surviving parent is the natural guardian of her minor children, and in the absence of a guardian of their property is entitled to manage such of their property as is derived from the deceased parent: *Wood v. Murray*, 85–505.

The maternal grandfather is the natural guardian of a minor whose parents and other nearer relatives are deceased, and such natural guardian may change the domicile of the child from one state to another, so far at least as to give the probate court in the new domicile, jurisdiction to appoint a guardian: *In re Benton*, 92–202.

Where in such case a guardianship has been properly granted in another state, there is no occasion to continue guardianship in this state: *Ibid.*

As to removal of natural guardian for misconduct, see §§ 3246–8.

Liability for support: The duty of a parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty, but the liability of a child to support its parent when indigent, destitute or aged, is wholly created by statute, and therefore an express promise on the part of the child to pay for past expenditures made by a third person for the parent is not binding on the child: *Dawson v. Dawson*, 12-512.

While the obligation of parents to support their children at common law is somewhat uncertain, ill-defined and doubtful, the rule seems to be in this country that, independently of any statute, parents are bound to contribute to the support of their minor children, and such obligation rests mainly on the father; and that in favor of a third person who supports the child, a promise to pay may and should be inferred on the ground of the legal duty imposed. But in view of the statutory provision rendering the property of both husband and wife chargeable for family expenses (§ 3165), the wife who has furnished the support of the children after she has been abandoned by her husband cannot recover for such support: *Johnson v. Barnes*, 69–641.

A father is not legally bound for the support of his adult children either at common law or under the statutes of the state: *Monroe County v. Teller*, 51–670.

At common law the father is not liable for necessaries, such as medical treatment furnished to an adult child at the request of such child, even though the child be at the home of the father, when the necessaries are furnished to a member of his family; and this rule is not changed by the provisions of the Code with reference to family expenses; *Blachley v. Laba*, 63–22.

It is the legal as well as the moral duty of parents to furnish necessary support to their children during minority, and while a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same, yet such promise may be inferred on the ground of the legal duty imposed: *Porter v. Powell*, 79–151.

While the duty to support rests upon both parents so that neither can maintain a claim against the other therefor, yet where by written agreement following a decree of divorce it was stipulated that the child should be supported by his father and should be in his custody, and the child without cause left the father's custody and lived with the mother, the father being notified of that fact, but refusing to agree to pay for his support, *held*, that no recovery for such support could be had by the mother: *Cushman v. Hassler*, 82–295.

It is the duty of the parent to provide his minor child with the necessaries of life, and in the absence of evidence to the contrary, it will be presumed that the minor is subject to the control of the parent, and that the liability of the parent for necessaries furnished the child continues although the child may be away from home. The fact that the child is away from home with the parent's consent and is able to work and controls his earnings does not show the parent not to be liable for support furnished to such a child: *Cooper v. McNamara*, 92–243.

One who marries a woman with children by a previous husband, and receives such children into his family, stands in the position of parent toward them, and is entitled to their services, and is responsible for their education and maintenance; and, if he is appointed their guardian, cannot claim compensation for their support: *Bradford's Heirs v. Bodfish*, 39-681. And see *Gerdes v. Weiser*, 54–591.

Where articles of adoption were properly executed, but afterwards canceled by agreement, with the arrangement that other articles should be executed, revesting in the parent his parental right, and pending the proposed arrangement it was agreed that the adopting parent should retain the child, receiving from the natural parent compensation for its support, *held*, that the adopting parent had a valid claim against the natural parent for such agreed support, such as would serve as a consideration for the execution of a mortgage by the natural parent to secure such compensation: *Clayton v. Whitaker*, 68–412.

A parent of limited means may have an allowance out of the estate of his child, when ample for that purpose, for the maintenance of such child: *Gerdes v. Weiser*, 54–591.

Services: The fact that a child lives in the family of the parent after becoming of age, receiving support as one of the family, creates no liability on the part of the parent, in the absence of express contract, to pay for services rendered by the child during that time: *Hart v. Flinn*, 36–366.

The father cannot recover for the destruction of a child *in ventra sa mere*, unless on the basis of loss of service; and whether he could on that ground *doubted: Kansz v. Ryan*, 51–232.

Custody: At common law, the father, being under legal obligation to support the child, is entitled to its custody unless his

disability is shown: *Hunt v. Hunt*, 4 G. Gr., 216.

Although, ordinarily, when parents are living apart, the father is entitled to the custody of the child, such right is not absolute, and, in a proceeding for divorce, temporary provision may be made for the custody of the children: *Green v. Green*, 52-403.

In an action of *habeas corpus* by the mother against the father for the custody of an infant child of fifteen months of age, taken by the father from the mother by stealth, *held*, that the right of the father to the care and custody of such child was not paramount to that of the mother: *State v. Kirkpatrick*, 54-373.

Where the parents had been divorced and it appeared that the mother was not a proper person to have the custody of her child, *held*, that it was error to commit the custody of the child to a brother of the mother, where it did not affirmatively appear that he was a proper person, or that the father was an unsuitable person, to have the custody of the child: *Farrer v. Farrer*, 75-125.

The right of the parent to the child is not absolute, and the question of guardianship must be determined in view of the best interests of the child. The parent may lose the right of custody by misconduct or mistreatment. And in a particular case, *held*, that the character of the parent who sought to set aside the appointment of a guardian for his minor child was such that he had lost all right to have the custody of his child: *Lally v. Sullivan*, 85-49.

In habeas corpus proceedings: Although a parent is entitled to the custody of his child, yet when he seeks such custody in a *habeas corpus* proceeding the welfare of the child will be considered, and the custody will not be given him if inconsistent with the best interests of the child: *Ibid.; Drumb v. Keen*, 47-435; *Fouts v. Pierce*, 64-71.

The principal object which the court seeks to secure in *habeas corpus* proceedings for the custody of a child is its welfare: *State v. Noble*, 70-174.

Where the father of an illegitimate child two years of age sought to recover the custody of the same from its mother, it appearing that his moral character was not better than hers, *held*, that it was error to deprive her of its custody: *Pratt v. Nitz*, 48-33.

Where the right to the custody of a child, under the decree in an action of divorce, has not been waived or surrendered, and the person decreed to be entitled to such custody is able to take care of the child, the right of custody under the decree cannot be changed in an action of *habeas corpus* on the ground that the welfare of the child requires that the other parent should have its custody and care: *Jennings v. Jennings*, 56-288.

A father has the right to the care and custody of his minor children and to superintend their education and nurture; and where he is deprived of such care and custody, and of this superintendence, by the act of another, he has his remedy by proper action against such person: *Everett v. Sherfey*, 1-356.

By emancipation is to be understood such act of the father as sets the son free from his subjection and gives him the capacity of managing his own affairs as if he were of age. Such emancipation need not be evidenced by any formal or record act of manumission, but it is a question of fact which may be proved by direct or circumstantial evidence: *Ibid.*

Although the father has once so far emancipated his son as that he would have the right of contract for his own services and seek his own place of employment, yet the father might afterwards assert his control and bring action for the subsequent harboring or retaining in employment against his will. After a party has notice that the parent does not consent to the surrender of control of his child, it is his duty to refuse such child a residence and employment, and by not refusing to give him such residence and employment he will render himself liable to an action for harboring such child: *Ibid.*

The fact that a minor son is living away from home and controls his own wages does not show emancipation in such sense as to prevent an action by the father for injury to such son: *Cooper v. McNamara*, 92-242; *Hopkinson v. Knapp & Spaulding Co.*, 92-328.

Marriage of child: A parent cannot recover damages against a person for procuring the marriage of his daughter in good faith and without force and imposition, at an age when the marriage is binding according to the common law, although it is without his consent and while the daughter is a minor: *Goodwin v. Thompson*, 2 G. Gr., 329.

Agreement as to custody: Where the father of a child had, by written agreement with a third person, placed such child in the custody of such person for a limited time, and at the expiration of that time sought to recover custody by writ of *habeas corpus*, *held*, that the feelings of defendant were not to be considered in view of the fact that he took the child under an express written agreement providing for its surrender, and that the preferences and wishes of the child, while not to be ignored, were not entitled to a controlling influence, the paramount interest of the child being the primary consideration: *Shaw v. Nachtwey*, 43-653.

The right of parents to the custody of a child is not absolute under all circumstances. The parent can by agreement surrender the custody of his infant child so as to make the custody of him to whom he surrenders it legal: *Bonnet v. Bonnet*, 61-199.

At common law the father could not, by consent or agreement, so dispose of his child as to discharge himself of the obligation to support it or to deprive himself of the right to its custody: *Hunt v. Hunt*, 4 G. Gr., 216.

While a parent may provide by will for the care and custody of a minor child, and may make a disposition of it by assenting to an act of adoption. he cannot, by mere oral gift, convey the right to such custody: *Burger v. Frakes*, 67-460.

SEC. **3193. Surviving parent—guardian of the person.** The surviving parent becomes such guardian, but, if there is none, the district court shall

appoint one, who shall have the same power and control over his ward as the parents would have, if living. [C.'73, §§ 2242, 2249; R., §§ 2544, 2550; C.'51, §§ 1492, 1498.]

The guardian thus appointed is the guardian of the person as well as of the property of the ward: *Burger v. Frakes*, 67–460.

In case of the death of the father the mother has the right to sue as guardian for the earnings of the minor: *Cain v. Devitt*, 8–116.

The court at the place of domicile of a child has jurisdiction of the matter of a guardian of its person. The domicile of the child is to be determined by the domicile of the parents and when the domicile is once fixed it remains until another is lawfully acquired; *Jenkins v. Clark*, 71–552.

By his appointment the guardian is vested with the same right to the custody of a ward as a parent has of his own child, and this right to such custody cannot be defeated by a provision in the will of a parent, for such a provision cannot create any legal relation between the person designated and the child, nor impose any obligation upon such person: *Ibid.*

As a parent cannot by will impose any liability upon another with reference to the custody of a child, such a provision in the will cannot defeat the power of the guardian appointed by the proper court: *Ibid.*

Testamentary guardianship is not authorized by the present Code although it was provided for under the Code of '51 and the Revision, and where an adopting parent having his domicile in the state, by will appointed a guardian for the adopted child who was a resident of another state and in whose custody the child was at the time application for guardianship was made, *held*, that the court was not bound to appoint the person thus designated by will. The fact that the person named in the will was a nonresident would be a sufficient reason for not appointing him guardian: *In re Johnson*, 87–130.

In a proceeding touching the appointment of a guardian for a minor child, where it appeared that the mother in her will had requested that certain parties should be appointed as such guardians, and had orally expressed the same desire shortly before her death; *held*, that while testamentary guardianship is not authorized in this state, yet the expressed wish of the parent, and especially when made shortly before dissolution, will influence the court, and, other consideration being equal, will determine the appointment: *In re O'Connell*, 71 N. W., 211.

If the parents, or the one of them surviving, is not qualified to discharge the duty of care and custody, and to manage the property of the minor, the court may appoint a guardian for the purpose. Such a case arises when, from dissolute habits or other cause, the parents are not qualified and competent to have the care and control of the child, or, being qualified and competent for that, are disqualified and incompetent to manage the property; and the court may, where there is no parent, appoint one guardian for the person and another for the property: *Lawrence v. Thomas*, 84–362.

The action of the court as to the appointment of a guardian of the person and property of a minor is reviewable only on assignment of errors: *Ibid.*

A party seeking appointment as guardian holds the burden of establishing his qualification, and the findings of the court on that question are entitled to the effect of a verdict: *Ibid.*

Although removal from the state is a good ground for requiring a guardian to resign, yet if there is no such resignation or substitution of a new guardian, the bondsmen remain liable, at least with reference to property of the ward coming within the state, although both guardian and ward are absent from the state: *Farrington v. Secor*, 91–606.

SEC. **3194. Of property.** If a minor owns property, a guardian must be appointed to manage the same. [C.'73, § 2243; R., §§ 2545–6; C.'51, §§ 1493–4.]

The law recognizes the right of parents to the custody and control of their minor children and the management of property derived from either parent without appointment from a court: *Lawrence v. Thomas*, 84–362.

In the absence of other guardian the natural guardian is entitled to manage such of the children's property as is derived from the deceased parent: *Wood v. Murray*, 85–505.

While this section does require the appointment of a guardian in certain cases it does not affect the property rights of minors who fall within its provisions: *Knox v. Singmaster*, 75–64.

And where property was voluntarily conveyed by a father to his minor daughter, who reconveyed the same to her father soon after reaching her majority, *held*, that the daughter was entitled to the rental value of the property, less the amount paid for taxes, for the time she held the legal title: *Ibid.*

This section has no application where both parents are dead: *Lawrence v. Thomas*, 84–362.

SEC. **3195. Minor may choose.** A minor over fourteen years of age, of sound mind, may select the guardian, subject to approval by the district court, or a judge thereof, of the county in which his parents reside, if living with them, if not, of the county of his residence. [C.'73, § 2244; R., § 2547; C.'51, § 1495.]

SEC. **3196. Power of court and guardian.** The guardian and court making the appointment have power and authority over any property of the minor, situated or being in any other county, to the same extent as if it was situated in the county where the appointment was made; but, if an order is made by such court affecting the title of lands lying in another county, a certified copy of such order, and of all the papers on which it is founded, shall be transmitted to the clerk of the district court in the county where such lands are situated, who shall enter the same on the proper docket, index, and make a complete record thereof, in the same manner as if the cause in which the order is made had been commenced in his court. [C. '73, § 2245.]

SEC. **3197. Bond and oath.** Guardians appointed to take charge of the property of a minor must give bond, with surety to be approved by the court or clerk, in a penalty double the value of the personal estate and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardians according to law, and take an oath of the same tenor as the condition of the bond. The court, or a judge thereof, may also require a bond to be given by the guardian of the persons of minors, with like conditions. [C. '73, § 2246; R., § 2548; C. '51, § 1496.]

This section applies not only to a guardian appointed under the provisions of § 3194, but whenever there is property of a minor, whether the appointment is general or limited: *Lawrence v. Thomas*, 84–362.

A guardian who receives property of his ward, and wrongfully converts it to his own use, and makes no report thereof, is liable in an action on his bond, although no adjudication of defeat has been made by the probate court: *Robb v. Perry*, 35 Fed., 102.

It is proper to appoint one guardian for several wards jointly and to take a bond for their joint security, when the wards hold by common title, as, for instance, as tenants in common: *Pursley v. Hayes*, 22-11.

The liability of the guardian aside from the bond is the same as that which is fixed by the bond and except as to the obligation of the sureties the bond is of no significance: *Wyckoff v. Michael*, 64 N.W., 608.

Therefore an action to compel a guardian to account and pay over is not an action on a written instrument but must be brought within five years after the right accrues: *Ibid.*

Where the guardian gave a joint bond as to four different wards, *held*, that the sureties thereon could not be liable as to the funds received for any one ward to more than a proportional amount of the sum mentioned in the bond: *Hooks v. Evans*, 68–52.

When a bond is given for the benefit of several wards, and the defalcation of the guardian is for an amount in excess of the penalty, neither of the wards is entitled to recover as against the sureties more than his *pro rata* share of the penalty: *Knox v. Kearns*, 73–286; *Edmonds v. Edmonds*, 73–427.

The duty of passing upon the sufficiency of the guardian's bond devolves upon the court and cannot be performed by the clerk in vacation. Therefore, *held*, that the clerk was not liable in damages for the acceptance of the bond of a guardian appointed in vacation without requiring sureties. The duty of approving the bond should have been performed by the court at the term following the appointment: *Reno v. McCully*, 65–629; *Reno v. McCully*, 66–730. (But see now, § 250.)

The sureties upon a guardian's general bond are not liable for moneys received by him in the sale of the ward's real estate, under the order of the court, a special bond being required in such cases (§ 3209): *Madison County v. Johnston*, 51–152; *Bunce v. Bunce*, 65–106.

The fact that a sale bond is given, or that an order of sale is wrongfully made, or the proceeds converted, will not render the sureties on the general bond liable: *Bunce v. Bunce*, 65–106.

Where a sale of real property was made by a referee in a proceeding for partition, *held*, that the guardian was liable under his general bond for the proceeds of such sale, there being no provision for a special bond in such case: *Hooks v. Evans*, 68–52.

Where a guardian is required by order of court to give additional bond, on account of insufficiency of the first bond, the sureties on the additional bond are liable for default of the guardian previous to the giving of the new bond: *Douglass v. Kessler*, 57–63.

The sureties upon the guardian's bond become liable for money received by the guardian previous to his appointment and in his hands at the time of the appointment and giving of bond: *Bockenstedt v. Perkins*, 73–23.

The court has the sole right to determine what is a guardian's duty under the law, and nothing but a failure to obey its orders can be deemed a breach of the guardian's bond: *O'Brien v. Strang*, 42–643.

The surety's liability on the bond does not commence simultaneously with the ward's majority, but only upon failure of the guardian to comply with an order of the court in a proper proceeding for settlement of his accounts: *Ibid.*

A failure to pay over money by the guardian will not constitute a breach of his bond until the guardianship accounts are settled, or until he has failed to obey a mandate of the court requiring him to account: *Vermilya v. Bunce*, 61–605.

A surety in a guardian's bond should not be absolutely discharged upon his application, upon the minor's coming of age. The

most that he is entitled to is a conditional discharge. If, after the majority of the ward and the final settlement with the guardian, the ward unreasonably delays to enforce what rights he may have against sureties on the bond, he may, upon application of the sureties, be ordered to commence and prosecute proceedings within a time to be named, and in the event of a failure to do so the sureties may be regarded as discharged: *Ibid.*

To constitute a breach of the bond it is necessary that there shall be a failure to obey an order of the court. An action will not lie against the surety until there has been a settlement of the guardian's account and failure to obey his order. And where such settlement was made and entered into in another county than that in which the guardian was appointed, *held*, that such settlement was not binding on the surety: *Gillespie v. See*, 72–345.

Right of action by a ward against his guardian arises when the guardianship ceases by the guardian's resignation or removal, or by reason of the ward arriving at full age, and such an action must be brought within the time limited by statute thereafter: *Humphreys v. Mattoon*, 43–556.

The guardian having conveyed certain land in trust for his ward as partial security for the ward's funds in his hands, but which was not actually purchased with such funds, *held*, that the ward having a remedy against his guardian and his bondsmen should pursue such remedy, and not insist upon the trust deed as against creditors seeking to make their debts out of such property: *Thomas v. Pyne*, 55–348.

Where the sureties to the bond become obligated not only to pay all moneys coming into the hands and possession of the guardian, but also that such guardian shall faithfully discharge the office and trust according to law, they are liable not only for funds received by the guardian after the giving of the bond, but for the payment by such guardian of any sums found due on eventual settlements, whether arising out of transactions prior or subsequent to the giving of the bond: *Knox v. Kearns*, 73–286.

The order of court for the settlement of the guardian's accounts is an adjudication as between the guardian and the ward or his representatives of all questions as to the liability of the guardian and the extent of that liability. Such an order made for the payment of a sum of money is necessarily a determination that the guardian at the date of his appointment had in his hands a sum of money which, with the interest thereon, after deducting the credits allowed, would amount to the sum which he is ordered to pay over, and such an adjudication is binding on the guardian and the surety on his bond: *Knepper v. Glenn*, 73–730.

SEC. **3198. Removal—new bond.** Guardians may, upon notice given them, be removed by the court at any time for cause, which must be entered of record; and new or additional bonds may be required, if it finds the same necessary for the protection of the estate. [C. '73, § 2247; R., § 2562; C. '51, § 1510.]

In an action to remove a guardian, technical nicety of pleading is not required, and the provision for the statement of the cause of removal is directory only. It may be a question whether such provision is applicable where the removal is the result of a written application and the cause fully appears elsewhere: *Crawford v. Crawford*, 92–744.

SEC. **3199. Inventory and appraisement.** Guardians, within fifteen days after their appointment, must make out an inventory of all the property of the minor, which shall be appraised in the same manner as the property of a deceased person, and filed in the office of the clerk of the district court. [C. '73, § 2248; R., § 2549; C. '51, § 1497.]

SEC. **3200. Duties.** Guardians of the property of minors must prosecute and defend for their wards, may employ counsel therefor, lease lands, loan money, and in all other respects manage their affairs, under proper orders of the court or a judge thereof. [C. '73, § 2250; R., § 2551; C. '51, § 1499.]

Powers: The power to manage the estate of an infant can only emanate from the court authorized to appoint a guardian: *Young v. Gammel*, 4 G. Gr., 207.

Guardians of the property of their wards manage their interests under the direction of the court, and all money paid out should be paid under the court's order: *Coffin v. Eisminger*, 75–30.

And where a judgment was rendered against a guardian as garnishee in a suit against his ward, and the guardian failed to pay the judgment and to ask instruction of the probate court in regard to it, *held*, that it was proper for the plaintiff to obtain an order of court to compel the guardian to do his duty: *Ibid.*

An assignment of a mortgage by a guardian after the ward is of age is valid in the absence of objection by the ward: *Hippee v. Pond*, 77–235.

Where a guardian receives notes of third parties in satisfaction of an indebtedness, and afterwards as guardian receives the money upon such notes, such satisfaction of the original indebtedness is sufficient in equity: *Jones v. Jones*, 20–388.

Under the statute the powers of the guardian over his ward's property are more limited than at common law. The guardian

can only act in pursuance of the direction of the court first obtained, and an act done without such direction will not bind the ward's property: *Bates v. Dunham*, 58–308.

A guardian cannot loan the ward's money to himself, nor without the order of the court invest it in land; and where, without authority, money of the wards was thus invested, and the probate court refused to recognize the transaction as binding upon the wards, *held*, that the property did not vest in them but remained in the guardian: *McReynolds v. Anderson*, 69–208.

A lease made by a guardian is invalid, or voidable at least, unless ordered or approved by the proper probate court: *Alexander v. Buffington*, 66–360.

A guardian has no authority to pay, out of the proceeds of the sale of the ward's property, claims of third persons against such ward: *Cassedy v. Casey*, 58–326.

The guardian has the power, under direction of the court, to superintend the education and nurture of the ward, and for that purpose he may pay out such portion of the ward's money as the probate court may, from time to time, order and direct. For this purpose the rents and profits of the real estate, and after that the interest of the ward's money, are to be first resorted to; but the guardian will not be permitted, without an order of the court to that effect, to encroach upon the principal sum of the ward's estate. As a general rule the expenses of the ward must be kept within the income of the ward's estate: *Foteaux v. Lepage*, 6–123.

Where the ward has received no consideration for a conveyance, the guardian may bring action for him to set the same aside without first procuring an order of court authorizing him to do so, and without any formal act of revocation: *Gates v. Carpenter*, 43–152.

In such a case, if the validity of the guardian's appointment is not properly put in issue, evidence that the ward was not an inhabitant of the county at the time of the guardian's appointment, and that he had no foreign guardian, is not admissible: *Ibid.*

A guardian has authority to compromise a suit for his ward upon obtaining leave of court, and notice to the ward of an application for such permission is not essential, the proceeding not being one adversary as to the ward: *Hagy v. Avery*, 69–434.

The power of the guardian ceases on the death of the ward. The settlement of the estate devolves on the administrator: *Ordway v. Phelps*, 45–279.

The power of the guardian does not necessarily terminate at the moment the ward becomes of legal age. The guardian should be given reasonable time for an accounting and to close his official labors. Therefore an action may in some cases be maintained by a guardian in the interests of the ward although the ward has attained majority, as for instance, where the guardian has not yet accounted, or been called on to account. And in such case it is for the defendant claiming that the authority of the guardian has terminated to plead and establish that fact: *Reed v. Lane*, 65 N. W., 380.

Liability: It is proper to render a personal judgment against a guardian who executes a bond for his ward in his individual capacity: *Oliver v. Townsend*, 16–430.

Proceedings to establish a claim against the ward's estate should be brought against the ward: *Bentley v. Torbert*, 68–122.

Where a guardian collected pensions due to his ward, so far as they were necessary to support the ward, *held*, that it was not negligence on his part to allow arrears of pensions to accrue uncollected, although by the subsequent death of the ward the collection of such arrears from the government was, by reason of the provision of the statutes of the United States, impossible: *Mattox v. Patterson*, 60–434.

If the guardian has wrongfully invested funds belonging to the minor and held for the minor's benefit, an action by the minor after attaining majority may be brought to enforce his claim for such funds against the property in which they have been invested, and even though the court decrees the property to be held in trust for the minor and directs its sale for the purpose of satisfying the claim for the funds invested therein, this does not constitute a ratification of such investment so as to release the guardian from liability: *Reed v. Lane*, 65 N.W., 380.

The law prohibits the investment of money and doing other acts by the guardian in behalf of the ward without the direction of the court which must be given before the act is done, and the guardian will be liable for the amount of the estate of the ward invested otherwise than as thus directed. *Garner v. Hendry*, 63 N. W., 359.

Therefore where the guardian had deposited the funds of the ward in a bank drawing interest but at a lower rate than that required by the order of court, and the bank had subsequently failed, *held*, that the guardian was liable for the entire amount of such deposit, without waiting for the ascertainment of how much should be realized from the deposit on the settlement of the affairs of the bank and that he must himself look to the bank for the recovery of such sum as might be available on the deposit: *Ibid.*

This section so far modifies the common law rule as to the authority of the guardian as to inhibit the investment of money and the doing of other acts by the guardian for the ward without the direction of the court and to require that the direction be given before the act: *Slusher v. Hammond*, 63 N. W., 185.

Therefore a transfer of a note executed to the guardian in the course of the management of the ward's estate cannot be transferred by the guardian, and one who takes by an attempted transfer not authorized by the court must be held liable to the ward's estate although the proceeds of the transfer of such note have been appropriated by the guardian: *Ibid.*

In an action by the former ward after majority against a person to whom the guardian without authority has transferred a note belonging to the estate of the ward, it is not necessary to show that the accounts of the guardian have been settled and that

he has failed to pay over the amount of the funds due to the ward: *Ibid.*

Where a tax title was conveyed to the guardian as such, *held*, that the conveyance inured to his ward's benefit, and that subsequent purchasers of the property from the guardian were chargeable with notice of the rights of the ward: *Rankin v. Miller*, 43–11.

Where a person who had stood in *loco parentis* to a minor, and was his guardian, soon after the coming of age of the minor, and before he had become emancipated from the habit of obedience and deference, secured an unconscionable contract from him by the exercise of authority and solicitation, or by fear excited by false representations, *held*, that such contract would be regarded as procured by undue influence, and would be set aside in a proper action: *Tucke v. Buckolz*, 43–415.

SEC. **3201. Breach of bond—new guardian.** A failure to comply with any order of the court or a judge thereof in relation to guardianships shall be ground for removal, and a breach of the guardian's bond; and the court or judge may appoint a new guardian, if necessary, and require his predecessor to deliver to the person entitled thereto, within a time fixed by the court or judge, the effects of such ward then in the hands of said predecessor, and may commit him to jail until he complies with such order. Action for the breach of such bond may be brought by any one aggrieved thereby, or by such new guardian, and, if property is not delivered in accordance with such order, the guardian removed shall, in addition to any other remedy, be subject to a penalty, for the benefit of the ward's estate, of one hundred dollars, to be recovered in an action on his bond. [C. '73, §§ 2251–2; R., §§ 2561, 2563; C. '51, §§ 1509, 1511.]

Section considered: *O'Brien v. Strang*, 42–643.

An action against a guardian for failure to account and pay over funds coming into his hands is not an action on the bond as a written instrument, but an action for failure to perform a duty and must be brought in five years after the cause of action had accrued: *Wyckoff v. Michael*, 64 N.W., 608.

In event of the death of the guardian, the bondsmen become liable for any amount due although there has been no settlement of the guardian's account or failure on his part to obey a mandate of the court requiring an account. In such case the granting of administration on the guardian's estate is not essential: *Farrington v. Secor*, 91–606.

SEC. **3202. Nonresident minors.** A guardian may be appointed for a nonresident minor, idiot, lunatic or person of unsound mind, who has property in this state, on application to the district court or judge of the county in which such property or any part thereof may be, who shall qualify in the same manner, have the same powers, and be subject to the same rules, as guardians of resident minors. [19 G. A., ch. 100, § 1; C. '73, § 2253.]

SEC. **3203. Account.** All guardians are required to render an account to the district court, at least once each year, of all moneys or other property in their possession, with all interest which may have accrued on money loaned, belonging to their wards. [C. '73, § 2254; R., § 2568.]

Intermediate reports of the guardian approved by the court must be regarded as at least *prima facie* correct: *Warfield v. Warfield*, 74–184.

Further as to reports and accounting, see notes to § 3205, and as to liability on bond, see notes to § 3197.

SEC. **3204. Penalty.** In case any guardian shall fail to make such report within the time above specified, he shall forfeit and pay into the county treasury the sum of fifty dollars, and such failure shall be ground for his removal. [C. '73, § 2255; R., § 2569.]

SEC. **3205. Compensation.** Guardians shall receive such compensation as the court may from time to time allow, the amount and the service for which it was made being entered upon the records of the court. [C. '73, § 2256; R., § 2567; C. '51, § 1515.]

Accounting; support: A guardian standing *in loco parentis* toward the ward cannot in ordinary cases have compensation for the ward's maintenance: *Latham v. Myers*, 57–519.

And on this point, see notes to § 3192.

Claims for support of the ward may be allowed by the probate court without notice to the ward. Such proceedings are not adversary, but the court simply directs the guardian in the discharge of his duty as it would its officers: *Brewer v. Stoddard*, 49–279.

To justify an allowance being made from the ward's funds for past support by the parent, all the facts necessary to a future allowance must be shown, and a satisfactory showing must be made why application for such allowance was not made in advance: *Welch v. Burris*, 29–186.

Pension money granted to the ward's

father while living, and passing to the ward on his death, is not exempt from liability for the ward's support: *Ibid.*

The fact that the record of an order made upon the application of a guardian giving him an allowance for the maintenance of the ward is imperfect or wanting will not prevent him from having credit for an expenditure on that account approved by the court: *Latham v. Myers*, 57–519.

It is unquestionably the duty of the guardian, when there are more wards than one, to keep the account of each one separate and to keep the estate of each to itself: *Foteaux v. Lepage*, 6–123.

If judgment is to be rendered against the guardian in such case, it should be for such sum, to be ascertained by the court, as each ward is entitled to, and not for the whole amount in his hands due to all the wards: *Ibid.*

An action cannot be maintained in behalf of an insane person against his guardian for unlawful disbursement of funds. Such a liability can be adjusted in a probate court in settling the guardian's accounts: *Tiffany v. Worthington*, 65 N. W., 817.

Report: The report of the guardian as to his account cannot properly be demurred to. If necessary in order to bring out the facts, a motion for more specific statement should be made. and the case determined on the facts thus shown: *Gerdes v. Weiser*, 54–591.

The fact that an intermediate report by the guardian charges him with money improperly invested in land in the name of his ward is an error which cannot be corrected on an appeal by the guardian to which the ward is not a party. If the ward should retain the title to the property until majority, the charge would be erroneous: *Cassedy v. Casey*, 58–326.

Where the guardian reports a sale of property and investment of proceeds in other property in the name of the ward, the failure of the ward, until after coming of age, to disaffirm such transaction will prevent him from objecting to the report in that respect: *Ibid.*

Settlement: Where the accounts of a guardian have been settled in the probate court and a balance found due him, such settlement will bind the ward until it is set aside or in some way lawfully attacked, and a proper expenditure in behalf of the ward cannot be called in question in an action by the guardian against the ward to recover the amount found to be due on such settlement: *King v. King*, 40–120.

Where the ward, after becoming of age, accepted from the surety on the guardian's bond, in settlement of the indebtedness of the guardian, at that time deceased, a note received by the guardian for money of the ward loaned by such guardian, *held*, that the fact that at the time such note was accepted the maker and surety thereon were insolvent, that fact not being known to the parties, would not prevent the acceptance being binding upon the ward: *Smith v. McKee*, 67–161.

The settlement of the accounts of the guardian of an insane person will not constitute a former adjudication in an action to set aside a conveyance from the insane person to such guardian and for an accounting for the profits received by the latter from the property: *Warfield v. Warfield*, 76–633.

Following proceeds: Where the guardian has improperly invested the money of the ward the latter may, at his election, instead of holding the guardian accountable, follow the money and claim the property in which it has been invested: *Robinson v. Robinson*, 22–427.

Liability for interest: Where the guardian has failed to account, and has encroached upon property of the ward's estate, he may be required to pay interest, compounded at the end of each year at six per cent.: *Foteaux v. Lepage*, 6–123.

Where certain charges of a guardian for support of his ward were disallowed, *held*, that, as it was the duty of the guardian to invest the money, he should be charged with six per cent. interest thereon, compounded annually: *Bradford's Heirs v. Bodfish*, 39–681.

Where a guardian has improperly expended money of the ward in his hands he may be charged with the amount received and thus improperly expended with eight per cent. interest thereon with annual rests: *In re Mells*, 64–391.

Compensation: Where a guardian had delayed for ten years to make a settlement, and instead of putting out the money of the ward at interest, had used the same himself, *held*, that, although he could not be charged a higher rate of interest than six per cent. compounded annually, he might properly be denied compensation: *Foteaux v. Lepage*, 6–123.

The action of the court in allowing the guardian no compensation, but in lieu thereof not charging interest on the balance in his hands, *held* proper: *Mattox v. Patterson*, 60–434.

The compensation due the guardian should be fixed by the probate court and will be presumed to have been considered in the final adjudication as to an accounting. And such an adjudication will debar the allowance to the guardian of compensation in an action against him by the ward for a sum found due as the result of such accounting. *Reed v. Lane*, 65 N. W., 380.

SEC. **3206. Property sold.** When not in violation of the terms of a will by which a minor holds his real property, it may, upon application by the guardian to, and under the direction of, the district court or judge, be sold or mortgaged, when such sale or mortgage is necessary for the minor's support or education, or where his interest will be thereby promoted by reason of the unproductiveness of the property, or of its being exposed to waste, or of any other peculiar circumstances. [C. '73, § 2257; R., § 2552; C. '51, § 1500.]

Where the application to the court is for power to sell, the court has no jurisdiction to make an order authorizing the guardian to mortgage the property: *McMannis v. Rice*, 48–361.

The term "mortgage" means the granting of an estate as pledge for the payment of money, without reference to the form which the grant assumes: *Foster v. Young*, 35–27.

A father merely as natural guardian has no authority to sell land of his child, even when authorized to do so by order of the probate court, and a deed made by him will not be valid, even as against him when he subsequently acquires the title by inheritance from the child: *Shanks v. Seamonds*, 24–131.

A sale or mortgage of the ward's property will cover a reversionary interest therein owned by the ward, although he does not have a fee simple title: *Foster v. Young*, 35–27.

A refusal by the court to order a sale when proper grounds therefor are shown is an error which will be corrected on appeal. The discretion with which the court is clothed is not absolute, but a legal discretion: *Dickinson v. Hughes*, 37–160.

The proceedings for the sale are not abated by the resignation of the guardian who files the petition and the appointment of another guardian: *Wade v. Carpenter*, 4–361.

In the absence of anything in the record showing the order of sale or the sale itself to be void, the proceedings will be presumed regular: *Pursley v. Hays*, 17–310.

If the court has jurisdiction of the subject matter and the parties, its judgment, in the absence of fraud, is conclusive, and cannot be collaterally attacked: *Pursley v. Hayes*, 22–11.

Where jurisdiction has attached and a sale has been approved, it cannot be successfully attacked in a collateral proceeding alleging the want of a sale bond: *Bunce v. Bunce*, 59–533.

Where it appears that there was service of notice, and the record of the court recites that notice, according to law, has been given, the regularity of the manner of giving notice cannot be inquired into collaterally: *Wade v. Carpenter*, 4–361.

As to the validity of proceedings as affected by defect in the notice, and as to what presumptions are to be indulged in in favor of their regularity, see *Cooper v. Sunderland*, 3–114. Also, on a parallel question, see *Shawhan v. Loffer*, 24–217.

The validity of the sale cannot be attacked collaterally on account of insufficiency of the oath of the guardian: *Frazier v. Steenrod*, 7–339.

A minor who, after attaining his majority, with full knowledge of all the facts attending the sale of his property by the guardian and its alleged invalidity and of his rights in the premises, elects to receive and still retains the purchase money, thereby ratifies the sale, and is estopped from claiming that it is void: *Pursley v. Hays*, 17–310; *Deford v. Mercer*, 24–118.

Where a court finds that the funds of a minor have been wrongfully invested in property in the guardian's name and orders such property to be sold to satisfy a claim for such funds, treating the property as held in trust for the minor, such sale is not within the provisions of this section with reference to the sale of the minor's property. *Reed v. Lane*, 65 N. W., 380.

SEC. **3207. Petition—notice.** The petition for that purpose must state the grounds thereof, be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court or judge, must be served personally upon the minor at least ten days prior to the time fixed for such application. [C. '73, § 2258; R., § 2553; C. '51, § 1501.]

A general averment in the petition, in regard to the necessity of a sale of the ward's property, is sufficient to give the court jurisdiction to order such sale: *Bunce v. Bunce*, 59–533.

When the petition for authority to sell alleges the necessary jurisdictional facts, it is not requisite, after the hearing is had, that the final order by the court should recite them in detail: *Pursley v. Hayes*, 22–11.

Where the petition in an application for leave to sell did not set out the names of the wards, but described them simply as heirs, although the notice was to them by name and was served upon each, *held*, that the defect was not jurisdictional, and that proceedings thereunder could not be collaterally attacked, especially where the minor heirs named were the only ones, and the whole record showed that they were sufficiently named and described: *Ibid.*

The proceeding does not abate by the resignation of the guardian filing the petition and the appointment of another guardian: *Wade v. Carpenter*, 4–361.

The notice is essential to the jurisdiction of the court; without it the sale will be void; but a defective notice will be sufficient to give jurisdiction, and the proceedings thereunder cannot be collaterally attacked; *Lyon v. Vanatta*, 35–521.

The proceeding for the sale of the ward's property is not *in rem*, but an adversary proceeding, and a sale without the notice required by law is void for want of jurisdiction: *Ibid.*

A notice fixing the time for hearing at a time not during a term of court, or which does not fix any time, is no notice, and proceedings thereunder will be void: *Ibid.*; *Haws v. Clark*, 37–355.

A sale of land belonging to a ward by his guardian cannot be attacked by a collateral proceeding because the notice of the application to sell was served upon the ward three days before the appointment of the guardian, such defect not affecting the jurisdiction of the court: *Hamiel v. Donnelly*, 75–93.

If there is no service of notice the pro-

ceedings will be void: *Rankin v. Miller*, 43–11.

But if there is defective service, which is by the court held sufficient, any error in such holding cannot be the subject of collateral attack: *Pursley v. Hayes*, 22–11, 38.

Where the notice of the sale contained an entirely erroneous description of the property, *held*, that the sale was entirely void. The fact that the court has properly acquired jurisdiction to appoint a guardian will not render subsequent want of notice as to the sale a mere irregularity. Jurisdiction as to the one matter does not necessarily confer jurisdiction as to the other: *Frazier v. Steenrod*, 7–339.

Where actual personal service of notice upon a minor was shown, and it appeared that the court had determined that the service had been duly made, as provided by law, and such determination was of record, *held*, that even though it did not appear that a copy of the petition was filed, as required by statute, the proceedings were not void: *Bunce v. Bunce*, 59–533.

Under a statute requiring notice to a minor of an application by his guardian for sale of his lands, *held*, that in the absence of proof of notice, or the finding by the court that notice had been given, the proceedings were void and no title passed: *Rankin v. Miller*, 43–11.

Where the application was for authority to sell, *held*, that the guardian had no power to mortgage: *McMannis v. Rice*, 48–361.

As to want or insufficiency of notice as affecting jurisdiction, see notes to preceding section.

SEC. **3208. Postponement and publication—reference.** The court in its discretion, or the judge thereof, may direct a postponement of the matter, and order such further notice, by publication through the newspapers or otherwise, as may be expedient, and may direct a reference for the purpose of ascertaining the propriety of ordering the sale or mortgage applied for. [C.'73, §§ 2259–60; R., §§ 2554–5; C.'51, §§ 1502–3.]

SEC. **3209. Bond.** Before any such sale or mortgage can be executed, the guardian must give security to the satisfaction of the court or judge, the penalty of which shall be at least double the value of the property to be sold or of the money to be raised by the mortgage, conditioned that he will faithfully account for and apply all money received by him, by virtue of such sale or mortgage, under the direction of the court or judge. [C.'73, § 2261; R., § 2556; C.'51, § 1504.]

While it would be better to make the guardian's bond payable to the parties interested, the fact that it is payable to the county will not vitiate it, nor will the fact of its being thus made payable, or the failure of the judge to enter of record its approval, invalidate the title derived from the sale: *Pursley v. Hayes*, 22–11.

Action on the bond cannot be brought until the guardian has failed to obey some order of the court in respect to the proceeds of the sale: *O'Brien v. Strang*, 42–643.

The sale of land belonging to a minor by a guardian, without giving a sale bond, cannot be attacked in a collateral proceeding after the sale has been approved: *Hamiel v. Donnelly*, 75–93.

Where real estate was sold by the guardian under order of court for the purpose of investing the proceeds, and on the settlement the guardian was ordered to pay over to the ward a sum in excess of the amount received from the sale of the real estate, *held*, that the surety on the bond for the sale was liable for the amount received therefrom, although in the settlement it did not expressly appear what portion of the amount ordered to be paid over was received from the real estate: *McWilliams v. Kalbach*, 55–110.

Where jurisdiction has attached and a sale has been approved, it cannot be successfully attacked in a collateral proceeding alleging the want of a sale bond: *Bunce v. Bunce*, 59–533.

The sureties on this bond and not those upon the general bond are liable for failure of a guardian to account for proceeds of the sale: See note to § 3197.

SEC. **3210. Costs.** When the application for the sale or mortgage of property is resisted, the court may, in its discretion, award costs to the prevailing party, and, when satisfied that there was no reasonable ground for making it, may direct the costs to be paid by the guardian from his own funds. [C.'73, § 2262; R., § 2557; C.'51, § 1505.]

SEC. **3211. Deeds—approval.** Deeds may be made by the guardian in his own name, but must be returned to the court, and the sale or mortgage be approved, before the same are valid. [C.'73, § 2263; R., § 2558; C.'51, § 1506.]

The approval of the sale by the court as required by the statute is not a mere formality, but is essential to its validity. The approval is of the sale and not merely of the deed: *Wade v. Carpenter*, 4–361.

The record in a particular case, *held* to sufficiently show the approval of the mortgage made by order of the court: *McMannis v. Rice*, 48–361.

Under a former statute allowing the clerk of the probate court to transact, in the absence of the judge, all probate business not

requiring notice, subject to the supervision and approval of the judge, *held*, that the indorsement upon the deed of approval by the clerk of the sale and deed, and the approval by the judge of the sale when reported by the guardian, constituted a sufficient approval to render the deed valid: *Bunce v. Bunce*, 59–533.

It is at least doubtful whether, between the time of sale and the approval of the deed, the purchaser has any taxable interest in the property sold: *Ordway v. Smith*, 53–589.

Representations made by the guardian at a sale of real property on his application, with reference to the legal title, which was a matter of record, *held* no defense in an action against the purchaser for the price: *Findley v. Richardson*, 46–103.

A mortgage of the ward's estate by the guardian is invalid unless approved by the court: *Dohms v. Mann*, 76–723.

While the judgment of a court on the foreclosure of such mortgage would be conclusive as to its validity if the parties were all before it, *held*, that where the ward, though twenty years of age, was not served with notice, the judgment was not binding upon him: *Ibid.*

SEC. **3212. Evidence—limitation.** The rule prescribed in the sale of real property by executors shall be observed in relation to the evidence necessary to show the regularity and validity of the sales of guardians; and no person can question the validity of any such sale after the lapse of five years from the time it was made. [C.'73, §§ 2264–5; R., §§ 2559–60; C.'51, §§ 1507–8.]

To avail himself of the limitation here provided the defendant must show that he has been in continuous possession of the property for five years: *Washburn v. Carmichael*, 32–475.

The limitation does not apply when the sale is void, as in case of failure to notify the minor as provided in § 3207: *Rankin v. Miller*, 43–11. But if the sale is made pursuant to an order of a court having jurisdiction it cannot be attacked after five years for irregularities in the proceedings: *Pursley v. Hayes*, 22–11, 24.

The limitation has no application to appeals or other proceedings bringing the matter of the validity of the sale up for review in the superior court: *Ibid.*

Nor does it prevent the heir from questioning, after five years, the validity of a sale by a person having no pretense of authority as guardian, or one where there has been no notice to the heir, and which is therefore made without jurisdiction, and where no possession has been taken under the purchase: *Ibid.*

A purchaser under a guardian's sale who has been in possession for five years from the time of sale will be protected from objections as to the regularity of the sale, not jurisdictional in character, especially when raised in a collateral proceeding: *Ibid.*

See generally, as applicable to this section, notes to § 3332; the opinion of Beck and Cole, JJ., in *Good v. Norley*, 28–188, being stated by Beck, J., as applicable to this section: *Washburn v. Carmichael*, 32–475.

FOREIGN GUARDIANS.

SEC. **3213. Property in this state.** The foreign guardian of any nonresident minor, idiot, lunatic or person of unsound mind may be appointed the guardian of the property of such person in this state by the district court, or judge thereof, of the county wherein he has any property, for the purpose of selling, mortgaging or otherwise controlling that and all other property of such person within the state, unless a guardian has previously been appointed. [19 G. A., ch. 100, § 2; C.'73, § 2266; R., § 2564; C.'51, § 1512.]

SEC. **3214. Appointment—qualifying.** Such appointment may be made upon his filing with the clerk of the district court of the county wherein there is any such property an authenticated copy of the order for his appointment. He shall thereupon qualify like other guardians, except as provided in the next section. [C.'73, § 2267; R., § 2565; C.'51, § 1512.]

SEC. **3215. Bond.** Upon the filing of an authenticated copy of the bond and inventory filed by the guardian in a foreign state, if the court or judge is satisfied with the sufficiency and the amount of the security, it may dispense with the filing of an additional bond. [C.'73, § 2268; R., § 2566; C.'51, § 1514.]

SEC. **3216. Personal property.** Foreign guardians of nonresidents may be authorized by the district court, or judge thereof, of the county wherein such ward has personal property, to receive the same upon complying with the provisions of the following sections. [C.'73, § 2269.]

This statute authorizes a guardian appointed in another state to apply in a court of this state to have funds of his ward under the control of such court transferred to him: *In re Benton*, 92–202.

Minors having a domicile in this state

at the time of the parents' death may be taken to another state by the natural guardian and there acquire such residence as that the court of such state may grant letters of guardianship which shall be recognized under this and the following sections: *Ibid.*

SEC. **3217. Copy of bond.** Such foreign guardian shall file in the office of the clerk of the district court, in the county where the property is situated, a certified copy of his official bond, duly authenticated by the court granting the letters of guardianship, and shall also execute a receipt for the property received by him. [C.'73, § 2270.]

SEC. **3218. Order of court.** Upon the filing of the bond as above provided, and the court or judge being satisfied with the amount thereof, it shall order the personal property of the minor to be delivered to the guardian, and the clerk shall spread the bonds and receipt upon the records, and notify by mail the court granting the letters of guardianship of the amount of property allowed to the guardian, and the date of the delivery thereof. [C.'73, § 2271.]

DRUNKARDS, SPENDTHRIFTS AND LUNATICS.

SEC. **3219. Guardians of.** When a petition, verified by affidavit, is presented to the district court that any inhabitant of the county is:

1. An idiot, lunatic or person of unsound mind;
2. An habitual drunkard, incapable of managing his affairs;
3. A spendthrift who is squandering his property;

And the allegations of the petition are satisfactorily proved upon the trial provided for in the following section, the court may appoint a guardian of the property of such person, who shall be the guardian of the minor children of his ward, unless the court otherwise orders; and if such person is an habitual drunkard the court may appoint a guardian of his person, whether he has any estate or not. [23 G. A., ch. 42, § 1; C.'73, § 2272; R., § 1449.]

The appointment of a guardian for an insane person is based upon the fact of insanity: *Wilson v. Shorick*, 21-332.

The appointment of a guardian upon a petition charging insanity will be regarded as a determination of the fact of insanity: *Ockendon v. Barnes*, 43-615; *Seerley v. Sater*, 68-375.

The record of the proceeding for the appointment of a guardian of an insane person will not constitute notice to one who marries such person under the belief that the latter is sane: *Barber v. Barber*, 74-301.

The statutory provision with reference to guardianship of persons of unsound mind relates to a condition different from idiocy, lunacy or insanity. Weakness of mind is not necessarily unsoundness, but there may be a weakness short of idiocy, either congenital or superinduced by disease or old age, that amounts to unsoundness: *Smith v. Hickenbottom*, 57-733.

A person of unsound mind is one who is incapable of transacting the particular business in hand. It is not necessary that he be insane or a distracted person, and he may be capable of transacting some kinds of business and yet be of unsound mind and incapable of transacting business of magnitude, or of some degree of intricacy: *Seerley v. Sater*, 68-375.

The question to be determined in the appointment of a guardian for one claimed to be of unsound mind is whether such person is capable of managing his estate, not whether he is capable of managing it as well as such estates are commonly managed. If he is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of the business and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others, he is not of unsound mind within the meaning of this section, and should not be deprived of the control of his property: *Emerick v. Emerick*, 83-411.

It is error to instruct the jury in such a case that if the party is not possessed of sufficient strength of mind and ability to transact his business affairs with ordinary care and prudence, then under the law he will be deemed of unsound mind: *Ibid.*

In a particular case, *held*, that an allegation that the person for whom it was sought to have a guardian appointed was "incapaciated . . . for taking care of his property" was a sufficient statement of unsoundness to make it a case for the appointment of a guardian, in the absence of any objection to its insufficiency: *Guthrie v. Guthrie*, 84-37.

While it is better to have the record show explicitly that the person for whom a guardian is appointed is adjudicated to be of unsound mind, the appointment of a guardian on an application based on that ground will be presumed to have been based upon the finding that the person in question was of unsound mind: *Ibid.*

The verification of the petition is not a jurisdictional matter: *Ibid.*

The duties of guardians of insane persons in respect to the management of their property are, by statute, substantially the same

as those of guardians of minors: *Gates v. Carpenter*, 43–152.

A tenant renting property belonging to a landlord who is under guardianship will be considered as holding the property under such insane owner, and as having notice of the rights of such owner, and a release by the guardian will not be regarded as defeating the rights of his ward: *Thode v. Spofford*, 65–294.

The guardian of an insane wife has not the power, on her behalf, to waive the right to have her dower interest in the estate of her deceased husband so set off as to include the homestead: *Ratcliff v. Davis*, 64–467.

A person under guardianship is *prima facie* disqualified to make a will: *In re Fenton's Will*, 66 N.W., 99.

However, an adjudication as to sanity with reference to the granting of guardianship is not conclusive as to capacity or incapacity to make a will, as conditions of mind that would show a person incompetent to care for and preserve property might in no sensible degree show a condition of mind to incapacitate for making a will: *Ibid.*

Therefore, *held*, on the other hand that an adjudication of sanity was necessarily conclusive in proceeding to probate the will: *Ibid.*

SEC. **3220. Petition—Trial.** Such petition shall set forth, as particularly as may be, the facts upon which the application is based, and shall be answered as in other ordinary actions, all the rules of which shall govern so far as applicable and not otherwise provided in this chapter. The applicant shall be plaintiff and the other party defendant, and either party may have a trial by jury. The petition may be presented to the judge, who may appoint a temporary guardian. [C. '73, § 2273.]

SEC. **3221. Order of court—power of guardian.** Said court, or a judge thereof, may from time to time make such orders as may be necessary, authorizing the guardian of the person of an habitual drunkard to confine and restrain him in such manner and in such place within this state as may by the court or judge be considered best for the purpose of preventing his using intoxicating liquors, and as may tend to his reformation, which may be modified, changed or vacated by the court or any judge thereof until the guardianship shall be terminated. Such person shall, at all reasonable times, have the right to confer with his attorney, and may at any time apply to said court or any judge thereof for the modification or vacation of any existing order as to his confinement and restraint. Any application for the entry, modification or vacation of any order relative to such confinement or restraint, made by the guardian or his ward, shall be heard upon such notice to the other party as the court or judge may direct. [23 G. A., ch. 43, § 2.]

SEC. **3222. Termination of guardianship.** At any time, not less than six months after the appointment of such guardian, the person under guardianship may apply to the court, or any judge thereof, by petition, alleging that he is no longer a proper subject thereof, and asking that the guardianship be terminated. Notice of such petition shall be served upon the guardian in such manner and for such length of time as the court or judge may direct, requiring the guardian to answer the same at or before a time fixed therein. If the guardian shall file an answer denying the allegations of the petition, the court or judge shall try the issue, unless the petitioner demand a jury trial, in which case the issue shall be tried by a jury as soon as practicable, and the costs paid by the ward, unless judgment terminating the guardianship is rendered, and a finding is made that the guardian resisted the petition therefor without reasonable cause, in which event the costs or any part thereof may be taxed against him. If any petition for terminating such guardianship shall be denied, no other petition shall be filed therefor until at least four months shall have elapsed since the denial of the former one. [Same, § 3.]

SEC. **3223. Provisions made applicable.** The provisions of this chapter, and all other laws relating to guardians for minors, and regulating or prescribing the powers, duties or liabilities of each, and of the court or judge thereof, so far as the same are applicable, shall apply to guardians and their wards appointed under the fourth preceding section of this chapter. [C. '73, § 2274; R., § 1451.]

The statutory provision for bringing action in behalf of a minor by next friend (§ 3480) is not applicable in case of actions in behalf of insane persons which can only be brought by guardian. (See § 3485): *Tiffany v. Worthington*, 65 N.W., 817.

SEC. **3224. Suits by guardian.** Any guardian may sue in his own name, describing himself as guardian of the ward for whom he sues; and when his guardianship shall cease by his death, removal or otherwise, or by the decease of his ward, any action or proceeding then pending shall not abate, but his successor, or the person for whom he was guardian, or the executor or administrator of such person, as the case may require, shall be substituted or joined as party thereto. [C.'73, § 2275; R., § 1452.]

SEC. **3225. Real estate sold—allowance to family.** Whenever the sale or mortgage of the real estate of such ward is necessary for his support, or for the support of his family or the payment of his debts, or will be for the interest of the estate or his children, the guardian may sell or mortgage the same under like proceedings as required by law to authorize the sale of real estate by the guardian of the minor. The court shall, if necessary, set off to the wife and children under fifteen years of age of the insane person, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them for twelve months from the time he was adjudged insane. [26 G. A., ch. 54; 22 G. A., ch. 70; C.'73, § 2276; R., § 1453.]

The right of the wife and minor children to support out of the estate, is subordinate to the rights of the creditors as to property not exempt from liability for debts: *Dutch v. Marvin*, 72–663.

SEC. **3226. Guardian to complete contracts.** The guardian of any person contemplated in this chapter providing for the appointment of guardians, whether appointed by a court in this state or elsewhere, may complete the real contracts of his ward, or any authorized contracts of a guardian who has died or been removed, in the same manner and by like proceedings as the real contracts of one deceased may be, under an order of court, performed by his executor or administrator. [C.'73, § 2277; R., § 1454.]

SEC. **3227. When estate is insolvent.** If the estate of such person is insolvent, or will probably be insolvent, the same shall be settled by the guardian in like manner, and like proceedings may be had, as are required by law for the settlement of the insolvent estate of a deceased person. [C.'73, § 2278; R., § 1455.]

SEC. **3228. Custody.** The priority of claim to the custody of any idiot, lunatic, person of unsound mind, habitual drunkard or spendthrift shall be:

1. The legally appointed guardian;
2. The husband or wife;
3. The parents;
4. The children. [C.'73, § 2279.]

CHAPTER 6.

OF MASTER AND APPRENTICE.

SECTION **3229. Indenture.** Any minor child may be bound to service, until the attainment of the age of majority, by a written indenture, specifying the age of the minor, the terms of agreement, and, if more than twelve years of age and not a pauper, the indenture must be signed by him of his own free will. [C.'73, §§ 2280–1; R., §§ 2573–4; C.'51, §§ 1516–17.]

SEC. **3230. Consent of parent or guardian.** A written consent must be appended to such agreement and signed by the father, but if he is dead or has abandoned his family or is for any cause incapacitated, by the mother, or if she is dead or is incapacitated, by the guardian, or if there is none, then by the clerk of the district court. [C.'73, § 2282; R., § 2575; C.'51, § 1518.]

SEC. **3231. Paupers.** The clerk of the district court may bind minors who are paupers until they have attained the age of majority, without

obtaining their consent, and the indenture must in that case be signed by the master and said clerk. [C.'73, §§ 2283–4; R., §§ 2576–7; C.'51, §§ 1519–20.]

SEC. **3232. Indenture in triplicate.** The indenture must in all cases where there is a parent or guardian be in three parts, one being left with the master, another with the clerk of the district court, and the third with the person by whose consent he is bound. [C.'73, § 2285; R., § 2578; C.'51, § 1521.]

SEC. **3233. Powers—rights—liabilities.** The powers, liabilities and duties of the master and the rights of the apprentice are the same as those of parent and child, respectively, except as to inheritances and as is otherwise provided by law. [C.'73, § 2286; R., § 2579; C.'51, § 1522.]

SEC. **3234. Binding out children in poor-house.** Any child confined in any poor-house or house of refuge, who is under sixteen years of age, may be apprenticed to learn a trade or occupation, and such apprenticeship shall continue until the child attains the age of eighteen years, or such earlier age as may be fixed in the articles, but the apprenticeship shall terminate upon marriage. The board of supervisors of the county, or the board of trustees of such house of refuge, may appoint a committee from its members, consisting of one or more, who may, in the name of such board, subject to the approval of the district court or a judge thereof, execute articles of indenture for such child to any proper person whom such committee may select, which articles shall be filed with the clerk of the district court, but in all other respects such apprenticeship shall be governed by the provisions of this chapter. Such apprentice, if he proves untrustworthy and intractable, shall be returned to the institution from which he was apprenticed, upon an application in writing by the master, and satisfactory proof thereof to the proper board, who shall thereupon cancel the articles of indenture, and make a record thereof. [C.'73, §§ 539–541, 1378; R., §§ 1112–13, 1115, 1407; C.'51, § 839.]

SEC. **3235. Interests of minor protected.** The parent, guardian or officer by whose act or consent any minor is bound must watch over his interests, and, if the case requires, must enter complaint as provided for in the following section. [C.'73, § 2287; R., § 2580; C.'51, § 1523.]

SEC. **3236. Complaint against master—notice.** Upon complaint by the minor, or by any other person, made to the judge of the district court, stating under oath that the master is ill-treating his apprentice, or is in any other manner failing in the discharge of his duty in regard to him, and giving the particulars with reasonable certainty, the court shall summon the master to appear and answer to such complaint, which, with the summons indorsed thereon, must be served and returned in the same manner as a notice of the commencement of an ordinary action, and the time for appearance shall be regulated by the same rules. The court may make such order as is necessary for the care and custody of the apprentice pending the hearing. [C.'73, §§ 2288–9; R., §§ 2581–2; C.'51, §§ 1524–5.]

SEC. **3237. Answer—trial.** The answer of the master must be under oath, and if any other issue be joined thereon it must be tried as in other cases in the court. [C.'73, § 2290; R., § 2583; C.'51, § 1526.]

SEC. **3238. Judgment—discharge.** If the complaint is admitted by the master, or if the facts proved upon the trial are of sufficient importance to justify the discharge of the minor from further service, judgment shall be rendered accordingly, and a certificate thereof placed in his hands; otherwise the complaint shall be dismissed. [C.'73, § 2291; R., § 2584; C.'51, § 1527.]

SEC. **3239. Appeal.** From any judgment in such cases either party may appeal in the same manner as in ordinary actions. [C.'73, § 2292; R., § 2585; C.'51, § 1528.]

SEC. **3240. Suit for damages.** The above proceedings will be no bar to the bringing of an action by or on behalf of the minor for damages, nor for compensation for services. [C.'73, § 2293; R., § 2586; C.'51, § 1529.]

SEC. **3241. Complaint against apprentice.** If the apprentice refuses to serve according to the terms of the indenture, upon complaint made by the master, the judge shall issue a warrant to forthwith bring the apprentice before him, and shall also cause notice of the proceedings to be given to the parent, guardian or officer by whose act or consent the minor was bound, if found in the county, and a reasonable time, not exceeding three days, shall be allowed the minor in which to make his answer to the complaint. [C.'73, §§ 2294–5; R., §§ 2587–8; C.'51, §§ 1530–1.]

SEC. **3242. Discharge.** If he shows sufficient cause for refusing to serve, he may be discharged from his indenture in the manner hereinbefore provided. [C.'73, § 2297; R., § 2590; C.'51, § 1533.]

SEC. **3243. Master released.** Instead of proceeding as above provided, the master may, for any refusal to serve, or for any gross misbehavior on the part of the apprentice, file a complaint for the purpose of releasing himself from the indenture, whereupon proceedings shall be had similar to those provided in case of a complaint by or on behalf of the apprentice, and judgment rendered in like manner. [C.'73, §§ 2298–9; R., §§ 2591–2; C.'51, §§ 1534–5.]

SEC. **3244. Schooling and treatment of apprentice.** Every master shall send his apprentice, who is six years old and over, to school at least four months in each year, if there is one in the district in which he resides, and at all times he shall clothe him in a comfortable and becoming manner, and provide him with suitable and sufficient food. [C.'73, § 2306; R., § 2599; C.'51, § 1542.]

SEC. **3245. Dissolution—allowance.** The death of the master or removal from the state shall work a dissolution of the indenture, unless otherwise provided therein, or unless the apprentice elects to continue in his service, and, in the event of a dissolution, the apprentice shall receive such allowance for services previously rendered as may be reasonable under the circumstances of the case. [C.'73, § 2300; R., § 2593; C.'51, § 1536.]

SEC. **3246. Binding out by order of court.** Upon a verified complaint being made to the district court of the proper county that the father or mother of a minor child is, from habitual intemperance or vicious and brutal conduct, or from vicious, brutal or criminal conduct toward said child, an unsuitable person to retain the control and education of such child, or where minor children have been abandoned by the parents, the court may, if it finds the allegations in the complaint manifestly true, and may if expedient also, direct that such child be bound as an apprentice to some suitable person until he attains his majority, or appoint a guardian for such child; but nothing herein shall be so construed as to allow the taking of such child, if either parent is a proper custodian. [C.'73, §§ 2301–2; R., §§ 2594–5; C.'51, §§ 1537–8.]

Where the father of an illegitimate child two years of age sought under this section to recover the custody of the same from its mother, it appearing that his moral character was not better than hers, *held*, that it was error to deprive her of its custody: *Pratt v. Nitz*, 48–33.

As to custody, in general, see notes to § 3192.

SEC. **3247. Complaint.** In such a case, a verified complaint must be filed in the office of the clerk of the district court, and a copy thereof, with a notice fixing the time when the matter will be for hearing before the court, must be personally served upon the parent from whom the custody is sought to be taken, at least ten days before the time is stated. [C.'73, § 2303; R., § 2597; C.'51, § 1540.]

SEC. **3248. Preference.** Preference shall be given to such cases over the ordinary business of the court, but trials actually commenced need not be suspended for that purpose. [C.'73, § 2305; R., § 2598; C.'51, § 1541.]

SEC. **3249. Trial—appeal.** In any of the cases provided for in this chapter, where issue is joined, the same shall be tried as ordinary civil

actions, and from the judgment rendered therein the right of appeal by either party will be the same as in such actions. [C. '73, §§ 2296, 2299, 2304; R., §§ 2589, 2592, 2597; C. '51, §§ 1532, 1535, 1540.]

CHAPTER 7.

OF ADOPTION.

SECTION **3250. Who may adopt.** Any person competent to make a will is authorized to adopt as his own the minor child of another, conferring thereby upon it all the rights, privileges and responsibilities which would pertain to it, if born in lawful wedlock to the person adopting. [C. '73, § 2307; R., § 2600.]

SEC. **3251. Consent of parents or officer.** If living, and not divorced or separated, the consent of both parents; if divorced, separated or unmarried, the consent of the parent lawfully having the care and providing for the wants of the child; or if either is dead, then the consent of the survivor; or if both are dead, or if the child has been abandoned, that of the mayor of the city, or if not in a city, of the clerk of the district court of the county where it is living, shall be given to such adoption by an instrument in writing, signed by the parties or party consenting, which shall give the names of the parents if known, the name of the child if known, the name of the person adopting it, the place of residence of all if known, the name by which such child is thereafter to be called, and also state that it is given to the person adopting for the purpose of adoption as his own. [C. '73, § 2308; R., § 2601.]

SEC. **3252. Instrument acknowledged and recorded.** Such instrument must also be signed by the person adopting, and be acknowledged by all the parties thereto in the same manner as deeds conveying real estate are acknowledged, and shall be recorded in the recorder's office in the county where the person adopting resides, and be indexed with the name of the parent by adoption, as grantor, and the child as grantee, in its original name, if stated in the instrument. [C. '73, § 2309; R., § 2602.]

Where there is an entire failure to execute the instrument of adoption as contemplated by statute, a court of equity will not carry out the mere intention to do so: *Long v. Hewitt*, 44–363.

Rights of inheritance can only be acquired through the adoption by a full compliance with the provisions of the statute: *Shearer v. Weaver*, 56–578.

Where the articles of adoption are properly executed, but not recorded during the lifetime of the adopting parent, the adoption does not take effect so as to entitle the child to inherit from the adopting parent, although the child and his natural parents have complied with the terms of the articles: *Ibid.*

The filing for record is as essential to the validity of the adoption as is the execution of the acknowledgment, and a filing for record after the death of the adopting parent will not make the adoption valid: *Tyler v. Reynolds*, 53–146.

So where the written instrument of adoption was almost entirely destroyed by accident soon after execution, by reason of which it became impossible to make record of it, *held*, that the adoption was not valid: *Gill v. Sullivan*, 55–341.

It would seem that failure to record articles of adoption renders them voidable only. As to whether the natural parent may, on account of such failure to record, avoid the articles, and whether the execution of new articles which are recorded before the recording of the prior articles would constitute an avoidance, *quære: Fouts v. Pierce*, 64–71.

The adoption cannot be made when the minor has a guardian, at least without his consent: *Burger v. Frakes*, 67–460.

Adoption does not take effect until the recording of the instrument, and where such record was made during the lifetime of the adopting parent but not until after the child had reached majority by reason of marriage, *held*, that the adoption was not valid: *McCollister v. Yard*, 90–621.

The instrument of adoption is not one authorized to be recorded under § 4630 nor is it a paper belonging to a public office or by law required to be kept therein within § 4635, so as to make the recording thereof original evidence admissible without proof of loss of the instrument itself: *Ibid.*

SEC. **3253. Effect.** Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall be the same that exist by law between parent and child by lawful birth. [C.'73, § 2310; R., § 2603.]

A child by adoption cannot inherit from the parent by adoption, unless the act of adoption has been done in strict accord with the statute: *Tyler v. Reynolds*, 53–146.

Even though the fact of the existence of the instrument of adoption is known to the prospective heirs before the death of the ancestor, the adopted child cannot inherit, unless the instrument of adoption is recorded as required by law: *Ibid.*

The adopted child does not lose the right to inherit from its natural parents: where a father adopted the child of his deceased daughter, *held*, that such child would inherit from him as his own child and also take the share of its deceased mother: *Wagner v. Varner*, 50–532.

Whether foster-parents will inherit from adopted children, *quære: Burger v. Frakes*, 67–460.

Where by adoption in another state the adopted child was entitled to inherit from the adopting parent, *held*, that such child was not entitled, after the death of such parent, to inherit property of another through such parent, under the provisions of § 3378: *Estate of Sunderland*, 60–732.

SEC. **3254. Change of custody.** In case of maltreatment committed or allowed by the adopting parent, or neglect of duty on his part toward such child, the custody thereof may be taken from him by the district court of the county where the parent resides, and intrusted to another at his expense, and the same proceedings may be had therefor, so far as applicable, as in case of master and apprentice, or the court may, on showing of the facts, require from the adopting parent bond with security, in a sum to be fixed by it, running to the county, and for the benefit of the child, conditioned for its proper treatment and the performance of his duty toward it; but no action of the court in the premises shall affect the acquired right of inheritance on the part of the child. [C.'73, § 2311; R., § 2604.]

CHAPTER 8.

OF HOMES FOR THE FRIENDLESS.

SECTION **3255. Powers.** Homes for the friendless incorporated under the laws of the state may receive, control and dispose of minor children of deceased fathers, and those abandoned by them, or where, being able, they fail to provide for them, and in all such cases the mother, for the purpose of surrendering them into the custody of such corporations, shall be considered their legal guardian. If the person or persons lawfully authorized to act as the guardian of any child are unknown, the mayor of the town or city where such home is located may surrender such child. [17 G. A., ch. 176, § 1.]

SEC. **3256. Surrender of child to.** When it is made to appear to a judge of a court of record, or mayor, or justice of the peace of or in such town or city, that the father of a child is dead or has abandoned his family, or is an habitual drunkard, or in prison for crime, and the mother is dead, or has abandoned her family, or is such drunkard, or so confined for crime, or an inmate of a house of ill fame, or that the parents of such child have abandoned or neglect to provide for it, such judge or mayor or justice of the peace may surrender it to said corporation. [Same, § 2.]

SEC. **3257. Upon complaint—appeal.** When complaint is made to the judge of any court of record, or the mayor or a justice of the peace in the city or town where such home is located, that any girl under the age of fourteen years, or boy under the age of twelve years, is abandoned by or is sustaining relations to its parents or guardian as provided in the preceding section, such judge, mayor or justice shall issue a warrant for the arrest of such child, and if it has no parents, or is abandoned by them or its guardian, the mayor, judge or justice may, if he finds it for the best interests of the

child, surrender it to the care of said corporation. An appeal may be taken to the district court from the order of the judge, mayor or justice, within twenty days, in the same manner appeals are taken from judgments in justices' courts, and upon the trial thereof the party charged may have a trial by jury. [Same, § 3.]

SEC. **3258. Habeas corpus.** Upon the hearing of any *habeas corpus* proceedings for the custody of any such child, if it appears that it has been surrendered to the home under the provisions of this chapter, such fact shall be presumptive evidence that it was properly done and that said home was entitled to the custody and guardianship thereof. [Same, § 4.]

SEC. **3259. Guardianship.** Such corporation shall be the legal guardian of the persons of all children surrendered to it under the provisions of this chapter, and may exercise all the right and authority of the parents of such children in regulating the apprenticing and adoption thereof. [Same, § 5.]

SEC. **3260. Religious instruction.** If religious instruction is given any child while an inmate of such home, it shall be in the religious faith of its parents, if the same is known, and when any home shall dispose of the custody of any child, it shall be to some person of the same religious faith as its parents, unless the parent or former guardian otherwise consents. [Same, § 6.]

TITLE XVII.

OF THE ESTATES OF DECEDENTS.

CHAPTER 1.

OF THE PROBATE COURT.

SECTION **3261. Always open—hearing.** The district court shall always be open for the transaction of probate business, but the hearing of any matter requiring notice shall be had only in term time, or at such time and place as the judge may appoint. In cases where there is no contest, or by agreement, such hearing may be had at any place within the judicial district in which the business is pending. [21 G. A., ch. 144; C.'73, § 2313.]

The hearing may be ordered to be had at a place other than the county seat, notwithstanding the provisions of § 286: *Casey v. Stewart*, 60–160.

SEC. **3262. Notice.** When a judge fixes a time and place of hearing thereof, he shall direct what notice shall be given, and no hearing shall be had until proof is made of the giving of such notice. When no notice is prescribed by the judge or court as above provided, the same notice shall be given as in commencing a civil action. [C.'73, § 2314.]

Where a probate court directed that notice of an application by the administrator for sale of the real property to pay debts of the estate should be served by publication for two weeks in a newspaper, which order was complied with, *held*, that the court thereby acquired jurisdiction as against nonresident defendants to act upon such application: *Casey v. Stewart*, 50–160.

SEC. **3263. Disqualification of judge.** Where the judge is a party, or connected by blood or affinity with a person interested nearer than the fourth degree, or is personally interested in any probate matter, he shall order the same transferred to the district court of another district, or to be heard before another judge of the same district, or procure a judge of another district to hold his court for the hearing of such matter. [C.'73, § 2317.]

SEC. **3264. Concurrent jurisdiction.** When a case is originally within the jurisdiction of the courts of two or more counties, that one which first takes cognizance thereof by the commencement of the proceedings shall retain the same throughout. [C.'73, § 2318.]

SEC. **3265. Extent of jurisdiction.** The court of the county in which a will is probated, or in which administration or guardianship is granted, shall have jurisdiction coextensive with the state in the settlement of the estate and the sale and distribution thereof; and a certified copy of any order, judgment or deed, affecting real estate in any county other than that in which administration or guardianship is originally granted, shall be furnished to and entered by the clerk of the district court of the county where such real estate is situated in the probate records of said court. [C.'73, § 2319.]

The fact that a court in granting administration upon the estate of a foreign decedent appoints an administrator for the care of real estate in that county does not limit its jurisdiction under this section as to property in other counties of the state: *Lees v. Wetmore*, 58–170.

SEC. **3266. Process revoked.** Any process or authority emanating from the court in probate matters may for good cause be revoked and a new one issued. [C.'73, § 2320; R., § 2307; C.'51, § 1275.]

SEC. **3267. Bonds filed—approval.** All bonds relating to probate matters shall be filed in the office of the clerk of said court, and shall not be

sufficient until examined by him, and his approval indorsed thereon. [C. '73, § 2321; R., § 2308; C. '51, § 1276.]

This section has no reference to the bonds of guardians, which are provided for by § 3197. Guardianship is not a probate matter, within the meaning of this section: *Reno v. McCully*, 65-629.

SEC. **3268. Clerk to approve.** The clerk shall approve the bonds of all guardians, executors, administrators and trustees, and during the month of January in each even-numbered year shall examine into the sufficiency of the sureties of all executors', administrators', and guardians' bonds in force in his office, which have been executed more than one year prior thereto, and, if he finds the same sufficient, shall note thereon his examination and reapproval, but if he finds the same insufficient, or the sureties shall not requalify on being required by him to do so, he shall note his disapproval thereon, notifying the principal thereof, and place the matter upon the calendar of the court at the next term for the proper order. [21 G. A., ch. 51.]

SEC. **3269. Calendar.** The clerk shall keep a court calendar, and enter thereon only such cases in probate as require the action of the court, and on the first day of each term shall report to the presiding judge all estates wherein an inventory or report is due by law or under the order of the court, and which has not been filed. [Rules in Probate, I, II.]

CHAPTER 2.

OF WILLS AND LETTERS OF ADMINISTRATION.

SECTION **3270. Disposal of property by will.** Any person of full age and sound mind may dispose by will of all his property, subject to the rights of homestead and exemption created by law, and the distributive share in his estate given by law to the surviving spouse, except sufficient to pay his debts and expenses of administration; but where the survivor is named as a devisee therein, it shall be presumed, unless the intention is clear and explicit to the contrary, that such devise is in lieu of such distributive share, homestead and exemptions. No devise or bequest, however, to a corporation organized under the chapter relating to corporations not for pecuniary profit, or to a foreign corporation of a similar character, shall be valid in excess of one-fourth of the testator's estate after payment of debts, if a spouse, child or parent survive the testator. [C. '73, §§ 1101, 2322; R., § 1198.]

142 N.W. 984

Taking effect: No matter when a will is dated or published, it takes effect from the time of the testator's death: *In re Goldthorp's Estate*, 62 N. W., 845; *Bond v. Home for Aged Women*, 62 N. W., 838.

Therefore, where a bequest was made "to the Old Ladies' Home and to the Old Men's Home, if any such are organized in the state, but if not, etc.," *held*, that an old ladies' home organized after the death of the testator was not entitled to the bequest, although provision was made for the payment of the bequest after the estate was settled and other bequests paid: *Bond v. Home for Aged Women*, 62 N. W., 838.

The execution of a will during the life of a testator is not a disposition of property, as the purpose of such instrument is simply to change the direction of the law as to the descent of property, and only becomes operative by the death of the testator: *In re Estate of Peet*, 79-185.

Right to dispose: Under this section testator may so dispose of his property as to deprive an heir of any share or interest therein without any express declaration to that effect: *Stennett v. Hall*, 74-279.

Testator may, by making a full disposition of his property without making any provision for one of his children, thereby disinherit such child although no intention to that effect is expressed: 93-416.

A will is not invalid because it provides for the disposition of the homestead or of property which may be liable for the payment of debts: *Ames v. Holderbaum*, 44 Fed., 224.

The wife's contingent interest in her husband's property cannot be defeated by his will: See notes to §§ 3362, 3376.

Testamentary capacity: The law regards other conditions of mind as well as absolute unsoundness, and such conditions may materially affect the validity of a will; and

while nothing short of absolute imbecility or incompetency will make a will void, yet if the testator had a weak mind so as to be imposed upon and unduly influenced, this is a material thing going to affect its validity: *Bates v. Bates*, 27–110.

A party competent to make a valid will should possess a mind capable of exercising judgment, reason and deliberation, and capable of weighing the consequences of his will to a reasonable degree, and the effect of it upon his estate and family; and all persons devoid of such reason are incompetent to make a legal will: *Ibid.*

There may be sufficient capacity to make a will although there is such mental condition as to authorize the granting of guardianship, and therefore an adjudication in a proceeding as to guardianship is not conclusive on the question of capacity to make a will. *In re Fenton's Will*, 66 N. W., 99.

In order that testator may be held to have due testamentary capacity, it is not necessary that it appear that he possessed the intellectual vigor of youth or that usually enjoyed by him while in perfect health. It is enough if he was capable of comprehending his property interests, and determining the disposition he desired to make of such property and making it: *Webber v. Sullivan*, 58–260.

An instruction was held unobjectionable which stated that a person of sound mind as here contemplated is one who has full and intelligent knowledge of the act he is engaged in, and full knowledge of the property he possesses, and intelligent perception and understanding of the disposition that he desires to make of it, and of the persons that he desires shall be the recipients of his bounty, and the capacity to recollect and apprehend the nature of the claims of those that are excluded from participating in his bounty, but it is not necessary that he should have sufficient capacity to make contracts and to transact business generally, nor to enable him to engage in complex and intricate business matters: *Meeker v. Meeker*, 74–352.

An unnatural and unreasonable disposition of property by will may be considered on the issue of mental condition: *Bever v. Spangler*, 93–576.

One who is incapable of exercising judgment and reason and deliberation and understanding the consequences of his will, and its effects upon his relatives and estate, has not sufficient mental capacity to make a valid will: *Ibid.*

Proof of monomania exhibiting itself in an insane and unfounded dislike to a particular person, either expressly recited in the will or to be inferred in its peculiar dispositions, may be sufficient to overturn it. The evidence that such dislike was groundless must be satisfactory or it will not be sufficient: *Pelamourges v. Clark*, 9–1.

On the issue of sanity raised on the probate of a will, *held*, that facts connected with the personal history of testator, his deportment, conversation and acts, and his confession during sanity, just preceding death, that he had been insane for twenty years preceding, during which time the will was executed, *held* competent; also *held*, that a subsequent will, executed while testator was unquestionably insane, and decedent's conversation while sane in reference thereto, were competent evidence of his insanity when executing the first will, the second will showing as intelligible an exercise of the power to dispose of property as the first: *Ross v. McQuiston*, 45–145.

In a particular case, *held*, that the testamentary capacity of a person executing a will made upon being roused from a state of stupor might well be doubted: *Davis v. Davis*, 43–687.

The fact that devisees and legatees in the will are not relatives of the testator but friends only, is, in the absence of other evidence, of no weight to show want of capacity to make a will: *Smith v. James*, 72–515.

The fact that testator was a spiritulist, and entertained the peculiar views of that sect, is not suffioient, in itself, to establish insanity such as to invalidate his will: *Otto v. Doty*, 61–23.

Where it was claimed that testator was of unsound mind at the time of executing a will, *held*, that his mental condition during six years following the execution of the will might be shown, it appearing that his condition during that time indicated a mental unsoundness of long standing and progressive in itsnature: *Bever v. Spangler*, 93–576.

In such case it is not necessary to negative the execution of the will during a lucid interval: *Ibid.*

The fact that testator is able to attend to ordinary business affairs is not inconsistent with mental unsoundness as shown in other ways, inasmuch as such capacity in some kinds of mental unsoundness continues notwithstanding the disease of the mind: *Ibid.*

Evidence in a particular case, *held* sufficient to support the verdict that testator was not of sufficient mental capacity to execute a will: *Seaward v. Carman*, 78–707.

Where a testator willed the greater part of his property to a friend and two of his sons, giving to only one of his own relatives any substantial part of it, and to the other relatives merely nominal amounts, in an action to set aside the probate of the will on the ground of undue influence and the weakness of the testator's mind at the time the will was executed, *held*, that the evidence was not sufficient to sustain the petition: *Malcomsen v. Graham*, 75–54.

In a particular case, *held*, that the question of testamentary capacity under the circumstances of extreme sickness of the testator should have been left to the jury: *Duggan v. McBreen*, 78–591.

Where the evidence was conflicting as to the alleged incapacity of the testator, and the undue influence by which it was procured, *held* that, the case not being triable *de novo* upon appeal, the finding of the jury would not be disturbed: *Primmer v. Primmer*, 75–415.

The attorney who draws the will and who at the request of the testator is a wit-

ness thereto is competent notwithstanding the provisions of § 4608 as a confidential communication to an attorney to testify as to communications made to him by the testator with reference to the will, the fact of his being a witness at the request of the testator being a waiver of objection to the disclosure of the confidential communications: *Denning v. Butcher*, 91–425.

The executor of a will is competent to waive the objection to the testimony of the physician of the testator as to the mental condition of testator at the time of the execution of the will: *Ibid.*

Evidence in a particular case as to the peculiarities of a testator, *held* not sufficient to show a want of testamentary capacity: *Bennett v. Hibbert*, 88–154.

It is competent for a non-expert witness to state the mental condition of the person after first giving facts showing an acquaintance and knowledge of the person: *Kostelecky v. Scherhart*, 68 N. W., 591. But non-expert witnesses cannot give opinions to the jury based on facts not detailed by them: *Furlong v. Carraher*, 71 N. W., 210.

A non-expert witness giving an opinion as to testamentary capacity must testify to such facts as show his competency to express an opinion, and it is for the trial court to say in the exercise of a sound legal discretion whether the witness has shown himself qualified to give such opinion: *In re Goldthorp's Estate*, 62 N. W., 845.

Testimony as to declarations and conversations of proponents prior to the execution of the will is inadmissible, the persons making them not being parties to the record: *Ibid.*

Declarations of testator to proponents prior to the execution of the will are admissible not as establishing undue influence but as touching the mental capacity of the testator, or that the will was procured by undue influence: *Ibid.*

Evidence of subsequent declarations of testator is also admissible: *Ibid.*

A subscribing witness to a will can state whether the testator was sane at the time the will was executed, although he is not shown to be an expert: *Parsons v. Parsons*, 66–754.

A non-expert witness who is well acquainted with the testator and has had the care of him is competent to testify that he saw no difference in his mental condition in sickness and his mental condition in health: *Severin v. Zack*, 55–28.

Expressions of opinions by the witness in regard to the appearance, conversation and acts of the testator, whose mental capacity is brought in question, are admissible: *Meeker v. Meeker*, 74–352.

It is not erroneous to instruct the jury that the testimony of medical men of experience, given after a careful examination of testator's mental condition, touching such condition at the time of the execution of the will, may be given more weight than the testimony of unprofessional witnesses: *Blake v. Rourke*, 74–519.

The burden of proof of the unsoundness of mind of the testator is upon the party impeaching the validity of his will: *In re Will of Coffman*, 12–491; *Webber v. Sullivan*, 58–260.

Where it appears that testator was capable of making a will except at such times when he was suffering under temporary paroxysms of pain, it is incumbent upon the contestants to prove that the will was made while the deceased was suffering temporary derangement: *Blake v. Rourke*, 74–519.

In a contest as to the probate of a will, the true rule is that the burden of proof of insanity is upon the party alleging it, and who claims the benefit of the fact when established: *Stephenson v. Stephenson*, 62–163.

The legal presumption being in behalf of the mental capacity of the testator and a want of undue influence in the execution of a will, the contestant of the will relying upon the want of mental capacity and the existence of undue influence has the burden of proving those facts even in a case where the beneficiary under the will is one who is in no way related to the testator: *Denning v. Butcher*, 91–425.

The doctrine that in case of gifts between parties standing in confidential relations to each other the burden of proof is on the party claiming under the gift is not applicable in such case: *Ibid.*

Undue influence: The influence exercised over a testator, sufficient to defeat his will, must go to the extent of destroying in some degree his free agency. A bequest made at the request of the devisee is not for that reason alone void, because of undue influence: *McIntire v. McConn*, 28–480.

The burden is upon the contestants to establish undue influence, and the fact that the will is unjust or unreasonable is not sufficient evidence that such influence was exercised, nor does it change the burden of proof: *Webber v. Sullivan*, 58–260.

Evidence of undue influence, exercised by testator's wife over him before marriage, cannot be received to show undue influence during marriage at the time of the execution of the will: *Ibid.*

Where undue influence or false representations have not been shown, evidence of facts showing recitals in the deed in regard to the circumstances inducing the disposition made to be erroneous cannot be received. If the conclusion is the result of erroneous convictions engendered in the mind of the testator on his own motion it cannot be said to be the result of undue influence: *Ibid.*

The fact that the devisee's name was written in the will by himself, that he took charge of the will immediately upon its execution, and that it was not read by the subscribing witnesses nor to decedent in their presence, are suspicious circumstances, and evidence of the further facts that devisee refused to produce the will when requested to do so by decedent, and the declarations of decedent respecting his children, should be admitted to bear upon the question of fraud and undue influence: *In re Will of Hollingsworth*, 58–526.

The fact that before the will was executed testator said that persons had advised him to cut contestant out, *held* not to tend to show undue influence: *In re Will of Convey*, 52–197.

Under the evidence in a particular case, *held*, that there was nothing to show undue influence over testator, whose mental capacity had been claimed to be impaired: *Collins v. Brazill*, 63–432.

Instructions as to what should be considered in determining the competency of testator to execute a will, and whether he did so under undue influence, *held* correct: *In re Will of Convey*, 52–197.

The fact that the disposition made of the property is unreasonable cannot be considered as showing undue influence. Neither can prior declarations of an intent to otherwise dispose of the property be shown for that purpose. Physical condition and age of deceased considered apart from the condition of his memory and other mental faculties are not proper matters to be shown for that purpose. Nor will relationship between the parties alone support a claim of undue influence: *Muir v. Miller*, 72–585.

Where it is claimed that testator was mentally incompetent to execute a will and was influenced to do so by reason of undue influence, it may be shown, as tending to overcome such evidence and the presumption arising from leaving the property to those who are not by nature the next of kin, that previous provision had been made for such next of kin, and that their pecuniary condition was such as to explain the leaving of the property to another: *Sim v. Russell*, 90–656.

The unreasonableness of the will may be taken into account with other circumstances or surroundings in the actual mental condition of the testator when the will was made, his motives which prompted him and the influences to which he was subjected: *Ibid.*

When it is claimed that a will containing a bequest to a person not a relative of the testator was procured by the undue influence of such beneficiary, it is competent to show that the testator lived in the family of such beneficiary and the method in which testator was cared for in such family: *Denning v. Butcher*, 91–425.

Declarations of testator showing that he believed certain persons, mentioned in the will as legatees, were lacking in due affection for him, *held* admissible in a contest as to the probate of a will in support of the claim that it was executed under undue influences, as tending to show that in some manner his feelings toward such legatees had been changed: *Stephenson v. Stephenson*, 62–163.

Evidence that a testator, when in health and long before his will was executed, and when he was not probably under the influence of other persons, expressed his intention to make disposition of his property substantially as he subsequently did in the will, is admissible to show that the will was not made under undue influence: *Dye v. Young*, 55–433.

Evidence of alleged declarations of testator as to how he was going to dispose of his property may be considered in determining the condition of the testator's mind or the state of his affairs. In such cases, the evidence is admissible simply as external manifestations of the testator's mental capacity, and not as evidence of the truth or falsity of the facts he states: *Bever v. Spangler*, 93–576.

The declarations of a testator are not competent evidence to show a revocation of a will admitted to have been once valid or to impeach the validity of a will for a cause not involving his mental condition. But such declarations, whether made before or after making the will, are competent evidence to show the mental incapacity of the the testator or that the will was procured by undue influence: *Bates v. Bates*, 27–110.

Declarations of a testator made after the execution of the will are admissible, as bearing on the question of undue influence: *In re Will of Hollingsworth*, 58–526; *Parsons v. Parsons* 66–754.

Declarations of testator made after the execution of the will, *held* admissible in evidence, not as showing undue influence, but as showing the effects on testator's mind of whatever influence, if any, was exerted upon him to procure him to execute the will: *Stephenson v. Stephenson*, 62–163.

Declarations of legatees, made before or after the execution of a will, are not receivable, in a proceeding to which they are not parties, to affect the validity of the will: *In re Will of Ames*, 51–596.

The declarations of an executor who is a legatee and a party to the record are equally inadmissible: *Ibid.*

Where there are several legatees, declarations of one of them are not admissible to impeach the will: *Dye v. Young*, 55–433.

A contestant cannot introduce in evidence declarations of one of the legatees of a will, nor can declarations of one of the contestants be introduced in evidence by or in behalf of the legatees: *Parsons v. Parsons*, 66–754.

Knowledge of legatee's misconduct: A bequest by wife to husband with knowledge of facts as to the husband's previous conduct and connections, which might be such as to render the marriage void, will not be invalid on that account, however it might be if the bequest were made in ignorance of such facts: *In re Will of Donnely*, 68–126.

Devise to corporation: The provision limiting devises and bequests to corporations, applied: *Byers v. McCartney*, 62–339.

SEC. 3271. After-acquired property. Property to be subsequently acquired may be devised, when the intention is clear and explicit. [C. '73, § 2323; R., § 2310; C.'51, § 1278.]

The bequest in a will of "the remainder of all my personal property and the whole of my real estate," *held* to cover subsequently acquired property, whether real or personal: *Briggs v. Briggs*, 69–617.

The provision of this section with relation to after-acquired property means that such property shall pass by the bequest whenever the intention of the testator to have it so pass is fairly to be inferred from the provisions of the will, when construed according to the established rules for the construc-

tion of such instruments, and it is not necessary that the intention be expressed in direct language: *Ibid.*

Bequests in this form of the residue of testator's estate have always been held to carry the residuum of all the personal property owned by the testator at the time of his death. As to that class of property the rule has been that the will speaks from the time of his death and not from the date of execution, and it was not the intention of the legislature in enacting this statutory provision to change the rule, but it was enacted for the purpose of extending the rule and making it applicable to real as well as personal property: *Ibid.*

SEC. **3272. Verbal wills.** Personal property to the value of three hundred dollars may be bequeathed by a verbal will witnessed by two competent persons, but if such bequest is of greater value, it shall be valid only to that extent. [C.'73, § 2324; R., § 2311; C.'51, § 1279.]

The fact that a decedent in making a nuncupative will attempts to dispose of real property and of personal property to a greater amount than can be legally disposed of in that manner will not render the disposition entirely void, but it will be carried out so far as such a disposition would be valid. In such a case, *held*, that a sum equal to the amount which might legally be disposed of by nuncupative will should be paid out of decedent's personal estate to the persons designated: *Mulligan v. Leonard*, 46–692.

Where it was sought by verbal will to dispose of a promissory note of the value of $400, *held*, that such will was invalid, not only as to the excess of the amount that might be legally disposed of in that manner, but as to the whole: *Stricker v. Oldenburgh*, 39–653.

It need not appear in case of an invalid will that the witnesses were expressly called on by decedent to attest his will: *Mulligan v. Leonard*, 46–692.

Where it appeared that deceased, in answer to questions as to the disposition of his property, answered that he wanted a certain person named to have it, *held*, that the intention to make a disposition of his property was sufficiently shown, and it would be presumed that he spoke with an understanding of the effect of his words, so that the *animus testandi* would be inferred: *Ibid.*

SEC. **3273. Soldier or mariner.** A soldier in actual service, or a mariner at sea, may dispose of all his personal estate by a will so made and witnessed. [C.'73, § 2325; R., § 2312; C.'51, § 1280.]

SEC. **3274. In writing—witnessed—signed.** All other wills, to be valid, must be in writing, signed by the testator, or by some person in his presence and by his express direction writing his name thereto, and witnessed by two competent persons; but if a codicil is duly executed to a will defectively executed and clearly identified in such codicil, the will and codicil shall be considered one instrument and the execution of both sufficient. [C.'73, § 2326; R., § 2113; C.'51, § 1281.]

"Witnessed by two competent witnesses" means that such witnesses must subscribe the will. It is not sufficient to prove the will by witnesses who were present but did not subscribe it: *In re Will of Boyeus*, 23–354.

It is not necessary that the testator should state to the witnesses the character and purpose of the instrument which he causes them to witness: *In re Will of Hulse*, 52–662.

Nor need they be shown to have been requested by the testator to attest his will: *Mulligan v. Leonard*, 46–692.

It is not necessary that the witnesses should see the testator subscribe the will. If the signature be adopted or acknowledged in their presence it is sufficient: *In re Will of Convey*, 52–197.

Where a will has only one competent attesting witness, but a codicil is added on the same sheet of paper, referring to and identifying the original, and the codicil is duly witnessed, the proof of execution will be held sufficient as to both the will and the codicil: *In re Murfield's Estate*, 74–479.

The interest of a witness to a will, in order to disqualify him, must be present, certain and vested: *Quinn v. Shields*, 62–129; *Bates v. Officer*, 70–343.

A corporator in a charitable corporation in which it is not contemplated that any profits shall arise, whose only interest therein is contingent upon a possible termination of the corporation and division of its assets, has no such interest as to be disqualified from being a witness to a will in which a bequest to such corporation is made: *Quinn v. Shields*, 62–129.

The interest which a husband may have in real estate devised to his wife is not such an interest as to disqualify him as a witness: *Hawkins v. Hawkins*, 54–443; *Bates v. Officer*, 70–343.

A will made in another state, and valid where made, but not executed in compliance with the laws of this state, will not be effectual to dispose of real property situated here: *Lynch v. Miller*, 54–516; *Ware v. Wisner*, 4 McCrary, 66.

The signing and executing of a will creates no right and vests no title, not even an inchoate one, in the divesee: His rights, if any, first accrue upon the death of the testator: *Lorieux v. Keller*, 5–196.

A will has no effect upon the rights of any one until the death of the testator. Prior to that time it is inoperative: *Stephenson v. Stephenson*, 64–534.

While a legacy or distributive share in

an estate vests in the heir or legatee at the death of the testator or intestate, a general legacy does not operate as payment of a debt due from the legatee. The payment of such debt is not regarded as having been made at the date of testator's death: *Bowen v. Evans*, 70–368.

SEC. **3275. Interest of witness.** No subscribing witness to a will can derive any benefit therefrom unless it be signed by two competent and disinterested persons as witnesses thereto, besides himself, but if, without a will, he would be entitled to any portion of the testator's estate, he may receive such portion to the extent in value of the amount devised. [C.'73, §§ 2327–8; R., §§ 2314–15; C.'51, §§ 1282–3.]

SEC. **3276. Revocation—cancellation.** Wills can only be revoked in whole or in part by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will; but the subsequent birth of a legitimate child to the testator before his death will operate as a revocation. [C.'73, §§ 2329–30; R., §§ 2320–1; C.'51, §§ 1288–9.]

The manner of revocation thus provided for must be observed, and *held*, that the drawing of a scroll through the name of the testator, not obliterating the signature, did not constitute a destruction of the will, and not being witnessed was not a cancellation: *Gay v. Gay*, 60–415.

Evidence of declarations of testator is not admissible to prove a cancellation of his will where such will has not been destroyed or canceled in such manner as is required by statute: *Ibid.*

Where a testator undertakes to dispose of personal property and real estate, and he subsequently conveys the real estate, it will not, in general, work a revocation of his will as to the personal property of which he dies seized. The conveyance of a part of the devised property works a revocation *pro tanto* only: *Warren v. Taylor*, 56–182.

The birth of a child after the execution of a will and prior to the death of the decedent will operate as an implied revocation thereof: *McCullum v. McKenzie*, 26–510; *Negus v. Negus*, 46–487; *Fallon v. Chidester*, 46–588; *Alden v. Johnson*, 63–124; *Ware v. Wisner*, 4 McCrary, 66; *S. C.*, 50 Fed., 310.

This rule is not changed by the fact that the testator had children living at the time of making the will: *Negus v. Negus*, 46–487.

The subsequent birth and recognition of an illegitimate child by its father operates in the same manner to revoke a previous will: *Milburn v. Milburn*, 60–411.

In the absence of statutory provision upon the subject, the same formalities are required for the republication as for the publication of a will. So *held* as to a will which had been revoked by the subsequent birth of a child: *Carey v. Baughn*, 36–540.

The mere fact that a codicil has been executed does not warrant an inference that it revokes or changes the provisions of the will, and if such codicil has been lost and its contents cannot be proved the will should be allowed to stand as the last and duly executed and published will of the deceased, it not appearing that any portion thereof was revoked by such codicil: *Sternbery's Estate*, 62 N. W., 734.

SEC. **3277. Deposit.** A will sealed up and indorsed may be deposited with the clerk of the court, who shall file and preserve the same until the death of the testator, unless he sooner demands it. [C.'73, § 2331; R., § 2322; C.'51, § 1290.]

SEC. **3278. Executors.** If no executors are named in a will, or if those named fail to qualify and act, the court admitting it to probate shall appoint one or more to carry it into effect. [C.'73, §§ 2332–3; R., §§ 2331, 2334; C.'51, §§ 1299, 1302.]

If an executor is named in the will, a general administrator should not be appointed to supersede him: *Pickering v. Neiling*, 47–242.

SEC. **3279. Posthumous children.** Posthumous children unprovided for by the parent's will shall inherit the same interest as though no will had been made, and the amount thus allowed to such a child, as well as that of any other claim which it becomes necessary to satisfy in disregard of or in opposition to the provisions of the will, must be taken ratably from the interests of heirs, devisees and legatees. [C.'73, §§ 2334–5; R., §§ 2316–17; C.'51, §§ 1284–5.]

Where a certificate in a mutual benefit association named the three children of the member in existence at the time of the issuing of the certificate as beneficiaries, and subsequently the member married again and after his death a child was born to him, *held*, that such child was not entitled to share in the benefit of the certificate: *Spry v. Williams*, 82–61.

Birth of a child after execution of will and prior to the death of the testator acts as an implied revocation: See note to § 3276.

SEC. **3280. Devise—legacy—bequest.** The word "devisee," as used in this title shall, when applicable, be construed to embrace "legatees," and the word "devised" shall, in like cases, be understood as comprising the word "bequeathed." [C.'73, § 2336; R., § 2318; C.'51, § 1286.]

SEC. **3281. Heirs of devisee.** If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest. [C.'73, § 2337; R., § 2319; C.'51, § 1287.]

The widow of a deceased husband cannot inherit property devised by him to a child who died before the death of the husband (following the cases cited in notes to § 3378): *Will of Overdieck*, 50–244.

The word "heir," as used in this section, includes the brother of decedent, but does not include the widow: *Blackman v Wadsworth*, 65–80. As to the widow, see *Phillips v. Carpenter*, 79–600; but now see § 3313.

Where there are no words of gift or grant in a will, but only a direction for a division of the estate at a future time, such direction should be construed as vesting an interest in the estate only when such time arrives. Therefore where it was directed that on the arrival at full age of testator's youngest child the real estate of testator be equally divided between certain children named, their heirs or survivors of them, *held*, that one of such children who died before the time for distribution had no interest in such property which could be disposed of by the will of such child: *McClain v. Capper*, 67 N. W., 102.

Certain provisions of a will construed and held to postpone the vesting of the testator's estate. *Held*, further, that by the terms of the will there is an absolute devise to such of the children as should survive at the time the youngest of them became of age, but it was not to vest until the happening of certain events: *Wilhelm v. Calder*, 71 N. W., 214.

SEC. **3282. Custodian—filing—penalty.** Any person having the custody of a will shall, as soon as he is informed of the death of the testator, file the same with the clerk. Any person who fails to produce the same after receiving reasonable notice so to do may be committed to jail until he does, and shall be liable for all damages occasioned by his failure. [C.'73, §§ 2338–9; R., §§ 2323–4; C.'51, §§ 1291–2.]

SEC. **3283. Probate—jury trial.** After the will is produced, the clerk shall open and read the same, and a day shall be fixed by the court or clerk for proving it, ~~which shall be during a term of court~~, and may be postponed from time to time in the discretion of the court. When the probate of a will is contested, either party to the contest shall be entitled to a jury trial thereon. [16 G. A., ch. 11; C.'73, § 2340; R., § 2325; C.'51, § 1293.]

While probate of a will is necessary to perfect it as an instrument of title, yet, without probate, it is capable of conveying an interest in land devised, and may be the foundation of an equity and claim therein: *Olleman v. Kelgore*, 52–38.

The title of a devisee vests at the death of the testator, and, while a probate of the will is necessary to enable such devisee to introduce it in evidence, it is sufficient if the probate is had before its introduction in evidence although not prior to the bringing of action by the devisee claiming thereunder: *Otto v. Doty*, 61–23.

Under the facts in a particular case, *held*, that there had been a change of domicile on the part of the decedent after the execution of his will, but prior to his death, such as to entitle his will to be probated in the county of his death: *In re Will of Olson*, 63–145.

Before the amendment of this section, expressly providing for a jury trial, *held*, that there was no right to a jury trial: *Gilruth v. Gilruth*, 40–346.

Under the section as amended the parties may demand a jury trial as a matter of right, and the verdict of the jury in such cases will be as conclusive as is the verdict of the jury in an action at law. It cannot be treated like a verdict upon issues in chancery, which were referred to a jury for the purpose of informing the conscience of the court: *Collins v. Brazill*, 63–432.

Since the amendment of this section authorizing a jury trial there is no right to institute an original proceeding or action at law to again try the same questions which have been fully adjudicated in a jury trial under this section: *Smith v. James*, 74–462.

The proceedings in probate cannot be tried *de novo* on appeal in the supreme court: *Ross v. McQuiston*, 45–145; *Sisters of Visitation v. Glass*, 45–154; *In re Will of Donnely*, 68–126; *In re Will of Norman*, 72–84. There is the same presumption in behalf of the jury's verdict as in an ordinary action: *Primmer v. Primmer*, 75–415; *Seaward v. Carman*, 78–707; *Bever v. Spangler*, 93–576.

Where after the close of contestant's evidence, the court refused to direct a verdict sustaining the will, but sustained a motion to the same effect at the close of proponent's evidence, *held*, that the action of the court was erroneous being necessarily based, under such circumstances, upon the relative weight of the testimony in behalf of contestants and proponents respectively. In case of a conflict in the evidence, the question is for the jury: *Phillips v. Phillips*, 61 N. W., 1071.

The question in a proceeding to probate a will is simply whether the writing is the last will of the deceased, and whether it was

duly executed and published by him as such. Admission of the will to probate decides no question but that relating to its due execution and publication: *Lorieux v. Keller*, 5-196.

The probate establishes the execution of the will and renders it admissible as evidence in the courts of the state, and nothing more. It does not establish the testamentary character of the instruments and give validity to a title based upon it. The effect of the will and its interpretation are matters for adjudication when rights of property are claimed under it: *Fallon v. Chidester*, 46-588; *Ware v. Wisner*, 4 McCrary 66; *S. C.*, 50 Fed., 310.

Probate courts have the right to interpret wills in order to ascertain and give effect to the intentions of testator: *Jordan v. Woodin*, 93-453.

But where the executor asked to be discharged and there was nothing in the proceedings up to that time to give rise to any controversy as to the interpretation of the will, held that failure on the part of other parties interested to ask the construction of the will before the discharge of the executor would not preclude them from doing so afterward in a distinct action. *Ibid.*

A proceeding to set aside a last will and testament on the ground of want of testamentary capacity and to admit to probate a prior will may be maintained by one who claims under the prior will although not interested as heir and on that ground entitled to contest the subsequent will. *Kostelecky v. Scherhart*, 68 N W., 591.

Probate proceedings as to the election of a widow to take premises by way of homestead, instead of a dower interest therein, are not conclusive on persons who are not parties to the proceedings and had no knowledge thereof: *Mayee v. Allison*, 63 N. W., 322.

It being presumed that the laws of another state are the same as those of this state, *held*, that a certificate of probate of a foreign will which did not show any steps corresponding to those required by this section was not sufficient in the absence of any showing that the proceeding was not in accordance with the laws of the state where it was had: *In re Capper's Will*, 85-82.

Sufficiency of evidence offered on the probate of a will considered: *White v. Nafus*, 84-350.

When a will is admitted to probate it is to be regarded as a contract of record: *Quinn v. Shields*, 62-129.

A purchaser from devisee in a will which has been probated does not stand in the position of a purchaser without notice as to persons claiming adversely to the will. The question as between the two parties is simply as to which holds the legal title: *Fallon v. Chidester*, 46-588.

As to the jurisdiction of the probate court, see notes to § 225.

A subscribing witness cannot testify as to his understanding of the purpose and object of making the will: *Stephenson v. Stephenson*, 62-163.

A contestant having admitted that testator signed the paper purporting to be his will, and the same was properly witnessed, should not be permitted to introduce testimony tending to show that the will was not witnessed at the request of testator: *Ibid.*

The probate court having general and original jurisdiction of probate of wills, and having exercised such jurisdiction, its proceedings are not void when collaterally assailed, although the certificate of its action might fail to show a direct compliance with the provision of the statute: *Latham v. Latham*, 30-294.

It being by statute provided that the probate court might grant probate upon the testimony of one subscribing witness if no objection was made to the probating, *held*, where the record showed that but one witness was examined in the proceeding it would be presumed that the court properly exercised its discretion in allowing the probate upon such testimony: *Barney v. Chittenden*, 2 G. Gr., 165.

It is not a part of the duty of the probate court to place a construction upon a will when it is offered for probate: *Murphy v. Black*, 41-488.

A contract on the part of a legatee in a will to allow the will to be defeated, when offered for probate, in order to deprive others of their rights under such will, is illegal: *Gray v. McReynolds*, 65-461.

Where a party in his own interests, and not as executor, seeks to have a will probated and is unsuccessful, the costs of the proceeding should be taxed to him: *Allen v. Seward*, 86-718.

A judgment that the parties to a contest of a will with relation to the costs, making them payable out of the estate is not binding upon one who is not a party to such contest and in a particular case, *held*, that the devisee whose interest, whether under the will or without regard to it was unquestioned should not be subjected to the payment of a portion of the costs of such contest: *Bennett v. Hibbert*, 88-154.

It being the duty of an executor to probate the will, he should not be personally held liable for costs of a contest in the absence of bad faith: *Meeker v. Meeker*, 74-352.

And this principle is applicable to an action of right to determine the title of property claimed under the will, in such case *held*, that the defendant being also the executor should not be made liable for costs under a judgment against him but that such costs, including a reasonable attorney fee for plaintiff's attorney, should be paid out of the estate: *Ibid.*

As to setting aside the probate of the will, see § 3296.

SEC. 3284. Notice of hearing. The clerk shall give notice of the time fixed, by publishing a notice, signed by himself and addressed to all whom it may concern, in a daily or weekly newspaper printed in the county where the will is filed, for three consecutive weeks, the last publication of which shall be at least ten days before the time fixed for such hearing, and the

court in its discretion may prescribe a different notice. [C.'73, § 2341; R., § 2326; C.'51, § 1294.]

Publication of the notice here required need not be by the affidavit of the foreman or publisher of the newspaper in which the publication is made, but may be by anyone having knowledge of the fact: *Farrell v. Leighton*, 49–174.

The notice of the probate of a will given by publication is all that is required to be given, and such notice will be binding upon a minor and authorize the court to appoint a guardian *ad litem*: *Ibid.*

No other or further notice than by publication is required to give the court jurisdiction in the proceeding: *In re Will of Middleton*, 72–424.

SEC. **3285. Proof—depositions.** The proof may be made by the oral testimony of the subscribing witnesses taken in open court, or by deposition when they reside outside of the state or judicial district in which the will is to be proven. When by deposition, the court or judge shall order the issuance of a commission to some officer authorized by the laws of this state to take depositions, with the will annexed, and the officer taking the deposition shall exhibit it to the witness for identification, and, when identified by him, shall mark it as "exhibit ....," and cause the witness to connect his identification with it as such exhibit. Before sending the commission out, the clerk shall make and retain in his office a true copy of such will.

SEC. **3286. Certificate.** Wills, when admitted to probate, shall have a certificate of such fact indorsed thereon or annexed thereto, signed by the clerk and attested by the seal of the court; and, when so certified, it or the record thereof, or the transcript of such record properly authenticated, may be read in evidence in all courts without further proof. [C.'73, § 2342; R., § 2332; C.'51, § 1300.]

The probate of a will does not determine its testamentary character and give validity to a title based thereon, but its effect and interpretation are matters for adjudication when rights arise thereunder: *Fallon v. Chidester*, 46–588.

Although the certificate fails to show a compliance with all the directory provisions of the statute in regard to the probate of wills, yet it will entitle the will to be read in evidence: *Latham v. Latham*, 30–294.

The record of the transcript of a will filed in another county is not admissible evidence in proof of the will: *McCarty v. Rochel*, 85–427.

The records here referred to are to be made and kept in the county where the will is probated: *Ibid.*

SEC. **3287. Recorded—executor to have copy.** After being proved and allowed, the will, together with the certificate hereinbefore required, shall be recorded in a book kept for that purpose, and the clerk shall cause the same, or an authenticated copy thereof, to be placed in the hands of the executor therein named or otherwise appointed. [C.'73, §§ 2343–4; R., §§ 2327, 2330; C.'51, §§ 1295, 1298.]

Where real estate is devised to executors as individuals, with power to sell whenever they shall think it advisable to do so, there cannot be a sale of such land for distribution to beneficiaries until the persons named have renounced their trust: *In re Van Brocklin's Estate*, 74–412.

Where the will directed the executor to mortgage the real property for the payment of debts, *held*, that it was his duty to do so, in the absence of any direction of the court to the contrary, and that a mortgage thus executed by him was binding upon the estate, and took priority over the claims of creditors upon the land: *Iowa Loan & Trust Co. v. Holderbaum*, 86–1.

In such case the validity of the mortgage will not depend upon the disposition made of the funds realized thereon: *Ibid.*

SEC. **3288. Married woman as executor.** A married woman may act as executor, independent of her husband. [C.'73, § 2345; R., § 2336; C.'51, § 1304.]

SEC. **3289. Minors.** If a minor under eighteen years of age is nominated as an executor, there will be a vacancy as to him until he reaches that age. [C.'73, § 2346; R., § 2337; C.'51, § 1305.]

SEC. **3290. Vacancies.** If a person nominated as executor refuses to accept the trust, or neglects to appear within ten days after his appointment and give bond as hereinafter prescribed, or if an executor removes his residence from the state, the office shall be vacant. [C.'73, § 2347; R., § 2335; C.'51, § 1303.]

An executor may surrender his trust by resignation, and after a reasonable time for filling his place, he will be released from the duty of participating in the settlement of the estate without any formal order accepting such resignation, and a service of notice upon him threafter as executor will not be good: *U. S. Rolling Stock Co. v. Potter*, 48–56.

The provisions of this section as to removal from the state, apply also to administrators. In ordinary cases a nonresident should not be appointed administrator: *In re Estate of O'Brien*, 63–622.

There is no provision under which any person can be compelled to act as an executor, and if the person named in the will decline to accept the executorship, when the vacancy occurs, and upon proper application, an executor or administrator may be appointed: *Cable v. Cable*, 76–163.

The provisions of this section, that if the person appointed refuses to appear and qualify within ten days a vacancy occurs, do not apply to a foreign executor appointed in accordance with the provisions of § 3295: *In re Miller's Estate*, 92–741.

And further, see notes to § 3297.

SEC. **3291. How filled.** In case of a vacancy, letters of administration with the will annexed may be granted to some other person, or, if there be another executor competent to act, he may be allowed to proceed by himself in administering the estate. [C. '73, § 2348; R., § 2339; C. '51, § 1307.]

In case of a vacancy by resignation the person appointed succeeds to the duties and obligations as well as the powers of the first executor, and can discharge such duties and obligations without delay or interruption: *Shawhan v. Loffer*, 24–217.

As a general rule the power conferred by will upon an executor to sell real property does not pass to an administrator with the will annexed, and this rule is not affected by this section: *Hodgin v. Toler*, 70–21.

An administrator *de bonis non* at common law derived title from the deceased and not from the former administrator, and was entitled only to the goods and personal property remaining in specie, but in this state the powers and duties of a substituted administrator are determined by this section: *Stewart v. Phenice*, 65–475.

A substituted administrator may sue his predecessor on his bond for funds received by him and not applied to the payment of debts of the estate, where there are such debts. It is not necessary that the action be brought by the creditors entitled to such funds: *Ibid.*

But if there are no claims against the estate, then the parties entitled to share in the assets and not the administrator *de bonis non* must sue: *Ibid.*; *Kelley v. Mann*, 56–625.

Where the will designates an executor, the court has no jurisdiction to appoint a general administrator. It can only appoint a special administrator, to serve until the will is proved and the executor is authorized to act: *Pickering v. Weiting*, 47–242.

SEC. **3292. Substitution.** The substitution of other executors shall occasion no delay in the administration of the estate. The periods hereinafter mentioned within which acts are to be performed after the appointment of executors shall all, unless otherwise declared, be computed from the issuing of the letters to the first general executor. [C. '73, § 2349; R., § 2340; C. '51, § 1308.]

SEC. **3293. Trustees to give bond.** Trustees appointed by will or by the court must qualify and give bonds the same as executors, and shall be subject to control or removal by it in the same manner, and others appointed. [C. '73, § 2350.]

Persons to whom property is bequeathed in trust, to be applied as directed in the will, are legatees, and not trustees, within the meaning of this section, and the probate court cannot require them to give bonds as here provided: *Perry v. Drury*, 56–60.

Where property was devised to certain trustees for the benefit of a certain church, *held*, that the fact that the church was unincorporated and was prohibited from taking or holding any property was immaterial, as the money was not devised to the church but to the trustees, who took it coupled with a trust, and as legatees charged by the testator with the duty of executing a charitable use and the benevolent purpose of the testator: *Seda v. Huble*, 75–429.

While the power here given to the court to remove trustees does not apply to legatees to whom property is bequeathed charged with certain trust duties in respect thereto, and although such legatees are exempt from giving bond, yet in view of the power and duty of courts of equity to see that such trusts are fully and faithfully carried out, and that they do not fail for want of a trustee to execute them, they may be removed on their refusal, and others may be appointed to execute the trust; and such appointment may be made although there is an executor authorized to carry out the provisions of the will. Such executor would have no authority as to the management of the bequests to legatees in trust: *In re Estate of Petranek*, 79–410.

Under an appointment of a trustee in a particular case, *held*, that the surcties were liable on his bond not only for the rents of the real estate but for other property coming into his possession as such trustee: *Roberts v. Chambers*, 91–204.

Unless the will relieves the trustee from

the obligation, the court must require a bond to be given. *Held*, also, that a clause in the will, which relieved an executor from obligation to give bond, was personal to him, and did not relieve his successor from complying with the statute: *Sneer v. Stutz*, 71 N. W., 415.

SEC. **3294. Foreign wills—probated in other states.** A will probated in any other state or country shall be admitted to probate in this state, without the notice required in the case of domestic wills, on the production of a copy thereof and of the original record of probate, authenticated by the attestation of the clerk of the court in which such probation was made, or, if there be no clerk, by the attestation of the judge thereof, and the seal of office of such officers, if they have a seal. [C. '73, § 2351; R., § 2328; C. '51, § 1296.]

The probate court having adjudicated the sufficiency of the authentication on the copy presented to it for probate, such adjudication cannot be questioned collaterally when the will is offered in evidence. (See § 3296): *Stanley v. Morse*, 26–454.

An allowance of a foreign will is conclusive of the due execution of the will unless set aside by original or appellate proceedings: *Vance v. Anderson*, 39–426.

The order of probate of a foreign will may be set aside by original action on the ground that the will, although valid in the state where executed, is not in compliance with the requirements of our law, and therefore not valid as a disposition of real property here situated: *Lynch v. Miller*, 54–516.

The proceedings of the court of another state in the probate of a will will be presumed to be regular: *Otto v. Doty*, 61–23.

Where a will probated in another state empowered the executors at their discretion to sell real and personal property and appropriate the proceeds in the manner indicated, *held*, that such power might be exercised by an executor appointed in this state where property was situated, and that the power conferred was not in the nature of a personal trust: *Lees v. Wetmore*, 58–170.

The ancillary administrator should proceed without reference to the condition of the principal estate, at least until such condition is shown: *Ashton v. Miles*, 49–564.

Under the ancillary administration, claims filed under the principal administration may be proved, and if the ancillary estate is solvent the administrator may proceed to pay the claims against that estate in full, unless it is made to appear that the principal estate is insolvent: *Miner v. Austin*, 45–221.

Where administration is taken out in a state in which testator lived and died and in which he owned property, and is afterwards taken out, at the request of the first administrator, in another state in which the testator owned land, the first administrator is the principal and the second the ancillary administrator: *In re Estate of Gable*, 79–178.

And where sufficient assets for the payment of debts are not found under the control of the principal administration, any money, assets remaining under control of the ancillary administration, after debts therein have been paid, should be transmitted to the principal administrator and not distributed to the heirs: *Ibid.*

Where decedent died in Vermont, where she had previously resided, and administration was there granted, but subsequently original administration was also granted in New York, where she had been for a time shortly before her death and where there was a note belonging to her, and the maker of the note, residing in Iowa, made payment thereof to the administrator in Vermont before the granting of papers of administration in New York, *held*, that such payment discharged the obligation of such maker, and that he could not be required to make payment under the administration granted in New York: *Bull v. Fuller*, 78–20.

The giving of notice is dispensed with under this section: *In re Capper's Will*, 85–82.

In a particular case, there being nothing in the record of the probate of the will in the foreign state, to show when, or in what court in such state the will was probated, or that any court or judge ever passed upon the sufficiency of the proof offered and adjudged it sufficient, and that any order was ever made by anyone duly authorized, admitting the will to probate, *held*, that the action of the lower court in admitting such will to probate was erroneous: *Ibid.*

An executor appointed in a foreign jurisdiction in accordance with the provisions of a will is entitled to precedence over anyone else in the granting of ancillary administration: *In re Miller's Estate*, 92–741.

SEC. **3295. Sale of real estate by foreign executors.** All provisions of law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to probate in this state. If the executors or trustees under such wills are empowered to sell and convey real estate, then, upon the production and recording in the proper probate record of a copy of the original record of the appointment, qualification and bond, unless bond was waived in the will, duly authenticated in the manner foreign wills are required to be, such executors or trustees may, in conformity with the power granted in such wills, sell and convey real estate within any county in this state where such probate and proof of qualification may be of record, without further qualifying

in this state, and without reporting such sale to the district court in this state for approval; and such sales and conveyances shall have the same force as if made by executors or trustees qualified within this state and reported to and approved by the district court, unless, at the time of the execution and delivery of said deed, letters testamentary or of administration upon the estate of such decedent shall have been granted in this state and remain in force, and due notice thereof has been given in such county, if other than one in which such letters were granted here, as required in reference to actions affecting real estate; in which case, any conveyance shall be made subject to all the rights acquired under the appointment and letters granted in this state; but no such conveyance shall be made by such executor or trustee until three months after the recording of a duly authenticated copy of the will, original record of appointment and qualification and bond, unless bond was waived in the will, in the proper probate record of the county where the land is situated. [18 G. A., ch. 162, § 1; C. '73, § 2352.]

There is no provision similar to this with reference to domestic wills, and the record of the transcript of such a will filed in another county is not admissible: *McCarty v. Rochel*, 85-427.

The provisions of § 3290 declaring a vacancy if the executor appointed does not appear and qualify within ten days, are not applicable to foreign executors appointed under this section: *In re Miller's Estate*, 92-741.

A sale made under a foreign will not in accordance with this section is valid where the objection is waived: *Dorsey v. Banks*, 88-595.

Under the legalizing provision of 18 G. A., ch. 162, *held*, that where such executors had under a will a right to sell the land sold, and any defect in the sale was due merely to want of formality, the sale was rendered legal: *Smith v. Callaghan*, 66-552.

SEC. **3296. Probate conclusive—setting aside.** Wills, foreign or domestic, shall not be carried into effect until admitted to probate as hereinbefore provided, and such probate shall be conclusive as to the due execution thereof, until set aside by an original or appellate proceeding. [C. '73, § 2353; R., § 2329; C. '51, § 1297.]

The probate of a will does not prevent a subsequent action to set it aside. Such action is legal and not equitable in its nature; *Leighton v. Orr*, 44-679.

An original action to set aside the probate of a will may be brought in the district court: *Lynch v. Miller*, 54-516.

Any person who would have an interest in the property if the will were set aside may maintain an action in probate to have it set aside on the ground that it has been revoked by the subsequent birth of a child: *Alden v. Johnson*, 63-124.

In an action brought in a probate court by the executor of a will to obtain an interpretation thereof, the defendants may set up, in a cross-petition, facts showing that the will is invalid; such proceeding will constitute a direct and not a collateral attack: *Kelsey v. Kelsey*, 57-383.

In determining whether an instrument is a contract or will, the rule is: If the instrument passes a present interest, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract, but if the instrument does not pass an interest or right till the death of the maker, it is a will, or testamentary paper. An instrument may be partly a deed and partly testamentary: *Burlington University v. Barrett*, 22-60.

In determining whether an instrument is testamentary or contract, the use of language peculiar to either class of instruments, or the belief of the maker as to its character, does not control inflexibly the construction. But, weighing all the language as well as the facts and circumstances attending its execution, the courts will give it such construction as will effectuate the manifest intention of the maker: *Ibid.*

An agreement for the disposition of property intended to continue after the death of the owner cannot be given testamentary force and allowed to have operation unless in such form as to be valid as a will: *Crispin v. Winkleman*, 57-523.

A motion to set aside the probate of a will supported by affidavits is not authorized: *In re Will of Middleton*, 72-424.

A party who has not had notice of a probate proceeding and has not appeared therein and contested or waived his right to contest the probate in the manner prescribed by law is not estopped by such proceeding from prosecuting an original action in equity to set aside the will on the ground that it was executed through undue influence. For the purpose of rendering the probate proceedings conclusive on an interested party, notice by publication is not sufficient: *Gregg v. Myatt*, 78-703.

A probate proceeding is not a proceeding *in rem*: *Ibid.*

In an action to quiet title to property claimed under a will, defendant questioned the validity of the probate of the will; *held*, that the action was not one to recover real property and was barred in five years: *Willard v. Wright*, 81-714.

As to the effect of an order of probate, see notes to § 3283.

SEC. **3297. Administration granted.** In other cases, where an executor is not appointed by will, administration shall be granted:

1. To the husband or wife of the deceased;
2. To his next of kin;
3. To his creditors;
4. To any other person whom the court may select.

Individuals belonging to the same or different classes may be united as administrators. [C.'73, §§ 2354–5; R., §§ 2343–4; C.'51, §§ 1311–12.]

The fact that there was an agreement of separation between husband and wife will not deprive the latter of her preference in the matter of administering on the estate of her deceased husband: *Read v. Howe*, 13–50.

After the lapse of the time allowed to relatives of different degrees to apply for administration, the court may appoint any proper person even though not next of kin nor a creditor: *Crossan v. McCrary*, 37–684.

The court has some discretion as to appointing a person designated by this section, and may properly refuse to make the appointment where the party is a nonresident: *In re Estate of O'Brien*, 63–622.

The mere fact of nonresidence will not necessarily disqualify a person from being appointed as an administrator. But it should be considered in determining the qualifications of an applicant: *Chicago, B. & Q. R. Co. v. Gould*, 64–343.

The provision of § 3290, that the removal from the state of an administrator shall create a vacancy, does not disqualify a nonresident for holding the office, but simply enables the court to take into account the fact of nonresidence occurring after the original appointment, and an administrator who has become a nonresident may, nevertheless, be reappointed, if deemed advisable: *Ibid.*

The grant of letters of administration to a person is not in itself an adjudication that such person is an heir, and that there are no other heirs having a better right to administer: *Anson v. Stein*, 6–150.

Administration upon the estate of a nonresident may be granted in any county in which real property of decedent is situated, provided there are debts of decedent, and it does not appear that there is personalty, or sufficient personalty, to satisfy them: *Little v. Sinnett*, 7–324; *Lees v. Wetmore*, 58–170.

As the administrator has nothing to do with the real property of decedent unless it be found that it is necessary for the payment of debts, an application for the grant of letters of administration upon real estate alone should show that such debts exist: *Little v. Sinnett*, 7–324.

Where a court assumes jurisdiction to appoint an administrator, such appointment cannot be collaterally attacked by showing that there was no property upon which administration could be granted: *Murphy v. Creighton*, 45–179. And see *Francisco v. Chicago, M. & St. P. R. Co.*, 35 Fed., 647.

An appointment of an additional administrator (even against the objection of the one first appointed) will not be disturbed on appeal unless an abuse of the discretion of the court in such matters can be shown: *Read v. Howe*, 13–50.

SEC. **3298. Time allowed.** To each of the above classes, in succession, a period of twenty days, commencing with the burial of the deceased, is allowed within which to apply for administration. [C.'73, § 2356; R., § 2345; C.'51, § 1313.]

SEC. **3299. Special administrators.** When, from any cause, general administration or probate of a will can not be immediately granted, one or more special administrators may be appointed to collect and preserve the property of the deceased, and no appeal from such appointment shall prevent their proceeding in the discharge of their duties. [C.'73, § 2357; R., § 2352; C.'51, § 1320.]

In the absence of a direct review, by appeal or otherwise, of the action of the circuit court in appointing a special administrator, it will be presumed that a proper occasion existed for his appointment: *Masterson v. Brown*, 51–442.

SEC. **3300. Inventory—preservation of property.** They shall make and file an inventory of the property of the deceased in the same manner as is required of general executors or administrators, and shall preserve such property from injury, and for that purpose may do all needful acts under the direction of the court, but shall take no steps in relation to the allowance of claims against the estate. Upon the granting of full administration, the powers of the special administrators shall cease, and all the business be transferred to the general executor or administrator. [C.'73, §§ 2359–61; R., §§ 2354–6; C.'51, §§ 1322–4.]

A special administrator does not represent the estate in such manner that the statute of limitations will commence to run against claims from the time of his appointment: *Pickering v. Weiting*, 47–242.

A special administrator may be substi-

tuted as plaintiff in a suit pending in behalf of the deceased, and may prosecute the same: *Masterson v. Brown*, 51-442.

The court has no authority to order a sale of real estate upon the petition of a special administrator, and such sale would be without jurisdiction and absolutely void: *Long v. Burnett*, 13-28.

It having been shown that the special administrator has received property of the intestate, the burden is upon him to account for it, but the mere fact that he fails to make proper report to the court will not render him or his bondsmen absolutely liable if he shows that the property came into the hands of the regular administrator: *Taylor v. McArthur*, 87-155.

SEC. **3301. Bond—oath.** Every executor or administrator, except as herein otherwise declared, before entering on the discharge of his duties, must give a bond in such penalty as may be required by the court, to be approved by the clerk, conditioned for the faithful discharge of the duties imposed on him by law, according to the best of his ability, and take and subscribe an oath the same in substance as the condition of the bond, which oath and bond must be filed with the clerk. [C. '73, §§ 2362-3; R., §§ 2348-9; C. '51, §§ 1316-17.]

The fact that the administrator's bond is signed and sworn to before his appointment will not affect the validity of the appointment: *Morris v. Chicago, R. I. & P. R. Co.*, 65-727.

Action against an administrator for money in his hands which should be paid to the distributees is to be brought by the persons entitled to the money, and not by the administrator *de bonis non*: *Kelley v. Mann*, 56-625.

But if claims against the estate remain unpaid, the administrator *de bonis non* may sue for funds in the former administrator's hands which should have been applied to the payment of such claims: *Ibid.*

Where, by the failure of the administrator to give notice of his appointment, the time within which claims must be filed does not expire, and it does not become known whether or not the assets are sufficient to pay all the claims, an action against the administrator on his bond may be brought by the new administrator appointed on his removal, and the right of action is not confined to creditors having claims: *Stewart v. Phenice*, 65-475.

Where, however, all claims are paid, and the funds remaining in the hands of the administrator are due only to the next of kin, the action on the bond should be brought by the persons entitled thereto, and not by a new administrator: *Ibid.*

An allegation that an administrator fraudulently pretended that he would consent to the allowance of a claim, and proposed to secure the claimant by a conveyance of real property in satisfaction thereof, which was not done, *held* not sufficient to show fraud on the part of the administrator, rendering him personally liable: *Hazlett v. Burge*, 22-535.

If property not belonging to the estate be wrongfully seized by the administrator he is personally liable, and a claim therefor need not be filed as a claim against the estate: *Adkinson v. Breeding*, 56-26.

Where an administrator by a fraudulent concealment secures a receipt from a claimant for the amount of his claim against the estate, he does not thereby become necessarily liable in an action for the amount of such claim, but the action against him must be as adminstrator, and must be brought in a court having jurisdiction of the administrator: *Shropshire v. Long*, 68-537.

A suit against an administrator for nonfeasance or malfeasance may be brought in the district court: *Jenkins v. Shields*, 36-526.

Costs of administration should not be charged up to the administrator except so far as they are occasioned by a contest arising upon exceptions to his report: *In re Heath's Estate*, 58-36.

Where it appears that the administrator has received money belonging to the estate, and he fails to show lawful excuse for not paying it over upon the order of the court, he may be punished for contempt, although he shows that he has otherwise distributed the money in payment of claims and demands which he had no authority to pay, and has no money of his own with which he can repay the amount required: *Wise v. Chaney*, 67-73.

Failure to file an account within one year after appointment, as required by statute, will constitute breach of the bond for which at least nominal damages can be recovered: *Clark v. Cress*, 20-50.

Where there was a clerical mistake in the bond in naming the person whose estate was the subject of the proceeding, *held*, that such mistake might be corrected in equity as against the sureties as well as the principal: *Foley v. Hamilton*, 89-686.

In the approval of a bond under this section the clerk must use the care and diligence which ordinarily prudent persons would exercise in transactions of like importance, and where the sureties are persons entitled to share in the estate and there is ample property he may take into account the inventory as showing the value of their interest, but he may make inquiry outside of such inventory: *Marshall Field & Co. v. Wallace*, 89-597.

If the sureties are not sufficient on the bond in the amount in which it is executed but are sufficient for the amount for which the bond might properly have been executed if the inventory had shown the real value of the estate the clerk will not be liable: *Ibid.*

A surety on an administrator's bond would not become liable for the payment of money by an administrator to himself as entitled to a distributive share in the estate, in the absence of any maladministration or failure to

perform orders of the court, and therefore would not become liable on a judgment against such administrator in a garnishment proceeding in which it should be sought to reach the fund and subject it to payment of judgment against the administrator as an individual: *Shepherd v. Bridenstine*, 80-225.

Where it appears that the executor is mismanaging the affairs of the estate, to the detriment of creditors, he may be required to give bond, although the will provides otherwise: *In re Estate of Holderbaum*, 82-69.

Where the estate was entitled to the benefit arising from the use of the land, and it appeared that the executor had used the land largely on his own account, *held*, that he was properly chargeable with its rental value: *Ibid.*

The court may properly refuse to accept an attorney as surety on an administrator's bond (see § 3851): *Cuppy v. Coffman*, 82-214.

SEC. 3302. New bond. New bonds may be required by the court or judge thereof, to be given in a new penalty and with new securities, when it is found necessary. [C. '73, § 2364; R., § 2350; C. '51, § 1318.]

SEC. 3303. Letters. After filing the bond, the clerk shall issue letters testamentary or of administration, as the case may be, under the seal of the court, giving the executor or administrator the power authorized by law. [C. '73, § 2365; R., § 2351; C. '51, § 1319.]

Letters: The fact that letters of administration are signed by the clerk will not show that the appointment of the administrator was made by the clerk. Such letters are not the evidence of the administrator's appointment, and they would be issued in that form, although the appointment was made by the court during the trial term: *Citizens' Bank v. Rhutasel*, 67-316.

If the clerk issues letters giving greater power than authorized by law, the grant of such excessive power is void: *Pickering v. Weiting*, 47-242.

A foreign administrator cannot sue in our courts without taking out letters of administration: *McClure v. Bates*, 12-77; *Karrick v. Pratt's Ex'rs*, 4 G. Gr., 144.

The appointment of an administrator in another state will be presumed to be regular: *Woodruff v. Schultz*, 49-430.

Where the record of the appointment of a person as executor was not given, but he was referred to and mentioned throughout the record of the court as the executor, and made the report of a sale as executor, and finally resigned as such, *held*, that this was *prima facie* sufficient to satisfy the court on appeal that he was executor in fact: *Shawhan v. Loffer*, 24-217.

Powers conferred; liability: To establish title under an executor's deed, the grantee must, in addition to introducing it in evidence, prove the will and the probate thereof, and lawful proceedings ending in the execution of the deed: *Miller v. Miller*, 63-387.

An executor authorized by the will to convert property into money and put the same at interest has no authority to mortgage the land for the purpose of raising money, and the approval by the court of such proceeding will not render it valid, but the estate having received the money advanced upon such mortgage will be required to repay it with legal interest: *Deery v. Hamilton*, 41-16.

A contract by the executor of a deceased partner with the surviving partnership to continue the partnership business is without authority unless approved by the probate court, and will not bind the estate but the executor only: *Clark v. Ross*, 65 N.W., 340.

An executor or administrator cannot give a promissory note which will be binding as such upon the estate. Such a note if executed will be individually binding upon him, and he may be sued thereon and an individual judgment recovered against him: *Winter v. Hile*, 3-142.

In such case, even though he signs the note with the addition of words indicating his representative capacity, he will nevertheless be personally liable: *Dunne v. Deery*, 40-251.

The addition of the word "administrator" to the signature of an instrument will not render the maker liable in a representative capacity when there is nothing in the instrument itself indicating that it was given in such capacity: *Tryon v. Oxley*, 3 G. Gr., 289.

An administrator is liable individually on a note given by him in satisfaction of a claim due from the estate. The giving of the note is *prima facie* evidence of a consideration, and an admission that he has assets in his hands sufficient to pay the amount: *Thompson v. Maugh*, 3 G. Gr., 342.

Where the widow of deceased owner of real property and his father, each being entitled to a half interest therein, enter into negotiations with reference to the purchase by the former of the interest of the latter, *held*, that the widow, although administratrix of the estate of her deceased husband, was not charged with the duty of protecting or regarding the interest of the other in the property: *Herron v. Herron*, 71-428.

It seems that at common law garnishment of an administrator is not permissible until a balance has been struck and a certain amount found due to distributees; and *held*, that where the widow as administratrix of her husband's estate had received a sum of money in which she was entitled to distributive share as widow, a judgment could not be rendered against her individually, as such judgment would not give the judgment creditor any higher right than he already had, the sureties on the bond of administratrix not being liable under such circumstances: *Shepherd v. Bridenstine*, 80-225.

Under the facts of a particular case, *held*, that the evidence in an action against the administrator individually by claimant, alleging that such administrator had been guilty of negligence and fraud, whereby satisfaction of the claim had been prevented, was not sufficient to support the judgment against the defendant: *Gault v. Sickles*, 85-266.

An administratrix who colludes in the sale of property of a firm of which decedent was a member, thereby depriving the estate of assets with which to pay a judgment-creditor thereof, renders herself individually liable for the amount of the judgment: *Aline v. Franz*, 91-746.

Where a will authorizes a sale of real property by the executor and distribution of the proceeds to legatees, a sale regularly made in pursuance of this power cannot be set aside by the court on the application of the legatees offering to pay all charges on the land and asking to have it set apart to them in specie. The provisions of the will must be carried out: *In re Estate of Bagger*, 78-171.

No relief can be had in an action against an administrator with reference to the estate after his final discharge: *Richardson v. Haney*, 76-101.

Actions by: An administrator may bring action to set aside a voluntary conveyance of property by decedent if his estate is insolvent, and the property or its value is required for the payment of his debts: *Cooley v. Brown*, 30-470: *Doe v. Clark*, 42-123.

And such action may be maintained against a purchaser from the grantee in such conveyance who took the property with knowledge of the facts: *Cooley v. Brown*, 30-470.

The right of the administrator to bring an action to set aside a fraudulent conveyance by his intestate does not defeat the right of the creditor himself to maintain such action: *Harlin v. Stevenson*, 30-371.

A foreign administrator or executor cannot maintain an action without authority of the court of probate in the jurisdiction in which the debtor resides: *Karrick v. Pratt's Ex'rs*, 4 G. Gr., 144.

Under the provisions of the Code of '51, a foreign administrator could not sue in our courts without taking out letters of administration. But the letters of such foreign administrator are admissible in evidence in an action by him: *McClure v. Bates*, 12-77.

A foreign administrator who has acquired possession of a note belonging to deceased is entitled to its control and proceeds, which he does not lose by sending it for collection to a county in this state in which ancillary jurisdiction has been granted, and such administrator may maintain action for the proceeds of such note in his own name and personal right: *Chamberlin v. Wilson*, 45-149.

A foreign executor may make such an assignment of a note due to his testator as will enable the assignee thereof to bring action thereon, as owner, against the maker in the courts of any state in which such action might have been brought by the testator himself. Such right of action is not limited to the state in which the executor making the assignment is appointed: *Campbell v. Brown*, 64-425.

Where an administrator is made party to an action in the state in which he is appointed, and therein recovers judgment against the opposite party, he may sue upon such judgment in another state without reappointment: *Greasons v. Davis*, 9-219.

The administrator of a decedent's estate may maintain an action grounded upon a fraudulent alienation of property by the decedent, when the estate is insolvent and the property or its value is required for the payment of debts: *Cooley v. Brown*, 30-470; *Doe v. Clark*, 42-123; *Harlin v. Stevenson*, 30-371.

Actions against: As an administrator has a right to resort to the real property for the purpose of paying debts, he is a proper party to the proceeding to set aside a sheriff's sale of such property: *Crawford v. Ginn*, 35-543.

An administrator is not concluded by a judgment rendered in a cause to which the heirs were parties, but in which he was not joined: *Dorr v. Stockdale*, 19-269.

When a judgment is against an administrator in his representative capacity, and is to be finally paid from the assets of the estate, for which he has already given the required security, the appeal bond should be light: *In re Pierson's Ex'rs*, 13-449.

In an action against an administrator in his representative capacity, it is error to render judgment against him personally: *Tyler v. Langworthy*, 37-555.

But advantage cannot be taken of such error on appeal unless a motion for the correction of the error has been made and overruled in the lower court: *Wile v. Wright*, 32-451.

Counter-claims: In an action by an administrator for money due decedent, demands against the estate acquired by defendant after the death of intestate cannot be pleaded as a set-off: *Cook v. Lovell*, 11-81; *Woodward v. Laverty*, 14-381: *Lucore v. Kramer*, 22-387.

In an action by an executor to enforce a claim due from defendant to decedent in his life time, defendant may set up any claim existing in his favor against decedent before decedent's death: *Lucore v. Kramer*, 22-387; but cannot interpose claims acquired by him after decedent's death: *Wikel v. Garrison*, 82-454.

The enforcement against the estate of a counter-claim acquired before the death of decedent is not subject to the expenses of administration and claims of the administrator: *Ibid.*

A person sued for funds in his hands belonging to the estate cannot set up by way of counter-claim a demand which he has against the estate for personal services rendered prior to the death of decedent. He must file and establish his claim therefor in the mode prescribed by statute: *Crispin v. Winkleman*, 57-523.

A creditor of the estate who purchases personal property of the estate cannot have his claim against the estate deducted in full from the purchase price. If the estate is in-

solvent he must pay the full price of the property and accept upon his demand a *pro rata* share of the assets: *Eldredge v. Bell*, 64–125.

A claim against the estate not filed within the time required may still be used as a counter-claim against an action for an indebtedness due to the estate: *Ware v. Hawley*, 68–633.

An executor cannot make any agreement for the discharge of his individual liability by the discharge of his creditor's liability to the estate of which he is executor, and he cannot set up the indebtedness to the estate as a counter-claim in an action brought against him individually: *Gourley v. Walker*, 69–80.

In an action by an administrator to collect rent accrued after the death of the decedent, where the defendant, a corporation, asked to have an indebtedness of decedent for stock allowed as a set-off against the claim for rent, *held*, that defendant would have been entitled to offset his claim aginst his liabilities to decedent which had accrued at the time of his death, but as the rents in question had accrued wholly after the death of decedent and had become a part of the general assets of the estate, the claim of defendant could not be allowed: *Toerring v. Lamp*, 77–488.

SEC. **3304. Notice of appointment.** The executors or administrators first appointed and qualified for the settlement of the estate shall, within ten days after the receipt of their letters, publish such notice of their appointment as the court or clerk may direct, which direction shall be indorsed on the letters when issued. [C. '73, § 2366; R., §§ 2389–90; C. '51, § 1357.]

Special administrators are not intended to be included herein, and need not give notice: *Pickering v. Weiting*, 47–242.

This provision as to giving notice is directory, and omission to give the notice does not have the effect to annul the appointment, or prevent the administrator from discharging the duties pertaining thereto: *Johnson v. Barker*, 57–32.

Under § 4681 the affidavit of the executor is competent to prove the fact of his having posted notice of his appointment: *Brownell v. Williams*, 54–353.

By the notice here contemplated the court acquires jurisdiction of the settlement of the estate, and the provision as to notice before final settlement (§ 3399) is precautionary and not jurisdictional: *Van Aken v. Coldren*, 80–254.

SEC. **3305. Limitation.** Administration shall not be originally granted after five years from the death of the decedent, or from the time his death was known, in case he died out of the state. [C. '73, § 2367; R., § 2357; C. '51, § 1325.]

Under this section, *held*, that where it appeared that administration on the estate of a person dying out of the state was granted after five years from the time of his death, it would be presumed that it was shown to the court that such grant of administration was within five years from the time his death was known; *Lees v. Wetmore*, 58–170.

An administrator *de bonis non* may be appointed after the lapse of five years from the death of decedent. This section refers to the first assumption of management of the estate by the probate court in the appointment of the first administrator: *Crossan v. McCrary*, 37–684.

Ancillary administration in this state may be granted after the expiration of five years to an administrator appointed in another state as provided in the next section: *Woodruff v. Schultz*, 49–430; *Dolton v. Nelson*, 3 Dillon, 469.

A judgment creditor who has failed to have administration granted within the time specified cannot afterwards maintain an action to revive his judgment against the heirs or others holding property which belonged to such decedent. Whether any equitable circumstance would warrant the granting of original administration after the expiration of five years, *quære: Bridgman v. Miller*, 50–392.

Before the expiration of the time for granting administration the heirs have no power to bind the estate by the submission of a question to arbitration: *Stahl v. Brown*, 72–720.

As to title to property of the estate where administration has not been granted within the time limited, see notes to § 3362.

SEC. **3306. Foreign administration.** If administration of the estate of a deceased nonresident has been granted in accordance with the laws of the state or country where he resided at the time of his death, the person to whom it has been committed may, upon his application and upon qualifying in the manner required of nonresident executors, be appointed to administer upon the property of the deceased in this state, unless another had been previously appointed; but the original letters or other authority conferring his power upon such administrator, or an attested copy thereof, must be filed and recorded with the clerk of the proper court, and a bond,

with resident sureties, given in such an amount as the court shall prescribe, conditioned for the payment of all claims allowed to residents of the state, and the payment of all legacies and distributive shares coming to such residents, so far as the assets thereof shall extend, before such appointment can be made. In such cases, the court or judge may require payment of all claims filed and allowed or proved belonging to residents of this state, and of all legacies or distributive shares payable to such residents, before allowing the estate to be removed from the state. [C. '73, §§ 2368–9; R., §§ 2341–2; C. '51, §§ 1309–10.]

Under the ancillary administration, claims filed under the principal administration may be proved, and if the ancillary estate is solvent the administrator may proceed to pay the claims against that estate in full, unless it is made to appear that the principal estate is insolvent: *Miner v. Austin*, 45–221.

Until it is shown that the principal estate is insolvent the ancillary administrator should proceed with the payment of the claims properly filed before him, and the settlement of his affairs, without reference to the principal estate: *Ashton v. Miles*, 49–564.

The allowance of a claim before a foreign administrator is not binding on an administrator appointed in this state. There is no privity between such administrators, and the allowance of the claim in the foreign jurisdiction is not evidence as against the administrator here: *Cresswell v. Slack*, 68–110.

A foreign administrator cannot sue in our courts without taking out letters of administration: *McClure v. Bates*, 12–77; *Carrick v. Pratt's Ex'rs*, 4 G. Gr., 144.

The appointment of an administrator in another state will be presumed to be regular: *Woodruff v. Schultz*, 49–430.

Where the administrator of another state is appointed here, and the proceedings in this state are simply in aid of those in the other state, a creditor whose claim is not properly filed under the laws of the other state will not be allowed to subject land in this state, which has by the will passed to a devisee, to the payment of such a claim: *Durston v. Pollock*, 91–668.

This section is not applicable to a case where a foreign executor appointed by will and holding letters from the court in the foreign jurisdiction complies with the provision of § 3294: *In re Miller's Estate*, 92–741.

Where action is brought by a foreign administrator before securing the issuance to him of letters in the jurisdiction where the action is brought, the objection, if not in some manner raised, will be deemed waived: *McAleer v. Clay County*, 38 Fed., 707.

SEC. **3307. Estates of absentees.** When a citizen of the state, owning property therein, absents himself therefrom and conceals his whereabouts from his family for a peried of seven years, a petition may be filed in the district court of any county where such property is situated, setting forth such facts, by any person entitled to administer upon such absentee's estate if he was known to be dead, and praying for the issuance of letters of administration thereon, whereupon said court shall prescribe a notice to be given to such absentee, and order the same to be published in a newspaper published weekly in said county, to be designated by the court, for eight weeks, proof of the publication of which, in the manner and for the time ordered, shall at the expiration of said period be filed with said petition, and thereupon, if the absentee does not appear, letters of administration upon his estate shall issue as though he were known to be dead, and the person to whom the administration is granted shall proceed and administer and dispose of his estate in the same manner that administrators are required to dispose of and administer the estates of decedents.

SEC. **3308. Certificate of foreign administrator, executor or guardian.** A copy of the record of the appointment and qualification of any administrator, executor or guardian, in any other state or country, together with the certificate of the custodian thereof that such appointment is then in force, duly attested and authenticated in the manner provided by law in case of judicial records, may be recorded in the proper probate record in any county in this state, and shall be presumptive evidence of such appointment and qualification. Any such administrator, executor or guardian is authorized to release and discharge of record in any manner, and by any instrument authorized by law, to the same extent as any such officer appointed under the laws of this state could do, any judgment rendered by the supreme court or by any court of any county where such copy of the record is recorded, or

any mortgage or deed of trust given as a mortgage on property within such county belonging to the estate, or to the minor or other person represented by him, and may also release and discharge any property in this state from the lien of such judgment, mortgage or deed of trust; but appended to and as a part of such release shall be the certificate of the judge or clerk of the proper court, duly attested, that said executor, administrator or guardian is, at the date of such release or instrument, still acting as such officer under the authority of said court, and is authorized to execute the same. Nothing herein contained shall authorize any administrator, executor or guardian of another state or country to release or discharge any judgment, mortgage or deed of trust in this state while any administrator, executor or guardian of the estate to which such judgment, mortgage or deed of trust belongs, is authorized to act by virtue of appointment and qualifications under the laws thereof. [25 G. A., ch. 51; 21 G. A., ch. 103.]

There is no such provision with reference to domestic wills: *McCarty v. Rochel*, 85–427.

SEC. **3309. Will executed in another state or country.** A last will and testament executed without this state, in the mode prescribed by the law, either of the place where executed or of the testator's domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided said last will and testament is in writing and subscribed by the testator.

CHAPTER 3.

OF THE SETTLEMENT OF ESTATES.

SECTION **3310. Inventory.** Within fifteen days after his appointment, the executor or administrator shall make and file with the clerk an inventory of all the personal effects of the deceased which have come to his knowledge, and a list of all book accounts which appear to be unsettled, which shall show separately and distinctly, each by itself, the property inventoried as general assets of the deceased, that which is regarded as exempt, and the book accounts. A supplemental inventory must be made in the same manner whenever the existence of additional property is discovered. Inventories as above provided must be filed in all cases, notwithstanding the provisions of any will or the action of any heirs or devisees waiving the filing thereof, and no administration shall be closed until the same has been filed. The court shall enforce the filing thereof whenever the executor or administrator fails to do so. [C.'73, §§ 2370, 2376; R., §§ 2360, 2365; C.'51, §§ 1328, 1333.]

Until the debts and legacies are settled an executor is entitled to the personal property, and may sue for a recovery of debts due the estate: *Grimmell v. Warner*, 21–11.

Upon the appointment of the administrator, his title to the personal property relates back to the death of the intestate: *Haynes v. Harris*, 33–516.

Possession by devisee of personal property is *prima facie* evidence that he holds it as such unless the same person is executor and holds in that right: *White v. Secor*, 58–533.

An administrator has authority to assign notes and bills, and in the absence of any showing to the contrary it will be presumed that this power has been rightly exercised, even if the administrator improperly disposes of them. His assignee taking in good faith acquires good title: *Marshall County v. Hanna*, 57–372.

Where payment of a claim due an estate was made to the widow of decedent, who was afterwards appointed administratrix, *held*, that such payment operated as payment to the estate: *Savery v. Sypher*, 39–675.

If the order of court appointing an administrator is erroneous, and therefore voidable merely, all acts of the administrator until his appointment is set aside will be valid, and payment made to him before removal will bind the estate: *Chicago, B. & Q. R. Co. v. Gould*, 64–343.

Payment to the widow of deceased, who is not administratrix, of damages in causing the death of decedent is not a satisfaction of the claim of the estate: *Dowell v. Burlington, C. R. & N. R. Co.*, 62–629.

The administrator has no power to make a contract with a creditor of the estate by which the latter is to receive land in satisfaction of the claim. Such a contract will not bind the heirs: *Hazlett v. Burge*, 22–531.

It is doubtful at least whether an administrator without leave of court can take real property in payment of an indebtedness to the estate. Where the heir owning the estate entered into a parol agreement with the administrator whereby any interest which he was entitled to as heir or distributee of deceased was to be applied on such indebtedness, *held*, that the administrator did not thereby acquire a claim upon real property descending to the heir, such as would take priority over the levy of attachment against such heir at the suit of his creditor. *Allison v. Graham*, 67–68.

Upon a motion to set aside a compromise made by an administrator by leave of court, *held*, that the proper remedy was by a suit in equity to which the person with whom the compromise was made was a party: *Henry County v. Taylor*, 36–259.

The old common-law rule, that a debtor who has been made executor of his creditor's estate is released from his debt, when it does not appear that the assets of the estate are insufficient to pay the debts, is not in force; but where there is a person other than the executor authorized to collect the debts of the estate, a suit or judgment against the executor for a debt due by him to the estate should be against him individually and not as executor: *Kaster v. Pierson*, 27–90.

Where an administrator, after reporting that there were no assets subject to payment of the debts of the estate, sold property which was set apart to the widow as exempt, and took a note for the same, payable to him as administrator, *held*, that he was not thereby estopped as against a creditor from showing that such note was not an asset of the estate: *Laub v. Trowbridge*, 71–396.

Where the executor set apart to the widow property of the estate to which she was not entitled, *held*, that he was properly chargeable with the value thereof: *In re Estate of Holderbaum*, 82–69.

It is the duty of the court to cause the executor to file his inventory and it is immaterial from what source complaint comes of his failure to do so: *Poole v. Burnham*, 68 N.W., 816.

SEC. **3311. Appraisement.** All property inventoried by the executor or administrator shall be valued by three appraisers, who shall be appointed immediately on the filing of the inventory. The clerk shall issue to them a notice of their appointment, accompanied by a copy of the inventory returned by the executor or administrator, and they shall qualify by taking an oath faithfully and impartially to make the required valuation, and in making the same they shall fix a value to each item of property separately as it appears in the inventory. If any portion of the decedent's personal property is situated in another county, the same appraisers may serve, or others may be appointed. [C. '73, §§ 2373–4, 2378; R., §§ 2363–4; C. '51, §§ 1331–2.]

The appraisement is for the purpose of an accounting with the administrator, and is not evidence against the estate in an action for the recovery of damages for the killing of animals belonging to the estate, unless to rebut the evidence of persons making the appraisement if called as witnesses: *Morrison v. Burlington, C. R. & N. R. Co.*, 84–663.

SEC. **3312. Exempt personal property.** When the deceased leaves a widow, all personal property which in his hands as the head of a family would be exempt from execution, after being inventoried and appraised, shall be set apart to her as her property, and be exempt in her hands as in the hands of the decedent. [C. '73, § 2371; R., § 2361; C. '51, § 1329.]

A failure to inventory and appraise the personal property thus to be set apart to the widow, as required by statute, will not defeat her absolute ownership thereof, nor its exemption in her hands: *Adkinson v. Breeding*, 56–26.

As to who is to be deemed head of a family in such sense that upon his decease his widow may claim property as exempt, see *Linton v. Crosby*, 56–386.

It is doubtful whether the husband can by will deprive his widow of personal property which in his hands has been exempt from execution: *Linton v. Crosby*, 61–293.

It is not provided by statute that the property of the wife, exempt in her hands, shall upon her death vest in the husband. The statute (§ 3366), making provisions as to the widow of deceased husband applicable to the husband of a deceased wife, applies only to the sections of the chapter in which it occurs. The personal property of the wife at her death goes into the hands of her administrator for distribution: *Wilson v. Breeding*, 50–629.

Under a former statute, which did not give the exempt property absolutely to the widow, but provided that it should remain in her possession until disposed of as provided by law, it was held that she could not sell such property and receive the proceeds for her own use: *Meyer v. Meyer*, 23–359, 377.

Also, *held*, that when such property was no longer needed by the widow it did not become liable to administration or to be taken to pay debts, but was to be distributed according to law: *Ellsworth v. Ellsworth*, 33–164; *Paup v. Sylvester*, 22–371.

The administrator cannot maintain replevin against the widow or her vendees for the recovery of chattels exempt from administration. He has no power to control her disposition of such property: *Wilmington v. Sutton*, 6–44.

The administrator has no right to take into his possession property of the widow or that to which she is entitled as exempt property of her husband's estate: *Herd v. Herd*, 71–497.

Pension money is, by § 4009, exempt to the pensioner as such, and not because he is the head of a family; therefore, his widow is not entitled to the same under the provisions of this section: *Perkins v. Hinckley*, 71–499.

SEC. **3313. Life insurance — damages for death — widow deemed heir.** The avails of any life or accident insurance, or other sum of money made payable by any mutual aid or benevolent society upon the death or disability of a member thereof, are not subject to the debts of the deceased, except by special contract or arrangement, and shall be disposed of like other property left by the deceased. When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts. The words "heirs," or "legal heirs" or other equivalent words used to designate the beneficiaries in any life insurance policy or certificate of membership in any mutual aid or benevolent association, where no contrary intention is expressed in such instrument, shall be construed to include the surviving husband or wife of the insured, and the share of such survivor in the proceeds of such policy or certificate made payable as aforesaid shall be the same as that provided by law for the distribution of the personal property of intestates. [18 G. A., ch. 5; C.'73, §§ 1182, 2372, 2526; R., §§ 2362, 4111; C.'51, § 1330.]

Proceeds of life insurance: The administrator is charged with the duty of collecting life insurance and distributing it to the proper persons, and is liable on his bond for failure to do so: *Kelley v. Mann*, 56–625.

The proceeds of a policy of life insurance inure to the separate use of the husband or wife and children, if any, and are not to be distributed in such case among the heirs generally, as other personal property: *Rhode v. Bank*, 52–375.

The above provision contemplates a case where the policy is payable to deceased or his legal representative. If payable to another person, for the use and benefit of such person, it cannot be otherwise disposed of by will: *McClure v. Johnson*, 56–620.

The facts in a particular case, *held* not sufficient to establish an agreement that the avails of life insurance should be subject to a debt: *Herriman v. McKee*, 49–185.

Proceeds of life insurance in the hands of the beneficiary are subject to his debts: *Murray v. Wells*, 53–256.

The proceeds of life insurance if passing to collateral heirs are exempt from the debts of the deceased in the same manner as though they passed to wife and children: *Larrabee v. Palmer*, 70 N.W., 100.

To constitute a special contract or arrangement under this section there must have been a meeting of the minds of the parties amounting to a contract: *Ibid.*

The fact that this section as it originally stood with reference to life insurance was amended by 18 G. A., ch. 5, so as to include sums payable by any mutual aid or benevolent society does not show that such society is not within the provisions of the general statutes of the state relating to insurance: *Grimes v. Northwestern Legion of Honor*, 64 N.W., 806.

See, also, § 1805 and notes.

Damages for death: In an action by the administrator of an infant two years of age, whose death was caused by defects in a county bridge, *held*, that the administrator could recover although the proceeds of such recovery would go to the parent of such child whose negligence contributed to the injury for which action was brought: *Wymore v. Mahaska County*, 78–396.

As to survival of action for injuries causing death, see § 3443 and notes.

SEC. **3314. Allowance to widow and children.** The court shall, if necessary, set off to the widow and children of the decedent under fifteen years of age, or to either, sufficient of his property, of such kind as is appropriate to support them for twelve months from the time of his death, and may, on the petition of the widow or other person interested, review such allowance and increase or diminish the same, and make such orders in the premises as shall be right and proper. Applications for such allowance shall state under oath the number of children under fifteen years of age, the amount of property already set apart to the widow, the value of her deceased husband's estate, the amount of its indebtedness, the value of all property

owned by the widow, and what allowance, if any, has heretofore been made to her. [Rules in probate, VI; C.'73, §§ 2375, 2377; R., § 2370; C.'51, § 1338.]

There is no statutory provision authorizing an allowance to be made to the widow for her support for any period except for the year subsequent to the death of her husband. Under particular facts, *held*, that the supreme court would not interfere with an order refusing to make an allowance to the widow: *Caldwell v. Caldwell's Estate*, 54-456.

The probate court has no authority to make an allowance for this purpose by virtue of the terms of an antenuptial contract: *In re Estate of Collins*, 66-79.

A court in equity may have jurisdiction to carry out the terms of an antenuptial contract and make an allowance in accordance therewith for the support of the widow, but a court of probate cannot grant such relief: *Ibid.*

The allowance for temporary support where necessary is no part of the widow's dower or inheritance, but something entirely distinct, and the right thereto is not relinquished by an antenuptial release of all rights of dower and inheritance as the widow and heir of deceased: *Mahaffy v. Mahaffy*, 61-679.

The purpose of the statute is to provide support for the widow and children for one year from the time of the death of the decedent, and the amount required for such purpose is in the nature of a charge upon the estate, the claim of the widow and children to such allowance being of a higher character than that of the heirs; therefore, *held*, that real estate may be sold to raise the necessary amount, where the personal property is not sufficient for such purpose: *Newans v. Newans*, 79-32.

Nor will such claim be denied even though the widow has no children to support, and has property of her own, when it is shown that the income from such property is not sufficient to meet the expenses for the year: *Ibid.*

This section doubtless confers upon a widow and minor children, if they do not have other means of support, a right to an allowance for their support out of the estate even though it be insolvent: *Dutch v. Marvin*, 72-663.

While the primary idea of the statute is that specific property must be set off, yet, in case it is not possible, the court may charge the executor with making money payments, and that, too, regardless of the question as to whether he has the requisite amount of money in his hands at that time, if there is property which the executor may convert into money for the purpose of making such payments: *Estate of McReynolds*, 61-585.

It is improper for the court to postpone the payment of the allowance made to the widow by ordering that an allowance made to a creditor shall first be paid. The administrator cannot by any agreement or contract with such creditor deprive the widow of her right to priorty as to her allowance: *In re Estate of Dennis*, 67-110.

Under former statutory provisions, *held*, that if the estate was insolvent so that after the payment of debts there would be nothing for distribution, there was no authority for directing the executor to pay an allowance to the widow for the support of herself and minor children: *In re Application of Hieschler*, 13-597.

Facts in a particular case bearing on the amount of the allowance to be made to a widow considered: *In re Dewell's Estate*, 88-14.

The allowance may, upon a proper application and showing, be reduced. It should not ordinarily be paid in advance, but a reasonable opportunity should be left to modify and reduce the allowance in case it should be found necessary to do so: *Estate of McReynolds*, 61-585.

In such matter the court must be allowed the exercise of a considerable discretion. In a particular case, *held*, that the refusal of the lower court to make any allowance would not be reversed on appeal: *Caldwell v. Caldwell's Estate*, 54-456.

A reduction of the allowance can only operate upon an unexpended balance thereof. The widow cannot be required to account for or pay back any portion already expended: *Harshman v. Slonaker*, 53-467.

SEC. **3315. Discovery of assets.** The court or judge may require any person suspected of having taken wrongful possession of any of the effects of the deceased, or of having had such effects under his control, to appear and submit to an examination under oath touching such matters, and if on such examination it appears that he has the wrongful possession of any such property, the court or judge may order the delivery thereof to the executor or administrator. [C.'73, § 2379; R., § 2366; C.'51, § 1334.]

The finding of the court upon such proceeding cannot be pleaded in bar of an action by the administrator to recover the property of the estate: *Ivers v. Ivers*, 61-721.

The court is not given general jurisdiction for the discovery of assets. It may not determine the question as an issue of fact upon general evidence whether the person has taken wrongful possession, but its order must be based on the examination of the defendant himself, and such order can only be made after having obtained jurisdiction of the defendant's person by his presence in court: *Rickman v. Stanton*, 32-134.

In this proceeding the parties are not to be heard as upon a trial, and other evidence than that of the party summoned is not to be introduced. The objection that the adverse party in such proceeding is an executor (see § 4604) cannot be urged against a person thus required to submit to an examination: *Smyth v. Smyth*, 24-491.

An administrator *de son tort* is liable under § 3407 at the suit of a creditor, and the remedy by this section, which is only in favor of an administrator, need not be pursued: *Madison v. Shockley*, 41–451.

Where it appears that the administrator has received money belonging to the estate, and he fails to show lawful excuse for not paying it over upon the order of the court, he may be punished for contempt as here provided, although he shows that he has otherwise distributed the money in payment of claims and demands which he had no authority to pay, and has no money of his own with which he can repay the amount required: *Wise v. Chaney*, 67–73.

Where it appeared that a note and money belonging to the estate were in the hands of decedent's father under a claim of a gift thereof to decedent's mother, but it appeared that such gift was not executed before decedent's death, *held*, that by a proceeding under this section, the father could be required under penalty of imprisonment to deliver over the property belonging to the estate: *Donover v. Argo*, 79–574.

But *held*, that the order of imprisonment should be so modified that it should not provide for the imprisonment of a person for not complying with an order of the court for the delivery of property when it is out of his power to do so: *Ibid.*

An appeal may be taken from an order made by the court in a proceeding under this section: *In re Estate of Pyle*, 82–144.

But where the only order of court in such proceeding was that the administrator bring action against the party complained of, to determine the right to the property in question, *held*, that such party had not such interest in the proceeding as to be entitled to appeal: *Ibid.*

SEC. **3316. Commitment.** If, on being served with the order of the court or judge requiring him to do so, any person fails to appear in accordance therewith, or if, having appeared, he refuses to answer any question which the court or judge thinks proper to be put to him in the course of such examination, or if he fails to comply with the order of the court or judge requiring him to deliver the property to the executor or administrator, he may be committed to the jail of the county until he does. [C. '73, § 2380; R., § 2367; C. '51, § 1335.]

SEC. **3317. Subjecting real estate.** When it is probable that the known and acknowledged property of the deceased will not be sufficient for the payment of his debts, any person to whom the legal title of any real estate was conveyed by the decedent, or any person through whom such title has subsequently passed, or any person claiming an interest therein, may be required to appear and submit to an examination as provided in the two preceding sections, subject to the penalties therein described, and the court or judge shall direct the executor or administrator to file a petition in equity to secure to the estate the title to any real estate which, in the event of the insufficiency of the personal property, would be assets for the payment of debts. [C. '73, § 2381.]

SEC. **3318. Compounding claims.** The executor or administrator, with the approval of the court, may compound with any debtor of the estate who may be thought unable to pay his whole debt. [C. '73, § 2382; R., § 2368; C. '51, § 1336.]

SEC. **3319. Mortgage as assets—satisfaction.** The interest of a deceased mortgagee shall be included among his personal assets and, upon the mortgage being paid off, satisfaction shall be entered by the executor or administrator. [C. '73, § 2383; R., § 2369; C. '51, § 1337.]

SEC. **3320. Security to creditors.** When a person by his will makes such a disposition of his effects as to prejudice the rights of creditors, the will may be sustained, by giving security to the satisfaction of the court for the payment of the claims of the creditors, to the extent of the value of the property devised. [C. '73, § 2384; R., § 2371; C. '51, § 1339.]

A will may dispose of the homestead or of property liable for payment of debts: *Ames v. Holderbaum*, 44 Fed., 224.

SEC. **3321. Funds collected—paid out.** When no different direction is given by will, debts due the estate, as far as practicable, shall be collected, and the debts owing by the estate paid off therewith, to the extent of the means thus obtained. [C. '73, § 2385; R., § 2372; C. '51, § 1340.]

SEC. **3322. Sale of personal property.** The court, on the application of the executor or administrator, from time to time shall direct the sale of such portions of the personal effects as are of a perishable nature, or

which from any cause would otherwise be likely to depreciate in value, and also such portions as are necessary to pay off the debts and charges upon the estate. [C. '73, § 2386; R., § 2373; C. '51, § 1341.]

Debts should be paid out of the personal estate alone unless otherwise directed by the will, although the will leaves the personal property all to one party as a bequest: *McGuire v. Brown*, 41-650.

Where it appears that deceased before his death had made a verbal sale of property, and received the consideration therefor, it is within the power of the court to direct the execution of a release: *Van Aken v. Clark*, 82-256.

The executor has no authority to make a contract with the surviving partners of deceased for the continuance of the partnership business without the approval of the probate court. Such a contract will be binding on the executor only: *Clark v. Ross*, 65 N. W., 340.

SEC. **3323. Sale of real estate—application.** If the personal effects are found inadequate to satisfy the debts and charges, a sufficient portion of the real estate may be ordered sold or mortgaged for that purpose, application therefor being made in the court granting administration, and only after a full statement of all the claims against the estate, and after rendering a full account of the disposition made of the personal estate. [C. '73, §§ 2387-8; R., §§ 2374-5; C. '51, §§ 1342-3.]

When sale proper: Proceedings to set aside the widow's distributive share, and thus compel her to elect whether she will accept the distributive share or retain the homestead for life, should not be commenced until it is determined whether any portion, and if so how much, of the real property of the estate must be sold for the payment of debts: *Thomas v. Thomas*, 73-657.

It is only the interest of the estate in the property owned by decedent, and not the interest vested in the wife under § 3366, which may be subjected to the payment of debts: *Mock v. Watson*, 41-241.

The widow's rights must be set up in the proceeding: See notes to § 3324.

The fact that the personal property is insufficient to pay the debts, by reason of the misapplication thereof by the administrator, will not be a ground of objection to the application for leave to sell: *Conger v. Cook*, 56-117.

The adjudication of the court, in an order for the sale of real property by the administrator, to the effect that such sale is necessary, is to be deemed sufficient as to that fact: *Little v. Sinnett*, 7-324.

Claims against an estate are not liens upon the real property of decedent, and a mortgage placed upon such real property by the executor in accordance with the provisions of the will takes priority over such claims: *Iowa Loan & Trust Co. v. Holderbaum*, 86-1.

The provisions as to sale of real property for the payment of debts do not conflict with the authority of the testator to prescribe that the property of the estate be sold, with or without such necessity: *Ibid.*

Where lands are converted into money for the purpose of paying the debts against estate of a decedent, any of the proceeds shall be regarded as personal property, and, if in the hands of an ancillary administrator, must be transmitted to the principal administrator and not distributed to the heirs: *In re Estate of Gable*, 79-178.

A partition of the lands of an estate should not be ordered until it is determined that the personal estate is sufficient to pay the debts, but an action may be commenced, and if it does not appear when partition is made that it will be necessary to resort to the real estate to pay the debts, the decree partitioning the lands will not be disturbed: *Snyder v. Snyder*, 75-255.

The rights of devisees are inferior to those of creditors: *Spurgin v. Bowers*, 82-187.

Where a person entitled to share the real property has given a bond for payment of claims against the estate such party becomes liable thereunder for claims that are duly allowed unless such allowance is procured by fraud: *Snelling v. Kroger*, 89-247.

Proceedings: This section does not imply that the claims must have been already proven: *Little v. Sinnett*, 7-324.

The fact that the petition does not state all the claims against the estate will not render the proceedings void: *Myers v. Davis*, 47-325.

Allegations in a petition that no personal estate had come into the hands of the administrator, and that there were debts remaining unpaid, *held* sufficient to sustain the jurisdiction of the court in ordering a sale: *Stanley v. Noble*, 59-666.

In the absence of a contrary showing it will be presumed, in the case of a sale of the whole, that such sale was ordered for good reason: *Cowins v. Tool*, 36-82, 86.

Where the records show that claims were filed against the estate, proceedings for sale of property will be upheld against collateral attack, although it does not appear that such claims were ever paid: *Lees v. Wetmore*, 58-170.

Where the provisions of a will required the sale of real property upon the marriage of the widow without reference to the condition of the assets of the estate, *held*, that it was of no importance whether the executor made a proper showing of indebtedness, or whether he acted in good faith or bad faith in the management of the estate, as far as the validity of the sale was concerned: *Urban v. Hopkins*, 17-105.

Sale of real estate cannot be ordered upon the application of a special administrator: *Long v. Burnett*, 13-28.

Defects in the application will not defeat the jurisdiction of the court, and the valid-

ity of proceedings thereunder cannot be attacked collaterally: *Read v. Howe*, 39–553.

The application will not be sustained if not made within the time limited for the filing and allowance of claims against the estate under § 3349, unless the peculiar circumstances of the case are of such a character as to make it the duty of a court of equity to depart from this general rule, and under such circumstances the application must be made within a reasonable time: *McCrary v. Tasker*, 41–255; *Creswell v. Slack*, 68–110.

The action to subject land to the payment of debts should be brought within one year from the giving of notice of administration except under peculiar circumstances which justify a departure from the rule, and during this year partition ought not to be granted. After the year has expired the presumption is that the land is not needed for the payment of debts and partition can then properly be made between the heirs unless it be shown in defense that there is not enough personal property to pay debts and that the executor still has the equitable right to sell the land to meet the liabilities of the estate: *Minear v. Hogg*, 63 N.W., 444.

Under the facts of a particular case, *held*, that circumstances were such as to make proper an application for sale of real estate three years after publication of notice of the appointment of administrator: *Reed v. Reed*, 63 N.W., 329.

Where an application to sell real estate was made more than fifteen years after administration was granted, *held*, that this long delay required the plaintiff to establish circumstances excusing the delay: *Wilson v. Stanton*, 58–404.

While executors and administrators may ask leave to sell real estate before the debts are proven, it cannot be required that a creditor shall do so; and where a creditor had, within a reasonable time after his claim was established, proceeded in equity to compel the sale of real estate in the hands of heirs for the purpose of paying debts, *held*, that he was in time although more than ten years had elapsed after the probate of the will: *Schlarb v. Holderbaum*, 80–394.

In a particular case, *held*, that the circumstances were not such as to authorize an order for the sale on an application made after the time for filing claims had expired: *Hadley v. Gregory*, 57–157.

Matters excusing a delay in filing the application for leave to sell real estate until after the time for filing claims may be set up in the petition making application for leave to sell, and proved: *Conger v. Cook*, 56–117.

A judgment ordering a sale cannot be collaterally attacked, although rendered after the time for filing claims has expired: *Stanley v. Noble*, 59–666.

The petition and notice confer jurisdiction to make an order of sale, and if the court determines that they are sufficient, any error therein must be raised by appeal and not collaterally: *Read v. Howe*, 39–553; *Hilton v. Budgett*, 43–684; *Lees v. Wetmore*, 58–170; *Stanley v. Noble*, 59–666.

If the judgment of the court ordering the sale shows that there was notice, and that the sufficiency thereof was determined, the proceedings cannot be regarded as void for want of jurisdiction on account of irregularities appearing in the record which affect the sufficieney of the service: *Tharp v. Brenneman*, 41–251.

The question as to what must appear in order to give the court jurisdiction to order a sale, and as to the presumption in favor of jurisdiction, discussed at length: *Morrow v. Weed*, 4–77.

Objection to the regularity of the proceedings for the sale of real estate on the ground that there was not a proper accounting as to personal effects cannot be considered to render the order of sale void: *Spurgin v. Bowers*, 82–187.

Before the power to order a sale of real estate to pay debts can arise, a petition, as the law directs, must be presented by a legal administrator: *Long v. Burnett*, 13–28.

When such petition is presented, jurisdiction over that subject is acquired, and the subsequent proceedings, although those of a court of inferior and limited jurisdiction, will be presumed as regular and conclusive as those of courts of general jurisdiction, and cannot be collaterally attacked: *Ibid.*

SEC. 3324. Notice. Before any order to that effect can be made, all persons interested in such real estate shall be served with notice in the same manner as is prescribed for the commencement of civil actions, unless a different one is prescribed by the court or judge. [C. '73, § 2389; R., § 2376; C. '51, § 1344.]

The proceeding upon application of an administrator to sell real property is adversary and not *in rem* merely, and the absence of the notice of such application required by statute renders the proceeding absolutely void: *Good v. Norley*, 28–188; *Boyles v. Boyles*, 37–592.

Where a sale of real property of deceased was made by his heirs, and soon afterward application to sell such property was made by the administrator, of which no notice was given to the purchaser from the heirs, *held*, that such purchaser was bound to know that his vendors took as heirs, and to inquire whether there had been any administration on the property, and was bound without other notice of the proceedings: *Dolton v. Nelson*, 3 Dillon, 469.

The fact that the service of notice is defective will not render the judgment void: *Meyers v. Davis*, 47–325.

A recital in the record that notice has been served is *prima facie* evidence of that fact: *Little v. Sinnett*, 7–324.

Failure to give notice to a devisee or his grantee, on application for sale of real estate, will not render the proceeding of the probate court void and open to collateral attack. Such party may at the proper time, upon application, be granted a hearing: *Spurgin v. Bowers*, 82–187.

Where in proceedings under a previous

statute, which required such notice as the court might prescribe, it did not appear what notice was prescribed, but it did appear that the widow, for herself and also as guardian of her children, signed an instrument approving the conveyance and sale, *held*, that the proceedings were not subject to collateral attack: *Bacon v. Chase*, 83–521.

A party served by publication only may, in the manner provided by § 3796 have an order of sale which is made in pursuance of such application and notice set aside: *Huston v. Huston*, 29–347.

In case of proceedings to sell real property upon application of an administrator, where notice is properly served upon a minor and his guardian, it is not essential to the jurisdiction of the court to order a sale that there be a formal defense interposed on behalf of the minor, at least where it appears that the order of sale was not made upon default but upon a hearing of the evidence and an investigation of the case: *Bickel v. Erskine*, 43–213.

A widow properly notified must set up her claim to dower in this proceeding or be thereafter barred from any claim on the property sold in pursuance thereof: *Olmsted v. Blair*, 45–42.

And where the widow appeared and resisted the sale, but it was ordered without making any reservation of her dower interest, *held*, that she was precluded from subjecting the land so sold to any claim for dower in a subsequent proceeding: *Garvin v. Hatcher*, 39–685.

Where the administrator, for the purpose of paying a mortgage debt, sells the property covered by the mortgage, after proper proceedings, to which the widow is made a party, the dower right of such widow is thereby extinguished as fully as if the property had been sold in pursuance of a foreclosure of the mortgage: *Mead v. Mead*, 39–28.

SEC. **3325. Method of sale.** The real estate shall, when to the interest of the estate, be divided into parcels, appraised as the personal estate was, and the appraisement filed in like manner; but when a part can not be sold without material prejudice to the general interests of the estate, the court may order the sale of the whole, or of such parts as can be sold advantageously. [C.'73, §§ 2390–1; R., §§ 2377–8; C.'51, §§ 1345–6.]

In the absence of a contrary showing it will be presumed, in the case of a sale of the whole, that such sale was ordered for good reason: *Cowins v. Tool*, 36–82, 86.

This provision is not intended to apply to the wife's one-third interest in the land: *Mock v. Watson*, 41–241.

SEC. **3326. Public or private—notice—credit.** Property may be permitted to be sold at private sales when the court is satisfied that the interest of the estate will be thereby promoted, but in other cases sales must be made at public auction, after giving the same notice as is necessary for the sale of like property on execution, but it may be ordered to be sold on a partial credit of not more than twelve months. No property can be sold at private sale for less than the appraisement, without the express approval of the court or judge. [C.'73, §§ 2392–5; R., §§ 2379–82; C.'51, §§ 1347–50.]

Where, in a notice of sale dated June 4th, the time was stated as the 26th of June next, *held*, that the date referred to was in the same year, and not in the next year: *Little v. Sinnett*, 7–324.

Where a town was named as the place of sale, but no particular place therein specified, *held*, that without showing that a mistake occurred, or that an unusual or improper place was adopted for the sale, the defect in the notice was insufficient to render the sale void: *Ibid.*

An administrator has no authority, in the absence of express order of the court, to accept notes and mortgages in part payment for real property sold, and should be charged with the sum for which the property was sold as money received, nor can he be credited with expenses of foreclosing a mortgage so taken: *Richards v. Adamson's Estate*, 43–248.

A purchase of land at administrator's sale by the attorney or any other agent of the administrator and for his benefit, cannot be upheld, and if the property has passed into the possession of an innocent purchaser the administrator will be accountable for its value: *Read v. Howe* 39–553.

A purchaser at such sale by the administrator is voidable at the election of the parties interested, but valid as to others: *Harshman v. Slonaker*, 53–467; *Welch v. McGrath*, 59–519.

Under the evidence in a particular case, *held*, that a claim against the estate for the payment of which real property of decedent had been sold was not fraudulent, and that the sale should not be set aside: *Trimble v. Marshall*, 66–233.

Where an administrator obtained leave to sell an equitable interest of the estate in certain property which was incumbered, and such interest was sold, and subsequently the incumbrance was, in an action for that purpose, found to be void, *held*, that a purchaser of the equitable interest did not take the legal title free from such incumbrance, and nothing passed by the sale: *Crane v. Guthrie*, 47–542.

Where an administrator sells land which is subject to liens, the liens remain upon the land, and do not attach to the fund in the hands of the administrator: *Sullivan v. Leckie*, 60–326.

The rule *caveat emptor* applies to a judicial sale of land by order of court on an applica-

tion of an administrator unless there is fraud, and the estate will not be bound by covenants of warranty inserted in the deed by the administrator: *Hale v. Marquette*, 69–376.

Where it did not appear of record that there was any publication, notice, sale, etc., as required, *held*, that a deed purporting to be made as a result of such proceeding was invalid: *Thornton v. Mulquinne*, 12–549.

The interest of a mortgage under a mortgage on the real property of the decedent made by the executor in pursuance of the directions of the will is not affected by a sale of such property under the order of the court, to which proceeding the mortgagee is not made a party: *Iowa Loan & Trust Co. v. Holderbaum*, 86–1.

The purchasers of real property at a sale made by an executor in accordance with the directions of the will are necessary parties to a proceeding to set aside such sale: *In re Estate of Bagger*, 78–171.

An executor has the right to appeal from an order setting aside a sale which he claims to have made in pursuance of the provisions of the will: *Ibid.*

Where a court has jurisdiction of the matter its action in ordering and confirming the sale cannot be impeached by showing that the requirements of the statute in regard to appraisement or sale were not complied with as to matters of form: *Cowins v. Tool*, 36–82.

Where an order of sale is made in a proper proceeding after due notice, and the deed is approved, an error in the proceedings can be corrected only upon appeal and not by collateral attack: *Hutton v. Laws*, 55–710.

Where a sale had been acquiesced in for twenty-six years, *held*, that it would not be set aside on the ground that the evidence of notice and other essential requisites was missing, it appearing also that the party had made no effort to repay to the purchaser any part of the money paid by him: *Horr v. French*, 68 N. W., 581.

SEC. **3327. Borrowing money.** If the court is satisfied that it will be for the best interest of the estate that the real estate shall be withheld, it may, upon the application hereinbefore provided for, order the executor or administrator to borrow money thereon, and execute a note or notes in the name of such officer, secured by mortgage on any real estate belonging to the estate not exempt as a homestead, to secure the payment thereof, and with the proceeds pay the debts shown in the statement set out in the application, and report his action therein to the court.

SEC. **3328. Bond to prevent sale.** Any person interested in the estate may prevent a sale of the whole or any part of the real estate by giving bond to the satisfaction of the court, conditioned that he will pay all demands against the estate to the extent of the value of the property thus kept from sale, as soon as called upon by the court for that purpose, and, if the conditions of such bond are broken, the property will be liable for the debts unless it has passed into the hands of innocent purchasers, and the executor or administrator may take possession thereof and sell it under the direction of the court, or he may prosecute the bond, or pursue both remedies at the same time, if the court so directs. [C. '73, §§ 2396–7; R., §§ 2383–4; C. '51, §§ 1351–2.]

The sale to which this section refers is one for the purpose of paying the debts and charges against the estate, and a sale made to carry into effect the will of the testator is not within its provisions: *In re Estate of Bagger*, 78–171.

Where the will provided for the sale of real property by the executor and the distribution of the proceeds to certain legatees, and it appeared that such sale was regular, *held*, that such legatees did not have a right, on tendering payment of all the charges on the estate, to have the sale set aside and the land set apart to them in specie: *Ibid.*

The object of this section is to prevent a sale of the property by putting the bond in the place of the property and it is only when the sale is to be made to pay demands against the estate that this section applies. It has no application to a case where partition is sought among the heirs and does not authorize the giving of a bond by the heirs for the payment of the debts of the estate so as to enable partition to be made: *Clarity v. Sheridan*, 91–304.

Such partition proceedings may be commenced before the debts are paid, but a decree should not be rendered until it is determined that the real property is not necessary for the payment of the debts of deceased: *Ibid.*

SEC. **3329. Effect of bond.** If the conditions of the bond are complied with, the property shall pass by devise, distribution or descent in the same manner as though there had been no debts against the estate. [C. '73, § 2398; R., § 2385; C. '51, § 1353.]

SEC. **3330. Approval of conveyances.** When real estate is sold or mortgaged, the conveyances or mortgages thereof, executed by the executor or administrator, shall not be valid until approved by the court, which

approval shall be entered of record, and a certificate thereof indorsed on the deed or mortgage, with the signature of the clerk and the seal of the court affixed thereto, and, when so indorsed, shall pass to the purchaser all the interest of the deceased therein prior to his death, in case of sales, and create a lien thereon, in case of mortgages, and be presumptive evidence of the validity thereof, and of the regularity of all the proceedings connected therewith. [C.'73, §§ 2399, 2400; R., §§ 2386–7; C.'51, §§ 1354–5.]

Where the validity of a contract depended upon its approval by the orphans' court of another state, *held*, that such approval rendered the contract as effectual as if it had originally been executed and approved: *Frost v. Clark*, 82–298.

SEC. **3331. Reports of sale or mortgage—record.** All sales, deeds and mortgages shall be reported to the court for approval as soon as practicable after being made. Reports of the sale or mortgage of real estate must be sworn to, and state the term at which the order therefor was obtained, whether the property was appraised, and, if so, the appraised value, whether sold at public or private sale, the terms of sale, whether the additional bond required has been given and approved, and the opinion of the persons making them as to whether the sale is an advantageous one and should be approved, or otherwise. When the subject of the sale, conveyance or mortgage is located in a county other than that in which administration is granted, a complete transcript of the record of all proceedings relating thereto shall be filed by the administrator in the office of the clerk of the district court in such county, and he shall cause the same to be copied at length in the probate records of such county. [Rules in Probate, IV.]

SEC. **3332. Limitation of action.** No action for the recovery of any real estate sold or mortgaged by an executor or administrator can be maintained by any person claiming under the deceased, unless brought within five years after the sale by him or under the foreclosure of such mortgage. [C.'73, § 2401; R., § 2388; C.'51, § 1356.]

This section does not apply to a case where the proceedings of the court granting leave to sell were absolutely void for want of notice or other cause: *Good v. Norley*, 28–188; *Boyles v. Boyles*, 37–592. Nor does it bar an action brought to set aside the sale on the ground of fraud within five years after the discovery of such fraud. (See § 3448): *Cowins v. Tool*, 31–513.

As to similar provision in regard to sales by guardians, see § 3212 and notes.

SEC. **3333. Possession of real property.** If there is no heir or devisee present and competent to take possession of the real estate left by the decedent, the executor or administrator may do so, and demand and receive the rents and profits, and do all other acts relating thereto which may be for the benefit of the persons entitled to the same. [C.'73, § 2402.]

The administrator has no title in the real property of decedent which is subject to sale under a judgment against such administrator: *Lepage v. McNamara*, 5–124.

The administrator has nothing whatever to do with the real estate unless it be necessary to be sold for the payment of debts: *Little v. Sinnett*, 7–324; *Gray v. Myers*, 45–158; *Hodgin v. Toler*, 70–21.

In the absence of statutory provision (which is found, however, in § 4209), the administrator cannot maintain an action of forcible entry and detainer as to real property of decedent: *Beezley v. Burgett*, 15–192.

The administrator has no right as such to receive the rents accruing after the death of decedent from his real property: *Foteaux v. Lepage*, 6–123; *Kinsell v. Billings*, 35–154.

Nor has he authority to pay out money for repairs, improvements and taxes upon such property: *Foteaux v. Lepage*, 6–123.

The administrator, as such, may, in a proper case, sue for rents, but to justify him in doing so it must be shown that there is no heir or devisee present and competent to to take: *Shawhan v. Long*, 26–488; *Toerring v. Lamp*, 77–488.

The administrator may not take possession of the real estate except when there is no heir or devisee present and competent to take possession: *Brundage v. Chenoweth*, 70 N. W., 211.

An executor is not entitled to rents and profits where the persons entitled to the real property are present and competent to take possession: *Dexter v. Hayes*, 88–493.

Where the homestead has been sold under execution the right to rents and profits during the period of redemption is subject to descent and dower and the executor is not entitled thereto for the payment of debts: *Ibid.*

Whether under this section an administrator might bring action for injury to real

estate, *quære*. Whatever he may do is as trustee, not simply in his capacity as administrator, and he must aver the facts which authorize him to act: *Kinsell v. Billings*, 35–154.

Where by the terms of a will the executor is authorized to control and manage the real property of deceased, to rent and dispose of the same in accordance with its provisions, etc., he may maintain an action to quiet the title: *Laverty v. Sexton*, 41-435.

To give an administrator the right to bring action to remove a cloud from the title to land belonging to decedent, and subject it to the payment of his debts, he must show by a full statement of the claims against the estate and a like account of the disposition made of the personalty that the real property is necessary to the payment of the debts. If however, it appears that there was no personal property, the showing of the existence of debts would be sufficient: *Gladson v. Whitney*, 9–267.

In such a proceeding heirs are necessary parties: *Ibid.*

Where growing crops are standing upon land set apart to the widow as dower they pass with the lands, and do not pass to the executor: *Ralston v. Ralston*, 3 G. Gr., 533.

A lease made by an executor not properly approved by the court has no validity, and cannot be enforced against him: *Capper v. Sibley*, 65–754.

Where the will made provision by which the widow and heirs were to continue in occupation of the common property for a considerable time, *held*, that such provisions were in conflict with the widow's dower right and could not be enforced without her consent, and therefore that they must entirely fail, not only as to the widow, but as to the heirs: *Howard v. Smith*, 78–73.

SEC. **3334. Proceeds—account.** Such executor or administrator, under the direction of the court, may apply the profits thereof to the payment of taxes and claims against the estate of the deceased, if the personal assets are insufficient, and account to the heirs or devisees therefor, deducting therefrom the payments made as above provided, together with a reasonable compensation for his own services, to be fixed by the court. [C. '73, §§ 2403–4.]

The appropriation authorized by this section is not restricted to the rents issuing from real property of which the executor has taken possession because there is no heir present or competent to take it, but when the necessity of the appropriation has been shown and the heirs and devises made parties to the proceeding, the profits of any other real estate left by the decedent may be applied to the payment of debts: *Toerring v. Lamp*, 77-488.

SEC. **3335. Taxes for minor heirs without guardians.** When there are minor heirs for whom no guardian has been appointed, the executor or administrator shall pay, out of any assets in his hands, all taxes assessed against the estate, not otherwise provided for, and be credited therefor as for the payment of other claims against the estate. [C.'73, § 2405.]

SEC. **3336. Provisions of will.** When the interests of creditors will not thereby be prejudiced, a testator may prescribe the entire manner in which his estate shall be administered; may exempt the executor from the necessity of giving bond, and prescribe the manner in which his affairs shall be conducted until his estate is finally settled, or until his minor children become of age. [C. '73, § 2406; R., § 2358; C. '51, § 1326.]

Testator may dispose by will of the homestead, or of property liable for the payment of debts: *Ames v. Holderbaum*, 44 Fed., 224.

Authority may be given to the executor by will to incumber the real estate for the payment of his debts, and such mortgage will take priority over the claims of creditors upon the real estate: *Iowa Loan & Trust Co. v. Holderbaum*, 86-1.

And where such direction was given and carried out without objection on the part of the creditors, *held*, that they could not afterwards claim that the mortgage was invalid because prejudicial to their interests: *Ibid.*

Where it appears that the executor is mismanaging the affairs of the estate, to the detriment of creditors, he may be required to give bond, although the will provides otherwise: *In re Estate of Holderbaum*, 82-69.

SEC. **3337. Business continued.** The court, in its discretion, may authorize an executor or administrator to continue the prosecution of any business in which the deceased was engaged at the time of his death, in order to wind up his affairs with greater advantage, but such authority shall not exempt him from returning a full inventory and appraisement, and making reports, as in other cases. [C. '73, § 2407; R., § 2359; C. '51, § 1327.]

SEC. **3338. Claims—statement—notice—allowance.** Claims against the estate shall be clearly stated, and, if founded upon a written instrument, the same or a copy thereof and of all indorsements thereon shall be attached

as a part of the statement, and if upon account, an itemized copy shall be attached, showing the balance; which statement must be sworn to and filed with the clerk of the district court, and ten days' notice of the hearing thereof—which shall be at some regular term of the court—accompanied by a copy of the claim, shall be served on one of the executors or administrators in the manner required for commencing ordinary actions, unless the same has been approved by the executor or administrator, in which case it may be allowed by the clerk, without notice, and so entered upon the probate calendar. [C. '73, § 2408; R., §§ 2391, 2393; C. '51, §§ 1359, 1361.]

Filing of claims: The original written instrument which is a basis of the claim need not be produced until the trial. The filing of a copy is sufficient: *Braught v. Griffith*, 16–26.

The stating of a claim as provided by statute is in the nature of a petition, and a copy of a written instrument or an account upon which it is founded should be attached: *Baker v. Chittucks*, 4 G. Gr., 480.

The claim filed takes the place of a petition, and is to be regarded as a statement of the cause of action against the estate, and must contain all the averments necessary to show such cause of action: *Bremer County v. Curtis*, 54–72.

All that is required in the first instance of the claimant is to make out, verify and file his claim. The administrator may then approve or allow it, if he sees proper; otherwise it is deemed denied (§ 3340). But before the court can obtain any jurisdiction or power to decide as to the correctness of the claim notice must be served on the administrator. The allowance by the administrator, after filing and before notice, of a part of the claim, is not an adjudication as to the balance, and is not binding on claimant, and he may prosecute his demand as to the balance: *Smith v. McFadden*, 56–182.

That the claim is not properly sworn to does not render the filing thereof void: *Goodrich v. Conrad*, 24–254.

The provision in that respect is directory, and the oath may be administered after filing: *Wile v. Wright*, 32–451.

If the claim is filed in due time, though not sworn to, it will be sufficient. The omission of the oath will not render the filing void: *McCrary v. Deming*, 38–527.

The law contemplates that the claim shall be filed with the clerk of the court, and a filing with the administrator is not sufficient: *Corey v. Gillespie*, 62 N. W., 837.

If the claim is such that action thereon may be brought against the administrator in some other court, it need not be the first filed, etc., in the probate court: *Linn County v. Day*, 16–158.

The jurisdiction of the probate court is not exclusive. After the claim is filed the action may be taken to the district court by consent of parties, and that court will have jurisdiction: *McCrary v. Deming*, 38–527.

So under Revision, § 2395, which prohibited the prosecution of claims for a mere money demand in the district court, except with the approbation of the county (probate) court, *held*, that such provision did not deprive the district court of jurisdiction, but was merely an inhibition upon plaintiff, which must be taken advantage of by way of defense, or it would be considered waived, and the district court would have jurisdiction by consent: *Sterritt v. Robinson*, 17–61; *Cooley v. Smith*, 17–99.

And under the same section (which is omitted in the Code of '73) it was held that a matter of equitable nature was originally cognizable in the district court, without leave of the county court: *Waples v. Marsh*, 19–381.

Also, *held*, that such a proceeding in the district court, the approbation of the county court not being shown, was properly dismissed: *Crane v. Maloney*, 39–39.

But where an action was brought in the district court against the heirs and administrator of decedent to foreclose a mortgage, and a judgment was rendered for the amount due, *held*, that this was an establishment of the claim against the administrator, and that it was not necessary that such claim be established in the probate court: *Crane v. Guthrie*, 47–542.

Where the claim against the estate grew out of a contract upon which the testator was jointly liable with another, and action was brought against the survivor and the executors of decedent jointly, in the same court in which the claim against the surety might have been filed, *held*, that the bringing of such action was a sufficient filing of the claim against the estate: *Moore v. McKinley*, 60-367.

The administrator or executor cannot be held to take notice of the filing of a claim against the estate, so as to take it into account in the distribution of the assets until he has been notified thereof in the manner required by this section: *Ashton v. Miles*, 49–564.

Notice: The notice provided for by this section has no effect in determining the class to which a claim belongs. It will be of the third class provided it is filed within proper time although notice is not served within six months: *Phelps, etc., Co. v. Greenbaum*, 87–347.

It is not required that notice of the filing be given, it is the duty of the administrator to take notice thereof. The notice is for the purpose of bringing the claim on for hearing. Therefore the proceeding to enforce the claim is commenced within the statute of limitations when the claim is filed: *Fritz v. Fritz*, 93-27.

While the statute provides for notice of the hearing of the claim, it does not fix the time within which such notice shall be given, even inferentially, as to claims of the third class· *Godes v. Hassen*, 81–197.

Where no notice was given to the administrator of the hearing of the application for

the allowance of a claim, but the administrator appeared and interposed proper defenses, *held*, that notice was waived by the appearance: *McLeary v. Doran*, 79-210.

If the claim is approved by the administrator, no notice is required, and the claim may be allowed by the court, without further proceedings; and such approval by the administrator, or its equivalent, will prevent the claim becoming barred, under the statute of limitations: *Wilson v. McElroy*, 83-593.

What claims proper: From the occupancy of premises of a married son by his mother, not a member of his family, the law will presume that the mother is to pay what the premises are reasonably worth, unless it is expressly understood that she is to have them without charge, and reasonable compensation therefor may be recovered by the son from the mother's estate: *Harlan v. Emery*, 46-538.

Where a minor is received into the family of another, and treated as a member thereof, he cannot, in the absence of express contract, recover compensation from the estate of such person for services rendered while a member of such family: *Smith v. Johnson*, 45-308.

Where decedent had lived in the family of his son as a member thereof, *held*, that, in the absence of proof of any express agreement on his part to pay for his support, the son had not a valid claim therefor upon the estate: *Traver v. Shiner*, 65-57.

A claim for service rendered by a child of the deceased will not be supported by mere proof of rendition of services, but it must be shown that there was an expectation by both parties that compensation should be made. The presumption growing out of the family relation that services were rendered without any obligation for compensation must be overcome by affirmative evidence, and clearly established; but it is not essential to show that the rate of compensation was agreed upon: *McGarvy v. Roods*, 73-363; *Cowan v. Musgrave*, 73-384; *Magarrell v. Magarrell*, 74-378.

A claim to property of an estate arising under a contract made between heirs subsequently to the death of decedent cannot be filed as a claim against the estate: *Rogers v. Gillett*, 56-266.

Where, after a claim is filed against the estate of a decedent, the debt is paid by a surety, such payment entitles him to be subrogated to all the rights of a creditor in relation to such claim: *Braught v. Griffith*, 16-26.

A claim against an administrator for seizing and appropriating property not belonging to the estate is not such a claim as must be filed against the estate: *Adkinson v. Breeding*, 56-26.

Under the circumstances of a particular case, *held*, that the attorney acting for defendant in an action against an estate did so in behalf of other parties interested, and that an allowance to him of an attorney's fee out of the estate was improper: *Crane v. Guthrie*, 47-542.

As to claims for funeral expenses, tombstones, etc., see notes to § 3347.

Payment of liens upon property: Where a title bond was transferred by decedent before his death to his children, and the claim of the obligor of such bond for unpaid purchase money was filed against the estate, *held*, that the administrator, upon payment of such claim out of the personal assets, was not entitled to an assignment of the claim under the title bond, but that such payment was a satisfaction of the indebtedness, and that the children to whom the title bond had been assigned held the property free from such indebtedness: *Black v. Black*, 40-88.

Where the administrator had paid out funds to general creditors, and was then directed to make *pro rata* payments to a party who had also a lien upon real estate which had been subject to the claim of the general creditors, *held*, that in the absence of funds to make such payments he might enforce against such real estate the lien of the party to whom such payments were ordered to be made: *Black v. Black*, 42-694.

Where the owner of property conveyed the same by warranty deed while it was incumbered by mortgages to secure notes given by him, and such incumbrances were not excepted in the conveyance, and the mortgagees filed their claims against the estate after the owner's death, *held*, that the administrator could pay such claims out of any assets on hand, and the mortgagees could not be required to make the amount out of the mortgaged premises: *Sharpless v. Gregg*, 45-649.

Money furnished executor: If money is furnished to an executor to pay indebtedness against an estate, the estate becomes liable therefor, but it is not liable for money furnished for improvements: *Dunne v. Deery*, 40-251.

Judgments: A judgment rendered against decedent in his lifetime may be enforced after his death against property upon which it became a lien: *Baldwin v. Tuttle*, 23-66.

In such case the holder may seek payment out of the personal assets by filing his claim, or he may enforce it against property upon which it is a lien without filing it, but if he pursues the latter method, he must enforce it while the lien continues or he will be entirely barred: *Davis v. Shawhan*, 34-91.

A judgment rendered against deceased in his lifetime must be paid in the first instance out of the personal estate, and must therefore be filed and allowed as other claims of the fourth class, and becomes barred if not thus filed and allowed within proper time. When the personal estate is insufficient to satisfy it, action may be brought to enforce payment by sale of real estate: *Bayless v. Powers*, 62-601.

A judgment against decedent can only be enforced by proceedings against the estate. An action will not lie to revive the judgment against the heirs: *Bridgman v. Miller*, 50-329.

A judgment against a decedent may be enforced against the property on which it is a lien without being filed as a claim against the estate: *Boyd v. Collins*, 70-296.

Mortgages: Claims secured by mortgage may be filed and allowed as other claims, but a creditor does not thereby waive his

right to subsequently foreclose the mortgage to enforce payment: *Moores v. Ellsworth*, 22-299.

A mortgage may be enforced against the property upon which it is a lien without being filed as a claim against the estate: *Allen v. Moer*, 16-307.

After the death of a mortgagor of chattels the mortgagee is not required to file his claim and await the slow process of administration to determine his rights, but he may proceed to foreclose by notice and sale, just as he could have done had the mortgagor survived: *Cocke v. Montgomery*, 75-259.

Action against heirs: For indebtedness due from decedent a claim must be filed against his estate. Action cannot be maintained thereon against the heirs direct. The heir only becomes liable in case there is not sufficient personal property to pay the claims, in which case real property of the decedent in the hands of the heirs may be subjected to its payment: *Reynolds v. May*, 4 G. Gr., 283.

An administrator who has a claim against the estate, and has had assets in his hands out of which it might have been paid, but has failed to take any steps to secure its allowance and payment until the period prescribed for the presentation of such claims has elapsed, cannot enforce it by action against the heirs: *Janes v. Brown*, 48-568.

Whether in this state an action may be brought against the heir for the debt of the ancestor, *quære: Ibid.*

In an action to subject the land of decedent in the hands of the heir to the payment of decedent's debts, the administrator of decedent is a necessary party, and the action cannot be prosecuted until administration is granted: *Postlewait v. Howes*, 3-365.

Action against administrator: The adjudication of a claim against the estate is to be deemed a part of the settlement of the estate, and an action cannot be brought in the district court against the administrator of the estate on an indebtedness of decedent: *Tillman v. Bowman*, 68-450.

Payment out of personal property: Debts should be paid out of the personal estate alone unless otherwise directed by the will, although the will leaves the personal property all to one party as a bequest: *McGuire v. Brown*, 41-650.

The debts of an estate, secured and unsecured, should be paid from the proceeds of the personal property. The administrator has no right to appropriate real estate for that purpose unless absolutely necessary: *Boyd v. Collins*, 70-296.

Land conveyed by decedent to a voluntary grantee cannot be subjected to the payment of expenses of administration: *Willett v. Malli*, 65-675.

Abandonment: Where a note having been filed as a claim against an estate was afterwards withdrawn from the files for the purpose of bringing action against the surety thereon, and there was no record of any dismissal of the proceedings, *held*, that the claim was not abandoned: *Braught v. Griffith*, 16-26.

Allowance: The administrator cannot make any arrangement with the creditor by which the court will be authorized to order an allowance to such creditor to have priority over the allowance made to the widow: *In re Estate of Dennis*, 67-110.

Whether, when the administrator admits the correctness of a claim, the court may hear further proof, *quære: Karr v. Stivers*, 34-123.

The heirs cannot, in advance of administration, bind the administrator by submitting claims against the estate to arbitration: *Stahl v. Brown*, 72-720.

Where claims have been approved by the administrator they may be allowed by the clerk without notice; and where claims were thus approved and paid but not filed with the clerk within six months after notice of administration, *held*, that there being no substantial prejudice by reason of their not being filed, such payment by the administrator was not improper: *In re Estate of Wonn*, 80-750.

Although the court may approve a payment made by the administrator upon his own allowance, the claim is not established against the estate until it is approved by the court, by sanctioning the approval of the administrator, or by rendering judgment as in cases of contest: *Byer v. Healy*, 84-1.

Upon a showing by heirs made at the same term at which allowance of claims against the estate were made, to the effect that the circumstances tended to sustain the defenses set up to the claim, and that if the allowance was sustained they would be compelled to refund sums of money already paid to them out of the estate, *held*, that the court had authority to set aside such allowance: *In re Davenport*, 85-293.

Presumption: Where the probate court orders a claim to be paid which has been duly sworn to and filed, and it is so paid, this is sufficient evidence that it was admitted by the administrator with the approbation of the court: *Marlow v. Marlow*, 48-639.

Setting aside for fraud: The allowance by the administrator of a claim against the estate is not an adjudication binding upon the court when the action of such administrator is properly called in question, and it will be set aside if fraudulent: *Riordan v. White*, 42-432.

Where an administrator by fraud procures an allowance of a claim of his own, the court should, in a proper proceeding, set the allowance aside, but this should not be done upon a mere exception to his report. It would seem that an action should be brought for that purpose: *Ashton v. Miles*, 49-564.

Setting aside allowance made in vacation: An allowance of a claim by an administrator, and the proof thereof by the clerk made in vacation, may be set aside at the next term by the court: *Ordway v. Phelps*, 45-279.

Conclusive: The adjudication and order of the court allowing a claim and fixing its character is conclusive unless corrected on appeal or in some other direct proceeding: *Hart v. Jewett*, 11-276.

An allowance of a claim is an adjudication binding upon the administrator and upon creditors who may be deemed to be rep-

resented by him, but it is not conclusive against the grantee of decedent by a voluntary conveyance when it is sought to subject the land thus conveyed to the payment of such claim: *Willett v. Malli*, 65-675.

Not a judgment: The allowance of a claim by the probate court is not a judgment in such sense as to be barred in ten years, under the statute of limitations. The filing and allowance of a claim are in the nature of the filing of a petition in an action, and the action will be considered as pending until the claim is paid or otherwise disposed of: *Smith v. Shawhan*, 37-533.

The court should not render judgment upon a claim filed, but simply direct the payment by the administrator of the amount allowed: *Little v. Sinnett*, 7-324.

Where a judgment is rendered upon a claim against an estate it should be against the executor or administrator as such, and not in his individual capacity: *Voorhies v. Eubank*, 6-275.

If a judgment may be rendered against an estate it cannot be enforced by execution, but only by filing it in the probate court as a claim established against the estate: *Orcutt v. Hanson*, 71-514.

SEC. **3339. How entitled.** All claims filed against the estate shall be entitled in the name of the claimant against the executor or administrator as such, naming the estate, and in all further proceedings thereon this title shall be preserved. [C.'73, § 2409.]

Where the claim was prepared for filing before the probate jurisdiction was transferred to the district court, and as thus prepared it was subsequently filed in the district court, after it acquired probate jurisdiction, *held*, that the omission to substitute the word district for circuit in the address was a formal error, which was waived by a failure to make objection in due time: *Ury v. Bush*, 85-698.

SEC. **3340. Denial.** All claims filed, and not expressly admitted in writing signed by the executor or administrator, with the approbation of the court, shall be considered as denied, without any pleading on behalf of the estate, but special defenses must be pleaded. The burden of proving that a claim is unpaid shall not be placed upon the party filing a claim against the estate; but the executor or administrator may, on the trial of said cause, subject the claimant to an examination on the question of payment, but the estate shall not be concluded or bound thereby. [26 G. A., ch. 75; C.'73, § 2410.]

The denial of a claim against an estate puts in issue all matters upon which a defense to the claim could be based, usually set forth in a general denial: *Scovil v. Fisher*, 77-97; *Smith v. King*, 88-105.

It is not necessary for an administrator to file a written resistance to a claim, even though such claim is not filed within one year after notice of administration; *McLeary v. Doran*, 79-210.

Although no answer is filed to the claim, every allegation thereof is deemed denied unless admitted, and the burden is upon claimant to prove such allegations: *Lamm v. Sooy*, 79-593.

A claim filed against an estate and never expressly admitted in writing, is considered as denied without any pleading on behalf of the estate: *Wickham v. Hull*, 71 N. W., 352.

Under a denial of the claim, payment may be shown though not specially plead: *Stevens v. Witter*, 88-636.

The denial of liability which is implied by law is overcome upon the introduction of a note of decedent the signature of which is established, or presumed genuine, and it is not necessary to show affirmatively that the note has not been paid: *Schulte v. Coulthurst*, 62 N. W., 770.

The denial implied by law puts in issue the genuineness of the signature to a written instrument although such signature is not denied under oath as required by § 3640: *Smith v. King*, 88-105.

SEC. **3341. Hearing—trial by jury.** If a claim filed against the estate is not fully admitted by the executor or administrator, the court may hear and allow the same, or may submit it to a jury, and on the hearing, unless otherwise provided, all provisions of law applicable to an ordinary action shall apply. [C.'73, § 2411; R., §§ 2392, 2394; C.'51, §§ 1360, 1362.]

The parties are entitled to a trial by jury: *Lamm v. Sooy*, 79-593.

Either party is entitled to a jury trial upon demand. If the parties waive a jury the trial may be by the court: *Ingham v. Dudley*, 60-16.

Where the administrator admits the correctness of a claim, whether the court may hear further proof discussed: *Karr v. Stivers*, 34-123.

The allowing of a claim by the court is not a judgment against which the statute of limitations will run: See note to § 3338.

While a court would be warranted in setting aside the allowance of a claim shown to be unjust or invalid, even where the administrator had negligently permitted the allowance to be made, a court ought not to disturb such allowance without a showing of the existence of a meritorious defense: *Dessaint v. Foster*, 72-639.

Where a claim has been allowed in favor of an administrator of an estate against the estate, the heirs interested may apply for and prosecute an appeal from such action in their own name, even though such appeal

might have been prosecuted in the name of the administrator temporarily appointed to defend against the claim: *Burns v. Keas*, 20–16.

Where a claim is allowed upon a final hearing, the validity of such claim cannot be contested by exceptions to the administrator's report, but if the court errs in allowing such claim, the error can only be corrected upon an appeal or by a proceeding based on fraud: *McLeary v. Doran*, 79–210.

SEC. **3342. Demands not due.** Demands not yet due may be presented, proved and allowed as other claims. [C.'73, § 2413; R., § 2396; C.'51, § 1364.]

The fact that a contingent claim is allowed does not entitle the claimant to an order of payment until the title of the claimant becomes absolute: *Blanchard v. Conger*, 61–153.

The statutory provision as to contingent claims does not apply to sureties who, having paid the principal's debt, stand in the place of creditors who have filed claims against the estate: *Braught v. Griffith*, 16–26.

SEC. **3343. Contingent liabilities.** Contingent liabilities must be presented and proved, or the executor or administrator shall be under no obligation to make any provision for satisfying them when they accrue. [C.'73, § 2414; R., § 2397; C.'51, § 1365.]

SEC. **3344. Referees.** Claims against an estate, and counter-claims thereto, may, in the discretion of the court, be proved before one or more referees, to be agreed upon by the parties or appointed by the court, and their decision, entered upon the record, shall become the decision of the court. [C.'73, § 2415; R., § 2398; C.'51, § 1366.]

SEC. **3345. Actions pending.** Actions pending against the decedent at the time of his death may be prosecuted to judgment, his executor or administrator being substituted as defendant, and any judgment rendered therein shall be placed in the catalogue of established claims, but shall not be a lien. [C.'73, § 2416; R., § 2400; C.'51, § 1368.]

SEC. **3346. Executor interested.** If either of the executors or administrators is interested in favor of a claim against the estate, he shall not serve in any manner connected therewith, and if all are thus interested, the court shall appoint some competent person a temporary executor or administrator in relation to such claims. [C.'73, § 2417; R., § 2401; C.'51, § 1369.]

SEC. **3347. Expenses of funeral—allowance to widow.** As soon as the executor or administrator is possessed of sufficient means over and above the expenses of administration, he shall pay off the charges of the last sickness and funeral of deceased, and next, any allowance made by the court for the maintenance of the widow and minor children. [C.'73, §§ 2418–19; R., §§ 2402–3; C.'51, §§ 1370–1.]

Last sickness and funeral: The homestead is not liable for the payment of charges for the last sickness and funeral expenses: *Knox v. Hanlon*, 48–252.

Monument: The purchase and erection of a tombstone is a proper expenditure to be made by an executor as pertaining to the funeral expenses, and such expenditure may be made without direction by the will, and notwithstanding the insolvency of the estate: *Crapo v. Armstrong*, 61–697.

The propriety of such an expenditure and the amount thereof may properly be left to the determination of the court having supervision of the settlement of the estate, and, unless the provision made shall appear to be unreasonable or excessive, such determination will be binding on the parties in interest: *Ibid.*

In case of a refusal by the executor to make application to the court for a proper and reasonable allowance for such purpose the widow or heirs may present the matter to the court: *Ibid.*

Where the widow of deceased ordered a monument, *held*, that an order of the court disallowing a claim therefor was improper where it did not appear that the monument was too expensive, or not otherwise suitable, and the estate was solvent: *Lutz v. Gates*, 62–513.

Allowance: The administrator cannot make any arrangement with the creditor by which the court will be authorized to order an allowance to the creditor to have priority over the allowance made to the widow: *In re Estate of Dennis*, 67–110.

The allowance to the widow or minor children having been once made, whether right or wrong, the administrator is bound to pay it, and cannot be held liable for doing so where the funds remaining are not sufficient to pay the claims of a creditor: *Buttschaw v. Miller*, 72–225.

SEC. **3348. Other demands—order of payment.** Other demands against the estate shall be payable in the following order:

1. Debts entitled to preference under the laws of the United States;
2. Public rates and taxes;

3. Claims filed within six months after the first publication or posting of the notice given by the executors or administrators of their appointment;

4. All other debts;

5. Legacies and the distributive shares, if any. [C. '73, § 2420; R., § 2404; C. '51, § 1372.]

The filing of a claim within six months entitles it to precedence in payment, although not admitted by the administrator or allowed by the court until after that time has expired: *Chandler v. Hockett's Adm'r*, 12–269; it is the filing which fixes its character as a claim of the third class and gives it precedence over claims filed after the expiration of the six months: *Noble v. Morrey*, 19–509; but the filing of the claim is notice to the administrator so as to require him to take account of it in the distribution of the assets only where he has been notified thereof in the manner contemplated in § 3338: *Ashton v. Miles*, 49–564.

Where a claim is filed within the time required to make it a claim of the third class, notice thereof within the six months is not necessary to entitle it to rank with claims of that class: *Phelps, etc., Co. v. Greenbaum*, 87–347.

Under Revision, *held*, that a claim upon which action was properly brought in the district court within six months was entitled to be treated as a claim of the third class upon the filing of the judgment in the county court, although such judgment was not filed for more than eighteen months after administration was granted: *Cooley v. Smith*, 17–99.

The fact that a contingent claim is allowed does not entitle the claimant to an order of payment until the right of the claimant becomes absolute: *Blanchard v. Conger*, 61–153.

Where the administrator approved and paid claims against the estate which were not filed within six months as specified for making them claims of the third class, and the estate subsequently proved insolvent, *held*, that the administrator was nevertheless entitled to be credited with claims thus paid, it appearing that there was no prejudice to other claimants by reason of the omission to file claims with the clerk within the statutory period: *In re Estate of Wonn*, 80–750.

A claim will not be advanced from the fourth to the third class on account of equitable considerations which would be sufficient to have entitled it to be admitted to the fourth class, provided it had not been filed within a year. The court has no power to advance a claim from the fourth to the third class: *Kells v. Lewis*, 91–128.

Where the deceased received money as agent for which he was to account on yearly settlements, *held*, that the money thus in hand was not a trust fund and that the claim of the principal for such money was not a preferred claim against the estate: *Chappell v. Craig*, 65 N. W., 146.

The executor should pay taxes due from the deceased, and a devisee of property which is subject to the lien of taxes is entitled to have such taxes paid out of the estate: *Findley v. Taylor*, 66 N. W., 744.

The federal courts have jurisdiction of an action against an executor to enforce a claim against the estate for unpaid installments of stock owned by decedent, but can only determine whether a liability exists, and will leave the enforcement of the indebtedness when established to the probate court: *Wickham v. Hull*, 60 Fed., 326.

As to counter-claims, see notes to § 3303.

SEC. **3349. Limitation.** All claims of the fourth of the above classes, not filed and allowed, or if filed and notice therof, as hereinbefore provided, is not served within twelve months from the giving of the notice aforesaid, will be barred, except as to actions against decedent pending in the district or supreme court at the time of his death, or unless peculiar circumstances entitle the claimant to equitable relief. [C. '73, § 2421; R., § 2405; C. '51, § 1373.] 1924, S. 1961; — 1972.

Limitation: This section refers to claims sought to be enforced against the personal assets of decedent, but not to a claim secured by mortgage upon which the creditor relies for satisfaction: *Allen v. Moer*, 16–307.

Further, as to filing mortgages and judgments, see notes to § 3338.

Where action on a claim is pending in the district court at the time administration is granted, a failure to file it as a claim against the estate will not cause it to be barred under this section: *O'Donnell v. Hermann*, 42–60.

The pendency of a suit, which is not revived, against a representative of the deceased does not prevent the claim from becoming barred: *Schlutter v. Dahling*, 69 N. W., 884.

The filing contemplated by this section is a filing with the clerk and not with the administrator and a proceeding to prove it up must be a proceeding in court wherein a judgment or order may be made: *Corey v. Gillespie*, 62 N. W., 837.

In order that the claim shall be pending in the district court within the meaning of this section, it must be pending on the law or equity side thereof, as distinct from its probate jurisdiction. An action brought against decedent prior to his death, and continued against his administrator, would be a claim thus pending: *Farmers', etc., Bank v. Creveling*, 84–677.

Where the administrator fails to give notice of his appointment, the time for filing claims does not run, nor does the time for payment of claims become fixed: *Stewart v. Phenice*, 65–475.

The limitation begins to run from the time of giving notice by the general admin-

istrator. Notice by the special administrator is not contemplated: *Pickering v. Weiting*, 47-242.

The limitation does not apply to claims not existing at the time of decedent's death, but arising thereafter: *Savery v. Sypher*, 39-675; *Wickham v. Hull*, 71 N. W., 352.

Where a widow's right to a share of the real property of decedent was not established within the twelve months following the giving of notice by the administrator, *held*, that a claim by her for rents and profits on such share, filed after the expiration of that time, was not barred: *Senat v. Findley*, 51-20.

Claims of the third class may be approved after the expiration of the time fixed by the foregoing statutory provision for the filing and proving of claims of the fourth class: *Goodrich v. Conrad*, 24-254; *Smith v. McFadden*, 56-482.

Mere delay in bringing a claim of the third class on for hearing will not estop the claimant from proving it up, where it does not appear that the estate is in any manner damaged or injured by the delay, except that during the delay the co-obligors of deceased have become bankrupt: *Smith v. McFadden*, 56-482.

Claims of the fourth class are to be both filed and approved within the time limited. Mere filing is not sufficient to prevent a claim being barred: *Noble v. Morrey*, 19-509; *Willcox v. Jackson*, 51-296; *Brownell v. Williams*, 54-353.

A claim of the third class is not barred because not approved until after the expiration of twelve months from notice of appointment of an administrator; and a delay to bring a claim on for hearing will not operate as a bar or estoppel to prevent it being proved, unless the estate has been prejudiced by the delay: *Schriver v Holderbaum*, 75-33; *Godes v. Hassen*, 81-197.

Where a claim was filed against an estate after the expiration of one year, and such claim contained no averments which would excuse the failure to file, *held* that, as it did not appear upon the face of the claim that it was not filed within the proper time, it was not demurrable; but even if it had so appeared, and a demurrer could have been interposed, that would not affect the jurisdiction of the court: *McLeary v. Doran*, 79-210.

Failure to prove claims of the third class during the time in which they are required by statute to be filed does not bar them nor does failure to give notice of such claim within the time within which it is required to be filed make it a claim of the fourth class, overruling to some extent *Ashton v. Miles*, 49-64; *Phelps, etc., v. Greenbaum*, 87-347.

The limitation of this section is to be applied in the probate court. Therefore, where a federal court took jurisdiction of an action against the estate on account of unpaid installments of stock, *held*, that it would not take notice of this limitation, but leave it to be applied in the probate court when the claim, as established, was presented for allowance: *Wickham v. Hull*, 60 Fed., 326.

Equitable relief against statutory bar: The mere fact of filing the claim within the twelve months provided by statute, but at such time that it cannot be reasonably expected that it can be proved within that time, will not entitle a party to equitable relief against the bar of the statute: *Willcox v. Jackson*, 51-296; *Clark v. Tallman*, 68-372.

Where it appeared that a claimant was a nonresident of the state, and had no notice of the death of intestate, and afterwards filed his claim six or eight months too late, it appearing that the debt was just and unpaid, and that the estate was still unsettled and solvent, *held*, that the circumstances were such as to entitle claimant to relief against the statutory bar: *McCormack v. Cook*, 11-267.

Where the claim was filed within such time that there was reasonable ground for believing that it would be passed upon within the time limited, *held*, that if not proved up in time, such circumstance would entitle claimant to equitable relief, if the failure did not result from any fault of his: *Wile v. Wright*, 32-451.

Where the attorney for claimant had delayed filing the claim upon the request of the administrator, who promised to secure settlement of the same without action, and it also appeared that the estate remained unsettled, and that there were sufficient assets to pay all indebtedness, *held*, that the circumstances were such as to entitle the claimant to equitable relief: *Brayley v. Ross*, 33-505.

As to whether a party whose claim is barred is entitled to equitable relief depends upon the peculiar facts of the case: *Johnston v. Johnston*, 36-608.

The provisions of this section as to equitable relief are not intended to deprive the parties of a trial by jury as to the allowance of a claim; but it is for the court to first determine whether the circumstances are such as to entitle to equitable relief as against the bar of the statute: *Lamm v. Sooy*, 79-593.

Where a claim was against the decedent as surety, and it appeared that the creditor had delayed filing his claim pending the efforts to realize the amount thereof out of other securities, and presented the same to the administrator after six months, but within twelve months, and filed his petition for the allowance of the claim after twelve months, but as soon as he learned that the claim had not been allowed by the administrator, and that the estate still remained open, *held*, that he was entitled to equitable relief as against the bar of the statute: *Ibid.*

Where plaintiff was a resident of another state, and was informed by an attorney of that state that two years were allowed for proof of claims of the fourth class in Iowa, and, relying on such information, failed to file her claim until nearly two years after notice of administration, *held*, that the excuse for delay was not sufficient to entitle plaintiff to equitable relief: *Roaf v. Knight*, 77-506.

Where the claim against the estate depended on a pending litigation, of which the executor was thoroughly advised, and the estate remained solvent and unsettled, *held*, that the circumstances were such as to entitle the plaintiff to relief against the bar of

the statute, no prejudice to the estate having resulted from the delay in filing the claim: *Sankey v. Cook*, 82-125; and see *Wickham v. Hull*, 71 N. W., 352.

Where a claim was properly prepared and placed in the hands of attorneys for filing, who delayed filing it for the benefit of the estate, the fact of the existence of the claim being known to the executor, who gave assurance that it would be paid, and the estate remained unsettled, *held*, that the circumstances were such as to entitle the claimant to equitable relief: *Ury v. Bush*, 85-698.

Where the claim was filed with the administrator instead of with the clerk and no reply to the letter transmitting the claim was sent to the claimant and nothing was done by the administrator to induce the claimant to remain inactive, *held*, that there was no ground for equitable relief from the bar of the statute: *Corey v. Gillespie*, 62 N. W., 837.

One seeking relief from the bar of the statute must show the exercise of proper diligence. It is no excuse that he has relied on statements of persons not legally representing the estate: *Schlutter v. Dahling*, 69 N. W., 884.

Where a party seeks to have his claim established as against the estate and sets out grounds for relief against the bar of the statute, and the defendant makes a general denial, it may be regarded as conceded that the claim was not filed within the statutory period: *Manning v. Stout*, 93-233.

Under the facts of the case, *held*, that there had been nothing in the conduct of the executor to entitle the claimant to assume that the claim would be paid without being filed, and that therefore he was not entitled to equitable relief: *Ibid.*

The controlling consideration in determining whether equitable relief should be afforded in case of failure to file a claim within the time provided is that the estate remains unsettled: *Johnston v. Johnston*, 36-608.

Notwithstanding an estate may be closed, a creditor may establish an equitable ground to have the matter re-opened and his claim allowed. Such right to relief depends upon various circumstances, such as absence of inexcusable neglect upon plaintiff's part, solvency of the estate, etc.; but in a particular case, *held*, that a showing of equitable grounds was not sufficient: *Hazlett v. Burge*, 22-531.

Where a claim was left with attorneys more than six months before the expiration of the time for filing the same, and failure to file resulted from accident or mistake on the part of such attorneys, *held*, that there was a sufficient ground for equitable relief from the bar of the statute: *Wilcox v. Jackson*, 57-278.

Where the claim is filed in time to have it properly allowed within the year, the fact that its allowance is postponed beyond the year, by a continuance granted to defendant to enable defense to be made, will be a ground of equitable relief from the bar of the statute: *Ingham v. Dudley*, 60-16.

Where the holder of a claim, at the request of the administrator and on promise of payment, was induced to delay the filing of his claim beyond the proper time, *held*, that he would be relieved from the bar of the statute: *Burroughs v. McLain*, 37-189.

Where it appeared that a claim against the estate was placed in the hands of attorneys in due time for filing, and that they delayed filing upon the request of an attorney who had been acting for the administratrix, upon representation by him that he would see the administratrix with a view to an adjustment of the matter, and was then filed three months before the expiration of the limitation, but at such time that the term of court, in which it would come up for allowance, did not commence until a few days after the expiration of the year, *held*, that in view of the fact that the estate remained unsettled and was solvent, a sufficient excuse was shown for the slight delay, and that the court erred in rejecting the claim: *Pettus v. Farrell*, 59-296.

Under particular facts, *held*, that by reason of a just expectation on the part of claimant that his claim would be paid without being filed, he was excused for failing to file the same at the first term of court when such claim might have been filed, and as after filing the claim at the second term of court it was impracticable to have it allowed within the year he was entitled to equitable relief from the bar of the statute: *Orcut v. Hanson*, 70-604.

Where a creditor agreed to allow an account against his decedent as a payment or set-off against certain promissory notes in his hands against the owner of said account, and the latter, relying on the special agreement, did not present said account for probate as he otherwise would have done, *held*, that the facts did not constitute such peculiar circumstances as to entitle the owner of the account to equitable relief from fraud as against his failure to file the claim in time: *Preston v. Day*, 19-127.

A mere promise of an administrator to pay a claim is not sufficient to excuse the failure of the claimant to file it within the time required: *Colby v. King*, 67-458.

The fact that the county judge (then judge of the probate court) kept no books of record in his office in which to file a claim, and that a prior administrator had promised to pay the claim, and that the estate was still unsettled, *held* not sufficient to entitle the claimant to equitable relief: *Davis v. Shawhan*, 34-91.

Whether the claim was originally legal or equitable in its nature should make but little difference, if any, in determining what peculiar circumstances are sufficient to excuse the delay in filing: *Brewster v. Kendrick*, 17-479.

Grounds of equitable relief which will warrant the court in the consideration of a claim not filed within a year will not authorize the advancement of the claim from the fourth to third class under the preceding section: *Kells v. Lewis*, 91-128.

Equitable relief will not be extended to a party who has been negligent in presenting his claim: *Ferrall v. Irvine*, 12-52: *Lacey v. Loughridge*, 51-629.

Where a claimant filed his claim, but

failed to prosecute it and have it allowed, and after eight years commenced action thereon against the administrator, who in the meantime had obtained a final discharge, *held*, that plaintiff had been negligent in prosecuting such claim, and was not entitled to equitable relief: *Phelps v. Thompson*, 48-641.

Where claimant knows that his claim is disputed, and allows several terms of court to pass without filing it, he is not entitled to equitable relief as against the bar of the statute by the fact that the statement of the claim is lost: *Pearson v. Christman*, 93-703.

A party attempting to show equitable circumstances to excuse failure to file his claim within the time required should be held to very strict proof when he comes in after final settlement and seeks to interfere with payments already made, or subject other property to the payment of his debt. The fact of final settlement, and especially when made years after the grant of administration, is a most controlling circumstance under the statute: *Shomo v. Bissell*, 20-68.

Limitation need not be pleaded: The limitation of the time for filing claims against the estate need not be pleaded to be made available. No denial of a claim is necessary, and whenever it appears to the court, by inspection of the claim or otherwise, that it has not been filed or proved as required, it is the duty of the court, independently of any pleading on the part of the executor or administrator, to reject it: *Brownell v. Williams*, 54-353. 6 x 5 30

Failure of an administrator to employ an attorney to defend against a claim on the ground that it is barred cannot constitute fraud in itself: *Trimble v. Marshall*, 66-233.

Counter-claim: A claim against the estate not filed within the time required may still be used as a counter-claim against an action for an indebtedness due to the estate: *Ware v. Howley*, 68-633.

SEC. **3350. Payment of claims—classes.** After the expiration of the time for filing the claims of the third of the above classes, the executors or administrators shall proceed to pay off all claims against the estate in the order above stated, as fast as the means of so doing come into their hands, but no payment can be made to a claimant in any one class until those of a previous class are satisfied. [C. '73, §§ 2422, 2424; R., §§ 2406, 2408; C. '51, §§ 1374, 1376.]

SEC. **3351. Payment of fourth class.** Claims of the fourth class may be paid off at any time after the expiration of six months, without any regard to those claims not filed at the time of such payment. [C. '73, § 2423; R., § 2407; C. '51, § 1375.]

SEC. **3352. Demands not due.** Demands not yet due may be paid, if the holder will consent to such a rebate of interest as the court thinks reasonable; otherwise, the money to which he would be entitled shall be invested until his debt becomes due. [C. '73, § 2425; R., § 2409; C. '51, § 1377.]

SEC. **3353. Order of payment—dividends.** Within their respective classes, debts shall be paid in the order in which they are filed, unless it is likely there will not be sufficient means with which to pay the whole of the debts of any one class, in which case the court shall from time to time order a dividend of the means on hand among all the creditors of that class, and the executors or administrators shall pay the several amounts accordingly. [C. '73, §§ 2426-7; R., §§ 2410-11; C. '51, §§ 1378-9.]

An order for payment *pro rata* is only contemplated in the event that there are not likely to be means enough to pay all the debts of any one class: *Hart v. Jewett*, 11-276.

Where an order was made for the payment in general of claims proportionally and the assets of the estate were thus distributed, and subsequently, certain creditors refusing to receive their *pro rata* share on the ground that they were entitled to prefcrence, an order was made without the court's attention being called to the prior order, directing payment to be made to such creditors in preference to others, *held*, that a subsequent application to the court to correct and make of record by a *nunc pro tunc* entry its first order was properly sustained: *Jones v. Field*, 80-281.

SEC. **3354. Incumbrances.** The executor or administrator may, with the approval of the court, use funds belonging to the estate to pay off incumbrances upon lands owned by the deceased, or to purchase lands claimed or contracted for by him, prior to his death. [C. '73, § 2428; R., § 2412; C. '51, § 1380.]

SEC. **3355. Specific legacies.** Specific legacies of property may by the court be turned over to the legatees at any time upon their giving unquestionable security by bond, or upon real estate, as may be ordered by the court or judge, to restore the property or refund the amount at which it

was appraised, if wanted for the payment of debts. [C.'73, § 2429; R., § 2413; C.'51, § 1381.]

A legacy vests in the legatee at the time of the death of the testator, but it is not due or payable until such time as the executors may lawfully pay it. And where a legacy was given to a person who was indebted to the testator on notes, *held*, that the notes were not to be deemed paid by the legacy at the time of the testator's death, but drew interest until the legacy could properly have been paid: *Bowen v. Evans*, 70–368.

The rule with reference to advancements (see notes to § 3383) is not applicable to the case of a residuary legatee: *In re Estate of Lyon*, 70–375.

Where testator bequeathed a pecuniary legacy to his daughter and devised to his son certain real estate and the residue of all his estate real and personal, *held*, that the legacy to the daughter was not a charge on the real estate specifically devised to the son: *In re Peet's Estate*, 68 N.W., 705.

The executor who retains the funds in his hands unnecessarily and for an unreasonable length of time, to the prejudice of a legatee should be charged with interest thereon: *In re Gloyd's Estate*, 93–303.

SEC. **3356. In money.** Legacies payable in money may be paid on like terms, whenever the executors possess the means which can be thus used without prejudice to the interest of any claim already filed. [C.'73, § 2430; R., § 2414; C.'51, § 1382.]

SEC. **3357. After twelve months.** After the expiration of the twelve months allowed for filing claims, such legacies may be paid without requiring the security provided for in the two preceding sections, if means are retained to pay off all the claims proved or pending. [C.'73, § 2431; R., § 2415; C.'51, § 1383.]

SEC. **3358. Order named in will.** If the testator has not prescribed the order in which legacies are to be paid, and if no security is given as above provided, in order to expedite their time of payment, they may be paid in the order in which they are given in the will, where the estate is sufficient to pay all. [C.'73, § 2432; R., § 2416; C.'51, § 1384.]

SEC. **3359. Ratable payment.** When not incompatible with the manifest intention of the testator, the court may direct all payments of money to legatees to be made ratably. [C.'73, § 2433; R., § 2417; C.'51, § 1385.]

SEC. **3360. Estate insufficient.** Such must be the mode pursued when there is danger that the estate will prove insufficient to pay all the legacies, unless security is given to refund as above provided. [C.'73, § 2434; R., § 2418; C.'51, § 1386.]

SEC. **3361. Judgment on executor's bond.** If the executor or administrator fails to make any payment in accordance with the order of the court, any person aggrieved thereby may, on ten days' notice to him and his sureties, apply to the court for judgment against them on their bond. The court shall hear the application in a summary manner, and may render judgment against them for the amount of money directed to be paid, and costs, and issue executions against them therefor. If any of the obligors are not served, the same proceedings in relation to them may be had with the same effect as in an action by ordinary proceedings under similar circumstances. [C.'73, § 2435; R., §§ 2419–21; C.'51, §§ 1387–9.]

In such summary proceedings to compel payment by an executor in accordance with the order of the court, a petition alleging a breach of the bond is not necessary: *Hart v. Jewett*, 17–234.

It is no defense that a prior order for a *pro rata* payment of the claim has not been made, but the executor will only be liable to judgment for such *pro rata* amount as claimant is entitled to: *Ibid.*

The sureties cannot set up as a defense in such proceeding that the claim which the administrator has failed to pay was allowed by him after it was barred by statute, unless fraud or collusion of the administrator is relied on: *Weber v. Noth*, 51–375.

Where it was objected, in an action against an executor, that notice of the application for an order requiring him to pay over a distributive share was served on him in another state, of which he was a resident, *held*, that in his representative capacity he was subject to the jurisdiction of the court granting administration, and such court having expressly found that he was served with due and legal service, it would be at least a *prima facie* presumption that the court had jurisdiction: *Huey v. Huey*, 26–525.

A nonresident administrator appointed by the court is, in his representative capacity, subject to its jurisdiction, and the service of notice issued to him in a probate pro-

ceeding relative to the estate may be good, although made out of the state: *Chicago, B. & Q. R. Co. v. Gould*, 64-343.

But if it should appear that process or orders cannot be served upon him by reason of his absence from the state, or that prejudicial delay in securing his service is occasioned by such nonresidence, the court may remove him or require prompt periodical appearance in the court at sufficiently brief intervals, or in other ways facilitate the service of process and orders upon him: *Ibid.*

In determining the duty of the executor as to the payment of legacies, etc., the probate court has jurisdiction to interpret the will. The jurisdiction of a court of chancery is not exclusive in that respect: *Covert v. Sebern*, 73-564.

Further, as to payment of claims, see notes to § 3338.

The tender by the executor of an amount claimed by him to be due a person entitled to a distributive share will be an admission of his liability to that amount, but will not be a discharge, and the benefit of such tender will be lost by a failure to keep it good, or pay the money into court when suit is brought. Therefore, *held*, that where the executor without authority to make such tender deposited the money in a bank to the credit of the heir, and the money was lost by the bank's failure, the executor was not discharged: *Rainwater v. Hummell*, 79-571.

CHAPTER 4.

OF THE DESCENT AND DISTRIBUTION OF THE INTESTATE'S PROPERTY.

SECTION **3362. Personal property.** The personal property of the deceased not necessary for the payment of debts, nor otherwise disposed of, shall be distributed to the same persons and in the same proportions as though it were real estate. [C.'73, § 2436; R., § 2422; C. '51, § 1390.]

The estate of a deceased person may consist of both real and personal property, and the final distribution of the estate relates to the one as well as to the other: *Rogers v. Gillett*, 56-266.

Until the estate is settled, the heirs are not entitled to any of the personal property which belonged to decedent: *Van Aken v. Clark*, 82-256.

The interest of the deceased partner in realty belonging to the partnership will be deemed personalty, so far as is necessary for the purpose of settling and closing up the business of the partnership: *Ibid.*

The right to a distributive share of personal property vests in the persons entitled thereto, whether widow or next of kin, *instanter*, upon the death of the intestate, and not from the time of the actual distribution. Upon the death of the distributee before distribution is made, his share goes to his legal representative or legatee: *Moore v. Gordon*, 24-158.

Under statutes prohibiting an alien from inheriting real estate, *held*, that he might nevertheless take a distributive share in personal property: *Greenhcld v. Morrison*, 21-538.

A contract between the surviving husband and the heirs of the wife's estate as to distribution of the assets thereof, construed, and *held*, that any claim of the husband for deficiencies in property taken by him in lieu of his distributive share should be paid *pro rata* with the claims of the heirs: *Sloan v. Moffatt*, 41-271.

Where the administrator of an estate reported to the court that one of the children of decedent was supposed to be dead, giving reasons therefor, and subsequently asked that the money in his hands, a portion of which would have been the share of such child if alive, might be ordered to be distributed among the other heirs, and such distribution was made and the administrator discharged, *held*, that there was no adjudication thereby as to the death of such child which would preclude his creditors from garnishing the heirs to whom such distribution was made, for the share to which their debtor would have been entitled upon proof overcoming the presumption of death: *Crosley v. Calhoon*, 45-557.

The widow's distributive share of personal property under this section cannot be affected by will. (Overruling *In re Estate of Davis*, 36-24): *Ward v. Wolf*, 56-465; *Linton v. Crosby*, 61-293; *In re Estate of Lyon*, 70-375. And the same doctrine is applicable to the husband's interest in the personal property of his deceased wife: *May v. Jones*, 87-188.

The fact that a widow entitled to a share of personal property, notwithstanding the will of her husband making other disposition of it, made no claim thereto until the executor had paid out a large portion of the personal estate in legacies, *held* not to estop her from afterward insisting on her distributive share in opposition to the will: *Linton v. Crosby*, 61-293; *Linton v. Crosby*, 61-401.

In case there is no will and decedent leaves no children, the wife becomes entitled to one-half of his personal property the same as in case of real estate: *Dodds v. Dodds*, 23-306.

The persons who are entitled to a distributive share of the personal property, and their proportions, are governed by the rule applicable to real estate, but the character of the title or interest is not so governed. Therefore, *held*, under a law which made the widow's dower a life estate only, that such widow would nevertheless take an absolute title to her share of the personal property: *Moore v. Gordon*, 24-158; *Hale v. Hunter*, 24-181.

The widow has only a distributive share in the personal property of which the husband dies seized. During his lifetime she has no inchoate right in such property, and he may make such distribution of it in his lifetime as he sees fit: *Samson v. Samson*, 67–253.

In a particular case, *held*, that the action of the court in ordering the payment to the widow of a sum to apply on the amount to which she might be afterward found entitled as her share of the personal, estate was not erroneous in not ordering payment of a larger sum or allowing interest on the amount paid, the estate being still unsettled: *Linton v. Crosby*, 61–401.

The amount of advancement is not to be added to the personal estate so as to increase the avails of the personal estate to be distributed to the widow: *In re Will of Miller*, 73–113.

Further, as to advancements, see § 3383 and notes.

The heirs take no title to or ownership of the personal property of the estate while it is subject to administration, but it descends to the administrator on his appointment: *Stahl v. Brown*, 72–720.

Where the period fixed for granting letters of administration has not expired, no action can be maintained by the heirs of deceased upon a promissory note, the property of decedent at the time of his death: *Hanes v. Harris*, 33–516; *Baird v. Brooks*, 65–40.

Where the time within which administration should have been granted has expired and it appears that the debts of decedent have been paid, the widow and heirs of decedent are owners in fact of his personal property and are entitled to maintain action in equity against one of the heirs who has improperly appropriated such property for the purpose of enforcing his trust and compelling an accounting: *Murphy v. Murphy*, 80–740.

As any personal property not covered by the administration belongs after the discharge of the administrator to the heirs, it is not necessary to grant additional administration on the discovery of such property unless there are debts of the estate to be paid: *Jordan v. Hunnell*, 65 N. W., 302.

Where the statutory period for the granting of letters of administration has expired without the appointment of an administrator, and it appears that there are no debts against the estate, the title to personal property vests in the heirs jointly, and in such case an action by the heirs upon a promissory note belonging to decedent may be maintained: *Phinny v. Warren*, 52–332.

If, after filing final statements and an order discharging the administrator, other assets are found to be administered upon and other debts to be paid, the court having jurisdiction of the estate may order further administration; but the discovery of other property such as an uncollected claim after the final accounting and discharge of the administrator will not make it proper to reopen such administration, as any property not included in the administration belongs to the heirs and such claim may be collected by them: *Jordan v. Hunnell*, 65 N. W., 302.

Sec. 3363. Payment of shares. The distributive shares shall be paid over as soon as the executor or administrator can properly do so. [C.'73, § 2437; R., § 2423; C.'51, § 1391.]

Sec. 3364. In kind—proceeds distributed. The property itself shall be distributed in kind when that can be satisfactorily and equitably done. In other cases, the court may direct the property to be sold, and the proceeds distributed. [C.'73, § 2438; R., § 2424; C.'51, § 1392.]

Sec. 3365. Partial distribution. When the circumstances of the family require it, the court may, in addition to what is set apart for their use, direct a partial distribution of the money or effects on hand, at any time after filing the inventory and appraisement, upon the execution of security like that required of legatees in like cases. [C.'73, § 2439; R., § 2425; C.'51, § 1393.]

Sec. 3366. Share of surviving spouse—dower. One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him. The same share of the real estate of a deceased wife shall be set apart to the surviving husband. All provisions made in this chapter in regard to the widow of a deceased husband shall be applicable to the surviving husband of a deceased wife. [C.'73, § 2440; R., §§ 2477, 2479; C.'51, §§ 1394, 1421.]

Dower abolished: While the Code of '73 expressly abolished the estate of dower and created another estate to take its place, yet the use of the word has not been dispensed with, and in some of its essential characteristics the interest of the wife under the statute has the same character as the estate of dower: *Mock v. Watson*, 41–241.

The widow's interest in the real property of her deceased husband, designated by the

statute as a distributive share, is a materially different estate from that derived by descent: *Rausch v. Moore*, 48–611.

While the Code of '73 abolished the estate of dower, and the interest in the lands of the deceased husband given by law to the widow is designated by other terms the profession continues to use the word "dower" to designate such interest and no confusion or misunderstanding arises from such use of the word, the profession understanding its meaning in accord with the estate prescribed by the statute: *Daugherty v. Daugherty*, 69–677.

Until the adoption of this section, the term dower was legally understood to refer to an interest in real estate only, but under the peculiar language of an antenuptial contract, *held*, that provision therein made for the wife was in lieu of her distributive share of personal as well as her interest in real estate: *Ditson v. Ditson*, 85–276.

But this provision does not entitle the husband to exempt personal property: See notes to § 3312.

The character and extent of the interest of the wife in her husband's real estate is not different since the adoption of the Code of '73 from what it had been under prior statutes. The addition in that Code of the provision that "the estates of dower and courtesy are hereby abolished" did not create a new estate nor do away with the rights of the husband or wife in the real estate of the other as then existing: *Purcell v. Lang*, 66 N. W., 887.

The provisions of this section that the husband shall have the same interest in the property of his deceased wife as the wife has in the property of her deceased husband is applicable to the other sections of this chapter and entitles the husband to the same interest in the personalty of the deceased wife as the wife would have in that of her husband under § 3362: *May v. Jones*, 87–188.

Inchoate right; what law governs: The interest of the wife in the lands of her husband, so long as it is inchoate only, may be enlarged, abridged or entirely taken away by the legislature. The extent of her interest is measured by the law in force at the time of her husband's death: *Lucas v. Sawyer*, 17–517; *Moore v. Kent*, 37–20; *Parker v. Small*, 55–732; *Foley v. Kane*, 53–64; *Cunningham v. Wilde*, 56–369.

But her interest in lands previously alienated by her husband, to which she has not relinquished her right of dower, cannot be increased by legislation subsequent to such alienation: *Moore v. Kent*, 37–20; *Davis v. O'Ferrall*, 4 G. Gr., 168; *Young v. Wolcott*, 1–174; *Craven v. Winter*, 38–471; *Pierce v. O'Brien*, 29 Fed., 402.

In such cases the widow is entitled to recover in accordance with the law at the time of alienation by the husband notwithstanding a change of the law after alienation and prior to the husband's death: *Purcell v. Lang*, 66 N. W., 887.

Under the act of 1862, which repealed the provisions of the statute by which dower was a life estate and changed it to a fee-simple, *held*, that the dower right existing in favor of the wife in property conveyed before the repeal of the prior statute was preserved: *Moore v. Kent*, 37–20.

That act did not take away the estate of dower theretofore existing, but simply enlarged it: *Ibid.; Kendall v. Kendall*, 42–464.

That statute did not change the common-law rule previously in force, that until dower right is assigned it is not subject to execution or attachment in an action at law. Whether this rule is changed by later statutory provisions, *quære: Rausch v. Moore*, 48–611.

Where property of the husband to which the wife had not relinquished the right of dower was sold at judicial sale, while the statute did not bar her dower in property sold at judicial sale, and the husband died after a change of the statute, by which the dower in such property was barred, *held*, that the widow could not claim dower in the property so sold: *Sturdevant v. Norris*, 30–65.

When vested: Upon the death of the husband the interest of the wife becomes vested and cannot be affected by subsequent legislation: *Burke v. Barron*, 8–132.

Not subject to decedent's debts: The widow's dower right attaches upon the concurrence of seizin of the husband and coverture of the wife, and is not subject to the debts of the husband as is the interest of an heir: *Mock v. Watson*, 41–241; *Kendall v. Kendall*, 42–464.

The one-half interest which the wife may take under § 3659, in the absence of issue, includes the one-third interest here provided for, and that in excess of one-third is subject to debts of the husband: See notes to that section.

Priority of lien or mortgage for purchase money: The widow cannot claim dower in property to which her husband acquired an equitable title by a contract to convey as against the vendor's claim for the purchase money: *Barnes v. Gay*, 7–26.

The widow's dower right is subject to a mortgage for purchase money, although she did not join therein to release her dower: *Thomas v. Hanson*, 44–651.

As to other liens, see notes to § 3369.

In what property dowable: The widow has no interest in a pre-emption right: *Bowers v. Keesecker*, 14–301; *Langworthy v. Heeb*, 46–64.

Where the husband acquired title to public lands in trust for another, *held*, that his widow was not entitled to dower therein: *Langworthy v. Heeb*, 46–64.

The widow of one holding property in trust has no right to dower therein. So *held* where a person received and held a patent from the government for land, which he had previously conveyed, and to which he thus held the legal title by arrangement merely as trustee: *McDaniel v. Large*, 55–312.

A widow is endowable of lands to which the husband has an equitable estate: *McReynolds v. Anderson*, 69–208.

The right of redemption in an equitable estate is real property subject to dower: *Dexter v. Hayes*, 88–493.

Where a guardian of minor heirs without authority invested the money of his wards in real property, causing title to the same to

3447 B. Hackman v. Albertson
130 N. W. 139.

be taken in the name of his son as trustee, *held*, that having no power to thus invest the trust funds, the ownership thereof did not vest in his wards, and that he therefore had an equitable interest in such property to which the dower right of his wife would attach: *Ibid.*

In such case, *held*, that under the particular facts the purchaser from the trustee took his title with notice of the equitable interest of the guardian, and therefore subject to the dower rights of the wife: *Ibid.*

The widow of a member of a partnership formed to deal in real property, the provision being that the property shall be bought and sold in the name of a trustee, does not have dower interest in land thus purchased and conveyed: *Mallory v. Russell*, 71-63.

Where land was conveyed to a partnership in the individual names of the partners, with the intention that it should be partnership property, *held*, that upon the death of one of the partners, it appearing that the partnership was insolvent, the widow of such partner acquired no dower interest in such property: *Paige v. Paige*, 71-318.

Where the husband had entered into a contract for the purchase of land for his own benefit and paid the purchase price, but caused the title to be conveyed to his son, *held*, that the dower interest of his wife in such land was not thereby defeated, and that it was immaterial that the husband took possession under parol contract, he having made valuable improvements on the property and continued in possession up to the time of his death: *Everett v. Everett*, 71-221.

An unassigned dower right may be encumbered by the widow and an encumbrance by her of a portion of the property in which she has an unassigned dower right will be valid as an encumbrance of her interest therein: *Herr v. Herr*, 90-538.

In an action to correct a mistake in a deed, by which land, not intended to be conveyed thereby, is covered, it is not necessary to make the wife of the defendant a party. She has no dower right in such premises: *Stevenson v. Polk*, 71-278.

Although the provisions of this section apply only to property of which the husband is seized during coverture yet under the provisions of § 3381 the widow has the additional right to one-third of property which would have gone to her husband on the death of his son by a former marriage in case he had survived such son; that is, she or her heirs or devisees are entitled to one-sixth of the property of a stepson who leaves no widow or child surviving him: *In re Parker's Estate*, 66 N. W., 908. And see notes to § 3381.

Release of dower by conveyance: A joint deed of husband and wife will operate as a release of the wife's dower interest, although it contain no express relinquishment thereof: *Edwards v. Sullivan*, 20-502; *Jones v. Des Moines*, 43-209.

Under former statutory provisions, *held*, that a conveyance not expressly releasing dower and not acknowledged by the wife, would not bar her dower right: *Westfall v. Lee*, 7-12.

The execution of a deed by one holding a power of attorney from the husband and wife, in the name of the husband alone, will not pass the wife's dower, nor will any amount of intention aid the defective execution of the power: *Wilkinson v. Getty*, 13-157.

An instrument relinquishing dower may be valid without being acknowledged or recorded: *Lake v. Gray*, 30-415.

In an action to foreclose a mortgage on real property for part of the purchase price, where it appeared that the plaintiff (vendor) had agreed to obtain a conveyance to defendant (vendee) from his wife of her dower interest in the land, and had failed to do so, *held*, that plaintiff was not entitled to relief: *Blasser v. Moats*, 81-460.

A wife who has joined in a bond for a deed cannot complain that such instrument was without her knowledge intended only as security for a debt: *Steele v. Sioux Valley Bank*, 79-339.

A wife accepting money as consideration for a valid promise not to assert her dower right as against property conveyed by her husband, in the conveyance of which she does not join to relinquish her dower, is estopped thereby from afterwards setting up any dower interest in such land, and the estoppel also operates as against her heirs: *Dunlap v. Thomas*, 69-358.

It seems that the wife may, at the time of conveyance of property by the husband, make a separate contract for the sale of her inchoate right of dower therein: *Ibid.*

Purchaser without notice: It is no defense in an action for dower that defendant is a purchaser in good faith without notice: *Cruize v. Billmire* 69-397.

Nor will the fact that the parties have lived separately and apart from each other for a long time create an estoppel as against the claim of the wife for dower: *Ibid.*

Where a purchaser of land held under patent from the school fund had no knowledge of the fact that such patent was issued in pursuance of a contract of purchase by another person than the patentee, nor that anyone was entitled to a dower interest in the land, *held*, that the dower right of the wife of a person who took a contract for the purchase, and assigned the same without the wife's joining to release her dower, could not be asserted as against such innocent purchaser. While, if the purchaser had had knowledge, actual or constructive, of the interest of the first purchaser from the school fund, he might have been put on inquiry as to the dower interest of the wife of such purchaser, if any he had, it cannot be considered that he would be put on inquiry in regard to the possible dower right of some wife of whose husband he had no knowledge, actual or constructive: *Robinson v. Hague*, 63-273.

Where a man against whom a decree of divorce had previously been rendered at the suit of a woman claiming to be his wife, made an exchange of land with another who knew the fact of such divorce and believed that the party against whom it was rendered was therefore unmarried, and the transaction of exchange was effected through a son

by a former marriage of the party against whom the divorce was rendered, such son and agent remaining silent as to the fact that his mother was yet living, *held*, that such son was estopped from claiming, against the party with whom the exchange of property was made, that his mother was living in another state at the time that such exchange was made, and that she survived his father and became entitled to a dower interest in such property, which descended to him as her surviving heir: *Williams v. Wells*, 62-740.

Conveyance in trust: Where a husband had conveyed property in trust for the benefit of his wife, and upon her death to her heirs, subject to a life estate in himself, *held*, that he was entitled upon her death to one-third in fee in addition to his life estate: *Conrad v. Starr*, 50-470.

Limitations: The husband's right to dower, to which he has made no relinquishment, cannot be barred as against the purchaser from the wife by the statute of limitations during the lifetime of the wife: *Hurleman v. Hazlett*, 55-256.

As to limitation of actions to recover dower, see notes to § 3369.

Relinquishment by wife to husband: Under the statutory provision (§ 3154), that neither husband nor wife has any interest in the property of the other which can be the subject of contract between them, *held*, that a release of dower by the wife in a contract with her husband with reference to a separation was not valid: *Linton v. Crosby*, 54-478.

But in the absence of such statutory provision it was held that a relinquishment of dower in an agreement to separate would be binding: *Robertson v. Robertson*, 25-350.

The wife's interest in the real property belonging to the husband cannot by contract between them be extinguished so that the wife cannot after her husband's death assert her dower right in property conveyed by the husband: *Shane v. McNeil*, 76-459.

But aside from any agreement to separate, the contingent right of dower could not become the subject of valid grant or conveyance between husband and wife: *McKee v. Reynolds*, 26-578. And see notes to § 3154.

Relinquishment before marriage: Where, previously to their marriage a husband and wife had executed a written contract by which they waived all right in each other's real estate, *held*, that on the death of the husband the wife could not claim dower: *Jacobs v. Jacobs*, 42-600.

In a particular case, *held*, that the provisions of an antenuptial contract relinquishing dower were applicable over the wife's prospective interest in real estate: *Pitkins v. Peet*, 87-268.

Conveyance in lieu of dower: The conveyance of property to a wife by her husband, *held* not to have been made in lieu of dower so as to deprive her of her dower right. *Trowbridge v. Sypher*, 55-352.

Divorce bars dower: A wife who obtains a divorce from her husband thereupon loses all claim to a share in his property should she survive him: *Marvin v. Marvin*, 59-699; *Boyles v. Latham*, 61-174.

The divorced wife of the owner of real estate has no interest therein such as to make it necessary for her to join in a conveyance: *Winch v. Bolton*, 63 N.W., 330.

A wife cannot be allowed dower where a decree of divorce obtained before the death of the husband remains in force: *McCraney v. McCraney*, 5-232, 252.

If the sentence of divorce is void for fraud or duress it should be declared void *in toto*. But until such relief is granted, not only as to the portion determining the property rights but as to the entire decree, dower cannot be allowed: *Ibid.*

A legislative divorce as well as one granted by a court will defeat the widow's dower right: *Levins v. Sleator*, 2 G. Gr., 604.

The mere fact that one party to the marriage has remarried under such circumstances as to render him guilty of a crime unless a divorce has been had will not, as to the other party claiming dower and not shown to have been cognizant of such acts, raise a presumption of divorce: *Ellis v. Ellis*, 58-720.

In the absence of record evidence of a divorce it will not be presumed from the mere fact of long separation of the husband and wife so as to defeat the wife's right to dower: *Cruize v. Billmire*, 69-397.

In an action for dower, where the marriage of the parties is not denied, the burden of proof to establish a divorce as terminating the dower right is upon the party denying such right: *In re Estate of Edwards*, 58-431.

Adultery: The statute of Westminster 2, 13 Edward I, ch. 34, which makes an adulterous elopement a bar to dower, never having been adopted in Iowa, is not a part of the law of the state. Its provisions are inconsistent with the legislation of the state on the subject of dower, and the mode in which such right may be barred or relinquished, and also with the statutory provisions in respect to divorce on the ground of adultery: *Smith v. Woodward*, 4 Dillon, 584.

Foreclosure as a bar: If a mortgage against the husband in which the wife did not join is not foreclosed before the death of the husband, the foreclosure thereof will not bar dower unless her dower right is put in issue therein, even though the wife is made party to the foreclosure: *Mooney v. Maas*, 22-380.

But a foreclosure after the husband's death of a mortgage in which the wife has joined with the husband will bar her dower: *Ibid.*; *Mead v. Mead*, 39-28.

And a sale of the property by her husband's administrator in pursuance of proper proceedings to which she is a party, for the purpose of paying a mortgage thereon in which she joined, will equally defeat her dower right: *Mead v. Mead*, 39-28.

Where in a foreclosure of a mortgage it appeared that a widow of the deceased under her dower right was entitled to one-half of the tract covered by the mortgage, *held*, that the dower right being established, one-third of the proceeds of the portion subject to the dower right should be set aside, but that judgment should not be rendered

against the plaintiff therefor: *Gilman v. Sheets*, 78–499.

Sale by administrator: A widow who is notified and made a proper party to proceedings by an administrator to sell real property of her deceased husband for payment of his debts, and does not set up dower right in the land in such proceeding, cannot afterwards claim any dower interest therein: *Garvin v. Hatcher*, 39–685; *Olmstead v. Blair*, 45–42.

Judgment against husband: Where the wife's interest in property has once attached, and the question is as to whether it has been divested or otherwise affected, a party seeking affirmative relief on the theory that it has, should make her a party to the action brought to determine such question. But where a verdict or decree against the husband shows that he never had any interest in which the wife could have dower or a distributive share, the wife is bound thereby, although not made a party: *Lea v. Woods*, 67–304.

The fact that the husband has held the legal title to the property is only *prima facie* evidence that he had an interest in which his wife is dowable, and the wife may be bound by an adjudication against him to which he is not a party, determining that he never had such interest: *Ibid.*

Judicial sale: Prior to the enactment of Code of '51 there had not been, either in the state or territory of Iowa, any limitation of the common-law rule as to the wife's dower interest in the real property of her husband, and up to that time the dower right of a wife could not be extinguished by a sale under execution against the husband: *Pense v. Hixon*, 8–402.

Under the present provisions, *held*, that where the husband purchased property subject to a mortgage which he agreed to pay, and which the property was during his lifetime sold to satisfy, his widow's dower right was barred: *Kemerer v. Bournes*, 53–172.

Where two tracts of land belonged to an estate, one of thirty-four acres and one of two hundred acres which included the homestead, and the court ordered that both tracts be sold, and the entire proceeds of the smaller tract and so much of the proceeds of the larger tract as might be necessary to satisfy the indebtedness of the decedent be applied to that purpose, and one-third of the balance remaining be applied upon the widow's claim for dower, *held*, that the decree was not erroneous because it did not limit the widow's interest to her homestead right in forty acres: *In re Estate of Rawlings*, 81–701.

A referee's sale in partition proceedings is a judicial sale by which a wife's right to dower may be extinguished, although she is not a party to the partition suit: *Williams v. Westcott*, 77–332. 42 X 314

Under the provisions of Code of '51, authorizing a short foreclosure of mortgages by notice and sale, *held*, that such a proceeding was a judicial sale in such sense as to bar the widow's dower right: *Sturdevant v. Norris*, 30–65.

A sale of real property by an assignee under an assignment for benefit of creditors is a judicial sale within such statutory provision, and bars any contingent right of dower in the property: *Stidger v. Evans*, 64–91.

A sale by an assignee in bankruptcy is a judicial sale in such sense as to defeat the widow's dower right under the same statutory provision: *Taylor v. Highberger*, 65–134.

A purchaser at execution sale under a judgment against the husband takes the property discharged of any inchoate interest of the wife: *Baxter v. Hecht*, 67 N. W., 407.

As to assignment of the dower interest and actions to protect or recover the same, see notes to § 3369.

A divorce procured for the fault of the wife deprives her of any interest in the property of her husband: § 3181 and note.

Where the widow's interest and the provisions of a will are inconsistent the widow may elect: § 3376 and note.

SEC. 3367. Homestead. The distributive share of the survivor shall be set off so as to include the ordinary dwelling-house given by law to the homestead, or so much thereof as will be equal to the share allotted to her by the last section, unless she prefers a different arrangement; but no such arrangement shall be permitted unless there be sufficient property remaining to pay the debts of the decedents. [C.'73, § 2441; R., § 2426; C.'51, § 1395.]

Where the widow takes her third in fee out of the homestead, her share still has the homestead character, and a judgment existing against her will not become a lien thereon: *Briggs v. Briggs*, 45–318; *Nye v. Walliker*, 46–306; *Knox v. Hanlon*, 48–252.

When a widow elects to take her distributive share and has it so set off as to include the homestead, she has the right to have the portion of the property not included in the homestead first exhausted in the payment of a mortgage lien upon the whole premises: *Wilson v. Hardesty*, 48–515.

The guardian of an insane wife cannot make an election for her to have her share set apart from other property than the homestead: *Ratcliff v. Davis*, 64–467.

Where, in order to set off a widow's dower interest, it is necessary to sell the premises, the creditors cannot require that the widow's share of the proceeds be taken entirely from or include the proceeds of the homestead for the purpose of asserting their claims as against the proceeds of other property in the hands of the heirs, and avoiding the exemption of the proceeds of the homestead in the hands of the heirs under § 2985. In such case the share of the widow is to be taken from the whole: *Kite v. Kite*, 79–491.

The surviving husband or wife may elect to take a distributive share of the real estate of the deceased spouse which shall not include the homestead which was owned by the decedent and the share thus taken as

well as the homestead in the hands of the heirs will be exempt from the claims of creditors: *In re Coulson's Estate*, 64 N. W., 755.

And as bearing upon this section, see notes to § 2985.

SEC. 3368. Survivor a nonresident. As against a purchaser from a nonresident alien, the survivor shall not be entitled to a distributive share in the estate of the deceased, if at the time of the purchase such survivor was also a nonresident alien. [C. '73, § 2442.]

The term "nonresident alien" as used in this section means an alien not residing in the state and not one who is a nonresident of the United States, and the purpose of the statute is to encourage the purchase of lands from nonresident owners and to protect purchasers of real estate against claims for dower or distributive share therein: *In re Estate of Gill*, 79–296.

Mortgagees of nonresident aliens are purchasers within the meaning of this section, and are entitled to priority over a claim for dower: *Ibid.*

SEC. 3369. Setting off survivor's share. The survivor's share may be set off by the mutual consent of all parties in interest, or by referees appointed by the court or the judge thereof, the application therefor to be made in writing, after twenty days from the death of the intestate and within ten years, which application must describe the land in which the share is claimed, and pray the appointment of referees to set it off. [C. '73, §§ 2443–4; R., §§ 2427–8; C. '51, §§ 1396–7.]

Assignment of dower: Where the widow's interest exists in several tracts her share may be assigned in a body. She cannot be compelled to take one-third of each tract: *Montgomery v. Horn*, 46–285; *Jones v. Jones*, 47–337.

The court cannot compel the widow to accept dower in one of several tracts conveyed by her husband, in which conveyance she did not join: *O'Ferrall v. Simplot*, 4–381.

Proceedings in admeasurement of dower, and to compel the widow to elect whether she will hold the homestead or accept a distributive share, should not be brought until the estate is so far settled as to determine how much, if any, of the real property must be sold for the payment of debts: *Thomas v. Thomas*, 73–657.

The finding or judgment of one referee is not sufficient: *Jones v. Jones*, 47–337.

Apportionment of liens: The widow's share in property other than the homestead should bear its proportion of mortgage indebtedness to which she has assented by joining in the execution of the mortgage, and she can only claim, in such case, her distributive share of the proceeds of the property after the mortgage indebtedness has been satisfied therefrom: *Trowbridge v. Sypher*, 55–352; *McGlothlen v. Hite*, 55–392; *Cottrell v. Smith*, 63–181.

Likewise the widow's dower interest, when it is not taken out of the homestead, is subject to a *pro rata* proportion of the taxes upon the whole property: *Ibid.*

Where the portion set off to the widow for dower includes the homestead, such homestead is not to be subjected to the payment of a mortgage covering it, together with other property, though the widow joined in such mortgage, until such other property is exhausted: *Wilson v. Hardesty*, 48–515; *McGlothlen v. Hite*, 55–392; *Wells v. Wells*, 57–410.

Where mechanic's liens and taxes on decedent's real property have been paid with money provided from the personal estate, such liens and taxes should not be deducted from the widow's share of the real estate: *Conger v. Cook*, 57–49; *Linton v. Crosby*, 61–293.

The widow's share in real property is subject to a *pro rata* liability for mortgages, in which she joined, upon the whole of the property. In case of a homestead her share therein should only be subjected to a *pro rata* liability for the mortgages upon it alone: *Conger v. Cook*, 57–49.

The widow is under no obligation to pay any part of the taxes upon property in which she has a dower interest, before assignment, and therefore, in an action to recover dower from the grantee of her husband, her interest should not be held subject to the refunding of any taxes paid by such grantor, at least before demand made for assignment of dower: *Felch v. Finch*, 52–563.

Action in equity: Courts of equity will exercise a general concurrent jurisdiction with courts of law in the assignment of dower, and the widow is not limited to the method provided by statute for admeasurement: *Starry v. Starry*, 21–254; *Phares v. Walters*, 6–106.

Proceedings for admeasurement of dower under this section are not exclusive, but it may be assigned and set off in a proceeding in chancery, as, for instance, in an action for partition: *Thomas v. Thomas*, 73–657.

Limitation: The statute of limitation does not apply to an action in equity, or for the recovery of real property, to recover a dower interest. The statute does not commence to run until the heir or his assignee denies the right to dower: *Starry v. Starry*, 21–254; *Rice v. Nelson*, 27–148; *Felch v. Finch*, 52–563; *Berry v. Fuhrman*, 30–462.

The statutory limitation as to proceedings for the admeasurement of dower applies only to proceedings in the probate court and not to an action to recover dower: *Sully v. Nebergall*, 30–339.

The statute of limitations does not run against an unrelinquished right of dower before it becomes vested by the death of the husband or wife: *Hurleman v. Hazlett*, 55–256.

Unassigned dower cannot be interposed as a defense to an action by the heirs for the possession of property. Recovery of pos-

session by the heirs, however, will not defeat the widow's claim for dower: *Cavender v. Smith*, 8-360.

Damages; rents and profits: No action for damages by a widow claiming dower can be maintained against a person in possession of property, receiving the rents and profits, when such dower has not been assigned or demand therefor made: *Huston v. Seeley*, 27-183.

The widow has no right to sue in respect to the rents before dower assigned: *Laverty v. Woodward*, 16-1.

Recovery of dower interest by heirs: If a widow, entitled to dower, fails to have her interest defined and set apart in her lifetime, her heirs may recover the same after her death: *Potter v. Worley*, 57-66.

Rights of creditor: The creditor of a widow cannot maintain an action in equity to have her share in specific land of decedent set apart to enforce his claim against such share: *Getchell v. McGuire*, 70-71.

Setting off dower; growing crops: Where property is set off to the widow as dower, growing crops thereon pass with the land set off and do not become the property of the executor: *Ralston v. Ralston*, 3 G. Gr., 533.

Assignment of inchoate right: The inchoate right of dower is not subject to grant or to assignment: *Craven v. Winter*, 38-471.

The inchoate right of dower does not pass by an assignment in bankruptcy, and a purchaser thereof from the assignee acquires no rights upon the dower interest becoming vested: *Lucas v. Bennett*, 42-703.

Right of way: The widow cannot, before her dower is assigned, maintain an action against a railway company for the value of her one-third interest in property conveyed by the husband for right of way. Whether the widow can claim any interest in the right of way so conveyed, *quære: Tuttle v. Burlington & M. R. R. Co.*, 49-134.

Action to protect inchoate right: Although during the lifetime of the husband the dower right is inchoate and contingent, yet it possesses the elements of property, and may be protected from fraudulent alienation through the connivance of the husband: *Buzick v. Buzick*, 44-259.

Therefore, where the husband of plaintiff allowed a son by a former marriage to acquire a sheriff's deed upon property for much less than its value, a fraudulent intent on the part of such son being shown, *held*, that the title of the son under the sheriff's deed, so far as the property exceeded the amount paid at the sheriff's sale, should be subject to plaintiff's contingent right of dower: *Ibid.*

Where the wife voluntarily unites in the conveyance of real property, and the proceeds are invested by the husband in other property, the title of which is taken in the name of a third person, the wife has no cause of action for the protection of her dower right: *Beck v. Beck*, 64-155.

Action to recover dower right: The widow may, as against the grantee of the husband, recover her dower in land in which she has not relinquished dower, after she has made demand thereof, and may recover rents and profits for the time subsequent to making demand, and within six years prior to the bringing of suit: *O'Ferrall v. Simplot*, 4-381.

The dower right is such an interest that it may be recovered in a real action: *Rice v. Nelson*, 27-148; *Huston v. Seeley*, 27-183, 197.

Increase of value; improvements: In an action by a widow against a grantee of her husband, under a conveyance in which she did not join to release her dower, to recover her dower interest in the property so conveyed, she can only recover her interest in the property without the improvements put thereon by the grantee; and where the grantee had increased the value of the property by securing the location of a railway depot thereon at considerable expense, *held*, that such expense was in the nature of improvements, and should be taken into the estimate in favor of the grantee to the extent to which it increased the value of the property, not exceeding the amount actually expended. (Decided under statutes prior to the Code of '73): *Felch v. Finch*, 52-563.

There is nothing in the present statute indicating an intention to change the equitable rule announced in the case last above cited. When an alienation is made by the husband without the wife joining therein, her right is to one-third of the property as owned and possessed by the husband, and not a right to one-third, also, in the improvements put thereon by the labor and money of one in whose property she has no right: *Pierce v. O'Brien*, 29 Fed., 402.

SEC. 3370. Referees—notice. The court or judge shall fix the time for making the appointment of the referees, and direct such notice thereof and of the application to be given to all parties interested therein as it thinks proper. [C. '73, § 2445; R., § 2429; C. '51, § 1398.]

Where it appears that there was a notice, though it was defective or the service thereof imperfect, if the court determined in favor of its sufficiency, which fact is shown by the record, the judgment will not be held void in a collateral proceeding. An error of the court as to the sufficiency of notice can only be attacked on appeal: *Shanchan v. Loffer*, 24-217.

SEC. 3371. Shares marked off. The referees may employ a surveyor, if necessary, and must cause the shares to be marked off by metes and bounds, and make report of their proceedings to the court as early as practicable. [C. '73, § 2446; R., § 2430; C. '51, § 1399.]

SEC. 3372. Report. The court or judge may require a report by such a time as it thinks reasonable, and if the referees fail to obey this or any

other of its orders, it may discharge them and appoint others in their stead, and impose upon them the payment of all costs previously made, unless they show good cause against it. [C. '73, § 2447; R., § 2431; C. '51, § 1400.]

SEC. **3373. Confirmation—new reference.** The court may confirm the report, or set it aside and refer the matter to the same or other referees, at its discretion, which confirmation, after the lapse of thirty days, unless appealed from, shall be binding and conclusive, and the survivor may bring an action to obtain possession of the land set apart. [C. '73, §§ 2448–9; R., §§ 2432–3; C. '51, §§ 1401–2.]

Dower should be set off in specific portions of real property. It is not proper to determine simply the value of the dower interest with a view to its being paid out of the assets of the estate: *Corriel v. Bronson*, 6–471.

SEC. **3374. Right contested.** Nothing in the last section shall prevent any person interested from controverting the right of the survivor to the shares thus set apart, before confirmation of the report of the referees. [C. '73, § 2450; R., § 2434; C. '51, § 1403.]

SEC. **3375. Sale—division of proceeds—homestead.** If the referees report that the property or any part of it cannot be readily divided, the court may order the whole sold and one-third of the proceeds paid over to the survivor, but no sale shall be made if any one interested gives security to the satisfaction of the court, conditioned to pay the survivor the appraised value of the share, with eight per cent. interest on the same, within such reasonable time as it may fix, not exceeding one year. If no such arrangement is made, such survivor may keep the property by giving like security to pay the claims of all others interested upon like terms. With any money thus obtained, the survivor may procure a homestead, which shall be exempt from liability for all debts from which the former homestead would have been exempt, and such sale shall not be ordered so long as those in interest shall express a contrary desire and agree upon some mode of sharing and dividing the rents, profits or use thereof, or shall consent that the court divide it by rent, profits or use. [C. '73, § 2451; R., § 2478; C. '51, §§ 1404–6.]

SEC. **3376. Share not affected by will—election.** The survivor's share cannot be affected by any will of the spouse, unless consent thereto is given within six months after a copy thereof has been served upon the survivor by the other parties interested in the estate, and notice that such survivor is required to elect whether consent thereto will be given, which consent, when given, shall be in open court, or by a writing filed therein, which shall be entered on the proper records thereof; but if at the expiration of six months no such election has been made, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder. [C. '73, § 2452; R., § 2435; C. '51, § 1407.]

Effect of will: This section applies as well to a will executed before marriage as to one executed after that time: *Ward v. Wolf*, 56–465.

That it applies also to the provisions of a will with reference to personal property, see notes to § 3362.

The widow's consent must be made of record within the six months. She will not be bound or estopped by a writing not so made of record: *Baldozier v. Haynes*, 57–683.

The heirs have no right to rely upon such an agreement: *Ibid.*

It is not proper for the court, upon proof that the surviving husband or wife had knowledge of the will from the first, and that it was in accordance with the wish of such survivor, to enter an order, making of record the fact of consent, more than six months after the death of the party whose consent is thus established, to take under the will. Consent alone, without entry of that fact of record within six months after notice of the provisions of the will, does not defeat the party's rights: *Houston v. Lane*, 62–291.

The fact that the widow, without objection, allows the executor to pay out upon legacies such amounts as not to leave enough remaining in his hands to pay her distributive share of the personal property, will not estop her from claiming such distributive share against the provisions of the will which she has accepted: *Linton v. Crosby*, 61–401.

This section applies equally to the husband's right under the will of the wife as to the wife's right under the will of her husband: *Shields v. Keys*, 24–298; *May v. Jones*, 87–188; *Everett v. Croskrey*, 92–333.

Where after notice of the provisions of the will are served, the surviving husband does not make known his consent thereto, within the six months allowed, he is pre-

sumed to have elected to take his distributive share: *Everett v. Croskrey*, 92-333.

Under previous statutory provisions which required objection by the surviving husband or wife to prevent the dower interest being barred by other provisions made in the will, *held*, that as the will passed the title of the property devised to the devisee, subject to be divested by the objection of the husband or wife, if such party did not object, he acquired no interest to which the lien of a judgment creditor could attach, and the creditor could not in equity control the election of the surviving husband or wife with reference to abiding by or objecting to the will: *Shields v. Keys*, 24-298.

Under such previous provisions, *held*, that silence and failure to perform an act of relinguishment authorized the conclusion that the survivor accepted the provisions of the will, and a subsequent will made by such survivor could not act as a relinquishment of such provisions: *Kyne v. Kyne*, 48-21.

The devise to the widow of all decedent's property will not impose upon her the necessity of filing an election to take under the will instead of taking her statutory share: *Bulfer v. Willigrod*, 71-620.

Election to accept under will: The election, when once made, fixes the widow's relation to the estate, and such relation cannot be afterwards changed: *Ashlock v. Ashlock*, 52-319.

But where the consent to the will was given in pursuance of an agreement whereby the heirs were to give her in addition certain other property, which agreement was not concurred in by all the heirs as contemplated, *held*, that she might withdraw her consent: *Richart v. Richart*, 30-465.

Where it was stipulated between the widow and the executor that she would accept the provisions of the will in her behalf and release the estate from all other claim upon payment of ten thousand dollars in addition to the interest given her by will, *held*, that such a stipulation was valid and vested in the estate for the benefit of the legatees and devisees other than the widow all rights which the widow might have asserted inconsistent with the will: *Baldwin v. Hill*, 66 N. W., 889.

The acceptance of the provisions of the will does not bar a widow's right to dower where such provisions are not inconsistent with her dower right: *Potter v. Worley*, 57-66.

Where there is no express declaration in the will that a devise therein to the wife is to be in lieu of dower, the intention is to be deduced by clear and manifest implication from the will, founded upon the fact that the claim of dower would be inconsistent with the will, or so repugnant to its disposition as to disturb or defeat it: *Corriell v. Ham*, 2-552.

The widow may take dower, notwithstanding a devise to her in the will, unless there be an express provision in the will to the contrary, or the claim for dower be inconsistent with, and will defeat some of the provisions of, the will: *Daugherty v. Daugherty*, 69-677; *Sutherland v. Sutherland*, 71 N. W., 424.

A devise to the wife will not be considered as in lieu of her dower unless made so by express words or necessary implication. If there is any doubt she will not be put to an election: *Clark v. Griffith*, 4-405.

Where there were no expressed declarations of the will barring the dower of the wife, the intention that it must be barred must be decided by clear and manifest implication founded on the fact that claim of dower would be inconsistent with the will or be so repugnant thereto as to defeat other provisions of the will: *Herr v. Herr*, 90-538.

The rule is that in the absence of provisions to the contrary in the will, dower must be allowed unless to do so would be inconsistent with the will and would defeat some of its provisions: *Hunter v. Hunter*, 64 N.W., 656; *Baldwin v. Hill*, 66 N. W., 889.

Where there is no express declaration in the will, barring the widow's dower, the intention that the provisions of the will are in lieu of dower must be adduced by clear and manifest implication from the instrument itself, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to some of its dispositions as to defeat them: *Metteer v. Wiley*, 34-214; *Bare v. Bare*, 91-143.

Therefore, *held*, that the acceptance of the provisions of a will by which all testator's real and personal property, not otherwise disposed of, was given to the widow for life, to be divided among the heirs on her death, did not bar dower: *Metteer v. Wiley*, 34-214.

Where a testator devised his entire property, real and personal, to his wife during her natural life, or so long as she should remain unmarried, and provided further that, in the event of her marrying again, her interest should be restricted to her usual dower right, *held*, that such provision was not inconsistent with the right of the widow to assert her claim of dower in property conveyed by the husband before his death, and to which she did not relinquish her dower right: *Corriell v. Ham*, 2-552.

The election of the widow to take under a will which gives her a life estate, so long as she remains a widow, in all testator's property, with provision that at her death or marriage it is to be equally divided between his heirs, will not defeat her right of dower: *Sully v. Nebergall*, 30-339.

The acceptance by the widow of a bequest of a life estate in her husband's lands does not bar her right of dower, which she may take in addition to the life estate: *McGuire v. Brown*, 41-650; *Blair v. Wilson*, 57-177; *Daugherty v. Daugherty*, 69-677; *Howard v. Watson*, 76-229; *Herr v. Herr*, 90-538; *Richards v. Richards*, 90-606; *Bare v. Bare*, 91-143.

Therefore, *held*, that a bequest to the widow of all testator's real property not otherwise disposed of, during the period of her widowhood, and in the event of her remarriage to take the course prescribed by law, did not defeat her dower right, and upon remarriage she might still claim such interest as she would have had without the will: *McGuire v. Brown*, 41-650.

Where the will gives the widow a life estate, occupancy of the premises is not an

election which precludes the claim of dower: *Bare v. Bare*, 91-143.

A will giving the wife one-third of testator's real estate, and directing the distribution of the remainder among heirs named, is not inconsistent with the widow's right to dower: *Watrous v. Winn*, 37-72.

The bequest to the wife of one-third of testator's estate, consisting entirely of personalty, is not inconsistent with her right to a distributive share in the estate, and she is not required to elect: *In re Estate of Blaney*, 73-113.

Where a wife entered into an agreement, upon consideration to be paid, to release the dower interest in certain lands of her husband, and received a portion of such consideration before his death, and afterwards filed a claim against his estate for the balance, *held*, that she thereby elected to accept the provisions of her husband's will based upon such agreement, and could not claim dower interest in the lands released: *Stoddard v. Cutcompt*, 41-329.

Under certain facts, the provisions of a will were held to be inconsistent with widow's dower right: *Cain v. Cain*, 23-31.

A devise of property to the wife in trust for the children and not for her own benefit is not inconsistent with her right of dower: *Rittgers v. Rittgers*, 56-218.

Where the will gave to the wife certain real property to be held by her in trust for minor children, the proceeds arising therefrom to be appropriated for their care and benefit, and each of them to have an equal share on arriving at majority, other property being given to the wife, *held*, that the provision as to the disposition of the property left in trust for the children indicated the intention that dower should not be allowed out of such property, and that therefore the provisions of the will must be considered as in lieu of dower, and the wife, having accepted the provisions of the will and elected to retain them, could not claim dower: *Van Guilder v. Justice*, 56-669.

Where a will gave certain specific property to the widow and made distribution of the entire remaining property of testator, *held*, that the provision for the widow must be considered in lieu of dower: *Snyder v. Miller*, 67-261.

Under the provisions of a particular will, *held*, that a devise to the wife must be considered as in lieu of dower: *Severson v. Severson*, 68-656.

Where the widow elects to take her distributive share, including the homestead, instead of the provisions made for her in the will, the devisee of the homestead whose devise is thus defeated cannot recover its value from the estate: *Gainer v. Gates*, 73-149.

Where there is no express provision in the will against dower, the provisions of the will are not to be considered as made in lieu of dower, unless the allowance of dower in addition to the provisions of the will would be inconsistent with and defeat some of the provisions of the will. And where the devise was specific, describing the particular property, both as to a life estate given to the widow and as to a remainder to heirs, *held*, that such provision should not be considered as in lieu of dower: *Parker v. Hayden*, 84-493.

Where a testator devised a life estate to his widow and the property after the termination of the life estate to certain legatees, and the widow refused to take under the will but elected to take her dower interest, *held*, that the residuary legatees would be entitled to whatever remained after the payment of debts and the widow's claim for dower: *In re Estate of Rawlings*, 81-701.

Where a testator gave his wife one-third of the homestead property and the remaining two-thirds to his daughter, and the widow continued to occupy the premises as a home until her death, but had previously conveyed her interest in the property to defendant, *held*, that as her occupation was not exclusive and adverse to plaintiff, and was not continued for ten years, it could not be regarded as an election to take the homestead for life in lieu of her distributive share, and her deed to defendant was effectual to convey an undivided one-third of the property: *Larkin v. McManus*, 81-723.

A bequest to the wife of a life estate in personalty is inconsistent with her dower interest, and she cannot assert such right under the will unless she consents to the will in accordance with the provisions of this section. In the event of failure to thus consent to the provisions of the will within the time specified after notice, the right of the widow under the will is lost: *In re Will of Foster*, 76-364.

The rule in this respect in regard to the personalty is different from that recognized as to realty: *Ibid.*

The widow cannot elect to accept the provisions favorable to her and reject the remainder and therefore if she accepts the provisions of the will as to personal property by accounting as executor for all of such property as received by her in accordance with the provisions of the will she cannot assert a dower interest inconsistent with the will in the real property: *In re Frank's Estate*, 66 N. W., 918.

Where provisions are made for the widow upon the condition that she shall accept under the will, they are deemed not to have been intended to be operative if the will is rejected, and by refusing to take under the will the widow makes the provisions of no effect, and cannot derive any benefit from them: *Stewart v. McFarland*, 84-55.

The acceptance of the devise by the widow does not defeat her right to dower unless the intention of the testator that such devise shall be in lieu of dower is shown by the declaration in the will to that effect or is clearly deducible from its terms, as where it appears that a claim for dower would be incompatible with the will and that to allow it would defeat some provision of the will: *In re Frank's Estate*, 66 N. W., 918; *Watson v. Watson*, 67 N. W., 83.

There is no inconsistency between a devise of property including the homestead to the widow during her natural life as her exclusive property and a provision that the homestead shall go to children after the death of the wife: *Ibid.*

Where a wife in her will gave a specific money legacy to her husband and her children, having at the time and till her death a sum of money in bank substantially equal to the sum of the bequests thus made, but before her death and prior to the execution of the will gave to her husband a check on her funds in the bank which was not cashed till after her heath, *held*, that the acceptance by the husband of the amount of the check did not constitute an acceptance of the provisions of the will so as to defeat his right to claim his share without regard to the will: *May v. Jones*, 87–188.

The election of the widow to take under the provisions of the will need not be shown by formal consent but may be otherwise established: *In re Frank's Estate*, 66 N. W., 918.

Mere acts and statements of the widow will not constitute an election to take under the will so as to defeat her right to dower. Such an election must appear of record: *Whited v. Pearson*, 87–513.

Notice and record. It is not necessary that there should be a writing signed by the widow and made of record in order to manifest her election to take under the provisions of the will in lieu of dower; but if the record discloses any act or declaration of the widow plainly indicating the purpose to take under the will, she will be held to have so elected. Where it appeared that the widow joined in a report as executor, showing that by the will the widow was to have the use of the real estate for life, and made a final report reciting that the real estate is by said will given for the sole use and benefit of said widow, and signed a receipt closing up the estate, the report being approved by the court, *held*, that there was sufficient evidence to show an election by the widow to take under the will: *Craig v. Conover*, 80–355.

Consent to take under a will may be shown otherwise than by the record, and where the report of the executor showed that he had turned over all the personal property not sold to a purchaser thereof from the widow to whom it was bequeathed, such sale being evidenced by a deed of the widow, duly recorded, *held*, that the consent of the widow to take under the will sufficiently appeared: *Pellizzarro v. Reppert*, 83–497.

The court cannot entertain jurisdiction of a proceeding by the guardian of an insane widow to have the acceptance of the will made of record until service has been had upon such insane person: *In re Hunter's Estate*, 84–388.

Where in a proceeding to have dower set off, an order was made that a certain paper, claimed to be an acceptance of the provisions of the will should be put on record, *held*, that such order was not one from which appeal could be taken: *In re Estate of Slauson*, 82–366.

Where there is no inconsistency between the will and provisions as to distributive share, the filing of a writing refusing to accept the provisions of the will and electing to take a distributive share is immaterial and of no effect: *Richards v. Richards*, 90–606.

The widow has six months after the notice here provided for in which to make her election, and she is not cut off by a failure to elect within six months after obtaining knowledge of the provisions of the will, no such notice having been given: *Ibid.*; *Howard v. Watson*, 76–229.

SEC. **3377. Election as between distributive share and occupancy of homestead.** Within six months after written notice to the survivor, given by any heir of a deceased intestate, or by the administrator of his estate in case a sale of the real estate is necessary to pay debts, the survivor may elect to take the distributive share, or the right to occupy the homestead, which election shall be made and entered of record as provided in the preceding section. In case of a failure to make such election, the right to occupy the homestead in lieu of the distributive share shall be waived. [C. '73, § 2008; R., § 2296; C. '51, § 1264.]

SEC. **3378. Descent—to children.** Subject to the rights and charges hereinbefore provided, the remaining estate of which the decedent died seized shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case the heirs of such shall inherit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents. [C. '73, §§ 2453–4; R., §§ 2436–7; C. '51, §§ 1408–9.]

Upon the death of the ancestor his real estate descends at once to his heirs, who may alien the same subject to its liability for the payment of debts. The heirs are bound to pay taxes, and are entitled to possession and the rents and profits, and if the administrator receive them he is individually liable for them to the heirs or their assignees: *Laverty v. Woodward*, 16–1.

Rents not accrued pass with the real estate out of which they are to issue to the heirs of the intestate, but accrued rent will pass to the administrator: *Tcerring v. Lamp*, 77–488.

The heirs take the property as tenants in common: *Peters v. Jones*, 35–512.

The possession of the heirs follows that of the ancestor, and the former cannot maintain trespass against one who enters the land and carries away logs which he has purchased from the ancestor: *Morgan v. Corbin*, 21–117.

Where a party claims as heir, he must establish first affirmatively, his relation with

deceased, and second, negatively, that no other descendant exists to impede the descent to him: *Anson v. Stein*, 6–150.

During the brief period elapsing between an injury and death resulting therefrom, an injured person may take by inheritance. If a person weaker than he has been involved in the same catastrophe and has lost his life by the same means, the law will, in the absence of proof as to such question, presume that he survived the weaker individual and during the interval was vested with a perfect right to such property, which will be disposed of accordingly. (Overruling *Sherman v. Western Stage Co.*, 24–515): *Kellow v. Central Iowa R. Co.*, 68–470.

A conveyance by a deed covenanting to stand seized to uses, where the use is executed, conveys an inheritable estate: *Pierson v. Armstrong*, 1–282.

An adopted child inherits from its natural parents as well as from its parents by adoption: *Wagner v. Varner*, 50–532.

The court does not say, even by way of *dictum*, that foster-parents will inherit from adopted children under the rule of inheritance directing the descent of adopted children to and through their natural parents: *Burger v. Frakes*, 67–460.

Where, by a special act of another state, the adoption of a child was authorized, and it was declared that such child should inherit from the adopting parents, or either of them, as if she were their legitimate child, *held*, that such adopted child did not thereby become entitled to inherit property situated in this state, left by the father of her adopting father, dying in this state after having survived such adopting parents: *Estate of Sunderland*, 60–732.

Where, under a will, realty is to take one direction and personalty another, it may be that land directed to be sold is to be regarded as personalty in the sense that the proceeds of it when sold are to take the direction of personalty, but where there is no such provision the party whose interest attaches to the land at the death of the testator, and who is not divested until he parts with it by his own act, is considered as owner of the realty: *Hadley v. Stuart*, 62–267.

Where a son in feeble health and accustomed to write to his parents, was absent without being heard of for six years and nine months before the death of his father, *held*, that it would be presumed in making distribution of the property as to other heirs that such son died before the death of the father: *Leach v. Hall*, 64 N. W., 790.

The conditions upon which children inherit are fixed by statute, and the inheritance only takes place where the property is not otherwise disposed of by will. Therefore if by will, the property of testator is disposed of, a child for whom no provision is made in the will is disinherited although no such intention is expressed: *Heeb v. Heeb*, 93–416.

Where in pursuance of a general plan of distribution of property among prospective heirs the owner conveyed a tract of land to his daughter's husband, there being no trust expressed in behalf of the daughter, *held*, that the heirs of such daughter upon her death could not establish any right to or interest in the property or its proceeds as against the first grantee, the husband of deceased: *Acker v. Priest*, 92–610.

Degrees of relationship are to be computed according to the rule of the civil law. (See § 48, ¶ 24): *Martindale v. Kendrick*, 4 G. Gr., 307.

The mother of a child which dies while both its parents are living, cannot, upon the death of its father, claim any share in his estate as heir of such child: *McMenomy v. McMenomy*, 22–148; *Journell v. Leighton*, 49–601. And see *Will of Overdieck*, 50–244 (construing § 3281).

So, when a devisee dies before the testator, the devise will pass to his brother, but not to his widow, under the statutory provision just referred to: *Blackman v. Wadsworth*, 65–80.

Where, at the time of decedent's death, his son was already deceased, *held*, that the widow of such son could not claim any interest in the estate by inheritance from a child of herself and such deceased son, said child having survived its father, but having died without issue before the death of its grandfather. The statute only provides for inheritance by the parents of the *estate* of a child dying without issue: *Leonard v. Lining*, 57–648.

Section applied: *McGuire v. Brown*, 41–650.

SEC. 3379. Wife and parents. If the intestate leaves no issue, one-half of the estate shall go to the parents, and the other half to the spouse; if no spouse, the whole shall go to the parents. [C. '73, § 2455; R., § 2495; C. '51, § 1410.]

If one-third of the real property of decedent has been set apart to his widow as dower, she is, in the absence of issue, further entitled by statute to one-fourth of the remainder: *Ralston v. Ralston*, 3 G. Gr., 535.

This section applies only in the distribution of the estate of an intestate, and not where the property is otherwise disposed of by will: *Clark v. Griffith*, 4–405; *Dobson v. Dobson*, 30–410.

The one-half given to the wife in cases here contemplated is inclusive of her one-third or dower interest: *Burns v. Keas*, 21–257; *Nicholas v. Purczell*, 21–265; *McGuire v. Brown*, 41–650.

The distributive share which may thus be held free from debts is limited to one-third. The additional interest making the one-half which the surviving husband or wife may take as heir in the absence of issue is not exempt from indebtedness of of decedent: *Smith v. Zuckmeyer*, 53–14.

The excess over one-third which the surviving husband or wife may take, in the absence of issue, is subject to other disposition of the property made by will: *Ibid.*; *Clark v. Griffith*, 4–405; *Dobson v. Dobson*, 30–410; *Linton v. Crosby*, 54–478.

Although under this provision a widow takes as heir, yet the widow is not in gen-

eral included in the term "legal heir." So *held* with reference to a certificate of insurance made payable to legal heirs: *Phillips v. Carpenter*, 79–600. But see now § 3313.

The district court, in fixing the shares, gave to appellant, the widow of the deceased, one-third of the land; it also ordered that from the remaining two-thirds the disbursements by her should be paid; and of the balance it gave to appellant one-fourth, and the remainder to appellees. The effect of the order was to make the one-sixth necessary to make the difference between the one-third and one-half going to appellant bear its proportion of the incumbrance, leaving to her one-third in no way affected by the incumbrance. It was held that she had no ground for complaint: *Wilcke v. Wilcke*, 71 N.W., 201.

SEC. **3380. Surviving parent.** If one of the parents is dead, the portion which would have gone to such deceased parent shall go to the survivor, including the portion which would have belonged to the intestate's spouse, had one been living. [C. '73, § 2456; R., § 2496; C. '51, § 1411.]

SEC. **3381. Heirs of parents.** If both parents are dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on, through ascending ancestors and their issue. [C. '73, § 2457; R., § 2497.]

Where an owner of property died, leaving neither issue, wife nor parents living, *held*, that his step-mother surviving him, was entitled to one-sixth of his property: *Moore v. Weaver*, 53–11; and if in such case the step-mother is already deceased, her devisees will take such share: *In re Parker's Estate*, 66 N. W., 908.

Where both parents die before intestate's decease the property is to descend as though both had outlived the intestate and died already in the possession and ownership of the portion falling to their respective shares: *Bassil v. Loffer*, 38–451: *Neeley v. Wise*, 44–544. And see *McGuire v. Brown*, 41–650.

Where intestate dies without issue, and his parents are both dead, it is immaterial which died first, and it is immaterial whether such parents, or either of them, made any disposition of their property by will other than that which would have been made by law. The persons entitled to distributive shares in decedent's estate take from him directly, and not through the parent, the supposition that such parent died in possession of the property being merely for the purpose of determining the descent: *Lash v. Lash*, 57–88.

The heirs of the parents are made the heirs of the intestate: *Wilcke v. Wilcke*, 71 N. W., 201.

Therefore, *held*, that transmission by inheritance from brother to brother is direct and not dependent on capacity to inherit on the part of the deceased parent: *Ibid.*

SEC. **3382. Spouse and heirs.** If heirs are not thus found, the portion uninherited shall go to the spouse of the intestate, or the heirs of such spouse if dead, according to like rules, and if such intestate has had more than one spouse who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation. [C. '73, § 2458; R., § 2439; C. '51, § 1413.]

SEC. **3383. Advancements.** Property given by an intestate by way of advancement to an heir, for the purposes of the division and distribution thereof shall be considered part of the estate, and be taken by him toward his share of the estate at what it would be worth if in the condition in which it was given to him, but if such advancement exceeds the amount to which he would be entitled, he cannot be required to refund any portion thereof. [C. '73, § 2459; R., §§ 2445–6; C. '51, §§ 1419–20.]

An advancement is an irrevocable gift in anticipation of the share of the heir in the estate: *In re Estate of Lyon*, 70–375; *In re Will of Miller*, 73–118; *West v. Beck*, 64 N. W., 599.

Such advancement creates no right of property in the estate, and cannot be regarded in making distribution under § 3362, and the share of the widow is not increased by reason of it: *In re Will of Miller*, 73–118.

The rule that advancements made to an heir are to be brought into hotchpot is not applicable to a case where there is a will under which the heir is a residuary legatee; the rule applies to intestate, or possibly to partially intestate, estates only: *In re Estate of Lyon*, 70–375.

A contract during the life of decedent, made by his prospective heirs in consideration of present advancement of property to them, by which they release all interest in his estate, should he die without making a will, and agree in no case to claim anything more from his estate, will be binding upon them in the distribution of his estate, and cannot be varied by parol evidence: *Jones v. Jones*, 46–466.

In a particular case, *held*, that the evidence established advancements to heirs such as to defeat their claim to share in the

intestate's real property: *Ramsey v. Abrams*, 58–512.

Declarations made by the decedent to the effect that a conveyance to his son was not made by way of advancement is competent evidence in an action by such son against the other heirs of decedent to recover his interest in the estate: *Middleton v. Middleton*, 31–151.

A voluntary conveyance from parent to child is presumed to have been an advancement and the burden of showing that it was not is upon the person who claims that it was not so intended: *Philips v. Philips*, 90–541; *Finch v. Garrett*, 71 N. W., 429.

One purchasing the interest of an heir, with notice that other heirs are claiming that advancements had been made to his grantor, *held* not to be an innocent purchaser: *Finch v. Garrett*, 71 N. W., 429.

Where in pursuance of an intention to make distribution of property among next of kin money is paid to a prospective heir the ancestor is conclusively presumed to know that the presumption will arise that such payment is by way of advancement and unless the intention to make an advancement is negatived the money thus paid cannot be recovered back: *Murphy v. Murphy*, 63 N. W., 697.

No distinction seems to be drawn in this section between advancements of real and personal property and there is nothing to indicate that the legislature intended advancements of personal property to be taken from the personal and advancements of real property from the real estate, indeed a contrary intention is apparent. Advancements of money may therefore be offset against an heir's share of real estate: *West v. Beck*, 64 N. W., 599.

Declarations by the father at the time of making the advancement although addressed to a third person are admissible as part of the *res gestæ* to show that the money furnished was by way of advancement: *Ibid.*

When a father pays off a debt owed by his son to a third person the law presumes the money so paid to be an advancement unless it is shown that it was not so intended: *Ibid.*

Where decedent signed notes as surety for his son with the understanding that any amount he should pay thereon should be deducted from the son's estate, *held*, that payments so made by decedent before his death and by his administrator after his death should be treated as advancements: *In re Pickenbrock*, 70 N. W., 1004.

The advancement should be valued at what the property is worth at the time of distribution: *Finch v. Garrett*, 71 N. W., 429.

SEC. **3384. Illegitimate children—inherit from mother.** Illegitimate children inherit from their mother, and she from them. [C. '73, § 2465; R., § 2441; C. '51, § 1415.]

An illegitimate child will inherit anything coming to the mother by descent, even though the mother be dead before the descent is cast: *McGuire v. Brown*, 41–650.

The law presumes the legitimacy of a child born any time during wedlock, and the issue of a voidable marriage are legitimate until the marriage is annulled by proper proceedings. They cannot be bastardized in a collateral proceeding: *Niles v. Sprague*, 13–198.

Declarations of the parent after marriage are not competent to bastardize the issue; but where the question is one of inheritance, such declarations are admissible, as showing no marriage, to rebut the presumption of legitimacy of a child begotten before and born after the alleged marriage: *Ibid.*

A man who knows a woman married by him to be with child by another man at the time of marriage is regarded as standing *in loco parentis* as to such child at its birth, and as adopting it into his family. The law in such cases raises a conclusive presumption that the husband is the father of the illegitimate child. But this rule would not prevail in cases involving questions of inheritance: *State v. Shoemaker*, 62–343.

SEC. **3385. From father.** They shall inherit from the father when the paternity is proven during his life, or they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing. Under such circumstances, if the recognition has been mutual, the father may inherit from his illegitimate children. [C. '73, §§ 2466–7; R., §§ 2442–3; C. '51, §§ 1416–17.]

The recognition in writing here contemplated need not be a formal avowal executed for the purpose of making known and perpetuating the fact, but any recognition in writing, as by letter or otherwise, is sufficient: *Crane v. Crane*, 31–296.

Evidence in a particular case, *held* sufficient to show that decedent was the father of illegitimate children, and that he recognized them in such a general and notorious manner as to entitle them to inherit from him: *Blair v. Howell*, 68–619.

A verdict for plaintiff in an action for seduction in which damages are sought by reason of defendant being the father of plaintiff's child, such verdict not being necessarily based upon the paternity of the child, is not sufficient evidence of paternity to entitle the child to inherit from the putative father: *Koon v. Mallett*, 68–205.

For the purpose of inheritance, an illegitimate child, when recognized by its father, stands on precisely the same footing as if it were legitimate, and the birth of such a child and its recognition revoke a prior will in the same manner as the subsequent birth of a legitimate child: *Milburn v. Milburn*, 60–411.

A recognition made before the adoption in the Code of '51 of the statutory provision above referred to will not entitle the illegitimate child to inherit under that provision: *Hartinger v. Ferring*, 24 Fed., 15.

SEC. **3386. Heir or beneficiary causing death or disability.** No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or take by devise or legacy from him, any portion of his estate; and no beneficiary of any policy of insurance or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; but in every instance mentioned in this section, all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken or who is thus disabled shall become subject to distribution among the other heirs of such deceased person, according to the foregoing rules of descent and distribution in case of death, and in case of disability the benefits thereunder shall be paid to the disabled person.

SEC. **3387. Escheat.** If there is property remaining uninherited, it shall escheat to the state. [C.'73, § 2460; R., § 2446; C.'51, § 1414.]

Where proceedings were brought by the attorney-general to recover for the state land claimed as an escheat, *held*, that the legislature had power to order the proceedings abated and to release the interest of the state in the property to the parties claiming adversely: *State ex rel v. Tilghman*, 14–474.

SEC. **3388. Proceedings.** When the judge or clerk of the district court has reason to believe that any property of the estate of an intestate within the county should by law escheat, he must forthwith inform the state auditor thereof, and appoint some suitable person administrator to take charge of such property, unless an executor or administrator has already been appointed for that purpose in some county in the state. [C.'73, § 2461; R., § 2468; C.'51, § 1443.]

SEC. **3389. Notice to persons interested.** The administrator must give such notice of the death of the deceased and the amount and kind of property left by him within the state as, in the opinion of the judge or clerk appointing him, will be best calculated to notify those interested, or supposed to be interested, in the property. [C.'73, § 2462; R., § 2469; C.'51, § 1444.]

SEC. **3390. Sale—proceeds.** If within six months from the giving of such notice no claimant thereof appears, such property may be sold and the proceeds, under the direction of the state auditor, paid over by the administrator for the benefit of the school fund. If real estate, the sale shall be conducted and the proceeds treated like those of school lands. [C.'73, § 2463; R., § 2470; C.'51, § 1445.]

SEC. **3391. Payment to person entitled.** The money or any portion of it shall be paid at any time within ten years after the sale of the property or the appropriation of the money, but not afterwards, to any one showing himself entitled thereto. [C.'73, § 2464; R., § 2471; C.'51, § 1446.]

SEC. **3392. Land patented to person deceased.** Where a patent has been or may be issued by the state to a person who had died, or who dies before the date of such patent, the title to the land patented shall inure to and vest in the heirs, devisees or assignees of such patentee, as if the patent had issued to him during his life. [17 G. A., ch. 33.]

CHAPTER 5.

OF ACCOUNTING AND MISCELLANEOUS PROVISIONS.

SECTION **3393. Reference—examination of accounts.** In matters of accounts of executors and administrators, the court may appoint one or

more referees, who shall have the powers and perform all the duties therein of referees appointed by the court in a civil action. [C.'73, § 2412.]

Power is by this section conferred upon a probate court to appoint a referee in the matter of the examination of administrator's accounts: *In re Heath's Estate*, 58–36.

SEC. **3394. Report.** On the expiration of six and within seven months from the first publication or notice of his appointment, and sooner if required by the court, the executor or administrator shall render his account to the court, showing the condition of the estate, its debts and effects, the amount of money received, and the disposition made of it; and from time to time, as may be required by the court, he shall render further accounts until the estate is finally settled, which final settlement shall be made within three years, unless otherwise ordered by the court. Such account shall embrace all matters directed by the court and pertinent to the subject. [C.'73, § 2469; R., §§ 2447–8; C.'51, §§ 1422–3.]

A court of equity will not review or correct the acts of an administrator while administration is pending in a probate court. The administrator must be held accountable to the court from which his letters issued, and where his bond is, and no other: *Hutton v. Laws*, 55–710.

Where an administrator dies, a new administrator should be appointed in his place and an administrator should be appointed over his estate. The estate of the deceased administrator should be settled by his administrator, and that of the original decedent by the new administrator: *Ibid.*

Under a prior statutory provision relating to the powers of a county judge with reference to estates, *held*, that such judge had authority to receive money paid by an executor upon claims filed and allowed against the estate, and that upon such payment by the executor to the county judge, the executor was discharged from liability. Also, *held*, that no written order for payment need be made by the county judge to authorize such payment to be made to him: *Doogan v. Elliott*, 43–342.

An allegation that the executor has induced the guardian to make false charges in the guardian's account, of which the executor received the benefit, will not be sufficient ground for setting aside such executor's accounts and holding him liable for such fraudulent charges. His liability, if any, will be individual and not as executor: *Estate of Berryhill*, 61–345.

The proper time to contest the propriety of allowing items of expense by the administrator is when the report is approved, unless it is opened by proper showing within three months: *Ashton v. Miles*, 49–564.

Where an executor was ordered to pay to the widow her distributive share, and, in apparent defiance of the citations issued by the court from time to time, he failed to account, *held*, that it was proper to charge him not only with six per cent. interest on the money due at the time of the order, but with the additional sums received by him after the order: *Huey v. Huey*, 26–525.

Where an administrator failed to properly account for notes and moneys coming into his hands, *held*, that it would be presumed that while he held the notes they were drawing the highest customary interest, to wit, ten per cent., and that he should be charged with six per cent. interest, compounded annually on moneys received: *Lommen v. Tobiason*, 52–665.

An administrator may reasonably be expected to keep a fund which remains in his hands invested as a reasonably prudent man would invest his own money, and if he negligently suffers it to lie idle he is chargeable with interest. He is not excused from making such investment on the ground that a contingency might happen requiring an accounting for the money: *In re Young's Estate*, 66 N. W., 163.

Where an administrator commenced action on a certificate of insurance which constituted the only assets of his intestate, but one claiming to hold such certificate by assignment intervened in the action and the parties interested in the estate employed an attorney to look after their interests, *held*, that failure of the administrator to emply counsel or further appear in the case did not render him liable for the insurance money which was decreed to the intervenor and collected by him, but on reversal of the judgment of the lower court could not be recovered back from him: *Meyeringh v. Wendt*, 86–465.

As to liability of administrator personally and on his bond, see notes to § 3301.

SEC. **3395. Examination of executor.** He may be examined under oath by the court upon any matter relating to his accounts, when the vouchers and proofs in relation thereto are not sufficiently full and satisfactory, and must account for all the property inventoried at the price at which it was appraised, as well as for all other property coming into his hands belonging to the estate. [C.'73, §§ 2470–1; R., §§ 2449–50; C.'51, §§ 1424–5.]

SEC. **3396. Presumption from appraisement.** The appraisement shall be presumptive evidence of the value of an article and so regarded, either for or against him. [C.'73, § 2472; R., § 2451; C.'51, § 1426.]

SEC. **3397. Profit and loss.** He shall derive no profit from the sale of property for a higher price than the appraisement, nor is he chargeable with any loss occurring without his fault. [C.'73, § 2473; R., § 2452; C.'51, § 1427.]

SEC. **3398. Mistakes corrected.** Mistakes in settlements may be corrected in the probate court at any time before his final settlement and discharge, and after that time by equitable proceedings, on showing such grounds as will justify the interference of the court. [C.'73, § 2474; R., § 2457; C. '51, § 1430.]

This section does not authorize a proceeding to vacate an order of a court allowing a claim upon a hearing, unless it be made to appear that there was fraud or collusion between the administrator and the claimant: *McLeary v. Doran*, 79–210.

And parties are not entitled to the relief provided by § 3399 except by an attack made upon a settlement of the accounts of the administrator in their absence and within three months: *Ibid.*

SEC. **3399. Settlement contested.** Any person interested in the estate may attend upon the settlement of his accounts and contest the same. Accounts settled in the absence of any person adversely interested, and without notice to him, may be opened within three months on his application. [C.'73, § 2475; R., § 2456; C.'51, § 1431.]

Settlements made by the court with the executor must stand until impeached by evidence of fraud or mistake. Where the estate remains unsettled, and the executor has not been discharged, mistakes which have occurred may be corrected by proper action upon the final settlement: *Cowins v. Tool*, 36–82.

Until the discharge of the administrator, a party interested is not concluded by yearly settlements made in his absence and without notice, even though he has failed to appeal therefrom. In such case he may bring action upon the bond: *Clark v Cress*, 20–50.

There is no provision for making persons interested parties to the settlement, nor for requiring notice of the proceedings to be given them. The final settlement and order of discharge may be made in their absence and without notice to them, and when so made it will doubtless have the force of a judgment in so far that it cannot be questioned in any mere collateral proceeding; but, like any other judgment or order, it may be amended or set aside entirely for any sufficient cause upon timely and appropriate proceedings: *Arnold v. Spates*, 65–570.

The provision as to the time within which the settlement may be opened is not applicable to a case where it is claimed that the administrator, by fraud or mistake, has omitted to account for a portion of the estate: *Ibid.*

In the absence of fraud, mistake or other grounds of equitable relief, a settlement made even in the absence of persons adversely interested cannot be set aside after the expiration of the three months allowed by statute: *Patterson v. Bell*, 25–149.

A party seeking to avail himself of mistake or fraud for setting aside the settlement after the expiration of the period specified by statute must allege sufficient reasons for not availing himself of those provisions for opening up the settlement; and if he seeks equitable relief on the ground of fraud, must set forth the fraudulent acts complained of, and show how he was deceived and misled thereby: *Kows v. Mowery*, 57–20.

Orders of court approving progressive reports must be regarded as correct, and it is incumbent on the heirs attacking the reports to show that they were incorrect and fraudulent, if so claimed: *In re Heath's Estate*, 58–36.

Equitable relief in case of fraud or mistake is not limited to the time within which an application may be made to have a settlement and discharge set aside: *Arnold v. Spates*, 65–570.

Settlement by an administrator with the probate court in which items of account are allowed cannot be collaterally assailed: *Harlin v. Stevenson*, 30–371.

Where a creditor has filed his claim and allowed the estate to be settled up and the administrator discharged, he cannot afterward, in an action against such administrator or heirs, subject to the payment of his claim property which he insists was fraudulently conveyed by decedent in his lifetime to such heirs for the purpose of defeating it. As he might, by proper proceedings, have had such property subjected to the payment of his claim during the administration, he cannot, after the estate has been settled, open up the settlement for that purpose. The settlement and discharge of the administrator is an adjudication not only that he has accounted for all property which came into his hands, but also that the estate has been properly administered upon: *Daniels v. Smith*, 58–577.

Where reports of an executor have been approved, and have passed without objection for years, they cannot afterwards be opened up: *In re Estate of Holderbaum*, 82–69.

There is no provision requiring notice in case of final settlement, but this section contemplates that a notice may be given, and, if given, it has the effect to defeat the right to open settled accounts under its provisions: *Van Aken v. Coldren*, 80–254.

And *held*, that notice in compliance with general rule adopted by the judges, given

by publication in the manner of serving original notice, was sufficient to defeat the account being opened up, a personal notice not being as matter of law essential. Notice in such cases is not jurisdictional, the estate being in court, of which persons interested must take notice: *Ibid.*

Where parties appear in the proceeding and offer evidence without objection in support of their exceptions to the report, and except to the finding and order of the court with reference thereto, it cannot be objected on appeal by such parties that they are not parties to the proceeding: *In re Estate of Wonn*, 80–750.

Where an administratrix approved and paid claims of the estate within six months of the notice of administration, but such claims were not filed as required to entitle them to be treated as third-class claims, *held*, that nevertheless no substantial prejudice had been suffered by other creditors and the administratrix was entitled to be credited with payment of such claims as third-class: *Ibid.*

In the absence of a showing to the contrary, it will be presumed that the heirs had due notice of the application of the executor for a discharge: *Van Aken v. Clark*, 82–256.

Where the executors of a will filed their final report, by which it was shown that the widow claimed the personal property under the will, to which defendants excepted, claiming that she was entitled to a life estate only, in both real and personal property, and the court found that it was unnecessary to construe the will further than to hold that the widow was entitled to hold and control both real and personal property during her life, *held*, that it was the right of the parties to have the question determined, that the widow might deal with the property knowing what her rights were: *Bills v. Bills*, 77–179.

The right given to a party adversely interested to have an account opened is not an absolute one and in a proper case should be denied, but, as a rule, every person interested in the estate of a decedent can have an opportunity to present any objections to the report of the administrator before his final discharge; and while it may be that the burden is upon the plaintiff to overcome the presumption in favor of the correctness of the action of the court in approving the report, yet where the application was properly made by petition and defendant did not answer, *held*, that the averments of the petition stood confessed, and proof in support thereof was not required: *Van Aken v. Welch*, 80–114.

Where an interest in the estate was claimed by those whose right thereto was based on the interest of an immediate party deceased, *held*, that it appearing that there were no claims against the estate or intermediate party, the administrator of the first estate might make final settlements directly with those entitled to the proceeds of the estate of the intermediate party, without administration having been granted: *Hoffman's Estate v. Hoffman*, 81–292.

SEC. **3400. Discharge.** Upon final settlement, an order shall be entered discharging him from further duties and responsibilities. [C. '73, § 2476; R., § 2459; C. '51, § 1434.]

The order of discharge may properly be made when the administrator is relieved from further duty touching the debts of the estate, and it has been properly found that he has accounted for the assets of the estate that were at any time under his control, although the estate is not yet finally settled: *Crossan v. McCrary*, 37–684.

Where an administrator is discharged by a court of competent jurisdiction, the burden of proof is upon the party seeking to hold him liable for errors or frauds in his accounts: *Read v. Howe*, 39–553.

If an order of discharge is based upon receipts of the distributees or their assignees, given by them for amounts found due them respectively upon a final accounting, and no application is made to set aside the discharge within the time allowed, the persons receipting must be deemed to have acquiesced in the order of receipting and final discharge, and to be concluded thereby: *Dichl v. Miller*, 56-313.

Where the record shows that no notice has been given to a person clearly appearing to be interested within the meaning of rule seven of the probate rules, and notice has not been waived, the court has not authority to discharge the executor, and its action in doing so should be set aside: *Godes v. Hassen*, 81–197.

It is not necessary to entitle a party to have the discharge set aside for want of notice to him to show that the estate was solvent or that the executor at any time had assets from which the claim would have been paid. Prejudice will be presumed from the facts stated: *Ibid.*

After the discharge of an administrator no relief can be given in an action against him, with reference to the estate: *Richardson v. Haney*, 76–101.

After settlement of the accounts of the executor he is deemed to be discharged and he has no further authority with reference to the estate: *Logan v. McCahan*, 71 N. W., 252.

SEC. **3401. Judgment—execution.** If judgment is rendered against an executor or administrator for costs in any action prosecuted or defended by him in that capacity, execution shall be awarded against him as for his own debt, if it appears to the court that such action was prosecuted or defended without reasonable cause. In other cases, the execution shall be awarded against him in his representative capacity only. [C. '73, § 2477; R., § 2458; C. '51, § 1433.]

SEC. **3402. Receipts by one executor.** One of the several executors or administrators may receive and receipt for any money, which receipt shall be given by him in his own name only, and he must individually account for all the money thus received and receipted for by himself, and this shall not charge his co-executor or administrator, except so far as it can be shown to have come into his hands. [C. '73, § 2478; R., § 2467; C. '51, § 1442.]

L. and S. qualified as executors and went to the bank where decedent had money deposited and gave a joint receipt for the whole amount and directed the bank to pass one-half of said sum to the credit of each, which was done. The money was never drawn from the bank and neither party had any actual possession, control or custody of the one-half thereof transferred to the other's credit. S. accounted for his half, but L. failed to do so. Later, an account was filed by them as executors, in which they charged themselves with the entire sum. As to the liability of S. for the share credited to L.'s account, the supreme court were equally divided: *Nettman v. Schramm*, 23–521.

SEC. **3403. Notice of order—publication.** When the court shall make an order affecting an executor or administrator, and it cannot be personally served upon him, service thereof may be made by publication of a notice, stating the substance of such order, in some weekly newspaper published in the county where such order was made, for four weeks in succession, which publication may be proved as in case of original notice. [C. '73, §§ 2479–80; R., §§ 2474–5.]

SEC. **3404. Effect.** Service as above shall be as effectual as if personally made, and actions and proceedings may be commenced and prosecuted in all respects as if such notices or orders had been personally served. [C. '73, § 2481; R., § 2476.]

SEC. **3405. Failure to account.** Any executor or administrator failing to account, upon being required to do so by the court or as he is required to do by law, shall, for every such failure, forfeit one hundred dollars, to be recovered in a civil action on his bond for the benefit of the estate by any one interested therein. [C. '73, § 2482; R., § 2453; C. '51, § 1428.]

SEC. **3406. Executor of executor.** An executor or administrator has no authority to act in a matter wherein his decedent was merely executor, administrator or trustee. [C. '73, § 2483; R., § 2463; C. '51, § 1438.]

SEC. **3407. Executors in their own wrong.** Any person who, without being regularly appointed as executor or administrator, intermeddles with the property of a deceased person, is responsible to the regular executor or administrator, when appointed, for the value of all property taken or received by him, and for all damage caused by his acts to the estate of the deceased. [C. '73, § 2484; R., § 2464; C. '51, § 1439.]

The wife cannot, by the purchase of property with the money of her deceased husband, become entitled to such property, even to the extent to which she is entitled to share in his estate, but will hold the property in trust: *Claussen v. La Franz*, 1–226.

Although the widow or heir is entitled to a definite and determined portion of decedent's property, yet neither can take the property of decedent and invest it and appropriate the proceeds: *Schaffner v. Grutzmacher*, 6–137.

When in such case the widow assumes to administer without right, she cannot take credit for that which, under a regular administration, might have been her own. The portion which would have been hers individually, but which is so mingled with the property of the heirs that it cannot be distinguished, cannot be detained by her as against her heirs as a lien against the property purchased by the proceeds of the estate: *Ibid.*

A person who has been acting as agent of decedent during his lifetime has no authority after his death to use funds remaining in his hands in payment of claims against the estate, and will be accountable for funds so used. Even if this were not so, he would not be allowed to escape liability for money used, unless it were affirmatively shown that the amounts were correct: *Crispin v. Winkleman*, 57–523.

Where the widow and heirs have appropriated personal property in the purchase and improvement of land they become liable as administrators *de son tort* in an action by a creditor to the extent of the value of the property coming into their hands, and the funds thus improperly appropriated may be pursued into the property purchased therewith, subject to the payment of the debts of of the estate: *Madison v. Shockley*, 41–451.

The intermeddler is liable to an action by a creditor of the estate, as well as by the regularly appointed executor. The last

clause of this section is only intended as limiting the amount of liability in such case: *Elder v. Littler*, 15–65.

Under particular facts, *held*, that one of several heirs taking possession of the personal property of the ancestor did so without right, and could, in an action by the others against him, be compelled to account: *Murphy v. Murphy*, 80–740.

A person in possession of property under color of title cannot be regarded as an executor *de son tort*, nor will the intermeddling with the lands of deceased charge a person as executor in his own wrong, because such interference is a wrong done to the heirs or devisees: *Claussen v. Lafrenz*, 4 G. Gr., 224.

Acts of defendant in dealing with property of the estate, *held* not to have resulted in damage, and therefore not such as to render defendant liable to more than nominal damages: *Portman v. Klemish*, 54–198.

An agent with whom notes are left for collection by decedent in his lifetime does not become liable as executor in his own wrong for failure to turn over said notes to a foreign administrator without demand having been made for the same: *Darr v. Darr*, 59–81.

Where the widow took possession of the property of her deceased husband without administration, *held*, that as she thereby became personally liable for the assets of the husband to a creditor holding a note of the husband's, a new note executed by her in renewal of the note of her husband was founded upon a sufficient consideration: *French v. French*, 91–140.

SEC. **3408. Action against heirs and devisees—costs—tender.** In an action against the heirs and devisees, where the judgment is to be against them in proportion to the respective amounts received by them from the estate, costs awarded against them shall be in like proportion, and any one may tender the amount due from him to the plaintiff, which shall have the same effect, as far as he is concerned, as though he was the sole defendant. [C.'73, §§ 2485–6; R., §§ 2465–6; C.'51, §§ 1440–1.]

SEC. **3409. Specific performance.** When a person who is under such obligation to convey real estate as might have been enforced against him, if living, dies before making such conveyance, the court may enforce a specific performance of such contract by the executor or administrator, and require him to execute the conveyance accordingly, and it shall not be necessary to make any other than the executor or administrator party defendant to such proceedings in the first instance, but the court in its discretion may direct other persons interested to be made parties, and may cause them to be notified thereof in such manner as it may think expedient, or the heirs and devisees, upon their own motion, may at any time be made defendants, and such conveyances may be authorized upon the petition of the executor or administrator. [C.'73, §§ 2487–8; R., §§ 2460–1; C.'51, §§ 1435–6.]

This provision is simply permissive. Without it, an action against the executor would have been improper; but the action may still be brought, as formerly, against the heirs alone: *Judd v. Mosely*, 30–423.

It is not necessary in a proceeding under this statutory provision that the heirs should join in the conveyance in order to pass a good title: *Fulwider v. Peterkin*, 2 G. Gr., 522.

The provision for an order of specific performance in such case without notice to the heirs is not unconstitutional: *Van Aken v. Clark*, 82–256.

SEC. **3410. Executors considered as one.** In an action against several executors or administrators, they shall be considered one person, and judgment may be taken and execution issued against all as such, although only part were served with notice. [C.'73, § 2489; R., § 2462; C.'51, § 1437.]

SEC. **3411. Records in probate matters.** The clerk shall keep a book to be known as the "Probate Docket," which shall show:

1. The name of every deceased person whose estate is administered, and who dies seized of any real estate situated within the county, and the date of his death;
2. The names of all the heirs at law and the surviving spouse of such deceased person, and their ages and places of residence, so far as they can be ascertained;
3. The name of each person as to whom application for guardianship of the person or property has been made or granted;
4. A note of every sale of real estate made under the order of the court, with a reference to the volume and page of the record where a complete record thereof may be found. [C.'73, § 2490.]

SEC. **3412. List of heirs—discovery.** In order to ascertain the facts required to be stated in such docket, the clerk may require each executor or administrator to furnish him with a list of the names, ages and places of residence of the heirs, which list shall be sworn to by him, but if such executor or administrator shall certify under oath that there are no heirs, or that, after using due diligence, he has been unable to ascertain their names, ages or residences, the clerk shall make an entry in the docket accordingly. If thought necessary, he may examine the county records to ascertain whether any deceased person died seized of any real estate, and be allowed such fee therefor as may be fixed by the court, or he may, upon the application of any person representing that a person has died intestate, leaving real estate, and none of the persons entitled by law to administer upon the estate of such deceased person has made application for letters of administration, appoint some responsible person as administrator, whose duty it shall be to ascertain the names, ages and places of residence of the surviving spouse of such intestate, if any, and of his children, and the heirs of such thereof as are dead, and to file a list of the same, with their ages and places of residence, with a list of such decedent's real estate, with such clerk, and perform such other duties as the court may direct in the premises, the expenses of which administration shall be taxed to the estate. [C. '73, § 2491.]

SEC. **3413. Complete record.** He shall also keep a book which shall be known as the "Probate Record," which shall contain full and complete journal entries of all orders or other proceedings had in probate matters, and where real estate is sold or mortgaged by an executor, administrator or guardian, under an order of court therefor, a complete record of the same, including the petition, notice, return of service, and all other papers filed, with the orders made, report, deed of conveyance or mortgage, and order of approval. [C.'73, § 2492.]

SEC. **3414. Bond record.** The clerk shall also keep a book known as "Records of Bonds," in which he shall record all bonds given by executors, administrators and guardians. [C.'73, § 2493.]

SEC. **3415. Compensation.** Executors and administrators shall be allowed the following commissions upon the personal estate sold or distributed by them, and for the proceeds of real estate sold for the payment of debts, which shall be received in full compensation for all the ordinary services:

For the first one thousand dollars, five per cent.;

For the overplus, between one and five thousand dollars, two and one-half per cent.;

For the amount over five thousand dollars, one per cent. Such further allowances as are just and reasonable may be made by the court for actual, necessary and extraordinary expenses or services. [C.'73, §§ 2494–5; R., §§ 2454–5; C.'51, §§ 1429–30.]

It will be presumed that compensation beyond that fixed by statute was for extraordinary services, in the absence of a showing to the contrary: *Patterson v. Bell*, 25-149.

In a particular case, *held*, that services rendered by executors under agreement of the parties interested in the settlement of the estate were properly taken into account in allowing compensation, although the authority of the executors with reference to the real estate was doubtful, subsequent acquiescence of the persons interested in the report of the executor showing his charges being such as to preclude objection thereto: *In re Estate of Mansfield*, 80-681.

Extraordinary allowances of compensation beyond that authorized by this section are not to be made unless good reasons appear for so doing: *In re Gloyd's Estate*, 93-302.

Services may be out of the ordinary course either as to kind or amount. Therefore where receipts and expenditures extended over an unusual period of time, *held*, that though ordinary in character there might be a right to additional compensation: *In re Young's Estate*, 66 N.W., 163.

But where there was a claim that the administrator should be accountable for interest on funds in his hands without rests and the court required him to pay simple interest only, *held*, that it would be presumed that the special services were taken into account in that way: *Ibid.*

The statute makes no provision as to compensation of trustees acting under a will, but such trustees may be compensated at the rate provided by this section for executors. *In re Gloyd's Estate*, 93-302.

SEC. **3416. Removal of executor.** After letters testamentary, of special administration, or of administration with the will annexed, or general administration, shall have been granted to any person, he may be removed by the court or judge thereof, when the interests of the estate require it, for any of the following causes:

1. When by reason of age, continued sickness, imbecility, or change of residence, or any other cause, he becomes incapable of discharging his trust in such manner as the interest and proper management of the estate may require;

2. When he shall fail or refuse to return inventories or accounts of sales of the estate, or to make reports of the condition thereof, or fails or refuses to comply with any order of the court or judge thereof, or fails to seasonably apply for authority to sell personal or real estate for the payment of debts or claims against the estate when it shall be necessary for him to do so, or fails or refuses to discharge any of the duties prescribed for him by law, or shall be guilty of any waste or maladministration of the estate, or where for any other reason it appears for the best interests of the estate;

3. Where it is shown to the court or judge thereof by his sureties that he has become or is likely to become insolvent, in consequence of which such sureties have suffered or will suffer loss. [C. '73, § 2496; R., § 2338; C. '51, § 1306.]

A party against whom an administrator is prosecuting an action for damages due to the estate has not such interest in the estate as to be entitled to ask for the removal of the administrator. The statuted contemplates that the party authorize to ask for such removal is one having a right to a benefit from the estate which will prompt him to act for the preservation of its assets and the increase of its value: *Chicago, B. & Q. R. Co. v. Gould*, 64-343.

SEC. **3417. Petition.** Petition for the removal of executors or admintrators, or for the purpose of requiring additional sureties, shall be filed in the court from which the letters were issued by any person interested in the estate, which petition must be verified by oath, and specify the grounds of complaint. [C. '73, §§ 2497-8.]

SEC. **3418. Citation—how served.** Upon the filing of such petition, a citation shall issue to the person complained of, requiring him to appear and answer the complaint, and if he is not a resident of the county where it is made, notice thereof shall be served upon him in such manner as the court or judge thereof or clerk may direct. [C. '73, §§ 2499, 2500.]

SEC. **3419. Property delivered—penalty.** Upon the removal of any executor or administrator, he shall be required by order of the court or judge to deliver to the person who may be entitled thereto all the property in his hands or under his control belonging to the estate, and if he fails or refuses to comply with any proper order of the court, he may be committed to the jail of the county until he does. [C. '73, §§ 2501-2.]

SEC. **3420. Reports—accounts.** Each report of an executor, administrator, guardian or trustee shall be self-explanatory, so that the clerk or court, from a perusal thereof, may understand the matter in hand, without explanations or being compelled to examine or refer to other papers in the case. All accountings must state the debit and credit and show the balances. Guardians' and trustees' accounts must show the amount of interest earned since appointment or last report, and how and upon what security the trust fund is invested. All reports and accounts must be verified. [Rules in Probate, III.]

SEC. **3421. Orders in probate—applications.** All applications for orders in probate must be made in writing, verified and self-explanatory, so that the clerk or court from a perusal thereof may understand the relief sought without explanations. [Same, V.]

SEC. **3422. Notice of application for discharge.** Unless notice be waived in writing, no administrator, executor, guardian or trustee shall be discharged from further duty or responsibility upon final settlement, until notice of the application shall have been served upon all persons interested as required for the commencement of a civil action, unless a different service be ordered by the court or judge, which order may be made before or after filing the final report. [Same, VII.]

The notice here required is sufficient if it informs the other party as to what action is contemplated and what relief is asked: *Jordan v. Woodin*, 93–453.

Notice that an executor desires to be discharged does not make it necessary that the opposite party set up claims against him which would become valid only in an event and under a construction of the will which the executor has not yet insisted upon: *Ibid.*

SEC. **3423. Attorney appointed for minors and persons not represented.** At or before the hearing of petitions and contests for the probate of wills, letters testamentary or of administration, for sales of real estate and confirmation thereof, settlements and distributions of estates, and all other proceedings in this title, where all the parties interested in the estate are required to be notified thereof, the court in its discretion may appoint some competent attorney at law to represent therein the devisees, legatees, heirs or creditors of the decedent who are minors and have no general guardian in the county, or who are nonresidents of the state, and those interested who, though they are neither minors or nonresidents, are unrepresented. The order making the appointment must specify the names of the parties, so far as known, for whom the attorney is appointed, and he will be authorized to represent such parties in all such proceedings subsequent to his appointment. He shall be paid for his services out of the estate, as a part of the cost of administration, a fee to be fixed by the court, and upon distribution it may be charged to the party represented by him. The court may substitute another attorney for the one first appointed, in which case the fees must be divided in proportion to the services rendered. [25 G. A., ch. 78.]

PART THIRD.

CODE OF CIVIL PRACTICE.

TITLE XVIII.

OF PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

CHAPTER 1.

OF PRELIMINARY PROVISIONS.

SECTION **3424. Proceedings.** Every proceeding in court is an action, and is civil, special or criminal. [C. '73, § 2504; R., § 2605.]

SEC. **3425. Civil and special actions.** A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party, known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for the recovery of a penalty or forfeiture. Every other proceeding in a civil case is a special action. [C. '73, §§ 2505–6; R., §§ 2606–7, 2609.]

The term "civil case," *held* to include both "actions" and "special" proceedings under the language of the Code of '73: *College of Physicians and Surgeons v. Guilbert*, 69 N. W., 453.

Civil actions include everything except those cases which come under the criminal jurisdiction of the court: *Tomlinson v. Hammond*, 8–40.

The term "civil action" includes ordinary proceedings and also proceedings in equity: *Kramer v. Rebman*, 9–114.

The granting of letters of administration by a county court, *held* not to constitute another action pending so as to defeat the jurisdiction of the district court which would otherwise attach: *Waples v. Marsh*, 19–381.

Where a note provided for an attorney's fee in case action was brought thereon, *held*, that filing the note as a claim against the estate, the claim being resisted, was sufficient bringing of action to entitle the plaintiff to the attorney's fee: *Davidison v. Vorse*, 52–384.

Under the corresponding section of the Code of '73 in which the term "special proceeding" was used, *held*, that proceeding to disbar an attorney was a special proceeding: *State v. Clark*, 46–155; as was also a hearing before the railroad commissioners to fix rates: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312; an appeal from action of a board of supervisors in selecting papers for publication of proceedings of the board: *Starr v. Ingham*, 84–580; a proceeding for the appointment of a guardian: *Lawrence v. Thomas*, 84–362; and a proceeding to assess damages for taking a railroad right of way: *Hartley v. Keokuk & N. W. R. Co.*, 85–455.

That provisions as to civil actions are to be followed in special actions so far as applicable, see § 3438 and notes.

As to the method of trying issues in special actions, see note to § 3647.

SEC. **3426. Form of actions.** All forms of action are abolished, but proceedings in civil actions may be of two kinds, ordinary or equitable. [C. '73, § 2507; R., §§ 2608, 2610.]

All technical forms of action and of pleading are abolished: *Heichew v. Hamilton*, 3 G. Gr., 596.

Although forms of proceedings are abolished, yet pleas in abatement, such as to the jurisdiction, or of another action pending, are still proper and legitimate: *Rawson v. Guiberson*, 6–507.

Under the equity procedure the distinction as to the form of stating an action of trespass and one of trespass on the case is immaterial: *Brown v. Hendrickson*, 69–749.

Forms of action are abolished in this state and the pleader simply makes a plain statement of the facts, avoiding legal conclusions, and may recover as damages on the facts stated whatever the law will allow either for breach of contract or for tort: *Mentzer v. Western Union Tel. Co.*, 93–752.

The legislature has no power to abolish the distinction between proceedings at law and in equity. Such distinction is defined and recognized by the constitution: *Claussen v. Lafrenz*, 4 G. Gr., 224.

By the provisions of the Code of '73 it was intended to assimilate and make uniform the procedure in all law and equity cases. The changes introduced were to be applied equally to both: *Shepard v. Ford*, 10–502.

The term "civil actions" includes proceedings in equity as well as ordinary proceedings: *Kramer v. Rebman*, 9–114.

For somewhat similar provision, see § 3557.

"Special proceedings" as the term was used in Code of '73 were not classed as ordinary or equitable, and issues therein were triable by virtue of § 3650, by the court without a jury: *In re Bresee*, 82–573.

SEC. **3427. Equitable proceedings.** The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity before the adoption of this code had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive. [C. '73, § 2508; R., § 2611.]

Reformation of an instrument to correct a mistake cannot be granted in an action at law: *Adams v. Commercial Nat. Bank*, 53–491.

The provision (§ 4302) allowing a nuisance to be abated at law does not abrogate the equitable remedy before existing by way of injunction: *Bushnell v. Robeson*, 62–540.

Where plaintiff has an election to bring an action at law or in equity, and brings it in equity, it is error to transfer the cause on motion of the opposite party to the law docket: *Gribben v. Hansen*, 69–255.

Where the prayer of a petition in an action for the recovery of real property was for judgment establishing in plaintiff an estate in fee-simple in the land and giving him the immediate possession thereof, and determining and quieting the title, and for judgment of a specific sum, *held*, that as a judgment for possession, together with damages for detention, amounted, as between the parties, to all that was asked for in the prayer, it was not error to overrule a motion to transfer the cause to the equity docket: *Byers v. Rodabaugh*, 17–53.

Where an auxiliary injunction was issued to prevent garnishees from paying over money upon intervention under the statutory provisions for injunction in ordinary proceedings, and every issue made could be and was tried at law, *held*, that the auxiliary injunction did not change the action from one by ordinary to one by equitable proceedings, and the court might try the case as an action at law: *Pool v. Paul*, 23–421.

The jurisdiction of chancery has been so extended as to grant relief to prevent deprivation of rights in connection with real estate, as rights to easements and the like, without the allegation that the threatened injury would be irreparable: *Swan v. Burlington, C. R. & N. R. Co.*, 72–650.

Partnerships and the question of their existence are matters of which chancery has jurisdiction, and if the pleadings put in issue the existence of the partnership, and the right to appropriate relief if the partnership is found to exist, it is not error to transfer the case to the equity docket: *McReynolds v. McReynolds*, 74–89.

An action to enforce an equitable lien is properly brought in equity: *Schafer v. Schafer*, 75–349.

A party is not estopped by bringing an action at law from amending his pleadings before the case has been finally submitted so as to change it into an action in equity: *Barnes v. Hekla F. Ins. Co.*, 75–11.

Fraud constituting a defense to an action on contract is not such as gives equitable jurisdiction: *Smith v. Griswold*, 64 N. W., 624.

An action on account of fraud is not necessarily of exclusive equity jurisdiction: *Hawley v. Exchange State Bank*, 66 N. W., 152.

A court of equity may have jurisdiction of an action to correct conveyance of a highway and may also entertain an application for an injunction to restrain the obstruction of such highway, although as to such obstruction there might be a remedy at law: *Clayton County v. Herwig*, 69 N. W., 1035.

Before the adoption of the Code courts of law and of chancery had concurrent jurisdiction over many causes of action, and in such case the plaintiff may still prosecute his action by equitable proceedings: *Toledo Savings Bank v. Johnson*, 62 N. W., 749.

An action against an officer and director of a bank to charge him as a trustee and require from him an accounting as to money improperly obtained from the bank by a borrower, through his connivance, is one which may be brought by equitable procedure: *Ibid.*

In such case it is not error to refuse to transfer the action against the officer to the law docket: *Ibid.*

Equity cannot take cognizance of an action upon a note of which the defendant wrongfully and fraudulently procured and retains possession. Such a case does not fall within the reason of the rule allowing suit in equity upon a lost note: *Searcy v. Miller*, 57–613.

While it is true that when equity obtains jurisdiction it will sometimes grant relief in the way only of a money judgment yet the mere averment of fraudulent conduct as the basis for such a judgment does not present an equitable issue. To determine whether the case is one of equitable consideration, regard is to be had to the relief sought: *Kelley v. Andrews*, 62 N. W., 853.

An action against stockholders to enforce their liability for unpaid installments of their stock in behalf of a creditor of a corporation is properly brought at law and defenses to such action based on averments

that defendant is not an owner of such stock and the like, raise no equtable issue: *Calumet Paper Co. v. Stotts Investment Co.*, 64 N. W., 782.

A receiver may be appointed in law as well as in equity and in a law action may be required to pay over money in his hands as such receiver: *Rabb v. Albright*, 93–50.

Where the parties stipulate as to the facts and it appears to be their intention that the court shall give such relief whether legal or equitable as the facts will authorize, equitable relief may be given, although the action is brought at law: *Logan v. Hall*, 19 Iowa, 491; *Iowa City v. Johnson County*, 61 N. W., 995.

SEC. **3428. Action on note and mortgage.** An action on a note, together with a mortgage or deed of trust for the foreclosure of the same, shall be by equitable proceedings. An action on the bond or note alone, without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings. [C. '73, § 2509; R., § 4179.]

The provision that an action to foreclose a mortgage shall be by equitable proceedings is not in conflict with the constitution, art. I. § 9, guarantying the right of trial by jury. Such right was never recognized in equity suits: *State v. Orwig*, 25–280; *Clough v. Seay*, 49–111.

Action on a mortgage and to recover judgment on the note secured thereby is not an improper union of legal and equitable proceedings: *Cooley v. Hobart*, 8–358.

As to effect of bringing separate suits on the note and mortgage, see § 4288.

SEC. **3429. Mechanic's lien.** An action to enforce a mechanic's lien shall be by equitable proceedings, and no other cause of action shall be joined therewith. [C. '73, § 2510; R., § 4183; C. '51, § 985.]

All persons interested must be made parties to the proceedings before they can be affected by the decree: *Jones v. Hartsock*, 42–147, 153.

Held, that an action at law might, by consent of parties, be tried in connection with equitable actions to enforce mechanic's liens against the same defendant, and one judgment rendered therein adjusting all claims between them: *Hines v. Whitebreast Coal, etc., Co.*, 48–296.

Under Revision, § 4183, by which an action for a mechanic's lien was to be prosecuted as an ordinary proceeding, *held*, that subsequent incumbrancers need not be made parties, and that even though not made parties they could not bring action to redeem, and that in such cases there was no equity of redemption as in case of a mortgage: *State v. Eads*, 15–114; *Shields v. Keys*, 24–298, 308.

Even if in such action there is a misjoinder of causes of action, objection thereto is deemed waived unless made as provided elsewhere in reference to misjoinder of actions: *Flynn v. Des Moines & St. L. R. Co.*, 63–490.

Where an action is properly brought in equity to enforce a mechanic's lien the court may proceed to give a complete remedy, as for instance, judgment for the amount due on the account, although the right to equitable relief for the enforcement of the lien is not established: *Green Bay Lumber Co. v. Miller*, 62 N. W., 742.

The fact that a purchaser of the property subject to the lien has assumed its payment is made defendant in the action against the original debtor, does not constitute a misjoinder: *Eagle Iron Works v. Des Moines Suburban R. Co.*, 70 N. W., 193.

SEC. **3430. Divorce.** An action for a divorce shall be by equitable proceedings, and no cause of action, save for alimony, shall be joined there with. [C. '73, § 2511; R., § 4184.]

An action for divorce being equitable the right to a trial by jury does not exist, and the parties are entitled to a trial *de novo* in the supreme court: *Sherwood v. Sherwood*, 44–192.

SEC. **3431. Ordinary proceedings.** In all other cases, unless otherwise provided, the plaintiff must prosecute his action by ordinary proceedings. [C. '73, § 2513; R., § 2612.]

Action for writ of *habeas corpus* is therefore to be tried as an ordinary action at law: *Shaw v. Nachtwey*, 43–653; *Drumb v. Keen*, 47–435.

The fact that plaintiff must set out or compute various payments for the purpose of determining the amount of his cause of action will not entitle him to bring his action in equity. Such is not a case of mutual account: *Upton v. Paxton*, 72–295.

The word "action" as used in this section includes special proceedings, and is not used in the more limited sense as defined in § 3425: *Lawrence v. Thomas*, 84–362.

An action to recover wages due upon a contract is not a cause for equitable cognizance: *Galliers v. Peppers*, 76–521.

An appeal in the proceedings with reference to the award of county printing must be prosecuted as an ordinary action: *Democrat Publishing Co. v. Lewis*, 90–304.

SEC. **3432. Error—effect of.** An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the

action, but merely a change into the proper proceedings, and a transfer to the proper docket. [C.'73, § 2514; R., § 2613.]

An action erroneously brought at law may be changed to an action in equity without leaving the court: *Holmes v. Clark*, 10–423, 427.

Relief will not be denied because plaintiff has addressed his petition to the wrong side of the court if he is entitled to relief: *McDole v. Purdy*, 23–277.

The fact that plaintiff has improperly commenced his action by equitable proceedings, when it should have been by law, will not prevent his having an injunction under the provisions of the statute in such cases applicable to law actions: *Mills v. Hamilton*, 49–105.

Objections to the jurisdiction of the court cannot be made on the ground that the action should have been brought in equity instead of at law. If plaintiff err in the kind of proceedings adopted, the proper remedy is a motion to transfer the action to the proper docket: *Spelman v. Gill*, 74–717.

An error in commencing an action in equity instead of at law, or *vice versa*, should be corrected by motion. It it not a ground of demurrer: *Conyngham v. Smith*, 16–471; *Brow v. Mallory*, 26–469; *Wright v. McCormick*, 22–545; *Pella v. Scholte*, 21–463; *Thomas v. Farley Mfg. Co.*, 76–735; *Riddle v. Beattie*, 77–168.

That plaintiff has a full, speedy and complete remedy at law is not proper ground for demurrer in an action by equitable proceedings. The remedy is by motion to have the action changed into the proper proceeding: *Savery v. Browning*, 18–246; *Traer v. Lytle*, 20–301; *Gray v. Coan*, 23–344; *Gibbs v. McFadden*, 39–371; *Independent School Dist. v. Independent School Dist.*, 41–321.

The fact that plaintiff has a plain, speedy and adequate remedy at law will not deprive the court of jurisdiction in an equitable action. The only remedy in such case is the transfer of the action to the law docket: *Corey v. Sherman*, 64 N.W., 828.

The court is not justified in raising such an objection on appeal if it has not been raised in the lower court. (Overruling *Keokuk & N. W. R. Co. v. Donnell*, 77–221): *Ibid.*

The fact that an action is in equity instead of at law is not fatal. Defendant may have the action tried as an action at law, and failing to avail himself of that right he cannot complain: *Lewis v. Soule*, 52–11.

By agreement parties may have proceedings in a law action joined to and tried with those in an equitable action in which the parties are not the same, but the action still remains one at law: *Hines v. Whitebreast Coal etc., Co.*, 48–296.

Where an answer to a petition at law set up both legal and equitable defenses, and no separation of the legal and equitable issues was had on the trial, *held*, on appeal, that it would be treated as an equitable action: *Van Orman v. Merrill*, 27–476.

See, also, notes to §§ 3435 and 3437.

An action in which parties ask an accounting as to items omitted through fraud, accident or mistake, in a settlement had between them, is properly equity. It is not error to refuse to transfer the same on motion to the law docket: *Donahue v. McCosh*, 81–296.

This provision has no application to double actions for the same thing: *Jamison v. Burlington & W. R. Co.*, 78–562.

An amendment to a petition may be allowed which changes the action from law to equity, or *vice versa*: *Newman v. Covenant Mut. Ins. Ass'n*, 76–56.

Error in transferring a case to the equity docket will not be waived by proceeding to the trial of the case in equity and asking to have it set out for hearing on depositions: *Ingersoll v. Hayward*, 92–159.

The provisions of this section will be followed by the federal courts in Iowa and on the sustaining of a demurrer to a bill in equity on the ground that complainant has an adequate remedy at law, they will permit the cause to be transferred to the law docket with leave to amend the pleadings if necessary: *United States Bank v. Lyon County*, 48 Fed., 632.

SEC. **3433. How corrected by plaintiff.** Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards on motion in court. [C.'73, § 2515; R., § 2614.]

SEC. **3434. By defendant.** The defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provision of this code wrong proceedings have been adopted. [C.'73, § 2516; R., §§ 2615, 2616.]

The motion here contemplated cannot be made after filing an answer, nor at the time of filing an answer to an amended petition, when the fact of error in the proceedings was apparent, but not taken advantage of, at the time of filing an answer to the original petition: *Moore v. District T'p*, 28–425.

Where an amendment is made during the trial changing the nature of the action, motion to change the cause to the proper docket should then be made, and not a motion to strike the amendment from the files on that ground: *Weaver v. Kintzley*, 58–191.

Where the plaintiff has an election to bring an action at law or in equity and brings it in equity, it is error to transfer the case on the motion of the opposite party to the law docket: *Gribben v. Hansen*, 69–255.

Defendant has the right to insist upon a ruling on his motion to transfer to the other docket before answering: *Ellis v. Butler*, 78–632.

SEC. **3435. Equitable issues.** Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion,

to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings. [C. '73, § 2517; R., § 2617.]

The issue must be made before the transfer to the chancery docket can be ordered by the court. The discretion of the court is a legal one and is reviewable: *McHenry v. Sypher*, 12-585.

A case properly commenced by ordinary proceedings is not to be transferred to the equity docket on filing an answer setting up equitable defenses, but either party may have such equitable issues tried by equitable proceedings: *Byers v. Rodabaugh*, 17-53.

Where defendant in an action to recover real property brought his bill in equity, setting up certain equitable defenses, and asking that the action at law be enjoined until the determination of such equitable defenses, *held*, that it was not necessarily an improper exercise of discretion to postpone the legal action: *Purington v. Frank*, 2-565.

The equitable issues which either party elects to have tried by equitable proceedings may be, and under ordinary circumstances should be, first tried and settled: *Hackett v. High*, 28-539.

After the equitable issues are thus tried, any legal issues remaining are to be disposed of in the manner provided for the disposal of such issues: *Rosierz v. Van Dam*, 16-175; *Van Orman v. Spafford*, 16-186; *Kramer v. Conger*, 16-434; *Corbin v. Woodbine*, 33-297.

But it is not imperative that the equitable issue be first tried. That issue should be first tried which may result in rendering a further trial unnecessary: *Morris v. Merritt*, 52-496.

To entitle a defendant to a trial of such equitable issue by equitable proceedings such issue must be one heretofore exclusively cognizable in equity. (Decided under Revision, § 2617): *Walton v. Gray*, 29-440.

In a particular case, *held*, that the issues raised by defendant were such as to entitle him to have them tried in equity: *Marling v. Burlington, C. R. & N. R. Co.*, 67-331.

Where parties who are made defendants interpose a defense that is purely equitable the case may properly be tried as an equitable action: *Gresham v. Chantry*, 69-728.

Where plaintiff seeks to recover real property in an action at law he cannot recover upon proof of an equitable title, and if he asks any equitable relief it is not error to hold his petition insufficient on demurrer, and it would be unavailing in such case to transfer the cause to the equity docket: *Kitteringham v. Blair Town Lot, etc., Co.*, 66-280.

As to interposing equitable defenses in an action at law, see notes to § 3566.

Where an answer to a petition at law set up both legal and equitable defenses, and no separation of the legal and equitable issues was had on the trial, *held*, on appeal, that it would be treated as an equitable action: *Van Orman v. Merrill*, 27-476.

The interposition of an equitable defense in an action at law does not give rise to an equitable issue unless defendant asks relief in equity. The issue arising upon an equitable defense in such action is to be tried according to legal and not according to equitable procedure: *Carey v. Gunnison*, 65-702.

Where neither party asks equitable relief, and no equitable defense is interposed, it is not proper to transfer to the equity docket an issue arising in an action at law. It is immaterial that in the reply plaintiff sets up matter which might be made the basis of a prayer for equitable relief, but which is only relied upon by way of confession and avoidance of the legal defense set up in the answer: *Price v. Ætna Ins. Co.*, 80-408.

In an action to recover possession of property under a chattel mortgage, the claim of the defendant being that the mortgage had been satisfied by conveyance of real estate, *held*, that the right of the defendant to foreclose the mortgage was not in controversy, and there was no equitable issue in the case: *Beroud v. Lyons*, 85-482.

In an action on a note there is no occasion to transfer to the equity docket issues joined on the allegations of fraud and consideration, and whether the purchaser took for value before due without notice. These questions are triable at law: *Richardson v. Monroe*, 85-359.

Where pleadings were properly filed in probate, and the case was afterwards transferred to the equity docket, *held*, that there was no necessity for refiling such pleadings: *Winkleman v. Winkleman*, 79-319.

The objection to the action of the court in transferring a case to the equity docket cannot be first taken on appeal: *Gate City Land Co. v. Heilman*, 80-477.

There is no provision that issues at law arising in an action commenced in equitable proceedings shall be tried according to the method of trying law actions: *Ryman v. Lynch*, 76-587; *Frost v. Clark*, 82-298; *Wilkinson v. Pritchard*, 93-308.

Therefore a defendant who by counterclaim in an equitable action raises an issue of law is not entitled to a jury trial thereof: *Ryman v. Lynch*, 76-587.

Defendants have no right to a transfer to the law docket of an issue arising on defenses legal in their nature which were interposed in an equitable action: *Leach v. Kundson*, 66 N.W., 913.

In an action commenced in equity the defendant does not have a right to have an issue at law raised by answer or counterclaim tried to a jury: *Gatch v. Garretson*, 69 N.W., 550.

The rule as to the separation of equitable issues in law actions and the trial thereof by equitable proceedings does not apply so as to make it necessary to transfer law issues in equitable proceedings to the law docket for trial by ordinary proceedings. If a case is properly commenced in equity and the relief asked can only be granted there, defendant

cannot force its transfer to the law side of the calendar for trial to a jury by consenting that, if plaintiff is found entitled to the relief asked, it may be granted in a court of law: *Evans v. McConnell*, 63 N. W., 570.

It is not error, therefore, where two actions are pending, one begun as a law action and the other in equity, to consolidate the actions and try them in equity, nor to refuse in such case to grant a jury trial: *Ibid.*

Where plaintiff commenced his action in equity and defendant took issue upon the facts alleged in the petition and also filed a cross petition for equitable relief, and thereupon plaintiff filed an amended petition setting up matters cognizable at law and moved to have the case transferred to the law docket, *held*, that such motion was properly overruled even though plaintiff consented in his amended petition to the equitable relief asked by defendant: *Wilkinson v. Pritchard*, 61 N. W., 965.

Where a counter-claim presents an issue which involves equitable relief the case is properly transferred to the equitable docket, although there is no controversy as to the facts which entitle the defendant to such relief: *Marquis v. Illsley*, 68 N. W., 589.

In an action to recover specific personal property there may be an equitable defense which may be a ground for transferring the action to the equity docket for trial, but such equitable defense must be a defense proper and not a counter-claim: *Palmer v. Palmer*, 90–17.

An intervenor presenting issues a part only of which are equitable has no right to delay in the action in order to transfer the equitable issues to the equity docket: *Kassing v. Ordway*, 69 N. W., 1013.

The defendant by going to trial in the action as prosecuted, does not waive any error of the court in changing the form of the action: *Rabb v. Albright*, 93–50.

SEC. **3436. Court may order change.** If there is more than one party plaintiff or defendant, who fail to unite on the kind of proceedings to be adopted, the court, on its own motion, may direct such proceedings to be changed to the same extent as if the parties had united in asking it to be done. [C. '73, § 2518.]

SEC. **3437. Errors waived.** An error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the time and in the manner prescribed in this chapter; and all errors in the decisions of the court are waived unless excepted to at the time, save final judgments and interlocutory or final decrees entered of record. [C. '73, § 2519; R., § 2619.]

Under this section, *held*, that where proceedings in the circuit court which should have been brought in probate were entitled in equity or at law, a motion to change to the proper docket was the only remedy: *Ashlock v. Sherman*, 56–311; *McName v. Malvin*, 56–362; *First Nat. Bank v. Green*, 59–171; *Goodnow v. Wells*, 67–654.

The fact that a party seeks relief in an assignment proceeding which should have been asked in a suit in equity cannot be urged on appeal if not raised in the lower court: *In re Knapp*, 70 N. W., 626.

Objection that the action was brought by the wrong kind of proceedings cannot be taken advantage of after judgment: *Hatch v. Judd*, 29-95.

If the proper steps to effect the change are not taken in the court below the remedy is regarded as waived: *Parshall v. Moody*, 24-314: *Green v. Marble*, 37–95; *Knott v. Tincher*, 39–628.

A party who fails at the proper time to object to the prosecution of an action in equity which should have been at law, by moving to transfer it to the law docket, is presumed to have waived objection on that ground and to have assented to the cause proceeding as an equitable action, and in such case such relief as equity might render in a proper case might be given: *Richmond v. Dubuque & S. C. R. Co.*, 33–422, 504.

Where an action is improperly prosecuted by equitable proceedings, a failure to object thereto as provided in § 3434 operates as a waiver of a jury trial: *Ibid.*, 490.

Generally a judgment in an equitable proceeding may be sustained if objection to the form of proceeding has not been made in the manner prescribed by the statute, though the action should have been by ordinary proceeding; but if, upon the merits of the case, the relief granted would have been denied at law and ought not to have been given in an equitable proceeding, the judgment will not be sustained: *Ibid.*, 489.

The right to insist that equitable relief cannot be given, where the action is only for a judgment at law and is by ordinary proceeding, is not waived by failing to move for a change to the proper docket: *Newman v. Covenant Mut. Benefit Ass'n*, 72–242.

An objection to the form of the proceeding cannot be first raised on appeal: *Tugel v. Tugel*, 38–349; *Gould v. Hurto*, 61–45.

Error of the court in sustaining a motion to transfer to the equity docket will not be ground of reversal on appeal where it does not appear that the party excepted to such action or demanded a jury trial: *State v. Craig*, 58–238.

Where an action is brought in equity, and without objection by defendant is set for trial as an equitable action and tried in that manner, defendant cannot object to the method of trial on the ground that the action is solely cognizable at law: *McVey v. Manatt*, 80–132.

An objection to the form of action that it ought to have been at law and not in equity is waived by not moving to transfer the case to the proper docket and cannot be raised by demurrer: *Bibbins v. Clark*, 90–230.

Where actions legal and equitable were

improperly joined, and without any motion for separation the court disregarded the action in equity, and tried the action at law only, *held*, that there was no such error as to require reversal: *Mallon v. Ludden*, 91–743.

Where in the same petition a cause of action at law is joined with one in equity, the defendant has not the right after joining issue to have the whole cause transferred to the law calendar for trial to the jury: *First Nat. Bank v. Rowley*, 92–768.

Where an answer in an action at law sets up defenses some of which are legal and some equitable and neither party takes steps to have the issues separated they will be heard together on appeal in equity: *Thatcher v. Stickney*, 88–454.

SEC. **3438. Uniformity of procedure.** The provisions of this code concerning the prosecution of a civil action apply to both ordinary and equitable proceedings unless the contrary appears, and shall be followed in special actions not otherwise regulated, so far as applicable. [C.'73, § 2520; R., §§ 2620, 4173; C.'51, § 2516.]

Proceedings to condemn property for a work of internal improvement should be governed, as far as practicable, by the rules governing ordinary actions: *Forney v. Ralls*, 30–559.

Thus it was held that the provisions of the Civil Code as to change of place of trial were applicable in an appeal, in a proceeding to condemn land for a right of way: *Whitney v. Atlantic Southern R. Co.*, 53–651.

This provision was applied also to proceedings to disbar an attorney: *State v. Clark*, 46–155, 159.

The provision that the averments of a petition shall be held true, unless denied, is applicable in a special proceeding to set aside the report of an administrator: *Van Aken v. Welch*, 80–114.

The statute of limitations is not applicable to a proceeding to assess damages for a right of way taken by a railway: *Hartley v. Keokuk & N. W. R. Co.*, 85–455.

SEC. **3439. Actions on judgments.** No action shall be brought upon any judgment against a defendant therein, rendered in any court of record of the state, within fifteen years after the rendition thereof, without leave of the court, for good cause shown, and on notice to the adverse party; nor on a judgment of a justice of the peace in the state within eight years after the same is rendered, unless the docket of the justice or record of such judgment is lost or destroyed; but the time during which an action on a judgment is prohibited by this section shall not be excluded in computing the statutory period of limitation for an action thereon. [C.'73, § 2521.]

It is a ground of demurrer to a petition on such a judgment that the action appears to be brought within fifteen years without leave of court: *Watts v. Everett*, 47–269.

This statutory provision affects the remedy, and applies to judgments rendered before as well as after its passage: *Ibid.*

Where the record of the judgment is lost or destroyed, suit thereon, even if proper, is not the only method for supplying such record: *Gammon v. Knudson*, 46–455.

An action to foreclose a mortgage, given to secure a note which is already reduced to judgment, is not prohibited by the statutory provision above referred to: *Matthews v. Davis*, 61–225.

Prior to the enactment of this section in the Code of '73, *held*, that an action might be maintained on a domestic judgment while in full force, and upon which an execution might issue, in the absence of any legislative restriction: *Thompson v. Lee County*, 22–206; *Simpson v. Cochran*, 23–81.

The restriction here imposed is not applicable to actions in the federal courts: *Phillips v. O'Brien County*, 2 Dillon., 518.

A judgment rendered in an action on a prior judgment is a conclusive adjudication that plaintiff is owner of such judgment, and is entitled to receive the whole amount due thereon: *Virden v. Shepard*, 72–546.

A party is not entitled to maintain an action which, if successful, would result in a personal judgment against defendant of no more binding force than the one which he already has: *Shepherd v. Bridenstine*, 80–225.

An application to the probate court for an order to compel a guardian to pay the amount of a judgment against him as garnishee in a suit against his ward, is not such an action upon a judgment that it cannot be brought within fifteen years without leave of court: *Coffin v. Eisminger*, 75–30.

Section applied: *Morrison v. Springfield, etc., Co.*, 84–637.

Under the corresponding section of the Code of '73, which did not contain the last clause, *held*, that as the action on a judgment might not be maintained until the expiration of fifteen years from the time of its rendition, the statute of limitations as against such action did not commence to run until the fifteen years had expired, and the action on the judgment might therefore be brought within twenty years thereafter. (See § 3447, ¶ 8): *Weiser v. McDowell*, 93–772.

SEC. **3440. Judgments not annulled in equity.** Judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. But such

judgment does not prevent the recovery of any claim, though such claim might have been used by way of counter-claim in the action on which the judgment was recovered. [C.'73, § 2522; R., § 2621.]

This does not prevent the issuance of an injunction against the collection of a judgment which is being enforced contrary to the agreement of parties: *Baker v Redd*, 44–179.

Judgment in garnishment proceedings, although rendered for an amount in excess of garnishee's liability to judgment debtor, cannot be modified in an action in equity: *Burlington & M. R. R. Co. v. Hall*, 37–620.

Where a defendant permits judgment to go against him by default on a legal demand, he may in a subsequent action set up and rely upon equitable matters which would have constituted an available defense in the first action: and *semble*, that the same would be true where the claim available as a defense is a legal one: *Fairfield v. McNany*, 37–75.

Where an action was brought on account, but plaintiff afterwards elected to dismiss the same without prejudice, and the clerk by mistake entered judgment against him, and plaintiff had no knowledge of the mistake until the judgment so entered was pleaded in bar of a second action on the same account, and the court held the defense good and rendered judgment against him in the second action, *held*, that the last judgment must be considered a final adjudication of the claim, as a court of equity could not treat it as a nullity or set it aside: *Lowery v. Greene County*, 75–338.

This section has no reference to judgments which are entirely void and the enforcement of such a judgment may be enjoined in a suit in equity: *Leonard v. Capital Ins. Co.*, 70 N. W., 629.

A defense to the judgment which has arisen since the judgment was entered may be made the ground for enjoining the enforcement of the judgment: *Brakke v. Hoskins*, 67 N. W., 235.

SEC. **3441. Discovery.** No action to obtain a discovery shall be brought, except, where a person or corporation is liable either jointly or severally with others by the same contract, an action may be brought against any parties who are liable, to obtain discovery of the names and residences of the others. In such action the plaintiff shall state in his petition, in effect, that he has used due diligence, without success, to obtain the information asked to be discovered, and that he does not believe the parties to the contract who are known to him have property sufficient to satisfy his claim. The petition shall be verified, and the cost of such action shall be paid by the plaintiff unless the discovery be resisted. [C.'73, § 2523; R., § 4127.]

Equity will not take jurisdiction of a case on the ground of discovery, if it be not shown that the practice of the law courts and the rules of evidence prevailing over it are such that the party can obtain the evidence necessary to establish the amount of recovery: *Richmond v. Dubuque & S. C. R. Co.*, 33–422, 484.

The fact that plaintiff prays that defendant be required to produce the note sued on and attach a copy of it to his answer does not bring the case within equitable cognizance. Under this section an action solely for discovery cannot be brought in equity: *Searcy v. Miller*, 57–613.

SEC. **3442. Successive actions.** Successive actions may be maintained upon the same contract or transaction whenever, after the former action, a new cause of action has arisen thereon or therefrom. [C.'73, § 2524; R., § 4128.]

While a breach of contract for continuing services, such as furnishing support to plaintiff, might be a ground for treating the contract as finally broken, and bringing action for the entire amount of the contract from the time of breach, yet the beneficiary is not bound to treat the contract as entirely broken, but may sue for damages accrued, and may maintain successive actions for subsequent damages: *McCay v. McDowell*, 80–146.

There is nothing in this section indicating that the successive actions referred to are not governed by the general statute of limitations so that they must be brought within the prescribed period from the time when the right of action accrues. The section has no application to additional damages happening or discovered because of some particular breach of contract: *Russell v. Polk County Abstract Co.*, 87–233.

Section referred to in *Richmond v. Dubuque & S. C. R. Co.*, 33–422.

As to when successive actions are permissible, so that the bar of the statute of limitations will not cut off plaintiff's right, see notes to § 3447.

SEC. **3443. Actions survive.** All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same. [C.'73, § 2525; R., §§ 3407, 4110; C.'51, § 2502.]

Right of action or defense survives: Any rights of remedy or defense existing in a party pass to his representatives on his death: *Harper v. Drake*, 14–533.

An action for libel will survive: *Carson v. McFadden*, 10–91.

Although an action for slander will survive against the personal representatives of defendant, the plaintiff cannot recover, as against such representatives, exemplary or punitive damages: *Sheik v. Hobson*, 64–146.

An action for injury to the person will survive: *McKinlay v. McGregor*, 10–111.

A servant's right of action for personal injury against his master survives the death of the servant: *Mumm v. Owens*, 2 Dillon, 475.

An action for seduction brought by the female herself survives: *Shafer v. Grimes*, 23–550.

An action for divorce is abated by the death of the parties, and with it all claim for alimony: *Barney v. Barney*, 14–189; *O'Hagan v. O'Hagan's Ex'r*, 4–509.

If a counter-claim is properly maintainable in favor of two defendants, the death of one of them will work no abatement thereof: *Moorehead v. Hyde*, 38–382.

A deposition taken after plaintiff's death upon notice served before his death cannot be used in subsequent proceedings in which the personal representatives are substituted, and should be stricken from the files on motion: *Kershman v. Swhela*, 59–93.

As to survival of actions pending upon appeal, see notes to § 4150.

Assignment. All causes of action which survive under the statutory provision above referred to are assignable: *Gray v. McCallister*, 50–497.

A cause of action for a personal tort is assignable: *Ibid.; Weire v. Davenport*, 11–49; *Vimont v. Chicago & N. W. R. Co.*, 64–513; *Hawley v. Chicago, B. & Q. R. Co.*, 71–717.

It seems to have been otherwise held before the passage of statutory provisions relating to survival of actions: *Taylor v. Galland*, 3 G. Gr., 17.

Action upon a right of action arising from personal injury may be brought by the assignee thereof in a state where the assignment of such a cause of action is permitted by statute, although the assignment is made in a state where the common-law rule prohibiting such assignment is still in force: *Vimont v. Chicago & N. W. R. Co.*, 69–296.

A cause of action for injuries to stock under § 2055 may be assigned, and the assignee may recover the double damages which are by that section allowed to the owner: *Everett v. Central Iowa R. Co.*, 73–442. As to assignability, see § 3044 and notes. As to survival of actions pending, see § 3476.

SEC. **3444. Civil remedy not merged in crime.** The right of civil remedy is not merged in a public offense, but may in all cases be enforced independently of and in addition to the punishment of the latter. [C. '73, § 2526; R., § 4111.]

SEC. **3445. Actions by or against legal representatives—substitution.** Any action contemplated in the two preceding sections may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived. If such is continued against the legal representative of the defendant, a notice shall be served on him as in case of original notices. [C. '73, § 2527; R., § 4111; C. '51, § 1699.]

Injuries causing death: Although the provision of Revision, § 4111, Code of '51, § 2501, that when a wrongful act produces death the perpetrator is civilly liable for the injury, was not retained in the Code of '73, *held*, that the effect of the provisions of that Code were the same as though that express language had been retained: *Conners v. Burlington, C. R. & N. R. Co.*, 71–490.

An action for personal injuries causing instant death survives, and may be prosecuted by the administrator: *Worden v. Humeston & S. R. Co.*, 72–201.

A corporation is liable in a civil action for wrongful acts of its servants, done in its employment and producing death. Its liability, however, would not probably be held to exempt the immediate agent from liability: *Donaldson v. Mississippi & M. R. Co.*, 18–280.

Where an employe of a railroad company received injuries through the wrongful act of a co-employe, resulting in death, the company was held to be the "perpetrator" within the language of Revision, § 4111, and civilly liable: *Philo v. Illinois Cent. R. Co.*, 33–47.

Law of the place: At common law no action could be maintained for an injury resulting in death, and the right of recovery for such injuries exists, if at all, only by reason of the law of the place of the injury: *Hyde v. Wabash, St. L. & P. R. Co.*, 61–441.

Therefore, *held*, that the personal representatives of the person whose death was caused by an injury in Missouri, where the statute does not authorize a recovery in such cases by the personal representatives, could not maintain an action for such injury in the courts in Iowa: *Ibid.*

A right of action for personal injury arising under the laws of this state, being assignable in this state, an action may be brought here by an assignee thereof, although the assignment is made in a state where the common-law rule prohibiting such assignment is still in force: *Vimont v. Chicago & N. W. R. Co.*, 69–296.

Where the right of action accrues by virtue of the statute of one state the action may be maintained in another state, if not contrary to the public policy or laws of the place where suit is brought: *Morris v. Chicago, R. I. & P. R. Co.*, 65–727.

Therefore, where the death which was the subject of the action was caused in the state of Illinois by the negligence of a rail-

way company, and the statutes of Illinois gave to the administrator of deceased the right of action for such injury, *held*, that the courts of Iowa, within which defendant was also operating its line of railroad, might obtain jurisdiction, and appoint an administrator to maintain a suit for the recovery of the damages allowed by the statutes of Illinois: *Ibid.*

Substitution: No notice to defendant is necessary when the cause is continued in favor of the legal representative of plaintiff, and the substitution of such representative is no cause of continuance on behalf of defendant: *Masterson v. Brown*, 51–442.

Under Code of '51, *held*, that where one of the joint makers of a note died during the pendency of a suit thereon, the action could not be continued, jointly, against the administrator of the deceased and the surviving joint obligors: *Pecker v. Cannon*, 11–20; *Marsh v. Goodrel*, 11–474.

To whom action accrues: In determining whether the cause of action accrues to the person injured or only to his legal representatives, the test is whether he lived after the injury, and not the length of time he lived thereafter. If he lived but a short time, the cause of action accrued to him as actually as it would have done had he lived a month or a year thereafter. (Overruling *Sherman v. Western Stage Co.*, 24–515); *Kellow v. Central Iowa R. Co.*, 68–470; *Ewell v. Chicago & N. W. R. Co.*, 29 Fed., 57.

Where a minor received injuries from which he died about two hours afterwards, *held*, that the cause of action for such injuries should be deemed to have accrued to the personal representative at the same time that it accrued to the minor, and that the action not being brought for two years was barred, the personal representative not being entitled to any extension of time for bringing the action on account of the minority of the decedent: *Murphy v. Chicago, M. & St. P. R. Co.*, 80–26.

Measure of recovery: The damages in an action by the administrator, brought on account of injuries to intestate causing his death, are given on different principles and for different causes from those controlling where the action is brought directly by the person injured, and no allowance can be made for pain and suffering: *Dwyer v. Chicago, St. P. & O. R. Co.*, 84–479.

Where action for personal injuries is brought by the administrator after the death of the injured party, for the benefit of the estate, damages for pain and suffering cannot be recovered; but if the action is brought by the injured party before his death, and afterward his administrator is substituted as plaintiff, damages for pain and suffering may be recovered as though the action had been prosecuted to a termination by the person injured: *Muldowney v. Illinois Cent. R. Co.*, 36–462.

While this section preserves a right of action to the representatives of the deceased it does not determine the damage to be allowed. Where the action is brought by the representative of deceased it is to repair an injury done to the estate and pain and suffering of the deceased are not taken into account, nor can there be recovery of exemplary or punitive damages, but when the action is brought by the injured party who dies during its pendency, the representative, being substituted, prosecutes the action as it might have been prosecuted by the deceased if he had lived, and the same damages may be recovered as though the recovery of judgment had been by the injured party: *Union Mill Co. v. Prenzler*, 69 N.W., 876.

Damages: In an action by the administratrix of the estate of a deceased person for damages in causing the death of deceased, the jury should assess the damages at such just and reasonable sum as will compensate the estate of the deceased for the loss occasioned by his death. The jury may consider the circumstances of the deceased, his occupation, age, health, habits as to industry, sobriety and economy, the amount of his property, if any, and the probable duration of his life, and from these elements determine what his annual income during life would probably have been which would have been saved to his estate, and not expended, and a gross sum which would have produced a like income at interest, will be a proper sum to be allowed as damages, although the jury may arrive at the value of the life of the deceased to his estate in some other manner if they see fit; but they should not take into account the pain and suffering nor the wounded feelings or grief of his relatives: *Kelley v. Central R. of Iowa*, 48 Fed., 663.

In an action by the administrator of a minor to recover damages to the estate resulting from injuries causing his death, the recovery is limited to those damages accruing after the minor would have attained his majority and up to the limit of his probable expectancy of life. The damages accruing before majority are not to the estate, but to the father or other person entitled to the minor's services: *Walters v. Chicago, R. I. & P. Co.*, 36–458; *Lawrence v. Birney*, 40–377.

As to the amount of recovery in cases of death, see *Kelley v. Central R. of Iowa*, 5 McCrary, 653. As to disposition of proceeds of recovery on account of death, see § 3313 and notes.

SEC. **3446. Construction of code provisions.** The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice. [C. '73, § 2528; R., § 2622; C. '51, § 2503.]

Similar provision in Code of '51, applied: *Strother v. Steamboat Hamburg*, 11–59; *Kramer v. Rebman*, 9–114.

A remedial statute should be so construed as to meet most effectually the beneficial end in view and prevent a failure of the remedy intended: *Steamboat Kentucky v. Brooks*, 1 G. Gr., 398.

A remedial statute ought always to receive a liberal construction: *Steamboat Lake of the Woods v. Shaw*, 2 G. Gr., 91.

Statutes made to promote an impartial administration of justice should receive a liberal construction: *Lyne v. Hoyle*, 2 G. Gr., 135.

Exemption laws are to be maintained in spirit as well as letter, and even liberally construed in favor of those claiming their benefit: *Kaiser v. Seaton*, 62–463.

Where a statute gives a right and creates a liability not existing at common law, and at the same time provides a specific mode in which such right shall be asserted and liability ascertained, that mode and that alone must be pursued: *Cole v. Muscatine*, 14–296; *Lease v. Vance*, 28–509; *Conrad v. Starr*, 50–470.

The statute in relation to mechanic's liens being in derogation of the common law should be strictly complied with: *Greene v. Ely*, 2 G. Gr., 508; *Logan v. Attix*, 7–77.

Statutes authorizing the taking of private property for particular purposes are not to be extended by construction to apply to objects or persons not expressly within their terms: *Sandford v. Martin*, 31–67.

As applicable to a provision not found in the Code, see *Doolittle v. Greene*, 32–123; *Foster v. Elliott*, 33–216.

Section applied: *National Park Bank v. Peavey*, 64 Fed., 912.

CHAPTER 2.

OF LIMITATION OF ACTIONS.

SECTION 3447. Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

1. *In actions for injuries from defects in roads or streets—notice.* Those founded on injury to the person on account of defective roads, bridges, streets or sidewalks, within three months, unless written notice specifying the time, place and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury;

2. *Penalties or forfeitures under ordinance.* Those to enforce the payment of a penalty or forfeiture under an ordinance, within one year;

3. *Injuries to person or reputation—relative rights—statute penalty—setting aside will.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within five years from the time the same is filed in the clerk's office for probate and notice thereof is given;

4. *Mechanic's lien.* Those to enforce a mechanic's lien, within two years from the expiration of the [illegible] or ninety days, as the case may be, for filing the claim as provided in the law relative to mechanics' liens;

5. *Against sheriff or other public officer.* Those against a sheriff or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the non-payment of money collected on execution, within three years;

6. *Unwritten contracts—injuries to property—fraud—other actions.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years;

7. *Written contracts—judgments of courts not of record—recovery of real property.* Those founded on written contracts, or on judgments of any courts except those provided for in the next subdivison, and those brought for the recovery of real property, within ten years;

8. *Judgments of courts of record.* Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years. [26 G. A., ch. 63; 22 G. A., ch. 25; C. '73, §§ 486, 2529; R., §§ 1075, 1865, 2740; C. '51, §§ 948, 1659.]

I. IN GENERAL.

In equitable actions: The statute of limitations applies equally to actions at law and suits in equity: *Phares v. Walters*, 6-106; *Relf v. Eberly*, 23-467; *Williams v. Allison*, 33-278; *District T'p v. District T'p*, 62-30.

While equity will usually, in analogy to the law, follow the statute of limitations, it will not in any case cut off rights of parties to relief within a shorter time than that prescribed by the statute, unless the other party is shown to have been prejudiced by delay in some manner which would render it inequitable to grant the relief sought: *Light v. West*, 42-138.

Equity will treat a stale claim as barred in analogy with the provision of the statute of limitations, even though the case is such that technically the statute is not applicable: *Mickle v. Walraven*, 92-423.

When a party seeking relief in equity has been guilty of laches, so that it is doubtful whether the other party can produce the evidence which is necessary to a fair presentation of the case on his part, or when it appears that such party has been misled to his disadvantage by such misconduct, the court acts in obedience to the spirit of the statutes of limitation, and adopts the reasons and principles on which they are founded, rather than on their literal requirements: *Mathews v. Culbertson*, 83-434.

Estoppel: Nothwithstanding the analogy between the law by which a right of action is limited and that of an estoppel where time is an ingredient the time in the two cases is not the same and an estoppel may arise, although the cause of action is not barred: *State ex rel v. Des Moines*, 65 N.W., 818.

Infringement of patent: The state statute of limitations is not applicable to actions to recover damages for infringement of a patent: *May v. Cass County*, 30 Fed., 762.

Construction: The statute of limitations should not be viewed in an unfavorable light or as a defense unjust and discreditable: *Penley v. Waterhouse*, 3-418.

Against municipal corporations: The statute does not run against the state: *Des Moines County v. Harker*, 34-84; *Kellogg v. Decatur County*, 38-524.

Though the action be brought in the name of a county, yet if it be for the benefit of the state, as for the recovery of a part of the school fund, it will not be barred by the statute: *Ibid.*

The liability of an estate of an insane person for the expenses of his confinement in the asylum is to the county and not the state, and the statute of limitaticns commences to run as against such claim from the time the county pays to the state the amount of such expenses: *Harrison County v. Dunn*, 84-328.

The statute will run against a city: *Pella v. Scholte*, 24-283.

Statutes of limitations will not run to defeat the exercise by a city of its governmental authority in establishing or maintaining a street, but in cases wherein arise questions involving property or contracts, which do not pertain to the exercise of its authority, the statute will run: *Waterloo v. Union Mill Co.*, 72-437.

Where a city attempts to recover upon a contract, the statute of limitations may be interposed as a bar as in the case of persons: *Muscatine v. Chicago, R. I. & P. R. Co.*, 79-645.

Where it was claimed that by contract contained in a city ordinance, and the acceptance thereof by a railroad company, the company thereby became obligated to do certain grading on the street, *held*, that the lapse of more than ten years constituted a bar to the action: *Ibid.*

The statute of limitations runs against an action by the county for delinquent taxes, for which the county is liable to the state: *Brown v. Painter*, 44-368.

Where actions are brought by municipal corporations to recover property or to enforce contracts made with them in their corporate or governmental capacity, the statute may be applied in the same manner as where like actions are brought by natural persons: *Burlington v. Burlington & M. R. R. Co.*, 41-134.

The general statute of limitations applies to actions in the name of the state for the use of an individual or corporation against whom the statute would run: *State v. Henderson*, 40-242.

The statute of limitation does not run against the state university: *Manatt v. Starr*, 72-677.

Special proceedings: The provisions of this section are not applicable to special proceedings, as, for instance, proceedings to assess damages for the taking of land for a right of way by a railroad: *Hartley v. Keokuk & N. W. R. Co.*, 85-455.

In action for penalty under law of United States: When a cause of action is created by statute of the United States, the provisions of the state statute do not apply thereto, unless congress has so declared: *Welles v. Graves*, 41 Fed., 459.

Pertains to the remedy: The statute of limitations in the state in which the action is brought prevails, and not that in which the contract was made: *Bruce v. Luck*, 4 G. Gr., 143.

Statutes of limitation pertain to the remedy and not to the essence of the contract, and an act extending the time for bringing suit on a cause of action is valid: *Edwards v. McCaddon*, 20-520.

And such statutes are not unconstitutional as impairing the obligation of existing contracts: *Parsons v. Carey*, 28-431; *Harrencourt v. Merritt*, 29-71; *Campbell v. Long*, 20-382.

The statute of limitations pertains to the remedy and not to the right of action or validity of the cause of action, and even though it prevent action being brought on a cause of action, such as a judgment which is still valid and enforcible in another state, it does not conflict with the provisions of the constitution of the United States, securing in each state full faith and credit to the judicial provisions of other states: *Meek v. Meek*, 45-294.

The statute of limitations does not affect the validity of a debt or obligation of a contract; it simply operates to arrest the rem-

edy: hence an offer to pay a debt legally due applies to a debt, the remedy for which is barred by the statute of limitations: *Barke v. Earley*, 72-273.

Changes in statutes of limitation take effect on antecedent contracts: *Sleeth v. Murphy*, Mor., 321.

The Code of '73 being a re-enactment of the provisions of the Revision as to limitations of actions, *held*, that the time which had run at the date when that Code was enacted was to be added to the time running under that Code in making the period of limitation. And *held*, that to construe the Code of '73 as extending the period of limitation, and allowing the full period in each case after its taking effect as to causes of action already existing, would affect rights already accrued, contrary to the provisions of § 50 of that Code (see § 51): *McDonald v. Jackson*, 55-37.

The statute of limitations applies to the remedy only, and if there is a cause of action existing, not barred when the statute takes effect, the statute applies to it, even though it is not made retrospective in its operations: *Higgins v. Mendenhall*, 42-675.

Before the bar of the statute is complete the legislature may by statute enlarge the period: *Harwood v. Quinby*, 44-385.

Repeal: Where a statute of limitations is unconditionally repealed without any saving clause, the rights of parties are to be adjudicated in the same manner as if the act had never existed, unless the period of limitation under the previous statute has already expired, in which case the repeal of the previous act will not revive the right of action: *Norris v. Slaughter*, 1 G. Gr., 338.

While the legislature has the power to enlarge the time for the statute to run, or to repeal a statute which has run for a part of the time prescribed, and give to past creditors the same length of time to prosecute their claims as future creditors, it cannot revive any right of action already barred: *Ibid.*

The repeal or amendment of the statute of limitations cannot act retrospectively so as to disturb rights acquired thereunder, and deprive parties of protection to which they were fully entitled under a prior enactment. Actions which have become barred are not revived upon the repeal of the statute of limitations: *Thompson v. Read*, 41-48.

Where a previous statute was repealed and a new one enacted without any saving clause, *held*, that in computing the statutory period on an action arising before the taking effect of the new law, the period of time which had elapsed prior to the taking effect of the new law could not be included: *Ibid.*; *Forsyth v. Ripley*, 2 G. Gr., 181; *Wile v. Matherson*, 2 G. Gr., 184.

Where the statute reduced the period of limitation as to existing causes of action, *held*, that the new period for such actions was not to exceed the whole period allowed by the new statute, nor the period which would have been allowed under the old. (Overruling *Bennett v. Bevard*, 6-82; *Phares v. Walters*, 6-106): *Wright v. Keithler*, 7-92; *Montgomery v. Chadwick*, 7-114; *Campbell v. Long*, 20-382.

And further, as to the effect of the provisions of the Code of '51, as to causes of action not already barred, see *Kilbourne v. Lockman*, 8-380.

Effect: The fact that the period of limitation has expired as against a note will not support an averment of payment. A barred debt is not to be regarded as extinguished: *Austin v. Wilson*, 46-362.

Satisfaction of a judgment will be presumed after a lapse of twenty years, subject to explanation in regard to the nonresidence of defendant. Within the twenty years, however, the jury may be authorized to presume payment from circumstances, but not from the lapse of time alone: *Hendricks v. Wallis*, 7-224.

Statutes of limitation do not affect the validity of the cause of action, and the fact that a judgment is still valid and may be enforced in the state where rendered does not prevent its being barred by the provisions of our law, notwithstanding the requirements of the constitution of the United States that full faith and credit shall be given to the judicial proceedings, etc., of another state: *Meek v. Meek*, 45-294.

Actual adverse possession of real estate for ten years under a claim of absolute ownership creates a title by prescription not merely for defensive but for all practical purposes upon which an action to quiet the title may be maintained: *Independent Dist. v. Fagen*, 63 N. W. 456.

Adverse possession for ten years may show such title in grantor as to enable him to comply with the conditions of a contract under which he undertakes to make perfect title. While in such case there may be a possibility that the adverse claimant was under such disability as would bring the case within the exception of the statute of limitations, such fact cannot be presumed: *Hunt v. Gray*, 76-268.

An attorney's claim for compensation under a contract having become barred by the statute of limitations, his right to enforce a lien for his compensation is also barred: *Larned v. Dubuque*, 86-166.

In case of surety: A claim which is, by the statute of limitations, barred as against the principal debtor, is by reason thereof barred also as against the surety, whether the statutory period as to the surety has expired or not: *Auchampaugh v. Schmidt*, 72-656.

The same period of limitation applies in an action against sureties upon an official bond that would apply in an action against the principal, and it is immaterial that judgment against the principal has already been obtained: *Wadsworth v. Gerhard*, 55-367.

The fact that the principal debtor is discharged by the statute of limitations does not prevent a surety on the original indebtedness being held on a new promise or admission: *Collins v. Bane*, 34-385.

Must be pleaded: The defense of the statute of limitations is an affirmative one, and the party pleading it must show the facts constituting the bar: *Harlin v. Stevenson*, 30-371; *Tredway v. McDonald*, 51-663.

The statute cannot be relied upon at the trial unless pleaded: *Brush v. Peterson*,54-243.

It must be specially pleaded, and will be held waived unless taken advantage of by demurrer or answer: *Robinson v. Allen*, 37-27.

The fact that a claim was barred by the statute of limitations before suit was brought thereon does not affect title acquired through such action. If parties have failed to interpose the defense of the statute at the proper time they are deemed to have waived it: *Welch v. McGrath*, 59-519.

Raised by demurrer: Where the petition shows affirmatively that its cause of action is barred by the statute of limitations it may be assailed by demurrer. (§ 3561, ¶ 6): *Shorick v. Bruce*, 21-305.

A petition in an action for slander, alleging the publication of the slander on or about a particular date, is demurrable if the date thus mentioned is such that the statute of limitation appears to have run against the action: *Jean v. Hennessy*, 69-373.

A demurrer in such case will not be defeated by the fact that the petition alleges the repetition of such slanderous words at divers times after the original publication up to the bringing of action. Such allegations of the repetition of the slander constitute only a pleading of evidence which is admissible for the purpose of showing malice: *Ibid.*

A petition cannot be assailed by demurrer on the ground that the action was barred by the statute until it shows on its face that the cause of action accrued against defendant at a time prior to the period limited by the statute: *District T'p v. Independent Dist.*, 69-88.

The objection that the action appears to be barred by the statute should be raised by demurrer, but may be taken by answer where no objection is made to its presentation in that manner: *Sac County v. Hobbs*, 72-69.

Where a special form of action is provided by statute, and it is also provided that it shall be pursued within a limited time, such limitation need not be pleaded, and the objection may be made by motion to dismiss the action if brought after the time limited: *Newcomb v. Steamboat Clermont*, 3 G. Gr., 295.

Matter removing the bar: Plaintiff may in his petition allege matters displacing the apparent bar of the statute: *Petchell v. Hopkins*, 19-531.

Thus, under a former statutory provision by which plaintiff might call defendant as a witness to prove a cause of action barred by the statute, *held*, that plaintiff must, in such a case, if his cause of action was apparently barred, state in his petition that he intended to rely upon defendant's testimony or his petition would be subject to demurrer: *Newfield v. Blawn*, 16-297.

Where the note sued on appears on its face to be barred, but plaintiff in his petition sets up facts preventing such bar from being applicable, an averment in the answer that the note shows on its face that the action is barred is no answer to the averments of the petition: *Walker v. Russell*, 73-340.

Who may take advantage of: Where land is sold at foreclosure sale for an indebtedness represented by a second note secured by mortgage, the purchaser may plead the statute of limitations in an action in which it is sought to subject the land to the payment of the first note secured by the same mortgage. The original maker of the notes and mortgage being a party to the action, but no judgment being asked against him, cannot make admissions in the pleadings such as will defeat the defense of the statute of limitations as to such purchaser: *Day v. Baldwin*, 34-380.

Where a devise is made upon condition that the devisee pay all the debts enforcible against testator's estate, the period of limitation as against such devisee who accepts under the will is not extended: *Huston v. Huston*, 37-668.

Suspension of right to sue: The time during which a party is prevented by injunction from enforcing a judgment in his favor should be excluded from calculating the period of limitation, both as to the person enjoined and those claiming under him: *Tredway v. McDonald*, 51-663; and see § 3458.

Where the statute has commenced to run against a cause of action it will not be suspended on account of the death of the party in whose favor the cause of action has existed and the minority of the persons to whom his rights have been passed: *Bishop v. Knowles*, 53-268.

II. When Commences to Run.

When cause of action accrues: The statute of limitations begins to run from the time the cause of action accrues. After the statute once begins to run, no subsequent disability will suspend it unless the statute itself provides therefor. Before a cause of action will accrue or the statute begin to run, there must exist a cause of action and a person authorized to prosecute it. So the statute will not run against a cause of action accruing to the estate of a decedent until there is a personal representative in whose name it may be prosecuted: *Sherman v. Western Stage Co.*, 24-515, 553.

The principle announced in *Sherman v. Western Stage Co. supra* that the statute of limitations does not begin to run until there is some one authorized to sue, does not apply to cases where the cause of action is in favor of a person under disability such as a minor or insane person. In such case the suit might be brought during the continuance of the disability and all that the statute attempts to secure is that the bar shall not be complete until a reasonable time after the disability has been removed: *McNeill v. Sigler*, 64 N. W., 604.

The action by the personal representative of a minor, for injury causing his death, must be brought within two years from the time of such injury, the personal representative not being entitled to any extension of time on account of minority of decedent: *Murphy v. Chicago, M. & St. P. R. Co.*, 80-26.

Where the statute commences to run during the lifetime of the person in whose

favor the right originally accrued, its operation is not suspended by his death: *Grether v. Clark*, 75–383.

It is not the date of the promise, but the time when the cause of action accrues thereon, which determines when the statutory period commences to run: *Walker v. Lathrop*, 6–516.

The statute of limitations commences to run when the cause of action has fully accrued: *Baker v. Johnson County*, 43–645.

Where it was agreed between the heirs of an estate that, upon the setting aside of the will, a certain amount should be allowed to two such heirs upon final distribution of the property of the estate, *held*, that the statute of limitations against the claim of the heirs for the amount thus agreed upon did not commence to run until the final distribution of the property: *Rogers v. Gillett*, 56–266.

An action for the interpretation of a will and for the recovery of property thereunder does not accrue until the rights claimed under the will have been infringed: *Jordan v. Woodin*, 93–453.

When a person indebted to an estate made certain payments, and afterwards failed to set such payments up in defense to the action in behalf of the estate by reason of an arrangement for a compromise, and judgment was rendered against him for a larger amount than his indebtedness, and thereafter the terms of the compromise were violated by the opposite party, *held*, that the debtor's cause of action to recover payments not set up by him in the action accrued only from the time of the violation of the agreement for the compromise: *Savery v. Sypher*, 39–675.

A right of action does not accrue for a wrongful act until the party complaining has suffered injury therefrom: *Steel v. Bryant*, 49–116; *Moore v. McKinley*, 60–367.

To set aside fraudulent conveyance: A cause of action for the setting aside of a conveyance as fraudulent does not accrue until the creditor has obtained his judgment, it not appearing that he has been guilty of laches in delaying to obtain judgment with reasonable diligence after his cause of action accrued: *Brundage v. Cheneworth*, 70 N. W., 211.

On written contract to convey: In an action to recover the part of the purchase money paid, in case of breach of written contract to convey, the statute commences to run from the time of demand and refusal to convey, and not from date of payment of the money, such action not being for money had and received: *Deming v. Haney*, 23–77.

No time for the performance of a contract to convey being specified, it is implied that the performance shall be made within a reasonable time, and the statute of limitations will commence to run from that time: *Harbour v. Rhinehart*, 39–672.

Under continuous contract: When labor is performed during a continuous period under one contract, the statute of limitations begins to run from the completion of the work: *Shorick v. Bruce*, 21–305.

It must be presumed that it is the universal custom to render compensation for personal services at intervals, whatever may be the time of employment. But unless the custom is known to exist in case of expenses and services in support of a child or other person running through a long series of years, if the contract fixes no time for its termination, the law will presume that, unless terminated, the contract continues to run so long as the services are rendered, or in case of a child, until majority, and the amount of charges for such services and expenses will be deemed entire and not from year to year: *Carroll v. McCoy*, 40–38.

The repudiation of a contract will not authorize an action to be commenced prior to the time fixed for the bringing of such action by the terms of the contract: *McConnell v. Iowa Mutual Aid Ass'n*, 79–757.

In case of partnership: The statute of limitations does not begin to run against an action for settlement of a partnership until the partnership is dissolved, or until sufficient time has elapsed after demand for accounting and settlement: *Richards v. Grinnell*, 63–44.

In case of surety: The payment of a judgment by a surety gives rise immediately to a right of action against the principal debtor for the money so paid, and the fact that such payment is made upon the mere indefinite promise by the principal to repay at some future time will not suspend the surety's right of action and the running of the statute of limitations thereon: *Wilson v. Crawford*, 47–469.

A cause of action by the surety against the principal arises when the surety pays the obligation and upon an implied promise of indemnity. Such action being on an unwritten contract must be brought within five years: *Miller v. Lesser*, 71–147.

Where the grantee of real property, as a part of the purchase money, agreed to pay off a judgment against the grantor, *held*, that the relation of principal and surety was created, and the grantor having paid the judgment, his right to recover from the grantee accrued from the date of payment, no special time for payment being fixed: *Foster v. Marsh*, 25–300.

A joint maker of a note who is in fact only a surety, and who pays or purchases the note, is not entitled to recover on the note. but his action is one for indemnity for the money paid, on the unwritten and implied agreement of his principal, and such action is barred in five years from the date of payment: *Harrah v. Jacobs*, 75–72.

Contract to pay after death: Where there is a contract for services to be paid for on the death of the party to whom they are rendered, the statute of limitations as against such claim commences to run only from the death of the party: *Riddle v. Backus*, 38–81.

Contract for support: An action for breach of contract to support during life is not barred by the statute of limitations so long as plaintiff lives: *Riddle v. Beattie*, 77–168.

A contract for the support of a person during life being a continuing one for breach of which the obligor would be liable at any

time during the life of the beneficiary, an action for such breach is not barred by lapse of time during the life of the beneficiary, but the recovery will be limited to damages accruing within five years before the bringing of the action: *McCay v. McDowell*, 80–146.

Indebtedness payable on demand: Upon an unwritten contract for a loan of money payable on demand, the statute commences to run from the time of the loan: *Hall v. Letts*, 21–596.

Claim against county: The statute commences to run as against an unliquidated claim against a county from the time the account accrues and not from the time the demand required by § 3528 is made: *Baker v. Johnson County*, 33–151.

Where a warrant is made payable out of a certain fund the right of action on the warrant does not arise until the fund out of which it is made payable comes into existence: *Wetmore v. Monona County*, 73–88.

Where preliminary steps are required: A party holding a claim or right of action cannot be allowed to prolong the operation of the statute by refusing to take the steps which the law requires in order to authorize the maintenance of the action: *Prescott v. Gonser*, 34–175; *Hintrager v. Hennessy*, 46–600; *First Nat. Bank v. Greene*, 64–445; *Squier v. Parks*, 56–407; *Hintrager v. Traut*, 69–747; *Mickle v. Walraven*, 92–423; *Grand Lodge v. Graham*, 65 N. W., 837.

The right of action will be deemed to have accrued at the time when by taking the proper steps the action might have been brought: *Hintrager v. Traut*, 69–746.

When a plaintiff could at any time by making a demand and giving a notice have acquired a right to recover against the defendant, the statute of limitations begins to run when he might have done so: *Great Western Tel. Co. v. Purdy*, 162 U. S., 329.

Even where a demand may be necessary before bringing action, the party having the right to demand performance at any time cannot delay such demand and thereby prevent the statute of limitations from commencing to run; and where the demand is not necessary to create a debt, but is only a preliminary step to the enforcement of a remedy for the breach of such debt, which breach is complete without the demand, the statute will commence to run from the time that demand might have been made: *Prescott v. Gonser*, 34–175.

A person cannot postpone the operation of the statute of limitations by failing to make a demand where the demand is all that is necessary to fix the liability of the other party: *Lower v. Miller*, 66–408; *Great Western Tel. Co. v. Purdy*, 83–430.

Therefore in an action by a corporation for the payment of subscriptions of stock, where the call for such payment might have been made at any time upon an order for payment and notice thereof, *held*, that, in the absence of any order and notice, the right of action became barred after the statutory period: *Great Western Tel. Co. v. Purdy*, 83–430.

When the right of action depends on a demand, such demand must be made within the statutory period of limitation after the right to make it accrues, unless there are special circumstances excusing the party from so doing; otherwise the demand will be considered as not made within a reasonable time: *Ball v. Keokuk & N. W. R. Co.*, 62–751.

Therefore, *held*, that where it appeared that a railway company had a contract with a land owner by which the former was entitled to a deed for a right of way upon demand as soon as the road was located, and no demand was made until the expiration of ten years after the right to make it had accrued, the right of the company to a deed had become barred: *Ibid.*

Where a contract between two district townships provided that the defendant district should pay a certain share of the indebtedness of the plaintiff, and should share *pro rata* in all discounts or money saved by compromise of any such indebtedness, and where the contract stated no definite time for payment, *held*, that as the plaintiff could at once demand judgment, and failed to do so for fifteen years, the action was barred by the statute of limitations: *District T'p v. District T'p*, 79–100.

Claim against township or school district: Where a township clerk paid an order which should have been allowed by the township trustees at the first settlement thereafter, *held*, that the statute of limitations, as against an action of *mandamus* to enforce the allowance of the claim, commenced to run from that time, and not from the time of subsequent demand: *Dewey v. Lins*, 57–235.

The statute of limitations commences to run against warrants drawn by a district township on its own treasurer, at least from the time of their presentation for payment, although such payment is refused only for the reason that there are not funds on hand at the time: *Carpenter v. District T'p*, 58–335.

Election of remedies: Where a party has two remedies the fact that he elects to proceed on one does not stop the running of the statute of limitations as to the other: *Garrett v. Bicklin*, 78–115.

Therefore, where it was claimed that property was wrongfully seized under attachment, *held*, that the right of action for damages for wrongful attachment accrued at once when the attachment was made, and not from the time of judgment in the attachment proceeding, and that it was immaterial that prior to the judgment plaintiff was pursuing his remedy by intervention in that proceeding to recover the property: *Ibid.*

Option as to payment: Where the debtor has the option to pay the debt at any time before a certain date the cause of action does not accrue until the expiration of such time: *Creighton v. Rosseau*, 1–133.

A provision in a mortgage that upon default in the payment of installments of interest or taxes, the whole indebtedness shall become due, is for the benefit of the mortgagee at his election, and such default will not stay the statute of limitations running against the indebtedness, in the absence of an election on the part of the mortgagee to take advantage of such provision: *Watts v. Creighton*, 85–154.

Against sheriff for right-of-way damages: A right of action against a sheriff for money paid to him in pursuance of an assessment of damages for right of way accrues at the expiration of the thirty days allowed for appeal from such assessment: *Lower v. Miller*, 66–408.

Where a right of action against a sheriff has accrued during his first term, and he is re-elected for a second term, such re-election does not stop the running of the statute as to such money. It cannot be claimed that he received at the beginning of the second term from himself an amount for which he was liable during his first term: *Ibid.*

Void county bonds: Where by reason of an adjudication that bonds issued in payment of stock in a railroad company were void, a county became entitled to the return of such bonds, or damages on account of their having passed into the hands of innocent purchasers, *held*, that such right accrued when the bonds were declared void: *Wapello County v. Burlington & M. R. R. Co.*, 44–585.

On accommodation paper: A right of action in favor of the accommodation maker of paper against the party accommodated only arises upon failure of the latter to pay the paper at maturity or to reimburse the maker in case he is compelled to pay it: *Jefferson County v. Burlington & M. R. R. Co.*, 66–385.

But where a county issued negotiable bonds in aid of a railroad company which had passed into the hands of innocent holders, who could recover thereon, although the bonds were in fact issued without authority, it being believed, however, at the time they were issued, by all parties, that they were valid, *held*, that the right of action of the county against the railway company to recover the amount of the liability thus improperly incurred in behalf of such company accrued at the time the bonds passed into the hands of the railway company, and the right of action was barred in five years thereafter: *Ibid.*

Against officer for taking improper bond: A cause of action against a clerk for taking a defective stay bond does not accrue until plaintiff has been damaged, that is, until a right of action has accrued on the bond: *Steel v. Bryant*, 49–116.

Therefore, an action by a clerk against his deputy, for default of the latter in approving such bond, does not accrue until the same time: *Moore v. McKinley*, 60–367.

Against trustee: The statute of limitations will run in favor of the trustee of a resulting or constructive trust from the time he disowns the trust and claims title in his own right to the trust property: *Otto v. Schlapkahl*, 57–226; *Gebhard v. Sattler*, 40–152.

The conveyance of the trust property by the trustee holding under a resulting trust by a deed in which he asserts that he is the absolute owner, followed by possession of his vendee, is sufficient to constitute a denial of the trust: *Peters v. Jones*, 35–512.

The statute of limitations will limit and control the right of action in equity in cases of implied or resulting trusts: *Harbour v. Rhinehart*, 39–672.

A contract to make a deed to a certain piece of land, provided the grantor should get a pre-emption on the same, "in the penal sum of two hundred dollars," *held* not to constitute a case of direct or express trust which in equity has been considered not to be barred by the statute of limitations. Even if in such case the purchase money has been paid, the trust is still one raised by implication and therefore within the statute: *Johnson v. Hopkins*, 19–49.

Although the statute of limitations will not run against an express trust, yet a right of action accrues whenever there is a breach of the trust, and the statute begins then to run, at least if the breach is known to the beneficiary: *Wilson v. Green*, 49–251.

Where a party takes possession of property under such circumstances as to create a trust in him, the statute of limitations does not commence to run in his favor until he has in some unmistakable manner given to persons interested notice, or sufficient reason to know, that he claims the property adversely: *Murphy v. Murphy*, 80–740.

The statute of limitations against an action for the misappropriation of a ward's money after majority by the guardian in the purchase of land commences to run from the time of such purchase, and in the absence of concealment or fraud the action is barred in five years: *Potter v. Douglass*, 83–190.

The general rule is that possession by a trustee subject to the trust is the possession of the *cestui que* trust and the statute of limitations will not commence to run in favor of the trustee till he repudiates his trust: *Long v. Valleau*, 87–675.

In favor of bailee: The statute of limitations will not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use: *Reizenstein v. Marquardt*, 75–294.

Where a party deposited a watch with defendant for repairs and safe keeping, and did not demand it for a period of ten years, when defendant refused to deliver it, *held*, that an action for its conversion might be brought any time within five years from the date of such demand and refusal: *Ibid.*

Against action to recover taxes: As against an action by one of two claimants of land who has been defeated in an action to assert title thereto, and thereupon seeks to recover from the successful claimant the amount of taxes paid while claiming title, the statute of limitations commences to run from the time the question of title is finally adjudicated: *Goodnow v. Stryker*, 62–221; *Goodnow v. Litchfield*, 63–275; *Bradley v. Cole*, 67–650; *Goodnow v. Oakley*, 68–25.

Where a tax title was, in an action in equity brought by the holder of the legal title, declared void for the reason that the tax for which the sale was made had been in fact paid, and thereupon the holder of the legal title was required to repay to the holder of the tax title all taxes paid by the latter on the land, *held*, that such obligation to repay being a mere equity, incident to the relief granted, was not affected by the statute of limitations, and should not be limited

to taxes paid within five years: *Harber v. Sexton*, 66-211.

As to limitation of actions to recover taxes paid by mistake, see notes to next section.

In case of continuing injury: Where the injury is such that it follows as the result of natural causes in consequence of one wrongful act, the action for all the damages resulting therefrom accrues at the time of the doing of the act, and the statute of limitations then commences to run: *Powers v. Council Bluffs*, 45-652.

Where the cause of action is based on wilful trespass in construction of a ditch to interfere with plaintiff's water-power, the cause of action will be deemed to have arisen at the time such ditch was constructed: *Williams v. Mills County*, 71-367.

Where plaintiff alleged damages resulting from the diversion of a stream of water in the negligent construction of defendant's road, and that such damages occurred at a time subsequent to the construction of the road, *held*, that the statute of limitations would commence to run from the time of the damages and not from the time the road was constructed: *Van Orsdol v. Burlington, C. R. & N. R. Co.*, 56-470.

Right of action for damages resulting from the construction of a tile drain permanent in its nature and throwing an increased quantity of water upon another's land, accrues when the drain is constructed and an action not brought within five years after that is barred: *McCormick v. Winters*, 62 N.W., 655.

In an action for damages suffered from the maintenance of a nuisance (the erection and use of gas works), it appearing that the nuisance and injury were of a permanent character and began when the works were erected, *held*, that, as plaintiff was entitled to recover all the damages sustained in one action, the action was barred after the lapse of five years from the commencement of the nuisance: *Baldwin v. Oskaloosa Gas Light Co.*, 57-51.

The cause of action for damages from the improper construction of a ditch does not arise until the ditch first begins to affect the party's premises: *Miller v. Keokuk & D. M. R. Co.*, 63-680.

A cause of action for damages for an overflow of water caused by an inadequate culvert in a railway embankment does not accrue when the culvert is built, but when the overflow occurs: *Sullens v. Chicago, R. I. & P. R. Co.*, 74-659.

In an action against a railway company for causing damage to plaintiff's land by construction of an embankment preventing the natural flow of surface water without providing as it might have done sufficient outlets by ditches and culverts, *held*, that the damage was not original but continuing, and that plaintiff might recover for damages accruing within five years prior to bringing of his action: *Willitts v. Chicago, B. & K. C. R. Co.*, 88-281.

As against a cause of action for injury to property from the construction of a ditch which is of such character as to cause permanent injury unless human agency intervene to prevent it, the statute of limitations commences to run from the beginning of the injury. In such case there cannot be successive actions, but the whole injury is to be compensated in the one action: *Powers v. Council Bluffs*, 45-652.

But this does not apply to a case where one party is under obligation to protect another from injury and fails from time to time to do so: *Drake v. Chicago, R. I. & P. R. Co.*, 63-302.

Where the plaintiff turned water from his land so that it flowed upon the land of defendant to his injury, *held*, that plaintiff had acquired no right to the flow of water as changed, by prescription, although the stream was diverted more than ten years before the action was commenced, in the absence of evidence that defendant had express notice, other than the mere use, that plaintiff's claim was adverse: *Preston v. Hull*, 77-309.

Where a railway company had stipulated in a right of way deed not to construct culverts in its embankment on plaintiff's premises, and thereby to keep the surface water from running upon plaintiff's land, *held*, that the right of action for damages resulting from the construction of such culvert would not accrue upon the construction of a wooden culvert designed to be of a temporary character, but only from the time of the construction of a permanent culvert: *Peden v. Chicago, R. I. & P R. Co.*, 78-131.

In an action to recover damages resulting from the construction of an embankment by a railway company causing the overflow of plaintiff's land, *held*, that it was error to admit evidence tending to show, for the purpose of avoiding the plea of the statute of limitations, that defendant constructed and attempted to maintain a ditch along such embankment for carrying off the water obstructed by the embankment: *Willetts v. Chicago, B. & K. C. R. Co.*, 80-531.

Damages from overflow of land due to negligence of a railway company in constructing and maintaining a culvert, such damages occurring at irregular intervals, *held* not to be such continuing damage that an action therefor must be brought within the statutory period after the construction of the road, but that plaintiff might recover for such damage occurring within five years prior to the bringing of action: *Hunt v. Iowa Cent. R. Co.*, 86-15.

Where the ground of complaint against a railroad company with reference to the construction of an approach to an embankment was that it obstructed the flow of water and caused damage to plaintiff's property, *held*, that the cause of action arose, not when the embankment was constructed adjacent to plaintiff's land, but on the construction of the approach itself; and that the fact that the approach was contemplated when the embankment was made would not affect the case: *Kelleher v. Chicago, St. P. & K. C. R. Co.*, 66 N. W., 94.

Where the franchises of a railway company wrongfully maintaining its track in the streets of a city without having had damages

to abutting property owners assessed and paid were under foreclosure sold to defendant company, who continued to maintain such track, *held*, that defendant was a trespasser from the time it became the owner of such franchises, and that an action against it was not barred by reason of the fact that the track was originally constructed more than the statutory period before the commencement of the action: *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

An action against a railway for laying its track in the streets of a city in accordance with the ordinance, but without making compensation to the abutting owner as required by § 767, accrues upon the laying of the track, and is barred in the statutory period thereafter. It is not to be deemed a continuing action: *Fowler v. Des Moines & K. C. R. Co.*, 91–533.

It is otherwise where the track is laid without the consent of the city or the abutting owners, unless it is of such character, and laid under such circumstances as that it is to be deemed permanent: *Ibid.*

In an action to recover damages for nuisance consisting in smoke and soot occasioned by defendant's waterworks, *held*, that although the works had been in operation more than five years, yet as it did not appear that there was any actionable injury until within five years and no claim for damages for injury antedating such five years was made, the cause of action would not be deemed barred: *Churchill v. Burlington Water Co.*, 62 N. W., 646.

The continuance of a nuisance for more than five years does not give rise to a prescriptive right to continue such nuisance. Under § 3004 adverse possession alone will not give rise to an easement: *Ibid.*

Ignorance of claim: When no fraud is charged, ignorance of a right will not prevent the operation of the statute of limitations against an action based thereon: *Campbell v. Long*, 20–382; *Brown v. Brown*, 44–349.

The fact that the extent of injury or damage is not fully known at the time the cause of action therefor accrues does not postpone the time of commencement of the statutory period: *Gustin v. Jefferson County*, 15–158; *Steel v. Bryant*, 49–116; *Fadden v. Satterlee*, 43 Fed., 568.

Where a judgment plaintiff failed to credit a payment made on the judgment, and afterward, on execution, recovered the whole amount thereof, *held*, that the action to recover back the amount of the payment was barred in five years, although the judgment defendant was not aware of the failure to credit the payment until the expiration of the five years: *Shreves v. Leonard*, 56–74.

A cause of action by one county against another for support of a pauper arises when the support is furnished, and ignorance of the fact as to the proper place of settlement of the pauper will not delay the operation of the statute as against such claim: *Washington County v. Mahaska County*, 47–57.

A party who collects the amount due on a note given as collateral security becomes liable to pay over the excess beyond the amount of indebtedness at the time of the receipt of the money, and the cause of action commences to run at that time. A failure to pay in such a case cannot be deemed a fraud so as to prevent the running of the statute until the receipt of the money becomes known to the party entitled thereto: *Brunson v. Ballou*, 70–34.

All actions enumerated in the statute must be brought within the period specified, except when otherwise specially declared, and the fact that the creditor has been unable, for any reason, to discover the place of residence of his debtor, within the statutory period within which an action may be brought, will not defeat the bar of the statute: *Miller v. Lesser*, 71–147.

As against an action for failing to account for property turned over, the statute of limitations commences to run from the time the person entitled to an accounting is aware that the other party claims to have accounted in full: *Wolf v. Wolf*, 66 N. W. 170.

Where the defendant was negligent in its business of making abstract and furnished to plaintiff an abstract of title which did not show a lien for on premises, *held*, that the right of action for damage resulting from such negligence arose at once when the abstract was furnished, and not when the error was discovered or the damage became apparent: *Russell v. Polk County Abstract Co.*, 87–233.

Mere ignorance of the existence of the right of action will not suspend the running of the statute of limitations where there is no such fraud or mistake as to bring the case within the following section: *Ibid.*

Such a case is not one of continuing damage in such sense as that the statute continues to run only from the time when the resulting damage accrues: *Ibid.*

Fraudulent concealment of a cause of action by the party against whom it exists, preventing the opposite party from acquiring knowledge thereof, will prevent the statute from commencing to run until the cause of action was or might have been discovered; and this is true irrespective of the statutory provision as to the cases of fraud and mistake: *District Tp v. French*, 40–601; *Findley v. Stewart*, 46–655.

Where by fraud or fraudulent concealment a debtor prevents a creditor from obtaining knowledge of the fact of indebtedness, the statute commences to run from the time of the discovery of the right of action, or when, by the use of due diligence, it might have been discovered. And this rule applies when the cause of action does not grow out of the fraud alleged, but exists independent of it, and is governed by the general provisions of the statute of limitations, and not by the provision of § 3448: *Bradford v. McCormick*, 71–129.

Where a party received money under obligation to account for it, but concealed the fact, and thereby prevented the other party from obtaining knowledge thereof, *held*, that the statute of limitations did not commence to run until the right of action might have been discovered in the exercise of due diligence: *Wilder v. Secor*, 72–161.

The liability of the surety is dependent

on the liability of the principal, and, if by reason of fraudulent concealment of the cause of action, it is not barred as against the principal, neither is it barred as against his sureties: *Bradford v. McCormick*, 71–129.

Where it was alleged that defendant having commenced an action to recover on certain notes, and for foreclosure of a mortgage securing the same, received full payment of the amount due, and agreed to dismiss the action, but failed to do so, and secured a decree and sale of the property thereunder, bidding it in at the sale, but subsequently concealed that fact and received payment of other installments, *held*, that an action by plaintiff to set aside the foreclosure, though brought more than five years after the recording of the sheriff's deed, was not barred, the concealment being such as to prevent the statute from running, there having been a confidential relation between the creditor and the plaintiff, who was an ignorant woman, unable to understand the English language: *Jacobs v. Snyder*, 76–522.

Where the cause of action had been fraudulently concealed by the defendant, *held*, that the statute of limitations did not begin to run until the facts were discovered by plaintiff: *Cook v. Chicago, R. I. & P. R. Co.*, 81–551.

Where one school district received and appropriated from year to year for fifteen years the taxes from a certain territory, which were properly payable to another school district, *held*, that there was not an action on an open account nor any such fraudulent concealment of a cause of action as to entitle to recovery for the taxes thus wrongfully received beyond the statutory period of limitations: *District T'p v. Independent Dist.*, 80–495.

In a particular case, *held*, that action against a former guardian could not be maintained more than twenty years after the termination and settlement of the guardianship, there being no such evidence of fraud or fraudulent concealment as to entitle to relief: *Heath v. Elliott*, 83–357.

Where it appeared that more than five years had elapsed after the alleged right of action to recover money advanced by one party to another had accrued, and no fraudulent concealment was shown, *held*, that the right of action was barred: *Duncan v. Finn*, 79–658.

As a cause of action by the administrator for personal injuries causing the death of the intestate cannot be deemed to have been concealed by the railroad company so as to suspend the running of the statute by reason of the mere fact that the company conceals the negligence of its employes, the fact of the accident and death having been known: *McBride v. Burlington, C. R. & N. R. Co.*, 66 N. W., 73.

III. LIMITATION IN PARTICULAR CASES.

Par. 1. Notice of defects in streets: The object of requiring notice is that the city authorities may investigate the question of the city's liability while the facts are fresh, and the evidence is attainable. Reasonable certainty as to the place and circumstances of the injury is all that is required. If the notice conveys the necessary information to the proper officers it is good even though it may be inaccurate: *Owen v. Ft. Dodge*, 67 N. W., 281.

Testimony to prove the mayor's knowledge as to the place of the accident, *held* proper, not perhaps to supplement the notice but to show that the city was not misled by inaccuracies therein: *Ibid.*

The facts being undisputed the question as to the sufficiency of the notice is for the court: *Ibid.*

The fact of the service of the notice is a material allegation on the part of plaintiff in such a case: *Pardey v. Mechanicsville*, 70 N. W., 189.

The provisions of § 3455 with reference to the limitation of actions applicable to a suit commenced within six months after the dismissal of a previous suit on the same cause of action, are not applicable to sustain a suit brought after the expiration of the time here provided without notice of the injury having been given, it not appearing that the failure in the first suit was not on account of negligence of the plaintiff: *Ibid.*

This provision as to notice is mandatory and cannot be waived by action of the city council by entering into negotiations with the injured party for a settlement of the claim or otherwise: *Starling v. Bedford*, 62 N. W., 674.

Where a passer was injured by the falling of a bill-board which had been allowed to remain beside the sidewalk for a considerable time in a defective and dangerous condition, *held*, that the claim against the city for damages was within these provisions, and there could be no recovery in the absence of the written notice here required: *Blivens v. Sioux City*, 85–346.

It is competent for the city by answer to raise the objection that proper notice has not been served: *Kelly v. West Bend*, 70 N. W., 726.

The action against a city for personal injuries may be brought within two years if notice of such injury has been served within the time specified: *Robinson v. Cedar Rapids*, 69 N. W., 1064.

Authority conferred upon a city in its charter to audit claims presented against said city does not authorize it to prohibit the bringing of a suit for personal injury until the claim of damages therefor has been presented to the city council. Claimants who have complied with the statute cannot be required to comply with additional provisions in the city ordinances on the subject: *McFarland v. Muscatine*, 67 N. W., 233.

These provisions are not in mitigation of the limitation of such actions, and compliance is required even though the claim is in behalf of a minor. There is no provision by which it is allowed to the minor claimant to give notice after coming of age: *Morgan v. Des Moines*, 54 Fed., 456. No exception in behalf of minors is to be incorporated into the statute by construction: *Morgan v. Des Moines*, 60 Fed., 208.

This subdivision will not be considered as applicable to claims already accrued, and

which under its provisions could not be presented within the time required: *Kennedy v. Des Moines*, 84-187.

Par. 3. Injuries to person: Injuries resulting in death are "injuries to the person" within the meaning of the statute, and an action by the personal representative therefor is barred in two years: *Sherman v. Western Stage Co.*, 22-556; *S. C.*, 24-515; *Nord v. Burlington & M. R. R. Co.*, 37-498.

Where the injury and the death resulting therefrom are not simultaneous, the cause of action is deemed to have accrued to the person injured and not to his personal representatives. (Overruling *Sherman v. Western Stage Co.*, 24-515): *Kellow v. Central Iowa R. Co.*, 68-470; *Ewell v. Chicago & N. W. R. Co.*, 29 Fed., 57.

An action against a carrier of passengers upon a contract of transportation for personal injuries received is barred in two years: *Nord v. Burlington & M. R. R. Co.*, 37-498.

In case of injury to the person, the statute of limitations begins to run from the time of the injury and not from the time the extent thereof is discovered by the person injured: *Gustin v. Jefferson County*, 15-158; *Fadden v. Satterlee*, 43 Fed., 568.

An action by the wife or children against a person who causes the intoxication of the husband or father by selling intoxicating liquor to him in violation of law is an action for personal injuries so as to be barred in two years: *Emmert v. Grill*, 39-690.

The provision as to actions for injuries to the person applies to all cases where an injury to the person is the basis of the damages sought to be recovered, although the right to maintain the action may be founded upon a statute, a contract or a tort. Therefore, *held*, that an action on contract against a physician for malpractice was barred in two years: *Fadden v. Satterlee*, 43 Fed., 568.

Statute penalty: The double damages allowed against a railroad company for killing stock (§ 2055) are not a statute penalty so as to come within this section. The action may, therefore, be brought within five years. What are statute penalties as here contemplated discussed: *Koons v. Chicago & N. W. R. Co.*, 23-493.

The penalty provided by former statute of five times the amount of overcharge to be recovered from a railway company charging a greater amount for transportation of freight than allowed by law was a statute penalty, the action for which was barred in two years: *Herriman v. Burlington, C. R. & N. R. Co.*, 57-187.

But an action against the company to recover the amount paid in excess of the statutory rate, *held* not to be an action for the penalty, and therefore not barred in two years: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63-732.

An action under § 2423 to recover back money paid for intoxicating liquors illegally sold is not an action for a statutory penalty: *Woodward v. Squires*, 41-677.

A bastardy proceeding is not an action for a statutory penalty within the meaning of this section: *State v. Laughlin*, 73-351.

Par. 4. Mechanic's lien: Although the filing of a statement for a mechanic's lien, within the thirty or ninety days provided by statute, is not essential to enable the mechanic to enforce his lien against anyone except purchasers or incumbrancers in good faith, without notice, after the expiration of that time, yet the two years' limitation commences to run from the expiration of the period of thirty or ninety days, as the case may be, whether the statement for the lien is filed within that time or not: *Squier v. Parks*, 56-407; *Dimmick v. Hinckley*, 57-757.

Under the provisions of the Revision, that in case of action to enforce a mechanic's lien suit must be commenced within nine months from the time of filing the account or statement of the lien, *held*, that where the account was filed with the clerk within the ninety days allowed for filing such statement, the nine months' limitation began to run from the date of such filing, and when the account was not thus filed, the time began to run from the expiration of the ninety days within which the account should have been filed, although the failure to file the account would not defeat the lien as to parties having notice: *Gilchrist v. Gottschalk*, 39-311.

If the action to foreclose a mechanic's lien is not barred as against the principal debtor by reason of his nonresidence, it is not barred as to other persons holding liens upon the premises who have been residents of the state during the period of limitation: *Leeds Lumber Co. v. Haworth*, 67 N.W., 383.

Par. 5. Action against public officer: An action against a treasurer, not on his bond, for moneys received and appropriated, is barred in three years: *Keokuk County v. Howard*, 41-11.

So an action against a treasurer and his sureties on his bond, for failure to account for and pay over revenues in his hands, is within this clause, and barred within three years. It does not fall within the provisions of ¶ 5: *State v. Dyer*, 17-223; *State v. Henderson*, 40-242.

The action of *mandamus* against a public officer to compel the performance of an official duty cannot be maintained until there has been a refusal to perform such duty, and the statute commences to run from the time when the plaintiff has a right to demand the performance of the act, and he cannot delay or postpone it by neglecting to make such demand: *Prescott v. Gonser*, 34-175; *Beecher v. Clay County*, 52-140.

In an action against the clerk of the court for damages resulting from his negligence in accepting an insufficient stay bond, *held*, that the cause of action did not accrue nor the statute begin to run until the stay expired: *Steel v. Bryant*, 49-116.

Under the Code of 1851, *held*, that the failure of a county judge to pay over money received by him in his official capacity was not the omission of an official duty, within the meaning of this clause, and, therefore, that the three years' limitation did not apply to an action on his bond to recover such money: *Poweshiek County v. Ogden*, 7-177.

If action against the sureties of an officer on his official bond be not brought within three years after the breach thereof it is

barred, although in the meantime action may have been brought and judgment recovered against the principal: *Wadsworth v. Gerhard*, 55–357.

Where a new obligation is accepted from an officer in satisfaction of his liability on his bond, the action upon such new obligation is not barred in three years: *Sac County v. Hobbs*, 72–69.

Where action was brought against a county auditor for money received by his predecessor in redemption from sale of property for city taxes, *held*, that the statute did not begin to run from the time of the receipt of the money by the predeccssor, but from the time of its actual receipt by defendant on his accession to office: *Hintrager v. Richter*, 76–466.

The time for bringing action against an officer for damages in the wrongful levy of an execution commences to run from the time notice of ownership of the adverse claimant is served: *Bank of Reinbeck v. Brown*, 76–696.

Where illegal taxes are paid, the statute of limitations begins to run against an action for their recovery from the time of payment: *Eyerly v. Supervisors of Jasper County*, 77–470.

If an officer receives money as a private person, and not in his official capacity, an action for the recovery thereof would be barred in five years: *State v. Farrell*, 83–661.

Where money was deposited with the clerk in pursuance of an order of court to await application therefor by an unknown claimant, *held*, that the three years' limitation upon an action against the clerk and his bondsman to recover such amount did not commence to run until an order for the payment of the fund was made: *Walters-Cates v. Wilkinson*, 92–129.

Par. 6. On unwritten contracts: A parol acceptance of a written proposition constitutes an oral contract: *Hulbert v. Atherton*, 59–91.

A contract by the board of supervisors with an agent for services to be performed does not become a written contract from the mere fact that the terms of such contract are embodied in the records of the board: *Baker v. Johnson County*, 33–151.

An oral acceptance of such employment by the opposite party makes the contract a parol and not a written contract: *Kinsey v. Louisa County*, 37–438.

In order to constitute a written contract sufficient to bring a case within the next paragraph and prevent the bar of five years from applying, the essential facts establishing the liability of defendant should be in writing: *Lamb v. Withrow*, 31–164.

Where it was sought to recover of defendant the amount paid by plaintiff in satisfaction of notes upon which the two appeared as joint makers, parol evidence being offered to show that plaintiff was only surety for defendant, *held*, that the action was upon an unwritten contract, and could not be brought after five years: *Ibid.*

Where a surety on a judgment pays the same he may maintain an action against the principal for the amount so paid, but such action is founded upon a promise to repay, and not upon the judgment, and will therefore be barred in five years: *Johnston v. Belden*, 49–301.

An action by an accommodation indorser who has paid the judgment on a note to compel contribution by another indorser who is liable as co-surety must be brought within five years after the payment is made: *Preston v. Gould*, 64–44.

Action against a party to whom a note has been indorsed as collateral security to recover the excess of the amount collected on the note beyond the amount of the indebtedness is an action upon an implied contract and must be brought within five years from the receipt of the money: *Brunson v. Ballou*, 70–34.

Under the statutory provision (§ 2423) that money paid in pursuance of the illegal sale of intoxicating liquors shall be held to have been received upon a valid promise to repay the same on demand, *held*, that an action to recover money so paid is only barred after the expiration of such time as would bar an action to recover money received under an express promise to repay, and that the clause of the statute limiting actions for statutory penalties to a shorter period is not applicable: *Woodward v. Squires*, 41–677.

Actions for the use and occupation of real estate are to be considered as brought upon an unwritten contract: *Tibbetts v. Morris*, 42–120.

The six years' limitation upon the recovery of rents and profits (see § 4198) applies to an action for the recovery of real property by one having the legal title; in an equitable action for conveyance and accounting, rents and profits can only be recovered for five years previous: *Muir v. Bozarth*, 44–499.

Other actions: Where an officer seeks to recover fees against a party at whose instance they were incurred, under § 1295, he must bring his action within five years: *State Ins. Co. v. Griffin*, 84–602.

An action for negligence in the performance of an obligation arising solely by contract will be an action for breach of contract and not an action for tort: *Russell v. Polk County Abstract Co.*, 87–233.

Where in an action to quiet title defendant by cross-petition attached plaintiff's title for fraud, *held*, that his right to make such defense was barred by the lapse of five years: *Willard v. Wright*, 81–714.

Par. 7. Written contracts: An action to enforce specific performance of a contract to convey real estate is governed by the provision as to actions on written contracts: *Wright v. Leclaire*, 3–221.

An action on a written contract to pay for goods to be delivered is not barred in five years, although the fact of delivery is to be established by parol evidence: *Wing v. Evans*, 73–409.

Where action was brought to foreclose a deed of trust given to secure subscriptions of money thereafter to be made, *held*, that the action was properly brought upon the written instrument, although parol evidence was necessary to show that the advances were made, and therefore that the action was not barred in five years: *White v. Savery*, 50–515.

The statutory provisions as to actions

upon written contracts are applicable to suits for the foreclosure of mortgages: *Newman v. DeLorimer*, 19–244.

And also to actions to redeem: *Gower v. Winchester*, 33–303; *Green v. Turner*, 38–112; *Crawford v. Taylor*, 42–260.

An action to foreclose or redeem from a mortgage is barred at the same time as an action at law on the mortgage debt: *Smith v. Foster*, 44–442.

But a mortgage is not barred so long as the debt is unpaid and capable of being enforced: *Clinton County v. Cox*, 37–570; *Brown v. Rockhold*, 49–282; *Jenks v. Shaw*, 68 N. W., 900.

The prior lien of a mortgage may be continued or revived by written admission of the debt secured thereby notwithstanding the bar of the statute of limitations: *First Nat. Bank v. Woodman*, 93–668. But further on this point, see notes to § 3456.

A mortgage does not become barred so long as the debt which it was given to secure may be enforced, even though the form of the debt has been changed, as, for instance, by being merged into a judgment: *Shearer v. Mills*, 35–499.

Therefore where, by reason of the absence of defendant from the state, the action upon the indebtedness is not barred by the lapse of ten years, neither is the action to foreclose the mortgage to secure such indebtedness barred, although the action to foreclose might, by proceedings by publication, have been brought during defendant's absence: *Clinton County v. Cox*, 37–570.

So if an action to foreclose a mechanic's lien is not barred as against the principal debtor by reason of his nonresidence, though the statutory period has run, it will not be barred as against lien holders, though they have not been nonresident: *Leeds Lumber Co. v. Haworth*, 67 N.W., 383.

Although an action to redeem from a mortgage will be cut off at the expiration of ten years from the time the right of redemption accrued, yet where it is claimed that the mortgage has been satisfied by the receipt of rents and profits by the mortgagee in possession, the action to declare the mortgage satisfied and have it canceled will not be barred until ten years after the payment was thus completed: *Green v. Turner*, 38–112.

Action for the enforcement of a vendor's lien, being treated in the same light as the foreclosure of a mortgage, must be brought within ten years from the time the cause of action accrued: *Day v. Baldwin*, 34–380.

An action against a guardian for failure to account and to pay over funds coming into his hands is not an action on a written instrument although the guardian has executed a bond for the performance of his duty, and such action does not come within the provision as to actions on written instruments: *Wyckoff v. Michael*, 64 N. W., 608.

Action against a stockholder to recover a balance of subscription to corporate stock, such subscription being in writing, should be brought within ten years, dating from the time of the subscription and not from the making of an assessment on such stock: *Great Western Tel. Co. v. Purdy*, 162 U. S., 329.

A written statement for confession of judgment duly filed, is a contract in writing, on which the statute will run from the time of its execution, no judgment by confession having been entered: *Trenery v. Swan*, 93–619.

The right of action upon a breach of covenant of seizin and good right to convey accrues when the covenant is broken, and is barred by the statute of limitations in ten years from the execution of the deed: *Mitchell v. Kepler*, 75–207.

An action for breach of covenant against encumbrances is an action on written contract: *Yancey v. Tatlock*, 93–386.

Such action accrues when the conveyance is made, but nothing more than nominal damages can be recovered until the grantee has paid off the encumbrance: *Ibid.*

The written contract referred to in this section need not be one executed and signed by the defendant in person; it is sufficient if it is made in accordance with his direction and by his consent: *First Methodist Episcopal Church v. Donnell*, 64 N. W., 412.

Therefore, *held*, that the placing of defendant's name on a church subscription list in response to his oral request in a public meeting was a sufficient execution to bind him to a written contract, and that an action on such subscription might be brought within ten years: *Ibid.*

Recovery of dower: The statutory provisions as to limitation of an action to recover real property are applicable to a suit by a widow for dower: *Phares v. Walters*, 6–106.

But the statute does not commence to run against her until her right to dower is denied: *Starry v. Starry*, 21–254; *Rice v. Nelson*, 27–148; *Sully v. Nebergall*, 30–339; *Felch v. Finch*, 52–563.

Lapse of ten years will not bar the doweress of her dower where there has been no adverse possession: *Berry v. Furhman*, 30–462.

The statute does not run against the dower right until it has become vested by the death of husband or wife: *Hurleman v. Hazlett*, 55–256.

Recovery of real property: Where an action is brought to set aside a sheriff's sale and get possession of the property conveyed thereby it is an action to recover real property within the terms of the statute: *Williams v. Allison*, 33–278.

An action against a railway company to recover damages to an abutting property owner by reason of the location of the track along the street of a city is not an action relating to an interest in real property, and must be brought within five years from the time when the right of action accrues: *Pratt v. Des Moines N. W. R. Co.*, 72–249.

The fact that an action at law to recover damages for breach of contract to convey real property has become barred will not necessarily bar an action for specific performance. Under a former statute, *held*, that the latter action was within the provision as to real property and not within that as to contracts: *Wright v. Leclaire*, 3–221.

An action in equity to compel conveyance

by a purchaser who has purchased in trust for plaintiff and her husband, he being deceased, and she claiming to be sole devisee, comes within the limitation as to actions for the recovery of real property rather than the provisions as to actions for relief on the ground of fraud: *Stanley v. Morse*, 26-454.

Where the landlord is in an action determined not to be the owner of the premises, his tenant becomes liable to eviction by the real owner at any time, and the statute of limitations against such action for eviction commences to run at once and not from the end of the term: *Tibbetts v. Morris*, 42-120.

Where lots were sold in accordance with a plat on which a tract was marked as a public square, and which it was represented should remain open and without buildings, *held*, that a right of action to restrain the use or sale of such square as private property did not accrue until there was an attempt on the part of the grantor or his grantees to make some use or disposition of the premises inconsistent with such representations: *Fisher v. Beard*, 32-346; *S. C.*, 40-625.

Redemption or foreclosure: The rule that an action by a junior mortgagee to redeem from a senior mortgage is barred in ten years is in nowise dependent upon the question of adverse possession: *Floyd County v. Cheney*, 57-160.

The mortgagor, or his grantee, or a subsequent incumbrancer, do not hold adversely to the mortgagor. Therefore, the statute of limitations will not run in favor of a subsequent grantee as against the mortgagee. (Explaining *Jamison v. Perry*, 38-14): *Hodgdon v. Heidman*, 66-645.

Whether there is adverse possession or not under a foreclosure sale does not affect the period of limitation within which an action by a subsequent incumbrancer not made party to the foreclosure of a prior incumbrance may bring his action to redeem: *Gower v. Winchester*, 33-303.

Adverse possession: The limitation commences to run from the time of ouster by one who enters with claim of adverse possession, and not from the time the adverse claimant obtains title: *Robinson v. Lake*, 14-421.

As against an action for the recovery of real property the statute begins to run at the time adverse possession is taken and held by the tenant or those under whom he claims. The possession of a tenant holding over after his term, or that of a mere trespasser, does not amount to a disseizin such that the statute will begin to run. Disseizin occurs only when possession is taken and held without assent of the owner, with intent to hold the estate therein under claim adverse to him: *Barrett v. Love*, 48-103.

What constitutes; claim of right or color of title: Mere possession for the statutory period of limitation is not sufficient to enable the defendant to rely on the bar of the statute. Such possession must be adverse under color of title or claim of right: *Wright v. Keithler*, 7-92; *Jones v. Hockman*, 12-101; *Clagett v. Conlee*, 16-487; *Larum v. Wilmer*, 35-244; *Davenport v. Sebring*, 52-364; *Donahue v. Lannan*, 70-73.

The possession of land which will impart notice of title thereto must be adverse, exclusive, open, unequivocal and notorious, and must be inconsistent with the claim of any other person: *Elliot v. Lane*, 82-484.

Possession, to be adverse, must be actual, continuous, visible, notorious, distinct and hostile, and under claim of right or color of title: *Hempstead v. Huffman*, 84-398.

Possession of land for five years claiming title adverse to the owner is not sufficient to constitute a defense to an action to quiet title. The possession must be exclusive, actual, open, notorious and under color of title or claim of right for ten years to be available: *Des Moines & Ft. D. R. Co. v. Bullard*, 89-749.

A party out of possession cannot base a right of action upon adverse possession for less than the statutory period: *Hanlenbeck v. Riley*, 35-105.

Where a party states that he entered under claim of title, but also states that he took possession under a conveyance which excluded the land in question by description, he will not be deemed to have color of title: *Weinig v. Holcomb*, 73-143.

Where it appeared that the property in question had been inclosed by the claimant thereof with adjacent property which he did not own and to which he made no claim of title, and which he used for a cattle yard and for other purposes, *held*, that as it appeared that his possession was not under claim of title, nor adverse to the real owner, no right could be maintained under it: *McCarty v. Rochel*, 85-427.

The abandonment of possession by the real owner and the taking of possession by one claiming under adverse title will not give to the latter any valid claim by estoppel or otherwise until the expiration of the period of limitation: *Sanders v. Godding*, 45-463.

A party cannot claim title by prescription on the strength of adverse possession, where he does not show color of title or claim of right: *Solberg v. Decorah*, 41-501.

Possession, to be adverse, must be with intention to claim title. Facts, such as that the party has prosecuted an action against his grantor for purchase money and accepted payment thereof, and negotiated with the true owner for the purchase of the property, and that he claimed only the ownership of the improvements, should be considered as showing an abandonment of the claim of title: *Davenport v. Sebring*, 52-364.

Mere occupation of land belonging to a city, with full knowledge of the occupant that he has no color of right thereto, does not give any prescriptive right therein: *Twining v. Burlington*, 68-284.

To constitute adverse possession the occupancy must have been with the intention to claim title and it must be in good faith. If the intention is simply to occupy under an adverse title derived from one known to be without title as against the holder of a patent from the government but with the intention of making title as a squatter should the patent title be declared invalid, such claim will not be deemed in adverse possession against the holder of the patent title: *Litchfield v. Sewell*, 66 N. W., 104.

An offer by the occupant to purchase the

property which he is holding adversely made within the statutory time is a clear recognition of the want of title which will interrupt the adverse possession: *Ibid.*

A conveyance will not constitute a color of title or claim of right such as to serve as a basis for the operation of the statute of limitations where the grantee knows that such conveyance transfers no title: *Smith v. Young*, 89-338.

Therefore, *held*, that a conveyance by a widow having only a life estate and the reconveyance to her did furnish the basis for a claim of adverse possession in such widow or her heirs: *Ibid.*

Occupancy by one tenant in common will not be adverse as to the other tenants in common: *Ibid.*

A possession held by virtue of a contract with the owner cannot be deemed adverse as to him: *Laraway v. Zenor*, 69 N.W., 416.

An entry without color of title or claim of right may become adverse by subsequent acquisition of color of title or claim of right and held under it, but the possession is only adverse from the time of acquiring such title or claim of right: *Wickham v. Henthorn*, 91-242.

As between parties claiming under conveyances from the same grantor, there may be adverse possession; and in a particular case, *held*, that possession of a tract of land, which had once been laid out into lots and streets, but which had never been opened to public use, was held adversely to the city in such way as to cut off any rights of the city in such streets: *Smith v. Osage*, 80-84.

A party against whom a judgment quieting title has been rendered cannot in an action by the owner of the land to recover possession set up adverse possession back of the decree thus quieting title: *Hintrager v. Smith*, 89-270.

The statute of limitations is not available as a defense unless the defendant holds under color of title or has had actual possession for the full time limited under a claim of right. Mere possession without color of title or claim of right is not adverse, but the possessor will be deemed by the law to hold under the legal owner. No length of possession will make it adverse: *Grube v. Wells*, 34-148.

One who enters upon land without color of title, as a trespasser, does not hold adversely to or interrupt the possession of another adversely claiming the land: *Whalley v. Small*, 29-288.

A mere continuance in possession by the grantor, after conveyance by him, will not ripen into a right to rely upon the statute of limitations: *Livermore v. Maquoketa*, 35-358.

Where a party is in possession after an adjudication that he is not the owner of the premises his possession is not under claim of right or color of title: *Larum v. Wilmer*, 35-244.

Claim of right is, however, alone sufficient to entitle a party to rely upon his possession as adverse. It is not essential that he have color of title: *Hamilton v. Wright*, 30-480: *Colvin v. McCune*, 39-502.

It is not essential for one relying upon adverse possession as a bar to show legal title. A claim of right to the land is sufficient, and this claim need not be based upon the legal or a paper title, but may rest in parol. A claim based upon an equity is sufficient: *Montgomery County v. Severson*, 64-326.

It is not necessary that a title in order to constitute color of title so as to protect the person claiming thereunder shall be valid, and it is immaterial whether its want of validity results from its inherent defects or from matters transpiring subsequently to the action; or whether such want of validity is attributable to individual or judicial action: *Hamilton v. Wright*, 30-480.

The term color of title, used to designate a claim of title under which lands are held that will support a defense based upon the statute of limitations, implies that the title thus described is not valid, but is claimed to be by the party holding it; and *held*, that a party claiming under a tax deed which was void for the reason that the title of the land was in the United States government at the time of the levy of the tax on it, and therefore taxable, constituted color of title, and might be pleaded as raising the bar of the statute of limitations: *Chicago, R. I. & P. R. Co. v. Allfree*, 64-500.

A tax deed, void on its face, is sufficient to give color of title: *Colvin v. McCune*, 39-502.

A descent cast, or a devise, gives color of title, although the ancestor or devisor was a mere trespasser: *Hamilton v. Wright*, 30-480.

The possession of real property by heirs of one who held adversely under claim of right is under color of title: *Teabout v. Daniels*, 38-158.

Where a party took possession of land under a deed and held such possession for sixteen years without any adverse claim being made, *held*, that such possession being under color of title, gave such party title to the land, although the deed under which possession was taken was not properly acknowledged and therefore was not entitled to record: *Cramer v. Clow*, 81-255.

The title acquired by prescription through adverse possession is not merely defensive but is for all practical purposes a title, and an action to quiet title founded on such possession may be maintained: *Ibid.*

Deeds of conveyance purporting to convey the land to the person in possession are evidence of color of title, although they are informal and indefinite in description. It is not necessary that they be sufficient to convey the title: *Sater v. Meadows*, 68-507.

But in order that an informal instrument shall constitute color of title it must appear that it was relied upon as the source of title: *Moore v. Antill*, 53-612.

Possession taken under contract of sale of premises which have been the grantor's homestead, such contract being made by the husband alone, without the wife joining therein, may be adverse to the wife, so that after the statutory period the title of the vendee will be perfect as against any homestead right in the wife: *Boling v. Clark*, 83-481.

Adverse possession commencing under claim of right to possession by virtue of a parol agreement between plaintiff and defendant, his father, that plaintiff should have the land in controversy in consideration of services performed in carrying on the farm of defendant in pursuance of a contract to that effect, *held* sufficient to constitute such adverse possession as would by the lapse of time ripen into perfect title: *Quinn v. Quinn*, 76–565.

A party claiming under a quitclaim deed, though he is not to be regarded as a good-faith purchaser, nevertheless has sufficient color of title to enable him to set up adverse possession: *Tremaine v. Weatherby*, 58–618.

Merely paying taxes upon wild lands and occasionally looking at them and showing them to others, *held* not such actual, visible, notorious, adverse possession as is necessary to enable a party to take advantage of the statute: *Brown v. Rose*, 48–231; *S. C.*, 55–734.

Payment of taxes is mere evidence of a claim and its extent; it is not, of itself, adverse possession: *Sioux City & I. F. Town Lot, etc., Co. v. Wilson*, 50–422.

The adverse possession need not be in defendant personally and solely, but it is sufficient if it be in him and those through whom he derives title, they claiming title: *Kilbourne v. Lockman*, 8–380.

The adverse possession must be under claim of right with intention to claim title, and not by agreement with the true owner: *McNamee v. Moreland*, 26–96.

Where the intention as an element of adverse possession is sought to be shown, the declarations of the occupant that he did not hold adversely are competent evidence. If the entry be permissive, it can be shown that the party did some act which would make his holding adverse: *Ibid.*

The possession, to be adverse, must be actual, continued, visible, notorious, distinct and hostile, and commenced under claim or color of title, but actual residence on the land is not necessary to constitute such possession. Any acts which are open and notorious, done under claim or color of title and continued for the necessary time, will justify the finding of adverse possession: *Robinson v. Lake*, 14–421; *Booth v. Small*, 25–177.

The acts relied on as showing actual possession must be such that on the one hand the fair inference is that they were done because the doer thereof claimed title or ownership in the premises, and on the other hand they must be such as would naturally lead any one interested in the land to understand that they were done by some one who was claiming title in the premises: *Merrill v. Tobin*, 30 Fed., 738.

The title under which the adverse possession is held need not be valid and perfect, but must be claimed in good faith; nor need the possession be shown to have been known to the adverse party or his grantor: *Close v. Samm*, 27–503.

Adverse possession must be open and notorious, and, if so, the person against whom it is maintained is presumed, as a matter of law, to know of it: *Teabout v. Daniels*, 38–158.

One may hold possession in fact of unenclosed land by the exercise of such acts of ownership over it as are necessary to the enjoyment of the ordinary use of which it is capable, and acquire the profits it yields in its present condition. Such acts being continued and uninterrupted will amount to actual possession, and, if under color of title or claim of right, will be adverse: *Colvin v. McCune*, 39–502.

Where a person exercises such acts of ownership of real property as is necessary to enjoy the ordinary use of which it is capable in its existing condition, he is to be regarded as in possession of the same: *Teabout v. Daniels*, 38–158.

One who takes possession of timber land, and makes such use of it as it is susceptible of, cutting timber therefrom every year, is to be considered as in adverse possession: *Spitler v. Scofield*, 43–571.

Where the land in question was uninclosed and unimproved prairie land, and it was sought to show adverse possession thereof, commencing at a time when such land is not ordinarily put to any use, *held*, that it was error to instruct that such possession might be inferred from such acts of ownership, control and dominion over the property as are usually exercised by owners of land in such condition and situation: *Brown v. Rose*, 55–734.

Acts of an owner in going upon such land and hunting and digging thereon for a corner, *held*, not sufficient to constitute adverse possession: *Ibid.*

Constructive possession: In case of unoccupied land the owner is presumed to be in possession as against the holder of a void tax deed, and an action brought within ten years from the time possession is taken under such deed will not be barred: *Burke v. Cutler*, 78–299.

Transfer of title carries with it legal possession of unoccupied land: *American Emigrant Co. v. Fuller*, 83–599.

Therefore, *held*, that a grantee under the swamp-land grant would be deemed in possession until title or actual possession in an adverse claimant was shown: *Ibid.*

And *held*, that failure on the part of the swamp-land claimant to take any action with reference to the land for five years after his title was questioned would not be considered an abandonment: *Ibid.*

Where premises were sold under order of a probate court, but a portion thereof incapable of cultivation remained unimproved, being in the meantime conveyed by the claimant under the probate proceedings, *held*, that the possession of such portion followed the deed given in the probate proceeding, and was adverse to the heirs claiming in hostility to such proceeding: *Bacon v. Chase*, 83–521.

The right arising from constructive possession can have no application where the possession is actual. There can be no constructive possession where the actual possession is in another. Therefore, where a person who owns an undivided half interest in land, and claims title to the whole, is in actual possession, his possession will not inure to the benefit of the holder of the tax

title of the other half, they not being tenants in common: *Willcuts v. Rollins*, 85-247.

Where by permission of the owner of wild and unoccupied land, another cut and stacked hay thereon, plowing around the stacks as protection against fire, *held*, that there was such possession as would be available under § 1448 to defeat the claimant under a tax title who took no possession of the premises till the expiration of the five years' limitation therein provided for: *Dorweiler v. Callanan*, 91-299.

It is not necessary to actually occupy unbroken prairie land during the winter season in order that there may be adverse possession thereof. It is sufficient to occupy it during the proper season for grazing and making hay: *Dice v Brown*, 67 N. W., 253.

Under the facts in a particular case, *held*, that unimproved and uninclosed prairie land had not been so held by adverse possession as to give rise to a title under the statute of limitations: *Phillips v. Wilmarth*, 66 N. W., 1053.

A roving possession from one part of a tract of land to the other will not constitute adverse possession as to any part of the land which has not been held adversely for the statutory period: *Messer v. Reginnitter*, 32-312.

The facts relied upon to constitute adverse possession must be strictly proved. They cannot be presumed. The law presumes that the possession of land is always under a legal title, and will not permit this presumption to be overcome by another presumption. An intention to hold adversely cannot be inferred from possession alone: *Grube v. Wells*, 34-148.

Actual possession of a part of a tract is legal possession of the whole of the tract covered by the title under which the actual possession is taken, and possession of the part will impart notice of the claim to the whole tract: *Watters v. Connelly*, 59-217.

Where a party enters upon land and holds it under claim of right or color of title, having possession which is hostile and adverse to the holder of the legal title, and cultivates a portion as his own, resting his claim to the whole upon the same color of title, the law will presume him to be in possession of all the land within the boundaries as prescribed in such title; but such a rule would not apply if the adverse party had possession of the portion which claimant did not cultivate: *Chicago, R. I. & P. R. Co. v. Allfree*, 64-500.

Where one takes possession of a government subdivison of land under claim of title to the whole of it, breaks it up and puts part of it under cultivation, and no other person is in possession of any part, his possession must be held as applying to the whole tract claimed by him, especially when the actual possession extends to every government subdivision embraced in the whole tract: *Tremaine v. Weatherby*, 58-615.

Two government subdivisions in different sections, but adjoining each other, may constitute together one tract, possession of a part of which will be possession of the whole: *Kerr v. Leighton*, 2 G. Gr. 196.

Facts in a particular case, *held* sufficient to show actual, open and exclusive possession by defendant, and those under whom he claimed, of open and uninclosed land: *Forey v. Bigelow*, 56-381.

By mistake: Where a strip of land is held under a claim of right for the statutory period the title becomes complete by adverse possession, there being no material mistake as to the boundary line therof: *Wilson v. Gunning*, 80-331.

The occupation of a strip of land by reason of a mistake as to the true boundary line between adjoining owners will not constitute adverse possession thereof: *Mills v. Penny*, 74-172; *Goldsborough v. Pidduck*, 87-599.

Where possession to a line is claimed under the belief that it is the true line, such possession is not adverse if the line is by mistake not the true boundary line: *Jordan v. Ferree*, 70 N. W., 611.

In case of mistake as to the boundary line the possession of the party against whom the mistake exists will not be deemed adverse. Mere mistake does not make the possession one under claim of right: *Grube v. Wells*, 34-148; *Wacha v. Brown*, 78-432.

But where parties have established a line and used it as a boundary, irrespective of the true line, the possession will be adverse, and, after the lapse of the necessary period, conclusive upon the parties and their grantees: *Hiatt v. Kirkpatrick*, 48-78.

Where the owner of property claims to a line as fixed by stakes or other visible monuments and occupies for the requisite length of time to acquire title to such line by adverse possession although by mistake the line is not the true boundary line. So *held* with reference to occupancy by an adjoining owner of a portion of the street: *Johnson v. Burlington*, 63 N. W., 694.

To constitute adverse possession the claim must be as broad as the possession, else the holder cannot be said to be holding under claim of right hostile to the true owner. If the claim is of right to a fence, without regard to whether that fence is on the party line, it will be deemed hostile: *Doolittle v. Bailey*, 85-398.

In an action to settle a boundary line, wherein it was stipulated that the adverse parties were the owners of the respective government subdivisions, and plaintiff claimed and introduced evidence to prove adverse possession to a certain fence which was not on the true line, *held*, that such proof of adverse possession was admissible: *Meyer v. Weigman*, 45-579.

An owner of land, who, through ignorance of the dividing line, includes a part of an adjoining tract within his inclosure, does not hold such portion by adverse possession, so as to set the statute of limitations in motion: *Skinner v. Crawford*, 54-119.

Where the possession with reference to a boundary line is by reason of mutual mistake as to the true line, such possession will not be deemed adverse, so as to give rise to a title by prescription: *Heinz v. Cramer*, 84-497.

Possession of a strip of land under the claim that it is a portion of a tract owned by the person claiming title to such strip is not

adverse as against the owner of the tract to which such strip actually belongs: *Fisher v. Muecke*, 82-547.

Where defendant claimed ownership, with corresponding acts of use and occupation for ten years, up to a line fence which was erected at the mutual cost of both parties and intended to be the division line between them, it was held that a grant would be presumed under the statute of limitations in the absence of rebutting circumstances: *Burdick v. Heivly*, 23-511.

If a party owning on one side of a division line has been in peaceable possession and claimed up to the partition line and cultivated it as his, claiming adversely to all the world for more than ten years, then his title to the strip of land on his side of such division line which may not previously have belonged to him becomes complete by adverse possession: *Brown v. Bridges*, 31-138.

Where adjoining owners have, for the period of limitation, occupied to a boundary line fixed upon by agreement, and not merely under a misapprehension as to its representing the true boundary under their conveyances, they are deemed to have held to such line by adverse possession: *Foulke v. Stockdale*, 40-99.

Where parties agree as to a certain line between their property being the true division line, and occupy to such line, each is to be considered as in adverse possession of the property so occupied, whether the line is correct or not: *Tracy v. Newton*, 57-210.

Where parties by unmistakable acts adopt a corner and boundary line as true, they become binding without any express provisions, and possession under such acts is adverse: *Davis v. Curtis*, 68-66.

Where a division line is agreed upon by the persons owning adjoining real estate, and possession is taken in accordance with such agreement, such possession must be considered as adverse from the time it is taken: *Heinrichs v. Terrell*, 65-25.

Highway: Ten years' use of a highway by the public under claim of right will bar the owner of the soil: *Keyes v. Tait*, 19-123; at least in the absence of proof that the road was used by leave, favor or mistake: *Onstott v. Murray*, 22-457.

Whether the statute of limitations runs against the public because of adverse possession of a highway established in the manner prescribed by law, *quære;* but *held*, that, in case of non-use of a highway for a long time and actual adverse possession thereof for ten years, the public were estopped from asserting any right thereunder: *Davies v. Huebner*, 45-574.

Mere non-user of an easement granted by deed will not bar the right. There must be some use adverse to that of the grantee to have that effect: *Barlow v. Chicago, R. I. & P. R. Co.*, 29-276.

In case of mistake of land owners as to the division line in their lands, the person holding the lands as a part of his tract and believing it to be within his boundaries is not protected by the statute of limitations, and the rule is applicable in the case of the public using a highway supposed to be on a certain line, but which through mistake is not really upon it: *Bolton v. McShane*, 79-26.

Adverse possession of a highway will not be presumed on account of a slight mistake or variance between the use and the true line: *State v. Welpton*, 34-144; *State v. Gould*, 40-372; *State v. Schilb*, 47-611.

The claim of the public to the use of a strip of land as a highway may be lost by sufficiently long-continued adverse possession, in good faith, without any notice of the claims of the public: *Smith v. Gorrell*, 81-218.

Where a highway had been established but never opened or used by the public, what travel there was having been over adjacent land, and where there had been open, notorious and adverse holding by the defendant and her devisor for more than ten years, *held*, that the right of the public to the highway had been extinquished and defendant had a right to extend her fences to inclose the adjacent land: *Orr v. O'Brien*, 77-253.

The fact that a person filing a plat, showing the dedication of certain streets, remains in possession of the land included in such streets, does not constitute possession under a claim of right adverse to the public in such sense that the statute of limitations will run: *McDunn v. Des Moines*, 34-467.

Mere neglect to use the rights conferred on a municipal corporation by the dedication in a plat of ground for an alley will not estop the public from asserting its right thereto: *Taraldson v. Lime Springs*, 92-187.

Where by deed an easement for a way or alley was recognized but the property remained inclosed, *held*, that the fact that the alley was not open and used would not constitute adverse possession which would ripen into a right antagonistic to such easement: *Garstang v. Davenport*, 90-359.

Where an adjoining proprietor fenced in a portion of a highway, but on petition being made promised to re-open such highway and otherwise by declarations recognized the right of the public to the highway, his continuance of possession will not be deemed adverse: *DeVoe v. Smeltzer*, 86-385.

An adjoining owner cannot acquire title by adverse possession to a portion of a highway. Being charged with knowledge of the width of the highway as fixed by law his possession will not be under claim of right or color of title: *Rae v. Miller*, 68 N. W., 899.

Where one person takes title in trust for another, to be conveyed when the amount advanced is repaid, the statute of limitations does not run in favor of the person thus taking the title unless payments have been fully made: *Byers v. Johnston*, 89-278.

A municipal corporation may be estopped by allowing land which has been dedicated for streets or alleys to be adversely occupied, from making any claim to have such street or alley opened: *Cambridge v. Cook*, 66 N. W., 884.

Where a highway has been in fact opened in pursuance of proceedings therefor, and has been used by the public for the statutory period, the land owner will be barred from questioning the rights of the public, although

the proceedings for the location were void by reason of want of legal notice. The fact that the land owner consented to the public use only by reason of the belief that the proceedings were valid would not affect the rights of the public acquired by prescription: *State v. Waterman*, 79–360.

Use of a strip of land as a highway in a particular case, *held* to be such as to show an establishment of the highway by prescription: *Sherman v. Hastings*, 81–372.

Where a right of way had been used for a time longer than the period of the statute of limitations, peacefully, continuously, uninterruptedly, openly and notoriously, and with the knowledge of the persons claiming adversely to the existence of such road, *held*, that the facts showed a highway by prescription: *McAllister v. Pickup*, 84–65.

One who claims a right to an easement whenever it is obstructed, and denies the right of another to obstruct it, must be regarded to hold the easement adversely to the one who interferes with his enjoyment of it, and it is not necessary to show acts or declarations indicating that the use is adverse, except as there is occasion for making such claim: *Ibid.*

If the use of the road was begun under permission, but continued under a claim of right for the statutory period, a highway will be thereby acquired by prescription: *Ibid.*

Where a strip of land was recognized by the land owner as a highway by constructing bars at each end thereof for the use of the public, and by abstaining from cultivating the same, and was used for that purpose by the public without objection, *held* that, although it thus remained inclosed, the owner could not claim rights therein adversely to the public by reason of his possession: *Hempsted v. Huffman*, 84-398.

Where a highway has been laid out by a survey, the lines of which have been for more than ten years recognized by the parties interested and the public as being correct, and improvements have been made with reference thereto, they will not be disturbed: *Crismon v. Deck*, 84–344.

Under particular circumstances, *held*, that it did not appear that the land owner had ever denied the right of the supervisor to open and work a highway in pursuance of action of the board of supervisors in establishing such highway, and that therefore the rights of the public had not been cut off by adverse possession: *Hayes v. Tyler*, 85–126.

Further as to adverse possession of highway, see notes to § 1482.

Where the grant of a right of way for a highway was made involving the construction of a bridge, but there was no stipulation for a right to a cattle pass under such bridge, *held*, that the use of such bridge as a cattle pass would not by continuance mature into a right: *Agne v. Seitsinger*, 60 N.W., 483.

Adverse possession of a right of way which is open and notorious and such as to deprive the claimant of the enjoyment thereof will extinguish such right of way by lapse of the period of limitation: *Ritzmann v. Aspelmeier*, 89–179.

Public land: The statute of limitations does not run against the United States, and possession cannot as against the United States ripen into a title: *Durham v. Hussman*, 88–14.

Adverse possession may be based upon color of title as against a grantee of the general government even though the land has not been formally conveyed by it: *Shelley v. Smith*, 66 N. W., 172.

Adverse possession of public land cannot avail against the government: *Sater v. Meadows*, 68–507.

But if possession originates while the title is in the government its adverse character attaches and becomes operative from the time the title passes from the government to a private owner: *Ibid.*

Where a party was in possession of land under claim of title from the United States government at the time that an adverse title was acquired, and remained in such possession for the period of limitation, *held*, that his defense as against such adverse title was complete: *Tremaine v. Weatherby*, 58–615.

Possession of public lands under claim of title does not create any right as against the grantee of the United States, unless continued for such length of time after the government parts with the title as to entitle the defendant to avail himself of the benefits of the statute: *Iowa R. Land Co. v. Adkins*, 38–351.

While the statute of limitations does not run against the government, there is no provision in law declaring that a citizen cannot hold adversely to the government, or hold under a claim of title against it: *Chicago, R. I. & P. R. Co. v. Allfree*, 64–500.

Where a person was in possession of land under color of title while the title was still in the United States government, and remained in such possession after the title passed from the government to the plaintiff for the full period of ten years, *held*, that he might plead such possession under color of title as against the government's grantee: *Ibid.*

Adverse possession makes it immaterial whether the title conveyed by patent issued by and divesting the title of the United States was in other respects good or not: *Bicknell v. Comstock*, 113 U. S., 149.

Where an attempt was made to enter land under a military land warrant, but by mistake the entry and patent did not describe the land, *held*, that the statutory limitation based on adverse possession commenced to run only from the issuance of the corrected title covering the land in question, the title prior to the issuance of the patent being only an equitable one which would not have supported an action to recover the land. And *held*, that in such case the second patent would not relate back: *Churchill v. Sowards*, 78–472.

Where land was granted to a railroad company on condition that it should complete its road by a certain time, and such condition was complied with, *held*, that its title became complete without any certificate or patent being issued therefor, and that ten years' adverse possession from that time would bar its title: *Cole v. Des Moines Valley R. Co.*, 76–185.

Where land bordering on the Mississippi river was granted by the United States to the city of Dubuque, *held*, that the city took the same as a trustee and held the title for the public, subject to all the liabilities and conditions to which the property was subject in the hands of the United States, and that a person could not, by adverse and hostile possession of any part of the strip, claim title against the public under the statute of limitations: *Simplot v. Chicago, M. & St. P. R. Co.*, 5 McCrary, 158.

Possession becoming adverse: An entry made upon land even under the title of the owner may become thereafter adverse to such title and owner: *Hamilton v. Wright*, 30–480.

The possession of a mere trespasser who enters without color of title and claim of right will become adverse from the time he places on record a deed to him purporting to convey the title to the land. The taking and the recording of such deed will operate as a notice to the owner that the person in possession is no longer a trespasser, and the statute of limitations will begin to run from that time: *Ibid.*

Where possession is originally lawful a mere forcible entry thereon, not followed by continuous possession, will not prevent the statute from continuing to run. But otherwise if entry be peaceable and continuous possession thereunder is retained: *Pella v. Scholte*, 24–283.

Where, at the time a party wall was first used for the benefit of adjoining premises, it was used by a tenant for years of such premises as a support to a building erected by him, and a stipulated sum was paid by him to the person erecting such wall as rental for the use thereof, *held*, that the statute of limitations against an action to recover one-half the expense of such wall commenced to run only from the refusal of the person owning and occupying the adjoining premises to continue to pay such rental for the use of the wall: *Crapo v. Cameron*, 61–447.

Where title is obtained by adverse possession, such title must be presumed to continue until it is divested in some manner recognized by law. It may be sold and conveyed, and the party against whom it has become perfect can do nothing to in any manner impair it. The party in whom such title has become perfect will be deemed to be in possession, and actual occupancy is not essential to its continuance: *Heinrichs v. Terrell*, 65–25.

Tenant in common: The seizin and possession of one tenant in common are the seizin and possession of others, and the statute of limitation will not operate in favor of the former to give him title by adverse possession unless it be sole and exclusive and with the knowledge and acquiescence of the co-tenants: *Killmer v. Wuchner*, 74–359.

Seizin and possession of one tenant in common are the seizin and possession of the other. One can never be disseized by another without an actual ouster, to constitute which physical eviction is not required, but a possession attended with such circumstances as to evince a claim of exclusive right and title and the denial of the right of the other tenants to participate in the profits. Actual ouster and aversed possesssion might be inferred from sole possession and an exclusive reception and enjoyment of the rents and profits with the knowledge and implied acquiescence of the other tenant in common for the period of ten years: *Burns v. Byrne*, 45–285.

One going into possession as tenant in common is not to be regarded as holding adversely to the other tenants in common until eviction: *Shell v. Walker*, 54–386.

Under the peculiar facts of a particular case, *held*, that plaintiffs had never lost their title as tenants in common in the premises in controversy, and that there had been no act of defendant amounting to an ouster of plaintiffs or assertion of his title in severalty to the whole tract: *Hume v Long*, 53–299.

The possession of a tenant in common is not adverse to his co-tenant. It may, however, become such, and is to be regarded as such, when the tenant in common holds possession under a claim of entire ownership and the co-tenant has knowledge of it. Such knowledge on the part of the co-tenant need not necessarily be shown by direct and positive evidence. It is sufficient if it is not shown to be otherwise, and the circumstances are such that it might reasonably be presumed that the co-tenant had such knowledge: *Knowles v. Brown*, 69–11.

In a particular case, *held*, that the possession by a co-tenant was of such character and so long continued, and the circumstances otherwise were such, that notice of his occupancy must be presumed to have come to his co-tenant, and his possession would be deemed adverse: *Ibid.*

It seems that exclusive occupancy by one tenant in common for a long time will constitute ouster of a co-tenant; but under the circumstances of a particular case, *held*, that an occupancy of seventeen years would not have that effect: *Flock v. Wyatt*, 49–466.

A person entering into possession as tenant in common is presumed to continue to hold in that manner, and not adversely, until he has done some act amounting to eviction of his co-tenant: *Shell v. Walker*, 54–386.

While possession of one tenant in common, however long continued, will not amount to adverse possession as against another tenant in common, yet a conveyance by one such tenant as his own, and possession taken by his grantee under such conveyance, amounts to ouster and disseizin of his co-tenant, and the recording of the deed, accompanied by actual and notorious possession in the grantee, is notice of such adverse claim, and from that time the statute will run: *Kinney v. Slattery*, 51–353.

It is a general rule that the possession of one tenant in common is possession for his co-tenants, and that one cannot be disseized by another without an actual ouster, or a possession attended by such circumstances as to evince a claim of exclusive right and title and a denial of the right of other tenants to participate in the profits. The statute of limitations will not commence to run in such case until there is an actual adverse

position with the intent to claim against the true owner: *Van Ormer v. Harley*, 71 N.W., 241.

The statute of limitations against an action to recover real property does not commence to run from the time of obtaining an adverse title, but from the time of ouster: *Sorenson v. Davis*, 83-405.

Conveyance by one co-tenant of his undivided interest will not constitute an ouster of the other co-tenants so that the statute of limitations will commence to run against their right: *Ibid.*

One going into possession under a quit-claim deed from a tenant in common does not thereby assert adverse possession as against the other tenant in common so as to set the statute of limitations in motion: *Moore v. Antill*, 53-612. And see *Hume v. Long*, 53-299.

A person who has been in possession of property under color of title for such length of time that the statute of limitations has run in his favor cannot be required to relinquish his claim thereunder and rely only upon title to one-half of the property as tenant in common cast upon him by operation of law after the commencement of his possession: *De Long v. Mulcher*, 47-445.

Where a purchaser from a tenant in common of a portion of the common premises took possession thereof and asserted such ownership as to indicate his understanding and belief that he was the owner in severalty of the land thus purchased, and retained such possession beyond the statutory period, *held*, that he should be regarded as having held adversely to the co-tenants of his grantor, who had knowledge of the facts, and as having acquired title to the property by adverse possession, although the deed under which he held did not as a matter of law, confer upon him any right in severalty: *Laraway v. Larue*, 63-407.

The rights of one tenant in common are not waived by the fact that another is not barred of his action as against an adverse possession by reason of minority: *Peters v. Jones*, 35-512.

An adverse claim of title must exist to enable defendant in an action for the recovery of land to plead the statute of limitations. So long as the relation of mortgagor and mortgagee or of trustee and *cestui que trust* exists between the parties neither can be considered as holding a claim adverse to the other: *Jordan v Brown*, 56-281.

Mortgagor or mortgagee: The possession of mortgagor or mortgagee under the mortgage is not to be considered as adverse to the other, and this is true where the possession is under a deed absolute in terms, but which is in law a mortgage: *Crawford v. Taylor*, 42-260.

The mere possession of a mortgagee will not be held adverse to the mortgagor, even after payment of the mortgage debt, so as to give him the benefit of the statute. Something beyond mere possession after payment is necessary to make such possession adverse: *Green v. Turner*, 38-112.

Possession of the mortgagor or his grantor or an incumbrancer is not adverse to that of the mortgagee: *Hodgdon v. Heidman*, 66-645.

Possession of the mortgagor will not be deemed adverse to the mortgagee or his assignee: *Watts v. Creighton*, 85-154.

And the grantee of the mortgagor under a conveyance subsequent to the mortgage holds adversely to the title of a purchaser at the sale under a foreclosure to which only the mortgagor was a party: *Jamison v. Perry*, 38-14, as explained in *Hodgdon v. Heidman*, 66-645.

A mortgagor or the grantee of a mortgagor or a subsequent incumbrancer in possession of land does not hold adversely to the mortgagee: *Hodgdon v. Heidman*, 66-645.

The grantee in a conveyance absolute on its face but intended as a mortgage does not hold adversely to the grantor until he asserts as against the grantor an adverse title: *Danton v. McCook*, 93-258.

Grantor or grantee: A party having possession under a bond for a deed providing that on default the grantor might declare the bond forfeited, and the grantee, his tenant at will, was held not to be in adverse possession against the grantor until notice to quit was served, although that was not until more than ten years after default: *Austin v. Wilson*, 46-362.

The possession of the vendee under a bond to convey is, until the contract is declared forfeited by the vendor, regarded as that of a purchaser, and therefore adverse to that of a vendor: *Montgomery County v. Severson*, 64-326.

A vendor under bond for conveyance upon payment of the purchase money is regarded as a mortgagor until the vendor, if he may do so under the contract, declares such contract forfeited. Until such forfeiture, the vendee is regarded as a purchaser and holding as such, and his possession is therefore adverse to the vendor: *Ibid.*

A purchaser, going into possession in pursuance of a void sale under a deed of trust, has color of title, and his possession is adverse to that of the original grantor: *Gebhard v. Sattler*, 40-152.

A right by prescription cannot be set up in place of one which is held by grant to defeat the terms and conditions of the grant: *Mosle v. Kuhlman*, 40-108.

Par. 8. On judgments of courts of record: The order of a probate court allowing a claim is not a judgment within the statutory provision as to actions upon judgments: *Smith v. Shawhan*, 37-533.

Under a former statute not expressly specifying judgments, *held*, that an action upon a foreign judgment was not barred by the provisions as to actions upon bills, notes, or writings obligatory for the payment of money or delivery of property, etc.: *Latourette v. Cook*, 3 G. Gr., 593.

Under former statutory provisions specifying judgments of courts of record and also actions upon bills, notes, etc., *held*, that an action upon the judgment of a justice of the peace was within the limitation relating to judgments of a court of record: *Danemuller v. Burton*, 4 G. Gr., 445.

A revival of a judgment by *scire facias* is not a new judgment against which the statute of limitations commences to run, but the period of limitation continues to run against the original judgment: *Meek v. Meek*, 45-294.

A judgment against a decedent must be filed as a claim under § 3349 or it will be barred as there specified: *Davis v. Shawhan*, 34-91.

An action on a judgment is not an action on a written contract: *McAleer v. Clay County*, 38 Fed., 707.

The general statute of limitations is not applicable to judgment liens which expire and cease to be liens at the expiration of the time fixed by § 3801: *Albee v. Curtis*, 77-644.

Under provisions of Code of '73, *held*, that the twenty years' limitation of an action on a judgment commenced to run from the time when action thereon might first be brought under the provisions of § 2521, of that Code, that is, after the expiration of fifteen years from the rendition of the judgment: *Weiser v. McDowell*, 93-772. But now see § 3439.

SEC. **3448. Fraud—mistake—trespass.** In actions for relief on the ground of fraud or mistake, and those for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake or trespass complained of shall have been discovered by the party aggrieved. C. '73, § 2530; R., § 2741; C. '51, § 1660.]

A cause of action on account of fraud such as was heretofore cognizable in chancery commences to run from the time of the discovery of the fraud: *Cowin v. Toole*, 31-513.

The fraud contemplated in this section is only such as was heretofore solely cognizable in chancery: *Gebhard v. Sattler*, 40-152; *Brown v. Brown*, 44-349; *Phœnix Ins. Co. v. Dankwardt*, 47-432.

Where the fraud is not of that character, but the plaintiff's remedy is concurrent, the exception here made does not apply: *Relf v. Eberly*, 23-467; *McGinnis v. Hunt*, 47-668.

An action to rescind a contract for fraud, and set aside a deed and restore the parties to their rights prior to the fraud, is an action solely cognizable in a court of chancery, and the statute begins to run with the discovery of the fraud: *Relf v. Eberly*, 23-467.

The fraud contemplated by this section is such as was heretofore solely cognizable in a court of chancery, and actions at law are not within this exception to the general statute of limitations: *Carrier v. Chicago, R. I. & P. R. Co.*, 79-80.

Therefore, where actions were brought against a railroad company for the recovery of unreasonable and excessive charges for freight, *held*, that the cause of action accrued when the charges were paid and not when the fact of the discrimination was discovered: *Ibid.*

But where the company had fraudulently concealed the fact that the amount paid by plaintiff was unreasonable and in excess of that paid by other shippers, *held*, that the cause of action did not accrue until the fact was discovered: *Ibid.*

Where plaintiff dismissed an action on a bond for specific performance upon defendant's testimony that a subsequent conveyance to a third person was without notice of plaintiff's rights, and subsequently learned that such testimony was false and the pretended conveyance was fraudulent, *held*, that the statute of limitations as against an action for relief from such fraud commenced to run from the discovery thereof, although the action on the bond was barred: *Muir v. Bozarth*, 44-499.

In actions brought by an assignee in bankruptcy to recover damages for fraud, the limitation of two years imposed by the statutes of the United States upon such actions commenced to run when the fraud is discovered: *Clews v. Traer*, 57-459.

An action for money paid by mistake or one party and fraudulently received and retained by the other is not an action for relief on the ground of fraud "in a case heretofore solely cognizable in a court of chancery," and therefore is barred in five years irrespective of the time of discovery of the fraud or mistake: *Higgins v. Mendenhall*, 51-135.

The cases of mistake referred to in the statutory provision are not limited to those cognizable solely in equity, but include such as are cognizable at law as well: *Higgins v. Mendenhall*, 42-675; *McGinnis v. Hunt*, 47-668; *Higgins v. Mendenhall*, 51-135.

The fact that a party might have discovered a mistake more than five years before bringing action will not defeat the recovery if he was lulled into security, and the belief that there was no mistake by the acts of the opposite party: *Manatt v. Starr*, 72-677.

This section is applicable to an action brought to enjoin the enforcement of a judgment rendered without jurisdiction, and such action does not become barred until after five years from the discovery of the mistake in taking judgment: *Gerrish v. Seaton*, 73-15.

In an action for relief on the ground of fraud, defendant pleading the statute of limitations must show that plaintiff had knowledge of the fraud more than five years before the action was brought: *Baldwin v. Tuttle*, 23-66; *Harlin v. Stevenson*, 30-371.

The statute commences to run not merely from the actual discovery of the fraud, but from the time when it might, by the use of diligence, have been discovered: *Humphreys v. Matoon*, 43-556.

This section does not contemplate actual knowledge of the fraud before the statute shall begin to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud: *Nash v. Stevens*, 65 N.W., 825.

The recording of a deed is sufficient notice of any fraud involved in its execution to cause the statute to begin to run against an action based upon such fraud: *Bishop v. Knowles*, 53-268.

Where the cause of action is based on a fraudulent execution of a deed, the grantee will be deemed to have had notice of such fraud from the time the deed is filed for record, and the statute of limitations will commence to run from that time: *Laird v. Kilbourne*, 70-83.

Where a sale is made under the provi-

sions of a deed of trust, which is void by reason of insufficiency of notice, and that fact appears upon the face of the conveyance, the grantor in the deed of trust is chargeable with notice of the fact that the sale is void from the time such deed is recorded: *Gebhard v. Sattler*, 40–152.

As against an action by the creditor to set aside a deed by the debtor as fraudulent, the statute of limitations commenced to run from the time of the recording of such deed. Such recording is notice to all the world and the creditor is charged with knowledge of the fraud from that time: *Hawley v. Page*, 77–239; *Mickle v. Walraven*, 92–423; *Sims v. Gray*, 93–38, *Nash v. Stevens*, 65 N. W., 825.

But an action by a creditor to set aside a conveyance on the ground of fraud does not accrue until he has recovered judgment on his indebtedness, even though he has prior notice of the existence of the fraud: *Mickle v. Walraven*, 92–423.

The use of funds of the ward by the guardian after the ward has come of age, in the purchase of land, gives rise to a right of action, which in the absence of concealment or fraud is barred in five years, whether the trust be considered as express or implied: *Potter v. Douglass*, 83–190.

In a particular case, *held*, that a party against whom judgment was rendered without jurisdiction did not have notice of the same, so that his cause of action to set aside the judgment was barred: *Jamison v. Weaver*, 84–611.

In an action to set aside a guardian's deed made under order of court, on the ground of fraud, seven years after the ward had attained his majority, *held*, that the cause of action accrued when the fraudulent deed was recorded and was therefore barred by the statute of limitations: *Francis v. Wallace*, 77–373.

Where action was brought against a railroad company for fraud in issuing stock and bonds to the injury of taxpayers who were entitled to stock in exchange for taxes paid, *held*, that there was nothing to show that by the exercise of due diligence the taxpayers would not have discovered the alleged fraud and that they were effected with notice of the execution of the bonds claimed to be fraudulent by the recording of a mortgage securing such bonds: *Allen v. Wisconsin, I. & N. R. Co.*, 90–473.

Where by reason of a mistake in not being aware of the passage of a new statute on the subject, the county treasurer in paying over money collected for a city retained a larger percentage than he was entitled to, and the city accepted the payment thus made, *held*, that the action to recover the balance of the amount which should have been paid accrued when the mistake was discovered, and action therefor might be brought within five years after such discovery: *Iowa City v. Johnson County*, 61 N. W., 995. [But on rehearing the appeal was dismissed because of insufficient service of notice: *S. C.*, 68 N. W., 815.]

Where a note executed to an insane person during insanity was found among his papers long after his decease and after the cause of action was barred by the statute of limitations, *held*, that the bar could not be avoided on the ground of fraudulent concealment in the fact that the note was delivered to such person while in an insane condition, there having been opportunity on the part of the representatives of such person after his decease to discover and enforce the note: *McNeill v. Sigler*, 64 N. W., 604.

Evidence in a particular case, *held* sufficient to show that the discovery of the mistake relied upon was made within five years: *Eggspieller v. Nockles*, 58–649.

Where the petition alleges the discovery of the fraud which is the subject of the action, within five years, it is not subject to demurrer: *Shank v. Teeple*, 33–189.

While, in an action to recover on the ground of fraud, brought more than the statutory period after the commission of the fraud, it may be necessary for plaintiff to allege due diligence in the discovery of the fraud, yet objection for failure to allege due diligence not being raised in the lower court by motion or demurrer cannot be raised for the first time in the supreme court on appeal: *Clews v. Traer*, 57–459.

The statute will run against an action to recover taxes illegally exacted from the time of their payment, and not from the time that their illegality is discovered: *Callanan v. Madison County*, 45–561; *Beecher v. Clay County*, 52–140.

A taxpayer who is entitled to recover from the county for money paid in the purchase of land on which the taxes are not delinquent, and which is sold by the treasurer by mistake, may bring his action within five years from the discovery of such mistake: *Storm Lake Bank v. Buena Vista County*, 66–128.

SEC. 3449. Open account. When there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial. [C. '73, § 2531; R., § 2743; C. '51, § 1662.]

The statute commences to run from the date of the last item, whether debit or credit: *Thorn v. Moore*, 21–285; *Mills v. Davies*, 42–91; *Keller v. Jackson*, 58–629.

The account here contemplated is one which is not interrupted nor broken, not closed by settlement or otherwise, and is a running, connected series of transactions. Where there was a hiatus of two years, followed by an item of a different character than those before, *held*, that the last item was not properly a part of the same account: *Tucker v. Quimby*, 37–17.

An interval of one year and nine months between two of the consecutive items of an account, both of which were on the credit side, *held* not sufficient to show such break in the account or cessation of dealing as to

63– 413;
19 x 327
50– 606
45 x 300
93 – 13
57 x 635

cause the statute of limitations to commence to run, it appearing that all the items had relation to the same open and continuous transaction between the parties: *Keller v. Jackson*, 58-629.

A claim for work performed at different periods of time, under separate and distinct contracts, is not a continuous, open, current account: *Shorick v. Bruce*, 21-305.

Where the indebtedness was accruing daily, monthly or yearly for items of board, rent, etc., *held*, that it would constitute a current account: *Moser v. Crooks*, 32-172.

And so *held* in case of a charge for keeping and providing for another continuously: *Wendeling v. Besser*, 31-248.

Though a special contract be made as to a specific piece of work, the price thereof may still be a proper item of account: *Mills v. Davies*, 42-91.

An objection that a finding in an action upon an account is not on an issue submitted, because it shows that several items were furnished under a contract between the parties, is not well founded, because a recovery could be had upon the account although the items were furnished under a contract: *Haywood v. Woods*, 28-563.

The account in a particular case, *held* to be an open account: *Wing v. Page*, 62-87.

A charge for money due on an executed contract may form one of the items of a running account: *Buford v. Funk*, 4 G. Gr., 493.

The fact that no date, or an incorrect date, was fixed to the account, or that it was not directly charged to anyone, *held* not to prevent the provisions of this section from applying: *Tubbs v. Maquoketa*, 32-564.

In a case not involving the construction of this section, *held*, that an intervening statement of a balance did not prevent subsequent items from forming a portion of the same continuous account: *Lamb v. Hanneman*, 40-41.

Where, after the conclusion of the debit items of an account, the payment of the same was assumed by a third person who afterwards made payments thereon, *held*, that such payments were not to be treated as items of the account, and the running of the statute was determined by the date of the last debit item: *Hammond v. Hale*, 61-38.

A payment made upon an account by an assignee of an insolvent debtor cannot be regarded as an item of the account for the purpose of determining whether the action on the account is barred: *Van Patten v. Bedow*, 75-589.

Under a statute requiring an action to foreclose an account for a mechanic's lien to be brought within one year from the time the payment should have been made, *held*, that no item of the account of charges for which the lien was claimed should be considered as due before the date of the last item: *Merchand v. Cook*, 4 G. Gr., 115.

Salary for services as officer of a corporation elected and employed from year to year do not constitute items of an open, current and continuous account. While the creditor may for some purposes disregard a settlement and maintain his suit upon the original items, he cannot by so doing change the character of the account for the purpose of avoiding the statute of limitations: *Porter v. Chicago I. & D. R. Co.*, 68 N. W., 724.

The claim of a public officer for compensation is not in the nature of an open account. Each one of several terms of office is to be deemed a separate employment: *Griffin v. Clay County*, 63-413.

Where, in such a case, plaintiff had confessed that his account was made up of separate causes of action, amending his petition and setting out the same in separate counts, *held*, that he could not afterwards, for the purpose of defeating the statutory bar, claim that they were parts of an open account: *Ibid.*

Under a statute which authorized defendant to be called as a witness to prove a cause of action which was barred by the statute, *held*, that an account apparently barred was admissible for the purpose of forming a foundation to remove the bar by calling defendant as a witness: *Thorn v. Moore*, 21-285.

Where it appeared that plaintiff had been continuously employed for a number of years, though prices and rate of compensation had varied at times, *held*, that the employment being continuous the account of charges for services was continuous: *Kilbourn v. Anderson*, 77-501.

Damages for the breach of a continuing contract to furnish support cannot be considered to constitute an open account so as to prevent the statute of limitations from barring such damages as have accrued prior to the limitation of the statute: *McCay v. McDowell*, 80-146.

Under particular facts, *held*, that an account for items of labor, money advanced, and rent of a sewing machine, was not a continuous account, it appearing that there was, as to the items for labor, a break of at least two years, and that the later items for labor were for work done under a contract: *Gavin v. Bischoff*, 80-605.

In an action by a county against the estate of an insane person to collect the expenses charged to such county for the support of such person in the insane asylum the items of charge are to be deemed parts of an account even though there is an interval of two years or more between different charges, the patient having been without leave absent from the asylum during that time and the county may therefore recover for all such charges if the action is brought within the proper time after the last item of charge: *Cedar County v. Sager*, 90-11.

The giving of a note for balance appearing due on an account creates a presumption that the account between the parties was settled to that date and that the account is no longer an open account: *Morse v. Minton*, 70 N. W., 691.

Items of overcharge by a railroad company on various shipments of goods in a continuous business may be considered as items of an open account: *Higley v. Burlington, C. R. & N. R. Co.*, 68 N. W., 829.

SEC. **3450. Commencement of action.** The delivery of the original notice to the sheriff of the proper county, with intent that it be served imme-

diately, which intent shall be presumed unless the contrary appears, or the actual service of that notice by another person, is a commencement of the action. [C.'73, § 2532; R., § 2744; C.'51, § 1663.]

When deemed commenced: Where the original notice was not served until a month after the petition was filed, *held*, that the court would presume the notice was delivered to the sheriff at the time of the filing of the petition with the intent that it be served immediately, and that the commencement of the action would be presumed from that time: *Snyder v. Ives*, 42-157.

The action is not commenced or pending until the delivery of the notice to the sheriff, although the petition be previously filed: *Collins v. Bane*, 34-385.

However, in an injunction proceeding, *held*, that the filing of a petition and service of the writ operated to commence the action, although no original notice was served before the period of limitation had expired: *Sweatt v. Faville*, 23-321.

Where a petition was filed, but no original notice served and no jurisdiction over defendant obtained until appearance, which was after the expiration of the period of limitation, *held*, that the suit was not sufficiently begun by the filing of the petition to prevent the cause of action being barred: *Ewell v. Chicago & N. W. R. Co.*, 29 Fed., 57.

The intent in regard to immediate service of the notice which the statute contemplates should be a continuing intent. So where a notice was placed in the sheriff's hands, who neglected to serve the same, but afterwards returned it to the attorney, who lost it and afterwards had another notice served, *held*, that the action was not begun with the delivery of the first notice to the sheriff, and that the statutory period having expired before the second notice was placed in his hands, the action was barred: *Wolfender v. Barry*, 65-653.

Where an original notice was delivered to a constable in which the return day was left blank and was afterwards filled up by him and served, *held* that such delivery of notice did not constitute a commencement of action within the meaning of the statute: *Phinney v. Donahue*, 67-192.

The sheriff is required to serve notices put in his hands for service, whether the parties to be served are residents of the county or not; and an action is sufficiently brought within the terms of this section to avoid the bar of the statute of limitations, if before the bar has accrued the notices are put into the hands of the sheriff for service, although some of the defendants are non-residents of the county: *Hampe v. Shaffer*, 76-563.

Neglect of duty by the sheriff in serving notices put in his hands will not defeat the rights of plaintiff accruing by delivery of the notice to the sheriff for service: *Ibid.*

Where an action is brought in the proper county, the delivery of the original notice to the sheriff of that county is a sufficient commencement of the action with reference to the statute of limitations, although defendant was a resident of another county in which notice was actually served: *Bracken v. McAlvey*, 83-421.

In an action upon account, where the notice was served more than a month before the account would have been barred by the statute of limitations, but the notice stated that the term of court at which defendants were required to appear would commence on the 30th day of August, when in fact it would begin on the 31st day of that month, and the cause was continued at that term and a second notice served on defendant, which was delivered to the sheriff more than five years after the date of the last item of the account, *held*, that the first notice was fatally defective, and that its delivery to the sheriff and its service did not arrest the operation of the statute of limitations and the action was barred: *Fernekes v. Case*, 75-152.

Delivery of notice to a person other than the sheriff does not constitute the beginning of an action within the terms of this section: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N.W., 761.

Where the original notice was directed to the Des Moines Insurance Company of Des Moines, Iowa, and the action was brought against and the service was made upon the Des Moines Insurance Company, *held*, that the variance did not prevent the service from being effectual as a commencement of the action: *Woodruff v. Des Moines Ins. Co.*, 90-735.

Where the claim is against an estate, the filing of the claim and such action by the administrator as to indicate the approval thereof are a sufficient commencement of an action to prevent the claim afterwards being barred by the statute of limitations, although no notice is actually served, service of notice of a claim being unnecessary, under § 3338, when the claim is approved by the administrator: *Wilson v. McElroy*, 83-593.

In case of a claim against an estate the action is commenced when the claim is filed and not from the time of notice that the claim will be brought on for hearing: *Fritz v. Fritz*, 93-27.

The commencement of an action as a *lis pendens* dates from the filing of the petition and not from the service of notice: *Fisher v. Shropshire*, 147 U. S., 133.

For most purposes the action is not commenced until the service of notice as provided by § 3514. The special provisions of this section with reference to the statute of limitations are not applicable under § 1448, with reference to actions attacking a tax deed: *Hintrager v. Nightingale*, 36 Fed., 847.

This section only fixes the time of commencement of actions with reference to the statute of limitations. Other statutory provisions determine what shall be deemed commencement of the action for other purposes: *Parkyn v. Travis*, 50-436. And see notes to § 3514.

Amendments: The filing of an amended petition, if the cause of action remains the same, does not affect the question as to whether the action is brought in time: *Cobb v. Illinois Cent. R. Co.*, 38-601, 626; *Carnegie v. Hulbert*, 70 Fed., 209; and see notes to § 3600.

Where an action was commenced in the name of two parties as executors before the period of limitation had expired, but after the expiration of such period an amended petition was filed by one only claiming as sole heir, *held*, that as the amendment was allowed without objection, defendant could not claim that the action as made by amendment was a different one from that originally commenced: *Wade v. Clark*, 52–158.

An amendment to the petition claiming additional damages, and predicated upon the same cause of action on which the original petition was founded, may be interposed after the time for bringing action on the original cause of action has expired, provided that the action on which such amendment was filed has been brought within the proper time: *Cooper v. Mills County*, 69–350.

Where the original petition, although not stating all the facts necessary in law to enable plaintiff to succeed in the action, was not attacked by demurrer or motion, *held*, that the fact that the party afterwards filed an amendment thereto after the time when, but for the commencement of the original action, the statute of limitations would have barred the action, would not deprive plaintiff of the benefit of having brought his action within the proper time: *Myers v. Kirt*, 68–124.

Where an amendment filed after the action is brought does not pertain to the cause of action so far that a new cause of action is presented, but simply alleges facts supporting plaintiff's right of recovery, the action is not barred: *Barke v. Early*, 72–273.

In a proper case plaintiff may change his claim as to the remedy and ask different relief without presenting a new cause of action: *Case v. Blood*, 71–632.

SEC. 3451. Nonresidence. The time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitation above described. [C. '73, § 2533; R., § 2745; C. '51, § 1664.]

Under this section, *held*, that residence and not citizenship was within the contemplation of the statute: *Savage v. Scott*, 45–130.

A person on his decease ceases to be a nonresident. The disability of nonresidence ends with his death: *Ibid.*

The statute commences to run in favor of a defendant having a residence in this state of such character as would subject him to process of the courts of this state. Residence, and not citizenship or domicile, determines the running of the statute: *Ibid.*

Under the statute of limitations of Nebraska, *held*, that the mere temporary absence of a debtor from the state where he has a usual place of residence, such that service of summons might be had upon him, does not suspend the statute of limitations, and it was so held where defendant, though an unmarried man, had in the state a house or rooms, which he owned or leased, furnished for his home and place of residence, and still his home and residence while temporarily absent: *Thomas v. Brewer*, 55–227.

A foreign corporation doing business within the state in such way that action might be brought against it and jurisdiction obtained in the state courts may take advantage of the statutory limitation, and is not to be deemed a nonresident: *Wall v. Chicago & N. W. R. Co.*, 69–498; *McCabe v. Illinois Cent. R. Co.*, 4 McCrary, 492; *Guinn v. Iowa Cent. R. Co.*, 4 McCrary, 566.

But this rule is not to be applied to foreign corporations generally. The fact that a foreign corporation has a general agent within the state upon whom service may be had does not entitle it to be considered a resident in such sense that the statute of limitations will run in its favor: *Winney v. Sandwich Mfg. Co.*, 86–608.

The fact that a nonresident land owner has had a tenant in possession of the property, against whom action might have been brought under § 4183, will not cause the statute of limitations to run in favor of such nonresident owner: *Heaton v. Fryberger*, 38–185, 196.

The expressions "out of this territory" and "the time of such person's absence," occurring in the corresponding action of the act of February 15, 1843, relating to the same subject, *held* to mean such an absence as suspended the power to commence action against such party in any of the methods provided by law; but not a mere temporary absence, during which the family of the party remained at his usual place of abode, and service of notice might have been had upon him by leaving a copy with some member of such family: *Penley v. Waterhouse*, 1–498.

The term beyond seas, used in a previous statute as indicating an exception to the running of the statute, was held to be considered as beyond the limits of the United States, and not merely as beyond the limits of the state: *Darling v. Meachum*, 2 G. Gr., 602.

If, by reason of nonresidence of the debtor, an action on a note is not barred, neither is the action to foreclose a mortgage securing the same: *Clinton County v. Cox*, 37–570.

Where the only evidence of absence from the state was that defendant went east, *held*, that nonresidence did not sufficiently appear in order to defeat the defense: *Tremaine v. Weatherby*, 58–615.

A railroad corporation does not become a nonresident within the meaning of this section when a receiver therefor is appointed by a federal court: *Fowler v. Des Moines & K. C. R. Co.*, 91–533.

One who has been a nonresident may be liable on an indebtedness although it is no longer enforcible against others who have also been liable therefor: *Robertson v. Stuhlmiller*, 93–326.

Where a mortgagor becomes a nonresident so that the bar of the statute does not become complete as against him, the mortgage remains enforcible against the property even in the hands of a purchaser who has not been a nonresident, and who has assumed the payment of the mortgage debt: *Ibid.*

If by reason of the nonresidence of a principal debtor an action for foreclosure of a mechanic's lien is not barred as against him it is not barred as against lien holders

although they have been residents of the state during the statutory period: *Leeds Lumber Co. v. Haworth*, 67 N. W., 383.

Where a person leaves the state in the employ of the general government, with the intention of returning when such employment shall cease, but the time of his returning is indefinite, and he retains no domicile in the state, he is to be deemed a nonresident: *Hedges v. Jones*, 63–573.

When a note shows on its face that it is barred by the statute of limitations, and defendant's answer denies the indebtedness and interposes the plea of the statute, judgment should not be rendered against defendant by default without proof of his not having been a nonresident of the state through the period of limitation: *Smith v. Gage*, 31–27.

It appearing that defendant was not a resident of the state where a judgment was recovered against him in 1850, nor subsequently when revivors thereof were had, and that he resided in this state in 1873, at the time of commencement of suit against him upon such judgment, *held*, that under the facts a presumption arose that he had resided here continuously from a period anterior to the rendering of the judgment in 1850: *Meek v. Meek*, 45–294.

When defendant pleading the statute of limitations shows when the statute commenced to run, the burden of proving an exception by reason of nonresidence is upon the party relying thereon: *Evans v. Montgomery*, 50–325.

The party pleading facts to take a case out of the operation of the statute need not plead all the facts to show that the action is not barred, but until the facts do appear the law favors a right of action: *First Nat. Bank v. Woodman*, 93–668.

The presumption arises that parties to actions are citizens of the state, and that the cause of action arose in the state, unless the contrary is shown; and when the plaintiff relies upon the nonresidence of defendant or the fact that the contract was made in another state to defeat the defense of the statute of limitations, these facts must be pleaded in the petition or in a reply to defendant's answer: *Van Patten v. Bedow*, 75–589.

The lien of a judgment terminates at the end of ten years (§ 3801) regardless of the residence of defendant, and the time of redemption from a sale under a mortgage is not extended by the fact that the purchaser is a nonresident: *Albee v. Curtis*, 77–644.

Heirs of a person dying in this state, and who have themselves been residents of the state, cannot be presumed in the absence of evidence to have afterwards been nonresidents: *Laird v. Kilbourne*, 70–83.

Under previous statutes exempting the property of volunteers in the United States military service from execution or attachment, providing that the statute of limitations should not run in favor of such volunteer, *held*, that an action to enforce a mechanic's lien against the property of such volunteer did not commence to run until after his discharge from the service: *Edwards v. McCaddon*, 20–520.

Held, also, that such provision did not apply in case of action by a soldier against one not in the military service: *Hulbert v. Hopkins*, 33–122.

The statutory provisions applied in a particular case: *Gray v. Spanton*, 35–508.

SEC. **3452. Bar in foreign jurisdiction.** When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; but this section shall not apply to causes of action arising within this state. [C. '73, § 2534; R., § 2746; C. '51, § 1665.]

If the cause of action did not arise in this state, the fact that defendant resided here before going to the state where the cause of action became barred, will not prevent his taking advantage of such bar in a subsequent suit here: *Lloyd v. Perry*, 32–144.

The use of the words "has previously resided" does not imply that the defendant interposing the plea of bar must at such time be a resident of this state. That plea may be interposed by either a resident or a nonresident: *Lebrecht v. Wilcoxon*, 40–93.

Aside from statute the rule is that a debt barred by the statute of the state in which it was contracted is not barred by the laws of another state in which suit may be brought. To enable a party to avail himself of the provisions of our statute to the contrary, he must show that he has, previous to his removal to this state, resided in another state by the laws of which the cause of action has been fully barred: *Sloan v. Waugh*, 18-224; *Petchell v. Hopkins*, 19–531.

A party must rely upon either the domestic or foreign bar. He cannot weld the time which elapsed before he came to this state to that which elapsed thereafter, in order to obtain the years requisite to constitute a bar under our statute: *Sloan v. Waugh*, 18-224.

As against an indebtedness contracted while defendant was a resident of another state, the statute only commences to run when he becomes a resident of this state (unless the claim was then barred as here provided): *Petchell v. Hopkins*, 19–531.

It will not be presumed that because notes are barred by the law of the state where the defendant has previously resided a mortgage given to secure them is also barred thereby: *Gillett v. Hill*, 32–220.

Before the change of the statute in 1870, which added the last sentence to this section, *held*, that the provisions as to the bar of a foreign statute fully completed were applicable to actions arising within the state, if they were general in their nature, so that they might have been prosecuted where defendant resided: *Davis v. Harper*, 48–513.

And *held*, also, that where a cause of action arising in this state had thus become barred under the laws of a foreign state, the subsequent enactment of the statutory provision of 1870 did not remove such bar: *Thompson v. Read*, 41–48.

A cause of action for the recovery of taxes paid by a person claiming to be the owner of real estate, but against the one subsequently adjudged to be the owner thereof, is a cause of action arising in this state under the statutory provision: *Bradley v. Cole*, 67–650.

SEC. **3453. Minors and insane persons.** The times limited for actions herein, except those brought for penalties and forfeitures, shall be extended in favor of minors and insane persons, so that they shall have one year from and after the termination of such disability within which to commence said action. [C.'73, § 2535; R., § 2747; C.'51, § 1666.]

By this section action for the recovery of real property must be brought by a minor within one year after attaining majority, when the ten years' limitation expires during the year or during minority. If the limitation runs for more than a year after majority the minor's rights are the same as those of an adult: *Campbell v. Long*, 20–382.

The statute of limitations will not bar an action by a minor brought before the termination of his minority: *McGinnis v. Edgell*, 39–419.

The statute commences to run during infancy, but the action is not barred until at least one year after majority: *Mathews v. Stephens*, 39–279.

Where the minor owns as tenant in common with others, the fact that his claim or right is kept alive by this exception in his favor will not keep alive the claims of his cotenants: *Peters v. Jones*, 35–572.

Under § 1439 extending in favor of a minor the time for redeeming from a tax sale to a year "after such liability is removed," *held*, that such disability was removed by death and the redemption must be made within the year following and not afterwards: *Gibbs v. Sawyer*, 48–443.

Under the Revision there was no such exception in favor of insane persons, nor was there at common law: *Shorick v. Bruce*, 21–305.

Where plaintiff, within one year after attaining his majority, brought action to redeem from a tax sale made during his minority, claiming title by virtue of a bond for a deed executed more than ten years previously, *held*, that the right which the grantor in the title bond would have to interpose the defense of the statute of limitations, against any claim of plaintiff thereunder, passed to defendant by the tax deed and might be interposed by him against plaintiff's action to redeem: *Byington v. Stone*, 51–317.

This exception to the statute of limitations in favor of minors applies to such causes of action as accrued originally in their favor, and has no application to such as come to them by descent, and against which the statute had already begun to run: *Grether v. Clark*, 75–383.

Therefore, where an ancestor foreclosed a mortgage against the mortgagor only, not making the grantees of the mortgagor who were in possession parties, and afterwards died leaving minor heirs, *held*, that his right of action against the grantees, having accrued before his death, was barred as against his minor heirs in ten years from the time it accrued: *Ibid.*

The fact that the owner of a cause of action is a minor when it accrues will not prevent the running of the statute, and upon the death of the minor the action is to be deemed (under § 3445) to have accrued to the personal representative at the same time that it did to the minor: *Murphy v. Chicago, M. & St. P. R. Co.*, 80–26.

The cause of action in favor of the minor or insane person accrues and the statute of limitations commences to run notwithstanding the disability. All that this section secures is that there shall be a reasonable time after the removal of the disability before the action shall be deemed barred: *McNeill v. Sigler*, 64 N. W., 604.

The periods provided for under this and the following sections are not to be reckoned as cumulative. Thus, after the death of an insane person in whose favor a cause of action exists which would have been barred save for the ground of insanity, only one year and not two should be reckoned in determining the bar of the statute: *Ibid.*

The exception here made in behalf of a minor is not to be incorporated by construction into the statutory provision requiring notice of a claim against a city for injuries received from defective streets to be given within ninety days: *Morgan v. Des Moines*, 60 Fed., 208. And see notes to § 3447, ¶ 1.

SEC. **3454. Exception in case of death.** If the person having a cause of action dies within one year next previous to the expiration of the limitation above provided for, such limitation shall not apply until one year after such death. [C.'73, § 2536; R., § 2748; C.'51, § 1667.]

SEC. **3455. Failure of action.** If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first. [C.'73, § 2537; R., § 2749; C.'51, § 1668.]

This provision applies when no judgment on the merits has been rendered and another suit is brought on the same cause of action. If judgment on the merits is rendered in the first suit it will bar a new one: *McDonald v. Jackson*, 55–37.

This section will not operate to extend the period of limitation where a condition prece-

dent to the right to bring the action has not been complied with in proper time, for instance, the presentation of the claim to a board of directors: *District T'p v. District T'p*, 62-30.

Nor will this provision apply to dismissal of an action by plaintiff unless such dismissal is compulsory. Therefore, *held*, that where plaintiff voluntarily dismissed his action for the reason that he found that he could not obtain justice in the court in which the cause was pending, a new action brought by him after the expiration of the period of limitation, but within six months after the dismissal of the preceding action, was barred: *Archer v. Chicago, B. & Q. R. Co.*, 65-611.

Under this statutory provision the fact that the first suit was discontinued (under § 3515), for failure of plaintiff's attorney to file the petition by the time fixed in the notice, constitutes such negligence as to prevent another suit on the same cause of action being brought after the expiration of the statutory period of limitation: *Clark v. Stevens*, 55-361.

It is for the plaintiff to allege in the second action that the failure of the first was not due to negligence in its prosecution: *Pardey v. Mechanicsville*, 70 N. W., 189.

In analogy with this section, where an action on a policy of insurance was dismissed because of the misdescription of the property in the policy and an action in equity was brought to reform the policy and recover thereunder, *held*, that the second action, if brought within a reasonable time, would not be barred by the limitation in the policy as to the time of bringing suit thereon; *Jacobs v. St. Paul F. & M. Ins. Co.*, 86-145.

Where the action under a policy of insurance is prematurely brought and plaintiff is defeated on that account, he cannot bring a new action under the provisions of this section. He will be deemed to have been negligent in having prosecuted the action prematurely brought instead of dismissing it and bringing a proper action within the period prescribed for bringing such action: *Heusinkveld v. Capital Ins. Co.*, 64 N. W., 594; *Wilhelmi v. Des Moines Ins. Co.*, 68 N. W., 782; *Harrison v. Hartford F. Ins. Co.*, 67 Fed., 298.

But overruling the foregoing cases so far as they are considered to be in point, it is now held, that this section of the statute has no application to limitations by contract, such as those found in policies of insurance: *Harrison v. Hartford F. Ins. Co.*, 71 N. W., 220.

SEC. 3456. Admission in writing—new promise. Causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same. [C. '73, § 2539; R., § 2751; C. '51, § 1670.]

What sufficient admission: An admission should not be excluded because made on Sunday: *Ayers v. Bane*, 39-518.

Partial payments and indorsements thereof on a promissory note are not sufficient to prevent the bar of the statute. The rule was different before the adoption of the statutory provision, but as the statute applies to the remedy, it is not unconstitutional as affecting contracts already made: *Parsons v. Carey*, 28-431; *Harrencourt v. Merritt*, 29-71; *Roberts v. Hammon*, 29-128.

An indorsement of part payment made on a note signed by the maker of the note does not constitute such admission that the debt is unpaid and a new promise to pay the same as is required to revive the debt: *Hale v. Wilson*, 70-311.

Without determining whether an indorsement of payment, signed by the party to be charged, would remove the bar of the statute, *held*, that such indorsement, signed by the treasurer of a district township, had no such effect, as he had no authority to bind such township by his contracts or admissions: *Carpenter v. District T'p*, 58-335.

A payment upon a current account before it becomes barred will prevent the statute from running as to any part of the account until five years from such payment: *Thorn v. Moore*, 21-285.

A new promise to pay a debt at a different time and in a different manner from that of the original contract is not a new agreement, but only a new promise, and cannot be enforced unless it is in writing as required by statute: *Price v. Price*, 34-404.

An agreement extending time on the original obligation without a new consideration does not suspend the right of action on such obligation, and therefore does not prevent the statute of limitations from running: *Ibid.*

Where a party is in default as to a debt or obligation, the right of action arises at the time liability accrues, and the statute of limitations begins to run from the time that defendant first becomes liable. Indulgence extended by a party to whom defendant is bound, or anything short of the extinction of the liability or the commencement of an action, will not defeat the statute. Subsequent promises to comply with the obligation will not make a new cause of action: *Cobb v. Illinois Cent. R. Co.*, 38-601.

Whether an admission would be good, if made to one not a party in interest or the agent of such party, *quære: Collins v. Bane*, 34-385, 389; *Palmer v. Butler*, 36-576.

But the admission need not show to whom it was made: *Mahon v. Cooley*, 36-479.

A writing admitting the debt proven to be by the party sought to be charged, but not signed by him, is not admissible, and the oral testimony of defendant that the debt in controversy is the one referred to in certain written admissions is not competent, not being an admission in writing: *Collins v. Bane*, 34-385, 390.

A judgment cannot be revived by an admission: *McAleer v. Clay County*, 38 Fed., 707.

The written admission or new promise should be signed by the party to be charged therewith. And *held*, that in case of a judgment against a county there was no one having authority to sign such admission: *Ibid.*

A renewal of notes evidencing partnership indebtedness made by the surviving member of the firm, *held* sufficient to remove

the bar of the statute of limitations as to an action to enforce the payment of the indebtedness out of firm property held by the representatives of the surviving partner: *Van Staden v. Kline*, 64–180.

Where a mortgagor, in executing a second mortgage to persons as trustees under a will expressly stated that it was subject to a prior mortgage held by the same persons as trustees of the will of a different person, *held*, that the recital in the second mortgage was a sufficient admission to the mortgages, so far as they held under the first mortgage, to take the case out of the statute of limitations, and amounted to a sufficient admission of the existence of the previous mortgage to authorize the inference of a promise to pay the same: *Palmer v. Butler*, 36–576.

It is not necessary that there be both an admission that a debt is unpaid and a new promise to pay, but either alone is sufficient: *Stewart v. McFarland*, 84–55.

While an admission contained in a will may be sufficient to revive the debt, yet, in a particular case, *held*, that the direction in the will that a specified sum should be paid to the widow "in full payment of her note against me," such direction being in connection with other bequests, and the amount due on the note being greater than the amount thus bequeathed, and it being stipulated that the provisions of the will should be in lieu of dower, *held* not a sufficient admission of indebtedness to revive the debt: *Ibid.*

It is sufficient that there is either an admission that the debt is unpaid or a new promise to pay it, but the admission must be in writing. A statement of the debtor that he will pay what he can and what is right is not sufficient: *Nelson v. Hanson*, 92–356.

Where an assignment was made for the benefit of creditors and an account recognized and included in the sworn schedule of claims, *held*, that while this was not a new promise, but only an admission that the account was unpaid, still if it were a promise, such promise and admission would not authorize an action upon the account more than five years after the revivor: *Van Patten v. Bedow*, 75–589.

A letter which referred to "those old notes" and said: "I have no money now, but you shall have every cent that is due on them," *held* not to be an admission that anything was due on a particular note and a promise to pay an amount on it, and therefore not sufficient to revive the debt on the note which was barred by the statute of limitations: *Stout v. Marshall*, 75–498.

In an action upon two promissory notes which upon their face appeared to be barred by the statute of limitations, but where it appeared that before the bar of the statute defendant had, in a letter, referred to an existing indebtedness and to the fact that he had paid interest due and not due upon the same, *held*, that the letter was an admission of indebtedness, and if plaintiff could prove that the notes in suit constituted a part of such indebtedness, the cause of action was revived by the letter: *Miller v. Beardsley*, 81–720.

A promise to pay will not revive an action of tort after the action is barred by lapse of time nor will the tort which is already barred serve as a consideration for a new promise to pay the damages sustained: *Peterson v. Breitag*, 88–418.

A new promise will not be binding on a surety if not signed by him: *Drake v. Stuart*, 87–341.

A proposition to compromise is not a new promise to pay and does not revive the debt: *Morehead v. Gallinger*, 9–519; *Brenneman v. Edwards*, 55–374.

As to the sufficiency of statements in letters to constitute admissions or new promises, see *Bayliss v. Street*, 51–627; *Oakson v. Beach*, 36–171.

The first part of the statutory provision already set out relating to admissions or new promises simply declares the common-law rule. An acknowledgment of the debt is a sufficient admission, but it seems that if the admission or acknowledgment is coupled with the expression of an unwillingness to pay and an intention not to pay, it will not revive the debt: *Penley v. Waterhouse*, 3–418.

Parol evidence may be received to show that a letter containing an admission was addressed to the plaintiff by defendant, and referred to the account in suit, but the amount of the recovery must be limited to the amount therein admitted: *Wise v. Adair*, 50–104.

In a particular case, *held*, that oral testimony was admissible to show that a letter addressed "Dear cousin" was sent to one having a beneficial interest in the note sued on, and therefore constituted an admission taking such note out of the statute of limitations: *Collins v. Bane*, 34–385.

The question whether a writing sufficiently identifies and refers to the claim in suit in order to constitute an admission taking such claim out of the statute of limitations is one of intention, and is properly left to the jury: *Ibid.*

The burden of proof is upon plaintiff to show that the acknowledgment has reference to the claim which he sets out, but the question whether it has reference to such claim or not is for the jury: *Dixon v. State*, 3–416.

Parol evidence is admissible to establish the identity of the note or other indebtedness referred to in the written admission: *First Nat. Bank v. Woodman*, 93–668.

Where the written admission shows something to be due, the cause of action is thereby revived for whatever is due to be settled by averment and proof. If the admission refers to a note showing indebtedness on its face, such note *prima facie* fixes the amount due. The admission simply revives the cause of action: *Ibid.*

Remittance by letter of a payment of interest is an admission that something is due: *Ibid.*

An admission which revives the debt suspends also the operation of the statute of limitations as to the mortgage given to secure the indebtedness, and such reviver as to a prior mortgage will be effectual as against a subsequent mortgage, whether the revivor takes place before or after the first mortgage becomes barred: *Ibid.*

The revivor will be effectual as to a sub-

sequent mortgage though by the record the first mortgage appears to be barred when the subsequent one is executed: *Ibid.*

Where at the time a mortgage is executed to one who parts with value a prior mortgage is barred by the statute of limitations a revival by the mortgagor of the prior mortgage indebtedness will not give such prior mortgage priority over the mortgagee's rights under the second mortgage: *Cook v. Prindle*, 66 N.W., 781.

After a debt has been revived by an admission, the statute commences to run anew against the original cause of action, and will run for the same length of time as against the original claim: *Bayliss v. Street*, 51–627.

Original action revived: The subsequent promise is to be considered as a waiver of the statute or the bar created by the statute: *Penley v. Waterhouse*, 3–418.

An admission or new promise may be made before the bar of the statute becomes complete as well as afterwards: *Ibid.; Lindsey v. Lyman*, 37–206.

A new consideration is not necessary to support it. The action should be brought on the original cause of action and not on such admission or new promise: *Frisbee v. Seaman*, 49–95.

Either an admission or new promise is sufficient. Both are not necessary: *Mahon v. Cooley*, 36–479; *Ayres v. Bane*, 39–518.

A new promise which operates to keep alive a debt will also keep alive the lien of a mortgage given to secure the same: *Clinton County v. Cox*, 37–570.

An admission of the husband, without the wife's consent, will keep alive the lien of a mortgage given on the homestead to secure the debt: *Mahon v. Cooley*, 36–479.

A renewal by acknowledgment or new promise, made prior to the sale of the premises mortgaged to secure the debt so renewed, will be binding on the vendee thereof, and he cannot set up the statute of limitations against such mortgage: *Palmer v. Butler*, 36–576.

But it is otherwise if the renewal is made subsequently to the sale: *Day v. Baldwin*, 34–380.

Where a junior mortgage was taken while a senior mortgage was in existence and not barred by the statute of limitations, and the senior mortgage afterward became barred, but was subsequently revived by a new promise of the mortgagor to pay the debt, made while the junior mortgage was in process of foreclosure, *held*, that no equities having intervened in favor of junior mortgagee, the debt secured by the senior mortgage was still a prior lien to that of the junior mortgage: *Kerndt v. Porterfield*, 56–412.

SEC. **3457. Counter-claim.** A counter-claim may be pleaded as a defense to any cause of action, notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred, and was not barred at the time the claim sued on originated; but no judgment thereon, except for costs, can be rendered in favor of the party so pleading it. [C.'73, § 2540; R., § 2752.]

Any counter-claim which is authorized by § 3570 may be pleaded as a counter-claim, notwithstanding it is barred, and the statutory provision in that respect is not limited to counter-claims which were strictly so named under previous statutes: *Folsom v. Winch*, 63–477.

No recovery can be allowed on a counter-claim, which is thus interposed, although barred, for any amount over and above the amount of plaintiff's claim, such being the express statutory provision: *Ibid.*

Where it is attempted to interpose as a counter-claim a cause of action which appears to be barred, such counter-claim is available to the defendant only to the extent of extinguishment of plaintiff's claim, and therefore the amount in controversy is the amount of the claim of the plaintiff and not the full amount of defendant's counter-claim: *Schultz v. Holbrook*, 86–569.

Special statutes of limitation with reference to the time of filing claims against an estate do not apply to an offset interposed by a person who is sued by an administrator to recover a debt due from him to the estate: *Ware v. Howley*, 68–633.

A claim against one who is an heir may be properly set up against him in settling his distributive share of the estate, although such claim be barred by the statute of limitations. But the pendency of proceedings in chancery for the settlement of the estate, which are in no sense an action on the claim, will not prevent the statute from running, and, after sufficient time, would defeat an action at law on the claim: *Garrett v. Pierson*, 29–304.

Section applied: *Allen v. Maddox*, 40–124

SEC. **3458. Injunction.** When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition shall not be part of the time limited for the commencement of the action, except as herein otherwise provided. [C. '73, § 2541.]

The time during which a party is prevented by injunction from enforcing a judgment in his favor should be excluded, both as to such party and those claiming under him: *Tredway v. McDonald*, 51–663.

The provision of § 2521 of Code of '73 by which an action on a judgment could not be brought within fifteen years after its rendition, *held* to constitute a statutory prohibition so as to entitle the holder of the judgment to twenty years after the expiration of the fifteen years' term within which to bring such action: *Weiser v. McDowell*, 93–772. But see now § 3439.

CHAPTER 3.

OF PARTIES TO AN ACTION.

SECTION **3459. Plaintiff—party in interest—exception.** Every action must be prosecuted in the name of the real party in interest; but an executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted. [C.'73, §§ 2543–4; R., §§ 2757–8; C.'51, § 1676.]

Who may be plaintiff: A taxpayer may maintain a proceeding by *certiorari* to review an action of the board of supervisors whereby his taxes are wrongfully increased: *Goetzman v. Whitaker*, 81–527.

A nonresident taxpayer may maintain an action to enjoin a city from improper disposition of city property: *Brockman v. Creston*, 79–587.

Nor can the motives of a party in such case be inquired into: *Ibid.*

As to parties in a suit by injunction to restrain official action, see, also, notes to § 4354.

A garnishee has such interest in the subject-matter of a judgment against him that he may bring action in equity to set it aside for fraud: *Searle v. Fairbanks*, 80–307.

Where money belonging to the county is improperly paid out by the treasurer, an action for the recovery thereof may be brought in the name of the county: *Polk County v. Sherman*, 68 N.W., 562.

Real property in interest: The party holding the legal title of a note or instrument may sue on it, though he be an agent or trustee and liable to account to another for the proceeds of the recovery; but defendant in such cases may interpose any defense which he may have against the party beneficially interested. The party beneficially interested may also sue in his own name: *Cottle v. Cole*, 20–481; *Farwell v. Tyler*, 5–535; *Pearson v. Cummings*, 28–344.

Holder of note: An indorsee may sue in his own name, although he holds the note only as security: *Sheldon v. Middleton*, 10–17.

Where a promissory note is indorsed as collateral security, the title passes to the indorsee, who may sue on it in his own name without averring or showing that the indebtedness is *bona fide*: *McCarty v. Clark*, 10–588.

A party holding a note and mortgage by written assignment may sue thereon and recover notwithstanding parol evidence that he holds the same only for collection: *Mann v. Cross*, 9–327.

One to whom a note is indorsed for collection may bring action thereon as the real party in interest: *Abell Note, etc., Co. v. Hurd*, 85–559.

Where it appeared that the owner of negotiable instruments had deposited them with his agent as collateral security for another party, and to be applied in payment of the debt so secured, *held*, that such other party became the owner thereof in such sense that he might have brought action on the securities in his own name as owner, and therefore that the death of the original owner did not terminate the right of such agent to possession of the notes and their proceeds: *Bennett v. Stoddard*, 58–654.

The holder of notes secured by mortgage remains the real party in interest although he has assigned the mortgage securing such notes without an assignment of the notes themselves: *Swan v. Yaple*, 35–248.

The real party in interest may sue on a negotiable note, although he is not the payee or indorsee: *McDowell v. Bartlett*, 14–157.

He may be entitled to sue under an assignment made otherwise than by indorsement: *Warnock v. Richardson*, 50–450; *Allison v. Barrett*, 16–278.

A verbal assignment will be sufficient to enable the assignee of a note to sue: *Green v. Marble*, 37–95.

Where the note in suit had been transferred to plaintiff without indorsement or written assignment, and he had given his check therefor, *held*, that he was entitled to bring action on such note, although it did not appear that the check had been paid: *Harlan v. Ash*, 84–38.

The holder without indorsement of a promissory note payable to the order of payee may maintain an action thereon in his own name: *Trustees of Northwestern College v. Schwagler*, 37–577.

Where a note had been indorsed to and was in the possession of plaintiff, and the petition alleged that it was owned by him, which allegation was not controverted by defendant, although the answer contained a general denial of matters not admitted, *held*, that the proof of ownership was sufficient: *Farmers Bank v. Arthur*, 75–129.

Where a note intended for a principal was executed to the agent of such principal, who died without having transferred it, and no administration on the estate was granted, *held*, that the principal might sue on the note in his own name: *McDowell v. Bartlett*, 14–157.

Where a note left with an agent, after maturity for collection by him, was wrongfully converted to his own use, and afterwards seized under execution and sold as his property to plaintiff, *held*, that plaintiff had not become the owner and could not sue thereon, not being the real party in interest: *McCormick v. Williams*, 54–50.

A person in possession of a note payable to bearer may maintain suit thereon in his own name: *Allensworth v. Moore*, 3 G. Gr., 273; *Riggs v. Price*, 3 G. Gr., 334; *Bigelow v. Burnham*, 90–300.

A party who assigns notes and mortgages

as securities, but afterwards pays off the indebtedness for which such assignment of the instruments is made, and regains possession of the instruments, may maintain action thereon as the real party in interest without a written reassignment: *Norris v. Hix*, 74–524.

A party in possession of a non-negotiable note, payable to another, may bring suit thereon in his own name: *Rising v. Teabout*, 73–419.

A party suing on an instrument not negotiable by delivery, and not payable to or indorsed to him, must show by what right he claims to sue. It is not sufficient to aver simply that he is the owner: *Montague v. Reineger*, 11–503.

A party suing on a note must have the legal property or beneficial interest. A surety, prior to the payment of the note, has no right therein as against the principal: *Dennison v. Soper*, 33–183.

The assignee of a chose in action may sue thereon in his own name: *Roberts v. Corbin*, 26–315, 325.

The assignee by verbal assignment of an instrument of guaranty may sue thereon: *Green v. Marble*, 37–95.

One who has possession of a county warrant assigned to bearer may bring action thereon in his own name: *McCormick v. Grundy County*, 24–382.

The assignee of a bond by parol assignment may sue thereon: *Conyngham v. Smith*, 16–471.

Where plaintiff sues as assignee of a bond, the assignor thereof being made party defendant and admitting such assignment of record, *held*, that the obligor in the bond could not object that plaintiff was not the owner: *Burrows v. Stryker*, 47–477.

Where the lessor had subsequently to the lease sold the premises, but had not assigned the contract of lease, *held*, that he might bring action in his own name under the lease against the lessee and a party who had guaranteed the payment of the rent, and that the vendee might not maintain such action, although he might have sued lessee alone for the rent: *McLott v. Savery*, 11–323.

Where by assignment a party is enabled to prosecute a suit in his own name although it is in the interest of the assignor, the judgment in such a suit will be conclusive as against a suit by the original assignor after reassignment of the claim to him: *Garretson v. Ferrall*, 92–728.

A promise made to a person holding a lien is transferable with the lien to an assignee, and may be enforced in an action by the assignee in his own name: *Barker v. Guilliam*, 5–510.

It would seem that the mortgagee of property might maintain an action on a policy of insurance issued to the mortgagor and assigned to the mortgagee after loss, notwithstanding a provision therein prohibiting its assignment: *Mershon v. National Ins. Co.*, 34–87.

If the claim is assigned in fact, though merely for the purpose of action, defendant cannot object that suit is brought by the assignee, even if there is no consideration therefor: *Gere v. Council Bluffs Ins. Co.* 67–272.

An assignment absolute in form vests plaintiff with the title and property in the claim, and is sufficient to enable the assignee to bring action thereon in his own name, although the assignment to him is merely in trust: *Goodnow v. Litchfield*, 63–275.

Where a policy of insurance was taken out in the name of the owner and assigned to the mortgagee as his interest might appear, *held*, that an action on such policy might be brought by the owner to recover the entire amount of the loss due thereon, there being ample power in the court to enter such judgment in the case as would fully protect the rights of all parties: *Stevens v. Citizens Ins. Co.*, 69–658.

The assignee of a personal action for tort may maintain an action thereon. His right of action will not be defeated by reason of an agreement made at the time of the assignment to pay a portion of the amount recovered to the assignor: *Vimont v. Chicago & N. W. R. Co.*, 64–513.

The assignee of a cause of action may bring action thereon as the real party in interest, although the intention of the assignment was to prevent a removal of the cause to the federal courts: *Vimont v. Chicago & N. W. R. Co.*, 69–296.

The fact that an action is being prosecuted by the attorney under a champertous contract, or that plaintiff is prosecuting the action under an assignment by a corporation which it has no power to make, cannot be set up to defeat the action: *Small v. Chicago, R. I. & P. R. Co.*, 55–582.

A note payable to payee or order may be assigned without indorsement so that (under § 3461) the assignee may sue in his own name, but subject to any defense or set-off existing in behalf of the maker against the assignor, before notice of assignment: *Younker v. Martin*, 18–143; *Pearson v. Cummings*, 28–344.

A transfer by a separate instrument is an assignment and not an indorsement: *Franklin v. Twogood*, 18–515.

A valid verbal transfer of an account will enable the transferee to bring action thereon: *West v. Moody*, 33–137.

One to whom an account is assigned with an agreement on his part to pay over the proceeds realized is the real party in interest entitled to sue on the account, and such a transaction does not constitute champerty: *Knadler v. Sharp*, 36–232.

A judgment may be assigned, and action thereon should be prosecuted in the name of the assignee: *Edmonds v. Montgomery*, 1–143.

Where a party, having recovered a judgment for the possession of certain land, conveyed such land to another, *held*, that the grantee became entitled to the benefit of such judgment: *Wright v. Parks*, 10–342.

The assignee of a judgment may sue thereon in his own name: *Charles v. Haskins*, 11–329.

One to whom a judgment has been assigned without consideration for the purpose of enabling him to bring action thereon may prosecute a suit to enforce its collection as

the real party in interest, being the holder of the legal title: *Searing v. Berry*, 58–20.

Holder of legal title to real property: The holder of the legal title to real property may sue for trespass, although another party is entitled to the proceeds of the recovery: *State v. Butterworth*, 2–158.

Where property is sold to one person and at his request conveyed to another for a special purpose, the one to whom it is actually sold is the proper party plaintiff to a suit to recover for fraudulent representations in the sale: *Phillips v. Bush*, 15–64.

The holder of the legal title of real property is the real party in interest in an action for the recovery thereof, although he be under obligation to account to another for the proceeds: *Boardman v. Beckwith*, 18–292.

Where the lessor of premises conveys the same the right to collect rents afterwards accruing and payable is in the vendee, and he may recover the same in an action in his own name: *Abercrombie v. Redpath*, 1–111.

A party who has conveyed his interest in property cannot thereafter maintain an action to quiet title to the land so conveyed: *Page County v. Burlington & M. R. R. Co.*, 40–520.

Where a party sued for relief in regard to property which it appeared he had before conveyed, *held*, that the burden of proof was upon him to show that as warrantor or otherwise he had such interest as to entitle him to maintain the action: *Harlow v. Gow*, 44–533.

As to transfer of interest in the subject-matter during the pending of the action, see § 3476 and notes.

One partner cannot maintain an action on an indebtedness due to the partnership: *Sypher v. Savery*, 39–258.

A surviving partner of a firm is the real party in interest as to claims existing in favor of the partnership, and he should sue as surviving partner without joining the representatives of the deceased partner: *Brown v. Allen*, 35–306.

Where, by the terms of dissolution of a partnership, the proceeds of indebtedness due the firm was to be applied to the extinguishment of indebtedness due from the firm to one partner, *held*, that action to recover such indebtedness was properly brought in the firm name, and that the partner entitled to the proceeds was not the real party in interest in such sense that the action must be brought in his name: *White v. Savery*, 50–515.

Where payment was made of a partnership note by the administrator of a deceased partner out of the assets of the estate, such note having been allowed by the court as a claim against such estate, and an action was brought by the administrator against the surviving partner for contribution, *held*, that such administrator was the proper party plaintiff and not the surviving partner in the name of the firm: *Hosmer v. Burke*, 26–353.

Where a partner enters into a contract for the firm, action thereon may be brought in the firm name without joining the partner as a party: *Marsh v. Chicago, R. I. & P. R. Co.*, 79–332.

Heirs: Where one became entitled to a distributive share in an estate, *held*, that at her death it vested in her administrator, and he alone could recover the same for the use of the estate, to be expended in the payment of debts thereof and to be distributed to the heirs, and that the heirs were not proper parties to maintain an action for its recovery: *Rhodes v. Stout*, 26–313.

The heirs are not the real parties in interest as to a cause of action in favor of the ancestor, although no administration on his estate has been taken out, where it does not appear that the time for the original application for administration has expired: *Haynes v. Harris*, 33–516; *Baird v. Brooks*, 65–40.

But if the period for granting administration has expired without an administrator being appointed, action on such a note may be maintained by the heirs as the real parties in interest: *Phinny v. Warren*, 52–332.

Action by or against boat or vessel: Whilst under former statutes suits were authorized to be instituted against a boat or vessel by name, such statutes did not authorize any such boat or vessel to bring suit or sue out any writ or process in that name: *Steamboat Kentucky v. Hine*, 1 G. Gr., 379.

An action cannot be prosecuted in a name which is not that of a partnership, corporation or person. "Steamboat Pembinaw and owners," *held* not to be the name of a party in whose name action might be prosecuted: *Steamboat Pembinaw v. Wilson*, 11–479.

Misnomer of corporation: Where the corporate name was "The Trustees of Algona College," and a judgment was obtained against the corporation in the name of "Algona College," *held*, that the judgment was not void by reason of the misnomer: *Wilson v. Baker*, 52–423.

Unincorporated association: None but a natural or artificial person can become a party to a suit. Action cannot be maintained in the name of an unincorporated association, nor by a third person on a note made for the benefit of such association: *Nightingale v. Barney*, 4 G. Gr., 106.

Such an association cannot sue in that character, nor can individual members thereof prosecute a suit in behalf of other members: *Pipe v. Bateman*, 1–369.

It is not proper for a taxpayer to bring an action in the name of the school district to recover damages against the members of the board of directors individually for an improper location of a school-house: *Independent Dist. ex rel. v. Gookin*, 72–387.

Substitution of proper party: Where objection is made to the capacity of a plaintiff to bring suit, the court may allow the name of the proper party to be substituted. A plea of abatement on that ground is no longer allowed: *Roop v. Clark*, 4 G. Gr., 294.

Where an action was brought by a plaintiff who was not a proper party to bring action, and he afterwards withdrew and the proper plaintiff was substituted, *held*, that the action was not thereby dismissed: *Griffin v. Sheley*, 55–513.

Persons who are already parties to a proceeding in any capacity are bound to take notice of an order of substitution by which

they are made parties in another capacity: *MacGregor v. Gardner*, 14–326.

Want of capacity; who may raise: The fact that one of several co-plaintiffs has not legal capacity to sue is not a ground of demurrer. The proper remedy in such case is by motion to strike from the petition the name of the party improperly joined: *District T'p v. District T'p*, 44–512.

Want of capacity in one of several defendants cannot be raised as a ground of objection by a co-defendant: *Ibid.*

An administrator may be properly joined in a bill in equity by parties jointly interested with his intestate seeking to set aside a judgment in partition of lands: *Powell v. Spaulding*, 3 G. Gr., 443.

Where a bond in a replevin suit concerning property of an intestate was made payable to the executor in his individual capacity, *held*, that he might sue thereon either in his representative capacity or individually: *Oliver v. Townsend*, 16–430.

Where decedent gave defendant a title bond to real estate, receiving notes for the purchase money, and afterwards bequeathed and devised the notes and the title to the property with power to convey to plaintiff, who was also executrix of his will, *held*, that the latter had an election to sue on the notes for foreclosure either individually or as executrix: *Grimmell v. Warner*, 21–11.

Guardian: Where a contract of insurance was made by the guardian in her own name, but with the knowledge on the part of the company that the title of the property was in the minor, *held*, that action on such contract could be brought by the guardian in her own name: *Jamison v. State Ins. Co.*, 85–229.

A guardianship does not necessarily terminate at the moment the ward becomes of age, and therefore the fact that the ward is of age will not, in itself, show that an action by the guardian cannot be maintained: *Reed v. Lane*, 65 N.W., 380.

Trustee: The beneficiary in a trust deed may sue in his own name: *Devin v. Hendershott*, 32–192.

The penalty of a bail bond being payable into the county treasury for the benefit of the school fund renders the county such a "trustee" therefor that it may bring action for such penalty: *Shelby County v. Simmonds*, 33–345.

The township trustees and clerk of a township are not the trustees of an express trust in such sense as to be entitled to recover from the county money due to the township or the local board of health for expenses of the board of health: *Sanderson v. Cerro Gordo County*, 80–89.

A railroad company which has without authority delivered goods to a person who was to receive the same only on payment of draft attached to bills of lading, without such draft being paid or bills of lading delivered, is the trustee of an express trust in such sense as to be entitled to bring action to recover from the person to whom the goods were delivered, the goods themselves or the value thereof: *Starker v. McCosh Iron & Steel Co.*, 62 N. W., 848.

Where a contract is made with an agent or trustee, the real party in interest may sue in his own name without joining such agent or trustee, or the latter may sue without joining the former: *Rice v. Savery*, 22–470.

An action on an instrument made payable to trustees for the benefit of, and to secure repayment to, subscribers to a fund of the amount subscribed and paid by them may be brought by the subscribers who have not been paid, and any subscriber, if he were the only unpaid subscriber, might bring such action for himself. But as to whether one such subscriber might bring the action for the amount to which he was entitled, if there were other unpaid subscribers, the court were not agreed: *Ibid.*

Where a subscription was made payable to the treasurer of an unincorporated association, *held*, that he might sue thereon in his own name: *McDonald v. Gray*, 11–508.

The trustee of an unincorporated association may sue in his own name for the benefit of the association as the trustee of an express trust: *Laughlin v. Greene*, 14–92; *Arts v. Guthrie*, 75–674.

While the beneficiary may bring action in his own name to foreclose a deed of trust, it is necessary that the trustee of the legal title be made a party: *Tucker v. Silver*, 9–261.

An assignee suing by virtue of an assignment in writing of a cause of action, by setting out the assignment by way of exhibit to his petition, sufficiently shows that he sues as trustee of an express trust, without further allegation: *Goodnow v. Litchfield*, 67–691; *Goodnow v. Oakley*, 68–25.

Action by agent: Where a contract is made in the name of a person acting as agent for another, and the promise is made to him, he is the real party having the legal interest, and may sue thereon: *Fear v. Jones*, 6–169.

An agent who is left in charge of real property has no such interest therein as to enable him to maintain in his own name an action for the possession thereof: *McHenry v. Painter*, 58–365.

An action to recover damages for mistake in transmitting a message by a broker to his principal may be brought by the principal in his own name: *Aiken v. Western Union Tel. Co.*, 69–31.

Where an agent of a manufacturer made a contract to sell a machine which he was not entitled to make as agent, but which he claimed to make for himself, he being responsible to the company for the machine sold, *held*, that he might maintain action on the contract in his own name: *Jackson v. Mott*, 76–263.

One may bring action for breach of a contract made in his name individually, though in reality he be acting as agent for another: *Brown v. Sharkey*, 93–157.

Person for whose benefit contract is made: Where one party purchased a stock of goods coupled with an agreement on the part of the seller not to engage in the same business, *held*, that the purchaser might maintain an action for the breach of such agreement, although the purchase was made for the benefit of a third party: *Moorehead v. Hyde*, 38–382.

Where plaintiff had contracted with different persons to furnish him grain, agreeing to procure for them transportation to the common destination of the grain, *held*, that he might be a proper party plaintiff in an action against a carrier for refusing to transport the grain when tendered by the respective sellers: *Cobb v. Illinois Cent. R. Co.*, 38–601.

In an action brought by a party to recover an amount deposited by him for himself and others as a wager, *held*, that the contract being void, he could not recover as the "party with whom or in whose name a contract is made," but could only recover the amount of the deposit belonging to him individually: *Toney v. Snyder*, 50–73.

Where a box belonging to two persons jointly, containing personal property of each, was taken by a common carrier for transportation under a contract with them jointly, *held*, that they might join in an action on the contract for the loss of the property as the parties with whom the contract was made: *Anderson v. Wabash, St. L. & P. R. Co.*, 65–131.

A third person in whose favor a contract is made, but who is not a party thereto, may sue thereon: *Knott v. Dubuque & S. C. R. Co.*, 84–462; *Gooden v. Rayl*, 85–592.

Where one person makes a promise to another for the benefit of a third, the party to be benefited may maintain an action on the promise, but if the primary object was to subserve the interests of either one or both of the parties to the contract, they alone can maintain an action for its breach, even though a benefit might have resulted to a third party from its performance: *Messenger v. Votaw*, 75–225.

Where money was contributed to an auxiliary society for the benefit of a church, *held*, that the church was the proper party to sue for such money: *First M. E. Church v. Sweney*, 85–627.

A third person may maintain an action on a promise made to another for his benefit although he was not a party to or cognizant of it when made: *Hawley v. Exchange State Bank*, 66 N.W., 152.

The person to whom a telegraphic message is sent may properly sue for damages for the non-delivery of such message: *Mentzer v. Western Union Tel. Co.*, 93–752.

SEC. **3460. Plaintiffs joined.** All persons having an interest in the subject of the action, and in obtaining the relief demanded, may join as plaintiffs, except as otherwise provided. [C. '73, § 2545; R., § 2759; C. '51, § 1678.]

Who may join: Sureties who pay money for their principal may sue jointly for its recovery, or severally for the amount paid by each: *Skiff v. Cross*, 21–459.

Where several independent school districts brought action against another independent district to recover taxes levied upon them, when they were a part of the same district, which taxes they claimed defendant was under obligation to pay entirely, *held*, that plaintiffs could not thus join their actions: *Independent School Dist. v. Independent School Dist.*, 50–322.

One of several joint heirs and the grantee of the interest of all the co-heirs in the property may join as plaintiffs in an action to set aside a tax deed of such property: *Watson v. Phelps*, 40–482.

Where, by the terms of a contract, two parties were bound for the entire work and labor to be performed thereunder, and were both liable for any failure therein, *held*, that the mere fact that each was to receive thereunder a separate sum of money did not necessarily render it several, so that they could not join in a suit thereon: *Fauble v. Davis*, 48–462.

Joint owners of a note should, in a suit thereon, be joined as plaintiffs, unless some of them refuse to join, in which case those refusing to join could be made defendants. The fact that the note is payable to them jointly or to bearer and is in the possession of one of them does not entitle such payee to sue as sole owner: *McNamee v. Carpenter*, 56–276.

In action to set aside a contract, brought by a third person claiming to have been defrauded by such contract, one of the parties executing the contract also claiming to be defrauded thereby may be joined as party plaintiff: *McMurray v. Van Gilder*, 56–605.

An action for breach of a joint obligation to have lands which are conveyed to different parties released from the lien of a mortgage may properly be brought in the name of the several parties jointly: *Linder v. Lake*, 6–164.

Where it was sought to restrain the collection of a tax, on the ground that there was no assessment or levy, *held*, that owners in severalty of different portions of the property affected by such tax might join as plaintiffs: *Brandirff v. Harrison County*, 50–164.

Residents and taxpayers of an independent district have such direct legal interest in the question of the validity of the taxes that they are authorized to join in an action to declare them void: *Wilkinson v. Van Orman*, 70–230.

Where a city instituted proceedings to assess damages caused by change of grade of a street and assessed the same in a particular case to two persons as joint owners of the lot, when their ownership was in fact several as to particular portions thereof, *held*, that on appeal by such owners to recover a larger amount, the city could not object to judgment being in favor of them jointly: *Thompson v. Keokuk*, 61–187.

In an action of *certiorari* to review the proceedings of a board of supervisors in authorizing the construction of a levee and the assessment of taxes upon adjacent land, different property owners, each of whom owns land subject to assessment on account of such action, may join as plaintiffs: *Richman v. Board of Supervisors*, 70–627.

In an action brought by a tax purchaser of one of three parcels of land against the original owner of all, *held*, that a cross-peti-

tion by such mortgagee and also by another junior mortgagee against the original parties and tax purchasers of other tracts and subsequent purchasers thereof on foreclosure of such mortgage was proper: *Switz v. Black*, 45-597.

Parties separately owning property on which they reside may join in an action to enjoin the continuance of a nuisance which affects the healthfulness of the neighborhood and interferes with the enjoyment of their property: *Bushnell v. Robeson*, 62-540.

Where there is unity of interest as to the object to be attained by a bill in equity, all parties seeking redress may join in the same complaint: *Powell v. Spaulding*, 3 G. Gr., 443; *De Louis v. Meek*, 2 G. Gr., 55.

Creditors having separate claims may maintain an action in equity to discover and subject property of their common debtor to the payment of their judgments: *Gorrel v. Gates*, 79-632.

Where a policy of insurance is issued to two persons jointly on property owned by them severally, such owners can join as plaintiffs in an action to recover under the policy: *Graves v. Merchants, etc., Ins. Co.*, 82-637.

An administratrix of the deceased partner should not be joined with the survivor in an action against the firm's debtor: *Robinson v. Hintrager*, 36 Fed., 752.

Misjoinder: Where two persons are improperly joined as plaintiffs in an action, the one may withdraw therefrom and allow the other to continue the action to recover the amount due him individually: *Stepanek v. Kula*, 36-563.

If there is a misjoinder of parties plaintiff, it is competent for one of them to dismiss the action as to himself, and such dismissal will not affect the case as to the other party plaintiff, nor render the filing of an amended petition by the latter necessary: *Hanks v. North*, 58-396.

Two plaintiffs cannot sue in an action for slanderous words spoken of them jointly: *Hinkle v. Davenport*, 38-355.

The owners of three separate accounts cannot join in action thereon: *Faivre v. Gillan*, 84-573.

Parties who are jointly arrested and tried for larceny cannot join as plaintiffs in an action for malicious prosecution: *Rhoads v. Booth*, 14-575.

Separate and distinct causes of action in favor of distinct parties, as, for instance, for fraudulent representations in regard to notes transferred to them in distinct transactions, cannot be joined: *Bort v. Yaw*, 46-323.

Such a defect is not waived by failure to raise the objection by demurrer or answer: *Ibid.*

A joint petition by two plaintiffs upon two distinct causes of action in favor of them may be attacked by demurrer: *Mervin v. Sherman*, 9-331.

Misjoinder of parties is not a ground for demurrer, but should be taken advantage of by motion to strike out the names of the parties improperly joined: *District T'p v. District T'p*, 44-512; *Independent School Dist. v. Independent School Dist.*, 50-322; *King v. King*, 40-120.

Misjoinder of parties plaintiff or defendant must be raised by motion. It cannot be taken advantage of on demurrer or in arrest of judgment: *Miller v. Keokuk & D. M. R. Co.*, 63-680.

Misjoinder of a party as plaintiff who cannot properly be joined as such is not ground for dismissing the action: *Arts v. Guthrie*, 75-674.

Objection to the misjoinder of defendants cannot be taken for the first time by one defendant on appeal: *Morse v. Close*, 11-93.

Defect of parties may be taken advantage of on demurrer, but not misjoinder of parties: *Beckwith v. Dargets*, 18-303.

The fact that persons are joined with plaintiff who have no interest in the action is not a ground of demurrer: *Grayson v. Willoughby*, 78-83.

The objection to misjoinder of parties plaintiff (as, for instance, where two persons individually injured by malicious prosecution join as plaintiffs in an action to recover damages therefor) may be taken on the trial, in arrest of judgment, or by appeal, and especially is this so where such misjoinder does not appear on the face of the petition: *Rhoads v. Booth*, 14-575.

SEC. **3461. Assignment—without prejudice.** The assignment of a thing in action shall be without prejudice to any counter-claim, defense or cause of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and upon a valuable consideration before due. [C. '73, § 2546; R., § 2760.]

~ 104 x 279

Under this section the transferee after maturity of a negotiable note, takes subject to any counter-claim, though it be an independent cause of action, in favor of the maker and against the transferrer, existing before notice of the transfer: *Downing v. Gibson*, 53-517.

And the same rule is applied to an indorsee of negotiable paper before maturity, if the indorsement is not in good faith and for a valuable consideration: *Bone v. Tharp*, 63-223.

Held, also, that the indorsee after maturity takes subject to the defense of payment made by maker to payee before notice of the transfer: *Haywood v. Seeber*, 61-574.

The transfer of a draft before maturity, etc., is not an assignment of a thing in action, so as to authorize the acceptor to set up as against the indorsee any claim held by such acceptor against the drawer of the draft. The drawer cannot be deemed an assignor under such circumstances, nor is the acceptance a promise made to such drawer: *Jack v. Hosmer*, 65 N.W., 1009.

One who takes a claim by assignment

takes subject to any defense or counterclaim which the holder may have against the assignor before notice of the assignment is given in writing to the holder, even though he has previous information that such assignment has been made and acquires claims against the assignor for the purpose of setting them off against his indebtedness: *Franzen v. Hutchinson*, 62 N.W., 698.

A bank may set up as a defense in an action against it upon a check, a note of the drawer of the check held by the bank and the having had no notice of the check until after the drawer's insolvency: *Thomas v. Exchange Bank*, 68 N.W., 780.

A claim for personal services, being exempt as to the debts of the claimant, may be transferred even to a nonresident with the same exemption from offset on account of claimant's debts: *Millington v. Laurer*, 89-322.

A claim for the recovery of money paid for intoxicating liquors is assignable: *Sellers v. Arie*, 68 N. W., 814.

The assignee of a judgment takes it subject to the right of the defendant to have such judgment set off under a prior judgment held by the defendant against the plaintiff and it is immaterial that the assignment is made in payment of attorney fees for services rendered by the attorney in the action in which the judgment is recovered: *Benson v. Haywood*, 86-107.

Aside from statutory provision the transferee after maturity takes subject to equities attaching to the instrument inself, and such as between the parties to it would control, qualify or extinguish any rights arising between them, but he is not subject to equities between the parties to the note arising from other and independent transactions between them, and is, therefore, not subject to a set-off arising out of an independent transaction, even though existing at the time of the transfer: *Shipman v. Robbins*, 10-208; *Bates v. Kemp*, 13-223; *Ryan v. Chew*, 13-589; *Way v. Lamb*, 15-79; *Stannus v. Stannus*, 30-448.

And this rule was held applicable, notwithstanding Revision § 2760, which provided that an action by an assignee of a chose in action should be without prejudice to any set-off or other defense existing before notice of the assignment; it being considered that the fact that the paper was transferred after maturity, if in the usual mode of transferring negotiable paper, would not render it a mere non-negotiable chose in action: *Richards v. Daily*, 34-427.

As bearing on this section, see notes to § 3044.

SEC. **3462. Defendants.** Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved in the action, except as otherwise expressly provided. [C. '73, § 2547; R., § 2761.]

In action for tort: Where parties are interested in the controversy adversely to the plaintiff, and are liable to plaintiff in the same cause of action (in tort) they are properly joined as defendants: *Knott v. Dubuque & S. C. R. Co.*, 84-462.

In foreclosure: The trustee of a deed of trust of real property should be made a party in a foreclosure proceeding thereon: *Tucker v. Silver*, 9-261.

The administrator is a proper if not a necessary party in a proceeding to foreclose a mortgage executed by his decedent: *Darlington v. Effey*, 13-177.

The beneficiary in a prior deed of trust is a proper though not a necessary party in the foreclosure of a junior mortgage: *Standish v. Dow*, 21-363.

In an action to foreclose a mechanic's lien the owner of the property is a necessary party: *Keller v. Tracy*, 11-530.

Where the property was that of a Catholic church unincorporated, the legal title being in the bishop, *held*, that the bishop or the individual members of the church, or both, should have been made parties: *Ibid.*

Where the mortgagor has parted with all his interest in the property, and no personal judgment is sought against him, he is not a necessary party to an action to foreclose the mortgage: *Watts v. Creighton*, 85-154.

In an action to foreclose a mortgage executed by defendant before his marriage on property which subsequently to such marriage became his homestead, the wife is a necessary party defendant, and her rights in the homestead cannot be otherwise cut off: *Chase v. Abbott*, 20-154.

In an action by a subcontractor to enforce a mechanic's lien for the amount of an open, unliquidated and unsettled account against the principal contractor for labor and material, the principal contractor is a necessary party defendant: *Vreeland v. Ellsworth*, 71-347.

A wife is not a necessary party in a proceeding to enjoin the sale of property under a mortgage executed by her husband with whom she joined for the purpose of releasing either her dower or homestead right: *Sloan v. Coolbaugh*, 10-31.

In an action involving priority of liens to which the owner of the property is not a party, the validity of the respective claims cannot be brought in issue: *First Nat. Bank v. Jasper County Bank*, 71-486.

Heirs: Under the facts of a particular case, *held*, that the heirs of a person through whom the title had passed were not necessary parties to the suit, it being simply a question of right as between plaintiff and defendant: *Thomas v. Kennedy*, 24-397.

In an action to set aside a fraudulent conveyance made by a decedent, his heirs are not proper parties defendant: *Harlin v. Stevenson*, 30-371.

The grantor in a conveyance which is claimed to be in fraud of creditors is not a necessary though he is a proper party defendant in an action to set it aside: *Potter v. Phillips*, 44-353.

A grantor of property claimed to have

been fraudulently transferred by a debtor to defraud creditors is not a necessary party in an action to subject the property to the payment of debts: *Capital City Bank v. Wakefield*, 83–46.

In an action by equitable proceedings to correct a mistake in a chain of title previous grantors may be made parties defendant: *Walkup v. Zehring*, 13–306.

As to parties in action to enforce a contract to convey made by a decedent, see § 3409.

Grantees: In an action by a grantee against his grantor to set aside a conveyance, where it appeared that the property had been reconveyed by the grantee to other parties who were not parties to the action, *held*, that in the absence of such parties the conveyance would not be set aside: *Audubon County v. American Emigrant Co.*, 40–460.

In an action by a fraudulent grantee to enjoin the sale of land under an execution against the grantor, the grantor is not a necessary party: *Dunn v. Wolf*, 81–688.

The grantee in a deed fraudulently made to defeat a creditor is a proper party defendant in an action to subject the property conveyed to the claim of a creditor, and after the issuance of the attachment it becomes a lien upon the property attached. to be enforced by creditor's bill in equity: *Taylor v. Branscombe*, 74–534.

Vendor: In an action to remove a cloud from plaintiff's title it was held that a vendor of the property who had confederated with the other defendants to perpetrate an alleged fraud was properly made a party defendant: *Beckwith v. Dargets*, 18–303.

Other cases: In a particular case, *held*, that the necessary parties to the determination of a question arising under a contract for the purchase of land were not before the court, and therefore that such question could not be determined: *Decatur County v. Bright*, 57–724.

A decree declaring an absolute conveyance to be merely a mortgage should not be rendered when parties directly interested in the instrument itself are not before the court: *Clemons v. Elder*, 9–272.

And where the widow of deceased who left one child as his heir made application for an order to have the legal title to land owned by deceased and intended for a homestead conveyed to her, it was held proper to dismiss her petition for want of necessary parties, the child not having been made a party defendant: *Palmer v. Blair*, 25–230.

In an action in the nature of a creditor's bill in equity against husband and wife, upon the death of the wife her administrator is a proper, if not a necessary, party defendant when it is sought to reach her estate: *Parshall v. Moody*, 24–314.

In an action for the cancellation of the assignment of a contract on the ground of fraud, both parties to the assignment are necessary defendants, and judgment cannot properly be rendered against the one until the other is brought in. In such case failure to raise the objection by answer will not waive it, but such objection may be insisted upon to defeat the final decree: *Miller v. Mahaffy*, 45–289.

To a bill seeking to reinstate a judgment against a party and make it a lien on land conveyed by him to another, the original defendant in the judgment is a necessary party: *Seeley v. Reid*, 3 G. Gr., 374.

Judgment plaintiff is an essential party to an action to set aside a judgment for fraud: *Hulverson v. Hutchinson*, 39–316.

In an action against a judgment creditor by a surety on a judgment asking its cancellation, a third person who is charged with having received money which he should have applied in satisfaction of the judgment may be made a party defendant: *Stringfield v. Graff*, 22–438.

In such case the principal judgment debtor, not having been a direct party to the transaction claimed to have amounted to satisfaction, *held* not to be a necessary party: *Ibid.*

An attorney who, by agreement, is to receive a per cent. of the judgment is not such a party in interest that he must be made a party to the action: *McDonald v. Chicago & N. W. R. Co.*, 26–124.

Where an attorney is not charged with fraud he is not properly joined with his client as defendant for acts done by him as attorney: *Paton v. Lancaster*, 38–494.

Where the validity of the bonds of a corporation was in issue and the officers set up the rights of the stockholders, *held*, that the stockholders individually were not necessarily parties, although such bonds were issued in fraud of the stockholders, and, if valid, would exhaust the property of the corporation and render the stock valueless: *Des Moines Gas Co. v. West*, 50–16.

The purchasers of real property at a sale made by the executor in accordance with the directions of a will are necessary parties to a proceeding to set aside such sale: *In re Estate of Bagger*, 78–171.

In an action to enjoin the opening of a highway established by the board of supervisors, the members of the board are not proper parties defendant. They act in a judicial capacity: *Everett v. Board of Supervisors*, 93–721.

In an action to enjoin the officers of a school district and the county officers from payment of bonds of a school district claimed to be invalid, the district itself is not a necessary party: *Holliday v. Hildebrant*, 66 N. W., 89.

In actions against partners: A partnership may be sued in the partnership name or in the individual names of its members: *Markham v. Buckingham*, 21–494.

In an action to determine the interest of defendant in a partnership and subject it to the payment of a judgment, all the parties are necessary parties: *Westphal v Henney*, 49–542.

Where one partner is sued upon a partnership debt it is not error to allow the other partner to come in and join in the defense: *Peck v. Parchen*, 52–46.

Where one of the partners dies pending suit against the firm, the surviving partner is the representative of the firm, and it is against him that suit is to be continued and not against the personal representatives of the deceased member: *Childs v. Hyde*, 10–294.

The common law rule that in an action at

law a party cannot in his individual capacity bring suit against a partnership or board of trustees of which he is a member is not applicable in a proceeding in *mandamus: Cooper v. Nelson*, 38–440.

In an equitable action it is not error to make defendants a firm, one member of which is a member of the firm who are plaintiffs: *Ford v. Independent Dist.*, 46–294.

Although defendant has been warranted under the facts in regarding two persons as partners, so that he may set up any defense in an action by one of them which he would have had if there had been a partnership in fact, yet if they are not in fact partners, he cannot, in an action by the one who is the real partner in interest, insist that the supposed party join in the action as plaintiff: *Enix v. Hays*, 48–86.

As to cases of joint and several liability on contract, see § 3465 and notes.

Misjoinder: Where plaintiff joins separate causes of action against different parties separate judgments cannot be rendered. The objection may be raised by demurrer if it appears on the face of the petition, otherwise by answer or motion in arrest of judgment. In such case perhaps plaintiff might dismiss as to all the parties not jointly liable. So *held* in case of a joint action against several owners of cattle for joint trespass committed by them: *Cogswell v. Murphy*, 46–44.

It being averred in the answer that defendants are improperly joined and that fact being admitted, the court should on the request of the defendant instruct that there can be no recovery, or should sustain a motion in arrest of judgment upon a verdict for plaintiff: *Mendenhall v. Wilson*, 54–589.

Non-joinder: Where it appears by the bill that a proper party is not before the court so that he may have an opportunity to be heard, the usual method is to demur or to make the objection by answer, and if this non-joinder cannot prejudice the rights of the parties to the action, the objection should be taken in this manner and cannot be urged for the first time on the hearing; but if it appears that the rights of those who are made parties may be prejudiced by such non-joinder, or that there may be a failure to mete out complete justice, the objection may be made on the hearing, or the judge may himself state the objection and refuse to proceed to make a decree. (So *held* under chancery practice): *Postlewait v. Howes*, 3–365.

The non-joinder of parties defendant in an action against persons jointly liable cannot be raised for the first time by the evidence after plaintiff has closed his case: *Hine v. Houston*, 2 G. Gr., 161.

Where a defect of parties is not apparent upon the face of the pleadings it must be pleaded by answer and the issue submitted to the jury: *Enders v. Beck*, 18–86.

A defect of parties defendant cannot be raised for the first time on appeal: *Coe v. Anderson*, 92–515.

As to demurrer on the ground of defect of parties, see § 3561 and notes.

SEC. **3463. United interest.** Persons having a united interest must be joined on the same side, either as plaintiffs or defendants, except as otherwise expressly provided; but when some who should be made plaintiffs refuse to join, they may be made defendants, the reason therefor being set forth in the petition. [C. '73, § 2548; R., § 2762; C. '51, § 1679.]

Joint owners of a note should join as plaintiffs, or if one refuses to join he should be made defendant: *McNamee v. Carpenter*, 56–276.

SEC. **3464. One suing for all.** When the question is one of a common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. [C. '73, § 2549; R., § 2753; C. '51, § 1680.]

This provision is not applicable where each of the parties might sue alone, and there is no necessity for joining them all in the action: *Fleming v. Mershon*, 36–413.

Therefore, *held*, that it was not proper for one or more taxpayers to bring suit in behalf of themselves and other taxpayers interested in the same question, to enjoin the collection of a tax on the ground of illegality: *Ibid.*

Where one party sues for the benefit of others, those for whose benefit the action is brought are not parties to the suit in such sense as to have the right to appeal: *Ibid.*

Where the portion of the petition by which plaintiff attempts to maintain an action for others not named as plaintiffs was stricken out, *held*, that an appeal would not lie therefrom as the parties not named could not appeal and plaintiff was not prejudiced by the action of the court: *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72–556.

One or more of the members of an unincorporated society may be sued or may defend for all if they are so numerous that it would be impracticable to bring them all before the court: *Keller v. Tracy*, 11–530.

An action may be maintained by some members of a mutual insurance company for the benefit of all the members, to restrain an illegal assessment: *Corey v. Sherman*, 64 N.W., 828.

In a case wherein parties may jointly sue, one of them may under this statutory provision prosecute the action for the benefit of the others having a common interest: *Palo Alto Banking, etc., Co. v. Mahar*, 65–74.

SEC. **3465. Joint and several obligations.** Where two or more persons are bound by contract or by judgment, decree or statute, whether

jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others. [C. '73, § 2550; R., § 2764; C. '51, §§ 1681–2.]

Joinder: The maker and assignor or guarantor of an instrument not negotiable may be made joint defendants in an action thereon: *Tucker v. Shiner*, 24–334; *Huse v. Hamblin*, 29–501.

So the maker and guarantor or indorser of a negotiable instrument may be joined: *Marvin v. Adamson*, 11–371; *Mix v. Fairchild*, 12–351; *Veach v. Thompson*, 15–380; *Stout v. Noteman*, 30–414.

Action against two makers of a promissory note may be maintained, although one of them has signed it only as surety and after its maturity: *Jones v. Wilson*, 11–160.

Joint action cannot be maintained against a county on a warrant and a guarantor who has guaranteed the payment of such warrant in a separate instrument: *Griffin v. Grundy County*, 10–226.

An action against joint and several makers could not, under the provisions of Code of '51 (different from those now found in this section), be continued after the death of one maker against an administrator and the surviving maker: *Pecker v. Cannon*, 11–20; *Marsh v. Goodrell*, 11–474.

Under the same provision, *held*, that action could not be maintained jointly against the surviving partner of a firm and the administrator of a deceased partner: *Childs v. Hyde*, 10–294.

Action may be brought against the personal representatives of one of two or more joint obligors, although the other joint obligor or obligors are still living: *Sellon v. Braden*, 13–365.

Where action upon a joint contract is brought against a survivor and the executors of a deceased party in the same court in which the claim against the decedent's estate might have been filed, the bringing of such action will be deemed a sufficient filing of the claim against the estate: *Moore v. McKinley*, 60–367.

Action on an obligation of a firm may be brought against one partner alone: *Ryerson v. Hendrie*, 22–480.

Where a district township was divided into independent school districts, *held*, that action could not be brought on an indebtedness of the township against one of such independent districts alone: *Knoxville Nat. Bank v. Independent Dist.*, 40–612.

But that a joint action might be brought against all the independent districts composing what was formerly the district township, and a judgment against all of them might be rendered: *District T'p v. District T'p*, 52–73; *Kennedy v. Independent School Dist.*, 48–189.

Persons consequentially liable to be affected by the recovery of plaintiff against defendant should be joined as defendants that their liabilities may be adjudicated in the one proceeding: *Camp v. McGillicuddy*, 10–201.

To entitle a party to be made a defendant, his claim must be made in good faith, with an apparent interest in the controversy. A mortgagor who has conveyed mortgaged property with covenants may, on his own motion, be made a party to a suit to foreclose the mortgage: *Gifford v. Workman*, 15–34.

A petition in foreclosure making third parties defendants for the purpose of cutting off their equities is not objectionable on the ground of multifariousness: *Greither v. Alexander*, 15–470.

A judgment in favor of a sole plaintiff, against two defendants jointly, may be set off against a judgment against such plaintiff in favor of one of the defendants: *Ballinger v. Tarbell*, 16–491.

Joint and several liability: Parties who are each liable to an action for separate injuries committed by the illegal sale of intoxicating liquors (§ 2418) are not so bound by statute as to be joined as defendants when they would not be otherwise jointly liable: *La France v. Krayer*, 42–143.

In an action on a joint policy of insurance made by four companies, in which each bound itself in case of a loss to pay one-fourth of the amount of insurance, the court was divided as to whether the cause of action against each was separate so that they could not properly be joined as defendants in one action: *Viele v. Germania Ins. Co.*, 26–9.

An action may be brought against any one or all of co-obligors, and the bankruptcy of one cannot in any manner affect the right of recovery against the other: *Smith v. McFadden*, 56–482.

In case of an action against two defendants jointly and severally liable, judgment may be entered against one, although the case is not disposed of as to the other: *Poole v. Hintrager*, 60–180.

In an action against joint obligors judgment may be had against one although another has not been served: *Kellogg v. Window*, 69 N. W., 875.

An action on a promissory note against a surety may be brought where there is judgment by confession against the principal: *Citizens', etc., Bank v. Oleson*, 47–492.

As to judgment in action against joint defendants, see § 3774 and notes.

Judgment may be rendered against a surety who makes default prior to the de-

termination of the suit and the rendition of the judgment against the principal. And in such case the surety is not constructively in court after the judgment against him, and is not bound by the subsequent proceedings: *Okey v. Sigler*, 82–94.

This section has no application to a case where a party who has the election to hold one or the other of two parties liable makes an election to hold one of them. He thereby precludes himself from pursuing his remedy against the other: *McLean v. Ficke*, 62 N. W., 753.

SEC. **3466. Other parties brought in.** The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy between the parties before the court can not be made without the presence of other parties, it must order them to be brought in. [C. '73, § 2551; R., § 2765; C. '51, § 1683.]

A person cannot be divested of property in a proceeding in which he is not a party: *Moore v. Held*, 73–538.

In a proceeding to abate premises as a nuisance under the prohibitory liquor law, and for the destruction of property illegally used on the premises, all the owners of the property are necessary parties: *Shear v. Green*, 73–688.

This section is especially applicable to cases where the debtor is under an apparent liability to two different parties for the same debt, and only one of them is before the court: *Fowler v. Doyle*, 16–534.

In a proceeding to correct a misdescription of the premises, running through prior deeds, *held*, that the original grantor conveying with such mistaken description, or if dead, his heirs, were necessary parties, and should have been brought in: *Flanders v. McClanahan*, 24–486.

The mortgagee of chattels may be required to be made party to a suit by mortgagor against a third person for injury to such property: *Evans v. St. Paul Harvester Works*, 63–204.

In an action by an assignee of a cause of action for tort, the defendant cannot require that the assignor be made party: *Vimont v. Chicago & N. W. R. Co.*, 64–513.

Where the controversy may be determined by the court between the parties before it without prejudice to the rights of others, it is not necessary that such other parties be brought in: *Baldwin v. Thompson*, 15–504.

The owner of land is not entitled to be made a party in the action wherein the land is attached as the property of another: *Loving v. Edes*, 8–427.

It is not proper in a collateral proceeding to determine the question of title as between plaintiff and one not a party to the action, and when such a decree is asked the adverse claimant to the title should be made a party or the petition dismissed. *Litchfield v. Polk County*, 18–70.

A party to a contract under which a third person claims a benefit may show fraud in such contract, although the other party thereto be not a party to the suit. The determination of the question will not be binding upon such other party, and if defendant does not choose to make him a party he is not obliged to do so: *Fuller v. Lamar*, 53–477.

An order of court making a person a party defendant to an equitable proceeding, and service of notice thereunder, is as effective as an amendment to the petition bringing in such party and repeating the allegations: *McGregor v. McGregor*, 21–441.

In an action on a policy of insurance, *held*, that a motion to make other persons who claimed to have acquired by assignment the right to sue on such policy, parties to the action was properly overruled: *Kelley v. Norwich F. Ins. Co.*, 82–137.

A party who, after having by pleadings claimed that another person is a necessary party to the suit, has procured an order making him a party, cannot afterwards insist that such order is not necessary and that judgment is valid though rendered without jurisdiction over such party: *Ibid.*

In an action on a attachment bond the defendant may require that other parties who may have a right of recovery under the bond shall be brought in: *King v. Kehoe*, 91–91.

In an action to quiet title, the grantor of the defendant is not a necessary party to the suit. Even if the defendant has a remedy as against such grantor by way of breach of warranty, it would not be proper for him to prosecute such remedy in an equity action to quiet title: *Independent Dist. v. Gunn*, 93–44.

Under these provisions an action may be brought against a surety without joining his principal, or if the action is joint against principal and surety, judgment against a surety alone may be rendered: *Marshall County v. Knoll*, 69 N. W., 1146.

In an action on a note and mortgage under a claim of parol assignment the alleged assignor who is making such claim of ownership to the note and mortgage is a necessary party and should be brought in on motion of defendant: *Kennedy v. Moore*, 91–39.

As to who are necessary parties defendant, see notes to § 3462.

SEC. **3467. Suit on public bond.** When a bond or other instrument given to the state or county or other municipal or school corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, action may be brought thereon in the name of any person intended to be thus secured, who has sustained an injury in consequence of a breach thereof, except when otherwise provided. [C. '73, § 2552; R., § 2787; C. '51, § 1693.]

A bond given partly for the benefit of a party not named therein might be sued on by the person in his own name: *Huntington v. Fisher*, 27–276.

Where a bond intended for the security of a county was improperly given to the county judge, *held*, that the county might sue thereon: *Collins v. Ripley*, 8–129.

Where the bond of a county treasurer was given "unto the county of Warren and state of Iowa," *held*, that it should be construed as a security to the county. Whether the state can maintain action on a county treasurer's bond, *quære: State v. Henderson*, 40–242.

A person for whose security an injunction bond was evidently intended may maintain action thereon, though it be not made payable to him: *Van Gorder v. Lundy*, 66–448.

In case of a bond given to release attached property to the sheriff instead of the plaintiff, *held* the plaintiff might sue thereon: *Moorman v. Collier*, 32–138.

In such a case, if the judgment is assigned, the assignee of the judgment may bring action on such bond: *Rowley v Jewett*, 56–492.

Where a bond is executed to the sheriff an assignment by him is not necessary to enable a party intended to be secured thereby to bring suit thereon: *Sheppard v. Collins*, 12–570.

Where a constable wrongfully levies upon property that is exempt from execution the owner of the property may recover damages therefor in an action upon his bond: *Strunk v. Ocheltree*, 11–158.

Suit on an administrator's bond may be brought by any person entitled to money coming into the administrator's hands which he fails or refuses to pay over: *Stewart v. Phenice*, 65–475.

Where a contractor gives bonds for the performance of his contract, providing for the payment of subcontractors, a subcontractor may bring action thereon for breach of the contract: *Baker v. Bryan*, 64–561.

Where a bond was given by one who contracted for the execution of a certain portion of the work of constructing a railway for the performance of his contract, which provided for the payment of all claims against him or his subcontractor for labor performed in the prosecution of the work, *held*, that laborers employed by a subcontractor or an assignee of the claims of such laborers could bring action on such bond to recover compensation for services rendered: *Jordan v. Kavanaugh*, 63–152; *Wells v. Kavanagh*, 70–519.

In an action against a road supervisor upon his official bond, *held*, that the township clerk entitled to the money, for the misappropriation of which the action was brought, was the proper party to sue: *Wells v. Stomback*, 59–376.

A bond, though not such as is required in a particular case by statute, may still be good as a common-law bond, and the party for whose benefit it was given may sue thereon: *Sheppard v. Collins*, 12–570; *Garretson v. Reeder*, 23–21.

This section was not intended to apply exclusively, if at all, to cases of tort, but primarily and principally to matters of contract: *Tucker v. Silver*, 9–261.

Where a county treasurer fails to pay over or account for taxes collected to aid in the construction of a railroad, the railroad company is the proper party to bring an action on the treasurer's bond: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

Where a third party claimed to own certain property levied upon under execution, and entered into a written contract with the plaintiff to hold said property or its proceeds subject to the order of the court, in an action for breach of the contract, *held*, that the instrument was intended as security for plaintiff, in whose interest the execution issued, and that plaintiff would have the same right to bring suit thereon as in the case of an official or statutory bond: *Allen v. Pratt*, 79–113.

While the person for whose benefit a mortgage is made may avail himself thereof, still if not a party thereto he is not bound by the recital of the mortgage as to the consideration therefor: *De Goey v. Van Wyk*, 66 N.W., 787.

SEC. **3468. Partnership.** Actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof; and a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice. A new action may be brought against the members not made parties, on the original cause of action. [C.'73, § 2553; R., § 2785; C.'51, §§ 1690–1.]

A partnership is a distinct legal entity, capable of transacting business and making contracts, and may sue and be sued in the partnership name: *Brumwell v. Stebbins*, 83–425.

For many purposes the partnership is as distinct from the persons composing it as they are from each other. For the purpose of suit the partnership may have a residence district from the residence of its members: *Ruthven v. Beckwith*, 84–715.

Where the action is against a partnership not residing or doing business in the state, a member thereof who does reside in the state has not the right to have the action removed to his county: *Sketchley v. Smith*, 78–542.

A partnership may be sued before a justice of the peace, and notice of service upon the resident partner will give the justice jurisdiction of the partnership so that judgment may be rendered against the firm as such, and enforced against the partnership property; but the justice will not thereby acquire jurisdiction as to an individual partner residing in another county: *Ebersole v. Ware*, 59–663.

Where judgment on a partnership debt is recovered against individual members of a

firm, a sale of individual property thereunder will not be invalid, although an individual creditor might, by proceedings in equity in a proper case, compel a resort to partnership property: *Hamsmith v. Espy*, 13–439.

Whether a judgment against the firm alone, as such is a lien upon anything but firm property, *quœre*, but the individual property of the members may be made liable by proper action: *Markham v. Buckingham*, 21–494.

Service on one member of a co-partnership, after dissolution, *held* sufficient to warrant judgment againt the firm, to be satisfied out of the partnership property: *Hale v. Van Saun*, 18–19.

A judgment against a firm does not become a lien on real property held in the name of one partner until made so by proper proceedings, although the firm may be the equitable owner: *Stadler v. Allen*, 44–198.

The surviving partner should sue as such for claims in favor of the partnership without joining the representative of the deceased partner: *Brown v. Allen*, 35–306.

Service upon one member of the firm is sufficient to give the court jurisdiction as against the partnership: *Gregory v. Harmon*, 10–445.

In such case it is not necessary that the service be made upon the member while employed in the general management of the business. Each member is an agent for all the others in the firm business, and a service upon any one is sufficient: *Walker v. Clark*, 8–474.

Under prior statutory provisions authorizing judgment against a member of the firm in an action against the firm, *held*, that service on one member would authorize a judgment against another member not served only in case the service was made during the continuance of the partnership: *Stephens v. Parkhurst*, 10–70.

Under such provisions, *held*, also, that service of notice upon an alleged partner, where there was no partnership in fact, did not give the court jurisdiction over other members of the alleged firm not served and not appearing: *Nixon v. Downey*, 42–78.

Where an action is brought against partners individually and not against the partnership, service upon one partner does not give jurisdiction over the firm or the other partner: *Weaver v. Carpenter*, 42–343.

Under the Code of '51, the individual property of a member of a firm could not be levied upon under execution, upon a judgment against the firm, until such individual member had had an opportunity to show cause why such levy should not be made. The method of subjecting the individual property to the payment of the firm debt was by *scire facias*: *Davis v. Buchanan*, 12–575.

In general, as to suits by and against partners, see notes to §§ 3459, 3462 and 3465.

SEC. **3469. Foreign corporations.** Foreign corporations may sue in the courts of this state in their corporate name. [C. '73, § 2554; R., § 2789; C. '51, § 1695.]

SEC. **3470. Action for seduction.** An unmarried female may maintain, as plaintiff, an action for her own seduction. [C. '73, § 2555; R., § 2790; C. '51, § 1696.]

This section does not take away from the father the right to sue for damages for the seduction of his minor daughter, which he may do under the next section: *Stevenson v. Belknap*, 6–97.

In an action by an unmarried female for her own seduction she may recover such damages as may be found in her favor, and the fact that the petition does not allege that plaintiff was damaged in any sum cannot be first raised after verdict: *Gray v. Bean*, 27–221.

To enable an unmarried female to recover for her own seduction it is not necessary that she be of previously chaste character (as is required in a criminal prosecution for seduction). Without that, she may recover for loss of health, etc., but not for loss of character: *Smith v. Milburn*, 17–30.

It is contemplated that the person seduced shall be unmarried at the time of the seduction: *Gover v. Dill*, 3–337.

In an action by a female for her own seduction it is not necessary to show by direct evidence that she is unmarried. That fact may be inferred from the circumstances. Nor is it necessary, under the issue arising upon a general denial, to prove that the damages have not been paid: *Egan v. Murray*, 80–180.

Such action survives under § 3443 to the personal representatives of the female: *Shafer v. Grimes*, 23–550.

For other cases as to seduction, see notes to § 4762.

SEC. **3471. Injury or death of minor child.** A father, or, in case of his death or imprisonment or desertion of his family, the mother, may as plaintiff maintain an action for the expenses and actual loss of service resulting from the injury or death of a minor child. [C. '73, § 2556; R., § 2792; C. '51, § 1697.]

The damages to be recovered in an action for the death of a minor child are those accruing before the date of the minor's attaining majority. For damages accruing subsequently the administrator must sue for the benefit of the estate: *Walters v. Chicago, R. I. & P. R. Co.*, 36–458; *Lawrence v. Birney*, 40–377.

In an action for seduction brought by the parent the damages are very much in the discretion of the jury. Where the act is proved, all the aggravating circumstances that follow come in by way of increasing damages. Defendant's attention to the daughter as a suitor, and the flatteries, persuasions, promises, etc., made use of by him to accom-

plish his ends, may be considered in estimating the damages: *Stevenson v. Belknap*, 6-97.

The attaining the age of majority by the daughter does not take away the father's right of action: *Ibid.*

The statute, providing a remedy for the daughter, should not be construed as taking away the right of the father, or as restricting his damages to the loss of service or actual expenses incurred. The father, mother or guardian may maintain an action, though she be not living with, nor in the service of, such person, and though there be no loss of service: *Ibid.*

The father may recover exemplary damages, and the jury are to look not to the loss of service but to the damages resulting from all that the father can feel from the nature of the injury: *Ibid.*

The action by the parent must be based upon loss of service and expense incurred. Where the daughter, for whose seduction plaintiff had sued as father, was married before any expense was incurred or loss of service suffered, *held*, that plaintiff had no cause of action: *Humble v. Shoemaker*, 70-223.

Proof of mere careless indifference on the part of the parent as to the daughter's chastity will not defeat his right to recover for loss of service, but may be introduced in mitigation of damages: *Zerfing v. Mourer*, 2 G. Gr., 520.

No action can be maintained by the parent for the seduction of an adult child. And in an action by a parent the fact that the daughter is a minor must be alleged and proved: *Dodd v. Focht*, 72-579.

SEC. **3472. Name unknown.** When the precise name of any defendant cannot be ascertained, he may be described as accurately as practicable, and when it is ascertained it shall be substituted in the proceedings. [C. '73, § 2557; R., § 2788; C. '51, § 1694.]

In a suit brought against "the heirs of Otis Reynolds," *held*, that the defendants were not described with sufficient certainty. It is contemplated in this section that the defendant shall be a known person, who can be described with some certainty: *Reynolds v. May*, 4 G. Gr., 283.

Where action was brought to foreclose a tax title as against a tract of land by description under a former statute allowing such procedure when the owner was unknown, *held*, that reasonable diligence to discover the owner was required by statute, and should be made to appear by stating what was done in the exercise of such diligence: *Lot Two v. Swetland*, 4 G. Gr., 465.

For similar provision as to proceedings before a justice, see § 4488.

SEC. **3473. Action on written instrument.** When an action is founded on a written instrument, it may be brought by or against any of the parties thereto by the same name and description as those by which they are designated in such instrument. [C. '73, § 2558; R., § 2786; C. '51, § 1692.]

Under this section it is not necessary to allege either co-partnership or corporate capacity: *Harris Mfg. Co. v. Marsh*, 49-11.

So where the action is against defendant in the name in which the contract is signed, it is not necessary to allege either co-partnership or corporate capacity: *Wendall v. Osborne*, 63-99.

Where the name inserted in the instrument as that of payee is not that of a person, partnership or corporation, the suit cannot be brought in that name. So *held* where a note was made payable to "Steamboat Pembinaw and owners:" *Steamboat Pembinaw v. Wilson*, 11-479.

By signing an instrument in which the payee is specified in a particular manner the maker estops himself from setting up that the name thus used is not the proper name and description of such payee, and an action on the instrument may be brought in such name: *Davis v. David*, 1 G. Gr., 427.

Proof of defendant's signature to a note given to a partnership in its firm name is sufficient evidence to support an action thereon in the firm name: *Gordon v. Janney*, Mor., 182.

The making of a note payable to a firm or corporation is a written admission of the existence of such firm or corporation, and proof *aliunde* of the co-partnership or corporation is not required in order to make out a *prima facie* case: *Griener v. Ulerey*, 20-266.

SEC. **3474. Prisoner in penitentiary.** No judgment can be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court. [C. '73, § 2559; R., § 2784.]

SEC. **3475. Actions by state.** The state may maintain actions in the same manner as natural persons, but no security shall be required in such cases. [C. '73, § 2560; R., § 2793.]

SEC. **3476. Transfer—abatement.** No action shall abate by the transfer of any interest therein during its pendency, and new parties may be brought in, as may be necessary. [C. '73, § 2561; R., § 2794; C. '51, § 1698.]

Where plaintiff in an action to recover property transferred his interest pending the action, *held*, that the suit might still be prosecuted in his name: *Jordan v. Ping*, 32-64.

Where a cause of action is, pending the action, assigned to a third person, such action may be continued in the name of the original party, or the court may allow the

person to whom the transfer has been made to be substituted as plaintiff: *Chickasaw County v. Pitcher*, 36-593.

Where a cause of action is assigned after action is commenced, the court may allow the case to proceed in the name of the original plaintiff: *Kreuger v. Sylvester*, 69 N.W., 1059.

Such a substitution will not be made if the rights of defendant would be prejudiced thereby: *Snyder v. Phillips*, 66-481.

An alienation of interest *pendente lite*, either voluntary or involuntary, cannot constitute a bar to the prosecution of the suit, but may render it necessary for the assignee to be made a party: *Wright v. Meek*, 3 G. Gr., 472.

A conveyance pending a proceeding to assess damages for a right of way will not affect such proceedings The purchaser may be substituted for the original owner: *Forney v. Ralls*, 30-559.

Where persons acquires property by conveyance from one who has bought at foreclosure sale, and while a proceeding is pending against him by a junior mortgagee seeking to redeem, they are not necessary parties in the further course of such proceeding and are bound by a decree therein rendered on a supplemental petition filed after such conveyance, and not asked in the original petition: *Hervey v. Savery*, 48-313.

While parties may not, by agreement, upon an assignment of the legal title of a note, provide that suit shall be prosecuted thereon in the name of the assignor, yet a party may, pending an action on a note, assign to another his interest in the recovery without rendering it necessary to change the name of the party plaintiff: *Allen v. Newberry*, 8-65; *Howey v. Willtrout*, 10-105.

But where there is a transfer of the ownership of the note during the pendency of the suit, the new owner may be substituted as plaintiff on his own motion: *Ferry v. Page*, 8-455; *Fannon v. Robinson*, 10-272.

Where, pending the action to foreclose a mortgage, the mortgagee assigns his interest therein, the decree may be rendered in the name of the assignee: *Wahl v. Phillips*, 15-478.

An action against a partnership should on the death of one partner be continued against the survivor: *Childs v. Hyde*, 10-294.

Where the plaintiff had sold his interest in the premises with reference to the use of which he was prosecuting the suit, but had not yet executed a deed therefor or received full payment of the purchase price, *held*, that he still had such interest in the suit that an appeal therein might be maintained in his name: *Price v. Baldauf*, 90-205.

SEC. **3477. Married woman may sue.** A married woman may in all cases sue and be sued without joining her husband with her, and an attachment or judgment in such action shall be enforced by or against her as if she were single. [C. '73, § 2562; R., § 2772.]

The claim of the wife for damages for a tort against her should be prosecuted in her own name, and not jointly with her husband. The sections allowing her to sue alone in such cases are not simply permissive but imperative: *Musselman v. Galligher*, 32-383.

Personal judgments against married women may be enforced against subsequently acquired property the same as in case of judgments against other persons: *Van Metre v. Wolf*, 27-341.

Where a contract for conveyance was made with a married woman individually, *held*, that action thereon could be brought by her alone, and that she need not join her husband therein: *Malli v. Willett*, 57-705.

A married woman may sue in her own name for the alienation of her husband's affections: *Price v. Price*, 91-693.

SEC. **3478. Defense by.** If husband and wife are sued together, the wife may defend for her own right, and if either neglects to defend, the other may defend for both. [C. '73, § 2563; R., § 2774; C. '51, § 1687.]

SEC. **3479. When husband or wife deserts family.** When a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had; and, under like circumstances, the husband shall have the same right. [C. '73, § 2564; R., § 2776.]

SEC. **3480. Actions by minors.** The action of a minor must be brought by his guardian, if he has one, if not, by his next friend, but the court may dismiss it if it is not for his benefit, or may substitute a guardian or another person as next friend. [C. '73, § 2565; R., § 2777; C. '51, §§ 1688-9.]

An infant may sue by his next friend, and on the trial prove his infancy as establishing his right to sue in that manner: *Byers v. Lessees of Des Moines Valley R. Co.*, 21-54.

The "next friend" in whose name a suit for a minor is commenced may be discharged and another substituted: *Thurston v. Cavenor*, 8-155.

In an action brought for a minor by his next friend such next friend is liable for costs: *Vance v. Fall*, 48-364. But the minor is also liable: *Albee v. Winterink*, 55-184.

An action brought in the name of the guardian of minors instead of the minors themselves, asking the quieting of title, etc., *held* not improperly brought in view of the

fact that the court would have the power by the terms of the decree to sufficiently protect the interests of such minors: *Hanna v. Hawes*, 45–437.

Under a finding made by the court that the action was not being prosecuted for the benefit of the minor, and that the further prosecution was not for his best interests, *held*, that the court was authorized to dismiss the action upon a stipulation signed by the next friend who brought it: *Ball v. Miller*, 59–634.

In a suit brought for a minor by his next friend, defendant cannot interpose a counterclaim against such next friend: *Smith v. Dawley*, 92–312.

SEC. **3481. Plaintiff insane.** The action of a person judicially found to be of unsound mind must be brought by his guardian, but, if he have none, the court or judge thereof, or the clerk in vacation, may appoint one for the purposes of the action. [C.'73, § 2569; R., § 2781.]

Where a person has been judicially found to be of unsound mind in a proceeding authorized by law, an action by him must be brought by his guardian, and not in his own name. If brought in the name of the ward it will be dismissed: *Chavannes v Priestly*, 80–316.

An action for an insane person cannot be brought by next friend. Notwithstanding the provisions of § 3223 by which the laws relating to guardians of minors are made applicable to guardians of insane persons, the provision of the preceding section as to bringing action by a next friend of a minor is not applicable in case of insane persons: *Tiffany v. Worthington*, 65 N. W., 817. [A different view was previously suggested in *McNeill v. Sigler*, 64 N. W., 604.]

SEC. **3482. Defense by minor.** The defense of a minor must be by his regular guardian, or by one appointed to defend for him where no regular guardian appears, or, where the court directs a defense, by one appointed for that purpose. No judgment can be rendered against a minor until after a defense by a guardian. [C.'73, § 2566; R., § 2778; C.'51, §§ 1688–9.]

It is error to enter judgment against a guardian *ad litem*. It should be rendered against the minor party: *Tucker v. McClure*, 17–583.

In a proceeding to probate a will, the court acquires jurisdiction to appoint a guardian *ad litem* by service of notice by publication: *Farrell v. Leighton*, 49–174.

The appointment of a guardian *ad litem* may be a proper ground for continuance to enable him to prepare the case for trial: *Blythe v. Blythe*, 25–266.

At common law, infants were required to sue and defend by guardians. An infant is supposed to be incapable of guarding his own interests, and it is the duty of the court, before it divests him of his estate, to be satisfied that he has had full opportunity to have his day in court by proper and suitable guardian, and to see, notwithstanding any admission of facts by such guardian, that his rights are not sacrificed: *Cavender v. Smith's Heirs*, 5–157, 192.

A guardian *ad litem* will be appointed either on motion of plaintiff or defendant, but the court will not permit an adverse party to choose the guardian: *Ralston v. Lahee*, 8–17.

The fact that the guardian *ad litem* is interested adversely to the minor may be a ground for his removal. But unless it is shown that he took advantage of his position to injure the interests of the infant, the mere fact of his adverse interest will not be considered such conclusive evidence of fraud as to authorize the setting aside of the decree: *Ibid.*

Infants are as much bound by the conduct of those who carry on their case as adults, provided such conduct be *bona fide: Ibid.*

Failure to appoint a guardian *ad litem*, and rendition of judgment without defense by a minor, does not render a judgment void. It is erroneous, but can only be taken advantage of by direct proceedings: *Drake v. Hanshaw*, 47–291; *Myers v. Davis*, 47–325, 330; *Bickel v. Erskine*, 43–213; *Hoover v. Kinsey Plow Co.*, 55–668.

A judgment against a minor upon appearance by attorney, while irregular, is not void. Objection to the judgment cannot be raised in an action thereon in another state, but must be taken advantage of in the state where rendered and by a direct proceeding. Such an error does not go to the jurisdiction of the court: *Milne v. Van Buskirk*, 9–558.

Where a guardian is served, but does not appear, and makes no defense, the judgment rendered is without jurisdiction as to the minor, and void: *Dohms v. Mann*, 76–723.

Where a guardian *ad litem* was not appointed for a minor defendant until the trial had commenced and plaintiff had rested, when an attorney for the defendant was appointed as such guardian, *held*, that a refusal of the court to retry the case from the beginning would not be sufficient to warrant a reversal, no prejudice appearing to have resulted therefrom; *Wickersham v. Timmons*, 49–267.

A guardian *ad litem* in making defense may set up any matter which will defeat the action, although it be such matter as might have been the basis of an independent action in behalf of the minor: *Kelsey v. Kelsey*, 57–383.

A judgment in an action for partition of land belonging to minors and adults is conclusive against such minors, and a judgment for costs in the proceeding is binding upon them: *Johnson v. Carson*, 3 G. Gr., 499.

Where the pleadings and evidence in a

particular case failed to show the fact that one of the defendaants was a minor, *held*, that it would be presumed that she was of age and competent to make her own defense: *Kavalier v. Machula*, 77–121.

As to answer by guardian, see § 3567.

SEC. **3483. Guardian ad litem.** Such appointment can not be made until after the required service of the notice in the action, and then may be by the court, or in vacation by a judge or the clerk; but the court shall have the power to remove such guardian when the interests of the minor require it. If made by the judge or clerk, it shall be done by indorsing the name of the person appointed and the time thereof on the petition in the action. [C.'73, § 2567; R., § 2779.]

Service of notice by publication upon a minor gives the court jurisdiction to appoint a guardian *ad litem*, although it has not authority to render a personal judgment: *Judd v. Mosely*, 30-423; *Hoover v. Kinsey Plow Co.*, 55-668.

Where there has not been sufficient service of notice the appointment and appearance by a guardian *ad litem* will not confer jurisdiction: *Allen v. Saylor*, 14-435.

The court has no authority to appoint a guardian *ad litem* to act for a minor until complete service upon such minor has been had: *Good v. Norley*, 28–188, 199.

SEC. **3484. Application for appointment.** The appointment may also be made on the application of the minor, if he is of the age of fourteen years, and applies at or before the time he is required to appear and defend. If he does not, or is under that age, the appointment may be made on the application of any friend of his, or on that of the plaintiff in the action. [C.'73, § 2568; R., § 2780.]

SEC. **3485. Defense of insane person—appointment of guardian.** The defense of an action against a person judicially found to be of unsound mind, or of one confined in any state hospital for the insane who, by the certificate of the physician in charge, appears to be insane, must be by his guardian, or a guardian appointed by the court to defend for him. Such appointment may be made upon the application of any friend of the defendant, or on that of the plaintiff, but not until service has been made as directed in this code, and no judgment can be rendered against him until defense has been made as herein provided. [C.'73, § 2570; R., § 2782.]

Probate jurisdiction over the persons and property of insane persons does not exclude the jurisdiction of a court of law in an action against an insane person with reference to his property: *Flock v. Wyatt*, 49-466.

There is no authority to appoint a guardian *ad litem* for an insane person before service of notice on such person: *In re Hunter's Estate*, 84-388.

Therefore, *held*, that the court did not have jurisdiction of a proceeding by the guardian of an insane widow who had received a devise under her husband's will to have a record made of the widow's acceptance of the devise until notice had been served on the insane person: *Ibid.*

SEC. **3486. Pending suit.** Where a party is judicially found to be of unsound mind, or is confined in any state hospital for the insane, and, by the certificate of the physician in charge, appears to be insane, during the pendency of an action, the fact being stated on the record, if he is plaintiff his guardian may be joined with him in the action as such; if defendant, the plaintiff may, on ten days' notice thereof to his guardian, have an order making the guardian a defendant also. [C.'73, § 2571; R., § 2783.]

SEC. **3487. Interpleader.** Upon the affidavit, before answer, of a defendant in any action upon contract for the recovery of personal property, that some third person, without collusion with him, has or makes a claim to the subject of the action, or on proof thereof, as the court may direct, it may make an order for the safe keeping, or for the payment or deposit in court, or delivery of the subject of the action to such person as it may direct, and an order requiring such third person to appear in a reasonable time and maintain or relinquish his claims against defendant, and in the meantime stay the proceedings. If such third person, being served with a copy of the order, fails to appear, the court may declare him barred of all claims in respect to the subject of the action against the defendant therein. If such third person appears, he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all

liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for payment, deposit or delivery thereof. [C.'73, § 2572; R., § 2767; C.'51, §§ 1685–6.]

SEC. **3488. By sheriff.** The provisions of the last section shall be so far applicable to an action brought against a sheriff or other officer for the recovery of personal property taken by him under an attachment or execution, or for the value of such property so taken and sold by him, that, upon exhibiting to the court the process under which he acted, with his affidavit that the property for the recovery of which, or its proceeds, the action was brought was taken under such process, he may have the attaching or execution creditor made a joint defendant with him, and if judgment go against them, it shall provide that the property of such creditor shall be first exhausted in satisfaction thereof. [C.'73, § 2573; R., § 2768.]

This section gives a merely cumulative remedy to the officer. He is entitled to an indemnifying bond: *Kaster v. Pease*, 42–488.

SEC. **3489. Substitution.** In an action against a sheriff or other officer for the recovery of property taken under an attachment or execution, the court may, upon application of the defendant and of the party in whose favor the process issued, permit the latter to be joined with such officer as defendant. [C.'73, § 2574; R., § 2769.]

This section is independent of other provisions as to interpleader and the application need not be made before defendant's answer is filed. The party substituted takes up the case in the condition it is in at the time of substitution: *Bixby v. Blair*, 56–416.

In so far as it is attempted by these provisions with regard to interpleader to deprive a property owner of his right of action against a sheriff to recover property wrongfully seized by such officer under an execution against another person they are unconstitutional: *Sunberg v. Babcock*, 61–601; *Maish v. Littleton*, 62–105.

These provisions for the substitution of attachment plaintiff in an action against an officer for wrongful levy of the attachment have reference to an action for the recovery of specific personal property: *Sperry v. Ethridge*, 70–27.

Where property was levied upon under an execution and a third party claimed to own said property and entered into a contract with the party in whose favor the judgment was rendered, to the effect that he would hold said property or its proceeds subject to the levy, in an action for the breach of the conditions of the contract, *held*, that the proceeding was not such as is contemplated by this section, and that the party in whose favor process was issued was a proper party to the suit, though not substituted by the court: *Allen v. Pratt*, 79–113.

SEC. **3490. Landlord's attachment.** An action brought by a tenant, his assignee or under tenant, to recover the possession of specific personal property taken under landlord's attachment, may be against the party who sued out the attachment; and the property claimed in such action may, under the writ therefor, be taken from the officer who seized it, when he has no other claim to hold it than that derived from the writ. The indorsement of a levy on the property, made upon the process by the officer holding it shall be a sufficient taking of the property to sustain an action against the party who sued out the writ. [C.'73, § 2575; R., § 2770.]

CHAPTER 4.

OF PLACE OF BRINGING ACTION.

SECTION **3491. In relation to real property.** Actions for the recovery of real property, or of an estate therein, or for the determination of such right or interest, or for the partition of real property, must be brought in the county in which the subject of the action or some part thereof is situated. [C.'73, § 2576; R., § 2795; C.'51, § 1703.]

Under the provisions of the Code of '51, that an action relating to real property should be brought in the county where the rea. property was situated, *held*, that an action of trespass *quare clausum fregit* was governed thereby: *Barnes v. Davis*, 2–160.

An action under § 4228 to establish disputed boundaries may be brought in the county in which one of the tracts in question is located, and the court will have jurisdiction, although the adjoining tracts are in another county: *Tooman v. Hidlebaugh*, 83–130.

SEC. **3492. For injuries thereto.** Actions for injuries to real property may be brought either in the county where the property is, or where the defendant resides. [C.'73, § 2577.]

SEC. **3493. To foreclose mortgage or mechanic's lien.** An action for the foreclosure of a mortgage of real property, or for the sale thereof under an incumbrance or charge, or to enforce a mechanic's lien thereon, shall be brought in the county in which the property to be affected, or some part thereof, is situated. [20 G. A., ch. 126; C.'73, § 2578.]

Under the corresponding section of Code of '73 as it stood before amendment, *held*, that an action to foreclose a mortgage and for general judgment against the mortgagor might be brought where the defendant resided: *Cole v. Conner*, 10–299; *Finnagan v. Manchester*, 12–521.

Also *held*, that where the note secured by a mortgage was made payable at a particular place, action to foreclose the mortgage might be brought in the county in which the note was made payable, although the land mortgaged was situated in another county: *Equitable L. Ins. Co. v. Gleason*, 56–47.

Also *held*, that although a mortgage might be foreclosed in any county in which the court could acquire jurisdiction to render a personal judgment on the debt, yet if the proceeding was upon publication only, and defendant did not appear, the foreclosure could not be had in a county where no portion of the property was situated: *Iowa Loan & Trust Co. v. Day*, 63–459.

An action being brought to recover upon three notes and to foreclose six mortgages upon six parcels of land in as many different counties, such mortgage being for a specific sum, a part of the note described therein, *held*, that each mortgage constituted a separate cause of action, and a motion should have been sustained to strike from the petition the portions thereof relating to mortgages upon lands not situated in the county where the action was brought: *Chadbourne v. Gilman*, 29–181.

Under the provisions of the Code of '51, *held*, that a bill in equity brought by the vendor to foreclose a title bond was a local action and properly brought in the county where the land is situated: *Johns v. Orcutt*, 9–350.

Where distinct deeds of land in different counties were given as security in connection with an instrument of defeasance, in such way as to constitute a mortgage, *held*, that a suit to foreclose as to all the lands might be brought in the county in which a portion thereof was situated: *Lomax v. Smyth*, 50–223.

It seems that where no personal judgment can be rendered in an action of foreclosure, it is an action *in rem*, and the court acquires no jurisdiction in a proceeding brought in the wrong county: *Orcutt v. Hanson*, 71–514.

An action against husband and wife for indebtedness incurred for family expenses, and in which it is sought to make such indebtedness a lien upon real property of the wife, may be brought in the county where such real property of the wife is situated, although neither husband nor wife be a resident of that county: *Hawke v. Urban*, 18–83.

SEC. **3494. Local actions.** Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. *For fines, penalties or forfeitures.* Those for the recovery of a fine, penalty or forfeiture imposed by a statute; but when the offense for which the claim is made was committed on a water course or road which is the boundary of two counties, the action may be brought in either of them;

2. *Against public officers.* Those against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who by his command or in his aid shall do anything touching the duties of such officer, or for neglect of official duty;

3. *On official bonds.* Those on the official bond of a public officer. [C.'73, § 2579; R., § 2796.]

An action of *certiorari* to review proceedings of the state board of health should be brought in the county in which the board acts: *College of Physicians and Surgeons v. Guilbert*, 69 N.W., 453.

An action on a bail bond given upon change of venue from one county to another, conditioned for the appearance of defendant in the county to which the change is taken, should be brought in that county and not in the county where the indictment was found. The forfeiture belongs to the county to which the change was taken: *Decatur County v. Maxwell*, 26–398.

As to place of bringing action on bail bond, see § 5518.

SEC. **3495. By attachment.** An action against a nonresident of the state, when aided by an attachment, may be brought in any county of the state

wherein any part of the property sought to be attached may be found, or wherein any part was situated when the action was commenced, or where the defendant is personally served in this state; and, except as hereinafter provided, an action against a resident of this state must be brought in the county of his residence, or that in which the contract was to be performed, except that, if an action be duly brought against such defendant in any other county by virtue of any of the provisions of this chapter, then such action may, if legal cause for an attachment exist, be aided by attachment. Should such action be brought against a resident of this state in any other county than that of his residence, he may have the place of trial changed to the district court of the county wherein he resides, in the same manner and upon the same terms as provided in section thirty-five hundred and four of this chapter, and the property attached shall not be released because said action was brought in the wrong county, but shall be held and subject in the same manner as if said action had been brought in the county of defendant's residence. [26 G. A., ch. 89; C.'73, § 2580; R., § 2797; C. '51, § 1703.]

In an action by attachment the seizure of property in the county where suit is brought will be sufficient to give the court jurisdiction, but jurisdiction cannot be conferred by attaching that which is not subject to attachment and which could not be made liable under the judgment to plaintiff's demands; *Courtney v. Carr*, 6-238.

As to whether the proceedings in an action by attachment against a nonresident defendant served by publication, brought in a county where no property is found, but in which proceedings property in another county is levied on, are valid and may be removed to the proper county under § 3504 (discussing the question with reference to the provisions of Code of '51), see *Laird v. Dickerson*, 40-665.

It is the service of the attachment which gives jurisdiction where there is no personal service, and an action by attachment against a nonresident not served cannot be prosecuted in the county in which the contract on which action is based is made payable unless property of defendant can be attached in that county: *Hedrick v. Brandon*, 9-319.

A court does not acquire jurisdiction by attachment in an action against a resident of the state not served with notice: *Langworthy v. Root*, 10-260.

The provisions of this section restrict attachments against residents. An attachment issued in a case brought in a county other than thus specified is invalid and should be dismissed on motion, even if the case itself is transferred. upon the application of the defendant, to the county of his residence: *Wasson v. Millsap*, 70-348.

The word "contract" in the phrase "that (county) in which the contract is to be performed" refers to such written contract as is contemplated in the following section and not to verbal contracts: *Hatch v. Johnson*, 44-535.

An action against a nonresident corporation may be maintained when aided by attachment of property found within the state. and the judgment of a federal court in a former suit founded on the same cause, dismissing the action for want of jurisdiction of the person, will not bar a subsequent action when aided by attachment: *Weyand v. Atchison, T. & S. F. R. Co.*, 75-573.

An action against nonresidents aided by attachment may be brought wherever any part of the property attached, such as a fund in the hands of a garnishee, may be found: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N. W., 761.

Though the action be brought in the wrong county, an attachment therein will not be void but voidable only on application of defendant to have the case removed to the proper county, and another attaching creditor cannot take advantage of the objection: *Payne v. Dicus*, 88-423.

The residence contemplated in this section is actual residence. It is not practicable as a matter of law to say how long an absence from the state in a way that a personal action could not be commenced will constitute a person a nonresident: *Stevens v. Ellsworth*, 63 N.W., 683.

While a residence once established is presumed to continue until proof of a change of residence is made, yet there may be evidence of abandonment such as to overcome such presumption without showing the acquisition of another residence: *Ludlow v. Szold*, 90-175.

And where defendant was shown to have left the county of his former residence, in which suit was brought, before the beginning of such suit and to have been temporarily in another county, though only for a few days, with the apparent intention not to return to the county of his former residence, *held*, that the action was improperly brought and that an attachment sued out in such action was not a valid one: *Ibid.*

Section applied: *German Bank v. American F. Ins. Co.*, 83-491.

SEC. **3496. Place of contract.** When, by its terms, a written contract is to be performed in any particular place, action for a breach thereof may, except as otherwise provided, be brought in the county wherein such place is situated. [C.'73, § 2581; R., § 2798; C.'51, § 1704.]

This section is permissive, and not mandatory, and plaintiff may still sue in the county where defendant resides: *Troy, etc., Mill Co. v. Bowen*, 7-465.

This section only applies to cases where personal service is had upon defendant within the state. If the proceedings are by attachment against a nonresident defendant suit can only be brought where the property is attached: *Hedrick v. Brandon*, 9-319.

Where the terms of a written contract of sale of a wagon provided that it should be paid for on delivery, one-half in cash and a note for the other half, "said amount to be settled by note at Algona, Iowa, on receipt of goods," *held*, that the contract was to be performed at Algona within the terms of this section, and that an action for nonpayment could be brought in that county: *Bradley v. Palen*, 78-126.

The place of payment specified in a note is not the place of payment for the indorser: *Davis v. Miller*, 88-114.

Action on a written contract which is, by its terms, to be performed in a particular place cannot be brought in that place against parties who have orally undertaken to carry out the stipulations in such contract and are not residents of that county: *McDaniels v. Wheeler*, 64-678; *Wright, etc., Mfg. Co. v. Kleigel*, 70-578.

Where defendant bought of plaintiff fruit trees, agreeing to pay therefor a certain sum on their delivery at a certain place, *held*, that the contract to pay was not, by its terms, to be performed in any particular place, and suit for the price should be brought where the defendant resided. The agreement to perform in a particular place must be in terms, and not by implication merely: *Hunt v. Bratt*, 23-171.

To entitle plaintiff to prosecute an action in the county where the contract is to be performed the performance must have been required to be there made by the terms of the contract: *Fort Dodge Coal Co. v. Willis*, 71-152.

Where personal property is to be delivered by the vendor and received by the vendee at a particular place, an action for the breach of such contract may be brought in the county where, by its terms, the property was to be delivered: *Oliver v. Bass*, 30-90; *Haugen v McCarthey*, 34-415.

Where a certificate of deposit was issued payable at a certain date on return of the certificate, *held*, that by its terms it was "to be performed" at the place where issued, so that an action on it might be brought in that county: *Sanbourn v. Smith*, 44-152.

Where a bond was given conditioned for the payment of a penalty if the principal failed to erect a school-house at a place named, according to a certain written contract, etc., *held*, that it was not "to be performed in a particular place," and an action thereon should be brought in the county where defendant resided: *Independent School Dist. v. Reichard*, 39-168.

Where plaintiff agreed to lay a railroad track for defendant in Lucas county, and defendant agreed to deliver iron and material for laying the track at the end thereof, and pay plaintiff any damage sustained by reason of delay in finishing the grade, *held*, that as to damages for delay, etc., the action could not be brought in Lucas county, as the place of performance of the contract, but *semble* that as to damages for not delivering iron, etc., at end of track, action might be brought in that county as the place where the contract was to be performed: *Manley v. Wolfe*, 24-141.

An action upon service by publication to foreclose a mortgage cannot be brought in the county in which the note is made payable, if no portion of the property is situated in that county: *Iowa Loan & Trust Co. v. Day*, 63-459.

SEC. **3497. Against common carriers.** An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal, telegraph and telephone companies, and the lessees, companies or persons operating the same, in any county through which such road or line passes or is operated. [C. '73, § 2582.]

A railway company has a residence in any county through which its road passes and in which it transacts business: *Baldwin v. Mississippi & M. R. Co.*, 5-518; *Richardson v. Burlington & M. R. R. Co.*, 8-260.

A railroad, operating a line of road in the county at the time suit is commenced against it there, is subject to jurisdiction of the courts of that county: *Knott v. Dubuque & S. C. R. Co.*, 84-462.

A railway company doing business in the state so that action might be commenced against it as here provided cannot claim advantages of the provisions of the statute of limitations as to nonresidents: See notes to § 3451.

An action against a foreign railway corporation not operating a line of railway nor having any office in the state cannot be brought in the state on a cause of action arising out of business not transacted within the state by means of service of notice on an agent found within the state: *Elgin Canning Co. v. Atchison, T. & S. F. R. Co.*, 24 Fed., 866.

Bringing cars within the state with a patent air brake for purposes of exhibition does not authorize service upon the foreign corporation owning such cars: *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed., 434.

Corporations operating railways within the state are subject to the jurisdiction of our courts the same as any person resident within the state: *Mooney v. Union Pacific R. Co.*, 60-346.

The provision as to telegraph companies was held applicable to telephone companies, before they were expressly mentioned, and authorized the bringing of action against such a company before a justice of the peace in any county through which the line of the company passed or was operated: *Franklin v. Northwestern Telephone Co.*, 69-97.

SEC. **3498. Against construction companies.** An action may be brought against any corporation, company or person engaged in the con-

struction of a railway, canal, telegraph or telephone line, on any contract relating thereto or to any part thereof, or for damages in any manner growing out of the work thereon, in any county where such contract was made, or performed in whole or in part, or where the work was done out of which the damage claimed arose. [C.'73, § 2583.]

Under this section, *held*, that where an action was brought by a subcontractor entitled to a mechanic's lien against the contractor for the construction of the railway on an agreement to pay the amount of such lien, such action was properly brought in the county through which the road was being constructed, and could not be removed, on the application of defendant, to the county of his residence: *Vaughn v. Smith*, 58–553.

The facts showing that the contract has been performed or the work done in the county in which suit is brought may be established by affidavit on the hearing of the motion, if defendant seeks to change the place of trial to the county of his residence: *Jordan v. Kavanaugh*, 63–152.

On motion for a change of venue the question as to plaintiff's right of recovery against a portion of defendants cannot be raised, as such a question must be determined upon demurrer: *Ibid.*

SEC. **3499. Against insurance companies.** Insurance companies may be sued in any county in which their principal place of business is kept, or in which the contract of insurance was made, or in which the loss insured against occurred, or, in case of insurance against death or disability, in the county of the domicile of the insured at the time the loss occurred, or in the county of plaintiff's residence. [21 G. A., ch. 65, § 13; C. '73, § 2584.]

Under this section an action may be brought before a justice of the peace against an insurance company in another county than that of its residence, notwithstanding the provisions of § 4476, with reference to the place of bringing action in justices' courts: *Hunt v. Farmers' Ins. Co.*, 67–742.

Suit may be brought in the county where the loss occurs: *State Ins. Co. v. Granger*, 62–272.

A provision in a certificate of mutual benefit insurance by which it is stipulated that action shall not be brought thereon except in a certain county named is not valid: *Matt v. Iowa Mut. Aid Association*, 81–135.

An action may be brought against an insurance company in any county in which the loss occurred although it has no agent on whom service can be made, provided jurisdiction *in rem* is acquired by publication: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N. W., 761.

An action against an insurance company may be brought in the county in which the loss occurred, even though the principal place of business of a company is in another county of the state: *Prader v. National Masonic Acc. Ass'n*, 63 N. W., 601.

Mutual benefit associations are to be deemed insurance companies within the provisions of this section: *Ibid.*

SEC. **3500. Office or agency.** When a corporation, company or individual has an office or agency in any county for the transaction of business, any actions growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located. [C.'73, § 2585; R., § 2801; C.'51, § 1705.]

These provisions are permissive and not mandatory, and the suit, if against a nonresident, may be brought in the usual manner of commencing actions against nonresidents: *Dean v. White*, 5–266.

This section merely fixes the county in which suit shall be brought; it does not define the manner in which jurisdiction over the person is to be acquired: *Centennial Mut. L. Ass'n v. Walker*, 50–75.

One who accepts the benefits of a sale by a person claiming to act as his agent, or who accepts the benefits of a proposition made through and forwarded by him, thereby ratifies the transaction, so that an action arising therefrom may be brought in the county of such agency: *Milligan v. Davis*, 49–126.

A certain method of doing business between a firm and defendant, *held* such as to constitute the firm agents for defendant, and authorize an action against defendant growing out of the business of such agency to be brought in the county where the agency was located: *Ibid.*

An action by the agent against the principal for services as agent is connected with the business of the agency in such sense that suit against the principal may be brought in the county of such agency: *Ockerson v. Burnham*, 63–570.

The section does not limit the right to commence a suit in the county where the agency is located to the time during which the agency exists: *Ibid.*

This provision is also applicable to suits against a partnership brought in a justice's court, and the partnership may be considered a resident of the county in which the business is transacted, although none of its members are residents of such county: *Fitzgerald v. Grimmell*, 64–261.

A partnership may be considered as having a residence in the county in which it does business, though neither partner resides in such county: *Ruthven v. Beckwith*, 84–715.

The office or agency referred to is one established for the purpose of carrying on the business for which the corporation is organ-

ized. A foreign corporation does not subject itself to suit here by sending here an agent to advertise, make contracts, etc.: *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed., 434.

Where it appeared that the business out of which the suit arose did not pertain to the agency, *held*, that the provisions of this section were not applicable in determining the place of bringing suit: *King v. Blair*, 69 N. W., 261.

This section has no reference to an agency which is not located and applies to the place of business of the agent rather than to the relation between the principal and the agent; and where it appeared that if there was an agency it had no relation to any particular locality, *held*, that place of action could not be determined by the provisions of this section: *Wickens v. Goldstone*, 66 N. W., 896.

The state may prescribe as a condition on which a foreign insurance company may do business within the state that service upon an agent of the company shall give the courts of the state jurisdiction in an action against such company: *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 63 N. W., 565.

Where an insurance agent in Wisconsin was directed by the owner of property to secure insurance thereon, and negotiated for such insurance through another agent outside of the state who placed the insurance in defendant company which was not regularly doing business in that state without any direction on the part of the first agent as to the company in which the insurance should be secured, *held*, that the agent in Wisconsin to whom the application was made became the agent of the defendant company in the procuring of such insurance, and that under the laws of Wisconsin, service on such agent would give the court of that state jurisdiction of an action against the company: *Ibid.*

The issuing of policies of insurance outside of the state on property within it is the doing of business within the state such as to subject the company to statutory regulation: *Ibid.*

SEC. 3501. Place of residence. Personal actions, except as otherwise provided, must be brought in a county in which some of the defendants actually reside, but if neither of them have a residence in the state, they may be sued in any county in which either of them may be found. In all actions upon negotiable paper, except when made payable at a particular place, in which any maker thereof, being a resident of the state, is defendant, the place of trial shall be limited to a county wherein some one of such makers resides. [C. '73, § 2586; R., § 2800; C. '51, § 1701.]

A personal action may be brought in the county where one of the defendants resides, and the fact as to whether the petition is sufficient to entitle the plaintiff to recover against such defendant cannot be determined on a motion for change of venue to the county where other defendants reside: *Armstrong v. Borland*, 35–537.

Previous to the enactment of the clause in relation to negotiable paper, it was held that when a joint action was brought against the maker and indorsers of a note it might properly be brought in the county where an indorser resided: *Stout v. Noteman*, 30–414.

The indorser on a note does not become bound to pay the same at the place of payment named in the note, and therefore if the action is against the indorser alone, the maker being a nonresident of the state, the action must be brought in the county of indorser's residence and not where the note is by its terms made payable: *Davis v. Miller*, 88–114.

And that the fact that guarantors or indorsers became parties to the note subsequent to the maker, if in good faith, would not change the rule: *Troy, etc., Mill Co. v. Bowen*, 7–465.

But *held*, that a suit brought in the county of the residence of a party who was made defendant merely for the purpose of compelling the other defendants to attend at great expense in a county where suit could not have been brought against them alone, might be removed to the county of residence of the proper defendants: *Ibid.*

It is not proper to join as defendants stockholders of a corporation so as to enable the suit to be maintained in a county other than that of the residence of some of them. The policy of the law is that, aside from excepted cases, a person shall not be required to appear to defend against any demand in any court other than that held in the county of his residence: *Kell v. Lund*, 68 N. W, 593.

The fact that an attachment is sought against property in another county than that of defendant's residence will not change the rule as to the place of bringing suit: *Gates v. Wagner*, 46–355.

The fact that the defendant is a resident of another state will not defeat the jurisdiction of our courts: *Swan v. Smith*, 26–87.

In a personal action the court acquires jurisdiction by getting jurisdiction of the person of defendant, no matter where the contract was made nor where it is to be performed: *Johnson v. Tostevin*, 60–46.

A person who, having relinquished his residence in one county, is in the act of removing to another with intent of residing within the latter, has not "a residence within this state," and may be sued in any county where found. The meaning of residence as here used is more precise and limited than that of domicile: *Cohen v. Daniels*, 25–88.

In determining whether defendant is a resident of the state his statements and those of his family are not conclusive as to the intention with which he has left the state, nor as to the facts with reference thereto: *Stevens v. Ellsworth*, 63 N. W., 683.

An action for a libel being a personal action must be brought within a county where some of the defendants reside: *Hall v. Royce*, 54–136.

Where the action seeks a remedy against an attorney for negligence it is a personal action, and if not brought in the county of his residence should be changed to such county upon proper application, although the relief asked is in connection with an application for an injunction to prevent him from enforcing judgments recovered in an action in which he appeared as attorney, and which have been assigned to him. In such case an action cannot be brought in the county in which the judgments were recovered other than that of defendant's residence: *Baker v. Ryan*, 67–708.

Where an action is brought against a nonresident, and he is served in the state, but in a different county from that in which the action is brought, the only remedy is a motion for change of place of trial to the county of service. If such motion is not made the judgment will not be void for want of jurisdiction: *Marquardt v. Thompson*, 78–158.

Where action is brought by attachment against a nonresident partnership, the fact that one of the partners resides in another county of the state will not entitle him to have the action changed to such county: *Sketchley v. Smith*, 78–542.

Where, in a suit which contemplated relief against different parties, judgment was rendered against one party and by amendment another party was brought in, *held*, that the party thus brought in was not entitled to have the action removed to the county of his residence, although the other parties against whom relief was asked were not yet served with notice: *Anderson v. Orient Fire Ins. Co.*, 88–579.

The place of bringing action being a proper one at the time the action was brought, the jurisdiction of the court will not be affected or taken away by the intervention of a party who may be ultimately liable for any judgment recovered against the original defendant: *German Savings Bank v. Citizens' Nat. Bank*, 70 N. W., 769.

The term personal action used in this section is to exclude actions *in rem*, and a suit brought to enjoin the opening of a highway is properly subject to the provisions of this section as a personal action: *Everett v. Board of Supervisors*, 93–721.

SEC. **3502. Residents of different counties.** Where an action provided for in the preceding section is against several defendants, some of whom are residents and others nonresidents of the county, and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is a failure to obtain judgment against such residents, such nonresidents may, upon motion, have said cause dismissed, with reasonable compensation for trouble and expense in attending at the wrong county, unless they, having appeared to the action, fail to object before judgment is rendered against them. [C.'73, § 2587.]

This section has no application to an action of replevin brought in the county in which the property is situated: *Porter v. Dalhoff*, 59–459.

Where one of defendants is a resident of the county where the suit is brought, and the cause remains undetermined as to him, it cannot be dismissed on motion on the ground that defendant as to whom the issue is raised is a resident of another county: *McAlister v. Safley*, 65–719.

This section is not penal in its nature but compensatory only, and is intended to give only an actual return for the trouble and expense involved in being sued in the wrong county: *Everett v. Board of Supervisors*, 93–721.

SEC. **3503. Change of residence.** If, after the commencement of an action in the county of the defendant's residence, he removes therefrom, the service of notice upon him in another county shall have the same effect as if it had been made in the county from which he removed. [C.'73, § 2588.]

SEC. **3504. Change when brought in wrong county.** If an action is brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demands a change of place of trial to the proper county, in which case the court shall order the same at the cost of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expense in attending at the wrong county; and if the sum so awarded and costs are not paid to the clerk by a time to be fixed by the court, or if the papers in such case are not filed by the plaintiff in the court to which the change is ordered ten days before the first day of the next term thereof, or, if ten days do not intervene between the making of said order and the first day of the next term of said court, ten days preceding the first day of the next succeeding term thereof, in either event the action shall be dismissed. [C.'73, § 2589; R., § 2802; C.'51, § 1702.]

Motion to change only remedy: Where suit is brought in the wrong county, defendant's remedy is not by demurrer to the jurisdiction of the court, but by motion to change the place of trial to the proper county. If such change is not asked, suit may be

prosecuted to judgment in the county where it is brought: *Lyon v. Cloud*, 7-1; *Cole v. Conner*, 10-299; *Leach v. Kohn*, 36-144.

If an action of replevin is brought in the the wrong county the only remedy is by motion to change the venue to the proper county: *Goldsmith v. Willson*, 67-662.

Failure to move to transfer to the proper county will waive the objection that an action against a nonresident is brought in another county of the state than that in which he was served with notice: *Marquardt v. Thompson*, 78-158.

The question as to the place to try the action having been determined on a motion for change of venue, *held*, that it was not proper by averments in the answer to raise an issue on that question for the purpose of having an attorney's fee taxed against the plaintiff for bringing action in the wrong county: *Kelly v. Cosgrove*, 83-229.

The objection that parties are improperly joined cannot be raised on a motion by one of them for change of place of trial: *Troy, etc., Mill Co. v. Bowen*, 7-465; *Lyons v. Frazier*, 8-349.

Where the proceeding is *in rem* only, the court acquires no jurisdiction in an action brought in the wrong county, and the provision that it may proceed with the case, unless motion to transfer it to the proper county is made, is not applicable: *Orcutt v. Hanson*, 71-514.

Even though the action be brought in the wrong county an attachment had thereon will not be void, but voidable only on application of defendant to have the case removed to the proper county: *Payne v. Dicus*, 88-423.

Where the defendant files a cross petition and serves notice thereof on a co-defendant, even though the latter has not been served with notice in the original action, such co-defendant is not entitled to a removal of the cause to the county of his residence: *Mahaska County State Bank v. Crist*, 87-415.

Nominal party: A defendant who is merely a nominal party to the cause cannot compel a change in the place of trial without the concurrence of the real parties in interest: *Omaha & St. L. R. Co. v. O'Neil*, 81-463.

Time for application: Where a default had been set aside and defendant granted a certain time in which to answer, *held*, that such application, made after the expiration of the time given to answer, was too late: *First Nat. Bank v. Krance*, 50-235.

Showing for the change: On the hearing of an application of a defendant for the transfer of an action to another county upon a showing that it is his place of residence, the plaintiff should be allowed to make a counter-showing on that question: *Turner v. Maddox*, 6-489.

Plaintiff is not required to state in his petition facts showing that he is entitled to sue in the county where suit is brought but may make such showing by counter affidavits in resistance to a motion for change: *Jordan v. Kavanagh*, 63-152.

Where an application for a change has been made and conditionally granted, with opportunity for the opposing party to make objection or showing against such order, it is not too late for the filing of an amendment dismissing one of the causes of action so so as to defeat the ground for the change of venue: *Allen v. Braswell*, 35-218.

If, when the motion for change of venue is to be determined, the state of the pleadings is such as to show that the action is against joint defendants, one of whom is a resident of the county, the motion should be overruled although at the time it was filed the defendant who asks the change was the only defendant and it appears that he was a resident of another county. The plaintiff may by amendment bring in another defendant after the filing of the motion and thus defeat the change: *Tibbetts v. Wadden*, 62 N.W., 693.

Waiver of objection: A party moving for a change of place of trial to the proper county, and appealing from the action of the court in overruling such application, takes the chances as to such appeal, and, if the ruling of the court below on the motion is sustained, cannot, after judgment has been rendered against him, be allowed an opportunity to defend in the action: *Breckenridge v. Brown*, 9-396.

Where a transfer is ordered, but the papers are filed in the court to which the case is transferred after the time required by statute, the other party will not be held to have waived the right to have the action discontinued by appearing in the court where the papers are filed and moving for such discontinuance: *Hall v. Royce*, 56-359.

Where a motion for change of place of trial was made, but did not appear to have been ruled on, and no exception to the action of the court was shown, *held*, that the motion would be deemed waived: *Knott v. Dubuque & S. C. R. Co.*, 84-462.

These provisions as to changing the place of trial to the proper county have no application to actions before a justice of the peace: *Post v. Brownell*, 36-497; *Meunch v. Breitenbach*, 41-527.

If defendant instead of asking the removal of the case to the proper county takes it to the federal court he will not be entitled in the federal court to have it removed to the division in which is located the county to which the removal might have been had. By electing to remove the case to the federal court defendant deprived himself of any right to removal under the state statute: *O'Donnell v. Atchison, T. & S. F. R. Co.*, 49 Fed., 689.

Costs: Defendant is to be compensated for his actual and necessary trouble and expenses in attending in the wrong county, even where the change to the proper county is defeated by plaintiff's dismissing the suit: *Allen v. Van*, 1-568.

Action of the court in its ruling in sustaining a motion to dismiss the case because the costs were not paid within the prescribed time, *held* not to be open to review in the absence of a showing in the record on appeal that the supreme court had before it all the evidence and the facts upon which the court acted: *Smith v. Yager*, 85-106.

Dismissal: Where one of several counts in a petition is upon a cause of action prop-

erly suable in the county where the action is commenced, and the causes of action set up in the other counts are improperly brought there, defendant should move to strike the latter counts from the petition if he desires any relief, and cannot have the cause changed to another county: *Davis v. Kimball*, 74–84.

After one of two defendants who is entitled to a change of place of trial to another county appears and moves for such change and for an allowance of expenses, his right to have such allowance made cannot be defeated by dismissal of the action: *Farmers', etc., Bank v. Cohen*, 71–473.

As failure to file the papers in the proper court would work a discontinuance, the dismissal of the action upon the election of the party to stand upon exceptions and not to file the papers in the proper court will be, even if irregular, error without prejudice: *Edgerly v. Stewart*, 86–87.

In superior court: The provisions of this section are, under § 261, applicable to actions brought in the superior court, and in such case a change may be granted by the superior court to the district court of the proper county: *Day v. Greenwood*, 64 N. W., 789.

CHAPTER 5.

OF CHANGE OF PLACE OF TRIAL.

SECTION 3505. Grounds for. A change of the place of trial in any civil action may be had in any of the following cases:

1. *County a party.* Where the county in which the action is pending is a party thereto, if the motion is made by the party adversely interested, and the issue be triable by jury;

2. *Judge a party or interested.* Where the judge is a party, or is directly interested in the action, or is connected by blood or affinity with any person so interested nearer than the fourth degree;

3. *Prejudice or local influence.* Where either party files an affidavit, verified by himself and three disinterested persons not related to the party making the motion nearer than the fourth degree, nor standing in the relation of servant, agent or employe of such party, stating that the inhabitants of the county or the judge is so prejudiced against him, or that the adverse party or his attorney has such an undue influence over the inhabitants of the county, that he cannot obtain a fair trial; and when either party files such an affidavit the other party shall have a reasonable time in which to prepare and file counter affidavits, and the court or judge, in its discretion, may cause the affiants upon either side to be brought into court for examination upon the matters contained in their affidavits, and, when fully advised, shall allow or refuse the change according to the very right and merits of the matter;

4. *Agreement.* By the written agreement of the parties;

5. *Jury not obtainable.* If the issue is one triable by a jury, and it is made apparent to the court or judge that a jury cannot be obtained in the county where the action is pending, then, upon the application of either party, a change of place of trial shall be granted to the nearest county in which a jury can be obtained.

Not more than two such changes to either party shall be allowed for any of the causes enumerated in this section; nor shall a change be allowed in case of appeal from a justice of the peace; nor, when the issues can only be tried to the court, for any objection to the inhabitants of the county, or for the objection that the adverse party or his attorney has such an undue influence over the inhabitants thereof that he can not obtain a fair trial. After a change of place of trial has been taken and a trial had, and the jury discharged or a new trial granted, a subsequent change may be taken for any of the causes mentioned in this section. [20 G. A., ch. 94; 17 G. A., ch. 118; C.'73, § 2590; R., § 2803; C. '51, § 1706.]

County a party: The fact that the penalty to be recovered in an action in the name of the state on a bail bond goes into the county school fund does not make the county a party to such action so as to be a ground for changing the venue of the action: *State v. Merrihew*, 47–112; *State v. Stewart*, 74–336.

The provision that a change of place of trial shall not be granted after a continuance applies as well to a case where the county in which action is brought is a party as to any other case: *Ferguson v. Davis County*, 51–220.

Prejudice of the judge: The fact that the judge before whom the case is tried has previously been counsel for one of the parties will not render judgment by him void. Objection should be made by motion for a change of place of trial: *Jewett v. Miller*, 12–85.

Motion for change of venue on account of prejudice of the judge, if properly made in vacation, should be granted, even though the judge to whom objection is made is to go out of office before the next term of court. The change is not merely for purposes of trial; but where the objection is to the court, the statute contemplates that it may be had before the issues are made up and the case ready for trial: *Allerton v. Eldridge*, 56–709.

There is no distinction between a change on the ground of prejudice of the judge and on the ground of prejudice of the inhabitants of the county. It is not proper to designate one as a change of forum and the other as a change of place of trial: *Weare v. Williams*, 69–252.

Even though no counter-affidavits are filed, and the persons making the affidavits for the change are not brought into court for examination, the court may exercise its discretion in granting such change. In such case the court should act upon the facts as they appear, considering its own knowledge in the premises; and where the ground for change was previous misconduct of the judge in the case, *held*, that a refusal to grant the change might properly be considered as a denial of such misconduct, and the action of the judge in refusing to grant the change would not be reversed: *Garrett v. Bicklin*, 78–115.

It being claimed that reversal of previous action of the court presided over by the same judge in the same case was an indication of prejudice or ill will, *held*, that such reversal was not an indication of bias in the former action: *Ibid.*

Undue influence of opposite attorney: An affidavit of undue influence of the attorneys for the opposite party will not be sufficient to support an application for change of venue on that ground after some of the attorneys have withdrawn from the case: *Anderson v. Leverich*, 70–741.

Where three disinterested citizens of the county make affidavit that they have read the affidavit of the applicant for a change, stating the prejudice of people of the county and the undue influence of the attorney of the opposite party, and that such statements are true, the application is sufficient under the statute. It is not necessary that the applicant and the three citizens sign and swear to the same affidavit: *Deere v. Bagley*, 80–197.

In order that the influence of the attorney of the opposite party over the inhabitants of the county shall be such as to entitle a party to a change, it is not necessary that such influence shall have been acquired by improper methods, the material inquiry being whether the attorney has in fact such undue influence. The fact that the opposite attorney as a candidate for political office had at the preceding election received an unprecedented vote in the county, *held*, to be sufficient grounds for a change: *Ibid.*

By stipulation of parties: The statutory provision for change of place of trial on written agreement of the parties and their attorneys should be construed to authorize such change when the written agreement therefor is signed by the parties or their attorneys: *Oltrogge v. Schutte*, 51–279.

On motion of court: A court has no authority to change the venue of an action on its own motion to another court. Therefore, *held*, that a change ordered in a case in which no application was made was erroneous, although in another case between the same parties an application had been made, supported by affidavit, on the ground of prejudice of the judge: *Bennett v. Carey*, 57–221.

Affidavits: An affidavit by counsel, not containing any showing or reason why it is not made by the party, nor showing the counsel's means of knowledge, is not sufficient: *Dean v. White*, 5–266.

Where the affidavit showed that the agent making it was the only person, officer or agent of the corporation conversant with the facts, and that the matters stated therein were connected with the special business, *held*, that it was sufficiently apparent that he was the proper person to make the affidavit: *Jones v. Chicago & N. W. R. Co.*, 36–68.

Where a change of venue is desired by a corporation, the requisite affidavit must be made by its officers or agents; and *held*, that an affidavit commencing "I, A. B., vice-president of the defendant above named, being duly sworn," etc., and not otherwise showing that the affiant was vice-president, was not sufficient for the reason that the connection of the affiant with the corporation was thus shown merely by an unverified statement: *McGovern v. Keokuk Lumber Co.*, 61–265.

An affidavit of witnesses that they "verily believe" that prejudice on the part of the judge exists is sufficient: *Jones v. Chicago & N. W. R. Co.*, 36–68.

The fact showing such prejudice need not be stated: *Turner v. Hitchcock*, 20–310.

Where an application for change is made on account of prejudice of the inhabitants of the county, it should be overruled if not supported by such affidavits as required by statute: *Ferguson v. Davis County*, 51–220.

If the motion is made by more than one party it must distinctly appear from the affidavit that neither one of the three disinterested persons subscribing thereto is related nearer than the fourth degree to either of the parties making the motion: *Fairburn v. Goldsmith*, 58–339.

Where the affiants in their affidavit collectively declare that they are not related within the specified degree to the one party making the motion, that is sufficient: *Goodnow v. Litchfield*, 63–275.

Where the affidavit for a change on the ground of undue influence of the adverse

party or his attorney stated that "defendants and their attorney" had such undue influence, *held*, that it was sufficient to authorize a change: *Bixby v. Carskaddon*, 63–164.

An application for change of venue on the ground of alleged prejudice of the inhabitants of the county must be sworn to by the party asking the change if he is a natural person: *Hedge v. Gibson*, 58–656.

Where the application is not supported by affidavits of "three disinterested persons" as required it should be overruled: *Ferguson v. Davis County*, 51–220.

Discretion: Under § 2590 of Code of '73 before its amendment by 20 G. A., ch. 94, it was held that where a party seeking a change made such showing as required by statute, it was error to refuse his application, and the court had not in civil cases the discretion confided to it in criminal cases to determine in its discretion the propriety of granting the change: *Turner v. Hitchcock*, 20–310; *Miller v. Laraway*, 31–538; *Jones v. Chicago & N. W. R. Co.*, 36–68; *Moorman v. Moorman*, 39–460; *Cass v. State*, 2 G. Gr., 353.

Counter-affidavits: Also *held*, that counter-affidavits could not be received in a civil case as authorized in criminal cases: *Jones v. Chicago & N. W. R. Co.*, 36–68.

The amendment of the section by 20 G. A., ch. 94, authorizing counter-affidavits, is applicable on the trial of actions which were commenced before such amendment: *Eikenberry v. Edwards*, 71–82.

Examination of affiant: The court may protect itself from imposition, and, though the affidavit be in due form, may require the disinterested persons to be produced in court; and in a case where they were not found and information concerning them was refused, and other suspicious circumstances appeared, *held*, that the application for change, though sufficient in form, was properly overruled: *Davis v. Rivers*, 49–435.

Before the special provision for examination of affiants was made by 20 G. A., ch. 94, it was held that the party by whom the principal affidavit was made could not be compelled to submit to an examination as to the truth of the matter stated in his affidavit: *McGovern v. Keokuk Lumber Co.*, 61–265.

Amended affidavits not presented until the case was called for trial, *held*, under the particular circumstances of the case, to have been properly refused: *Chicago & S. W. R. Co. v. Heard*, 44–358.

Affidavits part of the record: The affidavits on file become a part of the record and may be certified by the clerk on appeal in the same manner as other matters of record. It is not necessary that they be presented by a bill of exceptions: *McGovern v. Keokuk Lumber Co.*, 61–265.

Presumption in favor of action: Unless the contrary appears from the record, the action of the court in granting a change will be presumed correct: *Ramsey v. Bush*, 27–17.

Jurisdiction: An application for a change being within the jurisdiction of the court to which it is addressed, its order thereon will not be void though erroneous: *Joerns v. La Nicca*, 75–705.

In special proceedings: The provisions of statute for change of venue in civil actions are applicable in special proceedings for the disbarment of an attorney: *State v. Clarke*, 46–155.

In right of way proceedings: A change of place of trial may be had as here provided on an appeal in proceedings to assess damages for taking property for right of way: *Whitney v. Atlantic Southern R. Co.*, 53–651.

On new trial: A change of place of trial cannot be had while the case is pending on motion for new trial, after verdict: *Perkins v. Jones*, 55–211.

The provisions as to change of place of trial are applicable to a proceeding for new trial upon petition under § 4092: *Gibbs v. Buckingham*, 48–96.

On motion to correct the record the law makes no provision for a change of place of trial, where the case has been tried and judgment rendered, and the only matter pending before the court is a motion to correct the record. In such a case a removal of the cause cannot be had: *Maxon v. Chicago, M. & St. P. R. Co.*, 67–226.

To enforce judgment: A proceeding for execution against a partner on a judgment already rendered against the partnership can only be brought, if proper at all, in the court where the judgment was rendered, and cannot be removed on the motion of the defendant to the county of his residence: *Hollowell v. Dickerson*, 46–569.

To vacate judgment: Although proceedings to vacate and set aside a judgment for fraud must be brought in the court where the judgment was rendered, a change of venue may be taken in such proceedings as in other cases: *State v. Whitcomb*, 52–85.

Appeals from justices of the peace: A change of place of trial on appeal from a justice of the peace cannot be granted to another county or district: *Ardery v. Chicago, B. & Q. R. Co.*, 65–723.

Although an appeal from a justice of the peace in a civil case could not be changed from the circuit to the district court, yet where such appeal was consolidated with an action originally brought in the circuit court, *held*, that the consolidated action might be changed as in any other case: *Browne v. Hickie*, 68–330.

The provision as to appeals from justices positively prohibits a change of venue from the county in a case of that kind. Where the objection is to the inhabitants of the county, or on any other good ground, the provision plainly forbids the case being sent out of the county: *Boileau v. Chicago, B. & Q. R. Co.*, 69–324.

Effect of change: After granting the change the court has no further jurisdiction over the subject-matter or the parties: *Campbell v. Thompson*, 4 G. Gr., 415.

If a change is granted the cause is within the jurisdiction of the court to which the change is taken, and a motion to dismiss it for want of prosecution should be made in that court: *Farr v. Fuller*, 12–83.

The court to which the change is granted may dismiss the action where the record as filed is defective in not showing that there is any issue raised for trial: *Thompson v. Campbell*, 4 G. Gr., 322.

In garnishment cases: A garnishee is

such a party as to be entitled to change o-venue, and where he does not join in applicaf tion for the change the cause will proceed against him in the court where commenced: *Westphal v. Clark*, 42-371.

Waiver of change: Where the party who has obtained the order for the change makes no objection at a subsequent term to the re-docketing of the cause, and goes to trial, he cannot assign such proceeding as error: *Eckles v. Kinney*, 4-539.

Waiver of objection: A party who has procured the dismissal of an action in one court on the ground that it is properly pending upon change of venue in another is estopped from afterwards denying the jurisdiction of the latter court: *Perkins v. Jones*, 32-345.

Where a party has duly objected to a change of venue being granted, he does not waive such objection by appearing in the court to which the cause is changed and going to trial: *Jones v. Chicago & N. W. R. Co.*, 36-68; *McCracken v. Webb*, 36-551; *Ferguson v. Davis County*, 51-220.

The fact that a party, after properly excepting to the ruling granting a change of venue, goes to trial in the court to which the change is granted and does not raise an objection to the change by motion for new trial or in arrest of judgment, does not prevent his alleging it upon appeal: *Michaels v. Crabtree*, 59-615; *Bennett v. Carey*, 57-221.

Error in granting change: The fact that a party has had a fair trial before an unprejudiced jury does not render an improper change of venue previously made error without prejudice: *Ferguson v. Davis County*, 51-220.

An appeal will not lie from an order granting or refusing a change of venue, but upon a subsequent appeal properly taken, even from an intermediate order as to change of venue may be reviewed: *Allerton v. Eldridge*, 56-709.

By an appeal from an order granting a change of venue the supreme court acquires no jurisdiction, and will refuse to consider the case even though objection to the jurisdiction is not made by either party: *Groves v. Richmond*, 58-54.

Where the supreme court on appeal determines that a change of venue has been granted without authority, it will not review errors in the proceeding subsequent to such change, but will remand the case to the court from which it was improperly changed: *Bennett v. Carey*, 57-221: *Gilman v. Donovan*, 59-76.

SEC. **3506. Application for.** The application for a change of place of trial may be made either to the court or to the judge in vacation, and if made in term time shall not be awarded until the issues are made up, unless the objection is to the court, nor shall such application be allowed after a continuance, except for a cause not known to the affiant before or arising since such continuance, and after one change no party is entitled to another for any cause in existence when the first was obtained. [C. '73, § 2591; R., § 2804; C. '51, § 1708.]

Time for application: A change cannot be allowed after continuance: *Dean v. White*, 5-266; *Ferguson v. Davis County*, 51-220.

A change on the ground of local prejudice should not be granted after a continuance: *German Savings Bank v. Citizens Nat. Bank*, 70 N. W., 769.

To warrant a change after a continuance the affidavit for the change must state that the cause for which it was asked was not known to the applicant before such continuance: *McCracken v. Webb*, 36-551; *Finch v. Billings*, 22-228.

An application for change on the ground of prejudice of the judge, not made until after a continuance is had, is too late when it does not appear that the grounds therefor were not known prior to the continuance: *Finch v. Billings*, 22-228.

An application made on the day of trial of a cause, without previous notice and without the showing of a reason why it was not sooner made, may properly be overruled: *Demoss v. Noble*, 6-530.

It cannot be determined until the issues are made up whether "the issue can only be tried to the court," and an application for change on account of the prejudice of the people of the county cannot therefore be made even in vacation until the issues are made up: *Gibson v. Abbott*, 50-155.

Second change: After the venue has once been changed a second change cannot be granted for a cause existing when the first was granted, and this is applicable to a change asked by the party who did not ask for the first change: *Schaentgen v. Smith*, 48-359.

After one change of venue a party applying for another change must allege and show that the cause upon which he bases his application was not in existence when the first change was obtained: *Michaels v. Crabtree*, 59-615.

A previous change, had by agreement of parties, does not, under the statute, prevent a subsequent change on statutory grounds, whether existing at the time of the first change or not: *Bixby v. Carskaddon*, 63-164.

The provision prohibiting a second change does not apply where a change is granted but not perfected, and the cause then proceeds in the court where it was originally brought: *Eckles v. Kinney*, 4-539.

Where a second change is asked the affidavit upon which such application is based must show that the ground relied on did not exist when the first application was granted, and it is immaterial that the first change asked was on account of the judge, and the second on account of prejudice of inhabitants of the county: *Weare v. Williams*, 69-252.

Where, after one change of venue had been granted, there was a change of judges of the court to which the case was sent, *held*, that a subsequent application for a change

on the ground of prejudice of the judge might be entertained without showing that the objection did not exist when the first change was granted, and that the supreme court would take notice of such change of judges: *Upton v. Paxton*, 72–295.

SEC. **3507. To what county or court.** If the application for a change is granted for any cause except on account of the prejudice or disability of the judge, the cause shall be sent to the nearest or most convenient county in the district, unless objections supported by affidavit are made to each county in the district, in which case to the nearest or most convenient county in another district. If the objections are to the judge, the cause shall not be tried by him, but retained on the docket and tried as provided in the chapter relating to the district court. [C.'73, § 2592; R., § 2805; C.'51, § 1707.]

The "most convenient county" is not necessarily the one nearest in point of distance. The question as to which county is most convenient must be determined to some extent by the peculiar circumstances of each case, taking into account the distance of parties and witnesses, the convenience of attorneys, and the prospect of reaching a speedy trial, as well as the relative distance of different counties. And where nothing is shown to the contrary, it will be presumed that the county selected was, within the meaning of the law, the most convenient: *Allen v. Skiff*, 2–433.

The presumptions are that there was sufficient evidence before the court to justify it in holding that the county selected was the most convenient until the contrary appears: *Robbins v. Neal*, 10–560.

Before the circuit court was abolished it was held that, when the objection was to the judge, the change should be to the district or circuit court of the same county: *Polk County v. Hierb*, 37–361. Also that where the case was one in which the circuit court had exclusive jurisdiction, it could not be changed to the district court, but should be sent to some other circuit court: *Schuchart v. Lammey*, 62–197.

To render it error to send a case to a particular county on the ground that objection exists thereto, such objection must be specifically made and not in a general, vague manner: *Cobb v. Thompson*, 10–367.

SEC. **3508. Notice in vacation.** If an application for the change is made in vacation, five days' notice thereof, with a copy of the affidavit, shall be served on the adverse party or his attorney, and, if granted, the judge shall forthwith transmit his order to the clerk, with all the papers presented to him. [C.'73, § 2593; R., § 2806; C.'51, § 1709.]

A change should not be granted in vacation unless notice of the application therefor has been given the opposite party: *Preston v. Winter*, 20–264; *Loomis v. McKenzie*, 31–425.

SEC. **3509. When change perfected.** If the order for the change is granted in vacation, it must be perfected by noon of the second day after the order is received by the clerk, and if granted during term time, by the morning of the second day thereafter, or before the cause is reached for trial, if sooner reached, or such change, whether granted in term or vacation, will be waived, and the cause tried as though no such order had been granted. When the change has been perfected or agreed to by the parties, the clerk must forthwith transmit to the clerk of the proper court a transcript of the record and proceedings, with all the original papers, having first made out and filed in his office authenticated copies thereof; but if less than all of several plaintiffs or defendants take such change, the original papers shall not be so transmitted, but a copy thereof, and, as to those who take no change, the cause shall proceed as if none had been taken. [C.'73, § 2594; R., §§ 2807, 2810; C.'51, § 1710.]

If costs are not paid within the time provided a subsequent payment will not effect the change: *Stryker v. Rivers*, 47–108, 110.

In case of a change granted during term, the payment of costs during the second day after the granting of the order, though not by the morning of that day, will be sufficient, provided they are paid before any action is taken by the court to vacate the order: *Bacon v. Black*, 38–162.

The provisions of this section as to the time within which the change is to be perfected do not apply to cases where the venue is changed by agreement of the parties: *Carroll County v. American Emigrant Co.*, 37–371.

A change of venue cannot be granted on application of a stranger to the action who has applied for but not yet obtained leave to intervene: *Barkdull v. Callanan*, 33–391.

A garnishee is such a party as to be entitled to change of venue, and where he does not join in an application for the change the cause will proceed against him in the court where commenced: *Westphal v. Clark*, 42–371. See, however, § 3502 and notes.

It does not follow from the mere fact that a change is granted to a portion of defend-

ants or plaintiffs a change must also be granted to the others who do not desire it. In such case the cause must proceed as to them as if no change had been taken; but where all the defendants ask for a change, and their defense is identical, if one shows a right to the change it should be granted as to all: *Sweet v. Wright*, 62–215.

SEC. **3510. Docketed.** Upon filing such transcript and papers in the office of the clerk of the court to which the same were certified, the cause shall be docketed without fee and proceeded with as though it had originated therein. [C. '73, § 2595; R., § 2808; C. '51, § 1711.]

SEC. **3511. Costs of change.** Unless the change is granted under subdivisions two, four or five of the first section of this chapter, all costs caused thereby or that are rendered useless by reason thereof, shall be paid by the applicant, and the court or judge, at the time of making the order, shall designate in general terms such costs, and no change shall be held perfected until the same are paid. [C. '73, § 2596; R., § 2809; C. '51, § 1712.]

The applicant should be charged not only with the costs of the transcript but also with the costs of the term: *Allen v. Skiff*, 2–433.

The clerk's fee for entering order of change is part of the cost to be paid by the applicant: *Stryker v. Rivers*, 47–108.

Costs accrued at a former term of court are not to be taxed up to the party asking a change. It is not competent for the court to impose upon him conditions not authorized by law. Upon a proper showing he is entitled to a change as a legal right: *Bannigan v. Central Iowa R. Co.*, 58–671.

The court cannot, after the change has been allowed, order the applicant to give to the adverse party a bond to secure him in the additional costs incurred by such change: *Eckles v. Kinney*, 4–539.

The court may make the change conditional upon the payment of the costs within a specified time: *Robbins v. Neal*, 10–560.

The provisions as to prepayment of costs are applicable to justice courts: *Holmes v. Butts*, 87–412.

SEC. **3512. Jury fees.** Where the place of trial in any civil action is changed to any county other than that in which the same was properly commenced, where the trial thereof takes place at a regular term and occupies more than one calendar day, the judge trying it shall certify the number of days so occupied, and the county in which the action was originally commenced shall be liable to the county where the same is tried for the sum of two dollars per day, for each juryman engaged in the trial thereof. [C. '73, § 2597.]

SEC. **3513. Special term.** Where a special term of any court is held for the trial of any action contemplated in the preceding section, the court trying the same shall make out and certify the amount of county expenses incurred in the trial of each action, and the same shall be paid by the county in which the same was properly commenced. [C. '73, § 2598.]

CHAPTER 6.

OF THE MANNER OF COMMENCING ACTIONS.

SECTION **3514. Original notice.** Action in a court of record shall be commenced by serving the defendant with a notice, signed by the plaintiff or his attorney, informing him of the name of the plaintiff, that a petition is, or on or before the date named therein will be, filed in the office of the clerk of the court wherein action is brought, naming it, and stating in general terms the cause or causes thereof, and if it is for money, the amount thereof, and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming it, his default will be entered and judgment or decree rendered against him thereon. In all cases where the time for the commencement of the term has been changed after the notice has been served, the defendant shall be held to appear at the time to which such term has been changed. [C. '73, § 2599; R., §§ 2811–12; C. '51, §§ 1714–15.]

Not process: The original notice is not a process of the court and need not be in the style of "The State of Iowa" (Const., art. V, § 8): *Nichols v. Burlington, etc., Plank Road Co.*, 4 G. Gr., 42; *Klingel v. Palmer*, 42–166.

A summons or subpœna in chancery is not sufficient to constitute an original notice under the requirements of the statute: *McKee v. Harris*, 1–364.

Without signature: A notice not signed by plaintiff or his attorney is invalid and the court acquires no jurisdiction thereunder: *Hoitt v. Skinner*, 68 N.W., 788.

When action deemed commenced: Where a notice was placed in the hands of an officer for service on the day before the date on which the cause of action became due, but was not actually served until the day after maturity, *held*, that the actual commencement of the action was the day of actual service, and that § 3450, declaring the action to be commenced on the date of placing the notice in the hands of the sheriff for service, has reference only to the bar of the statute of limitations: *Parkyn v. Travis*, 50–436.

So, where a penal bond provided that it should be deemed fulfilled unless action thereon was begun by a certain day, and notice of suit thereon was placed in the hands of the sheriff before that date but not served until afterward, *held*, that the action was not commenced in time: *Proska v. McCormick*, 56–318.

The provisions of this section determine what is the commencement of an action in all cases except those specially provided for by § 3450 in regard to the general statute of limitations: *Hintrager v. Nightingale*, 36 Fed., 847.

An action is commenced so as to operate as a *lis pendens* when the petition is filed: *Fisher v. Shropshire*, 147 U. S., 133.

Where the court acquired jurisdiction of defendant only by appearance, *held*, that the action was to be deemed commenced with reference to the limitation of time of bringing action on an insurance policy from the time of appearance: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N. W., 761.

Misnomer: Where the petition and original notice gave defendant's christian name incorrectly, and service was made by leaving a copy at defendant's usual place of residence while she was temporarily sojourning elsewhere, and defendant was ignorant of the pendency of the action until after judgment and levy of execution, and then offered to pay the amount actually due, but plaintiff, with notice of the facts before the levy, sold defendant's property thereunder, *held*, that defendant not being personally served, and having no actual notice, was not required to take advantage of the misnomer by pleading in abatement, and that plaintiff and the officer executing the writ were liable in trespass: *Journey v. Dickerson*, 21–308.

Publicaton of notice in which defendant's name was stated as "P. T. B. H——," instead of "T. P. B. H——," *held* insufficient to confer jurisdiction: *Fanning v. Krapfl*, 61–417.

But where the original notice was directed to "P. T. B. H——, wife of John C. H——," *held*, that it was sufficient to give the court jurisdiction of "T. P. B. H——," it appearing that she was generally and better known in the county of her residence as the wife of John C. H—— than by her own name: *Fanning v. Krapfl*, 68–244.

Where the petition was filed by Levi Rike, and the notice stated the plaintiff's name as Levi Pike, and a judgment was rendered by default in favor of the latter, *held*, that the judgment was absolutely void: *Newman v. Bowers*, 72–465.

A party duly served with notice becomes a party to the action without appearance: *Aultman v. McLean*, 27–129.

It seems that an original notice should be addressed to the person intended to be served: *Steele v. Murry*, 80–336.

Description of the court: A notice informing defendant that a petition would be filed in the office of the clerk of the district court of Des Moines county, *held* sufficiently descriptive of the court: *Nichols v. Burlington, etc., Plank Road Co.*, 4 G. Gr., 42.

The original notice need not give the name of the state: *Lyon v. Byington*, 10–124.

Place of holding court: A notice which does not state when or where (*i. e.*, in what court) defendant is required to appear is fatally defective, and a judgment rendered thereon is void and may be collaterally attacked: *Kitsmiller v. Kitchen*, 24–163.

But it is not necessary that the name of the city or town in which the court is to be held should be stated: *Bond v. Epley*, 48–600.

Statement of cause of action: A notice simply stating the amount of plaintiff's claim without stating its nature is not sufficient: *Moody v. Taylor*, 12–71.

The notice is not to set forth the cause of action in detail, but the defendant should be informed with reasonable certainty as to the nature of plaintiff's claim, or the remedy sought, as well as of the amount of recovery asked: *Ibid.; Harkins v. Edwards*, 1–296.

Notice of an action to foreclose a mortgage, without claiming any special sum, *held* sufficient to warrant a personal judgment for the amount due: *York v. Boardman*, 40–57.

Where the original notice advised defendants that plaintiff claimed of them a judgment on a note and foreclosure of the mortgage given to secure payment of the same, while in the petition he claimed judgment against them for the foreclosure of the mortgage, and judgment against only one of them for the amount of the note, *held*, that there was no material variance between the notice and petition: *Hickman v. Chambers*, 10–301.

The law does not require that the original notice, in an action to foreclose a mortgage, shall describe the land covered by the mortgage: *Van Sickles v. Town*, 53–259; *Lindsey v. Delano*, 78–350.

Therefore, *held*, that a mistake in the description with reference to the number of the township did not render the judgment void. It appeared, however, that the land was otherwise sufficiently described in the notice: *Lindsey v. Delano*, 78–350.

A notice informing defendant that there was on file in the office of the clerk, etc., a petition of plaintiff claiming of him the sum

of —— dollars, "as money due on a promissory note," *held* sufficient, though the plaintiff was not the payee of the note, but claimed it by transfer: *Elliott v. Corbin*, 4–564.

The original notice in a suit on a promissory note, following the language of the note, omitted the word "dollars." *Held*, that the notice was sufficient to show that plaintiff claimed a certain sum in money, and that the case was one, therefore, of defective notice, and not of entire want of notice, and the defect, not having been objected to, could not be raised on appeal: *Gray v. Wolf*, 77–630.

A notice stating the claim as upon a promissory note, when it was in fact upon a guaranty of a non-negotiable instrument, *held* sufficient: *Peddicord v. Whittam*, 9–471.

A notice claiming of defendant a certain sum "as money due for your trespasses upon and injuries done certain parcels of real estate of your petitioner," *held* sufficient: *Des Moines Nav. & R. Co. v. Doran*, 4–553.

Where the petition contained two counts, one for damages under the statute for the killing of stock by a railroad, the other for damages for the same act recoverable at common law, *held*, that the original notice claiming the damages given by the statute was sufficient as to both counts, the cause of action in either case being the same: *Pearson v. Milwaukee & St. P. R. Co.*, 45–497.

In the original notice in an action for divorce it is not necessary to state that alimony is claimed. It is allowed as an incident of the main action: *McEwen v. McEwen*, 26–375; *Darrow v. Darrow*, 43–411.

A slight variance as to the amount claimed between the petition and the notice will not be a fatal defect: *Anderson v. Kerr*, 10–236.

The statement should be sufficiently full to inform the person to whom it is addressed of the nature and substance of the relief demanded: *Jordan v. Woodin*, 93–453.

Statement as to time for appearance: The original notice should fix, by name, the term at which defendant is required to appear. (Explaining *Lemonds v. French*, 4 G. Gr., 123, and *Butcher v. Brand*, 6–235): *Des Moines Branch, etc., Bank v. Van*, 12–523; *Van Vark v. Van Dam*, 14–232.

A notice requiring defendant to appear "on or before noon of the second day of the next regular term," etc., but not naming the term, is defective: *Decatur County v. Clements*, 18–536.

A notice requiring defendant to "appear and answer on or before noon of the 15th day," etc., it appearing that the day named was the second day of the next term, was held sufficient, although the term was not named: *Knapp v. Haight*, 23–75.

Where a notice required defendant to appear "on or before the 29th day, etc., being the second day of the next term," etc., whereas that day was in fact the fourth day of the term, *held*, that it was not error to refuse to set aside a default rendered on the 29th, there being no showing that the defendant had been misled: *Burr v. Wilcox*, 19–31.

A notice giving the date of the commencement of the term, but not otherwise naming it, *held* sufficient: *Farmers' Ins. Co. v. Highsmith*, 44–330.

Notice requiring defendant to appear on the second day of the April term, "commencing April 12th," etc., when the term really commenced April 18th, *held* insufficient: *Boals v. Shules*, 29–507.

An original notice which states the term at which the defendant is required to appear, but does not state the correct date, is fatally defective and confers no jurisdiction: *Fernekes v. Case*, 75–152.

A notice requiring an appearance at a date prior to the term is void and confers no jurisdiction: *Haws v. Clark*, 37–355.

Where the notice fixes a date for appearance of defendant which is prior to the service of the notice, and therefore impossible, the notice will not confer jurisdiction: *Genther v. Fuller*, 36–604.

A notice which does not advise defendant of time and place when and where he is required to appear, or notifies him to appear at a later date than that at which the proceedings are afterwards had, is not merely a defective notice, but is no notice, and confers no jurisdiction upon the court in such proceedings, and a judgment therein rendered is void and subject to collateral attack: *Lyon v. Vanatta*, 35–521; *Kitsmiller v. Kitchen*, 24–163.

A notice, not stating the term of court at which defendant is required to appear, does not confer jurisdiction. And in a case where it was required by statute that suit be brought within a limited time, and the notice served did not contain a statement as to the next term, *held*, that a second notice served after the expiration of the time limited, to which the defendant appeared, would not enable the court to entertain the action: *Jones, etc., Lumber Co. v. Boggs*, 63–589.

An original notice of action in a justice's court in which the return day is left blank is not such notice as is required by law: *Phinney v. Donahue*, 67–192.

Where the notice is defective in that the copy incorrectly states the date of commencement of the term at which defendant is required to appear, the original being correct in that respect, the remedy of defendant is to apply to the officer for an amended return showing the facts as to such copy, and then move to set aside the default, or, if the term has expired, petition for a new trial on the ground of having been prevented from making an appearance and interposing his defense: *Irions v. Keystone Mfg. Co.*, 61–406.

After proper service of notice is made, a subsequent change in the time of holding the term of court will not render the notice insufficient, and defendant must appear at the term as so changed: *Peoria M. & F. Ins. Co. v. Dickerson*, 28–274.

Defendant is not entitled to a continuance unless for cause shown, when he has appeared in response to a notice defective only in not naming the term: *Des Moines Branch, etc., Bank v. Van*, 12–523.

Plaintiff cannot have judgment for default in failing to answer before the day fixed in the notice, even though by rule of court he is required to answer on the first instead of

the second day of the term: *Worster v. Oliver*, 4–345.

Under Code of '73 *held* that the court might by rule provide that defendant should be required to appear and answer by noon of the first day instead of the second day of the term: *McGrew v. Downs*, 67–687.

Statement that judgment will be entered: A notice that, for failure of defendant to appear, judgment would be rendered against him, *held* sufficient without specifying that default would be entered for want of appearance: *Farmers' Ins. Co. v. Highsmith*, 44–330.

Where the notice fails to inform defendant that a money judgment is claimed, such judgment should not be entered against him, but if entered it will be simply erroneous and not void: *Blair v. Wolf*, 72–246.

Defective notice and the effect thereof, see notes to § 3519.

SEC. **3515. Dismissal for failure to file petition.** If the petition is not filed by the date thus fixed, and ten days before the term, the defendant may have the action dismissed. [C. '73, § 2600; R., § 2813; C. '51, § 1716.]

Under § 2600 of Code of '73, if the petition was not filed by the date fixed in the notice the action was to be deemed discontinued: *Hudson v. Blanfus*, 22–323. And see *Webster v. Hunter*, 50–215.

Where notice was given by publication and the petition was on file before the first publication of the notice, it was held sufficient, although the petition was not on file by the time named in the notice: *Oliver v. Davis*, 81–287.

But under prior statutory provisions differing slightly from the section of the Code of '73, *held*, that a failure to file the petition by the time specified in the notice would not work a dismissal of the action if it was filed ten days before the commencement of the term: *McCaffree v. Guesford*, 1–80; *Cheever v. Lane*, 3–296: *Anderson v. Kerr*, 10–233; *Sweet v. Porter*, 12–387.

The fact that a petition is by mistake filed in the wrong court will not prevent the cause being discontinued for failure to file it within proper time: *Morgan v. Small*, 33–118.

Where a petition is marked filed by the clerk within the proper time, but he makes no memorandum of the fact upon the appearance docket, it cannot be considered filed, and the provisions of this section are applicable: *Nickson v. Blair*, 59–531.

In determining whether the petition is filed ten days before the term, Sunday is to be included in computing the days, although it is the last of the ten days: *Conklin v. Marshalltown*, 66–122.

Where an original notice, which was served on the defendant, stated that a petition would be on file "on or before the 1st day of Dec., 1889," and that the term would be begun "on the 9th day of Dec., 1889," and the petition was in fact filed on the 29th day of Nov., 1889, and it appeared that the 1st day of Dec., 1889, was Sunday, it was held that there was no irregularity in rendering a judgment so far as the notice and time of filing the petition were concerned: *Church v. Lacy*, 71 N. W., 338.

Upon failure of plaintiff to file his petition at the time fixed in the notice, the law implied, under the section of the Code of '73, that the case was discontinued without an order of court to that effect: *Clark v. Stevens*, 55–361.

Where the petition was not filed by the date fixed in the notice, and it appeared that no prejudice resulted to defendant from that fact, *held*, that a judgment by default was not rendered void on account of such irregularity: *Brown v. Mallory*, 26–469.

A judgment recovered upon a petition filed after the time named in the notice is not void, and cannot be collaterally impeached: *Hildreth v. Harney*, 62–420.

Where the date fixed for the filing of the petition was previous to that on which the notice was served, and the petition was filed at the time of such service, but not at the time fixed, *held*, that the defendant suffered no prejudice, and the action should not be deemed discontinued: *Smith v. Shaw*, 49–294.

An appearance to move for a discontinuance for failure to file petition by time fixed in notice did not waive the right to such discontinuance: *Cibula v. Pitts' Sons' Mfg. Co.*, 48–528. Appearance to insist upon the discontinuance of the case would not give the court jurisdiction of defendant, but appearance to plead and make defense will give it such jurisdiction: *Paddleford v. Cook*, 74–433.

This section is not applicable to actions in justices' courts. Even when a petition must be filed in an action in such court it is sufficient to file it on the return day: *Duffy v. Dale*, 42–215.

SEC. **3516. Who may serve notice.** The notice may be served by any person not a party to the action. [C. '73, § 2601; R., § 2814; C. '51, § 1718.]

If the notice is served by a constable the fees allowed him in such cases by § 4598 may be taxed up as costs: *Du Boise v. Babcock*, 42–233; but where notice is served by a person not an officer, his charges cannot be so taxed: *Conway v. McGregor & M. R. R. Co.*, 43–32.

The deputy of a sheriff who is a party to a case is disqualified from serving notice: *Gollobitsch v. Rainbow*, 84–567; and see § 513.

SEC. **3517. How long before term.** The defendant shall be held to appear at the next term after service:

1. If served within the county where the action is brought in such time as to leave at least ten days between the day of service and the first day of the next term;

2. If without the county, but within the judicial district, so as to leave at least fifteen such days;

3. If elsewhere, so as to leave at least twenty such days for every one thousand miles, or fraction thereof, extending between the places of trial and service, which distance shall be judicially noticed by the court. If not so served, he shall be held to appear at the second term after service. [C.'73, § 2602; R., § 2815; C. '51, § 1720.]

In the computation of the periods of time here mentioned the day of service and the first day of the term are both excluded. The last day of service for a term commencing on Monday falls on Thursday. Sunday is not to be excluded in the computation: *Robinson v. Foster*, 12–186.

Where personal service is made on defendant outside the state, it should be so made as to leave twenty days between the day of service and the next term of court: *Griffith v. Milwaukee Harvester Co.*, 92–634.

The fact that notice is not served such length of time before the term as to entitle the plaintiff to a trial at that time will not justify a discontinuance of the action: *Lemonds v. French*, 4 G. Gr., 123.

Even where by statute defendant cannot be required to answer until the lapse of a longer period than that required for his appearance, yet he will be in default for failure to appear at the time required: *McKinley v. Betchtel*, 12–561.

If notice is served before, but not in time for the term named therein, defendant must appear at the next term thereafter: *Walters v. Blake*, 69 N.W., 879.

Change of time of holding court will not affect the sufficiency of the notice: See § 3514 and notes.

Personal service outside of the state upon a person not a resident or citizen of the state is only equivalent to service by publication: See § 3537 and notes.

Judgment by default rendered upon insufficient notice cannot be corrected on appeal unless motion to set aside the default has been made in the trial court: See notes to § 4105.

SEC. **3518. Method of service.** The notice shall be served as follows:

1. By reading it to the defendant, or offering to do so in case he neglects or refuses to hear it read, and in either case by delivering him personally a copy thereof, or, if he refuses to receive it, offering to do so;

2. If not found within the county of his residence, by leaving a copy thereof at his usual place of residence with some member of the family over fourteen years of age;

3. By taking an acknowledgment of the service indorsed thereon, dated and signed by the defendant. [C. '73, § 2603; R., § 2816; C. '51, §§ 1721, 1732.]

Of these methods of service, the first and third constitute personal service; the second, substituted service, while that by publication is constructive. If the defendant is misnamed in a notice served by personal or actual service, it seems that he can only take advantage thereof by appearing and pleading that fact in abatement; and if he fail to do so he cannot afterwards question the regularity of the judgment. But where the defendant was misnamed in a notice served by leaving a copy, etc., and had no actual notice of the action, and was not in debt to the plaintiff in the amount claimed, *held*, that he was not bound by the judgment: *Journey v. Dickerson*, 21–308.

Plaintiff went from Iowa to another state, where he engaged in business, with the intention of permanently residing there, his family, however, remaining at his former home in Iowa. *Held*, that his former home ceased to be his place of residence, and that service of notice by leaving a copy there with his wife was not sufficient to give the court jurisdiction: *Schlawig v. De Peyster*, 83–323.

One who leaves his home as a fugitive from justice, and is absent for a year or more, cannot be regarded as a resident of the home where his wife still resides, so that service can be made upon him by leaving a copy at such place with his wife: *Wolff v. Shenandoah Nat. Bank*, 84–138.

Service by leaving copy at the residence is not authorized where it appears from the return of the sheriff that the party on whom the service is sought is within the jurisdiction but cannot be personally served on account of sickness: *LeGrand v. Fairall*, 86–211.

The method of service by leaving a copy is not sufficient in cases where personal notice is provided for without provision for service by copy. So *held* under § 1513 relating to service of notice of appeal in proceedings to establish a highway: *Ellis v. Carpenter*, 89–521.

A substituted service, by leaving a copy with a member of the family, is complete when the notice is properly left, and no time is held necessary to elapse because of the absence of defendant from the county: *Ross v. Hawkeye Ins. Co.*, 83–586.

Where service is authorized on an agent or officer of a corporation (or a member or agent of a partnership, as under Rev., § 2826) personal service is necessary, and service by leaving copy at the usual place of residence of such person will not be sufficient: *Brydolf v. Wolf*, 32–509.

A waiver of service indorsed on the notice is equivalent to an acknowledgment of service: *Johnson v. Monell*, 13–300.

In an appeal from an assessment of damages for the location of a highway, acknowledgment of service, signed by the auditor,

is sufficient to constitute a valid service upon him, although he is not "defendant" in the action: *Libbey v. McIntosh*, 60-329.

Where within nine days after defendant was last seen in the state, there being no evidence that he had then formed an intention to abandon his residence, he was served with notice by a copy left with his wife at his home, he not being found within the county. *held*, that it was to be presumed that his residence was still in the state and that the service was sufficient: *Botna Valley State Bank v. Silver City Bank*, 87-479.

Service upon attorney does not constitute service upon the client: *Death v. Bank of Pittsburg*, 1-382.

SEC. **3519. Return of personal service.** If served personally, the return must state the time, manner and place of making the service, and that a copy was delivered to defendant, or offered to be delivered. If made by leaving a copy with the family, it must state at whose house the same was left, and that it was the usual place of residence of the defendant, and the township, town or city in which the house was situated, the name of the person with whom the same was left, or a sufficient reason for omitting to do so, and that such person was over fourteen years of age and was a member of the family. [C. '73, § 2604; R., § 2817; C. '51, § 1723.]

Method of service; return: The return should show a strict compliance with the law, as nothing will be presumed in its favor when it appears that the requirements of the statute have not been observed: *Diltz v. Chambers*, 2 G. Gr., 479.

Therefore, *held*, that a return was defective which did not state the time of service, and that the fact that part of the paper containing the return was torn off, or that the return was sworn to more than the required length of time before the return day, would not cure the defect: *Hakes v. Schupe*, 27-465.

That the return does not state the time of making service will not be a fatal defect in a collateral attack: *Wilson v. Call*, 49-463.

Where a notice was returned as served by "J. R. Myers, Deputy, J. W. Workman, Sheriff," *held*, that the service appeared to have been made by Myers, as deputy of Workman, sheriff, and was sufficient: *Gray v. Wolf*, 77-630.

A return must show the manner of service—the acts done—that the court may judge of their sufficiency. A return stating that the notice was "duly served" is not sufficient: *Hodges v. Hodges*, 6-78; *Harris v. Powell*, 10-553.

A return "served on John Long on the 29th day of August, 1857," *held* insufficient: *Park v. Long*, 7-434.

A return stating "served within by reading," *held*, not sufficient: *Bain v. Galyear*, 10-585; *Boker v. Chapline*, 12-204.

A return stating that service of notice was made "by reading the same in the presence and hearing of" defendant, *held* insufficient. Service should be by reading to defendant: *Hynek v. Englest*, 11-210.

But *held*, that such defect was cured by a recital in a return that defendant demanded and received a copy of the notice: *Anderson v. Kerr*, 10-233.

And a recital in the return in such a case that a true copy was left with defendant, also *held* sufficient to cure the defect: *Grosvenor v. Henry*, 27-269.

A party may waive the reading of the notice to him, and such waiver can be properly proved by recitals in the return of the officer: *Gregory v. Harmon*, 10-445.

A statement that a copy was refused by defendant sufficiently indicates that one was offered: *Farmers' Ins. Co. v. Highsmith*, 44-330.

The right of defendant to a copy may be waived, and the return of the sheriff is sufficient evidence of that fact: *Chapman v. Allen*, Mor., 23.

If the whole return shows a substantial compliance with the statute it is sufficient, and it is not necessary to use the exact language of the statute: *Macklot v. Hart*, 12-428.

Where the place of making service was stated in the return after the signature of the officer, *held*, that it sufficiently appeared that service was made at that place: *Wilson v. Call*, 49-463.

In a particular case, *held*, that the return of service, was sufficient: *Low v. Barnes*, 60-240.

A return of service of notice by reading the same "to the within-named defendant, G. B. Little, and his wife, Mrs. G. B. Little, a member of the family over fourteen years old, and delivering her a true copy of the same," *held* to be sufficient to sustain a judgment by default against Mrs. Ora M. Little as against a collateral attack, it not appearing but that Mrs. Ora M. Little and Mrs. G. B. Little were names by which defendant was known: *Peterson v. Little*, 74-223.

Where notice was served on N. Young, and it was subsequently claimed that N. S. Young was the defendant in the case, *held*, that the question as to whether N. Young and N. S. Young were the same person was a question for adjudication: *Allison v. Chicago, B. & Q. R. Co.*, 76-209.

Where notice was served by publication on "John Van Nortrick," and it appeared that counsel representing defendant defended the action, *held*, that it would be presumed that such action was defended by a person in interest whose name was "John Van Nortwick," and that the variance between the names was immaterial: *Mallory v. Riggs*, 76-748.

Where notice was served on two persons designated as assignees of, etc., and the name of one of them was spelled "Luckenbaugh" instead of "Luckenbach," *held* that, in view of the statement of the representative capacity, the error in name did not prevent the notice from being sufficient to give the court jurisdiction: *Schee v. La Grange*, 78-101.

Under such circumstances, *held*, that the case was not one of no service, but one in which, if erroneous at all, the service was

defective only, and the judgment thereunder was not open to collateral attack: *Ibid.*

Where the petition stated the name of defendant as "Edward" L. and the record showed service of notice upon "Edmund" L., *held*, that judgment against "Edmund" L. was not void for want of jurisdiction: *Lindsey v. Delano*, 78–350.

Where the return recited service on defendant, who was not found in the county, by delivering to M. H. a true copy at her home and place of residence, it not being shown that M. H. and the person to be served were members of the same family, nor that the copy was left at his usual place of residence, *held*, that the service was wholly insufficient to confer jurisdiction: *Dohms v. Mann*, 76–723.

Service by leaving copy; return: It is essential to the sufficiency of service by leaving copy, etc., that it appear from the return that the defendant was not found: *Davis v. Burt*, 7–56; *Chittenden v. Hobbs*, 9–417; *Nosler v. Githens*, 9–295; *Grant v. Harlow*, 11–429: *Bonsall v. Isett*, 14–309; *Sidles v. Reed*, 10–589; *Eikenburg v. Barrett*, 10–593.

The return of the sheriff need not state what diligence was used to obtain service upon defendant in person. A return that he was not found is sufficient: *Neally v. Redman*, 5–387.

A return, "the defendant not being found," is a sufficient statement of that fact. It is not necessary to state that defendant could not be found: *Wilson v. Call*, 49–463.

A return that "defendant was not found" will be presumed to mean that he was not found within the county of his residence: *Macklot v. Hart*, 12–428.

It should appear from the return that the person with whom the copy was left was a member of the family of the defendant. A statement that she was the mother of defendant, *held* not sufficient: *Lyon v. Thompson*, 12–183.

A return stating that the notice was served on defendant Call by copy left, etc., "with Mrs. Call, she being a member of the family," etc., *held* sufficient: *Wilson v. Call*, 49–463.

The place where the copy is left must be returned by the sheriff as defendant's usual place of residence, and the copy must be left with some member of his family over fourteen years of age. The return must further show at whose house, and the name of the person with whom the copy is left, or a sufficient reason must be given for the omission: *Converse v. Warren*, 4–158.

Therefore, *held*, that a return of service upon F. H. W., stating, "left a copy with Mrs. G., at defendant's boarding-house, being the residence of E. E. G., the above-named Mrs. G. being over fourteen years of age, and being a member of the family of E. E. G.," was not sufficient to show service upon defendant by leaving copy: *Ibid.*

But *held*, that a return of service by leaving a copy with a certain person, a member of the family of defendant, "in his usual place of residence," stating the town and county, was sufficient: *Neally v. Redman*, 5–387; *Farris v. Ingraham*, 34–231.

A return "served by certified copy left with [defendant's] wife at his usual residence," *held* not sufficient: *Davis v. Burt*, 7–56.

A return not showing that the copy was left at the usual place of defendant's residence, nor giving the name of the person with whom it was left, *held* not sufficient: *Tavenor v. Reed*, 10–416.

A return of service by leaving copy at the residence of defendant, not stating that defendant could not be found, nor at whose house the copy was left, or that it was left at defendant's usual place of residence, or the name of the person with whom it was left, *held* fatally defective: *Clark v. Little*, 41–497.

A party may have more than one residence though but one domicile: *Love v. Cherry*, 24–204.

Return of service by leaving copy with a member of the family, *held* insufficient in a particular case: *Pilkey v. Gleason*, 1–85.

Service by leaving copy at the store of defendant with a clerk will not be sufficient unless the return shows that the store was defendant's usual place of residence: *Winchester v. Cox*, 3 G. Gr., 575; *Hendrey v. Wells*, 10–587.

Where service is authorized on an agent or officer of a corporation, or member or agent of a partnership, personal service is necessary, and a service by leaving copy at the usual place of residence of such person will not be sufficient: *Brydolf v. Wolf*, 32–509.

Misnomer in copy: Where defendant is misnamed in a notice served by leaving copy, and has no actual notice of the action, and is not indebted to the plaintiff, he is not bound by the judgment rendered against him: *Journey v. Dickerson*, 21–308.

A mistake in the name of the defendant in the copy furnished him will not be ground for setting aside a default where it appears from the original notice and the officer's return thereon that the defendant was sued in his right name and that the notice was read to such defendant by the officer: *Breen v. Kuhn*, 91–325.

Effect of defects in substituted service: Where the return of service by leaving a copy did not state the facts essential to constitute such service, *held*, that objection might be taken to the jurisdiction of the court rendering the judgment: *Clark v. Little*, 41–497.

Where the requirements of the statute as to service by copy are not observed, defendant is not in court, and any judgment against him is erroneous and will be reversed on appeal: *Harmon v. Lee*, 6–171.

Amended return: The officer's return may be amended in accordance with the facts: *Brown v. Petrie*, 86–581.

Presumptions: Where the return of the sheriff showed service on "L. Burt" of a notice directed to Luther Burt, *held*, that judgment thereon for failure to appear was not erroneous, and that the court was authorized to infer that the person served was the person named in the notice: *Davis v. Burt*, 7–56.

Under the Code of '51, which did not require the return to state whether a copy of the notice had been delivered, *held*, that in the absence of any statement in the return

it would be presumed that the officer had done his duty in that respect: *Watts v. White*, 12-330.

Even though the return does not show sufficient service, yet it will be presumed, in support of the ruling of the court holding the service sufficient, that due proof of service was made in some other manner: *Lees v. Wetmore*, 58-170.

The presumption is that the officer made the service shown by his return in the manner prescribed by law: *Ketchum v. White*, 72-193.

Evidence: Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof: *Wyland v. Frost*, 75-209.

Where it appears that the return, which is of record, with reference to the date of service is not the return of the officer, and that the official return in that respect is not in existence, it is competent to establish the date of service by parol: *McComb v. Council Bluffs Ins. Co.*, 83-247.

The return as to the service of notice may be overthrown by evidence although it must be regarded as strong evidence of the facts to which the law requires the officer to certify: *Hoitt v. Skinner*, 68 N.W., 788.

The return of the officer is not conclusive as to the correctness of the copy given the party upon whom the notice is served, and when it is shown that the copy fixed an erroneous date for the commencement of the term of court at which defendant was required to appear and that on that account defendant was misled so as to be unable to make defense he was entitled to have the judgment set aside on petition: *Browning v. Gosnell*, 91-448. Further as to evidence of the return, see notes to § 3524.

Objection to service: An objection to the sufficiency of the service of notice can be made only by the parties as to whom the service is claimed to be defective: *Semple v. Lee*, 13-304.

Defective service: Insufficient service will not be ground for quashing the notice and dismissing the cause: *Cheever v. Lane*, 3-296.

There is a clear distinction between a service insufficient only in the manner of making it and a case where no service at all is made or attempted to be made. In the latter case there is no question of jurisdiction to decide, and if a judgment is rendered under such circumstances against a party it will be a nullity. But if there is a question of jurisdiction raised which the court must decide, if it does so erroneously against the defendant, and renders a judgment for plaintiff, such judgment will be voidable, but binding upon the parties until reversed or corrected on appeal: *Bonsall v. Isett*, 14-309.

Where it appears that there was notice and return of personal service, a defect therein which is held immaterial by the tribunal cannot be taken advantage of collaterally: *Pursley v. Hayes*, 22-11: *Ballinger v. Tarbell*, 16-491.

Though the notice be irregular and insufficient, yet if the court takes jurisdiction to render the judgment, the judgment is not void, but the error can only be taken advantage of on appeal: *Moody v. Taylor*, 12-71; *De Tar v. Boone County*, 34-488; *Woodbury v. Maguire*, 42-339.

Where there is service, though defective, the judgment can only be attacked in a direct proceeding. The presumption is in favor of the correctness of the proceedings of a court of general jurisdiction and that a public officer properly discharges his duty: *Boker v. Chapline*, 12-204.

Therefore, *held*, that the judgment of a court of general jurisdiction rendered upon service, by leaving a copy, although the return did not show that defendant was not found, could not be attacked collaterally: *Bonsall v. Isett*, 14-309; *Gregg v. Thompson*, 17-107; *Muscatine Turn Verein v. Funck*, 18-469.

The determination of the court as to the sufficiency of proof of service cannot be collaterally attacked: *Ketchum v. White*, 72-193: *Baker v. Jamison*, 73-698.

Where there is actual service and the return is defective, the judgment is not void and can only be attacked in a direct proceeding: *Moomey v. Maas*, 22-380.

Where it appears that there was notice and service, though they were defective, yet if the court determines in favor of their sufficiency, even though the determination be erroneous, the court will have jurisdiction, and its judgment cannot be held void in a collateral proceeding: *Shawhan v. Loffer*, 24-217; *Farmers' Ins. Co. v. Highsmith*, 44-330; *Shea v. Quintin*, 30-58; *Ballinger v. Tarbell*, 16-491; *Rotch v. Humboldt College*, 89-480.

If a service of an original notice, which service is in part defective, is shown to have been made, and it appears that the trial court has determined that it is sufficient, its sufficiency cannot be attacked in a collateral proceeding: *Schneitman v. Noble*, 75-120.

Where notice of an application to sell land belonging to a ward was served on the ward three days before the appointment of the guardian, *held*, that the irregularity was not sufficient to affect the jurisdiction of the court: *Hamiel v. Donnelly*, 75-93.

Where there appears to have been service, and the court rendering the judgment determined that there was such personal service as to authorize the rendition of a judgment, the judgment is not open to collateral attack on the ground that the service was not sufficient: *Latterett v. Cook*, 1-1.

The sufficiency of service being subject to the determination of the court, and that determination being that it is sufficient, such determination is conclusive against collateral attack: *Telford v. Barney*, 1 G. Gr., 575.

Where the court's jurisdiction depends upon the sufficiency of service of notice, and it finds and adjudges that due and lawful service has been made, this judgment cannot be attacked collaterally upon proof that service was in fact insufficient: *Lees v. Wetmore*, 58-170.

Where a decree recited a finding by the court that defendant had been served with

notice, *held*, that the presumption was in favor of such finding, and the fact that the record did not otherwise show service would not overthrow the presumption. The party claiming the fact to be otherwise must allege and prove such fact: *Hale v. First Nat. Bank*, 50-642.

If there is notice, but it is illegal and technically defective, and the court holds it sufficient and enters judgment, such judgment is not void or subject to collateral attack: *Dougherty v. McManus*, 36-657.

Where the judgment of the court shows that there was notice of some kind, and that the sufficiency of the service was determined by the court in favor of its jurisdiction, the proceedings cannot be regarded as void for want of jurisdiction on account of irregularities appearing in the record which affect the service. Such judgment cannot be questioned in a collateral proceeding, but only upon appeal or otherwise as provided by law: *Woodbury v. Maguire*, 42-339.

It will be presumed in such case that due proof of all matters necessary to be shown was made to the court upon which the adjudication of the sufficiency of the service was had: *Tharp v. Brenneman*, 41-251.

Where a judgment was rendered on a return of service which did not state the date thereof, *held*, that it was not subject to collateral attack by a motion to vacate the judgment filed four years after its rendition: *Wilson v. Call*, 49-463.

If there is notice, though defective, the proceeding will not be void on account of error of the court in holding the notice sufficient: *Bunce v. Bunce*, 59-533.

When the question of jurisdiction upon service by publication is necessarily presented to a court of general jurisdiction, and is decided in favor of its jurisdiction, such judgment will be conclusive against a collateral attack: *Wright v. Marsh*, 2 G. Gr., 94.

Where a statute provided that notice in a particular proceeding should be given, such as the court might prescribe, and the court ordered due notice to all concerned to be given, and then entered on its record a recital that service of notice of the proceeding had been made, pursuant to the direction of the court, *held*, that the determination was sufficient and the judgment could not be attacked collaterally: *Stanley v. Noble*, 59-666.

Where the court necessarily determines, in rendering judgment, that the service of notice was sufficient, the correctness of this ruling cannot be questioned in a collateral proceeding: *Fanning v. Krapfl*, 68-244.

Mere want of compliance with the requirements of statute as to form of notice and manner and time of service will not constitute a want of notice such as to render the judgment void. If there is a mere defect in the notice or service, it is subject to correction on appeal, but cannot be relied on as avoiding the judgment: *Shea v. Quintin*, 30-58.

For instance, where the notice directs defendant to appear at the next term, but does not name the term, a judgment rendered in pursuance thereof will not be void for want of jurisdiction. Such a case is one of defective notice and not want of notice: *De Tar v. Boone County*, 34-488.

Where the original notice and return of the officer were regular and sufficient, but the copy delivered was defective in erroneously stating the date of commencement of the term of court in which defendant was required to appear, *held*, that the judgment was not void and subject to collateral attack: *Irions v. Keystone Mfg. Co.*, 61-406.

Where some essential requirement of the law going to make up and constitute notice to the party is omitted, so that practically the notice required by the law has not been given, then there is such a fatal defect in the substance of the notice that no jurisdiction is conferred thereby; but if a party has been served with a notice which informs him of the remedy sought and the time and place he is required to appear, proceedings had in conformity with such notice will not be held void in a collateral proceeding, although there are defects in the notice or service: *Lyon v. Vanatta*, 35-521.

Where a defendant is personally served with notice, a judgment of the court by default will not be void for want of jurisdiction, although he was not served the requisite number of days before the return day, as required by law. Such a service will be simply defective and not void: *Darrah v. Watson*, 36-116.

The fact that judgment is rendered at the first term after service of notice, and that the requisite time has not intervened between the service of notice and the beginning of the term, will not render a judgment *in rem* void and subject to collateral attack: *Griffith v. Milwaukee Harvester Co.*, 92-634.

Where there is a service insufficient only in the manner of making it, a question of jurisdiction is raised which the court may decide, and if it does so decide erroneously, its judgment, though voidable, is binding until reversed and corrected on appeal: *Myers v. Davis*, 47-325.

Original notice of an action by an attachment was attempted to be served out of the state but the service was invalid by reason of mistake as to the identity of the person to be served, but in a subsequent action of which the same person had lawful notice the first action was referred to; *held*, that such defendant, although not appearing in the first action, could not be heard on a motion to set aside a judgment in that action and sale thereunder, it not appearing that he had any defense to the action: *Corn Exchange Bank v. Applegate*, 65 N.W., 1007.

Service upon an agent upon whom service against the principal is not authorized is not simply defective service, but must be regarded as no service, and judgment rendered in pursuance therof will be void for want of jurisdiction: *State Ins. Co. v. Granger*, 62-272.

A motion to correct a judgment rendered by default upon defective service must be made in the lower court, or the error in rendering such judgment cannot be reviewed on appeal: *Pratt v. Western Stage Co.*, 27-363.

Where a judgment is rendered without notice it is void and will be set aside in chancery. This relief will not be granted if the

party holding such void judgment has a valid claim whereon it was rendered to which there is no defense, but if such claim is barred by the statute of limitations the judgment may be enjoined: *Gerrish v. Seaton*, 73–15.

Where the notice is not read to defendant and the copy given him is defective in that it does not show that the notice was signed by plaintiff or his attorney the court acquires no jurisdiction: *Hoitt v. Skinner*, 68 N. W., 788.

Where the fact of service of notice appears from the decree, it is sufficiently shown by the record, if there is nothing in any other part of the record showing otherwise: *Tolivar v. Morgan*, 75–619.

Notwithstanding a decree recites lawful service of notice the contrary may be shown, and when established in a direct proceeding the judgment will be set aside: *Wolff v. Shenandoah Nat. Bank*, 84–138.

Where the return did not show either personal service, or sufficient notice by leaving copy, *held*, that the case was not one of defective service, but want of service, and the court acquired no jurisdiction: *Dohms v. Mann*, 76–723.

Service of notice on a local agent in an action not relating to the business of his agency gives the court no jurisdiction: *State Insurance Co. v. Waterhouse*, 78–674.

Where the record in an action against two defendants showed a notice addressed to both of them, with return of service on one, and judgment by default against him, and a judgment against the other at a subsequent term, without any further service, *held*, that there being a conflict in the oral evidence as to whether or not notice was actually served, the lower court correctly found that the judgment against the latter defendant was without notice, and therefore void for want of jurisdiction: *Jamison v. Weaver*, 84–611.

SEC. **3520. Indorsement and return by sheriff.** If the notice is placed in the hands of a sheriff, he must note thereon the date when received, and proceed to serve the same without delay in his county, and must file the same, with his return thereon, in the office of the clerk of the court where the action is pending, or return the same by mail or otherwise to the party from whom he received it. [C. '73, § 2605; R., § 2819; C. '51, § 1717.]

The failure of the sheriff to indorse on the notice the time it was received by him will not vitiate the service thereof: *Cobb v. Newcomb*, 7–43.

SEC. **3521. Penalty—amendment.** If a notice is not filed or returned by the sheriff to the person from whom it was received, or if the return thereon is defective, the officer making the same may be fined by the court not exceeding ten dollars, and he shall be liable to an action for damages by any person aggrieved thereby. But the court may permit an amendment according to the truth of the case. [C. '73, § 2606; R., § 2820.]

SEC. **3522. Service on Sunday.** Notice shall not be served on Sunday unless the plaintiff, his agent or attorney makes oath thereon that personal service will not be possible unless then made, and a notice so indorsed shall be served by the sheriff, or may be served by another, as on a secular day. [C. '73, § 2607; R., § 2821.]

SEC. **3523. Notice of no personal claim.** The plaintiff may state in the notice the general subject of the action, a brief description of the property affected by it, and that no personal claim is made against any defendant, naming him, and if such defendant unreasonably defends he shall pay the costs occasioned thereby. [C. '73, § 2608; R., § 2822; C. '51, § 1724.]

SEC. **3524. Proof of service—patients in hospital for insane.** If service is made within the state, the truth of the return is proven by the signature of the sheriff or his deputy, and the court shall take judicial notice thereof. If made without the state, or by one not such officer within the state, the return must be proven by the affidavit of the person making the same. Service may be made on any patient confined in any of the hospitals for the insane by the superintendent or assistant superintendent thereof, and the certificate of such officer, under the seal of the hospital, shall be proof of such service. [20 G. A., ch. 77; C. '73, § 2609; R., § 2823; C. '51, § 1732.]

The best evidence of the service of an original notice is the officer's return thereof, and if this cannot be had by reason of the loss or destruction of the notice, the testimony of the officer who made the service is competent to prove the fact of service and return of the notice: *Bridges v. Arnold*, 37–221.

It seems that the officer's return of service should be deemed conclusive, and if any damage is suffered through his failure to make service in accordance with the statements in his return, defendant should be left to his remedy on the officer's bond: *Irions v. Keystone Mfg. Co.*, 61–406.

Service made by a constable, or by any

person not a sheriff, must be proven by his affidavit: *Moss v. Blinn*, 7–261.

A sheriff has no power as such to serve notice outside of the limits of his county, and the return of service as made by him outside of the state in his official capacity, even verified by oath, will not show personal service: *Weil v. Lowenthal*, 10–575.

Affidavit of service *held* sufficient although the jurat did not state by whom it was sworn to: *Kirby v. Gates*, 71–100.

The same presumption arises in favor of a return made by a person not a party, when properly proven, as in favor of a return of a sheriff: *Macklot v. Hart*, 12–428.

In general, as to the return, see notes to § 3519.

SEC. **3525. Superintendent may acknowledge service.** When it becomes necessary to serve personally with a notice or process of any kind a person who is confined in any state hospital for the insane, the superintendent thereof shall acknowledge service for such person, whenever in his opinion personal service would injuriously affect such person, which fact shall be stated in the acknowledgment of service. A service thus made shall be held a personal one on the defendant. [C. '73, § 2616.]

SEC. **3526. Service on insane person out of hospital.** When a defendant has been judicially declared to be of unsound mind and is not confined in any state hospital for the insane, service may be made upon him and upon his guardian, and, if he have none, then upon his wife, or the person having the care or custody of him or with whom he lives. [C. '73, § 2615; R., § 2829; C. '51, § 1729.]

SEC. **3527. On prisoner in penitentiary.** When the defendant is a prisoner in the penitentiary, a copy of the petition must be delivered to him at the time the notice is served, and a copy of the notice must be delivered to the husband or wife of the defendant, if any such be found within this state. [C. '73, § 2617; R., § 2830.]

SEC. **3528. Service on county—presentation of claims.** If a county is defendant, service may be made on the chairman of the board of supervisors or county auditor. But no action shall be brought against any county, on an unliquidated demand, until the same has been presented to such board and payment demanded and refused or neglected. [C. '73, § 2610; R., § 2824; C. '51, § 1726.]

Service: Whether service upon the chairman of the board of supervisors made outside of his county will confer jurisdiction in an action against the county, *quære: Gross v. Sioux County*, 2 Dillon, 509.

In an action not against the county, but against the members of the board of supervisors, service cannot be made upon the county auditor: *Polk v. Forest*, 71–26.

In order to bind the county by a proceeding in court the notice must be served as here provided. A proceeding against the county treasurer with service upon him will not be binding on the county: *Polk County v. Sherman*, 68 N. W., 562.

Presentation of claim: If the creditor presents his demand and it is not allowed after a reasonable time he may bring his action. It is not necessary that the fact of the refusal to allow the claim shall appear from the records of the board. They cannot defeat the claim by a failure to take action: *White v. Polk County*, 17–413; *Ferguson v. Davis County*, 57–601.

After the presentation of the claim the board is entitled to a reasonable time in which to determine what disposition should be made of it and the question as to what is a reasonable time is one for the jury: *Ross v. Hardin County*, 62 N. W., 844.

This statutory provision will be enforced by the federal courts. So *held* in an action to recover damages against a county for the infringement of a patent: *May v. Buchanan County*, 29 Fed., 469; *May v. Cass County*, 30 Fed., 762.

This provision, as originally enacted, was limited to actions commenced after it took effect; and *held*, that in an action commenced before the act took effect, an amendment to the petition, which set out a claim for the same recovery, basing it upon an account instead of a written contract, was not a new action: *Mather v. Butler County*, 16–59.

A creditor is not obliged to appeal from the action of the board in refusing to allow his claim, but may bring action against the county: *Armstrong v. Tama County*, 34–309; *Curtis v. Cass County*, 49–421.

The common-law remedy by action against the county is not taken away by this statutory provision, but the party has his election of appealing from the disallowance of his claim or instituting his action in the proper court: *State ex rel. v. County Judge*, 5–380.

It is only unliquidated demands against the county that must be presented to the board: *Sanford v. Lee County*, 49–148.

The provision that demand must be made is not applicable where the claim has already been presented and liquidated or allowed, and a warrant, note or bond has been issued therefor: *Clapp v. Cedar County*, 5–15, 44.

This statutory provision is applicable to a claim by one county against another for relief furnished to a pauper: *Cerro Gordo County v. Wright County*, 50–439.

A claim against the county for the refund-

ing of taxes must be presented in accordance with the provisions of this section before action is brought thereon: *Bibbins v. Clark*, 90-230.

The statute of limitations commences to run against a claim which is thus required to be presented from the time it accrues and not from the time it is presented: *Baker v. Johnson County*, 33-151; *Kinsey v. Louisa County*, 37-438.

Proof of the fact of demand may be made by the testimony of the person making such demand: *Ferguson v. Davis County*, 57-601.

If a claim is allowed in part the acceptance of the allowance bars an action for the balance: *Brick v. Plymouth County*, 63-462; *Wapello County v. Sinnaman*, 1 G. Gr., 413.

But unless the party filing his claim has accepted a partial allowance under such circumstances that a settlement or compromise between the parties can be inferred therefrom, he is not precluded from maintaining his action for the portion disallowed: *Wilson v. Palo Alto County*, 65-18.

Where partial payment was accepted without knowledge on the part of claimant that the balance of his claim was rejected, *held*, that the claimant was not precluded from recovering the portion of the claim disallowed: *Fulton v. Monona County*, 47-622.

Presentation of a liquidated demand and acceptance of a part allowed will not estop claimant from recovering the balance: *Sanford v. Lee County*, 49-148.

This section does not require that a claimant having an unliquidated demand against the county shall produce his evidence in support thereof, but it is enough if the board is informed of the amount of the claim, and the grounds upon which it is made, with sufficient clearness to enable it to investigate the facts and reach an intelligent decision: *Dale v. Webster County*, 76-370.

It is not necessary that the claimant demand the compensation to which he claims to be entitled, nor produce his evidence. It is enough if the board is informed of the amount of the claim and the ground on which it is made with sufficient clearness to enable it to investigate the facts and reach an intelligent decision: *Homan v. Franklin County*, 68 N. W., 559.

It is not error to instruct the jury that the aggregate recovery should not exceed the amount named in the claim made before the board of supervisors: *Ibid.*

Where plaintiff presented a claim of five hundred dollars to the board of supervisors for personal injury to his wife caused by a defective bridge, which was refused, and he then brought action for that amount, but afterwards by amendment to his petition claimed a larger amount, on the ground that the injuries were more serious than they were at first supposed to be, *held*, that plaintiff's recovery could not exceed five hundred dollars, as no claim for a larger amount had been presented to the supervisors: *Marsh v. Benton County*, 75-469.

Although the amount to be paid to an attorney selected by the county attorney with the approval of the district court to assist in the prosecution of a criminal case (§ 303) is to be fixed by the board of supervisors, yet their discretion is not absolute, and the attorney is not under obligation to accept the amount allowed, but may resort to the courts to have the amount to which he is entitled determined: *Stone v. Marion County*, 78-14.

The claim for attorney's fees taxed in a liquor prosecution, and which the board of supervisors has directed not to be paid over to the attorney claiming such fees, *held* not to be an unliquidated demand for which claim need be presented as required in this section: *Farr v. Seaward*, 82-221.

A claim against a county for infringement of a patent is such a claim as must be presented under this section, even though it is alleged that there is a fixed amount of royalty uniformly demanded and collected from users of the patented device: *May v. Jackson County*, 35 Fed., 710.

Action against the county for injury from a defective bridge is barred in three months unless written notice of the claim has been given: See § 3447, ¶ 1.

SEC. **3529. On agent of corporation.** If the action is against any corporation or person owning or operating any railway or canal, or any telegraph, telephone, stage, coach or car line, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company or person, wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county. [C. '73, § 2611; C. '51, § 1727.]

Service upon the trackmaster of a railroad, *held* not sufficient to constitute service upon the company: *Richardson v. Burlington & M. R. R. Co.*, 8-260.

A railway corporation not operating a line of railway within the state, and not having any office or agency within the state, out of the business of which the cause of action arises, is not within the jurisdiction of the state or federal courts of Iowa, and a service upon one of its agents who may be found within the state will not confer jurisdiction: *Elgin Canning Co. v. Atchison, etc., R. Co.*, 24 Fed., 866.

A foreign corporation doing business in the state in such way that it may be served with notice under statutory provisions cannot be deemed a nonresident in such sense that the statute of limitations will not run in its favor: *Wall v. Chicago & N. W. R. Co.*, 69-498.

The service here referred to is sufficient in an action in the federal court against a foreign railroad company doing business in Iowa: *Dinzy v. Illinois Cent. R. Co.*, 61 Fed., 49.

SEC. **3530. On agent of insurance company.** If the action is against an insurance company, for loss or damage upon any contract of insurance or indemnity, service may be had upon any general agent of the company wherever found, or upon any recording agent or agent who has authority to issue policies.

As to place of suit in action against insurance company, see § 3499, and notes.

SEC. **3531. On municipal or other corporation.** When the action is against a municipal corporation, service may be made on the mayor or clerk; if against a school township or independent district, on the president or secretary; if against any other corporation, on any trustee or officer thereof, or on any agent employed in the general management of its business, or on any of the last known or acting officers of such corporation; and if no person can be found on whom service can be made as provided in this and the two preceding sections, it may be made by publication as provided in other cases. [C.'73, § 2612; R., § 2824; C.'51, § 1726.]

Service upon the treasurer of an independent school district is a sufficient service upon the district: *Kennedy v. Independent School Dist.*, 48-189.

A notice in a garnishment proceeding directed to A. B., Mayor of Iowa City, C. D., Recorder of Iowa City and E. F., Treasurer of Iowa City, *held* not to give the court any jurisdiction of the city, the notice not being directed to nor served upon such persons as officers: *Claflin v. Iowa City*, 12-284.

In an appeal from the action of the board of equalization in a city notice may be served upon the mayor: *Farmers' Loan & Trust Co. v. Newton*, 66 N.W., 784.

Service upon an agent of a corporation, employed in the general management of the business of a corporation, may be made in all actions without regard to the place where the action is brought. The statutory provisions with reference to service upon an agent or clerk employed in an office or agency are not applicable: *Centennial Mut. L. Ass'n v. Walker*, 50-75.

An agent having no authority to act for a corporation within the state, and whose duties outside of the state were limited to the investigation of facts and reporting them to the general manager, *held* not to be such an agent as that service upon him would constitute service upon the corporation: *Philip v. Covenant Mut. Benefit Ass'n*, 62-633.

In an action against a foreign insurance company brought in a county in which the contract of insurance was made, service of notice may be made upon any agent in the state designated by the company under the statutes of the state as an agent on whom service may be made: *Niagara Ins. Co. v. Rodecker*, 47-162. [But now see §§ 1722, 1818.]

In a particular case, *held* that the officer upon whom notice was served as secretary of defendant corporation was such by virtue of election and recognition. As to whether service on a merely *de facto* officer would be sufficient, *quære*: *Perry District Fair Society v. Zenor*, 64 N.W., 598.

Service on a general agent within the state is sufficient and it is not necessary that such agent have a fixed and definite place of business and the question whether the statute of limitations runs against a foreign corporation on account of its having such agent in the state cannot depend upon whether the creditor of such corporation has knowledge of the existence of such agency: *Winney v. Sandwich Mfg. Co.*, 86-608.

But the fact that there is in the state an agent of a foreign corporation upon whom service might be made does not render such foreign corporation a resident in such sense that the statute of limitations will run in its favor except in the case of railroad companies operating roads within the state: *Ibid.*

SEC. **3532. On agent, as to business of office or agency.** When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency. [C.'73, § 2613; R., § 2827; C.'51, § 1705.]

Service cannot be made upon another agent of the same party than that who transacts the business out of which the action arises, and whose agency is of a different scope. In such cases the service must be made upon some one connected with the business out of which the action grows, and if made upon an agent not connected with such business, it is a case not of defective service, but of entire want of service: *State Ins. Co. v. Granger*, 62-272.

This section allows service upon the agent in a suit against the principal in matters connected with the agency, but the principal is not required to respond to service upon the agent of a notice of garnishment of the principal in a proceeding for the collection of a debt from the agent in no manner connected with the agency: *Upton Mfg. Co. v. Stewart*, 61-209.

Service on an agent of an insurance company whose business is to solicit and forward

risks and whose residence is in the county is sufficient to constitute service upon the company. It is not necessary that he should be a general agent, have an office, or transact all business of the company in the county: *Farmers' Ins. Co. v. Highsmith*, 44–330.

A local insurance agent is not so employed in the general management of the business of the company that service can be made upon him in a suit against the company relating to a transaction not growing out of the business of his agency: *State Ins. Co. v. Waterhouse*, 78–674.

Where service was made upon one who had become agent for a nonresident corporation by a written contract, by the terms of which his agency had expired, but was still acting as agent for the completion of the business, *held*, that notice of an action brought to recover upon a breach of warranty in a sale made by the corporation through such agent was properly served upon him: *Gross v. Nichols*, 72–239.

This section does not authorize service upon a general agent, but upon any agent or clerk employed in an office or agency which the defendant may have for the transaction of its business: *Winney v. Standrich Mfg. Co.* 86–608.

If the agency for the prosecution of the business out of which the contract arose is discontinued, and the agent's authority revoked, service of process cannot be made upon such agent, though defendant keeps an agent in the same place for the transaction of other business: *Ibid.*

In a particular case, *held*, that it appeared that defendant maintained in the state such an agency as that service on the agent employed therein might be made with reference to actions growing out of the business of such agency: *Bellows v. Litchfield*, 83–36.

Where service of an original notice was made on an agent, and the sufficiency of the service was questioned, *held* that, as the trial court had determined its sufficiency, it could not be attacked in a collateral proceeding: *Schneitman v. Noble*, 75–120.

SEC. **3533. On minor.** If the defendant is a minor under fourteen years of age, the service must be made on his father, mother or guardian, but if there be none of these within the state, then on the person therein having care of or control over him, or with whom he resides, or in whose service he is employed. When he is over fourteen years of age, service on him shall be sufficient. [C.'73, § 2614; R., § 2828; C.'51, § 1729.]

Where the service is not upon the father, mother or guardian it should appear from the return that neither father nor mother is within the state, and that there is no guardian on whom service could be made: *Allan v. Saylor*, 14–435.

The judgment of a court as to the sufficiency of such notice can only be questioned on appeal, and cannot be attacked collaterally: *Tharp v. Brenneman*, 41–251.

Although notice in an action against a minor is defective in being directed to the guardian instead of to the minor, yet if it contains the necessary statements, and is in fact served upon the minor, a judgment rendered in pursuance thereof will not be void for want of jurisdiction: *Dahms v. Alston*, 72–411.

Where a minor twenty years of age was not served with notice of an action to foreclose a mortgage given by his guardian, *held*, that the court did not acquire jurisdiction of him, and the judgment did not bar his right to question the validity of such mortgage on the ground that it was not approved by the court: *Dohms v. Mann*, 76–723.

Where it appeared on appeal that service of the notice of appeal had been made on a minor but it did not appear what his age was, *held*, that it would be presumed that he was of such age that service upon him would be sufficient: *Brundage v. Chenoweth*, 70 N. W., 211.

SEC. **3534. By publication.** Service may be made by publication, when an affidavit is filed that personal service can not be made on the defendant within this state, in either of the following cases:

1. In actions brought for the recovery of real property, or an estate or interest therein;
2. In an action for the partition of real property;
3. In an action for the sale of real property under a mortgage, lien or other incumbrance or charge;
4. In actions to compel the specific performance of a contract of sale of real estate, or in actions to establish or set aside a will, where in such cases any or all of the defendants reside out of this state and the real property is within it;
5. In actions brought against a nonresident of this state, or a foreign corporation, having in the state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way;
6. In actions which relate to or the subject of which is real or personal property in this state, when any defendant has or claims a lien or interest,

actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation;

7. In all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a notice, or keeps himself concealed therein with like intent;

8. Where the action is for a divorce, if the defendant is a nonresident of the state, or his residence is unknown. [C. '73, § 2618; R., §§ 2831–2; C. '51, § 1725.]

Sudbury v Sudbury 162 N.W. 211 Ia. 2

When proper: A proceeding to foreclose a mortgage may be brought against a nonresident upon service by publication: *Robertson v. Young*, 10–291.

The provisions for service by publication in such cases are not unconstitutional: *Palmer v. McCormick*, 28 Fed., 541.

An affidavit stating that defendant has absconded so that ordinary service cannot be made upon him in the state is not sufficient to give the court jurisdiction upon service by publication: *Fuller v. Riggs*, 66–328.

Service by publication in foreclosure proceedings may be made not only in actions against nonresidents, but when the affidavit shows that personal service cannot be made within the state: *Palmer v. McCormick*, 28 Fed., 541.

Statutory requirements strictly construed: Service by publication being only constructive service provided for by the legislature, and to be resorted to mainly in proceedings *ex parte*, the requirements of the statute must be strictly complied with: *Broghill v. Lash*, 3 G. Gr., 357.

The court acquires jurisdiction by publication only by strict compliance with the requirements of the statutes: *Carnes v. Mitchell*, 82–601.

Therefore *held*, that publication without the filing of an affidavit stating that personal service could not be made on the defendant within this state was not authorized, and a judgment rendered thereon was void for want of jurisdiction: *Ibid.*; *Chase v. Kaynor*, 78–449.

While a strict compliance with the requirements of the statute is essential to the validity of a judgment rendered on service by publication, yet where there has been in a proper case such service by publication or personal service outside the state, and the only defect consists in the fact that the requisite time did not elapse between the service of notice and the first day of the term at which judgment was rendered, such judgment will not be void and subject to collateral attack: *Griffith v. Milwaukee Harvester Co.*, 92–634.

Where a court acquires jurisdiction only by publication, unless publication is made as required by statute no service is obtained, and the proceedings of the court under it are void: *Hinch v. Weatherford*, 2 G. Gr., 244.

A party relying upon service by publication is held to a strict and faithful compliance with the statute: *Smith v. Smith*, 4 G. Gr., 266; *Tunis v. Withrow*, 10–305.

The statute authorizing service of notice by publication must be strictly pursued, and if the recitals in a judgment show a failure to comply with these requirements the judgment will be void: *Bardsley v. Hines*, 33–157.

Judgment by default should not be rendered against a party not personally served until the court is satisfied that every requirement of the statute with reference to the publication has been performed: *Pinkney v. Pinkney*, 4 G. Gr., 324.

The proof of service of notice required in case of publication is a condition precedent without which a court has no power to enter judgment by default; the proof required being made an element of jurisdiction, the record should should show that it was made before default against the debtor: *Broghill v. Lash*, 3 G. Gr., 357; *Lot Two v. Swetland*, 4 G. Gr., 465.

Presumption: The statute permitting service by publication must be strictly complied with. Hence, in an action to set aside a judgment for want of legal notice, where it is not shown by the record, nor by evidence *aliunde*, that the defendant was a nonresident when the service upon him was attempted, the court will not presume that he was not a resident: *Hartley v. Boynton*, 5 McCrary, 453.

If the record discloses the fact that the proper steps for service by publication which are required to be made matter of record have not been made to appear to the court, the presumption which obtains in favor of the jurisdiction of a court of general jurisdiction is thereby rebutted: *Tunis v. Withrow*, 10–305.

Judgment rendered upon service by publication may be attacked collaterally by showing that the essential steps have not been taken. So *held* under a previous statute which required the sending of a copy of the petition by mail to the defendant, although it was recited by the decree that defendant had been served with notice as required by law: *McGahen v. Carr*, 6–331.

Under a statute providing that the court might order publication of notice in case certain facts were shown by affidavit, *held*, that the filing of such affidavit was necessary to give the court jurisdiction to order publication, and that the fact that the affidavit was filed would not be presumed in the absence of express adjudication to that effect: *Bradley v. Jamison*, 46–68; *Bardsley v. Hines*, 33–157.

The statements in an affidavit for publication showing nonresidence of defendant are to be deemed to cover the period for making the contemplated service under the forms prescribed by law, and in the construction of such affidavits it will be presumed to be intended that personal service could not

be had for the term, not merely that it could not be had on the day the affidavit was made or filed: *Snell v. Meservy*, 91-322.

The fact that a person having a claim against a nonresident does not bring suit by attachment on publication as he might, does not raise any presumption of payment: *Ludwig v. Blackshere*, 71 N. W., 356.

Where jurisdiction is acquired only by service by publication, presumption as to the fact of publication will not be indulged to support it: *Miller v. Corbin*, 46-150.

But a judgment upon service by publication cannot be attacked in a collateral proceeding for mere insufficiency in the notice or service, if the court has held it sufficient: *Gregg v. Thompson*, 17-107.

The determination of a court that proof of service by publication is sufficient cannot be questioned in a collateral proceeding to set aside the sheriff's deed executed to the purchaser at a sale under a judgment recovered on service by publication only: *Fanning v. Krapfl*, 68-244.

Steps necessary: Two conditions must exist to authorize service by publication against a nonresident or a foreign corporation having property or debts sought to be taken by any of the provisional remedies, in order to give the court jurisdiction to enter judgment against defendant upon such service: First, the action must relate to some of the interests enumerated in the statute; and second, defendant must be a nonresident of the state or a foreign corporation: *Sweeley v. Van Steenburg*, 69-696.

If these two conditions in fact exist at the time judgment is entered, it is valid although their existence is not shown by the record. The statute does not require that these facts be shown, but only that publication be made in the manner and for the length of time prescribed. The fact of publication must be shown by the record or the judgment will be void; but the existence of the two conditions above mentioned need not be thus shown. It is the fact, and not proof of the fact, which confers jurisdiction in these respects: *Ibid.*

It is not necessary that an affidavit for service by publication in such cases show that defendant is a nonresident. Such nonresidence is a jurisdictional fact, but it is to be ascertained and proved the same as any other necessary fact in the case: *Taylor v. Ormsby*, 66-109.

If defendant does not live within the state, plaintiff may properly make affidavit that service cannot be made within the state, notwithstanding the possibility that personal service might be made during a temporary visit: *Palmer v. McCormick*, 30 Fed., 82.

The fact that there is service by publication on the filing of an affidavit of nonresidence of the defendant does not show that such defendant was a nonresident: *Carter v. Steyer*, 93-533.

Under a statute authorizing publication of notice in certain cases, when defendant could not be found within the state, upon proper showing of the fact by affidavit, *held*, that proof of the nonresidence of defendant, and return of "not found" by the sheriff, was sufficient evidence upon which to base the determination that the defendant could not be found within the state: *Byrne v. Roberts*, 31-319.

While affidavit for publication of notice as against parties out of the state under a previous statute should state facts showing that diligence had been used to ascertain the name and residence of the party, yet where everything else was regular, and the affidavit stated the use of diligence, *held*, that the failure to state the facts constituting such diligence would not deprive the court of jurisdiction so as to render its decree void: *Little v. Chambers*, 27-522.

Under the same statute, *held*, that the fact that the affidavit for publication was made by plaintiff's attorney, which did not explain affiant's means of knowledge, or why it was not made by plaintiff, was not a ground for attacking collaterally a judgment rendered on such publication: *Banta v. Wood*, 32-469.

Under previous statutory provisions that publication of notice could only be made upon an order of the court, *held*, that such order could not be made by the clerk, and that judgment upon service by publication thus ordered was void: *Miller v. Corbin*, 46-150; *Royer v. Foster*, 62-321.

Under provisions of the Code of '51, that default should not be entered against a defendant served by publication until proof was made that a copy of the petition and notice had been mailed to his address, *held*, that judgment by default upon such notice without such proof being made was void, and that the fact that the proof of mailing was made should appear of record and would not be presumed: *Broghill v. Lash*, 3 G. Gr., 357; *Taylor v. Brobst*, 4 G. Gr., 534.

Under the same provisions, *held*, that a sale in an attachment proceeding in which it did not appear that the petition and notice had been thus mailed to defendant was void, and that the judgment could not be made valid by supplementing defects in the service and proofs after default was rendered: *Hodson v. Tibbetts*, 16-97.

Also, *held*, that the fact of mailing the notice and petition was a jurisdictional step upon which the power of the court was made to depend and should be made to appear permanently upon the record: *McGahen v. Carr*, 6-331; *Abell v. Cross*, 17-171.

Held, also, that the order for publication in such cases should direct the mailing of a copy of the petition and notice, but that the fact that it did not so direct would not constitute an error in the subsequent proceedings if it was shown the copies were duly mailed: *Lyon v. Comstock*, 9-306.

The affidavit for publication may be sufficient though the venue be omitted, provided the state and county where it is made appear from the context: *Palmer v. McCormick*, 30 Fed., 82.

Effect of publication: Judgment in an action to quiet title rendered upon service by publication when without appearance for defendant, purporting to bar defendant from ever asserting any right or title to the land, *held* not a bar against defendant's seeking in

another suit to assert title to the same land: *Pitts v. Clay*, 27 Fed., 635. But see *Arndt v. Griggs*, 134 U. S., 316.

Service by publication upon a nonresident minor is to be made in the same manner as upon an adult, and when the service is so made the court will have authority to appoint a guardian *ad litem: Judd v. Mosely*, 30-423.

No personal judgment: Judgments *in personam* cannot be rendered where jurisdiction is acquired by publication only: *Doolittle v. Shelton*, 1 G. Gr., 272.

Where the action is improperly commenced by publication, defendant being a resident of the state, and he enters an appearance without service of notice, the jurisdiction is not *in rem* only, but is personal to the same extent that it would have been if he had been personally served: *Equitable L. Ins. Co. v. Gleason*, 56-47.

It is error to enter a judgment *in personam* upon service by publication in a proceeding for attachment against a nonresident: *Wilkie v. Jones*, Mor., 97.

In such a case judgment should be *in rem* only, and a personal judgment would be void, even though the attached property were sold thereunder: *Smith v. Griffin*, 59-409.

That personal judgment cannot be rendered upon service by publication without appearance by defendant, see §§ 3537 and 3800 and notes.

A personal judgment rendered against an absconding and nonresident debtor upon service by publication is absolutely void, and a sale of real estate thereunder is unauthorized: *Cassidy v. Woodward*, 77-354.

Personal judgment cannot be rendered on personal service made outside of the state and without appearance: *Robertson v. Stuhlmiller*, 93-326.

No valid personal judgment can be rendered against a defendant served by publication only, who has not made an appearance: *Griffith v. Milwaukee Harvester Co.*, 92-634.

Even if in some respects the judgment seems to be personal, yet if taken together it contains the essentials of a judgment *in rem*, it will be upheld: *Ibid.*

Judgment against property: A judgment in an attachment proceeding upon service by publication binds only the property attached and cannot be enforced *in personam*, and other property than that seized under the attachment cannot be sold, nor can the attachment operate as a lien upon other property: *Banta v. Wood*, 32-469; *Mayfield v. Bennett*, 48-194.

Therefore, *held*, that where an action by attachment was brought upon a note without reference to the mortgage given to secure it, the mortgaged property not levied on under the attachment could not be sold under the execution: *Banta v. Wood*, 32-469.

An action against a nonresident corporation may be maintained in the courts of this state when aided by attachment of property found within the state, and the judgment of a federal court in this state dismissing a former action based on the same cause, but not aided by attachment, is no bar to the subsequent action: *Weyand v. Atchison, T. & S. F. R. Co.*, 75-573.

An action to quiet title is within the provisions of subdivision 6 of this section: *Carnes v. Mitchell*, 82-601.

In a partition suit where the service upon nonresident minors was by publication, and a guardian *ad litem* was appointed who appeared and answered, *held*, that the service of notice was sufficient and the proceedings as to the nonresident minors final and conclusive: *Williams v. Westcott*, 77-332.

Where an attempt was made to substitute a judgment *in rem* for a personal judgment rendered twelve years before, and read and approved and signed by the judge who presided in the court at the time, *held*, that as the defendant in the former proceedings had conveyed his interest in the land, service upon him by publication was not authorized by law: *Cassidy v. Woodward*, 77-354.

In an action to abate a liquor nuisance, a nonresident of the state, who is assignee in bankruptcy, and as such holds title to the lot in question, may be served with notice by publication: *Radford v. Thornell*, 81-709.

Service by publication in an action to quiet title is valid in cutting off the rights of a nonresident: *Knudson v. Litchfield*, 87-111; *Arndt v. Griggs*, 134 U. S., 316.

Where a suit is commenced for attachment upon service by publication only, and no property is attached, the judgment is a nullity; *Judah v. Stephenson*, 10-493; *Cooper v. Smith*, 25-269.

The court acquires no jurisdiction in an attachment proceeding upon service by publication, unless the property of defendant is attached: *Wells v. Sequin*, 14-143.

Where, in an action by attachment against a nonresident, no property was levied on in the county, but a levy was made in another county to which, upon subsequent appearance of defendant in the action and motion to change the venue, the cause was transferred, *held*, that the lien of the attachment was valid from the date of the levy, and took precedence of an attachment in another action brought in the county in which the property was situated before the change of venue in the first action was had to that county: *Laird v. Dickerson*, 40-665.

Where notice of garnishment is served in an attachment proceeding commenced by publication, but no debt due the defendant is reached thereby, the court acquires no jurisdiction, and cannot, by a subsequent proceeding, subject a debt afterwards coming into existence: *Morris v. Union Pacific R. Co.*, 56-135.

The fact that a writ of attachment issues against defendant as a nonresident does not render the proceedings *in rem*, where it appears that defendant was personally served: *Darrah v. Watson*, 36-116.

In a suit against a nonresident by attachment upon service by publication, a debt due for personal services rendered by such nonresident in the state of his residence, and payable there, may be subjected, by garnishment of his creditor in this state, to the payment of a claim, although by the laws of the state of his residence the debt would be

exempt from execution: *Mooney v. Union Pacific R. Co.*, 60–346.

In proceedings for divorce commenced by publication of notice the court acquires jurisdiction to allow alimony: *Harshberger v. Harshberger*, 26–503: *Twing v. O'Meara*, 59–326.

SEC. **3535. Method.** The publication must be of the original notice required for the commencement of actions, once each week for four consecutive weeks, before or after the filing of the petition, in some newspaper printed in the county where the petition is or will be filed, which paper shall be determined by the plaintiff or his attorney. [C.'73, § 2619; R., § 2833.]

Form of notice: Any notice which would give jurisdiction if personally served upon the party is good when served by publication in a proper case if the publicity of the pendency of the action which the law intends is thereby given. That is, a description in the notice of the person intended, which would be sufficient if the service was personal, is also sufficient when the service is by publication: *Fanning v. Krapfl*, 68–244.

Length of publication: Under a former statute providing that notice of a proceeding therein referred to should be published for a time not less than "once a week for four consecutive weeks," *held*, that the notice was completed at the last publication: *Banta v. Wood*, 32–469.

In what newspaper: It would seem that under the statute publication of the notice in a paper published in the county but printed in another county would not be good unless there is no paper printed in the county, and the county in which the paper is printed is the next nearest county: *Cooke v. Tallman*, 40–133.

The fact that an original notice is printed in a paper one-half of which is "patent insides" printed in Chicago does not invalidate the notice. If the local characteristic departments of the paper are in fact printed in the county where the paper is circulated there is a substantial compliance with the statutory provisions: *Palmer v. McCormick*, 30 Fed., 82.

The plaintiff has the right to designate the newspaper in which publication of original notices, or notices of execution sales shall be made [§ 1293]: *Herriman v. Moore*, 49–171.

Under the language of § 2618 of the Code of '73 it was held that the publication would be valid though made before the filing of the petition. (Overruling *Billings v. Kothe*, 49–34.): *Foster v. Henderson*, 54–220. [This section contains a clause obviating any such difficulty. There has been also a legalizing act to cure such defects as to judgments already rendered: 18 G. A., ch. 124, § 1.]

The paper for publication of notice on unknown defendants is to be selected by the court: See § 3539.

SEC. **3536. When complete—proof.** When the foregoing provisions have been complied with, the defendant so notified shall be required to appear as if personally served on the day of the last publication within the county in which the petition is filed, proof thereof being made by the affidavit of the publisher or his foreman, and filed before default is taken. [C. '73, § 2620; R., § 2834; C.'51, § 1732.]

The provision that proof of publication shall be made by affidavit of the publisher or foreman is only applicable to publication of original notices in the actions specified in this chapter. In other cases proof of publication may be made by any one having knowledge of the fact. (See § 4680): *Farrell v. Leighton*, 49–174.

As to judgment upon service by publication, see notes to § 3534.

SEC. **3537. Actual service.** Actual personal service of the notice within or without the state supersedes the necessity of publication. [C.'73, § 2621; R., § 2835.]

Personal service upon defendant outside of the state supersedes the necessity of service by publication and has the same force and effect: *Mooney v. Union Pacific R. Co.*, 60–346.

To authorize personal service without the state it is not necessary to file an affidavit that such service cannot be made within the state as is required in case of publication: *Miller v. Davison*, 31–435.

Actual personal service without the state upon a person not a resident or citizen of the state merely stands in the place of notice by publication and does not confer jurisdiction to render a personal judgment without appearance: *Griffith v. Milwaukee Harvester Co.*, 92-634; *Weil v. Lowenthal*, 10-575; *Bates v. Chicago & N. W. R. Co.*, 19–260; *Hakes v. Shupe*, 27–465; *Darrance v. Preston*, 18–396; *Lutz v. Kelly*, 47–307.

Service by publication or personal service without the state upon a person who is not a resident or citizen of the state confers no jurisdiction upon the person. It simply authorizes the court to conclude the rights and interests of the nonresident in property over which the court, by process of attachment or otherwise, has acquired jurisdiction *in rem*, and to subject such property to sale in satisfaction of the amount found due. A personal judgment in such a case is a nullity: *Lutz v. Kelly*, 47–307.

Service within the state upon a citizen of another state will give a court jurisdiction,

although he is but temporarily within the jurisdiction at the time of service: *Darrah v. Watson*, 36–116.

But if the person upon whom the service is thus made has been brought within the jurisdiction by fraud, as, for instance, by false statements as to the purpose for which his presence is desired, and concealment of the fact that it was intended to serve notice upon him when brought within such jurisdiction, the court will not entertain the jurisdiction thus sought to be acquired: *Dunlap v. Cody*, 31–260.

The rule that if a person residing in one jurisdiction be induced under false pretenses and representations to come within another for the purpose of there getting service upon him, the jurisdiction will be there held fraudulent and the judgment void, has no application in a suit against a nonresident to subject debts due to him by a corporation operating a line of railway within the state: *Mooney v. Union Pacific R. Co.*, 60–346.

The legislature cannot, by any enactment, confer upon a court of the state jurisdiction over the person of a citizen of another state: *Weil v. Lowenthal*, 10–575.

Service by publication or by personal service without the state, upon one who is not a citizen or resident, confers no jurisdiction either as to the person or property of such nonresident, other than is acquired *in rem: Darrance v. Preston*, 18–396.

The judgment of a court of another state against a nonresident not served with notice within the jurisdiction, and making no appearance, has no binding force nor effect upon him *in personam*, and an action thereon cannot be maintained in this state: *Melhop v. Doane*, 31–397.

Decree of foreclosure on personal service in another state is valid to support a sale of the property, though not effectual as a personal judgment: *Wehrman v. Conklin*, 155 U. S., 314.

Jurisdiction cannot be acquired over nonresident persons by process served without the territorial limits of the state in which the court attempting to exercise jurisdiction is held: *Kelley v. Norwich F. Ins. Co.*, 82–137; *Gary v. Northwestern Masonic Aid Ass'n*, 87–25.

In general, see notes to §§ 3534 and 3800.

SEC. **3538. Unknown defendants.** Where it is necessary to make an unknown person defendant, the petition shall be sworn to, and state what interest such person has or claims to have, how the same was derived or is claimed to have been derived, as definitely as may be, that the name and residence of such person is unknown to plaintiff, and that he had sought diligently to learn the same; thereupon the court or judge thereof shall approve a notice collected from the averments of the petition, which shall contain the name of the plaintiff, a description of the property, and all the allegations of the petition concerning the interest of the unknown person, and the mode of devolution thereof, the relief demanded, the name of the court, and the term at which appearance must be made. Such notice must be entitled in the full name of the plaintiff against the unknown claimants of the property, and shall be signed by the plaintiff or his attorney. [24 G. A., ch. 34; C.'73, §§ 2622–3; R., §§ 2836–7.]

If the provisions of this section are not complied with, the court acquires no jurisdiction of the unknown defendants: *Guise v. Early*, 72–283.

While the verification here referred to is jurisdictional that rule does not apply in other cases where pleadings are directed to be verified: *Guthrie v. Guthrie*, 84–372.

SEC. **3539. Order of publication.** The court or judge thereof, on its or his approval of the notice, shall indorse thereon an order that it be published in some newspaper of the state, designating such paper as shall be most likely to give notice to such unknown person. [24 G. A., ch. 34; C.'73, § 2624; R., § 2838.]

SEC. **3540. Length of publication.** Such notice shall be filed in the action, and its contents, without more, shall be published in the paper, and for the time designated, at least once each week for six successive weeks, and at the end of said time service shall be complete, and such unknown person in court at the next term thereafter. [C.'73, § 2625; R., § 2839.]

SEC. **3541. Mode of appearance—when required.** The mode of appearance may be:

1. By delivering to the plaintiff or the clerk of the court a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person or his attorney, dated the day of its delivery, and to be filed in the case;

2. By entering an appearance in the appearance docket or judge's calendar, or by announcing to the court an appearance, which shall be entered of record;

3. By an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice; and an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance, if it shall appear to the court that he has not had the full timely notice required of the substantial cause of action stated in the petition.

No member of the general assembly shall be held to appear or answer in any civil or special action in any court while such general assembly is in session, nor shall any person be held to answer or appear in any court on the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the twenty-fifth day of December, or on any day of thanksgiving appointed by the president of the United States or by the governor of this state. [15 G. A., ch. 10; C.'73, § 2626; R., § 2840.]

What sufficient: The memorandum in writing need not in terms state that the defendant appears. If he files a pleading in the action it will be sufficient. Such an appearance will be an appearance in court, although the court be not in session: *Conklin v. Johnson*, 34–266.

The fact that the order of the court in a case is made upon agreement of the parties is sufficient to show an appearance by defendant, whether such agreement was oral or in writing: *Auspach v. Ferguson*, 71–144.

The written memorandum of appearance in a particular case, *held* sufficient: *Shaw v. National State Bank*, 49–179.

Appearance to object to the service of notice is a general appearance to the action and confers jurisdiction: *McFarland v. Lowry*, 40–467; *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N.W., 761.

An appearance to object to the original notice because not properly stamped, and to cross-examine plaintiff's witnesses, *held* an appearance to the action: *Wilsey v. Maynard*, 21–107.

Appearance to object to the sufficiency of service upon a director of a corporation defendant is sufficient to give the court jurisdiction: *Robertson v. Eldora R., etc., Co.*, 27–245.

The rule that a special appearance to object to the notice confers jurisdiction is applicable in proceedings before a justice: *Church v. Crossman*, 49–444.

If defendant makes appearance for any purpose the notice has then served its purpose and a second one will not be required. Being in court with timely notice he is held to answer unless he can show that by reason of defect in the notice, such as failure to specify the term at which he is required to appear, he has not been able to prepare his defense: *Des Moines Branch, etc., Bank v. Van*, 12–523.

Where a nonresident, having been served with notice in the state, but in another county than that in which suit was brought against him, specially appeared in the county in which suit was brought, and asked to have the suit dismissed for want of jurisdiction, *held*, that the court acquired jurisdiction to render judgment in the case: *Marquardt v. Thompson*, 78–158.

Appearance of a person in a suit to which he is not a party for the purpose of securing leave to interplead, which is granted to him, but which leave is not exercised, does not make him a party to the suit in such sense as to bind him by the result of the adjudication: *Carson, etc., Co. v. Knapp, etc., Co.*, 80–617.

Prior to the enactment of the provision that a special appearance to object to the service of notice should constitute an appearance, *held*, that a special appearance to object to defect in the notice would not confer jurisdiction: *Hodges v. Brett*, 4 G. Gr., 345; *Milbourn v. Fouts*, 4 G. Gr., 346; *Weil v. Lowenthal*, 10–575; *Converse v. Warren*, 4–158.

Under such statute, *held*, also, that defendant might appear so far as to object to the jurisdiction of the court over the person or subject-matter, but if he appeared by motion or otherwise, seeking to call into action any power of the court except such as pertains to its jurisdiction, it was an appearance: *Ulmer v. Hiatt*, 4 G. Gr., 439; *Stockdale v. Buckingham*, 11–45.

Therefore, *held*, that an application for a continuance amounted to an appearance: *Ibid.; Converse v. Warren*, 4–158.

Held, also, that an appearance by motion to suppress a deposition or quash an attachment constituted such appearance as to give the court jurisdiction: *Clark v. Blackwell*, 4 G. Gr., 441.

An appearance by motion to change the venue confers jurisdiction: *Post v. Brownell*, 36–497.

So *held*, also, as to a motion to dissolve an attachment: *Chittenden v. Hobbs*, 9–417; *Wood v. Young*, 38–102.

An appearance to a writ of attachment constitutes a general appearance in the action: *Winchester v. Cox*, 3 G. Gr., 575.

Appearance to set aside the sale of attached property does not constitute an appearance to the action: *Osborn v. Cloud*, 21–238.

The filing of a demurrer by a nonresident defendant constitutes general appearance, giving the court jurisdiction: *Johnson v. Tostevin*, 60–46.

Appearance to cross-examine plaintiff's witnesses, even though a general appearance is disclaimed, is sufficient to give jurisdiction: *Rahn v. Greer*, 37–627.

As to appearance after default to cross-examine witnesses, see § 3792.

Where intervenors, residents of another county, voluntarily appeared in an action and filed their petition and an amended pe-

tition, *held*, that they were estopped from saying that the court did not have jurisdiction, and that they had no cause of action which by proper amendment could be joined with the pending action: *Jack v. Des Moines & Ft. D. R. Co.*, 49-627.

Appearance not conferring jurisdiction: A want of notice is not waived by appearance where notice is jurisdictional, except where a subsequent notice would have the effect to give jurisdiction: *Spurrier v. Wirtner*, 48-486.

An appearance does not waive the right to have an action discontinued if the petition is not filed by the time fixed in the notice as provided in § 2600 of Code of '73. (See § 3515): *Cibula v. Pitts' Sons' Mfg. Co.*, 48-528.

An appearance after default, to have the default set aside as being rendered on insufficient notice, is not such an appearance as will cure the defect in entering default without proper notice, such a case being different from an appearance before the default to object to the insufficiency of the notice: *Boals v. Shules*, 29-507.

An appearance by motion to set aside a sheriff's sale is not an appearance to the original action: *Osborn v. Cloud*, 21-238.

An appearance of a party to testify as a witness is not an appearance to the action: *Nixon v. Downey*, 42-78.

Where an action is by statute required to be brought within a specified time, the appearance by defendant to such action brought after the time specified, and the filing of pleading by him setting out such facts, will not constitute a waiver of the objection: *Jones, etc. Lumber Co. v. Boggs*, 63-589.

The filing of a pleading to the jurisdiction of the court by defendant will not confer jurisdiction upon the court: *Elgin Canning Co. v. Atchison, etc., R. Co.*, 24 Fed., 866.

Where a motion is made to set aside a sheriff's sale in a court other than that in which the action is pending, the act of defendant in appearing and moving to strike the motion from the files will not confer jurisdiction upon the court: *White v. Hampton*, 14-66.

Where a judgment was rendered upon service by publication, and subsequently defendant therein filed a petition to set it aside, and afterwards filed a motion in that case for change of venue, *held*, that this did not make the judgment effective as a judgment *in personam: Mayfield v. Bennett*, 48-194.

Voluntary appearance in a case in which jurisdiction has been acquired only upon the defendant who has been induced by fraudulent representations to come within the jurisdiction, will not confer such jurisdiction upon the court as to defeat collateral attack upon such judgment in another jurisdiction where it is sought to enforce it: *Toof v. Foley*, 87-8.

Waives defects: By appearing and submitting to the jurisdiction of the court, defendant waives all defects in the process and service thereof: *Bell v. Pierson*, Mor., 21; *Hall v. Biever*, Mor., 113; *Hedinger v. Silsbee*, 2 G. Gr., 363; *Houston v. Walcott*, 1-86: *Van Vark v. Van Dam*, 14-232; *Childs v. Limback*, 30-398.

Where the court has jurisdiction of the subject-matter, mere irregularity in the process or its service will be cured by voluntary appearance; so *held* in case of an appeal from a justice of the peace: *Wilgus v. Gettings* 19-82.

Appearing and submitting to the jurisdiction is a waiver of all objection to any preceding irregularity: *Cane v. Watson*, Mor., 52.

A subsequent appearance of defendant will validate the previous service of a writ of injunction made without the court having obtained jurisdiction of defendant: *District T'p v. District T'p*, 54-115.

The appearance of a party to a writ of *certiorari* cures any defect in the writ or in the service thereof: *Remey v. Board of Equalization*, 80-470.

A party who submits to the jurisdiction of a court by appearing and joining issue on the merits of the controversy thereby waives any objection to such jurisdiction: *German Bank v. American F. Ins. Co.*, 83-491.

Where notice might have been served which would have given the court jurisdiction, an appearance will waive any objection to insufficiency or want of notice: *O'Donnell v. Atchison, T. & S. F. R. Co.*, 49 Fed., 689.

By attorney without authority: Where it is shown that appearance by attorney is made without authority, the case stands as if there had been no appearance, and if default has been entered it is the same as a default without service: *Rice v. Griffith*, 9-539; *Macomber v. Peck*, 39-351.

Such a judgment is a nullity, and not merely voidable, and even though the record recites that jurisdiction has been acquired, a sale thereunder will pass no title to an innocent purchaser: *Harshey v. Blackmarr*, 20-161.

The defendant in an action upon a foreign judgment may deny the authority of the attorney who appeared for him in the action: *Baltzell v. Nosler*, 1-588.

In an action to set aside a judgment defendant may show that an agent or attorney who entered appearance for him, or accepted service, had no authority to do so, for the purpose of showing that the judgment was without jurisdiction: *Newcomb v. Dewey*, 27-381.

The presumption is that an attorney who appears for a party is authorized to do so: *Potter v. Parsons*, 14-286; *Harshey v. Blackmarr*, 20-161.

But if the attorney is in fact not authorized, the party may be relieved against the judgment by direct action in equity to set it aside: *Bryant v. Williams*, 21-329.

The fact of an appearance by attorney being established, it is for the party insisting that the appearance was unauthorized and the judgment void to show that fact: *Bond v. Epley*, 48-600.

Where a foreign judgment is resisted on the ground that the court rendering it had no authority, the fact that the attorneys who appeared for defendant were not authorized to do so is immaterial, if it is shown that defendant was duly served with notice, and would have been precluded without an appearance: *Woodward v. Willard*, 33-542.

A party who adopts the acts of an at-

torney appearing for him, although such appearance is without authority, by paying him for such services, thereby ratifies his acts and is bound by the judgment rendered: *Ryan v. Doyle*, 31–53.

Where an appearance by attorney is authorized, the court acquires jurisdiction of defendant by reason of such appearance, and any irregularity in the original notice, or want of authority in the attorney to accept service of such notice is immaterial: *Fanning v. Minnesota R. Co.*, 37–379.

Evidence in a particular case of the authority of an attorney to appear for a party, *held* sufficient to overcome the denial of such authority on the part of the party: *Ellis v. White*, 61–644.

Further as to appearance by attorney, see notes to § 320.

Time to plead: It is not error to enter up a judgment by default on the day of the filing of such appearance without giving time to plead when no time is asked: *Shaw v. National State Bank*, 49–179.

Defendant is not entitled to a continuance except for cause upon appearing to a defective notice: *Des Moines Branch, etc., Bank v. Van*, 12–523.

Where by statute defendant was given in equity a longer time in which to answer than that allowed in law cases, *held*, that he would nevertheless be in default in failing to enter an appearance on the return day, although not required to answer on that day: *McKinley v. Bechtel*, 12–561.

SEC. **3542. Where one or more of defendants not served.** When the action is against two or more defendants, and one or more of them shall have been served, but not all, the plaintiff may proceed as follows:

1. If the action is against defendants who are jointly, or jointly and severally, or severally liable only, he may, without prejudice to his rights in that or any other action against those not served, proceed against those served in the same manner as if they were the only defendants; if he recovers against those jointly liable only, he may take judgment against all thus liable, which may be enforced against the joint and separate property of those served, but not against the separate property of those not served, until they have had opportunity to show cause why judgment should not be enforced against their separate property; or,

2. He may continue until the next term and bring in the other defendants; but at such second term the action shall proceed against all who have been served in due time, and no further delay shall be allowed to bring in the others, unless all that appear shall consent to such delay, or the cause is continued for other reasons. [C. '73, § 2627; R., § 2811.]

SEC. **3543. Notice of action pending.** When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and, while pending, no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's rights, if the real property affected be situated in the county where the petition is filed. [C. '73, § 2628; R., § 2812.]

Effect of the notice: The record in a suit to restrain the enforcement of a mortgage is receivable in evidence as against a purchaser at a foreclosure sale under such mortgage, to affect him with notice of the claims of the plaintiff in such suit: *Sowden v. Craig*, 26–156.

An action to foreclose a mortgage is notice to the world of the rights of the mortgagee in the mortgaged premises: *Knowles v. Rablin*, 20–101.

The purchaser at a foreclosure sale is affected with notice of another foreclosure proceeding then pending as to the same property: *Cooley v. Brayton*, 16–10.

The purchaser at a tax sale of land on which a university fund mortgage is being foreclosed is bound by the decree therein: *Crum v. Cotting*, 22–411.

A purchaser *pendente lite* takes subject to an action pending against his grantor, affecting the title, and the fact that the suit is subsequently dismissed without prejudice and a new suit commenced will not relieve him of notice: *Ferrier v. Buzick*, 6–258.

A purchaser after judgment is rendered and satisfied, and before appeal, is not affected by subsequent proceedings in the case: *Davis v. Bonar*, 15–171.

But where a purchaser took before judgment and without paying consideration, *held*, that he was affected with the result of the proceeding: *Smith v. Kerns*, 24–589.

While the provisions of the statute rendering a petition affecting real estate notice of the action so as to charge third persons applies only where there is, at the commencement of the suit, a personal, vested interest, claim or lien in or upon the actual subject-matter of the action, *held*, that an action for the illegal sale of intoxicating liquors, wherein it was also sought to charge the property on which the sale was made, was such as to affect a subsequent purchaser of the property with notice of the claim: *O'Brien v. Putney*, 55–292.

Where a decree has been rendered enjoining the use of premises for the illegal sale of intoxicating liquors, a person using such premises for the prohibited purpose is punishable for contempt in violating the injunction, although he was not a party to the proceeding in which the injunction was

granted and had no notice thereof: *Silvers v. Traverse*, 82-52.

Without deciding whether the vendor entitled to a lien may bring his action before maturity of the debt, to charge third persons with notice of his lien, the court holds that in a particular case, there being no right to a vendor's lien, an action brought before the maturity of the debt was not maintainable: *Erickson v. Smith*, 79-374.

The fact that the grantor fraudulently conceals from the grantee the pendency of the action will not affect the force of the judgment as between the opposite party and the grantee: *Blanchard v. Ware*, 37-305.

After action is brought to set aside a deed for fraud, a purchaser at execution sale from the defendant in such action, of the property conveyed thereby, is charged with notice of the action: *Rider v. Kelso*, 53-367.

It is the filing of the petition which, under the statute, imparts notice. The indexing in the appearance docket is no part of the filing, and failure to index reversely in name of defendant will not invalidate the notice. Nor is the service of original notice an essential of the filing or necessary to constitute notice: *Haverly v. Alcott*, 57-171.

It is the filing of the petition and not the service of the notice which creates notice to third parties: *Shropshire v. Lyle*, 31 Fed., 694; *Fisher v. Shropshire*, 147 U. S., 133.

In a particular case, *held*, that land in controversy was sufficiently described in the petition in a previous equity case so that the party was affected with notice thereof in a subsequent case: *Citizens Savings Bank v. Stewart*, 96-467

The fact that the suit has been talked about will not constitute notice: *France v. Holmes*, 84-319.

In what cases applicable: The doctrine of *lis pendens* is not solely confined to actions in equity; it is also a rule in actions at law: *O'Brien v. Putney*, 55-292.

The doctrine of *lis pendens* has no application to personal property. *Miles v. Left*, 60-168; *Ware v. Delabaye*, 64 N. W., 640.

One who takes negotiable bonds with full knowledge of the pendency of a suit to avoid the bonds and coupons is not entitled to the protection of an innocent and *bona fide* purchaser: *Durant v. Iowa County*, Woolworth, 69.

A pending action will not constitute notice as to matters not set up in such action until after the acquisition of rights by a party who is protected without such notice: *Wheeler & Wilson Mfg. Co. v. Hasbrouck*, 68-554.

The filing of a petition for divorce and asking judgment for alimony, and that it be made a lien on defendant's real estate, does not create a lien on particular property, nor is it sufficient to give notice to third parties: *Scott v. Rogers*, 77-483.

Where a party brought an action to have a certain conveyance set aside on the ground that it was fraudulent as to him, and another party intervened, claiming that it was also fraudulent as to him, and asking similar relief, *held*, that such a party was a mere interloper whose pleadings were unknown to the law and without legal effect, and one purchasing with knowledge of the attempted intervention could not be held to have had constructive notice of any rights of the party thus intervening: *Des Moines Ins. Co., v. Lent*, 75-522.

One who takes a lease pending foreclosure proceedings to which lessor is a party is bound thereby: *Stanbrough v. Cook*, 83-705.

Parties: It may be questioned whether, in the absence of notice to the party or his attorney, it is necessary, in order to create a *lis pendens*, to make any other persons parties than those whose interest in the subject is shown in some manner by the records, or by possession of the subject matter of the controversy. But where the plaintiff or his attorney has notice that an interest is claimed by some person, it is the better practice, if not a bounden duty, to make such person a party to the action, in the absence of notice to such person of plaintiff's equity: *Mitchell v. Peters*, 18-119.

Pending a partition suit a party thereto may make a valid conveyance of his interest in the property, or his creditors, by judgment, execution and sale, may invest themselves with whatever right he has; and in the event that partition is found to be impracticable and the premises are sold for the purpose of making division of the proceeds, the purchaser of the undivided share is entitled to the entire amount apportioned to the party whose interest he has bought at execution sale. In order to limit the claim of the creditor to share in the proceeds equivalent to his claim, it would be necessary to make him a party to the action: *Aplington v. Nash*, 86-488.

A purchaser bound by judgment: A purchaser *pendente lite* is bound by the judgment which is finally rendered in the case although not made a party thereto: *Jackson v. Centerville, M. & A. R. Co.*, 64-292.

The assignee of a mortgage is not affected by notice of rights involved in an action against the mortgagor's grantor not brought when the conveyance to the mortgagor was made: *Farmers' Nat. Bank v. Fletcher*, 44-262.

One who takes an assignment of a note secured by a mortgage on property the title to which is in litigation in a pending action takes subject to the rights of the parties asserted and subsequently established in such action: *Bowman v. Anderson*, 82-210.

Fictitious mortgagor: The fact that the mortgagor was a fictitious person would not, in such case, affect the right of an assignee if he had no knowledge thereof: *Ibid.*

Foreclosure of mechanic's lien: Persons purchasing after the commencement of an action to foreclose a mechanic's lien, *held* affected by notice thereof, and estopped thereby from afterwards setting up as a defense to the claim any matter which should have been interposed in such action: *Tredway v. McDonald*, 51-663.

Purchaser entitled to benefits: Where one purchases land *pendente lite*, and the action is determined in favor of the grantor, such purchaser may claim the benefits of the adjudication: *Woodin v. Clemons*, 32-280.

Purchaser from one not a party: A pur-

chaser of real property during a litigation affecting the same, but taking title from one who is not a party to such litigation but holds adversely to such party, is not affected with notice of the rights involved: *Semple v. McCrary*, 46–37.

A purchaser of real property is not charged with notice of a suit with respect thereto to which neither he nor his grantor is a party: *Parsons v. Hoyt*, 24–154.

A purchaser from the wife is not affected by the fact that suit has been brought against her husband affecting the land, he having no notice that such suit has relation to the land in question: *Bailey v. McGregor*, 46–667.

A judgment against one who does not hold the legal title does not prevent the holder of the legal title from passing a good title to a *bona fide* purchaser: *Joseph v. McGill*, 52–127.

Delivery of deed; estoppel: It seems that one who is a defendant in an action to determine the title to real estate is concluded from claiming the same by virtue of the delivery, by another defendant, of a deed executed by the plaintiff and held in escrow, when such delivery is made while the suit is pending, shortly before decree is entered adjudging plaintiff to be the owner of the land: *McGregor v. McGregor*, 21–441.

Actual notice: A *lis pendens* only operates as constructive notice to all persons of the title or claim of the parties to the subject of the litigation. If actual notice is otherwise given to one, it is immaterial whether or not, as to him, there is a *lis pendens: Mitchell v. Peters*, 18–119.

SEC. **3544. In another county.** When any part of real property, the subject of an action, is situated in any other county than the one in which the action is brought, the plaintiff must, in order to affect third persons with constructive notice of the pendency thereof, file with the clerk of the district court of such county a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby, who shall at once index and enter a memorandum thereof in the incumbrance book, and, from the time of such indexing, the pendency of the action shall be constructive notice to subsequent purchasers or incumbrancers thereof, who shall be bound by all the proceedings taken after the filing of such notice, to the same extent as if parties to the action. Within two months after the determination of the action, there shall also be filed with such clerk a certified copy of the final order, judgment or decree, who shall enter and index the same as though rendered in that county, or such notice of pendency shall cease to be constructive notice. [C.'73, § 2629; R., § 2843.]

CHAPTER 7.

OF JOINDER OF ACTIONS.

SECTION **3545. When permitted—issues tried separately.** Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same rights, and if action on all may be brought and tried in that county, may be joined in the same petition; but the court may direct all or any portion of the issues joined to be tried separately, and may determine the order thereof. [C.'73, § 2630; R., § 2844; C.'51, § 1751.]

Two causes of action which may be prosecuted by the same proceeding may properly be joined: *Reed v. Howe*, 28–250.

A cause of action on tort and one on contract may be joined: *Turner v. First Nat. Bank*, 26–562; *Jack v. Des Moines & Ft. D. R. Co.*, 49–627.

An action in equity, and one at law on the same right of action, cannot be maintained together: *National State Bank v. Delahaye*, 82–34.

So *held* where an action was brought to recover a judgment, and also to have a deed set aside and subject the land conveyed thereby to the satisfaction of defendant's debts: *Faivre v. Gillan*, 84–573.

An action which the plaintiff has an election to bring in law or in equity may be joined with another equitable proceeding: *Toledo Savings Bank v. Johnson*, 62 N. W., 749.

Where an amended and supplemental petition presents a cause of action in equity, while the original action is by ordinary proceedings, the supplemental petition should be stricken from the files on motion as leading to an improper joinder of causes of action:

Bowman v. Chicago, St. P. & K. C. R. Co., 86–490.

Plaintiff may join in the same action a claim to recover rent of real estate under an implied contract, and one for the recovery of damages for the wrongful occupation of the same real estate: *Foster v. Hinson*, 76–714.

A cause of action upon a note may be joined with one upon an account: *Thorpe v. Dickey*, 51–676,

But such causes of action cannot be joined where the parties to the note are not all parties to the account, even though the note has been indorsed as collateral security for the account: *Ibid.*

In an action in tort several distinct trespasses may be joined in the same action: *Wilson v. Johnson*, 1 G. Gr., 147.

Indebtedness due upon an executed contract may be included as an item of account, and form a part of the action on said account which includes other items: *Buford v. Funk*, 4 G. Gr., 493.

A tender of separate lots of goods at different times for transportation, on behalf of the same party, does not necessarily show different causes of action for each amount tendered: *Cobb v. Illinois Cent. R. Co.*, 38–601.

Under statutory provisions for the foreclosure of tax deeds, *held*, that one action of foreclosure might properly be brought on twenty-two different tax deeds when the title was to the same property, the land owned by the same party, the deeds all made the same day, to the same purchaser, and the right of action had accrued on all of them: *Byington v. Woods*, 13–17.

Where the petition shows a number of causes of action, even though they may be different and various, it cannot for that reason be attacked by demurrer: *McFaul v. Ramsey*, 20 How., 523.

Equity abhorring a multiplicity of suits will never send a suitor from its bar to bring another action, when relief can be granted fully and completely and without injustice to others in an action wherein it has acquired jurisdiction of the parties and of the subject-matter in controversy: *Stapleton v. King*, 40–278.

In an action for breach of contract plaintiff may also have judgment for the foreclosure of a mortgage given as security upon such contract: *Ibid.*

A cause of action by the wife for injuries suffered by reason of acts of defendant, causing her husband's death, cannot be joined with an action commenced by the husband for such injuries in which the wife, after his death, is substituted as administratrix: *Frink v. Taylor's Adm'x*, 4 G. Gr., 196.

In an action to foreclose a mortgage as against the maker of a note and mortgage, it is not proper to join the action against the indorser of the note on his indorsement: *Breckinridge v. Brown*, 9–396.

A separate cause of action against one defendant, and a cause of action against the same defendant and another defendant, cannot be joined in the same action: *Addicken v. Schrubbe*, 45–315.

An action at law against one party cannot be joined with an action in equity against such party and another: *Stevens v. Chance*, 47–602.

A joint action for slander cannot be maintained by two plaintiffs. If the same slanderous words are at the same time spoken respecting several persons they furnish each a ground for a separate action, but such persons have no community of action and cannot sue together: *Hinkle v. Davenport*, 38–355.

Where the petition against two defendants avers a joint tort by each, it cannot be assailed for misjoinder, but no judgment should be rendered thereon unless the proof warrants a joint judgment. Otherwise no judgment should be rendered at all: *Barnes v. Emmenga*, 53–497.

Where, by dismissing a cause of action embraced in one count as against a portion of the defendants, a joinder of actions in the two counts is rendered improper, plaintiff may be allowed to file a new petition setting up the cause of action in one of such counts, and defendants may be required to appear thereto without new service: *Dorothy v. Hicks*, 63–240.

Where, by amendment to a petition, a cause of action is set up which cannot be properly joined with the action in the original petition, if plaintiff does not elect which one of such causes of action he will prosecute, the amendment may be stricken from the files on motion: *Sweetzer v. Harwick*, 67–488.

The rule that a party cannot maintain an action on inconsistent rights but must elect as to which he will rely on, does not prevent his joining distinct causes of action even though they relate to the same subject matter: *Jenks v. Lansing Lumber Co.*, 66 N. W., 231.

The same cause of action may be pleaded in different counts of the petition: *Cawker City State Bank v. Jennings*, 89–230.

As to joint action against a saloon-keeper and the owner of premises used for such purpose, see §§ 2418, 2422, and notes.

SEC. **3546. Plaintiff may strike out.** The plaintiff may at any time before the final submission of the case to the jury, or to the court when the trial is by the court, strike from his petition any cause of action or part thereof. [C. '73, § 2631; R., § 2845.]

Section applied: *Allen v. Bidwell*, 35–218.

Where by dismissal of a cause of action embraced in one count as against a portion of the defendants, a joinder of actions in the two counts is rendered improper, the plaintiff may be allowed to file a new petition stating the cause of action in one of such counts, and the defendants may be required to appear thereto without new service: *Dorothy v. Hicks*, 63–240.

SEC. **3547. Motion to strike out.** The court, at any time before the answer is filed, upon motion of the defendant, shall strike out of the petition

any cause or causes of action improperly joined with others. [C. '73, § 2632; R., § 2846.]

Where the misjoinder is of causes of action against different parties this section and the following one are not applicable: *Cogswell v. Murphy*, 46–44.

That causes of action against several defendants are improperly joined does not entitle one of the defendants to have the action dismissed as to him. At most he is only entitled to have the other causes of action stricken from the petition against him: *Wilson v. Baker*, 52-423.

SEC. **3548. Misjoinder waived.** All objections to the misjoinder of causes of action shall be waived, unless made as provided in the last preceding section. [C. '73, § 2633; R., § 2847.]

A misjoinder not taken advantage of by motion before answer cannot be made the ground of a motion in arrest: *Grant v. McCarthy*, 38–468.

Failure to file a motion to strike out an action improperly joined waives the objection: *Flynn v. Des Moines & St. L. R. Co.*, 63–490.

If different causes of action which might properly be joined in one action in separate counts are improperly joined in one count, the pleading can only be assailed by motion, and such objection cannot be raised upon the introduction of evidence: *Cobb v. Illinois Cent. R. Co.*, 38–601.

Where no objection is made in the court below to a misjoinder of actions, such objection cannot be made on appeal: *Hines v. Horner*, 86–594.

SEC. **3549. Separate petitions.** When a motion is sustained on the ground of misjoinder of causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in his discretion, to file several petitions, each including such of said causes of action as may be joined, and an action shall be docketed for each of said petitions, and the causes shall be proceeded in without further service, the court fixing by order the time of pleading therein. [C. '73, § 2634; R., § 2848.]

One who under the provisions of this section files separate petitions against defendants who have previously been joined in one action thereby waives any objection to the ruling of the court requiring such separation: *Weaver v. Stacy*, 93–683.

CHAPTER 8.

OF PLEADING.

SECTION **3550. Time to plead.** The defendant shall, in an action commenced in a court of record, demur or answer to the original petition, or assail the same by motion, before noon of the second day of the term. [C. '73, § 2635; R., § 2849; C. '51, § 1737.]

It is not a sufficient cause for striking an answer from the files that it was filed after the second day of the term, which is the day required by law for the filing of such pleadings: *Keeney v. Lyon*, 10–546.

The filing of a counter-claim in proper time is equivalent to the filing of an answer: *Town v. Bringolf*, 47–133.

In the absence of a rule of court defendant is not required to appear and answer or demur before noon of the second day, and if the attention of the supreme court is not called to any rule of the lower court authorizing default for failure to appear on the first day it will be presumed that the action of the lower court in setting aside a default for failure to appear the first day was proper: *Huebner v. Farmers' Ins. Co.*, 71–30.

SEC. **3551. Motions and demurrers.** All demurrers and motions assailing a pleading shall be in writing, and filed before answer or reply has been filed to the pleading assailed, except as provided in this chapter, and specify the causes on which they are founded, and none other shall be argued or considered; but one motion and one demurrer assailing such pleading shall be filed, unless such pleading is amended after the filing of a motion or demurrer thereto. [C. '73, § 2639; R., §§ 2864–6.]

A motion should state the causes on which it is based: *Hall v. Crouse*, 14–487.

A motion urging as an objection to a pleading that it is not sworn to is not sufficient to cover the objection that the affidavit is by a party who does not show himself competent to make it: *Wood v. Bailey*, 12–46.

Where a motion is founded upon matter

outside of the record it should be verified: *Shellenberger v. Ward*, 8–425.

A motion simply directing the attention of the court to the case as it is presented in the pleadings and record, in order that the party may have the relief to which he thus appears entitled, need not be in writing: *Palmer v. Jones*, 49–405.

The filing of a demurrer waives any error in overruling a motion to strike or to require a more specific statement: *Stineman v. Beath*, 36–73.

A motion after a motion or a demurrer after a demurrer to the same pleading is not allowable: *Riddle v. Backus*, 36–430.

Where a demurrer had been filed by an attorney without the knowledge or consent of the party, and such demurrer was by permission of the court withdrawn, *held*, that the same attorney, after receiving proper authority, might interpose a new demurrer: *Winterstein v. Walker*, 10–198.

Where a demurrer has been submitted and not yet decided, the court may allow the party filing the demurrer to amend it and re-submit it, the prior submission having been set aside: *Poweshiek County v. Cass County*, 63–244.

A motion which has once been passed upon should not be reheard at the instance of the unsuccessful party until the ruling thereon has been set aside on his motion, with notice to the opposite party: *Townsend v. Wisner*, 62–672.

A party cannot, by asking to refile a pleading which has previously been stricken from the files, raise the same question which was determined by striking it from the files, for the purpose of excepting to the ruling of the court thereon: *Barkdull v. Callanan*, 33–391.

A motion should state the causes on which it is based: *Hall v. Crouse*, 14–487.

Where no ruling appears to be made upon a motion the presumption is, unless it otherwise appears, that it was waived: *Cook v. Smith*, 50–700.

A motion should be so presented to the court that its request, or a particular request thereof, if it contains more than one, may be sustained or overruled. Therefore where a motion asked that a party state whether a certain agreement referred to was in writing and that he set out a copy of the writing, and the case was not one where it was necessary to set out a copy of such writing if it existed, *held*, that the motion was properly overruled: *National State Bank v. Delahaye*, 82–34.

A second demurrer presenting new grounds of objection must be regarded as a new demurrer and not as an amendment and therefore improper; but *held*, that no objection on that ground having been raised at the time, complaint thereof could not afterwards be made: *Lundbeck v. Pilmair*, 78–434.

Where a second demurrer was interposed, *held*, that costs might be taxed against the demurring party who failed to sustain such second demurrer under the rule of the court allowing taxation of costs in such cases: *Ibid.*

There is no prohibition in this section against filing a demurrer after a motion to the same pleading, even though the pleading has not been amended in the meantime. *Gross v. Miller*, 93–72.

SEC. **3552. Subsequent pleadings.** Each party shall so demur, assail by motion, answer or reply to all subsequent pleadings, including amendments thereto and substitutes therefor, before noon of the day succeeding that on which the pleading is filed, but all pleadings must be filed by the time the cause is reached for trial. [C.'73, § 2636; R., §§ 2850–1, 2858.]

These provisions as to filing pleadings before the case is reached for trial are applicable to an appeal from a justice court: *McDowell v. Booth*, 72–141.

An answer filed, without leave of court, after the full submission of the cause, and presenting new issues, may be stricken from the files: *Sullivan Savings Institution v. Copeland*, 71–67.

Defendant has until noon of the next day after the filing of an amended petition in which to file an answer thereto: *Brandt v. Wilson*, 58–485.

The plaintiff may file a reply later than the time here fixed, upon such reasonable terms as the court may impose: *Williams v. Niagara F. Ins. Co.*, 50–561.

An answer to amendments to the petition filed with the argument and before final submission, *held* to be in time: *Kehoe v. Carville*, 84–415.

As to default for failure to file pleadings, see § 3788 and notes.

SEC. **3553. First day of term.** The day on which the judge actually opens court shall, for the purpose of timing the pleading, be considered the first day of the term. [C. '73, § 2637; R., § 2857.]

SEC. **3554. Extension of time.** The court may extend the time for filing any pleading beyond that herein fixed, but shall do so with due regard to making up issues at the earliest day practicable. [C. '73, § 2638; R., § 2859.]

The extension by the court of the time for filing an answer does not deprive defendant of his right to demur, nor does it extend the time for filing such demurrer. A demurrer filed at the time fixed by the court for filing an answer should be stricken from the files: *District T'p v. White*, 42–608.

Where time is given to answer, and at the expiration of that time and before default a demurrer is filed, the action of the court in refusing to strike such demurrer from the files on motion will not be reversed where the abstract does not show all the facts and circumstances surrounding the transaction, and that there was prejudicial error in the ruling: *Gray v. Myers*, 45–158.

Refusal by the court on motion to strike a demurrer from the files because filed after the time provided amounts in effect to an extension of the time: *Rumsey v. Robinson*, 58–225.

Where plaintiff was allowed a certain time to file an amended petition, after a demurrer to the original petition had been sustained, but did not file such amendment until after the expiration of the time fixed, and defendant thereupon moved to strike it from the files, and plaintiff asked for time to make resistance to the motion by filing an affidavit of excuse, which he did not file within the time fixed by the court nor until after the argument of defendant on the motion to strike was closed, *held*, that it was not error to strike the amended petition from the files as asked: *Hayward v. Goldsbury*, 63–436.

Where defendant was given until a certain time to answer, and before that time change of venue was taken to another county, *held*, that he was not in default for want of answer until the first day of the next term in the county to which the cause was taken; *Wornley v. District T'p*, 45–666.

Where a motion is made to strike a pleading from the files because not filed in the time required by rule of court, and no excuse is offered for the failure to comply with the rule, the striking of the pleading from the files will not be error: *Bolander v. Atwell*, 14–35.

SEC. **3555. Demurrer or motion suspends other pleadings—submission.** A motion or demurrer assailing any pleading, or count thereof, suspends the necessity of filing any other pleading thereto until the same has been determined, and the next pleading shall be filed by the morning of the day succeeding such determination; and all motions and demurrers shall be argued and submitted on the morning of the day succeeding the filing thereof, or at such other time as is ordered by the court, unless the cause is sooner reached for trial. [C.'73, §§ 2640–1; R., §§ 2867, 2869.]

It is error to render judgment on the same day on which a demurrer to a pleading is sustained in the absence of any showing of record that the party consented that the judgment should be rendered against him or elected to stand on his pleading: *Newcom v. Dubois*, 63 N. W., 677.

SEC. **3556. Not withdrawn.** A motion or demurrer once filed shall not be withdrawn without the consent of the adverse party in writing, or given in open court, or of the court. [C.'73, § 2642; R., § 2870.]

SEC. **3557. Pleadings defined—filing—forms abolished.** Pleadings are the written statements by the parties of their respective claims and defenses and are:

1. The petition of the plaintiff;
2. The motion, demurrer or answer of the defendant;
3. The motion, demurrer or reply of the plaintiff;
4. The motion, or demurrer of the defendant.

The filing of a pleading or motion in the clerk's office during a term, and a memorandum of such filing made in the appearance docket within the time allowed, shall be equivalent to filing the same in open court. All technical forms of action and pleading, all common counts, general issues, and all fictions, are abolished, and hereafter the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in the code. [C.'73, §§ 2643–5; R., §§ 2871–4.]

The minutes of the testimony taken before the grand jury do not in any sense constitute a pleading; so *held* with reference to the requirements as to filing pleadings: *State v. Craig*, 78-637. Further as to filing pleadings, see § 291 and notes.

Our system of pleading ignores all fictions and technical forms, actions and pleadings. All that is required is a statement of the facts constituting the cause of action: *Holloway v. Griffith*, 32–409, 413.

For somewhat similar provision as to forms of action, see § 3426.

SEC. **3558. Copy filed—fee—taking files from office.** Every party, at the time of filing any petition, answer, reply, demurrer or motion, except a motion for continuance or change of venue, shall file with the same one plain copy thereof for the use of the adverse party, and, on failure to do so, the cause may be continued at the option of the adverse party, or the paper so filed stricken from the files. A fee of ten cents per hundred words shall be allowed for all copies and taxed with the costs. The original files shall be taken from the clerk's office only on order of the judge by leaving with the clerk a receipt for the same. [Rules of Practice, § 1.]

Failure to file a copy of a pleading in accordance with the rules of the court on that subject, *held* to be a ground for motion to strike the pleading from the files without showing as to prejudice: *Burgit v. Case*, 84–33.

Under the rule adopted by the district judges requiring the filing of copies of pleadings, *held*, that for filing a defective copy the opposite party might have a continuance, but could have the pleading stricken from the files only in the discretion of the court when prejudice should appear: *Searles v. Lux*, 86–61.

While the court has the power to enforce the rules as to filing copies by striking a pleading filed in violation of its provisions from the files on the application of the opposite party, such party has not the right to have it stricken, that being a matter of discretion, and where a copy is filed in such time that no prejudice results, it will not be error for the court to refuse to strike the pleading: *Smith v. Harrington*, 89–603.

Pleadings may properly be filed in an appeal to the district court from the action of the board of equalization, and in such case copy fees are taxable: *Farmers' Loan and Trust Co. v. Newton*, 66 N.W., 784.

SEC. **3559. Petition—what to contain—counts—divisions—paragraphs.** The petition must contain:

1. The name of the court and county in which the action is brought;

2. The names of the parties to the action, plaintiffs and defendants, followed by the words, "petition at law" or "petition in equity," as the case may be;

3. A statement of the facts constituting the plaintiff's cause of action;

4. A demand of the relief to which the plaintiff considers himself entitled, and if for money, the amount thereof;

5. Where the petition contains more than one cause of action, each must be stated wholly in a count or division by itself, and must be sufficient in itself; but one prayer for judgment may include a sum based on all counts seeking a money remedy. In a petition by equitable proceedings, each division shall also be separated into paragraphs numbered as such, and each paragraph shall contain, as near as may be convenient, a complete and distinct statement. [C.'73, § 2646; R., 2875; C.'51, § 1736.]

I. THE COMMENCEMENT.

The caption determines what court the petition is in: *Morgan v. Small*, 33–118.

An error in the petition in stating the name of the county in which the action is brought is matter of form which will not be a ground for disturbing the judgment: *Holmes v. Wright*, Mor., 100.

Title: Where the petition was addressed to "The judge of the district court," but did not contain in the heading the names of the parties nor the word "petition," *held*, that it was merely defective in form, and the court did not err in refusing, on account of such defect, to dismiss the action on defendant's motion: *Smith v. Watson*, 28–218.

Where, in the title, the defendants were named and described as late partners of the firm named, and in the petition it was alleged that defendant executed a promissory note, a copy of which was set out in the firm name, *held*, that it was sufficiently charged that defendants were members of said firm: *McCloskey v. Strickland*, 7–259.

A paper denominated "synopsis of petition" and entitled with the names of parties and filed by the clerk, and entered upon the appearance docket of the district court, but not containing the name of the court or county, and which the clerk was not directed to file in any particular court, *held* not sufficient to invoke jurisdiction of the court in which it was filed, and therefore properly stricken from the files on motion: *Garretson v. Hays*, 70–19.

Held that a petition entitled in the circuit court did not, by being filed in the district court, give the latter any jurisdiction. The fact that an indorsement on the back of the wrapper showed that the filing in the circuit court had been canceled and that it was refiled in the district court *held* not to affect the case, the words and figures on the wrapper being no part of the petition: *Jordan v. Brown*, 71–421.

II. STATEMENT OF CAUSE OF ACTION.

Ultimate facts: Our system of pleading is a fact system, one which requires the parties to state truly and frankly the facts upon which they rely for their action or defense. It does not allow on the one hand, the statement of legal conclusions, nor on the other the statement of evidence of facts: *Lumbert v. Palmer*, 29–104; *Pfiffner v. Krapfel*, 28–27.

The pleading should state ultimate facts, and not the evidence of such facts. It is not required that the facts should be pleaded so as not to be objectionable, as questions to a witness: *Robinson v. Berkey*, 69 N. W., 434.

Presumptions of law need not be averred nor proven: *Furgison v. State*, 4 G. Gr., 302.

Consideration being presumed in case of written instruments (§ 3069) need not be averred nor proved in the first instance: *State v. Wright*, 37–522.

In pleading a tax sale, where the execution and delivery of the deed by the proper officer is alleged, and a copy thereof is attached to the petition, it is not necessary to aver facts of which the law makes the deed presumptive evidence: *Byington v. Robertson*, 17–562.

Matters of which judicial notice is taken need not be stated in the pleading: *Clough v. Goggins*, 40–325.

It is not necessary to set forth or cite a

public statute upon which the right claimed in the pleading is based: *Chicago, B. & Q. R. Co. v. Porter*, 72-426.

In pleadings under the Code the statement of fact should be as much a logical statement of the cause of action as was ever required by the strict rules of the common law: *McConnoughey v. Weider*, 2-408.

Nothing is more clearly condemned by the provisions of the Code, nor with greater justice, than the pleading of statements of evidence instead of propositions which contain the ultimate results of evidence: *Davenport Gas, etc., Co. v. Davenport*, 15-6.

A pleading in equity presenting an account of payments and credits and referring to the evidence upon which plaintiff's claim is based, found in letters and explanations thereof, intended to assist in the proper understanding of the facts, *held* not necessarily improper: *Ingle v. Jones*, 43-286.

Where a party alleges notice or knowledge he may prove not only direct and positive notice or knowledge but also such a state of facts and circumstances with reference thereto as that a court or jury would be justified in saying that the other party ought to have notice or knowledge. Ultimate facts only are to be stated in the pleadings and any evidence which tends to support the allegations is competent and relevant: *De Lay v. Carney*, 69 N.W., 1053.

Not conclusions of law: A pleading must state the facts from which the conclusion can be drawn that the party is entitled to the relief asked or to maintain the defense interposed. If conclusions only are stated a motion for more specific statement may be sustained, and the pleader may be required to set out the facts on which he relies without setting out the evidence to sustain them: *Lane v. Burlington & S. W. R. Co.*, 52-18.

A paragraph of a pleading should contain something more than a mere conclusion of law based upon statements of facts contained in some other paragraph. If it does not, it may be stricken out on motion: *Cooper v. French*, 52-531.

The allegation of conversion of property is a legal conclusion. The pleading should show what was done constituting a conversion: *Burt v. Decker*, 64-106.

A general averment of priority of one mortgage over another is not the pleading of any fact, but the mere assertion of a legal conclusion, and under such allegation actual notice, not otherwise specially pleaded, cannot be proved: *Koon v. Tramel*, 71-132.

Under our system of pleading the facts upon which a right of action is based are required to be stated; and it is not permissible for the party to plead mere conclusions: *Sac County v. Hobbs*, 72-69.

A pleading stating that a city had fixed and established the grade of a street, *held* to sufficiently state an ultimate fact by stating the method in which the grade was established: *Luse v. Des Moines*, 22-590.

An averment in an answer attacking the validity of a tax sale, that the day on which the sale was made "was a day not authorized by law therefor," *held* to be a proper averment of fact: *Plympton v. Sapp*, 55-195.

In an action for seduction the fact of seduction is the ultimate fact to be established, and it is not necessary to aver the means made use of to deceive and mislead: *Brown v. Kingsley*, 38-220.

Certain allegations of an answer *held* properly stricken out on motion as being merely legal conclusions and matters of argument: *Boggs v. Chicago, B. & Q. R. Co.*, 54-435.

The objection that an allegation of a pleading is a conclusion of law instead of a statement of fact should be raised by motion for more specific statement or otherwise, and not by demurrer: *Kendig v. Marble*, 55-386.

It is not allowable to plead mere abstract conclusions of law having no element of fact, but if they contain also the elements of a fact, construing the language in its ordinary meaning, then force and effect must be given them as allegations of fact: *Grinde v. Milwaukee & St. P. R. Co.*, 42-376.

Information not sufficient: Where the averment of a fact is essential to entitle plaintiff to recover, it is not sufficient to aver information of such fact: *Winneshiek County v. Allamakee County*, 62-558.

Contract: The averment that defendant signed and delivered to plaintiff an agreement in writing is sufficient as an averment that defendant entered into such contract: *Waukon & M. R. Co. v. Dwyer*, 49-121.

In an action upon a policy of insurance, *held*, that the averment in the petition of the issuance of the policy, coupled with the averment that the amount stated in the policy with interest is due to plaintiff, sufficiently stated the cause of action supporting the judgment upon proper evidence, no objection having been made to the form of the pleading: *Revere F. Ins. Co. v. Chamberlin*, 56-508.

Negativing defenses: The plaintiff need not in his petition negative matter which it would be proper for defendant to set up by way of defense to the action: *Dunlavey v. Watson*, 38-398.

The fact that plaintiff makes an averment as to a matter which should properly have been left to the defendant to plead as a defense, does not change the burden of proof nor give rise to an issue as to such matter by reason of a general denial on the part of defendant: *Jones v. United States Mut. Acc. Ass'n*, 92-652.

It is not necessary that the party whose right of action exists unless a contingency has happened which relieves defendant from liability, plead the non-occurrence of such contingency, that being an affirmative defense which defendant must plead if it exists: *Wallace v. Ryan*, 93-115.

Conditions precedent to the contract sued upon being binding must be pleaded by plaintiff, but conditions limiting defendant's liability are to be pleaded by him: *Jones v. United States Mut. Acc. Ass'n*, 92-652.

Allegations as to diligence and negligence: Where the petition in an action for damages against a railway company alleged the running of an engine in such a grossly negligent manner that the same ran over the animal for the killing of which damages were sought, *held*, that the defendant was

not entitled on motion to a more specific statement: *Grinde v. Milwaukee & St. P. R. Co.*, 42-376.

Under an allegation that the injury complained of was caused by the employes of defendant in charge of a train, recovery cannot be had by proving that it was caused by employes elsewhere: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

In an action for negligence the evidence must show that the injury for which damages are claimed was caused in the manner alleged in the petition. It is not sufficient to show that the injury occurred in any other manner because of defendant's negligence: *Manuel v. Chicago, R. I. & P. R. Co.*, 56-655; *Carter v. Kansas City, St. J. & C. B. R. Co.*, 65-287.

A party averring in his pleading a fact as constituting negligence, whereon he bases his right to recover, cannot depart from the issue made by this averment and show other facts in order to establish other negligence; and this will be true whether it is necessary or not to allege negligence: *Miller v. Chicago & N. W. R. Co.*, 66-364.

A general averment of diligence is not an averment of an ultimate fact, but a conclusion of law: *Leas v. White*, 15-187.

Where the petition in an action for personal injury to a passenger alleged that such injury resulted from the careless running of defendant's engine, *held* that, in the absence of motion for more specific statement, plaintiff was properly permitted to prove that failure to sound the whistle or ring the bell contributed to plaintiff's injury: *Winter v. Central Iowa R. Co.*, 80-443.

In an action to recover for injuries received by a railroad employe by reason of the alleged defect of a car, *held*, that a general averment of negligence in the use of such car was sufficient, in the absence of a motion to make the petition more specific as to the negligence complained of: *O'Connor v. Illinois Cent. R. Co.*, 83-105.

In an action for injuries by reason of being run over by defendant at a crossing, *held*, that variance as to the direction in which defendant was going at the time of the accident was immaterial: *Robbins v. Diggins*, 78-521.

Under the rule prevailing in this state, plaintiff seeking to recover for personal injuries by reason of a defective sidewalk is required to allege and prove that he is free from contributory negligence with reference to the injury received: *Fernbach v. Waterloo*, 76-598.

One who seeks to recover on account of negligence of defendant must plead his own freedom from contributory negligence, but this he may do in general terms: *Gregory v. Woodworth*, 93-246.

It is a general rule that plaintiff suing to recover for personal injuries due to negligence must allege freedom from contributory negligence: *Rabe v. Sommerbeck*, 63 N. W., 458.

In an action against the owner of a dog for injuries caused thereby (under § 2340) the plaintiff must allege and prove freedom from contributory negligence: *Stuber v. Gannon*, 67 N. W., 105.

Fraud: In order to admit evidence of fraud under our system of pleading there should be at least a general statement of the facts constituting fraud: *Hale v. Walker*, 31-344.

A mere charge of fraud in the pleading is not sufficient without statements of specific words or acts constituting fraud. Such an allegation is the mere averment of a legal conclusion. The facts upon which the fraud is based must be averred: *Ockendon v. Barnes*, 43-615; *Mason v. Searles*, 56-532.

A party asking relief on the ground of fraud must set forth the fraudulent acts complained of, and show how he was defrauded or misled thereby: *Kows v. Mowery*, 57-20.

While fraud is a good defense to a contract, it is not sufficient to plead it in general terms. The specific statements and acts relied upon as constituting fraud must be set out. If these do not show fraud, the pleading is insufficient and may be successfully assailed by demurrer: *Mills v. Collins*, 67-164.

Whoever sets up fraud must do more than allege fraud in general and abstract terms. He must set out the specific facts in which the fraud consists: *Kerr v. Steman*, 72-241.

In pleading fraud and collusion it is not necessary for the pleader alleging such fraud or collusion to set forth all the minute facts tending to establish or confirm the allegation, but there must at least be a general statement of the facts: *Singleton v. Scott*, 11-589.

In charging fraud it is not necessary or proper for the pleader to set out all the facts establishing it. The ultimate fact and not the evidence should be pleaded: *Cowin v. Toole*, 31-513.

A petition in an action against the indorser of a negotiable instrument, stating that defendant falsely and fraudulently represented to plaintiff, with a view to induce him to purchase the note and take the assignment thereof without recourse, that it was all right, etc., whereas the contrary was true, sets out a sufficient cause of action: *Watson v. Chesire*, 18-202.

A petition alleging facts constituting fraud, without alleging that such facts are fraudulent or designating them as a fraud, is sufficient to charge fraud: *Lefever v. Stone*, 55-49.

A petition stating that a sale of real estate by an administrator to pay debts was a private sale, and void, because effected through fraud and collusion between the administrator and the purchasers, is sufficient, if proved, to avoid the sale if the property is still in the hands of the first purchaser: *Van Horn v. Ford*, 16-578.

Allegations of indebtedness: An answer denying that plaintiff is the real party in interest, or that defendant is indebted to him as charged without stating the facts upon which such allegations are based, is insufficient: *Cottle v. Cole*, 20-481.

Where plaintiff alleges an indebtedness which was to be repaid in a certain manner, and it appears that something has been received by him, he must, to entitle him to recover, state how much has been received: *Gammel v. Young*, 3-297.

Under an allegation of indebtedness for medical services rendered at defendant's request, plaintiff cannot recover for such services rendered at the request of defendant's physician: *Schrader v. Hoover*, 87–654.

In an action upon a judgment it is not necessary to allege that the judgment is still in full force and virtue and not satisfied. It is sufficient if it is alleged in the usual form that the sum claimed is still due: *Blake v. Burley*, 9–592.

Averment of nonpayment of a judgment in replevin, *held* a sufficient allegation to show a breach of the replevin bond: *Cameron v. Boyle*, 2 G. Gr., 154.

Where in action for damages on an attachment bond it was not averred that damages were unpaid, but the question of the liability of defendant to damages was contested on the trial, no objection being made on account of the want of such averment, *held*, that such objection would not be considered on appeal: *Knapp & Spaulding Co. v. Barnard*, 78–347.

Incorporation by reference: A petition must be understood as averring the facts disclosed and alleged in the exhibits attached thereto: *Marriage v. Woodruff*, 77–292.

It is not uncommon for a pleading to refer to and incorporate therein portions of the court files by specific averment: *Wishard v. McNeil*, 78–40.

Estoppel: Where no estoppel is pleaded, it is reversible error to instruct the jury that they may find for the plaintiff on the ground that an estoppel has been proven: *Eggleston v. Mason*, 84–630.

Matter in estoppel must be specially pleaded or it can not be considered: *Golden v. Hardesty*, 93–622; *H. E. Spencer Co. v. Papach*, 70 N. W., 748.

Ownership or title: Where a party sues on a promissory note made payable to him in his name, the averment that the demand sued on is his property is not necessary. He is presumed to be the owner until the contrary is shown: *Blake v. Burley*, 9–592.

Where a note is payable to bearer, the allegation in the petition that it is the property of plaintiff is sufficient without alleging the method in which it became his property: *Dabney v. Reed*, 12–315.

A statement in a petition averring ownership is sufficient without stating the facts showing plaintiff's title: *Sturman v. Stone*, 31–115.

An averment that a party holds title to real property is not an averment of fact, but of a conclusion of law: *Jordan v. Walker*, 56–686.

In an action to cancel a deed it is sufficient if the petition shows a right to the relief asked without stating the prior history of the title: *Wilson v. Miller*, 16–111.

Where a plaintiff in an action of replevin seeks to recover on the ground of ownership of the property, he cannot sustain the action by evidence that he holds a lien thereon under which he is entitled to possession: *Knowlton v. Lendrum*, 54–756.

Where plaintiff alleges as the basis of his right to maintain an action on a promissory note that he is the absolute and unqualified owner thereof and issue is raised on such allegation, he should not be allowed to recover under some other right not that of ownership: *United States Nat. Bank v. Crossley*, 86–633.

Act of agent: An allegation as to the doing of an act by the party may be established by proof that the act was done by his agent: *Poole v. Hintrager*, 60–180.

Under an allegation of an act done or contract made proof is admissible showing such act or contract by an agent and the ratification thereof by the principal: *Long v. Osborn*, 91–160.

A petition alleging that the defendant, through an agent named, employed plaintiff, *held* to be a sufficient averment of an employment of plaintiff through an authorized agent: *Call v. Hamilton County*, 62–448.

Proof of partnership: Where defendant was sued as a partner, *held*, that evidence that he held himself out to the public as a partner was admissible in evidence without such fact being pleaded: *Hancock v. Hintrager*, 60–374.

Want of jurisdiction: Where in a pleading it is averred as an essential fact that the court rendering a certain judgment, referred to therein, had no jurisdiction so to do, the opposite party is entitled, on a motion for more specific statement, to have the facts set out on which the alleged want of jurisdiction is based: *Crewdson v. Middleton*, 57–335.

Excessive judgment: In an action to set aside a judgment claimed to be excesssive the fact should be alleged from which it may appear by computation that the amount of the judgment is in excess of the amount due: *Byers v. Odell*, 56-618.

Waiver: It is proper to declare on a contract and set up a waiver of the conditions thereof: *Flynn v. Des Moines & St. L. R. Co.*, 63–490.

Under our code system of pleading a plaintiff cannot, in an action against an indorser of a note or bill under an averment of demand, protest and due notice, recover upon proof of facts amounting to a waiver of them. Waiver cannot be proved under an allegation of notice: *Lumbert v. Palmer*, 29–104.

But where it was averred that defendant waived want of demand and notice in such case, *held*, that this might be relied on in addition to the averment that demand was made and notice given: *Peck v. Schick*, 50–281.

Under allegations of due diligence in notifying the indorser of a negotiable note in order to hold him liable, proof that such diligence would have been unavailng is not admissible, although under the statutes of the state in which the transaction took place the latter fact would have been sufficient to render the indorser liable if it had been properly pleaded: *Woolsey v. Williams*, 34–413.

Where a pleading avers payment it will not be supported by proof of a waiver of payment, although waiver, if properly pleaded, would sustain the cause of action, and it is immaterial that the pleading would have been sufficient without such averment: *Bernhard v. Washington L. Ins. Co.*, 40–442.

Where there is a condition precedent to plaintiff's right of action, he should aver and prove the performance of such condition

or its waiver, and upon averment of performance evidence of waiver is not admissible: *Edgerly v. Farmers' Ins. Co.*, 43-587.

Waiver cannot be proven under plea of performance, nor is it competent under plea of performance to show that the contract was altered by the act of the parties. A party cannot sue upon one contract and recover upon another: *Fauble v. Smith*, 48-462.

Where defendant in his answer set up certain printed instructions under which he claimed to have acted as agent of plaintiff, *held*, that he could not, under such pleadings, prove conversations or directions waiving or changing such instructions: *Howe Machine Co. v. Wooly*, 50-549.

Waiver of condition in a policy of insurance requiring preliminary proofs of loss cannot be shown without being alleged: *Smith v. State Ins. Co.*, 64-716. Evidence of such waiver is not admissible under an allegation that the proofs were furnished: *Welsh v. Des Moines Ins. Co.*, 71-337; *Heusinkveld v. Capital Ins. Co.*, 64 N.W., 594.

When the waiver of a condition is relied upon it must be pleaded: *Eiseman v. Hawkeye Ins. Co.*, 74-11; *Brock v. Des Moines Ins. Co.*, 64 N.W., 685.

Implied contract; tort; conversion: Proof of a tortious taking of property, where the property has not been sold by the wrongdoer, will not support the averment of a contract to pay therefor: *Moses v. Arnold*, 43-187.

Where the facts stated show a cause of action for the recovery of purchase money paid in pursuance of a contract which the vendee has made, on the ground of false representations by the vendor, plaintiff may recover on proving the essential fact as to the false representation, although he has also alleged that the misrepresentation was wrongfully and wickedly made; the unnecessary allegation as to intent will not change the cause of action from one of contract to one of tort: *Maichen v. Clay*, 62-452.

Consideration: Where a mere simple contract is the foundation of an action plaintiff must allege a consideration: *Decker v. Birhap*, Mor., 62.

Where the consideration for an agreement is the compromise of a suit such fact must be alleged by the party seeking to establish the agreement, and such an issue must be made in the pleadings before the fact can be proven in his behalf: *Richardson v. Barrick*, 16-407.

The objection that no consideration is shown upon the face of an instrument pleaded, or that none is averred in plaintiff's petition, cannot be taken by demurrer. Want of consideration, or failure in whole or in part of the consideration of a written contract, must be averred and shown by way of defense, consideration in a written instrument being presumed (§ 3069): *Linder v. Lake*, 6-164; *Towsley v. Olds*, 6-526; *Goodpaster v. Porter*, 11-161; *Henderson v. Booth*, 11-212; *State v. Wright*, 37-522.

Performance: In an action for mechanic's lien, *held*, that the performance of the contract under which the plaintiff claimed was sufficiently averred, in the absence of motion for more specific statement: *Bangs v. Berg*, 82-350.

Performance of condition: Where it is provided in the contract, under which a telegram is sent, that any claim for damages must be made within a time specified, the fact that such claim has been made should be alleged in the petition and the failure to allege it would be a ground of demurrer: *Albers v. Western Union Tel. Co.*, 66 N.W., 1040.

Breach of contract; demand: Where the contract is an agreement to deliver a specified article of personal property, or make payment in that manner, demand must be made and alleged as having been made before action was brought: *Decker v. Birhap*, Mor., 62.

In a particular case, *held*, that a petition which set out a contract, alleged a breach thereof and that damage resulted therefrom, and asked a judgment on that account, was in an action on contract, and that certain other allegations coupled therewith, which in themselves stated what would be a cause of action in tort, not being made the basis for recovery, but for pleading a settlement, did not constitute a second cause of action: *Strauss v. Shaw*, 84-300.

Breach of covenants of warranty: In an action upon breach of covenant of seizin it is sufficient to negative the words of the covenant, and it is not necessary to show wherein the grantor was not lawfully seized: *Socum v. Haun*, 36-138.

In pleading breach of covenant as a defense in an action for purchase money, it is sufficient to negative the words of the covenant and allege that the grantor had no title or seizin. It is not necessary to aver ouster or eviction: *Camp v. Douglas*, 10-586.

In setting out breach of covenant it is not sufficient to allege merely a failure of title. The denial of title should relate to the time of the conveyance. Nor is it the proper practice to set out the deed in full as a part of the pleading. The covenants claimed to have been broken, alone should be set out: *McCampbell v. Vastine*, 10-538.

Breach of warranty in sales: In an action for breach of warranty in the sale of a horse, *held*, that the allegation that the animal was unfit for one purpose for which he was warranted was sufficiently specific without an allegation of the cause of such unfitness: *Schurtz v. Kleinmeyer*, 36-392.

Where a contract of sale of a machine contained a stipulation that in case it did not comply with the terms of the warranty the purchaser should notify the seller of the fact, and the latter might have an opportunity to make it comply or substitute another machine, *held*, that plaintiff could not recover for breach of warranty without also alleging notice to the seller and the giving of an opportunity to remedy the defects: *Davis v. Robinson*, 67-355.

Breach of bond: See § 3638 and notes.

Allegations and proof: The proof must sustain the material allegations of the petition. Under an allegation in an action of replevin that plaintiff is the absolute and unqualified owner of the property he cannot

recover upon proof of an interest as mortgagee: *Kern v. Wilson*, 73-490.

A plaintiff is not required to prove all the averments of his petition but it is sufficient if he shows a good cause of action on any of the grounds stated therein: *Kaline v. Stover*, 88-245.

Under allegations of an oral contract plaintiff cannot recover on proof of a written contract, even though such proof be oral, establishing the contents of a written contract which has been lost or destroyed: *Petersen v. Ochs*, 40-530.

When a written warranty is relied upon evidence of a parol warranty is not admissible: *Barrett v. Wheeler*, 66-560.

Under a petition upon a written contract plaintiff cannot recover upon proof of an estoppel: *Phillips v. Van Schaik*, 37-229.

Under allegations of an indebtedness for work performed plaintiff cannot recover on a contract guarantying payment for such work by another: *Packard v. Snell*, 35-80.

In an action to recover borrowed money, evidence which tends to show liability for failure to pay a draft drawn upon defendant is incompetent and immaterial, not being relevant to the issue made in the pleadings: *Groneweg v. Kusworm*, 75-237.

Where action is brought for the destruction of hay of plaintiff, due to fire set out by a railway company in the operation of its engine, but no particular negligence is stated, it is competent for plaintiff to prove any kind of negligence in the operation of such engine causing the injury. It might be otherwise, if the particular kind of negligence were alleged: *Bullis v. Chicago, M. & St. P. R. Co.*, 76-680.

Discrepancies between the transcript of a judgment set out in a petition as the basis of the cause of action, and in the transcript of such judgment offered in evidence, *held* immaterial: *Rea v. Scully*, 76-343.

Where a petition alleged a promise to pay certain items of an account, and there was no evidence to sustain the allegations, *held*, that no prejudice could have resulted to defendant from a statement in an instruction that plaintiff's claim was based upon a special promise, as no verdict was returned for plaintiff upon those items of the claim: *Ressler v. Baxley*, 81-750.

Where in an action against the Dubuque & Sioux City Railroad Company it was alleged that the "Sioux City & Dubuque Railroad Company" assumed the obligation on which action was brought, *held*, that the discrepancy was only a clerical error and would not defeat recovery: *Knott v. Dubuque & S. C. R. Co.*, 84-462.

Where a petition alleged an absolute sale of goods, and the evidence showed that the sale was conditional, but because of the failure of the condition it had become an absolute sale for which the vendees were liable, *held*, that the allegations of the original petition were sufficiently broad to allow a recovery on the evidence submitted: *George v. Swafford*, 75-491.

Under an allegation in an action on a policy of insurance that proofs of loss were furnished it is not competent to prove a waiver of such proofs: *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 64 N.W., 769.

When plaintiff declares upon a special contract he must prove the contract as laid, and any material variance even as to the amount due on the contract will be fatal. It would be otherwise if the action were for work and labor, in which case the amount claimed would be immaterial: *Beebe v. Brown*, 4 G. Gr., 406.

In a particular case, *held*, that there was a variance between the contract given in evidence and the contract set out in the pleadings: *York v. Wallace*, 48-305.

A party suing on a contract for services performed thereunder is limited in his recovery to the amount stipulated in such contract, and cannot recover an additional amount for breach of the contract by the other party: *Bush v. Chapman*, 2 G. Gr., 549.

Under the allegations in a particular case, *held*, that plaintiff did not claim under a special contract, and might recover the reasonable value of services rendered: *Forey v. Western Stage Co.*, 19-535

A plaintiff who declares specially upon a contract and also upon the common count for goods sold and delivered may recover upon the common count on the *quantum meruit*: *Formholz v. Taylor*, 13-500.

Although at common law an express promise might be alleged although an implied contract was relied upon, under code pleading proof of an implied promise is not proper under the allegations of an express promise: *Proctor v. Reif*, 52-592; *Lines v. Lines*, 54-600.

Where the petition alleges the cause of action based on breach of a specified contract and the evidence shows only a right to recover on *quantum meruit*, there is a fatal variance: *Walker v. Irwin*, 62 N. W., 785.

The allegation of an express contract to take a note in payment of a debt will be sustained by proof of a state of facts from which an agreement to that effect would be implied: *Hunt v. Higman*, 70-406.

Although it is well settled that when plaintiff alleges a special contract he cannot prove and recover upon another contract or on a count for *quantum meruit*, yet when plaintiff set out one contract which was denied by defendant, who in his answer set up another contract, under which he claimed plaintiff's services were rendered, and the case was fully tried upon these issues, *held*, that plaintiff was properly allowed to recover the amount to which he was entitled under the contract set up in defendant's answer: *Cook v. Smith*, 54-636.

When the plaintiff seeks to recover against defendant individually upon a several promise a joint note containing a joint promise only is not admissible in evidence: *Roop v. Seaton*, 4 G. Gr., 252.

Where, in an action on a note, a deposition was taken in which the note referred to was set out by copy different from the note set out in the petition, *held*, that although such a variance might have been ground for objecting to the evidence, yet the identity of the note referred to in the deposition and the one set out in the pleading might have been established by other evidence, and in

the absence of a showing that all the evidence in the court below was before the supreme court on appeal, it would be presumed that such other evidence was introduced: *Lauman v. Nichols*, 15–161.

Where the petition in an action for breach of warranty averred that paramount title had been subsequently purchased by plaintiff from a corporation named, but offered in evidence in support of that allegation a deed from another corporation, *held*, that this was a material variance, and the deed should have been rejected: *Burns v. Iowa Homestead Co.*, 48–279.

Plaintiffs, in an action of forcible entry and detainer, claimed to recover on the ground that defendant was tenant at will by holding over after the termination of the lease. *Held*, that they were confined to these facts and could not recover upon proof of fraudulent combination to obtain the lease without amendment of the pleadings. As to whether such amendment could be made, *quære*: *Goldsmith v Boersch*, 28–351.

Where a party induced by fraud to make an exchange of one horse for another which was diseased brought replevin to recover the animal which he had given in exchange, alleging absolute ownership and right to possession, and that defendant falsely pretended to have entered into a contract of exchange, etc., and that plaintiff had tendered back the horse received and demanded the return of the other, and thereupon defendant alleged ownership by a valid contract of exchange, *held*, that plaintiff might show fraud in the contract of exchange, rendering it void, at least in a proceeding before a justice of the peace, where not quite the same strictness of pleading is required as in courts of record: *Nolan v. Jones*, 53–387.

In a particular case, *held*, that an admission tending to show a guaranty or warranty was not admissible in an action for false representations: *Clark v. Ralls*, 58–201.

Where plaintiff sought to recover the value of property alleged to have been fraudulently converted by defendant, and defendant alleged title under a bill of sale, no allegation of fraud in such transaction being made by plaintiff, *held*, that plaintiff could not introduce evidence to prove fraud and thus defeat plaintiff's title: *Kervick v. Mitchell*, 68–273.

A petition claiming that defendant cut and carried away timber from the land of plaintiff, *held* not necessarily in form an action of trespass, and that under such petition plaintiff could show a promise to pay for such timber though he was not in possession at the time of the injury and had not the complete title until afterward: *Kline v. Mann*, 29–112.

Specific negligence must be proved as set out: *Armstrong v. Ackley*, 71–76.

Where the petition in an action before a justice of the peace claimed $100 "for damages and trespass," etc., and that defendant "broke and entered said premises by force . . . and did cut down and carry away one hundred trees to the value of $100," *held*, that, upon a trial of such action on appeal, plaintiff could recover for the consequent injury to the realty, as also for the breaking: *Dugan v. Hunt*, 29–447.

The fact that the cause of action stated in the petition is that of trespass, while the evidence shows what was formerly known as trespass on the case, will not constitute a material variance: *Brown v. Hendrickson*, 69–749.

As to variance, see § 3597 and notes.

As to effect of failure to prove allegations, see § 3639 and notes.

Allegations of damage: In an action for damages to furniture, *held*, that evidence of damage to other articles, such as provisions, etc., could not be introduced: *Whitmore v. Bowman*, 4 G. Gr., 148.

Under a petition claiming damages for selling plaintiff a horse having the glanders, *held*, that plaintiff could not recover for damages resulting from unlawful sale of such diseased horse by defendant to another by which plaintiff was injured: *Proctor v. Reif*, 52–592.

Damages caused by physical and mental suffering may be alleged in a general way, and plaintiff cannot be required to make an itemized statement thereof: *Gilbert v. Hoffman*, 66–205.

It is not necessary to allege in a pleading the qualities or uses of the thing which add to its value, when recovery is sought for its destruction or injury: *Lanning v. Chicago, B. & Q. R. Co.*, 68–502.

The averment in an action for personal injuries that plaintiff was seriously injured and suffered great pain and mental anguish, and was put at great expense because of the negligence of defendant causing the injury, *held* not sufficient to entitle plaintiff to recover for loss of time: *Gardner v. Burlington, C. R. & N. R. Co.*, 68–588.

Under general allegation of damage for personal injuries recovery may be had without the pleading of special damages for loss of time, suffering and expenditure for medical attendance and care, but not for loss of profits in farming: *Homan v. Franklin County*, 90–185.

Where plaintiff sues for compensation under a contract which he has but partially performed, while he is subject to have set off against him the damages which the opposite party has sustained by reason of his failure to completely perform, yet it is for such opposite party to aver and prove such damages, and not for the party suing upon the contract to negative their existence: *Wolf v. Gerr*, 43–339.

Where the petition in an action upon a replevin bond claimed a certain amount due as damages, and stated fully and explicitly the nature of the injury, *held*, that the petition was sufficient to entitle plaintiff to recover the damages suffered: *Keyes v. McNulty*, 14–484.

Plaintiff can recover no more than claimed in his petition: *Cameron v. Boyle*, 2 G. Gr., 154; *Stiles v. Brown*, 3 G. Gr., 589.

Relief which is not claimed in the petition cannot properly be afforded: *Gwynn v. Turner*, 18–1.

It is against the spirit and intent of our Code to allow, as fruits of litigation, that which was not, by fair and obvious import of the pleadings, put in issue and litigated between them: *Pfiffner v. Krapfel*, 28–27.

No judgment or other relief should be

granted where none is asked: *McConnell v. Denham*, 72–494.

Proof as to the amount of damage should be confined to the damages alleged in the petition: *Gamble v. Mullin*, 74–99.

The jury cannot award a greater sum as damages than is claimed in the pleading: *Charles City Plow, etc., Co. v. Jones*, 71–234.

A claim in a petition for expenses incurred for medical attendance covers expenditures for medicine used by the physician in giving such medical attendance: *Knapp v. Sioux City & P. R. Co.*, 71–41.

Where a petition to recover damages caused by the destruction of grain gave the number of bushels of grain destroyed and demanded judgment for a specified sum, *held*, that judgment could not be reversed for failure to allege the value of the grain, in absence of a motion for a more specific statement: *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 72–535.

III. PRAYER.

Essential: It is error to render judgment against a defendant against whom no prayer for relief is made: *Mobley v. Dubuque Gas, etc., Co.*, 11–71.

Where the petition set out facts which *prima facie* entitled plaintiff to be regarded as assignee of a dower interest, but did not specifically seek to have such dower assigned, and defendant by answer and cross-petition set up title under a deed of trust and asked that his title be quieted, *held*, that a decree for defendant should be modified so as not to bar plaintiff from asserting his rights as assignee of the dower interest: *Huston v. Seeley*, 27–183.

Where the petition sets out a cause of action with the proper averments showing damages, the fact that it contains no prayer for damages cannot be taken advantage of after verdict: *Humphreys v. Daggs*, 1 G. Gr., 435.

A mere clerical error which was immaterial under the other averments of the petition and the prayer for judgment, *held* properly disregarded by the court and jury: *Fleming v. Stearns*, 79–256.

Prayer for general relief: Where there is a prayer for general relief the plaintiff may have such relief against the parties to the action as he shows himself entitled to, where such relief is consistent with the case made by the petition: *Laverty v. Sexton*, 41–435.

Under a general prayer for relief in an equitable action plaintiff is entitled to any relief in equity to which he is entitled under the facts pleaded: *Hoskins v. Rowe*, 61–180.

Under a prayer for general relief, any relief may be granted which is consistent with the allegations of the pleading and sustained by the proof; and it is error to fail to grant relief to which the party shows himself entitled, though it be not specially asked: *Pond v. Waterloo Agl. Works*, 50–596.

Under a general prayer for relief in a petition in equity plaintiff may be awarded any remedy afforded by the law for the particular wrong complained of: *Thomas v. Farley Mfg. Co.*, 76–735.

Under a general prayer for relief in an equitable action plaintiff is entitled to judgment for costs, although no such judgment is specially prayed for: *Searle v. Fairbanks*, 80–307.

In an action to quiet title and for general relief the court may give plaintiff a money judgment, if that appears to be the relief to which he is entitled: *Iler v. Griswold*, 83–442.

Under a general prayer for relief there may be a decree for the foreclosure of a mortgage, if the facts stated justify such relief, although the foreclosure is not specifically asked: *Herring v. Neeley*, 43–157; *Hait v. Ensign*, 61–724.

Under a prayer for general relief complainant may be entitled to any relief consistent with the case made in his petition, but not to a decree covering matters not referred to nor included therein and as to which defendant has not properly had his day in court: *Wilson v. Horr*, 15–489,

A court of equity cannot, under a general prayer for relief, make a decree or grant relief which has no proper basis in the facts set up in the petition: *Casady v. Woodbury County*, 13–113.

Relief cannot be granted by a decree which is not specially prayed for and is not within the contemplation of a general prayer for relief: *Johnson v. Mantz*, 69–710; *Walker v. Walker*, 93–643.

Exemplary damages in an action for civil damages for sale of intoxicating liquors to husband being specially authorized by statute need not be asked in the prayer: *Gustafson v. Wind*, 62–281.

Interest: Where the petition prays judgment for a certain sum "with interest and costs," recovery may be had for interest on the sum so claimed from the commencement of the action, but not for interest accrued prior to that time: *Haven v. Baldwin*, 5–503; *Butcher v. Brand*, 6–235; *Barton v. Smith*, 7–85; *Hefferman v. Burt*, 7–320; *Lyon v. Byington*, 10–124; *Anderson v. Kerr*, 10–233; *Anderson v. Kerr*, 10–236; *Galley v. Tama County*, 40–49.

Where in the petition interest is prayed for from the commencement of the suit, it is error to direct the jury that they may allow interest from an earlier date: *Winney v. Sandwich Mfg. Co.*, 86–608.

Interest accruing after the commencement of the action may be included in the judgment, although the amount for which judgment is asked in the petition is not large enough to include such interest: *Dawson v. Graham*, 48–378.

Where a petition set forth a promissory note drawing interest and alleged "that said amount specified in said note is wholly due and unpaid," and asked for "judgment for the amount due by the said note," *held* not erroneous to include in the judgment the interest due on the note up to the rendition of the judgment: *Smith v. Watson*, 28–218.

Where a plaintiff brought an action at law upon a promissory note and subsequently filed an amended and supplemental petition asking equitable relief, *held*, that plaintiff could not rely on both statements of his cause of action at the same time and must elect

between them: *National State Bank v. Delahaye*, 82–34.

IV. COUNTS AND PARAGRAPHS.

Counts: Different causes of action should not be mingled in one count: *Sands v. Wood*, 1–263.

Two or more notes may constitute but one cause of action, and may be embraced in a single count with the petition: *Stadler v. Parmlee*, 10–23; *Merritt v. Nihart*, 11–57; *Ragan v. Day*, 46–239.

Under the present Code parties are allowed to plead the same cause of action in different counts, as they might do at common law, where it appears that the counts relate to the same cause of action: *Pearson v. Milwaukee & St. P. R. Co.*, 45–497; *Peck v. Schick*, 50–281; *Van Brunt v. Mather*, 48–503.

The statement in the petition that the counts relate to the same cause of action is unnecessary, but will not vitiate the pleading: *Pearson v. Milwaukee & St. P. R. Co.*, 45–497.

It is allowable under the Code, to join two counts which seek to recover on different and inconsistent states of fact: *Jack v. Des Moines & Ft. D. R. Co.*, 49–627.

It is proper to plead the same indebtedness in different forms and in different ways; and two claims, one upon an account and the other upon a bill of exchange, the indebtedness sought to be recovered being the same, may be joined in the same petition: *Kimball v. Bryan*, 56–632.

Although one count fails to state sufficient facts to entitle the plaintiff to relief demanded therein, yet if such facts are stated in other parts of the petition, and objection to the count is not taken by way of motion or demurrer, it cannot be raised afterward by an instruction: *Cruver v. Chicago, M. & St. P. R. Co.*, 62–460.

Under a former statutory provision prohibiting the statement of one cause of action in different counts, *held*, that where the petition showed that the cause of action was for one wrong which in one count was styled malicious prosecution and in the other false imprisonment, *held*, that the costs were properly taxed against the plaintiff: *Watson v. Bell*, 37–640.

The petition in an action for personal injury should not, ordinarily, be devided into counts: *Hammer v. Chicago, R. I. & P. R. Co.*, 61–56.

Where separate causes of action are set out in one count of the petition, the court may properly sustain a motion to divide and enforce such order by striking out a substituted petition filed without compliance with such order: *O'Connor v. Chicago, R. I. & P. R. Co.*, 75–617.

Where each count of a petition contained two causes of action and defendant failed to object to the same, *held*, that both causes of action in each count were properly submitted to the jury: *Joy v. Bitzer*, 77–73.

The same cause of action may be stated in different counts of the petition: *Sadler v. Olmstead*, 79–121.

Therefore, where plaintiff sought to recover in one count on contract and in another on arbitration and award, for the same thing, *held*, that the first count was not a waiver of the award: *Ibid.*

Where two counts of a petition were much the same in legal effect, *held*, that no prejudice could have resulted from overruling a motion to require plaintiff to elect the count upon which it would proceed and to strike the other from the petition: *Taylor County v. Stanley*, 79–666.

A written or oral promise to pay money in consideration of damages due for a wrongful act, and the promise implied by law to pay the damages growing out of such wrongful act considered as a tort, are separate causes of action and must be pleaded, if relied on in the same action, in separate counts: *Aultman v. Goldsmith*, 84–547.

Where the facts were set up in one count, *held*, that it would be deemed a cause of action on the contract set out, and not on an implied promise growing out of the acts as constituting a tort: *Ibid.*

The statute requires each cause of action to be stated wholly in a count or division by itself. If more than one cause of action is pleaded in a single count or division, and no objection is made thereto, recovery may be had on all, but in such event it must appear that this was intended. Where the right of recovery is based upon a written contract, and the averment of facts constituting another cause of action is necessary to bring the remedy sought within the terms of the contract, it will be assumed that only one cause of action was intended to be pleaded: *Chicago, R. I. & P. R. Co. v. Haywood*, 71 N. W., 358.

The same cause of action may be pleaded in different counts: *Cawker City State Bank v. Jennings*, 89–230.

One prayer may cover the claim made in two or more counts: *Peregoy v. Wheeler*, 88–732.

Divisions: Where a petition contains several causes of action, but is not separated into divisions, a demurrer to one cause of action may be sustained, and the plaintiff cannot urge the defects in his pleading to defeat the demurrer: *Burhans v. Squires*, 75–59.

Paragraphs: One of the paragraphs into which a petition setting forth an equitable cause of action is divided is not alone subject to demurrer. If, when taken with the other paragraphs, a cause of action is stated, that will be sufficient: *Benedict v. Hunt*, 32–27; *Delaware County Bank v. Duncombe*, 48–488.

Whatever is numbered as a distinct paragraph should contain something more than a mere conclusion of law, based upon statements of facts in other paragraphs, otherwise it may be stricken out on motion: *Cooper v. French*, 52–531.

Recovery: A judgment for a greater amount than is claimed in the petition is not authorized, and plaintiff should not be permitted to amend his petition after judgment is rendered, claiming damages greater than were alleged in the original petition: *Cox v. Burlington & W. R. Co.*, 77–478.

The fact that judgment is for a larger

amount than prayed for in the petition is an error which will not be corrected on appeal unless the attention of the trial court has been called thereto by a motion or otherwise: *Yancey v. Tatlock*, 93–386.

The amount in controversy is the amount claimed and which may be recovered in the action: *McVey v. Johnson*, 75–165.

Under an allegation of damage to plaintiff's land for the wrongful diversion of surface water and its discharge upon such land, plaintiff may recover for the deposit of earth, clay and other materials upon the land by such overflow, although not specially pleaded: *Hunt v. Iowa Cent. R. Co.*, 86–15.

Where the relief granted is consistent with the case made by the petition and embraced in the issues presented by the pleadings, it cannot be complained of as greater than the relief demanded: *Johnson v. Rider*, 84–50.

In an action on account stated, *held*, that the amount alleged in the petition was balance due on the account stated after payments and not the amount found due by the settlement: *Thompson v. Smith*, 82–598.

SEC. **3560. Amended before answer.** The plaintiff, without prejudice to the proceedings already had, may amend his petition, without leave, at any time before the answer is filed, notice thereof being given the defendant or his attorney, and the defendant shall have the same time to plead thereto as he had to the original petition. [C.'73, § 2647; R., § 2975.]

Leave of court is not necessary to entitle plaintiff to file such amendment as here contemplated, and an appearance of defendant to move to strike such amendment from the files or to demur or answer thereto obviates the necessity of notice of the amendment: *Kimball v. Bryan*, 56-632.

Leave of court to file such amendment is not required and plaintiff may thus amend notwithstanding refusal of the court to give him permission to do so: *Kay v. Pruden*, 69 N. W., 1137.

SEC. **3561. Demurrer—causes of.** The defendant may demur to the petition only where it appears on its face:

1. That the court has no jurisdiction of the person of the defendant or the subject of the action;
2. That the plaintiff has not legal capacity to sue;
3. That there is another action pending between the same parties for the same cause;
4. That there is a defect of parties, plaintiffs or defendants;
5. That the facts stated in the petition do not entitle the plaintiff to the relief demanded;
6. That the petition, on the face thereof, shows that the cause of action is barred by the statute of limitations; or fails to show it to be in writing, where it should be so evidenced; or, if founded on an account or writing as evidence of indebtedness, that neither such writing or account or copy thereof is incorporated into or attached to the pleading, or a sufficient reason stated for not doing so. [C.'73, § 2648; R., §§ 2876, 2918, 2920, 2961, 2963–4.]

Grounds: The provisions of the statute limit the causes of demurrers and no others can be urged. The fact that the pleading is argumentative, not being one of the causes set out, cannot be taken advantage of in that manner: *Davis v. Bonar*, 15–171.

Want of jurisdiction: Unless it appears on the face of the petition that the court has no jurisdiction, an objection on that ground cannot be raised by a demurrer, and can only be taken advantage of by answer: *Childs v. Limback*, 30–398.

Demurrer to the jurisdiction of the court is not the proper method of raising the objection that the action is brought in the wrong county. Such objection is to be raised by motion to change the place of trial to the proper county: *Cole v. Conner*, 10–299.

An objection based on the want of jurisdiction may be raised at any time, and is not waived even by consent: *Orcutt v. Hanson*, 71–514.

Another action pending: A demurrer on this ground can only be sustained when the fact appears on the face of the petition: *Mosher v. Independent School Dist.*, 42–632, 635. In other cases it is to be pleaded in the answer: *Treanor v. Sheldon Bank*, 90–575.

That pendency of another action may be pleaded in abatement, see notes to § 3642.

The defect of parties which is a ground of demurrer is a non-joinder of parties who should have been joined, either as plaintiffs or defendants. A misjoinder or uniting of parties who should not be joined is not a ground of demurrer: *Turner v. First Nat. Bank*, 26–562; *Mornan v. Carroll*, 35–22; *King v. King*, 40–120; *Dubuque County v. Reynolds*, 41–454; *District T'p v. District T'p*, 44–512, 517; *Bort v. Yaw*, 46–323; *Independent School Dist. v. Independent School Dist.*, 50–322.

The fact that a party to the proceeding who was properly made a party has not been served with notice cannot be taken advantage of by demurrer on behalf of another party who is served: *Forbes v. Delashmutt*, 68–164.

If causes of action against different parties are joined the defendant may demur: *Coyswell v. Murphy*, 46–44.

If the defect of parties appears on the face

of the petition it will be held waived, unless taken advantage of by demurrer: *McCormick v. Blossom*, 40–256; *Lillie v. Case*, 54–177.

If defect of parties be fatal to the character of the petition and the relief asked, the objection may be insisted on at the hearing, and if the court proceeds to a decree nowithstanding such objection, it may be reversed for error on this account: *Swan v. Clark*, 36–560.

The objection that a necessary party defendant has not been served with notice need not, and perhaps should not, be raised by answer of the other defendant, but may be insisted upon to defeat a final decree: *Miller v. Mahaffy*, 45–289.

Not raised on appeal: An objection on the ground of defect of parties cannot be made for the first time in the supreme court. If not taken advantage of by demurrer or perhaps by plea, it must be regarded as waived: *Bouton v. Orr*, 51–473; *Coe v. Anderson*, 92–515.

An objection to the non-joinder of parties, when first made in the appellate court, if well taken, will operate to remand the cause for further proceedings in the court below: *Parshall v. Moody*, 24–314.

Where it appears in the supreme court that parties who are necessary to a full determination of the controversy are not in court, the cause will be remanded for the purpose of allowing such parties to be brought in: *Crosby v. Davis*, 9–98.

As to misjoinder of parties, see notes to §§ 3460 and 3463.

That the facts do not entitle the party to the relief demanded: Under the Revision a petition was not vulnerable to demurrer simply because it asked relief to which its averments did not entitle the pleader: *Byers v. Rodabaugh*, 17–53; *Orman v. Orman*, 26–361; *Harwood v. Case*, 37–692.

But the phrase "relief demanded" used in the Code is broader than the corresponding term used in the Revision: *Watts v. Everett*, 47–269.

Therefore, *held*, that a demurrer would lie in an action on a judgment brought within fifteen years from its rendition without leave of court, as required by § 3439, being alleged: *Ibid.*

A petition setting out a cause of action upon a note alleged to have been executed upon a date which fell upon Sunday is subject to demurrer, and the court will take judicial notice of the fact that a given day of the month falls upon Sunday: *Clough v. Goggins*, 40–325.

Where the petition sets out a contract under which it is incumbent upon plaintiff to do something before it becomes incumbent or proper for defendant to perform on his part, and the plaintiff fails to allege performance, the objection to the defect in plaintiff's petition can be raised by demurrer: *White v. Day*, 56–248.

The fact that the averments of the petition do not entitle plaintiff to the relief demanded should be raised by demurrer, and not through motion to strike them from the petition; but if the motion is made and passed upon, without objection on that ground, the form of raising the question will not constitute reversible error: *Rhoadabeck v. Blair Town Lot, etc., Co.*, 62–368.

Under a general prayer in a petition in equity; the plaintiff may be awarded any remedy afforded by the law for the particular injury or wrong complained of, and such a petition is not open to demurrer on the ground that the facts stated do not entitle the plaintiff to the relief demanded, if there is any relief that may be granted under the facts alleged in the petition: *Thomas v. Farley Mfg. Co.*, 76–735.

Statute of limitations: Where a pleading shows affirmatively that its cause of action is barred by statute of limitations, the proper mode of assailing it is by demurrer: *Miller v. Dawson*, 26–186; *Springer v. Clay County*, 35–241.

To enable a party by demurrer to insist on the bar of the statute of limitations, the pleading must show affirmatively that the cause of action is barred by the laws of this state or of some other state where defendant has resided: *Moulton v. Walsh*, 30–361; *Shearer v. Mills*, 35–499.

Where it appears that before the period of limitation expired defendant became a nonresident of the state, and it does not affirmatively appear that the action has become barred by the laws of the state where he has subsequently resided, a demurrer will not lie: *Brown v. Rockhold*, 49–282.

Under a previous statutory provision which did not expressly authorize a demurrer on this ground, although it appeared on the face of the petition that the cause of action was barred by the statute of limitations, *held*, that the objection could not be taken by demurrer, but must be set up by way of answer or plea, for the reason that the statute recognized exceptions which might take the action out of the operation of the statute, and the statute ought to be pleaded so that the other party might have an opportunity to take advantage of such exceptions: *Wapello County v. Bigham*, 10–39.

This was also the rule at common law, but it was otherwise in equity: *Phares v. Walters*, 6–106.

Where it appears on the face of a petition on a policy of insurance that the action is brought after the expiration of the time limited in the policy for bringing such action, the objection may be raised by demurrer: *Moore v. State Ins. Co.*, 72–414; and see *Carter v. Humboldt F. Ins. Co.*, 12–287.

It will be presumed that parties to actions are citizens of the state, and that the cause of action arose in the state, unless the contrary appears; and where the petition shows nothing as to these facts, but shows that the cause of action is otherwise barred by the statute of limitations, a demurrer to the petition should be sustained: *Van Patten v. Bedow*, 75–589.

Statute of frauds: The objection that the contract sued upon is not in writing cannot be urged as a ground of demurrer unless the contract appears to be one which must be in writing to be enforced: *Cox v. Carrell*, 6–350.

That a contract relied on appears to have been in parol when under the statute of

frauds it should have been in writing is made a ground of demurrer. If plaintiff relies for proof of his claim upon the testimony of defendant he must make that averment in his petition in order that it be not subject to demurrer: *Babcock v. Meek*, 45–137.

And it was similarly held as to the statute of limitations under previous provisions authorizing the plaintiff to recover notwithstanding the bar of the statute, where he could establish his claim by defendant's testimony: *Newfield v. Blawn*, 16–297.

The objection that a contract sued on is not evidenced in writing when it should be so evidenced under the statute of frauds, should be raised by demurrer if the objection appears upon the face of the petition, and cannot in such case be raised by an answer: *Wiseman v. Thompson*, 63 N. W., 346.

Failure to set out account or copy thereof: In a petition claiming an amount due for services performed for defendant at his verbal request and not under written contract during a certain period and at a certain place, *held*, that it did not necessarily appear that the cause of action embraced separate items of account so that a demurrer on the ground that the account or a copy thereof was not set out should have been sustained: *O'Brien v. Chicago, M. & St. P. R. Co.*, 64–411.

This provision as to setting out a copy of the account sued on is to be observed no matter how simple may be the account: *Winters v. Page County*, 70–300.

In an action for balance due on settlement of account, a copy of the account need not be set out: *Buehler v. Reed*, 11–182.

As to bill of particulars, see § 3623.

Failure to set out copy of written instrument sued on: Where plaintiff claims under an assignment without stating whether it is in writing or not, but without setting out any writing, he may be compelled, on motion for more specific statement, to show how he became owner of the claim, but the objection cannot be reached by demurrer for failure to set out a copy of such instrument, it not appearing that it was in writing: *Thompson v. Cook*, 21–472.

The objection that a bill of particulars, or a written instrument, is not set out or attached, must be taken by demurrer; it cannot be interposed as a ground for the exclusion of evidence: *Farwell v. Tyler*, 5–535; *Peterson v. Allen*, 12–366; *Smith v. McLean*, 24–322.

Objection that written notice of loss of stock, in case of injury to such stock on a railway where the company has a right to fence and has not done so, as provided in § 2055, is not attached to the petition, should be taken advantage of on demurrer, and not by objection to the introduction of such notice in evidence: *McKinley v. Chicago, R. I. & P. R. Co.*, 47–76, 78.

It is necessary in an action to recover upon a subscription of stock to a corporation to set out a copy of the subscription paper: *Hudson v. Plank Road Co.*, 4 G. Gr., 152.

Where a pleading is founded upon breach of covenants in a deed, a copy of the deed should be incorporated into or attached to such pleading: *Nosler v. Hunt*, 18–212.

Where a negotiable instrument is sued on in the name of the indorsee, a copy of the indorsement should be set out together with a copy of the instrument: *Mainer v. Reynolds*, 4 G. Gr., 187.

In an action upon the guaranty of a written instrument it is not necessary to set out a copy of the guaranty. The action is founded on the instrument itself: *Knight v. Fox*, Mor., 305.

In an action on a note and mortgage by an assignee the instrument of assignment may properly be attached to the petition: *Franklin v. Twogood*, 18–515.

The fact that a petition avers that the mortgage therein referred to was duly assigned to plaintiff does not necessarily imply that it was transferred by writing, and such petition will not, therefore, be subject to demurrer on the ground that such written instrument is not set out: *Barthol v. Blakin*, 34–452.

Where an action was brought upon a large number of bank-bills of different denominations, *held*, that it was sufficient to attach one of each denomination as an exhibit: *Turbell v. Stevens*, 7–163.

The failure to set out in a cross-petition a written instrument relied on therein which is already set out in the original petition is not a ground of demurrer: *Coe v. Lindley*, 32–437.

If the action is based upon a contract written in a foreign language it is sufficient to attach a translation to the petition; a copy in the foreign language need not be set out: *Christenson v. Gorsch*, 5–374; *Bower v. Diedeker*, 38–418, 421.

It is only necessary to attach a copy of the written instrument when the action is founded on such instrument: *Barney v. Buena Vista County*, 33–261.

It is not the evidence in the case that plaintiff is to attach to his petition, but a copy of the instrument or account on which he brings his suit: *Latterett v. Cook*, 1–1.

Plaintiff is not required to attach to his petition copies of instruments which he intends to introduce in evidence unless they are the instruments upon which the action is founded: *McLott v. Savery*, 11–323.

Plaintiff cannot be required to set up a written instrument which is not the basis of his cause of action, but is merely a link in the chain of evidence necessary to establish it: *Harwood v. Case*, 37–692.

Where a record is not the foundation of an action it need not be set out: *Ruddick v. Marshall*, 23–243.

Where a petition in equity sought to have set aside a judgment by confession, *held*, that it was not necessary to attach a copy of the statement on which such judgment was rendered: *Vannice v. Green*, 14–262.

In an action for damages for right of way, *held*, that the deed for such right of way might be introduced as evidence without having set it out in the answer: *Taylor v. Cedar Rapids & St. P. R. Co.*, 25–371.

The duplicate receipt of the receiver of the United States land office, relied on to

establish plaintiff's title in an action of trespass, need not be set out by copy: *Dorcey v. Patterson*, 7-420.

In an action of right it is not necessary to attach copies of title papers: *Boardman v. Beckwith*, 18-292.

Where, in an action against a county treasurer for wrongfully seizing and selling plaintiff's property, defendant justified under a tax list and warrant, setting out the warrant, *held*, that the answer was not demurrable for not setting out a copy of the tax list: *Games v. Robb*, 8-193.

In an action to set aside a sheriff's sale, *held*, that it was not necessary to attach a copy of the execution and sheriff's deed as instruments sued on: *Walkup v. Zehring*, 13-306.

Where a party suing upon rescission of a contract for the conveyance of land offered to return certificates of stock received by him in payment for such land, *held*, that he need not set out a copy of such certificates: *Carey v. Cincinnati & C. R. Co.*, 5-357.

Where a note is written upon the back of a paper containing a contract, it is not necessary, in making an exhibit of a copy of the note in the pleading, to set out a copy of such contract: *Dunning v. Rumbaugh*, 36-566.

Where defendant alleged payment by an agreement with plaintiff by which certain property was taken in satisfaction of plaintiff's claim, *held*, that even if such contract were in writing, it was not such a contract as defendant could be required to set out in his pleading: *National State Bank v. Delahaye*, 82-34.

Where defendants in an answer expressly make a certain will, and a probate and record thereof, a part of the answer, they will not be heard to say that such will and records shall not be so treated, when the answer is attacked by demurrer, because the same are not set in or attached as an exhibit to their answer: *Sutherland v. Sutherland*, 71 N.W., 424.

For objection appearing on the face of the petition: A demurrer can be interposed only for matters appearing on the face of the petition: *Polk County v. Hierb*, 37-361.

An exhibit cannot be attached to a demurrer in order to take advantage of grounds therefor which would not otherwise appear: *Ruddick v. Marshall*, 23-243.

Neither the interrogatories attached to a pleading nor the answers thereto can, on demurrer, aid a defective pleading: *Lane v. Krekle*, 22-399.

In ruling upon a demurrer the court cannot go outside of the pleading to discover facts upon which the pleading may be sustained: *Miller v. Miller*, 63-387.

What objections raised by demurrer and what by motion: Under previous practice, *held*, that a variance between the declaration and the writ could not be raised by demurrer: *Culver v. Whipple*, 2 G. Gr., 365.

If an averment of the petition is claimed to be insufficient in law, the proper way to raise the objection is by demurrer and not by motion: *Childs v. Griswold*, 15-438.

An objection which is a ground of demurrer cannot properly be raised by motion to dismiss the action: *State ex rel. v. De Kruif*, 72-488; nor by motion to strike: *Irwin v. Yeagar*, 74-178.

A demurrer and not a motion to strike from the files is the proper mode of determining the sufficiency of the pleading: *Clark v. Cress*, 20-50; *Martin v. Dobbins*, 32-534; *Merchants' Nat. Bank v. Montgomery*, 32-602.

Where a motion to strike is allowed, without objection of the opposite party, to have the effect of a demurrer, complaint cannot be made of the ruling in excluding the matter objected to, where it would have been adjudged insufficient on demurrer: *Chase v. Kaynor*, 78-449.

A motion to strike from the petition matter which constitutes a cause of action may amount in effect to a demurrer: *Seiffert & Wiese Lumber Co. v. Hartwell*, 63 N. W., 333.

It is not the province of a motion to test the sufficiency of a cause of action or defense. A demurrer is the method prescribed by statute for that purpose: *Wattels v. Minchen*, 93-517.

An objection that a counter-claim set up in the answer cannot be properly interposed on account of its not being in behalf of the proper parties should be raised by demurrer and not by motion to strike from the files: *Bird v. McCoy*, 22-594.

Objection to the sufficiency of a petition cannot properly be raised by motion to strike out all the averments thereof. Such objection should be raised by demurrer: *Rhoudabeck v. Blair Town Lot, etc., Co.*, 62-368.

However, if such a motion is made and passed upon in such a case without objection on that ground, the form of raising the question will not constitute reversible error: *Ibid.*

The fact that plaintiff's action should have been brought in law instead of in equity, or *vice versa*, or that plaintiff in an action in equity has a full, speedy and complete remedy at law, are not proper grounds for demurrer. The remedy in such cases is by motion to have the action changed to the proper docket: See § 3431 and notes.

An alternative allegation in the petition, of a material fact, is not a ground of demurrer: The remedy for such defect is by motion: *Turner v. First Nat. Bank*, 26-562.

Failure of the petition to set out the damages sustained by plaintiff is not a ground of demurrer, but can only be reached by motion for more specific statement: *McCormick v. Basal*, 46-235.

Where one count of the pleading is held insufficient on demurrer, and an amendment is filed, the same in substance as the original, the other party is not required to again demur, but the amended pleading should be stricken from the files on motion: *Waukon v. Strouse*, 74-547.

Where a mortgage provided that upon thirty days' default in payment of interest the whole amount of the principal should become due at the option of the holder, and at the end of such thirty days' default action was brought, it being alleged in the petition that plaintiff had elected that the whole sum become due, *held*, that a demurrer would not lie upon the ground that notice of the elec-

tion had not been given, but such objection could only be raised by motion for more specific statement or answer: *Parkyn v. Travis*, 50-436.

Where a petition in an action to recover damages for changing the grade of a street alleged that the grade was established by ordinance, but neither described the grade nor set out the ordinance, *held*, that while it might be subject to be made more specific on motion it was not vulnerable to demurrer: *Noyes v. Mason City*, 53-418.

Defensive matter: The petition in equity in an action to defeat certain tax deeds stated that the plaintiff was the owner of the property at the time of the several sales and continued to be such owner; that she had redeemed from the sales and paid all taxes due, and that notwithstanding these facts defendant had in some manner obtained tax deeds; *held*, that if defendant claimed title under a sale made at a different time from any mentioned in the petition, such fact could only be made available by affirmative pleading on his part and that a demurrer would not lie: *Gray v. Coan*, 23-344.

Where the allegation of the petition, that the indebtedness to secure which a vendor's lien was sought to be enforced was incurred in the purchase of the homestead, was not distinctly negatived by the answer, so that the court could not determine therefrom whether the homestead right existed and was effectual or not, *held*, that it was not error to sustain a demurrer to that part of the answer setting up a homestead exemption: *Pratt v. Delavan*, 17-307.

Where the defense set up in the answer is held insufficient on demurrer, it will not be presumed that the issue raised by such defense was before the court upon final hearing in such manner as to render the ruling upon the demurrer error without prejudice: *Schroeder v. Chicago, R. I. & P. R. Co.*, 41-344.

Several causes of demurrer: Where a demurrer assigns several causes, and is sustained as to one and overruled as to others, such ruling will not be reversed on appeal if any of the causes assigned is good, although as to the particular ground on which it was sustained the ruling be found erroneous: *Jeure v. Perkins*, 29-262.

To entire pleading; when one count or division is sufficient: A demurrer can only properly be interposed to controvert the legal sufficiency of the matter stated in the entire count or petition, and not to assail a portion of a count, or improper, foreign, redundant or irrelevant matter therein. If the count contains sufficient statements to constitute a cause of action or defense it is not vulnerable to demurrer: *Hayden v. Anderson*, 17-158.

A paragraph of a pleading cannot be assailed on demurrer, the demurrer being proper only when it attacks the whole pleading or count: *Delaware County Bank v. Duncombe*, 48-488.

A demurrer to the entire petition should not be sustained because a portion of it demands relief upon facts improperly pleaded: *District T'p v. District T'p*, 44-512.

Where an answer sets up but one defense it is not proper to interpose a demurrer to a portion thereof: *Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 67-324.

Where but a portion of the pleading or count is defective, a motion to strike out the objectionable matter is the proper remedy: *Shulte v. Hennessy*, 40-352.

Where distinct defenses are improperly joined in one division of an answer, the demurrer may be directed against one of them alone: *Wright v. Connor*, 34-240.

A general demurrer to a pleading containing more than one count should be overruled if either count or any cause of action set out therein is sufficient: *Chambers v. Lathrop*, Mor., 102; *Jarvis v. Worick*, 10-29; *Coon v. Jones*, 10-131; *Darr v. Lilley*, 11-4; *Edmonds v. Cochran*, 12 488; *Zapple v. Rush*, 23-99; *Singer v. Cavers*, 26-178.

Judgment against plaintiff on demurrer to one count of the petition should not be entered while an issue upon a plea to another count remains undetermined: *Roberts v. Albright*, 2 G. Gr., 120.

Where a petition is not separated into divisions, but contains several causes of action, a demurrer may be sustained to one of them: *Burhans v. Squires*, 75-59.

A demurrer to the whole of an answer, some parts of which are good, should be overruled: *Bonney v. Bonney*, 29-448.

A demurrer to the whole answer should not be sustained where the answer contains a general denial: *Sample v. Griffith*, 5-376.

It is error to sustain a demurrer to the whole of an answer when a material issue is presented therein by an averment that defendant has not knowledge or information sufficient to form a belief as to an allegation of the petition: *McPhail v. Hyatt*, 29-137.

Where an entire answer is attacked by a demurrer, the demurrer should be overruled if the answer contains a defense to the action, although some one or more divisions therein are vulnerable to demurrer: *Holbert v. St. Louis, K. C. & N. R. Co.*, 38-315; *Johnson v. Tantlinger*, 31-500.

What admitted by demurrer: A demurrer only admits such facts to be true as are well pleaded: *Harkins v. Edwards*, 1-426; *Hartford Bank v. Green*, 11-476; *Scofield v. McDowell*, 47-129; *Bailey v. Landingham*, 52-415.

A demurrer does not admit conclusions. In determining what is admitted all the pleadings should be considered: *State ex rel. v. Nichols*, 78-747; *Bogaard v. Independent Dist.*, 93-269.

A demurrer admits facts well pleaded in the pleading attacked, but not conclusions of law stated therein: *Games v. Robb*, 8-193; *Lyon v. O'Kell*, 14-233; *Smith v. Henry County*, 15-385; *Freeman v. Hart*, 61-525.

One of the offices of the demurrer is to inquire whether the matter is well pleaded or can be pleaded, and it therefore raises the question whether the opposite pleader may, under the rules of evidence, prove the facts which he has pleaded: *Harkins v. Edwards*, 1-426.

Where a demurrer is interposed to the petition on an account, on the ground that no copy thereof is set out or attached, and is

overruled, the defendant should not be held as admitting the averments of the petition, and, on failure to answer, plaintiff's claim should be established by evidence as on default: *Buehler v. Reed*, 11–182.

An averment as to the non-existence of evidence of a fact or of a conclusion of law is not admitted by demurrer: *Iowa R. Land Co. v. Sac County*, 39–124, 132.

A fact which is judicially known to the court is to be regarded as a matter of law, and cannot be pleaded. A contradiction or denial of such fact cannot, therefore, be well pleaded, and is not admitted by demurring to the pleading containing such contradiction or denial: *Cooke v. Tallman*, 40–133.

A demurrer does not confess an allegation which it appears from the face of the pleading that the pleader is estopped to make. Thus a party having, in an answer, admitted the execution of a tax deed and also alleged its invalidity for want of advertisement of the sale, *held*, that as the deed was conclusive as to the regularity of the sale in this respect, the allegation of invalidity for want of advertisement was not admitted by demurrer to the answer: *Scofield v. McDowell*, 47–129.

In an action to compel the collection of a tax voted in aid of a railroad upon certain conditions, *held*, that an averment that due proof had been made as to compliance with the conditions was an averment of fact, and was confessed by the demurrer to the petition: *Burlington, C. R. & M. R. Co. v. Stewart*, 39–267.

Where a petition, based upon certain certificates, alleged that they were in due form of law, but the certificates were also set out, *held*, that a demurrer on the ground that they did not contain conditions required by law did not admit the averment that they were in due form: *Minnesota & I. S. R. Co., v. Hiams*, 53–501.

In passing upon a demurrer the court will not look to prior or subsequent pleadings for facts admitted nor consider facts not pleaded or admitted. The facts alleged in the pleading alone are to be deemed admitted for the purpose of its consideration: *Johns v. Bailey*, 45–241.

Amendment: A demurrer may be amended: *Morrison v. Miller*, 46–84; *Poweshiek County v. Cass County*, 63–244.

Demurrer relating back: The common-law rule that the demurrer relates back to the first defective pleading is not applicable under the Code, and if the objection to the first defective pleading is not raised by the opposite party, it is no ground for holding such pleading bad when a demurrer is afterward interposed to the pleading of the opposite party: *Gano v. Gilruth*, 4 G. Gr., 453.

But under the common-law practice where defendant filed a defective pleading, and plaintiff a replication to which defendant demurred, *held*, that although the replication was defective, the court would go back to the first error committed and render judgment in favor of plaintiff on the ground that the demurrer would relate back to the first mistake in pleading: *Wile v. Matherson*, 2 G. Gr., 184.

Withdrawal of pleading in order to demur: It is a matter within the sound discretion of the court to allow the withdrawal of a pleading and the filing of a demurrer to the previous pleading instead, and such discretion is not reviewable unless shown to have been abused: *Dubuque County v. Reynolds*, 41–454; *Byington v. Stone*, 51–317.

Second demurrer: A second demurrer to the same pleading is not allowable: See § 3551.

A demurrer is waived by interposing a second demurrer whilst the first is undisposed of: *District T'p v. District T'p*, 44–512.

Or by filing an answer: *Fisher v. Scholte*, 30–221.

Or by going to trial on an issue of fact: *Porter v. Lane*, Mor., 197; *Daugherty v. Bridgman*, Mor., 295.

Change of ruling on demurrer: Where a pleading was held bad on demurrer, and an amendment was filed setting up substantially the same allegation, and a motion was made to strike such amendment from the files, *held*, that the court in passing upon such motion might change its ruling as to the demurrer, and refuse to strike the amendment from the files: *Jenkins v Shields*, 36–526.

The court is not concluded in the subsequent stages of the case by rulings made upon a demurrer, but may and should change such rulings if satisfied of its error. If thereby a party is taken by surprise, some order should be made which will fully protect his rights: *Norton v. Knapp*, 64–112.

A ruling upon demurrer is not conclusive upon the court as to the same question arising subsequently in the case: *Richman v. Supervisors of Muscatine County*, 77–513; *Brown v. Cunningham*, 82–512. And see notes to §§ 243 and 3563.

Other pleadings: Where a substituted pleading is filed the original cannot be considered in ruling on a demurrer attacking the substitute: *State v. Simpkins*, 77–676.

Misjoinder: The fact that persons are joined with plaintiff who have no interest in the action is not a ground of demurrer: *Grayson v. Willoughby*, 78–83.

As to the effect of a ruling on demurrer, and as to waiver thereof, see § 3564, and notes.

SEC. **3562. How specific.** A demurrer must specify and number the grounds of objection to the pleading; and it shall not be sufficient to state the objection in the terms of the preceding section, except that a demurrer to an equitable petition, for the fifth reason of said section, may be stated in the terms thereof. [C.'73, § 2649; R., § 2877; C.'51, § 1754.]

How specific: The general demurrer is abolished: *Davenport Gas, etc., Co. v. Davenport*, 15–6.

A demurrer not distinctly stating the grounds on which it is based should not be regarded: *Jones v. Brunskill*, 18–129.

In demurrers and motions the true ground of objection should be distinctly stated in order that the party shall be advised what specific defect is aimed at: *Danforth v. Carter*, 1-546.

A party will not be allowed to state one ground of demurrer, and argue and obtain judgment upon another: *Middleton Savings Bank v. Dubuque*, 15-394.

And an objection not pointed out cannot be raised thereunder: *Allen v. Cerro Gordo County*, 34-54.

Under a demurrer on the ground that the facts stated in the answer do not constitute a defense, the objection that the facts stated are not well pleaded cannot be raised: *Traders' Bank v. Alsop*, 64-97.

It is no part of the office of a demurrer to contain an argument or anything other than just such matter as shall call the attention of the opposite party clearly to the specific points made by it. A pleader is not required to give the reason which has led his mind to the conclusion that the pleading attacked is objectionable in the matters pointed out: *Davenport Gas, etc., Co. v. Davenport*, 15-6.

In law actions: A demurrer must specifically point out the ground upon which it is founded: *Babbitt v. Walters*, 3 G. Gr., 564; *Traders' Bank v. Alsop*, 64-97.

As an action of *mandamus* is an action at law, a demurrer to the petition must specify the grounds of objection: *District T'p v. Independent Dist.*, 72-687.

A demurrer in an action at law that the matters stated in the petition are not sufficient to constitute a cause of action or to entitle plaintiff to recover is not sufficiently specific and should be disregarded: *Crouch v. Crouch*, 9-269; *Singer v. Cavers*, 26-178; *McLaughlin v. Bascomb*, 36-593; *Davidson v. Biggs*, 61-309.

In a demurrer in a law action to an answer purporting to be equitable it is sufficient to allege as ground thereof that the facts therein stated do not constitute any defense: *Reed v. Lane*, 65 N. W., 380.

Demurrers in particular cases, *held* too general or indefinite: *McKellar v. Stout*, 13-487; *McGregor & S. C. R. Co. v. Birdsall*, 30-255; *Childs v. Limback*, 30-398.

A demurrer to a petition based upon certificates of clerks of election as to the voting of a railroad aid tax, on the ground that they contained no conditions upon which said tax was claimed to have been voted, the statute requiring such conditions to be incorporated into such certificates, *held* sufficiently specific: *Minnesota & I. S. R. Co. v. Hiams*, 53-501.

Where by stipulation of the parties a demurrer had been recognized as raising an issue in the case, *held*, that the objection to such demurrer, that it was not in proper form, could not be taken advantage of: *Updegraft v. Edwards*, 45-513.

Statement of grounds of demurrer in a particular case, *held* sufficient: *Davenport v. Whisler*, 46-287.

In equity: In determining a demurrer to a petition in equity setting up the objection that the petition does not show that the plaintiff is entitled to any equitable relief, the question is not whether plaintiff is entitled to all the relief asked for in the prayer of the petition, but whether he is entitled to any relief in equity, conceding the facts set forth in the petition to be true: *Peters v. Phillips*, 63-550.

While a general demurrer may be interposed to a petition in equity, yet if the party undertakes to specify grounds of demurrer he will be confined to those designated and cannot raise others which might have been taken advantage of under a general demurrer: *Allen v. Cerro Gordo County*, 34-54; *Bisson v Curry*, 35-72.

A demurrer in an equitable action may be both general and special, and if the general ground is substantially stated and well taken, it is sufficient although the special ground alleged be not sufficient: *Cowen v. Boone*, 48-350.

A general demurrer to a bill that it is without equity reaches matters of substance only and not defects which are merely formal: *Hoskins v. Hattenback*, 14-314.

Under a general demurrer in an equitable action, the right of plaintiff to maintain the action as a proper party may be raised: *Hanna v. Hawes*, 45-437.

If any of the cases mentioned as ground of demurrer except the general ground specified in ¶ 5 of the preceding section are intended to be relied on, they should be specified in an equitable action with the same certainty and precision as in a law action or they will be disregarded: *Ibid.*

Where a proceeding has, without objection, been treated as in equity, and a general demurrer to the petition has been sustained, such ruling will not be reversed in the supreme court on the ground that the action was not properly in equity, and the demurrer should have been specific: *Hintrager v. Sumbargo*, 54-604.

SEC. 3563. Objection raised by answer—arrest of judgment. When any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer. If the facts stated by the petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment is entered. [C.'73, § 2650; R., § 2878.]

[The cases cited under this section as to the effect of failure to demur were all decided prior to, or at least without reference to the provisions of 25 G. A., ch. 96, embodied in the next section, and those provisions must now be taken into account in applying the rules announced in these cases.]

Objections not properly raised by motion, demurrer or otherwise must be deemed waived: *Murphy v. Creighton*, 45-179, 183; *Hanks v. North*, 58-396; *Wendall v. Osborne*, 63-99; *Linden v. Green*, 81-365.

An objection to the pleadings not taken before trial nor by motion in arrest of judg-

ment is deemed waived: *Great Western Printing Co. v. Tucker*, 73-755.

When the grounds of the objection appear on the face of the petition it cannot be made by answer. The meaning of the section is that if the objection be not taken by demurrer when that is the proper mode, or by answer when that is proper, it is waived, and in either event the objection cannot be raised by motion for a new trial. Such motion cannot be deemed equivalent to a motion in arrest of judgment: *Linden v. Green*, 81-365.

Ground of demurrer or motion waived: Defendant by taking issue upon the allegations of the petition thereby admits that they constitute a cause of action, and cannot therefore insist that plaintiff shall prove facts outside of the record in order to make out his cause of action: *Frentress v. Mobley*, 10-450; *Sutherland v. Standard L. etc., Ins. Co.*, 87-505.

A judgment based upon an answer setting up the statute of limitations will not be set aside as erroneous on the ground that the question might and should have been raised by demurrer; that objection to the answer must be raised at the proper time: *Brenneman v. Edwards*, 55-374.

A demurrer to an amended petition presenting all the grounds of objection in a previous demurrer to the original petition, *held* to be a waiver of the original demurrer: *District T'p v. District Tp*, 44-512.

Objections raised by demurrer not showing want of jurisdiction are waived by joining issue and going to trial upon the merits: *Stiles v. Brown*, 3 G. Gr., 589.

An objection which might have been raised by demurrer cannot be first urged by a motion for judgment where the evidence shows the existence of a fact not pleaded which would cure the objection: *Olson v. Neal*, 63-214.

The method of taking advantage of a question which goes to the cause of action as set out in the petition is by demurrer, motion in arrest, and perhaps also upon error duly assigned, but the advantage of such objection cannot be taken by motion for new trial: *Veach v. Thompson*, 15-380; *Egleston v. Brassfield*, 38-698; *Brockert v. Central Iowa R. Co.*, 82-369.

The objection that the petition fails to allege that the damage claimed was the result of the injury imputed to defendant cannot be raised where it is not made until after the trial: *Gray v. Bean*, 27-221.

If defendant both demur and answer to the same cause of action, his answer will be held as waiving his demurrer: *Fisher v. Scholte*, 30-221.

Where defects are apparent on the face of a pleading, if they are not assailed by demurrer they are waived: *Dunn v. Wolf*, 81-688.

A party who fails to demur to the petition cannot by allegations of the answer, not setting up defensive matter, put in issue the sufficiency of the petition: *Wing v. District T'p*, 82-632.

Where in an action to recover damages on an attachment bond it is not alleged that the damages are unpaid, but the case is tried on the question as to the liability under the bond, no objection having been made on account of failure to plead non-payment of damages, such objection will be deemed waived by not having presented it by demurrer: *Knapp & Spalding Co. v. Barnard*, 78-347.

An objection to a petition that it does not allege a material fact, which is not taken by demurrer or answer, is deemed waived: *Lynn v. Morse*, 76-665.

Where a petition on a contract for breach of promise of marriage was not attacked by demurrer, *held*, that the objection that it was void by reason of conditions contained in the contract appearing from the face of the petition could not be made the ground of objection to the admission of evidence: *McConahey v. Griffey*, 82-564.

Where the opposite party attacks a pleading by motion which is overruled, and then demurs thereto, the ground of the motion will be deemed waived, even though it is repeated in the demurrer, providing the motion was the proper method of raising the objection relied upon: *Nieukirk v. Nieukirk*, 84-367.

In an action for an injunction, the fact that the petition does not allege that the threatened injury is irreparable, nor that the defendant is insolvent, is waived by failing to demur on that account: *Price v. Baldauf*, 82-669.

Where the defect is apparent on the face of the petition the objection is to be taken by demurrer and not by answer. So *held* as to the objection that the contract sued upon is not in writing as required by the statute of frauds: *Wiseman v. Thompson*, 63 N.W., 346.

Objection to a petition for want of definiteness and exactness in statement of the cause of action is waived by failure to raise such objection upon motion or demurrer: *Miller v. Keokuk & D. M. R. Co.*, 63-680.

An objection which might have been raised by demurrer to the petition cannot be made the ground of motion to dismiss the action, but can only be raised by motion in arrest of judgment: *Draper v. Ellis*, 12-316.

Where the petition has not been assailed by motion or demurrer, defendant cannot object to the introduction of evidence thereunder merely on the ground that it is too general in its terms to admit of evidence being introduced: *Ruby v. Shee*, 51-422.

The fact that an allegation in a pleading is informal, if not taken advantage of by motion or demurrer, cannot be made the ground of objecting to the introduction of evidence thereunder: *Oliver v. Depew*, 14-490.

As a court may in the exercise of its discretion permit the withdrawal of an answer and filing of demurrer, it is not error to pass upon the questions raised by the demurrer after an answer has been filed: *Wilson v. McIntyre*, 73-713.

If matter pleaded as a defense is not attacked by motion or demurrer, and there is testimony to sustain it, it will defeat the action although it may not amount to a legal defense: *Benjamin v. Vieth*, 80-149, *First Nat.*

Bank v. Zeims, 93-140; *Weis v. Morris*, 71 N. W., 208.

Where the answer set up facts as constituting an estoppel, which facts were established by the evidence, *held*, that the effect of such defense could not be defeated on the ground that the facts did not constitute an estoppel, the sufficiency of such facts in law for that purpose not having been raised by demurrer nor by motion in arrest of judgment: *Arndt v. Hasford*, 82-499.

After the filing of a reply by plaintiff the sufficiency of the facts pleaded by defendant as a defense cannot properly be raised: *Carson, etc., Co. v. Knapp, etc., Co.*, 80-617.

Where defendant's answer setting up a mistake in the contract sued on as a defense is not demurred to but issue is taken thereon, the insufficiency of the defense will not be a ground for reviewing the judgment in favor of defendant where the evidence establishes the facts set up in such answer. Any objection to the sufficiency of the defense set up in the answer must be raised by demurrer or it will be deemed waived: *Martin v. Widner*, 91-459.

In general any defect appearing on the face of a pleading and not raised at the time and in the method provided for raising such objection, is to be deemed waived: *Daugherty v. Chicago, M. & St. P. R. Co.*, 87-276; *Manwell v. Burlington, C. R. & N. R. Co.*, 89-708; *Fulmer v. Mahaska County*, 92-20; *Medland v. Walker*, 64 N.W., 797; *Clark v. Ross*, 65 N. W., 340; *Zundelowitz v. Webster*, 65 N.W., 835.

An objection which might be taken to a petition by way of demurrer is waived if not so taken and cannot be urged by way of answer: *Wing v. District T'p*, 82-632; *Wiseman v. Thompson*, 63 N.W., 346.

After an issue has been raised by answer the court does not go back to the original petition to see whether it states a cause of action. Such objection is waived by filing an answer: *Foley v. Hamilton*, 89-686.

Failure to rely upon defense in answer: Where a defense such as that of the statute of limitations is not set up in the answer, it cannot afterward be relied upon: *Robinson v. Allen*, 37-27.

Where a petition in equity to rescind a contract to convey real property does not show that any consideration has been paid, nor contain any offer to repay the consideration, defendant, if he desire to rely upon the failure of plaintiff to offer to pay the consideration received, must state the fact that the consideration was paid by way of defense in his answer, and the failure to do so will be regarded as waiving such defense: *Seymour v. Shea*, 62-708.

Misjoinder of parties is not a ground of demurrer. If not raised by motion it is waived, and cannot be afterwards raised, even in arrest of judgment: *Miller v. Keokuk & D. M. R. Co.*, 63-680.

Where misjoinder of parties does not appear on the face of the petition it is waived if not taken by answer: *McKeever v. Jenks*, 59-300.

Where plaintiff seeks to recover for a joint tort of defendants, who, by the evidence, appear not to be jointly liable, the objection may be taken by motion in arrest: *Cogswell v. Murphy*, 46-44.

So where two plaintiffs sued jointly for a cause existing in their favor severally, if at all, *held*, that a motion to dismiss was properly sustained: *Bort v. Yaw*, 46-323.

Defect of parties: Non-joinder of necessary parties should be raised by demurrer and cannot be first interposed by answer where the defect appears on the face of the petition: *Roop v. Seaton*, 4 G. Gr., 252; *McCormick v. Blossom*, 40-256; *Ryan v. Mullinix*, 45-631.

Defect of parties not appearing on the face of the petition and not raised by answer must be deemed waived; but in case of a defect of parties in a proceeding in equity where such defect was vital to the character of the petition and relief asked, *held*, that it might be first insisted on at the final hearing: *Swan v. Clark*, 36-560.

The fact that a necessary party is not served need not be set up in the answer, and is not waived by failure so to do: *Miller v. Mahaffy*, 45-289.

Defect of parties not taken advantage of by demurrer, answer or motion in arrest of judgment will be deemed waived: *Melick v. First Nat. Bank*, 52-94.

Objection to evidence cannot properly be made on account of defect in the pleading which might have been raised by demurrer: *Fairbairn v. Haislet*, 90-143; *Van Sickle v. Keith*, 88-9; *Conger v. Crabtree*, 88-536.

Instructions: It is not proper by instructions to raise objections which might have been raised by motion or demurrer, but which have been waived by failure to make such objection: *Wimer v. Allbaugh*, 78-79.

By failing to take advantage of grounds of demurrer to the petition, the defendant waives objection thereto, and is not entitled to have the court direct a verdict for him on such grounds: *Dodge v. Davis*, 85-77; *Fulmer v. Mahaska County*, 92-20.

See also notes to § 3705.

Motion in arrest is the proper method of raising an objection to a petition which is defective in substance, and not as matter of form only: *Edgerly v. Farmers' Ins. Co.*, 43-587; *Hahn v. Wickham*, 55-545.

Where the petition states facts sufficient to entitle plaintiff to some relief the question whether it is sufficiently specific must be raised by motion for more specific statement, otherwise it is waived, and cannot be raised by motion in arrest: *District T'p v. Board of Directors*, 52-287.

If the motion in arrest is not made in the trial court it cannot be taken advantage of on appeal: *Smith v. Warren County*, 49-336; *Melick v. First Nat. Bank*, 52-94.

A motion in arrest of judgment is provided where the facts stated in the petition do not entitle the plaintiff to any relief. If there is a lack of evidence to sustain a verdict defendant's remedy is to move for a new trial: *Kirk v. Litterst*, 71-71.

The waiver involved in pleading over does not apply as to an objection raised by a motion in arrest of judgment: *Pardey v. Mechanicsville*, 70 N. W., 189.

An objection which may be taken by a

motion in arrest of judgment is not waived by not urging it earlier in the proceeding: *Woodcock v. Hawkeye*, 66 N. W., 764.

The fact that the special findings are inconsistent with the general verdict is not a ground for motion in arrest of judgment: *Moffitt v. Albert*, 66 N. W., 162.

In an action to recover for negligently causing personal injury such for instance as the negligence of a druggist in giving to a customer an injurious substance in lieu of proper medicine, it is necessary to aver freedom of plaintiff from contributory negligence and in the absence of such averment a verdict for the plaintiff should be set aside on motion in arrest of judgment: *Rabe v. Sommerbeck*,,63 N. W., 458.

Where an action on a policy of insurance is brought within ninety days after the loss (contrary to provisions of § 1744) the objection may be taken by motion in arrest: *Woodcock v. Hawkeye Ins. Co.*, 66 N. W., 764.

A correct test of the sufficiency of the petition to entitle plaintiff to any relief is to admit the facts pleaded, and to determine the law applicable thereto, and the want of an allegation, which if made would only make the petition more specific, will not be ground for arresting judgment: *O'Connor v. Illinois Cent. R. Co.*, 83-105.

The fact that allowance has been made of a claim pleaded as a counter-claim, but which, while constituting a cause of action in favor of defendant against plaintiff, could not properly be set up as a counter-claim, cannot be made a ground for an arrest of judgment, where no objections were made before the trial: *Mitchell v. Joyce*, 76-449.

If the allegations of the petition are supported by proof, but nevertheless do not constitute a cause of action, the court may instruct the jury that the plaintiff cannot recover. It is not the rule that when a demurrer has been overruled and defendant has answered, judgment must be rendered for plaintiff, if the proof sustains the allegations of his petition, even though no legal liability is shown: *Brown v. Cunningham*, 82-512.

Where the facts stated in the petition entitle the plaintiff to some relief, a motion in arrest of judgment will not lie: *Johnson v. Miller*, 82-693.

Defect in the verification of a pleading cannot be made a ground for an arrest of judgment: *Turner v. Younker*, 76-255.

As to amending to cure defect raised by motion in arrest, see notes to § 3760.

Objections not to be first raised on appeal: An objection which might have been raised in the lower court by demurrer or motion in arrest of judgment cannot first be raised on appeal: *Garland v. Wholebau*, 20-271; *Savings Bank v. Horn*, 41-55; *Church v. Higham*, 44-482.

Where defendant answered the petition, went to trial and introduced his evidence, and did not attack the sufficiency of the petition either before or after the verdict, *held*, that he could not object to it upon appeal: *Martyn v. Lamar*, 75-235.

In order to have the ruling on a demurrer reviewed upon appeal, it is not sufficient to note a general exception at the end of the decree to all of the rulings set out in the decree, but the party excepting must have the record show an election to stand on the demurrer: *Stanbrough v. Daniels*, 77-561.

Where the petition in an action for fraud does not allege that the party knew the statements constituting the fraud, and without objection on that ground the defendant proceeds to trial, he cannot afterwards raise such objection for the first time on appeal: *Mann v. Taylor*, 78-355.

And see notes to § 4105.

Objections not deemed waived: Where the facts stated in the petition do not entitle plaintiff to any relief, although no demurrer on that ground is interposed, the court may instruct the jury to find for defendant: *Seaton v. Hinneman*, 50-395; *Smith v. Burlington, C. R. & N. R. Co.*, 59-73.

Where, after a verdict for defendant, plaintiff moved to set aside the verdict and for a new trial on the ground of error in the admission of evidence, and the court overruled such motion, *held*, that as plaintiff's petition was not sufficient to show a cause of action the decision of the court below would not be reversed, although the defects in the petition had not been raised by demurrer: *Wetmore v. Mellinger*, 64-741.

If upon a trial evidence is offered in support of what the party deems an immaterial averment such evidence may be objected to by the opposite party, and if the court deems the averment irrelevant the evidence will be excluded: *Specht v. Spangenberg*,70-488.

Waiver of objection on the ground that an issue is not involved in the case under the pleadings will not arise from the fact that evidence is allowed to be introduced without objection, which might bear upon such issue if it were involved in the case, but which is applicable to issues arising under the pleadings as they stand: *Eikenberry v. Edwards*, 67-14.

A ruling on demurrer does not preclude the court from afterwards determining the sufficiency of the petition at the close of plaintiff's evidence: *McClain v. Capper*, 67 N. W., 102.

Want of jurisdiction of the person or subject matter appearing on the face of a petition may be raised by demurrer and if not so appearing it may be set out in the answer, but if the objection is not so taken it is not to be deemed waived: *Corey v. Sherman*, 64 N. W., 828.

The doctrine of waiver of defects in the pleadings by failure to demur thereto does not apply to the indictment in a criminal case: *State v. Daniels*, 90-491.

Ruling not conclusive: The court may change his ruling on a question of law during a trial and is not bound during the subsequent stages of the case by the view announced in deciding the demurrer: *Tyler v. Coulthard*, 64 N. W., 681; *Bibbins v. Polk County*, 69 N. W., 1007.

And see notes to §§ 243 and 3561.

Defects cured by verdict: A defect in a petition that might have been assailed by motion or demurrer is cured by the verdict: *Crossen v. White*, 19-109.

Where a defect in a petition which might

be raised by demurrer is not thus attacked, and defendant succeeds on the trial, he cannot, upon appeal by plaintiff, insist that on account of such defect plaintiff was not entitled to recover: *Kendig v. Overhulser*, 58–195.

A defect, whether of substance or form, which would have been fatal on demurrer, will not be fatal after verdict if the issue joined is such as necessarily required proof of the facts defectively stated or omitted in the pleading, and without which it is not presumed either that the judge would have directed the jury to give, or the jury would have given, a verdict: *Cotes v. Davenport*, 9–227.

Going to trial waives objections not raised: Where the evidence is sufficient to support the judgment, it will not be reversed by reason of a mere irregularity in the pleadings as to the manner in which the issues are made. which was not raised in the proper manner: *Union Nat. Bank v. Barber*, 56–559.

Where allegations of a petition are not denied, and the parties proceed to trial on the theory that such allegations are admitted, the opposite party is estopped from afterwards objecting thereto: *First Nat. Bank v. Warrington*, 40–528.

Motions, demurrers or pleas undisposed of: By consenting to go to trial on an issue of fact, defendant waives any demurrer remaining undisposed of: *Porter v. Lane*, Mor., 197; *Daugherty v. Bridgman*, Mor., 295.

So *held*, also, as to a plea on file not disposed of: *Starr v. Wilson*, Mor., 438; *Cook v. Steuben County Bank*, 1 G. Gr., 447.

Where it appears that a motion filed was never called to the attention of the court nor any ruling made upon it, it will be presumed that it was waived: *Guest v. Byington*, 14–30.

Withdrawal of answer: The court may in its discretion, permit the defendant to withdraw his answer and file a motion to strike a pleading of plaintiff's from the file: *Bowman v. Chicago, St. P. & K. C. R. Co.*, 86–490.

SEC. **3564. Demurrer to one of several causes—effect of demurrer and ruling.** The defendant may demur to one or more of the several causes of action alleged in the petition, and answer as to the residue. A demurrer shall be considered as an admission of the allegations of the pleading demurred to for the purposes of demurrer, and for such purposes only; and when a demurrer shall be overruled and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer; and in such case the sufficiency of the pleading thus attacked shall be determined as if no demurrer had been filed. No pleading shall be held sufficient on account of a failure to demur thereto. [25 G. A., ch. 96; C.'73, § 2651; R., § 2879; C.'51, § 1738.]

The provisions of 25 G. A., ch. 96, incorporated into this section, are applicable to a trial on the merits although a demurrer has been ruled on prior to the taking effect of the statute: *Bibbins v. Polk County*, 69 N. W., 1007. But they are not applicable to a trial had before the act took effect: *Barrett v. Northwestern Mut. L. Ins. Co.*, 68 N. W., 906; *Littleton v. People's Bank*, 63 N. W., 666; *Long v. Millett*, 63 N. W., 190.

Such provision does not change the rule in cases where a demurrer is sustained and a party who amends his pleading can not complain on appeal of the action of the court in sustaining a demurrer to such pleading: *Krause v. Lloyd*, 69 N. W., 1062. (See notes to next section.) Nor do they enable a party to present in the supreme court questions which were not presented to the court below: *Boyd v. Watson*, 70 N. W., 120; *Weis v. Morris*, 71 N. W., 208.

The provisions of 25 G. A., ch. 96 applied: *Pardey v. Mechanicsville*, 70 N. W., 189.

SEC. **3565. Joinder in demurrer—answering, amending or pleading over.** The opposite party shall be deemed to join in a demurrer whenever he shall not amend the pleading to which it is addressed. Upon a demurrer being overruled, the party demurring may answer or reply. Upon a decision of a demurrer, if the adverse party fail to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff or the defendant had made default, as the case may be. [C.'73, §§ 2652–4; R., §§ 2900, 2976, 3086; C.'51, §§ 1755, 1771.]

Right to amend or plead: The party demurring has a right, after the overruling of his demurrer, to plead over: *Hillis v. Ryan*, 4 G. Gr., 78.

The overruling of a demurrer to the answer does not, when issue is joined, conclude plaintiff from showing the true rights of the respective parties: *Standish v. Dow*, 21–363.

If the party to whose pleading a demurrer is sustained does not ask leave to amend, but excepts to the ruling, judgment may be entered as for want of a pleading: *Bridge v. Livingston*, 11–57.

Judgment: If defendant stands upon his demurrer the court may properly render judgment as upon a finding of the facts alleged in the petition: *Brown v. Mallory*, 26–469.

But judgment should not be rendered against a defendant standing on his demurrer to plaintiff's petition, without plaintiff proving up his claim as required in other default cases: *Musser v. Hobart*, 14–248; *Buehler v. Reed*, 11–182.

Where it appears from the record that judgment against the party is entered upon the overruling of his demurrer for failure to

plead further, it will not be considered a judgment on the merits, even though it recites that it was rendered upon the hearing of evidence and an inspection of the pleading: *Conner v. Long*, 63-295.

A judgment upon demurrer is a bar to any other action upon the facts, the sufficiency of which was put in issue by such demurrer: *Felt v. Turnure*, 48-397.

Where a party excepts to an order overruling his demurrer and judgment is entered against him, and on appeal the action of the court is affirmed, the judgment is final and he cannot have the cause remanded in order that he may plead: *Grimes v. Hamilton County*, 37-290.

Where plaintiff's demurrer to a portion of defendant's answer, which would, if sufficient, constitute a complete defense, is overruled and plaintiff elects to stand on such demurrer, he may appeal from the ruling thereon, and is not required to proceed to trial on the other defenses set up in the answer: *Wallace v. Council Bluffs Ins. Co.*, 66-139.

Where a party stands on his demurrer, and appeals from the judgment overruling it, judgment should be rendered against him, and on affirmance of the judgment on appeal he cannot be permitted to withdraw his demurrer and proceed to trial on the merits: *Dunlap v. Cody*, 31-260.

Upon failure of defendant to answer after the overruling of his demurrer to the petition, judgment should be rendered in plaintiff's favor without evidence except as to the allegations of value or amount of damages: *Minear v. Hogg*, 63 N. W., 444.

The overruling of a demurrer and failure of the party demurring to stand thereon does not constitute an adjudication as to the sufficiency of one of the grounds on which relief is sought inasmuch as the overruling of the demurrer must be based on the entire cause of action set out by the opposite party: *Long v. Millett*, 63 N. W., 190.

Standing upon the pleading or demurrer: If a party desires to have the decision upon a demurrer against him reviewed on appeal he must suffer judgment to be rendered against him on the demurrer: *Plummer v. Roads*, 4-587.

Upon the overruling of a party's demurrer he may either stand thereon and have a review of the ruling of the court on the appeal, or he may plead over, thereby waiving his right to appeal, or in case no further pleading on his part is necessary to raise issue, he may waive the issue on the demurrer by proceeding to the trial of the cause. By insisting on judgment for want of a pleading or refusal to proceed with the trial, the adverse party may require the unsuccessful party to either stand upon his demurrer or waive it, and if the latter elects to stand upon his demurrer, judgment may be rendered against him, which may be final in case the decision of the court is affirmed on appeal. But if no such judgment is entered, the affirmance upon appeal will not debar the unsuccessful party from pleading over or proceeding with the trial, as the case may be: *Tyler v. Langworthy*, 37-555.

In cases where no reply to an answer is necessary, the party demurring thereto, whose demurrer has been overruled, if he elects to stand thereon, must so state, and have the fact shown of record. A mere exception to the ruling will not be sufficient: *Wilcox v. McCune*, 21-294.

When a demurrer is overruled the party demurring has his election to stand on it or plead over; he may move the court to plead over and proceed to trial on the merits. But if he fails to do this the court is justified in presuming that he stands upon his demurrer, and may render judgment against him for failure to plead in proper time: *Cameron v. Boyle*, 2 G. Gr., 154.

Failure of the unsuccessful party to amend or plead over, after the ruling upon a demurrer, subjects him to the consequences of an adverse verdict if plaintiff, or a default if defendant: *Grimes v. Hamilton County*, 37-290; *Bridge v. Livingston*, 11-57.

Plaintiff by electing to stand on his petition as against a ruling sustaining a demurrer does not thereby waive a cause of action set out in an amendment to the pleading filed after the filing of the demurrer: *Kelley v. Chicago, M. & St. P. R. Co.*, 93-436.

Where a ruling on a demurrer was made on the last day of a term of court, and the exception then taken, *held* that there was no abuse of discretion upon the part of the trial court in permitting the party to have until the next term of court in which to elect whether or no the would stand on his petition or plead further: *Nelson v. Hamilton County*, 71 N. W., 206.

Error in ruling on motion waived: Error in overruling a motion to strike is waived by demurring to the same pleading, and error in overruling the demurrer is waived by answer or reply. A party who has thus waived his legal objections to the pleading cannot complain that the court refused to consider the same objections by way of instructions to the jury: *Wyland v. Griffith*, 64 N. W., 673.

Where a motion to make a petition more specific is overruled and defendant answers, he thereby waives any error in overruling the motion: *Randolf v. Bloomfield*, 77-50; *Ida County v. Woods*, 79-148; *Manatt v. Shaver*, 67 N. W., 264.

Where a motion to strike irrelevant and redundant matter from a petition is overruled, the defendant, by proceeding to trial, does not thereby waive his right to object to such matter on the trial as surplusage, and the overruling of such motion will therefore be error without prejudice: *Ida County v. Woods*, 79-148.

Any error in motions to strike a petition from the files or to strike out parts thereof, or make the same more specific, is waived by answering and going to trial: *Mann v. Taylor*, 78-355.

Where a party sought to maintain a right to recover in law, and also to recover in equity in the same action, and his petition in equity was on motion stricken out, *held*, that by proceeding to trial on the petition at law, he waived objection to the action of the court with reference to the other petition: *National State Bank v. Delahaye*, 82-34.

Objection to the action of the court in

sustaining a motion to require separation of actions as against different defendants is waived by filing separate petitions against such defendants under the provisions of § 3549: *Weaver v. Stacy*, 62 N. W., 222.

The filing of a demurrer waives any error in overruling a motion to strike or to require a more specific statement: *Stineman v. Beath*, 36-73; *Baldwin v. Dougherty*, 39-50.

Amending: By amending his pleading after a demurrer thereto has been sustained, a party waives any objection which he may have to the ruling on the demurrer and cannot urge such objection on appeal: *Taylor v. Galland*, 3 G. Gr., 17; *Ford v. Jefferson County*, 4 G. Gr., 273; *Duncan v. Hobart*, 8-337; *Rees v. Leech*, 10-439; *Franklin v. Twogood*, 18-515; *Smith v. Cedar Falls & M. R. Co.*, 30-244; *Melhop v. Doane*, 31-397; *Philips v. Hosford*, 35-593. *Muscatine v. Keokuk N. L. Packet Co.*, 47-350; *Lane v. Burlington & S. W. R. Co.*, 52-18; *Bixby v. Blair*, 56-416; *Brown v. McMahon*, 80-191; *Scholl v. Bradstreet*, 85-551; *Krause v. Lloyd*, 69 N.W., 1062.

Where a party does not stand upon his pleading but after it has been held insufficient on demurrer files a new pleading he cannot question the correctness of the ruling on the demurrer: *Barrett v. Northwestern Mut. L. Ins. Co.*, 68 N.W., 906.

The rule that the filing of an amended pleading waives any error in sustaining a demurrer to such pleading is only applicable where the party, by pleading over, supplies omissions or cures defects in his pleading pointed out by the demurrer. Therefore, the filing of an amendment to an answer setting up a new defense does not waive error in sustaining a demurrer to the defense set up in the original answer: *Ingham v. Dudley*, 60-16.

Where one division of an answer sets out a counter-claim, and a demurrer to that division as well as another portion of the answer is sustained, an amendment as to the other portion will not waive error in the ruling as to the counter-claim: *Folsom v. Winch*, 63-477.

Any error in sustaining a motion striking out a portion of the pleading is waived by filing an amendment to such pleading: *Marker v. Dunn*, 68-720.

This section does not provide when and how the amendment may be made to prevent judgment following upon the ruling on the demurrer. That is a matter within the discretion of the court: *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed., 7.

Pleading: By answering, defendant waives any objection he may have to the overruling of his motion attacking the petition: *Rea v. Flathers*, 31-545; *Benedict v. Hunt*, 32-27; *Coakley v. McCarty*, 34-105; *Clary v. Iowa Midland R. Co.*, 37-344; *Shugart v. Pattee*, 37-422; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656; *Wattels v. Minchen*, 93-517.

By pleading over, that is, filing an answer or reply, a party waives any objection which he might have to the overruling of his demurrer to the pleading filed by the adverse party: *Moore v. Ross*, Mor., 401; *Steamboat Kentucky v. Brooks*, 1 G. Gr., 398; *Baldwin v. Winn*, 3 G. Gr., 180; *Ford v. Jefferson County*, 4 G. Gr., 273; *Harmon v. Chandler*, 3-150; *Mitchell v. Wiscotta Land Co.*, 3-209; *Ayres v. Campbell*, 3-582; *Abbott v. Striblen*, 6-191; *Paukett v. Livermore*, 5-277; *Cameron v. Armstrong*, 8-212; *Wilcox v. McCune*, 21-294; *Walker v. Kynett*, 32-524; *Coakley v. McCarty*, 34-105; *Conner v. District Tp*, 35-375; *State v. Tieman*, 39-474; *Jones v. Marcy*, 49-188; *Westphal v. Henney*, 49-542; *Smith v. Warren County*, 49-336; *Gray v. Lake*, 55-156; *Smith v. Powell*, 55-215; *Tootle v. Phœnix Ins. Co.*, 62-362; *Allen v. Pratt*, 79-113; *Manwell v. Burlington, C. R. & N. R. Co.*, 89-708; *Asbach v. Chicago, B. & Q. R. Co.*, 86-101.

The overruling of a demurrer to a petition is waived by answering over, and the question cannot again be raised unless renewed by a motion in arrest: *Mahaska County v. Ingalls*, 14-170.

However, all substantial objections can be reached by instructions asked or by rulings on the evidence or by motion in arrest of judgment: *Williams v. Soutter*, 7-435.

If the court could not under any circumstances have jurisdiction over the subject-matter of the action, its error in overruling a demurrer would not be waived by pleading over. But where, the general jurisdiction of the court not being questioned, it is claimed that a certain fact is pleaded or exists which if true would oust it of jurisdiction, any error of the court in deciding such claim must be preserved and shown of record like any other error: *Roland v. Brock*, 29-284.

Although the demurrer raises a question not raised by the answer, yet the filing of the answer will waive any objection to the ruling on the demurrer: *Westphal v. Henney*, 49-542.

The fact that the defendant, after excepting to the overruling of his demurrer, files an answer which is withdrawn before the case comes on for trial, does not constitute a waiver of error in the overruling of his demurrer. The withdrawal of the answer restores the parties to the position they were in before the answer was filed: *Jordan v. Kavanaugh*, 63-152.

A demurrer to the answer having been sustained and the defendant having elected to stand thereon and prepare his bill of exceptions, the plaintiff asked to withdraw his demurrer, but the defendant objected and was sustained; *held*, that the defendant waived his exception to the error in sustaining the demurrer and was estopped from availing himself of it: *Anson v. Dwight*, 18-241.

Where defendant, upon the overruling of his demurrer, took time to answer, but no answer was filed, and judgment went against him by default, *held*, that he did not waive objection to the ruling on demurrer: *Watts v. Everett*, 47-269.

A plaintiff who files a replication to an amended answer thereby waives any objection he might have made to the right of defendant to file such amended answer: *Phœnix Ins. Co. v. Dankwardt*, 47-432.

The filing of an answer to an amended petition which has been improperly filed, and proceeding to trial on an issue thus raised, will waive any error in the filing of the amended petition: *Pumphery v Walker*, 71-383.

Where, after the sustaining of defendant's

demurrer, he waives the advantage thereof and answers, the plaintiff cannot afterwards on appeal complain of the ruling on the demurrer: *Eubank v. Whittaker*, 11–197.

By filing a reply and going to trial on the issues thus formed plaintiff waives any objection he may have to the overruling of his demurrer to answer: *Shroeder v. Webster*, 88–627.

Going to trial: Objections raised by demurrer not showing want of jurisdiction are waived by joining issue and going to trial on the merits: *Stiles v. Brown*, 3 G. Gr., 589.

Where one of the several pleas was demurred to and the demurrer sustained without exception of defendant, who went to trial on the other issues, and judgment was rendered against him, *held*, that he could not complain of the action of the court in sustaining the demurrer to the plea: *Eastman v. English*, 14–95.

By going to trial and resting his defense upon remaining pleas, *held*, that defendant waived any objection in sustaining a demurrer to other pleas filed by him: *Swafford v. Whipple*, 3 G. Gr., 261.

Where a party relied upon and went to trial upon a plea, *held*, that it would be presumed that a previous plea was waived, or that objection to the ruling of the court in rejecting such plea was abandoned: *Cook v. Steuben County Bank*, 1 G. Gr., 447.

Where a party did not stand upon his plea which was overruled, but went to trial upon the general issue, *held*, that he thereby waived any error in the overruling of the plea: *Hotchkiss v. Thompson*, Mor., 156.

Error in overruling a demurrer to an answer is waived by consenting to go to trial on the issues: *Finley v. Brown*, 22–538; *Warren v. Scott*, 32–22.

Motion for new trial which is granted waives objection to the overruling of a motion to direct the jury to find a verdict for defendant: *Laverenz v. Chicago, R. I. & P. R. Co.*, 53–321.

SEC. **3566. Answer—what to contain—distinct defenses.** The answer shall contain:

1. The name of the court and county, and of the plaintiffs and defendants, but when there are several plaintiffs and defendants it shall only be necessary to give the first name of each class, with the words "and others";

2. A general denial of each allegation of the petition, or of any knowledge or information thereof sufficient to form a belief;

3. A special denial of each allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

4. A statement of any new matter constituting a defense;

5. A statement of any new matter constituting a counter-claim.

The defendant may set forth in his answer as many causes of defense or counter-claim, whether legal or equitable, as he may have. [C.'73, § 2655; R., § 2880.]

I. DENIAL.

What sufficient: A denial of each and every allegation in the adverse pleading not admitted is a proper form of denial: *Ingle v. Jones*, 43–286; *Hintrager v. Richter*, 85–222.

In a particular case, *held*, that an answer was not in effect either a denial of matter pleaded nor a denial of knowledge or information of such matter: *Blaul v. Tharp*, 83–665.

Where, in an action against a railroad company for killing seven animals, defendant admitted the killing of six of them, and pleaded a tender of the value thereof, and also interposed a general denial, *held*, that the general denial should be limited to the facts relating to the liability for the seventh animal: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76–753.

In an action for damages for seduction, the plaintiff alleged non-payment, and defendant interposed a general denial. *Held*, that failure of plaintiff to introduce direct evidence of non-payment would not be ground for reversal of judgment for plaintiff, the case evidently having been tried on the theory that plaintiff's demand always had been resisted: *Egan v. Murray*, 80–180.

An answer consisting of a direct traverse of the statements of the petition, although amounting to a negative prognant, cannot be regarded as a mere nullity: *Doolittle v. Greene*, 32–123.

Where plaintiff, in a petition in equity, alleged the purchase by defendant of certain property with the means of plaintiff, and sought to hold defendant as trustee of such property, and defendant, after denying the allegations of plaintiff's petition, proceeded to state what was done with the money alleged to have been invested in such property, *held*, that such allegations of defendant were not by way of counter-claim but by way of denial, and were not irrelevant: *Childs v. Griswold*, 15–438.

As legal conclusion: An answer which makes a denial as a conclusion or inference from facts stated is not to be considered as a general denial of plaintiff's petition: *Wright v. Schmidt*, 47–233.

Where plaintiff averred a written assignment to him of the cause of action, *held*, that a denial of the assignment was not sufficient and that defendant should have denied the execution thereof: *Cottle v. Cole*, 20–481.

An answer which simply denies a fact of which the record set out in the petition is conclusive evidence, or which denies the conclusion drawn from the facts alleged in the petition, is insufficient and subject to demurrer: *State v. Bryant*, 55–451.

An allegation in an answer which simply states a conclusion drawn from facts not pleaded does not raise an issue: *Hinrager v. Richter*, 85–222.

An allegation that notes were not indorsed so as to transfer the title, *held* not to be a denial of the transfer nor of the act of indorsement, but a mere conclusion of law not sufficient to raise an issue as to the validity of the indorsement: *Second Nat. Bank v. Martin*, 82–442.

Where a denial is not unqualified but is based upon facts alleged in the answer, then, if such facts do not controvert the allegations of the opposite pleading, such pleading cannot be deemed denied: *State v. Iowa Cent. R. Co.*, 83–720.

What denial puts in issue: A general denial in an answer to a petition which alleges performance of a contract does not put in issue the fact of the existence of the contract, nor constitute a denial of a recital in the petition that a deposit of money has been made as a condition precedent: *Halferty v. Wilmering*, 112 U. S., 713.

An answer by a corporation defendant in an action on a note and mortgage, denying that the note sued on is its note and that it was ever made and executed by defendant, *held* to put directly in issue the allegations of the petition that the note and mortgage were executed by defendant through its duly authorized board of trustees, and to authorize defendant to show that persons signing the note and mortgage were not trustees of defendant and had no authority to execute such instruments, and therefore that the answer was not sham and irrelevant: *Babbage v. Second Baptist Church*, 54–172.

Denial of intent: Where the petition in an action for slander alleges the effect of words spoken and the intent of the speaker to have been to charge plaintiff with a crime, a denial that defendant intended to or did charge plaintiff with the commission of a crime by the language used raises a material issue: *Wilkin v. Tharp*, 55–609.

Denial of information or belief: A denial of any knowledge or information sufficient to form a belief as to the truth of allegations contained in the petition is in effect a denial of the matter thus pleaded and puts the same in issue: *Carr v. Bosworth*, 68–669.

An answer simply denying any knowledge or information with respect to a note upon which action is brought cannot be held frivolous. An answer will not be so held unless its insufficiency is so clear that it is apparent on a mere inspection: *McFarland v. Lester*, 23–260.

An allegation that defendant has no knowledge or information as to a certain fact alleged in the petition, and, therefore, upon such knowledge alleges, upon information and belief, that the fact is not true, is a sufficient denial to put the allegation of the petition in issue: *Leyner v. Fuller*, 67–188.

Averment of want of knowledge or information sufficient to form a belief as to any particular fact presents precisely the same issue as a general denial, and is not sufficient where a specific allegation is necessary to put the matter in issue: *Craig v. Hasselman*, 74–538.

Where plaintiff sought to recover damages for the death of a cow, alleged to have been caused by the negligence of defendant's servant, and defendant stated in his answer that of the alleged negligence of said servant and death of said cow defendant had no knowledge or information to form a belief that said cow died in consequence of such negligence, and therefore denied the same, *held*, that such denial did not put in issue the acts of negligence, but only that the cow died in consequence thereof: *Beyre v. Adams*, 73–382.

A statement that defendant has no information sufficient to form a belief, etc., is not sufficient to raise an issue. The denial should be of any knowledge or information: *Manny v. French*, 23–250; *Claflin v. Reese*, 54–544.

An allegation that the party has no knowledge sufficient to form a belief is not sufficient to raise an issue: *Cutler v. McCormick*, 48–406, 415.

Denial and admission: A general denial in an answer will apply only to facts not admitted in the pleading: *Moore v. Isbel*, 40–383.

Denial in sense not intended: Where an averment taken in the sense in which it is intended by the pleader is not denied no issue is raised thereon: *Fellows v. Webb*, 43–133.

Where plaintiff sought to recover under a contract in one count of the petition, and in another sought to recover the amount due on an award upon submission to arbitration, and where defendant admitted the award, *held*, that this was an admission of the agreement to submit the matter to arbitration: *Sadler v. Olmstead*, 79–121.

Denial not subject to demurrer: Denials, whether general or special, are not subject to demurrer. If informal, redundant or otherwise objectionable, the denial should be reformed on motion: *Oleson v. Hendrickson*, 12–222.

A denial is not subject to demurrer even though it be of a fact shown by a record which is set out in the petition: *State ex rel. v. Davenport*, 12–335.

So far as an answer amounts to a denial of the petition it cannot be assailed by demurrer: *Stuart v. Aumiller*, 37–102.

Where the answer interposes a general denial putting in issue some fact which is essential to plaintiff's right of recovery, a demurrer to the entire answer will not be sustained: *Hine v. Keokuk & D. M. R. Co.*, 42–636.

A demurrer to such an answer will not be sustained unless it contains averments which show affirmatively that there is no defense: *Stratton v. Drenan*, 58–571.

Not to be deemed frivolous: The fact that an answer is but a general denial will not warrant its being stricken from the files. Such an answer is not manifestly frivolous, nor is it scandalous or irrelevant: *Keeney v. Lyon*, 10–546.

What admissible under general denial: Where the evidence tends to disprove material matter alleged by plaintiff and denied by defendant, it is admissible without any special defense being pleaded: *Johnson v. Pennell*, 67–669.

In an action for personal injuries in which plaintiff alleges and seeks to prove freedom

from contributory negligence defendant may, under general denial, introduce evidence of intoxication for the purpose of showing negligence on the part of plaintiff which contributed to the injury: *Fernbach v. Waterloo*, 76–598.

Where a title is attacked on the ground of fraud a general denial of the pleading is sufficient to authorize any proof showing that the title is not fraudulent: *Ray v. Teabout*, 65–157.

And as to what may be shown under denial, see § 3615.

General issue: Under a general denial defendant may not introduce evidence of all the facts which might have been proved under the general issue at common law, but is confined to contesting the facts alleged in the petition; but he may introduce as evidence whatever goes to controvert or disprove the facts alleged in the petition which are denied in the answer: *Oleson v. Hendrickson*, 12–222.

Under our system of pleading there is no general issue, and a defendant should plead any defense he intends to interpose: *Hagan v. Burch*, 8–309.

The Code in providing for a general denial does not authorize anything corresponding to the general issue at common law, which is unknown under our system of pleading. Under the general denial any affirmative defense can be proved, but no evidence is competent which does not tend to negative some fact which plaintiff is bound to prove in order to entitle him to recover: *Scott v. Morse*, 54–732.

Trespass: In an action of trespass defendant may under the general denial introduce evidence to show that he took and held possession of the property under an agreement with and by consent of plaintiff: *Wallace v. Robb*, 37–192.

Under an answer by simple denial in an action for trespass, the defendant cannot excuse the trespass by proving the right of possession or title in a third person: *Patterson v. Clark*, 20–429.

Negligence: Where plaintiff seeks to recover for negligence of defendant, and the answer contains a denial of the allegations of the petition, defendant may prove acts tending to show the exercise of care. Such proof negatives negligence and is not in support of an affirmative defense: *Kendig v. Overhulser*, 58–195.

Where the party whom it is sought to hold for negligence desires to rely upon negligence of the opposite party in avoidance, such negligence should be pleaded: *First Nat. Bank v. O'Connell*, 84–377.

That plaintiff should plead freedom from contributory negligence, see notes to § 3559.

Payment: Evidence of payment may be introduced in an action upon a contract under a general denial of indebtedness: *Sinnamon v. Melbourn*, 4 G. Gr., 309.

A plea of payment is not an affirmative defense: *Stacy v. Stichton*, 9–399; *Poweshiek County v. Mickel*, 10–76.

Where plaintiff in his petition claimed an amount due, and defendant set up a contract with plaintiff and alleged full payment thereunder, *held*, that the averments of defendant were not by way of confession and avoidance, but in full denial, and that the burden of proving the sum due was upon plaintiff: *Garretson v. Bitzer*, 57–469.

A complete accord and satisfaction is to be pleaded by way of defense and not raised by motion to dismiss the action: *George v. Chicago, F. M. & D. M. R. Co.*, 85–590.

Denial of ownership of note: Where a plaintiff claims to be the owner of a promissory note and seeks to recover its value from defendant as wrongfully in possession thereof, defendant may merely deny plaintiff's allegations and need not allege or prove ownership in himself. In order to recover, plaintiff must prove defendant's possession unlawful: *Gaskell v. Patton*, 58–163.

Denial of indebtedness: An answer merely denying that plaintiff is entitled to recover the amount claimed, but not putting in issue plaintiff's cause of action, does not raise any issue triable by jury, but the court may proceed to render judgment as upon default: *Mann v. Howe*, 9–546; *Sheldon v. Middleton*, 10–17.

Denial of an indebtedness to plaintiff in any sum whatever raises no issue: *McIntosh v. Lee*, 57–356. 10 × 893

A denial that "there is due on said note the sum of, etc., as claimed by plaintiff," *held* not sufficient as an answer, and assailable by demurrer: *Stucksleger v. Smith*, 27–286.

A denial in the answer that defendant is indebted in the amount claimed in the petition does not present an issue of fact and does not amount to a general denial: *Callanan v. Williams*, 71–363.

A general denial of indebtedness as claimed in the petition is not sufficient to put in issue the execution of a note sued on, nor plaintiff's property therein, and such facts will be deemed admitted: *Morton v. Coffin*, 29–235.

Where defendant denied owing the amount claimed in the petition, but proceeded to state matters which he claimed showed the absence of such indebtedness, and the matters so stated were held insufficient, on demurrer, to constitute a defense, *held*, that no issue was left on the denial: *Bridge v. Livingston*, 11–57.

A denial that defendant owes the sum claimed in the pleading or any other sum is a sufficient denial to put in issue the indebtedness: *Godfrey v. Cruise*, 1–92.

What put in issue by: Where an answer averred that there was no valid ordinance under which a certain license was issued, *held*, that in the absence of a motion for more specific statement, it sufficiently put in issue the validity of a pretended ordinance under which such license was issued: *Horner v. Rowley*, 51–620.

The denial that the contract relied upon in the petition as made for defendant by an agent was defendant's agreement raises the question of the authority of the agent to enter into such contract for defendant. It is not necessary to specially plead that the agent had exceeded his authority in making the contract: *Gilbert v. Baxter*, 71–327.

II. NEW MATTER: CONFESSION AND AVOIDANCE.

What may be pleaded as a special defense: Defendant may plead as a defense any fact which will defeat plaintiff's claim for relief: *Kelsey v. Kelsey*, 57–383.

It is the policy of the law to settle all controversies and litigations without any unnecessary multiplication of suits, and if in one action all the rights of the parties may be determined, it will be done without requiring other suits to be instituted: *Ibid.*

An allegation that a written contract under which plaintiff seeks to recover has been altered since its execution is an allegation of new matter, which does not cast upon plaintiff the obligation of explaining such alteration until evidence in support of such allegation is introduced by defendant: *Wing v. Stewart*, 68–13.

Defense must be pleaded: In an action to enforce a contract for taking and leaving cars on a side-track, it was alleged as a part of the defense that plaintiffs had been negligent in handling cars left for them on said side-track. Such defense not being pleaded by way of counter-claim or as a defense in bar to plaintiffs' action, *held* properly stricken from the files on motion: *Amsden v. Dubuque & S. C. R. Co.*, 13–132.

A defense such as that a partner who became personally liable has by reason of subsequent change in the partnership been released from liability, must be plead: *Osborne v. Evans*, 91–13.

In an action for breach of contract if it is claimed that the contract had been terminated before the occurrence of the alleged breach such fact should be set up as an affirmative defense: *Kelley v. Stone*, 62 N.W., 842.

Where an answer by its terms excludes from the defense matters not pleaded, the defendant cannot complain when the matters excluded are withheld from the jury: *Pelley v. Walker*, 79–142.

The defense of breach of warranty in an action on a contract of sale is an affirmative one, and must be pleaded: *Bradley v. Palen*, 78–126.

Facts constituting but a mere argumentative denial, which so far as material are admissible under the general denial, may be stricken out on motion: *De Forest v. Butler*, 62–78.

A party may not plead one defense and prove another: *Ruby v. Schee*, 51–422.

Must be responsive to petition: The defendant cannot set up a supposed or presumed ground of claim for plaintiff, and then plead to it himself, and thus put the plaintiff to the necessity of pleading to it also: *Kilbourne v. Lockman*, 8–380.

Defense imposing liability on defendant: A defendant cannot interpose a defense, the result of which will be to cause a damage which he will be under obligation to pay. The obligation to pay the damage to result would prevent the interposition of the defense, a circuity of actions being disfavored: *First Nat. Bank v. Schlichting*, 40–51.

Affirmative denial: Where defendant, denying the allegations of the petition setting up plaintiff's claim of right to property and possession, affirmed that he (defendant) was entitled to such property and possession, *held*, that the latter allegations did not constitute new matter: *Hunt v. Bennett*, 4 G. Gr., 512.

Failure to prove affirmative denial: If the material allegations of the petition are neither proved nor admitted, the plaintiff cannot recover because of the failure of defendant to prove the allegations of his answer: *Iowa County v. Huston*, 39–323.

Want of authority to sue: Where defendant by his answer avers that plaintiff has no authority to sue, plaintiff should join issue with defendant upon such answer and prove his authority. Such an answer cannot be attacked by demurrer: *Merritt v. Daniels*, 10–196.

Special defenses: As to what defenses must be specially pleaded, see § 3629 and notes.

Confession and avoidance: A party pleading new matter in avoidance must first confess either expressly or by implication that which he proposes to avoid: *Martin v. Swearengen*, 17–346; *Anson v. Dwight*, 18–241; *Morgan v. Hawkeye Ins. Co.*, 37–359.

The answer should specifically deny, or, admitting, should set forth that which would justify and avoid every material allegation in the petition: *Hutchinson v. Sangster*, 4 G. Gr., 340.

A party desiring to plead in avoidance must confess the fact sought to be avoided: *Howes v. Carver*, 7–491.

General denial and confession and avoidance may be pleaded in separate divisions of the same answer: See notes to § 3620.

If new matter is pleaded in avoidance there should be in the same count a confession that but for such new matter the action could be maintained; and in a particular case, *held*, that the different counts of the answer setting up new matter in avoidance did by implication admit a cause of action: *Morgan v. Hawkeye Ins. Co.*, 37–359.

An implied admission is sufficient to give color to a plea of confession and avoidance. It is not necessary that the confession be in express terms: *Runkle v. Hartford Ins. Co.*, 68 N. W., 712.

In a particular case, *held*, that the answer contained sufficient confession to warrant proof of matter in avoidance: *Abbott v. Sartori*, 57–656.

Mitigation: As to pleading matter in mitigation, see § 3593 and notes.

Abatement: See notes to § 3642.

III. EQUITABLE DEFENSES.

In an action on a judgment defendant may set up as an equitable defense any matter which he might have made the ground of an equitable suit directly assailing the judgment: *Rogers v. Guinn*, 21–58.

Affirmative defenses, equitable in their nature, are to be viewed in the same manner as to substance as though the same facts had been made the basis of a petition in chancery: *Penny v. Cook*, 19–538.

The right of a defendant to avail himself

of an equitable defense is not limited to any particular kind of action, but is general: *Thompson v. Hurley*, 19–331.

Equitable defenses may be plead in an action to recover possession of personal property although counter-claims are not allowed in such action. The distinction between equitable defenses and counter-claim considered under particular circumstances: *Palmer v. Palmer*, 90–17.

An equitable defense being interposed, it may be sustained by such proof as is properly admissible on the trial of such an issue. The proper practice is to try the equitable issues first, afterward the other issues, if any remain: *Byers v. Rodabaugh*, 17–53.

Where the answer to a petition at law set up both legal and equitable defenses, and the cause was tried by a referee without any separation of the issues, *held*, that although one of the parties served separate notice of appeal as from two cases, it would be treated on appeal as one case, and tried as an equitable action: *Van Orman v. Merrill*, 27–476.

Where defendant seeks to show that by reason of mutual, material mistake, a contract never received the assent of the parties thereto, the issue thereby raised is one of law and not equitable: *Carey v. Gunnison*, 65–702.

Further, as to equitable issues, see notes to § 3435.

The defense that certain conditions on which a contract to convey land was made have not been performed is not an equitable defense, but is simply a legal defense to the title under the contract: *In re Smith*, 56–270.

Where the plaintiff brought action for the possession of specific personal property, alleging his ownership thereof, and on the trial introduced a bill of sale as evidence of such ownership, *held*, that it was competent for defendant to introduce parol evidence to show that such bill of sale was in fact a mortgage, after having pleaded such fact: *McAnnulty v. Seick*, 59–586.

Equitable title: Under prior statutes not allowing equitable defenses in actions at law, it was held that an equitable title was no defense against a legal one in such an action: *Page v. Cole*, 6–153; *Harmon v. Steinman*, 9–112; *Farley v. Goocher*, 11–570; *Abbott v. Chase*, 13–453; *Cole v. Gill*, 14–527.

But under the statutory provision allowing equitable defenses in actions at law, an equitable title may be set up as a defense to an action to recover real property by a party having the legal title: *Rosierz v. Van Dam*, 16–175; *Van Orman v. Spafford*, 16–186; *Kramer v. Conger*, 16–434; *Shawhan v. Long*, 26–488.

An equity will not support an action at law to recover possession of land against the holder of the legal title: *Pendergast v. Burlington & M. R. R. Co.*, 53–326.

Where no equitable defense is pleaded the legal title must prevail: *Goepinger v. Ringland*, 62–76.

IV. Sufficiency of Answer.

Mere conclusions: It is not proper to state in an answer mere conclusions, whether drawn from facts not stated or from allegations of fact found in the opposite pleading, which might have been attacked by demurrer: *Sac County v. Hobbs*, 72–69.

Objection previously raised: An objection which has been made to the petition by demurrer and overruled cannot again be pleaded and relied upon by way of answer: *Kissinger v. Council Bluffs*, 73–171.

Allegation of payment: An allegation of full payment of the amount due plaintiff, without stating the amount paid, is not sufficiently specific: *Feller v. Winchester*, 3 G. Gr., 244.

An allegation that a party gave or delivered over to the county all the taxes levied, etc., *held* a sufficient allegation of payment of such taxes: *Goodnow v. Oakley*, 68–25.

Under an allegation that plaintiff paid money for defendant which he agreed to pay, evidence is admissible to show arbitration establishing such indebtedness: *Beidler v. Shallenberger*, 42–203.

Purchaser for value: An allegation by a party relying upon the fact of his being an innocent purchaser, as a defense, that he paid full value, will be sufficient in the absence of a motion for a more specific statement: *Haven v. Kramer*, 41–382.

Fraud: A general allegation of fraud by way of defense to a note is sufficient: *Hildreth v. Tomlinson*, 2 G. Gr., 360; *Strawser v. Johnson*, 2 G. Gr., 373.

In a particular case, *held*, that a plea of fraud, though not artistically drawn, was sufficient, no objection thereto being raised until on appeal: *Clark v. Taylor*, 68–519.

Joint answer: One defendant is not bound by the answer of a co-defendant: *Mobley v. Dubuque Gas, etc., Co.*, 11–71.

The failure of one of several partners sued upon a partnership claim to set up a defense will not deprive another of the right to do so: *Brayley v. Goff*, 40–76.

A defense which is good as to one defendant and not as to another will be held bad when pleaded by the defendants jointly: *Morton v. Morton*, 10–58.

Where two persons are sued as partners and service is had on only one of them, he cannot by joint answer bind the other alleged partner, if no partnership actually exists: *Nixon v. Downey*, 42–78.

A counter-claim is an answer: *Town v. Bringolf*, 47–133.

No notice need be served on plaintiff of the filing of an answer asking affirmative relief: *Treiber v. Shafer*, 18–29.

A counter-claim is an answer, and where the petition is verified an answer setting up a counter-claim must be verified in the same way as any other answer: *Yarger v. Chicago, M. & St. P. R. Co.*, 78–650.

It is not required that the pleading setting out a counter-claim shall be designated as such: *Starker v. McCosh Iron & Steel Co.*, 62 N.W., 848.

Where plaintiff sought to recover a share of partnership profits, but it appeared that instead of profits, there had been a loss in the business, *held*, that defendant having asked no affirmative relief was not entitled to judgment against plaintiff for his proportion of such loss: *Helmer v. Yetzer*, 92–627.

Facts which are pleaded as a defense by

way of estoppel should not be made the basis of rendering judgment in behalf of defendant against plaintiff unless judgment is properly asked for. A mere affirmative defense is not sufficient to authorize affirmative relief: *Walker v. Walker*, 93–643.

Further as to counter-claims, see § 3570.

SEC. **3567. Answer of guardian.** The guardian of a minor or other person, or attorney for a person in prison, must deny in the answer all the material allegations of the petition prejudicial to such defendant. [C. '73, § 2656; R., § 2893.]

Section applied: *Bickel v. Erskine*, 43–213. As to defense by guardian, see § 3482 and notes.

SEC. **3568. Divisions of answer.** Each affirmative defense shall be stated in a distinct division of the answer, and must be sufficient in itself, and must intelligibly refer to that part of the petition to which it is intended to apply. [C. '73, § 2657; R., § 2882.]

Several distinct defenses should not be pleaded in the same division of the answer: *Donahue v. Prosser*, 10–276.

Contradictory defenses should not be pleaded in the same division: *Morgan v. Hawkeye Ins. Co.*, 37–359.

Each affirmative defense must be stated in a distinct division of the answer, and must be sufficient in itself: *Davis v. Robinson*, 67–355.

Each division must in itself be sufficient for the purposes for which it is pleaded; otherwise it would be subject to demurrer: *National Bank v. Green*, 33–140.

Where an answer is divided into paragraphs which do not state separate defenses, but which, taken together, state one defense, a paragraph of such answer is not subject to demurrer: *Benedict v. Hunt*, 32–27.

Where the second part of the answer contained a denial of all allegations not admitted therein, *held*, that such denial had reference to admissions in the first division of the answer, and that the two were not to be taken as setting up distinct and inconsistent defenses, but to be construed together as setting up one defense: *Comes v. Chicago, M. & St. P. R. Co.*, 78–391.

SEC. **3569. No prayer.** In the defense part of an answer or reply, it shall not be necessary to make a prayer for judgment. [C. '73, § 2658; R., § 2883.]

SEC. **3570. Counter-claim—how stated—what may constitute.** Each counter-claim must be stated in a distinct count or division, and must be:

1. When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court;

2. A cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition or connected with the subject of the action;

3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so plead. [C. '73, § 2659; R., §§ 2884, 2886, 2889, 2891; C. '51, § 1740.]

How set up: The provisions of this section as to stating each counter-claim in a distinct count, etc., refer to pleadings in an action at law. The following section requires a counter-claim in equity to be divided into paragraphs: *Pond v. Waterloo Agl. Works*, 50–596.

A counter-claim is not a defense. It does not deny the cause of action or plaintiff's right to recover thereon. A defense denies the right to recover, and shows either that plaintiff never had a right of action or that it is discharged: *Haywood v. Seeber*, 61–574.

A counter-claim is an answer, so that a defendant who has interposed such counter-claim cannot be adjudged in default for want of answer: *Town v. Bringolf*, 47–133.

A set-off (now included among counter-claims) is not an answer to plaintiff's claim, and should be set forth after and totally distinct from the defense itself: *Freeman v. Fleming*, 5–460.

Where the case goes to the jury upon a counter-claim, setting up a cause of action which cannot properly be recovered on in that way, the court cannot on motion disregard such allowance, and treat the case as if such counter-claim had not been pleaded: *Mitchell v. Joyce*, 76–449.

Must be specially pleaded: If a counter-claim is relied upon it must be pleaded: *Lord v. Ellis*, 9–301.

Affirmative relief cannot be granted to the defendant in an equity case without being asked by cross-bill or otherwise: *Holladay v. Johnson*, 12–563.

In case of partnership: An account against a firm of which plaintiff is a member may be pleaded as a set-off (or counter-claim) by defendant in an action to foreclose a

mortgage brought by plaintiff in his individual right: *Allen v. Maddox*, 40-124.

Where a petition stated a cause of action against a partnership, and its answer set up a counter-claim in behalf of the partnership and certain individuals, and also contained allegations indicating that the individuals were members of the partnership and that the counter-claim related to the same transaction as that referred to in the petition, *held*, that such counter-claim was properly interposed: *Bird v. McCoy*, 22-549.

By surety: Where an action is brought against a principal and surety, the surety may, by consent of the principal, interpose any counter-claim, which would be available in favor of the principal as against such indebtedness, notwithstanding the provisions of the third subdivision of this section: *Reeves v. Chambers*, 67-81.

By one joint defendant: Where a husband and wife were sued jointly, *held*, that the husband could not set up, by way of counter-claim, a cause of action in his favor alone for malicious prosecution: *Musselman v. Galligher*, 32-383.

Malicious prosecution: A counter-claim for damages for malicious prosecution of an action cannot be interposed in the action. The right of action in behalf of defendant for malicious prosecution does not arise until the original action is ended: *Brooks v. Westover*, 65-369.

An action for malicious prosecution in suing out a landlord's attachment cannot be maintained by way of counter-claim, as suit thereon could not have been brought when the action was commenced: *Youngerman v. Long*, 63 N. W., 674.

The fact that after the filing of such claim plaintiff amends his petition asking the enforcement of his landlord's lien in equity instead of by attachment, as in the first, will not render the counter-claim available to defendant in the subsequent progress of the case: *Ibid.*

Cause accrued: To be available as a counter-claim the cause of action must have been held by the defendant when the action was commenced (except as is expressly otherwise provided): *Cawker City State Bank v. Jennings*, 89-230.

A claim for damages on an attachment bond may be interposed as a counter-claim in the action itself: See § 3888 and notes.

Where defendant in an attachment suit had previously made an assignment of his property, *held*, that the right of action on the attachment bond inured to the assignee, and that a subsequent assignment thereof by the latter to the defendant would not enable defendant to set it up as a counter-claim under subdivision 3 of this section: *Rumsey v. Robinson*, 58-225.

In an action by a receiver of a corporation to recover indebtedness accruing before his appointment, an account against such corporation accruing also before the taking possession by the receiver may be set off: *Cook v. Cole*, 55-70.

An individual claim against one who is receiver cannot be set off in an action by such receiver in his representative capacity: *Polk v. Garver Coal & Mining Co.*, 91-570.

In action by assignee, where the claimant of property in possession of assignee, claiming a lien thereon for compensation to his assignor for services rendered in connection with such property, for the purpose of getting possession of the property gave to assignor a bond for the payment of any compensation which might be found due the latter, and an action on such bond was brought by the assignee, *held*, that the defendant in such action might set off a claim against the assignor for indebtedness due at the time of the assignment: *Van Sandt v. Dows*, 63-594.

Further as to how far an assignee is subject to counter-claims against the assignor, see § 3461 and notes.

Next friend: In a suit brought for a minor by his next friend, defendant cannot interpose a counter-claim against such next friend: *Smith v. Dawley*, 92-312.

In an action to collect a special tax against a property owner for improvements on abutting streets, the property owner cannot set up by way of counter-claim a claim of damages against the city for injuries to his property by reason of the negligent manner of making such improvements: *Burlington v. Palmer*, 67-681.

In such case, even though the claim of the city to recover the special tax is defeated, the counter-claim against the city for dam ages cannot be maintained: *Ibid.*

In a suit by an administrator to collect a claim due decedent in his lifetime, the defendant may set up as a counter-claim a demand existing in his own favor against decedent, but if the counter-claim exceeds the original claim, the balance can only be enforced as other claims against the estate: *Lucore v. Kramer*, 22-387; *Van Sandt v. Dows* 63-594.

But in such case defendant could not set off a claim against the estate acquired by him subsequently to the death of the intestate: *Cook v. Lovell*, 11-81.

The whole theory of the counter-claim is based upon the right of deduction. If that does not exist, the claim should be made the subject of an independent action, where judgment for the whole amount due can properly be rendered: *Eldredge v. Bell*, 64-125

An executor cannot, in an action against him individually, interpose as a counter-claim a debt due to his testator's estate: *Gourley v. Walker*, 69-80.

And see § 3303 and notes.

Where counter-claim is barred: The provisions of § 3457, allowing a counter-claim to be pleaded, even when barred as an independent cause of action, are applicable to counter-claims under the first and third subdivision of this section, as well as those under the second: *Folsom v. Winch*, 63-477.

Failure to interpose: The fact that a counter-claim which might have been interposed against a cause of action was not thus interposed will not prevent its afterwards being set up in an action on the judgment: *Ibid.*

Dismissal of action does not dismiss a counter-claim already interposed: See notes to § 3766.

What constitutes counter-claim: An an-

swer stating matters simply intended to defeat plaintiff's claim, where no affirmative defense is sought, is not a counter-claim: *Stuart v. Hines*, 33–60.

Where, in an action upon a promissory note given for the purchase price of certain sheep, defendant alleged that a certain sum was to be deducted from the amount of the note in accordance with stipulations in a contract of purchase, *held*, that such averments set up a defense and not a counter-claim, although at the close of the answer defendant claimed judgment for the sum specified: *Burroughs v. McLain*, 37–189.

Matters stated by defendant by way of evidence having no other effect than to put in issue plaintiff's right to recover under his petition, and which might have been proven under a general denial in the answer, do not constitute a counter-claim: *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 66–751.

In an action to foreclose a mortgage in which a party is made defendant who, it is alleged, claims a lien upon the premises, the answer of such party stating the nature of his lien, does not constitute a counter-claim, and such answer does not therefore require a reply: *Vaughan v. Eckler*, 69–332.

Where an answer in an action to foreclose a mortgage amounted in itself only to a plea of payment, although defendant prayed therein for a cancellation and satisfaction of the mortgage, *held*, that after dismissal of action by plaintiff, defendant was not entitled to any relief as upon a counter-claim, although in case of trial upon the petition and answer he might, upon recovery of judgment in his favor, have been entitled to a decree of cancellation and satisfaction, as prayed: *Union Nat. Bank v. Carr*, 49–359.

A pleading in a particular case, *held* to be a counter-claim against an intervenor, and not a reply to an answer in the case, and therefore not subject to the rule that a reply must not be inconsistent with the petition: *Jack v. Des Moines & Ft. D. R. Co.*, 49–627.

The three subdivisions of this section are in substance the same as the three sections of the Revision of 1860 relating to set-off, counter-claim and cross-demand: *Sherman v. Hale*, 76–383.

A cause of action arising on contract in behalf of one of two or more defendants may be pleaded as a counter-claim in an action founded on contract: *Ibid.*

The statutory counter-claim includes matters of recoupment and of set-off, and any new matter constituting a cause of action in favor of the defendant against the plaintiff, and owned by the defendant when the suit was brought, may be set up: *Welles v. Stout*, 38 Fed., 807.

Where a principal and surety are sued jointly on a promissory note or contract, they are entitled to plead as a counter-claim a cause of action arising in favor of the principal alone out of matters independent of the contract sued on; but where the cause of action is in favor of the surety alone, it cannot be pleaded as a counter-claim: *Corbett v. Hughes*, 75–281.

In an action on a debt secured by a pledge, the pledgor may by counter-claim set up wrongful acts of the pledgee as to the pledged property: *First Nat. Bank v. O'Connell*, 84–377.

Where plaintiff had recovered a judgment in one case which she was entitled to set off against her notes in another case, *held*, that the costs included in the judgment should be considered a part of the set-off: *Otcheck v. Hostetter*, 77–509.

Where affirmative matter was pleaded in an answer to a petition designed as a defense to plaintiff's claims, *held*, that such averments in the answer could not be regarded as a counter-claim, as a decree in favor of defendants on the allegations of the petition would have given them all the relief they could have obtained on the averments of their answer: *Deere v. Wolf*, 77–115.

Where in an action to quiet title defendant set up the payment of taxes by way of defense, but did not ask any affirmative relief on that account, *held*, that the court should not direct a repayment to him of such taxes, but leave the matter for subsequent adjudication: *American Emigrant Co. v. Fuller*, 83–599.

Where in an action of replevin defendant sought equitable relief with reference to the subject-matter of the action, but the parties, and the subject-matter, and the judgment sought, were all such that the relief asked could not be obtained under a merely defensive plea, *held*, that the claim for such relief constituted a counter-claim, and could not therefore be interposed in such action: *Muir v. Miller*, 82–700.

A cross-petition is in both name and substance something more than a defensive plea. It presents a cross-demand, which under this section is a counter-claim: *Ibid.*

In an action against a physician for malpractice he may set up as a counter-claim the value of his services. The fact that he has been guilty of negligence will not prove that his services were of no value: *Whitesell v. Hill*, 70 N. W., 750.

A distinction between a counter-claim and an equitable defense pointed out under particular circumstances: *Palmer v. Palmer*, 90–17.

Set-off: Previous to the present statutory provision which treats set-off as a kind of counter-claim, *held*, that the set-off must be predicated upon an independent demand which defendant had against plaintiff, and was different from a mere right to reduction of plaintiff's demand or a claim to defeat it on account of some matter connected therewith: *Crookshank v. Mallory*, 2 G. Gr., 257.

The principles upon which set-off in equity was based and the rules by which it was governed were entirely different from those which governed in common law. In a legal set-off a mutual dependence or mutual credit in an equitable sense was not required, and it was sufficient that there be a debt on each side: *Zugg v. Turner*, 8–223.

A claim sounding in tort as well as one arising on contract may be used as a set-off: *Campbell v. Fox*, 11–318.

Defendant in an action on a note duly assigned cannot litigate a set-off against an assignor not a party to the record under an

averment that he was the real party in interest: *Lewis v. Denton*, 13–441.

To entitle a party to use a set-off it must have existed in his own favor and not in favor of a third person: *Reed v. Darlington*, 19–349.

As explaining the difference between set-off and counter-claim, as defined by previous statutes, see *Allen v. Maddox*, 40–124.

Counter-claim proper: It is not required that the facts constituting a counter-claim under the second division of this section should exist at the commencement of the action: *Wilson v. Wilson*, 40–230.

A set-off or counter-claim of damages for fraud and deceit may be interposed by defendant in an action to foreclose a mortgage: *Moberly v. Alexander*, 19–162.

In an action to recover upon a promissory note, a counter-claim in the nature of an action for the possession of the note, for the purpose of cancellation, is proper: *Sigler v. Hidy*, 56–504.

In an action in equity by an insurance company for the cancellation of a policy, *held*, that a cause of action in behalf of defendant for a loss under the policy was sufficiently "connected with the subject of the action" to be set up as a counter-claim: *Revere Fire Ins. Co. v. Chamberlain*, 57–508.

Where plaintiff is liable jointly with others to defend on contract, such liability may be set up as a counter-claim (§ 3465): *Redman v. Malvin*, 23–296.

It is not proper to set up by way of counter-claim an independent claim or new matter constituting a cause of action against plaintiff in favor of one of several defendants: *Jenkins v. Barrows*, 73–438.

Cross-bill: No notice need be served on defendant of the filing of an answer in the nature of a cross-bill asking affirmative relief: *Trieber v. Shafer*, 18–29

While it is true, as a general rule, that defendant is not entitled to any affirmative relief except upon averments of a cross-bill or cross-petition, yet where plaintiff files his petition for an account, and a balance is ultimately found in favor of defendant, the latter is entitled to a decree for such balance: *McGregor v. McGregor*, 21–441.

If affirmative relief has been granted to defendant, as prayed in his answer, without a cross-bill or cross-petition, and no objection to the form of the pleading is taken in the trial court, such objection will not be considered on appeal. (Overruling *MacGregor v. MacGregor*, 9–65): *Kellogg v. Aherin*, 48–299.

The judgment on a cross-petition by defendant against plaintiff cannot be reviewed on an appeal from the judgment in the original action, unless the party against which the judgment on such cross-petition is rendered takes an appeal: *Mahaffy v. Mahaffy*, 63–55.

As to cross-bill for divorce, see § 3176.

Objection waived: Where the allegations of a counter-claim show an indebtedness from plaintiff to defendant, but not an indebtedness which can properly be made the subject of a counter-claim, and no demurrer or other objection is interposed before the trial, the plaintiff cannot afterwards have an allowance by the jury of the amount claimed by defendant disregarded on motion: *Mitchell v. Joyce*, 76–449.

Form of trial: While it is provided (§ 3435) that an equitable issue arising in an action properly commenced by ordinary proceedings may be tried in the manner prescribed for the trial of equitable proceedings, there is no such provision with reference to issues of law arising in cases properly commenced by equitable proceedings, and therefore, where defendant by a counter-claim raises an issue at law in an equitable action, he is not entitled to a jury trial thereof: *Ryman v. Lynch*, 76–587.

SEC. **3571. Equitable answer—paragraphs.** An equitable division must also be separated into paragraphs and numbered, as required in regard to an equitable cause of action in the petition. [C. '73, § 2660; R., § 2885.]

SEC. **3572. Counter-claim by co-maker or surety.** A co-maker or surety, when sued alone, may, with the consent of his co-maker or principal, avail himself by way of counter-claim of a debt or liquidated demand due from the plaintiff at the commencement of the action to such co-maker or principal, but the plaintiff may meet such counter-claim in the same way as if made by the co-maker or principal himself. [C. '73, § 2661; R., § 2887.]

The surety may, by consent of his principal, interpose a counter-claim which would be available in an action against the principal, although it is not within the provisions of subdivision 3 of § 3570: *Reeves v. Chambers*, 67–81.

SEC. **3573. New party.** When a new party is necessary to a final decision upon a counter-claim, the court may either permit such party to be made, or direct that it be stricken out of the answer and made the subject of a separate action. [C. '73, § 2662; R., §§ 2888, 2890.]

SEC. **3574. Cross-petition.** When a defendant has a cause of action affecting the subject-matter of the action against a co-defendant, or a person not a party to the action, he may, in the same action, file a cross-petition against the co-defendant or other person. The defendants thereto may be notified as in other cases, and defense thereto shall be made in the time and manner prescribed in regard to the original petition, and with the same

right of obtaining provisional remedies applicable to the case. The prosecution of the cross-petition shall not delay the trial of the original action, when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-petition. [C. '73, § 2663; R., § 2892.]

Cross-petitions or cross-actions: Defendants to cross-petitions or cross-actions brought against them by their co-defendants must be served with notice of the claim made against them: *Thode v. Spofford*, 65-294.

A decree on a cross-bill of one defendant against another should not be rendered until the latter has been made an adversary party, by motion or otherwise, to plaintiff in the cross-bill: *Miller v. McGalligan*, 1 G. Gr., 527.

Where plaintiffs brought action to set aside a guardian's deed to property held by defendant, and defendant, by cross-petition against certain mortgagees of the property from plaintiff, sought to have such mortgages set aside, *held*, that the mortgagees were properly brought in by cross-petition and their rights determined: *Bunce v. Bunce*, 59-533.

The dismissal of the original petition after the filing of a cross-petition will not operate as a dismissal of such cross-petition: *Spearing v. Chambers*, 25-99.

Cross-petition of one defendant against another, *held* proper in a particular case: *Rose v. Schaffner*, 50-483.

In an action to foreclose, brought against several defendants, *held*, that a cross-bill by one such defendant for the recovery of money paid by mistake to a co-defendant upon which plaintiff had a claim was proper: *Ibid.*

Where a cross-petition is filed by a defendant against another defendant, though the latter has not been served with notice in the original action but has notice only of the cross-petition, such latter defendant is not entitled to have the cause removed to the county of his residence: *Mahaska County State Bank v. Crist*, 87-415.

A junior mortgagee whose mortgage covers premises which are also covered by a senior mortgage may by cross-petition in an action to foreclose such senior mortgage ask relief against a party who has obligated himself to pay such senior mortgage for his protection: *Montpelier Savings Bank v. Arnold*, 81-158.

Where a cross-petition is filed the plaintiff may interpose any defense to defendant's action which he could have pleaded had defendant first brought action: *Willard v. Wright*, 81-714.

Where plaintiff appears to and answers a cross-petition he cannot afterward complain of want of notice: *Russell v. Lamb*, 82-558.

The term cross-bill is often used as synonymous with cross-petition, as here described: *Ibid.*

In a particular case, *held*, that the cause of action set up by defendant in his cross-petition did not affect the subject-matter of plaintiff's action in such way as to render the cross-petition proper: *Mahaska County State Bank v. Christ*, 82-56.

Although in an action against joint defendants, one of them may by cross-bill have relief as against the other with reference to the same transaction, he is not bound to resort to this method of securing his rights and will not be barred from prosecuting an independent action with reference thereto: *Purslow v. Jackson*, 93-694.

SEC. **3575. Demurrer to answer.** When the facts stated in the answer, or any count or division thereof, are not sufficient to constitute a defense or counter-claim, the adverse party may demur, and shall be held to the same certainty in the statement of the grounds therefor as obtains in a demurrer to the petition, and with like results attendant upon the ruling thereon. [C. '73, § 2664; R., § 2894.]

Where the matter pleaded in the answer does not amount to a denial or to confession and avoidance, the defect may be reached by demurrer: *Davenport Gas, etc., Co. v. Davenport*, 15-6.

The sufficiency of a defense pleaded in an answer should be raised by demurrer to the answer, and not by motion to strike the answer from the files: *Walker v. Pumphrey*, 82-487.

Want of verity in the allegations of an answer cannot be made available by demurrer. When the answer contains a specific denial of every averment in the petition, it is error to sustain a demurrer as to these denials: *McGregor v. McGregor*, 21-441.

When an answer alleging former adjudication was demurred to on the ground that the prior suit was not for the same matters, *held*, that properly such facts were to be relied upon as evidence and not as causes of demurrer: *Keokuk County v. Alexander*, 21-377.

A demurrer to an answer on the ground that it does not state facts constituting a defense, where the matters pleaded are neither by way of denial nor by way of new matter, is sufficiently specific: *Davenport Gas, etc., Co. v. Davenport*, 15-6.

In a demurrer to an equitable answer in an action at law it is sufficient to say that the facts stated in the answer do not constitute any defense: *Reed v. Lane*, 65 N. W., 380.

In cases where no reply to an answer is necessary, the party demurring thereto, whose demurrer has been overruled, if he elects to stand thereon, must so state, and have the fact shown of record. A mere exception to the ruling will not be sufficient: *Wilcox v. McCune*, 21-294.

Where two defenses are improperly joined in one count of the answer the plaintiff may demur to one of them only, and the defendant will not be allowed to object thereto on the ground that the demurrer does not go to the whole count: *Wright v. Connor*, 34-240.

An objection that a counter-claim set up in the answer cannot be properly interposed on account of its not being in behalf of the

proper parties should be raised by demurrer and not by motion to strike from the files: *Bird v. McCoy*, 22–549.

Demurrer to the whole answer should not be sustained where the answer contains a general denial: *Sample v. Griffith*, 5–376.

The sufficiency of matter pleaded to constitute a defense to the action cannot be determined upon motion to strike out the answer setting up such matter, but only upon demurrer: *Wattels v. Minchen*, 93–517.

As to demurrers generally, see §§ 3561, 3562 and notes.

SEC. **3576. Reply—when necessary.** There shall be no reply except:

1. Where a counter-claim is alleged;

2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer. [C.'73, § 2665; R., § 2895; C.'51, § 1741.]

When required: Allegations of an answer not relating to a counter-claim are deemed controverted without a reply, and no reply is necessary: *Davis v. Payne*, 45–194; *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 65–563; *Mills County Nat. Bank v. Perry*, 72–15.

No reply is required to an answer which in substance pleads payment only: *Kirk v. Woodbury County*, 55–190.

The law interposes for plaintiff a general denial of the affirmative matter in the answer, and plaintiff is not required to file any reply unless he wishes to confess and avoid such matters: *McQuade v. Collins*, 93–22.

Where the allegations of defendant's answer do nothing more than put in issue the right of plaintiff to recover under his petition, and do not set up any matter which might not have been proved under a mere denial, they need not be denied in the reply: *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 66–751.

Where the answer does not set up an affirmative defense but simply puts in issue one of the material allegations of the petition, a reply is not necessary: *Bayliss v. Murray*, 69–290.

However, although a reply is not called for, yet where it raises no new issue, and every fact alleged in it could be shown under the issues raised on the petition and answer, it will not constitute reversible error to refuse to strike it from the files: *Ibid.*

A reply is not necessary to put in issue new matter of avoidance set up in the answer: *Hartley v. Keokuk & N. W. R. Co.*, 85–455.

A reply is not necessary, under our system of pleading, to let in proof of a former adjudication of matters set up in the answer, not in the nature of a counter-claim: *Carleton v. Byington*, 24–172.

Where facts, which might be set out by way of reply, appear affirmatively in the answer, no reply is necessary: *Scott v. Luther*, 44–570.

Where the defendant in an action on a written contract of subscription set up want of consideration, *held*, that plaintiff might prove facts showing the incurring of expenses on the faith of such subscription, without having pleaded it in reply, such matter being in denial and not in confession and avoidance of the matter averred in the answer: *University of Des Moines v. Livingston*, 57–307.

Plaintiff cannot be required to file a pleading confessing and avoiding, or denying, the allegations in the answer or cross-petition: *Cassidy v. Caton*, 47–22.

The implied admission in a reply of the truth of the allegation to the answer arising from the setting up of matter by way of confession and avoidance does not overcome the denial of the allegations of the answer implied by law. The two are to be considered as inconsistent defenses of which the plaintiff has a right to avail himself as against the answer: *Day v. Mill Owners Mut. F. Ins. Co.*, 75–694; *Nicholls v. Chicago G. W. R. Co.*, 62 N. W., 769; *Schulte v. Coulthurst*, 62 N. W., 770. [And see now the last clause of the next section.]

If the plaintiff desires to avoid the facts pleaded as a defense he should plead facts in avoidance by way of reply: *Smith v. Griswold*, 64 N. W., 624.

If the reply contains a denial of affirmative matter not constituting a counter-claim, coupled with express confession of the same matter the denial will be disregarded and the reply will be considered an admission of the allegations of the answer: *Meadows v. Hawkeye Ins. Co.*, 62–387.

The pleading of a waiver or estoppel is not necessarily inconsistent with the denial of facts pleaded in the answer as a defense, and pleading such waiver or estoppel will not be a waiver of the denial: *Tobin v. Western Mut. Aid Soc'y*, 72–261.

Where, in reply to an answer setting up a previous adjudication, plaintiff, without admitting or denying such previous adjudication, alleged that it was procured by fraud, *held*, that such reply did not constitute a confession of the matter alleged in the answer: *Platner v. Platner*, 66–378.

If plaintiff expects to introduce evidence of matter to avoid the facts pleaded in the answer, as that an assignment set up in the answer is a forgery, he should plead that fact by way of reply: *Hay v. Frazier*, 49–454.

But the only penalty which attaches for failure to set up matter in avoidance by way of reply, when relied on, is that evidence of such matter cannot be introduced if the defendant objects in proper time. Failure to reply does not admit the allegations of the answer: *Ibid.*

Where a defendant pleads a defense which avoids the cause of action, plaintiff cannot introduce evidence to show the waiver of such defense without having set up such waiver in the reply: *Zinck v. Phœnix Ins. Co.*, 60–266.

Where plaintiff has a defense to affirmative matter set up by defendant in his an-

swer, such defense should be pleaded in his reply: *Kervick v. Mitchell*, 68–273.

Affirmative facts pleaded in defense are not to be taken as true on failure to reply thereto: *Chase v. Kaynor*, 78–449.

Where in an action for breach of contract defendant pleaded minority and the recission of the contract because thereof, and the reply did not deny the fact of minority or recission, but stated facts in avoidance, *held*, that minority and recission were thereby admitted: *Harrison v. Burns*, 84–446.

Where in connection with an allegation by way of avoidance the reply contains a general denial, the matter in the answer which is sought to be avoided will not be deemed to be admitted: *McDermott v. Iowa Falls & S. C. R. Co.*, 85–180: *Stanbrough v. Daniels*, 77–561.

Matter in avoidance of the plea of the statute of limitations cannot be shown without having been set out in reply: *Willits v. Chicago, B. & K. C. R. Co.*, 80–531.

Under the provisions of the Revision no reply to affirmative matter in an answer not setting up a counter-claim was necessary; and where defendant set up a release or other affirmative matter, plaintiff might meet the issue raised by proving fraud, etc., without having set up such matter, either in his petition or in a reply: *Noble v. Steamboat Northern Illinois*, 23–109; *Barger v. Farris*, 34–228; *Corbin v. Beebee*, 36–336. And as to other cases under the Revision, see *Stuart v. Hines*, 33–60, 101; *Gwyer v. Figgins*, 37–517. It was to obviate this construction that the second paragraph of the section as it stands in the Code was added: *Code Com'rs' Rep.*, p. 95.

As to when a reply is required, see also §§ 3622 and 3648.

There is no necessity for replying to statements in the answer which are not of issuable facts: *Runkle v. Hartford Ins. Co.*, 68 N. W., 712.

The allegations of the answer were taken as denied and unless there is evidence to sustain them they will be disregarded: *Oskaloosa Street Railway and Land Co. v. Oskaloosa*, 68 N. W., 808.

An amendment to the answer pleading settlement does not require a reply: *Higley v. Burlington, C. R. & N. R. Co.*, 68 N. W., 829.

It is the office of a reply to show facts in avoidance of the defense set up in the answer. Therefore, *held*, that where, in an action on a policy of insurance, defendant pleads a want of notice and proof of loss, plaintiff may, in his reply, plead a waiver of such notice and proofs: *Jacobs v. St. Paul F. & M. Ins. Co.*, 86–145.

In an action to foreclose a chattel mortgage, a party claiming to have a prior mortgage on the property was made defendant. In his answer he asserted the priority of his lien and in a cross-bill sought to have his mortgage foreclosed. Plaintiff filed no reply and no answer to the cross-bill. *Held*, that the issue as to the validity of defendant's prior mortgage was properly before the court for determination without further pleading: *Taylor v. Gilbert*, 92–587.

Matters which should have been alleged in the petition: A repetition in the reply of allegations of matter pleaded in the petition may be stricken out on motion. So, also, may prayers for relief which substantially appear in the petition, or a prayer asking dismissal of a cross-bill which is answered in the reply: *Hall v. Harris*, 61–500.

The office of the reply is to make an issue on the allegations of the counter-claim of defendant or to plead matter in defense or avoidance of the matters pleaded by way of defense in the answer. A plaintiff is not permitted to plead in his reply matters which are material only to the cause of action alleged in his petition. Much less will he be permitted to recover on a distinct cause of action pleaded only in his reply: *Marder v. Wright*, 70–42.

It is not proper to set out in the reply allegations which are intended as amendatory to the petition. But an objection to such pleading cannot first be taken on appeal: *Wilson v. Harris*, 68–443.

Claims for damages should be made in the petition and amendments thereof, and are not sufficient if first made in the reply: *Jones v. Marshall*, 56–739.

Where one who is defendant in a mortgage foreclosure as having an equity in the premises seeks to establish by a cross-bill the fact that his lien is a prior one, plaintiff may allege for the first time in his reply that his mortgage was recorded prior to defendant's: *Clark v. Bancroft*, 13–320.

SEC. **3577. Statements of.** When a reply must be filed, it shall consist of:

1. A general or specific denial of each allegation or counter-claim controverted, or any knowledge or information thereof sufficient to form a belief;

2. Any new matter, not inconsistent with the petition, constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, not inconsistent with the petition, which avoids the same, but an allegation of new matter in avoidance shall not be treated as a waiver of the denial of the allegations of the answer implied by law. [C.'73, § 2666; R., § 2896.]

Where plaintiff dismissed his cause of action, but defendants proceeded upon a counter-claim, *held*, that the pleading by plaintiff in the nature of an answer or counter-claim to defendants' claim could not be stricken from the files because inconsistent with the petition: *Gardner v. Halstead*, 71–259.

Where, in an action on a note, defendant denied that he signed the note and claimed

it to be a forgery, *held*, that plaintiff might in his reply set up an estoppel without abandoning the allegation of his petition that the note was signed by defendant: *Eikenberry v. Edwards*, 71–82.

Defendant may set up matters in avoidance, thereby colorably confessing the allegations of the answer, but not expressly admitting them, without waiving the general denial implied by law of the allegations of the answer. He has the right in this way to set up inconsistent defenses: *Day v. Mill-Owners' Mut. F. Ins. Co.*, 75–694.

An objection that averments of the reply are inconsistent with those of the petition cannot be made for the first time in the supreme court on appeal: *Adams County v. Hunter*, 78–328.

As to effect of matter in confession and avoidance upon the denial implied by law, see notes to preceding section.

SEC. **3578. Defenses to counter-claim—paragraphs.** Any number of defenses, negative or affirmative, are pleadable to a counter-claim, and each affirmative matter of defense in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply. A division of equitable matter must also be separated into paragraphs and numbered, as required in case of such matter in the answer. [C. '73, § 2667; R., §§ 2897–8.]

SEC. **3579. Demurrer to reply.** When the facts stated in the reply do not amount to a sufficient defense, the defendant may demur, subject to the same requirements of certainty in statement of grounds thereof as obtain in demurrer to the petition, and with like results attendant upon the ruling thereon. [C. '73, § 2668; R., § 2899.]

SEC. **3580. Verification—when necessary.** Every pleading must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except motions and demurrers, shall be verified also; and in all cases of verification of a pleading, the affidavit shall be to the effect that the affiant believes the statements there to be true. [C. '73, § 2669; R., § 2904.]

Failure to verify: The court cannot disregard a pleading which is not verified when it should be: *Lee v. Keister*, 11–480.

An unverified petition, even in a case where verification is made necessary, is not a nullity, and advantage of the defect can only be taken by motion to strike (§ 3588): *Rush v. Rush*, 46–648.

Objection that the pleading is not properly verified cannot be raised by way of attack upon the judgment in the proceeding: *Wright v. Marsh*, 2 G. Gr., 94.

Filing a demurrer to a petition waives any error in the ruling of the court on motion to strike out for want of verification: *Stineman v. Beath*, 36–73.

Failure to verify answer: When an answer is filed which is not verified when it should be, the court should not render judgment by default against defendant for want of an answer, without the proper steps being taken to strike the answer from the files: *Wolff v. Hagensick*, 10–590.

Where the petition is verified defendant must verify his answer setting up a counter-claim: *Yarger v. Chicago, M. & St. P. R. Co.*, 78–650.

When, after the filing of the petition and answer, both unverified, plaintiff verified his petition by leave of court, *held*, that the court should not have rendered judgment by default against defendant for want of an answer: *Mallory v. Sailing*, 48–699.

The object of the provisions requiring an answer to a sworn petition to be verified is not merely to enable a party to obtain testimony by having his pleadings responded to under oath, but to secure the truthful statement of the defense, and when the petition is verified the plaintiff has a right to insist upon a sworn answer If such verified pleading is not filed the other party may insist upon and claim a default: *Wilson v. Preston*, 15–246.

Where the parties go to trial upon the issue raised by an unverified answer, in a case where the answer ought to be verified, the plaintiff is not entitled to have the averments of his petition deemed true for want of answer: *Taylor v. Runyan*, 9–522.

The statute does not provide, as a consequence of failure to answer under oath, nor does it intend, that the pleading sworn to is to be taken as true: *Ibid.*

The fact that the petition which is verified includes an application for an attachment which is specially required by statute to be verified does not relieve defendant from verifying his answer: *Harper v. Drake*, 15–157.

As to verified answer in equity, see § 3590 and notes.

Amendment: Where a petition for attachment is not sufficiently verified as to the existence of grounds for attachment the defect may be cured by amendment: *Lowenstein v. Monroe*, 52–231.

The court may permit an amendment to a pleading to be made without being verified unless a new and distinct cause of action is introduced (§ 3591): *Teyler v. Shipman*, 33–194.

An amendment containing substantial additional matter must be verified in the same manner as the original: *Walker v. Ayres*, 1–449.

What sufficient verification: Where the jurat specifies that the party "makes oath

that the matters and things stated in the petition are true," this is sufficient as a verification, although affiant does not sign the affidavit or pleading. (Decided under Code of '51): *Bates v. Robinson*, 8–318.

Under the provisions of statute that answers to interrogatories shall be verified by the affidavit of the party answering, *held*, that an affidavit was necessary, and that a simple verification "subscribed and sworn to before me this," etc., with the signature and seal of the notary public was not sufficient: *Averill v. Boyles*, 52–672.

An affidavit as to the truth of the pleading, "to the best of affiant's knowledge and belief," is not sufficient: *Stadler v. Parmlee*, 10–23.

A verification to the effect that the facts set forth in the pleading are true is sufficient. The word "facts" thus used covers the allegations in the petition the same as though affiant had stated that the matters and things therein set forth were true: *Sherrill v. Fay*, 14–292; *Wheelock v. Winslow*, 15–464.

An affidavit referring to "the foregoing petition," without giving the title of the action, *held* sufficient: *Levy v. Wilson*, 43–605.

Jurat: It is not necessary, under the present Code, that the certificate to the affidavit show the name of the affiant: *Stone v. Miller*, 60–243.

The jurat need not expressly state that the affidavit was subscribed and sworn to by the person whose name is signed thereto. That fact will be inferred from the expression "subscribed in my presence and sworn to before me:" *Stoddard v. Sloan*, 65–680.

While it should appear that the notary in signing the jurat acts in his official capacity, it is not necessary that he append to his designation as notary public the name of the county in and for which he acts. The court will take judicial notice of the county for which he is commissioned as notary, and if it appears that that county is the one in which the act is performed as shown by the evidence it will be sufficient: *Ibid.*

Where an affidavit was headed "State of Iowa, Delaware County," and the officer's signature, with the addition "Notary Public," was authenticated with a seal, *held*, that it was sufficient: *Stone v. Miller*, 60–243.

Where the jurat was signed with the name of a person with the word "clerk" added, and the seal of the court was attached thereto, *held*, that it sufficiently appeared that the person before whom the affidavit was made was clerk of such court, and that the venue was thus sufficiently shown: *Levy v. Wilson*, 43–605.

SEC. **3581. By corporation.** Where a corporation is a party, the affidavit may be made by any officer or agent thereof. [C.'73, § 2670; R., § 2905.]

SEC. **3582. By parties united in interest.** When there are several parties united in interest, the affidavit may be made by any one of them. [C.'73, § 2671; R., § 2906.]

SEC. **3583. By agent or attorney.** If the pleading is founded on a written instrument for the payment of money only, and such instrument is in possession of the agent or attorney, the affidavit may be made by such agent or attorney, so far as relative to the statement of the cause of action thereon; but when relief is asked other than a money judgment or decree of foreclosure, the affidavit must contain averments showing competency, as herein provided. [C.'73, § 2672; R., § 2907.]

The requirements of this section are not applicable to the verification of a petition for attachment as provided for in § 3878. Under that section it is not necessary that a verification by plaintiff's attorney shall show that he had knowledge of the statements contained in the petition: *Sioux Valley State Bank v. Kelloy*, 81–124.

SEC. **3584. By person knowing facts.** If the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same. [C.'73, § 2673; R., §§ 2908–9.]

Where the name of the person verifying the petition is the same as that of plaintiff, it will be presumed that such person is the plaintiff. Therefore, where a petition in an action brought by a partnership was verified by a person who did not state that he was a member of the firm, but the account attached to the petition was verified and showed that a person of the same name was a member of such firm, *held*, that it sufficiently appeared that the verification of the petition was by a member of the firm: *Lessem v. Wilson*, 43–488.

Where a sworn answer was called for in an equitable proceeding as to transactions between plaintiff and defendant, *held*, that an answer verified by the wife of defendant acting as his agent, and showing herself familiar in general with the business to which the controversy related, but not as to the particular transactions referred to, was not sufficient: *Leach v. Keach*, 7–232.

An affidavit of verification by the attorney of a party, showing his knowledge of the facts stated in the pleading and the source of it, is sufficient: *Brady v. Otis*, 40–97.

Where the affidavit does not state that a person making it has knowledge as to the truth of its allegations, nor state facts from which such knowledge can be inferred, the verification is not sufficient: *Clute v. Hazleton*, 51–355.

Where a person other than the party verifies a pleading, it is not sufficient if he states in his affidavit that he knows the facts stated to be true as he verily believes. Why he thus knows is not required to be stated: *Yoe v. Nichols*, 51–330.

But if the affiant states the facts by reason of which he claims to have personal knowledge, and such facts do not render him competent to speak as from personal knowledge, the verification will not be sufficient: *Searle v. Richardson*, 67–170.

Where the affidavit shows that affiant was possessed of the requisite knowledge of the facts to make a verification, that is sufficient although it be not certain to a certain intent in every particular: *First Nat. Bank v. Mason*, 57–105.

Verification by the agent of the plaintiff, both as to the cause of action and the grounds for attachment, *held* sufficient in a particular case: *Rausch v. Moore*, 48–611.

SEC. **3585. Verification of counter-claim.** Where the petition is not verified, and the answer contains a counter-claim, the same may be verified apart from the defense part of the answer, and the foregoing provisions are applicable to the counter-claim as if the same were a separate pleading. [C.'73, § 2674.]

An answer setting up a counter-claim must be verified if the petition is verified. (Overruling *Innes v. Krysher*, 9–295): *Yarger v. Chicago, M. & St. P. R. Co.*, 78–650.

SEC. **3586. When verification not required.** Verification shall not be required to any pleading of a guardian, executor or prisoner in the penitentiary, nor to any pleading controverting the answer of a garnishee, nor to one grounded on an injury to the person or the character. [C.'73, § 2675; R., §§ 2910, 2912.]

SEC. **3587. Crimination not required.** When it can be seen from the pleading to be answered that an admission of the truth of its allegations might subject the party to a criminal prosecution, no verification shall be required. [C.'73, § 2676; R., § 2911.]

SEC. **3588. Failure to verify.** If a pleading is not duly verified, it may be stricken out on motion; but such defect will be waived if the other party responds thereto, or proceeds to trial without such motion. [C.'73, § 2677; R., § 2916.]

An unverified petition, even in a case where verification is made necessary, is not a nullity, and advantage of the defect can only be taken by motion to strike: *Rush v. Rush*, 46–648; *Guthrie v. Guthrie*, 84–372.

Objection that a pleading is not verified cannot be raised by instructions to the jury or motion in arrest of judgment: *Turner v. Younker*, 76–258.

Filing a demurrer to a petition waives any error in the ruling of the court on motion to strike out for want of verification: *Stineman v. Beath*, 36–73.

And see notes to § 3580.

SEC. **3589. When verification applicable to amount claimed.** The verification of the pleading does not apply to the amount claimed, except in actions founded on contract, express or implied, for the payment of money only. [C.'73, § 2678; R., § 2914.]

As to the amount claimed the statement of the pleading is not an admission or declaration which may be used for the purpose of impeaching the testimony in another case on the same matter of the party who filed the petition: *State v. Brown*, 69 N.W., 277.

SEC. **3590. Effect of verification.** The verification shall not make other or greater proof necessary on the side of the adverse party. [C.'73, § 2679; R., § 2915.]

The provisions as to verification apply equally to pleadings in ordinary and in equitable proceedings. (Overruling previous cases): *Shepard v. Ford*, 10–502.

The rule as to the amount of testimony necessary to overcome a sworn answer in a chancery proceeding is abrogated: *Wilson v. Holcomb*, 13–110; *Mitchell v. Moore*, 24–394; *Smith v. Phelps*, 32–537.

SEC. **3591. Amendments not verified.** Amendments may be made without being verified, unless a new and distinct cause of action or counter-claim is thereby introduced, in which case they shall be verified as other pleadings. [C.'73, § 2680; R., § 2981.]

Section applied: *Tegler v. Shipman*, 33–194, 197.

SEC. **3592. Pleading in slander and libel.** In an action for slander or libel, it shall not be necessary to state any extrinsic facts for the purpose

of showing the application to the plaintiff of any defamatory matter out of which the cause of action arose, or that the matter was used in a defamatory sense; but it shall be sufficient to state the defamatory sense in which such matter was used, and that the same was spoken or published concerning the plaintiff. [C.'73, § 2681; R., § 2928.]

Allegation of defamatory sense: It is sufficient to set out the words themselves and state the defamatory sense: *Kinyon v. Palmer*, 18–377; *Swearingen v. Stanley*, 23–115; *Clarke v. Jones*, 49–474.

Words are to be taken in their plain and natural import and in the sense in which they would be understood by those to whom they were addressed: *Truman v. Taylor*, 4–424; *Wilson v. Beighler* 4–427.

And explanatory circumstances known to both parties will be considered as part of the words: *De Moss v. Haycock*, 15–149.

Cause of action: There can be but one cause of action for a slanderous conversation, although the items of slander are numerous: *Cracraft v. Cochran*, 16–301.

Plaintiff need only set out in his petition or prove so much of the conversation as constitutes a cause of action, but either he or defendant may prove all of the conversation occurring at the same time for the purpose of showing the *quo animo: Ibid.*

Special damages: Where the words spoken are actionable *per se*, special damages need not be alleged or proven: *Parker v. Lewis*, 2 G. Gr., 311.

In such case general damages may be proved, but plaintiff cannot prove or recover for special injuries not alleged: *Hicks v. Walker*, 2 G. Gr., 440.

Where the words charged are actionable *per se*, the fact that averments are made of damage to plaintiff as a citizen, farmer and church member will not justify the requirement of a more specific statement as to the particular damage in the case: *Swearingen v. Stanley*, 23–115.

Evidence: It is not necessary for plaintiff to prove the precise words as laid in the petition, but it is sufficient to prove them substantially as set out: *McClintock v. Crick*, 4–453; *Desmond v. Brown*, 29–53; *Bower v. Deideker*, 38–418.

Proof of words spoken in a foreign language: While at common law the authorities are uniform that to allege a publication of ignominious words, and prove a publication of words in another tongue, is a variance and cause for nonsuit, yet, under our system of pleading, it seems that it would be sufficient to set out a translation of the words spoken in the foreign language, averring that they were spoken in that language, and that the words charged are a correct translation of them. In such case the proof of the speaking of the words in a foreign language would not constitute a variance: *Bower v. Deideker*, 38–418.

The meaning of the words used may be inferred from their plain import, and evidence of the sense in which they were understood is not necessary, although testimony of those who heard the words as to their understanding would be proper if their meaning was not clear: *Hess v. Fockler*, 25–9.

Repetition: It is competent in actions for slander to prove a repetition of the slanderous charges for the purpose of showing malice, without any allegation in the petition of such repetition, and the portion of the petition making such allegation may be stricken out on motion: *Halley v. Gregg*, 74–564.

SEC. **3593. Matter in mitigation—justification.** In any action brought to recover damages for an injury to person, character or property, the defendant may set forth, in a distinct division of his answer, any facts, of which evidence is legally admissible, to mitigate or otherwise reduce the damages, whether a complete defense or justification be pleaded or not, and he may give in evidence the mitigating circumstances, whether he proves the defense or justification or not, and no mitigating circumstances shall be proved unless pleaded, except such as are shown by or grow out of the testimony introduced by the adverse party; and in actions for slander or libel, an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury on the whole case finds that such defense was made with malicious intent. [C.'73, § 2682; R., § 2929.]

Mitigation or partial defense: All mitigating circumstances, certainly all contemporaneous with the act, which might at common law have been given in evidence under the general issue, may still be given under an answer in denial. But all which tend to show the truth of the charge must be pleaded. It is the safest rule to state every fact relied on in mitigation: *Beardsley v. Bridgman*, 17–290.

In an action for slander defendant offered to amend his answer by alleging that there was such a report in circulation at and before the time the words were alleged to have been spoken by defendant. *Held*, that such offer was properly refused, it not being alleged that the words were repeated without actual malice: *Ibid.*

Facts relied upon as mitigating circumstances must be pleaded as such, and not by way of defense or justification: *Ronan v. Williams*, 41–680.

Facts which might be considered by way of mitigation of damages cannot be considered if pleaded as a complete defense when they do not constitute a defense: *Ibid.*

Evidence by defendant of matters not pleaded as justification or mitigation is not admissible: *Halley v. Gregg*, 82–622.

Where facts which do not constitute a justification are pleaded as such, evidence thereof is not admissible in mitigation: *Jenks v. Lansing Lumber Co.*, 66 N. W., 231.

A partial defense, or matter in mitigation, must be pleaded and proved as such, and not as a complete defense. Where the matter set up is neither by way of denial nor of confession and avoidance, a demurrer will lie: *Davenport Gas, etc., Co. v. Davenport*, 16–6; *Peck v. Parchen*, 52–46.

While, in one sense, facts pleaded in mitigation do not constitute a defense, yet, as such facts, if relied on, must be pleaded to entitle defendant to introduce evidence of them, a plea of such facts must be regarded as tendering an issue: *Mielenz v. Quasdorf*, 68–726.

Whether facts can be pleaded in mitigation for the purpose of showing that defendant had reasonable ground to believe that the facts written and spoken were true, *quære: Ibid.*

Matter in defense cannot be pleaded hypothetically, nor can a party plead to the whole cause of action, and also aver matter which shows only a partial defense: *Martin v. Swearengen*, 17–346.

Defendant may allege mitigating circumstances without confessing the speaking of the words, and it is not necessary to deny malice, or aver belief in the truth of the words spoken: *Desmond v. Brown*, 33–13.

Where mitigating circumstances are pleaded it is incumbent upon the party pleading to prove them, which must be done in his own behalf and not by cross-examination of witnesses who are not examined in chief as to the mitigating matter: *Hanners v. McClelland*, 74–318.

In an action to recover damages for wrongfully suing out an attachment, malice may be in issue otherwise than by way of mitigation and therefore evidence tending to show want of malice may be introduced although the fact is not alleged as required by this section: *Bowman v. Western Fur Mfg. Co.*, 64 N. W., 775.

The fact that defendant reduces plaintiff's recovery by matter pleaded in mitigation will not entitle defendant to apportionment of costs: *McGuire v. Montrose*, 70 N. W., 743.

Prior to the enactment of this section, *held*, that proof that the words were spoken in the heat of passion or under excitement produced by immediate provocation might be shown without being specially pleaded: *McClintock v. Crick*, 4–453.

But this statutory provision does not make any change in the law as to matters of substance. The same matters only can now be pleaded in mitigation which are recognized to be such by law, independent of the Code: *Marker v. Dunn*, 68–720.

In an action for libel in charging plaintiff with being a defaulter to the government, *held*, that the action of the government subsequent to the publication of the libel, in relieving plaintiff from the consequences of default, could not be shown in evidence: *Roberts v. Miller*, 2 G. Gr., 122.

Evidence that plaintiff has made statements tending to show the truth of the words charged as slanderous is admissible: *Bower v. Deideker*, 38–418.

Under an allegation by defendant in a suit for slander for charging plaintiff with unchastity that plaintiff was reported to be unchaste at the time the words were spoken, but not alleging the truth of the charge, defendant cannot prove specific acts of unchastity: *Hanners v. McClelland*, 74–318.

Plaintiff's character: The bad character of plaintiff may be shown in mitigation of damages: *Armstrong v. Pierson*, 8–29; *Fletcher v. Burroughs*, 10–557.

Plaintiff's bad character is no bar to his right to recover; it only goes in mitigation of damages. Defendant may still be held to recompense the injured party to the extent of the trouble or expense in recovering, or disproving the unjust accusation: *Armstrong v. Pierson*, 8–29.

But defendant cannot plead either in defense or mitigation that the plaintiff has been guilty of a specific crime in no way connected with the alleged defamatory words, or the occasion on which they were used: *Fisher v. Tice*, 20–479.

Nor can defendant prove specific offenses or particular acts of dishonesty not connected with the transaction under investigation nor set up in the pleadings, nor that the plaintiff was in the habit of committing such offenses: *Fountain v. West*, 23–9.

Provocation: That slanderous words were spoken through heat of passion, under provocation, may be shown in mitigation, but not in complete defense: *McClintock v. Crick*, 4–453.

Insanity or monomania on the subject matter of the charge may be pleaded in defense to an action for libel: *Fisher v. Tice*, 20–479.

Intoxication: It is no defense to an action for slander that defendant was intoxicated at the time of the speaking of the slanderous words: *Reed v. Harper*, 25–87.

Justification: Where defendant, in an action for slander in speaking words imputing a crime, attempts to justify by proof of the truth of the charge, he is not required to prove the commission of the crime beyond a reasonable doubt, as would be necessary in a criminal prosecution for such crime. (Overruling *Bradley v. Kennedy*, 2 G. Gr., 231; *Forshee v. Abrams*, 2–571; *Fountain v. West*, 23–9; *Ellis v. Lindley*, 38–461; *Georgia v. Kepford*, 45–48; *Mott v. Dawson*, 46–533); *Riley v. Norton*, 65–306. And see notes to § 5376.

Matter in justification is not admissible unless justification is pleaded: *Forshee v. Abrams*, 2–571.

Where defendant pleads the truth of the words spoken by way of justification, the motive of plaintiff in prosecuting the action cannot be inquired into: *Bradley v. Kennedy*, 2 G. Gr., 231.

It is no justification that defendant believed the words to be true. To justify, he must prove they were in fact true. But the belief may be given in evidence in mitigation: *Fountain v. West*, 23–9.

SEC. **3594. Intervention.** Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause, and before the trial commences. [C. '73, § 2683; R., § 2930.]

By taxpayer: A taxpayer, as such, has not such an interest in the matter in litigation as to entitle him to intervene in a suit against his county to enforce the payment of a claim, at least in the absence of a showing that the board of supervisors, acting in bad faith, are failing properly to defend against such claim: *Cornell College v. Iowa County*, 32–520.

But where the board aid, collude and conspire with the opposite party to procure judgments against the county a taxpayer may intervene: *Greeley v. Lyon County*, 40–72; *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Where the board of supervisors refuse to set up a defense in an action against the county a taxpayer may do so by intervention: *Richards v. Supervisors*, 69–612.

In a proceeding by *certiorari* by a taxpayer of the county to have an action of the board of supervisors, by which the salary of the county attorney was increased, set aside, *held*, that the county attorney was a necessary party, and the court did not err in allowing him to intervene, although the cause had been determined, as the granting of the application did not cause any delay in the final decision of the cause: *Goetzman v. Whitaker*, 81–527.

By county: Where taxpayers brought action against a purchaser of the poor farm from the county, for the purpose of having the sale set aside on the ground of inadequacy of price, etc., *held*, that the county might intervene in the action and join with defendants in resisting the granting of the relief: *McConnell v. Hutchinson*, 71–512.

By other parties: In a proceeding to enjoin the collection of a tax in aid of a railway, the railway company may intervene, although it be not yet entitled to the tax: *Brown v. Bryan*, 31–556.

A party claiming to be the equitable owner of a promissory note may intervene and have his rights established in a suit brought by the possessor and holder of the legal title against the owner: *Taylor v. Adair*, 22–279.

The purchaser at a foreclosure sale is subrogated to the rights of the mortgagee, and may intervene in the foreclosure suit which is still pending as to other defendants: *Dyer v. Harris*, 22–268.

A party *held* entitled to intervene under the facts of a particular case: *Young v. Tucker*, 39–596.

While a party interested in the subject-matter involved may unite with the defendant in resisting the claim of the plaintiff, he cannot ask to be substituted as the defendant to the action in place of the original defendant: *Britton v. Des Moines, O. & S. R. Co.*, 59–540.

The wife may intervene in an action against her husband to compel specific performance of a contract executed by him alone for the conveyance of the homestead: *Perry v. Dillrance*, 86–424.

One who attempts to intervene between other parties without bringing himself within the provisions of this statute is a mere interloper, who acquires no rights by his unauthorized interference, unless objection thereto is waived. His pleadings are unknown to the law and can have no legal effect: *Des Moines Ins. Co. v. Lent*, 75–522.

Where a party intervened in an action in which it was sought to recover damages against a railway company for maintaining its track over the streets of a city without paying damages to abutting property owners and to enjoin the company from operating its railway, and the suit was determined on the petition of intervention without regard to the application for an injunction, *held*, that such decision did not bar a subsequent suit by the intervenor for an injunction: *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

By assignee: An assignee of a debtor under general assignment made after a levy of attachment may intervene in an attachment proceeding for the purpose of interposing against plaintiff a claim for damages growing out of a wrongful suing out of an attachment: *Dunham v. Greenbaum*, 56–303.

Notice: Where, in a proceeding to foreclose a mortgage executed to a trustee to secure bonds, the holder of a portion of the bonds intervened and an issue was raised between such bondholder and the trustee, on the trial of which evidence was introduced, it appearing that the petition of intervention was filed before default of the defendant corporation, *held*, that the objection that notice of the petition of intervention had not been served upon defendant could not be raised for the first time in the supreme court: *Sanxey v. Iowa City Glass Co.*, 63–707.

How affected: A party cannot by one petition intervene in several distinct and unconsolidated actions, nor can an agent make his principal a party to the intervention by filing the petition in his (the agent's) name: *Rosenbaum v. Adams*, 61–382.

This section empowers a person to become a party by intervention to an action or controversy between others only during the pendency of the action: *Edwards v. Cosgro*, 71–296.

An intervention is effected by petition and not by motion: *Dullard v. Phelan*, 83–471.

Judgment conclusive against intervenor: A judgment in an action where a third party has intervened as defendant is conclusive both upon the original defendant and the intervenor: *Witter v. Fisher*, 27–9.

As between different intervenors, the court may determine their respective rights as to liens. One who is adjudged not to have a lien cannot object as to the disposition made of other claims: *Phillips v. Both*, 58–499.

The intervenor cannot object to the amount of judgment rendered against defendant in the main action: *Ibid.*

Dismissal: The intervenor may dismiss his intervention at any time before final submission without any express order to that effect, and it will be without prejudice to his rights in another action: *Dalhoff v. Coffman*, 37–283.

The right of an intervenor to dismiss his petition of intervention at any time before judgment is well settled, and he will not by such dismissal be estopped from at any time litigating the same matter: *Woodward v. Jackson*, 85–432.

Supplemental petition: Where the court had jurisdiction of the subject-matter and the parties, *held*, that it might render judgment in favor of an intervenor on an amended petition, setting up an award had upon an agreement of arbitration made subsequently to the filing of the original petition of intervention: *Joliet Iron, etc., Co. v. Chicago, C. & W. R. Co.*, 51–300.

SEC. **3595. Decision—no delay—costs.** The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained he shall pay all costs of the intervention. [C.'73, § 2684; R., § 2931.]

An intervenor cannot be allowed to tender an issue which can be tried only by a change in the form of proceeding, and a continuance of the cause for testimony: *Van Gordon v. Ormsby*, 55–657.

The court may refuse to permit an intervention where the petition is presented too late, or where it is attempted to raise issues which would necessarily involve delay: *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75–722.

Where a verdict has been rendered, or the parties have agreed upon the judgment to be entered, it is too late to intervene: *Henry v. Cass County Mill, etc., Co.*, 42–33; *First Nat. Bank v. Gill*, 50–425.

An intervenor is not entitled to have the action delayed in order that he may have equitable issues transferred to the equity docket: *Kassing v. Ordway*, 69 N. W., 1013.

Wherever the filing of a petition by intervention would cause delay in the disposition of the case the application for intervention should be denied: *Dupont v. Amos*, 66 N. W., 774.

An intervenor cannot tender an issue which would cause delay or change the form of procedure: *Kassing v. Walter*, 65 N.W., 832.

A petition of intervention cannot properly be filed after the rendition of judgment in the original cause: *Ball v. Cedar Valley Creamery Co.*, 67 N. W., 232.

SEC. **3596. By petition.** The intervention shall be by petition, which must set forth the facts on which it rests, and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings. But if such petition is filed during term, the court shall direct the time in which an answer shall be filed thereto. [C.'73, § 2685; R., § 2932.]

SEC. **3597. Variance—amendments.** No variance between the allegations in a pleading and the proof is to be regarded as material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown by proof to the satisfaction of the court, and such proof must also show in what respect he has been so misled, and thereupon the court may order the pleading to be amended upon such terms as may be just. [C.'73, § 2686; R., § 2972; C.'51, § 1758.]

What variance deemed material: No variance is material unless the adverse party has been misled to his prejudice: *Bower v. Deidecker*, 38–418.

A slight variance between the allegations of the petition and the proof, which cannot have misled the opposite party, is not to be deemed material: *White v. Spangler*, 68–222.

Variance in a particular case between the allegations and the proof, *held* not to be material: *Rayburn v. Central Iowa R. Co.*, 74–637.

As to what discrepancy between allegation and proof is to be deemed a variance, see notes to § 3559.

Conformity of proof to pleadings: The rule requiring conformity of allegation and proof is not materially changed by the Code, although non-conformity may be now corrected by amendment: *Hoben v. Burlington & M. R. R. Co.*, 20–562.

A party cannot, having sued under a provision of statute authorizing him to recover treble damages, upon an appeal from the judgment awarding such relief, support his right to actual damages on an entirely different right of recovery: *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

An amendment to conform the pleadings to the proofs by introducing allegations of a material fact which is shown by the evidence may be made after verdict and judgment: *Davis v. Chicago, R. I. & P. R. Co.*, 83–744.

Variance as to circumstances surrounding the negligence complained of as a cause

of action, *held* immaterial: *Robbins v. Diggins*, 78–521.

What sufficient on appeal: The objection that the evidence does not correspond with the allegations, if not raised in the court below, cannot be first urged upon appeal: *Iselin v. Griffith*, 62–668; *Mathes v. Cover*, 43–512; *Wilcox v. Jackson*, 57–278.

If a right to recovery is established to the amount claimed such recovery will not be interfered with on appeal on the ground that the facts upon which the amount of recovery depended differed in some respects from the facts pleaded: *Jenkins v. Barrows*, 73–438.

Malice: Under a petition alleging wilful and malicious acts of defendant as a ground of recovery, plaintiff may recover on proof of careless and negligent acts, without proof of malice, if an averment of such acts would have authorized recovery: *McCord v. High*, 24–336.

Payment: Where defendant set up an account against plaintiff by way of payment, *held*, that he could not introduce evidence of payment of money not embraced in such account under his answer: *Hoddy v. Osborn*, 9–517.

Matters of account: A book of account showing dealings between defendant and one of the plaintiffs cannot be used as evidence in an action brought by two persons holding and owning the book jointly with another without proof that it was actually the account book of the two jointly: *Hansen v. Kirtley*, 11–565.

Where plaintiff claimed in his petition a certain sum which was not stated to be a balance due upon account, but the account was set up in items of debit and credit, leaving a balance to the amount claimed, *held*, the allegations of the petition were sustained by proof of a balance due upon the account: *Keys v. Francis*, 28–321.

Ownership of third person: Where, in an action against sureties on a sheriff's bond for negligence of the sheriff in not making a levy, it was averred that the execution defendant had property subject to execution, and that the sheriff was guilty of negligence in omitting to levy thereon, the defendant denying such averment alleged particularly the ownership respectively of the different articles of property in the execution defendant s possession; *held*, that such particular averments in the answer were necessary, and it was not error in the court to instruct the jury that such ownership should be proved as averred: *Crosby v. Hungersford*, 59–712.

Written instrument: The slightest variance in any portion of the written instrument is fatal unless it should conclusively appear that the mistake could not operate prejudicially to the party taking advantage of it: *Hight v. White*, Mor., 45.

Judgment: So *held* where the judgment sued on was described as being for $834.41 damages and costs, whereas the judgment introduced in evidence was for that amount besides costs: *Ibid.*

Where a portion of the record is set out in an action on a judgment, and on the trial other portions of the record of the proceedings in which the judgment was rendered are offered in evidence, such evidence will not constitute a variance: *Latterett v. Cook*, 1–1.

Variance as to interest: The fact that an instrument as set out in the pleadings contains no reference to interest, while the instrument introduced in evidence provides for interest at a certain rate, will not constitute a material variance: *Wilson v. King*, Mor., 106.

Breach of warranty as defense to note: In an action on a note given for fruit trees, the defense set up in the answer was that the trees were to be delivered to defendant in good condition, and that when delivered they had been frozen and damaged while in plaintiff's possession and owing to his negligence, and were worthless, and that the trees were frozen by the fault of plaintiff; *held*, that evidence of improper packing and boxing of the trees by plaintiff was admissible under the issues: *Phœnix v. Lamb*, 29–352.

Copy of written instrument: When there is a variance between the allegations and the proof as to the character of a written instrument, and a correct copy thereof is attached to the pleading, such variance will be immaterial: *Walker v. Ayres*, Mor., 200; *Carothers v. Green*, Mor., 429.

Date: When it is impossible to determine from the instrument what the date is as shown by the writing, the question of date should be left to the jury in determining whether the evidence supports the allegations of the pleading: *Jefferson County v. Savory*, 2 G. Gr., 238.

Under a petition alleging the execution of a contract on the day it bears date, it is not competent to prove that it was executed on a different date: *McIntosh v. Lee*, 57–356.

Variance between the allegations and the proof as to the date of a note sued on and the indorsements on the back thereof, *held* not material and therefore not fatal: *Bremer County Bank v. Eastman*, 34–392.

Time and place, when material, see §§ 3613, 3614 and notes.

Sufficiency of proof: See § 3639 and notes.

SEC. **3598. Not material.** When the variance is not material, the court may direct the fact to be found according to the evidence, and order an immediate amendment without cost. [C.'73, § 2687; R., § 2973; C.'51, § 1757.]

SEC. **3599. Failure of proof.** When, however, the allegation of the claim or defense to which the proof is directed is unproved in its general meaning, it shall not be held to be a case of variance within the last two sections, but a failure of proof. [C.'73, § 2688; R., § 2974.]

In a particular case, *held*, that the allegations of the pleading were not "unproved in its general meaning" within the provisions of this section, and that the variance between the pleading and the proof was not material: *Miller v. Kendig*, 55–174.

SEC. **3600. Amendments allowed.** The court may, on motion of either party at any time, in furtherance of justice and on such terms as may be proper, permit such party to amend any pleadings or proceedings by adding or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceedings to the facts proved. [C. '73, § 2689; R., § 2977; C. '51, § 1759.]

I. RIGHT TO AMEND.

In equity: These provisions apply in equity as well as at law: *Brink v. Morton*, 2-411.

In supreme court: This section is of a general character and applies to all courts, and is peculiarly applicable to proceedings in the supreme court. Under it the supreme court may on motion grant leave to file an amended assignment of errors: *Stanley v. Barringer*, 74-34.

The rule is to allow: So far as substantial rights are not prejudiced the court should allow amendments on proper terms rather than dismiss the action and compel the party to commence anew: *Harkins v. Edwards*, 1-296; *Seevers v. Hamilton*, 11-666.

The rule is to allow amendments; to refuse them, the exception: *Pride v. Wormwood*, 27-257; *Hinkle v. Davenport*, 38-355; *Newman v. Covenant Ins. Ass'n*, 76-56.

Where an action was brought against a mutual benefit association on a certificate, and it was held on appeal that plaintiff was not entitled to a money judgment, but only to the proceeds of an assessment according to the rules of the company, and the judgment against the company was therefore reversed and the cause remanded, *held*, that the plaintiff might thereupon amend his petition so as to ask for the assessment, although the time within which such an assessment might have been demanded in the original action had already expired: *Newman v. Covenant Ins. Ass'n*, 76-56.

The right to make amendments by which cases are changed from the law to the equity jurisdiction of the court has been too long recognized in practice to be now called in question: *Ibid.*

The language of this section is such as to induce a liberal construction that the spirit of the legislation may be preserved. And *held*, that a cause of action under a contract in a different form from that stated in the original petition was proper: *Williamson v. Chicago, R. I. & P. R. Co.*, 84-583.

The law as to amendments is designed to permit the parties, sooner or later, to plead the actual facts: *Ibid.*

It is within the discretion of the court to permit a material amendment to be made to the pleadings at any time, and where such amendment is made and the allegations contained therein are not denied by subsequent pleading, they will be regarded as admitted: *Eslich v. Mason City & Ft. D. R. Co.*, 75-443.

Where an amendment merely sets out more fully what has already been alleged in a previous pleading, objection cannot be maintained to the filing, but the party, if prejudiced thereby, must ask for additional time: *Hintrager v. Richter*, 85-222.

An amendment to the petition adapting the prayer to the allegations of fact may be properly allowed: *Cook v. Chicago, R. I. & P. R. Co.*, 75-169.

Amendments within the limits of the statute should always be allowed when substantial justice will thereby be promoted: *Dixon v. Dixon*, 19-512; *Tegler v. Shipman*, 33-194; *Miller v. Perry*, 38-301.

The allowance of an amendment is within the sound judical discretion of the court, and if it does not introduce a new cause of action and is in furtherance of justice for the purpose of remedying an error, leave should be granted: *O'Connell v. Cotter*, 44-48.

Refusal to allow defendant to amend his answer where there has been a mistrial, and application for leave is made, will be error: *Logan v. Tibbott*, 4 G. Gr., 389.

The statute and the practice under it are very liberal in allowing amendments, especially where the object is to make the pleadings conform to the evidence: *Blandon v. Glover*, 67-615.

The right to amend cannot depend on the character of the evidence introduced under such amendment: *Mitchell v. Joyce*, 69-121.

Applications to amend should always be allowed when the tendency is to advance justice: *Wilson v. Johnson*, 1 G. Gr., 147.

Where the facts set up in an amendment were material, and such that they could not be proven without being pleaded, *held*, that it was error to strike the amendment from the files on motion: *Fairburn v. Goldsmith*, 58-339.

Discretionary: The right to amend is not an absolute and unconditional right, but is to be allowed in the sound discretion of the court in furtherance of justice: *Brockman v. Berryhill*, 16-183; *Hays v. Turner*, 23-214; *State ex rel. v. Mayor of Keokuk*, 18-388; *Phillips v. Van Shaick*, 37-229.

Review of discretion on appeal: Before the discretion exercised in granting leave to amend can be held erroneous, satisfactory evidence must be furnished of abuse thereof: *Phœnix Ins. Co. v. Dankwardt*, 47-432.

The allowance or rejection of amendments is a matter of sound judicial discretion, and the ruling thereon will only be interfered with by an appellate tribunal where substantial prejudice has resulted to the party complaining: *Fulmer v. Fulmer*, 22-230.

The supreme court will not interfere with the discretion of the trial court allowing amendments within the time fixed by statute: *Marling v. Burlington, C. R. & N. R. Co.*, 67-331.

While the rule is to allow amendments, yet to refuse them is not reversible error where no prejudice has resulted: *Union Mill Co. v. Prenzler*, 69 N. W., 876.

The discretion lodged in the trial court with reference to allowing or rejecting amendments will only be interfered with when substantial prejudice has resulted: *Guyar v. Minnesota Thresher Mfg. Co.*, 66 N. W., 83.

The matter of allowing amendments to pleadings is so much one of discretion of the trial court that the appellate court will not interfere with the exercise of such discretion in the absence of a showing of legal abuse: *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 64 N. W., 769.

Error without prejudice: In particular cases, *held*, that refusal to allow an amendment was error without prejudice: *Allison v. Barrett*, 16-278; *State ex rel. v. Mayor of Keokuk*, 18-388; *Simmons v. Rust*, 39-241; *Whalley v. Small*, 29-288.

Leave to amend: Amendments can only be made by leave of court, except in accordance with § 3560, authorizing an amendment of the petition before the filing of an answer: *Allen v. Bidwell*, 35-86. And see note to that section.

Although a party has no right to file an amendment without leave, yet the court should not strike such amendment from the files on motion if it is one which should have been allowed if leave had been asked: *Miller v. Perry*, 38-301.

The court may strike an amendment from the files because filed without leave if it would have been justified in refusing leave if asked before filing: *Schoenhofen Brewing Co. v. Armstrong*, 89-673.

The allowance of the amendments is to be in furtherance of justice and it will not be error to refuse an amendment or to strike it from the files where leave has not been granted if such action would not interfere with the just disposition of the case: *Ibid.*

Where the transcript of the record on appeal showed that an amendment to the pleading in the court below setting out an instrument in writing was made by interlineation, *held*, that it would be presumed that it was made when objection to the introduction of the statement as evidence was interposed, and that the amendment was thus made by leave of court: *Giddings v. Giddings*, 57-297.

Waiver of objection: The fact that the opposite party answers an amended petition filed without leave constitutes a waiver of objection to such filing: *Keokuk County v. Howard*, 43-354.

Where a party makes no objection to the filing of an amendment, but takes issue, and goes to trial upon the merits, he thereby waives any error in allowing the amendment: *Foley v. McKeegan*, 4-1.

Failure to except to an order of court granting leave to amend waives objection to the filing of the amendment, and a motion cannot afterwards be sustained to strike such amendments from the files: *Scott v. Chickasaw County*, 53-47.

Where a demurrer to the petition was sustained on account of failure to set out a written notice, required by statute, and the plaintiff without leave of court, attached to his petition a copy of such notice, and defendant, in answer, set up a want of such notice, *held*, that, the issue being raised by the answer, the notice was receivable in evidence: *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

The terms upon which an amendment may be made rest within the discretion of the court, and its action with respect thereto will not be reviewed unless abuse of discretion is shown: *Harrison v. Colton*, 31-164.

It is not usually proper to tax all the costs accrued to defendant as a condition of granting leave to amend his answer: *Poole v. Hintrager*, 60-180.

Re-swearing of jury: It is not error to refuse to re-swear the jury after the filing of an amendment changing the issue: *Arnold v. Arnold*, 20-273.

Where an amended petition was filed submitting a cause of action in favor of one plaintiff in place of a similar cause of action in favor of joint plaintiffs, *held*, that it was not necessary to have the jury re-sworn: *Hinkle v. Davenport*, 38-355.

Surprise; continuance: Neither party should be allowed to be prejudiced or taken by surprise: *Harkins v. Edwards*, 1-296.

The filing of an amendment which takes the opposite party by surprise, so that he cannot go to trial, may be a good ground for continuance, but the amendment cannot for that reason be stricken from the files: *Snediker v. Poorbaugh*, 29-488.

As to when an amendment will be ground for continuance, see § 3502 and notes.

In trial of an appeal from a justice of the peace: In an action pending on appeal from a justice of the peace, new or amended pleadings cannot be filed as matter of right, but may be allowed upon proper terms and a showing of cause for failure to plead below: *Dunton v. Thorington*, 15-217; *Stanton v. Warrick*, 21-76; *May v. Wilson*, 21-79; *Warren v. Scott*, 32 22; *Ping v. Cockyne*, 37-211; *Adae v. Zangs*, 41-536; *Clow v. Murphy*, 52-695.

Held not error to allow an amendment correcting a mistake in the name of the plaintiff in such a case after the case was called for trial: *Adae v. Zangs*, 41-536.

An additional pleading by way of amendment to defendant's answer setting up a new defense may be allowed on such appeal: *Nettman v. Schramm*, 23-521; *Warren v. Scott*, 32-22.

It is not error to allow in the district court on appeal from the justice court the filing of an amended pleading which does not change the cause of action nor the remedy sought: *Boos v. Dulin*, 68 N.W., 707.

But amended pleadings cannot be filed in such cases as a matter of right. Leave to file, even upon cause shown, is a matter of discretion: *Packard v. Snell*, 35-80; *Griswold v. Bowman*, 40-367.

II. Within What Time.

After demurrer: It is error to sustain a demurrer to a pleading which has been corrected by an amendment filed after the filing of the demurrer: *Bell v. Byerson*, 11-233.

Where a demurrer was filed before the filing of the amendment to the pleading attacked, and was decided after the filing of

such amendment, it not appearing that the court considered such amendment upon passing upon the demurrer, *held*, that as the ruling upon the demurrer would have been erroneous if the amendment had been considered, it would be presumed that it was not so considered: *Johnson v. Tostevin*, 60–46.

Where an amendment is filed after a demurrer to the original pleading is sustained, the case is not properly disposed of by the plaintiff electing to stand upon his pleading. Some disposition should be made of the amendment: *Kelley v. Chicago, M. & St. P. R. Co.*, 93–436.

During the trial: Amendments may be allowed in a proper case after the jury are sworn. (Overruling *Cole v. Swan*, 4 G. Gr., 32): *Williams v. Miller*, 10–344.

They may be allowed during the progress of the trial on proper terms: *Arnold v. Arnold*, 20–273.

The practice of allowing amendments offered when the case is called for trial should not be encouraged: *Union Mill Co. v. Prenzler*, 69 N. W., 876.

An amendment to correct a clerical error may properly be allowed during the trial, if without prejudice: *Avery v. Wilson*, 26–573.

The allowing of an amendment to the petition after plaintiff's opening argument to the jury was finished, *held* not such an abuse of discretion as to be reversible on appeal: *Harrison v. Colton*, 31–16.

Leave granted to amend an answer after the testimony was closed, upon condition that the party pay all costs up to that time, *held* not improper in the absence of any showing of abuse of discretion: *Hall v. Doran*, 6–433.

It is not error to allow an amendment after the evidence is received, for the purpose of adapting the pleadings to the case made by the evidence: *Ellis v. Lindley*, 37–334.

An amendment may be allowed after commencement of argument to the jury, where the claim is not changed by the amendment: *Hammond v. Sioux City & P. R. Co.*, 49–450.

A motion to strike certain portions of the amendment to a petition, which amendment was filed during the trial, was properly overruled, it appearing that the portions sought to be stricken did not change the claim as originally made, and the defendant having delayed filing his motion for two days after the amendment had been filed, and after the evidence to support such amendment had been submitted: *Cason v. Ottumwa*, 71 N. W., 192.

It is not error to allow an amendment after the conclusion of the testimony, and for the purpose of conforming the pleadings to the proof, even when such amendment changes the issue. If, after the amendment, the opposing party can make it appear that he is surprised, or is not prepared to meet the issue raised by the amendment, a continuance will be allowed at the cost of the other party. If such continuance is not applied for, the objection is waived: *Thomas v. Brooklyn*, 58–438.

It is not error to allow defendant to plead the invalidity of an assignment relied on by plaintiff by way of amendment to his answer after nearly all the testimony had been adduced: *Franzen v. Hutchinson*, 62 N. W., 698.

Where, after the evidence had been partly introduced, defendant filed an amended answer, setting up a new defense, and plaintiff did not ask a continuance but proceeded with the trial, *held*, that he could not complain, after verdict, of the filing of the amendment: *Sheldon v. Booth*, 50–209.

After defendant has introduced his evidence and rested, he should be granted leave to file an amended and substituted answer for the purpose of conforming his answer to the evidence: *Blandon v Glover*, 67–615.

Where the amendment offered before the close of the introduction of evidence was proper, *held*, that it was not error to refuse to grant a continuance to the other party, it not appearing but that he had opportunity to procure any additional evidence desired with reference to the matter set out in the amendment: *Clough v. Bennett*, 68 N. W., 578.

In an action to set aside a deed as procured by fraud and undue influence, *held*, that it was not improper to allow plaintiff, after the conclusion of the evidence and during the argument by council, to file an amendment setting up the fact that plaintiff was of weak understanding and in financial distress, it being considered that such amendment did not materially change the issue nor set up a new cause of action or ground of relief. The question whether the amendment shall be allowed is addressed largely to the discretion of the lower court: *Clough v. Adams*, 71–17.

In an action to quiet title in which plaintiff avers ownership of the property, it is not error to allow him, after conclusion of the evidence, to amend so as to ask general relief and for possession of the property: *Wyland v. Mendel*, 78–739.

Where an amendment was allowed while the second argument was being made, *held*, that the discretionary power of the trial court is such matters would not be interfered with on appeal unless it satisfactorily appeared that the order was not in furtherance of justice: *Smith v. Howard*, 28–51.

Where a material amendment was offered by plaintiff and defendant did not ask for a continuance to enable him to produce his evidence to meet the amendment, *held* that he could not complain of the amendment being allowed: *Leek v. Chesley*, 67 N. W., 580.

Held not error, after the introduction of plaintiff's evidence, to allow plaintiff to file an amended petition, not changing the plaintiff's claim, but setting out more fully the form and substance of the contract sued on; and *held*, that in such case there was no ground for a continuance: *Marsh v. Chicago, R. I. & P. R. Co.*, 79–332.

Amendments to pleadings are frequently allowed after the evidence has been fully submitted, in the furtherance of justice; and *held*, that it was not ground for reversal to refuse to strike out an amendment filed after the trial of an action before a referee, and before a decision thereon, no prejudice to the opposite party appearing: *Crismon v. Deck*, 84–344.

It is error to refuse leave to plaintiff, after

the close of the arguments, to file an amendment to his petition for the purpose of conforming the allegations to the proofs: *Tiffany v. Henderson*, 57-490.

An amendment may be allowed, to make the pleading conform to the facts proved, after the evidence is all in and after opening arguments have been made: *Larkin v. McManus*, 81-723.

An amendment to conform the pleadings to the proofs by introducing an allegation of a material fact which is shown by the evidence may be made, even after verdict and judgment: *Davis v. Chicago, R. I. & P. R. Co.*, 85-744.

Where leave to amend was granted after the conclusion of the argument to the jury, and the amendment was filed after the return of verdict, it being slight and only for the purpose of conforming the petition to the proof, *held*, that it was properly allowed: *Correll v. Glasscock*, 26-83.

So *held*, also, where the allowance of the amendment was made after the decision of the court was announced, but before decree was formally entered: *Spink v. McCall*, 52-432.

So, also, where an amendment was allowed after the issue on a plea in abatement had been tried and determined: *Hunt v. Collins*, 4-56.

Held proper to allow an amendment, after verdict, to a petition so as to correct a mistake therein and make it apply to the land described in the evidence: *Ball v. Keokuk & N. W. R. Co.*, 71-306.

Amendments after verdict and before judgment are usually allowed for the purpose of conforming pleadings to the evidence, and even after judgment the petition may be so amended as to ask in the prayer other relief which has been granted in the judgment: *O'Connell v. Cotter*, 44-48.

To allow an amendment on a second trial withdrawing a denial previously made by the pleading, and thus securing for the party so amending the opening and closing, *held* not erroneous: *Bates v. Bates*, 27-110.

An amendment may be made to the petition, without terms, no prejudice resulting to the defendant thereby, pending a motion in arrest of judgment for variance: *Thompson v. Wilson*, 26-120.

An amendment may be allowed after judgment is rendered. Whether the court should permit an amendment at such time is largely within its discretion: *Squires v. Jeffrey*, 70 N.W., 730.

Amendments filed too late: After a referee's report has been filed, a party ought not to be allowed to file an amended petition tendering a new issue, and have the case resubmitted to the referee, without showing proper excuse for the delay: *Newell v. Mahaska County Savings Bank*, 51-178.

Where leave to amend was asked just as the jury was called, for the purpose of interposing a cross-action, and was refused, *held*, that such ruling was not erroneous: *Brockman v. Berryhill*, 16-183.

Where an amendment to an answer was offered after defendant had made his argument and submitted his cause to the jury, and it did not appear but that it might have been filed sooner, *held* not error to strike it from the files: *Bays v. Herring*, 51-286.

It is not error to refuse leave to file an amendment to the original petition at the close of the trial, in which for the first time appears any cause of action against defendant: *Nelson v. Hays*, 75-671.

It will not be considered error to refuse to allow an amendment after the cause has been submitted to the jury, where no facts indicating an abuse of discretion of the court are shown: *Hatfield v. Gano*, 15-177.

Where an amended answer was not filed until the day before the cause was called for trial, although it had been pending with opportunity to file it for several years, *held*, that it was not an abuse of discretion in the court to strike from the files on motion; *McClintock v. Crick*, 4-453.

In a particular case, *held*, that an application to amend the petition, made at a late day, during a second trial, and such as would entitle defendant to a continuance, was properly rejected: *Phillips v. Van Schaick*, 37-229.

An amendment offered after the submission of the cause to the court, and which was not merely to make the pleading correspond to the proof, but set up a material allegation upon which defendant would have had the right to take issue, *held* too late and properly refused: *Harrington v. Christie*, 47-319.

The filing of an amendment after verdict will not enable the supreme court to consider an issue in the case which was not raised by the pleadings as they stood during the trial, and which was not considered during that time as involved in the case: *Eikenberry v. Edwards*, 67-14.

Where a party failed to file his amendment within the time granted by the court to do so, but afterwards filed it, and the opposite party moved to strike it from the files, and the party filing it asked time to make resistance to the motion by affidavit, which affidavit was not filed within the time set therefor, nor until after the argument of the motion, *held*, that the motion to strike the amendment from the files was properly sustained: *Hayward v. Goldsbury*, 63-436.

Where, in a replevin suit, plaintiff was granted leave to file a substituted pleading by a certain date and did not file it until five months afterward, and after a motion for judgment had been filed by the other party, *held*, that in view of the nature of the case the substituted petition was properly stricken from the files: *Becker v. Becker*, 50-139.

It is not error to refuse leave, after a decree is entered and before it is approved, to file an amendment to the pleadings which will present a new issue and require a reopening of the cause: *Deere v. Nelson*, 73-186.

The right to amend exists only during the proceedings in the case, and cannot be exercised after the cause is decided and the right of the parties settled, and judgment finally entered. It may be that after judgment an amendment may be permitted to conform the pleading to the proceedings, but not one setting up new claims or new issues: *Bicklin v. Kendall*, 72-490.

It is not error to refuse the defendant

leave to set up by way of amendment to his answer, after introduction of evidence, that the contract sued on by plaintiff is void because of being entered into on Sunday. Such defense being purely technical is not in furtherance of justice, it appearing by the testimony of defendant that the indebtedness actually existed. It might be otherwise with reference to the statute of limitations: *Chlein v. Kabat*, 72–291.

Where at the end of plaintiff's evidence defendant asked leave to file an amendment to the answer and set up a settlement and release made long prior to the trial, *held*, that the action of the court in refusing leave did not constitute reversible error: *Thoman v. Chicago & N. W. R. Co.*, 92–196.

Leave to amend after the close of the trial in order to raise an issue to be supported by evidence which is claimed to have been discovered after the introduction of evidence has closed may be refused where it does not appear that there has been reasonable diligence in discovering or procuring such evidence: *LeMoyne v. Braden*, 87-739.

After appeal: It is too late to amend after a cause is pending in the appellate tribunal: *Johnson v. Chaplin*, 28–570.

After cause remanded for new trial: A party may be allowed to amend after the case has been appealed to the supreme court, and been sent back for a new trial: *Bebb v. Preston*, 3–325; *Scott v. Chickasaw County*, 53–47; *Gray v. Regan*, 37–688.

Where a demurrer is overruled in the court below, and the ruling is reversed on appeal, final judgment cannot be rendered in the supreme court; but the party whose pleading is thus assailed has a right to amend in the court below: *Ware v. Thompson*, 29–65.

After trial of an equity cause *de novo* on appeal and the filing of a *procedendo* in the court below, it is error to allow the filing of an amended pleading setting up matter which might have been set up before the trial: *Reed v. Howe*, 44–300; *Sexton v. Henderson*, 47–131.

After appeal in an equity case and trial *de novo* and remand of cause to the lower court for further action, the unsuccessful party is entitled, upon such showing of newly discovered evidence as would entitle him to a new trial after a decree, or material facts transpiring subsequent to the decree, to have a hearing thereof and introduce amended and additional pleadings rendered necessary by such new evidence or new facts: *Adams County v. Burlington & M. R. R. Co.*, 44–335; *Shorthill v. Ferguson*, 47–284.

Where an amendment is thus allowed, raising a new issue, the subsequent trial should be on such new issue. The other issues must be regarded as settled by the previous adjudication: *Adams County v. Burlington & M. R. R. Co.*, 55–94.

Where the party entitled to a final decree cannot have the same in the supreme court by reason of a mistake in his pleading, as to which he and his attorney are not chargeable with negligence, the court may remand the case, although it is triable *de novo* in the supreme court, for the purpose of enabling the party to amend his petition and secure the relief to which he is entitled: *White v. Farlie*, 67–628.

Where, after a decree adjudging to a party the ownership of specific property had been affirmed in the supreme court and the case remanded, such party asked leave to amend his pleadings so as to allege that the property had been converted by the other party and asking for the return of the property, or judgment therefor, it was held error to refuse leave to so amend: *Jones v. Clark*, 31–497.

III. WHAT AMENDMENTS ALLOWABLE.

Changing from law to equity: It is not improper to allow an amendment which changes the cause in action from one in equity to one at law: *Emmet County v. Griffin*, 73–163.

A party is not estopped, by bringing an action at law, from amending his pleadings before the case has finally been submitted to the court, so as to change it into an action in equity: *Barnes v. Hekla F. Ins. Co.*, 75–11.

So *held* in an action on a policy of insurance as to an amendment asking a reformation of the policy: *Esch v. Home Ins. Co.*, 78–334.

It is proper to allow the filing of an amendment raising equitable issues, and in the meantime stay the action at law: *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed., 7.

Changing name of plaintiff: Where suit was brought by an individual partner when it should have been by the firm. *held* proper to allow an amendment making the other partner a joint plaintiff: *Hodges v. Kimball*, 49–577.

And in such case, where a new action would have been barred, *held* error to refuse such amendment: *Dixon v. Dixon*, 19–512.

When an action was brought in the name of a firm as plaintiff, and it was sought to defeat the right of recovery on the ground that the evidence showed the name of plaintiff was incorrect by reason of the word "limited" in such name being omitted, *held*, that it was not error to allow plaintiff to amend his petition by adding such word in the title of the case: *Paine v. Waterloo Gas Co.*, 69–211.

Where an order is made substituting one party for another as plaintiff in the petition, and the defendant has answered, it is too late to object to the insufficiency of the petition in that respect. In such a case there is no necessity for a new petition by the substituted plaintiff or the formal acceptance of the petition by him: *Ream v. Jack*, 44–325.

Where suit was brought in the name of a township, *held*, that, although the township had no capacity to sue, the name of the township officer entitled to the possession of the money sued for might, on motion, be substituted as plaintiff and the action proceed: *Wells v. Stomback*, 59–376.

A petition may be amended by striking out the name of a party improperly joined as plaintiff: *Butcher v. Carleton*, 11–47; *Hinkle v. Davenport*, 38–355.

It is proper to allow an amendment to the petition substituting for the name of plaintiff

before her marriage her name after marriage: *Glick v. Hartman*, 10–410.

Name of defendant: It is not improper to allow an amendment substituting the true name of the party defendant when ascertained: *Arbuckle v. Bowman*, 6–70.

Joining another defendant: In an action against one party defendant, an amendment showing a cause of action against the same defendant and another, *held* allowable: *Harkins v. Edwards*, 1–296.

What may be amended: A demurrer may be amended as other pleadings: *Morrison v. Miller*, 46–84.

Where a demurrer has been submitted and not yet decided, the court may allow the party filing the demurrer to amend it and re-submit it, the prior submission having been set aside: *Poweshiek County v. Cass County*, 63–244.

The statement of a relator in his application for a writ of *mandamus* may be amended: *State ex rel. v. Bailey*, 7–390.

The return of an alternative writ of *mandamus* may be amended: *State ex rel. v. Mayor of Keokuk*, 18–388.

A motion for a new trial made within three days after the rendition of the verdict, as required by statute, may be amended by matter germane thereto at any time during the term: *Sowden v. Craig*, 20–477.

Where the verification of the pleading is defective, the court may allow a new verification to be made by way of amendment: *Hughes v. Feeter*, 18–142.

The plaintiff may, after the filing of an unverified answer to his petition, amend by adding a verification to his petition, whereupon it will be necessary for defendant to file a verified answer: *Wilson v. Preston*, 15–246.

A motion for new trial may be amended after the time limited for filing such motion but not with the addition of a new ground: *Dutton v. Seevers*, 89–302.

Under these provisions as to amendment an assignment of errors in the supreme court may be amended in furtherance of justice: *Buhlman v. Humphrey*, 86–597; *Laughren v. Des Moines*, 72–384; *Stanley v. Barringer*, 74–34.

As to amending petition for injunction, see notes to see § 4354.

As to the right to amend in attachment proceedings, see § 3933.

What not allowed: A judgment for a greater amount than is claimed in the petition is not authorized, and plaintiff should not be permitted to amend his petition after judgment is rendered, claiming damages greater than were alleged in the original petition: *Cox v. Burlington & W. R. Co.*, 77–478.

Where the allegations of an amendment filed after the verdict was returned were such as to affect the rights of the parties, the amendment was properly stricken from the files by the court on its own motion: *Toledo Savings Bank v. Rathmann*, 78–288.

Where in an action at law upon a promissory note plaintiff filed an amended and supplemental petition asking equitable relief, *held*, that he could not maintain both causes of action on the same right of recovery and could be required to elect between them: *National State Bank v. Delahaye*, 82–34.

In an action for libel, *held*, that the amendment to the answer pleading other words spoken and written, constituting a wholly new transaction, was properly stricken out on motion: *Halley v. Gregg*, 82–622.

It is not error to refuse leave to file an amended pleading after judgment, which is not intended to conform the allegations to the proofs, but to set up a new defense: *McNider v. Sirrine*, 84–58.

In an action brought to restrain a road supervisor from making certain proposed changes in a public street in front of plaintiff's premies, *held*, that the court properly refused to allow an amendment setting up a cause of action against the road supervisor and his sureties on his bond for damages by reason of having done the acts which were sought to be restrained: *Randall v. Christianson*, 84–501.

In a particular case, *held*, that the proposed amendment to the answer changed the defense and therefore was properly rejected: *Denzler v. Reickhoff*, 66 N. W., 147.

Answer to amended petition: When an amendment to the petition is made and allowed, pending or after the argument of the cause below, defendant is entitled to file an answer to the amendment: *Fulmer v. Fulmer*, 22–230.

Demurring to amended petition: Where an amended petition is filed, materially changing the cause of action, a demurrer thereto may be interposed without withdrawing the answer already on file to the original petition: *Keller v. Bare*, 62–468.

Amendments relating back: Where the amendment set up a distinct cause of action, which when pleaded was barred by the statute of limitations, *held*, that it would not be considered as relating back to the date of the original petition, so as to avoid the bar of the statute: *Van de Haar v. Van Domseler*, 56–671.

What matter may be set up by amendment: It may be proper under certain circumstances to allow defendant, after the introduction of evidence has commenced, to amend his answer so as to set up the bar of the statute of limitations: *Phœnix Ins. Co. v. Dankwardt*, 47–432.

It is not error to allow an amendment to a petition so as to increase the amount claimed: *McDonald v. Chicago & N. W. R. Co.*, 26–124, 138.

An amendment may properly be made to the petition adding another count seeking to recover the same indebtedness but in another form. The original notice of the claim for the indebtedness will be deemed to cover the indebtedness in whatever form it may be set up in the amendment: *Kimball v. Bryan*, 56–632.

An amended petition should refer to matters existing previously to the commencement of the action. Those matters arising subsequently thereto should be set up in a supplemental petition (§ 3641): *Seevers v. Hamilton*, 11–66.

It is not proper to allow an amendment to the petition on a promissory note for the pur-

pose of setting up a cause of action on a mechanic's lien, as these two actions cannot be joined: *Sweetzer v. Harwick*, 67-488.

Where an amendment in the nature of a cross-bill was offered by defendant setting up want of authority for appearance for him, and attacking the decree upon such ground, it appearing that defendant had been duly and legally served with notice of the pendency of the action, *held*, that it was not error to reject the amendment: *Aultman v. McLean*, 27-129.

An amendment should not be stricken out as cumulative where it sets out material matter not covered by the preceding pleading: *Brundage v. Chenoworth*, 70 N. W., 211.

That a cause of action barred by the statute of limitation cannot be set up by amendment, see notes to § 3450.

Second amendment: Where a party has once amended and asks to do so again, he must, by tendering his amended pleading, show that the change he offers to make is a substantial one: *Harvey v. Spaulding*,7-423.

Amendment must be substantial: If it appears that the court has held the pleading bad for a certain cause, and the amendment does not cover it, such amendment may be rejected; but if it covers the objection, any defect in it must be reached by motion or demurrer as in case of the original pleading: *Hamill v. Phenicie*, 9-525.

The court, in the exercise of its discretion, must see that the amendment is substantial, and not a mere repetition of the former pleading: *Harvey v. Spaulding*, 7-423.

If it is a mere repetition of the former pleading the amendment may be rejected or stricken from the files upon motion: *Mayer v. Woodbury*, 14-57; *Robinson v. Erickson*, 25-85; *Phenix Ins. Co. v. Findley*, 59-591.

It is not allowable, after the pleading has been held bad upon demurrer, to file another which does not differ in substance but only in phraseology, and such amendment may be stricken out on motion: *Epley v. Ely*, 68-70.

Where the amended pleading is in substance the same as the original it may be stricken from the files on motion, but if the opposite party sees fit to attack it on the same grounds as those on which the original pleading was held defective the court may, in its discretion, reach a different conclusion from that on the first consideration of the case and is not bound to follow its first ruling: *Van Werden v. Equitable L. Assur. Soc.*, 68 N. W., 892.

Construction: As to how amendments are to be construed with reference to the original pleading, see § 3603 and notes.

Striking from files: The court is vested with a sound discretion as to striking an amendment from the files: *Wyland v. Mendel*, 78-739.

Original pleading: The pleading to which a substitute is filed still remains as a solemn admission of the facts therein stated by the party pleading them: *Mulligan v. Illinois Cent. R. Co.*, 36-181, 189.

Where a substituted pleading is filed in an action, the original pleading cannot be considered in a demurrer attacking the one substituted: *State v. Simpkins*, 77-676.

An amended and substituted petition becomes the basis for the subsequent proceedings and the original petition is superseded although not formally dismissed: *Mowry v. Wareham*, 69 N.W., 1128.

A superseded pleading cannot be considered in evidence without being introduced: *Shipley v. Reasoner*, 87 Iowa, 555; *Leach v. Hill*, 66 N.W., 69.

It is not error to permit the plaintiff to introduce in evidence the original answer of the defendant, even though it should be deemed to have been superseded by amendments filed thereto. If the facts pleaded in said original answer have been mistakenly or inadvertently stated, the defendant has a right to explain the circumstances under which they were made: *Ludwig v. Blackshere*, 71 N.W., 356. And see notes to § 3701.

Amendment withdrawn: It is not proper for counsel in argument to comment upon an amended pleading which has been withdrawn: *Riley v. Iowa Falls*, 83-761.

Not a new action: Where an amended petition did not set up any different claim from that first presented, *held*, that the claim therein set forth was not to be regarded as an action brought after the passage of an act which was enacted subsequently to the original petition and prior to the amendment: *Mather v. Butler County*, 16-59.

The filing of an amendment not materially changing the cause of action does not constitute the bringing of action within the provisions of the statute of limitation: *Carnegie v. Hulbert*, 70 Fed., 209.

The fact that plaintiff having asked a landlord's attachment subsequently amends his petition so as to seek the enforcement in equity of his landlord's lien does not so change the cause of action as to render a counterclaim for malicious prosecution in wrongfully suing out the attachment which could not be interposed to the original petition, available as to the amended petition: *Youngerman v. Long*, 63 N.W., 674.

SEC. **3601. Errors disregarded.** The court, in every stage of an action, must disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. [C.'73, § 2690; R., § 2978.]

A defect in the pleadings will not be regarded where no prejudice could have been wrought thereby: *Coates v. Davenport*, 9-227; *Doniphan v. Street*, 17-317.

Judgment on the verdict of a jury should not be reversed on account of misconduct of the jury unless it appears that such misconduct resulted prejudicially to the party complaining: *Hathaway v. Burlington, C. R. & N. R. Co.*, 66 N. W., 892.

Where there is an error as to instructions, but the evidence is such that had there been a correct instruction and a verdict the other way, it would properly have been set

aside for want of support in the evidence, the error as to the instruction will be deemed to have been without prejudice: *Croddy v. Chicago, R. I. & P. R. Co.*, 91–598.

Section applied: *Smith v. Milburn*, 17–30; *Kibby v. Harsh*, 61–196.

An error will not be regarded on appeal unless the ruling is upon a material point: See § 3754.

SEC. **3602. Continuance on account of amendment.** When a party amends a pleading or proceeding, the case shall not be continued in consequence thereof, unless the court is satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of such amendment; if the court is thus satisfied, a continuance may be granted to some day in the same or the next term of said court. [C. '73, § 2691; R., § 2979; C. '51, § 1756.]

A continuance should not be granted on account of the filing of an amendment by the opposite party unless some showing of cause therefor is made: *State v. Tieman*, 39–474.

An amendment of the petition in an action for personal injuries, by which the amount of damage claimed was increased and the description of the injury slightly changed, *held* not sufficient to entitle defendant to a continuance: *Garlick v. Pella*, 53–646.

Where a person has not asked a continuance upon the filing of an amendment by the opposite party he cannot afterwards complain that no time was given after filing of the amendment before the final decree: *Wyland v. Mendel*, 78–739.

Where the amendment, so far as allegations thereof are not in the original pleading, is immaterial, filing thereof will constitute no ground for continuance: *Nelson v. Hagen*, 72–705.

A continuance on account of the filing of a substituted petition may properly be refused where the new petition urges substantially the same cause of action as that set out in the original: *Skrable v. Pryne*, 93–691.

An application for a continuance to prepare an answer to an amendment to make the pleading conform to the proofs is properly denied, where it appears that the amendment is not material, and that the cause has been tried from the beginning on the theory disclosed by the amendment: *George v. Swafford*, 75–491.

If no continuance is asked on account of an amendment, complaint cannot afterwards be made that time was not granted: *Wyland v. Mendel*, 78–739.

Where an amendment is allowed which is proper, the opposite party having any ground to object to going to trial thereunder should take a continuance and without doing so cannot complain of prejudice by reason of the allowance of the amendment: *McCormick Harvesting Machine Co. v. Richardson*, 89–525.

SEC. **3603. How amendment made.** All matters of supplement or amendment, whether of addition or subtraction, shall not be made by erasure or interlineation of the original, or by addition thereto, but upon a separate paper, which shall be filed and constitute, with the original, but one pleading. But if it be stated in such paper that it is a substitute for the former pleading intended to be amended, it shall be so taken, but the pleading superseded by the substitute shall not be withdrawn from the files. [C. '73, § 2692; R., § 2983.]

To be construed with original: The original pleading and the amendment are to be construed together: *Burrows v. Frank*, 67–502.

They are to be construed so as to be consistent if possible, rather than inconsistent and conflicting: *Pharo v. Johnson*, 15–560.

Not deemed a substitute: An amended pleading which is not expressly made a substitute for a preceding one will be construed with the original as in addition thereto: *Kostendader v. Pierce*, 37–645; *State v. Finn*, 45–148.

A pleading which is filed as an amendment to a former pleading will not be treated as a substitute, but both will constitute one pleading and be construed together: *Cooley v. Brown*, 35–475.

Where the amendment did not withdraw a part of the original petition relating to a tender, *held*, that it was to be construed in connection therewith: *Rump v. Schwartz*, 56–611.

The prayer for relief in the original petition is applicable to an amendment. The amendment and the original constitute but one plea: *Montgomery v. Shockey*, 37–107.

An answer filed after the amendment is to be regarded as referring to the allegations of the petition as it stands after amendment. The original and amendment together constitute the pleading: *Flint v. Gauer*, 66–696.

An amended petition, substantially the same as the original, requires no further answer than the one filed to the original petition: *Brown v. Ellis*, 26–85.

When to be deemed a substitute: So far as an amended answer covers the same ground as the original, it is to be deemed as a substitute for it, even though embracing additional matters: *White v. Hampton*, 9–181.

An answer headed "amended answer," setting up substantially the same matters as the pleading to which it was an amendment, *held* to be a substitute and not an amendment to such pleading: *Bates v. Kemp*, 12–99.

Where an amended answer and not an amendment to the answer is filed, it is to be deemed a substitute for the original, and the issues are to be ascertained from such

amended answer alone: *Lauman v. Des Moines County*, 29–310.

Original: A pleading which has been stricken from the files remains a part of the record and may by reference be incorporated into a new pleading: *Mahaska Co. State Bank v. Crist*, 87–415. As to whether the original may be considered as evidence, see notes to § 3600.

SEC. **3604. Interrogatories annexed to pleading.** Either party may annex to his petition, answer or reply written interrogatories to any one or more of the adverse parties, concerning any of the material facts in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering. [C. '73, § 2693; R., § 2985.]

A method of procuring the testimony of the opposite party is thus provided in addition to other ordinary methods, and an interrogatory tending to elicit evidence pertinent and material to the issue ought not to be stricken out on motion: *Greene v. Woods*, 34–573.

Where the interrogatories ask for matters which are immaterial, the refusal of the court to require them to be answered will not constitute error: *Mason v. Green*, 32–596.

This section furnishes a method in addition to that otherwise provided, for procuring the testimony of the opposite party, but such interrogatories must be asked concerning material matters which are in issue: *McFarland v. Muscatine*, 67 N. W., 233.

It is not error to refuse to make an order requiring answers to interrogatories attached to a pleading when such interrogatories are frivolous and unimportant. Even if one of them is proper but not particularized, it is not error to refuse an order requiring them all to be answered: *Hogaboom v. Price*, 53–703.

Neither the interrogatories nor the answers thereto will, on demurrer aid a defective pleading: *Lane v. Krekle*, 22–399.

The party filing the interrogatories has the right to have them answered by the person to whom they are addressed, and such person cannot substitute answers made by another, and thus make such other person the witness in the case: *Gollobitsch v. Rainbow*, 84–567.

SEC. **3605. Answers thereto.** The party answering shall not be confined to responding merely to the interrogatories, but may state any new matter concerning the same cause of action, which shall likewise be read as a deposition. [C.'73, § 2694; R., § 2986.]

Section applied: *Gwyer v. Figgins*, 37–517.

SEC. **3606. Time of responding.** The interrogatories shall be answered at the same time the pleading to which they are annexed is answered or replied to, unless they are excepted to by the adverse party; in which event the court shall determine as to the propriety of the interrogatories propounded, and which of them shall be answered, and within what time such answer shall be made. [C.'73, § 2695; R., § 2987.]

Where the interrogatories are attached to an answer which requires no reply, the court should be asked to fix a time within which they should be answered, before moving to dismiss the defense for want of such answer: *Hogaboom v. Price*, 53–703; *Garvin v. Cannon*, 53–716.

SEC. **3607. Continuance for failure to answer.** The trial of an action by ordinary proceedings shall not be postponed on account of the failure to answer interrogatories, if the party interrogated is present in court at the trial, so that he may be orally examined; nor in case of absence, unless an affidavit is filed showing the facts the party believes will be proved by the answers thereto, and that the party has not filed the interrogatories for the purpose of delay; whereupon, if the party will consent that the facts stated in the affidavit shall be considered as admitted by those interrogated, the trial shall not be postponed for that cause. [C.'73, § 2696; R., § 2988.]

Where interrogatories were filed by the defendant just before going to trial, although the petition had been on file for several months, *held*, that they were, on motion, properly stricken from the files: *Jones v. Berryhill*, 25–289.

Where there was no affidavit made and the cause was reached for trial, *held*, that the counts containing the interrogatories were properly stricken out: *Courtright v. Deeds*, 37–503, 516.

SEC. **3608. Particularity required.** The party, in answering such interrogatories, shall distinguish clearly between what is stated from his

personal knowledge and what from information or belief merely. An unqualified statement of a fact shall be considered as made of his personal knowledge. [C.'73, § 2697; R., § 2989.]

SEC. **3609. How verified.** The answers to the interrogatories shall be verified by the affidavit of the party making them, to the effect that the statements therein made of his own personal knowledge are true, and those made from the information of others he believes to be true. And when the party interrogated is a corporation, the answers and affidavit verifying the same shall be made by the officers or agents of such corporation who have knowledge of the subjects and matters covered by the interrogatories. [C. '73, § 2698; R., § 2990.]

Where there was no verification to the answers to the interrogatories except the usual certificate of the notary, "subscribed and sworn to before me," *held*, that the answer was not sufficiently verified: *Averill v. Boyles*, 52–672.

SEC. **3610. Effect of failure to answer.** Where a party filing interrogatories shall also file an affidavit that he verily believes the subject of the interrogatories, or any of them, is in the personal knowledge of the opposite party, and that his answers thereto, if truly made from such knowledge, will sustain the claim or defense, or any part thereof, and the opposite party shall fail to answer the same within the time allowed therefor, or by the court extended, the claim or defense, or the part thereof, according to such affidavit, shall be deemed to be sustained, and judgment given accordingly. [C. '73, § 2699; R., § 2991.]

This section establishes a rule of evidence, and the interrogatories unanswered and the affidavit constitute proof of the claim or defense, and on trial judgment should be given accordingly; but they do not entitle the party to judgment without trial, and, after the filing of the affidavit, the opposite party may dismiss: *Perry v. Heighton*, 26–451.

Although the failure to reply to interrogatories thus propounded entitles the opposite party to judgment, he cannot avail himself of such failure by first making his objection on appeal: *Sully v. Wilson*, 44–394.

Where the interrogatories were not answered, although the affidavit as above referred to was filed, but the party did not ask for judgment accordingly, *held*, that failure of the court to thus order a judgment in his favor could not be taken advantage of on appeal: *Garvin v. Cannon*, 53–716.

To entitle a party to have his claim or defense taken as true on account of failure of the opposite party to answer interrogatories attached to his pleading, the affidavit of the party that he believes that the facts inquired about are within the knowledge of the opposite party, and that the answers of such party will sustain his claim or defense, should, if the facts are claimed as applicable to a part of the claim or defense, state what particular portion would be sustained by such answers: *Hogaboom v. Price*, 53–703.

A party to the suit is bound to take notice of interrogatories filed and the party filing them may take advantage of the admission provided for by this section by pursuing the method pointed out: *Beacham v. Gurney*, 91–621.

SEC. **3611. Answers compelled.** The court may compel answers to interrogatories by process of contempt, and may, on the failure of the party to answer them, after reasonable time allowed therefor, dismiss the petition, or strike the pleading of the party so failing from the files. [C. '73, § 2700; R., § 2992.]

SEC. **3612. Denial as to time, sum, quantity, or place.** In all cases in which a denial is made by answer or reply concerning a time, sum, quantity or place alleged, the party denying shall declare whether such denial is applicable to every time, sum, quantity or place and, if not, what time, sum, quantity or place he admits. [C. '73, § 2701; R., § 2901.]

SEC. **3613. Allegations as to time.** When time is material, the day, month and year, or when there is a continued act, its duration, must be alleged. When time is not material it need not be stated, and, if stated, need not be proved. [C. '73, § 2702; R., § 2955.]

In an action for trespass the time when the trespass was committed is not ordinarily material and need not be proven as alleged, plaintiff being at liberty to prove the trespass at any time before the commencement of the action, either before or after the day laid in the declaration: *Terpenning v. Gallup*, 8–74.

Where an answer in an action to foreclose a tax deed alleged redemption on a certain

date, and plaintiff denied the making of redemption on that or any other date, *held*, that it was not a variance to introduce a certificate of redemption bearing a different date from that stated in the answer: *Byington v. Bradley*, 11–78.

SEC. **3614. Allegations as to place.** It shall be necessary to allege a place only when it forms a part of the substance of the issue. [C. '73, § 2703; R., § 2957.]

In an action to recover damages for the illegal sale of liquor to plaintiff's husband, the description of the property occupied by defendant in making such sale is not material unless it is sought to charge the owner of such property with the lien of the judgment recovered: *Gustafson v. Wind*, 62–281.

It is unnecessary in a replevin suit to allege the place where the property is detained by defendant: *Kelley v Cosgrove*, 83–229.

As to description of place in a prosecution for maintaining a liquor nuisance, see notes to § 2384.

SEC. **3615. Evidence under denial.** Under a denial of an allegation, no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove. [C. '73, § 2704; R., § 2944.]

Under a denial by operation of law of the allegations of an affirmative defense, the only proofs admissible are such as would negative the affirmative averments of the answer: *First Nat. Bank v. Wright*, 84–728.

Where plaintiff sought to recover for injuries received by reason of the defective condition of a sidewalk, due to the negligence of the city, *held*, that evidence that plaintiff was at the time intoxicated was admissible on the part of defendant, it being obligatory upon the plaintiff to prove freedom from contributory negligence, and the evidence referred to having a tendency to show the existence of such negligence: *Fernbach v. Waterloo*, 76–598.

Where the plaintiff sought to recover under implied warranty in a sale and which was denied, *held*, that as a written warranty would negative an implied warranty it was error to exclude evidence offered by plaintiff of such written warranty: *Bucy v. Pitts Agl. Works*, 89–464.

In general, see notes to § 3566.

SEC. **3616. Counts and divisions numbered.** The counts of the petition, and divisions of a petition in equity, must be consecutively numbered as such, and so must the divisions of the answer and reply. [C. '73, § 2705; R., § 2902.]

SEC. **3617. Correction of defect.** If any pleading does not conform to the foregoing requirements as to form, divisions or numbering, or the distinct or separate statements of its causes of action or defense, the court may, on its own motion or that of the adverse party, order the same to be corrected, on such terms as it may impose. [C. '73, § 2706; R., § 2903.]

SEC. **3618. Sham defenses—redundant matter.** Sham and irrelevant answers and defenses, and irrelevant and redundant matter in all pleadings, may be stricken out on motion, upon such terms as the court may, in its discretion, impose. [C. '73, §§ 2707, 2719; R., §§ 2861, 2946; C. '51, § 1753.]

What deemed irrelevant or redundant: It is often difficult to say just when the rule excluding redundant or irrelevent matter is infringed upon, but in a case arising upon the equity side of the court the violation of the rule must be clear in order to justify the court in striking matter from the pleading which is explanatory of the nature of the defense interposed therein: *Childs v. Griswold*, 15–438.

Matter not pertinent to the cause of action upon which the petition is based, but which may be regarded as introductory or an inducement to the facts relied upon by the plaintiff, need not be stricken out upon motion: *Bellows v. District T'p*, 70–320.

Irrelevant or immaterial matter is anything stated in the pleading which, if established on the trial, would not entitle the party to or aid him in obtaining the relief demanded or sustaining the defense pleaded: *Johns v. Pattee*, 55–665.

A paragraph in an answer, setting up matter which does not constitute a defense, may be stricken out on motion: *Evans v. Robbins*, 29–472.

Certain matter in a pleading as to which no evidence could properly be admitted, even if issue had been taken thereon, *held* properly stricken out on motion: *Davis v. Chicago & N. W. R. Co.*, 46–389.

Averments in an answer and amendment thereto as to title of defendant to personal property sought to be recovered by plaintiff, *held* immaterial, as plaintiff could only recover by showing title in himself: *Whitaker v. Sigler*, 44–419.

An allegation in a petition of a fact, the existence of which cannot, as it appears from the allegations of the petition, be actually known, will be immaterial: *Carl v. Granger Coal Co.*, 69–519.

When to be stricken out; discretion: A mere averment of law, if so voluminous as to incumber the record, may be stricken out on motion, but to refuse to do so is not error: *Abbott v. Striblen*, 6–191.

Refusal to strike from the pleading re-

dundant matter being within the discretion of the court is not reversible upon appeal: *Buel v. Lake*, 8–551.

As a general rule an appeal does not lie from the ruling on a motion to strike matter from a pleading as irrelevant and redundant. Such ruling does not necessarily affect the final result in the case: *Allen v. Church*, 70 N.W., 127; *Allen v. Cook*, 71 N.W., 534.

It is not error to overrule a motion to strike out redundant matter, where it does not appear that the opposite party is aggrieved thereby: *Cate v. Gilman*, 41–530.

Statements of facts which could be proved under denials already made in the answer and which are inconsistent with the allegations of the petition should not be stricken from the answer on motion: *Ibid.*

Any party required to answer a pleading containing irrelevant matter is aggrieved thereby and may have it stricken out on motion: *Johns v. Pattee*, 55–665.

While it is the duty of the court to expunge redundant or irrelevant matter upon motion, such motion should not be entertained when facts and not the evidence of facts are stated in such a manner as not to prejudice the opposite party: *Childs v. Griswold*, 15–438.

It will not be error to refuse to strike from the petition averments which cannot result in prejudice to the opposite party: *Bangs v. Berg*, 82–350.

Motion to strike: A party may properly move to strike irrelevant matter from the pleading in order to ascertain beforehand whether or not the court deems it irrelevant and whether the court will permit evidence to be introduced in support thereof, but he does not, by proceeding to trial after his motion to strike has been overruled, waive any objection to the relevancy of such allegation: *Specht v. Spangenberg*, 70–488.

Where the whole statement of a cause of action is irrelevant or redundant matter a demurrer would be proper, but if the petition is good in part and only objectionable in containing whole statements of irrelevant or redundant matter which cannot be made the subject of a material issue, such matter should be purged by motion: *Bolinger v. Henderson*, 23–165; *Douglass v. Bishop*, 27–214.

Where a motion to strike is allowed without objection of the opposite party to have the effect of a demurrer, complaint cannot be made of the ruling in excluding the matter objected to, where it would have been adjudged insufficient on demurrer: *Chase v. Kaynor*, 78–449.

A motion to strike a pleading from the files is not a proper method of assailing such pleading on account of containing irelevant, immaterial and redundant matter: *Walker v. Pumphrey*, 82–487.

Error without prejudice: Where, on motion, certain portions of the answer were stricken out, but the issue sought to be raised by such portions was sufficiently raised by the portions not stricken out, *held*, that the granting of the motion, if error, was without prejudice: *Cooper v. McKee*, 49–286.

Where the party complaining of the overruling of a motion to strike out a portion of the pleading would not have been benefited by the granting of his motion, the error, if any, will be deemed to be error without prejudice: *Holt v. Brown*, 63–319.

Need not be proven: Where the fact pleaded is immaterial it need not be proven: *Billingham v. Bryan*, 10–317.

Surplusage: Where one is sued *in autre droit*, and it appears from the allegations of the petition that defendant is liable in his own right, the words added to defendant's name to indicate the right in which he is sued will be treated as surplusage or *descriptio personæ: Laverty v. Woodward*, 16–1.

An irrelevant averment in a pleading, not stricken out, becomes mere surplusage, and must be treated as such in the trial of the case: *Specht v. Spangenberg*, 70–488.

SEC. **3619. Statute—how pleaded—judicial notice.** In pleading a statute, or a right derived therefrom, it shall be sufficient to refer thereto so as to plainly designate it, and the court shall thereupon take judicial notice thereof. [C. '73, § 2708; R., § 2926.]

A foreign statute must be pleaded, and it is not sufficient merely to refer to it by its title or date of approval, nor by stating what, in the judgment of the pleader, are its general requirements: *Carey v. Cincinnati & C. R. Co.*, 5–357.

Section applied: *Clark v. Riddle*, 70 N.W., 207.

SEC. **3620. Inconsistent defenses—verification.** Inconsistent defenses may be stated in the same answer or reply, and when a verification is required, it must be to the effect that the party believes one or the other to be true, but cannot determine which. [C. '73, § 2710; R., § 2937.]

Inconsistent defenses may be stated in the same answer: *Morgan v. Hawkeye Ins. Co.*, 37–359.

Inconsistent defenses may be pleaded in an answer or reply. They ought to be in separate divisions but if not so framed a demurrer is not a proper pleading to reach the defect: *Runkle v. Hartford Ins. Co.*, 68 N.W., 712.

The rule of common law as modified by the statute of 5th Anne was that matter in confession and avoidance might be pleaded with the general denial and did not take away the necessity of plaintiff first making out his case: *Grash v. Sater*, 6–301.

A plea in confession and avoidance does not destroy the force and effect of a general denial, the burden of proof still being upon plaintiff: *Quigley v. Merritt*, 11–147.

An admission in the nature of a confession and avoidance does not admit matters formally denied in other counts of the answer: *Treadway v. Sioux City & St. P. R. Co.*, 40–526.

Pleading the statute of limitations as to an adverse title does not constitute an admission of want of title in the party so pleading: *Tabler v. Callanan*, 49–362.

Allegations in the reply by way of avoidance must in effect confess that but for the matter pleaded in avoidance the defense to which it applies would entitle the party pleading the same to succeed. But this confession need not be made in terms; it may be made by implication. It is sufficient if it give color to the alleged right of the adverse party. Plaintiff may thus seek to avoid the allegations of defendant's answer without waiving the denial thereof implied by law. He has the right to thus rely upon inconsistent defenses to the allegations of the answer: *Day v. Mill-Owners' Mut. F. Ins. Co.*, 75–694.

The implied admission in a reply of the truth of the allegation to the answer arising from the setting up of matter by way of confession and avoidance does not overcome the denial of the allegations of the answer implied by law. The two are to be considered as inconsistent defenses of which the plaintiff has a right to avail himself as against the answer: *Nicholls v. Chicago G. W. R. Co.*, 62 N. W., 769; *Schulte v. Coulthurst*, 62 N.W., 770. And see now the last clause of § 3577.

But an express admission in the reply supersedes the denial which is implied by law: *Meadows v. Hawkeye Ins. Co.*, 62–387.

And further as to when reply is necessary, see §§ 3576 and 3622 and notes.

A defendant cannot, while denying a fact essential to plaintiff's recovery, base a claim for affirmative relief on the same fact: *Baird v. Morford*, 29–531.

Although a party may plead inconsistent defenses, he cannot claim property under two inconsistent rights at the same time: *Crawford v. Nolan*, 70–97.

An admission in one defense made necessary by the nature of that defense is not to be construed as affecting a different defense inconsistent with such admission: *Barr v. Hack*, 46–308; *Heinrichs v. Terrell*, 65–25.

Defendant should have the full benefit of each defense pleaded. Therefore, in an action of slander, where defendant pleaded general denial and justification, *held*, that the admission in the plea of justification could not avail plaintiff upon trial of the issue raised by the general denial: *Barr v. Hack*, 46–308; *Herzman v. Oberfelder*, 54–83.

In case of a plea of tender and also a general denial, the plea of tender overrides and controls the denial although they are in separate counts: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76–753.

SEC. **3621. Pleading exceptions.** When a party claims a right in derogation of the general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his pleading. [C.'73, § 2711; R., § 2940.]

Where a statute gives a new right or privilege under certain circumstances, conditions or qualifications, the party claiming such right in his petition or setting it up in his defense must bring himself within the requirements of the statute: *Helfenstein v. Cave*, 6–374.

An exemption or exception must be pleaded: *First Nat. Bank v. Baker*. 57–197.

Section applied: *Winney v. Sandwich Mfg. Co.*, 86–608.

SEC. **3622. What deemed admitted.** Every material allegation in a pleading not controverted by a subsequent pleading shall, for the purposes of the action, be taken as true, but the allegations of the answer not relating to a counter-claim, and of the reply, are to be deemed controverted. An allegation of value, or amount of damage, shall not be held true by a failure to controvert it. A party desiring to admit any allegations which, by this section, would be considered controverted may file at any time a written admission thereof. [C.'73, § 2712; R., § 2917; C.'51, § 1742.]

Material allegations in the petition not denied in the answer are to be taken as true: *Bolander v. Atwell*, 14–35; *Singer Mfg. Co. v. Billings*, 39–347.

Facts alleged in the petition and not denied are deemed admitted: *Pierce v. Herrold*, 83–764.

This rule is applicable in a special proceeding: *Van Aken v. Welch*, 80–114.

Where an amendment is made to a pleading which contains a material allegation, if such allegation is not denied by subsequent pleading it will be regarded as admitted: *Eslich v. Mason City & Ft. D. R. Co.*, 75–443.

Allegations contained in an amendment not contradicted by any subsequent pleading are to be deemed true: *Clough v. Adams*, 71–17.

Facts well pleaded: It is only facts which are well pleaded that are admitted by failure to deny them. Legal conclusions stated in the pleading are not thus admitted: *Alston v. Wilson*, 44–130.

Denial of a conclusion from the facts stated in the petition will not amount to a denial of the facts themselves: *Bensley v. McMillan*, 49–517.

Even where the pleading is to be taken as true it is only to the extent of admitting facts and not the correctness of conclusions drawn from them by the pleader as to matter of law: *Twogood v. Coopers*, 9–415.

Allegations which are inconsistent with the facts pleaded are not deemed admitted by failure to deny: *Scofield v. McDowell*, 47–129.

Partial denial: Where the facts stated in the petition tended to show that defendant was liable either as common carrier or as warehouseman, *held*, that the fact that defendant's answer denied liability as warehouseman did not tend to show his liability

as common carrier: *Porter v. Chicago & N. W. R. Co.*, 20-73.

Where the answer put in issue only the third count of the petition, which was for the attorney fee provided for in the note sued on in the first and second counts, *held*, that judgment was properly rendered on the first and second counts as being a part of the claim not controverted: *Musser v. Crum*, 48-52.

Under the pleadings of a particular case, *held*, that the answer put in issue only certain items of the account, and that as to the balance plaintiff should have judgment: *Rodefer v Myers*, 56-227.

Default not necessary: Where the defendant answered, but did not controvert the substantial portion of the petition, *held*, that plaintiff was entitled to a judgment when the cause came on for trial, and that there was no need of a formal default being entered as for want of an answer, and that defendant would not, in such case, be entitled to a jury: *Mann v. Howe*, 9-546.

Evidence not required: Where the material facts upon which plaintiff's right to recover depends are admitted or uncontroverted, it is not necessary for him to introduce any evidence whatever: *Bloomer v. Glendy*, 70-757.

Denial coupled with confession and avoidance: An admission in an answer in the nature of confession and avoidance does not operate to admit matters formally denied in the other counts of the answer: *Treadway v. Sioux City & St. P. R. Co.*, 40-526.

Pleading the statute of limitations as to an adverse title does not constitute an admission of want of title in the party so pleading: *Tabler v. Callanan*, 49-362.

Where plaintiff pleaded breach of contract and defendant denied the breach and set up minority and rescission, and plaintiff pleaded in avoidance without denying the allegations of the answer, *held*, that the burden of proof was upon plaintiff to establish the breach of the contract and the truth of the matter pleaded by way of avoidance in his reply: *Harrison v. Burns*, 84-446.

Denial presumed: After a trial on the merits where justice appears to have been done, and it does not appear to have been claimed during the trial that an allegation of a pleading was not put in issue, no advantage can be taken of the want of denial thereof: *Clay v. Alcock*, 23-591.

After trial upon the merits without objection to the pleadings, the judgment will not be reversed because a replication had not been filed when it was required to prevent the allegations of the answer being deemed admitted. It will be considered that the failure to file such replication was waived: *Sullivan v. Finn*, 4 G. Gr., 544; *Arbuckle v. Bowman*, 6-70.

Where a plaintiff proceeds with the trial, treating his pleading as denied, even though not formally denied, he cannot object after verdict that his pleading should have been taken as true: *Hendrie v. Rippey*, 9-351.

Under the denial implied by law of the allegations of the answer showing failure of consideration for the note sued on, *held*, that plaintiff could not show facts constituting a waiver of such failure of consideration: *First Nat. Bank v. Wright*, 84-728.

Where a matter is set up by way of cross-bill, which is a part of the transaction and proper to be considered if no counter-claim had been pleaded, the failure to deny such matter in the reply will not be an admission of the truth of the allegation: *Brown v. Barngrover*, 82-204.

Where in an equity case it did not appear that any answer to a cross-pelition had been filed in the court below, but the parties there and the court had proceeded as though such answer had been filed, and the allegations in the cross-petition were in issue, *held*, that it would be presumed that an answer to the cross-petition had been filed at the proper time: *Hervey v. Savery*, 48-313.

Where the original petition was denied by answer but no denial was filed as to an amendment setting out more at length the grounds of recovery relied on in the original petition and a trial was had on the theory that the allegations of the amendment were denied. *held*, that the want of such denial could not be urged for the first time on appeal: *Wright v. Waddell*, 89-350.

Although no pleading to controvert the allegations of the counter-claim is filed, yet, if the case is tried on the theory that the counter-claim is controverted, advantage of the failure to controvert can not be taken for the first time in the supreme court: *Burnett v. Loughbridge*, 87-324.

Where the allegations of an amendment to the petition are not denied by answer but the parties proceed to trial as though they had been denied, no advantage being taken of the failure to deny by asking default, the allegations of the amendment will be deemed to have been properly in issue: *Long v. Valleau*, 87-675.

Where the facts set up in a cross-bill are already put in issue by the allegations of the petition and answer the allegations of such cross-bill are not to be deemed admitted because not denied: *Ware v. Delahaye*, 64 N.W., 640; *Medland v. Walker*, 64 N. W., 797.

Where the parties proceed to trial on the theory that the allegations of the pleading are denied the party who might have insisted on judgment by reason of failure to deny such allegation is to be deemed to have waived that right and cannot afterwards take advantage of the failure of the opposite party to interpose such denial: *Medland v. Walker*, 64 N. W., 797.

Allegations of answer: The allegations of an answer not relating to a counter-claim are deemed controverted without reply: *Davis v. Payne*, 45-194.

An allegation that a written contract under which plaintiff seeks to recover has been altered since its execution is an allegation of new matter which does not cast upon plaintiff the obligation of explaining such alteration until evidence in support of such allegation is introduced by defendant: *Wing v. Stewart*, 68-13.

The allegations of an answer, not constituting a counter-claim, are deemed denied by operation of law, and plaintiff cannot be

compelled to file a pleading admitting or confessing and avoiding the same. If defendant introduces no evidence supporting his allegations they are to be deemed unproved: *Cassidy v Caton*, 47-22.

Where plaintiff replied to an affirmative defense in the answer by way of confession and avoidance, *held*, that the affirmative defense must be considered as admitted by the pleadings: *Clapp v. Cunningham*, 50-307.

No reply is necessary in order to controvert affirmative matter in the answer not amounting to a counter-claim, and if a reply is filed containing both a denial of such matter and also a confession and avoidance thereof, the denial will be disregarded and the affirmative matter in the answer will be deemed admitted: *Meadows v. Hawkeye Ins. Co.*, 62-387.

But plaintiff may set up in his reply matter in avoidance, impliedly confessing the truth of the allegations of the answer, without waiving the denial implied by law. He has a right to thus rely upon inconsistent defenses in his reply: *Day v. Mill Owners' Mut. F. Ins. Co.*, 75-694.

Under the Revision it was not necessary that a reply be filed in order to enable plaintiff to prove matter in confession and avoidance of affirmative defenses in the answer, but if he filed, as he was authorized to do, a formal admission of affirmative matter set up in the answer, he could not prove matter in avoidance without having given notice of his intention to do so in the admission: *Viele v. Germania Ins. Co.*, 26-9, 42.

Under the provisions of the Code of '51 affirmative allegations of an answer not denied in the reply were deemed admitted: *Arbuckle v. Bowman*, 6-70; *Alexander v. Doran*, 13-283.

Further as to when reply is necessary, see § 3576 and notes.

Allegations of value or amount of damages are not deemed true by reason of failure to deny them: *Chicago & S. W. R. Co. v. Northwestern U. Packet Co.*, 38-377, 382; *Yoe v. Nichols*, 51-330.

An admission of the facts alleged in the petition will not constitute an admission of the indebtedness to the amount claimed or to any amount: *Hallowell v. Fawcett*, 30-491.

Allegations of value of services rendered by the plaintiff for which recovery is sought in the petition are not admitted by failure to controvert them: *Haldane v. Arcadia*, 70-462.

A party failing to deny an allegation of value is not estopped from offering evidence as to such value, nor is a party precluded from proving the true value where, by mistake, he has alleged it incorrectly: *Reilly v. Ringland*, 39-106.

Where plaintiff claimed *quantum meruit* for services, and defendant admitted the services, but pleaded a special contract and payment thereunder, *held*, that the finding that there was no special contract did not authorize judgment for plaintiff for the amount claimed: *Templin v. Henkle*, 50-95.

Where a reply controverting a counter-claim was stricken from the files, *held*, that it was error to render judgment for defendant for costs without evidence showing that the counter-claim equaled or exceeded the plaintiff's demand: *Yoe v. Nichols*, 51-330.

A denial of an indebtedness to the plaintiff in any sum whatever raises no issue: *McIntosh v. Lee*, 57-356.

SEC. **3623. Account—bill of particulars.** If a pleading is founded on an account, a bill of particulars thereof, with the items therein consecutively numbered, must be incorporated into or attached to such pleading, and considered a portion thereof, subject to be made more specific on motion, and shall define and limit the proof, but may be amended as other pleadings. [C. '73, § 2713; R., § 2918.]

The provisions of this section are applicable in cases before justices of the peace: *McKinney v. Hopkins*, 20-495.

Failure to attach a copy of an account on which a pleading is founded is ground for a demurrer: See § 3561.

In an action founded upon tort plaintiff cannot be required to attach a bill of particulars of the items included in his claim for damages, although his petition may, in a proper case, be required to be made more specific in this respect (under § 3630): *McDonald v. Barnhill*, 58-669.

SEC. **3624. Account deemed true.** In all actions for money due upon an open account, when the defendant has been personally served with the original notice therein, and the petition is duly verified, and where a bill of particulars of said account is incorporated into or attached to the petition, if the defendant makes default or fails to controvert or deny the same or any of the items thereof by pleading duly verified, the account, or so much thereof as is not so controverted or denied, shall be taken as true and admitted. [16 G. A., ch. 36.]

To make this provision applicable the action must be for items of account properly provable by books of original entries: *Lyman v. Bechtel*, 55-437.

A claim for attorney's fees and various items of money advanced by an attorney is properly a matter of account, and if the petition to which a bill of particulars is attached is duly verified judgment may be rendered on default without further evidence: *Eaton v. Peavy*, 75-740.

SEC. **3625. Judgment—how pleaded.** In pleading a judgment, or the determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but it may be stated to have been duly given or made. [C.'73, § 2714; R., § 2921.]

In this state it is not necessary in pleading a judgment to state the facts conferring jurisdiction, but it is sufficient to state that the judgment was duly rendered: *American Emigrant Co. v. Fuller*, 83–599.

SEC. **3626. Conditions precedent.** In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part. [C.'73, § 2715; R., § 2922.]

Section applied: *Clark v Riddle*, 70 N. W., 207.

Where in a suit on a policy of insurance the plaintiff alleges generally the performance of the conditions of the policy, the defendant, to raise an issue as to the sufficiency of such performance, for instance, as to furnishing proofs of loss, must (under § 3628) specifically allege in what respect defendant has failed to perform, yet if plaintiff alleges particularly the performance of such condition, a general denial puts in issue that fact and the sufficiency of the proofs of loss is for determination: *Brock v. Des Moines Ins. Co.*, 64 N.W., 685.

SEC. **3627. Action in representative capacity.** A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver the same generally, or as a legal conclusion, and where a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way. [C.'73, § 2716; R., § 2923.]

Where plaintiff or defendant is a corporation or partnership, the averment of corporate or partnership capacity should be made, and a failure to do so will be ground of demurrer: *Sweet v. Ervin*, 54–101.

An action in a name which is not that of a person, partnership or corporation cannot be maintained: *Steamboat Pembinaw v. Wilson*, 11–479.

Where the action is not against a natural person the petition should in some manner show that as an artificial person the defendant named can sue and be sued. Therefore, *held*, that in action of trespass against a railroad company, the corporate capacity of defendant not having been alleged, the petition was subject to demurrer: *Byington v. Mississippi & M. R. Co.*, 11–502.

Where a city has been incorporated by special charter its corporate existence need not be averred, but judicial notice may be taken thereof. But when incorporated under general incorporation acts its corporate existence must be averred, and, when properly put in issue, proved: *Hard v. Decorah*, 43–313.

Where a school district sues it need not set out the manner in which it was formed. The presumption is that it was constituted properly: *Ft. Dodge School Dist. v. District T'p*, 15–434.

After the question of organization and capacity of a corporation plaintiff to sue has been submitted to the court in a collateral proceeding by agreement, and a finding had thereon, without objection, it is too late to question the right of the defendant to raise the question in such proceeding: *Ft. Dodge School Dist. v. District T'p*, 17–85.

The fact that defendant is described in the petition as a city, and its style is averred to be "the city of," etc., is a sufficient averment of the fact that it is a municipal corporation: *Stier v. Oskaloosa*, 41–353.

SEC. **3628. Denial—facts must be stated.** If either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated. [C.'73, § 2717; R., § 2925.]

Where a general allegation of corporate capacity is made, a bare denial thereof will not put in issue such capacity, and it will be deemed admitted: *Stier v. Oskaloosa*, 41–353.

Facts showing want of corporate capacity cannot be relied on, if not specifically stated in the answer: *Warder, etc., Co. v. Jack*, 82–435.

But *held*, that an answer denying "that defendant is or ever was a corporation duly organized . . . under the laws of . . . or under the laws of any other state or government," sufficiently put in issue the fact of corporate existence: *Folsom v. Star Union Line*, 54–490.

A mere denial that plaintiff suing in the capacity of a receiver had duly qualified, *held* not sufficient to put his official capacity in issue, but that the facts relied upon should have been stated: *Goodhue v. Daniels*, 54–19.

A general denial does not put in issue the fact of administratorship, where it is generally averred: *Mayes v. Turley*, 60–407.

A general denial does not put in issue the existence of a corporation and its capacity to sue: *Blackshire v. Iowa Homestead Co.*, 39–

624; nor the validity of the appointment of a guardian: *Gates v. Carpenter*, 43–152; nor the power of a bank to purchase a note: *Commercial Bank v. King*, 47–64.

Where plaintiff alleged a consolidation on the part of a corporation defendant, *held*, that such allegation was not in the statutory provision above referred to, and was put in issue by a general denial: *Koons v. Chicago & N. W. R. Co.*, 23–493.

The objection that the petition does not describe the defendant as a corporation cannot be raised for the first time by motion in arrest of judgment: *Andre v. Chicago & N. W. R. Co.*, 30–107.

Where an action is brought by or against a corporation or partnership in the name in which it is designated in a written instrument on which the action is based, no allegation of corporate or partnership capacity need be made: See § 3473 and notes.

Where plaintiff, in an action to enjoin the maintenance of a nuisance for the sale of intoxicating liquor, avers that he is a citizen of the county for the purpose of showing himself entitled to bring such action, that fact is not put in issue by a general denial, but only by specially pleading the facts showing such allegation not to be true: *Littleton v. Harris*, 73–167; *Shear v. Green*, 73–688.

In such a case defendant does not raise an issue as to plaintiff's citizenship in the county by averment of want of knowledge or information sufficient to form a belief with reference thereto: *Craig v. Hasselman*, 74–538.

In an action on a policy of insurance, containing a condition that notice of loss must be given, and proofs of loss furnished, as a condition to recovery thereunder, *held* in the absence of anything in defendant's answer raising an issue as to the sufficiency of the notice and proofs of loss, there was no necessity of introducing evidence of the contents of either: *Hagan v. Merchants, etc., Ins. Co.*, 81–321.

In order to put in issue the validity of a judgment, it is not sufficient to deny that the judgment was duly rendered, but the facts relied on must be specifically stated: *American Emigrant Co. v. Fuller*, 83–599.

A general denial does not put in issue the allegation of plaintiff suing as administratrix that she was duly appointed and qualified: *Sparks v. National Masonic Acc. Ass'n*, 69 N. W., 678.

Section applied: *Independent Dist. v. District T'p*, 88–713.

SEC. **3629. Matters specifically pleaded.** Any defense showing that a contract, written or oral, or any instrument sued on, is void or voidable; or that the instrument was delivered to a person as an escrow, or showing matter of justification, excuse, discharge or release, and any defense which admits the facts of the adverse pleading, but by some other matter seeks to avoid their legal effect, must be specially pleaded. [C.'73, § 2718; R., § 2942.]

Matter in avoidance, such as that defendant is not liable by reason of judgment having been rendered against him for an indebtedness in a garnishment proceeding, must be specially pleaded and cannot be shown under a general denial: *Walters v. Washington Ins. Co.*, 1–404.

Want of consideration: Where plaintiff sues upon a written contract it is incumbent upon defendant to aver want of consideration if he relies thereon: *University of Des Moines v. Livingston*, 57–307.

If defendant relies as a defense to an action for services performed upon an agreement that they should be rendered without compensation, he should specially plead that fact, and evidence thereof will be irrelevant under a general denial: *Scott v. Morse*, 54–732.

Where the answer denied that there was any consideration for a note sued on, without stating the facts upon which this allegation was based, *held*, by part of the court, that it was not demurrable, but could be attacked, if at all, only by motion to make make more specific. But the other members of the court held that as it was stated that the note was a gift and the petition showed that expenses had been incurred by reason thereof, the facts stated constituted no defense, and the answer might be assailed by demurrer: *Simpson Centenary College v. Bryan*, 50–293.

That consideration is presumed in case of a written contract, see § 3069 and notes.

Exception: Where an exception exists which constitutes a defense, such exception should be pleaded by defendant, and any matter available as against such exception should be pleaded by way of reply: *McCormick v. Holbrook*, 22–487.

In case of trespass: If the defense is that the property did not belong to plaintiff, but belonged to defendant, the answer must set up this fact before defendant can be allowed to prove it on the trial: *Dyson v. Ream*, 9–51.

Defendant cannot excuse a trespass by proving that the right of possession or title is in some third person, without pleading such fact as a general defense: *Patterson v. Clark*, 20–429.

Matter in estoppel must be specially pleaded: *Ransom v. Stanberry*, 22–334; *Phillips v. Van Schaick*, 37–229; *Folsom v. Star Union Line*, 54–490.

The facts constituting an estoppel must be pleaded, and when this has been done a demurrer to the pleading will raise the sufficiency of the facts to constitute such estoppel: *Crawford v. Nolan*, 70–97.

The statute of limitations must be specially pleaded: See notes to § 3447.

Other defenses: The defense that a contract is void because entered into on Sunday must be specially pleaded: *Riech v. Bolch*, 68–526.

Any defense, such as that the instrument sued on is not stamped as required by the United States revenue laws, must be specially pleaded: *Glidden v. Higbee*, 31–579.

Fraud relied upon as a defense must be specially pleaded: *Root v. Schaffner*, 39–375.

An allegation in an answer to a petition

on a note of a fact showing that plaintiff is not a *bona fide* holder thereof, and that it was obtained through fraud and without consideration, constitutes a sufficient traverse of the petition, and, if notice of fraud or of want of consideration is established, it will defeat recovery, although plaintiff prove that he became a holder of the note for value before maturity: *Moore v. Moore*, 39-461.

Where the discharge of a contract is relied upon as a defense, such discharge must be specially pleaded. Therefore, *held*, that in an action on a note for default in payment of interest an admission of the execution of the note coupled with a denial of all other allegations of the petition would not raise an issue as to whether there was such default, the fact of the payment of interest not being alleged by defendant: *Junge v. Bowman*, 72-648.

A judgment is *prima facie* evidence of the existence of indebtedness and the burden is upon the party claiming that payment has been made to plead and prove the fact: *O'Brien v. Sanbach*, 69 N.W., 1133.

A party should not recover under a state of facts different from those pleaded by him: *Gary v. Northwestern Mut. Aid Ass'n*, 87-25.

As to what may be proved under general denial, without any special defense being pleaded, see notes to § 3566.

SEC. **3630. Motion for more specific statement.** When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may, on motion, require it to be made more definite and certain. No pleading which recites or refers to a contract shall be sufficiently specific unless it states whether it is in writing or not. Such motion shall point out wherein the pleading is not sufficiently specific, or it shall be disregarded, and if the reason for such demand exists outside of the pleadings, the motion must state the same, and be supported by affidavit. [C. '73, § 2720; R., § 2948.]

3561

What required: A demand made should be distinctly stated, and, if it is a money demand, it should be shown with accuracy: *Gammel v. Young*, 3-297.

Uncertainty cured by proofs: Allegations in a pleading which are indefinite and uncertain may have the certainty required for a proper judgment or decree afforded by proofs: *Harrison v. Kramer*, 3-543, 557; *Russell v. Nelson*, 32-215.

Where the allegations in a petition are general and indefinite, but defendant, without moving for a more specific statement, puts in issue the general averments of the petition, plaintiff may introduce evidence tending to establish the cause of action thus generally averred in his petition: *Gunsel v. McDonnell*, 67-521.

Motion for more specific statement: There is no prejudice in refusing to sustain a motion for more specific statement when the allegation which is sought to be made more specific is surplusage: *Schoonover v. Hinckley*, 46-207.

A motion for more specific statement will lie for indefiniteness in the statement of facts, etc., but not for indefiniteness in the prayer for judgment: *Sieberling Co. v. Dujardin*, 38-403.

Where a matter of fact is alleged in the alternative, the remedy for the defect is by motion and not by demurrer: *Turner v. First Nat. Bank*, 26-562.

Where plaintiff sought foreclosure of certain tax deeds, and alleged payment of taxes subsequently, for which he asked a lien, *held*, that a motion for a more specific statement, and not a demurrer, was the proper method to raise the objection that it did not appear what the subsequent taxes paid were: *Byington v. Woods*, 13-17.

Failure of plaintiff to state the specific items constituting his cause of action cannot be raised by way of objection to the evidence. It must be interposed by motion for more specific statement: *Bartle v. Des Moines*, 38-414.

Any error in overruling the motion of the defendant to have the petition made more specific is waived by answering: *Coakley v. McCarty*, 34-105; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656.

The objection that the petition in action for damages for personal injuries does not allege the skill of the plaintiff or his capacity to earn wages cannot be made a ground for excluding evidence of that element of damage, where no motion for more specific statement in respect to the basis of damages has been made: *Flanagan v. Baltimore & O. R. Co.*, 83-639.

Whether agreement is written or oral: A motion for more specific statement should be sustained as to an alleged agreement whereby defendant claims to have advanced money in behalf of plaintiff, in order that it may appear whether such agreement was written or oral, and defendant may also be required to set out a bill of particulars of the amounts and dates at which such moneys were advanced: *Schoonover v. Hinckley*, 46-207.

The objection that the petition does not show whether the contract sued on is in writing or not cannot be raised by demurrer, but only by motion for more specific statement: *Barthol v. Blakin*, 34-452.

Where, in an action to recover on a policy of insurance, plaintiff alleged the waiver of the provisions of the policy requiring the filing of proofs of loss, *held*, that a motion by defendant to require plaintiff to state whether such waiver was oral or in writing, and what officer or agent undertook to make such waiver, should have been sustained: *Webster v. Continental Ins. Co.*, 67-393.

Where it was alleged that property had been taken by plaintiff in full payment of the claim sued on, and plaintiff moved to re-

quire defendants to state whether or not an agreement referred to by which the property was taken in payment was oral, and that they be required to set out a copy of the same, *held*, that as the motion asked but for one relief, to-wit, the setting out of the copy, and as the case was not one wherein the setting out of the copy was necessary, the motion was properly overruled: *National State Bank v. Delahaye*, 82–34.

Failure to set out a copy of a written instrument or give reason for not doing so is a ground of demurrer: See § 3561 and notes.

SEC. **3631. Title of cause.** The title of the cause shall not be changed in any of its stages of transit from one court to another. [C.'73, § 2721; R., § 2949.]

SEC. **3632. Judicial notice.** Matters of which judicial notice is taken need not be stated in a pleading. [C.'73, § 2722; R., § 2950.]

SEC. **3633. Pleading conveyance.** When a party claims by conveyance, he may state it according to its legal effect or name. [C.'73, § 2723; R., § 2952.]

SEC. **3634. Pleading estate.** It shall not be necessary to allege the commencement of either a particular or a superior estate, unless it be essential to the merits of the case. [C.'73, § 2724; R., § 2954.]

SEC. **3635. Injuries to goods.** In actions for injuries to goods and chattels, their kind or species shall be alleged. [C.'73, § 2725; R., § 2956.]

SEC. **3636. Injuries to real property.** In actions for injuries to real property, the petition shall describe the property, and when the injury is to an incorporeal hereditament, shall describe the property in respect of which the right is claimed, as well as the right itself, either by the numbers by which the property is designated in the national survey, or by its abuttals, or by its courses and distances, or by any name which it has acquired by reputation certain enough to identify it. [C.'73, § 2726; R., § 2958.]

SEC. **3637. Malice.** When the party intends to prove malice to affect damages, he must aver the same. [C.'73, § 2727; R., § 2959.]

This section is applicable where plaintiff seeks to recover exemplary damages on the ground that the acts of defendant were malicious: *Jones v. Marshall*, 56–739.

An averment of malice by plaintiff when required should be made in the petition or an amendment thereto. It is not sufficient to make it in the reply: *Ibid.*

Exemplary damages cannot be recovered unless malice is averred: *Johnson v. Chicago, R. I. & P. R. Co.*, 51–25.

SEC. **3638. Bond—breaches of.** In an action on a bond with conditions, the party suing thereon shall notice the conditions and allege the facts constituting the breaches relied on. [C.'73, § 2728; R., § 2960; C.'51, § 1818.]

Attaching a copy of the bond to the pleading as an exhibit is not a compliance with this section: *Ryder v. Thomas*, 32–56.

It is not always sufficient to state the condition correctly and aver a breach thereof in the words of the instrument itself. The petition should set out the facts fully enough to enable the court, upon the admission of the facts set forth, to grant the relief sought: *Leas v. White*, 15–187.

In an action on a delivery bond, *held*, that it was not necessary to make an assignment of a breach thereof, there being in such case but one breach and the measure of damage being fixed by statute: *Gordon v. Atkinson*, Mor., 195.

In an action on an attachment bond the bond should be set out, the conditions noticed, and the facts establishing the breach, as, for instance, that the attachment was wrongfully sued out, alleged: *Bunt v. Rheum*, 52–619.

In an action upon a bond plaintiff cannot recover any more than a nominal sum until some damage resulting from the breach thereof has been averred and proven, even although the breach is alleged and shown: *Linder v. Lake*, 6–164.

In an action upon a bond it must be alleged that the damages which have become payable thereunder have not been paid: *Ryder v. Thomas*, 32–56; *Horner v. Harrison*, 37–378; *Hencke v. Johnson*, 62–555.

At common law it was sufficient to assign a breach in the words of the contract either negatively or affirmatively, or in words coextensive with the import and effect of the contract, and as defendant must know in what respects he has or has not performed his contract, any great particularity ought not to be required. Accordingly, in an action upon a penal bond providing for the payment of a penalty for the illegal sale of intoxicating liquors, *held*, that it was sufficient to allege a sale for purposes other than those permitted, and it was not necessary to state for what purpose such sale was made, nor when, where, and to whom: *Jones County v. Sales*, 25–25.

In an action upon a bail bond or recognizance, the petition need not aver the particular fact that the officer had power to take

it: *Furgison v. State*, 4 G. Gr., 302; *State v. Hufford*, 23–579.

As to pleading breach of contract in general, see notes to § 3559.

SEC. **3639. Amount of proof.** A party shall not be compelled to prove more than is necessary to entitle him to the relief asked for, or any lower degree included therein, nor more than sufficient to sustain his defense. [C.'73, § 2729; R., § 2966.]

Where the petition alleges two states of facts upon either of which defendant would be liable, and some of its averments while material to one are redundant to the other, failure to prove the latter, where a right of recovery is established without such facts, will not defeat the recovery: *Way v. Chicago, R. I. & P. R. Co.*, 73–463.

Where the proof of an occurrence is made by statute presumptive evidence of liability, it is not necessary to prove negligence of the defendant in connection therewith, even though alleged in plaintiff's petition: *Engle v. Chicago, M. & St. P. R. Co.*, 77–661.

The fact that plaintiff is allowed to recover without proving the entire facts alleged by him will not constitute error where his petition alleges the grounds necessary to entitle him to recover, and sufficient is proved to make out a cause of action: *Little v. McGuire*, 38–560.

Where plaintiff sought to recover for medical services as family expenses, and averred in his petition that such services were necessary family expenses, *held*, that the averment that they were necessary being not required need not be proved: *Schrader v. Hoover*, 80–243.

In an action for damage by fire from an engine it is sufficient for plaintiff to set forth the occurrence of the injury, and an averment of negligence is mere surplusage; but such unnecessary averment does not change the burden of proof, and it is not sufficient to show that the company was not negligent in operating its road, but the presumption of liability is overcome only on proof that it was not guilty in the matters which were the immediate cause of the injury: *Engle v. Chicago, M. & St. P. R. Co.*, 77–661.

A party is not required to prove the unnecessary averments of a pleading. All that is required is proof sufficient to establish the cause of action or defense: *Knapp v. Cowell*, 77–528.

It is necessary to prove only the substance of the issue. Thus where, in an action for malicious prosecution in charging plaintiff with being the father of a bastard child, it was alleged that defendant was the father of such child, *held*, that this averment formed no part of the real issue and need not be proven: *Green v. Cochran*, 43–544.

Where the question of a trust is raised by the pleadings, the court may grant relief, although the trust as found does not correspond in its entire scope and purpose with that alleged: *Jordan v. Brown*, 56–281.

Where the statute authorized a party having a hedge on the partition line between his own and another's land to select his own half thereof and require payment for the other half by the adjoining owner, and plaintiff in his petition claimed to recover one-half of the hedge, alleging its value to be a certain amount, and evidence showed that he had selected one-half and the fence-viewers had found the value of the other half, *held*, that there was no variance: *McKeever v. Jenks*, 59–300.

Further as to variance, see § 3597 and notes.

Section applied: *Arnold v. Arnold*, 20–273; *Sweezey v. Collins*, 36–589; *Snyder v. Reno*, 38–329; *Knott v. Tincher*, 39–628; *Edwards v. Cottrell*, 43–194; *Moseley v. Shattuck*, 43–540, 543; *Kearney v. Fitzgerald*, 43–580.

SEC. **3640. Denial of genuineness of signature.** When a written instrument is referred to in a pleading, and the same or a copy thereof is incorporated in or attached to such pleading, the signature thereto, and to any indorsement thereon, shall be deemed genuine and admitted, unless the person whose signature the same purports to be shall, in a pleading or writing filed within the time allowed for pleading, deny under oath the genuineness of such signature. If such instrument is not negotiable, and purports to be executed by a person not a party to the proceeding, the signature thereto shall not be deemed genuine or admitted, if a party to the proceeding, in the manner and within the time before mentioned, states under oath that he has no knowledge or information sufficient to enable him to form a belief as to the genuineness of such signature. The person whose signature purports to be signed to such instrument shall, on demand, be entitled to an inspection thereof. [C.'73, § 2730; R., § 2967.]

Signature deemed genuine unless denied: Where the assignment of a judgment is set out, the signature to such assignment will be deemed true until denied under oath: *Edmonds v. Montgomery*, 1–143; so *held*, also, in an action against the guarantor of a promissory note: *Partridge v. Patterson*, 6–514.

This statutory provision is applicable in case of city warrants: *Clark v. Des Moines*, 19–199, 227. Also in case of county warrants: *Clark v. Polk County*, 19–248.

Signatures to a deed, not being denied under oath, must be taken as genuine: *Blackshire v. Iowa Homestead Co.*, 39–624.

In an action upon a bond of a district township, the answer not being under oath,

held, that, the signature being shown to be genuine, there was no error in admitting the bond in evidence: *Curry v. District T'p*, 62-102.

Although defendant files a verified answer, yet, if he does not therein deny the genuineness of the note sued on, it may be admitted in evidence without proof of the genuineness of such signature: *Jones v. Baker*, 76-303.

Where a writing is incorporated in the petition by copy and the genuineness of the signature thereto is not denied under oath, the signing of the instrument is not to be deemed in question: *Thompson v. Lenth*, 62 N. W., 842.

Where no issue is formed in regard to the genuineness of any signature this section does not apply: *Sawin v. Union Building & Saving Ass'n.*, 64 N. W., 401.

Section *held* applicable to an indorsement of a negotiable instrument in a suit between the indorsee thereof and the maker: *Shaw v. Jacobs*, 89-713.

Effect of denial: Where the genuineness of the signature is denied under oath, the party seeking to introduce the instrument in evidence cannot do so until he has established *prima facie* the genuineness of the signature; and in case the signature is that of an agent purporting to act for the principal, whose name is signed to the instrument, the authority of the agent to bind the principal must be shown: *Miller v. House*, 67-737.

If the signature to a written instrument is denied and is established by proof, the instrument imports a consideration: *McCormick v. Jacobson*, 77-582.

Where denial under oath not required: The statutory provision does not apply to an administrator suing on the note of his decedent, and a denial by him of the execution puts in issue the genuineness of the signature: *Ashworth v. Grubbs*, 47-353.

By whom denial made: The denial under oath contemplated in the statute must be by the party whose signature it purports to be: *Walker v. Sleight*, 30-310.

A denial by the maker of the genuineness of the signature of an indorser is not sufficient to throw the burden of proving the genuineness of such signature upon the party claiming thereunder: *Robinson v. Lair*, 31-9.

Under a prior statute it was held that the denial under oath was required to be made by defendant, although the instrument purported to be signed by an agent or another person for him: *Thompson v. Abbott*, 11-193.

The genuineness of a signature may be placed in issue by denial not made by the person whose signature it purports to be and in such case the burden of proof as to that issue is upon the party making the denial: *Shaw v. Jacobs*, 89-713.

What sufficient denial of signature: The denial that a note sued on was for a valuable consideration assigned and indorsed to plaintiff by defendant or by any other person with his knowledge or assent, at the time set forth in the plaintiff's petition, although under oath, does not amount to a denial of defendant's signature: *Carle v. Cornell*, 11-374.

An allegation by defendant that the instrument sued on by plaintiff has been materially changed after execution without defendant's knowledge and consent does not constitute a denial of the execution of the instrument, and it is therefore not necessary to introduce the instrument in evidence: *Hagan v. Merchants, etc., Ins. Co.*, 81-321.

Denial of execution: Under this section a denial of the execution of the instrument will not be sufficient to put in issue the genuineness of the signature: *Loomis v. Metcalf*, 30-382.

Nor will a denial of knowledge or information as to the signing of the instrument put the signature in issue: *Hall v. Ætna Mfg. Co.*, 30-215.

Nor will denial that defendant ever signed or executed an instrument of such tenor and effect raise such an issue: *Douglass v. Matheny*, 35-112.

An answer admitting the making of a note at the time specified in the petition, similar in tenor to the copy declared on, but stating that whether the one sued on was the identical note, and the defendant's signature thereto genuine, were matters with which he was not acquainted, and therefore requiring plaintiff to prove the same, *held* not to be such a denial as to raise an issue with reference to the execution of the note: *Sheldon v. Middleton*, 10-17.

It is not necessary that the answer shall be sworn to in order to raise an issue on the execution of a note. This section gives to defendant the privilege of denying the genuineness of the signature under oath and thus changing the burden of proof to plaintiff, who must then prove its genuineness: *Lyon v. Bunn*, 6-48; *Seachrist v. Griffeth*, 6-390; *Terhune v. Henry*, 13-99.

A denial, though not sworn to, puts in issue the execution so far as to prevent its being taken as admitted: *Fannon v. Robinson*, 10-272.

Under a denial of the execution defendant may introduce evidence that the instrument, by reason of alterations or otherwise, is not such as he signed, without having denied the genuineness of the signature under oath: *Lake v. Cruikshank*, 31-395.

In an action upon a contract claimed to be held by plaintiffs by an assignment where defendant's answer put in issue both the execution of the assignment and plaintiffs' ownership of the claim, *held*, that the burden was upon plaintiffs to establish the existence of the assignment and their ownership of the same when the action was commenced: *Probert v. Anderson*, 77-60.

A denial of the execution of a note puts in issue the genuineness of the signature and disposes of the presumption which ordinarily obtains in favor of the genuineness of the signature to a written instrument when the statutory denial is not made: *Schulte v. Coulthurst*, 62 N.W., 770.

Burden of proof: Where a written instrument was relied upon by a party in his pleading, but was not so set out by copy that the opposite party was required to deny the genuineness of the signature under oath, *held*, that such instrument should not have been admitted in evidence over an objection

thereto, until evidence tending to prove its genuine character had been introduced: *Hay v. Frazier*, 49-454.

The object of this section is to change the burden of proof in respect to the execution of the instrument, and cast it upon defendant, but defendant is not estopped from controverting the execution of the instrument, or his signature thereto, by proof, where he has denied the execution in his answer: *Sankey v. Trump*, 35-267.

Defendant may, by answer not under oath, deny the genuineness of his signature, and support such allegation by proper evidence, the burden of proof being upon him: *Brayley v. Hedges*, 52-623.

Whilst a denial of the execution of a note will not cast upon plaintiff the burden of proving the signature, yet it will permit defendant to prove that the signature is not his: *Sully v. Goldsmith*, 49-690.

When a signature is denied, while the defendant must introduce some evidence to support his defense and overthrow the *prima facie* case made by the writing, yet, when he has done so, the *onus probandi* as to the genuineness of the signature rests upon plaintiff: *Farmers', etc., Bank v. Young*, 36-44.

Where the genuineness of the signature is put in issue the burden of proving it is on the plaintiff. The denial of a claim against a decedent's estate under § 3340 is a sufficient denial to put in issue the genuineness of the signature of the instrument evidencing such claim: *Smith v. King*, 88-105.

Signature admitted: When a written contract is set out in the pleadings and recognized by the parties on both sides it is not necessary for them to prove the signature: *Brewer's Estate v. Crow*, 4 G. Gr., 520.

Where the execution of a contract set out in the pleadings is not denied under oath and there is no evidence tending to show that it has not been duly executed, its execution should be regarded as admitted: *Templin v. Rothweiler*, 56-259.

SEC. 3641. Supplemental pleading. Either party may be allowed to make a supplemental petition, answer or reply, alleging facts material to the case which have happened or have come to his knowledge since the filing of the former pleading; nor shall such new pleading be considered a waiver of former pleadings. [C.'73, § 2731; R., § 2968; C. '51, § 1749.]

The ordinary use of a supplemental petition is in alleging facts transpiring after the beginning of the action, or which were not known at that time, tending to strengthen or re-enforce the cause of action or to enlarge the extent of, or change the relief sought. Whether a supplemental petition may be filed is largely within the discretion of the court: *Leech v. Germania Building Ass'n*, 70 N. W., 1090.

An amended petition should refer to matters existing previously to the commencement of the action. Those matters arising subsequently thereto should be set up in a supplemental petition: *Scovers v. Hamilton* 11-66.

Evidence cannot be given of matters arising after the commencement of the action, whether occurring before or after the filing of the pleading, unless foundation has been laid by a proper supplemental pleading: *Allen v. Newberry*, 8-65.

Where defendant alleged, by way of defense, that the claim sued on was only to become mature on a contingency which had not happened, *held*, that plaintiff might, in a supplemental petition, set up the happening of such a contingency after suit was brought: *Davenport v. Mitchell*, 15-194.

A substituted petition may be deemed a supplemental pleading in such sense that if the cause of action had already arisen at the time the substituted petition was filed it might be maintained although the cause of action had not accrued when the action was commenced: *Bloom v. State Ins. Co.*, 62 N.W., 810.

Where the petition improperly sets up a cause of action not yet accrued, but such cause of action does afterwards accrue, it may then be set up in a supplemental petition: *Sigler v. Gondon*, 68-441.

In an action for an injunction to restrain the illegal sale of liquor on the premises as a nuisance the petition charged that defendants "have established and are now" keeping and maintaining a nuisance; *held*, that, evidence of illegal acts committed at any time after the commencement of the action was competent: *State v. Williams*, 90-513.

An answer setting up matters in bar occurring since the last adjournment of the court can only be interposed by leave of court, and in the absence of such leave should be disregarded: *Williams v. Miller*, 10-344.

Where the relief asked in the original petition, being the right to redeem a portion of premises sold at foreclosure sale, was granted, but before the expiration of the time for such redemption as thus allowed a party asked in a supplemental petition that the decree be modified so as to allow the redemption of an additional portion of the property, and it appeared that the full relief was not asked at first through mistake or oversight and without negligence, *held*, that the relief sought in the supplemental petition should be granted: *Herrey v. Savery*, 48-313.

When in an action to foreclose a mortgage securing several notes recovery is sought for all the notes that will mature before final decree, there is no necessity for amendment or supplemental pleading setting up the maturity of notes maturing after the commencement of the suit and asking relief as to them: *Whiting v. Eichelberger*, 16-422.

Where an action is brought without compliance with a condition precedent required by the contract, the plaintiff cannot by supplemental petition set up the performance of such condition and thus cure the defect: *Zalesky v. Home Ins. Co.*, 71 N. W., 566.

SEC. 3642. Matter in abatement. Matter in abatement may be stated in the answer or reply, either together with or without causes of defense in

bar, and no one of such causes shall be deemed to overrule the other; nor shall a party, after trial on matter of abatement, be allowed in the same action to answer or reply matter in bar. [C.'73, § 2732; R., § 2969.]

Another action pending: Two actions cannot be maintained at one time between the same parties for the same cause if objection be made: *Weaver v. Stacy*, 93-683.

Under the provisions of the Code of '51, *held*, that a plea to the jurisdiction, or that there was another action pending, was as proper and legitimate as before the adoption of that Code: *Rawson v. Guiberson*, 6-507.

The fact that there is another action pending between the same parties for the same cause of action may be pleaded in abatement to another action in which the same parties are the real parties in interest, although there may be other parties thereto who are merely nominal: *Jennings v. Warnock*, 37-278.

Where two actions are brought for the same cause of action, but one of them is dismissed before that fact is pleaded in abatement in the other, or indeed if the one be dismissed before the court has in the other determined the sufficiency of the plea in abatement, the plea should be overruled. (Overruling *Rawson v. Guiberson*, 6-507): *Rush v. Frost*, 49-183.

To constitute the defense of a previous action pending it must appear that the former action is still actually pending: *Hawley v. Chicago, B. & Q. R. Co.*, 71-717.

A previous action pending is not a defense if the former action is dismissed before the question as to its pendency comes before the court for determination: *Ball v. Keokuk & N. W. R. Co.*, 71-306.

The pendency of another action in the name of another plaintiff suing on the same cause of action is not ground of abatement: *Guest v. Byington*, 14-30.

An action pending in the federal court brought by creditors to set aside a general assignment will not necessarily prevent an action by the same creditors in a state court to have the assignee enjoined from paying dividends under such assignment: *Wurtz v. Hart*, 13-515.

That a person seeking relief might obtain it by cross-bill in another pending action cannot be made an objection in an original action: *Osborn v. Cloud*, 23-104.

Where plaintiff in one action asked damages for the use of property by a railway company, and the company in another action sought to compel the party who was plaintiff in the first to convey a right of way in accordance with an alleged agreement, *held*, that although the fact as to the alleged agreement was in issue in both actions, the pendency of the first could not be pleaded in abatement as to the second: *Chicago & S. W. R. Co. v. Heard*, 44-358.

The fact that the party had one action pending against the sheriff to enjoin an execution sale, *held* not to be matter which should be urged in abatement of an action against the purchaser of the property at execution sale: *Jones v. Brandt*, 59-332.

A void judgment is not pleadable in abatement of another suit brought upon the same subject-matter: *Zalesky v. Iowa State Ins. Co.*, 70 N. W., 187.

An action to quiet title will not be abated because plaintiff brought a prior action for the same purpose which was dismissed before the second suit was tried: *Moorman v. Gibbs*, 75-537.

In an action praying for an injunction to restrain defendant from keeping a saloon for the sale of intoxicating liquors, where defendant pleaded in abatement the pendency of a former action, *held*, that the burden of proof was upon defendant to show that both actions related to the same place, and, *held*, also, that the evidence was insufficient to establish that fact: *Farley v. Hollenfeltz*, 79-126.

That the pendency of another action for the same cause of action is a ground of demurrer, see § 3561.

Jurisdiction: The proper mode of raising the objection of want of jurisdiction where it is not apparent upon the face of the petition is by pleading the facts in abatement: *Meunch v. Breitenbach*, 41-527.

Award: The fact that a cause of action has been settled by an award on file is matter to be pleaded in abatement, and cannot be raised by motion to dismiss the action: *Hynes v. Sabula, A. & D. R. Co.*, 38-258.

Garnishment: That defendant has been garnished for a debt due the assignor of plaintiff before assignment, if no judgment has yet been rendered in the garnishment proceedings, is pleadable in abatement and not in bar: *Clise v. Freeborne*, 27-280.

Effect of abatement: The sustaining of a demurrer to an answer setting up matter in abatement is not a trial in such sense as to prevent a setting up of matter in bar by way of answer: *Winet v. Berryhill*, 55-411.

The mere filing of an answer setting up a plea in abatement by reason of defect of parties will not warrant a dismissal of the action: *McCormick v. Blossom*, 40-256.

Must be pleaded: Proof of matter tending to abate the action, if objected to, should not be received if such matter has not been pleaded; and, *held*, that although a champertous contract as to the maintenance of plaintiff's suit appeared from the evidence, yet, as no such fact was pleaded, it was not a ground for abating the action: *Allison v. Chicago & N. W. R. Co*, 42-274.

The pendency of another action not appearing on the face of the petition must be raised by answer in order to constitute a defense: *Treanor v. Sheldon Bank*, 80-575.

Judgment: If the judgment does not show that it is on matter in abatement, the presumption in a subsequent action on the same claim is that it was rendered on matter in bar: *Garretson v. Ferrall*, 92-728.

As to form of judgment on matter in abatement, see § 3771.

SEC. **3643. Subsequent defenses.** Any defense arising after the commencement of any action shall be stated according to the fact, without any

formal commencement or conclusion, and any answer which does not state whether the defense therein set up arose before or after action shall be held to be of matter arising before action. [C.'73, § 2733; R., § 2970.]

SEC. **3644. Consolidation of actions.** When two or more actions are pending in the same court which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no sufficient cause is shown, it shall be done. [C.'73, § 2734; R., § 2980.]

The power of the court to consolidate actions has long been exercised in the absence of any express statutory direction, and the relief which by this section is given to defendant with reference to actions pending in the same court which might have been joined may also in a proper case be given to plaintiff: *Viele v. Germania Ins. Co.*, 26-9, 46.

Failure to give notice of the consolidation of actions will not render the judgment invalid as to so much thereof as might properly have been rendered in an action to which defendant was properly a party, without consolidation being made: *Willard v. Calhoun*, 70-650.

Where actions are by consent of parties consolidated, the two separate actions may be deemed discontinued, and a new and distinct action created, in which is included all of the questions presented by the pleadings in both of the former actions, and the power and jurisdiction of the court with reference to this new action is the same as though it had been brought in the manner in which actions are ordinarily instituted: *Browne v. Hickie*, 68-330.

Where three separate actions were brought against the same defendant joined with different co-defendants in each action, *held*, that plaintiff might, after dismissing the action as to such co-defendants, have all the actions consolidated: *Harwick v. Weddington*, 73-300.

In a particular case, *held*, that a consolidation of actions where one suit would have adjusted the entire issues of both cases would have been proper: *Turner v. Bradley*, 85-512.

SEC. **3645. Lost pleading—substitution.** If an original pleading is lost, or withheld by any one, the court may order a copy thereof to be substituted, or a substituted pleading to be filed. [C.'73, § 2735; R., § 2982; C.'51, § 1760.]

As to substituting lost pleadings, see notes to § 288.

SEC. **3646. Records not to be altered.** No record shall be amended or impaired by the clerk or other officer of the court, or by any other person without the order of such court, or of some court of competent authority. [C.'73, § 2736; R., § 2984.]

CHAPTER 9.

OF TRIAL AND JUDGMENT.

SECTION **3647. Issues.** Issues arise in the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

1. Of law;
2. Of fact. [C.'73, § 2737; R., § 2993.]

Issues arising in special proceedings must be tried either as an ordinary or equitable proceeding, and the mode of trial will be determined by assigning the proceeding to whichever class it appropriately belongs: *Sisters of Visitation v. Glass*, 45-154.

SEC. **3648. Of fact and of law.** An issue of fact arises:

1. Upon a material allegation of fact in the petition denied by the answer;
2. Upon material allegations of new matter in the answer, either denied by a reply or by operation of law;
3. Upon allegations of new matter in the reply, which shall be considered as controverted by the opposite party without further pleading.

Any other issue is one of law. [C.'73, § 2738; R., §§ 2994-5.]

As to when reply is necessary, see §§ 3576, 3622.

SEC. **3649. Trial defined.** Issues of law must be tried first. A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact. [C.'73, § 2739; R., §§ 2996-7; C.'51, § 1770.]

In conformity to this definition of trial, *held*, that the rendering of a judgment by a justice of the peace in a criminal case on a plea of guilty was not a trial in such sense as to entitle the justice of the peace to a trial fee: *Mathews v. Clayton County*, 79-510.

SEC. **3650. How issues tried.** Issues of fact in an ordinary action must be tried by jury, unless the same is waived. All other issues shall be tried by the court, unless a reference thereof is made. [C.'73, § 2740; R., § 2998; C.'51, § 1772.]

It is not prejudicial error to refuse a jury trial where the questions involved are such that nothing arises for the determination of a jury: *Bremer County Bank v. Bremer County*, 42-394.

The amount of damages is to be assessed by the jury, and it is improper to order an assessment by the clerk: *Wiley v. Arnold*, 1 G. Gr., 365.

An action for divorce being an action in equity, the parties have no right to a jury trial: *Sherwood v. Sherwood*, 44-192.

An issue of fact in an equitable proceeding is to be tried by the court and cannot be submitted to a jury, even as formerly provided under Revision, § 2999, for the purpose of informing the conscience of the court. The reference contemplated in this section is not one to a jury, but such an one as is provided for in § 3734 *et seq.* (overruling in this respect, *Sherwood v. Sherwood*, 44-192, and *Howe Machine Co. v. Wooley*, 50-549): *Hobart v. Hobart*, 51-512.

A party may rely as a defense to a contract upon matter such as fraud in its execution, showing that no such contract was entered into by the parties, although he might in equity make such fact the ground for a cancellation of the contract. The interposition of such a defense does not raise an equitable issue: *Carey v. Gunnison*, 65-702.

Where the same action involves issues cognizable in equity, and also law issues, either party is entitled to a jury trial as to the latter, and those issues are to be tried first the determination of which will be most likely to dispose of the case: *Morris v. Merritt*, 52-496.

It is not error in the court to overrule motion of a party to submit to a jury certain issues in an equitable action: *Shontz v. Evans*, 40-139.

The right to trial by jury is not inalienable, but may be waived or forfeited: *Wilkins v. Treynor*, 14-391.

It is immaterial that the party complaining of the illegality of the jury is a municipal corporation. Although it may be that such a corporation has no constitutional right to jury trial, yet the statute does not profess to make any special provisions for such cases: *Kelsh v. Dyersville*, 68-137.

The verdict in a trial by a jury defective as to the number will be void unless the defect is waived. The mere act of the party in accepting the jury will be deemed merely a waiver of further objection to individual jurors and not a waiver of the objection to number, where it appears that the party had no knowledge of the deficiency in that respect: *Cowles v. Buckman*, 6-161.

The provision requiring a party to pay a jury fee, or increasing the jury fee, is not unconstitutional: *Adae v. Zangs*, 41-536, 542; *Little v. McGuire*, 43-447; *Steele v. Central R. of Iowa*, 43-109; *State v. Verwayne*, 44-621.

Issues in a special proceeding are triable to the court without a jury: *In re Bresee*, 82-573.

Issues at law arising in actions commenced by equitable proceedings are triable according to the method of trial in equity, and a party thereto does not have a right to jury trial: *Ryman v. Lynch*, 76-587; *Gatch v. Garretson*, 69 N. W., 550.

If a cause is transferred to the equity docket the issues therein are triable without a jury whatever their nature: *Marquis v. Illsley*, 68 N. W., 589.

Where a case was set for trial to the court, without exception being taken, and subsequently the pleadings were amended and an additional party was made plaintiff, *held*, that the defendant was not entitled to a jury, the jury having been dismissed for the term before the time set for the trial of the case, the question whether there was such change of circumstances to entitle the defendant to withdraw his consent to a trial by the court and insist on a trial by jury, being within the discretion of the court for determination, and no review of its action on appeal being proper unless such discretion should appear to have been abused: *Foster v. Hinson*, 76-714.

In an action for the possession of real estate and damages for its wrongful detention, where the question of ownership has been determined by equitable proceedings and judgment entered, the issue as to the value of the rents and profits need not be submitted to a jury, where there is no dispute as to the facts or amount: *Woodbridge v. Austin*, 81-671.

In equitable actions triable to the court, a reference may be made, even without consent. The parties are not entitled, as of right, to a trial by jury: *State v. Orwig*, 25-280.

And as to right of trial by jury, generally, see Const., art. I, § 9, and notes.

A party in default is not entitled to a jury to assess amount of recovery: See § 3791 and notes.

Waiver of jury trial, § 3733.

Trial to the court without a jury, see § 3783 and notes.

SEC. **3651. Method of trial in ordinary actions—appeal.** All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as provided by law; and, upon appeal, no evidence shall go to the supreme court except such as may be necessary to explain any exception taken in the cause, and such court shall

hear and try the case only on the legal errors so presented. [18 G. A., ch. 83; C.'73, § 2741; R., § 2999.]

To warrant the supreme court in reviewing errors of law in the admission or exclusion of evidence, the record need not contain all the evidence in the case, but need only show the purport of the evidence passed upon: *Smith v. Johnson*, 45–308.

Evidence offered, but rejected, need not be taken to the supreme court on appeal where the error assigned is the dismissing of the case upon the evidence: *State ex rel. v. Chamberlin*, 74–266.

The evidence in full is required in law actions only when, as an objection to the judgment, it is urged that the verdict is not supported by the testimony. The supreme court will pass upon the correctness of instructions or rulings as to the admission or rejection of testimony when the bill of exceptions contains a statement that there was evidence tending to prove the facts to which the instructions are applicable or states evidence, not necessarily in full, about which the question as to the admissibility of evidence arises. The issues in the case in determining the applicability of instructions and the competency and relevancy of the evidence are to be determined from the pleadings: *Kelleher v. Keokuk*, 60–473.

In an appeal in a law action it is not necessary nor proper to set out in the abstract evidence not necessary to explain exceptions taken to the rulings which are brought before the supreme court for review: *Hammond v. Wolf*, 78–227.

In order to determine whether prejudice resulted to appellant by reason of the exclusion of evidence, not only the questions, but the answers, or the facts that they would tend to establish, should appear in the record. Unless prejudice be thus shown, the judgment cannot be disturbed on account of exclusion of evidence: *Jenks v. Knott's Mexican Silver Mining Co.*, 58–549. And see notes to § 4139.

Questions not raised below will not be considered on appeal: See notes, II, a, to § 4139.

Special proceedings (such as probate of wills, etc.) are triable in the supreme court upon legal errors duly assigned, and not *de novo*: *Ross v. McQuiston*, 45–145; *Sisters of Visitation v. Glass*, 45–154; *Brett v. Myers*, 65–274.

The mode of trial in special proceedings will be determined by assigning the proceeding to that class, legal or equitable, to which it properly belongs: *Davis v. Clinton*, 55–549.

If a special proceeding is triable as an ordinary action, there is the same right to trial by jury, change of venue, etc., as in ordinary proceedings: *Whitney v. Atlantic Southern R. Co.*, 53–651.

An appeal in the proceedings with reference to the allowance of county printing must be prosecuted as ordinary proceedings and evidence cannot be introduced by affidavit: *Democrat Publishing Co. v. Lewis*, 90–304.

The rule is to try all causes on oral evidence, and, in the supreme court, on exceptions and errors duly assigned, and if trial *de novo* on appeal is desired, the proper steps to secure it must be taken: *Finch v. Hollinger*, 47–173, 175.

Under Revision, § 2999, *held*, that in equity actions tried by the second method (as provided in that section) the supreme court could only consider questions of law properly assigned, as in actions by ordinary proceedings: *Snowden v. Snowden*, 23–457.

A trial of a case to a referee does not constitute a trial in open court, nor will a subsequent hearing of the case on exceptions to the report of the referee constitute such trial: *Hobart v. Hobart*, 45–501.

The question of the correctness of the ruling of the lower court in excluding evidence may be raised under the statement that the evidence offered tended to prove facts which would have been material without setting out in full the questions asked: *Forcum v. Independent Dist.*, 68 N. W., 802.

Further as to the record on appeal, see notes to § 4139.

SEC. **3652. In equitable actions—certificate of evidence—trial anew on appeal.** In equitable actions wherein issues of fact are joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may, at pleasure, take his testimony, or any part thereof, by deposition. All the evidence so taken shall be certified by the judge at any time within six months after the entry of a final decree, and the evidence and certificate be made a part of the record, and go on appeal to the supreme court, which shall try the cause anew. [19 G. A., ch. 35, § 1; 17 G. A., ch. 145; C. '73, § 2742.]

Cases tried as equitable: Where a proceeding has been treated without objection in the lower court as equitable, it is to be so treated in the supreme court: *Hintrager v. Sumbargo*, 54-604; *Balch v. Ashton*, 54–123; *Manchester v. Hoag*, 66–649; *Fritzler v. Robinson*, 70–500.

Where an equitable action and a counterclaim therein were both tried in the court below as in equity, *held*, that on appeal all the issues would be triable *de novo*, although the counter-claim was legal in its nature: *Taylor v. Kier*, 54–645.

Where the issues are equitable it will be presumed that the case was tried as an equitable action, unless the record shows the contrary: *Baldwin v. Davis*, 63–231.

The supreme court regards cases tried in the lower court under the rules governing equitable actions as belonging to that class,

whether any question of strictly equitable jurisdiction arises or not; but the fact that the case was tried before a court without a jury does not show that it was tried as an equitable action: *McCormick v. Lundbury*, 74–558.

Mistake in form of proceeding: Where a case is tried without objection or exception in the court below as a case in chancery, and appealed to the supreme court in form to be tried *de novo*, it will be so tried, whether properly triable as an equitable action or not: *Clute v. Frasier*, 58–268.

A party cannot, on appeal, complain that relief is granted in an action at law which could only be given in equity, where the action, although brought by ordinary proceedings, is tried below and upon appeal as an equitable action: *Graham v. Rooney*, 42–567.

Trial de novo is the proper method in equity: Equity cases tried by the method provided by statute must on appeal be heard *de novo*. The appellant cannot have the case tried in any other manner. It is the mode of trial and not the character of the case and the relief sought which determine the method of trial on appeal: *Blough v. Van Hoorebeke*, 48–40.

Where a case was on appeal properly triable *de novo*, *held*, that the court would not refuse to try it in that manner because the attorney, by reason of a mistaken belief as to the proper method of trial in such an appeal, had not embodied all the evidence in the abstract, or introduced evidence in the court below which he wished to have considered on such appeal: *Sherwood v. Sherwood*, 44–192.

An equity case will be tried *de novo* on appeal, notwithstanding the special finding of the jury on the trial below: *Chambers v. Ingham*, 25–222.

Where an equitable action is triable *de novo* on appeal, the fact that the referee reports the facts and conclusions of law separately will not give to his findings the effect of a special verdict, and the supreme court may still try the case upon the facts: *Cooper v. Skeel*, 14–578.

The constitution guaranties the right of trial *de novo* on appeal in an equitable action, and a former statutory provision for a review of divorce and foreclosure cases only upon errors assigned was held unconstitutional: *Sherwood v. Sherwood*, 44–192; *Howe Machine Co. v. Woolly*, 50–549.

Where appellant insists upon a trial *de novo*, and appellee objects, there can be no ground of complaint of either party where the court tries the cause anew and affirms the judgment: *McClain v. McClain*, 57–167.

It is competent for the parties, with the consent and approval of the court, to waive provisions as to the manner of trial: *Baker v. Jamison*, 73–698.

It is error to submit an issue of fact in an equity action to the determination of a jury, and the fact that such submission is erroneously made will not prevent the trial of the case *de novo* on appeal: *Frank v. Hollands*, 81–164.

Where it appears that the case was tried below as in equity, the evidence being in writing and certified by the judge, the cause will be tried *de novo* on appeal: *Ryan v. Heenan*, 76–589.

Where in an action commenced as a law action a motion was made to transfer the cause to the equity side of the calendar, and the record failed to show a ruling on the motion, or that the cause was thereafter treated as in equity, or that any equitable relief was given, upon appeal, *held*, that it would be presumed that the motion was not ruled upon by the court, but was abandoned by plaintiff, and the cause would be treated as an action triable by ordinary proceedings: *Johnson v. Webster*, 81–581.

Further, as to trial *de novo* on appeal, see notes to § 4139.

Trial of equity case on errors assigned: Where it did not appear that the steps required by statute, in order to obtain a trial *de novo* on appeal, had been taken, *held*, that the case could not be tried in that manner, but only as a law action upon errors assigned: *Lynch v. Lynch*, 28–326; *Mallory v. Luscombe*, 31–269; *Twogood v. Reily*, 48–546; *Howe Machine Co. v. Woolly*, 50–549.

Where the necessary steps to secure a trial *de novo* have not been taken, errors of law properly assigned may be considered: *Jordan v. Wimer*, 45–65; *Lutz v. Kelley*, 47–307; *Kershman v. Swehla*, 62–654.

On appeal in an equitable case, from a ruling on motion or demurrer, exceptions must be taken and errors assigned, as in an action by ordinary proceedings, and the hearing will be only upon the errors assigned: *Fink v. Mohn*, 85–739.

Errors in ruling upon demurrer or other issues of law must be preserved by exception and assigned as error. It is only as to issues of fact in equitable cases that a trial anew can be had in the supreme court: *Exchange Bank v. Pottorf*, 65 N.W., 312.

In such a case it will be necessary that the same steps shall have been taken to preserve and present the errors relied upon as must be taken in an action at law to secure a hearing upon the errors: *Buckwalter v. Craig*, 24–215; *Krapfel v. Pfiffner*, 24–176; *Schmeltz v. Schmeltz*, 52–512.

Parties have the right to prepare and have an equity case tried on appeal upon errors assigned, and may stipulate or agree upon evidence introduced and considered in the court below for that purpose: *Hutchinson v. Wells*, 67–430.

On appeal in an equitable case from a ruling upon a motion or demurrer exceptions must be taken and errors assigned as in an action by ordinary proceedings, and the hearing will be only upon errors: *Powers v. O'Brien County*, 54–501; *Patterson v. Jack*, 59–632.

That exception to a decree is not necessary to support an appeal, see notes to § 3749.

Where in an action in equity judgment is rendered on the allegations in the pleading and an appeal is taken therefrom, no assignment of errors is necessary and the trial in the supreme court will be *de novo*: *Heidlebaugh v. Wagner*, 72–601.

Appellant in an equitable action may have the case considered on error, but for

that purpose an assignment of errors is required: *Marshall v. Westrope*, 67 N.W., 257.

Law case not triable de novo: Even though an action by ordinary proceedings is tried on written evidence, and on appeal to the supreme court all the evidence is taken up, the case will not be tried *de novo*, but only upon errors: *Dove v. Independent School Dist*,. 41-689.

Regulations as to method: Although the legislature cannot take away the right of trial *de novo* on appeal in equity cases, yet the manner of its exercise may be regulated: *Richards v. Hintrager*, 45-253.

The right to a trial *de novo* in equity cases on appeal is granted by the constitution only where the mode and manner prescribed by statute have been followed in the court below and the necessary steps taken to obtain such a form of trial on appeal: *Sisters of Visitation v. Glass*, 45-154.

Where a divorce case was not tried in open court, as required by statute, but was sent to a referee, who reported the evidence with his findings to the court, and all the evidence was taken to the supreme court on appeal, *held*, that as the trial in the court below was not in the manner prescribed by law, the supreme court could not try the case *de novo: Hobart v. Hobart*, 45-501.

The legislature is not prohibited from providing for the trial of chancery causes in the supreme court upon questions of law certified by the court below. The provision prohibiting appeals in cases where the amount in controversy does not exceed one hundred dollars, except upon questions of law duly certified, is not unconstitutional as prohibiting a trial *de novo: Andrews v. Burdick*, 62-714.

The rule is to try all cases on oral evidence in the lower court, and in the supreme court on exceptions and errors duly assigned, and if trial *de novo* on appeal is desired the proper steps to secure it must be taken: *Finch v. Hollinger*, 47-173.

Change in statute applicable to actions pending: A change in the statute as to the method of trying equitable actions is applicable to a case commenced before the passage of the act which comes on for trial after the act has taken effect: *Bailey v. Malvin*, 53-371.

A change in provisions as to the certificate of the judge, required to show that the evidence was all reduced to writing, *held* applicable to actions pending but not tried: *Cornell v. Cornell*, 54-366.

Where an equitable action was sent back on appeal for a new trial with permission to the parties to replead, and a trial was had after a change in the statute as to such method of trial, *held*, that the method of securing trial *de novo* on appeal was to be determined by the statute in force at the time of the second trial: *Cross v. Burlington & S. W. R. Co.*, 58-62.

Written evidence: Where an order has been made for trial in an equitable action upon written evidence oral evidence is not admissible; *Sexton v. Henderson*, 47-131; *Harlan v Porter*, 50-446.

Under the law now in force, when a case is tried as au equitable action no order of the court that it be tried on written evidence is required. If the evidence is in fact taken down in writing and certified by the judge and properly made part of the record it is sufficient: *Hines v. Horner*, 86-594.

Taking down in writing: The taking of the testimony in shorthand, no transcript thereof being filed, is not a taking down "in writing:" *Godfrey v McKean*, 54-127.

If the court orders the evidence taken down in shorthand, and the evidence is so taken and properly certified at the time, and it is afterwards transcribed, this is a sufficient taking down in writing. It is not necessary that the translation or transcript be made at the time of the trial: *Ross v. Loomis*, 64-432; *Howe v. Jones*, 66-156.

A case cannot be tried *de novo* on appeal unless the evidence be certified by the judge. It is not sufficient that the evidence be taken in shorthand and the notes preserved: *Barskaddon v Bartlett*, 63-180.

But if the evidence is taken down in shorthand by order of the court, and the notes are afterwards transcribed by the reporter and certified by him and filed, such transcript will be deemed written evidence; but this transcript must be filed within the six months allowed for making the judge's certificate. If the judge's certificate has been made in proper form in connection with the original notes as filed, it may be regarded as so connected with the transcript when made as to constitute, with the reporter's certificate, a sufficient certificate of the evidence; but the certificate is not to be deemed complete until the transcript is made and certified by the reporter. This rule would, perhaps, have no application in a case tried by ordinary proceedings: *Merrill v. Bowe*, 69-653.

Where the shorthand reporter's notes are filed, but are not extended or certified to by the reporter until after the expiration of six months from the trial, the case cannot be tried anew upon appeal, although the judge within the six months attaches his signature to the notes, to the effect that they contain all the evidence offered or introduced: *Wise v. Usry*, 72-74.

The translation of the shorthand notes is required to be filed within six months from the rendition of the decree: *Arts v. Culbertson*, 73-13.

The burden is upon appellant to show that the transcript of the shorthand notes was properly certified within six months after the entry of judgment: *Moody v. Edwards*, 72-456.

Shorthand notes of the evidence taken on the trial and certified by the judge at its close, when followed by the filing of the transcript of the same, is a sufficient taking down of the evidence in writing: *Goetz v. Stutsman*, 73-693.

Where the shorthand notes of the evidence are certified to by the judge as containing all the evidence introduced and offered, together with all the objections and exceptions of the parties, and ordered filed and made a part of the record, and are so filed, and afterwards the translation of the notes by the shorthand reporter and his cer-

tificate thereto that such translation is full, true and complete, is filed within proper time, the evidence is sufficiently preserved to entitle the parties to trial anew on appeal: *Adams County v. Graves*, 75-642.

It is no objection to the trial of a case *de novo* that the evidence was not taken down and certified by the official reporter where it is tried upon written evidence: *Gately v. Kniss*, 64-537.

Depositions: The granting of an order that an equity case be tried upon depositions rests in the exercise of the sound discretion of the court, and it will be presumed on appeal that such discretion has been properly exercised. The fact that the party making application has failed to avail himself of the opportunity to take depositions given by an order at a former term may be sufficient ground for refusing the subsequent application for such order: *Mills County Nat. Bank v. Perry*, 72-15.

Where a cause is ordered to be submitted on depositions it is incumbent on either party, desiring to offer documentary evidence, to give notice thereof to the opposite party and while the court, in the exercise of a proper discretion, may permit such evidence to be offered at the trial and may also allow oral testimony to be taken, yet it ought to allow the other party to rebut such evidence when it is received: *Clapp v. Greenlee*, 69 N. W., 1049.

Trial term: When an order is made to take the evidence in the form of depositions the cause is necessarily continued, and the appearance term is not the trial term, even in actions for foreclosure, divorce, etc.; but if the evidence is ordered to be taken down in writing there need be no continuance unless for cause, and the appearance term is the trial term for those classes of equitable actions: *Holbrook v. Fahey*, 51-406.

Where one party demands a trial the court should not continue the cause for the purpose of taking depositions without making an order for trial of the cause upon depositions. *Ellwood v. Price*, 73-84.

Question as to admissibility of evidence: On the trial of an equitable action *de novo* on appeal, questions as to competency of testimony, admissibility of depositions, etc., come up as original questions upon the objections made in the court below, and upon their decision the testimony is considered or rejected, as the case may be. If found competent and admissible the testimony is considered, although it was excluded in the court below, but the decision is not thereby reversed, unless the consideration of such testimony makes a different conclusion necessary: *Blough v. Van Hoorebeke*, 48-40.

Error in the admission of evidence in an equity case triable *de novo* on appeal does not constitute a ground of reversal: *Hasner v. Patterson*, 70-681.

Immaterial evidence will be disregarded, whether objected to on the trial below or not: *Cook v. Smith*, 50-700.

Upon trial of an equitable action *de novo*, the supreme court passes upon the sufficiency of the evidence properly admitted, and need not consider the objections to the admissibility of evidence made in the court below: *Hanks v. Van Garder*, 59-179.

The fact that evidence has been erroneously admitted in the lower court in such a case will not render a reversal necessary, but such evidence will be disregarded, and the final determination of the case will be made upon evidence properly received: *Van Bogart v. Van Bogart*, 46-359; *Putney v. O'Brien*, 53-117.

If, however, testimony which is properly admissible, but is rejected by the lower court, is not a part of the record, the determination that there was error in the action of the lower court in excluding it would render it necessary to reverse the judgment and remand the cause. The proper practice in such cases is to permit all testimony to which objections are sustained to be made part of the record, so that if held admissible by the supreme court it may be considered upon the trial in that court: *Blough v. Van Hoorebeke*, 48-40.

Where records were allowed to be introduced in evidence contrary to an order that all documentary evidence should be filed with the clerk before the trial of the case, *held*, that the party complaining, if taken by surprise, should have moved for a continuance, but was not entitled to a decree in his favor on account of such erroneous action of the court: *Collins v. Valleau*, 79-626.

As the provisions of this section can be complied with and the full benefit of a trial *de novo* be secured only by causing all the evidence offered to be written down, if questions asked are not permitted to be answered, and thus made part of the record, the defeated party must be allowed to have a review of such questions upon error. Otherwise he would be denied the benefit of an appeal: *Clinton Lumber Co. v. Mitchell*, 61-132.

Where in the trial of an equitable action a deposition was erroneously stricken from the files, *held*, that the supreme court would not try the case *de novo*, considering such deposition, but would remand the case for a new trial, in order that the opposing party might have an opportunity to introduce further evidence on his part: *Sweet v. Brown*, 61-669.

The supreme court will reverse a decree of the lower court where it is apparent upon the record that there is not sufficient evidence to sustain it: but if the record entry recites that there was other evidence, which would be sufficient, and which may have been lost, the case will be remanded for a retrial: *Webster County v. Taylor*, 19-117.

It being the practice in the trial of equity cases in the trial courts to admit evidence offered, without ruling as to its admissibility, a party who, by cross-examining a witness, calls out the same evidence which he has objected to in chief, will not be deemed to have waived his objection: *Donnell v. Braden*, 70-551.

What questions considered: Where a case is tried *de novo*, all questions may be presented in the supreme court which legitimately arise on the record, whether they were urged or relied on in argument in the lower court or not: *Seymour v. Shea*, 62-708.

Alleged errors in interlocutory proceedings will not be considered, but the supreme court will try the case on its merits: *Hackworth v. Zollars*, 30-433; *State v. Orwig*, 27-528.

An equity cause comes to the supreme court with the objections interposed by counsel in the record and the supreme court makes such rulings with reference to the objections as ought to be made: *Clapp v. Greenlee*, 69 N. W., 1049.

What must appear of record to warrant trial de novo: An equity cause cannot be tried *de novo* in the supreme court unless the testimony is all embodied in the record: *Krapfel v. Pfiffner*, 24-176; *Maxwell v. Lundy*, 19-576.

Where it does not appear from recitals in the decree or from a certificate of the judge or clerk that the evidence is all before the supreme court, the case will not be tried *de novo: Van Orman v. Spafford*, 16-186; *Anderson v. Easton*, 16-56; *Kellogg v. Kelsey*, 16-388; *Winslow v. Turner*, 20-294; *Pickett v. Hawes*, 20-335; *Wetherell v. Goodrich*, 22-583.

If the evidence is not all in the record the same presumption obtains as to the correctness of the judgment of the court below as in an ordinary action: *State v. Orwig*, 27-528; *Garner v. Pomeroy*, 11-149.

Where the record did not show the evidence upon which findings of fact by a referee were based, *held*, that the supreme court could not try the case *de novo: Lillie v. Skinner*, 46-329.

The testimony and not simply the facts found by the court should be set out in the record: *Robb v. Dougherty*, 14-379.

Where the record contained a stipulation as to certain facts, but no statement that the cause was tried upon such stipulation, *held*, that the cause could not be tried *de novo*: *Davenport v. Ells*, 22-296.

Where the bill of exceptions referred to exhibits which did not appear of record, so that it was apparent that the evidence was not all before the court on appeal, *held*, that the decree below would not be disturbed: *Cook v. Woodbury County*, 13-21.

The court cannot try a case *de novo* where it has before it the oral evidence taken down in writing, but not the documentary evidence: *Howe v. Jones*, 66-156.

Where the record showed that certain facts were proved without setting forth the evidence by which such proof was made, *held*, that the supreme court would not refuse to try the case *de novo* because of the omission of such evidence when no objection appeared to have been made to its sufficiency at the trial, but that if it affirmatively appeared that the record did not contain all the facts proved or all the evidence submitted to the lower court, its action would not be reviewed: *Pickett v. Hawes*, 20-335.

If it should appear from an inspection of the record that some item of the evidence irrelevant to some issue in the case, or entirely immaterial, was omitted from it, the court would not on account of such omission refuse to try the case anew. But to warrant the court, however, in so trying the cause, the irrelevancy or immateriality of the omitted testimony must be clearly made to appear from the evidence: *Palo Alto County v. Harrison*, 68-81.

Appellee cannot object to a trial *de novo* on the ground that the record does not contain evidence admitted against his objection but not contained in the abstract; it must be presumed that as to him the admission would strengthen rather than weaken appellant's cause: *Clinton Lumber Co. v. Mitchell*, 61-132.

What the abstract must show: To entitle the party appealing to a trial *de novo* in an equitable action, it should appear from the statements of his abstract, which will be deemed true if not controverted, that the evidence is all before the court: *Britton v. Central R. Co.*, 39-390.

The court cannot consider a case triable *de novo* where the abstract does not purport to contain all the evidence: *Britt v. Case*, 58-757; *Goodykuntz v. Ringland*, 52-732.

It must appear from the abstract not only that all the evidence was made of record on the trial below, but that all the evidence is substantially embodied in the abstract: *Greer v. Dickey*, 53-755.

When a trial anew is desired it is essential that the evidence introduced in the district court should be set out in the abstract, and upon proper application made to the court it must be assumed that such evidence in all cases can be procured or supplied: *Shear v. Brinkman*, 72-698.

If the action is triable on appeal *de novo*, and the abstract does not purport to be an abstract of all the evidence, the court will not try the case, but will simply affirm the the decree: *Overholt v. Esmay*, 54-748; *Wilson v. Blair*, 55-745.

Or the appeal may in such case be dismissed on motion: *Green v. Ronen*, 59-83.

The abstract must contain the statement that it embraces all the evidence offered or introduced on the trial below: *Polk County v. Nelson*, 75-648. A statement that it contains all the evidence introduced and received is not sufficient: *Wallick v. Pierce*, 71 N. W., 429.

Where the case was equitable in nature, and the abstract purported to contain all the evidence, and recited that such evidence was by order of the court taken down in writing and filed with the clerk, and made part of the record, *held*, that there appeared a sufficient compliance with the statute to entitle appellant to trial *de novo* on appeal: *Stoddard v. Hardwick*, 46-160.

And see also notes to § 4139.

As to the abstract in general, see notes to § 4118.

Method of making evidence appear of record: There are but three modes by which the supreme court can know that all the evidence introduced below is in the record: 1st. By bill of exceptions stating that fact. 2d. By certificate of the judge as contemplated in this section; and, 3d, by certificate of the judge, agreement of parties, or certificate of the clerk as provided in § 4107: *Flesher v. Groves*, 48-700.

Books of record and documents which have been properly identified in the shorthand reporter's notes as having been offered in evidence are to be regarded as a part of the record even though they may have been for the time being removed from the office of the clerk. They need not be attached to or incorporated into the shorthand reporter's

notes or a translation if they are sufficiently identified: *Jamison v. Weaver*, 87-72.

Judge's certificate; time for making: The certificate of the evidence by the judge must be made during the time allowed for appeal (six months): *Mitchell v. Laub*, 59-36; *Page County v. American Emigrant Co.*, 61-246; *Marshalltown v. Forney*, 61-578; *Preston v. Hale*, 65-409; *Hartnett v. Sioux City*, 66-253; *Wisconsin, I. & N. R. Co. v. Braham*, 71-484.

Where it does not appear at what time the certificate of the evidence is made by the judge the cause cannot be heard *de novo*. It should be made to appear affirmatively that the certificate was signed within the time fixed by statute, and it cannot be presumed that it was so signed: *Russell v. Johnston*, 67-279; *Mitchell v. Laub*, 59-36.

Objection to the giving of a certificate after the time for appeal has expired is not waived by a stipulation, entered into by the parties before the expiration of the time for perfecting appeal, that the case shall be heard at a particular term of the supreme court: *Hartnett v. Sioux City*, 66-253.

Evidence certified at such time as is provided for under the section as amended, although before the passage of such amendment, may be considered in an appeal submitted after the taking effect of the act: *Starr v. Case*, 59-491.

The judge may certify to the record within the proper time, even though it be after the appeal is taken: *Goff v. Hawkeye Pump, etc., Co.*, 62-691.

A certificate of the trial judge cannot be made after the expiration of his term of office: *Burnett v. Loughbridge*, 87-324.

The section does not prescribe the manner of certification, and the certificate may be attached to the shorthand reporter's notes or to his translation of his notes or to the evidence itself, but it is not essential that it be in either of these forms. It will be sufficient if it clearly identifies the evidence so there can be no mistake as to what is intended: *Ibid.*

It will be sufficient if it is embodied in a recital in the decree that the evidence was all reduced to writing by the shorthand reporter, which was ordered filed and made a part of the record: *Ibid.*

It is necessary not only that the shorthand notes be certified at the time of the trial, but that the transcript thereof be filed within the time limited for appeal and if not so certified the case cannot be tried *de novo*: *Yetser v. Wiles*, 91-478.

Unless the transcription of the reporter's shorthand notes is filed in the lower court within six months from the time of entering the decree, that is within the time allowed for appeal, the case cannot be tried *de novo*. *Calef v. Cole*, 93-679.

The time for filing the notes is to be computed from the rendition of the decree, and not from the time of a subsequent formal entry for the correction of an error therein: *Ibid.*

A transcript of the shorthand notes certified by the judge but never filed with the clerk is not so authenticated as to be entitled to consideration upon a trial *de novo* on appeal: *Baldwin v. Ryder*, 85-251.

Even though it may be that documentary evidence can be certified by the clerk separately from the certificate of the judge to the transcript of the evidence taken down in writing, such certificate should be given within the time allowed for appeal: *Jamison v. Weaver*, 84-611.

Where the translation of the reporter's notes is not filed in the lower court within six months from the decree the case cannot be tried *de novo* on appeal: *State v. Roenisch*, 77-379.

A party will not be entitled to a trial *de novo* upon appeal where the translation of the shorthand reporter's notes is not certified and filed in the office of the clerk within six months from the rendition of the decree: *Kavalier v. Machula*, 77-121; *Thomas v. McDaneld*, 77-126; *State v. Boyd*, 85-740.

The statute determines the time within which the evidence in an equity action triable *de novo* on appeal must be made of record, and it is not competent for the court by fixing a time for filing a bill of exceptions to restrict the time fixed by statute: *Frank v. Hollands*, 81-164.

As to the time for filing transcript of shorthand notes in actions at law, see notes to § 4123.

Where a case is not one in which a transcript of the evidence is not necessary to be filed and such transcript is not presented and filed as required by law there can be no hearing on the appeal, except upon errors assigned: *Independent School Dist. v. Ross*, 63 N. W., 576.

This section as it now stands makes a certificate of the judge to the evidence necessary, whether such evidence is oral or in the form of depositions or other written evidence. The office of the certificate of the clerk under § 4123 is to identify and authenticate the record. (Overruling *Cross v. Burlington & S. W. R. Co.*, 58-62): *Teague v. Fortsch*, 66 N. W., 1056; *Runge v Hahn*, 75-733.

After the time has expired within which a certificate of the evidence is required to be made, the judge has no power or jurisdiction to amend or alter it, and it may be shown in the supreme court by evidence outside of the record, as, for instance, by a certificate or affidavit of the judge, that interlineations appearing in the judge's certificate were made by him after the time for making the certificate had expired: *Lewis v. Markle*, 71-652.

Whether the court has power after six months have expired to correct clerical errors in the certificate, *quære: Runge v. Hahn*, 75-733.

Sufficiency of judge's certificate: A certificate not attached to any evidence, but merely showing the names of the witnesses, and the side upon which they were introduced respectively, without referring to any testimony as taken in writing, *held* insufficient: *Alexander v. McGrew*, 57-287.

In a particular case, *held*, that the certificate, although not attached to the evidence, identified the different instruments of evidence with as much certainty as was possible under the circumstances, and was sufficient in that respect: *Palo Alto County v. Harrison*, 68-81.

Where, upon a trial of an issue as to one defendant, he introduced the same evidence that was introduced on the hearing of the case as to another defendant, *held*, that it was sufficient that the certificate of the judge appeared as to the evidence introduced on the first issue, and it need not be certified again as evidence introduced on the second trial: *Ætna L. Ins. Co. v. Bishop*, 69–645.

The certificate of the judge, when it properly identifies the evidence, has the effect to make it part of the record. It is not essential that it contains an express declaration or order to that effect, but it must sufficiently identify the different items of evidence, and cannot in this respect be supplemented by the certificate of the clerk. And *held*, that a recital in the certificate that the cause was submitted upon packages of depositions filed upon a certain date did not sufficiently identify the evidence: *Runge v. Hahn*, 75–733.

The judge's certificate to the shorthand notes and the reporter's certificate to his translation of the notes is a sufficient identification of the evidence to enable the supreme court to try the case anew: *Adams County v. Graves*, 75–642.

Where the documentary evidence filed with the certificate by the clerk is identified in the shorthand notes to which the judge's certificate is attached in due form, the evidence is sufficiently identified: *Richardson v. Gray*, 85–149.

Certificate by the judge trying the case: Where the trial is had before the judge of another district holding court by exchange, the judge trying the case can give the certificate within the time provided by statute, although he has left the district where the trial was held: *Howe v. Jones*, 66–156.

A certificate of the evidence must be made by the trial judge and will not be sufficient if by his successor in office: *Teague v. Fortsch*, 66 N.W., 1056.

What certificate must show: To secure a trial *de novo* in the supreme court in an equitable action it is necessary that the certificate of the judge show that all the evidence *offered* upon the trial is before the court. The certificate that the evidence preserved is all the evidence which was *introduced* is not sufficient: *Taylor v. Kier*, 54–645; *Groneweg v. Barnum*, 70–763; *Polk v. Sturgeon*, 71–395.

So *held* as to a certificate showing that the record contained all the evidence *used* on the trial: *Hart v. Jackson*, 57–75.

So *held*, also, as to a certificate that the record contained all the evidence "adduced," it further appearing from the record itself that in several instances evidence was offered and excluded which was not made part of the record: *Tuttle v. Story County*, 56–316.

A certificate that the transcript contains all the evidence, together with the objections of the parties, etc., is not sufficient to enable the supreme court to try the case anew: *Lewis v. Markle*, 71–652.

A certificate that the evidence certified was all that was "offered, adduced and introduced," *held* sufficient: *Marshalltown v. Forney*, 61–578.

So *held*, also, as to a certificate that the evidence certified "is all the evidence offered in said trial, as well as the evidence introduced and admitted and used in the trial: *Wood v. Wood*, 61–256.

A certificate that the evidence certified was "all the evidence submitted in said cause," *held* sufficient: *Miller v. Wolf*, 63–233.

Certificate of referee: Where a judgment is rendered upon a referee's report it is not sufficient that the evidence is certified by the referee, but it must be certified by the judge: *Porter v. Everett*, 66–278.

The certificate of the evidence must be signed by the judge. A certificate given by a referee before whom the evidence is presented will not be sufficient: *Young v. Scoville*, 63 N. W., 607.

The certificate here required must be made by the judge even in a case tried before a referee. The certificate of the latter would refer only to the evidence offered before him and would not show the proceedings in the court acting on the report of the referee. The appeal is from the action of the court and not from that of the referee: *Young v. Scoville*, 68 N W., 670.

A certificate that all the evidence offered and introduced is made of record is not sufficient to enable the supreme court to try the case *de novo: Second Nat. Bank v. Ash*, 85–74.

A certificate that a transcript of the reporter's notes contains all the evidence introduced, but not showing that it contains all the evidence offered, is not sufficient to enable the court to try the case *de novo: Baldwin v. Ryder*, 85–251.

That the evidence offered as well as that introduced must be set out in the abstract to enable the supreme court to try the case *de novo*, see notes to § 4139.

Agreement of parties: If by the agreement of the parties the facts are reduced to a statement in writing, such statement takes the place of depositions or of oral testimony reduced to writing and becomes the evidence in the case, and upon such evidence the case may be tried *de novo* on appeal: *Williams v. Wells*, 62–740.

The certificate of the clerk that the transcript contains all the evidence on file does not sufficiently show that the evidence thus certified was all that was used in the court below: *Grant v. Grant*, 46–478; *Davenport v. Ells*, 22–296.

Where it appears that the evidence on the trial of an equitable action consists wholly of depositions and papers on file, the certificate of the clerk to such evidence is sufficient to authorize the supreme court to entertain the appeal. The rule requiring the certificate of the judge to be made during the term has no application to such certificate of the clerk: *Cross v. Burlington & S. W. R. Co.*, 58–62.

SEC. **3653. Abstracts in equity causes.** In equitable causes, where the evidence is taken in the form of depositions, the court may require to be submitted with the arguments an abstract of the pleadings and evidence, substantially as required by the rules of the supreme court for abstracts in

appeals in equitable causes, except that the same need not be printed. [Rules of Practice, § 5.]

SEC. **3654. Finding of facts.** In all trials of fact by the court, other than those contemplated in the second preceding section, the court shall, if either party requests it, give its decision in writing, stating separately the facts found and the legal conclusion founded thereon; and the whole decision shall be a part of the record, and the finding shall have the effect of a special verdict. [C. '73, § 2743; R., § 3088; C. '51, § 1793.]

The finding: The court is to find the facts, and not the evidence of the facts: *Myers v. Smith*, 15–181. And such facts should be stated with the same certainty and definiteness that would be required in a pleading: *Van Riper v. Baker*, 44–450.

Where the findings of fact are so indefinite that judgment cannot properly be rendered thereon the judgment will be set aside: *Kelly v. Burns*, 36–507.

The findings here provided for must be made prior to or at the time the judgment is rendered, unless upon consent of the parties to the contrary, and an extension of time for signing bill of exceptions beyond the term will not give authority to the judge to file findings of fact after judgment has been rendered, and such findings filed after the rendition of the judgment cannot be considered, although embodied in such bill of exceptions: *Hodges v. Goetzman*, 76–476.

Findings of fact in a particular case, *held* proper and not prejudical, although the facts to which they related were not directly presented by any issue in the case: *British Amer. Ins. Co. v. Neil*, 76–645.

Objection cannot be made on appeal to error of the court in failing to state separately findings of fact and conclusions of law, unless objection thereto has been made in the lower court, and opportunity given the court to correct the error: *Ash v. Scott*, 76 27.

The findings of fact by the court cannot be reviewed on appeal where the evidence on which it was based does not appear of record: *Englert v. Roman Cath., etc., Soc.*, 82–465.

As to review, on appeal, of the findings of the court, and presumption in favor thereof, see notes to § 4139.

Request: The court may upon its own motion make such a finding of facts: *Jennings v. Jennings*, 56–288.

If a finding is made by the court it may be presumed on appeal that it was done in pursuance of a request of one of the parties, in the absence of anything to the contrary in the record: *McCue v. Wapello County*, 56–698; *Corner v. Gaston*, 10 512.

A finding of facts cannot be required where there is no competent evidence before the court upon which such a finding could be made: *Golden v. Newbrand*, 52–59.

Where a party asked findings of fact and the court directed him to present the points on which he wished findings to be made, and he did so without objection, *held*, that he had no ground of complaint on appeal: *Olson v. Martin*, 38–346.

Also *held*, in such case, that the party could not complain because the findings were not in the form required by law or did not present conclusions of law: *Ibid.*

Where a decision in writing is not requested the final judgment is the only finding necessary to be made by the court: *Gallinger v. Vale*, 6–387.

The neglect of the court to find upon any particular fact involved upon which no finding is asked will not be error, even though the court does find specially upon some other facts in controversy: *Ruble v. Atkins*, 39–694.

Effect: The special finding of facts by the court, like the special verdict of the jury, when entered of record becomes part of the judgment entry, and takes the place of a bill of exceptions for all questions of law legitimately deducible from the same: *Corner v. Gaston*, 10–512.

Method of trial to the court, see § 3783 and notes.

Presumption in favor of, on appeal: The finding of facts by the lower court in a trial before it has the same presumption in its favor in the supreme court upon appeal as are entertained in favor of the verdict of a jury: *State v. Haskell*, 20–276; *Mallory v. Luscombe*, 31–269; *Hambell v. O'Neal*, 39–562; *Clark v. Reynolds*, 46–674; *Dove v. Independent School Dist.*, 41–689; *State v. Intoxicating Liquors*, 76–243; *Pace v. Heinley*, 85–733; *Clark v. Ross*, 65 N. W., 340; *First Nat. Bank v. Booth*, 71 N.W., 238.

In all actions or special proceedings not triable *de novo* on appeal, the finding of the lower court upon questions of fact stands as the verdict of a jury, and will not be disturbed on appeal unless clearly unsupported by the evidence: *Hamilton v. Iowa City Nat. Bank*, 40–307; *Sisters of Visitation v. Glass*, 45–154; *Knox v. Hanlon*, 48–252; *Smith v. Walker*, 49–289; *In re Will of Donnelly*, 68–126; *Goldsmith v. Wilson*, 68–685; *Brainard v. Van Kuran*, 22–261; *Remey v. Board of Equalization*, 80–470; *Kuhn v. Breen*, 70 N.W., 722.

The findings of fact by the court must be clearly and manifestly unsustained by the evidence to justify the appellate court in granting a new trial on this ground: *Berryhill v. Jones*, 35–335; *Fouts v. Pierce*, 64–71.

To authorize a reversal in such case there must be such want of testimony in support of the findings of the lower court as to raise the presumption that the finding is not the unprejudiced and honest exercise of the discretion of the court: *Vogel v. Wadsworth*, 48–28; *Root v. Gay*, 64–399; *Woodman v. Dutton*, 57–442; *Ross v. McQuiston*, 45–145; *Gibson v. Fisher*, 68–29; *British Am. Ins. Co. v. Neil*, 76–645.

Conflicting evidence: A finding of facts by the lower court will not be disturbed on account of insufficiency of the evidence to support it where the evidence is conflicting: *Harris v. Heackman*, 62–411; *In re Railsback's Heirs*, 54–459; *Hallam v. Haywood*, 21–398; *McIntosh v. Livingston*, 41–219; *Watkins v. Swiggett*, 41–684; *Perry v. Cottingham*, 63–41.

Unless it appears that a finding of facts

by the court below is so manifestly against the evidence as to demand a reversal, the supreme court will not interfere with such finding, although if trying the case for itself it might have reached a different conclusion: *Williams v. Brown*, 45-102; *Starker v. Luse*, 33-595.

It is only when the finding of facts by the lower court is clearly and manifestly in conflict with the evidence that the appellate court is warranted in interfering therewith: *Ruble v. Atkins*, 39-694; *Pearson v. Minturn*, 18-36; *Goldsmith v. Boersch*, 28-351.

The supreme court will not, in a law case, reverse the judgment of the court below based upon a finding of facts, if there is any evidence upon which such finding can be sustained: *Leighton v. Orr*, 44-679.

It is only where the finding evinces passion or prejudice, and cannot be supported under any reasonable view which may be taken of the evidence, that it should be set aside on appeal: *Van Steenburg v. Milford Water Power Improvement Co.*, 64-711.

The question before the court on appeal, where there has been a finding of facts in a law action, is not whether the finding is sustained by the evidence, but whether there was evidence tending to support such finding: *Altman v. Farrington*, 45-620.

When the evidence submitted to the court below leaves a question of fact in doubt the supreme court will not reverse the finding: *Weller v. Hawes*, 19-443.

When the finding of the court below is not sustained by the testimony a new trial will be awarded: *Keokuk County v. Alexander*, 21-377.

Where no finding of facts is made the supreme court can on appeal determine whether the testimony is sufficient to support a conclusion of fact which would in law authorize the judgment rendered: *Vogel v. Wadsworth*, 48-28.

Finding not conclusive if judgment thereon reversed: Where final judgment is rendered in favor of a defendant he cannot appeal from a finding of facts which is against him. But if defendant has properly objected to the correctness of such finding, it is not proper, in case of a reversal on plaintiff's appeal, to render judgment against defendant thereon without opportunity for a new trial: *Boyce v. Wabash R. Co.*, 63-70.

Conclusion of law: A finding by the lower court, which is merely a conclusion of law from the facts, there being no dispute or controversy as to the facts themselves, is reviewable on appeal, and is not conclusive in the same sense that a finding of fact is: *Northwestern Coal Co. v. Bowman*, 69-150; *Norwegian Plow Co. v. Clark*, 70 N.W. 808.

As to what is necessary to secure a review in the supreme court of a case tried by the court, see § 4107.

SEC. **3655. Trial term.** Except where otherwise provided, causes shall be tried at the first term after legal and timely service has been made. [C. '73, § 2744; R., § 3007; C. '51, § 1762.]

SEC. **3656. In equitable actions.** The appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages and other instruments of writing whereby a lien or charge on property is created, or to enforce mechanics' liens. [C. '73, § 2745; R., § 2856.]

Where the court, in an action triable by equitable proceedings, orders the evidence taken down in the form of depositions, the appearance term cannot be the trial term; but if no such order is made and the court directs the evidence to be taken down in writing at the trial, then the appearance term is the trial term in such equitable actions as are specified by this section, to-wit, divorce, foreclosure of mortgage or other lien, and enforcement of mechanic's lien: *Holbrook v Fahey*, 51-406.

If at the first term the court orders the testimony in an equitable action, such as that for foreclosure of a mortgage, to be taken by deposition, and either party elects to take his testimony in that form, the trial of the case must of necessity be continued to give an opportunity for the taking of depositions. The court exercises its discretion as to whether it will order the testimony taken in this form; and if it refuses to do so, and the party requesting such action does not elect to have his testimony taken in that manner, he cannot complain of the refusal to grant a continuance to the next term: *Lombard v. Thorp*, 70-220.

As to the provisions in relation to the trial term in actions of divorce, foreclosure, etc., see *Sherwood v. Sherwood*, 44-192; *Palmer v. Call*, 4 Dillon, 566.

The fact that the first term is not the trial term for a cause does not make it improper to render judgment at that term by default in the absence of any motion or claim by defendant for a continuance: *Duncan v. Hobart*, 8-337; *Holt v. Smith*, 9-373.

SEC. **3657. Separate trials.** The court may, in its discretion, allow separate trials between the plaintiff and any defendant, or of any cause of action united with others, or of any issue in an action; and such separate trials may be had at the same or different terms of the court, as circumstances may require. [C. '73, § 2746; R., §§ 3024–5; C. '51, § 1768.]

The granting of separate trials is discretionary with the court: *Kilbourne v. Jennings*, 40-473.

And where a husband and wife brought joint action for slander, *held* that it was not error to allow the plaintiffs to sever their causes of action: *Blades v. Walker*, 36-266.

Where a plaintiff seeking to recover a sum of money based his right in the first count of his petition upon the ground of his

minority at the time of making the contract, and in the second count upon the ground of fraudulent representations, *held*, that it was not error in the court to refuse to grant separate trials upon the two counts: *Childs v. Dobbins*, 61-109.

Where a motion for separate trials is overruled by the court below in the exercise of its discretion, the supreme court should require a very strong showing before holding such discretion to have been improperly exercised: *Forshee v. Abrams*, 2-571.

Where separate trials are granted, a trial as to one defendant is not an adjudication as to the other: *Eikenberry v. Edwards*, 71-82.

SEC. **3658. Trial notice.** In any case once continued, where an answer is on file, either party desiring to bring such cause on for trial at any term shall, at least ten days before such term, file with the clerk a notice of trial, and no such cause shall stand for trial unless a trial notice be so filed, except by consent of parties. But after the commencement of the term, the court may in its discretion, by order entered of record, permit notices of trial to be entered in the same manner, ten days prior to such date as the court may name in such order. Such order may be general, and not entered of record in each particular case. The clerk, in preparing the court calendars, shall note thereon, opposite the title of each cause noticed for trial, the words, "For trial," which words shall also appear on the printed calendar. This rule shall not apply to appearance or criminal cases, nor to proceedings in probate. [Rules of Practice, § 2.]

A rule of court as to trial notice construed, and *held*, that no trial notice was required as to the appearance term or as to the term at which the issues are first settled: *Erickson v. Barber*, 83-367.

It is not an abuse of discretion on the part of the trial court to set a cause for trial to the court before the issues are made up, the parties not insisting upon a jury trial: *Foster v. Hinson*, 76-714.

SEC. **3659. Assignments of trial causes—hearing of motions and demurrers.** On the first day of the term, or as soon thereafter as practicable, the court may make an assignment of the trial causes, which assignment shall fix the day of the term on which each cause will be tried, and parties will be required to conform to this order of trial. Further assignments may be made by the court as often as necessary. The court may also designate particular times for the hearing of motions and demurrers. [Same, § 3.]

The court may, after an assignment of causes has been made, make a reapportionment, and if the party is not taken by surprise, or thus prevented from obtaining his testimony, he will have no ground of objection: *Elliott v. Cadwallader*, 14-67.

SEC. **3660. Docketing appeals from justices—other appeals.** In appeals from justices' courts or other inferior tribunals in civil causes, the appellant shall cause the case to be docketed by noon of the second day of the term to which the same is returnable, and, in case of his failure to do so, the appellee may procure the case to be docketed, and thereupon will be entitled to have the judgment below affirmed, or to have the case set down for trial upon its merits, as he may elect, and the provisions of this code as to appeals from justices' courts shall be applicable, so far as may be, to other appeals contemplated in this section. [Same, § 4.]

SEC. **3661. Calendar.** The clerk shall keep a calendar distinguishing, first, criminal causes, and next, civil causes, and arranging each in the order of their commencement, and, if the court so order, shall, under the direction of the court or judge, apportion the same to as many days as is believed necessary, and, at the request of any party to a cause, or his attorney, shall issue subpœnas accordingly. The clerk shall furnish the court and the bar with a sufficient number of printed copies of the calendar. [C. '73, § 2747; R., § 3005; C.'51, §§ 1761-2.]

A bar docket printed in pursuance of the provisions of this section is no part of the official records of the court: *Gifford v. Cole* 57-272.

SEC. **3662. Continuances—application for.** When time is asked for making application for continuance, the cause shall not lose its place on the calendar, or it may be continued at the option of the other party, and at the cost of the party applying therefor, for which cost judgment may at

once be entered by the clerk, unless the contrary be agreed between the parties or ordered by the court. [C.'73, § 2748; R., § 3008; C.'51, § 1764.]

SEC. **3663. Causes for.** A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor; subject to this rule, it may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly obtained. [C.'73, § 2749; R., § 3009; C.'51, § 1765.]

In criminal cases: The provisions of these sections are applicable in criminal cases: See § 5370.

Party not at fault: A continuance should not be granted for a cause growing out of the fault of a party: *Connor v. Griffin*, 27–248.

A continuance on the ground of the absence of a witness should not be granted to defendant in default, who offers no defense, nor when the residence of the witness is not given, and diligence in ascertaining it is not shown: *James v. Arbuckle*, 8–272.

Diligence required: Application for continuance, based upon absence of papers which have been taken from the court by the attorney of the party asking the continuance, may properly be refused: *Wright v. Clark*, 2 G. Gr., 86.

The party seeking a continuance on the ground of the absence of a witness must show that he has availed himself of the means given by the statute to procure the attendance of such witness, or to obtain his deposition: *State v. Cross*, 12–66.

It is not error to refuse a continuance asked to enable a party to take additional evidence where it appears that ample time has been given for that purpose: *Hardin v. Iowa R. & Const. Co.*, 78–726.

The absence of a witness cannot be made the ground for a continuance where the party has not subpœnaed such witness or made an attempt to do so: *Foster v. Hinson*, 76–714.

A continuance on account of the absence of a witness is properly denied where it does not appear that due diligence has been used to secure his attendance: *George v. Swafford*, 75–491.

Where defendant had had ample time in which to prepare for trial and did not file an amended answer pleading settlement until the day the cause was reached for trial, and showed no diligence in procuring the witnesses to prove such settlement, *held*, that the negligence of her attorney, who was also to be her witness to prove such settlement, in failing to appear at the trial, did not entitle defendant to a continuance: *Zabel v. Nyenhuis*, 83–766.

In a particular case, *held*, that there had not been such diligence in securing the attendance of witnesses and in attempting to take depositions as to entitle the party to continuance: *State v. Farrington*, 90–673.

The fact that a witness examined before the grand jury, and whose name is indorsed upon the indictment, is subpœnaed by the prosecution but does not appear, cannot be made the basis of a motion by defendant for continuance, after the jury is sworn, upon the ground that he is a material witness for defendant. If his attendance on behalf of defendant is desired he should be subpœnaed by defendant and steps taken to ascertain whether he will be present: *State v. Hayden*, 45–11.

Where defendant was a resident of California, and his attorney had been for more than two months in communication with him, but it did not appear that he had taken any steps to secure the testimony of his client, *held*, that there was not sufficient showing of diligence to entitle defendant to a continuance for the purpose of having his testimony taken: *Argall v. Pugh*, 56–308.

Absence of a witness, *held* not sufficient ground for a continuance where the deposition of the witness could have been taken: *Bell v. Chicago, B. & Q. R. Co.*, 64–321.

A party must show, not only that he made proper efforts to obtain the desired evidence after he knew that it might be obtained, but also that he used due diligence in discovering it: *State v. Bell*, 49–440.

An affidavit in a particular case *held* insufficient, in that it did not show that the witness' absence was unknown until so near the term that his deposition could not be taken: *Widner v. Hunt*, 4–355.

A party is held to greater diligence in procuring the deposition of a nonresident than that of a resident witness: *Peck v. Parchen*, 52–46.

Where a commission issued in December to take the deposition of a witness, and was not returned before trial in the following June, *held*, that sufficient diligence was not shown: *Cole v. Strafford*, 12–345.

It is not required of a party, in the exercise of proper diligence, that he have witnesses in attendance from a distance to meet a claim not yet made in the pleadings, although he may have noticed that such claim will be made: *Sapp v. Aiken*, 68–699.

The supreme court would be slow to disturb an order of continuance made upon application of the prosecution after the failure of the jury to agree in a criminal prosecution submitted to them, where the ground for asking such continuance is that witnesses for the prosecution have been allowed to depart from the court before the conclusion of the trial and cannot be secured before the next term: *State v. Miller*, 65–60.

A party is not entitled to a continuance for the purpose of taking testimony where the action has been so long pending and the necessity of the testimony has been apparent for such length of time that it is negligence on his part not to have procured his testimony sooner: *Greither v. Alexander*, 15–470.

A party cannot have a continuance on account of the absence of a witness where it does not appear that proper steps were taken to secure his attendance or that the party had any reason to believe that the witness would remain within the reach of a subpœna during the term: *Fiske v. Berryhill*, 10–203.

As to whether sufficient diligence was used under particular circumstances, see *Fiske v. Berryhill*, 10-203; *State v. Scott*, 44-93; *State v. Spurbeck*, 44-667; *State v. Dakin*, 52-395; *Brandt v. McDowell*, 52-230; *Kimball v. Bryan*, 56-632; *State v. Stone*, 65-366.

Discretion: The application for a continuance is addressed peculiarly to the sound legal discretion of the judge, and his ruling thereon will not be interfered with on appeal, unless the supreme court is clearly satisfied that this discretion has been abused and injustice thereby done: *Widner v. Hunt*, 4-355; *Childs v. Heaton*, 11-271; *State v. Rorabacher*, 19-154; *Boone v. Mitchell*, 33-45; *Finch v. Billings*, 22-228; *Harrison v. Charlton*, 37-134; *Peck v. Parchen*, 52-46: *State v. Wells*, 61-629; *State v. Reid*, 20-413.

The discretion which is conferred upon the court is, however, not arbitrary, but is to be governed and controlled by legal rules: *Purington v. Frank*, 2-565.

Where a party clearly brings himself within the law in an application for continuance, and no special circumstances are shown defeating his right, it is the duty of the court to grant the motion, and a refusal to do so will constitute reversible error: *Welsh v. Savery*, 4-241; *State v. Barrett*, 8-536.

While much is left to the discretion of the court in passing upon such an application, its ruling should not be arbitrary nor in violation of the rights of either party: *State v. Painter*, 40-298.

The judge, being acquainted with all the facts in connection with the case, can determine whether the party has, with due diligence and good faith, made efforts to prepare for the trial: *State v. Stegner*, 72-13.

Grounds; absence of evidence: In a criminal case the state as well as defendant is entitled to reasonable opportunity to procure its witnesses and be prepared for trial, and where a proper application for a continuance is made by the state with sufficient showing of diligence it should be granted: *State v. Painter*, 40-298.

In a particular case, *held*, that a continuance should have been granted on application of defendants to allow them to procure testimony as to their general character: *State v. Nash*, 7-347, 373.

Where, in a prosecution for murder, defendant asked a continuance on account of the absence of a witness by whom he expected to prove that he (witness) did the killing, *held*, that the improbability that the witness would thus subject himself to a criminal prosecution was not sufficient ground for refusing a continuance: *State v. Farr*, 33-553.

A continuance could not be granted on account of the absence of a witness whose testimony would relate only to a portion of the claim which is dismissed: *Herd v. Herd*, 71-497.

A party is not entitled to a continuance or postponement for the purpose of taking further evidence as a matter of right, but if he has additional evidence which he wishes to introduce, it should be so shown by affidavit: *Barnes v. Hekla F. Ins. Co.*, 75-11.

Absence of counsel: A continuance may be granted in a particular case on account of absence of counsel, but if such application is refused, the supreme court would require very strong circumstances, manifesting a clear abuse of discretion, before it would interfere: *Brady v. Malone*, 4-146.

While the absence of a party's attorney on account of sickness might be a ground for continuing a cause to a later day in the same term, under the circumstances of a particular case, *held*, that it was not sufficient to require a continuance over the term: *State v. Ostrander*, 18-435, 448.

Sickness of the defendant's counsel in a criminal case will not, *per se*, be sufficient ground for continuance if, in the exercise of reasonable diligence, defendant could have been ready for trial. Under the circumstances of a particular case, *held*, that it was not error to refuse a continuance on that ground: *State v. Rainsbarger*, 74-196.

Held not error to refuse to grant a continuance to defendant on account of sickness of his attorney in view of the fact that the indictment had been pending for fifteen months, and a continuance on the same ground had been granted at a previous term: *State v. Stegner*, 72-13.

Where it was shown that the attorney for one of the parties at the time of the motion for continuance was very sick and unable to do business, and the nature of the case was such that no other attorney could prepare for its trial at that time, *held*, that it was error to refuse a continuance, although it appeared that afterwards, and prior to the time of the trial, such attorney had so far recovered as to be at the court house, though not in a condition to try the case: *Rice v. Melendy*, 36-166.

Negligence of the party in regard to securing counsel will defeat his application for continuance based on the ground of want of such counsel: *Maloney v. Traverse*, 87-306.

Absence of the party: To warrant the granting of a continuance on account of the absence of the party himself, the court should require much stricter showing of diligence or cause for such absence than in case of a witness not a party: *Gates v. Hamilton*, 12-50.

Where an affidavit for continuance showed the absence of a party to the suit, but did not show that his presence was necessary except as a witness, and did not state what was expected to be proved by his testimony nor the particular facts to which he would testify, *held*, that a continuance was properly refused: *Jackson v. Boyles*, 64-428.

The showing in a particular case *held* not sufficient to entitle defendant to a continuance on account of his own absence: *Brandt v. McDowell*, 52-230.

The appointment of a guardian ad litem may be a proper ground for continuance to enable him to prepare the case for trial: *Blythe v. Blythe*, 25-266.

The substitution of an administrator as a party is not a ground for continuance: *Masterson v. Brown*, 51-442.

Amendment of pleadings as a ground for continuance, see notes to § 3600.

Prejudice must appear: Under equity practice, *held*, that where defendant had

called for a replication under oath, and the same was duly given, he was not entitled to a continuance in order to procure attendance of plaintiff as a witness to testify concerning the same matter already embraced in his sworn replication: *Stevens v. Campbell*, 6-538.

Where a criminal case was continued to a special term in the absence of the prisoner on account of the previous connection of the judge with the case, *held*, that no prejudice resulted to the accused in view of the fact that the continuance would have resulted from operation of law in any event: *State v. Linhart*, 23-314.

A party complaining of the refusal of the court to grant a continuance upon an amendment being filed by the opposite party must show that he suffered prejudice, such as that he had not information of all the evidence required to make his defense, or that his witnesses were not all present, or the like: *York v. Clemens*, 41-95.

Where a defendant asked for a two days' continuance for the purpose of procuring testimony, which was overruled, and the cause was proceeded with, but defendant was not called upon to introduce evidence until the third day after, *held*, that he was not prejudiced by refusal to grant his application: *Winklemans v. Des Moines Northwestern R. Co.*, 62-11.

Where a case has been continued upon the application of a party at previous terms, reasonable prejudice should be shown before another continuance is granted: *Rosecranes v. Iowa & M. Telephone Co.*, 65-444.

Facts in a particular case *held* not to show sufficient prejudice to entitle a party to continuance on account of the absence of testimony: *Owens v. Hart*, 66-565.

SEC. **3664. Affidavits—what must show.** Motions for continuance on account of the absence of evidence must be founded on the affidavit of the party, his agent or attorney, and must state:

1. The name and residence of such witness, or, if not known, that the affiant has used reasonable diligence to ascertain them, and in either case facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term;

2. Efforts constituting due diligence which have been used to obtain such witness, or his testimony;

3. What particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proven. [C.'73, § 2750; R., §§ 3010-11; C.'51, § 1766.]

Affidavits: It is not competent for the attorney to swear to an affidavit as to facts for a continuance which are solely within the knowledge of his client: *Widner v. Hunt*, 4-355.

The statements made in an affidavit by a party in support of a motion for continuance may be read to the jury by the opposite party without the affidavit having been introduced in evidence. The affidavit is a part of the record in the case: *Cross v. Garrett*, 35-480; *Asbach v. Chicago, B. & Q. R. Co.*, 86-101.

Counter-affidavits: See notes to § 3668.

Ability to procure witness at next term: The provision that the affidavit shall show reasonable ground of belief as to the attendance of witnesses at the next term, etc., contemplates more than a mere statement of a belief that the testimony can be procured: *State v. Rorabacher*, 19-154.

The application must state facts and show reasonable grounds for believing that the attendance or testimony of witnesses will be procured at the next term of court: *State v. Farrington*, 90-673.

Showing of diligence: It is not sufficient to state that due diligence has been used; the facts constituting such diligence must be shown: *Thurston v. Cavenor*, 8-155.

The facts constituting due diligence must be shown, and from such facts the court will determine whether the necessary diligence has been exercised: *Brady v. Malone*, 4-146.

Affidavits for the purpose of showing due diligence should be strictly construed and most strongly against the applicant for the continuance: *Ibid.*

The showing in particular cases for a continuance on account of the absence of material witnesses *held* sufficient: *State v. Dakin*, 52-395; *State v. Nash*, 7-347, 373.

In particular cases *held* that the showing of diligence was not sufficient to require the court to grant the continuance: *Thurston v. Cavenor*, 8-155; *Walker v. Scofield*, 39-666; *Adams v. Peck*, 4-551; *Brotherton v. Brotherton*, 41-112; *State v. Spurbeck*, 44-667; *Randall v. Fockler*, 52-618; *Finch v. Billings*, 22-228.

Statement as to what absent witness will prove: Where the application for continuance is made on account of the absence of witnesses the affidavit ought to give the names of the witnesses, their residence and the particular facts which the party expects to prove, or give some excuse for not doing so, not only in order that it may appear that substantial justice requires the continuance, but because the opposite party has a right to know the facts expected to be proved in order that he may admit them and thus prevent a continuance if he so desires, as provided in the next section: *State ex rel. v. Tilghman*, 6-496; *Olds v. Glaze*, 7-86.

The affidavit as to what affiant believes witness will prove must state facts, as distinguished from legal conclusions: *State v. Felter*, 25-67.

A statement that the party expects to

prove by the witness "all the material allegations contained in his answer" is not sufficient: *Olds v. Glaze*, 7–86.

The affidavit must show that the witness would, if present, testify to facts material and relevant to the issue: *State v. Bennett*, 52–724; *State v. Williams*, 8–533; *State v. Falconer*, 70–416.

Where the ground for continuance was the absence of defendants to the suit, who it was claimed were the only witnesses by whom the defense could be proven, *held*, that the application was not sufficient without setting out the facts to which such witnesses would testify: *Jackson v. Boyles*, 64–428.

Where the showing as to what it was expected to prove by a witness whose absence was made the basis of an application for continuance did not indicate that the matters to which he would testify would show a legal defense, *held*, that the continuance was properly refused: *State v. Clark*, 69–196.

After the closing of the evidence the court may properly refuse to grant a continuance for procuring witnesses without a showing being made as to the purpose for which they are wanted: *State v. Osborne*, 65 N. W., 159.

No other witnesses: The affidavit must show that there are no other witnesses by whom the facts stated can be fully proved: *Thompson v. Abbott*, 11–193.

But where a party stated in his affidavit that he knew of no person by whom the same facts could be "as fully proved as by said" witness, *held*, that the affidavit was sufficient: *Welsh v. Savery*, 4–241.

A continuance should not be granted upon an affidavit that the party knows of no witness in the state by whom he can prove the desired fact, where he fails to state that there is a person anywhere by whom such fact can be proven: *Thompson v. Lord*, 14–591.

SEC. **3665. Admission by opposite party.** If the application is insufficient, it shall be overruled; if sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated. [C.'73, § 2751; R., §§ 3012–13; C.'51, § 1767.]

Where the opposite party admits that the witness, if present, would testify to the facts stated, the affidavit may be read to the jury as the basis of such admission: *Strong v. Hart*, 7–484.

But it can be read only in so far as it states facts which the witness, if present, would be allowed to testify to: *State v. Sater*, 8–420.

The admission does not preclude legal objections which might be made to the testimony if the witness were present: *State v. Geddis*, 42–264.

The statements of the affidavit, if admitted and read, are to be taken as the testimony of the witness in court, and cannot be impeached by proof of different statements made out of court, unless a proper foundation therefor has been laid, even though such outside statements were under oath: *State v. Shannehan*, 22–435.

The statements in a motion for continuance which are admitted by the opposite party for the purpose of preventing the continuance being granted are not admissible on a subsequent trial of the case even though it be then impossible to secure the evidence of the witnesses. The reasons which call for their admission on the trial when a continuance has been asked do not operate as to such subsequent trial: *Hudson v. Applegate*, 87–605; *State v. Felter*, 32–49.

As to whether the provisions denying a continuance on the ground of absence of witnesses in case of admission as to what the witness is expected to prove is in violation of defendant's constitutional right to compulsory process for the attendance of his witnesses, *quære: Trulock v. State*, 1–515.

Although where the facts stated by the affidavit as those which it is expected to show by an absent witness are not material a change should not be granted, yet the ruling of the court in granting a change will not, in case the opposite party elects to allow the affidavit to be read in evidence, preclude the court from changing its former ruling and refusing to allow the affidavit to be read in evidence on the ground that the facts to be proven by the absent witness are immaterial: *Whitney v. Brownewell*, 71–251.

Even though the oral testimony of the witness would be of greater advantage to a party seeking a continuance on account of the absence of such witness than the admission of the statement as to what such witness would testify to, nevertheless the continuance may properly be denied where such admission is made: *Reed v. Lane*, 65 N. W., 380.

SEC. **3666. Filing motion.** The motion must be filed on the second day of the term, if it is then certain that it will have to be made before the trial, and as soon thereafter as it becomes certain that it will need to be made, and shall not be allowed to be made when the cause is called for trial, except for matters which could not by reasonable diligence have been before that time discovered. If made after the second day of the term, the affidavit must state facts constituting an excuse for the delay in making it. If time is taken when the case is called to make such motion, it shall be made and determined as soon as the court opens after the next ordinary adjournment. [C.'73, § 2752; R., § 3014.]

The motion should be filed as soon after the second day of the term as it becomes certain that it will have to be filed: *Bays v. Herring*, 51-286.

If the affidavit is not made on the second day, a sufficient excuse therefor should be therein stated: *Randall v. Fockler*, 52-618.

If filed after the second day, and no reason for the delay is shown, the motion should be overruled: *Lucas v. Cassady*, 12-567; *Chicago & S. W. R. Co. v. Heard*, 44-358; *Bell v. Chicago, B. & Q. R. Co.*, 64-321; *State v. Benge*, 61-658.

Under the facts in a particular case, *held*, that it did not sufficiently appear that the application was made as soon as it became certain that it would need to be made as required by statute: *Bays v. Herring*, 51-286.

Where the application was made on the day the cause was regularly reached for trial, *held*, that in the absence of any showing to the contrary, it would be presumed that it was overruled for the reason that it was not made within the time required: *Woolheather v. Risley*, 38-486.

SEC. **3667. Amendment.** The application may be amended but once, unless by permission to supply a clerical error. [C. '73, § 2753; R., § 3015.]

Before the enactment of this provision, *held*, that the practice of suffering affidavits for continuance to be amended, or new ones to be filed, was one which might be productive of much evil, and which should be permitted with great caution, if at all: *Widner v. Hunt*, 4-355.

SEC. **3668. Written objections.** To such motion, in its original form or as amended, the adverse party may at once, or within such reasonable time as the court shall allow, file written objections, stating wherein he claims that the same is insufficient, and on such motion and objections no argument shall be heard unless the court desires it. [C. '73, § 2754; R., § 3016.]

In case of a motion for continuance on account of the absence of evidence, counter-affidavits are not receivable: *State v. Bowers*, 17-46; *State v. Dakin*, 52-395; *State v. Wells*, 61-629.

But where the motion was overruled because insufficient in itself, *held*, that the action of the court could not be reversed on appeal although counter-affidavits had been received and considered: *Williams v. Niagara F. Ins. Co.*, 50-561.

Where a continuance is asked on account of excitement and prejudice against defendant in a criminal case, the application may be resisted by counter-affidavits as to the matters relied upon: *State v. Wells*, 61-629.

The statement of facts which are expected to be proven by an absent witness cannot be contradicted by counter-affidavits, but as to facts showing diligence and the like counter-affidavits are receivable: *State v. Rainsbarger*, 74-196.

Counter-affidavits are not to be received to contradict the statements of the application for continuance as to what the absent witnesses would swear to but may be received for other purposes as for instance to show want of diligence in procuring the desired testimony: *State v. Belvel*, 89-405.

Where the defendant in a criminal case files an application for a continuance, the state may file counter-affidavits contradicting other averments than those relating to the testimony of witnesses: *State v. Murdy*, 81-603.

The showing in a particular case *held* not sufficient: *Ibid.*

SEC. **3669. Part of record.** Such motion and objections shall be a part of the record, and error in refusing a continuance or in compelling an election may be reviewed upon appeal. [C. '73, § 2755; R., § 3017.]

As to review, on appeal, of a ruling on a motion for continuance, see § 4101 and notes.

SEC. **3670. Entered on appearance docket.** No copy of a motion for continuance or of objections thereto need be served, but a minute of the filing thereof shall be entered on the appearance docket. [C. '73, § 2756; R., § 3018.]

SEC. **3671. Costs.** Every continuance granted shall be at the cost of the party applying therefor, unless otherwise ordered by the court. [C. '73, § 2757; R., § 3019.]

Where a continuance was granted to defendant for the reason that plaintiff had asked and obtained leave to introduce evidence material to the case, after both parties had rested and after defendant's witnesses had left the court, *held*, that the cost of the trial being rendered useless by the continuance, and the continuance being rendered necessary by the plaintiff's witness being absent, the costs were properly taxed to plaintiff: *Voorhees v. Chicago, R. I. & P. R. Co.*, 71-735.

After a party has accepted an unnecessary order for a continuance, accompanied by an order for the payment of costs, he should not be heard to complain of the latter order: *Robinson v. Chicago, R. I. & P. R. Co.*, 73-506.

The action of the trial court in overruling a motion to tax costs to the party asking a continuance will not be reversed where it does not appear that any costs were, in fact, incurred at the term for which such taxation was granted: *Gerke v. Lucas*, 92-79.

SEC. 3672. By agreement. The court shall grant continuances whenever the parties agree thereto, and provide as to costs as may be stipulated. [C.'73, § 2758; R., § 3020.]

SEC. 3673. Case remains on docket. A case continued remains for all purposes except a trial on the facts. [C.'73, § 2759; R., § 3022.]

SEC. 3674. One of several defendants. When the defenses are distinct, any one of several defendants may continue as to himself. [C.'73, § 2760; R., § 3023.]

Where the action was against two defendants as a firm and not against them as individuals, *held*, that a continuance against one would operate as a continuance against both: *Butler v. McCall*, 15–430.

SEC. 3675. Report of trial—certificate. In all appealable actions triable by ordinary or equitable proceedings, any party thereto shall be entitled to have reported the whole proceedings upon the trial or hearing, and the court or judge shall direct the reporter to make such report in writing or shorthand, which shall contain the date of the commencement of the trial, the proceedings impaneling the jury, and any objections thereto with the rulings thereon, the oral testimony at length, and all offers thereof, all objections thereto, the rulings thereon, the identification as exhibits, by letter or number or other appropriate mark, of all written or other evidence offered, and by sufficient reference thereto, made in the report, to make certain the object or thing offered, all objections to such evidence and the rulings thereon, all motions or other pleas orally made and the rulings thereon, the fact that the testimony was closed, the portions of arguments objected to, when so ordered by the court, all objections thereto with the rulings thereon, all oral comments or statements of the court during the progress of the trial, and any exceptions taken thereto, the fact that the jury is instructed, all objections and exceptions to instructions given by the court on its own motion, the fact that the case is given to the jury, the return of the verdict and action thereon of whatever kind, and any other proceedings before the court, judge or jury which might be preserved and made of record by bill of exceptions, and shall note that exception was saved by the party adversely affected to every ruling made by the court or judge. Such report shall be certified by the trial judge and reporter, when demanded by either party, to the effect that it contains a full, true and complete report of all proceedings had that are required to be kept, and, when so certified, the same shall be filed by the clerk and, with all matters set out or identified therein, shall be a part of the record in such action, and constitute a complete bill of exceptions. But on a trial before a jury it shall not be necessary to take down arguments of counsel or statements of the court, except his rulings, when not made in the presence of the jury. [18 G. A., ch. 195, § 2; C.'73, § 3777.]

Under former provisions, *held*, that the direction to have the testimony reported by the official reporter was discretionary with the court: *State v. Frost*, 64 N. W., 601.

The reporter's transcript of the evidence on a former trial is not admissible in a law action without a showing of reason for not producing the witness himself. The transcript cannot be received except under circumstances which would make the deposition of the witness admissible upon statutory grounds: *Baldwin v. St. Louis, K. & N. R. Co.*, 68–37.

A transcript of the evidence on a former trial cannot be read without any showing of the absence of witnesses, or of inability to produce the original documents, and without notice to the other party: *Case v. Blood*, 71–632.

Where it appeared that a witness whose testimony had been taken on a former trial was out of the state and absent without the fault of the party desiring to call such witness or his counsel, *held*, that the report of his testimony on a former trial was admissible; also *held*, that the rule with reference to notice for taking depositions had no application to the introduction of the transcript in evidence, but if any notice of its proposed introduction was necessary the five days' notice given in this case was sufficient: *Fleming v. Shenandoah*, 71–456.

The shorthand report of the evidence of a witness on a former trial is not admissible unless there is a sufficient showing of the inability of the witness to be present: *Seeds v. Grand Lodge*, 93–175.

A transcript of the shorthand report of the evidence may be used on a subsequent trial of the case to impeach the testimony of witnesses whose evidence on the former trial is contained therein: *Hibbard v. Zenor*, 82–505.

The transcript of the evidence of a witness taken by the shorthand reporter on a former trial may be introduced in evidence where the deposition of such witness would be admissible; for instance, where the witness lives in a county of the state other than that wherein the trial is held: *Bank of Monroe v. Gifford*, 79-300.

The stenographer who took down the testimony of the witness on the former trial may testify from his notes as to what such testimony was, although he has no independent recollection of the facts. It is immaterial that the shorthand notes are not intelligible to persons generally: *State v. Smith*, 68 N. W., 428; *O'Brien v. Sanbach*, 69 N. W., 1133.

The transcript of the reporter's notes is not the only evidence which is admissible as to the testimony on a former trial. One who heard and remembers the former testimony may testify as to what it was: *State v. Mushrush*, 66 N. W., 746.

A shorthand reporter is an officer of the court and the filing of his notes and the translation thereof are official acts, and where the notes and translation are duly certified by him and filed they are presumed to be correct. Therefore *held*, that a decree reciting that all the evidence was taken down in shorthand by the reporter and ordered filed and made a part of the record was a sufficient certificate to comply with the provisions of § 3652: *Burnett v. Loughridge*, 87-324.

Where the judge in his certificate of evidence recognizes the person taking the same as the official stenographer, his subsequent certificate that such stenographer had not been duly appointed will not affect the validity of the record of the evidence. Under such circumstances it would appear that the reporter was the *de facto* officer of the court, and that would be sufficient: *Etter v. O'Neil*, 83-655.

If the shorthand notes are properly certified by the reporter and judge and filed within the proper time they become a part of the record without any special direction to that effect by the judge in his certificate, but if neither the notes nor the transcript thereof is thus certified within the time for filing the bill of exceptions they cannot be considered: *Bunyan v. Loftus*, 90-122.

If the shorthand reporter's notes are properly filed and made a part of the bill of exceptions the transcript thereof may be filed at a later time, provided it is so filed in such time that the case may be properly presented to the supreme court: *Hammond v. Wolf*, 78-227. And see notes to § 3752.

It may be proper for the trial court to permit the reading to the jury by counsel in argument of portions of the testimony of witnesses as taken down by the reporter and transcribed; but in such case the other party may be permitted to have the balance of the testimony of any witness touching the same matter read. But as a rule little good can come from reading any of the transcript of the evidence and it would not be error to refuse to permit it to be done when it would likely result in allowing witness to have all of his evidence thus read to the jury, if such reading would necessarily delay the trial, unless the court was satisfied that it was necessary to a fair presentation of the case: *McConkie v. Babcock*, 70 N.W., 103.

An attorney has no right to make changes in the stenographer's notes even for the purpose of correcting what he claims to be errors therein; such correction must be made only on application to the court: *Long v. Valleau*, 87-675.

SEC. **3676. Selection of jury.** When an action is to be tried by a jury, the clerk shall select twelve jurors by lot from the regular panel, if there are enough therein; if not, the deficiency shall be supplied as provided in the chapter on jurors. [C. '73, § 2761; R., § 3026; C. '51, § 1773.]

Where the jury consisted of but eleven jurors, it appearing that the parties had no knowledge of that fact until after verdict, *held*, that the defect was fatal and could not be considered as waived: *Cowles v. Buckman*, 6-161.

As to trial by jury, see § 3650 and Const., art. I, § 9.

SEC. **3677. Challenges.** A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror. [C. '73, § 2762; R., § 3027; C. '51, § 2972.]

SEC. **3678. Joint challenges.** Where there are several parties, plaintiffs or defendants, and no separate trial is allowed, they shall not sever their challenges, but must join in them. [C. '73, § 2763; R., § 3028.]

The ruling of the court as to a challenge by one of two joint defendants may properly be based upon the condition of the case as it then appears and its correctness will not be affected by the fact that subsequently it is made to appear that the other party had ceased to be a defendant in the case: *Cleveland v. Atkinson*, 63 N. W., 465.

SEC. **3679. To the panel.** A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury. [C. '73, § 2764; R., § 3029; C. '51, § 2974.]

A challenge to the panel should be sustained where the requisite number of trial jurors has not been summoned: *Baker v. Steamboat Milwaukee*, 14-214.

SEC. **3680. When and how made.** A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge. [C. '73, § 2765; R., § 3030; C. '51, § 2975.]

SEC. **3681. How tried.** A challenge to the panel may be taken by either party, and upon the trial thereof the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge. [C. '73, § 2766; R., § 3031; C. '51, § 2976.]

SEC. **3682. Allowance.** If the challenge is sustained by the court, the jury must be discharged, and its members will be disqualified from sitting in the trial in question; if it is overruled, the court shall direct the jury to be impaneled. [C. '73, § 2767; R., § 6032; C. '51, § 2977.]

The fact that vacancies in the panel from which the jury is drawn have been filled with talesmen in an illegal manner is not a ground for challenge to the panel. The objection should be raised by challenge to such talesmen when called: *Buford v. McGetchie*, 60-298.

SEC. **3683. To jurors.** A challenge to an individual juror is either peremptory or for cause. [C. '73, § 2768; R., § 3033; C. '51, § 2978.]

SEC. **3684. When made—determination.** It must be taken when the juror appears and before the jury is sworn. Upon the trial of a challenge, the juror challenged shall be sworn, if demanded by either party, and examined as a witness, and must answer every question pertinent to the inquiry thereof. [C. '73, §§ 2769, 4407; R., §§ 3034, 4773; C. '51, §§ 2979, 2988.]

This section refers exclusively to challenges for cause; but a party has the right to ask questions of a juror with reference to any peculiarity of conduct, association, character or opinion, or any predeliction of such juror, or other circumstances which in the opinion of the examiner might influence the person as a juror and affect his verdict, in order to determine whether to exercise as to him the right of peremptory challenge: *State v. Foster*, 91-164; *State v. Dooley*, 89-584.

It is not proper to ask a juror whether the fact that a man has been indicted would raise in his mind any presumption of guilt: *State v. Cleary*, 66 N.W., 724.

SEC. **3685. Peremptory.** A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him. [C. '73, §§ 2770, 4412; R., §§ 3035, 4778; C. '51, § 2980.]

Parties should be permitted within reasonable limits to examine persons called to act as jurors to the end that peremptory challenges may be used intelligently and questions may be asked as to matters which would not be a ground for challenge for cause: *State v. Dooley*, 89-584.

Where in a prosecution for murder in the first degree, the court refused to allow a juror to be questioned by the prosecution as to whether he had any preconceived opinion or notion against capital punishment but allowed such question to be asked in connection with the right of peremptory challenge, *held*, that the action of the court was proper: *State v. Foster*, 91-164.

SEC. **3686. Number of—how made.** Each party shall have the right to challenge peremptorily five jurors. The parties shall challenge alternately, commencing with the plaintiff, and, the challenges for cause being first exhausted or waived, the parties shall then in turn, in the same order, exercise the right of peremptory challenge, in such manner as the parties may agree upon or the court order. [C. '73, § 2771; R., § 3036; C. '51, § 1774.]

An error in overruling a challenge to a juror for cause is waived if the party making such challenge afterward waives a peremptory challenge to the jury containing such juror: *Barnes v. Newton*, 46-567; *State v. George*, 62-682.

Error in overruling a challenge to a juror is error without prejudice if the juror does not sit and the defendant does not exhaust all his peremptory challenges: *State v. Brownlee*, 84-473.

A waiver of peremptory challenge by a party only counts as one of the number to which he is entitled, and, after a challenge by the other party, he may use any remaining right of challenge, even as to a juror in the box when the waiver was made: *Fountain v. West*, 23-9.

Where a jury was selected and accepted by the parties and then dismissed upon the adjournment of court until the next day without being sworn, *held*, that at the opening of the next session and before the actual swearing of the jury a party might interpose

a peremptory challenge not exercised by him in the impaneling of the jury: *Spencer v. De France*, 3 G. Gr., 216.

By waiving peremptory challenges and accepting the jury the defendant waives any error in overruling previous challenges for cause: *State v. Winter*, 72–627.

SEC. 3687. Vacancy filled. After each challenge, the vacancy shall be filled before further challenges are made, and any new juror thus introduced may be challenged. [C.'73, § 2772; R., § 3037; C.'51, § 1775.]

SEC. 3688. For cause. A challenge for cause is an objection to a juror, and may be for any of the following causes:

1. A conviction of felony;
2. A want of any of the qualifications prescribed by statute to render a person a competent juror;
3. Such defects in the faculties of mind or organs of the body as render him incapable of performing the duties of a juror;
4. Consanguinity or affinity within the ninth degree to the adverse party;
5. Standing in the relation of guardian and ward, or the client of any attorney engaged in the cause, master and servant, landlord and tenant, or being a member of the family or in the employment of the adverse party;
6. Being a party adverse to the challenging party in a civil action, or having complained against or been accused by him in a criminal prosecution;
7. Having already sat upon the trial of the same issues;
8. Having served as a grand or trial juror in a criminal case based on the same transaction;
9. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict;
10. Being interested in a like question with the issue to be tried. [C.'73, § 2772; R., §§ 2271, 3037–40.]

Discretion: Questions as to the qualification of jurors are submitted to the sound discretion of the court, and its action will not be reviewed unless an abuse thereof is shown: *Anson v. Dwight*, 18–241; *May v. Elam*, 27–365.

Even where it would not be error to overrule a challenge for cause, the action of the court in sustaining it will not be interfered with on appeal in the absence of a showing of prejudice: *Geiger v. Payne*, 69 N. W., 554.

Causes of challenge: Where it was shown that a juror had a bet of twenty-five cents outstanding which would be affected by the result of the trial, and this fact was not disclosed when he was interrogated as to his qualifications, *held*, that he was incompetent, and that a new trial should have been granted: *Seaton v. Swem*, 58–41.

In an action against a city for damages a citizen and taxpayer of the city is not a competent juror: *Davenport Gas, etc., Co. v. Davenport*, 13–229; *Dively v. Cedar Falls*, 21–565; *Cramer v. Burlington*, 42–315; *McGinty v. Keokuk*, 66–725; *Cason v. Ottumwa*, 71 N. W., 192.

A taxpayer of a city is subject to challenge as a juror by plaintiff in an action against the city for damages, although he is a nonresident of the city: *Kendall v. Albia*, 73–241.

The right to challenge is a right allowed parties to protect themselves in their interests, but it is not a ground of challenge by one party that the juror has an interest adverse to that of the other. Therefore, *held*, that on appeal in a proceeding to assess damages for change of the grade of a street the city could not challenge a juror on the ground that he was a taxpayer: *Conklin v. Keokuk*, 73–343.

In an action against a city for damages the defendant cannot object to a resident of the city acting as juror on the ground that he is not a taxpayer: *Hollenbeck v. Marshalltown*, 62–21.

Jurors who have rendered a verdict of guilty in a criminal prosecution are not competent to sit in a civil action for trespass against the same defendant, arising out of the same transaction, even though they state upon their *voir dire* that they have not formed or expressed any opinion in the case: *Spear v. Spencer*, 1 G. Gr., 534.

Where it appeared, in an action to collect a subscription to a railway company, that a juror was united with others along the road in resisting suits brought to recover upon contracts given for the same purpose as the contract in suit, *held*, that he was properly excluded from the jury for cause: *Courtwright v. Strickler*, 37–382.

Where a juror was a partner of one of the parties, *held*, that he was properly excused upon challenge for cause: *Stumm v. Hummel*, 39–478.

Cases of express and implied bias, as those terms were used in a previous statute, discussed: *May v. Elam*, 27–365.

Cause stated: A challenge for cause not further specifying the objection made to the juror should be overruled. *Bonney v. Cocke*, 61–303; *Davis v. Anchor Mut. F. Ins. Co.*, 64 N. W., 687.

Evidence: In order that a party may take advantage of the fact that a juror had in advance of the trial expressed an opinion upon

the merits of the case, it must appear on the record that the juror was examined as to whether he had formed or expressed such opinion or belief, and the showing thereof by affidavit is not sufficient: *Light v. Chicago, M. & St. P. R. Co.*, 93–83.

Upon the trial of challenges other evidence than the testimony of the person challenged may be heard, and the court is required to determine both the law and fact involved. It is the duty of the court, therefore, to determine whether the opinion formed is an unqualified one on the merits of the controversy or whether the state of mind of the juror is such as would preclude him from rendering a just verdict. The court may take into account not alone the answers given, but the general demeanor and appearance of the person: *Sprague v. Atlee*, 81–1.

Error in ruling: When a challenge to a juror is sustained, even though erroneously, and an unobjectionable jury is procured, the supreme court must be well satisfied that the challenge was sustained without any cause in order to justify a reversal on that ground: *Wisehart v. Dietz*, 67–121.

Where a juror was discharged on a showing that one of the parties was the father of the juror's wife, it not appearing what other showing there was as to bias, *held*, that the judgment would not be reversed on that ground: *Ibid.*

Where the court properly takes the case from the jury and directs a verdict any error in ruling on challenges to jurors becomes error without prejudice: *Mellerup v. Travelers' Ins. Co.*, 63 N.W., 665.

Objection waived: A motion for a new trial on the ground that one of the jurors had already sat on the trial of the same issues should not be sustained in the absence of a showing that the party complaining was ignorant of that fact: *Hurtert v. Weines*, 27–134.

Where the party does not examine the jurors under oath or otherwise as to their qualification and competency, he cannot make an objection to a juror which would have thus been disclosed a ground for a new trial: *Stewart v. Ewbank*, 3–191.

SEC. **3689. How tried.** Upon the trial of a challenge to an individual juror, he may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon, and other evidence may be heard. [C.'73, § 2773; R., § 3042; C.'51, § 2988.]

SEC. **3690. Determination.** In all challenges, the court shall determine the law and the fact, and must either allow or disallow the challenge. [C.'73, § 2774; R., § 3043; C.'51, § 2990.]

SEC. **3691. Persons who keep the seventh day.** A person whose religious faith requires him to keep the seventh day of the week can not be compelled to attend as a juror on that day. [C.'73, § 2776; R., § 4112; C.'51, § 2504.]

SEC. **3692. Exemption.** An exemption from service as a juror is not a cause of challenge, but the privilege of the person exempt. [C.'73, §§ 2777, 4406; R., §§ 3041, 4772; C.'51, § 2987.]

The section applied: *State v. Adams*, 20–486. As to what persons are exempted, see § 333.

SEC. **3693. Attachment for absent jurors.** When a cause is called for trial, and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and an attachment to be issued against those who are absent, but the court may, in its discretion, wait or not for the return of the attachment.

SEC. **3694. Ballots prepared.** The clerk shall prepare separate ballots containing the names of the persons returned as jurors, which shall be folded, each in the same manner, as near as may be, and so that the name thereon shall not be visible, and must deposit them in a box kept for that purpose.

SEC. **3695. Drawing.** Before the name of any juror is drawn, the box must be closed and shaken, so as to intermingle the ballots therein, and the clerk shall draw such ballots from the box, without seeing the names written thereon, through the top of the lid thereof.

SEC. **3696. Jurors absent or excused.** If a juror is absent when his name is drawn, or be set aside or excused from serving on that trial, the ballot containing his name must be folded and returned to the box as soon as the jury is sworn.

SEC. **3697. Ballots returned to box.** When a jury is completed, the ballots containing the names of the jurors sworn must be laid aside and kept apart from the ballots containing the names of the other jurors until it is discharged, and must then be again folded and returned to the box, and so on, as often as a trial is had.

SEC. **3698. Panel exhausted.** If for any reason the regular panel is exhausted without a jury being selected, it shall be completed in the manner provided in the chapter upon selecting, drawing and summoning juries.

Under prior provisions it was held that where the panel of jurors regularly summoned was exhausted by challenges it might be filled by calling persons present in court, and it was not error to refuse to order it filled from the jury lists and delay the trial for that purpose: *State v. Harris*, 64-287; *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Also *held*, that the fact that a jury was filled up by talesman was no ground of objection unless abuse of discretion on the part of the court was shown: *Emerick v. Sloan*, 18-139.

It is not a ground for challenge to the panel from which the jury is drawn that vacancies in the panel have been filled in an illegal manner. The objection should be raised by challenge to the jurors improperly added when they are called: *Buford v. McGetchie*, 60-298.

SEC. **3699. Majority verdict—struck jury.** The parties, at any time before the final submission, may agree to take the verdict of the majority, which agreement, being stated to the court and entered upon the record, shall bind the parties, and in such case a verdict, signed by any seven or more and duly rendered, when read and not disapproved by said majority, shall in every particular be as binding as if made by a full jury; or, when both parties require it, a struck jury may be ordered, whereupon eighteen jurors shall be called into the box, and the plaintiff first, and then the defendant, shall strike out one juror in turn until each has struck six, and the remaining six shall try the cause. [C.'73, § 2778; R., § 3045; C.'51, § 1776.]

SEC. **3700. Procedure after jury is sworn—order of evidence.** When the jury has been sworn, the court shall proceed in the following order:

1. The party on whom rests the burden of proof may briefly state his claim and the evidence by which he expects to sustain it;
2. The other party may then briefly state his defense and the evidence by which he expects to sustain it;
3. The party on whom rests the burden of proof in the whole action must first produce his evidence, to be followed by that of the adverse party;
4. The parties then will be confined to rebutting evidence, unless the court for good reasons, in furtherance of justice, permit them to offer evidence in their original case;
5. But one counsel on each side shall examine the same witness. Upon interlocutory questions, the party moving the court or objecting to testimony shall be heard first; the respondent may then reply by one counsel, and the mover rejoining, confining his remarks to the points first stated and a pertinent answer to respondent's argument. Argument on the questions shall then be closed, unless further requested by the court. [C.'73, § 2779; R., § 3046.]

Impaneling jury: When the jury have been sworn, as usual, to try the issues between the parties, the subsequent allowance of an amendment presenting a new issue will not, it seems, make it necessary to reswear the jury: *Arnold v. Arnold*, 20-273.

Burden of proof; opening and closing: The question as to who has the burden of proof is properly a matter of practice, and the ruling of the court thereon will not be reviewed unless there is evidence of an abuse of discretion: *Viele v. Germania Ins. Co.*, 26-9.

The true test, to determine upon whom is the burden of proof, is to consider which party would be entitled to the verdict if no evidence were offered on either side. The burden is upon the party against whom, in such case, the verdict ought to be: *Ibid.*; *Vieths v. Hagge*, 8-163, 192.

The party having the affirmative of the issue does not always have the burden of proof: *Sillyman v. King*, 36-207.

Where, under the issues, plaintiff is not required to introduce any evidence and is entitled to judgment for all he claims if defendant fails to establish matters pleaded by him, the burden of proof and the right to open and close the case are upon defendant: *Bixby v. Carskaddon*, 70-726.

The court has a discretion in the matter of opening and closing and where the attorneys concede that the facts alleged for the plaintiff are not in controversy the court may give the opening and closing to the defendant, although in accordance with the issues as shown by the pleadings the plaintiff has the burden: *Names v. Dwelling House Ins. Co.*, 64 N. W., 628.

Where the burden of the issue is on plaintiff he is technically entitled to the opening and closing, but it is not error for the court

to award it to the party upon whom the evidence casts the burden. The better practice is to claim the right before the evidence is introduced: *Milwaukee Harvester Co. v. Crabtree*, 70 N. W., 704.

Where after the opening argument by plaintiff defendant files an amended answer admitting the allegations of plaintiff, it is not error to refuse to change the order of argument so as to give the defendant the closing. Such matter is within the discretion of the trial court: *Fred Miller Brewing Co. v. DeFrance*, 90-395.

Where, upon the material issues in a case, the burden was upon defendant, *held* not error to give him the opening and closing, although the allegations of the petition were not, in terms, admitted by the answer: *Delaware County Bank v. Duncombe*, 48-488.

Action of the court in determining who is entitled to the opening and closing is not subject to review on appeal: *Goodpaster v. Voris*, 8-334.

While the right of reviewing the decision of the court as to who has the affirmative is not absolutely denied, there must be a clear case of prejudice arising from error in the decision of the court upon that point to justify a reversal on such ground: *Fountain v. West*, 23-9; *Preston v. Walker*, 26-205; *Woodward v. Laverty*, 14-381; *Smith v. Cooper*, 9-376; *Ashworth v. Grubbs*, 47-353; *Dent v. Smith*, 53-262; *Van Horn v. Smith*, 59-142.

In an attachment suit, where a counterclaim on the bond is interposed, if plaintiff introduces no evidence to show defendant's liability on the cause of action, defendant has the opening and closing with reference to the liability on the bond: *Whitney v. Brownewell*, 71-251.

The burden of proving freedom from contributory negligence is upon the party alleging negligence, although the fact of contributory negligence may be alleged in the answer: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-315; *Gamble v. Mullin*, 74-99.

Where a party has insisted on the right to open and close, against the objection of the other party, and has been allowed by the court to do so, he cannot complain of an instruction that the burden of proof is upon him: *Lister v. Clark*, 48-168.

As to opening and closing the argument, see next section.

Order of evidence: The order in which the proof of facts shall be received is in the sound discretion of the court: *Cannon v. Iowa City*, 34-203; *Woolheather v. Risley*, 38-486; *Carman v. Roenman*, 45-135; *Duffees v. Judd*, 48-256; *State v. Fry*, 67-475.

The order of the introduction of evidence is a matter largely in the discretion of the trial court: *Kassing v. Walter*, 65 N.W., 832.

And in the absence of any proof of prejudice to the appellant or of abuse of discretion by the court, the supreme court will not feel justified in interfering, on appeal, with the exercise of such discretion: *Pearson v. South*, 61-232.

A decision of the court in such matter will not be overruled on appeal unless manifest abuse of such discretion is shown: *Samuels v. Griffith*, 13-103: *Donaldson v. Mississippi & M. R. Co.*, 18-280.

The supreme court will not be justified in interfering with the exercise of this discretion by the lower court, unless in a clear case of its abuse, even where it is exercised in excluding evidence which is not strictly rebutting in its character, after the original case for that party has been closed: *Boals v. Shields*, 35-231.

The order of the introduction of evidence is so largely a matter within the discretion of the trial court that rulings relating thereto will not be interfered with on appeal unless it clearly appears that the court has abused its discretion: *Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.*, 66 N.W., 96.

It is within the discretion of the court to permit a witness at any time during the trial to correct the evidence previously given. If the opposite party is taken by surprise, and he is unable to controvert the new evidence because of the absence of witnesses, he should at least apply for a continuance: *Miller v. Hartford F. Ins. Co.*, 70-704.

Out of regular order: In the exercise of its discretion, and in accordance with common practice, the court may admit testimony the relevancy or competency of which is not at the time apparent, on the promise of the party offering it and with the understanding that he will introduce other testimony by which its competency or relevancy shall become apparent, and that otherwise it shall be ruled out; but the court may, in its discretion, require the evidence to be introduced in its proper order: *Rutledge v. Evans*, 11-287; *Cramer v. Burlington*, 42-315.

Where the pleadings of defendant alleged that he had fully complied with the conditions of a title bond, which he offered in evidence, *held*, that an objection to the introduction of such bond offered in evidence because defendant had showed no title or interest therein was properly overruled, defendant being permitted first to introduce the bond and then to show his title and interest in it: *Van Orman v. Spafford*, 16-186.

The record in another case may be introduced in evidence to prove a prior adjudication without previous proof that the former action was between the same parties or involved the same rights. Those facts might be established by evidence afterwards: *Searle v. Richardson*, 67-170.

It is not error to admit secondary evidence of an instrument claimed to be lost before there is evidence authorizing the introduction of such secondary evidence, if afterwards facts are shown in the testimony of either party rendering the introduction of such secondary evidence proper: *Cook Mfg. Co., v. Randall*, 62-244.

Where it is sought to prove by parol evidence a sale which is taken out of the statute of frauds by part performance, evidence of the sale may be first introduced, to be followed by proof of part performance: *Campbell v. Ormsby*, 65-518.

Additional evidence in chief after party has rested: The entire subject of the examination of witnesses and the order of production of testimony rests very largely in the discretion of the judge trying the cause, and it is within his discretion, in the furtherance of justice, to admit new testimony on

the part of the affirmative after the testimony on the part of the negative has been closed: *Hubbell v. Ream*, 31–289.

Unless an abuse of discretion is shown the action of the court in allowing the plaintiff on rebuttal to introduce evidence which is not strictly rebutting furnishes no ground of reversal: *Hess v. Wilcox*, 58–380.

So where defendant, under the allegations of his answer, introduced testimony upon a point as to which the burden of proof was properly upon plaintiff under the pleading, *held*, that it was not error in the court to then allow plaintiff to introduce adverse evidence, although it was not in rebuttal: *Crane v. Ellis*, 31–510.

Although the matter of the order of introducing evidence is largely in the discretion of the court, yet where evidence was allowed out of its proper order and the court refused to allow additional evidence in rebuttal, *held*, that there was such error as to require reversal: *McDonald v. Moore*, 65–171.

Testimony offered merely for the purpose of corroborating a witness may properly be excluded until the testimony of the witness has been impeached: *State v. Rorabacher*, 19–154.

The provisions of this section are to be followed in criminal cases so far as applicable: *State v. Yetzer*, 66 N. W., 737.

Additional evidence after evidence is closed: The admission of testimony after both sides have rested their case is so much a question of discretion that it will not be interfered with on appeal without a showing of abuse of discretion or prejudice to appellant: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28–12.

The court may in its discretion allow the introduction of additional evidence after the evidence has been closed and the arguments of counsel have been made: *Darlan v. Rosencrans*, 56–122.

It is the common practice in trial courts to permit parties to introduce material evidence at any time before the verdict, which has been omitted by mistake or inadvertence: *Meadows v. Hawkeye Ins. Co.*, 67–57.

Evidence may be received out of its regular order for other reasons than "to correct an evident oversight or mistake," as provided in § 3719: *Huey v. Huey*, 26–525.

Where plaintiff had omitted to prove title necessary to make out his case, *held* not error to allow him to introduce proof thereof after the evidence had been closed: *McNichols v. Wilson*, 42–385.

Where an issue is finally submitted to the court and determined, it is too late afterwards to introduce additional evidence bearing thereon: *Byington v. Moore*, 62–470.

Evidence to rebut counter-claim: After defendant has introduced proof to establish a set-off, plaintiff should be allowed to introduce evidence to show that defendant's claim has been paid. He is not called upon to introduce such evidence until after defendant has introduced the evidence on his part: *Luke v. Bruner*, 15–3.

Preliminary statement: The introduction of evidence is not to be precluded by the statement of the case to the jury by the attorney in opening. Admissions thus made are not binding on the party: *Frederick v. Gaston*, 1 G. Gr., 401.

Introduction of written evidence: Where a case was being tried on the written report of evidence offered on a former trial, *held*, that a party might on his own motion withdraw or withhold a portion of the evidence offered by himself on such trial: *Henderson v. Chicago, R. I. & P. R. Co.*, 48–216.

Introduction of record: It is not necessary to constitute a full introduction of the record in evidence that it be actually handed to the jury: *Fabian v. Davis*, 5–456.

Where a written instrument is offered in evidence and no objection is made thereto, it is to be regarded as introduced: *Stephens v. Pence*, 56–257.

Where a party made an oral statement that he offered a certain copy of a book in evidence, but did not file it in the case nor produce it on the trial, *held*, that it could not be considered as a part of the evidence received, and that the right to a trial *de novo* on appeal could not be defeated by the fact that the record did not contain such copy: *Palo Alto County v. Harrison*, 68–81.

Inspection of instrument: When a note is introduced in evidence the opposite party has a right to inspect the same, but if, taking advantage of such temporary possession, he fails to return it or puts it out of his power to return it, a copy may be introduced and used: *Selman v. Cobb*, 4–534.

Number of witnesses: The trial court is authorized to exercise a discretion as to the number of witnesses that shall be introduced to a particular point or to establish any particular fact: *Kesee v. Chicago & N. W. R. Co.*, 30–78; *Bays v. Herring*, 51–286; *Bays v. Hunt*, 60–251; *Minthon v. Lewis*, 78–620.

This rule is applicable to criminal cases: *State v. Bebout*, 69 N. W., 429.

Where the court, in advance, informed the respective parties that the number of witnesses as to a particular point (the value of property in an appeal from an assessment for damages for right of way) would be limited to five on each side, *held*, that such action was not erroneous: *Everett v. Union Pacific R. Co.*, 59–243.

In the absence of manifest abuse of such discretion the appellate court will not interfere with the action of the lower court with reference thereto: *Kesee v. Chicago & N. W. R. Co.*, 30–78.

A *nisi prius* court must be permitted to exercise a discretion as to the number of witnesses, the order and manner of their examination, etc., in cases before it; otherwise examinations and trials might be indefinitely prolonged: *Preston v. Cedar Rapids*, 63 N. W., 577.

Therefore, *held* that in an action to recover against a city, damages resulting from change of grade in a street, the court was justified in limiting the witnesses as to the amount of damages to seven on each side and that the fact that two witnesses for one party when called appeared not to be competent to testify as to the amount of damage, did not entitle such party to call two other witnesses in their place: *Ibid.*

Excluding jury: While it is sometimes desirable that remarks by the judge and arguments by the counsel upon questions involved in the case be not made in the presence of the jury, yet it is not always practicable or desirable to have such questions argued and determined in their absence. The proper practice in each case is to be determined by the trial court in the exercise of sound legal discretion: *Hall v. Carter*, 74-364.

Submission: So long as the case is open for evidence by agreement of counsel or order of court, it is open for all proper applications and orders, and cannot be considered as submitted without having been called in court for that purpose or peremptorily ordered by the judge: *Cate v. Gilman*, 54-576.

SEC. **3701. Argument—opening and closing.** The parties may then either submit or argue the case to the jury. In the argument, the party then having the burden of the issue shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause; and if in the close he should refer to any new material point or fact not relied upon in the opening, the adverse party shall have the right of reply thereto, which reply shall close the argument in the case. [C. '73, § 2780; R., § 3048.]

Where a defendant admits the allegations of plaintiff's petition he is entitled to open and close the argument: *Hallowell v. Fawcett*, 30-491.

The order of argument is so much a matter of discretion that the appellate court will not review on appeal a ruling with reference thereto: *Woodward v. Laverty*, 14-381.

Refusal of the trial court to allow a previous opinion of the supreme court in the same case to be read in argument for the purpose of comment, *held* not ground for reversal in the absence of a showing that such opinion was applicable to the case and that the discretion of the court was wrongfully exercised: *Shephard v. Brenton*, 20-41.

It is error to allow counsel in argument to read to the jury as a part of his argument evidence introduced on a former trial of the same cause, but not introduced in the pending trial: *Martin v. Orndorff*, 22-504.

A motion for continuance being part of the record is a proper matter of comment by counsel without being formally offered in evidence: *Cross v. Garrett*, 35-480.

It is not proper for counsel in argument to comment upon an amended pleading which has been withdrawn: *Riley v. Iowa Falls*, 83-761, and see notes to § 3600.

It is not improper for counsel in argument to read to the jury by question and answer a portion of the testimony of a witness, and he cannot be required as a condition of doing so to read the entire testimony of such witness: *Goodson v. Des Moines*, 66-255.

While counsel may be permitted to read to the jury portions of the transcript of the evidence of witnesses, it is not error to refuse to allow such reading where it appears that unnecessary delay in the trial of the case might result, and no necessity for such reading appears: *McCormick v. Babcock*, 70 N. W., 103.

It is not improper to allow an attorney in his argument to the jury to exhibit a drawing which he claims gives the result of the evidence submitted to the jury: *Stafford v. Oskaloosa*, 64-251.

Great latitude is allowed to counsel in appealing to the sympathy of the jury: *Dowdell v. Wilcox*, 64-721.

The absence of the judge during the argument of the case to the jury will not constitute error sufficient to authorize reversal of a judgment, unless prejudice resulting from his absence, or some ground from which such error can be presumed, is shown: *Baxter v. Ray*, 62-336; *Hall v. Wolff*, 61-559.

Unless an abuse of discretion by the court below is shown the case will not be reversed upon appeal for alleged error in the argument of counsel: *Hull v. Alexander*, 26-569.

As to the right of adverse counsel to reply to any reference made by counsel in closing to new matter, see *Cross v. Garrett*, 35-480.

That misconduct of counsel in argument may be ground for new trial, see § 3755, and notes.

A party to an action has a right to have the cause fully and fairly argued to the jury, but after every point material to his interest has been presented in the opening argument, he cannot demand as a matter of right that his counsel be further heard, except in reply to the argument for the adverse party: *Carruthers v. McMurray*, 75-173.

An affidavit for a continuance when duly filed is a part of the record, and may be read to the jury and commented upon by counsel in argument, and it may be so read and commented upon although filed in another case with the understanding that it should apply to both: *Brannum v. O'Conner*, 77-632.

In a particular case, *held*, that while counsel may not have stated facts correctly in his argument, and was free in his inferences from such facts, yet he did not transgress so far in this respect as to require a reversal of the judgment: *Deere v. Wolf*, 77-115.

Failure of a party to call witnesses to prove a fact which must be within their knowledge may properly be made a subject of comment before the jury: *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80-620.

Where an attorney by mistake referred to evidence given on a former trial, which had not been introduced in the pending trial, and the opposite attorney made no objection thereto, although aware of the mistake, *held*, that the error would not be ground of reversal: *Pence v. Chicago, R. I. & P. R. Co.*, 79-389.

Statements made by counsel for plaintiff in his closing argument, relating to matters not in evidence, and not proper to be considered by the jury, *held* subject to criticism; but *held*, that counsel on the other side

having made no objection at the time, and having in no manner called the court's attention thereto, nor asked that the offensive and unlawful argument be arrested, such improper argument would not be a ground for reversal on appeal: *Blair v. Madison County*, 81–313.

Objection cannot be made on appeal to the order of argument in the lower court where it appears that the order pursued was not objected to: *Sherman v. Hale*, 76–383.

The question as to who has the burden of proof is a matter of practice and the ruling of the trial court will not be disturbed unless there is evidence of an abuse of discretion: *White v. Adams*, 77–295.

In an action on a note by the transferee thereof, in which the making of the note was admitted and also the assignment to plaintiff and the fact that it was unpaid, but the maker set up defenses to the note, and plaintiff in reply relied upon an estoppel against the maker from pleading such defenses, *held*, that the defendant had the right to open and close, there being no occasion for plaintiff to offer evidence of the estoppel until defendant had made a *prima facie* defense: *Seekel v. Norman*, 78–254.

SEC. **3702. Waiver of opening.** If the party holding the affirmative waives the opening, he shall be limited in the close simply to a reply to his adversary's argument, otherwise the other party shall have the concluding argument. [C.'73, § 2781; R., § 3048.]

SEC. **3703. Number of attorneys—court to arrange order.** Every plaintiff or defendant shall be entitled to appear by one attorney, and if there be but one plaintiff or defendant he may appear by two, and where there are several defendants having the same or separate defenses and appearing by the same or different attorneys, the court shall, before argument, arrange their order. [C.'73, § 2782; R., § 3049.]

SEC. **3704. Argument restricted.** The court may restrict the time of argument of any attorney to itself, but shall not limit the argument in cases tried to a jury. [C.'73, § 2783; R., § 3050.]

Before the adoption of this provision it was held that the time allowed to an attorney for addressing the jury might be limited by the court in its discretion, and that such action would not be interfered with on appeal unless it should appear that the party was greatly prejudiced by the exercise of such discretion: *Fletcher v. Burroughs*, 10–557.

SEC. **3705. Instructions—to be in writing.** When the argument is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked, and the charge of the court, shall be in writing. [C.'73, § 2784; R., § 3051.]

I. FORM OF AND METHOD OF GIVING.

When to be asked: Instructions which are submitted during the opening and only argument made at the trial cannot be refused as being presented too late: *McCaleb v. Smith*, 22–242.

In writing: Under the provision requiring instructions to be in writing it is error to orally explain an instruction given, or to charge the jury verbally: *Head v. Langworthy*, 15–235.

In a civil action it is error to orally explain or modify an instruction asked by either party, and equally so for the court, on its own motion, to charge the jury orally: *State v. Harding*, 81–599; and see § 3708.

Where the jury sent questions to the judge, in response to which he told them orally that their questions had nothing to do with the case, and that it was their duty to determine the case under the evidence and instructions given, *held*, that such action was not erroneous, it not being an instruction to the jury, but a refusal to instruct: *Sullivan v. Collins*, 18–228.

As to giving additional instructions after the jury has retired, see § 3720.

A direction to a jury to retire and consider further of their verdict and answer an interrogatory previously propounded to them is not such an instruction as must be in writing: *Judge v. Jordan*, 81–519.

Where the jury returned a verdict, and the judge stated to them that the verdict was not in accordance with the charge of the court, and directed them to retire and return a verdict in accordance with such charge, *held*, that such direction did not constitute an instruction required to be in writing: *Johnson v. Rider*, 84–50.

Where a stipulation in another case was introduced in evidence during the progress of a trial, and the court said in the presence of the jury, "I shall hold that by that stipulation defendants acknowledged that there was twelve hundred dollars and interest due the said railroad company that has not been paid," *held*, that as the remark was not addressed to the jury, and as there was no conflict in the evidence as to the fact that the amount named was in fact due the railroad company, and the question of indebtedness was fairly submitted to the jury, no prejudice could have resulted from the remark: *Cedar Rapids, I. F. & N. R. Co., v. Cowan*, 77–535.

It is not error in the court, after reading to the jury instructions asked by one of the parties, to state orally that such instructions are given at the request of such party: *Scott v. Chicago, M. & St. P. R. Co.*, 68–360.

A direction to the jury to find a verdict for one party, when such direction is proper, need not be in writing: *Milne v. Walker*, 59–186.

Instructions asked, written in pencil, cannot be refused as not being in writing, as required by the statute: *Harvey v. Tama County*, 53-228.

The rule requiring instructions to be in writing is sufficiently complied with by presenting them in print: *State v. Fooks*, 65-196.

Where instructions were given orally and afterwards reduced to writing, with the acquiescence of defendant, *held*, that it was not ground for reversal on defendant's appeal: *State v. Sipult*, 17-575.

If a party sits by with the knowledge that the statute requiring instructions to be in writing is not being complied with, and without excepting to the oral charge, he cannot afterwards be allowed to complain: *Head v. Langworthy*, 15-235.

A remark of the court, not designed as an instruction to the jury, nor addressed to them, nor of a nature to be considered while they were deliberating upon their verdict, will not be presumed to have influenced their verdict: *Cormac v. Western White Bronze Co.*, 77-32.

It is a general principle in trial courts in passing upon the admissibility of evidence, and especially where it is admitted, and is of special application, to state for what purpose it is admissible, and the practice is to be encouraged within proper limits. Such a statement is not an instruction to the jury which is required to be in writing: *Farmer v. Thrift*, 62 N. W., 804.

Where the court reserves the question of the admissibility of certain evidence which is offered, and afterwards excludes such evidence, it is not necessary that there be a special written instruction to the jury withdrawing the evidence from their consideration: *State v. Bigelow*, 70 N. W., 600.

A direction to the jury to return a verdict is not such an instruction as need be in writing: See notes to § 3722.

It is improper for the court to underscore words and phrases in instructions given. The tendency of it is to give undue weight and force to certain words and sentences and thereby to prevent a jury from giving to other portions of the charge, the weight and consideration which they should have: *State v. Cater*, 69 N.W., 880.

Remarks of the court in the presence of the jury relating to the weight of evidence offered and which would be erroneous if embodied in an instruction may be sufficient ground for a new trial: *Shakman v. Potter*, 66 N.W., 1045; *State v. Philpot*, 66 N.W., 730.

As to submission of special interrogatories, see § 3727.

II. Duty to Instruct; Refusal; Modification.

A justice of the peace has no authority to give instructions to a jury in his court: *St. Joseph Mfg. Co. v. Harrington*, 53-380.

Duty to instruct: It is the duty of the judge to see that every case is so presented to the jury that they have clear and intelligent notions of what they are to decide, and necessary instructions should therefore be given, although not requested by counsel; and a failure to give such instructions may be ground for new trial when the verdict does not effectuate justice between the parties: *Owen v. Owen*, 22-270.

If the instructions asked by counsel are defective and insufficient, and the case is complicated, or the law applicable to it not supposed to be within the knowledge of jurymen, and, particularly, if the charge is of a high criminal offense, it is the duty of the court to point out to the jury controverted questions of fact, and state the law applicable to them, and a failure to do so will be error: *State v. Brainard*, 25-572.

Where, in a criminal prosecution, the court gave full instructions as to the theory of the case relied on by the prosecution, but omitted to give instructions upon an essential part of the case upon the theory upon which defendant relied, *held*, that the judgment should be reversed: *State v. O'Hagan*, 38-504.

Where instructions, although correct as far as they go, do not announce such rule as is necessary for the guidance of the jury, the giving of them will amount to error: *Durant v. Fish*, 40-559.

The fact that an instruction directs the attention of the jury to certain things proper to be considered, as well as to the facts and circumstances surrounding the case, will not constitute error merely because it omits to direct their attention to other facts which might be proper for them to consider: *Allender v. Chicago, R. I. & P. R. Co.*, 43-276.

In an action for personal injuries received on a city street, it is error to fail to instruct the jury on the question of contributory negligence: *Ely v. Des Moines*, 86-55.

It is not necessary to warn the jury by instructions not to consider matters which have been in no way presented to them: *Pingery v. Cherokee & D. R. Co.*, 78-438.

The court may indulge a reasonable presumption as to the knowledge by the jury of principles commonly understood, and give such instructions on the basis thereof as will, under the evidence, enable the jury to reach a correct result: *Ibid.*

Where plaintiff sought to recover for injuries due to negligence of a railway company in operating its trains on two parallel tracks at a place where they were crossed by a highway, *held*, that it was not necessary for the court to point out to the jury each separate claim, or the evidence which might be properly considered in connection with it: *Pence v. Chicago, R. I. & P. R. Co.*, 79-389.

The reasons for the rules of law contained in instructions to the jury need not be stated: *State v. Turner*, 19-144; *State v. Rorabacher*, 19-154.

Instructions should be asked: It is not incumbent on the court, on its own motion, to instruct as to a matter upon which an instruction is not requested by the party desiring it: *Smith v. Chicago, M. & St. P. R. Co.*, 60-512.

Where it does not appear but that substantial justice has been effected, and further instructions have not been asked, the case should not be reversed for failure of the court to more fully instruct the jury: *Hubbell v. Ream*, 31-289.

If instructions given do not embrace the law applicable to the case it is the duty of the party desiring a fuller or broader in-

struction to ask it, and if he fails to do so he cannot object to an instruction which is given and is correct as far as it goes: *Gwinn v. Crawford*, 42-63.

Mere failure to instruct may be reversible error if it appears that defendant has not had a fair trial. But where instructions are correct as far as they go, defendant cannot be heard to complain of failure to instruct as to matters as to which no instructions have been asked: *State v. Helvin*, 65-289.

Failure to state the law upon a particular point will not avail defendant if he has not asked instructions on such point: *State v. Tweedy*, 11-350; *State ex rel. v. O'Day*, 69-368.

A party cannot object on the ground of failure of the court to fully instruct the jury unless he has asked proper instructions on the point on which he claims the charge to be defective: *Ault v. Sloan*, 4-508.

Failure of the court to instruct as to other points upon which no instructions were asked will not be error where the instructions given are correct as far as they go: *Mackie v. Central R. of Iowa*, 54-540; *Hall v. Stewart*, 58-681.

Where an instruction is correct as far as it goes, it will not generally be considered erroneous for not stating additional rules applicable to the same point, unless the opposite party asks an instruction for the purpose of supplementing it: *Gwinn v. Duffield*, 66-708.

Objection that instructions are not more specific cannot be urged by a party who failed to ask more specific instructions: *Dixon v. Stewart*, 33-125; *Harrison v. Iowa Midland R. Co.*, 36-323: *Koehler v. Wilson*, 40-183.

If a party desires to have a question specifically presented to the attention of the jury he should ask an instruction upon it: *State v. Hazen*, 39-648; *McCausland v. Cresap*, 3 G. Gr., 161.

Where an instruction contains affirmative error, appellant will not be debarred from complaining thereof because he fails to ask an instruction which would have contravened the one given and expressed the correct rule: *State v. Pennell*, 56-29.

Failure to give an instruction which is absolutely essential to enable the jury to correctly apply the rule laid down in the instruction given will constitute error even though no such instruction is asked: *Seekel v. Norman*, 71-264.

Where the court has charged the jury fully in regard to its duties and the issues have been fairly submitted, a party will not be heard to complain of a failure to give other instructions which were not asked: *Duncombe v. Powers*, 75-185.

Where an instruction as to a certain rule of law was not asked for, *held*, that the failure of the court to give such instruction could not be complained of when the rule was not necessary for the correct determination of the case: *Deere v. Wolf*, 77-115.

Instructions which are correct as far as they go cannot be complained of because they do not cover questions as to which no instructions were asked by the party complaining: *Wimer v. Allbaugh*, 78-79; *Churchill v. Gronewig*, 81-449; *State v. Viers*, 82-397; *Wheelan v. Chicago, M. & St. P. R. Co.*, 85-167.

It is not error to fail to instruct the jury as to which party has the burden of proof where no instructions on that question are asked: *Duncombe v. Powers*, 75-185; *Martin v. Davis*, 76-762.

Instructions which are correct as far as they go will not be erroneous for failing to embody a proposition as to which no instruction is asked by the complaining party: *Kidd v. American Pill & Med. Co.*, 91-261.

Where the court in instructing the jury follows the rule of law adopted by the party in his pleading and presentation of his case, and he fails to ask any instruction announcing a different rule, he cannot afterwards avail himself on appeal of error of the court in so doing: *Moloney v. Chicago & N. W. R. Co.*, 63 N. W., 690.

Refusal of irrelevant instructions: It is not error to refuse instructions which are irrelevant to the issue: *Ford v. Jefferson County*, 4 G. Gr., 273.

Instructions may be refused which, while correct, are not essential to enable the jury to understand the questions involved: *Hale v. Philbrick*, 47-217.

Refusal to modify: Although the court may in its discretion modify instructions asked and give them as modified, yet it is not under obligation to so correct or limit them. It may refuse them entirely and leave the party proposing them to assume the hazard of their entire correctness: *Tyfield v. Adams*, 3-487; *Keenan v. Missouri State Mut. Ins. Co.*, 12-126.

It is not error to refuse an instruction which could not be properly given without modification: *Grimes v. Martin*, 10-347; *Morrison v. Myers*, 11-538.

Refusal as to facts in detail: The court may properly refuse instructions which merely call the attention of the jury to particular facts and circumstances testified to by the witnesses in the case which are proper for their consideration. It might be impracticable to instruct as to all the facts in detail: *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656; *State v. Miller*, 65-60.

The jury having been instructed that plaintiff could not recover unless they found the existence of the contract relied on by him, *held*, that it was unnecessary to further instruct that plaintiff could recover upon proof of other matters: *Poole v. Hintrager*, 60-180.

Refusal of proper instructions error: The court should give instructions asked if they are correct and there is any basis for them in the testimony: *State v. Gibbons*, 10-117.

Where letters were put in evidence to prove an admission and also to be used by way of comparison to prove the genuineness of a signature, *held*, that it was error to refuse to instruct the jury that they might make such comparison: *Saunders v. Howard*, 51-517.

The refusal of the court to give instructions correct in law and supported by the evidence and not covered by instructions given constitutes reversible error: *Prichard v. Hopkins*, 52-120; *Spaulding v. Adams*, 63-437.

It is not sufficient that the jury might have considered evidence referred to without an instruction. If it is proper for the jury to consider matters referred to in the instruction it is proper for the court to so instruct them: *Spaulding v. Adams*, 63-437.

An instruction simply calling the attention of the jury to certain matters which the evidence tends to establish, informing them that they should consider such circumstances, should be given if requested and correct in law: *Ibid.*

Instructions cannot be refused on the ground of being unnecessarily lengthy and numerous: *McCaleb v. Smith*, 22-242.

The refusal of an instruction calling attention to the effect of impeaching evidence upon the credibility of any particular witness, *held* not error where a general instruction on that question was given: *State v. Curran*, 51-112.

Also *held* not error to refuse an instruction cautioning the jury not to put a strained construction upon the testimony of the prosecuting witness: *Ibid.*

Refusal of instructions otherwise given: It is not error to refuse instructions asked where the subject is properly covered by instructions given by the court: *Rusch v. Davenport*, 6-443; *State v. Castello*, 62-404; *Seekel v. Norman*, 71-264.

The court is not bound to repeat the instructions previously given: *Trustees of Iowa College v. Hill*, 12-462.

It will not constitute error to refuse instructions when others given by the court cover precisely and fully the same ground: *Harper v. Madren*, 21-407.

It is not error to refuse instructions which are correct if others to the same effect have been given: *Clinton Nat. Bank v. Torry*, 30-85; *Todd v. Branner*, 30-439; *Hopper v. Moore*, 42-563.

It is not error to refuse instructions which, though correct, are substantially covered by instructions given by the court: *Price v. Alexander*, 2 G. Gr., 427; *Raver v. Webster*, 3-502; *Rusch v. Davenport*, 6-443; *Mills v. Mabon*, 9-484; *Payne v. Billingham*, 10-360; *State v. Hockenberry*, 11-269; *Rindskoff v. Barrett*, 14-101; *Russ v. Steamboat War Eagle*, 14-363; *State v. Rorabacher*, 19-154; *State v. Schlagel*, 19-169; *Harper v. Madren*, 21-407; *Robinson v. Illinois Cent. R. Co.*, 30-401; *Wilhelm v. Fimple*, 31-131; *Maxwell v. Gibbs*, 32-32; *State v. Morphy*, 33-270; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656; *Thomas v. Brooklyn*, 58-438; *Thompson v. Keokuk*, 61-187; *Votaw v. Diehl*, 62-676; *Gee v. Moss*, 68-318; *Albrosky v. Iowa City*, 76-301.

When the law of the case has once been stated to the jury all further instructions should be refused: *Wilson Sewing Machine Co. v. Bull*, 52-554.

It is not error to refuse an instruction substantially given in another form which is as beneficial to the party as if given in the form asked by his counsel: *State v. Stanley*, 33-526.

Where by agreement of the parties instructions given by the court were to be decisive of the case, *held*, that the refusal to give every instruction asked by one of the parties could not be construed as error: *Parsons v. Hedges*, 15-119.

It is not error to refuse one instruction and give another in its place which differs from the former merely in words and not in essential meaning: *Galpin v. Wilson*, 40-90; *National State Bank v. Delahaye*, 82-34.

It is not error to refuse instructions embodying propositions which are all forcibly and favorably presented in instructions given: *State v. Donneker*, 40-340.

It is not error to refuse an instruction which presents a doctrine that has been fairly stated in another instruction: *Allen v. Burlington, C. R. & N. R. Co.*, 57-623.

Where the instructions given fairly submit the merits of the controversy to the jury, the refusal to give others substantially covered by those given will not constitute error: *Van Winter v. Henry County*, 61-684.

Where the court has on its own motion given correct instructions on a particular point, it is not error to refuse others asked on the same point, even though they are also correct: *Bener v. Edgington*, 76-105; *Minthon v. Lewis*, 78-620.

Where one instruction states to the jury the rules as to an element of the case it is not necessary to repeat the same rule in connection with other instructions: *State v. Heatherton*, 60-175.

It is not necessarily error to refuse instructions asked which are intended as aids to the jury in weighing and considering the evidence. The court may rightfully say that such instructions are unnecessary: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76-753.

A refusal to give an instruction which in a conceivable view of the case ought to have been given will not necessarily be reversible error, as the court might trust somewhat to the common sense of the jury: *West v. Chicago & N. W. R. Co.*, 77-654.

Particular instructions: Each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no ground for error or mistake, and it is error to refuse an instruction correct in law and applicable to the evidence which instructs as to a particular state of facts, although the general proposition is covered by other instructions: *Muldowney v. Illinois Cent. R. Co.*, 32-176; *Perry v. Dubuque Southwestern R. Co.*, 36-102; *Manuel v. Chicago, R. I. & P. R. Co.*, 56-655; *Parkhill v. Brighton*, 61-103.

It is error to refuse an instruction directly applicable to facts of which there is evidence before the jury, although the principles of law to which such facts relate are properly stated in the instructions given: *Muldowney v. Illinois Cent. R. Co.*, 39-615.

It is error to refuse correct instructions which are relevant, even though the same instructions are given in a different form: *Webster v. Raver*, 4 G. Gr., 426.

III. SUBJECT-MATTER OF INSTRUCTIONS.

a. *In General; Misleading and Erroneous; Effect of Error.*

The charge in general: It is better as a general rule for the judge to put aside the instructions asked and cover the whole ground in a methodical charge of his own:

State v. Collins, 20–85; *Stevenson v. Chicago & N. W. R. Co.*, 61 N.W., 964.

Where numerous and conflicting instructions are asked by the opposite parties they should be subjected to the mental alembic of the judge and materially reduced and purified and moulded to the facts of the case: *Murphy v. Chicago, R. I. & P. R. Co.*, 38–539.

It is not good practice for the court to charge the jury in chief and then give all the instructions asked by either party. A clear and distinct enunciation of the law should be given: *Wilson Sewing Machine Co. v. Bull*, 52–554.

Ordinarily where the whole law of the case is given to the jury, although at the instance of the different parties, the supreme court will not interfere, but the instructions must be consistent as a whole, and not misleading: *Hoben v. Burlington & M. R. R. Co.*, 20–562.

Instructions to the jury which partake of the nature of an argument are to be discouraged, and courts should labor to give such only as present the issues in a clear, simple, plain and unincumbered manner: *State v. Turner*, 19–144.

While it is not good practice to ask instructions which are simply intended to constitute a reply to the argument of counsel on the other side, and such instructions can usually be properly refused, yet where the argument of counsel contained statements not warranted by the evidence, *held*, that it was error to refuse an instruction which was intended to correct any misapprehension growing out of such improper argument: *State v. McCartney*, 65–522.

Held not erroneous to instruct the jury to consider the whole case under the evidence and law as given them, and return such verdict as they think right: *McKenna v. Hoy*, 76–322.

In an action to recover on the ground of false representations, an instruction need not be confined to those representations testified to by plaintiff, but should be in language so general as to be applicable to any representations which are covered by the allegations of the petition: *Phelps v. James*, 79–262.

Foreign terms: The use of the word *onus* in an instruction *held* not objectionable; for, though a Latin word, it is incorporated into our language: *In re Will of Convey*, 52–197.

Should be clear and consistent: Instructions should be brief and perspicuous; and where they are confused or in conflict, to the probable prejudice of the complaining party, a new trial should be granted: *Eyser v. Weissgerber*, 2–463; *Hoben v. Burlington & M. R. R. Co.*, 20–562.

The whole charge, as given, should be consistent, and so framed as not only to state the law correctly, but in such manner as not to confuse the jury: *Hoben v. Burlington & M. R. R. Co.*, 20–562.

Abstract propositions: The instructions should clearly present the rules applicable to the peculiar facts of the case rather than general and abstract propositions of law, the bearing and force of which will not be fully understood and correctly applied by the jury: *State v. Glynden*, 51–463.

The giving or refusal of an instruction upon a mere abstract proposition of law, not referring in any way to the evidence, is not sufficient to warrant a reversal, unless it may be fairly inferred that the jury was thereby misled to the prejudice of the party complaining: *McGregor v. Armill*, 2–30.

While the giving of instructions containing abstract propositions of law not applicable to the evidence will not in itself constitute prejudicial error, yet, if the jury are thereby left without any other guide in applying the evidence to the case, that fact may in itself constitute error warranting a reversal: *State v. Thompson*, 45–414.

It may also be error to give instructions embodying abstract propositions of law which are correct in themselves, but are not applicable to the evidence, where such instructions have a tendency to make an erroneous impression upon the jury and mislead them: *Moffitt v. Cressler*, 8–122; *Van Tuyl v. Quinton*, 45–459; *Williamson v. Reddish*, 45–550.

Contradictory: It is error sufficient to warrant a reversal that instructions lay down two contradictory rules for the guidance of the jury, if it appears that they may have adopted the erroneous instead of the correct one: *State v. Hartzell*, 58–520; *Winey v. Chicago, M. & St. P. Co.*, 92–622.

Conflict in the instructions is a ground for reversal on appeal: *Moore v. Des Moines & Ft. D. R. Co.*, 69–491.

Where an erroneous instruction is given the fact that the jury are elsewhere correctly instructed will not cure the error. In such case the instructions would be conflicting and inconsistent: *State v. Keasling*, 74–528.

Where there are conflicting instructions and the verdict is consistent with instructions which are correct, it will not be set aside on account of the inconsistent instructions: *Hillebrant v. Green*, 93–661.

Misleading: An instruction embracing a legal principle may be misleading as applied to the particular facts of the case, and therefore erroneous: *State v. Benham*, 23–154.

An instruction embracing a correct legal principle, but couched in such language as to be likely to mislead the jury, may properly be refused: *Perry v. Dubuque Southwestern R. Co.*, 36–102.

Where the instructions are such that the jury have been probably misled and confused by the language used, a new trial should be granted, even though the law may have been correctly stated in some of the instructions: *Preston v. Dubuque & P. R. Co.*, 11–15.

In a particular case, *held*, that an instruction referring to a matter which, owing to the circumstances of the case, was not proper for the jury to consider, was misleading and therefore erroneous: *Dolan v. Jean*, 35–413.

Where an instruction is misleading by reason of being susceptible of an erroneous construction, although technically correct, it may be a ground for reversal: *McCracken v. Webb*, 36–551.

An instruction which is inapplicable to the testimony, and has a tendency to mislead the jury, will constitute error: *Aultman v. Lee*, 43–404.

Giving an instruction so framed that it might have misled the jury as to the amount of proof necessary on the part of defendant, *held* sufficient error to warrant a reversal: *Williamson v. Reddish*, 45–550.

An instruction collecting together various things which, if true, would exonerate defendant from liability, *held* to be misleading in that it tended to lead the jury to believe that all such circumstances must concur to exonerate defendant, whereas a portion of them only were sufficient, as a matter of law, for that purpose: *Van Tuyl v. Quinton*, 45–459.

In an action for personal injuries suffered on account of defendant's negligence, where several negligent acts are alleged, it is error to instruct in such form as to require the plaintiff to prove all the negligent acts so alleged before being entitled to recovery: *Winey v. Chicago, M. & St. P. R. Co.*, 92–622.

In an action to recover personal property by virtue of certain chattel mortgages, where the defense was that the mortgages were without consideration and were made to hinder and defeat the creditors of the mortgagor, an instruction which when taken alone appeared to direct the jury that, in order to succeed, the defendant must prove both of these allegations, *held* not misleading when taken with other paragraphs of the charge: *Reigelman v. Todd*, 77–696.

An instruction directing the jury if they find a certain fact to be true to return a verdict for plaintff, when the right of recovery depends upon other facts in connection with the fact thus mentioned, is misleading: *McKern v. Albia*, 69–447.

An instruction directing the jury as to the effect of a particular fact, which fact is in iself not essential as to the rights of either party, is misleading: *Campbell v. Wheeler*, 69–588.

An instruction to the effect that a bill of sale was invalid unless possession of the property passed thereunder, *held* misleading, as no explanation was made as to the effect of notice to other persons of the transaction: *Tiffany v. Anderson*, 55–405.

Where an instruction was such that it authorized the jury, if they found a certain fact, to consider it only in mitigation and allow some damage, when the fact itself was such as to entirely preclude plaintiff's recovery, *held* error sufficient to require a reversal: *Guptill v. Verbach*, 58–98.

A particular instruction excluding from the jury any statements of counsel as to the issues of a former trial, *held* not erroneous as tending to exclude the pleadings on the former trial: *Wormley v. Hamburg*, 46–144.

An instruction to the jury that if they believed plaintiff had testified falsely to any material fact they would be authorized to reject all his testimony unless corroborated by other credible evidence, *held* not misleading: *Brown v. Chicago, R. I. & P. R. Co.*, 51–235.

A mere mistake of the court in directing the jury that, if their verdict was for plaintiff, the form should be "that the jury find for the defendants," etc., *held* not such error as likely to mislead the jury: *Eldridge v. Bell*, 64–125.

The fact that the court in stating the issues to the jury confounds the action of trespass with trespass on the case is not such an error as can be made ground for reversal: *Brown v. Hendrickson*, 69–749.

Error without prejudice in giving instructions: A case will not be reversed for the giving of an erroneous instruction which could not have worked any prejudice to the complaining party: *Eyser v. Weissgerber*, 2–463; *McGregor v. Armill*, 2–30; *McKay v. Leonard*, 17–569; *Clagett v. Conlee*, 16–487; *Ocheltree v. Carl*, 23–394; *Hunt v. Chicago & N. W. R. Co.*, 26–363; *Horr v. Reed*, 20–591; *Thompson v. Blanchard*, 2–44; *First Nat. Bank v. Breese*, 39–640; *Blackburn v. Powers*, 40–681; *State v. Hart*, 67–142; *Kendiy v. Overhulser*, 58–195; *Parkhurst v. Masteller*, 57–474; *Walthem v. Artz*, 70–609.

The giving of an irrelevant instruction will be considered error without prejudice where it could not have been detrimental to the party complaining: *Sullivan v. Finn*, 4 G. Gr., 544.

Where the result could not have been different if erroneous instructions which were given by the court had not been given, the giving of such instructions will be deemed error without prejudice: *Farwell v. Salpaugh*, 32–582.

The failure to give a correct instruction will not be reversible error, if, even had the instruction been given, the result must have been the same, and any other verdict would properly have been set aside: *Cedar Falls & M. R. Co. v. Rich*, 33–113; *Olson v. Neal*, 63–214.

The refusal to give a correct instruction as to a matter properly before the jury will be error without prejudice if the jury specially find that the facts on which the instruction was founded did not exist: *Martin v. Algona*, 40–390; *Clinton Nat. Bank v. Graves*, 48–228.

Where it is clear from the verdict that the jury have not been misled by an erroneous instruction, the giving thereof will not be ground for reversal: *Gwinn v. Crawford*, 42–63; *Peake v. Conlan*, 43–297.

An instruction which might be erroneous as a general proposition, but is not misleading under the evidence, will not be ground for a reversal: *Ross v. Davenport*, 66–548.

Error in giving an instruction will be error without prejudice where the verdict of the jury is in favor of the person complaining: *Dunham v. Dennis*, 9–543.

Where an erroneous instruction as to a particular matter is given, but from the verdict it is apparent that the jury have adopted a view of the case which renders such matter immaterial, the error will be considered as without prejudice: *Hall v. Stewart*, 58–681; *Hall v. Ballou*, 58–585.

Error in the giving of an instruction will be without prejudice where it appears that the jury have made such a finding upon the facts that such instruction can have had no influence upon the result: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 61–175; *Lathrop v. Central Iowa R. Co.*, 69–105.

Where an instruction in stating the liability of defendant fails to notice a limita-

tion on that liability, but the evidence clearly shows the non-existence of such limitation, the error in failing to state the limitation will be deemed to be without prejudice. *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Where instructions were given as to the right of plaintiff to recover exemplary damages, which were claimed to be erroneous, *held*, that as, under the circumstances, plaintiff was not entitled to actual damages, the instruction was, if erroneous, error without prejudice: *Myers v. Wright*, 44-38.

Where the verdict necessarily implies the finding of every fact as established which under the law is required to establish right to recovery, there is no ground to set aside the verdict, even though under the instructions plaintiff was required to prove in addition, as a condition of his right to recover, another fact which was not essential: *Tuck v. Singer Mfg. Co.*, 67-576.

Error in general instructions to the jury as to matters of law will be deemed error without prejudice where the verdict of the jury is special, having no connection or relation whatever with any principle of law: *Wilkinson v. Connecticut Mut. L. Ins. Co.*, 30-119.

Where the jury has, by special findings, determined every fact necessary to authorize judgment, error in giving or refusing instructions as to the legal conclusions to be drawn from such facts will constitute error without prejudice: *Boals v. George*, 30-601.

It is not error to refuse instructions asked which are substantially given in the charge of the court: *Wilhelm v. Fimple*, 31-131.

A party cannot claim that he has been prejudiced by the failure to instruct at his request as to what his rights would have been under a condition of things which the verdict shows conclusively did not exist: *Ibid.*

Judgment will not be reversed because of an erroneous instruction given by the court below when the controlling question in the case was fairly left to the jury, and correctly decided by them: *Bondurant v. Crawford*, 22-40.

If a party complains of erroneous instructions he must not only show the error, but that it resulted to his prejudice, and for that purpose it must appear that judgment was rendered against him: *Shannon v. Scott*, 40-629.

Error of which party cannot complain: A party cannot complain of the giving of instructions which are of the same purport, though not identical with those asked by himself: *Smith v. Sioux City & P. R. Co.*, 38-173.

Where an instruction given is erroneous on a particular point, but as to that point the instructions asked by the party complaining contain the same error, the party cannot take advantage of such error in the instruction given: *Weller v. Hawes*, 49-45; *Campbell v. Ormsby*, 65-518.

Where instructions follow the theory of the case as set forth in the petition, plaintiff cannot complain of error in the instructions as to the basis of recovery: *Briscoe v. Reynolds*, 51-673.

An error in presenting issues to the jury by which defendant is allowed the benefit of a defense which he is not entitled to will not be a ground of reversal in favor of such party: *Chlein v. Kabat*, 72-291.

General directions to jury: A statement by the judge to the jury, that, a case having been twice tried, it was important that they should agree if they could satisfy their minds as to the right of the case, *held* not improper: *Niles v. Sprague*, 13-198.

It is not error to caution the jury, after they have been out for some time without agreement, that each juror should lay aside pride of opinion and examine their differences in a spirit of fairness and candor, and state to them that a new trial would involve large expense: *Frandsen v. Chicago, R. I. & P. R. Co.*, 36-372.

The court may properly instruct upon a point not suggested by counsel for either party, and intimate to counsel his intention of instructing on such point, and his desire to have the point discussed, even though thereby he discloses to the counsel of one party an error which such counsel might have overlooked, and which would have been fatal to his case: *Hinkle v. Davenport*, 38-355.

b. *Stating the Issues.*

By the court: It is the province of the court, and not that of the jury, to determine the nature of the action, or what issues are made by the pleadings: *McKinney v. Hartman*, 4-154; *Beebe v. Stutsman*, 5-271; *Potter v. Wooster*, 10-334; *Reid v. Mason*, 14-541; *Pharo v. Johnson*, 15-560; *Hempstead v. Des Moines*, 52-303.

Duty to state the issues: In a proper and necessary case the court is to inform the jury specifically as to the issues involved and not leave it to them to determine such issues; but when such necessity does not exist, no such direction can be asked as a matter of right: *Fannon v. Robinson*, 10-272.

A plain and concise statement of the issues should always be given to the jury; but a party who has consented that the jury should determine the issues from the pleadings cannot complain of the failure of the court in this respect: *Burns v. Oliphant*, 78-456.

A description in a general way of the issues is all that is required: *Jenks v. Lansing Lumber Co.*, 66 N. W., 231.

It is the province and duty of the court to determine what are the issues in the pleadings, and this cannot be left to the jury: *West v. Moody*, 33-137.

It is the duty of the court to instruct as to the issues, and state directly and plainly the claims made by the parties: *Little v. McGuire*, 43-447.

The court should make a full statement of the issues to the jury: *Hollis v. State Ins. Co.*, 65-454.

Where an instruction stating the issues was submitted to attorneys and approved by them, *held*, that objection could not afterwards be made on the ground that such instruction did not specifically refer to the issue presented by an amendment to the answer: *Sprague v. Atlee*, 81-1.

Where an instruction submitted one question which did not arise under the pleadings, but by other instructions the issues were submitted to the jury, and it was clear that the very question upon which, under the pleadings, the rights of the parties depended, was before them, *held*, that the judgment would not be reversed because of error in the one instruction: *Newton v. Ritchie*, 75–91.

Where an instruction contained a reference to a certain matter "alleged in defendant's answer," *held*, that the reference was to a preceding instruction which contained the substance of the answer, and was not erroneous: *Probert v. Anderson*, 77–60.

It is error to instruct the jury that the plaintiff cannot recover without proving each and every of the allegations of the petition, where the petition contains averments of distinct elements of damage, proof of one or more of which would entitle plaintiff to recovery: *Harley v. Merrill Brick Co.*, 83–73.

In a particular case, *held*, that there was no error in submitting a particular issue to the jury, although the petition did not contain a direct allegation with reference to the matter thus submitted, there being allegations in the petition from which such averment could be implied: *Sage v. Haines*, 76–581.

In an action for assault and battery committed by defendant in ejecting plaintiff from his house, where the court instructed the jury that, if plaintiff and husband had been occupying the house with defendant's consent for more than thirty days, then defendant could not eject them except by process of law, *held* that, while the question of plaintiff's tenancy at will was not in issue, yet the charge was justified by defendant's plea that he had rightly ejected plaintiff and by the evidence on that issue: *Redfield v. Redfield*, 75–435.

Where the court in stating the issues in an action to recover for negligence substantially copied the petition, *held*, that it should have pointed out more specifically the negligence charged and should have directed the jury to inquire as to that only: *Gorman v. Minneapolis & St. L. R. Co.*, 78–509.

Failure of the court to state fully to the jury the material issues made by the pleadings will constitute error: *Potter v. Chicago, R. I. & P. R. Co.*, 46–399.

The fact that an issue is ignored in the instructions given to the jury will constitute reversible error: *Hill v. Aultmann*, 68–630; *Kennedy v. Rosier*, 71–671.

It is error to omit reference to a material issue in the case, as, for instance, the issue of contributory negligence: *Gamble v. Mullin*, 74–99.

In a particular case, *held*, that there was no prejudicial error in referring in an instruction to the matter charged in the petition, without specifying also an amendment to the petition: *Fuhs v. Osweiler*, 59–431.

Instructions in a particular case, *held* sufficiently to present to the jury the issues before them, although the fact that defendant denied the averment of plaintiff's petition was not stated in express terms: *Gunsel v. McDonnell*, 67–521.

Matters not in issue: The court is not required to instruct the jury in regard to a matter not material to any issue in the case: *Duncombe v. Powers*, 75–185.

It is not necessary to present to the jury questions which have been disposed of by rulings made during the progress of the trial: *Wells v. Kavanaugh*, 74–372.

Error in stating: As to the correctness of statement of the issues in particular cases, see *Stafford v. Oskaloosa*, 57–748; *Beems v. Chicago, R. I. & P. R. Co.*, 58–150.

It is not error in the court to fail to state to the jury the effect of impeaching evidence as to the credibility of a witness where no instruction on that question is asked. The impeachment of a witness does not constitute a defense, but merely relates to the credibility to be given to the testimony, and the failure to instruct as to the effect of an effort to impeach does not constitute a failure to state the issues in the case: *State v. Kirkpatrick*, 63–554.

Matters of dispute arising upon the law or the evidence are not issues which the court ought specifically to present to the jury: *State v. Nadal*, 69–478.

Failure to give an instruction with reference to immaterial questions on matters which, though pleaded by way of defense, do not constitute a defense in law, will not be deemed prejudicial to the party seeking to raise the immaterial question or plead the incompetent matter: *Tuck v. Singer Mfg. Co.*, 67–576.

It is error to submit to the jury an issue not in the case: *Storrs v. Emerson*, 72–390; *Benton v. Chicago, R. I. & P. R. Co.*, 55–496; *Jones v. United States Acc. Ass'n*, 92–652.

Where a mortgagor brought action to recover possession of the mortgaged property and defendant interposed a general denial, and there was no question raised by the evidence as to plaintiff's ownership of the property, except as affected by the chattel mortgage, *held*, that it was not prejudicial error in the court to fail to present to the jury the issue as to plaintiff's general ownership, which was technically raised by the general denial. *Hollingsworth v. Holbrook*, 80–151.

Where the issues in the third division of an answer were substantially embraced in the second, *held*, that a statement of the issues of the third division was unnecessary: *Richmond v. Sundburg*, 77–255.

Where the court, on inquiry of the attorneys, is told that there is no issue as to certain matters, he may instruct the jury with reference to such matters as though they were settled by the pleadings and need not leave them for the determination of the jury: *Names v. Dwelling House Ins. Co.*, 64 N. W., 628.

Issues not supported by evidence: Failure to state to the jury an issue raised by the pleadings will not constitute error where there was no evidence for the party introduced upon such issue: *Van Vechten v. Smith*, 59–173.

It is not necessary for the court to state to the jury an issue involving matters as to which there is no conflict in the evidence: *Kimball v. Monarch Ins. Co.*, 70–513.

Not sufficiently specific: If the issues are stated in the instructions, failure to state them more specifically will not be reversible error where more specific instructions are not asked by the opposite party: *Dixon v. Stewart*, 33-125.

Issues withdrawn: Where the court declines to submit an issue to the jury upon which evidence has been introduced, the evidence bearing on that issue should be taken from the jury, and it is error in such case to instruct them that the facts concerning that matter may properly be considered in determining the issues that are submitted: *Hammer v. Chicago, R. I. & P. R, Co.*, 70-623.

It is not necessary to instruct the jury with reference to issues which though raised in the pleadings or in the evidence have been withdrawn: *New Haven Lumber Co. v. Raymond*, 76-225; *Erickson v. Barber* 82-838.

Reference to pleadings: It is improper to direct the jury to the pleadings for the purpose of ascertaining what the issues are: *Fitzgerald v. McCarty*, 55-702; *Porter v. Knight*, 63-365; *Bryan v. Chicago, R. I. & P. R. Co.*, 63-464; *Hollis v. State Ins. Co.*, 65-454; *Lindsay v. Des Moines*, 68-368. But such reference will not constitute error if the issues are clearly stated without regard to such reference: *Dorr v. Simerson*, 73-89.

It is error for the court to refer the jury to the pleadings to determine the issues before them especially where the allegations of the pleading are such that it does not clearly appear what the issues presented are: *Keatley v. Illinois Central R. Co.*, 63 N. W., 560.

The practice of stating the issues by setting out copies of the pleadings is disapproved: *Robinson v. Berkey*, 69 N. W., 434.

The statement of the issues should be in writing, and it is error to make such statement by reading from the pleadings portions which are not incorporated in the instructions: *Hall v. Carter*, 74-364; *State v. Birmingham*, 74-407.

It is not error to refer the jury to the pleadings to ascertain the narrative of the facts therein contained: *Marion v. Chicago, R. I. & P. R. Co.*, 64-568.

It is not improper to refer the jury to the petition and the amendment thereto for a fuller statement of the several items of the plaintiff's claim for damages: *Lanning v. Chicago, B. & Q. R. Co.*, 68-502.

It is not error to state the issues in the form presented by the parties: *Fleming v. Shenandoah*, 71-456.

It is a sufficient statement of the issues if the court sets out the pleadings and adopts them as a part of the instructions where the pleadings contain a plain statement of the matter in controversy: *Crawford v. Nolan*, 72-673.

It is not required that the issues should all be stated in a single paragraph of the charge. It is sufficient if they are fully stated to the jury in some part of the charge in such a manner as to be understood: *Timins v. Chicago, R. I. & P. R. Co.*, 72-94.

Instructions in a particular case as to the issues, *held* not erroneous in referring to the pleadings, the issues being fully presented in the instruction without such reference: *Morrison v. Burlington, C. R. & N. R. Co.*, 84-663.

IV. PERTINENCY TO ISSUES AND EVIDENCE.

a. *In General.*

Must be pertinent to issues in pleadings: It is error to submit to the jury a question not presented by the pleadings: *Stein v. Seaton*, 51-18; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

An instruction to the jury as to liability for a cause of injury not alleged in the petition is ground for a reversal: *Cressy v. Postville*, 59-62; *Keatley v. Illinois Cent. R. Co*, 63 N.W., 560.

Instructions should not be given upon a matter which is not in issue: *Troughear v. Lower Vein Coal Co.*, 62-576; *Fisk v. Chicago, M. & St. P. R. Co.*, 74-424.

It is error to give an instruction containing a correct legal proposition which is not applicable to any issue involved in the case: *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52; *Roberts v. Richardson*, 39-290; *Sioux City & P. R. Co. v. Walker*, 49-273; *Wood v. Chicago, M. & St. P. R. Co.*, 68-491.

The court is under no obligations to instruct the jury in regard to a theory not raised by the pleadings, nor claimed to be true by either party, nor sustained by the testimony of any witness: *George v. Swafford*, 75-491.

Instructions may properly be refused relating to a question not put in issue by the pleadings nor constituting a matter of controversy in the evidence and as to which neither of the parties makes any claim: *Borland v. Chicago, M. & St. P. R. Co.*, 78-94.

An instruction which treats as in doubt or in issue the correctness of a matter which is admitted and not in dispute when the case is submitted is erroneous: *Blaul v. Tharp*, 83-665.

In an action to recover a sum of money paid to release an attachment where the petition alleged that the demand upon which it was paid was illegal and unjust, but did not charge either fraud or extortion, and there was no evidence to show either, *held*, that an instruction from which the jury might have found that payment was obtained by fraud, compulsion or extortion was erroneous and not warranted by the pleadings or evidence: *Lyman v. Lauderbaugh*, 75-481.

An instruction in an action for negligence directing the jury to find as to negligence not alleged in the petition is erroneous. The case must be tried on the issues made in the pleadings: *Miller v. Chicago, M. & St. P. R. Co.*, 76-318.

Where evidence is admitted without objection upon an issue not raised by the pleadings, the court may properly instruct the jury as to the effect of such evidence. The objection that no such issue is raised in the pleadings comes too late after the evidence is introduced: *Collins v. Collins*, 46-60; *White v. Byam*, 64 N. W., 765.

The objection that instructions given pertain to an issue not in the case cannot be

considered if the party objecting has asked instructions upon that issue: *Hahn v. Miller*, 60-96.

A party who treats a question as in issue cannot complain that the court submits it as an issue to the jury: *Morgan v. Fremont County*, 92-644.

In an action upon certain promissory notes, where the defense was an agreement for an extension of time made by the agent of plaintiff, and no claim was made by the pleadings of a subsequent ratification of such agreement by plaintiff, *held* that while an instruction which submitted the question of subsequent ratification to the jury may have been erroneous, it was without prejudice to defendants: *Miller v. Root*, 77-545.

Refusal of instructions not pertinent: An instruction not pertinent to the pleadings or evidence should be refused although containing correct propositions of law: *Cutler v. Fanning*, 2-580; *Gover v. Dill*, 3-337; *Conner v. Dean*, 3-463; *Oliver v. Depew*, 14-490; *Packer v. Cockayne*, 3 G. Gr., 111; *State v. Gibbons*, 10-117; *Negley v. Cowell*, 91-256; *Thompson v. Anderson*, 86-703.

Instructions not supported by evidence: It is error to give an instruction on a state of facts not proven, even though the instruction is correct as an abstract proposition of law, if the giving of such instructions may tend to mislead the jury: *Moffitt v. Cressler*, 8-122; *Farr v. Fuller*, 8-347.

Where an instruction is based upon a theory wholly unsupported by the evidence and calculated to mislead the jury, the giving thereof will constitute error: *Mundhenk v. Central Iowa R. Co.*, 57-718; *Murphy v. Chicago, R. I. & P. R. Co.*, 38-539.

An instruction which though correct is not adapted to the facts of the case upon any hypothesis which the evidence tends to establish should not be given, especially when the jury is properly instructed otherwise: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28-12.

Refusal of an instruction as to a state of facts finding no support in the evidence will not constitute error, though the instruction be abstractly correct: *Messer v. Reginnitter*, 32-312; *Cross v. Garrett*, 35-480.

An instruction should be refused where there is no evidence to which it is applicable: *State v. Corrette*, 12-358; *Cobb v. Illinois Cent. R. Co.*, 38-601; *Davis v. Robinson*, 71-618; *Dyar v. Shenkberg*, 93-154; *Van Winkle v. Chicago, M. & St. P. R. Co.*, 93-509.

A court cannot be required to give an instruction containing an abstract proposition which is correct in itself, but which is not legitimately connected with the evidence in the case: *Tryon v. Oxley*, 3 G. Gr., 289; *Hall v. Hunter*, 4 G. Gr., 539; *Trustees of Iowa College v. Hill*, 12-462; *Connors v. Burlington, C. R. & N. R. Co.*, 74-283.

A court may refuse to submit to the jury an issue as to which there is no evidence which would support a verdict for the party relying thereon: *Wilson v. Phelps*, 86-735.

An instruction correct in law, but based upon a state of facts as to which there is no evidence, should not be given: *McCramer v. Thompson*, 21-244; *First Nat. Bank v. Hurford*, 29-579; *Byington v. McCadden*, 34-216; *Case v. Illinois Cent. R. Co.*, 38-581; *Murphy v. Chicago, R. I. & P. R. Co.*, 38-539; *Leffingwell v. Gilchrist*, 40-416; *Howell v. Price*, 40-548; *State v. Fraunburg*, 40-555; *O'Laughlin v. Dubuque*, 42-539; *Henderson v. Chicago, R. I. & P. R. Co.*, 43-620; *State v. Osborne*, 45-425; *Clark v. Ralls*, 58-201; *Hess v. Wilcox*, 58-380; *Hall v. Wolff*, 61-559; *Snyder v. Kurtz*, 61-593; *Johnson v. Miller*, 63-529; *State v. Archer*, 69-420; *Stein v. Council Bluffs*, 72-180.

It is error to submit a material question of fact to the jury upon which there is no evidence, even though the rule of law as to such question of fact be properly stated: *Bank of Monroe v. Anderson Bros. Mining & R. Co.*, 65-692; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150; *White v. Spangler*, 68-222; *State v. Myer*, 69-148; *Johnson v. Miller*, 69-562; *Griffith v. Burlington, C. R. & N. R. Co.*, 72-645.

Error in giving an instruction which states a correct proposition of law, but is not founded upon anything appearing in the evidence, will not be considered to be without prejudice, where all of the instructions given are of that character, and fail to show their applicability to the case or the evidence before the jury: *State v. Thompson*, 45-414.

An instruction cannot be held erroneously refused when there is nothing in the record to indicate what testimony was before the jury, as the refusal may have been justified on the ground of inapplicability: *Little v. Martin*, 28-558.

It is error to direct the attention of the jury to matters as to which there is no evidence before them: *Allender v. Chicago, R. I. & P. R. Co.*, 37-264.

The jury cannot be required to pass upon the effect of a fact as to which there is no evidence: *Stier v. Oskaloosa*, 41-353.

It is error to give an instruction based upon facts as to which there is no evidence, assuming to the jury thereby that there is such evidence, the sufficiency of which is left for them to pass upon: *Moorehead v. Hyde*, 38-382.

An instruction assuming that the jury may find a fact as to which there is no evidence whatever is erroneous: *Hand v. Langland*, 67-185.

An instruction directing the jury that they may allow damages as to which there is no evidence is erroneous: *Reed v. Chicago, R. I. & P. R. Co.*, 57-23.

Where there is no evidence whatever tending to show the amount of a particular item of damage, it is error to authorize the jury to allow damages for such item. So *held* as to expenses incurred for medical treatment in case of personal injury: *Stafford v. Oskaloosa*, 57-748.

Held, that it was error to instruct the jury that they might allow for loss of time and expenses of medicine and nursing in an action for personal injuries, where there was no allegation in the pleadings as to loss of time and no evidence of expense: *Gardner v. Burlington, C. R. & N. R. Co.*, 68-588. But *held*, that it was not error to give such an instruction where the petition asked a recovery for such expenses, and the evidence showed them to have been incurred: *Knapp v. Sioux City & P. R. Co.*, 71-41.

It is improper to leave to the jury the de-

termination of damages, based upon the employment of counsel, where there is no evidence as to the amount of counsel fees: *Parkhurst v. Masteller*, 57-474.

It is error to submit to the jury a question upon which there is no evidence: *Everingham v. Lee*, 78-630; *Trapnell v. Red Oak Junction*, 76-744; *Elder v. Stuart*, 85-690.

No matter how carefully guarded the instruction in such a case may be, it can hardly be held that such instruction constitutes error without prejudice: *Trapnell v. Red Oak Junction*, 76-744.

It is not error to fail to instruct the jury with reference to an issue as to which there is no evidence: *Eckelund v. Talbot*, 80-569.

Where the whole record shows that there is but one disputed question in the case, it is not error in the court to fail to present other questions to the jury that might have been tried under the issues in the pleadings: *Scott v. Chicago, M. & St. P. R. Co.*, 78-199.

Where plaintiff alleged certain acts of negligence by defendant, but offered no evidence to sustain the allegations, and defendant pleaded a waiver of the negligent acts, *held*, that the question of waiver was properly withdrawn from the consideration of the jury: *Brooke v. Chicago, R. I. & P. R. Co.*, 81-504.

Failure to present an issue in the case to the jury will be error without prejudice where it appears that there could not have been a verdict for appellant on such issue: *Churchill v. Gronewig*, 81-449.

It is not prejudicial error to fail to call attention of the jury by instructions to an issue in a case on which there is no evidence to support a verdict in behalf of the party complaining: *Flanagan v. Baltimore & O. R. Co.*, 83-639.

There is no error in an instruction which withdraws an issue raised in the petition, from the consideration of the jury, when there is no evidence to sustain such issue; *Whalen v. Chicago, R. I. & P. R. Co.*, 75-563.

In a particular case, *held*, that there was not such want of evidence in support of an instruction as to render it improper: *Brannum v. O'Conner*, 77-632.

It is error to give an instruction based entirely upon evidence which was improperly admitted: *Willits v. Chicago, B. & K. C. R. Co.*, 80-531.

Where a party has asked an instruction as to a question he cannot object if an instruction is given upon such question. that the matter thus submitted to the jury is without support in the evidence: *Light v. Chicago, M. & St. P. R. Co.*, 93-83.

It is error to instruct with reference to whether an action is barred by the statute of limitations where there is no competent evidence to support such action: *Herring v. Herring's Estate*, 62 N.W., 666.

Where there is some evidence upon the point, an instruction which is applicable to that point and correct in law should be given without regard to the weight of such evidence: *De Camp v. Mississippi & M. R. Co.*, 12-348.

The statement of an abstract proposition not inherently erroneous and not purporting to relate to the evidence will not require a reversal merely on the ground that there is no evidence to which it is applicable: *Kearney v. Fitzgerald*, 43-580.

An instruction embodying a correct presentation of the law, which may have been given to meet positions taken in argument, will not be ground for reversal, although not applicable to the evidence, if not of such nature as to mislead the jury: *Hall v. Stewart*, 58-681.

Where there is evidence introduced relating to a particular matter, the court will be justified in instructing the jury in regard to the law pertaining to such matter, even though the evidence is not such that the party introducing it could properly claim anything therefrom, if there appears to be any danger that the jury may be misled by such evidence: *Walker v. Camp*, 69-741.

A party who has asked instructions upon a particular point cannot afterwards complain of instructions given by the court upon that point, on the ground that there is no evidence whatever to support the instructions: *Spears v. Mt. Ayr*, 66-721.

b. *As to Questions of Fact.*

Matters of law and not of fact: The instructions must state rules of law only, leaving to the jury the decision of the facts and the application of the rules of law given them by the court: *Muldowney v. Illinois Cent. R. Co.*, 32-176.

The court cannot instruct the jury upon questions of fact: *Frederick v. Gaston*, 1 G. Gr., 401.

It is error for the court to find the facts, and instruct the jury as to what the facts are: *Nimon v. Reed*, 79-524.

It is not proper to allow a witness to give an opinion concerning a question of fact, which is not a proper subject of expert evidence, which fact must be determined by the jury from all the evidence: *Cason v. Ottumwa*, 71 N. W., 192.

The sufficiency or insufficiency of testimony to establish a given fact or determine an issue cannot be passed upon by the court, but must be left to the jury: *Franks v. State*, 1 G. Gr., 541.

The court cannot instruct the jury upon the sufficiency of the evidence to entitle a party to recover. If there is evidence tending to entitle him to a verdict it is the exclusive province of the jury to pass upon its sufficiency: *Robinson v. Illinois Cent. R. Co.*, 30-401.

It is not error to submit to the jury a question relating to a matter as to which the evidence on one side is not contradicted by any direct evidence on the other, if there are circumstances to be considered by the jury in determining whether the fact is established by the evidence or not: *Saar v. Fuller*, 71-425.

It is error to give an instruction which, though stating a correct proposition of law, assumes facts to be true which are in issue: *Luman v. Kerr's Adm'r*, 4 G. Gr., 159.

It is error to charge the jury as to the weight and sufficiency of the testimony: *Houston v. State*, 4 G. Gr., 437.

The court may explain to the jury the

legal effect of facts, but the facts themselves must be determined exclusively by the jury: *Ibid.*

An instruction which assumes as true the very fact in controversy, and bases thereon the relative duties and liabilities of the parties, should be refused: *Russ v. Steamboat War Eagle*, 14-363.

It is error to assume a fact as proven which is properly for the determination of the jury: *State v. Jones*, 33-9.

An instruction based upon an assumption of fact is erroneous: *Walters v. Chicago, R. I. & P. R. Co.*, 41-71.

The court would not be justified in giving an instruction which assumes facts as true which are for the jury to determine: *Ruter v. Foy*, 46-132.

An instruction should not assume facts as not proven of which there is some evidence: *Napper v. Young*, 12-450.

It is error to assume as true in an instruction a fact which is in issue and upon which the evidence is conflicting: *Case v. Burrows*, 52-146; *Bryon v. Brazil*, 52-350; *Bowersock v. Winers*, 60-84.

An instruction will not be erroneous which assumes facts which are admitted by the parties or about which there is no controversy: *McKenna v. Hoy*, 76-322; *Muir v. Miller*, 82-700; *Kenosha Stove Co., v. Shedd*, 82-540.

It is not error to assume in an instruction the existence of a fact about which there is no conflict in the evidence and which is fully established by the evidence: *Hall v. Manson*, 90-585.

An instruction which directed the jury that "it would be a false representation if defendants delivered said so-called guaranty as a true description of said land, even though they did not in fact know said description to be false," *held* to be erroneous, as alleging that the representations by means of the guaranty were false, when such fact was one which should have been determined by the jury: *Phelps v. James*, 79-262.

It is not error to instruct the jury that certain acts if proven would constitute an assault: *State v. Urie*, 70 N. W., 603.

It is not an instruction as to the facts to say that if two or more persons separately do things to effect a common purpose the doing of the things warrants a conclusion of a previous understanding or agreement to do them: *Names v. Dwelling House Ins. Co.*, 64 N. W., 628.

It is error to give an instruction based upon an assumption as to a fact which is in issue and upon which there is a conflict in the evidence, and such an instruction will be considered prejudicial: *Roach v. Parcell*, 61-98.

A fact should not be assumed to be true of which there is no proof: *Howes v. Carver*, 3-257.

However slight the effect of testimony, and however little the consideration to which it is entitled from a jury, still its weight is to be determined by them, and should not be determined beforehand by the court in an instruction: *Miller v. Mutual Benefit L. Ins. Co.*, 31-216.

It is not the province of the court to direct the jury to consider what is or is not probable as between conflicting theories in the case. It is the duty of the jury to determine, as best they can, which is supported by a preponderance of the evidence and not which is probably true: *Butler v. Chicago & N. W. R. Co.*, 71-206.

Remarks made in the presence of the jury, based upon an assumption of the facts upon which it is the province of the jury to pass, and which would be erroneous if contained in an instruction, will entitle defendant to a new trial: *State v. Stowell*, 60-535.

An instruction that if the jury find the testimony of plaintiff to be the only positive evidence in support of material allegations, and that it is contradicted in all material points by an unimpeachable witness, they must find for defendant, *held* error, as taking from the jury the province of weighing the entire evidence: *Delvee v. Boardman*, 20-446.

The practice of emphasizing evidence by instructions is not as a rule to be commended, but the court should exercise wise discretion in the matter: *West v. Chicago & N. W. R. Co.*, 77-654.

While evidence should not be emphasized by an instruction, yet a judgment will not be reversed because the court told the jury that they should regard as evidence what in fact is evidence, as it is proper to call the attention of the jury to evidence which is obscure and which might escape their attention: *West v. Chicago & N. W. R. Co.*, 77-654.

In an action to recover for hay burned by fire from an engine, where the evidence was conflicting as to plaintiff's interest in the hay, *held*, that it was the duty of the jury to reconcile the evidence as best they could and render a verdict upon it, and an instruction that if there was any doubt as to plaintiff's interest he could not recover was properly refused: *Ibid.*

The law does not require the court in its instructions to the jury to call special attention to the facts testified to by the several witnesses: *State v. Laughlin*, 73-351.

As to whether instructions in particular cases were erroneous as containing an assumption of fact, see *Perigo v. Chicago, R. I. & P. R. Co.*, 55-326; *Richardson v. Hoyt*, 60-68; *State v. Tarr*, 28-397.

The assumption in an instruction that a certain fact is conceded will not be presumed to be erroneous, it not appearing by the record but that such concession or admission was made in some proper manner: *Walsh v. Ætna L. Ins. Co.*, 30-133.

Where there is no controversy as to the facts, especially where the evidence is documentary, the court may direct the jury as to the application of such evidence to the law that must govern the case; *Thorp v. Craig*, 10-461; *Wood v. Porter*, 56-161; *Hughes v. Monty*, 24-499; *State v. Meshek*, 61-316; *Russ v. Steamboat War Eagle*, 14-363.

It is always proper for the court to instruct the jury as to every fact about which there is no controversy: *State v. Archer*, 73-320.

Stating to the jury the law as applicable to a particular state of facts will not necessarily be erroneous as an assumption that such facts are proven: *State v. Ziebart*, 40-169.

Instructions with reference to certain

facts which the evidence tends to prove, stating what the legal effect of such facts will be if found by the jury, may be proper: *Pritchett v. Overman*, 3 G. Gr., 531.

The grouping together in one instruction of legitimate facts which the evidence tends to prove, and charging that such facts constitute circumstantial evidence, is not necessarily erroneous: *State v. Carnahan*, 17-256.

It is proper for the court to announce to the jury rules sanctioned by reason and experience to enable them rightly to weigh the evidence submitted in the case. Thus the jury may be told that a writing is entitled to more weight than statements founded merely on memory; and that expert testimony is of the lowest order and most unsatisfactory character: *Whitaker v. Parker*, 42-585.

It is not improper for the court to advise the jury as to the character of the evidence introduced on the trial and the relative weight of different kinds of evidence: *Buford v. McGetchie*, 60-298.

Held prejudicial error to erroneously state the testimony of a party in such a way as to make such testimony appear to be in conflict with admissions shown to have been made by him: *State v. Richards*, 72-17.

It is error for the court to instruct the jury as to the effect of the evidence: *State v. Cater*, 69 N. W., 880.

It is not error to refuse specific instructions as to the weight of the evidence of an impeached witness or the opinions of an expert in answer to hypothetical questions when the court has given general instructions that the jury are to give such weight to the evidence or the opinions as they believe them entitled to in view of the other testimony in the case. The court may well presume upon the intelligence of the jury and that they will know without being specially instructed what weight ought to be given to the evidence in such cases. Courts must rely upon jurors possessing at least ordinary intelligence: *Bever v. Spangler*, 93-576.

It is not competent for the court to direct the jury as to the effect of the evidence or the facts established thereby, unless there be no conflict in the evidence: *Leiber v. Chicago, M. & St. P. R. Co.*, 84-97.

Where evidence is before the jury proper to be considered on one point but not proper as to another, the court should direct the jury that it is not to be considered as to the point as to which it is not proper: *State v. Lavin*, 80-555.

It is proper to instruct the jury that in weighing the testimony of witnesses they should consider their demeanor and appearance and their lack of interest in the result of the action, and their interest or disposition to shield the party: *State v. Viers*, 82-397.

A party cannot complain of the giving of an instruction as to the burden of proof, when he failed to except to such instruction when given: *Duncombe v. Powers*, 75-185.

Neither can a party complain of failure to instruct as to the burden of proof when no instruction on that question is asked: *Ibid.*; *Martin v. Davis*, 76-762.

Instructions in a particular case as to burden of proof, *held* proper: *White v. Adams*, 77-295.

c. *As to Effect of Written Instruments, Records, etc.*

The construction of a written instrument is for the court: *Lucas v. Snyder*, 2 G. Gr., 499; *Durham v. Daniels*, 2 G. Gr., 518; *Hendrick v. Kellogg*, 3 G. Gr., 315.

The court may charge the jury as to whether or not a writing introduced in evidence is a contract: *Eyser v. Weissgerber*, 2-463.

The question whether certain letters introduced in evidence constituted a contract is to be determined by the court: *Lea v. Henry*, 56-662.

Where it was claimed that a contract was void as against public policy on account of provisions therein, *held*, that the contract should have been construed by the court, and that it was not proper to leave the question of its validity to the jury: *Merrill v. Packer*, 80-542.

It is the duty of the court to construe the contract of the parties and give its construction to the jury to aid them in reaching a proper verdict: *Richardson v. Coffman*, 87-121.

Effect of written instrument: The legal effect of an instrument is to be determined by the court and not by the jury, and if such instrument is conclusive evidence of a fact, it is error to leave that fact to the jury for determination: *Chandler v. Keiler*, 44-371.

It is the duty of the court to construe a contract, and it is error to leave its construction to the jury: *Kilbourne v. Jennings*, 40-473; *Vaughn v. Smith*, 58-553.

Where the evidence is undisputed it is for the court to determine whether a written instrument has been duly executed or not so as to effect the purposes for which it was intended: *Snyder v. Kurtz*, 61-593.

When a contract is in writing the court should interpret it and not submit to the jury the question of its meaning as dependent upon parol evidence which is not admissible for the purpose of varying it: *Daly v. W. W. Kimball Co.*, 67-132.

Where a question arises as to the construction of a written contract it is for the court and not for the jury to construe it; but where the question in controversy is as to whether the contract has been lawfully performed, and that question depends upon extrinsic evidence, the weight and effect of the evidence is for the jury: *Fairbanks v. Jacobs*, 69-265.

If a paper introduced in evidence amounts to a contract the legal effect of it is to be determined by the court, but if it is relied on merely as an admission, the weight of it is for the jury: *Murphy v. Murphy*, 63 N. W., 697.

Therefore, *held*, that where a memorandum of items of money not specifying from whom they were received but signed by the person receiving them was introduced in evidence, its weight was to be determined by the jury and there was no ground for construction by the court: *Ibid.*

The relations of persons growing out of a

contract are to be determined by the court, and not by the jury, such relations depending upon a written contract which is for the court to construe: *Hughbanks v. Boston Investment Co.*, 92–267.

Where the court is unable to determine the date of an instrument owing to the manner in which the figures are written, it may submit the question to the jury: *Partridge v. Patterson*, 6–514.

Where letters are plain in their language and require no interpretation, it is not necessary for the court to put a construction upon them, but they may be left to the jury as other evidence: *Avery v. Chapman*, 62–144.

Where the objects of an association were to be determined from the constitution and by-laws, *held*, that it was for the court to construe such instruments, and the question as to the purposes of the association should not have been submitted to the jury: *Johnson v. Miller*, 63–529.

Ordinances: The construction of an ordinance of a city should be made by the court and not left to the jury: *Ingram v. Chicago, D. & M. R. Co.*, 38–669.

Record of road: It is the province of the court to determine the sufficiency of the records to sustain a road, and an instruction may properly be given that the records and papers offered in evidence are sufficient proof of the establishment of a public highway: *State v. Prine*, 25–231.

Title to real estate: The court may instruct the jury as to who holds title to real estate as shown by deeds introduced, or when the question of title is one of law upon the testimony: *State v. Delong*, 12–453.

Issues in former judgment: It is the province of the court and not the jury to determine what issues were involved in a case which is pleaded as a former adjudication: *Neumeister v. Dubuque*, 47–465; or where it is claimed that the issues in another case were identical with those in the pending action: *Hempstead v. Des Moines*, 52–303.

d. *Construction; Conflicting Instructions.*

All the instructions given should be read and construed together for the purpose of determining the correctness of any part of the charge: *Burrows v. Lehndorff*, 8–86, 104; *Brown v. Bridges*, 31–138; *State v. Maloy*, 44–104; *Locke v. Sioux City & P. R. Co.*, 46–109, 114; *State v. Stanley*, 48–221; *Albertson v. Keokuk & D. M. R. Co.*, 48–292; *State v. Golden*, 49–48: *Beazan v. Mason City*, 58–233; *Gronan v. Kukkuck*, 59–18; *Carter v. Monticello*, 68–178; *Roberts v. Morrison*, 75–321; *Fish v. Chicago, R. I. & P. R. Co.*, 81–280; *Martin v. Murphy*, 85–669.

Circumstances of the case: Instructions must always be considered with reference to the circumstances of the case in which they are given: *State v. Johnson*, 8–525.

In the light of the evidence: Instructions are to be construed in the light of the evidence in the case: *Amos v. Buck*, 75–651.

An instruction which as a naked proposition would not be correct may, when considered in the light of the evidence to which it is supposed to be applicable, be found to be unobjectionable: *Light v. Chicago, M. & St. P. R. Co.*, 93–83.

Not erroneous as qualified: Even though the instruction be abstractly erroneous or capable of misconception, yet if, when taken with the other instructions and in the connection in which it was given, it could not have been misunderstood, the giving of it will not constitute ground for reversal: *Ferguson v. Beadle*, 30–477.

Even though one clause of an instruction be apparently erroneous, yet if it is so clearly qualified by what follows that from the entire instruction the jury cannot have failed to receive a correct impression, the instruction will not be erroneous: *Dixon v. Stewart*, 33–125.

If, as a whole, the instructions contain a correct exposition of the law, the supreme court will not ordinarily interfere, even though, if separately considered, they might be objectionable. Where, however, they are so framed as to present a conflict or tend to mislead the jury, that fact will constitute error: *Brown v. Bridges*, 31–138.

Although an instruction, if standing alone, might be susceptible of an interpretation which would make it erroneous, yet if, when construed with other instructions, it cannot be reasonably understood in such erroneous sense, the giving of it will not be ground for reversal: *Parker v. Dubuque Southwestern R. Co.*, 34–399; *Harrison v. Snair*, 76–558.

The charge of the court must be taken together, and if, when so considered, it fairly presents the law, and is not liable to misapprehension nor calculated to mislead, the judgment should not be reversed simply because some one of the instructions may lay down the law without sufficient qualification: *Rice v. Des Moines*, 40–638.

If, as a whole, the instructions contain a correct exposition of the law the case will not be reversed, although, separately considered, they may be objectionable: *Green v. Cochran*, 43–544.

It is not proper to select out single sentences or phrases from the instructions as a subject for criticism as distinct from the entire instructions: *State v. Pierce*, 65–85.

Instructions must be regarded as a whole, and a defect in one may be cured by other portions of the charge: *Hamilton v. State Bank*, 22–306.

Though one of the instructions is too broad in its statements, if it is properly limited by a subsequent one the charge will not be considered erroneous: *Ruble v. McDonald*, 18–493.

An instruction cannot be complained of for not containing limitations or qualifications given in another instruction: *Stier v. Oskaloosa*, 41–353.

Courts cannot ordinarily embrace the law of a case in a single instruction, and the instructions must be considered together for the purpose of determining whether error has been committed: *Munger v. Waterloo*, 83–559.

All the rules upon a subject need not be given in one instruction when they are sufficiently presented in others: *Deere v. Wolf*, 77–115.

The fact that one instruction does not state all the rules of law applicable to a

cause of action or a defense does not render it erroneous where other instructions cover the ground: *Chapin v. Chicago, M. & St. P. R. Co.*, 79–582.

An instruction apparently erroneous when taken alone, *held* to be without prejudice in view of the charge as a whole; *Riegelman v. Todd*, 77–696.

All the instructions given should be taken and construed together and if when so construed they announce correct rules of law there will be no prejudice even if one of them taken alone might be said to be incomplete and therefore erroneous: *Orr v. Cedar Rapids & M. C. R. Co.*, 62 N. W., 851.

All the instructions must be considered together and if as a whole they correctly state the law, an objection to one particular paragraph because it is not in itself sufficient will not be considered unless it is in conflict with some of the other paragraphs, or unless it contains some affirmative misstatement of the law: *State v. Urie*, 70 N. W., 603.

Where an instruction presents a correct proposition of law, but one which needs to be explained, modified and corrected by some other proposition, it cannot ordinarily be presumed that the jury is misled if the other proposition is expressed in a different instruction: *Lombard v. Chicago, R. I. & P. R. Co.*, 47–494.

The omission in one instruction of a proper qualification which is given in another may be sufficient to prevent the instructions from being erroneous: *Allen v. Burlington, C. R. & N. R. Co.*, 57–623.

It is not usual, and in ordinary cases not possible, to state in a single instruction all the propositions to which the attention of the jury should be directed, and if the instructions taken together present a correct statement of the law applicable to the case there will be no ground of reversal: *Funston v. Chicago, R. I. & P. R. Co.*, 61–452.

All the essential ideas necessary to the expression of a single rule should be expressed in a single instruction: *Wordon v. Humeston & S. R. Co.*, 72–201.

Conflicting instructions: It is error to give instructions which are conflicting: *Hart v. Chicago, R. I. & P. R. Co.*, 56–166; *Brown v. Bridges*, 31–138.

Where instructions are inharmonious and misleading, and directly in conflict, the judgment will be reversed on appeal: *Vanslyck v. Mills*, 34–375.

Where instructions are contradictory it cannot be said that the error of one is cured by the giving of the other. It cannot be determined in such case which one of the instructions the jury followed, and it cannot be said that no prejudice resulted from the error: *Conway v. Illinois Cent. R. Co.*, 50–465; *Carlin v. Chicago, R. I. & P. R. Co.*, 31–370.

Where the instructions are contradictory and it is impossible to tell which the jury followed, such conflict will constitute error and warrant a reversal: *Hawes v. Burlington, C. R. & N. R. Co.*, 64–315.

Where there are conflicting instructions and the verdict is consistent with those which are correct, and supported by the evidence, it will not be set aside on appeal on account of the inconsistent instructions: *Hillebrant v. Green*, 93–661.

In a particular case, *held*, that instructions given were in conflict and misleading: *Pumphrey v. Walker*, 75–408.

Common understanding: Where an instruction, taken in connection with others given, states the law in such a manner as to enable a person of common understanding to know what is intended, it is sufficient: *Smothers v. Hanks*, 34–286.

A verbal inaccuracy in an instruction will not be ground for reversal if it is not such as to tend to mislead or confuse the jury, and the meaning is plain to the common understanding: *Harger v. Spofford*, 46–11.

It is not necessary, in an instruction, for the court to define words that may be understood by men of ordinary intelligence: *Rogers v. Millard*, 44–466.

Sense intended: Where a word is used in an instruction which might be taken in different senses, and the jury follows the instruction in the sense in which it was intended, a judgment on the verdict will not be reversed because the jury might have followed it in the sense in which it was not intended: *Parkhurst v. Masteller*, 57–474.

Ordinary meaning: It is not proper to seek after some far-fetched and unusual signification of the language of an instruction and base a reversal thereon. The language should be given its usual and ordinary meaning: *State v. Huxford*, 47–16.

The language of an instruction should receive a reasonable construction in view of all the circumstances, and not a strange or forced one: *Davenport v. Cummings*, 15–219.

e. *Duty of Jury to Follow.*

Law of the case: The instructions of the court to the jury constitute the law of the case, and must be followed by the jury whether right or wrong: *Taylor v. Cook*, 14–501; *Baird v. Chicago, R. I. & P. R. Co.*, 55–121; *Stewart v. Smith*, 60–275; *Roberts v. Leon Loan, etc., Co.*, 63–76; *Crane v. Chicago & N. W. R. Co.*, 74–330.

The instructions constitute the law of the case for the jury, and a verdict contrary to the instructions will be set aside or the judgment reversed without regard to whether the instructions are correct or not: *Caffrey v. Groome*, 10–548; *Savery v. Busick*, 11–487; *Jewett v. Smart*, 11–505; *Farley v. Budd*, 14–289; *Porter v. Thomson*, 22–391; *Beal v. Stone*, 22–447; *Morss v. Johnson*, 38–430; *Cobb v. Illinois Cent. R. Co.*, 38–601; *Sullivan v. Otis*, 39–328; *Howell v. Snyder*, 39–610; *Peterson v. Ochs*, 40–530; *Baird v. Chicago, R. I. & P. R. Co.*, 55–121; *Furman v. Chicago, R. I. & P. R. Co.*, 57–42; *Musser v. Maynard*, 59–11; *Griffith v. Parton*, 59–31; *Graham v. McGeoch*, 61–51; *Browne v. Hickie*, 68–330; *Way v. Chicago, R. I. & P. R. Co.*, 73–463.

The instructions to the jury must be regarded as the law of the case, and if the verdict of the jury is without support in the evidence under the instructions a new trial should be granted: *Dutton v. Wabash, St. L. & P. R. Co.*, 66–352; *Griffith v. Burlington, C. R. & N. R. Co.*, 72–645.

A refusal of the lower court to grant a

new trial on that ground will require a reversal: *Nichols v. Chicago, R. I. & P. R. Co.*, 69-154.

Where an instruction states that to entitle a party to recover the jury must find a certain fact, and there is no evidence establishing such fact, the case will be reversed although the instruction itself is erroneous, and the fact referred to is not essential to support the verdict: *Bowman v. Brown*, 52-437.

It is the duty of the jury to regard the law as laid down by the court, even if it is incorrect; and where a verdict has been returned which is contrary to the instructions given, and a new trial has been granted upon that ground, the supreme court will affirm the order without reviewing the instructions: *Boyer v. Riley*, 41-13.

It cannot be presumed in favor of the verdict on appeal that it was rendered upon a theory of the case correct in law, but in conflict with the instructions given: *Mast v. Pearce*, 58-579.

While an instruction given is binding on the jury without regard to its correctness, yet it is not binding upon the court, and the court may, in ruling upon a motion for judgment upon a special finding or upon the pleadings, disregard instructions which would have been binding upon the jury, and which it considers erroneous: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359; *Haldane v. Arcadia*, 70-462.

Where a general verdict is set aside because in conflict with an instruction given, it does not follow that the court should render judgment on a special verdict in accordance with the law in such instruction. If the instruction is incorrect the court may refuse to render judgment in accordance therewith, and award a new trial: *Evans v. St. Paul Harvester Works*, 63-204.

Where the court instructed the jury that they could not award plaintiff more than nominal damages, and the jury returned a verdict for a larger amount, *held*, that the court might reduce the verdict to nominal damages, but that it could not, after having done so, set it aside and grant a new trial on the ground merely that the jury had disregarded the instructions: *Morlan v. Russell*, 71-214.

The jury are bound to follow the instructions given, although such instructions may not be in harmony with the law as declared by the supreme court, and if the verdict is not in harmony with such instructions the judgment thereon will be reversed: *State v. Moore*, 81-578; *Davis v. Chicago, R. I. & P. R. Co.*, 83-744.

An instruction to which no exception has been taken must be regarded as the law of the case, and if under the findings of fact as applicable to such instruction, a general verdict is erroneous, judgment should be rendered on the special verdict: *Krauskoff v. Krauskoff*, 82-535.

An instruction which is not objected to by either party must be deemed the law of the case: *Beck v. German Klinik*, 78-696; *Troxel v. Vinton*, 77-90.

A party who has not appealed cannot, with the view of supporting the judgment on the verdict which is contrary to such instructions, claim that the instructions were erroneous: *Bellows v. Litchfield*, 83-36; *Fisk v. Chicago, M. & St. P. R. Co.*, 83-253.

f. *What Objections May be Raised or Errors Cured by Instructions.*

Defects in pleading: The question as to the sufficiency of a pleading cannot be raised by an instruction: *Nollen v. Wisner*, 11-190; *McIntire v. McIntire*, 48-511; *Bushnell v. Robeson*, 62-540.

An objection to defendant's cross-demand, which should have been raised by demurrer, comes too late when made for the first time, after a trial on the merits, by an instruction, and is deemed waived: *Young v. Broadbent*, 23-539.

That a contract is void because made on Sunday must be specially interposed as a defense. It cannot be raised by instructions to to the jury on the evidence if not pleaded: *Riech v. Bolch*, 68-526.

The objection that the facts stated in the petition will not entitle the plaintiff to any relief whatever, is waived by going to trial on the merits and cannot be first raised in an instruction: *Cruver v. Chicayo, M. & St. P. R. Co.*, 62-460.

It is not proper by instructions to raise objections which might have been raised by motion or demurrer, but which have been waived by failure to make such objection: *Wimer v. Allbaugh*, 78-79.

It is error to instruct the jury so as to withdraw from them the consideration of evidence of an estoppel on the ground that the facts do not, in law, constitute an estoppel, such facts having been properly set out in the answer, and the sufficiency of the answer not having been questioned by demurrer: *Arndt v. Hasford*, 82-499.

Where the petition and proofs thereunder show no legal liability, the court may instruct the jury that plaintiff cannot recover, even though the demurrer to plaintiff's petition has been overruled, and defendant has answered: *Brown v. Cunningham*, 82-512.

On this point see also notes to § 3563.

Objections to evidence cannot be first taken by an instruction to the jury. Such objection should be disregarded: *State v. Pratt*, 20-267; *Starr v. Stevenson*, 91-684.

It is error to exclude from the jury, by an instruction, evidence which has been admitted without objection: *Becker v. Becker*, 45-239.

An objection to evidence, made at the time the evidence is introduced, cannot be raised by objecting to the giving of instructions based on such evidence: *Le Grand Quarry Co. v. Reichard*, 40-161.

Where a defense in a criminal prosecution for obstructing a highway rested upon the insufficiency of the record of the establishment of the highway, *held*, that such objection could be raised by instructions although it might have been interposed to the admission of the record in evidence: *State v. Anderson*, 39-274.

Withdrawing improper evidence from jury: If the court, by an instruction excludes

from the consideration of the jury evidence which has been improperly received, such exclusion of the evidence will not be considered as preventing any prejudice which would otherwise result from the admission thereof. It is not to be presumed that the minds of the jurors would become poisoned or prejudiced by the introduction of evidence which the court afterward directs them not to take into consideration: *State v. Postlewait*, 14–446.

Where improper evidence was admitted against objection, but was afterwards by the court expressly withdrawn from the consideration of the jury, *held*, that there was not sufficient error to require a reversal of the case: *State v. Spurbeck*, 44–667.

Where the court in its charge to the jury plainly directs them to disregard evidence improperly admitted, error in admitting the evidence is thereby cured: *Cook v. Robinson*, 42–474.

Error in admitting evidence as to a matter not in issue by the pleadings is cured by an instruction plainly taking such evidence from the jury: *Bardwell v. Clare*, 47–297.

The prompt exclusion of evidence erroneously admitted will correct the error: *State v Davis*, 56–202; *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

In a particular case, *held*, that the court by taking the question entirely from the jury cured an error in admitting improper evidence on such question: *Pingery v. Cherokee & D. R. Co.*, 78–438.

By an instruction withdrawing or excluding from the jury the consideration of evidence which has been improperly admitted, the error in such admission may be cured: *Davis v. Danforth*, 65–601; *Redfield v. Redfield*, 75–435; *Shepard v. Chicago, R. I. & P. R. Co.*, 77–54; *Pennington v. Pacific Mut. etc., Co.*, 85–468; *Gall v. Dickey*, 91–126; *Chapman v. James*, 64 N. W., 795; *State v. Helm*, 66 N. W., 751.

Error in refusing, on motion, to strike out improper evidence cannot be cured by an instruction to the jury which correctly states the law of the case: *Wicks v. De Witt*, 54–130.

Error in the admission of evidence may be so serious that it cannot be cured by instructions to the jury as to the application of the evidence admitted: *Hall v. Chicago, R. I. & P. R. Co.*, 84–311.

An admonition to the jury to disregard evidence improperly admitted will not always be sufficient to cure the error committed in receiving the evidence: *Jones v. United States Mut. Acc. Ass'n*, 92–652.

Striking evidence out after the jury has heard it does not always remedy a mistake in erroneously admitting it and trial courts cannot be too cautious in avoiding the necessity of so doing, especially when the law excluding such evidence is well settled: *Robinson v. Cedar Rapids*, 69 N. W., 1064.

Instructions of the court to the jury to disregard matters which it has improperly allowed to be read to the jury, *held* not sufficient in a particular case to cure the error: *Martin v. Orndorff*, 22–504.

Where evidence which is incompetent in any event is introduced, even without objection, it may properly be excluded on motion or the jury instructed to disregard it entirely; but where secondary evidence which may be made competent is introduced without objection, it ought not to be withdrawn by an instruction: *Davis v. Strohm*, 17–421.

Misconduct of counsel may be cured by direction of the court not to consider such matters, so as to render the improper action not prejudicial: *Egan v. Murray*, 80–180; *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84–27.

SEC. **3706. Modification.** If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as "changed thus," which words shall themselves indicate that the same was refused as demanded. [C.'73, § 2785; R., § 3053.]

Modifications of instructions asked should not be by interlineation or erasure: *Phillips v. Starr*, 26–349.

In giving instructions the court is not limited to the language adopted by the party requesting them, but may modify them to meet its views; but if, as so modified, they do not express the law they are subject to objection: *State v. Gibbons*, 10–117; *Abbott v. Striblen*, 6–191.

It will not constitute error to add to an instruction a modification which does not change its meaning: *Moore v. Chicago, B. & Q. R. Co.*, 65–505.

Held not error to modify an instruction so as to make it as broad as the issues between the parties: *Large v. Moore*, 17–258.

Modifications will not be erroneous which are merely words of explanation expressing that which must have been understood had they not been added: *Paukett v. Livermore*, 5–277.

Where an instruction asked by a party is modified by the court with matter not pertinent thereto, or erroneous if pertinent, it will constitute error: *State v. Green*, 20–424.

A modification of an instruction by cutting out a portion of it, *held* not to constitute error where the change was a proper one: *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

SEC. **3707. Record—exceptions.** All instructions requested or given shall be filed by the clerk and be a part of the record, and if the giving or refusal of an instruction is excepted to, it may be noted by the shorthand reporter, and no reason for such exception need be given. [C.'73, § 2787; R., § 3055.]

How made of record: By this section instructions and the action of the court thereon in giving or refusing them constitute a part of the record, and need not be set out in the bill of exceptions in order to bring them before the supreme court: *Roberts v. Leon Loan, etc., Co.*, 63-76.

The instructions when filed become a part of the record and may be certified by the clerk: *Parker v. Middleton*, 65-200.

Where the giving and refusal of instructions and exceptions to such rulings are noted on the margins of the instructions, the supreme court can review such rulings, although they are not preserved by a bill of exceptions: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520.

While it is not essential that instructions should be preserved by a bill of exceptions when they have been filed and made part of the record, yet it is essential that they be certified by the clerk of the trial court to the supreme court; and if they cannot be made a part of such transcript, error in the giving of them cannot be considered: *Bonney v. Cocke*, 61-303.

Instructions, and the exceptions noted upon the margins thereof, are a part of the record, without a bill of exceptions: *Allison v. Jack*, 76-205.

Exceptions necessary: The action of the trial court in giving instructions cannot be reviewed on appeal unless exceptions thereto have been duly taken in the trial court: *Kelleher v. Keokuk*, 60-473; *Todd v. Branner*, 30-439; *Norton v. Swearengen*, 19-566; *Cadwallader v. Blair*, 18-420; *State v. Moran*, 7-236; *Kirk v. Litterst*, 71-71; *Lewis v. Lewis*, 75-669; *Norris v. Kipp*, 74-444; *Bush v. Nichols*, 77-171.

So *held*, also, as to refusal to give instructions: *Morse v. Close*, 11-93.

The record must show that exception to the giving of instructions was duly taken: *May v. Wilson*, 21-79; *Wilcox v. McCune*, 21-294.

Instructions cannot be reviewed which have not been excepted to at the time, or in a motion for new trial with the ground of objection stated: *Thompson v. Anderson*, 63 N.W., 355.

As to time for taking exceptions, and statement of grounds, see § 3709 and notes.

Noting exceptions: Where the fact of giving or refusing to give instructions and exceptions thereto is entered in the margin in the handwriting of the judge, and the giving of such instructions is afterwards made a ground for sustaining a motion for new trial, it will be presumed that such entry was made at the time the instructions were passed upon: *Kellow v. Central Iowa R. Co.*, 68-470.

If the ruling of the court upon an instruction with a proper exception thereto is noted on the margin of the instruction it is sufficient, and a formal bill of exceptions is not necessary, although proper: *Cadwallader v. Blair*, 18-420; *Phillips v. Starr*, 26-349.

Where an instruction was given with others, and the fact of giving and the exception thereto were noted on the margin thereof just as on the margin of the others, but the judge failed to sign such entry as he did in case of the other instructions, *held*, that it sufficiently appeared that the exception was taken, such exception being duly certified with others in the bill of exceptions: *State v. Lavin*, 80-555.

A uniform practice in the court to consider that exceptions are taken to the instruction without having them shown of record will not obviate the necessity of having such exceptions appear of record on appeal, nor authorize the consideration of errors in the instructions: *Bowman v. Western Fur Mfg. Co.*, 64 N. W., 775.

Exception en masse: A general exception *en masse* to all the instructions given is sufficient if no portion of the charge is correct: *Eddy v. Howard*, 23-175.

But if any portion of the instructions given is correct such an exception *en masse* will not be regarded. (The rule being different under the present statutory provision from that announced in *Eyser v. Weissgerber*, 2-463, decided under a former statute.) *Davenport Gas, etc., Co. v. Davenport*, 13-229; *Loomis v. Simpson*, 13-532; *Jack v. Naber*, 15-450; *Armstrong v. Pierson*, 15-476; *Cousins v. Westcott*, 15-253; *Lyons v. Thompson*, 16-62; *Shephard v. Brenton*, 20-41; *Spray v. Scott*, 20-473; *Verholf v. Van Houwenlenoen*, 21-429; *Carpenter v. Parker*, 23-450; *Redman v. Malvin*, 23-296; *McCaleb v. Smith*, 24-591; *Mershon v. National Ins. Co.*, 34-87; *Cook v. Sioux City & P. R. Co.*, 37-426; *Bartle v. Des Moines*, 38-414; *Moore v. Gilbert*, 46-508; *Ruter v. Foy*, 46-132; *Pitman v. Molsberry*, 49-339; *Reeves v. Harrington*, 85-741; *Rowen v. Sommers*, 66 N. W., 897; *Hollenbeck v. Garst*, 65 N. W., 417; *Ludwig v. Blackshere*, 71 N. W., 356.

And it was held that an instruction to the charge in the words "to the giving of each of which instructions the defendant excepted" was not sufficient: *Davenport Gas, etc., Co., v. Davenport*, 13-229.

Where but one instruction was given, only a portion of which was considered objectionable, *held*, that an exception to the entire instruction was not sufficiently specific: *Brown v. Scott County*, 36-140.

Designation by number sufficient: An exception to instructions which specifies them by number is sufficiently definite as to the part objected to: *Miller v. Gardner*, 49-234.

An exception to all the instructions between certain numbers, "and to each of them," is sufficiently specific: *Mann v. Sioux City & P. R. Co.*, 46-637.

An exception to the refusal to give instructions, as follows, "to which said refusal as to each of said instructions separately the defendant at the time excepted," *held* sufficient, even if exception to refusal to give was required to be specific, which it is not: *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126.

An exception to the giving of each and every instruction given, taken at the time the instructions are given, is sufficient. A change in the statute since the decision in *Davenport Gas, etc., Co., v. Davenport*, 13-229, renders the rule of that case to the contrary no longer applicable: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-315; *Eikenberry v. Edwards*, 67-14.

Single proposition: If there is but a

single proposition stated in the charge an exception thereto is sufficiently specific: *Boyce v. Wabash R. Co.*, 63–70.

A general exception to the refusal to give several instructions is sufficient: *Davenport Gas, etc., Co. v. Davenport*, 13–229; *Harvey v. Tama County*, 53–228; *Williamson v. Chicago, R. I. & P. R. Co.*, 53–126, 143.

Particular exception construed: Where the judge refused certain instructions which he had before announced that he would give, to which exception was taken, and gave in their place another instruction in which a specific question was submitted to the jury, *held*, that an exception to this instruction sufficiently called in question the correctness of the action of the court, not only as to the time and manner of giving the instruction, but also as to the matter thereof: *Eddy v. Howard*, 23–175.

What necessary to enable court to review instructions: So much of the evidence should be set out in the record as relates to the instructions that their applicability may appear, but it is not absolutely essential that all the evidence should be set out. Instructions which are erroneous and misleading in any possible view will be reviewed, although the record does not present all the evidence: *Stevenson v. Greenlee*, 15–96; *Murphy v. Johnson*, 45–57.

Evidence to support instructions: As an instruction may not state all of an abstract proposition of law, and yet be correct as applicable to the facts of the case, the supreme court cannot pass upon the correctness of instructions without some statement of the facts which the evidence tended to establish being before it: *Mudge v. Agnew*, 56–297.

The supreme court cannot pass upon the correctness of the action of the lower court in giving or refusing instructions unless the evidence upon which such instructions are based appears of record and is appropriately brought before such court: *Potter v. Wooster*, 10–334; *Wilcox v. McCune*, 21–294.

Where instructions are founded on evidence they will not be reviewed unless all the evidence is before the court: *Reid v. Mason*, 14–541.

As instructions, abstractly correct, may be properly refused if not applicable under the evidence, a party complaining of the refusal to give an instruction must bring before the court on appeal the evidence showing such applicability: *Cutler v. Fanning*, 2–580; *Gover v. Dill*, 3–337; *Hanan v. Hale*, 7–153; *Frost v. Inman*, 10–587; *Wisner v. Brady*, 11–248: *Paden v. Griffith*, 12–272; *Wilcox v. McCune*, 21–294; *Chase v. Scott*, 33–309.

The refusal of instructions which might have been proper under a certain state of the proof will nevertheless not be held erroneous on appeal when the evidence is not all before the court: *Shephard v. Brenton*, 20–41.

The court cannot, upon appeal, pass upon the pertinency of instructions given, unless all the evidence is before it: *Nollen v. Wisner*, 11–190: *Preston v. Walker*, 26–205.

The presumption is that instructions were correctly given, and that there was evidence introduced on the trial to authorize them, unless the absence of such evidence is made to appear: *Bridgman v. Steamboat Emily*, 18–509; *State v. Rice*, 56–431; *Roby v. Appanoose County*, 63–113.

The court cannot say that an erroneous instruction was without prejudice, unless such fact affirmatively appears: *Carlin v. Chicago, R. I. & P. R. Co.*, 31–370; *Potter v. Chicago, R. I. & P. R. Co.*, 46–399; *Roby v. Appanoose County*, 63–113.

In order to secure the review of instructions properly excepted to, it is only necessary that the record present so much of the evidence as will show that facts to which instructions are applicable were before the court. And what is usually necessary is a statement in the bill of exceptions that there was evidence tending to prove such facts: *Kelleher v. Keokuk*, 60–473.

The correctness of instructions clearly relating to a matter of law involved in the case as shown by the pleadings independent of the evidence may be considered, although the evidence does not properly appear in the record: *Seevers v. Gabel*, 62 N. W., 669.

When all the instructions must appear: The supreme court cannot reverse a criminal case for failure of the court to properly instruct the jury, when it has not before it all the instructions and evidence: *State v. Hamilton*, 32–572.

To warrant a reversal on account of refusal of the lower court to give instructions asked, it must appear that those given are all before the appellate court: *State v. Johnson*, 19–230; *Bower v. Stewart*, 30–579; *Chase v. Scott*, 33–309; *State v. Nichols*, 38–110; *Moody v. St. Paul & S. C. R. Co.*, 41–284; *State v. Stanley*, 48–221; *State v. Williamson*, 68–351; *Huff v. Aultman*, 69–71.

If an instruction given is so far erroneous that any modification thereof properly presenting the law would have been in conflict with it, the error will be ground for reversal although all the instructions are not before the court; but it will be otherwise if there might have been, in another instruction, modifications or limitations such as, with the instruction complained of, would have correctly presented the law: *Bland v. Hixenbaugh*, 39–532.

Verdict against instructions: The granting of a new trial on the ground that the verdict is against the instructions will not be reviewed unless the instructions appear in the record: *Caffrey v. Groome*, 10–548: *Briggs v. Hartman*, 10–63; *Beal v. Stone*, 22–447: *Howell v. Snyder*, 39–610.

Presumptions: In passing upon the correctness of the action of the trial court in refusing instructions as not applicable to the facts of the case, the presumption will be in favor of the correctness of the ruling of the court in the absence of evidence showing it to be erroneous: *Stier v. Oskaloosa*, 41–353.

A case will not be reversed for refusal to give instructions asked where it does not appear what instructions were actually given: *Moody v. St. Paul & S. C. R. Co.*, 41–284.

Where it appears that instructions were given which were not before the court, which might have modified or changed those given which are insisted upon as being erroneous,

the court cannot presume that there were not other instructions correcting any error in the one relied upon as being erroneous: *State v. Stanley*, 48–221.

Where instructions are objected to as not applicable to the evidence, and the evidence is not all before the court on appeal, it will be presumed that there was evidence to which the instructions were applicable, rather than the contrary: *Blackburn v. Powers*, 40–681: *Gantz v. Clark*, 31–254.

Where instructions would be correct under a possible state of facts, and the evidence is not all before the court, it will be presumed that the evidence was such as to justify the giving of the instructions: *Rice v. Des Moines*, 40–638; *State v. Hemrick*, 62–414: *Wallace v. Robb*, 37–192; *Warbasse v. Card*, 74–306.

SEC. **3708. Numbered—given or refused.** The instructions given, whether by request or otherwise, shall be in consecutively numbered paragraphs, shall be read to the jury without oral comment or explanation, and be announced as given, and those refused shall be so marked, and the court, without reading them, shall announce such refusal. Those given at the request of either party shall be marked given at the request of the party asking them, naming him as plaintiff or defendant, as the case may be. [C.'73, §§ 2786–8; R., §§ 3054, 3057–8, 3060.]

Marking as "given" or as "refused:" Where several instructions were asked, written on sheets of paper fastened at the top, and on the margin of the first sheet the court wrote, "instructions one to seven, all refused" *held*, that this was a substantial compliance with the statute requiring the court to write "given" or "refused" in the margin of each instruction, and was a refusal such that exception might be taken thereto: *Harvey v. Tama County*, 53–228.

Unless it is stated on the margin or elsewhere that an instruction complained of was "given," it will not be regarded as properly before the court on appeal. The recital in the clerk's transcript that an instruction was given is not sufficient: *Cadwallader v. Blair*, 18–420.

As to making instructions part of the record, and preserving exceptions thereto, see § 3707.

Failure to mark: Failure to mark an instruction as given, appearing to be due to oversight and not objected to when the instruction was given, nor made the ground of a motion for a new trial, cannot be objected to for the first time on appeal: *Fish v. Chicago, R. I. & P. R. Co.*, 81–280.

Omission of the court to write the word "given" upon the margin of the instructions given to the jury cannot be taken advantage of on appeal, when no exception was taken to the omission, nor objection thereto made in the court below: *Knight v. Chicago, R. I. & P. R. Co.*, 81–310.

Reading as asked: While it is not error to read to the jury instructions as asked by the respective parties, announcing them as thus asked, yet it is better to incorporate all the instructions into one charge: *Stevenson v. Chicago & N. W. R. Co.*, 61 N. W., 964. And see notes to § 3705 (III, a.).

Giving instructions to jury without reading: A party who, without objection, permits instructions to be handed to the jury as given, without being read, cannot after verdict object to the action of the court in so doing: *Langworthy v. Meyers*, 4–18; *Talty v. Lusk*, 4–469.

Numbering paragraphs: Whether a failure to number in consecutive paragraphs is a sufficient ground for a new trial, *quære: Goin v. Hess*, 71 N. W., 218.

SEC. **3709. Exceptions after verdict.** Either party may take and file exceptions to the charge or instructions given, or to the refusal to give any instructions asked, within three days after the verdict, which shall be a part of the record, and may include the same in a motion for a new trial, but in either case the exceptions shall specify the part of the charge or instruction objected to and the ground of the objection. [C.'73, § 2789; R., § 3059.]

Time for excepting: Where exceptions are not taken at the time they can only be preserved in writing filed within three days setting out the grounds of exception: *Dean v. Zenor*, 65 N.W., 410.

Under this section exceptions to the giving or refusal of instructions may be taken within three days after verdict, but it is not sufficient to take them after that time, even in a bill of exceptions allowed and signed: *Bailey v. Anderson*, 61–749.

The ruling of the court in giving or refusing instructions cannot be reviewed when such ruling was not excepted to at the time or within three days after verdict: *Maxon v. Chicago, M. & St. P. R. Co.*, 67–226; *Robinson v. Linn County*, 71–224.

Exceptions taken in a motion for new trial filed within the three days after verdict allowed by statute, the grounds of objection being set out, are sufficient: *Deere v. Needles*, 65–101; *Parker v. Middleton*, 65–200.

But if the motion is not filed within the three days the exceptions cannot be regarded: *Harrison v. Charlton*, 42–573: *Kirk v. Woodbury County*, 55–190; *Ewaldt v. Farlow*, 62–212; *Rowen v. Sommers*, 66 N.W., 897.

Where leave is granted by agreement to file a motion for a new trial after three days such agreement does not authorize the taking of exceptions to instructions in such motion filed after three days: *Bush v. Nichols*, 77–171; *Hollenbeck v. Garst*, 65 N. W., 417; *Leach v. Hill*, 66 N.W., 69.

If objections to instructions are not taken at the time, but are taken in a motion for a new trial, the ground of objection must be stated: *Parsons v. Parsons*, 66-754.

Exceptions to instructions preserved during the course of the trial may be considered on appeal, although the motion for a new trial, in which they are also incorporated, is stricken from the file because filed too late: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

A claim that it is the practice in a trial court to regard all instructions as excepted to will be of no avail in the supreme court if the fact of the existence of such practice does not appear in the record: *Steyer v. Curran*, 48-580.

Statement of grounds: The grounds of exception to the giving or refusal of instructions need not be stated if exceptions are taken at the time of giving or refusal: *Van Pelt v. Davenport*, 42-308, 314; *Johnson v. Chicago, R. I. & P. R. Co.*, 51-25; *Williams v. Barrett*, 52-637; *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126; *Boyce v. Wabash R. Co.*, 63-70.

If exceptions are not taken when the instructions are given such exceptions must specify the ground of objection: *Hale v. Gibbs*, 43-380, 384.

An objection taken to an instruction on motion for a new trial, without grounds of objection being stated, will not be considered: *Lyons v. Van Gorder*, 77-600; *Stanhope v. Swafford*, 80-45.

Exceptions taken after verdict in a motion for new trial must specify the part of the charge excepted to and state the ground of the objection: *Ludwig v. Blackshere*, 71 N. W., 356.

In such case the ground of objection that "they are not applicable" is not sufficiently specific where it is urged that the instructions are essentially erroneous: *Miller v. Gardner*, 49-234.

An objection that an instruction is contradictory, erroneous and misleading, without more, is too general: *Patterson v. Chicago, M. & St. P. R. Co.*, 70-593.

So where the exception was first taken in the motion for a new trial, no ground being alleged, *held*, that error in the instructions could not be considered on appeal: *Stevens v. Taylor*, 58-664.

An exception stating that "the court misdirected the jury in a matter of law," *held* too general where the exception was not taken at the time the instruction was given: *Benson v. Lundy*, 52-265.

An exception in a motion for a new trial that "the court erred in giving first, second, third, fourth and fifth instructions to the jury" is not a sufficient exception to instructions when not taken at the time: *Byford v. Girton*, 90-661.

Where grounds are stated no others can be considered on appeal: *Price v. Burlington, C. R. & M. R. Co*, 42-16; *Davenport v. Cummings*, 15-219; *Patterson v. Chicago, M. & St. P. R. Co.*, 70-593.

SEC. **3710. View of premises by jury.** When in the opinion of the court it is proper for the jury to have a view of the real property which is the subject of controversy, or the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose; while the jury are thus absent, no one, save such person so selected, shall speak to them on any subject connected with the trial. [C. '73, § 2790; R., § 3061; C. '51, § 1779.]

The purpose of viewing the premises is to enable the jury to better understand the testimony of witnesses respecting the same, and more intelligently apply such testimony to the issues before them, and not to make them silent witnesses in the case. Therefore, *held*, that it was error to instruct them to "determine from all the evidence in the case, and all the facts and circumstances disclosed on the trial, *including your personal examination*, whether," etc.: *Close v. Samm*, 27-503. And see *Harrison v. Iowa Midland R. Co.*, 36-323.

The object of this section is to enable the jury the better to apply the evidence given on the trial and not to base their verdict in any degree upon the examination of the premises or to be a silent witness as to facts in relation to which neither party has a right to cross-examination: *Moore v. Chicago, St. P. & K. C. R. Co.*, 93-484.

And *held*, that it was entirely improper in an action for personal injuries to send the jury with counsel and the court reporter to the scene of the accident to witness experiments for the purpose of determining whether from certain positions plaintiff could have seen the danger and thus in the exercise of ordinary care, have avoided the injury: *Ibid.*

In the absence of evidence to the contrary it will be presumed that there has been no change in the premises between the time to which the controversy relates and the time of trial and it will not be error to permit the jury to take a view of the premises: *Banning v. Chicago, R. I. & P. R. Co.*, 89-74.

Where the value of property is in issue and the jury have inspected the premises, it is not error to instruct them that in determining the market value of the property they are to weigh the evidence in the light of what they have seen: *Thompson v. Keokuk*, 61-187.

There is no impropriety in allowing the jury to go to view personal property, the identity of which is a question in controversy, where it is impracticable to have the property brought before them: *Nutter v. Ricketts*, 6-92.

The exercise of the authority to direct the jury to view the premises rests in the judgment and discretion of the court, and the refusal to exercise it will not constitute reversible error where it is not made to appear

that the decision was not correct or that the discretion of the court in the matter was abused: *King v. Iowa Midland R. Co.*, 34–458; *Clayton v. Chicago, I. & D. R. Co.*, 67–238.

Under this section, *held*, that the court might in its discretion direct the jury to view a gate, through which the testimony showed stock had got upon the track of a railroad company, it being claimed that such gate was insufficient: *Morrison v. Burlington, C. R. & N. R. Co.*, 84–663.

But *held*, that an instruction permitting the jury to give weight to their own observations, instead of using them for the more intelligent application of the testimony, was erroneous and prejudicial. It is only when the testimony cannot otherwise be so well understood and applied that a view is permitted, and, when it is permitted, the jury should be instructed as to the purpose and cautioned not to take their own observations as evidence: *Ibid.*

While it may not always be necessary to instruct the jury at the conclusion of the case with reference to the effect to be given to the view of the premises provided they have been correctly instructed before proceeding to make such view as to the purpose and effect thereof, yet where during such view of the scene of a railroad accident the officers of the company had caused engines and cars to be operated on the track for the purpose of illustrating how the accident occurred, *held*, that as such proceeding was highly improper it was error on the part of the judge to fail to include in his final instructions a full statement in regard to the object and purpose of the view: *Cox v. Chicago, & N. W. R. Co.*, 63 N. W., 450.

The action of individual jurors during an intermission in viewing premises to which evidence relates will not constitute such misconduct as to require a new trial: *Bowman v. Western Fur Mfg. Co.*, 64 N. W., 775.

For similar provisions in criminal cases, see § 5380.

SEC. **3711. Rules as to jury—deliberation—kept together.** When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they shall be kept together, under charge of an officer until they agree upon a verdict or are discharged by the court. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon. [C. '73, § 2791; R., § 3062; C. '51, § 1781.]

Conversation by the officer with the jury except as herein permitted constitutes a sufficient ground for setting aside the verdict: *Cole v. Swan*, 4 G. Gr., 32.

It is misconduct on the part of the jury, sufficient to warrant a new trial, to have the reporter come into the jury room and read from his notes portions of the testimony as requested by them: *Fleming v. Shenandoah*, 67–505. And see notes to § 3755.

The rule that the jury should not separate after the cause is submitted to them is doubtless applicable in criminal as well as in civil cases, though in the section with reference to the conduct of jurors in criminal cases it is not expressly so provided: *State v. Wright*, 68 N. W., 440.

Where the jury in response to a direction of the court, made without the consent of the parties, brought in a sealed verdict and separated, *held*, that there were not sufficient grounds for a new trial, no prejudice being made to appear: *Walker v. Dailey*, 87–375.

As to the separation of the jury where a sealed verdict is returned, see § 3724 and notes.

SEC. **3712. Separation—advice by court.** After the jury is sworn they shall not be permitted to separate during the trial, unless so ordered by the court, and, when so ordered, they must be advised by the court that it is the duty of each one of them not to converse with any other of them, or with any person, nor to suffer himself to be addressed by any person, on any subject of the trial, and that, during the same, it is the duty of each one of them to avoid, as far as possible, forming any opinion thereon until the cause is finally submitted to them. [C. '73, § 2792; R., § 3063; C. '51, § 1780.]

The action of two jurors in looking at premises described in the evidence during an intermission in the trial will not constitute misconduct requiring a reversal: *Bowman v. Western Fur Mfg. Co.*, 64 N. W., 775.

And further on this point, see notes to § 3755.

SEC. **3713. Discharge of juror.** If after impaneling a jury and before a verdict a juror becomes sick, so as to be unable to perform his duty, he may be discharged. In such case the trial shall proceed with the remaining jurors if the parties consent, which consent shall be entered by the court or shorthand reporter and become a part of the record; otherwise the jury shall be discharged. [C. '73, § 2793; R., § 3064; C. '51, § 1782.]

The legislature has no authority, in providing for a jury trial under the constitution, to authorize such trial by a less number than twelve jurors. Therefore § 2793 of Code of '73 providing that the trial might continue with a jury of not less than ten was unconstitutional: *Eshelman v. Chicago, R. I. & P. R. Co.*, 67-296; *Kelsh v. Dyersville*, 68-137.

The fact that the party objecting to the cause being tried by a less number than twelve proceeds with the trial does not constitute a waiver of his objection: *Eshelman v. Chicago, R. I. & P. R. Co.*, 67-296.

Where the jury was discharged on account of one juror being necessarily excused, and a new jury was impaneled consisting of the same jurors except the substitution of a talesman for the juror excused, *held*, that no error appeared, the case not having proceeded with the first jury further than a statement of the case by counsel: *State v. Laughlin*, 73-351.

SEC. **3714. Discharge of jury.** The jury may be discharged by the court on account of any accident or calamity requiring it, or by the consent of both parties, or when on an amendment a continuance is ordered, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing. [C. '73, § 2794; R., § 3665.]

Where a jury was impaneled and sworn to try a cause, and the court thereupon adjourned until the following day, when, by reason of the filing of an amended pleading, the case was postponed for a day and another cause tried in which some of the same jurors served, *held*, that upon the subsequent trial of the first cause the first jury should have been dismissed and a new jury formed: *Lyons v. Hamilton*, 69-47.

Where a jury is dismissed and an order of continuance is made, not a mere adjournment of the court, but a continuance of the cause to another day in the term, the jury should be regarded as discharged: *Ibid.*

It is not error for the court to call in the jury and on ascertaining that they have been unable to agree to send them out again with the statement that the case is submitted to them for decision and not for disagreement, the language not being such as to indicate an intention of coercing the jury into an agreement: *German Savings Bank v. Citizens Nat. Bank*, 70 N. W., 769.

SEC. **3715. Cause retried.** In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may then direct. [C. '73, § 2795; R., § 3066.]

SEC. **3716. Adjournment.** The court may, at any time after having entered upon the trial of any cause, and in furtherance of justice, order an adjournment for such time within the term, and subject to such terms and conditions as to costs and otherwise, as it may think just. [C. '73, § 2796; R., § 3067.]

SEC. **3717. What jury may take with them.** Upon retiring for deliberation, the jury may take with them all books of accounts and all papers which have been received as evidence in the cause, except depositions, which shall not be taken unless all the testimony is in writing and none of the same has been ordered to be struck out. [C. '73, § 2797; R., § 3068; C. '51, § 1783.]

The jury has nothing to do with papers not introduced as evidence, such, for instance, as a motion for a continuance: *McClintock v. Crick*, 4-453.

It it not error to allow the jury to take the pleadings with them to the jury room: *McGinty v. Keokuk*, 66-725; *Dorr v. Simerson*, 73-89.

The jury may properly take with them the pleadings, and *held*, that it was not error for them also to take the original instruments set out in the pleadings although such instruments had not been introduced in evidence: *State Bank v. Brewer*, 69 N. W., 1011.

The jury may take with them the instructions of the court: *Head v. Longworthy*, 15-235.

They may take with them, also, papers admitted in evidence: *Peterson v. Haugen*, 34-395.

A party cannot be heard to complain that the jury took a deposition with them to their room unless he objected at the proper time and it appears that prejudice resulted: *Shields v. Guffey*, 9-322; *Davenport v. Cummings*, 15-219.

Where the jury took with them a deposition attached to the pleadings, with the presumed consent of appellant, and no prejudice was shown, *held*, that there was not sufficient error to warrant a reversal: *State v. Delong*, 12-453.

Where a deposition which was material to the issue, but which had not been offered in evidence, was taken by the jury to their room without the knowledge or consent of the party, *held*, that it was error in the court below to refuse a new trial: *Coffin v. Gephart*, 18-256.

So *held*, also, where the jury took with them and considered a deposition not in evidence, and favorable to the successful party: *Stewart v. Burlington & M. R. R. Co.*, 11-62.

But such misconduct would not vitiate the verdict if the deposition was favorable to the party complaining, or could not have

prejudiced him: *Ibid.; Abel v. Kennedy*, 3 G. Gr., 47.

The statute does not prohibit the jury from taking with the many evidence, except depositions, which is in proper form to be considered by them; and *held*, that it was not erroneous to allow them to take with them a photographic view which had been introduced in evidence: *Barker v. Perry*, 67–146.

Where a deposition has been introduced in evidence embracing documents as exhibits, the court should not, except by consent of parties, allow the exhibits to be detached from the deposition and taken by the jury: *Oskaloosa College v. Western Union Fuel Co.*, 90–308.

Objection that the jury did not take with them documents introduced in evidence should be made at the time and cannot be urged on motion for a new trial: *German Savings Bank v. Citizens Nat. Bank*, 70 N.W., 769.

The right of a party who has introduced books of account to have them taken by the jury to the jury room may be waived by his action: *Davenport v. Cummings*, 15–219.

The fact that the jury improperly takes with them an account book which has been introduced in evidence will not vitiate their verdict if it does not appear that the party objected thereto, or had no opportunity to object, or that his rights were prejudiced: *Turner v. Kelley*, 10–573.

The jury must try the case in the light of the evidence and not upon their private knowledge or prejudice: *Pumphrey v. Walker*, 71–383.

The jury cannot be permitted by adding evidence to make the case other or different than that which was taken with them to their room: *Kruidenier v. Shields*, 70–428; *Griffin v. Harriman*, 74–436.

The evidence of an intelligent witness must be accepted, unless he is contradicted or impeached by other evidence in the case, or his statements are improper in view of other testimony or impossible in the nature of things: *Ibid.*

Judgment for a greater sum than that shown to be due by the evidence will be reversed: *Callender v. Drabelle*, 73–317.

SEC. **3718. Court open for verdict.** When the jury is absent, the court may adjourn from time to time in respect to other business, but shall be regarded as open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. [C.'73, § 2798; R., § 3609; C.'51, § 1784.]

SEC. **3719. Further testimony to correct mistake.** At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake, but terms may be imposed upon the party obtaining the privilege. [C.'73, § 2799; R., § 3070; C.'51, § 1778.]

It is within the discretion of the court to allow a witness to be recalled in order to have him testify on a matter about which there is a misunderstanding between the attorney and the court touching his testimony as given: *State v. Burke*, 88–661.

The admission of evidence after the case is closed is in the discretion of the court and the rule will not be interfered with unless it clearly appears that the lower court has abused its discretion: *Thatcher v. Stickney*, 88–454; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88–364; *Hartley State Bank v. McCorkell*, 91–660.

It is not error to refuse a naked request to offer evidence after the case is closed where no reason is assigned for not offering it at the proper time: *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88–364.

It is within the power of a trial court to set aside the submission of a case and to hear further evidence, and such action will not be deemed erroneous where no abuse of legal discretion is shown: *Sawin v. Union Building & Savings Ass'n*, 64 N.W., 401.

It is in the discretion of the court to allow a party to introduce testimony as to a certain point claimed to have been omitted by oversight, although the case had been partially argued to the jury: *McManus v. Finan*, 4–283.

So *held*, also, where a party was allowed to introduce evidence after the conclusion of the argument of one of the counsel for the opposite party: *McCormick v. Holbrook*, 22–487.

But *held*, in a particular case, that the refusal of the court to allow defendant to introduce additional evidence after the opening argument in the case had been made was not sufficient ground for reversal, it not appearing that the court's discretion had been abused: *Kemerer v. Bournes*, 53–172.

This provision is applicable to a case where a witness is by accidental delay prevented from reaching the place of trial in time for the introduction of his testimony at the proper time: *Smith v. State Ins. Co.*, 58–487.

Even if the power of the court under this provision is discretionary, the abuse of such discretion in refusing to admit testimony in a proper case will be ground for reversal: *Ibid.*

In a case tried in equity upon depositions, *held*, that the party should be allowed, after the announcement of the decision of the court and before entry of judgment, to introduce oral evidence to correct a misstatement in the witness' deposition: *Eggspieller v. Nockles*, 58–649.

It is not an abuse of discretion to refuse to reopen a case after it has been submitted to give a party opportunity to introduce newly discovered evidence which might, in the exercise of a reasonable degree of diligence, have been discovered before the trial: *Baker v. Jamison*, 73–698.

Under particular circumstances, *held*, that it was improper to refuse a party leave to recall a witness after his case was closed for the purpose of establishing material facts: *Cowan v. Musgrave*, 73–384.

The privilege of recalling a witness to reexamine him upon the same subject-matter, for the purpose of explaining an apparent contradiction, is a matter within the discretion of the court: *State v. Rorabacher*, 19–154.

Although this provision relates only to civil cases, yet in criminal cases also, under some circumstances and for some purposes, a witness may be recalled after the evidence is closed, and in the absence of a showing to the contrary it will be presumed that he was properly recalled: *State v. Shean*, 32–88.

Where the court permitted plaintiff, against defendant's objection, to introduce evidence after plaintiff had rested his case and before the argument to the jury had been commenced, *held*, that it would be presumed that the evidence had been omitted by oversight or inadvertence: *Randolph v. Bloomfield*, 77–50.

Where the court refused to admit a deposition after the case was closed on both sides, *held* that as it did not appear that the deposition was otherwise admissible, the case would not be reversed: *Gorman v. Minneapolis & St. L. R. Co.*, 78–509.

Where both parties had rested, and plaintiff's witnesses had gone away, *held*, that it was not error to refuse to allow defendant to make another amendment and offer testimony in support thereof: *Osgood v. Bauder*, 82–171.

After the close of the evidence, and while the court was reading its charge to the jury, plaintiff asked permission to offer additional testimony alleged to have been newly discovered. *Held*, that as such evidence was cumulative and no diligence to procure it was shown, it was not error to refuse permission to introduce it; *Seekel v. Norman*, 78–254.

The right to introduce additional evidence does not exist after final submission: *Dunn v. Wolf*, 81–688.

It is competent for the court, after an equity cause has been tried and fully submitted, to set aside the submission on motion, and give the party leave to introduce additional evidence. While the statute contemplates that the additional testimony should be offered before the case is finally submitted, yet the submission cannot be said to be final, if an application be promptly made to set the submission aside, or what amounts to the same thing, if a timely application be made to correct the mistake or omission by the introduction of additional evidence. Whether it is a final submission may be safely left for the trial court to determine: *Sickles v. Dallas Center Bank*, 81–408.

Where there is a misunderstanding between the court and counsel, on a motion to take the case from the jury, as to what witnesses have testified to, it is proper for the court to suggest that the witnesses be recalled: *State v. Huff*, 76–200.

Section applied: *McComb v. Council Bluffs Ins. Co.*, 83–247.

In general, as to order of introducing evidence, etc., see notes to § 3700.

SEC. **3720. Additional instructions.** After the jury has retired for deliberation, if they desire to be instructed as to any point of law arising in the case, they may request the officer to conduct them into court, which he shall do, when the court may further instruct, which instruction shall be given in the presence of or after notice to the parties or their counsel. Such instruction shall be in writing, be filed as other instructions in the case, and be a part of the record, and may be excepted to in the same time and manner as the instructions given before the jury retires. [C.'73, §§ 2800–1; R., §§ 3071–2.]

Additional instructions should always be given in open court. It is error to send them to the jury in their room: *O'Connor v. Guthrie*, 11–80.

Additional instructions should not be given without notice to counsel of the parties: *Davis v. Fish*, 1 G. Gr., 406.

It is not error to instruct a jury which has, after some time, failed to come to an agreement, that it is the duty of each juror to lay aside all pride of opinion and carefully review the ground of his opinion; that a new trial would involve a large expense, etc., and direct them to return to their room and examine their differences in a spirit of fairness and candor: *Frandsen v. Chicago, R. I. & P. R. Co.*, 36–372.

Where the jury, after retiring, returned into court and requested permission to examine a witness as to testimony given by him, *held*, that it was not error to allow such examination and refuse permission to counsel to make further examination of the witness: *Herring v. State*, 1–205.

As to giving instructions in writing, see § 3705.

SEC. **3721. Food and lodging.** If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court orders them to be provided with suitable food and lodging, it must be provided by the sheriff at the expense of the county. [C.'73, § 2802; R., § 3076.]

SEC. **3722. Verdict—how signed and rendered.** The verdict must be in writing, signed by a foreman chosen by the jury itself, and, when agreed to, the jury must be conducted into court, their names called, and the verdict rendered by him and read by the clerk to the jury, and the

inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury shall be discharged from the case. [C. '73, § 2803; R., § 3073; C. '51, § 1789.]

I. Sufficiency in General.

Form: Where the intention of the jury is sufficiently indicated by the language of the verdict, it may be carried out although informal, and where the verdict was for the plaintiff for the amount of a note and interest, *held*, that it was not error to direct the clerk to compute the amount and enter up judgment therefor: *Stevens v. Campbell*, 6–538.

Where the foreman filled up and signed the blank form of verdict given to the jury by the court in its instructions, and returned the same as the verdict of the jury, and the jurors were thereafter polled, *held*, that there was no ground of objection on appeal: *McGinty v. Keokuk*, 66–725.

The provision as to signing is directory merely, and if the verdict is in fact returned by the jury, a failure to sign it will not be fatal: *Morrison v. Overton*, 20–465.

The provisions of this statute as to the signing of a verdict are directory, and the objection that the verdict as returned is not signed by a member of the jury as foreman will not be entertained if not made at the time, no prejudice appearing: *McFarland v. Muscatine*, 67 N. W., 233.

Where a verdict, taken in connection with the charge of the court as to form, etc., thereof, leaves no doubt as to what the court and jury mutually understood and intended, it is sufficient: *State ex rel. v. Funck*, 17–365; *Harrell v. Stringfield*, Mor., 18.

The form of a verdict is sufficient if it expresses the intention of the jury. In arriving at this intention, it is always proper to look at the nature of the case, the issue made, and especially the whole language used by the jury: *Cassel v. Western Stage Co.*, 12–47.

A verdict which unmistakably expresses the intention of the jury is sufficient: *Armstrong v. Pierson*, 15–476.

A judgment will not be disturbed on account of any defect in the verdict, provided the intention of the jury is unequivocal and evident: *Cane v. Watson*, Mor., 52.

A verdict, however informal, is good if the court can understand it; and where, in an action in which exemplary damages were claimed, the jury rendered a general verdict for $100 actual damages, and a special verdict for $200 exemplary damages, *held*, that a judgment for $300 was not erroneous: *Ward v. Thompson*, 48–588.

Where the verdict in an action on a note was for "the amount of the note and interest," and the only question at issue was as to the right to recover at all, *held*, that the court might order the clerk to compute the amount and enter judgment accordingly: *McGregor v. Armill*, 2–30.

Where a counter-claim is interposed and the jury find for the plaintiff in a certain amount, it will be understood that the counter-claim has been passed upon by the jury: *Stepanck v. Kula*, 36–563.

Where, in an action against four defendants, all of whom set up counter-claims, a verdict in favor of plaintiff against two of the defendants was returned, *held*, that such verdict was also conclusive as to the counter-claims of the two defendants against whom no damages were allowed: *Ibid.*

In an action of right in which damages were claimed for the unlawful detention, *held*, that a verdict for plaintiff in a certain sum was sufficient to support judgment for plaintiff for possession of the property: *Daniels v. Chicago & N. W. R. Co.*, 35–129.

A verdict in an action of replevin finding the party "entitled to the following articles described in her petition, viz. (naming the articles)," *held* to be insufficient for uncertainty in not describing the articles to which the party was found entitled: *Richardson v. McCormick*, 47–80.

Correction by the court: The verdict of the jury may be put in form by the court, if it can be definitely ascertained from the data given by them for whom and in what amount they intended to render a verdict: *Stevens v. Campbell*, 6–538; *Cassel v. Western Stage Co.*, 12–47; *Armstrong v. Pierson*, 15–476.

When the amount cannot be definitely ascertained by reference to the pleadings, or to some certain data given by the jury, the court cannot assume the power to fix the amount: *Fromme v. Jones*, 13–474; *Moore v. Devol*, 14–112.

Where the jury return a verdict for a larger amount than authorized by the instructions of the court, the court may, by its own order, reduce the amount of the award, but having done so it cannot afterward set aside the verdict as being in violation of the instruction and grant a new trial: *Morlan v. Russell*, 71–214.

A verdict may be amended in matter of form at any time before the judgment is rendered: *Cane v. Watson*, Mor., 52.

The court may change the language of the verdict of the jury and make it correspond to the usual forms, whenever such change cannot, by possibility, alter its meaning; and such change may be made after the separation of the jury: *Gordon v. Higley*, Mor., 13.

Although the court may put the finding of the jury in proper legal form, it cannot change it for the purpose of curing a substantial defect therein: *Wise v. Hine*, 1 G. Gr., 62.

To justify a court in modifying or reforming a verdict, it must have unmistakable data upon which to base its action, and when the verdict is for a specified amount, "with interest," it cannot be altered so as to draw interest from a date prior to the verdict: *Edwards v. McCaddon*, 20–520.

Modification of the verdict, by which plaintiff is allowed to recover less than the amount found in the verdict, cannot be complained of by the opposite party: *Blakley v. Bird*, 12–601.

Correction of verdict and entry of judg-

ment in a different amount by the court, *held* erroneous under particular circumstances: *Flanagan v McWilliams*, 52–148.

Returning to jury for correction: The party against whom a verdict is rendered cannot complain of the action of the court in permitting the jury to reduce the amount thereof, when the record contains no evidence nor exceptions to rulings to show that he could have escaped a judgment for the first amount: *Hamilton v. Barton*, 20–505.

Where the controversy was as to the *right* to recover at all, and not as to the *amount*, and the jury rendered a sealed verdict "for the plaintiffs," *held* not error to call the jury into the box and direct them to find the amount due plaintiffs: *Lee v. Bradway*, 25–216.

Where the verdict returned by the jury is informal or ambiguous, it is the duty of the court to have it corrected in form or have the ambiguity explained by the jury at any time before their discharge: *Orton v. State*, 4 G. Gr., 140.

Where a verdict is rendered which does not express the intention of the jury, through a failure to include in the computation interest which the jury intended to allow, the remedy of the party prejudiced is by motion to reform the verdict or have it set aside. He cannot, upon failure to take advantage of his rights in this respect, have relief in equity: *McFaul v. Woodbury County*, 57–99.

Granting it to be technical error to send a jury back to return a different verdict in the absence of the attorney for the unsuccessful party the verdict must stand unless a showing of prejudice is made: *Rowell v. Williams*, 29–210.

As to correction of sealed verdict, see notes to § 3724.

In gross upon two counts: Where a verdict is rendered for a gross sum upon two counts, and it does not appear what amount was allowed under each count, the error as to one count will operate upon appeal to cause the reversal of the entire judgment: *Sioux City & P. R. Co., v. Walker*, 49–273.

A general verdict in a case where the petition sets up distinct causes of action will not be set aside as against the evidence if it can be sustained on any one of the causes of action: *Burtis v. Chambers*, 51–645.

In such case the verdict will be presumed to have been based upon the count which is sustained by the evidence: *Bays v. Herring*, 51–286.

Polling the jury: Where it appears upon polling the jury that jurors do not agree, the court should send the jury out for further consideration of the case. It is not proper to receive affidavits of the other jurors to the effect that the verdict was agreed to by all the jurors, and render a verdict accordingly in disregard of the objection made when the jury is polled: *Jessup v. Chicago & N. W. R. Co.*, 82–243.

The court cannot by its order direct the return of a verdict, without opportunity to the unsuccessful party to have the jury questioned in open court as to their assent to such verdict: *Ibid.*

Setting aside verdict: Although the statute provides for setting aside a verdict on the application of the party aggrieved, this does not preclude the court from taking such action on its own motion where an error is apparent: *Allen v. Wheeler*, 54–628.

Further as to setting aside verdicts, see § 3755.

II. Directing Verdict; Taking Case From Jury.

When case may be taken from jury: Where there is no evidence on behalf of a party having the burden of proof as to the issue, or where essential or integral elements of his cause of action or defense are wholly without proof, the court may properly refuse to let the case go to the jury, or it may direct the jury as to the verdict to be returned: *Allen v. Pegram*, 16–163; *Powers v. Council Bluffs*, 45–652; *Murphy v. Chicago, R. I. & P. R. Co.*, 45–661; *Allen v. Wheeler*, 54–628.

This is true where there is no controversy as to the facts, and especially where the evidence thereof is documentary: *Thorp v. Craig*, 10–461.

Where facts are established without conflict, which as a matter of law will defeat the right to recover, the court should, upon motion, take the case from the jury: *Conners v. Burlington, C. R. & N. R. Co.*, 74–383.

Where there is an utter want of evidence to sustain a defense it is proper for the court to direct the jury to render a verdict accordingly: *Atkinson v. Blair*, 38–156.

In an action for personal injuries, *held*, that there was no evidence showing negligence on the part of defendant causing the injury, and that the court properly directed the verdict for defendant: *Skellenger v. Chicago & N. W. R. Co.*, 61–714.

Where, in an action for personal injuries, it appears without controversy that plaintiff was not in the exercise of ordinary care at the time of receiving the injury, the court may properly direct a verdict to be rendered for defendant: *Starry v. Dubuque & S. W. R. Co.*, 51–419; *Griffin v. Chicago, R. I. & P. R. Co.*, 68–638.

So where in such an action there was nothing to show absence of contributory negligence on plaintiff's part, *held*, that it was proper to direct a verdict for defendant: *Murphy v. Chicago, R. I. & P. R. Co.*, 45–661.

Where there is no testimony sustaining the charge in a criminal case, or where it is so slight that a verdict of guilty would be instantly set aside, the court may direct an acquittal, but not where there is a conflict in the testimony: *State v. Smith*, 28–565.

The court is justified in taking a case from the jury only when there is an entire absence of evidence tending to establish the claim or defense which is set up in the pleading: *Sperry v. Etheridge*, 63–543; *Citizens' Bank v. Rhutasel*, 67–316.

The trial court is warranted in taking the case from the jury only where there is an entire want of evidence tending to prove some of the facts essential to plaintiff's right of recovery, or where, without conflict, the evidence establishes some right which defeats his right of recovery: *Lane v. Central Iowa R. Co.*, 69–443.

In a particular case, *held*, that there was

not such lack of evidence as to justify the taking of the case from the jury: *Vickers v. Woodruff*, 78-400.

Where it would be the duty of the court to set aside a verdict for plaintiff, if rendered, it may properly, on motion, at the conclusion of the evidence, direct a verdict for defendant: *Starry v. Dubuque & S. W. R. Co.*, 51-419: *Bothwell v. Chicago, M. & St. P. R. Co.*, 59-192.

In a particular case, *held*, that the court should have directed the jury to find a verdict for plaintiff and assess his damages at a certain sum: *Fairburn v. Goldsmith*, 58-339.

Evidence in a particular case *held* to be such as to warrant the withdrawal of the case from the jury: *Bemis v. Woodworth*, 49-340.

If the facts stated in the petition do not entitle plaintiff to relief, the court may, at the trial, direct the jury to find for defendant: *Smith v. Burlington, C. R. & N. R. Co.*, 59-73.

When there is nothing for the jury to do but determine the amount of a note, the court may direct their verdict: *Potter v. Wooster*, 10-334.

Where, on an issue of fact raised by petition and answer in denial, all evidence was ruled out, *held* error to direct a verdict for plaintiff, as plaintiff was bound to prove the substance of his complaint, and whether he had done so was a question for the jury: *Oleson v. Hendrickson*, 12-222.

It is not proper to direct a verdict against a party for failure to allege and prove an essential element of his cause of action or defense (as, for instance, for failure to aver performance of conditions of a contract on which he relies). Such failure is a ground for motion in arrest of judgment, and the party should be allowed the opportunity to cure it as provided in § 3760: *Wrought Iron Bridge Co. v. Greene*, 53-562.

The trial judge should sustain a motion to direct a verdict when, considering all the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom the burden of proof rests: *Meyer v. Houck*, 85-319; *Hirschl v. Case Threshing Mach. Co.*, 85-451. And see *Osgood v. Bauder*, 82-171; *Mayer v. Chicago & N. W. R. Co.*, 82-249; *Sioux Valley State Bank v. Kellogg*, 81-124; *Wilcox v. Williamson Law Book Co.*, 92-215; *Yeager v. Burlington, C. R. & N. R. Co.*, 93-1; *Seeds v. Grand Lodge*, 93-175; *Reeder v. Dupuy*, 65 N. W., 338; *Kohn v. Johnson*, 66 N. W., 76; *Hurd v. Neilson*, 69 N. W., 867.

While there are cases in this state holding that a verdict should not be directed where there is a scintilla of evidence in support of a contrary conclusion, yet the foregoing rule is in accordance with the great weight of authority, and cases to the contrary are overruled: *Meyer v. Houck*, 85-319.

The rule that a trial judge should direct a verdict against the party having the burden of proof, if it clearly appears to him that it would be his duty to set aside a verdict in favor of such party if found, has no application to the supreme court in passing on the question whether it should grant a new trial: *Bever v. Spangler*, 93-576.

Where there is a conflict upon the question of negligence it is for the jury to decide that question under the facts and circumstances, and a motion to take the case from the jury should be overruled: *Theissen v. Belle Plaine*, 81-118.

Where there is no dispute as to the facts showing contributory negligence of the person seeking to recover for personal injuries, the court may properly direct a verdict for the defendant: *Collins v. Burlington, C. R. & N. R. Co.*, 83-346.

In an action for personal injuries where the evidence fails to show absence of contributory negligence, the court may direct a verdict for defendant: *Platt v. Chicago, St. P., M. & O. R. Co.*, 84-694.

In a particular case, *held*, that the evidence as to the contributory negligence of the person for whose death an action was brought was such that the court erred in not directing a verdict for defendant: *Tierney v. Chicago & N. W. R. Co.*, 84-641.

When any verdict, except for nominal damages, would, under the evidence, be improper, the action of the court in directing a verdict for defendant will not be reversed on appeal: *Williams v. Brown*, 76-643.

In an action for personal injuries resulting from defendant's negligence, the burden being upon plaintiff to show his freedom from negligence contributing to the injury, a verdict should be directed for defendant where the course of business complained of by plaintiff as causing his injury was one of which he had full knowledge and had made no complaint: *Beckman v. Consolidation Coal Co.*, 90-252.

Where the question is whether one for whose death action is brought exercised reasonable care to avoid the injury, that being a question of fact for the jury, and there being evidence with reference thereto, it is error to direct a verdict for the defendant: *Hopkinson v. Knapp & Spalding Co.*, 92-328.

Where an action was brought on two claims pleaded in different counts, and on motion of the defendant the court rendered judgment on one count against plaintiff, and submitted the other to the jury, which returned a verdict against plaintiff, and a general judgment was then entered against him, *held*, that while the court may have erred in its practice in rendering judgment on the count instead of directing the jury to find for defendant upon it, the judgment was not void for that reason: *Lowery v. Greene County*, 75-338.

It is not improper to hear and consider in the presence of the jury a motion to direct the jury to render a verdict for the defendant: *State v. Huff*, 76-200.

Instructions in a particular case to the jury, "to return a verdict in form as directed," *held* not to be a direction of the verdict, but a direction as to the form of the verdict: *State exrel v. Harbach*, 78-475.

Under the circumstances of a particular case, *held*, that the court properly directed a verdict for defendant: *Meca v. Brown*, 84-7.

It is competent for the court on its own motion to direct a verdict in a proper case,

and objection to the action of the court in so doing cannot thereafter be based on defects in a motion made for that purpose: *Johnson v. Rider*, 84–50.

It is not competent by a motion to direct a verdict for defendant, to raise the question as to the sufficiency of the petition in its statement of facts, to show a cause of action: *Fulmer v. Mahaska County*, 92–20.

In ruling on a motion to direct a verdict the court is not bound by its views of the law announced in a previous ruling on demurrer: *Tyler v. Coulthard*, 64 N. W., 681.

Although the court has held, by overruling a demurrer to the petition, that the facts are sufficient to show a cause of action, nevertheless it may on motion at the conclusion of plaintiff's evidence direct a verdict for defendant, although the evidence supports the allegations of the petition: *Littleton v. People's Bank*, 63 N. W., 666.

Where the case is tried to the court it is not bound in ruling on a motion for judgment by the same rules which govern it in a motion to take the case away from the jury: *Hayward v. Jackman*, 64 N.W., 667.

Conflicting evidence: Where there is a conflict in the evidence the court should not direct the verdict of the jury: *Woods v. Mains*, 1 G. Gr., 275.

If there is evidence tending in any degree to establish a cause of action or defense, it is error to take the case from the jury: *Crawford v. Burton*, 6–476; *Hall v. Ætna Mfg. Co.*, 30–215; *Green v. Milwaukee & St. P. R. Co.*, 38–100.

It is only where the facts are settled and there exists no controversy or conflict of evidence respecting them that a motion to take the case from the jury or an instruction directing their verdict is proper: *Greenleaf v. Illinois Cent. R. Co.*, 33–608.

The court should not take the case from the jury or pronounce an opinion upon the sufficiency or weight of the evidence where there is evidence in any degree tending to establish a cause of action or defense, except in cases where the proof is documentary: *Muldowney v. Illinois Cent. R. Co.*, 32–176.

Where there is evidence tending in any degree to establish a cause of action or defense, however slight it may be, the question of fact involved should be left to the jury, even though the court should feel in duty bound to set aside a verdict for one of the parties if it should be found in his favor: *Way v. Illinois Cent. R. Co.*, 35–585.

After party has rested: A motion to direct a verdict for defendant on plaintiff's evidence cannot be entertained until plaintiff has rested his case: *Miller v. House*, 63–82.

The court should not direct a verdict at the close of all the evidence unless it would have done so at the close of the evidence of the party against whom such verdict is asked: *Bever v. Spangler*, 93–57.

Where at the close of the evidence on the part of the party having the burden of proof, the court overruled a motion to take the case from the jury, but sustained such motion on behalf of the same party at the close of his evidence, *held*, that such action of the court was erroneous, as it must have been based to some extent on the evidence offered by such party. Where there is a conflict in the evidence, the question must be submitted to the jury, whatever may be the opinion of the court as to its weight: *Phillips v. Phillips*, 93–615.

Need not be in writing: An instruction of the court to the jury directing a verdict for a party on the evidence is not such an instruction as is required to be in writing: *Stone v. Chicago & N. W. R. Co.*, 47–82; *Milne v. Walker*, 59–186; *Liggett & Myers Tobacco Co. v. Collier*, 89–144.

A motion to direct the jury to return a verdict for a party upon the evidence need not be in writing, nor need it state the facts and conclusions which are admitted thereby: *Foley v. Chicago, R. I. & P. R. Co.*, 64–644.

A motion to instruct the jury to render a verdict for defendant is not a motion which need be in writing; it is really a demurrer to the evidence, and it is the uniform practice to present such motion or demurrer orally: *Young v. Burlington Wire Mattress Co.*, 79–415.

Where defendant elected to stand upon his motion to have the court direct a verdict of the jury in his favor, *held*, that he thereby waived errors which had previously occurred, and that he could not complain of the action of the court in directing the verdict for the plaintiff, unless such direction was against the evidence: *Battis v. McCord*, 70–46.

What deemed admitted: Where the court is asked by defendant to instruct the jury to find in his favor, the plaintiff is entitled to have everything regarded as established which the testimony tends to prove: *Stone v. Chicago & N. W. R. Co.*, 47–82, 84.

Where the court dismisses an action or counter-claim, after the evidence has been introduced, the party prejudiced by such ruling is entitled to have everything on which his right to recover depends, which the evidence tended to prove, regarded as established: *Welch v. Jenks*, 58–694.

There is no rule requiring the court or jury to specially find the facts before a verdict may be directed, nor will all the facts be considered as admitted or established which the jury might have inferred from the evidence. The court is authorized to determine what conclusions of fact may be lawfully inferred from the facts proved, and may direct accordingly: *Griffin v. Chicago, R. I. & P. R. Co.*, 68–638.

Where the defendant moves the court to direct the jury to find a verdict for him on plaintiff's evidence, plaintiff is not entitled to have an admission of record by defendant of all the facts that the evidence tends to prove: *Youll v. Sioux City & P. R. Co.*, 66–346.

Although it is true that by a motion to direct a verdict a party admits every fact which the evidence introduced by the opposite party tends to prove, yet the admission is not such that if the motion for a verdict is overruled and on appeal the supreme court holds that it should have been sustained, the supreme court may thereupon render judgment as upon a finding of facts: *Meadows v. Hawkeye Ins. Co.*, 67–57.

By a motion to instruct the jury to return a verdict a party does not waive his right to afterwards submit evidence in case the motion is overruled: *Case Threshing Machine Co. v. Merrill*, 68–540.

Demurrer to evidence: It may be doubted whether under the reform system of procedure a demurrer to evidence was intended to be allowed in any case, but, if permissible, the demurrant should bring himself within the established rules of common law, one of which is that a part of the evidence cannot be arrested from the jury by demurrer unless it embraces all the evidence offered by the same party: *Hardin v. Snyder*, 15–460.

It is the peculiar province of the jury to ascertain the truth of the facts and the credibility of witnesses, and a party ought not to be allowed by a demurrer to evidence to refer the question to another tribunal. Therefore such a demurrer admits on the record not only the truth of all the facts proven by the evidence, but every conclusion which the evidence offered conduced to prove: *Ibid.*

However loose and undetermined the evidence may be, if it conduces to prove any relevant fact it should be left to the determination of the jury: *Franks v. State*, 1 G. Gr., 541.

In determining a demurrer to the evidence, all the facts which the evidence tends to prove are to be regarded as admitted, and the court must pass upon the legal effect of such facts as proved, admitted or inferred, and not upon the sufficiency of the evidence submitted to prove them: *Ibid.*

On taking the case from the jury it must be conceded that those facts were fully established which the testimony tended to establish: *Miles v. Townsend*, 3 G. Gr., 546.

A demurrer to evidence not only admits the truth of the facts found, but every fact and conclusion in favor of the other party which the evidence conduces to prove, or which the jury might have inferred therefrom in his favor: *Jones v. Ireland*, 4–63.

Before a party can demur to evidence the facts must be first ascertained and found and admitted on the record. The demurrer admits the facts found and every fact and conclusion which the evidence conduces to prove or which the jury might have inferred from it. Without these admissions plaintiff is not bound to join in the demurrer, or if he should the court could pronounce no judgment thereon: *Gaates v. Galena & C. U. R. Co.*, 18–177.

Upon a demurrer to evidence the testimony is to be taken most strongly against the party demurring: *Stanchfield v. Palmer*, 4 G. Gr., 23.

A demurrer to evidence is only allowable in the discretion of the court: *Jones v. Ireland*, 4–63.

Nonsuit: If the testimony offered does not support the action or is so insufficient as to justify an arrest of judgment, the court may nonsuit the plaintiff, but great care and caution should be exercised to guard against any interference with the province of the jury. It should not be done if there is any room for doubt as to the sufficiency of the evidence: *Mason v. Lewis*, 1 G. Gr., 494: *Eddy v. Wilson*, 1 G. Gr., 259.

On a motion to nonsuit the plaintiff on the evidence, the court should not take the case from the jury if the evidence tends, although remotely, to show facts which, if established, would support the action. Such a motion is like a demurrer to evidence, and admits all the facts to be proved on which the evidence bears: *Wiley v. Shoemak*, 2 G. Gr., 205.

Under the practice in this state it is not proper to nonsuit the plaintiff on the evidence, even when the evidence is so insufficient that a verdict for plaintiff would be set aside, provided there is any evidence tending to support plaintiff's claim: *Way v. Illinois Cent. R. Co.*, 35–585.

Where there is any proper evidence before the jury it is error to nonsuit the plaintiff on the motion of defendant: *Hall v. Ætna Mfg. Co.*, 30–215.

Refusal to enter a nonsuit on defendant's motion will not be ground for reversal on appeal where defendant has afterward introduced his evidence and there has been a trial on the merits: *Ayers v. Hartford F. Ins. Co.*, 17–176.

SEC. **3723. Jury polled.** When the verdict is announced, either party may require the jury to be polled, which shall be done by the court or clerk, asking each juror if it is his verdict. If any one answers in the negative, the jury must be sent out for further deliberation. [C. '73, § 2804; R., § 3074.]

SEC. **3724. Sealed verdict.** When by consent of the parties and the court the jury have been permitted to seal their verdict and separate before it is rendered, such sealing is equivalent to a rendition and a recording thereof in open court, nor shall such jury be polled or permitted to disagree thereto, unless such course has been agreed upon between the parties in open court and entered on the record. [C. '73, § 2805; R., § 3075; C. '51, § 1875.]

If the jury agree upon their verdict and seal it at an unusual hour, it need not be at once filed with the clerk: *Bass v. Hanson*, 9–563.

Where a jury sealed up their verdict and left it with the bailiff to be handed to the clerk, and then separated without the parties having consented to a verdict being rendered in that manner, *held*, that the separation did not necessarily render the verdict void: *Cook v. Walters*, 4–72: *Heiser v. Van Dyke*, 27–359.

Where a verdict though sealed is merely informal, the jury may be afterwards directed to put it in form: *Bass v. Hanson*, 9–563; *Tifield v. Adams*, 3–487.

A jury may, after returning a sealed verdict, be permitted to correct an error in the amount which was caused by a single omission: *Hamilton v. Barton*, 20–505.

A sealed verdict, being opened, read as follows: "We, the jury, find for the plaintiffs." The jury, being recalled by the court

and instructed to put their verdict in form, did so by adding, "for the sum of," etc., that being the sum due, if anything, on the note sued on. *Held*, that the action of the court was only requiring the jury to do a ministerial act which the clerk might have done, and if error, was without prejudice: *Higley v. Newell*, 28–516.

In all cases of the rendition of a sealed verdict the court should be careful to have the jury present at the opening of the verdict, if it is at all practicable, in order to recommit it to them if it is so informal that it cannot be rectified by the court: *Tifield v. Adams*, 3–487.

It is not proper to recommit a sealed verdict to the jury except for the purpose of correcting formal errors. They should not be allowed afterwards to return another verdict contrary to the former: *Miller v. Mabon*, 6–456.

The jury may be allowed to reconsider a sealed verdict for the purpose of correcting an error occurring through inadvertence: *Hamilton v. Barton*, 20–505.

In case of a sealed verdict the jury should not be polled, but if they are, the dissent of a juror to the verdict will not affect its validity: *Bingham v. Foster*, 37–339.

It is not improper to allow the jury to separate under the agreement of counsel upon the return of their sealed verdict, although having failed to answer special interrogatories submitted, it not appearing that the party requested that the jury should be sent out again to consider further of such special findings: *Rogers v. Hanson*, 35–283.

Where in pursuance of an order made by the consent of the parties a jury returned a sealed verdict and separated, but having failed to answer interrogatories were summoned again by the court and directed to make answer, *held*, that the action was not improper, especially in view of the fact that the answers to the interrogatories were immaterial: *Roberts v. Roberts*, 91–228.

While there is no authority for allowing a jury to return a sealed verdict and separate before they return their verdict into court, yet where the court allowed them to do so, although without the consent of the parties, *held*, that there was not sufficient ground for a new trial in the absence of prejudice being made to appear: *Walker v. Dailey*, 87–375.

Where the case is such that the court is authorized to direct a verdict for plaintiff, it is at most only error without prejudice to direct the jury, after having returned a special verdict and separated, to render a general verdict for the defendant: *Allen v. Wheeler*, 54–628.

As to what is "open court," see *Hobart v. Hobart*, 45–501.

SEC. **3725. General or special.** The verdict of a jury is either general or special. A general verdict is one in which they pronounce generally for the plaintiff or for the defendant upon all or upon any of the issues. [C.'73, § 2806; R., § 3077.]

SEC. **3726. Special defined.** A special verdict is one in which the jury finds facts only; it must present the ultimate facts as established by the evidence, and not the evidence to prove them, so that nothing remains to the court but to draw from them its conclusions of law. [C.'73, § 2807; R., § 3078.]

In an action involving an issue as to the execution of an instrument, it being claimed by defendant that only a part of it had been read over to him, *held*, that a finding by the jury that defendant *signed* the instrument was not the finding of an ultimate fact, but only an item of evidence to prove such fact: *Hardin v. Branner*, 25–364.

Where the petition states two causes of action, the court may properly instruct the jury to find independently on each cause and a verdict so finding will be a general and not a special verdict: *Robinson v. Berkey*, 69 N. W., 434.

Where the ownership of a note was put in issue by the pleadings, and the jury, following the instructions of the court, returned the following verdict: "We, the jury, find that the amount loaned to defendant by John R. Pumphrey was $70, and that said loan was made on the 7th day of June, 1877," *held*, that the verdict was not sufficient to authorize a judgment for plaintiff, as it did not show a finding upon the issue as to the ownership of the note, nor a finding, general or special, for plaintiff: *Pumphrey v. Walker*, 75–408.

SEC. **3727. Findings.** The jury in any case in which it renders a general verdict may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact, to be stated to it in writing, which questions of fact shall be submitted to the attorneys of the adverse party before argument to the jury is commenced. [C.'73, § 2808; R., § 3079; C.'51, §§ 1786–7.]

Special findings; general verdict: Either party has a right to a general verdict if he demands it and the jury renders it, and the court has no authority, against the objection of a party, to direct the jury to return only a special verdict: *Schultz v. Cremer*, 50–182; *Morgan v. Thompson*, 60–280.

It is reversible error to interfere with the discretion of the jury to return a general verdict. So *held* in a jury trial on the issues in a garnishment proceeding: *Shadbolt & Boyd Iron Co. v. Camp*, 80–539.

The jury may return special findings on their own motion without instructions: *Hall v. Carter*, 74–364.

The statutory provisions for the submis-

sion of interrogatories to the jury and requiring special findings thereon are not applicable in criminal cases: *State v. Ridley*, 48–370; *State v. Fooks*, 65–196.

The fact that special interrogatories are improperly submitted to the jury will not constitute prejudicial error sufficient to reverse the judgment where such judgment has been rendered on a general verdict which is not shown to be erroneous: *Petrie v. Boyle*, 56–163.

Where certain facts amounting to a settlement were alleged as a defense, and the jury in a special verdict found that there was such settlement, *held*, that it was not error to have refused instructions asked by plaintiff as to what constituted a settlement: *Wales v. Independent School Dist.*, 49–200.

A special finding by one jury is not binding upon the court on a second trial: *Hollenbeck v. Marshalltown*, 62–21.

If a special verdict be sufficiently definite to enable the court to pronounce judgment thereon, it is not necessary that there be a general verdict for either party. And where a special verdict affords the court all the data necessary, judgment may be entered though there is no assessment by the jury: *Helphrey v. Chicago & R. I. R. Co.*, 29–480.

Where one of the findings of fact having a material bearing upon the issues in the case is without support in the evidence, the verdict should be set aside and a new trial granted: *Heath v. Whitebreast Coal, etc., Co.*, 65–737.

Where a party asks to have a general verdict set aside and for a new trial on account of certain special findings of fact inconsistent with the general verdict, and the entire verdict is set aside, he cannot be bound by special findings as to which no objection was made: *Ruble v. Atkins*, 39–694.

Although the court directs the jury to return a general verdict as well as special findings yet it will not constitute error that special findings are returned without any general verdict, no objection thereto being made at the time: *National Horse Importing Co. v. Novak*, 64 N.W., 616.

Where the special findings are not such that the court could enter judgment thereon, because of failure to state a material fact, it is error for the court to assume or determine the result of the evidence as to that fact and enter judgment accordingly: *Ibid.*

Where in pursuance of an order made by consent of the parties a jury returned a sealed verdict and separated, but having failed to answer interrogatories were summoned again by the court and directed to make answer, *held*, that the action was not improper, especially in view of the fact that the answers to the interrogatories were immaterial: *Roberts v. Roberts*, 91–228.

The attorney in his argument to the jury may read and comment upon the interrogatories on which the findings are to be made and may refer to the necessity of having the findings consistent with the general verdict: *Powell v. Chittick*, 89–513.

As to judgment upon special verdict, see § 3778.

As to special verdict in criminal cases, see § 5405.

Submission to opposite attorney: The requirement to submit all questions to the attorney of the adverse party is limited to such questions as are requested by the parties, and is not applicable to those submitted by the court on its own motion: *Clark v. Ralls*, 71–189.

A special interrogatory submitted by the court on its own motion is not required to be submitted to the inspection of counsel: *Briggs v. McEwen*, 77–305.

Time for presenting: Where a party presented his interrogatories just before the final argument to the jury was commenced, *held*, not error to refuse them as not being presented in time: *Hopper v. Moore*, 42–563.

It is not error to refuse to submit to the jury interrogatories not submitted to opposing attorneys until after the argument has commenced. It is not sufficient that they are submitted to the court before that time: *Crosby v. Hungerford*, 59–712.

Whether the interrogatories submitted to the jury by the court on its own motion are required to be submitted to the attorneys of the parties before the argument is commenced, *quære: Petrie v. Boyle*, 56–163.

A party cannot, after a general verdict. have the case resubmitted to the jury in order to have them make special findings: *Rogers v. Hanson*, 35–283.

The statute as to the time when interrogatories should be submitted to attorney for the other side is imperative and if they are not submitted within the time named the court is under no obligations to give them but may submit interrogatories on its own motion: *Humbert v. Larson*, 89–258.

The court is justified in refusing to submit special interrogatories handed to the judge out of court and not submitted to counsel on the other side: *Barnes v. Marcus*, 65 N. W., 984.

Form of interrogatories: The questions so submitted should be such that they can be answered by yes or no, or in some brief and pertinent way: *Marshall v. Blackshire*, 44–475; *O'Leary v. German Am. Ins. Co.*, 69 N.W., 686.

Where a special interrogatory calls for an answer which would be a determination of the case, it is a request for a special verdict rather than an answer to a special interrogatory, and is properly refused: *White v. Adams*, 77–295.

The court cannot be required to propound interrogatories calling for conclusions from facts rather than findings upon any particular questions of fact. Nor can it be required to propound interrogatories for findings of facts not necessarily determinative of the case; nor to submit particular questions not ultimate in their nature, or which could not well be considered or answered without danger of confusion or misrepresentation: *Thomas v. Schee*, 80–237.

The court is not required to submit interrogatories for findings of fact not necessarily determinative of the case nor to submit particular questions not ultimate in their nature or which could not well be considered or answered without danger of confusion or misrepresentation: *Runkle v. Hartford Ins. Co.*, 68 N. W., 712.

It is not error to refuse to submit to the

jury particular questions not ultimate in their nature, or which could not well be considered or answered without danger of confusion and misapprehension: *Phœnix v. Lamb*, 29–352.

The court cannot be required to propound to the jury interrogatories which call for a finding of facts not necessarily determinative of the case. A party is not entitled to a special finding upon every circumstance which might have some bearing upon the case: *Hawley v. Chicago, B. & Q. R. Co.*, 71–717.

The jury should not be required to find specially on a question, an answer to which would involve, not the statement of a single fact, but a conclusion drawn from many facts: *Home Ins. Co. v. Northwestern Packet Co.*, 32–223, 246.

The questions of fact presented to the jury for special findings must be founded upon the material facts in the pleadings in such form as to elicit conclusions of fact as established by the testimony, and not what the evidence was, nor conclusions of law: *Hatfield v. Lockwood*, 18–296.

It is not error to refuse to instruct the jury to make a special finding upon a fact which is immaterial: *Bonham v. Iowa Cent. Ins. Co.*, 25–328.

The statute contemplates that specific questions of fact shall be submitted to the jury, and not such questions as whether a person was guilty of negligence as to a certain matter, and if so, in what manner, etc.: *Lewis v. Chicago, M. & St. P. R. Co.*, 57–127,

It is not proper to submit interrogatories relating to matters as to which there is no controversy: *Citizens' State Bank v. Council Bluffs Fuel Co.*, 89–618.

It is not error to refuse to submit interrogatories calling for findings as to particular or minor facts in a chain of evidence from which ultimate facts are to be found: *Aultman, & Taylor Co. v. Shelton*, 90–288.

Special findings need not be submitted which do not present for answer ultimate facts involved in the case, but a question of evidence on which it is claimed these ultimate facts will be proved or disproved: *Clifton v. Granger*, 86–573.

An interrogatory *held* not proper which required the jury, in action for negligence, to find "what negligent act was done, or what duty omitted," as it left the jury to canvass the whole field of negligence rather than the acts alleged: *Gorman v. Minneapolis & St. L. R. Co.*, 78–509.

Where the issue was whether or not a certain mortgage was given for the purpose of hindering and defrauding creditors, and the court submitted by a special interrogatory whether it was made and received for the purpose of hindering and defeating creditors, *held*, that if there was any difference between "defrauding" and "defeating" creditors it was not material, as the jury could not have been misled thereby under the instructions: *First Nat. Bank v. Fenn*, 75–221.

In a particular case, *held*, that it was not improper to submit the question as to whether the note in suit was upon a consideration, it appearing that in view of the charge the interrogatory was not objectionable as calling for a legal conclusion: *Toledo Savings Bank v. Rathmann*, 78–288.

Immaterial or not pertinent: The court cannot be required to ask special findings as to immaterial facts: *Lawson v. Chicago, R. I. & P. R. Co.*, 57–672; *Liston v. Central Iowa R. Co.*, 70–714.

Interrogatories which demand special findings not pertinent to the issues may properly be withheld from the jury: *Bellows v. District T'p*, 70–320.

Requests for special findings which do not relate to ultimate facts but relate to questions incidentally arising, or requests which are likely to confuse the jury, may be refused: *Winter v. Central Iowa R. Co.*, 80–443.

Special interrogatories must ask a response as to the existence of some particular facts which must be material and pertinent to the matter in controversy, and must not embrace a series of facts which are necessarily included in and determined by the general verdict: *Whalen v. Chicago, R. I. & P. R. Co.*, 75–563.

Special interrogatories submitting immaterial questions to the jury, *held* properly refused: *White v. Adams*, 77–295.

Where the findings submitted to the jury are not of ultimate facts necessary to support a verdict, a failure of the court to require a finding of such facts will not invalidate the verdict: *Sutherland v. Standard Life, Etc., Ins. Co.*, 87–505.

Findings of fact which are without support in the evidence will not be ground for reversal where they are not material to the determination of the case: *McMurray v. Hughes*, 82–47.

Where the evidence is not before the supreme court, it will be presumed that the necessary facts were established to warrant the special findings: *Hawley v. Atlantic*, 92–172.

To warrant a judgment upon a special finding against the general verdict, the conveyance must be absolutely inconsistent therewith: *Ibid.*

Not relevant to the evidence: It is not error to refuse to submit to the jury questions which it is not practicable for them to answer under the evidence in the case: *Winkleman v. Des Moines Northwestern R. Co.*, 62–11.

Modification: A court is not required to submit improper questions to the jury because requested so to do by a party, nor to give such as are proper in substance in the precise form in which they are presented: *Mickey v. Burlington Ins. Co.*, 35–174.

Modifications by the court of interrogatories submitted, *held* proper as more fully adapting them to the issues and evidence in the case: *Dunning v. Van Buren*, 46–492.

Improper interrogatories: Interrogatories asked in particular cases, *held* properly refused: *Cummins v. Des Moines & St. L. R. Co.*, 63–397; *Hollingsworth v. Des Moines & St. L. R. Co.*, 63–443.

The fact that the answer to a special interrogatory is not inconsistent with the general verdict, and nothing is claimed for it, does not prove that its submission to the jury was not erroneous; it may nevertheless have

misled the jury as to the effect to be given to the facts therein referred to: *Ferguson v. Central Iowa R. Co.*, 58–293.

Refusal to submit: Where the fact which a party asks to have submitted to the jury is important as bearing upon the issue involved in the case it will be error to refuse to submit it: *Day v. Mt. Pleasant*, 70–193.

Interrogatories should be clear and distinct, and capable of being answered briefly, and should not refer to immaterial facts. It is not error to refuse to submit an interrogatory the answer to which could not have controlled the general verdict. A party is not entitled to a special finding upon every circumstance which may have some bearing on the case: *Scagel v. Chicago, M. & St. P. R. Co.*, 83–380.

There is no error in refusing to submit special interrogatories, when the answers, however given, could not affect the general verdict: *Hablichtel v. Yambert*, 75–539; *Van Horn v. Overman*, 75–421.

A refusal of the court to submit special interrogatories to the jury, *held* not prejudicial where it appeared that such interrogatories were not relevant to any issue in the case, or where no answer could have been given which would have controlled the general verdict in the absence of other special findings: *Cormac v. Western White Bronze Co.*, 77–32.

It is not error to refuse to submit a question which though important, does not relate to an ultimate fact but to an incident of the main issue: *Cawker City State Bank v. Jennings*, 89–230.

Instructions as to answering: It is proper and not uncommon, in the submission of special interrogatories, to instruct the jury as to the mode and manner of answering each one, according as they find the facts to exist: *State v. Geddis*, 42–264.

A statement to the jury that if they find a verdict for plaintiff, they will answer certain interrogatories propounded is not objectionable as indicating to the jury that the court expects a verdict for plaintiff: *Smith v. Dawley*, 92–312.

Answers: If the evidence is insufficient to enable the jury to answer an interrogatory in the affirmative, a negative answer should be given and not an evasive and uncertain one: *Fisk v. Chicago, M. & St. P. R. Co.*, 74–424.

An answer by the jury to an interrogatory that they "don't know" or "can't say" will not be ground for reversal where it appears that the answer to the interrogatory was not important. Such an answer amounts to a failure to answer: *Patterson v. Omaha & C. B. R. Co.*, 90–247; *Hawley v. Atlantic*, 92–172.

Argument upon: *Held* not error to permit an attorney submitting special interrogatories to read such interrogatories to the jury and instruct them how they ought to be answered in the light of the evidence: *Timins v. Chicago, R. I. & P. R. Co.*, 72–94.

Failure to answer: Where the jury, in their answer to interrogatories for findings of fact as to matters which are pertinent and material to the finding of a general verdict, reply "we do not know," a motion for a new trial on that ground should be sustained: *Darling v. West*, 51–259.

Where the answer of the jury to an interrogatory is that they do not know, and such answer is plainly contrary to the undisputed evidence in the case, the court will be justified in granting a new trial on such ground: *Lytton v. Chicago, R. I. & P. R. Co.*, 69–338.

Where the jury in answer to special interrogatories used the words "think" and "have reason to believe," *held*, that such answer presented in positive language the conclusion reached by the jury: *Martin v. Central Iowa R. Co.*, 59–411.

Held not prejudicial error to dismiss the jury without requiring answer to an interrogatory propounded, where such answer, if given, could not have controlled the general verdict: *Dreher v. Iowa Southwestern R. Co.*, 59–599.

The failure of a jury to answer a specific interrogatory, upon a point upon which there was no conflicting evidence, *held* not to justify a new trial, especially if the general verdict was warranted: *Dively v. Cedar Falls*, 27–227.

The action of the court below, in refusing to return a jury to their room because they fail to find definitely as to certain specific interrogatories, will not be interfered with on appeal, except abuse is clearly shown; especially when the materiality of the answer sought is not apparent, or the general verdict is inconsistent with but one answer to such questions: *Greenleaf v. Illinois Cent. R. Co.*, 29–14.

Where a jury, in connection with answers to certain interrogatories, addressed a communication to the court stating that they were of such a nature that the evidence would hardly warrant definite answers to the same either in the affirmative or negative, *held*, that a general verdict in accordance with the answers to the special interrogatories should not be set aside: *Bayliss v. Davis*, 47–340.

Where the jury fails to respond through inadvertence to an interrogatory, and omits to state a material point of the finding required thereby, the court may direct them to retire and answer such interrogatory, before receiving their verdict: *Bank of Monroe v. Gifford*, 79–300.

Where the jury failed to answer a question and the defendant asked that they be sent out to render an answer, but they in open court declared that they could not answer, *held*, that the court rightly regarded this as a sufficient declaration of the jurors' want of ability to answer the question, and that it was not error to refuse to require them to retire for the purpose of making such answer: *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81–444.

Where the jury were directed that if they found for plaintiff they should answer a special interrogatory submitted by the court, and they returned a verdict for plaintiff but did not answer the interrogatory, and after the verdict was filed and read the court returned the verdict to the jury and directed them to "retire and consider further of their

verdict, and return a verdict with answer to the special interrogatory," and they returned the same verdict with the answer, *held*, that there was no error in the action of the court, and no prejudice to defendants: *Judge v. Jordan*, 81 519.

A failure to answer special interrogatories will not be ground for setting aside the verdict where there are other facts than those suggested by the interrogatories upon which it may rest: *Andrews v. Mason City & Ft. D. R. Co.*, 77–669.

Where a jury does not return an answer to a special interrogatory and the party in whose behalf it is submitted does not insist thereon, he will not be heard to urge for the first time on appeal the objection that such interrogatory was not answered: *Mack v. Leedle*, 78–164.

Where the fact inquired about in the interrogatory appears, in view of the answers to other interrogatories, to be immaterial, failure to answer it cannot be made a ground of objection: *Seekel v. Norman*, 78–254.

A judgment will not be disturbed on appeal because the special findings were not so full or accurate as they might have been, where the findings as to such interrogatories could not have controlled the result: *Pence v. Chicago, R. I. & P. R. Co.*, 79–389.

In a particular case, *held*, that answers to certain special findings, whatever way they were answered, would not have been inconsistent with the general verdict, and therefore the failure to give definite answers was immaterial: *McMarshall v. Chicago, R. I. & P. R. Co.*, 80–757.

SEC. **3728. Findings inconsistent with general verdict.** When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly, or set aside the verdict and findings, as justice may require. [C.'73, § 2809; R., § 3080.]

The special findings of the jury cannot prevail over the general verdict, unless it affirmatively appears that they are inconsistent therewith: *Mitchell v. Joyce*, 76–449.

It is only when the special findings of facts are manifestly inconsistent with the general verdict that the special findings should control: *Johnson v. Miller*, 82–693.

A general verdict in conflict with a special finding should be set aside: *Bryson v. Chicago, B. & Q. R. Co.*, 89–677.

Where the special findings are inconsistent with the general verdict, judgment should be rendered upon the special findings: *Davis v. Campbell*, 93–524.

It is only when special findings are shown to be inconsistent with the general verdict that the latter can be set aside and judgment be rendered on the former: *Case v. Chicago, M. & St. P. R. Co.*, 69 N. W., 538.

Where the special verdict is inconsistent with the general verdict the latter should be set aside and judgment entered on the former: *McGregor & S. C. R. Co. v. Foley*, 38–588.

The findings and verdict should be in harmony. And *held*, that it was not error to direct the jury that they should be careful that the answers to interrogatories were in harmony with and in support of their general verdict, although it would have been better to have cautioned them to be careful that their general verdict was in harmony with the answers to the interrogatories: *Capital City Bank v. Wakefield*, 83–46.

In a particular case, *held* proper to instruct the jury, in connection with the submission of special interrogatories, that they should be careful that the answers to the interrogatories supported and were in harmony with their general verdict: *Des Moines etc., Co. v. Polk Cunty, etc., Co.*, 82–663.

To entitle to a judgment upon a special verdict against a general verdict in favor of the other party the special findings must be inconsistent with the general verdict, and sufficient of themselves, when taken together with the facts admitted by the pleadings, to establish or defeat (as the case may be) the right to recover: *Hardin v. Branner*, 25–364; *Conners v. Burlington, C. R. & N. R. Co.*, 71–490.

It is only when the general and special verdicts are so inconsistent that both cannot stand that the latter will be allowed to defeat the former; and where there is evidence to sustain the general verdict it will stand, although the special verdict does not seem tc sustain it: *Phœnix v. Lamb*, 29–352.

To justify a judgment upon special findings against a general verdict the findings must be inconsistent with the general verdict: *Bills v. Ottumwa*, 35–107.

Where the special findings, while inconsistent with the general verdict, are not sufficient in themselves to authorize a judgment for the opposite party, the court may be justified in setting aside the general verdict and granting a new trial: *Hammer v. Chicago, R. I. & P. R. Co.*, 61–56; *Davenprt Savings, etc., Ass'n v. North Am. F. Ins. Co.*, 16–74.

Where the jury found special facts which under the instructions of the court showed contributory negligence on the part of plaintiff, *held*, that the general verdict was inconsistent with such special finding and must be set aside, irrespective of whether the instructions of the court were correct or not: *Baird v. Chicago, R. I. & P. R. Co.*, 55–121.

Where the jury, in an action for negligence of a railway company causing an injury, found generally for the plaintiff, but in answer to special interrogatories as to which of the employes of the company was negligent responded that it was the brakeman or the fireman, *held*, that their general verdict should be set aside: *Ford v. Central Iowa R. Co.*, 69–627.

Where, to entitle a party to recover, two facts must be found by the jury, and they return a general verdict in his favor, it will be presumed that they found both facts in his favor, and a special finding as to one of them only will not amount to a finding that the other does not exist: *Nockles v. Eggspieler*, 53–730.

Where, under the special findings, plaintiff had no cause of action, and they were inconsistent and irreconcilable with the verdict, *held*, that the latter should have been set aside and a judgment rendered on the former: *Cooper v. McKee*, 53–239.

The court cannot go outside of the special and general verdicts of the jury regularly rendered for the purpose of penetrating the councils of the jury room; and where it appeared, by reason of certain words written after one of the instructions of the court, that the jury misunderstood such instruction as being a special interrogatory asking for a finding of fact, *held*, that the words thus written and relied upon as impeaching the verdict must be disregarded: *Cooper v. Mills County*, 69–350.

Action of a court in refusing to set aside a general verdict, and render a judgment upon the special findings, will be waived, if the party afterwards moves to set aside the general verdict for a new trial and such motion is granted: *Williams v. Frick*, 71–362.

Where a general verdict in behalf of defendant is rendered in an action in which a counter-claim is pleaded, it will not be error for the court to refuse to set it aside on the ground that the claim set up cannot be properly introduced by way of counter-claim, but only as an independent cause of action: *Mitchell v. Joyce*, 76–449.

Where under the instructions in the case, not objected to, and the findings of fact by the jury, a general verdict is erroneous, it should be set aside, and judgment rendered on the special verdict, in accordance with the instructions: *Krauskoff v. Krauskoff*, 82–535.

In the absence of a special finding to the contrary, it will be presumed from the general verdict that the jury found the existence of facts necessary to support the general verdict: *Johnson v. Miller*, 82–693.

A general verdict on a claim for various items of damage will not be erroneous, in the absence of a request for special findings, and under such circumstances it cannot be determined whether the findings on any item exceeded the amount thereof stated in the petition: *Clampit v. Chicago, St. P. & K. C. R. Co.*, 84–71.

Where the answers to special interrogatories were not in conflict with the general verdict, nor such as to have influenced it, *held*, that the fact that some of the interrogatories related to immaterial matters, and as to others there was a dispute as between the parties, would not make a submission of such interrogatories prejudicial error: *Sage v. Haines*, 76–581.

The fact that special findings are inconsistent with the general verdict is not a ground for a motion in arrest of judgment. In such a case the special findings control and the judgment may be given accordingly: *Moffitt v. Albert*, 66 N. W., 162.

If the special finding is not of itself conclusive of the rights of the parties and when taken in connection with the facts admitted by the pleading is not sufficient to make out or defeat the right of recovery, as the case may be, the supreme court ought not on appeal to interfere with the action of the lower court in overruling a motion for judgment on such special findings, although it reverses the action of the lower court in rendering judgment on the general verdict: *Kerr v. Keokuk Water Works Co.*, 64 N. W., 596.

To entitle a party to judgment on special findings against a general verdict in favor of his adversary the special findings must be inconsistent with the general verdict and must of themselves or when taken in connection with the facts admitted by the pleadings or by the evidence introduced be sufficient to establish or defeat the right to recovery: *Coffman v. Chicago, R. I. & P. R. Co.*, 90–462.

As to judgment on special verdict, see § 3778 and notes.

SEC. **3729. Assessment of recovery.** When by the verdict either party is entitled to recover money of the adverse party, the jury in its verdict must assess the amount of such recovery. [C.'73, § 2810; R., § 3081; C.'51, § 1788.]

SEC. **3730. Joint or several verdicts.** Where there are several plaintiffs or defendants, whether the pleadings are joint or several, the verdicts shall be moulded according to the facts and to suit the exigencies of the case. [C.'73, § 2811; R., § 3083.]

SEC. **3731. Form.** The verdict shall be sufficient in form if it expresses the intention of the jury. [C.'73, § 2812; R., § 3084; C.'51, § 1790.]

SEC. **3732. Entered of record.** The verdict shall in all cases be filed with the clerk and entered upon the record, after having been put into form by the court, if necessary, and be a part of the record. [C.'73, § 2813; R., § 3085; C.'51, § 1789.]

SEC. **3733. Waiver of jury trial.** Trial by jury may be waived by the several parties to an issue of fact in the following cases:

1. By suffering default, or by failing to appear at the trial;
2. By written consent, in person or by attorney, filed with the clerk;
3. By oral consent in open court, entered in the minutes. [C.'73, § 2814; R., § 3087.]

The right to trial by jury is not inalienable, but may be waived or forfeited: *Wilkins v. Treynor*, 14–391.

Where the parties appear and a trial is had to the court without objection, it will be presumed that jury trial is waived: *Saum*

v. Jones County, 1 G. Gr., 165; *McGuire v. Kemp*, 3 G. Gr., 219.

Where it does not appear on appeal that a jury was not waived, the supreme court will not reverse a case on the ground that the court below refused to submit the cause to a jury: *Hawkins v. Rice*, 40–435.

The right to jury trial is waived by failing to demand it when the cause comes up for trial, and the fact that at a previous term such right was demanded and refused, the cause being then continued, does not render a new demand for jury trial necessary, when the cause again comes on for trial: *Davidson v. Wright*, 46–383.

By consenting to a reference a party waives his right to a trial by jury, and cannot afterwards, upon a new order directing the referee to proceed, object and claim a jury trial: *Hewitt v. Egbert*, 34–485.

By making default a party waives his right to jury trial: *Clute v. Hazleton*, 51–355.

Waiver of jury trial relates to all issues in the case as they exist or may arise upon further pleadings as authorized by law: *Honny Buggy Co. v. Patt*, 73–485.

SEC. **3734. Reference—by consent.** All or any of the issues in an action, whether of fact or of law, or both, may be referred upon the consent of the parties, written or oral, in court entered upon the record. [C.'73, § 2815; R., § 3089; C.'51, §§ 1650, 1794.]

There cannot be a reference in an action for divorce, even by consent of parties: *Hobart v. Hobart*, 45–501.

Where the parties have agreed to a reference, neither can afterward demand a trial by jury: *Hewitt v. Egbert*, 34–485.

Where a party is present when an order for reference is made, and nothing appears of record to the contrary, his consent to such order will be presumed: *Vandall v. Vandall*, 13–247.

A party who agrees to a trial by a referee thereby waives a trial by jury: *In re Assignment of Hooker*, 75–377.

SEC. **3735. Without consent.** When the parties do not consent, the court may, upon motion of either, or upon its own motion, direct a reference in either of the following cases:

1. When the trial of an issue of fact shall require the examination of mutual accounts, or when, the account being on one side only, it shall be made to appear to the court that it is necessary that the party of the other side should be examined as a witness to prove the account, in which case the referee may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein;

2. When the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact shall arise in any action by equitable proceedings, in which case the court in the order of reference shall prescribe the manner in which the testimony shall be taken on the trial. [C. '73, § 2816; R., § 3090.]

Reference without consent: The cases which may be referred without consent of parties are only those which were formerly cognizable in equity, and it is only in such cases that a reference can be made without consent of the parties. Otherwise the right of trial by jury would be infringed: *McMartin v. Bingham*, 27–234.

Where accounts were to be examined and a series of calculations made, *held*, that the remedy by means of a reference would be more complete and adequate, and that, therefore, equity would have jurisdiction and a compulsory reference might be ordered: *Blair Town Lot, etc., Co., v. Walker*, 50–376.

The provision for compulsory reference in cases of account is not unconstitutional, since such cases come within the jurisdiction of courts of equity: *Burt v. Harrah*, 65–643.

A mortgage foreclosure, although it was triable under the Revision as an action at law, was held to be nevertheless of equity cognizance so that it might be referred without consent of the parties: *State v. Orwig*, 25–280.

In law actions: A compulsory reference cannot be made in an action at law. Therefore where plaintiff's cause of action was to recover for money which defendant had received and converted to his own use, *held*, that a compulsory reference was erroneous: *District T'p v. Bulles*, 69–525.

A probate court has power in proceedings as to accounts of executors to appoint a referee (§ 3393): *In re Heath's Estate*, 58–36.

Discretion of court: An order appointing a referee in an equity case is so essentially a matter of practice, so preliminary in its nature, and so much in the discretion of the court, that it cannot be successfully assigned as error without a showing of prejudice: *Hatch v. Judd*, 23–499.

SEC. **3736. Hearing—decision.** Where not otherwise declared in the order of reference, all the referees must meet to hear proofs, arguments, and to deliberate, but a decision of a majority shall be regarded as their decision. [C.'73, § 2817; R., § 3091; C.'51, § 1652.]

SEC. **3737. Vacancies.** When appointed by the court, the judge thereof may fill vacancies in vacation. [C.'73, § 2818; R., § 3092; C.'51, § 1653.]

SEC. **3738. Powers.** The referee shall stand in the place of the court, and shall have the same power, so far as necessary, to discharge his duty. [C.'73, § 2819; R., § 3093; C.'51, § 1769.]

Although the report of a referee is like the verdict of a jury or a finding by the court, yet under the language of § 3764, ¶ 1, a party may dismiss his action after a submission to the referee, although he could not after a like submission to the court or a jury: *Belzor v. Logan*, 32–322.

The referee is not the court: *Hobart v. Hobart*, 45–501.

SEC. **3739. Method of trial—proceedings.** The trial by referee shall be conducted in the same manner as a trial by the court; he shall have the same power to summon and enforce by attachment the attendance of witnesses, to punish them as for a contempt for non-attendance or refusal to be sworn or to testify, and to administer all necessary oaths in the trial of the case, to take testimony by commission, to allow amendments to pleadings, grant continuances, preserve order and punish all violations thereof. [C.'73, § 2820; R., § 3094.]

SEC. **3740. Report—judgment.** The report of the referee on the whole issue must state the facts thus found and the conclusions of the law separately, and shall stand as the finding of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; the report may be excepted to and reviewed in like manner. [C.'73, § 2821; R., § 3095.]

Reporting conclusions: Where a cause was referred to a commissioner in equity "to examine and report his conclusions under the rules of practice of this court," *held*, that a report in the form of a statement by the commissioner of the import of the testimony as he understood it sufficiently followed the order of the court: *Byington v. Hampton*, 13-23.

The fact that a referee who is only authorized by the submission to find the facts reports also his conclusions of law, which are adopted by the court, constitutes error without prejudice: *Shindler v. Luke*, 43–89.

It is not required that the report should be in any particular form, nor that it be paragraphed or arranged under proper subdivisions. All that is required is that the facts found and conclusions of law be stated separately at some place in the record, and that they be not so blended as to render it impossible to distinguish one from the other: *Young v. Scoville*, 68 N. W., 670.

Report of balance: In the absence of instructions by the court the referee is not bound to find as to the items of a mutual account, but may simply report the final sum due from one party to the other: *Hewitt v. Egbert*, 34–485.

Facts not ultimate: Failure of the referee to make findings as to certain facts will not be ground for reversal where the facts as to which findings were requested were immaterial or were not ultimate facts: *Keokuk County v. Howard*, 42–29.

Uncertainty: Where the report of a referee is so uncertain and defective that it is impossible to ascertain therefrom the facts governing a material issue in the cause, it should be set aside on motion: *Doyle v. Reilly*, 18–108.

Official capacity presumed: In order to support a referee's report the presumption will be entertained, in an action upon the official bond, that the official capacity of the referee was fully established: *Keokuk County v. Howard*, 42–29.

Correctness presumed: It must be presumed, in the absence of any showing whatever, that the matters stated in the report of the referee are correct: *Shindler v. Luke*, 43–89.

It is to be presumed that the referee in his findings has determined the question of interest upon the evidence before him, and the court should not, in rendering judgment upon such finding, provide for the recovery of interest upon the amount found due: *Keokuk County v. Howard*, 43–354.

Where upon the evidence it is impossible to determine whether a referee's report is correct or not, it should be allowed to stand: *In re Heath's Estate*, 58–36.

Effect of report: Where the reference is made by order of court the pleadings constitute the submission, and an agreement between the parties that the award shall be made a rule of court is unnecessary. When the award is returned to the court a judgment may be rendered upon the same, or the court may set it aside in whole or in part, or make a new reference: *Schohmer v. Lynch*, 11–461.

Certification of the evidence: The referee should certify all the evidence. If he fail to do so the report may be set aside and recommitted with an order to report with all the evidence duly certified. If the evidence was not taken in writing, and such time has elapsed that the referee cannot make the required certificate, it seems he should, on due notice, recall witnesses. The report of the evidence certified by the referee should have all the elements of certainty of a bill of exceptions: *Smith v. Harlan*, 49–101.

The court should require the referee to preserve and report the evidence with his findings of fact and conclusions of law unless there is some good reason for not doing so: *Goodale v. Case*, 71–434.

Unauthorized findings: Findings of a referee which he has not been authorized

nor required to make should be set aside upon exception being made to the report: *Sage v. Nichols*, 51-44.

Reference back to make specific: The court may refer the case back to tne referee to have the findings of fact made more specific, but the additional findings should be confined to matters specified in the order recommitting the case: *Ibid.*

Amended pleadings: A party should not be allowed to file an amended pleading and tender a new issue after a referee's report has been filed, and thereupon have a resubmission to the referee, without at least offering some excuse for not filing the amendment before the making of the referee's report: *Newell v. Mahaska County Savings Bank*, 51-178.

Review by the court; preservation of the evidence; exceptions: The court appointing a referee is not authorized to review the evidence taken before him, or his rulings, unless such evidence and rulings are preserved by bill of exceptions: *Inman v. Jamison*, 18-22.

And if the finding is claimed to be against the evidence, all the evidence should be preserved and certified by the court: *Oliver v. Townsend*, 16-430.

If the conclusions of a referee are inconsistent with the facts which he reports, the latter must govern, and the court may correct or disregard such erroneous conclusions: *In re Assignment of Hooker*, 75-377.

Findings of law; exceptions: But a party may have a review of the findings of law and fact made by the referee, irrespective of whether any exceptions thereto were taken before the referee. The power of the court in acting on the report of a referee is not merely appellate: *Edwards v. Cottrell*, 43-194; *Hodgin v. Toler*, 70-21.

Exceptions before the referee need only be taken to make that of record which would not otherwise appear. Error in his conclusion of law may be taken advantage of by motion to set aside the report, or by exceptions filed upon the coming in of the report: *Washington County v, Jones*, 45-260.

Exceptions before court and before referee: The provisions of this section as to exceptions to the report do not refer to exceptions taken before the referee under § 3742: *Michael v. Longman*, 42-484.

And where no such exceptions were taken either to the report or to the judgment thereon, a review cannot be had in the supreme court, even though the report was filed or the judgment rendered in vacation: *Roberts v. Cass*, 27-225.

The referee's report cannot be reviewed on appeal unless exceptions thereto have been taken in the lower court: *In re Malvin's Estate*, 93-169.

Where the report of the referee is to be reviewed, exceptions should be taken to it as the foundation of the review; an exception to the final judgment will not enable the supreme court on an appeal to inquire into the correctness of the report: *Bauder v. Hinckley*, 60-185.

The party desiring to except to the finding, when the evidence is not all certified, should have the whole report recommitted. It is not proper to allow the referee to make such certificate after his report is filed and judgment is rendered thereon, nor is it sufficient that he certify to the best of his recollection after his report is filed: *Smith v. Harlan*, 49-101.

The exceptions referred to in this section are not such as are taken before the referee, but those to the report after it is returned to the court, and an exception taken to a judgment rendered upon such report is not sufficient to bring up for review on appeal an alleged error in the report itself: *Bolton v. Kitsman*, 80-343.

Where a referee's report is filed in vacation without agreement, it cannot be regarded as coming in until presented to the court and acted upon. Therefore where it is agreed that any exceptions to the master's report should be filed within a limited time after the coming in thereof, such exceptions may be filed within that time after the first day of the next term: *Michael v. Longman*, 42-484.

Too general: An exception that a finding is contrary to law is too general and uncertain: *Sage v. Nichols*, 51-44.

Irregularities in proceeding; setting report aside: Exceptions to the master's report relating to irregularities in his proceeding should be overruled. Such errors or defects are to be reached by motion to set aside the report or refer it back for correction: *White v. Hampton*, 10-238.

The report of the referee is not to be set aside on the mere affidavit of the party as to a matter of opinion inconsistent with the finding of the referee: *Dunn v. Starkweather*, 6-466.

On appeal: The finding of the referee is regarded as the same as the verdict of a jury, and will not be disturbed unless clearly and manifestly against the weight of the evidence: *Johnston v. Johnston*, 19-74.

In ordinary actions a finding of facts by a referee has the effect of a special verdict of a jury and can only be disregarded when palpably against the weight of the evidence; but in equitable actions, triable as such, it is the duty of the court to adjudicate the case upon the evidence, and not alone upon the finding of facts: *Wilgus v. Gettings*, 21-177.

The report of the referee is to be regarded as the verdict of a jury, and a judgment thereon should not be reversed unless there is such an absence of evidence in its support as to authorize the conclusion that it was not the result of the exercise of honest, intelligent and unprejudiced judgment: *Taylor v. French Lumbering Co.*, 47-662; *Moore v. Brown*, 49-130. And see *Childs v. Shower*, 18-261; *Johnston v. Johnston*, 19-74; *Whicher v. Steamboat Ewing*, 21-240; *Lyon v. Harris*, 73-292.

The report will not be set aside on appeal where there is a conflict in the testimony: *Carson v. Cross*, 14-463; *Brainard v. Simmons*, 67-646.

The judgment upon the report cannot be reviewed by the supreme court unless all the evidence is contained in the record: *Haywood v. Woods*, 28-563.

A certificate of the referee that the record contains the substance of all the material evidence will not warrant such review: *Sears v. Sellew*, 28–501.

The report is not to be overthrown if there is any evidence in its support: *Corley v. Osborne*, 50–526.

Where the evidence upon which the referee makes his report is not before the court, his findings of fact must be accepted as correct: *Peck v. Schick*, 50–281.

The finding of fact by the referee being regarded as the verdict of a jury, the action of the lower court in setting it aside will not be interfered with on appeal if there is anything in the record to support such action: *Lyons v. Harris*, 73–292.

SEC. **3741. Finding of facts.** When the reference is to report the facts, the report shall have the effect of a special verdict. [C.'73, § 2822; R., § 3096.]

See notes to preceding section.

SEC. **3742. Bill of exceptions.** The referee shall sign any true bill of exceptions taken to any ruling by him made in the case upon the demand of either party, who shall have the same rights to obtain such bill as exists in the court, which bill shall be returned with the report, but no bill of exceptions is necessary to preserve or make of record any matter taken or noted down by the official shorthand reporter of the court, or one appointed by it or the referee, or agreed upon by the parties, and whose report is certified by such reporter and referee to be a full and true report of all the proceedings had, which shall be filed with the referee's report, and the whole be a part of the record. Such reporter shall be governed by the law relating to official shorthand reporters. [C.'73, § 2823; R., § 3097.]

See notes to § 3740.

SEC. **3743. Selection of referees.** In all cases of reference, the parties, except when a minor is a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be persons free from objection, or the court may allow each party to select one and itself select a third. [C.'73, § 2824; R., § 3098; C.'51, §§ 1651, 1795.]

SEC. **3744. Appointed in vacation.** A judge of the court, when a cause is pending, may, in vacation, upon the written consent of the parties, make an order of reference, which shall be written on the agreement to refer, and filed with the clerk with the other papers in the case, and become part of the record. [C.'73, § 2825; R., § 3099.]

SEC. **3745. Sworn.** The referee must make affidavit well and faithfully to hear and examine the case, and make a just and true report therein, according to the best of his understanding. The affidavit shall be returned with the report, filed by the clerk, and be a part of the record. [C.'73, § 2826; R., § 3100.]

If the affidavit here required is shown to have been made, but lost, its absence will not warrant the setting aside of a referee's report: *Sears v. Sellew*, 28–501.

A failure to return the affidavit with the report is not a fatal objection to the report. The fact that the referee was duly sworn may be otherwise shown: *Shindler v. Luke*, 43–89.

Where the record showed that the referee was only properly sworn three days before filing his report, but it appeared by affidavit on the hearing of a motion to set aside the report that he had been properly sworn before he commenced the trial of the case and the affidavit had been lost, *held*, there was no error in refusing to set aside the report: *Harper v. Kissick*, 52–733.

Where an exception is filed to the report of the referee on the ground that he has not been sworn, and evidence is introduced, not objected to, to the effect that he was duly sworn, the execution should be overruled: *Quick v. Cox*, 38–568.

SEC. **3746. Procedure.** The order shall not be made until the case is at issue as to the parties whose rights are to be examined on the reference. The order may direct when the referee shall proceed to a hearing and when he shall make his report, but, in the absence of such direction, he shall do so on the morning of the tenth day after the day on which the order of reference was made, and shall file his report as soon as done. The parties shall take notice of the time thus fixed or determined and non-

attendance of either party within an hour thereof shall be attended with like consequences as if the case were in court, which consequences shall be reported as any other fact or finding of the referee. [C.'73, § 2827; R., § 3102.]

Where the referees are directed to proceed, and it is left to them to fix the time of hearing both by agreement of parties and order of court, they will not be compelled to set the hearing of the cause on the tenth day after the issuing of the order: *Corbitt v. Nealy*, 29–445.

The referee has no authority to act even by consent of parties after the time fixed by the order appointing him for making his report and a report subsequently filed should be stricken out upon motion: *Davis v. Caldwell*, 69 N.W., 1037.

The report of the referee ought not to be received after the term at which he is required to report by the order appointing him. After that time he ceases to have authority as a referee: *Goodale v. Case*, 71–434.

That plaintiff's attorney on account of some conversation and negotiation between him and the defendant failed to appear at a trial before a referee, *held* no excuse, the circumstances not being such as to warrant the attorney in being misled: *Washington County v. Jones*, 45–260.

SEC. **3747. Acceptance by referee.** The referee must be called on by the court to accept or refuse the appointment, and his acceptance shall be entered of record; and he shall be under the control of the court, who may on the motion of either party make proper orders with a view to his proceeding with all due dispatch, and the court or judge may, on motion, extend the time for making his report. [C.'73, § 2828; R., § 3103.]

SEC. **3748. Proceed as court.** The form of procedure which in the court itself regulates service, pleading, proof, trial and the preparation, progress and method of each of these, shall obtain before the referee; and in every incident of the proceeding before him the rights and responsibilities of parties and of their attorneys, and of the referee, shall be the same as if the referee was the court engaged in the same manner. [C.'73, § 2830; R., § 3105.]

Where a referee upon request of a party investigated matters not in issue under the pleadings, and the finding thereon was adverse to such party, *held*, that the costs thereof were properly taxed to him, although he recovered judgment in the case: *Keokuk County v. Howard*, 42–29.

The referee cannot give a certificate of evidence for the purpose of an appeal from the judgment of the court. His certificate could only be as to proceedings before him, while the appeal is not from the referee but from the court. Where there is a reference there are in effect two trials: *Young v. Scoville*, 68 N.W., 670.

Section applied: *Keokuk County v. Howard*, 43–354.

SEC. **3749. Exceptions—how taken.** An exception is an objection, taken to a decision of the court, or person acting as the court, on a matter of law. The party excepting to the decision must do so at the time it is made, unless it is upon a motion or demurrer, in which case it may be taken within three days. It may be embodied in a bill of exceptions to be filed within thirty days after the final determination of the case, or within a reasonable time thereafter, to be fixed by the court, not to exceed ninety days therefrom. In equitable actions, triable *de novo* on appeal, no bill of exceptions shall be necessary, nor in other actions in which all the proceedings are, under the direction of the court, taken in writing or shorthand by the regular court reporter, or another appointed by the court or judge for the purpose, and embodied in a report by such reporter, certified by him and the court or judge, in the manner provided in this chapter for making and certifying such report. This section shall not be so construed as to prevent any party embodying in a bill of exceptions all or any part of the proceedings in any action in which he may elect to preserve his exceptions in that form. And whenever the judge or referee trying a cause is unable by reason of death, removal, resignation or any cause to sign a bill of exceptions, or certify the shorthand reporter's record, the same shall be done by his successor, and the time for such signing or certification shall be extended thirty days after the appointment, or election and qualification of such successor. [18 G. A., ch. 209; C.'73, § 2831; R., § 3106; C.'51, § 1805.]

Exceptions necessary: The supreme court will not review, on appeal, a ruling of the lower court to which exception is not duly taken: *Chapman v. Lobey*, 21–300; *Holton v. Butler*, 22–557; *Appanoose County v. Walker*, 23–26; *Redding v. Page*, 52–406; *Spelman v. Gill*, 75–717.

A party objecting to a decision or ruling in a justice's court must make his objection known at the time in order to have the decision reviewed upon appeal: *Coudray v. Stifel*, 77–283.

The fact that the exception was properly taken must affirmatively appear: *Beason v. Jonason*, 14 399.

This rule is not affected by the statutory provision (§ 4106) dispensing with the necessity of a motion for a new trial: *Eason v. Gester*, 31–475.

The supreme court will not review a case on appeal where the record presents no finding of facts by the court below, or motion for a new trial or other exception taken to its ruling: *Marshall v. Richards*, 19–571.

Where no exceptions were taken save to the ruling on a motion for new trial, and the record contained nothing to show the truth of the grounds assigned for new trial, the judgment was affirmed: *Kline v. Moore*, 20–599.

Where no exceptions are taken on the trial of an equity case, and the proper steps are not taken to have the case tried anew in the supreme court, there is nothing which the court can consider on appeal: *Richards v. Hintrager*, 45–253.

No objection to a judgment not excepted to in the court below can be considered upon appeal: *Redding v. Page*, 52–406; *Soup v. Smith*, 26–472.

Appeal cannot be taken from the ruling upon a demurrer unless such ruling is duly excepted to: *Cain v. Story*, 15–378.

An exception is not required to a judgment which is rendered as a result of a ruling on demurrer which ruling on demurrer was properly excepted to: *Haefer v. Mullison*, 90–372.

An exception to the overruling of a demurrer is all that is necessary to preserve the party's right of appeal from such ruling. It is not necessary for him to except again when the final judgment is entered: *Jordan v. Kavanaugh*, 63–152.

Where a motion for continuance was made by defendant, but overruled, and judgment entered against him by default, and no exception was made to the ruling on the motion, nor was any motion made to set aside the default, *held*, that there was nothing which could be reviewed on appeal: *Carter v. Griffin*, 54–62.

The action of the court in ordering a change of place of trial should be excepted to or it cannot be made a ground for objection on appeal; if not known to the appellant in time for taking proper exceptions, he should move to set aside the order on that ground, and except to the action of the court if adverse to him: *Scott v. Neises*, 61–62.

Objections to a referee's report cannot be urged on appeal unless exceptions to the report have been filed in the trial court: *Blake v. Dorgan*, 1 G. Gr., 547.

Improper remarks of the judge in the presence of the jury, made a ground of motion for new trial, should, for the purpose of appeal from the ruling of the court on such motion, be preserved by bill of exceptions, and not by affidavits in the lower court: *State v. Hall*, 79–674.

Where a judgment or order is entered of record, and is not disputed, the record, and not the bill of exceptions, is the proper source of information as to what such order is: *In re Estate of Pyle*, 82–144.

See, further, notes to § 4123.

Not necessary in equity: An exception to a final decree in an equitable action is not necessary where the party is entitled to a trial *de novo* on appeal: *Dicken v. Morgan*, 59–157; *Gately v. Kniss*, 64–537.

Where a party in an equitable suit stands upon the ruling upon a motion or demurrer, and desires to appeal therefrom, he should except thereto as in a law action: *Powers v. O'Brien County*, 54–501; *Patterson v. Jack*, 59–632; *Phipps v. Penn*, 23–30; *Hodgin v. Toler*, 70–21.

On appeal in an equitable case from a ruling on motion or demurrer exceptions must be taken and errors assigned as in an action by ordinary proceedings, and the hearing will be only upon the errors assigned: *Fink v. Mohn*, 85–739.

Where a case is triable *de novo* an objection to the admission of evidence which was made below may be renewed upon appeal, even though no exception was taken to its admission below: *Cochran v. Breckenridge*, 75–213.

An exception is necessary to a ruling on demurrer in an equity case in order that it shall be considered on appeal. It is only as to issues of fact that a trial anew in the supreme court without exceptions is allowed: *Exchange Bank v. Pottorfe*, 65 N.W., 312.

By whom taken: An exception by the party who is the real party in interest in the appeal, although not technically the party appealing, will be sufficient to save the question for review: *Fries v. Porch*, 49–351.

Waiver of exception: An exception properly taken, but afterwards expressly waived upon appeal, cannot be taken advantage of by the opposite party: *Fortney v. Jacoby*, 51–95.

No exceptions being taken to the failure of the court to rule on a motion, and it not appearing that the attention of the court was called to such motion, where ruling thereon has been reserved, it will be presumed that the motion was waived: *Payne v. Dicus*, 88–423. And see notes § 4139.

Waiver of necessity for exceptions: Where upon the transfer of a cause by agreement from one court to another for trial, it was stipulated that the judgment to be rendered should be entered in the court from which the transfer was taken, as of the previous term, and that either party should have the right to appeal, *held*, that such stipulation amounted to a waiver of the necessity of excepting to the judgment: *Wolf v. Smith*, 36–454.

Successful party need not except: The successful party cannot, in any way, be prejudiced by the failure to except to any action of the court adverse to him: *Baird v. Chicago, R. I. & P. R. Co.*, 61–359.

Therefore where, on appeal, a judgment was reversed because the verdict was contrary to an instruction given, and the cause was remanded for a new trial, and the unsuccessful party then moved for judgment on special findings, on the theory that under the doctrine of the instruction he was entitled to judgment on such findings, *held*, that the successful party might controvert the correctness of such instruction although he had not excepted thereto, and that the instruction was not binding on the court: *Ibid.*

Time for taking: An exception to a decision or ruling must be taken at the time the decision or ruling is made. The only departure from this rule is that authorized by statute in regard to instructions (§ 3709): *Joliet Iron, etc., Co. v. Chicago, C. & W. R. Co.*, 50–455; *Nagel v. Guittar*, 62–510; *Boardman v. Beckwith*, 18–292. [But by express provision now incorporated into this section, exception to decision on motion or demurrer may be taken within three days.]

Objection to the introduction of evidence must be made at the time it is offered: *State v. Benge*, 61–658.

Exceptions must be taken at the time of the decision: *Souster v. Black*, 87–519.

Time for filing: It is not error to refuse to stop a trial for the purpose of allowing a party to prepare a bill of exceptions, when time is granted within which to prepare the same: *Anson v. Dwight*, 18–241; *Hanan v. Hale*, 7–153.

Where, pending the argument of a motion for a new trial by the party applying therefor, the court adjourned without giving an opportunity to file a bill of exceptions, *held*, that the action of the court could not be reviewed on affidavits: *Campbell v. Ayres*, 4–358.

Where a motion in arrest and for a new trial has been continued to a succeeding term, it is sufficient to embody the exceptions into one bill and have it signed by the judge, unless dissent of the opposite party is shown: *Courtney v. Carr*, 11–295.

In the absence of an express agreement or consent the judge has no power to sign a bill of exceptions after the final adjournment of the term: *Claggett v. Gray*, 1–19; *State v. Orwig*, 34–112; *Hahn v. Miller*, 60–96; *Gates v. Brooks*, 59–510; *Gibbs v. Buckingham*, 48–96.

The subsequent verbal alteration of an order or judgment made on approving it at a subsequent term will not entitle the party to a bill of exceptions at that term, including objections raised at the trial: *State v. Orwig*, 34–112.

An exception can be preserved only by having it embodied in the bill of exceptions, or by having it noted in the record of the decision to which it relates (§ 3751), and a party who would save his exception by the first method must have his bill of exceptions signed and filed within the time prescribed therefor; and where, upon a demurrer being overruled, followed by an order dismissing the action, the unsuccessful party filed a motion for rehearing, which was, on the same day, submitted and taken under advisement, but not overruled until the following term, *held*, that a bill of exceptions signed at the following term was insufficient: *State ex rel. v. Leach*, 71–54.

The bill of exceptions must be settled at the term unless the time is extended by consent or order of the court: *Deering v. Irving*, 76–519.

A bill of exceptions may, by agreement of parties, be settled and signed after the conclusion of the term: *Harrison v. Charlton*, 42–573; *Dedrick v. Hopson*, 62–562.

A bill of exceptions filed later than the time fixed by agreement of the parties will not be stricken out on appeal where it is admitted that the abstracts present all the evidence introduced on the trial: *Richardson v. Blinkiron*, 76–255.

An agreement between two attorneys for an extension of time to file a bill of exceptions, duly filed, is binding upon the parties without any approval by the court: *State ex rel. v. Chamberlin*, 74–266.

If time for filing the bill of exceptions is extended by consent, it must be filed within the time so given, and will not be considered if filed afterwards: *Lynch v. Kennedy*, 42–220; *Lloyd v. Beadle*, 43–659; *St. John v. Wallace*, 25–21; *Frost v. Senior*, 44–706; *Parmenter v. Elliot*, 45–317; *Deland v. Weddington*, 54–698; *Hahn v. Miller*, 60–96; *Mineral Ridge Coal Co. v. Smith*, 68–561.

A bill of exceptions signed after the expiration of the term or after the time allowed for that purpose, if the time has been extended, will be stricken out on motion in the supreme court: *Lynch v. Kennedy*, 42–220; *Gibbs v. Buckingham*, 48–96; *Templin v. Exchange Bank*, 69–149; *McCarthy v. Watrous*, 69–260; *Barber v. Scott*, 92–52.

If not filed within the time prescribed in the order of court extending the time, the bill will be disregarded or stricken from the record: *McFarland v. Folsom*, 61–117.

Where thirty days was agreed upon to settle a bill of exceptions, and no showing was made of a proper effort to settle the same within the time fixed, *held*, that without such showing a party could not have the benefit of exceptions signed by the judge after that time, and that he was in no better position when it was thus signed by bystanders: *St. John v. Wallace*, 25–21.

Where the time was extended to a day beyond the term, by consent, for signing and filing a bill of exceptions, and the bill was signed by that date, but not filed, *held*, that it was not valid, and the judge could not by order made in vacation at the time of signing, direct that it be made a part of the record: *Cobb v. Chase*, 54–196.

Where it appears that within the time allowed for settling and filing a bill of exceptions the bill was signed, but it does not appear, except by statement in the abstract, not based upon matter of record, that such bill was filed with the clerk, the supreme court cannot consider it: *Anderson v. Leaverich*, 70–741.

Where sixty days were allowed defendant in which to file a bill of exceptions, and none was filed until more than seven months after the time allowed, when one was filed by leave of court, and a certified copy of the evidence filed at the same time, *held* the bill of exceptions was filed too late: *Short v. Chicago, M. & St. P. R. Co.*, 79–73.

Where sixty days from March 17th were

given in which to file a bill of exceptions, *held*, that a bill filed on May 17th could not be considered: *McCoid v. Rafferty*, 84–532.

An agreement for the submission of a cause and for a decision in vacation as of the last day of the term does not have the effect of extending the time for filing the bill of exceptions: *Edwards v. Cosgrove*, 77–428.

Where a stipulation was filed for sixty days in which to file bill of exceptions after ruling on motion for arrest of judgment and new trial, and such motion was determined at a new term subsequent to that at which the trial was had, *held*, that it was not necessary that an order should have been entered of record at the term at which the case was tried extending the stipulation beyond that term: *Etter v. O'Neil*, 83–655.

The fact that the findings provided for by § 3654 are embodied in a bill of exceptions filed by agreement after the term will not obviate the objection that such findings were not filed before judgment: *Hodges v. Goetzman*, 76–476.

In order to bring up for review in the supreme court alleged errors in the report of a referee, timely exceptions thereto must be filed in the trial court: *In re Malvin's Estate*, 93–169.

Such exceptions must be filed within three days after the opening of the term of court first following the time when the report is in fact filed if it is filed in vacation: *Ibid.*

Where a bill of exceptions is not filed within the time allowed therefor, it is not within the power of the lower court on motion, without notice to the opposite party, to grant extension of time to file. If there is any reason for extending the time beyond that originally allowed, it ought to be discovered and an order asked before the original time given expires: *Rosenbaum v. Partch*, 85–409.

The statute gives no room for the exercise of discretion as to the time within which a bill of exceptions may be approved. After the expiration of the time fixed by the statute or by the court or consent of parties in accordance with the statute without such time having been extended, the power to sign a bill of exceptions is gone and the judge cannot make a *nunc pro tunc* order approving such bill: *White v. Guarantee Abstract Co.*, 65 N.W., 305; *State v. Hathaway*, 69 N.W., 449.

The right to settle a bill of exceptions should be kept alive and not be permitted to expire. It cannot be revived by an order of the court or judge made after the expiration of the term: *Bennett v. Marion*, 70 N.W., 105.

Where the certificate of the evidence by the judge was not filed until long after the time fixed for filing the bill of exceptions, *held*, that the evidence thus certified could not be considered: *Drake v. Fulliam*, 67 N. W., 225.

The indorsement on a bill of exceptions by attorney for the opposite party indicating his approval of it as correct does not amount to a waiver of time of filing: *Bennett v. Marion*, 70 N.W., 105.

What sufficient filing: A bill of exceptions which has been signed by the judge and handed to the clerk to be filed is filed in contemplation of law, even though the clerk has failed to properly indorse the fact that it has been filed: *Foster v. Hursen*, 75–291.

The leaving of a bill of exceptions with the clerk is a sufficient filing thereof, and the fact that it is afterwards taken by the attorney filing it, to prepare an abstract, will not defeat the effect of such filing: *Sheldon Bank v. Royce*, 84–288.

It is the filing of a bill of exceptions after it has been signed that makes it of record: *Bennett v. Marion*, 70 N. W., 105.

Presumption: Where it appears that the bill of exceptions was signed within proper time, and it is made part of the transcript, it will be presumed, in the absence of all showing to the contrary, that it was filed within the proper time: *Wilson v. First Presb. Church*, 60–112.

Where the bill of exceptions is silent as to when it was settled, it will be presumed that it was taken during the term regularly, or settled by agreement without reference to the time of filing; and if consent to an extension of time beyond the term is shown, it will be presumed that the bill was reduced to form and made part of the record within the time contemplated by law. But if it appears to have been taken in vacation, and assent is not shown, the bill will be stricken from the record upon objection properly made: *Claggett v. Gray*, 1–19.

SEC. **3750. Form—grounds.** No stated form of exception is required. If the exception is to the admission or exclusion of evidence, oral or written, the ground of the objection must be stated, and no other shall be regarded. [C. '73, § 2832; R., § 3107.]

What sufficient: An exception to the overruling of a motion for a new trial is a sufficient exception to the judgment: *Gulliher v. Chicago, R. I. & P. R. Co.*, 59–416.

Where a motion asking for judgment on the findings of a special verdict was overruled, and proper exception taken, *held*, that it was not necessary to except to the judgment afterwards rendered: *Aldrich v. Price*, 57–151.

Where the judgment is founded upon a conclusion of law which is duly excepted to, it seems that such exception will be sufficient to entitle the party to have the correctness of such conclusion determined upon appeal, although no exception to the final judgment appears: *Barnhart v. Farr*, 55–366.

Where a judgment is entered on a referee's report, exception to such judgment will not preserve for review objections to the report which were not made in the lower court: *Bolton v. Kitsman*, 80–343.

Where exception was entered to a ruling instructing the jury to return a verdict for defendant, *held*, that such exception related to that ruling and not to a former ruling refusing to allow plaintiff to dismiss the action: *Westlake v. Muscatine*, 85–119.

The practice of making statements in the presence of the jury of what is offered to be

proven being often objectionable, the court may properly require the questions to be raised by interrogatories propounded to the witness when they can be so raised: *Osgood v. Bauder*, 82-171.

An exception in general terms which does not specifically call the court's attention to an alleged error and requires the court to examine the entire record, is insufficient: *Feister v. Kent*, 92-1.

To admission or rejection of evidence: When exception is taken to the admission or exclusion of evidence the ground of objection must be stated, otherwise the ruling cannot be reviewed on appeal: *Peck v. McKean*, 45-18; *Davidson v. Smith*, 20-466; *Thompson v. Blanchard*, 2-44.

To preserve an objection to questions asked in examination of a witness the objection should be made after the asking of the question, and it is too late to make such objection after the answer is made. In such case the proper method is to move to strike out the answer and except to the overruling of such motion: *Duer v. Allen*, 64 N. W., 682.

Objections to evidence not raised in the court below cannot be first taken on appeal: *Johnson v. Miller*, 69-562.

If incompetent evidence is not objected to at the time it is produced its admission cannot afterward be made ground for reversal: *State v. McLaughlin*, 44-82.

In the absence of objection at the time and a showing of prejudice the fact that one who read testimony reduced to writing to the jury in a criminal action was not sworn to do so correctly cannot be urged as an objection on appeal: *State v. Polson*, 29-133.

An objection to the competency of a witness not made in the lower court cannot be first urged on appeal: *Schmidt v. Littig*, 69-277.

Evidence which is competent as determining the rights of the parties, and which might have been made admissible by the amendment of the pleadings on the trial, if not objected to then cannot afterwards be objected to in the supreme court on appeal as not admissible under the issues raised by the pleadings: *Council Bluffs Lodge v. Billups*, 67-674.

A party cannot, on appeal, object to evidence on a different ground from that interposed in the court below: *Luke v. Bruner*, 15-3; *Iowa Homestead Co. v. Duncombe*, 51-525.

The record must show that the introduction of evidence was objected to upon the same ground urged against it upon appeal: *Childs v. McChesney*, 20-431.

A party having alleged one objection to evidence on which it is improperly excluded, cannot, on appeal, allege other objections thereto in support of the action of the court below: *Lines v. Lines*, 54-600.

For instance, under the objection that evidence is incompetent, irrelevant and immaterial under the pleadings, he cannot urge that it was improperly admitted in rebuttal: *Davidson v. Dwyer*, 62-332.

When the admission in evidence by the defendant of a deed void upon its face is objected to on other grounds, which are overruled, the plaintiff may upon appeal offer such objection to its validity, when the record shows that the court found for the defendant solely upon the evidence of the deed, and that plaintiff excepted to this finding and made it a ground of a motion for a new trial: *Ferguson v. Heath*, 21-438.

Grounds must be stated: The ground of objection to evidence should be distinctly stated: *State v. Wilson*, 8-407.

It is error to overrule an objection to a question on a motion to strike out an answer where the ground therefor is not stated: *State v. Lee*, 64 N.W., 284.

The court is not required to sustain an objection to testimony where the grounds of the objection are not stated, and this applies to a motion to strike out the testimony as well as to an objection to its introduction: *Smith v. Dawley*, 92-312.

It is not necessary to show by bill of exceptions the reason or ground of an objection to the action of the court below where the entire basis of the action of the court necessarily appears from the record; in such case any objection which may be raised to the action of the court can be urged under an exception taken to such action: *McGovern v. Keokuk Lumber Co.*, 61-265.

Error in admitting testimony cannot be complained of if introduced without objection: *State v. Smith*, 46-670; *State v. Hamilton*, 32-572.

The degree of particularity required in pointing out objections to testimony when offered must depend very much on the kind of testimony and the circumstances and attitude of the case: *Rindskoff v. Malone*, 9-540.

Where testimony was received "subject to all legal objections," and no objection was made at the trial nor in the motion for a new trial, *held*, that the objection that papers were thus introduced without proper authentication, or that records were used without accounting for the absence of the originals, were not objections which could be first made on appeal: *Guest v. Byington*, 14-30.

Objection to evidence as "incompetent, irrelevant and immaterial" does not raise the question of the competency of the witness to testify as to a question of value: *White v. Smith*, 54-233.

Nor does such objection raise the question as to whether the evidence offered is the best evidence: *Iowa Homestead Co. v. Duncombe*, 51-525; but *contra*, see *Hunt v. Higman*, 70-406.

The objection "incompetent, irrelevant and immaterial" to offered testimony, without more, goes to the testimony, and not to the competency of the witness: *Ball v. Keokuk & N. W. R. Co.*, 74-132.

An objection to evidence "as incompetent under the law" raises the objection that the examination of the witness in the manner proposed is not authorized by law as well as that the evidence sought to be introduced is inadmissible. Therefore, *held*, that such an objection was sufficient to raise the point that a witness could not be cross-examined as to his belief as to a future state of existence for the purpose of discrediting his testimony, although other evidence of the fact would be admissible: *Dedric v. Hopson*, 62-562.

A party's right to the relief asked in his pleading, or objections to defects in his pleading, cannot be raised by objections to evidence: *Jones v. Marcy*, 49–188.

A general objection to the introduction of evidence, specifying no ground upon which it is raised, cannot be taken advantage of on appeal: *Gelpeck v. Lovell*, 18–17; *Carleton v. Byington*, 18–482; *Davidson v. Smith*, 20–466; *O'Hagan v. Clinesmith*, 24–249; *Chase v. Walters*, 28–460; *Keough v. Scott County*, 28–337; *Williams v. Meeker*, 29–292; *Snyder v. Nelson*, 31–238; *Lake v. Miller*, 31–596; *State v. Benge*, 61–658.

Where the party appealing has made a general objection to the admission of evidence, the ground of which does not appear of record, and it is *overruled*, such ruling cannot be reviewed upon appeal, for the reason that, in presenting such objection, he might have relied upon an insufficient ground, and should not be allowed, upon appeal, to rely upon another and sufficient ground. But where the successful party makes a general objection which is *sustained*, if the appellant can show that there could be no legal or possible ground upon which such ruling can be sustained, he will be entitled to a reversal: *Clark v. Connor*, 28–311; *Engleken v. Webber*, 47–558.

Where the bill of exceptions does not disclose the ground of objection to a question, but the objection is sustained, the court will, on appeal, if the question is vulnerable to any objection, presume that such was the one made and rightfully sustained: *Hoben v. Burlington & M. R. R. Co.*, 20–562.

What sufficiently specific: An exception on the ground of incompetency is sufficiently specific: *Greenleaf v. Dubuque & S. C. R. Co.*, 30–301.

Where testimony was introduced to impeach a witness by showing bad moral character, *held*, that an objection to such testimony as incompetent and improper was not sufficiently specific to raise the objection that the testimony related to a specific vice and not to the general moral character: *Kilburn v. Mullen*, 22–498.

Motion for new trial is not necessary to enable the court to pass upon a ruling as to the admission or exclusion of evidence, where such ruling is duly excepted to, and virtually disposes of the whole case: *McCoy v. Julien*, 15–371.

Instructions: As to exceptions to instructions, see §§ 3707 and 3709 and notes.

SEC. **3751. Exception noted.** When the decision objected to is entered on the record, and the grounds of the exception appear in the entry, or when any error appears of record, the exception may be taken by the party causing to be noted at the end of the decision, or in connection therewith, that he excepts. [C.'73, § 2833; R , § 3108.]

An oral exception entered of record at the end of the decision excepted to is sufficiently taken: *Cramer v. White*, 29–336.

An exception thus entered need not be embodied in a bill of exceptions: *Laub v. Paine*, 46–550; *Winet v. Berryhill*, 55–411.

The noting of a general exception at the end of a decree to all rulings set out in the decree will not be sufficient to have a ruling on demurrer reviewed upon appeal, but the party excepting must have the record show an election to stand on the demurrer: *Stanbrough v. Daniels*, 77–561.

An exception to the conclusion of law in the judgment, *held* sufficient to raise a question whether the conclusion reached from the facts found was correct: *Henkle v. Keota*, 68–334.

A bill of exceptions makes that a part of the record which was not so before. If the error appears without it there is no necessity for it: *Eyser v. Weissgerber*, 2–463.

It is not necessary to preserve by a bill of exceptions the decision on a demurrer, or the judgment of the court: *State v. Strong*, 6–72.

Exceptions to the overruling of a motion for new trial relating to rulings in the admission of evidence and instructions to the jury, constitute an exception to the judgment: *What Cheer v. Hines*, 86–231.

A written agreement of facts signed by the parties and filed becomes a part of the record without being embodied in a bill of exceptions: *Black v. Howell*, 56–630.

Exceptions entered by a judge upon his calendar and not otherwise preserved are not sufficiently made of record: *Lewis v. May*, 22–599.

Errors with reference to the introduction or rejection of evidence cannot be considered where there is no bill of exceptions showing that the rulings complained of were made: *Acton v. Coffman*, 74–17.

Misconduct on the part of an attorney in arguing to the jury must be shown by a bill of exceptions and not by affidavit: *Rayburn v. Central Iowa R. Co.*, 74–637; *Hall v. Carter*, 74–364; *Fowler v. Strawberry Hill*, 74–644; *Little Sioux Savings Bank v. Freeman*, 93–426; *State v. Helm*, 66 N.W., 751; *State v. La Grange*, 68 N.W., 557; *Farmer v. Brokaw*, 71 N.W., 246; *State v. Bigelow*, 70 N.W., 600.

It is not competent to consider on appeal affidavits which were attached to the motion for a new trial in the lower court for the purpose of showing use of improper language in the address to the jury: *Knaebel v. Wilson*, 92–536. And see notes to § 4123.

That exceptions may be noted by the reporter and thus made of record, see now § 3675.

SEC. **3752. Writings identified—skeleton bill.** A bill of exceptions, when presented for signature, need not include therein, spread out at length, any writing filed in court, but may incorporate the same by any unmistakable reference thereto; and the clerk, in making a transcript of

the bill of exceptions, shall write therein at length all of such writing included therein by reference. [C.'73, § 2834; R., § 3109.]

Written instruments: To make writings, etc., a part of the record they should be incorporated into the bill of exceptions or plainly identified thereby. They cannot be made a part of the record by the mere certicate of the clerk (under § 4123): *Garber v. Morrison*, 5-476; *Reed v. Hubbard*, 1 G. Gr., 153; *Jordan v. Quick*, 11-9; *State ex rel. v. Jones*, 11-11; *Harmon v. Chandler*, 3-150.

A paper which is not of itself a part of the record cannot be made a part of the record by being certified to by the clerk and inserted in his transcript. It must be preserved by a bill of exceptions. An entry by the judge in his private calendar, or even by the clerk in his record, that a ruling was made and that an exception was taken to the ruling, is not such an exception as is contemplated by law: *State ex rel. v. Jones*, 11-11.

Papers not identified by a bill of exceptions are not properly a part of the record although embraced in the transcript: *Green v. McFaddin*, 5-549.

In all cases where a written instrument is referred to as connected with the action of the court to which exception is taken, it should be contained in the bill of exceptions: *Reed v. Hubbard*, 1 G. Gr., 153.

Identification of instruments of evidence: It is the safer practice, when exceptions are taken in relation to any instrument in writing, to copy the same into the bill of exceptions, but if this is not done it should be so particularly described and referred to in the bill as to enable the clerk to copy the same without mistake into the record and to enable the supreme court to refer to it with positive certainty: *Humphry v. Burge*, 1 G. Gr., 223.

A paper sought to be incorporated into a bill of exceptions by description must be designated and identified with clearness and certainty: *Sands v. Woods*, 1-263; *Bryan v. State*, 4-349.

The reference in a bill of exceptions to papers on file, not otherwise identifying them, is not sufficient to make them a part of the bill of exceptions: *Freher v. Geeseka*, 5-472.

The statement in a bill of exceptions that the plaintiff offered in evidence "the transcript sued on" is not sufficiently definite to identify the instrument offered in evidence, although it was in fact the instrument attached to the petition: *Smith v. Taylor*, 11-214.

The fact that the bill of exceptions refers to depositions marked as exhibits cannot be sufficient to identify and make part of the record depositions which are not identified by the certificate of the clerk or the judge, or by any exhibit marks, as depositions read upon the trial: *Pierce v. Locke*, 11-454.

Where the bill of exceptions stated that the party filed a certain motion with affidavits attached, etc., *held*, that the mention of the affidavits was not sufficient to make them a part of the record: *Moffit v. Rogers*, 15-453.

Writings referred to in the bill of exceptions should be copied at length in their proper place in the transcript: *Ibid.*

Although, if attached and clearly identified, the writings referred to may be embodied in the transcript without being copied out in the bill of exceptions, the sufficient and better plan is to follow the course laid out and insert them in the bill: *Lyons v. Thompson*, 16-62.

If the evidence or other papers attached to the bill of exceptions are not sufficiently identified therein they will be disregarded: *Van Orman v. Spafford*, 16-186.

When the testimony is not in the body of the bill of exceptions, and there are discrepancies in the paging or references made, the supreme court will disregard it: *Burlington Gas Light Co. v. Green*, 21-335.

The identification of certain documents in the reporter's translation of his notes embodied in a bill of exceptions, *held* sufficient to render such documents a part of the record: *Johnston v. McPherran*, 81-230.

Skeleton bills: A bill of exceptions which does not contain the evidence, but directs the clerk to "insert all the evidence, rulings, objections and exceptions," does not sufficiently identify such evidence, and it may, upon motion, be stricken from the files: *Hill v. Holloway*, 52-678.

A skeleton bill of exceptions which does not identify the evidence which is to be inserted, but merely directs the clerk to insert all the evidence, or "plaintiff's evidence" and "defendant's evidence," is not sufficient. The clerk has no power to determine what is to be inserted under such a direction. The bill must so identify the evidence that a mistake of the clerk as to what is to be inserted in the transcript may be readily corrected: *Tootle v. Phœnix Ins. Co.*, 62-362; *Wilson v. Tenant*, 61-194; *Wooster v. Chicago, M. & St. P. R. Co.*, 74-593.

A bill of exceptions directing the clerk to copy as a part thereof the evidence and the instructions given and refused, leaving the clerk to determine what he shall copy, and giving no means of identification whereby he may be directed what papers he shall copy, and whereby errors, if any should be made, could be corrected, is not sufficient to make the evidence thus referred to a part of the record. The bill should identify the different papers intended to be made a part of the record: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520.

A bill of exceptions in which the clerk is merely directed to insert the evidence, without such evidence being otherwise identified, is not sufficient: *Lockard v. Chicago, St. P., M. & O. R. Co.*, 66-250; *Williams v. Williams*, 69-715; *Parks v. Council Bluffs Ins. Co.*, 70-655.

Where the bill of exceptions directed the clerk to insert the evidence taken by the shorthand reporter and filed in the case, marked "C," and certified by the court, but no transcript of such shorthand report was ever filed, *held*, that the evidence was not sufficiently made of record: *Warbasse v. Card*, 74-306.

A bill of exceptions, though a skeleton bill, in form, is sufficient if it only refers to the shorthand report of the evidence, and

directs the evidence thus referred to to be inserted: *Glenn v. Gleason*, 61-28.

The certificate of the reporter and of the judge must show that all the evidence was taken down, and not merely that all the notes are transcribed, if it is claimed that the supreme court has all the evidence before it: *Farmer v. Brokaw*, 71 N.W., 246.

A skeleton bill of exceptions which sufficiently identifies the evidence which is to be inserted therein, as, for instance, by a proper reference to the notes or transcript of the evidence as taken down by the shorthand reporter and filed with the clerk, will make such evidence a part of the record: *McCarthy v. Watrous*, 69-260.

Where the bill of exceptions directed the clerk to insert the transcript of the evidence produced and offered by plaintiff, contained in the reporter's notes, filed in the office of the clerk of the court, *held*, that such identification was sufficient, although the transcript was not on file when the bill of exceptions was signed, it being filed, however, when the bill was filed: *Gardner v. Burlington, C. R. & N. R. Co.*, 68-588.

A bill of exceptions referred to the evidence in the following manner: "The following rulings were had and reduced to writing by said reporter, being all the testimony in said trial. Here insert evidence in full." *Held* to sufficiently identify the evidence: *Wilson v. First Presb. Church*, 60-112.

Where the bill of exceptions directed the clerk to insert the instructions given by the court on its own motion, and such instructions were incorporated by the clerk in the transcript, *held*, that it would not be presumed that instructions were given by the court other than on its own motion, and therefore that it would be considered that all the instructions given were before the court, and that the identification of the instructions in the skeleton bill of exceptions was sufficient: *King v. Barber*, 61-674.

A direction in the bill of exceptions to insert the translation of the shorthand reporter's notes of the evidence of all the witnesses and the exhibits offered in evidence and referred to in said notes, and all the objections to the testimony and the rulings of the court thereon and the exceptions thereto is sufficient to make the evidence a part of the bill of exceptions: *Smith v. Pella*, 86-236.

Where the shorthand notes are duly certified by the judge, and are incorporated by reference into the bill of exceptions, it is not necessary that the judge shall sign the translation of the shorthand notes: *Croddy v. Chicago, R. I. & P. R. Co.*, 91-598.

To make the minutes of the evidence certified to by the judge answer for the bill of exceptions, it must appear to have been signed and filed as required; that is, during the term or in such time thereafter as may be fixed by the order of the court or by consent; otherwise the evidence will be stricken on motion: *Markley v. Owen*, 71 N.W., 431.

Upon a motion to strike from the abstract a deposition on the ground that it was not identified in the skeleton bill of exceptions where such bill directed the clerk to insert the deposition "as shown by the minutes of the shorthand reporter taken upon said hearing," it was held that this sufficiently identified the evidence, it appearing that the evidence was taken in shorthand by the official stenographer, and immediately certified and filed as required by law, and that the notes clearly identified the said deposition: *Winters v. Winters*, 71 N. W., 184.

The evidence may be sufficiently incorporated in the bill of exceptions by reference to the stenographer's report of the evidence, whether such report is certified by the reporter or not. A transcript or extension in long-hand of the reporter's notes is not necessary to complete the bill of exceptions, and is not necessary unless a transcript is required: *Hampton v. Moorehead*, 62-91.

Where the original notes of the reporter are filed, and the reporter has therein marked and identified, in writing, the papers offered in evidence, and the clerk is directed to insert in the bill of exceptions all exhibits referred to and identified by said reporter, the written evidence offered is sufficiently identified to become a part of the record: *Manson v. Ware*, 63-345.

Where a skeleton bill of exceptions directed the clerk to insert the shorthand reporter's translation of evidence, and the official translation failed to show the cause in which the evidence was given, except by indorsement upon the outside of the last leaf of the translation, which indorsement was not in the handwriting of the reporter, *held*, that the translation was not sufficiently identified and the evidence would be stricken from the record: *Joy v. Bitzer*, 77-73.

A bill of exceptions referring to the shorthand reporter's notes and the evidence as on file, and making them and the translation thereof a part of the bill of exceptions, and directing the clerk to copy the translation into the bill of exceptions, is sufficient to preserve the evidence as embodied in the reporter's notes: *Hunter v. Burlington, C. R. & N. R. Co.*, 76-490.

To make the shorthand notes a part of the record it is not necessary to attach them to the bill of exceptions if they are properly referred to. The transcript when properly certified becomes a part of the record by such reference in the bill of exceptions: *Waller v. Waller*, 76-513.

The depositing of the shorthand notes in due time in the court below, though they are not marked filed, is sufficient, though the evidence does not become a part of the record until the shorthand notes, together with a translation thereof, are deposited in the clerk's office, and the evidence thus presented is duly certified by the judge: *Harrison v. Snair*, 76-558.

The shorthand reporter's notes become a part of the record in the case and may be made a part of the bill of exceptions by incorporating them into a skeleton bill by reference, and the transcript of such notes need not be filed within the time allowed for taking an appeal, but it will be sufficient if such transcript is filed in time to allow the proper presentation of the case to the supreme court: *Hammond v. Wolf*, 78-227.

A shorthand report of the evidence, duly

certified by the judge and made a part of the record, constitutes a bill of exceptions within the requirements of the statute, and, in an action at law, the fact that the translation is not filed until more than six months after the judgment is rendered is not a fatal objection: *Fleming v. Stearns*, 79-256.

The filing of a transcript of the shorthand notes within six months is not essential. The evidence is sufficiently made a part of the record by the filing of the notes and if a transcript is required, a reasonable time should be allowed for making a transcript of such notes: *Slone v. Berlin*, 88-205.

While the shorthand notes or the transcript thereof must be certified by the judge or otherwise made a part of the record within the time for filing bill of exceptions yet, if the judge certifies to the notes and they are properly filed, the filing of the transcript within the time limited for bills of exceptions is not necessary: *Bunyan v. Loftus*, 90-122.

Documentary evidence, properly identified in the reporter's notes is part of the record on appeal although not attached to and incorporated into the stenographer's report when certified by the judge: *Novelty Iron Works v. Capital City Oat Meal Co.*, 88-524.

Further to the effect that the stenographer's report constitutes in itself a bill of exceptions, when certified by the judge, see now § 3675.

SEC. **3753. Signing.** When the decision is not entered on the record, or the grounds of objection do not sufficiently appear therein, the party excepting must reduce his exception to writing and present it to the judge for his signature, which, if it fairly presents the facts, he shall sign; if he refuses, the party may procure the signature of two bystanders attesting that the exception is correctly stated, and that the judge has refused to sign the same, which bill of exceptions shall then be filed with the clerk and become a part of the record. The truth of such exceptions may be controverted and maintained by affidavits, not exceeding five on each side, which shall become a part of the record. All affidavits impugning the exception must be filed within three days from the time of filing the bill, and all affidavits sustaining the same within two days thereafter. [C. '73, § 2835; R., § 3110; C. '51, §§ 1806-7.]

What deemed of record: Under the provisions of § 4123 a motion properly filed becomes part of the record: *Lemonds v. French*, 4 G. Gr., 123; *Mays v. Deaver*, 1-216; *Ellsworth v. Moore*, 5-486.

The fact that a matter is recited in a motion which is made a part of the record does not make the matter itself of record unless expressly made so: *Herring v. State*, 1-205; *Pharo v. Johnson*, 15-560.

The answer of a garnishee does not become a part of the record unless embodied in a bill of exceptions: *Brainard v. Simmons*, 58-464.

Affidavits introduced on the hearing of an application for a temporary injunction in resistence thereof are no part of the record unless preserved by bill of exceptions or otherwise: *Hart v. Foley*, 67-407.

It is not necessary that affidavits which have been presented on a motion for change of venue be preserved and made matter of record by a bill of exceptions. When filed they become part of the record and may be certified by the clerk on appeal in the same manner as other matters of record: *McGovern v. Keokuk Lumber Co.*, 61-265; *Winet v. Berryhill*, 55-411.

An affidavit for publication, when filed, becomes part of the record: *Bradley v. Jamison*, 46-68, 73.

Where exceptions are duly made of record, and the question presented arises from the pleadings, and nothing else, the pleadings being of record, no bill of exceptions is necessary: *Gardner v. Halstead*, 71-259.

Opinion of lower court: An opinion filed by the trial court stating his conclusions of fact and of law may properly be made a part of the record and presented on appeal to the supreme court; *Gregg v. Spencer*, 65 N. W., 411. And see notes to § 4118.

Record in another case: Where the party desires to rely upon matter appearing of record in another case in the same court he must, in order that such matter can be considered on appeal, have it made of record in the case in which the appeal is taken: *State v. Lee*, 64 N. W., 284.

Evidence taken in shorthand: It is the better practice to preserve evidence which is taken down in shorthand by a bill of exceptions. Whether it may be done by filing the original notes and making certified transcripts therefrom, *quære*. At any rate the record must be made up in the court below: *State v. Hessian*, 58-68.

A report of the evidence by the shorthand reporter which is not filed in the cause, nor any transcript thereof, does not become a part of the record: *Ferris v. Anderson*, 72-420.

The provisions of § 3777 of Code of '73, as amended, with reference to the taking down of evidence by a stenographer, *held* not to dispense with formal bill of exceptions, and such bill filed within the proper time, and referring to the original notes or transcript, was necessary in order to make the evidence a part of the record on appeal: *McCarthy v. Watrous*, 69-260. But now see § 3675.

The only way oral evidence introduced on the trial of the cause can be preserved and identified for the purposes of an appeal is by bill of exceptions signed by the trial judge. A paper purporting to contain a portion of the evidence introduced on the trial, and certified to by the official reporter, but not embodied in the bill of exceptions, cannot be

recognized as a part of the transcript: *State v. Hemrick*, 62–414.

The stenographer's notes, when filed with the clerk as a part of the record of the case, may be amended or corrected by the court when it is ascertained in a proper proceeding that they do not fully or correctly embody the action or proceeding of which they were intended to be the record: *Mahaffy v. Mahaffy*, 63–55.

The filing of the stenographer's original notes and the subsequent incorporation of them into the bill of exceptions, and the insertion of a duly certified copy thereof in longhand in the transcript, is sufficient to make the evidence of record: *McAnnulty v. Seick*, 59–586.

To render a shorthand report of the evidence a part of the record it must be filed with the clerk, together with the reporter's transcript thereof. It cannot be made of record by being merely referred to in the bill of exceptions without being filed: *Lowe v. Lowe*, 40–220.

Where the shorthand report is ordered by the court to be made a part of the record and a certificate of the judge in due form is attached the evidence when transcribed and certified by the reporter is sufficiently preserved without the certificate of the judge to such transcript and the attorneys of the parties are not entitled to have the transcript submitted to them to enable them to determine whether or not it is a correct transcript of the evidence. Errors or omissions in the transcript are to be cured upon application to the court: *Hood v. Chicago & N. W. R. Co.*, 64 N.W., 261.

Depositions read in evidence are sufficiently identified by reference to them in the transcript of the shorthand notes as the depositions of certain named witnesses and thereby are made part of the record unless objection to the sufficiency of the identification is made in the lower court: *Ibid.*

Where the exception refers to the evidence taken in the case by the official reporter, and certified to by the judge, "and marked Exhibit A," the fact that neither the original nor the translation of such notes is marked "Exhibit A" will not prevent its being considered a part of the record, it being otherwise sufficiently identified: *Miller v. Chicago, M. & St. P. R. Co.*, 70–302.

In order to make a transcript of the reporter's notes a part of the record they should be certified by him to be a correct transcript. A certificate of the judge to such notes is not sufficient: *Richards v. Lounesbury*, 65–587.

As to the stenographer's report being a part of the record, see now § 3675.

Certificate of judge: A certificate of the judge showing the several rulings made during the trial as to the admission or exclusion of evidence, and that the same were duly excepted to, is sufficient as a bill of exceptions: *State v. Fay*, 43–651; *Hay v. Frazier*, 49–454.

While a certificate of the judge to the evidence, that it is all the evidence offered and received on the trial of the case, is a sufficient compliance with the statute respecting bills of exception, yet this certificate must be filed within the time prescribed, and if not so filed will be disregarded and stricken from the record: *Gibbs v. Buckingham*, 48–96: *State v. Newcomb*, 56–335; *McCarthy v. Watrous*, 69–260.

The translation of the shorthand notes of evidence duly certified by the judge may be regarded as having the effect of a bill of exceptions, but it must be certified and filed within the time prescribed for filing a bill of exceptions: *Wadsworth v. First Nat. Bank*, 73–425.

The shorthand report of the evidence, objections, rulings and exceptions, certified to by the judge and made a part of the record by him, and filed within proper time, is sufficient as a bill of exceptions: *Hurlburt v. Fyock*, 73–477.

Upon judge's own motion: A judge may, on his own motion and without the request of either party, make and file a bill of exceptions, but the party should have notice of it. Such notice, however, will be presumed in the absence of a contrary showing: *Shepherd v. Brenton*, 15–84.

Bill cannot be contradicted: A bill of exceptions, when signed and filed, becomes a part of the record, and the judge cannot change or modify it by a contradictory statement or certificate. Where a party has excepted to rulings upon the evidence when made and has not waived his objection, and his bill of exceptions is filed within the time allowed by law or agreed upon between the parties, it is competent for him to embody in it all grounds of objection upon which he desires a review of the cause, and to waive such others as he sees fit: *Dedric v. Hopson*, 62–562.

The record entry of a verdict by the clerk is higher evidence thereof than the bill of exceptions embodying such verdict. It is not strictly the office of the bill of exceptions to show the amount of the verdict: *Cook v. United States*, 1 G. Gr., 56.

Where there are affidavits and counter-affidavits as to the action of the court, the recitals of the bill of exceptions will be relied upon as stating the facts: *Shepherd v. Brenton*, 15–84.

In case of a conflict between the record entry of the clerk and a bill of exceptions the clerk's entry should control: *State v. Ingraham*, 65 N. W., 152.

In case of conflict between the bill of exceptions and the shorthand reporter's notes the bill of exceptions will govern: *Oskaloosa College v. Western Union Coal Co.*, 90–308.

Not certified: A paper purporting to be a bill of exceptions and not certified as a part of the record cannot be considered: *Conrad v. Baldwin*, 3–207.

Impeachment: A witness' testimony, as embodied in a bill of exceptions, cannot be introduced on a subsequent trial to impeach him: *Boyd v. First Nat. Bank*, 25–255.

What sufficient signing: A bill of exceptions, signed with the last name of a judge, the final designation "judge" being added, if properly certified by the clerk, will be presumed to have been signed by the judge and filed in the case in which the certificate is given: *Mays v. Deaver*, 1–216.

It is contemplated that a bill of excep-

tions shall be signed by the trial judge except in cases where signature by bystanders is authorized: *Independent School Dist. v. Farmer*, 74-744.

Refusal of judge to sign: It is not proper, by proceedings in *mandamus*, to control the discretion of the trial judge in regard to proceedings which are to be shown by bill of exceptions. If the parties have agreed to extend the time for filing a bill until it is too late to have a bill signed by bystanders, they must rely upon the discretion of the judge: *Jamison v. Reid*, 2 G. Gr., 394.

Signing by bystanders: The only remedy, when the court refuses to sign a bill of exceptions or signs an incorrect one, is by the signature by bystanders to a correct bill. A bill cannot be impugned by affidavits: *Woodworth v. Byerly*, 43-106.

Where a bill of exceptions is signed by bystanders, it should be drawn up and signed at the time of the trial: *Clark v. Parvin*, Mor., 371.

Where time beyond the term has been given for filing the bill that method does not obtain: *St. John v. Wallace*, 25-21.

The attorneys of a party are not proper persons, as bystanders, to sign a bill of exceptions of such party: *Ibid.; Simon v. Weigel*, 10-505.

It is not necessary that the judge certify to his refusal to sign the bill of exceptions. That fact may be proved by the evidence of the bystanders, as here provided: *Craig v. Andrews*, 7-17.

A bill of exceptions signed by bystanders is not sufficient if it merely states what they understand the action of the court to be: *Clark v. Parvin*, Mor., 371.

To authorize a bill of exceptions signed by bystanders it must appear that the judge refused to sign it: *Edgar v. Caldwell*, Mor., 434.

Where a judge refuses to sign a correct bill of exceptions the only remedy is by obtaining the signatures of bystanders. Whether this method can be pursued where the time to file a bill of exceptions is extended beyond the term, *quære*. But if the party accepts the incorrect bill and prosecutes his appeal therefrom, and judgment is rendered against him he cannot upon such facts obtain relief from such judgment in an action in equity: *Bellows v. Tod*, 52-359.

As to signing bills of exception by referee, see § 3742.

SEC. 3754. Must be on material point. No exception shall be regarded in the supreme court unless the ruling has been on a material point, and the effect thereof prejudicial to the rights of the party excepting. [C. '73, § 2836; R., § 3111.]

Ruling not reviewed unless prejudicial: An exception will not be regarded in the supreme court unless the ruling has been on a material point, and prejudicial to the rights of the party excepting: *Bremer County Bank v. Eastman*, 34-392.

Mere abstract questions or those involving rights no longer existing will not be considered on appeal: *Potts v. Tuttle*, 79-253; *Chicago, R. I. & P. R. Co. v. Dey*, 76-278.

Where it is apparent that in view of the undisputed facts in the case a judgment on reversal and new trial must result for the party who has been successful on the first trial, the court will not reverse a case for errors but will affirm the judgment: *Schoenhofel Brewing Co. v. Armstrong*, 89-673.

A judgment will not be reversed for an error committed by the trial court, unless appellant has been prejudiced thereby: *Tuck v. Singer Mfg. Co.*, 67-576; *Whitney v. Brownell*, 71-251.

A judgment will not be reversed in consequence of errors which do not operate injuriously upon the party seeking reversal: *Granger v. Buzick*, 3 G. Gr., 570.

A case will not be reversed on account of error in the action of the court below which has worked no prejudice to the appellant: *Union Ag'l, etc., Ass'n v. Neill*, 31-95; *Wile v. Wright*, 32-451; *Hamilton v. Floyd*, 20-598; *Crawford v. Paine*, 19-172; *Bell v. Byerson*, 11-233; *Smith v. Eaton*, 50-488.

One of two co-parties cannot object on appeal that a judgment against them jointly is erroneous because a judgment against his co-party was not proper, such co-party not having appealed: *Hoadley v. Hammond*, 63-599.

A party cannot, on appeal, complain of rulings which are in his favor, or a judgment so far as it is in his favor: *Boyce v. Wabash R. Co.*, 63-70; *Hintrager v. Hennessy*, 46-600; *Day v. Mill Owners' Mut. F. Ins. Co.*, 70-710.

A party cannot complain of an erroneous instruction when the error relied on is in his favor: *Deere v. Wolf*, 77-115.

Where the answers to questions objected to are favorable to the party objecting, the error, if any, will be without prejudice: *State v. McGee*, 81-17.

A party having objected to evidence, which was thereupon admitted only for a particular purpose, cannot afterwards complain on appeal that such evidence should have been admitted for other purposes: *Henderson v. Chicago, R. I. & P. R. Co.*, 48-216.

Refusal to strike out immaterial matter in a pleading, upon motion, cannot be reviewed upon appeal: *Abbott v. Striblen*, 6-191.

Refusal to allow an amended answer to be filed will be deemed error without prejudice, where it appears that all the facts alleged in the amended answer might have been proven under the original answer: *Hough v. Housel*, 20-19.

Allowance of an amendment which works no prejudice to the party appealing cannot be made a ground for reversal: *Tabor v. Foy*, 56-539.

It is not sufficient simply to show error in the ruling as to an application to amend a pleading; prejudice must also appear: *Guyar v. Minnesota Thresher Mfg. Co.*, 66 N. W., 83.

Where an objection to a juror based upon his having a previously formed opinion with

reference to the facts relating to a certain issue in the case was overruled, *held*, that such ruling would be error without prejudice where it appeared that the facts as to that issue in the case were not in controversy: *Albia v. O'Harra*, 64–297.

The exclusion of evidence by the consent of a party cannot be made ground for reversal: *Wilson v. McAdams*, 10–590.

It is not necessary to reverse a judgment for failure to instruct as to the necessity of finding a fact which is substantially admitted of record: *State v. Shank*, 79–47.

In an action to recover damages for the wrongful suing out of attachment, errors in the instructions with reference to the measure of damages will be immaterial where the attachment was not wrongfully sued out: *Mayne v. Council Bluffs Savings Bank*, 80–710.

That failure to allow nominal damages will be deemed without prejudice, see notes to § 4139.

Error not affecting the result: An error committed in favor of an intervenor to whom no relief of any kind is finally granted is without prejudice and no ground of complaint upon appeal: *Farmers' Bank v. Arthur*, 75–129.

Where the jury by a special verdict found that an alleged contract had never existed, *held*, that the exclusion of evidence relating solely to plaintiff's measure of damages for a breach of the contract was immaterial and without prejudice: *Carruthers v. McMurray*, 75–173.

An error in admitting evidence as to special damages is without prejudice and is not ground for reversal, when the court does not render judgment for any damages: *Coleman v. Reel*, 75–304.

An instruction which erroneously excludes a claim on a contract is without prejudice, when the contract upon which the claim is made is invalid: *King v. Mahaska County*, 75–329.

Erroneous rulings in regard to matters which were material on the trial only upon a theory of the case not accepted by the jury in their verdict, will constitute error without prejudice: *McIntire v. Eastman*, 76–455.

Where in a prosecution for murder complaint was made of the admission in evidence of acts and declarations of an alleged co-conspirator, not made in the presence of the defendant, *held*, that as the jury returned a verdict of manslaughter its findings must have been that the killing was not the result of conspiracy, and therefore any errors in instructions with reference to conspiracy were errors without prejudice: *State v. Row*, 81–138.

Where it appears from the finding of the jury that a recovery could not have been had upon an issue raised in the case, the case will not be reversed on account of failure to present such issue: *Churchill v. Gronewig*, 81–449.

Where under the finding of facts by the jury it appears that an erroneous instruction could not have affected the result, it will be deemed to have been without prejudice: *Fisk v. Chicago, M. & St. P. R. Co.*, 83–253.

The fact that a party introduced evidence not required to sustain his cause of action will not constitute prejudicial error: *Hagan v. Merchants', etc., Ins. Co.*, 81–321.

It is not prejudicial error to fail to call attention of the jury by instructions to an issue in a case on which there is no evidence to support a verdict in behalf of the party complaining: *Flanagan v. Baltimore & O. R. Co.*, 83–639.

A case will not be reversed for the giving of an instruction, where the verdict could not have been different had the instruction not been given: *Phelps v. Walkey*, 84–120.

Where there is an error as to instructions, but the evidence is such that had there been a correct instruction and a verdict the other way, it would properly have been set aside for want of support in the evidence, the error as to the instruction will be deemed to have been without prejudice: *Croddy v. Chicago, R. I. & P. R. Co.*, 91–598.

Error in admitting evidence upon an issue not finally submitted to the jury is without prejudice: *Trulock v. Donahue*, 85–748.

Error committed in instructions with reference to a higher degree of a crime than that for which defendant is convicted will not necessarily be error without prejudice. Thus where in a prosecution for murder the court erred in instructing the jury as to whether certain facts would constitute a provocation reducing the crime to manslaughter, *held*, that such error was not without prejudice, although the conviction was for manslaughter: *State v. Adams*, 78–292.

The giving of contradictory instructions will be regarded as prejudicial error, which will be reversed upon appeal, as it would be uncertain which one the jury followed: *Neville v. Chicago & N. W. R. Co.*, 79–232.

It cannot be claimed that because evidence which is erroneously excluded is cumulative, therefore the error is without prejudice: *Snyder v. Witwer*, 82–652.

A judgment will not be disturbed upon appeal because of error in the admission of evidence where it appears that no prejudice resulted: *Seska v. Chicago, M. & St. P. R. Co.*, 77–137.

Refusal of the court to give a proper instruction with reference to the weight of a witness' testimony where general instructions as to the right of the jury to judge of the evidence have been given, is error without prejudice: *Bever v. Spangler*, 93–576.

Where a mistake was made in the decree in the numbers of certain certificates of stock ordered to be sold, *held*, that the error was without prejudice and no ground for reversal: *Ft. Madison Lumber Co. v. Batavian Bank*, 77–393.

Error in sustaining a motion to strike on grounds which should have been raised by demurrer will be error without prejudice, where no objection is made to the motion on that ground and the matter stricken out would have properly been held insufficient on demurrer: *Chase v. Kaynor*, 78–449.

Where it appears from the testimony and the finding of the court that no prejudice could have resulted from the admission of

testimony objected to, errors in the submission will not be ground for reversal: *Rappleye v. Cook*, 79-564.

The admission of certain evidence, *held*, if erroneous, to be error without prejudice, and not ground for reversal: *Worden v. Humeston & S. R. Co.*, 76-310.

Although the overruling of a motion to strike redundant and irrelevant matter from a petition may be erroneous, it is error without prejudice, for the defendant may urge his objection at the trial: *Ida County v. Woods*, 79-148.

Where in attachment suit judgment for five cents was rendered for defendant on a counter-claim for the wrongful suing out of the attachment, *held*, that inasmuch as the judgment was for defendant in the main action, the error if it was such, in rendering judgment on the counter-claim without sufficient evidence, was error without prejudice, and would not require reversal: *Richardson v. McLaughlin*, 92-393.

An erroneous instruction as to the measure of recovery will be error without prejudice if no recovery whatever on the claim referred to is had: *White v. Byam*, 64 N.W., 765.

Where the court properly takes the case from the jury and directs a verdict any error in ruling on challenges to jurors, becomes error without prejudice: *Mellerup v. Traveler's Ins. Co.*, 63 N. W., 665.

Where proceedings in the trial of the case had been improper, *held*, that the case would be reversed, although the verdict was rendered for defendant by direction of the court for insufficiency of plaintiff's evidence: *Moore v. Chicago, St. P. & K. C. R. Co.*, 93-484.

It is not error to refuse to give an instruction with reference to a matter which in view of the verdict of the jury could not have affected the result of the case: *Jones v. Cooper*, 65 N. W., 1000.

Judgment on the verdict of a jury should not be reversed on account of misconduct of the jury unless it appears that such misconduct resulted prejudicially to the party complaining: *Hathaway v. Burlington, C. R. & N. R. Co.*, 66 N.W., 892.

Where a change of place of trial, on account of action being brought in wrong county, has been ordered, failure to comply with which would operate as a discontinuance under statutory provisions, the dismissal of the action upon the election of the party not to so file the papers will, even if irregular, be error without prejudice: *Edgerly v. Stewart*, 86-87.

Waiver of error: Where improper evidence is permitted to remain in a criminal case, without objection, the error in its admisson is waived: *State v. Stickley*, 41-232.

The action of the court in requiring additional security on a replevin bond, *held* not to be ground for reversal as such order could not affect the validity of the judgment when rendered on the merits, and the error, if any, was waived by the compliance therewith: *Pritchard v. Hopkins*, 52-120.

Where defendant was by the court ordered to answer, and thereafter obtained an extension of time within which to answer, and, upon his failure to comply, default was entered against him, *held*, that any error in the first order requiring defendant to answer was error without prejudice: *Rock v. Wallace*, 15-379.

Even if the cross-examination is improper the objecting party waives any error connected therewith by allowing the introduction of evidence of the same witness to such facts without objection: *State v. Eifert*, 65 N. W., 309.

Errors subsequently cured: Where an action of the court is at the time erroneous (as, for instance, in admitting a written instrument without proper proof of the signature), yet if subsequent evidence is such as to render the action of the court proper thereunder, there is no ground for reversal: *Davenport v. Cummings*, 15-219.

Judgment in favor of the party beneficially interested will not be reversed on account of error of the referee in finding in favor of a party not entitled: *Williams v. Brown*, 28-247.

Error in striking defendant's answer from the files, on motion, is cured by subsequently allowing defendant to prove the defense alleged when the evidence fails to establish the same: *McNamara v. Estes*, 22-246.

Where an erroneous ruling is made but is afterwards corrected by the trial court, the error is cured by the subsequent action and is not ground for reversal upon appeal: *Van Horn v. Overman*, 75-421.

An error in admitting secondary evidence is cured and without prejudice when primary evidence is afterwards admitted upon the same matter: *Amos v. Buck*, 75-651.

The sustaining of an objection to a question will be error without prejudice where the witness afterwards testifies fully as to the matter inquired about: *Way v. Chicago & N. W. R. Co.*, 76-393.

Where a witness testified as to the result of a conversation without having testified that he was present, *held*, that any error in refusing to sustain an objection on that account was error without prejudice in view of the cross-examination by the opposite party: *Seekel v. Norman*, 78-254.

Error in excluding the evidence of a witness cannot be complained of on appeal where it appears that he was afterwards recalled and permitted to testify fully as to the matter referred to: *State v. Shank*, 79-47.

Where objections to questions on cross-examination are sustained on the ground that they are not proper in cross-examination, but the party afterwards makes the witness his own and thus secures answers to such questions, error in the exclusion of the evidence will be deemed without prejudice: *In re Assignment of Rea*, 82-231.

The sustaining of an objection to a question will be error without prejudice if the witness afterwards testifies fully as to the matter thus inquired about: *Cahalan v. Cahalan*, 82-416.

Error in overruling a challenge to a juror, *held* to be without prejudice where the juror did not sit, and the defendant had not exhausted his peremptory challenges: *State v. Brownlee*, 84-473.

Where evidence as to damages was improperly admitted, but the court required a remission of a portion of the verdict, greater than could have been due to such improper admission of evidence, *held*, that the error was thereby cured: *Hurlbut v. Hardenbrook*, 85–606.

Where evidence was erroneously received in support of one count of an indictment, but the court afterwards instructed the jury to find for defendant on that count, *held*, that the error in the receipt of the evidence was cured: *State v. Craig*, 78–637.

Where certain books were admitted in evidence and extracts were read therefrom, and afterwards the books were excluded, *held*, that such ruling removed any prejudice that might have resulted from the improper admission of evidence of witnesses with reference to such books: *Rea v. Scully*, 76–343.

As to curing error by instructions, see notes to § 3705.

Errors which have ceased to be prejudicial: A judgment will not be reversed which, however erroneous when made, has, by reason of a change in circumstances, ceased to be prejudicial to the complaining party *State ex rel. v. Waterloo Savings Bank*, 39–706.

The supreme court will not reverse a case in behalf of a party where the right which he seeks to protect, if it ever existed, has expired: *Cutcomp v. Ult*, 60–156.

The supreme court will not review the ruling of a lower court denying a judgment of ouster as to officers already out of office: *State ex rel. v. Powell*, 70 N. W., 592.

The improper substitution of a new appeal bond on an appeal from a justice of the peace, *held* to be error without prejudice where judgment on such appeal was for the party appealing and giving the bond: *Hammitt v. Coffin*, 3 G. Gr., 205.

Where persons bound over to await the action of the grand jury bring a proceeding, by *habeas corpus*, to test the correctness of the action of the magistrate, and being remanded to custody thereupon appeal from such order, a subsequent indictment by the grand jury for the same offense will render the decision in the *habeas corpus* proceeding immaterial and the appeal will be dismissed: *Witmore v. Burgan*, 70–161.

Rulings upon demurrer; when deemed without prejudice: The fact that a demurrer based on an insufficient ground is erroneously sustained will not be ground for reversal, where there could have been no recovery upon the count of the petition to which the demurrer was directed: *Childs v. Dobbins*, 61–109.

Where the lower court, in ruling on the demurrer to a petition, erroneously sustains it as to some portions thereof, but the action is determined in favor of plaintiff, and he is given the relief demanded, the ruling on the demurrer will be considered as error without prejudice: *Scott v. Union County*, 63–583.

The fact that the court erroneously sustains a demurrer to a count of the answer is error without prejudice, where the issue raised by such count is elsewhere presented and passed upon by the jury: *McKeever v. Jenks*, 59–300.

Where a demurrer to a petition was overruled and plaintiff thereupon filed an amended petition setting out the cause of action fully, *held*, that any error of the court in overruling the demurrer was without prejudice to the defendant: *Gillis v. Matthews*, 4 G. Gr., 254.

Where a demurrer to a portion of an answer was overruled, but under the instructions the issue thereby presented was, by implication, excluded from the jury and not considered by them, *held*, that the error, if any, in the ruling on the demurrer was without prejudice: *Flanagan v. McWilliams*, 52–148.

Where a demurrer is erroneously sustained upon one ground, and overruled upon another as to which it should have been sustained, the action of the court will be reversed on appeal in order that the appellant may be enabled to take such action as he might have taken in the lower court if the demurrer had been sustained on a proper ground: *District T'p v. Independent Dist.*, 63–188.

Error without prejudice in rulings upon evidence: Where, from the instructions or from other parts of the record, it is made to appear that error in the admission of testimony has worked no prejudice to the party objecting, the cause should not be reversed on that ground: *Woodward v. Horst*, 10–120.

A cause will not be reversed for the admission of evidence which cannot have been prejudicial to the party complaining, even though such evidence was inadmissible: *Quinton v. Van Tuyl*, 30–554; *Cooper v. Mills County*, 69–350; *Walsh v. Ætna L. Ins. Co.*, 30–133.

The admission of evidence which is of no legal weight and could not influence a court will, in case of a trial to the court, be deemed error without prejudice: *Asbach v. Chicago, B. & Q. R. Co.*, 86–101.

Mere technical errors as to the admission or exclusion of evidence will not be sufficient to require reversal where it appears that no substantial prejudice has resulted: *Bever v. Spangler*, 93–576.

Where, under the issues and the evidence, plaintiff could not recover, even had defendant introduced no evidence whatever, any error in the admission or exclusion of evidence cannot be complained of by plaintiff: *George v. Eason*, 69–461.

Where it appears that answers to questions which were properly objected to were favorable rather than adverse to the party objecting, the overruling of the objection will be considered as error without prejudice: *Andrews v. Woodcock*, 14–397; *Drath v. Deitz*, 15–436.

A judgment will not be reversed for improper rejection of testimony when the court is satisfied that justice has been done and that there is no reason to believe that a different result would be reached upon a new trial: *Pelamourges v. Clark*, 9–1.

Where the jury have returned their verdict against a party seeking to recover, any error in the admission of evidence having a

tendency merely to limit the extent of his recovery will be error without prejudice: *Chambers v. Grout*, 63–342.

The admission of unimportant and irrelevant evidence, if without prejudice, will not operate to reverse a case on appeal, though such admission may have been error: *McKenzie v. Kitler*, 27–254; *Curl v. Chicago, R. I. & P. R. Co.*, 63–417.

Where immaterial evidence was admitted, in the main without objection, *held*, that the judgment would not be reversed because an inconsiderable portion thereof was admitted over the party's objection: *Weitz v. Ewen*, 50–34.

Error in admitting or rejecting evidence is cured by a subsequent admission, by the party objecting, of the fact which the evidence tended to prove: *Murray v. Wells*, 57–26; *Liston v. Central Iowa R. Co.*, 70–714.

The supreme court will not reverse a case for the rejection of testimony which could not have changed the verdict: *Robinson v. Keith*, 25–321; *State v. Hallett*, 63–259.

The execution of a deposition will not be made a ground for reversal where it appears that it does not tend to prove or disprove any fact in issue between the parties: *Kelly v. Ford*, 4–140.

Error in admitting or refusing to exclude evidence will not be sufficient ground for reversal where the result must have been the same if the evidence had been excluded: *Brayley v. Ross*, 33-505; *Courtwright v. Strickler*, 37–382; *Jaques v. Sax*, 39–367; *Langford v. Ottumwa Water Power Co.*, 59–283; *Amsden v. Dubuque & S. C. R. Co.*, 13–132; *Holt v. Brown*, 63–319; *Celair v. Chicago & N. W R. Co.*, 43–662; *Hubbard v. Mason City*, 60–400.

A cause will not be reversed for the admission of evidence which does not cast any greater burden upon the opposite party than he would have had without the admission of such evidence: *Barker v. Kuhn*, 38–392.

Admission of improper evidence as to a matter which is self-evident or of common observation known to all men, and in accord with such common observation, cannot be considered prejudicial: *State v. Smith*, 46–670; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50–656.

Where objection to the testimony of the witness is withdrawn and the party originally offering such testimony declines to recall the witness, error in rejecting the testimony will be deemed to have been without prejudice: *State v. Smith*, 68 N. W., 428.

It is not error for a trial court to refuse to permit a witness to answer questions objected to when he has already in substance answered the same questions: *Ludwig v. Blackshere*, 71 N. W., 356.

The exclusion of evidence will constitute error without prejudice where the witness is afterwards allowed to testify fully as to the matters called for by the question objected to: *Keouoh v. Scott County*, 28–337; *State v. Geddis*, 42–264; *Allison v. Chicago & N. W. R. Co.*, 42–274; *Ham v. Wisconsin, I. & N. R. Co.*, 61–716; *Reed v. Chicago, R. I. & P. R. Co.*, 57–23; *Abell v. Cross*, 17–171; *State v. Nelson*, 58–208; *Sprague v. Atlee*, 81–1; *Miller v. James*, 86–242; *Brown v. Sioux City & P. R. Co.*, 62 N. W., 737.

Where the lower court erred in admitting testimony, but sufficient evidence was properly admitted to justify the judgment, *held*, that the error was without prejudice and the judgment would not be disturbed: *Rosenthal v. Miller*, 79–130.

An error in submitting a question of estoppel to the jury, *held* not prejudicial when the effect of the estoppel, if it had been proven, would be to establish a fact which was otherwise proven: *Bartlett v. Fireman's Fund Ins. Co.*, 77–155.

The admission of incompetent evidence to prove a fact already admitted, which could not be regarded as relating to the point in issue, *held* not prejudicial: *Key v. Des Moines Ins. Co.*, 77–174.

Error in allowing the introduction of a portion only of a deposition, *held* to be error without prejudice in view of the fact that the entire deposition was afterwards introduced: *Bixby v. Carskaddon*, 63–164.

The overruling of a motion to suppress a deposition is error without prejudice, where the witness testifies in person on the trial, and such testimony is more favorable to the party complaining than that in the deposition: *Curry v. Allen*, 60–387.

Judgment will not be reversed for erroneous admission of evidence to establish a fact which is sufficiently established by other and competent evidence: *Ellwood v. Wilson*, 21–523; *McCrary v. Deming*, 38–527; *Le Grand Quarry Co. v. Reichard*, 40–161; *Wallace v. Wallace*, 62–651; *State v. Shelton*, 64–333; *Jackson v. Boyles*, 64–428; *Stone v. Ballinyall*, 41-291; *Siltz v. Hawkeye Ins. Co.*, 71–710; *Morgan v. Wilfley*, 71–212. But see *Oppenheimer v. Barr*, 71–525; *Muir v. Miller*, 82–700; *Bartlett v. Fireman's Fund Ins. Co.*, 77–155; *State v. Black*, 89–737.

A judgment will not be reversed for error in admitting testimony to prove title when the title is subsequently established by competent evidence: *Des Moines v. Casady*, 21–570.

Error in rejecting evidence will be deemed to have been without prejudice where the facts to be proven by such evidence are otherwise fully established: *Lowe v. Lowe*, 40–220; *State v. Woodson*, 41–425; *Hoadley v. Hammond*, 63–599; *State v. Pratt*, 40–631; *Parcell v. McReynolds*, 71–623.

It will not constitute prejudicial error that evidence is admitted to establish a fact which is already admitted by the pleadings: *Blotcky v. Caplan*, 91–352.

Held, that defendant was not prejudiced by the rejection of testimony which had been once introduced and was again offered to the jury: *Smith v. Howard*, 28–51.

Where the jury has failed to allow exemplary damages, any error in the admission of evidence as to malice will be error without prejudice: *Brown v. Hendrickson*, 69–749.

The admission of evidence upon a prosecution for murder, tending to show malice and deliberation, *held* error without prejudice in view of the fact that defendant was convicted only of manslaughter: *State v. Middleham*, 62–150.

Where a witness, in a prosecution for assault with intent to commit murder, gave evidence tending to show malice, and a

cross-question to such witness by defendant's counsel was overruled, *held*, that as defendant was convicted only of assault and battery, the error, if any, was without prejudice: *State v. Graham*, 51-72.

A cause will not be reversed on appeal upon the ground that the evidence is not admitted in the proper order, or for the reason that a fact which should be proved in the first instance by one party is established by the testimony of the other: *Cook Mfg. Co. v. Randall*, 62-244.

If, in answer to an improper question, matter is elicited not responsive thereto, the error of the court in overruling an objection to the question will not justify a reversal on the ground of prejudice from the part of the answer not responsive to the question. In such case the court should be asked to strike out the irresponsive matter: *Hatfield v. Chicago, R. I. & P. R. Co.*, 61-434.

A verdict will not be set aside because in conflict with evidence which is irrelevant and immaterial, even though admitted without objection: *Scott v. Morse*, 54-732.

A cause will not be reversed on the ground that an objection to an improper question has been overruled, if the question itself was not followed by an improper answer: *State v. Groome*, 10-308.

As to what must appear in the record in order that error in rulings upon evidence may be considered, see notes to § 4123.

Error in admitting evidence cured by taking it from jury, see notes to § 3705.

Error without prejudice as to instructions, see notes to § 3705.

That error is prejudicial must affirmatively appear: A party appealing from a ruling of the lower court must not only show affirmative error, but also error prejudicial to his substantive rights: *Fulmer v. Fulmer*, 22-230; *Blackburn v. Powers*, 40-681; *Brewington v. Patton*, 1-121.

Where the evidence in an action triable *de novo* was not properly certified, and was on motion stricken from the abstract, *held*, that the court would not consider an alleged error of the court below in dismissing plaintiff's petition, for the reason that even if there was error in the ruling it could not be determined, in the absence of the evidence, whether plaintiff was entitled to recover: *Hoy v. Cowgill*, 52-711.

Where it is claimed that the jurors have taken improper considerations into account in determining their verdict, prejudice must be shown, or sufficient ground must appear for presuming prejudice, to warrant a reversal on account of refusal of the lower court to grant a new trial on that ground: *State v. Woodson*, 41-425.

Error appearing, presumed prejudicial: Error in the admission of evidence will not be deemed to have been without prejudice if such evidence is material. The admission of incompetent evidence has been held to be error without prejudice in cases where it appears that the judgment or verdict could not have been different had the evidence been excluded; but no such ruling has been made where the evidence held to be unlawful constituted the whole of the proof of the party offering it, or added to the weight of the testimony in his behalf: *Smith v. Johnson*, 45-308.

When there has been error a presumption of prejudice arises, and if the record fails to satisfy the supreme court that no prejudice has been caused, then such error cannot be disregarded: *Potter v. Chicago, R. I. & P. R. Co.*, 46-399; *Strobel v. Moser*, 70-126; *Reynolds v. Keokuk*, 72-371; *McCormick Harvesting Machine Co. v. Jacobson*, 73-546; *McNamara v. New Melleray*, 88-502; *Swanson v. French*, 92-695; *Herring v. Herring's Estate*, 62 N.W. 666; *Hibbard v. Zenor*, 75-471; *Hall v. Chicago, R. I. & P. R. Co.*, 84-311.

Where a conflict in the instructions arises from giving an erroneous instruction inconsistent with others given, although it is not shown that such instruction was considered and had an effect upon their decision, it will be presumed that it was considered, and the verdict will be set aside: *Carlin v. Chicago, R. I. & P. R. Co.*, 31-370. But see notes to § 3705 (IV, d.).

Where evidence is admitted over the objection of a party it will be presumed that the jury considered it, and that, if it was erroneously admitted, prejudice resulted: *Leaseman v. Nicholson*, 59-259; *Ryan v. Conway*, 93-513; *Arney v. Meyer*, 65 N.W., 337.

An erroneous instruction will not be deemed to be without prejudice unless the fact appears affirmatively: *Roby v. Appanoose County*, 63-113.

If the instruction is erroneous or misleading it will be presumed that there was evidence to which it was applicable, and that it therefore constituted prejudicial error: *Harrison v. Charlton*, 37-134; *Warbasse v. Card*, 74-306.

If error in admitting evidence appears it must be affirmatively shown to be without prejudice to warrant its being disregarded: *George v. Keokuk & D. M. R. Co.*, 53-503.

Prejudice will be presumed from an erroneous ruling upon a motion for change of venue: *Ferguson v. Davis County*, 51-220.

While a presumption of prejudice will arise from a legal error, yet such presumption may be overcome; and where it is made to appear affirmatively that no prejudice did or could have resulted from the error, the case should not be reversed therefor: *Dunne v. Deery*, 40-251.

Where an instruction is erroneous, prejudice will be presumed therefrom and to avoid reversal on that ground it must affirmatively appear that the error was without prejudice: *Thomas v. Chicago, M. & St. P. R. Co.*, 93-248.

The fact that the jury makes a finding which would establish liability regardless of the error involved in the instruction, will not necessarily show that the instruction was without prejudice: *Ibid.*

What record must show: Error must affirmatively appear: See notes to § 4139.

SEC. **3755. New trial—grounds for.** A new trial is a re-examination in the same court of an issue of fact, or some part or portions thereof, after verdict by a jury, report of a referee, or a decision by the court. The

former report, verdict or decision, or some part or portion thereof, shall be vacated and a new trial granted, on the application of the party aggrieved, for the following causes affecting materially the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, referee or prevailing party; or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;
2. Misconduct of the jury or prevailing party;
3. Accident or surprise which ordinary prudence could not have guarded against;
4. Excessive damages appearing to have been given under the influence of passion or prejudice;
5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property;
6. That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law;
7. Newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial;
8. Error of law occurring at the trial, excepted to by the party making the application;
9. That the pleadings of the prevailing party do not state facts sufficient to constitute a cause of action or defense, as the case may be, specifying wherein they are defective. [C. '73, § 2837; R., § 3112.]

As to granting new trial on appeal, see notes to § 4139.

As to new trial in criminal cases, see §§ 5422-5425.

As to new trial on petition, see §§ 4091-4099.

I. In General.

Presumption in favor of court's action: There are many things attendant upon the trial in a *nisi prius* court which never can be presented to an appellate court. The former has much better facilities for determining whether justice has been done, or whether there has been accident or surprise to the prejudice of the unsuccessful party, and its ruling is always regarded by the supreme court as having a presumption in its favor: *Conklin v. Dubuque*, 54-571; *Hill v. Denslinger*, 61-240; *Johnson v. Chicago, R. I. & P. R. Co.*, 58-348.

Discretion: A motion for a new trial is addressed to the sound discretion of the court, and such discretion will not be interfered with, unless it is manifest that it has been improperly exercised: *Freeman v. Rich*, 1-504; *Ruble v. McDonald*, 7-90; *Pickering v. Kirkpatrick*, 32-163; *New York Piano Forte Co. v. Mueller*, 38-552; *Donahue v. Lannan*, 70-73; *Murray v. Weber*, 92-757; *Arctic King Refrigerator Co. v. Kelly*, 63 N. W., 676. And see notes to § 4139.

But this discretion is a legal one, and must be exercised according to the rules of law: *Stewart v. Burlington & M. R. R. Co.*, 11-62; *Stockwell v. Chicago, C. & D. R. Co.*, 43-470.

The ruling upon a motion for a new trial will not be disturbed upon appeal where it appears that the court has not abused its discretion by such ruling. This is especially true where a motion for a new trial is granted: *Peebles v. Peebles*, 77-11.

Where the evidence is conflicting, and the court in the exercise of its discretion sustains a motion to set aside a verdict on the ground that it is not sustained by sufficient evidence, the ruling will not be interfered with unless it clearly appears that injustice has been done: *Morgan v. Wagner*, 79-174.

The motion being addressed to the sound discretion of the court, the judge may take into consideration in ruling upon it, facts which are within his knowledge as having transpired in the trial of another case: *Searcy v. Martin-Woods Co.*, 93-420.

A motion for a new trial is addressed to the sound discretion of the court and its action thereon will not be reversed unless it is manifest that such discretion has been improperly exercised, and this rule is especially applicable where a motion for a new trial is sustained: *Hopkins v. Knapp & Spaulding Co.*, 92-212.

Where the evidence of alleged misconduct of the jury is conflicting, the action of the lower court in granting a new trial will not be interfered with. *Ibid.*

And see notes to § 4139, with reference to a review on appeal of the action of the court below in granting or refusing a new trial.

Substantial justice: A new trial should not be granted where justice has been done and the merits correctly decided: *Woodward v. Horst*, 10-120.

If there are strong probable grounds to believe that all the merits of the case have not been fully tried and that justice has not been done, the court will be justified in granting a new trial: *Deere v. McConnells*, 15-269.

Bill of exceptions: A rule of court to the effect that no motion for new trial should be heard until a bill of exceptions was pre-

sented ready for signature, etc., *held* inconsistent with the statutory provisions for new trial. The trial court is presumed and bound to know what occurred during the trial without a bill of exceptions: *Emery v. Emery*, 54–106.

Waiver: A motion for new trial is waived by motion for judgment upon special findings in opposition to the general verdict. Such temporary waiver of a motion for new trial has the effect of a withdrawal of it: *Nixon v. Downey*, 49–166.

Negligence: Both in equity and in law, the negligence of a party or his agent or attorney, which alone produces an adverse result, will estop him from claiming relief as to such result: *White v. Poorman*, 24–108.

Where it does not appear that the knowledge of an irregularity for which a new trial is asked was acquired by the party in time to do anything to avoid the prejudice resulting from the misconduct of the jury, *held*, that his right to a new trial was not defeated: *Oleson v. Meader*, 40–662.

Where a party does not examine the jurors under oath or otherwise as to their qualifications and competency, he cannot make an objection to a juror, which would thus have been disclosed, the ground for a new trial: *Stewart v. Ewbank*, 3–191; *McKinney v. Simpson*, 51–662; *State ex rel. v. Funck*, 17–365; *Faville v. Shehan*, 68–241.

Where no diligence whatever to discover a mistake is shown and no excuse for the failure to discover it is averred a new trial on account of such mistake should not be granted: *Reed v. Lane*, 65 N. W., 380.

As to the diligence in discovery of evidence, see *infra*, II, f.

The trial judge ought to grant a new trial whenever his superior and more comprehensive judgment teaches him that the verdict of the jury fails to administer substantial justice. The trial judge is not to be governed by the rule which guides the supreme court in determining whether they will reverse the action of the lower court in ruling upon a motion for a new trial: *Kern v. May*, 92–674.

Concurring verdicts: The court should require a much stronger case to be made in the application for a new trial, where two verdicts have been rendered in favor of the same party; yet such second verdict by no means concludes the court from again granting a new trial, and especially when the second application is based on another ground: *Jourdan v. Reed*, 1–135.

If the jury have disregarded the law or have rendered two concurring verdicts that show a want of fair and proper exercise of judgment on the testimony submitted, and are against the evidence, a third trial ought to be granted: *Carlin v. Chicago, R. I. & P. R. Co.*, 37–316.

The fact that two or more juries have reached the same result in the same case on different trials may be considered as tending to show that the last verdict is not the result of passion or prejudice: *McMurrin v. Rigby*, 87–18.

As to effect of concurring verdicts when reversal is sought, see notes to § 4139.

To one of two parties: Where a judgment is rendered against two defendants, the granting of a new trial as to one does not affect the judgment as to the other: *Gordon v. Pitt*, 3–385.

In an action against joint wrong-doers the court may set aside the verdict and award a new trial as to a portion of the defendants, and render a judgment upon the verdict as to the others: *Terpenning v. Gallup*, 8–74.

As to part of the case: While, as a general rule, if granted at all, a new trial is awarded for the entire case, yet, where it can be done without danger of confusion or prejudice, it may be granted as to one count and refused as to another: *Woodward v. Horst*, 10–120.

It seems that the court may in a proper case grant a new trial as to a part of the case and allow the judgment to stand as to the other portion, but this will not generally be done; and if it appears on appeal that the judgment is erroneous as to a portion thereof the whole judgment will be reversed: *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

II. GROUNDS.

a. *Misconduct of Court or Jury.*

Improper action of court: Remarks of the court in the presence of the jury relating to the weight of evidence offered and which would be erroneous if embodied in the instruction may be sufficient ground for a new trial: *State v. Philpot*, 66 N. W., 730; *Shakman v. Potter*, 66 N. W., 1045.

It is not error to send the jury out again when they report a disagreement, there being no indication of an intention of coercing them into an agreement: *German Savings Bank v. Citizens Nat. Bank*, 70 N. W., 769.

What sufficient: To vitiate the verdict of a jury for misconduct, it must be such as to satisfy the court that a fair and impartial trial has not been had, and that the verdict is contrary to the law and the evidence: *Langworthy v. Myers*, 4–18; *State v. Accola*, 11–246.

Quotient verdict: Where the jury determined their verdict by adding together twelve different amounts marked down by them respectively, and dividing the same by twelve, having agreed beforehand to be bound by the result as their verdict, such verdict should be set aside: *Manix v. Malony*, 7–81; *Schanler v. Porter*, 7–482; *Denton v. Lewis*, 15–301; *Hendrickson v. Kingsbury*, 21–379.

In such case it is error to allow plaintiff to remit all above the lowest amount set down by any member of the jury, and render judgment in the plaintiff's favor for that amount: *Darland v. Wade*, 48–547.

But where the verdict is on this account irregular as to only a part of the amount found, the valid portion will be allowed to stand: *Fuller v. Chicago & N. W. R. Co.*, 31–211.

Where, however, by this method a sum is found, without an agreement in advance to be bound by it, and afterwards, upon discussion, it is agreed to and adopted, the verdict will be valid: *Burton v. Holmes*, 16–252; *Ham-*

ilton v. Des Moines Valley R. Co., 36–31; *Deppe v. Chicago, R. I. & P. R. Co.*, 38–592; *Sullens v. Chicago, R. I. & P. R. Co.*, 74–659.

Where the action of the jury in adding together the amount of the verdict which would be satisfactory to each and dividing that amount by the number of jurors is not in pursuance of an agrecment beforehand to be bound by the result as the verdict, but is resorted to only as an experiment and is afterwards agreed to individually, the verdict should be allowed to stand: *Peterman v. Jones*, 63 N. W., 338.

Verdict determined by lot: Where the jury, some or all of the members having first agreed to be bound by the result, determine their verdict by lot or ballot, such verdict will be set aside and a new trial granted: *Merseve v. Shine*, 37–253; *Ruble v. McDonald*, 7–90.

While they may, after having so formed an illegal verdict, repudiate it and find a valid one as the result of due deliberation, yet the evidence of such action must be clear and satisfactory; and where a subsequent vote is but a ratification of the verdict by lot, it will not be sufficient: *Thompson v. Perkins*, 26–486.

The drinking of intoxicating liquor by a juror during the discharge of his duty as such is sufficient ground for setting aside the verdict and ordering a new trial: *State v. Baldy*, 17–39; *Berry v. Berry*, 31–415.

The fact that one of the jurors became intoxicated on the evening of the day on which the trial commenced and before the conclusion thereof, *held* sufficient ground to warrant a new trial: *Fairchild v. Snyder*, 43–23.

The drinking of intoxicating liquors by a juror after the submission of the case to the jury will be sufficient to warrant the granting of a new trial, whether he drinks so much as to come under the influence thereof or not: *Ryan v. Harrow*, 27–494.

Taking intoxicating liquor as medicine before the final submission of the case is not ground for new trial: *State v. Morphy*, 33–270; *O'Neill v. Keokuk & D. M. R. Co.*, 45–546.

The drinking of beer by some of the jurors during the time the trial is in progress and before the submission of the case is not in itself sufficient to vitiate a verdict: *Hemmi v. Chicago G. W. R. Co.*, 70 N. W., 746.

It has been repeatedly held that the use of intoxicating liquors by a juror during the time the jury is deliberating except as a medicine in cases of actual sickness is misconduct for which the verdict should be set aside: *Hopkins v. Knapp & Spalding Co.*, 92–212.

Indulgence in intoxicating liquors during the adjournment of the court and before the final submission of the cause to the jury will not be a ground for setting aside the verdict and granting a new trial in the absence of a showing of prejudice resulting therefrom: *State v. Bruce*, 48–530; *Van Buskirk v. Daugherty*, 44–42; *State v. Livingston*, 64–560.

The drinking of intoxicating liquors at the instance and solicitation of one of the parties cannot be made a ground for new trial on the motion of such party: *Webster County v. Hutchinson*, 60–721.

The affidavit of a party to the fact of a juror's intoxication should be admitted, if at all, only in cases where no other proof is practicable and failure of justice might result from its rejection: *State v. McLaughlin*, 44–82.

Bet: The fact that a juror had an outstanding bet, which would be directly affected by the result of the trial, which fact was not disclosed by him when questioned as to his competency and was not known to the adverse party, *held* sufficient ground for a new trial, although the bet was trifling in amount: *Seaton v. Swen*, 58–41.

Social intercourse between juror and attorney: Acts of social intimacy between a juror and an attorney in the case during the progress of the trial, *held* sufficient misconduct to require the granting of a new trial: *Stafford v. Oskaloosa*, 57–748. But in a particular case, *held*, that the facts were such as not to require the granting of a new trial on that ground: *Koester v. Ottumwa*, 34–41.

Communication with juror: Conversation held with the jury by the officer in charge except for the purpose of ascertaining whether they have agreed on a verdict is sufficient ground for setting the verdict aside: *Cole v. Swan*, 4 G. Gr., 32. But statements by bailiff to jury in a particular case *held* not such as to require a new trial: *State v. Cowan*, 74–53.

A judgment will not be reversed because of alleged misconduct of the jury in permitting the bailiff and sheriff to communicate with them, where there is nothing to indicate that the jury could have been influenced by the communication: *Miller v. Root*, 77–545.

Where it appeared that one who was not a member of the jury slept in the same room with the jurors and had conversation with one or two of them, in which he made statements reflecting upon the character of plaintiff and his credibility, *held*, that such misconduct was a sufficient ground for granting a new trial. When jurors have been exposed to improper influence, it will not do to inquire into the probability of the extent of such influence and its effect upon the verdict, but the verdict must be set aside: *Welch v. Taverner*, 78–207.

Where, after the general verdict was agreed upon, a physician was summoned to prescribe for a juror with the consent of the party *held*, that there was not such misconduct as to make a new trial necessary: *Wesley v. Chicago, St. P. & K. C. R. Co.*, 84–441.

Conversation of a juror with counsel of one of the parties, had after the conclusion of the argument in the case, *held* sufficient misconduct to warrant the granting of a new trial: *Oleson v. Meader*, 40–662.

The fact that after the verdict had been agreed to and signed, but before it was returned and the jury had separated, one of the jurors disclosed to the attorney for one of the parties the result, *held* not such misconduct as to require the granting of a new trial: *Hyde v. Lookabill*, 66–453.

Where during the adjournment of the court a party not knowing that the person addressed was a juror asked him what he thought of the case, etc., but, upon being informed that the person addressed was a

juror, said no more, *held*, that no misconduct was shown: *Wise v. Bosley*, 32–34.

Statements of fellow jurors in regard to the credibility of a witness, made after they have agreed upon their verdict, are not grounds for setting the verdict aside: *Ibid.*

While it is improper for jurors during the trial to engage in conversation with other persons with reference to the merits of the case, yet it must be made to appear that such conduct was prejudicial in order to warrant a new trial: *Waterhouse v. Black*, 87–317.

A verdict will not be set aside merely because the jury has in violation of its duty talked to persons about the case. It must appear that the misconduct was such as to materially affect the substantial rights of the complaining party. So *held* where members of the jury while viewing premises had spoken to parties as to the evidence already given with reference to such premises: *Fœdisch v. Chicago & N. W. R. Co.*, 69 N. W., 1055.

The fact that during an intermission of the court pending the trial, a person not connected with the case spoke to the juror in relation to the merits thereof, without any reply by the juror being shown, *held* not sufficient to require a reversal: *McCash v. Burlington*, 72–26.

Misconduct of a juror in asking an immaterial question of a witness while viewing the premises, and also of another juror in conversing with disinterested persons regarding the case, *held* error without prejudice: *Stockwell v. Chicago, C. & D. R. Co.*, 43–470.

Under the showing in particular cases, *held*, that it did not appear that a juror was in fault in reference to overhearing a conversation in regard to the case between outsiders, and that there was not such prejudice shown as to warrant the granting of a new trial on that account: *Ridenour v. Clarinda*, 65–465; *Thrift v. Redman*, 13–35.

Where it appeared that a paper was thrown by a member of the jury which was picked up by the attorney of the successful party, but it did not appear that it was for him, and it was by him at once shown to the judge, *held*, that misconduct sufficient to require the setting aside of the verdict did not appear: *Allison v. Chicago & N. W. R. Co.*, 42–274.

Separation of the jury without some showing of prejudice will not be sufficient to warrant the setting aside of the verdict: *Ibid.*

A new trial should not be granted for the separation of the jury for a short time and for a necessary purpose, after submission and before a verdict is agreed upon, when it appears that they have communicated with no one and no prejudice has resulted: *Boggs v. Chicago & N. W. R. Co.*, 29–577.

Statements by a juror to his fellow jurors, made after their retirement, and relating to matters outside of the case for their consideration in making up their verdict, may be a ground for new trial, if prejudice is shown to have resulted: *Hall v. Robison*, 25–91.

Statements by a juror to his fellows as to personal knowledge with reference to a matter in issue may be shown as ground for new trial: *Griffin v. Harriman*, 74–436.

A juror should not state to the jury matters of which he has personal knowledge but which are not shown by the evidence. The jury has no right to consider any facts not put in evidence in the regular course of the trial: *Hathaway v. Burlington, C. R. & N. R. Co.*, 66 N. W., 892.

While the jury are not to take into account matters within their personal knowledge not brought to their attention through the evidence, yet it is proper for them to observe, note and comment upon the conduct in open court, of defendant in a criminal prosecution during the trial of the court, just as it is to consider the conduct, deportment and demeanor of a witness while on the stand: *State v. Hutchison*, 64 N. W., 610.

Misconduct of a juror in making statements to the jury outside of the evidence will not be ground for new trial unless it appears that such statements had some influence in determining the verdict. It will not be presumed that they were prejudicial: *State v. Cross*, 64 N. W., 614.

Improper discussion: The fact that the character and standing of one of the parties was canvassed and discussed by the jury while considering the case, *held* not sufficient to show misconduct of the jury: *Fulliam v. Muscatine*, 70–436.

Although it is allowable for jurors to ask occasional questions of witnesses while they are giving their testimony, it is improper for a juror to enter upon disputes and discussions with the counsel in the case as to the construction of the testimony: *Truman v. Bishop*, 83–697.

But in a particular case, *held*, that any prejudice resulting from such improper conduct was cured by an instruction to the jury: *Ibid.*

Disqualification of juror: Affidavits that a juror has stated that he is a nonresident will not be sufficient to require the setting aside of the verdict: *Parkinson v. Parker*, 48–667.

A motion for a new trial on the ground that one of the jurors has already sat on the trial of the same issues should not be sustained in the absence of a showing that the party complaining was ignorant of that fact: *Hurtert v. Weines*, 27–134.

Leaving jury room: Held not to be sufficiently prejudicial error to warrant reversal that one of the jurors, after the case was submitted to the jury, was permitted to withdraw from the jury room and attend the trial of another case in the same court in which he was a party: *State v. Fertig*, 70–272.

Mistake of jurors: It is not a sufficient reason for setting aside the verdict of a jury and ordering a new trial that a portion or all the jurors supposed that their verdict, if for defendant, would not be a bar to a subsequent suit by plaintiff for the same cause of action: *Minter v. Hite*, 4–583.

Taking improper papers: Where counsel prepared a statement in writing of the damages, and after using the same in his argument to the jury, handed it to them with the papers in the case, as his estimate of the proper claims, without any intention to conceal the fact, *held*, that in the absence of a showing of bad faith, or prejudice to the

other party, or objection to such action, the case would not be reversed for such irregularity: *Greff v. Blake*, 16–222.

The fact that a deposition is improperly taken by the jury will not be ground for a new trial, where it is shown that no prejudice resulted to the complaining party by reason of the irregularity: *Morris v. Howe*, 36–490.

Where the jury sent for the petition in the case, to which was attached a copy of the note sued on, and, assuming that such exhibit was the original and not a copy, proceeded to compare the signature thereof with the signature of the same person to another paper claimed to have been signed by him, *held*, that such facts might be shown as ground for a new trial: *Kruidenier v. Shields*, 70–428.

Where, without fault attributable to either party, a paper, which was not in evidence and which was capable of influencing the jury, was in their hands and read by them, *held*, that their verdict would be set aside, although the trial court may have decided that the verdict was not subject to be set aside as not being supported by the evidence before the jury: *McLeod v. Humeston & S. R. Co.*, 71–138.

Further as to what papers the jury may take with them on retiring, see notes to § 3717.

Reading parts of evidence: It is misconduct on the part of the jury sufficient to warrant a new trial to have the reporter come into the jury room and read from his notes portions of the testimony as requested by them: *Fleming v. Shenandoah*, 67–505.

How misconduct shown: In order to take advantage of misconduct on the part of a juror, the party complaining must set out the misconduct complained of in order that the opposite party may be prepared to meet the complaint with counter-affidavits: *Beal v. Stone*, 22–447.

An affidavit of the party as to misconduct of the jury based upon information and belief is not sufficient: *State v. Tucker*, 68–50.

An affidavit of a person who states that he heard a juryman talking about the evidence that had been produced in the case, but not giving the name of the juryman nor the statements made by him, is not sufficient to require the verdict to be set aside for misconduct: *Brant v. Lyons*, 60–172.

A party cannot take advantage of the fact that a juror had expressed a prior opinion as to the case unless he has examined such juror as to whether he had formed or expressed such an opinion or belief, and the showing of the fact of such examination must be made from the record, and not by affidavit: *Light v. Chicago, M. & St. P. R. Co.*, 93–83.

Where on a claim of misconduct of a juror there are conflicting affidavits, the action of the court in granting a new trial will not be interfered with: *Wightman v. Butler County*, 83–691; *Light v. Chicago, M. & St. P. R. Co.*, 93–83.

Discretion: The question whether the verdict ought to be set aside on account of alleged misconduct is left very largely to the sound discretion of the trial court, and, in the absence of a showing of an abuse of discretion, its action will not be reversed upon appeal: *Perry v. Cottingham*, 63–41.

A party who has knowledge before the conclusion of the trial of misconduct of jurors and proceeds thereafter without objection will be held to have waived the right to a new trial on account of such misconduct: *Foedisch v. Chicago & N. W. R. Co.*, 69 N.W., 1055.

Prejudice must appear: It is not every act of misconduct of a juror which will warrant a court in setting aside a verdict. It should be made to appear that the misconduct prejudiced the complaining party. The circumstances disclosed should be such as to satisfy the trial court that a fair and impartial trial has not been had: *Carbon v. Ottumwa*, 64 N. W., 413.

Therefore, *held*, that the fact that one of the jurors instituted an investigation into the facts of the case outside of the evidence before the jury, was not sufficient ground for granting a new trial, it appearing that he did not consider the facts thus ascertained in arriving at his verdict nor communicate such facts to the other members of the jury: *Ibid.*

The fact that individual jurors during an intermission in the trial view the premises to which evidence relates will not necessarily constitute such misconduct as to require a new trial: *Bowman v. Western Fur Mfg. Co.*, 64 N. W., 775.

A new trial should not be granted on account of misconduct of a juror where it does not appear that prejudice has resulted to the party complaining: *Hathaway v. Burlington, C. R. & N. R. Co.*, 66 N. W., 892.

b. *Misconduct of Opposite Party or Attorney.*

False testimony: That the successful party has introduced false testimony constitutes misconduct which, upon motion, requires the granting of a new trial: *First Nat. Bank v. Wabash, St. L. & P. R. Co.*, 61–700.

Misconduct of the prevailing party such as the introduction of false testimony is a ground for a new trial: *Clessle v. Frerichs*, 63 N. W., 581.

Without prejudice: Misconduct in a particular case *held* to be without prejudice: *Stockwell v. Chicago, C. & D. R. Co.*, 43–470.

Where the opposite party rode in the same conveyance with the jury and counsel on both sides in going to view the premises, no objection thereto being at the time made, *held*, that there was not such misconduct as to require a new trial: *Hahn v. Miller*, 60–96.

Improper statements or argument to jury: Improper statements made in argument to the jury by the attorney of the successful party may be such misconduct as to justify the court in setting aside the verdict: *Wickersham v. Timmons*, 49–267.

But misconduct in the attorney of the prevailing party in the argument to the jury, in referring to matters not pertaining to the case, *held* not sufficient ground for a new trial when it did not appear that prejudice had re-

sulted to the other party therefrom: *Hammond v. Sioux City & P. R. Co.*, 49–450.

It is not improper for counsel in argument to the jury to read and comment upon a motion and affidavit filed by the opposite party at a previous term to obtain a continuance: *Hanners v. McClelland*, 74–318.

The conduct of the opposite counsel and party in appealing to the sympathies of the jury, in a particular case, *held* not sufficient to require a new trial: *Dowdell v. Wilcox*, 64–721.

Counsel must be permitted some latitude and discretion in addressing the jury, and absolute correctness of statement as to matters of law is not required: *Scott v. Chicago, M. & St. P. R. Co.*, 68–360.

Misconduct of opposing counsel in an argument to the jury cannot be made ground for new trial unless objected to at the time; at least, the action of the lower court in overruling an application for a new trial on that ground will not be reversed on appeal: *Ross v. Davenport*, 66-548.

Where the improper action of counsel in addressing the jury was not objected to until after the verdict, *held*, that the action of the lower court in overruling the application for a new trial on that ground would not be interfered with on appeal, it not appearing that the complaining party was prejudiced by what occurred: *Sunberg v. Babcock*, 66–515.

The act of counsel in seeking to introduce in evidence an offer to permit judgment to be taken will constitute misconduct, but if objection thereto is not taken at the time by moving to discharge the jury and have another trial, it cannot be urged as a ground for new trial after verdict: *Riech v. Bolch*, 68–526.

In such case a direction to the jury to disregard such statement will not cure the misconduct: *McCormick v. Chicago, R. I. & P. R. Co.*, 47–345.

Where objection was made to remarks of counsel in addressing the jury, and the judge stated orally that he would instruct the jury not to consider any remarks of that kind, but failed to do so, *held*, that what was said to the jury sufficiently corrected any improper effect to result from such remarks: *Lindsey v. Des Moines*, 74–111.

Where statements were made by an attorney in his concluding argument not warranted from anything in the evidence and relating to the animus actuating the other party, etc., *held*, that it was misconduct for which a new trial should have been granted; and that where such statements were made while the judge was not present, but was hearing another case, the fact that objection was not made to the court by the opposite party at the time of the misconduct did not defeat his right to call it in question: *Hall v. Wolff*, 61–559.

Action of counsel in making statements to the jury as to the existence of facts of which there is not only no evidence, but no claim that they are proven, for the purpose of inducing the jury to make deductions prejudical to the other party, might, it seems, be ground for a new trial although no objection thereto was made at the time: *Whitsett v. Chicago, R. I. & P. R. Co.*, 67–150.

It is improper and censurable practice for an attorney to make statements designed to prejudice a party to the suit, which are not justified by the record in the case, and when this rule is violated the judgment should be set aside unless the court is satisfied that the misconduct was not instrumental in securing it; but an application to set aside a verdict on the ground of misconduct of counsel must be determined by the trial court in the exercise of a sound legal discretion, and the supreme court will not interfere unless an abuse of discretion is shown: *George v. Swafford*, 75–491.

The fact that a part of a deposition which is subsequently excluded is read to the court, in the presence of the jury, in arguing the question whether it should be admitted or not, does not constitute misconduct which may be the ground for a new trial: *Rogers v. Winch*, 76–546.

Where a motion for a new trial was made upon the ground of the misconduct of an attorney in commenting, in the absence of the judge, upon a case which had been read to the court in the hearing of the jury, *held* that, if there was misconduct as charged, no abuse of the discretion of the court was shown and the action would not be disturbed: *Shepard v. Chicago, R. I. & P. R. Co.*, 77–54.

Where counsel cited as facts matters about which there was no testimony, but the court instructed the jury not to consider such statements as in any way affecting the case, *held*, that any prejudice resulting from the improper conduct of counsel was removed: *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84–27.

A statement by counsel to the jury that he proposes to show certain facts which are not subsequently shown by any competent evidence, may if allowed to stand on the record without any attempt to remove its damaging effect, be highly prejudicial: *Jones v. United States Mut. Acc. Ass'n*, 92–652.

Where the attorney used language which was objected to as not based on anything appearing in the record and such objection was overruled, *held*, that the court would not grant a new trial for misconduct, the question having been before the lower court and the jury as to whether or not there was anything in the evidence to support the statement: *Brown v. Sioux City & P. R. Co.*, 62 N. W., 737.

Intemperate language used by defendant's counsel in an argument to the jury referring to the fact that plaintiff was a wealthy and nonresident corporation and declaring that the property of such a corporation attempting to enforce such a contract as that involved in the suit should be confiscated, and referring to other matters not shown by any evidence, *held* sufficient ground for a new trial: *Wheeler & Wilson Mfg. Co. v. Sterrett*, 62 N.W., 675.

Where misconduct of counsel in addressing the jury is complained of and made a ground for an application for new trial, it must appear to justify the appellate court in reviewing the action of the lower court in refusing to grant such new trial that the attention of the court and of the counsel whose

misconduct is complained of was called to the matter at the time. It is not sufficient to file with the court an exception to the action of counsel: *State v. Hutchison*, 64 N. W., 610.

The discretion of the trial court in determining whether the action of counsel is improper and prejudicial will not be ground of reversal on appeal unless an abuse of discretion is shown: *Ibid.*

The action of counsel in commenting on evidence must be left largely to the discretion of the lower court: *Geiger v. Payne*, 71 N.W., 571.

A cross-examination which is manifestly intended by the manner of it to throw discredit on the testimony of the witness and prejudice him in the eyes of the jury is improper and may be a ground for a new trial. Such improper procedure cannot be cured by the ruling of the court on the questions asked: *Hood v. Chicago & N. W. R. Co.*, 64 N.W., 261.

While an agreement of attorneys not made in writing or entered of record is not valid and should not be referred to, yet it is not improper to call the attention of the court to a verbal agreement made in open court in order to have it made of record: *Leek v. Chesley*, 67 N.W., 580.

While the court may permit counsel to read in argument to the jury portions of the transcript of the evidence of witnesses, it is not error to refuse to do so where it appears that it would be necessary to allow other portions of such evidence to be read for a fair presentation of the case and such reading would unnecessarily delay the trial: *McCormick v. Babcock*, 70 N.W., 103.

Where the attorney having made improper statements afterwards withdrew the same in open court, *held*, that the prejudice was removed: *Erb v. German Am. Ins. Co.*, 67 N. W., 583.

Remarks of the counsel of the plaintiff to the jury, in an action for personal injury, insinuating the possibility of, although not expressly charging, improper action on the part of defendant in seeking to bring disrepute upon the plaintiff so as to damage his testimony in the case, *held* to be such as, under the circumstances, to require the granting of a new trial: *Henry v. Sioux City & P. R. Co.*, 70-233.

While a delicate sense of propriety ought probably to deter counsel from stating to the jury the result of a former trial, it is not necessarily such misconduct as to demand anything more from the court than an admonition to the jury that the knowledge of the amount of the former verdict should have no influence upon them: *Ball v. Keokuk & N. W. R. Co.*, 74-132.

When a reversal is asked on the ground of the misconduct of an attorney, the record should show such misconduct without question: *Everett v. Central Iowa R. Co.*, 73-442.

The action of the trial court in overruling the motion to set aside the verdict on the ground of the misconduct of attorneys will be presumed to be correct: *Seekel v. Norman*, 71-264.

While it is not proper in argument to refer to the result of a previous trial yet in a particular case, *held*, that under the circumstances such reference did not constitute error sufficient to require reversal: *Miller v. Boone County*, 63 N.W., 352.

Where the only evidence of the alleged misconduct of an attorney in argument is in the form of a statement contained in a motion for a new trial, it will be disregarded: *Gray v. Chicago, M. & St. P. R. Co.*, 75-100.

Where complaint is made of the argument of counsel, such argument will not be considered upon appeal, where it is not shown by the abstract that it was preserved by a bill of exceptions: *Nelson v. Chicago, M. & St. P. R. Co.*, 77-405.

Where misconduct of attorney in argument is relied on for reversal on appeal it should be shown by bill of exceptions, and not by affidavits filed in the trial court. See notes to § 3751.

The incompetence of counsel will not ordinarily constitute ground for a new trial. Indeed, in civil cases, the rule may be regarded as almost invariable: *State v. Benge*, 61-658.

c. *Accident or Surprise.*

Absence of witness: A new trial should not be granted on account of the absence of a witness where the party goes to trial without asking for a continuance: *Mays v. Deaver*, 1-216; *Gee v. Moss*, 68-318.

Cases of surprise: The granting of a new trial where it was shown that a reply to defendant's answer had been prepared and handed to the clerk for filing and not filed, *held* proper: *Barnes v. McDaniels*, 35-381.

Where, by agreement of attorneys, a cause was to be continued, and the attorney for plaintiff was to see that the entry was made, and owing to his absence from court plaintiff employed another attorney and procured judgment without a defense and without the knowledge of defendant, *held*, that there was such surprise as to entitle defendant to a new trial: *Chicago & N. W. R. Co. v. Gillett*, 38-434.

When a new trial has been granted on the ground of error in instructions given, a party cannot claim, upon another trial, that he is taken by surprise by the giving of the same instructions: *Lowe v. Lowe*, 40-220.

Where a motion for a new trial was made on the ground of surprise caused by certain testimony, *held*, that the ground was not well taken, as the statement of witness could not have been prejudicial, the fact to which it related not having been denied: *Key v. Des Moines Ins. Co.*, 77-174.

Circumstances of a particular case, including illness of attorney for defendant, *held* sufficient to warrant the setting aside of the judgment rendered by default and the granting of a new trial under the provisions of § 4091: *Wishard v. McNeil*, 78-40.

The mere showing by a party that during the trial he was absent, with reasons therefor, *held* not sufficient to entitle him to a new trial. The rules in regard to the showing necessary in setting aside a default are not applicable to a new trial: *Seiberling v. Schuster*, 83-747.

Mistake: A party will not be granted a new trial on account of mistake of law on his part founded in negligence: *Russell v. Nelson*, 32-215.

The fact that a witness gave an incorrect answer by reason of not understanding the question will not be a ground for new trial, at least unless it appears that prejudice resulted to the party from the incorrect evidence: *State v. Viers*, 82-397.

Accident; sickness: Where a party, who was also an important witness, was detained by illness from being present, but a continuance was not asked, *held*, that, under the circumstances, sufficient diligence was not shown to entitle him to a new trial on the ground of accident: *Whilworth v. Murphy*, 29-470.

The fact that a material witness who is expected to be present at the trial is accidentally delayed and unable to reach the place of trial in time would be ground for a new trial. But if he might be introduced after the conclusion of the testimony, and even after some of the arguments have been made to the jury, application for leave to introduce him should be made: *Smith v. State Ins. Co.*, 58-487.

The affidavit of defendant, on a motion for a new trial, to the effect that he was unable to be present on account of sickness, *held* not sufficient, as not showing that a continuance might not have been asked; also, in not showing that the facts which he proposed to testify to would have been admissible under the issues: *Nolan v. Grant*, 53-392.

Where the attorney of the party, not being able to be present at the term of court, employed another attorney to be present, and his failure to do so was not due to want of ordinary diligence, *held*, that the judgment was properly set aside and a new trial granted on account of accident and surprise: *First Nat. Bank v. Harwick*, 74-227.

Negligence of attorney in failing to appear and defend is not a ground for new trial: *Church v. Lacy*, 71 N. W., 338. And see notes to § 4091.

d. *Excessive or Deficient Verdict.*

Reduction of excessive verdict: If the damages are deemed excessive, the court may fix a reasonable amount and give the successful party the option to accept such sum or submit to a new trial: *Brockman v. Berryhill*, 16-183.

But the party cannot, by offering to remit the amount found excessive, without specifying any amount, compel the court to say how much is excessive. The court may refuse to fix any amount and order a new trial: *La Salle v. Tift*, 52-164.

The doctrine that where the verdict is excessive the court may direct the successful party to accept a judgment for a less amount or submit to new trial, leaving the election with such party, does not apply where the successful party voluntarily remits any excess in the verdict, and in such case there is not election on the part of defendant to have a new trial on account of the excessive verdict: *McCoy v. Treichler*, 90-1.

Where a verdict is excessive the court may give the plaintiff his election to remit the excess or submit to an order for a new trial. In like manner, when the verdict is too small, defendant may be given the election to submit to a proper verdict or have a new trial, and if defendant submits to the larger verdict as fixed, plaintiff cannot have a new trial: *Callanan v. Shaw*, 24-441.

The court has no power to render judgment for a less sum than the verdict without giving the successful party the option of accepting such less amount or submitting to a new trial: *Noel v. Dubuque, B. & M. R. Co.*, 44-293; *Brown v. McLeish*, 71-381.

The court has no power to render judgment for a less amount than the verdict without giving the parties the option to accept such amount or a new trial, but the party against whom the verdict was rendered cannot complaim of a judgment rendered against him for such reduced amount: *Hudson v. Applegate*, 87-605.

The rule that the court cannot reduce the damages allowed without giviving to the successful party the election of accepting a new trial has no application where the trial is to the court without a jury. In such case the court may change its finding as to the amount of damages as it sees fit: *Flickinger v. Omaha Bridge & Terminal R. Co.*, 67 N.W., 372.

Where the court has reduced the verdict because excessive under the instructions, it cannot afterwards set it aside because contrary to instructions: *Morlan v. Russell*, 71-214.

Where the trial court, on a motion for a new trial upon the ground that the damages are excessive, reduces the amount of recovery, to which the successful party consents, the case stands as though a verdict of the jury in that amount had been returned, and defendant cannot complain on the ground of excessive damages unless the amount thus allowed is excessive: *Van Winter v. Henry County*, 61-684; *Duffy v. Dubuque*, 63-171.

Even in an action to recover on liquidated damages the court may, if the verdict is excessive, give the successful party the option of remitting an amount which will make the verdict proper or submit to a new trial, and defendant has no ground of complaint if the *remittitur* is filed. So *held* where, in an action on an attachment bond by way of counter-claim, defendant secured a verdict for damages in excess of the amount stipulated in the bond, which should limit the recovery: *Union Mercantile Co. v. Chandler*, 90-650.

The plaintiff may remit any excess in the verdict beyond the amount which he is entitled to recover, and the opposite party is not entitled in such case to the option of submitting to the judgment as thus reduced or having a new trial: *McCoy v. Treichler*, 90-1.

The court has no authority to direct a *remittitur* of a portion of the verdict and enter a judgment for the balance where it is ascertained that there has been misconduct of the jury vitiating the verdict. In such case the verdict should be set aside entirely and a new trial granted: *Darland v. Wade*, 48-547.

As to remittitur in supreme court, see notes to § 4139.

Verdict against evidence: In an action sounding in tort a wide latitude is allowed the jury, and the court will seldom interfere with the verdict because excessive or because in the opinion of the judge it may be less than he would have given; but where the fact that the amount is less than the amount to which the party is entitled is susceptible of ascertainment by computation, a verdict which is not supported by the evidence as to the amount will be set aside: *Fawcett v. Woods*, 5–400.

Excessive damages: Where excessive damages are not made the basis of a motion for a new trial, a party cannot on appeal object that in assessing the amount of recovery the jury allowed more that the proper amount for certain items for which recovery was permitted: *Reynolds v. Iowa & Neb. Ins. Co.*, 80–563.

Smallness of damages: The provision of § 2839 of Code of '73 (not retained) was an absolute limitation upon the power of the courts to grant new trials on account of smallness of damages for injury to person or reputation, but it did not follow that they were required to grant a new trial where the damages did not include the actual pecuniary injuries sustained: *Hubbard v. Mason City*, 64–245.

There is no express ground for new trial based upon the insufficiency of the damages awarded by the jury, but it was properly inferred from the language of § 2839 of Code of '73 that a new trial might be granted where the damages found by the jury were less than the actual pecuniary damages sustained: *Kinser v. Soap Creek Coal Co.*, 85–26.

That the verdict is excessive, as, for instance, in allowing actual damages when only nominal damages are proper, can only be taken advantage of by motion for new trial; arrest of judgment cannot be granted on that ground: *Carl v. Granger Coal Co.*, 69–519.

Correction of verdict by jury: Where, under the direction of the court to correct an error, the jury reduced the amount of their verdict, and there was nothing to show that the party against whom the verdict was rendered could have escaped the first verdict, *held*, that a motion by him for a new trial was properly overruled: *Hamilton v. Barton*, 20–505.

e. *Verdict Against the Evidence or the Law.*

When sufficient to warrant new trial: The rule of the supreme court, that it will not interfere with the decision of the court below in refusing a new trial on account of the insufficiency of evidence where there is a conflict, has no application whatever to *nisi prius* courts. They should independently exercise the power to grant new trials, whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties, using caution, however, in the exercise of the power, so as not to invade the legitimate province of the jury: *Dewey v. Chicago & N. W. R. Co.*, 31–373.

To justify the granting of a new trial on the ground that the verdict is against the weight of evidence the want of evidence must relate to a material issue legitimately made by the pleadings: *Parker v. Hendrie*, 3–263.

A verdict should not be set aside as against the evidence when that evidence is irrelevant or immaterial under the issues: *Scott v. Morse*, 54–732.

The fact that a jury by a special verdict show that they excluded from their consideration a material fact appearing from the evidence may be ground for a new trial: *Baldwin v. St. Louis, K. & N. W. R. Co.*, 63–210.

Where it appears that one of the findings of fact made by the jury, which relates to a matter having an important bearing upon the liability of defendant, is contrary to the evidence, a new trial should granted: *Heath v. Whitebreast Coal, etc., Co.*, 65–737.

Where the general conclusion reached by the jury appears to the court to be wrong, and it is shown by special findings that the jury are unable to assign any certain or tangible grounds for their conclusion, it is clearly the duty of the court to interfere and grant a new trial: *Ford v. Central Iowa R. Co.*, 69–627.

Where the direct testimony and circumstances shown could be reconciled and made harmonious, *held*, that a verdict in conflict with such testimony should have been set aside and a new trial granted: *Sullivan v. Wabash, St. L. & P. R. Co.*, 58–602.

In a particular case, *held*, that the verdict was not so wanting support in the evidence as to warrant the court in saying the jury were governed by either passion or prejudice, and therefore it could not reverse the judgment: *Beazan v. Mason City*, 58–233.

Although trial courts are properly reluctant to interfere to set aside a verdict as not supported by the evidence, yet when a plain case is presented where that right should be exercised, trial judges should not hesitate to act, and while it is not the practice of the supreme court to disturb verdicts when the evidence is conflicting, yet it will do so where a manifest injustice will be done by permitting the verdict to stand: *Chicago Cottage Organ Co. v. Caldwell*, 63 N. W., 336.

When a special finding is not supported by the evidence, and the fact so found is material though not necessarily of a determinative character, a new trial must be granted: *Peck v. Hutchinson*, 88–320.

Conflict in the evidence will not warrant reversal for failure of the trial court to grant a new trial: See notes to § 4139.

Passion and prejudice: In a particular case, *held*, that the damages allowed were so disproportionate to the actual injury as to lead irresistibly to the conclusion that the verdict was not the result of a deliberate and dispassionate examination of the testimony, and a ruling refusing a new trial was reversed: *Sadler v. Bean*, 38–684.

A special finding against the express admission of the party in whose favor the verdict was found, *held* to sufficiently indicate passion on the part of the jury: *Jeffrey v. Keokuk & D. M. R. Co.*, 51–439.

Variance: A new trial will not be granted

for variance between the allegations and proof when no objection was offered to the evidence when introduced: *Schrimper v. Heilman*, 24-505.

Verdict against instructions: That the verdict of the jury is contrary to the law as laid down in the instructions of the court will be a ground for new trial, regardless of the correctness of the instructions, see notes to § 3705.

f. *Newly-Discovered Evidence.*

Such as to produce different result: An application for new trial on this ground should be denied when it is apparent that that the ground relied on is technical, and that the rights of the parties have been once fairly adjudicated and settled: *McLain v. Lawson*, 25-277.

A new trial in such cases should not be granted, unless the court should think that upon a new trial such newly-discovered evidence might probably lead to a different result: *Millard v. Smger*, 2 G. Gr., 144; *State v. Bowman*, 45-418; *Cornish v. Chicago, B. & Q. R. Co.*, 49-378; *Carpenter v. Brown*, 50-451; *Harber v. Sexton*, 66-211.

There is no rule recognized in this state to the effect that, where a verdict has been found for plaintiff in an action for slander in which defendant pleads justification, a new trial on account of newly-discovered evidence cannot be granted: *Boggess v. Read*, 83-548.

Must be material: The party moving for a new trial on the ground of newly-discovered evidence must make it appear that the proposed evidence is competent and material: *Manson v. Ware*, 63-345; *Lisher v. Pratt*, 9-59; *Harnett v. Harnett*, 59-401.

What sufficient showing: Affidavits as to what a certain party had told others, without a statement that affiant believed such facts to be true, or that such party would so testify if called as a witness, *held* not sufficient to require the granting of a new trial: *State v. Wells*, 48-671.

Where a party seeks to prosecute a new trial on the ground of newly-discovered evidence, it should give the court the best evidence possible of the truth of the allegations that such evidence has been discovered, where it is, and that it can be had at the proper time: *Reeves v. Royal*, 2 G. Gr., 451.

The application for a new trial on the ground of newly-discovered evidence should be accompanied by the affidavit of the newly-discovered witness, where it can be procured, stating the facts to be established by his testimony: *Warren v. State*, 1 G. Gr., 106; *Mays v. Deaver*, 1-216; *Manix v. Malony*, 7-81; *Sully v. Kuehl*, 30-275; *Hand v. Langland*, 67-185.

To authorize a new trial on the ground of newly-discovered evidence, the facts to be proven by such evidence must be made to appear so that the court may determine whether it is material or not: *State v. Bowman*, 45-418.

Where the defense in an action to recover back money paid for purchase of intoxicating liquors was that the seller had a permit to sell and the sales were therefore lawful, *held*, that a showing that the record of such permit could not be found at the time of the trial, but was subsequently found in an unused room in the court-house where meetings of the board of supervisors had previously been held, was a sufficient showing of newly-discovered evidence to entitle the party to a new trial: *Grotte v. Schmidt*, 80-454.

After remanding of case in equity: Where, after the remanding of an equity case, tried *de novo* in the supreme court, and before the final decree in the lower court, a party makes such showing of newly-discovered evidence as to entitle him to a new trial, he may file amended pleadings, if necessary, and introduce such evidence before final decree is rendered: *Adams County v. Burlington & M. R. R. Co.*, 44-335; *Shorthill v. Ferguson*, 47-284.

But in such case the trial will be limited to the new issue presented. The issues previously determined are to be regarded as already adjudicated: *Adams County v. Burlington & M. R. R. Co.*, 55-94.

Due diligence: If a party is surprised on the trial by evidence which he is not prepared to meet, he should ask a continuance, and, if he does not do so, the discovery of evidence to meet it afterwards will not entitle him to a new trial. Diligence to procure the evidence in time for trial must be shown: *Dunlavey v. Watson*, 38-398; *Hooper v. Moore*, 42-563; *Mehan v. Chicago, R. I. & P. R. Co.*, 55-305.

Where witnesses are discovered before the termination of the trial, although after the proper time for the introduction of their testimony, the party should ask to have their testimony received, and, upon failure to do so, cannot ask a new trial on the ground of such testimony as newly-discovered evidence: *Dettman v. Zimmerman*, 53-709.

The fact that the attorney for the party applying for a new trial because of newly-discovered evidence knew of facts tending to rebut the testimony of the opposite party, and did not take the stand as a witness for his client, *held* not sufficient to constitute negligence on the part of his client. An attorney should avoid, if possible, being a witness for his client: *Alger v. Merritt*, 16-121.

It must appear that reasonable diligence has been exercised to discover the evidence, the discovery of which is relied upon as a ground for new trial: *Bingham v. Foster*, 37-339, 341; *Mather v. Butler County*, 33-250; *Lay v. Wissman*, 36-305; *Kilburn v. Mullen*, 22-498; *Reeves v. Royal*, 2 G. Gr., 451; *Millard v. Singer*, 2 G. Gr., 144; *Hesser v. Doran*, 41-468; *Stuckslager v. McKee*, 40-212; *Carman v. Roenan*, 45-135; *Clark v. Nelson*, 40-678; *Norris v. Hix*, 74-524.

Where a party had on the trial introduced evidence of a particular character, and afterwards asked a new trial on the ground of the discovery of new evidence of the same character, without showing diligence in seeking to obtain such newly-discovered evidence before the trial, *held*, that a new trial was properly refused: *First Nat. Bank v. Charter Oak Ins. Co.*, 40-572.

It is not sufficient to show that the testimony was not discovered before the close of the trial, but the party must show that he

used diligence to ascertain whether such testimony was in existence or that such diligence would have been unavailing: *Pelamourges v. Clark*, 9-1; *Lisher v. Pratt*, 9-59; *Hopper v. Moore*, 42-563; *State v. Bowman*, 45-418.

Where the new evidence relied upon was that of a party to the suit, *held*, that it would be presumed, in the absence of the clearest showing, that the omission to introduce it on the original trial was through his own negligence: *Jack v. Des Moines & Ft. D. R. Co.*, 53-399.

Where newly-discovered evidence relied upon is that of a witness who was called and examined on the first trial, a new trial will not be granted: *Fanning v. McCraney*, Mor., 398.

In particular cases, *held*, that sufficient diligence in discovering the evidence on account of which a new trial was asked was not shown: *Smith v. Wagaman*, 58-11; *Roziene v. Wolf*, 43-393; *Bailey v. Landingham*, 52-415; *Lindauer v. Hay*, 61-663.

Where it does not appear that the facts relied upon were not known to the party at the time of the trial, and he did not ask for a continuance in order that he might establish them when it became apparent that they were important, he is not entitled to a new trial for the purpose of establishing such facts: *State v. Morgan*, 80-413.

It is not necessary in the showing of diligence to state that the evidence on account of which a new trial is asked was not known to the attorney of the party: *Boggess v. Read*, 83-584.

Where a year intervened between the finding of an indictment and the trial thereunder, *held*, that failure to look for material evidence in the case until just prior to the trial was such negligence that a subsequent discovery of such evidence would not be a ground for new trial: *State v. Minneapolis & St. L. R. Co.*, 88-689.

What sufficient diligence: Only reasonable diligence to discover the evidence is required to be shown in an application for a new trial on the ground of newly-discovered evidence: *Stineman v. Beath*, 36-73.

Showing of diligence in particular cases *held* sufficient: *Eckel v. Walker*, 48-225; *Wayt v. Burlington, C. R. & M. R. Co.*, 45-217; *Van Horn v. Redmon*, 67-689.

Under particular facts, *held*, that a delay in asking for a new trial on the ground of newly-discovered evidence was not due to neglect and that the new trial should not be denied on that ground: *Clessle v. Frerichs*, 63 N. W., 581.

Facts constituting diligence: A general allegation of diligence as to the discovery of the evidence on which a new trial is asked is not sufficient. The party must show what he did towards discovering the evidence in order that the court may judge whether it constituted due diligence: *Carson v. Cross*, 14-463; *Sully v. Kuehl*, 30-275; *Cohol v. Allen*, 37-449; *Moody v. Priest*, 69-23; *Boot v. Brewster*, 75-631.

Statements in regard to diligence, which are in the nature of conclusions and do not recite facts from which the court may determine whether or not due diligence was used, will not be sufficient: *Cahalan v. Cahalan*, 82-416.

The fact that the affidavit states conclusions rather than particular facts goes rather to the value of the affidavit as evidence than to its legality: *Boggess v. Read*, 83-548.

Cumulative evidence: A new trial will not be granted for newly-discovered evidence which is merely cumulative: *Reeves v. Royal*, 2 G. Gr., 451; *Manix v. Malony*, 7-81; *Sturgeon v. Ferron*, 14-160; *Wilhelmi v. Thorington*, 14-537; *Keyes v. Francis*, 28-321; *Cohol v. Allen*, 37-449; *Bingham v. Foster*, 37-339; *German v. Maquoketa Savings Bank*, 38-368; *First Nat. Bank v. Charter Oak Ins. Co.*, 40-572; *Morrow v. Chicago, R. I. & P. R. Co.*, 61-487; *Bryson v. Chicago, B. & Q. R. Co.*, 89-677.

Though the evidence be in some respects cumulative, still, if in any degree it has an independent and distinct bearing upon the issue it will be sufficient: *Stineman v. Beath*, 36-73; *Hambel v. Williams*, 37-224.

Where newly-discovered evidence is cumulative or impeaching in its character, it is not ground for a new trial: *Donnelly v. Burkett*, 75-613.

The newly-discovered evidence in a particular case, *held* to be cumulative and therefore not ground for a new trial: *State ex rel. v. Oeder*, 80-72.

What deemed cumulative: Evidence which is simply additional to evidence already introduced of the same kind upon the point in dispute, and which would not be conclusive, is cumulative: *First Nat. Bank v. Charter Oak Ins. Co.*, 40-572.

Evidence may tend to establish the same issue and yet be so unlike and distinct from any evidence before produced as not to be deemed cumulative: *German v. Maquoketa Savings Bank*, 38-368.

That new evidence tends to establish the same ultimate fact, if it is not of the same kind and to the same point, will not render it cumulative: *Eckel v. Walker*, 48-225; *Able v. Frazier*, 43-175; *Alger v. Merritt*, 16-121.

Evidence is not necessarily cumulative because it tends to establish the same issue which was controverted on the trial. It must not only be to the same point, but of the same kind as that before produced: *Wayt v. Burlington, C. R. & M. R. Co.*, 45-217.

To render newly-discovered evidence cumulative so that it will not be considered sufficient ground for new trial, it must be additional to other evidence on the same point. Other evidence of the same ultimate fact as that upon which evidence was introduced on the trial will not necessarily be cumulative: *Boggess v. Read*, 83-548.

Therefore, in an action for slander, in charging plaintiff with lewdness, *held*, that newly-discovered evidence as to other acts tending to show lewdness was not cumulative: *Ibid.*

Newly-discovered evidence will not be deemed insufficient as ground for a new trial because it is cumulative of evidence elicited on cross-examination, which is incidentally favorable to the party examining: *White v. Nafus*, 84-350

Under the facts of a particular case, *held*, that the newly-discovered evidence relied on was cumulative and not ground for granting a new trial: *Names v. Dwelling House Ins. Co.*, 64 N.W., 628.

Separate admissions as to a fact made by different parties cannot be considered as cumulative: *Means v. Yeager*, 65 N.W., 993.

New evidence as to statements made by a witness on the trial in conflict with his testimony and not discovered until after the conclusion of the trial is not impeaching evidence, nor is it cumulative, and it may be sufficient to justify the granting of a new trial: *Murray v. Webber*, 92–757.

Admissions or declarations of party: Therefore, *held*, that evidence as to an admission of the opposite party as to a matter in controversy was not cumulative with original evidence of a different kind on the same point: *Wayt v. Burlington, C. R. & M. R. Co.*, 45–217.

Evidence as to declarations of a party in relation to the terms of the contract sued upon is not to be deemed cumulative with other evidence of such contract: *Cook v. Smith*, 58–607.

Evidence of admissions of the opposite party in a particular case, *held* sufficient to authorize a new trial where it could not have been discovered before the trial: *Eckel v. Walker*, 48–225.

Newly-discovered evidence, consisting of admissions of plaintiff showing negligence on his part such as to defeat his recovery, *held* sufficient ground for a new trial on the part of defendant where it appeared that there was no negligence in not discovering the evidence in time to introduce it on the trial, notwithstanding the alleged admission was denied in an affidavit by the party by whom it was claimed to have been made: *Spears v. Mt. Ayr*, 66–721.

Where the testimony on the former trial was conflicting and the preponderance doubtful, *held*, that newly-discovered evidence as to the statements of plaintiff in which he claimed much less than the sum recovered was sufficient to warrant the granting of a new trial: *Woodman v. Dutton*, 49–398.

In a particular case, *held*, that the showing as to admissions made by a plaintiff was sufficient to entitle defendant to a new trial for the purpose of introducing such newly-discovered evidence: *Seeley v. Perry*, 52–747.

Mitigation of damages: A new trial will not be granted on account of newly-discovered evidence which would go in mitigation of damages: *Ruble v. McDonald*, 7–90.

Impeaching testimony: A new trial will not be granted on account of newly-discovered evidence impeaching an opposing witness: *Wise v. Bosley*, 32–34; *Dunlavey v. Watson*, 38–398; *Morrow v. Chicago, R. I. & P. R. Co.*, 61–487.

Evidence of admissions and conversations of defendant inconsistent with the whole theory of the defense, but not relating to the veracity of defendant or contradicting his statements as a witness, *held* not to be impeaching, but original evidence, and if discovered after the trial, a sufficient ground for new trial: *Alger v. Merritt*, 16–121.

g. *Error of Law.*

What sufficient: An erroneous statement of the law upon a material matter, orally made by the judge to the jury in the progress of the trial, will entitle the unsuccessful party to a new trial: *Beardsley v. Bridgman*, 17–290.

Remarks of the court in the presence of the jury as to the law of the case which are not erroneous as matter of law will not be ground for a new trial: *Kreuger v. Sylvester*, 69 N. W., 1059.

Objections which might have been raised by demurrer or motion in arrest of judgment are deemed waived if not thus raised, and cannot be raised by motion for new trial: *Brockert v. Central Iowa C. Co.*, 82–369.

Exception necessary: Error of law is not ground for new trial unless duly excepted to: *Darrance v. Preston*, 18–396.

Under previous statutory provisions, *held*, that error in giving instructions might be made a ground for sustaining a motion for new trial, although the instructions were not excepted to at the time: *Farr v. Fuller*, 8–347.

Also that mere failure to except to an error, where it did not appear that the nature of the error was apparent at the time it was committed, would not necessarily render the granting of a new trial erroneous: *Head v. Langworthy*, 15–235.

Error in instructions: An error in giving an instruction will not be ground for reversal where it appears that any other verdict than that reached by the jury would have been clearly against the evidence and ought to have been set aside: *Middleton v. Middleton*, 31–151.

SEC. **3756. Application—affidavits.** The application must be made within three days after the verdict, report or decision is rendered, unless for good cause the court extends the time, except for the cause of newly discovered evidence; must be by motion upon written grounds, and, if for the causes enumerated in subdivisions two, three and seven of the preceding section, may be sustained and controverted by affidavits. [C.'73, § 2838; R., §§ 3114–15; C.'51, §§ 1808, 1810.]

3 50.A.1.32

Time for filing: Except when based upon the ground of newly-discovered evidence the application must be made at the term, and within three days after the verdict or decision: *Boardman v. Beckwith*, 18–292.

Where the record shows that the motion was not made in time the decision of the trial court in overruling it will not be reviewed. If the record is wrong in this respect it should be corrected in the court below: *Stiles v. Botkin's Estate*, 30–60.

A motion filed after the time specified cannot be considered for any cause except newly-discovered evidence: *Clinton Nat. Bank v. Graves*, 48–228; *Patterson v. Jack*, 59–632.

Where a court takes a recess during the term, such recess is not to be excluded in determining the time when a motion for a new trial shall be filed: *Ewaldt v. Farlow*, 62–212.

Under facts in a particular case, *held*, that there was not sufficient excuse for not filing motion for new trial by the time stipulated by the parties, even conceding that in a proper case such failure might be excused: *Weems v. Chicago, R. I. & P. R. Co.*, 58–150.

It is not required that a motion to reinstate a cause which has been dismissed for want of prosecution shall be filed within three days, as in case of a motion for a new trial: *Byington v. Quincy*, 61–480.

Where a motion for a new trial was made more than three days after judgment was rendered, but contained an averment in which it was described as a petition, and contained statements and demands for relief which would be proper in a petition, *held*, that the motion was sufficient, and even if it had been objected to in the court below, the objection might have been overruled and the application treated as if by petition: *Council Bluffs L. & T. Co., v. Jennings*, 81–470.

Where plaintiff had, by stipulation, five days after the verdict in which to file motion in arrest of judgment, and for a new trial, which motions were duly filed, *held*, that by insisting on the judgment for motion on special findings, the motion for new trial was not waived, but that it might be insisted upon after the motion for judgment was overruled, although it was then too late to have filed a motion for new trial: *Pieart v. Chicago, R. I. & P. R. Co.*, 82–148.

On account of newly-discovered evidence: If a motion is made on the ground of newly-discovered evidence after the expiration of three days it should be by petition and within one year, as provided in § 4092: *First Nat. Bank v. Murdough*, 40–26.

Where the time for filing a motion for new trial is extended by consent beyond the term, such motion, if on the ground of newly-discovered evidence, may be made at the next term, provided it is made within the time agreed upon, and need not be, in such cases, by petition: *Eckel v. Walker*, 48–225.

Amendment: A motion for new trial on the ground of newly-discovered evidence is not required to be filed within three days after the verdict, and therefore an amendment to a motion on that ground, filed more than that length of time after the verdict, but during the same term, may be considered: *Van Horn v. Redmon*, 67–689.

If the motion be made in proper time, an amendment thereto, germane to the object and purposes of the original motion, may be made after the time specified: *Sowden v. Craig*, 20–477.

An amendment to a motion for a new trial filed more than three days after the verdict in accordance with the order of court, in which the opposite party was given time to make resistance to such motion, such party making no objection to accepting the provisions of the order in his behalf, *held* sufficient: *Spears v. Mt. Ayr*, 66–721.

Where a motion for a new trial is made in time it may be amended after the expiration of three days, but not by the addition of any new grounds which are not germane to those contained in the original motion: *Dutton v. Seavers*, 89–302.

Such question is not one of discretion, and if the added ground is not proper the supreme court, on appeal, will reverse the ruling of the lower court: *Ibid.*

Motion after judgment: A judgment entered before the expiration of the time for filing motion for a new trial under the statute or stipulation of the parties, could not be set aside on that account: *Beems v. Chicago, C. I. & P. R. Co.*, 58–150.

The granting of a new trial after a formal entry of judgment upon the verdict operates as a vacation of the judgment entered: *Low v. Fox*, 56–221.

Continuance of motion: The law primarily contemplates the disposition of motions for new trial at the trial term, and they should never be continued except from the necessities of the case: *Laird v. Ashley*, 1–570.

It is not required that the motion for new trial be determined at the term at which it is filed. It stands like any other matter submitted to the court, and upon final adjournment, in absence of agreement that it may be decided in vacation, goes over to next term by operation of law; and the court has jurisdiction to determine it at such term: *Van de Haar v. Van Domseler*, 56–671.

Waiver: Where a motion for judgment, notwithstanding the general verdict, is made and overruled, the party is not thereby deprived of his right to file a motion for new trial if filed within the proper time: *Stone v. Hawkeye Ins. Co.*, 68–737.

The ground relied on must be set out in the motion, otherwise affidavits in support thereof cannot be received: *Beal v. Stone*, 22–447.

Affidavits: Where the grounds for a motion do not appear in the record, they should be established by extrinsic proof before the court can be required to act on them: *Cochrane v. Knowls*, 3 G. Gr., 115.

It is only with reference to misconduct of the jury or prevailing party or accident or surprise that affidavits are admissible. Therefore, *held*, that affidavits in support of a motion asking a new trial on the ground of prejudice of the referee were properly stricken from the files: *Feister v. Kent*, 92–1.

Affidavits of jurors to impeach verdict: Affidavits of jurors may be received for the purpose of avoiding a verdict by showing any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself. But such affidavits cannot be received as to any matter essentially inhering in the verdict itself, as that a juror did not assent to it, that he misunderstood the instructions, that he was unduly influenced or mistaken, etc.: *Wright v. Illinois & Miss. Tel. Co.*, 20–195; *Cowles v. Chicago, R. I. & P. R. Co.*, 32–515; *Garretty v. Brazell*, 34–100; *Shepherd v. Brenton*, 15–84; *Turney v. Barr*, 75–758.

It cannot be shown by affidavits of jurors that they did not voluntarily assent to the verdict: *Cook v. Sypher*, 3–484; *State v. Doug-*

lass, 7-413. The assent of a juror indicated by allowing the verdict to be read in his presence and affirming that it is his verdict cannot be overcome by his affidavit: *Hollenbeck v. Garst*, 65 N.W., 417.

The affidavit of one juror that he agreed to the verdict because he was sick, and that of another that he agreed thereto solely on account of the sickness of the first and the threatened injury to him by reason of longer confinement, etc., *held* not receivable for the purpose of impeaching the verdict: *Brown v. Cole*, 45-601.

Affidavits of jurors cannot be received to show that the special findings were not assented to by all the jury: *Garretty v. Brazell*, 34-100.

A juror cannot be allowed to make affidavit that his judgment did not approve of the verdict rendered. The ground upon which he agreed to the verdict is a matter essentially inherent in it, and his affidavit cannot be received to explain or contradict it: *Fox v. Wunderlich*, 64-187.

The affidavit of a juror is not receivable to show that he only concurred in the verdict because he had learned that his father was very sick, and for that reason was unwilling to hold out longer, and that the verdict was not his deliberate judgment: *Ibid.*

Affidavit of a juror cannot be received to show that the jurors concurred in the verdict under a misapprehension of the law: *Ward v. Thompson*, 48-588.

Such affidavits were held not competent where they were produced to show that the jury supposed that exemplary damages, allowed in an action for damages for sale of intoxicating liquors to plaintiff's husband, would go to the school fund and not to plaintiff: *Ibid.*

Such affidavits are not admissible to show that the jury misunderstood the instructions of the court or the testimony: *Davenport v. Cummings*, 15-219; *Jack v. Naber*, 15-450; *Moffit v. Rogers*, 15-453.

Nor are affidavits of jurors receivable to show the motives which influenced their decision: *Darrance v. Preston*, 18-396; *Bryson v. Chicago, B. & Q. R. Co.*, 89-677.

Nor to show that they read and were influenced by a part of the answer in the case which had been stricken out on demurrer: *Cowles v. Chicago, R. I. & P. R. Co.*, 32-515.

Nor that they were unduly influenced by fellow jurors in the determination of the verdict: *Bingham v. Foster*, 37-339; *Purcell v. Tibbles*, 69 N.W., 1120; *Bryson v. Chicago, B. & Q. R. Co.*, 89-677.

Nor that their action was influenced by statements made by one of their number of his own knowledge: *Dunlavey v. Watson*, 38-398.

Nor that their action was influenced by what was said to the jury by the bailiff: *State v. Cowan*, 74-53.

Nor that they erroneously rejected evidence which was properly before them: *State McConkey*, 49-499.

Affidavits of jurors are not receivable to explain their verdict by showing what items of account were allowed and what rejected: *Lloyd v. McClure*, 2 G. Gr., 139.

Affidavit of a juror is not competent to show a mistake in calculation or an error in judgment in reaching a verdict: *Wilkins v. Bent*, 66-531.

Affidavits of jurors that it was agreed that if the court made no response to a request for instructions as to certain points a verdict of guilty was to be rendered, which was done on failure of the court to give any instructions on the points in question, *held* not competent for the purpose of impeaching the verdict: *State v. McConkey*, 49-499.

Affidavits of jurors to show misconduct: Affidavits of jurors are receivable to show misconduct of the jury, as taking with them and considering a deposition not introduced in evidence: *Stewart v. Burlington & M. R. R. Co.*, 11-62.

Or to show the statement, by a juror to his fellows, of a fact outside the case made in court: *Hall v. Robison*, 25-91.

Or to show that a fellow juror made statements of his own personal knowledge as to the matters in issue: *Griffin v. Harriman*, 74-436.

Or to show that the verdict was a quotient verdict: *Schanler v. Porter*, 7-482; *Manix v. Malony*, 7-81; *Hendrickson v. Kinsbury*, 21-379; *Darland v. Wade*, 48-547; *Fuller v. Chicago & N. W. R. Co.*, 31-187.

Also to show that the verdict was arrived at by lot: *Ruble v. McDonald*, 7-90; *Wright v. Illinois & Miss. Tel. Co.*, 20-195.

Affidavits of jurors to sustain verdict: While affidavits of jurors are not receivable for the purpose of impeaching their verdict with reference to matters which inhere therein, it does not necessarily follow that such affidavits are not admissible for the purpose of sustaining their verdict; and where it appeared that a deposition had been improperly taken by the jury to their room, *held*, that the affidavits of jurors showing that no prejudice resulted from that fact were receivable: *Morris v. Howe*, 36-490.

Matters not inhering in the verdict may be shown by the affidavits of jurors, as, for instance, that in determining whether a witness had, as he testified, signed a paper which was in evidence, they compared it with another paper which was erroneously supposed to be one which he also claimed to have written: *Kruidenier v. Shields*, 70-428.

Therefore, *held*, also, that affidavits of jurors selected to assess damages for taking right of way might be received to show when such assessment was actually made: *Jamison v. Burlington & W. R. Co.*, 69-670.

When it is sought to sustain the verdict, or to show the basis upon which the verdict was found, not for the purpose of impeaching, but for the purpose of determining the rights of the parties in a mere matter of costs, affidavits of jurors may be considered; for instance, on the question whether any allowance of interest was included in the verdict: *Swails v. Cissna*, 61-693; *Butt v. Tuthill*, 10-585.

Voluntary affidavits: The affidavits of jurors which may be received on a motion for a new trial must be voluntary. The court cannot, by rule upon the jury, compel them to answer under oath as to the manner of

making up their verdict: *Forshee v. Abrams*, 2–571; *Grady v. State*, 4–461; *Crumley v. Adkins*, 12–363.

Affidavits as to statements by jurors: Affidavits of the attorney of the unsuccessful party as to statements made to him by jurors, showing misconduct of the jury, *held* not admissible to impeach such verdict. Such evidence is merely hearsay: *State v. Quinton*, 59–362.

An affidavit showing that a juror has made statements to the effect that the jury did not take into consideration the instructions of the court, and that members of the jury refused to make affidavit as to that fact, cannot be considered: *Grady v. State*, 4–461.

SEC. **3757. Judgment notwithstanding verdict.** Either party may file a motion for judgment in his favor, notwithstanding the fact that a verdict has been returned against him, if the pleadings of the party in whose favor the verdict has been returned omit to aver some material fact or facts necessary to constitute a complete cause of action or defense, the motion clearly pointing out the omission. [C.'73, §§ 2842, 2859; R., §§ 3119, 3138.]

Under the former system of pleading and practice, a motion for judgment notwithstanding the verdict was only entertained by the court under a certain state of the pleadings and findings of the jury, and was never entertained on behalf of the defendant. It is only for plaintiff that such a judgment can be rendered: *Bradshaw v. Hedge*, 10–402.

Where there was no answer, *held*, that judgment should have been rendered for plaintiff, notwithstanding evidence on the part of the defendant disproving the claim had been erroneously received: *Singer Mfg. Co. v. Billings*, 39–347.

Also *held*, that where defendant pleads a tender, judgment in plaintiff's favor for the amount of the tender should be rendered, although the verdict of the jury is for defendant: *Sheriff v. Hull*, 37–174.

Where, upon motion for judgment for an amount admitted on the pleadings to be due, the opposite party asked to amend and leave was granted, *held*, that the court properly refused to enter judgment on the pleadings until the amendment was filed: *Snyder v. Phillipps*, 66–484.

SEC. **3758. Arrest of judgment.** Either party may file a motion in arrest of judgment, where the pleadings of the prevailing party wholly fail to state a cause of action or a complete defense, and a verdict has been returned in his favor. [C.'73, § 2650; R., § 2878.]

In an action upon certain promissory notes, where an issue in the case had not been disposed of, *held*, that it was error to render a judgment on the pleadings: *Black v. De Camp*, 75–105.

A judgment on a verdict will not be arrested on the ground that it is excessive: *Carl v. Granger Coal Co.*, 69–519.

In general, as to arrest of judgment on a defective pleading, see § 3563.

SEC. **3759. Filing of motion.** The filing of either a motion for a new trial, for judgment notwithstanding the verdict, or in arrest of judgment, shall not be a waiver of the right to file either or both of the others, but any such motion shall be filed within the time fixed for the filing of motions for new trials.

SEC. **3760. Amendment to cure defect.** Upon any motion for a new trial, for judgment notwithstanding the verdict, or in arrest of judgment, the party whose pleading it is alleged is defective may, if the court considers it necessary, file an amendment setting up the omitted facts, which, if true, would remedy the alleged defects, and such amendment shall be filed before the hearing of the motion, and shall suspend the same. If the facts thus stated would not, if proven, defeat the object of the motion, it shall be sustained. If such new averments would, if proven, defeat its object and are not admitted, they must be denied, or confessed and avoided, by the opposite party within such time as the court shall direct, unless the same are denied by legal operation, and in such case the law of pleading and procedure shall apply, except that the amendment and response need not be verified. [C.'73, § 2842; R., § 3119.]

Amending after motion in arrest: Under this section an objection made upon motion in arrest of judgment on account of the nonaverment of some material fact may be obviated by the filing of a statement of such omitted fact: *Boude v. Methodist Ep. Church*, 47–705.

Therefore it is not proper to direct a verdict against a party on account of the insufficiency of his petition in failing to aver an essential fact, as, for instance, the performance of the conditions of a contract on which he relies, as such action of the court would deprive him of the benefit of the statutory provision for curing such defect: *Wrought Iron Bridge Co. v. Greene*, 53–562.

Where the averments of a petition are

too indefinite to entitle plaintiff to any relief, and upon a recovery by him being attacked by motion in arrest, he does not proceed as provided in this section, he cannot be relieved from such defect on appeal: *Sloan v. Rebman*, 66–81.

Where plaintiff amends his petition to avoid an objection after verdict, which should have been made before trial, he cannot afterwards be heard to insist that such amendment was unnecessary: *Coates v. Galena & C. U. R. Co.*, 18–277.

SEC. **3761. Issues tried—judgment.** If the facts thus pleaded are admitted, the party pleading the same shall be entitled to such judgment as he would have been entitled to if such facts had been stated in the original pleading and admitted as proven on the trial, but, if controverted, there shall be a trial of the issues raised by the new pleadings, and judgment shall be rendered on the original verdict or finding, as modified or supplemented by the verdict or finding on the new issues. [C. '73, § 2843; R., § 3120.]

SEC. **3762. Costs of new trial.** The cost of all new trials shall either abide the event of the action or be paid by the party to whom such new trial is granted, according to the order of the court, to be made at the time of granting such new trial. [C; '73, § 2840; R., § 3117.]

SEC. **3763. Conditions.** The court may determine not to grant a new trial unless certain terms or conditions named by it shall be agreed to by the opposite party, and, in the event of his agreement, the terms or conditions named shall be entered on the record, and no new trial shall be granted if he refuses to agree thereto. [C. '73, § 2841, R., § 3118.]

The court may make the filing of a bond for the payment of judgment and costs the condition upon which a new trial will be granted: *Loring v. Holt*, 39–574.

It may also give the successful party the alternative of submitting to certain terms or to a new trial: *Brockman v. Berryhill*, 16–183.

In a particular case, *held*, that the action of the trial court in holding that the condition in regard to the payment of costs by a certain time had been sufficiently complied with to entitle the party to a new trial was not so far without support as to be interfered with on appeal: *First Nat. Bank v. Brown*, 81–208.

SEC **3764. Dismissal of action.** An action may be dismissed, and such dismissal shall be without prejudice to a future action:

1. By the plaintiff, before the final submission of the case to the jury, or to the court when the trial is by the court;

2. By the court, when the plaintiff fails to appear when the case is called for trial;

3. By the court, for want of necessary parties, when not made according to the requirements of the court;

4. By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence;

5. By the court, for disobedience by the party of an order concerning the pleadings or any proceeding in the action. [C. '73, § 2844; R., § 3127; C. '51, §§ 1803–4.]

At what time permitted: The provision that plaintiff may dismiss his action at any time before final submission is equivalent to a denial of a right to dismiss after such submission: *Belzor v. Logan*, 32–322.

After final submission it is too late to take a nonsuit: *Hays v. Turner*, 23–214; *Mansfield v. Wilkerson*, 26–482.

Plaintiff may dismiss his suit before the filing of an answer: *Allen v Van*, 1–568.

Where, after submission of the case, the court allowed plaintiff to file an amended petition, not for the purpose of conforming the pleadings to the evidence, but in order to raise a new issue, *held*, that plaintiff might thereupon dismiss the action, it being presumed that the first submission had been set aside in order to permit the new issue to be tendered: *Jones v. Currier*, 65–533.

One of several co-plaintiffs may dismiss an action as to himself whenever, in his judgment, the right or his interest requires him to do so: *Ocheltree v. Hill*, 77–721.

The right to dismiss an action without prejudice does not exist after the final submission of the case to the jury or to the court: *Dunn v. Wolf*, 81–688.

This section by construction denies a right to dismiss after the submission of the case to the court, and it is not competent for an attorney by an understanding with the court to reserve the right to dismiss without prejudice in the event the court decides against him: *McArthur v. Shultz*, 78–364.

What deemed final submission: The direction of the court to the jury, after the giving of the instructions, to enter upon the consideration of the cause, is the final submission to the jury: *Harris v. Beam*, 46–118.

Where, by the ruling of the court, in an action tried before it, all of plaintiff's evidence was excluded, and he was left without

testimony, *held*, that he should be allowed to dismiss, although the court was ready to give its decision: *Partridge v. Wilsey*, 8–459.

Where the character of the court's instructions to the jury was stated to the parties, but they had not yet been read over to the jury, *held*, that the plaintiff had a right to dismiss: *Mullen v. Peck*, 57–430.

Plaintiff may withdraw a portion of his petition after the instructions are given but before the cause is finally submitted to the jury: *Livingston v. McDonald*, 21–160.

A submission to a referee not being mentioned, a party may dismiss at any time before the filing of the referee's report, notwithstanding the referee stands in the place of the court: *Belzor v. Logan*, 32–322.

Plaintiff may dismiss after filing of the affidavit provided for, in case interrogatories annexed to the answer are not responded to. Such affidavit only entitles to judgment on trial, and does not operate immediately as a judgment: *Perry v. Heighton*, 26–451.

If a case has been fully tried, submitted, and the decree determined, the court should refuse leave to withdraw it and dismiss: *Chicago, I. & D. R. Co., v. Estes*, 71–603.

Where defendant, after the conclusion of plaintiff's evidence, moved the court to instruct the jury to find for defendant, which motion, being fully submitted, the court indicated that it would sustain, but had not yet made the entry on the calendar, nor given the jury the instruction requested, *held*, that a dismissal of the action by plaintiff was in time: *Morrisey v. Chicago & N. W. R. Co*, 80–314.

A dismissal pending the announcement of the decision of the case by the court, where the trial is had to the court, is too late: *Toof v. Foley*, 87–8.

On appeal from justice's court: Where a cause is being tried on appeal from a justice's court, the right to dismiss is the same as in an action originally brought in the higher courts; certainly so in an action which might originally have been prosecuted in such court: *Harris v. Laird*, 25–143; and see notes to § 4553.

After cause remanded by supreme court: Where a cause is remanded after reversal on appeal it is not error to allow plaintiff to dismiss without prejudice: *Rynear v. Neilin*, 4 G. Gr., 524.

As to one cause of action: A party may dismiss as to one or more of several causes of action and prosecute as to others: *Ballinger v. Davis*, 29–512; *Cooper v. Wilson*, 71–204.

There is nothing to prevent plaintiff's withdrawing a part of his demand before trial commences: *Campbell v. Ayres*, 9–108.

As to one defendant: In actions *ex contractu* as well as *ex delicto*, plaintiff may enter a *nolle prosequi* as to a part of the defendants, if they have severed in their defenses and have pleaded matters going to their personal discharge: *Quigley v. Merritt*, 4–475.

In a suit upon a joint and several note plaintiff may dismiss as to one defendant and take judgment as to the other: *Young v. Brown*, 10–537.

Where an action was pending against a partnership and was by plaintiff dismissed as to one partner, *held*, that such dismissal operated to dismiss the action against the partnership, and it could not be continued as an individual action against the other partner: *Storm v. Roberts*, 54–677.

The dismissal of an action as to one defendant who has already appeared and moved for change of place of trial to the county of his residence will not defeat his right to have an allowance made for his expenses in attending in the wrong county: *Farmers & Traders' Bank v. Cohen*, 71–473.

Reinstating: The granting or refusal of a motion to reinstate a cause of action is within the discretion of the district court, and where there has been unreasonable delay in making it, and it is then made without notice to or appearance by the adverse party, an appellate court will not reverse the order refusing to reinstate the cause, even when wrongfully dismissed: *Chapman v. Lobey*, 21–300.

Before the adjournment of the term an order of dismissal may be set aside, proper excuse for the failure to prosecute being shown: *Taylor v. Lusk*, 9–444.

Where the cause has been dismissed for want of prosecution and not for default in pleading, the court may, at its discretion, reinstate it on the motion of plaintiff: *Byington v. Quincy*, 61–480.

Dismissal waives error: A plaintiff who voluntarily dismisses his action cannot complain, on appeal, of any action of the court previous to such dismissal: *Marsh v. Graham*, 6–76.

Effect of dismissal: After plaintiff has manifested his intention of dismissing his cause, and both parties have acted accordingly, the action is deemed dismissed, and its pendency cannot be relied upon to defeat a subsequent action for the same cause: *First Nat. Bank v. Haire*, 36–443.

Dismissal of an action in the court where it is pending will terminate any right to have the supreme court consider an appeal from an interlocutory order in such case: *Chicago, R. I. & P. R. Co. v. Dey*, 76–278.

Without prejudice: Although it is provided by statute that the dismissal of an action shall be without prejudice, yet this does not enlarge nor extend the statute of limitations, and a new suit cannot be brought after the expiration of the statutory period except under the special circumstances authorized by § 3455: *Archer v. Chicago, B. & Q. R. Co.*, 65–611.

SEC. **3765. Decision on the merits.** In all other cases upon the trial of the action the decision must be upon the merits. [C. '73, § 2845; R., § 3128.]

This section and the preceding are applicable in equitable actions as well as in actions at law, and the court has no authority upon the final submission of an equitable action to dismiss the bill at plaintiff's cost without prejudice: *Forsythe v. McMurty*, 59–162.

A decree of the circuit court of the United States showing that an equitable cause was submitted to the court upon pleadings and

proofs, and that complainant's bill was dismissed with costs, shows an adjudication upon the merits and is a bar to another action. The fact that it appears from the record that an attorney for plaintiff withdrew his appearance before such submission will not change its effect: *Scully v. Chicago, B. & Q. R. Co.*, 46–528.

The statutory provisions as to dismissal of actions are not applicable in determining the effect of a decree in equity in the federal court dismissing complainant's bill: *Ibid.*

A decree dismissing a bill in chancery absolute in terms, unless not made on grounds going to the merits, is a bar to further litigation on the subject between the the same parties: *Adams County v. Graves*, 75–642.

SEC. **3766. Counter-claim tried.** In any case when a counter-claim has been filed, the defendant shall have the right of proceeding to trial thereon, although the plaintiff may have dismissed his action or failed to appear. [C.'73, § 2846; R., § 3129; C.'51, § 1801.]

Unless an answer setting up a counter-claim has been filed, defendant cannot prevent a dismissal of the action by plaintiff on the ground that he desires to interpose a counter-claim: *Kuhn v. Bone*, 10–392; *Holmes v. Hull*, 48–177.

Withdrawal of plaintiff's suit does not authorize the dismissal of defendant's cross-bill against his objection: *King v. Thorp*, 21–67.

But for this section the dismissal of an action would end all proceedings in the case, and a counter-claim pleaded could not be tried or would be regarded as dismissed. The statutory provision was not intended to authorize the trial of new causes of action in favor of defendant not set up before the dismissal: *Page v. Sackett*, 69–226.

The withdrawal, by one of two joint plaintiffs to an action, of his claim does not dismiss a counter-claim of defendant against him: *Stepanck v. Kula*, 36–563.

A plaintiff who dismisses his action cannot insist on the dismissal of a counter-claim against him on the ground that he has the right to dismiss without prejudice, and that if the counter-claim is allowed it will be prejudicial to him: *Sigler v. Hidy*, 56–504.

Dismissal of an action by plaintiff on appeal from a justice of the peace does not warrant a judgment against him upon a counter-claim of defendant without proof of the amount thereof: *Joy v. Huit*, 31–22.

Notwithstanding the dismissal of plaintiff's action, defendant may proceed with the trial of the case made by a cross-bill: *Foster v. Ellsworth*, 71–262.

Where plaintiff in reply to defendant's counter-claim asks a reformation of a contract, the court may give him relief in that respect although his original cause of action is dismissed. Such dismissal does not withdraw the action on the counter-claim: *Hoyt v. McLagan*, 87–746.

As to effect of dismissal in replevin on defendant's claim for damages, see notes to § 4176.

SEC **3767. Or dismissed.** The defendant may, at any time before the final submission of the cause to the jury, or to the court when the trial is by the court, dismiss his counter-claim without prejudice. [C.'73, § 2847; R., § 3130; C.'51, § 1802.]

Defendant cannot take a nonsuit on his counter-claim after the case has been finally submitted to the court: *Gunsaulis v. Cadwallader*, 48–48.

SEC. **3768. Dismissal in vacation.** Any party to any claim may dismiss the same in vacation, and the clerk shall make the proper entry of dismissal on the record, and if the costs are not paid may enter judgment against such party therefor in favor of the party entitled thereto, and issue execution therefor at the order of such party. The party so dismissing shall be liable for no costs made by the other party after notice to him of such dismissal. [C.'73, § 2848; R., § 3131; C.'51, § 1822.]

SEC. **3769. Judgment—final adjudication.** Every final adjudication of the rights of the parties in an action is a judgment; and such adjudication may consist of many judgments, one of which may determine for the plaintiff or defendant on the claim of either as an entirety; or, when a claim consists of several parts or items, such judgment may be for either of them on any specific part or item of such aggregate claim, and against him on the other part thereof; or a judgment may, in either of these ways, determine on the claims of co-parties on the same side against each other. [C.'73, § 2849; R., § 3121; C.'51, §§ 1814–15.]

Nature: A judgment is not, in a strict sense, a contract: *Sprott v. Reid*, 3 G. Gr., 489; *Johnson v. Butler*, 2–535.

But it is a debt: *Gray v. Ferreby*, 36–146.

A judgment is not an "action" or a "special proceeding commenced." It is the determination of an action or a special proceeding: *Gray v. Iliff*, 30–195.

What constitutes: A final judgment is not a resolve or decree of the court, but the sentence of the law pronounced in the court upon the action or question before it: *Zeigler v. Vance*, 3–528.

The filing and allowance of a claim against an estate in a probate court which has no authority to issue execution upon such allow-

ance is not a judgment: *Smith v. Shawhan*, 37–533.

A judgment or decree of the court controls the written opinion, and, if they are at variance, the former prevails and determines the rights of the parties: *Goodenow v. Litchfield*, 57–226.

Final judgment is the application of the law by the court to the particular case before it, and specifically denying or granting the remedy sought by the action: *Taylor v. Runyan*, 3–474.

A judgment by confession is a judgment, and valid until it is set aside in a proper proceeding: *Dullard v. Phelan*, 83–471.

Where notice of appeal specifies "the judgment" in the case, it is a sufficient indication that the appeal is from the final adjudication with reference to the party appealing: *Searles v. Lux*, 86–61.

An adjudication is a different thing from a satisfaction of such adjudication, and where judgment was rendered for damages and further provided that the successful party should have certain property, or the value thereof, *held*, that the payment of the amount of the judgment did not prevent a subsequent action for the value of such property: *Morrison v. Springfield Engine, etc., Co.*, 84–637.

An order entered of record for the payment of a sum of money by one party to the other, constitutes a judgment, and if no claim for a judgment is properly made in the pleadings, it is erroneous: *Walker v. Walker*, 93–643.

The final adjudication of the rights of the parties in an action is a judgment; therefore, *held*, that the sustaining of a demurrer to an indictment in a criminal case was such a final judgment as to authorize an appeal therefrom by the state: *State v. Bair*, 92–28.

Form: While no particular form of words is necessary, there must be something to show that the judgment stated or indicated by the court has been entered by the clerk: *Taylor v. Runyan*, 3–474.

A mere memorandum of the minutes of the judge from which the record of the case is afterwards to be drawn up does not constitute a judgment: *Ibid.*

A record not corresponding in form to what would be necessary for a judgment in this state may be shown by the laws, practices and usages of the state in which the suit is brought to be sufficient to constitute a judgment there: *Ibid.*

The form of a finding, order or judgment is wholly immaterial, and the dismissal of plaintiff's petition with judgment in favor of defendant for costs constitutes a judgment for defendant: *Edwards v. Louisa County*, 89–499.

Further, as to what is a sufficient entry to constitute a judgment, see notes to § 288.

An order for the recovery of money against one of two defendants, without naming which, is sufficient if it is manifest from the whole record which one is referred to: *Finnagan v. Manchester*, 12–521.

A judgment rendered against "Daniel Dougherty, Treasurer," *held* to be a personal judgment, and that in order to make it a judgment against him in his official capacity only it should have been rendered against him "as treasurer:" *Dougherty v. McManus*, 36–657.

It is not necessary to set out in a decree the facts upon which it is founded: *Campbell v. Ayres*, 6–339.

Where the petition in an action upon a foreign judgment alleged that it was duly rendered by the court, and set forth the entry thereof, which recited the name of the court, the title of the case, service, entry of judgment, etc., and was signed by the clerk, *held*, that a demurrer to the petition on the ground that the judgment record showed that judgment was rendered by the clerk instead of the court was properly overruled: *Thompson v. Cook*, 21–472.

The action of the court, although nominally an order, yet if in the nature of a final adjudication, must be given the force and effect of a judgment and the presumptions applying to judgments will apply in its support: *Reed v. Lane*, 65 N. W., 380.

There is no absolute requirement that a judgment be dated, and in the absence of any showing to the contrary it will be presumed to have been rendered by the court in term time and not in vacation: *Ibid.*

As to form of judgments in justices' courts, see notes to § 4522.

On contract payable in property: A judgment upon a promissory note payable in county orders should be for such property, and not for money, unless the notes have become money demands: *Ransom v. Stanberry*, 22–334.

Alternative: The finding of the court that defendant is indebted in one or the other of two different amounts, leaving the question as to which of the two is proper to be determined in the future, is not a judgment. A judgment cannot be alternative, conditional or contingent: *Battell v. Lowery*, 46–49.

A judgment awarding an execution against a party for costs if not paid within a time limited is not a conditional but a final and absolute judgment: *Sprott v. Reed*, 3 G. Gr., 489.

The assignment of a judgment carries with it a cause of action existing against the sheriff for damages for negligence of the sheriff in the keeping of the property levied on: *Citizens Nat. Bank v. Loomis*, 69 N. W., 443.

Evidence: The record of a judgment of a court of general jurisdiction is admissible in evidence, without proof of the service of process and the pleadings: *American Emigrant Co. v. Fuller*, 83–599.

As to proof of judgment see, also, notes to § 4644. As to action on judgment, see § 2439.

Jurisdiction: So long as the judgment debtor is content to permit a judgment to be enforced against his property, a stranger to the judgment cannot question its validity on account of the want of jurisdiction: *Wright v. Mahaffey*, 76–96.

Where suit was brought against N. Young, and a garnishee was sought to be held for indebtedness due N. S. Young, *held*, that the question whether N. S. Young was the same person as defendant N. Young was

raised by the answer in the case, and was for adjudication: *Allison v. Chicago, B. & Q. R. Co.*, 76–209.

Parties who are not within the jurisdiction of the court are not affected by the judgment of the court: *Blackman v Wright*, 65 N. W., 843.

Further as to validity of judgment in case of defective service or want of service, and how the question may be raised, see notes to § 3519.

Where liability does not appear: Judgment need not be entered on a petition and proofs which show no legal liability, even though a demurrer to the petition has been overruled, and defendant has answered over, denying such allegations: *Brown v. Cunningham*, 82–512.

And see notes to § 3563.

Limitation of actions on judgments: See notes to § 3447, ¶ 8.

Deceased defendant: Where defendant dies after the submission of the cause, and before the rendition of judgment, the judgment should be entered as of the date of submission or at least of a date prior to the death. It is irregular to enter it as of a date subsequent to the death: *Flock v. Wyatt*, 49–466.

Deceased plaintiff: A judgment in a party's favor, after his death, is not void but voidable: *Gilman v. Donovan*, 53 362.

Bar; prior adjudication: A defendant relying upon a prior adjudication has the burden of showing that the particular matter in controversy was included in the former action and that it was determined on the merits: *Mum v. Shannon*, 86–363.

Where by transfers of interest for the purpose of enabling the transferee to maintain the suit for the benefit of his assignor, the suit is prosecuted in the name of such transferee and judgment rendered therein, such judgment will be a bar to a subsequent action in the name of the assignor after reassignment of the cause of action: *Garretson v. Ferrall*, 92–728.

The question of the identity of the two actions is for the jury: *Mum v. Shannon*, 86–363.

SEC. **3770. Judgment for part.** Any party who succeeds in part of his cause or causes, and fails as to part, may have the entry in such case express judgment for him for such part as he succeeds upon, and against him on the other part. [C. '73, § 2850; R., § 3122.]

SEC. **3771. In abatement.** Where matter in abatement is pleaded in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare. [C. '73, § 2851; R., § 3124.]

The judgment in a particular case finding for defendant, and reciting an offer to plaintiff of a nonsuit and the acceptance thereof by plaintiff, *held* sufficient to indicate that the judgment was upon matter in abatement pleaded in the action and not on the merits: *Atkins v. Anderson*, 63–739.

Where an action in the federal court was abated because prematurely brought, no trial being had upon the merits, it was held that the judgment rendered in said cause would not bar another action for the same cause in the state court: *Harrison v. Hartford F. Ins. Co.*, 71 N.W., 220.

Section applied: *Clise v. Freeborne*, 27–280.

Where the record fails to distinguish between matters pleaded in bar and those pleaded in abatement, it will be assumed that the judgment was not rendered in abatement: *Garretson v. Ferrall*, 92–728.

As to how matter in abatement is to be pleaded, etc., see § 3642.

SEC. **3772. Special execution.** Where any other than a general execution of the common form is required, the party must state in his pleading the facts entitling him thereto, and the judgment may be entered in accordance with the finding of the court or jury thereon. [C. '73, § 2852; R., § 3125.]

SEC. **3773. Several judgment.** In an action by several plaintiffs, or against several defendants, the court may, in its discretion, render judgment for or against one or more of them when a several judgment is proper, leaving the action to proceed as to the others. [C. '73, § 2853; R., §§ 3123, 3126; C. '51, § 1816.]

In actions against several defendants jointly and severally liable, judgment may be taken as to one and the case continued as to others, and such judgment will not bar a right to recover against those as to whom the case is continued, when the cause is ripe for disposition as to them: *Smith v. Cooper*, 9–376.

In an action of replevin against joint defendants judgment may be rendered against one, although plaintiff is not entitled to judgment against the other: *Carothers v. Van Hagan*, 2 G. Gr., 481.

If plaintiff maintains his cause of action against one of several defendants, he may have judgment against that one, and the other defendants may have judgments against plaintiff for their costs: *Eyre v. Cook*, 9–185.

Judgment against one of several defendants jointly and severally liable may be rendered without the cause being disposed of as to the others: *Poole v. Hintrager*, 60–180.

Where one of two joint defendants pleads matter going to the cause of action or which constitutes a defense for both in its nature,

the other defendant, though in default, should have the benefit of such defense: *Morrison v. Stoner*, 7-493; *Campbell v. McHarg*, 9-354.

It often happens in actions in chancery that the same relief is not sought or granted against all the parties joined as defendants: *Taylor v. Branscombe*, 74-534.

The practice is where there are two defendants to an action on contract, one of whom makes defense, whilst the other suffers judgment to be given against him by default, not to enter final judgment against the party in default until the issues joined by the other defendant are disposed of: *Pierson v. David*, 4-410; *Loeber v. Delahaye*, 7-478; *Greenough v. Shelden*, 9-503.

Where judgment is entered against two defendants, motion for new trial may be granted as to one without vacating the judgment as against the other: *Gordon v. Pitt*, 3-385; *Terpenning v. Gallup*, 8-74.

Where defendant has recovered on a cause of action against joint defendants on which they are severally liable, the fact that, as between them, one rather than the other is under obligation to satisfy the judgment, will not affect plaintiff's right as to its enforcement: *Palmer v. Stacy*, 44-340.

So *held* in an action for injuries received by reason of the obstruction of a street, brought against the city and the party guilty of the obstruction jointly: *Ibid.*

Where separate judgments are rendered against two or more defendants jointly sued for the same tort, plaintiff may elect what judgment he will enforce, and when it is satisfied the other will be regarded as discharged: *Putney v. O'Brien*, 53-117.

In an action for damages for a tort against two or more defendants sued jointly, judgment may be rendered against the defendant found liable: *Boswell v. Gates*, 56-143.

A judgment cannot be rendered in favor of one defendant against a co-defendant unless such judgment is asked for and there is an adjudication of the claims between them: *Beall v. West*, 13-61.

SEC. **3774. Judgment against one of joint defendants.** Though all the defendants have been served with notice, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants if the action had been against such alone. [C.'73, § 2584; R., § 3132.]

A party against whom judgment is rendered prior to the determination of the suit as against his co-defendants is not constructively in court after the rendition of such judgment, and is not bound by the subsequent proceedings in the case: *Okey v. Sigler*, 82-94.

SEC. **3775. What relief granted.** The relief granted to the plaintiff, if there be no answer, cannot exceed that which he has demanded in his petition. In any other case the court may grant him any relief consistent with the case made by the petition and embraced within the issue. [C.'73, § 2855; R., § 3133; C.'51, § 1829.]

Relief not called for by the pleadings will not be granted by the decree: *Byam v. Cook*, 21-392.

A judgment different from that prayed for in the petition should not be entered: *Lafever v. Stone*, 55-49; *Marder v. Wright*, 70-42.

The court should not grant to the plaintiff relief in any respect greater than that claimed in the petition: *Tice v. Derby*, 59-312.

When an answer is filed the plaintiff is not limited to the relief asked by his petition: *Wilson v. Miller*, 16-111.

If the court has jurisdiction of the subject-matter and of the defendant, a judgment in excess of that asked is not void, but voidable only: *O'Connell v. Cotter*, 44-48.

Where the petition prayed for foreclosure of an equity of redemption, *held*, that personal judgment could not be rendered upon default: *McGlaughlin v. O'Rourke*, 12-459.

Where the petition asked only for judgment for the amount due at the commencement of the action, *held*, that it was error to give judgment for installments of the indebtedness falling due after the suit was commenced and before decree: *Blake v. Blake*, 13-40.

Where the only issue was whether a deed had been procured by fraud and deceit, *held* error to set aside such deed because the party had not sufficient mental capacity to execute a deed: *Hines v. Horner*, 86-594.

SEC. **3776. Judgment for part of claim not controverted.** If only part of the claim is controverted by the pleading, judgment may at any time be rendered for the part not controverted. [C.'73, § 2856; R., § 3135.]

If only part of the claim is controverted by the pleading, judgment may be rendered for the part not controverted: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633, 638.

Where plaintiff sued on two notes, and in a third count in his petition claimed the attorney's fee provided for therein, *held*, that a denial of the right to the attorney's fee did not put in issue the counts for amounts due upon the notes respectively, and judgment was properly rendered thereon for want of denial: *Musser v. Crum*, 48-52.

In an action to recover real property the party showing himself entitled to an undivided interest may recover such interest, but not full title, and may have the right of possession as against a stranger: *Hughes v. Holliday*, 3 G. Gr., 30.

A party is not entitled to judgment for part of a claim not controverted, when such claim has not yet matured: *King v. Howell*, 28-65.

SEC. **3777. Judgment on verdict.** When a trial by jury has been had, judgment must be entered by the clerk in conformity with the verdict, unless it is special, or the court orders the case to be reserved for future argument or consideration. [C.'73, § 2857; R., § 3136.]

SEC. **3778. When verdict is special.** When the verdict is special, or when there has been a special finding on particular questions of fact or issues, or when the court has ordered the case to be reserved, it shall order what judgment shall be entered. [C.'73, § 2858; R., § 3137.]

To justify a court in rendering a judgment upon a special finding of facts against a general verdict, such finding must be manifestly inconsistent with the general verdict: *Bonham v. Iowa Cent. Ins. Co.*, 25–328; *Clavk v. Warner*, 32–219; *Mershon v. National Ins. Co.*, 34–87; *Case v. Chicago, M. & St. P. R. Co.*, 69 N. W., 538.

To warrant such judgment, the special verdict must be such that, when taken together with the facts admitted in the pleadings, it establishes the right of the party to recover: *Lamb v. First Presb. Society*, 20–127; *Hardin v. Branner*, 25–364.

It is only where the general and special verdict are so inconsistent that both cannot stand that the latter will be allowed to defeat the former. The mere fact that the special verdict does not support the general will not render judgment on the general verdict erroneous; *Phœnix v. Lamb*, 29–352.

The court cannot properly render judgment for a party upon a special verdict, unless, taken in connection with the pleadings, it is such as to show conclusively that the party is entitled to judgment: *Crouch v. Deremore*, 59–43.

When a court is called to rule upon a motion for judgment upon a special verdict, it is to consider what the law is, and is not bound by its instruction previously given to the jury: *Baird v. Chicago, R. I. & P. R. Co.*, 61–359; *Evans v. St. Paul Harvester Works*, 63–204.

Under peculiar facts, *held*, that a special verdict was not sufficient to entitle plaintiff to judgment in a case where a general verdict for defendant was set aside on account of error in the instructions: *Pettus v. Farrell*, 59–296.

Where the special finding of a jury is in direct conflict with the general verdict, the judgment must be entered on the finding: *O'Donnell v. Hastings*, 68–271.

Where, after judgment upon a general verdict, the court on motion, without having first set aside such judgment, rendered a judgment for the opposite party upon a special verdict, *held*, that such final judgment was valid: *Mornyer v. Cooper*, 35–257.

The fact that it appears by the special verdict of the jury that they excluded from their consideration a material fact appearing in the evidence may be a ground for a new trial: *Baldwin v. St. Louis, K. & N. R. Co.*, 63–210.

A motion for judgment on special findings will not waive the right to insist upon a motion for new trial filed at the same time, and if the former is overruled the latter may be considered: *Pieart v. Chicago, R. I. & P. R. Co.*, 82–148.

As to special verdict, see §§ 3727, 3728.

SEC. **3779. Principal and surety—order of liability.** When a judgment is rendered against a principal and his surety, it shall recite the order of their liability therefor, and the term "surety" includes all persons whose liability on the claim is posterior to that of another. [C.'73, §§ 3040, 3042; R., §§ 3259, 3261.]

SEC. **3780. Judgment on counter-claim—affirmative relief.** If more is recovered on a counter-claim than on the plaintiff's claim, judgment for the defendant must be given for the excess; or, if it appears that the defendant is entitled to any other affirmative relief, judgment must be given therefor. [C.'73, § 2860; R., § 3139; C.'51, § 1798.]

SEC. **3781. Judgment by agreement.** Any judgment in a case pending, other than for divorce, which may be agreed upon between the parties interested therein, may at any time be entered, and if not done in open court, the judgment agreed to shall be in writing, signed, and filed with the clerk, who shall thereupon enter the same accordingly, and execution thereon may issue forthwith unless therein otherwise agreed upon. [C.'73, § 2861; R., § 3143; C.'51, §§ 1821–2.]

An agreement for judgment, when properly filed, becomes a part of the record in the case, and a subsequent pleading inconsistent therewith should be stricken from the files: *Vail v. Stone*, 13–284.

The fact that counsel for a party is in court when judgment is rendered against his client and makes no objection thereto does not show that the judgment thus rendered is by agreement or consent: *Hershee v. Hershey*, 15–185.

Where an action for recovery of real estate was tried under an agreed statement of facts which recited that the plaintiffs were entitled to the realty, excepting improvements thereon, unless prevented by the facts stated, *held*, that a judgment determining rights to the improvements as well as to

the land was erroneous: *Burns v. Keas*, 21-257.

When parties by agreement determine the amount which is to be paid by way of compromise of the suit, their determination stands in place of a judgment of the court, and upon payment of the sum agreed upon, defendant has the right to demand that the plaintiff shall do what in his petition he has expressed a willingness to do, although defendant has not asked such specific relief: *Robertson v. Central R. Co.*, 57-376.

Where a petition embraced two claims, and an offer to compromise by permitting judgment was accepted, *held*, that both claims were thereby satisfied and adjusted: *Ibid.*

Where an officer holds liquors under a warrant in a proceeding for their condemnation he has no authority to stipulate for judgment against him in a proceeding by a third party for their recovery: *Fries v. Porch*, 49-351.

Where the parties to a number of like cases agreed that judgment might be entered in the court in which they were pending, when a certified copy of the judgment in one case which had been removed to another county for trial was filed, and in pursuance of the agreement judgments were ordered by the judge and entered by the clerk of the court in vacation, *held*, that the stipulation was that one trial should settle the issues in all the cases, and that judgment might be entered by the clerk in vacation, and that judgment thus entered was valid: *Western Land Co. v. English*, 75-507.

SEC. **3782. No distinction between debt and damages.** In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages. [C.'73, § 2862; R., § 3144.]

SEC. **3783. Court acting as jury.** The provisions of this chapter relative to juries are intended to be applied to the court when acting as a jury on the trial of a cause, so far as they are applicable and not incompatible with other provisions herein contained. [C.'73, § 2863; R., § 3145; C.'51, § 1823.]

Where the cause is submitted to trial by the court without a jury, questions both of law and of fact are for the court, and the fact that it treats a question belonging to one class as though it belonged to another will not be reversible error if the result reached is correct: *Ayres v. Bane*, 39-518.

The same rules as to the admission or rejection of evidence are applicable in trials to the court as in trials to the jury: *Williams v. Soutter*, 7-435, 439.

In a particular case, *held*, that by the terms of a stipulation with reference to the trial the judge was authorized in vacation to pass upon all matters and interlocutory motions in the same manner as in case of a trial before the court: *Clews v. Tracr*, 57-459.

Where the cause is tried to the court without a jury, a judgment of the court stands as a general verdict of the jury, and will not be interfered with unless palpably against the weight of evidence: *Woods v. Gevecke*, 28-561: *Mellenger v. Parsons*, 51-58.

Where there is a conflict in the evidence the court will not set aside a judgment because it is not supported by the testimony: *Boone County v. Wilson*, 41-69.

To authorize the supreme court to reverse a judgment on the ground of want of evidence for its support, there must be such absence of proof as to warrant the conclusion that the decision of the lower court was the result of passion or prejudice: *Murray v. Wells*, 57-26; *Melendy v. Rice*, 94 U. S., 796; *Patterson v. Seaton*, 70-689.

In the absence of a special finding of facts by the court it will be presumed that the judgment is based upon facts which in the proper exercise of judicial discretion the court below could have found under the evidence: *Bower v. Webber*, 69-286.

The supreme court may review the findings of the court below in like manner as it may re-examine the verdict of a jury, but for that purpose the entire evidence must be taken up. This takes the place of a motion to set aside the verdict of the jury for the reason that it is not supported by the evidence: *Snell v. Kimmell*, 8-281.

As to finding of facts by the court and review thereof, see § 3654 and notes.

SEC. **3784. Judgments and orders entered.** All judgments and orders must be entered on the record of the court, and must specify clearly the relief granted or order made in the action. [C.'73, § 2864; R., § 3140.]

There can be no judgment until it is entered in the proper record of the court. It cannot exist in the memoranda of an officer of the court nor in memorandum entered upon the books not intended to preserve the record of judgments, and an execution issued under such circumstances may be enjoined although after the issuance of the execution a proper judgment is entered: *Winter v. Coulthard*, 62 N. W., 733.

As to entry of judgments of record, see § 288 and notes

SEC. **3785. Satisfaction of judgment—complete record.** Where a judgment is set aside or satisfied by execution or otherwise, the clerk shall at once enter a memorandum thereof on the column left for that purpose in

the judgment docket. In cases where the title to land is involved and expressly settled or determined, the clerk shall make a complete record of the whole cause and enter it in the proper book. But in no other case need a complete entry be made, except at the request of a party who will pay the expense of such record. [C. '73, §§ 2865–6; R., §§ 3141–2; C. '51, §§ 1817, 1819.]

A judgment lien holder who has secured the reinstatement of his judgment after satisfaction thereon has been entered, cannot claim the superiority of the lien of such judgment as against an assignee of a junior mortgage upon the premises covered by such judgment, who has accepted such assignment while the judgment appeared as satisfied of record: *Head v. Newcomb*, 89–728.

A party who has paid the amount of a judgment to the clerk cannot be compelled a second time to pay the same claim although the clerk has turned the money over to a person not entitled thereto: *Heins v. Wicke*, 71 N.W., 345.

This provision as to a complete record contemplates only cases where plaintiff claims title in himself and defendant disputes such claim, and not a case where it is sought to subject real estate, standing in the name of the wife, to a judgment against the husband. In a proper case for making the record here provided, all that should be recorded is the original notice and return, the pleadings and the judgment or decree: *Smith v. Cumins*, 52–143.

SEC. **3786. Discharge of judgment—on motion.** A defendant against whom a judgment has been rendered, or any person interested therein, having matter of discharge which has arisen since the judgment, may upon motion, in a summary way, have the same discharged, either in whole or in part, according to the circumstances. [C. '73, § 2867; R., § 3146.]

In the absence of statutory authority the court has no jurisdiction to cancel a judgment, and the right to cancel given by statute arises only out of matters subsequent to the judgment: *Brett v. Myers*, 65–274.

In some cases the question whether the judgment has been satisfied or not may be raised by motion, while in others it might be necessary to go into equity to obtain proper relief: *Traer v. Lytle*, 20–301.

Sureties, upon paying a judgment rendered upon contracts whereon they are bound, are not entitled to take an assignment of the judgment and enforce it by execution; but payment is a satisfaction of the judgment: *Bones v. Aiken*, 35–534; *Drefahl v. Tuttle*, 42–177; *Johnston v. Belden*, 49–301.

But if judgment is rendered against the maker of a promissory note and one who indorses it after the payee, such indorser may, upon payment of the judgment, take an assignment thereof and enforce it against the maker: *Schleissman v. Kallenberg*, 72–338.

Where receipts were drawn up to joint judgment debtors with the arrangement that they were to pay their *pro rata* shares, a provision for costs having been omitted by oversight, a judgment creditor refused to receive the amounts agreed upon and the receipts were taken without his consent. *Held*, that the judgment was not satisfied: *Dorgan v. Piehn*, 84–564.

Where land belonging to a party had been sold under several judgments, one of which was against his mother as surety, and the mother arranged with a third party to acquire the certificates of sale and extend the right to redeem, *held*, that the payment was not a payment in satisfaction of the judgments, as she had a right to acquire and hold the judgments for her own protection; *Bleekman v. Butler*, 77–128.

Where the payee of a note became liable thereon by indorsement and was made a party defendant in an action on the note against the maker, and default was taken against him but no judgment rendered, *held*, that a purchase by him of the judgment against the maker, and an assignment thereof to him or one acting for him, would not constitute a satisfaction of such judgment: *Des Moines Savings Bank v. Colfax Hotel Co.*, 79–497.

Where a judgment was obtained against the maker and indorser of a promissory note, and the indorser placed money in the hands of an agent, who was to obtain an assignment of the judgment to himself and afterwards assign it to plaintiff, but the agent assigned it to one N., who received money for the satisfaction of the judgment from the maker of the note, and at the time of the assignment to N. he and the maker of the note knew that the agent had no interest in the judgment or authority to assign it to any one but the plaintiff, *held*, that the maker of the note could not discharge his obligation to the indorser by paying the amount of the judgment to N., and that, as the judgment was satisfied by the unauthorized payments of the maker, the indorser and plaintiff, his assignee, could treat the judgment as satisfied in fact and recover the amount paid by the indorser not exceeding the sum required to satisfy the judgment: *Johnson v. Webster*, 81–581.

Where a surety advanced money to enable his wife to purchase the judgment against him, *held*, that this would not constitute a satisfaction of the judgment and his interests would be protected: *Anglo-American Land, etc., Co. v. Bush*, 84–272.

As to third persons without notice the entry of the satisfaction of a judgment is a suspension of the lien thereon and one who takes a mortgage on the premises which will be covered by the lien of the judgment, is not affected by a revival of such lien by reason of the cancellation of the satisfaction: *Head v. Newcomb*, 89–728.

SEC. **3787. Fraudulent assignment of judgment.** The court shall have power, on motion, to inquire into the facts attending or connected

with the assignment of a judgment, or the entry of the same to the use of any party, and to strike out such use, or to declare such assignment void, either in whole or in part, whenever such assignment or use shall be determined to be inequitable, fraudulent or in bad faith. [C. '73, § 2868; R., § 3147.]

SEC. **3788. Default—when made and entered.** If a party fails to file or amend his pleading by the time prescribed by the rules of pleading, or, in the absence of rules, by the time fixed by the court, or if, having pleaded, his petition, answer or reply on motion or demurrer is held insufficient, or is stricken out, and he fails to amend, answer or reply further as required by the rules of or by the court, or if he withdraws his pleading without authority or permission to replead, judgment by default may be rendered against him on demand of the adverse party, made before such pleading is filed. [C. '73, § 2869; R., § 3148; C. '51, § 1824.]

What coustitutes default: When a party seeks to prevent his adversary from a hearing upon the merits, he ought to show that such adversary has failed to comply with some statute or some special or general rule of court: *Wright v. Howell*, 24–150.

The order for default is not a judgment but a final declaration of an admission which takes the place of evidence. A judgment is rendered upon default as a judgment is rendered upon evidence: *Walker v. Cameron*, 78–315.

Therefore, under § 3796, which authorizes a motion to set aside default in cases of service by publication to be made within two years from the rendition of judgment, the time commences to run from judgment and not from the entry of default: *Ibid.*

A personal judgment by default against a party as to whom no cause of action is stated or attempted to be stated in the petition is invalid and may be set aside in equity even after the one year allowed under § 4092 for asking a new trial by petition: *Larson v. Williams*, 63 N. W., 464.

Failure to file pleading: A pleading is in time to prevent default if filed previous to the actual entering of the default, in the absence of express rules to the contrary: *Davis v. Brady*, Mor., 101.

Where an answer was filed some eighteen days after the time allowed for filing of answer by agreement of parties, but some months before the next term of court, and in answer to an amended petition setting up a new cause of action, and in pursuance of an order of court made in vacation upon application extending the time, but without notice to the adverse party, *held*, that there was no abuse of discretion on the part of the court in refusing to grant default on motion: *Redfield v. Miller*, 59–393.

Under the showing in a particular case, *held*, that it was not error to refuse a motion for default for want of answer and allow an answer to be filed: *Walker v. Hutchinson*, 50–364.

Where time is fixed for the filing of the pleading, and it is not filed within such time, it is the usual practice to raise the question as to excuse for not filing it within the proper time by a motion to strike such pleading from the files because not filed in time: *Briggs v. Coffin*, 91–329.

Where a defendant served with notice of a suit does not appear and answer, but makes default, no decree or judgment can be entered against him for relief not prayed for, or which is not clearly within the contemplation of a general prayer for relief: *Heins v. Wicke*, 71 N.W., 345.

Where, in the notice served on the defendant, no claim was made for a personal judgment, and the petition did not ask a personal judgment, and the defendants did not appear or answer, but made default; *held*, that the plaintiff should not have been permitted to amend his petition claiming a personal judgment, and such a judgment should not have been rendered against the defendant: *Ibid.*

As to when pleadings should be filed, see § 3552.

In a suit against joint defendants: Judgment by default should not be entered in an equitable action against a portion of defendants when one of them has on file a demurrer or answer which goes to the merits of the action as to all of them: *Jenkin v. McCully*, Mor., 447.

Final judgment should not be rendered against one of two joint debtors by default so long as an answer by one of them going to the validity of the cause of action remains undetermined: *Campbell v. McHarg*, 9–354.

Where there are two defendants, one of whom makes default and the other appears, it is not the practice to enter judgment on default against the first, before the issue raised by the answer of the second is disposed of: *Greenough v. Sheldon*, 9–503.

Failure to answer an amended petition will be accompanied with the same consequences as failure to plead to the original, and the fact that a plea to the original is on file will not prevent defendant from being in default if he has been ruled to replead to the amended petition: *Porter v. Moffett*, Mor., 58.

A failure to answer an amended petition entitles plaintiff to default as fully as if the original petition had not been answered: *Brenner v. Gundersheimer*, 14–82.

Where plaintiff, after the filing of an answer to his unverified petition, amends the same by adding a verification, defendant must file a verified answer, and will be deemed in default upon failing to do so: *Wilson v. Preston*, 15–246.

Appearance without answer: Where defendant enters a written appearance, but does not file any pleading nor ask time to

plead, it is not error to enter default and judgment at once: *Shaw v. National State Bank*, 49–179.

Where defendant who was in default for want of answer was present when the case was submitted, making no objection, and there was no issue to try, *held*, that the case was properly heard as one of default and there being nothing to show upon what evidence the case was heard, the judgment would be affirmed on appeal: *White v. Kelley*, 23–275.

Negligence in filing pleading: Where the defendant is ruled to answer by a certain day in vacation, if he is unable to do so then, for a good reason, he should do so as soon thereafter as possible; and on a motion to set aside a default for a failure to answer, an excuse will not be sufficient which applies to the failure to answer on the day fixed, but does not apply to the failure to answer subsequently and before default was taken: *Thatcher v. Haun*, 12–303.

An action at law being commenced to recover rent by attachment, and defendant, after the lapse of nearly three years, having filed his answer and cross-petition, the latter being in equity and bringing in a new party and praying affirmative relief, *held* that, no notice having been given plaintiff, a decree for defendant based on *ex parte* testimony should be vacated upon motion: *Allen v. Rogers*, 27–106.

Failure to file pleading in vacation: Where an action for an injunction was commenced during term time, and defendants were required to appear and show cause why a temporary injunction should not be allowed, and did appear and demur to the petition, which demurrer was overruled, *held*, that plaintiff was not entitled to default for want of answer until the next term, which was the regular appearance term of the action: *Matter v. Phillips*, 52–232.

Where, by rules of court, defendant was required to plead by demurrer or answer in vacation within ten days after service, and upon failure to do so was to be regarded as in default, *held*, that the fact that the notice simply advised him that he was to answer by the time therein fixed could not have misled him as to the character of the pleading which he was entitled to file, and that, not having filed any pleading, default was properly entered: *Lyman v. Bechtel*, 55–437.

Default as to one count: Where one of several counts remains unanswered, but the defense interposed as to other counts is equally applicable to it, the refusal to grant default on such count will not constitute reversible error: *Kinyon v. Palmer*, 20–138.

After ruling on demurrer: Where a demurrer to an answer is sustained default should not be rendered for failure to answer further, in the absence of any rule or order of the court fixing the time in which an answer must be filed: *Wright v. Howell*, 24–150; *Rollins v. Coggshell*, 29–510.

Defective answer: It is erroneous to render judgment by default against defendant who has an answer on file undisposed of, although it may be defective: *Arbuckle v. Bowman*, 6–70; *Canal Bank v. Newberry*, 7–4; *Burlington & M. R. R. Co. v. Marchand*, 5–468; *Keeney v. Lyon*, 10–546; *Markey v. Metler*, 1–528; *Brown v. Hollenbeck*, 2 G. Gr., 318; *Wolff v. Hagensick*, 10–590; *Mallory v. Sailing*, 48–699; *Levi v. Monroe*, 11–453.

Two answers: Also *held*, that it was erroneous to grant default, where defendant had two answers on file, one of which was assailed by demurrer but the other remained undisposed of: *Crafts v. Clark*, 31–77.

Motion on file: It is error to render judgment by default where defendant has a material motion on file: *Coffin v. Kemp*, 4 G. Gr., 119.

Answer not raising issue: An answer denying the amount of defendant's indebtedness as claimed by plaintiff, but not denying his cause of action, does not entitle defendant to trial, but leaves him substantially in default: *Mann v. Howe*, 9–546.

Failure of defendant to appear at trial, when he has an answer on file, is not a ground of default, but the issue should be tried by a jury: *Brown v. Hollenbeck*, 2 G. Gr., 318.

A judgment against a defendant who has appeared to an action and filed an answer, but at time of trial fails to appear, is not a judgment by default: *Douglass v. Langdon*, 29–245.

Presumption: Where default is granted upon motion it must be presumed, in support of the court's action, in the absence of a showing to the contrary, that a sufficient ground for the default was made to appear to the court: *Thompson v. Savage*, 43–398.

Party in contempt: While a party is in contempt the court may refuse to receive pleadings offered by him, and treat him as in default: *Saylor v. Mockbie*, 9–209.

Where defendant in a suit for divorce was in contempt for failure to pay temporary alimony as ordered by the court, *held*, that it was error to strike his answer from the files without granting leave, which he asked, to show cause why he had failed to comply with the order: *Peel v. Peel*, 50–521.

A party who is in contempt has no right to be heard in defense of the action and will be deemed in default. But this rule does not apply to the mere failure to pay temporary alimony awarded in an action for divorce, where judgment has been entered: *Baily v. Baily*, 69–77.

Filing pleading after default: The answer of a defendant who is in deault when the answer is filed should be stricken from the files on motion. Defendant is not entitled to plead in such case until the default is set aside: *Brayton v. Delaware County*, 16–44; *Clute v. Hazleton*, 51–355.

The party in default may move for modification of the judgment to make it conform to the pleadings: *Mickley v. Tomlinson*, 79–383.

When a pleading is filed after the time fixed by order of court, a showing of merits and an excuse for the delay may be required before setting aside a default granted on that ground; but whether such showing should be made or not, when the default has not been entered, is largely to be determined by the court in the exercise of a sound legal

discretion; and in this case *held*, that failure, until after long delay to insist on a motion for default and to strike out a pleading filed after the time allowed for filing, was sufficient to warrant the court in refusing to grant the default, it appearing that there was some showing of excuse and that the opposite party had had a full hearing on the merits: *Briggs v. Coffin*, 91–329.

Waiver of default: An answer being filed after entry of default without leave of court, and no steps being taken to strike the answer from the files, but issue being joined upon it and trial had, *held*, that complainant waived any objection on account of defendant's default: *Jones v. Jones*, 13 276.

The subsequent filing of an amended petition bringing in other parties, but not changing the relief asked against the defendant in default, will not operate to set aside a default: *McDonald v. Donaghue*, 30–568.

Discretion: The question of allowing defaults and setting them aside is largely within the discretion of the court; and where it appeared that the court did not consider a petition to have been filed a sufficient length of time before the term to entitle plaintiff to default at that term, and continued the case instead of dismissing it, *held*, that its action in refusing the default would not be reversed on appeal: *Jones v. Merrill*, 73–234.

Judgment: The judgment here contemplated is one purely by default, and may be set aside as provided for by § 3790: *Park v. Ratcliffe*, 42–42.

It is not essential that the judgment of default be first rendered; the final judgment may embrace the judgment of default as well as the determination of the liability of defendant on the cause of action: *Davis v. Burt*, 7–56.

SEC. **3789. Notice must appear.** Where no appearance is made, default shall not be entered until the court determines from an inspection of the record that notice has been given as required by this code. [C.'73, § 2870; R., § 3149; C'.51, § 1826.]

This provision is simply directory; and if service has been actually made, a judgment rendered thereon by default is not void, even though there is no return of service: *Lawrence v. Howell*, 52–62.

Where judgment by default is rendered, it will be presumed that proper notice appeared to have been had, unless the contrary is alleged and clearly proved: *Hale v. First Nat. Bank*, 50–642.

Where there is service, though defective, a judgment by default will not be void, even when it is error in the court to render it: *Pratt v. Western Stage Co.*, 27–363; *Muscatine Turn Verein v. Funck*, 18–469.

The affidavits, etc., required to be filed in cases of service by publication are essential to the validity of a judgment on such service; if materially defective, the judgment will be erroneous, even though it recites that defendant was served with notice. The presumptions in favor of the jurisdiction of the court do not cure such a defect: *Tunis v. Withrow*, 10–305.

Where a judgment is taken by default it should appear affirmatively that there has been such service and compliance with the provisions of the law as gives the court jurisdiction over the person of defendant, and it is clearly irregular to take such judgment where the record discloses the fact that there has not been such service and compliance: *Woodward v, Whitescarver*, 6–1.

Default rendered without legal authority should be set aside without a compliance with the terms prescribed in the next section: See notes to that section.

SEC. **3790. Setting aside default—terms.** Default may be set aside on such terms as to the court may seem just, among which must be that of pleading issuably and forthwith, but not unless an affidavit of merits is filed, and a reasonable excuse shown for having made such default, nor unless application therefor is made at the term in which default was entered, or if entered in vacation, then on the first day of the succeeding term. [C.'73, § 2871; R., § 3150; C.'51, § 1827.]

On application of co-defendant: Where a judgment by default against one defendant will affect the interest of a co-defendant who is not in default, such judgment should be set aside: *Broghill v. Lash*, 3 G. Gr., 357.

Affidavit of merits: The defendant seeking to have a default set aside must present an affidavit of merits, as well as a reasonable excuse: *Smith v. Watson*, 28–218; *McDonald v Donahue*, 30–568; *King v. Stewart*, 48–334.

It is not sufficient to state generally that defendant has a good and substantial defense, but the facts should be stated that the court may determine therefrom the question of merits: *King v. Stewart*, 48–334; *Jaeger v. Evans*, 46–188; *McGrew v. Downs*, 67–687.

The party seeking to have a default set aside must in an affidavit of merits set out and show the facts constituting the defense which he claims to be meritorious, to the end that the court itself may adjudge whether it be so. In the absence of such showing it is error to set aside the default: *Palmer v. Rogers*, 70–381.

The filing of an affidavit of merits, after the motion to set aside the default has been overruled for want of such affidavit, is not sufficient to cure the defect: *Thompson v. Savage*, 43–398.

The default should not be set aside unless the party sets up facts constituting a meritorious defense: *Polk County Savings Bank v. Geneser*, 70 N.W., 89.

Grounds for setting aside default: The fact that defendant failed to defend for the reason that he was advised by an attorney

that he had no defense, where it appears that such advice was given by the attorney of the opposite party, and it does not appear that the fact that the attorney giving this advice was employed by the opposite party was known to defendant, will be ground for setting aside the default: *Simmons v. Church*, 31-284.

A mistake, even though it relate to a matter concerning which the party is charged by law with notice, may offer sufficient ground of excuse; so also may an assurance of the judge as establishing a course which will be pursued in reference to the trial of the case, even though unauthorized, if it has in good faith been acted on by the party: *Jean v. Hennessy*, 74-348.

Where rules of court provided for the filing of a copy of petition for the use of defendant, and three days before the appearance day defendant applied for such copy and it was not on file, and he thereupon filed an affidavit of such fact and asked to have a copy, and to be allowed reasonable time thereafter to defend, and thereafter was detained at home by sickness for nine days, *held*, that upon proper application default against him entered on the regular appearance day should have been set aside: *Brett v. Farr*, 58-442.

In a particular case, *held*, that the sickness of defendant did not appear to have been of so serious a character as to warrant interference with the action of the lower court in refusing to set aside default on that ground: *Reiher v. Webb*, 73-559.

The excuse shown for having made default, *held* sufficient in particular cases: *McNulty v. Everett*, 17-581; *Willett v. Millman*, 61-123.

Negligence: Default should not be set aside where it is the result of a party's own negligence: *Harrison v. Kramer*, 3-543; *Thatcher v. Haun*, 12-303.

An excuse based upon forgetfulness and carelessness of counsel, *held* not sufficient to justify interference with the refusal of the court below to set aside the default: *State v. Elgin*, 11-216.

A party should not be relieved from the consequences of his own neglect or that of his attorney: *Reiher v. Webb*, 73-559; *Ordway v. Suchard*, 31-481.

But under the particular facts, *held*, that default due to oversight of attorney, caused by mislaying papers, should have been set aside: *Ordway v. Suchard*, 31-481.

Held a sufficient excuse for setting aside a default that the attorney of the party in default was so ill that forgetfulness of his employment in the case could not be imputed to him as negligence: *Montgomery County v. American Emigrant Co.*, 47-91.

Variance between the notice and the petition may be made a ground for setting aside a default: *Wright, etc., Mfg. Co., v. Kleigel*, 70-578.

Where it appears that a default was rendered on the first day of appearance term, and the attention of the supreme court is not called to any rule of the court authorizing default on the first day, it will be presumed that the default was properly set aside: *Huebner v. Farmers' Ins. Co.*, 71-30.

In a particular case, *held*, that plaintiffs' neglect to appear through their attorneys was inexcusable, and a motion to set aside a default was properly overruled: *Williams v. Westcott*, 77-332.

The showing made in particular cases of diligence and of merits, *held* sufficient, and the overruling of the motion error: *Ellis v. Butler*, 78-632; *Heins v. Wicke*, 71 N. W., 345.

Agreement of parties: A judgment by default should not be set aside for an alleged oral understanding between the parties as to the time for appearance, when such agreement was not communicated to the court, or satisfactorily and clearly established in the application: *Dixon v. Brophey*, 29-460.

Sufficiency of showing: A default will not be set aside merely upon the affidavit of defendant that his attorney filed an answer to plaintiff's petition, and that the same was not marked "filed" by some accident and was lost from the papers, it not being satisfactorily shown that such answer was in fact ever filed: *Barnes v. Anderson*, 19-70.

In a particular case, *held*, that the affidavit of merits did not set up any defense, and that the motion to set aside the default was, therefore, properly overruled: *District T'p v. White*, 42-608.

The showing of excuse in a particular case, *held* not sufficient to require a reversal of the action of the court below in refusing to vacate a judgment by default: *Miracle v. Lancaster*, 46-179.

Where a showing to set aside a default was sufficient as to the term to which default was taken, but it appeared from the record that defendant had failed to answer for more than two years anterior to the term in question, for which no reason or explanation was given, *held* not an abuse of discretion to overrule the motion: *Kreisinger v. Icarian Community*, 16-586.

Judgment of nonsuit for failure to file declarations in time may be set aside upon showing of excuse: *Martin v. Van Bergen*, 1 G. Gr., 314.

An answer should accompany the application to set aside the default: *Thatcher v. Haun*, 12-303.

Where the motion to set aside a default was accompanied with a verified answer, which, if true, constituted a complete defense to the action, and defendant asked that the answer might be accepted and taken by the court as an affidavit of merits, *held*, that the court might properly so consider it: *Huebner v. Farmers' Ins. Co.*, 71-30.

Defendant is required, in addition to presenting an excuse for default, to plead issuably and forthwith, and a statement in his affidavit that he has an answer ready to file will not be sufficient to show that the court erred in refusing to permit him to file such answer where it does not appear what the answer contained: *King v. Stewart*, 48-334.

Defendant is not entitled to file his answer until the default is set aside: *Ibid.*

The affidavit of merits may be made by the attorney if it appears that the attorney has full knowledge of the facts constituting the defense: *Jean v. Hennessy*, 74-348; *Ellis v. Butler*, 78-632.

A judgment by default cannot be set

aside because it is in the alternative unless defendant files an answer and affidavit of merits: *Brunson v. Nichols*, 72–763.

The showing of a defense must be by giving a statement of the facts constituting such defense; but, *held*, that the allegation that the matters alleged in the petition were involved and litigated in a former action, and declared invalid, was sufficient: *Jean v. Hennessy*, 74–348.

Defendant must show by his affidavit that he has a meritorious defense, and also that he has a reasonable excuse for having made default; but no evidence in addition to that offered in support of the motion can be received as to the merits of the defense. If the affidavit shows a defense good in law it must be accepted, and there can be no further inquiry as to the truth of the facts stated: *Joerns v. La Nicca*, 75–705.

Where default is set aside on an affidavit of merits, defendant may be required to plead by answer and the court may refuse to consider a demurrer: *Perkins v. Davis*, 3 G. Gr., 235.

Default against garnishee for failure to appear and answer should be set aside on showing of a slighter excuse or diligence than would be necessary in case of default against a defendant debtor: *Evans v. Mohn*, 55–302.

Default improperly granted: The provision requiring an affidavit of merits before a default shall be set aside applies only to cases where the party is really in default. Where default has been entered by mistake or improperly, it should be set aside without such affidavit: *Messenger v. Marsh*, 6–491; *Rice v. Griffith*, 9–539; *Boals v. Shules*, 29–507; *United States Rolling Stock Co. v. Potter*, 48–56.

Where default has been improperly granted, it should be set aside upon motion without the showing of a meritorious defense: *Beasley v. Cooper*, 42–542.

Default improperly entered should be set aside without showing of excuse or affidavit of merits: *Brandt v. Wilson*, 58–485.

Where the judgment had been entered entirely without jurisdiction as where there has been no sufficient notice, it should be set aside without a showing of merits: *Hoitt v. Skinner*, 68 N.W., 788.

Where a default was attempted to be set aside because a copy of the petition was not served with the notice as required by a rule of court, *held*, that such service of the petition was not a jurisdictional prerequisite, and, there being no affidavit of merits, the default should not be set aside. In the absence of a showing the presumption is that such rule was complied with: *Knapp v. Haight*, 23–75.

Time for setting aside: It would seem that the limitation of time within which a motion to set aside a default may be made applies to judgments by default and not to simple defaults, and that the latter may be set aside at any time before or at the term when judgment is rendered thereon, whilst it might also be true that simple defaults taken in vacation are to be set aside at the commencement of the succeeding term: *Harper v. Drake*, 14–533.

Motion to set aside default must be made at the term at which judgment was entered and must be accompanied with an answer. The granting of the motion will open the case for the filing of an answer and beyond the affidavit of merits there will be no further inquiry of the truth of the defense except upon trial of the issues. *Worth v. Wetmore*, 87–62.

Dismissal: Where a cause has been dismissed, not for default in pleading, but merely for failure of the plaintiff to appear and prosecute at the time set for trial, it may be reinstated on motion of the plaintiff at the discretion of the court: *Byington v. Quincy*, 61–480.

Discretion: The court has a large discretion in passing upon motions to set aside defaults, and unless it is shown that such discretion is abused the appellate court will not interfere: *Marsh v. Colony*, 36–603; *Rogers v. Cummings*, 11–459; *Gilbert v. Wilcox*, 33–594; *Briggs v. Coffin*, 91–329.

The fact that the defendant has, after the setting aside of the default, filed a demurrer instead of an answer, cannot be raised as an objection to the action of the court in not setting the default aside. In such a case plaintiff should file a motion to strike the demurrer from the files: *Jean v. Hennessy*, 74–348.

Courts should favor the trial of causes upon their merits, and it would require an exceedingly strong and conclusive showing of abuse of discretion to authorize the supreme court to interfere with action of the lower court setting aside a default and allowing a defense to be made where judgment on the default has not already been entered: *McQuade v. Chicago, R. I. & P. R. Co.*, 78–688.

A showing of reason of absence, such as will warrant the setting aside of default, will not be sufficient showing of ground for new trial: *Seiberling v. Schuster*, 83–747.

The action of the trial court in setting aside a default will not be interfered with on appeal except in a clear case of abuse: *Liggett v. Worrall*, 67 N.W., 406.

Where a motion to strike defendant's answer because not filed in time was overruled on condition that he pay costs, which he failed to do, and a judgment was then rendered against him by default, *held*, that it was not error to refuse to reinstate the case: *Malek v. Kodad*, 92–763.

Unless it appears that the court has improperly exercised its discretion in refusing to set aside a judgment on default, the judgment will be affirmed on appeal: *King v. Kinney*, 8–521.

While motions to set aside a default are not to be granted as of course, yet the court has a large discretion, and the supreme court will not interfere with its ruling unless it is manifest that such discretion has been abused: *Clarke v. Hedge*, 10–528.

The matter of setting aside a default granted for failure to file pleadings within the time required by rules or order of court is largely within the discretion of the court, and the supreme court will not interfere unless such discretion has been abused: *Bolander v. Atwell*, 14–35; *Clute v. Hazleton*, 51–355.

But the ruling will be reversed when

there is a clear abuse of discretion or misapprehension of duty; and default should be set aside on application made before judgment is rendered, when based upon proper grounds: *Simmons v. Church*, 31–284.

It will require a stronger case to warrant the reversal of the action of a court in setting aside a default than in case of refusing to set it aside: *Westphal v. Clark*, 46–262.

An application to set aside a default is addressed largely to the discretion of the trial court: *Browning v. Gosnell*, 91–448.

A large discretion is vested in the district court in the matter of setting aside a default and granting a new trial. It is the policy of the law to dispose of cases on their merits: *Capital Savings Bank & Trust Co. v. Swalm*, 69 N.W., 1065.

The presumption in favor of the correctness of the rulings of the court in respect to setting aside a default is stronger than in other cases: *Willett v. Millman*, 61–123.

The terms upon which a default will be set aside rest within the sound discretion of the judge, and his action thereon will not be interfered with unless an abuse of discretion be made to appear: *Blough v. Van Hoorebeke*, 48–40; *Briggs v. Coffin*, 91–329.

Canceling order: Where the court cancels a previous order setting aside default and granting leave to answer, the answer filed in pursuance of such previous order is to be regarded as stricken from the files: *Kirby v. Gates*, 71–100.

Review on appeal: Before judgment on default will be reviewed in the supreme court, motion to set it aside must have been made and overruled in the court below: *Downing v. Harmon*, 13–535; *Hunt v. Stevens*, 25–261.

Where judgment is rendered at a time earlier than that at which defendant can be required to answer, a motion to correct the judgment should be made in the trial court before prosecuting the error on appeal: *Pigman v. Denney*, 12–396.

SEC. **3791. Clerk to compute amount.** When the action is for a money demand, and the amount of the proper judgment is a mere matter of computation, the clerk shall ascertain the amount, but no fee shall be charged therefor. When long accounts are to be examined, the court may refer the matter. In other cases the court shall assess the damages, unless a jury is demanded by the party not in default. The proper amount having been ascertained by either of the above methods, judgment shall be rendered therefor. [C.'73, § 2872; R., § 3151; C.'51, §§ 1828–30, 1832.]

What deemed admitted by default: Upon an answer controverting the amount of indebtedness claimed by plaintiff to be due, but not denying his cause of action, the court may proceed to render judgment as upon default: *Mann v. Howe*, 9–546.

A party in default cannot contest the right of plaintiff to recover something. He cannot question the sufficiency of the petition: *Lieber v. Delaheye*, 7–478.

Where no cause of action is stated in the petition a default does not admit any indebtedness. Although defendant may be concluded by default, where the facts stated do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer, yet where the petition omits a necessary averment to show liability against defendant, the court can and should, even upon default, refuse to enter judgment: *Bosch v. Kassing*, 64–312.

A default admits matters well pleaded, but entitles plaintiff to recover nothing more than the relief sought in the petition; and a judgment should not be rendered by default where no judgment is prayed for: *Johnson v. Mantz*, 69–710.

Assessment of damages: A judgment by default admits the averments of the cause of action as alleged in the petition, and that something is due and payable. The only matter to be found in such case is the amount of damages: *Whittey v. Douge*, 9–597.

But where the amount due upon a subscription of stock was dependent upon how many installments had been called for by the board of directors, etc., *held*, that such facts must be proved to the court before it could assess the amount of recovery: *Burlington & M. R. R. Co. v. Shaw*, 5–463; *Burlington & M. R. R. Co. v. Marchand*, 5–468.

Where the amount to be computed by the clerk was left blank, to be filled in when ascertained, and was not filled in, *held* that, although the rights of third parties had intervened, the judgment was not void as to them: *Lind v. Adams*, 10–398.

Where a reasonable attorney's fee is provided for, it may be proved up and should be allowed, although the petition does not state the amount claimed on that account: *Nelson v. Everett*, 29–184.

Defendant's demurrer being overruled and he being in default for want of an answer, *held* error to render judgment against him without an assessment of damages: *Musser v. Hobart*, 14–248.

An assessment of damages is not necessary on an appeal from a justice of the peace. If appellant does not appear in such case, judgment of affirmance must be rendered: *Taylor v. Barber*, 2 G. Gr., 350.

A cause will not be reversed upon appeal because testimony was improperly admitted when the appellant is in default and liable to judgment on the pleadings: *Pfantz v. Culver*, 13–312.

Upon default of defendant judgment may be rendered against him without evidence except as to allegations of value or amount of damages: *Minear v. Hogy*, 63 N.W., 444.

Default against joint defendants: Where some of several defendants answer, and others make default, plaintiff should not have any greater relief against those in default than against those who answer: *Pierson v. David*, 4–410.

And in such case, if the cause of action is

not made out against those who appear, judgment should not be rendered against those in default, but the action should be dismissed as to them also: *Curtis v. Smith*, 42–665.

A defendant, though in default, should have the benefit of a matter pleaded by a co-defendant going to the cause of action, or in its nature constituting a defense for both: *Morrison v. Stoner*, 7–493.

A party in default is not entitled to have the damages against him assessed by jury: *Wilkins v. Treynor*, 14–391; *Carleton v. Byington*, 17–579; *Armstrong v. Catlin*, 17–581; *Clute v. Hazleton*, 51–355.

A party in default waives his right to demand a jury to assess the damages: *Preston v. Wright*, 60–351.

Default waives jury trial: See § 3733.

An attorney's fee is a part of the costs, and defendant in default as to the principal indebtedness cannot put in issue the amount of such fee and claim a jury trial thereon: *Musser v. Crum*, 48–52.

Where plaintiff in a replevin suit dismisses his action he is to be regarded as in default, and cannot demand a jury trial upon the question as to the amount of defendant's damages: *Wilkins v. Treynor*, 14–391.

It is immaterial when the witnesses of plaintiffs are examined, and whether any one attends for the purpose of making cross-examination, where the party in default has not claimed the right of such cross-examination: *Olim v. Chicago, M. & St. P. R. Co.*, 61–250.

SEC. **3792. Appearance to cross-examine witnesses.** The party in default may appear at the time of the assessment and cross-examine the witnesses against him, but for no other purpose. [C.'73, § 2873; R., § 3152; C.'51, § 1831.]

The party in default cannot object to the admissibility of witnesses called by the plaintiff to establish his claim: *McLott v. Savery*, 11–323.

Nor can he object to the introduction of evidence by the opposite party: *Wright v. Lacy*, 52–248.

The party in default has no right to offer evidence, address the jury, nor ask instructions: *Cook v. Walters*, 4–72.

A party in default may appear at the time of the assessment of damages and cross-examine the witnesses against him, but for no other purpose. He cannot introduce evidence in his own behalf: *Carleton v. Byington*, 17–579.

A party in default cannot object to the evidence offered, nor cross-examine the witness in relation to portions of the claim which are not referred to in the testimony in chief of such witness; thus, *held*, that where a portion of plaintiff's claim was sufficiently established by a sworn account, and a witness was introduced to prove another portion, the cross-examination could not be extended to items of account established by the sworn account: *Lyman v. Bechtell*, 58–755.

SEC. **3793. Judgment on default in equitable proceeding.** When the action is of an equitable character, the court, upon hearing the pleadings and proofs, and hearing the testimony offered, shall render such judgment as is consistent with the rules of equity. [C.'73, § 2874; R., § 3153; C.'51, § 1833.]

Where a bill is taken as confessed, all definite and positive allegations are to be taken as true without proof; but if the allegations are indefinite, or the prayer is uncertain, the certainty requisite to a proper decree must be afforded by proof: *Harrison v. Kramer*, 3–543; *Bolander v. Atwell*, 14–35.

Where a bill is taken *pro confesso*, all distinct and positive averments are to be considered as true; but if allegations are indefinite, or plaintiff's demand is uncertain, the requisite certainty must be afforded by the proof: *Atkins v. Faulkner*, 11–326.

A decree by default or *pro confesso* cannot be assailed by a bill of review on the ground that it was taken without evidence to support it, when it is recited therein that the cause was heard on the evidence: *Barnes v. Anderson*, 19–70.

The allegations in a petition to quiet title, that defendant holds certain real estate fraudulently and in trust for another, are to be taken as true when default is made: *Greeley v. Sample*, 22–338.

SEC. **3794. Setting aside, if on notice by publication.** A defendant served by publication alone shall be allowed, at any time before judgment, to appear and defend the action, and, upon a substantial defense being declared, time may be given on reasonable terms to prepare for trial. [C. '73, § 2875; R., § 3154.]

SEC. **3795. Security required of plaintiff.** When judgment by default is rendered against a defendant who has not been personally served, the court, before issuing process to enforce such judgment, may, if deemed expedient, require the plaintiff to give security to abide the future order of the court as contemplated in the following section. [C. '73, § 2876; R., §§ 3156–9; C. '51, § 1834.]

SEC. **3796. New trial after judgment, on publication.** When a judgment has been rendered against a defendant or defendants, served by publication only, and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may, at any time within two years after the rendition of the judgment, appear in court and move to have the action retried, and, security for the costs being given, they shall be permitted to make defense; and thereupon the action shall be retried as to such defendants as if there had been no judgment; and upon the new trial the court may confirm the former judgment, or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it and yet remaining in his possession, and pay to the defendant the value of any property which may have been taken in attachment in the action or under the judgment, and not restored. [C. '73, § 2877; R., § 3160; C. '51, § 1835.]

The filing of the motion here provided for, with the clerk, within a proper time is a sufficient "appearance in court," even though filed in vacation, and though the time therefor has expired before a term of court commences: *Conklin v. Johnson*, 34–266.

Upon the filing of such motion the defendant is entitled to a retrial of the entire proceeding: *Fleming's Heirs v. Hutchinson*, 36–519.

The retrial provided for by this section does not abate nor disturb the judgment but is granted to see if the judgment should be changed: *Stanbrough v. Cook*, 86–740.

Upon the retrial depositions which were taken upon a notice filed with the clerk as provided in § 4697 are admissible. The fact that there was no cross-examination by defendant will not exclude them: *Watson v. Russell*, 18–79.

Where, upon a retrial, no sufficient defense is found to the action, the original judgment should be confirmed. It is not necessary that plaintiff again introduce evidence which he had before produced in taking the default, as, for instance, the note sued on: *Morton v. Coffin*, 29–235.

This section authorizes a retrial in all cases where a judgment by default has been rendered against one served by publication only. It has no reference to a case wherein a judgment is void for want of jurisdiction to render it: *Smith v. Griffin*, 59–409.

The provisions of this section are applicable where the party is served by publication with notice of the application by an executor to sell real estate under § 3324. Such party may, in the time and manner here provided, have an order of sale, made in pursuance of such application and notice, set aside: *Huston v. Huston*, 29 347; but these provisions are not applicable to divorce suits; and whether they are not limited in their application to actions *in rem*, *quære: Gilruth v. Gilruth*, 20–225; *Whitcomb v. Whitcomb*, 46–437.

The provisions of this section are, under § 4885, applicable to proceedings in justices' courts: *Taylor & Farley Organ Co. v. Plumb*, 57–33.

A defendant personally served outside of the state cannot claim the benefit of this section: *McBride v. Harn*, 52–79; although service might have been made by publication: *Griffith v. Milwaukee Harvester Co.*, 92–634.

A defendant served by publication only cannot appeal until he has moved for a retrial as here provided (see § 4105): *Berryhill v. Jacobs*, 19–346; but an affirmance on appeal for failure to make such motion will not deprive the party of the right to still make the motion, if within proper time: *Berryhill v. Jacobs*, 20–246.

Section *held* not applicable in a particular case: *Hulverson v. Hutchinson*, 39–316.

The statute does not provide that notice of the motion shall be served upon the plaintiffs, and such notice is not required. The theory of the statute is that the case remains virtually in court for two years for the purpose of such motion, if any defendant shall see fit to make it. The court should, however, exercise some proper discretion as to the time for which the cause should be set for trial: *Pollock v. Simpson*, 67–519.

One who was not a party to the proceeding cannot in his own right have a new trial under this section: *Parsons v. Johnson*, 66–455.

The legal representatives of a party served by publication only may have the action retried under the provisions of this section: *Williamson v. Wachenheim*, 62–196.

The relief authorized by this section is a retrial. If upon that trial the party seeking relief from the judgment fails to establish his defense, then the judgment must be confirmed, and the rights under it left undisturbed. But if upon new trial it is found that such party has a valid defense in whole or in part, then the judgment must be modified or set aside, and in either event the party who secured the judgment is not entitled to any rights under it as originally entered: *Clark v. Ellsworth*, 84–525.

No relief from the judgment rendered before default, and no restitution of the property acquired under it, are authorized until a retrial is had (§ 4096): *Stanbrough v. Cook*, 83–705.

The two years' period within which the motion must be made commences to run from the time of judgment and not from the time of entering default: *Walker v. Cameron*, 78–315.

It is evidently contemplated that the bond shall be ordered and approved when the judgment is set aside and not before action upon the motion. If, therefore, the bond is insufficient or no bond is given, objection should be made at some stage of the proceedings and cannot be raised for the first time on appeal: *Ibid.*

Where a party recovering judgment on service by publication conceals the fact until after the expiration of the two years within which a retrial could be applied for under this section, equity will grant relief: *Clark v. Ellsworth*, 84–525.

SEC. **3797. Title to property not affected.** The title of a purchaser in good faith to any property sold under attachment or judgment shall not be affected by the new trial permitted by the preceding section, except the title of property obtained by the plaintiff and not bought of him in good faith by others. [C.'73, § 2878; R., § 3163; C.'51, § 1386.]

This section is not applicable where a sale is made prior to the service of original notice upon the defendant. Therefore, where at the time judgment was rendered against the principal defendant, another defendant had not yet been served with notice, and there was a sale under execution on such judgment, before notice by publication to the other defendant, *held*, that the defendant thus subsequently served might appear within the time and have the judgment by default upon such publication set aside and the sale vacated, not only as against the original plaintiff, but as against the purchaser of the certificate of sale: *Bartlett v. Bilger*, 92–732.

Section applied: *Union Bank v. Ames*, 37–672.

SEC. **3798. Serving copy of judgment.** The plaintiff may, at any time after the judgment, cause a certified copy thereof to be served on a defendant served by publication only, whereupon the period in which such defendant is allowed to appear and have a new trial shall be reduced to six months after such service. [C.'73, § 2879; R., § 3161.]

SEC. **3799. Manner of service.** The service, whether made within or without the state, shall be actual and personal by delivery of such certified copy, and made and returned as in case of original notice. [C.'73, § 2880; R., § 3162.]

SEC. **3800. Personal judgment.** No personal judgment shall be rendered against a defendant served by publication only who has not made an appearance; but a personal judgment may be rendered against a defendant, whether he appears or not, who has been served in any mode provided in this code other than by publication, whether served within or without this state, if such defendant is a resident of the state. [C.'73, § 2881; R., § 3164.]

Service by publication or by personal service without the state, upon one who is not a citizen or resident, confers no jurisdiction either as to the person or property of such nonresident, other than is acquired *in rem: Darrance v. Preston*, 18–396.

In a proceeding by attachment, when the defendant is personally served, the judgment should be *in rem* only, and a personal judgment would be void even though the attached property were sold thereunder: *Smith v. Griffin*, 59–409.

As personal service without the state only stands in place of notice by publication, no personal judgment can be rendered thereon: *Bates v. Chicago & N. W. R. Co.*, 19–260. And see notes to §§ 3534 and 3537.

SEC. **3801. Liens of judgments.** Judgments in the supreme or district court of this state, or in the circuit or district court of the United States within the state, are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment. [17 G. A., ch. 129, §§ 1, 2; C.'73, § 2882; R., §§ 4105, 4109; C.'51, §§ 2485, 2489.]

I. COMMENCEMENT AND CONTINUANCE.

When lien attaches: A verdict without the rendition of judgment thereon does not give plaintiff any interest in the property of defendant in advance of the rendition of judgment: *Miller v. Wolf*, 63–233.

A *nunc pro tunc* judgment will not become a lien upon property prior to its actual rendition so as to bind third persons: *Ibid.*

As between the judgment debtor and a purchaser under execution on such judgment, the purchaser may show by the pleadings or record in the action that the judgment attached as a lien on the property purchased by him, though from the face of the judgment that fact does not appear: *Markham v. Buckingham*, 21–494.

So *held* where individual property was sold under judgment nominally against a partnership: *Ibid.*

A judgment on a debt contracted prior to the time that property assumes the homestead character, although rendered after that time, is a lien on such property, certainly as to persons chargeable with notice of the character of the debt; and if one claims under a homestead right he is bound to ascertain when such right began: *Hale v. Heaslip*, 16–451.

As between judgment creditors and third persons it is not competent for the judgment creditor to extend the lien of his judgment by proof *aliunde*, but as between the parties to the judgment and their heirs such proof is admissible: *Delavan v. Pratt*, 19–429.

Under prior statutory provisions, the lien of a judgment on a note secured by mortgage attached as between the parties from the date of the recording of the mortgage, but as to third persons the lien only attached from the date of the rendition of the judgment unless the property was described in the judgment and a special execution directed: *State v. Lake*, 17–215.

In such case the mortgage lien continues until the debt is satisfied and is not merged in the judgment on the note secured: *Ibid.*

How long continued: The lien of a judgment expires in ten years, and cannot be revived or continued after that time by any proceeding on the judgment: *Denegre v. Haun*, 13–240; *Virden v. Shepard*, 72–546.

A judgment lien which has expired by limitation cannot be revived as against another judgment lien acquired after the expiration of the ten years and prior to such revivor: *Boyle v. Maroney*, 73–70.

But although the lien ceases the judgment itself is not barred until the expiration of twenty years, and during that time an execution may be issued and a sale had thereunder, but an execution issued after the expiration of the ten years only operates as a lien from the time of its levy: *Stahl v. Roost*, 34–475.

In case of a mortgage foreclosure the lien of the mortgage is not merged in that of the judgment, and continues after the judgment lien ceases, and until the judgment itself is barred: *Ibid.*; *Hendershot v. Ping*, 24–134; *Shearer v. Mills*, 35–499.

If, on appeal from the judgment, it is affirmed and a *procedendo* issues, the lien of the judgment continues; but if a new judgment is rendered in the supreme court upon the appeal bond, the former judgment is merged therein, and its lien is lost: *Swift v. Conboy*, 12–444.

The lien of a judgment will not be destroyed by a sale of the property under a judgment subsequently rendered: *Lathrop v. Brown*, 23–40.

A judgment upon the former judgment, not by way of revivor, but as upon a debt, merges the old judgment in the new, and the lien of the old judgment ceases to exist: *Denegre v. Haun*, 13–240.

The lien of a judgment will not be extended as against a junior lienholder by the levy of an execution within the statutory period of limitation, but without a sale thereunder until after the expiration of ten years from the date of the judgment: *Albee v. Curtis*, 77–644; *Lakin v. McCormick*, 81–545.

A judgment lienholder has not the right after ten years to redeem from prior liens: *Albee v. Curtis*, 77–644.

Where a judgment is rendered in a justice court and a transcript is filed in the district court it is a lien for ten years from the date of the filing of the transcript, and such judgment may be enforced by execution issued at any time within twenty years from the time of filing the transcript: *Rand v. Garner*, 75–311; *Stover v. Elliott*, 80–329.

Where execution was improperly issued on a judgment after the death of defendant, *held*, that although a sale under such execution was void, the judgment continued a lien on the property for ten years, but after the expiration of that time it ceased to be a lien and the prior mortgage on the premises became a first lien thereon: *Bull v. Gilbert*, 79–547.

Release of lien: In order to establish a parol release of real estate from a judgment lien the proof must be clear, satisfactory and conclusive: *Dalby v. Cronkhite*, 22–222.

Where a judgment is canceled the lien thereof ceases to exist: *Polk County v. Nelson*, 75–648.

After death of judgment debtor: A judgment may be enforced against property upon which it is a lien, after the death of a debtor, without filing it as a claim against the estate; but this must be done while the judgment lien exists: *Baldwin v. Tuttle*, 23–66; *Davis v. Shawhan*, 34–91; *Boyd v. Collins*, 70–296.

Effect of bankruptcy: A valid, subsisting judgment lien in a state court existing at the time of bankruptcy of defendant cannot be assailed in the bankrupt court, and a decree in the state court subsequent to the bankruptcy, subrogating a surety to the benefit of such lien on account of payment of the judgment made before bankruptcy will not be void, although the assignee in bankruptcy is not made a party to the action: *Perry v. Miller*, 54–277.

II. Upon What Property.

Origin of judgment liens: Before the statute of Westminster 2, judgments could not be collected by sale of land, but by that statute creating the writ of *elegit*, although no lien was created, yet lands were considered as subject to judgment and the courts inferred a lien from the power to take lands on execution: *Woods v. Mains*, 1 G. Gr., 275.

The mortgagee's interest being deemed personal property, a judgment against the mortgagee does not become a lien upon the real property covered by the mortgage: *Scott v. Mewhirter*, 49–487.

Claim for tort: The holder of a judgment against one having a claim for tort has no equities as against such claim which give him a prior right thereto over a creditor to whom the claim may be assigned: *Gray v. McCallister*, 50–497.

A leasehold interest is such interest in real estate as is subject to the lien of a judgment: *First Nat. Bank v. Bennett*, 40–537.

The creditor does not, in such cases, need the aid of a court of equity to enforce his judgment. He can sell the leasehold interest upon execution: *Sweezy v. Jones*, 65–272.

The lien of a judgment attaches to the interest of a tenant in real property leased by him and a building erected thereon, unless the right to remove such building at the expiration of the tenancy appears, and the lien of the judgment will be prior to that of a chattel mortgagee of such building: *Hayden v. Goppinger*, 67–106.

It appears that the same rule would apply even where the right of the tenant to remove the building at the expiration of the lease is shown: *Ibid.*

License: A judgment lien will not attach

to a mere license or privilege to use real property for a particular purpose, which may be terminated at pleasure by the party having such privilege: *Melhop v. Meinhart*, 70-685.

A building erected under a license upon the land of another is a chattel and is not subject to the lien of a judgment: *Walton v. Wray*, 54-531.

A vendor's lien is not such an interest in real estate, without a judgment against the purchaser, that it can be enforced against such real estate. Equitable proceedings, or proceedings by garnishment, must be resorted to for that purpose, and until such proceedings are commenced the purchaser of the real estate may discharge the lien by payment to the vendor: *Baldwin v. Thompson*, 15-504; *Woodward v. Dean*, 46-499.

Does not attach to fund: Where land subject to a lien is sold by the judgment debtor, the lien still remains on the land, and does not attach to the fund: *Sullivan v. Leckie*, 60-326.

Option to purchase: The mere right of an option to purchase real property is not a right in the property to which a judgment lien can attach: *Sweezy v. Jones*, 65-272.

A pre-emption right to lands being a right which is temporary in its nature and unknown to the common law is not subject to the lien of a judgment: *Harrington v. Sharp*, 1 G. Gr., 131.

Naked legal title: A judgment lien does not attach to property, the naked legal title of which passes through the judgment debtor without any interest in such property having vested in him: *Atkinson v. Hancock*, 67-452.

In enforcing a judgment lien the law looks for the equitable interest in the property. If defendant has no such interest and holds only the legal title, the lien does not attach. If he has such interest, and another person holds the legal title, the lien will attach: *Rice v. Kelso*, 57-115.

Therefore, *held*, that a judgment would not attach to property already acquired by the judgment defendant which had been mortgaged by him previous to its acquisition. In such case the prior mortgage would attach to the subsequently acquired title before the attachment of the judgment lien: *Ibid.*

The lien of a judgment attaches, not to the naked legal title of property, but to the interest which the debtor has therein: *Blaney v. Hanks*, 14-400; *Patterson v. Linder*, 14-414; *Churchill v. Morse*, 23-229.

A judgment is a lien upon the interest of the judgment debtor, as it exists at the time of the rendition of the judgment and upon what he may afterwards acquire: *Weaver v. Stacy*, 93-683.

Equitable interests: A judgment becomes a lien upon any interest in real estate owned by the debtor, whether it be equitable or legal: *Blain v. Stewart*, 2-378; *Crosby v. Elkader Lodge*, 16-399.

But the unsatisfied portion of a judgment does not remain a lien upon the debtor's interest in the property which has been sold in partial satisfaction of such judgment: *Clayton v. Ellis*, 50-590. On this point see notes to § 4045.

A judgment is a lien upon any equitable interest in land in the judgment debtor which may be sold on execution, but is subordinate to vendors' liens and homestead rights existing prior to the judgment: *Twogood v. Stephens*, 19-405.

A judgment is a lien upon the equitable interest of the debtor in real estate, and if such equitable interest is of record it may be sold under execution, and the title thereby acquired will prevail as against an equitable action to subject such interest to the payment of another judgment on the same debt: *Lippencott v. Wilson*, 40-425.

A judgment is enforceable as a lien against an equitable interest in real property: *Bartle v. Curtis*, 68-202.

As between the parties, it is immaterial whether the equitable interest appears of record or not: *Denegre v. Haun*, 13-240: *Lathrop v. Brown*, 23-40.

In enforcing a judgment lien the law looks to the equitable interest, and the judgment does not attach to the legal title in the hands of one who does not have such equitable interest: *Brebner v. Johnson*, 84-23.

A judgment is a lien upon an equitable interest in real estate owned by defendant at the time of its rendition or subsequently acquired: *Rand v. Garner*, 75-311.

Therefore, *held*, that a judgment against defendant became a lien on real estate which he subsequently purchased and took possession of, but which had not been conveyed to him, being held by the grantor as security for the unpaid purchase-money: *Ibid.*

A purchaser at the execution sale of an equitable interest takes only such interest as the debtor actually has in the property. The lien of a judgment on such equitable interest will not affect the legal title of a person holding *bona fide* without notice of such equity: *Harrison v. Kramer*, 3-543; *Hultz v. Zollars*, 39-589.

A junior judgment creditor taking advantage of the proceedings provided by § 4087 *et seq.* for subjecting equitable interests to the satisfaction of a judgment may acquire by reason of his greater diligence a lien upon such property which will be superior to that of a prior judgment: *Bridgman v. McKissick*, 15-260; *Boyle v. Maroney*, 73-70.

A judgment lien upon an equitable interest in real property will not prevail as against subsequent *bona fide* purchasers without notice: *Stadler v. Allen*, 44-198; *Farmers' Nat. Bank v. Fletcher*, 44-252.

Interest of partnership in real property: A judgment being a lien upon equitable interests in real property is a lien upon land owned by a partnership where the naked legal title is still in the former owner: *Lathrop v. Brown*, 23-40.

Whether a judgment in an action brought against a partnership in their firm name alone is a lien only upon the partnership property, *quære: Markham v. Buckingham*, 21-494.

A judgment against a firm is not a lien upon real estate equitably belonging to it, but held in the name of one partner: *Stadler v. Allen*, 44-198.

The lien of a judgment rendered upon a partnership debt, if prior in time to one on

an individual debt, is not postponed to the latter. The rule that individual creditors are to have priority as to individual property applies only in equity: *Gillaspy v. Peck*, 46-461.

The fact that the holder of a judgment against a partnership releases land which is subject to the lien of the judgment will not relieve one of the partners from liability under such judgment: *Gegner v. Warfield*, 72-11.

Property held in trust: A judgment is a lien upon the equitable interest of the debtor in property conveyed by trust deed, and the surplus in the hands of the trustee may be subjected to the payment of the judgment, but the lien does not attach to such surplus until steps are taken to subject it to the payment of the judgment: *Cook v. Dillon*, 9-407.

If proceedings have been commenced to reach the surplus in the trustee's hands, the jurisdiction of the court in such proceedings will not be ousted by garnishment of the trustee to subject the money in his hands to a judgment against the debtor: *Ibid.*

A judgment against a person in his individual capacity does not become a lien upon land conveyed to him as trustee: *Boardman v. Willard*, 73-20.

Property fraudulently conveyed: A judgment recovered by a creditor after a fraudulent conveyance by his debtor does not become a lien upon the property so conveyed, in the absence of proceedings to subject the property to such judgment. The conveyance is absolute as to the grantor, and leaves no interest in him subject to the lien: *Howland v. Knox*, 59-46.

Where the debtor has made a fraudulent conveyance of his property to one who purchases in bad faith, the lien of the judgment attaches, and the creditor may sell the land under execution, and after expiration of the time of redemption may bring action to set aside the fraudulent conveyance and quiet his title: *Harrison v. Kramer*, 3-543.

Where real property was voluntarily and without consideration conveyed by the husband to the wife, the husband remaining in possession and control of the property, *held*, that such conveyance was not made as a devise, but as a gift, and that a judgment against the wife attached thereto and followed the property on a reconveyance to the husband: *Craig v. Monitor Plow Works*, 76-577.

Survivor's right in homestead: A judgment against the husband does not become a lien on his right to occupy the homestead as survivor upon the death of the wife, owning the fee: *Smith v. Eaton*, 50-488.

Where a widow, having elected to retain the homestead for life acquired by inheritance afterward an undivided interest in the property subject to a homestead right, *held*, that such undivided interest was subject to the lien of a judgment against her: *Strong v. Garret*, 90-100.

Exempt property: The lien of a judgment does not attach to property which is exempt from execution, as, for instance, a homestead: *Lamb v. Shays*, 14-567; *Cummings v. Long*, 16-41.

Therefore, a judgment against a city does not become a lien upon its public buildings which by § 4007 are exempt from sale on execution: *Davenport v. Peoria M. & F. Ins. Co.*, 17-276.

Where a contract for land was assigned by a husband to his wife and the premises were then occupied by them as a homestead, *held*, that they were exempt as a homestead from liability for judgments against the husband subsequent to such assignment: *Belden v. Younger*, 76-567.

III. EFFECT OF LIEN; PRIORITIES.

Nature of lien: A judgment lien upon land constitutes no property or right in the land itself: *Independent School Dist. v. Werner*, 43-643.

Rights of owner subject to lien: The owner of property subject to a judgment lien has the right to cut wood and timber upon the land. Timber thus cut but not removed becomes personal property, and does not pass under a sale of the property under execution subsequently levied: *Ibid.*

Enjoining sale: Where execution is levied on real property upon which the judgment is not a lien, a sale may be enjoined to prevent a cloud being cast upon the title: *Key City Gas Light Co. v. Munsell*, 19-305.

But if the judgment is a lien it cannot be enjoined on the ground that it is inferior to the lien of plaintiff. The senior lienholder is not entitled to an injunction to prevent the junior lienholder from selling: *Wiedner v. Thompson*, 66-283.

Redemption by lienholder: The holder of a judgment lien not made a party to a foreclosure proceeding may make equitable redemption from a purchaser at the foreclosure sale: *Wright v. Howell*, 35-288.

Priority of lien: The lien of a judgment creditor is subject to equities against the property of the debtor existing in favor of third persons at the time of the recovery of the judgment: *Jones v. Jones*, 13-276; *Parker v. Pierce*, 16-227; *Welton v. Tizzard*, 15-495.

A specific lien, though unrecorded, such as that specially arising by stipulation in a confession of judgment, takes priority over a judgment lien: *Sigworth v. Merian*, 66-477.

A judgment creditor, not having a specific lien upon the property, but merely such lien as the statute gives, acquires no priority over an unrecorded mortgage or other conveyance: *Seevers v. Delashmutt*, 11-174; *Welton v. Tizzard*, 15-495; *Hays v. Thode*, 18-51; *Hoy v. Allen*, 27-208; *Rice v. Kelso*, 57-115.

A judgment lien will not take priority over a subsequent mortgage given in renewal of a previous mortgage: *Young v. Shaner*, 73-555.

If the prior unrecorded instrument is recorded before sale of the property under an execution issued upon the judgment, the purchaser at such sale is affected with notice thereof. In this respect the assignee of the judgment stands in no better position than the original judgment creditor, and is equally affected with all equities and conveyances of which he has notice before becoming a purchaser at the sale: *Chapman v. Coats*, 26-288.

That a judgment creditor is not a purchaser in such sense as to be protected against prior unrecorded instruments, see notes to § 2925.

Neither a judgment creditor nor an assignee of such judgment acquires any interest in lands standing in the name of the judgment debtor, such as will be paramount to the right of one who has conveyed such lands, to have the conveyance set aside on the ground that it was procured by fraudulent representations: *Rider v. Kelso*, 53–367.

One who purchases property subject to a mortgage and pays the amount of such mortgage does not thereby acquire rights superior to the lien of the judgment upon the premises, even though it is subsequent to the mortgage: *First Nat. Bank v. Thompson*, 72–417; *Goodyear v. Goodyear*, 72–329.

The lien of a judgment does not take precedence of a prior agreement under which the premises in controversy are transferred to a trustee to secure indebtedness: *Anglo-American Land, etc., Co. v. Bush*, 84–272.

A judgment lienholder may, by execution and sale, acquire all the rights of the owner of the property as against a senior mortgagee, and moreover may, when the mortgagee seeks to foreclose such mortgage, set up the claim that it is fraudulent as to creditors: *Ramsdell v. Tama Water Power Co.*, 84–484.

Where it appears by the record that a judgment became a lien upon land and so continued, the burden is on a party who claims that the land was sold to him before the rendition of such judgment to establish that fact: *Hodge v. Dent*, 80–378.

Where the ten years, during which the judgment would be a lien, expired while a homestead right to premises which would otherwise have been subject to lien still existed, and subsequently the owner of the homestead conveyed the same before levy of execution upon such premises, *held*, that the purchaser took free from any claim under the judgment: *Benbow v. Boyer*, 89–494.

Where several judgments are in existence at the time real property is acquired by the judgment debtor, they will attach to such future acquired property, not in the order of their rendition, but concurrently: *Ware v. Purdy*, 60 N.W., 526; *Ware v. Delahaye*, 64 N.W., 640; *Kesterson v. Tate*, 63 N.W., 350.

A vendor's lien is subordinate to a judgment lien acquired without notice of the vendor's rights: *Cutler v. Ammon*, 65–281.

Prior sale under junior judgment: The purchaser at a sale under a judgment which is in existence as a lien will acquire priority over a purchaser at a sale prior in point of time, but under a junior judgment: *Marshall v. McLean*, 3 G. Gr., 363.

Judgments of same date: As between judgment creditors whose liens are of the same date, he who first takes the property in execution has the preference to be first paid: *Cook v. Dillon*, 9–407; *Lippencott v. Wilson*, 40–425. *Wilson v. Baker*, 52–423.

Priority of seizure: Where neither of two judgments is a lien upon the real property in question, the one under which the real property is first seized by actual levy will be a prior lien thereon: *Lathrop v. Brown*, 23–40.

Where judgments have attached concurrently to real estate afterward acquired, the holder of one of such judgments cannot acquire priority over the other by a prior levy: *Kesterson v. Tate*, 63 N. W., 350.

As between judgments for partnership and individual debts: A judgment against an individual partner for a partnership debt which is prior in time to a judgment against him for an individual debt will be prior in lien also. Such priority is not affected by the rule for marshaling assets in such cases: *Gillaspy v. Peck*, 46–461.

Lien under judgments by agreement: With regard to the effect of particular stipulations in the judgments with respect to the liens thereof, see *Perry v. Miller*, 54–277; *Sigworth v. Meriam*, 66–477.

Subrogation: Where a surety pays off a judgment the judgment is considered discharged and can no longer be enforced at law, but in equity the lien will be regarded as surviving for his protection, and by an action in equity he may avail himself of the lien. But the action to recover from the principal the amount paid is based upon an implied promise, and is barred in five years from the time of payment: *Johnston v. Belden*, 49–301.

The statements of the petition in a particular case *held* sufficient to entitle plaintiff, as surety, having paid the claim, to subrogation to the rights of the judgment creditor against the estate of a deceased defendant, whether such deceased defendant was the principal debtor or a co-surety with plaintiff: *Hollingsworth v. Pearson*, 53–53.

The purchaser of a judgment in foreclosure becomes subrogated to the rights of the original holder, and may have the premises, upon which the judgment is a lien, sold thereunder: *Shimer v. Hammond*, 51–401.

SEC. **3802. When attach — filing transcript in another county.** When the land lies in the county wherein the judgment was rendered, the lien shall attach from the date of such rendition, but if in another it will not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies. [17 G. A., ch. 129, § 2; C.'73, §§ 2883–4; R., §§ 4106–7; C.'51, §§ 2486–7.]

A judgment is not rendered nor does it operate as a lien until it is entered of record in the books prescribed by statute, among which is the "index of liens:" *Ætna Life Ins. Co. v. Hesser*, 77–381.

As to filing transcripts in another county, see § 3958.

As to transcripts of judgments in justices' courts, see § 4537 and notes.

SEC. **3803. Docketing transcript.** Such clerk shall, on the filing of such transcript of the judgment in his office, immediately proceed to docket

and index the same in the same manner as though rendered in the court of his own county. [17 G. A., ch 129, § 3; C.'73, § 2885; R., § 4108; C.'51, § 2488.]

The clerk of the court where the transcript is docketed cannot issue execution thereon: *Seaton v. Hamilton*, 10–394.

This section is to be considered together with the two preceding sections, and requires the abstract to be indexed in order to complete the record and make it a lien: *Ætna Life Ins. Co. v. Hesser*, 77–381.

SEC. **3804. Satisfaction of judgment.** When the amount due upon judgment is paid off, or satisfied in full, the party entitled to the proceeds thereof, or those acting for him, must acknowledge satisfaction thereof upon the record of such judgment, or by the execution of an instrument referring to it, duly acknowledged and filed in the office of the clerk in every county wherein the judgment is a lien. A failure to do so for thirty days after having been requested in writing shall subject the delinquent party to a penalty of fifty dollars, to be recovered in an action therefor by the party aggrieved. [17 G. A., ch. 129, § 4.]

SEC. **3805. Conveyance by commissioner.** Real property may be conveyed by a commissioner appointed by the court:

1. Where, by judgment in an action, a party is ordered to convey such property to another;

2. Where such property has been sold under a judgment or order of the court, and the purchase price has been paid. [C.'73, § 2886; R., § 3165.]

SEC. **3806. Deed.** The deed of the commissioner shall refer to the judgment, orders and proceedings authorizing the conveyance. [C.'73, § 2887; R., § 3166.]

SEC. **3807. Conveys title.** A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land. [C.'73, § 2888; R., § 3167.]

SEC. **3808. Other parties.** A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding. [C.'73, § 2889; R., § 3168.]

SEC. **3809. Approval by court.** A conveyance by a commissioner shall not pass any right until it has been approved by the court, which approval shall be indorsed on the conveyance and recorded with it. [C.'73, § 2890; R., § 3169.]

SEC. **3810. Form.** The conveyance shall be signed by the commissioner only, without affixing the names of the parties whose title is conveyed, but the names of such parties shall be recited in the body of the conveyance. [C.'73, § 2891; R., § 3170.]

SEC. **3811. Recorded.** The conveyance shall be recorded in the office in which, by law, it should have been recorded had it been made by the parties whose title is conveyed by it. [C.'73, § 2892; R., § 3171.]

SEC. **3812. Approval in vacation.** Whenever by law it is permitted or required that judicial or other sales and conveyances of land may or shall be confirmed and approved by a court, the judge of the court may, in vacation, approve the same, and cause the proper entry or entries to be made. [C.'73, § 2893.]

CHAPTER 10.

OF JUDGMENT BY CONFESSION.

SECTION **3813. How entered.** A judgment by confession, without action, may be entered by the clerk of the district court. [C.'73, § 2894; R., § 3397; C.'51, § 1837.]

The statute does not authorize the confession of a judgment by the debtor without the knowledge or consent of the creditor. Such a judgment may be canceled on motion of the creditor: *Farmers', etc., Bank v. Mather*, 30–283.

A judgment by confession is one entered without action, and if the note on which the judgment is confessed stipulates for attorney's fees in case action be brought thereon, attorney's fees cannot properly be included in the judgment: *Dullard v. Phelan*, 83-471.

SEC. **3814. Only for money.** The judgment can be only for money due or to become due, or to secure a person against contingent liabilities on behalf of the defendant, and must be for a specified sum. [C.'73, § 2895; R., § 3398; C.'51, § 1838.]

SEC. **3815. Statement.** A statement in writing must be made, signed and verified by the defendant, and filed with the clerk, to the following effect:

1. If for money due or to become due, it must state concisely the facts out of which the indebtedness arose, and that the sum confessed therefor is justly due, or to become due, as the case may be;

2. If for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting such liability, and must show that the sum confessed therefor does not exceed the same. [C.'73, § 2896; R., § 3399; C.'51, § 1839.]

It is not sufficient to state that the sum for which judgment is confessed is due upon a note, but the statement should show the manner in which the indebtedness arose for which the note was given, and it must state that the amount is justly due: *Edgar v. Greer*, 7-136.

Where the statement was that the amount was due on a promissory note given for balance due on settlement, and it was not alleged that the amount was justly due, *held*, that a judgment on such statement was illegal and should not affect third parties, and that an existing creditor, subsequently obtaining judgment, might have the judgment by confession set aside on motion: *Bernard v. Douglas*, 10-370.

As between the parties judgments by confession are valid, although the statement does not substantially comply with the statute in showing how the indebtedness arose. (Criticising *Edgar v. Greer*, 7-136, and *Kennedy v. Lowe*, 9-580, which held that the defendant himself might take advantage of such defect): *Plummer v. Douglas*, 14-69. And see *Churchill v. Lyon*, 13-431.

A statement that the amount due was for money borrowed from plaintiff and interest, etc., evidence by a promissory note, etc., *held* sufficient: *Vanfleet v. Phillips*, 11-558.

And so *held* where the statement was for "money borrowed:" *Marvin v. Tarbell*, 12-93; *Kendig v. Marble*, 58-529.

Where a note on which a judgment by confession was sought was attached to the statement properly identified, *held*, that this constituted a concise statement of the facts, within the meaning of this section: *Dullard v. Phelan*, 83-471.

The statement in a particular case of the facts out of which the indebtedness arose, *held* sufficient: *Brown v. Barngrover*, 82-204.

As to sufficiency of statements in particular cases, see *Daniels v. Claflin*, 15-152; *Miller v. Clarke*, 37-325.

In a particular case, *held*, that the statements of the confession of judgment did not render a party thereto liable to judgment thereon as principal, but only as surety: *Jarosh v. Easton*, 57-569.

The mere fact that the statement for the confession of judgment is sworn to before a notary public who at the time is one of the attorneys of the plaintiff does not necessarily render it void. But such circumstance might be considered if it were claimed that fraud was practiced in procuring the confession: *Vanfleet v. Phillips*, 11-558.

Failure of the notary to affix his seal to the jurat of the affidavit to the statement will render judgment thereon erroneous: *Chase v. Street*, 10-593.

Where the jurat to the statement for confession of judgment was defective in that the notary public omitted to sign his surname, but the seal attached gave his name in full, *held*, that the authentication was sufficient and the confession valid: *Grattan v. Matteson*, 54-229.

As between the parties, the statement will be sufficient without being sworn to. A defect in that respect may be amended on leave of court: *Thorp v. Platt*, 34-314.

As between the parties, if defendant swears that a certain sum is due and consents to the rendition of judgment for that amount, there is no necessity for a sworn statement: *Plummer v. Douglas*, 14-69.

If the honesty and integrity of the transaction is affirmatively shown, the judgment will not be invalid as to creditors or parties, though based upon a defective statement: *Vannice v. Greene*, 16-574.

A confession of judgment can only be made as here provided, and a warrant of attorney to confess judgment which would be valid in another state where it is executed will not be sufficient in this state to authorize the entry of judgment thereunder: *Hamilton v. Schoenberger*, 47-385.

One partner has no authority to confess judgment against the firm, and such a judgment would be void as to the other partners: *Christy v. Sherman*, 10-535.

But it would be binding as to the partner confessing judgment: *North v. Mudge*, 13-496.

Where the statement was first signed in the firm name and sworn to by one member, and the judgment entry recited that the firm acknowledged themselves justly indebted, etc., *held*, that the judgment would bind the firm: *Edwards v. Pitzer*, 12-607.

SEC. **3816. Judgment—execution.** The clerk shall thereupon make an entry of judgment in his court record for the amount confessed and costs, and shall issue execution thereon as in other cases, when ordered by the party entitled thereto. [C. '73, § 2897; R., § 3400; C. '51, §§ 1840–1.]

Entry by clerk: All the power the clerk has to render judgment on confession is given by the statute, and, unless its provisions are strictly complied with the power of attorney under which the clerk acts is a nullity: *Edgar v. Greer*, 7–136; *S. C.*, 10–279.

The statute authorizing confessions of judgment does not give judicial powers to the clerk of the court. The judgment entered is to be treated as one entered by the court itself: *Grattan v. Matteson*, 54–229.

When a proper statement in writing, duly signed and verified, is filed, it is the duty of the clerk to enter judgment for the amount fixed, and to issue execution as in other cases: *Dullard v. Phelan*, 83–471.

Such judgment should be signed by the judge, and when entered in vacation should be approved and signed at the next term; but failure to sign at next term as directed by § 242 will not render the judgment void: *Ibid.*

It is the duty of the clerk to enter judgment against all the parties who are shown by the confession to be indebted to the plaintiff and who authorize or join in the execution of such confession, and an omission of the clerk to enter judgment against a party thus liable under the confession may be subsequently corrected by the court: *Risser v. Martin*, 86–392.

Although the clerk fails to enter up judgment on the statement filed with him, such statement constitutes an instrument in writing creating a legal obligation to pay on which an action may be maintained, and against which the statute of limitations will run from the time the statement is made: *Trenery v. Swan*, 93–619.

In vacation: Judgment may be entered by the clerk in vacation and approved at the next term: *Vanfleet v. Phillips*, 11–558; *Kendig v. Marble*, 58–529.

Approval: Where a judgment was entered in 1884, and confirmed in 1889, *held*, that the approval was sufficient: *Brown v. Barngrover*, 82–204.

Appearance by attorney is not necessary in order to support a confession of judgment: *Edmonds v. Montgomery*, 1–142.

Lien of: Where a confession of judgment stipulated that execution thereon should not be issued for two years, and that the judgment should be a lien upon the property described therein until fully paid, *held*, that such confession of judgment constituted in effect a mortgage upon the property described which would have priority over the lien of a subsequent judgment creditor, even after the expiration of ten years from the time of rendering judgment on the confession: *Sigworth v. Meriam*, 66–477.

Alteration of record: Evidence in a particular case, *held* insufficient to establish the alteration of the record of a judgment by confession: *Wright v. Howell*, 35–288.

Appeal: The judgment when entered is a judgment by the court, and is subject to revision on appeal in the same manner as any other judgment: *Edgar v. Greer*, 7–136; *Troxel v. Clarke*, 9–201; *Burge v. Burns*, Mor., 287.

Execution: Process may issue for the enforcement of a judgment by confession before the approval of the record of such judgment: *Vanfleet v. Phillips*, 11–558; *Wright v. Howell*, 35–288.

Effect of: In the absence of fraud or other ground of equitable relief, the judgment is conclusive as to any defense, such as usury, which might have been interposed before judgment: *Twogood v. Pence*, 22–543; *Troxel v. Clarke*, 9–201; *Miller v. Clarke*, 37–325.

But a judgment by confession, entered into with the purpose of evading the usury laws, is void, as between the parties, as to the amount in excess of the sum lawfully due: *Mullen v. Russell*, 46–386; *Ohm v. Dickerman*, 50–671.

The mere fact that the note upon which judgment by confession is rendered is usurious does not in itself show that the parties caused judgment to be entered for the purpose of concealing usury or to avoid the statute against it: *Kendig v. Marble*, 58–529.

Where a surety's signature to a note was obtained by false representations amounting to fraud on the part of the payee, *held*, that a confession of judgment thereon, made before the fraud was known to the surety, would not estop him from setting up that fact in an action to set aside the judgment: *Melick v. First Nat. Bank*, 52–94.

When, in an action of foreclosure, mortgagee set up a written agreement by mortgagor to confess judgment, and an issue was made upon the allegation that such agreement was obtained by fraud, which issue was found for plaintiff, *held*, that such determination only settled the validity of the agreement, and that defendant could still file another answer, setting up usury: *Lyon v. Welsh*, 20–578.

Confession of judgment by a principal will not bar action thereon against a surety: *Citizens' Savings Bank v. Olsen*, 47–492.

Errors or irregularities, not rendering the judgment by confession void, cannot be taken advantage of by a garnishee: *Henny Buggy Co. v. Patt*, 73–485.

It is competent in a judgement by confession on notes secured by mortgage to provide that the property covered by the mortgage shall be sold without redemption: *Cook v. McFarland*, 78–528.

The statute with reference to attorney's fees (§ 3869) does not authorize the taxation of such fees when the judgment is rendered by confession: *Dullard v. Phelan*, 83–471.

In justices' courts: See § 513.

SEC. **3817. Offer to confess before action.** Before an action for the recovery of money is brought against any person, he may go before the

clerk of the court of the county of his residence, or of that in which the person having the cause of action resides, and offer to confess judgment in favor of such person for a specified sum on such cause of action, as provided for in the foregoing sections. If such person, having had the same notice as if he were defendant in an action that the offer would be made, of its amount, and of the time and place of making it, refuses to accept it, and afterwards commences an action upon such cause, and does not recover more than the amount so offered to be confessed, he shall pay all the costs of the action; and on the trial thereof the offer shall not be treated as an admission of the cause of action or amount to which the plaintiff was entitled, nor be given in evidence. [C. '73, § 2898; R., § 3403.]

SEC. **3818. After action brought.** After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. If the plaintiff, being present, refuses to accept judgment for such sum in full of his demands in the action, or, having had three days' notice that the offer would be made, of its amount, and of the time of making it, fails to attend, and on the trial does not recover more than was offered to be confessed, he shall pay the costs of the defendant incurred after the offer. The offer shall not be treated as an admission of the cause of action or amount to which the plaintiff was entitled nor be given in evidence upon the trial. [C. '73, § 2899; R., § 3404.]

Under this section an offer to confess judgment may be made orally, and there is nothing requiring it to be a matter of record. It is therefore competent, when the amount of the offer is questioned, to prove it by parol: *Barlow v. Buckingham*, 68–169.

An offer to confess judgment for a certain amount carries with it liability for costs, and it is not necessary that the offer to confess expressly include costs: *Manning v. Irish*, 47–650.

Where in an action for balance on mutual accounts an offer to confess was made for a certain amount, *held*, that it was an offer to confess a balance of that amount due and not merely to confess items of indebtedness on defendant's part to plaintiff amounting to the sum specified: *Ibid.*

The offer to confess must be confined to claims embraced in the suit: *Phillips v. Shearer*, 56–261.

An offer to confess, unless accepted, does not entitle plaintiff to judgment for the amount offered: *Holmes v. Hamburg*, 47–348.

If the offer to confess is insufficient it is to have no effect on the question of costs: *McClatchey v. Finley*, 62–200.

The provisions as to offer to confess judgment are applicable in cases of appeal from the award made by commissioners in assessing the damages for taking right of way: *Harrison v. Iowa Midland R. Co.*, 36–323.

Where an offer to confess was made in a justice's court, and plaintiff recovered judgment for a larger amount than the amount of the offer, but on appeal judgment was given for an amount not greater than the offer, *held*, that plaintiff should pay the costs. The provisions of this section have reference to the amount finally recovered: *Watts v. Lambertson*, 39–272.

The provision as to offering to confess judgment does not contemplate admissions or confessions contained in the pleadings: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

CHAPTER 11.

OF OFFER TO COMPROMISE.

SECTION **3819. Offer of judgment.** The defendant in an action for the recovery of money only may, at any time after service of notice and before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for a specified sum with costs. If the plaintiff accepts the offer, and gives notice thereof to the defendant or his attorney within five days after the offer is made, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer, verified by affidavit; and in either case a minute of the offer and acceptance shall be entered upon the judge's calendar, and judgment shall be

rendered by the court accordingly. If the notice of acceptance is not given in the period limited, the offer shall be treated as withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he cannot recover costs, but shall pay the defendant's costs from the time of the offer. [C.'73, § 2900; R., § 3405.]

Under this section it is error to allow the statement of an offer to compromise to be made to the jury: *McCormick v. Chicago, R. I. & P. R. Co.*, 47–345.

The only effect of the offer is as to costs: *Ibid.*

Where an offer to allow judgment to be taken is not accepted, an attempt on the part of the counsel for the party to whom it is made to introduce it in evidence constitutes misconduct, but no steps being taken at the time to have the jury discharged and a new one impaneled on account of such misconduct, *held*, that the act of the party objecting in proceeding with the trial of the cause was a waiver of his objection: *Riech v. Bolch*, 68–526.

An offer to pay a sum of money and costs if plaintiff will dismiss his action is not within the provisions of this section: *Quinton v. Van Tuyl*, 30–554.

Where, in a proceeding to condemn the right of way for a street, plaintiff offered to submit to judgment in a certain amount, and on the trial a less amount was found for defendant, *held*, that it was not a case for taxing costs against defendant, the action not being one for the recovery of money: *Cherokee v. Sioux City & I. F. Town Lot Co.*, 52–279.

Where an offer to confess judgment has been made which is insufficient in amount, it will have no effect upon the question of costs where the matter to which the confession relates is only one of the questions upon which the controversy is determined: *McClatchey v. Finley*, 62–200.

Where judgment is entered for more than the amount of the tender, the amount offered is never material: *Russell v. Critchfield*, 75–69.

An offer to confess judgment for a certain amount with costs to date of offer, "said amount to be a full settlement of the above cause," is not a conditional offer, and when defendant made such offer, which was refused and judgment afterwards recovered against defendant for a less amount than the offer, *held*, that it was not error for the court to tax the costs accruing after date of offer to the plaintiff: *De Long v. Wilson*, 80–216.

SEC. **3820. Conditional offer.** In an action for the recovery of money only, the defendant, having answered, may serve upon the plaintiff or his attorney an offer in writing that, if he fails in his defense, the amount of recovery shall be assessed at a specified sum. If the plaintiff accepts the offer, and gives notice thereof to the defendant or his attorney within five days after it was served, or within three days if served in term time, and the defendant fails in his defense, the judgment shall be for the amount so agreed upon. If the plaintiff does not accept the offer, he shall prove the amount to be recovered as if the offer had not been made, and the offer shall not be given in evidence or mentioned on the trial, and if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in the defense. [C.'73, § 2901; R., § 3406.]

SEC. **3821. No cause for continuance.** The making of any offer pursuant to the provisions of this chapter shall not be cause for a continuance of the action or a postponement of the trial. [C.'73, § 2902; R., § 3407.]

CHAPTER 12.

OF RECEIVERS.

SECTION **3822. When and how appointed.** On the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed,

may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him. Upon the hearing of the application, affidavits, and such other proof as the court or judge permits, may be introduced, and upon the whole case such order made as will be for the best interest of all parties concerned. [C.'73, §§ 2903, 2970; R., §§ 3216, 3419; C.'51, § 1656.]

Insolvency: Insolvency of the defendant *held* not sufficient to authorize the appointment of a receiver in an action to recover possession of real property: *Cofer v. Echerson*, 6–502.

But a creditor seeking in equity to set aside a conveyance of real estate is not entitled to a receiver in the absence of showing of insolvency of the debtor and particular circumstances making such relief necessary: *Clark v. Raymond*, 84–251.

Other remedies: It does not seem to be the practice of the courts to appoint a receiver where the question is upon the legal right, or where a party can assert his right by a direct action at law as for possession: *Ibid.*

In a law action: Under this section a receiver may be appointed in a law action, and, in a proper case, before the defendant is affected with notice of the pendency of the suit: *Jones v. Graves*, 20–596.

A creditor who has not yet reduced his claim to judgment cannot maintain a bill to subject the land to the payment thereof, and have a receiver appointed: *Clark v. Raymond*, 84–251.

An order made in vacation appointing a receiver is appealable the same as if made in term time: *Ibid.*

The statute authorizes the appointment of a receiver in a law action and an order to the receiver to pay over money can be made in a law action as well as in equity: *Rabb v. Albright*, 93 50.

A receiver may be appointed in an action in which it is sought to establish a landlord's lien: *Smith v. Dayton*, 62 N.W., 650.

Probable right: It is not necessary that it should conclusively appear that the party is entitled to recover, before a receiver can be appointed; a probable right only is required: *Des Moines Gas Co. v. West*, 44–23.

In equity; settlement of partnership accounts: It is a legitimate and regular mode of proceeding for a court of equity, in an action for the settlement of accounts between partners, to appoint a receiver to take charge of the partnership assets, etc.. *Saylor v. Mockbie*, 9–209.

In such a case it must first be made to appear that there is a partnership in existence, and a right in the party applying to share in the profits; a mere agreement for a partnership will not be sufficient: *Hobart v. Ballard*, 31–521.

In a particular case, *held*, that the facts were not sufficient to authorize the appointment of a receiver of partnership property on the petition of one of the partners: *Loomis v. McKenzie*, 31–425.

In action against bank: In a particular case, *held* that, although the facts shown were not consistent with entire good faith on the part of the officers of a bank, they were not sufficient to justify the appointment of a receiver to take charge of the business of the bank: *French v. Gifford*, 30–148.

The stockholder of a bank who, in case of its insolvency or on account of its being conducted at a loss may become personally liable, may have a receiver appointed under the provisions of this section: *Dickerson v. Cass County Bank*, 64 N. W., 395.

Insolvency is not the only ground on which a receiver may be appointed in such cases: *Ibid.*

There being jurisdiction to appoint a receiver in such cases the fact that the corporation does not resist but consents to such appointment will not deprive the court of its authority to act: *Ibid.*

A creditor who has filed his claim with the receiver and has for some time made no objection to the proceeding cannot afterwards question the legality of the receiver's appointment, the proceeding not being absolutely void: *Ibid.*

Of corporation: This section does not authorize the dissolution of a corporation by a court of equity nor the placing of its property in the hands of a receiver merely on the ground of dissensions among the stockholders: *Wallace v. Pierce-Wallace Pub. Co.*, 70 N. W., 216.

Rights of third parties. While it is competent for a court of equity to take possession of property, which is the subject of litigation, by an interlocutory order, yet if the rights of third persons, not parties to the record, have intervened, as by purchase in good faith, the property will not be ordered into the possession of a receiver in this summary manner: *Levi v. Karrick*. 13–344.

Appointment under agreement of parties: In cases not covered by this section the court may appoint a receiver in accordance with stipulations of the parties made in the contract creating the indebtedness: *Hubbell v. Avenue Investment Co.*, 66 N. W., 85.

Particular facts: Under the facts in a particular case, *held* the party was not entitled to the appointment of a receiver: *Sleeper v. Iselin*, 59–379.

Mortgaged property: The appointment of a receiver to take charge of mortgaged premises, after final judgment of foreclosure, is allowable, if at all, only upon a strong showing: *Adair v. Wright*, 16–385.

Where a mortgagor is insolvent and the mortgaged property is insufficient to pay the debt, if the rents and profits are included in the mortgage, the general rule is to appoint a receiver as of course: *Des Moines Gas Co. v. West*, 44–23.

There is a clear and well defined distinction as to the right to have a receiver appointed where the bonds and mortgage pledge the rents or income for the payment of the debt, and where they do not: *Ibid.*

Where the rents and profits are applied to the mortgage debt there is no occasion for

the appointment of a receiver and none will be appointed: *Fitzgerald v. Daniels*, 52–744; *Myton v. Davenport*, 51–583. And see *Barnett v. Nelson*, 54–41.

The possession of mortgagor, pending proceedings to foreclose, should not be disturbed by the appointment of a receiver, except in cases of fraud clearly proved, or in order to protect the rights of a party having a clear, strong claim: *Callanan v. Shaw*, 19–183. And see *White v. Griggs*, 54–650.

In order to authorize the appointment of a receiver of mortgaged property it must appear that the property, or its rents and profits, are in danger of being lost or materially impaired. Where a mortgagee is in possession of a stock of goods and selling them out in the usual course of trade, and it does not appear that he is an improper person to be intrusted with the property, a receiver will not be appointed at the instance of a creditor of the mortgagor who garnishes the mortgagee: *Silverman v. Kuhn*, 53–436.

Whether a receiver can be appointed on foreclosure of a mortgage to collect the rents and profits during the period of redemption, *quære: Goodhue v. Daniels*, 54–19.

Even though a mortgage creates a lien upon rents and profits and stipulates for the appointment of a receiver, yet the mortgagee is not as a matter of course entitled to such receiver after judgment of foreclosure, where it does not appear that such rents and profits are being wasted or that they are being improperly applied to prior mortgages: *Paine v. McElroy*, 73–81.

Under a mortgage providing that in case of default the mortgagee might take possession and apply the rents and profits of the property to the satisfaction of the mortgage, *held*, that in the absence of any express provisions for the appointment of a receiver, it was error to make such appointment and authorize the receiver to take possession of the property during the period of redemption for the benefit of the mortgagee: *Swan v. Mitchell*, 82–307.

Also, *held*, that the appointment of a receiver was improper, in view of the want of proof that the mortgagor was insolvent: *Ibid.*

Where a chattel mortgagee brought an action in equity to foreclose his mortgage against the mortgagor and certain attaching creditors, the mortgage being upon a stock of dry goods which would have been greatly depreciated in value if taken and withheld from sale by the mortgagee, and the mortgagee having by the mortgage the right to take possession whenever he should choose to do so, and proceed to subject the property to the payment of the amount due or to become due on his mortgage, *held*, that the case was a proper one for the appointment of a receiver upon request of such mortgagee, although the action was commenced before the mortgage indebtedness had become due: *Maish v. Bird*, 59–307.

Where there was a question as to whether a certain note belonged to the president of an insurance company individually or was the property of the company, *held*, that the receiver was entitled to the possession of such note, and the court might, in an equitable action brought by such receiver against the president, have such possession awarded to him without an adjudication as to the question of the title to the note itself: *Brandt v. Allen*, 76–50.

A mortgage which does not, in terms, give the mortgagee the right of possession before sale and the termination of the right of redemption, nor pledge the rents and profits, creates no lien upon or interest in the statutory right of possession under the mortgage and the mortgagee is not entitled to have a receiver appointed in order to make such right of possession and the rents and profits thereunder available in satisfaction of his claim: *American Investment Co. v. Farrar*, 87–437.

Where the mortgage pledged the rent of premises for the payment of a mortgage debt, and it appeared that they were not being so applied, but that the tenant was a foreign corporation and insolvent and the security insufficient, and that the mortgage authorized the appointment of a receiver on default, *held*, that the appointment of a receiver was proper: *Stetson v. Northern Investment Co.*, 70 N. W., 595.

Under a provision in a mortgage authorizing the mortgagee on default to take possession and collect rents, profits and incomes from the property, to be applied upon the debt, *held*, that the rents accruing after the appointment of a receiver were assets in his hands and not subject to garnishment by other creditors: *Ibid.*

As the mortgagor has the right to possession, mortgagee is not entitled to a receiver for the rents and profits. Therefore, *held*, that a receiver would not be appointed to take possession of crops on the mortgaged premises: *White v. Griggs*, 54–650.

As to appointment of receiver when mortgagor is guilty of fraud, see *Callanan v. Shaw*, 19–183; *White v. Griggs*, 54–650.

One tenant in common cannot have a receiver appointed for a co-tenant who is in possession of the premises, unless the circumstances are such as to make the co-tenant liable to account: *Varnum v. Leek*, 65–751.

Attached property: Under § 2970 of Code of '73 with reference to appointment of a receiver of attached property (which is not retained as a distinct provision), *held*, that something more than the mere fact of attachment must be shown to justify the appointment of a receiver. Facts must be shown rendering the exercise of the power necessary or proper: *Silverman v. Kuhn*, 53–436.

When application may be made: A receiver may be appointed upon a proper application at any time during the pendency of the action and before it is finally decided in the supreme court on appeal and the district court may therefore in a proper case appoint a receiver while the appeal is pending in the supreme court: *Mitchell v. Roland*, 63 N. W., 606.

Right to object: One who has acquired no rights in the property as against the parties cannot question the appointment of a receiver: *Bartlett v. Bilger*, 92–732.

Errors of court and of receiver: Any

errors in the proceedings of the court appointing a receiver and controlling and directing his action must be corrected by the proper application to the court, or by appeal from its orders or decisions as provided by the law applicable to such cases. Errors or irregular proceedings of the receiver must be corrected by the court having control of his action. They cannot be set up in an action brought by him under the direction of the court: *Stewart v. Lay*, 45–604.

Fraud in appointment of receiver; when to be pleaded: Fraud in the appointment of a receiver of a corporation should be set up in the action in which the receiver is appointed and not that in which the receiver sues for a stock subscription: *Schoonover v. Hinckley*, 48–82.

Res adjudicata: Where the appointment of a receiver is asked in an action to wind up a partnership, and refused, after which the action is dismissed by the plaintiff, it is not a *res adjudicata*, and a party may apply again in a new action brought for the same purpose some time afterwards: *Anderson v. Powell* 44–20.

Appointment in vacation: The judge may appoint a receiver in vacation. Such appointment should not, except under peculiar circumstances, be made without notice to the opposite party, and where peculiar circumstances are relied on they should be set forth: *French v. Gifford*, 30–148; *Bisson v. Curry*, 35–72, 80; *Howe v. Jones*, 57–130.

Notice: Where the adverse party is not within the jurisdiction of the court and cannot be served with notice, the court may, under some circumstances, appoint a receiver without notice: *Maish v. Bird*, 59–307.

Improper appointment: Where a bond was required of the party asking the appointment of a receiver, *held*, that he might be liable on such bond for injury resulting from an improper appointment, although the receiver was guilty of no act rendering him liable on his bond: *Thayer v. Hurlburt*, 5–521.

Where the court appoints as receiver a person agreed upon by the parties, it will be considered that the parties have consented that the receiver be appointed: *Jaffray v. Raab*, 72–335.

SEC. **3823. Oath and bond of.** Before entering upon the discharge of his duties, he must be sworn faithfully to discharge his trust to the best of his ability, and must also file with the clerk a bond with sureties, to be approved by him, in a penalty to be fixed by the court or judge, and conditioned for the faithful discharge of his duties, and that he will obey the orders of the court in respect thereto. [C.'73, § 2904; R., § 3420; C.'51, § 1657.]

SEC. **3824. Power of.** Subject to the control of the court or judge, a receiver has power to bring and defend actions, to take and keep possession of property, to collect debts, to receive the rents and profits of real property, and, generally, to do such acts in respect to the property committed to him as may be authorized by law or ordered by the court. [C.'73, § 2905; R., § 3421; C.'51, § 1658.]

Failure to intervene; no appeal: A receiver who does not intervene and have himself made a party to the action against the former holder of the property, over which he claims custody by virtue of his receivership, cannot maintain an appeal from the judgment rendered: *Borgalthous v. Farmers', etc., Ins. Co.*, 36–250.

In what court receiver may be sued: The fact that a corporation is in the hands of a receiver will not deprive another court of jurisdiction to entertain an action against such receiver of the corporation without the consent of the court appointing the receiver having been first obtained. But the court appointing the receiver may interfere and protect the possession of its receiver whenever such possession is sought to be disturbed: *Allen v. Central R. Co.*, 42–683.

To bring an action in a state court against a receiver appointed in a federal court, leave not having first been obtained, constitutes a contempt: *Thompson v. Scott*, 4 Dillon, 508.

Garnishment of receiver: Receivers of insolvent debtors being representatives of the court are not subject to garnishment even where permission to proceed against the receiver is given by the judge in vacation. Even as between judgment creditors, while they may ask to have the funds in the hands of the receiver applied to the payment of their judgments they cannot acquire priority, one over the other, by means of a garnishment: *McGowan v. Myers*, 66–99.

Errors of receiver: Errors or irregular proceedings of a receiver must be corrected by the court having control of his action, and cannot be set up in an action brought by him: *Stewart v. Lay*, 45–604.

The receiver is an officer of the court and if it finds that he has property in his hands not belonging to defendant in the action it may order such property turned over to the rightful owner: *Smith v. Dayton*, 62 N.W., 650.

A receiver may appeal from an order erroneously fixing the amount of property in his hands, and directing him to turn over more than he has in custody: *How v. Jones*, 60–70.

Fraud in the appointment of a receiver should be set up in the action in which the receiver is appointed, and not in an action in which the receiver brings the suit: *Schoonover v. Hinckley*, 48–82.

Powers: Where a receiver was appointed to receive the rents and profits of "Burrow's Lock and Mills," it was held that this language included and covered a wharf located on the block and which was constructed and used in furtherance of the business of the mills: *Grant v. Davenport*, 18–179.

The receiver of a corporation may maintain an equitable action against officers thereof charged with concealing its assets with the purpose of converting the same to their own use, to compel the surrender to him of all property to the possession of which he is entitled as such receiver: *Brandt v. Allen*, 76-50.

The general rule is that trustees and like officers empowered by courts to manage the affairs of others cannot exercise such authority outside of the limits of the state in which they are appointed, and the cases in which receivers have been allowed to thus act outside of the jurisdiction of their appointment are to be regarded as exceptional: *Ayers v. Siebel*, 82-347.

The receiver has no extra territorial jurisdiction or power of official action and cannot go into a foreign state or jurisdiction to institute a suit for the recovery of demands due the person or estate subject to his receivership: *Barker v. Lamb*, 68 N. W., 686.

Where a loan company had made sale of certain securities and received payment therefor, delivery of such securities to be made when they should be procured and ready for delivery, and a receiver of such company was afterwards appointed, *held*, that the purchaser of such securities had a right therein which a court of equity would protect, no adverse rights having been acquired by third parties: *Kimball v. Gifford*, 78-65.

Under particular facts, *held*, that the receiver was warranted in construing a failure of a party to object to a proposition to sell property at private sale as a consent thereto, and such sale was upheld: *Yetzer v. Applegate*, 85-121.

In such case *held*, that in the absence of a showing of prejudice, it appearing that the consideration received was more than the appraised value, the sale should be affirmed: *Ibid.*

The receiver may take property on account of indebtedness, to be credited in such amount as may be approved or allowed by the court: *Everingham v. Harris*, 68 N.W., 804.

An individual claim against the receiver cannot be set off in an action by him in his representative capacity: *Polk v. Garver*, 91-570.

Conversion and distribution: When the receiver converts the property into money, the money takes the place of the property and is distributed to the parties who establish their rights to the property: *Gilbert v. Greenbaum*, 56-211.

Disbursement for attorney's fee: Disbursements by a receiver for attorney's fees and other charges in collecting money made in good faith, which are necessary and beneficial to the parties ultimately entitled to the fund, should be paid out of the fund: *How v. Jones*, 60-70.

Preference given by debtor after receiver appointed: After the appointment of such receiver without resistance on the part of the debtor and without appeal from the order of appointment, such debtor has no such control over the fund and power to direct its application that he can by assignment give one creditor preference over another: *McGowan v. Myers*, 66-99.

Railroads; personal injuries: It seems that the court appointing a receiver may provide for the payment by him of all just claims arising out of the operation of the road, while in his charge, including damages for personal injuries, but the claim for such damages cannot be enforced against the purchaser of the road at a foreclosure sale who takes his deed before the rendition of judgment on such claim: *White v. Keokuk & D. M. R. Co.*, 52-97.

A person operating a railway as receiver is liable in an action under § 2055, providing for double damages in cases of injuries to stock where the road is not fenced: *Brockert v. Central Iowa R. Co.*, 82-369.

Where a railroad was sold under mortgage foreclosure in which a receiver had been appointed, *held*, that that purchaser became entitled to the funds in the receiver's hands as a portion of the property passing by the foreclosure sale, and that the property and funds were not subject to claims against the railroad for injuries not already reduced to judgment: *Brockert v. Iowa Central R. Co.*, 93-132.

Larceny from a receiver: In a prosecution for larceny of goods from the hands of a receiver it is not necessary for the state to prove that a bond had been given before the property was taken by such receiver, it appearing that he was acting under a proper order of the court, and that defendant, before the commission of the acts charged, knew that he was so acting: *State v. Rivers*, 60-381.

Ownership may be laid in the receiver: The ownership of the goods may be laid in the receiver. It is not a case falling under the provisions of § 4850, which relates to the wrongful taking of property while in possession of an officer by virtue of legal process: *Ibid.*

Resistance: One who resists a receiver seeking to take possession of property under the order of the court is guilty of the crime of resisting a "person authorized by law . . . to execute a legal order" (§ 4899): *State v. Rivers*, 64-729; *S. C.*, 66-653.

Control of property pending an appeal from appointment: Where the order of the court appointing a receiver is affirmed on appeal, the property of the debtor corporation comes under the control of the receiver only when such appeal is determined and the order appointing the receiver confirmed: *Cook v. Cole*, 55-70.

Receiver to complete a railroad; certificates issued by: Where an order of the court appointing a receiver conferred upon him unusual powers as to purchasing material and borrowing money for the completion of a line of railroad and to issue certificates therefor, which should be a first lien upon said road, *held*, that the receiver had no implied powers other than those conferred by the order of the court, and could not issue valid certificates except for material actually furnished, and a holder of certificates improperly issued was charge-

able with notice of the powers of the receiver and could not claim protection as an innocent holder: *Bank of Montreal v. Chicago, C. & W. R. Co.*, 48–518.

To incur expenses in extension: The question as to what expenses a receiver of a railway may be authorized to incur, and as to whether he may be authorized to incur indebtedness for extensions which shall be a first lien upon the whole property, considered, and *held*, that where a lien holder was not a party, the expenses of an extension could not be made paramount to his lien: *Snow v. Winslow*, 54–200.

Sale by receiver as affecting lien holders not parties: A receiver appointed in a proceeding to which a lien holder is not a party does not represent such lien holder, and cannot sell the property divested of the lien, nor can an execution sale be made in such case which will divest said lien: *Ibid.*

Mingling of private and trust funds: The fact that a receiver mingles money received by him as such with his individual funds, and from the aggregate amount draws money for his own use, will not be sufficient to justify his being required to pay interest upon money received: *Radford v. Folsom*, 55-276.

Settlement of accounts: The mere fact that a receiver's report is held incorrect as to certain matters, when it is not shown that the errors were intentional or for dishonest purposes, is not enough to tax him with the costs incurred in passing upon his accounts, no bad faith or fraud being shown: *Ibid.*

Charging receiver with interest: It is error to charge a receiver with interest upon money in his hands, without any evidence of wrong on his part: *How v. Jones*, 60–70.

Receiver's report; mistake: Where a receiver shows to the court that there was a mistake in the former report, in that he charged himself therein with money not received, such mistake should be corrected by the court: *Ibid.*

Negligence of the receiver: Action for injuries to personal property resulting from the fraud or negligence of a receiver must be brought against him and not the plaintiff at whose instance he was appointed, when the latter acted in good faith upon probable cause: *Kaiser v. Kellar*, 21–95.

Compensation: While a receiver should receive compensation according to the degree of his business capacity, and the integrity and responsibility required in the case, yet such compensation should be limited to what would have been necessary to employ a person of such qualifications to perform the services by private contract: *French v. Gifford*, 31–428.

When no question is made as to the legality and propriety of the appointment of a receiver and he has closed up the business in pursuance of his appointment, his compensation should be paid from the funds in his hands: *Radford v. Folsom*, 55–276.

Receiver improperly appointed: Where it has been determined that the receiver has been improperly appointed, and he is ordered to turn over property coming into his hands to an intervenor who establishes his right thereto against the receiver and the party to the suit at whose instance the receiver was appointed, the costs and expenses of the receivership and the compensation of the receiver should not be deducted out of the fund or the property thus directed to be turned over, but the receiver should look for his compensation to the party procuring his appointment: *How v. Jones*, 60–70.

Where a receiver wrongfully appointed paid out a portion of the funds coming into his hands in good faith under order of the court, *held*, that he was entitled to credit for money thus paid out, even though it was afterwards determined that such third party was not entitled to the payment. But *held*, that as to that portion of the amount claimed to have been paid out to such third person, which he retained as attorney's fee due to himself from such third party, he could not assert priority over the rightful claimant of the fund: *Ibid.*

It is a general rule that the compensation of the receiver is not taxable to the parties, but is taken from the sum in controversy between them: *Jaffray v. Raab*, 72–335.

A receiver who refuses to pay over money in accordance with an adjudication against him may be held to pay interest from the time of such adjudication: *Howe v. Jones*, 71–92.

SEC. **3825. Priority of liens.** Persons having liens upon the property placed in the hands of a receiver shall, if there is a contest as to their priority, submit them to the court for determination.

CHAPTER 13.

OF SUMMARY PROCEEDINGS.

SECTION **3826. Judgments on motion.** Judgments or final orders may be obtained on motion by sureties against their principals, or by sureties against their co-sureties, for the recovery of money due them on account of payments made by them as such; by clients against attorneys; plaintiffs in execution against sheriffs, constables and other officers, for the recovery of

money or property collected for them, and damages; and in all other cases specially authorized by statute. [C. '73, § 2906; R., 3422.]

The court, under this section, may order an attorney to pay to the client money collected for him in the course of professional employment, and disobedience to such order may be punished under § 324: *Cross v. Ackley*, 40–493.

So the court may make an order against a clerk to compel payment of money received by him on a judgment. *Elliott v. Jones*, 47–124.

A motion does not ordinarily seek a final adjudication of a controverted matter: *Dullard v Phelan*, 83–471.

An adjudication in a proceeding under this section that an attorney is not liable for the money sought to be recovered from him is an adjudication binding on the person claiming the money, so as to bar a subsequent action for the same cause: *Hawk v. Evans*, 76–593.

The filing of an answer by respondent in such proceeding does not throw any additional burden upon the complainant, and a failure to file a reply cannot be construed as an admission of the averments of the answer: *State v. Morgan*, 80–413.

The fact that the relationship of attorney and client in the transaction involved is denied will not deprive the court of jurisdiction in this proceeding to determine that question: *Ibid.*

Where money is paid to the clerk to apply on a judgment, the court has jurisdiction under this section to make such order as to the disposition of the money as the facts may require: *Peterson v. Hays*, 85–14.

SEC. **3827. Notice—service.** Notice of such motion shall be served on the party against whom the judgment or order is sought, at least ten days before the motion is made. [C. '73, § 2907; R., § 3423.]

SEC. **3828. Form.** The notice shall state in plain and ordinary language the nature and grounds thereof, and the day on which it will be made. [C. '73, § 2908; R., § 3424.]

See *Mansfield v. Wilkerson*, 26–482.

SEC. **3829. When abandoned.** Unless the motion is made and filed with the case on or before the day named in the notice, it shall be considered as abandoned. [C. '73, § 2909; R., § 3425.]

SEC. **3830. No written pleadings.** It shall be heard and determined by the court without written pleadings, and judgment given according to the very right of the matter. [C. '73, § 2910; R., § 3426.]

See *Mansfield v. Wilkerson*, 26–482.

In the absence of a demand for trial of the issues as at law and for a jury, it is not error to try the case to the court as an equitable proceeding: *Lothian v. Lothian*, 88–396.

CHAPTER 14.

OF MOTIONS AND ORDERS.

SECTION **3831. Motion defined.** A motion is a written application for an order, addressed to the court or to a judge in vacation, by any party to an action, or by any one interested therein. [C. '73, § 2911; R., § 3428.]

A decree or judgment is not an order within the meaning of the words here used: *Wagner v. Tice*, 36–599.

A motion to instruct the jury to render verdict for defendant on the evidence is not such a motion as need be in writing: *Young v. Burlington Wire Mattress Co.*, 79–415.

SEC. **3832. Several objects.** Several objects may be included in the same motion, if they all grow out of or are connected with the action in which it is made. [C. '73, § 2912; R., § 3438.]

SEC. **3833. Proof by affidavit.** Testimony to sustain or resist a motion may be in the form of affidavits, or in such other form as the parties may agree on or the court or judge direct. If by affidavit, the person making the same may be required by the court or judge to appear and submit to a cross-examination. [C. '73, § 2913; R., § 3440.]

Trial of motion on affidavits: Matters which may be tried on motion by affidavit are limited, but it is difficult to define the limit; and *held*, that a motion to discharge the attached property might be submitted on affidavits showing that the attachments

were made outside of the limits of the county in which the officer was authorized to act: *Pomroy v. Parmlee*, 9–140, 148.

Where certain affidavits were presented on a motion to discharge garnishee, *held* proper to consider the same affidavits on a subsequent motion to the same effect: *Scholes v. Murray Iron Works Co.*, 44–190.

After the decision upon a motion leave was granted to the unsuccessful party to file additional affidavits; *held*, that such action amounted to a suspension of the decision upon the motion, and that the new affidavits were properly considered: *Winet v. Berryhill*, 55–411.

Issues of fact may arise upon motion: *Lease v. Franklin*, 84–413.

Affidavits of grand jurors are not receivable to show that witnesses were examined before the grand jury whose names are not indorsed on the indictment and the minutes of whose testimony are not returned therewith: *State v. Miller*, 64 N.W., 288.

As to requiring affiant to appear and be examined, see also § 4678.

SEC. **3834. Notice of motion.** A party who has appeared in an action, or who has been served with the original notice therein in any manner provided by this code, shall take notice of all motions filed during term time, upon the same being filed by the clerk and entered in the appearance docket. All motions filed in vacation shall be entered on such docket and served as herein required. [C.'73, § 2914; R., § 3429.]

A party must take notice of motions filed during term. No other notice is necessary: *Wagner v. Tice*, 36–599.

Notice of a motion for change of venue, made in vacation (under § 3506), should be given as here required: *Preston v. Winter*, 20–264; *Loomis v. McKenzie*, 31–425.

A motion to set aside a judgment rendered at a prior term should not be heard without notice to the parties interested: *Keeney v. Lyon*, 21–277.

Notice of a motion affecting an action, but in which no parties are named, will not bind the party upon whom it is served: *Eastman v. Moore*, 14–586.

Where a motion to set aside a decree rendered on default was filed after the expiration of the term, and was granted without notice to the opposite party, but such opposite party appeared and filed a motion to set aside the order thus made and was fully heard, *held*, that the want of notice would not render the action of the court erroneous: *Rivers v. Olmsted*, 66–186.

Where the opposite party appeared in connection with a motion to vacate the judgment and excepted to the ruling, *held*, that he could not object that formal notice was not served on him: *Billings v. Kothe*, 49–34.

SEC. **3835. Form of notice.** When notice of a motion is required to be served, it shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, and the place where and the day on which it is to be heard, and, if affidavits are to be used on the hearing, the notice shall be accompanied with copies thereof, and shall be served such length of time before the hearing as the court or judge may fix. [C.'73, § 2915; R., § 3430.]

SEC. **3836. Service.** Notices and copies of motions mentioned in this chapter may be served by any one who would be authorized to serve an original notice. [C.'73, § 2916; R., § 3431.]

SEC. **3837. On each party.** The service shall be on each of the parties adverse to the motion, if more than one, or on an attorney of record of such party. [C.'73, § 2917; R., § 3432.]

SEC. **3838. Personal or on attorney.** The service may be personal on such party or attorney, or may be made in the same manner as is provided for the service of the original notice in civil actions; or it may be served on the attorney by being left at his office with any person having the charge thereof. [C.'73, § 2918; R., § 3433; C.'51, § 2496.]

SEC. **3839. Return.** Any officer authorized to serve any notice shall serve the same at once and make prompt return to the party who delivered it to him, and a failure to do so shall be punished as a disobedience of the process of the court. [C.'73, § 2919; R., § 3435.]

SEC. **3840. What to state.** The return of proof of service must state the manner in which it was made. [C.'73, § 2920; R., § 3436; C.'51, § 2499.]

SEC. **3841. Court may direct mode of service.** When the party has no known place of abode in this state, and no attorney in the county where the action is pending, or where the parties, plaintiffs or defendants, are numerous, the court or judge may direct the mode of serving such notices, and on whom they shall be served. [C.'73, § 2921; R., § 3437.]

SEC. **3842. "Order" defined.** Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order. [C. '73, § 2922; R., § 3427.]

There is a distinction between an order and a judgment. An order is not a judgment in such sense that the statute of limitations applies to it: *Smith v. Shawhan*, 37–533, 535.

SEC. **3843. May issue in vacation.** A judge's order may issue in vacation, directing any of the officers of the court in relation to the discharge of their duties. [C. '73, § 2923; R., § 3795; C. '51, § 2210.]

Where the sheriff published notice of sale in another paper than that designated by plaintiff, *held*, that the judge in vacation, upon proper application, might make an order directing the publication to be made in the proper paper: *Harriman v. Moore*, 49–171.

This section furnishes a plain, adequate and speedy remedy to the party claiming a right to have execution issued on a judgment, and he cannot, therefore, maintain *mandamus* against the clerk to enforce the issuance of such execution: *Pickell v. Owen*, 66–485.

SEC. **3844. How long in force.** Such order shall be in force only during the vacation in which it is granted, and for the first two days of the ensuing term. [C. '73, § 2924; R., § 3796; C. '51, § 2211.]

This section applies only to an order directing officers of the court in relation to the discharge of their duties and not to a temporary injunction granted in vacation: *Curtis v. Crane*, 38–459.

Nor does such provision apply to an order in a proceeding by *habeas corpus*: *Shaw v. McHenry*, 52–182.

SEC. **3845. Bond.** The judge granting it may require the filing of a bond as in case of an injunction, unless from the nature of the case such requirement would be clearly unnecessary or improper. [C. '73, § 2925; R., § 3797; C. '51, § 2212.]

SEC. **3846. Filed and entered.** Orders made out of court shall forthwith be filed with and entered by the clerk in the journal of the court in the same manner as orders made in the term. [C. '73, § 2926; R., § 3439.]

CHAPTER 15.

OF SECURITY FOR COSTS.

SECTION **3847. When required.** If a defendant, at any time before answering, shall make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he is a nonresident of this state, or a private or foreign corporation, before any other proceedings in the action, must file in the clerk's office a bond, with sureties to be approved by the clerk, in an amount to be fixed by the court, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter. [C. '73, § 2927; R., §§ 3442, 3448.]

These provisions apply to domestic as well as to foreign corporations: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38–446.

But they are not applicable to proceedings in justices' courts: *Smith v. Humphrey*, 15–428.

Whether, in an action on appeal from a justice's court, security for costs can be required, *quære;* but the motion therefor should at least be made at the earliest practicable moment: *Adae v. Zangs*, 41–536, 540.

These provisions for requiring a cost bond have relation to the ordinary forms of action and are not applicable to a proceeding for the trial of exceptions to a claim or demand filed against the estate of an insolvent: *Meyer v. Evans*, 66–179.

This section does not mean that a party may have his own time to file the motion. When the time arrives for an answer, demurrer, or motion, he may properly be required to do something, and if he chooses to

make the motion, he must make it instanter, or within such time as is given him by the court. If he fails, without sufficient excuse, he may properly be held to have waived his right to file the motion, and may be required to answer or demur: *Sprague v. Haight*, 54–446.

Where defendant did not file his motion for security for costs by noon of the second day of the term, nor by the further time fixed by the court therefor, but filed such motion after the time fixed by the court for answering, *held*, that the right to insist on such motion was waived and the motion properly overruled: *Ibid.*

The affidavit that the party has a good defense need not state the facts constituting such defense. The affidavits and counter-affidavits provided for in the latter part of the section are as to facts on which the motion is based, for instance, the residence or nonresidence of plaintiff: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38–446.

An appeal will lie from an order dismissing the action for want of a bond when required, but not from an order requiring a bond: *Ibid.*

The provisions of this section do not apply to a proceeding auxiliary to execution under § 4072: *Estey v. Fuller Implement Co.*, 82–678.

A question raised by motion to require additional security for costs is addressed largely to the discretion of the court: *Turner v. Younker*, 76–258.

SEC. **3848. Dismissal for failure to furnish.** An action in which a bond for costs is required by the last section shall be dismissed, if a bond is not given in such time as the court allows. [C.'73, § 2928; R., § 3443.]

SEC. **3849. When plaintiff becomes nonresident.** If the plaintiff in an action, after its institution and at any time before its final determination, becomes a nonresident of this state, he may be required to give security for costs in the manner and under the restrictions provided in the preceding sections of this chapter. [C.'73, § 2929; R., § 3444.]

The requirement that defendant must file his affidavit before answering (§ 3847) is applicable under this section: *Gilbert v. Hoffman*, 66–205.

SEC. **3850. Additional security.** In an action in which a bond for costs has been given, the defendant may, at any time before trial, make a motion for additional security, and if on such motion the court is satisfied that the surety in the plaintiff's bond has removed from the state, or it is not sufficient for the amount thereof, it may dismiss the action unless, in a reasonable time to be fixed by the court, sufficient security is given by the plaintiff. [C.'73, § 2930; R., § 3445.]

SEC. **3851. Attorney or other officer not received.** No attorney or other officer of the court shall be received as security in any proceeding in court. [C.'73, § 2931; R., § 3446.]

This provision applies not only to the bond for costs, but to injunction, attachment and other bonds: *Massie v. Mann*, 17–131; for instance, an administrator's bond: *Cuppy v. Coffman*, 82–214.

An attorney who tenders himself and is accepted as surety cannot escape liability through the provisions of this section: *Wright v. Schmidt*, 47–233.

SEC. **3852. Judgment on bond rendered on motion.** After final judgment has been rendered in an action in which security for costs has been given as above required, the court may, on motion of the defendant or any other person having the right to such costs or any part thereof, render judgment summarily, in the name of the defendant or his legal representatives, against the sureties for costs, for the amount of costs adjudged against the plaintiff, or so much thereof as may remain unpaid. [C.'73, § 2932; R., § 3447.]

CHAPTER 16.

OF COSTS.

SECTION **3853. Recoverable by successful party.** Costs shall be recovered by the successful against the losing party. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court on rendering judgment may make an equitable apportionment of costs. [C.'73, § 2933; R., § 3449; C.'51, § 1811.]

When taxable to plaintiff; Where defendant's answer was in effect a counter-claim, and he was successful thereon, *held*, that the costs incurred by reason of the trial of such issue should be taxed to plaintiff: *Judd v. Day*, 50–247.

Where, as to the matter in litigation, defendant was successful, but was ordered to pay off a claim upon the property involved which was acquired by plaintiff pending the suit, *held*, that no costs appearing to have been incurred as to the repayment of such claim, it was proper to tax costs to plaintiff: *Semple v. McCrary*, 46–37.

Where the merits of a proceeding by injunction were found substantially against plaintiff, *held*, that the costs were properly taxed against him, although as to a matter which might have been corrected without action he was successful: *Tredway v. McDonald*, 51–663.

Under the peculiar circumstances of a particular case, *held*, that the costs were properly taxed to plaintiff: *Bare v. Wright*, 23–101.

In an equitable action under § 1440 to redeem from a tax sale, the costs of establishing the right to redeem should be taxed to and paid by plaintiff as a part of the expense of making the redemption: *Serrin v. Brush*, 74–489.

Where defendant admitted plaintiff's claim, and the only contest was on a counter-claim in which defendant was successful, *held*, that plaintiff should pay all costs excepting those for commencing action and entering judgment for balance found due him: *Hall v. Clayton*, 42–526. See, also, *Judd v. Day*, 50–247.

Where in an action for specific performance and other relief it was found that plaintiff was entitled only to recover a sum of money paid in part performance of a contract to purchase land which the vendor had rightfully rescinded, and vendor had, when vendee tendered the balance of the purchase-money, offered to repay the amount received and it was found that vendee was entitled only to the return of the money paid, *held*, that there should be no recovery of costs: *Ellsworth v. Randall*, 78–141.

Costs against defendant: Where plaintiff sought, by motion, to have a judgment which had been discharged restored, and defendant resisted, *held*, that upon the sustaining of the motion all of the costs should have been taxed against the defendant: *Kanke v. Herrum*, 48–276.

Where plaintiff sought to set aside a tax title for fraud, and offered to pay the amount justly due from him to the owner of such title, and succeeded in the action, *held*, that costs should be taxed against defendant notwithstanding judgment was entered in his favor for taxes, interest and penalties: *Springer v. Bartle*, 46–688.

In a proceeding to subject defendant's property to the lien of a judgment for damages for the sale of intoxicating liquors thereon by a tenant, although defendant is not personally liable, yet if he resists the relief asked, costs may properly be taxed against him: *McVey v. Monatt*, 80–132.

Where the unsuccessful party secures a reversal on appeal and a new trial, but is ultimately unsuccessful, it is proper to tax the entire costs to such party, notwithstanding the success of the first appeal: *Palmer v. Palmer*, 66 N.W., 734.

Although an uncontested counter-claim is interposed by defendant, and plaintiff's amount of recovery is thereby reduced, it is not error to tax the costs to the defendant: *Brattebo v. Tjiernagel*, 91–283.

These provisions as to apportionment of costs do not apply to criminal cases, and where defendant is convicted even of a lower degree of the offense with which he is charged or of an included offense, the costs should be taxed against him: *State v. Belle*, 92–258.

Disclaimer: A party who, having filed a disclaimer of interest and moved to be dismissed, after such motion is denied contests plaintiff's right to recover, and is defeated, is liable for costs notwithstanding such disclaimer: *Wilcox v. Goldsmith*, 44–573.

In action by minor: In an action for an infant by his next friend, such "next friend" is liable for costs: *Vance v. Fall*, 48–364.

In an action by a minor in his own name a valid judgment for costs may be rendered against him: *Albee v. Winterink*, 55–184.

In action against administrator: Where, in an action by the widow against the administrator of her deceased husband's estate, the administrator did not defend, but counsel appearing for the heirs defended in his name and plaintiff secured judgment, *held*, that the costs of the suit should not be taxed against the estate, but against the heirs in whose behalf the defense was conducted: *Drummond v. Irish*, 52–41.

In probate proceedings: Costs in a proceeding to probate a will where the will is not admitted to probate should not be taxed against proponents if the result is not due to undue influence exercised by them, but to want of testamentary capacity: *Meeker v. Meeker*, 74–352.

Judgment: Where a court has jurisdiction to render judgment it may also render a valid judgment for costs: *Sprott v. Reid*, 3 G. Gr., 489.

One who is served with notice of an action which does not state that no personal claim is made against him cannot, after default and judgment against him for costs, have such judgment corrected or inquired into by an injunction. Having the power to render such judgment, the court's action can only be corrected by motion or on appeal: *Davis v. Keith*, 23–419.

A provision in a judgment for the recovery of costs by the successful party against his adversary is an adjudication with reference thereto: *Fairbairn v. Dana*, 68–231.

And the correctness of such determination cannot be urged by motion to retax the costs: *Ibid.*

If costs are erroneously taxed, it is the duty of the party against whom they are taxed to apply to the court for a retaxation, and without such application he cannot raise the question in the supreme court on appeal: *Allen v. Seaward*, 86–718.

In a contest as to the probate of a will,

where the party seeking the probate does not act in the capacity of executor, but in his own interests, and is unsuccessful, the costs are to be taxed to him: *Ibid.*

SEC. **3854. Apportionment.** In actions where there are several plaintiffs or several defendants, the costs shall be apportioned according to the several judgments rendered; and where there are several causes of action embraced in the same petition, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant upon those determined in his favor. [C.'73, § 2934; R., § 3451.]

When proper: While these provisions as to apportioning costs refer primarily to a case where the petition embraces several causes of action, or where several issues are joined thereon, or upon new matter in the answer, they may include a case where plaintiff recovers upon his demand, and defendant in whole or in part upon his counter-claim: *Arthur v. Funk*, 22–238.

Where plaintiff sued defendant for assault and battery and slander, and defendant defended and also set up a counter-claim for slander, and the jury returned a verdict of ten dollars for plaintiff for the assault and battery and a like amount for defendant for slander, *held*, that the action of the court below in taxing certain unnecessary costs to one party and dividing the balance equally between them was proper, it being impossible to assort the witnesses and apportion the costs on each issue tried: *Ferguson v. Thorpe*, 54–422.

Where plaintiff asked the reformation of a deed, but the relief granted was only a portion of that asked, *held*, that the claim was not indivisible and that an apportionment of the costs was proper: *Strayer v. Stone*, 47–333.

In an action before a justice upon four separate items, plaintiff recovered judgment, but upon appeal he obtained a general verdict for a less amount; *held*, that the case was a proper one for apportionment of costs, and that §§ 4564, 4565, as to costs in cases of appeal from justices, did not prevent such apportionment: *Howder v. Overholser*, 48–365.

In an action for the recovery of certain articles of specific personal property, where plaintiff recovered as to certain articles and failed as to others, *held*, that an apportionment of costs was proper: *Whitaker v. Sigler*, 44–419.

So *held*, also, where plaintiff failed as to a part of his demand, and had increased the costs by bringing his action in equity, when, as to a part of his claims, an action might have been brought at law: *Hatch v. Judd*, 29–95.

Where a number of witnesses were summoned by plaintiff and in attendance, to testify touching an issue presented by the pleadings, and the defendant, just before the impaneling of a jury, withdrew his answer and thereby rendered the testimony of such witnesses unnecessary, *held*, that although defendant was successful in the suit, it was proper to tax up a portion of the costs against him: *Whitney v. Hackney*, 20–460.

Equitable apportionment of costs made in a particular case: *Starr v. Case*, 59–491.

As to apportionment of costs of compensation of a receiver, see *French v. Gifford*, 31–428.

Where plaintiff's claim is indivisible and he recovers a portion of the amount claimed, the costs should be taxed to defendant. There is no ground in such case for apportionment: *Upson v. Fuller*, 43–409.

Where two causes of action are submitted and decided and the evidence relates to one as much as to the other the costs of the witnesses are not to be apportioned on account of the success of the defendant as to one of such issues: *McGuire v. Montrose*, 70 N.W., 743.

Where plaintiff recovers the whole of his claim, an apportionment of costs should not be made: *Drummond v. Irish*, 52–41.

Nor should apportionment be made when recovery is had for less than his claim, if the claim is indivisible: *Hammond v. Sioux City & P. R. Co.*, 49–450.

Failure of plaintiff to recover a portion of the amount claimed does not exempt the defendant from liability for any part of the costs unless there was a tender made and pleaded, or an offer to permit judgment to be entered for a sum equal to or greater than the amount of the judgment finally entered: *Rand v. Wiley*, 70–110.

Where in an action of replevin defendant establishes a lien upon the property there is no occasion for apportioning the costs although the amount of his lien is less than the value of the property or less than the amount claimed by him: *Harvey v. Pinkerton*, 70 N.W., 192.

Where plaintiff obtains relief in part, the costs may properly be charged to defendant in the discretion of the court: *Burton v. Mason*, 26–392.

Where final judgment is rendered for defended upon a voluntary nonsuit or plea in abatement, there should not be an apportionment of costs: *Hyde v. Cole*, 1–106.

Where plaintiff sued to redeem in equity from a tax sale and deed, and offered to pay such amount as should be found due defendant, but did not tender any specific sum, the amount to be paid not being ascertainable in advance, *held*, that it was not error to tax one-half the costs to defendant: *Elliott v. Parker*, 72–746.

Where certain costs in an action in equity would not have been necessary except for the laches of the party in failing to rescind as early as he might have done and before the making of improvements, *held*, that he could not complain of the apportionment of costs, even though he was successful: *McMurray v. Day*, 70–671.

Where the verdict is for defendant, but in a less amount than he appears entitled to on a counter-claim, to the extent of plaintiff's claim, and it does not appear that plaintiff could have secured his rights in the matter except by suit, there should be an apportionment of the costs: *Gravel v. Clough*, 81–272.

Where defendant admitted plaintiff's

claim and interposed counter-claims, but the costs of the trial resulted from attempting to establish a claim which was not allowed, *held*, that an apportionment of costs was properly denied: *Smith v. Hess*, 83-238.

Where a party brings an action founded on separate items of demand, and recovers on part of them, the court may in its discretion apportion the costs. But where the cause of action is a single claim, the reduction in the amount does not entitle the losing party to an apportionment. So where a constable brought suit against the county for fees, and the county set up the defense of settlement as to a particular part of the account, and plaintiff recovered only on a portion of the items, *held*, that apportionment of costs was proper: *Potts v. Polk County*, 80-401.

The issue as to matter in mitigation is not an issue within the meaning of this section so as to authorize an apportionment of costs where the amount of damages is reduced on account of matter pleaded in mitigation: *McGuire v. Montrose*, 70 N.W., 743.

Where there is no request for apportionment the action of the lower court in this respect will not be interfered with on appeal: *Fuller v. Griffith*, 91-632.

Where an action was brought against several defendants as jointly liable for a tort, and plaintiff recovered judgment against all but one of such defendants, and it did not appear that any portion of the costs was incurred on account of any special defense by the defendant not liable, *held*, that there was no occasion for apportionment of costs, and that the judgment against the defendants should include all the costs of the action: *Johnson v. Miller*, 93-165.

Discretionary: An order apportioning the costs will not be interfered with on appeal where the record does not show the basis on which the order was made below: *Brinck v. Neiweg*, 29-444.

The order as to costs is largely discretionary, and where no abuse of discretion is apparent the action of the court below will not be disturbed on appeal: *Boone County v. Wilson*, 41-69; *Harvey v. Pinkerton*, 70 N.W., 192.

The question of costs rests very largely in the sound discretion of the trial court. Where a petition embraced several distinct charges, amounting to $249, and plaintiff recovered only $5, *held*, that it was not error to assess one-third of the costs against him: *Andrews v. Zimmerman*, 42-708.

The apportionment of costs in certain cases is in the discretionary power of the trial court, and that discretion will not be interfered with on appeal unless an improper exercise thereof is shown: *Bush v. Yeoman*, 30-479.

The presumption in regard to the action of the court as to apportionment of costs is in favor of the correctness of such action, and the ruling will not be disturbed on appeal unless all the facts and circumstances are before the court, and it is manifest that the ruling is wrong: *Koestenbader v. Peirce*, 41-204.

When the record does not disclose the facts or circumstances attending the trial, the action of the lower court in refusing to tax in defendant's favor costs accrued in support of his cross-claim, only a small portion of which was established, will be presumed to have been based upon sufficient reasons: *Arthur v. Funk*, 22-238.

The mere fact that a decree in favor of the defendants directed that they pay the costs in the first instance, to be afterward recovered by them of the plaintiffs, *held* not of itself sufficient to warrant a reversal, when the facts on which the court acted were not shown: *Scott's Adm'rs v. Cole*, 27-109.

Action of the court in apportioning costs will be presumed to have been in accordance with facts appearing to the court: *Minnesota Stoneware Co. v. Knapp*, 75-561.

SEC. 3855. Collection. All costs accrued at the instance of the successful party, which cannot be collected of the other party, may be recovered on motion by the person entitled to them against the successful party. [C. '73, § 2935; R., § 3452.]

The judgment, so far as it covers costs, is for the use of the parties entitled to such costs, and the successful party has no interest in that part of the judgment except in so far as such costs have been paid by him; therefore a payment to him of the costs covered by the judgment will not release his judgment debtor from the claims of parties entitled to such costs: *McConkey v. Chapman*, 58-281.

The party against whom the judgment is rendered is primarily liable for all the costs to the parties entitled thereto. They may issue their fee bill therefor, and failing in that they may, by motion, require the successful party to pay such of the costs as accrued at his instance, as provided in this section. The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered: *Ibid.*

Officers and witnesses entitled to fees in a case cannot have process issued for the collection of such fees. The judgment is subject to the control of the party in whose favor it is rendered: *Ex parte Hampton*, 2 G. Gr., 137.

If fees are unreasonably delayed in their collection the person entitled thereto may proceed against the party liable: *Ibid.*

The preceeding by a motion for the collection of costs as contemplated by this section is a proceeding for the recovery of a money judgment and will be barred in five years under the statute of limitations. The costs cannot be tacked to the judgment so as to suspend the operation of the statute of limitations; and even if the remedy by motion were exclusive, the officer could not, by omitting to cause a fee-bill to be issued, prolong the statutory period: *State Ins. Co. v. Griffin*, 84-602.

SEC. **3856. What included in.** The necessary fees paid by the successful party in procuring copies of deeds, bonds, wills or other records filed as a part of the testimony shall be taxed in the bill of costs. [C.'73, § 2936; R., § 3453.]

SEC. **3857. Postage.** Postage paid by the officers of the court, or by the parties, in sending process, depositions, and other papers being part of the record, by mail, shall be taxed in the bill of costs. [C.'73, § 2937; R., § 3454.]

SEC. **3858. Defense arising after action brought.** When a pleading contains as a defense matter which arose after the commencement of the action, whether such matter of defense is pleaded alone or with other matter of defense which arose before the action, the party affected by such matter may confess the same, and shall be entitled to the costs of the action to the time of such pleading. [C.'73, § 2938; R., § 3455.]

SEC. **3859. On dismissal of action or abatement.** When a plaintiff dismisses the action or any part thereof, or suffers it to abate by the death of the defendant or other cause, or where the action abates by the death of the plaintiff, and his representatives fail to revive the same, judgment for costs may be rendered against such plaintiff or representative, and, if against a representative, shall be paid as other claims against the estate. [C.'73, § 2939; R., § 3456.]

Plaintiff is liable not only for costs taxed at the time of such dismissal, but for all costs properly taxed in the case: *Acres v. Hancock*, 4–568.

SEC. **3860. Between co-parties.** Co-parties against whom judgment has been recovered are entitled, as between themselves, to a taxation of the costs of witnesses whose testimony was obtained at the instance of one of the co-parties and inured exclusively to his benefits. [C.'73, § 2940; R., § 3457.]

SEC. **3861. When dismissed for want of jurisdiction.** Where an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs shall be adjudged against the party attempting to institute or bring up the same. [C.'73, § 2941; R., § 3458.]

SEC. **3862. Clerk to tax.** The clerk shall tax in favor of the party recovering costs the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow. [C.'73, § 2942; R., § 3459.]

The court may tax in addition to compensation for services specially mentioned a further sum for other matters when deemed just. Thus, *held*, that the cost of writing down the testimony by a person appointed by the court for that purpose, on agreement of the parties, might be taxed as costs: *Kuhnlee v. Independent Dist.*, 36–99.

But this section affords no warrant for taxing up as costs any fee for officers, except it is allowed by law: *Sprout v. Kelly*, 37–44.

The losing party may be taxed with costs of witness fees for witnesses who were properly subpœnaed and attended the trial, although they gave no material evidence. The fact that a witness does not give material evidence in a case is no reason why his fees should not be taxed to the losing party. It may be proper and necessary to summon witnesses whose evidence afterwards becomes immaterial and unnecessary: *Hanners v. McClelland*, 74–318.

A party who is called upon to produce his books is not entitled to have taxed as costs in his favor the expense of making a statement showing the condition of accounts appearing therein: *McNider v. Sinine*, 84–745.

The costs to be taxed for taking depositions are the fees allowed by statute in this state and not the fees allowed according to the laws of the state where the depositions are taken, if taken out of the state: *Ibid.*

The costs of a transcript of the reporter's notes, when required for the purpose of taking an appeal, may properly be taxed as costs in the case: *Palmer v. Palmer*, 66 N. W., 734. And see § 3775.

As to taxing jury fees, see § 3872.

SEC. **3863. When cause of action assigned.** In actions in which the cause of action shall, by assignment after the commencement thereof, or in

any other manner, become the property of a person not a party to the action, such party shall be liable for the costs in the same manner as if he were a party. [C.'73, § 2943; R., § 3460.]

SEC. **3864. Retaxation.** Any person aggrieved by the taxation of a bill of costs may, upon application, have the same retaxed by the court, or by a referee appointed by the court in which the application or proceeding was had, and in such retaxation all errors shall be corrected; and if the party aggrieved shall have paid any unlawful charge by reason of the first taxation, the clerk shall pay the costs of retaxation, and also to the party aggrieved the amount which he may have paid by reason of the allowing of such unlawful charges. [C.'73, § 2944; R., § 3461; C.'51, § 1813.]

The ruling on a motion to retax costs because certain costs taxed in the case were unnecessary cannot be reviewed where it is not affirmatively shown to what extent, if at all, unnecessary costs were taxed: *Toohey v. Lowell*, 68–661.

A motion to retax costs cannot be made in the lower court while the case is pending in the supreme court on appeal: *Levi v. Karrick*, 15–444.

The court may, in determining the matter of costs, consider affidavits and counter-affidavits, or may require the affiants brought in and subjected to examination and cross-examination: *Packer v. Packer*, 24–20.

A motion to retax costs should be filed in the case in which the costs are originally taxed, and not in connection with an action to set aside the judgment in such case: *Jackson v. Gould*, 65 N.W., 406.

SEC. **3865. Bill of costs filed on appeal.** In cases of appeals from the district court, the clerk, if final judgment is rendered in the supreme court, shall make a complete bill of costs in the court below which shall be filed in the office of the clerk of the supreme court and taxed with the costs in the action therein. [C.'73, § 2945; R., § 3462.]

SEC. **3866. Costs in supreme court.** When the costs accrued in the supreme court and the court below are paid to the clerk of the supreme court, he shall pay so much of them as accrued in the court below to the clerk of said court, and take his receipt therefor. [C.'73, § 2946; R., § 3463.]

As to taxation of costs on appeal see notes to § 4142.

SEC. **3867. Duty of clerk below.** On receiving such costs, the clerk of the court below shall charge himself with the money and pay it to the persons entitled thereto. [C.'73, § 2947; R., § 3464.]

SEC. **3868. Interest.** When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto. [C.'73, § 2948; R., § 3466.]

See notes to § 3038.

SEC. **3869. Attorneys' fees—when taxed as costs—amount.** When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs, on the first two hundred dollars or fraction thereof recovered, ten per cent.; on the excess of two hundred to five hundred dollars, five per cent.; on the excess of five hundred to one thousand dollars, three per cent.; and on all sums in excess of one thousand dollars, one per cent. If action is commenced and the claim paid off before return day, the amount shall be one-half of the sum above provided, and if it is paid after the return day but before judgment, three-fourths of said sum; but no fee shall be allowed in any case if an action has not been commenced, or expense incurred, nor shall any greater sum be allowed, any agreement in the contract to the contrary notwithstanding. [18 G. A., ch. 185, §§ 1, 2.]

Contract for, valid: A stipulation in a contract or note for the payment of an attorney's fee in case action shall be brought thereon is valid: *Kuhn v. Myers*, 37–351; *Shugart v. Pattee*, 37–422. So in case of mortgage: *Williams v. Meeker*, 29–292.

If the note is usurious an attorney's fee provided for therein cannot be recovered: *Miller v. Gardner*, 49–234.

Does not affect negotiability: Such a provision in a note does not destroy its negotiability: *Sperry v. Horr*, 32–184; *Shenandoah Nat. Bank v. Marsh*, 89–273.

Surety liable for: A surety on a note pro-

viding for attorneys' fees is liable therefor: *First Nat. Bank v. Breese*, 39–640.

What is bringing of action: Where a note provided for taxation of reasonable attorneys' fees for collection if an action should be brought thereon, *held*, that a resort to legal proceedings was contemplated as the occasion for taxing such fee, and that filing the note as a claim against the estate of the maker, and proving it as such claim, was sufficient to warrant the allowance of the fee: *Davidson v. Vorse*, 52–384.

These provisions as to allowance of attorney fees seem to apply to actions pending in court and not to foreclosure of mortgages upon notice and sale: *Aultman & Taylor Co. v. Shelton*, 90–288.

This section does not authorize the taxation of an attorney's fee when the judgment is rendered by confession: *Dullard v. Phelan*, 83–471.

Where several notes were in litigation before one of them was due, and the maker was entitled to a set-off on the note which would necessarily have to be abandoned if it was paid before maturity, *held*, that plaintiff could not be said to be in default on the note, or that suit had been brought to collect it, and attorney's fees should not be allowed: *Otcheck v. Hostetter*, 77–509.

Liquidated damages: Where the contract or note specifies the amount to be taxed as attorney's fees, the amount thus specified is not in the nature of a penalty, but is liquidated damages, for which recovery may be had without proof of the reasonable value of the services: *McIntire v. Cagley*, 37–676.

Evidence of value: Upon default in an action upon a note providing for the allowance of reasonable attorneys' fees it is error to allow an amount for such fees without evidence as to their value: *First Nat. Bank v. Krance*, 50–235.

Attorney's testimony: The testimony of plaintiff's attorney as to the value of his services in an action on a contract providing for the allowance of attorneys' fees will, in the absence of other evidence, be taken as establishing such value; and the court will not, for itself, judge of the value of such services: *Schlicht v. Stivers*, 61–746.

Pleading: Where the claim for attorneys' fees is in a separate count of the petition an answer to that count will not be regarded as putting in issue the averments of the other counts: *Musser v. Crum*, 48–52.

Where the provision is for the allowance of a reasonable amount as attorney's fees it is not necessary in the petition to aver what is a reasonable amount: *Nelson v. Everett*, 29–184.

Actual fee alone taxed: Whether the note provides for a fixed sum or a reasonable fee no more can be taxed than the actual fee. It is not by such agreement intended that the party shall, in any event, have any part of the fee taxed: *White v. Lucas*, 46–319.

Collusive taxation of excessive fee: Where, apparently to reduce the balance which would remain after satisfaction of the mortgage, and be subject to a judgment lien, it was agreed between defendant and plaintiff's attorney in a foreclosure suit that a larger amount than the attorney claimed should be taxed as attorney's fee, and the excess returned to defendant, *held*, that action by defendant to recover such excess from the mortgagee purchasing under the foreclosure could not be maintained: *Remley v. Johnson County Savings Bank*, 52–575.

Provision in mortgage: Where the provision authorizing the taxation of attorneys' fees is in the mortgage and not in the note secured, judgment for the fee should be against the mortgagor alone and not against parties who are liable on the note but are not parties to the mortgage: *Floyd County v. Morrison*, 40–188.

Usury: A stipulation for attorney's fee does not render a contract usurious: *Nelson v. Everett*, 29–184.

Not retroactive: This section does not apply to contracts made before it took effect: *McCormick v. Jacobson*, 77–582.

Taxed as costs; not assessed by jury: Attorneys' fees provided for in a contract are to be treated as costs in the action and not as part of the amount in controversy: *Spiesberger v. Thomas*, 59–606.

The defendant is not entitled to have the amount thereof assessed by jury: *Musser v. Crum*, 48–52.

But where the parties consent, or fail to object, to a submission of the matter to the jury, they cannot be heard afterward to say that the trial was not in the proper tribunal: *Dent v. Smith*, 53–262.

The taxation of the fee is an independent matter, and may be made after the services in the case are concluded. Therefore, where a motion to tax attorney's fee was not made until after taking appeal, *held*, that such taxation was improper at that time, and should be postponed until the termination of the appeal: *Mason v. Searles*, 56–532.

The amount of attorneys' fees to be taxed may be determined after the trial and decision of the case; and where it appears that they have been thus taxed, it will be presumed on appeal, in the absence of any showing on the subject, that there was evidence to support such taxation, and that the judgment was in accordance therewith: *Kelso v. Fitzgerald*, 67–266.

No evidence as to what is a reasonable fee is required; the amount due on the instrument being ascertained, the fee authorized may be fixed by the court without other proof of what is reasonable than that contained in the record of the case: *Cook v. Gilchrist*, 82–277.

SEC. **3870. Not to be divided—affidavit.** The attorney's fee allowed in the preceding section shall not be taxed in any case unless it shall appear by affidavit of the attorney, filed with the petition at the commencement of the action, that there has been, and is, no agreement between such attorney and his client, express or implied, nor between him and any other person, except a practicing attorney engaged with him as an attorney in the cause,

for any division or sharing of the fee to be taxed, which, when taxed, shall be only in favor of a regular attorney and as compensation for services actually rendered in the action. [Same, § 3.]

The attorney's affidavit required by statute, that there is no agreement to divide the fee, is not evidence to be introduced by the plaintiff; it is rather a condition precedent to be performed by the attorney before the attorney's fee can be allowed in his favor: *Spiesberger v. Thomas*, 59-696.

Such affidavit should be filed with the original petition; that is, at the same time that the original petition is filed: *Wilkins v. Troutner*, 66-557.

Where the attorney who commences the action files an affidavit at the time of filing the petition and afterwards upon his withdrawing from the case, another attorney being substituted such second attorney files an affidavit, the last affidavit may be treated as an amendment to the former one and the two together will support the allowance of attorney fees: *Fletcher v. Kelly*, 88-475.

The attorney's fee must be disallowed where the affidavit is not filed: *Sweney v. Davidson*, 68-386.

A requirement that an attorney shall file an affidavit that he has not directly or indirectly received any compensation for his service from any source must be complied with; it is not sufficient that his affidavit states that the claim is just and true: *Ryce v. Mitchell County*, 65-447.

The allowance of attorneys' fees will not be held erroneous on the ground that no affidavit was filed in the lower court, where the abstract does not show on appeal whether the affidavit was filed or not: *Mills County Nat. Bank v. Perry*, 72-15.

These provisions as to filing affidavit, as well as the other provisions of this statute, are not applicable to contracts made before its passage: *Eikenberry v. Edwards*, 71-82.

An affidavit in a particular case *held* sufficient to support the finding of the court that there was no unlawful agreement and that fees might properly be allowed under the terms of the note: *Black v. De Camp*, 78-718.

The affidavit of one member of a firm of attorneys is sufficient under this section: *Cook v. Gilchrist*, 82-277.

SEC. **3871. Opportunity to pay.** No such attorney fee shall be taxed if the defendant is a resident of the county and the action is not aided by an attachment, unless it shall be made to appear that such defendant had information of and a reasonable opportunity to pay the debt before action was brought. This provision, however, shall not apply to contracts made payable by their terms at a particular place, the maker of which has not tendered the sum due at the place named in the contract. [Same, § 4.]

Where a note was made payable in Boston, Mass., but no particular place was specified and no notice was given to the maker as to the party to whom the note was transferred, and no demand was made before suit, *held*, that nevertheless the maker was liable to attorney fees by reason of having resisted the payment of the note: *Livermore v. Maxwell*, 87-705.

SEC. **3872. Jury fees taxed as costs.** There shall be taxed, in every action tried in a court of record by a jury, a jury fee of six dollars, which, when collected, shall be paid by the clerk into the county treasury; all such fees, not previously reported, to be by him reported to the board of supervisors at each regular session, and by it charged to the treasurer. [16 G. A., ch. 39; 15 G. A., ch. 32; C.'73, § 3812.]

SEC. **3873. Compensation of arbitrators.** Arbitrators shall be paid, for each day actually and necessarily engaged in their official duties, two dollars, or such greater sum as the parties to the arbitration agree upon. [C.'73, § 3834; R , § 3691; C. '51, § 2114.]

SEC. **3874. Of referees.** Referees, acting under a submission by a court in an action pending therein, shall receive such compensation as is fixed by the court or judge, or agreed upon by the parties to the action, which shall be taxed as a part of the costs therein. [Same.]

SEC. **3875. Of reporters and clerks for transcripts.** The fees of shorthand reporters for making transcripts of the notes in any case or any portion thereof, as directed by any party thereto, shall be taxed as costs, as shall also the fees of the clerk for making any transcripts of the record required on appeal, but such taxation may be revised by the supreme court on motion on the appeal, without any motion in the lower court for the retaxation of costs.

The transcript of the reporter's notes was held properly taxable as costs before the enactment of this provision: See *Palmer v. Palmer*, 66 N.W. 734. See, also, notes to § 4142.

TITLE XIX.

OF ATTACHMENTS, GARNISHMENT, EXECUTIONS, AND SUPPLEMENTARY PROCEEDINGS.

CHAPTER 1.

OF ATTACHMENTS.

SECTION **3876. Method.** The plaintiff in a civil action may cause the property of the defendant not exempt from execution to be attached at the commencement or during the progress of the proceeding, by pursuing the course hereinafter prescribed. [C.'73, § 2949; R., § 3172; C.'51, § 1846.]

In equitable actions: An attachment may issue in an equitable proceeding as well as in an action at law: *Baldwin v. Buchanan*, 10-277; *Crouch v. Crouch*, 9-269.

In an equitable action by one partner against another to recover the amount due on partnership account, plaintiff may have an attachment, if there are proper grounds, although he may also be entitled to a receiver: *Curry v. Allen*, 55-318.

An attachment may issue in an action by one partner against another, in equity, for an accounting, it being claimed that there is a balance due: *Hansen v. Morris*, 87-303.

Against one of several defendants: In an action against several defendants, the plaintiff may have an attachment against any as to whom there are proper grounds therefor, without regard to whether there are any grounds as to the others or not. (Overruling *Courrier v. Cleghorn*, 3 G. Gr., 523; *Ogilvie v. Washburn*, 4 G. Gr., 548): *Chittenden v. Hobbs*, 9-417; *Austin v. Burgett*, 10-302.

Where there are several defendants, the property of a nonresident defendant may be attached, it being shown that the resident defendants are insolvent: *Smith v. Coopers*, 9-376.

A debtor who has made a fraudulent conveyance is regarded as a *cestui que trust* having an interest in the trust property which may be attached in a civil action: *Taylor v. Branscombe*, 74-534.

By landlord against property of tenant to enforce landlord's lien for rent, see § 2993.

When action deemed commenced: Under the statute allowing an attachment "at the commencement or during the progress of the proceeding," the action may be regarded as commenced as soon as the petition is filed, and before notice is placed in the hands of the sheriff, or served: *Hagan v. Burch*, 8-309.

Where it appears that the original notice and attachment were issued at the same time, it will be considered that the suit was commenced before the issuance of the attachment: *Nuckols v. Mitchell*, 4 G. Gr., 432.

So, where the filing of petition and issuance of writ bear the same date, it will be presumed that the writ was issued after the filing of the petition: *Pitkins v. Boyd*, 4 G. Gr., 255.

Return of "not found" unnecessary: In case of attachment against a nonresident it is not necessary that the return of "not found" be made before issuance of attachment: *Elliott v. Stevens*, 10-418.

Where brought: Proceedings by attachment against a resident are, by § 3495, required to be brought in the county of the defendant's residence or the county in which the contract is to be performed, and if they are brought in another county the attachment will be invalid and should be dismissed, even if the case is, upon application of defendant, transferred to the county of his residence: *Wasson v. Millsap*, 70-348.

Though an action be not brought in the proper county as required by § 3495, an attachment in such action will be voidable only, and not void, and the objection cannot be taken advantage of by other attaching creditors: *Payne v. Dicus*, 88-423.

Service by publication, see § 3534.

SEC. **3877. Proceedings auxiliary.** If it be subsequent to the commencement of the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto. [C.'73, § 2950; R., § 3173; C.'51, § 1847.]

Separate petition: Even when the attachment is asked at the beginning of the action it is not improper to file a separate petition setting forth the grounds of the attachment: *Shapleigh v. Roop*, 6-524; but it is not necessary: *Van Winkle v. Stevens*, 9-264; *Shaffer v. Sundwall*, 33-579.

The attachment and the suit are distinct, and any irregularity in the former will not affect the latter: *Elliot v. Mitchell*, 3 G. Gr., 237.

Amount due: If the amount due is stated in the body of the petition asking judgment, it need not be repeated in that part asking the writ. It is not essential that the portion of the petition asking an attachment be separate and distinct from that in the main cause and contain all the essential averments: *Shaffer v. Sundwall*, 33–579.

SEC. **3878. Grounds—not stated in alternative.** The petition which asks an attachment must in all cases be sworn to. It must state one or more of the following grounds:

1. That the defendant is a foreign corporation or acting as such;
2. That he is a nonresident of the state;
3. That he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts;
4. That he has disposed of his property, in whole or in part, with intent to defraud his creditors;
5. That the defendant is about to dispose of his property with intent to defraud his creditors;
6. That he has absconded, so that the ordinary process cannot be served upon him;
7. That he is about to remove permanently out of the county, and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff;
8. That he is about to remove permanently out of the state, and refuses to pay or secure the debt due the plaintiff;
9. That he is about to remove his property or a part thereof out of the county with intent to defraud his creditors;
10. That he is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors;
11. That he has property or rights in action which he conceals;
12. That the debt is due for property obtained under false pretenses.

The causes for the attachment shall not be stated in the alternative. [C. '73, §§ 2951, 3021; R., §§ 3174, 3242; C.'51, § 1848.]

I. IN GENERAL.

Verification: The verification of the petition may be by a person other than the plaintiff without any peculiar means of knowledge as to the facts being shown: *Pitkins v. Boyd*, 4 G. Gr., 255.

But it is desirable that the means of knowledge of such party be shown: *Bates v. Robinson*, 8–318.

Affidavit by plaintiff's attorney, stating a knowledge on his part of the facts, *held* sufficient; *Chittenden v. Hobbs*, 9–417.

It is not required under this section as it is under § 3583 that a verification by plaintiff's attorney must show that he had knowledge of the statements contained in the petition: *Sioux Valley State Bank v. Kellog*, 81–124.

If the petition is actually sworn to, the fact that the jurat is not signed by the officer administering the oath will not invalidate subsequent proceedings: *Cook v. Jenkins*, 30–452.

Attachments must be asked for in the petition: *Dawson v. Jewett*, 4 G. Gr., 157; *Queen v. Griffith*, 4 G. Gr., 113.

Amendments to petition are allowable which do not interpose any new cause of action and will not affect the attachment: *McCarn v. Rivers*, 7–404.

But that an amended petition shall support an attachment already issued, the petition as amended must state the cause to have existed at the date of the attachment: *Wadsworth v. Cheeny*, 10–257; *Crouch v. Crouch*, 9–269; *Bundy v. McKee*, 29–253.

If the amendment changes the cause of action, and under the petition as amended no cause of attachment appears to have existed at the time of the issuance of the attachment, it will be deemed to have been wrongfully sued out: *Young v. Broadbent*, 23–539.

Amendments to the petition setting up no new ground of attachment, but merely making the original more specific, and to the bond as to the amount of the penalty, should be allowed: *Gourley v. Carmody*, 23–212.

The fact that after the suing out of an attachment the plaintiff by amendment to his petition sets up a cause of action in different form for the same indebtedness does not render the suing out of such attachment wrongful, it appearing that the real cause of action existed at the time the attachment was sued out. In such cases plaintiff cannot be required to elect between his two statements of the cause of action, and a recovery under the second will sustain the attachment so far as the existence of the indebtedness is concerned: *Cawker City State Bank v. Jennings*, 89–230.

Verification of amendment: Where the amendment does not change the ground of the attachment nor introduce a new cause of action, nor claim a greater amount, but is merely a new statement of the same cause, it need not be verified: *Hamill v. Phenicie*, 9–525.

Defective affidavit of verification to the petition may be cured by amendment: *Bunn v. Pritchard*, 6–56. *Langworthy v. Waters*, 11–

432; *Shaffer v. Sundwall*, 33-579; *Lowenstein v. Monroe*, 52-231. And see § 357.

Effect of amendment: A party is not to be prejudiced by any defects which are corrected by amendment: *Wadsworth v. Cheeney*, 13-576.

And the attachment should not be dissolved for such a defect after its correction: *Gourley v. Carmody*, 23-212.

Where, after the filing of a motion to quash for a defect in the affidavit, such defect is cured by amendment, the motion should not be sustained: *Stout v. Folger*, 34-71.

So, where the action of the lower court in overruling a motion to quash the attachment for a defect in the affidavit was reversed on appeal and the cause remanded, and thereupon the defect was cured by amendment, *held*, that the proceedings under the attachment were thereby rendered valid: *Stadler v. Parmlee*, 14-175.

Leave to amend: An order sustaining a motion to disolve an injunction will not be held erroneous because it contains no permission to plaintiff to amend, where the record fails to show that plaintiff asked for leave to amend: *Pittman v. Searcey*, 8-352.

As to amendment in general, see § 3933.

II. STATEMENT OF GROUNDS.

Following statute: In alleging the cause of attachment the petition need not follow the exact language of the statute. It is sufficient if there is a substantial compliance with its provisions, the requisite facts being clearly stated: *Drake v. Hager*, 10-556; *Crew v. McClung*, 4 G. Gr., 153.

Alternative: Two or more causes for attachment may be stated, but they cannot be stated in the alternative: *Stacy v. Stichton*, 9-399.

Nonresidence: The allegation that defendant is "not now an inhabitant of this state" is equivalent to saying that he is a "nonresident of the state:" *Wiltse v. Stearns*, 13-282.

A mere intention to remove from the state will not make a person who is an actual resident of the state a nonresident: *Mann v. Taylor*, 78-355.

An attachment issued upon the ground of nonresidence avails nothing, unless the defendant has property or debts owing to him in the state: *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76-172.

Therefore, *held*, that an action could not be maintained against a nonresident defendant by means of garnishment served in the state upon the carrier having property of defendant in its possession in course of transportation outside of the state: *Ibid.*

Removing property out of state: To justify an attachment on the ground that defendant is about to remove his property out of the state, etc., the contemplated removal must be of a permanent character, and not merely temporary: *Wurder v. Thrilkeld*, 52-134.

Where attachment is asked on that ground, an intention to defraud creditors need not be averred: *Branch of State Bank v. White*, 12-141; *Sherrill v. Fay*, 14-292.

Actual fraud need not exist in such cases: *Mingus v. McLeod*, 25-452.

Contemplated removal of property from state is not ground for attachment unless it also appears that sufficient is not left to pay debts: *State v. Morris*, 50-203.

Disposal of property with intent to defraud creditors is not shown by allegation of disposal "with intent to delay and hinder creditors and prevent and defeat them from the collection of their claims." An intention to defraud must be alleged to bring the case within that ground: *Torbert v. Tracy*, 12-20.

Evidence of intent to defraud: Where the ground is that defendant is about to dispose of his property with intent to defraud his creditors, the allegation should be predicated upon some indication by word or act warranting a reasonable belief that defendant is about to defraud his creditors: *Lewis v. Kennedy*, 3 G. Gr., 57.

Absconding: That defendant is absenting himself from the state does not alone constitute an absconding: *State v. Morris*, 50-203.

The fact that defendant appears to the action does not disprove the allegation that he has absconded: *Phillips v. Orr*, 11-283.

Contemplated removal: A partnership may have a residence distinct from the residence of its members, and an attachment may be sued out against it, on the ground that it is about to remove permanently out of the county of its residence, and has property there which is not exempt from execution, and refuses to pay or secure the plaintiff: *Ruthven v. Beckwith*, 84-715.

The surety on a partnership note may have ground of attachment against the partnership on account of contemplated removal and refusal to pay or secure a claim, although the surety has not paid the note: *Ibid.*

To make a contemplated removal and refusal to pay or secure the debt a ground for attachment, it must appear that defendant was not willing either to pay or secure: *Drummond v. Stewart*, 8-341.

Property obtained under false pretenses: Where defendants by false representations induced plaintiff to purchase land worth six hundred and forty dollars for twenty-two hundred and fifty dollars, *held*, that defendants were liable for the loss and damage, and their liability was a debt "due for property obtained under false pretenses," and an attachment was properly issued: *Stanhope v. Swafford*, 77-594.

Inconsistent grounds: The allegation, in stating one ground, that defendant has property not exempt from execution and refuses to pay or secure, and in stating another, that he has disposed of all his property with intent to defraud creditors, are not necessarily inconsistent and contradictory: *Holloway v. Herryford*, 9-353.

Sufficincy of grounds: As to how the allegations as to the grounds of attachment are to be contested, see § 3888 and notes.

SEC. **3879. Issued on Sunday.** Where the petition states, in addition to the other facts required, that the plaintiff will lose his claim unless the attach-

ment issues and is served on Sunday, it may be issued and served on that day. [C.'73, § 2952.]

By an amendment filed on Sunday the facts showing a necessity for serving the writ on that day may be shown although the writ has already been issued, and upon the filing of such amendment the sheriff will be authorized to give preference in making a levy on Sunday to the writ which was already in his hands over a writ first issued on Sunday: *Richards v. Schreiber*, 67 N.W., 569.

SEC. **3880. On contract—amount due.** If the plaintiff's demand is founded on contract, the petition must state that something is due, and, as nearly as practicable, the amount, which must be more than five dollars in order to authorize an attachment. [C.'73, § 2953; R., § 3175; C.'51, § 1849.]

Amount due: A writ of attachment should be quashed when the petition therefor founded on contract does not state that something is due, and as nearly as practicable the amount due: *Blakely v. Bird*, 12–601; *Kelley v. Donnelly*, 29–70.

It is the petition, and not the affidavit attached to it, which is to state the amount claimed to be due: *Chittenden v. Hobbs*, 9–417.

It is not necessary that the portion of the petition asking the attachment state the amount due when that amount is stated in the portion of the petition asking judgment: *Shaffer v. Sundwall*, 33–579.

But where the petition stating the cause of action on contract is not under oath, the sworn petition asking an attachment must state the amount due: *Blakely v. Bird*, 12–601.

Where the writ directed the sheriff to attach property to satisfy $3,700, that sum being made up as appeared by the petition of $1,000 due and $2,700 to become due in the future, "with interest, attorneys' fees and costs," *held*, that the amount to be levied on should be determined on the basis of $3,700 due without including any sum for the interest, attorney's fees and costs and that the writ was therefore sufficiently specific: *Toledo Savings Bank v. Johnston*, 90–749.

False statement as to amount due: That the amount sworn to as due is unconscionable and unreasonable is no ground for dissolving an attachment, although it may render plaintiff liable on his attachment bond: *Lord v. Gaddis*, 6–57.

In actions for tort: When the plaintiff's claim is not founded on contract he is not required to state in his petition the amount due: *Sherrill v. Fay*, 14–292. And see § 3882.

Nor is it required in such actions, as it is in actions on contract, that the amount sued for must exceed five dollars to authorize an attachment: *Weller v. Hawes*, 49–45.

In justice's court the amount must exceed five dollars: See § 4579.

SEC. **3881. Value of property to be attached.** The amount thus sworn to is intended as a guide to the sheriff, who must, as nearly as the circumstances of the case will permit, levy upon property fifty per cent. greater in value than that amount. [C.'73, § 2954; R., § 3176; C.'51, § 1850.]

SEC. **3882. Allowance of value in other cases.** If the demand is not founded on contract, the original petition must be presented to some judge of the supreme, district or superior court, who shall make an allowance thereon of the amount in value of the property that may be attached. [C.'73, § 2955; R., § 3177; C.'51, § 1851.]

Not necessary in actions on contracts: Where plaintiff's right of action arises out of contract, no allowance of the amount for which attachment may issue is necessary, although the case is one in which, under the common-law rules of pleading, an action in tort might have been brought: *McGinn v. Butler*, 31–160.

Unliquidated damages; penal bonds: If the action is on contract and not in tort, no allowance is necessary even though the damages are unliquidated. The distinction intended by the statute is that between actions arising *ex contractu* and those arising *ex delicto*. Therefore, no allowance is necessary in an action on a penal bond: *Lord v. Gaddis*, 6–57.

Action on judgment: Where a judgment has been recovered for a tort, the cause of action on such judgment is no longer *ex delicto*, but is *ex contructu*, and the amount due being properly stated, no allowance is required: *Johnson v. Butler*, 2–535.

Action to recover penalty: No allowance is required in an action to recover a liquidated sum as a forfeiture provided by a penal statute or ordinance, the remedy being by action of debt: *Decorah v. Dunston*, 34–360.

In actions for tort: An attachment under any circumstances in actions for tort is not allowed in many of the states; and never, unless under some restrictions other than those provided in actions on contract; and hence, under our Code, an allowance is required of the amount of property to be attached which is not required in actions on contract: *Raver v. Webster*, 3–502.

Conversion: Actions for tortious conversion of property still in possession of defendant cannot be considered as on contract, and an allowance is necessary: *Moses v. Arnold*, 43–187.

False representations: An action for damages for false representations as to the soundness of sheep sold, *held* to be an action founded on contract, so that no allowance was required: *Swan v. Smith*, 26–87.

In an action for damages sustained by reason of misrepresentations as to the quality of land sold, not being founded upon a

written contract, and the damages being unliquidated, there must be an allowance: *Gates v. Reynolds*, 13-1. (This case is not consistent with the later one of *Swan v. Smith*, 26-87, *supra*. The statute does not, and did not when the above case was decided, require the action to be on *written* contract to render an allowance unnecessary.)

Allowance relating back; amendment: Where a writ of attachment, in an action not founded on contract, issues and is levied, without an allowance being made as required by statute, and a motion is made to quash the writ on that ground, the court may then make an allowance, to relate back, as between the parties, to the issuance of the writ, and fix the additional amount of property which may be levied on: *Magoon v. Gillett*, 54-54.

Allowance to be by judge: The allowance is to be made by a judge acting in his individual capacity and need not be attested by the seal of his court: *Sherrill v. Fay*, 14-292.

But it would seem that an allowance by the judge of the court in which the action is pending, while sitting as the court and not as a judge individually, would be sufficient: *Magoon v. Gillett*, 54-54.

Subsequent allowance: Upon a motion to discharge attached property on the ground that there has been no allowance when required, the court may make an order as to how much property shall be held: *Ibid.*

SEC. **3883. For debts not due—grounds.** The property of a debtor may be attached on debts not due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states one or more of the following grounds:

1. That the defendant is about to dispose of his property with intent to defraud his creditors;

2. That he is about to remove or has removed from the state, and refuses to secure the payment of the debt when it falls due, and which removal or contemplated removal was not known to the plaintiff at the time the debt was contracted;

3. That the defendant has disposed of his property in whole or in part with intent to defraud his creditors;

4. That the debt was incurred for property obtained under false pretenses. [21 G. A., ch. 29; C. '73, § 2956; R., § 3178; C. '51, § 1852.]

A surety upon indebtedness not yet due, and which he has not paid, cannot have an attachment against the principal, under the provisions for attachment in case of unmatured indebtedness: *Dennison v. Soper*, 33-183.

To bring a case within these provisions, a disposition or removal of the property must be with intent to defraud: *Pride v. Wormwood*, 27-257.

That defendant is about to dispose of his property with intent to defraud his creditors will bring a case within these provisions, without alleging a refusal to make any arrangements for securing the indebtedness: *Danforth v. Carter*, 1-546.

In an action under these provisions in regard to unmatured indebtedness, the defense that the debt is not due cannot be set up: *Churchill v. Fulliam*, 8-45.

Where suit was brought for a debt as due, and attachment procured, and defendant denied the indebtedness on the ground that it was not mature, and asked damages for wrongful suing out of the attachment, *held*, that it was proper to give him judgment for such damages, without giving plaintiff judgment for the amount of the claim: *Wetherell v. Sprigley*, 43-41.

SEC. **3884. Appearance in such cases—judgment.** If, at the time of the service of the attachment, the claim upon which suit is brought is not due, the defendant need not appear in the action until the maturity of the demand, unless he elects to plead, in which event the cause shall stand for trial when it is reached in its regular order, and no final judgment shall be rendered therein before the maturity of the debt unless such election is made, but if perishable property is levied upon, it may be sold as in other attachment cases. [C. '73, §§ 2957–8; R., §§ 3179–80.]

SEC. **3885. Bond.** In all cases before it can be issued, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties to be approved by such clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars in a court of record, nor less than fifty dollars if in a justice's court, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment. [C. '73, § 2959; R., § 3181; C. '51, § 1853.]

The amount of the bond is to be double the value of the property which the sheriff may attach, or three times the amount sworn to by plaintiff. It is not sufficient that it be double the amount sworn to, or double the value of the property which is actually at-

tached: *Churchill v. Fulliam*, 8–45. *Hamill v. Phenicie*, 9–525; *VanWinkle v. Stevens*, 9–264; *Hamble v. Owen*, 20–70.

The amount of the bond should be three times the sum alleged in the petition to be due, and it is not within the discretion of the court to permit the filing of a bond for a smaller amount. Upon a proper motion an attachment will be dissolved for failure to file a bond in the necessary amount, but under § 3933 the plaintiff should be allowed a reasonable time after such motion is made in which to furnish a sufficient bond, and if it is furnished the motion should be overruled: *Griffith v. Milwaukee Harvester Co.*, 92–634.

Surety: One surety is sufficient if his pecuniary responsibility satisfies the requirements of the law: *Elliott v. Stevens*, 10–418.

Signature of plaintiff is not essential: *Pitkins v. Boyd*, 4 G. Gr., 255.

Partnership name: A bond signed by both principal and sureties in their partnership name is not *prima facie* insufficient: *Danforth v. Carter*, 1–546; *Churchill v. Fulliam*, 8–45.

Where an attachment was sued out against a member of a firm for a partnership indebtedness, *held*, that a bond executed to the firm was not sufficient: *Courrier v. Cleghorn*, 3 G. Gr., 523.

Where the bond runs to a firm and the writ issues against firm property, it will not cover damages for wrongful attachment of the individual property of a member of the firm, although such partner is joined as defendant in the action: *Mason v. Rice*, 66–174.

Giving an appeal bond does not release from liability on the attachment bond: *McCall v. Bradley*, 3 G. Gr., 200.

Motion to dissolve the attachment for insufficiency of the bond may be made where the amount is not as large as required by statute: *Hamble v. Owen*, 20–70.

And this remedy, and not demurrer, is available for failure to give bond: *Brace v. Grady*, 36–352.

As to amending defective or insufficient bond, see, also, §§ 3933 and 357.

SEC. **3886. Additional security.** The defendant may, at any time before judgment, move the court or judge for additional security on the part of the plaintiff, and if, on such motion, the court or judge is satisfied that the surety on the plaintiff's bond has removed from the state, or is not sufficient, the attachment may be vacated and restitution directed of any property taken under it, unless, in a reasonable time, to be fixed by the court or judge, security is given by the plaintiff. [C. '73, § 2960; R., § 3182.]

This section relates to a case where additional security becomes necessary because of the removal of the surety, or the like: *Hamble v. Owen*, 20–70.

SEC. **3887. Action on bond.** In an action on such bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained, and reasonable attorney's fees to be fixed by the court; and if it be shown such attachment was sued out maliciously, he may recover exemplary damages, nor need he wait until the principal suit is determined before suing on the bond. [C. '73, § 2961; R., § 3183; C. '51, § 1854.]

Independently of statute: An action might be maintained independently of the statute against a party who, maliciously and without probable cause, should sue out a writ of attachment; but in the absence of proof of malice and want of probable cause, the only remedy is on the bond: *Tallant v. Burlington Gas Light Co.*, 36–262.

Where a writ of attachment is sued out maliciously and without probable cause, and damage ensues, the defendant has a remedy on common-law principles, aside from the remedy on the attachment bond: *Preston v. Cooper*, 1 Dillon, 589.

The only remedy of the attachment defendant, *it seems*, is upon the bond, or by an action for malicious attachment, in which latter case it is not sufficient to allege that the writ was *wrongfully* procured, but there must be allegations of malice and want of probable cause: *Ibid.*

Where by statute no bond in attachment is required and none given, the defendant, in the absence of legislation giving the right, cannot maintain an action against the plaintiff in attachment, by showing merely that the writ was wrongfully sued out because there was no debt due from him, but he must show malice, want of probable cause, and damage, as required by the principles of the common law in actions for malicious prosecution: *Ibid.*

Even though an attachment is premature and unlawful, there is no remedy therefor except in action upon the bond in the absence of malice: *Frantz v. Hanford*, 87–469.

While there may be an action for the malicious suing out of the writ without regard to the bond, yet under particular facts, *held*, that although the action was for a larger sum than that named in the bond it was on the bond and not for malicious suing out; *Union Mercantile Co. v. Chandler*, 90–650.

That the truth of the grounds of attachment alleged can only be questioned in an action on the bond, see next section.

Action should be on bond: An action for wrongfully suing out an attachment should be brought on the bond: *Abbott v. Whipple*, 4 G. Gr., 320.

Want of actual ground or reasonable belief: The question in an action on the bond, for improperly suing out the writ, is not alone whether the facts alleged as grounds

for attachment were actually true, but whether plaintiff, exercising that degree of caution that a reasonably prudent man should have exercised, had good cause to believe that they were true: *Winchester v. Cox*, 4 G. Gr., 121; *Mahnke v. Damon*, 3-107; *Burton v. Knapp*, 14-196; *Nordhaus v. Peterson*, 54-68.

In an action on the bond it may be shown as a defense, either that the party suing out the attachment had good cause to believe the ground stated to be true, or that it was true in fact, irrespective of his grounds of belief: *Vorse v. Phillips*, 37-428.

To constitute reasonable ground of belief that the facts alleged for securing an attachment are true, it is not necessary that the facts be such as to lead a reasonably prudent man to act in matters of the highest moment to himself. Reasonable grounds of belief of their truth is sufficient: *Carey v. Gunnison*, 51-202.

A verdict allowing a recovery on the bond necessarily implies a finding that the plaintiff in attachment had not reasonable grounds to believe his allegations true, as well as that they were not true: *Nockles v. Eggspieler*, 53-730.

Pleading breach: In an action on the bond the conditions of such bond must be set out, and facts alleged constituting their breach: *Ryder v. Thomas*, 32-56.

As, for instance, the nonpayment of damages which the party injured claims to have suffered: *Horner v. Harrison*, 37-378.

A failure to make such averment may be raised for the first time on motion in arrest of judgment, at least where no evidence of damage is offered: *Hencke v. Johnson*, 62-555.

The bond must be set out in an action thereon by original petition or by way of counter-claim but an omission to do so on trial is only an error in pleadings: *Union Mercantile Co. v. Chandler*, 90-650.

An allegation "that the attachment was wrongfully sued out with wilful wrongfulness," *held* a sufficient allegation of want of reasonable belief of the truth of the grounds set out on the part of the plaintiff in the attachment: *Abbott v. Whipple*, 4 G. Gr., 320.

Parties: Where different parties are entitled to recover under the attachment bond they are all necessary parties in an action on such bond, and in an action by one party claiming the right to recover, the defendant may require that the others be brought in: *King v. Kehoe*, 91-91.

Action accrues when: The breach of the bond consists in the wrongful suing out of the writ, and whatever damages have resulted to defendant are to be deemed a claim held by him at the commencement of the suit and filing of the bond, when they are concurrent acts; but otherwise if the attachment is sued out subsequently to the commencement of the action: *Reed v. Chubb*, 9-178.

The right of action on the bond accrues as soon as the defendant in the attachment is disturbed in the possession of the property levied on by virtue of the writ, if it is wrongfully issued, and he need not wait until the termination of the principal suit to sue on the bond: *Campbell v. Chamberlain*, 10-337.

By way of counter-claim: Therefore (without the statutory provision to that effect now found in § 3888, which see), *held* that, where the attachment was sued out at the commencement of the action, a claim on the bond for damages for the wrongful suing out of the attachment might be interposed as a set-off or counter-claim: *Reed v. Chubb*, 9-178; *Stadler v. Parmlee*, 10-23.

The decision of the court on this point in the foregoing cases would be subject to very grave doubts did not the statute now expressly authorize suit on the bond by way of counter-claim: *Branch of State Bank v. Morris*, 13-136.

Assignment of claim on bond: Where the debtor, after the suing out of the attachment, makes a general assignment, the assignee may intervene in the attachment proceeding in which the debtor has set up the claim for damages on the bond as a counter-claim: *Dunham v. Greenbaum*, 56-303.

Where defendant had, previous to the attachment, made an assignment of his property, *held*, that the right of action on the attachment bond inured to the assignee, and that a subsequent assignment thereof by the latter to the defendant would not enable defendant to set it up as a counter-claim in the action against him: *Rumsey v. Robinson*, 58-225.

No indebtedness: If there was no indebtedness from defendant to plaintiff in the attachment suit, that fact alone would probably be conclusive evidence that the attachment was wrongfully sued out: *Nordhaus v. Peterson*, 54-68.

The plaintiff's belief in such case with reference to the truthfulness of the grounds of attachment would not prevent such liability: *Porter v. Wilson*, 4 G. Gr., 314.

Dismissal of attachment suit by plaintiff therein and release of attached property does not, of itself, show that the attachment was wrongfully sued out: *Nockles v. Eggspieler*, 47-400.

Amendment: Where the petition stating the indebtedness in an attachment suit was amended after the suit was brought, so as to set up another cause of action, *held* that, as the second cause of action, as stated, arose after the bringing of suit, and was also inconsistent with the first, the filing of the amendment must be deemed an abandonment of the first cause of action and an admission that it did not exist when the attachment was sued out: *Young v. Broadbent*, 23-539.

Recovery of less than five dollars does not, in actions of tort, show that the attachment was wrongfully sued out. (See § 3880, distinguishing *Gaddis v. Lord*, 10-141): *Weller v. Hawes*, 49-45.

The judgment in the attachment suit may be introduced in evidence in an action on the bond, and is conclusive as to the indebtedness between the parties, but not as to the plaintiff's belief in regard to the truth of the matters stated in his petition: *Gaddis v. Lord*, 10-141; *Raver v. Webster*, 3-502.

Proof of cause of action not conclusive: The attachment may be wrongful, or even wilfully wrongful, although the cause of action is a just one: *Drummond v. Stewart*, 8-341.

The burden of proof is upon the party claiming that the attachment was wrongfully sued out, to establish that fact: *Burrows v. Lehndorff*, 8–96; *Veiths v. Hagge*, 8–163, 191.

The party seeking to recover for the wrongful suing out of the writ has the burden of showing, not only that the grounds stated therefor were not true, but also that the party suing out the writ did not have reasonable ground to believe that they were true: *Dent v. Smith*, 53–262.

Although plaintiff in the attachment suit in which defendant sues on the bond by way of counter-claim, may have the burden of proof as to the alleged liability of defendant on the cause of action, yet if no evidence to that effect is offered the defendant has the opening and closing on the question of plaintiff's liability on the bond: *Whitney v. Brownewell*, 71–251.

Intent of debtor: Testimony as to the intent of defendant is immaterial with reference to whether plaintiff had reason to believe that defendant was about to dispose of his property with intent to defraud his creditors: *Selz v. Belden*, 48–451; *Charles City Plow, etc., Co., v. Jones*, 71–234.

The opinion of a witness as to the debtor's intention in disposing of property is not admissible: *Carey v. Gunnison*, 51–202.

Right to recover: The wrongful suing out of attachment is not established by proof that the party causing it to be issued had no reasonable ground to believe that the alleged grounds for attachment were true, but there must be proof that they were not in fact true, and the burden of proof is on the one alleging the wrongfulness of the act: *McCormick v. Colliver*, 75–559.

The burden is on the party suing on the bond to show both that the ground alleged for the attachment was not true, and that the party suing out the attachment had not reasonable ground for believing it to be true, or that the party suing out the attachment had not facts and circumstances within his knowledge such as gave reasonable ground of belief that the ground stated was true. The material facts may be established by fair inference from many facts duly proven: *Deere v. Bagley*, 80–197.

It is not necessary that the information upon which the creditor acts be true if he acts in good faith and with reasonable care, nor is it necessary that he should act only upon such information as would be competent evidence in court: *Ibid.*

The fact that the petition is not filed nor the writ issued for three days after the verification of the petition does not indicate want of good faith: *Ibid.*

The fact that by amendment to petition after the suing out of the attachment plaintiff sets up his cause of action in different form, it appearing that such cause of action existed at the time the attachment was sued out, will not render the suing out of the attachment wrongful and entitle defendant to recover on the bond: *Cawker City State Bank v. Jennings*, 89–230.

A member of a firm cannot recover for seizure of his individual property under a bond given in a suit against the firm only: *Brumwell v. Stebbins*, 83–425.

Where in one count of an answer defendant alleged facts showing that the suing out of a writ of attachment, and the seizure of all his goods thereunder, was the breach of a contract obligation on the part of plaintiff towards him, *held*, that such division of the answer constituted a separate cause of action from that set out in another count, based upon an attachment bond: *Mitchell v. Joyce*, 76–449.

Where it is not averred in the action on the bond that damages remain unpaid but the case is tried on the issue as to the liability, no objection being made on account of failure to aver such fact in the pleadings, the objection cannot be entertained on appeal: *Knapp & Spaulding Co. v. Barnard*, 78–347.

Where it is charged that the debtor is about to dispose of his property with intent to defraud his creditors, a purpose to dispose of his property with such intent, and all acts of his tending to show such intent, may be proven or considered whether before or after the attachment: *Mayne v. Council Bluffs Savings Bank*, 80–710.

An instruction in a particular case *held* not to be objectionable as open to the criticism that it indicated that the matters acted upon in suing out the attachment had the appearance of truth: *Ibid.*

Erroneous instructions as to the measure of damages will be immaterial if the attachment was not wrongfully sued out: *Ibid.*

Secret instructions given by the debtor to his employes cannot be proved for the purpose of showing that the debtor was not disposing of his property with fraudulent intent, and that therefore the attachment was wrongfully sued out: *Deere v. Bagley*, 80–197.

For the purpose of showing that the attachment is wrongfully sued out it is not proper to prove that another attachment was levied at the same time in another state for the same indebtedness: *Ibid.*

Where a counter-claim for damages on a bond was based on the theory that there was no indebtedness, *held*, that indebtedness being shown the court properly withdrew the counter-claim from the consideration of the jury: *Britson v. Tjernagel*, 90–356.

The fact that a receiver is appointed under the attachment proceeding and the proceeds of the property are entirely applied to claims prior to the lien of the attachment will not prevent the defendant in the attachment proceedings recovering damages resulting from the forced sale of his property in such proceedings: *Union Mercantile Co. v. Chandler*, 90–650.

The fact that the attached property is covered by mortgage does not render the attachment invalid so that there can be no recovery under the bond: *Ibid.*

Effect of recovery: If the defendant by a counter-claim recovers damages for the wrongful suing out of a writ, which are deducted from the amount of plaintiff's recovery, he is not entitled after judgment to have the property discharged, but it should be held to satisfy such judgment: *Cole v. Smith*, 83–579.

Where a counter-claim was interposed for damages on a bond and the judgment allowed recovery on such counter-claim, and further provided that the plaintiff should return to defendant the attached property, or that the defendant should recover its value, and the judgment was thereupon paid but the property was not returned, *held*, that the right to recover on the bond for the failure to return the property was not adjudicated, and might be made the basis of a subsequent action: *Morrison v. Springfield Engine, etc., Co.*, 84-637.

Damages: Where a writ of attachment is wrongfully sued out, the measure of damages is such a sum as will compensate the defendant for the actual injury suffered: *Empire Mill Co. v. Lovell*, 77-100.

And where property was seized and sold, and the proceeds applied to the payment of the defendant's debts, *held*, that the measure of damages for the wrongful attachment was the difference between the proceeds of the sale and the value of the property at the time of the seizure: *Ibid.*

The amount of the bond limits the recovery, not only as against the sureties, but also as against the principal when the action is brought on the bond: *Union Mercantile Co. v. Chandler*, 90-650.

Where the defendant in his counter-claim is found to be entitled by way of damages in the full amount of the bond the plaintiff's claim, so far as it is established, should be deducted from the amount of defendant's recovery on the bond: *Ibid.*

For the purpose of showing the damages suffered by reason of the attachment, the attachment defendant may show that some of the goods were salable only at certain seasons and that by reason of the attachment they could not be sold until the following year. In such case the true measure might not be the difference between the market value of the goods when seized and their value at the date of the trial by reason of the fact that they are of such nature that if carried over from one season to another they are subject to damage from dust and moisture and are liable to be of little demand the second season, and by reason of the fact that goods out of season are sold by dealers at a discount: *Knapp & Spalding Co. v. Barnard*, 78-347.

In an action on an attachment bond for damages to a stock of goods seized under the attachment, the defendant in attachment should be permitted to prove the value of the goods, as tending to show the damage by removal and detention, and also that any part of the goods was of a perishable nature and the extent to which such goods were damaged by reason thereof while detained under the attachment: *Jamison v. Weaver*, 81-212.

The measure of damages in regard to property sold under attachment is the difference between what its value was at the time it was taken and the proceeds of the sale thereof, credited on the indebtedness: *Ruthven v. Beckwith*, 84-715.

Testimony as to the financial condition of the defendant, though not known to the plaintiff, is admissible as bearing upon the charge of intent to defraud: *Ibid.*

In an action upon a bond for the wrongful suing out of an attachment, where the property levied upon was lumber kept for sale, *held*, that the owner was not entitled to receive interest on the value of the lumber for the time the same was withheld from him, where no claim was made of damages because of a loss of sale: *Fullerton Lumber Co. v. Spencer*, 81-549.

Where it appears that there was in fact no levy of the attachment, there can be no recovery of damages on the bond, and a counter-claim seeking to recover such damages may be withdrawn from the jury: *Sioux Valley State Bank v. Kellog*, 81-124.

In an action on a bond, plaintiff may recover damages for negligence of the sheriff in the care of the property. With reference to such damage the sheriff is to be deemed the agent of the attaching plaintiff: *Blane v. Tharp*, 83-665; *Ruthven v. Beckwith*, 84-715.

Recovery may be had for being prevented from selling the property until the price has declined: *Chesmore v. Barker*, 70 N.W., 701.

Where the property levied on under the attachment was sold by virtue of other proceedings, and not in pursuance of the attachment levy, *held*, that the attachment debtor had no right of recovery on the bond for damages by reason of such sale: *Schwartz v. Davis*, 90-324.

Where the facts as to the amount of damage are in controversy, the question as to the amount of recovery should be left to the jury: *Anderson v. Wedeking*, 71 N. W., 360.

A mortgagee of real property cannot recover damages for the wrongful levy of an attachment thereon, it not appearing that such mortgagee was deprived of the property under such attachment nor that the same was injured, depreciated or lost by reason thereof. The fact that the attachment prevents the mortgagee from selling his mortgage or foreclosing it or protecting the property by insurance does not constitute a ground of recovery in his behalf: *King v. Kehoe*, 91-91.

Value of goods: In an action on the bond the true measure of the value of the goods attached is the cost of replacing them at the place where levied upon: *Selz v. Belden*, 48-451.

The measure of damage is a fair cash value of the property at the time when it was wrongfully taken and interest thereon: *Porter v. Knight*, 63-365.

The elements of damage to be considered include diminution in value of stock by reason of the levy and the closing up or stopping the business; also rent of store during the time the business is stopped; also loss of employment during the interruption in business if the debtor had been giving his personal labor and attention to the business and has been unable to obtain other employment: *Lowenstein v. Monroe*, 55-82.

The defendant in the attachment is to recover such losses as he may have sustained by reason of being deprived of the use of the property levied on, and any injury thereto by its loss or depreciation in value: *Ibid.; Campbell v. Chamberlain*, 10-337.

Injuries to character, or credit, or

business are too remote and speculative to be considered: *Ibid.*

Loss of profits in the retail of the goods is to be disregarded: *Lowenstein v. Monroe*, 55–82.

Injuries to credit cannot be shown as an element of damage: *Mitchell v. Harcourt*, 62–349.

Chattel mortgage: Where property levied on in attachment was taken from the officer under a prior chattel mortgage and sold, the balance only in excess of the mortgage being turned over to the officer by virtue of his levy, the damage for the wrongful act in suing out the writ will be limited to the balance paid the officer after the satisfaction of the mortgage, and interest, and the damages sustained by being deprived of the property during its detention under the attachment: *Porter v. Knight*, 63–365.

Rents: Where the rent of a mill was included in the claim for damages on the bond given in an attachment sued out by the landlord against the tenant on an independent indebtedness, *held*, that the tenant was thereby barred from afterward setting up the interruption of his possession as a defense in an action for the rent, although the claim on the bond had been interposed before the entire damage had accrued and the whole amount thereof was not then recoverable: *Davis v. Milburn*, 4–246.

Attachment defendant cannot recover, in an action on the bond, for the use of a storebuilding in which the goods levied on are kept, where it appears that the attachment defendant had the privilege of using the building during that time, and voluntarily relinquished such privilege: *Charles City Plow, etc., Co. v. Jones*, 71–234.

Refusal to secure or pay, while no ground for suing out an attachment, is admissible in evidence on the question whether the attachment was wrongfully sued out: *Myers v. Wright*, 44–38.

So, also, refusal of defendant to secure or pay indebtedness to others, such fact being known to plaintiff before suing out the attachment, may be shown: *Dent v. Smith*, 53–262.

Defendant's indebtedness at the time of attachment may be material as bearing on the question whether plaintiff was actuated by malice in suing out the attachment: *Mitchell v. Harcourt*, 62–349.

Deeds of conveyance by defendant of his property, made subsequently to the issuance of the attachment, are not admissible on the question as to whether he was about to dispose of his property at the time of attachment with intent to defraud his creditors: *Dynes v. Robinson*, 11–137.

The writ and return thereon are admissible as evidence in an action on the bond: *Drummond v. Stewart*, 8–341.

Statements of attaching plaintiff at the time of suing out the attachment are not admissible in evidence for the purpose of showing want of malice: *Shuck v. Vanderventer*, 4 G. Gr., 264.

Such statements made after the commencement of suit, and not connected with its commencement, are not receivable to show malice: *Burton v. Knapp*, 14–196.

Evidence that plaintiff, on the day on which attachment was levied, said, concerning the levy, that defendant therein "had had his time, and now he [plaintiff] would have his," *held* admissible to show the wrongful suing out: *White v. Beck*, 64–122.

Advice of counsel will go to rebut the idea of malice, but it must be proved that the party submitted his cause to the attorney, and was by him advised that he had a right to sue out an attachment. Proof of such advice may defeat the recovery of exemplary, but not of actual, damages: *Raver v. Webster*, 3–502.

It must appear that a full and fair statement of the facts was made to the attorney: *Porter v. Knight*, 63–365.

The fact that the attorney consulted was a stockholder and officer in the corporation suing out the attachment, or was not in practice, will not preclude the corporation from showing such legal advice. In such cases the question is whether plaintiff acted in good faith on the advice of counsel, and that is for the jury: *Charles City Plow, etc., Co. v. Jones*, 71–234.

The conversation with the attorney may be shown by plaintiff for the purpose of showing that the advice was given on a full and fair statement of the facts of the case: *Ibid.*

Where defendant in a counter-claim on the attachment bond alleges malice as a ground for recovery of exemplary damages and plaintiff's reply contains a general denial, the question of malice is in issue and evidence that the plaintiff took advice of counsel as to his right to an attachment may be proven although the fact is not pleaded by way of mitigation: *Bowman v. Western Fur Mfg. Co.*, 64 N.W., 775.

As facts bearing on plaintiff's want of malice in suing out the attachment the entries in a city directory with reference to defendant's business connections, etc., are admissible: *Ibid.*

Damages; expenses of defending: In an action on the bond, either original or by way of counter-claim, the party, if entitled to recover at all, may recover all expenses incurred in making defense to the attachment proceeding: *Vorse v. Phillips*, 37–428.

Attorney's fees: In the absence of any express statutory provision, the party suing on an attachment bond cannot recover, as a part of the costs or expenses covered by the bond, the fees of his attorney in prosecuting such suit: *Ibid.*

Nor even his attorney's fees on defending against the principal suit: *Plumb v. Woodmansee*, 34–116.

An attorney's fee may be recovered although only nominal damages are allowed for the wrongful suing out of the attachment: *Lyman v. Lauderbaugh*, 75–481.

If the party entitled to recover attorney fees makes no claim therefor until after payment of the judgment and costs, he cannot have the litigation opened up afresh in order to have evidence introduced to enable the court to fix the amount of such fee, and enter up another judgment therefor: *Solomon v. McLennan*, 81–406.

Attorneys' fees are allowable as costs in addition to the amount named in the bond: *Union Mercantile Co. v. Chandler*, 90–650.

Until both the wrongfulness of the suing out of the attachment and the absence of reasonable cause are shown there is no authority to fix attorneys' fees: *Dickinson v. Athey*, 65 N. W., 326.

Whether the attachment defendant might recover attorney's fees as a part of his damages in an action for malicious prosecution brought without regard to the bond, *quœre: Ibid.*

Attorneys' fees; how assessed: Under this section the jury have nothing to do with fixing the amount of such fee. The better practice would be not to introduce any evidence as to the fee during the trial, but if, in answer to a special interrogatory, the jury find that the attachment was wrongfully sued out, then evidence as to the amount of the fee should be introduced to the court and a finding made, and the amount so fixed should then be added to or deducted from the amount found by the jury, as the case may require: *Selz v. Belden*, 48–451.

Attorneys' fees constitute a part of the costs, and the legislature may authorize the court to fix the amount, without submitting the question to the jury: *Weller v. Hawes*, 49–45.

A verdict for actual damage, in an action on the bond, and a special finding that the attachment was wrongfully sued out, are sufficient to warrant the allowance of an attorney's fee. That there was no reasonable cause to believe the ground upon which the attachment was issued to be true is implied in such verdict and special finding: *Nockles v. Eggspieler*, 53–730.

In fixing the attorney's fee the court is not to take into account the trial of the principal case, but only the fee for prosecuting, by original action or counter-claim, the cause of action on the bond, on account of the wrongful suing out of the attachment: *Porter v. Knight*, 63–365.

The allowance of attorneys' fees for the services of attorneys in defending the entire case will not be erroneous where the whole defense made tended to show the wrongfulness of the attachment: *Whitney v. Brownewell*, 71–251.

Actual and not remote damages: Speculative and remote damages, such as that the attachment debtor was prevented from carrying out a plan of removing to another state and engaging in business there, cannot be allowed: *De Goey v. Van Wyk*, 66 N. W., 787.

Where the suing out of an attachment was not wilful and malicious, the damages recoverable are confined to actual compensation for damages immediately consequent upon the wrongful act: *Plumb v. Woodmansee*, 34–116.

Use: While the party against whom the attachment issues is entitled to compensation for the loss sustained by reason of being deprived of the use of property levied on, the value of this use must be predicated upon the condition of the property when it was attached and not upon what its condition was before, or what it was intended to be in the future: *Ibid.*

Attachment of property of wrong party; trespass: Where the proceeding was commenced against a firm and its members, but the bond was to the firm only, and the writ was directed against firm property only, *held*, that although the attachment was wrongfully sued out, yet there could not be a recovery on the bond by a member of the firm for damages caused to him by the levy of the attachment on his property, for the reason that the levy was not authorized under the writ and was a trespass by the officer for which the plaintiff in attachment was not liable on the bond: *Mason v. Rice*, 66–174.

Exemplary damages: To entitle a party to exemplary damages it must appear that the attaching plaintiff procured the attachment without reasonable grounds to believe the truth of the matter stated in his application, and with the intention, design or set purpose of injuring the defendant therein: *Gaddis v. Lord*, 10–141; *Raver v. Webster*, 3–502.

Something more must be made to appear than that the ground alleged for the attachment did not exist, and that attaching plaintiff had no ground to believe it did. These facts must be proven to establish the right to recover actual damages. To recover exemplary damages it must be shown that plaintiff acted with the intention, design or set purpose of injuring defendant: *Nordhaus v. Peterson*, 54–68.

There cannot be a recovery of exemplary damages where actual damages are not recoverable: *Myers v. Wright*, 44–38.

Where plaintiff's attachment was sued out on the ground that defendant was about to remove from the state, and refused to make arrangements for securing payment of indebtedness, and it appeared that plaintiff through his attorney knew at the time that the proposed sale of defendant's property was for the purpose of paying plaintiff's claim, and was acquiesced in by such attorney, *held*, that defendant was entitled to actual damages for the suing out of the writ, and also to exemplary damages, because of the intentional wrong on the part of plaintiff: *Hurlbut v. Hardenbrook*, 85–606.

In such case, *held*, that an instruction with regard to failure to take legal advice, as indicating malice, was properly given: *Ibid.*

The fact that plaintiff, before commencing the attachment suit, submitted the facts to counsel learned in the law may constitute a complete defense to exemplary damages: *Tank v. Rohweder*, 67 N.W., 106.

A creditor who brings suit in attachment without ground therefor merely because he fears a debtor is about to die and that he will lose his claim may properly be required to pay exemplary damages in an action on the bond: *Union Mill Co. v. Prenzler*, 69 N.W.,876.

Judgment not binding on sureties: A judgment on the bond, in an action to which the sureties are not parties, is not binding upon them: *Bunt v. Rheum*, 52–619.

Counter-claim: A suit on a bond by way of counter-claim, is an answer in the action sufficient to prevent default: *Town v. Bringolf*, 47–133, 135.

SEC. **3888. Remedy for falsely suing out.** The fact stated as a cause of attachment shall not be contested in the action by a mere defense. The defendant's remedy shall be on the bond, but he may in his discretion sue thereon by way of counter-claim, and in such case shall recover damages as in an original action on such bond. [C.'73, § 3017; R., § 3238.]

The averments of the grounds of attachment are not a part of the petition in the sense that they can be demurred to. If they are insufficient, a motion to dissolve the attachment is the proper remedy; if inconsistent grounds are alleged, the plaintiff may, on motion, be required to elect between them: *Holloway v. Herryford*, 9–353; *Hunt v. Collins*, 4–56.

No issue can be joined in the principal suit on the averment of facts constituting the ground for the attachment. The party injured by the wrongful suing out of the writ has no other remedy than by an action on the bond, unless in cases where an action of trespass would lie: *Veiths v. Hagge*, 8–163, 192; *Churchill v. Fulliam*, 8–45; *Sackett v. Partridge*, 4–416; *Sample v. Griffith*, 5–376; *Berry v. Gravel*, 11–135; *McLaren, v. Hall*, 26–297.

Therefore an answer raising such an issue may be stricken from the files on motion: *Burrows v. Lehndorff*, 8–96.

Much less can such an issue be made by an entire stranger to the suit: *Whipple v. Cass*, 8–126.

A motion to dissolve the attachment, based upon affidavits that the cause for attachment, as stated in the petition, is not true, cannot be sustained. No issue can be joined as to the facts stated as cause for the attachment. The only remedy is on the bond: *Sturman v. Stone*, 31–115.

SEC. **3889. Writ to sheriff.** The clerk shall issue a writ of attachment, directing the sheriff of the county therein named to attach the property of the defendant to the requisite amount therein stated. [C.'73, § 2962; R., § 3185; C.'51, § 1856.]

The object of the writ is to seize and hold the property of the defendant, or its equivalent, to await the event of the suit. If plaintiff recovers, the property is considered as having been levied on under execution, and defects in the writ or the proceedings thereunder cannot vitiate the proceedings in the suit in which the attachment is secured, the proceedings by attachment being merely auxiliary: *Carothers v. Click*, Mor., 54.

The cause of action or its nature need not be stated in the writ: *Wadsworth v. Cheeney*, 13–576; *Pitkins v. Boyd*, 4 G. Gr., 255; *Westphal v. Sherwood*, 69–364.

The fact of bond being given need not necessarily be recited in the writ: *Hays v. Gorby*, 3–203 (commenting upon *Barber v. Swan*, 4 G. Gr., 352); *Ellsworth v. Moore*, 5–486; *Westphal v. Sherwood*, 69–364.

The duties of the officer as to manner of making levy, return, etc., need not be stated in the writ: *Westphal v. Sherwood*, 69–364.

It is not necessarily a ground for quashing the writ that it is against only one of several defendants in the action, or that the bond is to the one against whom the writ issues and not to all: *Patterson v. Stiles*, 6–54.

Successive writs may issue in the same county until the proper amount of property is attached: *Hamill v. Phenicie*, 9–525.

Or to different counties without the filing of a new affidavit or bond: *Elliott v. Stevens*, 10–418.

The writ is not void in the hands of the officer for defects in the affidavit which might be cured if objected to: *State v. Foster*, 10–435.

Under the provisions of § 3933, it is held that the absence of the seal of the court, or the affixing of the seal of the wrong court, is a defect which may be cured by amendment: *Murdough v. McPherrin*, 49–479.

Where the writ is defective in not stating the sum claimed in the action, it may be amended in this respect after levy: *Atkins v. Womeldorf*, 53–150.

Where the writ under which a levy has been made is lost, but the date and title of the cause and amount of property authorized to be attached are established, there will be a *prima facie* presumption that the writ was issued by the proper officer, in due form, and under seal: *French v. Reel*, 61–143; *McNorton v. Akers*, 24–369.

If the writ is issued by a justice of the peace in a case in which the justice has no jurisdiction, the officer will not be protected in acting under the writ: *Carpenter v. Scott*, 86–563.

SEC. **3890. Several writs to different counties.** Attachments may be issued from the district court to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession and subsequently, until sufficient property has been attached; but only those executed shall be taxed in the costs, unless otherwise ordered by the court; and if more property is attached in the aggregate than the plaintiff is entitled to, the surplus must be abandoned, and the plaintiff pay all costs incurred in relation to such surplus. [C.'73, § 2963; R., § 3184; C.'51, §§ 1855, 1858.]

SEC. **3891. Property attached.** The sheriff shall in all cases attach the amount of property directed, if sufficient, not exempt from execution, is found in his county, giving that in which the defendant has a legal and unquestionable title a preference over that in which his title is doubtful or only equitable. [C.'73, § 2964; R., § 3186; C.'51, § 1857.]

Beyond jurisdiction: An attachment levy made by a sheriff outside of his county, or secured by fraud or violence, is void, and may be dissolved by motion: *Pomroy v. Parmlee*, 9–140.

By officer de facto: The service of a writ of attachment by an officer *de facto* is valid as to the rights of other persons: *Stickney v. Stickney*, 77–699.

What constitutes levy: To constitute a valid levy, even between the parties, the officer should do that which would amount to a change of possession, or something equivalent to a claim of dominion coupled with the power to exercise it: *Crawford v. Newell*, 23–453.

Therefore, *held*, that the act of the sheriff in barricading the front door of the building in which a stock of goods was situated, without entering and taking possession of the goods, the owner of the stock having a key to the back door, by which he might have access thereto, such door not being barricaded or guarded, was not sufficient to constitute a levy: *Bickler v. Kendall*, 66–703.

The officer must do such acts as that, but for the protection of the writ, he would be liable in trespass therefor: *Allen v. McCalla*, 25–464.

Therefore, *held*, that a levy upon certain patterns, which remained locked up in a building, the key of which was in the possession of the owner, was not sufficient: *Rix v. Silknitter*, 57–262.

The mere intention to levy, where no levy is actually made, will not create a lien as against a subsequent mortgagee: *Collier v. French*, 64–577.

Abandonment of levy: Where the officer, after levying his attachment, put the property in the possession of a workman on the premises, taking his receipt for it and did not afterwards, either himself or through his agent, assert any possession over or control of the property, and permitted an assignee to take possession of such property and apply it to the payment of the debts of the owner, and gave him no notice of the fact of levy, and made no claim upon him for the property until more than two years after the levy, *held*, that the lien of the attachment was lost and the levy would be regarded as having been abandoned: *Littleton v. Wyman*, 69–248.

An attachment lien upon personal property is lost by surrender of possession: *Ibid.*

Possession must be taken: It seems that a levy upon property not capable of manual delivery may be valid as between the parties, although the same is left in possession of the attachment defendant; but where property capable of possession, such as beer in tubs and vats, was left in defendant's possession, with authority to use as he wished by sale or otherwise, provided he should keep the quantity good, *held*, that the levy was not sufficient and was invalid, even as between the parties: *Nockles v. Eggspieler*, 47–400.

The thing against which the proceeding is directed must be brought within the jurisdiction of the court by virtue of a seizure, the evidence of which is the service of the writ and the return: *McDonald v. Moore*, 65–171.

Time of levy: Levy of the attachment may be made at any time before judgment and before the return: *Westphal v. Sherwood*, 69–364.

What subject to attachment: By the levy of an attachment the creditor after conveyance of the property by a debtor in fraud of creditors does not acquire any lien except by pursuing the method pointed out in §§ 4087, 4089: *Boggs v. Douglass*, 89–150. But now see § 3899.

The personal property of a debtor which has been fraudulently conveyed and the legal title to which is in another, cannot be attached: *Ware v. Delahaye*, 64 N.W., 640.

While it is the general practice, where it is claimed that personal property has been fraudulently conveyed, for the creditor to levy attachment on the property and determine the ownership by action of replevin, a judgment creditor may instead proceed to make an equitable levy under § 4087: *O'Brien v. Sanbach*, 69 N.W., 1133.

The assignee of property for the benefit of creditors, being an officer of the court, the property in his possession is to be deemed in the possession of the law if the assignment is valid, and in such case a creditor cannot, in a suit against the assignor, attach such property in the assignee's hands: *Hamilton-Brown Shoe Co. v. Mercer*, 84–537.

The interest of mortgagor in chattels covered by a chattel mortgage cannot be attached. The provision of this section as to giving preference to property in which defendant has a legal and unquestionable title relates to the duty of the officer as to the order in which property shall be seized, but does not establish a rule as to what interests may be levied upon: *Wells v. Sabelowitz*, 68–238.

If the validity of the mortgage is not questioned the creditor of the mortgagor can proceed by garnishment or in accordance with the provisions of § 3979 *et seq.* But if he questions the validity of the mortgage he may levy his attachment directly upon the property and such levy will take priority over a subsequent mortgage given with notice of such levy: *Clark v. Patton*, 92–247.

Interest of cestue que trust: Under the facts of a particular case, *held*, that an heir who by the terms of a will was to enjoy the proceeds of a trust created by the will had not such interest in the property of the ancestor which was to be converted into trust funds as to be subject to attachment: *Wilkinson v. Severance*, 80–436.

Unassigned dower right of a widow in

lands of her deceased husband was not at common law subject to attachment, nor did the act of 1862, which enlarged the dower to a fee-simple interest, change the rule. Whether the provisions of § 3366 as to the dower interest have changed it, *quære: Rausch v. Moore*, 48–611.

Landlord's share of crops: The right of a landlord to receive as rent a share of the crops grown upon the premises does not give him such interest in the crops, before his share is set off to him, that such share can be levied on under attachment. The landlord's interest can be reached only by garnishment of the tenant: *Howard County v. Kyte*, 69–307.

A mere license or privilege to erect buildings upon real property and use the same for a particular purpose, which may be surrendered at any time, does not constitute an interest in real estate, but is personal property, which can be levied upon only as other personal property: *Melhop v. Meinhart*, 70–685.

Equitable interests in real property, the legal title to which is in third persons, are not to be reached by garnishment: *Seymour v. Kramer*, 5–285.

The statement in the incumbrance book of an attachment of an equitable interest in land, not appearing of record, does not constitute notice to a purchaser or mortgagee of the person holding the legal title: *Farmers' Nat. Bank v. Fletcher*, 44–252.

Wrongful levy; trespass of officer: Where the writ is substantially defective, it will constitute no defense in an action against the officer for trespass in acting under it: *Deforest v. Swan*, 4 G. Gr., 357.

A United States marshal seizing property under attachment issued from a federal court can be sued personally by the owner of property seized by him which is not subject to the writ: *Sperry v. Ethridge*, 70–27.

A bond to indemnify the officer for not levying, in accordance with his legal duty, is void both as to the officer and the party injured: *Cole v. Parker*, 7–167.

Trespass in plaintiff: The possession of an officer who has taken property under an attachment is the possession of plaintiff in the attachment proceeding, and the latter will be held liable for a wrongful levy to the same extent as the former, whether he has actual knowledge of the seizure or not: *Robinson v. Keith*, 25–321.

Where chattel property in the possession of the mortgagor under a valid mortgage is levied upon in an attachment proceeding, and sold by order of the court procured by the attachment plaintiff, such plaintiff becomes liable to the mortgagee in an action of trespass: *Meyer v. Gage*, 65–606.

Conversion; liability of plaintiff: Where the seizure under the writ is not shown to be wrongful, the attachment plaintiff cannot be held liable for conversion without an allegation and proof that he did, or authorized the officer to do, some unlawful act with reference to the property: *Burt v. Decker*, 64–106.

Liability of attorney: An attorney is not liable for causing property to be seized under an attachment, if he acts in obedience to the instructions of his client: *Dawson v. Buford*, 70–127.

Appraisement of the property levied on is not necessary to make the levy good; it is only required where a delivery bond is given: *Smith v. Coopers*, 9–376; *Woodward v. Adams*, 9–474.

SEC. **3892. Several attachments.** Where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff. [C.'73, § 2965; R., § 3187.]

Where a writ already in the sheriff's hands is, by reason of facts stated in an amendment to the petition, authorized to be served on Sunday, it should be given priority over another writ originally issued on Sunday: *Richards v. Schreiber*, 67 N. W., 569.

SEC. **3893. Following property.** If, after an attachment has been placed in the hands of the sheriff, any property of the defendant is moved from the county, the sheriff may pursue and attach the same in an adjoining county within twenty-four hours after removal. [C.'73, § 2966; R., § 3188.]

This section has no application to the case of the removal of the debtor: *Budd v. Durall*, 36–315.

SEC. **3894. Corporation stock.** Stock or interest owned by the defendant in any company is attached by notifying the president or other head of the company, or the secretary, cashier or other managing agent thereof, of the fact that the stock has been so attached. [C.'73, § 2967; R., § 3194; C. '51, §§ 1859–60.]

At common law, shares of stock in an incorporated company could not be levied on. The only method, at present, of effecting levy under attachment is to follow the procedure pointed out by this section: *Mooar v. Walker*, 46–164.

The attaching creditor acquires priority over a transfer of the stock which does not appear on the books of the company as required by § 1626: *Fort Madison Lumber Co. v. Batavian Bank*, 71–270.

Until the required notice is given no valid levy can be said to be made. The notice should be in writing: *Moore v. Marshalltown Opera House Co.*, 81–45.

An indorsement upon the stubs of the stock certificates in the company's office of the fact of levy will not constitute a levy in the absence of written notice: *Ibid.*

In a particular case, *held*, that a written transfer of the stock by way of collateral security was sufficient as against notice of a levy subsequently given: *Ibid.*

A levy upon corporate stock claimed to

belong to the debtor is not valid, where no notice of such levy is given to the debtor as required by § 3900: *Commercial Nat. Bank v. Farmers', etc., Nat. Bank*, 82–192.

Therefore, a prior transferee of such stock by transfer not made on the books of the company has a better title than the purchaser of the stock at an execution sale in pursuance of an attachment, of which the defendant in the action had no notice: *Ibid.*

The method of reaching shares of stock here provided must be pursued. They cannot be reached by garnishment of one who holds the certificates: *Younkin v. Collier*, 47 Fed., 571.

A levy on shares of stock gives rise to a lien. The proceeding is not in the nature of a garnishment: *Mooar v. Walker*, 46–164; *McConnell v. Denham*, 72–494.

SEC. **3895. Judgments—money—things in action.** Judgments, money, bank bills and other things in action may be levied upon by the officer under an attachment in the same manner as levies are made under execution, except that notice of such levy shall be given as in levies by attachment, and after judgment such property shall be sold, appropriated or transferred as provided for in the chapter on executions.

Under the Code of '73 there was no such provision for levying on judgments as there was in the chapter on execution (§ 3971) and they could be reached only by garnishment: *Ochiltree v. Missouri, I. & N. R. Co.*, 49–150. And see *Osborn v. Cloud*, 21–238.

As to notice, see notes to § 3900.

SEC. **3896. Property in possession of another.** Property of defendant in possession of another, and of which defendant is entitled to the immediate possession, may be seized under attachment by taking possession thereof, in the same manner as though found in the defendant's possession. [C. '73, § 2967; R. § 3194; C. '51, § 1859–60.]

SEC. **3897. Garnishment.** Property of the defendant in the possession of another, or debts due the defendant, may be attached by garnishment as hereinafter provided. [Same.]

As to garnishment, see §§ 3935–3953 and notes.

SEC. **3898. When property bound.** Property capable of manual delivery, and attached otherwise than by garnishment, is bound thereby from the time manual custody thereof is taken by the officer under the attachment. [C.'73, §§ 2967, 2969; R., §§ 3194, 3215; C. '51, §§ 1859–60, 1874.]

A levy upon goods is not accomplished until defendant has done some act with reference to the property sought to be seized which would but for the writ amount to a trespass: *Hibbard v. Zenor*, 75–471.

Therefore, where an officer went to a store where the goods were kept for the purpose of making a levy, and, finding it closed, left a watchman at the building, while he went to get a key, but, failing to obtain one, returned and broke into the building and took possession of the goods, *held*, that the levy was not effected until the entrance to the building was accomplished, and it would not operate by relation back to the time he first attempted to make an entrance: *Ibid.*

A stock of goods may properly be levied on by retaining the goods in the custody of the sheriff through one whom he selects to take supervision thereof in the place where they are at the time of such levy, and the fact that the owner is allowed access to the premises does not render the levy invalid: *Hamilton v. Hartinger*, 64 N.W., 592.

The attachment is effected when the property is taken possession of by the officer, and the notice required by § 3900 is sufficient if given within a reasonable time thereafter: *Citizens' Nat. Bank v. Converse*, 70 N.W., 200.

In case of attachment a lien is acquired against the property, but no personal claim against a third party; while in garnishment there is no lien upon the property, but a personal claim is acquired against garnishee: *Mooar v. Walker*, 46–164; *McConnell v. Denham*, 72–494. (And see notes to § 3935.)

A levy on shares of stock by notice to the officers of the corporation, as provided by statute, gives rise to a lien. The proceeding is not in the nature of a garnishment: *Ibid.*

The lien is a vested right which nothing subsequent can destroy except the dissolution of the attachment. The legislature may suspend the enforcement of such liens, but cannot destroy them: *Hannahs v. Felt*, 15–141.

Therefore, *held*, that a statute providing that levies already made upon property of volunteers in the United States army should be discharged was unconstitutional: *Ibid.*

The death of defendant will not destroy a lien already acquired: *Lord v. Allen*, 34–281.

Where the second writ was levied before the officer levying under a previous writ had taken possession, but the second levy was abandoned and the officer levying under the first writ was garnished, *held*, that there was no right acquired by the second levy: *Hanson v. Taper Sleeve Pulley Incorporation*, 72–622.

An attaching plaintiff who has seized property as that of defendant cannot afterward assert a prior right in himself thereto, as under a pledge or sale: *Citizens' Bank v. Dows*, 68–460; *Crawford v. Nolan*, 70–97.

An attaching creditor acquires no greater right in the property attached than was held by the defendant at time of attachment: *Manny v. Adams*, 32-165; *Harshberger v. Harshberger*, 26-503; *Bacon v. Thompson*, 60-284; *Rogers v. Highland*, 69-504.

The lien of an attachment does not, under our registry laws, take priority over an unrecorded conveyance, even though the attachment creditor had no notice of such conveyance: *First Nat. Bank v. Hayzlett*, 40-659; *Savery v. Browning*, 18-246; *Norton v. Williams*, 9-528.

Notice to the officer before receiving the writ of attachment under which the levy is made of prior claims on the property must be deemed notice to the attaching plaintiff: *Lyons v. Hamilton*, 69-47.

And see notes to § 2906.

If the property has been assigned prior to the levy and the assignee is diligent in asserting his rights, he will be entitled to a release of the levy: *Stephenson v. Walden*, 24-84.

But evidence of a bill of sale, not accompanied by evidence of change of possession, cannot be received to defeat a levy of attachment on the property as that of the grantor: *Bevan v. Hayden*, 13-122.

Where an intervenor sought to avert an attachment lien, under claim that he was the owner of the property attached, *held*, that a decree in an action between him and attachment defendant, to which attaching plaintiff was not a party, was not admissible: *McBride v. Harn*, 48-151.

The burden of proof is upon an attachment creditor claiming priority over an attachment which is first in point of time: *Allen v. Loring*, 37-595.

The mere intention to levy, where no levy is actually made, will not give the attaching creditor any priority over a mortgage of the property subsequently executed: *Collier v. French*, 64-577.

SEC. **3899. Real property—lien—entry on incumbrance book.** Real estate or equitable interests therein may be attached, and the levy shall be a lien thereon from the time of an entry made and signed by the officer making the same upon the incumbrance book in the office of the clerk of the county in which the land is situated, showing the levy, the date thereof, name of the county from which the attachment issued, title of the action, and a description of the land levied on. In case of a levy upon any equitable interest in real estate, such entry shall show, in addition to the foregoing matters, the name of the person holding the legal title, and the owner of the alleged equitable interest, where known. The grantor of real estate conveyed in fraud of creditors shall, as to such creditors, be deemed the equitable owner thereof, and such interest may be attached as above provided, when the petition alleges such fraudulent conveyance and the holder of the legal title is made a party to the action. [C. '73, § 3022; R., § 3243.]

Until the return of the writ, persons acquiring an interest in the property are not affected with notice thereof: *First Nat. Bank v. Jasper County Bank*, 71-486.

The mere entry in the incumbrance book of a statement of the fact of levy coupled with the intention to make a levy, will not constitute a levy. The purpose of the entry is not as a part of the levy, but as constructive notice thereof: *Collier v. French*, 64-577.

An entry of the fact of levy on lands under an attachment against the husband constitutes no notice to a purchaser from the wife holding the legal title: *Bailey v. McGregor*, 46-667.

The entry in the incumbrance book of an attachment on an equitable interest in land is not notice to a vendee or mortgagee of the person holding the legal title: *Farmers' etc., Bank v. Fletcher*, 44-252.

Failure to enter the levy in the index of liens will not defeat the effect of the entry of the proper statement in the incumbrance book. The entry in the incumbrance book constitutes notice and effects the lien; the indexing, while directed to be made, is not essential to the validity of the entry in the incumbrance book: *Blodgett v. Huiscamp*, 64-548.

Section applied: *First Nat. Bank v. Hayzlett*, 40-659.

Where an attachment is levied in proceedings pending at a place where court is held other than the county seat, failure of the deputy clerk to transmit a transcript there and have it entered in the incumbrance book as required by § 288 will prevent such attachment becoming a lien on the land: *Benjamin v. Davis*, 73-715.

It seems that the weight of authority supports the rule that when the attachment creditor shows the existence of the indebtedness for which the attachment is issued, and the issuance, levy and return of the writ, and the neglect of the clerk by which the lien of the attachment was lost, a *prima facie* case is made against the clerk for the recovery of the full amount of the debt, unless the clerk can show that the property attached was of less value than the amount of the debt or that the attachment defendant had no interest in it: *Benjamin v. Shea*, 83-392.

The lien of a mortgagee upon land cannot be levied on by attaching the land. Garnishment is the method of reaching such interest: *Courtney v. Carr*, 6-238.

As to attachment of property fraudulently conveyed, see notes under §3891 of cases decided before the enactment of this provision.

SEC. **3900. Notice—return.** When any property is attached, the officer making the levy shall at once give written notice thereof to the defendant,

if found within the county in which the levy is made, and the fact of the giving of such notice, or that the defendant is not found within the county, shall be shown by the officer's return. A like notice shall be given to the party in possession of the property attached. If the party required to be notified is not found at his usual place of business or residence, such notice may be served upon a member of his family over fourteen years of age at such place. [C.'73, § 2967; R., § 3194; C.'51, §§ 1859–60.]

The notice here required is a written notice and is notice of the levy and not simply of the issuance of the attachment. Without notice the levy is not valid: *Hamilton v. Hartinger*, 64 N. W., 592.

But where a levy was made without written notice and was acquiesced in by both parties with full knowledge of the facts as a valid levy, *held*, that the attachment defendant for whose benefit the provision as to written notice is intended could not take advantage of the want of such notice: *Ibid.*

The notice here contemplated is not process issued by the clerk, but a notice given by the officer making the levy. *Wile v. Cohen*, 63 Fed., 759.

Notice of the levy, required in case of attachment of property in possession of defendant or a third person, is not necessary in case of garnishment: *Phillips v. Germon*, 43–101.

It seems that the direction that notice be given to defendant extends to levies on all property subject to attachment: *First Nat. Bank v. Jasper County Bank*, 71–486.

A levy upon land is invalid in the absence of the notice required by this section, even though it be entered in the incumbrance book: *Sioux Valley State Bank v. Kellog*, 81–124.

Where such facts appear on the record there can be no recovery on the attachment bond, and a counter-claim on such bond may be withdrawn from the jury: *Ibid.*

The time for serving such notice is when the levy is made and if it appears that defendant was not then within the county it is immaterial with reference to such notice that he was afterwards therein: *Hicks v. Swan*, 66 N.W., 762.

Where the validity of the levy is in issue evidence is admissible as to whether written notice thereof was given. So *held* in an action by mortgagee against a sheriff for levying an attachment upon the mortgaged property: *Chapman v. James*, 64 N.W., 795.

The levy dates from the time that the officer actually takes possession of the property, and not from the time of service of notice thereof, provided the notice is given within a reasonable time after the officer takes the property: *Citizens' Nat. Bank v. Converse*, 70 N. W., 200.

The return should show notice to the defendant where such notice is necessary, and without such return the attachment will not be valid although entered in the incumbrance book: *Anderson v. Moline Plow Co.*, 69 N.W., 1028.

In an action against the sheriff by one who claims to have purchased the property prior to the levy of an attachment, and whose claim is resisted on the ground that such purchase was fraudulent, notice of a levy is immaterial. If such purchaser is not the owner he is not entitled to notice and if he is the owner his claim is valid without regard to notice: *Klotz v. James*, 64 N.W., 648.

SEC. **3901. Examination of defendant.** Whenever it appears by the affidavit of the plaintiff, or by the return of the attachment, that no property is known to the plaintiff or the officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and it being shown to the judge of any court by affidavit that the defendant has property within the state not exempt, the defendant may be required by such judge to attend before him, or before the court in which the action is pending, or a commissioner appointed for that purpose, and give information on oath respecting his property. [C. '73, § 2968; R., § 3189.]

It is not necessary to show otherwise than by the affidavit here contemplated that suit is pending in which an attachment has issued *Lutz v. Aylesworth*, 66–629.

SEC. **3902. Money paid clerk.** All money attached by the sheriff, or coming into his hands by virtue of the attachment, shall forthwith be paid over to the clerk, to be by him retained till the further action of the court. [C.'73, § 2971; R., § 3217; C.'51, §§ 1875, 1882.]

SEC. **3903. Other property.** The sheriff shall make such disposition of other attached property as may be directed by the court or judge, and, where there is no direction upon the subject, he shall safely keep the property subject to the order of the court. [C.'73, § 2972; R., § 3218.]

Where property was held by the sheriff under attachment in an action for breach of warranty in the sale thereof, *held*, that being thus in the custody of the law, defendant was not entitled, on application to the court, to an order allowing him temporary possession thereof, for the purpose of trying whether it would conform to the terms of the warranty: *Rogers v. Hanson*, 35–283.

The officer holding property under writ

of attachment is only held to the exercise of ordinary care in the preservation of the property in his hands: *Cresswell v. Burt*, 61–590.

As to compensation for keeping, see § 3926.

SEC. **3904. Partnership property—receiver.** In executing an attachment against a person who owns property jointly or in common with another, or who is a member of a partnership, the officer may take possession of such property so owned jointly, in common, or in partnership, sufficiently to enable him to inventory and appraise the same, and for that purpose shall call to his assistance three disinterested persons; which inventory and appraisement shall be returned by the officer with the attachment, and such return shall state who claims to own such property. The plaintiff shall, from the time such property is taken possession of by the officer, have a lien on the interest of the defendant therein, and may, either before or after he obtains judgment in the action in which the attachment issued, commence action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances and conditions provided in chapter twelve, of title eighteen of this code. [C. '73, §§ 2973–4; R., §§ 3190–2.]

By the garnishment of a partner, a creditor cannot acquire a greater interest in the property of the debtor than as provided in this section. In case of an attachment of partnership property, it is only the defendant's interest in the funds garnished which can be reached: *Cox v. Russell*, 44–556.

SEC. **3905. Mortgaged personal property.** Mortgaged personal property may be levied on under attachment in the method provided for levying execution thereon. [21 G. A., ch. 117.]

See notes to § 3979,

SEC. **3906. Indemnifying bond.** The provisions as to notice of ownership and indemnifying bond to be given in cases of levies under execution shall in all respects be applicable to levies made under writs of attachment. [20 G. A., ch. 45.]

SEC. **3907. Bond to discharge.** If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the attachment, or after the return thereof by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged, and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action. [C. '73, § 2994; R., §§ 3191–2, 4129.]

Terminates the lien: Where the statutory bond discharging the attachment is executed, the property seized may be levied on under other attachments. The lien of the attachment is discharged by giving the bond: *Jones v. Peasley*, 3 G. Gr., 52.

The bond here contemplated must be for the performance of the judgment. A bond for the return of the property on demand does not release it from the lien of the attachment and terminate the detention for which the defendant may claim damages on the attachment bond in case the attachment is wrongful: *Selz v. Belden*, 48–451.

This bond is a new security taking the place of the attachment lien, and a motion to dissolve the attachment cannot properly be made after such bond is given: *Austin v. Burgett*, 10–302.

Charges for keeping; costs: When such bond is given it is erroneous to require defendant to pay the charges accrued for keeping the attached property before releasing it to him. Such charges go with the costs in the case: *Milburn v. Marlow*, 4 G. Gr., 17.

Formalities of the bond: The plaintiff may sue on the bond, although not executed to him but to the sheriff: *Moorman v. Collier*, 32–138.

It is not essential that it be signed by defendant: *Selz v. Belden*, 48–451.

A bond, irregular in form, *held* sufficient: *Sheppard v. Collins*, 12–570.

Presumption of regularity: It will be presumed, in the absence of anything in the record to the contrary, that a bond taken and approved by the clerk was taken under such circumstances as to render his action proper: *Budd v. Durall*, 36–315.

Not released by apppeal bond: The giving of a *supersedeas* bond on appeal does not affect a bond previously given to discharge the attachment. The plaintiff may recover to the full amount of the discharge bond if necessary to satisfy his judgment, and, if there is any part of the judgment unsatisfied, may also recover upon the *supersedeas* bond to that extent: *State v. McGlothlin*, 61–312.

Discharge of sureties: Where the sureties on such bond have been discharged upon

judgment against plaintiff without exception to the order of discharge, but on reversal, upon appeal, there is a new trial and plaintiff recovers, he cannot have judgment against the sureties if, after the order of discharge, they have surrendered indemnity previously held: *Barton v. Thompson*, 66–526.

Discharge by agreement of parties: Where the parties in an attachment suit agreed upon a settlement and directed the sheriff to release the attached property, *held*, that the sheriff could not afterwards be held liable because of the failure of the defendant to perform his part of the agreement: *Melhop v. Seaton*, 77–151.

And evidence tending to establish the agreement for settlement and discharge of the attachment. *held* not a contradiction of the officer's return and properly admitted: *Ibid.*

And the order in the attachment case directing the attached property to be sold to satisfy the judgment, *held* not to estop the sheriff from showing that he released it upon the agreement, as he was not a party to that case: *Ibid.*

Dispenses with necessity of notice of ownership: Where a delivery bond is given there is no necessity for giving to the officer the notice of ownership contemplated by § 3906: *Ayres, etc., Co. v. Dorsey Produce Co.*, 70 N. W., 111.

SEC. **3908. Judgment on bond.** Such bond shall be part of the record. If judgment go against the defendant, the same shall be entered against him and sureties. [C. '73, § 2995; R., § 3193.]

This remedy on the bond is additional to the remedy by action: *State v. McGlothlin*, 61–312.

SEC. **3909. Delivery bond.** The defendant, or any person in whose possession any attached property is found, or any person making affidavit that he has an interest in it, may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, to be approved by the sheriff, or after the return of the writ by the clerk, in a penalty at least double the value of the property sought to be released, but if that sum would exceed double the amount of the claim for which an attachment is sued out, then in such sum as equals double the amount of such claim, conditioned that such property or its appraised value shall be delivered to the sheriff, to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof. This bond shall be filed with the clerk of the court. [C. '73, § 2996; R., § 3219; C. '51, § 1876.]

A bond given under this section does not terminate the attachment, nor prevent defendant from moving for its discharge: *Allerton v. Eldridge*, 56–709.

Nor does it prevent a third party claiming title to the property from disputing the validity of the attachment by summary proceedings (under § 3928): *Tuttle v. Wheaton*, 57–304.

The execution of a delivery bond for the release of the property constitutes a waiver of any objection to irregularities or defects in the return of the attachment: *Case Threshing Machine Co. v. Merrill*, 68–540.

Being for benefit of plaintiff, the bond is not limited to the officer serving the process, but delivery must be made, if delivery becomes necessary, to the officer who has the final process: *Ramsey v. Coolbaugh*, 13–164.

A mistake in the bond as to the court in which the attachment issued will not render the bond invalid as to the sureties: *Ripley v. Gear*, 58–460.

A delivery bond, though so defective as not to be sufficient under the statute, may still be enforced as a common-law bond, and the attachment defendant will be liable thereon if judgment goes against him in the proceedings in which the attachment was issued: *Garretson v. Reeder*, 23–21.

Order for sale of the property, upon the rendering of judgment against defendant, is not necessary in order to fix liability on a delivery bond on which the property has been released: *Ibid.; Waynant v. Dodson*, 12–22.

Under the corresponding provision of Code of '51, *held*, that debts or property attached by garnishment might be released in the same way as property actually seized, and that the provisions as to appraisement were applicable to such cases: *Woodward v. Adams*, 9–474.

Action on the bond may be brought by the assignee of the attachment plaintiff: *Rowley v. Jewett*, 56–492.

An alteration made in the bond at the time of delivery to the officer, for the purpose of more fully describing the property, *held* not to release the sureties, although made without their knowledge, for the reason that the bond would have been sufficient without the alteration, which was therefore immaterial: *Ibid.*

The validity of the levy, not being questioned on the trial of an action on the delivery bond, cannot be first objected to on appeal in the supreme court: *American Ex. Co. v. Smith*, 57–242.

The execution of a supersedeas bond, on appeal to the supreme court from a judgment rendered in an attachment proceeding, does not operate to discharge the delivery bond. The plaintiff may avail himself of either or both such securities: *Williams v. Robison*, 21–498.

An appeal bond does not take the place of the delivery bond: *Jennings v. Warnock*, 37–278.

The appraisement provided for to determine the amount of the bond to be given is not *prima facie*, at least, essential to the validity of the bond, and need not be shown in the first instance in an action thereon: *Woodward v. Adams*, 9–474.

The provision as to the filing with the clerk is directory and does not affect the validity of the bond. Moreover, unless the contrary appears, it will be presumed that the officers did their duty: *New Haven Lumber Co. v. Raymond*, 76–225.

The execution of a bond and the release of property thereunder must be regarded as a waiver of any claim that the property is not subject to attachment: *Ibid.*

In an action on such bond it is not necessary to show that the attachment was specially confirmed by the judgment in the cause in which it was issued: *Ibid.*

Where a counter-claim for damages on the bond is brought in the original suit, and damages for the wrongful suing out of the writ are deducted from the plaintiff's recovery, the attachment is not dissolved, but the plaintiff is entitled to hold the property to satisfy his judgment: *Cole v. Smith*, 83–579.

Where a sheriff levied an execution in favor of plaintiff on certain personal property of defendants, and they gave a bond for the delivery of the property, but afterwards brought suit against the sheriff for possession, in which the sheriff recovered judgment for its value, and the judgment was paid to plaintiff, but it was not sufficient to satisfy plaintiff's judgment, *held*, in an action on the delivery bond, that plaintiff was entitled to recover only nominal damages: *Stuart v. Trotter*, 75–96.

The provisions of this section are not made applicable to an attachment for the enforcement of a landlord's lien, but a bond for that purpose received and acted on between the parties will be valid as a common law obligation: *Garretson v. Reader*, 23–22; *Painter v. Gibson*, 88–120.

SEC. **3910. Appraisement.** To determine the value of property in cases where a bond is to be given, unless the parties agree otherwise, the sheriff shall summon two disinterested persons having the qualification of jurors, who, after having been sworn by him to make the appraisement faithfully and impartially, shall proceed to the discharge of their duty. If such persons disagree as to the value of the property, the sheriff shall decide between them. [C.'73, § 2997; R., § 3220; C.'51, §§ 1877–8.]

The appraisement is not, *prima facie* at least, essential to the validity of the bond, and need not be shown in the first instance in an action thereon: *Woodward v. Adams*, 9–474.

Appraisement is not necessary in attachment except under the circumstances here provided: *Smith v. Coopers*, 9–376.

SEC. **3911. Defense in action on delivery bond.** In an action brought upon such bond, it shall be a sufficient defense that the property for the delivery of which the bond was given did not, at the time of the levy, belong to the defendant against whom the attachment was issued, or was exempt from seizure under such attachment. [C.'73, § 2998; R., § 3221; C.'51, § 1879.]

A defendant in an action on a bond, who seeks to take advantage of the fact that the property did not belong to him, must state in his answer to whom it did belong: *Blatchley v. Adair*, 5–545.

A defense to an action on the delivery bond is made out if it is shown that at the time of the levy of the writ the property belonged to some person other than the defendant in attachment: *Ayres, etc., Co. v. Dorsey Produce Co.*, 70 N.W., 111.

SEC. **3912. Sale of perishable property.** When the property attached is in danger of immediate and serious waste or decay, or when the keeping of the same will necessarily be attended with such expense as to greatly depreciate the amount of proceeds to be realized therefrom, or, by agreement of all parties interested, or upon the application of the sheriff or any party to the action, the court or a judge thereof, upon such notice as it or he may prescribe, may order the sale of any or all of such property, notice to be given thereof, as fixed in the order, which may require an appraisement of any part or all of such property. If the owner defendant is a nonresident, and makes an appearance, no notice of the application for the order need be given. [C.'73, § 2999; R., § 3222; C.'51, § 1881.]

SEC. **3913. Specific attachments.** In an action to enforce a mortgage of or lien upon personal property, or for the recovery, sale or partition of such property, or by a plaintiff having a future estate or interest therein for the security of his rights, where it satisfactorily appears by the petition, verified on oath, or by affidavits or the proofs in the cause, that the plaintiff

has a just claim, and that the property has been or is about to be sold, concealed or removed from the state, or where plaintiff states on oath that he has reasonable cause to believe, and does believe, that unless prevented by the court the property will be so sold, concealed or removed, an attachment may be granted against the property. [C.'73, § 3000; R., § 3225.]

Grounds urged in a particular case, *held* not sufficient: *Allerton v. Eldridge*, 56–709.

SEC. **3914. By vendor.** In an action by a vendor of property fraudulently purchased to vacate the contract and have a restoration of the property or compensation therefor, where the petition shows such fraudulent purchase of property and the amount of the plaintiff's claim, and is verified, an attachment against the property may be granted. [C.'73, § 3001; R., § 3226.]

SEC. **3915. Granted by court or judge—terms.** The attachment in the cases mentioned in the last two sections may be granted by the court in which the action is brought, or by the judge of any court, upon such terms and conditions as to security by the plaintiff for the damages which may be occasioned, and with such directions as to the disposition to be made of the property attached as may be just and proper under the circumstances of each case. [C.'73, § 3002; R., § 3227.]

SEC. **3916. Writ for attachment of specific property.** The attachment shall describe the specific property against which it is issued, and have indorsed upon it the direction of the court or judge as to the disposition to be made of the attached property, and be directed, executed and returned as other attachments. [C.'73, § 3003; R., § 3230.]

SEC. **3917. Terms of bond to discharge.** The court may, in any of the cases mentioned under this head of specific attachments, direct the terms and conditions of the bond to be executed by the defendant, with security, in order to obtain a discharge of the attachment or to release the attached property. [C.'73, § 3004; R., § 3231.]

SEC. **3918. Indebtedness due the state—security demanded.** In all cases in which any person is indebted to the state, or to any officer or agent thereof for the use or benefit of the state, the proper county attorney or attorney-general shall demand payment or security therefor, when, in the opinion of said county attorney or attorney-general, the debt is not sufficiently secured. [C.'73, § 3005.]

SEC. **3919. Attachment.** In all actions for money due to the state, or to any agent or officer for the use of the state, it shall be lawful for an attachment to issue against the property or debts of the defendant not exempt from execution, upon the filing of an affidavit by the county attorney of the proper county, or of the attorney-general, that he verily believes that a specific amount therein stated is justly due, and the defendant therein has refused to pay or secure the same, and unless an attachment is issued against the property of the defendant there is danger that the amount due will be lost to the state. [C.'73, § 3006.]

It is evidently contemplated that an attachment shall issue for the cause herein stated only when demand has been made upon the debtor for payment or security and is refused; and that the defendant is absent from the state, so that demand cannot be made upon him, does not change the rule: *State v. Morris*, 50–203.

SEC. **3920. No bond required.** The attachment so issued shall be levied as in other cases of attachment, and no bond shall be required of the plaintiff in such cases, and the sheriff shall not be authorized to require any indemnifying bond in case of such levy. [C.'73, § 3007.]

SEC. **3921. Bond to discharge or release.** An attachment levied under the provisions of the two preceding sections may be discharged, or any property taken thereunder may be released, by the execution of a bond with sufficient sureties, as provided by law in other cases of attachment. [C.'73, § 3008.]

SEC. **3922. Sheriff indemnified.** In case any sheriff shall be held liable to pay any damages by reason of the wrongful execution of any writ of attachment issued under the three preceding sections, and if a judgment is rendered therefor, the amount thereof, when paid by such sheriff, shall become a claim against the state in his favor, and a warrant therefor shall be drawn by the auditor upon proper proof. [C.'73, § 3009.]

SEC. **3923. Sheriff's return.** The sheriff shall return upon every attachment what he has done under it, which must show the property attached, the time it was attached, and the disposition made of it, by a full and particular inventory; also the appraisement above contemplated when such has been made. When garnishees are summoned, their names and the time each was summoned must be stated, with a copy of each notice of garnishment served attached as a part of his return. Where real property is attached, the sheriff shall describe it with certainty to identify it, and, where he can do so, by a reference to the book and page where the deed under which the defendant holds is recorded. He shall return with the writ all bonds taken under it, any notice of claim to such property by another than the defendant, any indemnifying bond given by the plaintiff in consequence of such notice, and all money and bank bills levied upon or paid to him thereunder. Such return must be made immediately after he has attached sufficient property, or all that he can find; or, at latest, on the first day of the first term on which the defendant is notified to appear. [C.'73, § 3010; R., § 3224.]

Writ not returned: The officer may justify under a writ under which a levy has been made, although the writ has not yet been returned: *Kingsbury v. Buchanan*, 11-387.

Defects in: It is the levy of the attachment, and not the sheriff's return on the writ, that gives the court jurisdiction of the subject-matter; and a defect in the return will not render the proceedings void, nor subject to collateral attack; but they will be voidable only, and subject to correction in a direct proceeding: *Rowan v. Lamb*, 4 G. Gr., 468.

The fact that the return does not state the property levied on to be that of defendant will not render subsequent proceedings under such levy void. (Overruling *Tiffany v. Glover*, 3 G. Gr., 387): *Rowan v. Lamb*, 4 G. Gr., 468.

Irregularities or defects in the return of an officer to the attachment are waived by acquiescence in the levy and consenting to the property being put into the possession of the officer. Such consent is shown by executing a delivery bond for the release of the property as authorized by law: *Case Threshing Machine Co. v. Merrill*, 68–540.

Jurisdiction is acquired over property by a levy. If it is valid. a defective return will not invalidate the proceedings: *Buck-Reiner Co. v. McCoy*, 85–577.

Thus where the writ ran against two defendants, and the return showed the levy upon certain property as the property of one of them, whereas it was in fact the property of both, *held*, that it would be given effect as a levy upon the property of both, notwithstanding the return: *Ibid.*

The words "duly served" on an appearance docket in regard to a writ of attachment, *held* properly excluded from evidence in view of the requirement that the facts constituting the service shall be stated in the return: *Benjamin v. Shea*, 83-392.

When to be made: It is not required that the writ be returned the first day of the first term succeeding its issuance. The levy of the writ may be made at any time before judgment or before its return: *Westphal v. Sherwood*, 69–364.

Return as evidence; patrol to vary: The return of the writ, being the act of a sworn officer, is *prima facie* evidence of the facts therein stated. Whether it can be contradicted by parol testimony, *quære: Kingsbury v. Buchanan*, 11-387

The return is the statutory evidence of what it purports to show. It constitutes with the writ, one record. Without a return the court has no proper evidence before it on which to base any proceedings against specific property levied upon, or credits garnished: *Rock v. Singmaster*, 62–511.

The service and return of the writ are the evidence of the levy: *McDonald v. Moore*, 65–171.

The return of the writ showing service upon the sheriff of notice by a third person claiming ownership of the property is sufficient evidence of the service of such notice: *Crawford v. Nolan*, 72–673.

The return should show what property was attached and the disposal made of it, and all acts done by the officer in the execution of it, and such return is evidence against the parties as to the acts done by the parties in executing it, which are required by law to be shown by the return, but it is not evidence of facts not necessarily involved in the execution of the writ, such as a malicious trespass: *Charles City Plow etc., Co. v. Jones*, 71–234.

While the return of the officer may be the only competent evidence of what property was seized under the writ, it is not conclusive in an action of trespass against the officer that the plaintiff's property had not been taken. Plaintiff may in such action

show that the officer has seized property not included in the return: *Carpenter v. Scott*, 86–563.

The return upon a writ of attachment is evidence only of what can be properly embraced in a return and a return which relates to acts done outside of the officer's duty is not receivable as evidence of such facts nor in any way conclusive upon the parties: *Citizens' Nat. Bank v. Loomis*, 69 N.W., 443.

The fact that in delivering the property to a receiptor the sheriff acted by direction of the attaching creditor is not a fact which is to be stated in the return: *Ibid.*

The officer's return should show the service of notice of the levy to the defendant and where such notice is necessary the levy will not be effectual without a showing of such notice in the return although the levy is entered in the incumbrance book: *Anderson v. Moline Plow Co.*, 69 N.W., 1028.

Levy after return of the writ and after default upon service by publication will not confer jurisdiction over the property, and a sale thereunder will be a nullity: *Osborn v. Cloud*, 23–104.

Amendment of return: See notes to § 3933.

Disposition of property: Where the sheriff under writ of attachment levied upon personal property, consisting of carpets, furniture, etc., used in a hotel, and allowed the same to be further used in the operation of the hotel, it appearing that the property would have been greatly damaged by removal, and that its storage elsewhere would have been attended with considerable expense, *held*, that no damage to the owner of the property appearing, he could not recover against the sheriff for the conversion of the property: *Etter v. O'Neil*, 83–655.

Though property attached is left with a receiptor it is still in the custody of the sheriff, and a statement that he holds the property subject to the order of the court, is not inconsistent with his having delivered it to a receiptor: *Citizens' Nat. Bank v. Loomis*, 69 N. W., 443.

An agreement between attaching creditors that the property shall be delivered to a person named who shall sell the same at public sale and return the proceeds to the sheriff to be disposed of in lieu of the property is not invalid, the person thus designated being regarded as holding for the sheriff. Such an arrangement does not release the liens of the attachments under which the property is seized: *Cressy v. Katz-Nevens-Rees Mfg. Co.*, 91–444.

SEC. **3924. Judgment—satisfied from proceeds.** If judgment is rendered for the plaintiff in any case in which an attachment has been issued, the court shall apply, in satisfaction thereof, any money seized by or paid to the sheriff under such attachment and by him delivered to the clerk, and any money arising from the sales of perishable property, and if the same is not sufficient to satisfy the plaintiff's claim, the court shall order the issuance of a special execution for the sale of any other attached property which may be under his control. [C. '73, § 3011; R., § 3232.]

A special execution may be issued in case of property held under attachment to await the rendition of judgment, although the judgment be general and no particular allowance of a special execution be made thereon: *Corriell v. Doolittle*, 2 G. Gr., 385.

In case of judgment in attachment proceedings a special execution in pursuance thereof cannot issue after the death of the judgment debtor: *Welch v. Battern*, 47–147.

Where attached property is sold it will be presumed that it was sold under special execution as provided by statute: *Peterson v. Foli*, 67–402.

The lien of the attachment is not lost by reason of an omission to order a special execution. The property may be sold under a general execution: *Kingsbury v. Buchanan*, 11–387.

In an attachment suit commenced by publication of notice, in which the court does not acquire jurisdiction over the person of defendant by personal service or appearance, the plaintiff cannot have judgment for a general execution for any residue of the debt left unsatisfied after exhausting the attached property: *Johnson v. Dodge*, 19–106.

Where a judgment was rendered for plaintiff in attachment after deducting from his claim the amount allowed defendant on a counter-claim on the bond for the wrongful suing out of the writ, *held*, that the property should not be discharged, but should be applied to the satisfaction of such judgment: *Cole v. Smith*, 83–579.

The provisions of § 3992 as to the liability of officers in levying execution apply to special as well as general executions: *Bank of Reinbeck v. Brown*, 76–696.

SEC. **3925. Court may control property.** The court may from time to time make and enforce proper orders respecting the property, sales and application of the money collected. [C. '73, § 3012; R., § 3233.]

SEC. **3926. Expenses for keeping.** The sheriff shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs. [C. '73, § 3013; R., § 3234.]

While the sheriff is entitled to be allowed his necessary expenses for keeping the attached property he is not to have any compensation for personal services in addition to his statutory fees and salary: *King v. Shepherd*, 68–215.

The sheriff is liable to a person employed by him to take care of attached property, and

this claim for necessary expenses of keeping such property is to be presented by the sheriff, and not by the person employed by him for that purpose: *Rowley v. Painter*, 69–432.

SEC. **3927. Surplus.** Any surplus of the attached property and its proceeds shall be returned to the defendant. [C. '73, § 3014; R., § 3235.]

SEC. **3928. Intervention.** Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition verified by oath to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in or lien on it, under any other attachment or otherwise, and setting forth the facts upon which the claim is founded; and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may impanel a jury to inquire into the facts. If it is found that the petitioner has a title to, a lien on or any interest in such property, the court shall make such order as may be necessary to protect his rights. The costs of such proceedings shall be paid by either party at the discretion of the court. [C. '73, § 3016; R., § 3237.]

A third party claiming the property may avail himself of the summary proceedings here provided to have his right to the property determined, although he has already secured possession of the property by a delivery bond: *Tuttle v. Wheaton*, 57–304.

This section simply provides an additional remedy to the third person whose property is wrongfully seized. He is not bound to follow it: *Sperry v. Ethridge*, 70–27.

By this section any person other than defendant may intervene at any time before the sale of attached property or before the proceeds thereof, or the attached debt, is paid over to the plaintiff in the action, and make a claim to the property or money. This section is, by virtue of § 3975, also applicable in garnishments under execution: *Edwards v. Cosgro*, 71–296.

The party entitled to such an order as is here contemplated should ask for it: *Moffitt v. Albert*, 66 N. W., 162.

Damages for the use or loss of service of the property cannot be recovered in such proceeding. Such relief can be had only in an independent action: *Jennings v. Hoppe*, 44–205.

Any claim, lien, interest or title to or in the property attached may be set up at any time before the proceeds are paid to the plaintiff in attachment: *Howe v. Jones*, 57–130.

But a claimant of the property cannot intervene after rendition of judgment: *Ball v. Cedar Valley Creamery Co.*, 67 N. W., 232.

These provisions are not limited to cases of specific attachment: *Jennings v. Hoppe*, 44–205.

Upon appeal from judgment of a justice against a garnishee, taken by the defendant in the action, a third person may intervene and assert his claim to the debt under these provisions although the garnishee does not appeal: *Daniels v. Clark*, 38–556.

A proceeding under this section is not necessarily in equity: *Clinton Nat. Bank v. Studemann*, 74–104.

The purpose of the law is to authorize the court in case of intervention in an attachment case to determine intervenor's claim, but not to consider or determine any other question, and the court cannot render a judgment for the value of the property against the intervenor in favor of either of the parties to the suit: *Valley Bank v. Wolf*, 69 N. W., 1131.

The provisions of § 3931 as to the time when an appeal must be taken after an order dissolving an attachment, in order to preserve such attachment, are applicable to orders made under this section: *Ryan v. Heenan*, 76–589.

SEC. **3929. Discharge on motion.** A motion may be made to discharge the attachment or any part thereof, at any time before trial, for insufficiency of statement of cause thereof, or for other cause making it apparent of record that the attachment should not have issued, or should not have been levied on all or on some part of the property held. [C. '73, § 3018; R., § 3239.]

Attached property will be discharged on motion only where it is apparent of record that it should not have been levied on; a third party claiming the property should proceed in accordance with the provisions of § 3928: *Tidrick v. Sulgrove*, 38–339; *Williams v. Walker*, 11–77.

That the petition for attachment does not state sufficient ground therefor cannot be raised by demurrer, but must be reached by motion as here provided: *Hunt v. Collins*, 4–56.

Where it appears that, at the time the writ issued, plaintiff had no cause of action, the property should be discharged, although a cause of action, as made out in an amended petition, has accrued subsequently to the writ: *Cramer v. White*, 29–336.

In a particular case, *held*, that an attachment should have been quashed for defects in the affidavit to the petition: *Stadler v. Parmlee*, 10–23.

Insufficiency of amount of bond may be a proper ground for motion to dissolve: *Hamble v. Owen*, 20–70.

Defect in writ or want of bond is to be raised in this manner, and not by demurrer: *Bruce v. Grady*, 36–352.

Failure of plaintiff to recover on the

whole of the claim sued on is not ground for quashing the attachment, *pro tanto*, after judgment: *Sackett v. Partridge*, 4–416.

The truth of the facts alleged as ground of attachment cannot be questioned on motion to dissolve. The remedy is by suit on the attachment bond: *Sturman v. Stone*, 31–115.

That property levied on is exempt from execution may be set up as a ground for its release: *Wilson v Stripe*, 4 G. Gr., 551.

Where it was shown that the property attached was exempt, *held*, that it should have been discharged upon motion, and that such showing was not inconsistent with the allegations in the petition for attachment, that plaintiff was about to remove his property from the state: *Hastings v. Phœnix*, 59–394.

If the party fails to take advantage of his exemption by motion to have the property released, he may still do so by replevin: *Wilson v. Stripe*, 4 G. Gr., 551.

Where attached property was released on motion as exempt, *held*, that upon seizure of the same property upon execution in the same action defendant might recover it by replevin, although a writ of error had been taken from the decision on the motion, no *supersedeas* bond being filed: *Pellersells v. Allen*, 56–717.

To justify the discharge of property on motion on the ground of exemption, the case should be made clear and entirely satisfactory. Otherwise the party should be left to other and ordinary means for testing the liability of the property to seizure under the writ: *McLaren v. Hall*, 26–297.

The fact that the property was attached by the sheriff outside of his county, or that the levy was secured by fraud or violence, is a ground for discharge of the property on motion: *Pomroy v. Parmlee*, 9–140.

The question whether certain real estate is subject to attachment may properly be determined on motion, but if the title to such property be a matter of dispute between the parties, upon the facts, it cannot properly be determined in this manner: *Rausch v. Moore*, 48–611.

Want of an allowance of the amount of property to be attached, as required in actions on tort, will not be ground to discharge the entire attachment where the action is both on contract and tort; but if more property is seized than can be held under attachment on the portion of the action founded on contract, the excess may be released: *Moses v. Arnold*, 43–187.

Where there is an absence of such allowance in an action on tort, and motion is made to discharge the attachment on that ground, the court may then make an allowance to relate back, as between the parties, to the issuance of the writ, and refuse to discharge the attachment: *Magoon v. Gillett*, 54–54.

No pleading controverting the motion is required or allowed. Evidence of any facts controverting the ground for release set up in the motion may be introduced without pleading them, even though they establish an estoppel: *Joyce v. Miller*, 59–761.

Dissolution of the attachment should not be ordered after the attachment has been discharged by bond: *Austin v. Burgett*, 10–302.

Appearance by motion to release attached property is a general appearance to the action: *Chittenden v. Hobbs*, 9–417.

The motion is to be determined for cause apparent of record, and should be sustained only where the showing is clear and entirely satisfactory, and the overruling of the motion is not an adjudication to the effect that the attachment is properly levied upon the property. That question may be determined in another proceeding: *Cox v. Allen*, 91–462.

If the property is not discharged on motion, but defendant recovers damages by way of counter-claim for the wrongful suing out of the writ, he is not entitled to the discharge of the property after judgment for plaintiff for the balance of the claim after the deduction of the defendant's damages, but the property should be held to satisfy such judgment: *Cole v. Smith*, 83–579.

SEC. **3930. Discharge—return of property.** If the judgment is rendered in the action for the defendant, the attachment shall be discharged and the property attached, or its proceeds shall be returned to him. [C. '73, § 3015; R., § 3236.]

Judgment against plaintiff upon demurrer or nonsuit discharges the attachment: *Harrow v. Lyon*, 3 G. Gr., 157; *Brown v. Harris*, 2 G. Gr., 505.

Where attachment has been dissolved by judgment against plaintiff, it is not revived by reversal of the judgment on appeal: *Harrow v. Lyon*, 3 G. Gr., 157.

Where the attachment is released by judgment of nonsuit, it is not revived by an order setting aside the nonsuit upon motion: *Brown v. Harris*, 2 G. Gr., 505.

Judgment dissolving the attachment on motion is suspended by appeal, if the appeal is taken within a reasonable time, and if the judgment is reversed the attachment remains: *Danforth v. Carter*, 4–230.

Such a judgment is a final adjudication upon all questions involved therein, unless appealed from in proper time. To continue the lien as to third persons the appeal must be taken forthwith [but see now, statutory provision referred to below], but as between the parties four days is a reasonable time. In the absence of notice that the plaintiff purposes appealing from the judgment dissolving the attachment on motion, the officer holding money which is the preceeds of the attached property may at once pay it over to the party thus appearing to be entitled thereto: *Danforth v. Rupert*, 11–547.

Where the special verdict of the jury showed that at the time the attachment issued plaintiff had no cause of action. *held*, that the attached property was discharged, although there was a verdict for plaintiff on an amended petition subsequently filed: *Cramer v. White*, 29–336.

Judgment against plaintiff discharges the attachment without any order of court, and

an appeal, taken after the two days from the rendition of such judgment, allowed by § 3931, within which to appeal, will not revive the attachment: *Harger v. Spofford*, 44–369.

The fact that defendant afterward formally moves for a dissolution will not enable plaintiff, by appealing within two days from such order, to keep the attachment in force: *Ibid.*

Where no exception was taken to an order discharging sureties on a discharge bond upon a judgment being entered against plaintiff, *held*, that a subsequent reversal would not entitle plaintiff to judgment against the sureties, it appearing that after the order discharging them they had released indemnity which they held: *Barton v. Thompson*, 66–526.

The invalidity of judgment for plaintiff, for whatever cause, does not defeat the attachment lien, but the case stands as if no judgment had been rendered, all rights depending upon the preceding steps being unimpaired: *Hodson v. Tibbitts*, 16–97.

Where a judgment was rendered for plaintiff in an attachment after deducting from his claim the amount allowed defendant on a counter-claim on the bond for the wrongful suing out of the writ, *held*, that the property should not be discharged, but should be applied to the satisfaction of such judgment: *Cole v. Smith*, 83–579.

SEC. **3931. Time for appeal from order of discharge.** When an attachment has been discharged, if the plaintiff then announces his purpose to appeal from such order of discharge, he shall have two days in which to perfect his appeal, and during that time such discharge shall not operate to divest any lien or claim under the attachment, nor shall the property be returned, and the appeal, if so perfected, shall operate as a supersedeas thereof. [C.'73, § 3019; R., § 3240.]

Where there is a judgment against the plaintiff in an attachment case, the judgment operates to dissolve the attachment without any further order of the court, unless appeal is taken within two days after the rendition of judgment; and where such a case is remanded for new trial, which results in a judgment for plaintiff, it is error to issue a special execution for the sale of the attached property: *McCormick v. Jacobson*, 77–582.

As an appeal is not perfected until notice is served on the clerk and his fees for transcript have been paid or secured, and as the *supersedeas* bond does not operate to secure the clerk's fees, *held*, in a particular case, that money for which the clerk had been garnished in an attachment proceeding was released by reason of proper steps not having been taken within the time specified: *Peterson v. Hays*, 85–14.

The provision of this section as to the time for perfecting an appeal from a ruling discharging the attachment so as to preserve such attachment is applicable to an order made under the provisions of § 3928 on an application of a third person claiming a lien upon or interest in the attached property: *Ryan v. Heenan*, 76–589.

The provisions of this section apply to attachment by garnishment: *Farwell v. Tiffany*, 82–405.

An appeal in an action to recover possession of personal property against an officer claiming to hold it under an attachment is not governed by the provisions of this section: *Linden v. Green*, 81–365.

Where jurisdiction of the court is not dependent upon the fact of attachment, this provision does not affect the right of appeal for other purposes. It relates only to the method of preserving the attachment lien: *Mum v. Shannon*, 86–363.

SEC. **3932. From judgment against plaintiff.** If a judgment in the action be also given against the plaintiff, he must, within the same time, take his appeal thereon, or such discharge shall be final. [C.'73, § 3020; R., § 3241.]

Judgment against plaintiff discharges the attachment without any order of court, and an appeal, taken after two days from the rendition of such judgment, will not revive the attachment: *Harger v. Spofford*, 44–369. And see notes to § 3930.

An appeal may be taken from an order discharging an attachment as well as from a final judgment, and this section is designed to compel plaintiff to take his appeal from the judgment within the time within which he is required to perfect his appeal from the order. It is not designed to apply to any case in lieu of the preceding section, but to add to its requirements when judgment has been rendered against the plaintiff: *Peterson v. Hays*, 85–14.

SEC. **3933. Liberal construction—amendments.** This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ or other proceeding; and no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings. [C.'73, § 3021; R., § 3242.]

Amendments to the petition setting up no new ground of attachment, but merely making the original more specific, and to the bond as to the amount of the penalty, should be allowed, and the attachment should not be dissolved for any defects thus corrected: *Gourly v. Carmody*, 23-212.

A party is not to be prejudiced by any defects which are corrected by amendment: *Wadsworth v. Cheney*, 13-576.

An amendment is allowable correcting a defect in the form of the affidavit: *Shaffer v. Sundwall*, 33-579; *Lowenstein v. Monroe*, 52-231: or a defect in the bond: *Cheever v. Lane*, 9-193; *Holmes v. Budd*, 11-186.

A substituted bond is to be treated in all respects as if filed at the beginning of the action: *Branch of State Bank v. Morris*, 13-136.

The objection that the bond is not sufficient in amount may be avoided by substitution of a sufficient bond: *Van Winkle v. Stevens*, 9-264.

This section is broader than Rev., § 3242, and clearly authorizes an amendment to a writ that is defective by reason of having the seal of the wrong court attached thereto: *Murdough v. McPherrier*, 49-479 (overruling *Foss v. Isett*, 4 G. Gr., 76, and *Shaffer v. Sundwall*, 33-579, decided under prior statutes).

Where the writ was defective in not stating the sum claimed in the action, *held*, that it might be amended in this respect after levy: *Atkins v. Womeldorf*, 53-150

The sheriff's return on the writ of attachment may be amended upon application to the court after as well as before the expiration of his term of office: *Jeffries v. Rudloff*, 73-60. And further as to the return, see notes to § 3964.

Statutory provisions as to attachment should be liberally and not narrowly and technically construed: *Richards v. Schreiber*, 67 N. W., 569.

Recitals in a writ that the petition was filed in the circuit court, when in fact the petition was filed in the district court, and the writ was under the seal of that court, *held* to be such defect as could be cured by amendment: *Rock Island Plow Co. v. Breese*, 83-553.

Where a county had no engraved seal and a scroll was used, the writ reciting the facts, *held*, that the writ was valid: *Conklin v. Wehrman*, 43 Fed., 12.

One of the evident purposes of this section is to prevent the loss to plaintiff, by reason of defects in the proceeding which he is willing and able to cure, of the benefits he would derive from the attachment, and to give him a reasonable opportunity to make necessary corrections. Until objection is made and a reasonable opportunity given to perfect proceedings in which there are curable errors, such proceedings will be treated as valid. Therefore, *held*, that after a motion to dismiss the attachment because the bond is not for a sufficient amount, plaintiff should be allowed a reasonable time in which to file a sufficient bond, and if such bond is filed, the motion should be overruled: *Griffith v. Milwaukee Harvester Co.*, 92-634.

As to amendment of petition, see notes to § 3878.

SEC. **3934. Sheriff—constables.** The word "sheriff," or "officer," as used in this chapter, is meant to apply to constables when the proceedings are in a justice's court, or the like officer of any other court. [C. '73, § 3023; R., § 3244; C. '51, § 1883.]

CHAPTER 2.

OF GARNISHMENT.

SECTION **3935. How effected—notice.** The officer serving a writ of attachment shall garnish such persons as the plaintiff may direct as supposed debtors, or having in possession property of the principal defendant, which shall be effected by a notice served in the manner and as an original notice in civil actions, forbidding his paying any debt owing such defendant, due or to become due, and requiring him to retain possession of all property of the defendant in his hands or under his control, to the end that the same may be dealt with according to law, and, unless answers are required to be taken as hereinafter provided, it shall cite the garnishee to appear on the first day of the next term, if the main cause is pending in a court of record, or not less than ten days thereafter, if such court is then in session, or on the day set for trial, if in a justice's court, and answer such interrogatories as may be propounded, or he will be liable to pay any judgment which the plaintiff may obtain against the defendant. [18 G. A., ch. 58; C. '73, §§ 2975, 2979, 2981; R., §§ 3195, 3199, 3202; C. '51, §§ 1861, 1863, 1866.]

Attachment necessary: Garnishment is simply a mode of attachment: *Woodward v. Adams*, 9-474.

It is only where the sheriff has a writ of attachment that he is authorized to garnish: *Vanfossen v. Anderson*, 8-251.

The authority of the officer to take the answer of the garnishee is dependent upon

the writ of attachment, and the written notice mentioned in § 3939 is simply the *præcipe* directing and demanding the discharge of the power conferred and the duty imposed by the statute. The service of garnishment process and the taking of the garnishee's answers are matters pertaining to the execution of the writ: *Kenosha Stove Co. v. Shedd*, 82–540.

To uphold a garnishment it is not necessary that an order be made by the court sustaining the attachment: *Ibid.*

It is a requisite to jurisdiction of the garnishee that there shall exist a live writ or process under which a garnishment is attempted, but if there is such writ and a service on the garnishee which though defective is followed by his appearance, judgment against him will be valid as against other claims, notwithstanding the defective notice: *Wile v. Cohn*, 63 Fed., 759.

Garnishment is, however, also an incident of execution: See §§3975, 3976.

How shown: The proper evidence of the fact of garnishment is the officer's return on the writ of attachment. Such fact cannot be proved by parol evidence of the officer nor his indorsement of service upon the notice to the garnishee: *Rock v. Singmaster*, 62–511.

When the fact of garnishment is put in issue the proper evidence of it is the same as the evidence of any levy, to wit, the return thereof. The fact that the garnishee appears and answers the interrogatories does not preclude him from afterwards putting in issue the fact of garnishment: *McDonald v. Moore*, 65–171.

Jurisdiction: Garnishment being in the nature of a proceeding *in rem*, the thing against which the proceeding is directed must be brought within the jurisdiction of the court by a virtual seizure thereof, and the court does not acquire jurisdiction except by the proper issuance of the writ of attachment and notice of garnishment thereunder: *Ibid.*

A proceeding in garnishment is in the nature of a proceeding *in rem* and the *res* or thing which is the subject of the action must be before the court Therefore, *held*, that a justice of the peace acquired no jurisdiction in a garnishment proceeding under an execution issued in another county than that in which the notice of garnishment was served: *Gaye v Maschmeyer*, 72–696.

If the proceeding is by publication and it is sought to effect the attachment by service of notice of garnishment, and no debt is due at the time so as to be actually reached by such garnishment, the court acquires no jurisdiction whatever in the case, and cannot acquire jurisdiction by reason of a debt afterwards arising from the party garnished to the defendant: *Morris v. Union Pacific R. Co.*, 56–135.

Notice: Though the notice to a garnishee to appear and answer specifies the wrong court, yet, if answers are taken by the sheriff under execution from the proper court and such answers are duly returned, that court acquires jurisdiction to render judgment against the garnishee: *Fanning v. Minnesota R. Co.*, 37–379.

A notice to a garnishee requiring him to appear on any other day than the first day of the next term of the court is void, and confers no jurisdiction over such garnishee: *Padden v. Moore*, 58–703.

Where a garnishee seeks in equity to have a judgment against him set aside on the ground that the notice was not sufficient to give the court jurisdiction, the burden is not upon him to show that the judgment is also erroneous, but is upon the adverse party who insists that it is just. The garnishee is not presumed to be indebted: *Ibid.*

The garnishment process may be served before service of notice of action by attachment: *Phillips v. Germon*, 43–101.

The notice here contemplated is not process issued by the clerk, but a notice given by the officer holding the writ of attachment: *Wile v. Cohn*, 63 Fed., 759.

Appearance of the garnishee will give the court jurisdiction and render the garnishment effectual, although the notice to appear is defective: *Ibid.*

Where it is sought to attach the sum due by a railway company to a land owner for right of way taken by the company, the notice of garnishment should be served on the company and not upon the agent of the company individually, although such agent is authorized to procure the right of way, and is doing so at his own risk for a gross sum: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62–494

Where a notice of garnishment stated the name of defendant as being "N. Young, or N. S. Young," and on a motion by N. S. Young to discharge the garnishment, so far as any liability to said N. S. Young was concerned, it appeared that the original action was against N. Young alone, and N. S. Young was not a party thereto, and the motion of N. S Young in the garnishment proceedings was thereupon sustained, *held*, that such ruling of the court was not an adjudication in subsequent proceedings in the case that N. Young and N. S. Young were not the same person, and that the indebtedness was not due to N. S. Young; *Allison v. Chicago, B. & Q. R. Co.*, 76–209.

Effect: The effect of the garnishment is to stop the payment of any debt, but it does not prevent any transaction which does not grow out of the relation of debtor and creditor, as a sale of property to the garnishee for cash in hand, or a loan to him by the execution debtor, for a limited time, of a horse, etc.: *Victor v. Fire Ins. Co.*, 33–210, 214.

No lien is acquired by garnishment: *Mooar v. Walker*, 46–164; *McConnell v. Denham*, 72–494; *Ware v. Purdy*, 60 N.W., 526; *Maish v. Bird*, 48 Fed., 607.

No lien on personal property can be acquired by process of garnishment, and the rights of a mortgagee whose mortgage was made subsequently to the process of garnishment are not affected thereby: *Booth v. Gish*, 75–451.

A garnishment proceeding creates no lien upon real estate nor upon the rents and profits thereof: *Clark v. Raymond*, 84–251.

Garnishment of a chattel mortgagee, for the surplus of the property over the amount of the debt secured does not create a lien

upon the property, but does create a claim upon the surplus which takes priority over a subsequent attachment of the property by the payment of the mortgage debt, under the provisions of § 3905: *Buck-Reiner Co. v. Beatty*, 82-353.

Where the creditor by attachment takes from the garnishee the goods for which he seeks to hold the garnishee personally he thereby waives his claim against the garnishee on that account: *Toledo Savings Bank v. Johnson*, 62 N.W., 749.

Garnishment is simply one mode of attachment; it creates no lien upon the goods held by the garnishee but makes him personally liable. The attaching creditor may release the garnishee or take the goods held by him. But he does not render himself liable for conversion in taking the goods on attachment without having previously caused the holder to be garnished: *Ibid.*

The garnishment of the tenant for the undivided share of the crop due to the landlord does not take priority over a prior chattel mortgage given on such undivided share: *Riddle v. Dow*, 66 N.W., 1066.

Where a creditor garnishes the chattel mortgagee, he acquires no lien on the property, but the creditor who attacks the validity of the chattel mortgage may levy on the chattels as the property of the mortgagor, and he will thereby acquire priority over a subsequent mortgage given with notice of his levy: *Clark v. Patton*, 92-247. And see notes to § 3891.

To some extent a garnishment is a proceeding *in rem*, but it is also a proceeding *in personam*. In either phase, however, notice of garnishment is essential to jurisdiction: *Gilmore v. Cohn*, 71 N. W., 244.

In supplementary proceedings the garnishee may be required to account for the proceeds of property held by him at the time of the garnishment and subject thereto: *McDonald v. Creager*, 65 N. W., 1021.

By the garnishment the plaintiff acquires an interest in property of the defendant held by the garnishee for which the garnishee may be required to account: *Ibid.*

See further as to the effect of garnishment, notes to § 3898.

As to executor, see next section.

Property in hands of agent: Where the answer of the garnishee showed that he was auditor and cashier of the corporation defendant in the principal action, and had charge of the accounts, receipted for cash remitted by its agents, made collections and disposed of the cash from time to time as directed by the general manager of the corporation, and that he had, at the time of the garnishment, certain money belonging to the corporation kept in the safe provided by it, to which he alone had a key, *held*, that it was his duty as garnishee to retain the money on hand subject to the garnishment, and he could not escape liability on the ground that he did not have independent control of the money, but was under obligation to dispose of it as directed by his superiors: *First Nat. Bank v. Davenport & St. P. R. Co.*, 45-120.

Though the answer of the garnishee discloses that it was his duty to pay out the money in his possession on the order of another, the process of garnishment imposes upon him a paramount duty to retain it in his possession: *Ibid.*

An attaching creditor cannot acquire by garnishment a higher or better right to the funds in the hands of the garnishee than the defendant had: *Des Moines Cotton Mill Co. v. Cooper*, 93-654.

Therefore, where an agent deposits money belonging to his principal in his name as agent, creditors cannot by garnishment have such funds applied to the payment of their claims: *Ibid.*

The possession or control referred to in this section is something more than constructive possession or control. In order to make the garnishee liable he must have the property in his possession so that he can surrender it, if the court so directs, in exoneration of his liability as garnishee. If out of possession and he can obtain it on demand, it may be that he is bound to make such demand, but nothing more can be required: *Smalley v. Miller*, 71-90.

The fact that a railroad company receiving household goods for transportation detains the same for some time under garnishment proceedings, without knowledge of the fact that they are claimed as exempt, but releases them within a reasonable time after receiving notice of that fact, will not render the company liable for damages on account of such detention: *Hynds v. Wynn*, 71-593.

Where, by agreement between a railway company and a contractor, it was provided that the former might reserve out of money due the latter such amount as might become due by the contractor to laborers, and superintend the payment of the same, *held*, that the money in the hands of the railway company thus reserved to be paid over to laborers was not subject to garnishment for the debts of the contractor: *Taylor v. Burlington & M. R. R. Co.*, 5-114.

A garnishment will be valid as against a fund of which the garnishee is the equitable custodian, although it is not within his possession: *Des Moines County v. Hinkley*, 62-637.

As to executor see next section.

What rights reached: The garnishee process only reaches the right which the defendant actually has at the time in the property thereby sought to be attached: *Thomas v. Hillhouse*, 17-67.

The liability of a garnishee is measured by his obligation to the execution defendant at the time of service of garnishment: *Huntington v. Risdon*, 43-517.

Debts due defendant are levied on by garnishment, which is a mode of attachment: *Woodward v. Adams*, 9-474.

The garnishee cannot be held for a debt which had no existence at the time of the garnishment but was subsequently contracted: *Thomas v. Gibbons*, 61-50.

The debt due, or to become due, which the garnishee is required to refrain from paying under this section must be in existence, and not incurred after the notice of garnishment, and it must be such as might in the absence of fraud be enforced by the judgment defendant against the garnishee: *Thomas v. McDaneld*, 71 N.W., 572.

It must be made to appear that the gar-

nishee was indebted to defendant at the time of service of notice. Where the service of notice and the assignment by the debtor of his claim against the garnishee appeared to be of the same date, *held*, that the garnishee would not be liable without further proof that the service was prior to the assignment: *Weire v. Davenport*, 11-49.

Judgment should not be rendered against the garnishee where it appears that his indebtedness to the principal debtor is only conditional and it is not shown that the condition has been fulfilled: *Williams v. Young*, 46-140.

Where the claim of a land owner against a railway company for damages for right of way was pending in court upon a claim for a greater amount of damages than allowed by the commissioners, *held*, that the garnishment of the railway company would hold any amount afterwards found due or which the company should agree to pay in satisfaction of the claim: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62-494.

Garnishee should not be held liable on a judgment where he has a cause of action which he might bring against the judgment creditor greater in amount than the amount of the judgment, even though such cause of action might have been interposed as a defense in the proceeding in which the judgment was recovered: *Fairfield v. McNany*, 37-75.

If a third person is garnished, in an action against one of two persons, for notes in his hands belonging to a partnership, and it appears that the partners are entitled to equal shares therein, and no claim of fraud is set up by partnership creditors, judgment may be rendered against him for the interest of defendant partner remaining in his hands: *Harlan v. Moriarty*, 2 G. Gr., 486; *Robinson v. Moriarty*, 2 G. Gr., 497.

Where the purchaser of property was advised, after making the contract of purchase, that the property belonged to another, and gave his note to such other for the balance of the purchase price, and was subsequently garnished as the debtor of the person with whom the contract was made, *held*, that he would not be protected in making payment to the payee of the note, with knowledge that the indebtedness was actually due to the party from whom the purchase was made: *Kesler v. St. John*, 22-565.

The fact that an innkeeper has a lien on the baggage of his guest for his charges will not prevent the guest from being garnished as the debtor of the innkeeper. The guest could, by paying over to the sheriff the amount due, release his baggage from the lien: *Caldwell v. Stewart*, 30-379.

Where a conveyance of property from grantor to grantee is rescinded by the action of the grantor, after a conveyance has been made to a subsequent grantee, the original grantor is not a debtor of his first grantee and subject to garnishment as to the consideration which is to be refunded, but his liability inures to the benefit of the subsequent grantee: *Deere v. Young*, 39-588.

Where horses belonging to a married woman were entered at a fair by her husband in his name, and the entrance fee was paid with money belonging to her, *held*, that under circumstances rendering the return of the entrance money proper, such money was not liable to garnishment by the creditor of the husband, although the payment thereof by the society to the husband would have relieved it from further liability: *McArthur v. Garman*, 71-34.

To hold a garnishee liable for property it must appear that at the service of the notice he has or has had such property in his possession or under his control: *Kiggins v. Woodke*, 78-34.

The proceeding by garnishment does not obtain where the creditor seeks to subject the real estate of his debtor in the hands of third persons to the payment of his debts. The provisions for garnishment under execution relate to personal property, and not to proceedings where the equitable interest of the debtor in real property is sought to be reached: *Seymour v. Kramer*, 5-285.

Real estate of the debtor, the title to which is in another, cannot be reached by the process of garnishment: *Baxter v. Myers*, 85-328.

The rule that an attaching creditor cannot acquire through his attachment a higher or better right to the property attached than the defendant had when the attachment was levied unless he can show some fraud or collusion by which his rights have been impaired is equally applicable in proceedings by garnishment: *Shaver W. & C. Co. v. Halsted*, 78 730.

In a particular case, *held*, that by garnishment proceedings a creditor had a lien upon proceeds of policies of insurance claimed by the wife of the debtor, and that she could not thereafter make any disposition thereof which would defeat the lien of the creditor on such fund: *Ibid.*

It is only where the debtor of the defendant in execution is garnished that the relation of debtor and creditor exists between the creditor and the garnishee; such relation does not exist by reason of the garnishment of one holding property of the debtor: *Ibid.*

A garnishment in an action by attachment against the firm of S. Bros., *held* not to cover a debt due from the garnishee to the firm of S. & Co., having one member in common with the firm of S. Bros.: *Brumwell v. Stebbins*, 83-425.

Where the question was whether the garnishee was the owner of certain property claimed to have been procured for him by the defendant, or whether the property belonged to defendant, and was transferred to the garnishee in fraud of creditors, *held*, that the person from whom the property was originally procured was not a necessary party: *Capital City Bank v. Wakefield*, 83-46.

A garnishment under an execution is an effectual method of enforcing a claim of parties who claim that the property is held by garnishee under a fraudulent transfer from one against whom the judgment is rendered: *Goll & Frank Co. v. Miller*, 87-426.

Where the purchaser of property is garnished by a creditor of the vendor, claiming the transfer to be fraudulent, the question is whether the garnishee, that is, the pur-

chaser, was in possession of the property or had the control thereof when he was garnished. When he is served with notice of garnishment it is his duty not to further dispose of the property and to refrain from selling it or otherwise realizing upon it; he is liable therefor as for conversion, at least this is true in an equitable proceeding: *Liddle v. Allen*, 90-738.

By garnishment against the mortgagee a creditor claiming the mortgage to be fraudulent as to him may reach the entire value of the mortgaged property: *Citizens State Bank v. Council Bluffs Fuel Co.*, 89-618.

While it is the general rule that the garnishee's liability to the defendant is the measure of his liability to the creditor of the defendant yet this rule is in no sense universal, and when the garnishee holds property of defendant under a fraudulent transfer or arrangement, the right of the plaintiff to hold the garnishee liable is not limited to the defendant's right against the garnishee: *Ibid.*

Capital stock: At common law stock in an incorpoated company could not be reached under an attachment, nor a valid transfer thereof prevented. The attaching creditor must follow the mode pointed out by § 3894, which requires notice to the president or other officer that the stock has been attached. Garnishment of the secretary as an individual will not accomplish the object, even though he understands that the attachment of the stock is intended: *Mooar v. Walker*, 46-164.

The garnishment of one who has in his possession certificates of stock belonging to the debtor will not create a lien upon such stock. The method pointed out in § 3894 must be pursued: *Younkin v. Collier*, 47 Fed., 571.

Interest of mortgagee: The interest of the mortgagee of real property cannot be seized under attachment by levy on the land. The method of procedure is by garnishment: *Courtney v. Carr*, 6-238.

A landlord's right to a share of the crops grown on the leased premises can only be reached by garnishment of the tenant: *Howard County v. Kyte*, 69-307.

Interest of morgtagee of chattels: A mortgagee of personal property not in his possession is not liable on garnishment for such property, or the amount of which the value thereof exceeds his claim: *Curtis v. Raymond*, 29-52; *First Nat. Bank v. Perry*, 29-266.

But the mortgagee in possession may be garnished for the surplus remaining in his hands: *Doane v. Garretson*, 24-351.

Unconditional judgment cannot be rendered against a chattel mortgagee, as garnishee, for the excess of the value of the mortgaged property over his debt, where he is not in actual possession of the property by virtue of the mortgage: *Fountain v. Smith*, 70-282.

The equity of redemption of the mortgagor of personal property after condition broken is subject to sale or transfer as other property and passes under a general assignment. After such general assignment the mortgagee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*, 58-414.

Where it was agreed by and between the mortgagor and attaching creditors and the mortgagee that the property should be sold in bulk and the proceeds applied upon the attachment, *held*, that the proceeding operated as a transfer of the equity of redemption of the mortgagor, and took priority over a subsequent garnishment by a second attaching creditor of the surplus in the sheriff's hands after the satisfaction of the first mortgage: *Phelps v. Winters*, 59-561.

The mortgagee of a stock of merchandise, when garnished while in possession, may discharge the landlord's lien for accrued rent out of surplus left after satisfying his mortgage, without being liable under garnishment for the amount thus applied: *Doane v. Garretson*, 24-351.

Fraudulent mortgagees, who are garnished by the mortgagor's creditors, must retain the property or its proceeds, and if they part with the same in payment of the mortgagor's debts they act at their peril: *Brainard v. Van Kuran*, 22-261.

A person holding property under a bill of sale to secure him for any liability as surety may be garnished for the proceeds of such property remaining after satisfying his claim: *Davis v. Wilson*, 52-187.

Exempt earnings: While a garnishment of an employer for wages of his employe will hold not only wages due but such as afterwards become due, yet, as the employe, if a married man, is entitled to have ninety days' wages exempt (under § 4011), the employer is not to be held liable to judgment in such case, unless it appears that at the time of garnishment, or some time subsequent thereto, he had more than ninety days' wages in his hands: *Davis v. Humphrey*, 22-137.

The burden rests upon defendant or garnishee to show that an amount due to the defendant in the principal action is exempt as earnings, and, unless that fact clearly appears, the debt will be held subject to garnishment: *Oakes v. Marquardt*, 49-643.

The debtor cannot, in a garnishment proceeding, appear and plead an exemption under the laws of another state: *Leiber v. Union Pacific R. Co.*, 49-688.

A debt due to a nonresident for services performed in another state may be attached in an action in this state by publication against such nonresident, by garnishment of the debtor in this state, notwithstanding any custom of the garnishee to pay for such services in the state where they are rendered: *Mooney v. Union Pacific R. Co.*, 60-346.

Exemption laws of another state are not to be relied upon as a defense, either by the garnishee or by the judgment debtor: *Broadstreet v. Clark*, 65-670.

Property out of the state: Personal property under the control of the garnishee, but situated out of the state where suit is brought, cannot be reached by process of garnishment; and this rule is especially applicable to property in the possession of a carrier, and in course of transportation outside of the state: *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76-172.

It seems that under a garnishment proceeding against a nonresident over whom

jurisdiction is acquired while temporarily within the state, the court cannot reach indebtedness which is not in any way connected with any office or agency of the garnishee within the state: *German Bank v. American F. Ins. Co.*, 83-491.

But where the garnishee in an action in another state was a corporation which was doing business in such state, and might have been subject to service of process, *held*, that it would be presumed in favor of a judgment against the garnishee in such proceeding that the laws of the state were such as to give the court jurisdiction: *Ibid.*

Proceedings by garnishment are in effect a suit by the defendant in the name of the plaintiff against the garnishee: *Ibid.*

A debt due in another state to a person residing there will be exempt in accordance with the laws of that state, which the courts of this state will recognize, although having personal jurisdiction: *Mason v. Beebe*, 44 Fed., 556.

After commencement of proceedings in garnishment in this state against a railroad company for wages due to defendant, an employe of the company in another state, a suit in such other state by the employe against the company will not affect the liability of the company in this state under the garnishment; even though as a result of this holding the garnishee might be held twice liable for the same indebtedness, such result furnishes no reason for relaxing the well settled rule of law in favor of the court first obtaining jurisdiction: *Willard v. Sturm*, 65 N.W., 847.

A creditor cannot, by instituting a garnishment proceeding in another state, seize a debt due the debtor in this state, and which would be here exempt from execution: *Teager v. Landsley*, 69-725; *Hager v. Adams*, 70-746.

Assignment: Where the creditor of the garnishee has, by assignment, in any form appropriated the property or indebtedness, and the assignment has been accepted by the assignee, the garnishee cannot be held liable: *Smith v. Clarke*, 9-241.

An equitable assignment will secure the property against garnishment for a debt of the assignor, though no notice be given to the party holding the property prior to the attachment, if such notice is given in time to enable the garnishee to bring it before the court in time for judgment: *Ibid.*

The assignee of a non-negotiable debt should give notice of the assignment to the garnishee in time to enable him to show such assignment in his answer, or at least before judgment against him: *Walters v. Washington Ins. Co.*, 1-404.

A garnishee who has notice of the assignment before answering and fails to set up that fact by way of defense, and allows judgment to go against him cannot plead such judgment against the assignee: *Ibid; Dalhoff v. Coffman*, 37-283.

The assignment of a debt will be good as against a garnishment of the debtor in a proceeding against the original assignor, though the claim is not taken by the assignee as payment but only as collateral security: *Moore v. Lowrey*, 25-336.

The assignor of a judgment taking it subject to garnishment of the judgment debtor acquires no right as against the plaintiff in the garnishment: *Phillips v. Germon*, 43-101.

A debtor having notice of the assignment of the debt before garnishment cannot be held liable in an action against the assignor: *Bailey v. Union Pacific R. Co.*, 62-354.

The garnishee cannot by reason of the garnishment be placed in any more favorable or unfavorable position than he would be were the claim being enforced against him by his creditor: *Metcalf v. Kincaid*, 87-443.

By assignment of wages not yet due, an employe may prevent garnishment of his employer for such wages: *Ibid.*

Where garnishee was by agreement under obligation to pay the amount of his debt to a party who had a lien thereon as against the creditor of such garnishee, *held*, that the claim under the garnishment was subordinate to the obligation of the garnishee under such agreement: *Bergman v. Guthrie*, 89-290.

As to negotiable paper, see § 3950.

SEC. **3936. Of officer, judgment debtor, executor, municipal corporation.** A sheriff or constable may be garnished for money of the defendant in his hands; a judgment debtor of the defendant, when the judgment has not been assigned on the record, or by writing filed in the office of the clerk and by him minuted as an assignment on the margin of the judgment docket; and an executor, for money due from decedent; but a municipal or political corporation shall not be garnished. [C.'73, § 2976; R., § 3196; C.'51, § 1862.]

Property in hands of officer: Where money of a debtor was taken under a search-warrant sworn out by a third person, and was in the hands of a justice of the peace to whom the search-warrant was returned, *held*, that a creditor of the prisoner might attach such money for his debt: *Patterson v. Pratt*, 19-358.

So an officer who in making an arrest has searched the person of the prisoner and taken therefrom property, such as a watch, money, etc., may be garnished for such property by a creditor of the prisoner, it not appearing that the arrest was collusively made or with any fraudulent purpose: *Reifsnyder v. Lee*, 44-101.

But property taken by an officer from the person of a prisoner which is not connected with the crime is to be deemed in the personal possession of the prisoner and cannot be attached in the officer's hands: *Commercial Exchange Bank v. McLeod*, 65-665.

A sheriff may, at the suit of the creditor of the mortgagor, be garnished for any balance of proceeds of the sale of property under

a chattel mortgage, put in his hands for collection, remaining after satisfying the mortgage: *Hoffman v. Wetherell*, 42–89.

And in such case, *held*, that a garnishment proceeding against the mortgagee of the property would not bind the balance in the hands of the officer: *Ibid.*

Where a deputy sheriff, proceeding to foreclose a chattel mortgage, seized a sum of money not covered by the mortgage, *held*, that he was liable therefor in a garnishment proceeding in which he was served with notice of garnishment before paying the money over to the mortgagee to apply on his claim: *Minthorn v. Hemphill*, 73–257.

An executor cannot be held liable as garnishee in his individual capacity for an indebtedness due as executor: *Clark v. Shrader*, 41–491.

The current of authorities holds executors and administrators not subject to garnishment until payment of the creditor's claim against the estate has been ordered, or the estate has been fully administered upon, the accounts settled, and an order for distribution made. Then the executor becomes personally liable, and may be served with notice as garnishee in his individual capacity. It is evident that this section was intended to give the right to garnish an executor before such an order, and that he may be garnished as to a legacy or distributive share as well as for a debt due from the estate: *Boyer v. Hawkins*, 86–40.

An administrator cannot be garnished under a judgment against himself in his individual capacity for money held by him as administrator to which he as an individual is entitled as a distributive share in the estate: *Shepherd v. Bridenstine*, 80–225.

Receiver: Property in the hands of a receiver is in the custody of the law, and therefore not liable to seizure on execution: *Martin v. Davis*, 21–535.

Exemption from garnishment: The exception of municipal corporations from liability to garnishment is the only exemption from such liability: *Caldwell v. Stewart*, 30–379.

Corporations generally may be garnisheed. So *held* of a railroad company: *Taylor v. Burlington & M. R. R. Co.*, 5 114.

Under statutory provisions which did not exempt a municipal corporation from garnishment, *held*, that a corporation, whether public or private, might be garnished, and that if there was any exemption of a municipal corporation, such an exemption was a privilege which it alone could assert, and which could not be interposed by the debtor: *Wales v. Muscatine*, 4–302; *Burton v. District T'p*, 11–166.

The provisions of this section as to municipal corporations apply to all cases and without condition, and are not dependent upon whether such exemption is necessary to protect them against embarrassment in the execution of their political, civil or corporate duties: *Jenks v. Osceola T'p*, 45–554.

Waiver: The municipal corporation itself may waive the exemption in its favor; and where the objection was not raised until upon a second trial, when the court first instructed in regard thereto, *held*, that the right to the exemption had been waived and could not then be raised: *Clapp v. Walker*, 25–315.

Where a municipal corporation, at the same term at which its answer in the garnishment proceeding made before a commissioner was reported to the court, raised the question of its right to exemption under the law, *held*, that such claim was in time and not waived: *Jenks v. Osceola T'p*, 45–554.

The fact that a county brings an action to determine to whom it shall pay a sum of money due by it to a contractor, and makes a creditor who has attempted to garnish the county for its indebtedness to him a party to the action, does not constitute a waiver of exemption from garnishment: *Des Moines County v. Hinkley*, 62–637.

SEC. **3937. Fund in court.** Where the property to be attached is a fund in court, the execution of a writ of attachment shall be by leaving with the clerk of the court a copy thereof, with notice, specifying the fund. [C. '73, § 2977; R., § 3197.]

Money in the hands of an officer of the court may be attached as here provided. So *held*, where the money of a debtor, being taken under a search-warrant sworn out by another person, and being in the hands of a justice, was attached for a debt due his creditor: *Patterson v. Pratt*, 19–358.

Property in the hands of a receiver is in the custody of the law, and therefore not liable to seizure on execution: *Martin v. Davis*, 21–535.

SEC. **3938. Death of garnishee.** If the garnishee dies after he has been summoned by garnishment and pending the litigation, the proceedings may be revived by or against his heirs or legal representatives. [C. '73, § 2978; R., 3198.]

SEC. **3939. Sheriff may take answers.** When the plaintiff, in writing, directs the sheriff to take the answer of the garnishee, he shall put to him the following questions:

1. Are you in any manner indebted to the defendant in this suit, or do you owe him money or property which is not yet due? If so, state the particulars;

2. Have you in your possession or under your control any property, rights or credits of the said defendants? If so, what is the value of the same? and state all particulars;

3. Do you know of any debts owing the said defendant, whether due or not due, or any property, rights or credits belonging to him and now in the possession or under the control of others? If so, state the particulars.

The sheriff shall append the examination to his return. [C.'73, § 2980; R., §§ 3200–1; C.'51, §§ 1864–5.]

It is only when the sheriff has a writ of attachment that he is authorized to take answers as here provided: *Vanfossen v. Anderson*, 8–251.

The fact that the plaintiff does not give the sheriff written direction to take the answers of the garnishee does not invalidate his acts in taking such answers: *Kenosha Stove Co. v. Shedd*, 82–540.

A deputy sheriff may administer the oath to the garnishee: *Conable v. Hylton*, 10–593.

As to answers, see § 3941 and notes.

SEC. **3940. Garnishee required to appear.** If the garnishee refuses to answer fully and unequivocally all the foregoing interrogatories, he shall be notified to appear and answer as above provided, and he may be so required in any event, if the plaintiff so notifies him. [C.'73, § 2981; R., § 3202; C.'51, § 1866.]

The questions need not be propounded or filed until the garnishee has appeared to answer: *Parmenter v. Childs*, 12–22.

The plaintiff is not precluded by the fact that the garnishee makes answer to the sheriff from prosecuting the examination further if he sees fit: *Thompson v. Silvers*, 59–670.

The creditor has the right to examine the garnishee personally, and where the garnishee did not appear, but filed a sworn answer, *held*, that such answer was properly stricken from the files and judgment rendered against him on default: *Penn v. Pelan*, 52–535.

Delay in taking the garnishee's answer will not be a ground for discharge, as the garnishee can apply to the court at any time, and have his answer taken, if it is found proper to do so: *Boyer v. Hawkins*, 86–40.

SEC. **3941. Examination.** The questions propounded to the garnishee in court may be such as are above prescribed to be asked by the sheriff, and such others as the court may think proper. [C.'73, § 2982; R., § 3203; C.'51, § 1867.]

It is within the discretion of the court to require that questions to be propounded to the garnishee shall be reduced to writing and submitted to the court before answer: *Elwood v. Crowley*, 64–68.

A wife who is garnished as the debtor of her husband is not exempt from answering on the ground that her answers would be testimony against her husband. It is not to be regarded as against her husband's interest that his property in her hands is subjected to payment of his debts: *Thompson v. Silvers*, 59–670.

Where a corporation aggregate is garnished it may answer in writing through some officer or agent duly authorized: *Bailey v. Union Pacific R. Co.*, 62–354.

Where the garnishee objects to the competency of a question asked him, he should, after the court has determined that the question is a proper one, have an opportunity to respond before being charged absolutely: *Sawyer v. Webb*, 5–315.

The answer of garnishee is competent evidence on the trial of the issue as to his liability: *Fairfield v. McNany*, 37–75.

The credit and weight to which the answer of the garnishee is entitled should be left to the jury: *Drake v. Buck*, 35–472.

The garnishee's answer is not a pleading in the case, but is in the nature of evidence, and, therefore, is not a part of the record unless made so by a bill of exceptions: *Brainard v. Simmons*, 58–464.

While the garnishee may be required not only to answer with reference to his liability, but to disclose what he knows with reference to other persons who may have property or credits of the debtor under their control, such answer does not bind anyone but the one making it. Therefore, the answer of a member of the firm, garnished individually, will not be binding upon the firm: *Bean v. Barney*, 10–498.

The garnishee's answer is not competent evidence on an issue raised by an intervenor claiming the debt sought to be reached by the garnishment: *Easley v. Gibbs*, 29–129.

The answer of the garnishee may be used as an admission against him, the same as any other declaration, but is not conclusive, it not appearing that the other party has acted upon it so as to constitute an estoppel, the person seeking to hold the garnishee bound by such answer not having been a party to the case in which the answer was made: *Walker v. Irwin*, 62 N.W., 785.

A debtor who procures himself to be garnished without the knowledge of his creditor, for a debt the proceeds of which are exempt, and does not set up such exemption, or notify his creditors so that the latter may do so, is guilty of fraud, and will not be released from liability by a judgment against him: *Smith v. Dickson*, 58–444.

Whether a garnishee is required to set up any defense that the debtor may have, as that the property or debt is exempt, or should notify the debtor of the fact of garnishment, in order that the latter may set up such defense, *quære: Moore v. Chicago, R. I. & P. R. Co.*, 43–385; *Leiber v. Union Pacific R. Co.*, 49–688.

An answer of the garnishee that he was informed and believed that the defendant was a married man living with his family, *held* not

sufficient to show the right of exemption, for the reason that it did not allege such to be the fact, nor allege that he was a resident of the state: *Smith v. Chicago & N. W. R. Co.*, 60–312.

Where the garnishee interposes an objection that the indebtedness is exempt and defendant has notice of the proceeding, and judgment is nevertheless rendered against garnishee, such judgment is conclusive against defendant in any subsequent action to recover the indebtedness. It is his duty to set up the exemption and to appeal from the judgment rendered, if erroneous: *Wigwall v. Union Coal, etc., Co.*, 37–129.

An assignee of non-negotiable paper must give the maker notice of the assignment before such maker is required to answer as garnishee in a suit against the assignor, or at least before judgment is rendered against such garnishee, or he will be barred by such judgment: *Walters v. Washington Ins. Co.*, 1–404; *McCoid v. Beatty*, 12–299.

If the paper is assigned after the garnishment of the maker he may be held liable, notwithstanding he knew of the assignment before answering: *Stevens v. Pugh*, 12–430.

Up to final judgment against him the garnishee may protect himself from liability by showing the assignment of the debt to a third person, made before the garnishment, and judgment in garnishment will not bar an action against the garnishee by such assignee if the garnishee had notice of the assignment before final judgment: *McPhail v. Hyatt*, 29–137.

Where an attorney was garnished for money collected by him on a note, and had knowledge of facts which, if made known, would have protected the rights of an assignee of such note, *held*, that he should have set up such facts in his answer: *Large v. Moore*, 17–258.

Where a debtor is garnished in a suit against his creditor, but no judgment has been rendered in the proceeding, he may, in defense to an action by an assignee of his creditor's claim, to whom such claim has been assigned after the garnishment, plead the pendency of such proceeding as matter in abatement, but not in bar of the action: *Clise v. Freeborne*, 27–280.

If the judgment on which the execution was issued, although voidable for error on appeal, is not void, it is sufficient to protect the garnishee, and he cannot object thereto: *Houston v. Walcott*, 1–86.

The provisions of § 3928 as to intervention are applicable in cases of garnishment under execution as well as in garnishment under attachment: *Edwards v. Cosgro*, 71–296.

In general, see notes to § 3935.

SEC. **3942. Witness fees.** Where the garnishee is required to appear at court, unless he has refused to answer as contemplated above, he is entitled to the pay and mileage of a witness, and may, in like manner, require advance payment before any liability shall arise for non-attendance. [C. '73, § 2983; R., § 3204; C. '51, § 1868.]

If his fees are not tendered the garnishee may refuse to attend, but will not be released from his obligation to retain any property belonging to, or money due, defendant, and his attendance may be secured at a subsequent term by proper summons and tender of fees: *Westphal v. Clark*, 42–371.

The power to compel the attendance of a garnishee is not limited to seventy miles, as is provided in case of witnesses: *Ibid.*

The non-payment of the fees of a garnishee, if lawfully demanded, will excuse his failure to testify, but if he appears without prepayment of fees, he cannot then demand mileage before testifying, and judgment may be rendered against him for failure or refusal to testify on account of such non-payment: *Stockberger v. Lindsey*, 65–471.

SEC. **3943. Failure to appear or answer—cause shown.** If, duly summoned, and his fees tendered when demanded, he fails to appear and answer the interrogatories propounded to him without sufficient excuse, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand for a mere failure to appear, but no judgment shall be rendered against him until he has had an opportunity to show cause against the same. [C. '73, §§ 2984–5; R., §§ 3205–6; C. '51, §§ 1869–70.]

Refusal to answer: Where a garnishee refused to answer questions propounded before a referee appointed to take such answers, and plaintiff, upon the facts being reported by the referee, moved for an order requiring her to answer at a particular time, at which time she refused to answer and her refusal was sustained by the court, *held*, upon appeal, that although the plaintiff might have been entitled to judgment by default against the garnishee for refusal to answer questions propounded by the referee, yet, having obtained an order for further examination, he could not have judgment against the garnishee for refusal to answer when the court sustained her objections, although in so doing the court erred: *Thompson v. Silvers*, 59–670.

Default: Where the garnishee was notified to appear and answer at the March term, but no appearance being made by him then, or at any time, default was taken at the October term of the next year, *held*, that such default was properly rendered, and it was immaterial whether a continuance from term to term was entered or not: *Langford v. Ottumwa Water Power Co.*, 53–415.

A slighter showing of diligence or excuse will be sufficient to warrant setting aside default against a garnishee than in case of default against a defendant: *Evans v. Mohn*, 55–302.

Where a court appoints a commissioner to take the answer of a garnishee, without fixing a time or place for such answer, the garnishee should not be judged in default for failure to appear and answer unless notified by the commissioner of the time and place fixed for taking his answer: *Thomas v. Hoffman*, 62-125.

Where judgment has been rendered against garnishee for failure to appear when he has not been served with notice to appear, he may at a subsequent term have the judgment against him vacated upon motion: *Ibid.*

Where the garnishee has appeared in the case, and is afterwards found to be in default for failure to answer, he is not entitled to the benefits of this section with reference to an opportunity to show cause: *McDonald v. Finney*, 87-529.

It is not essential that such notice be served ten days before the term at which judgment is sought. Where it was served during the term, but more than ten days before the time at which the garnishee was required to show cause, *held*, that it was sufficient. Also, *held*, that it was not error, in the absence of any appearance by the garnishee in response to such notice, to render final judgment against him at a later day in the term than that fixed in the notice: *Langford v. Ottumwa Water Power Co.*, 53-415.

Where the court has not acquired jurisdiction of the garnishee by proper notice, the fact that the garnishee, when served with notice to show cause why execution should not issue against him appears and protests that the court has acquired no jurisdiction, will not render judgment by it valid: *Padden v. Moore*, 58-703.

The garnishee may, when called upon to show cause why judgment should not be rendered against him, answer to the original notice of garnishment, although he is in default by failing to appear as required in such notice. His answer to the merits should be presented with his excuse for default, but it is not to be considered until his excuse is held sufficient and his default set aside: *Fifield v. Wood*, 9-249.

Garnishee should not only rebut the presumption of indebtedness, but show sufficient excuse for his default: *Parmenter v. Childs*, 12-22.

Where default has been rendered against a garnishee who has appeared, but has failed to answer in accordance with an order of the court, judgment by default may be rendered against him as for failure to plead, and such a default can only be set aside under the provisions relative to setting aside judgments by default in general: *Scamahorn v. Scott*, 42-529.

As long as the judgment against the garnishee stands as only for failure to appear, and until he is called on to show cause, he may protect himself from liability by showing an assignment of the debt from the judgment debtor to another, and the judgment in garnishment will not bar an action against the garnishee by the assignee of the claim: *McPhail v. Hyatt*, 29-137.

Further as to assignment, see notes to § 3941.

The notice required to be given garnishee of an opportunity to show cause is not a *scire facias*: *Duncan v. Sangamo F. Ins. Co.*, 35-20.

The showing in a particular case *held* sufficient to sustain the setting aside of default against the garnishee for failure to appear: *Westphal v. Clark*, 46-262.

The judgment which can be rendered against garnishee after he has been given an opportunity to show cause, in default of appearance, should not be greater than that for want of appearance. It is not proper to add interest or costs: *Langford v. Ottumwa Water Power Co.*, 53-415.

SEC. **3944. Paying or delivering.** A garnishee may, at any time after answer, exonerate himself from further responsibility by paying over to the sheriff the amount owing by him to the defendant, and placing at the sheriff's disposal the property of the defendant, or so much of said debts and property as is equal to the value of the property to be attached. [C.'73, § 2986; R., § 3207; C.'51, § 1871.]

The garnishee cannot be held liable for not turning over property to the sheriff, where he holds such property under a lien which has not been satisfied: *Smith v. Clarke*, 9-241.

A failure to tender or bring into court money or property in his hands liable to garnishment does not subject the garnishee to costs: *Randolph v. Heaslip*, 11-37.

A garnishee is not liable for interest unless it be shown that he used the money for which he is liable, instead of setting it apart as a separate fund; and this rule is not changed by the fact that he might, under the provisions of statute, pay over the money to the sheriff: *Moore v. Lowrey*, 25-336.

Where property is turned over by the garnishee to an officer upon certain conditions, such conditions should be recognized when shown to the court, and carried out: *Buckham v. Wolf*, 58-601.

The statutory provision with reference to turning over property does not authorize the discharge of a judgment against a garnishee upon the payment of a sum less than the amount of such judgment, even though the judgment rendered is for an amount greater than the amount actually due: *Burlington & M. R. R. Co. v. Hall*, 37-620.

The fact that the garnishee is entitled to discharge upon delivery of property in his possession shows that it was not intended to reach by garnishment property outside of the state, and which the garnishee himself must therefore transport at his own expense within the state in order to effect such delivery: *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76-172.

The responsibility from which the garnishee is to stand exonerated on payment to the sheriff of the money or delivery to him of the property belonging to the defendant,

is liability to the defendant and not a liability which may exist to other parties growing out of such transaction: *Kramer v. Adams*, 63 N. W., 180.

Therefore, where the purchaser of grain from a tenant subject to the landlord's lien was garnished in an action by the landlord against the tenant for rent and exonerated himself by delivery to the sheriff of the property of the tenant in his hands, *held*, that such delivery did not exonerate him from the liability to the landlord for converting property which was subject to the landlord's lien: *Ibid.*

SEC. **3945. Answer controverted.** When the garnishee has answered the interrogatories propounded to him, the plaintiff may controvert them by pleading thereto, and an issue may be joined, which shall be tried in the usual manner, upon which trial such answer of the garnishee shall be competent testimony. [C.'73, § 2987; R., § 3208; C.'51, § 1872.]

Notice of subsequent proceedings: The garnishee is bound to take notice of proceedings subsequent to his answer until he is discharged. He may move for a discharge upon filing his answer: *Chase v. Foster*, 9–429.

If issue is not taken upon the answer of the garnishee at the term it is filed, the garnishee is entitled to notice: *Kienne v. Anderson*, 13–565.

Issue upon guarnishee's answer: The plaintiff may take issue upon the general answer of the garnishee denying indebtedness: *Bebb v. Preston*, 3–325.

While it may be that formal pleadings are not necessary in reply to the answer of a garnishee in order to enable the defendant to dispute its truthfulness by evidence, yet, when the plaintiff files an answer setting up the facts upon which he bases the denial of the garnishee's answer, thus presenting an issue of fact, he cannot depart therefrom and ask recovery upon grounds not pleaded; *Freese v. Co-operative Coal Co.*, 67–42.

Where plaintiff, seeking to take issue on the garnishee's answer, filed a pleading controverting and denying the same and alleging that the garnishee was indebted to plaintiff in a certain sum, and asking judgment therefor without stating the facts constituting the indebtedness, *held*, that such pleading not having been assailed by motion or demurrer, the garnishee could not object to the introduction of evidence thereunder on the ground that it did not raise any issue: *Ruby v. Schee*, 51–422.

Whether the facts disclosed in the answer of the garnishee show an indebtedness to the principal debtor is a question of law which may be reviewed upon an appeal to the supreme court, but when the garnishee's answer is denied and evidence is introduced on both sides upon the issue thus made, which issue is tried and decided, the supreme court cannot pass upon the correctness of the decision without having the entire evidence before it: *Sheppard v. Downing*, 14–597.

Where plaintiff sought to take issue upon the answers of two garnishees by one pleading, and one of them was on motion discharged from the issue raised thereby, *held*, that it was error to strike from the files a subsequent pleading by the plaintiff controverting the answer of such other garnishee: *Coffman v. Ford*, 56–185.

When an intervenor in the garnishment proceeding who claims an assignment of the debt to him prior to the service of garnishment process has introduced evidence tending to establish such claim, he is entitled to judgment unless other facts are properly shown which defeat his claim, and the garnishee's answer is not competent evidence on such issue: *Easley v. Gibbs*, 29–129.

It is not necessary that plaintiff's pleading shall in express language controvert the answer of the garnishee. It is sufficient if it denies the allegations thereof: *Henny Buggy Co. v. Patt*, 73–485.

Questions of title to real property cannot be determined in a garnishment proceeding wherein it is sought to hold the garnishee for any property of the debtor in his possession: *Wright v. Mahaffey*, 76–96.

A pleading controverting garnishee's answer need not be sworn to: See § 3586.

Venue: Garnishment proceedings upon an execution cannot be brought in any other court than that in which the judgment to be satisfied is entered. No other court would have jurisdiction, and the garnishee must take notice of that fact: *McGuire v. Pitts' Sons*, 42–535.

The issue raised on the answer of garnishee must be tried in the court wherein the principal action is pending, and the venue cannot be changed to the county of the garnishee's residence: *Miller v. Mason*, 51–239; *Smith v. Dickson*, 58–444.

Where a change of venue is taken by defendant in the principal case, such change does not apply to the garnishee unless he joins in the application therefor, and the case should be tried as to him in the court where the proceeding is commenced: *Westphal v. Clark*, 42–371.

Trial: When a trial is required to determine the rights of all the parties, the question as to whether the garnishee is indebted to the defendant is not to be presented separate from that as to whether the debt in the hands of the garnishee is to be condemned for the payment of such indebtedness: *Williams v. Williams*, 61–612.

A justice has jurisdiction in proceedings against a garnishee, although the judgment on which garnishment issues be for more than one hundred dollars: *Gillett v. Richards*, 46–652.

As a proceeding in garnishment must be tried as an ordinary proceeding, or as an action at law, none but legal as distinguished from equitable issues can be tried therein. Plaintiff cannot controvert the answer of garnishee by showing an independent cause of action against the garnishee: *Seers v. Thompson*, 72–61.

On the trial of the issue in a garnishment proceeding before a jury, a party has a right

to a general verdict as in other cases: *Shadbolt & Boyd Iron Co. v. Camp*, 80–539.

Where issues are joined on garnishee's answer plaintiff has no right to have garnishee recalled for further examination. The examination of garnishee is not a matter for the jury: *Kelly v. Andrews*, 71 N.W., 251.

A garnishee is not relieved from the garnishment liability by a failure to have the garnishment proceedings continued from one term to another by order of the court. If he pays the debt before an order of discharge, it is at his peril: *Hughes v. Monty*, 24–499.

The fact that one or more terms intervene between the garnishment process and the judgment against the garnishee does not show an abatement of the proceedings: *Phillips v. Germon*, 43–101.

Evidence: While the answer of the garnishee is competent evidence on the trial, *Fairfield v. McNany*, 37–75, the credit and weight to which it is entitled should be left to the jury: *Drake v. Buck*, 35–472.

SEC. **3946. Judgment.** If in any of the above methods it is made to appear that the garnishee was indebted to the defendant, or had any of his property in his hands, at the time of being served with the notice of garnishment, he will be liable to the plaintiff, in case judgment is finally recovered by him, to the full amount thereof, or to the amount of such indebtedness or property held by the garnishee, and the plaintiff may have a judgment against the garnishee for the amount of money due from the garnishee to the defendant in the main action, or for the delivery to the sheriff of any money or property in the garnishee's hands belonging to the defendant in the main action within a time to be fixed by the court, and for the value of the same, as fixed in said judgment, if not delivered within the time thus fixed, unless before such judgment is entered the garnishee has delivered to the sheriff such money or property. Property so delivered shall thereafter be treated as if levied upon under the writ of attachment in the usual manner. [C. '73, §§ 2986, 2988; R., §§ 3207, 3209; C. '51, §§ 1871, 1873.]

Garnishee's liability: Primarily the garnishee is taken to be an innocent person, and to stand indifferent between the parties, and if no issue is raised on his answer it is the sole test of his indebtedness. His rights are to be carefully protected, and he is not to be placed in a situation where he will be compelled to pay the debt twice: *Walters v. Washington Ins. Co.*, 1–404.

The garnishee is not presumed to be indebted: *Padden v. Moore*, 58–703.

It is a well-settled rule that liability will never be presumed against a garnishee, but must be affirmatively shown: *Letts-Fletcher Co. v. McMaster*, 83–449.

He is in no case to be placed in a worse condition than he would be if the defendant himself was enforcing his claim: *Williams v. Housel*, 2–154; *Smith v. Clarke*, 9–241; *Burton v. District T'p*, 11–166; *Henry v. Wilson*, 85–60.

Judgment should not be rendered against a garnishee except by default, unless his liability is clearly established: *Brainard v. Simmons*, 67–646.

The indebtedness of the garnishee or his possession of property must be affirmatively shown in order to render him liable: *Morse v. Marshall*, 22–290.

Where there is nothing in the special verdict or evidence to justify charging the garnishee, a judgment against him will be reversed: *Kiggins v. Woodke*, 78–34.

While the garnishee is to be looked upon as an indifferent person as between the plaintiff and defendant, and is not to be required to pay his debt but once, yet he will not be protected against the consequences of his own carelessness and negligence, especially where such negligence may result to the injury of *bona fide* creditors: *Houston v. Wolcott*, 7–173.

While the garnishment stops the payment of any debt due from garnishee to defendant, it does not prevent any transaction not growing out of the relation of debtor and creditor, nor prevent the payment by the garnishee to defendant of money which such garnishee is under no legal obligation to pay: *Victor v. Hartford F. Ins. Co.*, 33–210.

Where a person, being insolvent, by an attorney in fact sold his entire stock of goods to a creditor to secure the payment of a debt, and after such creditor had taken possession he was garnished under an attachment issued in favor of another creditor, *held*, that the garnishee was not to be presumed liable, and the burden was upon plaintiff to show such liability, either from the garnishee's answer or by taking issue thereon, and showing it by evidence on such issue, and that upon failure to show that the garnishee did not hold the goods under a valid sale or pledge he was not to be held liable: *Farwell v. Howard*, 26–381.

Where the garnishee answered that the note in his hands sought to be reached by the garnishment proceeding was received by him from the defendant for the specific purpose of paying a judgment on which the garnishee was liable as surety, *held*, that the action as to garnishee was properly dismissed: *Dryden v. Adams*, 29–195.

Garnishee's liability is to be measured by his responsibility and relation to the defendant. Therefore, *held*, that where garnishee was surety for defendant and authorized to pay the secured debt out of property held by garnishee belonging to defendant, he should not be liable for so much of the proceeds of such property as was necessary to satisfy the secured debt: *Cox v. Russell*, 44–556.

Where the creditor requires payment or pledge to secure payment in advance of the contracting of indebtedness, no indebtedness

is created that can be the subject of garnishment: *Caldwell v. Stewart*, 30–379.

The garnishee is not to be held liable for proceeds of exempt property of the debtor, held by him at the time of garnishment under mortgage which he has sold or allowed to be sold for the debtor's benefit: *Brainard v. Simmons*, 67–646.

A garnishee frauduleutly appropriating property in his hands to his own use may be lawfully charged with interest from the day of such appropriation: *Risser v. Rathburn*, 71–113.

When answer shows liability: To charge a garnishee on his answer alone, there must be in it a clear admission of a debt due to, or the possession of attachable property of, the defendant. If there is a reasonable doubt whether he is chargeable, he is entitled to judgment in his favor: *Morse v. Marshall*, 22–290; *Church v. Simpson*, 25–408; *Hibbard v. Everett*, 65–372.

But, although the garnishee deny generally having property of, or being indebted to, the defendant, if it appear from the other statements of his answer that he is so indebted, judgment should be rendered against him: *Bebb v. Preston*, 1–460.

Although the admissions of the answer are not explicit, yet if from the entire answer it clearly appears that the garnishee is liable, judgment should go against him: *Smith v. Clarke*, 9–241.

To sustain a judgment against a garnishee upon his answer alone it must clearly appear that the liability exists: *Mason v. Beebee*, 44 Fed., 556.

Where the answer of the garnishee stated that he was indebted to the judgment debtor at a certain date, "about the time of the service of garnishment, in the sum of," etc., *held*, that the answer was sufficient to justify the conclusion that he was indebted at the time of service of notice, which was on the next day after the day mentioned in his answer: *Hoops v. Culbertson*, 17–305.

The statement of a person that he is indebted to defendant, and a promise on his part to retain the amount of such indebtedness in his possession until a garnishment proceeding can be instituted against him, will not estop him from stating, when summoned as garnishee, that he is not indebted to the defendant in such proceeding: *Starry v. Korab*, 65–267.

It is not competent on garnishee's answer to have the garnishee made a party defendant on motion: *Reeves v. Harrington*, 85–741.

Judgment: The judgment rendered against the garnishee should not exceed the amount of the judgment against the original debtor and the costs of the proceeding in which such judgment was obtained: *Timmons v. Johnson*, 15–23.

The garnishee should not be required to pay over any larger sum than the amount of the plaintiff's judgment interest and costs no matter what may be the amount of defendant's property which has been in his possession: *McDonald v. Creagor*, 65 N.W., 1021.

Without a recovery against the debtor there can be no judgment against the garnishee: *Barton v. Smith*, 7–85.

And a judgment against a garnishee will be reversed on appeal where it does not appear from the record that judgment was rendered against the defendant in the main action: *Bean v. Barney*, 10–498; *Toll v. Knight*, 15–370.

Where judgment is rendered against the defendant, the court will take judicial notice thereof, and that plaintiff is therefore a creditor of the defendant: *Kenosha Stove Co. v. Shedd*, 82–540.

Conditional judgment: Where the garnishee is found indebted to defendant on a contract payable in property other than money, the judgment should be conditioned that it may be discharged in property, or, on failure thereof, become absolute, and a general execution issue: *Stadler v. Parmlee*, 14–175; *Ransom v. Stanberry*, 22–334.

Where it appears that the garnishee has a lien upon property of defendant in his hands the judgment should be conditioned that it be discharged upon the property being turned over to the sheriff, the proceeds to be applied to the original judgment, after satisfying the lien of the garnishee: *Hawthorn v. Unthank*, 52–507.

It would not be proper in such a case to render an unconditional money judgment against the garnishee and thus make him a purchaser of the property without his consent: *Ibid.*

While an unconditional judgment against the garnishee should not be rendered until judgment is rendered against the defendant, the court may properly enter against the garnishee a judgment which will hold the debt or property pending the final adjudication. And in determining the question as against the garnishee, it is not necessary to submit to the jury the question whether plaintiff is entitled to judgment against the defendant: *Capital City Bank v. Wakefield*, 83–46.

A judgment against a garnishee requiring him to turn over to a constable such property of the judgment debtor as may remain in his hands after satisfying his own liens thereon, should not be so construed as to render him liable thereunder unless property of the judgment debtor remained in his hands after satisfying his own liens, and which he has failed to turn over as directed: *Brakke v. Hoskins*, 67 N. W., 235.

Alternative judgment: While the judgment against garnishee may be, in one sense, conditional, that is, contingent upon final recovery of judgment against the principal debtor, it should be absolute as to the amount of his indebtedness. If the judgment is for one of two amounts in the alternative, depending upon a future contingency, it cannot be regarded as final: *Battell v. Lowery*, 46–49.

A judgment that plaintiff recover from garnishee, providing that the garnishee be first fully indemnified, as by law provided, or that the notes be surrendered, is not a final judgment: *Seals v. Wright*, 37–171.

Defendant may set up exemptions: The defendant in the principal action may set up, by way of objection to a judgment against the garnishee, that the indebtedness is exempt from execution, or that the judgment is satisfied, etc. But he cannot interpose an

objection which is personal to the garnishee: *Wales v. Muscatine*, 4–302.

Other points as to judgment: Where garnishee was under obligation to account to defendant for one-half the proceeds of certain uncollected notes and accounts, *held*, that judgment could not be rendered against him for one-half the amount thereof, as some of them might be uncollectible, and the garnishee, being owner of the other half of such notes and accounts, was not under obligation to turn them over to the sheriff to escape liability: *Cox v. Russell*, 44–556.

Where the judgment in a garnishment proceeding was rendered jointly against different garnishees, who answered separately, and a reply was filed as to all of such answers, and no showing was made that a joint liability was not established, *held*, that the judgment was proper: *Boyd v. Rutledge*, 25–271.

Where the liability of the other garnishees would be increased by the discharge of one, such other garnishees have an interest in the determination of the liability of their co-garnishee: *Creasap v. Bower*, 41–210.

The judgment in the garnishment suit need not in express terms recite the satisfaction of the indebtedness from the garnishee to defendant: *Stadler v. Parmlee*, 14–175.

The garnishee cannot object to a judgment by confession under which he is sought to be held liable on account of errors or irregularities not rendering such judgment void: *Henny Buggy Co. v. Patt*, 73–485.

The garnishee has such interest in the subject-matter that he may maintain an action to set aside a judgment rendered against him by reason of fraud even though the owner of the money and property which it is sought to reach in his hands is also notified of the garnishment, such owner not being, however, a party to the proceeding in which the garnishment is effected, but a stranger to the judgment which it is sought to enforce by the garnishment: *Searle v. Fairbanks*, 80–307.

Where a garnishee, claiming the proceeds of property as a mortgagee, resisted the garnishment, and was subsequently allowed to retain a sufficient amount to pay the debt covered by the mortgage so far as it was not fraudulent, *held*, that he should not be allowed attorney's fees on his claim nor interest thereon after the time of the garnishment: *Southern White Lead Co. v. Haas*, 76–432.

A judgment discharging the garnishee cannot be rendered by a judge in vacation: *Laughlin v. Peckham*, 66–121.

Effect of judgment: The legal effect of a judgment against a garnishee is to satisfy, to the extent of such judgment, the indebtedness between such garnishee and the principal debtor: *Stadler v. Parmlee*, 14–175.

The garnishee is protected by the judgment, although for error therein it might be reversed on appeal: *Houston v. Wolcott*, 1–86.

If the debtor brings a suit against the garnishee, in this state, for a debt due him, the latter can successfully defend by setting up the fact that he has been garnished upon such debt in another state: *Moore v. Chicago, R. I. & P. R. Co.*, 43–385; *Leiber v. Union Pacific R. Co.*, 49–688.

Although exemption laws can have no teritorial effect, yet where the debtor and creditor both resided in this state, and the creditor caused proceedings to be brought in another state, and an indebtedness due to the debtor in this state, and exempt here, to be garnisheed, *held*, that the debtor might maintain an action against the creditor to enjoin the prosecution of such proceedings, and that the creditor, having violated such injunction and collected the amount of the indebtedness in the foreign jurisdiction, might be held liable in damages therefor in the same action: *Teager v. Landsley*, 69–725; *Hager v. Adams*, 70–746.

The judgment against the garnishee by a court having jurisdiction as to the subject-matter, that is, a debt due from the garnishee, is a judgment *in rem* and cannot be attacked in a collateral proceeding: *Moore v. Chicago, R. I. & P. R. Co.*, 43–385.

Where defendant relies upon garnishment proceeding in another state as a bar to an action, it is competent to show that the principal judgment on which the garnishment proceeding was based was invalid for want of service sufficient to give the court jurisdiction: *O'Rourke v. Chicago, M. & St. P. R. Co.*, 55–332.

The release of a garnishee who is in fact indebted does not estop the creditor from levying on property bought with money paid by the garnishee to the debtor and which was due and unpaid at the time of garnishment and release: *Milligan v. Bowman*, 46–55.

Where a judgment debtor has been garnished and judgment rendered against him without notice of a prior assignment of the judgment, the assignee cannot compel payment while the judgment in the garnishment proceeding remains in full force: *McGuire v. Pitts' Sons*, 42–535.

Money paid out by the garnishee in connection with the proceedings in the original case, but not in accordance with any judgment in such case, cannot be allowed in satisfaction of his indebtedness: *Myers v. McHugh*, 16–335.

A grantee to whom real property has been conveyed in fraud of creditors is not subject to garnishment at the suit of creditors for the value of such property, and a discharge in such garnishment proceeding will not bar a subsequent proceeding against the grantee by a creditor to set aside such conveyance: *Boyle v. Maroney*, 73–70.

One who is simply a pretended purchaser of property without consideration paid or agreed to be paid or without transfer of possession to him does not become liable as garnishee: *Kiggins v. Woodke*, 78–34.

Appeal: See § 3953 and notes.

SEC. **3947. Notice to defendant.** Judgment against the garnishee shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings, to be served in the same manner as original motions. [18 G. A., ch. 58; C.'73, § 2975; R., § 3195; C.'51, § 1861.]

Notice to the defendant in the principal action is required before the rendition of judgment against the garnishee, and such notice should be served ten days before the trial of the issue, and, in case there is no issue, ten days before judgment is rendered against the garnishee: *Williams v. Williams*, 61–612.

This notice is essential to the jurisdiction of the court over the subject-matter in controversy, and if the garnishee fails to assert his right to be discharged on account of such want of notice, but submits the case without making that question of record, it is proper for the court to set aside the trial and submission as premature and continue the cause for such action as either of the parties may take: *Ibid.*

Service of original notice of the action itself does not make this service of notice of the garnishment proceedings unnecessary: *Wise v. Rothschild*, 67–84.

But it has been held that the judgment debtor is not a necessary party to a garnishment proceeding under execution: *Smith v. Dickson*, 58–444.

The notice required to be served on the principal defendant is for his benefit, and he may waive it by voluntarily appearing in the proceeding: *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88–364.

The statute requires that the principal defendant shall have notice of the garnishment proceedings, but he must afterward take notice for himself of the further steps in the garnishment: *Ammerman v. Vosburg*, 70 N.W., 620.

SEC. **3948. Pleading by defendant.** The defendant in the main action may, by a suitable pleading filed in the garnishment proceedings, set up facts showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for plaintiff's claim, and if issue thereon be joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property, or any part thereof, is found to be thus exempt or not liable, the garnishee shall be discharged.

SEC. **3949. When debt not due.** If the debt of the garnishee to the defendant is not due, execution shall be suspended until its maturity. [C. '73, § 2989; R., § 3210.]

SEC. **3950. Negotiable paper.** The garnishee shall not be made liable on a debt due by negotiable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment. [C. '73, § 2990; R., § 3211.]

Under a similar provision, *held*, that a judgment on a mortgage lien could not be rendered unless the mortgage was delivered or the mortgagee exonerated: *Timmons v. Johnson*, 15–23.

Held, also, that such statutory provision was applicable to the case of negotiable paper after maturity, and that the maker thereof could not be held liable as garnishee without exoneration or indemnity: *Hughes v. Monty* 24–499.

But without reference to such provision, *held*, that the maker of a note who was garnished after maturity thereof, without notice or knowledge of any assignment, might be held liable as a debtor of the payee of the note: *McCoid v. Beatty*, 12–299.

Held, also, that this rule was applicable where the assignment of the note past due was made after service of the notice of garnishment, but before the answer of the garnishee, if the garnishee at the time of answering had notice of such assignment, the rights of the assignee being subordinate to the garnishment: *Stevens v. Pugh*, 12–430.

These provisions as to indemnity in case of negotiable paper may be taken advantage of by the garnishee, but if waived by him the failure to comply with them does not affect the power of the court to render judgment: *McPhail v. Hyatt*, 29–137.

But though the garnishee fails to demand indemnity and allows judgment to go against him, such judgment will be no defense against a holder of a paper who acquired it before the garnishment: *Yocum v. White*, 36–288.

In the case of negotiable paper, the court may order that plaintiff have judgment when the provisions as to indemnity are complied with. But such order will not be a final judgment upon which execution may issue: *Seals v. Wright*, 37–171.

Where the garnishee, after notice of garnishment, paid a note, made to the defendant or bearer, to the indorsee of such note, *held*, that under the evidence as to ownership introduced in the case, a judgment in favor of garnishee was not so wholly unsupported as that it should be reversed: *Kauffman v. Jacobs*, 49–432.

SEC. **3951. Judgment conclusive.** The judgment in the garnishment action, condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand, is conclusive between the garnishee and defendant. [C. '73, § 2991; R., § 3212.]

As to effect of judgment, see notes to § 3949. As to when assignee is bound see notes to § 3941.

SEC. **3952. Docket to show garnishments.** The docketing of the original case shall contain a statement of all the garnishments therein, and

when judgment is rendered against a garnishee, the same shall distinctly refer to the original judgment. [C.'73, § 2992; R., § 3213.]

This section is sufficiently complied with if the record entry of the judgment against the garnishee contains the title of the cause in which such original judgment was rendered: *Boyd v. Rutledge*, 25–271.

SEC. **3953. Appeal.** An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee, or an intervenor claiming the money or property. [C.'73, § 2993; R., § 3214.]

If the garnishee allows judgment to go against him for an amount in excess of his indebtedness, and does not appeal therefrom, he cannot be relieved, even on payment of the amount actually due: *Burlington & M. R. R. Co. v. Hall*, 37–620.

A judgment against a garnishee will not be reviewed on appeal when the appellant has taken no exceptions to any ruling of the court, or submitted any motion to set aside the judgment: *Eason v. Gester*, 31–475; *Robison v. Saunders*, 14–539.

The principal defendant may appeal from a judgment against the garnishee: *Sinard v. Gleason*, 19–165.

Where a judgment is rendered against the garnishee, defendant cannot complain thereof on appeal unless he has ground of objection to the judgment rendered against him for the indebtedness sued upon: *Fanning v. Minnesota R. Co.*, 37–379.

The decision that garnishee is indebted to defendant is not conclusive, although the garnishee does not appeal. If the case is again opened by appeal, other parties, claiming that the indebtedness is due to them, may intervene: *Daniels v. Clark*, 38–556.

An order discharging a garnishee is an order substantially affecting the rights of the parties and may be appealed from: *National Bank v. Chase*, 71–120.

The provisions of § 3931 as to the time allowed for appeal after the discharge of an attachment, are applicable also in cases of garnishment: *Farwell v. Tiffany*, 82–405.

CHAPTER 3.

OF EXECUTIONS.

SECTION **3954. On judgments or orders—attachment for contempts.** Judgments or orders requiring the payment of money, or the delivery of the possession of property, are to be enforced by execution. Obedience to those requiring the performance of any other act is to be coerced by attachment as for a contempt. [C.'73, § 3026; R., § 3247; C.'51, § 1885.]

Orders enforced by execution: An order to pay to the clerk a sum allowed in a divorce suit for temporary alimony may be enforced by execution: *Allen v. Allen*, 72–502.

A certified copy of an order appointing a receiver and directing him to take possession of property serves the same purpose as the writ itself, and a resistance to the receiver acting thereunder will constitute a resistance to the execution of an order of court: *State v. Rivers*, 66–653.

Where the relief sought is a judgment or order for the payment of an amount of money, on which a general execution may issue, it is not a case of equitable jurisdiction: *Kelley v. Andrews*, 62 N.W., 853.

Proceedings for contempt: The proper method of enforcing obedience to a continuing order in the nature of a mandatory injunction is by attachment for contempt: *State v. Baldwin*, 57–266.

Failure to pay money awarded as temporary alimony in a divorce suit, and for which judgment has been entered, cannot be treated as a contempt: *Baily v. Baily*, 69–77.

SEC. **3955. Within what time—to other counties—but one.** Executions may issue at any time before the judgment is barred by the statute of limitations; and upon those in the district and supreme courts, into any county which the party ordering may direct, but only one shall be in existence at the same time. [C.'73, §§ 3025, 3027; R., §§ 3246, 3248; C.'51, § 1888.]

No notice of the issuance of execution need be given the defendant therein: *Ayers v. Campbell*, 9–213.

Within what time may issue: At common law, if execution was not sued out within a year and a day after judgment, it was presumed that the judgment was satisfied or execution released, and a proceeding by *scire facias* was necessary before execution could afterwards issue: *Von Puhl v. Rucker*, 6–187.

Under the statute, execution on a judgment of a court of record may issue at any time within twenty years, but as the lien of such judgment upon real property terminates at the end of ten years, an execution on the judgment after that time only operates as a

lien upon real property from the time of levy: *Stahl v. Roost*, 34–475.

Execution on a judgment of a justice of the peace cannot issue after the expiration of ten years unless a transcript thereof has been filed: *Givens v. Campbell*, 20–79.

Where the time within which an execution might be issued upon a judgment was extended by statute, *held*, that such statute was applicable to judgments already in existence and extended the time within which execution might be issued thereon: *Gray v. Iliff*, 30–195.

The pendency of a *mandamus* proceeding to enforce payment of a judgment does not prevent the right to execution thereon from terminating at the end of twenty years: *McAleer v. Clay County*, 42 Fed., 665.

Judgment essential to validity: If there is no valid existing judgment when the execution is issued, it is void: *Balm v. Nunn*, 63–641.

A subsequent entry of judgment will not relate back so as to legalize an execution issued at a time when no judgment was properly entered and recorded: *Winter v. Coulthard*, 62 N. W., 733.

But one execution: The statutory provision that but one execution can be in existence at the same time is mandatory and not merely directory. Nevertheless it may be waived by the party for whose benefit it is enacted: *Merritt v. Grover*, 61–99.

The mere issuance of a second writ before the return of the prior execution under which the levy has been made is not of itself sufficient to establish the abandonment of such levy: *West v. St. John*, 63–287.

A second execution should not be issued until a levy under a prior execution has been disposed of: *Mc Williams v. Myers*, 10–325.

As to issuing execution to another county, see notes to § 3958.

SEC. **3956. On Sunday.** An execution may be issued and executed on Sunday, when an affidavit is filed by the plaintiff, or some person in his behalf, stating that he believes he will lose his judgment unless process issues on that day. [C.'73, § 3028; R., § 3263.]

SEC. **3957. On demand of party—entries by clerk.** Upon the rendition of judgment, execution may be at once issued by the clerk on the demand of the party entitled thereto; who shall enter on the judgment docket the date of its issuance, and to what county and officer issued, the return of the officer, with the date thereof, the dates and amount of all moneys received or paid out of the office thereon; which entries shall be made at the time each act is done. [C.'73, § 3029; R., § 3265.]

As to the return, see § 3965 and notes.

SEC. **3958. Entries in another county.** In case execution is issued to a county other than that in which judgment is rendered, and is levied upon real estate in such county, an entry thereof shall be made upon the incumbrance book of that county by the officer making it, showing the same particulars as are required in case of the attachment of real estate, which shall be bound from the time of such entry. [C.'73, § 3031; R., § 3249.]

This section is directory only, and a sale of lands in one county may be made on an execution issued from another county without the filing of the transcript provided for. The effect of failure to file the transcript will be that the levy and sale under the execution will not impart constructive notice to a subsequent purchaser of the property before the recording of the sheriff's deed. But actual notice of the proceedings will supply the want of such record notice: *Hubbard v. Barnes*, 29–239; *McGinnis v. Edgell*, 39–419.

When the sheriff's deed is recorded in pursuance of such a sale, it will operate as constructive notice of the title of the purchaser, although a transcript of the judgment was not filed: *Foreman v. Higham*, 35–382.

Execution cannot be issued on the transcript. It must issue from the court originally rendering the judgment: *Seaton v. Hamilton*, 10–394; *Furman v. Dewell*, 35–170.

The powers of the clerk with reference to transcripts of judgment rendered in another county and filed in his office are only those prescribed by this section. He is not authorized to receive payment of or satisfy the judgment, and a return of the sheriff reciting satisfaction of the execution by payment of the amount of the judgment to the clerk of the county where the transcript is filed does not show satisfaction: *Hawkeye Ins. Co. v. Luckow*, 76–21.

As to transcript, see, also, § 3802.

SEC. **3959. Return from another county.** When sent into any county other than that in which the judgment was rendered, return may be made by mail. But money cannot thus be sent, except by direction of the party entitled thereto, or his attorney. [C.'73, § 3032; R., § 3250; C.'51, § 1889.]

SEC. **3960. Form of execution.** The execution must intelligibly refer to the judgment, stating the time when and place at which it was rendered, the names of the parties to the action as well as to the judgment, its amount,

and the amount still to be collected thereon, if for money; if not, it must state what specific act is required to be performed. If it is against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of property of the debtor subject to execution. [C.'73, § 3033; R., § 3251; C.'51, § 1890.]

Form: While an execution must pursue and be warranted by the judgment, yet a mere irregularity as to date will not render a sale thereunder void. If it so describes and identifies the judgment as to render certain the authority on which it is issued, it is sufficient to vest the sheriff with power to sell: *Sprott v. Reid*, 3 G. Gr., 489.

An execution which did not state the amount to be made out of the property, but which contained a statement of the sum due under the decree, *held* sufficient: *Cooley v. Brayton*, 16–10.

A simple variance between the execution and judgment *held* not sufficient to affect the validity of the sale: *Cunningham v. Felker*, 26–117.

An execution showing that the judgment under which it was issued was recovered before a person described by name, but not stated to be a justice of the peace, *held* not sufficient to render the writ void, where the writ was so described and identified as to render certain the authority on which it was issued: *Dean v. Goddard*, 13–292.

An execution from a justice of the peace specifying who recovered the judgment, and against whom it was recovered, but not the names of the parties, *held* sufficient: *Williams v. Brown*, 28–247.

In a particular case, *held*, that the execution sufficiently referred to the judgment and stated the matters necessary to be stated as required by statute: *Burdick v. Shigley*, 30–63.

In whose name to issue: Execution can only issue in the name of the judgment creditor except in case of his death, bankruptcy, or the like. It cannot issue in the name of the assignee of the judgment: *Corriell v. Doolittle*, 2 G. Gr., 85.

The assignment of the judgment carries with it as a necessary incident the right to use the name of the party in whose favor the judgment was rendered, for the purpose of issuing execution: *McWilliams v. Myers*, 10–325.

Alteration: Where it appeared that the name of the execution debtor had been changed in the execution, and it was sought to defeat the sale on the ground of such alteration, *held*, that it would not be presumed that the alteration was fraudulently made by one not authorized to make it, and after the sale, but that the sale would be upheld: *Preston v. Wright*, 60–351.

Recall by court: Where a general execution was improperly issued on a judgment, *held*, that on motion of defendant an order should have been granted in the court in which the judgment was rendered, recalling the execution and releasing the levy made thereunder: *Mayfield v. Bennett*, 48–194.

Exempt property: It appears from this section that execution is not to be levied upon the exempt property of the debtor. Exemption in this case is not a personal privilege which must be claimed as against the levy but the levy is in itself wrongful and one who maliciously causes such wrongful levy to be made will be liable for abuse of process: *Nix v. Goodhile*, 63 N.W., 701.

Special execution: The provisions of § 3991 as to the liability of officers in levying execution apply to special as well as general executions: *Bank of Reinbeck v. Brown*, 76–696.

Where there was a judgment for the sale of pledged property in satisfaction of the pledged debt, but such sale was made by mistake under a general execution instead of under a special execution, *held*, that the pledgee did not thereby lose his lien, and that the purchaser was entitled to be considered an innocent purchaser free from equities: *Valley Nat. Bank v. Jackaway*, 80–512.

Under a particular decree providing for special execution in favor of different parties, *held*, that execution in favor of one did not exhaust the remedy of the other: *Beavans v. Dewey*, 82–85.

Further, as to special execution, see § 3772.

SEC. **3961. Against property.** If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees, it shall require the sheriff to satisfy the judgment and interest out of such property. [C.'73, § 3034; R., § 3252.]

See §§ 4036 and 4071.

SEC. **3962. For delivery of possession.** If it is for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require him to satisfy any costs, damages or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered subject to execution, and the value of the property for which judgment was recovered shall be specified therein, if a delivery thereof cannot be had, and it shall in that respect be regarded as an execution against property. [C.'73, § 3035; R., § 3253.]

SEC. **3963. When for performance of any other act.** When it requires the performance of any other act, a certified copy of the judgment may be served on the person against whom it is rendered, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. [C.'73, § 3036; R., § 3254.]

As to enforcement of order for abatement of nuisance, see notes to § 5447.

SEC. **3964. Officer to receipt for—return.** Every officer to whose hands an execution may come shall give a receipt therefor, if required, stating the hour when the same was received, and shall make sufficient return thereof, together with the money collected, on or before the seventieth day from the date of its issuance. [C.'73, § 3037; R., § 3255.]

Failure to return: An execution must be regarded as existing until it is returned, although the return day has passed; and a sale under a second execution, issued before the first is returned, should, as to the judgment creditor purchasing thereat, be set aside: *Merritt v. Grover*, 57–493.

The failure of the sheriff to make return of a sale within the year following, during which redemption is allowed, will not render the sale void: *Cooper v. French*, 52–531.

Failure to return execution within the time here required does not render the officer liable to an action for damages, unless special injury is alleged and proved: *Musser v. Maynard*, 55–197.

Sale after expiration of execution: If a levy be made while the execution is alive a sale thereunder will be valid, although made after the execution itself has expired: *Stein v. Chambless*, 18–474; *Moomey v. Maas*, 22–380; *Childs v. McChesney*, 20–431; *Butterfield v. Walsh*, 21–97; *Thorington v. Allen*, 21–291; *Wright v. Howell*, 35–288.

The rule that a sale made after the expiration of the execution is valid applies to executions issued by justices of the peace: *Walton v. Wray*, 54–531.

Where the right of the sheriff to subject the property levied on to the satisfaction of the execution is contested by an action of replevin he should not make any return until after the disposition of the replevin suit. Having made a levy it is competent for him to exhaust the property on that execution, no matter what time expires between the levy and sale of the property: *Cox v. Currier*, 62–551.

SEC. **3965. Indorsement by officer.** The officer to whom an execution is issued shall indorse thereon the day and hour when he received it, the levy, sale or other act done by virtue thereof, with the date thereof, the dates and amounts of any receipts or payment in satisfaction thereof; which entries must be made at the time of the receipt or act done. [C.'73, § 3038; R., § 3257.]

How made; evidence: The officer's return indorsed on the writ is the evidence as to what property is covered by the levy, and it is not proper for the officer as a witness to testify as to whether other property was levied upon: *Flannigan v. Althouse*, 56–513.

If the execution and return be shown to be lost, parol evidence may be introduced to show the contents of such return, but for no other purpose: *Le Barron v. Taylor*, 53–637.

An officer is required to make his return in writing indorsed on the execution. If the execution is lost or destroyed, it may be that it would be competent to make the return on a copy, but unless the fact of such loss or destruction is shown by the return, a return made upon a copy cannot be introduced in evidence; nor can the return be explained by parol, unless it is shown that it has been made and lost or cannot be produced: *West v. St. John*, 63–287.

A paper purporting to be an execution, not bearing the clerk's seal or filing mark, and not otherwise identified, but found with the papers in the case, *held* properly excluded as evidence: *Benjamin v. Shea*, 83–392.

Where the sale is treated as a nullity by the parties, parol evidence that it was never completed may be received: *Winnebago County v. Brones*, 68–682.

A return upon an execution should be a statement of what is done by the officer in obedience to the writ; and a statement therein purporting to show the acts of a person other than the officer is without authority of law, and surplusage; therefore, *held*, that a statement in the return that the execution was satisfied by defendant giving security, which was taken by order of plaintiff, and an entry by the clerk upon the judgment record of the same facts, did not show a satisfaction upon which a subsequent incumbrancer could rely: *Aultman v. McGrady*, 58–118.

Where a sheriff's return of execution under which a homestead with other land was sold showed that the land was offered for sale in separate parcels but did not show which parcel was offered first, *held*, that the parol testimony of the sheriff was admissible to show the fact, which did not appear on the return: *Smith v. De Kock*, 81–535.

Where, subsequently to the making of an assignment of a contract to convey land, an execution against the assignor was returned *nulla bona*, *held*, that such return did not give rise to a presumption of insolvency against the assignor at the time the assignment was made: *Belden v. Younger*, 76–567.

The return of the officer "no property found" is sufficient evidence to show that

property of defendant, on which to make a levy, has not been found within the state: *Cameron v. Boyle*, 2 G. Gr., 154.

Statements made by the officer in his return as to acts which are no part of his official duty are not evidence of such acts: *Wickersham v. Reeves*, 1–413.

As to return of writ of attachment, see § 3923 and notes.

Effect of irregularities: The validity of the sale does not depend upon the regularity of the sheriff's return, and a purchaser at such sale who pays his money and receives his deed cannot be prejudiced by want of or irregularity in the sheriff's return of the sale: *Hopping v. Brunam*, 2 G. Gr., 39; *Corriell v. Doolittle*, 2 G. Gr., 385.

Failure to state in the return that notice was given to the execution defendant will not invalidate the deed in a collateral attack: *Humphrey v. Beeson*, 1 G. Gr., 199.

SEC. **3966. Against principal and surety—order of liability.** The clerk issuing an execution on a judgment against principal and surety shall state in the execution the order of liability recited in the judgment, and the officer serving it shall exhaust the property of the principal first, and of the other defendants in the order of liability thus stated; but each person subsequently liable shall, if requested by the officer, point out property owned by the party liable, before him, to obtain the benefits of this provision. To obtain the benefits of this section, the order of liability must be recited in the execution, and the officer holding it must separately return thereon the amount collected from the principal debtor and surety. [C. '73, §§ 3039–42, 3071; R., §§ 3258–61, 3303; C. '51, § 1915.]

One of two joint judgment debtors cannot compel the creditor to resort to the other one first, unless so directed in the judgment, although as between the two the latter is primarily liable: *Palmer v. Stacy*, 44–340.

This provision only applies when judgment has been obtained against both principal and surety, and not then, unless the order of liability is stated in the judgment: *State v. McGiothlin*, 61–312.

The object of this provision is to enable one who is a surety to have it so declared of record, to the end that the property of the principal may be exhausted; but such a finding by the court will not be an adjudication as to the facts, at least unless the principal debtor was a party to the proceeding: *Walters v. Wood*, 61–290.

One who is made a party to a suit to foreclose a mortgage given to secure a note signed by such person as surety is bound by the adjudication as to his relation to the note and rights of priority as to the property to be resorted to for the satisfaction of the judgment: *Case v. Hicks*, 76–36.

Where a mortgage given for the deed of the husband covered land of the husband and also land of the wife, the tract belonging to the husband being the homestead, *held*, that although the wife was surety only, yet under § 2976, providing that in such cases the property not the homestead should be first exhausted, a release by mortgagor of the wife's land, the value of which was greater than the amount of the debt, would prevent the foreclosure of the mortgage against the homestead: *Bockholt v. Kraft*, 78–661.

SEC. **3967. Surety subrogated.** When the principal and surety are liable for any claim, such surety may pay the same, and recover thereon against all liable to him. If a judgment against principal and surety has been paid by the surety, he shall be subrogated to all the rights of the creditor, and may take an assignment thereof, and enforce the same by execution or otherwise, as the creditor could have done. All questions between the parties thereto may be heard and determined on motion by the court, or a judge thereof, upon such notice as may be prescribed by it or him. [C. '73, §§ 3039–42; R., §§ 3258–61; C. '51 § 1915.]

SEC. **3968. Levy—how made and indorsed.** When an execution is delivered to an officer, he must proceed to execute it with diligence; if executed, an exact description of the property at length, with the date of the levy, shall be indorsed upon or appended to the execution and if it was not executed, or only executed in part, the reason in such case must be stated in the return. [C. '73, § 3043; R., § 3262.]

No notice of a levy need be given to the execution defendant: *Ayres v. Campbell*, 9–213.

Description: A levy in the following words, "levied upon a lot of lumber, consisting of fencing, flooring, sheeting, etc., etc., as the property of," etc., *held* not sufficiently definite as to the description of the property to be valid. The levy should describe the property with such certainty as to enable either the successor of the officer or the purchaser at the sale to find and identify it: *Payne v. Billingham*, 10–360.

Return: The provisions as to returns of execution are substantially the same as those relating to returns of writs of attachment. (See § 3923): *Citizens' Nat. Bank v. Loomis*, 69 N. W., 443. See notes to §§ 3964, 3965.

Levy constitutes satisfaction: After levy of execution on goods and chattels sufficient to satisfy the judgment, and defendant in the execution is divested of his right to the property, and the officer making the levy becomes liable to the plaintiff for the debt in case of failure to perform his duty with reference to the property, such levy becomes *prima facie* satisfaction of the judgment: *Lucas v. Cassaday*, 2 G. Gr., 208.

And the subsequent release of such a levy without the knowledge of a surety, will operate as a release of the surety: *Sherraden v. Parker*, 24–28.

While proceedings for the satisfaction of a judgment are going on, and property sufficient to satisfy it is held under execution, the judgment cannot be sued on: *Peck v. Parchen*, 52–46.

Levy on sufficient personal property to satisfy the judgment is only considered a satisfaction in certain cases, as where the rights of a junior execution creditor intervene, or where the delay in the sale is occasioned by the plaintiff himself without the agency or consent of defendant, but as between the parties, levy is not satisfaction; and where property which at the time of levy was sufficient to satisfy a claim afterwards depreciated in value, owing to the postponement of the sale at the request of defendant, *held*, that the levy did not constitute a satisfaction: *Williams v. Gartrell*, 4 G. Gr., 287.

The rule that a levy upon personal property is a satisfaction of the judgment under which the levy is made does not apply in case of levy upon real property. Therefore, where a levy was made upon real property supposed to belong to defendant, and the same was bid in by plaintiff, but it afterwards appeared that defendant had no title, *held*, that plaintiff might recover from defendant the amount of the bid: *Reed v. Crosthwait*, 6–219.

SEC. **3969. What acts necessary.** The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same, selling the other property, and paying to the clerk or the plaintiff the proceeds, or so much thereof as will satisfy the execution. He may retain his own costs on receipting therefor on the judgment docket. [C.'73, § 3044; R., § 3267; C.'51, § 1904.]

What acts: In order to make a legal and valid levy upon personal property the officer must take possession and control, by doing such acts as that, but for the protection of the writ, he would be liable in trespass therefor. Levy upon property which remained locked in an outbuilding, the key of which was in possession of the debtor, *held* not sufficient: *Rix v. Silknitter*, 57–262.

Merely noting the fact of levy upon personal property without taking and keeping possession of it, *held* not sufficient to create a lien: *Techmeyer v. Waltz*, 49–645.

As to levy of attachment, see notes to § 3891.

Leaving property with defendant, who remains in possession without giving a delivery bond, will prevent the levy being valid as against a subsequent levy under execution, under which possession is taken: *Border v. Benge*, 12–330.

Growing crops: A levy of execution upon an unripe and growing crop is not valid as against subsequently acquired liens, if made so long before the officer can properly proceed to advertise or sell as to evince an intention on the part of the judgment creditor to hold the levy for a time merely as security, and especially if it is reasonably certain at the time of the issuance of the writ that it cannot be fully executed by the sale of the crop during the life of the writ, but that the judgment debtor must be put to the expense of another writ: *Burleigh v. Piper*, 51–649.

Where the sheriff levied upon corn in the field ungathered, and notified parties claiming the property of his intention to levy, going into the field for the purpose of making a levy, *held*, that having done all that could be done in order to take possession and give notice to persons interested, the sheriff was not required, in order to maintain his levy, to do more than owners of property usually do under such circumstances to retain possession: *Barr v. Cannon*, 69–20.

Where crops were levied upon as property of a tenant and left in his hands as agent, *held*, that this was a sufficient levy to constitute a conversion as to the landlord, who had a chattel mortgage on the crops, and that the conversion dated from such levy, and not merely from the time of sale: *Stuart v. Phelps*, 39–14.

Estoppel: The action of a party in disclaiming ownership in property before levy thereon cannot be relied on as estopping him from setting up a claim subsequently acquired, the party making the levy not having been deceived or induced to act by any precedent act or declaration of the party thus claiming under the subsequently acquired claim: *Davidson v. Dwyer*, 62–332.

Liability for preserving property under levy: An officer is required to exercise only ordinary care in the preservation of property held by him under execution or attachment: *Cresswell v. Burt*, 61–590.

After the officer has levied upon personal property it is, in legal contemplation, in his possession, custody or control; and if left with a third person as bailee for safe keeping, such custody is deemed the custody or possession of the officer and for his benefit. Although the bailee may be liable in replevin, it by no means follows that the officer is not also liable: *Ralston v. Black*, 15–47.

Where, in an action against a constable for the value of property levied on by him, it was alleged that he had negligently permitted the same to be stolen from him, *held*, that evidence of the fact that the property

was so stolen was admissible in behalf of defendant, notwithstanding the fact of the levy appeared from his return on the writ: *Harper v. Moffit*, 11–527.

A constable who is unable by reason of sickness to discharge his duties as to property levied upon may relieve himself from responsibility by turning the property over to another constable, and it seems that the latter may in such case demand indemnity if indemnity should properly be given, and could not then refuse to receive the property: *Evans v. Thurston*, 53–122.

Liability for execution of process: If the officer in executing process acts in good faith, and in entering upon the premises of the party against whom the writ is directed is guilty of no oppression, and makes no disturbance further than is necessary in making the seizure, the trespass even if made without authority, is nominal only, and nominal damages will limit the extent of the recovery against him: *Plummer v. Harbut*, 5–308.

The sheriff who seizes property beyond the limits of his own county is a wrong-doer, and is liable to the owner and possessor in an action for trespass: *Parmlee v. Leonard*, 9–131.

A process in a case over which the court or officer issuing it had jurisdiction, but in exercising which he does not in all particulars fulfill the requirements of the law, is not void. The officer cannot in such case determine the validity of the proceeding, nor refuse to execute the writ, and is therefore protected under it: *State v. Foster*, 10–435.

A sheriff who commits a trespass by taking goods illegally is liable after going out of office, though his successor sells the same and receives the money: *Duke v. Vincent*, 29–308.

Failure to make levy: A sheriff is not liable in damages for failure to levy execution upon property in defendant's hands if he uses ordinary skill and reasonable diligence in the discharge of his duties: *Crosby v. Hungerford*, 59–712.

To hold an officer liable for failing to perform his duty in the matter of levying upon and holding property on execution, it should appear that the property levied upon belonged to the execution defendant, and was subject to levy; that it was lost because of the officer's negligence, stating the facts constituting such negligence; and that plaintiff suffered injury because thereof: *Hawkeye Lumber Co. v. Diddy*, 84–634.

Action on delivery bond: Where a sheriff levied an execution in favor of plaintiff on certain personal property of defendants and they gave a bond for the delivery of the property, but afterwards brought suit against the sheriff for the property, in which the sheriff recovered judgment for the value of the property, and the judgment was paid and the money turned over to plaintiff, but it was not sufficient to satisfy the judgment, *held*, in an action on the delivery bond, that plaintiff was entitled to recover only nominal damages: *Stuart v. Trotter*, 75–96.

SEC. **3970. What property—no lien on personalty.** The officer shall in all cases select such property, and in such quantities, as will be likely to bring the exact amount required to be raised, as nearly as practicable, and, having made one levy, may at any time thereafter make others, if he finds it necessary. But no execution shall be a lien on personal property before the actual levy thereof. [C. '73, § 3045; R., § 3268; C. '51, § 1903.]

The general rule is that the right to seize and sell is co-extensive only with the power to take and deliver possession: *Campbell v. Leonard*, 11–489.

The pledgee under a valid pledge has a right to the property prior to that acquired thereon by levy of execution against the pledgor with knowledge of the pledgee's rights: *Reeves v. Sebern*, 16–234.

As to levy on mortgagor's interest in chattel property, see § 3979 and notes.

A leasehold interest is subject to sale under execution: *Sweezy v. Jones*, 65–272.

But the rights of a tenant in possession, with option of purchasing, are not greater than a leasehold interest, and cannot be sold distinct therefrom: *Ibid.*

An equitable interest in real property which is a matter of record, may be sold under execution without an equitable action being brought to subject it to the judgment: *Lippencott v. Wilson*, 40–425.

A building erected by one person upon land of another under a parol license, being chattel property, may be sold by a constable under execution from a justice of the peace: *Walton v. Wray*, 54–531.

Real property of a person deceased cannot be seized under a judgment recovered in an action against the administrator. Such sale would not be binding against the heirs: *Lepage v. McNamara*, 5–124.

The right of redemption and possession during the redemption period which a debtor has in property which has been sold at judicial sale is subject to levy and sale, at least in a case where the debtor would not be entitled to redeem from a second sale, and a surety may require that such property be subjected to the payment of the debt before his property is levied on: *Barnes v. Cavanagh*, 53–27. And see notes to § 4045.

An execution may be levied on and enforced against a reversionery interest in a homestead held by the heir, subject to the widow's right of occupancy for life, and such interest acquired by inheritance from an heir beyond the widow's right of occupancy for life may in the same way be levied on and sold for her debts: *Strong v. Garrett*, 90–100.

Property intended for special use is subject to a levy, although it cannot thereafter be applied to such use and does not realize on sale the amount of money it would have brought for use for the purpose intended. In such case the officer will not be liable for the damage resulting, if the levy is rightful: *Coffey v. Wilson*, 65–270.

Property in the hands of a receiver appointed by a court is not liable to seizure by an officer under execution: *Martin v. Davis*, 21–535.

Excessive levy will be ground for setting aside a sale, even though the whole property sold has been previously attached in the same action: *Cook v. Jenkins*, 30–452.

A second levy cannot be made until the first is disposed of: *Downard v. Crenshaw*, 49–296.

The assignee of a judgment cannot disregard a levy already made and issue a second execution and have another levy made thereunder until the levy under the first execution has been disposed of in some way known to the law: *McWilliams v. Meyers*, 10–325.

Where real estate has been levied on, such levy must be disposed of by sale or abandonment, or set aside by a court, before a second execution can issue, except as authorized by § 4042: *Downard v. Crenshaw*, 49–296.

But one execution can be in existence at the same time: See § 3955.

A writ of execution does not become a lien upon personal property until after levy is made: *Reeves v. Sebern*, 16–234.

SEC. **3971. Judgments — money — things in action.** Judgments, money, bank bills and other things in action may be levied upon, and sold or appropriated thereunder, and an assignment thereof by the officer shall have the same effect as if made by the defendant. The levy upon a judgment shall be made by entering upon the judgment docket a memorandum of such fact, giving the names of the parties plaintiff and defendant, the court from which the execution issued, and the date and hour of such entry, which shall be signed by the officer serving the execution, and a return made on the execution of his doings in the premises. [C.'73, § 3046; R., § 3272; C.'51, § 1893.]

Judgments: Aside from the provisions of this section, judgments cannot be levied on and sold as property, but garnishment of the judgment debtor would be the proper remedy: *Osborn v. Cloud*, 23–104.

Although by express statutory provisions a judgment may now be levied on and sold under execution, it is nevertheless a debt and not to be reached under an attachment by a levy, but only by garnishment: *Ochiltree v. Missouri, I & N. R. Co.*, 49–150.

Where an agent recovers a judgment in his own name, but for the benefit of the principal, and to which the principal is entitled, such agent has no interest therein which can be subjected to his debts: *Beaver Valley Bank v. Cousins*, 67–310.

Negotiable notes may, by the above statutory provision, be taken and sold by indorsement, and such transfer will vest the transferee with a title discharged of infirmites: *Earhart v. Gant*, 32–481.

The word "defendant" will apply to a defendant in a garnishment proceeding as well as to the defendant in the original action: *Ibid.*

Without reference to statutory provision, *held*, that a *bona fide* purchaser of a note levied on and sold under execution was protected against a prior purchaser of the note by verbal transfer from the judgment debtor, where the note was found in the hands of payee's agent, and without any marks of assignment to the purchaser: *Allison v. King*, 21–302.

A purchaser of a note at a sale under execution against one with whom it had been left after maturity for collection, and who had wrongfully converted it to his own use, acquires no title and cannot maintain action thereon: *McCormick v. Williams*, 54–50.

Bonds of a railroad company which had been negotiated and afterwards bought back by the company, but not delivered to it, *held* subject to be levied on by execution against the company: *Hetherington v. Hayden*, 11–335.

SEC. **3972. Persons indebted may pay.** After the rendition of judgment, any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and his receipt shall be a sufficient discharge therefor. [C.'73, § 3047; R., § 3273; C.'51, § 1894.]

See notes to § 3944.

SEC. **3973. Against municipal corporation — levy of tax.** If no property of a municipal corporation against which execution has issued can be found, or if the judgment creditor elects not to issue execution against such corporation, a tax must be levied as early as practicable to pay off the judgment. When a tax has been so levied and any part thereof shall be collected, the treasurer of such corporation shall pay the same to the clerk of the court in which the judgment was rendered, in satisfaction thereof. [C.'73, § 3049; R., § 3275; C.'51, § 1896.]

This section confers upon such corporations no additional power to tax which is not otherwise granted to them, and a corporation cannot be compelled under such provision to levy a tax in excess of the limit imposed by its charter or the limit imposed by statute or the constitution: *Clark v. Davenport*, 14–494; *Polk v. Winett*, 37–34; *Iowa R. Land Co.*

v. Sac County, 39–124; *Jeffries v. Lawrence*, 42–498, 505; *Supervisors v. United States*, 18 Wall., 71 (modifying *Butz v. Muscatine*, 8 Wall., 575).

But the limitations found in § 887, as to the rate of city taxes, apply only to taxes there specified, and do not prevent the levying of additional taxes to pay indebtedness on which a judgment has been rendered: *Rice v. Walker*, 44–458.

A judgment creditor has, under this provision, the right to require that the levy and collection of a tax to pay his judgment be made, and a sufficient amount thereof set apart for the payment of his claim, and this duty may be enforced by *mandamus: State ex rel. v Davenport*, 12–335.

But the payment of a claim not yet reduced to judgment cannot be thus enforced: *Ibid.*

A judgment creditor, having demanded the levy of a tax for the payment of his judgment, is entitled to have his debt paid in preference to other simple contract debts, and may have an order in an action by *mandamus* for the levy of a tax for the specific payment of such judgment: *Coy v. City Council of Lyons*, 17–1.

The order may direct that if the amount which may be legally levied is not sufficient, similar taxes shall be levied for that purpose for subsequent years: *Ibid.*

Mandamus is the appropriate remedy to compel the authorities to levy the tax when it is their duty to do so: *Butz v. Muscatine*, 8 Wall., 575.

Where a tax has been levied and collected, as provided by statute, an action of *mandamus* will lie to compel the treasurer to pay it over to the creditor: *Brown v. Crego*, 32–498.

Where a judgment cannot be paid out of the proper fund under a full legal levy in addition to the ordinary expenses of the municipal government, the payment of the judgment will be distributed and partial payments required, such as can be legally made: *Coffin v. City Council of Davenport*, 26–515.

That public buildings are exempt, see § 4007.

But where the tax cannot be levied by reason of the limit of taxation, *mandamus* will not be awarded: *Polk v. Winett*, 37–34; *Rice v. Walker*, 44–458; *Supervisors v. United States*, 18 Wall., 71.

Where the limit of taxation has been reached, and it appears that the payment of a judgment would seriously embarrass the county in meeting its current expenses, a writ of *mandamus* will not lie to compel the county to reserve a part of the tax collected in order to pay the judgment: *Clay County v. McAleer*, 115 U. S., 616.

Where taxes were levied for judgment fund and for city judgment tax, *held*, that the officers of the city could be enjoined at the suit of judgment creditors from diverting the proceeds to other purposes, and that evidence was not admissible to show that the levy was for another purpose: *Rice v. Walker*, 44–458.

The statutory provisions as to the enforcement of judgments are applicable to a school district, and *mandamus* may be brought against its officers to compel the levy of a tax as provided: *Boynton v. District T'p*, 34–510; *Stevenson v. District T'p*, 35–462, 471; *Curry v. District T'p*, 62–102

The right to the issuance of a *mandamus* to compel payment of a judgment by a public corporation is based upon the fact that there exists in favor of plaintiffs an operative and enforcible judgment against the defendant; and if during the pendency of the action the twenty years within which the right of execution on the judgment expires, the right to relief is terminated: *McAleer v. Clay County*, 42 Fed., 665.

Under the provisions of Revision of 1860, that a judgment creditor might have the amount of his judgment and costs in the ordinary evidences of indebtedness of the corporation, *held*, that a creditor could not be compelled to take such evidences of indebtedness in payment of his judgment: *State ex rel. v. Davenport*, 12–335; *Oswald v. Thedinga*, 17–13; *Porter v. Thomson*, 22–391.

The fact that a city cannot meet an indebtedness out of the funds raised by one year's levy, by reason of a restriction on the amount of such levy, cannot operate to defeat the right of a party having a contract with the city to ultimate payment: *Davenport, etc., Co. v. Davenport*, 13–229.

The fact that a judgment when rendered cannot be enforced against the city by reason of the want of power of the city to levy a tax to pay such judgment will not be a defense to the action: *Slusser v. Burlington*, 42–378.

SEC. **3974. Corporation stock—debts—property in hands of third persons.** Stock or interest owned by the defendant in any company or corporation, and also debts due him and property of his in the hands of third persons, may be levied upon in the manner provided for attaching the same. [C.'73, § 3050; R., § 3269; C.'51, § 1892.]

[The provisions as to attachment are in §§ 3894–3897. Levy upon mortgaged personal property is provided for by §§ 3979–3989.]

SEC. **3975. Garnishment.** Property of the defendant in the possession of another, or debts due him, may be reached by garnishment. [C.'73, § 3051; R., § 3270.]

This section does not apply to property or money seized on execution. It is expressly limited to proceedings by garnishment: *Ball v. Cedar Valley Creamery Co.*, 67 N. W., 232.

See notes to §§ 3935–3937.

SEC. **3976. Expiration or return of execution—return of garnishments.** Proceedings by garnishment on execution shall not be affected by its expiration or its return. Where parties have been garnished under it, the officer shall return to the next term thereafter a copy of the execution with all his doings thereon, so far as they relate to the garnishments, and the clerk shall docket an action thereon without fee, and thereafter the proceedings shall conform to proceedings in garnishment under attachments as nearly as may be. [C. '73, § 3052; R., § 3271.]

SEC. **3977. Joint or partnership property.** When an officer has an execution against a person who owns property jointly, in common or in partnership with another, such officer may levy on and take possession of the property owned jointly, in common or in partnership sufficiently to enable him to appraise and inventory the same, and for that purpose shall call to his assistance three disinterested persons, which inventory and appraisement shall be returned by the officer with the execution, and shall state in his return who claims to own the property. [C. '73, § 3053; R., § 3287; C. '51, § 1917.]

SEC. **3978. Lien—equitable proceeding—receiver.** The plaintiff shall, from the time such property is so levied on, have a lien on the interest of the defendant therein, and may commence an action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances provided in the chapter relating to receivers. [C. '73, § 3054; R., §§ 3289–91.]

A partner's interest in partnership property is liable to execution which may be levied thereon and will remain a lien until satisfied by sale or otherwise. The equitable proceedings contemplated by this section in such cases simply pertain to the method of enforcing the liability of the property to the writ: *Lambert v. Powers*, 36–18.

In determining the interest of the debtor in the partnership, partners and creditors may be made parties to the equitable proceeding, and where the case demands, the partnership may in such proceeding be fully settled and wound up: *Richards v. Haines*, 30–574.

Where a creditor levied on firm property under an individual judgment against one partner, and sold the property without bringing the equitable action provided for by statute, just referred to, *held*, that a creditor of the firm obtaining judgment against the partners individually might subsequently levy upon such property and maintain an equitable action to have the property subjected first to the payment of the firm debt, it appearing that there was no other firm property: *Aultman v. Fuller*, 53–60.

Where an execution against the partnership was returned *nulla bona* as to the partnership and also as to an individual partner, except as to certain property standing in his wife's name, *held*, that before a proceeding by *scire facias* (authorized by statutory provisions not now in force), plaintiff could maintain his action in equity to subject the property to the satisfaction of the execution, and require defendant to show cause in the same action why individual property should not be levied on to pay the firm debts: *Ticonic Bank v. Harvey*, 16–141.

SEC. **3979. Levies upon mortgaged personal property—payment or deposit.** Mortgaged personal property not exempt from execution may be taken on attachment or execution issued against the mortgagor, if the officer, or the attachment or execution creditor, within ten days after such levy, shall pay to the holder of the mortgage the amount of the mortgage debt and interest accrued, or deposit the same with the clerk of the district court of the county from which the attachment or execution issued, for the use of the holder of the mortgage, or secure the same as in this chapter provided. [21 G. A., ch. 117, § 1.]

Aside from statute, the mortgagee has the title and right of possession, subject to be divested only on performance of the condition, and the mortgagor has therefore no interest in the property which can be seized and sold under execution: *Campbell v. Leonard*, 11–489; *Gordon v. Hardin*, 33–550; *Vanslyck v. Mills*, 34–375; *Porter v. Knight*, 63–365.

Nor is such interest subject to levy under attachment; *Wells v. Sabelowitz*, 68–238.

The reason of holding that the interest of the mortgagor in the mortgaged property cannot be levied on and sold under execution is not that he has no interest therein which could be appropriated in satisfaction of his debts, but that the statutes of the state have made no provision under which his interest can be appropriated to that object by judicial sale: *Ibid.*

Prior to the enactment of this statute chattel property in the hands of the mort-

gagor, with the right of the mortgagee to possession, was beyond the reach of process by his creditors other than the mortgagee; but a creditor might by garnishment secure the surplus after the payment of the mortgage debt. The provisions of this statute do not give the attaching creditor priority upon paying the amount of the mortgage debt over the preceding garnishment of the mortgagee by another creditor. While the statute enables a creditor by pursuing the method pointed out to obtain a lien upon the property, this is not exclusive of the proceeding by garnishment: *Buck-Reiner Co. v. Beatty*, 82–353.

Prior to this enactment mortgaged property was protected from seizure or lien by attachment or execution. The creditor might proceed by garnishment, but would thereby acquire no right against the property, but only against the garnishee individually to the extent of the surplus: *Blotcky v. O'Neill*, 83 574.

Therefore, where tender was made to a mortgagee only after a prior tender by another creditor had been made, and the mortgage assigned to such prior claimant, *held*, that the subsequent claimant thereby acquired no right to the property: *Ibid.*

Also *held*, that where the subsequent claimant took an assignment of the mortgage he was entitled to possession thereof as against other executions in the sheriff's hands: *Ibid.*

The evident purpose and design of this statute is to give junior creditors the right to subject the property after the payment of the mortgage. It does not dispense with the notice required by § 3991: *Danforth v. Harlan*, 76–236.

If the mortgagee has the right to take possession he may do so even after levy, and leave no interest in the mortgagor subject to levy: *Wells v. Chapman*, 59–658.

Where a contract creating a lien carries with it the right to take possession, if, in the exercise of this right possession is taken forcibly and by violence, the mortgagee may be liable for the injury done in thus taking possession, but not for the value of the property taken in accordance with the terms of the agreement for the lien: *Brown v. Allen*, 35–306.

Where the mortgagor of chattels is in possession and has the right to possession of the mortgaged property for a definite period, his interest prior to the expiration of such period is the subject of levy and sale. But it is otherwise when the mortgagee may take possesion at his pleasure, or where the mortgagor's right of possession is for no definite time: *Rindskoff v. Lyman*, 16–260.

In case the mortgage was executed before the enactment of the statute, the deposit can only be made after the debt secured is due, and the debt secured does not become due merely by virtue of a provision in the mortgage authorizing the mortgagee, whenever he deems himself insecure, to take possession and sell the property: *Deering v. Wheeler*, 76–496.

But where money was deposited in such a case by the execution creditor before the mortgage was due and was accepted by the mortgagee, *held*, that the execution creditor thereby acquired the mortgagee's lien: *Ibid.*

The object of these provisions was to enable the creditor to reach by attachment or execution the value of the mortgaged property in excess of the amount necessary to discharge the mortgage debt. It is not intended for the protection of the mortgagor, and the mortgagee may, if he sees fit, waive the right to a deposit of the amount secured: *Willson v. Felthouse*, 90–315.

SEC. **3980. Interest.** When the debt secured by the mortgage is not due as shown by the mortgage, the officer, or the attachment or execution creditor, must also pay or deposit with the clerk interest on the principal sum at the rate specified in the mortgage for the term of sixty days from the date of the deposit, unless the debt secured falls due in a less time, in which case interest shall be deposited for such shorter period. [Same, § 2.]

SEC. **3981. Failure to pay, deposit or give security.** If within ten days after such levy the attachment or execution creditor does not pay the amount, make the deposit, or give the security required, the levy shall be discharged, and the property restored to the possession of the person from whom it was taken and the creditor shall be liable to the holder of the mortgage for any damages sustained by reason of such levy. [Same, § 2.]

SEC. **3982. Creditor subrogated.** When such sum is paid to the holder of the mortgage or deposited with the clerk, the attachment or execution creditor shall be subrogated to all the rights of such holder, and the proceeds of the sale of the mortgaged property shall be first applied to the discharge of such indebtedness and the costs incurred under the writ of attachment or execution. [Same, § 2.]

The words "such indebtedness" used in this section refer to the mortgage indebtedness, and such indebtedness under the mortgage in question or other mortgages must be satisfied before the proceeds can be applied to the extinguishment of other claims: *Frantz v. Hanford*, 87–469.

SEC. **3983. Holder reinstated.** If, for any reason, the levy upon the mortgaged property is discharged or released without a sale thereof, the

attachment or execution creditor who has paid or deposited the amount of the mortgage debt shall have all the rights under such mortgage possessed by the holder at the time of the levy. If the holder thereof desires to be reinstated in his rights thereunder, he may repay the money received by him, with interest thereon at the rate borne by the mortgage debt for the time it has been held by him, and demand the return of the mortgage, whereupon his rights thereunder shall revest in him, and the attachment or execution creditor shall be entitled to the deposit made, or any part thereof remaining in the hands of the clerk, or any money returned to the clerk by the holder of the mortgage. [Same, § 2.]

SEC. **3984. Statement by holder of amount due.** The holder of the mortgage shall, before receiving the money tendered to him by the attaching or execution creditor or deposited with the clerk, state over his signature and under oath, on the back of the mortgage, the amount due or to become due thereon, and deliver the same, together with the note or other evidence of indebtedness secured by said mortgage, to the person paying the said amount or the clerk with whom the deposit is made, and the holder of the mortgage shall only receive the amount so stated to be due, and the surplus, if any, shall be returned to the person making the deposit. [Same, § 2.]

SEC. **3985. Indemnifying bond released.** When the attaching or execution creditor thus pays or deposits the amount of the claim under the mortgage, he shall not be required to give an indemnifying bond on notice to the sheriff by the holder of the mortgage of his right to the property thereunder, or if one has been given, it shall be released.

SEC. **3986. Costs—surplus.** If under execution sale the mortgaged property does not sell for enough to pay the mortgage debt, interest and costs of sale, the judgment creditor shall be liable for all costs thus made, but if a greater sum is realized, the officer conducting the sale shall at once pay to the mortgage holder the amount due thereunder, and apply the surplus on the execution. [21 G. A., ch. 117, § 3.]

SEC. **3987. Statement of indebtedness.** For the purpose of enabling the attaching or execution creditor to determine the amount to be tendered or deposited to hold the levy under the writ of attachment or execution, the person entitled to receive payment of the mortgage debt shall deliver to any such person, upon written demand therefor, a statement in writing under oath, showing the nature and amount of the original debt, the date and the amount of each payment, if any, which has been made thereon, and an itemized statement of the amount then due and unpaid. [Same, §§ 2, 5.]

SEC. **3988. Contest as to validity or amount.** If the right of the mortgagee to receive such or any sum is for any reason questioned by the levying creditor, he may, within ten days after levy, or after demand is made for a statement of the amount due as above provided, commence an action in equity or contest such right upon filing a bond in a penalty double the amount of such mortgage, conditioned for the payment of any sum to be found due to the person entitled thereto, with sureties to be approved by the clerk, and if such mortgagee is a nonresident or his residence is unknown, service may be made by publication as in other actions, but if such residence becomes known before final submission, the court may order personal service to be made. If commenced at law, the court may transfer the same to the equity side as in other cases. The court may appoint a receiver, and shall determine the amount due on the mortgage, and all other questions properly presented, and may continue and preserve or dismiss the lien of the levy, the costs to be taxed to the losing party as in other cases. If there are two or more mortgages, the creditor may admit the validity of one or more, and make the required deposit as to such, and contest the other, and where there are two or more such mortgages, each of which is questioned, a failure to establish the invalidity of all shall not defeat the rights of the levying creditor, but in such case the decree shall determine the priority of liens, and direct the order of payment out of the proceeds of the property which shall

be sold under special execution to be awarded in said cause; but nothing in this chapter contained shall be construed to forbid or in any way affect the right of a creditor to contest in any other way the validity of any mortgage. [Same, § 4.]

The levy of an attachment on mortgaged chattels is not void because of a failure to pay or offer to pay the mortgage debt, where creditors are contesting the validity of the mortgage, and such failure does not affect the requirement that notice of ownership must be served by parties claiming the property: *Hibbard v. Zenor*, 75-471.

A creditor may, under this provision, contest the right of the mortgagee upon any ground that goes to the validity of the mortgage; but before he can do that, he must acquire an apparent lien upon the property by making a levy in accordance with these provisions: *Thomas v. Farley Mfg. Co.*, 76-735.

There is nothing in this statutory provision preventing the creditor when the mortgage is alleged to be fraudulent, from resorting to other remedies which were available to him before the passing of the statute: *Citizens' State Bank v. Council Bluffs Fuel Co.*, 89-618.

An attaching creditor of a mortgagor of chattels acquires such interest in such chattels by levying an attachment thereon, under the claim that the mortgage is void as to creditors, as entitles him to priority over a valid mortgage subsequently taken with knowledge of the levy: *Clark v. Patton*, 92-247.

It is not necessary that in order to secure such priority the attaching creditor proceed under the provisions of this statute: *Ibid.*

The provisions of this chapter are not exclusive of the remedies already existing: *Ibid.*

Further, see notes to § 3891.

SEC. **3989. Failure to make statement.** A failure to make the statement, when required as above provided, shall have the effect to postpone the lien of the mortgage and give the levy of the writ of attachment or execution priority over the claim of the holder thereof. [Same, § 6.]

SEC. **3990. Where mortgagee has been garnished.** If the mortgagee, before the levy of a writ of attachment or execution, has been garnished at the suit of a creditor of the mortgagor, a creditor desiring to seize the mortgaged property under a writ of attachment or execution shall pay to the holder of the mortgage, or deposit with the clerk, in addition to the mortgage debt, the sum claimed under the garnishment, and the provisions of this chapter, so far as applicable, in all respects shall govern proceedings relating thereto.

SEC. **3991. Indemnifying bond—notice of claim to property.** An officer is bound to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy, unless he has received notice in writing under oath from some other person, his agent or attorney, that such property belongs to him; stating the nature of his interests therein, how and from whom he acquired the same, and consideration paid therefor; or from the defendant, that the property is exempt from execution; but failure to give such notice shall not deprive the party of any other remedy. Or, if after levy he receives such notice, such officer may release the property unless a bond is given as provided in the next section; but the officer shall be protected from all liability by reason of such levy until he receives such written notice. [C.'73, § 3055; R., § 3277; C.'51, § 1916.]

Duty to levy; bond: An officer is bound to levy on any personal property in the possession of, or that he has reason to believe belongs to, defendant, or any on which the plaintiff directs him to levy, and is not liable in any way by reason of such levy until he receives the notice provided for in this section. He cannot demand an indemnifying bond until such notice is served. His remedy by interpleader is merely cumulative: *Kaster v. Pease*, 42-488.

A simple disclaimer at the time of the levy, by the execution debtor, of any interest in the property, will not be sufficient in itself to put the officer on inquiry as to the ownership of the property, or justify him in postponing the levy and incurring the risk of having the execution debtor dispose of the property or otherwise place it beyond his reach: *West v. St. John*, 63-287.

Where the execution plaintiff has given an indemnifying bond, the officer must hold the property at all events and apply it to the execution unless it is taken from him by legal process, and cannot escape liability for not so doing by showing that it was not the property of the judgment defendant: *Evans v. Thurston*, 53-122.

But the officer is not liable in damages for failure to levy upon property in defendant's possession, if it is shown that such defendant had no interest therein subject to levy: *Crosby v. Hungerford*, 59-712.

Where the officer has been indemnified

it is his duty to use the proper means to make the levy effective on the property: *Cox v. Currier*, 62-551.

This section does not apply to a case where the execution defendant claims that the property is exempt from execution: *McCoy v. Cornell*, 40-457; *Parsons v. Thomas*, 62-319.

These provisions as to the indemnifying bond, as they originally stood, did not apply to levies under attachment: *Wadsworth v. Walliker*, 45-395; *Hall v. Ballou*, 58-585. But now see § 3906.

Where the officer, without requiring an indemnity bond, proceeds to sell property as to which a third person has given him proper notice of ownership, such owner may maintain against him an action of replevin for the property, although at the time the action was brought the property was not in the possession of the officer: *Hardy v. Moore*, 62-65.

The provisions of this section apply to levies under special execution as well as under general execution: *Bank of Reinbeck v. Brown*, 76-696.

The time for bringing action against an officer for damages in the wrongful levy of an execution commences to run from the time notice of ownership of the adverse claimant is served: *Ibid.*

The officer may, at the peril of showing the real ownership of the property, discharge it on the ground that it is not the property of defendant in attachment, the burden of proof being on him to show that fact. Therefore, in an action against the officer for damages for wrongfully discharging attached property, evidence of ownership of the property by another person than the defendant in attachment should be admitted: *Wadsworth v. Walliker*, 45-395; *S. C.*, 51-605.

An officer who has levied upon property the title of which is in doubt, will render himself liable on his official bond by releasing such property if it is found that it was in fact subject to the attachment: *Wadsworth v. Walliker*, 51-605.

These provisions as to indemnifying bond are not unconstitutional: *Cheadle v. Guittar*, 68-680.

Although these provisions were not originally applicable to attachments, *held*, that in case the property was afterwards held under an execution subsequently issuing in the same case, such provisions would apply: *Allen v. Wheeler*, 54-628; *Wadsworth v. Walliker*, 45-395.

And *held*, that even if such bond should be given in an attachment case, it would only have the effect of a common-law bond, and would not render the officer liable absolutely for releasing property from the levy: *Wadsworth v. Walliker*, 45-395.

A bond to indemnify the officer for not levying under the writ, in accordance with his official duty, is void, both as to the officer and the party injured: *Cole v. Parker*, 7-167.

In an action against the sheriff by one who claimed to be the owner of attached property under a purchase made before the levy notice to the sheriff of the claim to the property was held to be immaterial, inasmuch as the purchase was found to have been fraudulent: *Klotz v. James*, 64 N. W., 648.

Joint bond: Where an officer has several writs of execution by different judgments against the same defendant, and is served with notice of a claim to the property by a third person, an indemnifying bond may be given jointly by the execution plaintiffs, and on such bond an action against them jointly may be maintained: *Baxter v. Ray*, 62-336.

The notice here provided for in order to authorize the officer to require an indemnifying bond must be delivered to him. It is not sufficient to simply read it to him: *Gray v. Parker*, 49-624.

The object of this notice is not for the purpose of proving claimant's title to the property, but to enable him to maintain an action against the officer. It should run to the officer and be unequivocal in character, and *held*, that a bill of sale from judgment defendant to the claimant, for the property levied on, was not a sufficient notice under the statute: *Gray v. Parker*, 53-505.

The notice contemplated by this section must be given before the claimant to the property under a chattel mortgage can maintain an action of replevin to recover the possession of the same: *Danforth v. Harlow*, 76-236.

An action against a sheriff to recover property taken on execution cannot be maintained unless the notice here provided for has been given: *Doolittle v. Hall*, 78-571.

The notice should describe the property so that the officer will be able to identify it, and a notice applying to all property upon certain tracts of land is not good when it does not allege ownership of all such property: *Ibid.*

Where property levied on under execution was claimed by chattel mortgagee and subsequently an indemnifying bond was given, *held*, that an assignee of the claim for damages under the bond did not have such interest as to be entitled to bring action without an assignment of the mortgaged indebtedness: *Garretson v. Ferrall*, 78-166.

Service of the written notice upon the deputy sheriff who makes the levy is sufficient: *Burrows v. Waddell*, 52-195; *Peterman v. Jones*, 63 N.W., 338.

But an acceptance of service of such notice by the sheriff's deputy is not binding: *Chapin v. Pinkerton*, 58-236.

If the levy is by the deputy sheriff service of notice of the claim upon the property by a third person made upon the sheriff is sufficient: *Headington v. Langland*, 65-276.

The fact that upon a claim by a third party to the property the levy has been released, upon failure of the execution plaintiff to give an indemnity bond will not render the seizure of such property under a second execution invalid as against the owner of the property or a fraudulent grantee thereof: *Clark v. Reininger*, 66-507.

The manner of service or form of proof required is not specified. If the written notice referred to is delivered to the officer, and he serves it, and without request hands it back to the owner who presents it and retains a copy, it is sufficient: *Peterman v. Jones*, 63 N.W., 338.

The notice contemplated by this section is sufficient if it enables the officer to obtain

an indemnifying bond. Objections to its sufficiency not made at the time, cannot be raised after it has served its purpose: *Waterhouse v. Black*, 87–317.

To render the sheriff liable he must be notified who the claimant of the property is that he may with such knowledge demand and approve a bond for his protection. If without such a notice the sheriff should sell, the sale as to him would be valid, and it seems that the sureties on the bond which may be given would not be liable on account of such sale. A third party claiming the property levied on should give the notice provided for by the statute as a basis for the cause of action on the bond: *Whitney v. Gammon*, 67 N.W., 405.

Written notice of ownership is not necessary in an action by the owner against one not the sheriff, for conversion of property even though there has been wrongful levy on the property by the sheriff under a claim against a person other than the owner: *Guest v. Heinly*, 93–183.

The manner of delivery of the notice is immaterial. It is only essential that it be received by the officer: *Turner v. Younker*, 76–255.

Where objections to the notice appear upon the face of the petition, and are not taken by demurrer or motion in arrest of judgment, they must be deemed waived: *Linden v. Green*, 81–365.

A notice that plaintiff claimed to be owner of a "certain stock of drugs" by virtue of a chattel mortgage, *held* sufficient notice of a mortgage upon the property as a "drug stock:" *Kern v. Wilson*, 82–407.

These provisions as to written notice have no application in a suit by the owner against one not the sheriff, for conversion of the property: *Guest v. Heinly*, 93–183.

The notice here provided for is for the protection of the officer and not for the benefit of the attaching plaintiff. The plaintiff acts at his peril and is not relieved from his common law liability by the failure of the claimant of the property to give the notice here contemplated: *Bradley v. Miller*, 69 N. W., 426.

The notice here referred to is for the protection of the officer making a levy and is not necessary where a delivery bond has been executed: *Ayres, etc., Co. v. Dorsey Produce Co.*, 70 N. W., 111.

The notice should state how the claimant acquired his interest in the property and for what consideration: *Bradley v. Miller*, 69 N. W., 426.

The notice to the officer by a third person, claiming the property, stating the nature and extent of his interest therein, and under what right he claims, is sufficient. Where such claim is based upon a mortgage securing notes, the consideration for the notes and mortgage need not be stated: *Crawford v. Nolan*, 70–97.

The return of the sheriff is evidence of the service of the notice, and any other proof thereof is wholly unnecessary: *Ibid*; *S. C.*, 72–673.

Notwithstanding the provisions of this section the chattel mortgagee must give notice to an officer who has levied upon the property as belonging to the mortgagor before an action of replevin can be maintained to recover possession of the property under such mortgage: *Danforth v. Harlow*, 76–236.

This section has reference to notice by a third party of a claim to the property, and not to a notice by the debtor that the property is exempt from execution: *Glover v. Narey*, 92–286.

Remedy against officer: In the absence of the notice of ownership of, or claim to, the property required by statute in order to authorize the officer to demand an indemnifying bond, replevin will not lie against the officer to recover the property levied on: *Finch v. Hollinger*, 43–598; *Peterson v. Espeset*, 48–262.

And in an action to recover the property from the officer holding it under a levy, it is necessary to allege the giving of such notice: *Allen v. Wheeler*, 54–628.

Although the officer is to be protected from all liability by reason of the levy until notice is received, he cannot maintain an action for expenses and attorneys' fees in defending a replevin suit for the property levied on, in which he is successful: *Rickabaugh v. Bada*, 50–56.

Where plaintiff gives an indemnifying bond upon notice being served upon the officer by a third person that he has a lien upon the property as mortgagee, and the property is then seized and sold, recovery on the bond cannot be defeated on the ground that the mortgagee still has a lien upon the property, and may take it under the mortgage: *Rand v. Barrett*, 66–731.

SEC. **3992. Conditions of bond—return.** When the officer receives such notice he may forthwith give the plaintiff, his agent or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sufficient sureties, to be approved by the officer, to the effect that the obligors will indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property such estate or interest therein as is sold; and thereupon the officer shall proceed to subject the property to the execution, and shall return the indemnifying bond to the court from which the execution issued. [C. '73, § 3056; R., § 3277.]

The owner of property wrongfully seized is not bound to bring an action upon the indemnifying bond, but in whatever proceeding recovery for the wrongful seizure and

sale is claimed, payment by and discharge of one wrong-doer, as, for instance, the execution plaintiff, will discharge other joint wrong-doers, for instance, the sheriff: *Atwood v. Brown*, 72–723.

Under § 3058 of Code of '73, omitted from present Code, which gave the claimant or purchaser a right of action on such bond, but barred any action against the officer making the levy, if the surety on the bond was good when it was taken, *held*, that said section was unconstitutional so far as it denied to a claimant of property levied on the right to maintain an action for its recovery against an officer levying on such property under execution against another person, in that it deprived the owner of his property without due process of law, by substituting the liability of the party to the bond for that of the officer for his trespass: *Foule v. Mann*, 53–42; *Craig v. Fowler*, 59–200. And see *Sunberg v. Babcock*, 61–601; *Cheadle v. Guittar*, 68–680.

SEC. **3993. Failure to give bond.** If such bond is not given, the officer may refuse to levy, or if he has done so, and the bond is not given in a reasonable time after it is required by the officer, he may restore the property to the person from whose possession it was taken, and the levy shall stand discharged. [C.'73, § 3057; R., § 3278.]

See notes to § 3991.

SEC. **3994. Application of proceeds.** Where property for the sale of which the officer is indemnified sells for more than enough to satisfy the execution under which it was taken, the surplus shall be paid into the court to which the indemnifying bond is directed to be returned. The court may order such disposition or payment of the money to be made, temporarily or absolutely, as may be proper in respect to the rights of the parties interested. [C.'73, § 3059; R., § 3280.]

SEC. **3995. Executions by justices.** The provisions of the preceding sections, as to bonds, shall apply to proceedings upon executions issued by justices of the peace. Indemnifying bonds shall be returned in such cases with the execution under which they are taken. [C.'73, § 3060; R., § 3286.]

SEC. **3996. Stay of execution—how effected.** On all judgments for the recovery of money, except those rendered on any appeal or writ of error, or in favor of a laborer or mechanic for his wages, or against one who is surety in the stay of execution, or against any officer, person or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution, if the defendant therein shall, within ten days from the entry of judgment, procure one or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest and costs from the time of rendering judgment until paid, as follows:

1. If the sum for which judgment was rendered, inclusive of costs, does not exceed one hundred dollars, three months;

2. If such sum and costs exceed one hundred dollars, six months. [C.'73, § 3061; R., § 3293.]

The privilege of staying the judgment is extended to anyone who, being a party to the proceeding, has such an interest as that, in equity, as between him and the judgment debtor, he may be compelled to pay the debt. Therefore, *held*, that a subsequent purchaser of mortgaged premises, who had assumed the payment of the incumbrance, might stay a judgment against the original mortgagor under a foreclosure proceeding to which both were parties: *Moses v. Clerk of Court*, 12–139.

While the legislature may abridge or take away the right to a stay of execution existing when the contract was made or the judgment rendered, the intention to do so should be clearly expressed; and where the time during which stay might be applied for was abridged, *held*, that in the absence of any expression of an intention to the contrary, the new statute was not applicable to the time within which stay might be taken as to judgments existing at the time of the change: *Du Boise v. Bloom*, 38–512.

Under a prior statute which did not forbid stays of judgment on appeal, *held*, that the provisions as to stay applied also to judgments in the supreme court: *Peoria F. & M. Ins. Co. v. Dickerson*, 29–98.

The time of the stay commences to run from the rendition of the judgment, and not from the time of filing of the bond: *Okey v. Sigler*, 82–94.

SEC. **3997. Affidavit of surety.** Officers approving stay bonds shall require the affidavit of the signers thereof, unless waived in writing by the party in whose favor the judgment is rendered, that they own property not exempt from execution, and aside from incumbrance, to the value of twice the amount of the judgment. [C. '73, § 3062.]

Failure of the clerk to require the sureties to justify will not defeat the stay: *Du Boise v. Bloom*, 38–512.

As to liability of clerk for approval of insufficient bond, see § 359 and notes.

SEC. **3998. Stay waives appeal.** No appeal shall be allowed after a stay of execution has been obtained. [C. '73, § 3063; R., § 3294.]

The right of appeal is waived by taking a stay: *Seacrest v. Newman*, 19–323.

Even though stay of execution is not taken in the form prescribed by statute, yet if, by consent of the parties, judgment is entered, so that there is a stay under a substantial waiver of further proceedings, an appeal should not be allowed: *Warford v. Eads*, 10–592.

SEC. **3999. Bond—approval—recording—effect.** The sureties for stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against their property, and shall be indexed in the proper judgment docket, as in case of other judgments. [C. '73, § 3064; R., §§ 3295, 3298.]

This section is not obnoxious to the objection that it deprives the parties on the bond of the right to trial. Such right of trial is waived by the execution of the bond: *Cavender v. Smith's Heirs*, 5–157, 186.

Under previous statutory provisions, somewhat different from the present, *held*, that a stay bond, although filed, would not become a lien on the property of a surety as against persons not having actual notice, unless entered of record as provided by statute: *Waldron v. Dickerson*, 52–171.

The determination of the clerk as to whether the bond is filed within the time required by statute, or whether the filing within the time specified is essential to its validity, in a case where such question arises, is a judicial act, and an error in his decision on that question will render a judgment against the sureties voidable only and not void: *Maynes v. Brockway*, 55–457.

Where an instrument intended as a bond for stay of execution is accepted and approved, and recorded as such by the clerk, it has the force and effect of a judgment against the property of the sureties, and cannot be questioned in a collateral proceeding by proof that it was not given until long after the expiration of the period for taking such stay, or that the cause was one in which a stay was not allowable: *Wishard v. Biddle*, 64–526.

Where a stay bond was accepted by the clerk but not recorded, *held*, that although as between the parties it became a lien upon the property of the sureties, subsequent mortgages and purchasers without notice were not affected thereby: *Waldron v. Dickerson*, 52–171.

SEC. **4000. Execution recalled.** When the bond is accepted and approved after execution has been issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution with his doings thereon. [C. '73, § 3065; R., § 3296.]

SEC. **4001. Property released.** All property levied on or before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer, upon stay of execution being entered. [C. '73, § 3066; R., § 3297.]

SEC. **4002. Execution against principal and sureties.** At the expiration of the stay, the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein, and the liability of such sureties shall be subject to that of their principal as provided in this chapter. [C. '73, § 3067; R., § 3299.]

Delay in issuing execution after expiration of stay does not discharge the lien of the judgment: *Parish v. Elwell*, 46–162.

SEC. **4003. Objection by surety.** When any court shall render judgment against two or more persons, any of whom is surety for any other in the contract on which judgment is founded, there shall be no stay of execution allowed, if the surety objects thereto at or before the time of rendering the judgment, whereupon it shall be ordered by the court that there be no stay, unless the surety for the stay of execution will undertake specifically to pay the judgment in case the amount thereof cannot be levied of the prin-

cipal defendant, and the judgment shall recite that the liability of such stay is prior to that of the objecting surety. [C. '73, § 3068; R., § 3300.]

Unless the surety in the original judgment objects to the granting of a stay thereof, he will be presumed to have consented to the stay, and thereby to have waived the right to redeem his property if sold under execution, no right to redemption being allowed from a sale under a judgment which has been stayed (§ 4045): *Chase v. Welty*, 57–230.

While it may be competent for the parties to have a provision for stay of execution inserted in the judgment, which shall be binding on the sureties, who are parties to the suit, and against whom judgment is rendered, the rule will not apply to the case of a surety against whom judgment is rendered by default, before the conclusion of the suit and rendition of judgment against the principal. In such a case, after the default, the surety ceases to be a party to the suit in such sense as to be bound by subsequent proceedings: *Okey v. Sigler*, 82-94.

Even though there is an agreement by virtue of which the allowance of a stay of execution would not release the surety, yet the surety would be released if the stay granted in such case should be for a longer time than that allowed by statute: *Ibid.*

SEC. **4004. Stay terminated by surety.** Any surety for the stay of execution may file with the clerk an affidavit, stating that he verily believes he will be compelled to pay the judgment, interest and costs thereon unless execution issues immediately, and gives notice thereof in writing to the party for whom he is surety; and the clerk shall thereupon issue execution forthwith, unless other sufficient surety be entered before the clerk within five days after such notice is given as in other cases. [C. '73, § 3069; R., § 3301.]

SEC. **4005. Other security given.** If other sufficient surety is given, it shall have the force of the original surety entered before the filing of the affidavit, and shall discharge the original surety. [C. '73, § 3070; R., § 3302.]

SEC. **4006. Lien not released.** Where a stay of execution has been taken, such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due. [C. '73, § 3071; R., § 3303.]

SEC. **4007. Exemption of public property.** Public buildings owned by the state, or any county, city, school district or other municipal corporation, or any other public property which is necessary and proper for carrying out the general purpose for which such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied on to pay the debt of any such. [C. '73, § 3048; R., § 3274; C. '51, § 1895.]

Public buildings of a municipal corporation are exempt from execution. Therefore, a judgment against the corporation owning them is not a lien thereon: *Davenport v. Peoria M. & F. Ins. Co.*, 17–276.

As such buildings cannot be seized and sold under execution, a mechanic's lien cannot be enforced against them: *Lewis v. Chickasaw County*, 50–234; *Loring v. Small*, 50–271; *Charnock v. District T'p*, 51–70: *Whiting v. Story County*, 54–81.

An averment that property levied on is that of a municipal corporation, and necessary and proper for its use in carrying out its purposes, is a sufficient allegation as to its public character: *Fort Dodge v. Moore*, 37–388.

As to levy of tax to pay judgment against municipal corporation, see § 3973.

SEC. **4008. Other exemptions.** If the debtor is a resident of this state and the head of a family, he may hold exempt from execution the following property: All wearing apparel of himself and family kept for actual use and suitable to their condition, and the trunks or other receptacles necessary to contain the same; one musket or rifle and shot gun; all private libraries, family bibles, portraits, pictures, musical instruments and paintings not kept for the purpose of sale; a seat or pew occupied by the debtor or his family in any house of public worship; an interest in a public or private burying-ground, not exceeding one acre for any defendant; two cows and two calves; fifty sheep and the wool therefrom and the materials manufactured from such wool; six stands of bees; five hogs, and all pigs under six months; the necessary food for all animals exempt from execution, for six months; one bedstead and the necessary bedding for every two in the family; all cloth manufactured by the defendant, not exceeding one hundred yards in quantity; household and kitchen furniture, not exceeding two hun-

dred dollars in value; all spinning wheels and looms; one sewing machine and other instruments of domestic labor kept for actual use; the necessary provisions and fuel for the use of the family for six months; the proper tools, instruments or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher or professor; if the debtor is a physician, public officer, farmer, teamster or other laborer, a team, consisting of not more than two horses or mules, or two yoke of cattle, and the wagon or other vehicle, with the proper harness or tackle, by the use of which he habitually earns his living, otherwise one horse; if a printer, a printing press and the types, furniture and material necessary for the use of such printing press and a newspaper office connected therewith, not to exceed in all the value of twelve hundred dollars; poultry to the value of fifty dollars, and the same to any woman whether the head of a family or not; and if the debtor is a seamstress, one sewing machine. [25 G. A., ch. 95; 19 G. A., ch. 49; 19 G. A., ch. 62, § 1; 15 G. A., ch. 42; C.'73, § 3072; R., §§ 3304, 3305, 3308; C.'51, §§ 1898–9.]

Head of family: The term "head of a family" is used in reference to the relation existing between the members of the family as recognized by law and the usages of society; and where a woman, who, as a widow and the mother of children, held the team belonging to her former husband exempt from execution, subsequently remarried, *held*, that she thereby ceased to be the head of the family, and the team became subject to execution on a judgment against her: *Van Doran v. Marden*, 48–186.

The question as to who is head of the family is one of law and not of fact; and when the husband is subject to no disability, he, and not the wife, is the head of the family, without regard to which one is the owner of the property: *Ibid.*

Where a widower kept house, employing a domestic, and having living with him his son and son's wife, who paid no compensation, *held*, that he was the head of a family: *Tyson v. Reynolds*, 52–431.

An unmarried man with whom his brother and brother's wife lived and for whom they kept house, he furnishing the necessaries, *held* not to be the head of a family: *Whalen v. Cadman*, 11–226.

Where husband and wife lived separate for seven years prior to his death, he neither contributing to nor being asked to contribute to her support, and it not appearing that the separation was intended to be temporary, *held*, that he was not the head of a family, and, therefore his widow was not, after his death, entitled to have set off to her (under § 3312) personal property which would have been in his hands as head of a family exempt from execution: *Linton v. Crosby*, 56–386.

There cannot be a head of a family when there is no family, and as to a person living alone, it is not material that such person has been the head of a family if that condition does not exist at the time the execution is claimed. The provision of § 2973 by which a widow or widower, though without children, shall be deemed a family while continuing to keep a house used as a homestead, has no application to exemption of personal property. The word family in this section is used in its ordinary sense, and necessarily includes more than one person: *Emerson v. Leonard*, 65 N. W., 153.

Team and vehicle with which debtor earns his living: *Held*, that the two horses with which a physician habitually earns his living will be exempt although he does not use them as a team, but singly; but he must show that they are so used, before he can have the benefit of the exemption: *Corp v. Griswold*, 27–379.

Evidence *held* sufficient in a particular case to show that the horses of a farmer were exempt as habitually used to earn his living: *Bevan v. Hayden*, 13–122.

One who abandons one employment and procures a team or part of a team, intending to complete the same, for the purpose of using it in good faith to earn his livelihood, may have the same exempt, without regard to the amount of use he has made thereof: *Ibid.*

Where the debtor was engaged in selling illuminating oil, such sales being for the most part made from a tank wagon, sometimes driven by the debtor but generally by his minor son, some few sales being made, however, at the room where the oils were kept, *held*, that the wagon and team used in the delivery were exempt: *Consolidated Tank Line v. Hunt*, 83–6.

It is not material in such case that the living of the debtor is not wholly earned by the use of the team and wagon, nor that the team is used for him by another: *Ibid.*

Where a husband sold the team, wagon and harness, exempt in his hands as a farmer, to his wife, and went out of the business of farming, *held*, that the sale was effectual as against creditors: *Pearson v. Quist*, 79–54.

A person may be a farmer within the meaning of this section if that is his business, although he does not at the time own a farm or have a lease for one and is not doing any specific thing as a farmer: *Hickman v. Cruise*, 72–528.

To hold an exemption as a farmer it is not necessary that the person shall have been actually engaged in farming at the time the levy was made, provided that has been his occupation and there is an intention to return to it. An intention to sell the property levied on is immaterial: *Pease v. Price*, 69 N. W., 1120.

Where plaintiff, whose stock of goods as a retail grocer had been taken on execution,

continued to use a spring wagon for the purpose of delivering goods for the person buying the stock, whether with or without compensation it did not appear, and had no other occupation or method of earning a living, *held*, that he was entitled to the wagon as exempt, although he had been using it in that manner but for a day or two: *Baker v. Hayzlett*, 53–18.

One who is engaged in the livery business is or may be a laborer, and if he in such business uses a team of horses, or wagon, or other vehicle, and thereby earns his living, the same is exempt: *Root v. Gay*, 64–399.

Where, at the time of seizure of a buggy by the officer, it was the vehicle by the use of which the plaintiff, as a physician, habitually earned his living, *held*, that it was exempt from seizure irrespective of the time when or the motive with which it had been procured: *Farner v. Turner*, 1–53.

Where it appears that the debtor has the right to select one of several vehicles as exempt, and such selection is made before levy, it should be respected by the officer: *Parker v. Haley*, 60–325.

A stallion which is not used for working purposes is not exempt under this section: *Smith v. Dayton*, 62 N.W., 650.

Cows: A yearling heifer is not exempt under the provision with reference to cows and calves: *Mitchell v. Joyce*, 69–121.

Tools: A party claiming tools as exempt must show that he is a mechanic, and that they are the tools of his trade; but he need not show that by the use of them he habitually earns his living: *Perkins v. Wisner*, 9–320.

The tools contemplated are those used or handled by the mechanic, and do not include the building or place where the trade is pursued. Therefore, *held*, that the building used by a photographer in carrying on his business, although shown to be personal property, was not exempt in the absence of any showing that a building constructed in a particular manner is required in that business: *Holden v. Stranahan*, 48–70.

A threshing-machine owned and used for the purpose of gain, by threshing for others, is not a part of the proper tools of a farmer so as to be exempt: *Meyer v. Meyer*, 23–359, 375.

The ordinary office furniture of a lawyer who is the head of a family is exempt under this section: *Abraham v. Davenport*, 73–111.

One who is in fact a lawyer may hold exempt his books although he is also partially engaged in other business, it not appearing that he holds property as exempt on account of any other occupation: *Equitable Life Assurance Soc. v. Goode*, 70 N.W., 113.

Provisions for the family do not include provisions for strangers or boarders lodging with the family. Therefore, *held*, that provisions prepared for boarders by the keeper of a restaurant were not exempt from execution: *Coffey v. Wilson*, 65–270.

Partnership property: A partner cannot hold partnership property exempt from execution for the debts of the firm, and this is so without regard to the rights and liabilities existing between the partners: *Van Staden v. Kline*, 64–180.

Life insurance is exempt from the debts of the assured: See §§ 1805 and 3313.

Fire insurance: The proceeds of a policy of insurance on exempt property, such as the books of a physician, are also exempt from execution: *Reynolds v. Haines*, 83–342.

Exchange of exempt property: Where exempt property is exchanged for property not by law exempt from execution, such newly-acquired property becomes liable for the owner's debts: *Friedlander v. Mahoney*, 31–311.

Use of: Wages for personal services earned in the use of exempt property are exempt, and it is not fraudulent for the husband to contract to render such services to another: *Patterson v. Johnson*, 59–397.

Sale: When property is exempt from execution the owner may transfer it free from any claim of his creditors without regard to the uses to which he diverts the proceeds, there being no provision in the statute to the contrary: *Waugh v. Bridgeford*, 69–334.

Therefore, where the wife of an absconding husband becomes entitled to property which was exempt in his hands, she may sell the same, and the property sold and the proceeds thereof will remain exempt: *Ibid.*

The mortgagee of chattel property taking possession thereof and selling the same for the benefit of the mortgagor is not liable as garnishee so far as such property is exempt from execution, whether the mortgage is in itself fraudulent or not: *Brainard v. Simmons*, 67–646.

A purchaser of exempt property acquires it free from the debts of the owner and may interpose in his behalf the exemption of the property from execution: *Redfield v. Stocker*, 91–383.

Proceeds of a voluntary sale of exempt property are not exempt from execution, and a judgment against the purchaser of such property for the purchase money may be levied on by garnishment: *Harrier v. Fassett*, 56–264.

Where exempt property is invaded and converted in whole or in part into a money claim, against the will of the owner, the money collected thereon is exempt, at least for a reasonable time: *Kaiser v. Seaton*, 62–463; *Mudge v. Lanning*, 68–641.

Liens on exempt property: The statutory provisions as to exemptions were not designed to prevent the accruing of liens otherwise recognized, such, for instance, as an innkeeper's lien, and such lien can be enforced against property to which it attaches without regard to the exemption: *Swan v. Bournes*, 47–501.

A lien such as that of an innkeeper or agister, may arise upon exempt property under the same circumstances as upon property not exempt: *Munson v. Porter*, 63–453.

Wrongful levy upon: A mortgagor of exempt property may maintain an action for the wrongful levy upon such property under execution as to which the property is exempt: *Evans v. St. Paul Harvester Works*, 63–204.

In an action by replevin to recover exempt property wrongfully levied upon under execution, the residence of plaintiff need not be alleged. It is for defendant to allege

and prove nonresidence as a defense: *Newell v. Hayden*, 8-140.

A levy on exempt property is unlawful just as would be the levy of an execution on property not belonging to the judgment debtor. In such connection it is not proper to say that the exemption is a personal privilege. It is a right not to be deemed waived except in the manner in which other rights are waived: *Nix v. Goodhile*, 63 N.W., 701.

Therefore, *held*, that one who maliciously causes levy to be made on exempt property or causes notice of garnishment to be served with reference to exempt earnings of his debtor is liable to an action for damages for abuse of process: *Ibid.*

As to the remedy against the officer for wrongful levy upon exempt property, see notes to § 3991.

A creditor resident in this state may be restrained by injunction from proceeding in an action brought in another state to subject to his judgment property of a debtor, also a resident of this state, which under the statutes of this state is exempt from execution: *Mumper v. Wilson*, 72-163.

Liberal construction: Exemption laws will be liberally construed: *Davis v. Humphrey*, 22-137; *Bevan v. Hayden*, 13-122; *Kaiser v. Seaton*, 62-463.

The exemption laws are to be liberally construed to carry into effect the purposes for which they were enacted, and among these is the protection in the hands of the debtor of the means of earning a livelihood: *Equitable Life Assurance Soc. v. Goode*, 70 N. W., 113.

While courts construe exemption statutes liberally to the end that they may be carried out in their object and spirit, they do not carry the rule to the extent of adding an exempted class of persons to those enumerated in the statute: *Tyler v. Coulthard*, 64 N.W., 681.

Therefore, *held*, that an abstracter of title was not entitled to have his abstract books exempted from execution: *Ibid.*

Pertain to remedy: Exemptions relate to the remedy and are to be governed by the law of the forum and not by the place of the contract: *Newell v. Hayden*, 8-140.

When exemption must be claimed: The owner of personal property exempt from execution may claim such exemption from levy at any time during the progress of the sale thereof, until the sale becomes effectual in law: *Bevan v. Hayden*, 13-122. See notes to § 4017.

Selection: Where the debtor is to select the animal to be held exempt, such selection may be made by serving written notice on the sheriff claiming the animal levied on: *Malvin v. Christoph*, 54-562.

Waiver of exemption: A simple waiver of the benefit of exemption laws, made contemporaneously with the contract or debt, will not entitle the creditor, in case of a failure to pay, to levy an execution under a judgment thereon upon exempt property, against defendant's objection: *Curtis v. O'Brien*, 20-376.

A stipulation in a lease by which the landlord is given a lien for his rent upon crops, stock, etc., of the tenant upon the premises, whether exempt or not, is in the nature of a mortgage and is valid: *Fejavary v. Broesch*, 52-88.

A waiver of exemption laws cannot be effectually made in a lease so as to subject exempt property to the landlord's lien. Such a provision, if valid, must be sustained as a chattel mortgage: *Sioux Valley State Bank v. Honnold*, 85-352.

SEC. **4009. Pension money.** All money received by any person, a resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him, shall be exempt from execution, whether such pensioner shall be the head of a family or not. [20 G. A., ch. 23, § 1.]

The exemption of pension money under the provisions of the Revised Statutes of the United States applies only to money due the pensioner while in course of transmission to him, and not after the money comes into his possession and is deposited in a bank or invested in property: *Webb v. Holt*, 57-712; *Tripplett v. Graham*, 58-135.

But where a pensioner transferred his pension check to his wife, who purchased real property therewith in her own name, *held*, that such property was exempt from the husband's debts, and the transfer could not be deemed fraudulent: *Farmer v. Turner*, 64-690.

Property purchased with pension money is exempt from execution by virtue of the federal statute. (Overruling *Webb v. Holt*, 57-712; *Tripplett v. Graham*, 58-135; *Baugh v. Barrett*, 69-495; *Farmer v. Turner*, 64-690; *Foster v. Byrne*, 76-295): *Crow v. Brown*, 81-344; *S. C.*, 86-741.

By this section pension money, whether in the pensioner's possession or deposited, loaned or invested, remains exempt. But this act is not applicable to such money coming into the pensioner's possession before it took effect: *Baugh v. Barrett*, 69-495.

From the time of the taking effect of this act exempting pension money, any pensioner had power to make a gift of his pension money, or the donee to receive the same or the property purchased therewith, free from the claim of donor's creditors; but where an action to subject such pension money to the payment of the pensioner's debts was brought before the taking effect of the statute exempting such money, *held*, that such statute could not be given effect: *Goble v. Stephenson*, 68-270.

The pension money is not exempt from execution because the pensioner is the head of a family, and therefore, upon his death, his wife does not become entitled thereto

under the provision of § 3312, with reference to property exempt to her husband as the head of a family: *Perkins v. Hinckley*, 71–499.

Pension money received after the taking effect of this act cannot be appropriated by the court, in administering the estate of an insane pensioner, to the payment of expenses already incurred by the county in support of such pensioner, whether incurred before or after the taking effect of this section. Whether such pension money could be appropriated by an order providing for expenses to be thereafter incurred, *quære: Fayette County v. Hancock*, 83–694.

The provisions of this section exempt animals purchased with pension money, but not the increase of such animals; but, *held*, that pension money used in paying for the services of a stallion would constitute an exemption to the extent of the money so paid in the colts foaled by mares purchased with pension money served with stallions whose services were thus paid for: *Diamond v. Palmer*, 79–578.

Where the pensioner paid the entire purchase price of a horse with pension money, and afterwards exchanged such horse for another, without any additional payment of money, *held*, that the horse thus acquired remained exempt, although its value was in excess of that of the pension money invested in the first horse: *Smith v. Hill*, 83–684.

This statutory provision, exempting from execution property acquired with pension money, does not apply as against debts contracted prior to the passage of the statute. In that respect the statute is unconstitutional, as impairing the obligation of contracts: *Foster v. Byrne*, 76–295.

Pension money remains exempt in the hands of the pensioner, and property procured therewith and taken in the name of his wife is also exempt: *Marquardt v. Mason*, 87–136.

It is the money or that in which it is invested which is exempt by this section and not the proceeds and accumulations of it: *Haefer v. Mullison*, 90–372.

Where the pension money was invested in land and it did not appear that such land was the homestead, *held*, that crops thereafter grown on the land were not exempt under the next section: *Ibid.*

SEC. **4010. Homestead bought with pension money.** The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations thereof, shall also be exempt; and such exemption shall apply to debts of such pensioner contracted prior to the purchase of the homestead. [Same, § 2.]

SEC. **4011. Personal earnings.** The earnings of a debtor who is a resident of the state and the head of a family for his personal services, or those of his family, at any time within ninety days next preceding the levy, are exempt from liability for debt. [C. '73, § 3074; R., § 3307; C. '51, § 1901.]

Earnings: The object of the statute being to protect the earnings of the debtor from subjection to his debts, it is not to be limited in its application to cases of attachment or execution, but is to be extended so as to afford protection against any method of subjecting such earnings to the claims of creditors: *Millington v. Laurer*, 89–322.

The exemption of earnings extends to professional men as well as to laborers: *McCoy v. Cornell*, 40–457.

If the employer of the debtor is garnished, he is not liable unless more than ninety days' earnings are in his hands. The earnings for that length of time, whether accruing before or after the garnishment, are exempt: *Davis v. Humphrey*, 22–137.

The object of the exemption of earnings is to protect the earnings for personal service, as contradistinguished from the income arising from a business involving other elements of gain than the mere personal service of those conducting it; therefore, *held*, that the business of keeping a boarding-house involves many elements of profit aside from the mere personal earnings of the proprietor and his family, and that money due to him in that business is not exempt from execution as personal earnings: *Shelly v. Smith*, 59–453.

The earnings of a debtor as subcontractor for personal services are exempt. Whether a contractor who furnishes materials on his own account, as well as labor, may divide his claim and hold exempt the proceeds of his labor, *quære: Banks v. Rodenbach*, 54–695.

The earnings of an artist for personal services are exempt as other personal earnings and the fact that in painting a portrait by which the services are earned material of a small value is used which is furnished by the artist is of no consequence: *Millington v. Laurer*, 89–322.

In an action to recover for earnings which are exempt the debtor cannot set off a judgment which he holds against the plaintiff, even though without agreement with the other party he contracted for the services with a view of using the judgment as an offset. To allow the setting off of a claim in such cases would be a nullification of the exemption law: *Ibid.*

The transferee of a claim due for personal services may hold the same exempt from offset on account of the debts of the creditor in the same way that the assignor held it and it is immaterial that such assignee is a nonresident: *Ibid.*

The person entitled to hold earnings exempt from execution may use such earnings in payment of property purchased by his wife, and such property will be held by the wife free from his debts: *Robb v. Brewer*, 60–539.

The earnings of the debtor being exempt from execution he may invest them in the name of his wife or make other use of them

to her advantage without fraud upon his creditors: *Carse v. Reticker*, 63 N.W., 461.

Earnings of a husband which are exempt from execution may be invested in land and such land conveyed to the wife without fraud as to creditors: *Nash v. Stevens*, 65 N. W., 825.

It is error to instruct the jury with reference to the right of the husband to give his exempt earnings to the wife, where there is no issue of that kind, and the sole question is as to the right of the creditor to such earnings: *King v. Bird*, 85–535.

Earnings of nonresident: To entitle a debtor to this exemption it must be shown that he is a resident of the state: *Smith v. Chicago & N. W. R. Co.*, 60–312.

If defendant is a nonresident he cannot claim exemption of earnings, even if they are rendered in the state of his residence, and are exempt by the laws of that state: *Mooney v. Union Pacific R. Co.*, 60–346.

The exemption laws of the state operate only in favor of residents, and therefore a nonresident cannot take advantage of the exemption under the laws of this state, nor under similar laws in the state where he resides: *Lyon v. Callopy*, 87–567.

Foreign exemptions: The exemption laws of another state or territory cannot be relied upon and pleaded as a defense, either by a garnishee or judgment debtor: *Broadstreet v. Clark*, 65–670.

A creditor cannot, by instituting a proceeding by garnishment in another state, seize a debt due to a debtor in this state, and which would be here exempt from execution: *Teager v. Landsley*, 69–725; *Hager v. Adams*, 70–746.

And see notes to § 3935.

SEC. **4012. "Family" defined.** The word "family," as used in this chapter, does not include strangers or boarders lodging with the family. [C.'73, § 3073; R., § 3906; C.'51, § 1900.]

SEC. **4013. Unmarried persons—nonresidents.** There shall be exempt to an unmarried person not the head of a family, and to nonresidents, their own ordinary wearing apparel and trunk necessary to contain the same. [C.'73, § 3075; R., § 3308; C.'51, § 1902.]

SEC. **4014. Persons starting to leave the state.** Where the debtor, if the head of a family, has started to leave this state, he shall have exempt only the ordinary wearing apparel of himself and family, and such other property, in addition, as he may select, in all not exceeding seventy-five dollars in value; which property shall be selected by the debtor and appraised according to the provisions of this code relating to the discharge of attached property; but any person coming into this state with the intention of remaining shall be considered a resident. [C.'73, § 3076; R., § 3308; C.'51, § 1902.]

Persons leaving state: A person who had avowed his purpose to remove from the state, had placed his wagon in position for loading, had boxed some of his goods, and removed them from the house, *held* to have "started to leave the state:" *Graw v. Manning*, 54–719.

The mere expression of intention on the part of a debtor to leave the state will not be sufficient to justify the levy upon his goods, which would otherwise be exempt from execution, and if, by reason of a subsequent change of intention, the debtor is not about to leave the state, the levy will be wrongful: *Tubbs v. Garrison*, 68–44.

The fact that the officer making the levy is informed that the debtor is about to leave the state is not admissible as a defense for the wrongful levy: *Ibid.*

Facts indicating an intention to remove from the town, without more, are not admissible as evidence of an intention to leave the state: *Ibid.*

While the word "start," in connection with leaving the state, in this statutory provision, is not limited to the actual setting out upon a journey, yet, where the intention with which a removal was effected was to change the residence from one part of the state to another, *held*, that there could not be any starting to leave the state within the definition of the statute: *Ibid.*

Persons coming into state: One who abandons his residence in another state and comes to this state to reside is entitled to his exemption immediately upon taking up his residence in this state: *Cox v. Allen*, 91–462.

SEC. **4015. Purchase money.** None of the exemptions prescribed in this chapter shall be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied. [C.'73, § 3077.]

SEC. **4016. Absconding debtor.** When a debtor absconds and leaves his family, such property as is exempt to him under this chapter shall be exempt in the hands of his wife and children, or either of them. [C.'73, § 3078; R., § 3309.]

To constitute an absconding the departure need not be without the knowledge and consent of the wife: *Malvin v. Christoph*, 54–562.

The wife of an absconding husband may sell property which be held exempt, and which by statutory provision remains exempt in her hands, and hold the proceeds free from his debts: *Waugh v. Bridgeford*, 69–334.

27 × 26

SEC. **4017. Failure to claim exemption.** Any person entitled to any of the exemptions mentioned in this chapter does not waive his rights thereto by failing to designate or select such exempt property, or by failing to object to a levy thereon, unless he fails or neglects to do so when required in writing by the officer about to levy thereon. [19 G. A., ch. 49; 15 G. A., ch. 42; C.'73, § 3072; R., §§ 3304, 3305, 3308; C.'51, §§ 1898–9.]

Prior to the enactment of this provision it was held that a voluntary surrender of property to the sheriff having the execution, or allowing the levy to be made without objection, precluded the debtor from afterwards setting up the exemption: *Richards v. Haines*, 30–574; *Angell v. Johnson*, 51–625; *Moffit v. Adams*, 60–44. And see *Green v. Blunt*, 59–79.

Under the section as it now stands, *held*, that mere silence of defendant, when informed of the levy, and failure to object thereto for two weeks, would not estop him from claiming his exemption, it not appearing what, if any, expense had been incurred by the officer in consequence of the levy: *Ellsworth v. Savre*, 67–449.

An interest in the property itself would not be waived by a failure to assert it at the time of the seizure, unless the party making the seizure was thereby misled or induced to change his relations with reference to the property: *Gunsel v. McDonnel*, 67–521.

Notice by the debtor to the officer that the property is exempt from execution need not be under oath nor signed by the debtor. The provisions of § 3991 relate to notice of a claim to the property by a third person: *Glover v. Narey*, 92–286.

SEC. **4018. Sending claims out of state to defeat exemption.** Whoever, whether as principal, agent or attorney, with intent to deprive a resident in good faith of the state of the benefit of the exemption laws thereof, sends a claim against such resident and belonging to a resident, to another state for action, or causes action to be brought on such claim in another state, or assigns or transfers such claim to a nonresident of the state, with intent that action thereon be brought in the courts of another state, the action in either case being one which might have been brought in this state, and the property or debt sought to be reached by such action being such as might, but for the exemption laws of this state, have been reached by action in the courts of this state, shall be guilty of a misdemeanor, and punished by a fine of not less than ten nor more than fifty dollars. [25 G. A., ch. 102, §§ 1, 2.]

This statute is not applicable in a case where the employer has been garnished in this state for wages due to the employe in another state where they are exempt from execution, such proceeding having been commenced before the passage of the statute: *Willard v. Sturm*, 65 N. W., 847.

SEC. **4019. Debts owing for labor preferred.** When the property of any company, corporation, firm or person shall be seized upon by any process of any court, or placed in the hands of a receiver, trustee or assignee for the purpose of paying or securing the payment of the debts of such company, corporation, firm or person, the debts owing to employes for labor performed within the ~~ninety days~~ next preceding the seizure or transfer of such property, to an amount not exceeding one hundred dollars to each person, shall be a preferred debt and paid in full, or if there is not sufficient realized from such property to pay the same in full, then, after the payment of costs, ratably out of the fund remaining, but such preference shall be junior and inferior to mechanics' liens for labor in opening and developing coal mines. [23 G. A., chs. 47, 48.]

The purpose of this statute is to better protect the wage working class of creditors, and to this end it is to be construed as giving a lien to the laborer which shall have preference over other liens existing at the time the laborer makes his claim as contemplated by this statute: *Reynolds v. Black*, 91–1.

SEC. **4020. Statement of claim—allowance.** Any employe desiring to enforce his claim for wages, at any time after seizure of the property under execution or writ of attachment and before sale thereof is ordered, shall present to the officer levying on such property or to such receiver, trustee or assignee, or to the court having custody of such property or from which such process issued, a statement under oath, showing the amount

due after allowing all just credits and set-offs, and the kind of work for which such wages are due, and when performed; and unless objection be made thereto as provided in the following section, such claim shall be allowed and paid to the person entitled thereto, after first paying all costs occasioned by the proceeding out of the proceeds of the sale of the property so seized or placed in the hands of a receiver, trustee, or assignee, or court, subject, however, to the provisions of the preceding section. [Same.]

Where a receiver was appointed to take possession of the corporate property, *held*, that laborers' claims might properly be filed with the receiver within the time fixed by law, although an attachment on the corporate property had previously been levied and the claims of laborers had not been filed with the sheriff as authorized in such cases: *St. Paul Title Ins. & Trust Co. v. Diagonal Coal Co.*, 64 N. W., 606.

The intention of the statute is to prefer the amount due to labor claimants who bring themselves within its provisions to the claims of all creditors, and therefore such labor claims are to be preferred to claims under a trust deed, either for the sum covered or for the expenses of enforcing the same, but the labor claims are not paramount to costs in the case in which such claims were filed, such as fees of receivers and their attorneys: *Ibid.*

SEC. **4021. Contest.** Any person interested may contest any claim or part thereof by filing objections thereto, supported by affidavit, with such court, receiver, trustee or assignee, and its validity shall be determined in the same way the validity of other claims are which are sought to be enforced against such property. [Same.]

SEC. **4022. Priority.** Claims of employes for labor, if not contested, or if allowed after contest, shall have priority over all claims against or liens upon such property, except prior mechanics' liens for labor in opening or developing coal mines as allowed by law. [Same.]

SEC. **4023. Notice of sale.** The officer must give four weeks' notice of the time and place of selling real property, and three weeks' notice of personal property. [C.'73, § 3079; R., § 3310; C.'51, § 1905.]

SEC. **4024. By posting or publication—compensation.** Notice shall be given by posting up in at least three public places of the county, one of which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property to the amount of two hundred dollars or upwards is to be sold, there shall be two weekly publications of such notice in some daily or weekly newspaper printed in the county, to be selected by the party causing the notice to be given, and the compensation for such publication shall be the same as is provided by law for legal notices. [C.'73, §§ 3080, 3872; R., § 3311; C.'51, § 1906.]

The proprietor of a newspaper cannot, by *mandamus*, compel publication in his paper: See notes to § 1419.

SEC. **4025. Notice to defendant—sale set aside.** If the debtor is in actual occupation and possession of any part of the land levied on, the officer having the execution shall, at least twenty days previous to such sale, serve him with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale; and sales made without the notice required in this section may be set aside on motion made at the same or the next term thereafter. [C.'73, § 3087; R., § 3318.]

Notice is not required where defendant is not personally in possession or actual occupation of the property: *Babcock v. Burney*, 42–154; *Bennett v. Burton*, 44–550.

The owner is not within the meaning of this section, "in the actual occupation" of land leased to, and occupied by, a tenant; but where the owner is in the actual use and enjoyment of the property, although not residing thereon, he is in such actual occupation and possession as is here required. So *held* where the owner, by means of employes residing on the land, was operating a sawmill thereon: *Fleming v. Maddox*, 30–239.

The provision that in the cases here referred to the sale may be set aside does not invest the court below with such discretion that its action cannot be reviewed on appeal. Though mandatory rather than permissive, it seems there might be cases within the letter of the statute where it would not be enforced: *Jensen v. Woodbury*, 16–515.

This section applies to sales under special as well as under general execution: *Ibid.*; *Fleming v. Maddox*, 30-239.

It is not essential that the return of the execution show notice to the party in possession of the premises. It would be presumed that such notice was given according to the requirements of the statute: *Corriel v. Doolittle*, 2 G. Gr., 385.

SEC. **4026. Sales by constables.** In constables' sales, the notice shall be posted for two weeks in three public places of the township of the justice, one of them at his office door, without newspaper publication. [C. '73, § 3080; R., § 3311; C. '51, § 1906.]

SEC. **4027. Penalty for selling without notice.** An officer selling without the notice above prescribed shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party; but the validity of the sale is not thereby affected. [C. '73, § 3081; R, § 3312; C. '51, § 1907.]

If it appears that the officer sold the property, without notice, for a sum equal to its value, and applied the proceeds upon the execution and costs, so that the property owner sustained no actual damage for want of notice, the latter cannot recover the penalty of $100 authorized by this section: *Coffey v. Wilson* 65-270.

So where plaintiff in such case on the trial withdrew his claim for actual damaged, *held*, that the penalty could not be recovered: *Enfield v. Blyler*, 67-295.

SEC. **4028. Time and manner.** The sale must be at public auction, between nine o'clock in the forenoon and four o'clock in the afternoon, and the hour of the commencement of the sale must be fixed in the notice. [C. '73, § 3082; R., § 3313; C. '51, § 1908.]

After expiration of execution, not invalid: See notes to § 3964.

Failure to make return of sale before the expiration of a year from the date thereof will not render the sale void: *Cooper v. French*, 52-531.

Injunction against sale: A sale of property on which the judgment is not a lien may be enjoined: *Key City Gas Light Co. v. Munsell*, 19-305.

But the sale will not be enjoined if the judgment is a lien on the property, although it is inferior to other liens: *Wiedner v. Thompson*, 66-283.

Who may be purchaser: One of several execution defendants has the right at the sale to purchase the property of another defendant: *Windle v. Brandt*, 55-221.

Where, at a foreclosure sale, a corporation not party to the foreclosure became the successful bidder, and by consent of the court the bid was transferred to the plaintiff in the foreclosure, to whom the deed was issued, *held*, that the latter was the purchaser and not the former: *Gilman v. Des Moines Valley R. Co.*, 42-495.

Property of one not party: Property of one person cannot be sold under a decree to which he is not a party, and a sale cannot be made under a decree in one action for the satisfaction of a judgment in another action, even though it is intended thereby to apply the property to the satisfaction of different claims thereto. Such a sale should be treated as entirely invalid: *Brown v. Brown*, 73-430.

Rights of purchaser: The rights acquired by a purchaser of personal property at execution sale are only the rights of the judgment defendant at the time of levy. They are subject to the rights of a prior purchaser: *Rakestraw v. Hamilton*, 14-147.

Where, without fraud, the execution defendant has sold his interest in the property before seizure under the process, although notice of such sale is not brought home to the execution plaintiff or the officer until after such seizure, the rights acquired under such previous sale are paramount to those acquired under the process: *Thomas v Hillhouse*, 17-67.

A purchaser at sale under execution acquires no title where it is apparent of record that the judgment debtor has no interest in or title to the property sold: *Stuart v. Hines*, 33-60.

The purchaser at execution sale without actual notice of a mortgage executed after the lien of the judgment has attached, and not recorded until after the sale, is not affected thereby: *Wood v. Young*, 38-102.

Where the purchaser at execution sale had notice of a prior conveyance of the property, but such conveyance appeared by the record to have been made at such time that it was subject to the lien under which the judicial sale was had, *held*, that in order to affect the purchaser at the execution sale with notice that such conveyance was superior to his rights, it must appear that there was something to indicate that the conveyance was made in fact before the time indicated by the record of the deed: *Brown v. Wade*, 42-647.

A purchaser at an execution sale does not acquire priority over the purchaser at a previous foreclosure sale under a mortgage executed and of record before the sale under execution was had: *Bell v. Hall*, 4 G. Gr., 68.

Facts of a particular case *held* not to impute to the purchaser at judicial sale notice of an equitable interest in the property held by a third party: *Bonnell v. Allerton*, 51-166.

A sheriff's deed under a sale on execution not only operates to transfer the premises sold, but relates back to the day when the judgment became a lien on the premises, and as against the purchaser avoids all intermediate liens and alienations: *Kane v. Mink*, 64-84.

The attorney of the execution plaintiff,

purchasing at a sale under execution of property levied on by attachment, is not to be deemed an innocent purchaser. He and his heirs holding under him are chargeable with equities or any illegalities in the proceedings: *Cook v. Jenkins*, 30–452.

An execution plaintiff who purchases at the sale in good faith, and before notice of appeal, will be protected to the same extent as a stranger: *Frazier v. Craft*, 40–110.

A judgment creditor purchasing under execution an equitable interest in real estate takes subject to prior equities of third persons of which he has no notice: *Wallace v. Bartle*, 21–346.

The plaintiff in execution who purchases at the sale is protected against outstanding equities of which he has no notice, actual or constructive, before the sale. He stands upon the same ground as any other purchaser: *Butterfield v. Walsh*, 36–534, and cases cited. And see *Bear v. Burlington, C. R. & M. R. Co.*, 48–619.

A purchaser at an execution sale, even if he is the plaintiff in execution, is protected against equities and unrecorded instruments of which he has no notice: See notes to § 2925.

A sale en masse of tracts which could advantageously be sold separately will be set aside, either on motion or in an independent proceeding in equity for that purpose: *White v. Watts*, 18–74; *Boyd v. Ellis*, 11–97; *Bradford v. Limpus*, 13–424.

So *held* in case of a sale in gross of distinct parcels under judgment of foreclosure on a mortgage covering all of them: *Lay v. Gibbons*, 14–377.

But such a sale, after an offering in parcels without a bid, will not be irregular: *Hill v. Baker*, 32–302.

Where it appeared by the return that each parcel was offered separately without bids therefor and that then all the parcels were offered and sold together, *held*, that the sale was valid: *Lamb v. McConkey*, 76–47.

If lands cannot be sold in separate tracts for want of bidders, it is proper to sell them *en masse: Connecticut Mut. L. Ins. Co. v. Brown*, 81–42.

A deed under an execution sale will not be set aside, because of an omission to plat the homestead, where a notice is served upon the sheriff by the owner reserving a definitely described tract of land as the homestead: *Smith v. De Kock*, 81–535.

And see, with reference to sales of homestead, notes to § 2976.

Distinct or separate parcels or tracts which can have no increased value by reason of being sold together cannot be sold *en masse* even if no bid is made for them when offered separately. And this is the common-law rule: *Williams v. Allison*, 33–278.

It may be questioned whether sale of two lots together, instead of separately, is such an irregularity as can, after the execution of the deed, be made available to defeat the title in a third party, though it is available to set aside a sale to the execution plaintiff: *Love v. Cherry*, 24–204.

Held, that a sale *en masse*, not shown to have been to the injury of the debtor and not attacked for six years, would not be set aside: *Cunningham v. Felker*, 26–117.

A sale of a large tract within the corporate limits of a city, *held* not invalid as a sale *en masse*, it not being shown that it had been divided into lots: *Wallace v. Berger*, 25–456.

Whether or not a sale of two parcels for a gross sum will avail in a direct proceeding to set aside the deed, it is clear that such deed cannot be regarded as void in a collateral attack: *Foley v. Kane*, 53–64.

If in case of a levy upon a congressional subdivision of land there should be an excess over all execution claims of the least legal subdivision thereof, it should not be sold: *Humphrey v. Beeson*, 1 G. Gr., 199.

Fraud of officer or purchaser: An averment that there was a fraudulent agreement between the purchaser and the officer, by which the former was to pay nothing on the property and that the return should not be made during the year for redemption, etc., etc., *held* not sufficient to affect the validity of the sale: *Cooper v. French*, 52–531.

In a particular case, *held*, that the facts were not sufficient to show fraud: *Wallace v. Berger*, 25–456.

The rights of a purchaser at an execution sale will not be affected by the improper conduct of the sheriff in the absence of a fraudulent combination between them: *Swortzell v. Martin*, 16–519.

Where it appeared that the purchaser at a sale under partition proceedings had for a consideration persuaded others intending to bid from doing so, *held*, that the sale and approval thereof by the court should be set aside for fraud: *Fleming's Heirs v. Hutchinson*, 36–519.

Under the circumstances of particular cases, *held*, that the showing of fraud on the part of the execution creditor and gross inadequacy of consideration was such as to warrant the setting aside of sheriff's deeds: *Sioux City, etc., Land Co. v. Walker*, 78–476; *Lehner v. Loomis*, 83–416.

Mistake: Where by reason of misapprehension as between a party desiring to bid and the officer, a higher bid than that on which the property was sold was not recognized by the officer, *held*, that the sale should be set aside, specially in view of the fact that it was a sale without the right of redemption: *Cornoy v. Wetmore*, 70 N. W., 178.

Illegality: Where a second execution was issued at the instance of the judgment creditor, before the return of the first, *held*, that the sale under the second should be set aside, at least in a case where the creditor was himself the purchaser at such sale: *Merritt v. Grover*, 57–493.

Further, *held*, that in such case an execution could properly issue for the sale of the property levied on, and remaining undisposed of by reason of the setting aside of the sale: *Ibid.*

The validity of the sale is not affected by a misnomer of the plaintiff in the title of the case in the execution where the name and character of the action are correctly described in the body thereof. Nor is the validity of the sale affected by any defect in the

notice thereof: *Griffith v. Milwaukee Harvester Co.*, 92-634.

Inadequacy of price: Gross inadequacy of price is not of itself sufficient to require the setting aside of a sale, but may become an element quite controlling in connection with other circumstances: *Cavender v. Smith's Heirs*, 1-306, 355; *Boyd v. Ellis*, 11-97; *Williams v. Allison*, 33-278.

So *held* where there was a sale *en masse* of separate parcels at an inadequate price: *Boyd v. Ellis*, 11-97; *King v. Tharp*, 26-283.

Mere inadequacy of the amount for which land is sold on execution will not make the sale invalid: *Griffith v. Milwaukee Harvester Co.*, 92-634.

It seems that when inadequacy of price is great and the bidders were few, and the power to adjourn was not judiciously exercised, the sale should be set aside upon application seasonably made: *Swortzell v. Martin*, 16-519.

A sale was set aside in favor of beneficiaries under an unrecorded mortgage when some of them were minors, the price was inadequate, there was a prior levy undisposed of, the legal title was in another than the judgment defendant, and application was made before the rights of third parties had attached and was accompanied with a tender of the amount of the judgment: *Miller v. Colville*, 21-135.

That the interest in real estate sold *en masse* under execution was not only merely equitable, but also contingent, and that there were other claims against the property prior to that of the judgment creditor, may be considered by the court in determining the adequacy of the amount paid at the sale: *Twogood v. Stephens*, 19-405.

Where there was an incumbrance on record against the property amounting to more than the value thereof, *held*, that the sale on execution of such property would not be set aside on account of inadequacy of price, although subsequently the incumbrance was held fraudulent and void: *McDonald v. Johnson*, 48-72.

In a particular case, *held*, that the sum realized at the execution sale was so inadequate as to constitute ground for setting the sale aside: *Wood v Young*, 38-102.

In a particular case, *held*, that the inadequacy in price was not sufficient to invalidate the sale: *Wallace v. Berger*, 25-456.

Gross inadequacy of price is not available to impeach the sale as to the original purchaser, who was a stranger to the transaction, the premises having in good faith been sold to a third person: *Hill v. Baker*, 32-302. And see *Shine v. Hill*, 23-264.

Where property is sold subject to redemption it is not expected that there will be competition at the sale, and the protection of the judgment debtor against inadequacy of price is to be found in his right to redeem: *Equitable Trust Co. v. Shrope*, 73-297.

Gross inadequacy of price is not sufficient to avoid a judicial sale, and a sale to the judgment creditor, having a small claim, of an indivisible tract of land much greater in value, upon a bid of the amount of his judgment and costs, will not be set aside: *Peterson v. Little*, 74-223.

It is not allowable for defendant in execution to institute an original action in equity at any time within the statute of limitations to set aside a sale under such execution upon the ground of inadequacy of consideration, where the sale has been regular and no fraud appears: *Sigerson v. Sigerson*, 71-476.

Mistake as to title: Where the defendant in execution did not have any interest at the time of the sale in the property sold, or where all the interest he did have has been taken away from the purchaser by virtue of a prior claim, the sale may be set aside. The doctrine of *caveat emptor* does not apply to such cases: *Ritter v. Henshaw*, 7-97.

An action in equity may be maintained to set aside an execution sale where the officer mistakenly understood that the property was covered by incumbrances to a greater amount than it was in fact, especially where the circumstances show bad faith on the part of the purchaser: *Whitney v. Armstrong*, 32-9.

Where property was bid in at execution under mistake as to the quantity sold, *held*, that the sale should be set aside: *Kellogg v. Decatur County*, 38 524.

Where the property was sold and bid in under a mistaken description, *held*, that the sale should be set aside, and that, under the circumstances, there was no such negligence on the part of the attorney of purchaser as to deprive him of the right to such remedy: *Latimer v. Jones*, 55-503.

Where, in recording a decree rendered in a foreclosure proceeding, the clerk omitted to include a portion of the property therein described, and this omission was perpetuated in the execution and at the sale at which plaintiff's attorney bid off the property for the amount of the debt, supposing that he was purchasing all that was embraced in the mortgage, *held*, that the sale should be set aside: *Snyder v. Ives*, 42-157.

Equity will refuse to correct a mistake of this kind on the ground of negligence only where the party seeking relief is bound to make inquiry which would have enabled him to correct the mistake or obviate its consequences and he negligently fails to make it. In such a case the law requires only reasonable diligence, to the end that culpable negligence may not be encouraged: *Ibid.*

Mere uncertainty of description of the property will not be a ground for setting aside the sale in equity where the land sold is actually the same as that levied on: *Hackworth v. Zollars*, 30-433.

As to setting aside on account of defective title, see § 4034.

Setting aside sale does not release surety: If the judgment is against principal and surety, and the sale is set aside as authorized in the statutory provision just referred to, the surety will not be held discharged, unless he has by reason of the sale changed his condition or been prejudiced: *Chambers v. Cochran*, 18-159.

Caveat emptor; defective title: The doctrine of *caveat emptor* applies to the purchaser at the sale under execution: *Jones v. Blumenstein*, 77-361; and such sale will not ordinarily be set aside to relieve one who has acquired a defective title. If the execution defendant has some interest in or title to the

property, the sale will be upheld, although such interest be of no value: *Hammersmith v. Espy*, 19–444; *Holtzinger v. Edwards*, 51–383. And see § 4034.

The rule *caveat emptor* applies to sheriff's sales. The purchaser takes subject to any further action in the case affecting the judgment. The sheriff sells only the interest of the judgment debtor: *Weaver v. Stacy*, 93–683.

One who buys at a judicial sale must, at his peril, assume that there is a valid subsisting power to make the sale and if it appears that the claim on which judgment was recovered, and an execution issued under which the sale was made, had been paid that fact would defeat the purchaser's title: *Shaffer v. McCrackin*, 90–578.

Thus where the legal title was in defendant, but by reason of a sale under a prior execution and other prior liens the interest acquired by plaintiff was valueless, *held*, that there was no ground for setting aside the sale or the satisfaction of judgment effected thereby: *Holtzinger v. Edwards*, 51–383.

A purchaser at execution sale cannot avoid his bid or excuse himself from paying the amount by showing a defective title in the judgment debtor: *Dean v. Morris*, 4 G. Gr., 312; *Cameron v. Logan*, 8–434.

The fact that property sold at judicial sale is covered by liens to nearly its entire value will not entitle the purchaser to rescind the sale: *Downard v. Crenshaw*, 49–296.

One who has acquired two distinct judgment liens on real estate and sells it under the junior lien without fraud or misrepresentation of any kind, is not estopped from afterwards enforcing as against the purchaser of the senior lien held by him. The purchaser under the sale to enforce the junior lien takes subject to the existing senior lien: *Matless v. Sundin*, 62 N. W., 662.

Other grounds for setting aside: Where the levy is excessive the sale will be set aside, even though the whole property sold had been previously attached in the same action: *Cook v. Jenkins*, 30–452.

If the sale of the property of a debtor is made to satisfy a joint indebtedness, the fact that the joint debtor is prejudiced by such sale will not be a ground on which the judgment creditor can have the sale set aside: *Miller v. Felkner*, 42–458.

The indorser of a note secured by a mortgage under foreclosure of which the sale is made, and who is collaterally liable on the indebtedness, has such interest as to be entitled to maintain an action for setting aside the sale: *Whitney v. Armstrong*, 32–9.

Where land was sold by a sheriff under the representation that the excess bid over the amount of the execution would be applied to satisfy a mortgage existing thereon, and the purchaser bid the whole amount of the judgment and mortgage, under the belief and representation that the excess would be so applied, *held*, that the mistake under which the parties acted was a mixed mistake of law and fact, and that the sale should be set aside upon application of the purchaser: *Bay v. Harnett*, 58–344.

Where the price was inadequate, and the deed was issued at once in denial of execution defendant's right to redeem, *held*, that the sale should be set aside in an action in equity: *Fitzgerald v. Kelso*, 71–731.

Where by reason of a technical defect in describing the premises a portion only of the land subject to the lien of the judgment was sold under execution thereon, *held*, that on application of the purchaser the sale should be set aside and a re-sale of the entire premises ordered: *Harrington v. Fidelity Loan & Trust Co.*, 91–703.

Where the sale is under mortgage foreclosure and the decree reserves to the court the right to approve the sale, the bidder acquires no title until such approval and will not be heard to resist an application for a re-sale: *Central Trust Co. v. Gate City Electric Street R. Co.*, 65 N.W., 982.

Notice of motion to set aside: An order setting aside a sale on motion, without notice to the other party or a voluntary appearance by him, is not binding upon him: *Wright v. Leclaire*, 3–221; *Lyster v. Brewer*, 13–461.

The sale will not be set aside on motion when the purchaser is not a party to the execution; at least without notice to him: *Osborn v. Cloud*, 21–238.

Restraing sale: Where the rights of a lien holder are such that they will not be affected by judicial sale under another lien, he cannot maintain an action in equity to restrain such sale: *Ruthven v. Mast*, 55–715.

Cancelling satisfaction of judgment: Where a sale has been judicially set aside, the satisfaction of the judgment which followed the sale and was entered of record by reason thereof should be also set aside: *Farmer v. Sasseen*, 63–110.

Where a special execution contained a description of a larger tract than the judgment was against, and plaintiff bid it in for the judgment, *held* competent for plaintiff by motion to have the satisfaction entered upon the execution canceled to the extent of the excess at which the extra quantity of land was bid off, leaving his judgment unsatisfied to that amount: *Parks v. Davis*, 16–20.

Where land was sold under execution to which defendant had no title, but there was no evidence as to the price for which the land was sold, or whether it was sold in separate tracts, or the relative value of the tracts at the date of sale, *held*, that the credit on the judgment entered in pursuance of such sale could not be set aside: *State Bank v. Harrow*, 26–426.

Diligence: Application to vacate a sale should be reasonably made. Acquiescence may be inferred from delay, and long delay with knowledge of the facts may justify a refusal of relief, especially if intervening rights have attached or the circumstances have essentially changed: *Chambers v. Cochran*, 18–159.

A motion to set aside a sale filed fifteen months after the sale was made, *held* too late: *Stewart v. Marshall*, 4 G. Gr., 75.

Jurisdiction to set aside: Where a case was taken from one court to another on change of venue, and the decree rendered was ordered to be recorded in the court from which the change was taken, *held*, that

such court had not jurisdiction to set aside a sale on execution under such judgment: *White v. Hampton*, 14–663.

Failure to object; estoppel: Where the debtor consents to the proceedings at the sale, and they are made under an agreement to which he is a party, he is estopped from setting up illegality or fraud for the purpose of defeating such sale as against the purchaser: *Crawford v. Ginn*, 35–543.

Where the debtor has knowledge of a contemplated private sale and does not object thereto, he will be estopped from complaining: *Maquoketa v. Willey*, 35–323.

Objection to a sale on the ground that it was made *en masse*, not raised until eleven years afterwards, it not appearing that the execution defendant was in any manner injured thereby, *held* not sufficient to warrant setting it aside: *Wood v. Young*, 38–102.

Where irregularities in a sale were not taken advantage of for eight years, *held*, that by such lapse of time they were cured: *Coriell v. Ham*, 4 G. Gr., 455.

The execution defendant, having knowledge of irregularities in the manner of sale before the making thereof, and not objecting thereto, cannot defeat the title under the deed, at least without offering to refund the purchase money. The irregularities should be taken advantage of by motion in the court to which the execution is returnable: *Cooley v. Wilson*, 42–425.

Where a surety, against whom judgment on a debt was recovered jointly with the principal, directed execution to be levied upon property of the principal, which was sold thereunder, *held*, that such surety could not afterwards, as against the purchaser at the sale, insist upon and foreclose a mortgage given him on the same property by the principal, to secure him for any liability which he might incur as such surety: *Exline v. Lowery*, 46–556.

Where it appeared that the party against whom execution was issued knew that another execution was in existence under the same judgment, and not only stood by and made no objection to the sale under the second, but at the expiration of the time for redemption surrendered the possession of the property, *held*, that he could not thereafter, in the absence of a showing that the land was sold for less than its value and an offer to pay the judgment, take advantage of the error: *Merritt v. Grover*, 61–99.

Where the execution purchaser has conveyed portions of the property to other purchasers in good faith, even though there is such irregularity in the sale that it might have been held void as to such purchasers, if promptly asserted, yet great delay in taking it may be ground for upholding the sale as to them: *Williams v. Allison*, 33–278.

Return of purchase money: A party seeking to have an execution sale to him set aside must return or offer to return the property, or, if he has sold it in good faith before knowledge of defect in the sale, must tender the proceeds: *First Nat. Bank v. Conger*, 37–474.

Where, on account of irregularities, a sale was set aside so far as the property remained in the hands of the purchaser, but there was no proof of fraud, *held*, that as to the portions of the property conveyed by him, he would be charged with its proportion of the amount bid and not with the amount for which it had been sold by him, the owner having lost his right to proceed against the persons deriving title from the purchaser by reason of laches: *Williams v. Allison*, 33–278.

A judgment plaintiff who has received the proceeds of a sale under his judgment, which is of doubtful validity, and afterwards accepts money deposited as a tender, will be held to have taken such tender in full satisfaction of his judgment, and will be required to account for the full proceeds of the sale: *Cotter v. O'Connel*, 48–552.

No tender of the amount bid need be made to the purchaser where it is sought to set aside a sale which is void: *Osborn v. Cloud*, 23–104.

Where the purchaser at an execution sale pays his money without any knowledge of irregularities therein, he is entitled, upon the sale being set aside, to have refunded to him the money paid, and for that purpose may be subrogated to the rights of the execution plaintiff, although such plaintiff may have afterwards received full satisfaction of his judgment: *Fleming v. Maddox*, 32–493.

Liability for rent or waste: The purchaser of premises under a foreclosure sale afterwards set aside is not liable for rent or waste accruing between such sale and annulment, if possession was taken by another without his knowledge and he was not in any manner connected with the acts of the tenant: *Vulgamore v. Stoddard*, 21–115.

Evidence of sale: To establish title under a sale on execution, the purchaser may give in evidence the judgment and execution under which the property was sold and prove the sale, which may be done by the sheriff's deed or the return on the execution: *Lepage v. McNamara*, 5–124.

Validity; presumptions: A purchaser at execution sale is only required to look at the judgment, execution, levy and sale under appraisement. If these are in conformity with the law, *prima facie* he is justified in paying the price required by law for the property, and he is only required to ascertain the amount as returned and need not go into an examination of the action of the appraisers: *Johnson v. Carson*, 3 G. Gr., 499.

When such a sale appears to have been regularly conducted by virtue of a judgment rendered, final and conclusive, the rights of a purchaser cannot be affected by any error or irregularity in the judgment: *Ibid.*

The purchaser depends upon the judgment, levy and deed. All other questions are between the parties to the judgment and the officer. Therefore, a failure to make an appraisement as required by law would not render the sale void as to the purchaser: *Shaffer v. Bolander*, 4 G. Gr., 201.

The purchaser has a right to rely upon the judgment, levy and deed. These being valid he cannot be affected by other irregularities of which he has no notice: *Cooley v. Wilson*, 42–425.

Where the officer making the sale has

power to make it, and there is merely a failure on his part to comply with some statutory provision, directory in its character, the title of the purchaser will be protected in the absence of fraud: *Cavender v. Smith's Heirs*, 1-306.

A sale should not be held void and liable to collateral attack for mere irregularities, for instance in the selection of appraisers: *Hill v. Baker*, 32-302; *Davis v. Spaulding*, 36-610.

A *bona fide* purchaser, even if he be the execution plaintiff, is not affected by any irregularity of the sheriff in giving notice and conducting the sale: *Coriell v. Ham*, 4 G. Gr., 455.

Irregularities such as a sale *en masse* or before the hour fixed in the notice will not affect the title in such purchaser: *Olmstead v. Kellogg*, 47-460.

It will be presumed that the officer did his duty and made the sale within the hours directed by law, although the notice fixed the time for the sale during hours some of which are not thus authorized by law: *Cole v. Porter*, 4 G. Gr., 510.

As to the presumption of regularity arising from the execution of the deed, see § 4064.

Liability of officer: A purchaser of property on which execution has been levied under a void judgment may maintain action against the officer for unlawfully selling the property. It is not necessary to entitle him to recover that he should have owned the property prior to levy: *Gates v. Neimeyer*, 54-110.

The policy of the law is to uphold judicial sales, and they will not be held invalid for irregularities in the acts of the officer. If the one making the sale holds himself out to be a public officer, or acts as an officer *de facto*, he cannot be heard to object that he is not an officer *de jure*. By acting as an officer he estops himself from denying his right to do so, even when indicted for malfeasance: *State v. Stone*, 40-547.

SEC. **4029. Officer may postpone.** When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, or the parties so agree, the officer may postpone the sale for not more than three days without being required to give any further notice thereof, which postponement shall be publicly announced at the time the sale was to have been made, but not more than two such adjournments shall be made, except by agreement of the parties in writing and made a part of the return upon the execution. [C. '73, § 3083; R., § 3314; C. '51, § 1909.]

The discretion of the sheriff, as to adjournment, should be exercised with a fair and impartial attention to the interests of all parties concerned. Where his power in that respect is not judiciously exercised, it may be a ground for setting the sale aside: *Swortzell v. Martin*, 16-519.

The fact that there was one more adjournment than is authorized by statute, and that the time was extended beyond the period allowed, *held*, a mere irregularity, to be taken advantage of only on a showing of prejudice: *Reese v. Dobbins*, 51-282.

The adjournment of a sale by plaintiff's attorney is a gross irregularity, and a sale at a time to which it is so adjourned will be void: *Wolf v. Van Metre*, 27-348.

The postponement of the sale by public proclamation and agreement of the parties in interest will not render a subsequent sale invalid: *Coriell v. Ham*, 4 G. Gr., 455.

Postponement of the sale at the instance and for the benefit of defendant in execution will not render it invalid between the parties: *Payne v. Billingham*, 10-360.

The only postponement which the sheriff can make in the absence of agreement must be made on the day of sale: *Long v. Valleau*, 66 N.W., 195.

SEC. **4030. Overplus.** When the property sells for more than the amount required to be collected, the overplus must be paid to the debtor, unless the officer has another execution in his hands on which said overplus may be rightfully applied, or unless there are liens upon the property which ought to be paid therefrom, and the holders thereof make claim to such surplus and demand application thereon, in which case the officer shall pay the same into the hands of the clerk of the district court, and it shall be applied as ordered by the court. [C. '73, § 3084; R., § 3315; C. '51, § 1910.]

Aside from this provision the sheriff would not be authorized to apply such overplus to another execution in his hands. The money being deemed in the custody of the law would not be subject to levy, but must first be paid to the party whose property is sold: *Payne v. Billingham*, 10-360.

SEC. **4031. Another execution.** If the property levied on sells for less than sufficient to satisfy the execution, the judgment holder may order out another, which shall be credited with the amount of the previous sale. The proceedings under the second execution shall conform to those hereinbefore prescribed. [C. '73, § 3085; R., § 3316; C. '51, § 1911.]

SEC. **4032. Plan of division of land.** At any time before nine o'clock a. m. of the day of the sale, the debtor may deliver to the officer a plan of division of the land levied on, subscribed by him, and in that case the officer shall sell, according to said plan, so much of the land as may be necessary to satisfy the debt and costs, and no more. If no such plan is furnished, the officer may sell without any division. [C.'73, § 3088; R., § 3319.]

This section applies to sales under special as well as general execution: *Taylor v. Truloch*, 59–558.

Distinct or separate parcels or tracts which can have no increased value by reason of being sold together cannot be sold *en masse*, even if no bid is made for them when offered separately. This is the common-law rule. The provision of this section as to subdivision does not affect that rule except as here specified: *Williams v. Allison*, 33–278, 288.

This section is intended to secure sales in separate tracts as defendant shall direct, but is not intended to defeat sales. It must be so construed that if the lands cannot be sold in separate tracts for want of bidders, they may be afterwards offered and sold *en masse*, and such a sale is not *per se* void or voidable. The fact that no bids were made when the land was offered in separate tracts, and it was therefore sold *en masse*, raises a presumption that the land is more valuable when taken together, or at least that defendant in execution suffered no prejudice by the sale: *Connecticut Mut. L. Ins. Co. v. Brown*, 81–42.

If there is no evidence as to whether the land would sell for a better price *en masse* or separately, it will be presumed on a motion to set aside the sale that the defendant suffered no prejudice in a sale *en masse*: *Ibid.*

And as to the effect of a sale *en masse*, see notes to § 4028.

SEC. **4033. When purchaser fails to pay.** When the purchaser fails to pay the money when demanded, the judgment holder or his attorney may elect to proceed against him for the amount; otherwise the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after postponement as above authorized. [C.'73, § 3089; R., § 3320; C.'51, § 1913.]

Where the execution debtor bid off the property and afterwards failed to pay the money, *held*, that the officer could not on the next day, accept the next highest bid and strike off the property to such bidder: *Swortzell v. Martin*, 16–519.

While the sheriff must sell for cash, yet if the person entitled to the proceeds is the purchaser, he can properly treat the satisfaction of the judgment as a cash payment: *Beal v. Blair*, 33–318.

Where the execution creditor bids in the property, although he cannot be required to pay to the sheriff that part of the purchase money which is to be credited on his judgment, he is to pay the costs, and if he does not do so the sheriff is to treat the sale as a nullity: *Reese v. Dobbins*, 51–282.

Where a purchaser at the sale bids with the understanding, and upon the condition, that the amount bid is first to be used to satisfy existing liens on the premises, his bid cannot be enforced unless the proceeds are thus applied: *Vanslick v. Mills*, 34–375.

Where the property sold was defendant's undivided interest in a crop, and the bid was by the acre, *held*, that under the circumstances of the case the bid should be considered as so much per acre for the acres which defendant's portion of the crop would amount to, and not as that amount for defendant's undivided interest in each acre of the crop: *Denny v. Cochran*, 51–652,

Where the property has been sold to the plaintiff in execution he has not a right thereafter to withdraw his bid and prevent the satisfaction of the judgment, at least without the assent of the sheriff, and probably also that of the execution debtor: *Downard v. Crenshaw*, 49–296.

Where an agent, acting for the execution creditor, by mistake bid more for land offered at the sale than he was authorized, but immediately withdrew his bid and paid costs of sale, *held*, that, as the execution debtor had not changed his position on account of the sale, the withdrawal was authorized and the property might be again offered for sale: *Fuson v. Connecticut General L. Ins. Co.*, 53–609.

Where it was claimed that the bid was misunderstood by the sheriff, and by mistake the record thereof differed from the bid made, *held*, that the bidder having notice of the record, and having failed to comply with the bid as claimed to have been made, was not entitled to relief after redemption of the premises: *Morrison v. Spencer*, 72–445.

Where the bidder fails to comply by paying the amount of the bid, he can make no complaint as to the action of the sheriff after accepting from the debtor the amount of the judgment and thus virtually setting aside the sale: *Long v. Valleau*, 66 N.W., 195.

Where the sheriff treats the sale as complete it will be presumed that the execution plaintiff, buying in the property, paid the costs, and such purchaser cannot, after a return of the sale has been made, treat it as a nullity and levy another execution under his judgment: *Harpham v. Worthington*, 69 N.W., 535.

SEC. **4034. Sales vacated.** When any person shall purchase at a sheriff's sale any real estate on which the judgment upon which the execution issued was not a lien at the time of the levy, and which fact was unknown to the purchaser, the court shall set aside such sale on motion,

notice having been given to the debtor as in case of action, and a new execution may be issued to enforce the judgment, and, upon the order being made to set aside the sale, the sheriff or judgment creditor shall pay over to the purchaser the purchase money; said motion may also be made by any person interested in the real estate. [C.'73, § 3090; R,. § 3321.]

This section *held* not applicable to a case where defendant had title to the property sold, and the judgment was not a lien thereon, because it was rendered in another county and no transcript was filed in the county where the land was situated: *Chambers v. Cochran*, 18–159.

If the judgment is against principal and surety, and the sale be set aside, as here provided, the surety will not be held discharged, unless he has, by reason of the sale, changed his condition or been prejudiced: *Ibid.*

When the real estate has been erroneously sold to satisfy a judgment which was not a lien upon it at the time of the levy the sale should be set aside: *Boggs v. Douglass*, 89–150.

See also notes to § 4028.

Where money was paid to redeem from a sale under a judgment which was afterward set aside on appeal, *held*, that the case was not one coming under this section and that the party redeeming could not in an action recover back the money paid to redeem: *Weaver v. Stacy*, 93–683.

SEC. **4035. Money—things in action.** Money levied upon may be appropriated without being advertised or sold, and so may bank bills, drafts, promissory notes, or other papers of the like character, if the plaintiff will receive them at their par value as cash, or if the officer can exchange them for cash at that value. [C.'73, § 3091; R., § 3322; C.'51, § 1914.]

The excess remaining in the sheriff's hands from sale of property under another execution may be appropriated as here provided: See § 4030 and notes.

Bank bills, etc., may be levied on and sold: See § 3971 and notes.

SEC. **4036. Subjecting real estate of deceased judgment debtor.** When a judgment has been obtained against a decedent in his lifetime, the plaintiff may file his petition in the office of the clerk of the court where the judgment is rendered, against the executor, the heirs and devisees of real estate, if such there be, setting forth the facts, and that there is real estate of the deceased, describing its location and extent, and praying the court to award execution against the same. [C.'73, § 3092; R., § 3323; C.'51, § 1918.]

The judgment should be filed and approved as a claim of the fourth class, within the time specified in § 3349, for payment out of the personal estate: *Bayliss v. Powers*, 62–601.

SEC. **4037. Notice.** The person against whom the petition is filed shall be notified by the plaintiff to appear on the first day of the term and show cause, if any he have, why execution should not be awarded. [C.'73, § 3093; R., § 3324; C.'51, § 1919.]

SEC. **4038. How served and returned.** The notice must be served and returned in the ordinary manner, and the same length of time shall be allowed for appearance as in civil actions, and service of such notice on non-resident defendants may be had in such cases by publication. [C.'73, § 3094; R., § 3325; C.'51, §1920.]

SEC. **4039. Execution awarded.** At the proper time, the court shall award the execution, unless sufficient cause is shown to the contrary, but the non-age of the heirs or devisees shall not be held such sufficient cause. [C.'73, §§ 3095–6; R., §§ 3326–7; C.'51, §§ 1921–2.]

SEC. **4040. Mutual judgments—set off.** Mutual judgments, executions on which are in the hands of the same officer, may be set off the one against the other, except the costs, but if the amount collected on the large judgment is sufficient to pay the costs of both, such costs shall be paid therefrom. [C.'73, § 3097; R., § 3328; C.'51, § 1923.]

Judgment against two persons, jointly, may be set off against a judgment in favor of one of them against the creditor in such joint judgment: *Ballinger v. Tarbell*, 16–491.

Judgments cannot be set off, the one against the other, unless they are strictly mutual and are still in fact the property of the respective parties thereto: *Bell v. Perry*, 43–368.

Where the judgment has been fraudulently assigned for the purpose of preventing the set-off, such set-off may be obtained in an action in equity: *Hurst v. Sheets*, 14–322.

But where the assignment was verbally made, before the recovery of the judgment sought to be set-off, the assignment not appearing to be fraudulent, a set-off was denied: *Gray v. McCallister*, 50–497.

Where judgment was rendered against one party for costs, and subsequently in a second action the same party recovered a judgment for debt against the other party, *held*, that the judgment for costs should be set off against the judgment for debt, notwithstanding the assignment of the judgment for debt to the attorney in satisfaction of his claim for services in the action for which he had filed a claim for a lien: *Tiffany v. Stewart*, 60–207.

In an attachment suit, where the defendant sued, by way of counter-claim, on an attachment bond executed by plaintiff to others, *held*, that he might have judgment thereon set off against a judgment in favor of such plaintiff: *Branch of State Bank v. Morris*, 13–136.

This provision as to setting off mutual judgments is not defeated by an attorney's lien: *National Bank v. Eyre*, 3 McCrary, 175.

Where judgments are originally mutual, but have ceased to be mutual by reason of the assignment of one of them, they cannot be set off, the one against the other: *Gallaher v. Pendleton*, 55–142.

The assignee of a judgment takes it subject to the right of the defendant to have such judgment set off under a prior judgment held by the defendant against the plaintiff, and it is immaterial that the assignment is made in payment of attorney fees for services rendered by the attorney in the action in which the judgment is recovered: *Benson v. Haywood*, 86–107.

SEC. 4041. Appraisement of personal property and leasehold interests. Personal property, and leasehold interests in real property having less than two years of an unexpired term, levied upon and advertised for sale on execution, must be appraised before sale by two disinterested householders of the neighborhood, one of whom shall be chosen by the execution debtor and the other by the plaintiff, or, in case of the absence of either party, or if either or both parties neglect or refuse to make choice, the officer making the levy shall choose one or both, as the case may be, who shall forthwith return to said officer a just appraisement, under oath, of said property if they can agree; if they cannot, they shall choose another disinterested householder, and with his assistance shall complete such appraisement, and the property shall not, upon the first offer, be sold for less than two-thirds of said valuation; but if offered at the same place and hour of the day as advertised upon three successive days, and no bid is received equal to two-thirds of the appraised value thereof, then it may be sold for one-half of said valuation. [C. '73, § 3100.]

The fact that one of the appraisers is selected by the deputy sheriff does not vitiate the sale. It is a mere irregularity, not affecting the power of the officer to sell nor the validity of the title acquired by the purchaser: *Davis v. Spaulding*, 36–610.

The fact that where it appears that the sheriff appointed one appraiser, his return does not show that the party for whom he acted in making such appointment was absent or refused to appoint, will not render the sale void: *Preston v. Wright*, 60–351.

Whether the appraisers in fixing the value of the property should find the amount of prior liens and incumbrances and fix the value with reference thereto, or should fix the whole value without reference to prior liens, and leave the matter of ascertaining such liens to the sheriff, *quære*. But *held*, that a judicial sale could not be set aside as having been made for an amount less than the two-thirds value, except it should be made to appear that it was for less than two-thirds of the value after deducting incumbrances: *Brown v. Butters*, 40–544.

Where a party sought relief on the ground that the sale was for less than two-thirds of the appraised value, *held*, that he had the burden of showing such fact, and unless it was established affirmatively, the sale could not be set aside: *Barber v. Tryon*, 41–349.

Further *held*, that the purchaser at such a sale is not bound to look beyond the records for the purpose of determining whether apparent liens or incumbrances have not been discharged. Where the records show an incumbrance which, added to the amount paid, makes two-thirds of the appraised value, the sale should not be set aside, although evidence is introduced to show that the incumbrance has been in fact satisfied: *Ibid.; McDonald v. Johnson*, 48–72.

The property appraised must be sold for a sum which, when added to the prior incumbrance, shall realize to the debtor two-thirds of the fair value of the property as the same has been ascertained by the appraisement: *Sargent v. Pittman*, 16–469; *McDonald v. Johnson*, 48–72.

The debtor cannot by stipulation in a mortgage or by verbal consent to the officer waive the provision for appraisement: *Minneapolis Threshing Machine Co. v. Beck*, 64 N. W., 637.

The fact that the debtor is present at the sale and with knowledge that no appraisement has been made fails to object on that ground, does not constitute a waiver: *Ibid.*

Rent accruing after the execution of the sheriff's deed is not directly the subject of sale, but passes merely as an incident. It is not necessary, therefore, that it be appraised separately from the land. It would be presumed that that right was considered in determining the appraised value of the property: *Townsend v. Isenberger*, 45–670.

An appraisement is not proper evidence of the value of the property in an action by a third person claiming to be the owner thereof and seeking to recover for its conversion: *Flannigan v. Althouse*, 56–513.

Failure to have the appraisement made, *held* not to affect the validity of the sale as to the purchaser: *Shaffer v. Bolander*, 4 G. Gr., 201.

The purchaser at the sale is not required to take notice of the regularity of the appraisement: *Johnson v. Carson*, 3 G. Gr., 499.

But, *per contra*, *held*, that the provisions as to appraisement were not merely directory, but affected the question of power to sell, on which the validity of the sale depended: *Sprott v. Reid*, 3 G. Gr., 489.

Any change in the appraisement laws calculated to impair rights under existing contracts cannot be made applicable to an execution sale in an action brought under such contract: *Burton v. Emerson*, 4 G. Gr., 393.

Where, at the time of the making of a contract, the law does not provide for appraisement, and, at the time of judgment thereunder, appraisement is provided for, the sale should be made under the law in force at the time of the contract, and appraisement should not be allowed: *Olmstead v. Kellogg*, 47–460.

While legislation depriving the judgment debtor of the benefit of appraisement or redemption laws is not inhibited by any constitutional provision, still under the statutory provision that the repeal of a prior statute shall not affect any act done or right accruing, and which has been established, etc., *held*, that a judicial sale upon a judgment rendered before the taking effect of the Code of '73 should be made under the law as to appraisement and redemption existing when the judgment was rendered, and not in accordance with the law in existence at the time of the sale, under which the right to appraisement was taken away: *Holland v. Dickerson*, 41–367.

But where the judgment was rendered after the taking effect of that Code upon a contract made before that time, *held*, that the sale should be according to the Code provisions which took away the right of appraisement, and not in accordance with the law as it existed at the time of the making of the contract: *Babcock v. Gurney*, 42–154; *Fonda v. Clark*, 43–300.

Appraisement pertains to the remedy, and is to be governed by the law of the forum and not that of the *lex loci contractus: Shaffer v. Bolander*, 4 G. Gr., 201.

Under prior provisions as to appraisement of real property, *held*, that a sale for a less proportion than directed by statute was invalid: *Woods v. Cochrane*, 38–484; *Maple v. Nelson*, 31–322.

SEC. **4042. Property unsold—levy holds good—additional levy—abandonment.** Subject to the provisions of the preceding section, when property is unsold for want of bidders, the levy still holds good; and, if there be sufficient time, it may again be advertised, or the execution returned and one issued commanding the officer to sell the property, describing it, previously levied on, to which a clause may be added that, if such property does not produce a sum sufficient to satisfy such execution, the officer shall proceed to make an additional levy, on which he shall proceed as on other executions; or the plaintiff may, in writing filed with the clerk or justice, abandon such levy, upon paying the costs thereof; in which case execution may issue with the same effect as if none had ever been issued. [C.'73, § 3086; R., § 3317; C.'51, § 1912.]

A second levy cannot be made until the first is disposed of: *Downard v. Crenshaw*, 49–296.

A sale under an execution which has expired is valid if the levy was made while the execution was in force: *Butterfield v. Walsh*, 21–97. And see notes to § 3964.

SEC. **4043. When sale absolute.** When real property has been levied upon, if the estate is less than a leasehold having two years of an unexpired term, the sale is absolute, but if of a larger amount, it is redeemable as hereinafter prescribed. [C.'73, §§ 3098–9; R., §§ 3329–30; C.'51, § 1924.]

SEC. **4044. Deed or certificate.** If the property sold is not subject to redemption, the sheriff must execute a deed therefor to the purchaser; but, if subject to redemption, a certificate, containing a description of the property and the amount of money paid by such purchaser, and stating that, unless redemption is made within one year thereafter, according to law, he or his heirs or assigns will be entitled to a deed for the same. [C.'73, § 3101; R., § 3331; C.'51, § 1925.]

Deed: As there might possibly be circumstances under which a court of equity might order a sale of real property without redemption, a decree ordering a sale without redemption, while it may be erroneous, will not be void for want of jurisdiction: *Trace v. Whitman*, 56–443.

So, although it is held in the federal courts that decrees in foreclosure proceedings in such courts in this state where, by state

laws, redemption from foreclosure sale is provided for, should not order an absolute sale without redemption, yet such a decree, though erroneous, will not be void and cannot be collaterally attacked: *Moore v. Jeffers*, 53 202.

Where land was sold under the appraisement law of 1860, and notice of election to have the sale made subject to redemption was not filed with the clerk within the time required by that statute, *held*, that defendant was not entitled to have the sale set aside and made subject to redemption: *Gillett v. Edgar*, 22-293.

Where a purchaser takes a deed immediately after the sale, relying upon the claim that the opposite party has no right to redeem, it is not necessary that an offer to redeem be made in order to entitle the execution defendant to have the deed set aside: *Fitzgerald v. Kelso*, 71-731.

And see notes to § 4062.

Assignment of certificate: The assignment to a junior lien holder of the certificate of purchase "and the lands therein described," *held* to transfer to the assignee not only the title under the certificate, but also the purchaser's right under a tax title which was matured in his hands at the time of the assignment: *Scribner v. Vandercook*, 54-580.

The assignee in good faith of the certificate of purchase from a purchaser at the sale cannot be held responsible for the application of the purchase money by the sheriff: *Gray v. Dye*, 39-360.

Where a creditor pays money to the purchaser, claiming it to be by way of redemption, and takes an assignment of the certificate, he acquires by such assigment the rights of the purchaser, even though his redemption is not effectual: *Wilson v. Conklin*, 22-452; *Rush v. Mitchell*, 71-333.

A junior lien holder may become the purchaser at a sale under a prior lien, or may take an assignment of a certificate of purchase under such sale; and where the acts of such junior lien holder were not such as required by statute in case of redemption, *held*, that they would be considered as a purchase rather than an attempt to redeem: *Streeter v. First Nat. Bank*, 53-177.

Where the holder of a portion of the notes secured by mortgage foreclosed the mortgage and bid off a portion of the land, and also procured the assignment to him of the certificate of purchase of the same premises at a sale of the balance of the land for the remaining note secured by the mortgage, and also purchased at judicial sale the equity of redemption of the grantee of the land who had taken it agreeing to pay the mortgage, *held*, that the assignment of the certificate was in the nature of a redemption: *Brooks v. Keister*, 45-303.

The assignee of a certificate of purchase takes it subject to any equities existing against the assignor: *Van Gorder v. Lundy*, 66-448.

A purchaser of an equity of redemption has no rights other than those of the execution debtor, and cannot, on making redemption from the holder of the certificate of purchase, insist upon the assignment of such certificate: *Hurn v. Hill*, 70-38.

The legal title of the owner of the property is not divested and transferred to the purchaser until the expiration of the period of redemption. During the period of redemption the purchaser has an equitable title only, which may or may not ripen into a legal title: *Shimer v. Hammond*, 51-401.

The purchaser acquires only a lien for the amount of his purchase money and interest, which may ripen into a perfect title at the expiration of the time allowed for redemption: *Curtis v. Millard*, 14-128.

The holder of a sheriff's certificate of sale is only a lien holder, and is a proper but not a necessary party to proceedings to foreclose a senior mortgage, and the execution of the sheriff's deed does not divest the liens of senior mortgages, although they can be enforced only after the rights of the owner have been adjudicated in the manner provided by law: *Stanbrough v. Daniels*, 77-561.

SEC. **4045. Redemption—by debtor—appeal or stay.** The debtor may redeem real property at any time within one year from the day of sale, and will, in the meantime, be entitled to the possession thereof; and for the first six months thereafter such right of redemption is exclusive; but no party who has taken an appeal from the superior or district court, or stayed execution on the judgment, shall be entitled to redeem. [C.'73, §§ 3102-3; R., §§ 3332-3; C.'51, §§ 1926-7.]

Period for redemption: Under a statutory provision, not now in force, which authorized action at law on a note secured by mortgage, and provided that the judgment in such case might be declared a lien from the date of the recording of the mortgage, and that the mortgagor or a lien holder might redeem from such sale as from any other sale under execution, *held*, that a lien holder, although not a party to the proceeding, could not redeem except within the time and in the manner thus provided: *Mayer v. Farmers' Bank*, 44-212.

Where the execution and return were kept in the office of the attorney for the execution plaintiff, and not filed in the clerk's office, and an inquiry there, and also of the attorney, failed to secure a knowledge of the amount necessary to effect redemption, *held*, that upon a tender being made after the expiration of the time for redemption it should have been allowed: *Hammersham v. Fairall*, 44-462.

The fact that property is misdescribed in a mortgage and sale thereunder, and that the description is subsequently corrected during the period of redemption, the party entitled to redeem being a party to the proceeding and asking no relief, will not operate to extend the period for redemption: *McKissick v. Mill Owners' Mut. F. Ins. Co.*, 50-116.

The statutory right to redeem within one year cannot be extended by an act of the party claiming the right, such as a suit to redeem, or the like, without more: *Hughes v. Feeter*, 23–547.

In a particular case, *held*, that an action brought by a purchaser of land at an execution sale against execution defendant during the period for redemption, in which it was sought to have the title declared to be in the purchaser as against such execution defendant, did not constitute a fraud against the execution defendant, such as to entitle him to make equitable redemption after the statutory period had expired: *Bradford v. Bradford*, 60–201.

Where, by reason of a mistake of the clerk in computing the amount required to redeem, the amount paid was not quite sufficient, *held*, that the redemptioner might, after the expiration of the year, have equitable relief against the deed upon paying the deficiency and interest on the whole amount up to the time of completing the redemption: *Wakefield v. Rotherham*, 67–444.

In computing the year allowed for redemption the day of sale is excluded, and redemption may be made any time during the corresponding day of the same month of the next year: *Teucher v. Hiatt*, 23–527.

The statutory right of redemption can be exercised only within the period and in the manner prescribed by the statute creating it: *Teabout v. Jaffray*, 74–28.

Where the party does not tender and bring into court the amount necessary for making the redemption he cannot, after the time for redemption has expired, have equitable relief against the issuance of the deed: *McConkey v. Lamb*, 71–636.

Redemption waived: Under the provision that the taking of an appeal defeats the right of redemption, it is immaterial whether a *supersedeas* bond is filed on the appeal or not: *Dobbins v. Lusch*, 53–304.

The provision that stay of execution waives the right of redemption is applicable to cases where such stay is taken in a justice's court where the judgment is rendered, and afterwards a sale of real property under such judgment is had by filing a transcript thereof in the district court: *Brown v. Markley*, 58–689.

The restriction upon the right of redemption in case of taking an appeal or stay of execution does not apply to creditors who would otherwise be entitled to redeem, and such creditors have the same right to redeem in case the debtor takes an appeal or a stay as in other cases: *Sieben v. Becker*, 53–24.

An appeal or stay of execution by the execution debtor will not defeat the right of redemption by his vendee: *Thayer v. Coldren*, 57–110.

A waiver of the right to redeem involved in taking an appeal waives not only the sale under an affirmance of the judgment appealed from but also from a sale under subsequent judgment rendered after the reversal of the case and a remand for new trial: *Lombard v. Gregory*, 90–682.

The intent of the law is that a defendant who by appeal delays the sale should not be entitled to avail himself of that delay and also retain the right of redemption: *Ibid.*

Payment of money in redemption operates as a waiver of appeal so far as it affects the real estate redeemed: *Weaver v. Stacy*, 93–683.

Where a surety does not object (as provided in § 4003) to stay of execution being granted, he will be considered as having assented thereto, if taken, and held to have thereby waived the right to redeem his property, if sold under such judgment: *Chase v. Welty*, 57–230.

When the appeal is not perfected by serving notice upon the clerk as well as upon the opposite party until after the sale, the right to redeem from the sale exists, and a deed executed immediately will be invalid as against the subsequent redemption: *Fitzgerald v. Kelso*, 71–731.

By vendee: The right of redemption may be in both the judgment debtor and his vendee where the property has been conveyed with covenants of title prior to the execution sale: *Harvey v. Spaulding*, 16–397.

The vendee of an execution defendant may redeem. He is to be considered as within the meaning of the term "defendant," as used in this section: *Thayer v. Coldren*, 57–110. And see § 4061.

The grantee of an execution debtor, who acquires the interest of his grantor after the right of a junior lien holder to redeem is barred by lapse of time, may himself redeem without subjecting the property to the claims of such junior lien holder: *Moody v. Funk*, 82–1.

Where the redemption was made by the surviving widow, who was also grantee of the heirs of the deceased execution debtor, *held*, that such redemption cut off the lien of a junior incumbrancer who was a party to the action: *Beavans v. Dewey*, 82–85.

By surety: Where land is sold under a judgment against both principal and surety, the surety may redeem from the sale and thus acquire the judgment for his own protection: *Bleckman v. Butler*, 77–128.

Further as to who may redeem, see § 4046 and notes.

Sale of debtor's redemption right: Defendant's right of possession and redemption during the statutory period may be levied upon and sold under execution: *Barnes v. Cavanagh*, 53–27; *Crosby v. Elkader Lodge*, 16–399.

But such redemption right cannot be sold under an execution issued on the balance of the same judgment under which the original sale was made: *Hardin v. White*, 63–633.

By the first sale the creditor exhausts his right as to the property, and it is immaterial that the same indebtedness is embraced in two different decrees, one by foreclosure of a personal property mortgage, and the other upon foreclosure of a mortgage on real property. If real property is sold under special execution issued under a decree on foreclosure of the real property mortgage, the debtor's right of redemption therein cannot be levied on and sold under a general execution issued upon a decree rendered in foreclosure of the personal property mortgage: *Ibid.*

A judgment recovered against the debtor during the period allowed him for redemption becomes a lien on his interest in property in which he has the right of redemption, and in case he or his grantee by conveyance made after such judgment redeems from the prior sale, such judgment may be enforced against the property so redeemed, although the holder of the judgment failed to exercise his own statutory right of redemption from the sale: *Curtis v. Millard*, 14–128.

After redemption by the debtor or his grantee or assignee of land sold in partial satisfaction of a judgment it at once becomes liable to pay the unsatisfied balance of such judgment: *Crosby v. Elkader Lodge*, 16–399; *Stein v. Chambless*, 18–474.

Therefore, *held*, where a debtor conveyed his right of redemption to his wife and furnished her the money to make redemption, with intent to hinder and delay his creditors, the land so redeemed remained subject to the balance of the judgment: *Peckenbaugh v. Cook*, 61–477.

The execution debtor does not, by redemption from a sale of his property for a portion of the judgment, acquire the same rights which would be acquired by a creditor or by a purchaser who is a stranger to the judgment, or by a mortgagee in case of redemption from such sale, and the land may be sold again in case of such redemption under execution for the balance of the judgment: *Campbell v. Maginnis*, 70–589.

The purchaser of property from a judgment debtor which has been sold upon execution has the same right to redemption which the judgment debtor has. Where the sale is under foreclosure of mortgage covering different installments and for the amount of only one of such installments, the grantee, having redeemed, holds the property free from the lien of the judgment for other installments covered by the same mortgage, whereas, if the judgment debtor had himself redeemed, the property would have become subject to the payment of such other installments: *Harms v. Palmer*, 73–446.

While a party cannot have successive foreclosures of the same mortgage lien, this rule has no application where the right to foreclose for notes not yet due is expressly reserved by the decree of the court: *Burroughs v. Ellis*, 76–649.

Where the holder of a junior mortgage buys the premises under a foreclosure of his mortgage, he purchases subject to prior liens, and he is not bound to see that the premises are sold for an amount sufficient to satisfy those liens, but he may afterwards take an assignment of the senior mortgage and foreclose it and sell the land thereunder: *Herrick v. Tallman*, 75–441.

Where the debtor's right of redemption was sold under a second execution, *held*, that he might within the time for redeeming from the first sale make redemption from both sales, and that the purchaser at the second sale had no ground of objection to such redemption: *Harrison v. Wilmering*, 72–727.

Redemption in foreclosure proceedings: Where it was provided by statute that foreclosure sales should be subject to redemption as in case of sales under general execution, and afterwards other statutory provisions as to redemption were made, *held*, that such provisions were applicable to sales on foreclosure although such sales were not specifically mentioned: *Davis v. Spaulding*, 36–610.

The provisions of this section are applicable to foreclosure sales: *Barret v. Blackman*, 47–565.

Mortgagor's right to possession: The right of possession during the period of redemption is in the nature of a stay law, and courts ought to require a very clear showing that it has been bargained away before depriving the debtor thereof: *Swan v. Mitchell*, 82–307.

Where there was no agreement to that effect in the mortgage, *held*, that it was improper to appoint a receiver to take possession of the mortgaged property during the period of redemption and thus deprive the mortgagor of the rents and profits: *Ibid.*

The right of the mortgagor to the possession and the rents and profits accruing therefrom up to the expiration of the period of redemption cannot be subjected to the mortgagee's claim by the appointment of a receiver unless the mortgage is, by its terms, a lien upon such right of possession: *American Investment Co. v. Farrar*, 87–437.

SEC. **4046. By creditors.** If no redemption is made by the debtor as above provided, thereafter, and at any time within nine months from the day of sale, said redemption may be made by a mortgagee before or after the debt secured by the mortgage falls due, or by any creditor whose claim becomes a lien prior to the expiration of the time allowed for such redemption; but a mechanic's lien before judgment thereon is not of such character as to entitle the holder to redeem. The owner of a claim which has been allowed and established against the estate of a decedent may redeem as in this chapter provided, by making application to the district court or any judge of the district where the real estate to be redeemed is situated. Such application shall be heard after notice to such parties as said court or judge may direct, and shall be determined with due regard to rights of all persons interested. [C. '73, §§ 3103–4; R., §§ 3333–4; C. '51, §§ 1927–8.]

Time for redemption by creditor or lien holder: A creditor or lien holder cannot not make statutory redemption after the expiration of nine months: *Newell v. Pennick*, 62–123.

And this is so even though the purchaser is also a junior judgment creditor: *George v. Hart*, 56–706.

Redemption by creditor within the first six months, during which the debtor's right

to redeem is exclusive, will be good as to a subsequent lien holder. It is only the debtor and purchaser who can object to such redemption: *Wilson v. Conklin*, 22–452.

The time within which the creditor may redeem cannot be enlarged by the assent of the purchaser: *Hurn v. Hill*, 70–38.

Where sale is had under decree of foreclosure, and subsequently to the expiration of the period for redemption from such sale judgment is rendered against a lien holder who was made party to the original action, such lien holder has only the right to redeem within the statutory period after the judgment against him, and cannot after the expiration of such period maintain an action in equity against grantees of the purchaser at foreclosure sale, who have improved the property, to redeem from such sale: *Lindsey v. Delano*, 78–350.

A junior lien holder who fails to exercise his right to redeem within the statutory period cannot afterwards defeat the right of the purchaser, or holder of the certificate of purchase to a deed: *Bleckman v. Butler*, 77–128.

The right of the holder of a judgment to redeem from a sale under a prior mortgage is absolutely barred in ten years from the date of the judgment: *Albee v. Curtis*, 77–644.

The general statute of limitations is not applicable to judgment liens, and the fact that the purchaser under the foreclosure was a nonresident would not extend the period of redemption: *Ibid.*

The holder of a junior judgment lien not made party to a foreclosure proceeding has no right either at law or in equity to redeem the property from foreclosure sale after the lien of his judgment has expired: *Long v. Millet*, 63 N.W., 190.

Method of making redemption: See § 4049 and notes.

By agent: A redemption of real property from sale under execution, made within the proper time by a sub-agent under color of authority, whose act was subsequently ratified by the principal, *held* sufficient against the purchaser under the sale: *Teucher v. Hiatt*, 23–527.

Mechanics' lien: The holder of a mechanic's lien before judgment thereon not being entitled to redeem, he does not become entitled to redeem by obtaining a mere money judgment on his claim as against a person not the owner of the property upon which the lien is claimed: *Spink v. McCall*, 52–432.

Who may redeem: A holder of a simple judgment lien has not an equitable right to redeem from a senior lien holder, after the execution of the sheriff's deed, made in pursuance of a sale thereunder. So *held* in case of a sale under foreclosure of a mechanic's lien, made under the Revision, which provided that such actions should be at law: *Diddy v. Risser*, 55–699.

The purchaser of property at a sale under a judgment which is junior to a mortgage may redeem from such mortgage before the foreclosure thereof, in the same manner as the debtor himself might have redeemed: *Hammond v. Leavitt*, 59–407.

A mortgagee may redeem from an execution sale of the property covered by his mortgage, although the liability secured by the mortgage is only a contingent one and may possibly never ripen into a certainty: *Crossen v. White*, 19–109.

A mortgagee cannot, after buying in the property at his own foreclosure sale for a portion of his judgment, redeem under such sale by virtue of the judgment held by him, either before or after a redemption is made by the mortgagor. The purchase of the property at the sale exhausts his lien with reference thereto: *Todd v. Davey*, 60–532.

Neither can an assignee of a portion of the mortgage debt redeem from a sale on foreclosure of another portion of such debt, whether his assignment was made before or after such foreclosure: *Harms v. Palmer*, 61–483.

A party who has no interest in the property sold, but is only liable as surety or otherwise for the payment of the indebtedness for which the sale is made, has not a right to redeem: *Brooks v. Keister*, 45–303; *Miller v. Ayers*, 59–424.

A judgment creditor who has purchased the property under his execution may redeem from a sale made under a senior judgment lien: *Seevers v. Wood*, 12–295.

And an attorney who has bought in the property for his client at a sale under execution in favor of such client may exercise such right of redemption which the client would have as against another sale under a senior judgment: *Ibid.*

A junior lien holder whose debt antedates the homestead may redeem from the sale of the homestead under a senior lien, and, for the purpose of entitling himself to thus redeem, may show by evidence *aliunde*, as against the senior lien holder who has purchased at the execution sale, the fact as to the date of his claim with reference to the commencement of the homestead right: *Phelps v. Finn*, 45–447.

A creditor holding a judgment which is lien upon real property of his debtor may become the purchaser of such real property at a sale under another judgment, and make redemption from such sale in the same manner as if some other person had been the purchaser: *Citizens' Savings Bank v. Percival*, 61–183.

An execution creditor who has bid in the property under his own execution does not have a lien upon such property for any unsatisfied balance of his claim by virtue of which he or his assignee can redeem under such sale. (Overruling *Crosby v. Elkader Lodge*, 16–399): *Clayton v. Ellis*, 50–590.

Where the execution defendant has no right of redemption, a judgment creditor, who did not become such until after the sale, cannot redeem: *Brown v. Markley*, 58–689.

Where the party seeking to redeem was one of several plaintiffs at whose suit the property in question was in equity declared subject to their judgments and sold to satisfy the same, *held*, that redemption could not be made by him: *Hayden v. Smith*, 58–285.

A judgment creditor of a grantor, who has made a fraudulent conveyance, has not such a lien upon the property thus conveyed

as to entitle him to redeem the same from execution sale, made under a decree obtained by other judgment creditors subjecting such property to the lien of their judgments: *Howland v. Knox*, 59–46.

Where land was sold under execution, and before the time for redemption expired certain mortgages were corrected so as to become a lien on the land, *held*, that the mortgagees had a right to redeem, but as they failed to avail themselves of this right and intimated no desire to redeem, until after a sheriff's deed had been issued to the purchaser under the execution sale, there were no circumstances which would justify an extension of the time for redemption even though it should be conceded that the power to make such extension existed: *Ettenheimer v. Northgraves*, 75–28.

One who has a claim against an estate which has not been allowed by the court is not a creditor in such sense as to be entitled to redeem from execution sale: *Byer v. Healy*, 84–1.

In a foreclosure proceeding it may be stipulated between the parties that the sale shall be without redemption, and title under such sale will thereupon pass free from the claims of any creditors who have not liens upon the property: *Cook v. McFarland*, 78–528.

SEC. **4047. By creditors from each other.** Creditors having the right of redemption may redeem from each other within the time above limited, and in the manner herein provided. [C.'73, § 3105; R., § 3335; C.'51, § 1929.]

SEC. **4048. Senior creditor.** When a senior creditor thus redeems from his junior, he is required to pay off only the amount of those liens which are paramount to his own, with the interest and costs appertaining to those liens. [C.'73, § 3107; R., § 3337; C.'51, § 1931.]

SEC. **4049. Junior may prevent.** The junior creditor may in all such cases prevent a redemption by the holder of the paramount lien by paying off the lien, or by leaving with the clerk beforehand the amount necessary therefor, and a junior judgment creditor may redeem from a senior judgment creditor. [C.'73, §§ 3108–9; R., §§ 3338–9; C.'51, § 1932.]

SEC. **4050. Terms.** The terms of redemption, when made by a creditor, in all cases shall be the reimbursement of the amount bid or paid by the holder of the certificate, including all costs, with interest the same as the lien redeemed from bears on the amount of such bid or payment, from the time thereof, but where a mortgagee whose claim is not yet due is the person from whom the redemption is thus to be made, he shall receive on such mortgage only the amount of the principal thereby secured, with unpaid interest thereon to the time of such redemption. [C.'73, § 3106; R., § 3336; C.'51, § 1930.]

40 SA 154
B, 192

Method of making redemption: In redeemptions made before the expiration of nine months from the date of sale the redemption is to be performed by the parties themselves, without the aid of the clerk, and the only evidence of the transaction necessary is the proper transfer of the certificate of sale. The statutory provisions with reference to the action of the clerk are applicable only to redemptions, as provided for, after the expiration of nine months: *Goode v. Cummings*, 35–67.

A redemption after six and prior to nine months of the sale can be made between the parties, without the aid of the clerk; and if the parties do just what, in law, is necessary to effect the redemption, the act will be deemed a redemption: *Lamb v. Feeley*, 71–742; *West v. Fitzgerald*, 72–306.

These provisions as to the amount to be paid in order to effect redemption refer to statutory redemption from execution sale, and not to a case where a junior lienholder, not made party to a foreclosure proceeding, seeks to redeem from the sale thereunder by an action in equity: *Jones v. Hardsock*, 42–147. And as to equitable redemption, see notes to § 4289.

Such junior lien holder seeking to redeem in equity from a prior judgment under which there has been no sale must pay the full amount of such judgment, but in making statutory redemption from a sale under the judgment he is only required to pay the amount for which the property was bid in at the sale, with interest, costs, etc.: *Hays v. Thode*, 18–51; *Tuttle v. Dewey*, 44–306; *Iowa County v. Beeson*, 55–262.

The right to redeem is statutory and must be exercised in the manner pointed out: *Case v. Fry*, 91–132.

Where the person making redemption holds a judgment lien, a transferee of the debtor's rights can redeem from him even as to a portion of the premises, only by paying the amount which such party has paid in making redemption and the entire amount of his judgment lien. The transferee in such case is not entitled to have the amount of the judgment lien apportioned: *Ibid.*

In redeeming from an execution creditor who has bought in the property at the sale the debtor need only pay the amount bid by such creditor, and is not required to pay, in addition thereto, any portion of the judgment remaining unsatisfied by the sale.

Such balance is not a lien upon the property sold. (Overruling *Crosby v. Elkader Lodge*, 16–399): *Clayton v. Ellis*, 50–590.

There is no distinction between the debtor and the creditor as to the matter of making redemption: *Ibid.*

Where a junior creditor attempts to redeem from a senior creditor who has taken an assignment of a certificate of purchase, he must pay to such senior creditor the amount of purchase money and also the amount of the senior creditor's lien: *Wilson v. Conklin*, 22–452.

Where a mortgage was foreclosed for one installment of the debt secured thereby, and the decree directed that the entire property covered should be sold and any balance realized in excess of the installment due should be applied to the payment of installments not yet due, and the property was bid in by the mortgagee for the entire amount secured by the mortgage, *held*, that the mortgagor could not redeem from such sale upon payment simply of the amount of the installment already due with interests and costs, but only upon payment of the entire amount for which the property was bid in by the purchaser, although such purchaser had not paid to the clerk any sum except the costs: *Williams v. Dickerson*, 66–105.

A judgment creditor whose lien is subsequent to an unrecorded deed cannot defeat the priority of the deed by first redeeming from a prior judgment creditor. The grantee in the deed may redeem from the subsequent judgment creditor in such case by paying the amount due the prior judgment creditor: *Fords v. Vance*, 17–94.

Where a party redeems from a sale under a judgment which by mistake is for too small an amount, he is under no obligation to tender more than the amount for which the property was bid in with interest and costs: *Day v. Cole*, 44–452.

Where the holder of the first two of three mortgages on the same property foreclosed the first and bid in the property at the sale thereunder, and thereafter the holder of the third foreclosed and bid in the property at his sale, and then redeemed from the sale under the first after nine months from the date of such sale, *held*, that such redemption was made under the right of the mortgagor and not as junior creditor, and that the redemptioner did not thereby acquire priority over the second mortgage: *Dickerman v. Lust*, 66–444.

Where the holder of a junior mortgage, more than six and less than nine months from the date of the sale under the senior mortgage, buys in the certificate of sale, and files an affidavit with the clerk stating the amount of his lien and that he has redeemed as a junior lien holder, such redemption is legal, and the owner of the land, with knowledge of the facts, cannot effect redemption without paying the amount of both mortgages: *Lamb v. West*, 75–399.

Where parties, under the mistaken notion that they had a right to do so, sought to redeem property from execution sale, and the holder of the certificate directed them to pay the money to the clerk, which they did, *held*, that such action amounted to an equitable assignment of the certificate to the person making payment: *Gilbert v. Husman*, 76–241.

Where money was received by the holder of a certificate under the mistaken belief that the party paying such money was entitled to redeem, and was subsequently returned to the clerk immediately upon discovering the mistake, *held*, that the transaction did not amount to an equitable assignment of the certificate: *Byer v. Healy*, 84–1.

An execution sale in a proceeding against a grantor who has conveyed the property with intent to defraud his creditors before levy made thereon by the creditor seeking to reach such property is invalid and redemption therefrom is not necessary: *Boggs v. Douglass*, 89–150.

One who redeems as owner is required to pay the amount paid by the person from whom he redeems with interest and costs: *Ibid.*

There is no occasion for a senior creditor making redemption from a junior lien holder except in so far as such lien holder has acquired by redemption liens which are paramount to the lien of such senior lien holder: *Lysinger v. Hayer*, 87–335.

SEC. **4051. By holder of title.** The terms of redemption, when made by the title holder, shall be the payment into the clerk's office of the amount of the certificate, and all sums paid by the holder thereof in effecting redemptions, added to the amount of his own lien, or the amount he has credited thereon, if less than the whole, with interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from date of payment, and upon the amount credited on his own judgment from the time of said credit, in each case including costs. [26 G. A., ch. 65; C.'73, § 3106; R., § 3336; C.'51, § 1930.]

SEC. **4052. By junior from senior creditor.** When a senior redeems from a junior creditor, the latter may, in return, redeem from the former, and so on, as often as the land is taken from him by virtue of a paramount lien. [C.'73, § 3109; R., § 3339.]

SEC. **4053. After nine months.** After the expiration of nine months from the day of sale, the creditors can no longer redeem from each other, except as hereinafter provided. [C.'73, § 3112; R., § 3342; C.'51, § 1934.]

The following provisions (§§ 4054 to 4057) apply only to redemptions after the expiration of nine months: *Goode v. Cummings*, 35–67. See, as to this section, notes to § 4046.

SEC. **4054. Who gets property.** Unless the defendant redeems, the purchaser, or the creditor who has last redeemed prior to the expiration of the nine months aforesaid, will hold the property absolutely. [C. '73, § 3113; R., § 3343; C. '51, § 1935.]

SEC. **4055. Claim extinguished.** In case it is thus held by a redeeming creditor, his lien, and the claim out of which it arose, will be held to be extinguished, unless he pursues the course pointed out in the next section. [C. '73, § 3114; R., § 3344; C. '51, § 1936.]

The omission to file the statement will not prejudice the right of other creditors to redeem, nor defeat the right of the debtor to demand the extinguishment of all the claims of the creditor so failing to file his statement: *Goode v. Cummings*, 35–67.

Where a junior mortgagee did the acts necessary as between the parties to amount to a redemption after six months and prior to the expiration of nine months from the sale, and did not, within ten days after the expiration of the nine months, enter on the sale book the amount he was willing to credit on his claim, *held*, that his mortgage was extinguished: *Lamb v. Feeley*, 71–742.

This provision, as to the whole of the redemptioner's claim being satisfied, unless the steps pointed out by statute are taken to prevent its having that effect, are applicable to redemptions made before the expiration of nine months as well as those made after that time: *West v. Fitzgerald*, 72–306.

SEC. **4056. Credit on judgment.** The mode of redemption by a lien-holder shall be by paying into the clerk's office the amount necessary to effect the same, computed as above provided, and filing therein his affidavit, or that of his agent or attorney, stating as nearly as practicable the nature of his lien and the amount still due and unpaid thereon. If he is unwilling to hold the property and credit the debtor thereon the full amount of his lien, he must state the utmost amount he is willing to credit him with. If the amount paid to the clerk is in excess of the prior bid and liens, he shall refund the excess to the party paying the same, and enter each such redemption made by a lien-holder upon the sale book, and credit upon the lien, if a judgment in the court of which he is clerk, the full amount thereof, including interest and costs, or such less amount as the lien-holder is willing to credit therein, as shown by the affidavit filed. [C. '73, §§ 3110, 3115–19; R., §§ 3340, 3345–9; C. '51, §§ 1937–9, 1941.]

Where the party making redemption pays, and the clerk in good faith receives, a banker's check, or currency which is not legal tender, before the expiration of the time for redemption, the redemption will be complete, although in case of the check the money is not realized thereon by the clerk until after the time for redemption has expired: *Webb v. Watson*, 18–537.

Whenever a payment to the clerk would be good, a payment or tender to the party entitled to receive the money will be equally valid. The provisions of the Code of '51, allowing money to be paid to the clerk, *held* to be for the benefit of the holder, and that a payment to the execution plaintiff would be effectual: *Armstrong v. Pierson*, 5–317.

Whether the requirement that an affidavit be filed by a creditor redeeming applies to redemptions made before the expiration of nine months, doubted: *Wilson v. Conklin*, 22–452.

Omission by a creditor who has made redemption to make the entry in the sale book as required by this section, in case he is not willing to credit the execution defendant with the full amount of the claim under which such redemption is made, will not prejudice the rights of other creditors to redeem nor defeat the right of the debtor to demand the extinguishment of all the claims of the creditor so failing to make such entry: *Goode v. Cummings*, 35–67.

Such provisions apply only to redemptions made after the expiration of nine months from the date of sale. Previous to that time no entry in the sale book is required: *Ibid.*

Redemption in all cases except where otherwise provided by statute has the effect to discharge and satisfy the whole of the debt and lien under which it is made: *West v. Fitzgerald*, 72–306.

The absolute right of redemption on the part of creditors is terminated at the end of nine months from the date of the sale, and it is for the creditor last redeeming within the nine months to determine whether the right of redemption shall be again opened to the other creditors. If he is willing to have his lien and claim wholly extinguished he is entitled to hold the property at that price, and no further redemption can be made by the creditors. If he is not willing to take the property in full satisfaction, then he must, within ten days, enter on the sale book the utmost amount he is willing to credit on his claim, and by so doing he confers upon the other creditors the right to redeem: *Woonsocket Institution v. Goulden*, 28 Fed., 900.

The holder of a certificate of redemption may, after the expiration of the nine months, give to the other lien holders, within the time limited, an opportunity to redeem, by paying less than the full amount of his claim, and at the same time retain a portion of said claim as against the holder; but unless he thus indicates the amount he is willing to

allow on his claim for the property, no other lienholder has any right to redeem from him: *Tharp v. Forrest*, 76–195.

The right to have the claim of a redeeming creditor recorded as satisfied on his failure to enter the amount he is willing to credit upon his judgment does not operate as a satisfaction of such judgment as against a party who has obligated himself to save the redeeming creditor entirely harmless from the prior lien: *Montpelier Savings Bank v. Arnold*, 81–158.

The statute does not prescribe the statement to be entered by a junior creditor redeeming from a judgment sale as to the amount which he is willing to allow on his claim, and if it indicates with sufficient certainty such amount it is sufficient: *Craig v. Alcorn*, 46–560.

Failure of the clerk to enter in the sale book the amount which a redeeming creditor is willing to allow on his claim, when a statement thereof is furnished by the creditor in due time, the statement being in fact known to the parties affected thereby within the ten days given by statute for making the entry, will not operate to defeat the effect of such entry, the object of the requirement being to secure to the debtor notice of the intention of the redemptioner; and actual notice will affect that purpose: *Ibid.*

Whether a senior lien holder may redeem from a junior who has already redeemed from him, *quære;* but redemption under this section must be within one year, as provided by § 4045: *Phelps v. Finn*, 45–447.

Where the sale is made in pursuance of a judgment in favor of A, the lien of which is junior to that of a judgment in favor of B, yet if by reason of redemption a deed is issued in pursuance of a judgment in favor of C, which is senior to B's judgment, B has no right to redeem therefrom: *Boggs v. Douglass*, 89–150.

SEC. **4057. Contest determined.** In case any question arises as to the right to redeem, or the amount of any lien, the person claiming such right may deposit the necessary amount therefor with the clerk, accompanied with the affidavit above required, and also stating therein the nature of such question or objection, which question or objection shall be submitted to the court or a judge thereof as soon as practicable thereafter, upon such notice as it or he shall prescribe of the time and place of the hearing of the controversy, at which time and place the matter shall be tried upon such evidence and in such manner as may be prescribed, and the proper order made and entered of record in the cause in which execution issued, and the money so paid in shall be held by the clerk subject to the order made.

SEC. **4058. Assignment of certificate.** A creditor redeeming as above contemplated is entitled to receive an assignment of the certificate issued by the sheriff to the original purchaser as hereinbefore directed. [C. '73, § 3120; R., § 3350; C. '51, § 1942.]

SEC. **4059. Redemption of portion of property.** When the property has been sold in parcels, any distinct portion may be redeemed by itself. [C. '73, § 3121; R., § 3351; C. '51, § 1943.]

In making redemption of any distinct portion of property sold in parcels, it is necessary to pay the entire amount of the judgment under which the sale is made, and which is a lien on the property. The person desiring to make the redemption cannot have an apportionment, and redeem a part upon paying a proportionate amount of the judgment lien: *Case v. Fry*, 91–132.

SEC. **4060. Interest of tenant in common.** When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately. [C. '73, § 3122; R., § 3352; C. '51, § 1944.]

A tenant in common cannot purchase the premises at foreclosure sale and set up as against the co-tenant title under the deed executed in pursuance of such sale: *Moy v. Moy*, 89–511.

SEC. **4061. Transfer of debtor's right.** The rights of a debtor in relation to redemption are transferable, and the assignee has the like power to redeem. [C. '73, § 3123; R., § 3353; C. '51, § 1945.]

One to whom a deed is made intended as security only has no greater rights than a mortgagee, and must redeem as creditor and not as transferee of the judgment debtor's rights in the property: *Robertson v. Moline etc., Wagon Co.*, 88–463.

Also see notes to § 4045.

SEC. **4062. Deed.** If the debtor or his assignee fails to redeem, the sheriff then in office must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his

assignee. If the person entitled is dead, the deed shall be made to his heirs. [C. '73, §§ 348, 3124; R., § 3354; C.'51, § 1946.]

Sheriff's deed: The recital of the execution in a sheriff's deed is not essential to its validity, and any variance or mistake in such recital will not impair the deed: *Humphrey v. Beeson*, 1 G. Gr., 199.

Sufficiency of description in the deed may cure any uncertainty of description in the levy and return: *Hopping v. Burnam*, 2 G. Gr., 39.

A sale under a void judgment cannot be validated by a recital in the sheriff's deed that the defendant elected to have said real estate sold subject to redemption: *Cassidy v. Woodward*, 77–354.

The sheriff in office at the time the deed is executed is the proper person to make a deed. and not a person who was sheriff at the time of the sale but whose term of office has expired: *Conger v. Converse*, 9–554.

The fact that the deed is executed by a deputy is no cause for setting it aside at the instance of the defendant in execution: *Chase v. Parker*, 14–207.

A deed issued prior to the expiration of the period of redemption is not necessarily void. It may be equivalent to a certificate of purchase, and admissible in evidence for the purpose of showing the sale: *Warfield v. Woodward*, 4 G. Gr., 386.

The fact that the sheriff gives a deed absolute in form instead of issuing a certificate of purchase will not defeat the right of redemption, and cannot be considered prejudicial to a party entitled to redeem: *Olmstead v. Kellogg*, 47–460.

The fact that the deed is improperly executed before the expiration of the period of redemption will not render it invalid, if redemption is not made: *Conner v. Long*, 63–295.

If the deed is issued to one who is not a purchaser, the presumption is that the sheriff had evidence of the fact that the purchaser's rights had been transferred to the person to whom the deed was issued: *Ibid.*

A sheriff's deed under execution for costs which have already been satisfied under a prior execution which has not been returned is not valid: *Soukup v. Union Inv. Co.*, 84–448.

The doctrine of *caveat emptor* applies to purchasers at sheriff's sales: *Jones v. Blumenstein*, 77–361. And see notes to § 4028.

To whom deed made: The judgment debtor and the purchaser are ordinarily the only parties who can object that the right of redemption has not been properly exercised; and where money had been paid for the purpose of making the redemption, by a party claiming the right to redeem, and had been accepted by the purchaser and the certificate assigned, *held*, that the sheriff could not refuse to make a deed to the assignee of the certificate on any real or supposed right in the execution plaintiff to resist such redemption: *Kilbride v. Munn*, 55–445.

The sheriff may make his deed to a different person from the purchaser, with such purchaser's consent: *Ehleringer v. Moriarity*, 10–78.

Where the person making redemption is the owner, or redeems as owner and not as creditor, he is not entitled to a sheriff's deed: *Dickerman v. Lust*, 66–444.

If a party not entitled to redeem, nevertheless pays money for that purpose and secures an assignment of the certificate of purchase, he is entitled to a deed. The execution defendant or his grantee has no ground of objection: *Rush v. Mitchell*, 71–333. And see notes to § 4044.

Right to crops, rent, etc.: The estate of the debtor is not divested until execution of the deed, and any crops upon the premises already matured do not pass thereby, although they were not matured when the purchaser became entitled to his deed: *Everingham v. Braden*, 58–133. And see notes to § 4289.

A purchaser under an execution sale is entitled to the rent accruing or falling due after the execution of the sheriff's deed, and the fact that the sale is in an action by attachment upon notice by publication does not prevent the application of the rule: *Townsend v. Isenberger*, 45–670.

Where a party, by holding over after the execution of a sheriff's deed to the premises, becomes a tenant at will, he becomes so as to the land in its condition at that time and liable to action for the rental value of the premises with unmatured crops growing thereon: *Martin v. Knapp*, 57–336.

After the execution of the sheriff's deed the tenant of the former owner ceases to have any right to the possession, and if he takes crops therefrom he must account to the execution purchaser and not to the former owner: *Ibid.*

A tenant of the execution defendant, sowing or planting crops after the sale, with knowledge that they cannot be harvested before the expiration of the period of redemption, is not entitled to possession for the purpose of harvesting such crops, after the right of the purchaser to possession under his deed has become complete: *Wheeler v. Kirkendall*, 67–612.

The delivery of the sheriff's deed vests in the purchaser ownership of the premises and of the crops then growing thereon and the right of immediate possession, and the tenant in possession under a title inferior to that under which the deed is issued becomes liable to account for the rent accruing and the crops growing after the purchaser becomes entitled to possession under his deed: *Stanbrough v. Cook*, 83–705.

As between a purchaser at foreclosure sale and the tenant of the mortgagor, the tenant is entitled to crops grown by him on the premises and already matured, but not severed at the time of the sale: *Richards v. Knight*, 78–69.

In a particular case, *held*, that a crop of corn was so far matured in August as to be the property of the tenant within the foregoing rule, it appearing that the season was an unusually early one: *Ibid.*

Taking deed for benefit of another: A contract whereby a third person was to purchase certificates of sale of real property sold

under execution, and upon securing a deed to the property convey a portion or all of it to the other party to the contract, who had lost his right of redemption, *held* not to constitute a mortgage, or to entitle the latter to any right of redemption except in accordance with the express terms of the contract: *Hensley v. Whiffin*, 58–426.

Where a purchaser under execution agrees to convey to the debtor the property purchased upon being paid a certain amount within a certain time, the debtor cannot, after failure to pay the amount within the time agreed, maintain an equitable action to redeem: *Tarkington v. Corley*, 59–28.

In a particular case, *held*, that even though a purchase at execution sale was made for the benefit of another with the right to him to avail himself thereof upon payment of certain specified amounts, yet the party seeking to avail himself of the purchase did not show such payments as to entitle him to the benefits of the agreement: *Jack v. Brown*, 60–271.

Under particular facts, *held*, that the purchase at execution sale was in trust, and that sufficient steps for redemption having been taken, the execution of the sheriff's deed should have been ordered to be made to the person who, by agreement between the parties, had effected the redemption: *Kennedy v. Stranahan*, 39–205.

Where a party buys the certificate of purchase and takes the deed to the premises under an arrangement with the owner whereby the owner furnishes a part of the money for such purchase, and it is agreed that the purchaser shall hold the premises for the owner until the amount advanced to complete the purchase is repaid, the owner may in equity enforce the performance of the trust: *Byers v. Johnston*, 89–278.

SEC. **4063. Recording.** The purchaser of real estate at a sale on execution need not place any evidence of his purchase upon record until sixty days after the expiration of the full time of redemption. Up to that time the publicity of the proceedings is constructive notice of the rights of the purchaser. [21 G. A., ch., 146; C.'73, § 3125; R., § 3355; C.'51, § 1947.]

One who, in good faith, purchases the property after the expiration of the period allowed for recording the deed, and before it is recorded, is not affected with constructive notice of the proceedings: *Harrison v. Cramer*, 3–543; *Churchill v. Morse*, 23–229.

But a failure to record the deed is not material as against one who is not a purchaser in good faith, or who purchases with actual notice of the sale: *Harrison v. Cramer*, 3–543; *Walker v. Schreiber*, 47–529, 533.

Only a *bona fide* purchaser, without notice, is protected against a deed not recorded: *Rush v. Mitchell*, 71–333.

A party cannot complain of delay in taking and recording the sheriff's deed unless he acquires his interest after the period allowed for recording: *Wood v. Young*, 38–102.

The constructive notice of the sheriff's sale imparted by the publicity of the proceedings themselves and the recording of the sheriff's deed, affects only those persons claiming under the title divested by the sale and not those claiming under an independent or hostile title: *Hultz v. Zollars*, 39–589; *Gardner v. Jaques*, 42–577.

Where the certificate is assigned by the purchaser to a third person, failure by the assignee to put his deed on record will not defeat his claims as against a subsequent purchaser from the assignors. The requirement of notice applies only as against purchasers from the judgment defendant: *Lindley v. Mays*, 66–265.

A levy upon and sale of land in another county than that in which the judgment is rendered, without the filing of a transcript of the judgment, are not proceedings of which a subsequent purchaser of the property is bound to take notice until the deed is actually recorded: *McGinnis v. Edgell*, 39–419.

The deed, when duly executed and recorded, is notice of the prior proceedings, and it is immaterial whether the judgment under which the execution issued was properly indexed or not: *Cushing v. Edwards*, 68–145.

SEC. **4064. Presumption.** Deeds executed by a sheriff in pursuance of the sales contemplated in this chapter are presumptive evidence of the regularity of all previous proceedings in the case, and may be given in evidence without preliminary proof. [C.'73, § 3126; R., § 3356; C.'51, § 1948.]

Where a sheriff's deed is silent as to the nature of the writ under which the sale is made, and no other evidence is offered, the sale is to be presumed regular: *Childs v. McChesney*, 20–431.

But aside from statutory provisions, it is not evidence of the regularity of prior proceedings, nor even of the existence of the judgment or execution. So *held* in case of a sale under strict foreclosure without proceedings in court, according to the provisions of Code of '51: *Seevers v. Drennon*, 29–225.

Recitals in a sheriff's deed to the effect that at the sale the property conveyed was struck off to the purchaser "together with other real estate . . . for the sum of," etc., *held* not sufficient to show a sale for a gross sum and overcome the presumption that the officer selling did his duty: *Foley v. Kane*, 53–64.

SEC. **4065. Damages for injury to property.** When real estate has been sold on execution, the purchaser thereof, or any person who has succeeded to his interest, may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale and before

possession is delivered under the conveyance. [C.'73, § 3127; R., 3357; C.'51, § 1949.]

The right to damages accruing after the sale will not be transferred by conveyance of the property made by the purchaser. Such conveyance will not operate as an assignment of the mortgagor's cause of action for damages: *Flickinger v. Omaha Bridge and Terminal R. Co.*, 67 N.W., 372. See § 4309.

SEC. **4066. Proceedings in justices' courts.** The provisions of this chapter are intended to embrace proceedings in justices' courts, so far as they are applicable; and the terms "sheriff" and "clerk" are to be understood as qualified in this chapter in the same manner in this respect as in that relative to attachment. [C.'73, § 3129; R., § 3359; C.'51, § 1952.]

SEC. **4067. Death of holder of judgment.** The death of any or all of the joint owners of a judgment shall not prevent an execution being issued thereon, but on any such execution the clerk shall indorse the fact of the death of such of them as are dead, and if all are dead, the names of their personal representatives, if the judgment passed to the personal representatives, or the names of the heirs of such deceased person, if the judgment was for real property. [C.'73, § 3130; R., § 3482.]

An execution issued in the name of a deceased plaintiff without the indorsement here provided for may be enjoined: *Meek v. Bunker*, 33–169.

Where action is brought, by mistake, in the name of a deceased person, and judgment is rendered and sale had thereunder, the proceedings are invalid: *White v. Secor*, 58–533.

And see notes to § 3769.

SEC. **4068. Officer's duty.** In acting upon an execution, so indorsed, the sheriff shall proceed as if the surviving owners, or the personal representatives or heirs as above provided, were the only owners of the judgment upon which it was issued, and take bonds accordingly. [C.'73, § 3131; R., § 3483.]

SEC. **4069. Affidavit required.** Before making the indorsements as above provided, an affidavit shall be filed with the clerk by one of the owners of such judgment, or one of such personal representatives or heirs, or their attorney, of the death of such owners as are dead, and that the persons named as such are the personal representatives or heirs, and in the case of personal representatives they shall file with the clerk a certificate of their qualification, unless their appointment is by the court from which the execution issues, in which case the record of such appointment shall be sufficient evidence of the fact. [C.'73, § 3132; R., § 3484.]

SEC. **4070. Execution quashed.** Any debtor in such a judgment may move the court or judge to quash an execution on the ground that the personal representatives or heirs of a deceased judgment creditor are not properly stated in the indorsement on the execution, and during the vacation of the court may obtain an injunction, upon satisfactory showing that the persons named as such are not entitled to the judgment on which the execution was issued. [C.'73, § 3134; R., § 3486.]

SEC. **4071. Death of part of defendants.** The death of part of the joint debtors in a judgment shall not prevent execution being issued thereon, but, when issued, it shall operate alone on the survivors and their property. [C.'73, § 3133; R., § 3485.]

At common law an execution cannot be issued on a judgment after the death of defendant therein, and sales made in pursuance of such execution are void, and this rule is recognized by this section. The fact that the property levied on under the execution is already held by the sheriff by writ of attachment levied before the death of the judgment debtor will not affect the rule: *Welch v. Battern*, 47–147.

The right to issue an execution against property of execution defendant terminates at his death, and, in the absence of any order or proceeding re-establishing such right, the sale and deed under such execution are ineffective for any purpose: *Boyle v. Maroney*, 73–70.

The death of defendant after levy, but before sale, cannot be shown for the purpose of defeating the sale. So *held* where the judgment was in partition for costs, and was made a special lien upon the shares of the property of vendee: *Sprott v. Reid*, 3 G. Gr., 489.

A judgment against a person afterwards deceased should be filed with claims against

the estate and approved as a claim of the fourth class, within the time specified in § 3349, in order to secure payment out of the personal estate. If not thus filed, the action authorized by § 4036 to subject real property of decedent to execution thereon cannot be maintained: *Bayless v. Powers*, 62–601.

A judgment against a decedent may be revived against his administrator: *Carnes v. Crandall*, 10–377.

A creditor cannot bring an action to revive, as against the heirs, a judgment rendered against decedent in his lifetime. The only method provided for the enforcement of such a judgment is by proceedings against decedent's estate: *Bridgman v. Miller*, 50–392.

The statute plainly implies that an execution issued after the death of the defendant shall not operate on him or his property, and sales based on such an execution are void. The fact that the property levied on under the execution was already held by the sheriff under writ of attachment levied before the death of the judgment debtor will not affect the rule: *Bull v. Gilbert*, 79–547.

This rule is applicable to personal judgments and to judgments *in rem;* and where the judgment was rendered in an attachment proceeding in which the court acquired jurisdiction only as against the property, the defendant being a nonresident, and it appeared that the execution for the sale of the property was issued after the death of such defendant, *held*, that a sale thereunder was void, and a deed in pursuance of such sale conferred no title: *Ibid.*

CHAPTER 4.

OF PROCEEDINGS AUXILIARY TO EXECUTION.

SECTION **4072. Debtor examined.** When execution against the property of a judgment debtor, or one of several debtors in the same judgment, has been issued from the superior, district or supreme court to the sheriff of the county where such debtor resides, or if he do not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, and execution issued thereon is returned unsatisfied in whole or in part, the owner of the judgment is entitled to an order for the appearance and examination of such debtor. [C. '73, § 3135; R., § 3375; C. '51, § 1953.]

This and the following sections contain no provision for making third persons parties to the proceedings, and where the defendant's wife, who was not a party to the proceeding, was ordered to appear before the referee, and was examined, and certain property which was in her possession, and which she claimed to own, was ordered to be applied to satisfy the judgment, *held*, that such order did not appropriate the property and was not binding upon the wife: *Osborn v. Reardon*, 79–175.

These sections of the statute are not unconstitutional: *Ibid.*

When the property is known, or has been discovered, the plaintiff does not need the aid of this statute, but may subject the property to the payment of his judgment by the levy of an execution, and the person directed to turn over property in such proceedings cannot be punished for contempt in disobeying such order, unless such disobedience consists of some act which would hinder or delay the taking possession of the property: *Reardon v. Henry*, 82–134.

The fact that proceedings under this section are conducted as though under an equitable action for subjecting property will not affect the result: *Estey v. Fuller Implement Co.*, 82–678.

In such proceedings, security for costs cannot be required: *Ibid.*

Such proceeding is not abated by an equitable action under § 4087: *Ibid.*

One who is not a party to the case is not concluded by an order made in this proceeding for the payment of money. Such an order is a protection to such third party in turning over property, or paying money, but it is not obligatory: *Ibid.*

SEC. **4073. Upon affidavit as to property.** The like order may be obtained at any time after the issuing of an execution, upon proof, by the affidavit of the party or otherwise, to the satisfaction of the court or judge who is to grant the same, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment. [C. '73, § 3136; R., § 3376; C. '51, § 1954.]

A second examination without a new affidavit may be held as a continuation of an examination previously had: *McDonnell v. Henderson*, 74–619.

SEC. **4074. By whom order granted.** Such order may be made by the superior or district court in which the judgment was rendered, or by the district court of the county to which execution has been issued, or in vaca-

tion by a judge thereof. And the debtor may be required to appear and answer before either of such courts or judges, or before a referee appointed for that purpose by the court or judge who issued the order, to report either the evidence or the facts. [C.'73, § 3137; R., §§ 3377, 3385; C.'51, § 1955.]

SEC. **4075. Debtor interrogated.** The debtor, on his appearance, may be interrogated in relation to any facts calculated to show the amount of his property, or the disposition which has been made of it, or any other matter pertaining to the purpose for which the examination is permitted to be made. The interrogatories and answers shall be reduced to writing and preserved by the court or officer before whom they are taken. All examinations and answers under this chapter shall be on oath, and no person shall, on such examination, be excused from answering any question on the ground that his examination will tend to convict him of a fraud, but his answers shall not be used as evidence against him in a prosecution for such fraud. [C.'73, § 3138; R., § 3378; C.'51, § 1956.]

A party who has made statements in a proceeding supplemental to execution for the purpose of discovering his property, and subjecting it to the payment of the judgment, cannot object to the use of such statements as evidence in a criminal prosecution against him: *Parks v. Johnson*, 86–475.

SEC. **4076. Witnesses examined.** Witnesses may be required by order of the court or judge, or by subpœnas from the referee, to appear and testify upon any proceedings under this chapter, in the same manner as upon the trial of an issue. [C.'73, § 3139; R., § 3379.]

Proceedings for contempt in violating an order of the court are to be tried before the court without a jury: *McDonnell v. Henderson*, 74–619.

SEC. **4077. Disposition of property.** If any property, rights or credits subject to execution are thus ascertained, an execution may be issued and the same levied upon. The court or judge may order any property of the judgment debtor not exempt, in the hands of himself or others, or due him, to be delivered up, or in any other mode applied towards the satisfaction of the judgment. [C.'73, § 3140; R., § 3380; C.'51, § 1957.]

An order that property be delivered up, or in any other mode applied to the satisfaction of the judgment, should not be made where the ordinary processes of law are adequate for the subjection of the property to the payment of the debt: *Reardon v. Henry*, 82–134.

SEC. **4078. Receiver.** The court or judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, or by injunction forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, or any interference therewith. [C.'73, § 3141; R., § 3381.]

SEC. **4079. Equitable interest.** If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee or otherwise, and the interest of said debtor can be ascertained as between himself and the person holding the legal estate or having any lien on or interest in the same, without controversy as to the interest of such person, the receiver may be ordered to sell and convey the same, or the debtor's equitable interest therein, in the same manner as is provided for the sale of real estate upon execution. [C.'73, § 3142; R., § 3382.]

SEC. **4080. Sheriff as receiver.** If the sheriff is appointed receiver, he and his sureties shall be liable on his official bond for the faithful discharge of his duties as such. [C.'73, § 3143; R., § 3383.]

SEC. **4081. Continuance.** The court, judge or referee acting under the provisions of this chapter shall have power to continue his proceedings from time to time until they shall be completed. [C.'73, § 3144; R., § 3384.]

SEC. **4082. Debtor failing to appear—contempt.** Should the judgment debtor fail to appear after being personally served with notice to that effect, or should he fail to make full answers to all proper interrogatories propounded to him, he will be guilty of contempt, and may be arrested and

imprisoned until he complies with the requirements of the law in this respect. And if any person, party or witness disobey an order of the court, judge or referee, duly served, such person, party or witness may be punished as for contempt. [C.'73, § 3145; R., § 3386; C.'51, § 1958.]

The corresponding provisions of Revision, §§ 3375–3390, for compelling the judgment debtor to appear and answer as to his property, and to deliver in satisfaction of the execution any property thus discovered, on penalty of contempt, were held unconstitutional, not because providing for imprisonment for debt, but as authorizing the determination in a summary proceeding, without a jury, and in a court of inferior jurisdiction (the county court), of questions as to liability of property, etc., not adjudicated in the original judgment, and the enforcement by imprisonment of an order made in such proceedings: *Ex parte Grace*, 12–208.

The foregoing sections are constitutional, the proceedings provided for being required to be before a court of general jurisdiction or a judge thereof: *Eikenberry v. Edwards*, 67–619.

The provision authorizing the arrest of a debtor is not in violation of the constitutional right to trial by jury: *Marriage v. Woodruff*, 77–292.

Where there is no effort to conceal property or otherwise to prevent its being taken for the satisfaction of indebtedness, the person in whose hands the property is discovered should not be punished for contempt in disobeying an order to turn it over: *Reardon v. Henry*, 82–134.

The provisions of this section do not apply to the refusal of a third person to deliver property and pay money under such an order. A third person, not a party to the proceeding, is not bound by the order, but such an order is binding upon the judgment debtor: *Estey v. Fuller Implement Co.*, 82–678.

SEC. **4083. Service of order.** The order mentioned herein shall be in writing and signed by the court, judge or referee making the same, and be served in the same manner as an original notice in other cases. [C.'73, § 3146; R., § 3387.]

Where it appears that a party was present at every stage of the proceedings, and had opportunity to be heard, it is not necessary to show that he was served with the written order here contemplated: *McDonnell v. Henderson*, 74–619.

SEC. **4084. Compensation of officers and witnesses.** Sheriffs, referees, receivers and witnesses shall receive such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and the collection thereof from such party or parties as ought to pay the same shall be enforced by an order or execution. [C.'73, § 3147; R., § 3388.]

SEC. **4085. Warrant of arrest.** Upon proof, to the satisfaction of the court or judge authorized to grant the order aforesaid, that there is danger that the defendant will leave the state, or that he will conceal himself, such court or judge, instead of the order, may issue a warrant for the arrest of the debtor, and for bringing him forthwith before the court or judge, upon which being done, he may be examined in the same manner and with the like effect as is above provided. [C.'73, § 3148; R., § 3389; C.'51, § 1959.]

A referee appointed by the court to examine a judgment debtor in proceedings auxiliary to execution may issue a warrant for the arrest of the debtor in case the latter refuses to appear in response to the order: *Marriage v. Woodruff*, 77–292.

SEC. **4086. Bond.** Upon being brought before the court or judge, he may enter into an undertaking in such sum as the court or officer shall prescribe, with one or more sureties, that he will attend from time to time for examination before the court or judge as shall be directed, and will not, in the meantime, dispose of his property, or any part thereof; in default whereof he shall continue under arrest, and may be committed to jail for safe keeping until the examination shall be concluded. [C.'73, § 3149; R., § 3390.]

SEC. **4087. Equitable proceedings.** At any time after the rendition of a judgment, an action by equitable proceedings may be brought to subject any property, money, rights, credits or interest therein belonging to the defendant to the satisfaction of such judgment. In such action, persons indebted to the judgment debtor, or holding any property or money in which such debtor has any interest, or the evidences of securities for the same, may be made defendants. [C.'73, § 3150; R., § 3391.]

The provisions of this section are applicable to equitable interests in real estate: *Bridgman v. McKissick*, 15-260.

The return of an execution "no property found," is a sufficient basis for and warrants a proceeding in equity to determine the nature of the defendant's interest in real estate, and subject such interest to the payment of the judgment: *McCormick etc., Co. v. Gates*, 75-343.

By the provisions of this section, an action by equitable proceedings to subject property to the payment of a claim can only be maintained after judgment has been recovered on such claim: *Fairre v. Gillman*, 84-573.

A creditor may maintain the action contemplated in this and succeeding sections though he has no lien on any of the property in question, and by § 4089 he thus acquires a lien which will take priority over other creditors: *Fulker v. Linehan*, 88-641.

This proceeding can be brought only after the rendition of judgment and the lien provided for is created as against the property, not alone by filing a bill in equity, but by service of notice and copy of petition. Unless such steps are taken a lien is not effected: *Ware v. Delahaye*, 64 N. W., 640.

A creditor who has filed his claim with an assignee in bankruptcy cannot maintain equitable proceedings for the purpose of securing priority for his claim as against property of the insolvent which has been fraudulently conveyed: *Mehlhop v. Ellsworth*, 64 N. W., 638.

While the general practice is to levy on personal property and determine the ownership by action of replevin, yet under these provisions a judgment creditor may proceed to make an equitable levy on personal property, the title to which is in dispute, and have the court determine whether it shall be subjected to his judgment: *O'Brien v. Sanbach*, 69 N. W., 1133.

SEC. **4088. Answers verified—petition taken as true.** The answers of all defendants shall be verified by their own oath, and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in such answers by process of contempt; or, upon failure to answer the petition, or any part thereof, as fully and explicitly as the court may require, the same, or such part not thus answered, shall be deemed true, and such order made or judgment rendered as the nature of the case may require. [C.'73, § 3151; R., § 3392.]

SEC. **4089. Lien created.** In the case contemplated in the two preceding sections, a lien shall be created on the property of the judgment debtor, or his interest therein, in the hands of any defendant or under his control, which is sufficiently described in the petition, from the time of the service of notice and copy of the petition on the defendant holding or controlling such property or any interest therein. [C.'73, § 3152; R., § 3393–4.]

While a judgment at law is a lien upon any equitable interest of the debtor in real property (§ 3091 and notes), it is not so in such sense as to affect *bona fide* purchasers without notice, and a judgment creditor may, by proceedings under this and the preceding sections, acquire a superior lien upon the property by reason of his greater diligence: *Bridgman v. McKissick*, 15-260.

It is only by pursuing the method here pointed out that the creditor seeking to attach property conveyed by his debtor in fraud of creditors can obtain a lien upon such property. Levy of an attachment or execution in an ordinary proceeding against the debtor will not create any lien upon such property, and between the debtor and his grantee the conveyance is binding, and the debtor has no interest therein which can be reached by attachment or execution. *Boggs v. Douglass*, 89-150.

Where the petition was filed before recovery of judgment, which did not therefore constitute a lien, but a supplemental petition was filed under the judgment in compliance with the statutory provisions, it was held that a lien was thereby created although there was no service of notice and copy of such petition, the debtor having appeared in the action to the supplemental petition. Where a party has appeared it may be presumed that he was served with notice and copy or waived such service: *Ware v. Purdy*, 60 N. W., 526.

SEC. **4090. Surrender of property enforced.** The court shall enforce the surrender of the money or securities therefor, or of any other property of the defendant in the execution, which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender until it shall be done, or the court is satisfied that it is out of his power to do so. [C.'73, § 3153; R., § 3395.]

TITLE XX.

OF PROCEDURE TO REVERSE, VACATE OR MODIFY JUDGMENTS.

CHAPTER 1.

OF PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS IN THE TRIAL COURTS.

SECTION **4091. Judgment vacated or modified—grounds.** Where a final judgment or order has been rendered or made, the district court, in addition to causes for a new trial hereinbefore authorized, may, after the term at which the same was rendered or made, vacate or modify the same or grant a new trial:

1. For mistake, neglect or omission of the clerk, or irregularity in obtaining the same;
2. For fraud practiced in obtaining the same;
3. For erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record;
4. For the death of one of the parties before the rendition of the judgment or making of the order, if no substitute has been made of the proper representative before the rendition of the judgment or order;
5. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;
6. For error in the judgment or order shown by a minor within twelve months after arriving at majority. [C. '73, § 3154; R., § 3499.]

In what cases granted: The statutory provisions as to vacating judgments are applicable to judgments in adversary proceedings, but not to an order for a guardian's sale of property: *Bunce v. Bunce*, 59–533.

A petition for a new trial will not lie where it appears that the judgment in the form in which it was entered was by agreement of the parties, a complete and final settlement of the controversy: *Lundon v. Waddick*, 67 N.W., 388.

Grounds for vacating; fraud: The term fraud is used in this section in its ordinary sense: *Lumpkin v. Snook*, 63–515.

It may admit of question whether a false statement in a pleading, which the opposite party has a full and fair opportunity to deny, can amount to fraud practiced by the successful party: *Miller v. Albaugh*, 24–128.

Under the facts of a particular case, *held*, that a combination was shown to surprise and defraud the plaintiff in the proceeding in which the judgment had been rendered from which relief was sought: *Pfiffner v. Krapfel*, 28–27.

A party cannot be charged with fraud in procuring a judgment, unless some device or artifice is resorted to in obtaining it whereby the court is misled or deceived, and the party against whom it is rendered is prevented from asserting his claim or making his defense. The mere fact of offering in evidence a tax deed, valid on its face, but which may be invalid by reason of some fact connected with a prior proceeding in which the deed was obtained, and of which the person offering it has no knowledge, will not constitute fraud: *Brownell v. Storm Lake Bank*, 63–754.

Where pending a suit to enforce judgment against land of defendant not a party to such judgment, the judgment was fully paid and satisfied, and subsequently the plaintiff in the action prosecuted his suit to judgment, defendant failing to defend, *held* that plaintiff's acts constituted such fraud as that in a proper proceeding the decree and sale thereunder should be set aside: *Oliver v. Riley*, 92–23.

The production of false testimony may amount to such fraud as to entitle the adverse party to a new trial, but this will not be so if the opposite party, being advised in advance that testimony of that character would be resorted to, neglects to produce evidence which he knows of to meet such false testimony: *Heathcote v. Haskins*, 74–566.

Where it appears that a defendant had allowed default to be rendered against him under a promise of the attorney of a co-defendant that his interests would be protected without his appearance, *held*, that he was entitled to a new trial: *Bennet v. Carey*, 72–476.

Statements made by the sheriff in a proceeding for an injunction for maintaining a nuisance to the effect, that nothing further will be done with the landlord, who is made defendant in the case, will not justify the

landlord in failing to give attention to the suit and will not be a ground of relief from a judgment rendered against him: *Seddon v. State*, 69 N. W., 671.

Dismissal of an action cannot be considered as having been procured by fraud where it is alleged to have been on the ground that the party was lulled into a sense of security by promises on the part of the other party to make some fair offer of compromise: *Dahlhoff v. Keenan*, 66–679.

The promise of a person seeking to foreclose a mechanic's lien, that he will pay the claim of a prior lien holder upon the premises if such lien holder will not appear and assert his prior lien, will not constitute fraud authorizing the setting aside of the judgment thus obtained on failure of the promisor to make such payment, even though the promise was made without intention of performance: *Lumpkin v. Snook*, 63–515.

The district court has jurisdiction of an action in which it is sought to set aside a judgment in the probate court for fraud: *Cowin v. Toole*, 31–513.

Fraud of the prevailing party on the former trial being shown which is sufficient to constitute reasonable grounds to believe that a different result may be anticipated on the retrial, the judgment should be vacated and the new trial ordered: *Brown v. Byam*, 59–52.

Where an attorney procured a personal judgment on a petition which did not set up any personal liability as against the defendant who made default, *held*, that such judgment should be set aside for irregularity in obtaining it: *Larson v. Williams*, 69 N. W., 441.

A petition charging that the attorney of defendant procured a change in the entry of judgment after the record had been read and approved by the court, *held* to sufficiently set out fraud on the part of defendant and entitle plaintiff to a new trial. Also *held*, that it was not necessary in the petition to charge fraud in words, but that fraud was sufficiently set out by alleging the facts constituting it without designating them as fraud: *Lafever v. Stone*, 55–49.

The fraud shown in a particular case *held* sufficient to warrant the setting aside of the judgment: *Independent School Dist. v. Schreiner*, 46–172.

In divorce cases: A decree of divorce obtained by fraud of the successful party may be set aside under the statutory provision, even though the rights of innocent third parties have intervened by reason of a remarriage, and in the petition for such relief it need not be alleged that rights of innocent parties have not intervened, that fact being immaterial: *Rush v. Rush*, 46–648; *S. C.*, 48–701.

The fact that the party procuring the fraudulent decree has again married will not prevent its being set aside: *Whitcomb v. Whitcomb*, 46–437.

A party who has remarried after procuring a fraudulent decree of divorce which is set aside upon application of the opposite party may be convicted of adultery in such remarriage: *State v. Whitcomb*, 52–85.

Newly-discovered evidence: The rules applicable in determining when newly discovered evidence will be a ground for a motion for new trial are also applicable in determining when such newly dicovered evidence will be sufficient to entitle the applicant to relief upon petition for new trial: *Morrow v. Chicago, R. I. & P. R. Co.*, 61–487.

Where the newly discovered evidence was that of a witness on the former trial whose testimony was entirely contradictory to that first given, *held*, that the new trial was properly refused, as such evidence would not authorize a different judgment from that rendered: *Carpenter v. Brown*, 50–451.

Newly discovered evidence set out in a particular case as a ground for a new trial in an action for divorce, *held* not sufficient: *Harnett v. Harnett*, 59–401.

Casualty or misfortune: That a party intended to appear and defend an action, but was prevented from doing so by a severe illness which rendered him incapable of attending to and interposing his defense, *held* sufficient ground for a vacation of the judgment against him by default: *Luscomb v. Maloy*, 26–444.

And so *held* where defendant, having left home in time to return to the trial, was prevented from doing so by sickness: *Brewer v. Holborn*, 34–473.

The evidence in a particular case *held* not to establish casualty or misfortune sufficient under this section to warrant the setting aside of a judgment: *Niagara F. Ins. Co. v. Rodecker*, 47–162.

Where the defendant was misled by an error in the copy of the original notice as to the commencement of the term of court and therefore did not appear to make defense till after the rendering of default against him, and the adjournment of the term, *held*, that he was entitled to a new trial upon presenting a meritorious defense: *Browning v. Gosnell*, 91–448.

That defendant was misled by an error in the copy of the notice served upon him in regard to the date of commencement of the term of court might be a sufficient averment of unavoidable casualty or misfortune, but where the petition contained an inconsistent averment that defendant had taken legal advice as to whether the error relieved him from obligation to appear at the proper time, *held*, that he did not make out a case for relief: *Irions v. Keystone Mfg. Co.*, 61–406.

Where it appeared that notice of the action was served on a married woman who was defendant therein, and she testified that she did not suppose that it concerned her individually, and therefore failed to defend, *held*, that there was not sufficient unavoidable casualty or misfortune shown to entitle her to have it set aside: *Teabout v. Roper*, 62–603.

The fact that a party asking a new trial is a foreigner, and laboring under that disadvantage in making defense, will not be sufficient to constitute casualty or misfortune entitling him to a new trial: *Heathcote v. Haskins*, 74–566.

Sickness of counsel is a sufficient excuse for want of attention to the case, where it

appears that such sickness has not been of such long standing that the party must be deemed guilty of negligence in not employing another attorney to take his place: *Snell v. Iowa Homestead Co.*, 67–405.

Where it appeared that the original judgment was by default, due to the failure of defendant's attorney to interpose a defense, such failure being caused by a severe illness which rendered it impossible for him to attend to any business, and the party himself was away and had no knowledge that the attorney was not able to attend to the case, *held*, that a sufficient showing for setting aside the judgment was made: *Wishard v. McNeil*, 78–40.

Where the attorney to whom the defense in the case was intrusted was unable to prepare such defense on account of illness, and notified the client of that fact, and the client understood that such attorney was to have another attorney in the case attend to the defense, but through misunderstanding or oversight on the part of the first attorney, this was not done, *held*, that judgment by default for want of a defense might properly be set aside on account of unavoidable casualty: *White v. Gray*, 92–525.

In a particular case, *held*, that the showing of the sickness of the defendant's attorney was such as to entitle the defendant to have a judgment against him by default set aside: *Callanan v. Ætna Nat. Bank*, 84–8.

Negligence of attorney: Negligence of one's attorney is not a ground for new trial either under this section or in equity: *Jackson v. Gould*, 65 N.W., 406; *Church v. Lacy*, 71 N.W., 338.

Fraud and negligence of attorney in not interposing a valid defense is not a ground for vacating a judgment and granting a new trial: *Jones v. Leech*, 46–186.

Absence of counsel on account of other engagements does not necessarily entitle a party to a continuance and will not be sufficient ground for a new trial: *Grove v. Bush*, 86–94.

While a new trial will not be granted because of the negligence of an attorney, yet where that negligence is not to be imputed to the party, and amounts to an unavoidable casualty or misfortune, preventing the party from defending or prosecuting, a new trial should be granted: *Ennis v. Fourth Street Bldg. Assn.*, 71 N.W., 426.

Where a defendant was prevented from making his defense without negligence on his part, but because, unknown to him, his attorney had absconded and failed to appear in the case, *held*, that such facts constituted an unavoidable casualty and misfortune, entitling him to a new trial: *Ibid.*

Under particular facts, *held*, that there was not such showing with reference to casualty and misfortune in the failure of an attorney claimed to have been employed in appearing for a party to entitle him to have a judgment against him set aside and a new trial granted: *Mogelberg v. Clevinger*, 93–736.

Irregularity: A judgment rendered by default upon a petition not filed by the time stated in the notice, as required by § 3515 *held* sufficiently irregular to be set aside upon application: *Morgan v. Small*, 33–118.

In case of death of plaintiff before judgment: A judgment rendered in a party's favor after his death, without substitution of his representatives, is not void, but only voidable, and is not to be set aside as a matter of course. Such judgment would, at least in another action, be conclusively presumed to have been rendered while plaintiff was living: *Gilman v. Donovan*, 53–362.

At any rate under this section, proceedings to have such judgment set aside must be brought within a year, and the judgment will not be vacated until it is determined that there is a valid defense to the action in which the judgment was rendered: *Ibid.*

Lost record: The fact that after rendition of judgment all the written evidence upon which an equity case had been tried was lost, *held* not to be a sufficient reason for granting a new trial: *Loomis v. McKenzie*, 48–416.

In case of judgment against minor: Under this section the right of an infant defendant to attack a judgment against him is fixed and determined, and it is not allowable for the infant to come in as a matter of course with a new defense, or new evidence, and try the case over again: *Bickel v. Erskine*, 43–213; *Webster v. Page*, 54–461.

The minor can only take advantage of error in the judgment apparent on the record, and such as would be ground for reversal on writ of error or appeal: *Ibid.*

A minor cannot, after the expiration of the year allowed by this section, question the correctness of a judgment against him by collateral proceedings: *Dahms v. Alston*, 72–411.

Where in an action against a minor an attorney appeared for him, and was during the trial appointed guardian *ad litem*, and made defense, *held*, that there was no ground, in the absence of prejudice being shown, to authorize setting aside the verdict and granting a new trial: *Webster v. Page*, 54–461.

Where the court appointed a guardian *ad litem* to answer for a minor, and an answer was filed by him denying the allegations of the petition, but it appeared that neither the minor nor the guardian knew of the facts, which showed that no claim existed, *held*, that the minor was entitled to a new trial under the provisions of this section. *Heathcote v. Haskins*, 74–570.

New trial in equity: An action in equity asking a new trial cannot be sustained where a plaintiff may have relief under the statutory provisions as to a petition for new trial: *Hintrager v. Sumbargo*, 54–604.

A court of equity will direct new trials in actions at law, in cases where such new trials would have been ordered by the courts wherein the actions were tried, had timely application been made to them, provided proper reasons are shown why application was not made in time, or the grounds upon which the interference of chancery is claimed arose after the courts of law were deprived of power to grant the relief: *Bowen v. Troy Portable Mill Co.*, 31–460.

Courts of equity have jurisdiction to grant relief against a judgment obtained by fraud in cases where the fraud is not, and by the

exercise of reasonable diligence could not have been, discovered by the party defrauded, until after the expiration of the time allowed in the statute for retrial: *Clark v. Ellsworth*, 84-525.

Courts of equity have jurisdiction to grant relief against a judgment where the ground of relief is not discovered until after the expiration of one year; but the extent of this jurisdiction is to grant relief on grounds named in this section: *McConkey v. Lamb*, 71-636; *Lumpkin v. Snook*, 63-515; *Larson v. Williams*, 69 N.W., 441; *Jackson v. Gould*, 65 N.W., 406.

An action in equity to set aside a judgment is not available to a party for errors of the court not affecting the jurisdiction which might have been corrected on motion or appeal: *Geyer v. Douglass*, 85-93.

The fact that a party brings his action in equity to set aside a judgment for fraud, when relief might have been obtained under these sections, is not a ground of demurrer: *Searle v. Fairbanks*, 80-397.

The action of the attorney for plaintiff in a garnishment proceeding in taking judgment against the garnishee after he has been advised that the money and property in the garnishee's hands belong to another person of the same name as plaintiff, and whom the garnishee at first supposed to be the same person as plaintiff, and has agreed to drop any further proceedings against the garnishee, and without notice to him, will constitute fraud authorizing the setting aside of the judgment. Such fraud not having arisen until such judgment was obtained, presents a case for equitable relief from the judgment: *Ibid.*

The provisions of this and the following sections are not applicable to an equitable action to enjoin the enforcement of a judgment for want of jurisdiction: *Leonard v. Capital Ins. Co.*, 70 N. W., 629.

SEC. **4092. New trial after term.** Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee or decision was rendered or made, the application may be made by petition filed, on which notice shall be served upon the successful party and returned, and he be held to appear, as in an original action. The facts stated in the petition shall be considered as denied without answer, and tried by the court as other actions by ordinary proceedings, but no such petition shall be filed after one year from the rendition of final judgment. [C. '73, § 3155; R., § 3116.]

By petition: The application should be by petition and not by motion; but where a motion was filed and the question as to the right to a new trial was determined thereunder without objection, *held*, that the action of the court would not be reversed on appeal: *Storm Lake v. Iowa Falls & S. C. R. Co.*, 62-218. And see *Callanan v. Ætna Nat. Bank*, 84-8; *Worth v. Wetmore*, 87-62.

The fact that a motion for a new trial has been previously made and overruled does not debar the party from seeking, by proceedings under this section, to have the judgment vacated on other grounds than those previously urged. Such application may be united with other facts than those directly connected with the cause in which the vacation is sought, when such facts constitute a defense to the claim upon which the judgment was founded: *Reno v. Teagarden*, 24-144.

Where a motion for a new trial was made more than three days after judgment was rendered, but contained an averment in which it was described as a petition, and contained statements and demands for relief which would be proper in a petition, *held*, that the motion was sufficient; and even if it had been objected to in the court below, the objection might have been overruled, and the application treated as if by petition: *Council Bluffs L. & T. Co. v. Jennings*, 81-470.

Where judgment is against joint defendants and one of them shows himself entitled to have it set aside, it should be set aside as to both: *Storm Lake v. Iowa Falls & S. C. R. Co.*, 62-218.

In what cases: This provision contemplates application for a new trial made after the expiration of the three days. If made within that time, it should be by motion; if afterwards, by petition: *First Nat. Bank v. Murdough*, 40-26.

Where the ground for a new trial is discovered so near the close of the term that application cannot be made at that term, it may be made at the following one: *Alger v. Merritt*, 16-121.

Where a default was entered upon an amended petition, on the last day of the term and just before adjournment, and it appeared that the case had not been entered on the calendars, and counsel for defendant had no notice that it would be called up, *held*, that the judgment might be set aside on motion at a subsequent term: *Walker v. Freelove*, 79-752.

Application to set aside a judgment rendered at a previous term, on the ground that the requisite time did not elapse between the service of notice and the first day of the term, should be made before the second day of the term following: *Griffith v. Milwaukee Harvester Co.*, 92-634.

Time for application: Where an amended petition for a new trial was filed after the expiration of one year, setting out new grounds, *held*, that it could not be considered: *Harnett v. Harnett*, 59-401.

Laches cannot be imputed to a party who brings his action within the time given: *Independent School Dist. v. Schreiner*, 46-172.

The petition in such cases need only show the facts upon which the new trial is asked as in other cases: *Stineman v. Beath*, 36-73.

The petition should be entitled as in the original cause: *Hintrager v. Sumbargo*, 54-604.

Notice: Where the original proceeding

is by attachment, notice of petition for new trial by a plaintiff in the original action may be served in the same manner as the orignal notice in an attachment proceeding; that is, by publication or personal service on defendant without the state: *Darrance v. Preston*, 18-396.

Diligence: A party asking a new trial on the ground of newly-discovered evidence must show the exercise of diligence in procuring or discovering such evidence: *Stuckslager v. McKee*, 40-212; *Miller v. Albaugh*, 24-128.

But only reasonable diligence need be shown: *Stineman v. Beath*, 36-73.

Where a petition for a new trial on account of newly-discovered evidence stated that such evidence did not come to plaintiff's knowledge until about the close of the trial, *held*, that he should have asked a continuance on account of such evidence, and, having failed to do so, was not entitled to relief: *Bailey v. Landingham*, 52-415.

But he need only allege that he could not with reasonable diligence have discovered the testimony before the trial; what was done by him, or what facts existed to show due diligence, is matter of evidence, and need not be stated in the petition, although necessary in an affidavit accompanying a motion for a new trial on such ground: *Woodman v. Dutton*, 49-398; but, holding *contra*, see *Cohol v. Allen*, 37-449.

The fact that a judgment is for an amount in excess of what was actually due will not be a ground for setting aside the judgment where the party was represented by an attorney, who consented to the entry of judgment, and it does not appear that there was any fraud or concealment. The judgment can be modified as to the amount of the recovery only for mistake or omission of the clerk, fraud by the successful party in obtaining the judgment, or unavoidable casualty or misfortune preventing the party from prosecuting or defending. Relief will not be granted from negligence of the party in ascertaining the defense in time to plead it in the action: *McConkey v. Lamb*, 71-636.

To entitle a party to new trial on the ground of newly discovered evidence, it must appear that he exercised all reasonable diligence to discover the evidence before the trial and rendition of judgment, and that he was unable to do so: *Heathcote v. Haskins*, 74-566.

Where defendants and their attorney resided at a distance from the place of holding court, and plaintiff's attorney had agreed with the attorney of defendants that the case should be continued, and not called for trial without notice to defendants' attorney, and where the case was afterwards called without such notice and judgment entered against defendants, *held*, that defendants were not so negligent as to be debarred from a new trial, and the court did not err in granting it: *Council Bluffs L. & T. Co. v. Jennings*, 81-480.

Where it appeared that one of the attorneys for a party did not appear through misunderstanding as to the extent of his employment, and the other, living out of the district, was misinformed by the opposite attorney as to the time for holding the term of the court, in consequence of which judgment was rendered against defendant, *held*, that there was not such negligence as to defeat the right to another trial upon petition: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49-657.

Where a party bases his petition for a retrial on the ground of accident or surprise, he must show that he could not, by reason of the accident or surprise, with reasonable diligence, properly defend the action, or could not, by such diligence, have discovered the evidence previously to the trial: *Richards v. Nuckolls*, 19-555.

Mistake will not be ground for granting a new trial where no excuse for failure to discover such mistake nor diligence in attempting to discover it is shown: *Reed v. Lane*, 65, N. W., 380.

Change of venue: Upon the trial of the petition a change of venue may be granted as in other cases: *Gibbs v. Buckingham*, 48-96; *State v. Whitcomb*, 52-85.

Trial of the petition: The court may first hear and decide upon the grounds to vacate the judgment, and such trial should not be by jury. (Overruling *Chicago & N. W. R. Co. v. Gillett*, 38-434): *Carpenter v. Brown*, 50-451.

The provision that the case should be tried as other cases refers to the mode of producing evidence in the ordinary manner instead of by affidavit, as in the case of the motion: *Ibid.*

Although a trial by jury is not authorized in such a case, yet if a party asks a jury he cannot afterwards complain of the submission of questions of fact to it: *Bennett v. Carey*, 72-476.

The proceeding is triable as an ordinary action unless the parties in some way assent to a trial by the other method, and this is true regardless of the fact as to the method by which the original case may have been tried: *Markley v. Owen*, 71 N.W., 431.

The trial is not to be had upon affidavits, but upon evidence introduced as in other cases: *Mortell v. Friel*, 85-738.

Appeal: In an application for a new trial under this section, only errors assigned and argued will be considered on appeal, and when the evidence on which the ruling is made in the lower court is conflicting, the supreme court will not interfere: *Kruidenier v. Shields*, 77-504.

A party cannot, by moving to vacate a judgment, and then appealing from the order refusing to grant such relief, extend the time for taking appeal from the judgment: *Russell v. First Nat. Bank*, 65-242.

An appeal may be taken from a ruling of the court on a petition for a new trial filed under this section within proper time after such ruling, although more than the specified time for appeal after the rendition of the original judgment: *Wishard v. McNeil*, 78-40.

Action of the court on application to set aside a judgment by default on the ground of casualty and misfortune, which has prevented defense being made, is largely discretionary, and the supreme court will not, on appeal, interfere, except in peculiar cases of abuse: *Callanan v. Ætna Nat. Bank*, 84-8.

The matter of sustaining a petition for a

new trial rests peculiarly within the sound discretion of the trial court and unless abuse of discretion is shown the supreme court will not interfere on appeal: *Lundon v. Waddick*, 67 N.W., 388.

An appeal lies from a proceeding to vacate a judgment for fraud: *Dryden v. Wyllis*, 51–534.

Such appeal is not triable in the supreme court *de novo: Independent School Dist. v. Schreiner*, 46–172.

Pendency of appeal: The fact that an appeal from the original judgment is taken and pending cannot be pleaded in bar of an action under this provision: *Cook v. Smith*, 58–607.

Effect of petition: The filing of a petition for a new trial under this section cannot have any greater force and effect than would a motion seeking the same thing when filed within the time prescribed by statute. The petition for a new trial is deemed denied by operation of law, and before there can be a new trial the court must make an order granting it, which should be entered of record among the proceedings of the court: *Brown v. Byam*, 59–52.

No new question: In this proceeding a party seeking a new trial is not entitled to raise any new question such as that of estoppel; the only effect of the order is the award of a new trial in the original cause: *Bennett v. Carey*, 72–476.

SEC. **4093. Motion to correct mistake or irregularity.** Proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining judgment or order, shall be by motion served on the adverse party or his attorney, and within one year; if made to vacate a judgment or order because of irregularity in obtaining it, such motion must be made on or before the second day of the succeeding term. [C. '73, § 3156; R., § 3500.]

Payment and satisfaction of a judgment by defendant will not bar a proceeding by plaintiff, within proper time, to correct a mistake of the clerk: *Goldsmith v. Clausen*, 14–278.

This section does not apply to an application for the entry of a judgment *nunc pro tunc* which has been entirely omitted: *Fuller v. Stebbins*, 49–376.

Nor does this statutory provision apply to a motion to correct a record, made by a party against whom the court has by mistake rendered a personal judgment without having jurisdiction to do so: *Shelly v. Smith*, 50–543.

Where a mistake of the clerk has remained undiscovered until too late to correct it by motion, under the statutory provision, the party being without fault and remediless in law, may be granted relief in an action in equity, and the fact that the erroneous judgment has been affirmed on appeal will not affect such right: *Partridge v. Harrow*, 27–96.

SEC. **4094. Petition.** The application based upon the other grounds shall be by verified petition setting forth the judgment or order, the alleged facts or errors constituting a cause to vacate or modify it, and the matters constituting a defense to the action, if the party applying was a defendant. Such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto is a minor or person of unsound mind, and then within one year after the removal of such disability. [C. '73, § 3157; R., § 3501.]

Application to vacate a judgment must be made within a year: *Hunt v. Stevens*, 26–399.

The time within which the proceedings must be instituted commences to run from the entry of the judgment, and not from the time of final judgment on appeal. It seems that taking an appeal waives the right to this proceeding: *Gray v. Coan*, 48–424.

If the proceeding to set aside a judgment for fraud is brought within the period allowed by statute it cannot be objected to as not prosecuted with sufficient diligence. The fact that the judgment has been assigned to an innocent party before the bringing of the action does not defeat the right to relief against it: *Independent School Dist. v. Schreiner*, 46–172.

The statutory limitations to proceedings to vacate or set aside a judgment do not apply to actions in equity founded upon the general jurisdiction which equity exercises to grant relief in cases of fraud: *District T'p v. White*, 42–608.

A court of equity will grant a new trial in an action at law, if the time for applying for relief under the statute has elapsed, only when proper reasons are shown for such application: *Ibid.; Bowen v. Troy Portable Mill Co.*, 31–460; *Bond v. Epley*, 48–600.

A party who has knowledge of the error complained of before the expiration of the year, and does not pursue his remedy as herein provided, cannot have equitable relief against the judgment: *Freeman v. Hart*, 61–525.

A judgment cannot be set aside in an equitable proceeding or enjoined on grounds which would be sufficient to secure a new trial under the statutory provision above referred to: *Hintrager v. Sumbargo*, 54–604.

The law contemplates that the motion to set aside a judgment should be made at the term next succeeding the one at which entry of the judgment was made. If such motion is afterwards made, the mistake should be clearly manifest and the court fully satisfied that no prejudice could result therefrom: *Keeney v. Lyon*, 21–277.

That the petition to set aside is not verified as required by statute will not render the proceedings thereunder void. Such defect should be taken advantage of by motion

to strike the pleading from the files: *Rush v. Rush*, 46–648, 651.

That the application for vacating or setting aside does not set forth the facts constituting a defense is a defect which must be taken advantage of by motion for more specific statement, or possibly by demurrer, but cannot be made available on a trial on the merits or by objection on appeal: *Turner v. First Nat. Bank*, 30–191.

SEC. **4095. Proceedings.** In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and return, and the pleadings, issues and form and manner of trial shall be governed by the same rules and conducted in the same manner, as nearly as may be, and with the same right of appeal, as in ordinary actions. No new cause of action or defense shall be introduced, and the matter stated in the petition shall be taken as denied without answer, and the issue shall be tried by the court. [C. '73, § 3158; R., § 3502.]

The proceedings authorized under this statute are in the nature of a writ of error *coram nobis* and are provided for a review of a case, after final judgment, in the very court wherein it was rendered. The jurisdiction of all other courts of such proceeding is thereby excluded, and a change of venue cannot be had: *Gilman v. Donovan*, 59–76 (apparently overruling *State v. Whitcomb*, 52–85, in which it was held, that if the proceeding was properly commenced in the court where the judgment was rendered, a change of venue to another county might be had as in other cases).

No defense such as that a party asking a new trial is estopped from claiming it can be introduced: *Bennett v. Carey*, 72–476.

In proceedings of this character large discretion is vested in the trial court and its action will not be set aside unless that discretion has been abused: *Mogelberg v. Clevinger*, 93–736.

SEC. **4096. Valid defense.** The judgment shall not be vacated on motion or petition until it is adjudged there is a cause of action or defense to the action in which the judgment is rendered; if a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. [C. '73, § 3159; R., § 3503.]

The proceedings provided for by this section contemplate a trial as to whether there is a valid defense. Plaintiff need not again introduce the evidence necessary in the first instance to entitle him to recovery: *Morton v. Coffin*, 29–235.

If the court finds that there are not sufficient grounds for vacating the judgment, it need not inquire into the validity of the defense offered. If it becomes necessary to do so, however, not only the sufficiency of the answer, but the truth of its averments must be determined: *Niagara Ins. Co. v. Rodecker*, 47–162.

The judgment is only to be vacated after a trial of the defense on its merits, and the finding of the sufficiency thereof: *Brewer v. Holborn*, 34–473.

No showing of defense to the action in which the judgment was obtained being made, the judgment should not be set aside: *Russell v. Pottawattamie County*, 29–256.

It must appear that a plaintiff seeking relief from a judgment against him has a valid action before the judgment can be vacated: *Coleman v. Case*, 66–534.

Where irregularity and fraud in obtaining a judgment were found, but there was no evidence that there was a valid defense, *held* error to order the judgment vacated: *Dryden v. Wyllis*, 51–534.

In a particular case, *held*, that the petition for new trial showed a meritorious defense to the action: *Wishard v. McNeil*, 78–40.

The court should first try the question of the validity of the defense, and if that should appear insufficient should overrule the application: *Miracle v. Lancaster*, 46–179.

The court, without a jury, is to decide upon the question of whether the judgment shall be vacated or not, and a new trial granted: *Carpenter v. Brown*, 50–451.

It is not the duty of the court, where it is sought to have a judgment vacated on the ground of fraud in procuring it, to carefully weigh the evidence and determine upon which side there is a preponderance as to whether there is a defense to the action or not, but to examine the evidence produced and therefrom, in connection with the evidence introduced on the former trial, determine whether there is a reasonable ground to believe that a different result will be reached upon a retrial; and it is not proper for the court to render another judgment without first having decided whether the original judgment should be set aside and a new trial ordered: *Brown v. Byam*, 59–52.

Where the party asking that a judgment be set aside presents a meritorious defense, the court will not pass upon the sufficiency of the evidence to support it. If the evidence tends to support it, even though it is not conclusive as to the facts, that will be sufficient: *Bowen v. Troy Portable Mill Co.*, 31–460; *State Ins. Co. v. Granger*, 62–272.

It is not required that the court shall find the defense established by a preponderance of the evidence before granting a new trial. If there is a reasonable ground to believe that a different result will be reached by a new trial, that is sufficient showing of a valid defense: *Clark v. Ellsworth*, 84–525.

The court in which a judgment is rendered may, in a proceeding to set it aside, inquire as to whether jurisdiction was acquired by service of notice or otherwise, although the

judgment itself recites the fact of service: *Newcomb v. Dewey*, 27–381.

Such a proceeding is a direct attack, and the fact of want of service being shown, the judgment should be vacated: *State Ins. Co. v. Granger*, 62–272.

The judgment is not to be vacated until a retrial is had, and this provision is applicable to the new trial authorized by § 3796: *Stanbrough v. Cook*, 83–705.

SEC. **4097. Grounds to vacate first tried.** The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the cause of action or defense. [C.'73, § 3160; R., § 3504.]

This section seems to contemplate that the court shall first try and decide upon the sufficiency of the grounds to vacate or modify before it enters upon the consideration of the validity of the defense presented: *Worth v. Wetmore*, 87–62.

SEC. **4098. Injunction.** The party seeking to vacate or modify a judgment or order may have an injunction suspending proceedings on the whole or part thereof, which shall be granted by the court or a judge thereof upon its being rendered probable, by affidavit or verified petition, or by exhibition of the record, that the party is entitled to the relief asked. [C.'73, § 3161; R., § 3505.]

SEC. **4099. Judgment affirmed.** If the judgment or order is affirmed and the proceedings have been suspended, an additional judgment shall be rendered against the plaintiff in error for the amount of the costs, together with damages at the discretion of the court, not exceeding ten per cent. on the amount of the judgment affirmed. [C.'73, § 3162; R., § 3506.]

CHAPTER 2.

OF PROCEDURE IN THE SUPREME COURT.

SECTION **4100. Appellate jurisdiction over judgments.** The supreme court has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law. [C.'73, § 3163; R., § 2631; C.'51, § 1555.]

I. JURISDICTION.

See Const., art. V, § 4.

Not original: The supreme court has no original jurisdiction. It can review or correct judgments of a lower court only upon appeal or writ of error: *Powell v. Spaulding*, 3 G. Gr., 417; *Westbrook v. Wicks*, 36–382; *Reed v. Murphy*, 2 G. Gr., 568; *Preston v. Daniels*, 2 G. Gr., 536.

The supreme court has no original jurisdiction and cannot, after the dismissal of a case in the lower court pending an appeal, retain jurisdiction of the case for the purpose of assessing damages on an injunction bond: *Chicago, R. I. & P. R. Co. v. Dey*, 76–278.

The jurisdiction of the supreme court is supervisory: *In re Bresee*, 82–573.

The supreme court will not in the first instance raise the objection that plaintiff suing in equity has a plain adequate and speedy remedy at law. (Overruling *Keokuk & N. W R. Co.*, 77–221): *Corey v. Sherman*, 64 N. W., 828.

It can only try issues presented on appeal. It cannot, by way of a ruling on a motion, determine that, by reason of matters arising pending the appeal and shown by affidavit, appellee should be barred from further prosecuting the case: *Simonson v. Chicago, R. I. & P R. Co.*, 48–19.

As a rule the supreme court has appellate jurisdiction over all judgments and decisions of other courts of record in the state, and where it does not appear that the case falls within the limitations as to the amount in controversy, jurisdiction will be assumed to exist in that respect: *Farley v. Geisheker*, 78–453.

A general right of appeal from all judgments of the district court is provided for by this section: *Farmers' Loan & Trust Co. v. Newton*, 66 N.W., 784.

Appeals are tried upon the record in the court below. Original pleading and proceedings are never filed or had in the supreme court: *Manatt v. Starr*, 72–677.

Court will inquire: The supreme court will, even upon its own motion, inquire as to its jurisdiction: *State ex rel. v. Van Beek*, 87–569; *Hodges v. Tama County*, 91–578. And see notes to § 4114.

Not conferred by consent: Parties cannot by agreement confer jurisdiction upon the supreme court in a case in which an appeal is not authorized: *Bills v. Bills*, 77–179. So *held*, where, by consent, an appeal in a

criminal case was taken without judgment having been rendered: *Rutter v. State*, 1-99.

Consent will not confer upon the supreme court jurisdiction to entertain an appeal where the proper steps for the appeal, such as the giving of notice, have not been taken: *Doerr v. Southwestern Mut. L. Assn.*, 92-39.

For correction of errors: In a law case it is a court for the correction of errors at law, and it will not decide a case upon an agreed statement of facts which does not purport to embody the evidence, and when no error of law is presented: *Harvey v. Miller*, 25-219.

Appeals in equity: The distinction between the law and equity attributes of the supreme court as recognized in Const., art. V, § 4, is too well defined to be erased by legislative action: *Claussen v. Lafrenz*, 4 G. Gr., 224.

The supreme court can only acquire jurisdiction in a chancery cause by appeal, and it can only review and decide questions made in and decided by the court below. Upon a trial *de novo* of a chancery cause, it cannot consider new testimony, and it has no power to entertain a bill of review: *McGregor v. Gardner*, 16-538.

The method to be pursued for securing a trial *de novo* upon appeal may be regulated by statute: *Richards v. Hintrager*, 45-253.

The right to a trial *de novo* upon appeal cannot be insisted upon unless the method prescribed by statute for securing such form of trial has been pursued: *Cross v. Burlington & S. W. R. Co.*, 51-683.

The right of trial *de novo* may be limited with respect to the amount in controversy: See notes to § 4110.

But the right of trial *de novo* in equitable actions cannot be entirely taken away by statute: *Sherwood v. Sherwood*, 44-192.

Jurisdiction of the supreme court in chancery cases can be exercised only upon appeal and not upon writ of error: *Stockwell v. David*, 1 G. Gr., 115.

The supreme court has jurisdiction to hear a case *de novo* on appeal only in actions in chancery and not in special proceedings: *Brett v. Myers*, 65-274.

Its jurisdiction may be restricted by the general assembly; and therefore, *held*, that where an act gave the district court *final* jurisdiction in a matter, there was no right of appeal from its judgment to the supreme court: *Lampson v. Platt*, 1-556.

II. APPEALS FROM FINAL JUDGMENT.

Final judgment necessary: An appeal cannot be taken from a verdict by a jury where the record fails to show that a judgment has been entered: *Jones v. Givens*, 77-173.

In such a case even consent of parties will not give jurisdiction of the appeal: *Bills v. Bills*, 77-179.

When an appeal is taken from a judgment in the absence of a showing to the contrary it will be presumed to be from the final judgment if that has been rendered: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N.W., 761.

A party against whom no judgment has been rendered cannot appeal: *Boyce v. Wabash R. Co.*, 63-70.

From portion of judgment: A party has the right to appeal from a definite and specified portion of the judgment: *Andrew v. Concannon*, 76-251.

In an equity case triable *de novo*, an appeal may be taken from a distinct and specified portion of the judgment: *Gleiser v. McGregor*, 85-489.

A portion of a judgment or decree not appealed from will not be disturbed: *Boggs v. Douglass*, 89-150.

What is a judgment: An order declaring a bail bond forfeited, and taxing costs to defendant, is a final judgment in such sense that an appeal may be taken therefrom: *State v. Conneham*, 57-351.

The overruling of a motion to dismiss the appeal from a justice on the ground that the court has no jurisdiction of such an appeal is such final order as may be appealed from: *Curran v. Excelsior Coal Co.*, 63-94.

A decree in a partition proceeding, settling the rights and interests of the parties, is final in its nature, and may be appealed from before the division of the property in accordance therewith is actually made: *Williams v. Wells*, 62-740.

Where in an equitable action, plaintiff sought to have a deed set aside and also asked to have an accounting, and a decree for a reconveyance was made with an order of reference for an accounting, *held*, that an appeal from the decree for reconveyance might be taken, and that therefore an appeal from the decree for accounting would not bring up the question as to the correctness of the decree for reconveyance: *McMurray v. Day*, 70-671.

The fact that a judgment is entered wholly without authority, as, for instance, by a person not qualified as judge, before whom the trial is had by consent, will not prevent the correction of the error on appeal, although the judgment itself is absolutely void: *Petty v. Durall*, 4 G. Gr., 120.

An appeal may be taken from a judgment by default: *Doolittle v. Shelton*, 1 G. Gr., 271; *Woodward v. Whitescarver*, 6-1.

An order denying to the district attorney the right to appear for the county, where the county is a party, is a decision from which an appeal may be taken: *Clark v. Lyon County*, 37-469.

The decision of the district court adverse to the board of equalization on an appeal from the action of such board in the equalization of taxes is a judgment from which an appeal may be taken to the supreme court: *Farmers' Loan & Trust Co. v. Newton*, 66 N. W., 784.

An order of court arresting judgment is not such a final judgment as that an appeal may be taken therefrom: *Wallis v. Sparks*, Mor., 20.

An order punishing for contempt cannot be reviewed by appeal: See § 4468.

An appeal may be taken from a decree which determines the rights of the parties to property in controversy, even though a cross-bill be still pending: *Lucas v. Pickel*, 20-490.

Under a statute allowing an appeal from "all decrees and decisions of the county

court," *held*, that an appeal could not be taken from the mere ministerial act of the county judge: *Kennedy v. Cress*, 19–42.

Judgment must appear: The record must show the rendition of judgment, that being a jurisdictional fact: *Heath v. Groce*, 10–591; *Warder v. Schwartz*, 65–170; *Shannon v. Scott*, 40–629; *Tague v. Benner*, 71–651.

III. RIGHT OF APPEAL AND WAIVER.

Must affirmatively appear: The supreme court can entertain an appeal only when a judgment has been rendered from which an appeal may be taken. The judgment must be affirmatively shown, and the court will dismiss the case where it does not appear that such judgment has been rendered, even though the parties fail to present the objection, for, being jurisdictional in its nature, the parties cannot waive it by silence or consent: *Green v. Ronen*, 59–83; *Groves v. Richmond*, 58–54.

Where the record shows a verdict to have been rendered, but does not show that a judgment has been entered thereon, the appeal should be dismissed: *Heath v. Groce*, 10–591; *Pittman v. Pittman*, 56–769.

By what law determined: The right of appeal is governed by the law in force at the time judgment was rendered: *Rivers v. Cole*, 38–677; *Davenport v. Davenport & St. P. R. Co.*, 37–624.

Another remedy: The fact that there is another remedy for the error complained of does not take away the right of appeal from an erroneous judgment or decision in cases where an appeal is authorized: *Wilson v. Shorick*, 21–332.

Express waiver: Parties may by agreement waive the right to complain of a ruling and thereby preclude the consideration of the appeal as to such ruling: *District T'p v. Bickelhaupt*, 68 N.W., 914.

An agreement by which a judgment rendered is to be a complete and final adjudication of the controversy and no appeal is to be taken, is binding: *Lundon v. Waddick*, 67 N.W., 388.

Waiver by accepting benefits; estoppel: A party who accepts the benefits of an adjudication, so far as favorable to him, thereby waives his right to appeal therefrom: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 55–157; *Independent Dist. v. District T'p*, 44–201; *Mississippi & M. R. Co. v. Byington*, 14–572.

The acceptance of a portion of the judgment admitted to be due will not waive the right to appeal from a part of the judgment claimed to be errroneous: *Upton Mfg. Co. v. Huiske*, 69–557.

The acceptance by appellant of money as to which there is no controversy will not constitute a waiver of his right of appeal: *Funk v. Mercantile Trust Co.*, 89–264.

A party cannot accept the benefit of an adjudication which is not separable and at the same time prosecute an appeal from it. Thus a party cannot appeal from an order requiring separation of an action after having elected to comply therewith: *Weaver v. Stacy*, 93–683.

If the right of appeal has been waived the appeal will be dismissed on motion: *Independent Dist. v. District T'p*, 44–201.

Whether such question can be raised on motion after the appeal has been determined, *doubted;* but under the peculiar facts of a particular case, *held*, that there had been no such acceptance of benefits as to constitute a waiver: *Crane v. Guthrie*, 48–693.

Where a party to the suit has had his claim satisfied by reason of having redeemed the property from execution sale, he thereby loses his right to appeal: *West v. Fitzgerald*, 72–306.

Where a party voluntarily caused execution to be issued and property to be sold in satisfaction of the judgment, *held*, that he thereby waived his right to further contest the correctness of the amount of recovery: *Anglo-American Land, etc., Co. v. Bush*, 84–272; *Lombard v. Bush*, 85–718.

Acceptance of fine: Under a statute allowing to the prosecution an appeal from the action of a justice of the peace in criminal cases, *held*, that the acceptance by the county treasurer of the fine imposed by the justice would not deprive the state of the right to appeal: *State v. Tait*, 22–140.

Acceptance by plaintiff's attorney in a prosecution under the liquor law, of the amount taxed in favor of plaintiff as attorney's fees, *held* a waiver of the plaintiff's right to appeal: *Root v. Heil*, 78–436.

Where, in an action against a county to recover fees in criminal cases, some of the items of plaintiff's claim were disallowed and plaintiff thereupon appealed from the portion of the judgment adverse to him, *held*, that the acceptance of the fees allowed by the lower court was not a waiver of such appeal: *Byram v. Polk County*, 76–75.

Payment of judgment: A party who has paid a judgment against him cannot afterward appeal from such judgment: *Borgalthous v. Farmers', etc., Ins. Co.*, 36–250.

An appeal cannot be maintained after the judgment complained of has been satisfied, if such satisfaction is made solely for the purpose of relieving property from the lien of such judgment. Such a satisfaction must be considered voluntary: *Hipp v. Crenshaw*, 64–404.

Performance of the judgment will waive an appeal therefrom: *Hintrager v. Mahoney*, 78–537.

Where the judgment involved the possession of real estate, and in order to reduce the amount of the *supersedeas* bond it was stipulated that plaintiff should have possession of it pending the determination of the title by an appeal, *held*, that such stipulation did not constitute a performance of the judgment in such sense as to waive the appeal: *Sample v. Collins*, 81–23.

Where a decree in a divorce suit directed the defendant to pay to plaintiff a sum as temporary alimony, and other sums to her attorneys for prosecuting the suit, such payment to be made by a person not a party to the suit, who was designated as the guardian of defendant, who was insane, *held*, that the payment of these sums by such third person would not be a waiver of defendant's right to appeal: *Tiffany v. Tiffany*, 84–122.

Where suit was brought against a bank as a nominal party only, to recover a sum of money in its possession, the real controversy

being between the plaintiff and another defendant who claimed the money, *held*, that payment of the money into court by the bank and a satisfaction of the judgment of plaintiff thereby, was not a waiver of the right of appeal on the part of the other defendant: *Sanford v. First Nat. Bank*, 63 N. W., 459.

The mere payment of the fees of an officer for his service in an action will not estop the unsuccessful party from prosecuting an appeal: *State ex rel. v. Martland*, 71-543.

Involuntary payment; under protest: Payment of the judgment, to prevent its satisfaction by sale of real property under execution which has already been levied thereon, will not constitute such voluntary payment as to defeat the right to appeal: *Grim v. Semple*, 39-570.

So *held*, also, as to payment made after the taking of appeal and under protest to prevent sale of property under special execution: *Burrows v. Stryker*, 45-700.

An involuntary payment is not such a recognition of the judgment as will waive the right of appeal: *Gilbert v. Adams*, 68 N. W., 883.

Acceptance of tender: Where the amount of a tender was paid into court and judgment was rendered for plaintiff for that amount, from which he appealed, claiming an additional sum as interest, and plaintiff, after the announcement of the judgment and signing of the bill of exceptions, had accepted the amount of the tender, *held*, that the right of appeal was not thereby waived: *Dudman v. Earl*, 49-37.

It will not amount to a waiver of an appeal that money paid in to the clerk by the opposite party is applied in part by the clerk in satisfaction of a claim for an attorney's lien, without the knowledge of appellant, where he, as soon as he becomes aware of the fact, repudiates the transaction, and pays back to the clerk the amount so paid in: *Jewell v. Reddington*, 57-92.

Change of venue by consent: Where, after perfecting his appeal from a judgment, the party consented to a transfer of the case to another court for trial, *held*, that the appeal was thereby waived: *Lillie v. Skinner*, 46-329.

Issuance of execution: The issuance of execution after perfecting the appeal and filing transcript and abstract in supreme court, on which execution nothing was realized, *held* not to be a waiver of the appeal, on which the appeal would be dismissed on motion: *Hornish v. Peck*, 53-157.

A party who proceeds in the lower court to enforce a judgment from which he appeals, thereby waives or abandons such appeal: *Reichelt v. Seal*, 76-275.

Filing transcript in another county: The right to appeal is not waived by filing transcripts of the judgment in other counties so as to make it a lien on property in such counties: *Tama County v. Melendy*, 55-395.

Action to enjoin judgment: An action in equity to enjoin the collection of a judgment waives the right to appeal from such judgment: *Gordon v. Ellison*, 9-317.

The bringing of a second action waives any error in dismissing a former action brought for the same indebtedness: *1 Ibid.*; *Liebuck v. Stahle*, 66-749.

Judgment procured by the party appealing: A party will not be allowed to appeal from a judgment which he caused to be rendered on his own motion: *Hughes v. Feeter*, 23-547.

Where the court rendered judgment for less than the amount of the verdict, *held*, that the party against whom the verdict was rendered could not complain of the error: *Deere v. Wolf*, 77-115.

A party who does not appeal must be regarded as having acquiesced in the judgment of the lower court: *Pace v. Heinley*, 85-733.

A party who does not appeal cannot have, in an equity case, any more favorable decree in the appellate court than he had in the court below: *Charlton v. Sloan*, 76-288.

One who has not appealed cannot urge errors in the action of the court, and cannot claim that, if such errors had not been committed, the error of which the other party complains would not have resulted: *First Nat. Bank v. Wright*, 84-728; *Bellows v. Litchfield*, 83-36; *Fisk v. Chicago, M. & St. P. R. Co.*, 83-253.

A party not appealing can have no relief: *Miller v. Schenck*, 78-372; *Hanks v. Brown*, 79-560; *Rainwater v. Hummell*, 79-571; *Matthews v. Cedar Rapids*, 80-459.

In an action upon a bond where judgment was rendered against defendant and he failed to appeal, *held*, that he did not thereby waive his right to appeal from the judgment in subsequent intervention proceedings, where the record showed that certain issues arising in the intervention proceedings were expressly reserved for decision in the former proceedings, although the same issues might have been raised and determined upon the trial in the main case: *Richards v. Osceola Bank*, 79-707.

Taking stay of execution is, by § 3998, made a waiver of the right to appeal: *Seacrest v. Newman*, 19-323.

Redemption is waived by taking appeal: See § 4045.

SEC. **4101. Appeals from orders.** An appeal may also be taken to the supreme court from:

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

2. A final order made in special actions affecting a substantial right therein, or made on a summary application in an action after judgment;

3. An order which grants or refuses, continues or modifies, a provisional remedy; grants or refuses, dissolves or refuses to dissolve, an injunction or

attachment, or grants or refuses a new trial, or sustains or overrules a demurrer;

4. An intermediate order involving the merits or materially affecting the final decision;

5. An order or judgment on *habeas corpus*. [C. '73, § 3164; R., § 2632; C. '51, § 1556.]

Orders: An appeal may be taken from an order of a probate court directing a guardian to pay over the amount of a judgment rendered against him as garnishee in a suit against his ward, as such order is one which involves a substantial right: *Coffin v. Eisiminger*, 75–30.

An appeal lies from an order of the probate court in a special proceeding for the discovery of assets: *In re Estate of Pyle*, 82–144.

But where in such proceeding the court merely directed suit to be brought by the administrator against the party complained of, to ascertain and enforce his rights, *held*, that such party was not entitled to appeal: *Ibid.*

Where in a proceeding to have dower set off, an order was made that a certain paper claimed to have been an acceptance of the provisions of the will should be put on record, *held*, that such order was not one from which an appeal could be taken: *In re Estate of Slauson*, 82–366.

An appeal will lie from an order transferring or refusing to transfer to the equity side of the docket issues arising in an action at law: *Price v. Ætna Ins. Co.*, 80–408.

Where an appeal was from "the decision" of the court, and the notice failed to indicate the decision from which the appeal was taken, *held*, that the word "decision" meant an adjudication other than a final decision: *Weiser v. Day*, 77–25.

Order in special action: A final order in a proceeding to vacate a judgment for fraud, *held* to be a "final order in a special proceeding, affecting a substantial right therein," within the language of § 3164 of the Code of '73, from which an appeal might be taken: *Dryden v. Wyllis*, 51–534.

An appeal will lie in a *certiorari* proceeding from a decision granting the writ and ordering a stay of proceedings in the court to which the writ issues: *Iske v. Newton*, 54–586.

An order of a district judge revoking a permit to sell intoxicating liquors, is a final order in a special proceeding, affecting a substantial right, from which an appeal may be prosecuted: *State v. Schmidtz*, 65–556.

An appeal is authorized from the action of the court dismissing a special proceeding to compel the payment by an attorney of money collected by him: *Hawk v. Evans*, 76–593.

Where, in a special proceeding for the discovery of assets, an order of the court was that the administrator bring suit against the party to such proceeding to determine the rights to the property in question, *held*, that such party was not so affected by the order as to be entitled to appeal therefrom: *In re Estate of Pyle*, 82–144.

The ruling of the court in a disbarment proceeding, in refusing to compel a member of the bar to prosecute the case, is not such as that an appeal can be taken therefrom: *Byington v. Moore*, 70–206.

A provisional remedy is one provided for temporary purposes, as to meet a present exigency, and an order for temporary alimony may therefore be appealed from: *Blair v. Blair*, 74–311.

An appeal lies from an order dissolving or sustaining an attachment: *Johnson v. Butler*, 1–459.

But such appeal does not bring up the main case for review, except so far as material to the understanding and disposition of the order from which the party appeals: *Berry v. Gravel*, 11–135.

An appeal may be taken from a judgment holding or discharging a garnishee: *Bebb v. Preston*, 1–460; *National Bank v. Chase*, 71–120.

An appeal will lie from the action of a court in dissolving an injunction granted by a judge in vacation: *Trustees v. Davenport*, 7–213.

The action of a judge allowing or refusing an injunction in vacation may be reviewed by appeal therefrom (an express statutory provision having changed the law under which *Monticello Bank v. Smith*, 25–248; *Jewett v. Squires*, 30–92; *In re Curley*, 34–184, and other cases, were decided): *Bennett v. Hetherington*, 41–142.

An appeal may be taken from an order appointing or refusing to appoint a receiver: *Callanan v. Shaw*, 19–183.

An order appointing a receiver if made in vacation is appealable, the same as if made in term time: *Clark v. Raymond*, 84–251.

Intermediate orders: An appeal will not lie from an intermediate order or ruling, as upon questions of practice or the admission or exclusion of evidence, but only from such judgments or orders as determine the rights of the parties to the relief or remedy asked, or to a substantial right as to the course of proceedings, whereby the cause is determined or is tried in a manner not authorized by law. The decision appealed from must be one affecting the merits of the case. (Explaining *McCoy v. Julien*, 15–371): *Richards v. Burden*, 31–305.

Interlocutory orders not final as to the rights of the parties or preventing the final determination of those rights cannot be appealed from: *Walker v. Pumphrey*, 82–487.

Erroneous action of the lower court in allowing a party to introduce additional evidence, when an equity case is remanded to the lower court for a decree in harmony with the opinion of the supreme court, is not a ruling so materially affecting the final decision as to authorize an appeal therefrom before final decision is rendered. It cannot be said that there will necessarily be an adjudication against the party complaining by reason of such error: *Garmoe v. Sturgeon*, 67–700.

An order of continuance is a mere intermediate order, not materially affecting the merits, and an appeal does not lie therefrom: *Jaffray v. Thompson*, 65–323.

A finding of facts, even though considered as an intermediate order, is not considered as so far prejudicial to the substantial rights of the party to whom it is adverse that an appeal can be taken therefrom before final judgment: *Boyce v. Wabash R. Co.*, 63–70.

An appeal lies from an order sustaining a motion to expunge a final order from the records, such an order for a change of the record virtually constituting a new trial: *Guthrie v. Guthrie*, 71–744.

The ruling on a motion to suppress depositions cannot be reviewed on appeal before final judgment: *Baldwin v. Mayne*, 40–687.

An appeal will not lie from an order granting a rule to produce books and papers, for, while the order may affect a substantial right, it neither determines the action nor prevents a final judgment from which an appeal may be taken: *Cook v. Chicago, R. I. & P. R. Co.*, 75–169.

Appeal cannot be taken from rulings on motions where they do not affect substantial rights by determining the action or by preventing judgment from which an appeal may be taken, nor involve the merits of the case, nor materially affect the final decision: *Quinn v. Capital Ins. Co.*, 82–550.

The objection that a ruling appealed from is not one from which an appeal is authorized is jurisdictional and will be taken by the court, although not made by the parties: *Ibid.*

An appeal from an interlocutory order will be dismissed when it is shown that the action has been dismissed in the lower court by the plaintiff in the manner pointed out by the statute: *Chicago, R. I. & P. R. Co. v. Dey*, 76–278.

An interlocutory order cannot be considered on appeal where no appeal from such order appears to have been taken: *Cannady v. Cannady*, 85–744.

An order refusing to enter a default cannot be appealed from where it does not affirmatively appear that such order substantially affected plaintiff's rights: *Roberts v. Malloy*, 69 N.W., 674.

A ruling upon exception to interrogatories, answers to which would be used as evidence in the trial of the case, *held* not to be a ruling from which an appeal could be taken: *State v. Arns*, 72–555.

An order requiring security for costs cannot be appealed from, but appeal may be taken from an order dismissing an action for failure to give such security: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38–446.

Where an intermediate order was one which the law did not contemplate, *held*, that it would be presumed that such order would not affect the final decision, and an appeal therefrom would not lie: *Battell v. Lowery*, 46–49.

An order recommitting a cause to arbitrators is a decision from which an appeal lies: *Brown v. Harper*, 54–546.

An order of court substituting other defendants in a case and releasing the original defendants may be appealed from, and such appeal may be prosecuted even though after such substitution the new defendants have procured a transfer of the case to the circuit court of the United States: *Sunberg v. District Court*, 61–597.

Appeal cannot be taken from an order granting or refusing a change of venue: *Allerton v. Eldridge*, 56–709; *Edgerly v. Stewart*, 86–87.

On such an appeal the supreme court acquires no jurisdiction, and will refuse to entertain the case although no objection on that ground is made by either party: *Groves v. Richmond*, 58–54.

Where the court has jurisdiction of the subject-matter and of the parties, the fact that the action is brought in the wrong county will not render the overruling of a motion for a change of venue such ruling as may be reviewed upon appeal before final judgment: *Horak v. Horak*, 68–49.

But where the motion for change of venue was treated as raising the question whether the action on a bail bond was properly brought in the county where the suit was commenced, and by that county, for the use of the school fund, or whether it should not have been brought in and by another county, *held*, that the decision of that question would be treated in the same manner as though made upon a demurrer, and an appeal therefrom would be entertained: *Lucas County v. Wilson*, 59–354.

If, however, the ruling upon the motion for change of venue is properly excepted to, an appeal from the final judgment will bring up the ruling for review if it was adverse to the party appealing: *McCracken v. Webb*, 36–551: *Allerton v. Eldridge*, 56–709; *Kell v. Lund*, 68 N. W., 593.

An appeal may be taken from the ruling on a demurrer if the party against whom the ruling is made excepts and elects to stand on his demurrer or pleading, as the case may be. It is not necessary that it appear that final judgment has been rendered: *Cowen v. Boone*, 48–350.

An appeal may be taken from an order which sustains or overrules a demurrer, but in such case the record must show that the ruling is final and not in any manner waived: *Seippel v. Blake*, 80–143; *Thorpe v. Smith*, 86–410.

If the party pleads over or amends, he thereby waives any error in the ruling: See notes to § 3565.

A plaintiff to whose petition a demurrer has been sustained has the right to appeal, unless it appears that such right has been in some manner waived: *Hampton v. Jones*, 58–317.

An appeal may be taken from the action of the court in overruling plaintiff's demurrer to defendant's answer and dismissing the action upon plaintiff's refusing further to plead, and giving a judgment for costs against plaintiff: *Arnold v. Kreutzer*, 67–214.

Where plaintiff demurs to defendant's answer and his demurrer being overruled elects to stand thereon, an appeal from such

ruling may be either on the ground that it is the overruling of a demurrer or that it is an intermediate order involving the merits: *Weiser v. McDowell*, 93–772.

An appeal does not lie from the overruling of a motion to strike surplusage from a petition: *Ida County v. Woods*, 79–148.

Where a motion to strike matter from the petition is sustained and the right of plaintiff to any relief on account of the matter thus stricken out is thereby denied, the ruling may be appealed from, its effect being practically that of the sustaining of a demurrer to the cause of action thus stricken out: *Seiffert & Wise Lumber Co. v. Hartwell*, 63 N.W., 333.

An appeal cannot as a general rule be taken directly from an order or ruling on a motion to strike certain allegations as irrelevant and redundant. Such ruling can only be reviewed in connection with an appeal from a final judgment unless such ruling goes to the party's entire right of action or defense: *Allen v. Church*, 70 N.W., 127; *Allen v. Cook*, 71 N.W., 534.

A recital that the court sustained a demurrer to plaintiff's petition and that plaintiff refused to plead further and elected to stand on the petition and excepted to the ruling of the court is one from which an appeal lies although no final judgment was rendered: *Bradley v. Miller*, 69 N.W., 426.

A ruling striking matter from a petition on motion, thus preventing plaintiff from introducing evidence of matter thus alleged, may be reviewed by appeal before final judgment: *Stanley v. Davenport*, 54–463.

The fact that the cause is still pending below does not prevent the supreme court from determining an appeal from an intermediate order involving the merits: *Ibid.*

A refusal by the court to sustain a motion to strike out a part of a petition not designed to show a distinct cause of action is not a ruling from which direct appeal will lie: *Specht v. Spangesberg*, 70–488.

The ruling on a motion to strike a petition of intervention from the files on the ground that the original action had been settled, *held* to be an intermediate order from which an appeal would lie: *First Nat. Bank v. Gill*, 50–425; *Bicklin v. Kendall*, 70–490.

An appeal will lie from the ruling of a court sustaining a motion to strike a cross-petition from the files: *Mahaska County State Bank v. Christ*, 82–56.

This section expressly provides that an appeal may be taken where the court refuses a new trial, and it is immaterial whether any judgment has been rendered on the verdict or not: *Baldwin v. Foss*, 71–389.

An appeal in an *ad quod damnum* proceeding from a decision of the court overruling a motion to set aside the verdict and quash the writ, *held* proper without final judgment being rendered: *Burnham v. Thompson*, 35–421.

Intermediate order reviewed on appeal from final judgment: In general, error in intermediate orders upon questions of practice, the admission of evidence, etc., from which an appeal cannot be directly taken, may be urged upon appeal from the final judgment: *Richards v. Burden*, 31–305.

But in such cases the error in the intermediate order will not be considered unless the record shows that a final judgment was rendered: *Shannon v. Scott*, 40–629; *Jordan v. Henderson*, 19–565.

An intermediate order may be reviewed on appeal from the final judgment taken within the proper time after the rendition of such judgment, although the time for appeal from such intermediate order separately has elapsed. The failure to appeal from an intermediate order, even when such appeal is allowable, will not waive the right to have such order reviewed on appeal from final judgment: *Jones v. Chicago & N. W. R. Co.*, 36–68.

An appeal from final judgment brings up for review all intermediate rulings to which exceptions are taken. So *held* as to a ruling setting aside a default: *Palmer v. Rogers*, 70–381.

There are orders from which appeals may be taken before final judgment and on such appeal all the rulings of the court made at the time or before the order appealed from was made may be reviewed, including a ruling on motion for change of venue: *Kay v. Pruden*, 69 N. W., 1137.

Dismissal of habeas corpus proceedings: Under a statute authorizing an appeal from a county court to the district court, upon the merits, of any matter affecting the rights and interests of individuals, *held*, that an order of the county court overruling a motion to dismiss proceedings under a writ of *habeas corpus* was not a final judgment from which an appeal would lie: *Smith v. Bigelow*, 19–459.

SEC. **4102. From order made by judge.** If any of the above orders or judgments are made or rendered by a judge, the same are reviewable the same as if made by a court. [C.'73, § 3165; R., § 2633.]

SEC. **4103. Other intermediate appeals.** Such court, in its discretion, may also prescribe rules for allowing appeals on such other intermediate orders or decisions as are expedient, and for permitting such appeals to be taken and tried during the pendency of the action in the court below; but such an intermediate appeal shall not retard proceedings in the court from which the appeal is taken. [C.'73, § 3166; R., § 2634; C.'51, § 1557.]

SEC. **4104. Mistake of clerk below.** A mistake of the clerk shall not be ground for an appeal until the same has been presented to and acted upon by the court below. [C.'73, § 3167; R., § 3498.]

Section applied: *Daniels v. Claflin*, 15-152: *Rising v. Teabout*, 73–419.

SEC. **4105. Motion to correct error.** A judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been there made and overruled. [C.'73, § 3168; R., § 3545.]

When necessary: Any objection to erroneous action of the court below, which might have been corrected in that court if attention had been called thereto, will not be considered if first raised in the supreme court: *Garvin v. Cannon*, 53–716.

So *held* as to an objection which might have been raised in the lower court by motion in arrest of judgment: *Smith v. Warren County*, 49–336.

So *held*, also, in regard to the objection that the judgment was excessive, no motion to correct such error having been made in the court below: *Black v. Boyd*, 52–719; *Dickey v. Harmon*, 26–501; *Finch v. Billings*, 22–228; *Keller v. Jackson*, 58–629.

So *held*, also, where the objection that the judgment below was improperly entered in vacation was not made in that court: *Carmichael v. Vandebur*, 50–651.

Questions of fact must be presented for the consideration of the trial court before they can be reviewed on appeal: *Ottumwa Savings Bank v. Ottumwa*, 63 N. W., 672.

Any defense not pleaded in the lower court will be disregarded on appeal: *Wilson v. Riddick*, 69 N. W., 1039.

No new issues can be presented on an appeal: *Bull v. Keenan*, 69 N. W., 433.

Defects in the petition not in any manner called to the attention of the trial court must be deemed to have been waived: *Shelley v. Smith*, 66 N. W., 172.

The action of the district court in permitting an amendment to a pleading after the evidence is in, will not be disturbed where no claim is made that the opposite party was surprised, no continuance was asked, and the record fails to show that the court exceeded its discretion: *Weis v. Morris*, 71 N. W., 208.

A party who has failed to ask for the correction of a judgment in the court below, in a matter as to which it might have been there corrected, cannot complain thereof on appeal: *Richman v. Board of Supervisors*, 70–627.

If plaintiff has failed to show himself entitled to recovery defendant should move the court to direct a verdict in his favor or ask an instruction to that effect. He cannot have a reversal without motion in the lower court for a verdict upon the ground that the evidence does not sustain the allegations of the petition: *Kirk v. Litterst*, 71–71.

An error or mistake as to the amount of the judgment cannot be corrected in the supreme court unless a motion to correct the same has first been made in the lower court: *Rising v. Teabout*, 73–419. But see *Kenyon v. Tramel*, 71–693.

Where no exceptions by appellant to any ruling or finding of the court below appear, no objections to the judgment can be raised on appeal: *British Amer. Ins. Co. v. Neil*, 76–645.

A judgment will not be reversed on account of mere defect in the original notice where no motion was made in the court below to correct the irregularity: *Gray v. Wolf*, 77–630.

Failure of the lower court to state separate findings of fact and conclusions of law cannot first be complained of on appeal. Such error could have been corrected on motion in the lower court: *Ash v. Scott*, 76–27.

The objection that the instructions read to the jury are not marked as given by the court cannot be raised for the first time on appeal: *Fish v. Chicago, R. I. & P. R. Co.*, 81–280.

The fact that the jury in estimating the amount of recovery makes too large an allowance for certain items for which recovery is allowed cannot be raised on appeal where the attention of the lower court has not in some way been called to the fact: *Reynolds v. Iowa & Neb. Ins. Co.*, 80–563.

An error consisting in rendering judgment for a larger amount than prayed for in the petition, will not be considered on appeal if the attention of the trial court has not been called thereto: *Yancey v. Tatlock*, 93–386.

Where by reason of overlooking a remitter, the court rendered judgment for an excessive amount, *held*, that such error would not be considered on appeal in the absence of any effort to have it corrected in the lower court: *Ketcham v. Larkin*, 88–215.

Errors in taxation of costs cannot be urged in the supreme court unless motion for retaxation has been made in the court below: *Hemphill v. Salladay*, 1 G. Gr., 301; *Yeager v. Circle*, 1 G. Gr., 438.

Where the costs were taxed to the defendant and it was claimed that there should have been an apportionment, but no motion was made to that effect in the lower court, *held*, that the order of the court would not be disturbed upon appeal: *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

A party cannot complain in the supreme court in regard to the taxation of costs, unless he has applied to the court below for a retaxation and appealed from the ruling on his application: *Allen v. Seaward*, 86–718.

A taxation of costs will not be made in the supreme court where no motion for retaxation of costs has been made in the court below: *Snell v. Dubuque & S. C. R. Co.*, 88–442.

Motion for retrial by defendant served by publication: As the statute gives to a defendant served by publication only a right to retrial upon motion within a specified time, he cannot, on appeal, object to the sufficiency of the service, unless such motion for retrial has first been made and overruled in the lower court: *Berryhill v. Jacobs*, 19–346: *S. C.*, 20–246.

Reason of the provision: The statutory provision above referred to was designed to prevent the expense and delay of appeal where the error relied upon is a mere irregularity, mistake or omission on the part of some ministerial officer, or the court itself, which could readily be corrected in the

trial court on motion: *Pigman v. Denney*, 12-396.

Other cases, applying the statutory provision, are as follows: *Robison v. Saunders*, 14-539; *Barnes v. Hayick*, 15-602; *Carleton v. Byington*, 17-579; *Boyd v. Rutledge*, 25-271; *Coakley v. McCarty*, 34-105; *Grimes v. Hamilton County*, 37-290.

Mistakes of clerk cannot be urged as objections to the judgment on appeal unless a motion to correct such error has first been made in the lower court: *Daniels v. Claflin*, 15-152.

Applicable in appeals from justices' courts: The same provision is applicable in case of appeal from the judgment of a justice of the peace: *Smith v. Parker*, 28-359; *Leonard v. Hallem*, 17-564.

But not in case of writ of error from the judgment of a justice of the peace which is entered without jurisdiction; *Holmes v. Hull*, 48-177.

What deemed sufficient calling attention of court to error: Where a motion for change of venue is resisted on the ground that the court to which it is proposed to send the case has no jurisdiction of such cases, and notwithstanding such objection the change is granted to such court, the error may be reviewed on appeal, although on motion to change the order and send the case to a court which would have had jurisdiction is made by the objecting party: *Sayles v. Deluhrey*, 64-109.

Statute not applicable: Such provision applies only to such errors as without motion would not be called to the attention of the lower court: *Brown v. Rose*, 55-734.

Motion to set aside default: A judgment by default will not be reviewed in the supreme court until a motion to set it aside has been made and overruled in the court below: *Hunt v. Stevens*, 25-261; *Savings Bank v. Horn*, 41-55.

Thus objection to judgment by default, that the notice was not served in time to render defendant in default, cannot be raised on appeal if no motion to set aside default was made below: *Pigman v. Denney*, 12-396; *McKinley v. Betchtel*, 12-561.

So *held*, also, as to objections to judgment by default, on the ground of defective manner of service, or defect in the notice itself: *Van Vark v. Van Dam*, 14-232; *Bethel v. Leay*, 14-592; *Downing v. Harmon*, 13-535; *Decatur County v. Clements*, 18-536; *Pratt v. Western Stage Co.*, 27-363.

Motion for new trial: The necessity of a motion being made below to correct errors, etc., is not removed by the following section, making motion for new trial unnecessary to secure the review of a cause in the supreme court: *Webster v. Cedar Rapids & St. P. R. Co.*, 27-315.

While the supreme court will not consider errors that have not been called to the attention of the trial court, it will consider all questions presented to the lower court upon which there was a ruling and exceptions taken when the ruling is assigned as error and presented in argument, although no motion for new trial was made: *Shipley v. Reasoner*, 80-548.

So *held* with reference to the action of the lower court in overruling a motion to direct a verdict for defendant and also overruling a motion for judgment for defendant on special findings, the action of the court in these respects being properly excepted to and the error therein assigned and argued: *Ibid.*

And see notes to § 4139.

SEC. **4106. Motion for new trial.** The supreme court on appeal may review and reverse any judgment or order of the superior or district court, although no motion for a new trial was made in such court. [C.'73, § 3169.]

The preceding section applies only to such errors as, without motion, would not be called to the attention of the lower court. This section renders a motion for new trial in the lower court unnecessary in order to authorize the appellate court to review any judgment or order of the court below: *Brown v. Rose*, 55-734; *Drefahl v. Tuttle*, 42-177.

Before the enactment of this statutory provision, *held*, that a judgment would not be reversed, on the ground that the verdict was contrary to the evidence, when a motion for a new trial upon that ground had not been made in the court below: *Brayton v. Boone*, 19-506.

But the question was unsettled whether a motion for a new trial was necessary to bring up for review errors of law occurring at the trial: *Presnall v. Herbert*, 34-539; *Rindskoff v. Lyman*, 16-260.

A motion for new trial was, however, held not necessary in order to enable the supreme court, on appeal, to review a decision upon the admissibility of evidence properly excepted to when such decision virtually disposes of the whole case: *McCoy v. Julien*, 15-371.

This provision affects the remedy, and hence is not unconstitutional as applying to actions arising before its passage: *Johnson v. Semple*, 31-49.

Nor is it in conflict with Const., art. V, § 4, providing that in actions at law the supreme court shall be a court for the correction of errors. Previous to the enactment of this provision, that court would review, as matter of law, the ruling of the lower court upon a motion for a new trial on the ground that the verdict was contrary to the evidence, and this act simply authorizes the court to treat the case as if such motion for a new trial was made and entered, and may be regarded as a standing motion in all cases: *Coffin v. City Council*, 26-515.

Where exceptions are duly preserved in the course of the trial they may be brought up on appeal, although the motion for new trial is stricken from the files because filed too late: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

The necessity of a motion being made below to correct errors, etc., is not removed by the provision making motion for new trial unnecessary to secure the review of a

cause in the supreme court: *Webster v. Cedar Rapids & St. P. R. Co.*, 27–315.

Under this provision, however, errors of law committed by the judge might be reviewed on appeal without any motion for new trial: *Delvee v. Boardman*, 20–446; *Presnall v. Herbert*, 34–539.

Nor does such provision dispense with the necessity of taking exceptions to rulings objected to: *Root v. Illinois Cent. R. Co.*, 29–102; *Eason v. Gester*, 31–475.

Where defendant moved in arrest of judgment, and thereupon, in order to cure the defect insisted upon, plaintiff amended his petition and introduced certain evidence to which a demurrer was sustained, the judgment arrested, and defendant recovered costs, *held*, that no motion for a new trial was necessary in order to present the exceptions, duly taken, on appeal: *Coates v. Galena & C. U. R. Co.*, 18–277.

All errors at law arising upon the trial, and to which proper and timely exceptions are taken, may be reviewed on appeal by the supreme court without having been embodied in a motion for new trial: *Hunt v. Iowa Cent. R. Co.*, 86–15.

The pendency of the motion for new trial at the time an appeal is taken will not in any manner invalidate the appeal or prevent the supreme court from considering the errors assigned: *Ibid.*

Even though motion for a new trial is not filed within such time as that it may be considered, yet exceptions duly taken and errors assigned independent of such motion may be reviewed: *Kaufman v. Farley Mfg. Co.*, 78–679.

SEC. **4107. Finding of facts — evidence certified.** Where a cause is tried by the court, it shall not be necessary, in order to secure a review of the same in the supreme court, that there should have been any finding of facts or conclusions of law stated in the record, but the supreme court shall hear and determine the same when it appears from a certificate of the judge, agreement of parties or their attorneys, or, if the record shows the evidence to consist wholly of written testimony, then from the certificate of the shorthand reporter or clerk that the record contains all the evidence introduced by the parties in the trial in the court below. [C. '73, § 3170.]

How reviewed: Before the enactment of this section it was held that, in order to enable the supreme court, on appeal, to review the correctness of the findings of the court below upon the facts, exceptions must have been taken to such findings and a new trial asked for: *Kelso v. Ely*, 11–501; *Gillett v. Foreman*, 11–512.

Before the enactment of this section there was, in an action at law tried by the court without a jury, no way of securing the review on appeal of the conclusions of the court upon the evidence, unless there was a special finding of facts by the court, except by a motion for new trial based upon the ground that the judgment was against the evidence, and an exception to the ruling on such motion: *Warner v. Pace*, 10–391; *Corner v. Gaston*, 10–512; *Roberts v. Hoyt*, 12–345; *Allman v. Gilbert*, 14–538; *Robison v. Saunders*, 14–539; *Reynolds' Heirs v. Miller*, 14–97.

The certificate referred to cannot be made by the judge in vacation, unless by agreement of parties. The term "judge" means the same as if the word "court" had been used: *Luse v. Des Moines*, 22–590.

In the absence of the certificate, or an agreement of the parties, the supreme court cannot, on appeal, review the conclusion of the court upon the evidence: *Wormley v. District T'p*, 45–666.

It is only when the evidence is all before the supreme court that it can review a finding of the court below as to a question of fact: *Van Riper v. Baker*, 44–450.

As to certificate of clerk, shorthand notes, etc., see notes to § 4123.

Assignment of errors: This section does not dispense with assignment of errors: *Sisters of Visitation v. Glass*, 45–154.

Trial de novo on appeal: The section is applicable only in actions at law, and therefore does not interfere with the provisions for securing a trial *de novo* in equity cases: *Ibid.; Vinsant v. Vinsant*, 47–594.

Finding of facts, and effect thereof, see § 3654 and notes.

As the finding of the court upon a question of fact in an action at law has the force of a verdict of a jury, the admission of improper evidence in such a case will be a ground for reversal, as fully and to the same extent that it would be in an action tried by a jury, where it does not appear but that such improper evidence was considered by the court in its final determination of the case: *Jaffray v. Thompson*, 65–323.

SEC. **4108. Title of cause.** The cause on appeal shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee. [C. '73, § 3171; R., § 3508.]

A case should on appeal be entitled as in the lower court: *Hollenbeck v. Stearns*, 73–570.

Where a case is docketed in the supreme court under another title than that in which it is tried in the lower court the appeal will be dismissed: *Lewis v. Minthorn*, 73–80.

SEC. **4109. Process.** The court may issue all writs and processes necessary for the exercise and enforcement of its appellate jurisdiction. [C. '73, § 3172; R., § 2635; C. '51, § 1558.]

SEC. **4110. Time for appealing—amount in controversy—certificate.** Appeals from the superior and district courts may be taken to the supreme court at any time within six months from the rendition of the judgment or order appealed from, and not afterward. No appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall, during the term in which judgment is entered, certify that the cause is one in which the appeal should be allowed, and, upon such certificate being filed, the same shall be appealable regardless of the amount in controversy; but this limitation shall not affect the right of appeal in any action in which an interest in real estate is involved, nor shall the right of appeal be affected by the remission of any part of the verdict or judgment returned or rendered. [C. '73, § 3173; R., § 3507; C. '51, § 1973.]

I. TIME FOR TAKING.

In computing the six months within which an appeal may be taken, the day on which judgment was rendered will be excluded and the corresponding day at the end of the time included: *Carleton v. Byington*, 16–588.

Therefore, *held*, that an appeal taken September 30, from a judgment rendered March 30, was in time: *Parkhill v. Brighton*, 61–103.

Where the decision was made June 3, and the appeal was taken December 4, *held*, that the appeal was not in time and must be dismissed: *Ritchey v. Fisher*, 85–560.

Where the record did not show the year in which the judgment of the court was entered nor how long after the entry of the judgment the appeal was taken, *held*, that there was nothing to show whether the appeal was taken within the time prescribed by law or not, and in the absence of such showing it would be dismissed: *Gleason v. Collett*, 77–448.

Jurisdiction: The time of taking the appeal is a jurisdictional fact and must affirmatively appear, otherwise the appeal will be dismissed: *Wambach v. Grand Lodge*, 88–313.

Record must show: If it does not appear in the record when the decree was rendered it cannot be assumed that the notice of appeal was served within the time required and there will be a failure of the appeal for want of jurisdiction. The court cannot infer in the absence of any showing that the notice was served within six months after the rendition of the decree: *Taylor v. Taylor*, 63 N. W., 180.

The service of the notice within the time specified is sufficient. It is not necessary that it be filed with the clerk within that time: *Baldwin v. Tuttle*, 23–66.

While it is required that the appeal must be taken within six months from the rendition of the judgment or order appealed from, it does not follow that the appeal must be perfected within that time. So *held* in regard to the filing of transcript of shorthand reporter's notes, which need not be within the time allowed for taking the appeal, provided the evidence is properly embodied by reference in the bill of exceptions filed within the time allowed therefor: *Hammond v. Wolf*, 78–227.

The fact that notice of appeal could not have been served upon the opposite party or his attorney within the time required by statute will not excuse failure to comply with the statutory requirements: *McNider v. Sirrine*, 84–58.

Securing the clerk's fees for a transcript is not necessarily a part of the perfecting of the appeal which must be completed within six months: *Fairburn v. Goldsmith*, 56–347.

An appeal from final judgment taken within the proper time will raise objections to previous proceedings in the case although more than the time prescribed for taking the appeal has elapsed since such previous proceedings: *Holladay v. Johnson*, 12–563.

Interlocutory orders and judgments, although made or rendered more than six months before the taking of appeal, may be reviewed on an appeal from the final judgment taken within the proper time: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N. W., 761.

The time for taking an appeal should be computed from the entry of a decree and not from the making of a subsequent order correcting a merely formal defect therein: *Calef v. Cole*, 93–679.

Where judgment relates back: Where judgment is entered in vacation as of the preceding term, by agreement, the period for taking appeal will commence to run from the time the decision is, in fact, made, and not from the time to which by agreement it relates back: *Carter v. Sherman*, 63–689.

Where the judgment appealed from bore date more than the prescribed length of time before the taking of the appeal, but it appeared that the cause was held under advisement and decided in vacation and within the prescribed time, without any agreement that judgment should be entered as of the last day of the preceding term, *held*, that the appeal was not barred: *Kendall v. Lucas County*, 26–395.

Where a decree, in an action seeking to have set aside a deed of real property, and for a reconveyance thereof, and also for an accounting of rents and profits and improvements, was rendered for reconveyance upon payment by plaintiff of the sum paid, with interest, and also the value of the improvements, less rents and profits, etc., and the case was sent to a referee to take an account, *held*, that an appeal from the decree as to the reconveyance, etc., must be taken within six months from the time such decree was entered, and that the questions involved therein could not be raised on an appeal

taken more than six months after that time, but within the six months after a final decree, based upon the referee's report, as to the accounting. Such decree is to be deemed final, although something further is required to be done afterwards: *McMurray v. Day*, 70–671.

Where a decree was rendered in a cause, adjudicating all the issues between the original parties, but the final disposition of the cause was delayed by reason of an intervention, *held*, that the time for taking an appeal from the decision of the issues between the original parties commenced to run from the time of such first decree, and its correctness could not be called into question in any appeal taken after six months from such decree: *Carter v. Davidson*, 73–45.

Ruling on motion for new trial: An appeal taken within six months from the decision of the court on a petition for a new trial, but more than six months from the rendition of the judgment upon the verdict, does not bring up for review the action of the court in rendering such judgment and its proceedings prior thereto, the appeal therefrom being barred: *Cohol v. Allen*, 37–449; *Carpenter v. Brown*, 50–451.

Where judgment is entered and afterwards a motion for new trial is made and overruled, an appeal from the judgment must be taken within six months after the entry thereof, and an appeal from the overruling of the motion for a new trial will not raise any question not involved in the ruling upon such motion: *Patterson v. Jack*, 59–632.

An appeal in an equity case not taken until more than six months after the rendition of judgment, although within six months from the time of the overruling of a motion for a new trial, does not bring up for consideration in the supreme court any of the proceedings of the court prior to the filing of the motion, and therefore does not enable the court to try the case *de novo*: *Bosch v. Bosch*, 66–701.

Where petition has been filed under the provision of § 4091 for new trial, an appeal may be taken from an order of the court striking such petition from the files, although the appeal is taken more than the specified time after the rendition of the judgment which it is sought to set aside in the petition for new trial: *Wishard v. McNeil*, 78–40.

II. AMOUNT IN CONTROVERSY.

Must exceed one hundred dollars: If the amount is just one hundred dollars there can be no appeal without a certificate: *Thurston v. Lamb*, 90–363.

Determined by the pleadings: To justify an appeal it must appear from the pleadings that it was possible for the court, consistently therewith, to render judgment against one of the parties to the action for more than one hundred dollars: *Madison v. Spitznogle*, 58–369.

The amount in controversy is to be determined from the pleadings and not the judgment: *Fullerton v. Cedar Rapids & M. C. R. Co.*, 70 N.W., 106.

When the amount in controversy appears by the pleadings to exceed one hundred dollars an appeal may be taken, and it is immaterial that, upon the trial, the evidence does not support the claim to that amount: *Ormsby v. Nolan*, 69–130.

Where a petition alleged that the value of the property in controversy was $100, and that plaintiff had sustained damages in the sum of $25, and the prayer asked for judgment for $125 and costs, *held*, that the amount in controversy was more than $100, and sufficient, upon appeal, to give the court jurisdiction without the certificate of the trial judge: *Ruiter v. Plate*, 77–17.

Where there cannot be a judgment under the pleadings for either party for more than $100, the case is not appealable without the certificate of the judge: *Buckland v. Shephard*, 77–329.

Therefore, where plaintiff's claim of $68.61 was admitted except $4.62, and defendant's claim of $102.06 was denied, *held*, that the amount in controversy was less than $100 and could not be appealed without certificate: *Ibid.*

Where defendant interposes as a counter-claim a cause of action which was barred at the time it was interposed, such counter-claim being available to him only to the extent of the extinguishment of plaintiff's cause of action, the amount in controversy is not the entire amount of the counter-claim, but the amount of plaintiff's claim: *Schultz v. Holbrook*, 86–569.

In a controversy where the amount sued for exceeded $100 but the amount in controversy under the petition for intervention is less than $100, the intervenor cannot appeal: *Fillmore v. Hintz*, 90–758.

Where under the pleadings a judgment could not have been rendered in favor of a plaintiff for $100 he cannot appeal from a judgment denying him relief, even though the amount involved with reference to the other parties is sufficient to warrant an appeal: *Central City v. Treat*, 70 N. W., 110.

The allegations and not the prayer of the pleading govern in determining the amount in controversy: *Cooper v. Dillon*, 56–367; *Nash v. Beckman*, 86–249; *Hiatt v. Nelson*, 69 N.W., 553.

The amount in controversy is to be determined from the body or charging part of the petition, and if, consistently with the pleadings, a judgment might be rendered for more than one hundred dollars, the case is appealable without certificate: *Thompson v. Jackson*, 93–376.

The amounts of the original claim and a counter-claim cannot be added together in determining the amount in controversy under this section: *Madison v. Spitznogle*, 58–369; *Fox v. Duncan*, 60–321.

Part admitted: Where defendant concedes a part of the claim, the amount in controversy is the part not admitted: *Thompson v. French*, 57–559.

Thus, if by tender defendant reduces the amount of plaintiff's claim which is contested to not exceeding one hundred dollars, there can be no appeal without a certificate: *Marlow v. Marlow*, 56–299.

If plaintiff's claim is admitted and a counter-claim interposed, the counter-claim

determines the amount in controversy: *Alsip v. Hard*, 38–697.

Where defendant claims a credit of more than one hundred dollars on a claim for less than that amount, but does not interpose a counter-claim, the amount in controversy does not exceed the plaintiff's claim: *Kurtz v. Hoffman*, 65–260.

Part of claim abandoned: Where the plaintiff claims more than one hundred dollars, but no evidence is introduced in support of a part of it, so that such part may be deemed abandoned, such part will not be considered in determining the amount in controversy: *Ibid.*

If by reason of dismissal of a part of plaintiff's cause of action the amount in controversy is reduced below one hundred dollars, the right of appeal does not exist: *Cooper v. Wilson*, 71–204.

So by amending after verdict plaintiff may reduce the amount of claim so as to prevent the right of appeal: *Wilson v. Hawkeye Ins. Co.*, 74–212.

Where a verdict is rendered for plaintiff for more than one hundred dollars, but the plaintiff takes judgment for less than that amount, the amount in controversy is thus reduced so that defendant cannot prosecute an appeal: *Nevada v. Klum*, 76–428.

Plaintiff may reduce the amount in controversy below the amount required in order to sustain an appeal, by waiving his claim to a part of the amount sought to be recovered: *Farley v. Geisheker*, 78–453.

A tender accepted pending the suit, and admitted in the answer, reducing the amount in recovery to less than $100, prevents appeal from the judgment without certificate of the judge: *Hassett v. Germania Building Association*, 78–386.

A party may by amendment after verdict reduce the amount claimed to less than $100, and thereby prevent appeal except on certificate of the judge: *Gieger v. Chicago & N. W. R. Co.*, 80–492.

The question in controversy is to be determined by the pleadings, and cannot, by an amendment made after the verdict, and after it is too late to secure a certificate from the trial judge, be so reduced as to preclude the taking of an appeal: *Sharp v. Nelson*, 93–466.

Consolidation: In a controversy where three cases, involving causes of action in favor of the same plaintiff against three different defendants, but similar in nature were by consent consolidated, and tried as one case, and the total amount in controversy and thus consolidated exceeded one hundred dollars, *held*, that there might be an appeal in the whole case as consolidated, although the three cases separately would not have involved one hundred dollars each: *Tuthill Spring Co. v. Smith*, 90–331.

Consolidation of actions on appeal from a justice, whereby the amount in controversy is increased to over one hundred dollars, will entitle to an appeal: *Brock v. Barr*, 70–390; *Edwards v. Cosgro*, 71–296.

Interest included: Where an action to set aside a previous judgment for one hundred dollars and costs was brought a year after the rendition of such judgment, *held*, that the interest accrued on the judgment would be included in determining the amount in controversy: *Dryden v. Wyllis*, 51–534.

Where the claim in controversy is for one hundred dollars and interest from commencement of suit, it is sufficient to entitle to an appeal: *Koltze v. Messenbrink*, 74–242; *Griffin v. Harriman*, 74–436.

Where writ of error was brought in the circuit court to review the judgment of a justice of the peace for one hundred dollars, *held*, that interest accrued on the judgment before suing out the writ of error would be included in determining the amount in controversy in the circuit court, and that the amount involved exceeded one hundred dollars: *Holmes v. Hull*, 48–177.

But in case of an appeal from a judgment of a justice of the peace for one hundred dollars, *held*, that the amount in controversy in the circuit court was to be determined by the pleadings in the justice's court, and that interest on the justice's judgment could not be included: *Hays v. Chicago, B. & Q. R. Co.*, 64–593.

Costs taxed in the case and included in the judgment cannot be considered in determining the amount in controversy. That depends upon the pleadings: *Hakes v. Dott*, 54–17; *Bradenberger v. Rigler*, 68–300.

In an action to subject real estate to the payment of a judgment for fine and costs for illegal sale of liquors, the costs are to be included in determining the amount in controversy: *State v. McCulloch*, 77–450.

Costs in justice's court: In an appeal from the action of a court on appeal from a judgment before a justice of the peace, the costs in the justice's court cannot be included in determining the amount in controversy: *Ardery v. Chicago, B. & Q. R. Co.*, 65–723.

In an action of replevin wherein defendant does not claim ownership of the property but only an interest therein, less than one hundred dollars in value, such interest and not the entire value of the property determines the amount in controversy: *Mohme v. Livingston*, 54–458; *Davis v. Upright*, 54–752.

Appeal dismissed: Where the amount in controversy does not exceed one hundred dollars, and there is no certificate of the judge, the appeal will be dismissed: *Harrington v. Pierce*, 38–260.

Amount must appear to defeat jurisdiction: As the supreme court has appellate jurisdiction in every case not falling within the exception of the statutory provision as to amount in controversy, the fact as to the amount, to bring a case within the exception and defeat the jurisdiction of the supreme court on appeal, must affirmatively appear: *Babcock v. Board of Equalization*, 65–110; *Henkle v. Keota*, 68–334.

This provision as to the amount in controversy applies only to cases where the amount in controversy as shown by the pleadings does not exceed one hundred dollars. It does not have reference to cases where the pleadings show no amount in controversy: *District T'p v. Independent District*, 72–687.

To defeat the jurisdiction of the supreme

court on account of the amount in controversy not being sufficient, it must affirmatively appear that the case falls within the limitations of this section, and therefore an appeal will lie in proceedings to abate a liquor nuisance although nothing appears as to the amount involved: *Farley v. Geisheker*, 78–453; *Geyer v. Douglass*, 85–93.

In a controversy where the amount in controversy does not appear the supreme court has jurisdiction to entertain the appeal: *Democrat Publishing Co. v. Lewis*, 90–304.

III. Certificate as to Question Involved.

[The following decisions were under prior provisions as to certificate, differing from those of this section.]

Must state the question: It is not sufficient that the certificate of the judge states that the case "involves the determination of a question of law," etc., but it must state the question of law upon which the decision of the supreme court is desired. (So *held* in pursuance of a rule of court requiring the question to be set out, overruling in this respect *Fell v. Burlington, C. R. & M. R. Co.*, 43–177, decided before the adoption of such rule.) If the question is not thus set out where a certificate is necessary, the appeal will be dismissed: *King v. Derby*, 51–11; *Wetz v. Austin*, 51–342; *Minnich v. Chicago, R. I. & P. R. Co.*, 51–363; *Throckmorton v. Horton*, 52–737; *Dawley v. Houck*, 53–733.

And such rule of the court is not void as limiting the jurisdiction of the court further than authorized by statute: *Wilson v. Iowa County*, 52–339.

The question must be one of law, as distinguished from one of fact, and the certificate must specifically point out the questions of law, which must not be mingled with questions of fact: *Gillooby v. Chicago, M. & St. P. R. Co.*, 61–53; *Chilton v. Chicago, R. I. & P. R. Co.*, 72–689.

The certificate must present a question of law and not one of fact: *Ross v. Hardin County*, 62 N. W., 844.

The certificate must be complete in itself. The question of fact necessary to be considered in connection with the question of law involved must be decided by the district court and not left for the determination of the supreme court: *Tucker v. Anderson*, 66 N. W., 754.

The certificate should not submit questions of fact: *Riddle v. Fletcher*, 72–454.

It is not sufficient that the certificate states that "a question" is involved; it must state that the case involves "a question of law:" *Kierulff v. Adams*, 40–31.

Questions presented in a particular case *held* not to be questions of law: *Landers v. Boyd*, 59–758.

Where the court is required to determine the law on a given state of ultimate facts, as certified, all of the necessary facts should be found by the trial court: *Vreeland v. Ellsworth*, 71–347.

Each question certified should present a question of law distinct from other questions of law and fact, and where the certificate of the trial judge contained questions involving the consideration of evidence and its weight and effect, *held*, that such questions were questions of fact, of which the court had no jurisdiction: *Bensley v. Chicago & N. W. R. Co.*, 79–266.

Mere abstract questions: The statute does not contemplate that mere abstract questions of law shall be certified, but only such as are decisive of the case: *Eckert v. Pickel*, 59–545; *Breneman v. Burlington, C. R. & N. R. Co.*, 92–755.

Certificate must state the questions: The certificate must point out the questions upon which it is desirable to have the opinion of the court in such a way as to be intelligible in and of themselves, without requiring the court to examine the whole case and determine what the questions are: *Hawkeye Ins. Co. v. Lewis*, 63–514.

The certificate must be sufficiently explicit and definite to explain itself without reference to the record or any part of it: *Meeker v. Chicago, M. & St. P. R. Co.*, 64–641; *White v. Beatty*, 64–331; *Bower v. Kavanaugh*, 62–757.

Where the question requires an examination of the facts presented in the record in order to determine what question is to be decided by the supreme court, it will not be considered: *Stern v. Sample*, 65 N. W., 304.

The questions certified should embrace statements of the specific facts which are to be taken into consideration by the court; it is not sufficient to refer generally to the facts as shown by the evidence: *Brown v. Petrie*, 56–209.

A certificate of the judge which fails to indicate the specific question or questions to be determined, but presents the whole case and every question involved therein, without showing what they are, or what one or more of them it is deemed desirable to present for determination, is not sufficient: *Dunn v. Zoller*, 61–227.

The certificate must contain the abstract question of law which it is desired the supreme court shall determine. It will not make an examination of the record in order to determine what ruling it is desired to review: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62–494; *Long v. Chicago, M. & St. P. R. Co.*, 64–541.

A question of law should be plainly set out in the certificate: *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69–320.

The certificate should point out the question to be determined and recite the facts upon which the question of law arises, so that it may be determined without resorting to the evidence in the case. It is not sufficient to refer the court to the record and ask it to determine whether there was error in particular matters: *Ibid.*

The certificate must set out and define the question which it is thought desirable to have determined, and the question set out should be so explicit as to render an examination of the record unnecessary: *Bennett v. Parker*, 67–451.

It is not proper to certify a general question which cannot be fully determined without a search of the entire record and a determination of two or more questions: *Wheaton v. Foster*, 58–661.

Where the certificate stated that there

was a question of law involved in certain instructions which involved more than one question, and did not point out which one it was desired to have determined, *held*, that it was not sufficient: *Gregg v. White*, 55–744.

Several questions must be so stated that the supreme court can readily ascertain the point to be determined, and that it is a question of law. Questions of law and fact cannot be mingled together under the guise of a question of law: *Centerville v. Drake*, 58–564.

The certificate in particular cases *held* sufficient: *Nichols v. Wood*, 66–225; *Chandler v. Loomis*, 87–151.

The supreme court will not look at the testimony to satisfy itself as to the question certified. Without the facts being specifically found, no question of law arises: *Des Moines Insurance Co. v. Briley*, 79–485.

It is not necessary to set out the testimony or the record of the proceedings below further than to show that the question certified is involved in the case: *Ibid.*

The certificate must point out the question upon which the opinion of the supreme court is desired so explicitly as to render the examination of the record unnecessary, and the court will not look to the record to ascertain what question it is called upon to determine; but when the question is explicitly certified and it is claimed that it did not arise in the case the court will look to the record to determine that question: *Martin Steam Feed, etc., Co. v. Olive*, 82–122.

Matters not appearing in the certificate cannot be considered. The court will look to the record to see if the questions certified are involved in the case, but will not decide questions not certified: *Jennings v. Bacon*, 84–401.

It is not sufficient to state in the certificate the facts and conclusions of law upon which a ruling of the court was made, but it must present some question as to such facts and conclusions for the determination of the supreme court: *Campbell v. Lewis*, 83–583.

Examination of the record: The court will sometimes look at the record for the purpose of determining whether the question certified properly arises in the case, and will refuse to consider the question if it appears that it has not been properly raised: *Swails v. Cissna*, 61–693; *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69–320.

The court will not, upon a certificate, consider an instruction differing from that which appears by the record to have been given in the case: *Cunningham v. Chicago, B. & Q. R. Co.*, 67–514.

The court cannot answer questions certified but which are not presented in the record: *Ibid.; Miller v. Buena Vista County*, 68–711.

And the court will not consider a certificate sufficiently specific which requires examination of the record to determine what the question certified is: *Votaw v. Corwin*, 62–39.

Certificates held defective: A certificate of a question as to whether judgment could be rendered for a party "upon the agreed statement of facts filed in the case," *held* not sufficient: *Dawley v. Houck*, 53–733.

Held, in a particular case, that the certificate did not sufficiently point out the question of law upon which the opinion of the supreme court was desired: *Fitch v. Flynn*, 58–159.

In cases which come before the supreme court only upon a question certified by the judge of the lower court, the supreme court has jurisdiction only to determine such questions of law as may be certified. If the question certified is one of fact, it cannot be determined: *Hanna v. Collins*, 69–51.

Must set out question: A certificate which does not set out the question of law upon which it is desirable to have the opinion of the supreme court is not sufficient: *Bradenberger v. Rigler*, 68–300.

A certificate is not sufficient which asks whether certain action was erroneous "in view of all the evidence in the case:" *Gillooby v. Chicago, M. & St. P. R. Co.*, 61–53.

Where the appellant's abstract failed to show that the judge's certificate stated that it was desirable to have the opinion of the supreme court on the question certified, *held*, that the supreme court did not acquire any jurisdiction by the appeal: *Milliken v. Daugherty*, 59–294.

Sufficiency of evidence: While the sufficiency of the evidence to support a verdict may, in a certain sense, be said to be a question of law, yet it is not such a question as can be certified: *Hudson v. Chicago & N. W. R. Co.*, 59–581.

Questions involved: The certificate must state that the questions certified are involved in the case: *Van Sickle v. Downs*, 72–624; *Ball v. Van Riper*, 74–146; *Beach v. Donovan*, 74–543; *Estey v. Yetmeir*, 65 N. W., 327; *Smith v. Smith*, 68 N. W., 721; *Connor v. Bennke*, 69 N. W., 414; *Hiatt v. Nelson*, 69 N. W., 553.

Where a certificate fails to state that a determination of the questions presented in it was involved or essential in the case, the court acquires no jurisdiction on appeal: *Beeler v. Garrett*, 76–231.

The certificate must show that the question was involved in the case, and the supreme court will not go beyond the certificate and examine the record to determine that fact: *Ellis v. Keokuk*, 62 N. W., 660.

Where questions certified call for answers in the nature of conclusions based upon the determination of several distinct questions of law, and cannot be answered without considering these questions, and answering each severally, they are not such as are contemplated by the statute. The court cannot be called upon to determine all the law questions in the case by a general question which brings them all up for consideration. Questions of doubt, and those only, should be specifically and separately stated: *Hawkeye Ins. Co. v. Erlandson*, 84–193.

Where a certificate is not one such as is required by statute, the supreme court will dismiss the appeal, although the objection is not made by the parties. The question is jurisdictional: *Ibid.*

The certificate must on its face show the jurisdictional facts. It is not sufficient to state that the cause involves questions on which it is desirable to have the opinion of

the supreme court, but it must also state that the questions certified are involved in the case: *Lamb v. Ross*, 84–578.

Questions not involved in the case will not be considered, though certified, nor will questions involved be considered when not certified: *Pickerell v. Hiatt*, 81–537.

Where the certificate in a case involving less than one hundred dollars recited the ultimate facts established by the evidence, and upon which the questions certified depended, *held*, that the certificate was sufficient to enable the court to consider the case: *Winelander v. Jones*, 77–401.

Where the answer to a question certified depends upon a fact not appearing in the certificate the question cannot be determined: *Courtright v. Singer Mfg. Co.*, 77–317.

Only such questions as are presented in the certificate will be considered and the court cannot consider an agreed statement of facts presenting questions outside of those stated in the certificate as adding to the certificate. The court may look to the record to see that the questions certified are involved but not for the purpose of ascertaining and determining questions not certified: *Lawrence v. Brown*, 91–342.

Questions must be such as arise and are argued: It is not the province of the supreme court to decide questions certified but not argued, nor questions argued but not certified, nor questions certified and argued where it is shown that they do not arise in the case: *Spiesberger v. Thomas*, 59–606.

Questions not certified: Only such questions as are presented in the certificate will be considered: *Thorpe v. Dickey*, 51–676; *Miller v. Haley*, 66–260.

The supreme court has no jurisdiction in such cases to determine any questions except those certified: *Ardery v. Chicago, B. & Q. R. Co.*, 65–723; *Vreeland v. Ellsworth*, 71–347; *Chilton v. Chicago, R. I. & P. R. Co.*, 72–689.

Although as a rule only the question certified will be considered, yet the court may inquire into the jurisdiction although such question is not certified to it: *Hodges v. Tama County*, 91–578.

Questions presumed to have arisen: Where the question is certified by the trial judge, it will be presumed that it arises in the case unless it is shown affirmatively otherwise: *Noble v. Chase*, 60–261.

It will be presumed that the facts are correctly found, whether any finding appears of record or not, unless the contrary appears: *Thorpe v. Dickey*, 51–676.

Questions certified will be presumed to have been involved in the case; but where it is claimed by the appellee that such questions did not arise in the case the supreme court will look into the record to determine that fact: *Parker v. Michaels*, 74–209.

The court will not go back of the record to determine whether an assumption of facts therein is warranted: *Miller v. Haley*, 66–260.

Or whether the case involves the question of law stated in the certificate: *Curran v. Excelsior Coal Co.*, 63–94.

Presumption as to facts; remanding: The presumption being that the court found the fact upon which the question of law is based, and that such fact appeared of record, upon a determination of the question of law the case may be remanded for final judgment, and the party will not be entitled to a further trial unless on account of newly-discovered evidence: *Andrews v. Burdick*, 64–692.

Provisions constitutional; cases in equity: The statutory provision requiring a certificate in cases involving less than the amount named applies to chancery cases as well as actions at law, and as thus applied is not unconstitutional, as depriving a party in such cases of a right of appeal and trial *de novo*. It amounts simply to a restriction or regulation of appeals in such cases: *Andrews v. Burdick*, 62–714; *Johns v. Pattee*, 61–393; *Teager v. Landsley*, 69–725.

Time of making certificate: The certificate of the judge must be made at the time of the trial, and before the adjournment of the term of court at which the judgment is rendered: *Fallon v. District T'p*, 51–206; *Independence v. Purdy*, 48–675; *Rose v. Wheeler*, 49–52; *Lomax v. Fletcher*, 40–705; *Rivers v. Cole*, 38–677; *Hershfield v. First Nat. Bank*, 39–699; *Nicely v. Rogers*, 39–441; *Morrison v. Ross*, 90–524.

The parties cannot by stipulation provide that the certificate may be made in vacation: *Fallon v. District T'p*, 51–206.

The certificate must be given at the time of the trial, unless delayed upon order or for cause: *Angus v. Shannon*, 60–311.

Where the date of certificate shows that it was given after the term at which the case was tried it cannot be considered: *Sayles v. Smith*, 71–241.

The certificate must be made when the cause is decided and judgment entered: *Powers v. Illinois Central R. Co.*, 66 N.W., 76.

Where the motion for a new trial was ruled on at 10 a. m. and a certificate of appeal was not signed by the judge until 2 p. m., *held*, that the certificate was not signed too late: *Courtright v. Singer Mfg. Co.*, 77–317.

The certificate must be made at the time of the trial and then made a part of the record, and where a certificate was filed on the day following that on which the case was tried and determined, *held*, that it could not be considered: *Brown v. Grundy County*, 78–561.

The certificate must be signed by the trial judge at the term at which the case is tried. A signature afterwards made *nunc pro tunc* will not give the supreme court jurisdiction, even though the failure to sign the certificate at the term was an oversight on the part of the judge: *Hinesley v. Mahaska County*, 69–511.

The certificate cannot be properly made until the case is finally disposed of, as by the ruling on a motion vacating a judgment and granting a new trial: *Hickok v. Buell*, 51–655.

The making and filing of a certificate during the same term, but subsequent to the rendition of judgment, is not sufficient; it must be made by the time the final judgment is rendered: *Foye v. Walker*, 62–251; *Schultz v. Holbrook*, 86–569.

Where the certificate was filed after judgment, but it did not appear when it was

signed, *held*, that the appeal would be dismissed: *Hakes v. Dott*, 54–17; *Callanan v. Kossuth County*, 62 N. W., 784.

Where the certificate was entitled of a proper term, but did not show when it was made, nor that it was made at the time of the trial, or even during the term of the trial, *held*, that it was not sufficient: *Babcock v. Chickasaw County*, 60–752.

Where it appears that the certificate was signed at the proper time it will be presumed that it was also filed in proper time: *Long v. Chicago, M. & St. P. R. Co.*, 64–541.

Not a matter of right: The purpose of the law in requiring a certificate in such cases was to prevent appeals in such cases in which the amount is trifling, unless there is an important question of law involved which should be decided in order that the decision may serve as a precedent, and the trial judge should not give a certificate unless he deems such question to be involved: *Meeker v. Chicago, M. & St. P. R. Co.*, 64–641.

Cannot be stipulated for: The parties cannot stipulate that the judge shall give a certificate in such cases. It is not a right of the unsuccessful party to have the certificate, and it can only properly be made where the judge believes it to be desirable for the proper administration of justice that some specified question in the case should be settled by the court of last resort: *Fallon v. District T'p*, 51–206.

Appellant cannot question the correctness of a certificate given by the trial judge, stating the questions on which the opinion of the supreme court is desired. The court is not bound to give any certificate at all, and if the appellant does not get the questions certified which were tried he is not bound to appeal: *Hager v. Adams*, 70–746.

The certificate is jurisdictional: The sufficiency of the certificate is a jurisdictional matter, and if it is not sufficient the court will take notice of it, although the objection is not made: *White v. Beatty*, 64–331.

Jurisdiction is conferred by the certificate and not by the pleadings or the evidence: *Beach v. Donovan*, 74–543.

Assignment of errors: The suggestion in *Andrews v. Burdick*, 62–714, that an assignment of errors will not be necessary in an equity case tried upon certificate made under this section has no application in general to errors of law in equity cases, and there must be an exception and assignment of errors as to ruling on questions of law in such cases as any other case at law: *Exchange Bank v Pottorfe*, 65 N. W., 312.

IV. INTEREST IN REAL ESTATE.

Where the case involves the right of the public to occupy and use real estate as a highway, an interest in real estate is involved within the meaning of this section: *McBurney v. Graves*, 66–314.

The fact that it is sought to establish a lien, special or general, upon real estate, does not make the case one involving an interest in real property, authorizing an appeal without regard to the amount in controversy: *Colyar v. Pettit*, 63–97; *Johns v. Pattee*, 61–393.

Therefore, *held*, that an action to foreclose a mechanic's lien was not within the exception: *Andrews v. Burdick*, 62–714.

A case involving the enforcing of a lien for less than one hundred dollars cannot be brought to the supreme court on appeal without the certificate required. A mortgage conveys no interest or title in the real property; the interest of the mortgagee, therefore, is not such an interest as gives rise to a right to appeal without regard to the amount involved: *Brown v. Smith*, 76–315.

An action to quiet title as against a sheriff's deed, on the ground that the property was plaintiff's homestead, "involves an interest in real estate," and may be appealed without a certificate regardless of the amount in controversy: *Jones v. Blumenstein*, 77–361.

SEC. **4111. Appeal by co-parties.** A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon those not joining therein, and file proof thereof with the clerk of the supreme court. [C.'73, § 3174; R., § 3517; C.'51, § 1979.]

Co-parties: It is essential in an appeal from the decree in a partition proceeding taken by one defendant that notice of appeal be served upon his co-defendant, otherwise the supreme court cannot review a ruling which would necessarily affect the interest of such co-defendant, and the appeal will be dismissed: *Hunt v. Hawley*, 70–183.

Failure to serve notice upon co-parties is not jurisdictional, but the court can consider such questions in the case as affect only the rights and interests of the appellant and the adverse party: *Moore v. Held*, 73–538; *Wright v. Mahaffey*, 76–96; *Kellogg v. Colby*, 83–513; *Soukup v. Union Inv. Co.*, 84–448.

Where the *supersedeas* bond recited expressly that one of two defendants alone had appealed, and such defendant's name alone appeared in the heading of the notice of appeal, *held*, that he only could be considered as having appealed, although the body of the notice spoke of the appeal being by defendants: *Webster v. Cedar Rapids & St. P. R. Co.*, 27–315.

One defendant cannot upon appeal complain of any error which results in injury only to his co-defendant: *Eyre v. Cook*, 9–185.

This section does not apply to an appeal by plaintiff where there are two or more defendants, and service on all the co-defendants is not required for the perfection of the appeal: *Payne v. Raubinek*, 82–587.

Where it appeared that the real party in interest was not a party to the appeal, and where no notice of appeal had been served on her by the appellant, *held*, that the appeal would be dismissed: *Day v. Hawkeye Ins. Co.*, 77–343.

In a proceeding for an assignment of dower, involving the rights of different parties, an appeal was taken by one of such parties, but no notice thereof was served on his co-defendants. *Held*, that the appeal must be dismissed: *Laprell v. Jarosh*, 83–753.

Where defendant in a divorce suit appeared to be insane and was not represented by guardian *ad litem*, but no objection on that ground was taken until the filing of arguments on final submission, *held*, that such objection was too late: *Tiffany v. Tiffany*, 84–122.

Failure to serve notice by one appellant upon a co-party will not affect the jurisdiction of the appeal but the court can consider only such questions in the case as may be determined between the appellant and appellee and not those affecting the co-party as to whom the appeal is not effected: *Fisher v. Chaffee*, 64 N. W., 662: *Brundage v. Chenoworth*, 70 N. W., 211.

Where the determination of an appeal will affect the interest of co-parties not served with notice the question cannot be determined although appearance by them is voluntarily entered. Jurisdiction cannot be conveyed on the court by consent: *Ash v. Ash*, 90–229.

Where the suit is brought against a surety without joining his principal an appeal may be taken by the surety without notice to such principal: *Marshall County v. Knoll*, 69 N.W., 1146.

The fact that in the trial of the case the same counsel appeared for co-parties does not entitle one of them to take advantage of an appeal effected by him in which the former does not join: *Epeneter v. Montgomery County*, 67 N.W., 93.

Must be party to the record: One who has not had himself made a party to the record cannot appeal from the judgment, although having an interest therein: *Borgalhous v. Farmers', etc., Ins. Co.*, 36–250; *Ferguson v. Board of Supervisors*, 44–701.

If a person having an interest in the result desires to question the action of the court, he should apply to be made a party. Until he is thus made a party he is in no way liable for costs, and therefore cannot be allowed to interfere with the rights of the original parties in the suit by appeal: *State ex rel. v. Jones*, 11–11.

If such a person should apply to be made a party and his application be refused, such refusal might be investigated upon appeal: *Phillips v. Shelton*, 6–545.

Where the complainant simply asks to redeem, a senior incumbrancer may appeal from an improper order in permitting the redemption, so that he does not get the full amount due on his mortgage, although he did not answer the bill: *White v. Hampton*, 13–259.

The parties for whose benefit suit is brought or defended, under § 3464, are not parties in such sense as to have the right of appeal: *Fleming v. Mershon*, 36–413.

In an action against the unknown owners of certain land, *held*, that there could be no appeal on behalf of the land, or the owners thereof, unless some one appeared in the action and made himself a party as the owner: *Fuller v. Unknown Owner, etc.*, 9–430.

Persons for whom plaintiff sues, but not named in the petition as plaintiffs, cannot appeal. And plaintiff in such a case has no ground to complain if the court strikes from the petition such parts thereof as have reference to such plaintiffs not named: *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72–556.

Where an executor has made a sale of real estate which is set aside on application in the lower court, the executor has such interest therein as to entitle him to appeal: *In re Estate of Bagger*, 78–171.

A deceased party cannot appeal nor can the right of his estate be adjudicated if an appeal in form is taken; *Tracy v. Roberts*, 59–624.

SEC. **4112. Parties not joining.** Co-parties, refusing to join in an appeal, cannot afterwards appeal, or derive any benefit therefrom, unless from the necessity of the case, but they shall be held to have joined, and be liable for their proportion of the costs, unless they appear and object thereto. [C. '73, §§ 3175–6; R., §§ 3518–19; C. '51, §§ 1980–1.]

A party who has not appealed cannot insist upon other or different relief from that awarded him in the court below: *Alexander v. Buffington*, 66–360; *Devoe v. Hall*, 60–749.

A party not appealing can have no relief: *Huff v. Olmstead*, 67–598; *Lamb v. Council Bluffs Ins. Co.*, 70–238.

Parties who do not join in the appeal cannot present questions affecting their claims or interest not involved in the questions arising upon the appeal as taken by appellant. They can have no modification of the decree: *Butler v. Barkley*, 67–491.

If a co-defendant does join in the appeal, appellant may thereupon urge any objection as to the judgment against his co-defendant which ultimately affects his own liability: *Engleken v. Webber*, 44–558.

If co-parties, upon being served, elect to join in the appeal, they are entitled to all the benefits thereof, and may be allowed to file an assignment of errors, and be heard: *Barlow v. Scott's Adm'rs*, 12–63.

That a party not appealing can have no relief on the appeal, see notes to § 4100.

SEC. **4113. Part of judgment or order.** An appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, shall not disturb, delay or affect the rights of any party to any judgment or order, or part of a judgment or order, not appealed from. [C. '73, § 3177; R., § 3510.]

SEC. **4114. Notice.** An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of

the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part. [C.'73, § 3178; R., § 3509; C.'51, § 1974.]

Sufficiency of notice: The fact that the notice of appeal designates the judgment as having been rendered at a different day from that shown by the transcript will not defeat the appeal, it not being claimed but that the appeal is from the judgment intended to be referred to in the notice or that it is not taken in time: *Kennedy v. Rosier*, 71-671.

A notice not signed is not a notice within the terms of this section, and the acceptance of service of such a notice will not waive the defect nor confer jurisdiction upon the supreme court: *Doerr v. Southwestern Mut. L. Assn.*, 92-39.

Such a notice cannot be regarded as merely a defective notice. It is no notice at all: *Ibid.*

Where an appeal was from "the decision" of the court, and it was not indicated in the notice what decision was appealed from, and when there were several decisions other than the final decision, *held*, that the notice of appeal was fatally defective: *Weiser v. Day*, 77-25.

There is usually but one final adjudication or judgment as to the same party, and a notice which specifies the judgment of the court in the case, naming it, is sufficiently definite in indicating from what the appeal is taken: *Searles v. Lux*, 86-61.

The fact that the notice does not specify the term of court to which the appeal is taken is not fatal: *Geyer v. Douglass*, 85-93.

Where the notice advised the opposite party of the appeal "from the decision and judgment" of the court, *held*, that it necessarily referred to the final judgment and was sufficiently specific: *Ibid.*

It will be presumed that the appeal is from the final judgment if rendered, unless the notice expressly refers to some other ruling in the case: *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 70 N. W., 761.

Service of notice: To give the supreme court jurisdiction, the service of notice upon appeal is as essential, where there is no voluntary appearance, as is the service of original notice in suits commenced in the lower court: *McClellan v. McClellan*, 2-312; *Lewis v. Miller*, 4 G. Gr., 95.

Service of notice of appeal upon the adverse party and upon the clerk is necessary to give the supreme court jurisdiction of the cause, and the fact of such service should be stated in the abstract: *Phillips v. Follett*, 69-39.

Method of service: The statute makes no provision for service by leaving a copy with a member of the party's family, as is authorized in case of service of an original notice, and such a service will not be valid: *Draper v. Taylor*, 47-407.

Service of notice of appeal upon the wife of attorney for appellee is not sufficient. Such notice of appeal can be served only in the manner prescribed by statute: *Webster v. Carson*, 69-243.

Service of notice of appeal may be made by taking a written acknowledgment of service by the person upon whom it is served: *Sanxey v. Iowa City Glass Co.*, 68-542.

Service of notice cannot be made by a party to the action: *Draper v. Taylor*, 47-407; *Marion County v. Stanfield*, 8-406.

Previous to the enactment of the provisions of § 3214 of Code of '73 (see § 4115), there was no method authorized for service of notice of appeal by publication: *McClellan v. McClellan*, 2-312.

Upon adverse party: The assignment of a decree after its rendition will not make the assignee a party to the action so as to require service of notice of appeal upon him: *Littleton Sav. Bank v. Osceola Land Co.*, 76-660.

In a particular case, *held*, that a person was not a party to the suit in such sense that notice of appeal need be served upon him: *Christie v. Life Indemnity, etc., Co.*, 82-360.

Service of notice of appeal upon the guardian *ad litem* of an insane person, who was also his attorney of record, *held* sufficient without service upon the party himself: *Shoemake v. Smith*, 80-655.

Upon attorney: Where an action was commenced against several defendants, and one of them by application had himself joined with plaintiff and declared to be a party plaintiff in the case, and was represented by the attorneys who brought the action for the original plaintiff, *held*, that a notice of appeal by defendants directed to the other plaintiff by name and to his attorneys, service of which was accepted by such attorneys as attorneys for plaintiff, was not sufficient as a notice of appeal to the party who had been made plaintiff, and that, as he was a necessary party to the appeal, it could not be prosecuted: *Goodwin v. Hilliard*, 76-555.

A notice "to the above-named plaintiff, or to W. H. Stivers, his attorney," and served upon such attorney is sufficient: *Bruner v. Wade*, 85-666.

Upon clerk: Service of the notice of appeal upon the clerk of the lower court is essential to the perfecting of the appeal, and in the absence of such service appearing of record the appeal will be dismissed on motion: *Independent Dist. v. Apperle*, 76-238; *McManus v. Smith*, 76-576; *Redhead v. Baker*, 80-162; *State ex rel. v. Clossner*, 84-401.

Unless it appears that notice of appeal was served upon the clerk the supreme court has no jurisdiction to entertain the appeal: *Merchant v. Soleman*, 63 N.W., 464.

Service of notice of appeal on the deputy clerk, shown by an exceptance of service signed by him with the name of the clerk by himself as deputy, is sufficient notice of appeal: *Sanxey v. Iowa City Glass Co.*, 68-542.

Service upon a *de facto* deputy of the clerk is sufficient though his appointment has not been confirmed and he has not given bonds: *Wheeler & Wilson Manufacturing Co. v. Sterrett*, 62 N.W., 675.

The fact that the clerk is secured for the costs of the transcript does not obviate the necessity of a showing that notice of appeal was served on him: *Ainslie v. Wynn*, 65 N. W., 401.

Filing with clerk: It is not necessary that the notice be filed in the office of the clerk within the time allowed for perfecting the appeal: *Baldwin v. Tuttle*, 23–66.

But, upon service of the notice, it should be filed or deposited with the clerk, and it thereupon becomes one of the original papers in the case and a part of the record. It is such a portion of the record as that it may be corrected by proper proceedings in the court in which it is filed, for instance, for the purpose of making it show the correct date of service upon the clerk: *Brier v. Chicago, B. & P. R. Co.*, 66–602.

The provision of the next section that the notice must be returned immediately after service to the office of the clerk is directory, and a failure to comply with such requirement does not affect the appeal: *Littleton Sav. Bank v. Osceola Land Co.*, 76–660.

New notice after delay in procuring appeal: Where four years had intervened between the taking of the appeal and the filing of the transcript, *held*, that the case would not be heard on motion of the appellant without additional notice to appellee, who had made no appearance: *Byington v. Robinson*, 16–591.

Record must show: Service of notice of appeal is essential to give the court jurisdiction of the case, and that fact must be shown by the record: *Michel v. Michel*, 74–577.

The fact that an appeal has been taken must affirmatively appear on the record, otherwise the appeal will be dismissed: *Bowman v. Day*, 86–746.

Where it does not appear that notice of appeal was served as required the supreme court is without jurisdiction: *Norwegian Plow Co. v. Bruning*, 65 N. W., 984; *Brandenburg v. Keller*, 69 N. W., 448.

Where the record does not show that an appeal was taken from the decree of the lower court, the appeal will be dismissed: *Kimball v. Barngrover*, 80–768; *Talbot v. Noble*, 75–167.

Where an additional abstract, not denied, shows that notice of appeal has not been served on the clerk, such abstract will be deemed to be true, and the case will be dismissed: *Smith v. Des Moines*, 84–685.

A failure of the transcript to show a notice of appeal served on the clerk is *prima facie* evidence that none has been served, and in the absence of further showing would be sufficient to defeat the appeal; but where the notice was in fact served and filed with the clerk, but was lost with the return of service, and such fact was satisfactorily shown by affidavits, *held*, that the appellants were entitled to a continuance to enable them to have the defect in the record corrected; but as the appellees failed to ask to have the lost record restored or to object to the competency of the evidence offered to show the fact of service, the defect in the transcript was not fatal to the appeal: *Malcomsen v. Graham*, 75–54.

The fact of the taking of the appeal must be shown in the abstract or the appeal will not be considered: *Names v. Names*, 74–213.

After appellee had appeared and filed amended abstract, *held*, that he could not first urge in reply that the record did not show the taking of an appeal: *Roundy v. Kent*, 75–662.

Appeal jurisdictional: The question as to whether an appeal has been taken is jurisdictional, and the court will not consider the case, unless the taking of the appeal is shown by the record, even though the question is not made by counsel: *McManus v. Swift*, 76–576.

The appeal is necessary to give the supreme court jurisdiction, and it cannot be waived by appearance of the parties to the merits of the case. Where the fact of the taking of the appeal does not appear from the abstract the case will be dismissed: *Whitton v. Fuller*, 77–599; *State ex rel. v. Clossner*, 84–401; *First Nat. Bank v. City Council of Albia*, 86–28; *Farrell v. Muscatine*, 85–753; *Mandel v. Friedman*, 85–734; *Donnelly v. Cedar County*, 75–536; *Schooley v. Globe Ins. Co.*, 76–78.

Unless the abstract shows service of the notice of appeal on the clerk, as well as on the opposite party or his attorney, the appeal will be dismissed for want of jurisdiction: *State ex rel. v. Clossner*, 84–401.

Want of service of notice will be a ground for dismissing the appeal even on rehearing: *Iowa City v. Johnson County*, 68 N. W., 815.

Substituted defendant: Where plaintiff appealed from an order substituting a third party in place of the sheriff against whom the action was brought, *held*, that the appeal might be prosecuted by plaintiff upon the sheriff without notice being served upon the substituted party, the substitution having been made on the joint application of the sheriff and such third party: *Sunberg v. Babcock*, 61–601.

Notice upon supervisors: The county auditor is not the agent of the board of supervisors in such sense that service of notice of appeal can be made upon him in an action against the members of such board: *Polk v. Foster*, 71–26.

A notice of appeal from a judgment brings up all the objections properly saved on the trial of the cause, including the motion for a new trial: *Gulliher v. Chicago, R. I. & P. R. Co.*, 59–416.

Appearance in the supreme court is a waiver of any irregularity in taking the appeal: *Romaine v. Commissioners*, Mor., 357. But if the lower court had no jurisdiction it will not be conferred by an appeal: *Burlington University v. Stewart's Ex'rs*, 12–442.

Such appearance is a waiver of notice: *Morrow v. Carpenter*, 1 G. Gr., 469.

Where there is no judgment rendered in the court below from which an appeal may be taken, consent of parties will not give the supreme court jurisdiction: *Long v. Long*, Mor., 381; *Rutter v. State*, 1–99; *Kimble v. Riggin*, 2 G. Gr., 245.

Appearance in the supreme court by filing additional abstract, etc., will not waive objection on account of want of notice, if such appearance is made prior to the expiration of the time during which notice might be served: *Brier v. Chicago, B. & P. R. Co.*, 66–602.

Unless the abstract shows the taking of

an appeal it does not show that the supreme court has acquired jurisdiction of the case, and the appeal will be dismissed, even though the appellee appears and does not urge the objection: *Plummer v. People's Nat. Bank*, 73–752.

Notice of appeal is jurisdictional, and want of notice cannot be supplied by voluntary appearance: *Ash v. Ash*, 90–229.

Party not served: There can be no review on appeal which would affect a party who has not been served with notice of the appeal, and no relief based upon a reversal as to him can be granted. *Chase v. Christenson*, 92–405.

Appellant can have no relief on appeal as against a judgment in favor of a party not served with notice: *Hunt v. Clark*, 46–291.

Where the notice of appeal was directed to J. M. W. instead of to John M. W., and acceptance of service was made by the attorney of the proper person, *held*, that the defect was immaterial: *Horst v. Wagner*, 43–373.

Effect of appeal: An appeal from a final decree in a chancery case deprives the trial court of all further jurisdiction in the case until it is remanded. It cannot make an order retaxing the costs, or amending the record: *Levi v. Karrick*, 15–444; *McGlaughlin v. O'Rourke*, 12–459.

And this rule applies also in actions at law, when the entire cause is brought to and pending in the supreme court on appeal: *Turner v. First Nat. Bank*, 30–191; *Carmichael v. Vandebur*, 51–225.

Where one ground of motion was ruled upon and appeal taken from such ruling and at a subsequent term the court's attention being called to the fact that other grounds of the motion had not been passed upon it then entered its ruling on such grounds without notice to or the presence of the party or attorney, *held*, that such ruling was not one from which a subsequent appeal could be taken: *Cox v. Chicago & N. W. R. Co.*, 63 N. W., 450.

Correction of record: The appeal does not so divest the jurisdiction of the lower court but that it may order a lost record substituted, or correct its record by supplying omissions, and do whatever else is proper to be done to enable the supreme court to review its alleged errors: *Steiner v. Steiner*, 49–70; *Becker v. Becker*, 50–139; *State v. Dillard*, 52–749; *Mahaffy v. Mahaffy*, 63–55; *Maxon v. Chicago, M. & St. P. R. Co.*, 67–226; *Buckwalter v. Craig*, 24–215.

The court below may settle and sign a bill of exceptions after appeal is taken, if done within the time allowed for that purpose: *Tiffany v. Henderson*, 57–490.

The lower court retains jurisdiction after the taking of the appeal to perfect the record by giving the certificate as to the evidence introduced in an equitable case: *Goff v. Hawkeye Pump, etc., Co.*, 62–691.

After the taking of appeal, a motion to amend the record cannot be entertained by the lower court without notice to the opposite party: *Eno v. Hunt*, 8–436.

SEC. **4115. Service.** A notice of appeal shall be served and return made thereon in the same manner as an original notice in a civil action, and filed in the office of the clerk of the court in which the judgment or order appealed from was rendered or made. All other notices connected with or growing out of the appeal shall be served and the return made in like manner, and filed in the office of the clerk of the supreme court, and all notices provided for in this section become a part of the record in the case on being filed. [C.'73, § 3214; R., § 3523.]

The provisions of this section with regard to returning notice after service are directory, and a failure to comply therewith will not affect the validity of the appeal: *Littleton Sav. Bank v. Osceola Land Co.*, 76–660.

Service of notice of appeal on a minor is to be made as in the case of service of original notice and where it is stated in the abstract that such service was made and it does not appear that notice was served on the guardian it will be presumed that the minor was of such age that service on him was sufficient under § 3533: *Brundage v. Chenoweth*, 70 N. W., 211.

As to service of notice, see § 4114 and notes.

SEC. **4116. Term for submission.** A notice of appeal must be served thirty, and the cause filed and docketed fifteen days before the first day of the next term of the supreme court, or the same shall not be submitted at that term unless the parties consent thereto. If the appeal is taken less than thirty days before the term, it must be so filed and docketed for the next succeeding term. [C.'73, § 3180; R., § 3513; C.'51, § 1978.]

A recital in the notice of appeal that the case will be for hearing at a term subsequent to the term at which by statute and the rules of the court it will be heard is surplusage, and should be disregarded. In such case the appellee might, by filing a transcript at the next term of court after service, have an affirmance or dismissal: *Mickley v. Tomlinson*, 79–383.

SEC. **4117. Docketing causes.** The clerk shall docket the causes as they are filed in his office, and shall arrange and set a proper number for trial for each day of the term, placing together those from the same judicial district, and cause notice thereof to be published and distributed as the court may direct. [C.'73, § 3203; R., § 3535.]

SEC. **4118. Abstracts.** Printed abstracts of the record shall be filed in accordance with rules established by the supreme court, and shall be presumed to contain the record, unless denied or corrected by subsequent abstract. If any denial or abstract is filed without good and sufficient cause, the costs of the same or any part thereof, and of any transcript thereby made necessary, shall be taxed to the party causing the same.

Form: The fact that what is filed and intended as an abstract is not so entitled or designated will not prevent the court from considering it if its nature is apparent: *Noble v. Des Moines & St. L. R. Co.*, 61–637.

Where the questions of law and fact involved in different cases are the same, they may be presented to the supreme court on one record: *King v. Glass*, 73–205.

Where the abstract set out the titles to several causes with a view to their presentation in one appeal, *held*, that as to the cause fully presented in such abstract the court would consider the appeal: *Searles v. Lux*, 86–61.

The abstract should not set out the pleadings with exhibits and the written evidence in full. It is sufficient, in incorporating deeds and mortgages, to state the introduction of the instrument in evidence, giving the substance only of what is material to questions in the case. The court ought not to be required to examine any part of the record except that which is necessary to determine the questions presented by the appeal. And in a case where the abstract did not comply with these requirements, a motion to strike it from the files was sustained and appellant was given additional time in which to file an abstract: *Seekell v. Norman*, 76–234.

Where an amended abstract consisted largely of questions and answers printed in full, *held*, that such form of presenting the record was unnecessary, and the abstract would on motion be stricken from the files: *State v. Hull*, 83–112.

Statements in an abstract as to the fact of rendition of judgment, settlement of bill of exceptions, and proof of appeal, *held* to be sufficient in a particular case: *Waller v. Waller*, 76–513.

Where the abstract has no index, the submission may be set aside and the cause continued until the defect is cured: *State v. Abegglen*, 69 N. W., 256.

As to index, see Rules of Supreme Court, § 65.

As to the rule (Rules of Supreme Court, § 88) authorizing a suspension of the requirement as to printing abstract, see *State v. Warner*, 67 N. W., 250.

Should contain what: It is not proper to set out in the abstract the entire testimony of witnesses, by question and answer, without excluding matter that is immaterial: *Vaughn v. Smith*, 58–553; *Tootle v. Taylor*, 64–629.

Nor should writs, services, and other writings not material to the case, be set out: *Tootle v. Taylor*, 64–629.

The abstract should show the fact of service of notice of appeal: *Phillips v. Follett*, 69–39.

Service of amended abstract: Where an amended abstract is served thirty days before the cause is submitted it will not be stricken from the files because not served within the time required by the rules, where no prejudice could have resulted from the delay: *Green v. Ronen*, 62–89.

Where appellee's amended abstract was served twenty days before the case was submitted, and the motion to strike involved nothing but the cost of printing, *held*, that appellant sustained no prejudice from the delay in service, and the abstract could not be stricken from the files: *Davidson v. Carter*, 55–117.

Time for filing: Where an additional abstract, filed after the filing of appellee's argument, was filed three months before the cause was submitted, and appellee had opportunity to examine it and correct any misstatements or errors contained in it, and filed an additional argument based, in part, upon the record as made by the additional abstract, *held*, that such additional abstract might be considered: *Palo Alto County v. Harrison*, 68–81.

The fact that an amended abstract is filed without leave or notice is not ground for striking it from the files: *Frost v. Parker*, 65–178.

An amendment to appellant's abstract, rendered necessary by reason of a motion in the court below after the record was made up and the appeal taken, should not be stricken from the files because not served upon appellee: *Peterson v. Adamson*, 67–739.

It is not unusual to allow a party to file an amended abstract when he discovers his case is not fully presented in the original abstract. This should be done, however, before the case is submitted and at such a time as that the other party will not be prejudiced thereby: *Wells v. Burlington, C. R. & N. R. Co.*, 56–520.

Where a motion was submitted with the case asking the court to strike from the files an amended abstract and argument of the opposite party because not filed within the time agreed upon between the parties, *held*, that while the motion would be overruled, no costs would be taxed to the unsuccessful party for printing such abstract and argument: *Keegan v. Malone's Estate*, 62–208.

Appellant cannot, after the appellee has argued his case, amend his abstract without leave of court and thus substantially change the record upon which the case is submitted. If leave to amend is asked, it may be granted upon such terms as seem proper under the circumstances, but an amendment filed without leave after the filing of appellee's argument will be stricken out on motion: *In re Caywood's Will*, 56–301.

Appellant cannot file an additional abstract with his argument in reply except to controvert the correctness of appellee's additional abstract: *Johnson v. Chicago, R. I. & P. R. Co.*, 51–25.

An amendment to appellant's abstract will not be stricken from the files because filed

without leave, even though filed after the cause has been argued by appellee: *Harl v. Pottawattamie County Mut. F. Ins. Co.*, 74–39.

Under some circumstances, doubtless, a submission may be set aside and the case would then be open for proper changes in the record, but an amended abstract filed after the case is submitted, without the submission being set aside, will not be considered: *Fletcher v. Terrell*, 50–267; *Rogers v. Carman*, 54–715.

An application by appellant to amend his abstract after the case is submitted, which application is not accompanied by a motion to set aside the submission, cannot be allowed: *State v. Hamilton*, 57–596.

The court will not summarily affirm a cause after it is prepared for submission on the part of the appellant, on the ground of delay in presenting the abstract and argument. If prejudice has resulted to the other party by delay, redress must be sought in some other way: *Fowler v. Strawberry Hill*, 74–644.

Time for filing: Failure to file an abstract or argument within the time required by the rules of the court will not be ground for striking it from the files and taxing the costs thereof to the party filing it, where it does not appear that the submission of the cause was delayed thereby: *Doolittle v. Doolittle*, 78–691; *Wilson v. Daniels*, 79–132; *Spencer v. Moran*, 80–374; *Lathrop v. Doty*, 82–272; *Thomas v. McDaneld*, 77–126.

An additional abstract will not be stricken from the files on the ground that it was not filed within proper time, if filed and served so long before final submission that it appears there could have been no prejudice by the delay: *Scholl v. Bradstreet*, 85–551.

Where the failure to file an amended abstract does not delay the submission of the cause nor prejudice the appellant, it will not be stricken out on motion because not filed in time: *Citizens State Bank v. Council Bluffs Fuel Co.*, 89–618; *Aultman & Taylor Co. v. Shelton*, 90–288; *Briggs v. Coffin*, 91–329; *Bowman v. Western Fur Mfg. Co.*, 64 N. W., 775; *Foley v. Tipton Hotel Ass'n*, 71 N. W., 236.

An additional abstract by appellant will not be stricken out because not filed in time where no showing of prejudice is made and it does not appear that the submission has been thereby delayed: *Peck v. Hutchinson*, 88–320: *Boggs v. Douglass*, 89–150; *Doerr v. Southwestern Mut. L. Ins. Co.*, 92–39; *Croddy v. Chicago, R. I. & P. R. Co.*, 91–598; *Gregg v. Spencer*, 65 N. W., 411.

Where it appeared that there had been an agreement by counsel extending the time for filing appellee's abstract, *held*, that the court would not strike such abstract from the files and tax the costs thereof to appellee because filed later than the time agreed upon, there being no written evidence as to what the agreement of the counsel in the premises was: *Taylor v. Chicago, M. & St. P. R. Co.*, 80–431.

An amendment to an abstract filed without leave, setting out matter to cure formal defects in the original abstract, will not be stricken from the files on motion if the submission on the merits is not thereby delayed: *Cason v. Ottumwa*, 71 N. W., 192.

An amendment cannot be filed long after the full argument and submission of the case *Hopper v. Chicago, M. & St. P. R. Co.*, 91–639.

An amended abstract cannot, at least without permission of court be filed after the submission of the cause. Even consent of counsel on the other side will not be sufficient to justify the court in considering such abstract: *State v. Thompson*, 64 N. W., 419; *State v. Windahl*, 64 N. W., 420.

Counsel have the right to suppose that when a cause is submitted no other paper will be filed therein by either party without the consent of the opposing party and the permission of the court granted when the submission of the case is taken: *Ibid.*

It is not the practice of the supreme court to strike from the files additional abstracts because not filed within the time required by the rules, although it would not hesitate to do so in a case where justice seemed to demand it, but in a particular case, *held*, that where no reason appeared for not embodying in appellee's first abstract all the matter subsequently set out by way of amendments and the failure to do so was calculated to mislead plaintiff in the presentation of his case, the costs of the amendments to appellee's abstract would not be taxed to plaintiff's on affirmance: *Bowman v. Western Fur Mfg. Co.*, 64 N.W., 775.

An appellant has a right to amend his abstract when done before the argument of appellee is served on him, and in ample time to permit appellee to make any argument he desires on the record as amended: *Gronewey v. Kusworm*, 75-237.

Costs of abstract: The appellant, although successful, should not be allowed the full cost of an abstract containing unnecessary matter: *Chandler v. Fremont County*, 42–58; *Macomber v. Peck*, 39–351; *Martin v. Cole*, 38–699; *York v. Clemens*, 41–95; *Byerlee v. Mendel*, 39–382; *Dye v. Young*, 55–433; *Poole v. Hintrager*, 60–180; *Donahue v. McCosh*, 70–733; *Baldwin v. Foss*, 71–389.

Where a large portion of the testimony of witnesses was unnecessarily set up in the abstract by question and answer, and deeds, including the certificates of acknowledgment, were set out at length, *held*, that it was a proper case for taxing a portion of the costs of such abstract to appellant: *Jons v. Campbell*, 84–557.

In a particular case, *held*, that costs of unnecessary printing should be taxed to appellant, although the case was reversed: *McDermott v. Iowa Falls & S. C. R. Co.*, 85–180.

Appellant is not entitled to have taxed as costs the expense of preparing typewriter copy of his abstract: *McNider v. Sirrine*, 84–745.

Costs of additional abstract should not be taxed to appellant where his own abstract fairly presents the questions to be determined: *Brown v. Byam*, 59–52.

While it is the duty of the appellant to submit a fair abstract of so much of the record as is necessary to an understanding of the questions involved, yet the costs of printing an additional abstract will not be taxed to him, where there is not an intentional omission of material matter from the abstract: *Schneitman v. Noble*, 75–120.

Where the appellee filed an additional abstract, which contained an abstract of all the evidence, and which appellant claimed to be unnecessary to a determination of the questions involved, but which was filed upon the claim that the evidence showed, without conflict, that plaintiff had been paid in full, and it did not appear that the claim was not made in good faith, *held*, that the costs should be taxed to the appellant upon an affirmance of the judgment: *King v. Mahaska County*, 75–329.

Where an additional abstract is necessary for the purpose of setting out the charge of the court in order to show that the instruction asked was not erroneously refused in view of the instructions given, the costs of such abstract will not be taxed to appellee: *Albrosky v. Iowa City*, 76–301.

Where appellant's abstract failed to set out the verification of the answer, which was material, *held*, that appellee might properly file an amended abstract setting out such verification, and that the costs of such additional abstract should be taxed in the case: *Comes v. Chicago, M. & St. P. R. Co.*, 78–391.

Where some of the matters set out in the additional abstract were material to a full understanding of the case, *held*, that costs of such abstract would not be taxed to appellee, even though it might be fuller than necessary, the unnecessary expense being little more than nominal: *Benton County Bank v. Walker*, 85–728.

In a particular case, *held*, that the additional abstract was necessary to a fair understanding of some of the rulings of the court, called in question on the appeal, and, while more voluminous than necessary, was not so much so as to require that the costs be taxed to appellee: *Meyer v. Houck*, 85–319.

It is the right of an appellee to have a cause submitted on a correct abstract and appellee need not wait until the arguments are made to determine whether the errors are material; but if their effect is at least doubtful he may correct them in an additional abstract; *Reed v. Lane*, 65 N.W., 380.

Where the additional abstract is filed without any occasion therefor, costs thereof will be taxed to the party filing it: *Boggs v. Douglass*, 89–150.

Where three-fourths of appellee's additional abstract was a repetition of appellant's and was unnecessary, *held*, that a motion to tax that portion of the costs of appellee's abstract to appellee would be sustained: *Lindsay v. Carpenter*, 90–529.

Where the appellee's additional abstract was to a considerable extent unnecessary and by reason of the filing of such additional abstract a transcript was made necessary, *held*, that on motion the costs of the transcript and of the unnecessary portion of the appellee's abstract should be taxed to appellee: *Fillmore v. Hintz*, 90–758.

Where an additional abstract was unnecessarily voluminous and there had been great delay in filing it, *held*, that the costs of printing the same should be taxed to the appellee: *Burke v. Dillon*, 92–557.

Where the appellee unnecessarily denied the correctness of appellant's abstract and set out at great length additional matter in his abstract which was filed more than nine months after appellant's abstract was served and within a short time of the submission of the cause, without any good reason being shown for the delay and thus caused appellant trouble and expense in the presentation of the cause, *held*, that the costs of such abstract should be taxed to appellee: *Gutherless v. Ripley*, 67 N.W., 109.

The costs of an amendment to the abstract will not be taxed to the party filing it if the matter set out is material: *Fitzgerald v. Nolan*, 71 N.W., 224.

If an agreed abstract is presented, the case will be heard on that, and no amendment presented by one of the parties will be considered: *Holmes v. Lucas County*, 53–211.

But an agreed abstract will not operate to waive statutory requirements as to appeal: *Lewis v. Pearson*, 50–702; nor the objection that the abstract does not appear to contain all the evidence: *Allen v. Hull*, 56–767.

Case determined upon abstract: The supreme court does not look beyond the abstract where a case has been argued and submitted with an apparent understanding that such abstract contains all that is material to its determination: *Montgomery County v. American Emigrant Co.*, 47–91.

Unless there is a disagreement in the abstracts the supreme court does not examine the transcript, and the abstracts constitute the record. Where a certificate of the judge is necessary to entitle the party to appeal it should be set out in the abstract: *Barnes v. Independent Dist.*, 51–700.

The supreme court will not, as a general rule, look into the transcript except for the purpose of determining the correctness of the abstract, where that is disputed in the manner required by the rules of court: *State v. Smouse*, 49–634.

In the absence of a conflict of abstracts the court treats the abstract as the record in the case, and if it is not sufficiently intelligible to show the rulings made the court acts upon the presumption that there is no error: *Eldredge v. Bell*, 64–125.

The transcript is not consulted unless the parties disagree as to the record set out in the abstract, and where the parties agreed to submit the cause on the abstract of plaintiff, *held*, that it would be presumed that the abstract was correct and the transcript would not be examined, and as the abstract failed to show that an appeal was taken, or a notice of appeal served, the case would be dismissed: *Talbort v. Noble*, 75–167.

Although the parties each claim that the abstract of the other is incorrect, the court will not refer to the transcript and original evidence, if it is not necessary in order to determine the case: *Charlton v. Sloan*, 76–288.

Where the issue is raised as to the correctness of the abstract, and appellant, after a reasonable time, has omitted to file a transcript, the judgment will be affirmed: *Howorth v. Seevers' Mfg. Co.*, 78–627.

Where appellee has filed an additional abstract and it appears that the abstracts present all the evidence introduced on the trial,

a motion to strike from the records the bill of exceptions on the ground that it was not filed in the district court within the time limited by the agreement of the parties will be overruled: *Richardson v. Blinkiron*, 76–255.

Alleged errors will not be reviewed where the evidence necessary to show the existence of the error is not made to appear in the abstract. In such case the presumption will be entertained that the ruling of the court was correct: *Brown v. Long*, 76–414.

Where the evidence in a case was stricken from the abstract and the transcript as not being properly embodied therein, and leave was given to perfect the record, and a perfect transcript was filed, but no new abstract, *held*, that the court could only consider the original abstract with the evidence stricken therefrom: *Weider v. Overton*, 47–538.

Should show appeal: The abstract must show the taking of an appeal: *Plummer v. People's Nat. Bank*, 73–752; *Names v. Names*, 74–213. And see notes to § 4114.

Must be based on record: Statements in an additional abstract not appearing to be based upon the record, but to be merely statements of counsel, will not be considered: *Payne v. Raubinek*, 82–587.

There should be no uncertainty as to the identity of instructions presented for review, and the method pointed out by law for their identification should alone be relied upon: *Ibid.*

Where the evidence embodied in the abstract has not been made of record in the court below, it may be stricken from the abstract on motion: *Harrison v. Snair*, 76–558.

An oral agreement by counsel that a case shall be submitted upon appeal on appellant's abstract, and that a transcript shall be waived, cannot be established by affidavits of appellant's attorneys: *Riegelman v. Todd*, 77–696

The court cannot take the abstractor's statement of a fact where there is no claim that the fact appears from the record: *Dickerman v. Lubiens*, 70–345; *Anderson v. Leaverich*, 70–741.

How correctness of abstract questioned: The correctness of the statements of the abstract cannot be impeached by a mere statement in argument: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56–245; *Rankin v. Miller*, 43–11.

Where the abstract, although failing to show that a bill of exceptions was filed in the court below, contains matter which it could not properly contain unless made of record, the court will regard the appellant as claiming that it was made of record, and a direct statement to that effect will not be necessary. If the appellee desires to claim that no bill of exceptions was filed he must do so in an additional abstract: *Thompson v. Silvers*, 59–670.

Where the abstract filed by appellant purports to be an abstract of all the evidence, it will be assumed, in the absence of any showing to the contrary, that the evidence set out therein was properly made of record. If the opposite party wishes to claim that the evidence was not made of record he should file an additional abstract so stating, and the statement of such additional abstract will be assumed to be true if not denied: *State v. Tucker*, 68–50.

Where appellant's abstract stated the taking of an exception, which was not denied in the amended abstract, *held*, that the court would consider that the exception properly appeared in the record: *Palmer v. Rogers*, 70–381.

An abstract cannot be impeached or contradicted by a certificate of the clerk of the court below: *White v. Savery*, 49–197.

Nor can it be altered or changed by affidavit or certificate of the judge: *Pearson v. Muxfield*, 47–135.

A so-called amended abstract, setting out affidavits showing the judgment to be different from that contained in the abstract, will not be considered: *Holmes v. Lucas County*, 53–211.

Where an abstract purports to contain a copy of a paper which is part of the record, it is not necessary for it to state that what it sets out is the whole paper, but it will be presumed to be so unless the contrary is shown: *Baird v. Chicago, R. I. & P. R. Co.*, 61–359

The correctness of appellant's abstract cannot be attacked in argument when no basis therefor has been laid by filing an amended abstract questioning its correctness: *McFarland v. Muscatine*, 67 N. W., 233.

Motion to strike evidence from abstract: If the abstract sets forth evidence not made of record, the appellee may, on motion, have such evidence stricken therefrom: *Mudge v. Agnew*, 56–297.

If no question is made as to the filing of the bill of exceptions, the court presumes that the evidence has been properly preserved. If the appellee states in his abstract that no proper bill of exceptions has been filed, and moves to strike out the evidence on that ground, the court does not take the statement as true, but refers to the transcript for a determination: *Wilson v. First Presbyterian Church*, 60–112.

A statement in appellee's abstract that no exceptions were taken as set out in the appellant's abstract will be deemed true if not denied or avoided by appellant: *Armstrong v. Nillen*, 70–51.

Setting out instructions: Where an abstract does not purport to set out the instructions, or any of them, in full, but simply sets forth parts of sentences of various instructions claimed to be erroneous, the court cannot pass upon their correctness: *State v. Nichols*, 38–110.

Where the abstract does not contain all the instructions given, alleged error in refusing an instruction cannot be considered: *State v. Williamson*, 68–351.

Abstract of all the evidence: The court will not, against the objection of appellee, review a finding of facts made by a court, jury or referee, unless the abstract purports to contain all the evidence introduced on the trial below: *Andrews v. Kerr*, 49–680; *Price v. Burlington, C. R. & M. R. Co.*, 42–16; *Rice v. Plymouth County*, 53–635; *Walker v. Plummer*, 41–697; *Wisconsin, I. & N. R. Co. v. Secor*, 70–647.

Where a review of the findings of a jury

on the evidence is sought, the abstract should contain the statement that it contains all the evidence: *Kearney v. Ferguson*, 50–72; *Andrews v. Kerr*, 49–680; *Parsons v. Parsons*, 66–754.

It is not sufficient that it appear that all the evidence is in the bill of exceptions: *Rice v. Plymouth County*, 53–635.

Where an abstract fails to state that all the evidence is before the supreme court, that court will not review the findings of the court below on a question of fact: *Van Riper v. Baker*, 44–450; *Commercial Bank v. King*, 47–64.

It must also appear from the abstract that all the evidence is made of record: *Wormley v. District T'p*, 45–666.

Where the abstract does not purport to be an abstract of all the evidence, an objection that the damages are excessive cannot be considered: *Brant v. Lyons*, 60–172.

Where the abstract shows that it does not contain all the evidence, the case will not be reversed if there might have been evidence supporting the judgment: *Enix v. Miller*, 54–551.

That it appears from the abstract itself that it does not contain the testimony of all the witnesses will prevent the supreme court from trying the case *de novo: Hart v. Hart*, 74–487.

On an appeal from the ruling of the lower court in setting aside an indictment it is not necessary that the abstract shall show all the evidence presented on the motion, where it appears that the ground for setting it aside was not sufficient: *State v. Smith*, 74–580.

The fact that an abstract does not contain immaterial evidence received on the trial in the lower court will not prevent trial of the case anew: *Buck v. Holt*, 74–294.

Where the ground upon which the lower court gives judgment is that, upon the facts specially found, plaintiff is not entitled to recover, it is not necessary that the abstract on appeal contain the evidence or the instructions of the court: *Conners v. Burlington, C. R. & N. R. Co.*, 71–490.

A court cannot, on appeal, interfere with the taxation of costs, where the abstract does not show that the court has before it all the evidence or showings upon which the lower court acted: *McNider v. Sirrine*, 84–58.

Must purport to contain all the evidence: An abstract which states that all the evidence in the case was reported and certified to by the reporter of the court, and duly certified by the court as being all the evidence offered in said trial, will not be sufficient to enable the court to try the case *de novo* if it fails to state that it (the abstract) contains all the evidence, that is, an abstract of all the evidence upon which the case was tried: *Cassady v. Spofford*, 57–237; *Ward v. Snook*, 61–610; *Hall v. Harris*, 61–500; *Phenix Ins. Co. v. Findley*, 59–591; *Ohrt v. Ober*, 51–540; *Conwell v. House*, 57–754; *Names v. Names*, 74–213.

If there is no statement in the abstract that it contains all the evidence on a particular matter the presumption with reference to a ruling as to that matter will be in favor of its correctness: *State v. Wright*, 68 N. W., 440.

The court cannot review a question involving the evidence upon which the action of the lower court is based, when the abstract does not show that it is an abstract of all the witnesses, or an abstract of all evidence introduced and offered on the trial: *In re Estate of Holderbaum*, 82–69.

Where the questions presented are such as can only be considered by reference to the testimony, and it appears that the abstract is not an abstract of all the evidence, questions raised will not be considered: *Shattuck v. Burlington Ins. Co.*, 78–377; *Neitz v. Hilker*, 84–459.

Where it is necessary that the abstract should contain all the evidence, it is not sufficient that it states that it contains all of the material evidence: *McCoy v. American Emigrant Co.*, 76–720.

While the abstract should purport to contain all the evidence, it is not usually necessary nor desirable that it should, in fact, contain all the evidence: *Huff v. Farwell*, 67–298.

The language of the record may be abbreviated in an abstract, but it is not proper for counsel to determine what are the facts established, or what is the effect of the evidence, or to substitute what they may consider as substantially the same: *Blohm v. Sweney*, 66–604.

A statement in an abstract that it contains "all the evidence bearing upon or introduced to sustain the issues and findings as to which plaintiff appealed," *held* not sufficient: *Roe v. Wilmot*, 51–689.

An abstract which purports to contain the testimony in "so far as the same is necessary to a correct understanding and consideration of the questions involved and presented for the decision of the court," does not show that the court has all the evidence before it, so that it can pass upon the sufficiency of the evidence to sustain the verdict: *Leiber v. Chicago, M. & St. P. R. Co.*, 84–97.

Abstracts in law actions are only required to be sufficiently full to present the facts in regard to the questions the supreme court is required to determine, and it will not dismiss an appeal or affirm a judgment merely because the abstract does not purport to be a complete abstract of the entire record in the case: *Foley v. Tipton Hotel Ass'n*, 71 N.W., 236.

As to when it is necessary that the record shall contain all the evidence in order to enable the court to consider questions presented on appeal, see notes to § 4139.

What sufficient to show that the abstract contains all the evidence: The statement in the abstract to show that all the evidence is comprehended therein is sufficient, if the opposite party and the court are fairly apprised that the appellant claims that he has presented an abstract of all the evidence, and in such cases the court will presume that he has, unless appellee sets out additional evidence: *Miller v. Wolf*, 63–233.

Where an abstract contains a statement that it is an abstract of all the evidence, it is assumed, not only that this statement is true, but that the evidence was made of record by due certification, unless it is made to appear

to the contrary; but where the certificate relied upon is set out, and appears to be insufficient, that presumption will not be entertained: *Alexander v. McGrew*, 57-287.

An abstract stating that "the testimony was taken on written deposition, and was essentially as follows," is not sufficient to show that the abstract contains all the evidence: *Britt v. Case*, 58-757.

Where the abstract stated that' 'the foregoing evidence is by the court duly certified to be all the evidence offered by either party on the trial of this cause," *held*, that it would be presumed that the evidence had properly been made of record by a bill of exceptions: *Mucleod v. Geyer*, 53-615.

A recital in the abstract that it was an abstract of all the evidence, and that within a proper time a bill of exceptions was filed embracing in the record the testimony set out, *held* sufficient to show that the evidence was before the court on appeal: *Deere v. Needles*, 65-101.

Where the abstract purported to contain all the evidence, and recited that the evidence was taken down in writing by order of the court, and made a part of the record, *held*, that there was sufficient to entitle appellant to a trial *de novo: Stoddard v. Hardwick*, 46-160.

Where the abstract purports to be an abstract of all the evidence, and sets out certificates of the trial judge showing that a bill of exceptions was signed, it will be presumed that the evidence was all made of record, and is all before the supreme court, unless an additional abstract is filed by the opposite party: *Bailey v. Mutual Benefit Ass'n*, 71-689.

Where depositions were referred to in the certificate of the judge as being marked by certain letters, and the abstract did not identify the depositions and documents printed therein as being referred to in the certificate, but it was alleged in an amended abstract, filed by appellant, that all the evidence offered, introduced or used in the trial was set out in the original and amended abstracts, which allegation was denied, *held*, that the court would presume that it had all the evidence before it: *Paine v. Means*, 65-547.

Where the abstract stated that a party filed a garnishee's answer "as follows, omitting formal parts," no issue appearing to have been joined thereon, and therefore no evidence having been admissible, *held*, that this statement was sufficient to show that all the evidence on which the court acted in ruling upon a motion for judgment on the garnishee's answer appeared to be presented: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56-245.

Where by the language of the abstract the opposite party and the court are fairly apprised that appellant claims that he has presented all the evidence, it will be assumed that he has done so unless the appellee sets out additional evidence in an amended abstract: *Miller v. Wolf*, 63-233.

Where it is apparent that appellant claims that he has presented an abstract of all the evidence it will be presumed that he has done so in the absence of any abstract of appellee showing additional evidence: *Guinn v. Phœnix Ins. Co.*, 80-346.

Where appellant states that his abstract is an agreed abstract, that fact will be deemed true unless denied by appellee, but after such denial it becomes the duty of the appellant to establish the fact of the agreement: *Shattuck v. Burlington Ins. Co.*, 78-377.

Where a certificate of the judge that the record contains all the evidence essential on appeal, if the abstract sets out the fact that the certificate was made on the date thereof it is not necessary that such certificate be set out in the abstract: *Yant v. Harvey*, 55-421.

In a particular case, *held*, that appellant's abstract sufficiently purported to contain an abstract of all the evidence: *Higgins v. Mendenhall*, 51-135.

If a party wishes to make it appear that his abstract is an abstract of all the evidence, that fact should be specifically stated in the abstract. It is not sufficient to set out in the abstract the certificate of the judge, or clerk or reporter, showing that the evidence is all made of record in the lower court: *Porter v. Stone*, 62-442; *Wisconsin, I. & N. R. Co. v. Secor*, 70-647; *Fulliam v. Muscatine*, 70-436; *Woodrum v. Carraher*, 69-145; *Hasner v. Patterson*, 70-681; *Morgan v. Wilfley*, 71-212; *Drake v. Kaiser*, 73-703; *Polk County v. Nelson*, 75-648; *Ainslee v. Wynn*, 65 N. W., 401; *Capital City State Bank v. Hammer*, 70 N.W., 89; *Collins v. Wilson*, 68 N.W., 916.

A statement in the bill of exceptions that it contains all the evidence will not show that the abstract is an abstract of all the evidence: *Wicke v. Iowa State Ins. Co.*, 90-4.

The fact that the abstract contains a copy of the certificate of the reporter and of the bill of exceptions signed by the judge, does not show that it contains all the evidence: *State v. Strohbehn*, 65 N.W., 304.

Even if the abstract appears to be an agreed abstract, it does not follow from the statement to that effect that it is to be considered as containing the entire record: *Ibid.*

Where in an additional abstract appellee consents that the case may be submitted on the two abstracts so far as a single point is concerned the court may consider that it has before it in such abstracts all the evidence introduced as to that point: *Westervelt v. Huiskamp*, 70 N. W., 125.

A stipulation for submission of a case on the abstracts waiving a transcript does not show that the abstracts contained all the evidence upon which the case was heard: *Koster v. Seney*, 69 N. W., 868.

Abstract deemed true: The abstract filed by appellant, in the absence of an additional abstract, constitutes the record and is regarded as a verity: *White v. Savery*, 49-197.

If appellant's abstract is not denied by appellee and shown to be untrue by an amended abstract it will be assumed to be true: *Ibid.; Kearney v. Ferguson*, 50-72; *Hardy v. Moore*, 62-65.

If appellee files an amended abstract which is not denied it will be assumed to be true: *Kearney v. Ferguson*, 50-72.

In the absence of a denial of appellee's amended abstract or of a reaffirmation of

plaintiff's abstract, the facts set forth in the amended abstract will be deemed true and the court will not resort to the transcript: *State v. Seery*, 64 N. W., 631.

The statements in an additional abstract with reference to whether the original abstract contains all the evidence are deemed true unless denied in another abstract, and denial in the argument is not sufficient: *Jamison v. Weaver*, 87-72.

If appellee's amended abstract is denied by another abstract filed by appellant, then the court will look into the transcript and determine its character: *White v. Savery*, 49-197.

In the absence of an amended abstract denying the statements contained in appellant's abstract, the latter is deemed to be true, notwithstanding such a denial is made in the argument of counsel: *Farmer v. Sasseen*, 63-110; *Weaver v. Kintzley*, 58-191; *Kendrick v. Eggleston*, 56-128.

Where appellee discusses questions raised upon the instructions without objecting or suggesting that they are not truly set out in the abstract, his denial in the amended abstract, that the instructions given and refused are not properly set out, will not be considered: *Roberts v. Leon Loan, etc., Co.*, 63-76.

Where the abstract on its face appears to be full and complete, the statement that it contains all the evidence cannot be overcome by a mere denial by appellee, so as to require an examination of the transcript, but he must set forth the omitted evidence: *Andrews v. Kerr*, 49-680; *Allen v. Bryson*, 67-591; *Mielenz v. Quasdorf*, 68-726; *Aller v. Pennell*, 51-537; *Huff v. Farwell*, 67-298; *McArthur v. Linderman*, 62-307; *Brooks v. Chicago, M. & St. P. R. Co.*, 73-179.

The party filing an additional abstract purporting to supply defects and omissions in the original abstract thereby admits that the two abstracts together contain all the evidence given on the trial: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520; *Wilson v. Palo Alto County*, 65-18; *Cross v. Burlington & S. W. R. Co.*, 58-62; *Conners v. Burlington, C. R. & N. R. Co.*, 74-383.

If an abstract states that it contains all the evidence, but an amended abstract is filed by appellee giving additional evidence, without claiming that, as thus corrected, the abstract does not give all the evidence, it will be presumed that the abstracts together bring all the evidence before the court: *Cross v. Burlington & S. W. R. Co.*, 51-683; *In re Estate of Bagger*, 78-171.

Appellee should set out whatever evidence he claims has been omitted from appellant's abstract and if appellant claims to have furnished an abstract of all the evidence it will be assumed that he has done so unless the appellee sets out additional evidence, and where the additional abstract does not set out the evidence claimed to have been omitted but only deductions and conclusions from appellant's abstract and matter already contained in appellant's abstract, *held*, that such additional abstract should be stricken on motion: *Peck v. Hutchinson*, 88-320.

Even if appellant's abstract contains no averment that all the evidence is found therein, if appellee files an amended abstract setting out evidence alleged to have been omitted from the original, without any statement or claim that the two abstracts together do not contain all the evidence, appellee cannot afterwards urge that the evidence is not all before the court: *Van Sandt v. Cramer*, 60-424; *Starr v. Burlington*, 45-87; *Ferguson v. Davis County*, 51-220; *Cummings v. Browne*, 61-385; *Balm v. Nunn*, 63-641; *O'Brien v. Harrison*, 59-686.

Where the abstract of appellant does not purport to contain all the evidence, the appellee may set forth in his amended abstract other portions, coupled with the denial that with these additions the abstracts contain all the evidence, and will not be estopped from relying upon such statement in denial: *Cartwright v. Copess*, 60-195: *Hall v. Harris*, 61-500; *Howe v. Jones*, 66-156; *Hassett v. Hassett*, 66-304; *Alexander v. McGrew*, 57-287; *Hunter v. Des Moines*, 74-215.

Where the appellee files an additional abstract, but denies therein that the evidence submitted on the trial of the cause was properly preserved and that the two abstracts contain all the evidence offered or introduced on the trial, and no response to such denials is made by appellant, these statements in appellee's abstract will be deemed true: *Love v. Donaldson*, 63-631; *Wilmering v. Western U. Tel. Co.*, 63 N.W., 677; *Hopkins v. Chicago, R. I. & P. R. Co.*, 64 N. W., 603; *Clark v. Tracy*, 68 N.W., 435.

And if such objection is made it will be deemed true, unless appellant shows by an amended abstract that the evidence was properly certified: *Roby v. Hall*, 57-213.

Where appellee in an amended abstract denies the correctness of appellant's abstract and asserts that neither that abstract alone nor the two taken together present the evidence introduced at the trial the case will be dismissed if there is no bill of exceptions: *Barber v. Scott*, 92-52.

A statement in appellee's amended abstract that the two abstracts taken together do not show all the evidence produced on the trial is to be deemed true if not denied, and such defect cannot be cured by a certified bill of exceptions brought to the supreme court and asked to be made part of the record: *Hoffman v. Fritz*, 91-733.

If an abstract is not denied by the appellee in an amended abstract, the record set out will be taken to be correct, as, for instance, it will be assumed that a bill of exceptions was filed. But if such facts are denied in an amended abstract, the denial will be taken to be true in the absence of a transcript: *Brainard v. Simmons*, 58-464.

Unless an additional or amended abstract be denied it will be regarded as presenting the record correctly, and will prevail against the original abstract: *Hart v. Jackson*, 57-75; *Ham v. Wisconsin, I. & N. R. Co.*, 61-716; *Lucas v. Jones*, 44-298; *Daniels v. Langdon*, 52-741: *Cole v. Coskery*, 63-526; *Maxwell v. La Brune*, 68-689; *Brooks v. Chicago, M. & St. P. R. Co.*, 73-179.

And this is true even though it seeks to

eliminate something from appellant's abstract: *Richardson v. Hoyt*, 60-68; *Burkhart v. Ball*, 59-629; *Kearney v. Ferguson*, 50-72.

The statement in an amended abstract that there is no bill of exceptions will be deemed correct unless denied: *Foley v. Hefferon*, 70-572.

Denial: Where an abstract claims to be an abstract of all the evidence, but that statement is denied in appellee's abstract, the statement of appellee will be deemed true unless denied by appellant: *Shattuck v. Burlington Ins. Co.*, 78-377; *Furenes v. Servertson*, 66 N.W., 918; *Kunz v. Young*, 66 N. W., 897.

An amended abstract, not denied, must be assumed as true, and if such amended abstract denies that evidence set out in the original abstract was introduced, the evidence will not be considered as before the court: *Knight v. Chicago, R. I. & P. R. Co.*, 81-310.

An amended abstract which is not denied will be deemed true, and if such amended abstract denies that matters appearing in appellant's abstract are a part of the record they will not be considered: *Cox v. Mason City & Ft. D. R. Co.*, 77-20.

Where appellant's abstract does not show that the evidence has been certified, and the appellee's amended abstract states that the evidence has not been certified, that statement will be deemed true unless denied by appellant: *Crawford v. Berryhill*, 66 N.W., 876.

Where an additional abstract was filed by the appellee denying that appellant's abstract contained all the evidence, and showing that the motion for a new trial was not filed within the time required by statute, and where appellant denied the additional abstract but failed to file a transcript, *held*, that as there was no extension of time for filing the motion for a new trial, all questions depending upon it or upon the evidence would be disregarded: *Riegelman v. Todd*, 77-696.

Where the abstract of appellant was denied by an additional abstract of the appellee, and appellant filed an amendment to its abstract but did not deny the additional abstract, *held*, that the supreme court would not refer to the transcript to determine the matter, but would accept the statement of appellee's abstract as correct: *Brooke v. Chicago, R. I. & P. R. Co.*, 81-504.

An amended abstract denying that all the evidence is set out in appellant's abstract and denying that any transcript of the reporter's notes has been filed and made a part of the record, which amended abstract is itself not denied, will be deemed true: *Harper v. Gleyslein*, 85-709.

Where the appellant sets out evidence in his abstract as having been made of record in the lower court, and the appellee files his certificate with the clerk of the lower court showing the fact that no translation of the shorthand notes has been deposited or filed in his office, and that therefore the evidence set out in the abstract is not of record, such certificate is to be regarded as an amended abstract showing the true condition of the record and denying the correctness of appellant's abstract: *Harrison v. Snair*, 76-558.

Where after appellee had filed an abstract denying the correctness of appellant's abstract and amendment a stipulation was entered into that such abstract and amendment would be fully sustained by the transcript of the record if filed, *held*, that such stipulation was a withdrawal of appellee's denial and obviated the necessity of filing a transcript: *Lindsley v. Western Mut. Aid Soc.*, 84-734.

Where appellant denies the correctness of appellee's additional abstract and furnishes a transcript, the court may try the case *de novo*: *Hoyt v. McLagan*, 87-746.

Where appellant's abstract claims that it is a presentation of all the evidence, and appellee presents an additional abstract containing additional evidence, but claiming that the two abstracts together do not present all the evidence, such allegation of the additional abstract will be deemed true unless denied by appellant. (Overruling *McArthur v. Linderman*, 62-307): *Goode v. Stearns*, 82-709; *Turner v. Ottumwa R., etc., Co.*, 93-799; *Fairbairn v. Haislet*, 90-143.

Where appellee denies the correctness of appellant's abstract and amends the same for the purpose of presenting his appeal, without undertaking to correct mistakes or supply defects in the original abstract, nothing further being presented by the appellant, this denial will be taken as true and appellant's abstract will be held to be incomplete: *Chapin v. Garretson*, 85-377.

Where appellee files an abstract setting out some evidence in addition to that set out by appellant, but claiming that the abstracts together do not contain all the evidence, the cause cannot be tried *de novo*: *State v. Roenisch*, 77-379.

Where appellee presents an additional abstract, but with the statement that both abstracts do not contain all the evidence, and this additional abstract is not denied by appellant, the court cannot consider that it has all the evidence before it, and cannot determine questions depending upon a consideration of the testimony: *Carson, etc., Co. v. Knapp, etc., Co.*, 80-617.

Where appellee filed an additional abstract denying the correctness of appellant's abstract, and appellant filed a statement practically reaffirming the correctness of the abstract, *held*, that there was a sufficient denial of the additional abstract: *Joy v. Bitzer*, 77-73.

It is not the practice of the court to strike out portions of an additional abstract on the ground that they are not justified by the record, but the correctness of such abstract is questioned by a printed denial of the statements in the nature of a reply, which may if necessary contain a fuller abstract of the record in explanation of the denial: *Briggs v. Coffin*, 91-329.

Where appellee filed an additional abstract containing a denial that the two abstracts together presented all the evidence, and appellant then filed an additional abstract setting out other evidence and controverting the denial in appellee's abstract and thereupon appellee still further denied that all the abstracts and amendments embraced all of the evidence, *held*, that this

denial by appellee would be deemed true unless further controverted by plaintiff: *Prescott v. Riverside Park R. Co.*, 68 N. W., 831; *Pioneer Implement Co. v. Sterling Mfg. Co.*, 71 N. W., 409.

When the abstracts of parties present an issue of fact as to the state of the record in a law action, the question must be settled by reference to the bill of exceptions, which it is the duty of the appellant to furnish: *Zimmerman v. Merchants' & Bankers' Ins. Co.*, 77–350.

Therefore, where there was no bill of exceptions, and the appellee filed an additional abstract denying that certain instructions complained of, and set out in appellant's abstract, were ever filed, and the additional abstract was not denied, *held*, that a motion to strike the instructions from the record would be sustained: *Ibid.*

A denial in argument alone is not sufficient to overcome the presumption in favor of the truth of appellant's abstract: *Anglo-American Land, etc., Co. v. Bush*, 84–272; *Jamison v. Weaver*, 87–72; *Kunz v. Young*, 66 N. W., 879.

In a particular case *held* that there was a sufficient denial of appellant's abstract to make it necessary for him to furnish a transcript: *Cord v. Barry*, 71 N. W., 228.

Name of judge: A failure to comply with the rule requiring abstracts to show the name of the trial judge, will prevent the appeal being considered until such defect is corrected: *Kissinger v. Council Bluffs*, 72–471; *Pitkin v. Peet*, 64 N.W., 793.

Opinion of lower court: It is not improper to present in the abstract or in an additional abstract the written opinion of the lower court rendered in connection with the decision of the case, and such opinion will not be stricken from the abstract on motion: *Mellerup v. Travelers' Ins. Co.*, 63 N. W., 665; *Mitchell v. Colby*, 63 N.W., 769; *Gregg v. Spencer*, 65 N.W., 411; *McLean v. Ficke*, 62 N.W., 753; *Williams v. Tschantz*, 88–126.

SEC. **4119. Trial term.** The clerk of the supreme court shall docket causes in which the appellant's abstract has been filed fifteen days before the first day of the next term of the supreme court; if the abstract is filed thereafter, it shall be docketed for the next succeeding term. No cause shall be tried which has not been docketed as above provided, nor unless the notice of appeal has been served thirty days or more before the first day of said term, except by consent of parties.

SEC. **4120. Dismissal or affirmance.** If an abstract of the record is not filed by appellant thirty days before the second term after the appeal was taken, unless further time is given by the court or a judge thereof for cause shown, the appellee may file an abstract of such matters of record as are necessary, or may file a copy of the final judgment or order appealed from, or other matters required, certified to by the clerk of the trial court, and cause the case to be docketed, and the appeal upon motion shall be dismissed, or the judgment or order affirmed. Denial of abstracts, additional abstracts or transcripts may also be filed. [C.'73, § 3181; R., § 3514.]

[The following decisions were made under § 3181 of Code of '73, materially differing from this section.]

In the absence of the certificate of the clerk below, excusing the failure to file a transcript on the ground that he has not had sufficient time to prepare it, the appellee may, by filing a certified transcript of the judgment, have the judgment affirmed on motion. This section is not merely directory, but must be complied with to entitle a party to be heard in the supreme court, unless waived by agreement or act of the appellee: *Turner v. Hine*, 37–500.

Appellee can only have the appeal dismissed or the judgment affirmed when notice of appeal has been served the proper length of time before the term; but a showing that the clerk was served in time will be sufficient to authorize an affirmance on motion for failure to file the transcript, without a showing that the party also was served: *Pratt v. Western Stage Co.*, 26–241.

By the provisions of 15 G. A., ch. 56, § 1, the appeal was not to be dismissed or the judgment affirmed on account of failure to docket or file transcript, if it appeared that the appeal was taken in good faith and not for delay: *Engleken v. Schultz*, 40–703.

If appellee, upon being served with the abstract, or within a reasonable time thereafter, does not indicate to appellant that he desires a transcript, but insists thereon at the term at which the cause is to be submitted by filing a motion to dismiss or affirm, time will be given to procure a transcript, and if necessary a continuance for that purpose will be granted: *White v. Savery*, 49–197.

Where the parties stipulate that a transcript shall be dispensed with unless the court requires one to be filed and provide that reasonable time shall be granted for that purpose, the court will grant such time: *Artz v. Culbertson*, 71–366.

The court will not dismiss the appeal on motion for failure to file a transcript, but order the transcript to be filed and continue the case until it can be done: *Manson v. Ware*, 63–345; *Aldrich v. Price*, 57–151.

Failure to file a transcript can only be taken advantage of by motion to dismiss the appeal or affirm the judgment, and cannot be urged on final hearing: *Holmes v. Hull*, 48–177.

A judgment of affirmance may be set aside upon a proper showing such as to authorize such action: *Scarf v. Patterson*, 37–503.

If the motion to dismiss the appeal is

overruled by the court *pro forma*, in order that it may be left for determination on the final submission. such action will not prevent its full consideration on the final determination of the cause: *Green v. Ronen*, 62–89.

The provision of the rules of the court for affirmance on motion for failure of the appellant to file a printed abstract, *held* not to supersede the provision of § 3182 of Code of '73 authorizing an affirmance on motion for failure to file the transcript with the clerk, but, *held*, that in the latter case appellee, to be entitled to an affirmance, must file a certified copy of the judgment as a basis of the court's action, which was not required where the failure was merely to file the printed abstract: *Hunger v. Patterson*, 37–501.

An appeal which has been properly perfected will not be dismissed merely because of a defective record, but will be affirmed or reversed as the record will justify: *Zimmerman v Merchants' & Bankers' Ins. Co.*, 77–350.

An appeal will not be dismissed on account of failure of the appellant to file the transcript within the prescribed time, when it appears that the appeal was taken in good faith and not for delay, and that the delay in prosecuting it was unavoidable and partly by consent: *McKay v. Woodruff*, 77–413.

Appellee is not entitled to have an appeal dismissed on a suggestion or request made in argument only, or after argument. He should file a motion for that purpose, showing the failure of which he complains, and make demand for a dismissal: *French v. French*, 84–655.

Failure to file an abstract within the time required will not be made a ground for affirming the judgment where such failure is due to the pendency of negotiations for a settlement, and such abstract and arguments are afterwards filed: *Price v. Price*, 91–693.

SEC. **4121. Fees prepaid.** No case shall be docketed until the fees provided by law therefor have been paid.

SEC. **4122. Transcript—when required.** No certification of the record shall be required, unless ordered by the supreme court or a judge thereof, which order must be made upon an application in writing or by motion, designating the matters and things of record desired to be included therein and showing the necessity therefor. The order, if granted, shall contain similar designations, and show the parts to be given by an abstract of the original record, and the portions to be by transcript, and may require any or all the matters to be presented by an amended abstract, and be transmitted by the clerk of the supreme court to the clerk of the lower court. The appellant, upon notice or copy of the order being received by him, shall promptly pay or secure to the clerk's satisfaction his fees and expenses for preparing and forwarding such record, and, upon failure so to do, the appeal, upon motion, may be dismissed or the judgment affirmed, as the appellee may elect. The translation of the original notes of the shorthand reporter, certified by him to be true and correct, shall constitute a part of the record, and shall be sent up in its original form in lieu of a transcript thereof when a transcript of the evidence is required, and shall be returned to the clerk of the court of the proper county after the cause has been determined by the supreme court. [26 G. A., ch. 64; 22 G. A., ch. 35; C. '73, § 3179; R., § 3511; C. '51, §§ 1975–6.]

[The following decisions were made under § 3179 of Code of '73 which, both in its original form and as amended, differed materially from this section.]

Appeal perfected: Where the abstract states that plaintiff appealed it will be assumed, in the absence of any showing to the contrary, that everything was done which was necessary in order to take an appeal: *Day v. Hawkeye Ins. Co.*, 72–597.

The appeal is not taken and perfected until the proper notice is served on the clerk of the court; *Fitzgerald v. Kelso*, 71–731; *State v. Rogers*, 71–753.

The appeal is perfected when service of notice is made, etc., as here contemplated, although the notice to co-parties provided for in § 4111 is not given: *Moore v. Held*, 73–538.

Fee for transcript: The appeal is not perfected until the fees for transcript are paid or secured, and giving a *supersedeas* bond cannot be regarded as "securing" such fees; and *held*, that after service of notice of appeal and filing of *supersedeas* bond, but before paying or securing costs of transcript, appellant had the right to abandon his appeal, and that the trial court had authority to entertain application by such party for a new trial, and grant it: *Loomis v. McKenzie*, 57–77.

The time within which the appeal is to be perfected by paying or securing the fees for transcript is not fixed. Filing an abstract and having the cause docketed is evidence of good faith, and the cause will not be dismissed for want of transcript. While one must be furnished, if insisted upon by appellee, time will be given to do so, unless appellant or his counsel have had notice that one would be required, and through negligence have failed to furnish it: *Fairburn v. Goldsmith*, 56–347.

As no transcript is necessary until a conflict arises as to the sufficiency of the abstracts, it is not necessary to tender the

clerk's fees for such transcript until a transcript is required: *Slone v. Berlin*, 88–205.

There is no provision fixing the time within which an appeal must be perfected by paying or securing the fees of the clerk for transcript: *Bruner v. Wade*, 85–666.

By the provisions of § 2412, officers are not entitled to demand their fees in advance, in actions to enjoin liquor nuisance, and therefore an appeal in such case will not be dismissed for failure to pay or secure the clerk's fees for transcript: *Searles v. Lux*, 86–61.

The *supersedeas* bond does not operate to secure the fees of the clerk within the requirements of this section: *Peterson v. Hays*, 85–14.

Failure to file transcript: The objection that appellant has not filed a transcript must be raised by motion and not after submission upon the argument: *Simplot v. Dubuque*, 49–630.

Appeal dismissed or judgment affirmed for failure to file abstract, see § 4120.

When abstract is to be deemed denied so that a transcript is necessary, see notes to § 4118.

Change of transcript: The motion of appellee to strike the evidence from the abstract, and to affirm the decree of the district court on the ground that certain exhibits were removed from the transcript after it had been prepared, will be overruled where it appears that they had been detached and placed in a safe to prevent loss, and it is not shown whether the transcript had been made a part of the record at the time the exhibits were removed and it appears that the exhibits were inserted in their proper places in the transcript, after which it was duly certified, and, as it appears in this court, is regular and sufficient: *Van Ormer v. Harley*, 71 N. W., 241.

Transcript may be unnecessary; reporter's notes: Where the abstract of appellant is satisfactory to the opposite party, there is no necessity for the clerk's transcript, nor for the transcript of the reporter's notes which have been properly filed in the original form in the court below. The appellant may make out his abstract from whatever source he sees fit: *Hampton v. Moorhead*, 62–91.

If the abstract is not controverted by appellee, the court will not look into the transcript of the original evidence, nor will it refuse to try the case simply because such transcript is not filed: *Austin v. Bremer County*, 44–155.

Denial of correctness of abstract: The amendment to § 3179 of Code of '73 was intended to encourage the presentation of cases without encumbering the records with a transcript, and the sufficiency of the abstract to present the evidence should not be denied by the appellee without good cause: *Goll & Frank Co. v. Miller*, 87–426.

Where a motion was made to tax the costs of transcript and amended abstract to appellee, and afterwards it was stipulated that the case should be tried on an amended abstract, *held*, that such stipulation was a confession that the record was not sufficiently presented in the abstract and that the motion should be overruled: *Winter v. Central Iowa R. Co.*, 80–443.

Where it appears that the abstract contains the substance of the entire record and should not have been denied by appellee, motion of the appellant to strike the denial and tax the costs thereof and of the transcript to appellee will be sustained: *Taylor v. Chicago, M. & St. P. R. Co.*, 80–431.

As to denial of correctness of abstract, see notes to § 4118.

Original papers: The supreme court will not recognize nor examine the original papers in a case transferred to it from the lower court except the evidence on which the case is tried in equity. And where the appellant insists that all the evidence is before the court, and that allegation is denied by appellee, it cannot be established by reference to a certificate of the evidence filed in the lower court and transferred with the original papers to the supreme court, instead of being certified by transcript: *Cox v. Macy*, 76–316.

For the same reason the fact that an appeal is taken when put in issue cannot be established by the original notice of appeal of which no transcript is furnished: *Ibid.*

SEC. **4123. What sent up.** When certification of the record is required, the designated papers, notices, shorthand reporter's translation of his report, depositions, exhibits identified as evidence, notices of appeal with return or acceptance of service thereon, and any other paper filed in the case, or any part thereof, may be transmitted to the supreme court in the original form, or by a transcript of the same, but all entries of record must be by transcript. The clerk of the trial court shall verify his return, whether it be of the record or transcription thereof, by his certificate, under seal, distinguishing between originals and transcripts, and such certification so made shall constitute a part of the record in the supreme court. [C.'73, § 3184; R., § 3512; C.'51, § 1977.]

Matters outside the record cannot be considered: The record of the proceedings in the lower court is the only basis for action in the supreme court. Extrinsic evidence cannot be considered: *Bell v. Pierson*, Mor., 21.

The supreme court has no original jurisdiction, and cannot review or correct judgments of the lower court upon motion and affidavits outside of the lower court, showing fraud in the procurement of the judgment: *Powell v. Spaulding*, 3 G. Gr., 417.

Even in an equity case the supreme court cannot hear depositions taken after the trial of the case in the court below and never submitted to such court: *Perkins v. Testerment*, 3 G. Gr., 207.

An amended return of service of notice cannot be filed originally in the supreme court: *Pilkey v. Gleason*, 1–85.

The record in the supreme court cannot be changed or explained by affidavits presented for that purpose, nor by the certificate of the clerk of the court below, except so far as such certificate is as to the matters appearing of record in his court: *Musgrave v. Brady*, Mor., 456.

A paper purporting to be a bill of exceptions, but not certified as part of the record, cannot be considered: *Conrad v. Baldwin*, 3–207.

Cases in the supreme court are tried only upon the record remaining in the court below, certified by transcript. The transcript cannot be altered, added to or contradicted by matter *dehors* the record: *Blanchard v. Devoe*, 80–521.

Appeals to the supreme court are based upon the records of the case in the court from which they are brought, and it is not competent to explain, contradict or extend the recital of the record by affidavits or certificates: *McArthur v. Shultz*, 78–364.

Therefore, *held*, that a certificate of the trial judge as to matters transpiring between the attorney and the judge in the lower court which were not of record could not be considered: *Ibid.*

Improper remarks by the judge in the presence of the jury, made a ground of motion for a new trial, should, for the purpose of appeal from a ruling of the court on such motion, be preserved by bill of exceptions and not by affidavits in the lower court: *State v. Hall*, 79–674.

Misconduct of attorney in the trial of a cause cannot be shown on appeal by affidavit. Such misconduct must be made to appear by bill of exceptions or certificate of the lower court: *State v. Clemons*, 78–123; *Knœbel v. Wilson*, 92–536; *Little Sioux Savings Bank v. Freeman*, 93–426.

An argument of counsel of which complaint is made will not be considered upon appeal, where the abstract fails to show that it was preserved by a bill of exceptions: *Nelson v. Chicago, M. & St. P. R. Co.*, 77–405.

Affidavits and counter-affidavits of counsel filed in the supreme court with reference to what was made of record in the lower court cannot be considered: *Rosenbaum v. Partch*, 85–409.

The fact that parties stipulate that evidence in another case may be used in an action does not make the evidence in such other case a part of the record, it not appearing that any such evidence was introduced: *Pitts v. Lewis*, 81–51.

It is not competent to contradict or vary or extend the record of the district court by certificates or affidavits filed in the supreme court: *Barber v. Scott*, 92–52; *Ford v. Easley*, 88–603; *State v. Black*, 89–737.

Where it is claimed that a juror had previously expressed an opinion in the case, the fact that he was properly examined as to whether or not he had expressed such opinion must appear on the record, and cannot be shown by affidavit: *Light v. Chicago, M. & St. P. R. Co.*, 93–83.

It is not competent to overcome the presumption in favor of the proceedings in a trial court, in regard to matters which occurred in presence of the court by means of an affidavit attached to a motion for a new trial: *State v. Kennedy*, 77–208.

Therefore, where a motion for a new trial on the ground that special *venires* were improperly issued was supported by affidavit of an attorney for defendant, but the transcript failed to show the irregularity complained of, *held*, that the facts in regard to the impaneling of the jury should have been made a part of the record by a bill of exceptions, and in the absence of such showing it would be presumed that the jury was properly impaneled: *Ibid.*

Where it is necessary to refer to the transcript in order to determine whether the evidence was certified in the lower court and whether the appeal was properly taken, the abstract cannot be supported by the original certificate of the judge and notice of appeal transmitted to the supreme court with the original papers in the case instead of by transcript: *Cox v. Macy*, 76–315.

The court cannot recognize the original papers as a substitute for the transcript for the purpose of determining a controversy as to the contents of the record: *Lookabill v. Faulks*, 83–423.

Evidence not made a part of the bill of exceptions but certified by the clerk of the district court cannot be considered a part of the record: *Neitz v. Hilker*, 84–45.

An agreed statement of facts not certified by the judge trying the case, nor otherwise identified and made a part of the record, cannot be considered on appeal: *Underwood v. Lombard Inv. Co.*, 84–25.

Where an objection is raised to the ruling of the court which was partly based on facts known to the judge, in addition to affidavits filed in the case, the statement of the judge should be embodied in the record: *Foster v. Hinsen*, 75–291.

Where the bill of exceptions was filed too late, *held*, that a motion to dismiss the appeal on the ground that the evidence had not been preserved would be sustained, at least to the extent of striking what purported to be the evidence from the record: *Short v. Chicago, M. & St. P. R. Co.*, 79–73.

The documentary evidence introduced on the trial of an equity case should be incorporated in and attached to the shorthand reporter's transcript of the testimony, and certified by the judge, and even if a certificate by the clerk would be sufficient in such cases, under the provisions of § 3652, such certificate should be made within the time allowed for the appeal: *Jamison v. Weaver*, 84–611.

The supreme court cannot on appeal in one case consider what the record shows in a case previously before it, except as the facts of the former case are shown in the record in the case pending, and while reference may be made to an opinion in the preceding case, the court cannot know except as the facts appear by record in the case pending, what the issues were and what was the judgment in the former case: *Garrettson v. Ferrall*, 92–728.

What deemed parts of record: An agree-

ment of attorneys with reference to the extension of the time for filing a bill of exceptions, when reduced to writing and filed, becomes a part of the record without being embodied in a bill of exceptions: *State ex rel. v. Chamberlin*, 74–266.

And see §§ 3749–3753 and notes.

In criminal cases under the provisions of § 5418 affidavits in support of a motion for a new trial become a part of the record when filed: *State v. Whalen*, 68 N. W., 554.

Certificate of clerk: A certificate of the clerk as to what evidence was presented in an action tried by ordinary proceedings will not be regarded; such evidence must be made matter of record by being embodied in the bill of exceptions signed by the judge: *Jordan v. Quick*, 11–9; *Garber v. Morrison*, 5–476.

A paper cannot be made a part of the record by mere certificate of the clerk: *State ex rel. v. Jones*, 11–11; *Harmon v. Chandler*, 3–150.

The bill of exceptions filed in the trial court, a transcript of which is sent to the supreme court, cannot be contradicted by the certificate of the clerk of the trial court. So *held* where the bill of exceptions showed a note sued on to be non-negotiable, while the note filed by plaintiff's attorney after the trial of the cause, and certified by the clerk by copy to the supreme court, showed that it was negotiable: *Daniels v. Gower*, 54–319.

The supreme court cannot notice matters certified by the clerk of the lower court which do not appear of record in such court: *Keller v. Killion*, 9–329.

It is not the duty of the clerk to certify or set out the evidence offered, and the supreme court cannot act upon his statements as to what the evidence was. It must be embodied in a bill of exceptions properly certified by the judge: *Potter v. Wooster*, 10–334.

The certificate of the clerk that certain instructions were given and were objected to by appellant, *held* not sufficient to raise the question as to their insufficiency: *Knight v. Kelley*, 10–104.

The certificate of the clerk as to what appears of record in his court will not prevail against the recital of the record itself as transmitted by him: *Holmes v. Budd*, 11–186.

The affidavit of the clerk is not admissible to contradict his certificate to the transcript showing it to be full, complete and perfect: *Corliss v. Conable*, 74–58.

What purports to be a transcript of the evidence cannot be considered on appeal if it is not certified by the clerk of the district court. Without such certificate the shorthand reporter's transcript of his notes cannot be considered as part of the record: *State v. Tower*, 64 N.W., 764. But now see § 3675.

Certificate of judge is not competent to contradict the recitals in a bill of exceptions: *Pearson v. Maxfield*, 47–135; *Dedric v. Hopson*, 62–562; *Connor v. Long*, 63–295.

A motion to strike evidence from the abstract because not preserved by a bill of exceptions properly raises the question whether there was a bill of exceptions or not: *Morris v. Steele*, 62–228.

On such a motion the record must speak for itself and can neither be attacked nor supported by affidavits: *Ibid.; Moriarty v. Central Iowa R. Co.*, 64–696.

Where it appears that a bill of exceptions is embodied in the abstract without having been properly made a part of the record in the lower court it may be stricken out on motion: *Wadsworth v. First Nat. Bank*, 73–425.

The fact that the evidence is not so certified as to be properly a part of the record may be raised by motion to strike it from the record, but will not be a ground for affirming the judgment, as the record, without the evidence, may show error entitling appellant to reversal: *Bracket v. Belknap*, 40–704.

The supreme court will determine upon final hearing whether the record is such that the case can be considered upon its merits, especially where appellee insists in his argument that it cannot: *Alexander v. McGrew*, 57–287.

Defects in record: An objection that the record on appeal does not properly embody the evidence cannot be supported by affidavit. If the objection does not appear on the face of the record, it may be amended upon suggestion of diminution, or if the record in the court below requires change to make it correspond with the facts, proper steps should be taken to amend it there: *Hughes v. Stanley*, 45–622.

That the entire record is not before the supreme court is not sufficient either to warrant the dismissal of the appeal or to strike from the files what is there. The extent to which a loss of a portion of the record will prejudice the parties will be considered on the final determination of the cause: *Mayo v. Temple*, 16–585.

If it should appear in a law case that the evidence is not all before the supreme court, it would not dismiss the appeal if there were questions which might be determined without all the evidence being before it: *Balm v. Nunn*, 63–641.

If the record is in such condition that the supreme court cannot determine from the pleadings what the issues are, it may remand the cause in order that the parties may have an opportunity to replead: *Lyon v. Tevis*, 8–79.

In the absence of a showing of excuse for not perfecting the record sooner a party will not be allowed to amend the record after a rehearing is granted: *Barber v. Scott*, 92–52.

Evidence must be of record below: A bill of exceptions cannot be considered in the supreme court unless it is embodied in the record certified from the court below: *Platner v. Mofford*, 1 G. Gr., 476.

But if no question is made the court presumes the evidence presented in filing the abstract was properly preserved. If that fact is called in question by a denial, the court will go to the transcript to determine it: *Wilson v. First Presbyterian Church*, 60–112.

Even if it appears that the transcript contains a paper not properly identified by the bill of exceptions, this fact will not warrant the striking the whole bill of exceptions from the record: *Hardy v. Moore*, 62–65.

Where no steps are taken to strike from the files a portion of the record claimed to

have been erroneously certified, it cannot be disregarded on final hearing: *Edie v. Applegate*, 14–273.

As to how writings, etc., must be identified in the bill of exceptions, see § 3752 and notes.

Although the record purports to contain all the evidence heard before a referee, yet if it does not appear that the evidence was preserved by a bill of exceptions, or a certificate of the referee, or otherwise identified, the court cannot consider that it has the evidence before it: *Donovan v. Hayes*, 62–36.

Where it is made to appear that the bill of exceptions was not presented to the attorney of the opposite party, as required by rule of the lower court, such bill of exceptions should be stricken out on motion in the supreme court: *Christenson v. Central Iowa R. Co.*, 63–703.

To secure a review of a law action it is not essential that the evidence and instructions should be certified by the judge. It is sufficient that the evidence is properly made part of the record by bill of exceptions, and the instructions are identified by the bill of exceptions or in other proper manner: *Wilson v. First Presbyterian Church*, 60–112.

Parties may, by stipulation, agree as to what the evidence was on which the case was tried in the court below, for the purpose of having a trial on appeal upon errors assigned, although the case is equitable: *Hutchinson v. Wells*, 67–430.

Insufficient record: Where the evidence and instructions referred to in the bill of exceptions, and by it made part of the record, are not actually included in the transcript, for the reason that they are not found on file by the clerk, the supreme court cannot pass upon errors in rulings upon the evidence or instructions to the jury, it not appearing that the abstract corrects such defect: *Bonney v. Cocke*, 61–303.

Transcript of the record: While a bill of exceptions in an action by ordinary proceedings should be brought to the supreme court by copy, and not in its original form, yet an error in this respect only works a continuance to obtain a correct transcript: *Fernow v. Dubuque & S. W. R. Co.*, 22–528.

A bill of exceptions transmitted to the supreme court with the record, but not embraced in it, nor certified to by the clerk as being a part of the record, cannot be considered: *State v. Leis*, 11–416.

It will not be a ground for striking the transcript from the files that it appears that it was delivered to the attorney of the party, where it is not shown that it was not afterward forwarded in the manner directed; *Dedric v. Hopson*, 62–562.

As to bringing up an original paper for inspection, see § 4124.

In equity cases: On appeal in a case tried by ordinary proceedings, a transcript should be sent up, but if tried by equitable proceedings upon written testimony, the depositions and papers are to be sent up in their original form: *Baldwin v. Tuttle*, 23–66.

If the original evidence is not certified up in such cases, the same presumption obtains in favor of the correctness of the ruling below as in an action at law: *State v. Orwig*, 27–528.

An objection that papers of record in the court below are certified to the supreme court by copy instead of in their original form should be raised in time to permit the other party to correct the error, if it be one, by filing the original papers. Such an objection not made before the final submission of the case will not be regarded: *McDonald v. Farrell*, 60–335.

Certificate of clerk: It is to be presumed that the papers certified by the clerk as a part of the record in the case were properly filed in such case, although the fact of their authenticity and connection with the transaction does not appear from the papers themselves: *Mays v. Deaver*, 1–216.

The certificate of the clerk to which he attaches loose and detached depositions in their original form, stating that the transcript contains the original depositions in the case, is not sufficient to enable the court to try the case anew: *Wetherell v. Goodrich*, 22–583.

Evidence presented in the record in an equity case, triable *de novo*, which is in no way certified or identified as that upon which the trial was had in the court below, will be stricken out on motion: *Bracket v. Belknap*, 41–592.

In an equitable action tried on written evidence it is not necessary that such written evidence be embodied in and preserved by bill of exception, but the certificate of the clerk that it is all sent up is sufficient to enable the supreme court to act upon it: *Ticonic Bank v. Harvey*, 16–141.

A certificate of the clerk that the transcript contains all the evidence "appearing on file" will not be sufficient: *Davenport v. Ells*, 22–296; *Grant v. Grant*, 46–478.

The certificate of the clerk that the record contains all the evidence offered in the court below, in a case tried wholly upon depositions and papers on file, is sufficient to enable the supreme court to consider the case on appeal; and the provisions of § 2742, of Code of '73, requiring a certificate of the judge to be given at the trial term, has no application in such a case: *Cross v. Burlington & S. W. R. Co.*, 58–62.

Where the clerk certified as follows: "The depositions accompanying this transcript, marked A, B, C, D and E, are all of the evidence in such case used on the trial thereof," and the depositions were found thus marked, *held*, that they were sufficiently identified, in the absence of a suggestion or showing of substitution: *Chambers v. Ingham*, 25–222.

The provision of this section as to certificate by the clerk does not make it unnecessary that the evidence in an equity action shall be certified by the judge as provided in § 3652 in order to bring the evidence before the supreme court on appeal: *Teague v. Fortsch*, 66 N. W., 1056. And the certificate of the clerk is for the purpose of identifying and authenticating the record, and not for the purpose of making written evidence a part of the record, which must be done by the certificate of the judge: *Runge v. Hahn*, 75–733.

Reporter's notes: In order to make the evidence as taken down by the shorthand reporter a part of the record, it must be transcribed by him and filed in the court below: *Gaylord v. Taft*, 53–756; *Lowe v. Lowe*, 40–220.

The reporter's translation of his notes does not become a part of the record unless certified to by him as correct. A certificate of the judge that the notes referred to in a bill of exceptions contain all the evidence, will not be sufficient: *Richards v. Lounesbury*, 65–587.

The evidence in a case may be preserved by the shorthand report thereof duly certified, without being embodied in a bill of exceptions: *De Long v. Lee*, 73–53.

Where the judge certifies to a shorthand writer's transcript of the evidence it is thereby sufficiently made part of the record, although the reporter was not appointed by the court, but acted at the request of one of the parties: *Lutz v. Aylesworth*, 66–629.

If there is a certificate of the judge to the reporter's notes, to the effect that they contain all the evidence introduced or offered in the case, it will be presumed that the statement is true, and that no evidence was afterwards introduced, although the judgment was not rendered until some time subsequent to the making of such certificate: *Royer v. Foster*, 62–321.

The identification of certain documents in the reporter's translation of his notes embodied in a bill of exceptions, *held* sufficient to render such documents a part of the record: *Johnston v. McPherran*, 81–230.

The certificate of the reporter to his notes and the translation thereof will not dispense with the certificate of the trial judge to show that all the evidence is of record: *Blanchard v. Devoe*, 80–521.

The reporter's transcript of the evidence, properly certified by him and the clerk, cannot be considered, where it does not appear that the testimony was preserved by bill of exceptions, and that the notes or the transcript was ever certified by the judge: *Neitz v. Hilker*, 85–743.

In a law case, it not being required that the evidence be certified by the judge within the time allowed for the appeal (as is required in equity cases by § 3652), if the shorthand reporter's notes of the testimony are properly embodied in a bill of exceptions, the transcript thereof need not be filed within the time for filing the bill of exceptions, but may be filed within such time as to permit the submission of the case to the supreme court in the manner and within the time fixed by statutory and other rules applicable in such cases: *Hammond v. Wolf*, 78–227.

It is not necessary that the reporter copy the documentary evidence into the transcript of the shorthand notes in an equity case. The judge's certificate being attached to the shorthand notes wherein the documentary evidence, filed with and certified by the clerk, is sufficiently identified, and a transcript of the shorthand notes duly certified by the reporter, and filed within the time required, setting forth a copy of the judge's certificate, constitute a sufficient identification of the evidence: *Richardson v. Gray*, 85–149.

In an action at law where the reporter's shorthand notes were duly certified and made a part of the record, *held*, that this was a sufficient bill of exceptions, although the translation was filed too late to answer the requirements of the statute for filing a bill of exceptions: *Fleming v. Stearns*, 79–256.

As to how reporter's notes are made part of the record, see §§ 3675 and 3752 and notes.

SEC. **4124. Original paper.** Where a view of an original paper or exhibit in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in the manner provided for the transmission of certifications of the record. [C. '73, § 3209; R., § 3525.]

Where the objection made in the court below to the introduction of a contract in evidence was that its appearance indicated that it had been altered since its execution, and there was no evidence tending in any manner to explain such alteration, *held*, that the supreme court could not pass upon the sufficiency of such objection, where the appellant had not secured the transmission to the supreme court of the instrument to which the objection was made: *Wing v. Stewart*, 68–13.

SEC. **4125. Transmission.** The transcript of any paper or exhibit required for use in the supreme court may be transmitted thereto by the clerk of the trial court by express or other safe and speedy method, but not by a party or any attorney of a party. [C. '73, § 3179; R., § 3511; C. '51, §§ 1975–6.]

SEC. **4126. Return of original papers.** If a new trial is granted by the supreme court, the clerk, as soon as the cause is at an end therein, shall transmit to the clerk of the court below all original papers or exhibits certified up from said court, and may at any time return any such papers when no new trial is awarded.

SEC. **4127. Perfecting record.** The lower court, the supreme court, or a judge of either court, may make any necessary orders to secure a perfect record or transcript thereof, upon a showing by affidavit or otherwise, and upon such notice as it or he may prescribe. [C. '73, § 3185; R., § 3524.]

Correction of record: Upon suggestion of diminution of the record, a party may have the record in the lower court corrected or amended by proper proceedings therein, and present the record as thus amended to the supreme court by supplemental abstract: *Mahaffy v. Mahaffy*, 63–55.

Mistake in the record as to date of service of notice of appeal on the clerk may be corrected upon motion in the court in which the notice is filed: *Brier v. Chicago, B. & P. R. Co.*, 66–602.

While evidence not offered or relied upon in the court below cannot be considered by the supreme court on appeal, yet where the record as filed is incomplete, it is competent for the lower court, even after appeal, to order all the evidence submitted at the trial to be certified: *Campbell v. Long*, 20–382.

Where it was made to appear to the court by affidavit that the record was defective, *held*, that the court might, in the exercise of a sound discretion, remand the case for the purpose of ascertaining and embodying in a proper bill of exceptions the evidence upon which the former trial was had: *Tasker v. Marshall*, 4–544.

The record before the court must be taken as conclusive of the facts recited. If erroneous in any respect, the error should have been corrected by proper proceedings in the court below: *Stiles v. Botkin's Estate*, 30–60.

The record on which the case is to be tried on appeal must be made up in the court below. The supreme court will not, on motion, amend such record, as by inserting a finding of facts alleged to be lost: *Dobbins v. Lusch*, 53–304.

Lost records of the court below cannot be supplied by affidavit in the supreme court: *Morris v. Steele*, 62–228.

The substitution of a lost pleading in the court below is to be made in that court and not in the supreme court: *Tomlinson v. Funston*, 1 G. Gr., 544.

Correction of omissions or mistakes: Appeals are based upon the records of the cause remaining in the court below. The supreme court has no jurisdiction to correct mistakes or supply omissions in such records: *Bartle v. Des Moines*, 37–635.

A motion made in the supreme court, supported by affidavits, to strike out the bill of exceptions as not correctly embodying the evidence, cannot be considered: *Hughes v. Stanley*, 45–622.

Any correction of the record must be made in the court below. The transcript is the authoritative record in the supreme court, and, after being certified, it cannot be impeached by a certificate of the clerk of the court below, or by any extrinsic evidence: *Gardner v. Burlington, C. R. & N. R. Co.*, 68–588.

Motion for correction of a record may properly be made in the lower court without any order or leave from the supreme court: *Reynolds v. Sutliff*, 71–549.

Since the abolition of the circuit court, applications for change in or correction of the records of that court should be made to the district court: *DeWolfe v. Taylor*, 71–648.

Supplying lost records: The written evidence upon which an equity case is tried becomes a part of the record, and if it is lost it is to be supplied by substitution. Such loss after judgment, and pending appeal, is not ground for a new trial; *Loomis v. McKenzie*, 48–416.

Where, after the taking of an appeal, the papers were lost without appellant's fault, *held*, that the court below should, on motion, have ordered substitution thereof: *Steiner v. Steiner*, 49–70.

Where a party, while his appeal was pending, filed in the court below a motion to supply his lost notice of appeal, which was done after the hearing of evidence with reference thereto, *held*, that as the evidence was conflicting, the order would not be disturbed: *State v. Dillard*, 52–749.

Where an additional transcript of a justice of the peace filed in the lower court in a proceeding by writ of error from the judgment of such justice of the peace was not sent to the supreme court with the transcript, but appeared to be lost, *held*, that the certificate of the judge and clerk were receivable to show that such amended transcript had been filed in the lower court: *Coffeen v. Hammond*, 3 G. Gr., 241.

Further as to correction or substitution of the record in lower court after appeal, see notes to § 4100.

Partial record: If appellant presents a partial record, which is, however, sufficient to clearly show the ruling appealed from, and it is manifest that the omitted parts could not aid the opposite party, the record will be sufficient to enable the court to pass upon the questions thereby raised: *Hall v. Smith*, 15–584.

SEC. **4128. Stay of proceedings—supersedeas bond.** No proceedings under a judgment or order, nor any part thereof, shall be stayed by an appeal, unless the appellant executes a bond with one or more sureties, to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal; and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When thus filed and

approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby, but no appeal or stay shall vacate or affect such judgment or order. [C.'73, § 3186; R., §§ 3527–8; C.'51, § 1983.]

An appeal is not perfected by the filing of a *supersedeas* bond alone, but service of notice of appeal is also necessary, and until such notice is served, at least on the clerk, such officer should not recall an execution or issue an order to stay proceedings thereunder: *Pratt v. Western Stage Co.*, 26–241.

A bond, irregular in form, *held* sufficient as a statutory appeal bond: *Field v. Schricher*, 14–119.

An order of discharge in a *habeas corpus* proceeding cannot be suspended by *supersedeas* bond pending an appeal: *State v. Kirkpatrick*, 54–373.

Where no *supersedeas* bond is filed, the appeal does not vacate or affect the judgment, and proceedings thereon are not stayed: *Phillips v. Germon*, 43–101.

A *supersedeas* bond is not essential in perfecting the appeal; it does not secure the clerk's fees for transcript, so as to render unnecessary the payment or securing of the same in order to perfect the appeal: *Loomis v. McKenzie*, 57–77.

The giving of a *supersedeas* bond does not supersede or render void a delivery bond previously given to secure the release of attached property: *Williams v. Robison*, 21–498; *State v. McGlothlin*, 61–312.

A *supersedeas* bond given in an action brought by a party claiming a public office, and who has been adjudged entitled thereto, does not suspend his right to exercise such office in pursuance of the judgment, and to receive the salary incident thereto; and therefore in an action on such bond the sureties are not liable for salary accruing pending the suit: *Jayne v. Drorbaugh*, 63–711.

When an order has been determined to have been correctly made, it is then too late for a party to claim relief because he was not allowed to supersede it: *Yetzer v. Martin*, 58–612.

Where, on appeal, judgment as to one party appealing was affirmed, but as to the co-party reversed, *held*, that the party as to whom it was affirmed and his sureties were liable on their appeal bond: *Knight v. Waters*, 15–420.

Sureties on a *supersedeas* bond are not discharged by an entry in the supreme court, by consent, of a judgment by the terms of which extension of time of payment and stay of execution are granted. Their relation to the action is not such as gives them control over it, and the party has a right to do whatever the law authorizes in such cases: *Drake v. Smythe*, 44–410.

A surety on a *supersedeas* bond will be bound by judgment rendered in the supreme court, although he is not a party to the action and has not been served with notice: *Phelan v. Johnson*, 80–727.

Where the appeal is simply dismissed, allowing the judgment in the lower court to remain in full force, such dismissal has the effect of affirming the judgment of the court below, and the parties to the *supersedeas* bond become liable thereon: *Coon v. McCormack*, 69–539.

Where the defense to an action on appeal bond was that the judgment appealed from was fraudulently obtained by depriving defendant of his day in court, *held*, that such fact, if true, was no defense to the judgment rendered in the supreme court upon trial *de novo*, to which defendant appeared and in which he was heard, it not being alleged that such fraud prevented a full and fair trial on appeal: *Knight v. Waters*, 18–345.

The language of this section relating to rents and damages which are to be covered by the bond is a specification only as to the condition of the bond; and if such condition is not contained in the bond, the party executing it cannot in an action thereon be held liable for rents or profits accruing during the appeal: *Gill v. Sullivan*, 62–529.

The taking of an appeal and filing of a *supersedeas* bond do not affect the judgment, which remains in full force, but process thereon is suspended until the appeal is determined; and in case of a decree granting an injunction the injunction remains in full force, and the appeal and *supersedeas* bond do not give the party enjoined a right to violate it: *Lindsay v. Clayton District Court*, 75–509.

It is proceedings on the judgment which are stayed and not proceedings after the judgment or order is made. A judgment or order which is self-executing is not superseded by the filing of a bond: *Allen v. Church*, 70 N.W., 127; *Allen v. Cook*, 71 N.W., 534.

SEC. **4129. Partial stay.** The taking of the appeal from part of a judgment or order, and the filing of a bond as above directed, does not stay execution as to that part of the judgment or order not appealed from. [C.'73, § 3191; R., § 3532; C.'51, § 1985.]

SEC. **4130. Execution recalled.** If execution has issued prior to the filing of the bond, the clerk shall countermand the same. [C.'73, § 3192; R., § 3533; C.'51, § 1987.]

SEC. **4131. Property surrendered.** Property levied upon and not sold at the time such countermand is received by the sheriff shall be at once delivered to the judgment debtor. [C.'73, § 3193; R., § 3534; C.'51, § 1988.]

It seems that this section refers only to personal property: *Swift v. Conboy*, 12–444.

SEC. **4132. Conditions of bond—how fixed.** If a party has perfected his appeal, and the clerk of the lower court refuses for any reason to

approve the bond, or requires an excessive penalty, or unjust or improper conditions, he may apply to the district court or judge thereof, who shall fix the amount and conditions of the bond and approve the same. Pending the application, the judge may, by a written order, recall and stay all proceedings under the order or judgment appealed from until the decision of the application. The bond thus approved shall be filed with the clerk, who shall issue a written order to stay proceedings. [C.'73, § 3187.]

SEC. **4133. Insufficient security — new bond.** The appellee may move the court rendering the judgment or making the order appealed from, or the supreme court, or a judge of either court, if in vacation, upon ten days' notice in writing to appellant, to discharge the bond on account of defect in substance or insufficiency in security, which motion if well taken, shall be sustained, unless appellant shall, within a day to be fixed in the order made and filed therein, give a new and sufficient bond as required by said order. If the new bond is not given, proceedings shall be had in the lower court as though no bond had been given, but a new and sufficient bond may be given at any time with like effect and results as though given in the first instance. [C.'73, §§ 3188–9; R., §§ 3529–30.]

SEC. **4134. Penalty of bond.** If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the condition shall be to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars. [C.'73, § 3190; R., § 3531; C.'51, § 1984.]

Where, in an action to forclose a mechanic's lien, a personal judgment for the amount claimed is rendered against defendant, and the lien is declared established upon the property, and the property is ordered sold upon special execution to satisfy the judgment, and it is directed that a general execution issue for any sum remaining unpaid after exhausting said property, the penalty of the appeal bond should be twice the amount of the judgment rendered. The value of property on which the judgment is especially declared a lien cannot be taken into account in fixing the bond: *Flynn v. Des Moines & St. L. R. Co.*, 62–521.

SEC. **4135. Security for costs.** The appellant may be required to give security for costs under the same circumstances and upon the same showing as plaintiffs in civil actions in the inferior court may be. [C.'73, § 3210; R., § 3526.]

SEC. **4136. Assignment of errors.** Except in actions triable *de novo*, no question shall be considered by the supreme court unless pointed out by an assignment of error, which need follow no stated form, but must clearly and specifically indicate the very error complained of, and, among several points made in demurrer, motion, instructions or rulings, the one, or those relied upon, must be separately stated. The court need consider only such errrors as are thus assigned, but must decide upon each one that is. [C.'73, § 3207; R., § 3546.]

Necessary in a law case: In a law action an assignment of errors is absolutely essential to the consideration of the case on appeal, and it is immaterial that but one point is relied upon, and that this is apparent from the record and argument: *Barnhart v. Farr*, 55–366.

The court cannot consider objections not made in the assignment of error: *Wood v. Whitton*, 66–295.

An objection not made in the assignment, but first raised in the argument, will not be considered: *Roberts v. Cass*, 27–225.

The court can only review errors assigned notwithstanding the provisions of 25 G. A., ch. 96 (see § 3564), that no pleading shall be held insufficient on account of a failure to demur thereto: *Boyd v. Watson*, 70 N.W., 120.

Not necessary in equity: In an equitable action triable *de novo* on appeal, an assignment of errors is not necessary: *Hackworth v. Zollars*, 30–433; *Sherwood v. Sherwood*, 44–192.

Where judgment is entered below on the admissions and allegations of the pleadings in an equity case, the cause on appeal is triable *de novo* on such allegations and admissions, and an assignment of errors is not necessary: *Early v. Burt*, 68–716.

On an appeal from the decision of a court appointing a receiver, in accordance with the prayer of a petition in equity and the proofs thereunder, no assignment of errors is necessary: *Clark v. Raymond*, 84–251.

An equity case cannot be tried as a law case when no errors have been assigned: *Reed v. Larrison* 77–399.

On appeal from ruling on motion or demurrer: When an appeal is taken in an equity case from a ruling upon motion or de-

murrer, error must be assigned: *Powers v. O'Brien County*, 54–501; *Patterson v. Jack*, 59–632.

Trial of equitable actions upon assignment of errors: Where an equity case is not in proper form for trial *de novo*, it may be heard like an action at law on assignment of errors properly preserved by exceptions: *Schmeltz v. Schmeltz*, 52–512; *Cross v. Burlington & S. W. R. Co.*, 51–683; *Jordan v. Wimer*, 45–65; *Lutz v. Kelly*, 47–307; *Lynch v. Lynch*, 28–326; *Jones v. Clark*, 37–586; *Mallory v. Luscombe*, 31–269.

Where a case cannot be tried *de novo* because the abstract fails to show all the evidence, an assignment of error which can be determined only upon the evidence will not be considered: *Giltrap v. Watters*, 77–149.

Record must show error assigned: Where the record does not show that the ruling complained of in the assignment of errors was in fact made, such question cannot be considered: *Borland v. McNally*, 48–440.

What the assignment should show: An assignment of errors should plainly state the error complained of and not merely refer to the parts of the record wherein the objection complained of is said to appear: *Wood v. Whitton*, 66–295.

It is not proper in an assignment to refer to the record in such form as to require an examination thereof throughout in order to ascertain what the error is which is complained of: *Feister v. Kent*, 92–1.

An assignment is not sufficient which makes it necessary to examine the testimony in order to determine just what errors are claimed to have been committed in the admission of such testimony: *Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.*, 66 N. W., 96.

The court is not required to resort to arguments of counsel to show what questions are intended to be raised by the assignments; and *held*, that assignments that the judgment is against the evidence as shown by the agreed statement of facts, and that the judgment is against the law applicable to the facts, and that the court erred in rendering judgment for the plaintiff, were insufficient: *Smola v. McCaffrey*, 83–760.

General assignments of error will not be considered: *Casey v. Ballou Banking Co.*, 67 N. W., 98.

The assignment relating to many different rulings grouped together is not sufficiently specific: *Calkins v. Chicago, M. & St. P. R. Co.*, 92–714.

Assignments such as "that the verdict is contrary to law" or "that the court erred in rendering judgment on the verdict" are too general and will not be considered: *Wood v. Hallowell*, 68–377; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88–364.

An assignment "that the court erred in its action in regard to the jury," *held* too indefinite: *Hannon v. Chandler*, 3–150.

An assignment that there was error in allowing the introduction of evidence objected to by plaintiff, and that the court erred in finding for defendant, *held*, too indefinite: *Garrett v. Wells*, 63–256.

An assignment that "the court erred in overruling the defendant's exceptions to the report of the referee and entering judgment against defendant," *held* not sufficiently specific: *Hoefer v. Burlington*, 59–281.

Assignments of error that the verdict is contrary to law, and that the court erred in admitting testimony on the trial, and that the court erred in excluding testimony on the trial, and that the court erred in overruling defendant's motion in arrest of judgment and for a new trial, are not sufficiently specific: *Armstrong v. Nillen*, 70–51.

The assignment in a particular case that "the verdict over and above the actual damages . . is not supported by the evidence," *held* sufficient: *Waller v. Waller*, 76–513.

Assignments such as that the court erred in its instructions, in sustaining objections to testimony, the court erred in overruling motion for new trial, the verdict is contrary to law, are not sufficiently specific: *Mara v. Bucknell*, 90–757.

Assignments which are not specific and do not point out the very error objected to will not be considered: *Keokuk Stove Works v. Hammond*, 63 N.W., 563.

Assignments *held* not sufficiently specific in the following cases: *Hawes v. Twogood*, 12–582; *Wilson v. Hillhouse*, 14–199; *Morris v. Chicago, B. & Q. R. Co.*, 45–29; *Oschner v. Schunk*, 46–293: *Bardwell v. Clare*, 47–297; *McCormick v. Chicago, R. I. & P. R. Co.*, 47–345; *Nuckles v. Eggspieler*, 47–400; *Moffatt v. Fisher*, 47–473; *Benton v. Nichols*, 47–698; *Betts v. Glenwood*, 52–124; *Black v. Boyd*, 52–719; *Brown v. Rose*, 55–734; *Wilson v. Klokenteger*, 56–764; *Low v. Fox*, 56–221; *Vanderberg v. Camp*, 68–212; *Smith v. James*, 72–515; *Wadsworth v. First Nat. Bank*, 73–425; *McMurray v. Capital Ins. Co.*, 87–493; *Shroeder v. Webster*, 88–627.

Assignments of error in particular cases considered: *Duncombe v. Powers*, 75–185; *Albrosky v. Iowa City*, 76–301; *Kaufman v. Farley Mfg. Co.*, 78–679; *Farmers' Savings Bank v. Wilcka*, 71 N. W., 200.

On demurrer: An assignment of error in the sustaining of a demurrer based on several grounds which does not point out the particular ground as to which it is claimed the court erred is not sufficiently specific: *Waukon v. Strouse*, 74–547; *Blocker v. Schoff*, 83–265; *Barrett v. Kemp*, 91–296; *Esty v. Magee*, 62 N. W., 673; *Guyar v. Minnesota Thresher Mfg. Co.*, 66–83.

Where the assignment is of error in overruling a demurrer but one cause of action being stated in the pleading, and but a single ground of objection urged in the demurrer, the assignment is sufficiently specific: *Sneer v. Stutz*, 93–62.

An assignment of error in the ruling of the court sustaining the several demurrers of different defendants is not sufficiently specific: *Bradley v. Johnson*, 67–614.

On rulings as to evidence: Assignments that "the court erred in admitting improper and rejecting proper testimony," and that "the court erred in admitting certain evidence of the defendant against plaintiff's objection," *held* not sufficiently specific: *Merchants' Union Barbed Wire Co. v. Rice*, 70–14.

An assignment that the court erred in the admission and exclusion of evidence upon the trial against the objections of the defendant is not sufficiently specific: *Chandler & Co. v. Knott*, 86-113.

A general assignment such as that "the court erred in admitting testimony objected to by defendant and in excluding testimony offered by defendant on the trial" is too indefinite: *Buford v. Devoe*, 65 N.W., 413.

An assignment that "the court erred in its ruling upon the objections to questions where the questions and objections are set out in the foregoing abstract," *held* too indefinite: *Dungan v. Iowa Central R. Co.*, 64 N.W., 762.

Assignments that "the court erred in overruling defendant's objections to the evidence offered by plaintiff" and that "the court erred in sustaining plaintiff's objections to evidence offered by the defendant," *held* insufficient: *Burnside v. Eaton*, 64 N.W., 786.

An assignment of error in overruling objections to the introduction of testimony shown in the abstract and objected to by defendant is not sufficiently specific: *Blocker v. Schoff*, 83-265.

An assignment of errors in the admission or exclusion of evidence need not embody the question. It is enough if it specifies the fact and states wherein the court erred: *Union Bldg. Ass'n v. Rockford Ins. Co.*, 83-647.

An assignment of errors in the admission of evidence need not set out the whole examination in which the error is claimed to have occurred: *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88-364.

Errors in instructions: Unless the particular points claimed to be erroneous in instructions are specifically designated, an assignment of error thereon will not be regarded: *Peck v. Hendershott*, 14-40; *Brewington v. Patton*, 1-121.

An assignment of errors, directed against all the instructions given by the court *en masse*, without specifying the particular errors complained of, is not sufficient: *Blair v. Madison County*, 81-313.

An assignment of error in giving certain instructions, in refusing certain others, and in modifying certain others, specifying them in each case, *held* sufficiently specific: *Sherwood v. Snow*, 46-481. And see *Ludwig v. Blockshere*, 71 N.W., 356.

An assignment of errors in giving instructions, designating them by number, as in "instructing the jury that," stating in substance a brief proposition of law, *held* sufficient: *Kendig v. Overhulser*, 58-195.

An assignment of errors stating that "the court erred in giving on its own motion each of the instructions numbered," setting out the numbers of the instructions objected to, is sufficiently specific: *Clark v. Ralls*, 50-275.

The assignment that the court erred in refusing to give certain instructions mentioned by number, and each one thereof, and in giving others mentioned by number, and in giving each thereof, is sufficiently specific: *Wood v. Whitton*, 66-295; *Hammer v. Chicago, R. I. & P. R. Co.*, 70-623.

Where several instructions present but a single proposition, the assignment that the court erred in refusing to give them and each of them specifically, points out the error objected to: *Hathaway v. State Ins. Co.*, 64-229.

An assignment based upon instructions generally, without pointing out specific portions claimed to be erroneous, is not sufficient: *Peck v. Hendershott*, 14-40; *Wicke v. Iowa State Ins. Co.*, 90-4.

Where the assignment indicates clearly the instructions asked and refused, and that the court erred in refusing them such assignment is sufficient without pointing out the particular objection relied upon: *Schuefert v. Chicago, M. & St. P. R. Co.*, 62-624.

Even if a general assignment of errors as to the giving of a number of instructions is sufficiently specific, it would not be good if any of the instructions thus grouped in one assignment is proper: *Koenig v. Chicago, M. & St. P. R. Co.*, 65 N. W., 314.

While it may not be necessary that an assignment of error must, to be considered, specify the very error in any instruction complained of, it is desirable and proper that it should do so: *Ibid.*

Error in ruling on motion: Where a motion is made upon a statutory ground, and the overruling of the motion is assigned as error, such assignment will be sufficiently specific although the motion has specified more than one thing as constituting the irregularity complained of in the motion: *Thomas v. Hoffman*, 62-125.

Assignment of error in the overruling of a motion to dismiss, which motion was based on a single ground, *held* sufficiently specific: *Nichols v. Wood*, 66-225.

A general assignment of error in the overruling of a motion containing separate grounds, is not sufficient: *Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.*, 66 N. W., 96.

An assignment of error in overruling a motion in arrest of judgment based on two grounds is not sufficiently specific: *Moffitt v. Albert*, 66 N. W., 162.

Error in ruling on motion for a new trial: A general assignment of error in overruling a motion for a new trial will not bring before the court the question whether the verdict finds sufficient support in the evidence, where that is only one of several grounds relied upon in the motion: *Leekins v. Nordyke, etc., Co.*, 66-471.

A general assignment of error in overruling motion for new trial, when such motion was based on several different grounds, is not sufficiently specific: *Reilly v. Ringland*, 44-422; *Richardson v. McCormick*, 47-80; *Stevens v. Brown*, 60-403; *Marsel v. Bowman*, 62-57; *Terry v. Taylor*, 64-35; *McCormick v. Chicago, R. I. & P. R. Co.*, 47-345; *Oschner v. Schunk*, 46-293; *Foley v. Kirkland*, 66-227; *Hasner v. Patterson*, 70-681; *Kirk v. Litterst*, 71-71; *State ex rel. v. Harbach*, 78-475; *Koenig v. Chicago, M. & St. P. R. Co.*, 65 N. W., 314.

An assignment of errors in overruling a motion for a new trial, where no specific grounds of error are pointed out, is not sufficient: *Morris v. Chicago, B. & Q. R. Co.*, 45-29.

Where the error assigned was that the

court erred in overruling the first, second and third grounds of defendant's motion for a new trial, and it appeared that the grounds referred to, while stated in three different ways, amounted to the same thing and embraced a single proposition, *held*, that the assignment was sufficient: *Kitterman v. Chicago, M. & St. P. R. Co.*, 69–440.

Where two of the twenty-nine grounds of a motion for a new trial were: First, "the verdict is contrary to law;" and second, "the verdict is contrary to the evidence," and the only reference to the grounds of the motion made in the assignment of errors was the following: "The court erred in not granting plaintiff's motion to set aside the verdict, arrest the judgment, and grant a new trial, for the reasons therein stated," *held*, that the assignment was too general to authorize a determination of the question upon appeal, as to whether or not the verdict was sustained by the evidence: *Duncombe v. Powers*, 75–185.

Error in judgment: An assignment that the court erred in rendering judgment against the party who appeals could be valid only where the court below had rendered its decision in writing, stating the facts found and the conclusions of law thereon, or where the case had been tried by the court and the evidence was all brought up by a bill of exceptions: *Dean v. White*, 5–266.

An assignment that "the court erred in rendering judgment for appellee" is not sufficiently specific: *Tomblin v. Ball*, 46–190.

An assignment that "the court erred in rendering judgment for the defendant" is not sufficient: *Klotz v. James*, 64 N.W., 648.

Deciding each error: The provision requiring the court to decide on each error assigned construed: *Baker v. Kerr*, 13–384.

Errors not argued deemed waived: See notes to § 4139.

Amendment: It is permissible to file an amendment to the assignment of errors in the furtherance of justice, and where it does not appear that the submission of the case to the court has been delayed, nor that the appellee has been in any manner prejudiced, such an amendment will not be stricken from the files on motion: *Hall v. Chicago, R. I. & P. R. Co.*, 84–311.

The assignment of errors like other pleading may be amended after the time fixed for filing the same: *Bunyan v. Loftus*, 90–122; *Buhlman v. Humphrey*, 86–597; *Stanley v. Barringer*, 74–34.

SEC. 4137. Failure to assign errors. If errors are not assigned and filed, and a copy thereof served on the appellee or his attorney ten days before the first day of the trial term, unless good cause for the failure be shown, the appellee may have the appeal dismissed or the judgment or order affirmed. [C.'73, § 3183; R., § 3516.]

If the assignment of errors is filed at the time required, it cannot be stricken from the files, although not served or filed until appellee's argument is filed: *Conner v. Long*, 63–295.

Appeal will be dismissed if assignment of errors is not served in time. It seems that, if properly served on the appellee, he could not complain of the mere non-filing of the same with the clerk: *Independent Dist. v. Independent Dist.*, 48–206.

An assignment of errors presented by appellant in connection with his reply to appellee's argument will not be considered: *Betts v. Glenwood*, 52–124.

Where the assignment of errors is not filed until after the term to which the appeal is taken, nor until after appellee's argument is filed, questions raised by the assignment cannot be considered: *Wise v. Usry*, 72–74.

An assignment of errors not filed within ten days before the first day of the term, and not until appellant's argument is filed, cannot be considered: *Russell v. Johnston*, 67–279.

Whether appellant may, upon proper showing, file an assignment of errors after the time fixed by statute, *quære*: *Walker v. Russell*, 73–340.

Where the assignment was not filed with the abstract but was filed long before the term to which the hearing of the appeal was continued, *held* that the assignment would not be stricken from the files, but the appellant would be required to pay the costs of the argument filed by the appellee in the meantime, the appellee, being plaintiff, having filed the opening argument under the assumption that the appeal was in equity: *Ingersoll v. Hayward*, 92–159.

Where assignments of error were filed out of time and therefore necessitated further argument on the part of appellee, *held*, that the costs of the appeal up to the time of filing the amended assignment should be taxed to appellant: *Feister v. Kent*, 92–1.

Appellee does not, by failing to object because the assignment is not filed with the argument waive the right to object, that it is not filed ten days before the trial term: *Exchange Bank v. Pottorfe*, 65 N.W., 312.

An assignment of errors filed with the argument, though not served within the time required, will not be stricken out on motion where it appears that appellee suffered no prejudice or inconvenience by reason of the delay: *Landon v. Waddick*, 67 N.W., 388.

This section has reference to the original assignment of errors, and not to any amended or additional assignment that may be filed. An amended assignment may be filed on leave to do so; but costs in the case up to the time of filing the amended assignment may be taxed to the appellant: *Stanley v. Barringer*, 74–34. And see notes to preceding section.

Objection for want of assignment must be made prior to the final trial and submission or it will be deemed waived, although the court may, notwithstanding such waiver, require an assignment: *Andrews v. Burdick*, 62–714.

Appellant may, after objection is made to his assignment of errors as not being sufficiently specific, amend such assignment by

leave of court: *Loughran v. Des Moines*, 72–382.

An amended assignment, filed more than ten days before the term at which the cause is submitted, and duly served, will be considered: *Kendig v. Overhulser*, 58–195.

An amended assignment of errors which is not in time for the term to which the case was appealed, but was in time for a subsequent term to which the case was continued, and at which it was tried, *held* to be filed in sufficient time: *Brown v. Rose*, 55–734.

Assignment made at end of appellant's argument, and not objected to by appellee until after the filing of his argument and within two days of the submission of the case, *held* sufficient: *University of Des Moines v. Livingston*, 57–307.

An appeal in an equity case may be dismissed if the abstract does not show exceptions and assignment of errors where the question is as to a ruling on an issue of law, such as a demurrer to a pleading. It is only issues of fact which are triable in equity without exceptions or assignments: *Exchange Bank v. Pottorfe*, 65 N.W., 312.

As the appellee may have the appeal dismissed for failure to assign errors, *held*, that the court would not dismiss on that ground where no motion for dismissal had been made, and no objection had been taken to the sufficiency of the assignment until the close of the argument: *Smith v. Hill*, 83–684.

SEC. **4138. Motion book.** All motions must be in writing and entered upon the motion book, and be heard upon such notice and argument, if any, as the court by rule may prescribe, but no motion shall be submitted without being publicly called by the court, unless the parties otherwise agree. [C. '73, § 3208; R., § 3547.]

Where it did not appear that a copy of the motion to dismiss the appeal had been served on appellant's counsel, *held*, that such motion could not be considered: *Morrison v. Springfield Engine, etc., Co.*, 84–637.

Where there is no proof of service of a motion filed in the supreme court it will be disregarded: *Blasser v. Moats*, 81–460.

A motion will not be considered of which notice is not given as required by the rules: *Wicke v. Iowa State Ins. Co.*, 90–4.

SEC. **4139. Arguments—submission—decision.** The parties to an appeal may be heard orally and in writing, subject to such rules as the court may prescribe; and all causes docketed, not continued by consent or upon cause shown, shall be submitted in the order assigned, unless otherwise directed by the court or the judges thereof. The court may reverse, modify or affirm the judgment, decree or order appealed from, or render such as the inferior court should have done. No cause is decided until the written decision is filed with the clerk. [C. '73, §§ 3194, 3204–5; R., §§ 3536, 3548, 3550; C. '51, § 1989.]

I. ARGUMENTS.

Failure of appellant to file argument or brief will be considered an abandonment of the appeal: *Mores v. Hanchett*, 54–747; *Dinning v. Bement*, 54–156; *Clime v. Phipps*, 62–759; *Lamp v. Sievers*, 66–85.

In such case the decision of the lower court will be affirmed: *Devore v. Adams*, 68–385.

Where appellants file no brief or argument, it will be presumed that they have abandoned their appeal, and it will be dismissed: *Raynor v. Raynor*, 77–282.

While the same rule is not applied to an appellee, in the absence of an argument he cannot complain if the conclusion is against him and the reasons for the decision are not given: *Russell v. Torbet*, 81–754.

Although in an equity case the opening and closing on appeal may fall upon appellee, yet the failure of appellee to file an opening argument will not warrant the appellant in failing to file any argument whatever. If he does so, his appeal will be regarded as abandoned: *Scott v. Neises*, 61–62.

Where in an equity case, appellee, being plaintiff, files his argument and there is no argument by appellant, the appeal is treated as abandoned: *Beams v. Crawford*, 86–753.

The supreme court will never decide questions which are not argued upon both sides, except where there exists an absolute necessity for their decision: *McKern v. Albia*, 69–447.

And the court will stop the consideration of a case not argued by appellee, upon reaching the conclusion that it ought to be reversed on any one ground: *Deeds v. Chicago, R. I. & P. R. Co.*, 69–164; *Gilfeather v. Council Bluffs*, 69–310.

Upon appeal, the decision of questions not argued by counsel on both sides of the case will be avoided if possible: *Humphrey v. Walker*, 75–408.

Where a case is argued by the appellant only, the court will determine no more than is actually necessary for its disposition: *Dodd v. Scott*, 81–319; *State v. Semotan*, 85–57.

As to time for filing abstracts and arguments, see notes to § 4118 and Rules of Supreme Court, § 37.

Assignments not argued: Assignments of error which are not discussed or insisted upon in argument will not be considered: *Clise v. Freeborn*, 29–110; *Soward v. Chicago & N. W. R. Co.*, 30–551; *Snyder v. Eldridge*, 31–129; *Hows v. Fostenson*, 31–600; *Abbott v. Board of Supervisors*, 36–354; *Cook v. Sioux City & P. R. Co.*, 37–426; *Hale v. Gibbs*, 43–380; *Huiras v. Berkey*, 51–701; *Betts v. Glenwood*, 52–124; *Hepmon v. Dubuque*, 52–713; *Rice*

v. Plymouth County, 53–635; *Smith v. Hickenbottom*, 57–733; *Clark v. Epworth*, 61–750; *Beeson v. Chicago, R. I. & P. R. Co.*, 62–173; *Wood v. Whitton*, 66–295; *Wood v. Hallowell*, 68–377; *Marsh v. Chicago, R. I. & P. R. Co.*, 79–332; *Estabrook v. Riley*, 81–479; *Hull v. Independent Dist.*, 82–686; *Young v. Omaha & St. L. R. Co.*, 92–583; *Neimeyer v. Weyerhaeuser*, 64 N. W., 416.

Errors assigned but not argued will be considered abandoned, and questions argued but not presented by the assignment will not be considered: *Duncombe v. Powers*, 75–185.

The supreme court will not consider assignments of error not argued by counsel even though they are stated in his argument: *Manning v. Burlington, C. R. & N. R. Co.*, 74–240; *Patterson v. Seaton*, 70–689.

An objection which is merely referred to in such a way as might be sufficient as an assignment of errors, but is not argued, will not be considered: *Goodnow v. Wells*, 67–654.

Where the only argument made in support of an error assigned is a mere restatement of the assignment, it will not be considered. If counsel are unable or unwilling to suggest cogent reasons in support of an alleged error, the court will not assume that duty: *Marker v. Dunn*, 68–720.

Where no reasons are given in support of an assignment it will not be considered by the court: *Parsons v. Parsons*, 66–754.

Errors assigned but not referred to in the opening argument are deemed waived, and cannot be referred to for the first time in appellant's reply: *Renwick v. Davenport & N. W. R. Co.*, 49–604.

Where the assignments are referred to, and the general theory of the case is argued as inconsistent with the instructions given, and calling for the instructions refused, which giving or refusing is assigned as error, the assignment will not be deemed waived, although the instructions are not specifically discussed: *Clark v. Ralls*, 50–275.

Opening and closing argument: In a trial *de novo* in the supreme court, the party having the burden of proof in the case is entitled to the opening and closing of the argument: *Steel v. Fife*, 48–99; *Alexander v. McGrew*, 57–287; *Devore v. Adams*, 68–385.

And where the burden of proof was upon appellee, *held*, that a reply filed by appellant to appellee's closing argument might be stricken out on motion: *Steel v. Fife*, 48–99.

Erroneous reasoning assigned as the ground of objection to action of the lower court will not prevent the court from considering a valid objection properly made in the lower court: *Gilman v. Donovan*, 59–76.

Filing of argument: An argument will not be stricken out on motion because not filed in time: *Bartle v. Des Moines*, 37–635.

But if the court is asked to do so, it will tax the costs to the party filing the argument after the proper time, unless the failure to file within the time prescribed by the rules has been reasonably excused: *Renwick v. Bancroft*, 59–116; *Smith v. McFadden*, 56–482.

While not striking the argument from the files because not filed in time, the court will, in a proper case, inflict penalties, or continue the case when asked to do so: *Cox v. Forest City & S. R. Co.*, 66–289.

Especially will the argument not be stricken from the files because not filed in time, where the party moving to strike does not desire to file any argument on his part: *Kellam v. McAlpine*, 63–251.

Arguments filed with the clerk after the case is submitted are, by order of the court, not sent to the justices: *Wells v. Burlington, C. R. & N. R. Co.*, 56–520.

Supplementary argument: Appellant has the right to file a supplementary argument after the filing of an additional abstract by appellee: *Tuthill Spring Co. v. Smith*, 90–331.

In a particular case, *held*, that an additional argument by appellee, filed after appellant's reply to appellee's argument, would not be stricken from the files: *Meka v. Brown*, 84–711.

An argument improperly filed, as where appellee has improperly filed the opening argument, may be stricken from the files, but will not entitle the opposite party to judgment for costs: *Devore v. Adams*, 68–385.

Service of argument: Where a cause is submitted in a regular manner it will not be remanded upon the mere statement of opposing counsel, in a petition for rehearing, that the argument was not properly served: *Hall v. Harris*, 61–500.

Where cases are argued together in the supreme court, in an oral argument, the court will look at the printed arguments in the cases to determine what portion of the oral argument was intended to be applicable to each, and a point raised in the oral argument will not be considered in a case the brief of which does not raise such point: *Iowa Homestead Co. v. Des Moines Nav. & R. Co.*, 63–285.

It is improper for counsel to present together questions peculiar to different cases, although such cases have other questions in common: *Hooper v. Sac County Bank*, 72–280. *Guise v. Early*, 72–283.

Taxation of costs: Where an argument contained numerous misleading errors, evidently due to want of time or negligence in reading the proof, *held*, that the costs thereof could not be taxed with the costs in the case: *Fair v. Brown*, 40–209.

It is proper to argue a motion to dismiss in connection with the argument on the main case, and it is not necessary to tax a portion of the costs to appellee: *Arts v. Rocksien*, 67 N.W., 409.

References to abstract: It is improper in a printed argument to refer to matters contained in the abstract without giving the page of the abstract where such matters may be found: *Herriott v. Kersey*, 69–111.

Improper argument: It is improper for an attorney in argument to make a statement of facts outside of the record impeaching the judicial conduct of the judge before whom the case is tried: *Paine v. Frost*, 67–282.

Improper remarks by counsel in printed argument adverted to and criticised: *Sax v. Drake*, 69–760.

On motion of appellant a portion of appellee's argument was stricken out on account of its abusive character: *Cassidy v. Palo Alto County*, 58–125.

Effect of statements: Where counsel in

opening argument made a concession as to the fact of a deed having been recorded, *held*, that he could not in reply question the existence of such record: *Hood v. Smith*, 79-621.

The supreme court will look to arguments of counsel to aid its conclusions from the record, but not for facts which it is within the province of the record to disclose: *In re Bresee*, 82-573.

II. WHAT QUESTIONS WILL AND WHAT WILL NOT BE CONSIDERED ON APPEAL.

a. *Question Not Raised in the Court Below.*

New objections not considered: An objection not made or question not raised in the court below cannot be considered on appeal: *Dean v. Hall*, 4 G. Gr., 425; *Hintermeister v. State*, 1-101; *Mumma v. McKee*, 10-107; *State v. Groome*, 10-308; *Berry v. Gravel*, 11-135; *Rockwell v. Kimball*, 11-524; *Elder v. Littler*, 15-65; *Starry v. Starry*, 21-254; *Kruck v. Prime*, 22-570; *McNaught v. Chicago & N. W. R. Co.*, 30-336; *Evans v. Hawley*, 35-83; *Stanberry v. Dickerson*, 35-493; *State v. Cuddy*, 40-419; *Price v. Burlington, C. R. & M. R. Co.*, 42-16; *Traer v. Reeder*, 45 272; *Davis v. Nolan*, 49-683; *Argall v. Pugh*, 56-308; *Wetmore v. McMillan*, 57-344; *Wire v. Foster*, 62-114; *Babcock v. Board of Equalization*, 65-110; *Goodnow v. Plumb*, 67-661; *Garretson v. Equitable Mutual Life, etc., Ass'n*, 74-419; *Bolton v. McShane*, 79-26; *Kenosha Stove Co. v. Shedd*, 82-540; *Independent Dist. v. District T'p*, 88-713; *Byers v. Johnston*, 89-278; *Beacham v. Gurney*, 91-621; *Ross v. Hawkeye Ins. Co.*, 93-222.

Questions which have not been brought to the attention of the trial court but are first submitted in the supreme court, cannot be considered: *Hinkle v. Saddler*, 66 N.W., 765.

A party is not to be surprised in the supreme court by new objections and issues not made in the court below, based upon defects of which he was not advised by motion or otherwise in the lower court, and which it would have been in his power to remedy had objection been taken thereto in proper time and manner: *Patterson v. Stiles*, 6-54.

An objection cannot be considered on appeal which is different from that made in the court below: *Oliver v. Depew*, 14-490; *Adams County v. Burlington & M. R. R. Co.*, 44-335; *Swan v. Bournes*, 47-501.

The court will not consider objections which are not based upon exceptions taken on the trial in the court below: *Spelman v. Gill*, 75-717.

Objection not raised in the court below, by pleading or in any other way, cannot be considered on appeal. So *held* where it was urged that plaintiff asking equitable relief had not done equity: *Chase v. Kaynor*, 78-449.

Where in an action by a receiver of a corporation against the president to compel him to deliver over a note, the possession of which the receiver claimed to be entitled to, it was directed that the note be delivered to the clerk, and no objection was made to such order in the lower court, *held*, that it could not be questioned on appeal: *Brandt v. Allen*, 76-50.

An objection that counsel in argument refers to evidence not introduced cannot first be made on appeal: *Pence v. Chicago, R. I. & P. R. Co.*, 79-389.

An objection to the action of the court in transferring a case to the equity docket cannot be first taken on appeal: *Gate City Land Co. v. Heilman*, 80-477.

Where a party has assumed in the lower court the burden of proof, he must be held to carry it on appeal, and cannot claim for the first time in the supreme court that the burden does not rest upon him: *Benjamin v. Shea*, 83-392.

Objection to parol evidence as varying a written contract cannot be first made in the supreme court: *Zabel v. Nyenhuis*, 83-766.

Where the attention of the court has been called to a question by motion after verdict for judgment *non obstante*, such question may be raised on appeal without having been renewed in a motion for new trial: *Kiggins v. Woodke*, 78-34.

The record should show affirmatively that at some stage of the proceedings the very defect complained of was presented to the court: *Shuck v. Chicago, R. I. & P. R. Co.*, 73-333.

No change of base: A party must, on appeal, stand in the posture in which he placed himself in the lower court. He cannot change his base after the appeal: *Garland v. Wholebau*, 20-271.

No new issues: An issue not raised in the court below cannot be urged for the first time in the supreme court: *Latterett v. Cook*, 1-1; *Brazelton v. Jenkins*, Mor., 15.

The objection to plaintiff's recovery that his claim is within the statute of frauds, not having been raised below by demurrer or answer, cannot be raised on appeal: *Lower v. Lower*, 46-525.

Ruling cannot be supported on ground not urged below: A ground not urged in the court below cannot, on appeal, be relied upon to sustain a ruling of that court, which is erroneous on the ground upon which it is based: *Knapp v. Sioux City & P. R. Co.*, 65-91.

Service of notice: Objections to the service of the notice will not be considered on appeal where the record facts fail to show any ruling thereon in the lower court: *Des Moines v. Layman*, 21-153.

An objection to jurisdiction not raised in the court below cannot be raised upon appeal unless the record shows the case to be *coram non judice: Bridgman v. Wilcut*, 4 G. Gr., 563.

A question as to the jurisdiction of the court, raised for the first time upon appeal, will not be considered: *Spelman v. Gill*, 75-717.

An objection which does not go to the jurisdiction of the court below, but merely to plaintiff's right to bring action, will not be considered on appeal unless made in the lower court: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

Although the objection that the court has no jurisdiction of the subject-matter or parties may be raised for the first time in the supreme court, yet if it appears that the lower court had jurisdiction of the parties, but only erred as to the kind of proceedings

adopted, the objection cannot be first raised on appeal: *Gould v. Hurto*, 61-45.

Where it appears that there is a want of jurisdiction in the court below, or where the ruling made is in excess of the authority or power of the court, it is the duty of the supreme court to recognize such want of jurisdiction, even if no objection be made: *Groves v. Richmond*, 53-570; *St. Joseph Mfg. Co. v. Harrington*, 53-380.

An objection to a pleading not raised by motion or demurrer in the court below, and passed upon by it, cannot be considered on appeal: *Ruddick v. Patterson*, 9-103; *Williams v. Sill*, 12-511; *Clews v. Traer*, 57-459; *Davis v. Burt*,7-56; *Gifford v. Ferguson*, 19-166; *McCoy v. Cornell*, 40-457.

So *held* as to a defect in verification not objected to in the lower court: *Moses v. Risdon*, 46-251.

Objection that the petition is not sufficiently specific cannot be urged for the first time on appeal: *Davis v. Walter*, 70-465.

Objections to the form of the pleading cannot be taken for the first time on appeal: *Wilson v. Harris*, 68-443.

An amended pleading, filed by a party in the lower court after an appeal is perfected, cannot be considered in determining the appeal, even though the amended pleading is made a part of the record in the supreme court: *Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co.*, 76-702.

Where it appeared that on the trial below the pleadings were deemed properly verified, and the action was regarded as being based upon an open account, *held*, that a party would not be allowed on appeal to claim that the action was not on account and that an amendment to the petition was not duly verified: *Garrett v. Polk County*, 78-108.

Where exhibits attached to plaintiff's petition were in the court below introduced in evidence without objection, *held*, that it was too late on appeal to object that they were only copies and not competent: *Scott v. Chicago, M. & St. P. R. Co.*, 78-199.

The objection that the averments of the reply are inconsistent with those of the petition cannot be raised for the first time on appeal: *Adams County v. Hunter*, 78-328.

Where the petition in an action for fraud does not allege that the party knew the statements constituting the fraud, and without objection on that ground the defendant proceeds to trial, he cannot afterwards raise such objection for the first time on appeal: *Mann v. Taylor*, 78-355.

Objections that pleadings were not properly filed in the lower court, they having been treated in all respects as duly filed, and no objection thereto made, cannot be first raised on appeal: *Winkleman v. Winkleman*, 79-319.

An objection that the relief granted is not asked in the pleading cannot be raised for the first time on appeal: *Iowa Lumber Co. v. Foster*, 49-25; *Williams v. Wilcox*, 66-65.

Issues not raised: Where the parties have themselves tried a case on the theory that the question presented on the trial is raised by the pleadings, the court may properly submit such question to the jury, and a party cannot complain on appeal that no such issue was raised by the pleadings: *Hoyt v. Hoyt*, 68-703.

Error in granting change of venue to an improper court will be reviewed on appeal, although the party did not, in applying for the change, designate the court to which a change was sought: *Sayles v. Deluhrey*, 64-109.

A defense not pleaded in the court below will be disregarded on appeal: *Thompson v. Lee County*, 22-206; *Barlow v. Brock*, 25-308.

A defense which should have been affirmatively pleaded in the court below cannot be raised for the first time on appeal: *Pierce v. Early*, 79-199.

A variance between the allegations and the proofs cannot be first raised on appeal: *Singer v. Given*, 61-93.

Where no objection is raised in the court below based upon an alleged variance between the pleadings and the proof, such objection cannot be first raised upon appeal: *Ressler v. Baxley*, 81-750.

Where evidence has been introduced without objection to establish plaintiff's claim, the defendant cannot urge on appeal that there was a variance between the plaintiff's pleadings and the proofs: *Ætna Iron Works v. Firmenich Mfg. Co.*, 90-390.

Swearing the jury: The supreme court will not disturb a judgment upon the ground that the jury in the cause was not sworn when such question was in no way raised in the court below: *State v. Schlagel*, 19-169.

Objections to evidence, what sufficient, see notes to § 3750.

Objections to instructions, see notes to § 3707.

Special verdict: Objection that the answer to an interrogatory propounded to the jury is not sufficient cannot be first made on appeal: *Timins v. Chicago, R. I. & P. R. Co.*, 72-94.

The form of the judgment cannot be objected to for the first time upon appeal: *Barlow v. Brock*, 25-308.

Where there is but a general exception to a judgment below, and the court is not asked by motion or otherwise to correct it, the appellant will not be heard to allege objections to the form of the judgment on appeal: *Robinson v. Keith*, 25-321.

A motion to vacate an injunction cannot be first made after appeal: *Bishop v. Carter*, 29-165.

Motion non obstante: A question which can only be raised by motion for judgment *non obstante verdicto* cannot be first raised on appeal: *Coonrod v. Benson*, 2 G. Gr., 179.

Objections deemed waived: Objections not made in the court below will be considered waived, and the judgment in an action at law will not be reversed on appeal upon a point not presented to, nor passed upon by, the court below: *Iowa Homestead Co. v. Duncombe*, 51-525.

By pointing out specific objections a party is deemed to have waived any objections not pointed out: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38-446.

New arguments or authorities may be presented on appeal, although no new ques-

tion can be raised: *District T'p v. French*, 40–601.

New reasons: Failure of the party objecting to the action of the lower court to urge a good reason in support of his point or objection will not prevent the supreme court from considering such reason and basing its action thereon: *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

The fact that the appellate court reaches its conclusions upon grounds different from those upon which the court below bases its judgment will have no effect as to such judgment if the conclusion reached is the same: *Richman v. Board of Supervisors*, 70–627.

All objections appearing of record may be urged: A party has the right to make, in the supreme court, all objections which legitimately arise on the record, whether made in the court below or not, except in cases where it is required that objections urged in the court below shall be stated in writing or made to appear of record: *McGovern v. Keokuk Lumber Co.*, 61–265.

Therefore, *held*, that the question of the sufficiency of affidavits to support a motion for change of venue was properly before the supreme court on appeal, although no objection thereto appeared of record, the party appealing having duly excepted to the ruling on the motion: *Ibid.*

b. *What the Record Must Show in Order that a Question May be Reviewed.*

Final action: Where the abstract does not show what the final action of the court was, nor that any appeal has been taken, the court cannot determine the appeal: *Pittman v. Pittman*, 56–769.

A party complaining of erroneous rulings must make it appear from the record that judgment was rendered against him: *Shannon v. Scott*, 40–629.

The court cannot entertain an appeal unless the record presented shows that the court below entered a judgment or order from which an appeal may be taken: *Tague v. Benner*, 71–651.

Must show prejudice: The supreme court will not reverse a cause for error committed below unless it is affirmatively shown by the record that such error was actually prejudicial to appellant: *Blackburn v. Powers*, 40–681; *Fulmer v. Fulmer*, 22–231.

Matters not of record: Evidence, instructions, etc., not made part of the record will not be considered on appeal: *Daniels v. Langdon*, 52–741.

Where the supreme court cannot determine from the record what issues are before it, the case may be remanded, in order that the parties may replead: *Lyon v. Tevis*, 8–79.

Evidence, how preserved and made of record, see notes to § 3750.

How fully the evidence must be set out: In order that rulings on the admission or exclusion of evidence may be reviewed upon appeal, it is not necessary that all the evidence be presented in the record. It is only necessary that the record shall show the rulings admitting or excluding the evidence, the purport of the evidence so passed upon, and the ground of objection: *Smith v. Johnson*, 45–308; *Brooks v. Chicago, M. & St. P. R. Co.*, 73–179.

The evidence in full is required in law actions only when, as an objection to the judgment, it is urged that the verdict is not supported by the testimony. Upon no other question would it be proper to take all the evidence to the supreme court on appeal. The supreme court will pass upon the correctness of instructions or rulings as to the admission or rejection of testimony when the bill of exceptions contains a statement that there was evidence tending to prove the facts to which the instructions are applicable, or states evidence, not necessarily in full, about which the question as to the admissibility of evidence arises: *Kelleher v. Keokuk*, 60–473.

Although the evidence may not be of record so as to be considered on appeal, the court may nevertheless decide questions not involving the consideration of the evidence: *Allison v. Jack*, 76–205.

In such case, if the pleadings show that the instructions are applicable to the issues, and instructions asked are applicable to evidence of the same character as the instructions given contemplate, it may be assumed that there was evidence to which the instructions were pertinent, and error in giving or refusal thereof may be considered: *Ibid.*

In an equity case where the appeal presents the single question as to plaintiff's right to dismiss without prejudice, the testimony taken on the trial not being necessary for the full understanding of the question, the case will be considered on appeal, although the abstract does not show all the evidence: *McArthur v. Schultz*, 78–364.

Where the abstract in a divorce case was complete as to the evidence relied on for a divorce, but did not show the evidence on which alimony was granted, *held*, that the court could pass on the sufficiency of the showing for divorce, and, finding that it was not sufficient, could deny the relief asked: *Tiffany v. Tiffany*, 84–122.

Where it appears that there was evidence on which the action of the court was based, but such evidence does not appear in the record, the action of the court will not be reviewed: *Haas v. Murdock*, 91–749.

Where the evidence is not properly preserved and brought before the supreme court, it can only pass upon questions, the determination of which does not involve an examination of the evidence: *Davis v. Campbell*, 93–524.

Where the evidence is not properly certified and preserved as a part of the record, the supreme court is limited to the consideration of such questions as may be determined without reference to the evidence: *Philbrick v. Unversity Place*, 70 N.W., 6–18.

A general statement in a bill of exceptions as to what the party sought to establish, without a statement of the exact evidence offered, will not be sufficiently definite to enable the court to pass upon an exception to a ruling on such evidence: *Cousins v. Westcott*, 15–253.

A statement in a bill of exceptions that it

contains the substance of the evidence is not sufficient where it is necessary, in order to authorize the court to pass on the action of the court below, that it shall have before it all the evidence in the case: *Thompson v. Mumma*, 21-65; *Burlington Gas Light Co. v. Green*, 21-335; *Lea v. Roads*, 22-408; *McKenzie v. Kitler*, 27-254; *Jemmison v. Gray*, 29-537; *Davis v. Card*, 33-592; *Hubbard v. Epperson*, 40-408; *Walker v. Beaver*, 50-504.

Where the bill of exceptions, after setting out evidence, continued, "being all the evidence offered by the plaintiff to sustain the issue on his part," *held*, that it sufficiently appeared that the evidence was all in the record to enable the supreme court to review the ruling of the lower court on a motion for nonsuit: *Rowan v. Lamb*, 4 G. Gr., 468.

Where it is necessary that the record shall be shown to contain all the evidence, such fact must appear from the judge's certificate and not merely from his reference to such a certificate made by the shorthand reporter: *Walker v. Beaver*, 50-504.

When insufficiency of evidence is relied upon as ground for new trial in the lower court, and the motion is overruled, the ruling cannot be reviewed unless the record contains all the evidence: *State v. Lyon*, 10-340; *State v. Hockenberry*, 11-269; *Parsons v. Chapman*, 11-294; *McCool v. Galena & C. U. R. Co.*, 17-461; *Garber v. Clayton County*, 19-29; *Beal v. Stone*, 22-447; *McKenzie v. Kitler*, 27-254; *Smith v. Cedar Falls & M. R. R. Co.*, 30-244; *Davis v. Card*, 33-592; *Everett v. Union Pacific R. Co.*, 59-243; *Crystal v. Des Moines*, 65-502; *Bowman v. Western Fur Mfg. Co.*, 64 N.W., 775.

The supreme court will not disturb a verdict, on appeal, for insufficiency of evidence to support it, if it has not all the evidence before it: *Barker v. Kuhn*, 38-392.

Where the evidence on which the court below acted is not before the supreme court, the action of the lower court cannot be inquired into so far as it purports to be based upon the evidence: *Skiff v. Mershon*, 7-79.

Where the abstract does not purport to contain all the evidence given and the appellee claims that a large part of it is omitted, the supreme court, upon appeal, will not determine whether or not the verdict was supported by the evidence: *Gray v. Chicago, M. & St. P. R. Co.*, 75-100.

All questions involving the sufficiency of the evidence to support the verdict, and the applicability of the instructions to the evidence, require for their consideration that the evidence shall be of record, and presented in the abstract: *Harrison v. Snair*, 76-558.

The ruling of the lower court, on a motion for a new trial based on a claim that the verdict is not supported by the evidence, cannot be reviewed by the supreme court, unless the evidence is all before it; and it will be immaterial that there is in the record the opinion of the judge of the lower court, in which he expresses his belief that the evidence does not support the verdict: *Kinser v. Soap Creek Coal Co.*, 85-26.

The findings of facts of the lower court cannot be reviewed, where the abstract does not present all of the evidence: *In re Estate of Holderbaum*, 82-69; *Englert v. Roman Cath., etc., Soc'y*, 82-465.

Impeaching evidence: In order that the action of the lower court in rejecting evidence offered to impeach a witness may be reviewed, the record should show the evidence given by the witness and what it was proposed to prove for the purpose of impeachment: *Shephard v. Brenton*, 20-41.

Rulings upon evidence; prejudice must appear: Where the answers to questions objected to, or sought to be elicited by such questions, are not shown by the record, the supreme court cannot review the ruling of the lower court in sustaining or overruling such objections. It must affirmatively appear that the action of the court, even if erroneous, was prejudicial: *Mays v. Deaver*, 1-216; *Speers v. Fortner*, 6-553; *Hanan v. Hale*, 7-153; *Willey v. Hall*, 8-62; *Lucas v. Jones*, 44-298.

When evidence is admitted over objection thereto: In reviewing the action of the court in overruling an objection to a question, the material inquiry is not whether an improper question was asked, but whether improper testimony was received, and error cannot be made to appear until it is shown that the question objected to was answered, and what the answer was: *Thurston v. Cavenor*, 8-155; *Campbell v. Chamberlain*, 10-337; *State v. Keeler*, 28-551; *Manny v. Woods*, 33-265; *Mosier v. Vincent*, 34-478.

It must be made to appear what the witness testified to, and that such testimony was material and prejudicial: *Oliver v. Depew*, 14-490; *Bradley v. Kavanagh*, 12-273.

Where a record is admitted over an objection thereto, but the record is not made to appear in the bill of exceptions, the ruling cannot be reviewed: *Oliver v. Depew*, 14-490.

The record must disclose facts affirmatively showing that the admission of evidence over objection was error to the prejudice of the party objecting, to warrant reversal on that ground: *Green v. Cochran*, 43-544; *Higley v. Newell*, 28-516.

But where evidence is admitted over the objection of a party it will be presumed that the court considered it, and that, if it was erroneously admitted, prejudice resulted: *Leasman v. Nicholson*, 59-259.

Where the record fails to show what questions were asked the witnesses in the examination in chief and upon the cross-examination, the court cannot consider an objection to evidence given on cross-examination on the ground that it was not properly elicited: *State v. O'Brien*, 81-93; *Peddicord v. Kile*, 83-542.

When evidence is excluded: In order to determine whether prejudice has resulted to a party by the exclusion of evidence offered by him, the answers, or the facts proposed to be proved by the witness in response to the question asked, must be made to appear. Unless prejudice be thus shown, the error in sustaining objection to the question or the evidence offered will not be ground of reversal: *Jenks v. Knott's Mexican Silver Mining Co.*, 58-549; *Gronan v. Kukkuck*, 59-18; *Bays v. Hunt*, 60-251; *Kelleher v. Keokuk*, 60-473;

Klaman v. Malvin, 61–752; *Shellito v. Sampson*, 61–40; *State v. Montgomery*, 65–483.

The court must be advised by the record of the character of the proposed evidence and the facts which the party desiring to introduce it claimed would have been established by it: *Votaw v. Diehl*, 62–676; *Paddleford v. Cook*, 74–433.

When the purpose of a question is not disclosed by the record, the supreme court will not interfere with the ruling of the court below in excluding it: *State v. Ross*, 21–467.

Where the bill of exceptions is so indefinite and uncertain that it cannot be determined what the evidence excluded was to which objection is made, the supreme court will not, on appeal, pass upon the correctness of the action of the lower court: *Hunt v. Daniels*, 15–146.

Where it is not shown what was sought to be proved by evidence offered, the supreme court cannot determine whether the exclusion of such evidence was erroneous or not: *Deere v. Bagley*, 80–197; *Hirschl v. Case Threshing Mach. Co.*, 85–451.

Error in excluding evidence cannot be considered where the record fails to show the substance of the evidence sought to be introduced, so that it may appear whether it was competent: *Bener v. Edgington*, 76–105.

In determining whether or not evidence is improperly excluded, the record must show that the evidence was under the circumstances admissible: *State v. Row*, 81–138.

A ruling of the court in refusing to require the production of a written instrument cannot be reviewed on appeal unless it appears that the instrument would have tended to establish the issue on the part of the party calling for it: *Greenough v. Shelden*, 9–503.

Error of the court in excluding evidence will be deemed without prejudice unless the record shows that such evidence was material to the issues: *Atkins v. Anderson*, 63–739.

But if the record states what the evidence rejected tended to prove, such statement will be presumed to be true, and will enable the appellate court to determine whether such rejection, if erroneous, was material: *Spaulding v. Adams*, 63–437; *Chase v. Scott*, 33-309.

If the materiality of the evidence sought to be introduced is apparent on the face of the question asked, it is not necessary that it appear that the party seeking to introduce it state what he expects to prove thereby; but if this is not apparent, the party seeking to introduce the evidence must state what he expects to prove, and thus make the materiality of the question appear: *Mitchell v. Harcourt*, 62–349; *Votaw v. Diehl*, 62–676; *Kuhn v. Gustafson*, 73–633.

Misconduct of jurors or counsel: The record must show that the court has before it all the evidence considered by the lower court on the question in order to rule upon the decision of the lower court with reference to granting a new trial on the ground of misconduct of jurors or counsel: *State v. Bigelow*, 70 N. W., 600; *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81–444.

As to how such conduct is to be made to appear, see notes to § 4123.

Review of instructions: Objections to an instruction cannot be considered when the instruction does not appear in the record: *State v. Illsley*, 81–49.

Correctness of instructions calling attention to questions on the evidence before the jury can only be considered on appeal when the evidence is embodied in the record: *Thill v. Pohlman*, 76–638.

Upon appeal, where the evidence submitted on the trial is not before the court, the giving or refusing of instructions will not be reviewed so far as the correctness of such rulings depends upon the evidence: *State v. Grossheim*, 79–75.

Where the instructions appear to be correct as abstract propositions of law, the question whether they are correct as applicable to the evidence cannot be determined where the evidence is not before the court: *Neitz v. Hilker*, 84–459.

The correctness of instructions as to burden of proof cannot be determined where the evidence is not before the court: *Chapel v. Wadsworth*, 85–742.

In order to determine the correctness of an instruction or a ruling to strike a pleading from the files, it is sufficient if the record shows the pleadings and evidence applicable to the questions involved, although all the evidence is not contained in the record: *Weitz v. Independent Dist.*, 79–423. And see notes to § 3707.

Findings of fact by the court below will be presumed correct and supported by the evidence, if the evidence is not all before the supreme court: *Napier v. Wiseman*, 3 G. Gr., 246; *Hamilton v. Walters*, 3 G. Gr., 556; *Rosseau v. Fine*, 1–98; *Snell v. Kimmell*, 8–281.

An order of the lower court will not be interfered with on appeal where the supreme court has not before it all the evidence upon which the lower court acted: *Krause v. Hampton*, 11–457; *Adams v. Peck*, 14–508.

The granting of a new trial on the ground of newly-discovered evidence will not be interfered with on appeal if it does not afirmatively appear that all the evidence on which it was granted is before the appellate court: *Sowden v. Craig*, 20–477; *S. C.*, 21–580.

Statement of judge as to evidence: Where a judge, in overruling a motion for a new trial, certifies that the newly-discovered evidence on which a new trial is asked is cumulative, such statement will be regarded, on appeal, as true, when the evidence itself is not before the court: *Seymour v. Hoyt*, 23-19.

A judgment will not be interfered with, on appeal, because not warranted by the evidence, unless all the evidence is before the appellate court: *Green v. McFaddin*, 5–549.

III. What Will and What Will Not Warrant Reversal.

a. *Presumptions of Regularity.*

In favor of action below: Every reasonable presumption is to be entertained in favor of the ruling of the court below and the correctness of its judgment: *Davis v. Moffit*, 4 G. Gr., 92; *Hendrie v. Rippey*, 9–351; *David v. Leslie*, 14–84; *Morris v. Steele*, 62–228; *Hintrager*

v. *Kiene*, 62-605; *Bower v. Webber*, 69-286; *In re Will of Norman*, 72-84.

This presumption in favor of the action of the court below will prevail unless overcome by something appearing of record: *Brobst v. Thompson*, 4 G. Gr., 135; *Lawson v. Campbell*, 4 G. Gr., 413; *Speers v. Fortner*, 6-553; *Scofield v. Ford*, 56-370.

The presumption is in favor of the action of the lower court, and it will be interfered with only where it affirmatively appears that some prejudicial error has been committed: *Hunt v. Higman*, 70-406.

If in any view the action of the court can be sustained, the presumption in favor of its correctness will prevail: *Arneson v. Thorstad*, 72-145.

An appellate court is always bound to exercise presumptions in favor of the judgment it reviews, unless it is shown that the law and justice have been violated by such judgment: *State v. Hopkins*, 67-285.

Where the record does not show what the issues in the case were, such issues will be presumed as would render the action of the court proper: *Holland v. Union County*, 68-56.

It will be presumed that there was sufficient testimony to support the judgment rendered unless the contrary appears: *Brady v. Malone*, 4-146; *Hefferman v. Burt*, 7-320; *Jennings v. Conn*, 11-542; *Willett v. Millman*, 61-123; *Phillips v. Phillips*, 46-703.

It will be presumed, in favor of the finding of the court, that lawful evidence authorizing such finding was introduced and considered: *Henry v. Evans*, 58-560.

The supreme court will not, for the purpose of reversing a cause, presume that the proof established a state of facts which would render the decision of the court below erroneous, if a state of facts can be supposed under which such decision would be correct: *Crane v. Ellis*, 31-510.

Where the record shows some evidence on which a ruling could be supported, it will be upheld, no evidence to the contrary appearing: *Blythe v. Blythe*, 25-266.

Where there is nothing in the bill of exceptions showing the existence of grounds on which a motion for new trial is based, it will be presumed in support of the action of the court in overruling such motion that such grounds were not shown to exist: *Keys v. Francis*, 28-321.

Where no finding of facts is made the presumption is that the court found such facts as will justify the conclusion of law, and the conclusion will not be held erroneous unless there is a finding of facts from which error affirmatively appears, or error appears otherwise from the record: *Oskaloosa v. Pinkerton*, 51-697.

Where it does not appear upon what facts the decision of the lower court was based, such a finding of facts will be presumed as will support the decision: *Fouts v. Pierce*, 64-71.

Where the judgment below is based upon an authentication of a judgment from another state, which is insufficient, the presumption will be entertained that there was other evidence sufficiently showing such judgment, unless the contrary appears: *Clemmer v. Cooper*, 24-185.

Where it appears that attorneys' fees were taxed, after rendition of judgment in the case, as they might properly be, it will be presumed that such taxation was made upon proper evidence being introduced, although it does not appear that there was any such evidence: *Kelso v. Fitzgerald*, 67-266.

In the absence of a showing in the record to the contrary, the supreme court will presume that there was before the lower court sufficient evidence to justify the finding that defendant had been duly and legally served with process: *Kent v. Coquillard*, 67-500.

Where appellants were defaulted, and the record did not show what proof was introduced to sustain the bill, held, that it would be presumed there was enough evidence to support the averment upon which judgment was rendered: *Semple v. Lee*, 13-304.

Where the decree recites that certain matters essential to the jurisdiction of the court were made to appear, it will be presumed on the appeal that they were made to appear in the proper manner and that the court rendering such decree performed its duty: *Jewett v. Miller*, 12-85.

The supreme court will presume in favor of the regularity of the proceedings below, even though such proceedings are not shown by the record: *Dixon v. State*, 3-416.

Where the record showed that the trial was not by jury, *held*, that it would be presumed that a jury was waived, although that fact did not appear: *Hawkins v. Rice*, 40-435.

Where it does not appear otherwise, the court must assume facts in support of the action of the lower court: *National State Bank v. Delahaye*, 82-34; *Pierce v. Herrold*, 83-764.

The presumption is in favor of the court's rulings in the absence of any showing of error therein: *Smith v. Yager*, 85-706.

Where it appeared that the plaintiff's demand had been reduced by the allowance of a counter-claim of defendant, *held*, that the costs were properly apportioned, and although the amount taxed to plaintiff appeared excessive, yet it would not be presumed that costs were taxed in the abuse of the court's discretion, but rather that the order for the taxation of costs was authorized by the facts: *Minnesota Stoneware Co. v. Knapp*, 75-561.

Where a question asked a witness was excluded and the record failed to show what fact was intended to be elicited by the question, *held*, that it would be presumed that it was properly excluded: *Donnelly v. Burkett*, 75-613.

Where in the trial of a case to the court evidence is admitted subject to objection, it cannot be said on appeal that there was error in the admission of the evidence, as it does not appear affirmatively that such evidence was considered: *Foster v. Hinson*, 76-714.

In a particular case, *held*, that it would not be presumed from the exclusion of certain evidence that the court intended to exclude other evidence which, if offered, would have been admissible: *Pingery v. Cherokee & D. R. Co.*, 78-438.

In favor of the action of the court in ruling upon a motion based upon a prior conversation with the judge, it would be presumed he took into consideration the matter which

was within his personal knowledge and that the matter of which he thus took notice would support his ruling: *Ellis v. Butler*, 78-632.

On appeal where the evidence has been stricken from the record, it will be presumed that the instructions given by the trial court are correct and justified by the evidence: *Short v. Chicago, M. & St. P. R. Co.*, 79-73.

Where the abstract fails to show the exact date of the commencement of an action, it will be presumed, in order to sustain the judgment of the court below, that it was commenced after the cause of action accrued: *Ida County v. Woods*, 79-148.

Under the presumption always exercised in support of proceedings of the court below, *held*, that an adjudication on a bail bond that defendant was in default sufficiently proved that there was an indictment pending against him: *State v. Coppock*, 79-482.

In support of the verdict of a jury it will be presumed that the jury found in accordance with the evidence, and that their verdict was based upon grounds which they were warranted in considering rather than on those which it would be erroneous for them to consider: *Ecklund v. Talbot*, 80-569.

Where the evidence is not before the court it will, in support of the rulings of the lower court, presume that the undisputed evidence required the lower court to hold as it did with reference to an issue before it: *Gavin v. Bischoff*, 80-605.

Where the competency of evidence which is rejected is not shown, the court will exercise the presumption that the court below rightly rejected it: *Blair v. Madison County*, 81-313.

Where a demurrer was based upon the ground that the petition did not state facts which would entitle plaintiff to the relief demanded, and that the cause of action was barred by the statute of limitations, and the demurrer was sustained generally, *held*, that the demurrer was properly sustained upon the first ground, and if sustained upon that ground the question as to the bar of the statute was not involved in the case: *Pickerell v. Hiatt*, 81-537.

Where the evidence of a fact not in issue has been received without objection it will be assumed that there was some stipulation of consent by virtue of which such evidence was admitted or that objection thereto was waived: *National State Bank v. Boesch*, 90-47.

Error must affirmatively appear: Error will not be presumed, and the party alleging the existence of error to his prejudice must make it affirmatively appear: *Hudson v. Mathews*, Mor., 94; *Isett v. Oglevie*, 9-313; *Way v. Lamb*, 15-79; *Carpenter v. Parker*, 23-450; *Messer v. Reginnitter*, 32-312; *Stewart v. Bishop*, 33-584; *State v. Foster*, 40-303; *Thompson v. Winnebago County*, 48-155; *Pottawattamie County v. Marshall County*, 56-410.

Error must affirmatively appear and the presumption is in favor of the action of the trial court: *Wright v. Farmers' Mutual Live Stock Ins. Ass'n*, 65 N.W., 308.

In ordinary actions the supreme court will not reverse for errors which do not affirmatively appear of record: *McVey v. Johnson*, 75-165.

The action of the trial court in setting aside a judgment will not be reviewed upon appeal when the determination of the errors alleged depends upon the evidence, which is not set out in the record: *Read v. Divilbliss*, 77-88.

Exclusion of evidence will not be deemed prejudicial where the fact which the question was designed to disclose does not appear: *Cahalan v. Cahalan*, 82-416.

Where a ruling of the court might have been proper under some circumstances, it will be presumed correct unless the circumstances rendering it prejudicial are shown: *State v. Potts*, 83-317.

Where the affidavits on a motion for new trial, on the ground of misconduct of a juror, were conflicting, *held*, that the error of the lower court in granting a new trial did not affirmatively appear, and its action would not be interfered with: *Wightman v. Butler County*, 83-691.

The rule is that error must appear to justify a reversal, and it will not be deemed to be shown by reason of a fact merely assumed for the purpose of argument: *Bruner v. Wade*, 84-689.

In an action for personal injuries, caused by a defective bridge, where an appeal was taken from the judgment of the lower court, but the abstract failed to show that plaintiff had offered any evidence which tended to show that he had sustained damage of any kind, *held*, that in the absence of such evidence there could be no prejudice in rulings of the court as to the character of the bridge in question: *Donnelly v. Cedar County*, 75-536.

Where instructions are given which would be correct with reference to a supposed state of facts and the evidence is not before the supreme court, it will be presumed there was evidence to support the instructions, but where the instructions would be erroneous when applied to any state of facts, prejudice will be presumed and to avoid reversal appellee must make it appear that no prejudice resulted: *Winey v. Chicago, M. & St. P. R. Co.*, 92-622.

Must be clearly manifest: Wherever error is complained of it should be made to appear not only affirmatively but with reasonable certainty: *Randolph Bank v. Armstrong*, 11-515; *Gantz v. Clark*, 31-254.

Presumption in favor of record: Where an abstract showed an interlineation with a pen, and it appeared that the finding of the court below would not have been justified unless the allegation of the petition was such as shown by the abstract as amended by the interlineation, *held*, that, in the absence of any showing to the contrary, it would be presumed that the abstract as thus amended was correct: *Mahaska County v. Ruan*, 45-328.

Defect in the record: Error cannot be presumed from mere omission or defect in the transcript. It must appear affirmatively. Unless it does so appear, the presumption of law is that the proceedings of the court below were legal and proper: *Mackemer v. Benner*, 1 G. Gr., 157.

Where a demurrer to a portion of the

counts of an answer was sustained, and no action as to other counts appeared of record, but they might properly have been stricken out, *held*, that it would be presumed they were stricken out and that the action of the court was proper: *District T'p v. Smith*, 39–9.

Presumption as to pleadings: Where there was a cross-petition, and the case was tried as though a reply thereto had been filed, *held*, that the court would presume there was such reply, although none appeared in the record: *Hervey v. Savery*, 48–313.

Where ruling does not appear: If it appears that a motion or demurrer was filed in the lower court, but it does not appear that any ruling was made thereon, it will be presumed that such motion or demurrer was waived: *Sigler v. Woods*, 1–177; *Busick v. Bumm*, 3–63; *Boardman v. Beckwith*, 18–292; *State v. Ross*, 21–467; *First Nat. Bank v. Carpenter*, 41–518; *Moore v. Gilbert*, 46–508; *Payne v. Dicus*, 88–423; *Schroeder v. Webster*, 88–627; *Corey v. Gillespie*, 62 N.W., 837; *Langhammer v. Manchester*, 68 N.W., 688.

Incidental rulings: The presumption in favor of the correctness of the rulings of the court below is especially applicable to those questions which are ever recurring and depend for their solution upon the discretion of the court: *Clinton Nat. Bank v. Torrey*, 30–85; *Thompson v. Burnham*, 35–411.

Acts done in court in the progress of the case are presumed to be in accordance with law unless the contrary is made to appear. A presumption as to the regularity of the proceedings of the lower court will always be exercised, and error in such proceedings must be affirmatively shown to warrant a reversal: *McCue v. Wapello County*, 56–698.

Facts presumed: The presumption to be entertained in support of the ruling of the lower court requires that, if it would be correct under any presumable state of facts not inconsistent with the pleadings and the record, it shall be upheld: *Ward's Heirs v. Cochran*, 36–432; *Johnson v. Mautz*, 69–710; *Stone v. Hawkeye Ins. Co.*, 68–737: *Freher v. Geeseka*, 5–472.

Where sufficient ground appears upon which the judgment of the court below can be upheld, it will be presumed that the judgment was rendered on such ground: *Frederick v. Mitchell*, 1–100; *State v. Gibbs*, 39–318; *Steel v. Miller*, 40–402.

One of several grounds: If there be several grounds upon which a ruling may have been based, it will be upheld if any of such grounds are sufficient to support it, and if, among several insufficient grounds, one would be sufficient under certain conditions that may have existed, the supreme court will presume that such conditions existed and that the ruling was based thereon: *Worthington v. Olden*, 31–419.

Where a case is submitted to the jury on two issues, and a verdict is returned in favor of one of the parties which is sustainable on one of the issues upon the evidence introduced, but not by any evidence in support of the other, it will be presumed that the verdict was upon the issue upon which there was evidence supporting it, and any error of the court below in refusing to take the other issue from the jury will be deemed to have been error without prejudice: *Calder v. Smalley*, 66–219.

Where an instruction was correct as to one question of fact involved and incorrect as to another, and it appeared that, under the evidence, the second question could not have been found as assumed in the instruction without the verdict being contrary to the evidence, *held*, that it would be presumed the verdict was found upon facts in harmony with the first branch of the instruction, and the error as to the other branch was without prejudice: *State v. Sanders*, 30–582.

If no ground can be discovered nor is pointed out upon which the action of the court can be upheld, the presumption of regularity will be overcome: *Baird v. Chicago, R. I. & P. R. Co.*, 61–359.

Where but one ground of objection is urged it must be presumed the ruling was on that ground, though erroneous: *Emery v. Emery*, 54–106.

Admission of evidence: If evidence may have been admissible under some aspects which the case may have assumed, and all the evidence is not before the court, it will be presumed that there was a state of facts authorizing the admission of the evidence objected to: *Chase v. Scott*, 33–309.

Where it appears that evidence was excluded, but it does not appear upon what ground, it will be presumed that there was some ground therefor, where the evidence is not all before the court: *Cook v. Sioux City & P. R. Co.*, 37–426.

If objection to evidence is sustained, and the record does not show the ground of the objection, if the evidence is vulnerable to any objection, it will be presumed that was the one made and sustained: *Hoben v. Burlington & M. R. R. Co.*, 20–562.

Where no other evidence than that appearing in the record could legitimately have been presented in the court below, it will not be presumed that the action of the court was based on anything not appearing of record: *McGovern v. Keokuk Lumber Co.*, 61–265.

Where the evidence is not all before the court, the action of the court in dissolving an injunction will not be reversed, but it will be presumed that a sufficient showing was made to justify the action of the court below: *Gray v. Montgomery*, 17–66.

Where the evidence is not all before the court it will be presumed that there was evidence sufficient to support the verdict: *State v. Pitman*, 38–252.

Where evidence is not all before the court on appeal it will be presumed that the jury followed the instructions and there was evidence to justify their verdict thereunder: *Wicke v. Iowa State Ins. Co.*, 90–4.

The same presumptions of regularity obtain in favor of the proceedings in a case in equity as in an action at law. Unless the contrary appears it will be presumed that the decree was authorized by the evidence: *Garner v. Pomroy*, 11–149.

Where the evidence upon which the court below has acted is not all before the supreme court, it will be presumed that the action of

the lower court was proper under the evidence: *State v. Postlewait*, 14–446; *McIntosh v. Kilbourne*, 37–420; *Laughlin v. Main*, 63–580; *State v. Drorsky*, 73–484.

Instructions: As to the presumption in regard to giving or refusing instructions, see notes to § 3707.

b. *What Errors Deemed Prejudicial.*

Exceptions on immaterial point not considered. See § 3754 and notes.

Errors waived: That amending or pleading over waives error in ruling on demurrer, see § 3565 and notes.

Application by a party for the reconsideration by the court of its ruling on a motion for a new trial will not waive error committed in such ruling and prevent the party from taking advantage thereof on appeal: *Anderson v. Cahill*, 65–252.

By answering an illegitimate and erroneous argument or procedure on the other side a party does not waive error therein nor remove any prejudice which might have arisen had he kept silent: *Leach v. Hill*, 66 N.W., 69.

Error in former action: Where suit was brought against several defendants for damages arising from illegal sale of intoxicating liquors, and the owner of the property in which the business was conducted was made a joint defendant, and a judgment by default was rendered against one of the sellers, the owner asking to be allowed to defend for such party, and afterward, a change of venue being first had as to the owner, judgment was rendered against him making the first judgment a lien against his property, *held*, that he could not on appeal in the latter case raise any error committed in refusing him leave to defend in the former case: *Putney v. O'Brien*, 53–117.

Where justice has been done: Where it appears that justice has been done, and that a new trial would result in the same verdict or the same judgment, the action of the court in refusing to grant a new trial on the ground of errors of law committed will not be reversed on appeal: *Dawson v. Wisner*, 11–6.

If the court below has erred in the decision of a legal proposition, and the supreme court can see that with the necessary correction the verdict on the second trial must be the same as the first, then the granting of a new trial by the lower court will not be interfered with; but if it is not manifest that upon such correction of error the second trial would result as the first, the action of the lower court in granting a new trial will be reversed: *Braddy v. Lumery*, 11–29.

While a verdict will not be sustained that is clearly against erroneous instructions, yet, in a particular case, as the court below did not so regard it, and it appeared that substantial justice was done by the verdict, *held*, that it would not be reversed for that reason alone: *Allison v. King*, 25–56.

Judgment will not be reversed because of an alleged erroneous instruction by the court, when the judgment is more favorable to the appellant than a fair construction of the evidence justifies: *McNally v. Shobe*, 22–49.

Where the jury were not sufficiently instructed as to the measure of damages, but it appeared that their verdict was not beyond the just sum that plaintiff ought to recover as lawful damage, *held*, that the judgment should not be reversed: *Cooper v. Central R. of Iowa*, 44–134.

A judgment will be affirmed upon appeal if it is correct, although the reasons given for it by the court below may have been erroneous: *Jamison v. Perry*, 38–14; *Whiting v. Root*, 52–292.

A cause will not be reversed because of an inconsiderable error in the amount of the judgment rendered: *Callanan v. Shaw*, 24–441; *Keokuk County v. Howard*, 42–29.

Where it appears that the jury upon the undisputed facts could have found no other verdict than that which they did find, error in introduction of evidence and the giving of instructions will be deemed without prejudice: *Blair Town Lot and Land Co. v. Hillis*, 76–246.

Where undisputed evidence under one proposition stated in the instructions would render the verdict of the jury correct, the judgment will not be reversed on account of error as to another proposition of law, even though it does not appear but that the verdict was based on such erroneous proposition: *Newell v. Martin*, 81–238.

Slight error: Slight error in estimating the amount of recovery will not justify reversal, and judgment will not be reversed for a nominal consideration: *Rappleye v. Cook*, 79–564.

Where it appeared that the verdict was excessive to the amount of about $12, *held*, that the error was not such as to warrant reversal, although the case was not such as that a *remittitur* could be required: *Van Gorder v. Sherman*, 81–403.

Where in an action of trespass it appeared that the defendant was guilty of no wrong in the acts done except the taking of a few sheaves of wheat worth ten or fifteen cents, *held*, that error in that respect would not be ground for reversal: *Ellithrope v. Reidessell*, 88–729.

Where the amount to which a party was entitled was very inconsiderable under a bond for an injunction, and was disallowed in the lower court, *held*, that error in that respect would not be a ground for reversal on appeal: *Ady v. Freeman*, 90–402.

Failure to give nominal damages not ground for reversal: The supreme court will not reverse a judgment because nominal damages were not allowed, even though it appears that the appellant was entitled thereto: *Watson v. Van Meter*, 43–76; *Rowley v. Jewett*, 56–492; *Phenix Ins. Co. v. Findley*, 59–591; *Case Threshing Machine Co. v. Haven*, 65–359; *Watson v. Moeller*, 63–161; *Wire v. Foster*, 62–114; *Thorp v. Bradley*, 75–50; *Stuart v. Trotter*, 75–96; *Cook v. Chicago, M. & St. P. R. Co.*, 83–278; *Harwood v. Lee*, 85–622; *Schwartz v. Davis*, 90–324; *Tank v. Rohweder*, 67 N.W., 106.

An omission to assess nominal damages, where there is a mere technical right of recovery, is not ground for reversal: *Norman v. Winch*, 65–263; *Crawford v. Bergen*, 91–675.

Although a case will not be reversed where the only right involved is that to

nominal damages, yet if it does not appear that no more than nominal damages could be recovered, the refusal of the court to allow any recovery may be reversed: *Madison County v. Tullis*, 69–720.

An omission to award nominal damages when the evidence shows the right to recover no more is no ground for setting aside judgment and granting a new trial: *Williams v. Brown*, 76–643.

Upon an appeal in an action for breach of contract where it is shown that there has been no damage to plaintiff, failure of the lower court to instruct the jury that plaintiff is entitled to nominal damages will not be ground for reversal: *Faulkner v. Closter*, 79–15.

Where it is shown that the actual damage, if any, is merely nominal, the judgment will not be disturbed on the ground that nominal damages were not allowed: *Fleming v. Stearns*, 79–256.

Remission of excess: See *infra* IV, c. in notes to this section.

c. *Review of Ruling Granting or Rufusing New Trial.*

Discretion of lower court not interfered with on appeal: See notes to § 3755.

Conflict in evidence: The action of the lower court in overruling a motion for a new trial based on the ground that the verdict is against the evidence will not be interfered with on appeal, if the conflict in the testimony is great, and its weight is not clearly against the verdict: *Ackley v. Berkey*, 22–226.

Where there is a conflict in the evidence the action of the court below in overruling a motion for a new trial will not be disturbed, on appeal, unless a clear case of abuse of discretion is made to appear: *Hubbell v. Ream*, 31–289.

Where there is a conflict in the evidence the supreme court will not interfere with the action of the lower court in refusing to set aside the verdict on the ground that it is not supported by the evidence: *Chambers v. Brown*, 69–213.

Where the evidence is conflicting, and the court below, which heard the evidence, with full opportunity for observing the manner and appearance of the witnesses, has overruled a motion for a new trial on the ground that it is not supported by the evidence, the supreme court will not interfere: *Snyder v. Eldridge*, 31–129; *Mahaney v. Bell*, 42–383.

When the verdict of the jury or the finding of the trial court involves the determination of a question of fact as to which there was a conflict in the evidence, or a deduction from proven facts which could be fairly arrived at from those facts, it will not be disturbed: *Primmer v. Primmer*, 75–415.

It is not essential to a conflict of evidence that the testimony shall come from opposing sides, but if the facts and statements are such that they tend to lead the mind of the court to opposite conclusions as to a particular fact in issue, there is a conflict of evidence: *Saar v. Finken*, 79–61.

Where there is a conflict in the testimony, the action of the trial court in overruling a motion for a new trial will not be disturbed on appeal, unless a clear case of abuse of discretion is made to appear: *Bever v. Spangler*, 93–576.

This rule is applicable in an appeal from the judgment of the court in the contest of a will: *Ibid.*

The discretion of the trial court in overruling a motion for a new trial on the ground that the verdict is contrary to the evidence will not be reversed where there is a conflict in the testimony: *Russ v. Steamboat War Eagle*, 14–363; *Brockman v. Berryhill*, 16–183; *Burlington Gas Light Co. v. Green*, 22–508; *Pierce v. Walker*, 23–424; *McCabe v. Knapp*, 23–308; *Callanan v. Shaw*, 24–441; *Schrimper v. Heilman*, 24–505; *Hull v. Alexander*, 26–569; *Sherman v. Western Stage Co.*, 24–515, 554; *Garland v. Wholeham*, 26–185; *Todd v. Branner*, 30–439: *Snyder v. Nels n*, 31–238; *Bergert v. Davenport City R. Co.*, 34–571; *Rogers v. Winch*, 76–546; *Dalhoff v. Bennett*, 77–140; *Saar v. Finken*, 79–61; *Taylor v. Chicago, M. & St. P. R. Co.*, 80–431; *Fulliam v. Hagens*, 83–763.

Verdict against manifest justice: When the court conscientiously believes that a verdict is against the truth or the weight of the submitted evidence a new trial should unhesitatingly be ordered; but to justify such inference the mind should be brought irresistibly to the conclusion that the verdict was not the result of a free, sound and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result if the verdict is permitted to stand: *McKay v. Thorington*, 15–25.

Whenever a verdict is clearly, not doubtfully, against the manifest justice of the case, it is the duty of the trial judge unhesitatingly to set it aside; but where there is a conflict of evidence, and the jury, being clearly charged as to the law, have found a verdict which the trial court has refused to set aside, the supreme court will not interfere: *Smith v. Williams*, 23–28.

Manifest error: The error in overruling a motion for new trial must be clearly manifest to warrant a reversal: *Bellamy v. Doud*, 11–285.

Verdict against immaterial evidence: To justify the granting of a new trial on the ground that the verdict is against the weight of the evidence, such want of evidence must relate to a material issue legitimately raised by the pleadings. The refusal of the lower court to grant a new trial when the objection is that the verdict is contrary to immaterial evidence, though admitted without objection, will not be reversed or disturbed on appeal: *Parker v. Hendrie*, 3–263; *Scott v. Morse*, 54–732.

Verdict supported by evidence: It is not the province of the supreme court to overrule both the jury and the lower court in a conclusion reached by them between conflicting evidence: *Sloan v. Central Iowa R. Co.*, 62–728.

Where the verdict finds support in the evidence the supreme court will not reverse the action of the court below in refusing to grant a new trial, although it believes that the preponderance of evidence is the other way: *Johnson v. Chicago, R. I. & P. R. Co.*, 58–348.

Excessive verdict: The court below, having a full opportunity of understanding whether the verdict is excessive, should fearlessly assume the responsibility of setting it aside on that ground, but the supreme court will be very reluctant to disturb verdicts in this respect: *Bower v. Burlington & S. W. R. Co.*, 42–546.

Where, in an action for personal injuries, the jury has rendered a verdict which the court below has refused to set aside as excessive, the supreme court will not, ordinarily, interfere: *Brown v. Jefferson County*, 16–339.

What the record must show: The supreme court cannot undertake to say that the lower court has abused its discretion, either in granting or refusing a new trial, unless the whole case is presented to it by the record: *Barker v. Brown*, 15–70.

Action of lower court overruled: If the verdict is clearly in conflict with the evidence, and works manifest injustice, the refusal of the trial court to grant a new trial may be overruled on appeal: *Sadler v. Bean*, 38–684.

Where there is no doubt as to the incorrectness of the verdict, the supreme court will grant relief therefrom by overruling the action of the lower court in refusing a new trial: *Martin v. Orndorff*, 20–217; *Lester v. Sallack*, 31–477.

Where material findings of fact in a special verdict are wholly unsupported by the evidence, and the court below has overruled a motion for new trial, the supreme court will reverse the judgment: *McCarty v. James*, 62–257.

Passion or prejudice: But such decision will not be disturbed unless so barren of support as to warrant the finding that it was the result of passion or prejudice: *Schermer v. Gendt*, 52–742.

Verdict not the result of free and unbiased judgment: Where the mind is brought inevitably to the conclusion that the verdict was not the result of a free, honest and unbiased exercise of judgment on the testimony submitted, and that manifest injustice will result if judgment is rendered thereon, the court below should grant a new trial; and where such a case is made clearly apparent to the supreme court a new trial will be ordered, though refused by the court below: *Jourdan v. Reed*, 1–135; *Fawcett v. Woods*, 5–400; *Byington v. Woodward*, 9–360.

Discretion subject to review: An error of the court in granting or refusing a new trial on a legal proposition is reviewable on appeal with no more presumption in its favor than a ruling made in any other stage of the case: *Byington v. Woodward*, 9–360. And see notes to § 3755.

Where the court below in granting or refusing a new trial misstates a legal proposition it is as much the subject of revision as any other question. In such cases the granting or refusing the motion is not a question of discretion, but is to be determined upon the law applicable to the case: *Stewart v. Ewbank*, 3–191; *Riley v. Monohan*, 26–507.

While in most cases the question of the granting of a new trial is within the sound discretion of the trial court, and such discretion will not be interfered with, yet if the grounds for a new trial appear of record and come within the well recognized rules of law the action of the court in refusing a new trial may be reversed: *Jones v. Fennimore*, 1 G. Gr., 134; *Shaw v. Sweeney*, 2 G. Gr., 587; *Humphreys v. Hoyt*, 4 G. Gr., 245; *In re will of Coffman*, 12–491.

Other grounds for new trial: Where the ground for new trial is accident or surprise, or that injustice has been done, the trial court is vested with a large discretion, which will not be interfered with on appeal unless the error affirmatively appears: *Hill v Denslinger*, 61–240.

The action of a trial court in passing upon misconduct of counsel as a ground for new trial will be sustained on appeal unless it clearly appears to have been erroneous: *Sunberg v. Babcock*, 66–515.

Whether a new trial should be granted for misconduct of the jury is left largely to the sound discretion of the trial court, which is in a much better position to determine whether the rights of the parties have been affected by such misconduct than the supreme court can be, and if the lower court has determined there should be another trial on that ground, its discretion will not be interfered with unless it is made to appear very clearly that there has been an abuse of discretion: *Perry v. Cottingham*, 63–41.

Where, upon the allegations of misconduct of the jury made as a ground for a new trial, there is a conflict in the evidence, the finding of the court in ruling upon such motion must have the same force as its finding upon any other question of fact arising in an action at law: *Watson v. Stotts*, 68–659.

The supreme court will not interfere with the action of the court below in refusing to grant a new trial on the ground of misconduct of the jury where there is a conflict in the evidence as to the nature of such misconduct: *Todd v. Branner*, 30–439.

A new trial will not be granted on appeal when a witness has given material evidence without being sworn, unless it be shown that the party complaining, or his attorney, did not know of the fact until after the verdict: *Riley v. Monahan*, 26–507.

Where new trial is granted: An order granting a new trial may be reviewed: *Stewart v. Ewbank*, 3–191; *Cook v. Sypher*, 3–484; *Newell v. Sanford*, 10–396.

But the supreme court will exercise a presumption in favor of the correctness of the ruling of the court below, and will not interfere with an order granting a new trial where it does not affirmatively appear that the action is erroneous: *Boardman v. Chicago & N. W. R. Co.*, 32–391.

It is a constant practice in the supreme court to refuse to disturb the action of the court below when a new trial is granted, although the ruling of the lower court would also have been upheld if the new trial had been refused: *Ibid.; McKay v. Thorington*, 15–25.

When the trial court determines that the verdict is contrary to the evidence, and ought

to be set aside on that ground, the case must be a very clear one to warrant an appellate court in interfering with its action: *Moran v. Harris*, 63–390.

Where the trial judge has determined that the fair administration of the law demands that a new trial should be granted for any cause which the law recognizes as a ground for a new trial, his action will be interfered with on appeal only when it is shown that he has abused the discretion with which the law vests him: *Rogers v. Winch*, 65–168.

The action of the court in setting aside a verdict and granting a new trial will not be interfered with where it does not appear that the discretion reposed in the trial court has been abused or erroneously exercised: *Laverenz v. Chicago, R. I. & P. R. Co.*, 53–321.

Where it appears that the court below, with full knowledge of all the circumstances transpiring at the trial, has ordered a new trial, the supreme court will not interfere therewith, unless error in the action of the court is made affirmatively to appear: *Finley v. David*, 7–3.

The supreme court seldom interferes with a ruling of the court below in granting a new trial, and would not be justified in doing so except in a clear case: *Lytton v. Chicago, R. I. & P. R. Co.*, 69–338.

On the question whether the lower court erred in granting a new trial, the presumption is in favor of the action of the court, the trial judge having far better opportunity to know whether or not the verdict was of a character to do substantial justice: *Kern v. May*, 92–674.

The supreme court will not interfere with the exercise of discretion by the court below in granting a new trial unless it is made to appear that such discretion has been abused to the injury of appellant: *Iowa Central Building & Loan Ass'n v. Phœnix Ins. Co.*, 70 N. W., 618.

A stronger case should be made to justify the interposition of the supreme court when a new trial has been granted than where it has been refused: *Ruble v. McDonald*, 7–90; *Newell v. Sanford*, 10–396; *Shepherd v. Brenton*, 15–84; *Burlington Gas Light Co. v. Green*, 21–335; *Chapman v. Wilkinson*, 22–541: *White v. Poorman*, 24–108; *Roberts v. Jones*, 30–525; *Forney v. Ralls*, 30–559; *Pickering v. Kirkpatrick*, 32–163; *Boardman v. Chicago & N. W. R. Co.*, 32–391; *Tegeler v. Jones*, 33–234; *New York Piano Forte Co. v. Mueller*, 38–552; *Howell v. Snyder*, 39–610; *Conklin v. Dubuque*, 54–571; *Halpin v. Nelson*, 76–427.

Where the trial court has set aside the verdict and granted a new trial, the supreme court will not be inclined to set aside the ruling on appeal: *Robinson v. Bacon*, 24–409.

Where a court grants a new trial on the ground that the jury were confused and misled by the instructions, the supreme court will not interfere: *Reeves v. Royal*, 2 G. Gr., 451.

An order granting a motion for a new trial will not be disturbed on appeal when the grounds alleged are fairly supported and there is nothing to show abuse of discretion: *Sanders v. Clark*, 22–275.

While it is true that a stronger showing should be made to justify an interposition of the supreme court when a new trial has been granted than when refused, yet, where the court in ordering a new trial misapplies a legal proposition, such ruling should be reviewed where made upon motion for new trial, the same as upon the ruling on any other legal question, and in so doing the discretion of the trial court as to granting new trials is not interfered with: *Mehan v. Chicago, R. I. & P. R. Co.*, 55–305.

No discretion is reposed in the court in determining whether or not evidence which is relied on to entitle the party to a new trial on the ground of newly-discovered evidence is cumulative, and a ruling of the court in granting a new trial upon the showing as to such evidence will be reviewed as readily as though the court had refused to grant the new trial: *Manson v. Ware*, 63–345.

If the verdict is contrary to instructions, and the lower court has granted a new trial on that ground, its action will not be disturbed on appeal, nor the instructions given be reviewed. It is the duty of the jury to regard the instructions as the law, and find a verdict accordingly, whether they be right or wrong: *Caffery v. Groome*, 10–548; *Savery v. Busick*, 11–487; *Jewett v. Smart*, 11–595; *Taylor v. Cook*, 14–501; *Porter v. Thomson*, 22–391.

Where, under the evidence, it is apparent that the jury has disregarded an instruction of the court, the supreme court will reverse the action of the lower court in failing to set aside the verdict and grant a new trial on that ground: *Nichols v. Chicago, R. I. & P. R. Co.*, 69–154.

And further as to duty of jury to follow the instructions, see notes to § 3709.

The action of the lower court in setting aside a verdict will not, in general, be interfered with on appeal on the ground that it is not sustained by the evidence: *Engs v. Priest*, 65–232.

Abuse of discretion must appear: Where a new trial is granted by the lower court on the ground that the verdict is not sufficiently supported by the evidence, the action of such court in determining such question will not be disturbed on appeal unless it appears that there has been an abuse of discretion in such ruling: *Hill v. Denslinger*, 61–240; *Stewart v. Dunlap*, 61–248; *Conklin v. Dubuque*, 54–571: *Pickering v. Kirkpatrick*, 32–163; *Able v. Frazier*, 43–175; *McNair v. McComber*, 15–368.

The setting aside of a verdict and ordering a new trial is a matter within the discretion of the trial court and the appellate court will not interfere therewith unless it appears that there has been a clear case of abuse of legal discretion: *Arctic King Refrigerator Co. v. Kelly*, 63 N. W., 676; *Murray v. Weber*, 92–757.

And where the verdict has been set aside by the court below as not supported by the evidence, and a new trial granted, it will require a stronger showing to warrant the interference of the appellate court than when a new trial asked on similar grounds has been refused: *Jenkins v. Chicago & N. W. R. Co.*, 32–97.

Where the verdict or the report of the

referee is set aside by the court below, the supreme court will reluctantly interfere, and will do so only when there is nothing found in the record to support the ruling: *Lyons v. Harris*, 73–292.

Action of the court in sustaining a motion for a new trial on the ground of surprise will not be reversed unless the supreme court is well satisfied that such discretion has been abused: *Schumaker v. Gelpcke*, 11–84.

Conclusive preponderance of evidence: To authorize the reversal of the decision of the court below setting aside a verdict on account of insufficiency of evidence, there should appear such conclusive preponderance of evidence in its support as would show that injustice would be done: *Worthington v. Olden*, 31–419; *Burlington Gas Light Co v. Green*, 21–335.

The case must be very clear to warrant the appellate court in interfering with the action of the trial court in setting aside a verdict as contrary to the evidence: *Moran v. Harris*, 63–390.

Error and abuse of discretion must be made to appear to justify a reversal of such action of the lower court: *Brett v. Bassett*, 63–340.

Excessive damages: The supreme court will hesitate long before interfering with the action of the trial court in setting aside a verdict on the ground that the damages found by the jury are excessive and appear to have been given under the influence of passion and prejudice: *White v. Beck*, 64–122.

Weight of evidence; manifest injustice: While there is no question as to the right of the supreme court to set aside a verdict and award a new trial when the verdict is against the weight of evidence or the truth of the case, yet, to justify such interference, the mind should be brought irresistibly to the conclusion that the verdict was not the result of a free, sound and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result if the verdict should be permitted to stand: *McKay v. Thorington*, 15–25.

Mistake as to legal proposition: The discretion with which the court is clothed as to granting a new trial is a legal discretion, and its exercise must accord with the rules of law. If a new trial is granted upon insufficient cause, or for reasons in conflict with the law, such action will be regarded as an abuse of the discretion of the court, and will be reversed on appeal with the same freedom as if made at any other stage of the trial: *Ruble v. McDonald*, 7–90; *Shepherd v. Brenton*, 15–84; *Stockwell v. Chicago, C. & D. R. Co.*, 43–470.

Although it will require a stronger case to warrant the supreme court in reversing the action of the court below where a new trial has been granted than where it has been refused, yet, if the evidence is clearly and explicitly supported by the verdict, the action of the lower court in granting a new trial may be reversed: *Cedar Falls & M. R. Co. v. Rich*, 33–113.

Concurring verdicts: Where several trials have resulted in the same verdict and the trial court has refused to set the last one aside as against the evidence, it would require a very strong case to justify an interference by the appellate court: *Burlington Gas Light Co. v. Greene*, 28–289; *Russ v. Steamboat War Eagle*, 14–363; *Terpenning v. Gallup*, 8–74; *Hollenbeck v. Marshalltown*, 62–21; *Slocum v. Konsby*, 80–368; *Gormmelman v. Union Pac. R. Co.*, 70 N.W., 90.

Where concurring verdicts have been rendered, and the last one is allowed to stand by the trial court, this fact will authorize the presumption on the part of the supreme court that another trial would result in the same way: *Penn v. McLaughlin*, 36–538.

Where three juries had decided in favor of plaintiff's claim, *held*, that the supreme court would not disturb the judgment on the last verdict for want of evidence to sustain it: *Barber v. Scott*, 92–52.

However, a second verdict concurring with the previous one, which has been set aside as against the evidence, by no means concludes the court from again granting a new trial, and especially when the second application is based upon a different ground from that contained in the first: *Jourdan v. Reed*, 1–135.

Where a verdict was set aside because one juror had not concurred therein, and upon a subsequent trial the same verdict was rendered, *held*, that the fact that the result had been concurred in by twenty-three jurors would have much weight in sustaining the action of the court below in refusing to grant a new trial on the ground that the verdict was contrary to the evidence: *State v. Cross*, 12–66.

But if the jury have disregarded the law, or their verdict is fairly against the evidence, a new trial will be granted, even though it is a second verdict: *Corbin v. Chicago, R. I. & P. R. Co.*, 37–316.

d. *Review of Verdict of Jury.*

Not interfered with if supported by evidence: The supreme court will not on appeal disturb the verdict of the jury as against the evidence on a question of fact, if there is any evidence to support it: *Harger v. Spofford*, 46–11; *Cole v. Coskery*, 63–526; *Witter v. Little*, 66–431.

To warrant a reversal on that ground the verdict must be clearly against the weight of evidence: *Booth v. Small*, 25–177; *Harper v. Madren*, 21–407; *Ayres v. Hartford Ins. Co.*, 21–193; *Starker v. Luse*, 33 595.

The supreme court interferes very reluctantly with the verdict of a jury, and never unless it is clearly unsupported by the evidence or has been otherwise improperly reached: *Miller v Mutual Benefit L. Ins. Co.*, 39–304.

Where the court instructed the jury that to warrant a verdict on a particular issue in behalf of one of the parties the evidence must be clear, satisfactory and conclusive in his favor, and a verdict was rendered for such party on such issue, *held*, that the supreme court would not on appeal set aside such verdict on the ground that the evidence was conflicting, if it appeared that the jury might, without bias or prejudice, have concluded that in their minds the evidence was of such a character: *Hadley v. Hammond*, 63–599.

Verdict against evidence: A judgment

rendered upon a verdict which is in conflict with the evidence and the instructions of the court, and which for that reason should have been set aside below, will be set aside on appeal: *Olin Tile & Brick Co. v. Barlow*, 76–426.

Where under the instructions, to which no exception was taken by appellant, there was some evidence to support the verdict as to the amount of damage, the verdict will not be set aside as excessive: *Minton v. Lewis*, 78–620.

Although the verdict seems to be contrary to the weight of evidence, the supreme court will not reverse a case on that ground if there is some some support for the verdict in the evidence: *Pence v. Chicago, R. I. & P. R. Co.*, 79–389.

Where there is any evidence in support of the verdict of a jury in the court below, the case will not be reversed because the verdict was not in accordance with the evidence: *Giger v. Chicago & N. W. R. Co.*, 80–492.

Where there is some evidence to support the verdict it is not for the appellate court to say that the verdict should be set aside. The witnesses being before the jury it is for them to say what weight should be given to the testimony of each: *Van Gent v. Chicago, M. & St. P. R. Co.*, 80–526.

Where the evidence is conflicting the supreme court will not set aside the verdict on the ground that it is not supported by the evidence: *Hall v. Hunter*, 4 G. Gr., 539; *Pilmer v. Branch of State Bank*, 19–112; *Jones v. Jones*, 19–236; *Eason v. Webster*, 20–591; *Reeves v. Reeves*, 20–597; *Ellwood v. Wilson*, 21–523; *Law v. Illinois Cent. R. Co.*, 32–534; *Maxon v. Chicago, M. & St. P. R. Co.*, 67–226; *Cottrell v Southwick*, 71–50.

Where there is a conflict in the evidence and the verdict is not palpably against the weight of evidence, the appellate court will not interfere: *Crabtree v. Messersmith*, 19–179.

Where the determination of a question upon the evidence involves the credibility of contradictory witnesses, it is a matter peculiarly for the jury: *Peck v. Hendershott*, 14–40.

When the jury have determined the question as to the credit which should be given to the testimony of a particular witness, when such question fairly arises in the case, their finding will not be set aside: *Cottrell v. Southwick*, 71–50.

The question as to the sufficiency of evidence which is wholly circumstantial as opposed to positive testimony is for the determination of the trial court or jury and their finding will not be disturbed upon appeal: *Cox v. Burlington & W. R. Co.*, 77–478.

The rule that a trial court should direct a verdict against the party having the burden of proof, if it clearly appears to him that it would be his duty to set aside a verdict in favor of such party if found, has no application to the supreme court in passing on the question whether it should grant a new trial: *Bever v. Spangler*, 93–576.

Honest and unbiased judgment of jury: Where there is a conflict in the evidence, the supreme court will not on appeal interfere with the verdict of a jury unless it is well satisfied of the insufficiency of the evidence to convince the reason, conscience and judgment of the triers: *Todd v. Branner*, 30–439.

Unless there is some foundation for the conclusion that the findings of the jury are not the result of honest, intelligent and unbiased judgment on their part, the supreme court will not disturb their verdict: *Martin v. Algona*, 40–390.

Preponderance not controlling: Where there is a mere conflict in the evidence, even though it strongly preponderates against the verdict, and there is a conviction in the minds of the supreme court that a different result would more nearly accord with justice, these facts are not sufficient to justify it in directing a new trial: *Garrety v. Brazell*, 34–100.

Where the evidence is conflicting the supreme court will not set aside the verdict of a jury, although they might have been better satisfied upon the evidence with a different result: *White v. Clark*, 39–338; *Starker v. Luse*, 33–595; *Hyde v. Lookabill*, 66–453.

A strong preponderance of evidence against the verdict, and a conviction that a different result would more nearly accord with justice, are not sufficient to justify the supreme court in ordering a new trial, where they are not satisfied from the absence of evidence to support a verdict that it was not the result of a free, honest, unbiased and intelligent exercise of judgment and conscience on the part of the jury, and that justice will fail if the verdict is not set aside: *Garrety v. Brazell*, 34–100; *Parker v. Dubuque S. W. R. Co.*, 34–399; *Myers v. Dresden*, 40–660; *Allison v. Chicago & N. W. R. Co.*, 42–274.

Question of negligence: If the conclusion of negligence can be, by the jury, reasonably drawn from the circumstances, such conclusion will not be interfered with on appeal, although the opposite conclusion appears to the court to be the more reasonable; but if the general result appears to be wrong, and the jury, as appears from their special findings, are unable to assign any certain or tangible ground for their conclusion, the court should interfere: *Ford v. Central Iowa R. Co.*, 69–627.

Where there is an absence of testimony as to an essential element of recovery (for instance, in an action for personal injuries, the freedom of the person injured from negligence), a judgment on the verdict will be set aside on appeal: *Tierney v. Chicago & N. W. R. Co.*, 84–641.

Question of fraud: It being the peculiar province of the jury to determine questions of fraud in fact, when alleged th supreme court will not on appeal, interfere with a judgment on the verdict in a case involving fraud, where it does not appear that the jurors could not, in the exercise of their unbiased and intelligent discretion, have properly found as they did: *Votaw v. Diehl*, 62–676.

Where the question is as to whether a transaction was fraudulent, the supreme court will not interfere with the verdict of the jury, who had the opportunity to see the witnesses and judge of their credibility, unless the evidence is so against the verdict as

to raise a presumption of passion or prejudice on the part of the jury: *Enneking v. Scholtz*, 69–473.

Where it was alleged that a mortgage executed by defendant to his wife was given for the purpose of hindering and defrauding creditors, and the question of fraud was fairly presented to the jury and they found that the mortgage was given for a valid consideration, *held* that their verdict would not be disturbed upon appeal, although there was some evidence which tended to show that the transaction was fraudulent: *First Nat. Bank v. Fenn*, 75–221.

Passion or prejudice must appear: Where there is a conflict in the evidence the supreme court will not set aside a verdict unless it appears that it is the result of passion or prejudice: *Melhop v. Doan*, 36–630; *Moore v. Moore*, 39–461; *First Nat. Bank v. Charter Oak Ins. Co.*, 40–572; *Hall v. Hallou*, 58–585; *French v. Reel*, 70–122; *Gibson v. Fischer*, 68–29.

To authorize a reversal on the ground that the verdict is against the evidence there must be such failure of proof as to raise the presumption that it was the result of passion or prejudice and not of an intelligent and honest exercise of discretion by the jury: *McCormick v. Fuller*, 56–43.

Verdict set aside: It is with reluctance and caution that an appellate court interferes with the verdicts of juries. Where there is reasonable doubt, or a conflict of evidence, the verdict will be upheld; but if there is no such doubt or conflict, the duty to set aside the verdict is plain; and in the case under consideration the verdict was set aside: *McAunich v. Mississippi & M. R. Co.*, 20–338.

And in particular cases, *held*, that the verdict was so clearly contrary to the evidence that the judgment upon such verdict should be reversed: *Martin v. Orndorff*, 20–217; *Lester v. Sallack*, 31–477; *Miller v. Mutual Benefit Ins. Co.*, 34–222.

Where there is an entire want of evidence to support or establish a fact essential to the verdict, a judgment based upon such verdict will be reversed on apeal: *Carlin v. Chicago, R. I. & P. R. Co.*, 37–316.

If the verdict is clearly unsupported by the evidence and appears to have been the result of passion or prejudice, the supreme court will not hesitate to reverse on that ground: *Woodward v. Squires*, 39–435.

The supreme court will reverse the case where, under the law as given the jury by the court, the verdict is contrary to the undisputed evidence: *Eckerd v. Chicago & N. W. R. Co.*, 70–353.

Excessive verdict: A judgment will not be interfered with as excessive where it is within the province of the jury to determine under all the circumstances the amount that plaintiff is entitled to recover, as, for instance, where exemplary damages are allowable: *Dynes v. Robinson*, 11–137.

It is the province of the supreme court on appeal to set aside a verdict which is excessive and remand the case for trial by another jury. The court will, however, usually not make an absolute order remanding the case for another trial in such cases, but will allow plaintiff to elect whether he will take another trial or accept a certain amount which would not seem to the court to be open to the objection of being excessive: *Cooper v. Mills County*, 69–350.

Under the evidence in a particular case, *held*, that without dispute the amount of the verdict was excessive, and the judgment was reversed: *Miller v. Brown*, 82–79.

Verdict contrary to instructions: A verdict in conflict with the instructions will be set aside on appeal without regard to their correctness. The instructions are the law of the case for the jury: *Sullivan v. Otis*, 39–328; *Morse v. Johnson*, 38–430; *Cobb v. Illinois Cent. R. Co.*, 38–601; *Farley v. Budd*, 14–289; *Browne v. Hickie*, 68–330. And see notes to § 3705.

If instructions are conflicting the verdict will not be set aside if in harmony with the correct instructions: *Cobb v. Illinois Cent. R. Co.*, 38–601.

Finding of facts by court, review of, see notes to § 3654.

Judgment of court on facts, review of, see notes to § 3783.

Findings of referee, review of, see notes to § 3740.

IV. Hearing and Determination of Appeal.

a. *Dismissal or Affirmance.*

For failure to file transcript, etc., see §§ 4120, 4137.

Where appellant's right has terminated, see § 4151 and notes.

Other grounds: Where it did not appear that a general verdict had been found or that judgment had been rendered, *held*, that the appeal ought to be dismissed on motion: *Martin v. State F. Ins. Co.*, 58–609.

The existence of the judgment from which the appeal is taken is a jurisdictional fact, and if the existence of such judgment does not appear from the abstract the appeal will be dismissed: *Warder v. Schwartz*, 65–170.

Affirmance or dismissal on motion will not be granted on the ground that the case is not triable *de novo*, and there is no assignment of errors. Such an objection can only be raised on final hearing: *White v. Savery*, 49–197.

An objection that the record, on appeal, does not sustain the errors assigned, can only be determined upon final hearing and not on motion: *Balm v. Nunn*, 63–641.

Cause remanded for repleading: When the record is in such condition that the supreme court cannot determine from the pleadings what issues are before it, the cause may be remanded in order that the parties may have an opportunity to replead: *Lyon v. Tevis*, 8–79.

Dismissal of appeal by appellant: The state may as appellant, dismiss its appeal from a ruling of the lower court when it does not appear that such dismissal will prejudice the rights of the appellee: *State v. Moriarty*, 20–595.

Where a suit for *mandamus* was brought

against the individuals composing the board of canvassers of an election to relocate a county seat (who were the county supervisors), and upon trial the *mandamus* was awarded, from which defendants appealed, *held*, that the appeal could not be dismissed in the supreme court upon motion of a subsequently elected board of supervisors, such board being merely the nominal party: *State v Cavers*, 22–343.

Affirmance without prejudice: It is competent for the supreme court, in the decision of a motion addressed to its discretion, to order the affirmance of the judgment without prejudice to the rights of the appellant to a new trial in the court below: *White v. Poorman*, 24–108.

Where a decree had been affirmed by reason of the defective condition of the record preventing a trial *de novo*, and afterward it was sought to have a reinvestigation of the case upon a perfected record, *held*, that the decree could not be reopened, but that, in view of the peculiar circumstances of the case, the court would order that such decree should not conclude the rights of either party in a new action: *Van Orman v. Spafford*, 20–215.

Second motion: A motion to dismiss an appeal is no bar to a motion for the same purpose made upon a new and more perfect record: *Seacrest v. Newman*, 19–323.

Setting aside affirmance: Where affirmance has been granted by reason of a mistake without fault on the part of the attorneys for appellant, it may be set aside on proper showing: *Simpson v. Simpson*, 91–235.

b. *Method of Trial of Appeal.*

In actions at law, see § 3651 and notes.

In actions in equity, see § 3652 and notes.

Correcting assessments: An appeal in an action by special proceedings is to be tried according to the method provided for ordinary or for equitable proceedings according to the nature of the action: *Davis v. Clinton*, 55–549.

Probate of will: A proceeding for the probate of a will being a special proceeding cannot be tried in the supreme court *de novo*, but must be reviewed on errors assigned in the record: *Ross v. McQuiston*, 45–145; *Sisters of Visitation v. Glass*, 45–154; *In re Will of Donnely*, 68–126.

An action to test the validity of a will is not triable *de novo* on appeal: *Kelsey v. Kelsey*, 57–383.

Special proceedings: A trial *de novo* can be had only in equitable proceedings. In summary proceedings, as, for instance, to cancel a judgment, the supreme court only has jurisdiction for the correction of errors at law: *Brett v. Myers*, 65–274.

A habeas corpus proceeding will be heard on appeal on errors assigned as in an ordinary proceeding: *Drumb v. Keen*, 47–435.

A proceeding to restore lost corners, as provided by statute, being a special proceeding involving merely a legal right, will be reviewed on appeal as an ordinary and not as an equitable action: *In re Warrington*, 54–33.

On appeal in an action by mandamus the court has only authority to review errors assigned: *Independent District v. Rhodes*, 88–570.

c. *Affirmance or Reversal in General; Remanding; Final Judgment.*

Want of jurisdiction of the subject-matter in the court below may be raised for the first time on appeal to the supreme court: *Walters v. Steamboat Mollie Dozier*, 24–192.

And the want of jurisdiction of the lower court may be taken notice of by the supreme court although not raised: *Groves v. Richmond*, 53–570.

Where a change of venue was granted to a court having no jurisdiction to try the case, *held*, that the want of jurisdiction in the trial court could be urged in the supreme court, although not raised below, and the judgment was reversed: *Cerro Gordo County v. Wright County*, 59–485.

Under such circumstances the supreme court will not review the questions arising on the trial in the court having no jurisdiction: *Bennett v. Cary*, 57-221; *Gilman v. Donovan*, 59–76.

After the court determines that it has no jurisdiction of the subject-matter, it will dismiss the appeal: *Stough v. Chicago & N. W. R. Co.*, 71–641.

Abstract questions: Mere abstract questions or those involving rights no longer existing will not be considered on appeal: *Potts v. Tuttle*, 79–253.

And see notes to §§ 4100 and 4151.

Affirmance where result is correct: Where the judgment of the court below is found to be correct, it will be affirmed although the reasons given therefor are erroneous: *Whiting v. Root*, 52–292; *Jamison v. Perry*, 38–14.

If a person has no standing in a court of equity upon his bill and the answer thereto, the court will not, on appeal, reverse the case because it was dismissed on motion, even though that might be an irregular method of practice: *Hoag v. Madden*, 70–612.

The fact that the district court gave as a reason for its judgment that certain mortgages amounted to a general assignment, when the true reason was that the conveyances were void as fraudulent, but not possessing all the elements of a general assignment, will not be ground for reversal upon appeal: *Wise v. Wilds*, 77–586; *Arnold v. Wilds*, 77–593.

Cannot be affirmed on another ground: Where a motion to set aside a verdict and grant a new trial is overruled upon all the grounds urged except one, and on appeal the action of the court on this ground is held to be erroneous, the case will be reversed without inquiry as to whether the motion should not have been sustained on other grounds, the opposite party not having appealed with reference to the ruling on such grounds: *Collins v. Brazill*, 63–432.

Where a demurrer is erroneously sustained upon one ground and overruled upon another as to which it should have been sustained, the action of the court will be reversed on appeal in order that the appellant may be enabled to take such action as he might have

taken in the lower court if the demurrer had been sustained on the proper ground: *District T'p v. Independent Dist.*, 63–188.

No relief to successful party: In an ordinary action the supreme court will review any such rulings of the trial court as were adverse to appellant: *Colfax Hotel Co. v. Lyon*, 69–683.

On an appeal from a ruling sustaining a motion to direct verdict for defendant, and refusing to direct verdict for plaintiff, the court can consider whether, under the pleadings and the evidence which appear in the record, error was committed: *Lindley v. Snell*, 80–103.

Where parties to an action are not affected by a decree, not having an interest therein, they lose no rights by not appealing, and are not bound by such decree in a subsequent action: *Pierce v. Early*, 79–199.

A party against whom no judgment has been rendered cannot question the correctness of the proceedings in the lower court, and if the judgment is reversed so far as it is in his favor, he should not be bound thereby so far as the proceedings are adverse to him, but should be given an opportunity for a new trial: *Boyce v. Wabash R. Co.*, 63–70.

Where a judgment contains two adjudications, one in favor of a party and one against him, and he appeals from the entire judgment, it will be presumed that he appeals from that portion adverse to him, and especially is this true where the relief sought by the appeal, if granted, would render the judgment of the court below nugatory. On such appeal the judgment will not be interfered with in behalf of the party not appealing: *Hintrager v. Hennessy*, 46–600.

In a law action, where the case is reversed on plaintiff's appeal, no relief can be furnished defendant on an appeal by him: *Minthorn v. Hemphill*, 73–257.

Entire reversal for error as to one count: Where error is committed as to only one of two counts upon which plaintiff recovers, but it does not appear clearly as to the amount recovered on each count, the entire judgment will be reversed: *Sioux City & P. R. Co. v. Walker*, 49–273; *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

Where an ordinance provided for a fine for maintaining a nuisance, and a person was under such ordinance fined and the abatement of the nuisance ordered, and the supreme court held that the ordinance, in so far as it provided for a fine, was in excess of authority and void, *held*, that it would not sustain so much of the judgment as provided for the abatement of the nuisance, but would reverse the whole judgment: *Nevada v. Hutchins*, 59–506.

Affirmance where several issues are involved: The affirmance of a general judgment is an affirmance thereof with respect to all the issues decided thereby, although the opinion be based upon but one of such issues: *Finch v. Hollinger*, 46–216.

Where a judgment is entire it should be affirmed or reversed as to all the parties appealing: *Cavender v. Smith's Heirs*, 5–157, 195.

Case remanded as to cross-action: A cause may be remanded for new trial as to a cross-action, with an order that such trial shall extend to that alone, and that the judgment on plaintiff's original action remain undisturbed: *McAfferty v. Hale*, 24–355.

Opinion of court on points which become immaterial: When a case is reversed upon errors in instructions and sent back for a new trial, the court will not express its opinion as to errors claimed to have been made in the admission or rejection of evidence which may not occur on a new trial: *Gould v. Chicago, B. & Q. R. Co.*, 66–590.

The court will not on appeal undertake to determine any question which can have no influence in determining the rights of the parties before it, however important such question may be in the abstract, and particularly is this true when there is a difference of opinion among the members of the court as to such question: *Payne v. Humeston & S. R. Co.*, 70–584.

Effect of affirmance of ruling on demurrer: Where a demurrer was submitted without stipulation for either party to amend or plead over, and the action of the court in overruling the demurrer was excepted to, and judgment for the other party entered, *held*, that upon the affirmance of the ruling on the demurrer the judgment was final, and the unsuccessful party could not have the cause remanded for the purpose of pleading over: *Grimes v. Hamilton County*, 37–290.

In such a case the court will not, upon affirming the action of the court below, grant leave to the appellant to withdraw his demurrer and proceed to trial upon the merits: *Dunlap v. Cody*, 31–260.

The action of the supreme court in sustaining the decision of the court below overruling a demurrer will be final as against the unsuccessful party only where judgment has been entered against him in the court below for failure to plead or to proceed with the case: *Tyler v. Langworthy*, 37–555.

Effect of reversal; new trial: It is only where the facts are settled by agreement of the parties or by the finding of a court or referee, or by a special verdict of the jury, that upon reversal in the supreme court in an action triable by ordinary proceedings, the court may render final judgment for the party unsuccessful in the lower court. In other cases a new trial must be awarded: *Artz v. Chicago, R. I. & P. R. Co.*, 38–293; *Gray v. Regan*, 37–688; *Harwood v. Case*, 37–692.

Where the facts are not thus determined. and the cause is reversed and remanded to the lower court, judgment should not there be rendered without a retrial: *Harwood v. Case*, 37–692.

Where a judgment rendered below upon a report of a referee was set aside, on appeal, as in conflict with the law and evidence, and the case was remanded, *held*, that the lower court should have proceeded in the same manner as though such report had been set aside upon motion there made: *Gray v. Regan*, 37–688.

A reversal of a judgment leaves the parties in the condition they were in before the judgment was rendered, and parties who

have not appealed are not deprived of their standing in the court after the reversal of the judgment by reason of their not having joined in the appeal: *Case v. Blood*, 71-632.

Where a demurrer to a counter-claim was sustained and the case tried without regard to such counter-claim, but on appeal the ruling on demurrer was reversed, *held*, that the case would be remanded for trial upon the counter-claim, plaintiff's judgment in the former trial not being vacated, but the court below being directed to make proper order to delay its collection during the pendency of the action on the counter-claim: *Sherman v. Hale*, 76-383.

When final judgment will be entered on reversal: The supreme court cannot render final judgment where it reverses a cause on the ground that a new trial should have been granted below. It can only enter up such judgment as the court below should have rendered: *Payne v. Chicago, R. I. & P. R. Co.*, 47-605.

So *held* in a case where a judgment was reversed because not supported by the evidence, and it also appeared that the evidence was substantially the same on a former trial in which judgment had likewise been reversed on the same ground: *Ibid.*

Upon a determination in the supreme court that there was error in refusing to admit certain testimony offered in the court below, the supreme court cannot proceed to render judgment as though the testimony had been admitted. The offered evidence might not be sufficient proof of the fact which it tended to establish, or might have been overthrown by other evidence. The issue must be again passed upon by the lower court: *Mendell v. Chicago & N. W. R. Co.*, 20-9.

Where defendant has not had an opportunity to defend in the court below, for example, in case of default upon service by publication, the supreme court will not, in case of reversal, enter final judgment, but remand the case for the purpose of allowing defense to be made: *Doolittle v. Shelton*, 1 G. Gr., 272.

Where defendant in the court below, upon his demurrer being overruled, stood thereon and appealed, and the ruling was reversed, *held*, that he was not entitled to judgment in the supreme court, but that the case must be remanded, and the plaintiff would have leave to amend: *Ware v. Thompson*, 29-65.

Where the court below made a finding of facts unfavorable to defendant, and to which he excepted, and rendered judgment for defendant upon another question, and upon appeal by plaintiff the judgment was reversed, *held*, that as the correctness of the finding of facts could not be inquired into, although defendant also appealed, for the reason that there was no judgment against him, the court would not enter up judgment upon the finding of facts, but remand the case to the district court to retry the issues of law and fact: *Boyce v. Wabash R. Co.*, 63-70.

The reversal on appeal of an order directing the issuance of a writ of possession on the ground that it is irregular merely, and not because the adverse party is entitled to possession, does not entitle such adverse party, on motion, to an order for a writ of restitution. If the writ of possession is yet undetermined the right thereto cannot be decided upon a mere motion: *Lombard v. Atwater*, 46-501.

Where the judgment upon a special verdict is reversed on an error below the supreme court may render such judgment as should have been rendered below: *Gilmore v. Ferguson*, 28-422.

Where a case is reversed on the ground that upon a finding of facts made by the court the judgment is erroneous as a matter of law, final judgment may be rendered on such finding: *Shaw v. Nachtwey*, 43-653.

In such a case the supreme court may remand the cause for final judgment in the lower court, and judgment below should be entered up without a retrial: *Roberts v. Corbin*, 28-355; *Drefahl v. Tuttle*, 42-177.

Where a party has sued under a statute authorizing the recovery of treble damages, and the judgment in his favor is held to be erroneous on appeal, the supreme court cannot give him judgment for actual damages on a different cause of action: *Bond v. Wabash, St. L. & P. R. Co.*, 67-712.

Where the facts are established by the verdict and the lower court might have rendered a proper judgment thereon, any error in the judgment may be corrected on appeal and final judgment entered without a new trial: *Union Mercantile Co. v. Chandler*, 90-650.

Where the facts are settled, the supreme court may enter such an order as the district court should have made: *In re Bresee*, 82-573.

Effect of reversal for conflict between verdict and instructions: Where a judgment is reversed because the verdict is inconsistent with the instructions of the court and special findings thereunder, although the correctness of the instructions will not be considered, the supreme court will not render a final judgment on the special findings, and in accordance with the instructions, but will remand the cause so that the correctness of the instructions may be determined by an appeal from the judgment of the court on the special findings: *Baird v. Chicago, R. I. & P. R. Co.*, 55-121; *S. C.*, 61-359.

Affirmance of judgment as modified: Where special findings were inconsistent with the general verdict, in so far as the latter included an allowance on one count of the petition, *held*, that the court could modify the judgment by striking therefrom the amount allowed on that count and affirm it as to the balance: *Cobb v. Illinois Cent. R. Co.*, 38-601.

Where final judgment should be entered: Where the judgment will affect the title to real estate it should be entered in the lower court, and the case will be remanded for that purpose: *Hait v. Ensign*, 61-724.

What is the final judgment: If final judgment is rendered in the supreme court on appeal, it is the judgment of that court which constitutes the final adjudication of the cause and not the judgment of the court below: *Griffin v. Seymour*, 15-30.

Final judgment at subsequent term: The supreme court having reversed a cause and remanded it for a new trial will not, at a subsequent term, on motion of appellant,

render judgment in his favor. In analogy to the rule as to the lower courts, entries or orders made at a previous term will only be changed to correct an evident mistake: *Roberts v. Corbin*, 26–315, 329.

Cancellation or correction of judgments: The supreme court has power, aside from any statutory provision, to correct or cancel judgments improvidently entered through mistake or oversight: *Drake v. Smythe*, 44–410.

Additional recovery on appeal; foreclosure of mortgage: Where the mortgagee in an action to foreclose a mortgage accepted and receipted the record for the amount found due thereon and thereafter the mortgagor conveyed the property to a third person, and afterward the mortgagee, within due time, prosecuted his appeal and obtained a decree for an additional amount, *held*, that the additional decree thus secured was not a lien as against the purchaser who took without notice of any intention on the part of the mortgagee to prosecute such appeal: *Davis v. Bonar*, 15–171.

Money paid over in pursuance of judgment: Where plaintiff, in an action to ascertain which of two persons was entitled to certain money due on real property purchased by him, paid the money into court, and it was adjudged to belong to one of the parties defendant and was paid over to him, and thereafter the other defendant appealed, *held*, that upon reversal of the judgment the appellant was not entitled to a recovery against the plaintiff for the money thus brought into court and already paid over to the other defendant: *White v. Butt*, 32–335.

Remitting excess, and final judgment in supreme court for balance: On an appeal in an action in which usury was pleaded as a defense, *held*, that plaintiff might remit the usury and take judgment in the supreme court for the principal, and that judgment might also be entered there for the ten per cent. penalty for the use of the school fund: *Thompson v. Purnell*, 10–205.

Where plaintiff, in an action to recover damages for injury to stock on defendant's railroad track, recovered double damages in the lower court, but on appeal it was considered that the service of notice was not sufficient to entitle him to double damages, *held*, that the case would be reversed unless plaintiff consented to a judgment for simple damages and submitted to pay the costs of appeal: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56–440.

Where the supreme court reversed a case for error in including certain items in the judgment therein, and, on a petition for rehearing, appellee offered to remit such portion of the judgment as was held erroneous and asked for judgment for the balance, *held*, that such offer would be accepted, even on rehearing, and a judgment for the balance was entered: *Hyde v. Minneapolis Lumber Co.*, 53–243.

Where the attention of the court is called, upon a petition for rehearing, to the fact that there is error in the allowance of interest, and the opposite party offers to remit the excess, the judgment will be reduced to the proper amount without granting a rehearing, and the costs of the appeal will be taxed to the appellee: *Gere v. Council Bluffs Ins. Co.*, 67–272.

Where the judgment is for too large an amount by reason of an erroneous assessment of interest, if the party recovering the judgment remits the amount of the excess, judgment may be affirmed with such correction, and it is not necessary that it be remanded: *Brentner v. Chicago, M. & St. P. R. Co.*, 68–530.

Where a judgment is found to be excessive and the party in whose favor it is rendered offers to remit the excess, the judgment will be modified accordingly: *Pelley v. Walker*, 79–142.

Where a judgment is rendered for an amount in excess of that due, but on appeal the successful party offers to remit the excess over the proper amount, the judgment will not be reversed: *Morrill v. Miller*, 3 G. Gr., 104.

Where a remittitur of an excess in the judgment is tendered by appellee on petition for rehearing it may be accepted and the judgment modified and affirmed: *Irlbeck v. Bierl*, 70 N. W., 206.

Remitting in lower court: Where an offer to remit the excess in the judgment was made in the lower court, after service of notice of appeal, and the appeal was nevertheless prosecuted, *held*, that the successful party might, upon remitting the excess, have affirmance of the judgment in the court below with costs, but that if no such remission was entered, then the judgment would be reversed: *Waggoner v. Turner*, 69–127.

The successful party may, in the lower court, remit the amount of the excess or submit to a new trial: *Kitterman v. Chicago, M. & St. P. R. Co.*, 69–440.

Where a remittitur is filed in the lower court to avoid a new trial and the judgment is then reversed on appeal, the remittitur has no further effect on the proceedings in the case: *What Cheer v. Hines*, 86–231.

Remittitur where verdict is excessive: Where a verdict is evidently excessive by reason of an error in assessing the amount of recovery, the supreme court may order the successful party to remit the amount of excess or submit to a new trial: *Howe v. Sutherland*, 39–484.

In a particular case, *held*, that the amount of damages allowed in an action for personal injuries, although mental anguish was a proper element to be considered, was so excessive as to indicate passion or prejudice, and appellee was allowed the option of accepting a less amount or submitting to a reversal: *McKinley v. Chicago & N. W. R. Co.*, 44–314.

A verdict in an action against a railway company for personal injuries being deemed by the supreme court excessive under the evidence in the case and the result of prejudice, they directed that appellee might take judgment for a certain amount, and that if he did not elect to do so within the time set, judgment should be reversed: *Lombard v. Chicago, R. I. & P. R. Co.*, 47–494.

Where judgment was entered below for less than the amount of the verdict on the

ground that it was excessive, *held*, that the cause should be reversed and remanded with direction to the lower court to allow plaintiff to accept such judgment or submit to a new trial: *Noel v. Dubuque, B. & M. R. Co.*, 44–293.

A verdict will not be reduced in the supreme court on the ground that it is excessive unless such relief has been asked in the court below: *Small v. Chicago, R. I. & P. R. Co.*, 55–582; *Dickey v. Harmon*, 26–501.

Election to remit: While, if the verdict is excessive, it may be set aside on appeal and remanded, yet the court will not usually make an absolute order of remand, but allow the successful party to elect to take a certain amount which the court considers not excessive, or submit to a new trial: *Cooper v. Mills County*, 69–350.

Costs in case of remittitur: Where a judgment was modified in the supreme court on account of excessive interest having been included therein, but it did not appear that attention had been called to the error in the court below, *held*, that costs of appeal should be taxed to appellant: *Bayliss v. Hennessey*, 54–11.

Where the mistake in the judgment is such that it would probably have been corrected if a motion therefor had been made, the costs will be taxed to appellant: *Sanxey v. Iowa City Glass Co.*, 68–542; *Kaufman v. Dostal*, 73–691.

Where the judgment is excessive in amount, and it does not appear that any offer was made to remit the excess in the court below, costs of the appeal will be taxed to the appellee, although he may make the remission in the supreme court and prevent the case from being remanded: *Payne v. Billingham*, 10–360.

Where, before costs were made on appeal, the successful party offered in writing to remit all the judgment above a certain amount, which offer was refused, and, upon final hearing, the other party was allowed to recover more than the amount offered, *held*, that the costs of appeal were to be taxed to him: *Montelius v. Wood*, 56–254.

Decision of the case binding on second appeal: A decision upon appeal in a case constitutes the law of the case, and will not on a subsequent appeal in the same case be overruled or re-examined, however well satisfied the court may be that it is erroneous: *Adams v. Burlington & M. R. R. Co.*, 55–94; *Barton v. Thompson*, 56–571; *Simplot v. Dubuque*, 56–639; *Star Wagon Co. v. Swezy*, 63–520; *Ellis v. State Ins. Co.*, 68–578; *District T'p v. Indpendent Dist.*, 69–88; *Raridan v. Central Iowa R. Co.*, 69–527; *Drake v. Chicago, R. I. & P. R. Co.*, 70–59; *Davis v. Curtis*, 70–398; *Babcock v. Chicago & N. W. R. Co.*, 72–197; *Lewis v. Burlington Ins. Co.*, 80–259; *Heffner v. Brownell*, 75–341; *Burlington, C. R. & N. R. Co. v. Dey*, 89–13; *Larkin v. Burlington, C. R. & N. R. Co.*, 91–654; *Garretson v. Merchants & Bankers' Ins. Co.*, 92–293.

Where the court has once definitely passed upon the case on one appeal, it will not, on a second appeal, reconsider its ruling thereon, unless there has been such change of the issues or other circumstances of the case as to raise a new question, touching the applicability of the former decision to the case as thus made on the second appeal. The only method for procuring a reconsideration of the decision on the first appeal is by rehearing: *Minnesota Linseed Oil Co. v. Montague*, 65–67.

Where in a prosecution for a nuisance defendant was convicted and on appeal to the supreme court the conviction was sustained, *held*, that in an appeal from the action of a judge in refusing to grant a writ of *habeas corpus* to release the same party from arrest in such case, the prior decision of the court would be considered binding: *Smith v. Foster*, 85–705.

Appeal not considered after dismissal for defects: Where an appeal is dismissed on the ground of defects in the record, it is incompetent for appellant, without obtaining a rehearing, to bring the case again before the court upon the same appeal on a corrected record: *Green v. Ronen*, 62–89.

Where an appeal is dismissed for the reason that appellant has not moved in the lower court to have the error complained of corrected, before appealing, a dismissal of the appeal and affirmance of the judgment will not prevent him, if not too late, from making the motion in the court below and again appealing from the refusal of the court to sustain it: *Berryhill v. Jacobs*, 20–246.

Where a judgment procured by appellee for failure of appellant to file a transcript was set aside on the ground that appellant had previously dismissed the appeal, *held*, that appellant could not afterwards prosecute his appeal, the formal setting aside of the judgment being a determination that the court had no longer any jurisdiction of the case: *Dewey v. Pierce*, 69–31.

To what court remanded; change of venue: Where a change of venue is improperly granted and the judgment of the court to which the change is taken is reversed for that error, the cause should be remanded to that court from which the change of venue was taken: *Ferguson v. Davis County*, 51–220; *Bennett v. Carey*, 57–221; *Gilman v. Donovan*, 59–76; *Cerro Gordo County v. Wright County*, 59–485.

Such an order was made without discussion in *McCracken v. Webb*, 36–551.

A procedendo is not necessary to authorize the court below to redocket and proceed with the case in a proper manner. That may be done, on proper notice to the adverse party, at any time after the time for rehearing has expired: *State v. Knouse*, 33–365; *Becker v. Becker*, 50–139.

Notice of further proceedings in lower court: The opposite party is entitled to some notice that the case is again upon the docket before judgment can be rendered, upon the case being remanded: *Messenger v. Marsh*, 6–491.

Proceedings in lower court after reversal and remand: After a cause is remanded with direction that a certain judgment be entered, no fact existing prior to the first hearing in the lower court can be interposed as a reason against the entry of such judgment: *Lord v. Ellis*, 11–170.

When a cause is remanded the unsuccess-

ful party is presumed to have presented all existing facts that would show him entitled to maintain his action when commenced, and he cannot relitigate the question decided: *Wilhelmi v. Des Moines Ins. Co.*, 68 N. W., 782.

As to whether amended or additional pleadings may be filed in the court below after a cause is reversed and remanded, see notes to § 3600.

Where a decree was reversed on the ground that the court below had erred in overruling a motion to strike certain depositions from the files, for the reason that they had been taken without authority, and the cause remanded, *held*, that the court below could not be required to dismiss the cause or enter decree for the opposite party, but must proceed to try the case anew: *Kershman v. Swehla*, 62–654.

Where a cause was reversed on one point and sent back for a new trial and further proceedings not inconsistent with the opinion in the supreme court, *held* that plaintiff (appellee on the appeal) was not required to introduce evidence on an issue determined in his favor on the former trial, and which was regarded as settled in his favor on the appeal, and as to which no inquiry was authorized by the opinion; and this even though defendant, in an amended answer after the cause was remanded, had denied the fact involved therein: *Croup v. Morton*, 53–599.

Where a motion for a new trial is overruled in the court below and that action of the court is reversed on appeal, nothing remains to the court below but to proceed with a new trial. It cannot receive other affidavits and pass again upon the motion for a new trial: *Pomroy v. Parmlee*, 10–154.

If judgment is reversed for error of law in entering judgment on a finding of facts and the case remanded for a proper judgment upon such finding, judgment should be entered without a retrial: *Roberts v. Corbin*, 28–355; *Drefahl v. Tuttle*, 42–177.

Where the case has been tried by the lower court, and the facts settled by the special findings, and is remanded for judgment, and there is no claim that a different showing can be made on a new trial, it is not error to enter up judgment without further proceedings: *City Bank v. Radtke*, 92–207.

Where the judgment in the supreme court leaves nothing for the lower court to do on the remanding of the cause except to enforce the performance of the duties imposed by the judgment of the supreme court upon an officer of the lower court by requiring him to pay over money in his hands, there is no occasion for a trial: *Howe v. Jones*, 71–92.

But this rule is not applicable where a motion for a verdict upon the evidence is overruled in the lower court, and on appeal it is held that such motion should have been sustained. The lower court might have, even after sustaining the motion, allowed the introduction of other evidence omitted by mistake or inadvertance, and the supreme court will not, by rendering final judgment upon the motion for verdict upon the evidence, cut off the opportunity which would have existed in the lower court to introduce such additional evidence: *Meadows v. Hawkeye Ins. Co.*, 67–57.

Where it was held on appeal that a new trial had been improperly granted on account of insufficient evidence, and the cause was remanded, *held*, that defendant was not entitled to judgment in the court below, but that it was the duty of that court to proceed and determine the issues joined in the petition for new trial as if no appeal had been taken: *Dryden v. Wyllis*, 53–390.

Where plaintiff in an action on a tax title set up generally the payment of taxes without specifying times or amounts, and the title was held invalid and the cause remanded for determination of amount plaintiff was entitled to recover for taxes paid and judgment therefor, *held*, that defendant might appear in the lower court and contest plaintiff's claim for taxes paid: *Miller v. Corbin*, 48–525.

If, from the judgment of the supreme court, it appears that the cause of action no longer exists, or, in other words, there is nothing left upon which the court below can act, the case, upon being remanded to the lower court, should be dismissed, and refusal of the lower court to do so may be corrected by *certiorari*: *Edgar v. Greer*, 14–211.

The court below should, upon the filing of a *procedendo* directing it to enter judgment in accordance with the opinion of the supreme court, proceed to enter such judgment irrespective of any notice by the adverse party of his intention to file a petition for a rehearing: *Fenton v. Way*, 44–438.

Where an answer containing three distinct defenses was demurred to, the demurrer sustained, and upon appeal the action of the court reversed as to the first cause, the other two not being passed upon, *held*, that defendant had no standing in the court below except on the first cause, but on a subsequent appeal the defendant had the right to have the sufficiency of the other defenses passed upon: *Bates v. Kemp*, 13–223.

A motion having been made in the supreme court to remand the cause to the lower court with leave to introduce additional evidence, and overruled, the lower court should refuse to receive further evidence and render judgment accordingly: *Garmoe v. Windle*, 76–239.

The fact that a case is remanded for further proceedings does not alone require the denial of additional relief but parties should not be permitted to plead a new cause of action: *Leech v. Germania Building Ass'n*, 70 N. W., 1090.

Where a case is remanded to the district court for decree in accordance with the opinion of the supreme court, the district court cannot entertain a motion to correct a computation in the supreme court: *Lombard v. Gregory*, 88–431.

Where judgment is rendered in the supreme court, and it is claimed that such judgment was rendered after the dismissal of the appeal and is for that reason erroneous, such error must be raised in the supreme court by motion to set the judgment aside, and cannot be urged in an injunction proceeding to prevent the enforcement of the judgment by execution: *Phelan v. Johnson*, 80–727.

Where the decree of the lower court is rendered in attempted compliance with the

opinion of the supreme court the supreme court will on appeal from such decree take notice of its own previous decision and the record on which it was founded in determining whether such decree is proper: *Pitkin v. Peet*, 64 N.W., 793.

d. *Trial of Equity Cases De Novo.*

Method of securing, see § 3652 and notes.

What triable de novo: A proceeding to establish a lost corner in a boundary of land is not triable *de novo* upon appeal: *Bohall v. Neiwalt*, 75–109.

The finding of the commissioner in such case will be regarded as the verdict of a jury, and the supreme court will determine whether the report has such support in the evidence that the action of the court in setting it aside and rendering judgment contrary thereto is erroneous: *Yocum v. Haskins*, 81–436.

The fact that an action in equity for an accounting is tried in the lower court by a referee does not affect the question as to the manner of trial on appeal: *Hubenthal v. Kennedy*, 76–707.

The action of the court with reference to the appointment of a guardian of the person and property of a minor is reviewable only on errors assigned: *Lawrence v. Thomas*, 84–362.

An appeal from the district court, in proceedings to review the action of a board of equalization, is triable *de novo: First Nat. Bank v. City Council of Albia*, 86–28.

In an action brought by a surviving partner against an administratrix to settle a partnership, where plaintiff's petition was dismissed as to his claim for affirmative relief, but the case was retained, requiring plaintiff to account for his trust as surviving partner, *held*, that the case could not be tried *de novo* upon appeal, because it remained in the court below for trial upon issues involving the rights of both parties and would therefore be remanded: *Smith v. Knight*, 77–540.

A party is entitled to have his case tried by a court of original jurisdiction, and where the judge is related within the prohibited degrees of consanguinity and attempts to dispose of the case without consent, he exceeds his jurisdiction and his acts are illegal, and the case will not be tried *de novo* upon appeal: *Chase v. Weston*, 75–159.

Where it appears by the record that in the trial below both the parties and the court regarded the action as an equitable one, and it was tried upon that theory, it will be so regarded and tried upon appeal: *Bryant v. Fink*, 75–516.

Where a case is tried in the lower court in equity it will be triable *de novo* on appeal even though the lower court has erroneously submitted an issue therein to the determination of a jury: *Frank v. Hollands*, 81–164.

Defects in the record which cannot affect the final result afford no ground for refusing a trial *de novo*: *Smith v. Watson*, 88–73.

What abstract must show: Where the case is triable *de novo*, and the abstract contains no part of the evidence, the appeal cannot be considered and the judgment will be affirmed: *Underwood v. Lombard Inv. Co.*, 84–25.

A case will not be tried *de novo* on appeal where the abstract fails to show the evidence offered and rejected as well as that introduced: *Giltrap v. Watters*, 77–149; *Reed v. Larrison*, 77–399; *Second Nat. Bank v. Ash*, 85–74; *Carlton v. Brock*, 91–710.

The fact that the abstract contains a certificate of the judge that the record contains all the evidence introduced or offered on the trial is not sufficient to enable the case to be tried *de novo*, it not appearing that all such evidence is in the abstract: *Walrod v. Flanigan*, 75–365; *Parks v. Garner*, 77–154; *Peoria Steam Marble Works v. Linesenmeyer*, 80–253; *Bailey v. Green*, 80–616; *Shattuck v. Burlington Ins. Co.*, 78–377; *Harper v. Gleyslein*, 85–709.

The supreme court cannot, even with the consent of counsel, try cases *de novo* unless the abstract shows that all the evidence is before the court: *Peoria Steam Marble Works v. Linesenmeyer*, 80–253.

Where the abstract claims to "fairly set out all the record material to the termination of this action," the court cannot try the case *de novo: Miller v. Terkeldsen*, 80–476.

In such case, *held*, that the decision below would be affirmed, although appella t in his argument in reply assigned errors, the court not having been asked to hear the appeal as a law action: *Ibid.*

Further, as to abstract in general, see notes to § 4118.

Certificate of judge: Where the evidence appears to have been in writing certified by the judge of the court below, and the certificate of the judge shows that it was tried below as in equity, it will be tried *de novo* on appeal: *Ryan v. Heenan*, 76–589.

Unless the certificate of the judge shows that the reporter's notes and translation thereof contain all the evidence, or that all of the evidence was made of record, the case cannot be tried *de novo*. The certificate of the reporter to his notes and translation will not dispense with the judge's certificate: *Blanchard v. Devoe*, 80–521.

Where the evidence is not certified it will be stricken from the record on appeal: *Ibid.*

Further, as to judge's certificate, see notes to § 3652.

The hearing and determination: On an appeal in an equitable action the court will examine into the merits of the case for the purpose of administering justice, guided only by the universal principles of equity jurisprudence, not being confined to errors apparent on the record: *Austin v. Carpenter*, 2 G. Gr., 131.

On such an appeal the facts as well as the law of the case are again reviewed and adjudicated: *Pierce v. Wilson*, 2–20.

The court, however, can only act upon the testimony upon which the decree below was rendered: *Walker v. Ayres*, 1–449.

It cannot, although the case be triable *de novo*, consider testimony not presented to and considered by the court below: *McGregor v. Gardner*, 16–538.

In case of a trial *de novo*, the supreme court will consider objections made by the

appellant to evidence offered by appellee and if it finds the objection well taken will exclude the evidence from consideration, but if the evidence has been admitted without objection on the trial below an objection will not be entertained on the appeal: *Grafton v. Moorman*, 88-736.

Upon trial *de novo* the court cannot determine a question as to which no issue is raised on the trial below: *Wheeler & Wilson Mfg. Co. v. Hasbrouck*, 68-554.

The difference between a court having appellate jurisdiction proper and a court for the correction of errors at law is, substantially, that the former tries cases *de novo* and renders such judgment as should be rendered upon the facts and the law, while the latter simply inquires into alleged errors of law committed by the lower court. Under our constitution the supreme court has jurisdiction to try *de novo* on appeal only chancery cases: *Sherwood v. Sherwood*, 44-192.

If a case is tried as an equitable one in the court below, and the proper steps are taken to secure a trial *de novo* on appeal, the case must be so tried, and not upon assignment of errors. The method of trial in the supreme court is dependent upon the manner in which the case was tried below, and not upon the nature of the case: *Blough v. Van Hoorebeke*, 48-40.

On appeal in equity cases the trial is of the whole case in so far as the appellate court is involved, but its province is not to review or modify a judgment in favor of parties who are content with the judgment below, which fact is assumed in the absence of a complaint by the parties by means of an appeal: *Smith v. Knight*, 88-257.

A case having been tried below as an equity action, fully argued upon its merits in the supreme court, *held*, that the court would consider it *de novo* without determining whether the assigning of errors was a waiver of the right to such trial: *Grafton v. Moorman*, 88-736.

While the appellant in an equitable action may have the case considered on errors of law instead of *de novo* yet for that purpose an assignment of errors is necessary: *Marshall v. Westrope*, 67 N.W., 257.

It is only issues of fact in equity cases which are triable anew on appeal without exceptions or assignments of error. Issues of law in these cases such as rulings on demurrer can be considered only upon exceptions and assignments: *Exchange Bank v. Pottorfe*, 65 N.W., 312. And see § 3749 and notes.

Where the members of the court, on a separate examination of the record, came to different results as to the amount which plaintiff was entitled to recover, but none of them reached a result more favorable to appellant than that reached in the court below, *held*, that the judgment should be affirmed: *Branhard v. Scott*, 76-773.

Case not to be remanded: It is not the duty of the court in a trial *de novo*, when it appears that the evidence is not sufficient to support the judgment in the court below, to remand the case for a new trial in order that the party who is unsuccessful on the appeal may have the opportunity of introducing additional evidence: *Wickersham v. Reeves*, 1-413.

Where the defendant in an equity case relied upon the defense of a former adjudication which was determined in his favor, and the plaintiff appealed, *held*, that although the decision of the court with reference to such prior adjudication was erroneous, the case would not be remanded for new trial, but would be finally determined upon the evidence; and the plaintiff not having introduced the evidence showing his right to recover must fail: *Butterfield v. Wilton Collegiate Inst.*, 85-404.

In such case the plaintiff has not the right on an issue of fact, where there is an affirmative defense pleaded, to try that issue, and if successful demand a further trial in the lower court on other issues presented: *Ibid.*

Affirmance; former adjudication: A judgment in an equity case which is affirmed on appeal to the supreme court, for the reason that proper steps were not taken to secure a hearing on the merits, is conclusive as a former adjudication, and may be pleaded as such when the same question arises in another action, although the decision of the supreme court, if the case could have been heard on the merits, would have been different: *Trescott v. Barnes*, 51-409.

When case will be remanded: Where the supreme court holds that an equitable action is not triable *de novo* on appeal for want of the proper steps having been taken, but reverses the judgment on errors assigned, it cannot enter a final decree, but must send the case back for further proceedings: *Jordan v. Winser*, 48-180; *Kershman v. Swehla*, 62-654.

Where objection to non-joinder of necessary parties defendant is made for the first time on the hearing of a case triable *de novo* in the supreme court, such want of proper parties will not cause the bill to be dismissed, but the action will be remanded with leave to have the necessary parties brought in: *Postlewait v. Howes*, 3-365.

Where the trial court had struck a deposition of a party from the files because not taken within the time required by order of the court, *held*, on appeal, that although such action of the court was erroneous, the supreme court would not proceed to try the case anew on the evidence submitted below and the deposition thus stricken from the files, but would remand it for the purpose of allowing the opposite party to present additional evidence, so that the party whose deposition was thus stricken out would not be able to take advantage of the error of the court below in refusing to consider his deposition: *Sweet v. Brown*, 61-669.

When an equity cause is, upon appeal, not tried *de novo*, but is reversed on errors assigned, and remanded, it stands for trial anew as a law action: *Jordan v. Winser*, 48-180.

Modification of decree: The supreme court will not, on appeal, make a modification of a decree so as to render it more favorable to the party who does not appeal, even though it may seem from the record that

such change would be proper if there had been an appeal by such party: *Smith v. Wolf*, 55-555.

Where there was nothing in the record indicating that an appeal was taken for delay, and the judgment of the lower court was affirmed after the expiration of the time fixed therein for performance by the unsuccessful party, *held*, that the time for performance should be extended so as to allow an opportunity to such party to perform the decree as affirmed: *Daniels v. St. Louis, K. C. & N. R. Co.*, 56-192.

Final decree: Where an equity case is appealed and tried anew, and the action of the court below is determined to have been erroneous, the successful party is entitled to have such decree as is proper on the record as made in the court below entered up in the supreme court: *First Nat. Bank v. Baker*, 60-132.

Where an equity case is tried anew on appeal it is the duty of the supreme court to render such judgment as the court below should have rendered: *Kaufman v. Dostal*, 73-691.

While the successful party is ordinarily entitled to a decree in the supreme court, and the cause cannot be remanded, yet there are exceptions to such rule. Where it appeared that by mistake the allegations of the petition were erroneous in the description of a highway with reference to which relief was asked, *held*, that the case might be remanded for the purpose of enabling plaintiff to amend his petition so as to secure such relief, it not appearing that plaintiff or his attorney was chargeable with negligence in connection with such mistake: *White v. Farlie*, 67-628.

In lower court: While either of the parties is entitled, upon a trial *de novo*, to have a final decree entered in the supreme court, yet if the judgment is such as to affect the title to real estate, it should properly be entered in the court where the case was tried: *Hait v. Ensign*, 61-724.

Proceedings in lower court after remand: After an equitable action has been tried *de novo* in the supreme court and remanded to the lower court for decree, in accordance with the decision of the supreme court, the party cannot amend his pleadings and present a defense that existed when the issues were first tried in the court below: *Sexton v. Henderson*, 47-131.

After reversal in a suit in equity, which is remanded for further proceedings not inconsistent with the opinion, it stands precisely as any suit in equity stands between the submission and the entry of the decree, the court being fully advised in the premises and the decision announced as to what decree should be entered upon the pleadings and evidence as they stand. The introduction of new evidence, omitted by inadvertance, or the filing of additional or amended pleadings, might be allowed in the discretion of the court, in view of the circumstances and in furtherance of substantial justice; but could not be claimed as a right: *Adams County v. Burlington & M. R. R. Co.*, 44-335.

The allowance of an amendment and tendering a new issue after trial *de novo* in supreme court, and remanding of cause for judgment in court below and *procedendo* filed, should be made only on the strongest showing of accident or mistake, or for matters arising subsequent to the decree, or the like. A party cannot be allowed to try his cause by piecemeal. But where a showing of diligence is made by affidavits, sufficient to entitle a party to show mistake and introduce a new issue, the question of diligence in discovery of the mistake is not further in issue, and neither that issue nor any of the former issues in the case, but only the new issue, is to be tried: *Adams County v. Burlington & M. R. R. Co.*, 55-94.

When an equity case is remanded for judgment in the lower court, the parties may introduce material evidence which has been discovered since the original trial, and may set up matters materially affecting the merits of the case which have occurred since the former trial, and the amendment to the pleadings necessary to such purpose may be made; but a party cannot set up by way of amendment matter existing at the time of the former trial, and which he omitted to set up at that time: *Sanxey v. Iowa City Glass Co.*, 68-542.

A grant of leave, in a decree entered under *procedendo* from the supreme court to one defendant to withdraw her answer, *held* not to have the effect of continuing or dismissing the case as to such defendant, especially when the decree was immediately afterwards set aside, and a new decree entered without such leave: *McGregor v. McGregor*, 21-441.

Where a cause is remanded to the lower court after trial *de novo*, merely for judgment, without further directions, judgment must be rendered as a matter of course and upon motion, unless the unsuccessful party shall bring himself within some recognized rule which would entitle him to a new trial: *Austin v. Wilson*, 57-586.

Where, in an equity case, there cannot be a trial *de novo* because of error in excluding evidence in the lower court which does not appear of record, the supreme court cannot render a final judgment, but will remand the cause. In such a case the court below cannot render a final decree, but must permit a new trial: *Kershman v. Swehla*, 62-654.

Erroneous action of the lower court in allowing a party to introduce additional evidence after an equitable cause has been remanded to the court below for a decree in conformity with the opinion of the court, is not an order so materially affecting the final decision that an appeal can be taken therefrom before the rendition of final judgment: *Garmoe v. Sturgeon*, 67-700.

e. *Rules, and Exercise of Powers.*

The rules of practice in courts of last resort ought to be framed and interpreted rather with a view to the submission of causes upon their merits than to their disposition merely upon technical grounds: *Palo Alto County v. Harrison*, 68-81.

The rules of the supreme court as to the practice therein have the force and effect of

laws duly enacted. They cannot be regarded as matter of mere form, and until abrogated must be substantially, at least, obeyed in the preparation of abstracts: *State ex rel. v. O'Day*, 68–213.

The constitution gives the supreme court jurisdiction and power to "exercise a supervisory control over all inferior judicial tribunals throughout the state," and while ordinarily such control must be exercised in strict accordance with the rules of procedure which obtain in actions at law or in equity, yet in anomalous and exceptional cases the court is not bound hand and foot and rendered powerless to redress palpable injustice caused by the erroneous action of a lower court: *Poole v. Seney*, 70–275.

SEC. **4140. Judgment against sureties on stay bond.** The supreme court, if it affirms the judgment, shall also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment, damages and costs referred to therein in case such damages can be accurately known to the court without an issue and trial. [C.'73, § 3195; R., § 3537; C.'51, § 1986.]

If appellee take a new judgment against appellant and sureties on his appeal bond, the former judgment is merged therein and its lien destroyed: *Swift v. Conboy*, 12–444.

Where action was brought to restrain the defendant from carrying on his business in violation of the terms of a contract of sale of such business to plaintiff, and plaintiff secured an injunction which was superseded by appeal, *held*, that the supreme court would not render judgment in plaintiff's favor on the bond, but would remit him to his remedy in the lower court: *Cole v. Edwards*, 93–477.

SEC. **4141. Damages for delay.** Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or part has been stayed by an appeal bond, the court may award to the appellee damages upon the amount so stayed; and, if satisfied by the record that the appeal was taken for delay only, may award as damages a sum not exceeding fifteen per cent. thereon. [C.'73, § 3196; R., § 3538; C.'51, § 1990.]

Where there is not a money judgment in the court below against appellants, this and the preceding sections do not confer power on the supreme court to render such judgment on the appeal bond. Although an appeal be taken solely for delay, yet it is only where the collection of money and the judgment therefor has been superseded by bond that damages may be awarded, as here contemplated against the party taking the appeal: *Berryhill v. Keilmeyer*, 33–20.

It appearing that appellant had been at the expense of printing abstract and argument, presenting the question raised by the appeal, *held*, that it was not proper to award damages against appellant for having taken the appeal: *Ragan v. Day*, 46–239.

It is only where a judgment or order for the payment of money is appealed from, or where the damages can be accurately known to the supreme court without an issue or trial, that the court is authorized to award to appellee damages against appellant for taking the appeal: *Branscomb v. Gillian*, 55–235.

SEC. **4142. Costs taxed.** The supreme court must provide by rule for taxing as costs all printing authorized upon the trial of appeals. The court shall also tax the costs of any translation of the shorthand notes filed as provided in this chapter. [26 G. A., ch. 64.]

If defeated party secures a reversal but is again defeated, all the costs may be taxed to him: *Palmer v. Palmer*, 66 N. W., 734.

Where there is a partial affirmance only, as to a branch of the case in which costs are nominal, all the costs may be taxed to appellee: *Baker v. Chicago, M. & St. P. R. Co.*, 67 N. W., 376.

As to the last clause see *Palmer v. Palmer*, 66 N. W., 734, decided before the enactment of these provisions.

As to taxation of costs on appeal in general, see Rules of Supreme Court, § 92.

SEC. **4143. Remand—process.** If the supreme court affirms the judgment or order, it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require. [C.'73, § 3197; R., § 3539; C.'51, § 1991.]

It is not obligatory upon the supreme court to issue process, etc., as here contemplated: *Roberts v. Corbin*, 26–315, 331.

SEC. **4144. Decision certified.** If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the

same force and effect as if made and entered during the session of that court. [C.'73, § 3206; R., § 3551.]

SEC. **4145. Restitution of property.** If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to him such property or its value. [C.'73, § 3198; R., § 3540; C.'51, § 1992.]

Restoration of property taken under the judgment appealed from cannot, in case of reversal, be given as a summary remedy where such property has, by voluntary sale or by seizure and sale, passed to an innocent purchaser, or has, in the *bona fide* discharge of a trust, pursuant to an order of court, been turned over to another: *Hanschild v. Stafford*, 27-301.

Where, upon appeal, it was decided that a writ of possession had been irregularly issued by the court below, *held*, that such fact did not, of itself, entitle the appellant to a restoration of the possession taken from him by such writ: *Lombard v. Atwater*, 46-501.

Where, at the time of a sale under a judgment, an appeal therefrom was pending, upon the subsequent determination of which the judgment was reduced to an amount less than that for which the plaintiff bought in the property at the sale, *held*, that defendant was not entitled to an order upon plaintiff to repay the excess, but that the property should be restored to defendant: *Munson v. Plummer*, 58-736.

Where the judgment under which the successful party has acted is reversed, it becomes his legal duty to restore to the other party all the property or its value taken under the judgment, and, upon failure to do so, action may be brought against him without previous demand: *Zimmerman v. National Bank*, 56-133.

Where certain stock was held by a bank as collateral security and was attached by other creditors, and it was found that the rights of the creditors were subject to those of the bank, and the judgment being afterwards reversed, the stock in the meantime depreciating in value, *held*, that the bank should restore not the amount paid for the stock but the substituted certificates, which was all it had received from the sale: *Ft. Madison Lumber Co. v. Batavian Bank*, 77-393.

This section does not apply to a case where redemption is made from execution sale under a judgment which is afterward reversed on appeal. *Weaver v. Stacy*, 93-683.

SEC. **4146. Title not affected.** Property acquired by a purchaser in good faith under a judgment subsequently reversed shall not be affected thereby. [C.'73, § 3199; R., § 3541; C.'51, § 1993.]

Purchase at sheriff's sale by the plaintiff in execution, or his attorney, with actual knowledge of a pending appeal, is at the peril of the purchaser, and such person is not protected as a *bona fide* purchaser: *Twogood v. Franklin*, 27-239.

In case of a purchase by a judgment creditor before notice of appeal, if he again recovers on another trial, his title is not affected: *Frazier v. Crafts*, 40-110.

Where the purchaser at a judicial sale, and the grantee holding under him, paid only the costs and not the whole amount bid, *held*, that not having paid value they could not be regarded as good faith purchasers; and *held*, further, that the attorney for the plaintiff in the lower court and on appeal could not, upon purchase of the property, become entitled to protection as a good faith purchaser: *O'Brien v. Harrison*, 59-686.

The provisions for the protection of a purchaser at judicial sale as against a subsequent reversal are not designed for the benefit of parties claiming under a distinct title: *Wood v. Young*, 38-102.

SEC. **4147. Mandates enforced.** The supreme court may enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until obeyed. [C.'73, § 3200; R., § 3542.]

SEC. **4148. Petition for rehearing.** If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing. [19 G. A., ch. 144; C.'73, § 3201; R., § 3543.]

Upon the same case and record: A new case cannot be made on a petition for rehearing, nor matters insisted upon which were not presented in the original case: *Hintrager v. Hennessy*, 46-600, 604; *Mann v. Sioux City & P. R. Co.*, 46-637, 643.

So the court cannot, upon rehearing, consider an additional abstract or amended record not before them at the first hearing: *Cramer v. Burlington*, 45-627; *Nixon v. Downey*, 49-166; *Parsons v. Parsons*, 66-754.

The parties cannot, on rehearing, amend the record or present questions not before presented, unless under authority of the court: *McDermott v. Iowa Falls & S. C. R. Co.*, 85-180.

An additional abstract filed by appellee upon rehearing cannot be considered: *Simplot v. Dubuque*, 49-630.

The fact of an appeal having been taken not being shown by the abstract, *held*, that such fact could not be shown on a petition for rehearing: *Hintrager v. Hennessy*, 46-600.

Failure of the abstract to show service of

notice of appeal cannot be cured on rehearing: *Iowa City v. Johnson County*, 68 N.W., 815.

A rehearing is not usually granted for the purpose of permitting correction of the record: *Barber v. Scott*, 92–52.

The fact that additional evidence has been discovered since the trial of the case in the court below is no ground for rehearing: *Zuver v. Lyons*, 40–510.

Certificate of appeal to U. S. supreme court: The certificate that the validity of a statute was drawn in question in the case on the ground that it was in conflict with the constitution of the United States will not be given where the question of such conflict was first raised in the petition for rehearing in the supreme court. The fact which is essential to give the supreme court of the United States jurisdiction on appeal from the state supreme court must appear on the face of the record. It is not sufficient that it be made in the argument of counsel: *Martin v. Cole*, 38–141.

Copy of opinion: Before the modification of rule 92 of the supreme court, *held*, that the requirement that a copy of the petition for rehearing should be delivered to the attorney of the adverse party must be observed: *Austin v. Wilson*, 52–731.

A petition for rehearing which does not contain the original opinion printed in full, or a reference to the number and page of the Northwestern Reporter in which the opinion is printed, will be stricken from the files: *Kervick v. Mitchell*, 68–273.

Remitting excess on rehearing: Where a cause was reversed on appeal because the judgment for plaintiff included an item erroneously allowed, *held*, that appellee might, on rehearing, offer to remit the excess over the amount of the proper judgment, and judgment for the balance would be entered in the supreme court: *Hyde v. Minneapolis Lumber Co.*, 53–243.

Not granted to party who has not argued; may be granted on court's own motion: The supreme court will not grant a rehearing upon the application of a party who failed to file or make an argument when the cause was submitted. But if it is satisfied that error has been committed, it will, on its own motion, order a rehearing for the purpose of correcting the error: *Wachendorf v. Lancaster*, 61–509.

Argument on rehearing: After the opposite party has filed a reply to the petition for rehearing, neither party has the right to file any other argument: *Webster County v. Hutchinson*, 60–721.

Bill of review: The statute having provided for a petition for rehearing and not for a bill of review, an implication arises against the right to file a bill of that kind: *McGregor v. Gardner*, 16–538.

Effect of curative act: Where a curative act is passed while a case in which the defect sought to be cured is raised is pending in the supreme court on rehearing, the case will be regarded precisely as if no opinion had been previously filed, and the defect will be deemed cured: *Iowa R. Land Co. v. Sac County*, 39–124, 151.

In case of division: Where the judgment on appeal stands affirmed by reason of a division in the supreme court, such affirmance is subject to reconsideration on rehearing as any other judgment: *Zeigler v. Vance*, 3–528.

If, on rehearing, the court is equally divided as to whether the former opinion should be adhered to, the case will stand as if the court had been equally divided on the first hearing, and the judgment will be affirmed: *Richards v. Burden*, 59–723, 754.

Effect of rehearing after procedendo: After the decision of a cause by the supreme court, a *procedendo* was filed in the court below, whereupon the proper steps were taken to remove the cause to the federal court. Subsequently, and within the proper time, a petition for rehearing was filed in the supreme court and allowed; *held*, on a motion to dismiss in the supreme court, that the cause was still pending there, and had not been removed to the federal court by proceedings in the court below: *McKinley v. Chicago & N. W. R. Co.*, 44–314; *Railroad Co. v. McKinley*, 99 U. S., 147.

Provisions applicable in criminal cases: The provisions as to rehearing found in the code of civil procedure are applicable in criminal cases as well as in civil, and in favor of the state as well as the defendant: *State v. Jones*, 64–349.

Opinion superseded: When a rehearing is ordered the first opinion is suspended and ceases to have any effect excepting as incorporated in or approved by the final opinion which is filed on rehearing: *Pitkin v. Peet*, 64 N.W., 795; *Stewart v. Stewart*, 65 N.W., 976; *In re Peet's Estate*, 68 N.W., 705.

SEC. **4149. Notice—arguments.** Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe. Such petition shall be printed and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed, and may be made the argument or a brief of authorities relied upon for a rehearing. The adverse party may file a printed argument in response. If the party applying for a rehearing shall give notice of oral argument in his petition, then both parties shall be entitled to be heard orally, unless the party giving notice waives oral argument. [19 G. A., ch. 144; C. '73, § 3202; R., § 3544.]

SEC. **4150. Death of party—continuance.** The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the

district court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice. [C. '73, § 3211; R., § 3520.]

Where, pending an appeal in a divorce case, one of the parties dies, the action abates, both as to the claim for divorce and as to alimony: *Barney v. Barney*, 14–189.

The fact that the death of a party to the appeal is suggested to the supreme court and made a matter of record does not constitute a revival of the cause against the heirs or representatives of such party: *Ibid.*

A person claiming to be administrator of a party to an action in the lower court cannot, on appeal, object to the correctness of the abstract and other proceedings, he not having been made a party to the case in the lower court nor upon the appeal: *Magarrall v. Magarrall*, 74–378.

Where, in an action to enjoin a liquor nuisance, suit was brought in the name of a citizen of the county, *held*, that upon his death the state might be substituted upon the application of a person duly authorized to represent the state: *Geyer v. Douglass*, 85–93.

Where the appellant is not entitled to prosecute the appeal, as, for instance, after payment of the amount of judgment and acceptance of the same by the appellant, the appeal will be dismissed on motion: *Independent Dist. v. District T'p*, 44–201.

SEC. **4151. Dismissal of appeal.** Where appellant has no right, or no further right, to prosecute the appeal, the appellee may move to dismiss it, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit. [C. '73, § 3212; R., § 3521.]

It being shown that the plaintiff has through his attorney accepted the benefit of the judgment in his favor, plaintiff's appeal should be dismissed: *Root v. Heil*, 78–436.

It is possible that where an appeal is prosecuted from an intermediate order affecting the merits, and the action is, in the meantime, prosecuted to final judgment in the court below, such fact might be brought to the attention of the supreme court as a ground for dismissal of the appeal: *Stanley v. Davenport*, 54–463.

Where appellant by motion and affidavit sought to show that pending the appeal appellee (the plaintiff) had accepted a sum of money in full settlement of the judgment recovered below, and appellant thereupon asked that the appellee should take nothing further in the cause and be barred from the further prosecution of the action, and that appellant be discharged from further liability, which motion was resisted on the ground that a part of the judgment had been assigned before settlement, and that there was fraud in obtaining the settlement, *held*, that the court could not grant the motion and appellant must either dismiss or prosecute his appeal: *Simonson v. Chicago, R. I. & P. R. Co.*, 48–19.

To justify a dismissal of the appeal upon a showing that appellant has no further right to prosecute it, that fact should clearly appear. Where there is any doubt as to the facts the appeal will not be dismissed: *Lewis v. Tilton*, 62–100.

Where, pending an action with reference to the use of premises as between adjoining tenants plaintiff sold the premises with reference to which the suit was brought but had not yet executed a deed or received the entire purchase price, *held*, that he had not so far lost his interest in the prosecution of the suit as to make it necessary to dismiss it at the motion of the adverse party: *Price v. Baldauf*, 90–205.

Where a party appealed from a decree restraining his use of property for a certain purpose, and on motion it was made to appear that he had lost his interest in the property, *held*, that the appeal would not be further entertained for the purpose of determining the question of costs: *Faucher v. Grass*, 60–505.

Where a party in whose name the action is prosecuted appears on appeal by his affidavit and otherwise not to be the real party in interest and not to have authorized the prosecution of the action, the appeal may be dismissed. Such showing by the party in whose name the appeal was prosecuted will constitute a virtual abandonment of the appeal: *Gresham v. Chantry*, 69–728.

Where a motion to dismiss an appeal, because appellant is not entitled to prosecute it, is based upon facts as to which the affidavits filed by the respective parties are in conflict, the appeal will not be dismissed: *Long v. Smith*, 67–22.

Where the claim of a party to the cause has been extinguished by reason of his having exercised the right to redeem property of the opposite party from sale under execution, such fact may be shown for the purpose of procuring the dismissal: *West v. Fitzgerald*, 72–306.

Where an appellant withdrew his appeal by serving notice of the withdrawal upon the appellee, but it was not dismissed in the supreme court and the judgment was affirmed, *held*, that such judgment was a final adjudication of the case and a second appeal could not be considered: *Trulock v. Friendship Lodge, K. P.*, 75–381.

To authorize the supreme court to consider an appeal there must be real present questions, involving actual interests and rights of the parties, and when in a case pending in the supreme court rights insisted upon cease to exist, the appeal will be dismissed. So *held* where, pending an appeal from an interlocutory order granting a temporary injunction, the action in the lower court was dismissed by plaintiff in the method authorized by statute: *Chicago, R. I. & P. R. Co. v. Dey*, 76–278.

Further as to dismissal, see notes to § 4139.

SEC. **4152. Proceedings on motion to dismiss.** The appellee may, by answer or abstract filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper or destroy the appellant's right of further prosecuting the same, to which the appellant may file a reply or abstract likewise verified by himself, his agent or attorney, and the question of law or fact therein shall be determined by the court, upon such evidence and in such form as it may prescribe. [C.'73, § 3213; R., § 3522.]

SEC. **4153. Executions.** Executions issued from the supreme court shall be like those from the district court, attended with the same consequences, and returnable in the same time. [C.'73, § 3215; R., § 3552.]

CHAPTER 3.

OF CERTIORARI.

SECTION **4154. When writ may issue.** The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy. [C.'73, § 3216; R., § 3487; C.'51, § 1965.]

Discretion of court: In an action of *certiorari*, the result of which is to annul the action of an inferior tribunal, board or officer, it is peculiarly the duty of the court to interfere only in a case properly made, and even then the court may exercise a proper measure of discretion. It is not bound to grant a writ on merely technical grounds, and where no prejudice is shown: *Woodworth v. Gibbs*, 61–398; *Johnson v. Supervisors*, 61–89.

Certiorari and appeal: The writ of *certiorari* is never used to correct a mere error, but only to test the jurisdiction of a tribunal and the legality of its action: *State v. Roney*, 37–30.

When a party has the right of appeal he cannot proceed by *certiorari: Ransom v. Cummins*, 66–137; *State v. Schmidtz*, 65–556.

Where an inferior court illegally exercises its jurisdiction, and there is no adequate remedy by appeal, the writ of *certiorari* will lie: *Coburn v. Mahaska County*, 4 G. Gr., 242; *Davis County v. Horn*, 4 G. Gr., 94.

Certiorari will not lie where there is a plain, adequate and speedy remedy by appeal: *Independent School Dist. v. District Court*, 48–182.

While the object of the proceeding is to review other proceedings and to modify, revise, or correct as the law requires, it is not an appeal but a remedy provided where one does not exist by appeal or under other forms of law: *College of Physicians and Surgeons v. Guilbert*, 69 N. W., 453.

The superior court has jurisdiction of proceeding by *certiorari: Ibid.*

Where the proceedings are entirely invalid, they may be called in question by a *certiorari* and it is not necessary to prosecute an appeal. So *held* with reference to action in the establishment of a road based upon the report of appraisers appointed at a time when the auditor had no authority to appoint such appraisers: *Abney v. Clark*, 87–727.

Certiorari, and not appeal, is the proper method of reviewing an action of a court providing or refusing to provide for the punishment of a party for contempt; and this is true whether the proceeding to punish for contempt is public or private: *Currier v. Mueller*, 79–316. And the writ to the district court in such a case can issue only from the supreme court or a judge thereof: *State v. District Court*, 84–167.

Quo warranto: In an action to prevent an insurance company from doing business in the state, notwithstanding that it had received a certificate from the auditor, on the ground that it was acting in violation of the law in such a manner as to forfeit its rights as a corporation, *held*, that *quo warranto* was the proper remedy to test the company's right to act; and not *certiorari* to review the act of the auditor in granting the certificate: *State v. Fidelity & Casualty Co.*, 77–648.

Remedy in equity: Where there is a plain, speedy and adequate remedy in equity the action of *certiorari* will not lie: *Independent Dist. v. Taylor*, 69 N. W., 1009.

After reversal on appeal: The judgment of a lower court being reversed on appeal and remanded for further proceedings in accordance with the opinion, such court has no jurisdiction to take any action inconsistent with such opinion, and if it attempts to do so its proceedings may be corrected by *certiorari: Edgar v. Greer*, 14–211.

Justice of peace; summary proceeding: Where a justice of the peace exercises a new jurisdiction created by statute, in which the proceedings are summary, and in a course different from the general principles of the common law, *certiorari* and not appeal is the proper method of having the action of the justice reversed: *Dubuque v. Rebman*, 1–444.

Judgment wrongfully set aside: Where

the court has jurisdiction of the parties at the time of making an order or entering a judgment, its action cannot be attacked by *certiorari;* the remedy then is by appeal; but an order made or judgment entered without jurisdiction may be corrected on *certiorari: Hawkeye Ins. Co. v. Duffie*, 67-175; *Rowley v. Baugh*, 33-201.

Failure to appeal: A party who fails to appeal within the time limited by law is not entitled to sue out the writ: *Sunberg v. District Court*, 61-597.

Where a party has, through his own fault, lost a plain, speedy and adequate remedy, which he might have availed himself of, as the right to appeal, he is not entitled to a remedy in *certiorari: Fagg v. Parker*, 11-18.

So he will not be allowed to select some erroneous ruling of an inferior tribunal and have it corrected by *certiorari: O'Hare v. Hempstead*, 21-33.

Administrator's settlement: The proper remedy for a refusal of the county court to correct a mistake in an administrator's final settlement is by appeal, and not by *certiorari: Ibid.*

Condemnation proceedings: Where, in right of way preceedings, it was not claimed that the land was such as could not be taken for right of way, nor that sufficient and proper notice had not been given, but simply that sufficient damages were not assessed and that the award was made on a day subsequent to that fixed in the notice, *held*, that the remedy, if any, was by appeal, not *certiorari: Cedar Rapids, I. F. & N. W. R. Co. v. Whelan*, 64-694.

Commissioners properly appointed to appraise damages for the taking of land for a right of way cannot be considered a tribunal exercising judicial functions and held liable for exceeding their jurisdiction or acting illegally when the proceedings are regular, even though the case is one in which there is no right to condemn the right of way: *Forbes v. Delashmutt*, 68-164.

The proceedings of an inferior tribunal to establish a highway will not be annulled on *certiorari* unless it is shown that it has exceeded its jurisdiction, or is otherwise acting illegally: *McCollister v. Schuey*, 24-362.

This is the proper proceeding by which to test the legality of the action of a city council in condemning land for a street: *Rockwell v. Bowers*, 88-88.

Where a board is given a discretion, a court cannot on *certiorari* inquire into the correctness of its decisions: *Hildreth v. Crawford*, 65-339.

The statutes in reference to this subject do not contemplate that the decisions of inferior tribunals in regard to matters of fact, where the tribunal is clothed with authority to decide with reference to matters submitted to it, and the subject-matter and the parties are within its jurisdiction, may be reviewed by a writ of *certiorari: Tiedt v. Carstensen*, 61-334; *Darling v. Boesch*, 67-702.

The board of township trustees in acting under the statute giving them discretionary authority to consolidate road districts is a board exercising judicial functions and *certiorari* will lie to determine the validity of their proceedings: *Dunham v. Fox*, 69 N.W., 437.

Where the tribunal has jurisdiction and is given a discretion the courts cannot on *certiorari* inquire into the correctness of its decision upon matters of fact nor reverse the exercise of the discretion given: *Iowa Eclectic Med. Col. Assn. v. Schrader*, 87-659.

Board of equalization: *Certiorari* is not the proper proceeding to control the discretion of a board of supervisors acting as a board of equalization: *Smith v. Board of Supervisors*, 30-531. Whatever the motive of the alleged wrongful action of the board, it cannot be deemed illegal in such sense as to be reviewed in that manner: *Polk County v. Des Moines*, 70-351.

Where a board of equalization acts in a case not within its jurisdiction, *certiorari* is the proper remedy: *Royce v. Jenney*, 50-676.

Where a board of equalization acts without jurisdiction, the proper remedy is by *certiorari* to review their proceedings: *Rockafellow v. Board of Equalization*, 77-493.

County seat; relocation: The action of a board of supervisors in determining upon the sufficiency of remonstrances, and the number of names signed thereto, in proceedings for the relocation of a county seat, is ministerial, and may be reviewed on *certiorari: Herrick v. Carpenter*, 54-340.

Intoxicating liquors; permits: The court cannot on *certiorari* review the finding of the board of supervisors in granting a permit to sell intoxicating liquors, as to the good moral character of the applicant, or as to whether the granting of the permit was necessary for the accommodation of the neighborhood. But it may determine whether the proceedings were illegal by reason of no certificate whatever, signed by the electors as required by statute, having been presented to the county auditor: *Darling v. Boesch*, 67-702.

Tax for railroad; illegal voting: The correctness of the action of township trustees in submitting a proposition to vote a tax for a railroad may be determined by *certiorari*, but not the question whether there has been fraud or illegal voting: *Jordon v. Hayne*, 36-9.

Assessor to correct errors: Where an assessor has failed to make on his books the corrections ordered by the township board of equalization, and such books have passed beyond his control into the hands of the auditor, an action of *certiorari* to have the same corrected is the proper remedy: *Keck v. Board of Supervisors*, 37-547.

School directors; illegal acts: Illegal acts of a board of school directors in directing their secretary not to certify to the board of supervisors a tax voted by the electors of the district may be corrected on *certiorari: Smith v. Powell*, 55-215.

Streets, highways: *Certiorari* will lie to control the action of a city council in improperly establishing or vacating streets: *Stubenrauch v. Neyenesch*, 54-567; *Rockwell v. Bowers*, 88-88.

While this is a proper remedy where the board of supervisors acts without jurisdiction (for want of proper notice) in the vacation of

a highway, the remedy by injunction is also applicable in such cases: *Moffit v. Brainerd*, 92–122.

Legislative acts of a city council in passing ordinances cannot be interfered with by *certiorari: Iske v. Newton*, 54–586.

Remitting taxes: The action of the city council in hearing a petition for the reduction of a tax and granting the same is a judicial action and properly brought in question by *certiorari: Collins v. Davis*, 57–256.

Want of jurisdiction: Where the judge attempted in vacation without notice to the other party to change the conditions of a decree of divorce, *held*, that such action being without jurisdiction should be corrected by *certiorari: Hamman v. Van Wagenen*, 62 N. W., 795.

Where the court in an equitable action to redeem from a tax deed entertained a motion for a new trial made after the decision of the action without notice of such motion to the opposite party, *held*, that such action was without jurisdiction, and could be corrected by *certiorari* for the reason that the opposite party not having notice had not appeared to take exceptions, and could not have prosecuted an appeal: *Callahan v. Lewis*, 79–452.

Who entitled to: A person in no way affected by the proceeding cannot interfere therewith by writ of *certiorari: Davis County v. Horn*, 4 G. Gr., 94; *Iske v. Newton*, 54–586.

A taxpayer may, in this proceeding, question the action of a city council in remitting taxes assessed against another taxpayer, although such plaintiff have no greater interest in the matter than other taxpayers: *Collins v. Davis*, 57–256.

A taxpayer may maintain a proceeding by *certiorari* to review an action of the board of supervisors whereby his taxes are wrongfully increased: *Goetzman v. Whitaker*, 81–527.

Taxpayers of different townships cannot join as plaintiffs in an action of *certiorari* to test the validity of such taxes: *Woodworth v. Gibbs*, 61–398.

The proper proceeding to arrest an attempt of a municipal corporation to unlawfully dispose of its property to the injury of its taxpayers is by injunction, which may be had at the suit of a nonresident taxpayer: *Brockman v. Creston*, 79–587.

Any citizen has sufficient interest in the granting of a permit to sell intoxicating liquors to entitle him to have the proceedings reviewed and the errors and irregularities therein corrected by *certiorari* without having any pecuniary interest in the matter: *Darling v. Boesch*, 67–702.

In a proceeding to review the action of the board of supervisors in assessing the costs of constructing a levy upon adjoining land, different property owners whose property will be subject to assessment on that question may join as plaintiffs: *Richman v. Board of Supervisors*, 70–627.

Several owners of distinct pieces of land cannot join in a proceeding by *certiorari* to correct the action in assessing damages resulting from the establishment of a road: *Chambers v. Lewis*, 9–583.

Defendant: The writ should be directed to the officer against whom it issues by name and not merely by his official title: *Ibid.*

SEC. **4155. By whom granted.** The writ may be granted by the district court, or judge thereof, but if to be directed to said court or judge, or to the superior court or its judge, then by the supreme court, or one of its judges, and shall command the defendant therein to certify to the court from which it issues, at a specified time and place, a transcript of the records and proceedings, as well as the facts in the case, describing or referring to them, or any of them, with convenient certainty, and also to have then and there the writ, and, when allowed by a court, it shall be issued by the clerk thereof and under its seal. [C. '73, § 3217; R., § 3488; C. '51, § 1966.]

Before the circuit court was abolished and its jurisdiction transferred to the district court it was held that the former had, under this section, exclusive jurisdiction in civil, and the latter in criminal, cases: *Keniston v. Hewitt*, 48–679.

Even though the form of the writ is erroneous, yet if in response to it defendant brings for review all the facts before the court which were considered, no prejudice can result on account of such error: *Richman v. Board of Supervisors*, 70–627.

The only means of reviewing an order of a district court punishing for contempt is by *certiorari*, and the writ can only be granted in such case by the supreme court or one of its judges. The district court has not authority, therefore, to admit defendant to bail pending such proceedings: *State v. District Court*, 84–167.

SEC. **4156. Stay of proceedings—bond.** If a stay of proceedings is sought, the writ can only issue upon the petitioner giving bond, the penalty and conditions thereof to be fixed by the court or judge allowing the writ, which bond with the sureties thereon may be approved by such court or judge, or the clerk issuing the writ, and in either case to be filed with the clerk. [C. '73, § 3218; R., § 3489; C. '51, § 1967.]

It not being provided that judgment upon the bond should be summarily entered against a surety as provided in the case of appeal bonds, such a judgment will be erroneous: *Smith v. Bissell*, 2 G. Gr., 379.

SEC. **4157. Petition.** The petition therefor must state facts constituting a case wherein the writ may issue, and be verified, and the court or judge, before issuing it, may require notice of the application to be given the adverse party, or may grant it without. If a stay of proceedings is sought, the writ can only be granted upon reasonable notice of the time, place and court or judge before whom the application will be made, which shall be fixed by the court or judge to whom the application is presented. [C.'73, § 3219; R., § 3490; C.'51, § 1968.]

SEC. **4158. Service and return.** The writ must be served and the proof of such service made in the same manner as is prescribed for the original notice in the district court, except the original shall be left with the defendant, and the return of service made upon a copy thereof. [C.'73, § 3220; R., § 3491; C.'51, § 1969.]

The appearance of a party to a writ of *certiorari* cures any defect in the writ or in the service thereof: *Remey v. Board of Equalization*, 80–470.

SEC. **4159. Defective return.** If the return of the writ be defective, the court may order a further return to be made, and compel obedience to the writ and to such further order by attachment, if necessary. [C.'73, § 3221; R., § 3492; C.'51, § 1970.]

SEC. **4160. Trial—judgment.** When full return has been made, the court must proceed to hear the parties upon the record, proceedings and facts as certified, and such other testimony, oral or written, as either party may introduce, and give judgment affirming or annulling the proceedings in whole or in part, or, in its discretion, correcting the same and prescribing the manner in which the parties or either of them shall further proceed. [C.'73, § 3222; R., § 3493; C.'51, § 1971.]

The hearing and judgment of the district court in a proceeding by *certiorari* should be upon the return to the writ, the facts as therein certified and other testimony which may be introduced: *McKinney v. Baker*, 69 N.W., 683.

Where a proceeding by *certiorari* was brought to determine the legality of the action of the board of supervisors in submitting to vote the question of changing the location of a county seat, *held*, that the return of the board showing upon what evidence the board proceeded, and in what manner they reached the result upon which the order was based, was proper: *Stone v. Miller*, 60–243.

Upon a return of the writ of *ceritorari*, *held*, that it was the duty of the court to examine not only the statement of the defendant made in the return, but also the evidence submitted: *Ibid.*

Although the writ may be defective in not having a sufficient certificate as to the record, yet if the facts deemed material are in fact certified no objection on account of the insufficiency of the writ can be afterwards raised: *Richman v. Board of Supervisors*, 70–627.

When the judge returns that notice has been given it will be taken as duly and properly established that notice was given in the proper manner; but if the proof of notice is set out, and it appears to be insufficient, the correctness of the finding of the judge as to the notice will be overcome: *Schroder v. Carey*, 11–555.

In a *certiorari* proceeding a certificate of the county auditor as to whether oral evidence was received before the board of supervisors touching a particular question is not competent to overturn the action of the board: *Woolsey v. Board of Supervisors*, 32–130.

Under the Revision, *held*, that the court could not, in this proceeding, consider errors or illegalities relating to or dependent upon facts not stated in the petition or the writ: *Everett v. Cedar Rapids & M. R. R. Co.*, 28–417; *Smith v. Board of Supervisors*, 30–531.

Also *held*, under the Revision, that the case could be heard only on the record returned and that other evidence could not be introduced: *Jordon v. Hayne*, 36–9.

Under present provisions the court is allowed to consider other evidence than that presented in the return of the writ, but it is not intended to extend the remedy so that inquiry can be made into matters other than the jurisdiction and legality of the proceedings of the inferior court. The provision for the introduction of other evidence is for the purpose of permitting the consideration of all the facts involved in the case bearing upon the issues in the proceeding, touching the jurisdiction and compliance with the law in the case reviewed: *Tiedt v. Carstensen*, 61–334.

The supreme court cannot, upon *certiorari* from a lower court, inquire whether the evidence before the latter justified the order made, and thus review, as upon appeal, its decision: *Wise v. Chaney*, 67–73.

SEC. **4161. By ordinary proceedings—appeal.** The action shall be prosecuted by ordinary proceedings so far as applicable, and from the judg-

ment of the court an appeal lies as in ordinary actions, and the record shall be prepared in the same manner. [C.'73, § 3223; R., § 3494; C.'51, § 1972.]

Under the Revision, *held*, that the proceeding by *certiorari* was a special proceeding and not a special action: *Ainsworth v. House*, 31–504.

The appeal is regulated by the same rules as in an ordinary action, and the findings of the court have the same presumptions in their favor as the verdict of a jury: *Remey v. Board of Equalization*, 80–470.

SEC. **4162. Limitation.** No writ shall be granted after twelve months from the time it is alleged the inferior court, tribunal, board or officer exceeded its or his jurisdiction, or otherwise acted illegally. [C.'73, § 3224.]

The period of limitation commences to run against a proceeding by *certiorari* to correct error in the action of a board of supervisors in holding a petition for the relocation of a county seat sufficient (§ 400) from the time the board decides to submit the question to vote, and not from the time it passes upon the petition: *Jamison v. Board of Supervisors*, 47–388.

Where the board of supervisors had, without being authorized to do so, established a ditch and afterwards levied a tax to pay for the construction of the same, *held*, that a proceeding by *certiorari* to review their action in levying such tax could be brought within one year after the levy, although more than one year after the alleged establishment of the ditch had expired: *Shepherd v. Supervisors of Johnson County*, 72–258.

It is not required that the return of the writ be made within the time herein provided if it is issued in time: *Remey v. Board of Equalization*, 80–470.

TITLE XXI.

OF PROCEDURE IN PARTICULAR CASES.

CHAPTER 1.

OF ACTIONS OF REPLEVIN.

SECTION **4163. Where brought—petition.** An action of replevin may be brought in any county in which the property or some part thereof is situated. The petition must be verified and must state:

1. A particular description of the property claimed;
2. Its actual value, and, where there are several articles, the actual value of each;
3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership;
4. That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him or against the property; but if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process;
5. The facts constituting the alleged cause of detention thereof, according to his best belief;
6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof. [C.'73, § 3225; R., § 3553; C.'51, § 1703.]

Venue: An action of replevin must be brought in the county wher defendant resides or some portion of the property is situated. Section 4168 does not authorize the bringing of the action in the county from which the property had been wrongfully removed, unless such county is that of the defendant's residence: *Hibbs v. Dunham*, 54–559; *Parker v. Norris*, 56–295.

If the action is brought in another county than that of the residence of defendant or in which some of the property is situated, a change of place of trial should be granted upon application: *Parker v. Norris*, 56–295.

The venue in such actions is not limited to the county of the residence of the defendant, and if action is brought where the property is situated, the defendant must either disclaim any interest or claim to the property or defend the action in the county where the suit is brought; he is not entitled to a change of the place of trial to the county of his residence: *Porter v. Dalhoff*, 59–459.

This rule is applicable in actions where bond is not given, and the possession of the property before judgment is not sought. It is also applicable where, although possession of property is sought, no property is actually seized, and that fact will not entitle defendant to have the venue changed to the county of his residence: *Laughlin v. Main*, 63–580.

Failure of plaintiff to show that the property is situated in the county in which suit is brought will not defeat his action. The remedy of defendant in such case, if the action is brought in the wrong county, would be by motion to transfer it to the proper county, and in case of failure to make such application, no objection to the place of bringing the action can be interposed: *Goldsmith v. Willson*, 67–662.

Plaintiff is not required to aver the place where the property is detained, and no issue on that question can be raised except by a motion to change the place of trial to the proper county: *Kelley v. Cosgrove*, 83–229.

Petition; verification: If the petition is not verified the writ cannot legally issue, nor be sustained if issued: *Cure v. Wilson*, 25–205.

In such an action before a justice of the peace, a sworn petition must be filed before a writ can issue, but it need not be filed before return day. The action is sufficiently commenced by service of original notice: *Duffy v. Dale*, 42–215.

The objection that the petition is not verified cannot be made a ground to direct the jury to render a verdict for defendant, nor taken advantage of by motion in arrest of judgment: *Turner v. Younker*, 76–255.

Description of property: The action cannot be maintained for the recovery of an article that cannot in its nature be distinguished from others, but where the petition described the property as a "six-barreled pistol, called a six-shooter or revolver," *held*, that the specific article was sufficiently described to support the action: *Wright v. Ross*, 2 G. Gr., 266.

The description of the property as a "certain storehouse, warehouse and the goods therein contained, being the store, etc., etc., known and designated as the store of your petitioner," *held* sufficient: *Ellsworth v. Henshall*, 4 G. Gr., 417.

The description in a petition designating the property by an enumeration of the different articles, followed by an averment that they were in the defendant's possession, *held* sufficient: *Fort Dodge v. Moore*, 37-388.

In an action for the possession of a piano, *held*, that a mistake in setting out the number of such instrument as a part of its description would not entitle defendant to a judgment, provided that the mistake clearly appeared: *Stephens v. Williams*, 46-540.

Property acquired by defendant at different times: One action may be maintained for the recovery of several items of property wrongfully detained, although they were acquired by defendant at different times: *Glover v. Narey*, 92-286.

Therefore in an action against the sheriff to recover property levied upon and claimed to be exempt, it is necessary to state in several counts the claims for such property taken under distinct levies: *Ibid.*

Plaintiff's right: Plaintiff claiming property by virtue of a chattel mortgage should not allege that he is the absolute and unqualified owner thereof, but should state the nature of his interest. Under an allegation of absolute ownership he cannot recover on proof of an interest as mortgagee: *Kern v. Wilson*, 73-490.

Where plaintiff alleged that he was the absolute and unqualified owner of the property, but also set out chattel mortgages as the basis of his claim of right of possession, *held*, that the mortgages were admissible in evidence, without regard to whether such mortgages should be regarded as showing absolute and unqualified ownership: *Darnall v. Bennett*, 67 N. W., 273.

Wrongful detention: A failure to allege in the petition the wrongful detention of the property is a substantial defect which may be taken advantage of by demurrer or by motion in arrest of judgment or upon appeal: *Draper v. Ellis*, 12-316.

Where the petition alleged that plaintiff was the absolute owner and entitled to the property, and that defendant wrongfully detained the same, but in further stating the ground of detention showed a state of facts which did not justify the recovery by plaintiff, *held*, that a demurrer to the petition should have been sustained: *Houghtaling v. Hills*, 59-287.

Cause of detention in a particular case *held* to be sufficiently stated: *Nolan v. Jones*, 53-387.

Exemption of property: The facts constituting the exemption of the property from levy under execution and which are required by statute to be stated, where it is sought to recover property taken under execution, are the facts which render the property exempt from execution under § 4017: *Armel v. Lendrum*, 47-535.

Although such exemptions are allowed only to residents, yet in a petition to recover such property seized on execution, the fact of residence in the state need not be averred, but nonresidence may be set up as a defense: *Newell v. Hayden*, 8-140.

Prayer for judgment: Although the petition in replevin may be defective in failing to ask a judgment for the possession of property, yet, if the plaintiff is found to be entitled to such possession and no objection to the petition is made in the court below, that objectfon cannot be raised on appeal: *Williams v. Wilcox*, 66-65.

Value: The allegations in the petition as to the value of the property or defendant's interest therein do not limit the amount of defendant's recovery in case he is successful, even though such allegations of the petition are not denied by him: *Chicago & S. W. R. Co. v. Northwestern U. Packet Co.*, 38-377.

The question as to the value of a team of horses being involved, *held*, that evidence as to the work it could do was admissible, particularly where defendant offered testimony as to the unsoundness of the horses. Also *held*, that such testimony was admissible as bearing on the use of the team under plaintiff's claim for damage: *Minthon v. Lewis*, 78-620.

In an action of replevin against an officer to recover property seized by him under a writ of attachment, the subsequent writ in the attachment suit in favor of the attaching plaintiff is admissible in evidence to show the value of the defendant's interest in the attached property: *Miller v. James*, 86-242.

Answer: A denial of the essential averments of the petition which puts them in issue is sufficient to require plaintiff to maintain the cause of action set up. There is no such technical effect to be given the answer as was given some of the common-law pleas in such cases: *Jansen v. Effey*, 10-227.

Right of possession: The question in replevin is, who was entitled to the possession of the property at the time the action was brought: *Campbell v. Williams*, 39-646; *Kingsbury v. Buchanan*, 11-387; *Waterhouse v. Black*, 87-317.

Replevin will not lie in favor of one who is already in possession of the property in controversy, nor can it be successfully maintained against one who does not detain possession of the property: *Hove v. McHenry*, 60-227.

The controlling question under this section is plaintiff's right to possession, and defendant is entitled to no relief in such an action, except judgment for return of the property and the value of his right therein where it has been wrongfully taken from him by the writ: *Beroud v. Lyons*, 85-482.

One who has sold the property of another, and is neither in possession of it nor colluding with his assignee as to keeping possession, cannot be made liable in an action of replevin: *Coffin v. Gephart*, 18-256.

Action of replevin cannot be maintained under an executory agreement to deliver possession of property, where no possession has been obtained nor act done under the agreement: *Berry v. Berry*, 31-415.

Where a horse, on which defendant claimed a lien, had been taken to plaintiff's

stable, and the parties had then agreed that the settlement of the lien should be temporarily postponed, *held*, that defendant would not be protected in the possession of the animal taken from plaintiff's stable without permission: *Bray v. Wise*, 82–581.

Where the parties traded horses on Sunday and on the next day plaintiff tendered back the animal received by him, *held*, that he was not thereupon entitled to maintain replevin for the animal which he gave in exchange: *Kelley v. Cosgrove*, 83–229.

In an action of replevin where the only evidence tending to show that the property was not in possession of defendant when the suit was begun was his statement that, in dividing his property after the demand of plaintiff for possession, his son took the property in controversy, *held*, that such evidence would not defeat the action: *Briggs v. McEwen*, 77–305.

An action of replevin may be maintained to recover possession of a draft which has been rendered void subsequently to its acceptance by reason of material alterations: *Smith v. Eals*, 81–235.

Where the right of a chattel mortgagee to possession were subordinate to a claim under a landlord's lien, but the landlord's lien was satisfied before the trial of the case, and the court taxed the costs up to the time of the satisfaction of such lien to plaintiff and the subsequent costs to defendant, *held*, that such action was proper and that plaintiff was entitled to recover: *Hibbard v. Zenor*, 82–505.

Detention: The gist of the action of replevin is the wrongful detention of the property: *Draper v. Ellis*, 12–316.

Ownership is not necessary to enable a party to recover. The present possession may be recovered by one entitled thereto, even against the owner: *McCoy v. Cadle*, 4–557.

A person who claims ownership in goods in an action of replevin and establishes an interest therein is entitled to recover although such interest is not the entire value of the property: *Jones v. Hetherington*, 45–681.

To entitle plaintiff to recover in an action of replevin it is not essential that he should have the legal title to the property, but he may recover on a naked right of possession, such as that of mortgagor, where mortgagee has not asserted his right to possession: *Goldsmith v. Willson*, 67–662.

The chief question in this section is, which party is entitled to the possession of the property. Incidentally the damages caused by its wrongful detention may be ascertained. Plaintiff will be entitled to recover on proving that he is entitled to the immediate possession of the property, whether his rights be those of full ownership or only those arising from a lien. If it appears that defendant is entitled to possession by virtue of a lien, although plaintiff is the owner, the costs should be taxed against plaintiff, and he is not entitled to apportionment: *Harvey v. Pinkerton*, 70 N. W., 192.

Ownership as evidence of right to possession: A plaintiff may urge his right to possession and maintain it by proof of ownership, which in the absence of proof to the contrary carries with it the right to possession: *Cassel v. Western Stage Co.*, 12–47.

Where plaintiff alleged the possession of the property to be in defendant, and that he was detaining it under the claim that he had purchased it, and defendant's answer denied the alleged ownership and right of possession of the plaintiff, and admitted that defendant owned the property, and alleged that defendant was unlawfully deprived of it by plaintiff, to defendant's damage, *held*, that the question as to whether defendant was the owner of the property was put in issue by the pleadings: *McIntire v. Eastman*, 76–455.

Proof of possession is presumptive proof of ownership, and makes out a *prima facie* case, and proof of an after-acquired possession by defendant, it appearing that it was procured wrongfully, will not avail him: *Cumberledge v. Cole*, 44–181.

Burden of proof: In an action of replevin the burden of proof is upon plaintiff, and he must recover solely upon the strength of his own title and not upon the weakness of that of his opponent: *Hamilton v. Iowa City Nat. Bank*, 40–307.

In an action of replevin the burden is upon plaintiff to show himself entitled to possession of the property. If defendant relies upon the claim of plaintiff being fraudulent, the burden of proof is then upon him to establish such fraud: *Hardy v. Moore*, 62–65.

An answer by defendant setting up a purchase of the property from a third person who is alleged to have been the owner thereof, as defendant believes, is equivalent to denying plaintiff's ownership and throws the burden of proof of ownership upon him: *Litchfield v Halligan*, 48–126.

Setting up claims of another: Where a plaintiff in a replevin suit abandoned the case, and the issue as to who was entitled to possession was between the defendant, holding possession under execution against a third party, and an intervenor claiming under a bill of sale from plaintiff, *held*, that the intervenor's bill of sale made out a *prima facie* case for him, and defendant could not defeat it by showing title in plaintiff: *Burrows v. Waddell*, 52–195.

Where one took possession of certain property as purchaser, asking the payment of certain mortgages, and brought action of replevin therefor in his own name, *held*, that he was not in a position to assert or protect the rights of the mortgagees as their agent: *McNorton v. Akers*, 24–369.

Demand, when necessary: Proof of demand will only be required where it is necessary to terminate defendant's right of possession or confer such right on plaintiff: *Stanchfield v. Palmer*, 4 G. Gr., 23; *Gilchrist v. Moore*, 7–9; *Smith v. McLean*, 24–322; *Redding v. Page*, 52–406; *Oswego Starch Factory v. Lendrum*, 57–573; *Ruiter v. Plate*, 77–17; *Leek v. Chesley*, 67 N.W., 580.

One who verbally bargains for the sale of personal property but pays nothing thereon, no time or place being fixed for its delivery, must make demand and tender of the purchase money (in the absence of an agree-

ment for credit) before the action for replevin will lie. A tender after suit brought will not entitle plaintiff to recover: *Hart v. Livingston*, 29–217.

Where the taking of the property by defendant has been wrongful, no demand before suit is necessary: *Robinson v. Keith*, 25–321; *Delancey v. Holcomb*, 26–94; *Jones v. Clark*, 37–586.

Where plaintiff and defendant claim under distinct or independent titles, demand is not necessary: *Redding v. Page*, 52–406.

Where plaintiff alleged that he was the owner of property and that defendant claimed possession thereof under a levy against a third person wrongfully claiming title thereto, *held*, that an averment of demand was not necessary: *Oswego Starch Factory v. Lendrum*, 57–573.

Where property had been forcibly taken under a chattel mortgage alleged to be void, *held*, that if the mortgage was in fact void the taking was wrongful, and a demand for the return of the property was unnecessary: *Ruiter v. Plate*, 77–17.

Where property was sold on trial, and promissory notes given for the purchase price, no part of which had been paid, in an action of replevin to recover the property, *held*, that no demand was necessary before bringing suit: *Peck v. Bonebright*, 75–98.

If both parties claim absolute ownership of property the possession of which is sought by plaintiff and the right of possession is incident to such ownership, a demand is not necessary: *Leek v. Chesley*, 67 N. W., 580.

To recover property seized under execution or attachment: If property is erroneously seized on execution against a third party, the party entitled to the possession thereof may bring action to recover the same: *Gimble v. Ackley*, 12–27; *Shea v. Watkins*, 12–605; *Remsden v. Wilson*, 49–211.

And this is true even though the property is not in the possession of the officer, but of his bailee: *Ralston v. Black*, 15–47.

And the same rule holds in case of a seizure under a writ of attachment against one not the owner: *Miller v. Bryan*, 3–58; *Smith v. Montgomery*, 5–370.

Replevin may be maintained by the owner of property against an officer who has seized and holds it under a writ of replevin issued against another person, in an action to which the real owner was not a party: *Davis v. Gambert*, 57–239.

The fact that the writ under which the officer claims to hold is from another court than that in which the action of replevin is brought will not deprive the latter court of jurisdiction: *Ramsden v. Wilson*, 49–211; *Seaton v. Higgins*, 50–305.

The provision for replevying property in the hands of an officer under judicial process cannot be applied as between a federal court and a state officer holding the property under the authority of a state court: *Senior v. Pierce*, 31 Fed., 625.

Replevin will lie for property wrongfully seized by an officer under execution, as, for instance, where the process under which the levy is made is void: *Armel v. Lendrum*, 47–535.

So where the levy was under process issued under an unconstitutional statute, *held*, that replevin would lie for the property: *Cooley v. Davis*, 34–128.

The general rule is that property seized on a legal writ issued by a court having jurisdiction of the subject-matter under a valid statute cannot be replevied by the owner: *Armel v. Lendrum*, 47–535.

So *held* where it was sought to show that the judgment under which the levy was made had been satisfied: *Ibid.*

The writ of replevin is not the lawful process for taking property from the possession of an officer holding it under a writ properly issued in a criminal proceeding. So *held* where it was sought to replevin intoxicating liquors from an officer holding them under search-warrant: *Lemp v. Fullerton*, 83–192.

The common law rule that the owner of a chattel cannot maintain an action of replevin for the possession of goods taken from him by legal process is modified so far as to authorize the maintenance of an action for such property when the petition shows facts exempting from seizure by such process. If the process issued from a court having no jurisdiction, or issued without a judgment having been rendered, or if the law under which the process is issued be unconstitutional, the process is void, and replevin may be maintained: *Morgan v. Zenor*, 88–175.

The mere allegation that there is no service of the original notice on the plaintiff will not show the court to have been without jurisdiction in such sense that the property seized under process in such case can be recovered; the jurisdiction of the court will be presumed: *Ibid.*

Exempt property: The party whose property is attached may maintain replevin if it is exempt from execution although he has failed to move to have the attachment dissolved on that ground as he might have done: *Wilson v. Stripe*, 4 G. Gr., 551.

Notice: An action of replevin cannot be maintained against an officer to recover property claimed to have been improperly seized by him unless written notice of the claim of such person is first served upon him: See notes to § 3991.

But if the officer proceeds to trial upon the simple issue as to the right of property he may be considered as waiving the notice, and cannot afterwards, by interposing the technical defense of want of notice, defeat the action. It is enough if in such case he is allowed to recover costs: *Warder v. Hoover*, 51–491.

In what cases replevin will lie; right to office: Parties cannot in replevin try the right to office held by a person not a party to the action, as, for instance, by claiming that a levy by a person acting as an officer was not valid by reason of his not having properly qualified: *Lufkin v. Preston*, 57–28.

Between partners: The right of possession, and the value of such right, recognized in the action, must be such as are recoverable in an action at law, and the accounts of partners and the extent of interest of each, as growing out of the partnership relation,

cannot be determined: *Kuhn v. Newman*, 49–424.

Possession of note: Action under this chapter may be brought by the maker to recover the possession of a promissory note: *Graff v. Shannon*, 7–508.

And it is not a valid objection in such action that the note, being paid, is of no value: *Savery v. Hays*, 20–25.

A bailee who gives a receipt for property is estopped from denying his bailor's right to possession, and cannot set up the ownership of a third party as a defense to an action of replevin: *Reed v. Reed*, 13–5.

A joint owner cannot recover in replevin from a pledgee of his co-owner's interest, where he could not have done so if the action had been against the part owner who made the pledge: *Frans v. Young*, 24–375.

Undivided interest; growing crops: While it is well settled that where chattels of the same nature and quality belonging to different owners are mingled in one mass, any owner can claim his aliquot part by replevin, yet where property of different owners is not susceptible of division, as in case of growing crops or in case of joint ownership of a single piece of property, replevin will not lie by one joint owner, because the property sought to be recovered is not susceptible of seizure and delivery to plaintiff: *Read v. Middleton*, 62–317.

Property severed from the realty: Where a party has by his own tortious act severed an article from the realty which but for such severance would still be real property, replevin will lie for its recovery. But such an act will not render the property liable to execution, if as a part of the realty it was exempt: *Congregational Society v. Fleming*, 11–533.

Action may also be brought for the recovery of a house which, as between the parties, is mere chattel property: *District T'p v. Moorehead*, 43–466.

Replevin will lie to recover a building which is being wrongfully removed from the land of the owner: *Crum v. Hill*, 40–506.

Rescission of sale: In an action for the recovery of property sold, on the ground that a note given in consideration therefor was void, *held*, that as the note was apparently valid and was outstanding, a judgment for the recovery of the property was erroneous: *Gittings v. Carter*, 49–338.

Property seized for taxes: Property seized to satisfy a tax may be recovered in this action when the tax is levied without authority, but not in cases where the authority exists but has been irregularly exercised: *Macklot v. Davenport*, 17–379; *Buel v. Ball*, 20–282.

So action will not lie in such case, when the levy was authorized and the warrant under which the treasurer acted was valid, although the assessment was erroneous: *Bilbo v. Henderson*, 21–56.

Where personal property is taken by an officer to secure payment of taxes, the owner cannot maintain replevin on the ground that a portion of the taxes were illegal, if a part were legal: *Emerick v. Sloan*, 18–139.

Intoxicating liquors: Replevin will not lie to recover intoxicating liquors seized by an officer by virtue of a search-warrant issued under the provisions of the prohibitory liquor law: *Funk v. Israel*, 5–438; *Weir v. Allen*, 47–482.

And this is true even though the recovery is sought on the ground that sufficient facts did not exist to authorize such seizure: *Cooley v. Davis*, 34–128.

SEC. **4164. Ordinary proceedings—no joinder or counter-claim.** The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counter-claim. [C. '73, § 3226; R., § 4175.]

Although the statute prohibits any counter-claim in such action, *held*, that an action for the possession of a note on the ground that it had been paid could properly be set up as a counter-claim to an action on the note: *Sigler v. Hidy*, 56–504.

It is not the purpose of this provision as to counter-claim to prevent the recovery by defendant of the property which is in controversy, and damages for its detention. It is the policy of the law to settle the matter of title when it is involved, and the right of possession, and questions which arise therefrom, so far as may be done in one action: *McIntire v. Eastman*, 76–455.

Where defendant sought to have the return of the property taken by plaintiff under his writ, or the value thereof, *held*, that a claim on the part of defendant for the return of property not taken under the writ was a counter-claim, and therefore not allowable: *Chapin v. Garretson*, 85–377.

This section precludes the introduction by defendant of a counter-claim, but does not prevent his setting up an affirmative defense; thus where the plaintiff sought to recover possession of personal property which he claimed of the other, *held*, that any equitable defense showing ownership in the defendant as against the plaintiff would be admissible, but not any independent claims against the plaintiff based on the transactions in which the property was involved: *Palmer v. Palmer*, 90–17.

The reason for not allowing a counter-claim is that it would permit a creditor to forcibly seize the property of the debtor without process and then to plead an indebtedness as a defense to an action to recover it back: *Ibid.*

Where the question was whether a chattel mortgage under which recovery of the possession was claimed had beeu satisfied by the execution of a warranty deed, *held*, that there was no equitable issue involved requiring the transfer of the case to the equity docket: *Beroud v. Lyons*, 85–482.

Section applied: *Muir v. Miller*, 82–700.

SEC. **4165. Process on Sunday.** If the plaintiff alleges in his petition that he will lose the property unless process issues on Sunday, the order may be issued and served on that day. [C. '73, § 3227.]

SEC. **4166. New parties.** If a third person claims the property or any part thereof, the plaintiff may amend and bring him in as a co-defendant, or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervention. [C.'73, § 3228; R., § 3561; C.'51, § 1684.]

A person claiming to hold a prior incumbrance should be allowed to become a party upon application: *Parrot v. Hughes*, 10-459.

In cases of intervention the judgment concludes the original defendant and the intervenor: *Witter v. Fisher*, 27-9.

The provisions of the statute allowing intervention by a party claiming the property, or any part of it, do not prevent such person from bringing replevin against the sheriff to recover possession of the property: *Davis v. Gambert*, 57-239.

An assignee in bankruptcy acquires such an interest in the property of the bankrupt fraudulently conveyed that he may maintain an independent action to recover such property: *Wetmore v. McMillan*, 57-344.

Where a party has himself substituted for the sheriff in an action of replevin, plaintiff, if entitled to a judgment against the original defendant, is entitled to judgment against such substituted defendant for costs: *Romick v. Perry*, 61-238.

The proceedings with reference to intervention are wholly statutory, and a party has not a right to intervene under this section who would not be entitled to make intervention under the general provisions on that subject (see § 2594): *Dupont v. Amos*, 66 N. W., 774.

SEC. **4167. Bond.** When the plaintiff desires the immediate delivery of the property, he shall execute a bond to the defendant, with sureties to be approved by the clerk or justice, in a penalty at least equal to twice the value of the property sought to be taken, conditioned that he will appear at the next term of the court, if in a court of record, or on the day fixed in the original notice, if in a justice's court, and prosecute his action to judgment, and return the property, if a return is awarded, and pay all costs and damages that may be adjudged against him, which bond shall be filed with the clerk or justice, and be for the use of any person injured by the proceeding. [C.'73, § 3229; R., § 3554.]

Judgment against sureties on the bond: Where the judgment in a replevin suit determines the title of the property, it cannot be questioned in an action on the bond; but when such judgment simply determines the right to possession, the title may be afterwards investigated, in action on the bond, to determine the amount of damages: *Harman v. Goodrich*, 1 G. Gr., 13; *Buck v. Rhodes*, 11-348; *Hawley v. Warner*, 12-42.

The surety on the bond cannot appeal from a judgment against his principal in a justice's court, and relitigate his principal's claim to the property; he is bound by the judgment: *Crites v. Littleton*, 23-205.

While the judgment should direct the return of the property, nevertheless the surety will be bound, although the judgment against the principal be only for the value of the property: *Mason v. Richards*, 12-73.

Where plaintiff dismisses his action and thereupon a judgment for the return of the property is entered in favor of defendant, the question of title is not settled by the judgment, and it is competent, in an action on the replevin bond, to show by way of defense that the ownership of the property was actually in the plaintiff: *Buck v. Rhodes*, 11-348.

The judgment entered on the replevin bond is at least *prima facie* evidence of the measure of damages in an action against the obligor in a bond of indemnity given to a surety on the replevin bond; and where to this is added proof that he has paid the whole amount of the judgment, it is sufficient to establish his claim unless rebutted: *Lyon v. Northrup*, 17-314.

In an action upon a replevin bond for the non-return of the property, the record in the replevin suit is admissible in evidence: *McGinnis v. Hart*, 6-204.

The liability of the sureties cannot be increased by the action of other creditors after the bond is given and the writ served: *McNorton v. Akers*, 24-369.

The sureties are regarded as in court and bound by the judgment against the principal; and if, by his consent, a judgment is rendered against him containing a provision that it shall be stayed a certain length of time, the sureties are not thereby released: *Hershler v. Reynolds*, 22-152.

The court may render an alternative judgment and enter the same so far as it is for money against the sureties on the bond: *Wilkins v. Treynor*, 14-391.

Aside from statutory provision judgment against sureties cannot be rendered without their being made parties to an action on the bond and having their day in court: *Jansen v. Effey*, 10-227; *Mason v. Richards*, 12-73; *Hurd v. Gallaher*, 14-394.

Where the party from whom the property is taken is adjudged not to be entitled to its possession, the liability upon the bond ceases, and there is no authority for holding sureties liable to a different degree and to another party claiming under an entirely different title: *Christy v. Vest*, 36-285.

Where attached property is replevied and released by bond in that action, the attaching creditor may pursue the property or the sureties on the bond, but he cannot hold the sureties and at the same time subject the property to another liability in the same action: *Struman v. Robb*, 37-311.

Where an action of replevin was brought to recover possession of property to which plaintiff was entitled by verdict alone, and subsequently his action was consolidated with others in which the title to the property was involved, the only thing preventing a judgment for plaintiff in the replevin suit being such consolidation, *held*, that the sureties upon the replevin bond were discharged from any liability: *Edwards v. Cottrell*, 43–194.

Measure of damages: Where the property is taken under the writ, and defendant shows himself entitled to its return, the judgment on the replevin bond should be for the value of the property at the date of the trial and not for its value at the time of seizure: *Clement v. Duffy*, 54–632.

Also *held*, that, where plaintiff in the replevin suit had been to the expense of threshing and marketing grain which had been seized by him in the stack, the proper amount of such expense should be deducted from the value of the grain: *Ibid.*

In an action against the surety on a replevin bond, it appeared that the property consisted of machinery in the shaft of a mine, which remained in the same situation as when the writ of replevin was served. *Held*, that the offer or tender of the property by defendant to plaintiff in such situation was sufficient, and that the surety on the bond was not liable for failure of defendant to remove it from the mine or deliver it above ground: *Nimon v. Reed*, 79–524.

If defendant has a lien upon the property he is entitled in an action on the bond to recover the value of his interest at the time of the taking: *McMeekin v. Worcester*, 68 N. W., 680.

SEC. **4168. Writ issued.** The clerk or justice shall thereupon issue a writ under his hand, and the seal of the court if a court of record, directed to the proper officer, requiring him to take the property therein described and deliver it to the plaintiff. If the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced, the writ may issue from the county whence the property was wrongfully taken, and may be served in any county where it may be found. [C. '73, § 3230; R., § 3555; C. '51, § 1997.]

Quashing the writ should not have the effect of abating the suit: *Minott v. Vineyard*, 11–90.

It is error to render judgment against plaintiff for mere failure to produce the writ when called for after it has served its purpose and property has been seized thereunder: *Saubman v. Greatrakes*, 34–598.

In a summary proceeding by motion to quash a writ on the ground of fraud in procuring the jurisdiction of the property, the evidence to authorize the court to set aside its process ought to be clear and satisfactory: *Gordon v. Bucknell*, 38–438.

SEC. **4169. Following property.** When any of the property is removed to another county after the commencement of the action, the officer to whom the writ is issued may follow the same and execute the writ in any county of the state where the property is found. For the purpose of following the property, duplicate writs may be issued, if necessary, and served as the original. [C. '73, § 3231; R., § 3556.]

SEC. **4170. Execution of writ.** The officer must forthwith execute the writ by taking possession of the property therein described, if it is found in the possession of the defendant or his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the writ was placed in the officer's hands, for which purpose he may break open any dwelling-house or other inclosure, having first demanded entrance and exhibited his authority, if demanded. [C. '73, § 3232; R., § 3557.]

The fact that the writ was served by a constable and not by the sheriff will not entitle the defendant to a return of the property: *Smith v. Eals*, 81–235.

SEC. **4171. Defendant examined on oath.** When it appears by affidavit that the property claimed has been disposed of or concealed so that the writ cannot be executed, the court or judge, upon verified petition therefor, may compel the attendance of the defendant or other person claiming or concealing the property, and examine him on oath as to the situation of the property, and punish a wilful obstruction or hindrance or disobedience of the order of the court in this respect as in case of contempt. [C. '73, § 3233; R., § 3558.]

Evidence of contempt in disobeying the order of court with reference to the property should be by affidavit as provided in relation to contempts in general. Oral evidence is not proper: *State v. Myers*, 44–580.

SEC. **4172. Delivery bond.** The officer, having taken the property or any part thereof, shall forthwith deliver the same to the plaintiff, unless, before the actual delivery to him, the defendant executes a bond to the plaintiff, with sureties to be approved by the clerk or officer, conditioned that he will appear in and defend the action, and deliver the property to the plaintiff, if he recovers judgment therefor, in as good condition as it was when the action was commenced, and that he will pay all costs and damages that may be adjudged against him for the taking or detention of the property; which bond shall be delivered to the officer, who shall return the property to the defendant, append the bond to the writ, return it therewith to the officer issuing it, and refer thereto in his return on the writ. [C. '73, §§ 3234–5, 3237; R., §§ 3559–60.]

Where the sheriff, instead of taking actual possession of the property and delivering it to the plaintiff, left it with the defendant, taking his receipt therefor, *held*, that plaintiff acquired no possession of the property, and was entitled to an alternative judgment: *Davis v. Bayliss*, 51-435.

A plaintiff in an action to recover property claimed to be exempt from execution, which is levied upon by an officer, and which is returned to plaintiff upon the execution of the bond, may give good title to a third party purchasing of him, and the lien of the execution will not, upon judgment being rendered against the plaintiff, revive against the property in the hands of such purchaser. The officer can only have recourse on the bond: *Gimble v. Ackley*, 12-27.

If the plaintiff had no title to the property, then he could confer none, although the property was in his possession under the writ, and a purchaser from him would take nothing by the purchase: *Ibid.*

Where plaintiff in an action against an officer has obtained possession of property levied upon and then dismisses before issue is joined, and the property is allowed to remain in plaintiff's hands, a mortgage executed by plaintiff while the property is thus in his possession will be superior to the claim of the officer under a writ of restitution or a subsequent levy, the plaintiff being in fact the real owner: *Case v. Woleben*, 52-389.

Where defendant elects to take a money judgment, it is no defense that part of the property has been lost or destroyed while in plaintiff's possession: *Lillie v. McMillan*, 52-463.

Where defendant in an action of replevin retains the property by giving a delivery bond, subsequent loss or destruction of the property in defendant's hands will not release him from the obligation to account for its value under his bond in case of judgment against him: *Hinkson v Morrison*, 47-167.

SEC. **4173. Inspection—appraisement.** When the property is so retained by the defendant, he shall permit the officer and plaintiff to inspect the same, and, if the plaintiff so request, the officer shall cause it to be examined and appraised by two sworn appraisers chosen by the parties to the action, or, in their default, by the officer himself, in the manner provided for other cases of appraisement, and in case they cannot agree he shall select a third, and an appraisement agreed to by two of them shall be sufficient, and he shall return their appraisement with the writ. [C. '73, § 3236.]

SEC. **4174. Return of writ.** The officer must return the writ on or before the first day of the trial term, or the return day if before a justice, and shall state fully what he has done thereunder. If he has taken any property, he shall describe the same particularly. [C. '73, § 3237; R., § 3559.]

SEC. **4175. Assessment of value and damages—right of possession.** The jury must assess the value of the property and the damages for the taking or detention thereof, whenever by their verdict there will be a judgment for the recovery or the return of the property, and, when required so to do by either party, must find the value of each article, and find which is entitled to the possession, designating his right therein, and the value of such right. [C. '73, § 3238; R., § 3082.]

Where the jury found generally for defendant for a particular sum, but did not award him the possession of the property, *held*, that it would not be presumed that the successful party was found entitled to the possession of the property: *Hunt v. Bennett*, 4 G. Gr., 512.

Where the property is taken by plaintiff under the writ and judgment is rendered in his favor, a failure to assess the value of the property cannot be prejudicial to defendant: *Williams v. Wilcox*, 66-65.

The failure to return the value of each article will not prevent the party entitled to property from having judgment for the aggregate value. Therefore a failure of plaintiff to prove the value of particular articles, a recovery of which is sought in the action,

will not be a ground for taking the case from the jury: *Goldsmith v. Wilson*, 67–662.

Error of the jury in finding the entire value of the property instead of plaintiff's interest therein will not defeat the judgment where plaintiff has not elected to take judgment for the value of the property, and defendant may satisfy the judgment by turning over the property itself: *Ormsby v. Nolan*, 69–130.

In an action of replevin against a constable, a third person claimed to own the property and intervened, and it appeared that the plaintiff agreed with the constable that there should be no judgment for damages or costs taken against him, and that the property should be regarded as being in the hands of the court, subject to a final determination as between the parties plaintiff and intervenor, and that the officer be discharged from the case. *Held*, that such agreement did not have the effect to release the plaintiff from liability to the intervenor on account of the use and detention of the property, which had been in his possession for a long time: *Van Horn v. Overman*, 75–421.

The damages for the wrongful taking of the property which is sued for should be estimated as of the time of the taking with interest thereon to the time of trial: *Neeb v. McMillan*, 68 N.W., 438.

SEC. **4176. Judgment.** The judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party, and shall also award such damages to either party as he may be entitled to for the illegal detention thereof. If the judgment be against the plaintiff for the money value of the property, it shall also be against the sureties on his bond. [C. '73, §§ 3229, 3239; R., §§ 3554, 3562, 3567.]

Judgment: Although, after the property is seized, it be determined in some other forum that plaintiff is not the owner of the property, yet defendant is not entitled to judgment as by default for its value, and plaintiff may introduce evidence upon the question of value: *Dehr v. Lampton*, 31–172.

Defendant taking a money judgment can recover only the value of his right in the property, and that value cannot exceed the amount of the claims for which he held the property when taken from him: *McNorton v. Akers*, 24–369.

The finding and judgment must follow the pleadings, and a judgment cannot be rendered in replevin in favor of several defendants, jointly, when some of them have no interest in the property; nor can a judgment be rendered in favor of a defendant who claims no interest in the property, and who does not ask for judgment for its return or its value; nor in favor of a defendant who claims the property by virtue of a chattel mortgage upon it, when such mortgage is not in evidence, and no testimony is introduced tending to show his ownership of the property or claim upon it: *Jandt v. Potthast*, 71 N. W., 216.

The value of goods not taken under the writ cannot be included in the judgment: *Ibid.*

Where an action of replevin is brought against a party having a lien upon the property, he is entitled to a judgment for its possession or for the value of his interest therein, but is not entitled to judgment for the full value of the property: *Knudson v. Gieson*, 38–234.

Where property is wrongfully taken from a sheriff who holds it under execution levy, the execution plaintiff in an action for damages is limited in his recovery to the amount still due him with interest and costs: *Hayden v. Anderson*, 17–158.

Where in an action of replevin to recover property seized under an execution it is determined that the execution is void, plaintiff should have a judgment for the return of the property, although his additional claim that the execution which is against another party as defendant is wrongfully levied upon property of which he is the rightful owner is not sustained: *Balm v. Nunn*, 63–641.

If plaintiff establishes his right to the property he may have judgment for its value, although at the time suit was brought the property was not in defendant's possession: *Hardy v. Moore*, 62–65.

The entire legal rights of the parties to the suit in the property in controversy should be adjudicated in the main action, and such an adjudication is as conclusive and final as in any other action: *Hayden v. Anderson*, 17–158.

Judgment for defendant should direct the return of the property: *Chadwick v. Miller*, 6–34; *Mason v. Richards*, 12–73; *Jansen v. Effey*, 10–227.

Judgment in favor of defendant may include interest on the value of the property from the time it was taken by the plaintiff: *Hurd v. Gallaher*, 14–394.

It is only in the judgment that it is necessary to specify which party is entitled to the property. Where plaintiff was in possession under the writ, a verdict of the jury for the plaintiff, simply, was held sufficient to warrant judgment that he was entitled to the possession: *Newlien v. Reed*, 30–496.

The party found entitled to possession may have judgment for the money value, or have return of the property, at his election: *McNorton v. Akers*, 24–369.

ALD an alternative judgment, allowing plaintiff execution for the specific property, or, in case that cannot be obtained, then for its value, is proper: *Clark v. Warner*, 32–219.

If defendant is entitled to judgment, he may have a money judgment against plaintiff and his sureties for the value of the property: *Armel v. Lendrum*, 47–535.

In an action of replevin where the record showed that a certain part of the property levied upon had been released, and judgment was rendered for plaintiff for the "possession of the property in controversy," *held*, that while the judgment would have been more definite and certain if it had specifically described the property in controversy, yet, as the record sufficiently indicated and pointed it out, the judgment would not be reversed: *Coleman v. Reel*, 75–304.

Where certain property was sold on trial and promissory notes given for the purchase price, no part of which had been paid, in an action of replevin to recover the property where there was a general verdict for the defendant, *held*, that a motion for a new trial was properly sustained, as the value of defendant's interest in the property could not be assessed on the general verdict: *Peck v. Bonebright*, 75–98.

Where plaintiff seeks to recover the value of the property he may also have damages for its detention: *Turner v. Younker*, 76–255.

Defendant having a lien is entitled to have the value of his lien determined, and though it does not amount to the full value of the property or the full amount of his claim, he should recover the costs of the action if a right of possession in him is ascertained: *Harvey v. Pinkerton*, 70 N. W., 192.

Measure of damages: In an action against a sheriff to recover property illegally seized, plaintiff cannot show by way of damages that he was compelled, for the purpose of getting the writ, to deposit with his surety a bond as indemnity: *Wilson v. Hillhouse*, 14–199.

Notwithstanding the provision of § 4164, prohibiting a counter-claim in this action, *held*, that where a defendant set up title to the property, and that he had been deprived thereof by the plaintiff, and asked judgment for the value of the property and damages for its detention, the relief asked by the defendant was authorized by this section: *McIntire v. Eastman*, 76–455.

Plaintiff is not limited in recovering damages for detention of the property to cases where he takes a judgment for its possession, but may have such damages for detention also, where he elects to take judgment for the value of the property: *Cook v. Hamilton*, 67–594.

The fact that plaintiff elects to take judgment for the value of the property does not defeat his right to recover damages for unlawful detention. The value recovered is not to be deemed the purchase price of the property at the time of the first unlawful taking: *Hartley State Bank v. McCorkell*, 91–660.

Where the petition stated that plaintiff was in possession of the goods as agent, and the value of such goods, and that defendant had deprived plaintiff of their possession, *held*, that the value of the goods stated was the amount of recovery which could be had against defendant if he could not obtain the goods: *Morris v. Burley*, 74–45.

Dismissal: Plaintiff cannot, without defendant's consent, so dismiss the action as to deprive him of his right to have damages assessed and a return of the property awarded: *Hall v. Smith*, 10–45.

Where plaintiff dismisses his action, and defendant seeks to have the damages sustained by him assessed, plaintiff is considered as being in default and cannot demand a jury trial: *Wilkins v. Treynor*, 14–391.

Upon dismissal of the action by plaintiff, the defendant is entitled to the return of the property, or judgment for the value of his interest therein: *Marshall v. Bunker*, 40–121.

The dismissal of the action by plaintiff will not prevent the defendant from recovering judgment for "the value of his right," and the cause should be retained for the purpose of settling such right. But if such matter is pleaded by defendant after the dismissal by the plaintiff, the latter should not be regarded as in default, but should be allowed to plead and introduce evidence upon the issue raised: *Crist v. Francis*, 50–257.

Where plaintiff sought to recover possession of property held by the sheriff, but did not allege service of notice of his ownership upon the sheriff, and thereafter, upon demurrer being interposed on that ground, the court allowed him to dismiss his action upon payment of costs, and, upon payment to the sheriff of the amount of the judgment for which the property was seized, to retain possession of the property, *held*, that under the facts appearing there was no error: *Reisner v. Currier*, 58–213.

SEC. **4177. Execution.** The execution shall require the officer to deliver the possession of the property, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which judgment was recovered to be specified therein if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property. [C.'73, § 3240; R., § 3253.]

SEC. **4178. Plaintiff's option.** If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter or otherwise, he may at his option have an execution for the delivery of the specific property, or for the value thereof as determined by the jury, and if any article of the property cannot be obtained on execution, he may take the remainder, with the value of the missing articles. [C.'73, § 3241; R., §§ 3563, 3568.]

Whether the successful party must make his election as to whether he will take the property or its value, at the time of judgment, or may do so when execution issues, seems left in doubt; but where the judgment was that plaintiff have immediate possession of the property, and in default thereof, recover the value, *held*, that the judgment amounted to an election to take the property, and it should have been accepted when tendered, and the judgment satisfied: *Oskaloosa Steam Engine Works v. Nelson*, 54–519.

The provision allowing the successful party to have execution for the property or its value at his option is intended to apply only to cases in which the court has jurisdiction to try and determine the merits of the controversy: *Williams v. Chapman*, 60–57.

Under the statute two distinct remedies are provided: First, the delivery of the property to plaintiff; second, where this is not or cannot be done, the rendition of a judgment in his favor for value. Only the first of these forms of proceeding is in the nature of the common-law action of replevin, and the other partakes of the nature of a common-law proceeding in detinue: *Laughlin v. Main*, 63–580.

Where the judgment was for a return of the property, and in default thereof that plaintiff recover of defendant a certain sum as the value of the same, *held*, that defendant could elect to tender the property within a reasonable time, and that when a tender was made within such time the plaintiff might be enjoined from enforcing by execution the alternative judgment for the money value: *McClellan v Marshall*, 19–561.

Where a party took judgment for the property, *held*, that such judgment was an election by him to take the property instead of a money judgment for its value, and he was only entitled to its value in default of recovery of the property by proper process, and upon tender of the property he was bound to receive it and enter satisfaction of the judgment: *Oskaloosa Steam Engine Works v. Nelson*, 54–519.

Where by defendant's own act and the act of plaintiff the property is restored to defendant before judgment is rendered in his favor, he cannot recover the value of the property but only damages for its unlawful detention: *Harrow v. Ryan*, 31–156.

It is not proper to give a money judgment for the value of the property against a person not in possession, nor having the right to possession thereof, either at the time action is brought or judgment is rendered: *Nichols v. Sheldon Bank*, 67 N.W., 582.

SEC. **4179. Judgment on bond.** When property is not forthcoming to answer the judgment, and for which a bond has been given as hereinbefore provided, and the party entitled thereto so elects, a judgment may be entered against the principal and sureties in the bond for its value. [C. '73, § 3242.]

See notes to §§ 4167, 4176.

SEC. **4180. Examination as to concealment.** When it appears by the return of the officer or by the affidavit of the plaintiff that any specific property which has been adjudged to belong to one party has been concealed or removed by the other, the court or a judge may require him to attend and be examined on oath respecting such matter, and may enforce its order in this respect as in case of contempt. [C. '73, § 3243; R., § 3564.]

SEC. **4181. Exemption.** A money judgment rendered under the provisions of this chapter for property exempt from execution shall also be to the same extent exempt from execution, and from all set-off or diminution by any person, which exemption may, at the election of the party in interest, be stated in the judgment. [C. '73, § 3244; R., § 4176.]

Where the property has been voluntarily sold, a money judgment for the purchase price thereof is not exempt: *Harrier v. Fassett*, 56–264.

CHAPTER 2.

OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

SECTION **4182. By ordinary proceedings—joinder—counter-claim.** Actions for the recovery of real property shall be by ordinary proceedings, and there shall be no joinder and no counter-claim therein, except of like proceedings, and as provided in this chapter. [C. '73, § 3245; R., § 4177.]

SEC. **4183. Parties.** Any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action against any person acting as owner, landlord or tenant of the property claimed. [C. '73, § 3246; R., § 3569; C. '51, § 2002.]

Parties: A person who has taken possession of and erected improvements upon land under a parol license to mine has such an interest in the real estate that the owner cannot revoke the license at once, and the licensee may assert his right to possession by this action: *Bush v. Sullivan*, 3 G. Gr., 344; *Beatty v. Gregory*, 17–109.

This action cannot be brought against the holder of a tax certificate. (*Arguendo*): *Eldridge v. Kuehl*, 27–160, 174.

A person who is the agent of the owner of real property cannot maintain such action in his own name: *McHenry v. Painter*, 58–365.

Although action may be brought against the tenant of a nonresident, the statute of limitations does not run in favor of such nonresident: *Heaton v. Fryberger*, 38–185.

The owner of an undivided interest may recover such interest: *Hughes v. Holliday*, 3 G. Gr., 30.

The widow may bring this action for her dower. She is not limited to a statutory proceeding for admeasurement, nor to an action in equity. The statute of limitations does not commence to run against her right until it is denied: *Rice v. Nelson*, 27–148.

An equity will not support an action at law to recover possession of land against the holder of the legal title: *Pendergast v. Burlington & M. R. R. Co.*, 53–326.

In an action at law where no equitable defense is pleaded, the legal title must prevail: *Goepinger v. Ringland*, 62 -76.

In an action to recover real estate based alone upon right of possession, plaintiff cannot recover if he is not the owner of the legal title: *Kitteringham v. Blair Town Lot, etc., Co.*, 66–280.

A party seeking to redeem in equity from a tax deed should bring his action under § 1440 and not under this section: *Callanan v. Lewis*, 79–452.

An action to establish and quiet title and enjoin interference therewith is an action for the recovery of real property and plaintiff must show title in himself: *Schlosser v. Crookshank*, 65 N.W., 344.

As to equitable defenses, see notes to § 4189.

SEC. **4184. Title.** The plaintiff must recover on the strength of his own title. [C.'73, § 3247; R., § 3591; C.'51, § 2020.]

Plaintiff's title: In an action of this kind the plaintiff must recover on the strength of his own title. Under the pleadings he must show the legal title to be in himself: *Huntington v. Jewett*, 25–249.

Plaintiff must recover on the strength of of his own title and not on the weakness of defendant's: *Hurley v. Street*, 29–429.

As plaintiff must recover on the strength of his own title, if he fails to establish such title he cannot sustain his action, whether defendants have any right or not: *Reed v. Wright*, 2 G. Gr., 15.

Where the conveyance upon which plaintiff relied as showing title was found to be fraudulent, *held*, that he could not recover: *Bouton v. Orr*, 51–473.

If defendant sets up an adverse and independent chain of title in a cross-bill, plaintiff cannot, by way of demurrer, object to defects and informalities in such title, raising an issue as to persons not parties in the case: *Lathrop v. American Emigrant Co.*, 41–547.

One who is in possession as a mere trespasser or intruder cannot protect himself by setting up an outstanding title in a stranger: *Williams v. Sweetland*, 10–51.

Where plaintiff in an action to recover real property claimed under a tax deed and set out an abstract of the title, showing title in defendant at the time of such tax sale, *held* that, on introduction of evidence of the payment of taxes by defendant before the sale, he was entitled to judgment without proving title to have been in him at that time, the admissions in plaintiff's abstract of title being sufficient for that purpose: *Easton v. Randall*, 45–111.

The provision that plaintiff must recover on the strength of his own title is not applicable in actions to quiet title: *Russell v. Nelson*, 32–215.

If judgment is for defendant it should be that plaintiff has no title, not that defendant has title: *Litchfield v. Railroad Co.*, 7 Wall., 270.

Plaintiff must recover on the strength of his own title, and the burden is upon him to show that it is superior to that of defendant: *McCarty v. Rochel*, 85–427.

Where plaintiff's title is admitted by defendant's answer he is relieved from showing title: *Heinz v. Cramer*, 84–497.

What sufficient chain of title: Where both parties claim title through a common grantor, it is sufficient to prove the derivation of title from him without proving his title: *Cooley v. Brayton* 16–10; *Byers v. Rodabaugh*, 47–53.

A deed of a party claiming from a grantor not shown to have had title is not sufficient to establish title in the party claiming it, nor to raise a presumption of actual possession in such party: *Wearin v. Munson*, 62–466.

In order to establish title in himself, a party must show not only a conveyance to him from another, but trace the title to the general government. The fact that a deed offered in evidence for the purpose of establishing a party's title does not clearly describe the premises is not ground for refusing to receive it: *Heinrichs v. Terrell*, 65–25.

Where plaintiff claimed title by virtue of a conveyance, but it appeared from the chain of title that prior to the deed to his grantor a deed to the property had been made by the then owner to another party, *held*, that this previous conveyance being unexplained, the title did not appear to be in plaintiff, and he could not claim anything thereunder: *Huston v. Markley*, 49–162.

In showing a good title plaintiff must not only show conveyance from a previous grantee, but that such grantee had title: *Armstrong v. Pierson*, 4 G. Gr., 45.

In an action of right plaintiff is only required to show title back to a landlord of defendant's whose title defendant has acknowl-

edged, defendant being estopped thereby: *Morrison v. Wilkerson*, 27–374.

Parol evidence: To the general rule that parol evidence is not admissible to prove title to real estate there are exceptions. If the title paper is lost its contents may be shown; or a parol purchase of real estate may be proved, followed by payment of the purchase money or the taking of possession under such contract; or if the vendor is himself the witness to prove such sale, parol evidence is admissible: *Davis v. Strohm*, 17–421.

Sufficiency of evidence of title: One who seeks to overturn a legal title must have proof, clear, satisfactory and conclusive, and not made up of loose and random conversations: *Parker v. Pierce*, 16–227.

Where a mother had procured land from her husband under decree of divorce and granted it to her daughter, and there was nothing in the record to show but that the daughter still held the legal title, though the husband had obtained a judgment for the land in an action against the mother alone, subsequent to the conveyance, *held*, in an action by the husband against a third party for trespass, that he had failed to show title: *O'Hagan v. Clinesmith*, 24–249.

Where a plaintiff, seeking to quiet his tax title as against claimants under the patent title, set out an abstract showing deeds in a chain of title to defendant, and defendant, seeking relief against the plaintiff's tax title, adopted such abstract, but it appeared therefrom that defendant's deed was executed by certain grantors claiming to be the heirs of the holder of the patent title, it not appearing that such previous holder of the title was dead or that said grantors were his heirs, *held*, that the showing of title was not sufficient to authorize relief to defendant as against such tax title: *Kreuger v. Walker*, 80–733.

SEC. **4185. Tenant in common.** In an action by a tenant in common or joint tenant of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial. [C. '73, § 3248; R., § 3605; C. '51, § 2027.]

Where one tenant is a disseisor of his cotenant, he becomes liable to an action for rents and for waste: *Dodge v. Davis*, 85–77.

SEC. **4186. Service on agent.** When the defendant is a nonresident having an agent of record for the property in the state, service may be made upon such agent in the same manner and with the like effect as though made on the principal. [C. '73, § 3249; R., § 3572; C. '51, § 2004.]

SEC. **4187. Petition.** The petition may state generally that the plaintiff is entitled to the possession of the premises, particularly describing them, also the quantity of his estate and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the same; but if he claims other damages than the rents and profits, he shall state the facts constituting the cause thereof. [C. '73, § 3250; R., § 3570.]

The petition may contain a general averment of the right claimed without a statement of the facts upon which it is intended to sustain such right: *Phillips v. Blair*, 38–649.

It is sufficient for plaintiff to state the extent of his interest, etc. He need not state the evidence upon which he expects to prove it: *Larum v. Wilmer*, 35–244.

Plaintiff may recover for the use and occupation as well as for the title and possession: *Dunn v. Starkweather*, 6–466. And see notes to § 4198.

Where the controlling issue in an action was with reference to the possession of land, the right to possession depending upon ownership, *held*, that the action was one of right, and not for trespass although damages for wrongful possession and use of the land were claimed: *Van Sickle v. Keith*, 88–9.

SEC. **4188. Abstract of title.** The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page and book where the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific, or may be amended by the party setting it out. [C. '73, § 3251.]

Under Revision, which did not contain this section, *held*, that copies of the title papers need not be attached to the petition, the provision as to setting out the writing on which the action is founded (see § 3561) not being applicable to such a case: *Boardman v. Beckwith*, 18–292.

SEC. **4189. Answer.** The answer of the defendant, and each if more than one, must set forth what part of the land he claims and what interest he claims therein generally, and if as mere tenant, the name and residence of his landlord. [C. '73, § 3252; R., § 3573; C. '51, § 2005.]

Before the adoption of the provision allowing equitable defenses in an action at law, (§ 3566), an equitable title was held to be no defense against a legal one: *Page v. Cole*, 6–153; *Farley v. Goocher*, 11–570.

In an action of right to recover possession of real estate it is a good equitable defense to show that defendant took possession and made improvements under a contract of sale made by plaintiff's grantor of which plaintiff had notice at the time of purchasing and which defendant has always stood ready to carry out: *Warren v. Crew*, 22–315.

In an action based on a legal title to recover possession of real property, the defendant may show as an equitable defense that he is in possession under a contract of purchase with plaintiff's grantor, of which plaintiff had notice before acquiring his title: *Baldwin v. Lowe*, 22–367.

In an action at law to recover possession defendant may plead and rely upon an equitable title as a defense, even though by reason of the statute of limitations he is precluded from affirmative relief: *Adams County v. Graves*, 75–642.

A prior adjudication may be introduced in evidence without being pleaded as an estoppel: *Larum v Wilmer*, 35–244.

Defendant is not obliged to set out details of his title, but only what he claims; but if he undertakes to show his title he should give it such definiteness that his adversary may be informed and enabled to meet it: *Gillis v. Black*, 6-439.

SEC. **4190. Landlord substituted.** When it appears that the defendant is only a tenant, the landlord may be substituted by the service upon him of original notice, or by his voluntary appearance, in which case the judgment shall be conclusive against him. [C. '73, § 3253; R., §§ 3571, 3589; C. '51, § 2003.]

This section does not require the landlord to be made a party: it is only permissive: *State v. Orwig*, 34–112.

SEC. **4191. Possession.** When the defendant makes defense it is not necessary to prove him in possession of the premises. [C. '73, § 3254; R., § 3575; C. '51, § 2007.]

Where defendant denies plaintiff's right to the premises, his actual possession need not be proved: *Kerr v. Leighton*, 2 G. Gr., 196.

SEC. **4192. Purchase pending suit.** Any person acquiring title to land or any interest therein, after commencement of an action under this chapter to recover the same, shall take subject to notice of and without prejudice to the rights of the parties to such action. [C. '73, § 3255; R., § 3578.]

As to *lis pendens*, see § 3543.

SEC. **4193. Order to enter and survey.** The court on motion, and after notice to the opposite party, may for cause shown grant an order allowing the party applying therefor to enter upon the land in controversy and make survey thereof for the purposes of the action. [C. '73, § 3256; R., § 3592; C. '51, § 2021.]

SEC. **4194. Service.** The order must describe the property, and a copy thereof must be served upon the owner or person having the occupancy and control of the land. [C. '73, § 3257; R., § 3593; C. '51, § 2022.]

SEC. **4195. Verdict—special.** The verdict may specify the extent and quantity of the plaintiff's estate and the premises to which he is entitled, with reasonable certainty, by metes and bounds and other sufficient description, according to the facts as proved. [C. '73, § 3258; R., § 3594.]

SEC. **4196. General verdict.** A general verdict in favor of the plaintiff, without such specifications, entitles the plaintiff to the quantity of interest or estate in the premises as set forth and described in the petition. [C. '73, § 3259; R., § 3595.]

SEC. **4197. Judgment for damages.** If the interest of the plaintiff expires before the time in which he could be put in possession, he can obtain a judgment for damages only. [C. '73, § 3260; R., § 3579; C. '51, § 2010.]

This section has reference to cases where plaintiff holds a limited or determinable interest which expires, and not to cases where he holds an absolute estate, and pending the suit conveys to a third person. In the latter case the suit may be prosecuted to judgment

in the name of the original plaintiff (§ 3476): *Jordan v. Ping*, 32–64.

This provision was apparently framed with reference to the case of a lease or demise: *Olive v. Daugherty*, 2 G. Gr., 393.

SEC. **4198. Use and occupation.** The plaintiff cannot recover for the use and occupation of the premises for more than five years prior to the commencement of the action. [C. '73, § 3261; R., § 3576; C. '51, § 2008.]

The widow in an action for the recovery of dower may recover damages from the grantee of her husband from the time of demand for a period not exceeding the six years' limitation: *O'Ferrall v. Simplot*, 4–381.

Judgment for the use and occupation of the premises for the full six years cannot be rendered against heirs upon whom descent has been cast within that time. They are only liable for the time during which they have been in possession after the death of the ancestor. A claim for rents and profits accruing before the death of the ancestor must be prosecuted against the administrator: *Cavender v. Smith*, 8–360.

This six year limitation applies only in actions to recover real property. General actions for rents, etc., are barred in five years under the provisions of § 3447: *Muir v. Bozarth*, 44–499.

So actions for use and occupation generally are barred within five years: *Tibbetts v. Morris*, 42–120.

This limitation does not prevent a party from setting off rents and profits of real estate against a claim for improvements under the occupying claimant law: See § 2964 and notes.

SEC. **4199. Improvements set off.** When the plaintiff is entitled to damages for withholding or using or injuring his property, the defendant may set off the value of any permanent improvements made thereon to the extent of the damages, unless he prefers to avail himself of the law for the benefit of occupying claimants. [C. '73, § 3262; R., § 3596; C. '51, § 2023.]

If plaintiff waives damages, or all but nominal damages, defendant cannot interpose a claim for improvements made: *Daniels v. Bates*, 2 G. Gr., 151.

Improvements upon land purchased by defendant may be set off as well as those made by him: *Wright v. Stevens*, 3 G. Gr., 63.

If defendant avails himself of the benefit of the occupying claimant law, rents and profits may be set off against his claim for improvements: See § 2964 and notes.

SEC. **4200. Wanton aggression.** In case of wanton aggression on the part of the defendant, the jury may award exemplary damages. [C. '73, § 3263; R., § 3597; C. '51, § 2024.]

SEC. **4201. Tenant—extent of liability.** A tenant in possession in good faith, under a lease or license from another, is not liable beyond the rent in arrear at the time of suit brought for the recovery of land, and that which may afterward accrue during the continuance of his possession. [C. '73, § 3264; R., § 3597; C. '51, § 2024.]

This section applies only to cases where the tenant is joined as defendant or in some manner restrained from paying rent to his landlord. Otherwise he is not bound to retain rent in his hands to await the result of the litigation: *Gardner v. Gardner*, 25–102.

This section relates to actions for the recovery of real estate and does not apply in an action by the purchaser under a sheriff's deed to recover from the tenant in possession under an inferior title for the wrongful conversion of pasturage and crops: *Stanbrough v. Cook*, 83–705.

SEC. **4202. Growing crops—bond.** If the defendant avers that he has a crop sowed, planted or growing on the premises, the jury, finding for the plaintiff, and also finding that fact, shall further find the value of the premises from the date of the trial until the first day of January next succeeding, and no execution for possession shall be issued until that time, if the defendant executes, with surety to be approved by the clerk, a bond in double such sum to the plaintiff, conditioned to pay at said date the sum so assessed, which shall be part of the record, and shall have the force and effect of a judgment, and if not paid at maturity the clerk, on the application of the plaintiff, shall issue execution thereon against all the obligors. [C. '73, § 3265; R., § 3599.]

These provisions are not applicable where defendant is a tenant under an execution debtor, and plants or sows his crops knowing that they cannot be harvested before his right of possession will be terminated by the expiration of the period of redemption after execution: *Wheeler v. Kirkendall*, 67–612.

SEC. **4203. Writ of possession.** When the plaintiff shows himself entitled to the immediate possession of the premises, judgment shall be entered and an execution issued accordingly. [C.'73, § 3266; R., § 3577; C. '51, § 2009.]

After plaintiff in an action to recover possession has had judgment in his favor and defendant has been put out of possession by legal process, plaintiff may have an injunction in an equitable action to restrain defendant from continuing in possession of the property in disregard of the judgment and process: *Ten Eyck v. Sjoburg*, 68–625.

SEC. **4204. Judgment for rent accruing.** The plaintiff may have judgment for the rent or rental value of the premises which accrues after judgment and before delivery of possession, by motion in the court in which the judgment was rendered, ten days' notice thereof in writing being given, unless judgment is stayed by appeal and bond given to suspend the judgment, in which case the motion may be made after the affirmance thereof. [C.'73, § 3267; R., § 3600.]

SEC. **4205. New trial.** In the cases provided for by this chapter the court, in its discretion, may grant a new trial on the application of any party thereto, or those claiming under a party, made at any time within one year after the former trial, although the grounds required for a new trial in other cases are not shown. [C.'73, § 3268; R., § 3584; C.'51, § 2014.]

Greater latitude is allowed in granting new trials in such actions than in other actions, though the discretion given the court is a legal one: *White v. Poorman*, 24–108.

Such discretion may be reviewed on appeal. But unless it appears that it has been improperly exercised the action of the court will not be reversed: *Coleman v. Case*, 66–534.

It cannot be said that the discretion of the court has been improperly exercised in refusing a new trial unless it fairly appears that a different result could be reasonably expected should a new trial be granted: *Ibid.*

Where an appeal is taken from a judgment in an action of right, and the cause is remanded from the supreme court to the lower court for judgment in accordance with its opinion, the judgment so rendered is a judgment of the lower court, and a new trial may be granted in the same manner as if no appeal had been taken: *Butterfield v. Walsh*, 25–263.

While these provisions apply to such actions only, yet the fact that an equitable defense was set up and tried in such action does not prevent the granting of a new trial: *Ibid.; Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49–657.

The showing for a new trial in a particular case, *held* sufficient: *Floyd v. Hamilton*, 10–552.

These provisions do not apply in actions to quiet title: *Russell v. Nelson*, 32–215.

It is not contemplated by these statutory provisions that the adverse party shall have notice of the application for a new trial, nor that he shall be allowed to controvert a showing made therefor: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 55–157.

Where action was brought in equity to redeem land from tax sale and deed on the ground that no notice of the expiration of the time to redeem was given, *held*, that a motion for new trial in such action was brought under § 1440, and not in pursuance of the provisions of this section, and that therefore notice of such motion was required: *Callanan v. Lewis*, 79–452.

SEC. **4206. Notice.** If the application is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term at which the action stands for trial. [C.'73, § 3269; R., § 3585.]

SEC. **4207. Purchaser not affected—execution.** The result of a new trial, if granted at a term subsequent to the one at which the first trial was had, shall in no case affect the rights of third persons, acquired in good faith and for a valuable consideration after the former trial; but the party showing himself on the new trial entitled to lands which have thus passed to a good-faith purchaser, may recover his damages in the same or a subsequent action against the other party, and the successful party in such new trial shall have an execution for the property, if the case requires it. [C. '73, §§ 3270–2; R., §§ 3586–8; C.'51, §§ 2015–17.]

CHAPTER 3.

OF ACTION FOR FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY.

SECTION **4208. Grounds.** A summary remedy for forcible entry or detention of real property is allowable:

1. Where the defendant has by force, intimidation, fraud or stealth entered upon the prior actual possession of another in real property, and detains the same;

2. Where a lessee holds over after the termination or contrary to the terms of his lease;

3. Where the defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale; in either of which cases such title shall be clearly and concisely set forth in the defendant's pleading;

4. For the non-payment of rent, when due. [C.'73, §§ 3611–12; R., §§ 3952–3; C.'51, §§ 2362–3.]

Threats sufficient to induce fear of violent ouster, *held* sufficient to bring the case within corresponding provision, although personal violence was not threatened: *Harrow v. Baker*, 2 G. Gr., 201.

A tenant holding over after the expiration of his lease does not become a tenant at will, entitled to thirty days' notice to terminate such tenancy, but is entitled to only the three days' notice to quit: *Kellogg v. Groves*, 53–395.

Fraud in the execution of a lease under which defendant holds possession cannot be set up by him in justification for holding over after the expiration of such lease: *Simons v. Marshall*, 3 G. Gr., 502.

The tenant of property sold under execution can be put out of possession by the provisions of this section after the purchaser's right to possession under his deed becomes complete, notwithstanding such tenant may have sowed or planted crops which are not yet matured, they having been sowed or planted with knowledge that his right to possession would terminate before time for harvesting the same: *Wheeler v. Kirkendall*, 67–612.

Possession: The question involved in the action is the fact of possession alone, and not the right to possession. A person may render himself liable to this action by entering on his own premises by force, fraud or stealth, even when he has the right to immediate possession: *Stephens v. McCloy*, 36–659; *Emsley v. Bennett*, 37–15.

The action may be brought by a trespasser who has had possession, even against the real owner, who has forcibly and illegally turned him out of possession: *Lorimier v. Lewis*, Mor., 253.

The right of a tenant to possession under a contract of lease, under which he has not had actual possession, cannot be asserted in this action: *Krumweide v. Schroeder*, 56–160.

There may be possession in fact of unin-closed or unimproved land, and such possession may be protected by this action, which covers all cases of actual possession as distinct from mere possession in law. To constitute such possession it is not necessary that the premises be surrounded with a fence or built upon: *Langworthy v. Myers*, 4–18.

An assault and battery is not justifiable when made for the purpose of taking possession of a house of which another is already in peaceful possession: *State v. McKinley*, 82–445.

The owner is liable for trespass in forcibly entering upon the possession of one in possession, without regard to the title of the person thus in possession: *Kimball v. Shoemaker*, 82–459.

It seems that a writ against one person claiming as tenant will not be valid as against another person claiming as an under lessee from such tenant if the under lessee was in possession before the commencement of the proceeding: *State v. Smith*, 70 N.W., 604.

Where it was claimed that the defendant entered into possession by force or fraud or stealth, it is competent for defendant to show that he has been in possession for a term of years and that he has a lease from the party seeking to recover possession. Proof of such lease does not raise the question of title, such as to deprive the justice of jurisdiction: *Peddicord v. Kile*, 83–542.

Section considered: *Jordan v. Walker*, 52–647.

As to question of title, see § 4216 and notes.

SEC. **4209. By legal representatives.** The legal representative of a person who, if alive, might have been plaintiff may bring this action after his death. [C.'73, § 3613; R., § 3954; C.'51, § 2364.]

By legal representatives is meant the executor or administrator. The right of the heir to bring such action exists without statutory enactment: *Beezley v. Burgett*, 15–192.

SEC. **4210. Notice to quit.** Before action can be brought in any except the first of the above classes, three days' notice to quit must be given to the defendant in writing. [C.'73, § 3614; R., § 3955; C.'51, § 2365.]

Under particular facts, *held*, that defendant went into possession as assignee of an unexpired lease, and not by stealth, and was, therefore, at the expiration of the lease, entitled to three days' notice to quit: *Gifford v. King*, 54–525.

Proof of service of such notice by affidavit of a person not an officer, in the manner provided for service of original notices by private persons, is not sufficient to entitle the notice to be received in evidence without further proof. The notice is not one in an

action, but one which forms the basis of a private right, and must be proved as any other matter *in pais: Hollingsworth v. Snyder*, 2–435.

The fact that, instead of serving the three days' notice to quit, service is made of a thirty days' notice to terminate a tenancy at will, as authorized by § 2991, the case being one in which no such thirty days' notice is necessary, will not render the proceedings under such notice, after the expiration of thirty days from the service thereof, void and without jurisdiction, but will be an irregularity only: *Shuver v. Klinkenberg*, 67–544.

The three days' notice required in order to authorize an action of forcible entry and detainer against a tenant holding over after the termination of his lease may be given before the expiration of the term and more than three days before bringing action; and where such notice had been given thirty days prior to the expiration of the lease and suit was brought the day after it expired, *held*, that the notice was sufficient: *McLain v. Calkins*, 77–468.

The three days' notice required to authorize an action of forcible entry and detainer against a tenant holding over after the expiration of his lease may be given before the expiration of the term: *Drain v. Jacks*, 77–629.

The service of notice to quit is not the commencement of the action, and if the time fixed in the notice for surrender of possession is after the expiration of thirty days peaceable possession as provided for in § 4217 the action will be ineffectual: *Heiple v. Reinhart*, 69 N.W., 871.

The service of notice is in itself an eviction, and a tenant upon whom such notice is served by his landlord may peaceably relinquish possession and sue the landlord for damages if the eviction is unlawful: *Tarpy v. Blume*, 70 N. W., 620.

SEC. **4211. Jurisdiction—transfer—appeal.** The district and superior courts within the county, and justices of the peace within the township where the subject-matter of the action is situated, shall have concurrent original jurisdiction of actions for the forcible entry or detention of real property, and the court first acquiring jurisdiction of an action therefor shall retain the same until judgment, unless it is transferred as hereinafter provided. By agreement of the parties, it may be transferred from a justice's court to a superior or the district court, or from a superior to the district court, and all such actions in which judgment is rendered in a justice's court may be appealed to the district or superior court, as provided by law. [C.'73, § 3616; R., § 3957; C. '51, § 2367.]

Under the Code of '73, *held*, that the district court could acquire no jurisdiction in such cases, not even by stipulation of the parties: *Easton v. Fleming*, 51–305; and therefore on appeal from the judgment of the justice the case should be tried as it was made before the justice, and not on new issues: *Dicks v. Hatch*, 10–380.

The allowance on appeal from judgment of a justice of an amendment to the petition more particularly describing the property, but not in any way changing the issue, *held* not ground for reversal: *Kuhn v. Kuhn*, 70–682

SEC. **4212. Petition—venue.** The action must be by petition, which must be sworn to, and when brought before a justice of the peace, and there is none present or qualified to act in the township where the subject thereof is situated, it may be brought in any adjoining township in the county. In any such action a change of place of trial may be had as in other cases. [C. '73, §§ 3615–16; R., §§ 3956–7; C. '51, §§ 2366–7.]

A petition conforming in its averments to the requirements of the statute is sufficient *Simons v. Marshall*, 3 G. Gr., 502.

SEC. **4213. Substituted service.** Where it is made to appear by affidavit that personal service of the original notice in such action cannot be made upon the defendant within the state, the same may be made by publication, if in a court of record, or by posting, if in a justice's court, in the same manner and for the same length of time as is required in other cases where such substituted service may be made.

SEC. **4214. Time for appearance.** The time for appearance and pleading, if in justice's court, must be not less than two nor more than six days from the time of completed service of the notice. If in district or superior court, the same time as is required in ordinary actions. [C.'73, § 3617; R., § 3958; C. '51, § 2368.]

The fact that the notice is served nine days before the time fixed for appearance in justice's court instead of two to six days as here provided will not deprive the court of jurisdiction nor render its proceedings void. The notice will be defective only: *Shuver v. Klinkenberg*, 67–544.

SEC. **4215. Adjournment.** No adjournment shall be made in justice's courts for more than ten days, except by consent of parties. [C.'73, § 3618; R., § 3959; C.'51, § 2369.]

SEC. **4216. Title not investigated—transfer.** The question of title can only be investigated in the district court, and can be pleaded in a justice's court only as provided in subsection three of section forty-two hundred and eight of this chapter. When so put in issue in a justice's court, the justice shall forthwith, without further proceedings, certify the cause and papers, with a transcript of his docket, showing the reason of such transfer to the district court, where the same shall be tried on the merits. Such cause shall not be dismissed because of error in transferring the same. When title is put in issue, the cause shall be tried by equitable proceedings. The appearance term shall be the trial term, and no continuance shall be granted for the purpose of taking the testimony in writing. Nothing herein contained shall prevent a party from suing for trespass or from testing the right of property in any other manner. [C.'73, § 3620· R., § 3961; C.'51, § 2371.]

The party who has been in possession cannot make use of such action instead of an action of right in order to have the right of possession determined: *Settle v. Henson*, Mor., 111.

Where defendant sets up a paramount title, or the question of title is otherwise involved the action cannot be maintained: *Bosworth v. Farrenholtz*, 4 G. Gr., 440. But see §§ 4505–6.

Where the petition stated the title of plaintiff for the purpose of showing that defendant was a tenant holding over after the termination of a tenancy at will, *held*, that it did not thereby appear that title was involved: *Jordan v. Walker*, 52-647.

Where defendant denied plaintiff's title, and averred title in himself, such answer not being in any way responsive to the petition, and the averment being a mere conclusion of law, *held*, that no question of title was thereby raised: *Jordan v. Walker*, 56–686.

Where plaintiff alleged entry by defendant by fraud and stealth, and defendant, denying entry by fraud and stealth, alleged that he had entered and was in possession with permission of plaintiff under a contract of purchase, *held*, that this allegation did not raise a question of title, but was in effect a mere denial of plaintiff's allegations: *Oleson v. Hendrickson*, 12–222.

Proof of title is not admissible for the purpose of showing constructive possession in the absence of other evidence of possession: *Stephens v. McCloy*, 36-659.

Where defendant continued in possession of land after the expiration of a lease, claiming that plaintiff had contracted to sell it to him, *held*, that this did not raise an issue as to title, and was a proper defense: *Hall v. Jackson*, 77-201.

See, also, § 4505.

SEC. **4217. Possession—bar.** Thirty days' peaceable possession with the knowledge of the plaintiff after the cause of action accrues is a bar to this proceeding. [C.'73 § 3621; R., § 3962; C.'51, § 2372.]

Neither the good faith with which the defendant went into possession, nor the fact that he made improvements on the property, are material under this section, nor sufficient to constitute a defense in the absence of the kind and length of possession contemplated: *Fultz v. Black*, 3-569.

For the purposes of the action of forcible entry and detainer a landlord is presumed to know whether his real property in the possession of another is held rightfully or not, and if the possession is peaceable and uninterrupted for thirty days with the knowledge of the landlord, his right to that action is barred, even though he may not in fact have known that the right of possession had ceased to exist by reason of the breach of the covenant, the fulfillment of which was required to make the possession rightful. So, *held*, where the breach of covenant consisted in the failure to pay taxes: *Heiple v Reinhart*, 69 N.W., 871.

Service of notice to quit within thirty days will not be sufficient if the action is not commenced within that time: *Ibid.*

SEC. **4218. No joinder or counter-claim.** An action of this kind cannot be brought in connection with any other, nor can it be made the subject of counter-claim. [C.'73, § 3622; R., § 3963; C.'51, § 2373.]

SEC. **4219. Order for removal.** The order for removal can be executed only in the daytime. [C.'73, § 3622; R., § 3964; C.'51, § 2374.]

SEC. **4220. Effect of appeal or writ of error.** An appeal or writ of error, taken from the action of a justice of the peace in such action in the usual way, if the proper security is given, will suspend the execution for costs, and may, with the consent of the plaintiff, prevent a removal under execution, but not otherwise. [15 G. A., ch. 41; R., § 3965; C.'51, § 2365.]

Issuance and execution of an order of removal, after judgment for plaintiff in such an action, should not be enjoined on the averment that defendant intends to appeal. Whether after appeal is taken he might have such injunction upon a showing that he will sustain irreparable injury, *quære: Curd v. Farrar*, 47–504.

SEC. **4221. Judgment.** If the defendant is found guilty, judgment shall be entered that he be removed from the premises, and that the plaintiff be put in possession thereof, and an execution for his removal shall issue accordingly, to which shall be added a clause commanding the officer to collect the costs as in ordinary cases. [C. '73, § 3619; R., § 3960; C. '51, 2370.]

SEC. **4222. Restitution.** The court, on the trial of an appeal, may issue an execution for removal or restitution, as the case may require. [C. '73, § 3624; R., § 3966; C. '51, § 2376.]

The fact that plaintiff has prosecuted to judgment a second action of forcible entry and detainer constitutes a waiver of his right to appeal in a former action for the same purpose in which he has been defeated: *Liebuck v. Stahle*, 66–749.

CHAPTER 4.

OF ACTION TO QUIET TITLE.

SECTION **4223. Who may bring action.** An action to determine and quiet the title of real property may be brought by any one, whether in or out of possession, having or claiming an interest therein, against any person claiming title thereto, though not in possession. [C. '73, § 3273; R., § 3601; C. '51, § 2025.]

Action to quiet title may be brought by a party out of possession against one in possession. Plaintiff is not required to resort to an action for possession: *Lewis v. Soule*, 52–11; *Lees v. Wetmore*, 58–170.

And plaintiff may, in such case, also ask the recovery of possession: *Lees v. Wetmore*, 58–170.

But aside from statutory provision, a party not in possession cannot maintain an action to remove a cloud from his title: *Harrington v. Cubbage*, 3 G. Gr., 307.

While an action to recover real property is the appropriate and most effectual remedy where defendant is in possession, nevertheless in such cases an action to quiet title may be maintained: *Lewis v. Soule*, 52–11.

In the federal courts a party out of possession having the legal title cannot have such equitable relief, his remedy at law being sufficient: *Whitehead v. Entwistle*, 27 Fed., 778; *Newman v. Westcott*, 29 Fed., 49.

A party who has sold and conveyed all his interest in the title to land cannot thereafter maintain an action to quiet the title of the same: *Adams County v. Burlington & M. R. R. Co.*, 39–507.

One who has an equitable title to land may maintain an action to quiet title against one who has no right thereto, without first having his legal title perfected, as, for instance, by having the reformation of his deed in equity. But the purchaser of a void title has no equity as against a rightful claimant of the property: *Rankin v. Miller*, 43–11.

Executors entitled to the possession and control of land for the purpose of carrying out the provisions of a will have sufficient interest to support this action: *Laverty v. Sexton*, 41–435.

If a tax deed upon unoccupied land has been recorded, either the tax purchaser or the original owner may bring action against the other to quiet title within the five years limitation provided by § 1448: *Barrett v. Love*, 48–103.

One who does not show competent title in himself cannot have the title to property quieted as against the holder of a tax title, although the statutory period has run against an action by such tax title holder to assert his rights in the property: *Varnum v. Shuler*, 69–92.

A claimant of swamp lands by conveyance from the state may maintain this action to determine and quiet his interest, and is not limited to a remedy by application to the commissioner of the general land office and secretary of the interior: *Snell v. Dubuque & S. C. R. Co.*, 78–88.

The legatee of real property may maintain an action to quiet his title against the widow of testator claiming dower therein, when by reason of an ante-nuptial contract the widow has surrendered her dower right: *Peet v. Peet*, 81–172.

A plaintiff who is in actual possession, so that he cannot maintain ejectment, may still bring an action in equity to quiet his title, although an ejectment suit against him by other claimants is pending: *Langstraat v. Nelson*, 40 Fed., 783.

So far as this section attempts to give an equitable remedy in cases where there is a legal remedy it is not applicable in the federal courts so as to extend the equitable jurisdiction of those courts and deprive a party of a jury trial: *Whitehead v. Shattuck*, 138 U. S., 146.

Where the evidence showed a contract between the defendant and plaintiff, who were father and son, by which defendant agreed orally with the plaintiff that plaintiff should remain and labor on defendant's farm, and receive one-half of the land therefor, and a subsequent settlement with plaintiff in which it was agreed that plaintiff should have the tract in controversy, to be conveyed to him, and plaintiff went into possession thereof and improved the same, claiming right and title thereto, *held*, that the court properly quieted the title of the premises in plaintiff: *Quinn v. Quinn*, 76–565.

Under the facts of a particular case, *held*, that defendant having acquired his title after the commencement of the action and after the adverse claimant had been in possession for eight years, the title was properly quieted against him: *Soukup v. Union Inv. Co.*, 84–448.

A title acquired by adverse possession is sufficient to entitle the party to have the title quieted as against adverse claimants: *Cramer v. Clow*, 81–255.

One who asks to have his title quieted to land claimed under a grant must establish title under such grant to the land claimed, and is not entitled to recover merely on failure of defendant to show any right to the land claimed: *Grant v. Hemphill*, 92–218.

In this action the grantor of defendant is not a necessary party even though the defendant might have an action afterwards against his grantor for breach of warranty: *Independent Dist. v. Gunn*, 93–44.

This section enlarges the jurisdiction of courts of equity in such cases in the following particulars: It does not require that plaintiff should have been annoyed or threatened by repeated actions of ejectment; it dispenses with the necessity of his title having been previously established by law; the bill may be filed by a party having an equitable as well as a legal title; it is not necessary that the plaintiff should be in possession of the land at the time of filing the appeal: *Wehrman v. Conklin*, 155 U. S., 314.

Its provisions are not unconstitutional as infringing the right of jury trial: *Ibid.*

Such an action may be maintainable in the federal courts only where plaintiff has no adequate remedy at law: *Ibid.*

The owner and possessor of real estate is entitled to go into equity to quiet his title against one who lays claim thereto and gives out and claims that he has title: *Standish v. Dow*, 21–363.

Where plaintiff had been in possession, under claim and color of title, at the time defendant acquired a void tax title, *held*, that plaintiff could recover and hold possession as against defendant holding under such void title, and be restored in equity to his rights, notwithstanding defects in his claim of title: *Keokuk & D. M. R. Co. v. Lindley*, 48–11.

Where a bond for a deed had been executed, and afterwards the agreement had been rescinded, but the bond was not deliverd up, *held*, that an action to quiet title as against the holder of the bond was proper: *Smith v. Van Campen*, 40–411.

The owner of land who has remained in possession thereof for such length of time after the issuance of a tax deed that action by the holder of the tax title to recover possession is barred may maintain action against the holder of such tax title to remove the cloud caused by the tax deed, and such action will not be barred by the statute which bars an action for the recovery of real property sold for the non-payment of taxes: *Peck v. Sexton*, 41–566.

Where defendant set up a tax deed, and plaintiff, in reply, alleged that defendant's rights thereunder were barred, *held*, that this did not amount to an admission by plaintiff of defendant's title, and would not prevent a decree for plaintiff: *Tabler v. Callanan*, 49–362.

The fact of a cloud upon the title of property sold cannot be set up as ground for enjoining an action for the purchase money, but may perhaps be interposed to prevent the enforcement of the judgment when recovered: *Dietz v. Mock*, 47–451.

This action can only be brought against a person *claiming title* (decided under Code of '51 and Revision): *Fejervary v. Langer*, 9–159; *Eldridge v. Kuehl*, 27–160, 176.

A railroad company to which land has been granted on condition may, after complying with the conditions of the grant, maintain an action to quiet the title, although no certificate or patent of the land has been issued to it: *Cole v. Des Moines Valley R. Co.*, 76–185.

In a particular case, *held*, that the title of the plaintiff was established as against that of the defendant, and that there were no laches on plaintiff's part such as to defeat his right to have his title quieted: *Chase v. Kaynor*, 78–449.

Where plaintiff was negligent for more than thirty years before bringing action to quiet title, *held*, that his long delay in bringing the action, with knowledge of the adverse acts of those claiming under an unrecorded mortgage, given before he acquired title, would raise a strong presumption against him, and he would not be allowed to assert his claim adversely to those holding under the mortgage: *Witherow v. Walker*, 81–651.

Where a party had made redemption from a tax sale, receiving a certificate thereof, *held*, that he was not guilty of laches in paying no attention to memoranda charging him with notice that another party had paid taxes or had a tax deed: *Burke v. Cutler*, 78–299.

Under particular circumstances, *held*, that persons who became owners of land as heirs, during minority and while nonresidents, were not guilty of such laches as to defeat their right to have their title to the land quieted, nothing having been done by them tending to mislead others as to their rights: *Carnes v. Mitchell*, 82–601.

Where it appeared that the adverse claimant in such case had expended money in protecting the title to the property, *held*, that it did not appear that the claims which were satisfied were claims which would have prevailed against plaintiffs' title, and that therefore plaintiffs were not chargeable with such expense: *Ibid.*

In an action to quiet title, where plaintiff's abstract stated that the deeds of conveyance from a certain grantor through intermediate grantors to plaintiff were introduced in evidence, and where such statements were denied by the appellee, *held*, that as there was an abstract of title showing the conveyances as claimed, and oral evidence on the trial, to which there was no objection, by which it was admitted or plainly shown that plaintiff held by a regular chain of conveyances from said grantor, it was unnecessary for plaintiff to introduce the deeds in evidence, and the appeal would not be dismissed because of failure to do so: *Cassidy v. Woodward*, 77–354.

In an action to quiet title and for general relief the court may give plaintiff a money judgment, if that appears to be the relief to which he is entitled: *Iler v. Griswold*, 83–442.

SEC. **4224. Petition—notice.** The petition therefor must be under oath, sotting forth the nature and extent of his estate, and describing the premises as accurately as may be, and that he is credibly informed and believes the defendant makes some claims adverse to the petitioner, and praying for the establishment of the plaintiff's estate, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the plaintiff. The notice in such action shall accurately describe the property, and, in general terms, the nature and extent of the plaintiff's claim, and shall be served as in other cases. [C. '73, § 3274; R., § 3602.]

The action may, by statutory provision, be brought against a nonresident defendant on notice by publication: *Miller v. Davison*, 31–435. A judgment in such case will bar the nonresident, even though he has made no appearance, from afterward asserting his right to the property in a federal court: *Arndt v. Griggs*, 134 U. S., 316; *contra*, *Pitts v. Clay*, 27 Fed., 635.

Service by publication in an action to quiet title is good in cutting off the rights of a nonresident: *Knudson v. Litchfield*, 87–111.

A petition substantially embodying the averments here mentioned, with a general prayer for equitable relief, will justify the granting of this relief, though it be not specifically asked: *Paton v. Lancaster*, 38–494.

SEC. **4225. Disclaimer — costs.** If the defendant appears and disclaims all right and title adverse to the plaintiff, he shall recover his costs. In all other cases the costs shall be in the discretion of the court. [C. '73, § 3275; R., § 3603.]

In an action to quiet title and bar defendant from claiming any right or interest in the property the provisions of this section as to costs are applicable although plaintiff also seeks to have a cloud upon the title removed: *Deacon v. Central Iowa Investment Co.*, 63 N. W., 673.

SEC. **4226. Demand for quitclaim—attorneys' fees.** If a party, twenty days or more before bringing suit to quiet a title to real estate, shall request of the person holding an apparent adverse interest or right therein the execution of a quitclaim deed thereto, and shall also tender to him one dollar and twenty-five cents to cover the expense of the execution and delivery of the deed, and if he shall refuse or neglect to comply therewith, the filing of a disclaimer of interest or right shall not avoid the costs in an action afterwards brought, and the court may, in its discretion, if the plaintiff succeeds, tax, in addition to the ordinary costs of court, an attorney's fee for plaintiff's attorney, not exceeding twenty-five dollars if there is but a single tract not exceeding forty acres in extent, or a single lot in a city or town, involved, and forty dollars, if but a single tract exceeding forty acres and not more than eighty acres; in cases in which two or more tracts are included that may not be embraced in one description, or single tracts covering more than eighty acres, or two or more city or town lots, a reasonable fee may be taxed, not exceeding, however, proportionately, those hereinbefore provided for. [25 G. A., ch. 103.]

SEC. **4227. Equitable proceedings.** In all other respects, the action contemplated in this chapter shall be conducted as other actions by equitable proceedings, so far as the same may be applicable, with the modifications prescribed. [C. '73, § 3276; R., § 3604; C. '51, § 2026.]

The proceedings under these provisions for quieting title are not special proceedings: *Miller v. Davison*, 31–435.

An action to quiet title under the statute is, in effect, an equity suit, and must be brought and determined as such: *Balmear v. Otis*, 4 Dillon, 558.

The provisions that, in an action to recover real property, plaintiff must rely solely on the strength of his own title (§ 4184), and in regard to new trials in such actions (§ 4205), are not applicable in actions to quiet title: *Russell v. Nelson*, 32–215.

Relief: Other equitable relief, as well as a decree quieting title, may be asked in the same petition: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49–657.

A court of equity has jurisdiction to quiet title and to restrain those having adverse titles from setting them up against the paramount title, but defects and irregularities in the title arising out of the official acts of the ministers of the law will not be cured. However, the action of the court in exercising its power in such a case would not be void for want of jurisdiction, but merely erroneous: *Stevenson v. Bonesteel*, 30–286.

In an action in chancery to quiet title the recovery of possession of the property may be awarded by the decree: *Wyland v. Mendel*, 78–739.

Where plaintiff alleges a fee-simple title and claims to recover possession and his petition is not denied, there is sufficient showing for rendering decree in his favor for the quieting of his title and the recovery of possession: *Ibid.*

In an action to quiet title the claim of an easement should be set up: *Smith v. Baldwin*, 85–570.

Where a case stood upon a cross-bill to quiet title and a defense of an oral contract to convey, *held*, that it was of equity jurisdiction, and a motion to transfer it to the law docket was properly overruled: *Harlan v. Porter*, 50–446.

Unless it appears that the cloud upon plaintiff's title cannot be removed by an action of ejectment, or that the title could not be settled so as to prevent a multiplicity of suits without the aid of chancery, complainant will be left to his remedy, at law: *Harrington v. Cubbage*, 3 G. Gr., 307.

As the right of possession to property is something distinct from the title, it does not follow that, upon judgment for defendant for costs in an equitable action to set aside defendant's title, the defendant is entitled to the right of possession: *Lombard v. Atwater*, 43–599.

Where plaintiff claims in such an action that he is owner of the property, a judgment in his favor is an adjudication of any right of ownership thereto which defendant might have set up: *Reed v. Douglas*, 74–244.

In this action the recovery of the possession of the property may be awarded by decree: *Wyland v. Mendel*, 78–739.

CHAPTER 5.

OF ACTIONS TO ESTABLISH DISPUTED CORNERS AND BOUNDARIES.

SECTION **4228. When allowed.** When one or more owners of land, the corners and boundaries of which are lost, destroyed or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, destroyed or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. If any public road is likely to be affected thereby, the proper county shall be made defendant. [15 G. A., ch. 8, §§ 2, 4.]

In what cases: It is only where the location of the government corner cannot be definitely ascertained that a dispute as to a boundary line can possibly arise. If the corner has been obliterated or lost, then evidence of its true location may be heard by the commissioners, and upon a consideration of such evidence and a survey the disputed boundary is established by them: *Mitchell v. Wilson*, 70-332.

The fact that division lines have been established by a surveyor, where such action of the surveyor is disputed, does not prevent proceedings to fix such lines from being brought and the lines established under these provisions: *Strait v. Cook*, 46–57.

These provisions are applicable to boundaries and corners on county lines, and the adjacent tracts may or may not be in the same county as that of the petitioning proprietor: *Tooman v. Hidlebaugh*, 83–130.

Order in a case appointing a commissioner to make a survey, etc., *held* proper, although defendant claimed adverse possession up to the line insisted upon by him: *Plank v. Reinhart*, 81–756.

Proceedings: Such proceedings are special proceedings triable on appeal like an ordinary action and not *de novo*: *In re Harrington*, 54–33.

Where the commissioners have determined facts which render the final location of the corner a mere matter of measurement, they may properly postpone the expense of actual survey until the court acts upon their report: *Ibid.*

The proceeding contemplated in this statute is a summary proceeding designed to determine and locate the true division line between land holders without issue in court or trial by jury: *Gates v. Brooks*, 59–510.

The statute, although not contemplating trial by jury, is not unconstitutional on that account: *Ibid.; Coombs v. Quinn*, 66–469.

Actions of this character not being triable *de novo* on appeal, the finding of the commis-

sioners and court must have the force and effect of the verdict of a jury: *Vittoe v. Richardson*, 58–575.

The report of the commissioners cannot have the effect of the verdict of a jury. The commissioners are simply officers of the court, appointed for the purpose of aiding the court in establishing the true boundary line: *Mitchell v. Wilson*, 70–332.

A proceeding to establish a lost corner is not triable *de novo* upon appeal, and the finding of the trial court will not be set aside for want of evidence, where the evidence is conflicting: *Bohall v. Neiwalt*, 75–109.

On an appeal from the judgment of a court establishing a lost corner, the report of the commissioner will be regarded as the verdict of a jury, and in determining whether the court properly set aside such report, and entered judgment in accordance therewith, the supreme court will determine whether there was such lack of evidence to support the finding of the commissioner as to justify the court in setting it aside: *Yocum v. Haskins*, 81–436.

Evidence in such a case as to the identification of a particular corner considered: *Ibid.*

When a petition is presented to the court for the appointment of a commission under this statute, the court has jurisdiction to look into the nature of the controversy and dismiss the petition if the controversy does not appear to be such as to justify the appointment of a commission: *Smith v. Scoles*, 65–733.

In a proceeding to establish a lost corner where the evidence was conflicting as to the location of the corner, *held*, that the rule in such cases is that courses and distances designated by the field survey must yield to fixed monuments: *Walrod v. Flannigan*, 75–365.

In a proceeding under these statutory provisions to establish a corner, all the property owners affected thereby are not necessary parties: *Rollins v. Davidson*, 84–237.

Misjoinder of parties will not defeat the action: *Ibid.*

The true corners are where the United States surveyors in fact established them, whether such location is right or wrong, as shown by subsequent surveys. Therefore, evidence is admissible tending to show the presence of monuments at points claimed to be the section corners, and other monuments in the township, from which to ascertain and locate those in question: *Ibid.*

When the corner as fixed by the government surveyor is found, or the place of its location identified, that will control, regardless of the fact that the actual location of the corner may result in deflecting the section line from a straight course between the government corners located east and west of the supposed lost corner. This proceeding is not instituted for the purpose of straightening lines, but it is to ascertain the location in fact of the government corner: *Doolittle v. Bailey*, 85–398.

SEC. **4229. Notice.** Notice of such action shall be given as in other cases, and if the defendants or any of them are nonresidents of the state, or unknown, they may be served by publication as is provided by law. [Same, § 2.]

In such a proceeding, in order to warrant service by publication as therein contemplated, the facts authorizing such publication must appear from the record: *Nesselroad v. Parish*, 52–269.

SEC. **4230. Pleadings—trial of issue.** The action shall be a special one, and the only necessary pleading therein shall be the petition of plaintiff describing the land involved, and, so far as may be, the interest of the respective parties, and asking that certain corners and boundaries therein described, as accurately as may be, shall be established, and either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, which issue may be tried before commission is appointed, in the discretion of the court. [Same, §§ 3, 4.]

The petition should state the facts in dispute sufficiently to enable the court to determine the nature of the controversy. If it does not, a motion for more specific statement will be proper. If the court errs in dismissing the petition, this action can be reviewed on appeal after its dismissal. The party would not have the right to commence a new proceeding on the same facts: *Smith v. Scoles*, 65–733.

Where it was stated in a petition that certain persons named as defendants were the only persons that would be affected by the proceedings, and it appeared that but one of them had been served with a notice or had made appearance, *held*, that the court nevertheless acquired jurisdiction to appoint a commissioner as between the plaintiff and the defendant who appeared, unless it was shown that there were other persons who were necessary parties: *Nesselroad v. Parish*, 59–570.

SEC. **4231. Commissioners.** The court in which said action is brought shall appoint a commission of one or more disinterested surveyors, who shall, at a date and place fixed by the court in the order of appointment, proceed to locate the lost, destroyed or disputed corners and boundaries. [Same, § 3.]

SEC. **4232. Oath—assistants.** The commissioners so appointed shall subscribe and file with the clerk, within ten days from the date of their appointment, an oath for the faithful and impartial discharge of their duties, and shall have the power to appoint necessary assistants. [Same.]

SEC. **4233. Hearing.** At the time and in the manner specified in the order of court, the commission shall proceed to locate said boundaries and corners, and for that purpose may take the testimony of witnesses as to where the true boundaries and corners are located, and, if that issue is presented, shall also take testimony as to whether the boundaries and corners alleged to have been recognized and acquiesced in for ten years or more have in fact been recognized and acquiesced in, and, if it finds affirmatively on such issue, shall incorporate the same into the report to the court. [Same.]

Commissioners appointed in this proceeding need not notify defendant of the time of making the survey, but if they fail to notify him so that he can offer evidence, and material evidence is thus omitted to his prejudice, the report should be rejected: *Nesselroad v Parrish*, 52-269.

Notice of the meeting of the commissioners, survey and the taking of evidence is not jurisdictional, and where it appeared that a party had ample opportunity to be heard, and to introduce evidence if he had seen fit, *held*, that the judgment would not be set aside for want of the showing of formal notice: *Neary v. Jones*, 89-556.

The evidence, plat and survey accompanying the report is a part of it and becomes of record in the same manner as the report, and therefore it is not necessary that they be preserved by a bill of exceptions: *Davis v. Curtis*, 68-66.

It was not the intention of the legislature to impose upon the commissioners the trial of the question of adverse possession of lands, and where they find no marked government corner, but do find one that has been acquiesced in by the adjoining proprietors for ten years, they should report that fact to the court, and it should be the end of the proceeding: *Ibid.*

SEC. **4234. Adjournments—report.** The proceedings may be adjourned by the commission from time to time as may be necessary, but the survey and location of the corners and boundaries must be completed and the report thereof filed with the clerk of the court at least ten days before the first day of the term next following that of its appointment, unless there are good and sufficient reasons for delay. [Same.]

SEC. **4235. Exceptions—hearing in court.** At the term of court after such report is filed, any party interested may file exceptions thereto before noon of the second day of the term, and the court shall hear and determine them, hearing evidence in addition to that reported by the commission, if necessary, and may approve or modify such report, or again refer the matter to the same or another commission for further report. [Same, § 4.]

The court is authorized on hearing the report of the commissioner to strike out evidence reported and confirm his report upon the remaining evidence without resubmitting it to the commissioner: *Caldwell v. Nash*, 68-658.

At any time before the final submission of the cause, the court may, at least upon proper showing, receive any evidence tending to show the location of the corner and the boundary line, and in its discretion it may set aside the report of the commissioners and make a new reference to the same or other commissioners to consider the new evidence together with what had been previously taken, and, if deemed necessary, to make another survey: *Mitchell v. Wilson*, 70-332.

The court may set aside the conclusions of a commissioner and reach a different result from that of the commissioner, if it has the testimony before it. Under such circumstances it would not be proper to refer the case back to the commissioner: *Doolittle v. Bailey*, 85-398.

In a proceeding to establish a lost corner the cost should be apportioned among all the parties according to their interest, and not according to the benefits which result from the suit: *Bohall v. Neiwalt*, 75-109.

In this proceeding the court may consider and receive evidence in support of a claim, that the true boundary line by reason of adverse possession is different from the boundary line according to the original government survey. The proceeding is not to establish corners and lines which do not determine the rights of the parties: *Williams v. Tschantz*, 88-126.

This is a proceeding to fix the line, and determine the rights of the parties, not only with reference to location of government corners, but as to lines as they may have been established on adverse possession, or by action and acquiescence of parties: *Neary v. Jones*, 89-556.

The land is not to be resurveyed as if there had been no survey, but the original survey is to be restored in such manner that the

different tracts affected thereby shall bear the same relation to each other as by the original survey: *Moreland v. Page*, 2–139: *Newcomb v. Lewis*, 31–488.

The true method of establishing a lost corner in a particular case considered: *Anderson v. Peterson*, 74–482.

SEC. **4236. Corners and boundaries established.** The corners and boundaries finally established by the court in such proceeding, or on appeal therefrom, shall be binding upon the parties as the corners or boundaries which had been lost, destroyed or in dispute, but if it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established. [Same.]

The corners and boundaries which have been recognized by the parties for ten years are to be adhered to: *Williams v Tschantz*, 88–126.

SEC. **4237. Appeal.** There shall be no appeal in such proceeding, except from final judgment of the court, taken in the time and manner that other appeals are, and heard as in an action by ordinary proceedings. [Same.]

SEC. **4238. Costs.** The costs in the proceeding shall be taxed as the court shall think just, and shall be a lien on the land or interest therein owned by the party or parties against whom they are taxed, so far as such land is involved in the proceeding. [Same.]

SEC. **4239. Agreements.** Any lost or disputed corner or boundary may be determined by written agreement of all parties thereby affected, signed and acknowledged by each as required for conveyances of real estate, clearly designating the same, and accompanied by a plat thereof, which shall be recorded as an instrument affecting real estate, and shall be binding upon their heirs, successors and assigns. [Same, § 1.]

CHAPTER 6.

OF PARTITION.

SECTION **4240. By equitable proceedings—no joinder or counter-claim.** The action for partition shall be by equitable proceedings, and no joinder or counter-claim of any other kind shall be allowed therein, except to perfect or quiet title, to declare and enforce liens between the parties to the action, and except as provided by this chapter. [C.'73, § 3277; R., § 4178.]

Partnership: Where land belongs to a partnership a partner has no such interest therein as to entitle him to an action for partition: *Pennybacker v. Leary*, 65–220.

Water power: A water power owned in common is subject to partition: *Doan v. Metcalf*, 46–120; *Cooper v. Cedar Rapids Water Power Co.*, 42–398.

While there may be partition of a water power owned in common, yet if such partition in kind can only be effected by means of a large expenditure, it is error to order such expenditure made, and charged to the interests of the respective parties, but a sale and division of the proceeds should be ordered: *Brown v. Cooper*, 67 N.W., 378.

Dower: In action for partition the distributive share of the widow may be determined and set off, and proceedings for admeasurement of dower are not exclusive. But partition should not be brought to compel an election between the homestead and a distributive share of the property until it has been determined whether any, and if so, how much, of the realty must be sold for the payment of debts: *Thomas v. Thomas*, 73–657.

Life tenant and reversioner: Partition can be had only when the parties are joint owners or tenants in common, and therefore there is no authority to grant a partition as between a life tenant and the owners of the reversion: *Smith v. Runnels*, 65 N. W., 1002.

Heirs: A partition of the lands of an estate should not be ordered until it is determined that the personal estate is sufficient to pay the debts, but an action may be commenced before that time, and if it does not appear, when partition is made, that it will be necessary to resort to the real estate to pay the debts, the decree partitioning the lands will not be disturbed: *Snyder v. Snyder*, 75–255.

There should not be a decree of partition as between the heirs until it has been determined that it will not be necessary to sell the land for the payment of debts of the estate of decedent, but an action for partition will not be premature if brought before the

liability of the land for debts is settled: *Clarity v. Sheridan*, 91-304.

A partition of real property among heirs should not be decreed within one year after notice of administration, as within that time the executor may ask for the sale of the land for the payment of debts under § 3323. But after the expiration of one year the presumption is that the land is not needed for that purpose, and partition can properly be made, unless it be shown in defense that there is not enough personal property to pay debts, and that the executor still has an equitable right to sell the land to meet the liabilities of the estate: *Minear v. Hogg*, 63 N.W., 444.

In an action in equity to partition certain real estate wherein some of the defendants pleaded advances made by their ancestors to the plaintiffs and the other defendants, and asked that these advancements be taken into account in making the partition, it was held, that parol evidence was admissible to show that the property described in the deeds was given by way of advancement, and should be taken into account in distributing the estate: *Finch v. Garrett*, 71 N.W., 429.

Tenants in common: Where one of three tenants in common, believing himself to be the sole owner of a certain tract of land, made valuable improvements thereon and occupied the same undisturbed for twenty years, in an action for partition, *held*, that he was entitled to the value of the improvements as against the other tenants: *Killmer v. Wuchner*, 79-722.

While it is the general rule that a tenant in common cannot make his co-tenant liable for improvements made upon the land without the consent of the latter, still such improvements may be taken into consideration by a court of equity in making partition that justice be done between the parties in interest: *Van Ormer v. Harley*, 71 N.W., 241.

In severalty: Partition cannot be had of real estate owned in severalty by several owners, for the purpose of determining metes and bounds of the several portions: *Johnson v. Moser*, 72-523.

Joinder; counter-claim: This section does not prevent a defendant in a foreclosure proceeding from asking relief which involves the partition of the land covered by the lien: *Hammond v. Perry*, 38-217.

So, also, a claim of defendants against plaintiff, for rent, damages, etc., pertaining to the property, may be set up in the answer and should be heard: *Metcalf v. Hoopingardner*, 45-510.

But an agreement entered into by a son to pay a certain mortgage on his parents' property, the proceeds of which were advanced to him, *held* not to be after the parents' death such a lien on the son's share as could be set up against him in a proceeding under the statute for the partition of the property. But the obligation of such a son to pay taxes on said land, under the lease of the same to him, is such a lien as can be set up as a counter-claim against a grantee taking with notice of such agreement: *Rider v. Clark*, 54-292.

SEC. **4241. Petition.** The petition must describe the property and respective interests of the several owners thereof, if known. If any interests, or the owners of any interests, are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty. [C. '73, § 3278; R., §§ 3606-7; C. '51, §§ 2028-9.]

Where a cause has been tried upon other issues and upon evidence introduced that is clearly incompetent under issues for partition, a partition cannot be granted upon such insufficient petition. These provisions as to the petition are mandatory: *Darr v. Darr*, 71 N. W., 419.

SEC. **4242. Abstract of title.** The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom it was obtained, and the books and pages in which the same appears of record. If such title, or any portion thereof, is not in writing or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or with a reasonable excuse for not so doing, within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial unless it has been sufficiently referred to in such abstract which, on motion, may be made more specific, and may be amended as other pleadings. [C. '73, § 3279.]

Where defendant claims under the same title as that asserted by plaintiff, he cannot question plaintiff's right to relief on the ground of the want of a sufficient showing of title: *Shane v. McNeill*, 76-459.

SEC. **4243. Contingent interests.** Persons having apparent or contingent interests in such property may be made parties to the proceedings, and the proceeds of the property so situated, or the property itself in case of partition, shall be subject to the order of the court until the right becomes fully vested. The ascertained share of any absent owner shall be retained, or the proceeds invested for his benefit, under like order. [C. '73, § 3280; R., §§ 3647-8; C. '51, §§ 2069-70.]

SEC. **4244. Lien creditors.** Creditors having a specific or general lien upon the entire property may be made parties at the option of the plaintiff or defendant. [C.'73, § 3281; R., § 3608; C.'51, § 2030.]

SEC. **4245. Answer.** The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may deny the interest of any of the plaintiffs, and by supplemental pleading, if necessary, may deny the interest of any of the other defendants. [C.'73, § 3282; R., § 3610; C.'51, § 2032.]

SEC. **4246. Issues—trial—costs.** Issues may thereupon be joined and tried between any of the contesting parties, the question of costs on such issues being regulated between the contestants agreeably to the principles applicable to other cases. [C.'73, § 3283; R., 3612; C.'51, § 2034.]

Section applied as to costs: *Finch v. Garrett*, 71 N. W., 429.

SEC. **4247. Reference to ascertain incumbrances.** Before making any order of sale or partition, the court may refer to the clerk or a referee to report the nature and amount of incumbrances by mortgage, judgment or otherwise upon any portion of the property. [C.'73, § 3284; R., §§ 3623–4; C.'51, §§ 2045–6.]

SEC. **4248. Proof of incumbrances.** The referee shall give the parties interested at least five days' notice of the time and place when he will receive proof of the amounts of such incumbrances. [C.'73, § 3285; R., § 3625; C.'51, § 2047.]

SEC. **4249. Issue as to incumbrances.** If any question arises as to the validity or amount of an incumbrance, or the payment of the same, the court may direct an issue to be made up between the incumbrancer and an owner, and an adjudication thereon shall be decisive of their respective rights; and, upon a sale, it may order the money to be retained or invested to await final action in relation to its disposition, and notice thereof to be forthwith given to the incumbrancer unless he has already been made a party. [C.'73, § 3286; R., §§ 3628–9; C.'51, §§ 2090–1.]

The holder of a mortgage not made a party to the proceedings does not lose his lien on the premises: *Lewis v. Atkinson*, 15–361.

Where partition was made in ignorance of a mortgage on part of the land and the mortgage was subsequently foreclosed, *held* under the circumstances not to be error to set aside the partition and make a new one: *Bridges v. Howard*, 18–116.

SEC. **4250. Undivided interests.** If the lien is upon one or more undivided interests, the holder thereof shall be made a party, and the lien shall, after partition or sale, remain a charge upon the particular interests or the proceeds thereof, but the amount of costs is a charge upon those interests, paramount to all other liens. [C.'73, § 3287; R., § 3609; C.'51, § 2031.]

When liens exist on some of the shares, the lienholders should be made parties, and an account of the amount due on their liens should be taken before order of sale (when sale becomes necessary), in order that a purchaser shall know just the extent of the liens and their rate of interest, and that the interest of the respective parties and all the parties may be protected: *Metcalf v. Hoopingardner*, 45–510.

A party who has acquired a lien on an undivided interest in the property may be made a party to the proceeding, but where a creditor had, pending the partition proceeding, levied an attachment on an undivided interest in the property and had recovered judgment and bought in such undivided interest at execution sale under the judgment, *held*, that he was not a mere lien holder entitled to reimbursement out of the proceeds of the sale of the property which was to be partitioned (partition having proved impracticable), but was entitled as owner to the entire share falling to the person whose interest he had bought: *Aplington v. Nash*, 80–488.

SEC. **4251. Not to delay distribution.** The proceedings in relation to incumbrances shall not delay the distribution of the proceeds of other shares not affected thereby. [C.'73, § 3288; R., § 3631; C.'51, § 2053.]

SEC. **4252. Confirmation.** After all the shares and interests of the parties have been settled in any of the methods aforesaid, decree shall be rendered establishing the rights of the parties, confirming the shares and

interests of the owners of the lands, and directing partition to be made accordingly. [C.'73, § 3289; R., § 3615; C.'51, § 2037.]

These provisions clearly imply that partition is admissible only between persons owning undivided interests, that is, joint owners or tenants in common: *Johnson v. Moser*, 72–523.

Any claim to the property not set up by a party to the suit before judgment is barred. Nor can a party afterwards set up a different right to the property than that claimed in the suit: *Olver v. Montgomery*, 39–601.

In a partition suit, where the court did not acquire jurisdiction of all the parties interested in the real estate, *held*, that the proceedings were not void or voidable as to those who were actually or constructively in court: *Williams v Westcott*, 77–332.

Where certain parties to the suit acquiesced in the proceedings by accepting and receipting for their share of the proceeds, *held*, that one to whom they had conveyed their interest in the land, who had knowledge of the facts, was estopped from questioning the validity of the proceedings: *Ibid.*

In an action for partition where one of several co-plaintiffs dismissed the action as to herself, having sold her interest in the property, but, notwithstanding the dismissal, judgment was ordered confirming the shares as alleged and for partition, *held*, that the plaintiff dismissing was not a party when the order for partition was made and was not bound thereby, and her assignee would not be bound merely by virtue of the assignment: *Ocheltree v. Hill*, 77–721.

Partition proceedings operate as a conveyance of the land to the person to whom the portions are awarded: *Burdick v. Chicago, M. & St. P. R. Co.*, 87–384.

An appeal may be taken from a decree settling the rights and interests of the parties. Such decree is in that respect final: *Williams v. Wells*, 62–740.

A party who is by the decree, adjudged to have no interest in the property may appeal from such decree as a final judgment as to himself: *Ramsey v. Abrams*, 58–512.

Order v. Wingate 19 Ock W. 320

SEC. **4253. Partition—referees appointed.** Upon entering such decree, the court shall appoint referees to make partition, unless the parties agree to a sale of the property, or where it is shown that the property cannot be equitably divided into the requisite number of shares, a sale shall be ordered. Three referees shall be appointed to make partition, unless the parties to the suit agree to a less number, but where it is shown that partition cannot be made and a sale is ordered, the court may fix the number. [C.'73, § 3290; R., §§ 3616, 3618–19; C.'51, §§ 2038, 2040–1.]

Where the shares of the parties or the description thereof is not settled by law, or by consent, referees are necessary. So *held* in an action for the partition of water power: *Doan v. Metcalf*, 46–120.

The power of the legislature to provide that the shares of all parties of property owned in common shall be sold where a division thereof cannot be made has been too long acquiesced in to be now called in question. The owner of an undivided interest has the right at any time to have partition made, and if the premises cannot be divided by metes and bounds, he has the right to compel a sale, and such proceeding is not depriving a party of his property without due process of law: *Metcalf v. Hoopingardner*, 45–510.

When parties by contract assume the relation of tenants in common in real estate, the law fixes their respective rights, one of which is that the partnership may be dissolved, so to speak, and that, if necessary, the common property may be sold and the proceeds divided: *Ibid.*

The court may order a sale of the property, even where it is capable of being divided, if the division will materially diminish the value: *Branscomb v. Gillian*, 55–235.

SEC. **4254. Shares marked out.** When a partition is ordered, the referees must mark out the shares by visible monuments, and may employ a competent surveyor and assistants to aid them therein, if necessary. [C.'73, § 3291; R., § 3637; C.'51, § 2050.]

SEC. **4255. Report of referees.** The report of the referees must be in writing, signed by them, and must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises, and must allot the shares to their several owners. [C.'73, § 3292; R., § 3638; C.'51, §§ 2060–1.]

SEC. **4256. Special allotments.** For good and sufficient reasons appearing to the court, the referees may be directed to allot particular portions of the land to particular individuals. In other cases the shares must be made as nearly as possible of equal value. [C.'73, § 3293; R., § 3617; C.'51, § 2039.]

It is a good and sufficient reason for allotting a particular portion to one tenant in common that he has acquired a homestead in that portion of the undivided premises, or has made valuable improvements thereon: *Thorn v Thorn*, 14–49.

In making a final settlement and division between tenants in common the court will look into the peculiar circumstances, and will protect one of the tenants who has made improvements on a portion of the premises by allowing him for such improvements, and if the land is partitioned may allow him the particular property upon which the improvement was made as a portion of his share: *Cooper v Frederick*, 4 G. Gr., 403.

The doctrine that where a tenant in common lays out money in improvements he must be compensated therefor before partition is made, or receive in the petition the portion so improved, is not applicable to cases where the other tenants in common contributed to the improvements: *Conrad v. Starr*, 50–470.

SEC. **4257. Partition of part.** When partition can be conveniently made of part of the premises, but not of all, one portion may be partitioned and the other sold, as provided in this chapter. [C.'73, § 3294; R., § 3640; C.'51, § 2062.]

SEC. **4258. Report set aside.** On good cause shown, the report may be set aside and the matter again referred to the same or other referees. [C.'73, § 3295; R., § 3641; C.'51, § 2063.]

Upon setting aside the referee's report the case may again be referred to the same or any other referee. If the case is not again sent to a referee a new trial should be granted and the case again tried upon the issues of fact in the manner determined by law or the agreement of the parties. The court should not for itself in such a case, try issues of fact, no agreement for trial in that form having been made: *Lyons v. Harris*, 73–292.

SEC. **4259. Judgment.** Upon the report of the referees being approved, a decree shall be rendered confirming the partition and apportioning the costs as herein provided, entering judgment therefor. [C.'73, § 3296; R., § 3642; C.'51, § 2064.]

A judgment in partition proceedings operating as a conveyance is to be construed by the same rules which apply to ordinary conveyances. Therefore if the estate created would be "in entirety" if held under an ordinary deed, so it must be under the judgment: *Hoffman v. Stigers*, 28-302.

An interlocutory decree establishing and confirming the interests of the various parties, and appointing referees to make partition, is not conclusive as to whether partition should be made in kind or the property be sold and the proceeds divided. It may be that the referee shall find it impracticable to make division: *Brown v. Cooper*, 67 N.W., 378.

In an action for the partition of water power, where it appeared that partition was impracticable without large expenditure in the improvement of the power, *held*, that it was error for the court to order such expenditure to be made and charged up to the owners of the respective interests, and that the case was one where a sale and distribution of the proceeds should have been ordered: *Ibid.*

SEC. **4260. Costs.** All the costs of the proceedings in partition shall be paid, in the first instance, by the plaintiffs, but eventually by all the parties in proportion to their interests, except costs which are created by contests. [C.'73, § 3297; R., § 3645; C.'51, § 2065.]

In an action for partition, a defendant who disclaims any right or interest in or title to the premises at the time the action is brought, or afterwards, and does not appear to be in possession or acting inconsistently with the disclaimer, is entitled to be dismissed with his costs: *Urban v. Hopkins*, 17–105.

In determining whether there was a contest respecting the extent of the plaintiff's share, so as to affect the question of costs, the court will not be justified in taking a very critical view of the proceedings; the question is whether there was practically a contest; and if the parties actually engaged in such contest, whether regularly raised in the pleadings or not, that fact is sufficient to control the question of costs: *Duncan v. Duncan*, 63–150.

The contest here referred to relates to issues made by the pleadings in reference to the respective interests of the parties: *Finch v. Garrett*, 71 N. W., 429.

SEC. **4261. Attorneys' fees.** In actions for partition of real estate, when a decree ordering partition or sale is rendered, there shall be taxed in favor of plaintiff's attorney, as costs in the case, an attorney's fee; but in no case shall the amount so taxed exceed the following, to wit: for the first two hundred dollars or fraction thereof, ten per cent.; for the next three hundred dollars, five per cent.; for the next five hundred dollars, three per cent.; and for all excess over above amounts, one per cent. of the value of the property partitioned. Such value to be determined by the court or the appraisement, or by the sale when sale is ordered. [20 G. A., ch. 184.]

Where an action was brought in form for partition, but in fact to determine the title to real estate which was in dispute, *held*, that the fees of plaintiff's attorney could not be taxed as a part of the costs: *McClain v. McClain*, 52-272.

This section contemplates the payment of plaintiff's attorneys for services essential to the accomplishment of actual partition of the real estate by the parties in proportion to their interest. Attorney fees, however, for services rendered in the determination of issues wherein the title to, or some interest in the property, is in controversy should not be allowed nor taxed as part of the costs: *Everett v. Crockrey*, 69 N.W., 1125.

Attorney fees in partition proceedings should not be taxed in cases where there is a contest: *Finch v. Garrett*, 71 N.W., 429.

SEC. **4262. Sale—referees to give bond.** Before selling, the referees shall give a bond in a penalty to be fixed by the court, payable to the parties who are entitled to the proceeds, with sureties to be approved by the clerk, conditioned for the faithful discharge of their duties. At any time thereafter, the court may require further and additional security, and upon failure of the referees to comply with such order they may be removed by the court and others appointed, and the court may at any time, for satisfactory reasons, remove them and appoint others. [C.'73, § 3298; R., § 3620; C.'51, § 2042.]

Where the owner of one of the shares cannot be found, the court may order his share of the proceeds to be deposited with the clerk until some one establish his right thereto, and the sureties of the clerk will be liable on his bond for the money so deposited. It is not necessary that the referees be continued for the purpose of having custody of such proceeds: *Walters-Cates v. Wilkinson*, 92-129.

SEC. **4263. Notice of sale.** The same notice of sale shall be given as when lands are sold on execution by the sheriff, and the sale shall be conducted in like manner. [21 G. A., ch. 130; C.'73, § 3299; R., § 3621; C.'15, § 2043.]

SEC. **4264. Private sale—appraisement.** Whenever in the discretion of the court such lands can be disposed of to better advantage and with less expense at private sale than in the manner above provided, they may be sold on such terms as are ordered by the court, but in such case they shall be appraised by three disinterested freeholders to be appointed by the court, and sold for not less than the appraised value. [21 G. A., ch. 130; R., § 3621; C.'51, § 2043.]

SEC. **4265. Report of sale.** After completing said sale, the referees must report their proceedings to the court, with a description of the different parcels sold to each purchaser and the price bid therefor, which report shall be filed with the clerk. [C.'73, § 3300; R., § 3622; C.'51, § 2044.]

SEC. **4266. Conveyance.** If the sale is approved and confirmed by the court, an order shall be entered directing the referees, or any two of them, to execute conveyances; but no conveyances can be made until all the money is paid, without receiving from the purchaser a mortgage on the land so sold, or other equivalent security. [C.'73, § 3301; R., § 3633; C.'51, § 2055.]

The approval of the sale is essential, and inadequacy of price alone is sufficient to justify the court in refusing its approval: *Loyd v. Loyd*, 61-243.

Where it appears that the purchaser at a judicial sale, in partition, for a consideration induced other persons intending to bid from so doing, the sale and approval of the court will be set aside for fraud: *Fleming's Heirs v. Hutchinson*, 36-519.

SEC. **4267. Validity.** Such conveyances, being recorded in the county where the premises are situated, shall be valid against all subsequent purchasers, and also against all persons interested at the time, who were made parties to the proceedings in the mode pointed out by law. [C.'73, § 3302; R., § 3634; C.'51, § 2056.]

SEC. **4268. When parties are married.** If the owner of any share thus sold has a husband or wife living, and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate, under the supervision of such person as it may appoint, taking the title in the name of the owner of the share sold as aforesaid. [C.'73, § 3303; R., § 3635; C.'51, § 2057.]

SEC. **4269. Sales disapproved.** If the sales are disapproved, the money paid and the securities given must be returned to the persons respectively entitled thereto. [C.'73, § 3304; R., § 3636; C.'51, § 2058.]

SEC. **4270. Security to refund money.** The court in its discretion may require all or any of the parties, before they receive the moneys arising from any sale authorized in this chapter, to give satisfactory security to refund the same, with interest, in case it afterward appears that such parties were not entitled thereto. [C.'73, § 3305; R., 3632; C.'51, § 2054.]

This section does not authorize the giving of a bond by the heirs who seek partition to secure the payment of claims against the estate which might be enforced by the sale of the land: *Clarity v. Sheridan*, 91–304.

SEC. **4271. Life estates.** If a tenant for life or years is entitled as such to a part of the proceeds of sale, and the parties cannot agree upon a sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the incumbered property to be invested, and the proceeds to be paid to the incumbrancer during the term of the incumbrance. [C.'73, § 3306; R., § 3630; C.'51, § 2052.]

Where a wife's dower interest was only a life estate it was held that it was not such a case as contemplated by this section, and that she could not be compelled to allow the property to be sold and the proceeds invested: *Clark v. Richardson*, 32–399.

SEC. **4272. Compensation of appraisers and referees.** Appraisers and referees appointed under the provisions of this chapter shall receive such reasonable compensation for their services as the court allows, which shall be taxed as a part of the costs.

CHAPTER 7.

OF THE FORECLOSURE OF MORTGAGES.

SECTION **4273. Of personal property—by notice and sale.** A mortgage of personal property to secure the payment of money only, where the time of payment is therein fixed, may be foreclosed by notice and sale, unless a stipulation to the contrary has been agreed upon by the parties, or by action in the proper court. [C.'73, § 3307; R., § 3649; C.'51, § 2071.]

Sale valid: In a particular case, *held*, that the foreclosure of a chattel mortgage in which the sale was in accordance with the agreement between the parties was valid, no want of good faith on the part of the mortgagee being shown: *Gear v. Schrei*, 57–666.

The law providing that only registered pharmacists shall sell drugs has no reference to sales of stocks of goods under foreclosure or judicial sale: *Cocke v. Montgomery*, 75-259.

Personal judgment: The mortgagee is not precluded from recovery upon the mortgage debt because he permits the property covered by the mortgage to be sold for an inferior claim or lien: *Jones v. Turck*, 33–246.

If, in the foreclosure proceeding, any property be sold not covered by the mortgage, no title will pass by such sale, and therefore injunction cannot be maintained by a junior mortgagee to restrain the foreclosure of a senior mortgage upon property which it is claimed is not covered thereby: *Rankin v. Rankin*, 67–322.

Under the circumstances of a particular case, *held*, that a sale under mortgage was valid, and that the fact that the property was by a previous appraisement higher than by a subsequent one under which it was sold, was not evidence of fraud: *Tootle v. Taylor*, 64–629.

Where a part of the chattels included in the chattel mortgage have been sold, it seems that the purchaser may require the balance of the property to be exhausted before taking the part sold, but he cannot require the mortgagee to foreclose his mortgage before it is due; and where he complains of negligence of the mortgagee in allowing other property to escape, he must show, in order to entitle himself to relief, that such property would have been sufficient to satisfy the mortgage: *High v. Brown*, 46–259.

A sale made under power to sell given by the mortgage, without the posting of notices as required by law, will not be invalid in such sense that it will not confer title upon the purchaser, but it will pass a perfect title to the property and the mortgagor will be divested of his right and interest in it: *Campbell v. Wheeler*, 69–588.

Redemption by creditor: A creditor of the mortgagor may, before forfeiture, pay the mortgage debt and levy upon the property, or, if a forfeiture has taken place, he may tender the amount, and, if refused, go into chancery to redeem at any time before the equity of redemption has been barred by foreclosure, or he may garnish the mortgagee for the value of the property in excess of the debt secured: *Torbert v. Hayden*, 11–435.

When the debt secured by the mortgage

is entirely paid off by a sale of a portion of the property sufficient to pay the debt and all costs connected with the sale, the right to possession of the unsold portion of the property ceases to exist either at law or in equity against the mortgagor or his assignee: *Bellamy v. Doud*, 11–285.

In equity: A chattel mortgage may also be foreclosed by an action in equity: *Packard v. Kingman*, 11–219.

A party claiming to hold a prior incumbrance should be allowed, on application, to be made a party to the foreclosure: *Parrott v. Hughes*, 10–459.

Death of mortgagor: After the death of a mortgagor of chattels the mortgagee is not required to file his claim and await the slow process of administration to determine his rights, but he may proceed to foreclose by notice and sale, just as he could have done had the mortgagor survived: *Cocke v. Montgomery*, 75–259.

Costs and attorney fees: Whether or not attorneys' fees are recoverable as costs in a proceeding to foreclose a chattel mortgage by notice, *held*, in a particular case that the fee claimed to have been paid by the mortgagee in securing such foreclosure was not shown to be a reasonable fee and could not be recovered: *Aultman & Taylor Co. v. Shelton*, 90–288. See now § 4279.

Where a mortgage authorizes a sale by the mortgagee, and such sale is had under the authority thus given, and not under the statutory provisions, it is error to allow as a part of the expenses of foreclosure, sheriff's fees and costs of appraisement, as these are not necessary parts of the proceedings where the foreclosure is not statutory: *Myers v. Snyder*, 64 N.W., 771.

SEC. **4274. Notice.** The notice must contain a full description of the property mortgaged, together with the time, place and terms of sale. [C. '73, § 3308; R., § 3650; C.'51, § 2072.]

SEC. **4275. Service.** Such notice must be served on the mortgagor and all purchasers from him subsequent to the execution of the mortgage, and all persons having recorded liens upon the same property which are junior to the mortgage, or they will not be bound by the proceedings. [C. '73, § 3309; R., § 3651; C. '51, § 2073.]

SEC. **4276. Return.** The service and return must be made in the same manner as in the case of the original notice by which civil actions are commenced in courts of record, except that no publication in the newspapers is necessary, the general publication directed in the next section being a sufficient service upon all the parties in cases where service is to be made by publication. [C. '73, § 3310; R., § 3652; C. '51, § 2074.]

SEC. **4277. Notice of sale.** After notice has been served upon the parties, it must be published in the same manner and for the same length of time as is required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner. [C. '73, § 3311; R., § 3653; C. '51, § 2075.]

SEC. **4278. Title of purchaser.** The purchaser shall take all the title and interest on which the mortgage operated. [C.'73, § 3312; R., § 3654; C. '51, § 2076.]

SEC. **4279. Attorney fees.** If the notes secured by such mortgage, or the mortgage itself, provide for the payment of attorney's fees, the same fees shall be collected as are provided by law in actions upon such contracts, if an attorney is employed to look after and direct the proceedings, who shall make an affidavit like that required in actions, and have it attached by the officer or person making sale to his return of the proceedings thereunder.

As to right to attorney fees before the enactment of this provision, see *Aultman & Taylor Co. v. Shelton*, 90–288.

SEC. **4280. Bill of sale.** The officer or person conducting the sale shall execute to the purchaser a bill of sale of the property, which shall be effectual to carry the whole title and interest purchased. [C. '73, § 3313; R., § 3655; C. '51, § 2077.]

SEC. **4281. Evidence of service perpetuated.** Evidence of the service and publication of the notice aforesaid, and of the sale made in accordance therewith, together with any postponement or other material matter, shall be perpetuated by affidavits reciting the facts attached to the bill of sale, and shall constitute the return of the officer or person making the sale, and be receivable in evidence to prove the facts they state. [C. '73, §§ 3314–15; R., §§ 3656–7; C. '51, §§ 2079–80.]

SEC. **4282. Validity of sales.** Sales made in accordance with the above requirements are valid as to property sold to a purchaser in good faith, whatever may be the equities between the mortgagor and mortgagee. [C.'73, § 3316; R., § 3658; C.'51, § 2081.]

SEC. **4283. How contested.** The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceeding may be transferred to the district court, for which purpose an injunction may issue, if necessary. [C.'73, § 3317; R., § 3659; C. '51, § 2082.]

After a transfer of the cause to court by injunction or otherwise the case stands as a foreclosure in court, and, where usury is made to appear, a judgment of forfeiture in favor of the school fund may be rendered: *Hanlin v. Parsons*, 33–207.

The injunction is not to issue as a matter of right where it is not necessary to protect the rights of parties interested, and they have already adopted another proceeding affording a full and complete remedy: *Sweet v. Oliver*, 56–744.

This provision does not prevent one whose property is seized without shadow of right, upon the pretense that it is covered by the mortgage (as where it has been, by valid agreement, released from the mortgage at the time of its purchase from the mortgagor), from bringing an action at law to recover the property: *Black v. Howell*, 56–630.

Where it is sought to recover possession of property under a chattel mortgage, and the defense is that the mortgage has been satisfied by the execution of a warranty deed for real estate, the case is not one in which the court acquires equity jurisdiction by reason of the action as to the chattel mortgage, the foreclosure thereof not being asked: *Beroud v. Lyons*, 85–482.

Where the rights of the mortgagor may be protected in an action on replevin bond by the mortgagee to secure possession of the mortgaged property, an injunction should not be granted: *Treanor v. Sheldon Bank*, 90–575.

SEC. **4284. Deeds of trust.** Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and shall be considered as, and foreclosed like, mortgages. [C.'73, § 3318; R., § 3673; C.'51, § 2096.]

SEC. **4285. Sale under pledge.** Where chattel property is pledged as security for an indebtedness, unless provision is made by an agreement in writing therefor, the same may be sold for the non-payment of the indebtedness by giving the pledgor, or any purchaser or assignee under him of the property or any part of it of which he has notice in writing, ten days' written notice of his intention to sell the same and make an application of the proceeds to the satisfaction of the debt, and posting for the same time in three public places in the township of such pledgor's residence a notice containing a full and accurate description of the property to be sold, the time and hour when, and the place at which, the sale will take place. If redemption is not made before the date thus fixed, the pledgee may sell at public auction, to the highest bidder, the pledged property, or so much of the same as may be necessary to pay the debt, interest, and all costs of making such sale, and may be a bidder at such sale. He shall apply the proceeds, *first*, in the payment of such costs, and *second*, to the payment of the debt. Any surplus arising from the sale and any property remaining unsold shall be paid or returned to the pledgor or his assigns.

SEC. **4286. Foreclosure by action.** Such pledgee may commence an action in equity for the foreclosure of such collaterals or pledges, and the court shall determine all issues presented as in other equity cases, and render judgment for the amount due from the pledgor, and award special execution for the sale of the collaterals or pledges, and general execution for any balance, or shall render such judgment as may be necessary to carry out any written agreement of the parties concerning the subject-matter; but in all cases a sale may be ordered unless there is a written stipulation to the contrary.

SEC. **4287. Of real property—foreclosure by equitable proceedings.** No deed of trust or mortgage of real estate shall be foreclosed in any other manner than by action in court by equitable proceedings. [C.'73, § 3319; R., §§ 3660, 3673, 4179; C.'51, §§ 2083, 2096.]

The nature of foreclosure proceedings discussed: *Kramer v. Rebman*, 9–114.

Remedy exclusive: This section simply requires that the holder of a mortgage shall proceed, if at all, in a certain manner. It does not refer to a case where a party seeks to redeem from an absolute deed as from a mortgage, and in such case the court may decree that plaintiff pay the amount necessary to redeem within a time fixed or the deed will become absolute: *White v. Lucas*, 46–319.

Petition: A petition asking judgment upon a note, and an execution against the property covered by a mortgage given to secure the same, is not a petition to foreclose the mortgage, and does not address itself to the chancery jurisdiction of the court: *Ballard v. Koons*, 10–534.

A bill asking foreclosure of a mortgage and making third parties defendants for the purpose of cutting off their equities is not objectionable for multifariousness: *Greither v. Alexander*, 15–470.

Prayer: Foreclosure of a mortgage may be granted in an equitable action, where it would be proper relief under the facts stated, under a prayer for general relief, although a foreclosure is not specifically asked: *Hait v. Ensign*, 61–724.

An attachment may be prayed for in connection with the action to foreclose a mortgage: *Baldwin v. Buchanan*, 10–277.

Foreclosure against right of way: The mortgagee of land from which a right of way has been condemned, and who has not been made party to such proceeding, may have a foreclosure against the entire property, with a judgment providing that the property be first offered for sale subject to the right of way, and in case it will not sell for enough to pay off the mortgage, then that the right of way be sold with the property or separate from it as shall be found most advantageous: *Severin v. Cole*, 38–463.

For installment: See notes to § 4293.

Claim against estate: Where the mortgagor of real estate has died and the mortgagee has filed in the county court the notes secured as claims against the estate, which have been allowed but not paid, the mortgagee may either obtain judgment in the probate court or foreclose the mortgage by separate proceeding: *Moores v. Ellsworth*, 22–299.

Correction of mortgage: The mortgagee is entitled, after foreclosure and sale of the property thereunder, to have a misdescription of the mortgage reformed: *Provost v. Rebman*, 21–419.

Notice by publication: When a nonresident executes a mortgage upon property in Iowa, it must be held that he executes the same with reference to the laws of Iowa relating to such instruments, and the statutory methods for the enforcement of such conveyances must be deemed a part of the contract of the parties. Hence, in foreclosure proceedings in the state courts, a decree of foreclosure in a proceeding against a nonresident served with notice by publication is proper, the judgment being *in rem* only: *Palmer v. McCormick*, 28 Fed., 541.

Assignees as plaintiffs: Two assignees of different notes secured by the same mortgage cannot properly bring a joint action to foreclose the mortgage: *Rankin v. Major*, 9–297.

Where pending an action to foreclose as to part of the notes secured by a mortgage, a person acquired a note secured by the same mortgage, but junior to those sued on, and from a person not made defendant, *held*, that such assignee had a right to foreclose, subject to the prior lien, but could not assert such right in an action for possession of the property: *Kemerer v. Bournes*, 53–172.

Mortgagor as party: A mortgagor who has divested himself of all interest in the mortgaged property is not a necessary party defendant in an action to foreclose: *Murray v. Catlett*, 4 G. Gr., 108; *Johnson v. Monell*, 13–300.

This is so even though the mortgagor is the only person against whom a personal judgment might be rendered. When the only object of the proceeding is to appropriate the mortgaged property to the satisfaction of the debt, the mortgagor who has conveyed all his interest in the property is not a necessary party: *Johnson v. Foster*, 68–140.

If it appears upon the face of the proceeding that the mortgagor has divested himself of all interest in the mortgaged property, there can be no necessity or propriety in making him a party. But a mortgagor who has conveyed his interest by a deed containing covenants of warranty against incumbrances still has such interest in the foreclosure suit as to authorize his being made party defendant on his own application: *Gifford v. Workman*, 15–34.

One who defends the foreclosure of a mortgage, claiming that the mortgagors had no interest in the mortgaged premises, cannot object that the mortgagors are not in court when their absence works no prejudice to him: *Williams v. Meeker*, 29–292.

The debtor not necessary party: Where a mortgage is given to secure an indebtedness of another party, the original debtor is not a necessary party in an action to foreclose the mortgage: *Deland v. Mershon*, 7–70.

Subsequent mortgagees are not indispensable parties to the foreclosure, and the fact that such a party is not brought in cannot be made a ground of objection by other defendants: *Heimstreet v. Winnie*, 10–430; *Donnelly v. Rusch*, 15–99.

A second mortgagee is not bound by a foreclosure proceeding under a prior mortgage to which he is not made a party, although he had both actual and constructive notice of such prior mortgage: *Anson v. Anson*, 20–55.

Subsequent mortgagees and purchasers of the mortgaged premises, who are not made parties to an action to foreclose a prior mortgage, are not bound by the foreclosure: *Gower v. Winchester*, 33–303.

The senior mortgagee cannot acquire equities against a junior mortgagee by the payment of a judgment, obtained in a suit to which the latter is not a party, nor by any arrangement between the former and the mortgagor, no matter in what form the mortgage exists: *Davis v. Rogers*, 28–413.

Subsequent purchaser: The purchaser of mortgaged premises whose deed is recorded at the time of the institution of the foreclosure proceedings will not be bound by the decree unless made a party: *Porter v. Kilgore*, 32–379.

A purchaser of the premises at foreclosure sale is subrogated to the mortgagee's rights, and when the foreclosure proceeding is still pending on the cross-petition of one of the defendants, claiming a portion of the land, the purchaser may file his petition of intervention, setting forth his interests, and asking to be joined with the plaintiff in his action: *Dyer v. Harris*, 22–268.

A foreclosure in which a purchaser of a part of the land from the mortgagor is not made party is not void. Such purchaser holds the equity of redemption and nothing more, and a purchaser at the sale under the decree takes title subject to such equity of redemption: *Douglass v. Bishop*, 27–214.

Subsequent lien holder: In an action to foreclose a mortgage a person holding a subsequent lien should be made a party. Otherwise he can not only redeem from the sale within the statutory period, but, if he neglect to do so, he may still redeem from the mortgage debt by paying it with interest and any other proper charges, and may have an accounting of the rents and profits and an application made thereof as against the mortgage debt: *Bunce v. West*, 62–80.

A judgment lien holder is not a necessary party to an action to foreclose a mortgage against a homestead upon which the judgment is not a lien, and such judgment creditor has no right of redemption except the statutory right to be exercised within nine months: *Sutherland v. Tyner*, 72–232.

Holder of senior lien: While the beneficiary in a trust deed which is prior to the mortgage is a proper, he is not a necessary, party to the foreclosure, his interests being paramount to those of the mortgagor, and not to be affected thereby. The junior mortgagee is bound to take notice of prior liens properly recorded and of rights thereunder: *Standish v. Dow*, 21–363.

Homestead rights: The rights of the wife in the homestead cannot be cut off by a sale under foreclosure to which she is not made a party, even though her marriage to the owner of the property is subsequent to the mortgage: *Chase v. Abbott*, 20–154.

The defense that property covered by a mortgage is the homestead of defendant must be set up in the foreclosure proceeding, and if not thus interposed cannot be made a ground for resisting the title of the purchaser under the forclosure: *Haynes v. Meek*, 14–320.

Where the wife is made a party to the foreclosure of a mortgage executed by the husband alone, and the fact that the premises constitute the homestead does not appear in the mortgage nor upon the face of the petition, and such fact is not set up by the wife, the foreclosure is conclusive upon her as to any claim of homestead in the premises: *Oleson v. Bullard*, 40–9.

Mechanic's lien: Where a person claiming a mechanic's lien is made a party to the foreclosure of the mortgage, and in such action the lien of the mortgage is declared superior, the holder of the lien cannot thereafter claim such lien as against a purchaser at the foreclosure sale: *Grosbeck v. Ferguson*, 43–532.

The holder of a sheriff's certificate of purchase at execution sale, subject to be defeated by redemption, has such an interest in the property that he may be made a party defendant in an action to foreclose a mortgage against the property: *Brobst v. Thompson*, 4 G. Gr., 135.

Dower right: Where a wife does not join in a mortgage, and the husband dies before foreclosure, the widow being made a party to the foreclosure proceedings is not under obligation to set up as a defense her dower right in the property, and a foreclosure sale, in the absence of such defense on her part, will not divest her dower interest, the facts alleged in the petition not being such as to show the existence of such interest: *Moomey v. Maas*, 22–380.

Junior claims: Where a party is made defendant to the foreclosure, who, it is alleged, has some claim upon or interest in the property junior to the plaintiff's lien, it is incumbent upon such defendant, if he claims a lien superior to that of plaintiff, to allege and show the existence of such lien: *Wolfinger v. Betz*, 66–594; *Vaughn v. Eckler*, 69–332.

Administrator: In an action to foreclose, the mortgagor's administrator has a right to appear and set up the defense of usury, although the property has been sold under a subsequent deed of trust. Especially is this so when the grantee did not assume the payment of the prior mortgage: *Huston v. Stringham*, 21–36.

The administrator of the estate of a deceased mortgagor is a proper party defendant in an action to foreclose: *Hodgdon v. Heidman*, 66–645.

Purchaser pending foreclosure: A railway company which, pending a proceeding to foreclose a mortgage, acquires a right of way from defendant in such proceeding, is bound by the decree rendered therein, although not made a party: *Jackson v. Centerville, M. & A. R. Co.*, 64–292.

Subsequent proceedings as to lienholder not made a party: Where a junior lienholder has not been made party to a foreclosure, a subsequent action of foreclosure may be brought against him, in which he may set up his rights and have them enforced as fully as if he had been a party to the original proceeding, and the effect of a decree in such subsequent proceeding will be the same as if a decree had been rendered against him in the original action: *Shaw v. Heisey*, 48–468.

Where, after foreclosure and sale, a subsequent incumbrancer was made a party to the proceeding by service of notice, no reference being made therein to the fact of sale, and no rights by virtue of the sale being claimed, *held*, that a decree by default upon such service did not cut off his right to inquire into the regularity of the sale: *White v. Watts*, 18–74.

The fact that necessary parties are not joined as defendants in a foreclosure pro-

ceeding will not defeat the rights of the mortgagee under a mortgage, even though the sale to him on foreclosure is not valid: *Harsh v. Griffin*, 72–608.

SEC. 4288. Separate suits on note and mortgage. If separate actions are brought in the same county on the bond or note, and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at his cost. [C. '73, § 3320; R., § 3663; C. '51, § 2086.]

This section is applicable although the covenants on which the law action is based are contained in the mortgage itself: *Brown v. Cascaden*, 43–103.

Where the liability secured by a mortgage had been submitted to arbitrators and an award made, *held*, that it was proper to sue upon such award and for the foreclosure of the mortgage in the same actions: *McKinnis v. Freeman*, 38–364.

After a general judgment upon the note secured by the mortgage an action may be maintained to foreclose the mortgage; the mortgage is not merged in the judgment: *Matthews v. Davis*, 61–225; *Morrison v. Morrison*, 38–73.

Merger of the note in judgment does not merge the mortgage: *Shearer v. Mills*, 35–499.

SEC. 4289. Judgment—sale and redemption. When a mortgage or deed of trust is foreclosed, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interest and costs. A special execution shall issue accordingly, and the sale thereunder shall be subject to redemption as in cases of sale under general execution. [C. '73, § 3321; R., § 3661; C. '51, § 2084.]

Costs included: A decree of foreclosure may include costs incurred up to the time of decree, but cannot be made to include items not embraced in the mortgage itself: *Bates v. Ruddick*, 2–423.

Attorney fees: A mortgagee is not entitled on foreclosure to attorney fees as against the mortgagor unless expressly stipulated for in the mortgage. *Bondurant v. Taylor*, 3 G. Gr., 561.

A stipulation in the mortgage and the note secured thereby for attorney fees is valid and does not constitute usury: *Weatherby v. Smith*, 30–131; *Coe v. Lindley*, 32–437.

Where there is such stipulation in the mortgage, and no stipulation for attorney fees is contained in the notes secured, such fees can be taxed only as against the parties to the mortgage: *Floyd County v. Morrison*, 40–188.

One who purchases property subject to a mortgage and agrees to "take up the mortgage and pay for it all" is liable for attorney fees under a provision in the mortgage: *Johnson v. Harder*, 45–677.

Where a mortgage provided that a certain sum as attorney fees should be taxed by the court and included in the costs, *held*, that the attorneys' fee could not be recovered unless the action of foreclosure proceeded to final decree: *Schmidt v. Potter*, 35–426.

Where the mortgage provided for reasonable attorney fees, of not less than fifty dollars, and there was no evidence or admission as to what amount a reasonable attorney fee in the case was, *held*, that it was error to allow more than the minimum amount, although a claim for a larger amount was made in the petition: *Hawley v. Howell*, 60–79.

Where the mortgage provided for a reasonable attorney fee, but it did not appear that any evidence as to the reasonable amount of the fee was introduced, *held*, that the plaintiff on foreclosure could not recover any greater fee than that specifically provided for in the notes: *Sawyer v. Perry*, 62–238.

Penalty for usurious interest: A judgment for the state by way of forfeiture for usurious interest reserved in the mortgage is not covered by the mortgage lien, and becomes a lien on the premises only from the time of rendition: *Lewis v. Barmby*, 14–88.

Amount of decree: Where the court below in a decree of foreclosure directed an accounting on the notes secured thereby, etc., and that execution issue for the amount thus appearing due, *held*, that the court should have determined the precise amount of credits and rendered judgment accordingly: *Wilson Sewing Machine Co. v. Rutledge*, 60–39.

Where the facts were such that the assignee of the mortgage became entitled to the balance due thereon after satisfaction of a prior assignee who held the same as collateral security, *held*, that it was proper to render a decree in favor of the second assignee for such balance without specifying the amount to which he was entitled: *Pike v. Gleason*, 60–150.

Lien: Where, in a foreclosure proceeding, it was stipulated that judgment should be entered and stayed without liability on the part of the surety on the stay bond, *held*, that it was the evident intent of the parties that the plaintiff should hold and not waive his mortgage lien and that he was entitled to a decree of foreclosure: *Rice v. Covey*, 54–112.

Covenants: Where a mortgagee foreclosed a mortgage and bought in the property at the sale for the full amount of the judgment, *held*, that he could not recover upon the covenants of warranty in the mortgage for the amount afterward paid to discharge prior liens thereon: *Todd v. Johnson*, 51–192.

Where the mortgagee of property bought the same in at foreclosure sale in full satisfaction of the mortgage, *held*, that he had no right of action under the covenants of the mortgage requiring the mortgagor to keep

the premises in good repair, or for waste committed by the mortgagor while in possession before the sale: *Corbin v. Reed*, 43–459.

Personal judgment: If the mortgage stipulates that no general execution is to be issued thereunder, a personal judgment should not be rendered: *Kennion v. Kelsey*, 10–443.

In an action to foreclose a mortgage given by one person as security for a note executed by another, but not signed by the mortgagor, personal judgment should not be rendered against such mortgagor: *Anderson v. Reed*, 11–177.

Where one of the defendants in an action to foreclose a mortgage was not a party to the mortgage and never undertook to pay the same, and the petition did not charge a personal liability for the debt secured, *held*, that it was erroneous to render a personal judgment against him: *Carleton v. Byington*, 24–172.

Before a personal judgment in an action of foreclosure can be rendered against the mortgagor, it must appear that the relation of debtor and creditor exists between the mortgagor and mortgagee, and there must be an obligation to pay independently of and in addition to the property: *Weil v. Churchman*, 52–253.

Where the wife joins in the mortgage, but not in the note secured thereby, and there is no provision in the mortgage expressly stipulating for personal liability, she does not become personally liable for the debt: *Reed v. King*, 23–500; *Knox v. Moser*, 69–341.

It is not essential to the proceeding that personal judgment be rendered for the amount of the debt, and an action of foreclosure may be maintained against the owners of the property, subject to the mortgage, although they are not personally liable for the indebtedness: *Johnson v. Foster*, 68–140.

Where property was conveyed subject to two existing mortgages and was then again mortgaged by the grantee, *held*, that a purchaser of the property at foreclosure sale under the last mortgage would take the property subject to such prior mortgages of which he had notice, and could not afterwards, upon an assignment of the second of such mortgages, enforce the same personally against the mortgagor without having in any way subjected the property to the satisfaction of such mortgage: *Crowley v. Harader*, 69–83.

Notice of an action to foreclose a mortgage having been properly given, the court will render a personal judgment for the amount due, although the notice does not claim any specific sum of money: *York v. Boardman*, 40–57.

Where the purchase is subject to a mortgage, and the amount thereof has been retained by the purchaser out of the purchase price, he will be held to have assumed the payment of the mortgage, but where there is an exchange of property covered by mortgage the purchaser does not become personally liable for the payment of the mortgage on the premises taken by him in exchange unless there are words in the contract or deed indicating the assumption of such personal liability: *Bristol Savings Bank v. Stiger*, 86–344.

Special execution: The court cannot, on rendering decree of foreclosure, order that special execution thereon be stayed for a specified time: *Carroll v. Reddington*, 7–386.

Although the general rule is that the land is to be subjected to the payment of several notes covered by one mortgage in the order of their maturity, yet the court may by decree direct otherwise, and if the last note is to be paid first, it would be error to issue a general execution on the judgment for such note without having first directed the sale of the land and application of the proceeds to its satisfaction: *Ayers v. Rivers*, 64–543.

A special execution under decree of foreclosure of a mortgage on a town lot, commanding the sheriff to sell the lot in conformity with the statute, *held*, not to be illegal as requiring the whole lot to be sold: *Southard v. Perry*, 21–488.

Where a special execution was improperly issued and a sale was had thereunder, but the same sale under a general execution would have been equally effective, *held*, that the error as to the form of execution was purely technical and the sale could not be set aside: *O'Connell v. Cotter*, 44–48.

Sale of portion of premises: A decree of foreclosure should only order the sale of so much of the mortgaged premises as is necessary to satisfy the amount due. To order the sale of the whole property absolutely, and direct that the amount remaining after paying the judgment be brought into court to answer its order, is erroneous: *Malony v. Fortune*, 14–417.

Where a mortgagor conveys a part of the mortgaged property, and retains the ownership of a part, the portion which he continues to own is to be sold first, and the part conveyed by him, in the hands of his grantee or those claiming under him, will be subject to sale only to satisfy the balance remaining after the sale of the property held by the mortgagor: *Mickley v. Tomlinson*, 79–383.

Sale en masse: If the premises consist of distinct parcels which are sold in a lump, the sale should be set aside in a proceeding brought for that purpose: *Lay v. Gibbons*, 14–377.

Rights of purchaser: Where the mortgagee purchases at a sale under the mortgage he buys with full notice of all defects: *Boyd v. Ellis*, 11–97.

While a purchaser takes subject to the equitable rights of the party in possession, yet where the property has been conveyed by him by a fraudulent conveyance, he has no remaining interest which can be set up or conveyed as against such purchaser: *Wright v. Howell*, 35–288.

Dower right: A foreclosure of the mortgage in which the wife has joined and a sale of the property thereunder will defeat her dower interest in such property: *Mooney v. Maas*, 22–380; *Mead v. Mead*, 39–28.

Equity will recognize and enforce a sale and conveyance of the dower interest before the dower has been assigned or admeasured; and so, where one purchases under a foreclosure of a mortgage given by husband and

wife of the wife's property, which foreclosure occurred after the death of the wife and before the husband's interest had been admeasured, *held*, that such purchaser became an assignee or owner of the husband's interest, and acquired all the rights which the husband had before possessed as survivor in the premises: *Huston v. Seeley*, 27–183.

Remainder: Where it appeared that the interest of the mortgagor was that of a remainder over after a life estate in the property, *held*, that the foreclosure and sale should be made applicable to such remainder, and a purchaser should hold the same upon the same conditions as the mortgagor: *Iowa Loan & Trust Co. v. King*, 58–598.

Purchase by trustee: In the absence of any express provision in the trust deed, and against an objection of a bondholder who as intervenor had become party to the suit, *held*, that it was erroneous for the court, on the foreclosure of a trust deed made to secure bonds issued by a corporation, to direct that the trustee should bid in the property for the benefit of all the bondholders at its fair market price: *Sanxey v. Iowa City Glass Co.*, 63–707.

So *held* where bonds owned by one bondholder had been guaranteed by other bondholders, so that the bidding in of the property for the entire amount of the bonded indebtedness would satisfy the judgment in favor of the bondholders and release the guarantor of such bonds: *Ibid.*

Inadequacy of price: Gross inadequacy of price of itself is a strong badge of fraud, and though not conclusive in itself, yet when coupled with other circumstances tending to prove fraud, it becomes controlling and conclusive evidence: *Boyd v. Ellis*, 11–97.

Purchase pendente lite: A purchaser from the mortgagor pending a proceeding to foreclose may, by appearing in the action, have the judgment direct that a portion of the property not affected by his purchase shall be first sold for the satisfaction of the mortgage, and if he does not do this, and the decree provides for the sale of the premises without regard to his interest, he cannot afterwards question the sale: *Jackson v. Centerville, M. & A. R. Co.*, 64–292.

Possession: A purchaser at a foreclosure sale is not entitled to possession until the expiration of the year for redemption: *Barrett v. Blackmar*, 47–565; *Myton v. Davenport*, 51–583.

Rents and profits: Defendant has the right of possession during the year for redemption after the foreclosure sale. Plaintiff, whose claim is satisfied by the sale, has no right to the rents. Neither has the purchaser at the foreclosure sale: *Hill v. Hewett*, 35–563.

Receiver: The mortgagor having a right to occupy the premises till the expiration of the right of redemption under foreclosure sale, the mortgagee has not the right to the appointment of a receiver, unless the mortgage creates a lien upon such right of possession and the rents and profits accruing therefrom: *American Investment Co. v. Farrar*, 87-437. And see notes to § 3822.

Crops: The mortgagor has the right to possession until the expiration of the year of redemption, and during that time has the right to crops growing on the premises: *White v. Griggs*, 54–650.

Crops matured but not yet harvested, standing on the premises at the time of the foreclosure sale, and belonging to a tenant who has been in possession under lease from the mortgagor, do not pass by the sale, but are personal property: *Hecht v. Dettman*, 56–679. And see notes to § 4062.

As between a purchaser at foreclosure sale and a tenant of the mortgagor, the tenant is entitled to crops grown by him on the premises and already matured but not severed at the time of the sale: *Richards v. Knight*, 78–69.

In a particular case, *held*, that a crop of corn was so far matured in August as to be the property of the tenant within the foregoing rule, it appearing that the season was an unusually early one: *Ibid.*

The lessee of one holding under a sheriff's deed executed in pursuance of the foreclosure of a junior mortgage, is subject to the rights of a subsequent purchaser of the premises under the foreclosure of the senior mortgage, and can be held to account to the latter for the pasturage and crops converted by him, after the time when the purchaser under the foreclosure of the senior mortgage became entitled to possession. The fact that such lessee is not made a party to the foreclosure of the senior mortgage will be immaterial where his lease is taken pending the foreclosure proceedings: *Stanbrough v. Cook*, 83–705.

Order of application of proceeds: Where the mortgage secures two or more notes maturing at different times, the proceeds of the foreclosure should be applied to the payment of the notes in the order in which they fall due, whether they are assigned or not and without reference to the time or order of assignment. The installments in such case are regarded as so many successive mortgages having priority accordingly: *Isett v. Lucas*, 17–503.

In such case the holder of a portion of the notes who has proceeded to foreclose the mortgage without making the holder of another note, earlier becoming due, a party, does not cut off the lien of the holder of the previous note, who may proceed to foreclose the mortgage as to the same property, without alleging or proving any fraud in the previous action: *Sangster v. Love*, 11–580.

Where a mortgage is given to secure notes coming due at different times, the notes have priority in the order of their maturity; and this rule is applicable even though there be a provision in the notes that the holder may elect to treat them all as due upon failure to pay any one of them at maturity. The holder of a subsequent note cannot, by treating it as falling due upon failure to pay prior notes, entitle himself to a *pro rata* share of the security: *Leavitt v. Reynolds*, 79–348.

Sale for installment: The sale of mortgaged property under foreclosure for an installment of the debt discharges the property in the hands of the purchaser or the debtor or his vendees, after redemption from the

lien of the mortgage, from any claim under the other installments: *Escher v. Simmons*, 54–269.

A sale in pursuance of foreclosure passes to the purchaser all the title and interest of the mortgagor and mortgagee in and to the property sold, and the purchaser takes free from the lien of the unpaid installments: *Poweshiek County v. Dennison*, 36–244.

Where some of the notes secured by a mortgage are transferred, foreclosure and sale of the premises in an action by the assignee will exhaust the lien of the mortgagee as to notes still held by the mortgagee upon the land so sold: *Harms v. Palmer*, 61–483.

It may be provided in the decree of foreclosure for one installment of the amount secured by the mortgage that the mortgagee's lien on the property for the notes not then due shall be preserved: *Burroughs v. Ellis*, 76–648.

Where a mortgage was given to secure several notes, and the mortgagee without the consent of the mortgagor assigned the notes last falling due and an interest in the mortgage to secure the same to plaintiff, making the interest assigned the first lien on the premises, and where the mortgage was foreclosed as to the notes first falling due, and the interest of the plaintiff recognized as the superior lien, the mortgagee purchasing the property at the foreclosure sale for just sufficient to satisfy his judgment, from which the grantee of the mortgagor redeemed, *held*, that the lien of the mortgage was not exhausted by the foreclosure and sale, and the interest of plaintiff was superior to that of one holding as grantee of the mortgagor: *Morgan v. Kline*, 77–681.

Redemption: By this section there is the same right to redeem from a sale in a foreclosure proceeding as from an ordinary sale under execution, and the same right of possession by the debtor during the redemption period: *Barrett v. Blackmar*, 47–565.

This section simply declares that there may be statutory redemption from sale under a foreclosure. Such redemption may be by one who is not a party to the suit, but must be made within the time and in the manner prescribed by the statute as to other execution sales: *Newell v. Pennick*, 62–123.

Parties to an action for foreclosure may stipulate that a sale of land upon the judgment to be rendered therein shall be absolute and without redemption, and a sale and deed under such a decree will pass the title to the purchaser free from the claims of any person not having liens upon the property: *Cook v. McFarland*, 78–528.

The right of equitable redemption is not taken away by the provision for statutory redemption from the sale. It exists independent of statute: *American Buttonhole, etc., Co., v. Burlington Mut. Loan Ass'n*, 61–464; *Spurgin v. Adamson*, 62–661.

In an action by a junior lien holder who had not been made a party to foreclosure proceedings under which the land was sold, *held*, that the purchaser of the land at the sale under foreclosure had a right to maintain a cross-action to compel or bar redemption, although the land had previously been sold to other parties: *Anderson v. Wyant*, 77–498.

Where action to foreclose a mortgage was brought against the mortgagor and those who, it was alleged, claimed liens against the premises, and as to the lien holder, by reason of want of service, no judgment was rendered until after the sale of the property under decree of foreclosure and expiration of the period for redemption, *held*, that the only right of such lien holder was to redeem within the statutory period after judgment was entered against him, and that he could not after the expiration of such period maintain an action in equity against the grantee of the purchaser at the sale to redeem from such sale, improvements having in the meantime been made on such premises by the purchaser: *Lindsey v. Delano*, 78–350.

In an action in equity to redeem from a decree of foreclosure and sale thereunder of mortgaged property on the ground that plaintiff was not served with notice of the foreclosure proceeding, the fact that he had knowledge of the sale in ample time to have made statutory redemption therefrom if he had wished to do so, and that he, without objection, allowed the purchaser at the foreclosure sale to make valuable improvements on the premises, would estop him from having equitable relief. Under the facts in the case, *held*, that the plaintiff in the foreclosure proceeding was justified in believing that the owner of the property had abandoned all claim thereto: *Schlawig v. Fleckenstein*, 80–668.

Under former statutory provisions by which a judgment against a firm was not a lien upon real property belonging to the firm, held in the individual name of one of the members, such judgment creditor could not redeem from a purchaser of the real property at a foreclosure sale under a mortgage given by the individual member holding the title: *Stadler v. Allen*, 44–198.

A decree cutting off the lien of a junior incumbrancer does not deprive him of any right he may have by virtue of statutory redemption: *Watts v. White*, 12–330.

A decree of foreclosure ordering a sale of mortgaged real estate rendered in the federal court must conform to the state law and preserve the right of redemption whereever the statutory right of redemption exists: *Farmers Loan & Trust Co. v. Iowa Water Co.*, 78 Fed., 881.

But *held*, that under a mortgage covering the property and franchise of a corporation organized and authorized to supply water to a city, a sale on foreclosure should be without the right of redemption: *Ibid.*

Who may redeem: One who has a mortgage upon property as that of another cannot claim the right of redemption after foreclosure of the mortgage on the ground that he has not been made a party to the proceeding in his own right, but only in the representative capacity in which he purported to act: *Foster v. Young*, 35–27.

The rule that the right of redemption from the mortgage debt after the foreclosure sale exists only in favor of a person who has a lien upon the identical title or interest upon

which the mortgage rests means only that the lien shall not rest upon a wholly independent title, that is, one which can be valid only in case the mortgagor has no title, and does not prevent a tax purchaser from making redemption, although his lien is not derived from the mortgagor: *Ayers v. Adair County*, 61–728.

Redemption from sale for one installment: The grantee of the mortgagor, by conveyance before the rendition of judgment in foreclosure of the mortgage, may redeem from a sale under the judgment of foreclosure for a part of the debt and hold the property free from any lien under the mortgage or under the judgment against his grantor for the balance of the debt: *Escher v. Simmons*, 54–269; *Todd v. Davey*, 60–532.

Where a mortgage is foreclosed for one installment of the debt, and during the period for redemption the mortgagor conveys the property to a third person, agreeing to redeem, and afterwards does redeem, such third person takes the property free from the lien of the mortgage for the balance: *Micklewait v. Raines*, 58–605.

Plaintiff in a foreclosure proceeding having bought in the property and the mortgagor having redeemed from such sale, *held*, that plaintiff's remedy against the property was exhausted irrespective of whether the mortgagees were parties to the proceeding or not: *Blake v. Black*, 55–252.

After redemption by a mortgagor from sale under foreclosure for a portion of the mortgage debt, the mortgagee cannot again subject the land to the payment of a part of the debt remaining unsatisfied. This rule holds where the mortgage secures different notes, some of which are assigned to a third party, and the foreclosure and sale of the premises in an action by the assignee exhausts the lien of the mortgage upon such premises: *Harms v. Palmer*, 61–483.

Where a junior mortgage is assigned, and the assignment is not made of record, a foreclosure of the senior mortgage to which the junior mortgagee is made a party is binding upon the assignee of such junior mortgage, and he can only make statutory redemption, although not made a party, where the fact of his interest is not known to the party foreclosing: *Reel v. Wilson*, 64–13.

Expiration of period; misdescription: A reformation of the mortgage to correct a misdescription may be had at the suit of the mortgagee, but such reformation would not cut off the right to redeem as to property not described in the original foreclosure: *Provost v. Rebman*, 21–419.

The fact that property is misdescribed in a foreclosure and sale thereunder, and that the description is subsequently corrected in a proceeding brought during the period of redemption, to which the party entitled to redeem is made a party and in which he asks no relief, will not extend the period for redemption: *McKissick v. Mill Owners' Mut. F. Ins. Co.*, 50–116.

Equitable relief: A failure to redeem from a foreclosure within the time set by statute because of losses suffered by mortgagor by reason of a grasshopper plague affords the mortgagor no ground for equitable relief against the mortgagee in possession under the decree of foreclosure. Courts of equity cannot base a decree against a defendant upon a misfortune of the complainant. If the legal title is vested in the defendant, as it is in this case, he cannot be deprived thereof, save upon some ground which affects him or shows that it would be inequitable or unjust for him to retain his legal advantage against the superior equity of the opposing party: *Palmer v. McCormick*, 30 Fed., 82.

Statute of limitations: A provision in a mortgage that upon default in the payment of installments of interest or taxes the whole indebtedness shall become due is for the benefit of the mortgagee at his election, and such default will not set the statute of limitations running against the indebtedness in the absence of an election on the part of the mortgagee to take advantage of such provision: *Watts v. Creighton*, 85–154.

SEC. **4290. General execution for balance.** If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise. [C. '73, § 3322; R., § 3662; C. '51, § 2085.]

This section does not apply to a case where the mortgage is given to secure the debt of another party, and the mortgagor does not sign the note or become otherwise liable for the payment of the debt. (Overruling *Deland v. Mershon*, 7–70): *Chittenden v. Gossage*, 18–157; *Anderson v. Reed*, 11–177; *Weil v. Churchman*, 52–253. But see *Newbury v. Rutter*, 38–179, which refers to *Deland v. Mershon*, 7–70, with approval.

SEC. **4291. Overplus.** If there is an overplus remaining after satisfying the mortgage and costs, and if there is no other lien upon the property, such overplus shall be paid to the mortgagor. [C. '73, § 3324; R., § 3666; C. '51, § 2089.]

Where a surplus was realized by the sheriff from the sale of a homestead under special execution, and the defendant permitted the sheriff, without objection, to apply such surplus upon other executions, and turn the same over to such execution creditors, *held*, that the debtor was estopped from seeking to recover such surplus from the sheriff: *Brumbaugh v. Zollinger*, 59–384.

The overplus may be garnished in the hands of the sheriff by a creditor of the mortgagor: *Hoffman v. Wetherell*, 42–89.

Or such surplus may be applied to another execution against defendant in the hands of the sheriff: *Payne v. Billingham*, 10–360.

SEC. **4292. Junior incumbrancer entitled to assignment.** At any time prior to the sale, a person having a lien on the property which is junior to the mortgage will be entitled to an assignment of all the interest of the holder of the mortgage, by paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with the foreclosure, or discontinue it, at his option. [C.'73, § 3323; R., § 3665; C.'51, § 2088.]

A tender made by a junior to a senior mortgagee before sale, for the principal, interest and costs then accrued, is sufficient, though not accepted until after sale: *Marshall v. Ruddick*, 28–487.

The manifest object of this provision is to secure to the junior lien holder the right to protect his lien by buying in the paramount incumbrance. If the junior lien attaches to but a portion of the property covered by the senior mortgage, and all parts of it are subject to be sold alike for the satisfaction of the debt secured by that mortgage, the junior lien holder is undoubtedly entitled, upon payment of the debt, to have an assignment of the interest of the holder of the mortgage, and may first apply the portion of the property covered by the senior mortgage alone, to the satisfaction of the debt secured by that mortgage, and afterwards may appropriate the property covered by the junior lien, or such portion of it as remains after satisfaction of the debt secured by the senior mortgage, to the payment of his claim: *Grant v. Parsons*, 67–31.

But where the senior mortgage is a lien upon premises a portion of which constitutes the homestead, while the junior mortgage covers only such portion of the same premises as are not embraced in the homestead, the junior mortgagee is not entitled, upon payment of the senior incumbrance, to an assignment thereof so far as it affects the homestead, for the reason that the homestead is only liable for the satisfaction of so much of the senior mortgage as shall remain unsatisfied after the other portion of the property is exhausted. But the junior lien holder may, if he so elects, have an assignment of the interest of the senior mortgagee in the property other than the homestead, and enforce that mortgage accordingly: *Ibid.*

The right of a junior judgment creditor to redeem from a senior creditor after the issuance of execution does not take away nor impair the right of a junior creditor to redeem from a senior mortgage previous to the foreclosure thereof: *Hammond v. Leavitt*, 59–407.

A purchaser of property at a sale under a judgment may redeem from a prior mortgage by paying or tendering to the mortgagee the full amount due thereon: *Ibid.*

In an action by the senior mortgagee to foreclose, to which the junior mortgagee is made party, the latter may by agreement with plaintiff's attorney pay to such attorney the amount necessary to entitle him to an assignment of the mortgage with an agreement that the action shall be prosecuted for the benefit of the junior mortgagee: *Harbach v. Colvin*, 73–638.

Where a junior mortgagee is not made party to the foreclosure of a senior mortgage, the senior mortgagee buying in the property at the sale may redeem from the claim of the junior mortgagee. In such case, the junior mortgagee upon redeeming would not be entitled to a conveyance of the estate, but only to an assignment of the prior mortgage, and therefore the prior mortgagee, as purchaser of the equity of redemption at the sale, may redeem from the junior mortgage just as the mortgagor might have done: *Smith v. Shay*, 62–119.

In making such redemption from sale under foreclosure of the junior mortgage, the amount to be paid would be, not the amount bid at such sale, but the amount of the indebtedness secured by the junior mortgage: *Ibid.*

The holder of land sold at foreclosure sale which is subject to redemption by a judgment creditor not made a party to the foreclosure proceeding has a right to redeem from such lien by paying off the judgment and discharging his lien: *Kraft v. James*, 64–159.

Where the holder of a junior mortgage, while suit for the foreclosure of a senior mortgage is pending, pays the amount of the mortgage debt with interest and costs, the transaction is not a sale but an equitable assignment, and the junior lien holder is entitled to be subrogated to all the rights of the holder of the senior mortgage: *Sessions v. Kent*, 75–601.

SEC. **4293. Other liens.** If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order. And if the money secured by any such lien is not yet due, a rebate of interest, to be fixed by the court or judge thereof, must be made by the holder, or his lien on such property will be postponed to those of a junior date, and if there are none such, the balance shall be paid to the mortgagor. [C.'73, § 3325; R., § 3667; C.'51, § 2090.]

A court having jurisdiction as to an installment due may retain jurisdiction over the parties and the cause until the whole debt falls due: *McDowell v. Lloyd*, 22–448.

Where interest is made payable annually, the mortgage may be foreclosed for an annual installment due and unpaid, although the principal is not yet due: *Bahr v. Arndt*, 9–39.

Where the sheriff is not directed as to the disposition of the surplus, and in good faith, without knowledge of subsequent liens, applies such surplus upon other executions in his hands against the mortgagor,

he is not liable to the holders of such subsequent liens: *Polk County v. Sypher*, 17-358.

Contests as to the surplus may be determined upon motion: *Ibid.*

This provision is of general application in foreclosure proceedings, and where a mortgage secures several notes and is foreclosed on default in the payment of one of them, the proceeds are to be applied to the payment of the others: *National Bank v. Dean*, 86-656.

SEC. **4294. How much sold.** As far as practicable, the property sold must be only sufficient to satisfy the mortgage foreclosed. [C. '73, § 3326; R., § 3668; C. '51, § 2091.]

Where the mortgaged property is susceptible of division, only such portion should be sold as may be necessary to satisfy the debt, and a refusal to sell in such parcels as are sufficient for that purpose will invalidate the sale: *Grapengether v. Fejervary*, 9-163.

SEC. **4295. Satisfaction acknowledged.** When the amount due on a mortgage is paid off, the mortgagee, or those legally acting for him, and in case of payment of a school fund mortgage the county auditor, must acknowledge satisfaction thereof in the margin of the record of the mortgage, or by execution of an instrument in writing, referring to the mortgage, and duly acknowledged and recorded. If he fails to do so within thirty days after being requested in writing, he shall forfeit to the mortgagor the sum of twenty-five dollars. When any mortgage is satisfied on the margin of the record of the mortgage, as herein provided, the person satisfying the same shall be identified to and his signature shall be witnessed by the county recorder or his deputy. [25 G. A., ch. 53; C. '73, § 3327; R., § 3670; C. '51, § 2093.]

The penalty is incurred by a failure to enter satisfaction within the time stipulated after request, and a subsequent entry of satisfaction, even before suit brought for the penalty, does not relieve therefrom: *Deeter v. Crossley*, 26-180.

There must be express satisfaction: and a conveyance from the mortgagee to the mortgagor, not referring to the mortgage, will not be sufficient: *Ibid.*

The penalty cannot be recovered from one who is assignee of the note secured by the mortgage, but has no written or recorded assignment of the mortgage: *Low v. Fox*, 56-221.

Where a mortgage has been assigned without an entry of such assignment on the record it can be satisfied of record only by the original mortgagee: *Kennedy v. Moore*, 91-39.

SEC. **4296. Entry on records.** When a judgment of foreclosure is entered in any court, the clerk shall make upon the margin of the record of the mortgage foreclosed a minute showing that fact, in what court foreclosed, and giving the date of the decree; and when the judgment is fully paid off and satisfied upon the judgment docket of such court, the clerk shall enter satisfaction upon the margin of such mortgage, and he shall be allowed as compensation for such service the sum of twenty-five cents, to be taxed as a part of the costs in the case. [C. '73, § 3328.]

SEC. **4297. Foreclosure of title bond.** In cases where the vendor of real estate has given a bond or other writing to convey the same on payment of the purchase money, and such money or any part thereof remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, the vendor may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property. [C. '73, § 3329; R., § 3671; C. '51, § 2094.]

A title bond invests vendee with an interest which can be reached by the vendor in a manner similar to the foreclosure of a mortgage: *Mullin v. Bloomer*, 11-360.

These provisions do not take away the rights of vendor to pursue any remedies he may have without regard to such provisions: *Page v. Cole*, 6-153.

The vendor may still proceed at law for any matured and unpaid installment of the purchase money: *Hershey v. Hershey*, 18-24; *Poweshiek County v. Dennison*, 36-244.

These provisions are merely permissive and do not take away any right which the grantor may have under the instrument by way of forfeiture: *Iowa R. Land Co. v. Mickel*, 41-402; *Johnson v. Thornton*, 54-144: *Mickelwait v. Leland*, 54-662.

Time may be made of the essence of a contract so that upon failure to pay within a time specified all rights under the bond will be forfeited: *Schmidt v. Williams*, 72-317.

As to how a vendor's lien may be reserved, see § 2924.

Until vendor declares a forfeiture vendee is deemed in possession as purchaser, and his possession is therefore adverse to vendor: *Montgomery County v. Severson*, 64-326.

This section *held* applicable to a case where the owner of land had agreed to convey to a railroad company the right of way over his land in consideration of their fencing the track and the construction of a crossing; and *held*, that the lien under such contract was superior to the claims of the purchaser of the road at foreclosure sale: *Varner v. St. Louis & C. R. R. Co.*, 55–677.

The assignee of a note given for the purchase money by the holder of a title bond has the same rights and remedies as the payee, and may bring action in his own name to foreclose the bond or contract: *Zebley v. Sears*, 38–507; *Guest v. Byington*, 14–30.

Where a party having a mortgage on land takes as additional security a deed for the same land, and gives back a bond to reconvey upon payment of sum named, the lien of his mortgage does not merge in the title thus acquired: *McElhaney v. Shoemaker*, 76–416.

Upon the maturity of a portion of a series of notes for the purchase money, the vendor may bring action to foreclose his title bond: *Tupple v. Viers*, 14–515.

And a foreclosure for an installment due, and a sale thereunder, has the same effect as in a similar action on the mortgage. The purchaser takes free from any claim of the vendor for unpaid installments: *Poweshiek County v. Dennison*, 36–244.

Where the vendor proceeds to foreclose the contract of sale, he loses his lien for any balance of the purchase money not paid by the foreclosure sale: *Todd v. Davey*, 60–532.

By the acceptance of a title bond specifying the sale and the vendee's contract to pay the purchase money at a specified time, the vendee becomes bound: *Huse v. McDaniel*, 33–406.

The fact that no notes or other obligations are executed by the person to whom is given a bond to convey will not show that he is not bound by the bond. Such a contract will not be considered as unilateral unless it is plain and clear that a unilateral contract was intended. In the absence of such proof of intention it will be presumed that the parties intended it to be mutually obligatory: *Flanders v. Merrill*, 38–583.

Where a contract to convey is assigned by the vendee to a third person, and accepted by him, and rights claimed thereunder, such assignee thereby assumes all the obligations of his assignor, and can be held personally liable thereunder: *Wightman v. Spofford*, 56–145.

Under a contract by which the owner of land held under execution had an election to repurchase within a given time, *held*, that no personal obligation was incurred on which judgment could be recovered: *Stroup v. Haycock*, 56–729.

Where, in a bond for a deed, vendee does not bind himself to pay for the premises, an acceptance of such bond creates no obligation on his part, but simply secures to him an option to pay the stipulated price and interest or take the land. When he neglects to pay according to such stipulations, the privilege of taking the land which he has under the agreement may become terminated in accordance with its provisions, and no demand against the vendee in favor of the vendor will exist after such termination: *Huston v. Kline*, 64–376.

The vendee in possession under a bond for a deed cannot acquire tax title against the owner under a sale made prior to the execution of the bond for a deed: *Cowdry v. Cuthbert*, 71–733.

Where the legal title is conveyed under such circumstances that it will in equity be held to be a mortgage, a separate agreement to reconvey his entire interest and rights to the debtor in the property may be foreclosed as herein provided: *Rubelman v. Rummel*, 72–40.

In an action to recover the purchase money of real estate and foreclose the interest of the vendee therein no tender of conveyance is required, for the reason that the court of equity can so mould the judgment or decree as to protect the rights of the vendee: *Stevenson v. Polk*, 71–278.

An action to foreclose a title bond is barred in the same time that an action on a mortgage would be: *Day v. Baldwin*, 34–380.

A judgment against the vendee and a foreclosure of the bond may be had in the same action, as in a suit to foreclose a mortgage: *Hartman v. Clarke*, 11–510.

In an action to foreclose a title bond to convey an undivided interest in real property, *held*, that a subsequent purchaser of a part of the property was properly made defendant and might in an action ask that the lien be enforced against the portion not claimed by him, and that a partition of the land be made: *Hammond v. Perry*, 38–217.

In an action on a title bond for balance of purchase money it is error to declare the bond forfeited and discharge the land therefrom. The lien of the vendor for the balance due should be foreclosed and the property sold to satisfy the judgment: *Gamut v. Gregg*, 37–573.

In an action to foreclose a title bond, *held* not error to render a decree requiring plaintiff to convey the property described in the bond to the purchaser under the decree, by a deed containing the covenants stipulated in the bond, upon payment by the purchaser of the full amount found due plaintiff on the bond: *Wall v. Ambler*, 11–274.

Where vendee enters into possession under a contract of sale, he is, after the sale of the premises under foreclosure of the contract, bound to surrender possession to the holder of the legal title without notice. He cannot claim to be a tenant at will: *Cole v. Gill*, 14–527.

In a proceeding to foreclose a title bond to real estate brought by an executrix, who was also under the will devisee of the property with power to convey, *held*, that a decree requiring that the deed to be delivered to defendant upon payment of the debt should be executed by plaintiff as executrix, instead of as devisee, was erroneous: *Grimmell v. Warner*, 21–11.

On the foreclosure of a title bond of real estate it is proper to award a general execution for any balance remaining due after the sale of the property on special execution: *Ibid.*

Subsequent lien holders not made parties to the foreclosure may redeem as from sale on foreclosure of mortgage: *Dukes v. Turner*, 44–575.

The grantee of a grantee under a title bond may maintain an action to redeem from the sale under foreclosure of the title bond by the grantor, to which he is not a party: *Ibid.*

SEC. **4298. Vendee deemed mortgagor.** The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. [C. '73, § 3330; R., § 3672; C. '51, § 2095.]

See notes to preceding section.

SEC. **4299. Forfeiture—notice.** Any contract hereafter made for the sale of real estate in the state of Iowa, and which provides for the forfeiture of vendee's rights therein upon the happening of certain conditions, shall not be forfeited or canceled unless, thirty days before a declaration of forfeiture is made, a written notice be served on the vendee or assignee, notice of whose rights as assignee has been conveyed to vendor, and on the party in possession of said real estate, which notice shall be served in same manner and by same parties authorized to serve original notices, and shall contain a declaration of an intention to forfeit said contract, and the reason therefor. [26 G. A., ch. 73, § 1.]

SEC. **4300. Performance.** For the period of thirty days after service of said notice the vendee, or those claiming under him, may discharge any unpaid payment and costs of service of notice of forfeiture, or perform any condition broken; and, if said payments are made or conditions broken are performed within said period of thirty days, the right to forfeit for defaults occurring before said notice is served is terminated. [Same, § 2.]

SEC. **4301. Terms of contract.** The requirements contained in sections forty-two hundred and ninety-nine and forty-three hundred shall be operative in all cases where the intention of the parties, as gathered from the contract and surrounding circumstances, is to sell or to agree to sell an interest in real estate, any contract or agreement of the parties to the contrary notwithstanding. [Same, § 3.]

CHAPTER 8.

OF ACTIONS FOR NUISANCE, WASTE AND TRESPASS.

SECTION **4302. Nuisance — what constitutes — action to abate.** Whatever is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof. [C. '73, § 3331; R., §§ 3713–15; C. '51, §§ 2131–3.]

In actions at law: In an action at law damages may be recovered for a nuisance, and the nuisance itself may be abated; therefore in an action for damages for a nuisance the plaintiff is entitled to have his damages assessed by a jury, notwithstanding the fact that he may couple with his claim for damages a prayer that the defendants may be enjoined from continuing the nuisance: *Miller v. Keokuk & D. M. R. Co.*, 63–680.

Notwithstanding this provision authorizing abatement of a nuisance in an action at law, proceedings for abatement may still be brought in equity: *Bushnell v. Robeson*, 62–540; *Gribben v. Hansen*, 69–255.

What deemed: A livery stable in a city is not necessarily a nuisance, but may be so under some circumstances: *Shiras v. Olinger*, 50–571.

As to duties of adjoining lot owners with reference to building, etc., see *Cook v. Benson*, 62–170.

The fact that stock yards are necessary to the operation of a railroad will not prevent recovery by a property owner for damages from unwholesome odors therefrom, it not appearing that such odors were unavoidable and that the yards might not have been located elsewhere: *Shively v. Cedar Rapids, I. F. & N. R. Co.*, 74–169.

The obstruction of a stream by which lands are inundated is a nuisance, and may be enjoined without regard to the insolvency of the defendant: *Moore v. Chicago, B. & Q. R. Co.*, 75–263.

A slaughter-house may be a nuisance in residence portions of a city, even though carried on in as careful a manner as possible. Individual property owners may have damages separate from the public, and may maintain a joint action for injunction, although owning separate property: *Bushnell v. Robeson*, 62–540.

The fact that property is purchased and used for residence, while a business is being prosecuted which is afterward complained of as a nuisance, will not prevent a court of equity from exercising its discretion to grant an injunction to restrain the continuance of the nuisance: *Ibid.*

A nuisance resulting in injury to the health and property of plaintiff may be a ground of recovery, although plaintiff is not affected in a different way in that respect from the public in general: *Harley v. Merrill Brick Co.*, 83–73.

In an action for damages for a nuisance consisting in smoke and soot caused by defendant in the operation of its works, *held*, that it was erroreous to instruct the jury that defendant would not be liable for such nuisance if caused in part by others. In such case, if it appears that defendant acted independently and not in concert with others, it should be held liable for the damages resulting from its own acts only: *Ibid.*

Also, *held*, that the plaintiff was not estopped from complaining because of knowledge of the erection of defendant's works without making objection, it appearing that plaintiff had in no way induced defendant to act in reliance on plaintiff's acts or omissions: *Ibid.*

In such case, *held*, that it was not competent to establish the existence of the alleged nuisance by showing how it affected persons and property not in controversy: *Ibid.*

Plaintiff also in the wrong: Where plaintiff's premises themselves constitute and contribute to the nuisance of which he complains, he cannot have relief against defendant: *Cassady v. Cavenor*, 37–300.

Not only the condition but the location of the alleged nuisance must be considered in determining whether the premises are objectionable: *Baker v. Bohannan*, 69–60.

Intent: In a civil action for damages for a nuisance the intention of the defendant in doing the act complained of need not be inquired into unless upon the question of exemplary damages: *Bonnell v. Smith*, 53–281.

In an action to recover damages caused by a nuisance, *held*, that the fact that plaintiff maintained another nuisance would not defeat his right of recovery, but that such fact might be considered in determining defendant's liability; and *held* also, that the doctrine of contributory negligence would not apply in such case: *Randolf v. Bloomfield*, 77–50.

In an action to recover damages caused by a sewer which emptied into the street near plaintiff's dwelling-house, evidence that another sewer of similar construction and use did not produce offensive smells, *held* properly excluded: *Ibid.*

Where an upper owner contributes to the pollution of a stream already polluted by others, and it appears that the water would have been good for stock and free from noxious odors but for such contribution, he will be liable in damages to the lower owner: *Ferguson v. Firmenich Mfg. Co.*, 77–576.

But where a stream is polluted by both upper and lower owners, the latter cannot recover for an injury to which he contributed: *Ibid.*

Acts under authority of law: An act done in accordance with authority of law cannot constitute a public nuisance, but may be a private nuisance for which damages may be recovered, and in the latter case the legislative grant will be no protection: *Churchill v. Burlington Water Co.*, 62 N.W., 646.

When a municipal corporation is authorized to do a particular thing so long as it keeps within the scope of the power granted it cannot be restrained on the ground that the thing done constitutes a nuisance, provided the result arises as a natural and probable consequence of the act authorized so that it may fairly be said to be covered in legal contemplation by the legislation conferring the power: *Miller v. Webster City*, 62–N.W., 648.

While the legislative grant is a bar to public prosecution for the maintenance of the nuisance but not to an action for damages suffered therefrom by an individual, yet the citizen is expected to submit to a reasonable amount of discomfort for the general public good: *Ibid.*

From time immemorial the creation and maintenance of public markets has been deemed an incident of sovereignty: *Ibid.*

Where the damage resulting from a nuisance can be admeasured and compensated, equity will not interfere, for the public benefit outweighs private and individual convenience: *Ibid.*

Prescriptive right: A claim of right to maintain a nuisance arising by continuance of the nuisance for more than five years is the claim of an easement, and, under § 3004, notice of such claim of a prescriptive right must appear, adverse possession alone not being sufficient: *Churchill v. Burlington Water Co.*, 62 N W., 646.

Public and private: A nuisance may be both public and private, and if an individual suffers special damages thereby he may maintain an action therefor: *Ewell v. Greenwood*, 26–377; *Platt v. Chicago, B. & Q. R. Co.*, 74–127.

A dam, although lawfully erected, may constitute a public nuisance in that it causes the water to overflow adjacent lands, by reason whereof such water is rendered impure and the overflowed land kept marshy and filled with noxious weeds and putrid vegetation, whereby the air becomes corrupted, infected, etc.: *State v. Close*, 35–570.

A private person has a right of action for a public nuisance only when he suffers an injury distinct from the public as a conse-

quence of the wrongful act: *Ingram v. Chicago, D. & M. R. Co.*, 38–669.

While a nuisance may as to some matter affect the public for which a private action will not lie, if as to other things it works an injury to the individual which is not shared by the public, he may have a remedy: *Park v. Chicago & S. W. R. Co.*, 43–636.

As a general rule a public nuisance gives no right of action to a private person, unless he suffer a special injury, distinct from that of the general public, and a municipal corporation is not authorized to bring an action to restrain and abate a nuisance on the ground that it is injurious to its citizens: *Ottumwa v. Chinn*, 75–405.

Independently of statutory provisions, a private individual will not be allowed to maintain an action to restrain or abate a public nuisance, unless he can show that it occasions some peculiar and special damage or injury to him; and where a railroad bridge was built across a navigable lake, and plaintiff subsequently established the business of keeping boats for hire at one end of the lake, *held*, that he could not maintain an action for damages against the company on account of the maintenance of such bridge, and consequent interference with his business, by reason of the obstruction to the passage of boats to other portions of the lake: *Innis v. Cedar Rapids, I. F. & N. W. R. Co.*, 76–165.

The order of a city council as a board of health declaring a structure a nuisance and dangerous to public health is not conclusive in an action against the person maintaining such structure by one who claims to be injured thereby, and does not relieve plaintiff in such action from the necessity of establishing the fact that such structure is a nuisance working injury to plaintiff or his property: *Kallsen v. Wilson*, 80–229.

Therefore, a private individual is not entitled by action of *mandamus* to compel the defendant, a school board, to abate on their premises a building which has been declared by the board of health to be a nuisance to the public: *Ibid.*

Obstruction of highway: To entitle a party to recover damages for the obstruction of a highway he must show not only the existence of the highway and the fact of obstruction, but that he has sustained some special damage or injury therefrom not shared by the public in general: *Brant v. Plummer*, 64–33.

A nuisance resulting from an obstruction to a highway leading to the premises of a party and interfering with the access thereto, and causing other special damage, is ground for recovery in an action by the person injured. In such cases action may be maintained though many persons other than plaintiff suffer like injuries from the same nuisance: *Park v. Chicago & S. W. R. Co.*, 43–636.

A land owner has a private right of action for damages and for abatement of a nuisance caused by the obstruction of a highway which is of special importance to him in connection with entering and leaving his premises: *Miller v. Schenck*, 78–372.

As to shade trees in highways, see § 1556 and notes.

As affecting property rights: A city which has contracted for a supply of gas cannot set up a defense that the gas works were a nuisance which they had no power to legalize: *Davenport Gas, etc., Co. v. Davenport*, 13–239.

Where property used as a house of ill-fame is seized by an officer without authority of law, the officer is liable for damages suffered thereby, notwithstanding the illegal character of the use: *Tieman v. Haw*, 49–312.

Measure of damages: In an action for a nuisance for allowing water to stand upon an owner's premises until it becomes offensive, the measure of damages should be limited to the diminution in value of the use of the premises affected thereby during the time during which the nuisance existed: *Quinn v. Chicago, B. & Q. R. Co.*, 63–510.

Where the upper owner, by an unreasonable use of a stream, pollutes the water so that it is rendered unfit for the use of stock and domestic purposes on the farm below, and is a source of sickness, pain and discomfort, the person injured is not limited in his recovery to the damages sustained by reason of the depreciation of the rental value of the property, but he is entitled to recover special damages for the inconvenience suffered by himself and family, including that resulting from sickness, pain and discomfort: *Ferguson v. Firmenich Mfg. Co.*, 77–576.

In an action to recover for a nuisance caused by defendant by constructing and maintaining a sewer which emptied near plaintiff's dwelling-house, *held*, that plaintiff was not limited in his recovery to damages resulting from the depreciation in the rental value of the property, but was entitled to recover for the inconvenience and discomfort suffered: *Randolf v. Bloomfield*, 77–50.

In an action to recover for a nuisance affecting the comfortable enjoyment of the homestead the damages are not limited to the rental value but recovery may be had for the inconvenience and discomfort suffered: *Churchill v. Burlington Water Co.*, 62 N. W., 646; *Foote v. Burlington Water Co.*, 62 N. W., 648.

Where the owner of a rock quarry allowed rock to roll or fall upon a street, and it was used by the city in making repairs, *held*, that while the city had the right to remove such obstruction as a nuisance, yet if it used the material on its streets, not merely for the purpose of removing the obstruction but for the purpose of the betterment of the street, it was liable to the owner for the value of the material, less the expense of the removal: *Kemper v. Burlington*, 81–354.

In an action for an injury to property by reason of a nuisance of such character that it may be discontinued, plaintiff is only entitled to recover depreciation in rental value during the existence of the nuisance: *Shively v. Cedar Rapids, I. F. & N. R. Co.*, 74–169.

Percolating water: Where a property owner allows water to accumulate in excavations upon his premises so as to constitute a nuisance, he will be liable for damages caused to the adjoining owner by the percolation of such water upon the premises of the latter: *Ibid.*

Surface water: A property owner has the right to construct a building upon his premises so as to cause the water falling upon such building to be discharged at one or more places, and if such discharge is caused to be made upon a street or alley, an adjoining property owner cannot complain because, by reason of his own lot being below grade, it is injured by the flow of such water thereon: *Phillips v. Waterhouse*, 69–199.

Continuance of nuisance; liability of grantee: It seems that the liability of the grantee for the continuance of a nuisance caused by the act of the grantor upon the premises prior to the conveyance is not dependent upon notice to the grantee of the continuance of the nuisance: *Drake v. Chicago, R. I. & P. R. Co.*, 63–302.

Where an injury is permanent the damage is spoken of as original and as accruing wholly when the wrongful acts are done; and is distinguished from an injury which is regarded as continuing, that is, an injury that could and should be terminated, and is to be compensated strictly with reference to the past and upon the theory that it will be terminated. In the former case, a recovery for damages subsequently accruing from the original wrong cannot be had against a subsequent purchaser of the property: *Bizer v. Ottumwa Hydraulic Power Co.*, 70–145.

Continuing damages: Where damages from a nuisance do not occur at the time of the doing of the act from which the damage subsequently results, the party owning the property damaged at the time that the damage occurs may sue thereon, although he was not the owner at the time the act was done which caused the damage: *Miller v. Keokuk & D. M. R. Co.*, 63–680.

Where a railway company laid a side track in the street of a city twelve feet nearer the side of the street than authorized by city ordinance, and the owner of property fronting on the street sued for damages occasioned to such property by running cars over and leaving them standing upon said side track, *held*, that the nuisance was continuing and not permanent, and that the occupant of the property might maintain the action, although such occupant was not the owner of the property so as to be entitled to sue for the original damage in laying the track, and although an action for such original damage would be barred: *Cain v. Chicago, R. I. & P. R. Co.*, 54–255.

Abatement by board of health: Exclusive jurisdiction to determine what constitutes a nuisance and to abate nuisances is not conferred upon the local board of health, but a private action for damages against a person maintaining a nuisance by one specially injured thereby may be brought without the action of the board having been invoked: *Baker v. Bohannan*, 69–60.

Abatement by person injured: At common law a person has a right to abate a nuisance which is injurious to him as distinct from the public: *State v. Moffett*, 1 G. Gr., 247.

The right of abatement of a nuisance by private act of a party injured thereby is authorized only in case of a particular emergency requiring a more speedy remedy than can be had by the ordinary proceedings at law, and must be exercised with the least practicable injury: *Moffett v. Brewer*, 1 G. Gr., 348.

A party who seeks to abate a nuisance with his own hands cannot be justified in the destruction of property unless it be absolutely necessary. It is only the ofiensive use of it that he is justified in abating: *Morrison v. Marquardt*, 24–35.

Nuisances may be abated by an individual only where they in fact exist. The determination of an individual that a nuisance exists does not make the thing a nuisance, and if he destroys property on the ground that it is a nuisance he is responsible, unless it is established that the property destroyed constituted a nuisance: *Cole v. Kegler*, 64–59.

Although a person may abate a nuisance upon the premises of another when the same is injurions to him or when there is a reasonable certainty that he will be injured by it, yet it cannot be said that he is negligent in not abating such nuisance unless there is an apparent danger that he will sustain some substantial damage: *Copper v. Dolvin*, 68–757.

Notice to abate: All that is required, in order to impose upon a party, whose building constitutes a nuisance by reason of throwing water upon the land of his neighbor, the duty of abating the nuisance, is that he be informed of its existence. No formal notice is necessary: *Ibid.*

Abatement in equity: A party cannot have a nuisance upon the premises of another abated on his complaint when a similar nuisance is maintained upon his own premises: *Cassady v. Cavenor*, 37–300.

Proceedings for the abatement of a nuisance are of a more summary character than actions, and a forfeiture may be enforced for that purpose: *Gosselink v. Campbell*, 4–296.

In order to abate a nuisance existing by reason of a stream or pond of water becoming impure from substances being cast into it, it is not necessary that such a stream or pond be filled up. The source from which the impurities originate may be removed or the parties operating the nuisance restrained from future acts of the kind: *Finley v. Hershey*, 41–389.

Where it is determined that premises are so occupied as to create a nuisance, but it is not found that they are a nuisance, that is, a nuisance *per se*, the court can only enjoin such use of the premises as will amount to a nuisance: *Richards v. Holt*, 61–529; *Shiras v. Olinger*, 50–571.

A blacksmith shop is not a nuisance *per se*, and a party cannot be enjoined from transacting the business of blacksmithing upon his premises. The decree in such cases should require the owner to so change his shop and so prosecute his business that no annoyance should result therefrom to others: *Faucher v. Grass*, 60–505.

Where a building on an adjoining lot is so used as to become a nuisance to plaintiff he may have the unlawful use enjoined, but not the building itself, nor will the court enjoin a use which it does not appear that the

party is likely to make of the premises: *Trulock v. Merte*, 72–510.

Where smoke and soot from the smokestack of a waterworks company came upon plaintiff's premises in such a manner as to deprive him of the comfortable enjoyment of his property, but the health of himself and family was not affected thereby or his property destroyed, *held*, that while such injury constituted a nuisance for which the plaintiff might recover at law, yet he would not be entitled to have an abatement thereof in equity. The rule in equity is that where the damages sustained can be admeasured and compensated equity will not interfere where the public benefit greatly outweighs private and individual convenience: *Daniels v. Keokuk Waterworks*, 61–549.

Under the facts of a particular case, *held*, that a rendering establishment maintained by defendant was shown to have been a nuisance, injurious to plaintiff, and though, as it appeared from defendant's evidence, it had been conducted with as little offense as possible, an injunction restraining defendant from maintaining and operating such establishment, and for its abatement, was proper: *Millheiser v. Willard*, 65 N. W., 325.

The fact that a party recovers damages for something, on the ground that it has been injurious to him as a nuisance, does not necessarily show that it is a nuisance at the time of the trial, and that he is therefore entitled to have it abated: *Fuller v. Chicago, R. I. & P. R. Co.*, 61–125.

Abatement in law action: Where a party sues for and recovers full damages resulting from a nuisance in its nature permanent, he is not entitled also to an order for the abatement of the nuisance. The provisions of this section authorizing an abatement in such cases do not make it obligatory upon the court to award an abatement in every case: *Downing v. Oskaloosa*, 86–352.

Criminal nuisance: See § 5078.

SEC. **4303. Waste by guardian or tenants—damages.** If a guardian, tenant for life or years, joint tenant or tenant in common of real property commit waste thereon, he is liable to pay three times the damages which have resulted from such waste, to the person who is entitled to sue therefor. [C.'73, § 3332; R., § 3716; C.'51, § 2134.]

The provisions of this section do not apply to an action against a tenant under a mining lease for having mined coal outside of the limits specified in the lease: *Oskaloosa College v. Western Union Fuel Co.*, 90–308.

SEC. **4304. Forfeiture and eviction.** Judgment of forfeiture and eviction may be rendered against the defendant whenever the amount of damages so recovered is more than two-thirds the value of the interest such defendant has in the property injured, when the action is brought by the person entitled to the reversion. [C.'73, § 3333; R., § 3717; C.'51, § 2135.]

SEC. **4305. Who deemed to have committed waste.** Any person whose duty it is to prevent waste, and who fails to use reasonable and ordinary care to avert the same, shall be held to have committed it. [C.'73, § 3334; R., § 3718; C.'51, § 2136.]

SEC. **4306. Treble damages for injury to trees.** For wilfully injuring any timber, tree or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard or town lot, or on the public grounds of any city or town, or any land held by the state for any purpose whatever, the perpetrator shall pay treble damages at the suit of any person entitled to protect or enjoy the property. [C.'73, § 3335; R., § 3719; C.'51, § 2137.]

Under the facts of a particular case, *held*, that plaintiff was entitled to treble damages for trespass although defendant claimed title, and the act of defendant seemed to have been committed for the purpose of causing a litigation which should establish the right to the premises: *Wilson v. Gunning*, 80–331.

This statute, being penal in its character, should not be applied so as to allow treble damages except in cases where the injury was wanton and without reasonable excuse. So *held* in a case of a highway supervisor cutting down trees in the highway, there being some evidence that his act was with the consent of the owner: *Werner v. Flies*, 91–146.

SEC. **4307. Remainder or reversion.** The owner of an estate in remainder or reversion may maintain either of the aforesaid actions for injuries done to the inheritance, notwithstanding any intervening estate for life or years. [C.'73, § 3337; R., § 3721; C.'51, § 2139.]

SEC. **4308. Heir.** An heir, whether a minor or of full age, may maintain these actions for injuries done in the time of his ancestor as well as in his own time, unless barred by the statute of limitations. [C.'73, § 3338; R., § 3722; C.'51, § 2140.]

SEC. **4309. Purchaser at execution sale.** The purchaser of lands or tenements at execution sale may have and maintain an action against any person for either of the causes above mentioned, occurring or existing after such purchase; but this provision shall not be construed to forbid the person occupying the lands in the meantime from using them in the ordinary course of husbandry, or taking timber with which to make suitable repairs thereon, unless the timber so taken shall be of higher grade than required, in which case he shall be held guilty of waste and liable accordingly. [C. '73, §§ 3339–41; R., §§ 3723–5; C. '51, §§ 2141–3.]

See § 4065.

SEC. **4310. Settlers on lands of state.** Any person settled upon and occupying any portion of the public lands held by the state is not liable as a trespasser for improving or cultivating it in the ordinary course of husbandry, nor for taking and using timber or other materials necessary and proper to enable him to do so, provided the timber and other materials are taken from land properly constituting a part of the "claim" or tract of land so settled upon and occupied by him. [C. '73, § 3342; R., § 3726; C. '51, § 2144.]

SEC. **4311. Holder of tax certificate.** The owner of a treasurer's certificate of purchase of land sold for taxes may recover treble damages of any person wilfully committing waste or trespass thereon. [C. '73, § 3343.]

SEC. **4312. Disposition of money.** All money recovered in an action brought under the preceding section shall be paid by the officer collecting it to the auditor of the county in which the lands are situated, which shall be held by him, and an entry thereof made in a book kept for that purpose, until the lands are redeemed, or a treasurer's deed therefor executed to the holder of said certificate. If redemption is made, the money shall be paid to the owner of the land, and if not, to the person to whom the deed is executed. [C. '73, § 3344.]

CHAPTER 9.

OF ACTIONS TO TEST OFFICIAL AND CORPORATE RIGHTS.

SECTION **4313. For what causes.** A civil action by ordinary proceedings may be brought in the name of the state in the following cases:

1. Against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by this state;
2. Against any public officer who has done or suffered an act which works a forfeiture of his office;
3. Against any person acting as a corporation within the state without being authorized by law;
4. Against any corporation doing or omitting acts which amount to a forfeiture of its rights and privileges as a corporation, or exercising powers not conferred by law;
5. Against any person claiming under any patent, granted by the proper authorities of the state, for the purpose of annulling or vacating the same as having been obtained by fraud, or through mistake or ignorance of a material fact, or when the defendants have done or omitted an act in violation of the terms or conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same. [C. '73, § 3345; R., §§ 3732, 3757; C. '51, §§ 2151, 2175.]

It would seem that *quo warranto* will not lie for the purpose of declaring void or annulling a legislative act passed by a state or an inferior municipal corporation: *State ex rel. v. Lyons*, 31–432.

The right to an office cannot be determined by bringing replevin for the records, etc., of such office: *Desmond v. McCarthy*, 17–525.

Where two school directors had been

elected in a district, which was entitled to but one, *held*, that in a civil action in the nature of a *quo warranto* to test their rights, it was not necessary to make the district, the inhabitants thereof, or the directors, parties to the action: *State v. Simpkins*, 77–676.

But a court may determine without an action which of two persons claiming to be sheriff is the lawful officer authorized to serve its process: *McCue v. Circuit Court*, 51–60.

The right of a party to an office cannot be tested in a *habeas corpus* proceeding: *Ex parte Strahl*, 16–369.

Where the council of a city is, by its charter, the judge of the qualification and election of its own members, but has never provided any method for trying contested election cases, a person claiming to be elected mayor may, by proceeding by information in *quo warranto*, have his right to such office determined: *State ex rel. v. Funck*, 17–365.

Quo warranto is the proper proceeding to determine the defendant's right to exercise the functions of an office, although as between the defendant and the relator the proper board has decided in favor of the latter: *State v. Minton*, 49–591.

The right to preside at the meeting of the city council is a franchise which may be contested by this proceeding. An original bill for an injunction is not the proper remedy: *Cochran v. McCleary*, 22–75.

Action in the name of the state to determine whether the electors of a certain territory are authorized to exercise the corporate powers of a school district should be against such electors in person, and not against the school district as such: *State v. Independent School Dist.*, 44–227.

An action may be brought upon the relation of the auditor to close the business of an insurance company for failure to comply with the statutory provisions as to the method of conducting such business, and for the purposes of such action it will be assumed that the corporation was duly organized: *State ex rel. v. Iowa Mutual Aid Ass'n*, 59–125.

In an action to prevent an insurance company from doing business in the state, notwithstanding that it had received a certificate from the auditor, on the ground that it was acting in violation of the law in such a manner as to forfeit its rights as a corporation, *held*, that *quo warranto* was the proper remedy to test the company's right to act, and not *certiorari* to review the act of the auditor in granting the certificate: *State v. Fidelity & Casualty Co.*, 77–648.

A failure to substantially comply with the express provisions of its articles, and of the general laws, may be a ground for declaring a forfeiture of the charter of a corporation, but such provisions must be expressed or there must be a plain mis-use or non-use of powers. The acts or omissions which are to be the basis of a forfeiture must relate to matters which are of the essence of the contract, that is, in which the public have an interest. Failure to fulfill obligations to individuals or to other corporations is not a ground of forfeiture. Where a breach of an obligation is not expressly made the ground of forfeiture, the court is invested with a discretion, and will not render a judgment of ouster if in its opinion the interests of the public do not require it: *State ex rel. v. Omaha & C. B. R. & B. Co.*, 91–517.

This provision for winding up the affairs of an insolvent corporation does not deprive a court of equity of jurisdiction to appoint a receiver at the suit of a stockholder: *Dickerson v. Cass County Bank*, 64 N.W., 395.

Where the office for the recovery of which the action is brought is one to which no compensation attaches, it is not error for the court to dismiss the suit when, at the time of trial, the term of office contested for has expired. So *held* in case of subdirector of school district: *State ex rel. v. Porter*, 58–19.

This is an action at law, and appeal therefrom is not triable *de novo*. If the finding of the lower court has support in the evidence it will not be disturbed: *State v. Gaston*, 79–457.

Action of a trial court in refusing to award judgment of ouster against officers will not be reviewed on appeal after the term of office of such officers has expired: *State ex rel. v. Powell*, 70 N. W., 592.

SEC. **4314. No joinder or counter-claim.** In such action there shall be no joinder of any other cause of action, nor any counter-claim. [C.'73, § 3346; R,, § 4180.]

SEC. **4315. By county attorney.** Such action may be commenced by the county attorney at his discretion, and must be so commenced when directed by the governor, the general assembly or a court of record. [C. '73, § 3347; R., §§ 3733–4; C.'51, §§ 2152–3.]

SEC. **4316. By private person.** If the county attorney, on demand, neglects or refuses to commence the same, any citizen of the state having an interest in the question may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, may bring and prosecute the action to final judgment. [C. '73,§ 3348; R., § 3735.]

The law does not define what the interest must be of the party who seeks to maintain this action, and the question whether the interest is sufficient is a preliminary one for the district court, to be determined before the commencement of the action: *State ex rel v. Des Moines*, 65 N.W., 818.

In a proceeding to determine the validity of a statute extending the limits of the city of Des Moines, *held*, that a nonresident owner

of land within the extended limits of city, taxation upon which amounted to $1.31 per year, had a sufficient interest to maintain such action: *Ibid.*

SEC. **4317. Petition.** The petition shall contain a statement of the facts which constitute the grounds of the proceeding, and, with the notice and all the subsequent pleadings and proceedings, shall conform to the rules given for procedure in civil actions, except so far as the same are modified by this chapter. [C. '73, § 3349; R., §§ 3736–8; C. '51, §§ 2154–6.]

SEC. **4318. Costs.** When such action is brought upon the relation of a private individual, that fact shall be stated in the petition, and the order allowing him to prosecute may require that he shall be responsible for costs in case they are not adjudged against the defendant. In other cases the payment of costs shall be regulated by the same rule as in criminal actions. [C. '73, § 3350; R., § 3746; C. '51, § 2164.]

SEC. **4319. Right to an office.** When the defendant is holding an office to which another is claiming the right, the petition shall set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties. [C. '73, § 3351; R., § 3739; C. '51, § 2157.]

SEC. **4320. Several claimants.** When several persons claim to be entitled to the same office or franchise, a petition may be filed against all or any portion thereof, in order to try their respective rights thereto. [C. '73, § 3352; R., § 3743; C. '51, § 2161.]

This section recognizes the right to proceed against one claiming to be entitled to an office or franchise, although he has not yet got possession of such office: *State ex rel. v. Van Beek*, 87–569.

SEC. **4321. Judgment.** If judgment is rendered in favor of such claimant, he shall proceed to exercise the functions of the office, after he has qualified as required by law. [C. '73, § 3353; R., § 3740; C. '51, § 2158.]

A *supersedeas* bond, given on appeal from the judgment of the court that the plaintiff is entitled to the office sued for, does not suspend his right to such office and the salary incident thereto, to which he becomes entitled by the judgment; and, therefore, in an action upon such appeal bond, after affirmance of such judgment, the appellee cannot recover the salary accruing during the pendency of the appeal: *Jayne v. Drorbaugh*, 63–711.

SEC. **4322. Books and papers.** The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody or under his control belonging to said office. [C. '73, § 3354; R., § 3731; C. '51, § 2159.]

SEC. **4323. Action for damages.** When judgment has been rendered in favor of the claimant he may, at any time within one year thereafter, bring an action against the defendant, and recover the damages he has sustained by reason of the act of the defendant. [C. '73, § 3355; R. § 3742; C. '51, § 2160.]

SEC. **4324. Judgment of ouster.** If the defendant is found guilty of unlawfully holding or exercising any office, franchise or privilege, or if a corporation is found to have violated the law by which it holds its existence, or is acting contrary to law, or in any manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted and altogether excluded from such office, franchise or privilege, and also that he pay the costs of the proceeding. [C. '73, § 3356; R., § 3744; C. '51, § 2162.]

SEC. **4325. Judgment in other cases.** If the defendant is found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges. [C. '73, § 3357; R., § 3745; C. '51, § 2163.]

SEC. **4326. Pretended corporation—costs.** In case judgment is rendered against a pretended but not real corporation, the cost may be collected from any person who has been acting as an officer or proprietor thereof. [C. '73, § 3358; R., § 3747; C. '51, § 2165.]

SEC. **4327. Action against officers of corporation.** When judgment of ouster is rendered against a corporation on account of the misconduct of the directors or officers thereof, such officers shall be jointly and severally liable to an action by any one injured thereby. [C.'73, § 3359; R., § 3755; C.'51, § 2173.]

SEC. **4328. Corporation dissolved.** If a corporation is ousted and dissolved by the proceedings herein authorized, the court shall appoint three disinterested persons as trustees of the creditors and stockholders. [C.'73, § 3360; R., § 3748; C.'51, § 2166.]

SEC. **4329. Bond.** Said trustees shall enter into a bond in such a penalty and with such security as the court approves, conditioned for the faithful discharge of their trust. [C.'73, § 3361; R., § 3749; C.'51, § 2167.]

SEC. **4330. Action on.** Action may be brought on such bond by any person injured by the negligence or wrongful act of the trustees in the discharge of their duties. [C.'73, § 3362; R., § 3750; C.'51, § 2168.]

SEC. **4331. Duty of trustees.** The trustees shall proceed immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled. [C.'73, § 3363; R., § 3751; C.'51, § 2169.]

SEC. **4332. Books delivered to.** The court shall, upon application for that purpose, order any officer of such corporation, or any other person having possession of any of the effects, books or papers thereof, in any wise necessary for the settlement of its affairs, to deliver the same to the trustees. [C.'73, § 3364; R., § 3752; C.'51, § 2170.]

SEC. **4333. Inventory.** As soon as practicable after their appointment, the trustees shall make and file in the office of the clerk of the court an inventory, sworn to by each of them, of all the effects, rights and credits which come to their possession or knowledge. [C.'73, § 3365; R., § 3753; C.'51, § 2171.]

SEC. **4334. Powers.** They shall sue for and recover the debts and property of the corporation, and shall be responsible to the creditors and stockholders, respectively, to the extent of the effects which come into their hands. [C.'73, § 3366; R., § 3754; C.'51, § 2172.]

SEC. **4335. Penalty for refusing to obey order.** Any person who without good reason refuses to obey an order of the court, as herein provided, shall be guilty of contempt, and fined in any sum not exceeding five thousand dollars, and imprisoned in the county jail until he complies therewith, and shall be further liable for the damages resulting to any person on account of his disobedience. [C.'73, § 3367; R., § 3756; C.'51, § 2174.]

CHAPTER 10.

OF ACTIONS ON OFFICIAL SECURITIES, FINES AND FORFEITURES.

SECTION **4336. Official bonds construed.** The official bond of a public officer is to be construed as a security to the body politic or civil corporation of which he is an officer, and to all the members thereof, severally, who are intended to be secured thereby. [C.'73, § 3368; R., § 3727; C.'51, § 2145.]

SEC. **4337. Prior judgment no bar.** A judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security for another delinquency, except that sureties can be made liable in the aggregate only to the extent of their undertaking. [C.'73, § 3369; R., § 3728; C.'51, § 2147.]

SEC. **4338. Fines and forfeitures.** Fines and forfeitures not otherwise disposed of go into the treasury of the county where the same are collected, for the benefit of the school fund. [C.'73, § 3370; R., § 3729; C.'51, § 1158.]

Suit for the penalty on a bail bond may be brought by the county. It is the trustee, and entitled to sue under the provisions of § 3459: *Shelby County v. Simmonds*, 33-345.

The fact that a fine or forfeiture is to go into the county treasury does not make the county a party to the action within the provisions of § 3505 so as to give the defendant the right to a change of venue: *State v. Merrihew*, 47-112.

The county in which the action upon a bail bond is properly brought is the county entitled to the money collected thereon: *Lucas County v. Wilson*, 61-141.

Where change of venue is granted from one county to another the bail for the appearance of defendant should be sent to the county to which the case is transferred, and in the event of forfeiture, action should be brought thereon by the latter county, the proceeds to go into the school fund of that county. If money is deposited instead of bail the money should be transferred to the clerk of the county to which change is granted: *Warren County v. Polk County*, 89-44.

The county in which the fine is collected under this section is the county in which the judgment for the fine is rendered and execution therefor is issued, and not the county in which such execution is enforced against property of defendant: *Pottawattamie County v. Carroll County*, 67-456.

The governor may remit a judgment against the sureties on a bail bond so far as such judgment covers the penalty on the bond, but not the portion of the judgment which is for costs taxed in favor of the witnesses, etc.: *State v. Beebee*, 87-636.

That fines and forfeitures are to go to school fund, see § 2839, and Const., art IX, § 4.

SEC. **4339. By whom action prosecuted.** Actions for their recovery may be prosecuted by the officers or persons to whom they by law belong, in whole or in part, or by the public officer into whose hands they are to be paid when collected. [C.'73, § 3371; R., § 3730; C.'51, § 2149.]

SEC. **4340. Collusion.** A judgment for a penalty or forfeiture, rendered by collusion, does not prevent another action for the same subject-matter. [C.'73, § 3372; R., § 3731; C.'51, § 2150.]

CHAPTER 11.

OF ACTIONS OF MANDAMUS.

SECTION **4341. Definition.** The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion. [C.'73, § 3373; R., §§ 3761, 3763; C.'51, § 2180.]

I. IN GENERAL.

The action of *mandamus* is a "civil action at law:" *Brown v. Crego*, 29-321.

Nature of the action discussed generally with reference to the Code of '51: *Chance v. Temple*, 1-179.

This writ should not issue unless there is some wrong on the part of the tribunal, corporation, board or person to be commanded: *Price v. Harned*, 1-473.

The state executive council being charged with the duty of letting a contract for the publication of state reports, *held*, that their action in awarding the contract to one bidder, and refusing to award it to another who claimed to have made a lower bid, could not be set aside under *mandamus* proceeding. Such an action is in effect an action against the state: *Mills Publishing Co. v. Larrabee*, 78-97.

Where it would be of no practical effect, or where there is no right to relief shown which could not be granted in the ordinary course of the law, the writ of *mandamus* will not issue: *Potts v. Tuttle*, 79-253.

Therefore, *held*, that the writ would not issue for the purpose of placing a party in office after the expiration of the term for which he was elected: *Ibid.*

In a particular case, *held*, that the action of the board of directors of a school district with reference to the removal of a schoolhouse from one district to another could not be controlled by *mandamus*: *Peters v. Warner*, 81-335.

The holding of the federal courts is that a proceeding by a writ of *mandamus* to enforce a judgment is not a suit in the jurisdictional sense, but a proceeding auxiliary to the judgment, whether brought before or after it is rendered: *Ex parte Holman*, 28-88, 102.

But a proceeding may be maintained in a state court to enforce the judgment of a federal court: *Brown v. Crego*, 32-498.

Mandamus proceedings in the United States courts for this state are not governed by the provisions of the state statutes in relation to such proceedings: *United States ex rel. v. Union Pacific R. Co.*, 2 Dillon, 527.

The writ of *mandamus* generally issues

to compel obedience to some specific duty by a public functionary, and while it will not issue to direct the action of such person, where the action is discretionary with him, yet where the law enjoins upon him the performance of a specific act, obedience to that law may be enforced by the writ: *United States ex rel. v. Commissioners*, Mor., 31.

Where the duty is only imposed upon a public functionary in his official capacity, the performance of it may be enforced against the successor of the person who should have performed the act: *Ibid.*

Where a positive official duty is enjoined by law upon an officer, as to the manner of the performance of which he has no discretion, the only adequate remedy, ordinarily, is the writ of *mandamus: Benjamin v. District T'p*, 50–648.

The duty of a railway corporation to construct an open crossing for the accomodation of a person owning land on both sides of the track, at his request, as required by law, is one which may be enforced by *mandamus: Boggs v. Chicago, B. & Q. R. Co.*, 54–435.

Mandamus is the proper remedy to compel a road supervisor to remove obstructions in a public highway: *Larkin v. Harris*, 36–93; *Patterson v. Vail*, 43–142.

Mandamus is the proper remedy to compel a board of canvassers to declare the proper party elected and so certify under § 1152: *Bradfield v. Wurt*, 36–291.

The board of county canvassers may be compelled to reassemble, after having declared the result of their canvass, and recanvass the returns to correct a mistake: *Price v. Harned*, 1–473; *State ex rel. v. County Judge*, 13–139.

Mandamus, not replevin, is the proper remedy to compel an officer of a corporation to produce and turn over the books of his office to his successor: *Keokuk v. Merriam*, 44–432.

A treasurer, who has executed a tax deed which is so irregular or imperfect as not to convey the title which the purchaser acquired at the tax sale, may, by *mandamus*, be compelled to execute a second and corrected deed (*arguendo*): *McCready v. Sexton*, 29–356, 377.

The district court can, by writ of *mandamus*, compel the auditor of state to draw a warrant on the treasurer of state for the sum due a public officer on his salary: *Bryan v. Cattell*, 15–538.

Mandamus may be brought against a county auditor to compel him to attach the county seal to a warrant issued by him or his predecessor: *Prescott v. Gonser*, 34–175.

A court will not, upon an application for a writ of *mandamus* against a religious corporation, compel the reinstatement of a member expelled, and inquire into the rightfulness of such action, it appearing that no property interest or other valuable civil right has been affected: *Sale v. First Regular Baptist Church*, 62–26.

A public officer cannot be compelled by *mandamus* to execute a contract binding upon the state: *Chance v. Temple*, 1–179, 200.

Where a board of school directors refuse to act in a particular case *mandamus* will lie, as, for instance, to compel a board of directors to restore territory to a district township, there being no appeal from the refusal of the board to act in such a case: *Albin v. Board of Directors*, 58–77.

An action of *mandamus* can be maintained to compel a board of school directors to make the restoration of territory contemplated by Code § 1852, when proper application therefor is made. The case is not one in which an appeal must be prosecuted to the county superintendent: *Odendahl v. Russell*, 86–669.

A board may be required by *mandamus* to act in a matter as to which a duty is enjoined upon it: *Hightower v. Overhausler*, 65–347; *District T'p v. Independent Dist.*, 72–687.

The courts may by *mandamus* compel school directors to readmit a pupil who has been unlawfully excluded by reason of a rule which the directors had no power to make: *Perkins v. Board of Directors*, 56–476.

The common-law rule that *mandamus* will not be granted when the right sought to be enforced is doubtful, even though applicable under the statutory provisions, does not refer to a case where the doubt is one arising upon the mere construction of a judicial order, or a legal doubt as to the effect or meaning of a record: *Larkin v. Harris*, 36–93.

The duty of school officers to obey the decisions of the state superintendent made on an appeal to him may be enforced by *mandamus: Newby v. Free*, 72–379.

Where a county auditor refused to make certain corrections in a tax list, reducing the valuation of property according to the direction of the board of equalization, *held*, that owners of real estate who had not yet paid their taxes might proceed against the auditor by *mandamus* to compel him to make the required correction: *Ridley v. Doughty*, 77–226.

An action of *mandamus* against a district township to compel it to furnish school facilities to certain territory is a proper method of determining whether such territory is part of the school district: *Hancock v. District Township*, 78–550.

A *mandamus* will lie to compel payment by the treasurer of an incorporated town of an order drawn upon him by the authority of the council and signed by the recorder: *Ireland v. Hunnel*, 90–98.

Demand is not necessary where the proceeding is brought to enforce the performance of a public duty which is pointed out by statute, although it may be necessary as to a matter of private right: *State ex rel. v. County Judge*, 7–186; *State ex rel. v. Bailey*, 7–390.

II. To Compel Levy, Collection, Etc., of Taxes.

A creditor by a simple contract debt has no legal right to *mandamus* to compel a city to levy a tax for his payment, unless the debt is contracted under a special law or vote authorizing such proceeding to enforce payment. But it is otherwise after judgment has been obtained and it can be paid in no other way: *State ex rel. v. Davenport*, 12–335; *Coy v. City Council*, 17–1.

If the debt is contracted under some special law or for some special purpose, and

the law or contract makes it obligatory on the officers to levy, collect and place in the treasury the means to meet such indebtedness, such duty may be enforced without the return of an execution *nulla bona: State ex rel. v. Davenport* 12-335.

Where it becomes the duty of a city to make compensation for property taken and to levy a tax therefor, the performance of such duty may be enforced by *mandamus: State ex rel. v. Keokuk*, 9-438.

Where county officers were directed by writ of *mandamus* to levy a tax which ought to have been made some time before, the treasurer should proceed to collect the tax in the same manner as if it had been levied when it ought to have been. The tax must therefore be treated as delinquent from the time when the levy ought to have been made and not from the time when it actually was made: *State ex rel. v. County Judge*, 12-237.

The board of supervisors cannot be compelled by *mandamus* to levy a tax beyond the constitutional limit of taxation: *Polk v. Winett*, 37-34.

Where a city council is directed by *mandamus* to levy a tax not exceeding the limit of taxation to pay off a judgment against the city, the order may direct that in case the amount realized is not sufficient to pay off the judgment an additional tax for that purpose shall be levied for subsequent years: *Coy v. City Council*, 17-1.

An action by *mandamus* may be maintained to compel a treasurer to pay over a tax levied and collected to pay a judgment: *Brown v. Crego*, 32-498.

And this remedy may be pursued in the state court although the judgment is in the federal court: *Ibid.*

The county treasurer may be compelled by *mandamus* to pay over to a railroad company a tax collected for its benefit: *McGregor & S. C. R. Co. v. Birdsall*, 30-255.

If the duty to levy and collect a tax for the payment of a special indebtedness is imposed, it is not performed by making the levy and providing generally for the payment of the tax, but should be specifically executed by setting apart the tax as a special fund for the purpose: *State ex rel. v. Davenport*, 12-335.

If the levy is made and the officer is proceeding with such dispatch as the law requires and permits to collect the same, he will not be in default: *Ibid.*

Where a county treasurer has collected railroad aid taxes and paid the amount over to the railway company and then gone out of office, *mandamus* will not lie against the board of supervisors to compel them to order the refunding of the taxes by the county treasurer or by the person who was formerly county treasurer to the taxpayers under the claim that the tax has been forfeited, the money thus collected not having been paid into the county fund nor used by the county: *Eyerly v. Board of Supervisors*, 81-189.

In a particular case, *held*, that as plaintiff could obtain no relief which would not be afforded in the ordinary course of the law, the writ was properly denied: *Ibid.*

In an action against an officer to compel the performance of a legal duty in the levying of a tax, a taxpayer cannot intervene on the ground that the tax would be void when levied: *Harwood v. Quinby*, 44-385.

It is not proper to grant a writ of *mandamus* commanding a performance beyond the powers of the defendant: *Rice v. Walker*, 44-458.

Where the county supervisors refuse to obey the mandate of the federal court to levy a tax, but there is no refusal on the part of the county treasurer to collect the tax if one were levied, the federal court will not set aside the statute which confides to the supervisors of the county exclusively the right to assess a county tax, and assess such tax itself by its own commissioner: *Rusch v. Supervisors*, Woolworth, 313.

The federal courts may exercise the same authority by *mandamus* to compel the payment of a judgment against a municinal corporation as may be exercised by the state courts: *Riggs v. Johnson County*, 6 Wall., 166.

Mandamus and not bill in equity and injunction is the appropriate remedy in cases like the above: *Ibid.; Walkley v. Muscatine*, 6 Wall., 481.

The federal courts have the power to appoint a marshal as a commissioner to levy and collect a tax against a municipal corporation, when the board of supervisors have disobeyed or evaded the law of the state or the peremptory mandate of the federal court: *Supervisors v. Rogers*, 7 Wall., 175; *Lansing v. County Treasurer*, 1 Dillon, 522.

Where the defendants had been enjoined by the state courts from levying a tax before suit had been brought in the United States courts, *held*, that the injunction was not a sufficient answer to an alternative writ of *mandamus* commanding them to levy a tax to pay a judgment afterwards recovered. It is immaterial whether the injunction of the state court was before or after the judgment obtained in the United States court, or whether before or after the institution of the suit. It is not a question which court first obtained jurisdiction of the case: *Mayor v. Lord*, 9 Wall., 409; *Supervisors v. Durant*, 9 Wall., 415; *Riggs v. Johnson County*, 6 Wall., 166.

III. INTERFERENCE WITH DISCRETION.

Mandamus is not designed to enable a party to have a review of the action of officers when they are clothed with a discretion, or when their action depends upon facts to be ascertained by them: *Scripture v. Burns*, 59-70.

An officer's discretion is not to be controlled by *mandamus: Christy v. Whitmore*, 67-60.

Courts cannot by *mandamus* compel the discretion of officers or tribunals. So, a board of supervisors cannot thus be compelled to build a bridge, or rebuild one when fallen down: *State ex rel. v. Morris*, 43-192.

Where a board of school directors have a discretion in a particular matter, such discretion cannot be controlled whether they have exercised it wisely or not: *Clark v. Board of Directors*, 24-266.

A county superintendent vested with a discretion in the matter cannot be compelled by *mandamus* to issue a teacher's certificate: *Bailey v. Ewart*, 52–111.

Mandamus will not lie to control the action of a board of equalization; it can only be brought to compel them to act: *Meyer v. Dubuque County*, 43–592.

Where an act is to be performed or omitted in the discretion of a party the performance cannot be enforced by an action of *mandamus: Milwaukee Malt Extract Co. v. Chicago, R. I. & P. R. Co.*, 73–98.

It is not judicial discretion for township trustees to arbitrarily refuse to certify with reference to a railroad tax, as by law they are required to do on grounds which they have no right to take into consideration: *Harwood v. Quinby*, 44–385.

SEC. **4342. Order issued.** The order may be issued by the district or superior court to any inferior tribunal, or to any corporation, officer or person; and by the supreme court to any district or superior court, if necessary, and in any other case where it is found necessary for that court to exercise its legitimate power. [C. '73, § 3374; R., §§ 3761, 3764; C. '51, §§ 2179, 2181.]

Mandamus cannot issue from the supreme court except to a court of record: *Westbrook v. Wicks*, 36–382.

It is a well settled principle that courts of appellate jurisdiction cannot issue a writ of *mandamus* except in aid of their appellate powers: *United States ex rel. v. Commissioners*, Mor., 31.

SEC. **4343. Extent of remedy.** The plaintiff in any action, except those brought for the recovery of specific real or personal property, may also, as an auxiliary relief, have an order of mandamus to compel the performance of a duty established in such action. But if such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance. [C. '73, § 3375; R., § 3767.]

The duty of the officers of a mutual fire insurance company to make an assessment for the payment of a loss may be enforced by *mandamus: Harl v. Pottawattamie County Mut. F. Ins. Co.*, 74–39.

SEC. **4344. Other remedy.** An order of mandamus shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law, save as herein provided. [C. '73, § 3376; R., § 3765; C. '51, § 2182.]

That a judgment debtor has an effectual remedy against one of two joint debtors will not prevent him from proceeding by *mandamus* against the other, where that is the proper remedy against the latter: *Palmer v. Stacy*, 44–340.

Mandamus will not lie against a board of school directors, where the party has the right of appeal to the county superintendent: *Marshall v. Sloan*, 35–445; *Barrett v. Directors*, 73–134.

But *mandamus* is the proper remedy to compel a board of school directors to carry out a vote of the electors, and it is not necessary to first prosecute an appeal from their action to the county superintendent: *Benjamin v. District T'p*, 50–648.

Mandamus is not the proper remedy for compelling a clerk to issue execution on a judgment, there being a plain, speedy and adequate remedy by application to the court or judge for an order for such execution: *Pickell v. Owen*, 66–485.

An action on an officer's bond for damages for failure to perform an official duty is not such speedy and adequate remedy as to prevent resort to *mandamus* to compel the performance of the duty: *Prescott v. Gonser*, 34–175.

SEC. **4345. Who may bring action.** The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the county attorney, when the public interest is concerned, and is in the name of such private party or of the state, as the case may be in fact brought. [C. '73, § 3377; R., § 3761.]

Party aggrieved: The order is granted on the petition of a private party aggrieved: *Harwood v. Case*, 37–692.

Therefore, *held*, that under the act allowing townships to vote a tax to aid in the construction of railroads, the company could not, by *mandamus*, compel a treasurer to collect the tax until it showed itself entitled to receive the tax and the whole amount thereof: *Ibid.*

Where a writ of *mandamus* was sued for to compel a mayor to issue a license to the applicant, and the city, while the suit was in progress, repealed the ordinance author-

izing the issuance of the license, *held*, that the action for *mandamus* could no longer be prosecuted: *Cutcomp v. Utt*, 60–156.

Mandamus will not be granted on the petition of a private person in a matter in which it does not appear that he has any interest: *State ex rel. v. County Judge*, 2–280.

It is doubtful whether an action by an independent school district against its president to compel him to perform a duty, involves the public interest in such sense as to require that it should be brought in the name of the state: *Independent Dist. v. Rhodes*, 88–570.

In a matter of public right any citizen may be a relator in an action for a *mandamus*: *State ex rel. v. County Judge*, 7–186.

A private citizen may maintain an action against the directors of a school district to compel action upon a petition to have part of a district township attached to an independent district for school purposes: *Hightower v. Overhaulser*, 65–347.

Electors of a precinct, the returns of which are thrown out by a canvassing board, are proper parties to bring action of *mandamus* against the board to compel the canvassing of such returns: *State ex rel. v. Bailey*, 7–390.

The publisher of a newspaper has no such personal interest in the action of the board of supervisers or a county officer authorized to make publication in a newspaper as to compel by *mandamus* the selection of his paper for that purpose: *Welch v. Board of Supervisors*, 23–199.

Where the question is one of public right, and the object is to procure the enforcement of a public duty, a private citizen cannot have the duty enforced on the ground that failure to enforce it results in private injury to him, but only when injury to the public is shown: *Crane v. Chicago & N. W. R. Co.*, 74–330.

Against partnership by member thereof: The common-law rule that a party in his individual capacity cannot bring an action against a partnership, board of trustees, or other body of which he is a member, does not apply to this proceeding: *Cooper v. Nelson*, 38–440.

Taxpayer's right to intervene: In an action against an officer to compel the performance of a legal duty in the levying of a tax, a taxpayer cannot intervene on the ground that the tax would be void when levied: *Harwood v. Quinby*, 44–385.

SEC. **4346. Petition.** The plaintiff in such action shall state his claim, and shall also state facts sufficient to constitute a cause for such claim, and shall also set forth that the plaintiff, if a private individual, is personally interested therein, and that he sustains and may sustain damage by the nonperformance of such duty, and that performance thereof has been demanded by him, and refused or neglected, and shall pray an order of mandamus commanding the defendant to fulfill such duty. [C.'73, § 3378; R., § 3762.]

As to the interest which a private individual must show in order to enable him to maintain an action to compel the opening of a highway, see *Moon v. Cort*, 43–503; *State ex rel. v. County Judge*, 2–280.

A party cannot have relief by *mandamus* without making the showing required by the statute: *Scripture v. Burns*, 59–70.

In general, see notes to § 4341.

SEC. **4347. Other pleadings.** The pleadings and other proceedings in any action in which a mandamus is claimed shall be the same, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages. [C.'73, § 3379; R., § 3766.]

Where the facts stated in an application for *mandamus* do not entitle the plaintiff to the relief asked, a demurrer and not a motion to dismiss is the proper remedy: *Meyer v. Dubuque County*, 43–592.

A demurrer in this action must specify the ground of objection to the pleading attacked as in other actions at law: *District T'p v. Independent Dist.*, 72–687.

An objection to the jurisdiction which relates to the character and residence of parties comes too late when first made after judgment and then can only be urged on error. If made and improperly overruled, it would be valid and binding until reversed on writ of error: *Ex parte Holman*, 28–88.

An action for *mandamus* may be continued until the acts required are performed: *Palmer v. Jones*, 49–405.

So where a city council is directed by *mandamus* to levy a tax not exceeding the limit of taxation to pay off a judgment against the city, the order may direct that, in case the amount realized is not sufficient to pay off the judgment, an additional tax for that purpose shall be levied for subsequent years: *Coy v. City Council*, 17–1.

Where a writ of *mandamus* issued without any order of the court having been entered on the journal record of the clerk, but a note of it was entered on the clerk's and judge's dockets, *held*, that the court on motion would allow the judgment to be entered *nunc pro tunc*: *Supervisors v. Durant*, 9 Wall., 736.

SEC. **4348. Injunction may issue—joinder.** When the action is brought by a private person, it may be joined with a cause of action for such an injunction as may be obtained by ordinary proceedings, or with the causes of action specified in this chapter, but no other joinder and no counter-claim shall be allowed. [C.'73, § 3380; R., § 4181.]

SEC. **4349. Peremptory order.** When the plaintiff recovers judgment, the court may include therein a peremptory order of mandamus directed to the defendant, commanding him forthwith to perform the duty to be enforced, together with a money judgment for damages and costs, upon which an ordinary execution may issue. [C.'73, § 3381; R., § 3768.]

The writ of *mandamus* can now only issue after judgment, and not as an original or intermediate process: *Wright v. Connor*, 34–240.

Where a writ was directed to a board of canvassers, *held*, that it was not necessarily erroneous, although one of the former members had become *functus officio: State ex rel. v. Bailey*, 7–390.

The proceeding under a writ of *mandamus* to compel a recanvass of votes at an election does not, in all cases, determine the ultimate right. It may still be necessary after a recanvass to resort to *quo warranto* or an injunction for a contest of election: *State ex rel. v. County Judge*, 7–186.

A peremptory writ of *mandamus* should issue to an officer in his individual name and not merely by the name of his office: *State ex rel. v. Smith*, 9–334.

A writ of *mandamus* compelling the mayor and aldermen of the city of Davenport to levy a tax is properly directed, although the corporate name, by which the charter provides that the city shall sue and be sued, is the "City of Davenport:" *Mayor v. Lord*, 9 Wall., 409.

A writ of *mandamus* directing payment of certain orders by the treasurer of a school district, without description of the orders by numbers or amounts, is defective: *State ex rel. v. District Tp*, 11–155.

SEC. **4350. Return.** The order shall simply command the performance of the duty, shall be directed to the party, and may be issued in term or vacation, returnable forthwith, and no return except that of compliance shall be allowed; but time to return it may, upon sufficient grounds, be allowed by the court or judge, either with or without terms. [C.'73, § 3382; R., § 3769.]

It is not proper to grant a writ of *mandamus* commanding a performance beyond the powers of defendant. But if the defendant has wrongfully put it out of his power to do the act he may be liable in damages: *Rice v. Walker*, 44–458.

To make return of a writ of *mandamus* to collect a tax properly responsive to the writ, all the facts should be alleged and the amount collected thereunder stated, so that the court can determine the excuse of the officer in case of failure to execute the mandate, and also whether the amount of the judgment has been realized. A return merely stating that a levy has been made to pay this and other claims is erroneous: *Benbow v. Iowa City*, 7 Wall., 313.

The return of a marshal may be amended to show that the writ was exhibited to each of the supervisors at the time of the service —this being a matter of common practice: *Supervisors v. Durant*, 9 Wall., 736.

SEC. **4351. Performance by another—costs.** The court may, upon application of the plaintiff, besides or instead of proceeding against the defendant by attachment, direct that the act required to be done may be done by the plaintiff or some other person appointed by the court, at the expense of the defendant, and, upon the act being done, the amount of such expense may be ascertained by the court, or by a referee appointed by the court or judge, and the court may render judgment for the amount of the expense and cost, and enforce payment thereof by execution. [C.'73, § 3383; R., § 3770.]

SEC. **4352. Temporary orders.** During the pendency of the action, the court, or judge in vacation, may make temporary orders for preventing damage or injury to the plaintiff until the action is decided. [C.'73, § 3384; R., § 3771.]

SEC. **4353. Appeal by state.** When the state is a party, it may appeal without security. [C.'73, § 3385; R., § 3772.]

CHAPTER 12.

OF INJUNCTIONS.

SECTION **4354. When allowed.** An injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adop-

tion of the code; and in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the commission of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress. [C. '73, § 3386; R., §§ 3773, 3778; C. '51, § 2180.]

In actions at law: Where an injunction is asked in an action at law as here contemplated, it is not necessary for a party to bring himself within the rules and usages of a court of equity in granting such relief: *Hall v. Crouse*, 14–487.

To entitle plaintiff to an injunction under such statutory provision, he need not allege that he will sustain an irreparable injury if the injunction is not granted, or that defendant is insolvent: *Mills v. Hamilton*, 49–105.

The fact that the action is improperly brought in equity, when it should have been brought at law, will not prevent plaintiff having the relief here provided for: *Ibid.*

A petition for injunction in ordinary proceedings must show a continuance or repetition of the injury: *Berger v. Armstrong*, 41–447.

The injunction may be granted before the determination of the case in which it is asked, the other party of course being heard: *Ewell v. Greenwood*, 26–377.

Where a defendant had sold to plaintiff the good-will of a business, and obligated himself under a penalty not to prosecute the same business in the same place for a limited time, *held*, that the only remedy for a breach of the agreement not to prosecute the business was an action for the penalty, and that an injunction could not be had under the statutory provision last above referred to to restrain defendant from violating his contract: *Stafford v. Shortreed*, 62–524.

Such statutory provision does not confer upon a court of law in such proceedings either general or special chancery powers, nor clothe it with power to grant any other relief or remedy not before possessed, except that of an injunction: *Richmond v. Dubuque & S. C. R. Co.*, 33–422, 475.

The authority to allow an injunction is an incident of chancery jurisdiction and can only be exercised by courts clothed with general chancery powers or by virtue of legislative enactment: *Cummings v. Des Moines, W. & S. W. R. Co.*, 36–173.

To restrain trespass; adequate remedy at law: An injunction ought not to be granted to restrain a mere trespasser, the party injured in such cases having an adequate remedy at law: *Wilson v. Hughell*, Mor., 461.

Equity has jurisdiction of an action to enjoin repeated and continuing acts of trespass where the party committing the same is insolvent: *Martin v. Davis*, 65 N. W., 1001.

Courts of equity will not interfere by injunction to prevent a mere trespass unless the right invaded or the act threatened is of such a character that such interference appears to be necessary for the prevention of an irreparable injury. If the party may be fully protected or indemnified by the ordinary processes of the law, the courts will remit him to the remedy thus afforded: *Thomas v. Farley Mfg. Co.*, 76–735.

In an action in equity to enjoin defendant from removing fences and traveling over the premises of plaintiff under the claim of a highway, *held* that, in order to a avoid a multiplicity of suits, plaintiff was entitled to relief by injunction, regardless of defendant's solvency or insolvency: *Ladd v. Osborne*, 79–93.

Where, after judgment in plaintiff's favor in an action for possession of real property, in which plaintiff's right to the property is fully adjudicated, and the issuance and service of a writ of assistance, by virtue of which defendant is put out of possession, he again takes possession of the property, plaintiff may have an injunction to prevent defendant from continuing to hold possession in disobedience of the judgment and process: *Ten Eyck v. Sjobury*, 68–625.

Threatened injury: A court of equity will interfere by injunction to protect a right only where there is apparent danger that the right will be invaded: *Trulock v. Merte*, 72–510.

Injunction will not be allowed against a threatened trespass, where it does not appear but that plaintiff has a full, complete and adequate remedy at law for any and all trespasses which may be committed, and especially is this true where the statute offers triple damages for any injuries inflicted by such trespass and makes the same criminal: *Cowles v. Shaw*, 2–496.

To preserve a right: A court of equity will ordinarily interfere by injunction to preserve or continue a right until the termination of the litigation upon the result of which the right itself depends: *Teabout v. Jaffray*, 74–28.

Insolvency: To authorize the interference of a court of equity by injunction to prevent trespass upon real estate, there must be some distinct ground of equitable jurisdiction, such as the insolvency of defendant, the prevention of waste or irreparable injury, or a multiplicity of suits: *Council Bluffs v. Stewart*, 51–385.

Where defendant in an action for trespass which is being continued is insolvent, an injunction to restrain the commission thereof may be properly issued: *Gibbs v. McFadden*, 39–371.

In the absence of a motion for more specific statement, an allegation in the petition that defendant is proof against execution is sufficient without more specific averment of the fact of insolvency: *Burroughs v. Saterlee*, 67–396.

Irreparable injury: If the injury threat-

ened be irreparable, chancery will interfere by injunction. Therefore, *held*, that a petition which alleged that threatened illegal acts of a road supervisor in throwing down a fence to open a highway would cause irreparable injury showed ground for relief in equity: *Bolton v. McShane*, 67-207.

A district township may have an injunction to restrain another district township from removing a school-house from the territory of the former. It is not limited to an action at law for the trespass: *District T'p v. District T'p*, 54-115.

Destruction of trees may be an irreparable injury in such sense that injunction will lie to prevent such threatened trespass. So *held* where one of two owners of adjoining property threatened to cut down trees growing on the boundary line and therefore owned by the two in common: *Musch v. Burkhart*, 83-301.

Where plaintiff was entitled to a supply of gas for specified purposes for a limited time by contract with a gas company, and the company was threatening by reason of alleged violation of the contract in the excessive use of gas to cut off the plaintiff's supply entirely, *held* that, as the plaintiff was entitled to the supply for proper purposes, the damage from shutting off such supply would be irremediable and he was entitled to an injunction: *Graves v. Key City Gas Co.*, 83-714.

Injunction is an extraordinary remedy, to be granted only when the party is likely to suffer some irreparable injury against which he has no other speedy or adequate remedy. Therefore, *held*, that an injunction should not be granted to restrain a street railway company, having the right to do so in the charter from the city, from laying its track on a street, although it was claimed that it was using a certain kind of rail or was building according to a certain gauge which would render its track a nuisance, there being no requirement as to the kind of rail nor the guage to be used: *Waterloo v. Waterloo Street R. Co.*, 71-193.

To restrain opening or obstructing highway: Where a road supervisor has served notice to have a road opened as an official act by virtue of proceedings in which it is claimed that a highway has been established, the owner of property which would be trespassed upon in opening the road may maintain an action for injunction to restrain the contemplated trespass before any actual trespass upon his land is committed: *Morgan v. Miller*, 59-481.

Equity will interfere by injunction to restrain road supervisors and others from removing or interfering with fences, hedges, water courses and the like in the discharge of their official duty. Relief in such cases is not based upon the ground of the irreparable character of the injury and the insolvency of defendant: *Bolton v. McShane*, 67-207.

The opening or vacation of highways and their illegal obstruction is within the control of the court by a proceeding for an injunction.. If the action of the board vacating a highway is void for want of the required notice, it may be corrected by *certiorari*, but injunction would nevertheless be a proper remedy: *Moffit v. Brainerd*, 92-122.

Injunction will not be granted when the party has a plain, adequate and speedy remedy at law. Therefore, *held*, that where the action of a city council in condemning property for a street might have been tested on *certiorari*, an injunction should not be granted preventing the opening of such street: *Rockwell v. Bowers*, 88-88.

The remedy by injunction in equity exists to restrain the obstruction of a highway, although there may be also a right of action at law to enjoin or abate such obstruction as a nuisance. *Clayton County v. Herwig*, 69 N. W., 1035.

An injunction will not lie to restrain a party from obstructing or inclosing a street or highway when it is in such condition that it cannot be used for that purpose: *Prince v. McCoy*, 40-533.

A party who will suffer no injury except in common with the public by reason of the obstruction of a highway will not be entitled to an injunction to restrain such obstruction: *Ibid.*

An action for an injunction may be maintained against a railway company which maintains its tracks over the streets of a city without having paid the damages to abutting property owners, and the fact that such property owner has brought an action at law to recover such damages and recovered judgment therein will not prevent his having a remedy by injunction: *Harbach v. Des Moines & K. C. R. Co.*, 80-593.

To restrain enforcement of illegal taxes: An injunction will lie to restrain the sale of personal property levied on to satisfy a tax illegally levied. Replevin would not be a full remedy: *Spencer v. Wheaton*, 14-38.

Injunction is the proper remedy to restrain the levy and collection of an illegal tax on shares of stock in a national bank: *Olmstead v. Board of Supervisors*, 24-33.

A resident and taxpayer of a school district may maintain a suit to enjoin the collection of a tax levied without authority of law: *Williams v. Peinny*, 25-436.

An injunction is the proper remedy to restrain the collection of a tax which is not only erroneous, but void: *Standard Coal Co. v. Independent Dist.*, 73-304.

The jurisdiction of equity to restrain the enforcement of an illegal tax has been too long recognized and too frequently resorted to in this state to be now made a matter of serious question: *Zorger v. Township of Rapids*, 36-175; *Brandriff v. Harrison County*, 50-164.

An injunction is not the proper remedy against an erroneous or excessive assessment; the taxpayer should apply to the board of equalization, but *aliter* if the law authorizing the tax is unconstitutional, or the levy is without authority or jurisdiction: *Macklot v. Davenport*, 17-379.

That a tax is merely irregular, for instance, by reason of property which should be included with the realty in an aggregate valuation being separately assessed as personalty, is not a ground for enjoining the collection of the tax. Such error should be corrected by application to the board of equalization: *Wilson v. Cass County*, 69-147.

In an action to enjoin the collection of an illegal tax, a number of persons having sep-

arate interests but equally interested in the relief, may join as plaintiffs: *Brandriff v. Harrison County*, 50–164.

And in such case, one or more parties thus interested may maintain an action for the benefit of the others having a like interest. (Overruling *Fleming v. Mershon*, 36–413): *Ibid.* And see *Palo Alto Banking, etc., Co. v. Mahar*, 65–74.

Residents and taxpayers of an independent district may join in an action to declare taxes levied therein for school purposes to be void: *Wilkinson v. Van Orman*, 70–230.

Two or more owners of distinct pieces of land cannot join in an action to restrain the levy and enforcement of a municipal tax upon their property on the ground that their land is so situated as not to be subject to the levy of such taxes: *Lewis v. Eshelman*, 57–663.

Where a tax in aid of a railroad was declared defeated by the judges of the election, but the township clerk improperly certified in regular form to the board of supervisors that the proposition was carried, and the board thereupon levied the tax, *held* that, as the tax was not voted, its collection might be restrained by injunction, and *certiorari* was not an available remedy: *Cattell v. Lowry*, 45–478.

Obstruction of navigable stream: Where the riparian owner shows that the filling up of the banks of a navigable stream beyond high-water mark will occasion him special damages different in degree or kind from such as will be sustained by the public, he may maintain an injunction to prevent such injury: *Musser v. Hershey*, 42–356.

Where it appeared that defendant had without right obstructed an outlet to a lake so as to increase the height of water therein, and caused the plaintiff's land to be overflowed, *held*, that an injunction against the further maintenance of such obstruction was properly granted: *Troe v. Larson*, 84–649.

And *held*, that it was immaterial whether the obstruction thus erected by defendant was on the land of defendant or not: *Ibid.*

To prevent ejectment suits: The rule of the common law, on account of which it was held that an injunction might be granted in equity to restrain the prosecution of actions of ejectment, when the title has been properly determined between the parties, no longer exists, and an injunction will not be allowed for the purpose of restraining a second suit to which a previous adjudication might be pleaded as a bar: *Gray v. Coan*, 36–296.

A suit to enjoin the prosecution of an action to recover real property on the ground that a deed in defendant's chain of title has been lost is allowed. In such case he has no adequate remedy at law: *Butch v. Lash*, 4–215.

To restrain taking private property for public use: An injunction will not be allowed to restrain a party from committing an injury by an attempt to take private property under pretense of legal authority for a highway, it not appearing that any authority to do so actually exists, unless it appears that such party is insolvent and unable to respond to an action at law for damages, or that the injury would be such that it could not be adequately compensated in money: *Dinwiddie v. Roberts*, 1 G. Gr., 363.

After the assessment of damages for right of way of a railway has been made, the land owner may enjoin the further use of his premises by the company until the damages are paid: *Richards v. Des Moines Valley R. Co.*, 18–259; *Hibbs v. Chicago & S. W. R. Co.*, 39–340.

Where one of the purposes for which the condemnation proceedings were ostensibly had was within the provisions of the statute, and the ground of complaint was that defendant sought to defraud plaintiff by proceeding under the statute ostensibly for a proper purpose, when the real and only purpose was to procure land for a use for which property could not be condemned, *held*, that the proceedings might be enjoined: *Forbes v. Delashmutt*, 68–164.

As the right of appeal is given in proceedings for condemning right of way, the party to such proceedings cannot by injunction take advantage of irregularities therein. The remedy by appeal is exclusive: *Phillips v. Watson*, 63–28.

Vacation of streets; certiorari: Injunction will not be granted to restrain the vacation of streets by a city council, there being a complete remedy by *certiorari: Stubenrauch v. Neyenesch*, 54–567.

To restrain official action: A citizen and taxpayer may maintain an action to enjoin the issuance by the county auditor of a warrant in payment of a refund of taxes illegally ordered by the board of supervisors. The determination by the board of the legality of such a refunding is not an adjudication which must be attacked only upon appeal or by *certiorari: Hospers v. Wyatt*, 63–264.

Citizens and taxpayers of a county may maintain an injunction against a county official to prevent the erection of a county courthouse at an improper place: *Rice v. Smith*, 9–570.

Where it appeared that the officers of a school district were about to accept a schoolhouse which did not comply with the terms of the contract for its construction and was much less valuable than provided by such contract, *held*, that an injunction might be granted against such officers at the suit of taxpayers to prevent the acceptance of such building: *Carthan v. Lang*, 69–384.

A taxpayer cannot by injunction restrain officers of the county in the performance of their duties, even though irregular, where it does not appear that their action is such as to be prejudicial to him: *Sperry v. Kretchner*, 65–525.

A party seeking an injunction to restrain the execution of a tax deed upon property must show that he has an interest in such property entitling him to such relief: *Johnson v. Brett*, 64–162.

A court of equity may interfere by injunction to prevent a conveyance by a municipal corporation of lands held by it for public purposes. Although such conveyance, being inconsistent with the purposes for which it is held, might be void, yet it may be enjoined to prevent the title from passing

into the hands of various grantees, by reason of which parties seeking to restrain the improper use of the land might be driven to a multiplicity of suits: *Cook v. Burlington*, 30–94.

Where a county auditor refused to make certain corrections in a tax list, reducing the valuation of reality according to the direction of the board of equalization, *held*, that the remedy of the owners of property who had not paid their taxes was by *mandamus* and not by injunction: *Ridley v. Doughty*, 77–226.

The court has no power to interfere by injunction to prevent legislation by a city on a subject within its power to legislate; but if such legislation will be in excess of its powers the court may interfere. *So held* where it was alleged that a city was about to pay, out of its general revenues, rental claimed by an electric light company under a contract which was not made in the method authorized by law: *Hanson v. Hunter*, 86–722.

An injunction will not be granted to restrain the board of supervirors from considering a petition for the relocation of a county seat on the ground that such petition is fraudulent. The board of supervisors has exclusive jurisdiction in such a proceeding: *Luce v. Fensler*, 85–596.

A taxpayer (whether resident or non-resident) may maintain an action for an injunction against a city to prevent it from making an unlawful disposition of city property: *Brockman v. Creston*, 79–587.

A taxpayer may maintain an action in his own name to prevent unlawful acts by public officers which would increase the amount of taxes which he is required to pay, or diminish a fund to which he has contributed: *Snyder v. Foster*, 77–638.

An officer may be made a party to restrain him in the discharge of official duties, where the discharge of his duties will be the means of consummating or aiding fraudulent purposes or of working oppression or injustice, although the officer is guilty of no wrong or unlawful purpose. But costs will not ordinarily be adjudged against him: *Palo Alto Banking etc., Co. v. Mahar*, 65–74.

So *held* in an action to which the county recorder was made a party defendant and in which it was sought to enjoin him from recording certain conveyances which it was alleged were being executed in pursuance of a fraudulent confederation to defraud plaintiff of his title: *Ibid.*

Legislative action of the state or of a municipal corporation within the scope of its powers cannot be restrained by injunction, even though the threatened act, if passed, would be unconstitutional and void: *Des Moines Gas Co. v. Des Moines*, 44–505.

Injunction will not be granted at the suit of a taxpayer to restrain a city from making a contract for lighting by electricity, even if such contract, if performed, might involve indebtedness beyond the constitutional limit: *Searle v. Abraham*, 73–507.

In regard to elections: A citizen of a county is authorized, as plaintiff, to prosecute an action for an injunction to restrain improper action of officers when counting votes on the question as to removing the county seat: *Collins v. Ripley*, 8–129.

In an injunction proceeding the validity of an election to remove a county seat may be tried: *Sweatt v. Faville*, 23–321.

Where an election as to change of county seat had been ordered by the board of supervisors, made upon a petition and notice therefor, and the vote was favorable to the change, *held*, that those opposing such change had no cause for equitable relief justifying an injunction, the order for the vote being conclusive until set aside by *certiorari*: *Bennett v. Hetherington*, 41–142.

It is doubtful whether any court has the power or jurisdiction to enjoin an election to be held by the people pursuant to public law: *Lamb v. Burlington, C. R. & M. R. Co.*, 39–333.

Right to public office: Action by original bill for an injunction is not the proper method for trying the right to a public office or franchise. The remedy by information in *quo warranto* should be adopted. But it would seem that a temporary injunction might be granted as an auxiliary remedy in such case: *Cochran v. McCleary*, 22–75.

An action in equity for an injunction is not the proper method to determine which of two persons has the right to teach a school and who is the legal subdirector in the district township: *District Tp v. Barrett*, 47–110.

To restrain proceedings at law: Equity will not interfere by injunction to restrain the prosecution of an action at law where it does not appear that plaintiff is insolvent or that there is any ground for a discovery, or that the facts upon which relief is sought cannot be made as fully available in an action at law as in equity: *Smith v. Short*, 11–523.

It is not the province of equity to interfere where there is a complete remedy at law, and especially when it is sought to restrain an action at law pending a hearing in equity: *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57–249.

A court of equity will enjoin proceedings in an action of forcible entry and detainer only where a certain and manifest irreparable injury will result unless its restraining power is exerted: *Crawford v. Paine*, 19–172.

Where parties are both residents of the state, the one may invoke the aid of a court of equity of the state to prevent the other from prosecuting an action in the courts of another state which will result in injury and fraud. Such jurisdiction is founded upon authority vested in courts of equity over persons within their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and which are contrary to equity and good conscience: *Teager v. Landsley*, 69–725; *Hager v. Adams*, 70–746

Where plaintiff was under contract entitled to a conveyance of a right of way, *held*, that it was proper in an action for specific performance thereof to ask an injunction to restrain defendant from proceedings to have damages for the right of way assessed by a jury: *Chicago & S. W. R. Co. v. Swinney*, 38–182.

A court of equity cannot by injunction interfere with criminal proceedings in a court of law: *Suess v. Noble*, 31 Fed., 855.

Where an injunction has been granted restraining plaintiff in an action pending in the same court from dismissing such action, the supreme court will not, on appeal in the latter action, allow the parties to dismiss the case in violation of such injunction: *Dubuque Branch of State Bank v. Rhomberg* 37-664.

Where plaintiff sought to enjoin defendant from prosecuting *ad quod damnum* proceedings to recover the value of certain lands occupied in the construction of plaintiff's railroad, *held*, that plaintiff had an adequate remedy at law, as all questions involved in the issue could have been determined in the *ad quod damnum* proceeding: *Keokuk & N. W. R. Co. v. Donnell*, 77-221.

To restrain enforcement of judgment: A court of equity has authority to enjoin proceedings to enforce a judgment which is void for want of jurisdiction: *Connell v. Stelson*, 33-147.

Injunction may be granted to restrain enforcement of a judgment at law rendered without notice to the defendant therein, and upon a claim against which he had a good defense: *Givens v. Campbell*, 20-79.

A party seeking to enjoin the enforcement of a judgment at law must show that he has a defense to the action, or make such a case as to satisfy the court that if a new trial is had a different result will be obtained: *Way v. Lamb*, 15-79.

The enforcement of a judgment at law will not be restrained by injunction where it is not shown that the judgment is unjust or oppressive, or in other words that there would be a good defense to the claim if the judgment should be set aside. A court of equity will not set aside a judgment and open up the litigation until it appears that the result will be other or different from that already reached: *Taggart v. Wood*, 20-236.

A court of equity will not interfere by injunction to restrain the enforcement of a judgment on a ground which might have been urged as a matter of defense in the action on which the judgment was recovered: *Faulkner v. Campbell*, Mor., 148.

To authorize a party to relief against a judgment at law, and to pay an execution thereon, it must appear that it is against conscience to execute such judgment, and also that the injured party could not have availed himself of the same facts at or before the trial, and that there was no fault or negligence on his part: *Kreichbaum v. Bridges*, 1-14; *Shricker v. Field*, 9-366.

Matters antecedent to the bringing of the action in which the judgment was recovered which is sought to be enjoined, which matters might have been interposed as a defense in such action, cannot be made the basis of a suit in equity to enjoin the judgment: *Lamb v. Drew*, 20-15.

In a motion to enjoin the enforcement of a judgment the court cannot go behind the judgment to determine the regularity of the proceedings: *Hampson v. Weare*, 4-13.

In the absence of fraud, accident or mistake, equity cannot interfere to restrain the enforcement of a judgment at law, although it be wrong, unjust or inequitable: *Finch v. Hollinger*, 47-173.

Equity will not enjoin the collection of a judgment at law where the legal remedy is full, ample and complete, unless possibly there has been fraud, accident or surprise, without fault or negligence on the part of the complaining party: *Freeman v. Hart*, 61-525.

Held, that a judgment defendant could not have the enforcement of the judgment enjoined on the ground that he had a claim against the assignee of the judgment, who was his attorney in the action in which the judgment was recovered, for negligence in defending such action, it not appearing that the attorney was insolvent. Under such circumstances there is no such relation of trust or confidence as to entitle the judgment debtor to relief: *Baker v. Ryan*, 67-708.

Where the provisions of a judgment were that it should be paid in a town order at the expiration of a certain time, and before that time execution was issued, and, when the time expired, the order was not tendered, and afterwards, without any offer to perform, an injunction was asked against such execution, *held*, that plaintiff was not entitled to relief by reason of his failure to tender the order: *Anamosa v. Wurzbacher*, 37-25.

Where a judgment was rendered by default upon agreement that it should be satisfied only out of certain specified property, *held*, that an injunction was properly granted in an action by the debtor to restrain its enforcement against other property than that agreed upon: *Montgomery v. Gibbs*, 40-652.

An action to enjoin the enforcement of a judgment should be brought against the officer who is proceeding to enforce the judgment: *Death v. Bank of Pittsburg*, 1-382.

To restrain sale on execution: Injunction will be granted to prevent sale on execution of real property, when such property does not belong to the judgment debtor and the sale would cast a cloud upon the title: *Key City Gas Light Co. v. Munsell*, 19-305.

But a sale will not be enjoined if the judgment is a lien upon the property, although it is junior to other liens: *Wiedner v. Thompson*, 66-283.

The fact that a judgment creditor, about to sell lands under execution, publicly asserts that his claim is prior to that of a mortgage on the premises, and that such mortgage is fraudulent, is not a ground on which to enjoin his sale at the suit of the mortgagee: *Ramsdell v. Tama Water Power Co.*, 84-484.

To restrain enforcement of chattel mortgage: As the purchaser at foreclosure sale can acquire title only to such property as is covered by the mortgage, an action cannot be maintained by a junior mortgagee to restrain the foreclosure of a senior mortgage upon property which, it is claimed, is not covered by such senior mortgage: *Rankin v. Rankin*, 67-322. And see notes to § 4283.

To restrain nuisance: Courts of equity have general jurisdiction to entertain an action to abate a nuisance, and, although such jurisdiction has generally been exercised only in actions where property rights of the

plaintiff are affected, yet it is competent for the legislature to extend this jurisdiction to cases where no property rights of the plaintiff as distinct from the general public are involved, and to authorize a suit to abate a nuisance to be brought by any citizen of the county: *Littleton v. Fritz*, 65–488.

So *held* under § 2384, authorizing a suit in equity by a citizen of the county to enjoin the unlawful sale of intoxicating liquors: *Ibid.*

The fact that the act enjoined is one which is by statute made a criminal one will not prevent a court of equity having jurisdiction to abate it by injunction: *Ibid.*

Further as to what may be enjoined as a nuisance, see § 4302 and notes.

To restrain conveyances, attachments, etc.: Where real property standing in the name of a person not a defendant is attached, as having been conveyed by defendant to defraud creditors, an action for an injunction may be maintained against the grantee in such fraudulent conveyance to prevent alienation of the property by him to an innocent purchaser, until the determination of the attachment suit: *Joseph v. McGill*, 52–127.

A creditor who has not yet recovered a judgment cannot have an injunction to restrain the debtor from disposing of his property: *Buchanan v. Marsh*, 17–494.

A mortgagee, although he has not recovered judgment, may maintain an action for injunction to prevent a judicial sale of the mortgaged premises on the ground that it is fraudulently intended to defeat his rights, but a general creditor not yet having recovered judgment can not do so: *Brigham v. White*, 44–677.

Where there were conflicting entries of public land, *held*, that the widow of the claimant in possession in her own interest as the guardian of minor children might maintain an injunction to protect such possession against interference by the adverse claimant, pending an appeal to the secretary of the interior, with reference to the right to the property: *Wood v. Murray*, 85–505.

And in such case *held*, that there was proper ground for equitable relief, there being no adequate remedy at law: *Ibid.*

One who has conveyed property by a warranty deed has no such interest therein that he can maintain injunction against the threatened sale thereof under a subsequent judgment, under which it is sought to subject the property on the ground that the conveyance was in fraud of creditors: *Small v. Somerville*, 58–362.

The grantee may, under proper circumstances, maintain an action for injunction to restrain his grantor and others from prosecuting a fraudulent confederation to convey the property so as to defeat his title: *Palo Alto Banking, etc., Co. v. Mahar*, 65–74.

In an injunction to restrain a sale by the trustee under a mortgage containing a power of attorney, where it did not appear that there was fraud or mistake, or that plaintiff would sustain an irreparable injury by such sale, and it was shown that plaintiff was aware of the condition of the title of which he complained at the time of taking the conveyance in part payment for which the mortgage was given, *held*, that there was no ground for an injunction: *Crocker v. Robertson*, 8–404.

Equity may, at the suit of the grantee of real property by a warranty deed, restrain the transfer of notes given for the purchase money where it appears that there was a breach of warranty as to a portion of the property. But such restraint will extend only to such amount as is necessary to make good to the grantee the damage resulting from the breach of warranty: *McDunn v. Des Moines*, 34–467.

Where property claimed by plaintiff was seized on attachment issued against a third person, and was replevied from the officer by plaintiff and taken into possession of plaintiff, *held*, that he could not have an injunction to restrain the levy of other attachments by other parties against such third person upon the same property: *Patterson v. Seaton*, 64–115.

To restrain payment of county warrant: An injunction restraining payment of a county warrant cannot operate to defeat a recovery upon such warrant negotiated before the injunction suit was commenced: *McCormick v. Grundy County*, 24–382.

To restrain sale of partnership property: Where plaintiff as administratrix of a deceased partner showed in her petition that the defendants, the copartners of her intestate, were insolvent and were disposing of the firm property and appropriating it to their own use, and that unless defendants were restrained by injunction there was danger of the property and assets of the firm being wholly lost, *held*, that there was a proper case for an injunction restraining defendants from disposing of the partnership property: *Fletcher v. Vandusen*, 52–448.

To restrain waste by mortgagor: Where an action was brought to enjoin the cutting of timber on mortgaged premises, and a temporary injunction was granted, but a final hearing was not had until after the property had been sold on foreclosure and bought for the full amount of the mortgage debt and interest by the mortgagee, *held*, that the injunction was properly dissolved and the petition dismissed, there being no reason why it should be continued during the time for redemption, as it appeared that the timber was cut under an agreement that it should be sold and the proceeds applied on the mortgage, and it did not appear that the defendant had any intention to cut any more; and the fact that the proceeds of the timber had not been applied on the mortgage was immaterial, since plaintiff had bought the land for the full amount of the debt and costs; *Ellison v. Smyth*, 75–570.

Second injunction in same action: Where an injunction has been already granted, a second injunction will not be granted to obtain the same object as the first while the first is in force: *Dickinson v. Eichorn*, 78–710.

SEC. **4355. Temporary or permanent.** In any of the cases mentioned in the preceding section, the injunction may either be a part of the judgment rendered in the action, or it may, if proper grounds therefor are

shown, be granted by order at any stage of the case before judgment, and shall then be known as a temporary injunction. [C.'73, § 3387; R., § 3775; C.'51, § 2191.]

SEC. **4356. Temporary—when allowed.** Where it appears by the petition therefor, which must be supported by affidavit, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act which would produce great or irreparable injury to the plaintiff; or where, during litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute. [C.'73, § 3388.]

An affidavit to the petition to the effect that the contents thereof are true, as the affiant believes, constitutes a sufficient verification: *Kelley v. Briggs*, 58–332.

If an amended pleading in an action for injunction is not sworn to, the temporary injunction may be dissolved on that ground, but it will be error to dismiss the action and proceed to personal judgment: *Porter v. Moffett*, Mor., 108; *S. C.*, Mor., 153.

Where an injunction is asked as auxiliary relief by a motion without verification or bond it should not be granted: *Pendleton v. Laub*, 64 N.W., 653.

Although an injunction be improperly issued on account of defects in the petition, yet if these defects are corrected by amendment the injunction should not be dissolved: *Sweatt v. Faville*, 23–321; *Des Moines Nav. & R. Co. v. Carpenter*, 27–487.

And this is true even though the amendment is made after the motion to dissolve is filed: *Crawford v. Paine*, 19–172.

A temporary injunction will not be issued where the facts stated in the petition, if proved, would not entitle the party to relief: *Zorger v. Township of Rapids*, 36–175.

In a suit brought under § 2384 to enjoin illegal sale of intoxicating liquors, a temporary injunction may be granted as in any other case: *Littleton v. Fritz*, 65–488. And see notes to that section.

To warrant the allowance of the writ, some act must be done or threatened which would produce great and irreparable injury to plaintiff, and is in violation of his right respecting the subject of the action, or which would tend to render ineffectual any judgment he might recover in the proceedings. It is not proper, therefore, to allow a preliminary injunction where the relief demanded consists in rescission and cancellation of a contract on the ground of fraudulent purposes of the officers of a corporation in entering into such contract, or that the steps necessary to bind the corporation have never been taken, such facts being available in defense of an action at law on the contract: *Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co.*, 76–702.

It is not necessary in order to entitle the party to a temporary injunction that it shall appear that the injury assigned would be irreparable. It is sufficient if such injury would be great: *Price v. Baldauf*, 82–669.

An injunction in aid of *quo warranto* proceedings brought in the name of the state should not be issued, as there are no proper parties to execute an injunction bond: *State v. Simpkins*, 77–676.

SEC. **4357. By whom granted.** A temporary injunction may be granted:

1. By the court or judge thereof in which the action is pending or is to be brought;

2. By any judge of the district court of such district, or a superior court in the proper county;

3. By any judge of the supreme, or a judge of any other district court.

But in cases where an action is pending, and it is applied for to affect the subject-matter thereof, it can only be granted by the court or judge thereof in which such action is pending. Nor shall it be granted by any judge mentioned in the second subdivision hereof, unless it satisfactorily appears by affidavit that the court or judge thereof in which the action is brought cannot, for want of time, sickness, or other disability, hear the same, or that the residence of the judge is inconvenient, or that it is for some sufficient reason impracticable to make the application to him. Nor shall it be granted by any judge mentioned in the third subdivision hereof, unless it be made satisfactorily to appear to such judge, by affidavit, that the application therefor cannot, for some sufficient reason, be made to either of the courts or judges mentioned in the first or second subdivision of this section. [C.'73, § 3389.]

A judge may act under this section during term time, while the court is not actually in session, as well as in vacation between terms: *Thompson v. Benepe*, 67–79.

Although the granting as well as the refusal of a temporary injunction rests much in the discretion of the court, and such discretion will not be controlled except where there is a manifest abuse or mistake of the law, yet where an appeal was taken from an order granting a preliminary injunction involving a simple question of law upon undisputed facts, *held*, that the question would be determined on appeal and not postponed to final hearing: *Fuson v. Connecticut General L. Ins. Co.*, 53–609.

A party cannot, by appealing from an order denying a temporary injunction and executing a *supersedeas* bond, have the benefit of such temporary injunction: *Troupe v. Eade*, 42–552.

Affidavits in resistance of an application for a temporary injunction are merely evidence which do not become a part of the record, unless preserved by bill of exceptions: *Hart v. Foley*, 67–407.

A temporary injunction issued in vacation is not dissolved by failure to procure an additional order therefor at the next term of court: *Curtis v. Crane*, 38–459.

An injunction relating to property held under attachment, where the attachment is the gist of the proceeding, must be brought in the same court where the attachment suit is pending: *Cooney v. Moroney*, 45–292.

A federal court will not, by temporary injunction, restrain proceedings in a state court in a criminal case, even though proceedings for its removal to the federal court have been taken: *Wagner v. Drake*, 31 Fed., 849.

SEC. **4358. Notice to defendant who has answered.** An injunction shall not be granted against a defendant who has answered, unless he has had notice of the application. [C.'73, § 3390.]

SEC. **4359. Notice in other cases.** An injunction to stop the general and ordinary business of a corporation, or the operations of a railway, or of a municipal corporation, or the erection of any building or other work, or the board of supervisors of any county, or to restrain a nuisance, can only be granted upon reasonable notice of the time and place of the application to the party to be enjoined; nor shall any temporary writ of injunction be allowed by any judge during term time, except the petition therefor shall be first filed with the clerk and entered upon the court calendar of that term, and the order allowing the same, if granted, shall be entered therein. [C. '73, § 3391.]

Section applied: *District T'p v. Barrett*, 47–110.

This section *held* not applicable where one district township sought to restrain another from removing schoolhouses from the territory of the former: *District T'p v. District T'p*, 54–115.

SEC. **4360. Refusal by court conclusive.** No injunction shall be granted by a judge after the application therefor has been overruled by the court; nor by a court or judge, when it has been refused by the court or judge thereof in which the action is brought. A judge refusing an injunction shall, if requested by either party, give him a certificate thereof. [C. '73, § 3392.]

Where an application for a preliminary injunction has been refused, such refusal will not preclude the granting of an injunction on a subsequent application presenting a different case: *Graves v. Key City Gas Co.*, 83–714.

SEC. **4361. Motion to dissolve.** The defendant may move to dissolve the injunction, either before or after the filing of the answer. [C.'73, § 3393; R., § 3790; C.'51, § 2206.]

SEC. **4362. Order issued.** If the order is made by the court, the clerk shall make an entry thereof in the court record, and issue the order accordingly. If made by the judge, he must indorse the said order upon the petition. [C.'73, § 3394; R., § 3776; C.'51, § 2192.]

This provision that the order for a temporary injunction shall be indorsed upon the petition is not mandatory, and the fact that it is made upon a separate piece of paper will not render subsequent proceedings thereunder void: *Jordan v. Circuit Court*, 69–177.

SEC. **4363. Bond.** The order of allowance must direct the injunction to issue only after the filing of a bond in the office of the clerk of the proper court, in a penalty fixed in the order, with sureties to be approved by the clerk, and conditioned for the payment of all damages which may be adjudged against petitioner by reason of such injunction. [C.'73, § 3395; R., § 3777; C.'51, § 2193.]

Additional bond: Under statute, as well as by rules of equity practice, it is competent for the court, in case the litigation wherein the injunction has been granted shall be protracted, to require an additional bond or further security to meet such contingency: *Crawford v. Paine*, 19–172.

Action on the bond for damages: The bond contemplated by statute in case of a temporary injunction is to cover such damages as may be adjudged against the obligors in an action brought thereon. The amount of damages cannot be adjudged in the original action. No such issue can be joined therein: *Fountain v. West*, 68–380.

A party can be damaged by an injunction only in case he is prevented by it from exercising or enjoying some right or privilege which he desired or was entitled to enjoy; and where an injunction was sought for the purpose of restraining the negotiation of a promissory note, and defendants by their answer negatived the allegation that they were about to negotiate the note, *held*, that no damage was shown to have accrued to them by reason of the granting of the injunction: *Bank of Monroe v. Gifford*, 70–580.

In order to recover damages on an injunction bond it is necessary that it should appear that the plaintiff was prevented by the injunction from exercising or enjoying some right or privilege which he desired to exercise and which he was entitled to enjoy. If the petition does not contain any averment that such damages were sustained by being deprived of some right, a demurrer thereto will lie: *Hibbs v. Western Land Co.*, 81–285.

Where the injunction has been improperly issued the defendant is entitled to at least nominal damages, though he has suffered no special injury: *Brown v. Cunningham*, 82–512.

Attorney fees: In an action on the bond, reasonable compensation for legal services in securing a dissolution of the injunction may be recovered; but not attorney fees for services in defending the entire suit: *Behrens v. McKenzie*, 23–333; *Langworthy v. McKelvey*, 25–48.

Expenses necessarily incurred for attorney fees in defending against an injunction suit may be recovered in an action on the injunction bond, when the proceeding is for an injunction alone and a motion to dissolve the injunction would have involved the whole case, and if sustained would have left nothing to try: *Thomas v. McDaneld*, 77–301.

When an injunction is the only relief sought and the dissolution is procured on a final hearing, necessary costs and expenses in procuring the dissolution are recoverable: *Bullard v. Harkness*, 83–373; *Colby v. Meservey*, 85–555.

Where an injunction was not the only relief demanded, and there was no motion to dissolve the injunction, it being superseded by the giving of a bond, *held*, that there was no right to recover attorney fees on the injunction bond: *Ady v. Freeman*, 90-402.

Where an injunction is asked and granted in an action auxiliary to other relief, attorney fees in defending such action are not recoverable in a suit upon the bond· *Leonard v. Capital Ins. Co.*, 70 N. W., 629.

Where an action was brought to have certain taxes declared illegal and void, and a temporary injunction was granted restraining their collection, but no steps were taken to have such injunction dissolved before final hearing, when it was dissolved, *held* that, the injunction being merely auxiliary, defendant was not entitled in an action on the injunction bond to recover attorney fees: *Carroll County v. Iowa R. Land Co.*, 53–685.

If the injunction is dissolved after hearing on the merits, and this is all there is in the case, counsel fees might be recovered. Such recovery is not confined to cases where the injunction is dissolved on motion: *Langworthy v. McKelvey*, 25–48.

Where the motion to dissolve is made in good faith and affidavits filed in support thereof, but the court declines to pass upon it until final hearing, when the injunction is dissolved after hearing upon the merits, counsel fees for preparation of motion, etc., may be recovered in suit upon the bond: *Wallace v. York*, 45–81; *Fountain v. West*, 68–380.

An allowance of attorney fees for time spent in drawing useless affidavits would be improper: *Ellwood Mfg. Co. v. Rankin*, 70–403.

Fees for the services of an attorney in a case in the supreme court after the dissolution of the injunction should not be allowed: *Ibid.*

Where an injunction is the only relief sought, and dissolution is procured only upon final hearing, attorney fees should, in an action on the bond, be allowed for defending in the entire action: *Reece v. Northway*, 58–187.

An attorney fee may be recovered where the injunction is dissolved on motion, and also where it is dissolved on final hearing, if it is the only relief sought. It may also be allowed in case of partial dissolution or modification, where such is the relief sought in the motion, but not where the motion is to dissolve as an entirety and is only partially sustained or a modification is granted: *Ford v. Loomis*, 62–586.

Dismissal of action: In an action on an injunction bond given to stay execution on a judgment, where it was alleged that an action for injunction had been dismissed, *held*, that the entry on the judgment calendar, "dismissed as per stipulation," was not sufficient evidence as to that fact in the absence of a showing as to what that stipulation was: *Towle v. Leacox*, 59–42.

Other damages: Where real estate depreciates in value during the time that sale thereof is prevented by injunction proceedings, there is no presumption that the owner, if not prevented, would have sold before depreciation and saved himself from loss, and damages are not recoverable for loss of sale unless it is made to appear that there was a *bona fide* application on the part of some person to buy, and that the sale was lost by reason of the injunction: *Reece v. Northway*, 58–187.

Failure to allow plaintiff nominal damages in an action brought upon an injunction bond will not be ground for reversal if no

actual damages are shown: *Boardman v. Willard*, 73–20.

In an action to recover damages for having wrongfully enjoined a sale under execution, *held*, that the costs made under the execution enjoined would be presumed to have been included in the amount for which the subsequent execution was issued, and that the cost of the judgment would be the only damage recoverable for delay in the sale: *Johnston v. Moser*, 72–654.

Defendant having a lot of unburned brick which were damaged by rain while an injunction was in force restraining him from carrying on the manufacture of such brick on the premises, *held*, that the writ of injunction as issued did not prevent him from taking steps to protect the brick from the rain, and if he was negligent in that respect he could not recover for damages sustained thereby: *Behrens v. McKenzie*, 23–333.

Where by injunction a creditor is restrained from selling land on execution, thereby being prevented from buying it in for his claim, he cannot recover by way of damages the value of the use of the land for the time he claims to have been kept out of possession, nor interest on the value: *Bullard v. Harkness*, 83–373; *Colby v. Meservey*, 85–555.

Where a temporary injunction was granted in an action for a permanent injunction, and pending an appeal from the refusal of the court to dissolve such injunction, the original action was dismissed by proper proceedings in the lower court, *held*, that the supreme court could not retain jurisdiction of the appeal for the purpose of assessing damages on the bond: *Chicago, R. I. & P. R. Co. v. Dey*, 76–278.

Defense: A bond given in an injunction proceeding is in the nature of an executed rather than an executory contract, and the fact that the one signing the bond and enjoying the benefit of the writ was insane at the time of signing it will constitute no defense to an action on the bond, if it appears that his insanity was not known to the opposite party: *Ibid.*

It is a defense to an action on the bond, that the party procuring the injunction was entitled to it at the time it issued; but the dissolution of the injunction and dismissal of the suit may be shown as *prima facie* evidence that the injunction was wrongfully granted: *Findlay v. Carson*, 66 N.W., 759.

The sureties on an injunction bond given under this section are not bound by judgment rendered against the plaintiff in the action for injunction, even though the injunction was to restrain the enforcement of a judgment as contemplated in the following section: *Spencer v. Sherwin*, 86–117; *Grove v. Bush*, 86–94.

Under a bond conditioned for the payment of damages which may be adjudged against the principal for the issuance of an injunction, the adjudication in the injunction proceeding that the injunction was wrongfully procured is conclusive upon the surety in an action against him on such bond: *Shenandoah Nat. Bank v. Read*, 86–136.

Summary damages should not be allowed on dissolution of an injunction unless they are such as are the immediate and necessary result of the allowance of the writ and depend simply upon computation for their determination, as the allowance of interest when the payment of money is restrained. In other cases the party should be left to his remedy by an action: *Taylor v. Brownfield*, 41–264.

Bond construed: In a particular case, *held*, that the bond rendered the obligor liable only for costs of the proceeding and not for other damages which accrued: *Gifford v. Mohr*, 47–279.

Right of action accrues on the bond at the final determination of the injunction suit, and not at the previous dissolution of the temporary injunction: *Bank of Monroe v. Gifford*, 65–648.

Where the action is to enjoin the sale of a particular piece of property under a judgment, the bond need not be for twice the amount of the judgment: *Hardin v. White*, 63–633.

SEC. **4364. When to restrain proceedings or judgment.** When proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, the action must be brought in the county and court in which such action is pending or the judgment or order was obtained, unless such judgment or final order is obtained in the supreme court, in which case the action must be brought in the county and court from which the case was taken to the supreme court. [C.'73, § 3396; R., § 3778; C.'51, § 2179.]

Where it is sought to restrain the sale of property on execution under a judgment, on the ground that the judgment is void, the suit must be brought in the county and court where the judgment was obtained: *Anderson v. Hall*, 48–346; *Bennett v. Hanchett*, 49–71; *Grattan v. Matteson*. 51–622.

This provision is applicable in case of special as well as of general execution: *Lockwood v. Kitteringham*, 42–257.

It seems, however, that it would not apply where it should be sought to enjoin the sale of property not belonging to defendant in execution, but belonging to a third person who seeks the injunction: *Ibid.*

Where the object of the action is to declare a judgment or final order of a court invalid, action must be brought in the court where the judgment or order was obtained; but where it is sought to enjoin the enforcement of a judgment because of some matter which has arisen since the judgment was rendered, and not on the ground that it should never have been entered, or that it is invalid, or that it should not be enforced, the action need not be brought in the court where the judgment was recovered, but may be brought in the county of defendant's residence: *Baker v. Ryan*, 67–708.

An action to set aside a sheriff's sale and

deed on the ground that the property was exempt as a homestead may be brought in a different court from that in which the judgment was rendered: *Visek v. Doolittle*, 60–602.

When a transcript of a judgment before a justice of the peace is filed in the office of the clerk of the circuit court, it becomes a judgment of that court, and a suit to enjoin proceedings thereon must be brought in that court: *Anderson v. Hall*, 48–346.

If the action is brought in the wrong county the court acquires no jurisdiction even by consent, and the action cannot be removed to the proper county: *Ibid.*

When a judgment is absolutely void by reason of want of notice whereby jurisdiction is not acquired, an action to cancel it may be brought in any court of competent jurisdiction as well as in the court in which it was rendered, or in any other court in the county wherein the court was held which rendered the void judgment: *State Ins. Co. v. Waterhouse*, 78–674; *Phelan v. Johnson*, 80–727.

But where a judgment was rendered in the supreme court, which, though it may have been erroneous, was not void, and execution thereon was issued to the sheriff of the county from which the case had been appealed, *held*, that injunction proceedings in the district court of such county to restrain the enforcement of such execution were improperly brought, and that the action of the judge of such court in allowing an injunction would be corrected by *certiorari: Phelan v. Johnson*, 80–727.

Where an execution issuing from the supreme court is sought to be enjoined, the action may properly be brought in the court of any county where it is sought to enforce such execution: *Davis v. Bonar*, 15–171; *Massie v. Mann*, 17–131.

The district court has no jurisdiction to restrain proceedings on a judgment of the supreme court: *Oberholtzer v. Hazen*, 70 N. W., 207.

SEC. **4365. Bond in such case.** In an action to enjoin the proceedings in a civil action, or on a judgment or final order, the bond must be further conditioned to pay such judgment, or comply with such final order if the injunction is not made perpetual, or to pay any judgment that may be ultimately recovered against the party obtaining the injunction on the cause of action enjoined. [Same.]

Where, in an action to enjoin the enforcement of a judgment, the bond does not obligate the sureties to pay the amount of the judgment, but is framed in accordance with § 4363, the court cannot, in the injunction proceeding, render judgment against the sureties on the bond, they not being parties to the action: *Spencer v. Sherwin*, 86–117; *Grove v. Bush*, 86–94.

SEC. **4366. Penalty.** The penalty of the bond must be twice the probable amount of liability to be thereby incurred. [C.'73, § 3397; R., § 3779; C.'51, § 2195.]

SEC. **4367. Defendant to show cause.** The court or judge, before granting the writ, may allow the defendant an opportunity to show cause why such order should not be granted. [C.'73, § 3398; R., § 3781; C.'51, § 2197.]

SEC. **4368. Application for dissolution.** If the order is granted without allowing the defendant to show cause, he may, at any time before the next term of the court, apply to the judge who made the order to vacate or modify the same, or the application may be made to the judge of the court in which the action is pending. [C.'73, § 3399; R., § 3782; C.'51, § 2198.]

SEC. **4369. Notice—showing.** The application must be with notice to the plaintiff, upon the ground that the order was improperly granted, or it may be founded on the answer of defendants and affidavits. In the latter case, the plaintiff may fortify his application by counter affidavits, and have reasonable time therefor. [C.'73, § 3400; R., § 3783; C.'51, § 2199.]

Upon answer: Where the facts alleged in the petition as a ground for the injunction are plainly, directly and fully denied by the answer, the injunction may be dissolved upon the answer alone: *Shricker v. Field*, 9–366; *Anderson v. Reed*, 11–177; *Stevens v. Myers*, 11–183; *Taylor v. Dickinson* 15–485; *Des Moines Nav. & R. Co. v. Carpenter*, 27 487; *Ingraham v. Chicago, D. & M. R. Co.*, 34–249; *Russell v. Wilson*, 37–377.

In a particular case, *held*, that the equities of the petition were sufficiently denied in the answer to warrant a dissolution: *Carrothers v. Newton Mineral Spring Co.*, 61–681.

Where defendant bases his motion to dissolve the temporary injunction on his answer alone the plaintiff may resist the dissolution by affidavits in support of his petition, although affidavits are offered by defendant: *Palo Alto Banking, etc., Co. v. Mahar*, 65–74.

An answer which does not fully meet the equities set up in the petition will not justify the dissolution of a temporary injunction, although it may be sufficient to support a judgment for defendant on the final trial: *Trotter v. Paunley*, 39–203.

Where one material allegation of a petition for injunction to restrain the collection

of a judgment was not denied by the answer, *held*, that the temporary injunction should not have been dissolved, but should have been continued to the final hearing: *Gates v. Ballou*, 54–485.

Where plaintiff sought to enjoin the enforcement of a judgment, alleging that large payments had been made thereon which had not been credited, and that fact was not denied in the answer, *held*, that the temporary injunction should have been dissolved only as to that part of the injunction not alleged to have been paid, and as to the other part it should have been continued to the hearing: *Marsh v. Mead*, 57–535.

To warrant the dissolution upon answer alone, the answer must be upon personal knowledge, and of such character as to entitle it to as much credit as the averments of the bill. If its statements are such as to leave the mind of the court in reasonable doubt as to whether the equities are sufficiently answered, the injunction ought not to be dissolved: *Sinnett v. Moles*, 38–25; *Fargo v. Ames*, 45–494.

Even where all the equities of the bill are denied by the answer, it does not follow as a matter of course that the injunction will be dissolved. Its dissolution or continuance rests very much in the sound discretion of the court, to be governed by the nature of the case: *Shricker v. Field*, 9–366.

The rule that the refusal of the lower court to dissolve an injunction will not be disturbed unless it appears that its discretion has been abused does not apply to cases involving questions of law arising on the face of the petition itself. If it appear on the face of the pleading that as a matter of law the injunction should not have been granted, it will be dissolved: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

An injunction should not be dissolved without proof, on an answer which admits the allegations of the petition and seeks to avoid their effect by pleading affirmative matter: *Shricker v. Field*, 9–366; *Judd v. Hatch*, 31–491; *Fargo v. Ames*, 45–494; *Mills v. Hamilton*, 49–105; *Huskins v. McElroy*, 62–508; *Hayes v. Billings*, 69–387.

Upon the hearing of a motion to dissolve an injunction the plaintiff may file an amended petition, and if it states a good cause for an injunction, not overborne by the adverse showing, the injunction should be continued: *Crawford v. Paine*, 19–172.

Where the final relief sought will be ineffectual if the temporary injunction is dissolved, it will be continued to the final hearing, even though the equities of the bill are fully denied in the answer: *Joseph v. McGill*, 52–127.

Where fraud is the gravamen of a petition, or it is apparent that by dissolution a party will lose all benefit to accrue from final success, the court may refuse to dissolve the injunction until final hearing: *Sinnett v. Moles*, 38–25; *Stewart v. Johnston*, 44–435; *Brigham v. White*, 44–677; *Fargo v. Ames*, 45–494; *Johnston v. Chicago, M. & St. P. R. Co.*, 58–537.

The general rule is that where all the material allegations of the petition for an injunction are fully and satisfactorily denied in the answer, upon the personal knowledge of the defendant, the preliminary injunction, if one has been allowed, will be dissolved. There are some exceptions to this rule, and one of them is where the gravamen of the petition is fraud: *Walker v. Stone*, 70–103.

Dissolution: The ruling of the court continuing a preliminary injunction to the hearing is largely a matter of discretion, and not to be reversed unless such discretion has been abused: *Ibid.*

Where there was no showing that the continuance of the injunction to the hearing would result in any substantial injury to defendant, and it appeared that the dissolution might materially injure plaintiff, *held*, that a refusal of the court to dissolve the injunction would not be reversed on appeal: *Kelley v. Briggs*, 58–332.

An injunction restraining the taking of private property for public use until compensation is made should not be dissolved while the question as to the right to compensation is pending and undetermined: *Trustees of Iowa College v. Davenport*, 7–213; *Connolly v. Griswold*, 7–416.

It being provided by statute that an injunction to restrain a nuisance can only be granted upon reasonable notice of the time and place of application to the party to be enjoined, *held*, that an injunction for that purpose, having been granted without notice, should be set aside on motion, and that an appearance to move to dissolve, accompanied by answer to the petition in the case was not a waiver of the right to have such dissolution: *Hughes v. Eckerson*, 55–641.

While an injunction should not be dissolved until after answer by defendant, this rule has no application where the party failing to answer is a merely nominal party: *Shricker v. Field*, 9–366.

Where it appeared that there had been no unreasonable delay in the service of the notice after the granting of the writ, *held*, that a motion to dissolve for want of notice was properly overruled, when made after service; also, that appearance waived any objection to the form or sufficiency of such notice: *Sweatt v. Faville*, 23–321.

As to curing defects by amendment, to prevent dissolution, see notes to § 4356.

An injunction cannot be dissolved on the ground that the service of the writ precedes the acquisition of jurisdiction of the person by appearance when the original notice is defective: *District T'p v. District T'p*, 54–115.

Where the writ of temporary injunction is broader than the petition, the remedy is not by motion for dissolution, but for modification of the writ: *Ford v. Loomis*, 62–586.

Upon motion to dissolve, the opposite party is not entitled, as a matter of course, to a continuance: *Taylor v. Dickinson*, 15–483.

The renewal of a motion already filed in another court to dissolve the injunction is not a second motion within the prohibition of the statute: *Carrothers v. Newton Mineral Spring Co.*, 61–681.

It may be that, upon a dissolution, damages which are the immediate and necessary result of the allowance of the writ, and which depend simply upon computation for their

determination, may be recovered by a summary proceeding; but damages consequential in their nature, as expenses, attorney fees, etc., can only be recovered in an independent action: *Taylor v. Brownfield*, 41–264.

Sustaining a motion to dissolve a temporary injunction which has been granted *ex parte* upon a showing then made does not bar the right to a perpetual injunction upon full proof at the final hearing: *Fisher v. Beard*, 40–625.

The dissolution of the injunction does not necessarily operate to dismiss the bill: *Russell v. Wilson*, 37–377; *Massie v. Mann*, 17–131; *Walters v. Fredericks*, 11–181.

While the continuance or dissolution of an injunction rests in the sound discretion of the court originally passing upon the question, yet this is a legal discretion, and if based upon sufficient grounds will be reversed on appeal: *Sinnett v. Moles*, 38–25; *Stewart v. Johnston*, 44–435.

Appeal from order of dissolution: After the dissolution of a temporary injunction it cannot be restored on appeal, although another might be granted if the case has not proceeded to a hearing, and if the granting of another such injunction would be of any use: *Ellwood Mfg. Co. v. Rankin*, 70–403.

SEC. **4370. Dissolution.** The judge shall decide the matter at once, unless some good cause for delay is shown, but the vacation of the order shall not prevent the action from proceeding, if anything is left to proceed upon. [C.'73, § 3401; R., § 3784; C.'51, § 2200.]

The dissolution of the injunction does not operate to dismiss the action. See notes to preceding section.

SEC. **4371. Only one motion.** Only one motion to dissolve or modify an injunction upon the whole case shall be allowed. [C.'73, § 3402; R., § 3793.]

The fact that an injunction is granted after notice and hearing does not make it improper to interpose a motion to dissolve: *Hinkle v. Saddler*, 66 N.W., 765.

The objection that a second motion to dissolve is not proper cannot be raised for the first time in the supreme court: *Ibid.*

SEC. **4372. Proceedings for violation.** Any judge of the supreme, district or superior court, being furnished with an authenticated copy of the injunction and satisfactory proof that it has been violated, shall issue his precept to the sheriff of the county where the violation occurred, or to any other sheriff, naming him, more convenient to all parties concerned, directing him to attach the defendant and bring him forthwith before the same or some other judge, at a place to be stated in said precept. [C.'73, § 3403; R., § 3785; C.'51, § 2201.]

Where a party is in court and hears an order for the injunction pronounced, he is as much bound thereby as if he had actually been served with the writ: *Milne v. Van Buskirk*, 9–558.

So long as an injunction remains in force the party bound thereby must obey it: *Langworthy v. McKelvey*, 25–48.

In seeking to punish a party for the violation of an injunction it must be taken in the form in which it was looked at by the court rendering it: *Lamb v. Burlington, C. R. & M. R. Co.*, 39–333.

Proof of a violation of the injunction should usually be made by affidavit: *State v. Meyers*, 44–580.

Contempt of court in violating an injunction should be dealt with as other contempts. The proceedings are merely incidental to the original proceeding and there is no appeal: *First Cong. Church v. Muscatine*, 2–69.

Any error in the injunction proceeding in granting an injunction without proper evidence cannot be raised by way of defense to a proceeding for contempt in violating such injunction: *Jordan v. Circuit Court*, 69–177.

The fact that the order allowing an injunction is not indorsed on the petition, but is entered on a separate piece of paper, will not prevent a violation of such injunction being a contempt: *Ibid.*

A party is liable for all damages resulting from a refusal on his part to obey the mandate of an injunction granted against him: *Benson v. Connors*, 63–670.

A judge may in vacation make an order imposing a fine and imprisonment for contempt in violating an injunction. The judge being authorized by statute to perform such judicial act in vacation, his act when so done has the force and effect of an act done by the court: *McLane v. Granger*, 74–152.

The proceeding to punish a violation of an injunction is criminal in its nature, and being merely incidental to the original proceeding need not be entitled as of the original cause, but is properly brought in the name of the state as plaintiff: *Fisher v. Cass County Dist. Court*, 75–232.

The requirement that an authenticated copy of the injunction shall be furnished in a proceeding for contempt for violation thereof does not apply where the proceeding for contempt is by information filed in the court granting the injunction and not before the judge at chambers: *Silvers v. Traverse*, 82–52.

Proceedings for contempt for the violation of an injunction may be reviewed by *certiorari*, whether the defendant has or has

not been punished, in all cases where a substantial right, either public or private, is involved, which can only be protected or enforced by the proceeding in contempt: *Lindsay v. Clayton Dist. Court*, 75–509.

SEC. **4373. Contempt purged.** When produced, he may file his affidavit denying or excusing the contempt, and the court may hear other evidence oral or by affidavit, and if satisfied that the defendant is not guilty, or that the contempt is sufficiently excused, he shall be released, and all affidavits shall be filed with and preserved by the clerk. [C.'73, § 3404; R., § 3786; C.'51, § 2202.]

SEC. **4374. Bond required.** If not so released, the judge may require him to give bond, with surety, for his appearance at the next term of the court and for his future obedience to the injunction, which shall be filed with the clerk. [C.'73, § 3405; R., § 3787; C.'51, § 2203.]

SEC. **4375. Commitment.** If he fails to give such bond, he may be committed to the jail of the county where the proceedings are pending until the next term of court, unless he gives the bond in the meantime. [C.'73, § 3406; R., § 3788; C.'51, § 2204.]

SEC. **4376. Contempt punished.** The court at the next term shall act upon the case, and, if a contempt is found to have been committed, punish it in the usual mode. [C.'73, § 3407; R., § 3789; C.'51, § 2205.]

See notes to § 4372. As to violation of injunction in liquor cases, see §§ 2384, 2407.

CHAPTER 13.

OF SUBMITTING CONTROVERSIES WITHOUT ACTION OR IN ACTION.

SECTION **4377. Agreed statement of facts.** Parties to a question in difference, which might be the subject of a civil action, may, without action, present an agreed statement of the facts to any court having jurisdiction of the subject-matter. [C.'73, § 3408; R., § 3408; C.'51, § 1843.]

Pleadings are not necessary in such a case: *Donald v. St. Louis, K. C. & N. R. Co.*, 52-411.

SEC. **4378. Affidavit.** It must be shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto. [C.'73, § 3409; R., § 3409; C.'51, § 1844.]

This provision is jurisdictional, and in the absence of compliance therewith a court cannot take cognizance of the case: *Keeline v. Council Bluffs*, 62-450.

SEC. **4379. Judgment.** The court shall hear and determine the case and render judgment as if an action were pending. [C.'73, § 3410; R., § 3410; C.'51, § 1845.]

SEC. **4380. Record.** The statement, the submission and the judgment shall constitute the record. [C.'73, § 3411; R., § 3411.]

SEC. **4381. Judgment enforced.** The judgment shall be with costs, and it may be enforced and shall be subject to review in the same manner as if it had been rendered in an action, unless otherwise provided for in the submission. [C.'73, § 3412; R., 3412.]

SEC. **4382. Submission of cause pending.** The same may also be done at any time before trial in an action pending, subject to the same requirements and attended by the same results as in a case without action, and such submission of a stated case shall be an abandonment by both parties of all pleadings filed in such cause, and the cause shall stand on the agreed case alone, which must provide for any lien created for attachment, and for any property in the custody of the law, else such lien and custody will be held to be waived. [C.'73, § 3413; R., § 3413.]

Where pending the trial of a cause the facts were agreed upon by the parties "to save expense and to simplify the issue" upon which the court should render judgment,

held, that it was the duty of the court to give such judgment, whether legal or equitable, as the facts agreed upon should be deemed to warrant or require: *Logan v. Hall*, 19–491.

Where a party has submitted a cause upon an agreed statement of facts, the court should enter such judgment as to his rights under the facts agreed upon as will establish the respective rights of the parties: *Kraft v. James*, 64–159.

SEC. **4383. Judgment.** The parties may, if they think fit, enter into an agreement in writing that, upon the judgment of the court being given on the question of law raised, particular property therein described, or a sum of money fixed by the parties or to be ascertained by the court or in such manner as the court may direct, shall be delivered to and vested in one of the parties by the other, or, in case of money, shall be paid by one of such parties to the other of them, either with or without costs of the action; and the judgment of the court may be entered for the transfer and delivery of such property, or for such sum as shall be so agreed or ascertained, with or without costs, as the case may be. [C.'73, § 3414; R., § 3414.]

SEC. **4384. Costs.** In case no agreement is entered into as to the costs, they shall follow the event of the action, and be recovered by the successful party. [C.'73, § 3415; R., § 3415.]

CHAPTER 14.

OF ARBITRATION.

SECTION **4385. What controversies.** All controversies which might be the subject of civil action may be submitted to the decision of one or more arbitrators, as hereafter provided. [C.'73, § 3416; R., § 3675; C.'51, § 2098.]

Under this section any "civil action" may be submitted to arbitration, and in this term is included everything except those cases which come under the criminal jurisdiction of the court. Therefore an equitable cause of action is subject to submission: *Tomlinson v. Hammond*, 8–40.

The question whether or not an alleged nuisance should be abated may be submitted to arbitration without the submission of any claim for damages: *Richards v. Holt*, 61–529.

SEC. **4386. Written agreement.** The parties themselves, or those persons who might lawfully have controlled a civil action in their behalf for the same subject-matter, must sign and acknowledge a written agreement, specifying particularly what demands are to be submitted, the names of the arbitrators, and court by which the judgment on their award is to be rendered. [C.'73, § 3417; R., §§ 3676–7; C.'51, §§ 2099, 2100.]

Method of submission: The subject-matter of the award must be definitely specified: *Woodward v. Atwater*, 3–61.

Under the statutory provision as to submission the arbitrators must be named in the agreement in order that the parties may have a judgment on the award: *McKnight v. McCullough*, 21–111.

If the submission is not acknowledged as required by statute, the award cannot be received as made under a statutory submission, although it may be good at common law, and an action maintained thereon: *Fink v. Fink*, 8–313.

If submission is by order of court, an acknowledgment is not necessary: *Ibid.*

The same degree of particularity is not required in the acknowledgment of an agreement of submission as is required in case of an instrument conveying real property: *McKnight v. McCullough*, 21–111.

An agreement for submission must contain a provision for judgment by some court upon the award. Without this it will not be such a submission as contemplated by statute, though it may be binding at common law as a settlement; but, in such cases, the result cannot be treated as an award under the statute: *Love v. Burns*, 35–150.

Where submission of arbitration between a school district and its treasurer covered "the money alleged to be due and owing" by the treasurer of the district, *held*, that such submission properly covered money due for several years, including some for which there ought to have been previous settlement: *District T'p v. Rankin*, 70–65.

The submission to arbitration in a particular case *held* to be sufficiently certain: *Donican v. Mulry*, 69–583.

In a particular case, *held*, that a submission to arbitration though not in statutory form was sufficient to render the award binding upon the parties: *Skrable v. Pryne*, 93–691.

A party in interest cannot be bound by

an agreement to arbitrate made by other parties in interest without his authority: *Sweney v. Davidson*, 68–386.

A corporation may submit controversies to arbitration although no such express power is conferred by its charter. Courts are disposed to encourage settlement by arbitration: *District T'p v. Rankin*, 70–65.

It not appearing that the arbitrators were not sworn, the presumption will be that they were sworn as required by law, and the submission being in accordance with the statutory proceedings thereunder must be such as directed in the case of a statutory award, and an action thereon at law as upon a common law award cannot be maintained: *Older v. Quinn*, 89–445.

The parties may agree that judgment on the award shall be rendered by a justice of the peace, and if so, he will have jurisdiction, provided the amount is such as to bring the case within his cognizance: *Van Horn v. Bellar*, 20–255; *King v. Hampton*, 4 G. Gr., 401; *Whitis v. Culver*, 25–30.

Where it was provided in the agreement that judgment should be rendered "by any court having jurisdiction," and judgment was rendered by the district court of the county where both parties resided, *held*, that as such court was the only one which (at that time) had jurisdiction, the agreement was sufficient to warrant such judgment: *McKnight v. McCullough*, 21–111.

Common-law submission: The statutory provisions as to the method of submission, etc., must be followed if the parties desire judgment upon the award; but a submission and award may be good as at common law between the parties, although these provisions are not observed, as, for instance, where the submission is in parol. An award so made may be enforced by action thereon, and may be set up as a defense to an action brought for the subject-matter therein settled: *Conger v. Dean*, 3–463; *Foust v. Hastings*, 66–522.

Parties may bind themselves by an agreement to submit a controversy to arbitration in a manner different from that required by statute, and if the submission and award are sufficiently certain to constitute a bar to a subsequent action for the same matter the award will be upheld: *Zook v. Spray*, 38–273.

A common-law submission to arbitration is always construed most liberally and with a view of effecting the purpose of the parties to it, even though it does not comply with the statutory requirements: *McKinnis v. Freeman*, 38–364.

To defeat a recovery on an award under a common-law submission, it is necessary for defendant to impeach the award in some proper manner: *Foust v. Hastings*, 66–522.

The legality and effect of an arbitration and award not made in accordance with the provisions of the statute relating to arbitration must be determined by the rules of the common law: *Thornton v. McCormick*, 75–285.

An award will not be set aside for error in the judgment of the arbitrators, nor for a mistake which would not have had any material influence on the arbitrators in reaching their conclusions. To justify the interference of a court there must be a showing of fraud on the part of the party relying upon the award, or a material mistake which entered into it: *Ibid.*

A common-law award must be held to be conclusive between the parties as to all matters submitted to arbitration unless a material mistake appear upon the face of the award, or unless equitable grounds for setting it aside are shown. When an award is questioned on equitable grounds the pleading attacking it should allege facts, as distinguished from legal conclusions, which show that it should be set aside: *Ibid.*

Where the agreement for arbitration did not require the witness to be sworn, the fact that the arbitrators gave more credence to the unsworn statements of plaintiff than to the written evidence offered by defendant, *held* to be no ground for setting aside the award: *Ibid.*

After a party has accepted benefits given to him by an award he cannot be heard to say that it is illegal: *Ibid.*

SEC. **4387. What submitted.** The submission may be of some particular matters or demands, or of all demands which the one party has against the other, or of all mutual demands on both sides. [C. '73, § 3418; R., § 3678; C. '51, § 2101.]

SEC. **4388. Action pending.** A submission to arbitration of the subject-matter of an action may also be made by an order of court, upon agreement of parties, after action is commenced. [C. '73, § 3419; R., § 3679; C. '51, § 2102.]

In case of submission by order of court, upon agreement of parties, the pleadings constitute the submission, and an agreement that judgment may be rendered on the award is not necessary. The court does not lose its control of the matter and may render judgment upon the award, or may set it aside, in whole or in part: *Schohmer v. Lynch*, 11–461.

A submission of matters involved in a pending suit may be made by agreement of parties without an order of court: *Higgins v. Kinneady*, 20–474.

The term "suit," used in the statutory provisions as to submitting pending proceeding, is broader than the term "action," and a special proceeding may, by order of court, be submitted to arbitrators by agreement of parties: *Marion v. Ganby*, 68–142.

Submission of a pending suit may be made without any instrument in writing. The statutory provision requiring a written agreement, signed and acknowledged, is applicable to controversies in which no action has been commenced: *Ibid.*

SEC. **4389. Procedure.** All the rules prescribed by law in cases of referees are applicable to arbitrators, except as herein otherwise expressed,

or except as otherwise agreed upon by the parties. [C.'73, § 3420; R., § 3680; C.'51, § 2103.]

Unless the submission provides otherwise, or a consent to a majority award is in a proper manner shown, all the arbitrators must concur in the award: *Richards v. Holt*, 61–529.

Where an agreement for submission provided that the award might be made by the arbitrators or any two of them, and after the award had been made and set aside a resubmission was ordered by the court, *held*, that if, before such resubmission, one of the arbitrators resigned, a submission for a finding by the two remaining arbitrators would not be valid, and that the agreement must be construed as contemplating a submission to three arbitrators: *Cary v. Bailey*, 55–60.

The finding of arbitrators upon a hearing of which one party had no notice, and at which he was not present nor represented, will not be binding upon him, though the instrument under which the arbitration is had does not expressly provide that the parties are to have notice or be heard: *Dormoy v. Knower*, 55–722.

The parties may, by agreement, determine the rules that shall govern the arbitrators, as that the award of the majority shall be binding: *Thompson v. Blanchard*, 2–44.

It need not appear affirmatively from the return that the witnesses were examined under oath, nor, it seems, that the arbitrators were sworn: *Tomlinson v. Hammond*, 8–40.

The arbitrators are not required, like referees, to make separate return of facts found and conclusions of law thereon: *McKnight v. McCullough*, 21–111.

It is competent for the parties to agree to a hearing without the arbitrators being sworn, and it not appearing whether or not they were sworn it will be presumed that the law was complied with, and the parties must proceed under the award as a statutory award, and cannot sue thereon as a common law award: *Older v. Quinn*, 89–445.

SEC. **4390. Revocation.** Neither party shall have the power to revoke the submission without the consent of the other. [C.'73, § 3421; R., § 3681; C.'51, § 2104.]

SEC. **4391. Neglect to appear.** If either party neglects to appear before the arbitrators after due notice, except in case of sickness, they may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them. [C.'73, § 3422; R., § 3683; C.'51, § 2106.]

SEC. **4392. Time for award.** If the time within which the award is to be made is fixed in the submission, one made after that time shall not have any legal effect, unless made upon a recommitment of the matter by the court to which it is reported. [C.'73, § 3423; R., § 3683; C.'51, § 2106.]

SEC. **4393. When time not fixed.** If the time of filing the award is not fixed in the submission, it must be filed within one year from the time the agreement is signed and acknowledged, unless by mutual consent the time is prolonged. [C.'73, § 3424; R., § 3684; C.'51, § 2107.]

SEC. **4394. Award—how made.** The award must be in writing, and shall be delivered by one of the arbitrators to the court designated in the agreement, or it may be inclosed and sealed by them and transmitted to the court, and not opened until the court so orders. [C.'73, § 3425; R., § 3685; C.'51, § 2108.]

Return of award: Although the award is not transmitted to the court in the method required by statute, yet it will be sufficient if it is delivered by one of the arbitrators to the clerk, and all chance for prejudice from the irregularity is expressly rebutted: *Higgins v. Kinneady*, 20–474.

A delivery of the award to the clerk in person in vacation, *held* sufficient: *McKnight v. McCullough*, 21–111.

Where the affidavit of one of the arbitrators filed as required by statute did not give the names of the parties to the controversy, but by mistake gave the names of the other arbitrators as the persons by whom he had been appointed, etc., *held*, that the notary taking such affidavit might be allowed to testify that it was properly sworn to, and that the names of the arbitrators had been inserted by mistake in place of the names of the parties: *Higgins v. Kinneady*, 20–474.

Clerical defects working no prejudice should not invalidate the proceedings: *Ibid.*

An affidavit of arbitration made and filed after the making of the award, and in pursuance of agreement between the parties that it might be so done, *held* sufficient: *Ogden v. Forney*, 33–205.

The arbitrators need not return separate findings of facts and conclusions of law: See notes to § 4389.

Sufficiency: Where the award, under the submission of a controversy as to the amount due to a municipal corporation from its treasurer, stated the amount of his deficiency, *held*, that while it might have made a more detailed statement of the account, the finding would not be open to objection on the ground of uncertainty: *District Tp v. Rankin*, 70–65.

Validity; presumptions: Every presumption is in favor of the correctness of the de-

termination of the arbitrators: *Tomlinson v. Hammond*, 8–40.

Where no mistake or injustice in the award is shown it will be upheld: *Struthers v. Clark*, 40–508.

An award has the same force and effect as the verdict of a jury, and every reasonable presumption is in favor of the correctness of an arbitrator's determination. The mode in which the arbitration is conducted, and the methods of procedure adopted, will not be reviewed by the courts except in clear cases of error, mistake, fraud or partiality: *Tank v. Rohweder*, 67 N. W., 106.

In a particular case, *held*, that the award of arbitrators was sufficiently supported by their findings, and that the fact that they embodied in their award decisions and recommendations entirely foreign to the questions submitted to them would not avoid the arbitration: *Lynch v. Nugent*, 80–422.

Impeachment: The award may be impeached by proof that matters were considered by the arbitrators which were not submitted, or that they have committed material errors or mistakes to the prejudice of either party, or have omitted to consider matters submitted, or on account of fraud: *Thompson v. Blanchard*, 2–44.

Proof is admissible to show that no evidence was given to the arbitrators upon a particular subject, the burden being upon the party seeking to impeach the arbitration to satisfy the jury of any mistake of the arbitrators, and also that he was prejudiced thereby: *Ibid.*

The award may be impeached by showing that the arbitrators did not pass upon questions embraced in the submission and essential to determine the rights of the parties: *Sharp v. Woodbury*, 18–195; *Mississippi & M. R. C., v. Sioux City & St. P. R. Co.*, 49–604.

In an action upon an award good at common law, but not made under a statutory submission, the fact that the arbitrators have considered matters not submitted, or have committed such mistakes as prejudice either party, or have omitted to consider matters which were submitted, may be shown for the purpose of impeaching the award: *Love v. Burns*, 35–150.

It is competent to introduce evidence to show that one of the arbitrators intrusted with the award for delivery to the court discovered a mistake in it before delivery and thereupon refused to deliver it: *Shulte v. Hennessy*, 40–352.

Effect: Where an agreement for submission to arbitration provided that the award should be made within thirty days, and it was afterwards made and set aside by mutual consent, and an action at law was commenced after the expiration of the thirty days, no further steps having been taken under the submission by either party, *held*, that the submission would not bar the action, and it was not incumbent upon the party bringing the action to first apply to have the arbitrators act, or others appointed, and a new award made: *Simplot v. Simplot*, 14–449.

An award cannot be relied upon unless pleaded: *Dougherty v. Stewart*, 43–648.

Civil liability of arbitrators: Arbitrators act in a judicial capacity, and cannot be held liable for damages for an award alleged to have been made fraudulently and corruptly, if within their jurisdiction: *Jones v. Brown*, 54–74.

Where an award was filed in defiance of an injunction, *held*, that it must be presumed that it was disregarded and worked no prejudice, and that an action for damages against the arbitrators would not lie: *Ibid.*

The fact that the award is valueless by reason of wilful misconduct of the arbitrators may be shown for the purpose of defeating their claim for compensation for services: *Bever v. Brown*, 56–565.

SEC. **4395. Arbitration by agreement.** Awards by arbitrators who may have been chosen without complying with the provisions of this chapter shall nevertheless be valid and binding upon the parties thereto, as other contracts, and may be impeached only for fraud or mistake, but such award can only be enforced by an action.

SEC. **4396. Hearing in court.** The award shall be entered on the docket of the court at the term to which it is returned, as an action is entered, and shall be called up and acted upon in its order, but the court may require actual notice to be given to either party, when it appears necessary and proper, before proceeding to act on the award. [C. '73, § 3426; R., § 3686; C. '51, § 2109.]

SEC. **4397. Rejection—rehearing.** The award may be rejected by the court for any legal and sufficient reasons, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon by the parties, or appointed by the court if they cannot agree. [C. '73, § 3427; R., § 3687; C. '51, § 2110.]

Power of court over: As to the power of a court over an award there is a material difference between the cases where the reference is under a statute provision or is made by a rule of court, and those where it is solely by an agreement of the parties as at common law. In the latter case the arbitrators constitute a tribunal created by the parties themselves, and the courts have but little authority over them. Nearly all the authority which does exist in regard to them is in courts of equity: *Burroughs v. David*, 7–154.

Therefore, *held*, that allegations of fraud of the opposite party in not making a full and true exhibit of the matters relating to the arbitration on the hearing before the arbitrators could not be considered in an action on the arbitration bond: *Ibid.*

As a justice to whom the award is made has no authority to try the case upon its merits, but only to render judgment on the award, or reject it and recommit it for a new hearing, no trial upon the merits can be had on an appeal from the action of the justice: *Whitis v. Culver*, 25–30.

Setting aside: An award will be set aside for material mistakes and errors prejudicial to either party, and for omission to consider matters submitted: *Adams v. New York Bowery F. Ins. Co.*, 85–6.

To entitle a party to have an award set aside on the ground of mistake or fraud he must not only clearly show the mistake or fraud, and that he was prejudiced thereby, but also that, if it had not occurred, the award would have been different: *Tank v. Rohweder*, 67 N. W., 106.

To entitle a party to have an award set aside on the ground of mistake, he must not only clearly show a mistake, and that he was prejudiced thereby, but also that if it had not occurred the award would have been different: *Tomlinson v. Tomlinson*, 3–575; *Gorham v. Millard*, 50–554.

Although an award can only be set aside for mistake, partiality, or fraud in the arbitration, yet, to constitute such conduct, evil intention is not a necessary ingredient; and where one of the parties was informed by one of the arbitrators that no testimony upon a certain question would be received and afterwards such testimony was received on the other side, *held*, that the award should be set aside: *Sullivan v. Frink*, 3–66.

An award should not be set aside for newly discovered evidence which is merely cumulative: *McDaniels v. Van Fosen*, 11–195.

The action of arbitrators in awarding costs to the successful party should not be interfered with unless a clear abuse of discretion is shown: *Ratliff v. Mann*, 5–423.

The court cannot change the award as to the taxation of costs. Its only authority is to recommit if improper: *Landreth v. Bass*, 12–606.

Where three arbitrators were appointed under an agreement that the award of a majority of them should be binding, and one of them refused to act, *held*, that the award of the other two should have been set aside, the claim that the arbitrator not acting had refused to act by reason of the procurement or at the instance of the adverse party not being established: *Kent v. French*, 76–187.

Resubmission: The award should only be rejected for want of jurisdiction in the arbitrators, but it should be recommitted for any reason which would justify the granting of a new trial after verdict: *Depew v. Davis*, 2 G. Gr., 260.

Upon recommitment the arbitrators need not be again sworn, nor need the award upon such commitment show that they were sworn in the first instance: *Tomlinson v. Hammond*, 8–40.

Disqualification or misconduct of arbitrators: Where a contract of lease provided that the rents should be determined by an appraisal of the property by three persons, of whom each should appoint one, and the two thus chosen should select the third, *held*, that such contract implied that the persons to be selected should be indifferent between the parties, and that it appearing that the appraiser appointed by one of the parties was a brother and confidential agent of such party, which fact was unknown to the other, the appraisal was void: *Pool v. Hennessy*, 39–192.

Where it appeared that one of the arbitrators procured the signature of another by representing that the other would sign it, which was not done, and such arbitrator was persistent in signing the award, although counsel had not been heard in argument and before the case was finally submitted, and when it appeared that plaintiff desired to introduce further evidence, and that such arbitrator was on unfriendly terms with plaintiff, *held*, that such arbitrator was not a proper person to act, and that a resubmission of the matter to the same arbitrators was error. In such case the award should have been rejected and the parties left to their ordinary remedies: *Brown v. Harper*, 54–546.

Setting aside in equity: Where a new school district had been organized from a part of the territory of an old one, and the two boards, upon failure to agree to the division of assets and liabilities, had appointed arbitrators as required by § 2744, *held*, that a court of equity might entertain jurisdiction to set aside an award of such arbitrators for gross errors in computation: *District T'p v. District T'p*, 54–286.

SEC. **4398. Force and effect of award.** When the award has been adopted, it shall be filed and entered on the records, and shall have the same force and effect as the verdict of a jury. Judgment may be entered and execution issued accordingly. [C.'73, § 3428; R., § 3688; C.'51, § 2111.]

The court has no authority to change the award by adding interest thereto. It should enter judgment on the award according to its terms, unless it appears that the award is inequitable, or that the arbitrators abused their discretion in apportioning the costs: *District T'p v. Independent Dist.*, 60–141.

Where the agreement of submission specifies the court wherein the award is to be filed, this sufficiently indicates the court wherein the judgment is to be rendered: *Ibid.*

As to what court may be given jurisdiction to render judgment, see notes to § 4386.

When the award has been returned to court it is a proceeding in court and prior to its adoption is in the nature of the verdict by a jury agreed upon but not yet reported. The parties cannot abandon the proceeding and sue upon the award thus made as a common law award: *Older v. Quinn*, 89–445.

SEC. **4399. Appeal.** When an appeal is taken from such judgment, copies of the submission and award, together with all affidavits, shall be

filed with the clerk of the supreme court. [C.'73, § 3429; R., § 3689; C.'51, § 2112.]

An appeal will not lie from the judgment of a justice of the peace on an award. Any error committed by him in rejecting or recommitting an award, or failure to do so, may be reviewed on writ of error: *Whitis v. Culver*, 25–30.

An appeal will lie from an order resubmitting a cause to arbitrators: *Brown v. Harper*, 54–546.

The acts of the court in sustaining a motion to set aside the award cannot be reveiwed where the record does not show upon what facts the court acted: *Hamble v. Owen*, 20–70.

SEC. **4400. Costs.** If there is no provision in the submission respecting costs, the arbitrators may apportion the same. [C.'73, § 3430; R., § 3690; C.'51, § 2113.]

SEC. **4401. Rights saved.** Nothing herein contained shall be construed to affect in any manner the control of the court over the parties, the arbitrators or their award; nor to impair or affect any action upon an award, or upon any bond or other engagement to abide an award. [C.'73, § 3431; R., § 3692; C.'51, § 2115.]

This section relates to the jurisdiction of the court over common law awards, and is intended to negative the idea that statutory means of arbitration are exclusive of the common law right: but it does not provide that parties after entering upon a statutory arbitration, and securing an award thereunder, may abandon the provisions of the statute with reference to such an award, and sue thereon as a common law award: *Older v. Quinn*, 89–445.

As to effect of common law awards, see notes to § 4386.

CHAPTER 15.

OF ACTIONS AGAINST BOATS OR RAFTS.

SECTION **4402. Seizure.** In an action brought against the owners of any boat or raft to recover any debt contracted by such owner, or by the master, agent, clerk or consignee thereof, for supplies furnished, or for labor done in, about or on such boat or raft, or for materials furnished in building, repairing, fitting out, furnishing or equipping the same, or to recover for the non-performance of any contract relative to the transportation of persons or property thereon, made by any of the persons aforementioned, or to recover damages for injuries to persons or property done by such boat or raft or the officers or crew thereof in connection with its business, a warrant may issue for the seizure of the same as herein provided. [C.'73, §§ 3432, 3445, 3447; R., §§ 3693, 3698, 3700; C.'51, § 2116.]

The jurisdiction of federal courts of admiralty is exclusive of the jurisdiction of the state court to entertain a proceeding *in rem* against a boat on a cause of action cognizable in admiralty, and corresponding provisions of the Revision, assuming to confer such jurisdiction upon the state courts, are unavailing for that purpose. (Overruling *Trevor v. Steamboat Ad. Hine*, 17–349): *The Hine v. Trevor*, 4 Wall., 555; *Walters v. Steamboat Mollie Dozier*, 24–192.

Under the provisions of the Revision, *held*, that the petition in such a proceeding *in rem* need not aver that the boat was within the jurisdiction of the state at the time suit was commenced. It is the service of the warrant that brings the property within the jurisdiction of the court. If the contract for the breach of which action is brought is violated within the waters of this state, and the boat is seized under warrant properly issued, the court will have jurisdiction although such contract was made elsewhere: *Baker v. Steamboat Milwaukee*, 14–214.

Under the provisions of Code of '51, which made certain charges a lien against the boat, *held*, that the seizure and sale of the boat under the laws of another state did not divest it of such lien: *Haight v. Steamboat Henrietta*, 4–472; *Odgen v. Odgen*, 13–176.

Also, *held*, that the boat was liable for money collected from consignments of goods for freight due a railroad company from whom the goods were received to be forwarded to their destination, and that such transaction was a "contract relative to the transportation of" freight: *Chicago, B. & Q. R. Co. v. Steamboat Woodsides*, 10–465.

The use of a barge may constitute a supply for which a claim against the boat may be enforced in such proceedings: *Steamboat Kentucky v. Brooks*, 1 G. Gr., 398.

It is sufficient to allege that the contract was made with the boat: *West v. Barge Lady Franklin*, 2–522.

Under the provisions of Code of '51, *held*, that the remedy intended was not designed solely for the benefit of the party furnishing

the supplies, but that a lien could be transferred by assignment and enforced by the transferee: *Strother v. Steamboat Hamburg*, 11–59.

A warrant and seizure of a boat thereunder is essential to confer jurisdiction upon the court. The proceeding is one *in rem*: *Ham v. Steamboat Hamburg*, 2–460.

One who renders service on a boat does not have a lien therefor until seizure of the boat under a warrant, and does not have priority over a chattel mortgage: *Seippel v. Blake*, 86–51.

Under § 3445 of Code of '73, which specifically made a raft liable for debts contracted by a pilot, *held*, that the raft was bound by such contract although it was agreed between the pilot and the owner that the former should bear all the expense: *Hanson v. Hiles*, 34–350.

Further as to that section, see *Seippel v. Blake*, 86–51.

SEC. **4403. Petition and warrant.** The petition must be in writing, sworn to, and filed with the clerk or a justice of the peace, who shall thereupon issue a warrant to the proper officer, commanding him to seize the boat or raft, its apparel, tackle, furniture and appendages, and detain the same until released by due course of law. [C.'73, § 3433; R., § 3701; C.'51, § 2121.]

SEC. **4404. Warrant issued on Sunday.** The warrant may be issued on Sunday, if the plaintiff, his agent or attorney states in his petition that it would be unsafe to delay proceedings. [C.'73, § 3434; R., § 3702.]

SEC. **4405. Service of notice.** It shall be sufficient service of the original notice in such an action to serve it on the defendant, or on the master, agent, clerk or consignee of such boat or raft; if neither of them can be found, it may be served by posting a copy thereof on some conspicuous part of the same. [C.'73, § 3435; R., § 3703; C.'51, § 2122.]

SEC. **4406. Service of warrant.** Any constable or marshal of any city or town may execute the warrant, whether it issues from the office of the clerk of the district or superior court, or of a justice. [C.'73, § 3436; R., § 3704.]

SEC. **4407. Who may appear.** Any persons interested in the property seized may appear for the defendant by himself, agent or attorney, and defend the action, and no continuance shall be granted to the plaintiff while the property is held in custody. [C.'73, § 3437; R., § 3705; C.'51, § 2123.]

SEC. **4408. Discharge by giving bond.** The property seized may be discharged at any time before final judgment, by giving a bond with sureties, to be approved by the officer executing the warrant, or by the clerk or justice who issued it, in a penalty double the plaintiff's demand, conditioned that the obligors therein will pay the amount which may be found due to the plaintiff, together with the costs. [C.'73, § 3438; R., § 3706; C.'51, § 2124.]

A formal entry of discharge under the bond is not necessary to render the principal and sureties liable thereon. Nor need the bond be formally approved if it is accepted by the officer and the boat released: *White v. Tisdale*, 12–75.

SEC. **4409. Special execution.** If judgment is rendered for the plaintiff before the property is thus discharged, a special execution shall be issued against it. If it has been previously discharged, the execution shall issue against the principal and sureties in the bond without further proceedings. [C.'73, § 3439; R., § 3707; C.'51, § 2125.]

A judgment may be rendered against the boat, and at the same time against the sureties on a bond on which the boat has been discharged: *Ogden v. Ogden*, 13–176.

SEC. **4410. Sale.** The officer must first sell the furniture or appendages of the boat or raft, if by so doing he can satisfy the demand. If he sells the boat or raft, he must do so to the bidder who will advance the amount required to satisfy the execution for the lowest fractional share thereof, unless the person defending desires a different and equally convenient mode of sale. The officer making the sale shall execute a bill of sale to the purchaser for the interest sold. [C.'73, § 3440; R., § 3708; C.'51, § 2126.]

SEC. **4411. Fractional share sold.** If a fractional share of the boat or raft is thus sold, the purchaser shall hold such share or interest jointly with the other owners. [C.'73, § 3441; R., § 3709; C.'51, § 2127.]

SEC. **4412. Appeal.** If an appeal is taken by the defendant before the property is discharged as above provided, the appeal bond, if one is filed, will have the same effect in discharging it as the bond above contemplated, and execution shall issue against the obligors therein after judgment in the same manner. [C.'73, § 3442; R., § 3710; C.'51, § 2128.]

SEC. **4413. Rights saved.** Nothing herein contained is intended to affect the rights of a plaintiff to sue in the same manner as though the provisions of this chapter had not been enacted. [C.'73, § 3443; R., § 3711; C.'51, § 2129.]

SEC. **4414. Contract alleged.** In actions commenced in accordance with the provisions of this chapter, it is sufficient to allege the contract to have been made with the boat or raft itself. [C.'73, § 3444; R., § 3712; C.'51, § 2130.].

Section applied: *West v. Barge Lady Franklin*, 2-522.

SEC. **4415. Lien.** Claims growing out of either of the above causes shall be liens upon the boat or raft, its tackle and appendages, for the term of twenty days from the time the right of action therefor accrued. [C.'73, § 3446; R., § 3699.]

SEC. **4416. Appearance by executing bond.** The execution by or for the owner of such boat or raft of a bond, whereby possession of the same is obtained or retained by him, shall be an appearance of such owner as a defendant to the action. [C.'73, § 3448; R., § 4130.]

CHAPTER 16.

OF HABEAS CORPUS.

SECTION **4417. Petition—grounds.** The petition for the writ of *habeas corpus* must state:

1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom and the place where he is so restrained, mentioning the names of the parties, if known, and if unknown describing them with as much particularity as practicable;
2. The cause or pretense of such restraint, according to the best information of the applicant; and if by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence;
3. That the restraint is illegal, and wherein;
4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant;
5. Whether application for the writ has been before made to and refused by any court or judge, and if so, a copy of the petition in that case must be attached, with the reasons for the refusal, or satisfactory reasons given for the failure to do so. [C.'73, § 3449; R., § 3801; C.'51, § 2213.]

A *habeas corpus* proceeding is civil, not criminal, and should be instituted in the name of the person restrained, as plaintiff: *State v. Collins*, 54-441.

The person restrained is to be regarded as the petitioner or plaintiff: *Ibid.; Thompson v. Oglesby*, 42-598; *Rivers v. Mitchell*, 57-193.

Where the allegations of the petition are sufficient to authorize the writ, the judge acquires jurisdiction of the parties and the subject-matter, and an order made by him will not be void, but at most voidable, and subject only to attack in a direct proceeding: *Shaw v. McHenry*, 52-182.

If the officer issuing the writ under which the prisoner is restrained acted under color of office, the question whether he is such officer *de jure* cannot be raised in a *habeas corpus* proceeding, but *aliter* if he is a mere usurper without color of office. The right to an office cannot be contested in this proceeding: *Ex parte Strahl*, 16-369.

A return by respondent that he is a military officer of the United States holding the person restrained for the crime of desertion awaiting trial by court-martial is sufficient, and the prisoner will be remanded: *Ex parte Anderson*, 16-595.

A soldier while on furlough is not within

the jurisdiction of the military authorities, and may be arrested by the civil authorities without conflict: *Ex parte McRoberts*, 16–600.

The court may, on *habeas corpus*, inquire into the sufficiency of the evidence to support a requisition under the provisions as to extradition. The determination of the governor as to the sufficiency of the evidence is not conclusive: *Jones v. Leonard*, 50–106.

Proceedings by *habeas corpus* for the custody of a child are not criminal in their nature. The action should be in the name of the person alleged to be illegally restrained, and not in that of the state, and in case of failure to secure the discharge the costs should not be taxed to the county: *State v. Collins*, 54–441.

The interest of the child is the controlling fact in a proceeding for its custody: *Kuhn v. Breen*, 70 N.W., 722.

And see notes to §§ 3192 and 3193.

Where a writ was sought to recover the custody of a child from its father, *held*, that it was not a sufficient answer that he had sent the child out of the state, where it did not appear but that he could secure its return if he desired to do so: *Rivers v. Mitchell*, 57–193.

SEC. **4418. By whom presented.** The petition must be sworn to by the person confined, or by some one in his behalf, and presented to some court or officer authorized to allow the writ. [C.'73, § 3450; R., § 3802; C.'51, § 2214.]

SEC. **4419. Writ allowed—service.** The writ may be allowed by the supreme, district or superior court, or by any judge of either of those courts, and may be served in any part of the state. [C.'73, § 3451; R., § 3803; C.'51, § 2215.]

SEC. **4420. Application—to whom made.** Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to therefor, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient court or a judge thereof. [C.'73, § 3452; R., § 3805; C.'51, § 2217.]

The person to be deemed the applicant is the one whose liberty is restrained, and not the one by whom the petition may be presented on behalf of such person, if it is presented by another than the person restrained: *Thompson v. Oglesby*, 42–598.

If the proceeding is for the recovery of the custody of a child, it may be brought in any county wherein the sworn petition states that the child is to be found: *Rivers v. Mitchell*, 57–193.

SEC. **4421. Writ refused.** If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge must refuse to allow the writ. [C.'73, § 3453; R., § 3806; C.'51, § 2218.]

SEC. **4422. Reasons indorsed.** If the writ is disallowed, the court or judge shall cause the reasons thereof to be appended to the petition and returned to the person applying for the writ. [C.'73, § 3454; R., § 3809; C.'51, § 2221.]

SEC. **4423. Form of writ.** If the petition is in accordance with the foregoing requirements, and states sufficient grounds for the allowance of the writ, it shall issue, and may be substantially as follows:

The State of Iowa,

To the sheriff of, etc. (or to A..... B....., as the case may be):

You are hereby commanded to have the body of C..... D....., by you unlawfully detained, as is alleged, before the court (or before me, or before E..... F....., judge, etc., as the case may be), at....., on..... (or immediately after being served with this writ), to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises. [C.'73, § 3455; R., § 3807; C.'51, § 2219.]

SEC. **4424. How issued.** When the writ is allowed by a court, it must be issued by the clerk, but when by a judge, he must issue it himself, subscribing his name thereto. [C.'73, § 3456; R., § 3868; C.'51, § 2220.]

SEC. **4425. Penalty for refusing.** Any judge, whether acting individually or as a member of the court, who wrongfully and wilfully refuses the allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars. [C.'73 § 3457; R., § 3810; C.'51, § 2222.]

SEC. **4426. Issuance on judge's own motion.** When any court or judge authorized to grant the writ has evidence, from a judicial proceeding

before him, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, such court or judge shall issue the writ or cause it to be issued, on its or his own motion. [C.'73, § 3458; R., § 3811; C.'51, § 2223.]

SEC. **4427. County attorney notified.** The court or officer allowing the writ must cause the county attorney of the proper county to be informed thereof, and of the time and place where and when it is made returnable. [C.'73, § 3459; R., § 3828; C.'51, § 2240.]

Where notice of the proceeding has not been given to the district attorney the court has no authority to appoint an attorney to represent the state and render the county liable for his fees: *Miller v. Buena Vista County*, 68–711.

SEC. **4428. Service of writ.** The writ may be served by the sheriff, or by any other person appointed in writing for that purpose by the court or judge by whom it is issued or allowed. If served by any other than the sheriff, he possesses the same power, and is liable to the same penalty for a nonperformance of his duty, as though he were the sheriff. [C.'73, § 3460; R., § 3812; C.'51, § 2224.]

SEC. **4429. Mode.** The service shall be made by leaving the original writ with the defendant, and preserving a copy thereof on which to make the return of service, but a failure in this respect shall not be held material. [C.'73, § 3461; R., § 3813; C.'51, § 2225.]

SEC. **4430. Defendant not found.** If the defendant cannot be found, or if he has not the plaintiff in custody, the service may be made upon any person who has, in the same manner and with the same effect as though he had been made defendant therein. [C.'73, § 3462; R., § 3814; C.'51, § 2226.]

SEC. **4431. Power of officer.** If the defendant conceals himself, or refuses admittance to the person attempting to serve the writ, or if he attempts wrongfully to carry the plaintiff out of the county or the state after the service of the writ, the sheriff, or the person who is attempting to serve or who has served it, is authorized to arrest the defendant and bring him, together with the plaintiff, forthwith before the officer or court before whom the writ is made returnable. [C.'73, § 3463; R., § 3815; C.'51, § 2227.]

SEC. **4432. Arrest.** In order to make the arrest, the sheriff or other person having the writ possesses the same power as is given to a sheriff for the arrest of a person charged with a felony. [C.'73, § 3464; R., § 3816; C.'51, § 2228.]

SEC. **4433. Plaintiff taken.** If the plaintiff can be found, and if no one appears to have the charge or custody of him, the person having the writ may take him into custody and make return accordingly, and to get possession of the plaintiff's person in such cases he possesses the same power as is given by the last section for the arrest of the defendant. [C.'73, § 3465; R., § 3817; C.'51, § 2229.]

SEC. **4434. Defects of form.** The writ must not be disobeyed for any defects of form or misdescription of the plaintiff or defendant, provided enough is stated to show the meaning and intent thereof. [C.'73, § 3466; R., § 3822; C.'51, § 2234.]

SEC. **4435. Penalty for eluding writ.** If the defendant attempts to elude the service of the writ, or to avoid the effect thereof by transferring the plaintiff to another, or by concealing him, he shall, on conviction, be imprisoned in the penitentiary or county jail not more than one year, and fined not exceeding one thousand dollars, and any person knowingly aiding or abetting in any such act shall be subject to like punishment. [C.'73, § 3467; R., § 3841; C.'51, § 2253.]

SEC. **4436. Refusal to give copy of process.** An officer refusing to deliver a copy of any legal process by which he detains the plaintiff in custody to any person who demands it and tenders the fees therefor, shall for-

feit two hundred dollars to the person who demands it. [C.'73, § 3468; R., § 3842; C.'51, § 2254.]

SEC. **4437. Preliminary writ.** The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer any irreparable injury before he could be relieved by the proceedings above authorized, may issue an order to the sheriff, or any other person selected instead, commanding him to bring the plaintiff forthwith before such court or judge. [C.'73, § 3469; R., § 3818; C.'51, § 2230.]

SEC. **4438. Arrest of defendant.** If the evidence is sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the order must also direct the arrest of the defendant. [C.'73, § 3470; R., § 3819; C.'51, § 2231.]

SEC. **4439. Execution of writ—return.** The officer or person to whom the order is directed must execute the same by bringing the defendant, and also the plaintiff if required, before the court or judge issuing it, and the defendant must make return to the writ in the same manner as if the ordinary course had been pursued. [C.'73, § 3471; R., § 3820; C.'51, § 2232.]

SEC. **4440. Examination.** The defendant may also be examined and committed, or bailed, or discharged, according to the nature of the case. [C.'73, § 3472; R., § 3821; C.'51, § 2233.]

SEC. **4441. Defect in writ.** Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to him by a wrong name or description, or to another person. [C.'73, § 3473; R., § 3823; C.'51, § 2235.]

SEC. **4442. Appearance—answer.** Service being made in any of the modes herein provided, the defendant must appear at the proper time and answer the petition, but no verification shall be required to the answer. [C.'73, § 3474; R., §§ 3824, 4182; C.'51, § 2236.]

SEC. **4443. Body to be produced.** He must also produce the body of the plaintiff, or show good cause for not doing so. [C.'73, § 3475; R., § 3825; C.'51, § 2237.]

Where a writ was sought to recover the custody of a child from its father, *held*, that it was not a sufficient answer that he had sent the child out of the state, where it did not appear but that he could secure its return if he desired to do so: *Rivers v. Mitchell*, 57–193.

SEC. **4444. Penalty—contempt.** A wilful failure to comply with the above requirements will render the defendant liable to be attached for contempt, and to be imprisoned till he complies, and shall subject him to the forfeiture of one thousand dollars to the party thereby aggrieved. [C.'73, § 3476; R., § 3826; C.'51, § 2238.]

SEC. **4445. Attachment.** Such attachment may be served by the sheriff or any other person authorized by the court or judge, who shall also be empowered to produce the body of the plaintiff forthwith, and has, for this purpose, the same powers as are above conferred in similar cases. [C.'73, § 3477; R., § 3827; C.'51, § 2239.]

SEC. **4446. Answer.** The defendant in his answer must state whether he then has, or at any time has had, the plaintiff under his control and restraint, and if so the cause thereof. [C.'73, § 3478; R., § 3829; C.'51, § 2241.]

SEC. **4447. Transfer of plaintiff.** If he has transferred him to another person, he must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor. [C.'73, § 3479; R., § 3830; C.'51, § 2242.]

SEC. **4448. Copy of process.** If he holds him by virtue of a legal process or written authority, a copy thereof must be annexed. [C.'73, § 3480; R., § 3831; C.'51, § 2243.]

SEC. **4449. Demurrer or reply—trial.** The plaintiff may demur or reply to the defendant's answer, but no verification shall be required to the reply, and all issues joined therein shall be tried by the judge or court. [C.'73, § 3481; R., 3832; C.'51, § 2244.]

The trial is to be as in ordinary proceedings: *Drumb v. Keen*, 47–435.

Therefore, upon appeal, the case will not be tried *de novo: Shaw v. Nachtwey*, 43–653.

The finding of the lower court as to the facts will have the effect of a verdict of the jury as in other cases by ordinary proceeding: *Drumb v. Keen*, 47–435; *Jennings v. Jennings*, 56–288; *Bonnett v. Bonnett*, 61–199; *Fouts v. Pierce*, 64–71; *Kuhn v. Breen*, 70 N.W., 722.

The supreme court will reverse the action of the lower court as to its finding of facts only where such finding is manifestly unsupported by the evidence: *Kline v. Kline*, 57–386; *Jenkins v. Clark*, 71–552.

But the court may review the correctness of the action of the lower court as based upon its finding of facts: *Shaw v. Nachtwey*, 43–653.

The officer against whom the action is brought has, it would seem, sufficient interest to be allowed to appeal: *Jackson v. Boyd*, 53–536.

The taking of an appeal from an order of discharge, and filing a *supersedeas* bond, does not stay the order of discharge: *State v. Kirkpatrick*, 54–373.

It is doubtful whether on appeal from an order refusing to release a party imprisoned for non-payment of fine such party is entitled to release on bail: *Elsner v. Shrigley*, 80–30.

Action of a judge may be appealed from: See § 4102.

SEC. **4450. Commitment questioned.** The reply may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge, in connection with any other testimony which may then be produced. [C.'73, § 3482; R., § 3833; C. '51, § 2245.]

The fact that the person arrested and brought before a committing magistrate waives preliminary examination does not debar him from the privilege of introducing evidence in a *habeas corpus* proceeding to question the sufficiency of the testimony to warrant his commitment: *Cowell v. Patterson*, 49–514.

It is not competent for plaintiff seeking to be released by *habeas corpus* from commitment on preliminary examination to state in his petition the substance of the evidence before the committing magistrate, and, by having defendant admit the correctness of such evidence, thereby make up the case which is to be presented to the court: *State ex rel. v. Rosencrans*, 65–382.

SEC. **4451. Action of grand jury—result of trial.** But it is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of the trial jury in the trial of a cause, nor of a court or judge when lawfully acting within the scope of their authority. [C.'73, § 3483; R., § 3834; C. '51, § 2246.]

Where prisoner is held under indictment: An indictment is presumptive evidence of the guilt of the prisoner, and, if it is for a capital offense, bail may be denied when applied for by *habeas corpus*. The court cannot be required in such cases to look behind the indictment and consider the evidence on which it was found: *Hight v. United States*, Mor., 407.

In case of contempt: Imprisonment for disobedience of an order of court which is erroneous only and not void cannot be inquired into by *habeas corpus: Ex parte Grace*, 12–208.

One court will not interfere by *habeas corpus* with proceedings in another court to punish a party for contempt, unless such proceedings are so grossly irregular as to be void: *Ex parte Holman*, 28–88; *Robb v. McDonald*, 29–330.

The supreme court cannot in a *habeas corpus* proceeding review an order of imprisonment for contempt and reverse it, unless the act constituting the alleged contempt was such that it can pronounce as a matter of law that it was not a contempt: *State ex rel. v. Seaton*, 61–563.

After conviction by a court having jurisdiction, though such conviction be irregular or erroneous, the party is not entitled to the writ, and this is true of a conviction before a magistrate; and where the defendant was found guilty before the proper police magistrate of a city for violation of an ordinance of such city, and sentenced to imprisonment, *held*, that he could not be released on the ground that the ordinance under which he was convicted was invalid: *Platt v. Harrison*, 6–79.

Proceedings in another court having jurisdiction of the subject matter and the person cannot be inquired into or corrected by a *habeas corpus* proceeding: *Ex parte Holman*, 28 88; *Zelle v. McHenry*, 51–572.

A judgment which is authorized by law, rendered in a court having jurisdiction, cannot be questioned by *habeas corpus*. Therefore, *held*, that a judgment of the lower court could not be attacked by *habeas corpus* on the ground that the judge had refused a change of venue and a jury trial: *Zelle v. McHenry*, 51–572.

The order of a judge having jurisdiction of the parties and the subject-matter, not being void, but, at most, voidable, cannot be set aside or evaded in a *habeas corpus* proceeding before another court or judge: *Shaw v. McHenry*, 52–182.

Habeas corpus cannot be invoked for the purpose of obtaining relief for mere errors and irregularities in the action of the court. Where the person has had a trial as to whether he was guilty of the crime for which he is imprisoned, the question of whether he committed the crime cannot be again determined upon *habeas corpus*, nor can an erro-

neous taxation of costs be questioned in that manner: *State v. Orton*, 67–554.

An attack by *habeas corpus* upon the validity of a judgment is of a collateral character, and cannot be sustained unless the judgment is void: *Turney v. Barr*, 75–758.

Failure of the court to specify the length of imprisonment for non-payment of fine will not entitle the defendant to release on *habeas corpus*. Such error may be corrected on appeal, but does not render the judgment void: *Elsner v. Shrigley*, 80–30.

Section applied: *State v. Zimmerman*, 83–118.

Proceedings in federal court: A state court cannot, on *habeas corpus*, release a person held in custody by the United States marshal by order of a federal court: *Ex parte Holman*, 28–88.

SEC. **4452. Discharge.** If no sufficient legal cause of detention is shown, the plaintiff must be discharged. [C.'73, § 3484; R., § 3835; C. '51, § 2247.]

The provisions of § 3844 as to certain orders of a judge made in vacation, that they shall be in force only during vacation and the first two days of the ensuing term of court, does not apply to the order in a *habeas corpus* proceeding made during vacation: *Shaw v. McHenry*, 52–182.

When an order of discharge is made, no further proceedings are to had: *State v. Kirkpatrick*, 54–373.

SEC. **4453. Plaintiff held.** Although the commitment of the plaintiff may have been irregular, if the court or judge is satisfied from the evidence that he ought to be held to bail, or committed, either for the offense charged or any other, the order may be made accordingly. [C.'73, § 3485; R., § 3836; C.'51, § 2248.]

A defect in the warrant of commitment will not entitle the prisoner to discharge if the court or jury is satisfied from the evidence that the prisoner ought to be committed for the offense charged, or any other, and in such case the prisoner should be remanded into custody and a proper order made in relation to the case: *Jackson v. Boyd*, 53–536.

SEC. **4454. Bail increased or diminished.** The plaintiff may also, in any case, be committed, admitted to bail, or his bail be reduced or increased, as justice may require. [C.'73, § 3486; R., § 3837; C.'51, § 2249.]

SEC. **4455. Plaintiff retained in custody.** Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in his custody, and may use all necessary and proper means for that purpose. [C.'73, § 3487; R., § 3838; C.'51, § 2250.]

SEC. **4456. Right to be present waived.** The plaintiff may, in writing, or by attorney, waive his right to be present at the trial, in which case the proceedings may be had in his absence. The writ will in such cases be modified accordingly. [C.'73, § 3488; R., § 3839; C.'51, § 2251.]

SEC. **4457. Disobedience of order.** Disobedience to any order of discharge will subject the defendant to attachment for contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by him in consequence thereof. [C.'73, § 3489; R., § 3840; C.'51, § 2252.]

SEC. **4458. Papers filed with clerk.** When the proceedings are before a judge, except when the writ is refused, all the papers in the case, including his final order, shall be filed with the clerk of the district court of the county wherein the final proceedings were had, and a memorandum thereof shall be entered by the clerk upon his judgment docket. [C.'73, § 3490; R., § 3843; C.'51 § 2253.]

SEC. **4459. Costs.** If the plaintiff is discharged, the costs shall be taxed to the defendant, unless he is an officer holding the plaintiff in custody under a warrant of arrest or commitment, or under other legal process, in which case the costs shall be taxed to the county. If the plaintiff's application is refused, the costs shall be taxed against him, and, in the discretion of the court, against the person who filed the petition in his behalf.

Prior to the enactment of this section, *held*, that where defendant was successful it was not proper to tax the costs to the county, nor to the person restrained where the application was made by another for his release, and it did not appear that the proceedings were brought by his consent. Whether they should be taxed to the person instituting the proceedings, *quære: State v. Collins*, 54–441.

CHAPTER 17.

OF CONTEMPTS.

SECTION **4460. What punishable as.** The following acts or omissions are contempts, and are punishable as such by any of the courts of this state, or by any judicial officer, including justices of the peace, acting in the discharge of an official duty, as hereinafter provided:

1. Contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority;

2. Any wilful disturbance calculated to interrupt the due course of its official proceedings;

3. Illegal resistance to any order or process made or issued by it;

4. Disobedience to any subpœna issued by it and duly served, or refusing to be sworn or to answer as a witness;

5. Unlawfully detaining a witness or party to an action or proceeding pending before such court, while going to or remaining at the place where the action or proceeding is thus pending, after being summoned, or knowingly assisting, aiding or abetting any person in evading service of the process of such court;

6. Any other act or omission specially declared a contempt by law. [C. '73, § 3491; R., § 2688; C. '51, § 1598.]

Jurisdiction: In the absence of statute, each court of record is the sole and final judge in matters of contempt with reference to its proceedings: *First Cong. Church v. Muscatine*, 2–69.

The visiting committee of an insane hospital has no authority under the Code to punish a witness for contempt for refusing to testify when summoned before it: *Brown v. Davidson*, 59–461.

Nature of proceeding: The proceeding to punish a contempt of process is merely incidental to, and, to a great extent, independent of, the original proceeding in which it may be invoked. It is in its nature criminal: *First Cong. Church v. Muscatine*, 2–69.

An action for contempt is a criminal action, and if in the federal courts the United States is a party thereto: *Durant v. Supervisors*, Woolworth, 377.

Contempt of court: Contemptuous or insolent behavior as here contemplated must be toward the court while it is engaged in judicial duty, and such behavior must tend to impair the respect due to its authority in order that such acts may be punishable as contempt: *Dunham v. State*, 6–245.

If by general rule, or by special rule made as to some cause on trial, a publication of the testimony pending the investigation has been prohibited, a wilful violation of such rule might amount to contempt on the ground that it would be a resistance to the rule thus made, and especially if the rule itself declared such act a contempt: *Ibid.*

It would seem that the provisions of the Code must be regarded as a limitation upon the power of courts to punish for any other contempts than those therein specified: *Ibid.*

The publication of newspaper comments upon the decision of a court when the case is disposed of and the decision announced are not punishable as contempt: *Ibid.*

Publication of articles in a newspaper reflecting upon the conduct of a judge in relation to a cause disposed of before such publication does not amount to a contempt: *State v. Anderson*, 40–207.

Argument by attorney: After the decision of the court has been made the time for argument in reference thereto has passed, and an attorney cannot, except by asking and obtaining leave, further argue the question or deny the statements of the court with reference to the facts involved in such determination: *Russell v. French*, 67–102.

Violation of injunction: The writ of injunction for the violation of which the proceedings are instituted, need not be filed in the proceeding: *Jordan v. Circuit Court*, 69–177.

While the provision for a fine of $500 for violation of an injunction prohibiting the sale of intoxicating liquors is extraordinary in amount, it is not in that respect unconstitutional: *Ibid.*

Attachment for contempt is the proper mode of enforcing obedience to a continuing order in the nature of a mandatory injunction: *State v. Baldwin*, 57–266.

In replevin: The judge is authorized in vacation to punish as contempt an unlawful obstruction or hindrance to an order for the taking of property: *State v. Myers*, 44–580.

In mandamus: Where a writ of *mandamus* to collect a tax is disobeyed by the board of supervisors, but one action for contempt is allowed against them, and that a joint action. If the board are severally proceeded against, the actions may be consolidated so long as the act charged is disobedience of the same writ of *mandamus*: *Durant v. Supervisors*, Woolworth, 377.

Action against receiver: It is contempt to bring an action in a state court against a receiver appointed by a federal court without first obtaining leave of the court appointing the receiver. It is immaterial whether

the property is thereby disturbed or not: *Thompson v. Scott*, 4 Dillon, 508.

Refusal to make affidavit: A witness may be punished for contempt in refusing to make an affidavit, and to answer questions as provided by §§ 4675, 4676, and the fact that the affidavit desired would not be legally admissible in the proceeding in which it is sought is no excuse for such refusal: *Robb v. McDonald*, 29–330; *State ex rel. v. Seaton*, 61–563.

Refusal to disclose property: See § 4082.

Attachment of witness: A party cannot take advantage of the refusal of the court to attach a witness for contempt who refuses to produce evidence: *Manning v. Perkins*, 16–71.

Where a witness appears without objection before a commissioner to take testimony, and is directed to bring in books which he promises to do, he cannot afterwards excuse his contempt in not producing the books by claiming that the commissioner was without authority: *Tredway v. Van Wagenen*, 91–556.

The fact that when committed the witness did not have the books in his possession will be immaterial where it appears that he had them in his possession when the order for their production was made: *Ibid.*

SEC. **4461. In courts of record.** In addition to the above, any court of record may punish the following acts or omissions as contempts:

1. Failure to testify before a grand jury, when lawfully required to do so;
2. Assuming to be an officer, attorney or counselor of the court, and acting as such without authority;
3. Misbehavior as a juror, by improperly conversing with a party or with any other person in relation to the merits of an action in which he is acting or is to act as a juror, or receiving a communication from any person in respect to it without immediately disclosing the same to the court;
4. Bribing, attempting to bribe, or in any other manner improperly influencing or attempting to influence a juror to render a verdict, or suborning or attempting to suborn a witness;
5. Disobedience by an inferior tribunal, magistrate or officer to any lawful judgment, order or process of a superior court, or proceeding in any matter in a manner contrary to law, after it has been removed from such tribunal, magistrate or officer. [C.'73, § 3492; R., § 2689; C.'51, § 1599.]

SEC. **4462. Punishment.** The punishment for contempts may be by fine or imprisonment, or both, but where not otherwise specially provided, courts of record are limited to a fine of fifty dollars, and an imprisonment not exceeding one day, and all other courts are limited to a fine of ten dollars. [C.'73, § 3493; R., § 2690; C.'51, § 1600.]

The court cannot punish an attorney for contempt by revoking or suspending his license. That can only be done in the manner provided by § 323 *et seq.*; *State v. Start*, 7–499.

Nor can it, by summary proceeding for contempt, compel a party to deliver to the sheriff a key or property claimed by another: *S. C.*, 7–501.

A judge may, in vacation, impose the same punishment for contempt as if he were acting in court: *State v. Myers*, 44–580.

The judge or court imposing a fine for contempt may direct imprisonment of defendant until such fine be paid; the extent of imprisonment being limited by the directions of § 5440: *Ibid.*

A party who is in contempt has no right to be heard in defense of the action in which the contempt has been adjudged, but failure to pay money awarded as temporary alimony for which judgment has been entered does not constitute contempt in this respect: *Baily v. Baily*, 69–77.

A proceeding for contempt for violating an order of injunction issued in an equity case may be prosecuted in a court of equity. The same court must inflict the punishment for contempt in which the order violated is granted: *Manderscheid v. District Court*, 69–240.

It is proper to conduct the proceedings for contempt under the title of the cause out of which the contempt arises: *Ibid.*

Any irregularity in serving a rule to show cause against punishment for contempt will be waived by the appearance of the party: *Ibid.*

A party charged with contempt has not a right to a jury trial although the act charged also constitutes a crime. The punishment of contempt is not a punishment of the act as a crime, and the crime may be separately punished: *Ibid.*

In a proceeding against an attorney for contempt the accusation should specify the manner in which he was disrespectful to the court. If it was done by insulting language, the words used by the accused should be given; if by disrespectful acts, those acts should be described so that the accused may know what words or acts he is required to meet. In a particular case, *held*, that the charge of contempt "in disobeying the orders of your Honor while engaged in your official capacity" was not sufficiently specific: *Perry v. State*, 3 G. Gr., 550.

In such case the finding or judgment should specify the particular charge or charges upon which the attorney's guilt is pronounced: *Ibid.*

The proceeding to punish a contempt of the process of a court is criminal in its nature, and being merely incidental to the orig-

inal proceeding need not be entitled as of the original cause, but is properly brought in the name of the state as plaintiff; and upon the appearance of the county attorney in behalf of the state, the court has full jurisdiction to proceed with the complaint: *Fisher v. Cass County Dist. Court*, 75–232.

SEC. **4463. Imprisonment.** If the contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it. In that case the act to be performed must be specified in the warrant of the commitment. [C. '73, § 3494; R., § 2691; C. '51, § 1601.]

SEC. **4464. When affidavit necessary.** Unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises. [C. '73, § 3495; R., § 2692; C. '51, § 1602.]

The affidavit here required need not show that affiant has personal knowledge of the facts: *Jordan v. Circuit Court*, 69–177.

Where information is filed before a court for the violation of an injunction granted by the same court, the information under oath constitutes a sufficient compliance with this section: *Silvers v. Traverse*, 82–52.

SEC. **4465. Notice to show cause.** Before punishing for contempt, unless the offender is already in the presence of the court, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor; or he may be brought before the court forthwith, or on a given day, by warrant, if necessary. In either case he may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved. [C. '73, § 3496; R., § 2693; C. '51, § 1603.]

Arrest: While it is true that proceedings to punish for contempt are in a certain sense of a criminal nature, they are not governed by the code of criminal procedure, but by a special statute, and under such provisions it is sufficient to serve a rule upon defendant to show cause against the punishment, and the court is not bound to secure the arrest of defendant and his personal presence before proceeding against him: *Jordan v. Circuit Court*, 69–177.

Where the proper order had been served upon defendant, *held*, that the court might proceed to take evidence, although defendant was not present personally or by counsel: *Ibid.*

A warrant may be made returnable on a certain day, which may be at a subsequent term, and it may direct the arrest of a person in contempt, in vacation, and provide for his release on bail: *State v. Archer*, 48–310.

Excuse or explanation: Where a reasonable time is asked to prepare a written explanation it should be granted: *State v. Duffy*, 15–425.

Upon a proceeding for an alleged contempt in failing to obey an order of court, defendant may by answer show that there was no contempt in fact by reason of the impossibility of performing the required act. He is not required to proceed by appeal or otherwise for a modification of the original order: *Hogue v. Hayes*, 53–377.

A party cannot, in a proceeding for contempt for disobedience to a judicial order rendered by a court having jurisdiction, call in question the correctness of the order itself. The only legitimate inquiry in such case is, did the court have jurisdiction, and did it make an order which has been violated: *Slate v. Baldwin*, 57–266.

It is improper to punish for contempt, even when committed in the presence of the court, without giving the offending party opportunity to make a written explanation of his conduct under oath for the purpose of excusing the contempt or reducing the punishment, and such reasonable opportunity must be given before the party is adjudged guilty of contempt and punishment therefor is inflicted. When the court deems that a contempt of its authority has been committed in its presence, the attention of accused should be called thereto and a reasonable time fixed within which he may make the written explanation contemplated by the statute. He should not be called upon to do so on the instant when the accusation is made, unless the emergency is more than ordinarily great: *Russell v. French*, 67–102.

Where the statement of an administrator required by order of court to pay over money received by him as such, shows the receipt of such money, but does not show its disbursement upon lawful claims, he does not purge himself of contempt by showing that he has disbursed the money upon claims not lawfully presented and allowed, and that he has no money of his own with which to satisfy the claim against him: *Wise v. Chaney*, 67–73.

Hearing: Where it is complained that after appearance of defendant in answer to a citation to show cause the case is set down for hearing at such time as not to allow defendant sufficient opportunity to prepare therefor, he should make a special showing for postponement: *Jordan v. Circuit Court*, 69–177.

Contempt proceedings cannot be tried by jury; but as to the doing of the act, *quære*: *McDonnell v. Henderson*, 74–619.

SEC. **4466. Testimony reduced to writing.** Where the action of the court is founded upon evidence given by others, such evidence must be in writing, and be filed and preserved, and if the court or judge acts upon personal knowledge in the premises, a statement of the facts upon which the order is founded must be entered on the records of the court, or be filed and preserved when the court keeps no record, and shall be a part of the record. [C.'73, § 3497; R., § 2694; C.'51, § 1604.]

These provisions apply to all proceedings for contempt, including those for refusing to deliver property under a writ of replevin (§ 4171): *State v. Myers*, 44–580.

An order entering a fine for contempt will be reversed when a statement of facts, upon which the order is founded, is not entered on the record in a case where the court acts upon its own knowledge: *State v. Utley*, 13–593; *Skiff v. State*, 2–550; *State v. Dougherty*, 32–261.

Where neither the record nor the warrant of commitment shows upon what evidence or facts an order of commitment is based, nor whether the same were within the knowledge of the court, the order will be reversed on *certiorari: State v. Folsom*, 34–583.

Although a failure of the judge to file and preserve a statement of the facts on which the order of contempt is founded will render the contempt invalid, yet where the transcript of the examination of a witness showing the questions asked, and the refusal to answer, was filed by the judge with his certificate, *held*, that it constituted a sufficient compliance with the requirements of the statute, although the transcript was made afterwards by a shorthand writer from notes taken at the time: *Lutz v. Aylesworth*, 66–629.

As to examination of witnesses in proceedings for contempt of injunction in liquor cases, see § 2407.

In a proceeding for contempt for publishing false, scandalous and defamatory articles in relation to the judge of the court, it is proper to hear testimony of witnesses as to the meaning and intent of the articles, and whether the same in their opinion referred to or meant the court or the judge thereof: *Henry v. Ellis*, 49–205.

The writ of injunction for the violation of which the proceedings are instituted need not be filed in the proceeding: *Jordan v. Circuit Court*, 69–177.

Where the evidence on which an order of commitment is made is taken down in shorthand, but the notes are not filed nor certified by the judge, nor is any transcript of them filed in the case for the purpose of making it a part of the record, the committment will be erroneous: *Dorgan v. Granger*, 76–156.

Where the shorthand minutes of the testimony were left upon the clerk's desk upon the same day upon which the order punishing for contempt was made and about two hours later, *held*, that as this constituted a filing, and as the law does not recognize parts of a day, the filing of the notes and the rendering of the judgment would be regarded as parts of one transaction: *Small v. Wakefield*, 84–533.

SEC. **4467. Warrant of commitment.** When the offender is committed, the warrant must state the particular facts and circumstances on which the court acted in the premises, and whether the same was in the knowledge of the court or was proved by witnesses. [C.'73, § 3498; R., § 2695; C.'51, § 1605.]

In a particular case, *held*, that the warrant of commitment for violating an injunction sufficiently recited the facts and circumstances on which the court acted in making the order: *Goetz v. Stutsman*, 73–693.

See, also, notes to preceding section.

SEC. **4468. Review by certiorari.** No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari. [C.'73, § 3499; R., § 2696; C.'51, § 1606.]

This special provision controls the general provision as to appeals, and extends to contempts by disobedience of injunction as well as other process: *First Cong. Church v. Muscatine*, 2–69.

Section applied: *Dunham v. State*, 6–245.

Proceedings for contempt may be reviewed by *certiorari*, whether the defendant has or has not been punished, in all cases where a substantial right, either public or private, is involved, which can only be protected or enforced by the proceeding in contempt: *Lindsay v. Clayton Dist. Court*, 75–509.

Therefore, where the district court refused to punish for a violation of an injunction restraining a liquor nuisance on the ground that the defendant had taken an appeal and filed a *supersedeas* bond, *held*, that the proceeding could be reviewed by *certiorari: Ibid.*

The action of the court in refusing to punish the defendant for contempt in violating an injunction against the illegal sale of intoxicating liquors is reviewable only by *certiorari* and not on appeal. Appeal does not lie from an order either providing or refusing to provide for punishment for contempt: *Currier v. Mueller*, 79–316.

A writ of *certiorari* to review the action of the district court in punishing for contempt can only be issued by the supreme court or a judge thereof, and the judge of the district court cannot admit the defendant to bail pending such proceeding: *State v. District Court*, 84–167.

SEC. **4469. Indictment.** The punishment for a contempt constitutes no bar to an indictment, but if the offender is indicted and convicted for the same offense, the court, in passing sentence, must take into consideration the punishment before inflicted. [C. '73, § 3500; R., § 2697; C. '51, § 1607.]

SEC. **4470. "Court" defined.** Any officer authorized to punish for contempt is a court within the meaning of this chapter. [C. '73, § 3501; R., § 2698; C. '51, § 1608.]

CHAPTER 18.

OF CHANGING NAMES.

SECTION **4471. By courts.** The district or superior court has power to change the names of persons. [C. '73, § 3502; R., § 3844; C. '51, § 2256.]

SEC. **4472. Petition.** The applicant for such change must file his verified petition, stating that he is a resident of the county, and has for one year last past been an actual resident of the state. It must also give a description of his person, stating his age, height, the color of his hair and eyes, the place of his birth, and the names of his parents. [C. '73, § 3503; R., § 3845; C. '51, § 2257.]

SEC. **4473. Order.** An order of the court shall thereupon be made and entered of record, giving a description of the applicant as set forth in the petition, the new name given, the time at which the change shall take effect, which shall not be less than thirty days thereafter, and directing that notice of such change shall be published, and in what newspaper of general circulation in the county. [C. '73, § 3504; R., § 3846; C. '51, § 2258.]

SEC. **4474. Publication.** Previous to the time thus prescribed for the taking effect of such change, the applicant shall cause notice thereof to be published for four successive weeks in the newspaper directed by the court. [C. '73, § 3505; R., § 3847; C. '51, § 2259.]

SEC. **4475. Proof filed.** The ordinary proof of such publication, being filed in the office of the clerk of the court, shall be by him preserved, and on the day fixed by the court, as aforesaid, the change shall be complete. [C. '73, § 3506; R., § 3848; C. '51, § 2260.]

TITLE XXII.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

CHAPTER 1.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

SECTION **4476. Jurisdiction.** The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties; but does not embrace actions for the recovery of money against actual residents of any other county, except as provided in this chapter. [C.'73, § 3507; R., § 3849; C.'51, § 2261.]

Justices of the peace, having no powers except as given them by statute, possess only limited jurisdiction, and their official acts, to be valid, must be in accordance with the provisions of statute: *Cook v. United States*, 1 G. Gr., 39.

The jurisdiction of a justice of the peace being co-extensive with the county, is not limited by the separation of the county into two divisions for judicial purposes: *Deere v. Council Bluffs*, 86–591.

The provisions of 20 G. A., ch. 198 (see § 228), by which terms of the district court are held in Pottawattamie county at a place other than the county seat, such terms being for the hearing of causes arising in a particular part of the county, do not limit the jurisdiction of justices of the peace in such county: *Coffman v. Trimble*, 90–737.

In a court of inferior jurisdiction such as that of a justice of the peace, the record must show the facts which confer the jurisdiction or his judgment is void: *Goodrich v. Brown*, 30–291.

The jurisdiction of a justice of the peace must appear on the face of the records. Therefore, *held*, that where a writ of attachment was issued in action for an amount exceeding one hundred dollars and not more than three hundred dollars, consent to the jurisdiction to the extent of three hundred dollars not appearing, the officer executing the writ of attachment was liable for an unauthorized levy, the writ not being a protection to him: *Carpenter v. Scott*, 86–563.

A justice does not acquire jurisdiction over an action against a resident of another county, even though he appear and proceed to trial without objection: *Chapman v. Morgan*, 2 G. Gr., 374; *Boyer v. Moore*, 42–544; *McMeans v. Cameron*, 51–691.

A failure to raise this objection before the justice of the peace before whom the action is properly brought does not prevent a party from raising it on appeal: *McMeans v. Cameron*, 51–691.

The justice does not acquire jurisdiction by notice served in the township where suit is brought, upon a resident of another county, and a judgment rendered thereon is void. Defendant is not required to appear and plead, suggesting want of jurisdiction: *Hamilton v. Millhouse*, 46–74.

If the suit is for money against an actual resident of another county, the fact that an attachment is sought against property in the county in which suit is brought will not confer jurisdiction: *Gates v. Wagner*, 46–355.

A resident of one county went with his family to another county to reside there temporarily, boarding at a hotel while building a schoolhouse under a contract, with intention of returning to his former home when the work was completed. *Held*, that he did not become a resident of the latter county so as to give a justice of the peace of that county jurisdiction in an action against him: *Bradley v. Fraser*, 54–289.

It is actual and not legal residence that is contemplated by the statute. The fact that defendant's domicile is in another county than that in which suit is brought does not prove that he is an actual resident of such other county, though that may be his legal residence. Therefore, *held*, that a contractor upon a railroad who had resided in another county for seven years, and was absent from that county only for the purpose of constructing such railroad, and expected to return to that county as soon as the job upon which he was at work should be completed, was not an actual resident of such other county within the meaning of this section, it appearing that he was living and keeping house with his family during the time that he was performing his contract in the county where suit was brought: *Fitzgerald v. Arel*, 63–104.

A person may be engaged in business in a county and personally present superintending it, and yet not be an actual resident of the county: *Fitzgerald v. Grimmell*, 64–261.

Where suit is brought before a justice of the peace against two persons jointly, as partners, and one of such partners is resident of another county, the justice of the peace acquires no jurisdiction as to such partner by service upon him in the county of his residence. The justice may acquire jurisdiction to render judgment against the firm by service upon the resident partner, but not as against the nonresident partner individually: *Ebersole v. Ware*, 59–663.

And see notes to § 3500.

Actions against corporations: See notes to §§ 3497 and 3499.

SEC. **4477. Amount in controversy.** Within the prescribed limit, it extends to all civil actions, except those by equitable proceedings, where the amount in controversy does not exceed one hundred dollars; and, by consent of parties in writing, it may be extended to actions where the amount claimed is not more than three hundred dollars. [C. '73, § 3508; R. § 3850; C. '51, § 2262.]

A justice has no equitable jurisdiction: *David v. Ryan*, 47–642, 646.

Therefore, *held*, that where an action was brought before a justice upon a note blank as to amount, the plaintiff could not, on appeal, ask a reformation of the note and judgment thereon as reformed, for the reason that he thereby sought to introduce an equitable cause of action which could not be tried before a justice: *Hollen v. Davis*, 59–444.

The jurisdiction of justices over cases where the amount does not exceed one hundred dollars is not exclusive: *Nelson v. Gray*, 2 G. Gr., 397; *Hutton v. Drebilbis*, 2 G. Gr., 593; *Chapman v. Morgan*, 2 G. Gr., 374.

The amount claimed, and not the amount appearing to be due on the instrument in suit, is the criterion for jurisdiction: *Stone v. Murphy*, 2-35.

The amount in controversy is determined by the amount claimed, and not by the allegation of the sum actually due: *McVey v. Johnson*, 75–165.

In an action in justice's court in which plaintiff claimed $40, and a verdict was rendered for that amount, and plaintiff immediately remitted all but $24.99 and judgment was entered for that amount, but before judgment was entered defendant filed an an appeal bond, *held*, that the appeal would not lie: *Schultz v. Chicago, R. I. & P. R. Co.*, 75–240.

If the amount in controversy, as shown by the pleadings, exceeds one hundred dollars, the justice has no jurisdiction even to render judgment for one hundred dollars or less: *Gillett v. Richards*, 46–652.

It is not the prayer of the petition but its allegations which show the amount in controversy: *Redfield v. Stocker*, 91–383.

Where the notice shows that the claim is for more than one hundred dollars, defendant may properly disregard it, and nothing can afterwards be done by the plaintiff by which the justice can acquire jurisdiction; and in such a case, *held*, that if such defendant appeared and demurred to the jurisdiction, the plaintiff could not give the justice jurisdiction by filing his petition for an amount within the jurisdiction of the justice: *Hynds v. Fay*, 70–433.

Where the amount claimed by the plaintiff is such as to bring the case within the jurisdiction of a justice of the peace, the fact that he erroneously renders judgment for an amount in excess of his jurisdiction will not render his judgment void, and the excess may be remitted: *Reed v. Shum*, 63–378.

In an action on account for a balance within the jurisdiction of a justice, the entire account is in controversy, although the recovery cannot exceed the amount claimed: *Hall v. Biever*, Mor., 113.

The amount of attorney fee provided for in the note is not to be taken into consideration in determining the amount in controversy, the attorney fee being part of the costs: *Spiesberger v. Thomas*, 59–606.

In determining the amount in controversy it is not proper to add together the amounts of the original claim and of a counter-claim: *Madison v. Spitznogle*, 58–369.

Where the claim stated in the notice was for one hundred dollars with interest and costs, *held*, that such a statement entitled plaintiff to interest on the amount demanded from the time of commencement of suit, and therefore the amount claimed was over one hundred dollars, and the justice had no jurisdiction: *Galley v. Tama County*, 40–49.

But where the petition claimed one hundred dollars, and the notice stated that that amount was claimed, but also stated that unless defendant appeared, etc., judgment would be rendered "for the whole amount with interest and costs," *held*, that the amount claimed did not exceed one hundred dollars, and the justice had jurisdiction: *Moran v. Murphy*, 49–68.

A clause in a note giving a justice of the peace jurisdiction in an action thereon to the amount of three hundred dollars will entitle plaintiff to bring action thereon before any justice who, but for the amount in controversy, would have had jurisdiction without such clause. The execution of such note and its acceptance by payee constitute a sufficient consent to give the justice jurisdiction: *Marshalltown Bank v. Kennedy*, 53–357.

Where a note dated and payable at Des Moines recited that judgment might be taken thereon "before any justice in said county," the only county mentioned therein being that of the maker's residence, Dallas county, *held*, that the specification did not operate to give a justice of the peace in Polk county, before whom action was properly brought, jurisdiction of the case to an amount in excess of the amount of one hundred dollars: *Brown v. Davis*, 59–641.

Where the action by consent of parties might be within the jurisdiction of the justice, such consent will be presumed in support of a judgment: *Chesmore v. Barker*, 70 N. W., 701.

Where the claim was for three hundred dollars, on a promissory note with attorney fees, it being stipulated in such note that a justice of the peace should have jurisdiction thereof, *held*, that the claim as to attorney fees was merely descriptive of the note and did not make the amount in controversy greater than three hundred dollars: *Long v. Loughran*, 41–543.

It is the fact of consent which gives the justice jurisdiction where the amount in controversy exceeds one hundred dollars, and if such fact exists, his judgment for more than that amount will be valid even though no record of the fact of consent appears: *Schlisman v. Webber*, 65–114.

In an attachment proceeding the amount

in controversy is the claim plaintiff seeks to enforce, and not the value of the attached property: *Hoppe v. Byers*, 39–573.

If the judgment is for an amount within the jurisdiction of the justice, he may, in a proper proceeding, render judgment against a garnishee for the entire amount due under such judgment, although, by reason of costs, the judgment against the garnishee exceeds the sum for which the justice may render judgment in an original action. The proceeding by garnishment is merely auxiliary to the original judgment and follows it as an incident for its enforcement: *Gillett v. Richards*, 46–652; *Hodge v. Ruggles*, 36–42.

A justice of the peace, who has jurisdiction of the indebtedness which is sought to be recovered by reason of consent of parties where the amount in controversy exceeds one hundred dollars, has also jurisdiction of an attachment proceeding auxiliary thereto, although there is no consent to jurisdiction for more than one hundred dollars as to the attachment: *Houghton v. Bauer*, 70–314.

SEC. **4478. Suits brought where party resides.** Actions in all cases may be brought in the township where the plaintiff, or the defendant, or one of several defendants, resides, unless otherwise provided by law. [C.'73, § 3509; R., § 3851; C.'51, § 2263.]

A trial had before the proper justice, but taking place outside of his township, by consent of parties, *held* not to be void for want of jurisdiction: *Rogers v. Loop*, 51–41.

That a suit before a justice is brought in the wrong township is not ground for change of venue. Such fact should be pleaded in abatement. Whether a motion to dismiss would be proper in such case, *quære: Meunch v. Breitenbach*, 41–527.

SEC. **4479. Where defendant served.** They may also be brought in any other township of the same county, if actual service on one or more of the defendants is made in such township. [C.'73, § 3510; R., § 3852; C.'51, § 2264.]

Defendant may be sued in any township where service is obtained on him, provided he be a resident of the county: *Klingel v. Palmer*, 42–166.

Service of notice upon defendant in his own township will not give the justice jurisdiction of defendant in an action brought in another township of the same county, but the justice having jurisdiction of the subject matter may acquire jurisdiction of defendant by appearance: *Auspach v. Ferguson*, 71–144.

Where the plaintiff is a nonresident of the county the justice has no jurisdiction in a township where the defendant does not reside or is not served: *Thompson v. Jackson*, 93–376.

SEC. **4480. In replevin or attachment—against nonresidents.** Actions in replevin may also be brought before any justice in the county in which the property is found. Actions aided by attachment may be brought against nonresidents of the state in any county and township wherein the property sought to be levied upon is found, and any action against such nonresidents may be brought in any county wherein any defendant is served with notice thereof. [C.'73, §§ 3511–12; R., §§ 3853–4; C.'51, §§ 2265–6.]

In such cases the jurisdiction of a justice is not limited to the township in which the defendant resides, or in which the property may be found, but is co-extensive with the county: *Leversee v. Reynolds*, 13–310; *Biddle v. Allender*, 14–410.

The justice has jurisdiction throughout the county without regard to the particular township in which the parties reside or the property is situated. (Overruling *Meunch v. Breitenbach*, 41–527): *Knowles v. Picket*, 46–503.

But the justice does not have jurisdiction of an action for the recovery of money against a resident of another county, although an attachment is sought in such action against property in the county where suit is brought: *Gates v. Wagner*, 46–355.

Removal of property from county: These provisions relate to the location of the property at the time the case is commenced, and not at the time it is seized under the writ. The removal of the property from the county after the commencement of the action, but before seizure, will not defeat the jurisdiction of the justice or the right to levy on the property: *Craft v. Franks*, 34–504.

This section, as to place of bringing suit, applies to actions in attachment, and is not in conflict with §§ 4581 and 4582, which apply to actions commenced by personal service of notice: *Anderson v. Union Pac. R. Co.*, 77–445.

SEC. **4481. Contracts in writing.** On written contracts stipulating for payment at a particular place, action may be brought in the township where the payment was agreed to be made. [C.'73, § 3513; R., § 3855; C.'51, § 2267.]

A justice may entertain jurisdiction in a suit upon a written contract stipulating for payment in his township, although the defendant be a resident of another county, and not served within the township where the suit is brought: *Klingel v. Palmer*, 42–166; *Baker v. Jamison*, 73–698.

For similar provisions as to courts of record, see § 3496.

SEC. **4482. In adjoining township.** If there is no justice in the proper township qualified or able to act, it may be commenced in any adjoining township in the same county. [C. '73, § 3514; R., § 3856; C. '51, § 2268.]

SEC. **4483. Docket furnished.** The board of supervisors of each county shall furnish to each justice of the peace thereof a well-bound blank record book of not less than four quires, with index, suitable for a docket, upon his certificate that the same is necessary for the business of the office. [C. '73, § 3635.]

SEC. **4484. Extries on docket.** Each justice shall keep such docket by entering therein each action and each act done, with the proper date as follows:

1. The title of the action;
2. A brief statement of the nature and amount of the plaintiff's demand, and defendant's counter-claim, if any, giving date to each where dates exist;
3. The issuing of the notice and the return thereof;
4. The appearance of the parties;
5. Every adjournment, stating at whose instance and for what time;
6. The granting of a change of place of trial, and the name of the justice to whom the case is sent;
7. The trial, and whether by the justice or by a jury;
8. The verdict and judgment;
9. The issuance of each execution, to whom delivered, the renewals, if any, and the amount of judgment and costs to be collected thereunder;
10. The issuance of each writ of attachment or replevin or other process, to whom delivered, and the particulars thereof;
11. The taking of an appeal, if any;
12. The giving a transcript for filing in the clerk's office, or for setting off against another judgment;
13. A note of all motions made or demurrers interposed, and whether sustained or overruled. [C. '73, § 3515; R., § 3857; C. '51, § 2269.]

The provision of ¶ 3 of § 3515 of Code of '73 which used the word "process" instead of "notice" as here, *held* directory, and that failure to note the return of an execution, before judgment against a garnishee garnished thereunder, could not be taken advantage of by the garnishee to reverse a judgment against him: *Houston v. Walcott*, 1–86. Also, *held*, that failure of the justice to note in his docket the return of notice would not affect his jurisdiction: *Bridges v. Arnold*, 37–221.

The last subdivision does not refer to motions made on the trial to exclude evidence. Objections to evidence, and rulings thereon, need not be entered on the docket: *Miller v. O'Neal*, 9–446.

An entry in the docket in the taking and allowance of the appeal, being an entry required to be made, will prevail over the entry on an appeal bond as to the date of filing and approving the same where the two are in conflict: *Moore v. Manser*, 9–47.

SEC. **4485. Parties—proceedings.** The parties to the action may be the same as in the district court, and all the proceedings prescribed for that court, so far as applicable and not herein changed, shall be pursued in justices' courts. The powers of the court are only as herein enumerated. [C. '73, § 3516; R., § 3858; C. '51, § 2270.]

A justice of the peace has no power to give instructions to a jury sitting in the trial of a case before him: *St. Joseph Mfg. Co. v. Harrington*, 53–380.

A party objecting to a decision or ruling in a justice's court must make his objection known at the time in order to have the decision reviewed upon appeal: *Condray v. Stifel*, 77–283.

By the provisions applicable to a change of venue in the district court, the costs therein are to be paid before the change becomes effectual, and this provision is applicable in justices' courts: *Holmes v. Butts*, 87–412.

The provisions of § 3796 for retrial of actions where service is by publication are, under this section, applicable to proceedings in justices' courts: *Taylor & Farley Organ Co. v. Plum*, 57–33.

The last sentence of the section refers to title 22 of the Code, and not to the Code as a whole: *Fitzgerald v. Grimmell*, 64–261.

SEC. **4486. How commenced.** Actions in justices' courts are commenced by voluntary appearance or by notice.

Voluntary appearance gives the justice jurisdiction as to the party without any service of notice whatever: *Acres v. Hancock*, 4–568.

The appearance waives any defect in the notice: *Houston v. Walcott*, 1–86.

Appearance by motions for continuance and change of venue waives objection to the notice or service: *Shaffer v. Trimble*, 2 G. Gr., 464.

Special appearance to object to sufficiency of service of notice confers jurisdiction: *Church v. Crossman*, 49–444.

An appearance to cross-examine witnesses, even though general appearance is disclaimed, will confer jurisdiction: *Rahn v. Greer*, 37–627.

Where the attorney of defendant was present at the time set for trial and asked to look at the papers, and told the justice that he had no jurisdiction or authority to try the case, *held*, that these acts did not constitute an appearance giving the justice jurisdiction: *Holmes v. Hull*, 48–177.

As to appearance by agent, see § 4493.

Where the justice has not jurisdiction of the subject matter, voluntary appearance will not confer jurisdiction; for instance, where defendant is a resident of another county: *McMeans v. Cameron*, 51–691; *Boyer v. Moore*, 42–544; *Chapman v. Morgan*, 2 G. Gr., 374.

SEC. 4487. Petition not necessary. No petition need be filed except as in this chapter required. The notice must state the cause of the action in general terms, sufficient to apprise the defendant of the nature of the claims against him. [C.'73, § 3518; R., § 3860; C. '51, § 2272.]

When the cause of action is such that it must be sworn to, the petition need not be filed until the return day. An original notice alone is sufficient to commence the action: *Duffy v. Dale*, 42–215.

A technical setting forth of the cause of action is not demanded, but a notice stating it in general terms, if sufficient to apprise the defendant of the nature of the claim against him, is all that is required: *Fauble v. Stewart*, 35–379.

Where the cause of action stated in the notice was "$40 damages in the sale of oxen," plaintiff was allowed to prove and recover upon a warranty made in such sale; and it was held that the notice sufficiently set forth such cause of action: *Dilley v. Nusum*, 17–238.

Where the claim was upon a written instrument of guaranty of a promissory note, and the notice stated the claim as upon "a promissory note," *held*, that the notice was sufficient: *Francis v. Bentley*, 50–59.

Where the notice of suit in the justice's court set out the cause of action as a claim for a certain sum with interest, etc., etc., and the petition filed on the return day claimed to recover the same sum with interest, etc., upon a bond signed by defendant as surety, *held*, that the petition was not based upon a different cause of action from that stated in the notice: *Winneshiek County v. Humpal*, 61–172.

Under notice of a claim for money due for "damages for the illegal and wrongful taking and detention" of property, "and as damages for the detention thereof," *held*, that plaintiff could recover the value of property wrongfully taken: *Paden v. Griffith*, 12–272.

As to defective notice, see § 4491.

Technical precision in pleading is not required, see notes to § 4499.

SEC. 4488. Form of notice. It must be addressed to the defendant by name, but if his name is unknown a description of him will be sufficient. It must be subscribed by the plaintiff, his attorney, or the justice before whom it is returnable. [C.'73, § 3519; R., § 3861; C.'51, § 2273.]

A notice signed by plaintiff's attorney is defective, but a judgment rendered by the justice on such notice will not be void for want of jurisdiction: *Arts v. Rocksien*, 67 N. W., 409.

As to unknown defendants, see § 3472.

SEC. 4489. What to state. It must state the amount for which the plaintiff will take judgment if the defendant fails to appear and answer at the time and place therein fixed. [C.'73, § 3520; R., § 3862; C. '51, § 2274.]

SEC. 4490. Time fixed. The time fixed in the notice must be not less than five nor more than fifteen days from the date, and it must be served not less than five days previous to the trial. [C. '73, § 3521; R., § 3863; C. '51, § 2275.]

Where the notice was served less than five days previous to trial, *held*, that judgment thereon was erroneous, but not void. Judgment on a defective or insufficient notice can only be attacked by appeal and not collaterally: *Shea v. Quintin*, 30–58; *Ballinger v. Tarbell*, 16–491.

SEC. 4491. Service and return. The service and return thereto must be made in the same manner as in the district court, except no service shall be made by publication other than is herein provided, nor shall any return made by another than the sheriff or a constable of the county be valid unless sworn to. [C.'73, § 3522; R., § 3864; C'51, § 2276.]

A defective notice, if service is properly had, does not affect the jurisdiction of the court nor the validity of the proceeding. If the justice err in holding the notice suffi-

cient, advantage thereof must be taken on appeal if at all: *Dougherty v. McManus*, 36–657.

Error in rendering judgment on a defective notice or insufficient service cannot be corrected by writ of error unless a motion to set aside the judgment is first made before the justice: *Leonard v. Hallem*, 17–564; *Smith v. Parker*, 28–359.

If the justice has no jurisdiction by reason of entire want of notice, the defendant need not move for correction of the error in rendering judgment against him, but may, if he knows of the judgment in time, have the error corrected by writ of error, or may afterward bring an independent action to set it aside: *Holmes v. Hull*, 48–177.

The officer's return is the best evidence of the service of notice and is not overcome by failure to enter the fact of return of service on his docket: *Bridges v. Arnold*, 37–221.

The determination by the justice of the peace of the sufficiency of the evidence of service cannot be collaterally attacked: *Baker v. Jamison*, 73–698.

The notice is not "process," and may, under some circumstances, be served out of the county, although it is provided that process from a justice court cannot issue into another county (§ 4590): *Klingel v. Palmer*, 42–166.

Where notice in an attachment proceeding required the defendant to appear before the justice on a certain date, and on that date the office of the justice before whom the defendant was required to appear was vacant, *held*, that a judgment rendered in pursuance of such notice should be held invalid on appeal: *Evans v. Richards*, 85–620.

SEC. **4492. Defendant may pay officer.** The defendant may at any time pay to the officer having the notice for service, or to the justice of the peace, the amount of the claim, together with the costs which have then accrued, and thereupon the proceedings shall be dismissed. [C. '73, § 3523; R., § 3865; C. '51, § 2277.]

SEC. **4493. Appearance of parties—agent's authority.** Either of the parties may appear in person or by agent; if by agent, he may be required by the justice to show his authority, if written, or prove it by his oath or otherwise, if verbal. [C. '73, § 3524; R., § 3866; C. '51, § 2278.]

A service of original notice upon the agent will not constitute service upon the principal, though the agent may bind the principal by appearance: *Brown v. Newman*, 13–546.

SEC. **4494. Time for appearance.** The parties in all cases are entitled to one hour in which to appear after the time fixed therefor, but neither party is bound to wait longer for the other. [C. '73, § 3525; R., § 3867; C. '51, § 2279.]

A judgment rendered against defendant before the expiration of the hour allowed by statute for appearance, though erroneous, is not void, and cannot be attacked in a collateral proceeding: *Central Iowa R. Co. v. Piersol*, 65–498.

Where the record of a judgment by default recited that it was entered after the expiration of the hour allowed, *held*, that the record was conclusive in that respect, and could not be impeached by affidavits that the hour had not expired: *Cory v. King*, 49–365.

SEC. **4495. Postponement.** Upon the return day, if the justice is actually engaged in other official business, he may postpone proceedings in the case until such business is finished. [C. '73, § 3526; R., § 3868; C. '51, § 2280.]

SEC. **4496. Adjournment.** If from any cause the justice is unable to attend to the trial at the time fixed, or if a jury is demanded, he may adjourn the cause for a period not exceeding three days, nor shall he make more than two such adjournments. [C. '73, § 3527; R., § 3869; C. '51, § 2281.]

An adjournment by the justice for more than three days, without consent of defendant, deprives him of jurisdiction, and a subsequent judgment against the defendant will be void even though the record of the justice shows that the defendant consented: *Iowa Union Tel. Co. v. Boylan*, 86–90.

SEC. **4497. Showing for.** In case of the absence of witnesses, either party, at his own cost, may have an adjournment, not exceeding sixty days, upon motion supported by an affidavit like that required to obtain a continuance in the district court for the like cause. [C. '73, § 3528; R., § 3870; C. '51, § 2282.]

A continuance by consent to an indefinite time will not enable one party to obtain judgment by default against the other without notice to the other as to the time when the cause is again set for trial: *Rowley v. Baugh*, 33–201.

After the death of a party before trial, a continuance may be granted to allow an administrator to be appointed, so that he may be made a party: *Caughlin v. Blake*, 55–634.

SEC. **4498. Testimony of witness taken.** Either party applying for an adjournment must, if required by the adverse party, consent that the testimony of any witness of the adverse party who is in attendance be then taken in writing, to be used as a deposition on the trial of the cause. [C. '73, § 3529; R., § 3871; C. '51, § 2283.]

SEC. **4499. Pleadings.** The pleadings must be substantially the same as in the district court. They may be written or oral, but if required to be verified they must be in writing. If oral, they must in substance be written down by the justice in his docket. [C. '73, § 3530; R., § 3872; C. '51, § 2284.]

Technical exactness and nicety in pleading are not required before a justice of the peace: *Wright v. Phillips*, 2 G. Gr., 191; *Taylor v. Barber*, 2 G. Gr., 350; *Packer v. Cockayne*, 3 G. Gr., 111; *Burton v. Hill*, 4 G. Gr., 379; *Hall v. Monahan*, 1–554; *Greff v. Blake*, 16–222; *Root v. Illinois Cent. R. Co.*, 29–102.

Technical rules of pleading which prevail in courts of record are not applicable to proceedings in justices' courts: *Francis v. Bentley*, 50–59.

The same technical precision is not required in stating a cause of action for defense: *Finch v. Central R. of Iowa*, 42–304.

What sufficient: If the cause of action is stated in general terms, with sufficient certainty to apprise the defendant of the nature of plaintiff's demand, it is sufficient: *Shea v. Livingstone*, 32–158.

Great liberality of construction should be indulged in relation to such pleadings: *Blake v. Graves*, 18–312; *Emerick v. Clemons*, 26–332.

In an action before a justice on account the charges were set forth as follows: "To dental work," "extracting teeth, etc.," the date of each, with the amount thereof, being set opposite each charge. *Held* to be a sufficiently specific statement: *Brownell v. Smith*, 13–287.

Formal errors and irregularities are to be disregarded on appeal: See § 4562.

Variance: Where the pleadings are oral, or even where they are written, exact correspondence in the proof is not required: *West v. Moody*, 33–137.

Variance between the evidence and the statement of the cause of action on the justice's docket should not be held fatal on appeal: *Rife v. Pierson*, 2 G. Gr., 129.

In a case originating before a justice, where full and formal pleadings are not required, a judgment will not be reversed because evidence is introduced that finds no support in a specific allegation of the pleadings, where both parties have covered the point in their evidence without objection: *Miller v. Cassady*, 25–323.

Under a general allegation, in an action against a carrier, of the loss of a trunk, *held*, that plaintiff might prove whatever was necessary to establish such loss: *Byers v. Lessees of Des Moines Valley R. Co.*, 21–54.

Objections to pleadings: If the plaintiff fails to state his cause of action in a sufficiently clear manner, the objection should then be taken, if at all, and cannot be made when the evidence is offered to sustain it: *Delany v. Reade*, 4–292.

Substantial requirements: But pleadings are required to be substantially the same as in the district court, and therefore it was held error, even in a trial before a justice, to admit evidence of defect in the proper execution of an instrument under a denial of indebtedness thereon: *Glidden v. Higbee*, 31–379.

Oral pleading: The requirement that an oral pleading be written down by the justice in his docket is merely directory, and a failure to comply therewith should not be allowed to prejudice a party so pleading: *West v. Moody*, 33–137.

It is not necessary that the justice should set out the claim with the particularity required in a formal petition: *Stone v. Murphy*, 2–35.

In writing down defendant's oral plea the justice should state the substance of the defense relied on, and not what he infers was meant thereby: *Jordan v. Quick*, 11–9.

On appeal, the transcript of the justice's docket, where the plaintiff's claim has been orally stated, must show the amount and nature of plaintiff's demand: *Sears v. Tubbs*, 4 G. Gr., 409.

If the cause of action is sufficiently entered upon the docket the loss of the original notice will be immaterial: *Shawg v. Bruce*, 3–324.

Style of plaintiffs: Where plaintiffs were designated in the notice as "heirs at law" of the payee of the note sued on, *held*, that they did not sue as heirs, and if they did it was immaterial: *King v. Gottschalk*, 21–512.

Bill of particulars: In an action before a justice on an account, plaintiff must, when demanded, furnish a bill of particulars, or name the items so that the justice can enter them on his docket: *McKenney v. Hopkins*, 20–495.

Substitution of administrator upon death of party: Upon the death of defendant after commencement of suit and before return day, the administrator may be substituted and the cause may be continued by one or more adjournments until an administrator can be appointed: *Caughlin v. Blake*, 55–634.

Denial presumed: Where, on appeal, it appears that a trial was had before the justice on the merits, a denial of plaintiff's right to recover will be presumed to have been made although it does not appear of record: *Simmamon v. Melbourn*, 4 G. Gr., 309; *Heath v. Coltenback*, 5–490; *Hall v. Denise*, 6–534; *Clark v. Barnes*, 7–6; *Weimer v. Linhard*, 12–359; *Richman v. Brown*, 25–33.

But where the entry of the justice indicates that there was no denial of a set-off, it should be regarded as admitted: *Brock v. Manatt*, 5–270.

SEC. **4500. Counter-claim.** A counter-claim must be made, if at all, at the time the answer is put in. [C. '73, § 3531; R., § 3873; C. '51, § 2285.]

In order that a counter-claim may be properly interposed so as to defeat plaintiff's right to dismiss the action, it must be set up in a written answer filed, or must be stated to the justice and the substance thereof entered on his docket: *Kuhn v. Bone*, 10–392.

SEC. **4501. Written instruments filed.** The original, or a copy, of all written instruments upon which a cause of action or counter-claim is founded must be filed with the claim founded thereon, or a sufficient reason given for not doing so. [C.'73, § 3532; R., § 3874; C.'51, § 2286.]

The failure of the justice to mark an instrument as filed will not prejudice the rights of the party filing it: *Stone v. Murphy*, 2–35.

Nor prevent its being admitted in evidence in a trial on appeal: *Eggleston v. Collis*, 10–554.

SEC. **4502. Change of place of trial.** Either party, before the trial is commenced, may have the place of trial changed, upon filing an affidavit that the justice is prejudiced against him, or is a near relative of the other party, or is a material witness for the affiant, or that he cannot obtain justice before him; but no more than one change shall be allowed each party, unless the justice to whom the case is transmitted is related to either party by consanguinity or affinity within the fourth degree, or is a witness, or has been an attorney employed in the action; in either of which events a second change may be allowed. [C.'73, § 3533; R., § 3875.]

It is not error to refuse a change after the trial is commenced: *McKenney v. Hopkins*, 20–495.

Where there was one trial in which the jury disagreed, and the cause was continued; and before the second trial an affidavit was filed asking a change, on the ground that the justice was a material witness for affiant, *held*, that the application was made in time: *Marshall v. Kinney*, 1–580.

The change must be granted where a motion and affidavit are filed complying with the requirements of the statute: *Berner v. Frazier*, 8–77.

As to another justice acting, see § 4588.

The fact that suit is brought in the wrong county is not a ground for change of venue to the right county: *Post v. Brownell*, 36–497.

Nor is the fact that suit is brought in the wrong township a ground for such change; the objection is to be raised by pleading the fact: *Meunch v. Breitenbach*, 41–527.

SEC. **4503. Next nearest justice.** When a change is allowed and the fees for transcript are paid, said justice shall transmit all the original papers in the case, and a transcript of his proceedings, to the next nearest justice in the township, if there be any, if not, to the next nearest justice in his county, and said justice shall proceed to try said case, and, if he cannot try the same immediately, he shall then fix a time therefor, of which all parties shall take notice. [C.'73, § 3534; R., § 3876.]

Although the justice from whom the change is taken commit an error in sending the case to a justice who is not the nearest one in the county to whom it might be sent, yet the justice to whom the case is thus sent cannot review such decision, and will have jurisdiction, and his action cannot be collaterally attacked: *Tennis v. Anderson*, 55–625.

It is necessary that the justice granting a change shall designate by name the next justice to whom the case is sent. This is a judicial determination, and in no other way can it be known who is the proper justice to whom the case has been transferred. Until the justice does determine and designate such nearest justice, the change of venue is not complete and no other justice can acquire jurisdiction: *Brenner v. Hallowell*, 59–433.

A justice of the peace, having the right to his fees before performing an official service, may refuse to transmit a case to another justice on an application for change of venue until his fees are paid: *Holmes v. Butts*, 87–412.

SEC. **4504. When change is not effected.** If the person to whom the cause is sent is not a justice, or for any reason, though a justice, cannot act, the court granting the change shall retain jurisdiction of the case for the purpose of perfecting the same and sending it to the next nearest justice who can serve.

SEC. **4505. Title to real property.** If the title to real property is put in issue by verified pleadings, or such fact manifestly appears from the proof on the trial of the issue, the justice shall, without further proceedings, certify the cause and papers, with a transcript of his docket showing the reason of such transfer, to the district court, where the same shall be tried on the merits. No cause so transferred shall be dismissed because the justice erred in transferring the same. [C.'73, § 3535; R., §§ 3877–8; C.'51, §§ 2287–8.]

In an action to recover for injury to trees, the ownership of plaintiff of the premises must be put in issue by pleading supported by affidavit and by motion to transfer the case to the district court. The justice of the peace cannot dismiss the action on the ground that it involves the title to real estate, and it will not be error for him to refuse to do so where the title is not put in issue as here required: *Delzell v. Burlington, C. R. & N. R. Co.*, 89–208.

That title cannot be determined in action of forcible entry and detainer, see § 4216.

SEC. **4506. Other causes severed.** When a case is thus transferred, if there are other causes of action not necessarily connected with the issue of title, they may be severed, retained, and tried before the justice. [C. '73, § 3536; R., § 3879; C. '51, § 2289.]

SEC. **4507. Demand for jury.** Unless one of the parties demands a trial by jury at or before the time for joining issue, it shall be by the justice. [C. '73, § 3537; R., § 3880; C. '51, § 2290.]

For a reasonable time after the filing of defendant's answer plaintiff has the right to demand a jury trial: *Hall v. Chicago, B. & Q. R. Co.*, 65–258.

SEC. **4508. Dismissal of action.** If the plaintiff fails to appear by himself or agent on the return day or time fixed for the trial, the justice shall dismiss the case and render judgment against him for costs, except as provided in the next section. [C. '73, § 3538; R., § 3881; C. '51, § 2291.]

If plaintiff appears before decision on a motion for dismissal on account of his non-appearance, the motion should be overruled: *Wright v. Philips*, 2 G. Gr., 191.

SEC. **4509. On written instrument.** When the action is founded on an instrument in writing, purporting to have been executed by the defendant, calling for a certain sum as due the plaintiff, if the signature of the defendant is not denied under oath, and if the instrument has been filed with the justice previous to the time fixed for appearance, or the action is upon an account which is verified, he may proceed with the cause, whether the plaintiff appears or not. [C. '73, § 3539; R., § 3882; C. '51, § 2292.]

A dismissal for failure of plaintiff to appear should not be entered where the action is upon a written instrument which has been filed with the justice prior to the time for appearance, as authorized by law: *Jewett v. McLelland*, 3 G. Gr., 568.

SEC. **4510. Default in such case.** In the case provided for in the last section, if the defendant does not appear, judgment shall be rendered against him for the amount of the plaintiff's claim. [C. '73, § 3540; R., § 3883; C. '51, § 2293.]

SEC. **4511. Default in other cases.** Where the plaintiff's claim is not founded upon such written instrument or account, and the defendant does not appear, the justice shall proceed to hear the allegations and proofs of the plaintiff, and render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount stated in the notice. [C. '73, § 3541; R., § 3884; C. '51, § 2294.]

SEC. **4512. Default as to counter-claim.** In the cases contemplated in the last two sections, if the defendant has previously filed a counter-claim, founded on a written instrument purporting to have been signed by the plaintiff, calling for a certain sum, or on a verified account, the justice shall allow such counter-claim in the same manner as though the defendant had appeared, and render judgment accordingly. [C. '73, § 3542; R., § 3885; C. '51, § 2295.]

SEC. **4513. Judgment set aside.** Judgment dismissing the cause, or by default, may be set aside by the justice at any time within six days after being rendered, if the party applying therefor shows a satisfactory excuse for his non-appearance. [C. '73, § 3543; R., § 3886; C. '51, § 2296.]

This section applies only to cases where there has been personal service. In case of judgment upon service by publication, § 3796 is applicable: *Taylor & Farley Organ Co. v. Plumb*, 57–33.

A judgment by default cannot be set aside on a showing, supported by affidavits, that the justice entered judgment by default before a particular time of day. The recitals of the judgment are conclusive upon that point: *Cory v. King*, 49–365.

Where defendant appears and demands a jury, and judgment is rendered against him for want of an answer, such judgment is not by default in such sense that it can be set aside on motion, as provided for in case of judgment by default: *Rhodes v. De Bow*, 5–260.

So, where defendant appeared and an-

swered, but did not appear at time of trial, and judgment was rendered against him, *held*, that it was not a judgment by default: *Douglass v. Langdon*, 29–245.

No notice to the opposite party of a motion to set aside default is necessary: *Stivers v. Thompson*, 15–1; *Park v. Ratcliffe*, 42–42.

A satisfactory excuse must be shown by the party making the application: *Arts v. Rocksien*, 67 N.W., 409.

As to what is a satisfactory excuse, much is left to the discretion of the justice: *Stivers v. Thompson*, 15–1.

Error in the name of the defendant in the copy furnished him of the notice served will not be sufficient ground for setting aside a default, the notice served on him, and the return of such notice, showing that the defendant was sued by his right name and that the notice was read to him by the officer: *Breen v. Coon*, 91–325.

A judgment of a justice will not be reversed on writ of error for error in rendering default, which might have been corrected by motion under this section, when no such motion was made before the justice; § 4105 is applicable in such case: *Leonard v. Hallem*, 17–564; *Smith v. Parker*, 28–359.

SEC. **4514. New trial.** In such case a new day shall be fixed for trial, and notice thereof given to the other party or his agent. [C. '73, § 3544; R., § 3887; C. '51, § 2297.]

SEC. **4515. Costs of new trial.** Such orders shall be made in relation to the additional costs thereby created as are equitable. [C. '73, § 3545; R., § 3888; C. '51, § 2298.]

SEC. **4516. Execution recalled.** Any execution which may in the meantime have been issued shall be recalled in the same manner as in cases of appeal. [C. '73, § 3546; R., § 3889; C. '51, § 2299.]

SEC. **4517. Jury summoned.** If a jury be demanded, the justice shall issue his precept to some constable of the township, directing him to summon the requisite number of jurors possessing the same qualifications as are required in the district court. [C. '73, § 3547; R., § 3890; C. '51, § 2301.]

SEC. **4518. Selection of jury.** The jury shall consist of six jurors, unless a smaller number be agreed upon between the parties. Each party is entitled to three peremptory challenges and no more. Any deficiency in their number, arising from any cause, may be supplied by summoning others in the manner above directed. [C. '73, § 3548; R., § 3891; C. '51, § 2302.]

SEC. **4519. Discharge of jury.** The justice may discharge the jury, when satisfied that it cannot agree, and shall immediately issue a new precept for summoning another, to appear at a time therein fixed, not more than three days distant, unless the parties otherwise agree. [C. '73, § 3549; R., § 3892; C. '51, § 2303.]

SEC. **4520. Motion in arrest or for new trial.** No motion in arrest of judgment to set aside a verdict, or for a new trial, can be entertained by a justice of the peace; nor can the justice give instructions to the jury, but must rule on objections to evidence. [C. '73, § 3550; R., § 3893; C. '51, § 2304.]

A justice of the peace has no power to give instructions to a jury sitting in the trial of a case before him: *St. Joseph Mfg. Co. v. Harrington*, 53–380.

Where it appeared upon writ of error to the circuit court that the justice had given instructions to a jury, *held*, that the cause should have been remanded for new trial, although the giving of instructions was not urged as error: *Ibid.*

Where a jury is called in a case before a justice, and duly impaneled, the justice cannot take the case from the jury. His only power is to discharge the jury if they fail to agree: *Hunt v. Farmers' Ins. Co.*, 74–231.

A justice of the peace has no authority to set aside a verdict of the jury: *Dupont v. Downing*, 6–172.

Nor to grant a new trial: *Helmick v. Johnson*, Mor., 89.

The justice has no power to set aside the verdict or to arrest the judgment, when the verdict is rendered. He has no discretion in the matter, but is required absolutely to enter judgment for the amount thereof, and in so doing he performs a merely clerical duty: *Atkinson v. Chicago & N. W. R. Co.*, 70–68.

The justice cannot entertain a motion after judgment to retax costs: *Miller v. Haley*, 66–260.

SEC. **4521. Verdict.** The verdict of the jury must be general. But, where there are several plaintiffs or defendants, it may be for or against one or more of them. [C. '73, § 3551; R., § 3894; C. '51, § 2305.]

In an action for balance due for the purchase of property, it is error to render judgment on a verdict of the jury "for the plaintiff" without an assessment of damages: *Bartle v. Plane*, 68–227.

If the verdict returned by the jury is incorrect in form, the justice may advise the jurors as to the proper form, and direct a new verdict in that form to be rendered: *Wright v. Phillips*, 2 G. Gr., 191.

SEC. **4522. Judgment entered.** In cases of dismissal, or of judgment by confession or on the verdict of a jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases, it shall be done within three days after the cause is submitted to the justice for final action. [C. '73, § 3552; R., § 3895; C. '51, § 2306.]

A judgment on the verdict of a jury should be entered up forthwith; and where there was a delay of sixty days in entering judgment, *held*, that the judgment so entered was void: *Harper v. Albee*, 10–389.

Such judgment might be reversed on a writ of error, but cannot be appealed from: *Ibid.; Brown v. Scott*, 2 G. Gr., 454; *Guthrie v. Humphrey*, 7–23.

"Forthwith" means within a reasonable time; and *held* that, where a confession was made on Saturday night before a justice and entered up Monday morning, it was in time; and that even when there is unreasonable delay, the judgment would, as between the parties, be voidable, but not void: *Burchett v. Casady*, 13–342.

Where a verdict was rendered at 10:30 p. m. on one day and judgment entered on the docket at 11 a. m. the next day, it was held that the statute was sufficiently complied with: *Davis v. Simma*, 14–154.

Where more than ninety days elapsed after the return of the verdict before judgment was entered, *held*, that the entry of the judgment was without jurisdiction and was void, and that not having had knowledge of the erroneous rendition of the judgment within time to prosecute a proceeding by *certiorari* for the correction thereof, defendant was entitled to have the judgment set aside in equity: *Tomlinson v. Litze*, 82–32.

Judgment upon a verdict returned at nine o'clock at night may properly be entered the next morning. The provision that judgment shall be entered "forthwith" must be reasonably construed: *Knox v. Nicoli*, 66 N. W., 876.

Entry upon the docket constitutes the rendition of the judgment: *Brown v. Scott*, 2 G. Gr., 454.

Form: A justice in rendering judgment need follow no particular form: *Stowers v. Milledge*, 1–150; *Barrett v. Garragan*, 16–47; *Church v. Crossman*, 41–373.

An entry reciting, "after hearing all the testimony on both sides it is believed that the plaintiff is entitled to seventy-five dollars debt," etc., *held* sufficient to constitute a judgment: *Stowers v. Milledge*, 1–150.

Where the transcript of the judgment of a justice of the peace showed the time, place, parties, matter in dispute and the result, *held*, that it possessed all the requisites of a valid judgment: *Church v. Crossman*, 41–373.

Where the time, place, parties, matter in dispute and the result were so concisely and clearly stated as to be unmistakable, *held*, that the entry was sufficent: *Barrett v. Garragan*, 16–47.

Entries in particular cases irregular in form, *held* sufficient: *Moore v. Manser*, 9–47; *Lavalle v. Badgly*, 33–155.

In a collateral proceeding liberal rules are recognized in relation to judgments of justices of the peace: *Williams v. Brown*, 28–247.

Where continuance was granted on agreement with a person assuming to be agent for a party to the suit, but who had no authority to represent him, *held*, that a judgment rendered in pursuance of such continuance was void, although the record of the justice showed that the continuance was by consent of parties: *Iowa U. Tel. Co. v. Boylan*; *Changed on rehearing*, 86–90.

SEC. **4523. In excess of jurisdiction.** If the sum found for either party exceeds the jurisdiction of the justice, such party may remit the excess and take judgment for the residue, but he can not afterwards sue for the amount remitted. [C. '73, § 3553; R., § 3896; C. '51, § 2307.]

SEC. **4524. Dismissal.** Instead of remitting the excess, the party obtaining such verdict may elect to have judgment dismissing the action, in which case such party shall pay the costs. [C. '73, § 3554; R., § 3897; C. '51, § 2308.]

SEC. **4525. Mutual judgments set off.** Mutual judgments between the same parties, rendered by the same or different justices, may be set off against each other. [C. '73, § 3555; R., § 3898; C. '51, 2309.]

SEC. **4526. As in district court.** When rendered by the same court, the same course shall be pursued as is prescribed in the district court. [C. '73, § 3556; R., § 3899; C. '51, § 2310.]

SEC. **4527. When by different justices.** If the judgment proposed to be set off was rendered by another justice, the party offering it must obtain a transcript thereof, with a certificate of such justice indorsed thereon, stating that no appeal has been taken, and that the transcript was obtained for the purpose of being used as a counter-claim in that case. [C. '73, § 3557; R., § 3900; C. '51, § 2311.]

SEC. **4528. Transcripts.** Such transcript shall not be given until the time for taking an appeal has elapsed. [C. '73, § 3558; R., § 3901; C. '51, § 2312.]

SEC. **4529. Docket entry.** The justice giving the transcript shall make an entry of the fact in his docket, and all other proceedings in his court shall thenceforth be stayed. [C. '73, § 3559; R., § 3902; C. '51, § 2313.]

SEC. **4530. Execution for balance.** The transcript being presented to the justice who has rendered a judgment between the same parties, if execution has not been issued thereon, he shall strike a balance between the judgments and issue execution for such balance. [C. '73, § 3560; R., § 3903; C. '51, § 2314.]

SEC. **4531. Execution on transcript.** If execution has issued, he shall also issue execution on the transcript filed with him, and deliver it to the officer who has the other execution. [C. '73, § 3561; R., § 3904; C. '51, § 2315.]

SEC. **4532. Executions set off.** Such officer shall treat the lesser execution as so much cash collected on the larger, and proceed to collect the balance. [C. '73, § 3562; R., § 3905; C. '51, § 2316.]

SEC. **4533. Costs in case of set-off.** The above rules as to setting off judgments between the same parties are subject to the same prohibition as to setting off costs, when the effect will be to leave an insufficient amount of money actually collected to satisfy the costs of both judgments, as is contained in the rules of proceedings in the district court. [C. '73, § 3563; R., § 3906; C. '51, § 2317.]

See § 4040.

SEC. **4534. Transcript filed.** When the judgment of another justice is thus allowed to be set off, the transcript thereof shall be filed among the papers of the case in which it is to be used, and the proper entry made in the justice's docket. [C. '73, § 3564; R., § 3907; C. '51, § 2318.]

SEC. **4535. Refusal to allow set-off of judgment.** If the justice refuses the judgment as a set-off, he shall so certify on the transcript and return it to the party who offered it. When filed in the office of the justice who gave it, proceedings may be had by him in the same manner as though no transcript had been certified. [C. '73, § 3565; R., § 3908; C. '51, § 2319.]

SEC. **4536. Judgment by confession.** A judgment by confession, without action, may be entered by a justice of the peace for an amount within his jurisdiction, and the provisions of law regulating judgments by confessions in courts of record shall, so far as may be, apply to confessions of judgment before a justice of the peace, and the justice shall enter such judgment on his docket, and may issue execution thereon as in other cases. [C. '73, § 3566; R., §§ 3397, 3401; C. '51, §§ 1837, 1841.]

SEC. **4537. Transcripts filed in clerk's office.** A party obtaining a judgment in a justice's court may cause a transcript thereof to be certified to the office of the clerk of the district court in the county. [C. '73, § 3567; R., § 3909; C. '51, § 2320.]

A transcript of a judgment before a justice can only be filed and become a lien in the county where rendered. To make it a lien in another county, a transcript must be taken to such county from the judgment as filed in the clerk's office in the county where rendered: *Blaney v. Hanks*, 14–400.

The filing of a transcript does not prevent the prosecution of an appeal or writ of error: *Wilson v. Robinson*, 61–357.

A judgment in a justice's court for fine and costs for illegal sale of liquors does not become a lien as provided by § 2422, until certified and filed as here required: *State v. McCulloch*, 77–450.

A judgment rendered in a justice's court, a transcript of which is filed in the district court, becomes a lien for ten years from the filing of the transcript, and may be enforced by execution issued within twenty years from that date: *Rand v. Garner*, 75–311; *Stover v. Elliott*, 80–329.

SEC. **4538. Effect.** The clerk shall file the transcript as soon as received, and enter a memorandum thereof and the date of filing in the judgment docket and lien index, and from such entry it shall be treated in all respects and in its enforcement as a judgment obtained in the district court. No execution shall issue from the justice's court after the filing of such transcript. [C. '73, § 3568; R., § 3910; C. '51, § 2321.]

Execution on the judgment so filed may be issued at any time within twenty years: *McCoy v. Cox*, 54–595.

SEC. **4539. Executions.** Executions for the enforcement of judgments in a justice's court may be issued, as provided in this chapter, at any time within ten years from the entry of the judgment, but not afterward. [C.'73, § 3569; R., § 3911; C.'51, § 2322.]

This section, extending the time within which execution may issue on the judgment beyond that provided in the Revision, *held* applicable to cases in which the time allowed under the Revision had not expired when the Code of '73 was enacted, but not to cases where such time had expired: *Woods v. Haviland*, 59–476.

In general, see § 3960 and notes.

SEC. **4540. Form.** Such execution shall be against the goods and chattels of the defendant therein, and shall be directed to any constable of the county. [C.'73, § 3570; R., § 3912; C.'51, § 2323.]

An execution specifying who recovered the judgment and against whom it was recovered, but not reciting formally the names of the parties to the action, *held* sufficient: *Williams v. Brown*, 28-247.

Immatured crops cannot be levied upon and sold on execution as personal property: *Ellithorpe v. Reidesil*, 71-315.

SEC. **4541. Return.** It must be dated on the day on which it is issued, and made returnable within thirty days thereafter. [C.'73, § 3571; R., § 3913; C.'51, § 2324.]

SEC. **4542. Renewable.** If not satisfied when returned, it may be renewed from time to time by an indorsement thereon to that effect, signed by the justice, and dated of the date of such renewal. [C.'73, § 3572; R., § 3914; C.'51, § 2325.]

SEC. **4543. For thirty days.** The indorsement must state the amount paid thereon, and shall continue the execution in full force for thirty days from the date of renewal. [C.'73, § 3573; R., § 3915; C.'51, § 2326.]

SEC. **4544. Garnishment.** Garnishment proceedings under execution shall be the same as in the district court, except, upon return of the garnishment being made to the justice who issued the execution, he shall docket a cause, fix a time, and cite the garnishee then to appear and answer.

SEC. **4545. Property sold.** Property levied on before such renewal may be retained by the officer and sold after renewal. [C.'73, § 3574; R., § 3916; C.'51, § 2327.]

A sale after the expiration of the execution under which levy is made, and without renewal as here contemplated, will be valid: *Walton v. Wray*, 54–531.

SEC. **4546. Appeal.** Any person aggrieved by the final judgment of a justice may appeal therefrom to the district or a superior court in the county, at his option, in the manner provided by law. [18 G. A., ch. 163; C.'73, § 3575; R., § 3917; C.'51, § 2328.]

Right of appeal: Whenever, in any case, there is final judgment before a justice, the right of appeal is given, unless denied by express provision or necessary implication. So *held* in an action against a defendant for violation of a city ordinance under a charter giving justices jurisdiction in such cases: *Dubuque v. Rebman*, 1–444.

But if the justice exercises a new jurisdiction created by statute, in which the proceedings are summary and different from the common law, *certiorari* and not appeal is the proper method of review: *Ibid.*

A party cannot appeal from the verdict of a jury. There must first be a judgment by the justice upon such a verdict: *Kimble v. Riggin*, 2 G. Gr., 245; *Brown v. Scott*, 2 G. Gr., 454; *Guthrie v. Humphrey*, 7–23.

An appeal may be taken from a judgment by default: *Butler v. Heeb*, 38–429.

An appeal may be taken from a judgment of nonsuit on the evidence: *Gilson v. Johnson*, 4–463.

The dismissal of action against a garnishee may be reviewed by appeal: *Hodge v Ruggles*, 36–42.

If the final judgment of the justice upon the evidence is wrong, the proper remedy is by appeal and not by writ of error: *Lane v. Goldsmith*, 23–240.

Where the question to be determined was as to the discharge of attached property on the ground that the same was exempt, the hearing being on affidavits and oral evidence, *held*, that an appeal, and not a writ of error, was the method for review: *Lease v. Franklin*, 84–413.

Errors of law committed in proceedings which end in final judgment, and which affect the merits of the controversy, may be reviewed on appeal unless waived: *Belding v. Torrence*, 39–516.

The right of appeal exists whether the judgment complained of, if final, is one of law or fact: *Griffin v. Moss*, 3–261.

Error in ruling on a demurrer cannot be

reviewed on appeal, as the appeal brings up the case for trial on the merits, and waives all such errors or irregularities: *Leftwick v. Thornton*, 18–56.

Judgment on an award cannot be reviewed on appeal, as the result would be to try the case anew instead of passing only upon the validity of the award: *Whitis v. Culver*, 25–30.

As between appeal and writ of error, see, also, § 4569.

The only provision made for the transfer of a cause from a justice's court to the district court is by appeal after a final judgment, and a transfer by consent of parties will not give the court jurisdiction: *Evans v. Phelps*, 77–526.

Judgments not final: An error of the justice in entertaining jurisdiction where there is no notice, and rendering judgment on default, should be corrected by writ of error and not by appeal: *Craine v. Fulton*, 10–457.

So an error of the justice in refusing to entertain jurisdiction and dismissing the case cannot be reviewed by appeal: *Belding v. Torrence*, 39–516.

Where the justice dismisses the action for failure of plaintiff to appear, and renders judgment against him for costs, the plaintiff is not thereby precluded from recovering in another action, and therefore the judgment is not final and can be reviewed only on writ of error. No appeal can be taken in such case: *Stricker v. Holtz*, 50–291.

Waiver: A party may by agreement, before or after the judgment is rendered, relinquish or waive his right of appeal from such judgment. (Overruling *Clark v. Gibson*, Mor., 328): *Lyon v. Sanders*, 3 G. Gr., 332.

A party cannot appeal from a judgment entered before a justice of the peace by his consent: *Stever v. Heald*, 61–709.

The filing of the transcript in the clerk's office does not prevent the taking of appeal or writ of error: *Wilson v. Robinson*, 61–357.

Any error in the ruling upon an incidental motion is waived by answering and proceeding in the case: *Rahn v. Greer*, 37–627.

Error in dismissing an action upon refusal to give security for costs is waived by commencing a new suit on the same cause of action: *Gordon v. Ellison*, 9–317.

Withdrawal, abandonment or dismissal of appeal: A party may withdraw his appeal, at least with the acquiescence of the other party: *McKeever v. Horine*, 12–227.

After giving notice and bond, but before filing of transcript, the appellant may withdraw his appeal and move before the justice to have the judgment set aside: *Park v. Ratcliffe*, 42–42.

Where the steps for an appeal were taken before the justice, but it was not prosecuted for four years, *held*, that appellant could not object to his property being subjected to the payment of the judgment: *Warder v. Rivers*, 64–412.

A party may be allowed to dismiss his appeal in the court to which it is taken: *Harper v. Albee*, 10–389; *Goodenow v. Perry*, 12–350.

A party has the same right to dismiss his appeal as to dismiss any other action: *Harris v. Laird*, 25–143.

Party to appeal: It is only parties to the action that have a right to appeal. A surety on a replevin bond cannot appeal from a judgment against his principal, and relitigate his principal's claim to the property: *Crites v. Littleton*, 23–205.

Appeals to superior court: See § 260 and notes.

SEC. 4547. Amount in controversy. No such appeal shall be allowed when the amount in controversy does not exceed twenty-five dollars. [Same.]

This limitation of the right of appeal to cases in which the amount in controversy exceeds twenty-five dollars is not unconstitutional as depriving the party of a trial before a common-law jury in such cases. The constitution authorizes the legislature to provide for trial by jury of less than twelve, in inferior courts, irrespective of the right of appeal: *Higgins v. Farmers' Ins. Co.*, 60–50.

Where the defendant makes a tender which is not accepted, the amount in controversy is the difference between the amount claimed and the amount tendered, and if that does not exceed twenty-five dollars no appeal is allowed: *Young v. McWaid*, 57–101.

In determining the amount in controversy under this section the costs taxed up by the justice of the peace will not be taken into consideration: *Curran v. Excelsior Coal Co.*, 63–94.

Amount in controversy on the appeal is the amount claimed by the pleadings, and not the amount of the judgment before the justice: *Nichols v. Wood*, 66–225.

Plaintiff cannot recover, in addition to the amount claimed by the pleadings, interest on the judgment rendered by the justice: *Hays v. Chicago, B. & Q. R. Co.*, 64–593.

Where plaintiff claimed less than twenty-five dollars in his account, and defendant set up, not by way of counter-claim, but as a defense, the payment of more than twenty-five dollars to plaintiff on the indebtedness, *held*, that the amount in controversy was what was claimed and not what defendant alleged that he had paid: *Boyle v. Wilcox*, 59–466.

Where the amount claimed by plaintiff is more than twenty-five dollars and he recovers less than that amount, and defendant appeals, the amount in controversy is that claimed by plaintiff, and not that for which judgment is rendered, for plaintiff may, on appeal, if he establishes his right thereto, recover the whole amount of his claim: *Lundak v. Chicago & N. W. R. Co.*, 65–473.

The question whether the amount in controversy between the parties exceeds twenty-five dollars is to be determined from the pleadings. Whenever one of the parties to the litigation has asserted a claim or demand in his pleadings upon which he asks relief against his adversary, which the other party denies, a controversy exists between them as to such claim or demand, and it is immaterial that upon the trial of the appeal the party asserting such demand does not introduce evidence to substantiate it, or is not able to prove but a portion of it. Such fail-

ure of evidence will not justify the dismissal of the appeal where the amount stated in the pleadings is sufficient: *Sterner v. Wilson*, 68–714.

Where plaintiff's cause of action was for less than twenty-five dollars, but defendant interposed a counter-claim for more than that amount, and judgment was rendered against plaintiff for costs and he appealed, *held*, that as the appeal brought up the whole controversy for trial anew, the amount of the counter-claim was involved and the appeal was proper: *Perry v. Conger*, 65–588.

If the party in whose favor judgment is rendered for more than twenty-five dollars remits the excess over that amount the opposite party cannot appeal: *Milner v. Gross*, 66–252.

Where plaintiff on a claim for one hundred dollars recovers less than twenty-five dollars he may, before appeal is taken, remit all claim for more than twenty-five dollars, and thus prevent appeal: *Bateman v. Sisson*, 70–518; *Vorwald v. Marshall*, 71–576.

Where a remittitur reducing the amount claimed to less than twenty-five dollars was filed before the actual entry of judgment, *held*, that there could be no appeal although an appeal bond had been previously tendered, accepted and filed: *Knox v. Nicoli*, 66 N. W., 876.

If by remittitur the amount of the claim is reduced to less than twenty-five dollars before the appeal is perfected by the giving of a bond no appeal can be taken: *Lynch v. Bruner*, 68 N. W., 908.

As to dismissal of appeal where the amount in controversy is not sufficient, see notes to § 4562.

As to what is deemed the amount in controversy in other cases, see §§ 4477 and 4110 and notes.

SEC. **4548. Time.** The appeal must be perfected within twenty days after the rendition of the judgment. [C.'73, § 3576; R., § 3918; C.'51, § 2329.]

An appeal is not perfected until the bond is filed and the sureties approved: *Brown v. Beesett*, 13–185; *McKeever v. Horine*, 12–227.

An appeal taken after a lapse of twenty days is in effect no appeal, and the case should be stricken from the docket of the court to which the appeal is taken. In such case the court has no jurisdiction to render any judgment except for costs: *Martin v. Croker*, 62–328.

When the method of taking an appeal provided by the next section is pursued, the appeal must be perfected within twenty days as in other cases: *McBrearty v. Dyer*, 6–528.

The appeal is not effected by a writ or process, but by notice, an appeal bond and a certified transcript of the proceedings: *May v. Wilson*, 20–117.

SEC. **4549. By clerk.** If within twenty days the appellant is prepared to take his appeal, and is prevented only by the absence or death of the justice, or his inability to act, he may apply to the clerk of the court to which the appeal may be taken for the allowance thereof. [C.'73, § 3577; R., § 3919; C.'51, § 2330.]

SEC. **4550. How secured.** Such application shall be founded on an affidavit, stating the amount and nature of the judgment, and the time of the rendition thereof, as nearly as practicable, and the reason why he thus applies. [C.'73, § 3578; R., § 3920; C.'51, § 2331.]

SEC. **4551. Action of clerk.** The clerk has thereupon the same power to act in the premises as the justice would have had. He may require the books and papers of the justice to be delivered to him, for which purpose he may issue a precept to the sheriff to that effect, if necessary, and may make out and file the transcript. After this he shall return to the office of the justice of the peace all the papers proper to be kept by the justice. [C.'73, § 3579; R., § 3921; C.'51, § 2332.]

SEC. **4552. Form of bond.** The appeal is not perfected until a bond in the following form, or its equivalent, is taken and filed in the office of the justice or clerk as above provided, in an amount sufficient to secure the judgment and costs of appeal:

The undersigned acknowledge ourselves indebted to.....in the sum of .....dollars, upon the following conditions: Whereas.....has appealed from the judgment of....., a justice of the peace, in an action between .....as plaintiff, and.....defendant:

Now, if said appellant pays whatever amount is legally adjudged against him in the further progress of this cause, then this bond to be void.

Approved. A.....B....., principal.
E.....F....., justice. C.....D....., surety.

If the judgment is affirmed, or if on a new trial the appellee recovers, or if the appeal is withdrawn or dismissed, judgment shall be rendered against the principal and surety on said bond. [C.'73, § 3580; R., § 3922; C.'51, § 2333.]

A bond equivalent in form to that given in the statute and substantially complying with its requirements is sufficient: *Moore v. Mansur*, 9–47.

Where the bond is not, in form or substance, such as is required by statute, it is error to enter up judgment thereon against the sureties, as authorized by statute: *Wilson v. Knight*, 3 G. Gr., 126.

Any defect in the bond may be cured by tendering a sufficient bond in the court to which the appeal is taken (such case being within the general provisions of § 357, as to defective bonds): *Brock v. Manatt*, 1–128.

The justice is not entitled to any fee for approving an appeal bond which is prepared by the attorney and handed him ready for approval: *McKay v. Maloy*, 53–33.

The justice may refuse to approve the bond unless the surety justifies as here required, and may require the surety to himself make affidavit as to his qualification: *Lane v. Coldsmith*, 23–240.

There is no appeal until the bond is taken and filed. Merely to give notice of an appeal without complying with the other provisions with reference thereto is not the taking of an appeal: *Lynch v. Bruner*, 68 N. W., 908.

Therefore if before the bond is filed the amount in controversy is reduced by remittitur to less than twenty-five dollars the appeal is cut off: *Ibid.*

As to judgment against sureties, see § 4566.

Where the appellant refused to pay the filing fee, and afterwards the transcript was lost so that the clerk could not file it when the fee was afterwards tendered, and no substitute was procured, *held*, that appellant must be considered to have abandoned his appeal: *Goodman v. Allen*, 72–616.

Further as to abandonment, see notes to § 4546.

Notice not essential to jurisdiction, see notes to § 4560.

Dismissal of appeal, see notes to § 4546.

SEC. **4553. Proceedings suspended.** Upon the appeal being perfected, all further proceedings in that court shall be suspended, and the case will be in the court to which the appeal is taken. [C. '73, §§ 3581, 3584; R., §§ 3923, 3926; C. '51, §§ 2334, 2337.]

SEC. **4554. Execution recalled.** If, in the meantime, an execution has been issued, the justice shall give the appellant a certificate that an appeal has been taken and perfected. Upon that certificate being presented to the constable, he shall cease further action, and release any property taken in execution. [C. '73, § 3582; R., § 3924; C. '51, § 2335.]

SEC. **4555. Papers filed.** Upon the appeal being perfected, the justice shall file in the office of the clerk of the court to which it is taken all the original papers relating to the action, with a transcript of all the entries in his docket. [C. '73, § 3583; R., § 3925; C. '51, § 2336.]

Whenever the transcript and papers from the justice are filed in the office of the clerk of the court to which appeal is taken, the cause is to be deemed in that court: *Holloway v. Baker*, 6–52.

Notes or other evidences of indebtedness, claimed to be those on which the action before the justice was based, and not certified by the justice with his record, are not to be received in evidence on the appeal unless marked filed by the justice or otherwise identified as the same as those used in the trial of the case before the justice. Otherwise the identity of the cause of action tried on appeal with that tried before the justice would not appear: *Graft v. Diltz*, 2 G. Gr., 570.

The certificate of an ex-justice in relation to proceedings had before him while in office is not entitled to legal consideration: *Brown v. Scott*, 2 G. Gr., 454.

An amended transcript sent up by the justice within the time for filing transcript should be considered: *Smith v. Snodgrass*, 4 G. Gr., 282.

The justice is not required to pay the clerk's fee for the filing of the transcript in the circuit court, and therefore cannot demand prepayment to him of such fee before filing his transcript in the clerk's office: *McKay v. Maloy*, 53–33.

The term "filed" as used in this section and the following means simply deposited in the clerk's office. Failure of the clerk to minute it as filed on the appearance docket will not defeat such filing: *Harrison v. Clifton*, 75–636.

A justice of the peace may waive the right to fees in advance for filing transcript, and having done so may be liable in damages for refusal to file such transcript, though the fees are not tendered: *Horne v. Pudil*, 88–533.

Amendment of pleadings, see notes to § 4562.

SEC. **4556. Return amended.** The proper court may, by rule, compel the justice to approve an appeal bond, or make or amend his return according to law. [C. '73, § 3584; R., § 3927; C. '51, § 2338.]

Where a party fails to take the proper steps to compel the furnishing of a perfect transcript, he cannot take advantage of such defect for judgment on appeal: *Whitmore v. Divilbis*, 10–68.

Application to the court to which the appeal is taken, to require a more complete transcript, should not be refused if made in due time: *Atwater v. Woodward*, 4 G. Gr., 431.

SEC. **4557. Mistakes corrected.** Where an omission or mistake has been made by the justice in his docket entries, and that fact is made unquestionable, the court to which the appeal is taken may correct the mistake or supply the omission, or direct the justice to do so. [C.'73, § 3586; R., § 3928; C.'51, § 2339.]

Correction of justice's record may be made by the court to which the appeal is taken, if a mistake or omission therein is unquestionably established, in order that the case may be fully tried on the issues presented before the justice: *Cooper v. Woodrow*, 3–189.

The court may hear evidence explaining a mistake or showing an omission in the justice's record: *Brown v. Beesett*, 13–185.

SEC. **4558. Return—when made.** If an appeal is perfected ten days before the next term of the court to which it is taken, the justice's return must be made at least five days before that term. All such cases must be tried when reached, unless continued for cause. [C.'73, § 3587; R., § 3929; C.'51, § 2340.]

Should be filed for regular term: The "next" term of court at which the transcript should be filed is the next regular term. The return should not be made to a special term: *Coon v. Matthews*, 10–290.

Trial term: Unless ten days intervene between the taking of the appeal and the commencement of the next term, neither party can be required to go to trial at that term: *Seeberger v. Miller*, 20–428.

The rule as to the trial term is the same as in case of original actions in the same court: *Mediken v. Mason*, 10–406.

Dismissal or affirmance for failure to file transcript: Failure of the justice to file his transcript at the proper term is not sufficient ground for an affirmance of the judgment: *Fisher v. Harber*, 10–293.

If the appellant fails to have a transcript filed it may be filed by appellee, and he may then have the appeal dismissed or the judgment affirmed: *Holloway v. Baker*, 6–52.

The neglect of the justice to make the return in the proper time is not a ground for dismissing the appeal: *Whitcomb v. Holloway*, 4 G. Gr., 311. And see *Whitehead v. Thorp*, 22–425.

Under a rule of court allowing appellee to pay the filing fee and have the appeal docketed and the judgment of the justice affirmed, upon a failure of appellant, after taking the appeal, to pay the fee and cause the case to be docketed, the appellee is not entitled to such affirmance where the clerk dockets the case without having required the fee in advance from appellant: *Squires v. Millett*, 31–169.

If the default or omission in paying the docket fee in such cases is remedied before the opposite party has suffered any detriment or made objection on that account, a motion for affirmance should not afterwards be allowed on that ground: *Hinman v. Weiser*, 9–561; *Robertson v. Eldora R., etc., Co.*, 27–245.

So an offer of appellant to pay the fee before the ruling of the court on the motion to affirm would render it improper to sustain the motion: *Squires v. Millett*, 31–169.

But where the rule of court required payment of docket fee by appellant by the morning of the second day, and the motion to affirm was made on the third day and determined on the ninth day, *held*, that an offer on the last named day by appellant to pay the fee, without showing a good excuse for not having sooner paid it, would not render an order of affirmance made on such motion erroneous: *State v. Glass*, 9–325.

So, where the rule required payment of the docket fee at the beginning of the term, *held*, that an order of affirmance in pursuance of such rule, made several days after the beginning of the term, should not be set aside on motion, no excuse for the delay being made to appear: *Heald v. House*, 39–198.

It is erroneous to affirm under such a rule on account of nonpayment of filing fee, where the appeal is taken only seven days before the term, ten days being required to make the appeal triable at the next term: *Seeberger v. Miller*, 20–428.

Where the rule of court provides for affirmance upon the filing of the transcript by appellee in case of appellant's failure to file it, a dismissal should not be granted on such ground, especially if appellee has not filed the transcript: *Heiserman v. Rush*, 22–240.

While under rule of court an appeal may be dismissed by a stated time in default of payment of the docket fee by appellant, an additional penalty cannot be imposed for such failure: *Baade v. Orten*, 4 G. Gr., 351.

SEC. **4559. Affirmance—trial.** If the appellant fails to pay the docket fee and have the case docketed by noon of the second day of the term at which the appeal should properly come on for trial, unless time is extended by the court, the appellee may do so, and have the judgment below affirmed, or have the case set down for trial on its merits, as he may elect. If the appellant, before noon of the next day after an order of affirmance has been granted, shall appear and make a sufficient showing of merits and proper excuse for his default, and pay to the clerk the docket fee, the court in its discretion may set aside the order of affirmance, and the cause shall stand for trial at that term, unless appellee asks

a continuance, and the clerk shall pay over to the appellee the docket fee, but, if the appeal at the election of appellee is set down for trial on its merits, and the trial has commenced, the foregoing provision shall not apply. [Rules of Practice, § 4.]

SEC. **4560. Notice of appeal.** If an appeal is not perfected on the day on which judgment is rendered, written notice thereof must be served on the appellee or his agent, at least ten days before the next term of the court to which the appeal is taken, if ten days intervene, or the action, on motion of the appellee, shall be continued at the cost of the appellant. [C. '73, § 3588; R., § 3930; C. '51, § 2341.]

Notice is not essential to give the court to which the appeal is taken jurisdiction, but failure to give proper notice simply entitles the appellee to a continuance: *Bond v. Davis*, 37–163.

Service of notice of appeal on appellee is not necessary if the appeal is allowed and perfected on the day on which judgment is rendered: *Holloway v. Baker*, 6–52.

The appearance of an appellee in the court to which the appeal is taken will amount to a waiver of any irregularity or defect in the taking of the appeal, provided the court has jurisdiction of the subject-matter: *Wilgus v. Gettings*, 19–82.

Where it does not appear affirmatively that proper notice of appeal was given, or that appellee appeared, judgment should not be rendered against the appellee: *Quillan v. Windsor*, 6–396; *McCormick v. Bishop*, 3 G. Gr., 99.

SEC. **4561. How served.** Such notice may be served like the original notice, and if the appellee or his agent has no place of residence in the county, it may be served by being left with the justice. [C. '73, § 3589; R., § 3931; C. '51, § 2342.]

SEC. **4562. Trial of appeal.** An appeal brings up the action for trial on the merits alone. All errors, irregularities and illegalities are to be disregarded under such circumstances, if the action might have been prosecuted in the court to which the appeal is taken. [C. '73, § 3590; R., § 3932; C. '51, § 2343.]

Method of trial; what questions considered: As an appeal brings up the case for hearing upon the merits, defects in the service of the original notice are not material: *Graves v. Heaton*, 11–169.

Technical errors of pleading are to be disregarded: *King v. Gottschalk*, 21–512.

Error in overruling a demurrer is waived by the appeal and the case is to be tried on its merits; advantage of such an error can be taken only by writ of error, if at all: *Leftwick v. Thornton*, 18–56.

Where the justice improperly sustained a demurrer to an answer, *held*, that such action should be disregarded and evidence under the answer admitted: *Oleson v. Hendrickson*, 12–222.

A variance between the petition and the original notice as to the facts of plaintiff's cause of action cannot be raised on appeal: *Frink v. Whicher*, 4 G. Gr., 382.

Objections to depositions other than for incompetency or irrelevancy should not be regarded unless made in the justice's court: *Alverson v. Bell*, 13–308.

If the cause of action before the justice is stated in different forms and a recovery is had in one form, an appeal brings up the whole case for trial on the merits and not merely the right to recover in the particular form which was upheld below: *Edwards v. Trulock*, 37–244.

Upon an appeal by defendant from a judgment against him for a part of plaintiff's claim in the justice's court, the plaintiff may, if he shows himself entitled thereto, recover a larger sum than that recovered before the justice: *Lundak v. Chicago & N. W. R. Co.*, 65–473.

Where, upon a demurrer being sustained in the justice's court to plaintiff's petition, such petition was amended and plaintiff recovered thereon, but on appeal the plaintiff withdrew his amendment and a trial was had on the merits and plaintiff again recovered, *held*, that defendant was not entitled to arrest of judgment on the ground that there was no issue, that objection not having been made until after verdict: *Ranney v. Templin*, 54–240.

Jurisdiction of court: An appeal from the judgment of the justice in a case in which he had no jurisdiction over the subject matter (as where the defendant is a resident of another county) does not give the court jurisdiction in the case, even though it might properly have been originally brought in that court: *McMeans v. Cameron*, 51–691.

So, also, where the amount in controversy is in excess of that of which the justice may take jurisdiction: *Galley v. Tama County*, 40–49.

The same point was ruled without discussion in *Chapman v. Morgan*, 2 G. Gr., 374.

Appearance on appeal as conferring jurisdiction: Where the subject-matter of the appeal is one over which the court to which the appeal is taken has jurisdiction, the appearance of the party against whom the appeal is taken will confer jurisdiction on such court to try the case, although there was no judgment in the justice's court from which an appeal could be taken: *Danforth v. Thompson*, 34–243. To the contrary: *Kimble v. Riggin*, 2 G. Gr., 245.

Appearance to the appeal cures want of jurisdiction of the person of defendant in the justice's court by reason of no notice hav-

ing been served: *Drake v. Achison*, 4 G. Gr., 297.

Dismissal of action: If a cause properly commenced before a justice is tried without authority by another justice the cause should not be dismissed on appeal, but the unwarranted action disregarded: *Ely v. Dillon*, 21–47.

Judgment against sureties on bond, see § 4566 and notes.

Affirmance for failure of appellant to appear: If the appellant fails to appear the court may affirm the judgment of the justice: *Wright v. Clark*, 2 G. Gr., 86; *Taylor v. Barber*, 2 G. Gr., 350.

Presumption as to issues: If it appears there was a trial on the merits a denial of plaintiff's cause of action will be presumed, if no issue appears on the pleadings: See notes to § 4499.

Amendment of the pleadings: A party cannot, in the court to which the appeal is taken, file new or amended pleadings as matter of right, but he may be allowed to do so upon proper terms, after showing sufficient excuse for the omission to file the same in the justice's court: *May v. Wilson*, 21–79; *Stanton v. Warrick*, 21–76; *Warren v. Scott*, 32–22; *Ping v. Cockyne*, 37–211.

An amendment may be filed in the district court which does not change the cause of action or the remedy sought: *Boos v. Dulin*, 68 N.W., 707.

A stipulation that the issue to be tried should be limited to a certain question of fact, *held* to be applicable to the trial in the justice court only, and not to the trial of the appeal. Therefore it was held not improper for the district court to allow an amendment of the pleading changing the issues: *Mills v. Bills*, 66 N.W., 881.

Leave to file amendments, even upon cause shown, is a matter of discretion: *Griswold v. Bowman*, 40–367.

In the absence of any showing of facts or circumstances requiring that a party be given permission to file an amendment, *held* not an abuse of discretion to refuse leave to do so: *Packard v. Snell*, 35–80.

The necessity of showing excuse may be waived by agreement of the parties: *Warren v. Scott*, 32–22.

The discretion of the court in allowing an amendment will not be interfered with unless it is clear that prejudice has resulted: *Dunton v. Thorington*, 15–217.

The allowing of an amendment correcting the name of the partnership suing as plaintiff, *held* not erroneous: *Adae v. Zangs*, 41–536.

In order to secure a trial of the appeal upon the very merits of the case, errors or insufficiencies in the pleadings should be allowed to be cured by amendment: *Clow v. Murphy*, 52–695.

SEC. **4563. New demand.** No new demand or counter-claim can be made upon the appeal, unless by mutual consent. [C.'73, § 3591; R., § 3933; C.'51, § 2344.]

A new cause of action or defense, of which the justice would not have had jurisdiction, cannot be set up on appeal, as, for instance, a claim for equitable relief: *Hollen v. Davis*, 59–444.

Nor can a claim for rescission of a contract be thus set up: *Griswold v. Bowman*, 40–367.

Although the statute forbids any new demand or counter-claim being set up on the appeal, defendant may file an amended answer setting up the defense of payment. Such matter does not constitute a new demand or a counter-claim: *St. Louis Type Foundry v. Medes*, 60–525.

SEC. **4564. Costs of appeal.** The appellant must pay the costs of the appeal, unless he obtains a more favorable judgment than that from which he appealed. [C.'73, § 3592; R., § 3934; C.'51, § 2345.]

There is no ground for apportionment of costs if the judgment is less favorable than that before the justice: *Best v. Dean*, 8–519.

But this section is only applicable to an appeal by the party who recovers the judgment before the justice: *Ibid.; Howder v. Overholser*, 48–365.

Where the appeal was by defendant from a judgment against him before the justice, and on the appeal plaintiff recovered on only a part of several items of demand included in the first judgment, *held*, that the case was a proper one for apportionment of costs: *Howder v. Overholser*, 48–365.

The fact that judgment on appeal by the party recovering judgment before the justice is only enough greater in amount than that recovered before the justice to cover accrued interest thereon will not render the judgment more favorable to appellant in such sense as to entitle him to recover costs: *Traer v. Filkins*, 10–563.

Where trial was had in a justice's court on a claim by plaintiff and counter-claim by defendant exceeding plaintiff's claim, and judgment was rendered for defendant, and plaintiff thereupon appealed to the district court, where judgment was again rendered for the defendant, *held*, that not having pursued the method pointed out by the next section plaintiff was not entitled to have costs taxed in his favor in the district court: *Cohen v. Gibson*, 78–214.

If the judgment recovered by appellant in the district court is greater than that in the justice's court only by the amount of interest accrued in the meantime the costs should be taxed to him: *Ritchey v. Adlefinger*, 71 N.W., 205.

SEC. **4565. Offer to confess judgment.** Appellant may offer to confess judgment for a certain amount, with costs, and if the final amount

recovered be less favorable to the appellee than such offer, he shall pay the costs of appeal. [C.'73, § 3593; R., § 3935; C.'51, § 2346.]

If the party against whom judgment is rendered by the justice appeals therefrom, and desires to avoid the costs of appeal in the event that appellee recovers on appeal a less amount, he (appellant) must proffer to pay a certain sum, and accrued costs, and then, if the judgment for appellee on appeal is for less than the amount proffered, the costs of the appeal will fall upon appellee: *Best v. Dean*, 8–519.

The proffer must be of a certain amount *with costs;* otherwise the appellee, if he recover judgment on appeal, is entitled to judgment for the entire costs, although he did not recover more than the amount proffered: *Powell v. Western Stage Co.*, 2–50.

These provisions do not restrict the statutory provisions as to an offer to confess judgment (§ 3818): *Watts v. Lambertson*, 39–272.

SEC. **4566. Judgment on appeal bond.** Any judgment on the appeal against the appellant shall be entered against him and his sureties, and shall recite the order of liability as principal and surety. [C.'73, § 3594; R., § 3936; C.'51, § 2347.]

Judgment against sureties on the appeal bond should be limited to the amount of the bond: *Perry v. Denson*, 1 G. Gr., 467.

Although it is error in the court to enup judgment against the appellant for a greater sum than the penalty of the bond, yet such a judgment would not be void for want of jurisdiction: *Freeman v. Hart*, 61–525.

If the appeal is dismissed because the amount in controversy is insufficient to warrant an appeal, judgment may be rendered against appellant and the sureties on the bond for the amount of the judgment in the court below and the costs of appeal: *Prescott v. Bacon*, 64–702.

A surety against whom judgment is rendered on the appeal bond has such an interest in the judgment that if erroneous he may move for its correction or for a new trial, or may appeal therefrom: *Freeman v. Hart*, 61–525.

SEC. **4567. Damages for delay.** If an appeal is taken for delay, the court to which it is taken may award such damages, not exceeding ten per cent. on the amount of the judgment below, as may seem right. [C.'73, § 3595; R., § 3937; C.'51, § 2348.]

SEC. **4568. Appeal from default—pleadings.** If the appeal is taken from a judgment by default, the defendant may file, before noon of the second day of the term at which the appeal is triable, in the court to which it is taken, and the plaintiff reply thereto as in other cases, any pleadings necessary to properly set forth any defense he may have to the action. In such case the costs of the trial before the justice shall be taxed to the defendant. [C.'73, § 3596.]

This provision extends to defaults for want of appearance as well as to defaults for failure to plead: *McFarland v. Lowry*, 40–467.

It is the absolute right of the party appealing from a judgment against him by default to file an answer on appeal, and in the absence of any rule or special order of court with reference to the time for filing such pleading, he may do so at any time before the case is reached for trial: *Harty v. Des Moines & M. R. Co.*, 54–327.

But before the adoption of this section the defendant could not, in such cases, as matter of right, file an answer interposing a defense without showing some reason or excuse for not having answered before the justice: *Ruddick v. Vail*, 7–44; *Craine v. Fulton*, 10–457; *Leftwick v Thornton*, 18–56.

As to filing new pleadings in other cases, see notes to § 4562.

In case of an appeal by a defendant from a judgment against him by default before the justice, if defendant does not appear nor interpose a defense in the court to which the appeal is taken, the judgment may be affirmed on plaintiff's motion: *Atkins v. McCready*, 8–214.

In such case defendant may appear and cross-examine witnesses in the same manner as in case of default in ordinary cases in such court. But if he makes no appearance the judgment of the justice may be affirmed without again introducing the evidence: *Harty v. Des Moines & M. R. Co.*, 54–327.

In the absence of any general rule of court to the contrary, such cases cannot be disposed of, even on failure of the party appealing to appear, until reached for trial on the regular call of the docket: *Ibid.*

Where defendant in default in the justice's court does not offer to file any answer until after the case is reached for trial, the court may properly refuse to allow such answer to be filed, the provisions of § 3552 being applicable: *McDowell v. Booth*, 72–141.

On appearance without interposing a defense the defendant in default before the justice may contest the amount of plaintiff's recovery, but not his right to recover: *Leftwick v. Thornton*, 18–56.

SEC. **4569. Writs of error—when allowed.** Any person aggrieved by an erroneous decision in a matter of law or other illegality in the proceedings of a justice of the peace may, within twenty days after the final

decision is made, remove the same, or so much thereof as is necessary, for correction into the court to which an appeal from such justice might be taken. [C.'73, § 3597; R., § 3938; C.'51, § 2349.]

Decisions of justices upon matters of law are reviewable upon writ of error; and where the decision of the justice is final and does not affect the right of the plaintiff to recover in another action, but is upon a question affecting the jurisdiction of the justice, the capacity of the parties to sue or be sued, etc., is to be viewed on writ of error and not upon appeal: *Belding v. Torrence*, 39–516.

This is a proper remedy where a justice errs by refusing to take jurisdiction: *Ibid.*

Or where he improperly takes jurisdiction, or renders judgment by default: *Craine v. Fulton*, 10–457.

Error of the justice in overruling a demurrer should be taken advantage of by writ of error. It would be waived by appeal: *Leftwick v. Thornton*, 18–56.

The action of the justice in rejecting or recommitting an award, or refusing to do so, may be reviewed by writ of error: *Whitis v. Culver*, 25–30.

Where the right of plaintiff to exemplary damages was not raised by motion or demurrer, but the case was submitted to the jury, *held*, that the defendant could not, by writ of error, call in question the judgment entered by the justice on the verdict of the jury, on the ground that it allowed exemplary damages: *Atkinson v. Chicago & N. W. R. Co.*, 70–68.

As to when appeal is the proper remedy, see § 4546 and notes.

A writ of error brings up for review only such questions as were raised in the justice's court. The question of the jurisdiction of the justice not being raised in that court cannot be raised on an appeal to the supreme court: *Edwards v. Cosgro*, 71–296.

A decision involving the determination of a question of fact cannot be reviewed on writ of error: *Lease v. Franklin*, 84–413.

Where the party prejudiced by the error of the justice might have it corrected on motion before the justice, he cannot maintain a writ of error to correct the error until he has made such motion and it has been overruled: *Leonard v. Hallem*, 17–564; *Smith v. Parker*, 28–359.

But if the justice has no jurisdiction the party prejudiced need take no steps before the justice to remedy the error in assuming jurisdiction, but may proceed by writ of error, or, if he does not know of the judgment in time for that, may maintain an independent action to set the judgment aside: *Holmes v. Hull*, 48–177.

The fact that the party recovering the judgment files a transcript thereof in the clerk's office does not prevent the judgment being reviewed by writ of error: *Wilson v. Robinson*, 61–357.

There is no provision for writ of error from a justice in criminal cases. Appeal is the only method of review. See § 5612 and notes.

SEC. **4570. Affidavit—notice.** The basis of the proceedings is an affidavit filed in the office of the clerk, setting forth the errors complained of, and must be filed in the same time, and the notice must be the same as in case of appeal. [C.'73, § 3598; R., § 3939; C.'51, § 2350.]

The affidavit may be made by the attorney of the party asking the writ, when he shows himself sufficiently acquainted with the facts to make the necessary statements: *Dixon v. Brophey*, 29–460.

The affidavit need not show that the party resisted the decision of the justice of which he complains, or excepted thereto, or that he applied to the justice to correct it: *Ibid.*

The affidavit required to obtain a writ of error must be signed by the affiant. It is not sufficient that it be sworn to without signing: *Crenshaw v. Taylor*, 70–386.

Where the statements of error made in the affidavit are insufficient and do not show error, the proceeding may be dismissed on motion before the hearing of the case: *Elliott v. Mitchell*, 3 G. Gr., 237.

A proceeding by writ of error without notice to the appellee cannot be entertained: *Sprote v. Marshall*, 4 G. Gr., 344.

The hearing is upon the return, and not the affidavit. See notes to § 4572.

SEC. **4571. Writ.** The clerk shall thereupon issue an order commanding the justice to certify the record and proceedings, so far as they relate to the facts stated in the affidavit. [C.'73, § 3599; R., § 3940; C.'51, § 2351.]

Where it does not appear to whom the writ was directed it will be presumed it was directed to the proper justice if he makes return thereto: *Sayles v. Deluhrey*, 64–109.

A mere failure to issue the writ of error *held* not to render subsequent proceedings erroneous, the return having been properly made by the justice, in answer to the affidavit for the writ: *Rhodes v. De Bow*, 5–260.

SEC. **4572. Copy served—return.** A copy of the affidavit shall accompany the order and be served upon the justice, who shall, with the least practicable delay, make the return required. [C.'73, § 3600; R., § 3941; C.'51, § 2352.]

The justice should not only certify matters appearing of record by the entries upon his docket, or a bill of exceptions, but any other proceeding stated in the affidavit for the writ, and may be required to certify as to objections made to evidence, and as to the

evidence received, so far as it is within his recollection, although not preserved by bill of exceptions; but this is only for the purpose of enabling the court to determine as to the correctness of rulings upon objections to evidence, etc., and not for the purpose of trying again questions of fact, which can only be done on appeal: *Miller v. O'Neal*, 9–446.

It is upon the return of the justice, and not upon the affidavit, that the question of error is to be determined: *Stone v. Murphy*, 2–35; *Lane v. Goldsmith*, 23–240.

If the return of the justice does not show the error complained of, the affidavit on which the writ is procured amounts to nothing for that purpose: *Vance v. Kirfman*, 20–13.

The justice of the peace is only required to show in his return such matters as are rendered necessary by the affidavit for the writ: *Spiesberger v. Thomas*, 59–606.

SEC. **4573. Bond.** All proceedings in the justice's court subsequent to judgment may be stayed by a bond, entered into like that required in cases of appeals, and on which judgment shall be entered against the principal and surety in like manner and under like circumstances. [C. '73, § 3601; R., § 3942; C. '51, § 2353.]

While no bond is required in case of the prosecution of a writ of error, yet if one is not given the judgment of the justice may be enforced notwithstanding the writ of error, and even though a judgment in the circuit court on the writ of error is superseded by a bond given on appeal to the supreme court: *Thomas v. Nicklas*, 58–49; *Pellersells v. Allen*, 56–717.

Failure to file *supersedeas* bond does not prevent writ of error: *Wilson v. Robinson*, 61–357.

SEC. **4574. Amended return.** The court may compel a return to the writ, or an amended return when the first is not full and complete. [C. '73, § 3602; R., § 3943; C. '51, § 2354.]

Where the facts are reasonably apparent from the return, it is not error to refuse to order a further return to correct a mere clerical error: *Olin v. Chicago, M. & St. P. R. Co.*, 61–250.

SEC. **4575. Hearing—dismissal—affirmance.** The action shall stand for hearing on the writ of error at the first term after due notice thereof has been given. In case the party suing out the writ fails to have the return of the justice docketed before noon of the second day of the term at which the case should properly come on for hearing on such writ of error, and to pay the clerk's fees therefor, the appellee, unless time is extended by the court, may cause the action to be docketed and the writ of error dismissed, and, if he so elect, the judgment below affirmed; and the provisions of the section relating to docketing of appeals by appellee shall be applicable to proceedings under writs of error, so far as may be.

SEC. **4576. Judgment.** The court may render final judgment, or it may remand the cause to the justice for a new trial, or such further proceedings as shall be deemed proper, and prescribe the notice necessary to bring the parties again before the justice. [C. '73, § 3603; R., § 3944; C. '51, § 2355.]

The question to be determined is whether the justice erred in the particular decision complained of in the affidavit for the writ of error: *Hays v. Gorby*, 3–203; *State v. Nichols*, 5–413.

The court will not, on the writ of error, review the findings of the justice as to questions of fact. Appeal is the proper remedy: *Taylor v. Rockwell*, 10–530; *State v. Roney*, 37–30.

And this is true although all the evidence before the justice is set out in a bill of exceptions: *Lane v. Goldsmith*, 23–240.

The court can render final judgment only where no trial is necessary. If there must be a new trial, the case should be sent back to the justice. The court has no authority to retain and try the case itself: *Swan v. Bournes*, 47–501.

On a writ of error from a judgment of a justice of the peace upon a verdict which did not properly specify the amount of recovery, *held*, that upon determination that the judgment was erroneous the cause should have been remanded to the justice and the court could not render judgment: *Bartle v. Plane*, 68–227.

There may be cases where the final judgment should be rendered in the district court after the determination of the writ of error: *Logan v. Samsel*, 74–87.

Under statutory provisions as to appeals similar to those now regulating writs of error, *held*, that upon reversal of the action of the justice it was not proper to order a new trial in the court in which the appeal was decided: *Davis v. Curtis*, 2 G. Gr., 575.

Though the justice may not have had jurisdiction, yet upon the removal to the circuit court, that court obtains jurisdiction, and its judgment is not void, although erroneous: *Finch v. Hollinger*, 47–173, 176.

The judgment of a justice should not be reversed on writ of error for any error which might have been corrected by the justice on motion, unless such motion is made and

overruled: *Leonard v. Hallem*, 17–564; *Smith v. Parker*, 28–359.

If, after the application for and service of the writ, but before the hearing, the opposite party causes the judgment to be modified so as to correct the error, no objection to such modification being made, the judgment should not be reversed on the hearing, although the party making the modification might be required to pay the costs of the proceeding by writ of error: *Rahn v. Greer*, 37–627.

SEC. **4577. Restitution.** If the court renders a final judgment reversing the judgment of the justice of the peace, after such judgment has been collected in whole or in part, it may award restitution, with interest, and issue execution accordingly, or it may remand the cause to the justice for this purpose. [C.'73, § 3604; R., § 3945; C.'51, § 2356.]

SEC. **4578. Replevin.** The proceedings and verdict in replevin shall be the same as are prescribed in such cases in the district court, except as modified in this chapter. [C.'73, § 3605; R., § 3946; C.'51, § 2357.]

SEC. **4579. Attachment.** Proceedings in attachment, except as modified in this chapter, shall be the same as in the district court, the justice performing the duties with reference thereto which are required of the clerk of that court. The petition must be verified, and claim more than five dollars, and, if a less sum is recovered, the plaintiff shall pay all the costs of the attachment. [C.'73, §§ 3024, 3606; R., §§ 3245, 3947; C.'51, §§ 1884, 2358.]

Although attachments are not allowable in justices' courts if the sum claimed is less than five dollars, yet in such an action the judgment may be for less than five dollars, and the fact that it is will not necessarily render the attaching plaintiff liable on his bond: *Bradley v. McCall*, 2 G. Gr., 214.

SEC. **4580. Answers of garnishee.** The constable has the same power to administer an oath to the garnishee in attachment or on execution, and to take his answer, as is given to the sheriff in like cases in the district court. [C.'73, § 3607; R., § 3948; C.'51, § 2360.]

SEC. **4581. Appearance.** Garnishees may be required to appear and answer at the time fixed for the appearance of the parties to the action, and the conduct of the same shall be governed by the law relating to garnishments under attachments in the district court. [C.'73, § 3608; R., § 3949; C.'51, § 2361.]

The justice having jurisdiction of the subject matter and the defendant may render judgment against a garnishee who has answered, although he be a resident of another county: *Smith v. Dickson*, 58–444.

A justice acquires no jurisdiction in a garnishment proceeding by reason of service of notice of garnishment in another county: *Gage v. Maschmeyer*, 72–696.

SEC. **4582. Attachment without personal service.** In actions in which an attachment is sought, if it is made to appear by affidavit that personal service cannot be had on the defendant within the state, the justice, upon the return day, unless the defendant appear, shall make an order fixing the day for the trial, not less than sixty days thereafter, and requiring notice to be given by any constable as provided in the next section. [C.'73, § 3609; R., § 3950.]

These sections refer to actions by attachment in justice, courts and are not in conflict with § 4480: *Anderson v. Union Pac. R. Co.*, 77–445.

Where notice in a proceeding by attachment required appearance on the day fixed, and on that day there was a vacancy in the office of the justice of the peace before which the defendant was to appear, *held*, that no judgment could properly be rendered in pursuance of such notice, and that in a direct attack a judgment thus rendered was void: *Evans v. Richards*, 85–620.

SEC. **4583. Notice by posting.** Upon such order being made, at least sixty days' notice of the pendency of such action shall be given by posting up written or printed notices in three public places in the township where the action was commenced, which shall have the effect of a service by publication in the district court, and the justice shall proceed to hear the cause upon the day specified for that purpose; but no bond shall be required of the plaintiff after judgment as may be in the district court. [C.'73, § 3610; R., § 3951.]

That the notice so posted does not state the township in which the action is pending will not invalidate the judgment: *Johnson v. Dodge*, 19–106.

SEC. **4584. Records deposited with successor.** Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official docket, as well as those of his predecessors which may be in his custody, there to be kept as public records. All his official papers shall also be turned over to his successor. [C.'73, § 3625; R., § 3967; C.'51, § 2377.]

SEC. **4585. Or county auditor.** If his office becomes vacant before his successor is elected, the said docket and papers shall be placed in the hands of the county auditor, and by him turned over to his successor when elected and qualified. [C.'73, § 3626; R., § 3968; C.'51, § 2378.]

SEC. **4586. Execution or transcript by successor.** The justice with whom the docket of his predecessor is thus deposited may issue or renew execution on or give a transcript of any judgment there entered, in the same manner and with like effect as the justice who rendered the judgment might have done; and in case of the death, absence or inability to act of any justice, or the vacation of the office from any cause, execution may be issued from the docket of said justice, or transcript given therefrom, by any other justice in said township, with like effect as might have been done by the justice who rendered the judgment. [C.'73, § 3627; R., § 3969; C.'51, § 2379.]

The certificate of an ex-justice in relation to proceedings had before him while in office is not entitled to legal consideration: *Brown v. Scott*, 2 G. Gr., 454.

SEC. **4587. Successor—how determined.** When two or more justices are equally entitled to be held the successor in office of any justice, the county auditor shall determine by lot which is, and certify accordingly; which certificate shall be in duplicate, one copy of which shall be filed in the office of such auditor, and the other given to such successor. [C.'73, § 3628; R., §§ 3970–1; C.'51, §§ 2380–1.]

SEC. **4588. Interchange.** In case of sickness or other disability or absence of a justice at the time fixed for a trial of a cause or other proceeding, any other justice of the township may, at his request, attend and transact the business for him without any transfer to another office. The entries shall be made in the docket of the justice at whose office the business is transacted, and the same effect shall be given to the proceedings as though no such interchange of official service had taken place. [C.'73, § 3629; R., § 3972; C.'51, § 2382.]

Whether another justice of the county can act at the request of the one before whom the suit is brought, but who, by reason of relations with one of the parties, deems that it would be improper for him to try the case, *doubted: Ely v. Dillon*, 21–47.

SEC. **4589. Special constables.** Any justice of the peace in writing may specially appoint any person of suitable age to perform any particular duty properly devolving upon a constable, and for that particular purpose the appointee shall be subject to the same obligations and receive the same fees. If such person is appointed to serve an attachment, execution, or order for the delivery of property, he shall, before levying upon the same, execute a bond to the state in a penal sum of not less than two hundred dollars, to be fixed by the justice, with one or more freeholders as sureties, to be approved by and filed with the justice making the appointment, and the usual official oath shall be indorsed thereon and signed. For any breach of such bond, any person injured thereby may bring action thereon in his own name, and recover the same damages as upon a constable's bond in like cases. [C.'73, § 3630; R., § 3973.]

A special constable appointed under this section is not a peace officer within the meaning of § 5099. The appointment may be to perform a particular duty, but it cannot be general, as to assist peace officers to seize liquors: *Foster v. Clinton County*, 51–541.

SEC. **4590. No process to another county.** No process can issue from a justice's court into another county, except when specially authorized. [C.'73, § 3631; R., § 3974; C.'51, § 2384.]

"Process," as here used, does not include original notices, which may be served out of the county in some cases: *Klingel v. Palmer*, 42-166.

SEC. **4591. Sheriff and constable.** The constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him. The powers and duties of the sheriff in relation to the business of the district court, so far as the same are applicable and not modified by statute, devolve upon the constable in relation to the justice's court. [C.'73, § 3632; R., § 3975; C.'51, § 2385.]

Sureties on the constable's bond are liable for the damages for an illegal arrest made by him: *Yount v. Carney*, 91-559.

SEC. **4592. Justice his own clerk.** The justice shall be his own clerk and perform the duty of both judge and clerk. [C.'73, § 3633; R., § 3976; C.'51, § 2386.]

SEC. **4593. Jury fees.** Jury fees in justices' courts shall be taxed as part of the costs. [C.'73, § 3811; R., § 4154; C.'51, § 2545.]

SEC. **4594. Powers of successor.** When the term of office of a justice of the peace expires, his successor may issue execution or renew execution in the same manner and under the same circumstances as the former justice might have done if his term of office had not expired. [C.'73, § 3634; R., § 3977; C.'51, § 2387.]

SEC. **4595. Report of unclaimed witness fees.** Each justice of the peace shall, on the first Monday in January and July each year, pay into the county treasury for the use of the county all fees of whatsoever kind in his hands at the date of payment and still unclaimed, and shall take from the treasurer duplicate receipts therefor, giving the title of the cause, the names of the witnesses, jurors, officers or other persons, and the amount each one is entitled to receive, one of which he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and enter the same upon the proper records as a claim allowed, and, on demand by the persons entitled to said fees, shall issue county orders for the amount due each person, respectively. [19 G. A., ch. 151, § 1; C.'73, § 3815.]

SEC. **4596. Penalty.** Any failure to pay over to the county treasurer witness fees, as above provided, is a misdemeanor, and shall be prosecuted as provided by law. [C.'73, § 3816; R., § 352.]

SEC. **4597. Fees of justice.** Justices of the peace shall be entitled to charge and receive the following fees:

1. For docketing each case in any action, except in garnishment proceedings, fifty cents;
2. For issuing each original notice, fifty cents;
3. For issuing attachment or order for the delivery of property, twenty-five cents;
4. For drawing and approving bond, when required in any case, fifty cents;
5. For entering judgment by confession after action brought, fifty cents;
6. For entering judgment by confession before action brought, one dollar;
7. For entering judgment by default, or on a plea of guilty, fifty cents;
8. For entering judgment when contested, fifty cents;
9. For additional when a jury is called, one dollar;
10. For issuing venire for jury, twenty-five cents;
11. For each subpœna in civil action, when demanded, twenty-five cents;
12. For each oath or affirmation, except in proceedings connected with actions before him, five cents;
13. For each continuance at the request of either party, fifty cents;
14. For setting aside each judgment by default, fifty cents;
15. For each information and affidavit, fifty cents;
16. For each execution, renewal of execution, or warrant of any kind, fifty cents;
17. For each bond or recognition, fifty cents;

18. For each mittimus or order of discharge, fifty cents;
19. For each official certificate or acknowledgment, twenty-five cents;
20. For making and certifying transcript, fifty cents;
21. For trial of all actions, civil or criminal, for each six hours or fraction thereof, one dollar;
22. For all money collected and paid over without action, five per cent.; and for all money collected and paid over after action brought without judgment, two per cent., which shall be added to the costs. [C. '73, § 3804.]

In default cases, where plaintiff is required to prove up his claim before getting judgment, the justice is entitled to both a trial fee and a fee for entering judgment: *Shaw v. Kendig*, 57–390.

The justice is not entitled to the fee "for drawing and approving a bond when required in any case," when the bond is prepared by an attorney and handed to the justice merely to be approved and filed: *McKay v. Maloy*, 53–33.

The justice cannot collect from the debtor the fees provided for collection of money without suit. Such compensation is not costs, but fees to be recovered from the party demanding the service: *Pennington v. Beedy*, 50–85.

A contract whereby a justice agrees to accept a less or a greater compensation than is prescribed by statute, or whereby he agrees not to avail himself of the statutory mode for the collection of his fees, is contrary to public policy and void: *Hawkeye Ins. Co. v. Brainard*, 72–130.

A certificate or transcript filed by the justice with the auditor for the purpose of securing an allowance of his fees by the county does not constitute a certificate or transcript for which a fee may be charged: *Hinesley v. Mahaska County*, 78–312.

The term "trial" used in this section means the judicial determination of an issue of law or fact, raised by demurrer or plea, and a justice is not entitled to the trial fee where defendant pleads guilty, and nothing remains for the justice to do but to pronounce judgment. Although in such cases he may hear testimony in mitigation or aggravation of the punishment, this will not constitute a trial: *Mathews v. Clayton County*, 79–510.

SEC. **4598. Fees of constables.** Constables shall be entitled to charge and receive the following fees:

1. For serving any notice or civil process, on each person named therein, fifty cents;
2. For copy thereof when required, ten cents;
3. For serving attachment or order for the delivery of property, fifty cents;
4. For traveling fees, going and returning by the nearest traveled route, per mile, five cents;
5. For summoning a jury, including mileage, one dollar;
6. For attending the same on trial, for each calendar day, one dollar;
7. For serving execution, besides mileage, fifty cents;
8. For advertising and selling property, seventy-five cents;
9. For advertising without selling, twenty-five cents;
10. For return of execution when no levy is made, ten cents;
11. For serving each subpœna, besides mileage, fifteen cents;
12. For posting up each notice required by law, fifteen cents;
13. For serving each warrant of any kind, seventy-five cents;
14. For attending each trial in a criminal case, for each calendar day, one dollar;
15. For serving each mittimus or order of release, besides mileage, thirty cents;
16. For serving a warrant for the seizure of intoxicating liquors and any other matter connected therewith, the same compensation as allowed a sheriff for a like service;
17. For all money collected on execution and paid over, except costs, five per cent., which shall constitute part of the costs. [C. '73, § 3805.]

Fees of a constable for serving an original notice of suit in a court of record may be taxed up as costs: *Du Boise v. Babcock*, 42–233.

A constable is not entitled to a fee for attending a trial, where there is a plea of guilty and judgment thereon, and no evidence is introduced: *Wheeler v. Clinton County*, 92–44. See also 84–602, 87–412.

SEC. **4599. In criminal cases.** The fees contemplated in the two preceding sections, in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees

cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit. [C. '73, § 3806.]

In the absence of any statute, the successor of the justice who is entitled to fees in state cases is not authorized to collect such fees for him. They constitute a personal claim in his favor against the county: *Labour v. Polk County*, 70-568.

A justice is not entitled to tax up as costs a certificate or transcript filed by him with the auditor for the purpose of securing payment by the county of his fees: *Hinesley v. Mahaska County*, 78-312.

The account must be made out in favor of, and verified by, the person who claims the fees: *Hegele v. Polk County*, 92-701.

SEC. **4600. Accounting for fees.** Justices of the peace and constables shall pay into the county treasury all fees collected in each year in excess of the following sums: In townships having a population of thirty thousand or more, justices, fifteen hundred dollars, constables, twelve hundred dollars; those having a population of twenty thousand and under thirty, justices, twelve hundred dollars, constables, one thousand dollars; those having a population of ten thousand and under twenty, justices, one thousand dollars, constables, eight hundred dollars; those having a population of four thousand and under ten, justices, eight hundred dollars, constables, six hundred dollars; in all other townships, justices, six hundred dollars, constables, five hundred dollars. Each of said officers, except when the fees charged or taxed do not exceed one hundred and fifty dollars for justices of the peace, and one hundred dollars for constables shall, under oath, make quarterly reports to the board of supervisors, upon blanks furnished by the county auditor, of all fees charged or taxed and collected, the last quarterly report to be an annual report, including therein a summary of the three preceding ones, which last report shall also show that all fees and fines collectible by law have been received, such annual report to be made on the first Monday in January, and before the annual settlement shall be made, and accompanied with the receipts of the treasurer for all money paid in to him. When the fees charged or taxed are less than the amount heretofore stated, annual reports only need be made. [25 G. A., ch. 74.]

TITLE XXIII.

OF EVIDENCE.

CHAPTER 1.

OF GENERAL PRINCIPLES OF EVIDENCE.

SECTION 4601. Witnesses—who competent. Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, except as otherwise declared. [C.'73, § 3636; R., § 3978; C.'51, § 2388.]

This section, in so far as it limits witnesses to human beings "of sufficient capacity to understand the obligation of an oath," is not in conflict with Const., art. I, § 4, such qualification being assumed therein; and where a little girl of less than nine years of age was not allowed to testify, it not appearing what other inquiry was made as to her capacity, the supreme court refused to interfere: *Kilburn v. Mullen*, 22–498.

A person of sufficient capacity to understand the obligation of an oath is a competent witness in any case, unless he is included in some of the exceptions in the statute: *State v. Rainsbarger*, 71–746.

The capacity of a witness twelve years of age to testify *held* sufficiently shown in a particular case: *State v. Severson*, 78–653.

The exceptions referred to in this section relate to restrictions placed upon the examination of witnesses by § 4604 as to transactions with a person since deceased, and § 4607 as to communications between husbands and wives. Persons are competent witnesses regardless of their interest in or relation to the action and proceedings: *Dysart v. Furrow*, 90–59.

As to defendant in a criminal prosecution being a witness, see § 5484.

SEC. 4602. Credibility. Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility. [C.'73, § 3637; R., § 3979; C.'51, § 2389.]

As affected by religious belief: Lack of belief in God, or future conscious existence, does not render a witness incompetent, nor does it render incompetent a party's dying declaration; but proof of such fact is admissible to lessen the credibility of his testimony or of such declaration: *State v. Elliott*, 45–486.

The fact that a witness does not believe in a God, and that He will reward or punish us according to our deserts, may be shown as affecting the credibility of the witness, but it is erroneous to confine the evidence to a belief in future rewards and punishments: *Searcy v. Miller*, 57–613.

The facts as to belief are not to be brought out by cross-examination, but by proof of declarations, etc.: *Ibid.*

A witness cannot be required to testify to his want of belief in any religious tenet nor to divulge his opinions on matters of religious faith for the purpose of affecting his credibility by showing that he does not believe in a future conscious state of existence: *Dedric v. Hopson*, 62–562.

As affected by mental condition: The credibility of a witness may be impeached by showing an abnormal condition of the mind, caused by disease or habits which impair the memory: *Alleman v. Stepp*, 52–626.

The fact that a witness was under the influence of liquor at the time of the occurrence with reference to which he testifies will not destroy the credibility of his testimony with reference thereto, although it will undoubtedly impair it, and if he is corroborated as to the occurrences, or his recollection appears distinct and clear, he may be entitled to belief: *State v. Castello*, 62–404.

Where dying declarations were introduced, it was held error to instruct the jury that the fact that at the time the circumstances referred to occurred, and the delarations were made, the deceased was intoxicated, should not be taken into account as affecting the credibility of such evidence: *State v. Nolan*, 92–491.

Interest: It is always permissible to show the interest of a witness in the event of the suit in order that due weight may be given to his testimony. Therefore, where an attorney was called as a witness, it was held proper to ask him if his compensation as an attorney depended upon a recovery in the case: *Harrington v. Hamburg*, 85–272. And see notes to next section.

Credibility as affected by interest in criminal cases, see notes to § 5483.

SEC. 4603. Interest. No person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be

excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in this chapter. [C. '73, § 3638; R., § 3980.]

Under our statute the interest of a witness does not disqualify him, but can only be shown for the purpose of lessening his credibility, but the rules relating to the admissibility of evidence showing the interest of the witness are the same as at common law: *Erickson v. Bell*, 53-627.

Therefore, *held*, in accordance with the rule of the common law, that testimony to establish declarations of a witness, to the effect that he is interested in the event of the suit, is not admissible: *Ibid.*

Interest of a witness in behalf of one of the parties should be considered as affecting his credibility and for no other purpose: *Holloway v. Griffith*, 32-409.

The jury may properly be instructed to consider the interest of a witness, his hopes and fears, etc.; and in an action against a railway, *held*, that such instruction was not erroneous as tending to reflect upon the credibility of railroad employes: *Hatfield v. Chicago, R. I. & P. R. Co.*, 61-434.

Held proper on cross-examination to show that the witness was a bondsman for the party by whom he was called, that fact being one proper to be considered by the jury in determining what weight and credit ought to be given to his testimony: *State v. Calkins*, 73-128.

SEC. **4604. Transaction with person since deceased.** No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence. [C. '73, § 3639; R., § 3982.]

Constitutionality: This section is not unconstitutional as in violation of the provision of Const., art 1, § 4, with relation to competency of witnesses. Under the constitutional provision it is still competent for the legislature to declare that interest in the event of a suit shall or shall not disqualify the witness: *Karney v. Paisley*, 13-89; *Donnell v. Braden*, 70-551.

To what actions the provision is applicable: The disqualification provided for in this section is not limited to actions brought by an executor, assignee or guardian, but applies also in actions against such parties. It extends, however, only to cases where the witness is examined as against such executor, assignee or guardian, and not to cases where he is examined by such party: *Leasman v. Nicholson*, 59-259.

This section is applicable to a controversy between the heirs of deceased: *Neas v. Neas*, 61-641.

Where an administrator, though a party, was not a necessary party, and the suit was dismissed as to him, *held*, that the testimony of plaintiff as to a personal transaction between himself and decedent was competent: *Campbell v. Mayes*, 38-9.

The section is not applicable in an action against an administrator *de bonis non* where the transaction as to which the witness is called to testify was with a prior administrator since deceased: *Dunne v. Deery*, 40-251.

One who is an executor *de son tort* is not entitled to the protection of this section, as applicable to executors or administrators: *French v. French*, 84-655.

While the widow, in case the deceased has not made a will or in case she has not accepted the benefit of the will, is not a legatee or heir of her deceased husband, she is next of kin, within the meaning of this section: *Ibid.*

The widow of decedent is next of kin within the meaning of this section: *Clarke v. Ross*, 65 N.W., 340.

But the action must be by or against the legatee or next of kin as such, and not in an individual capacity. (*French v. French*, 84 Iowa, 655, distinguished): *Ibid.*

Where a married woman is in possession of and claims real property under an alleged oral contract with one who is deceased, in an action to subject the property to the payment of a judgment against an heir of the deceased, the evidence of herself and husband is competent to prove the oral contract, the judgment creditor not being one of the persons designated by this section: *Drake v. Painter*, 77-731.

The word "survivor" is usually applied to the longest lived of two or more partners or trustees, and has been applied in some cases to the longest lived of joint tenants, legatees, and others having a joint interest in anything. But it has no application to

persons related as principal and agent, and this section does not preclude the testimony of a party with reference to a transaction had with an insurance agent since deceased, in an action brought upon a policy of insurance procured through such agent: *Reynolds v. Iowa & Neb. Ins. Co.*, 80–563.

Evidence of personal transactions with an agent since deceased is competent in an action against his principal: *Bellows v. Litchfield*, 83–36.

Where the plaintiff sought to recover from the husband items of family expense under a contract made with the wife, since deceased, *held*, that the plaintiff could not testify with reference to such contract: *Gavin v. Bischoff*, 80–605.

In an action by a personal representative involving the title to land, where defendant and his wife testified that by an oral contract with the deceased they had purchased and paid for the land, *held*, that such evidence was incompetent: *Cochrane v. Breckenridge*, 75–213.

This section does not apply in a proceeding to establish a claim against an estate by one who, though an heir of the deceased, does not claim as heir but as creditor: *Harrow v. Brown*, 76–179.

The provisions of this section have no application in an action against an executor to hold him personally liable on a contract purporting to be executed in behalf of the estate, but not binding on the estate because not approved by the probate court. The statute is intended for the protection of the estates of deceased and disabled persons or their privies or representatives who succeed to their rights: *Clark v. Ross*, 65 N.W., 340.

In a controversy between creditors as to which was entitled to property in the hands of an administrator, who was joined as a party defendant, *held*, that the case was not one in which such administrator was a party, so as to prevent one of the creditors who was a party to the suit from testifying as to transactions with decedent: *Gordon v. Kennedy*, 36–167.

While the hearing of exceptions to the report of executors is not the trial of an issue yet it is a proceeding in probate which is adversary in its character, and the provisions of this section are applicable thereto: *Ballinger v. Connable*, 69 N.W., 438.

In a particular case, *held*, that this section was not applicable: *Cahalan v. Cahalan*, 82–416.

Who excluded as parties: This section excludes as to certain matters the testimony, first, of *parties* to the action, and, secondly, of *persons interested therein;* that a party is shown not to have any interest in the matter will not render him competent: *Williams v. Barrett*, 52–637.

The testimony of a party to an action brought by an heir or administrator and relating to a personal communication between himself and deceased is not competent, although such party has no interest in common with the other defendants against such heir or administrator: *Burton v. Baldwin*, 61–283.

Where one of the parties defendant in an action by an administrator had entered into a stipulation for judgment against him to a particular amount, *held*, that he was no longer a party to the action in such sense as to be disqualified from testifying under the section, although judgment had not yet been formally rendered: *Conger v. Bean*, 58–321.

What interests sufficient to disqualify: The interest of an administrator no longer disqualifies him from testifying in an action to which he is a party. But if the adverse party is an executor, so as to bring the case within the statutory provision heretofore given, the administrator cannot testify: *Schmid v. Kreismer*, 31–479.

The interest which disqualifies must be a legal, certain and immediate interest. If it be a doubtful one, the objection goes to the credibility of the witness: *Birge v. Rhinehart*, 36–369.

The true test of such interest is that the witness will either gain or lose by the direct, legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. If the interest is of a doubtful nature, the objection goes to the credit of the witness and not to his competency: *Wormley v. Hamburg*, 40–22.

The interest contemplated as sufficient to exclude a witness is such as would, at common law, disqualify him. Where the witness has equal interest on both sides, he will not be disqualified: *Goddard v. Leffingwell*, 40–249.

The interest sufficient to disqualify must be present, certain and vested. It will not be sufficient that at a prior time the witness might nave been the holder of an equitabie interest in the property in controversy: *Zerbe v. Reigart*, 42–229.

Next of kin under this section inciude relations by marriage who are entitled by law to a distributive share in the estate of the decedent. Therefore, *held*, that in a suit against the husband on a note, signed jointly by himself and his wife, since deceased, evidence of the person who is in reality the party plaintiff in interest with reference to the facts and circumstances relating to the execution of the note by the wife was not admissible: *Campbell Banking Co. v. Cole*, 89–211.

In an action by an administrator against a person to recover property of the estate wrongfully appropriated. an heir of decedent who would be entitled to a distributive share of the estate not required for the payment of debts is an interested witness unless it appears that the estate is insolvent: *Ivers v. Ivers*, 61–721.

In such case a mere disclaimer by the witness of any interest in the estate will not render him competent, as such disclaimer will not operate to release his interest: *Ibid.*

In an action by the widow and administratrix of a deceased person to recover from the heirs property claimed to belong to the estate, testimony of the heirs as to a gift to them of the property by deceased during his lifetime is not admissible: *Samson v. Samson*, 67–253.

In such case, *held*, that the husband of one of the heirs, who was present during the

transaction, and, at his wife's request, joined with her in an undertaking to make payments to her father in consideration of the property received, was not a competent witness as to the transaction: *Ibid.*

But the wife of one the heirs, who was present at the time of the transaction with such heir, but was not a party to such transaction, *held* a competent witness: *Ibid.*

In an action by an executor to recover property given by decedent to a son during his lifetime, it being claimed that such transfer was produced by undue influence, *held*, that the wife of decedent was not competent to testify with reference to the transaction, but that other sons having no interest in the suit were competent witnesses: *Muir v. Miller*, 82-700.

It is not sufficient that the witness be an interested party, but his testimony must be in regard to a personal transaction or communication between him and deceased, in order to bring the case within this section: *Farmers', etc., Bank v. Creveling*, 84-677.

Where suit was brought against one of three partners on a partnership debt, *held*, that one of the other partners, though not a party to the suit, was so far interested in the result of the action that he was incompetent to testify to a personal transaction between himself and the deceased partner: *Giesecke, etc., Mfg. Co. v. Seevers*, 85-685.

In a controversy between the executors of the estate of the deceased person and a debtor who claims release of the indebtedness from deceased by written instrument, the testimony of a third person, to whom such releases were delivered by deceased, with reference to the transaction, is not incompetent under this section: *Toms v. Beebe*, 90-612.

In an action by a person claiming as heir against defendants claiming title to property of deceased through a sheriff's sale, *held*, that one of such defendants was not a competent witness as to a personal transaction with deceased tending to show an abandonment of the homestead right in the property sold: *Baker v. Jamison*, 73-698.

In an action by a corporation against the executor of the decedent, *held*, that a stockholder of plaintiff could not be allowed to testify as to a contract between plaintiff and deceased: *First Nat. Bank v. Owen*, 52-107.

The statute is not to be construed as applicable only to witnesses who are interested in favor of the party introducing them: *Donnell v. Braden*, 70-551.

A person whose liabilities would not be affected by the result of the action, *held* not incompetent to testify under this section: *Fuller v. Lendrum*, 58-353.

Under a corresponding provision (Rev., § 3982), which excluded the evidence of the adverse party in a suit by or against an executor, as to facts transpiring before decedent's death, *held*, that the payee of the note in controversy, who had transferred it to the plaintiff as a good faith purchaser before maturity, had no interest in an action brought thereon against the administrator of the maker of the note such as to disqualify him from testifying: *Burroughs v. McLain*, 37-189.

The facts in a particular case *held* not to show any interest on the part of a witness disqualifying him to testify as to admissions made to him by deceased: *Bixley v. Wormley*, 44-347.

What deemed personal transactions: It is only as to personal transactions between himself and deceased that a party is prohibited from testifying: *Sypher v. Savery*, 39-258, 264; *Haverly v. Alcott*, 57-171.

The question as to what is a personal transaction must be determined largely by the facts peculiar to each case: *In re Brown's Estate*, 92-379.

The payment of a note to the deceased is a personal transaction within the meaning of this section: *Williams v. Brown*, 45-102. So is the delivery of a deed from witness to decedent: *Wood v. Brolliar*, 40-591.

In an action by an administrator against a surety on a note, *held*, that the wife of defendant was a competent witness as to transactions between the deceased and her husband: *Auchampaugh v. Schmidt*, 77-13. Overruling *S. C.*, 72-652.

This section does not prohibit the testimony of the party nor of the husband or wife of the party in regard to transactions and communications in which the witness took no part: *Erusha v. Tomash*, 67 N. W., 390.

In a suit against the wife in respect to the homestead for the purpose of enforcing a claim under a conveyance of the same in which she joined with the husband, her testimony as to what was said to her by her husband at the time of the conveyance, he being since deceased, is not admissible: *Palmer v. Palmer*, 62-204.

Where a defendant, in an action by an executor on a note, attempted to show that such note was not the property of deceased, but of a third person, for whom deceased acted as agent, for the purpose of rendering admissible evidence by defendant of payment made to deceased on such note, *held*, that such evidence of payment was not to be received until defendant had satisfied the court of the relation of agency as claimed: *Williams v. Brown*, 45-102.

The testimony of an heir is not incompetent as to conversations which he heard between deceased and defendant: *Sweezey v. Collins*, 40-540.

Evidence of a party with reference to a conversation in his presence is not excluded: *Leipird v. Stotler*, 66 N.W., 150.

The personal transactions and communications which, under this section, may not be testified to by the wife are those had between her and the deceased personally. She is not incompetent to testify thereto if had between the deceased and her husband; therefore, *held*, that she might testify in regard to conversations between her husband and deceased as to which she was a mere listener: *Johnson v. Johnson*, 52-586.

The section does not forbid testimony as to personal transactions and communications between deceased and another person than the witness. The personal transaction or communication must be had with the witness in order to make his testimony inadmissible: *Lines v. Lines*, 54-600.

This section does not prevent one party to a suit testifying to a conversation between the deceased and a co-party: *Smith v. James*, 72–515.

A witness may, notwithstanding the provisions of this section, testify as to matters, knowledge of which is acquired without connection with the deceased person, such, for instance, as letters between the deceased and a party to the suit: *Gable v. Hainer*, 83–457.

The testimony of a witness in an action against an executor that a certain instrument was in the handwriting of the deceased, such testimony being based on the general knowledge of the handwriting of deceased, *held* not to pertain to a personal transaction within the provisions of this section: *Sankey v. Cook*, 82–125.

The statute does not exclude the proof of facts from which by inference other facts may be found: *McElhenney v. Hendricks*, 82–657.

In an action by an administrator, *held*, that defendant was not incompetent as a witness to testify as to the payment of money to a third person upon a lien as to which deceased appeared also to have made payment, the transaction being with the third person and not with deceased: *Wormley v. Hamburg*, 46–144.

The doing of certain acts in the presence of deceased, not depending for their value as evidence upon his presence, *held* not to be a personal transaction with him in such sense as to prevent the wife of the party from testifying in respect thereto: *Dougherty v. Deeney*, 41–19.

In an action by an administrator against defendant to recover a subscription alleged to have been paid by deceased to trustees and by said trustees to defendant, *held*, that defendant was a competent witness as to the transaction between himself and such trustees: *Sypher v. Savery*, 39–258.

That a party defendant, in an action by an administrator, after stating that he signed the note sued on in his own house, was allowed to state who were in the house at that time, was held not error under this section: *Conger v. Bean*, 58–321.

In an action by an administrator on a note executed to intestate, the party executing the note is not precluded from testifying as to the date on which the note was actually made: *Barlow v. Buckingham*, 68–169.

In an action against an administrator on a note claimed to have been given by decedent to plaintiff for labor performed by plaintiff's wife for deceased, *held*, that testimony of the wife respecting the amount of labor performed by her for deceased was not admissible: *Ashworth v. Grubbs*, 47–353.

Where it is sought to recover against an administrator for work done, etc., with the knowledge or assent of deceased, in such way as to raise an implied promise, the party seeking to recover cannot give evidence of the work done: *Peck v. McKean*, 45–18; *Smith v. Johnson*, 45–308; *Wilson v. Wilson*, 52–44.

Where it was sought to show that the daughter, who had rendered services as housekeeper and nurse to her father during his lifetime, had not received compensation therefor, *held*, that her testimony that she had never been paid by her father was not admissible: *Ridler v. Ridler*, 93–347.

Where a child seeks to recover compensation from the estate of a deceased parent for services rendered under express agreement for compensation, such child cannot be allowed to give evidence as to the kind or character of the work done, as such evidence would tend to prove a contract between herself and parent: *Cowan v. Musgrave*, 73–384.

In an action by the wife of deceased upon a note executed to her in a settlement between deceased and defendant, *held*, that evidence of defendant as to what occurred at the time of such settlement was not admissible: *Wilcox v. Jackson*, 51–208.

Where plaintiff proposed to prove upon his own testimony, in an action against an administrator for services alleged to have been rendered decedent under contract, that he had never received payment for such services, *held*, that the evidence was properly rejected: *Van Sandt v. Cramer*, 60–424.

The provision of this section which prohibits the party to an action from being examined as a witness in regard to any personal transaction or communication between such witness and a deceased person in an action against the executor of such person, applies to the testimony of such party with reference to an express as well as to an implied contract, and therefore covers a case where it is sought to recover for services claimed to have been rendered to deceased under an express agreement for compensation: *Herring v. Herring's Estate*, 62 N.W., 666.

An heir who claims credit in the distribution of the estate for improvements made upon property belonging to decedent is not a competent witness to testify as to the performance of the services and the payment of money for such improvements: *Ballinger v. Connable*, 69 N.W., 438.

The object of this statute is to prevent a party or person interested in a suit from having the advantage of testifying to personal transactions or communications against an adversary whose lips are sealed by death and could not answer; therefore, *held*, that in an action in probate by a son to recover upon implied contract for services rendered in supporting the father during his lifetime evidence was admissible as to the condition of his father and the care and attention which he required, it being carefully restricted so as not to include what the witness did or was required to do: *Marietta v. Marietta*, 90–201.

This case differs from others in that the evidence admitted would not in itself give rise to any implied contract: *Ibid.*

A party to a contract with deceased is not precluded from testifying as to whether he has or has had in his possession or under his control such written contract: *Stevens v. Witter*, 88–636.

But he could not testify as to the terms and conditions of a contract entered into between him and deceased. A written contract may be a personal transaction within the meaning of this statute: *Ibid.*

This section does not render incompetent the testimony of a party to a transaction with a person since deceased with reference to the account books, in which he has made charges against such deceased person, for the purpose of laying the foundation for the introduction of such books in evidence: *Dysart v. Furrow*, 90–59.

Personal transactions and communications as contemplated by this section are transactions and communications between the parties of which both must have personal knowledge: *Ibid.*

By a "personal transaction" the statute means some business or negotiation between two or more individuals: *Martin v. Shannon*, 92–374.

Therefore, *held*, that it was not error in a proceeding to establish a claim against an estate for a stock of goods sold to deceased which plaintiff had previously bought from another person, to allow plaintiff to testify as to what goods which formerly belonged to such third person he had seen in the possession of deceased: *Ibid.*

The fact that proposed evidence would tend to establish liability will not prevent its being admissible in such cases, provided it is of a fact resting outside of and independent of any personal transaction: *Ibid.*

This section does not relate to a statement of a witness made by observation as to the condition of the person since deceased, with reference to capacity to make a will: *Kostelecky v. Scherhart*, 68 N.W., 591.

Testimony of relatives as to testator's general manner and conduct in his family is not inadmissible as tending to show his lack of testamentary capacity, although such relatives are parties interested in contesting the will: *Bever v. Spangler*, 93–576.

One who is named in a will as legatee comes within the provisions of this section when called as a witness on the probate of a will. He does not become a legatee merely from the time the will is probated: *In re Goldthorp's Estate*, 62 N. W., 845.

Conversation with the deceased on which a witness proposes to predicate an opinion as to whether deceased had testamentary capacity is a transaction or communication within the meaning of this section: *Ibid.*

But facts ascertainable from observation alone are not considered personal transactions, and a witness who would be disqualified to testify as to a personal transaction with deceased may testify to the mental condition of decedent in so far as such testimony is based upon observation of the appearance, conduct, manner and habits of deceased: *Ibid.*

Where the son of testator contested the validity of the father's will on the ground that such testator was mentally incompetent to execute a valid will, and that the will was executed under undue influence, *held*, that he was not incompetent by this section from testifying as to the father's mental condition and the undue influence brought to bear upon him in the execution of the will: *Sim v. Russell*, 90–656.

Where it is sought to show want of mental capacity and undue influence for the purpose of setting aside a will, by reason of a bequest to a person, not a relative, in whose family testator lived and was cared for prior to and at the time of making the will, testimony of the wife of legatee as to the general manner and conduct of the testator while living in the family is not incompetent under this section: *Denning v. Butcher*, 91–425.

To be a personal transaction in such case, the matter testified about must have involved some act by or between the two parties, or some act by one party for the benefit or detriment of another, and in which the other was in some way interested, and the testimony of the wife as to what she saw and the conversations she heard between the testator and persons other than herself or her husband would be admissible: *Ibid.*

Acts and conduct of legatees in a will towards testator do not constitute a personal transaction between legatee and testator as to which the legatees cannot be called to testify in a proceeding to probate the will: *Parsons v. Parsons*, 66–754.

The husband of the legatee under the will is a competent witness to testify as to the mental condition of testator. Such condition does not relate to a personal transaction within the meaning of this section: *Severin v. Zack*, 55–28.

It is not necessary that the testator should proclaim or state to the subscribing witnesses to his will that the instrument is his will. And it is wholly unnecessary that there should be any personal transaction between the testator and the subscribing witnesses: *Bates v. Officer*, 70–343.

In particular cases, *held*, that the facts testified to by witnesses did not involve a transaction between the witness and decedent within the meaning of the section: *Mayes v. Turley*, 60–407; *Miller v. Dayton*, 57–423.

In rebuttal: A plaintiff coming within the terms of this section cannot testify as to personal transactions between himself and deceased, even to rebut the testimony of decedent's widow: *Canaday v. Johnson*, 40–587.

Removal of prohibition by testimony of administrator, heir, etc.: The prohibition prescribed in this section does not extend to any transaction as to which the administrator has been examined in his own behalf: *Ivers v. Ivers*, 61–721.

In an action by a husband against the heirs of his deceased wife to set aside a conveyance made by him to her during her lifetime, *held*, that the fact that defendant was introduced as a witness would only remove the prohibition against the testimony of plaintiff with reference to such transactions as were testified to by defendant: *Wood v. Brolliar*, 40–591.

The fact that the executor or administrator testifies as to one transaction does not entitle the opposite party to testify in reference to other transactions with the decedent: *Luehrsmann v. Hoings*, 60–708.

Where the executor or administrator of deceased testifies with reference to a personal transaction between the deceased and the claimant against the estate, such claimant may testify only with reference to the transaction as to which testimony is given by

such administrator or executor: *Clarity v. Sheridan*, 91-304.

Where a check issued by deceased is put in evidence in behalf of the estate, it does not constitute the testimony of the deceased within the meaning of this section so as to admit evidence of the claimant who received such check as to what the check was given for: *In re Brown's Estate*, 92-379.

The administrator having testified in such case that the check was in the handwriting of deceased, and that the name indorsed on the back of it was the handwriting of claimant, claimant would be permitted to testify touching such matters, but nothing further; moreover, such testimony would not be as to a personal transaction. Therefore, *held*, that in such case a claimant could not testify with reference to whether certain memoranda were on the check when delivered to him by deceased (the court being divided): *Ibid.*

The contestants of a will, in an action to probate the same, having testified only as to their relations with deceased, *held*, that it was not competent for one of the proponents to testify as to matters proposed to be proved by him: *Sisters of Visitation v. Glass*, 45-154.

The statute contemplates that when the administrator or other representative of the deceased testifies as to a personal transaction and describes it, then a party may also testify in relation thereto and give his version of the transaction; but the fact that the administrator refers to a personal transaction as possible does not open the way for the admission of such testimony: *In re Estate of Edwards*, 58-41.

When the executor testifies in his own behalf, but not as to a personal transaction, and his testimony is not adverse to the opposite party, the fact of his being a witness does not remove the prohibition as to personal transactions: *Ibid.*

Where the administrator testifies as to transactions between defendant and deceased raising an implied promise or obligation on the part of defendant to pay, defendant may testify as to what the real arrangement was in relation thereto: *Bailey v. Keyes*, 52-90.

Where a deposition is incompetent by reason of the interest of one of the parties to the suit, and the action is afterwards dismissed as to that party, it will become competent as to the others. The common-law rule as to the competency of a witness, by which his deposition, if incompetent on account of interest at the time it was taken, will always remain incompetent, will not apply: *Campbell v. Mayes*, 38-9.

But if the testimony of the witness is incompetent, when taken, by reason of his being a party, it is not admissible although at the time it is offered the *status* of the witness has changed and he is no longer a party: *Burton v. Baldwin*, 61-283.

The objection under this section is not to the competency of the witness but to the competency of the testimony: *Ibid.*

Under previous statutory provisions (Rev., § 3982, which differed materially from the present section), the administrator of a decedent was not incompetent as a witness to testify in an action brought by him to recover from another possession of property of such decedent: *Bradley v. Kavanagh*, 12-273.

So in a proceeding against an estate to enforce a claim the administrator was held competent: *Stiles v. Botkin's Estate*, 30-60.

The widow of decedent was held not incompetent to testify in an action against the administrator of decedent to recover compensation for support furnished to such widow during the lifetime of such decedent: *Romans v. Hay's Adm'r*, 12-270.

And therefore defendant in a replevin suit for goods taken on attachment was not placed in such a position by the death of the plaintiff in the attachment suit that he became incompetent as a witness: *Bevan v. Hayden*, 13-122.

Where an action was pending against a defendant, who subsequent y died, and whose administrator was then substituted, *held*, that a deposition of plaintiff taken before defendant's death was not admissible in evidence: *Quick v. Brooks*, 29-484.

Also *held*, that the statute was not applicaple to a case where the person deceased was merely a trustee and the person beneficially interested was living: *Watson v. Russell*, 18-79.

The fact that matters sought to be proved by a witness who is defendant in a suit brought against him as surveying partner for contribution, by the administrator of his deceased partner, are connected with transactions of the firm, and that the surviving member is a witness, cannot have effect to annul the statutory provisions with reference to such testimony: *Hosmer v. Burke*, 26-353.

In an action between a surviving member of a partnership and a creditor of a deceased member, *held*, that defendant was not incompetent to testify as to a personal transaction between him and such deceased member: *Brown v. Allen*, 35-306.

In an action by an assignee in bankruptcy of a surviving partner against a supposed debtor of the firm, *held*, that defendant was not prohibited from testifying as to personal transactions with the deceased partner: *Ruddick v. Otis*, 33-402.

Where in an action against an executor the only question was as to the amount of money contained in an express package which never reached the deceased, the testimony of plaintiff was competent to prove the amount of money contained in such package when deposited by him in the express office, such evidence, for the specific purpose for which it was offered, being competent from the necessity of the case: *Sykes v. Bates*, 26-521.

In an action against the executor of a deceased person, *held*, that the wife of plaintiff was not incompetent, the exclusion of the wife as a witness against her husband not having been made on the ground of interest: *Wendeling v. Besser*, 31-248.

Parties who were competent witnesses at common law in the cases referred to in the statutory provision are not rendered incompetent by it: *Cummins v. Hull's Adm'r*, 35-253.

And therefore evidence of a party to facts

and circumstances relating to the loss of a paper was held receivable as preliminary proof in order to warrant secondary proof of its contents: *Keech v. Cowles*, 34–259.

The statutory provisions *held* not to operate to exclude the testimony of a party who was made a competent witness by statute, as to proof of usury in a contract: *Rinehart v. Buckingham*, 34–409.

SEC. **4605. Depositions taken conditionally.** Any person may have his own deposition, or that of any other person, read in evidence in all cases where his evidence would be incompetent by the provisions of the preceding section, by causing it to be taken, either before or after action is brought, during the lifetime or sanity of the person against whose executor, heir or other representative the same is to be used, if such deposition shall have been taken and filed ten days prior to the death or insanity of such person. If after action is brought, such deposition may be taken in the usual manner; if before, then the same may be taken *de bene esse*, as provided by law. [C. '73, § 3640.]

SEC. **4606. Husband or wife as witness.** Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other, or in a civil action by one against a third party for alienating the affections of the other; but in all civil and criminal cases they may be witnesses for each other. [15 G. A., ch. 33; C. '73, § 3641; R., § 3983; C. '51, § 2391.]

Where husband and wife are joint defendants, the wife may be called to testify for plaintiff. In such case she is not a witness against her husband, within the meaning of this section: *Richards v. Burden*, 31–305.

A wife, summoned as garnishee in an action against her husband, is not exempt from answering interrogatories touching her indebtedness to him. The subjection of such indebtedness to the payment of claims against him cannot be regarded as against his interests: *Thompson v. Silvers*, 59–670.

In an action against a wife to subject property conveyed to her by her husband to the payment of his debts, the husband is not a competent witness to testify, for the purpose of defeating such conveyance, that he was insolvent at the time the conveyance was made. There is no warrant for engrafting upon the statute the rule that the husband may be allowed to testify against his wife if his testimony is against himself also: *Stephenson v. Cook*, 64–265.

The husband or wife, as the case may be, is a competent witness against the other in a prosecution for adultery: *State v. Bennett*, 31–24; *State v. Hazen*, 39–648.

In a prosecution for adultery the wife is a competent witness to prove the marriage: *State v. Hazen*, 39–648. Also in bigamy, which is a crime by the one against the other within the meaning of the statutory provision: *State v. Sloan*, 55–217; *State v. Hughes*, 58–165.

Incest on the part of a husband is a crime against the wife in such sense that she is a competent witness to prove the offense: *State v. Chambers*, 87–1; *State v. Hurd*, 70 N.W., 613.

Statements of the wife showing the guilt of her husband of a crime with which he is charged may be proved for the purpose of impeaching her evidence in his favor, but not as independent evidence: *State v. Davis*, 74–578.

The wife of one of two defendants charged with the commission of a crime, who are tried separately, is a competent witness for the state as against the other defendant, she not being examined as to any communication made by her husband to her: *State v. Rainsbarger*, 71–746.

Under Rev., § 3983, which prohibited the husband or wife being witnesses for or against each other, except in criminal cases, *held*, that this was a privilege which rested with the other party to the marriage relation, and might be waived by such party under Rev., § 3986 (see last clause of § 4608), and was not intended for the benefit of the opposite party in the suit: *Russ v. Steamboat War Eagle*, 14–363; *Blake v. Graves*, 18–312 (explaining *Karney v. Paisley*, 13–89.)

In a particular case, *held*, that the wife in her testimony had so far waived objection to her husband's testifying that he was properly permitted to do so as against her: *Estey v. Fuller Implement Co.*, 82–678.

The objection that the wife was a witness against her husband before the grand jury, upon the finding of an indictment, cannot be raised for the first time after conviction upon such indictment: *State v. Houston*, 50–212.

Testifying for or against herself and the heirs, by a widow, after the death of the husband, is not the same as testifying for or against the husband if alive, nor is her evidence as to a conversation had between plaintiff and her husband inadmissible on the ground of confidential communications between herself and husband: *Pratt v. Delavan*, 17–307.

This section and the following must be read together. In order to render the testimony of a husband or wife incompetent under this section the marriage relation must exist at the time the husband or wife is offered as a witness: *Parcell v. McReynolds*, 71–623.

As to admissibility of evidence of wife in criminal prosecutions against her husband, and as to her credibility in such cases, see notes to § 5483.

An objection to the husband or wife, when called as a witness against the other, is an objection to the competency of such witness and should be taken at the time when the

witness is sworn or it is proposed to examine such witness and not afterward. If the objection is not interposed until after the close of the examination, it will be deemed waived: *Watson v. Riskamire*, 45–231.

This section, which makes two exceptions to the general rule as to the exclusion of the testimony of husband and wife, is to be construed as negativing all other exceptions, and therefore an exception to the prohibition of the section is not to be recognized where the testimony of the husband as against his wife is also testimony as against himself: *Ward v. Dickson*, 65 N.W., 997.

SEC. 4607. Communications between husband and wife. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted. [C. '73, § 3642; R., § 3984; C. '51, § 2392.]

The rule of this section is analogous to that which excludes confidential communications: *State v. Chambers*, 87–1.

A transfer of a claim from husband to wife is not a communication within the meaning of this section: *Hanks v. Van Garder*, 59–179.

Exclamations made by the wife upon the killing of her son by her husband, *held* not communications between husband and wife within the meaning of this section: *State v. Middleham*, 62–150.

Proof of the declarations of the husband, while being examined as a witness on behalf of the plaintiff, in an action against the wife, she being present and not objecting, is not admissible in behalf of plaintiff, against the objection of the wife, upon a subsequent trial of the same case: *Kelly v. Andrews*, 71 N.W., 251.

SEC. 4608. Communications in professional confidence. No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred. [C. '73, § 3643; R., §§ 3985–6; C. '51, §§ 2393–4.]

The provisions of this section are applicable in the federal courts: *Mutual Benefit Life Ins. Co. v. Robison*, 58 Fed., 723.

Between physician and patient: As it may be lawful under some circumstances to produce a miscarriage, a communication by a women to a physician in relation to such matter will be privileged in the absence of a showing that it was not for a lawful purpose: *Guptill v. Verback*, 58–98.

Statements by a person injured, as to the cause of the injury, made to the physician called to treat him, in response to a question by the physician as to how the injury occurred, are privileged, and cannot be disclosed by the physician to whom they were made: *Raymond v. Burlington, C. R. & N. R. Co.*, 65–152.

It would manifestly violate the spirit of the statutory provision as to privileged communications to permit a physician to disclose a communication made in his presence to his partner: *Ibid.*

The prohibition in case of a physician is not limited to communications with the patient, but applies to all communications of the character indicated from different sources, and therefore to communications between physicians attending or consulting in the same case: *State v. Smith*, 68 N. W., 428.

This section is not confined in its effect to verbal communications, but extends to facts which are learned by a physician in the discharge of his duties from his own observation and examination of the patient. If the facts thus learned are of a confidential character, and are necessary and proper to enable the physician to discharge his professional duty to his patient, they are protected: *Prader v. National Masonic Acc. Assn.*, 63 N. W., 601.

Where the physician who was called as a witness had refused to have anything to do with the case as to which he was consulted by another physician, *held*, that the relation of physician and patient not having existed with reference to such person the statutory prohibition could not be waived by that person, so as to make the physician's testimony as to the communication admissible: *State v. Smith*, 68 N. W., 428.

The fact that the patient, as a witness, gives testimony as to his health at a particular time, and states that the physician was attending him at that time, does not amount to a waiver of the privilege with reference to such testimony: *McConnell v. Osage*, 80–293.

It is error in such cases to ask the patient on cross-examination whether he is willing that the physician should disclose conversations with the patient as to the state of the patient's health at a time with reference to which the patient gives testimony. A fair trial requires that such matters should not be referred to. A jury should not be impressed with the belief that there is reluctance to give such assent: *Ibid.*

Where the communication is made to a physician for an unlawful purpose, having for its object the commission of a crime, it is not privileged: *State v. Smith*, 68 N. W., 428.

The executor of a will may waive the objection to the testimony of the physician who attended testator and render such physician

competent to testify as to the mental capacity of testator at the time of executing the will: *Denning v. Butcher*, 91-425.

In a dispute between the devisee, or legal representative and the heirs at law, all claiming under the deceased, the attending physician of the deceased may be called as a witness by either party to testify with reference to the mental and physical condition of the deceased for the purpose of showing testamentary capacity or the want thereof: *Winters v. Winters*, 71 N. W., 184.

Between attorney and client: Statements made in the presence of an attorney will not necessarily be considered as privileged communications as to which he may not testify: *Shaffer v. Mink*, 60–754.

Although communications between attorney and client may not be testified to by the attorney or his clerk, others in whose presence such communications are made are not forbidden nor excused from testifying as to them: *State v. Sterrett*, 68–76.

Previous threats against the life of a party, for whose murder defendant was on trial, made to an attorney whom defendant was consulting in regard to a civil suit against such party, *held* not to be a privileged communication: *State v. Mewherter*, 46–88.

In a garnishment proceeding against an attorney, *held*, that his relations to his client would not excuse him from answering to whom and under what conditions he had paid over money of his client sought to be reached by the garnishment: *Williams v. Young*, 46–140.

A communication to one supposed to be an attorney, but who was not such at the time, but was studying and was soon after admitted, *held* not privileged: *Sample v. Frost*, 10–266.

That a person to whom communications were made was an acting magistrate and usually did the business of defendant, and frequently gave him advice and counsel, *held* not sufficient to make a communication to such person privileged: *Pierson v. Steortz*, Mor., 136.

An attorney is competent to testify where it appears that he was not the attorney of the party with reference to any matters about which he testifies, and that no information respecting such matters was obtained from him through the confidential relation of attorney and client: *Reinhart v. Johnson*, 62–155.

A party to a suit, who is also a witness, cannot be called on to state a confidential communication made to his attorney: *Barker v. Kuhn*, 38–392.

An attorney who was employed to draw a conveyance and whose services were subsequently sought with reference to keeping alive a mortgage on the same property, but who refused such employment, *held* not incompetent to testify with reference to communications made to him by the person for whom he rendered such service: *Theisen v. Dayton*, 82–74.

Where a client in connection with other business with his attorney delivered to such attorney certain releases of mortgagees saying that they were for the mortgagor, *held*, that such a statement was not a confidential communication as to which the attorney was incompetent to testify: *Thomas v. Beebe*, 90–612.

Communications or admissions made in the presence of an attorney but not directed to him more than to others present, *held* not to be privileged communications as to which he was precluded from testifying: *State v. Swafford*, 67 N. W., 284.

Communications in the presence of one's attorney with reference to the execution of a mortgage with another party does not constitute a privileged communication: *Wyland v. Griffith*, 64 N. W., 673.

A person should not be allowed to give in evidence information touching a matter in controversy which was obtained confidentially and in his professional capacity, to enable him to properly perform as attorney his professional duties on behalf of his client: *Blackman v. Wright*, 65 N. W., 843.

It is only communications which are confidential that are protected. Those which the attorney, in discharge of his duty to his client, is of necessity obliged to make public, cannot be said to be confidential, and are not privileged: *Caldwell v. Meltveldt*, 93–730.

The provisions of this section are not limited to communications between client and attorney, but extend to communications made to the attorney in his professional capacity and to enable him to discharge the functions of his office. So *held* in regard to a communication made to the county attorney by the prosecuting witness in a criminal case: *State v. Houseworth*, 91–740.

A copy of a public record sent by the client to an attorney is not a privileged communication; neither is correspondence with such attorney with reference to such copy, it not appearing that there was anything in the correspondence of a confidential nature or intended to be kept secret: *State v. Kidd*, 89–54.

An attorney who executes a will and is a witness thereto at the request of testator is competent to testify with reference to the statements made to him by the testator, the fact of making him a witness to the will being a waiver by the testator of the objection on the ground of privileged communications: *Denning v. Butcher*, 91–425.

Conversation with a minister not for the purpose of obtaining his advice or assistance or in any way by reason of his capacity as minister is not privileged: *State v. Brown*, 64 N.W., 277.

SEC. **4609. Public officers.** A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. [C. '73, § 3644; R., § 3987; C. '51, § 2395.]

SEC. **4610. Judge as witness.** The judge of the court is a competent witness for either party, and may be sworn upon the trial. But in such case

it is in his discretion to order the trial to be postponed or suspended, and to take place before another judge. [C.'73, § 3645; R., § 4005; C.'51, § 2408.]

SEC. **4611. Civil liability.** No witness is excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability. [C.'73, § 3646; R., § 3988; C.'51, § 2396.]

SEC. **4612. Criminating questions.** But when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in the next section. But in prosecutions against gaming, betting, lotteries, dealing in options, and keeping gambling houses, or rooms for illegal use or disposal of intoxicating liquors, no witness shall be excused from giving testimony upon the ground that his testimony would tend to render him criminally liable or expose him to public ignominy; but any matter so elicited shall not be used against him, and said witness shall not be prosecuted for any crime connected with or growing out of the act on which the prosecution is based in the cause in which his evidence is used for the state, under the provisions of this section. [C.'73, § 3647; R., § 3989; C.'51, § 2397.]

It is not alone left to the witness to determine whether the answer would tend to criminate him. While he is not required to explain how the answer would criminate him, the court may determine whether the answer can directly or indirectly have that effect: *State v. Duffy*, 15–425.

Where it is apparent to the court that the answer to the question could not criminate the witness he may be compelled to answer: *Richman v. State*, 2 G. Gr., 532.

Under the facts of a particular case, *held*, that the witness could not be required to answer: *Printz v. Cheeney*, 11–469.

Plaintiff in an action for seduction may refuse to answer as a witness whether she has had previous illicit intercourse with other men, as the matter sought to be elicited would subject her to public ignominy: *Brown v. Kingsley*, 38–220.

Where a witness who has taken advantage of his privilege is afterwards prosecuted, the fact that he so refused to testify cannot be given in evidence against him: *State v. Bailey*, 54–414.

The fact that it is the duty of a peace officer to file information for violation of liquor law known to him will not make the question whether he knows of any place where such liquors are sold criminating: *Hunt v. McCalla*, 20–20.

If witness waives his privilege and testifies as to matter tending to criminate him, he must testify in all respects relative to the matter material to the issue: *State v. Fay*, 43–651.

An employe cannot refuse to answer questions on the ground that answers thereto would tend to criminate his employer, and this is the rule also where the employer is a corporation: *United States Express Co. v. Henderson*, 69–40.

Where cross-interrogatories propounded under a commission to take a deposition ask the witness whether or not he has committed a crime, and remain unanswered, the party propounding them has no right to have them read, and the fact of their being unanswered brought to the attention of the jury: *Slocum v. Knosby*, 70–75.

It is the duty of the court to determine whether a witness should answer a question propounded, but, if reasonable grounds for believing that the answer would tend to render him criminally liable exist, it should not be required: *Mahanke v. Cleland*, 76–401.

But the witness should not be permitted to defeat the ends of justice by claiming a privilege to which there is no reasonable grounds for believing him entitled. And where the court directed the question to be answered, and there was nothing in the record as submitted to the supreme court on *certiorari* to overcome the presumption that the transaction did not involve criminal liability on the part of the witness, *held*, that the action of the trial court would not be set aside: *Ibid.*

The witness cannot claim his privilege where a prosecution for the offense of which he his guilty and to which the question relates is barred by the statute: *Ibid.*

Where the question asked of the witness related to an alleged fraudulent conveyance of property, and it appeared that a criminal prosecution for such act was barred, *held*, that the witness was not excluded from answering on the ground that such answer might expose him to public ignominy: *Ibid.*

Where a person charged with a crime testified before a coroner's jury, *held*, that such witness might subsequently, when called as a witness by another defendant charged with such crime, be asked on cross-examination as to her testimony before the coroner's jury. By once testifying freely, with knowledge that she had a right to decline to answer, she waived the privilege of not answering criminating questions and could be cross-examined for purposes of impeachment: *State v. Peffers*, 80–580.

A witness before the grand jury may be examined as to a criminal charge as against another even though he may be liable to prosecution for the same offense, so long as he is not required to answer questions which may criminate him: *State v. Lewis*, 65 N.W., 295.

SEC. **4613. Previous conviction.** A witness may be interrogated as to his previous conviction for a felony. But no other proof is competent, except the record thereof. [C.'73, § 3648; R., § 3990; C.'51, § 2398.]

It is not proper to ask a witness whether he has ever been convicted of a crime. The statute allows such question only as to previous conviction of felony: *Hanners v. McClelland*, 74–318.

The fact of being arrested for a crime is immaterial by way of impeachment: *State v. Brown*, 69 N.W., 277.

SEC. 4614. Moral character. The general moral character of a witness may be proved for the purpose of testing his credibility. [C. '73, § 3649; R., § 3991.]

Under the common-law rule, the moral character of a witness could not be shown, but only his reputation for want of truth and veracity. The object of this section is to change this rule, and therefore the general *reputation* may be now shown, but not the witness' *character* as known to the witness, independent of his reputation: *State v. Egan*, 59–636.

But a question as to the general moral character of the witness in the community in which he resides is proper as calling for his general reputation: *State v. Froelick*, 70–213. And see *State v. Hart*, 67–142.

A man's reputation for truth and veracity is what is said of him in the community in which he lives: *Dance v. McBride*, 43–624.

Evidence as to the reputation of witness "among the business men with whom he deals" is inadmissible: *Bays v. Herring*, 51–286.

It is competent for a witness, whose reputation for general morality and truth is assailed, to sustain his charactor by showing that those having the best opportunity of knowing his reputation have heard nothing said respecting his character; and in a particular case, *held*, that certain language of the court indicating that evidence of this kind was the best evidence of good reputation was erroneous, yet that such error was, under the circumstances, without prejudice: *State v. Nelson*, 58–208.

Proof of a specific vice, as want of chastity, is not competent for the purpose of discrediting the competency of a witness: *Kilburn v. Mullen*, 22–498.

The witness cannot be supported by showing that he was not guilty of specific immorality in connection with equivocal circumstances which he states as having given him a bad repute: *State v. Woodworth*, 65–141.

A person cannot be said to have a good moral character when he has a bad reputation as to a particular vice: *Ibid.*

The fact of assault and battery cannot be shown as bearing upon the question of moral character: *Kitteringham v. Dance*, 58–632.

A witness cannot be asked whether he was not successfully impeached in the trial of another case: *State v. Woodard*, 20–541.

The fact of dishonesty in a particular transaction will not destroy the evidence of a witness: *Wilson v. Patrick*, 34–362.

Held not proper, under this section, to ask a witness who has admitted that he has been guilty of horse-stealing, how long he has been engaged therein; such fact would have no bearing upon the moral character of the witness: *State v. McIntire*, 58–572.

Where defendant in a criminal prosecution becomes a witness on his own behalf, evidence tending to show that his moral character is bad is admissible, as in the case of any other witness: *State v. Kirkpatrick*, 63–554.

The truthfulness of a witness is always presumed, and evidence is not admissible for the purpose of establishing his credibility, as, for instance, that he has held public office, etc., where no attempt to impeach him has been made: *Walter v. Chicago, D. & M. R. Co.*, 39–33.

Where the effort is made to impeach a witness by proof of contradictory statements, it is not competent to support his evidence by proof of general good moral character or reputation for truth and veracity: *State v. Archer*, 73–320.

Under § 5483, this section is applicable equally in criminal cases; and where one of two co-defendants is called to testify for the other, he may be impeached as any other witness: *State v. Hardin*, 46–623.

It is competent to ask a witness what is his occupation and where he resides, although the answers to such questions may have a tendency to disgrace the witness, affect his credibility, or weaken his evidence: *State v. Pugsley*, 75–743.

Testimony as to the reputation of the witness should be confined to the place of his residence at the time of the trial, unless his residence there has been so brief that sufficient time had not elapsed for a reputation to have been acquired: *State v. Potts*, 78–656.

A witness may be said to be impeached when his general moral character is shown to be bad, but it is error to instruct the jury that under such circumstances they may discredit the testimony of such witness in all points in which they find it is not corroborated. Especially where the reputation as to bad moral character is founded upon indulgence in a single vice, as, for instance, sexual immorality, it does not follow necessarily that his testimony should be discredited where not corroborated. It is for the jury to say what, if any, credit should be given to the uncorroborated testimony of such witness, and they should not discredit it unless they believe its credibility has been destroyed: *McMurrin v. Rigby*, 80–322.

It is error to instruct the jury that testimony of a witness who is shown to have a bad reputation for truth and veracity, or whose general reputation as to moral character is bad, should be entirely disregarded, except where such testimony is corroborated by other credible evidence: *State v. Larson*, 85–659.

Evidence in a particular case as to the reputation of a witness, *held* proper to be considered by way of impeachment: *State v. Farrell*, 82–553.

SEC. **4615. Whole of a writing or conversation.** When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence. [C. '73, § 3650; R., § 3992; C. '51, § 2399.]

The whole of the act, declaration or conversation may be given in evidence by one party when another has introduced a part: *Courtright v. Deeds*, 37–503.

The other act or declaration contemplated by this section must be something which is necessary to make the previous or subsequent act or declaration fully understood, or to explain it. It is not all that a party may have said at other times in regard to the matter in controversy which may be thus introduced: *Dougherty v. Posegate*, 3–88. And see *Williams v. Donaldson*, 8–108.

Where a subject is introduced in the examination of a witness, and a part of the facts shown, the opposite party may inquire as to all the facts on the same subject: *Jones v. Hopkins*, 32–503.

A letter in reply to a letter which is admitted in evidence is also admissible as a part of the same communication: *Burlington, C. R. & N. R. Co. v. Sherwood*, 62–309.

Where a letter contains distinct statements of facts which cannot be misunderstood if read alone, one is admissible without the other: *Brayley v. Ross*, 33–505.

Parol evidence of the contents of a lost letter necessary to make another letter "fully understood" is admissible: *Collins v. Bane*, 34–385, 389.

If a part of an account in an account book is relied on, the whole must be received: *Veiths v. Hagge*, 8–163, 189.

Where a part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other: *Gaddis v. Lord*, 10–141; *Hess v. Wilcox*, 58–380.

Proof of statements made in connection with a plea of guilty in a criminal case is not admissible in a civil case where the fact of such plea of guilty may be shown: *Root v. Sturdivant*, 70–55.

In a civil action the defendant is not entitled to prove the circumstances under which he entered his plea of guilty in a criminal action, notwithstanding the provisions of the above section: *Hauser v. Griffith*, 71 N.W., 223.

Where, on the trial of a criminal action, one declaration of defendant was admitted, but subsequent declarations were offered, but refused, such action will not be held erroneous, unless it affirmatively appear that such subsequent declarations were necessary to explain the first, or make it fully understood: *State v. Vance*, 17–138.

Statements as to what third persons said, which would be mere hearsay evidence, are not admissible even to get the whole of a conversation before the jury: *Sims v. Moore*, 61–128.

The rule of this section does not apply so as to allow a party to introduce the rest of a conversation a part of which he has himself shown in evidence: *State v. Elliott*, 15–72.

The fact that the witness did not hear all the conversation will not render him incompetent to testify as to what he did hear, but will only go to the credibility of such testimony: *Mays v. Deaver*, 1–216; *State v. Elliott*, 15–72.

Detached conversations *held* not sufficiently connected to allow the introduction of the second as necessary to explain the first: *Williams v. Donaldson*, 8–108.

SEC. **4616. Writing and printing.** When an instrument consists partly of written and partly of printed form, the former controls the latter, if the two are inconsistent. [C. '73, § 3651; R., § 3993; C. '51, § 2400.]

This section has no application where the written portion is not inconsistent with that which is printed: *Heiple v. Reinhart*, 69 N. W., 871.

SEC. **4617. Understanding of parties to agreement.** When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. [C. '73, § 3652; R., § 3994; C. '51, § 2401.]

This section only applies to instruments which arise out of and are the expression of the agreement of two minds: *Pierson v. Armstrong*, 1–282, 287.

Section applied: *Snow v. Flannery*, 10–318; *Stout v. Fire Ins. Co.*, 12–371, 380; *Wilkinson v. Connecticut Mut. L. Ins. Co.*, 30–119, 127; *Thompson v. Locke*, 65–429; *McCorkell v. Karhoff*, 90–545.

This section is equally applicable to verbal and to written agreements: *Cobb v. McElroy*, 79–603.

This section applies to an agreement actually made, and not to a mere negotiation for one: *Patton v. Arney*, 64 N. W.. 635.

If the language used by and known to the parties to the contract is ambiguous or fairly admits of more than one construction, that meaning is to be given it in which it is understood by the other party, whether the party so acting has reason to believe it was so understood by the other party or not: *Minnesota Linseed Oil Co. v. Montague*, 65–67.

This section does not authorize the intro-

duction of parol evidence to vary the written contract by showing that the intent of the parties was different from that implied in the words used therein: *Walker v. Manning*, 6-519.

In the absence of fraud, accident or mistake a contract is to be construed by the language employed therein and not according to the views of its meaning entertained by the parties who drew it. Courts will not reform the plain language of the contract to make it conform to the notion of one of the parties executing it: *Gongower v. Equitable Mut. L. & End. Ass'n*, 63 N. W., 192.

Where a person subscribing for stock in a corporation had the privilege of paying therefor in lumber and believed that the opposite party who subsequently made a purchase of lumber expected to pay therefor by the issuance of stock, *held*, that the person selling the lumber was bound by the understanding of the opposite party and could not insist that he had an election to pay for the stock in money and require the payment for his lumber to be made in money: *Chicago Lumber Co. v. Tibbles Manuf'g Co.*, 80-369.

Where there was a question under the contract for the construction of a building as to the kind of stone work which should be put in the foundation, and the contractor, knowing that the owner was insisting that the work should be done in a certain manner, which was more expensive than the manner which the contractor considered was called for by the contract, performed the work in accordance with the claim of the owner, without referring the question to the architect, who by the terms of the contract was authorized to decide such controversy, *held*, that the contractor could not recover from the owner extra compensation on account of the manner in which the work was done: *Evans v. McConnell*, 63 N.W., 570.

Where a building contract provided that the architect should decide whether alterations asked for by the owner were within its terms, and the contractor, knowing that the owner understood such alterations to be within the terms of the contract, made them without securing a decision from the architect, *held*, that he was not entitled to recover: *S. C. on rehearing*, 68 N.W., 790.

SEC. **4618. Historical and scientific works.** Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest therein stated. [C. '73, § 3653; R., § 3995; C. '51, § 2402.]

The books and maps which are admissible under this section are such as are published for circulation among the people generally. They must be printed or otherwise published, so that the presumption will follow that their contents will be or may be generally known. A record filed in a public office is not such a publication as is here contemplated: *Heinrichs v. Terrell*, 65-25.

To render a map or plat admissible under this section it must be public, and must be shown to be the work of a disinterested person: *Pfotzer v. Mullaney*, 30-197.

A city map, purporting to have been made by the city engineer, and proved to have been recognized and used by the city as substantially correct, is admissible in evidence: *Nolser v. Chicago, B. & Q. R. Co.*, 73-268.

The herd-book of a particular breed of cattle is receivable in evidence under this section: *Kuhns v. Chicago, M. & St. P. R. Co.*, 65-528.

But without proof that a herd-book offered in evidence is recognized as correct by cattle dealers, and that the animal referred to is the same as the one herein entered, the herd-book is inadmissible: *Crawford v. Williams*, 48-247.

Standard medical books are admissible as evidence of the author's opinions as to methods of medical skill or practice: *Bowman v. Woods*, 1 G. Gr., 441.

The statutory provision as to medical books does not render inadmissible in evidence that which was before admissible, and standard medical authorities are not therefore the best evidence of what they teach or whether they differ. The testimony of experts is admissible on such points and also as to what are standard authorities, etc.: *Brodhead v. Wiltse*, 35-429.

A statement in a medical work that bears upon the question at issue in a case is not to be excluded on account of indefiniteness: *Quackenbush v. Chicago & N. W. R. Co.*, 73-458.

This provision is not intended to cover medical works of all kinds, and to make them independent evidence of whatever medical opinions or theories are therein expressed or formulated, and does not authorize such works to be read in evidence for the purpose of establishing the probable effects of a physical injury: *Union Pacific R. Co., v. Yates*, 79 Fed., 584.

Life tables: The Carlisle Life Tables, as found in the Encyclopedia Britannica, are admissible in evidence to show what was the expectation of life of the person for whose death damages are sought to be recovered: *Worden v. Humeston & S. R. Co.*, 76-310.

Johnson's Encyclopedia, containing life tables, *held* admissible in evidence as a standard and well known work treating on science and art: *Gorman v. Minneapolis & St. L. R. Co.*, 78-509; *Scagel v. Chicago, M. & St. P. R. Co.*, 83-380.

Books of science: Passages from scientific books are not admissible with reference to matters open to the observation of every one and within the common knowledge of all persons of ordinary experience: *Gould v. Schermer*, 70 N. W., 697.

Statements found in a standard scientific authority treating of the mechanical appliances for stopping trains and the distance required therefor, *held* not admissible in a particular case in which it is sought to charge defendant for not stopping its train whereby plaintiff was injured, the circumstances not being sufficiently shown to indicate that the statements were applicable to the case in question: *Burg v. Chicago, R. I. & P. R. Co.*, 90-106.

SEC. **4619. Subscribing witness.** When a subscribing witness denies or does not recollect the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence. [C.'73, § 3654; R., § 3996; C.'51, § 2403.]

Section applied: *Ballinger v. Davis*, 29–512.

SEC. **4620. Handwriting.** Evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury, with writings of the same person which are proved to be genuine. [C.'73, § 3655; R., § 3997; C.'51, § 2404.]

Comparison: The writing with which comparison is made must be proved to be genuine by testimony of witnesses who saw the party write it, or by the party's admission, when not offered by him, or in some such a positive manner. The genuineness of the standard cannot be proved by a witness who has seen the party write generally. The standard, however, need not be a writing connected with the case: *Hyde v. Woolfolk*, 1–159.

A paper offered in evidence for the mere purpose of furnishing the jury a standard of comparison is admissible only where no collateral issue can be raised concerning it; that is, when the paper is conceded to be genuine, or is such that the other party is estopped to deny it, or belongs to the witness, who was himself previously acquainted with the party's handwriting, and exhibits the paper in confirmation and explanation of his own testimony: *Wilson v. Irish*, 62–260.

The genuineness of the writing made the basis of the comparison, called the standard writing, should be proved by direct and positive evidence. A writing cannot be thus used when its genuineness rests only upon evidence based upon comparison with other writing claimed to be genuine: *Winch v. Norman*, 65–186.

The party whose handwriting it is sought to prove may, on his behalf, offer in evidence writings of his own proved to be genuine, and is not to be limited to such writings as were made before the issue as to genuineness of handwriting was raised. Therefore, *held*, that defendant might offer in evidence his signature to his answer in the case: *Singer Mfg. Co. v. McFarland*, 53–540.

An instrument purporting to be executed by the party whose signature is in question, and duly acknowledged, is not admissible in proof of handwriting. It might be properly executed and acknowledged, although the signature were in the handwriting of another: *Hyde v. Woolfolk*, 1–159.

Evidence of the genuineness of the party's signature on a hotel register *held* admissible for the purpose of proving by comparison the genuineness of a signature in question, although such evidence also tended to contradict the testimony of the party that he had not been at the place where such registry was claimed to have been made: *State v. Calkins*, 73–128.

Before a writing can be used for the purpose of making a comparsion with the writing in question, the genuineness of the standard of writing must be established, and no longer a question of fact in the case. The testimony of a witness that the writing sought to be used as a standard is the writing of the person whose signature is in question is not sufficient, where the witness' testimony is based on his general knowledge of the handwriting of such person: *Sankey v. Cook*, 82–125.

Refusal of the court to permit a witness to whom a number of cards bearing the name of the person, the genuineness of whose signature was in question, were shown, to state whether the signatures on the cards appeared more like his genuine signature than the one in question, *held* not erroneous, it not appear that any of the signatures on the cards were genuine: *Bruner v. Wade*, 85–666.

Defendant's genuine signature wherever found if made about the time of the writing where the genuineness is in question may be used for the purposes of comparison; so *held* as to a signature in a hotel register: *State v. Farrington*, 90–673.

The statute is absolute in its requirements that the genuineness of the standard writing must be established, but makes no provision as to how it shall be done, and in a particular case, *held*, that defendant's signature to an application for continuance sworn to by him before the clerk of the court, whose certificate and signature were properly attached, was admissible for purpose of comparison: *Ibid.*

Expert testimony: The opinion of an ordinary witness, formed upon comparison of the writings alone, is not admissible. No one but an expert can be allowed to give an opinion formed upon such comparison; but to be an expert in regard to handwriting the witness need not be a man of any particular calling: *Hyde v. Woolfolk*, 1–159; *Mixer v. Bennett*, 70–329.

The competency of the witnesses in a particular case, *held* to be sufficiently shown: *Ibid.*

The mere fact that a person is clerk of the courts will not entitle him to testify as an expert in regard to handwriting: *Winch v. Norman*, 65–186.

One who has seen a party write is competent to give an opinion as to genuineness of his signature on proper questions. It is not necessary that a witness shall have followed some calling making him an expert in handwriting: *State v. Farrington*, 90–673.

It is not necessary that a witness in order to be allowed to give his opinion on comparison of handwritings should claim to be an expert or that he possess the highest skill in detecting the differences or similarities in handwritings. And one who has for years been required in his business to frequently pass upon the genuineness of signatures is

entitled to give his opinion on making comparisons: *Christman v. Pearson*, 69 N. W., 1055.

Weight of expert testimony based on comparison: Expert testimony as to the genuineness of a signature, based upon comparison of handwriting, is of the lowest order, and ought not to be allowed to overthrow positive and direct evidence of credible witnesses who testify from personal knowledge: *Borland v. Walrath*, 33–130.

Expert testimony as to handwriting is of the lowest order and of the most unsatisfactory character: *Whitaker v. Parker*, 42–585.

This section does not require that the comparison to be made by experts shall be by juxtaposition, and in case the instrument, the genuineness of which it is sought to prove, has been lost, one who was familiar with it and remembers the signature may testify as to a comparison of such signature as he remembers it with a signature shown to be genuine to determine whether the two were by the same person: *Hammond v. Wolf*, 78–227.

Testimony of experts in regard to the genuineness of writings has not been considered as a rule to be of a satisfactory character, but it is admissible for what it is worth: *Ibid.*

When a witness testifies to the genuineness of the handwriting of a signature, it is proper to test the value of his evidence by asking his opinion as to the genuineness of signatures, which are prepared for that purpose, in the handwriting of the party whose signature the one in question purports to be and others which are not his. The opinions as to the genuineness of handwriting being at best but unsatisfactory evidence, every reasonable opportunity should be afforded for cross-examination to test the value of such opinions: *Browning v. Gosnell*, 91–448.

Comparison made by supreme court: On appeal in an equitable action, triable *de novo*, the supreme court will make a comparison of the writings: *Morris v. Sargent*, 18–90. And see *Baker v. Mygatt*, 14–131.

But in an action by ordinary proceedings, the determination of the court upon the genuineness of a signature is, upon appeal, entitled to the same consideration as the verdict of a jury: *Lay v. Wissman*, 36–305.

SEC. **4621. Private writing—acknowledgment.** Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without further proof. [C.'73, § 3656; R., § 4000; C.'51, § 2407.]

To render an instrument admissible under this section it must appear, if the instrument was a mutual one, that it was so executed as to be binding upon both parties, and an acknowledgment by one will not be sufficient: *Chicago, B. & Q. R. Co. v. Lewis*, 53–101.

And see § 4629 and notes.

SEC. **4622. Entries by deceased person.** The entries and other writings of a person deceased, who was in a position to know the facts therein stated, made at or near the time of the transaction, are presumptive evidence of such facts, when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty specially enjoined by law. [C.'73, § 3657; R., § 3998; C.'51, § 2405.]

Against interest: Verbal declarations of one deceased, against his pecuniary interest, in relation to facts of which he is immediately and personally cognizant, and made under circumstances excluding a probable motive to falsify, are admissible as evidence in an action against third persons: *Mahaska County v. Ingalls*, 16–81.

Entries in books made by a person who is deceased are admissible as evidence when clearly against his interest. Whether they must be made at or near the time of the transactions entered, *quære*. But they are inadmissible to prove the absence of other entries, when the omission would be favorable to the party making the entries: *State v. Wooderd*, 20–531.

Where entries are offered as being against the interest of the party making them, such interest should be made clearly to appear: *Ibid.*

The jury may be told that testimony of this kind, though competent, yet as the right of cross-examination does not exist, is not highly favored by the law: *Ibid.*

Declarations of a deceased witness against his interest are receivable in evidence: *Scott County v. Fluke*, 34–317.

Therefore in an action against a county treasurer, *held*, that the admissions of an assistant employed by the board of supervisors and for whom the treasurer was not responsible, to the effect that the misappropriation of funds was due to his own defalcation, were admissible: *Ibid.*

But declarations of a deceased witness not against his interest are not receivable, although they directly tend to contradict declarations made by him against his interest: *Wilson v. Patrick*, 34–362; *Wescott v. Wescott*, 75–628.

Entries in books of account made by third persons are only admissible where it is shown that the party making them is dead, and that the entries are against his interest: *Sypher v. Savery*, 39–258.

Dying declarations are admissible as such only in case of homicide, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the declaration. They are not admissible in an action by an heir to

prove that property conveyed to him by the ancestor making the declarations was not by way of advancement: *Middleton v. Middleton*, 31–151.

Declarations of a living witness who is competent and within the reach of process are hearsay and not admissible: *Hutchinson v. Watkins*, 17–475.

Family records: An entry by a deceased parent in the family Bible as to the date of birth or death of an individual is admissible as the declaration of the parent making the entry, but it must appear that such parent is dead: *Greenleaf v. Dubuque & S. C. R. Co.*, 30–301.

SEC. **4623. Books of account—when admissible.** Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility:

1. They must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books;

2. It must be shown by the party's oath, or otherwise, that they are his books of original entries;

3. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof;

4. The charges must also be verified by the party or clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made. [C. '73, § 3658; R., § 3999; C. '51, § 2406.]

To prove charges in ordinary course of business: Books of accounts are admissible to prove charges by one party against the other, made in the ordinary course of business and for no other purpose: *Veiths v. Hagge*, 8–163.

The party offering the books must prove what his ordinary course of business is: *Ibid.; Karr v. Stivers*, 34–123.

And in a particular case, *held*, that in the absence of any explanation as to what the ordinary course of dealing of the parties was, certain entries did not appear to be made in the usual course of business: *Karr v. Stivers*, 34–123.

Books of original entry are not admissible for the purpose of proving payment or loans of money unless that comes within the ordinary business of the party in whose behalf the books are kept: *Veiths v. Hagge*, 8–163; *Young v. Jones*, 8–219; *Sloan v. Ault*, 8–229; *Snell v. Eckerson*, 8–284; *Cummins v. Hull's Adm'r*, 35–253.

Such books are therefore inadmissible to prove a special agreement, or delivery of goods under such agreement, or to prove delivery of goods to a third person, or an agreement to pay a balance due from other parties: *Lyman v. Bechtel*, 55–437.

But if the payment or loan of money constitutes, in any just sense, the ordinary business of the party, and the charges are made in the ordinary course of business, they may be proved by the books of account: *Veiths v. Hagge*, 8–163; *Young v. Jones*, 8–219; *Orcutt v. Hanson*, 70–604.

The business of keeping a retail store is not generally such business as to justify the introduction of the books of account kept therein to prove charges for money loaned: *Veiths v. Hagge*, 8–163; *Sloan v. Ault*, 8–229.

Proof of a course of business between the parties, of lending and charging in a book of account, will not be sufficient to make such book admissible in evidence: *Veiths v. Hagge*, 8–163.

Admissible in other cases: Books of account are admissible in behalf of a party who made the entries therein, upon the ground of necessity, and upon the presumption that unless they be received there will be a total failure of proof. They are receivable, therefore, as to the daily sale and barter of merchandise and other commodities, the performance of services and the letting of articles to hire, circumstances so frequent in succession, and generally so trivial in their individual amount, that the procuring of formal proof would not compensate for the time bestowed: *Karr v. Stivers*, 34–123.

Where charges for stone purchased from plaintiff were not made at the time the stone was taken, but were made as soon as defendant notified him how many had been taken, *held*, that a satisfactory reason was thus shown for not making the entries at the time of the transaction: *Anderson v. Ames*, 6–486.

Where it was sought to show payment by proof that such payment had been made to attorneys of the claimant, *held*, that books of account are not proper evidence of the receipt of money, and that it was not shown that the books introduced covered all the accounts of the attorney during the time when it was claimed payment was made: *Shaffer v. McCrackin*, 90–578.

Must be books of original entry: Where it appeared that a certain book was used as a mere memorandum book from which an entry of charges against parties in what was called the sales book was made, *held*, that the sales book was the book receivable in evidence as the book of original entry and not the memorandum book: *Hancock v. Hintrager*, 60–374.

Where it appeared that as the party's books were kept the ledger was not a book of

original entries, but the party testified that a particular entry in the ledger was there made originally and not by transfer from any other book, *held*, that such fact did not render the ledger admissible in evidence to prove such item: *Fitzgerald v. McCarty*, 55–702.

The loan register of a loan company is not admissible as a book of account: *United States Bank v. Burson*, 90–191.

And *held*, that a book kept by a loan company, showing its loans, was not an account book within the meaning of this statute, but simply a private memorandum book, and therefore not admissible in evidence: *Security Co. v. Graybeal*, 85–543.

Preliminary proof: In general no party other than the one making the entries is competent to make the supplementary oath necessary for the admission of the book: *Karr v. Stivers*, 34–123.

Time-books, kept by officers or employes of defendant, *held* properly excluded when offered in evidence without being supported by testimony of those who kept them as to their correctness: *Ford v. St. Louis, K. & N. W. R. Co.*, 54–723.

Where books of account were introduced in evidence containing entries by different persons, *held*, that they were admissible as to entries made by persons who were called as witnesses and gave the requisite statutory evidence in relation thereto, although not as to entries not thus proven: *Herriott v. Kersey*, 69–111.

When a witness refers to books of account in aid of his statements, the books are competent to show a mistake in his testimony; and in such case formal proof is not necessary: *Davenport v. Cummings*, 15–219.

In an action against a principal by his agent where certain books of account were offered in evidence, which were admitted to be books of original entries kept in the ordinary manner and in the regular course of business, *held*, that they were competent evidence against defendant, although some of the entries were made by plaintiff for defendant: *Cormac v. Western White Bronze Co.*, 77–32.

A statement of account attached as an exhibit to a petition, not showing whose book account such exhibit is a copy of, nor by whom it was kept, nor when the entries were made therein, nor that they were believed to be true, *held* not to constitute evidence: *Pidcock v. Voorhies*, 84–705.

The preliminary proof to entitle a book of accounts to be admitted in evidence, *held* not sufficiently made in a particular case: *Security Co. v. Graybeal*, 85–543.

Where the charges in question were made from time to time on slips of paper to transfer, at the close of each day's business, to a ledger, *held*, that such ledger was not admissible in evidence as a book of original entry: *Way v. Cross*, 63 N.W., 691.

Charges in books not made in the ordinary course of business, and not covering a continuous course of dealing with persons generally, or several items of charge at different times against the defendant, and not verified by the person making the same, in the absence of any reason given for failure to make such verification, are not admissible in evidence: *Arney v. Meyer*, 65 N. W., 337.

The preliminary evidence necessary to authorize the introduction of books of account is not excluded by § 4604, although the charges sought to be proven by such books are by the plaintiff who testifies as to the books, and against the person since deceased: *Dysart v. Furrow*, 90–59.

Credibility: The preliminary proof being made, the question of the admissibility of books in evidence is for the court; the degree of credit given them, and the question of whether the charges are in the ordinary course of business, are to be determined by the jury: *Veiths v. Hagge*, 8–163; *Young v. Jones*, 8–219.

When the proper preliminary proof is made the books should be received in evidence, and any objection on account of discrepancies, etc., affecting their credibility only, should be left to the jury: *Eyre v. Cook*, 9–185.

Whole account admissible: However, when a defendant avails himself of credits shown by a book account in his favor, he cannot object to the account being used to show charges against him. The whole account must be taken together: *Veiths v. Hagge*, 8–163.

Parol evidence not admissible to vary: Parol evidence of the party making the entries is not admissible for the purpose of explaining the language used by him. The book of account when admitted becomes written evidence and speaks for itself: *Cummins v. Hull's Adm'r*, 35–253.

Where the cause of action is founded upon transactions embraced in books of account of one of the parties, the adverse party is not bound to rely upon such books of account, but may introduce other evidence, as to the transaction, and such other evidence, although entirely oral, will not be secondary: *Richmond v. Dubuque & S. C. R. Co.*, 40–264.

It is not permissible to substitute evidence as to the contents of the book for the book itself: *Churchill v. Fulliam*, 8–45.

Copies: The books of account must themselves be produced on the trial, and it is not competent to prove their contents by attaching copies to a deposition: *Peck v. Parchen*, 52–46.

Copies of books of account which would themselves be admissible in evidence are not competent: *Halstead v. Cuppy*, 67–600; *Creswell v. Slack*, 68–110.

A receipt the best evidence: Where the books show that a receipt was given for money, it is the best evidence and must be produced or accounted for: *Sloan v Ault*, 8–229

Showing account barred: Even though the books show the account sought to be proved by them to be barred by the statute of limitations, they are still admissible in evidence for the purpose of laying the foundations for showing defendant's written admission or promise removing the bar, or for showing from defendant's testimony that the cause of action still subsists: *Thorn v. Moore*, 21–255.

Not admissible to prove agreement: The

entry of a contract or agreement made by the party in his own book is not receivable in evidence. So *held* in case of a memorandum or stock book in which purchases of stock, etc., were noted: *Hart v. Livingston*, 29–217; *Whisler v. Drake*, 35–103.

SEC. **4624. Notarial certificate of protest.** The usual protest of a notary public, without proof of his signature or notarial seal, is *prima facie* evidence of what it recites concerning the dishonor, and notice thereof, of a bill of exchange or promissory note, and a copy from his record, properly certified by him, shall receive such faith and credit as it is entitled to by the law and custom of merchants. [C.'73, § 3668; R., §§ 199, 4011; C.'51, § 2414.]

The certificate of protest is only evidence of notice when it recites that notice was given: *Sather v. Rogers*, 10–231; *Thorp v. Craig*, 10–461.

It is only evidence of the facts therein recited, and where it shows that the notice was directed to the indorser at a particular place it will not be presumed that such place was the residence of such indorser: *Bradshaw v. Hedge*, 10–402.

But a certificate of protest stating that the notary notified the indorsers is sufficient although it does not show that the residences of the several parties are at the places to which the notices were addressed: *Fuller v. Dingman*, 41 506.

It is not necessary to annex to, or set out in, the notary's certificate, the notice referred to therein, nor need the certificate, in words, formally refer to the seal: *Jones v. Berryhill*, 25–289.

If the certificate states that notices of protest properly addressed were deposited in the post-office, it will be presumed that the postage was prepaid: *Brooks v. Day*, 11–46.

When the certificate of protest states that the notary notified the proper parties in a certain manner, the credit due the certificate will generate the presumption that the mode adopted accomplished the result certified to, unless it affirmatively appear that the method adopted could not have done so; but if the notary only certifies as to the steps taken, then, to make out a *prima facie* case, it must further appear that such steps would effectuate notice: *Wamsley v. Rivers*, 34–463.

The fact that the certificate is dated at a time subsequent to that of the dishonor and protest will not render it incompetent: *Chatham Bank v. Allison*, 15–357.

The protest of a notary is not receivable without his seal, but such defect may be cured by the affixing of the seal by the notary at the trial: *Rindskoff v. Malone*, 9–540.

The certificate of a notary public as to the protest of a bill or note is not admissible against defendant in a criminal case, as he is entitled to be confronted with the witnesses against him: *State v. Reidel*, 26–430.

SEC. **4625. Statute of frauds—contract in writing.** Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent:

1. Those in relation to the sale of personal property, when no part of the property is delivered and no part of the price is paid;
2. Those made in consideration of marriage;
3. Those wherein one person promises to answer for the debt, default or miscarriage of another, including promises by executors to pay the debt of the decedent from their own estate;
4. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year;
5. Those that are not to be performed within one year from the making thereof. [C.'73, §§ 3663–4; R., §§ 4006–7; C.'51, §§ 2409–10.]

Effect of the statute: Although the English statute of frauds provides "that no action shall be brought," while ours provides that "no evidence, etc., is competent," the effect is the same in both cases; and English and American authorities upon the construction of the former are applicable to the latter: *Westheimer v. Peacock*, 2–528.

The contract itself is not void, but may be subsequently revived so as to become binding: *Berryhill v. Jones*, 35–335.

What sufficiently in writing: A resolution of a board of supervisors is sufficient written evidence of a contract by them to convey real estate to enable the vendee to enforce the same: *Grimes v. Hamilton County*, 37–290.

The written evidence need not be contained in one paper, nor need the papers be contemporaneous; and parol evidence may be received to connect or explain them. In case of a sale of land at auction, the notice of sale containing the terms, etc., the plat upon which the name of defendant as purchaser, with price, etc., was entered by the clerk of the sale, and a letter signed by defendant declining to have anything further to do with the property, were held sufficient, with parol evidence, to comply with the requirements of the statute: *Lee v. Mahoney*, 9–344.

Auctioneer; administrator: Neither party can be the other's agent for the purpose of signing the writing sufficient to bind such

other party; and while an auctioneer, having no interest except as such, may sign such writing and thereby bind both parties, yet where the auctioneer is an administrator making a sale under direction of the court, he has such interest as to render him incompetent to bind a purchaser to the contract: *Wingate v. Herschauer*, 42–506.

Writing not delivered: A writing signed by defendant and kept in his possession without delivery is not available to take a case out of the statute: *Steele v. Fife*, 48–99.

Oral testimony: Verbal testimony is not admissible to supply any defects or omissions in the written evidence which is relied upon to take a case out of the statute of frauds; and where telegrams were relied upon as constituting a written contract, the language of which was unintelligible unless aided by extrinsic evidence, *held*, that the evidence was not sufficiently proven: *Watt v. Wisconsin Cranberry Co.*, 63–730.

The written evidence of a contract cannot be aided or added to by parol testimony: *Vaughn v. Smith*, 58–553.

The statute of frauds does not prevent the introduction of parol evidence as to the identity of land described in a written contract to convey: *Wilson v. Riddick*, 69 N. W., 1039.

Two or more papers executed as parts of one transaction may be read and construed together in determining whether they constitute such written evidence as is required by the statute of frauds, but the evidence necessary to take a contract out of the statute of frauds must all be furnished by the writings, parol evidence not being admissible to supply evidence not found in them. Therefore where the written evidence shows only a proposition by the seller, and no acceptance by the buyer, it is not sufficient: *American Oak Leather Co. v. Porter*, 62 N. W., 658.

Whether a contract within the statute of frauds may be proved by parol evidence of the contents of lost writings, which, if in existence, would be competent for that purpose, *quære: Elwell v. Walker*, 52–256.

Where the promise to pay the debt of another is sufficiently evidenced in writing, parol evidence to show that the debt has not been paid is admissible although it also bears upon the question of the promise: *Harbert v. Skinner*, 37–208.

If the party sought to be charged has in writing admitted the contract, this is sufficient to take the case out of the statute, no matter to whom the writing may have been addressed: *Warfield v. Wisconsin Cranberry Co.*, 63–312.

How objection raised: The objection that a contract is within the statute of frauds, and therefore that any parol evidence thereof is inadmissible, cannot be raised, unless the objection is made in the pleadings or when the evidence is offered: *Holt v. Brown*, 63–319.

If it appears from the face of the petition that the cause of action is based upon a contract which should be evidenced in writing, but is not so evidenced, the objection should be raised by demurrer and not by answer: *Wiseman v. Thompson*, 63 N. W., 346.

The statute of frauds is not to be raised by way of answer setting up a mere legal conclusion, but by demurrer to the pleading averring the contract, or by objection to the evidence when offered: *Groves v. Clark*, 69 N. W., 1046.

When parol evidence of a contract within the statute of frauds is introduced upon trial without objection, it cannot afterwards be objected to upon appeal: *Crossen v. White*, 19–109.

Executed contract: Although a promise by one party to be individually responsible for the debts of another would be within the statute, yet if such a promise has been performed the objection of the statute cannot be enforced: *Putnam v. Swinney*, 63–383.

Order of introduction of evidence: Parties are not restricted as to the order of the introduction of evidence, and evidence of a sale which is within the statute of frauds may first be introduced, to be afterward followed by proof of partial performance, taking the case out of the statute: *Campbell v. Ormsby*, 65–518.

Relief in equity: Equity will not relieve against the statute of frauds for the mere purpose of preventing the repudiation of a contract actually entered into which is in violation of such statute, but may relieve against the repudiation of such contract where an innocent party has been misled to his injury. The attempted fraud against which equity will relieve consists not merely in refusing to do what the party has agreed to do, but in deceiving the other out of his property: *Burden v. Sheridan*, 36–125.

Sale; delivery: The delivery of goods under an oral contract of sale to a common carrier (not designated by the purchaser) in the usual course of transportation is sufficient to render a parol contract for the sale of chattels binding: *Bullock v. Stcherge*, 4 McCrary, 184.

Delivery to a carrier is sufficient to take a case out of the statute of frauds without further acceptance by the vendee: *Leggett & Meyer Tobacco Co. v. Collier*, 89–144; *Star v. Stevenson*, 91–684.

Sale of personalty; part performance: Under a contract to furnish a dealer with a certain brand of cigars as ordered, *held*, that the filling of certain orders constituted a part performance taking the contract out of the statute of frauds, and that each order was not to be considered a separate transaction: *Kaufman v. Farley Mfg. Co.*, 78–679.

A parol contract creating a lien upon personal property equally with one for the sale of such property is made binding by delivery: *Brown v. Allen*, 35–306.

Sufficiency of delivery in particular cases discussed: *Marsh v. Bird*, 31–599; *Brown v. Wade*, 42–647.

In consideration of marriage: Where it is attempted, by letters, to prove a contract to convey real estate, in consideration of marriage, the letters should show a distinct proposition that, in consideration of the marriage, the one party would convey such real estate, and an acceptance of the proposition by the other party in as broad and distinct terms as it was made: *Elwell v. Walker*, 52–256.

Answering for debt or default of another: Where a father agreed to be answerable for his son's debts in consideration of a forbearance to sue the son, *held* that, in the absence of a release of the liability as against the son, the agreement so to pay the debt could not be enforced, although the forbearance to sue might constitute a consideration: *Westheimer v. Peacock*, 2–528.

An agreement upon certain contingencies to step into the place of another and assume his obligations is within the statute and cannot be established by parol: *Kauffman v. Hartsock*, 31–472.

A contract to indemnify another, and hold him harmless against anticipated loss, cannot be established by parol: *Ibid.*

Where goods were furnished one party and charged to him upon agreement of another to pay for them, *held*, that the agreement of the latter must be regarded as collateral and within the statute of frauds: *Langdon v. Richardson*, 58–610.

Where it is sought to hold one person liable on his promise to pay for goods delivered to another, if any credit at all be given to the party to whom the goods are delivered, the promise of the party sought to be charged is collateral, and must be in writing. But in a particular case, *held*, that in case of goods thus furnished, the seller did not at any time charge them to the person to whom they were furnished, although the bills of goods thus furnished were designated as bills of the seller against the person to whom the goods were furnished: *Benbow v. Soothsmith*, 76–151.

A contract in a particular case made by defendant to secure the furnishing of board by plaintiff to a third person, *held* to be an original undertaking, and therefore not within the statute of frauds: *Lessenich v. Pettit*, 91–609.

Where the plaintiff, who had been a laborer in the employ of a subcontractor, alleged that the defendant, who was the main contractor, had orally agreed to pay the claim due to the plaintiff from the subcontractor if the plaintiff would refrain from filing a mechanic's lien, and plaintiff alleged that he had thereupon delayed filing such lien, but it did not appear that he had by reason of such agreement lost his lien, nor released the subcontractor, *held*, that the promise of the principal contractor was a promise to answer for the debt of another, which must be in writing: *Vaughn v. Smith*, 65–579.

Under the facts in a particular case, *held*, that an agreement sued upon amounted to an undertaking to answer for the debt of another: *Beerkle v. Edwards*, 55–750.

An oral acceptance can be enforced only where, by reason of having funds in his hands or otherwise, the payment by the acceptor will be the payment of his own debt; otherwise the oral acceptance will be within the statute of frauds: *Walton v. Mandeville*, 56–597.

Where the main purpose of the promisor is not to answer for another, but to subserve some purpose of his own. the promise is not within the statute of frauds, although in form it may be a promise to pay another's debt, and although, incidentally, the performance of it may have the effect of extinguishing the liability of another: *Mills v. Brown*, 11–314; *Johnson v. Knapp*, 36–616.

Where an obligation is an original undertaking by a party, entered into for his own benefit, it is not to be deemed within the statute of frauds: *Clinton Nat. Bank v. Studemann*, 74–104.

Where an attorney agreed orally with another attorney to render service to a client of the first, to be paid for by the client or by the first attorney out of any money received from the client, *held*, that the attorney's agreement to pay was within the statute of frauds, and that the happening of the contingency of the first attorney receiving money from the client did not make his promise an original or binding one: *Walker v. Irwin*, 62 N.W., 785.

A promise by one of several co-parties to another co-party to pay a share of the cost of an appeal to be taken by the latter, it appearing that the party making such promise expected to derive some benefit from the appeal, *held* not to be a promise made to answer for the debt of another: *Wilson v. Smith*, 73–429.

The fact that the discharge of a person's own duly contracted debt will also operate to discharge the debt of another does not bring the obligation to discharge such debt within the statute of frauds: *Chamberlin v. Ingalls*, 38–300.

If a widow appropriates the estate of her deceased husband to her own use, thereby making herself liable for the payment of just claims against the estate, her promise to pay such a claim for the purpose of preventing suit, if not coupled with any unlawful object, would be for her own benefit, and not a mere promise to pay the debt of another, and such promise, though oral, could be enforced against her: *French v. French*, 84–655.

An agreement by A, B and C, that A shall pay the amount of the indebtedness which he owes B to C, to apply on an indebtedness from B to C, is not within the statute of frauds: *Lester v. Bowman*, 39–611.

An absolute promise by a party to assume and pay the indebtedness of another is not within the statute of frauds, but it must be shown to be supported by a consideration: *Bumford v. Purcell*, 4 G. Gr., 488.

Where the purchaser of a boat entered into an agreement with the holder of a lien thereon to pay the amount of the lien, *held*, that the undertaking was not to answer for the debt or default of another: *Barker v. Guilliam*, 5–510.

In an action against a bank upon certain bank bills of an insolvent bank, in which recovery from defendant for the value of such bills was sought on the ground that they had been taken on the strength of its representations as to their validity, *held*, that the cause of action was not within the statute of frauds: *Tarbell v. Stevens*, 7–163.

An agreement by a vendee to pay off a mortgage upon the property purchased makes the indebtedness his own and is not within the statute of frauds: *Bowen v. Kurtz*, 37–239.

Where defendant purchased lands of one V., agreeing to pay a debt owing from V. to plaintiff out of the purchase money, *held*, that the agreement was not within the statute of frauds and might be enforced by plaintiff against defendant: *Morrison v. Hogue*, 49-574.

Held, also, that a contract between defendant, plaintiff and said V., that defendant should pay V.'s debt to plaintiff out of the price of such land and in consideration of the release of an attachment upon the land, was not within the statute: *Ibid.*

Where the petition shows that plaintiff conveyed land to the defendant in consideration of a verbal promise to sell the same and to pay the net proceeds arising from the sale to plaintiff, and that plaintiff sold the land and refuses to pay over the net proceeds or any part thereof, the case is within the statute of frauds: *Harris v. Clark*, 62 N. W., 854.

But an allegation that in such case the defendant subsequently promised orally to pay to plaintiff the amount received shows a cause of action not within the statute of frauds: *Ibid.*

Where one of two persons whose names were affixed to a promissory note, although claiming that the signature of his name thereto was a forgery, assured the holder that the note would be paid, *held*, that such promise was one to answer for the default of another person and was not binding, not being in writing: *Smith v. Tramel*, 68-488.

An oral promise to pay the debt of another, which should be in writing, cannot constitute an estoppel so as to be binding: *Ibid.*

Where property was delivered upon the faith of a promise by the surety to sign the note therefor, *held*, that such promise was not within the statute: *Van Riper v. Baker*, 44-450.

Held, that if a loan was made to three, one only receiving the money, the others would be bound, although their promise was not in writing: *Dee v. Downs*, 50-310.

An oral promise to pay the debt of a relative if the creditor will not make trouble is within the statute of frauds, it not appearing that there was any pecuniary advantage to the promisor to result from the creditor's forbearance: *Schaafs v. Wentz*, 69 N.W., 1022.

Where one agrees to execute a note as surety for another, such agreement is a promise to answer for the debt of that other and is within the statute of frauds, and cannot be enforced unless the agreement is in writing. It differs from a case where the party receives a benefit from the agreement: *Dee v. Downs*, 57-589.

Where the promise to answer for the debt of another is made upon a new and original consideration, it is not within the statute: *Johnson v. Knapp*, 36-616: *Blair Town Lot, etc., Co. v. Walker*, 39-406; *Lamb v. Tucker*, 42-118.

An agreement by an incoming partner to become liable for the debts of the firm in consideration of the property acquired by the purchase is not within the statute of frauds, and the creditors may recover thereon: *Poole v. Hintrager*, 60-180.

The parol promise of a new firm to pay the debts of a firm to whose business they succeed is within the statute of frauds, and is not binding unless in writing, or unless the promise by the new firm is made by all the members thereof and amounts to a novation of the debt, merging it and extinguishing all liability under the old debt: *Sternburg v. Callanan*, 14-251.

The statute of frauds has no application to an agreement between one insurance company and another, by which the latter assumes the liabilities of the former, and such agreement may be established by parol evidence: *Bartlett v. Fireman's Fund Ins. Co.*, 77-155.

Transfer of interest in land: A verbal contract for the sale of land in consideration of services to be performed and cash to be paid is within the statute of frauds, if possession is not taken and no part of the services are performed or the cash paid: *Morgan v. McLaren*, 4 G. Gr., 536.

A license does not convey an interest in land, being always confined to the original parties to it: *Ague v. Seitsinger*, 85-305.

An agreement to procure a conveyance of land is not within the statute: *Bannon v. Bean*, 9-395.

So *held* in case of an agreement to foreclose a mortgage and sell the property and authorize the sheriff's deed to be made to another party, or to buy the property in at the sale and then make a deed: *Cooley v. Osborne*, 50-526.

A parol promise made by a judgment debtor after execution sale, that he would make a deed to the purchaser correcting a mistake in the sheriff's deed, *held* to be within the statute of frauds: *Butcher v. Buchanan*, 17-81.

A contract for the sale of improvements on public lands where the party selling has no title to the land itself is not a contract for the sale of an interest in the real property: *Zickafosse v. Hulick*, Mor., 175.

Where the person having a legal title to land suffers another to go on with improvements, in the expectation of a conveyance raised in him by the acts, encouragement or assurance of the owner, the transaction may be taken out of the statute of frauds: *McCoy v. Hughes*, 1 G. Gr., 370.

A parol agreement to relinquish interest in real property in consideration of the discharge of indebtedness would seem to be valid: *Hotchkiss v. Cox*, 47-655.

Fraud and undue influence in the procurement of a deed may be shown by parol evidence, notwithstanding the statute of frauds: *Day v. Lown*, 51-364.

Where land was sold with the agreement that, in case of resale by the vendee, the vendor should receive as additional compensation one-half the excess received by vendee above the amount paid vendor, *held*, that under the agreement no interest in the land was retained by vendor, which it was necessary under the statute of frauds to have evidenced in writing: *Miller v. Kendig*, 55-174.

A parol license to mine premises, under which the licensee enters into and holds possession, and which is established also by the licensor's testimony, is valid under the stat-

ute of frauds, but it would be otherwise if possession was not taken under and by virtue of the license: *Anderson v. Simpson*, 21-399.

A parol mining license is not absolutely void, but is only voidable. If the owner of the soil desires to revoke such license he should refund the expenses incurred in improvements, or give such reasonable notice as would enable the occupant to secure the products contemplated for his labor and improvements: *Bush v. Sullivan*, 3 G. Gr., 344.

An agreement between parties to be copartners in all their undertakings, and tenants in common in all real estate acquired, is within the statute of frauds: *Thorn v. Thorn*, 11-146.

A parol agreement to enter into a partnership for the purpose of dealing in real estate does not come within the provision as to contracts for the creation or transfer of an interest in land, and need not be evidenced in writing: *Richards v. Grinnell*, 63-44.

Parol evidence is admissible to show that a conveyance to two individuals was intended to be for the benefit of the partnership, and not to create in them a tenancy in common: *Paige v. Paige*, 71-318.

A contract of partnership for the purchase and sale of land is not a contract for the creation or transfer of interest in lands within the statute of frauds: *Pennybacker v. Leary*, 65-220.

Parol evidence is not admissible to establish an agreement that a tax title shall be taken and held in trust for the owner of the premises: *Richardson v. Haney*, 76-101.

Where the owner of land was prevented from making redemption from a tax sale upon promise of the tax purchaser to convey after a tax deed was executed, *held*, that the agreement, though in parol, was not within the statute of frauds: *Judd v. Mosely*, 30-423.

A deed signed with the wife's name by the husband is within the statute of frauds as to her interest: *Morris v. Sargent*, 18-90.

A parol ratification of a conveyance of real property will not render it valid nor estop a party from disclaiming it: *Hubbard v. German Catholic Congregation*, 34-31.

Where a wife receives the purchase money of property conveyed by her husband, in the conveyance of which she does not join to relinquish her dower interest, she may, in consideration of the money received, make an oral contract relinquishing her dower interest in such property: *Dunlap v. Thomas*, 69-358.

If a sale of land is within the statute of frauds when made, the fact that one of the parties places himself in a condition in which he is able to perform the contract on his part will not take it out of the operation of the statute: *Wilson v. Chicago, R. I. & P. R. Co.*, 41-443.

An agreement to purchase property under a foreclosure sale and acquire title thereunder, and hold the same as security for the money so advanced, until it should be repaid, when the property should then be reconveyed to the owner, is an agreement for the creation and transfer of an interest in real estate, and cannot be established by parol evidence: *Thorp v. Bradley*, 75-50.

Where plaintiff conveyed real estate in consideration of an agreement for support during her life, and the grantee afterward conveyed the land to defendant, who assumed the obligation to support plaintiff, *held*, that the transaction did not create a trust and might be proven by parol evidence: *Riddle v. Beattie*, 77-168.

An oral conveyance will be sufficient where the grantee goes into possession: *Wickham v. Henthorn*, 91-242.

A parol gift of lands by a father to his son, accepted by the son, and upon the faith of which he has taken possession and made lasting improvements, is an exception to the rule requiring contracts relating to real estate to be evidenced in writing, and such gift may be enforced by specific performance: *Truman v. Truman*, 79-506.

But the parol contract, agreement or gift should be established by clear, unequivocal and definite testimony, and acts claimed to have been done thereunder should be equally clear and definite and referable exclusively to the said contract or gift: *Ibid.*

A parol agreement that the plaintiff should have a certain tract of land in consideration for services rendered by him to defendant, his father, in carrying on defendant's farm in pursuance of a contract to that effect, *held* sufficient, in connection with the possession of the premises, to constitute adverse possession, ripening into perfect title by lapse of time: *Quinn v. Quinn*, 76-565.

Where it is sought to enforce specific performance of a parol gift of land upon the ground that the agreement has been partially executed and that improvements have been made on the faith of such parol gift, the proof must be clear and unequivocal: *Lich v. Lich*, 81-84.

As to written evidence of contracts with reference to party-walls, see notes to § 3003

An express trust not evidenced in writing cannot be enforced against the trustee. The mere refusal of the trustee to perform the contract, and his denial of its existence, will not authorize a court of chancery to enforce the contract: *McClain v McClain*, 57-167.

Where property was conveyed to a trustee to be converted into money and the entire proceeds paid out as directed by the grantor, without any advantage to accrue to the trustee, *held*, that an agreement by the trustee as to the disposal of the proceeds was within the statute of frauds and should have been in writing: *McGinness v. Barton*, 71-644.

Where a conveyance is made from a father to his daughter's husband a trust in favor of the daughter can only arise by agreement of the parties, and such agreement must under the statute of frauds be in writing: *Acker v. Priest*, 92-610.

The courts of this state in determining the validity of a contract creating an express trust in lands situated in another state will determine the question in accordance with the laws of the state where the land is situated, and not in accordance with the statutes of this state: *Ibid.*

A mere statement by a person who has held lands not subject to a trust, that he

holds the proceeds of such land in trust, and intends to purchase therewith other lands for the supposed beneficiary, will not create a trust in the lands so purchased, as the trust thus attempted to be established would rest in parol: *Ibid.*

A resulting trust arising from the furnishing of funds by one party, with which real estate is purchased by another in his own name, is not within the statute of frauds, but may be established by parol: *Nelson v. Worrall*, 20–469.

But such implied trust cannot be established by parol, where the party claiming it did not actually advance the purchase money: *Burden v. Sheridan*, 36–125.

Parol evidence is admissible to establish a resulting trust in an entry of government lands by one for another: *Sullivan v. McLenans*, 2–437.

It is not necessary, in such case, to show that the money was advanced at the time: *Bryant v. Hendricks*, 5–256.

A party cannot be allowed to show by parol that land purchased by him and conveyed to another was intended as a gift to him, or that it was purchased for his use: *Holland v. Hensley*, 4–222.

Further as to trusts, see § 2918 and notes.

Parol leases: In the exception as to leases it is the term of the lease that is referred to, and not the time from the making thereof within which it is to be performed. Verbal leases for a year are good although made to commence *in futuro: Sobey v. Brisbee*, 20–105; *Jones v. Marcy*, 49–188.

As to possession under parol lease, see notes to next section.

Contracts not to be performed within a year: In order to be within the clause of the statute relating to contracts not to be performed within a year, the contract itself must show from the nature of its subject-matter, by its express terms, or by necessary implication, that its performance within a year is forbidden. It is not sufficient to bring it within the statute that the parties manifestly intended to occupy more than a year in its performance: *Blair Town Lot, etc., Co. v. Walker*, 39-406.

A contract for services to be paid for upon the death of the person to whom the services are to be rendered is not within the statute of frauds: *Riddle v. Backus*, 38–81.

Contracts here referred to are such as are not to be performed within a year on either side: *Smalley v. Greene*, 52–241.

Such provision does not apply to contracts for the creation or transfer of an interest in lands: *Sobey v. Brisbee*, 20–105.

Where a contract to marry provided that the marriage should not take place until the restoration to health of one of the parties, but it did not appear that it was not to be performed within one year, *held*, that it was not within the statute of frauds: *McConahey v. Griffey*, 82–564.

SEC. **4626. Exceptions.** The provisions of the first subdivision of the preceding section do not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill or money is necessarily to be expended in producing or procuring the same; nor do those of the fourth subdivision apply where the purchase money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or when there is any other circumstance which, by the law heretofore in force, would have taken the case out of the statute of frauds. [C. '73, § 3665; R., § 4008; C. '51, § 2411.]

Where labor or money are to be expended: In case of a sale of personal property the fact that the goods are to be shipped by express from one place to another at an expense does not bring the case within the exception; such is not a case where "labor, skill or money are necessary to be expended," etc.: *Partridge v. Wilsey*, 8–459.

The facts taking a contract out of the statute of frauds may exist and be proved outside the contract itself. In a contract for a sale of hogs, *held*, that proof that at the time it was made the hogs were not owned by the vendor, but that labor, skill or money would be necessary to procure them, would be sufficient: *Bennett v. Nye*, 4 G. Gr., 410.

A parol contract for a lien on personal property, where the property is not owned by the vendor at the time of the sale, but is still to be purchased by him, is not within the statute of frauds: *Brown v. Allen*, 35–306.

In an action based on a written contract plaintiff cannot recover under an oral contract for the purchase of property not at the time ready for delivery, but for the procuring of which labor, skill and money are necessary to be expended: *Haw v. American Wire Nail Co.*, 89–745.

Written authority given to an agent to make a contract of purchase will not constitute a written contract for the purchase such as to take the case out of the statute of frauds: *Ibid.*

Taking and holding possession: A sale or gift of real estate is, under our statute, just as complete and perfect when made by parol and followed by possession under it, with the consent of the vendor, as if it were made in writing: *Hughes v. Lindsey*, 31–329.

A sale of real estate in parol, accompanied with possession, is valid: *Chamberlin v. Robertson*, 31–408; *Tuttle v. Becker*, 47–486.

But it must appear that the possession was taken under the contract and with the knowledge of the other party: *Carrolls v. Cox*, 15–455.

The mere continuance in possession by a tenant is not sufficient to render valid a verbal contract: *Mahana v. Blunt*, 20–142.

A license to mine is valid, though resting

wholly in parol, if possession is taken and held thereunder with actual consent of the licensor: *Anderson v. Simpson*, 21-399.

The fact that one of the members of a partnership withdraws from the management of the business, under a contract to sell his interest to his partner, leaving such partner in possession of the property and the business, does not show that the latter has taken and held possession under and by virtue of the contract so as to take the case out of the statute of frauds: *Wilmer v. Farris*, 40-309.

A parol contract for the exchange of land accompanied by delivery of actual possession of land exchanged in accordance with the contract is valid: *Baldwin v. Thompson*, 15-504.

An oral agreement rescinding a contract of sale to a person in possession may be established by evidence showing that the party in possession thereof held as tenant instead of owner, paying rent, etc., in accordance with the terms of such oral agreement: *Barton v. Smith*, 66-75.

The provision of this section referring to the fourth subdivision of the preceding section relates solely to contracts for the purchase or sale of real estate, and does not have the effect to qualify the rule enacted by the preceding section as to leases for a term exceeding one year: *Thorp v. Bradley*, 75-50.

Where acts of possession relied upon to show partial performance are of doubtful character, and may have been done with other views than as a part performance of the agreement, they do not take the case out of the statute; but where the acts are undisputed, and the sole question is whether they are done in the performance of the contract as claimed by one party, or of another contract as claimed by the other party, then the question as to what the contract was under which they were done must be established by a preponderance of the evidence: *Sweeney v. O'Hora*, 43-34.

Where a contract is taken out of the statute of frauds by part performance by one of the parties, by taking possession of the property conveyed, the contract may be enforced by the other party, as well as by the one who has partly performed: *Ibid.*

Where the defendant had no title to the land at the time he put plaintiff in possession, but represented that he had title and afterward procured a conveyance, *held*, that he was estopped from setting up the fact that such representations were fraudulent: *Renkin v. Hill*, 49-270.

The taking and holding possession under a verbal assignment of a lease, *held* not to take the contract of assignment out of the statute of frauds: *Hunt v. Coe*, 15-197.

A verbal lease for five years, under which lessee is in possession, is valid: *Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co.*, 53-521.

Part performance: If a party seeks to take a case out of the statute of frauds on the ground of a part performance, it is indispensable that the parol contract, agreement or gift should be established by clear, unequivocal and definite testimony: *Williamson v. Williamson*, 4-279; *McPherson v. Berry*, 92-64.

Execution of a deed, payment of the purchase money, or part of it, and possession of the premises, are sufficient to constitute part performance of a parol contract to convey and take it out of the statute of frauds: *Trayer v. Reeder*, 45-272.

Proof of part performance of an oral contract of lease for the term of more than a year will not take such contract out of the statute: *Hunt v. Coe*, 15-197: *Burden v. Knight*, 82-584; *Powell v. Crampton*, 71 N.W., 579.

To take a case out of the operation of the statute of frauds on the ground of part performance, it is indispensable that the acts done should be referable exclusively to the contract, but a preponderance of evidence alone is sufficient to show that fact: *Sweeney v. O'Hora*, 43-34; *York v. Wallace*, 48-305.

An agreement to give a mortgage on real estate for the purchase-money, though not in writing, does not come within the statute of frauds when part of the purchase price has been paid, and the vendee, with the consent of the vendor, has taken possession of the property: *Devin v. Eagleson*, 79-269.

Parol evidence of a verbal agreement of sale and a payment of a part of the consideration is competent: *Pressly v. Roe*, 83-545.

Where an easement had been taken possession of and used for many years, *held*, that there was sufficient part performance to take the parol grant of such easement out of the statute of frauds: *Ague v. Seitsinger*, 85-305.

A special agreement in regard to a party wall is not a contract for the creation or transfer of any right or interest in the land for the reason that there is a right to erect a wall on the line without an agreement, and therefore such contract will not, under § 3302, be helped by part performance: *Price v. Lien*, 84-590.

Where an oral contract was made in regard to a partition fence, *held* that, by adopting and acknowledging the benefit of the fence already erected, the contract was performed in such sense as to take it out of the statute of frauds: *Bodell v. Nehls*, 85-164.

Where property was delivered by plaintiff to defendant under the agreement that defendant was to pay plaintiff $100 each year during the latter's life, *held*, that it was partially performed and not within the statute: *Saum v. Saum*, 49-704.

Where it is agreed to pay for services in land the party rendering the services may recover the value of the land under an oral contract: *Bonnon's Estate v. Urton*, 3 G. Gr., 228.

If an oral assignment of a judgment is made in consideration of services to be rendered in obtaining such judgment, and the services are thereafter rendered, the assignment will thereby be taken out of the statute of frauds: *Howe v. Jones*, 57-130.

A parol contract for the sale of land accompanied by a payment of part of the purchase money makes, under the statute, a valid agreement, although there was a prior written memorandum which could not be introduced in evidence because unstamped: *Sykes v. Bates*, 26-251.

The deposit of the purchase money by the

purchaser for the seller under a parol contract will not take the case out of the statute of frauds where such deposit is upon conditions which prevent the money from becoming absolutely the property of the seller, such conditions in this case being that the money was to be paid to the seller whenever the title to the land was perfect, such title not having been perfected: *Query v. Liston*, 92–288.

Facts considered and *held* not to prove a delivery of notes in payment of the purchase money for real estate, or such an execution of the verbal contract of sale as to take the case out of the statute of frauds: *Auter v. Miller*, 18–405.

Where a sum of money in bank bills was deposited with the vendor as part payment of a contract, full payment of which was to be made by the vendee in coin, and the bills were afterwards returned to the vendee for the purpose of enabling him to secure the coin and make full payment, and the contract was never fulfilled by the vendee, *held*, that the vendor could not maintain an action to recover the value of the bills thus returned to the vendee: *Jones v. Taylor*, 1 G. Gr., 434.

There is great doubt as to whether the mere agreement that an indebtedness from the seller to the buyer shall go on the sale as a part of the purchase money will constitute part payment: *Brown v. Wade*, 42–647.

Where exchange of horses was agreed upon, and as a part of the consideration it was agreed that a debt from one party to the other should be extinguished, *held*, that the extinguishing of the indebtedness took place at once and constituted a part performance sufficient to take the contract out of the statute of frauds, although the actual change of possession of the horses did not take place at that time: *Peake v. Conlan*, 43–297.

The term "purchase money" as used in the statute means the consideration. Where such consideration was the conveyance to the vendor by the vendee of another piece of property, *held*, that proof that such conveyance was executed would take the case out of the statute of frauds: *Devin v. Himer*, 29–297.

So where the consideration for a contract to convey land was the performance of services, *held*, that proof of performance of such services would take the case out of the statute: *Stem v. Nysonger*, 69–512.

SEC. **4627. When contract not denied in the pleadings.** The above regulations, relating merely to the proof of contracts, shall not prevent the enforcement of those not denied in the pleadings, except in cases when the contract is sought to be enforced, or damages recovered for the breach thereof, against some person other than him who made it. [C.'73, § 3666; R., § 4009; C.'51, § 2412.]

If the contract is not denied in the answer of defendant it is to be enforced against him, although in such answer he may expressly insist upon the benefit of the statute: *Auter v. Miller*, 18–405.

In a particular case, *held*, that a denial in the answer was sufficient to prevent the enforcement of the contract alleged in the petition, and which was within the statute of frauds: *Mahana v. Blunt*, 20–142.

SEC. **4628. Party made witness.** The oral evidence of the maker against whom the unwritten contract is sought to be enforced shall be competent to establish the same. [C.'73, § 3667; R., § 4010; C.'51, § 2413.]

Where a party seeking to enforce a contract which should be in writing intends to rely upon the evidence of the party making it, he should so state in his petition, otherwise it will be subject to demurrer: *Babcock v. Meek*, 45–137; *Burden v. Knight*, 82–584.

If plaintiff relies on the testimony of defendant to establish the contract, he cannot contradict or supplement such testimony by that of other witnesses. The testimony of defendant is conclusive: *Auter v. Miller*, 18–405; *Thorn v. Moore*, 21–285; *Mighell v. Dougherty*, 86–480.

Nor can plaintiff introduce other evidence to impeach defendant's credibility: *Hunt v. Coe*, 15–197.

The provision allowing the opposite party to be called to establish a contract which should be in writing does not apply to the testimony of the agent of such party. His testimony cannot be received for that purpose: *Burnside v. Rawson*, 37–639.

In a particular case, *held*, that the contract sued upon was sufficiently established by the evidence of one of the defendants to entitle the plaintiff to recover against the defendants thereon, although it was within the statute of frauds and not in writing: *Dewey v. Life*, 60–361.

If the testimony of the party called as a witness establishes the oral contract, then such contract is as well proven under the statute of frauds as if it had been in writing. Whether such testimony of the party is sufficient to prove the contract is a question of fact for the jury and should not be taken away from them by an instruction: *Byerlee v. Mendel*, 39–382.

Where the evidence of defendant clearly established an oral contract to convey land, *held*, that the contract might be enforced: *Smith v. Phelps*, 32–537.

SEC. **4629. Instruments affecting real estate.** Every instrument in writing affecting real estate, or the adoption of minors, which is acknowledged or proved and certified as required, may be read in evidence without further proof. [C.'73, § 3659; R., § 4001; C.'51, § 1227.]

The deed, such as here contemplated, being in the custody of the grantee, will be presumed to have been delivered, and being in writing will import a consideration, and these facts need not be proved before offering the instrument in evidence: *Wolverton v. Collins*, 34–238.

Recitals in an instrument which is admissible by reason of acknowledgment are *prima facie* evidence of the facts recited: *Beal v. Blair*, 33–318.

A deed which is not properly acknowledged may still be received in evidence: *Gould v. Woodward*, 4 G. Gr., 82.

An instrument, such as here described, is not evidence of the handwriting of the person by whom it purports to be signed: *Hyde v. Woolfolk*, 1–159.

Where proof is made of the loss or inability to produce the original deed the record thereof may be introduced in evidence without evidence of the execution of such deed: *Carter v. Davidson*, 70–45.

As to acknowledgments in general, see §§ 2942–2956.

SEC. **4630. Record or certified copy.** When the recording of any instrument in the office of any public officer is authorized by law, the record of such instrument, or a duly authenticated copy thereof, is competent evidence whenever, by the party's own oath or otherwise, the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control. In such case, it is no objection to the record that no official seal is appended to the recorded acknowledgment thereof, if, when the acknowledgment purports to have been taken by an officer having an official seal, there is a statement in the certificate of acknowledgment that the same is made under his hand and seal of office, and the record shows, by a scroll or otherwise, that there was such a seal, which will be presumptive evidence that it was attached to the original certificate. [C. '73, §§ 2197, 3660; R., §§ 2528, 4002; C. '51, §§ 1228, 1476.]

Proof of loss of original: The record of such instrument is not admissible as evidence unless it is shown that the original is lost or does not belong to the party wishing to use the same or is not within his control: *Williams v. Heath*, 22–519; *Ackley v. Sexton*, 24–320; *Courtright v. Deeds*, 37–503; *Jaffray v. Thompson*, 65–322; *State v. Penny*, 70–190.

Record of instrument of adoption of a child is not admissible by virtue of this section without proof of loss of the original: *McColister v. Yard*, 90–621.

It is not necessarily an instrument affecting her property: *Ibid.*

What sufficient showing as to inability to produce: Where it is not shown that the instrument is lost, the party desiring to introduce a copy thereof should show both that it does not belong to him and that it is not under his control; but it will not be considered to be within his control merely from the fact that he may compel its production by a subpœna *duces tecum*: *McNichols v. Wilson*, 42–385.

In a criminal prosecution where the introduction of a mortgage in evidence became material in behalf of the state, *held*, that the testimony of the prosecuting witness, that he did not have possession of the original instrument, was not sufficient showing to authorize the admission of secondary evidence: *State v. Penny*, 70–190.

Where it was testified by the attorney of a party that the party offering in evidence the record of a deed did not have the original deed and that he could obtain no knowledge as to where it was, *held*, that the record should have been admitted: *Olleman v. Kelgore*, 52–38.

Where an agent of the party who alone had held possession of the papers, which had never been in the hands of the party himself, testified to the loss, *held*, that the showing was sufficient: *Corbin v. Beebee*, 36–336.

Where a party offering in evidence a deed proved that application had been made to a person who ought to have had the deed, and search had been made among papers among which it probably would have been found, without success, *held*, that secondary evidence was properly admitted: *Laird v. Kilbourne*, 70–83.

It does not follow that deeds belong to a grantee simply because they are executed to his grantor. They may contain a description of many other tracts of land owned by such grantor or his other grantees: *McNichols v. Wilson*, 42–385.

Where it appeared that the original was part of the files of a case in the supreme court and could have been readily procured, *held*, that a copy was not admissible in evidence: *Byington v. Oaks*, 32–488.

But where a deed had been introduced in evidence in a case in another county and was in the hands of the court there, *held*, that it was sufficiently shown not to be in the possession or under the control of the party: *Ingle v. Jones*, 43–286.

In a particular case, *held*, that the showing of inability of a party to produce deeds not in his possession was sufficient to entitle him to produce in evidence the record of such deeds: *Kreuger v. Walker*, 80–733.

Proof of delivery: The provisions of statute as to the admissibility of the record of an instrument in evidence do not dispense with the necessity of proof of delivery of the original in cases where such proof would be necessary, if the original itself were introduced: *Foley v. Howard*, 8–56.

Land patent: This section does not apply to a record copy of a patent of lands from the United States: *Curtis v. Hunting*, 6–536. But see § 4633.

SEC. **4631. Retrospective.** The provisions of the preceding section are intended to apply to all instruments heretofore recorded, as well as those hereafter to be recorded. [C.'73, § 3661; R., § 4003; C.'51, § 1229.]

SEC. **4632. Not conclusive.** Neither the certificate, the record nor the transcript thereof is conclusive evidence of the facts therein stated. [C.'73, § 3662; R., § 4004; C.'51, § 1230.]

The certificate of acknowledgment is *prima facie* evidence of the fact of acknowledgment, but not conclusive, and may be overcome by other evidence, the burden of proof being upon the party seeking to rebut the effect of the certificate: *Morris v. Sargent*, 18–90.

The right to contradict the certificate exists, for instance, when fraud is supposed in obtaining the acknowledgment, or when the certificate is alleged to be false, and it is proposed to show that the deed was never acknowledged: *Tatum v. Goforth*, 9–247.

But it is not contemplated that a defective certificate is to be supplied or made good by other evidence: *O'Farrell v. Simplot*, 4–381.

SEC. **4633. Recording United States and state patents.** United States and state patents for lands in the state, that have been or may be recorded in the recorder's office of the county in which the lands are situated, shall be matters of record, and copies thereof, certified to by the recorder, may be received and read in evidence in all courts, with like effect as other certified copies of original papers recorded in his office, and such patents may be recorded without an acknowledgment. [16 G. A., ch. 10.]

SEC. **4634. Field-notes and plats.** A copy of the field-notes of any surveyor, or a plat made by him and certified under oath as correct, may be received as evidence to show the shape or dimensions of a tract of land, or any other fact the ascertainment of which requires the exercise of scientific skill or calculation only. [C.'73, § 3701; R., § 4046; C.'51, § 2431.]

SEC. **4635. Copies of records and entries in public offices.** Duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original record or papers so filed. [C.73, § 3702; R., § 4047; C.'51, § 2432.]

In an action for a breach of warranty in a deed for land purchased as swamp, *held*, that a certified abstract from the United States land office was admissible in evidence to show that the land in question was not certified as swamp, and to throw upon defendant the burden of proving that the land had passed under the swamp grant: *Shorthill v. Ferguson*, 44–249.

Under the provisions of a railroad land grant authorizing the selection of indemnity lands, and an act of congress providing that in such case lists of the land certified by the commissioner of the general land office should be regarded as conveying the fee-simple title, *held*, that a duly certified copy of the original certified lists of selections under the grant, on file in the office of the commissioner of the general land office, was properly admitted in evidence: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

Where letters were on file in the state land office which would be themselves admissible in evidence, *held*, that they might be proven by copies certified by the register: *Bellows v. Todd*, 34–18, 26.

A certified copy of a paper in a public office, but which is of such nature that it is not authorized by law to be kept there, is not receivable in evidence: *Morrison v. Coad*, 49–571.

Parol evidence is not competent to correct a mistake in a duly certified copy of a record: *Monk v. Corbin*, 58–503.

A copy of a public document, or what purports to be such copy, found in the custody of a public officer, is not admissible in evidence under the rule admitting public documents, unless it be properly authenticated or proved to be correct: *Pfotzer v. Mullaney*, 30–197.

As to certified copies of recorded instruments, see § 4630 and notes.

The certificate of the custodian of a record stating its contents is not admissible in proof thereof. Neither will such certificate be received as evidence of the contents of a lost or destroyed record; nor can facts which are required to be of record, but which have been omitted, be proved by the certificate of the officer required to keep such record: *Goodrich v. Conrad*, 24–254.

The auditor's plat-book, made up from records in the recorder's office, is not admissible in evidence as a duly certified copy of the records of conveyances, to establish the title of the party whose name is entered thereon: *Heinrichs v. Terrell*, 65–25.

The reports of the register of the state land office are not receivable in evidence: *Gordon v. Bucknell*, 38–438.

The assignment of a mortgage on real estate is an instrument authorized to be recorded, under § 2925, and a copy of such record is therefore admissible: *Kenosha Stove Co. v. Shedd*, 82–540.

An instrument of adoption of a child is not a paper belonging to a public office nor

a paper by law required to be kept therein in such sense that the record thereof is admissible as original evidence: *McCollister v. Yard*, 90-621.

This section relates to certified copy of an original record not an original paper recorded: *Ibid.*

SEC. **4636. Copies of books of original entries.** Copies of entries made in the book of "copies of original entries," kept as a record in the office of the county recorder, when such book has been compared with the originals and certified as true copies by the register of the United States land office at which such original entries were made, may, when certified by the recorder to be true copies, be received and read in evidence in all of the courts, with like effect as certified copies of original papers recorded in his office. [18 G. A., ch. 186, § 1; C.'73, § 3704; R., § 4049.]

SEC. **4637. Additional entries.** Copies of additional entries shall, from time to time, be procured as made, certified as required in the preceding section, and entered in the book of "copies of original entries," until all the lands in the county have been entered and so certified. [C.'73, § 3705; R., § 4050.]

SEC. **4638. Officer to give copies of records.** Every officer having the custody of a public record or writing shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof. [C.'73, § 3706; R., § 4051; C.'51, § 2433.]

Where the secretary of state was asked to give a certified copy of the so-called prohibitory amendment to the constitution, which had already been decreed by the supreme court not to have been legally adopted, and suit was brought to compel him to give a copy of such amendment as being a part of the constitution, *held*, that his refusal to do so was proper as his determination to that effect would not be valid in view of the decision of the court: *Harvey v. McFarland*, 89-703.

SEC. **4639. Maps, etc., in office of surveyor-general.** Copies of all maps, official letters and other documents in the office of the surveyor-general of the United States, when certified by that officer according to law, shall be received by the courts of this state as presumptive evidence of the existence and contents of the originals, and that they are copies of the originals, notwithstanding such maps, official letters or other papers, may themselves be copied. [C.'73, § 3707; R., § 4052.]

SEC. **4640. Certificate as to loss of paper.** The certificate of a public officer, that he has made diligent and ineffectual search for a paper in his office, is of the same efficacy in all cases as if such officer had personally appeared and sworn to such facts. [C.'73, § 3708; R., § 4053; C.'51, § 2434.]

SEC. **4641. Duplicate receipt of receiver of land office.** The usual duplicate receipt of the receiver of any land office, or the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title, equivalent to a patent, against all but the holder of an actual patent. [C.'73, § 3709; R., § 4054; C.'51, § 2435.]

This section *held* applicableto the receiver of the Des Moines river land office: *Stone v. McMahan*, 4 G. Gr., 72.

SEC. **4642. Certificate of register or receiver.** The certificate of the register or receiver of any land office of the United States, as to the entry of land within his district, shall be presumptive evidence of title, in the person entering, to the real estate therein named. [C.'73, § 3710; R., § 4055.]

This section relates to the remedy, and applies to all actions in the courts of the state whether the land is situated in the state or not: *Pierce v. Reed*, 36-257.

Where the statute requires an officer to make a statement or certificate in writing, such writing is competent evidence of the fact stated or certified: *Clark v. Polk County*, 19-248.

SEC. **4643. Official signature presumed genuine.** In the cases contemplated in the last ten sections, the signature of the officer shall be presumed to be genuine until the contrary is shown. [C.'73, § 3711; R., § 4056; C.'51, § 2436.]

SEC. **4644. Judicial record—of this state or federal courts.** A judicial record of this state or any court of the United States may be proved by the production of the original, or a copy thereof certified by the clerk or person having the legal custody thereof, authenticated by his seal of office, if he have one. [C.'73, § 3712; R., § 4057; C.'51, § 2437.]

It is not necessary to account for the original before introducing a copy: *Dupont v. Downing*, 6-173.

Where a party relies upon a prior adjudication, he should introduce in evidence not only a copy of the judgment but also a copy of the pleadings: *Campbell v. Ayers*, 6-339.

A copy of the record of the judgment properly authenticated is competent evidence without proof of the official character of the person rendering the judgment: *Railroad Bank v. Evans*, 32-202.

The record of a judgment of a court of general jurisdiction is admissible in evidence without proof of service of process and the pleadings: *American Emigrant Co. v. Fuller*, 83-599.

SEC. **4645. Of another state.** That of another state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice or presiding magistrate that the attestation is in due form of law. [C.'73, § 3713; R., § 4058; C.'51, § 2438.]

The certificate of a judge, whether the presiding officer of the court or not, to the attestation by the clerk, is sufficient: *Simons v. Cook*, 29-324.

The certificate of the judge is conclusive that the attestation of the record is in due form, and if it appears to be made by a deputy in the name of the principal, it is conclusive as to the authority of the deputy to make such certificate: *Greasons v. Davis*, 9-219; *Young v. Thayer*, 1 G. Gr., 196.

Parol evidence may be received to show the practice and usage in the courts of another state, and whether a record conforms thereto, and its effect: *Greasons v. Davis*, 9-219.

Where a foreign judgment is introduced in evidence on the trial in the court below, and it appears not to be sufficiently formal and authoritative as a judgment on its face to authorize a recovery upon it, the presumption will be on appeal that it was supported by proper evidence to entitle it to faith and credit, unless the contrary appears by affirmative showing: *Clemmer v. Cooper*, 24-185.

The method prescribed by act of congress for authenticating a judicial record is not exclusive of that which a state may adopt with reference to such authentication in its own courts: *Latterett v. Cook*, 1-1.

A certificate of the clerk of the circuit court of West Virginia, stating that he was the successor of the clerk of the county court of Virginia in which the judgment was rendered before the formation of the state of West Virginia, *held* competent evidence of that fact and of the existence of the judgment: *Darrah v. Watson*, 36-116.

The attestation of the copy of the record in another state must be according to the form used in the state from which the record comes: *Roop v. Clark*, 4 G. Gr., 294.

Attestation of a foreign judgment in the name of the clerk by a deputy, together with the presiding judge's certificate of the official character of such clerk and deputy, and that the certificate is in due form of law, *held* sufficient: *Young v. Thayer*, 1 G. Gr., 196.

The record of a judgment is sufficiently authenticated if the certificate of the clerk identifies the transcript to be a true copy, and there is a further certificate of the presiding judge that such attestation is in due form of law: *Lewis v. Sutliff*, 2 G. Gr., 186.

Section applied: *Rowe v. Barnes*, 70 N.W., 197.

SEC. **4646. Of a justice of the peace.** The official certificate of a justice of the peace of any of the United States to any judgment and the preliminary proceedings before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature to his certificate is genuine, is sufficient evidence of such proceedings and judgment. [C.'73, § 3714; R., § 4059; C.'51, § 2439.]

The certificate of the clerk should show that the justice of the peace was a justice within the same county, and also that he was an acting justice of the peace at the time of signing the certificate: *Guesdorf v. Gleason*, 10-495.

The certificate of a retired justice of the peace in relation to his former official proceedings has no more weight than that of a mere stranger: *Brown v. Scott*, 2 G. Gr., 454.

The successor in office of a retired justice is the proper person to make the certificate here contemplated as to any of the official proceedings of his predecessor shown by the records in his office, and the certificate of the clerk of a court that the justice is an acting justice and his signature genuine is sufficient: *Railroad Bank v. Evans*, 32-202.

Where in the body of a certificate of a justice of the peace he states his official character, the failure to affix his official designation to the signature of the certificate will not affect its validity: *Ibid.*

The admission in evidence of the transcript from the docket of a justice of the peace in a foreign state, *held* not error where

such transcript was embraced in the certified copy of proceedings in the court of common pleas, where the judgment sued on was rendered on appeal: *Clemmer v. Cooper*, 24–185.

The provisions of the statutes of the United States as to the mode in which the judicial proceedings of a state may be authenticated so as to be given effect in other states refer only to courts of general jurisdiction and not to those of inferior jurisdiction, such as justices of the peace: *Gay v. Lloyd*, 1 G. Gr., 78.

SEC. **4647. Of a foreign country.** Copies of records and proceedings in the courts of a foreign country may be admitted in evidence upon being authenticated as follows:

1. By the official attestation of the clerk or officer in whose custody such records are legally kept;

2. By the certificate of one of the judges or magistrates of such court, that the person so attesting is the clerk or officer legally entrusted with the custody of such records, and that the signature to his attestation is genuine;

3. By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court. [C. '73, § 3715; R., § 4060; C. '51, § 2440.]

SEC. **4648. Presumption of regularity.** The proceedings of all officers and courts of limited and inferior jurisdiction within the state shall be presumed regular, except in regard to matters required to be entered of record, and except where otherwise expressly declared. [C. '73, § 3669; R., § 4120; C. '51, § 2512.]

Presumption as to regularity of official acts: Every legal presumption should be entertained that an officer has done his duty: *Cole v. Porter*, 4 G. Gr., 510: *Goodrich v. Beaman*, 37–563.

Such presumption will be entertained in the absence of any showing to the contrary: *Budd v. Durall*, 36–315; *Spitler v. Schofield*, 43–571.

Where it is the duty of an officer to do an act, it must be presumed that such duty has been performed: *In re Estate of Edwards*, 58–431.

There is a presumption that those charged with public trusts act honestly and in good faith: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

An act of an officer which may have been within his official powers will be presumed to have been within such powers in the absence of all evidence to the contrary: *Winneshiek County v. Maynard*, 44–15; *Babcock v. Wolf*, 70–676.

Official acts, even though ministerial in their nature, must be regarded as *prima facie* correct: *Smith v. District T'p*, 42 522.

There is a legal presumption in favor of the due execution of papers emanating from a public office: *French v. Reel*, 61–143.

Where the return of an officer on a writ of attachment showed a levy upon property, but did not state that the property was that of defendant, *held*, that the presumption of regularity would obtain in favor of such return: *Rowan v. Lamb*, 4 G. Gr., 468.

A court will not presume that an officer in the service of process failed to discharge a plain duty imposed upon him by law, nor infer facts inconsistent with the return of the writ, in order to divest rights acquired under it, or defeat the judgment of a court of competent jurisdiction: *Pursley v. Hays*, 22–310.

Where a person in authority is required to do a certain act which could not be omitted without a neglect of duty, the performance of it will be presumed unless the contrary is proved: *Dollarhide v. Board of Commissioners*, 1 G. Gr., 158.

Therefore, where it was required by statute that commissioners for a particular purpose should be sworn, *held*, that although in this respect compliance with the statute did not appear in the report of such commissioners, it would be presumed that the law was complied with: *Ibid.*

It must be presumed that the officers of the court in any particular matter performed their duty unless the contrary appears. Therefore, *held*, that where the trial of a criminal case was had at a special term of the court, it would be presumed that notice of the holding of such term, as required by law, had been given: *Harriman v. State*, 2 G. Gr., 270.

Where it appeared that an ordinance had been published in a newspaper, *held*, that the presumption that the officers had done their duty was sufficient to show that the newspaper was one of general circulation in the corporation, as required by law: *Bayard v. Baker*, 76–220.

The acts of a court of competent jurisdiction are presumed to have been rightly done until the contrary appears: *American Emigrant Co. v. Fuller*, 83–559.

Where the venue of an affidavit does not appear it will be presumed that the justice of the peace signing it administered the oath in the county in which he was authorized to act: *Snell v. Eckerson*, 8–284.

This section applies to a proceeding of the board of supervisors in establishing a highway: *McBurney v. Graves*, 66–314.

Where the tribunal determines that the essential steps to give it jurisdiction have been taken, and makes that determination a matter of record, the statute raises the presumption in favor of the correctness of

the determination, but it does not raise the presumption in favor of the jurisdiction of the tribunal in the absence of any determination by it that it had jurisdiction: *Ibid.*

Section applied: *State v Lane*, 26–223; *Lees v. Wetmore*, 58–170.

Acts of justice of the peace: It may be presumed in favor of the judgment of a justice of the peace that acts which are shown to have been done were done in such order as was necessary in order that the jurisdiction should be properly exercised: *Hodge v. Rugles*, 36–42; *Church v. Crossman*, 49–444.

While it may be that the decision of a justice of the peace that he has jurisdiction is presumed to be right until the contrary is shown, yet where the assumption upon which the decision is based appears, and the decision is thereby shown to be erroneous, the presumption in favor of the justice's jurisdiction is thereby rebutted: *Brown v. Davis*, 59–641.

Jurisdiction having once been acquired by a justice of the peace, the presumption is that it continues to judgment, in the absence of a showing to the contrary: *Moore v. Reeves*, 47–30.

Therefore, where judgment was rendered against a garnishee on his answer more than three days after it was filed, *held*, that it would be presumed that the case was properly continued to the day judgment was rendered: *Ibid.*

Where a justice has acquired jurisdiction, subsequent proceedings are deemed regular and cannot be collaterally assailed. Therefore, *held*, that a recital on the justice's docket of continuance by agreement could not be contradicted by affidavits denying such agreement: *Caughlin v. Blake*, 55–634.

So, also, the recitals of the justice's record as to the time in the day at which default is entered is conclusive as against collateral attack: *Cory v. King*, 49–365.

The correctness of a judgment as to a question arising in a case of which the justice has jurisdiction cannot be questioned in an action by *scire facias* on the judgment: *Haggarty v. Burr*, 22–219.

Where it appears that the justice has rendered a judgment for more than one hundred dollars, as he may do by the consent of the parties, it not being required that such consent shall appear of record, it will be presumed in favor of the judgment that it exists: *Schlisman v. Webber*, 65–114.

SEC. **4649. Executive acts.** Acts of the executive of the United States, or of this or any other state of the Union, or of a foreign government, are proved by the records of the state department of the respective governments, or by public documents purporting to have been printed by order of the legislatures of those governments, respectively, or by either branch thereof. [C.'73, § 3716; R., § 4061; C.'51, § 2441.]

SEC. **4650. Proceedings of legislature.** The proceedings of the legislature of this or any other state of the Union, or of the United States, or of any foreign government, are proved by the journals of those bodies, respectively, or of either branch thereof, and either by copies officially certified by the clerk of the house in which the proceeding was had, or by a copy purporting to have been printed by its order. [C.'73, § 3717; R., § 4062; C.'51, § 2442.]

The journals of the respective houses of the general assembly are competent evidence to show the proceedings of such houses: *Kœhler v. Hill*, 60–543.

The original acts of the general assembly, deposited with the secretary of state, as provided by law, are the ultimate proof of the statutes, whatever errors there may be in the printed copies of such statutes. The court will inform itself and take judicial notice of the true reading of the statutes as thus shown: *Clare v. State*, 5–509; commented upon in *State v. Dorchey*, 8–396.

The acts thus deposited are the bills which receive the signatures of the officers, etc., and behind them it is impossible for any court to go for the purpose of ascertaining what the law is: *Duncombe v. Prindle*, 12–1.

The enrolled bill, duly signed and filed in the office of the secretary of state, is at least presumptive evidence of its due enactment, and the court will take judicial notice of what appears from such record to be the law. The fact that the journal of one of the houses of the legislature fails to show that the statute passed such house will not be sufficient to overcome such presumption: *Jordan v. Circuit Court*, 69–177.

SEC. **4651. Printed copies of the statutes.** Printed copies of the statute laws of this or any other of the United States, or of congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the courts of such state or government, shall be admitted in the courts of this state as presumptive evidence of such laws. [C.'73, § 3718; R., § 4063; C.'51, § 2443.]

Printed copies of the statute laws of a state purporting to have been published under its authority, are admissible as evidence of such laws: *Webster v. Rees*, 23–269.

But the method here provided does not exclude other methods, such as producing copies duly authenticated under the seal of the state: *Latterett v. Cook*, 1–1.

The testimony of witnesses, however, would not be admissible to prove the statutes of another state: *Ibid.*

Parol evidence of a witness familiar with the laws of another state is not admissible for the purpose of showing the powers of a notary public under the statutes of that state: *State v. Cross*, 68–180.

Parol evidence of a person familiar with the practice in other states may be received to show that certain books are commonly received by the courts of that state as evidence of the statute laws thereof: *Greasons v. Davis*, 9–219.

Courts do not take judicial notice of the statutes of another state. If a party relies upon such statutes, he must plead them as any other fact; and it will not be sufficient to refer to them by their title or date of approval, nor by stating what are their general provisions and requirements: *Carey v. Cincinnati & C. R. Co.*, 5–357; *Taylor v. Runyan*, 9–522.

The presumption is that the laws of a foreign state are the same as our own. If it is claimed that they are different from our own, that fact must be averred and proved: *Bean v. Briggs*, 4–464; *Crafts v. Clark*, 31–77; *S. C.*, 38–237; *Sayre v. Wheeler*, 31–112; *Sayre v. Wheeler*, 32–559; *Stephens v. Williams*, 46–540; *Church v. Crossman*, 49–444; *Webster v. Hunter*, 50–215; *Neese v. Farmers' Ins. Co.*, 55–604; *Hadley v. Gregory*, 57–157.

The statutes of another state will, in the absence of any showing to the contrary, be presumed to be the same as those of this state: *Davis v. Chicago, R. I. & P. R. Co.*, 83–744; *German Bank v. American F. Ins. Co.*, 83–491; *In re Capper's Will*, 85–82.

In a prosecution for bigamy, evidence of a marriage in another state which is sufficient in form to be valid under the laws of this state will be sufficient, the statutes of the state where the marriage was celebrated being presumed to be the same as those of this state in the absence of proof to the contrary: *State v. Nadal*, 69–478.

The presumption is that the rule of law on a particular question is the same in another state as in this state: *Leiber v. Union Pacific R. Co.*, 49–688.

A volume not published under the authority of the state nor shown to be commonly admitted as evidence of the existing laws of that state in the courts thereof, is not admissible in another state to prove the laws of the former: *Goodwin v. Provident Savings L. Ass. Soc.*, 66 N.W., 157.

SEC. 4652. Written law—unwritten law. The public seal of the state or county, affixed to a copy of the written law or other public writing, is admissible as evidence of such law or writing, respectively. The unwritten laws of any other state or government may be proved as facts by parol evidence, or by the books of reports of cases adjudged in their courts. [C. '73, § 3719; R., § 4064; C. '51, § 2444.]

SEC. 4653. Ordinances of city or town. The printed copies of the ordinance of any municipal corporation, published by its authority, or transcripts of any ordinance, act or proceeding thereof recorded in any book, or entries on any minutes or journals kept under its direction, and certified by its clerk, shall be received in evidence for any purpose for which the original ordinances, books, minutes or journals would be received, and with the same effect. The clerk shall furnish such transcripts, and be entitled to charge therefor at the rate that the clerk of the district court is entitled to charge for transcripts of records from that court. [C. '73, § 3720; R., § 1076.]

In a proceeding under a city ordinance it is competent to prove publication thereof by introducing the original ordinance with a certificate of the clerk that it was regularly enacted and published as required. Such evidence is original, not secondary: *Des Moines v. Casady*, 21–570.

Evidence in a particular case *held* sufficient to identify a certain book as the ordinance book of a city: *Ottumwa v. Schaub*, 52–515.

Entries in a record book of a board of directors of a district township, *held* sufficiently verified in a particular case: *Cooper v. Nelson*, 38–440.

SEC. 4654. Books and papers—how procured. The district or superior court may in its discretion, by rule, require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them. [C. '73, § 3685; R., § 4026; C. '51, § 2423.]

The granting of the rule requiring the party to produce papers lies in the discretion of the court: *Sheldon v. Mickel*, 40–19; *Allison v. Vaughan*, 40–421.

Delay or negligence in asking for the rule might be sufficient ground for refusing to grant it: *Ibid.*

A party cannot be required to produce a document without having notice of such requirement and a reasonable time for its production: *Greenough v. Sheldon*, 9–503.

The agent of a telegraph company may be required to produce messages: *Woods v. Miller*, 65–168.

Under these sections the application must be by petition stating the facts expected to be proved by the books or papers and that they are under the control of the party

against whom the rule is sought, and it is not proper to grant the rule on defendant to produce such documents where their production is sought to be procured by notice on defendant instead of by petition: *Beebe v. Equitable Mut. L., etc., Ass'n*, 76-129.

Where a motion was filed on the morning of the day set for trial for an order requiring plaintiff to produce his books of account for the purpose of being inspected and copied, and it appeared that plaintiff resided and did business in Chicago and that the issues were settled and the case set for hearing six months before the motion, *held*, that the motion was properly overruled, as the order might have been refused because of the delay in asking for it: *Schmidt v. Kiser*, 75-457.

A party who is called upon to produce his books is not entitled to have taxed as costs in his favor the expense of having a statement made showing the condition of accounts as appearing in such books: *McNider v. Sirrine*, 84-745.

SEC. **4655. Petition—rule.** The petition for that purpose must state the facts expected to be proved by such books or papers, and that, as the petitioner believes, such books and papers are under the control of the party against whom the rule is sought, and must show wherein they are material. The rule shall thereupon be granted to produce the books and papers, or show cause to the contrary, if the court deems such rule expedient and proper. [C '73, § 3686; R., § 4027; C. '51, § 2424.]

SEC. **4656. Failure to obey.** On failure to obey the rule or show sufficient cause therefor, the same consequences shall ensue as if the party had failed to appear and testify when subpœnaed by the party now calling for the books and papers. [C. '73, § 3687; R., § 4028; C. '51, § 2425.]

SEC. **4657. Writing called for.** Though a writing called for by one party is by the other produced, the party calling for it is not obliged to use it as evidence in the case. [C. '73, § 3688; R., § 4029; C. '51, § 2426.]

SEC. **4658. Subpœnas for witnesses.** The clerks of the several courts shall, on application of any person having a cause or matter pending in court, issue a subpœna for witnesses under the seal of the court, inserting all the names required by the applicant in one subpœna, if practicable, which may be served by the sheriff, coroner or any constable of the county, or by the party or any other person. When a subpœna is served by any person other than the sheriff, coroner or constable, proof thereof shall be shown by affidavit; but no costs for serving the same shall be allowed. [C. '73, § 3671; R., § 4012.]

SEC. **4659. To whom directed—duces tecum.** The subpœna shall be directed to the person therein named, requiring him to attend at a particular time or place to testify as a witness, and it may contain a clause directing the witness to bring with him any book, writing or other thing under his control, which he is bound by law to produce as evidence. [C. '73, § 3672; R., § 4013; C. '51, § 2415.]

The provisions of this and the following sections are applicable to a witness, but not to a defendant whom it is sought to compel to produce books and papers as contemplated in §§ 4654–4656: *Beebe v. Equitable Mut. L., etc., Ass'n*, 76-129.

SEC. **4660. How far compelled to attend.** Witnesses in civil cases cannot be compelled to attend the district or superior court out of the state where they are served, nor at a distance of more than [illegible] miles from the place of their residence, or from that where they are served with a subpœna, unless within the same county. No other subpœna but that from the district or superior court can compel his attendance at a greater distance than thirty miles from his place of residence, or of service, if not in the same county. [C. '73, § 3673; R., § 4014; C. '51, § 2416.]

358 A. 42

The limitation as to the distance beyond which witnesses cannot be required to attend upon subpœna in a civil case does not apply to garnishees, who may be compelled to attend from any distance within the state: *Westphal v. Clark*, 42-371.

This provision is for the benefit of the witness. If he sees fit to respond to the subpœna from a greater distance than seventy miles he is entitled to mileage for the entire distance traveled unless it appears that the extra travel was for the purpose of unnecessarily increasing costs: *Briggs v. Rumely Co.*, 64 N.W., 784.

SEC. 4661. **Witness fees.** Witnesses in any court of record, except in the police courts, shall receive for each day's attendance [illegible] dollar and

38 74

twenty-five cents, and in the police courts the same fees and mileage as are allowed before justices of the peace; before a justice of the peace, fifty cents for each day; and in all cases five cents per mile for each mile actually traveled. An attorney, juror or officer, who is in habitual attendance on the court for the term at which he is examined as a witness, shall be entitled to but one day's attendance. No peace officer shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case, unless the court so orders. Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed four dollars per day while so employed. For attending before the grand or trial jury or court in criminal cases where the defendant is adjudged not guilty, the fees above provided for attending the district or justice's court shall be paid by the county, upon a certificate of the clerk or justice showing the amount of the services to which they are entitled. [16 G. A. ch. 62; C.'73, § 3814; R., § 4153; C.'51, § 2544.]

A witness summoned to attend in several state cases is entitled to compensation for his actual attendance in all the cases, but cannot recover fees for each separate case, where he is required to attend in more than one at the same time: *Hardin v. Polk County*, 39–661.

A rule of court providing that witnesses subpœnaed in cases between different parties should draw but one *per diem* was upheld in a particular case: *Meffert v. Dubuque, B. & M. R. Co.*, 34–430.

A witness for the prosecution who comes from another state at the request of the prosecution, and testifies in a case in which defendant is adjudged not guilty, should be compensated by the county for his mileage outside of as well as within the state, but such mileage cannot be taxed as costs: *Westfall v. Madison County*, 62–427.

A witness is not entitled to fees for the time during which he is confined in jail on commitment by a magistrate for failure to give security to appear as a witness for the state in a criminal prosecution: *Markwell v. Warren County*, 53–422.

Where a justice of the peace dismisses a criminal prosecution for failure of the prosecuting witness to appear, the costs, including witness fees, may properly be taxed to the county: *Cassidy v. Palo Alto County*, 58–125; unless the justice has ground for taxing them against the prosecuting witness as provided in § 5606: *Palo Alto County v. Moncrief*, 58–131.

Where the county fails to pay costs properly taxed against it, action may be brought against it therefor: *Cassidy v. Palo Alto County*, 58–125.

Under the Code of '51 there was no provision giving a witness summoned for defendant in a criminal prosecution the right of claiming witness fees from the county treasurer, and in such case it was held that he must look to the party summoning him for his fees: *Donnelly v. Johnson County*, 7–419.

As to fees for defendant's witnesses in criminal prosecutions, see, also, § 5492.

A witness is entitled to fees from the county for attendance in a criminal case on a preliminary examination before a justice: *Johnson County v. Porter*, 4 G. Gr., 79.

The arrest of the accused is essential to the power to subpœna a witness to testify on a preliminary examination; and where a subpœna was issued before any preliminary information was filed or arrest thereunder made, *held*, that a witness attending from another state in response to such subpœna could not recover witness fees from the county: *Warnstaff v. Louisa County*, 76–585.

A justice of the peace has no power to issue a subpœna for a witness upon a preliminary examination until an information has been filed by him or the defendant has been arrested without warrant and brought before him, and the witness attending in response to such subpœna cannot recover fees from the county. The witness is bound to know at his peril whether the justice of the peace has power to issue the subpœna or not: *Warnstaff v. Louisa County*, 76–585.

To entitle a party to fees as an expert it must be shown that he was called as such, and to testify to an opinion founded on his special study and experience: *Snyder v. Iowa City*, 40–646.

SEC. **4662. Fees in advance.** Witnesses, except parties to the action, are entitled to receive in advance, if demanded when subpœnaed, their traveling fees to and from the court, with their fees for one day's attendance. At the commencement of each day after the first, they are further entitled, on demand, to receive the legal fees for that day in advance. If not thus paid, they are not compelled to attend or remain as witnesses. [C. '73, § 3674; R., § 4015; C.'51, § 2417.]

By appearing, a witness waives the right to demand mileage before testifying: *Stockberger v. Lindsey*, 65–471.

SEC. **4663. Witness fees paid by party or county.** When the county or any party has paid the fees of any witness, and the same is afterward collected from the adverse party, the county or person so paying the same shall, upon the production of the receipt of such witness or other satisfactory evidence, be entitled to such fee, whether it be in the hands of the justice or clerk, or has been paid into the county treasury. [C.'73, § 3817.]

SEC. **4664. Contempt in failing to attend or testify.** For a failure to obey a valid subpœna without a sufficient cause or excuse, or for a refusal to testify after appearance, the delinquent is guilty of a contempt of court and subject to be proceeded against by attachment. He is also liable to the party by whom he was subpœnaed for all consequences of such delinquency, with fifty dollars additional damages. [C.'73, § 3675; R., § 4016; C.'51, § 2418.]

SEC. **4665. Proceedings for contempt.** Before a witness is so liable for a contempt for not appearing, he must be served personally with the process, by reading it to him, and leaving a copy thereof with him, if demanded, and it must be shown that the fees and traveling expenses allowed by law were tendered to him, if required; or it must appear that a copy of the subpœna, if left at his usual place of residence, came into his hands, with the fees and traveling expenses above mentioned. [C.'73, § 3676; R., § 4017; C.'51, § 2419.]

SEC. **4666. Serving subpœna.** If a witness conceals himself, or in any manner attempts to avoid being personally served with a subpœna, any sheriff or constable having the subpœna may use all necessary and proper means to serve the same, and may for that purpose break into any building or other place where the witness is to be found, having first made known his business and demanded admission. [C.'73, § 3677; R., § 4018; C.'51, § 2420.]

SEC. **4667. When party fails to obey subpœna.** In addition to the above remedies, if a party to an action in his own right, on being duly subpœnaed, fails to appear and give testimony, the other party may, at his election, have a continuance of the cause at the cost of the delinquent. [C.'73, § 3683; R., § 4024; C.'51, § 2421.]

SEC. **4668. Pleading taken true, or continuance.** Or if he shows by his own testimony, or otherwise, that he could not have a full personal knowledge of the transaction, the court may order his pleading to be taken as true; subject to be reconsidered during the term of the court, upon satisfactory reasons being shown for the delinquency. [C.'73, § 3684; R., § 4025; C.'51, § 2422.]

The pleading is not to be taken as true unless the court upon application make an order to that effect: *Hay v. Frazier*, 49–454.

SEC. **4669. Subpœnas by officer or board.** Any officer or board authorized to hear evidence shall have authority to subpœna witnesses and compel them to attend and testify, in the same manner as officers authorized to take depositions.

SEC. **4670. Prisoner produced.** A person confined in a penitentiary or jail in the state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, and in a criminal case in any county in the state; but in all other cases his examination must be by a deposition. [C.'73, § 3678; R., § 4019.]

Defendant in a criminal action has no absolute right to demand the personal attendance of a convict in the penitentiary or county prison, under an order of court, but the exercise of the power of the court to require the production of such prisoner is discretionary: *State v. Kennedy*, 20–372.

SEC. **4671. Deposition of.** While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge,

who shall afford reasonable facilities for the taking thereof. [C.'73, § 3679; R., § 4020.]

SEC. **4672. Procuring depositions.** When, by the laws of this or any other state or country, testimony may be taken in the form of depositions to be used in any of the courts thereof, the person authorized to take such depositions may issue subpœnas for witnesses, which must be served by the same officers and returned in the same manner as is required in a justice's court, and obedience thereto may be enforced in the same way and to the same extent a justice of the peace might do, or he may report the matter to the district court or a judge thereof, who may enforce obedience as though the action was pending in said court. [C.'73, §§ 3680–2; R., §§ 4021–3; C.'51, §§ 2477–9.]

SEC. **4673. Affidavits—before whom made.** An affidavit is a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state. [C.'73, §§ 3689–90; R., §§ 4030, 4035.]

This clearly implies that an affidavit should be signed by the affiant: *Crenshaw v. Taylor*, 70–386.

The jurat or certificate need not state the name of the person signing or swearing to the affidavit: *Stone v. Miller*, 60–243.

It is not necessary that the jurat expressly show that the person sworn is the person who subscribed to the affidavit. A jurat in the following form, "subscribed in my presence and sworn to before me," giving the date, *held* sufficient: *Stoddard v. Sloan*, 65–680.

The signature to a jurat by an officer writing his name with the designation, "Notary Public," is sufficient without adding the name of the county in and for which he is a notary. The court will take judicial notice of the fact that he is a notary for that county: *Ibid.*

Where an affidavit is headed with the name of the state and county, and the signature of the notary is authenticated with a seal, such signature is sufficient if it contains the name of the notary with the addition "Notary Public," without stating the state or county for which he is notary: *Stone v. Miller*, 60–243.

Where the venue of the affidavit is not indicated, it will be presumed that the oath was administered within the county in which the justice of the peace administering it had jurisdiction, that being the county in which the action was pending and in which the pleading was filed: *Snell v. Eckerson*, 8–284.

Although, in the caption, the affidavit is entitled of one county, while it appears to have been sworn to before a notary public in another county, the presumption is that the notary public took the affidavit within his own jurisdiction, and the caption will not be sufficient to show that it was sworn to without such jurisdiction: *Goodnow v. Litchfield*, 67–691.

Where an affidavit offered in evidence is authenticated by the signature and seal of a notary public, but the jurat does not refer to the seal, the notary may amend the jurat: *Hallett v. Chicago & N. W. R. Co.*, 22–259.

Affidavits are recognized as competent evidence on the hearing of application for a temporary injunction and for other purposes, and by agreement they are frequently treated as competent evidence on a final hearing of the case. There can be no objection to their being used when all the parties in interest assent to it: *Geyer v. Douglass*, 85–93.

SEC. **4674. Out of the state.** Those taken out of the state before any judge or clerk of a court of record, or before a notary public, or a commissioner appointed by the governor of this state to take acknowledgment of deeds in the state where such affidavit is taken, are of the same credibility as if taken within the state. [C.'73, § 3691; R., § 4036; C.'51, § 2475.]

The fact that the officer before whom an affidavit is made, out of the state, is authorized to administer oaths may be established *aliunde: Levy v. Wilson*, 43–605.

While the laws of other states will be presumed to be the same as the laws of this state, requiring the seal of the notary to have engraved thereon the name of his state, yet where the court receives and acts upon an affidavit for change of venue sworn to before a notary public of another state, whose seal does not bear the name of his state, it will be presumed that some showing was made that the seal was such as required by the laws of the state where the jurat was executed: *Goodnow v. Litchfield*, 67–691.

SEC. **4675. How compelled.** When a person is desirous of obtaining the affidavit of another who is unwilling to make the same fully, he may apply by petition to any officer competent to take depositions, stating the object for which he desires the affidavit. [C.'73, § 3692; R., § 4038; C.'51, § 2480.]

SEC. **4676. Subpœna issued.** If the officer is satisfied that the object is legal and proper, he shall issue his subpœna to bring the witness before

him, and, if he fails then to make a full affidavit of the facts within his knowledge to the extent required of him by the officer, the latter may proceed to take his deposition by question and answer in the usual way, which may be used instead of an ordinary affidavit. [C. '73, § 3693; R., § 4039; C. '51, § 2481.]

The party subpœnaed cannot be excused from making the affidavit or answering the questions propounded on the ground that the affidavit desired would not be legally admissible in proceedings for which it is sought. Neither the officer before whom the witness is brought, nor the witness himself, is allowed to determine that question in advance, and a failure to respond to the subpœna or to answer when brought before the officer may be punished as a contempt: *Robb v. McDonald*, 29–330.

A justice of the peace to whom such application is made has full power to pass upon the question of the legality or propriety of the affidavit sought, and is not without jurisdiction to issue a subpœna to compel such affidavit though as a matter of law it appears on the face of the petition therefor that it could not, when taken, have any legal use. An order of the justice of the peace imprisoning a witness for contempt in refusing to make the affidavit when properly required will not be inquired into by the supreme court in a *habeas corpus* proceeding: *State ex rel. v. Seaton*, 61–563.

But this section is not applicable where the affidavit is sought merely for information. The use for which the affidavit or deposition may be taken is manifestly a legal use as evidence, and the officer should not issue a subpœna where the affidavit required is not ostensibly for such legal use; and if ostensibly for such use, the officer should still be satisfied that it is desired for such use in fact. Therefore, where the affidavit was sought, not for use in a pending proceeding, but to procure information for the purpose of commencing an action, *held*, that the witness committed for contempt in refusing to obey the subpœna should have been discharged on *habeas corpus: Dudley v. McCord*, 65–671.

SEC. **4677. Notice.** The officer may, in his discretion, require notice of the taking of such affidavit or deposition to be given to any person interested in the subject-matter, and allow him to be present and cross-examine such witness. [C. '73, § 3694; R., § 4040; C. '51, § 2482.]

SEC **4678. Affiant produced.** The court or officer to whom any affidavit is presented as a basis for some action, in relation to which any discretion is lodged with such court or officer, may require the witness to be brought before it or him and submit to a cross-examination by the opposite party. [C. '73, § 3695; R., § 4041; C. '51, § 2483.]

For similar provision, see § 3833.

SEC. **4679. Signature and seal—presumption.** The signature and seal of such officers as are authorized to take depositions or affidavits, having a seal, and the simple signature of such as have no seal, are presumptive evidence of the genuineness thereof, as well as of the official character of the officer, except as otherwise declared. [C. '73, § 3696; R., § 4037; C. '51, § 2416.]

SEC. **4680. Publications—how proved.** Publications required to be made in a newspaper may be proved by the affidavit of any person having knowledge of the fact, specifying the times when and the paper in which the publication was made, but such affidavit must be made within six months after the last day of publication. [C. '73, § 3697: R., § 4042; C. '51, § 2427.]

As to proof of publication of original notice, see § 3536 and notes.

SEC. **4681. Proof of serving or posting notices.** The posting up or service of any notice or other paper required by law may be proved by the affidavit of any competent witness attached to a copy of said notice or paper, and made within six months of the time of such posting up. [C. '73, § 3698; R., § 4043; C. '51, § 2428.]

See *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69–320.

SEC. **4682. Other facts.** Any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing the course above indicated, as nearly as the circumstances of the case will admit. [C. '73, § 3699; R., § 4044; C. '51, § 2429.]

SEC. **4683. How perpetuated.** Proof so made may be perpetuated and preserved for future use by filing the papers above mentioned in the

office of the clerk of the district court of the county where the act is done, and the original affidavit appended to the notice or paper, if there is one, and, if not, the affidavit by itself is presumptive evidence of the facts stated therein, but does not preclude other modes of proof now held sufficient. [C.'73, § 3700; R., § 4045; C.'51, § 2430.]

SEC. **4684. Depositions—when taken and by whom.** After the commencement of a civil action or other civil proceeding, if the witness resides within this state but in a different county from the place of trial, or is about to go beyond the reach of a subpœna, or is for any other cause expected to be unable to attend court at the time of trial, the party wishing his testimony may take his deposition in writing before any person having authority to administer oaths; and if the action is by equitable proceedings, then, without any other reason therefor, either party may so take the deposition of any witness. [C.'73, § 3721; R., § 4065; C.'51, § 2445.]

Whether the reason shown for taking the deposition is a valid one or not, if objection is not made to the taking, it may be read if the witness is not in court: *Cook v. Blair*, 50–128.

Where a deposition is taken upon notice, and the adverse party appears and does not object to the want of statutory ground, the objection for want of such ground for taking the deposition may be deemed waived, but the deposition of a witness or the transcript of his evidence, taken in shorthand on a former trial, is not admissible in a law action without some statutory ground for taking his deposition appears or such objection is waived: *Baldwin v. St. Louis, K. & N. R. Co.*, 68–37.

That the grounds must appear in the deposition, see § 4709 and notes.

Where one was made a party defendant to an action in which the depositions of witnesses had been taken prior to his having been made such party, it was held that such evidence, properly objected to when offered, could not be received and used against him. Said defendant not standing in privity to the original defendant, as to him, when he became a party the action was a new one, and he could not, against his objection be bound or in any way affected by depositions taken by the plaintiffs before he was made a party to the action: *Brown v. Zachary*, 71 N.W., 413.

As to introduction of depositions when taken, see § 4712 and notes.

SEC. **4685. Upon notice or by commission.** If the deposition is to be taken within the state, it may be upon notice or upon commission, and, if without the state, it must be by the latter method, except by agreement of the parties. [C.'73, §§ 3722–3; R., §§ 4066–7; C.'51, §§ 2446–7.]

Where the notice stated the place for taking the deposition as the office of "Squire Moore," and the certificate showed that it was taken at the office of "Enos Moore," *held*, that the notice was insufficient in that respect, and the deposition was properly suppressed: *McClintock v. Crick*, 4–453.

Objection to the sufficiency of the notice is waived by appearing and cross-examining the witness: *Nevan v. Roup*, 8–207.

Where a party to an action dies after notice is served to take depositions, but before they are taken, they are illegal and should be stricken from the files on motion: *Kershman v. Swhela*, 59–93.

Parties who have been properly served with notice of the taking of a deposition cannot object to it because other parties were not notified: *Glenn v. Glenn*, 17–498.

The name of the witness whose testimony is to be taken should be stated in the notice: *Pilmer v. Branch of State Bank*, 16–321.

If there is a material difference between the name of the witness as given in the notice and that of the person whose deposition is taken, the deposition may be suppressed on motion: *Strayer v. Wilson*, 54–565.

Where an agreement was made to take the deposition of *S. M Kinne*, and the deposition of Sallie E. McKinne was taken, *held*, that it was properly suppressed upon motion: *Glenn v. Gleason*, 61–28.

Where certain depositions were taken in behalf of intervenors and notice served on an attorney of both the adverse parties to the suit, but the acceptance of service indicated that the attorney signing was attorney for one party only, *held*, that as the notice was addressed to him as attorney for both, by accepting the notice addressed to him he would be presumed to do so in that capacity, and the service of the notice was sufficient: *Walker v. Abbey*, 77–702.

Where a deposition is taken by mutual consent without any notice whatever the party appearing and participating in the taking of such deposition cannot afterwards object to its introduction in evidence: *Medland v. Walker*, 64 N. W., 797.

If the witness resides out of the county, but within the state, his deposition may be taken either on commission or on notice; if he resides out of the state, it can only be on commission; if within the county, it must be by notice: *Fabian v. Davis*, 5–456.

If the witness resides out of the state, but his deposition can be taken within the county where suit is pending, it may be taken on notice, and need not be by commission: *Anderson v. Easton*, 16–56.

SEC. **4686. By consent.** By the written consent of parties, depositions may be taken in either method, and without any reason therefor being made

to appear, and before any person designated in the agreement. [C. '73, § 3724; R., § 4068; C. '51, § 2448.]

SEC. **4687. On notice.** When the deposition is taken upon notice, it must be before some person authorized to administer oaths, or agreed upon by the parties, and notice of the name of the witness, and the time when, the place where and the person before whom it is to be taken shall be given to the opposite party. [C. '73, §§ 3721–2; R., §§ 4065–6; C. '51, §§ 2445–6.]

SEC. **4688. Not on election day or holiday, etc.** No party shall be required to take depositions on notice on the day of the general election, nor on any of the days on which appearance in an action cannot by law be required, nor during a term of the court in which the action is pending, unless such court, upon written motion, in furtherance of justice, shall so order. If notices are given in the same case by the same party of the taking of depositions at different places upon the same day, they shall be invalid. [C '73, §§ 3722, 3730; R., §§ 4066, 4073; C. '51, §§ 2446, 2453.]

SEC. **4689. On commission—notice—interrogatories.** A party wishing to take a deposition by commission may serve on the opposite party a notice that, on a day named, a commission will issue from the office of the clerk of the court in which the action or proceeding is pending, or in a case in a justice's court, from the office of the clerk of the district court of the county, directed to any of the officers or persons enumerated in the following section, specifying the officer or person, for the taking of such depositions on written interrogatories to be filed with the clerk, a copy of which must accompany and be served with said notice. Such notice shall give the name of the witness whose deposition is thus to be taken. [C. '73, § 3727; R., §§ 4071, 4092; C. '51, §§ 2450, 2465.]

SEC. **4690. Who may act as commissioner.** Such commission may issue to the clerk or any judge of any court of record, or any commissioner appointed by the governor of this state to take acknowledgments of deeds in another state, or any notary public, or any consul or consular agent of the United States, and such officer may be designated in the notice and in the commission, either by the name of office of such officer or by his individual name and official style; or the commission may issue to any person designated by the court for that purpose or agreed upon by the parties, such person being named in the notice. If the commission issues to any officer or person for the taking of the deposition in any of the United States or in Canada, the name of the state and county in which the deposition is to be taken shall be specified in the notice and commission; otherwise, it shall be sufficient to name the state, territory or district, and town or city. [C. '73, § 3725; R., § 4069; C. '51, § 2449.]

A commission directed to "any notary public within and for" any certain county and state is sufficient to comply with the requirements of the statute: *Sheriff v. Hull*, 37–174.

Where the commission was directed "To any notary public in and for Dauphin Co., Pa.," *held*, that the abbreviations used were such as were generally understood and that the deposition was properly admitted: *Gilman v. Sheets*, 78–499.

In a commission to take a deposition in the United States or Canada it is sufficient to name the county and state in which the commissioner resides. It is not necessary to name the city or town: *Lyon v. Barrows*, 13–428.

A mistake in the title of the court of which the commissioner was clerk, and in the name of such clerk, *held* fatal: *Jones v. Smith*, 6–229.

Where the commission was directed to the "clerk of the district court of Morgan county," etc., and the deposition was taken and certified by the "clerk of the court of common pleas" of that county, *held*, that the deposition should have been suppressed: *Plummer v. Roads*, 4–587.

But if it were made to appear in any sufficient manner that there was no district court such as that mentioned in the notice, and that the court of common pleas was a court of the same character and jurisdiction, the objection to the deposition would not be sufficient: *Ibid.*

Where a commission to take depositions was directed "To any notary public in and for the county of Baltimore, the state of Maryland," and the depositions were taken by a person designating himself as "a notary public of the state of Maryland, duly commissioned and qualified, residing in the city of Baltimore and the state of Maryland," *held*, that the depositions should be excluded, and that parol evidence was not admissible to show that notaries public in the city of

Baltimore were notaries for the whole state: *State v. Cross*, 68–180.

It is not proper to select and direct a commission in the alternative to several of the officers mentioned by statute: *Levally v. Harmon's Adm'r*, 20–533.

If a notary before whom depositions are taken is such an officer *de facto*, they cannot be suppressed on the ground that he had not properly qualified and was not such officer *de jure: Keeney v. Leas*, 14–464.

SEC. **4691. Officer within limits of jurisdiction.** None of the above named officers are permitted to take the depositions aforesaid by virtue of a commission directed to him merely as such officer, unless within the limits of his official jurisdiction. [C.'73, § 3726; R., § 4070; C.'51, § 2450.]

SEC. **4692. Cross-interrogatories.** At or before the time fixed in the notice for the issuance of the commission, the opposite party may file cross-interrogatories. If cross-interrogatories are not filed, the clerk shall file the following:

1. Are you directly or indirectly interested in this action? and, if interested, explain the interest you have;

2. Are all your statements in the foregoing answers made from your personal knowledge? and, if not, do your answers show what are made from your personal knowledge, and what are from information, and the source of that information? if not, now show what is from information, and give its source;

3. State everything you know concerning the subject of this action favorable to either party. [C.'73, § 3728; R., § 4072; C.'51, § 2452.]

SEC. **4693. Oral cross-examination.** When notice is served of taking a deposition on commission, the adverse party may elect to appear and orally cross-examine the witness, and, if he so elects, he shall serve written notice of his election on the opposite party or his attorney at least one day before the date on which the commission is to be issued; and if such notice is given, then, before said commission shall issue, the party suing out the same shall deliver to the adverse party or his attorney a written statement, giving the name and address of the commissioner, the place, and, if in a city, the street and number, and the day and hour of taking the deposition. Such statement must be delivered to said adverse party or his attorney five days before the date fixed for taking the deposition, if taken within the state; if taken elsewhere, one additional day for every three hundred miles distance between the place where the commission issues and where the deposition is to be taken. If the adverse party elects to cross-examine the witness orally, the party suing out the commission may waive his written interrogatories and appear and orally examine the witness. Except as otherwise provided in this section, the provision relating to taking depositions on notice shall be followed in taking that part of the deposition which is taken by oral examination. [26 G. A., ch. 74.]

SEC. **4694. Form of commission.** On the day fixed in the notice, the commission may issue in the name of the court and under its seal, with the signature of the clerk, and need contain only a statement of the case and court in which the testimony is to be used, the authority conferred upon the commissioner, who shall be designated as hereinbefore provided, and instructions to guide him in the taking of the deposition. The interrogatories and cross-interrogatories filed by the respective parties are to be appended to such commission. [C.'73, § 3734; R., § 4078; C.'51, § 2455.]

It is not essential that the notice and interrogatories be on file in the clerk's office on the day fixed for the commission to issue. The opposite party having been served with a copy of the interrogatories, the filing of the original interrogatories is not necessary to enable him to file his cross-interrogatories. A delay of seven days in issuing a commission after the date fixed in the notice, *held* not such a defect as to warrant the exclusion of the deposition when taken: *Bonney v. Cocke*, 61–303.

If it be shown that the commission is issued by the clerk, under the seal of the court, it will be presumed to have issued by authority of the court, which, for all practical purposes is the same as if it had issued in its name: *Plummer v. Roads*, 4–587.

Where a commission was sent to the witness, who delivered it to the proper officer, *held*, that in the absence of any showing of prejudice there was not error in overruling a motion to suppress the deposition: *Phelps v. Walkey*, 84–120.

SEC. **4695. In justice's court.** If the action in which it is desired to take a deposition on commission is pending in a justice's court, the commission shall issue from the office of the clerk of the district court of the county, or of the superior court, if there be one in the same township, on such notice as is required in suing out a commission in a case pending in such court. When such deposition is returned to the clerk of the court from which the commission issued, he shall deliver it personally or forward it by mail to the justice before whom the action is pending. [C.'73, § 3737; R., § 4081; C.'51, § 2458.]

SEC. **4696. Service of notice.** The notice of taking depositions by either of the methods provided may be served personally upon the opposite party or his attorney of record, in the same manner as an original notice in a civil action, except by publication, or such service may be accepted by the party or his attorney. [C.'73, §§ 3731–2; R., §§ 4074–5.]

In a case in which a sheriff is a party, his deputy is disqualified from acting, and service of notice to take depositions made by such deputy is illegal, and the depositions taken in pursuance of such notice should be suppressed: *Gollobitsch v. Rainbow*, 84–567.

SEC. **4697. By filing in clerk's office.** If the party sought to be served with notice is a nonresident, or his residence is unknown, or in case of default, and the party has no attorney of record who is a resident of the state, the notice of the taking of depositions or suing out a commission therefor may be served by filing such notice, or such notice with a copy of the interrogatories attached, with the clerk of the court in which the action or proceeding is pending, ten days before the taking of the depositions or the issuance of the commission, as the case may be. [C.'73, § 3733; R., § 4076.]

Depositions taken upon such notice as here provided are admissible on a retrial of the cause after default is set aside, as provided in § 3796. The fact that such depositions were taken without any cross-examination by defendant will not exclude them: *Watson v. Russell*, 18–79.

SEC. **4698. Length of notice.** The notice of taking a deposition by either of the methods, except as otherwise provided shall be, when served on the attorney, at least ten days, and upon the party within the county where the deposition is to be taken or the commission sued out, at least five days. If served upon the party outside such county, the length of time shall be that required in serving an original notice. If depositions are to be taken upon notice, whether served upon the attorney or party, one day in addition to the time hereinbefore specified must be allowed for every one hundred miles travel from the place where it is served to where the deposition is to be taken. [C.'73, § 3730; R., § 4073; C.'51, § 2453.]

When service is on a party, the additional days for the distance of travel as provided by statute are to be added to the five days; and, in all cases, in computing the time, the first day is to be excluded, and the last included: *Richardson v. Burlington & M. R. R. Co.*, 8–260.

The five days' notice referred to by statute is not intended to mean five clear days: *Bonney v. Cocke*, 61–303.

Where it does not appear that any travel is necessary from the place where the party lives or the place where notice is served to the place where the deposition is to be taken, it should not be suppressed for insufficiency of notice on account of want of allowance for time of travel: *Adams v. Peck*, 4–551.

The provisions of this section, with reference to the time of notice, relate to the county in which the depositions are to be taken and not to the county in which the action is pending: *Kennedy v. Rosier*, 71–671.

The county referred to in this section is not the county in which the depositions are to be taken, but the county from which the commission is to issue: *Cook v. Gilchrist*, 82–277.

SEC. **4699. Method of taking.** The person before whom depositions are taken must cause the interrogatories propounded, if oral, to be written out, if written to be stated by number, and the answers thereto inserted immediately thereunder. The answers must be in the language, as nearly as practicable, of the witness. The whole, being read over by or to the witness, must be subscribed and sworn to by him in the usual manner. [C.'73, § 3735; R., § 4079.]

A deposition in which the questions and answers were written out by the attorney of one of the parties was held to have been properly suppressed, where it appeared that the opposite party was not present and did not consent thereto: *Hurst v. Larpin*, 21–484.

Where the notice stated that the deposition would be taken between the hours of 9 o'clock a. m. and 6 p. m., and it was in fact completed and the witness was gone before 11 a. m., at which time the attorney for the opposite party was present to examine the witness, *held*, that it was receivable in evidence, no showing of bad faith or improper conduct being made, and it not appearing what the opposite party expected to prove by his cross-examination: *Scharfenburg v. Bishop*, 35-60.

The fact that the interrogatories attached to the commission are not written out by the notary and the answers of the witness written thereunder will not necessarily render the depositions invalid, where the interrogatories are numbered and the answers show by number the interrogatory to which each answer is intended to apply: *Giles v. Paxson*, 36 Fed., 882.

In a particular case, where in taking depositions the question was asked, "In whose care was the car-load, claimed for in this action, sent to Chicago," and the notary inadvertently wrote, "In whose car," *held*, that the mistake was not prejudicial: *Richmond v. Sunburg*, 77–255.

A person before whom depositions are to be taken may cause the examination to be written out by another: *Tuthill Spring Co. v. Smith*, 90–331.

SEC. **4700. Certificate.** The officer taking the deposition shall attach thereto his certificate that the testimony of the witness was correctly and fully written down by him, or by a disinterested person named therein, under his direction and in his presence, and was read over by the officer to such witness and signed and sworn to by the witness in the officer's presence; any exhibits offered and identified shall be referred to in the certificate as thus identified, and the certificate shall show that the same or a true copy thereof is attached to and returned with the deposition. When the oath is administered to the witness by some other person, the officer's certificate shall recite such fact, stating his name and official character. [C.'73, §§ 3736–7; R., §§ 4080–1; C. '51, §§ 2457–8.]

Exhibits: A deposition should not be suppressed because of failure to attach as exhibits certain deeds and notes incidentally referred to by the witness, but not in his control or forming the basis of the action, and about the contents of which there is no dispute: *Lyon v. Barrows*, 13–428.

A witness may embody in his deposition, by way of exhibit, answers made in another deposition, although the opposite party was not a party to the taking of such other deposition: *Bixby v. Carskaddon*, 63–164.

Where the deposition shows that the witness refers to a deed, it is proper for the notary to return a copy thereof attached to the deposition: *Giles v. Paxson*, 36 Fed., 882.

Copies of letters produced before the commissioner taking the deposition and thus incorporated into the deposition by copy, are admissible: *Bullis v. Easton*, 65 N. W., 395.

Certificate: The certificate of the officer must show that the requirements of the statute with relation to the taking of depositions, such as, for instance, that the deposition has been read to the witness before signing, have been complied with; and *held*, that a certificate merely showing the fact of signing and swearing, and the time and place thereof, was not sufficient: *Ball v. Sykes*, 70–525.

The person executing the commission and making a return of his doings should appear to be the person commissioned, and should so appear of record from the certificate appended to and returned with the commission; but where the commission was issued to *Fred. R——*, and the certificate was signed *F. A. R——*, *held*, that the presumption that the commission was sent to the person named therein, and the certificate signed by a name which might be that of the person to whom it was sent, were sufficient to show that the commission was properly executed; also *held*, that the re-issuance of the commission on an order of the court, in order that the proper return might be made, was not error, no prejudice being shown: *Byington v. Moore*, 62–470.

Where it appears from the caption of a deposition that it was taken before the proper officer, in the proper county, and that the witness was first duly sworn, and from the certificate that the deposition was read over by said witness, and subscribed and sworn to by said deponent therein, it sufficiently appears that the statute has been complied with: *Vaughn v. Smith*, 58–553.

The officer taking the deposition may, if his certificate is defective in not showing facts essential to render the deposition receivable in evidence, return an amended certificate, which, in the absence of any showing or complaint that it does not state the facts, may be accepted as true, and this may be done even after the filing of a motion to suppress the deposition for the defects in the first certificate: *McKinley v. Chicago & N. W. R. Co.*, 44–314.

The notary's certificate should be authenticated with his seal: *Stephens v. Williams*, 46–540.

Where it was stipulated that a person named should act as commissioner in lieu of a notary, and that the witnesses should be sworn by competent authority and the depositions taken by the person named, and when filed have the same force and effect as depositions taken in the ordinary way, *held*, that

the objection that the depositions were not properly certified or signed would not be sustained: *Shoemake v. Smith*, 80–655.

Certificate to depositions in particular cases, *held* sufficient: *Ingram v. Wakernagel* 83–82; *Giles v. Paxson*, 36 Fed., 882.

SEC. **4701. Oath administered.** If the deposition is taken in the state before a person not authorized to administer oaths, or out of the state not before an officer enumerated in and allowed by this chapter so to do, the witness must be sworn by some one who has that authority.

SEC. **4702. Taking in shorthand.** The deposition may be taken in shorthand, in which case the certificate of the person taking it on notice or commission must show that the testimony of the witness was correctly taken down in shorthand, and was correctly extended, and that the notes of his testimony or such extension thereof was read over to the witness, and signed by him and sworn to, if within the state before a person authorized to administer oaths, and if without the state before one of the officers authorized to take depositions outside of the state, and such extension, together with the shorthand notes, if signed and sworn to, must be returned as the deposition. Any one taking depositions in shorthand shall first take and subscribe an oath to take down and transcribe correctly such testimony, and shall certify that his translation thereof is full, true and complete. [25 G. A., ch. 94.]

SEC. **4703. Authentication of official character.** When depositions are taken before an officer not having a seal, unless so done by agreement of parties, his signature and official character must be authenticated by the certificate of the clerk of a court of record under its seal, or that of the officer having in charge the seal of state. If taken before an officer having a seal, whether in or outside the state, the certificate of the officer under such seal shall be received as presumptive evidence of the genuineness of the signature and of his official character. [C. '73, § 3742; R., § 4086; C. '51, § 2462.]

SEC. **4704. Neither party present at taking on commission.** Where a deposition is taken upon written interrogatories alone, neither party, nor his agent or attorney, shall be present at the examination of the witness, unless both parties are present or represented by an agent or attorney, and the certificate shall state such fact if a party or his agent is present. [C. '73, § 3738; R., § 4082.]

Where the statutory provision, that neither a party nor his agent nor attorney shall be present at the examination of a witness whose deposition is taken upon written interrogatories unless both parties are present or represented, has been violated, prejudice will be presumed to result therefrom, at least in the absence of a showing to the contrary: *Sheriff v. Hull*, 37–174.

The statute does not require the certificate to show the fact when neither party nor agent is present; and where the certificate is silent as to the fact and there is no evidence to the contrary, it will be presumed that the requirements of the law have been observed: *Turner v. Hardin*, 80–691.

Where it appears that the depositions were reduced to writing by another person than the notary and in his presence, it will not be presumed that such other person was the agent or attorney of the party unless that fact appears: *Cook v. Gilchrist*, 82–277.

SEC. **4705. Transmission.** The deposition duly certified as hereinbefore required, with the commission and interrogatories, if taken on commission, must be sealed up and deposited by the person taking it, within thirty days, with the clerk of the proper court, or transmitted to him by mail or express, unless some other mode be agreed upon between the parties. [C. '73, § 3737; R., § 4081; C. '51, § 2458.]

SEC. **4706. Indorsement.** The deposition, when prepared for filing with or return to the clerk, must be indorsed, on the outside of a sealed envelope in which it is inclosed, with the title of the cause in which it is to be used. [C. '73, § 3740; R., § 4084; C. '51, § 2460.]

SEC. **4707. Opened — custody.** When thus returned, it must be opened by the clerk and placed on file in his office, after which he shall at any time furnish any person with an attested copy of the same upon payment of the customary fees, but must not allow it to be taken from his office previous to the next term of the court, unless by the written consent of all of the parties. [C. '73, § 3739; R., § 4083; C. '51, § 2459.]

Failure of the clerk to make entry on the appearance docket of the fact of filing a deposition will not prevent its being introduced in evidence: *Byington v. Moore*, 62–470.

Where depositions were allowed to be taken out in violation of such provision, but for an honest purpose, and the violation was merely technical and without prejudice, *held*, that the subsequent admission of the deposition in evidence was not sufficient error to warrant a reversal: *Wolverton v. Ellis*, 18–413.

It is not a ground for suppression of a deposition that it has been taken from the clerk's office by the attorney of the opposite party during the next term of court after filing: *Hogaboom v. Price*, 53–703.

A deposition taken by one party may be introduced in evidence by the other: See notes to § 4711–12.

SEC. **4708. Unimportant deviations.** Unimportant deviations from any of the above directions shall not cause the deposition to be excluded, where no substantial prejudice could be wrought to the opposite party thereby, and by order of court it may be returned to the officer taking the same for correction and amendments as to formal matters. [C.'73, § 3741; R., § 4085; C.'51, § 2461.]

A mistake merely clerical in the date named in the caption, *held* not sufficient to exclude the deposition; but a mistake in the commission as to the title of the court of which the commissioner was clerk, and in the name of the clerk, *held* fatal: *Jones v. Smith*, 6–229.

The fact that the notice and commission stated the name of the witness in full, while the deposition only set out the initials of his first name, *held* not sufficient to justify the suppression of the deposition: *Grimes v. Martin*, 10–347.

Section applied: *Giles v. Paxson*, 36 Fed., 882.

SEC. **4709. Deposition to show reason for taking.** The deposition in all cases, unless the record discloses a cause for the taking, must show that the witness is a nonresident of the county, or such other fact as renders its taking legal, and no such deposition shall be read on the trial if, at the time, the witness himself is produced in court. [C.'73, § 3743; R., § 4087; C.'51, § 2463.]

Whether the reason shown for taking the deposition is a valid one or not, if objection is not made to the taking, it may be read if the witness is not in court: *Cook v. Blair*, 50–128.

If the deposition shows that the witness is a nonresident, that is sufficient, although the witness states that he expects to be present at the trial; and unless he is actually present the deposition should not be excluded: *Nevan v. Roup*, 8–207.

Where the ransom given for taking a deposition was that the witness did not expect to be able to attend the next term of court, but the cause did not come on for trial until the second term of court after the deposition was taken, *held*, that it was improper to admit such deposition in evidence without a showing of some reason why witness was not present at the trial: *Sax v. Davis*, 71–406.

SEC. **4710. On appeal from justice.** Depositions taken to be used in a justice's court shall be transferred to the court to which the cause is appealed, and used on the trial of such appeal. [C.'73, § 3744; R., § 4093; C.'51, § 2466.]

Objections to depositions other than for incompetenty or irrelevancy should be made in the justice's court, and should not be sustained if made for the first time on appeak *Alverson v. Bell*, 13–308.

SEC. **4711. Notice of filing.** Upon the filing of a deposition in the clerk's office, he shall, on the day it is filed, mail to the attorney of each party to the action, directed to his post-office address, a notice thereof, reciting the title of the case, names of witnesses, and the date of filing. If the post-office address of any such attorney is unknown to the clerk, the notice shall be addressed to him at the post-office where the cause is pending for trial. [17 G. A., ch. 26; C.'73, § 3751.]

SEC. **4712. Exceptions.** If a deposition is filed three days or more prior to noon of the second day of a term, no exceptions thereto, other than for incompetency, irrelevancy or immateriality, shall be regarded, unless made by motion and filed by that time; if a deposition is filed thereafter or during a term, such exception shall be filed by noon of the third day after such filing, but all such exceptions or motions to suppress such depositions must be made before the cause is reached for trial. [Same.]

Objection: An objection that a question propounded to the witness on the taking of his deposition is leading cannot be taken after the deposition is returned into court and offered in evidence. It should be made when the deposition is taken: *Keeney v. Chilis*, 4 G. Gr., 416; *Mumma v. McKee*, 10–107.

The better rule is to require that objections to the form of interrogatories proposed, where the deposition is to be taken by commission, should be made before the commission issues: *Jones v. Smith*, 6–229.

Section applied: *Shakman v. Potter*, 66 N. W., 1045.

Motions to suppress depositions are to be made before the commencement of the trial: *Frazier v. Smith*, 10–591; *Bays v. Herring*, 51–286.

Such requirement as to time for filing exceptions is applicable to the objection that questions in the deposition are improper or do not call for the best evidence: *Nelson v. Chicago, R. I. & P. R. Co.*, 38–564.

Where motion to suppress depositions was made after the second day of the term on the ground that it did not appear that neither the party nor his agent or attorney was present, *held*, that the objection was made too late: *Turner v. Hardin*, 80–691.

This requirement is applicable to a motion to suppress a portion of a deposition on the ground that it is not proper cross-examination. The mere noting of the objection on the deposition at the time it is taken is not sufficient: *Johnson v. Chicago, R. I. & P. R. Co.*, 51–25.

This statutory provision *held* applicable to an objection that the statutory cross-interrogatories were not answered in a deposition taken upon commission, and also where it was objected that copies of notes referred to in the answers were not attached: *Harris Mfg. Co. v. Marsh*, 49–11.

An entry in the notice book of the court purporting to show the filing of depositions which are not actually filed will not limit the time of filing motion to suppress such depositions; and such motion may be made after the case has been called for trial where the depositions have not previously been filed: *Accola v. Chicago, B. & Q. R. Co.*, 70–185.

An objection to a deposition for defect in the notice, first interposed when it is offered in evidence on the trial, will not be regarded, although exception was taken to the notice before the commission issued: *Pilmer v. Branch of State Bank*, 16-321.

Where the attorney, on the day that the cause was called for trial, asked time in which to file objections, and it appeared that the depositions had been on file more than thirty-six hours, and it did not appear but that the attorney had had knowledge of such fact, *held*, that his application was properly overruled: *Byington v. Moore*, 62–470.

Objection to the admissibility of the evidence of a witness who is incompetent, as where a husband or wife is called to testify against the other, should be made at the time the witness is called, and is too late if not interposed until the end of the deposition or when it is offered to be read in evidence on the trial: *Watson v. Riskamire*, 45–231; *Greedy v. McGee*, 55–759.

Objections to interrogatories and answers thereto in a deposition may be first made when the same are offered in evidence upon the trial in case the witness is only prohibited from testifying with respect to some particular matter, but is otherwise competent: *Winters v. Winters*, 71 N. W., 184.

Where, as soon as it was apparent in the course of taking a deposition that certain testimony therein was incompetent, the opposite party moved to strike such testimony out, and had such motion entered by the notary taking the deposition, *held*, that the objection was taken in time and might be considered: *Leather v. Ross*, 74–630.

An objection to the competency of the deposition, where the witness is claimed to be incompetent because the action is by an administrator, made at the time of the trial, cannot be considered where the same deposition has been received in a previous trial in the same case without objection: *McMillan v. Burlington & M. R. R. Co.*, 56–421.

An objection to testimony on the ground that it relates to a personal transaction between the witness and decedent in an action by or against an administrator is an objection to competency, and therefore not within the statutory provision requiring that objections other than for incompetency or irrelevancy shall be made on the second day of the first term after the deposition is filed: *Burton v. Baldwin*, 61–283.

The objection that the witness, although examined before a notary public in this state, is not a resident of this state, must be deemed waived if not taken when the residence of the witness is first disclosed; and where the counsel for the adverse party has been present and interposed no objection to the taking of the deposition until it has been signed, the objection cannot be maintained: *Burrows v. Stryker*, 47–447.

Objection to a part of the deposition on the ground that it is not proper cross-examination is too late if not made until the deposition is offered in evidence: *Bixby v. Carskaddon*, 63–164.

Where exceptions to questions and answers were filed with the notary taking the deposition, but it did not appear that the same were brought to the attention of the court within the time required by statute, *held*, that they could not afterwards be relied upon: *Neimeyer v. Cass County Bank*, 42–124.

Where a deposition is taken for use in a justice's court, objections thereto other than for incompetency or irrelevancy should be made in the justice's court, and cannot be made for the first time when the case is tried on appeal: *Alverson v. Bell*, 13–308.

An objection relating to the legality of the proof at the time it is offered cannot be required to be made at the time of taking the deposition: *Horseman v. Todhunter*, 12–200.

Exclusion of depositions: The mere fact that depositions in an equity case are filed after the time within which by order of the court the party has been required to file them is not sufficient ground for striking them from the files in the trial of the case: *Sweet v. Brown*, 61–669.

It will not constitute reversible error that a deposition is received which is taken

after the time allowed to the party for taking depositions, when it appears that additional time was also allowed to the other party for the same purpose: *Gardner v. Trenary*, 65–646.

Objections that depositions were not taken and filed within the time allowed for the purpose must be made promptly, and where two terms of court were allowed to elapse between the filing of the depositions and the filing of a motion to suppress such deposition, *held*, that the motion was properly overruled: *Tuthill Spring Co. v. Smith*, 90–331.

A deposition should not be excluded unless objection is made thereto: *Crick v. McClintic*, 4 G. Gr., 290.

A general objection to a deposition, a portion of which is properly admissible, is insufficient: *Whitaker v. Sigler*, 44–419.

The overruling of a motion to suppress a deposition is error without prejudice where the witness testifies in person on the trial and such testimony is more favorable to the party complaining than that contained in the deposition: *Curry v. Allen*, 60–387.

Striking out portion of deposition: The court cannot, upon motion, strike out a portion of an interrogatory in a deposition, leaving the answer standing: *Pelamourges v. Clark*, 9–1.

A question and answer in a deposition should not be supressed entirely where they are proper as to one matter referred to therein, but embrace something which is improper: *Adae v. Zangs*, 41–536.

Matters stated in answers to interrogatories in a deposition, *held* to be such as not called for by the question and therefore subject to be stricken out on motion: *Hendricks v. Wallis*, 7–224.

The rule requiring an answer to be responsive to the interrogatory should be substantially enforced: *McCarver v. Nealey*, 1 G. Gr., 360.

Correction: A deposition cannot be corrected on application supported by affidavit. *Groves v. Clark*, 69 N. W., 1046.

Introduction of deposition: A deposition need not be introduced by the party taking it, but the other party may introduce it if he so desire: *Hale v. Gibbs*, 43–380; *Wheeler v. Smith*, 13–564; *Pelamourges v. Clark*, 9–1, 16; *Crick v. McClintic*, 4 G. Gr., 290.

Depositions properly taken may be introduced by either party for the purpose of establishing any material point in the case: *Brown v. Byam*, 65–374.

Where a stipulation was entered into by the parties to the effect that plaintiff might introduce and use in his own behalf a deposition in another case to which defendant was not a party, *held*, that under such stipulation defendant was not entitled to introduce in evidence such deposition: *Borland v. Chicago, M. & St. P. R. Co.*, 78–94.

Where the deposition of plaintiff was taken in his own behalf before the first trial of the case, and the parties entered into a written agreement that it might be used in evidence in the trial of the cause, but plaintiff, being present at the trial, testified orally, and at the second trial, plaintiff not being present, the deposition was read, *held*, that as the agreement did not prescribe when the deposition should be read, it was properly admitted: *Nelson v. Chicago, M. & St. P. R. Co.*, 77–405.

A stipulation that a deposition when taken shall be receivable in evidence upon the trial of any case pending in the court named, between the same parties, will render a deposition taken in one such case admissible in any other: *Holmes v. Budd*, 11–186.

The party on whose behalf a deposition has been taken cannot read a portion thereof and omit other portions. The entire deposition, so far as competent and pertinent, should be read or none: *Kilbourne v. Jennings*, 40–473.

A deposition taken by a party is under his control, and, although he cannot withdraw it from the files, he can withhold it at pleasure, or any part of it, but the opposite party may introduce it in evidence if he sees fit, or a portion thereof not introduced by the party taking it: *Hale v. Gibbs*, 43–380.

It is not error to allow a party to read a portion of the deposition of the opposite party, taken by him, where it contains an admission: *Van Horn v. Smith*, 59–142.

One party may introduce a deposition taken by his adversary, but which such adversary declines to introduce. If the witness has been examined as to different transactions, a party introducing the deposition may introduce such portions of it as touch one or more portions of the transaction, and decline to introduce it as to others. But he cannot be permitted to introduce a portion of it as to any given subject while declining to introduce all that the witness has said upon that subject: *Citizens' Bank v. Rhutasel*, 67–316.

Depositions taken in a former action may be introduced in a subsequent action between the same parties without notice that such depositions will be offered in the subsequent action: *Shaul v. Brown*, 28–37.

Depositions taken in one action may be used in a subsequent action between the privies of the parties to the former action: *Atkins v. Anderson*, 63–739.

But a party should not be permitted to use depositions upon the trial of one cause which have been taken in another without having filed them in the cause for which he proposes to use them or obtained leave before the commencement of the trial to so use them. Otherwise the opposite party would not have the opportunity which the statute contemplates of taking exception to such depositions: *Searle v. Richardson*, 67–170.

Where the court refused to allow the introduction, after the close of the testimony of both parties, of a deposition received by mail after the close of the evidence, *held*, that as it did not appear that in other respects the deposition was admissible, the action of the court in excluding it was not shown to be erroneous: *Gorman v. Minneapolis & St. L. R. Co.*, 78–509.

SEC. **4713. Hearing.** The court shall, on motion of either party, hear and decide the questions arising on exceptions and motions to suppress depositions before the commencement of the trial. [C. '73, § 3752; R., § 4090.]

SEC. **4714. Errors waived.** Errors of the court in its decision upon exceptions to depositions are waived, unless excepted to. [C.'73, § 3753; R., § 4091.]

SEC. **4715. Fees for taking.** Any officer or person taking depositions is authorized to charge therefor ten cents per hundred words, exclusive of the certificate; for administering an oath to each witness, five cents; for certifying to the administration of the oath to and signature of the deposition by each witness, twenty-five cents; and for the certificate to the deposition or depositions, twenty-five cents, the charge for such certificate including the affixing of the seal thereto, if the person certifying is an officer having a seal; for issuing a subpœna for a witness, twenty-five cents; for certifying to a court the failure of a witness to respond to a subpœna, or his refusal to answer questions or to sign and swear to his deposition, twenty-five cents, with ten cents per hundred words for copies of papers required to be certified in such a case. [C.'73, § 3835; R., § 4160; C.'51, § 2552.]

Where depositions are taken out of the state, the fees to be taxed therefor are those which are allowable under this section and not such fees as the officer is entitled to in the state where the depositions are taken: *McNider v. Sirrine*, 84–745.

SEC. **4716. Witness fees.** A witness appearing before an officer directed to take his deposition is entitled to the same fees and mileage as a witness in the court in which the deposition is to be used. If subpœnaed, such a witness is entitled to his fees and mileage in advance, as in other cases.

SEC. **4717. Costs.** In all cases of taking depositions, the taxable costs thereof must be paid in the first place by the party at whose instance they are taken, subject, like other costs, to be taxed against the failing party in the action. [C.'73, § 3754; R., § 4100; C.'51, § 2474.]

The costs to be taxed are the fees allowed by the statute in this state, and not the fees allowed according to the laws of the state where the depositions are to be taken, if taken out of the state: *McNider v. Sirrine*, 84–745.

SEC. **4718. Perpetuating testimony.** The testimony of a witness may be perpetuated in the following manner: The applicant must file in the office of the clerk of the district or superior court a verified petition, which shall set forth the subject-matter relative to which testimony is to be taken, the names of the persons interested, if known, and, if not, such general description as he can give of such persons, as heirs, devisees, alienees, or otherwise. It must also state the names of the witnesses to be examined, the interrogatories to be propounded to each, that the applicant expects to be a party to an action in a court of the state, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where he expects to be the plaintiff. [C.'73, §§ 3745–6; R., §§ 4094–5.]

Where, in a proceeding to perpetuate testimony, the petition stated the name of the person interested as the "C., B. & Q. R. R. Co.," *held*, that it was not a sufficient designation of the corporation whose name was the "Chicago, Burlington and Quincy Railroad Company" so as to render the evidence taken in such proceeding afterwards admissible as against such corporation: *Accola v. Chicago, B. & Q. R. Co.*, 70–185.

SEC. **4719. Order of court or judge.** The court, or the judge thereof, may, if the occasion for taking the deposition be a proper one, make an order allowing the examination of such witnesses, which shall prescribe the time and place of the examination, how long the parties interested shall be notified thereof, and the manner in which they shall be notified. [C.'73, § 3747 R., § 4096.]

SEC. **4720. Cross-interrogatories.** When it satisfactorily appears to the court or judge that the parties interested can not be personally notified, such court or judge shall appoint a competent attorney to examine the petition and prepare and file cross-interrogatories to those contained therein. The witnesses must be examined upon the interrogatories of the applicant, and any cross-interrogatories filed by or for parties, and no others shall be propounded to them; nor shall any statement be received which is not

responsive to some of them. The attorney filing the cross-interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs. [C. '73, § 3748; R., § 4097.]

SEC. **4721. Before whom taken.** Such deposition shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and returned to the clerk's office of the court in which the petition is filed, the method of taking and verifying the same being the same as that provided for in case of depositions in an action, so far as applicable. [C. '73, § 3749; R., § 4098.]

SEC. **4722. Costs.** The costs of taking the deposition, including those incurred in the proceeding for securing them, shall be paid in the first instance by the party causing them to be taken.

SEC. **4723. Filing—use.** The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained as required; but such depositions shall be subject to the same objections for irrelevancy, incompetency or immateriality as may be made to depositions taken pending an action. [C. '73, § 3750; R., § 4099.]

PART FOURTH.

CODE OF CRIMINAL PROCEDURE.

TITLE XXIV.

OF CRIMES AND PUNISHMENTS.

CHAPTER 1.

OF OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

SECTION **4724. Treason.** Whoever within the jurisdiction of the state levies war against it, or adheres to its enemies, giving them aid and comfort, is guilty of treason, and shall be punished by imprisonment in the penitentiary at hard labor for life. [C.'73, § 3845; R., § 4188; C.'51, § 2565.]

SEC. **4725. Misprision of treason.** If any person have knowledge of the commission of said crime of treason, and does not as soon as may be disclose such offense to the governor or some judge within the state, he is guilty of misprision of treason, and shall be fined not exceeding one thousand dollars, or be imprisoned in the penitentiary not exceeding three years, nor less than one year. [C.'73, § 3846; R., § 4189; C.'51, § 2566.]

SEC. **4726. Evidence.** No person can be convicted of the crime of treason except upon the evidence of at least two witnesses to the same overt act, or on confession in open court. [C.'73, § 3847; R., § 4190; C.'51, § 2567.]

CHAPTER 2.

OF OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

SECTION **4727. Murder.** Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. [C.'73, § 3848; R., § 4191; C.'51, § 2568.]

Human being; infant unborn: An infant in the womb is not a human being within the meaning of this section; certainly not before it is quick: *Abrams v. Foshee*, 3-274.

An infant does not become possessed of independent life in such sense as to be subject of homicide until independent circulation has been established: *State v. Winthrop*, 43-519.

It is not necessary that an indictment for murder should allege that the deceased was a human being: *State v. Stanley*, 33-526, 531.

Malice aforethought: In murder of either degree there must be malice aforethought, express or implied: *State v. Johnson*, 8-525; *Fouts v. State*, 4 G. Gr., 500.

Malice aforethought is essential to the crime of murder, but it is not necessary that it should have existed for any considerable length of time. It is sufficient if it existed for any length of time before the commission of the act: *State v. Decklotts*, 19-447; *State v. Hockett*, 70-442; *State v. Sopher*, 70-494.

Malice inferred: Malice may, as at common law, be implied in case of homicide from any act unlawful and dangerous in its nature, unjustifiably committed. Therefore, *held*, that, independently of § 4759, death caused in an unlawful attempt to procure an abortion was murder in the second degree: *State v. Moore*, 25-128.

Persons conspiring to do an unlawful act

which is a trespass only will be guilty of murder only when death results in the prosecution of the design; but if the unlawful act be a felony, or more than a trespass, death resulting will be murder in all, although it happen beside the original design: *State v. Shelledy*, 8–477, 505.

Use of deadly weapon: The malice implied by the use of a deadly weapon is malice aforethought, such as will sustain a conviction for murder. Malice may be inferred from the deliberate, violent use of a deadly weapon: *State v. Zeibart*, 40–169.

When a man assaults another or uses upon another a deadly weapon in such a manner that the natural, ordinary and probable result of the use of such weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life: *State v. Sullivan*, 51–142; *State v. Hockett*, 70–442.

But it is error to charge the jury that malice is proved by the selection and use of a deadly weapon in a deadly manner without legal excuse. Such fact merely raises a presumption of malice subject to be rebutted: *State v. Townsend*, 66–741; *State v. Perigo*, 70–657.

An instrument may or may not be a deadly weapon, depending upon the manner in which it is used; and in a particular case, *held*, that a stick of wood might be found to be a deadly weapon: *State v. Brown*, 67–289.

Where defendant, a school-boy sixteen years of age, was on trial for homicide for causing the death of a playmate by means of a twenty-two calibre pistol, *held*, that although the size of a cartridge in such a pistol is little larger than a gun cap it was not error to instruct the jury on the theory that such instrument was a deadly weapon: *State v. Sterrett*, 80–609.

Where it appeared that defendant sought a meeting with deceased at which the act was committed by the use of a revolver, *held*, that his having used a revolver tended to indicate that defendant sought the meeting with the intent to take the life of deceased: *State v. Jones*, 64–349.

An instruction that malice would be implied from the unlawful and intentional use of a dangerous or deadly weapon in such manner that the natural consequence of the act would be to destroy the life of another, *held* not erroneous where there was no evidence that the killing was accidental or upon provocation: *State v. Rainsbarger*, 71–746.

The fact that there was a fight before the act of defendant was committed resulting in homicide will not necessarily show that he did not act with malice aforethought: *State v. Dillon*, 74–653.

Cause of death: The fact that deceased was in a feeble condition, so that a blow of less force caused his death than would have been required to take the life of a healthy man, even if that fact is not known to the assailant, will not constitute a defense: *State v. Castello*, 62–404.

It is the province of the jury to determine whether the injury inflicted by defendant upon deceased caused or contributed to the death of deceased. The fact that the deceased was afflicted with a disease which might have proved fatal would not constitute a defense to the charge of murder, nor would ignorance on the part of defendant of the diseased physical condition of deceased excuse defendant's acts: *State v. O'Brien*, 81–88.

Under the circumstances of a particular case, *held*, that it sufficiently appeared that the death of deceased was due to defendant's wrongful acts, and not solely to pre-existing disease: *Ibid.*

If death ensues from a wound given in malice, not in its nature mortal, but which being neglected or mismanaged causes death, this will not excuse the person who gave it, and he will be held to have caused the death, unless he can make it clearly and certainly appear that the maltreatment of the wound or the misconduct of the person wounded, and not the wound itself, was the sole cause of the death: *State v. Morphy*, 33–270.

Where death is caused by the administration of poison, the crime will be murder if the poison is unlawfully administered and without a good intention. Such administration of the poison constitutes the required deliberation, premeditation and intent to kill, and it is immaterial whether or not there is a specific intent to kill: *State v. Wells*, 61–629.

Some participation or complicity in the injury done, or the infliction of some injury, is necessary to render one guilty: *State v. Grinden*, 91–505.

A person who assumes to act as a physician in good faith, with good motives and honest intentions, however erroneous the course of treatment he adopts, is not to be held criminally liable if death results from such treatment: *State v. Schulz*, 55–628.

Under the facts of a particular case, *held*, that the evidence was not sufficient to show that the death of deceased caused by a bullet from a revolver was due to defendant and was not the suicidal act of the deceased, and the conviction of the defendant was, therefore, reversed: *State v. Billings*, 81–99.

An act which accelerates death may constitute homicide even though the person dying would have soon died from other causes: *State v. Smith*, 73–32.

Resisting officer: In a prosecution for murder in resisting an officer, the official character of the officer need not be shown by record evidence. It is sufficient if it is shown that he was acting as officer *de facto*: *State v. Zeibart*, 40–169.

Self-defense: "Justifiable" and "excusable" are synonyms, and it is not error in instructing the jury with reference to self-defense to speak of "justifiable self-defense:" *State v. Row*, 81–138.

In a particular case, *held*, that an instruction with reference to the amount of force to be used in resisting an unlawful arrest was correct: *Ibid.*

In a particular case, *held*, that the evidence was such as to indicate that defendant acted in self-defense and therefore the trial court was in error in not fully instructing the jury on that subject: *State v. Donahoe*, 78–486.

And *held*, that in such instructions the

court should have told the jury that the burden of proof was on the prosecution to prove defendant guilty beyond a reasonable doubt instead of indicating that the burden was on defendant to show that he was excusable by reason of self-defense: *Ibid.*

Where it was claimed that defendant in commiting a homicide had acted in self-defense, *held*, that the instructions of the lower court that the jury should consider the condition of defendant's health, the place where the shooting occurred, the size, age and relative strength of the parties, etc., were sufficient: *State v. Sterrett*, 80-609.

In a prosecution for murder where it appeared that the deceased was in an intoxicated condition and that he had removed his coat and vest for a fight with defendant, and that no weapon was found on his person nor near the place of the conflict, and that he had received six wounds, while there was no evidence that defendant received any injury nor suffered any violence in the fight, *held*, that defendant was not excusable on the ground of self-defense and the jury were warranted in finding a verdict of manslaughter: *State v. Shreves*, 81-615.

Instructions as to self-defense in a particular case considered: *Ibid.*

An instruction containing the expressions "enormous injury," "enormous bodily injury" and "dreadful injury," as indicating the degree of danger defendant must have apprehended before he was justified in taking life in self-defense, *held* not erroneous, as the expressions were used as the equivalent of "great bodily harm:" *State v. Murdy*, 81-603.

An instruction to the effect that, if the defendant sought the place of business of the deceased in order to provoke a quarrel with him, he could not avail himself of the plea of self-defense, though the killing may have been necessary to preserve his own life, *held* not erroneous, as there was evidence upon which to base such instruction: *Ibid.*

The character and reputation of deceased as a quarrelsome, vindictive and dangerous man, and threats made by him against defendant of which the defendant charged with homicide had knowledge, may be proved where the question is whether defendant acted in self-defense: *State v. Donahoe*, 78-486.

Threats against the life of a person charged with a felonous homicide uncommunicated to him at the time of the act are not admissible to show a motive or intent which influenced him to commit it. But if it be uncertain whether the deceased was not the aggressor in the conflict which led to his death, and it is material to determine that fact, evidence of recent threats made by deceased against the life of defendant is admissible, as tending to show that in the fatal encounter deceased was seeking to carry out his threats: *State v. Helm*, 92-540.

Indictment: It is not necessary that an indictment for murder should specifically charge, as at common law, that the defendant murdered the deceased. The use of other words of the same import will be sufficient: *State v. O'Niel*, 23-272.

Although the indictment must charge that the killing was done with malice aforethought, it is not essential that these identical words be used. It is sufficient if words are used of the same import, or if it clearly appears from the language used that malice aforethought is charged, or can, without doubt, be implied: *State v. Thurman*, 66-693.

Therefore, where the indictment charged murder in the second degree, committed by the administration of drugs and the use of an instrument for the purpose of procuring an abortion, and charged these acts as maliciously done, and with the specific intent to produce an abortion, *held*, that malice aforethought was sufficiently charged: *Ibid.*

In an indictment for murder under our statute it is necessary to charge that the homicide was done with malice aforethought: *State v. Newberry*, 26-467.

Words used in the indictment in a particular case, *held* to be equivalent to the expression "malice aforethought:" *State v. Neeley*, 20-108.

In an indictment for murder it is sufficient to aver that the wound was inflicted on the person of deceased, that his death was caused by it, and that the act was within the jurisdiction of the court. The wound need not be more particularly described: *Nash v. State*, 2 G. Gr., 286.

As to what crimes are deemed included in the charge of murder, see notes to § 5407.

Evidence: What the defendant said and did several hours after the commission of homicide cannot be shown in his behalf unless it is claimed that the evidence tends to prove insanity, and if it is so claimed such claim ought to be stated: *State v. Hockett*, 70-442.

Evidence tending to show the character of a mob, and what they contemplated accomplishing, is admissible in the prosecution of one of the number for murder committed in carrying out the plan: *State v. McCahill*, 72-111.

In a particular case, *held*, that the evidence fully supported a verdict of murder in the second degree: *State v. Murdy*, 81-603.

Where defendant was convicted of murder upon circumstantial evidence alone, *held*, that it was the province of the jury to determine the value and the weight of the evidence, and upon appeal the court would not be justified in saying that their verdict should be set aside because it was unsupported by the evidence: *State v. Kennedy*, 77-208.

Previous threats of intention to kill any one who shall resist certain proposed action are admissible in the prosecution for manslaughter in the killing of one who thus resists although the threats were not specific as to any particular person: *State v. Pierce*, 90-506.

Where two persons were killed at the same time, and defendant was put on trial for the murder of one of them, *held*, that the entire conditions and circumstances with reference to both might be shown in evidence although such evidence would tend to prove also the murder of the other: *State v. Dooley*, 89-584.

SEC. **4728. First degree.** All murder which is perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree, and shall be punished with death, or imprisonment for life at hard labor in the penitentiary, as determined by the jury, or by the court if the defendant pleads guilty. [18 G. A., ch. 2, § 1; 17 G. A., ch 165, § 1; C.'73, § 3849; R., § 4192; C.'51, § 2569.]

What constitutes: The distinctive peculiarity of murder in the first degree, as defined by statute, is that it must be accompanied with the premeditated intention to take life. The killing must be premeditated. Wherever, then, in case of deliberate homicide, there is a specific intention to take life, the offense, if consummated, is murder in the first degree. If there is not a specific intention to take life, it is murder in the second degree: *State v. Gillick*, 7-287, 311; *State v. Johnson*, 8-525.

An intention to take life may be presumed from the use of a deadly weapon in a manner in which death would most likely ensue, and proof of such a killing is primary evidence that it is wilful, deliberate and premeditated: *Ibid.*

Premeditation implies more than deliberation. It means to meditate and deliberate before concluding to do the deed; not only to wilfully take life, but to predetermine, to contrive by previous meditation; but no specific time is required for premeditation or deliberation: *State v. Johnson*, 8-525.

The intent must have preceded the killing long enough to admit of premeditation and deliberation. They need not have existed for any particular length of time if previously formed and continuing until the killing: *State v. Soper*, 70-494; *State v. Hockett*, 70-442.

It is not sufficient to charge murder in the first degree that the indictment alleges the killing as wilful and premeditated only: *State v. Boyle*, 28-522.

The indictment must charge that the *killing* was wilful, deliberate and premeditated. The allegation that the assault was so will not suffice: *State v. Knouse*, 29-118; *State v. Thompson*, 31-393.

So, an indictment charging that the assault was wilful, deliberate and premeditated, and that the blow from which deceased died was wilful, deliberate and premeditated, but not charging that it was dealt for the purpose of killing, or that the killing itself was wilful, does not charge murder in the first degree: *State v. McCormick*, 27-402; *State v. Watkins*, 27-415.

The facts to bring the case within the first degree of murder must be set out. Naming the offense in the introductory and closing portions of the indictment as murder in the first degree will not cure the defect. An indictment which would be sufficient at common law for murder is not necessarily sufficient to charge murder in the first degree under the statute: *Ibid.*

Under an indictment for murder in the first degree, as wilful, deliberate and premeditated, evidence is admissible that the crime was committed in the perpetration of robbery: *State v. Johnson*, 72-39.

To constitute the crime of murder in the first degree it is essential that the killing be done with malice aforethought, that it be done wilfully, and also that it be done deliberately and premeditatedly: but if it is charged and proven that the wounds were inflicted with specific intent to kill, and also that they were inflicted deliberately and premeditatedly, it is not necessary that it be charged and proven that the intent to kill was deliberate and premeditated: *State v. Shelton*, 64-333; *State v. Perigo*, 70-657.

A wilful killing is simply an intentional killing, and nothing more is necessary to make the killing wilful except the intended result of the act. It is not necessary, therefore, to charge that the killing was wilful where it is charged that the act causing the homicide was done with the specific intent to kill and murder: *State v. Townsend*, 66-741.

It is not necessary in charging murder in the first degree to use the precise language of the statute. It is sufficient if the words used are fully equivalent: *Ibid.*

The fact that the killing is wilful does not make it murder in the first degree, and an indictment charging wilful killing with malice aforethought would be good as an indictment for murder, but not for murder in the first degree: *State v. Keasling*, 74-528.

An indictment charging an assault with intent to kill, wilfully, etc., and that defendant did thereby, wilfully, etc., inflict a mortal wound of which the deceased then and there did die, sufficiently alleges murder in the first degree although there is no averment that the killing was done wilfully, etc.: *State v. Stanley*, 33-526.

Proof of design to kill at the time of killing would show malice aforethought, but would not show premeditation or deliberation: *Fouts v. State*, 4 G. Gr., 500.

The proof of killing, without more, does does not raise the presumption that such killing was wilful, deliberate and premeditated: *State v. McCormick*, 27-402.

Whether, in case the killing is committed in the perpetration or intent to perpetrate some of the felonies mentioned by the statute, it should be charged as wilful, deliberate and premeditated, *quære: Ibid.*

Premeditation: *Held*, under particular circumstances that the evidence did not sufficiently show premeditation to warrant conviction of murder in the first degree: *State v. Nolan*, 92-489.

Indictment: The jury cannot find the defendant guilty of murder in the first degree when the indictment is only sufficient to charge defendant with murder in the second degree: *Fouts v. State*, 4 G. Gr., 500.

It is prejudicial error to put a party on trial for murder in the first degree under an

indictment charging only murder in the second degree, although the party is only convicted of the lesser offense: *State v. Boyle*, 28–522; *State v. Knouse*, 29–118.

Where, on an indictment not sufficient to charge murder in the first degree, the defendant was found guilty in that degree, and defendant on appeal asked that the sentence be modified to one which would be proper under the indictment for the second degree, the court so reduced the sentence: *State v. McCormick*, 27–402.

But where, in a similar case, defendant denied the sufficiency of the evidence to establish his guilt in any degree, and demanded a new trial, *held*, that he was entitled thereto: *State v. Watkins*, 27–415.

An indictment for murder in the first degree, charging defendant with inflicting a wound "feloniously, deliberately, premeditatedly and with malice aforethought," but not charging, except in the concluding part of the indictment, that the murder was so committed, is not sufficient: *State v. Andrews*, 84–88.

Under an allegation of wilful, deliberate and premeditated killing, evidence is admissible to show that the killing was in the attempt to commit robbery: *State v. Weems*, 65 N.W., 387.

Indictment for murder in a particular case, *held* sufficient: *State v. Dooley*, 89–584.

Poison: Where death is caused by the administration of poison, the crime will be murder if the poison is unlawfully administered and without a good intention. Such administration of poison constitutes the required deliberation, premeditation and intent to kill, and it is immaterial whether or not there is a specific intent to kill: *State v. Wells*, 61–629.

Lying in wait: The expression "lying in wait," used in the statute in defining murder in the first degree, means lying in ambush or concealment: *State v. Cross*, 68–180.

Evidence: In a particular case, *held*, that the evidence, although circumstantial, was sufficient to sustain a conviction for murder in the first degree: *State v. Stanley*, 33–526.

Included crime: The crime of manslaughter is necessarily included in that of murder, and upon the trial for murder in the first degree, all the degrees of criminal homicide should be explained and submitted to the jury: *State v. Clemons*, 51–274; *State v. Glyndon*, 51–463.

Punishment: The provision that the jury may determine whether the punishment for murder in the first degree shall be capital is not unconstitutional: *State v. Hockett*, 70–442.

Further, see notes to §§ 4727, 4729, 4730 and 4751.

SEC. **4729. Second degree.** Whoever commits murder otherwise than as set forth in the preceding section is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term of not less than ten years. [C.'73, § 3850; R., § 4193; C.'51, § 2570.]

A specific intention to kill is not essential to constitute murder at common law, nor, under our statute, to constitute murder in the second degree: *State v. Decklotts*, 19–447; *State v. Morphy*, 33–270; *State v. Newherter*, 46–88.

An allegation that defendant caused death by acts intended to produce miscarriage, when not necessary to save life, sufficiently charges murder in the second degree: *State v. Leeper*, 70–748.

Evidence *held* not sufficient to support a verdict of murder in the second degree: *State v. Havercamp*, 54–350.

Neither deliberation nor premeditation is an essential element of the crime of murder in the second degree, or of assault with intent to commit murder: *State v. Keasling*, 74–528.

Where it appears that defendant formed the purpose of doing deceased an injury some moments before the injury was inflicted, *held*, that there was sufficient premeditation to constitute the crime of murder in the second degree: *State v. Peffers*, 80–580.

SEC. **4730. Degree determined.** Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty, must inquire, and by its verdict ascertain and determine the degree; but if the defendant is convicted upon a plea of guilty, the court must, by the examination of witnesses, determine the degree, and in either case must enter judgment and pass sentence accordingly. [C.'73, § 3851; R., § 4194; C.'51, § 2571.]

In case of a plea of guilty the record should show that the witnesses were examined by the court and the degree of the crime thus fixed: *McCauley v. United States*, Mor., 486.

A defendant cannot be found guilty of murder in the first degree when the indictment is only sufficient to charge murder in the second degree: *Fouts v. State*, 4 G. Gr., 500.

Where the jury, upon the trial of an indictment for murder in the first degree, found defendant "guilty as charged in the indictment," *held*, that such verdict was fatally defective as not sufficiently ascertaining the degree of the offense: *State v. Moran*, 7–236.

The jury, if they do not find defendant guilty of murder in either degree, may, under § 5407, convict him of manslaughter: *Gordon v. State*, 3–410.

Where defendant was charged with committing murder in the perpetration of robbery and burglary, and the verdict of the jury was "guilty as charged in the indictment," *held*, that this was a sufficient finding

of the degree of the crime and was a conviction of murder in the first degree: *State v. Weese*, 53–92.

Where on a plea of guilty the court took evidence and entered a judgment that defendant should suffer capital punishment, *held*, that failure to enter on the record the special purpose for which the testimony was taken and a special finding of the first degree of murder was immaterial: *State v. Cumberland*, 90–525.

And see notes to § 4728.

SEC. **4731. Punishment.** Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty of murder in the first degree, must direct in its verdict whether the punishment shall be death or imprisonment for life at hard labor in the penitentiary, but if the defendant pleads guilty the court shall so direct, and in either case must enter judgment and pass sentence accordingly. [18 G. A., ch. 2, § 2; 17 G. A., ch. 165, § 2.]

The provisions of this section are not in conflict with article V, §§ 1–5, of the state constitution, vesting the judicial power in certain courts consisting of certain judges: *State v. Hockett*, 70–442.

A verdict of imprisonment for life is sufficient without specifying "at hard labor:" *State v. Trout*, 74–545.

SEC. **4732. Execution.** When the court or jury shall direct that a defendant be punished by death, the court pronouncing judgment shall fix the day of the execution thereof, which shall not be less than one year after the day on which the judgment is rendered, and not longer than fifteen months, during which time the defendant shall be imprisoned in the penitentiary. [Same, § 3.]

SEC. **4733. Papers sent governor.** Immediately after entry of judgment of death, the court rendering the same must transmit by mail to the governor a copy of the indictment, plea, verdict, judgment and testimony in the case. [17 G. A., ch. 165, § 4.]

SEC. **4734. Warrant.** When a judgment of death is pronounced, a certified copy of the entry thereof in the record book must be furnished to the officer whose duty it is to execute the same, who shall proceed accordingly, and no other warrant or authority is necessary to require or justify the execution. [Same, § 5.]

SEC. **4735. Reprieve.** The only officers who shall have power to reprieve or suspend the execution of a judgment of death are the governor and, as provided in this chapter, the warden of the penitentiary, except in cases of appeal to the supreme court. [25 G. A., ch. 92, § 2.]

SEC. **4736. Insanity or pregnancy.** When the warden of the penitentiary is satisfied that there are reasonable grounds for believing that a defendant in his charge under sentence of death is insane or pregnant, he shall notify the commissioners of insanity of the county wherein the penitentiary is located, who shall be sworn by the warden well and truly to inquire into the facts as to the insanity or pregnancy of the defendant, as the case may be, and return a true report of their findings. [Same, § 3.]

SEC. **4737. How determined.** The commissioners, after being sworn, shall examine the defendant and hear any evidence that may be presented, and may examine the medical attendants at the penitentiary, if necessary, to ascertain the facts, and make report thereon in writing, signed by not less than a majority of them, finding as to the fact of insanity or pregnancy. [Same, § 3.]

SEC. **4738. Execution suspended by warden.** If the report does not show the defendant to be insane or pregnant, the warden shall not suspend the execution; but if it does, he shall suspend the execution, and immediately transmit the report to the governor. [Same, § 3.]

SEC. **4739. Subsequent warrant.** When a judgment of death from any cause has not been executed on the day appointed by the court therefor, the governor, by a warrant under the seal of the state, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution. [17 G. A., ch. 165, § 8.]

SEC. **4740. Time and manner of execution.** A judgment of death must be executed by the sheriff of the county in which the judgment was

rendered, or his deputy, within the walls of the penitentiary where the defendant is confined, or within a yard or inclosure adjoining thereto, on the day fixed in the judgment, between sunrise and sunset, by hanging by the neck until dead. [25 G. A., ch. 92, §§ 4, 5; 17 G. A., ch. 165, §§ 9, 10.]

SEC. **4741. Witnesses.** The sheriff or his deputy must, at least three clear days before executing a judgment of death, notify the judge of the district court who tried the case, or, if he be not in office, another judge of such court, the county attorney and the clerk of the district court of the county in which the judgment was rendered, the sheriff of the county in which the offense was committed, if other than that in which judgment was rendered, and two physicians and twelve respectable citizens of the state to be selected by him, to be present as witnesses at such execution. He must also, at the request of the defendant, permit one or more ministers of the gospel, named by him, and any of his relatives, to attend the execution, and also such magistrates, peace officers and guards as the sheriff shall deem proper, but no minor, and no person other than those herein authorized, shall be present. [25 G. A., ch. 92, § 6; 17 G. A., ch. 165, § 13.]

SEC. **4742. Certificate.** The sheriff or his deputy executing the judgment of death must prepare and sign with his name of office a certificate, setting forth the time and place of the execution, and that judgment was executed upon the defendant according to the foregoing provisions, and cause the certificate to be signed by the public officers, and at least twelve persons, not relations of the defendant, who witnessed the same. [17 G. A., ch. 165, § 14.]

SEC. **4743. Filed and published.** The sheriff or his deputy executing such judgment must cause the certificate to be filed in the office of the clerk of the district court of the county in which the judgment was rendered, and cause a copy thereof to be published in one newspaper printed at the capital of the state, and in one in his county. [Same, § 15.]

SEC. **4744. Stay of execution by appeal.** An appeal from a judgment of death shall stay the infliction of that punishment, but the defendant is to be retained in custody without bail to abide the judgment thereon. [Same, § 16.]

SEC. **4745. Proceedings on appeal.** When an appeal is taken from a judgment of death, the clerk of the district court in which it was rendered shall at once give the defendant or his attorney a certificate, under the seal of the court, certifying that fact, and the sheriff or other officer having the defendant in custody must, upon the delivery to him of the certificate, suspend further proceedings on the judgment until final judgment on the appeal is certified to him by the clerk of the supreme court. [Same, § 17.]

SEC. **4746. Proceedings on affirmance.** When such judgment is affirmed, the supreme court must cause a copy of its judgment to be delivered to the governor, and to the sheriff whose duty it is to execute such judgment, signed by the clerk thereof and under seal of the court, and the governor shall issue a warrant of execution under the seal of the state, and transmit it by messenger or mail to the sheriff whose duty it is to execute the judgment, directing him, on a day and at an hour therein named, not earlier than the day fixed by the district court, to execute such judgment in the manner required by law. The sheriff shall execute such warrant in the manner provided in this chapter, and report his doings to the governor and the district court whose judgment was appealed from, and make the publication of his doings in the manner provided for in this chapter. If from any cause the judgment is not executed on the day named in the warrant, the governor may appoint another, and so on until it is done. [Same, § 18.]

SEC. **4747. Killing in duel.** Whoever fights a duel with deadly weapons, and inflicts a mortal wound on his antagonist, is guilty of murder in the first degree, and shall be punished accordingly. [C.'73, § 3852; R., § 4195; C.'51, § 2572.]

SEC. **4748. Dueling—challenge.** Any person who fights a duel with deadly weapons, or is present thereat as aid, second or surgeon, or advises, encourages or promotes the same, although no homicide ensue; and any person who challenges another to fight a duel, or sends or delivers any verbal or written message purporting or intended to be such challenge, although no duel ensue, shall be fined in a sum not exceeding one thousand nor less than four hundred dollars, and imprisoned in the penitentiary not more than three nor less than one year. [C.'73, § 3853; R., § 4196; C.'51, § 2573.]

SEC. **4749. Accepting challenge.** Any person who accepts such challenge, or who consents to act as a second, aid or surgeon on such acceptance, or who advises, encourages or promotes the same, although no duel ensue, shall be punished as prescribed in the preceding section. [C.'73, § 3854; R., § 4197; C.'51, § 2574.]

SEC. **4750. Posting for not accepting.** If any person post another, or in writing or print use any reproachful or contemptuous language to or concerning another, for not fighting a duel, or for not sending or accepting a challenge, he shall be fined not exceeding three hundred nor less than one hundred dollars, and shall be imprisoned in the county jail not more than six nor less than two months. [C.'73, § 3855; R., § 4198; C.'51, § 2575.]

SEC. **4751. Manslaughter.** Any person guilty of the crime of manslaughter shall be imprisoned in the penitentiary not exceeding eight years, and fined not exceeding one thousand dollars. [C.'73, § 3856; R., § 4199; C.'51, § 2576.]

What constitutes: Manslaughter is not a degree of murder, but a distinct offense, included, however, in the crime of murder: *State v. White*, 45–325, 327; and under an indictment for murder a defendant may be convicted of manslaughter: See notes to § 4728.

The common law definition of manslaughter has not been changed by our statute: *State v. Shelledy*, 8–477; *State v. Moore*, 25–128.

The offense defined: *State v. Abarr*, 39–185; *State v. Spangler*, 40–365; *State v. Hockett*, 70–442.

Homicide committed otherwise than wilfully, deliberately, and with premeditation, may be manslaughter or murder in the second degree, depending upon the absence or presence of malice: *State v. Spangler*, 40–365.

A homicide committed in sudden passion or heat of blood, without premeditation and without malice, is not murder in the second degree, but manslaughter: *Ibid.; State v. Decklotts*, 19–447.

Provocation: Great provocation may reduce a homicide to manslaughter, but can never render it justifiable or excusable: *State v. Vance*, 17–138.

Mere words will not constitute sufficient provocation to reduce a homicide to manslaughter. *Held*, also, that the fact that deceased had been criminally intimate with defendant's wife's sister was not sufficient: *State v. Hockett*, 70–442.

An assemblage of persons for the purpose of a *charivari* accompanied with tumult and confusion is provocation to those annoyed and insulted by it, and may be sufficient to reduce a homicide committed under such provocation to manslaughter: *State v. Adams*, 78–292.

Intent: Lawful and peaceful intentions will not excuse an unlawful homicide by subsequent violence, though they might bear upon the degree of the homicide. If the conviction is for manslaughter the previous intent is immaterial: *State v. Castello*, 62–404.

Punishment for manslaughter in a particular case, where the facts indicated on the part of defendant an entire recklessness of the consequences in the unnecessary use of a dangerous weapon in self-defense, *held* not excessive: *State v. Fitzsimmons*, 63–656.

Where it appeared that defendant pointed a loaded gun at deceased under circumstances not justifying killing, and deceased seized it to prevent injury, and it was discharged in the struggle without any purpose on the part of defendant, *held*, that the latter would be guilty of manslaughter, and the circumstances of the case would not wholly excuse the homicide, but might be regarded by the court in fixing punishment. But *held*, that if the gun was pointed under circumstances in which it might have been lawfully discharged, defendant would be guilty of no offense: *State v. Benham*, 23–154.

As to assault with intent to commit manslaughter, see § 4772.

Negligence: The careless use of a dangerous and deadly weapon, whereby a person is killed, constitutes manslaughter, although no harm is intended: *State v. Hardie*, 47–647.

Where one by his negligence contributes to the death of another he is guilty of manslaughter, and it is no defense that the death of deceased was caused by the negligence of others as well as that of the defendant: *State v. Shelledy*, 8–477, 507.

One who points a loaded weapon at another with a knowledge that it is likely to go off and it is discharged and the other person is killed, even though the discharge is accidental, is guilty of manslaughter: *State v. Tippet*, 63 N.W., 445.

The word "wilfully" as used in an indictment for manslaughter means nothing

more than intentionally as distinguished from accidentally or involuntarily: *State v. Windahl*, 64 N.W., 420.

Indictment: In an indictment for manslaughter in exposing a newly born child, causing its death, *held*, that it was not necessary to allege that defendant was in duty bound to provide for and protect the child, or that the child was unable to help itself: *State v. Behm*, 72–533.

Instruction as to other crime: In a trial for manslaughter it is not necessary to define the crime of murder in either degree, nor is it necessary to define any included crime where it appears that defendant admits the killing but seeks to justify and excuse it. But if there is any evidence sustaining the claim that the blow was accidental, the law in relation to accidental killing should be given to the jury: *State v. Hartzell*, 58–520.

As to instructions with reference to manslaughter on trial for murder, see notes to § 4728.

SEC. **4752. Maiming or disfiguring.** If any person, with intent to maim or disfigure, cut or maim the tongue; cut out or destroy an eye; cut, slit or tear off an ear; cut, bite, slit or mutilate the nose or lip; cut off or disable a limb or any member of another person, he shall be imprisoned in the penitentiary not more than five years, and fined not exceeding one thousand nor less than one hundred dollars. [C.'73, § 3857; R., § 4200; C.'51, § 2577.]

The offense of maiming and disfiguring necessarily includes an assault and battery, within the meaning of § 5407: *Benham v. State*, 1–542.

The offense defined in this section is broader than that of mayhem at common law and includes the crime of assault with intent to commit great bodily injury as defined by § 4771: *State v. Akin*, 62 N.W., 667.

While a specific intent to disfigure is an essential element of the crime, yet such intent may be inferred or presumed if the act is done deliberately and the disfigurement is reasonably to be apprehended as the natural and probable consequence of the act: *State v. Jones*, 70–505.

Where an assault is made with intention of committing a bodily injury which will constitute a disfigurement no other intention to disfigure need be proven: *State v. Clark*, 69–196.

SEC. **4753. Robbery.** If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense, as is provided in the following two sections. [C.'73, § 3858; R., § 4201; C.'51, § 2578.]

What constitutes: To constitute robbery there must be *animus furandi;* compelling the payment of money which is due, by threats of violence, is not robbery, but is an offense under § 4767: *State v. Hollyway*, 41–200.

The means used to put in fear need not be such as would put in fear one used to the ways of the world: *State v. Carr*, 43–418.

A sudden snatching from the hand of another is sufficient force and violence to constitute robbery: *Ibid.*

The crime of robbery cannot be committed where there is no putting in fear and no resistance, without the use of force or violence other than that required to take and remove the property: *State v. Miller*, 83–291.

The crime of robbery as here defined includes larceny and a person indicted for the former may be convicted of the latter: *State v. Reasby*, 69 N.W., 451.

The crime of robbery includes all the elements of larceny from the person, defined in § 4837, with the addition of the element of violence or putting in fear, and the fact that the evidence shows the crime to be robbery will not render erroneous a conviction under that section: *State v. Graff*, 66–482.

The property taken need not be in the actual possession or presence of the person robbed. It is sufficient if it is so in his possession or under his control that violence or putting in fear is the means used to take it. So *held* where a robber by violence extorted from the owner information of the place where valuables were kept in another room of the house, and, leaving her bound, went and took the property: *State v. Calhoun*, 72–432.

Indictment: An indictment for robbery need not in express terms charge an assault; if it charge putting in bodily fear and danger of life it will be sufficient in this respect, the charge of an assault being thereby necessarily implied: *State v. Brewer*, 53–735.

An indictment stating that defendant, with force, etc., and by putting in fear, etc., "did take, steal and carry away from the said," etc., is not sufficient to charge this offense. It should charge a taking, etc., from the person: *State v. Leighton*, 56–595.

An indictment charging that defendant made an assault upon the person named, "and with force and violence unlawfully and feloniously did steal, take and carry away from the person of" said person, etc., *held* sufficient to charge robbery: *State v. Kegan*, 62–106.

Evidence that a person was robbed of a certain number of dollars in gold pieces of specified denominations and also of a certain number of dollars in silver coin, *held* sufficient to show that the person was robbed of gold and silver coins of denominations mention in the indictment: *State v. Helvin*, 65–289.

The presumption of guilt arising from recent possession of stolen goods applies in robbery as well as in larceny: *State v. Harris*, 66 N.W., 728. And see notes to § 4831.

SEC. **4754. With aggravation.** If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if, being so armed, he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery, present and so armed, he shall be imprisoned in the penitentiary for a term not exceeding twenty nor less than ten years. [C.'73, § 3859; R., § 4202; C.'51, § 2579.]

The question whether a cord used by the robber to bind the person robbed was a dangerous weapon may be left to the jury: *State v. Calhoun*, 72–432.

It does not render the indictment objectionable to the charge of duplicity that in alleging robbery it charges the accused with having been armed with a dangerous weapon with intent, if resisted, to kill or main the person robbed. The allegation as to such intent may be regarded as surplusage: *State v. Callahan*, 65 N.W., 150; *State v. Osborne*, 65 N.W., 159.

SEC. **4755. Otherwise.** If such offender commits the robbery otherwise than is mentioned in the preceding section, he shall be imprisoned in the penitentiary not exceeding ten nor less than two years. [C.'73, § 3860; R., § 4203; C.'51, § 2580.]

SEC. **4756. Rape.** If any person ravish and carnally know any female of the age of fifteen years or more by force and against her will, or carnally know and abuse any female child under the age of fifteen years, he shall be imprisoned in the penitentiary for life or any term of years. [26 G. A., ch. 70; 21 G. A., ch. 114, § 1; C.'73, § 3861; R., § 4204; C.'51, § 2581.]

What constitutes: The force necessary on the one hand, and the resistance required on the other, to constitute the crime, depend upon the relative mental and physical strength of the parties and the circumstances surrounding them: *State v. Tarr*, 28–397.

Where a female was imbecile, and the prisoner, knowing such fact (which might be inferred from his having had some conversation with her), used some force, and there was nothing to indicate consent on her part, *held*, that the act would be considered to have been against her will, and that in such case actual opposition or dissent need not be shown: *Ibid.*

It seems that a defendant might, under the statutory definition, be convicted of the crime of rape, committed upon a woman so destitute of mind that she was incapable of consent, without proof of any resistance on her part, notwithstanding the provisions of § 4758: *State v. Atherton*, 50–189.

It is erroneous to charge that when there is carnal knowledge and no consent is directly or inferentially shown there is in the act itself all the force which the law demands as a necessary element in the crime of rape: *State v. Philpot*, 66 N.W., 730; *State v. Beabout*, 69 N.W., 429.

Definition in a particular case *held* sufficient: *State v. Urie*, 70 N.W., 603.

The offense of rape may also constitute the offense of incest if the connection is had with a female within the prohibited degrees of relationship. It is not necessary that the female should be a consenting party: *State v. Chambers*, 81–1. And see notes to § 4936.

In a particular case, *held*, that an instruction as to the effect of duress was properly given: *State v. Ward*, 73–532.

Age of consent: The criminal knowledge and abuse of a female child under the age of ten [now fifteen] years is rape, and an assault with intent to commit such crime is an assault with intent to commit rape. The fact that defendant does not know that the child is under that age will be immaterial: *State v. Newton*, 44–45.

Where it does not appear that active resistance was made, the age of prosecutrix is important to be considered. If, though over the age of consent, she is still very young, with mind not enlightened upon the nature of the act, this consideration should lead the jury to demand a less clear opposition than if she were older and more intelligent. Consent involves submission, but submission does not necessarily involve consent; and while in most cases such submission of the adult female would imply consent, yet the mere submission of a young and uninformed female in the hands of a strong man cannot be taken to show consent: *State v. Cross*, 12–66.

Where a female over the age specified is presumed capable of giving consent, yet the fact that a female over that age lacked puberal development may be considered in support of her claim that she did not understand the nature of the intended act: *State v. McCaffrey*, 63–479.

The use of the word "child" alone does not indicate a female under the age of consent: *State v. Gaston*, 65 N.W., 415.

Included crimes: Assault and battery is not necessarily included in the crime of rape: *State v. McDevitt*, 69–549.

The crime of rape necessarily includes both a simple assault, and an assault with intent to commit the crime, within the meaning of § 5407: *State v. Vinsant*, 49–241; *State v. Peters*, 56–263.

On a trial for rape defendant may be convicted of an assault with intent to commit the crime, and even though consent is shown at the time of the commission of the act, it may be shown to have been absent at the time of the commission of the assault: *State v. Cross*, 12–66; *State v. Atherton*, 50–189.

Under an indictment charging carnal knowledge of a female child under the age of consent there may be a conviction for assault and battery or for simple assault, as included offenses: *State v. Hutchison*, 64 N.W., 210.

Where the evidence showing an assault is such as to show a battery also, it is not error to refuse to instruct the jury with reference to a simple assault where they are told that they may convict of assault and battery: *State v. Sigg*, 86-746.

Indictment: The sex of the person injured in a particular case *held* to sufficiently appear from the language of the indictment, although not specifically alleged: *State v. Hussey*, 7-409.

The indictment in a particular case *held* to sufficiently indicate the person ravished: *State v. Pennell*, 56-29.

Two or more may be jointly indicted for the crime, one being the principal and the other accessory: *State v. Comstock*, 46-265.

It is not necessary to allege in the indictment that the act was feloniously done where the assault alleged to have been made was felonious, and the act forcible and against the will of the person injured: *State v. Casford*, 76-330.

Where evidence of non-consent is introduced, and the jury is charged that there can be no conviction unless the act was accomplished by force and against the will of the prosecutrix, it will be immaterial that the indictment states the age of the prosecutrix as being over ten years instead of over thirteen years as contemplated by the amendment to this section: *Ibid.*

Evidence: It is not necessary to establish the non-consent or force by proof of outcries or of a struggle, nor need actual penetration be shown by the testimony of the prosecutrix herself. But the jury may say whether, from all the circumstances, the requisite facts are shown: *State v. Tarr*, 28-397.

The absence of any marks of violence, or of outcries, etc., at the time, may be considered as against the evidence of prosecutrix: *State v. Tomlinson*, 11-401.

Absence of such outcries and complaints tends strongly to rebut the hypothesis of guilt, but is not conclusive, and the age, etc., of proscutrix is to be considered: *State v. Cross*, 12-66.

The better rule is to admonish the jury as to the difficulty of disproving the charge, and call their attention to the fact whether outcry was made at the time: *State v. Hagerman*, 47-151.

The fact of prosecutrix making complaint is proper evidence, but the particulars of such complaint are not: *State v. Richards*, 33-420; *McMurrin v. Rigby*, 80-322.

The particular facts stated by the prosecutrix are not admissible in evidence except when elicited on cross-examination, or by way of confirming her testimony after an attempt to impeach it: *State v. Clark*, 69-294.

Therefore, *held*, that a letter written by prosecutrix relating the circumstances of the alleged crime was not admissible: *Ibid.*

A person to whom complaint is made may testify as to the fact of such complaint, and as to what the injured party complained of, as that the person accused ravished or had intercourse with her: *State v. Watson*, 81-380; *State v. Mitchell*, 68-116.

Where there was conflicting testimony as to the injuries received by prosecutrix, in an alleged rape, *held*, that a medical witness might testify as to an examination made by him, four weeks after the alleged injury, the weight of such evidence being for the jury: *Ibid.*

Instructions in a particular case *held* not open to the objection of limiting the inquiry of the jury to certain special facts in the case: *Ibid.*

Statements made by the injured party soon after the alleged commission of the offense as to who committed it may be given in evidence: *State v. Hutchison*, 64 N.W., 610. *State v. Cook*, 92-483. As may also the statement that the act was without consent, such being merely a method of stating that the party complaining was ravished, and not a statement of the particulars of the act: *State v. Cook*, 92-483.

Evidence that bruises were found upon prosecutrix two and one-half or three weeks after the alleged injury, *held* properly admitted. The length of time that had elapsed would be for the jury as affecting the credibility of the evidence, but would not render it incompetent: *State v. McLaughlin*, 44-82.

Evidence as to certain stains found on clothing of prosecutrix at the time the offense was committed, *held* competent as tending to show that the crime had in fact been committed: *State v. Montgomery*, 79-737.

Evidence in a particular case, *held* not sufficient to support the verdict of guilty, the acts of the prosecutrix at the time of the alleged commission of the crime, her prior conduct, and statements made by her, not being consistent with the testimony as to the commission of the crime: *State v. Cassidy*, 85-145.

Expressions of suffering and complaints of pain by prosecutrix shortly after the act complained of may be shown: *State v. Hutchison*, 64 N. W., 610.

Proof of another crime of the same character committed at a different time upon or against another person and having no connection with the crime charged is not admissible. So *held* in a prosecution for assault with intent to commit rape as to evidence of similar assaults at previous times upon other persons; but *held*, that proof of previous assaults on prosecutrix was admissible to show intent: *State v. Walters*, 45-389.

Evidence as to reputation of prosecutrix for want of chastity should be limited to such reputation before the alleged crime was committed, the claim of the defendant being that the act was with the consent of the prosecutrix: *State v. Ward*, 73-532.

In a prosecution for rape, *held*, that statements of prosecutrix made on the same day on which the crime was charged to have been committed, that she had had criminal intercourse with defendant and would have it again, were admissible in evidence as tending to show the character of prosecutrix and her feelings toward defendant: *State v. Cook*, 65-560.

Evidence as to failure to escape, want of complaint and subsequent friendly relations with defendant, *held* such as to negative the commission of rape on the prosecutrix: *State v. Chapman*, 88–254.

In the prosecution for having carnal connection with a girl under the age of consent, evidence showing previous connection between the parties in another county is admissible as bearing on the relations and dispositions of the parties: *State v. Gaston*, 65 N.W., 415.

The jury may consider the age, appearance, and demeanor of prosecutrix as exhibited during the trial in determining her mental capacity as bearing on the question of consent although there is no other evidence on that question: *State v. Philpot*, 66 N.W., 730.

Evidence considered, and *held* insufficient to justify conviction for the crime: *State v. Tomlinson*, 11–401.

Corroboration required, see § 5488 and notes.

Punishment: In a particular case, *held*, that the sentence of twenty years was not excessive for this offense: *State v. Beabout*, 69 N.W., 429.

Assault: As to assault with intent to commit rape, see § 4769 and notes.

SEC. **4757. Compelling to marry or be defiled.** If any person take any woman unlawfully and against her will, and by force, menace or duress compels her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding ten years. No person shall be convicted under the provisions of this section unless the evidence of the prosecuting witness be corroborated by other evidence tending to connect the defendant with the commission of the crime. [C.'73, § 3862; R., § 4205.]

No particular amount of force is necessary to constitute the offense of defilement under this section, and it was probably intended to cover cases in which there is no force, excepting that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will; but it contemplates at least an act against the will. The defendant is not required to show an affirmative act of consent to make out a defense: *Pollard v. State*, 2–567.

An indictment which charged the crime of forcible defilement, and in which words were used which described the time of rape, *held* not bad for duplicity, as the two offenses named are much alike, differing chiefly in the amount of force used, and the indictment considered as an entirety clearly showed an intent to charge forcible defilement: *State v. Montgomery*, 79–737.

This offense is committed where the carnal knowledge of a female is had by means of duress or threats. Therefore *held*, that if such carnal knowledge was procured by one who had caught the female in the act of intercourse with another upon threats of exposure, the crime was committed. *State v. Fernald*, 88–553.

Previous chastity is not essential in order that the connection shall be criminal under this statute: *Ibid.*

An acquittal of the crime herein described does not bar a prosecution for the crime of conspiracy in agreeing to have illicit intercourse with a female: *State v. Brown*, 64 N. W., 277.

SEC. **4758. Carnal knowledge of imbecile or insensible female.** If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall be punished as provided in the section relating to ravishment. [C.'73, § 3863; R., § 4206; C.'51, § 2583.]

The provision of this section is for the protection of a class of females who by reason of mental or bodily infirmity are incapable of making the resistance required to protect themselves against the force of the ravisher and is supplemental to the provision with reference to rape: *State v. Enright*, 90–520.

Evidence as to the mental condition being conflicting, the court may take into account the testimony of the female as tending to show her mental weakness: *Ibid.*

The indictment need not allege that the act was with force or against the will: *Ibid.*

In general, see notes to § 4756.

SEC. **4759. Attempt to produce miscarriage.** If any person, with intent to produce the miscarriage of any pregnant woman, wilfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and be fined in a sum not exceeding one thousand dollars. [19 G. A., ch. 19; C.'73, § 3864; R., § 4221.]

Abortion is the act of miscarriage and producing young before the natural time or before the fœtus is perfectly formed. It is not within the definition of murder and is not

criminal unless expressly made so by the statute: *Abrams v. Foshee*, 3–274.

It is not necessary to constitute the crime that the woman should be quick with child, nor, providing there is criminal intent, is it necessary that the substance administered should be such at would produce a miscarriage: *State v. Fitzgerald*, 49–260.

The crime is committed in the county where the drug or other substance is administered, and not where the miscarriage actually takes place; § 5157 does not apply: *State v. Hollenbeck*, 36–112.

No punishment is here provided for the woman who consents to the attempted abortion being procured upon her, and she is not therefore an accomplice with the person who attempts to procure such abortion: *State v. Smith*, 68 N. W., 428.

It is not a crime under this section for a woman to procure an abortion on herself: *Hatfield v. Gano*, 15–177.

Where death is caused in the procurement of an abortion it is error to instruct the jury that defendant in a prosecution for causing such death may be convicted of manslaughter. He will be guilty of murder in the second degree or nothing: *State v. Moore*, 25–128.

An indictment alleging that certain acts were done with the design and intention to produce a miscarriage, which it is averred was not necessary to save the life of the woman, is sufficient to charge murder in second degree: *State v. Leeper*, 70–748.

Evidence in a particular case *held* sufficient to sustain a conviction under this section: *State v. Montgomery*, 71–630.

As to civil liability for commission of abortion, see *Kansz v. Ryan*, 51–232.

SEC. **4760. Enticing female child for prostitution.** If any person take or entice away any unmarried female under the age of eighteen years for the purpose of prostitution, he shall be imprisoned in the penitentiary not more than five years, or be fined not more than one thousand dollars and imprisoned in the county jail not more than one year. [21 G. A., ch. 114, § 2; C.'73, § 3865; R., § 4207; C.'51, § 2584.]

The fact that defendant believed, and had good reason to believe, that the female was over the age specified, constitutes no defense if she was in fact under that age: *State v. Ruhl*, 8–447. (And as to similar point see *State v. Newton*, 44–45.)

If the parents are dead and no guardian has been appointed the persons with whom the female resides as a member of the family, and who have her wholly under their care and protection, would have "the legal charge of her person" within the meaning of the section: *Ibid.*

It is not sufficient to constitute an offense under this section that the accused entice away the female for his own carnal enjoyment, and such enjoyment would not constitute prostitution: *Ibid.*

As to corroboration of the evidence of prosecutrix, see § 5488.

SEC. **4761. Enticing away child.** If any person maliciously, forcibly or fraudulently lead, take, decoy or entice away any child under the age of fifteen years, with intent to detain or conceal such child from its parent, guardian or any other person having the lawful charge thereof, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding one thousand dollars, or punished by both such fine and imprisonment. [21 G. A., ch. 114, § 3; C.'73, § 3866; R., § 4208; C.'51, § 2585.]

SEC. **4762. Seduction.** If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [C.'73, § 3867; R., § 4209; C.'51, § 2586.]

What constitutes: Mere unlawful sexual commerce for a consideration paid is not seduction. There must be some artifice or false promise by which the virtuous female is induced to surrender her person. But the allegations in the indictment in a particular case, of representations as to the innocence of the act and promises of presents, etc., *held* sufficient on demurrer: *State v. Fitzgerald*, 63–268.

To "debauch" implies to "have carnal knowledge of" (*arguendo*): *Wood v. Mathews*, 47–409.

Something more than mere appeal to the lust and passion of a woman must be shown before the law will afford her a remedy by way of damages: *Hawn v. Banghart*, 76–683.

But under the facts in a particular case, *held*, that there was evidence that defendant, a married man, had, by caresses and flatteries, acquired such influence over plaintiff, a girl of fifteen, that by means of her affection for him, he had been able to accomplish his purpose, and that therefore the verdict for plaintiff would not be set aside: *Ibid.*

As affecting the damages in such case, it is not proper to show how particular acquaintances had treated plaintiff after the injury done to her by defendant in proving loss of social standing, but it will be taken notice of by the jury without proof: *Ibid.*

Where the evidence fails to show artifice, promise, flattery, deception or the like, it will not be sufficient to sustain a conviction: *State v. Crawford*, 34–40.

A woman who, without promise of marriage, yields to the embraces of a man who avowedly visits her for that purpose, and

threatens to cease visiting her if she refuses to comply with his desires, cannot recover for seduction: *Baird v. Boehner*, 72-318.

Manifestation of affection on the part of defendant and representations that there will be no harm in the act and that other girls submit thereto may constitute seductive arts apart from a promise of marriage: *State v. McIntire*, 89-139.

A representation that there is nothing wrong in connection between parties engaged to be married is a sufficient artifice to make the case one of seduction: *State v. Garrity*, 67 N. W., 92.

Promises of marriage in a particular case *held* sufficient: *State v. Knutson*, 91-549.

Evidence in a particular case *held* not sufficient as to seductive arts being used to support a verdict: *State v. Bollerman*, 92-460.

An indictment charging that defendant seduced and debauched, etc., etc., is sufficient without charging the facts as to the means made use of to accomplish such end: *State v. Curran*, 51-112; *State v. Conkright*, 58-338.

An indictment is sufficient which alleges that defendant "wilfully, unlawfully and feloniously did seduce and debauch (a named female) an unmarried woman of previous chaste character all contrary to and in violation of law." It is not necessary to allege carnal knowledge, as that is implied in the words "seduce and debauch:" *State v. Whalen*, 68 N. W., 554.

An indictment charging the seduction of Mary E. Starner, being then and there an unmarried female of previous chaste character, *held* sufficient to indicate that the charge had reference to the seduction of a woman: *State v. Hemm*, 82-609.

Evidence: The exact amount or kind of seductive arts necessary to establish the offense cannot be defined. Every case must depend upon its own peculiar circumstances, together with the conditions in life, advantages, age and intelligence of the parties: *State v. Higdon*, 32-262.

It is not necessary that the false promises or seductive arts be reasonable in their character and likely to have been relied upon by the prosecutrix; but the fact that they were extraordinary and made by a person who, to the knowledge of the prosecutrix, was not capable of performing them, should be considered by the jury in determining whether they were sufficient: *State v. Groome*, 10-308.

The fact that false promises of marriage were made at the time with intent to break them would be immaterial. Such false promises of marriage would be sufficient: *State v. Prizer*, 49-531.

While there may be seduction under promise of marriage, although prosecutrix is aware that the person making the promise is engaged to be married to some one else, yet the existence of such other promise may be shown as bearing on the chastity of the prosecutrix and to indicate whether she yielded her virtue in reliance on the promise of marriage: *State v. Brown*, 86-121.

The fact that prosecutrix was, during the time defendant was going with her, keeping company with another man may be shown as tending to weaken her claim that the defendant had promised to marry her: *State v. Baldoser*, 88-55.

Evidence of prosecuting witness that she had made preparations for marriage with defendant under a promise of marriage made by him prior to the seduction is not admissible: *State v. Lenihan*, 88-670; *State v. Buxton*, 89-573.

The particular time of the intercourse between defendant and prosecutrix may be material in determining the fact of seduction under the testimony of the prosecutrix, but is not material as to the commission of the offense: *State v. McIntire*, 89-139; *State v. Bauerkemper*, 64 N.W., 609.

Evidence of an offer by defendant to marry the prosecutrix, made prior to the finding of the indictment is admissible as against defendant to throw light upon the question whether he had connection with prosecutrix by means of promises of marriage, but not as showing in connection with her refusal to accept such offer of marriage that the intercourse was not on account of a previous promise of marriage: *State v. Bauerkemper*, 64 N.W., 609.

To warrant a conviction of defendant upon the evidence of prosecutrix there should not be any strained construction put upon her language in order to sustain the verdict. It is to be expected that she should, so far as possible, shield herself and cast the blame upon defendant. Therefore, in a particular case, a conviction was reversed on the ground that the evidence of prosecutrix did not, by fair and reasonable construction, show any arts, false promises, etc.: *State v. Haven*, 43-181.

Where, in a prosecution for seduction, prosecutrix testified that she resisted, and defendant overcame such resistance by force, *held*, that the court should have instructed the jury that, if they found such to be the fact, defendant was entitled to an acquittal, the crime under such facts being rape, and not seduction: *State v. Lewis*, 48-578.

Where defendant claimed that the evidence showed rape rather than seduction, *held*, that while the prosecutrix denied consent to the act the evidence together showed that no rape was commited and the conviction for seduction was sustained: *State v. Bradbury*, 92-512.

In a particular case, *held*, that it sufficiently appeared from the evidence that prosecutrix was an unmarried woman; also that the seductive arts were such as were sufficient to constitute the crime, being promises to marry, etc.; also, that the corroboration was sufficient: *State v. Heatherton*, 60-175.

Evidence of an offer by prosecutrix, after the commencement of the prosecution, to settle for a sum of money, *held* not admissible: *State v. Deitrick*, 51-467.

Where it appeared that defendant was a suitor of the prosecutrix before and for some time after the illicit intercourse, *held*, that his conduct during the entire time might be inquired into in determining whether her consent was gained by seductive means: *State v. Curran*, 51-112.

It is not error to allow the prosecutrix to

testify that after the alleged seduction she gave birth to a child, and to state the date of such birth, and to testify that a child with her is such child: *State v. Clemons*, 78–123.

Also *held*, that the person with whom prosecutrix lived at the time of the alleged seduction should have been permitted to testify that before the alleged seduction prosecutrix was out often late at night: *Ibid.*

It is error to instruct the jury that nothing said or spoken by the prosecutrix after the seduction can be shown as indicating want of chastity. Declarations or admissions made after seduction as to prior practices would be admissible for that purpose: *Ibid.*

In a prosecution for seduction, letters written by defendant to prosecutrix *held* properly admitted in evidence, where the contents of such letters were material as tending to show the relation of the parties, and even though a question was raised as to whether they were all in the same handwriting: *State v. Bell*, 79–117.

In a prosecution for seduction, where prosecutrix was permitted to testify that she understood that the defendant had other living children, *held*, that the evidence was improperly admitted, as it did not tend to prove the crime charged, and was prejudicial to defendant: *State v. Thompson*, 79–703.

And also *held*, that it was error to permit the prosecutrix to testify that defendant had written to her charging others with being the father of her child, as such evidence was secondary and also prejudicial: *Ibid.*

As to corroboration required, see § 5488 and notes.

Previously chaste character of prosecutrix: The word character as used in the statute defining the crime as the seduction of any unmarried woman "of previously chaste character" is used in its true sense as distinguished from reputation, but a female may be of unchaste character without being guilty of any act of sexual intercourse. Obscenity of language, indecency of conduct and undue familiarity with men may serve to indicate the true character. It is for the jury to decide, under all the circumstances, as to the character of the prosecutrix: *Andre v. State*, 5–389; *Boak v. State*, 5–430.

A female who has been unchaste may reform and acquire a chaste character, such as is referred to in the statute: *State v. Carron*, 18–372; *State v. Knutson*, 91–549.

Where improper relations between defendant and prosecutrix had existed, but were discontinued for some months and were then resumed, and there was evidence that they were resumed on promises of marriage by the defendant, and there was evidence that prosecutrix had not had improper relations with any one but defendant, *held*, that the jury were warranted in finding that at the time of the resumption of such relations prosecutrix was of chaste character: *State v. Moore*, 78–494; *State v. Gunagy*, 84–177.

Where the evidence shows a previous act of illicit intercourse and there is no showing with reference to a reformation it is not necessary to instruct the jury with reference to the effect of such reformation: *State v. Buxton*, 89–573.

Evidence that prosecutrix has a bad reputation for chastity is not admissible, but evidence that her reputation in that respect is good may be received in rebuttal of evidence tending to prove acts of lewdness: *State v. Prizer*, 49–531; *State v. Shean*, 32–88.

Proof of unchaste conduct on the part of prosecutrix just prior to the alleged seduction would entitle defendant to acquittal; therefore, an instruction that proof of such conduct should be considered against prosecutrix *held* erroneous, in that it did not go far enough in stating the effect of such conduct: *State v. Carr*, 60–453.

Where the woman is examined as a witness to prove the seduction, she may, on cross-examination, be asked as to matters which would show a want of chastity previous to such seduction. The question of chastity is directly in issue: *State v. Sutherland*, 30–570.

Instruction as to effect of proof of improper liberties allowed to others than defendant prior to the alleged crime, *held* misleading, in that the meaning of such term was left ambiguous: *State v. Carr*, 60–453.

Evidence of improper conduct of prosecutrix occurring eight years before the trial, and when she was but fourteen years of age, *held* properly excluded: *State v. Dunn*, 53–526.

The fact that it appears from defendant's evidence that he had intercourse with the prosecutrix at a date prior to that fixed by her testimony as the time of the seduction does not show that she was not of previously chaste character when the seduction took place, the date of seduction being immaterial: *State v. Bauerkemper*, 64 N.W., 609.

Evidence as to chaste character must be strictly confined to the time immediately prior to the alleged seduction: *State v. Gunagy*, 84–177.

In a prosecution for seduction, upon an issue as to the previous chastity of the prosecutrix, where defendant introduced testimony tending to show improper conduct and associations on her part, *held* not sufficient to overcome the presumption of chaste character, to which was added the testimony of neighbors and acquaintances that her previous character for chastity was good: *State v. Bell*, 79–117.

An instruction in a particular case *held* to sufficiently express the thought that proof of sexual intercourse is not essential to establish unchastity: *State v. Standley*, 76–215.

Acts and declarations of defendant touching his relations with prosecutrix from the time of their first acquaintance down to the trial may be shown. Acts subsequent to the alleged seduction are to be considered in determining whether a criminal intent existed at the first act, and whether the defendant was acting in good faith: *State v. Mackey*, 82–393.

While the crime is complete by the first act of illicit intercourse, yet subsequent acts extending through a period of months may be shown as corroborative of the evidence in regard to the first unlawful act: *State v. Wickliff*, 64 N.W., 282.

Evidecne on the part of defendant to show that other men were with the prosecuting witness about the time she became pregnant is admissible as tending to show that defendant was not the father of the child: *Ibid.*

In a particular case, *held*, that the evidence as to previous unchastity was not sufficient: *Ibid.*

Where the defendant testifies as to the conduct of the prosecutrix for the purpose of showing her unchaste character the prosecution may in rebuttal introduce evidence as to her previous chastity: *State v. Lenihan*, 87-670.

Indiscreet or suspicious conduct between prosecutrix and other men will not in itself furnish evidence of unchaste character: *State v. McIntire*, 89-139.

Evidence of language of prosecutrix three years before the alleged seduction and when fourteen years of age, *held* not admissible to show want of chastity: *State v. Hemm*, 82-609.

Only the previous character is put in issue, and all evidence of improper conduct after the time of the seduction sought to be proven should be excluded: *State v. Wells*, 48-671.

Questions as to chastity must clearly refer to a time previous to the seduction: *State v. Deitrick*, 51-467.

Previously chaste character is not essential in a civil action by a parent for seduction of a minor daughter: *Updegraff v. Bennett*, 8-72; or by an unmarried female for her own seduction: See notes to § 3470.

SEC. **4763. Marriage a bar.** If, before judgment upon an indictment, the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense. [C.'73, § 3868; R., § 4210; C.'51, § 2587.]

Such a marriage is encouraged by the law, and contracts entered into in contemplation thereof are not invalid as being made under duress, and will be upheld: *Armstrong v. Lester*, 43-159.

The mere willingness of the defendant to marry the woman is no bar to a prosecution for seduction, but the fact may be shown upon the question as to whether the woman was really seduced, or may be considered by the court in mitigation of punishment: *State v. Thompson*, 79-703.

The offer of defendant to marry prosecutrix is not a bar to the indictment. Nothing less than actual marriage will constitute such bar, and it is not proper to require the prosecution to prove beyond a reasonable doubt that the defendant refused to marry the prosecuting witness: *State v. Mackey*, 82-393.

Evidence that after defendant's arrest he told prosecutrix that he would do as he had agreed and that he had the license for their marriage but that she then objected to such proposed marriage, is sufficient for the purpose for which a refusal of the woman to marry her alleged seducer may be shown, that is as bearing on the question whether she really was seduced and in migitation of punishment: *State v. Whalen*, 68 N. W., 554.

SEC. **4764. Desertion after seduction and marriage.** Every man who shall marry any woman for the purpose of escaping prosecution for seduction, and shall afterwards desert her without good cause, shall be deemed guilty of a misdemeanor and shall be punished accordingly.

SEC. **4765. Kidnaping.** If any person wilfully, and without lawful authority, forcibly or secretly confine or imprison any other person within the state against his will; or forcibly carry or send such person out of the state; or forcibly seize and confine or inveigle or kidnap any other person with the intent either to cause such person to be secretly confined or imprisoned in the state against his will, or to cause such person to be sent out of the state against his will, he shall be imprisoned in the penitentiary not more than five years, or fined not exceeding one thousand dollars, or be both so fined and imprisoned, at the discretion of the court. [C.'73 § 3869: R., § 4211; C.'51, § 2588.]

SEC. **4766. Exposing child.** If the father or mother of any child under the age of six years, or any person to whom such child has been intrusted or confided, expose such child in any highway, street, field, house or outhouse, or in any other place, with intent wholly to abandon it, he or she, upon conviction thereof, shall be imprisoned in the penitentiary not exceeding five years. [C.'73, § 3870; R., § 4212, C.'51. § 2589.]

"Father *and* mother" construed to mean "father *or* mother." Either parent alone may commit the crime: *State v. Smith*, 46-670, 672.

SEC. **4767. Malicious threats to extort.** If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be imprisoned in the penitentiary not more than two years

or be fined not exceeding five hundred dollars. [C. '73, § 3871; R., § 4213; C. '51, § 2590.]

Extortion and pecuniary advantage are not necessary ingredients of this offense. An indictment charging defendant with maliciously threatening, etc., with intent "to compel the person, etc., to do an act against his will," is sufficient: *State v. Young*, 26–122.

An indictment charging defendant with verbally threatening to kill and murder two certain persons, with intent, etc., *held*, sufficient without setting out the threatening words used; also *held* that a threat to kill *two* persons constituted but one offense: *State v. O'Mally*, 48–501.

In the absence of a felonious intent it is not robbery to compel, by means of threats of personal violence, the payment of money; but such an act is an offense under this section: *State v. Hollyway*, 41–200.

The act of an officer in negotiating for a bribe for an omission to discharge his official duty does not constitute a crime under this section: *State v. Pierce*, 76–189.

It is essential that the threats be made to or in the presence of the person against whom they are directed: *State v. Brownlee*, 84–473.

Therefore, where defendant communicated to another his purpose to extort money from the prosecutor by threats, and made arrangements to meet the prosecutor for that purpose, but no threats to the prosecutor were ever made, *held*, that the crime was not committed, although the person to whom the plan was communicated advised the prosecutor of what was intended, and made arrangements to entrap the defendant: *Ibid.*

The statute is designed to prevent and punish threats to accuse a person of a crime or to do an injury to his person or property made with intent to accomplish a certain specific purpose: therefore, *held*, that an indictment charging that defendant attempted to induce prosecutrix to refrain from instituting bastardy proceedings by threatening "that it would not be good for her" to do so, did not charge an offense: *State v. McGlasson*, 88–667.

It is not necessary to set out in the indictment the threatening words, writings, or printed communications the use of which is charged as constituting the crime: *State v. Lewis*, 65 N.W., 295.

One may be guilty of this crime who obtains money by indirect threats of publication of scandalous matter in case such money is not paid: *Ibid.*

In an indictment charging this offense the allegation that an act was done "in order to compel" is equivalent to the allegation that it was "with intent thereby to compel:" *State v. Waite*, 70 N.W., 596.

In a particular case, *held*, that the indictment sufficiently alleged the person against whom the threat was directed and that it was made in his hearing: *Ibid.*

This provision relates to crimes against the laws of the United States as well as to those against the law of the state, if they might be prosecuted in the federal courts within the territorial limits of the state: *Ibid.*

The guilt of the person threatened is not involved though evidence to establish such guilt is sometimes admissible as bearing on the motive with which the threat was made: *Ibid.*

SEC. **4768. Assault with intent to murder.** If any person assault another with intent to commit murder, he shall be imprisoned in the penitentiary not exceeding ten years. [C. '73, § 3872; R., § 4214; C. '51, § 2591.]

In an indictment for an assault with intent to commit an offense it is not necessary to make all the averments required in an indictment for the offense itself. Therefore, *held* not necessary in charging an assault with intent to murder to charge that the assault was made with malice aforethought: *State v. Newberry*, 26–467.

An assault with intent to commit murder does not admit of different degrees, since the intent is the gist of the offense, but it necessarily includes a simple assault: *State v. Jarvis*, 21–44.

And a defendant indicted under this section may be convicted of that offense: *State v. Shepard*, 10–126.

An assault with intent to commit manslaughter is included in an assault with intent to commit murder, and a party may be convicted of the former offense under an indictment charging the latter, as provided by § 5407: *State v. White*, 45–325 (overruling *S. C.*, 41–316); *State v. Schele*, 52–608; *State v. Connor*, 59–357.

In a particular case, *held*, that the evidence was sufficient to show that the assault was made with premeditation and intent to kill: *State v. Brown*, 67–289.

The facts in a prosecution for assault with intent to commit murder, *held* sufficient to show that the punishment inflicted was excessive and sentence was modified accordingly: *State v. Doering*, 48–650.

Evidence in a particular case *held* sufficient to show defendant guilty as accessory to an assault with intent to murder: *State v. Mower*, 68–61.

The essential elements of the crime of assault with intent to commit murder are the assault, the specific intent to kill, and the malice aforethought. It is not necessary that the indictment charge deliberation or premeditation as required for first degree of murder: *State v. Keasling*, 74–528.

And where the verdict of the jury is not supported by evidence of malice aforethought the court may sentence defendant for assault with intent to commit manslaughter: *Ibid.*

In determining the intention with which the assault was made, the character and locality of the wound may be taken into account, and the nature of the weapon: *State v. Woodard*, 84–172.

An indictment which charges an assault and the wounding with a felonious intent to

kill and murder, *held* sufficient: *State v. Clark*, 69 N. W., 257.

One who is charged with assault with intent to commit murder, his guilt being that of accessory, may be convicted of assault with intent to commit manslaughter although the principal was guilty of the intent to murder: *State v. Smith*, 69 N. W., 269.

As to assault with intent to commit manslaughter, see notes to § 4772.

SEC. **4769. With intent to commit rape.** If any person assault a female with intent to commit a rape, he shall be imprisoned in the penitentiary not exceeding twenty years. [C.'73, § 3873; R., § 4215; C.'51, § 2592.]

What constitutes: It must appear that the intent of defendant was to gratify his passions, notwithstanding any possible resistance prosecutrix should make: *State v. Cross*, 12–66; *State v. Hagerman*, 47–151.

The intent to commit the crime of rape necessarily includes an attempt to overcome the resistance of the woman and accomplish the connection by force; and to establish assault with intent to commit rape, the evidence must show that the assault was made with the intent to use whatever degree of force might be necessary to overcome the resistance and accomplish the object: *State v. Canada*, 68–397; *State v. Kendall*, 73–255.

Assault with intent to commit rape does not necessarily include assault and battery: *State v. McDevitt*, 69–549.

Defendant may be found guilty of an assault with intent to commit, etc., although at the time of accomplishing the act there was such consent as to deprive the act of the character of rape: *State v. Cross*, 12–66; *State v. Atherton*, 50–189; *State v. Pilkington*, 92–92; *State v. Delong*, 65 N.W., 402.

Assault with intent to carnally know a child under the age of consent (see § 4756) is an assault with intent to commit rape, and in such case it is not necessary to prove that defendant knew the fact as to the age of the child. Proof of that fact itself is sufficient: *State v. Newton*, 44–45. And upon a similar point, see *State v. Ruhl*, 8–447.

A female under the age of consent is not competent to consent to an assault with intent to have sexual intercourse: *State v. Grossheim*, 79–75.

Evidence: In a prosecution for this crime the conduct of the parties towards each other, both before and after the alleged offense, may be shown in evidence: *Mallett v. Beale*, 66–70.

Facts in a particular case, *held* sufficient to show the intent with which the assault was committed: *State v. McIntire*, 66–339.

Evidence of intoxication is admissible for the purpose of showing absence of intent in such a case: *State v. Donovan*, 61–369.

The jury should be told that if they find from the evidence that defendant was so drunk as to be incapable of an intent to ravish the prosecutrix they should find him not guilty: *Ibid.*

There is no legal presumption that any offense or any specific result is intended by a man chasing a woman: *Ibid.*

Under the facts of a particular case, a new trial was granted for the insufficiency and unsatisfactory nature of corroborating testimony, and for want of proper instructions as to the effect of a jest as indicating criminal intent: *State v. Warner*, 25–200.

The intent with which the act is committed cannot ordinarily be shown by direct proof, but is to be inferred from the language and conduct of the parties and from all of the surrounding circumstances: *State v. Urie*, 70 N. W., 603.

Evidence in a particular case, *held* not sufficient to show that the intent of defendant was to accomplish his purpose by force: *State v. Biggs*, 93–125.

An instruction to the effect that the law would presume the criminal intent from certain acts specified, *held* not erroneous, as sexual intercourse would be the natural result of such acts and the defendant must be presumed to have intended such result in the absence of evidence to show the presumption not well grounded: *State v. Grossheim*, 79–75.

Where there was no question that an assault to commit rape had been made, *held*, that the evidence was sufficient to justify the jury in finding a verdict against defendant: *State v. Hatfield*, 75–592.

SEC. **4770. With intent to maim, rob, steal, etc.** If any person assault another with intent to maim, rob, steal or commit arson or burglary, he shall be imprisoned in the penitentiary not exceeding five years, or be fined not exceeding one thousand dollars, or both so fined and imprisoned, at the discretion of the court. [C.'73, § 3874; R., § 4216; C.'51, § 2593.]

One who intentionally bites off a person's ear is guilty of an assault with intent to disfigure, and not merely with intent to injure: *State v. Clark*, 69–196.

Under a charge of assault with intent to maim there may be a conviction for assault with intent to commit great bodily injury: *State v. Akin*, 62 N.W., 667.

SEC. **4771. With intent to inflict great bodily injury.** If any person assault another with intent to inflict a great bodily injury, he shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding five hundred dollars. [C.'73, § 3875; R., § 4217; C.'51, § 2594.]

This crime is sufficiently charged in an information which accuses defendant of an assault and battery, alleging that defendant wilfully and maliciously struck and beat the

person injured with intent of doing him great bodily injury: *State v. Carpenter*, 23–506.

An indictment charging an assault and battery with intent to inflict great bodily injury does not charge more than one offense. The battery is simply an aggravation: *Cokely v. State*, 4–477.

When the felonious intent is shown, that which would be an assault if unaccompanied with such intent will be such when thus accompanied: *State v. Malcolm*, 8–413.

Under an indictment for this offense defendant may be convicted of a simple assault, as provided in § 5407: *Orton v. State*, 4 G. Gr., 140.

A great bodily injury is an injury to the person of a more grave and serious character than an ordinary battery, but it cannot be definitely defined. The question whether the injury inflicted in a particular case constitutes a great bodily injury is for the jury: *State v. Gillett*, 56–459.

Where a person makes an assault on another and inflicts upon him an injury of a more grave and serious character than an ordinary battery, the presumption is warranted that he intended to inflict a great bodily injury, if there is no evidence tending to show that he intended a less injury: *Ibid.*

While a person is presumed to have intended all consequences which are to be ordinarily apprehended as the result of his act, yet expert evidence is not admissible to show what results might have been apprehended by a physician of skill and experience as likely to result from such an assault: *State v. Redfield*, 73–643.

The offense described in this section is necessarily included in that of maiming as defined in § 4752, the intention to inflict a great bodily injury being necessarily included in the intent that must be charged to constitute the crime of maiming: *State v. Akin*, 62 N. W., 667.

SEC. **4772. With intent to commit any felony.** If any person assault another with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year. [C.'73, § 3876; R., § 4218; C.'51, § 2595.]

Manslaughter may be the result of an intentional act and it is possible therefore that under this section there may be the crime of assault with intent to commit manslaughter: *State v. McGuire*, 87–142; *State v. Stone*, 88–724; *State v. White*, 45–325.

Where, if death had resulted from the assault, the crime would have been manslaughter, the assailant is guilty of assault with intent to commit manslaughter: *State v. Postal*, 83–460.

To convict of assault with intent to commit murder the evidence should show that defendant's act was unlawful, that it was committed with intent to take life, and that it was with malice aforethought. If the evidence as to malice aforethought is not sufficient to support the verdict of the jury, the court may, on motion for new trial, sentence defendant for assault with intent to commit manslaughter: *State v. Keasling*, 74–528.

In an indictment for an assault with intent to commit an offense it is not necessary to make all the averments with reference to the offense intended to be committed that are required in an indictment for the offense itself: *State v. Mecum*, 64 N.W., 286.

SEC. **4773. Mingling poison with food, etc.** If any person mingle any poison with any food, drink or medicine, with intent to kill or injure any human being, or wilfully poison any spring, well, cistern or reservoir of water, he shall be imprisoned in the penitentiary not exceeding ten years, and be fined not exceeding one thousand dollars. [C.'73, § 3877; R., § 4219; C.'51, § 2596.]

SEC. **4774. Assault and battery.** Whoever is convicted of an assault, or an assault and battery, where no other punishment is prescribed, shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [C.'73, § 3878; R., § 4220; C.'51, § 2597.]

Assault; what constitutes: To constitute an assault it is not necessary that defendant should have been in such position as to inflict injury on the person assaulted with the weapon used, provided it appears that he intended and endeavored to inflict such injury and had means and ability to do so, and was only prevented from doing so by the interference of others: *State v. Malcolm*, 8–413.

The definition of an assault as "an attempt or offer by force and violence to do a corporal injury to another," *held* erroneous, as the attempt to do the injury to the person of another by violence might under some circumstances be lawful; but in a particular case *held* that, the evidence not being before the supreme court, it would not be presumed that there was anything tending to show such state of facts as would render the act lawful: *State v. Wyatt*, 76–328.

It is not error to instruct that an assault is an unlawful attempt to do violence upon the person of another with the present ability to do so nor that a battery is an unlawful beating of another and that every battery includes an assault: *State v. Cody*, 62 N. W., 702.

It is an assault to present an unloaded gun or pistol at another in a manner calculated

to terrify the person aimed at, if the latter does not know or has no reason to believe that the weapon is not loaded: *State v. Shepard*, 10–126.

An indictment charging that defendant did make an assault with a certain dangerous weapon, to wit, a gun with which he was armed, etc., but not alleging that the gun was loaded, nor the manner of using it, nor that it was pointed or discharged, *held* sufficient to charge an assault: *Ibid.*

An assault may be committed without doing any personal injury: *State v. Myers*, 19–517.

Assault and battery: The statute merely prescribes the punishment for the offenses of assault, and assault and battery, and leaves them to be defined by the common law: *State v. Twogood*, 7–252.

It constitutes assault and battery to forcibly and violently take property claimed under chattel mortgage from the person in possession thereof, where it is necessary, in order to effect the purpose, to inflict personal injury: *State v. Boynton*, 75–753.

Justification: Angry words are no justification for an assault and battery. Neither is it unlawful for a party to forbid an angry person coming upon the former's premises: *Thompson v. Mumma*, 21–65.

The fact that an officer has levied upon property exempt from seizure is no justification for an assault: *Cokely v. State*, 4–477.

In a prosecution for an assault it is not proper to ask the prosecuting witness whether he had not at a previous time struck the defendant: *State v. Montgomery*, 65–483.

How charged: Information charging defendant with inhumanly beating his own child sufficiently charges the offense of assault and battery; but the name of the person on whom the offense was committed should be given: *State v. Bitman*, 13–485.

An information for assault and battery is sufficient which charges violent beating, wounding, etc., without alleging that such acts were done in anger and in a wilful manner, and with the purpose to hurt and inflict corporal injury: *State v. Boynton*, 75–753.

As to assault included in other crimes, see notes to § 5407.

The act of defendant in shaking his fist at the prosecutor and turning about the horse on which the prosecutor was riding, *held* not to constitute an assault in view of the fact that defendant was protesting against and attempting to prevent prosecutor from riding across defendant's land on the line of a highway not yet opened: *State v. Stoke*, 80–68.

An assault and battery is not justifiable when made for the purpose of taking possession of a house of which another is already in peaceful possession: *State v. McKinley*, 82–445.

Where defendant in pursuance of an unlawful purpose broke into the house of prosecutor and assaulted him, *held*, that the fact that defendant believed prosecutor was going into the house for a gun to use as against defendant would not constitute a defense, if it appeared that defendant could have escaped from the peril, if any, by going away: *Ibid.*

SEC. **4775. Carrying concealed weapons.** If any person carry upon his person any concealed weapon, or shall wilfully draw and point a pistol, revolver or gun at another, he shall be guilty of a misdemeanor, and be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days; but this section shall not apply to police officers and other persons whose duty it is to execute process or warrants, or make arrests. [C.'73, § 3879.]

The intent or purpose with which the weapon is carried is not an element of the offense, nor is it required that it be carried with defendant's knowledge, or wilfully, that is, with set purpose. The obvious purpose is to forbid the carrying of weapons on the person with the knowledge of the accused that the weapon was so carried, and that it was a weapon. If the weapon was carried through restraint, or ignorance, or for any innocent or lawful purpose, such fact may be shown by the defense; it need not be negatived in the indictment: *State v. Williams*, 70–52.

CHAPTER 3.

OF OFFENSES AGAINST PROPERTY.

SECTION **4776. Burning inhabited dwelling in nighttime.** If any person wilfully or maliciously burn in the nighttime the inhabited building, boat or vessel of another, or wilfully and maliciously set fire to any other building, boat or vessel owned by himself or another, by the burning whereof such inhabited building, boat or vessel is burnt in the night-time, he shall be imprisoned in the penitentiary for life or any term of years. [C.'73, § 3880; R., § 4222; C.'51, § 2598.]

There can be no conviction without satisfactory proof that the building was wilfully, maliciously and feloniously burned by some one and that such burning was not accidental: *State v. Carroll*, 85–1.

Where the evidence as to setting fire was circumstantial, *held*, that the previous occurrence of an accidental fire from a gasoline stove in the same locality should have been admitted: *State v. Delaney*, 92–467.

SEC. **4777. In daytime.** If any person wilfully or maliciously burn in the daytime the inhabited building, boat or vessel of another, or any building, boat or vessel adjoining thereto; or wilfully and maliciously set fire to any building, boat or vessel owned by himself or another, by the burning of which such inhabited building, boat or vessel is burnt in the daytime; or in the daytime wilfully and maliciously set fire to any building, boat or vessel owned by himself or another, by the burning of which any such inhabited building, boat or vessel is burnt in the nighttime, he shall be imprisoned in the penitentiary for a term not exceeding thirty years. [C.'73, § 3881; R., § 4223; C.'51, § 2598.]

SEC. **4778. Burning uninhabited dwelling, etc., in nighttime.** If any person wilfully and maliciously burn in the nighttime any uninhabited dwelling-house, boat or vessel belonging to another, or any court-house, jail, college, church, or any building erected for public use; or any other building, boat or vessel, by the burning whereof any building, boat or vessel mentioned in this section is burnt in the nighttime, he shall be imprisoned in the penitentiary not exceeding twenty years. [C.'73, § 3882; R., § 4224; C.'51, § 2600.]

SEC. **4779. In daytime.** If any person wilfully and maliciously burn in the daytime any building, boat or vessel mentioned in the preceding section, he shall be imprisoned in the penitentiary not exceeding fifteen years. [C.'73, § 3883; R., § 4225; C.'51, § 2601.]

SEC. **4780. Burning mills, locks, dams, depots, etc.** If any person wilfully and maliciously burn, either in the night or daytime, any warehouse, store, manufactory, mill, railroad depot, barn, stable, shop, office, outhouse or any building whatsoever of another, other than is mentioned in the preceding sections of this chapter, or any bridge, lock, dam or flume, he shall be imprisoned in the penitentiary not exceeding ten years. [C.'73, § 3884; R., § 4226; C.'51, § 2602.]

An indictment charging defendant with burning a certain "building, etc., *called a barn*," *held* sufficient, though in fact the building was not a barn but only a shed: *State v. Smith*, 28–565.

SEC. **4781. Setting fire with intent to burn.** If any person set fire to any building, boat or vessel mentioned in the preceding sections of this chapter, or to any material with intent to cause any such building, boat or vessel to be burnt, he shall be imprisoned in the penitentiary not exceeding five years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not more than one year. [C.'73, § 3885; R., § 4227; C.'51, § 2603.]

An averment that defendant set fire to certain material in the store of a person named is not sustained by proof that he set fire to such material in a building owned by such person but in a room occupied by a tenant as a store: *State v. Tennery*, 9–436.

But in such case an averment that the fire was applied in a room within the store building of such person, *held* proper: *Ibid.*

Where defendant set a lighted candle in hay and other combustible material, with intent to burn a barn, but neither the barn nor the material was ignited or burned, *held*, that nevertheless, he was guilty under this section. The lighting of the candle was "setting fire, etc., to any material:" *State v. Johnson*, 19–230.

Where an indictment charged the setting of fire to material with intent to burn a building and also alleged the burning of the building, *held*, that the latter allegation was not a charge of a distinct crime under the preceding section, but was a statement of facts showing the intent, and the indictment did not therefore charge two offenses: *State v. Hull*, 83–112.

The time of the day is not an element of the offense provided for in this section: *State v. Tennebom*, 92–551.

SEC. **4782. Burning or destroying lumber, fences, grain, etc.** If any person wilfully and maliciously burn, destroy or injure any pile or parcel of wood, boards, timber or lumber, or any fence, bars or gate, or any

grain, hay or other vegetable product severed from the soil, or any standing tree, grain, grass or other standing product of the soil, the property of another, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3886; R., § 4228; C.'51, § 2604.]

SEC. **4783. Liability of married woman.** The preceding sections of this chapter extend to a married woman who commits either of the offenses therein described, though the property burnt or set fire to may belong partly or wholly to her husband. [C.'73, § 3887; R., § 4229; C.'51, § 2605.]

SEC. **4784. Burning to injure insurers.** If any person wilfully burn any building, goods, wares, merchandise or other chattels which are insured against loss or damage by fire, or wilfully cause or procure the same to be burned, with intent to injure the insurer, whether such person be the owner thereof or not, he shall be imprisoned in the penitentiary not exceeding ten years. [C.'73, § 3888; R., § 4230; C.'51, § 2606.]

SEC. **4785. Setting out fire.** If any person wilfully, or without using proper caution, set fire to and burn, or cause to be burned, any prairie or timbered land, or any inclosed or cultivated field, or any road, by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or be both so fined and imprisoned in the discretion of the court. [17 G. A., ch. 55; C.'73, § 3889; R., § 4231; C.'51, § 2607.]

Under this section, *held*, that a party was liable for damages resulting to others, only where he set the fire out wilfully or without using the proper caution: *Conn v. May*, 36–241, and cases cited. And see notes to following section.

Under statute somewhat similar to this, but providing that the party setting out a fire should be liable for damages sustained, *held*, that he would not be liable where he had not willingly or maliciously permitted or suffered the fire to pass over his premises so as to injure another: *De France v. Spencer*, 2 G. Gr., 462; *Hanlon v. Ingram*, 3–81.

SEC. **4786. Allowing fire to escape.** If any person, between the first day of September in any year and the first day of May following, set fire to, burn or cause to be burned any prairie or timber land, and allow such fire to escape from his control, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars. [C.'73, § 3890.]

Setting out fire in a cultivated field is not within the scope of this section: *Brunell v. Hopkins*, 42–429. (But see, now, the previous section as amended.)

Under this section a party is absolutely liable for all damages resulting from the act prohibited, without regard to the question of negligence: *Conn v. May*, 36–241. See note to preceding section.

This section renders a person setting out fire and allowing it to escape within the prohibited period absolutely liable for the consequences, irrespective of the degree of diligence used to prevent its escape after being set out by him: *Thoburn v. Campbell*, 80–338.

If in such a case the fact that defendant set out the fire to protect his own property constitutes a defense, it is one which must be specially pleaded: *Ibid.*

Where defendant set out fire under such circumstances as to render him liable for damages caused thereby, and the plaintiff, to avoid destruction of his property, which would result from such fire, if not checked, set out a back fire, which, escaping from his control, causes the destruction of his property, defendant is liable for such damages: *McKenna v. Baessler*, 86–197.

The person who directly sets out fire contrary to the provisions of this section is absolutely liable for damages resulting therefrom, but if there be no intention to set out fire, and fire which is being used for a lawful purpose escapes from control, there will be liability only in case of negligence: *Ellsworth v. Ellingson*, 64 N.W., 774.

The act of a servant in setting out fire in the service of his master may be chargeable to his master although no express direction to do the act was given, it appearing that such act was within the general scope of the service which the master had directed to be performed: *Lewis v. Schultz*, 67 N.W., 266.

SEC. **4787. Burglary.** If any person break and enter any dwelling-house in the nighttime, with intent to commit any public offense; or, after having entered with such intent, break any such dwelling-house in the nighttime, he shall be guilty of burglary, and shall be punished according to the aggravation of the offense, as is provided in the next two sections. [C.'73, § 3891; R., § 4232; C.'51, § 2608.]

Breaking: The pushing open of a closed door is a sufficient breaking within the meaning of the law to constitute burglary: *State v. Reid*, 20–413.

Indictment: An indictment charging burglary in breaking and entering a house described as the property of a man whose wife owned the legal title, the property being occupied as a homestead, *held* proper, the possession being in the person named, as head of the family: *State v. Short*, 54–392.

An indictment for burglary which describes the premises as a "dwelling-house belonging to," etc., sufficiently describes the ownership thereof: *State v. Fox*, 80–312.

The opening of a screen door kept closed by spring hinges without other fastenings, is sufficient to constitute a breaking: *State v. Conners*, 64 N.W., 295.

With reference to the ownership of a building it is only necessary to prove that the person named in the indictment as owner was in the occupancy and possession of the building and it is immaterial that it appears that some one else was the owner of the title: *State v. Lee*, 64 N.W., 284.

When the indictment charged that the building broken and entered was the property of H., *held*, that proof that H. was in possession as tenant was sufficient proof of ownership: *State v. Golden*, 49–48.

Burglary is an offense against the possession. At common law the ownership was required to be laid in the tenant or person in possession, and this rule is not changed by any provision of statute, although, under § 5286, it would probably be immaterial whether the possession was laid in the land owner or the tenant if the offense was in other respects sufficiently described: *State v. Rivers*, 68–611.

In a prosecution for burglary it is material only to prove that the person named in the indictment as owner was in occupancy and possession of the building: *State v. Teeter*, 69–717.

It is not necessary that the indictment for burglary should allege that some one was in the house at the time of the commission of the crime: *State v. Reid*, 20–413.

It is not necessary that the indictment show that goods, wares and merchandise were kept for use, sale or deposit in the building; nor is it necessary that the indictment set out the names of the dwellers in the house. An erroneous allegation as to the ownership of the building is not material when the crime is in other respects described with sufficient definiteness: *State v. Emmons*, 72–265.

Where defendant was charged with breaking and entering buildings and stealing property therefrom and two indictments were found for each act, *held*, that they were separate offenses and separate indictments might be returned for each: *State v. Turney*, 77–269.

Time: In an indictment for burglary, *held*, that an allegation of breaking and entering on a certain day, in the nighttime of said day, constituted a sufficient allegation that the offense was committed in the nighttime: *State v. Ruby*, 61–86.

The heinousness of the crime committed in the nighttime is deemed much greater than when committed in the daytime: *State v. Frahm*, 73–355.

Intent: An indictment charging a breaking and entering with intent to commit larceny is sufficient without averring that the intention was to steal property of a greater value than twenty dollars: *State v. Jones*, 10–206.

It is not necessary in charging burglary by breaking and entering with intent to commit larceny to state the character of the property intended to be stolen, nor its value or ownership: *State v. Jennings*, 79–513.

The fact an indictment for burglary does not charge the breaking and entry as "burglarious" does not render the indictment bad. The breaking and entering with the required intent constitute the crime: *State v. Short*, 54–392.

The intent being made a necessary element in the crime here defined, intoxication may be weighed by the jury in considering whether such intent existed: *State v. Bell*, 29–316.

Where it appears that the accused at the time of entering the building had been drinking intoxicating liquors, it is a question for the jury to determine whether he was in such mental condition as to form the criminal intent essential to constitute the crime: *State v. Conners*, 64–295.

Breaking and entry of a dwelling-house in the nighttime with intent to commit adultery is burglary: *State v. Corliss*, 85–18.

The fact that the indictment charges two different intents does not render it bad. The crime may be established by the proof of one or all the intents alleged: *State v. Fox*, 80–312.

It is not improper in an indictment for burglary, to allege in connection with the breaking and entering, the commission of the crime which the defendant is charged to have intended to commit: *State v. Phipps*, 64 N. W., 410.

In an indictment for burglary it is not necessary to describe in technical language the crime intended to be committed. Thus it is sufficient to charge the intent as having been to commit a public offense, to wit: adultery: *State v. Mecum*, 64 N. W., 286.

Evidence: Proof of a larceny committed after the breaking and entering is admissible as showing the intent with which the breaking and entry were committed: *State v. Golden*, 49–48.

The fact of the breaking and entry may be considered in determining the intent with which the breaking and entry were committed, in connection with the other circumstances of the case: *State v. Teeter*, 69–717.

One who breaks into the dwelling-house of another in the nighttime, in the absence of any explanation of the act, will be presumed to have intended to commit a public offense: *State v. Fox*, 80–312.

The breaking and entry of a dwelling-house in the nighttime raises a strong presumption of intent to commit a public offense: *State v. Mecum*, 64 N. W., 286.

The possession of goods recently stolen in connection with the commission of a burglary is not of itself sufficient evidence upon which to find defendant guilty of the burglary: *State v. Shaffer*, 59–290; *State v. Tilton*, 63–117.

But such possession, in connection with other evidence of guilty conduct, such as the possession of burglarious tools, etc., is *prima facie* evidence of guilt, sufficient to convict: *State v. Reid*, 20-413.

The mere possession of goods stolen from the building in which the burglary is alleged to have been committed does not have the same tendency to connect the person found in the possession of such goods with the burglary as it does with the larceny, and is not *prima facie* evidence of guilt of the burglary; but when it is shown that the two offenses were committed at the same time, and by the same person, the fact of the possession of goods stolen at that time from the building has necessarily the same tendency to prove the person in possession thereof guilty of burglary as of the larceny: *State v. Rivers*, 68-611; *State v. Frahm*, 73-355.

The jury may, from the fact of recent possession of property stolen in connection with the commission of burglary, find the fact of breaking, from the fact of possession, having in view the facts and surroundings thereof, but it is not required so to do. No definite presumption follows the possession as a matter of law, and the burden is not necessarily shifted to explain such possession: *State v. Jennings*, 79-513; *State v. Yohe*, 87-33; *State v. Ham*, 66 N. W., 1038.

Proof of possession by defendant of goods recently stolen by breaking into a building gives rise to a presumption that such goods were stolen by so breaking. But the burden of proof is on the prosecution to prove that such goods were stolen from a building before such presumption arises: *State v. LaGrange*, 62 N. W., 664.

It is not error to instruct the jury that if they find that within a few hours after the breaking of a building property stolen therefrom was found in the possession of defendant they will be warranted in concluding that the property was stolen by defendant from said building by breaking and entering the same, unless the facts and circumstances disclosed by the evidence leaves in their minds a reasonable doubt as to whether defendant did not come honestly into such possession: *Ibid.*

Also, see notes to § 4831.

Compound offense: The two offenses of breaking and entering with intent to commit larceny, and the crime of larceny alone, cannot be committed by the same act so as to constitute a compound offense under § 5284: *State v. Ridley*, 48-370; *State v. Rhodes*, 48-702; *State v. McFarland*, 49-99.

Under an indictment which charges both the felonious breaking and entering, and larceny, the latter charge may be disregarded and trial and conviction had under the former: *State v. Hayden*, 45-11; *State v. Shaffer*, 59-290.

In a trial for burglary for breaking and entering with intent to commit larceny, the court should properly instruct the jury as to the elements constituting larceny: *State v. Yohe*, 87-33.

An acquittal of larceny is no bar to a prosecution for breaking and entering with intent to commit larceny: *State v. Ingalls*, 68 N. W., 445.

Further as to compound offenses, see § 5284.

SEC. **4788. With aggravation.** If such offender, at the time of committing such burglary, is armed with a dangerous weapon, or so arm himself after having entered such dwelling-house, or actually assault any person being lawfully therein, or has any confederate present aiding and abetting in such burglary, he shall be imprisoned in the penitentiary for life or any term of years. [C. '73, § 3892; R., § 4233; C. '51, § 2609.]

The portion of an indictment charging assault with intent to murder may be dismissed and defendant tried for burglary alone: *State v. Struble*, 71-11.

SEC. **4789. Otherwise.** If such offender commit such burglary otherwise than is mentioned in the preceding section, he shall be imprisoned in the penitentiary not exceeding twenty years. [C. '73, § 3893; R., § 4234; C. '51, § 2610.]

SEC. **4790. Possession of burglar's tools.** If any person be found having in his possession at any time any burglar's tools or implements, with intent to commit the crime of burglary, he shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days. The court before whom such conviction is had shall order the retention by the sheriff of such tools or implements, to be used in evidence in any court in which such person is tried for the offense herein defined, or that of burglary, and the possession of such tools or implements shall be presumptive evidence of his intent to commit burglary. [15 G. A., ch. 13.]

SEC. **4791. Other breakings and enterings.** If any person, with intent to commit any public offense, in the daytime break and enter, or in the nighttime enter without breaking, any dwelling-house; or at any time break and enter any office, shop, store, warehouse, railroad car, boat or vessel or any building in which any goods, merchandise, or valuable things

are kept for use, sale or deposit, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year. [C.'73, § 3894; R., § 4235; C.'51, § 2611.]

The word "break" used by the statute does not imply the use of any degree of force or violence in order to injure or destroy any part of the building but the force that is necessary to remove the impediments to entering, as the opening of doors. Therefore, *held*, that the lifting of the latch of a door and entering a store-room in the daytime with the purpose to steal, the store being at the time occupied by and in the possession of the owner, constituted a sufficient breaking: *State v. O'Brien*, 81–93.

One who receives the stolen goods is not an accomplice in the crime of breaking and entering here defined: *State v. Hayden*, 45–11.

The crime of entering a dwelling-house in the nighttime without breaking with intent to commit a public offense is included in that of burglary, under the provisions of § 5407, so that under an indictment for the latter offense a defendant may be convicted of the former: *State v. Maxwell*, 42–208.

The offense is against the owner of the building, and his name, and not that of the owner of goods, etc., therein, which the accused intended to steal, should be given in the indictment. If the name of such owner is not known it should be so stated: *State v. Morrisey*, 22–158.

While the offense defined by this section is similar to that of burglary, defined by § 4787, an indictment which describes the house as a place "in which goods were kept for use, sale and deposit," sufficiently specifies that the offense charged is one under this section, and not under the other: *State v. Franks*, 64–39.

Possession of burglarious tools within a few hours after the commission of the crime may be proven as tending to connect defendant with the crime, and such evidence is admissible for that purpose although it shows in itself a distinct substantive offense: *Ibid.*

Under § 5286 a variance between the evidence and the indictment as to the ownership and occupancy of the building is immaterial if it is otherwise described with sufficient certainty: *State v. Porter*, 66 N.W., 745.

Whether or not a corn crib is within the meaning of the term "building" used in this section will depend upon its construction and the question of its real character is to be left to the jury. It is perhaps not necessary that a structure to be a building must be permanent: *State v. Gibson*, 66 N.W., 742.

In a prosecution for feloniously breaking and entering a railroad car with intent to commit larceny, *held*, that evidence was admissible that a bill of goods ordered included certain articles which were after the breaking and entering of the car found to be missing therefrom as tending to show that such articles had been stolen by the person breaking and entering: *State v. Russell*, 90–493.

Where the evidence does not show that the breaking and entering was in the nighttime, the defendant may be convicted under an indictment for burglary for the statutory offense of breaking and entering the dwelling-house in the daytime with intent to commit a felony, the latter offense may be regarded as a lower degree of the offense of burglary: *State v. Jordan*, 87–86.

It is immaterial that an offense under this section is in the caption of the indictment described as burglary: *State v. Gillett*, 92–527.

SEC. **4792. Attempting to break and enter.** If any person, with intent to commit any public offense, shall attempt to break and enter any dwelling-house, at any time, or to enter any dwelling-house in the nighttime without breaking, or at any time to break and enter any office, shop, store, warehouse, railroad car, boat, vessel or any building in which any goods, merchandise or valuable things are kept for use, sale or deposit, he shall be imprisoned in the penitentiary not more than five years, or fined not exceeding three hundred dollars and imprisoned in the county jail not more than one year. [18 G. A., ch. 11.]

SEC. **4793. Entering unoccupied public building—nuisance.** If any tramp or vagrant, without permission, enter any school-house or other public building in the nighttime, when the same is not occupied by another or others having proper authority to be there, or, having entered the same in the daytime, remain in the same at night when not occupied as aforesaid, or at any time commit any nuisance, use, misuse, destroy or partially destroy any private or public property therein, he shall be imprisoned in the penitentiary not more than three years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year.

SEC. **4794. Breaking and entering car.** If any person unlawfully break and enter any freight or express car which is sealed or locked, in which any goods, merchandise or valuable things are kept for use, deposit or transportation, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year. [26 G. A., ch. 36.]

SEC. **4795. Dynamiting.** If any person, with intent to destroy or injure any inhabited dwelling-house, building, boat, vessel or raft, deposits or throws therein or thereunder, or elsewhere about the same, where its explosion will or is likely to destroy or injure the same, any dynamite, nitroglycerine, giant powder, or other explosive material, he shall be imprisoned in the penitentiary not more than twenty-five years.

SEC. **4796. Death caused thereby.** If any person wilfully deposits or throws in, under or about any dwelling-house, building, boat, vessel or raft or other inhabited place, where its explosion will or is likely to destroy or injure the same, any dynamite, nitroglycerine, giant powder or other material, and by reason of the explosion thereof any person is killed, he shall be guilty of murder.

SEC. **4797. Or injury to person.** If any person wilfully deposits or throws any dynamite, nitroglycerine or giant powder or other explosive material as provided in the preceding section, and by means of the explosion thereof any person is injured, he shall be guilty of an assault with intent to commit murder.

SEC. **4798. Or property.** If any person, with intent to destroy or injure any building, boat, vessel or raft, any bridge, viaduct or other structure not provided for in the preceding sections, deposits or throws in, under or about such building, boat, vessel, raft, bridge, viaduct or other structure any dynamite, nitroglycerine, giant powder or other explosive material, by the explosion of which any such structure will or will be likely to be destroyed or injured, he shall be imprisoned in the penitentiary not more than fifteen years.

SEC. **4799. Injuring or terrorizing inhabitants of dwelling.** If any person, with intent to injure or terrorize the inhabitants of any dwelling-house, or other building used as a dwelling, or any inhabited boat, vessel or raft, or with intent to injure, or deface any such structure, throws at, against or into the same any brick, stone, billet of wood or other missile, or shoots thereat, with such intent, any gun, pistol or revolver, he shall be imprisoned in the penitentiary not more than three years, or in the county jail not more than one year, or be fined not more than one thousand dollars.

CHAPTER 4.

OF MALICIOUS MISCHIEF AND TRESPASS.

SECTION **4800. Injuries to monuments of state boundaries.** If any person wilfully dig up, pull down, break or destroy, or in any other manner injure or remove, any of the cast-iron pillars or other evidences planted and fixed in and along any part of the boundaries of this state, he shall be fined not less than fifty nor more than two hundred dollars, or be imprisoned in the penitentiary for a term of not less than six months, or both. [C.'73, § 3989; R., § 4330; C.'51, § 2690.]

SEC. **4801. Other monuments of boundary, milestones, signboards, etc.** If any person maliciously take down, injure or remove any monument erected or any tree marked as a boundary of any tract of land or city or town lot; or destroy, deface or alter the marks of any such monument or tree made for the purpose of designating such boundary; or injure or deface any milestone, post or guideboard erected on any public way; or remove, deface or injure any signboard; or break or remove any lamp or lamp-post or extinguish any lamp on any bridge, way, street or passage, he shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding one year, or both, at the discretion of the court. [C.'73, § 3982; R., § 2343; C.'51, § 2683.]

SEC. **4802. Defacing public buildings.** If any person wilfully write, make marks or draw characters on the walls or any other part of any church, college, academy, school-house, court-house or other public building, or on any furniture, apparatus or fixtures therein; or wilfully injure or deface the same, or any wall or fence inclosing the same, he shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days. [C.'73, § 3986; R., § 4327; C.'51, § 2687.]

SEC. **4803. Defacing or destroying proclamations, notices, etc.** If any person intentionally deface, obliterate, tear down or destroy in whole or in part any transcript or extract from or of any law of the United States or of this state, or any proclamation, advertisement or notification, set up at any place within this state by authority of law or by order of any court, during the time for which the same is to remain set up, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C.'73, § 3987; R., § 4328; C.'51, § 2688.]

SEC. **4804. Breaking levees.** If any person maliciously injure, break or cause to be broken any levee erected to prevent the overflow of land within the state, such person so offending shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3991; R., § 4332.]

SEC. **4805. Obstructing public ditches or drains.** If any person place any obstruction in any of the public ditches or drains made for the purpose of draining any of the swamp lands in this state, he shall be compelled to remove the same, and be fined not less than five nor more than one hundred dollars, or be imprisoned in the county jail not more than thirty days. [C.'73, § 3992.]

Supervisors violating the provisions of § 424 by voting to erect a public building without submitting the question to vote, in a case where such submission is required, are guilty, under this section, of a misdemeanor: *State v. Conlee*, 25–237.

SEC. **4806. Malicious injury to dams, locks, mills, machinery, etc.** If any person maliciously injure or destroy any dam, lock, canal, trench or reservoir, or any of the appurtenances thereof, or any of the gear or machinery of any mill or manufactory; or maliciously draw off the water from any mill-pond, reservoir, canal or trench; or destroy, injure or render useless any engine or the apparatus thereto belonging, prepared or kept for the extinguishing of fires, he shall be imprisoned in the county jail not exceeding one year and be fined not exceeding five hundred dollars. [C.'73, § 3978; R., § 4319; C.'51, § 2679.]

A similar provision in a former statute *held* not to take away the common-law right of a person injured by the erection of a mill-dam to abate it as a private nuisance: *State v. Moffett*, 1 G. Gr., 247.

SEC. **4807. To highways, bridges, railways, telegraph lines, etc.** If any person maliciously injure, remove or destroy any bridge, rail or plank road; or place or cause to be placed any obstruction on such bridge or road; or wilfully obstruct or injure any public road or highway; or maliciously cut, burn or in any way break down, injure or destroy any telephone or telegraph post, or in any way cut, break or injure the wires or any apparatus thereto belonging, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3979; R., § 4320; C.'51, § 2680.]

Where a highway is duly laid out, the fact that it is not yet traveled will not prevent the act of obstructing it from being criminal: *Harrow v. State*, 1 G. Gr., 439.

Error in the description of the highway, so long as its identity is not doubtful, will not vitiate a conviction for obstructing it: *Ibid.*

A party obstructing a highway by fence or otherwise, may be punished under the provisions of § 5078, although the road supervisor might, under other provisions of the statute, rightfully remove the obstruction: *State v. Berry*, 12–58.

Under an indictment for obstructing a

"county road," a road established by statute only can be shown. Evidence of a highway by use or prescription is not admissible: *State v. Snyder*, 25–208.

In prosecutions for obstructing a public highway the state is not confined to documentary proof of the establishment thereof, but may show the highway by proof of consent and user, and the fact that the highway is not of statutory width will be no defense: *State v. Robinson*, 28–514.

A party failing to remove a fence, where a newly established highway crosses his land, is not liable to indictment for obstructing a highway, at least until after reasonable notice by the supervisor to remove the same: *State v. Ratliff*, 32–186.

Malice is not a necessary element of the offense of obstructing a highway; intent is only important to show whether it was wilful or merely accidental: *State v. Gould*, 40–372.

It is not necessary to specially submit the question of wilfulness to the jury; all that is required to constitute the crime is that the obstruction be intentional: *State v. Teeters*, 66 N.W., 754.

The fact that this offense may be trivial does not render the section unconstitutional on the ground of imposing an unreasonable punishment. Under some circumstances the crime might be a very serious one: *Ibid.*

It is not a punishable offense to obstruct a highway which, by reason of natural obstacles, cannot be used by the public: *State v. Shinkle*, 40–131.

But if part of the line of road is traveled, it would not excuse a party who obstructs it that another part was impassable as laid out: *State v. McGee*, 40–595.

Platform scales erected in a public street for private business may be removed by order of the city council: *Emerson v. Babcock*, 66–257.

It is not necessary in the indictment to aver whether the highway is one established by prescription or by dedication; a general averment of the obstruction of the highway is sufficient, and the extent of the highway may be shown by any competent evidence: *State v. Teeters*, 66 N.W., 754.

As a railroad company is allowed, under § 2017, to temporarily obstruct a highway for the purpose of constructing its track, an allegation in an indictment showing such obstruction will not be sufficient to charge a crime, without averments showing a violation of the provisions of that section of the statute: *State v. Chicago, B. & P. R. Co.*, 63–508.

See further, as to obstruction of highways, § 5078 and notes.

In a prosecution for obstructing the track of a railway it is not necessary to allege or prove that the obstruction did actually obstruct and hinder trains: *State v. Clemens*, 38–257.

As to railroads, see § 4809 and notes.

SEC. **4808. Obstructing or defacing roads.** If any person, without authority or permission from the proper road supervisor, shall in any manner obstruct, deface or injure any public road by breaking up, plowing or digging within the boundary lines thereof, he shall be fined not less than five nor more than twenty-five dollars, or be imprisoned in the county jail not more than thirty days, at the discretion of the court. [15 G. A., ch. 17.]

No one has a right to make a material change in a highway inconsistent with the plans of a road supervisor. To do so will constitute a defacing of the highway within the meaning of this section. The judgment of the supervisor must govern as to the proper plan: *State v. Hunter*, 68–447.

SEC. **4809. Placing obstructions on railways.** If any person shall wilfully and maliciously place any obstruction on the track of any railroad in the state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto whereby the life of any person is or may be endangered, he shall be imprisoned in the penitentiary for life, or for any term not less than two years. [C.'73, § 3990; R., § 4331.]

It being found that defendant knew the railroad was being used for the purpose of carrying freight and passengers, and intended to place the obstruction on the road, malice will be implied: *State v. Hessenkamp*, 17–25.

The fact that the land where the obstructions were placed on the track belonged to defendant, and the railroad company had no right of way over it or had violated the covenants of its contract with respect thereto, would be no defense in an action under this section: *Ibid.*

In a prosecution for obstructing the track of a railway, it is not necessary to allege or prove that the obstruction did actually obstruct and hinder trains: *State v. Clemens*, 38–257.

See, also, § 4807 and notes.

SEC. **4810. Shooting or throwing at train.** If any person throw any stone or other substance whatever, or present or discharge any gun, pistol or other firearm at any railroad train, car or locomotive engine, he shall be guilty of a misdemeanor. [16 G. A., ch. 148, § 1.]

SEC. **4811. Jumping off cars in motion.** If any person not employed thereon, or not an officer of the law in the discharge of his duty, without the consent of the person having the same in charge, get upon or off any

locomotive engine or car of any railroad company while the same is in motion, or elsewhere than at the established depots of such company, or get upon, cling to or otherwise attach himself to any such engine or car for the purpose of riding upon the same, intending to jump therefrom when such engine or car is in motion, he shall be guilty of a misdemeanor. [Same, § 2.]

Where a person wrongfully jumps from a train in motion in violation of this section, the law will presume that an injury sustained by such act is the result of his own negligence: *Herman v. Chicago, M. & St. P. R. Co.*, 79–161.

Violation of this section will not constitute such contributory negligence as to defeat recovery on the part of the passenger injured in getting off of a moving train if the act is with the consent of the employe in charge of the train: *Galloway v. Chicago, R. I. & P. R. Co.*, 87–458.

A brakeman is in charge of a train in such sense as just referred to: *Ibid.*

Where the recovery for injury received while getting off of a train while in motion is sought to be defeated on the ground that such act was unlawful and constituted contributory negligence, plaintiff may, under allegation of freedom from contributory negligence, prove that the act was with the consent of the conductor: *Raben v. Central Iowa R. Co.*, 74–732.

One who is injured in attempting to get on board a train in motion and relies as an excuse for such act upon the permission of the conductor, must show that the conductor had authority to gi ve such permission under the rules of the company: *Young v. Chicago, M. & St. P. R. Co.*, 69 N.W., 682.

SEC. **4812. Uncoupling locomotive or cars.** If any shall person wilfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or in any manner aid, abet or procure the doing of the same, such person shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding one thousand dollars, or both, at the discretion of the court. [19 G. A., ch. 112, § 1.]

SEC. **4813. Seizing and running locomotive.** If any person shall unlawfully seize upon any locomotive, with or without any express, mail, baggage or other car attached thereto, and run the same upon any railroad, or aid, abet or procure the doing of the same, such person shall be imprisoned in the penitentiary not exceeding ten years, or fined not exceeding two thousand dollars, or both fined and imprisoned. [Same, § 2.]

SEC. **4814. Wrongfully running hand-car.** If any person shall, without permission from the proper authority, wrongfully take or run any hand-car upon any railroad in this state, he shall be guilty of a misdemeanor; and if by such unlawful use of any hand-car any locomotive or car is thrown from the track, or a collision produced, or any person injured, he shall be imprisoned in the penitentiary for a term of not more than five years; and if thereby any person is killed, such person so offending shall be guilty of manslaughter. [Same, § 3.]

SEC. **4815. Interference with air-brake or bell-rope—arrest.** If any person not an employe upon the railroad shall wrongfully interfere with any automatic air-brake or bell-rope upon any railroad car, or use the same for the purpose of stopping or in any way controlling the movement of the train, he shall be subject to the penalty provided in the preceding section; and any conductor or brakeman on a railroad train shall have power to arrest a person so offending and deliver him to some peace officer on the line of the railroad. [Same, § 4.]

SEC. **4816. Tapping telegraph or telephone wires.** Any person who shall wrongfully or unlawfully tap or connect a wire with the telephone or telegraph wires of any person, company or association engaged in the transmission of messages on telephone or telegraph lines between the states or in this state, shall be fined not more than five hundred dollars, or imprisoned in the county jail not exceeding six months.

SEC. **4817. Evading admission fee to entertainments.** If any person wilfully enters any building or inclosure where any public entertainment or exhibition is being held at which an admission fee is charged, and without paying such fee or without leave to so enter, he shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days.

SEC. **4818. Injuries to beasts.** If any person maliciously kill, maim or disfigure any horse, cattle or other domestic beast of another, or maliciously administer poison to any such animal; or expose any poisonous substance with intent that the same should be taken by such animal, he shall be imprisoned in the penitentiary not exceeding five years, or imprisoned in the county jail not exceeding one year, or be fined not exceeding three hundred dollars. [C.'73, § 3977; R., § 4318; C.'51, § 2678.]

An indictment alleging the malicious killing of a sow, *held* sufficient; and *held*, that it was not necessary to allege and prove that a hog is a "domestic beast:" *State v. Enslow*, 10–115.

An indictment charging the maiming and disfiguring of an animal is not bad for duplicity; any one or all of the acts here mentioned may be charged in the same indictment, and the proof need only cover so much of the allegation as constitutes a complete offense. To constitute the offense of disfiguring, the disfigurement need not be permanent or great: *State v. Harris*, 11–414.

While mere wanton injury to an animal without malice against any person may not be sufficient to constitute the offense of malicious injury to animals, yet, though the owner may be unknown, if the act is done maliciously for the purpose and with the intent of injuring such person, it is sufficient: *State v. Linde*, 54–139; *State v. Williamson*, 68–351.

The infliction of a wilful and wanton injury upon an animal is evidence that the act is malicious both as to the animal and the owner: *State v. Williamson*, 68–351.

SEC. **4819. Driving away stock.** If any person knowingly or wilfully drive off, or suffer or permit to be driven off, any stock of another to a distance exceeding one mile from the residence of the owner, or of his agent having charge of such stock, or the range in which such stock is usually in the habit of running, without the consent of such owner or agent, he shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days; and any justice of the peace in any county through which the stock thus driven off should pass, or in which it may be found, shall have jurisdiction of the offense. [C. '73, § 3896.]

To authorize a recovery under this section for damages suffered it is necessary to allege and prove that defendant had knowledge of the fact that the animal had entered his drove and was being taken away: *Chamberlain v. Gage*, 20–303.

SEC. **4820. Disturbing stock.** Any person who knowingly discharges firearms of any description within, or in the immediate vicinity of, any inclosure where cattle, hogs or sheep are being fed for the purpose of fattening the same; or any person who enters such inclosure with firearms or dog, unless such person shall be the owner of said stock, or have the control of the same, or shall have permission from such owner or the person having control thereof to enter said premises, shall be guilty of a misdemeanor. [C.'73, § 3900.]

SEC. **4821. Hunting upon cultivated or inclosed land.** Any person who shall hunt with dog or gun upon the cultivated or inclosed lands of another without first obtaining permission from the owner or occupant thereof, or his agent, shall for each offense be fined not more than ten dollars and costs of prosecution, and shall stand committed until such fine and costs are paid; but no prosecution shall be commenced under this section except upon the information of the owner or occupant of such cultivated or inclosed lands, or his agent. [25 G. A., ch. 64.]

SEC. **4822. Malicious injury to buildings and fixtures.** If any person maliciously injure, deface or destroy any building, or fixture attached thereto, or wilfully and maliciously destroy, injure or secrete any goods, chattels or valuable papers of another, he shall be imprisoned in the county jail not more than one year, or be fined not exceeding five hundred dollars, and be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured. [C.'73, § 3985; R., § 4326; C.'51, § 2686.]

An indictment charging in one count that accused "injured and defaced" a building is not objectionable on the ground of duplicity. The clauses in this section being disjunctive, either one or all the acts here specified may be charged in one count and constitute the same offense: *State v. Hockenberry*, 11–269.

Malicious injury to a church building is punishable under this section, and it is suffi-

cient to aver ownership in the trustees, as such, without setting out the character of their title: *State v. Brant*, 14–180.

Description of the building injured, *held* sufficient in a particular case, although the statement as to the ownership being in a certain corporation was erroneous: *State v. Semotan*, 85–57.

The words "destroy, injure or secrete" being used disjunctively in this section it is proper to charge all of them conjunctively and such an indictment will not be vulnerable to objection on the ground of duplicity: *State v. Phipps*, 64 N. W., 411.

The term "chattels" is used in its broadest sense in this section and covers every kind of personal property. It therefore includes horses, although the act of killing, maiming, and disfiguring horses is covered by another section: *State v. Phipps*, 64 N. W., 411.

Malice against the owner of the property must be established but it is not necessary that defendant should have known at the time of doing the act, who the owner was, if defendant was bent on mischief against whoever might prove to be the owner, that is sufficient malice to constitute the offense: *Ibid.*

SEC. **4823. To vehicle or harness.** If any person maliciously, wilfully and feloniously cut, break, sever or unfasten any tug, strap, line or other part of any harness attached to any horse or team, or maliciously and feloniously remove, break, unfasten or injure any part of any vehicle, he shall be imprisoned in the penitentiary not to exceed one year, or be imprisoned in the county jail not to exceed six months, or be fined not to exceed five hundred dollars. [26 G. A., ch. 87.]

SEC. **4824. To rafts or boats.** If any person maliciously cut away, let loose, injure or destroy any boom or raft of wood, logs or other lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be fined not exceeding five hundred dollars, and imprisoned in the county jail not more than one year, and forfeit to the person injured double the amount of damages sustained. [C. '73, § 3980; R., § 4321; C. '51, § 2681.]

SEC. **4825. To fence, produce or fixtures.** If any person maliciously or mischievously break down, mar, deface or injure any fence, hedge or ditch inclosing lands belonging to another; or throw down or leave open any gate or bars not his own or under his charge, whereby an injury is done to another; or maliciously injure, destroy or sever from the land of another any produce thereof or anything attached thereto, he shall be imprisoned in the county jail not more than one year, or be fined not exceeding five hundred dollars, or both.

SEC. **4826. To fruit or ornamental tree.** If any person maliciously or mischievously bruise, break, pull up, carry away, cut down, injure, destroy or sever from the land any fruit, ornamental or other tree, vine or shrub standing or growing on the land of another for ornament or use, he shall upon conviction thereof be punished by imprisonment in the county jail not more than one year, or by fine of not more than five hundred dollars, or both. [C. '73, §§ 3899, 3981; R., § 4322; C. '51, § 2682.]

SEC. **4827. Stealing or knocking off fruit in daytime.** If any person maliciously or mischievously enter the inclosure of another with intent to knock off, pick, destroy or carry away, or, having lawfully entered, afterwards wrongfully knocks off, picks, destroys or carries away, any fruit or flower of any tree, shrub, bush or vine, he shall be fined for the first offense not less than five nor more than one hundred dollars, with the costs of conviction, or be imprisoned in the county jail not exceeding thirty days, and for a second violation he shall be fined not less than ten dollars and costs of conviction, or be imprisoned as above provided. [C. '73, § 3897.]

SEC. **4828. Same in nighttime.** If any person maliciously or mischievously enter the inclosure of another in the nighttime, and knock off, pick, destroy or carry away any fruit or flower of any tree, shrub, bush or vine, or if, having so entered with the intent to knock off, pick, destroy or carry away any fruit or flower as aforesaid, he be actually found therein, he shall be fined not less than twenty-five nor more than one hundred dollars and costs of conviction, or imprisoned in the county jail not exceeding thirty days. [C. '73, § 3898.]

A party has no right to prevent a trespass of this kind by the use of means dangerous to life, or by inflicting great bodily injury, as by a spring-gun: *Hooker v. Miller*, 37-613.

SEC. **4829. Trespass by digging, cutting, carrying away, etc.** If any person wilfully commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another; or by carrying away timber or wood being on such land; or by digging or carrying away any earth, stone, marble, slate, coal, copper, lead, iron ore or any other ore or metal; or by taking and carrying from such land any grass, hay, corn, grain, fruit or other vegetables; or carrying away from any wharf, street or landing place, any goods whatever in which he has no interest, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or both at the discretion of the court. If in any case the value of the property so cut down, carried away or otherwise taken shall not exceed the sum of fifty dollars, then the person so offending shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C.'73, § 3983; R., § 4324; C.'51, § 2684.]

A person may be punished for the crime of malicious trespass committed in cutting and carrying away timber from school land, although the title to the land is still in the United States: *Chalfont v. United States*, Mor., 214.

The name of the owner of the land upon which the trespass is charged to have been committed should be set out in the indictment, or, if unknown, the indictment should so state: *State v. McConkey*, 20-574.

An indictment for cutting down and destroying standing timber upon the land of another is not sustained by proof of carrying away wood being on such land. The two acts as here specified are distinct: *Ibid.*

Under Revision, § 4324, differing from this section, it was held that the value of the property need not be found: *State v. Gigher*, 23-318.

A party has no right to prevent malicious trespass by the use of means dangerous to life, or by inflicting great bodily injury, as by a spring-gun: *Hooker v. Miller*, 37-613.

An indictment which described the land upon which the trespass was committed as belonging to the estate and heirs of Madison Young, deceased, *held* not defective because it failed to give the names of the owners of the land: *State v. Paul*, 81-596.

The term "wilfully" here used not only requires that the act be intentional, but, also, that it be with an evil purpose, or in disregard of the rights of others: *Parker v. Parker*, 71 N. W., 421.

SEC. **4830. Taking property for boat or vessel.** If any owner, master, clerk or any other person having charge of or belonging to any boat, vessel or raft take any cord wood or any other species of property from the owner or his agent, without the knowledge of such owner or agent, or without paying the customary price for the same, he shall be fined not exceeding two hundred dollars, or imprisoned in the county jail not exceeding six months. [C.'73, § 3988; R., § 4329; C.'51, § 2689.]

CHAPTER 5.

OF LARCENY AND RECEIVING STOLEN GOODS.

SECTION **4831. Larceny defined.** If any person steal, take and carry away of the property of another any money, goods or chattels, including all domesticated or restrained animals; any writ, process or public record; any bond, bank note, promissory note, bill of exchange or other bill, order or certificate; or any book of accounts respecting money, goods or other things; or any deed or writing containing a conveyance of real estate; or any contract in force; or any receipt, release or defeasance; or any instrument or writing whereby any demand, right or obligation is created, increased, extinguished or diminished, he is guilty of larceny, and shall, when the value of the property stolen exceeds twenty dollars, be imprisoned in the penitentiary not more than five years; and when the value does not exceed twenty dollars, be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C.'73, § 3902; R., § 4237; C.'51, § 2212.]

Felonious taking: To constitute larceny the property must have been feloniously taken from the owner without his consent, or obtained by false representations, etc. If given by the owner to the defendant by virtue of his employment as agent, servant, or otherwise, and afterwards converted, the offense is embezzlement: *Ennis v. State*, 3 G. Gr., 67.

A felonious taking is a taking without color of right or excuse for the act, and it may safely be said that there was no color of right or excuse if the defendant knew that he had no authority to take the property, and with this knowledge he knowingly carried it away and converted it to his own use: *State v. Rivers*, 60–381.

A taking from the person is not necessary to constitute larceny (a special penalty therefor being provided in § 4837); and picking up money dropped by another, with unlawful intent, and converting the same to one's own use without the knowledge of the owner, is sufficient to constitute the offense: *State v. Pratt*, 20–267.

If the original possession of the property was innocent a subsequent conversion will not constitute larceny: *State v. Wood*, 46–116.

Where the owner of goods parts with their possession without the purpose of parting with the property therein, and expects their return or disposition according to his direction, or expects payment for them to complete the sale thereof, the taking and conversion of them, with the felonious intent to deprive the owner thereof, is larceny. So, if possession is gained by a trick, artifice, or false representation, with the intent on the part of the accused to convert them to his own use, he is guilty of larceny: *State v. Hall*, 76–85.

Therefore, where defendant having procured a tailor to furnish materials for and make for him a suit of clothes, induced the tailor's employe to deliver the garments to him and go with him to his room to receive payment and then escaped with the clothes, *held*, that he was guilty of larceny: *Ibid.*

One who assists in the disposition of stolen property will not be guilty of larceny, at least without a knowledge that it is stolen: *State v. Empey*, 79–460.

Where an auctioneer employed to sell impounded animals sold one of them as his own, and it was taken away by the purchaser, *held*, that there was sufficient taking to constitute larceny on the part of the person selling: *State v. Hunt*, 45–673.

A pledgee has such special property in the thing pledged that a taking from him by the pledgor may be larceny: *Bruley v. Rose*, 57–651.

Intent: Taking property into possession with intent to appropriate it is larceny, although the property is afterward let go, the latter fact being proper to be considered by the jury in determining the intent with which possession was taken: *Georgia v. Kepford*, 45–48.

To warrant a conviction for larceny the prosecution should show that possession was taken with the intent then existing in the mind of defendant to steal the property. Such intent, however, may be shown by subsequent acts and conduct: *State v. Wood*, 46–116.

If one sell or dispose of the property of another under the well founded, though erroneous, belief that he is authorized so to do, he is not guilty of larceny: *State v. Barrackmore*, 47–684.

In a prosecution for larceny of certain flaxseed, defendant claimed that it was taken under an understanding that he was authorized to take such property and sell it for the purpose of securing payment of a debt owing to him by the owner. It appeared that on the way to market defendant unloaded a portion of the seed, and sold the balance for more than enough to pay his debt. *Held*, that if the claim of right as to the original taking was correct, the sale of the balance would not constitute in itself a crime: *State v. Larson*, 85–659.

The act of an employe in giving away the employer's property, although without authority, may not necessarily constitute larceny, if the circumstances are such as to negative a criminal intent: *Mielenz v. Quasdorf*, 68–726.

In a prosecution for larceny of two colts, *held*, that evidence that the sale of the colts by a former owner to the prosecutor was a mere sham, and that they had afterward been sold by such former owner to defendant, should have been admitted: *State v. Waltz*, 52–227.

A pretended claim that money taken is due for services will not constitute a defense if it appears from the circumstances that such claim was a sham and that defendant intended to fraudulently appropriate the money: *State v. Bond*, 8–540.

Where defendant offered to prove by one at whose house he stopped that his acts were such as to show that it was not his intention to steal the property, *held*, that such offer was too indefinite and the evidence was properly excluded: *State v. Hart*, 29–268.

Lost property: To render the finding or conversion of lost property larceny, it must be shown that the person so finding and converting knew the owner of the property: *State v. Taylor*, 25–273.

The crime of larceny as to lost property consists in the original taking and not in a subsequent lack of diligence in attempting to find the owner, nor in a subsequent conversion. The omission to take the steps required by statute for the finding of the owner will not render the party guilty of larceny, if the owner was not known at the time of the taking: *State v. Dean*, 49–73.

If one picks up a pocket-book which has been dropped from the pocket of the owner, and with an unlawful intent converts it to his own use without the knowledge of the owner, he is guilty of larceny: *State v. Pratt*, 20–267.

See also § 4839.

Ownership: In an indictment for larceny of chattels in which a person has a special property or which he holds in trust, the ownership may be laid in either the general owner or the one having the special property: *State v. Mullen*, 30–203.

The ownership of property need not be shown to have been in the party from whom it was taken, if it was in his possession: *State v. Stanley*, 48–221.

In the case of larceny of property in the possession of a receiver, the indictment may properly lay the ownership of the property in the receiver: *State v. Rivers*, 60–381.

The fact that property which is stolen and taken away in one transaction is owned by different persons does not make the taking separate offenses: *State v. Larson*, 85–659.

Where a number of sacks of flax-seed were stolen, *held*, that while the taking of the first sack constituted larceny, yet the taking of additional sacks in the same transaction did not constitute more than one larceny: *Ibid.*

From possession of officer: Larceny from a receiver in possession of property is not from the possession of an officer in such sense as to constitute that specific crime as defined by statute: *Ibid.*

As intoxicating liquors seized by an officer on a warrant for their forfeiture are not subject to replevin, it would be a crime under the statute providing for the taking of goods from an officer to take possession of them under such a writ: *State v. Harris*, 38–242.

What property subject to larceny: A raccoon is not subject to larceny: *Warren v. State*, 1 G. Gr., 106.

Intoxicating liquors, although kept for sale contrary to law, are subject to larceny: *State v. May*, 20–305.

"Money" and "bank notes" are subjects of larceny: *State v. Carr*, 43–418.

A non-negotiable draft drawn by an insurance adjuster upon the company for a loss is an instrument the taking of which will constitute larceny although the acceptance of it by the company is necessary before it becomes valid: *State v. Patty*, 66 N.W., 727.

Indictment: An indictment describing money and notes as "gold and silver coin" and "Clark's Exchange bank bills of the value of," etc., *held* sufficient: *Munson v. State*, 4 G. Gr., 483.

So, also, an indictment *held* sufficient which charged the taking of "a promissory note for the payment of money, commonly called a bank note, purporting, etc., of the value of," etc.: *State v. Bond*, 8–540.

So also one charging the larceny of "$180 in bank notes, usually known and described as greenbacks:" *State v. Hockenberry*, 30–504.

So *held*, also, where the property was described as bank bills of the amount and value of, etc., "the number and denomination of which are to the jury unknown:" *State v. Hoppe*, 39–468.

It is not required that, in an indictment for larceny of an instrument in writing, the property shall be more particularly described than any other stolen property; therefore, *held*, that an indictment charging that defendant took, etc., a bill of exchange, to wit, an order for the payment of money (describing it), and of the value of $20.97, was sufficient: *State v. Pierson*, 59–271.

Where the indictment alleges the value of a check charged to have been stolen, such allegation must be taken as equivalent to an allegation that the instrument called for at least that amount of money: *Ibid.*

Indictment for larceny from a bank, describing the property as seven one hundred dollar notes, of the value and denomination of one hundred dollars each, consisting of national bank notes, national currency notes, called greenbacks, and all of the aggregate value of seven hundred dollars, *held* sufficient as to description: *State v. Graham*, 65–617.

Where the indictment alleges that the defendant took, stole, and carried away, etc., contrary to the statute, etc., it is not necessary to allege that the act was feloniously done: *State v. Griffin*, 79–568.

Also *held*, that the allegation as to the ownership of the property was sufficient, without the use of the words "then and there:" *Ibid.*

Also *held*, that it is not necessary in such case to charge the intent to convert the property to defendant's use and deprive the owner thereof: *Ibid.*

Evidence: A pertinent, well-connected chain of circumstances, showing that certain money found is the same as that taken from the prosecutor, is sufficient evidence of larcency of such money from him, although he cannot identify any of the particular bills: *State v. Hoppe*, 39–468.

In a particular case, *held*, that the evidence was sufficient to identify the bills found on the person of defendant to be the same as those charged to have been stolen from the prosecutor, the general appearance, manner of folding and denomination of the bills being the same: *State v. Buckley*, 60–471.

Proof that defendant charged with the larceny of bank notes, and in whose possession notes resembling those stolen were found soon after the larceny, had money of the same denomination some two or three months before the larceny was committed, would not be admissible in behalf of defendant: *State v. Graham*, 65–617.

Proof of the denomination, etc., of bills being made, it will be presumed that they were genuine: *State v. Pratt*, 20–267.

Two separate larcenies may be so connected that on the trial of the indictment for one facts as to the other may be admissible: *State v. Vermillion*, 90–57.

A confession of defendant that he "swiped" the goods in question from the owner, *held* to constitute an admission of guilt of larceny: *State v. Lee*, 70 N.W., 594.

Evidence in particular cases *held* sufficient to sustain a conviction for larceny: *State v. Lillard*, 59–479: *State v. Day*, 60–100.

Corpus delicti: Where the evidence in a prosecution for larceny showed that the horse charged to have been stolen was put into the stable at night and was gone the next morning, *held*, that the *corpus delicti* was sufficiently proven: *State v. Rodman*, 62–456.

Circumstantial: In a prosecution for larceny, *held* proper to instruct the jury that the evidence to establish the facts necessary to convict the defendant may be direct or circumstantial, or partly direct and partly circumstantial; direct, as by persons who saw the act; or circumstantial, as by evidence of facts from which the guilt of defendants may be fairly presumed: *State v. Brady*, 27–126.

Proof of non-consent: The rule requiring the production of the best evidence of which the nature of the case admits would require the introduction of the owner of the stolen goods to prove his non-consent to the taking except in cases where the property is stolen from a bailee, or some other person holding possession thereof, or where it is impossible to produce the evidence of the owner; *State v. Osborne*, 28–9.

Recent possession of stolen property: Possession of the stolen property immediately after a larceny is presumptive proof that the party so in possession is guilty of the larceny: *State v. Brady*, 27–126; *State v. Golden*, 49–48.

Such presumption is sufficient to convict unless rebutted: *State v. Hessians*, 50–135.

Recent possession of stolen property, unexplained, is evidence of guilt: *Johnson v. Miller*, 63–529.

But such possession is presumptive proof only after the stealing has been proved: *State v. Taylor*, 25–273.

The possession must be recent in order that it shall be admissible in evidence to prove the guilt of the accused: *Warren v. State*, 1 G. Gr., 106.

What is to be deemed recent possession depends very much on the character of the goods stolen. If they are such as to pass readily from hand to hand, the possession, in order to raise a presumption of guilt, should be much more recent than if they are of a class of property which circulates more slowly or is rarely transmitted: *State v. Walker*, 41–217.

There may be cases where the possession is so long after the commission of the crime that the court will refuse to submit the question to the jury, deciding as a matter of law that the possession is not recent, but in all other cases the question is one of fact: *Ibid.*

In a particular case, *held*, that an instruction directing the jury that, as a matter of law, proof of possession of part of the stolen goods four months after the commission of the crime was recent possession, from which a strong presumption of guilt arose, unless such possession was satisfactorily explained, was erroneous: *Ibid.*

The admission of defendant that ten months previous to the time the property is found in his possession he had no such property does not show the possession of the property to be recent in such sense as to throw upon him the burden of explaining such possession; *State v. Wallace*, 47–660.

The fact that stolen property is found in defendant's place of business will not alone raise the presumption of guilt, there being other inmates of the place. But if defendant admits the possession of the property and seeks to prove that it was not the property stolen, the evidence may properly be submitted to the jury: *State v. Griffin*, 71–372.

Where cattle claimed to have been stolen were found at the place of defendant's father, where defendant made his home, *held*, that the question whether they were in defendant's possession or not was a question for the jury: *State v. Van Winkle*, 80–15.

Where a stolen horse when found, soon after the larceny, was being ridden by a traveling companion of the defendant, *held*, that evidence of such fact was a circumstance tending to prove defendant's guilt, and sufficient to warrant his conviction: *State v. Pennyman*, 68–216.

It seems that where the party in whose possession recently stolen goods are found claims to have bought them of a real person, naming him, or of the thief, when there was no previous acquaintance or evidence of collusion, such explanation must be negatived by the state; but an explanation by such party that he bought of a stranger is not sufficient to oblige the state to disprove the statement before the presumption of guilt will arise: *State v. Brown*, 25–561.

The person charged with larceny may explain his possession of stolen property by showing what was said to him at the time he acquired possession: *State v. Jordan*, 69–506.

Evidence of recent possession of stolen property and falsity of explanations made thereof, *held* sufficient in a particular case to warrant a conviction: *State v. Hallett*, 63–259.

Where stolen property was found in the possession of defendant soon after it was stolen, *held*, that it was incumbent on him to make some reasonable explanation of his possession consistent with his innocence, and that, taking the evidence all together, it was proper to be submitted to the jury and sufficient to support the verdict: *State v. Whitmer*, 77–558.

Where stolen property is found in the possession of the defendant the jury may consider the explanation given by him of such possession either alone or in connection with other facts and circumstances disclosed by the evidence in determining whether he honestly came into the possession of such property. If such explanation creates in the minds of the jury a reasonable doubt as to the guilty possession of defendant he should not be convicted upon the evidence of such possession: *State v. Wilson*, 64 N. W., 266.

It may not be true as a general rule that recent possession of the particular property stolen is *prima facie* evidence that the possessor stole the whole of it, yet under the circumstances of the particular case such presumption may arise: *Ibid.*

While the presumption of guilt from recent possession, being recognized by the law, may be termed a presumption of law, it may also be termed a presumption of fact, as implying that from such fact the law will raise a presumption: *State v. Kelly*, 57–644.

The presumption arising from the recent possession of stolen goods may be overcome by testimony establishing facts inconsistent with guilt. Good character may serve in some cases to overcome such presumption: *Ibid.*; *State v. Richart*, 57–245.

Where the prosecution relies upon possession by defendant of recently stolen property, the defendant is not required to overthrow such presumption by a preponderance of evidence of the honesty of such possession. Evidence sufficient to raise a rea-

sonable doubt in his favor is sufficient: *State v. Richart*, 57-245; *State v. Emerson*, 48-172.

In such cases it is sufficient to authorize an acquittal if the evidence is such as to raise a reasonable doubt whether defendant honestly came into possession of the stolen goods. An instruction that the jury should acquit if the evidence left it reasonably doubtful whether defendant acquired the possession by theft, *held* correct: *State v. Peterson*, 67-564.

Unexplained possession by the defendant of recently stolen property is a circumstance against him, and will justify conviction unless there is such evidence of good character or other circumstances as to raise a reasonable doubt of guilt, or, if an explanation has been made, the jury should be instructed to acquit if the explanation is enough to raise a reasonable doubt: *State v. Kirkpatrick*, 72-500.

In a particular case, *held*, that the method of finding the goods at a place not in the dwelling-house of the defendant, and under circumstances indicating a knowledge on the part of others as to their location, were sufficient to prevent the recent possession relied upon from being satisfactory evidence of guilt: *Warren v. State*, 1 G. Gr., 106.

If the jury fail to find from the evidence that defendant was in any manner engaged in the larceny of the property they should acquit, although he has failed to show that he came honestly into possession: *State v. Jones*, 33-9.

The fact that recent possession of stolen property has not been explained in a manner consistent with defendant's innocence will not in itself necessarily establish his guilt: *State v. Jordan*, 69-506.

Possession of other stolen property than that for the larceny of which defendant was on trial, *held* admissible, not as showing the commission of another crime, but as contradicting the explanation made by defendant as to the possession by him of the property stolen in the commission of the larceny for which he is on trial: *State v. Ditton*, 48-677.

Recent possession of property acquired by breaking into a storeroom, if not explained, raises the presumption that the breaking and entering were with intent to commit larceny: *State v. Golden*, 49-48.

To warrant conviction of defendant on proof of subsequent possession of the stolen property the identity of the property should be satisfactorily established: *State v. Osborne*, 45-425.

It is erroneous to instruct the jury with reference to recent possession of stolen property, that if they are satisfied that the possession of the defendant was a guilty possession they should convict; such instruction would apply to a possession of goods received knowing them to be stolen: *State v. Tucker*, 76-232.

That the explanation of the possession of recently stolen property will require an acquittal, so far as the evidence of guilt consists in such recent possession, if it raises a reasonable doubt of defendant's guilt, see notes to § 5376.

See further, as to presumption from possession of stolen property, cases cited under §§ 4787 and 4833.

Grand and petit larceny: There are not two degrees in the crime of larceny, but only in the punishment; and a conviction for larceny bars a subsequent prosecution for grand larceny: *State v. Murray*, 55-530.

So, also, a conviction for petit larceny bars a prosecution for larceny from the person under § 4837: *State v. Gleason*, 56-203.

Under an indictment for larceny of property of greater value than twenty dollars defendant may be convicted upon proof of a larceny of part of the property less than twenty dollars in value. The offense is the same: *State v. Hessian*, 58-68.

In a trial upon an indictment for larceny charging the value of the property as exceeding twenty dollars, it is not necessary to instruct the jury as to the difference in the degrees of the offense of larceny. They should merely be instructed to find the value of the property: *Ibid.*

The finding of the jury that the value of the property did not exceed twenty dollars will not deprive the court of jurisdiction, under an indictment for larceny, to impose the proper sentence for the lesser offense, although larceny of goods less than twenty dollars in value is a misdemeanor exclusively cognizable before a justice of the peace: *State v. Church*, 8-252; *State v. Stingley*, 10-488. And see notes to Const., art. I, § 11.

Where the jury are in reasonable doubt as to whether the value of the property stolen exceeds twenty dollars in value they should only convict of the lesser crime: *State v. Wood*, 46-116; *State v. Hathaway*, 69 N.W., 449.

Value of property stolen: The verdict on an indictment for larceny should fix the value of the property stolen, so that the court may know of which degree of the offense the defendant is convicted. If the verdict does not so fix the value a new trial should be awarded: *Ray v. State*, 1 G. Gr., 316.

Such new trial will not be unlawful as putting the defendant twice in jeopardy (Const., art. I, § 12): *State v. Redman*, 17-329.

The jury should be instructed to assess the value of the property at what it would bring in the market, and not at what it was worth to the owner: *State v. Smith*, 48-595.

The fact that the value of the property was over twenty dollars, as well as the stealing itself, must be made out beyond a reasonable doubt to warrant a conviction of the higher offense. A preponderance of evidence alone will not be sufficient: *State v. Wood*, 46-116.

The jury should be instructed that if they are not satisfied beyond reasonable doubt that the value of the property stolen exceeds twenty dollars, they should convict of only the lower degree: *State v. McCarty*, 73-51.

The question whether the offense is to be tried as a felony or a misdemeanor is to be determined by the value of the property as stated in the indictment or information, and not by the value as found by the trial jury: *State v. Church*, 8-252.

It is error to instruct the jury that the question is as to the value of the property to

the owner. The true rule is the real value of the property in the market: *State v. Smith*, 48–595.

Where the testimony as to the value is conflicting, the supreme court will not reverse the case unless there is such want of evidence in support of the verdict as to give rise to the presumption that it was not the result of an honest and intelligent exercise of judgment by the jury: *State v. Scott*, 48–597.

Recovery of stolen property: Where stolen property is sold to a third person and afterwards retaken from him by the owner, he may recover the price paid in an action against the seller, even though the seller has not been convicted of the larceny: *Barton v. Faherty*, 3 G. Gr., 327.

Venue: Where property is stolen within the jurisdiction of another state and brought within this state, the offense is punishable as larceny in this state in any county into which the stolen goods are taken, on the principle that the continued possession of property stolen is in itself larceny. Every act of the thief in the removal of the property and keeping it from the possession of the owner is, in contemplation of law, an offense: *State v. Bennett*, 14–479.

In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods: *State v. Lillard*, 59–479.

SEC. **4832. In nighttime in dwelling-house, store, boat, etc.** If any person in the nighttime commit larceny in any dwelling-house, store or any public or private building, or in any boat, vessel or water-craft, when the value of the property stolen exceeds the sum of twenty dollars, he shall be imprisoned in the penitentiary not exceeding ten years; and when the value of the property stolen does not exceed twenty dollars, be fined not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year. [15 G. A., ch. 11; C. '73, § 3903; R., § 4238; C. '51, § 2613.]

An acquittal of larceny from a dwelling-house in the nighttime prevents a subsequent prosecution for robbery in the same transaction, as each includes the crime of larceny: *State v. Mikesell*, 70–17

And see notes to following section.

A charge of larceny from a building in the nighttime will sustain a conviction for larceny: *State v. Nordman*, 70 N. W., 621.

SEC. **4833. Same in daytime.** If any person in the daytime commit larceny as defined in the preceding section, and the value of the property stolen exceeds twenty dollars, he shall be imprisoned in the penitentiary not more than five years; and when the value of the property stolen does not exceed twenty dollars, be fined not exceeding two hundred dollars and imprisoned in the county jail not exceeding one year. [15 G. A., ch. 11; C. '73, § 3904; R., § 4239; C. '51, § 2614.]

The provisions of this and the preceding section merely point out certain circumstances which are an aggravation of the offense of larceny, and will subject the offender to a severer penalty. The facts of the time and place of the commission affect only the degree of punishment which shall be imposed upon the offender: *State v. Elsham*, 70–531.

Larceny from a dwelling-house in the nighttime and in the daytime are not different offenses; but each differs from simple larceny only in the circumstances affecting the degree of punishment, and they may be charged in the same indictment: *Ibid.*

Where defendant was indicted for stealing personal property of less than twenty dollars in value from a dwelling-house in the daytime, *held*, that the offense was one within the jurisdiction of the district court: *State v. Dawson*, 17–584.

The possession of goods recently stolen by breaking into a store-room, if not explained, raises the presumption that the party in possession thereof committed the breaking with intent to commit larceny. Such possession is competent as tending to prove the guilty intent: *State v. Golden*, 49–48; and as to the presumption from such possession in cases of larceny, see notes to § 4831.

SEC. **4834. Larceny of logs or lumber.** Whoever shall wilfully take, carry away or otherwise convert to his own use, or sell or dispose of, without the consent of the owner or owners, any pile, logs or cant suitable to be worked into plank, board, joist, shingles or other lumber, the property of another, whether the owner thereof be known or unknown, lying or being in any lake, bay or river in or bordering on this state, or in any tributary of such lake, bay or river or tributary, or in or on any slough, ravine, island, bottom or land adjoining any such lake, bay or river or tributary, such property being so taken, carried away or otherwise converted or sold or disposed of within this state, or taken possession of with intent to sell or dispose of as aforesaid; or cuts out, mutilates, destroys or renders illegible the marks or mark thereon, destroying the identification thereof;

or in any manner wilfully injures any such logs, not his own; or places upon such logs or pieces of timber any mark or device other than the original mark or device, shall be deemed guilty of the crime of larceny, and on conviction thereof shall be fined not less than fifty dollars, and be imprisoned in the county jail not less than three months; and on a second conviction for a like crime shall be fined not less than one hundred dollars and be imprisoned in the penitentiary not more than two years. [26 G. A., ch. 71, § 1.]

SEC. **4835. Double damages.** Every person guilty of any of the offenses described in the preceding section shall, whether convicted thereof in a criminal prosecution or not, be liable to pay the owner or owners of such pile, log, cant or other lumber respecting which the offense is committed, double the amount of the value of the same, to be recovered in an action therefor. [Same, § 2.]

SEC. **4836. Possession as evidence.** In any prosecution under the two preceding sections, if any such pile, log or cant shall be found in the possession of the defendant, either with or without the mark cut out or destroyed, or partly cut out or destroyed, or partly sawed or manufactured into lumber of any kind, fence posts, fence rails or stovewood, such possession shall be presumptive evidence of his guilt. The owner of any such pile, log, cant or other lumber may at any time lawfully, by himself or agent, enter in a peaceable manner into or upon any mill or mill-boom or raft of logs, piles, cant or other lumber, in any river or its tributaries in or bordering on this state, or on or near the banks of such lakes, bays or rivers, or their tributaries, in search of any such pile, log, cant or other lumber which he may have lost, and any person who shall wilfully prevent or obstruct such search shall, upon conviction thereof, be liable to a penalty of not less than twenty dollars, nor more than fifty dollars, for every such offense. [Same, § 3.]

SEC. **4837. From building on fire or from the person.** If any person commit the crime of larceny by stealing from any building on fire, or by stealing any property removed in consequence of an alarm caused by fire, or by stealing from the person of another, he shall be imprisoned in the penitentiary not exceeding fifteen years. [C.'73, § 3905; R., § 4240; C. '51, § 2615.]

A former conviction or acquittal, before a justice of the peace, of the crime of larceny, is a bar to an indictment under this section for stealing from the person, when based on the same act. The latter is larceny and something more: *State v. Gleason*, 56–203.

The crime of larceny from the person is included in the crime of robbery, defined in § 4753, and an indictment for the former offense is sustained by evidence which establishes the latter: *State v. Graff*, 66–482.

The offense here described differs from that of robbery in that the taking is without force or violence or putting in fear: *State v. Miller*, 83–291.

SEC. **4838. Falsely personating another.** If any person falsely personate or represent another, and in such assumed character receive any money or property intended to be delivered to the person so personated, with intent to convert the same to his own use, he is guilty of larceny, and shall be punished accordingly. [C.'73, § 3906; R., § 4241; C.'51, § 2616.]

This section abrogates the common law rule that a trespass is necessary to constitute larceny. The cases provided for here would not be larceny at common law: *State v. Brown*, 25–561.

Representations made by acts or declarations intended to induce the belief that the person making them is some one else may be sufficient to constitute the crime, although not amounting to direct representations that the party's name is that of the person whom he personates: *State v. Goble*, 60–447.

SEC. **4839. Appropriating found property.** If any person come by finding to the possession of any personal property of which he knows the owner, and unlawfully appropriate the same or any part thereof to his own use, he is guilty of larceny, and shall be punished accordingly. [C.'73, § 3907; R., § 4242; C.'51, § 2617.]

To render finding or conversion of lost property larceny, it must be shown that the person so finding and converting knew the owner of the property: *State v. Taylor*, 25–273.

The crime consists in the original taking, and not in a subsequent lack of diligence in attempting to find the owner, nor in a subsequent conversion. An omission to take the steps specified in § 2373 *et seq.* will not render the party guilty under this section, where the owner was not known at the time of the taking: *State v. Dean*, 49–73.

If one picks up a pocketbook which has been dropped from the pocket of the owner, and with an unlawful intent converts it to his own use without the knowledge of the owner, he is guilty of larceny: *State v. Pratt*, 20–267.

The fact that money which is claimed to have been found is returned when demanded will not show that there was not intent to convert, sufficient to constitute larceny. The question whether the finder knew the owner and intended to appropriate the property is for the jury: *State v. Bolander*, 71–706.

Where the found property is so marked as to be capable of identification, proof of the possession and of the immediate subsequent conversion is admissible as tending in itself to establish the *corpus delicti*. The only distinction between theft of lost goods and theft of other property seems to be that at the time of finding not only must the intent to steal exist, but the finder must know or have the reasonable means of knowing or ascertaining the owner. It is not necessary to show that defendant actually knew who the owner of the property was at the time of finding: *State v. Hayes*, 67 N.W., 673.

Where it appeared that defendant had picked up a pocketbook and carrying it to a place of concealment had there opened it and finding money therein had appropriated such money, *held*, that the finding of the money dated from the discovery thereof in the pocketbook: *Ibid.*

This section was not designed to create a distinct crime but to declare a rule of evidence which being fulfilled constitutes the crime of larceny: *Ibid.; State v. Nordman*, 70 N.W., 621.

Further, see notes to § 4831.

SEC. 4840. Embezzlement by public officers. If any state, county, township, school or municipal officer, or officer of any state institution, or other public officer within the state charged with the collection, safe keeping, transfer or disbursement of public money or property, fails or refuses to keep the same in any place of custody or deposit that may be provided by law for keeping such money or property until the same is withdrawn therefrom as authorized by law, or keeps or deposits such money or property in any other place than in such place of custody or deposit, or unlawfully converts to his own use in any way whatever, or uses by way of investment in any kind of property, or loans without the authority of law, any portion of the public money intrusted to him for collection, safe keeping, transfer or disbursement, or converts to his own use any money or property that may come into his hands by virtue of his office, he shall be guilty of embezzlement to the amount of so much of said money or the value of so much of said property as is thus taken, converted, invested, used, loaned or unaccounted for, and shall be imprisoned in the penitentiary not exceeding ten years, and fined in a sum equal to the amount of money embezzled or the value of such property converted, and shall be forever after disqualified from holding any office under the laws of the state. Any such officer who shall receive any money belonging to the state, county, township, school or municipality or state institution of which he is an officer shall be deemed to have received the same by virtue of his office, and in case he fails or neglects to account therefor upon demand of the person entitled thereto, he shall be deemed guilty of embezzlement, and shall be punished as above provided. [26 G. A., ch. 67; C.'73, § 3908; R., §§ 806–7, 4243; C.'51, § 2618.]

The offense here defined is different from the offenses described in §§ 1456, 1457. The latter sections contemplate cases where no loss results, but this one refers to cases where the money is unaccounted for; and to sustain this construction the word "or" preceding the words "unaccounted for" will be construed "and." An indictment under this section should charge that the money is "unaccounted for:" *State v. Brandt*, 41–593.

A deputy state treasurer is an officer within the meaning of this section, and may be indicted for embezzlement: *Ibid.*, 606.

Conversion is established by showing demand and refusal, unless a sufficient excuse is shown for such refusal: *State v. Bryan*, 40–379.

One who has acted *de facto* as a public officer cannot deny that he is such an officer when indicted for malfeasance: *State v. Stone*, 40–547.

To constitute the offense here defined the money must have been both misapplied and lost, and the crime consists only in converting, using or loaning so much of the public money intrusted to the officer for safe keeping as is taken and unaccounted for: *State v. Parsons*, 54–405.

Failure to account for public money used by an officer as his own is necessary to con-

stitute the crime of embezzlement: *Hale v. Richards*, 80–164.

Evidence that a public official charged with embezzlement had, at the time of such embezzlement, money on deposit in a bank to his credit officially, in excess of the amount which it is alleged he embezzled, is inadmissible where it does not tend to show that he did not misappropriate the money for which judgment is claimed: *Ida County v. Woods*, 79–148.

It being provided that the boards of directors of independent school districts shall elect a treasurer, *held*, that an indictment against such treasurer, designating him as "treasurer of the board of directors of the independent school district of," etc., was sufficient: *Ibid.*

The fact that the officers of a municipal corporation loaned the public funds in violation of the statute does not prevent the same being recovered in an action by the corporation against the person to whom they were so loaned or his surety: *District T'p v. Calvin*, 59–189.

A county treasurer prosecuted for embezzlement may show that the defalcation took place at such time that the prosecution is barred by the statute of limitations, although by fraudulent statements to the board of supervisors, he made it appear subsequently to such actual defalcation that he had on hand the necessary balance and that his accounts were correct. The rule of estoppel applicable in a civil action against the treasurer cannot be enforced in a criminal prosecution: *State v. Hutchinson*, 60–478.

An allegation of the manner in which the defendant disposed of the money for which he failed to account is unnecessary and need not be proved: *State v. King*, 81–587.

Where the record of the board of supervisors was introduced to show the report of a defaulting treasurer, *held*, that there was no prejudice to defendant by its introduction, as the report itself was afterwards introduced: *Ibid.*

And where it was proved that the treasurer received the money, that the same was demanded of him, and he refused to turn it over, and that he made no explanation of how or in what manner he used the money, the evidence was sufficient to establish the crime of embezzlement: *Ibid.*

SEC. **4841. Embezzlement by bailee.** Whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him, or any part thereof, which may be the subject of larceny, shall be guilty of larceny and punished accordingly.

SEC. **4842. Other embezzlement.** If any officer, agent, clerk or servant of any corporation or voluntary association, or if any clerk, agent or servant of any private person or co-partnership, except persons under the age of sixteen years, or if any attorney at law, collector or other person who in any manner receives or collects money or other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle or convert to his own use, without the consent of his employer, master or the owner of the money or property collected or received, any money or property of another, or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney at law, collector or other person, which has come to his possession or under his care in any manner whatsoever, he is guilty of larceny. If money or property is so embezzled or converted by a series of acts during the same employment, the total amount of the money and the total value of the property so embezzled or converted shall be considered as embezzled or converted in one act, and he shall be punished accordingly. [21 G. A., ch. 30; C.'73, § 3909.]

To constitute the crime here defined there must exist the relation of master and servant, or employer and employe, and the property stolen or converted must have been received by virtue of such employment: *State v. Johnson*, 49–141.

It is not necessarily a crime for an agent to convert to his own use the property of his principal or employer. Something more than agency and conversion must be established to show embezzlement: *State v. Wallick*, 87–369.

"Money or property," as here used, includes bills of exchange, etc. The crime defined is similar to that of larceny, and covers cases where, by reason of the trust reposed in defendant, the act would not be larceny at common law. Whatever would be property under one section would be under the other: *State v. Orwig*, 24–102.

Where the taking is not *animo furandi*, but the property is delivered to the defendant voluntarily while he is in the employ of the owner, and afterwards is appropriated by him, the crime is not larceny but embezzlement: *Ennis v. State*, 3 G. Gr., 67.

The crime of embezzlement embraces all the elements of larceny except the actual taking of the property or money embezzled: *State v. Baldwin*, 70–180.

The clause "without the consent of his employer" applies to embezzling and converting as well as to taking and secreting. That fact is a necessary element of the offense here defined and should be charged in the indictment: *State v. Foster*, 11–291.

Where the owner of a watch delivered it to another under an agreement that the latter was to trade it for a wagon and receive a certain sum as compensation for his services, *held*, that the relation between the parties was such that the wrongful conversion by the person intrusted with the watch constituted embezzlement: *State v. Foster*, 37–404.

Conversion may be shown either by direct proof of the fact of conversion or by proof of demand and refusal, but mere proof of the receipt of funds and failure to account therefor on demand, while sufficient to establish embezzlement by a public officer, under § 4840, is not sufficient to show embezzlement by an agent or servant: *State v. Bryan*, 40–379.

Where an agent, in order to make his books balance and cover up deficiencies on account of sums of money before appropriated to his own use, reported certain sums as unpaid which were in fact received by him, *held*, that he was guilty of embezzling such sums: *Bowman v. Brown*, 52–437.

Under this section an agent of a corporation may be guilty of embezzlement, although under the age of sixteen years: *State v. Goode*, 68–593.

And an agent may be guilty of embezzling his employer's money, either by actual conversion or by secreting the same with intent to convert: *Ibid.*

It is not necessary to allege the particular nature or character of the employment, but it is sufficient to aver generally that defendant was in the employment of the person named, as his clerk, without specifying particularly the employment. The words "such employment" in the latter part of the section relate to the general character of the employment rather than the particular business in which the accused was engaged when he received the money or property into his possession: *State v. Jamison*, 74–602.

A partner cannot be guilty of embezzlement of partnership funds by appropriating them to his private use: *Gary v. Northwestern Mutual Aid Ass'n*, 87–25.

The taking of several articles may be charged in a single count of the indictment: *State v. Pierce*, 77–245.

Where the evidence was conflicting, but it was shown that defendant had converted to his own use certain property belonging to his principal, that he concealed the facts as to the disposition of some of the property, and rendered a false account of his agency with regard to it, *held*, that the evidence was sufficient to sustain a verdict of embezzlement: *Ibid.*

Where the indictment charged authority in defendant to sell the property to a particular person and there was evidence tending to show such authority, *held*, that it was not erroneous to convict defendant under the indictment, although there was evidence tending to show a general authority to sell to anyone: *State v. Foley*, 81–36.

Where it appeared that defendant, intrusted as agent with the sale of certain diamonds, refused to account for them on demand at a time when the owner was entitled to an accounting, *held*, that the evidence was such as to warrant conviction: *Ibid.*

Instructions in a prosecution under this section as amended, against a loan agent for receiving money for the purpose of paying off liens upon land upon which a loan was negotiated and not paying the same out, and concealing his failure to do so, *held* correct in a particular case: *State v. Brooks*, 85–366.

In such case, *held*, that the evidence sufficiently showed a refusal on the part of the defendant to account for the money: *Ibid.*

The defendant was authorized to negotiate a loan for one Farr. He obtained the money of one Frazer, with instructions from the latter to turn it over to Farr only when Farr had executed a first mortgage upon certain land. Before the mortgage was executed the defendant had appropriated all the money received; *held*, that defendant was not guilty of larceny by embezzlement under an indictment charging him with embezzling Farr's money: *State v. Cooper*, 71 N.W., 197.

SEC. **4843. Retaining commission.** In a prosecution under the preceding section, it shall be no defense that such officer, agent, clerk, servant, collector, attorney at law or other person was entitled to a commission or compensation out of such money or property as compensation or commission for collecting or receiving the same for or on behalf of the owner thereof. It shall be lawful for such agent, clerk, servant, attorney at law, collector or other person to retain his reasonable compensation or collection fee for collecting or receiving the same, but no attorney at law may retain any money or property as compensation, or as money and property on which he has an attorney's lien, after the filing of a bond as provided for in regard to such liens. [Same.]

SEC. **4844. Embezzlement by carrier or persons intrusted.** If any carrier or other person to whom any money, goods or other property which may be the subject of larceny has been delivered to be carried for hire, or if any other person intrusted with such property, embezzle or fraudulently convert to his own use any such money, goods or other property, either in the mass as the same were delivered or otherwise, and before the same were delivered at the place or to the person where and to whom they were to be delivered, he is guilty of larceny. [C. '73, § 3910; R., § 4245; C. '51, § 2620.]

The offense here defined can only be committed upon property which "has been delivered to be carried for hire:" *State v. Stoller*, 38–321.

SEC. **4845. Receiving stolen goods.** If any person buy, receive or aid in concealing any stolen money, goods or property the stealing of which is larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, he shall, when the value of the property so bought, received or concealed by him exceeds the sum of twenty dollars, be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year; and when the value of the property so bought, received, or concealed by him does not exceed the sum of twenty dollars, be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C.'73, § 3911; R., § 4246; C.'51, § 2621.]

To establish the offense it must appear that the goods were the property of the person mentioned, that they had been recently stolen by some person from such another and that defendant received and concealed them, knowing them to have been stolen, and that such acts were done within the jurisdiction of the court and within the period of limitation. The intent, aside from knowledge that the goods were stolen, is immaterial: *State v. Smith*, 88–1.

Merely assisting the defendant by giving him his breakfast and feed for stolen horses, knowing that they were stolen, *held* not sufficient to warrant a conviction of this offense. The accused must have aided in concealing or hiding the property: *Upton v. State*, 5–465.

The fact of aiding in concealing stolen goods, knowing them to be stolen, necessarily implies a felonious intent: *State v. Turner*, 19–144.

The crime here defined may be committed as to property procured by burglary or robbery as well as by larceny: *Ibid.; State v. Lane*, 68–384.

To receive stolen property, with knowledge of the theft, is sufficient to constitute the crime: *State v. Lane*, 68–384.

Evidence in a particular case *held* sufficient to support a verdict for receiving and aiding in concealing, although no physical possession of the goods by defendant was shown: *State v. St. Clair*, 17–149.

Defendant's explanations in a particular case as to how he came into possession of the property being conflicting and unsatisfactory, a verdict of guilty of receiving stolen goods was held proper: *State v. Mayer*, 45–698.

It is competent to show a previous course of dealing between the parties as tending to establish the fact that the goods were received with knowledge of their having been stolen: *State v. Feuerhaken*, 65 N.W., 299.

The different acts named disjunctively by the statute as constituting the offense may be charged conjunctively in the indictment without duplicity: *Ibid.*

It is not necessary to name the person of whom the goods were received: *Ibid.*

An indictment for this offense, in a particular case, *held* good: *State v. Smith*, 88–1.

SEC. **4846. Common thief.** If any person, having before been twice convicted within the state of larceny, is guilty of another crime of larceny, he shall be deemed a common thief, and imprisoned in the penitentiary not more than seven years, or fined not exceeding one thousand dollars and imprisoned in the county jail not more than one year. [R., § 4247.]

The punishment here prescribed should be inflicted when the facts authorizing it appear in a prosecution for larceny. The section does not describe a distinct offense: *State v. Riley*, 28–547.

SEC. **4847. Second conviction for receiving.** If any person, after having been convicted of the offense of buying, receiving or aiding in the concealment of stolen money, goods or any property the stealing of which is larceny, or property obtained by robbery or burglary, be again convicted of the like offense, he shall be punished as provided in the preceding section. [C.'73, § 3912; R., § 4248; C.'51, § 2623.]

SEC. **4848. Receiver convicted without principal.** In any prosecution for the offense of buying, receiving or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing the same was so obtained, it shall not be necessary to aver nor prove on the trial that the person who stole, robbed or took the property has been convicted. [C.'73, § 3913; R., § 4249; C.'51, § 2624.]

SEC. **4849. Measure of value of stolen goods.** If the property stolen consist of any bank note, bond, bill, covenant, bill of exchange, draft, order or receipt, or any evidence of debt whatever, or any public security, or any instrument whereby any demand, right or obligation may be assigned, trans-

ferred, created, increased, released, extinguished or diminished, the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected, as the case may be, shall be adjudged the value of the thing stolen. [C.'73, § 3914; R., § 4250; C.'51, § 2625.]

Where the indictment alleges the value of a check charged to have been stolen, such allegation must be taken as equivalent to an allegation that the instrument called for at least that amount of money: *State v. Pierson*, 59–271.

Indictment for larceny from a bank, describing the property as seven one hundred dollar notes, of the value and denomination of one hundred dollars each, consisting of national bank notes and national currency notes, called greenbacks, and all of the aggregate value of seven hundred dollars, *held* sufficient: *State v. Graham*, 65–617.

For other cases as to the description, in the indictment for larceny, of notes and bills alleged to have been stolen, see § 4831.

Tickets taken up by a railroad conductor, whether they be coupon tickets issued by another road or tickets issued by his own road, are such instruments as are subjects of larceny under this section: *State v. Wilson*, 64 N. W., 266.

SEC. **4850. Taking goods from officer.** If any person, knowingly and without authority of law, take, carry away, secrete or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable or other officer, and rightfully held by such officer by virtue of execution, writ of attachment or other legal process, he shall be guilty of larceny, and, when the value of the property so taken, carried away, secreted or destroyed exceeds the sum of twenty dollars, be imprisoned in the penitentiary not more than one year; and when it does not exceed twenty dollars, be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days. [C.'73, § 3915; R., § 4251.]

Intoxicating liquors seized on a warrant issued on information for their forfeiture (under § 2413) are not subject to replevin, and to take them from a proper officer under such writ would be an unlawful act under this section: *State v. Harris*, 38–242.

A receiver does not hold property under what is denominated a legal process issuing out of any court, and he is not an officer within the meaning of this section. Therefore it is proper to charge the wrongful taking of property from him as larceny, laying the ownership of the property in the receiver: *State v. Rivers*, 60–381.

SEC. **4851. Custody of property levied on deposited by officer for safe keeping.** The possession or custody of goods and chattels by any person with whom the same have been left or deposited for safe keeping, to be returned for the purpose of being disposed of on legal process, shall be the possession and custody of the officer having or depositing the same and entitled to the custody thereof, and, in a prosecution under the preceding section, the property taken, carried away, secreted or destroyed, as therein mentioned, may be laid in the officer entitled to the custody thereof at the time of the commission of the offense. [C.'73, § 3916; R., § 4252.]

SEC. **4852. Selling or concealing mortgaged property.** If any mortgagor of personal property, while the mortgage upon it remains unsatisfied, wilfully destroy, conceal, sell or in any manner dispose of the property covered by such mortgage without the written consent of the then holder of such mortgage, he shall be guilty of larceny and punished accordingly. [25 G. A., ch. 50; C.'73, § 3895; R., § 4236.]

An indictment under this section should aver that the mortgage remains unsatisfied: *State v. Gustafson*, 50–194.

The consent of the mortgagee here contemplated, while it prevents the act from being a crime, does not constitute a waiver of his lien on the property: *Oswald v. Hayes*, 42–104, 106.

Where a mortgage of personal property provided that, if the mortgagor removed it from the county, the mortgagee might take possession of and sell it, *held*, that a mere removal from the county would constitute no offense under this section, and a subsequent concealment or sale would not be an offense in the county where the mortgage was executed; but it seems the offense would be committed in the county from which the property was thus subsequently taken for the purpose of concealment and sale: *State v. Julien*, 48–445.

A subsequent mortgage of the same property by the mortgagor is not void under this statutory provision: *Tootle v. Taylor*, 64–629.

It is the selling of mortgaged property without the consent of the *then* holder of the

mortgage that is made criminal. Consent of the mortgagor, given before the execution of the mortgage, that the mortgaged property may be sold, may, however, constitute a continuing consent, at least until the act consented to could properly be done, and may prevent an act in accordance with such consent from being criminal. The rule as to the inadmissibility of parol evidence to contradict a written contract is not applicable in such case. If the consent is such, in whatever way it may be given, that the seller honestly believes that he is authorized to sell the property, his honest act cannot be converted into a criminal one by the rules of evidence: *Walker v. Camp*, 69–741.

It is not criminal to purchase mortgaged chattels: *McDonald v. Norton*, 72–652.

CHAPTER 6.

OF FORGERY AND COUNTERFEITING.

SECTION **4853. Forgery defined.** If any person, with intent to defraud, falsely make, alter, forge or counterfeit any public record; or any process issued or purporting to be issued by any competent court, magistrate or officer; or any pleading or proceeding filed or entered in any court of law or equity; or any attestation or certificate of any public officer, or other person, in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof; or any charter, deed, will, bond, writing obligatory, power of attorney, letter of credit, policy of insurance, bill of lading, bill of exchange, promissory note; or any order, acquittance, discharge, or accountable receipt for money or other valuable thing; or any acceptance of any bill of exchange or order; or any indorsement or assignment of any bill of exchange, promissory note or order, or of any debt or contract; or any instrument in writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created, increased, transferred, conveyed, discharged or diminished, he shall be imprisoned in the penitentiary not more than ten years. [C.'73, § 3917; R., § 4253; C.'51, § 2626.]

Forgery defined: Forgery is the feloniously making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability: *State v. Johnson*, 26–407; *State v. Thompson*, 19–299.

In a prosecution for forgery in altering a receipt, the fact that defendant could not reap any personal advantage from the alteration is not a defense; the making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery: *State v. Wooderd*, 20–541.

The criminal intent, inferred from forging an instrument and using it in support of a claim, cannot be negatived by proof that the claim is a just one: *Ibid.*

It would constitute forgery to falsely sign a person's name to a mortgage, although such person is not owner of the property described therein, if the mortgage contains covenants which would create pecuniary liability on the part of the maker: *State v. Jamison*, 74–613.

In order to constitute forgery it is not necessary that the signature of the instrument be false; a fraudulent alteration, making the instrument such as was not signed by the maker, is sufficient: *Caulkins v. Whisler*, 29–495.

Alteration of an undated receipt by affixing a date thereto, so as to make it appear as a receipt for a subsequent account, is sufficient to constitute forgery: *State v. Maxwell*, 47–454.

As to alteration, see also § 4863.

Where an account against "The Steamer Irene" was receipted by the creditor and the defendant, who was a part owner of the steamer, afterwards changed the account so as to show that it was against the steamer Irene and himself, and then attempted to use such receipted account as a defense in an action against himself on an account for wholly different items of indebtedness, *held*, that such alteration and attempted use of the receipted account did not affect his liability and did not therefore constitute forgery: *State v. Dorrance*, 86–428.

The detaching of a condition from an instrument, by which it is converted from a non-negotiable to a negotiable instrument, *held* to constitute forgery: *State v. Stratton* 27-420.

Where the defendant counterfeited the certificate of a justice of the peace as to the presentation and destruction of gopher scalps, for which a bounty was allowed by statute, *held*, that the act was sufficient to constitute forgery: *State v. Johnson*, 26–407.

The alteration of a note by inserting without authority a rate of interest where the provision for interest is left blank is forgery: *Conger v. Crabtree* 88–536.

The "certificate" referred to in this section is a certificate required by law, or which

may be taken as legal proof of a fact: *State v. Rhine*, 84–169.

And *held*, that a writing purporting to give consent of a parent to the marriage of a daughter, stated therein to be of age was not such instrument that if falsely made the delivery thereof to the clerk for the purpose of procuring a license to marry such daughter would constitute a crime: *Ibid.*

The recorded proceedings of the board of supervisors constitute a public record which may be the subject of forgery; so *held* as to the alteration of a record as to the allowance to the county officers of an additional sum for clerk hire: *State v. Van Auken*, 68 N.W., 454.

It is not necessary to aver the genuineness or validity of the instrument forged. The essence of the crime consists in the doing of the act with intent to defraud. If the writing is invalid on its face it cannot be the subject of forgery, but it may be if the invalidity must be made out from extrinsic facts: *State v. Pierce*, 8–231; *State v. Johnson*, 26–407.

It is sufficient that the instrument might apparently be of legal efficacy or the foundation of a legal liability or the evidence of a legal right. *State v. Van Auken*, 68 N. W., 454.

The fact that the note charged to have been forged purports to be dated on Sunday does not show on its face that it is not an instrument creating a liability in such sense that the false making or signing may not be forgery, it appearing by the evidence that the instrument was written on a week day and dated on Sunday by mistake. Intent to deceive is the gist of the offense, and the fact that the false instrument is such that it was calculated to deceive is the material question: *Schafer v. McCracken*, 90–578.

The language used in this and the following sections covers an ordinary check: *State v. Bigelow*, 70 N. W., 600.

The offense of uttering does not cover, as a lower degree or an included crime, that of forgery. It is not necessary to show that defendant forged the instrument: *Ibid.*

The act of one who is intrusted with the making of an instrument, and who fraudulently makes a promissory note which is voluntarily signed by the other party, is not such a fraudulent making of the note as to constitute forgery: *Douglass v. Matting*, 29–498.

Where the indictment charged the forgery of an instrument signed by "Wright and Whaley," and the instrument when offered in evidence appeared to be signed "Wright Whaley," and it also appeared that this signature was an attempted signature of "Wright and Whaley," *held*, that the instrument was properly admissible: *State v. Nichols*, 38–110.

To constitute forgery of a bill of exchange or order it is not necessary that it contain the name of a payee or drawee. It is sufficient that it purports to create a liability against the person signing it: *State v. Baumon*, 52–68.

In a prosecution for forgery, *held*, that a particular instrument therein set forth sufficiently purported to create a liability against the person whose name was written thereto: *Ibid.*

The alteration of an unsigned indorsement, on the back of a note, of money paid, will not constitute forgery, where it does not appear but that such indorsement was a mere private memorandum made by the holder and not intended as a receipt: *State v. Davis*, 53–252.

A forwarding of a forged application for insurance by an insurance agent for the purpose of procuring the commission due to him upon such application, *held* to constitute forgery although the company refused to issue a policy upon such application: *Fountain v. Smith*, 70–282.

An indictment alleging in substance that the defendant falsely and feloniously, and with intent to defraud, made a negotiable promissory note, describing it and setting out a copy, is sufficient to charge the crime: *State v. Stuart*, 61–203.

The instrument should be set forth in the indictment, or some excuse for not doing so should be shown, but no technical form of words is necessary: *State v. Johnson*, 26–407.

The person intended to be defrauded, or the extent or particulars of the fraud, need not be stated: *State v. Maxwell*, 47–454.

Forgery, and uttering and publishing as true a forged instrument, are distinct offenses, and an indictment charging both is bad for duplicity. (Overruling *State v. Nichols*, 38–110): *State v. McCormack*, 56–585.

It is not necessary that the indictment allege the name of the person to whom the instrument was uttered: *State v. Hart*, 67–142.

It is sufficient in an indictment for forgery by altering a public record to state the alteration with which the defendant is accused and allege that it was unlawfully and feloniously made with intent to defraud, and that it was of a character to defraud, and that the record altered was the subject of forgery: *State v. Van Auken*, 68 N.W., 454.

Evidence: On a trial for the forgery of receipts, it is competent to show the payment of the indebtedness receipted for: *State v. Wooderd*, 20–541.

While proof of another act of forgery or uttering forged paper may be introduced, it is doubtful whether it ought not to be confined to a case where the former transaction was with reference to paper of the identical character of that involved in the act charged: *State v. Saunders*, 68–370.

When such other transaction is sought to be shown in evidence, it must appear that in the transaction a crime was committed: *Ibid.*

And it is necessary that the other instrument referred to must be produced or its absence accounted for: *Ibid.; State v. Breckenridge*, 67–204.

That defendant, on the trial of a civil cause in the county of his residence, produced the forged instrument which he is charged with forging, may be considered by the jury as tending to show that the forgery was committed in that county: *State v. Thompson*, 19–299.

Where the defendant is charged with forging an indorsement on the back of an order purporting to be drawn by one bank

on another, proof of the existence of the bank is not required. Nor is it necessary to aver the genuineness or validity of the instrument forged: *State v. Pierce*, 8–231.

Where there was a variance between the allegations of the indictment and the proof as to the date of the instrument set out in an indictment for forgery, but it was such as could not have misled defendant to his prejudice, *held*, that the variance was immaterial: *State v. Blanchard*, 74–628.

SEC. **4854. Uttering forged instrument.** If any person utter and publish as true any record, process, certificate, deed, will, or any other instrument of writing mentioned in the preceding section, knowing the same to be false, altered, forged or counterfeited, with intent to defraud, he shall be imprisoned in the penitentiary not more than fifteen years, and fined not exceeding one thousand dollars. [C.'73, § 3918; R., § 4254; C.'51, § 2627.]

The fact that defendant, in uttering a forged note, falsely represented himself to be the payee of the note, is sufficient evidence of intent without other evidence that he had knowledge of the forgery: *State v. Williams*, 66–573.

To justify a conviction for passing a forged instrument, the jury must find beyond a reasonable doubt that defendant had knowledge of the forgery: *Ibid.*

It is not necessary that the indictment allege the name of the person to whom the instrument was uttered: *State v. Hart*, 67–142.

Where a party executing a mortgage pretended to get his wife's signature thereto, but in fact procured the same to be signed by his daughter, having the same name as his wife, and delivered the instrument to the mortgagee, *held*, that though he might be guilty of cheating by false pretenses, he was also guilty of uttering a forged instrument: *State v. Farrell*, 82–553.

Where ordinarily the offense of uttering a forged instrument is constituted by an actual sale and transfer of an instrument, yet this is not always necessary. To constitute the offense it is sufficient if the evidence shows an offering to pass the instrument to another person with a direct or indirect declaration or assertion in words or actions that it is good: *State v. Sherwood*, 90–550.

See, also, notes to preceding section.

SEC. **4855. Forgery or counterfeiting of public instruments.** If any person, with intent to defraud, falsely make, utter, forge or counterfeit any note, certificate, state bond, warrant or other instrument, being public security for money or other property, issued or purporting to be issued by authority of this state or any other of the United States; or any indorsement or other writing purporting to transfer the right or interest of any holder of such public security, he shall be imprisoned in the penitentiary not more than twenty nor less than five years. [C.'73, § 3919; R., § 4255; C.'51, § 2628.]

SEC. **4856. Counterfeiting bills, notes or drafts.** If any person make, alter, forge or counterfeit any bank bill, promissory note, draft or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized for that purpose by any state of the United States, or any other government or country, with intent to injure or defraud, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding three hundred dollars, and imprisoned in the county jail not exceeding one year. [C.'73, § 3920; R., § 4246; C.'51, § 2629.]

SEC. **4857. Having counterfeit in possession.** If any person has in his possession any forged, counterfeited or altered bank bill, promissory note, draft or other evidence of debt issued or purporting to be issued as is mentioned in the preceding section, with intent to defraud, knowing them to be forged, counterfeited or altered, he shall be imprisoned in the penitentiary not more than five years, or fined not exceeding two hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3921; R., § 4257; C.'51, § 2630.]

Intent to defraud any person or corporation need not be averred (§ 5298), nor need it be alleged that the intent to defraud was "felonious" or "wilful." The language of the statute is sufficient: *State v. Callendine*, 8–288.

The description of the bank bills in a particular case *held* insufficient, and *held*, also, that a copy of such bills should have been set out in the indictment: *Ibid.*

SEC. **4858. Uttering counterfeit securities.** If any person utter, pass or tender in payment as true any false, altered, forged or counterfeited

note, certificate, state bond, warrant or other instrument of public security, or any bank bill, promissory note, draft or other evidence of debt issued or purporting to be issued by any corporation or company, knowing the same to be false, altered, forged or counterfeited, with the intent to injure or defraud, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3922; R., § 4258; C.'51, § 2631.]

An indictment charging the accused with uttering, passing and tendering in payment, etc., is not bad as charging more than one offense: *State v. Barrett*, 8–536.

It is not necessary, in such case, to charge an intent to defraud any particular person: *Ibid.; State v. Newland*, 7–242.

But if the name and incorporation of the bank intended to be defrauded is mentioned, it must be proved as stated: *State v. Newland*, 7–242.

But proof of the incorporation by reputation is sufficient (§ 4870): *Ibid.; State v. Barrett*, 8–536.

SEC. **4859. Second conviction.** If any person, having been convicted of any of the offenses described in the preceding section, afterward be convicted of a like offense, he shall be imprisoned in the penitentiary not less than two nor more than ten years. [C.'73, § 3923; R., § 4259; C.'51, § 2632.]

SEC. **4860. Making tools for counterfeiting.** If any person engrave, make or mend, or begin to engrave, make or mend, any plate, block, press or other tool, instrument or implement, or make or provide any paper or other materials, adapted and designed for the forging or making any false and counterfeit note, certificate, state bond, warrant or other instrument of public security for money or other property of this state or any other of the United States, or any bank bill, promissory note, draft or other evidence of debt issued or purporting to be issued by any corporation or company; and every person who has in his possession any such plate or block engraved in any part, or any press or other tool, instrument or implement, paper or other material, adapted and designed as aforesaid, with intent to use the same, or to cause or permit the same to be used, in forging or making any such false and forged certificates, notes, bonds, warrants, public securities or evidences of debt, shall be imprisoned in the penitentiary not more than five nor less than two years. [C.'73, § 3924; R., § 4260; C.'51, § 2633.]

SEC. **4861. Counterfeiting coin.** If any person forge or counterfeit any gold or silver coin, current by law or usage within this state, or if any person have in his possession at the same time five or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, he shall be imprisoned in the penitentiary not more than ten nor less than one year. [C.'73, § 3925; R., § 4261; C.'51, § 2634.]

On the trial of an indictment under this section it should be proved that the accused had in his possession "five or more pieces" to make out the offense defined: *State v. Pepper*, 11–347.

The word "and," occurring in the second line of this section, in the Code of '73, construed to mean "or," and *held*, that either of the acts described would constitute the offense; also, that an indictment charging both of them would charge but one offense, and would therefore not be open to the objection of duplicity: *State v. Myers*, 10–448.

So, if the counterfeiting and the having in possession with intent, etc., be charged in different counts, the indictment will not be bad if both counts refer to the same transaction: *State v. McPherson*, 9–53.

The possession, as contemplated here, may consist in having the counterfeit coin deposited in a secret place within the knowledge and control of the accused: *State v. Washburn*, 11–245.

It is not necessary to charge that the coin was counterfeited in a similitude to the current coin of the United States, or that it was of any value: *State v. Williams*, 8–533.

The counterfeiting of coin of the United States may be punished under this section; the jurisdiction of the federal courts over such offense is not exclusive: *State v. McPherson*, 9–53.

SEC. **4862. Uttering or having in possession counterfeit coin.** Any person who has in his possession any number of pieces less than five of the counterfeit coin mentioned in the preceding section, knowing the same to be false or counterfeit, with intent to utter or pass the same as true; and any person who utters, passes or tenders in payment any false and counterfeit

coin, knowing the same to be false and counterfeit, shall be imprisoned in the penitentiary not exceeding eight years, or fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3926; R., § 4262; C.'51, § 2635.]

In an indictment for the uttering of counterfeit money the name of the person injured must appear, if known, and if not known such fact must be stated. The provision that no indictment shall be quashed if an indictable offense is named therein does not apply to such defect: *Buckley v. State*, 2 G. Gr., 162.

SEC. **4863. Fraudulent alteration of instruments.** If any person fraudulently connect together different parts of several genuine bank bills, notes or other instruments in writing, so as to produce one instrument; or alter any note or instrument in writing in a matter that is material, with intent to defraud, the same shall be forgery in like manner as if such bill or note or other instrument had been forged and counterfeited. [C.'73, § 3927; R., § 4263; C.'51, § 2636.]

See notes to § 4853.

SEC. **4864. Affixing fictitious signatures.** If any fictitious or pretended signature of an officer or agent of any corporation be fraudulently affixed to any instrument of writing purporting to be a note, draft or other evidence of debt issued by such corporation, with intent to utter or pass the same as true, it is a forgery, though no such person may ever have been an officer or agent of such corporation, nor such corporation have ever existed; and the person guilty thereof shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding three hundred dollars and imprisoned in the county jail not more than one year. [C.'73, § 3928; R., § 4264; C.'51, § 2637.]

SEC. **4865. Obliteration of records or instruments.** The total or partial erasure or obliteration of any record, process, certificate, deed, will, or any other instrument in writing mentioned in this chapter, with the intent to defraud, shall be deemed forgery, and the offender shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3929; R., § 4265; C.'51, § 2638.]

This crime is not included in a lower degree of the crime of forgery defined in § 4853. This section relates to the partial or total destruction of an instrument while the former consists in the false making of the instrment: *State v. Kidd*, 89-54.

SEC. **4866. Second and third convictions.** If any person, having been convicted of either of the offenses mentioned in the preceding section, be afterward convicted of a like offense, he shall be imprisoned in the penitentiary not more than ten nor less than three years. [C.'73, § 3930; R., § 4266; C.'51, § 2639.]

SEC. **4867. Having instruments for counterfeiting.** If any person cast, stamp, engrave, make or mend, or have in his possession any mould, die, press or other instrument or tool adapted and designed for the forging and counterfeiting of any coin before mentioned, with intent to use the same, or permit the same to be used, for that purpose, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not more than one year. [C.'73, § 3931; R., § 4267; C.'51, § 2640.]

SEC. **4868. Counterfeiting foreign coin.** If any person forge or counterfeit any gold or silver coin of any foreign government or country, with intent to export the same to injure or defraud any such government or the citizens thereof, he shall be imprisoned in the penitentiary not exceeding ten years. [C.'73, § 3932; R., § 4268; C.'51, § 2641.]

SEC. **4869. Counterfeiting public seals.** Every person who is convicted of having forged, counterfeited, or falsely altered the great seal of the state; or the seal of any public office authorized by law; or the seal of any court, corporation, city or county; or who falsely makes, forges or

counterfeits any impression purporting to be the impression of any such seal, with intent to defraud, shall be imprisoned in the penitentiary not exceeding ten years. [C.'73, § 3933; R., § 4269; C.'51, § 2642.]

SEC. **4870. Existence of corporation proved by reputation.** On the trial of any person for forging or counterfeiting any bill, note or other evidence of debt purporting to be issued by any incorporated company; or for uttering, passing or attempting to pass, or having in possession the same with intent to utter or pass, such bill, note or evidence of debt, it is not necessary to prove the incorporation by the charter or act thereof; but the same may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill, note or evidence of debt is forged or counterfeit. [C.'73, § 3934; R., § 4270; C.'51, § 2643.]

This section is equally applicable to the charge of falsely indorsing a note or bill, etc.: *State v. Pierce*, 8–231.

In an indictment for uttering and passing counterfeit bills, etc., it is not necessary to charge an intent to defraud any particular person: *State v. Barrett*, 8–536; *State v. Newland*, 7–242.

But if the incorporation of the bank intended to be defrauded is mentioned, it must be proved as stated: *State v. Newland*, 7–242.

But under this section proof of that fact by reputation is sufficient: *Ibid.*

SEC. **4871. Counterfeiting brands or stamps.** If any person, with intent to defraud, falsely make, forge or counterfeit any stamp or brand authorized by law to be affixed to any substance or thing whatever; or, knowing such stamp or brand to be counterfeit, use the same as genuine, with intent to defraud, he shall be imprisoned in the penitentiary not exceeding ten years. [C.'73, § 3935; R., § 1911.]

See also § 3032.

CHAPTER 7.

OF OFFENSES AGAINST PUBLIC JUSTICE.

SECTION **4872. Perjury.** If any person, on oath or affirmation lawfully administered, wilfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice, or before any officer thereof, or before any tribunal or officer created by law, or in any proceeding in regard to any matter or thing in or respecting which an oath or affirmation is or may be required or authorized by law, he is guilty of perjury, and shall, if the perjury was committed on the trial of a capital crime, be imprisoned in the penitentiary for life or any term not less than ten years; and if committed in any other case, not more than ten years. [C.'73, § 3936; R., § 4271; C.'51, § 2644.]

What constitutes: The matter falsely sworn to must be material, and its materiality must be established by the evidence, and cannot be left to presumption or inference: *State v. Aikens*, 32–403.

Where the issue under the evidence was as to whether on a certain date an act was or was not done, *held*, that the date was material and that false swearing as to the date would constitute perjury: *State v. Swafford*, 67 N. W., 284.

Where the materiality of the false testimony depends upon a construction of the pleading in the case in which it was given, the question of materiality is for the court and not the jury: *Ibid.*

Falsely swearing in an affidavit for continuance that a witness is absent from the county will constitute perjury, and it cannot be said that the oath is not material to the issues in the case: *State v. Shupe*, 16–36.

Held, that a defendant, who, under Revision, § 2742 (providing that a claim barred by the statute of limitations might be established by the testimony of the opposite party), was called by plaintiff as a witness for the purpose of establishing a claim by own testimony, and who testified falsely, might be punished for perjury: *State v. Voght*, 27–117.

Under the provisions of the bankruptcy act requiring a schedule to be sworn to, and providing that false swearing should prevent the applicant's discharge, and also providing that he might be examined, and for false swearing in such examination should be deemed guilty of perjury, *held*, that mere false swearing in the schedule would not

constitute perjury: *United States v. Dickey*, Mor., 412.

Indictment: The materiality of the false testimony must be shown by averment in the indictment, but this may be done either by express averment or the statement of such facts as show its materiality: *State v. Cunningham*, 66–94.

In an indictment for perjury in making a false return to the assessor under oath, it must be averred, not only that certain property was withheld from the statement, but also that such property was assessable within the township within which the assessor was authorized to act: *Ibid.*

Indictment for false statement in a schedule sworn to in a proceeding in bankruptcy should state wherein such statement is false and incorrect: *United States v. Morgan*, Mor., 341.

In an indictment for perjury it is not necessary nor usual to aver that the court trying the case in which the perjury was committed had jurisdiction of such acts. It is sufficient to aver that the issue was duly joined in such court which came on for trial in due form of law: *State v. Newton*, 1 G. Gr., 160.

Under § 5296 it is sufficient to set forth the substance of the offense charged and before what court the oath was taken, averring such court to have full power to administer the same, etc.: *Ibid.*

It is not essential that the indictment allege the testimony to have been given corruptly if it is sufficiently charged that the testimony was wilful and intentionally given with the intent to have the court or magistrate before whom it was given, act thereon: *State v. Anderson*, 92–764.

An indictment charging perjury in testifying before a grand jury, and alleging that they were investigating a specified charge against a party named; that they had authority to investigate such charge, and that the matters sworn to by the defendant (particularly stated and their falsity charged) were material in that investigation, *held* sufficient. It is not necessary in such a case to allege that the party charged with the offense under investigation by the grand jury was or was not guilty thereof: *State v. Schill*, 27–263.

It is sufficient to charge that defendant was duly sworn before a court having authority, etc., and it is not necessary to allege that the oath was administered by anyone: *State v. O'Hagan*, 38–504.

But an indictment not averring that the court or person before whom the oath was taken had authority to administer the same is not sufficient: *State v. Nickerson*, 46–447.

An indictment for perjury is bad which alleges that the oath was administered by one not clothed with authority to administer it: *State v. Phippen*, 62–54.

Therefore where the indictment charged that the oath was administered by a certain person as an officer, but at a time which by law was prior to the time when he was authorized to enter upon the discharge of his duties, *held*, that the indictment was subject to demurrer: *Ibid.*

It is necessary to aver the jurisdiction and authority of the officer before whom the oath was taken to administer the oath, but this may be done by express averment that the officer had such right, or by setting out such facts as make it judicially appear. Under the averment that he was authorized and empowered by law to administer the oath, the facts essential to his jurisdiction and authority may be shown: *State v. Cunningham*, 66–94.

An indictment for perjury need not charge that the prisoner knew the falsity of the matter sworn to, unless the assignment of perjury is upon a statement of the accused as to his belief: *State v. Raymond*, 20–582.

Variance: Where the indictment charged that defendant testified that he saw M. enter upon premises of "Jason P." and saw him "getting and carrying away" corn therefrom, while the negative averment was that defendant did not see M. enter the premises of said "Joseph P." nor see him "gather and carry away" said corn, *held*, that the substitution of Joseph for Jason was clearly a clerical error, not affecting the substantial rights of the party, and that the effect of "gather" was, in the connection used, the equivalent of the word "getting:" *Ibid.*

Knowledge: Under a statute defining perjury as "wilfully and corruptly deposing, affirming or declaring any matter to be fact knowing the same to be false, or denying any matter to be fact knowing the same to be true," *held*, that an indictment was not sufficient which omitted to charge such knowledge: *State v. Morse*, 1 G. Gr., 503.

It should be clearly and distinctly averred in the indictment that defendant swore "falsely," that word being used in the statutory definition: *State v. Nickerson*, 46–447.

An indictment for perjury which charged that defendant at a certain time testified to certain matters whereas he "did know" they were false, *held*, by fair construction, to charge knowledge at the time defendant testified and to be sufficient in that respect: *State v. Wood*, 17–18.

Advice of counsel: In a prosecution for perjury, it being material to determine whether the testimony given was wilfully false, the fact that advice of counsel was taken by defendant as to the facts about which he testified is material: *State v. McKinney*, 42–205.

Evidence: It is not necessary that there be two witnesses to the giving of testimony upon which the perjury is assigned, but only as to its falsity: *State v. Wood*, 17–18.

The evidence of one witness as to the falsity of the matter sworn to, supported by evidence of strong corroborating circumstances, is sufficient to warrant a conviction: *State v. Raymond*, 20–582.

While the jury cannot consider any other perjury than that assigned in the indictment for the purpose of determining defendant's guilt as to such other perjury, yet when the evidence thereof is legitimately brought out, and relates to the subjectmatter of the perjury charged, it may be considered in determining defendant's corrupt intent: *Ibid.*

A judgment of acquittal in the case in

which the alleged perjury was committed is not admissible in evidence on a trial for perjury to show the guilt or innocence of the defendant: *State v. Caywood*, 65 N.W., 385.

Therefore even though the issue in the trial for perjury may involve the same question as was involved in the trial of the case in which the perjury is alleged to have been committed the judgment in the latter case cannot be pleaded as *res adjudicata* in the prosecution for perjury: *Ibid.*

SEC. **4873. Subornation.** If any person procure another to commit perjury, he is guilty of subornation of perjury, and shall be punished as provided in the preceding section. [C.'73, § 3937; R., § 4272; C.'51, § 2645.]

SEC. **4874. Attempt to suborn.** If any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year. [C.'73, § 3938; R., § 4273; C.'51, § 2646.]

In a prosecution for inciting or procuring another to commit perjury though no perjury be committed it is not necessary to show by the evidence of more than one witness the falsity of the matter testified to: *State v. Waddle*, 69 N.W., 279.

It is not necessary under this section that there must be a case pending: *Ibid.*

SEC. **4875. Bribery of public officers.** If any person give, offer or promise to any executive or judicial officer or member of the general assembly, after his election or appointment, and either before or after he has been qualified or has taken his seat, any valuable consideration, gratuity, service or benefit whatever, with intent to influence his act, vote, opinion or judgment in any matter, question, cause or proceeding which may be pending, or which may legally come or be brought before him in his official capacity, he shall be imprisoned in the penitentiary not more than five years, or be fined not more than one thousand dollars and imprisoned in the county jail not more than one year. [C.'73, § 3939; R., § 4274; C.'51, § 2647.]

SEC. **4876. Acceptance of bribes by officers.** If any executive or judicial officer or member of the general assembly accept any valuable consideration, gratuity, service or benefit whatever, or any promise to make the same or to do any act beneficial to such officer or member, under the agreement or with the understanding that his vote, opinion, decision or judgment shall be given in any particular manner or upon any particular side of any question, cause or other proceeding which is or may by law be brought before him in his official capacity, or that in such capacity he will make any particular nomination or appointment, he shall be imprisoned in the penitentiary not more than ten years, or be fined not more than two thousand dollars and imprisoned in the county jail not more than one year. [C.'73, § 3940; R., § 4275; C.'51, § 2648.]

An officer having possession of property under a warrant may be guilty of receiving bribes for using his official position in procuring the release of the property: *State v. Potts*, 78–656.

SEC. **4877. Disqualification.** Every person who is convicted under either of the two preceding sections shall forever afterwards be disqualified from holding any office under the laws of the state. [C.'73, § 3941; R., § 4276; C.'51, § 2649.]

SEC. **4878. Corrupt solicitation of places of trust.** If any person, directly or indirectly, give, offer or promise any valuable consideration or gratuity to any other person not being such officer as is mentioned in the preceding section, with intent to induce such person to procure for him by his interest, influence or any other means whatever any place of trust within this state, he shall be fined not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3942; R., § 4277; C.'51, § 2650.]

SEC. **4879. Acceptance of reward for securing.** If any person, not being such officer as is referred to in the preceding sections of this chapter, accept and receive of another any valuable consideration or gratuity whatever as a reward for procuring, or attempting to procure, any office

or place of trust within the state for any person, he shall be fined not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3943; R., § 4278; C.'51, § 2651.]

SEC. **4880. Bribery of jurors, referees, etc.** If any person give, offer or promise any valuable consideration or gratuity whatever to any one summoned, appointed or sworn as a juror, or appointed or chosen arbitrator, umpire or referee, or to any master in chancery, or appraiser of real or personal estate, or auditor, with intent to influence the opinion or decision of any such person in any matter, inquest or cause which may be pending or can legally come before him, or which he may be called on to decide in either of said capacities, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not more than one year. [C.'73, § 3944; R., § 4279; C.'51, § 2652.]

SEC. **4881. Acceptance of bribes by such persons.** If any person summoned, appointed or sworn as a juror, or appointed arbitrator, umpire or referee, or master in chancery, or auditor, or appraiser, as aforesaid, take or receive any valuable consideration or gratuity whatever, to give his verdict, award or report in favor of any particular party, in a matter for the hearing or decision of which such person has been summoned, appointed or chosen as aforesaid, he shall be imprisoned in the penitentiary not more than ten years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 3945; R., § 4280; C.'51, § 2653.]

SEC. **4882. Attempt to corrupt such persons.** If any person attempt to improperly influence any juror in any civil or criminal action, or any one drawn, summoned, appointed or sworn as such juror, or any arbitrator or referee, in relation to any cause or matter pending in or to be brought before the court for which such juror has been drawn, summoned, appointed or sworn, or for the hearing and decision of which such arbitrator or referee has been chosen or appointed, he shall be fined not exceeding five hundred dollars, and imprisoned in the county jail not more than six months. [C.'73, § 3946; R., § 4281; C.'51, § 2654.]

SEC. **4883. Jurors acting corruptly.** If any person drawn, summoned or sworn as a juror make any promise or agreement to give a verdict for or against any person in any civil or criminal action, or corruptly receive any paper, evidence or information from any one in relation to any matter or cause for the trial of which he is sworn, without the authority of the court or officer before whom such cause or matter is then pending, he shall be fined not exceeding two hundred dollars, or imprisoned in the county jail not exceeding three months. [C.'73, § 3947; R., § 4287; C.'51, § 2655.]

SEC. **4884. Sheriff or other officers receiving bribes.** If any sheriff, deputy sheriff, coroner or constable, or any marshal, deputy marshal, policeman or police officer of any city or town, receive from a defendant, or other person, any money or other valuable thing as a consideration or inducement for omitting or delaying to arrest any defendant, or to carry him before a magistrate or to prison, or for postponing, delaying or neglecting the sale of property on execution, or for omitting or delaying to perform any other duty pertaining to his office, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both fined and imprisoned, at the discretion of the court. [20 G. A., ch. 123; C.'73, § 3948; R., § 4283; C.'51, § 2656.]

The offense under this section of negotiating with a criminal for a bribe, for the omission on the part of the officer to discharge his duty, will not constitute the crime of threatening to accuse under § 4767: *State v. Pierce*, 76–189.

SEC. **4885. Accepting reward for public duty.** If any state, county, township, city, school or other municipal officer, not mentioned in this chapter, directly or indirectly accept any valuable consideration, gratuity, service or benefit whatever, or the promise thereof, other than the compensation

allowed him by law, conditioned upon said officer's doing or performing any official act, casting an official vote, making or procuring the appointment of any person to a place of trust or profit, or using his official influence or authority to give or procure for any person public employment, or conditioned upon said officer's refraining from doing or performing any of the foregoing acts or things, he shall be imprisoned in the penitentiary not exceeding two years, or in the county jail not exceeding one year, or fined in any sum not less than twenty nor more than three hundred dollars. [22 G. A., ch. 83, § 1.]

SEC. **4886. Corruptly influencing publication.** If any person, directly or indirectly, give, offer or promise, or conspire with others to give, offer or promise to any officer contemplated in the foregoing section any valuable consideration, gratuity, service or benefit whatever, with a view or for the purpose of corruptly influencing said officer's official acts or votes, such person shall be imprisoned in the penitentiary not exceeding two years, or in the county jail not exceeding one year, or be fined in any sum not exceeding three hundred nor less than than twenty dollars. [Same, § 2.]

SEC. **4887. Refusing to execute process.** If any officer authorized to serve process wilfully refuse to execute any lawful process to him directed, requiring him to apprehend or confine any person charged with or convicted of any public offense, or wilfully delay or omit to execute such process, whereby such person escape, he shall be imprisoned in the county jail not more than one year, or be fined not exceeding one thousand dollars, or both fined and imprisoned, at the discretion of the court. [C. '73, § 3949; R., § 4284; C. '51, § 2657.]

SEC. **4888. Extortion.** If any person corruptly and wilfully demand and receive of another, for performing any service or official duty for which the fee or compensation is established by law, any greater fee or compensation than is allowed or provided for the same; or if any witness falsely and corruptly certify that as such he has traveled more miles or attended more days than he has actually traveled or attended, he shall be fined not exceeding one hundred dollars for each offense, or imprisoned in the county jail not exceeding six months. [C. '73, § 3950; R., § 4285; C. '51, § 2658.]

SEC. **4889. Compounding felonies involving life imprisonment.** If any person, having knowledge of the commission of any offense punishable with imprisonment in the penitentiary for life, take any money or valuable consideration or gratuity, or any promise therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense, or not to prosecute the same, or not to give evidence thereof, he shall be imprisoned in the penitentiary not more than six years, or be fined not exceeding one thousand dollars. [C. '73, § 3951; R., § 4286; C. '51, § 2659.]

See notes to next section.

SEC. **4890. Compounding lesser felonies.** If any person, having knowledge of the commission of any offense punishable by imprisonment in the penitentiary for a limited term of years, is guilty of the offense described in the preceding section, he shall be imprisoned in the county jail not more than one year, and be fined not exceeding four hundred dollars. [C. '73, § 3952; R., § 4287; C. '51, § 2660.]

A contract entered into for the compounding of a felony is void, and the law will not afford either party thereto affirmative relief: *Allison v. Hess*, 28-388. And an instrument based upon an agreement not to prosecute for a felony is void: *Peed v. McKee*, 42-689.

The defendant in a criminal prosecution, being convicted, executed certain notes to the prosecuting witness and her attorney, to be delivered if the prosecutrix should sign an application for defendant's pardon, or if, upon appeal and reversal of the case, defendant should be acquitted or discharged. And it was also agreed that a civil action by the prosecutrix for damages should be discontinued. *Held*, that the agreement for the delivery of the note was void as against public policy, as tending to stifle the prosecution of crime: *Haines v. Lewis*, 54-301.

Evidence in a particular case *held* not sufficient to show that a contract was entered into for the purpose of compromising a felony: *Malli v. Willett*, 57-705.

If a person corruptly exacts a consideration from another for an agreement not to prosecute, he is guilty under this section,

although he took such consideration for the benefit of another: *State v. Ruthven*, 58–121.

The fact that a person guilty of a crime under this and the following section is an officer, coming within the provisions of § 4884, does not exempt him from the higher punishment prescribed in this section: *Ibid.*

Where it appeared that notes and mortgages were given by the parents of one who was threatened with criminal prosecution for embezzlement, *held*, that such notes and mortgages were wholly without consideration and void, irrespective of whether the offense of embezzlement had been committed or not: *Smith v. Steely*, 80–738.

A contract to waive civil and criminal proceedings for seduction in consideration of certain payments of money and the conveyance of real estate, *held* invalid *in toto* on account of the stipulation as to criminal proceedings, and no defense in a civil action: *Baird v. Bochner*, 77–622.

SEC. **4891. Suffering prisoner to escape.** If any jailer or other officer voluntarily suffer any prisoner in custody upon a charge or conviction of a felony punishable by imprisonment for life to escape, he shall be imprisoned in the penitentiary not more than ten years, nor less than one year. [C. '73, § 3953; R., § 4288; C. '51, § 2661.]

SEC. **4892. Same.** If any jailer or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of any other felony to escape, he shall be imprisoned in the penitentiary not more than eight years, or be fined not more than one thousand dollars. [C. '73, § 3954; R., § 4289; C. '51, § 2662.]

SEC. **4893. Same.** If any jailer or other officer suffer any prisoner in his custody upon charge or conviction of any public offense to escape, he shall be fined not exceeding one thousand dollars and be imprisoned in the penitentiary not exceeding five years. [C. '73, § 3955; R., § 4290; C. '51, § 2663.]

SEC. **4894. Assisting prisoner to escape from prison.** If any person by any means whatever aid or assist any prisoner lawfully detained in the penitentiary, or in any jail or place of confinement, for any felony, in an attempt to escape, whether such escape be effected or not, or forcibly rescue any person held in legal custody upon any criminal charge, he shall be imprisoned in the penitentiary not exceeding ten years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C. '73, § 3956; R., § 4291; C. '51, § 2664.]

SEC. **4895. Same.** Every person who by any means whatever aids or assists any prisoner lawfully committed to any jail or place of confinement, charged with or convicted of any criminal offense other than a felony, in an attempt to escape, whether such escape be effected or not; or who conveys into such jail or place of confinement any disguise, instrument, arms or other things proper or useful to facilitate the escape of any prisoner so committed, whether such escape be effected or attempted or not, shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding five hundred dollars, or be both fined and imprisoned, at the discretion of the court. [C. '73, § 3957; R., § 4292; C. '51, § 2665.]

SEC. **4896. Same from officer.** Every person who aids or assists any prisoner in escaping, or attempting to escape, from the custody of any sheriff, deputy sheriff, marshal, constable or other officer or person who has the lawful charge, with or without a warrant, of such prisoner upon any criminal charge, shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding five years. [26 G. A., ch. 88; C. '73, § 3958; R., § 4293; C. '51, § 2666.]

Assisting a prisoner to escape from an officer having him in charge under a warrant issued by a magistrate under § 5105, for threatening to commit a public offense, is within the meaning of this section. Whether the prisoner had in fact threatened to commit the offense as charged in the warrant is immaterial: *State v. Bates*, 23–96.

SEC. **4897. Prison breach—escape.** If any person confined in a penitentiary for any less period than for life breaks such prison and escapes therefrom, he shall be imprisoned in such penitentiary for a term not exceeding five years, to commence from and after the expiration of the original term of his imprisonment. [R., § 4294.]

SEC. **4898. Breaking jail—escape.** If any person confined in a county jail upon any criminal charge, either before or after conviction for a criminal offense, break jail and escape therefrom, he shall be imprisoned in such jail not exceeding one year, and fined not exceeding three hundred dollars; but when such jail breaking occurs during incarceration after conviction, or before trial for a criminal offense whereof he is afterwards convicted, in either of such cases the sentence to commence from and after the expiration of the sentence upon the original charge. [26 G. A., ch. 106; C.'73, § 3959; R., § 4295; C.'51, § 2668.]

SEC. **4899. Resisting execution of process.** If any person knowingly and wilfully resist or oppose any officer of this state, or any person authorized by law, in serving or attempting to execute any legal writ, rule, order or process whatsoever, or shall knowingly and wilfully resist any such officer in the discharge of his duties without such writ, rule, order or process, he shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding one thousand nor less than fifty dollars, or be both fined and imprisoned, at the discretion of the court. [C.'73, § 3960; R., § 4269; C.'51, § 2669.]

It is no defense that the process is irregular or defective, if it is one that the magistrate has authority to issue: *State v. Foster*, 10-435.

It will be presumed that the officer was proceeding to execute the process in a proper manner, and the indictment need not set forth the acts showing that he complied with the requisites of the statute: *State v. Freeman*, 8-428.

The officers here contemplated are those only who are authorized to execute legal writs, orders, etc., and resistance to a road supervisor engaged in removing obstructions from a public road in his district is not within this section: *State v. Putnam*, 35-561.

Under Revision, § 4296, before its amendment, it was held that to resist a peace officer making an arrest without a warrant was not an offense under this statute: *State v. Lovell*, 23-304.

A receiver properly appointed and directed by the court to take possession of property is an officer within the meaning of this section, and resistance to him in an attempt to take such possession is a crime under this provision: *State v. Rivers*, 66-653.

One who resists an officer in making arrest of another cannot justify such resistance on the ground that the person to be arrested was not guilty: *Montgomery v. Sutton*, 67-497.

The offense described in this section may be committed by knowingly and wilfully resisting an officer in the discharge of his duties. Where the offense is described as resisting an officer while conveying a person to jail in a proper manner, it is not necessary to state the name of the person the officer had under arrest: *State v. Garrett*, 80-589.

The rightfulness of the arrest or the guilt of the party thus arrested cannot be inquired into in the prosecution of the person thus resisting the officer: *Ibid.*

The fact that the person to be arrested draws a revolver and says he will shoot the officer before he will go with him constitutes a resistance of arrest. It is sufficient that there is an assault upon the officer which prevents him from taking the accused into custody: *State v. Seery*, 64 N. W., 631.

SEC. **4900. Refusing to assist officer.** If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable or other officer, wilfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue, he shall be imprisoned in the county jail not more than six months, or be fined not more than one hundred dollars. [C.'73, § 3691; R., § 4297; C.'51, § 2670.]

SEC. **4901. Falsely assuming to be officer.** If a person falsely assume to be a judge, justice of the peace, magistrate, sheriff, deputy sheriff, coroner or constable, and take upon himself to act as such, or require any one to aid or assist him in any matter pertaining to the duty of any such officer, he shall be imprisoned in the county jail not more than one year, or be fined not exceeding three hundred dollars. [C.'73, § 3962; R., § 4298; C.'51, § 2677.]

Where a constable who was re-elected proceeded to perform the duties of his office without qualifying anew, *held*, that he was not falsely assuming to be an officer under this section: *State v. Bates*, 23-96.

SEC. **4902. Exercising office without authority or under color.** If any person take upon himself to exercise or officiate in any office or place of authority in this state without being legally authorized; or if any person, by color of his office, wilfully and corruptly oppress any person under pretense of acting in his official capacity, he shall be fined not exceed-

ing one thousand dollars, or imprisoned in the county jail not more than one year, or be both fined and imprisoned. [C.'73, § 3963; R., § 4299; C.'51, § 2672.]

A constable may be guilty of the offense here defined: *State v. Bevans*, 37–178.

SEC. **4903. Stirring up quarrels.** If any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, attorney or counselor at law, encourage, excite or stir up any action, quarrel or controversy between two or more persons, with intent to injure such persons, he shall be fined not exceeding five hundred dollars, and shall be answerable to the party injured in treble damages. [C.'73, § 3964; R., § 4300; C.'51, § 2673.]

SEC. **4904. Neglect of duty by public officers.** When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor. [C.'73, § 3965; R., § 4301; C.'51, § 2674.]

SEC. **4905. Misdemeanors in general.** When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor. [C.'73, § 3966; R., § 4302; C.'51, § 2675.]

SEC. **4906. Punishment.** Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. [C.'73, § 3967; R., § 4303; C.'51, § 2676.]

SEC. **4907. False entries or returns by officer.** If any public officer fraudulently make or give false entries, false returns, false certificates or false receipts, in cases where entries, returns, certificates or receipts are authorized by law, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not exceeding five years, or both. [C.'73, § 3968; R., § 4304; C.'51, § 2677.]

A county auditor who gives a false certificate of the receipt by the treasurer of a certain sum in payment of interest upon a school fund note is guilty under this section, although the auditor is authorized to issue in case of such payment a receipt and not a certificate: *State v. Morse*, 52–509.

It is not necessary in charging this offense to charge an intent to defraud any particular person: *Ibid.*

SEC. **4908. Oppression by officers.** If any judge or other officer, by color of his office, wilfully and maliciously oppress any person under pretense of acting in his official capacity, he shall be fined not exceeding one thousand dollars, and imprisoned in the county jail not more than one year, and be liable to the injured party for any damage sustained by him in consequence thereof. [C.'73, § 3969; R., §§ 4305–6.]

SEC. **4909. Officers failing to pay over fees.** If any officer who by law is authorized to receive and required to pay over fees of office, or who is or may be authorized to impose or collect fines, shall fail, neglect or refuse to pay over, as prescribed by law, all such fees and fines, he shall be guilty of a misdemeanor, besides being liable in a civil action for the amount of fines and fees illegally withheld or appropriated. [C.'73, § 3965; R., § 4308.]

SEC. **4910. Making false entries in relation to fees.** If any officer who by law is authorized or required to keep a court docket, or who is required to keep an account of fees or fines, and pay over or in any way account for the same, shall in any manner falsify such docket or account, or shall fail, neglect or refuse to make an entry upon such docket, or account for such fees and fines as are required to be paid over, he shall be guilty of a misdemeanor. [C.'73, § 3971; R., § 4309.]

SEC. **4911. Officers misappropriating fees.** Any officer who may be found guilty of the offense of appropriating to his own use fees of office or fines collected for violation of law, or of neglecting to pay over the same as prescribed by law, shall be removed from office by the court before or by

whom the offense may be tried and judgment or conviction had; and every person so found guilty shall be fined not exceeding three hundred nor less than ten dollars, or imprisoned in the county jail not exceeding one year, or be both fined and imprisoned, in the discretion of the court. [C.'73, § 3972; R., § 4310.]

SEC. **4912. Notary public improperly acting.** If any notary public exercise the duties of his office after the expiration of his commission, or when otherwise disqualified, or appends his official signature to documents when the parties have not appeared before him, he shall be guilty of a misdemeanor, and fined not less than fifty dollars, and shall be removed from office by the governor. [C.'73, § 3975; R., § 210.]

SEC. **4913. Failure to take official oath.** If any officer or person wilfully fails to take the oath required by law before entering on the discharge of the duties of any office, trust or station, or makes any contract which contemplates an expenditure in excess of the law under which he was elected or appointed, or fails to report to the proper officer, showing the expenditure of all public moneys with proper vouchers therefor, by the time required by law, he shall be fined not exceeding five thousand dollars, or imprisoned in the penitentiary not exceeding five years, or both, atthe discretion of the court. [C.'73, § 3976; R., §§ 216, 2184.]

CHAPTER 8.

OF OFFENSES AGAINST THE RIGHTS OF SUFFRAGE.

SECTION **4914. Bribery of electors.** Any person offering or giving a bribe to any elector for the purpose of influencing his vote at any election authorized by law, or any elector entitled to vote at such election receiving such bribe, shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or both. [C.'73, § 3993; R., § 4333.]

It does not constitute bribery at an election to relocate a county seat for persons interested in the location at a particular place to agree to give certain facilities for the convenience of the whole county, such as offering a building for courts and officers, conveying real estate to the county, paying money toward the erection of a bridge, subscribing toward a high school, etc.: *Dishon v. Smith*, 10-212; *Hawes v. Miller*, 56-395.

A promise by a candidate to pay into the public treasury, if elected, a part or all of his compensation, is an offer of a bribe to electors, and disqualifies the person making it, if elected, for holding the office: *Carrothers v. Russell*, 53-346.

Giving or offering a bribe to an elector is a ground for contesting an election: See § 1198 and note.

SEC. **4915. To refrain from voting—to work for candidate.** If any person shall make an agreement with another to pay him any sum of money or other valuable thing in consideration that such other person shall refrain from voting at any election, or shall induce other qualified electors to refrain from voting, or that such other person shall perform any service or labor on any election day in the interest of any candidate for any office who is to be voted for at such election, or in the interest of any measure or political party, he shall be fined in any sum not less than fifty nor more than three hundred dollars, or be imprisoned in the county jail not exceeding ninety days. [25 G. A., ch. 59, § 1.]

SEC. **4916. Accepting.** Any person who shall, in consideration of any sum of money or other valuable thing, agree to refrain from voting at any general or municipal election, or to induce or attempt to induce others to do so, or agree to perform on election day any service in the interest of any candidate, party or measure in consideration of any money or other valuable thing, or who shall accept any money or other valuable thing for such

services performed in the interest of any candidate, political party or measure, shall be punished as provided in the preceding section. [Same, § 2.]

SEC. **4917. Contracts to convey voters.** Nothing in the two preceding sections shall be so construed as to punish individuals or committees of any political party for making contracts in good faith for the conveyance of voters to and from polling places and the payment of any reasonable compensation for such service. [Same, § 3.]

SEC. **4918. Voting more than once.** If any elector unlawfully vote more than once at any election which may be held by virtue of any law of this state, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding one year. [C.'73, § 3994; R., § 4334; C.'51, § 2692.]

SEC. **4919. When not qualified.** If any person, knowing himself not to be qualified, vote at any election authorized by law, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding six months. [C.'73, § 3995; R., § 4335; C.'51, § 2693.]

In an indictment for this offense it is not necessary to show that the election was held by the proper and legal officers, or to state the manner in which defendant was disqualified: *State v. Douglass*, 7–413.

SEC. **4920. Residence in county.** If any person go or come into any county of this state, and vote in such county, not being a resident thereof, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding one year. [C.'73, § 3996; R., § 4336; C.'51, § 2694.]

SEC. **4921. Residence in state.** If any person wilfully vote who has not been a resident of this state for six months next preceding the election, or who, at the time of the election, is not twenty-one years of age, or who is not a citizen of the United States, or who is not qualified, by reason of other disability, to vote at the place where and time when the vote is to be given, he shall be fined in a sum not exceeding three hundred dollars, or imprisoned in the county jail not exceeding one year. [C.'73, § 3997; R., § 4337; C.'51, § 2695.]

It is no defense under this section that defendant consulted others (not persons learned in the law) as to his right to vote, and was advised that he was qualified: *State v. Sheeley*, 15–404.

Voting in a township other than that of the voter's residence is an offense under this section, and it is not necessary to charge or prove that accused voted for or against any one. The casting of a ballot being proved, it would be presumed that it designated the name of some person for some office: *State v. Minnick*, 15–123.

SEC. **4922. Counseling to vote when not qualified.** If any person procure, aid, assist, counsel or advise another to give his vote, knowing that such person is disqualified, he shall be fined not exceeding five hundred nor less than fifty dollars, and be imprisoned in the county jail not exceeding one year. [C.'73, § 3998; R., § 4338; C.'51, § 2696.]

SEC. **4923. Deceiving voter as to ballot.** If any judge or clerk of election furnish an elector with a ticket or ballot, informing him that it contains a name or names different from those which are written or printed therein, with an intent to induce him to vote contrary to his inclination, or fraudulently or deceitfully change a ballot of any elector, by which such elector is deprived of voting for such candidate or person as he intended, he shall be imprisoned in the county jail not exceeding two years, and be fined not exceeding one thousand dollars nor less than one hundred dollars. [C.'73, § 3999; R., § 4339; C.'51, § 2697.]

SEC. **4924. Preventing from voting by force or threats.** If any person unlawfully and by force, or threats of force, prevent, or endeavor to prevent, an elector from giving his vote at any public election, he shall be imprisoned in the county jail not exceeding six months, and fined not more than two hundred dollars. [C.'73, § 4000; R., § 4340; C.'51, § 2698.]

SEC. **4925. Bribing clerks, judges, etc.** If any person give or offer a bribe to any judge, clerk or canvasser of any election authorized by law, or any executive officer attending the same, as a consideration for some act done or omitted to be done contrary to his official duty in relation to such election, he shall be fined not exceeding seven hundred dollars, and imprisoned in the county jail not exceeding one year. [C.'73, § 4001; R., § 4341; C.'51, § 2699.]

SEC. **4926. Procuring vote by influence or threats.** If any person procure, or endeavor to procure, the vote of any elector, or the influence of any person over other electors, at any election, for himself, or for or against any candidate, by means of violence, threats of violence, or threats of withdrawing custom or dealing in business or trade, or enforcing the payment of debts, or bringing any civil or criminal action, or any other threat of injury to be inflicted by him or by his means, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year. [C.'73, § 4002; R., § 4342; C.'51, § 2700.]

SEC. **4927. Judges or clerks making false entries, etc.** If any judge or clerk of any election authorized by law knowingly make or consent to any false entry on the list of voters or poll-books; or put into the ballot box, or permit to be so put in, any ballot not given by a voter; or take out of such box, or permit to be so taken out, any ballot deposited therein, except in the manner prescribed by law; or by any other act or omission designedly destroy or change the ballots given by the electors, he shall be fined not exceeding one thousand dollars, and imprisoned in the penitentiary not exceeding five years. [C.'73, § 4003; R., § 4343; C.'51, § 2701.]

SEC. **4928. Illegally receiving or rejecting votes.** When any one who offers to vote at any election is objected to by an elector as a person not possessing the requisite qualifications, if any judge of such election unlawfully permit him to vote without producing proof of such qualification in the manner directed by law, or if any such judge wilfully refuse the vote of any person who complies with the requisites prescribed by law to prove his qualifications, he shall be fined not more than two hundred nor less than twenty dollars, or be imprisoned in the county jail not exceeding six months. [C.'73, § 4004; R., § 4344; C.'51, § 2702.]

SEC. **4929. Misconduct to avoid election.** If any judge, clerk or executive officer designedly omit to do any official act required by law, or designedly do any illegal act, in relation to any public election, by which act or omission the votes taken at any such election in any city, town, precinct, township or district be lost, or the electors thereof be deprived of their suffrage at such election, or designedly do any act which renders such election void, he shall be fined not less than one hundred nor more than one thousand dollars, or imprisoned in the county jail not more than one year, or both. [C.'73, § 4005; R., § 4345; C.'51, § 2703.]

SEC. **4930. Not returning poll-books.** If any judge, clerk or messenger, after having been deputed by the judges of the election to carry the poll-books of such election to the place where by law they are to be canvassed, wilfully or negligently fail to deliver them within the time prescribed by law, safe, with the seal unbroken, he shall, for every such offense, be fined not more than five hundred nor less than fifty dollars. [C.'73, § 4006; R., § 4346; C.'51, § 2704.]

SEC. **4931. Improper registry.** Any person who causes his name to be registered, knowing that he is not or will not become a qualified voter in the precinct where his name is registered previous to the next election, or who shall wrongfully personate any registered voter, and any person causing, or aiding or abetting any person in either of said acts, shall be, for each offense, imprisoned in the penitentiary not less than one year. [C.'73, § 4007.]

CHAPTER 9.

OF OFFENSES AGAINST CHASTITY, MORALITY AND DECENCY.

SECTION **4932. Adultery.** Every person who commits adultery shall be imprisoned in the penitentiary not more than three years, or be fined not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married, both shall be punished. No prosecution therefor can be commenced except on the complaint of the husband or wife. [C.'73, § 4008; R., § 4347; C.'51, § 2705.]

Public offense: The offense here described is a public offense, and the breaking or entering of a dwelling in the nighttime for the purpose of committing it is punishable as an offense against the public: *State v. Corliss*, 85–18.

Void divorce: Where a decree of divorce is void for want of jurisdiction it will not bar a prosecution for adultery: *State v. Fleak*, 54–429.

Where a husband procured a divorce and remarried, but subsequently the decree of divorce was set aside and declared void at the suit of the wife [see title XX, ch. 1] on the ground that it was procured by fraud, *held*, that the divorce was no defense in a prosecution for adultery committed in cohabiting with the second wife: *State v. Whitcomb*, 52–85.

An erroneous belief of the validity of a divorce will not constitute a defense in a prosecution for adultery committed in a second marriage: *Ibid.*

Connection by force: The act may constitute adultery as to the man, although as to the woman it is effected by force and against her will: *State v. Donovan*, 61–278; *State v. Henderson*, 84–161.

To constitute adultery on the part of the man the consent of the woman need not be established. If willingly done on his part the crime is complete: *State v. Sanders*, 30–582.

Commencement of prosecution by husband or wife: It is sufficient if the prosecution is *commenced* by the husband or wife. It may be continued without further co-operation on the part of such party: *State v. Baldy*, 17–39.

Where the wife instituted the proceedings before an examining magistrate, in which the defendant was held to answer, but did not appear before the grand jury or otherwise in the further prosecution of the case, *held*, that the prosecution was sufficiently commenced upon the complaint of the wife: *State v. Dingee*, 17–232.

An unmarried person may be guilty of the crime of adultery, and complaint against such person may be made by the husband or wife of the married party, although such married party is not prosecuted: *State v. Wilson*, 22–364; *State v. Mahan*, 81–121.

The fact that the husband of the defendant prosecuted for adultery has before appearing before the grand jury to testify been divorced from the defendant will not prevent the prosecution of the case on his complaint: *State v. Russell*, 90–569.

It seems that where the party charged was married at the time of the commission of the offense the prosecution can be only on the complaint of the husband or wife of such party and not on the complaint of the husband or wife of the other party with whom the crime was committed if such other party is married: *State v. Oden*, 69 N. W., 270.

But the subsequent marriage of defendant before the commencement of the prosecution will not affect the case: *Ibid.*

The appearance of the wife before the grand jury, in response to a subpœna, and giving testimony against the husband without intending to prefer a charge, but supposing she was required to do so, would not constitute a complaint by the wife: *State v. Donovan*, 61–278; *State v. Stout*, 71–343.

The prosecution may be sufficiently commenced by the husband or wife, either by making complaint before the grand jury or by filing a preliminary information before a magistrate. If commenced by filing information it is not necessary that the husband or wife appear further in the proceedings. It is not necessary that the name of the husband or wife be indorsed on the indictment as private prosecutor: *State v. Briggs*, 68–416.

The words "husband or wife," as used in this section, refer to and mean the spouse of the person charged with the offense: *Bush v. Workman*, 64–205.

When the indictment does not show that the complaint is made by the husband or wife of the defendant it will not be presumed that such defendant is married unless that fact appears on the face of the indictment, and therefore, the fact not appearing, the indictment is not open to demurrer on that ground. The objection in such case is a matter of defense which defendant must prove in order to take advantage of it: *State v. Mahan*, 81–121.

An averment in the indictment that the prosecution was commenced by the husband or wife is not conclusive, and, if not so commenced, advantage of that fact may be taken by defendant: *State v. Roth*, 17–336.

It is essential that the state prove that the prosecution was so commenced. An averment in the indictment will not be presumptive proof thereof: *State v. Henke*, 58–457.

The provision forbidding prosecution except on complaint of the husband or wife does not prescribe an element of the crime but simply limits the authority of the court to punish the crime in certain cases, and evidence that the prosecution was in fact commenced by the husband or wife may be introduced, though no averment of that fact is

found in the indictment: *State v. Maas*, 83–469; *State v. Andrews*, 64 N.W., 404.

The allegation that the prosecution was so commenced must be proven by the state like other material averments of the indictment, and is to be determined by the jury upon the evidence given at the trial, and not by the court on affidavits upon a motion to dismiss the prosecution: *State v. Briggs*, 68–416.

The fact that the prosecution is commenced by the husband or wife does not enter into or constitute any of the facts which go to make up the crime, and therefore, although such fact must be proven, it is not necessary that it be established beyond a reasonable doubt: *State v. Donovan*, 61–278.

Failure to instruct the jury as to the necessity of the prosecution being so commenced is not error, where that fact appears without dispute in the evidence and such instruction is not asked by the defendant: *State v. Hazen*, 39–648.

Indictment: As any act of adultery committed between the parties within the statutory period of limitation might be proven under an indictment charging one such act, the allegation in the indictment of other acts committed on divers other days may be rejected as surplusage, and the indictment will not be bad: *State v. Briggs*, 68–416.

The better practice is to indict the parties guilty of adultery separately, although they may be indicted jointly: *State v. Dingee*, 17–232.

The name of the woman with whom the adultery was committed may be charged as to the grand jury unknown if that is the fact: *State v. Ean*, 90–534.

Evidence: The provision that the prosecution can be commenced only by the husband or wife leads to the inference that the offense is a crime by the husband or wife against the other rather than against society in general, and upon such prosecution the one may be a witness against the other under § 4606: *State v. Bennett*, 31–24; *State v. Hazen*, 39–648.

In a prosecution for adultery, record proof of marriage is not indispensable. It may be established by the testimony of the husband or wife: *State v. Wilson*, 22–364.

Admissions of defendant as to the fact of marriage, when voluntary, and not of the character of confessions exacted by improper inducements, are admissible as evidence of the marriage: *State v. Sanders*, 30–582.

Admissions of the woman with whom the husband is charged to have committed the crime are not competent evidence: *State v. McGuire*, 50–153.

The provisions of § 5319, as to the presumption arising from absence, in the case of a prosecution for bigamy, do not apply as against a defendant in a prosecution for adultery to establish the validity of his marriage with a wife who had previously been married: *State v. Henke*, 58–457.

Different acts: Where but one act of adultery is charged and evidence as to different acts is introduced, but the prosecution after the close of the evidence elects to rely upon one particular act referred to in the evidence, such election withdraws from the jury the evidence as to the other acts and cures any errors which may have been committed in admitting evidence with reference thereto: *State v. Donovan*, 61–278.

Evidence of other acts of adultery committed between the same parties prior to the statutory period of limitation or in another county than that in which the indictment is found are admissible to show the disposition of the parties, and may be taken, in connection with opportunity to commit the crime within the statutory period and within the jurisdiction of the court, as evidence that the crime was then committed: *State v. Briggs*, 68–416.

Where an instruction limited the jury in their inquiry as to the guilt of defendant to the act alleged to have occurred on the date named in the indictment, but allowed them to convict if they found that act to have been committed at any time within the statutory period, *held*, that there was no error of which the defendant could complain: *State v. Henderson*, 84–161.

Evidence of acts of adulterous intercourse subsequent to that relied on is not admissible: *State v. Oden*, 69 N. W., 270.

Subsequent relations between the parties may be shown as tending to show adulterous intent on the previous occasion: *State v. Mecum*, 64 N. W., 286.

Evidence that defendant, a married man, occupied a room during the night with a woman not his wife is sufficient evidence to show adultery: *State v. Ean*, 90–534.

As to evidence of adultery in actions for divorce, see notes to § 3174.

SEC. **4933. Bigamy.** If any person who has a former husband or wife living marry another person, or continue to cohabit with such second husband or wife, he or she, except in the cases mentioned in the following section, is guilty of bigamy, and shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year. [C.'73, § 4009; R., § 4348; C.'51, § 2706.]

Continuing to cohabit within the state after a bigamous marriage is a crime under this section, whether the marriage was consummated within or without the state: *State v. Sloan*, 55–217; *State v. Nadal*, 69–478.

Defendant may be prosecuted for continuing to cohabit within the state, although a prosecution for the bigamous marriage is barred: *State v. Sloan*, 55–217.

Venue: The prosecution may be had in any county where the defendant unlawfully cohabits with the second wife, although the marriage was consummated in another county: *State v. Hughes*, 58–165.

Indictment: An indictment for this crime, stating that the date of the lawful marriage was to the grand jury unknown, that it took place in Illinois, and that at the time

of the second marriage the former marriage relation still existed, *held* sufficient as against the objections, first, that it did not state the date of the first marriage; second, that it did not state that such marriage was lawful and valid by the laws of Illinois; third, that it did not appear that the lawful wife was still living at the date of the second marriage: *Ibid.*

An indictment under this section need not negative the exceptions contained in the next section: *State v. Williams*, 20–98.

Evidence: The testimony of a witness who saw the marriage is sufficient without record evidence thereof: *Ibid.; State v. Hughes*, 58–165.

While admissions of marriage or cohabitation will not authorize conviction, yet when the evidence shows a long recognition by defendant of the woman as his wife, and actual marriage, proof of admission of marriage and cohabitation may be shown: *State v. Nadal*, 69–478.

The testimony of either husband or wife, together with proof of continued cohabitation as husband and wife, raises such a presumption of an actual legal fact as to make it incumbent upon the defendant to rebut such presumption: *Ibid.*

In a prosecution for cohabiting in this state after a void marriage in another state, it is not necessary to prove the marriage to have been in accordance with the laws of such state, if it would have been sufficient under the laws of this state, there being no evidence that the laws of such state are different from those of this state: *Ibid.*

Under an indictment alleging the celebration of the void marriage at a particular place, evidence will be sufficient which shows the celebration of the marriage anywhere within the same state: *Ibid.*

In a prosecution for cohabiting with a second wife, evidence of the bigamous marriage in another county is proper, not to show a crime in that county, but to fix the nature of the subsequent cohabitation: *State v. Hughes*, 58–165.

It seems that the fact that defendant acted under reputable legal advice in contracting the second marriage would be no defense: *Ibid.*

The crime is one by the husband or wife against the other within the scope of § 4606, allowing the husband or wife to be a witness against the other: *State v. Sloan*, 55–217; *State Hughes*, 58–165.

In a prosecution for bigamy, evidence of lewdness on the part of the injured party is incompetent: *State v. Nadal*, 69–478.

SEC. **4934. Exceptions.** The provisions of the preceding section do not extend to any person whose husband or wife has continually remained beyond seas, or who has voluntarily withdrawn from the other and remained absent, for the space of three years together, the party marrying again not knowing the other to be living within that time; nor to any person who has good reason to believe such husband or wife to be dead; nor to any person who has been legally divorced from the bonds of matrimony. [C.'73, § 4010; R., § 4349; C.'51, § 2707.]

The provisions of this section, as to presumption arising from absence, do not apply as against a defendant, in a prosecution for adultery, to establish the validity of his marriage with a woman who had previously been married: *State v. Henke*, 58–457.

SEC. **4935. Knowingly marrying husband or wife of another.** Every unmarried person who knowingly marries the husband or wife of another, when such husband or wife is guilty of bigamy thereby, shall be imprisoned in the penitentiary not exceeding three years, or be fined not more than three hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 4011; R., § 4350; C.'51, § 2708.]

SEC. **4936. Incest.** If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son or sister's son; or if any person, being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be guilty of incest, and imprisoned in the penitentiary not exceeding ten years nor less than one year. [C.'73, § 4030; R., §§ 4337–9.]

The marriage of persons sustaining to each other any of the degrees of relationship here specified is incest. Carnal knowledge in such case need not be alleged or shown: *State v. Schaunhurst*, 34–547.

The words brother and sister, as here used, refer to illegitimate as well as legitimate children of the same parents: *Ibid.*

The offense of rape may also constitute the offense of incest if the connection is had with a female within the prohibited degrees of relationship. It is not necessary that the

female should be a consenting party: *State v. Chambers*, 87–1; and see notes to § 4932. But *contra*, *State v. Thomas*, 53–214.

It is sufficient to constitute the crime that defendant had carnal knowledge of the other party to the illicit relation, and it is not necessary to charge that the parties had carnal knowledge of each other: *State v. Hurd*, 70 N.W., 613.

This offense on the part of the husband is a crime against the wife in such sense as to make her a competent witness against him: *Ibid.*

Even though the act constitutes rape on the part of the defendant, it may also constitute incest as to him, that is incest may be an included crime in rape: *Ibid.*

The register of marriages is sufficient evidence of the incestuous marriage (§ 3146): *State v. Schaunhurst*, 34–547.

Admissions and declarations of the parties are also admissible to show the fact of marriage: *Ibid.*

The female is not an accomplice, where she does not consent, in such sense that corroboration of her testimony is required under § 5489: *State v. Chambers*, 87–1.

That corroboration of the testimony of prosecutrix is not required in such cases, see § 5488.

SEC. **4937. Sodomy.** Any person who shall commit sodomy, shall be imprisoned in the penitentiary not more than ten years nor less than one year. [24 G. A., ch. 39.]

SEC. **4938. Lewdness—indecent exposure.** If any man and woman not being married to each other, lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness, and designedly makes an open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be imprisoned in the county jail not exceeding six months, or be fined not exceeding two hundred dollars. [C.'73, § 4012; R., § 4351; C.'51, § 2709.]

Acts of private incontinence are not sufficient to constitute the offense here described: *State v. Marvin*, 12–499.

An indictment under this section should charge that the parties were not married to each other: *State v. Clinch*, 8–401.

Evidence that defendant in a prosecution for lewdness had a wife and children whom he had deserted, *held* admissible: *State v. Lyon*, 10–340.

Occasional acts of sexual intercourse in a secret manner between parties living in the relationship of master and servant may not be sufficient alone to constitute the crime of lewdness. But such acts and the birth of a child may be shown as tending with other circumstances to prove that the parties were in fact living together as husband and wife: *State v. Kirkpatrick*, 63–554.

In a prosecution for keeping a house of ill fame where the charge given by the court to the jury defined lewdness as the "irregular indulgence of the animal desires," *held*, that while the word "unlawful" instead of "irregular" would have been a more correct definition, yet the charge was not misleading or prejudicial to defendant: *State v. Toombs*, 79–741.

Where parties are jointly indicted for lewdly cohabiting together, declarations of one not made in the presence of the other may be shown as against the defendant making them, the jury being properly cautioned not to consider such evidence as against the other defendant. While in such case the guilt of one is inconsistent with the innocence of the other, yet the testimony may be sufficient to convict one and not the other: *State v. Miller*, 81–72.

Evidence of other similar acts by the same person is admissible to show that the act was designedly done and evidence of an indecent proposal to a woman in whose presence the exposure is made is also admissible for the same purpose: *State v. Stice*, 88–27.

SEC. **4939. Keeping house of ill fame.** If any person keeps a house of ill fame, resorted to for the purpose of prostitution or lewdness, such person shall be imprisoned in the penitentiary not less than six months nor more than five years. [20 G. A., ch. 142, § 1; C.'73, § 4013; R., § 4352; C.'51, § 2710.]

What constitutes prostitution: It is for the jury to say what acts are, under the circumstances, sufficient to render a person a prostitute, and it is not for the court to instruct as to what sexual intercourse is or is not sufficient to establish the fact: *State v. Rice*, 56–431.

Prostitution implies indiscriminate sexual intercourse on the part of a woman which she invites or solicits, without regard to whether it be for gain or not: *State v. Clark*, 78–492.

Evidence in a particular case, *held* sufficient to support a verdict for keeping a house of ill fame: *Ibid.*

Keeping house of ill fame: An indictment against a person for keeping a house of ill fame is sufficient if it charges the offense as committed within the county. The house need not be more specifically described: *State v. Shaw*, 35–575.

The statute does not require that the place be used habitually or for any length of time for the prohibited purposes in order to constitute the offense: *State v. Lee*, 80–75.

It is not necessary to show that the place

has a bad reputation: if it is shown that it is a place resorted to for the purpose of prostitution or lewdness, and that it is kept by defendant, it is sufficient: *Ibid.*

The term "house of ill fame" is synonymous with "bawdy-house," having no reference to the fame of the place, or its reputation, but only to the purpose for which it is used: *Ibid.*

If the facts constituting an offense under this section be properly charged in the indictment, the fact that the term nuisance is used to designate it will not invalidate the indictment nor make it an indictment for the offense defined in § 5080: *State v. Shaw*, 35–575.

The defense here defined is distinct from that defined in § 5080, in that, in the latter case, it must be "to the disturbance of others:" *State v. Odell*, 42–75; *State v. Alderman*, 40–375.

An indictment which charged that defendant kept a house of ill fame resorted to for purposes of prostitution or lewdness, *held* to charge but one offense, and therefore not void for duplicity: *State v. Toombs*, 79–741.

In a prosecution for keeping a house of ill fame, evidence as to conversation of women resorting to the house, though such conversation was not in the presence of defendant, is admissible, as showing the character of the women: *Ibid.*

And where it is shown that lewd women made a certain house a place of resort, and men of licentious repute visited the place, the evidence of the bad reputation of the house is sufficient to sustain a verdict of keeping a house of ill fame: *Ibid.*

Evidence that the owner of a house kept as a house of ill fame by the tenant was in the habit of spending a part of his time there, *held* insufficient to show that such owner was guilty as a keeper of such house: *State v. Pearsall*, 43–630.

Instructions to the effect that evidence showing that defendant was keeping a house and using it as his own, and exercising such control over it as men usually have over their own houses, will authorize the jury to find that defendant kept the house, and that the jury might find that defendant had knowledge of the character of the house and assented thereto, from the publicity of the lewd conduct carried on there and the public reports of its ill fame, and his knowledge of such reports, as well as his personal conduct and his conversation with inmates and visitors, *held* proper: *State v. Wells*, 46–662.

A previous conviction under an indictment charging only an offense under § 5080 will not warrant a sentence, on conviction under this section as it stood before amendment, of imprisonment in the penitentiary for a second conviction: *State v. Holmes*, 56–588.

The character of the house and of those frequenting it may be fixed by reputation, but the fact that defendant is the keeper of such a house cannot be proven by evidence of common reputation as to his character: *State v. Hand*, 7–411.

Where a husband is indicted for keeping a house of ill fame evidence of acts of prostitution on the part of his wife living with him with his knowledge is sufficient to establish the crime: *State v. Young*, 65 N. W., 160.

As to keeping of house of ill fame being a nuisance, see § 5080 and notes.

SEC. **4940. Terminating lease.** When a tenant, or any one claiming under him, is convicted of keeping a house of ill fame, the landlord of the premises may terminate the lease therefor, and recover possession thereof in the manner provided in case of violation of the provisions of the chapter upon intoxicating liquors. [C.'73, § 4014; R., § 4353; C.'51, § 2711.]

SEC. **4941. Leasing house for such purpose.** If any person let any house, knowing that the lessee intends to use it as a place or resort for the purpose of prostitution and lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be fined not exceeding three hundred dollars, or imprisoned in the county jail not exceeding six months. [C.'73, § 4015; R., § 4354; C.'51, § 2712.]

The acts here described constitute but one offense, and an indictment charging both of them is not bad for duplicity: *State v. Abrahams*, 6–117.

To render the defendant guilty of *knowingly permitting* the use, something more must be shown than his mere inactivity or failure to take steps to prevent such illegal use. Some act or declaration showing an affirmative assent must be shown: *Ibid.; Abrahams v. State*, 4–541.

The state may prove the bad character of the house by evidence of the bad character of the persons resorting thereto, and of the inmates thereof; but the general reputation of the house itself should be excluded: *State v. Lyon*, 39–379.

To charge a person with letting a house for purposes of prostitution is slander *per se: Halley v. Gregg*, 74–563.

SEC. **4942. Enticing to house of ill fame.** If any person inveigle or entice any female, before reputed virtuous, to a house of ill fame, or knowingly conceal or aid or abet in concealing such female so deluded or enticed, for the purpose of prostitution or lewdness, or entice back into a life of prostitution any female who has theretofore been guilty of prostitution and has abandoned it, he shall be imprisoned in the penitentiary not

not more than ten nor less than three years. [20 G. A., ch. 142, § 2; C. '73, § 4016; R., § 4355; C. '51, § 2713.]

The inveigling or enticing of a female, before reputed virtuous, to a house of ill fame, constitutes a complete offense, and to knowingly conceal, or assist or abet in concealing, such female so deluded or enticed for the purpose of prostitution or lewdness, constitutes another, and the two offenses, even though committed by the same person and in connection with the same female, cannot be charged in the same indictment: *State v. Terrill*, 76–149.

SEC. **4943. Prostitution.** If any person, for the purpose of prostitution or lewdness, resorts to, uses, occupies or inhabits any house of ill fame or place kept for such purpose, or if any person be found at any hotel, boarding house, cigar store or other place, leading a life of prostitution or lewdness, such person shall be imprisoned in the penitentiary not more than five years. [20 G. A., ch. 142, § 3.]

It is not necessary that the indictment expressly charge that the place resorted to was a house of ill fame or one kept for the purpose of prostitution or lewdness if it appears therefrom that defendant was in possession and control of the place which was resorted to, used and occupied for such purposes: *State v. Russell*, 64 N.W., 281.

Proof of a single act of prostitution would be sufficient to justify conviction under this section: *Ibid.*

It is erroneous, however, to charge that if defendant used, occupied or inhabited a certain place for the purpose of prostitution or lewdness, the crime is made out, for under such instruction a defendant might be convicted if she were a mere servant employed about the premises, without participation in any wrongful act: *Ibid.*

SEC. **4944. Evidence.** The state, upon the trial of any person indicted for keeping a house of ill fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evidence of the general reputation of such house as so kept. [Same, § 4.]

This section is not unconstitutional as depriving accused of liberty or property without due process of law. In order to render defendant punishable it must be established not only that the house in question is a house of ill fame, but also that it is resorted to for the purpose of prostitution or lewdness, and it is as to the character of the house that the evidence of reputation is made admissible: *State v. Haberle*, 72–138.

This section was not designed to add to the ingredients of the crime by requiring that a house should be generally reputed to be a house of ill fame, but to enlarge the means of proving its true character. Evidence of the general reputation of the house is made competent but not conclusive means of proving its true character: *State v. Lee*, 80–75.

SEC. **4945. Violating sepulchre and exposure of dead bodies.** If any person, without lawful authority, wilfully dig up, disinter, remove or carry away any human body, or the remains thereof, from its place of interment; or aid, assist, encourage, incite or procure the same to be done or attempted; or wilfully receive, conceal or dispose of any such human body or the remains thereof; or if any person, with the intent to commit any of the aforesaid acts, partially perform the same; or if any person wilfully and unnecessarily, and in an improper manner, indecently expose, throw away or abandon any human body, or the remains thereof, in any public place, or in any river, stream, pond or other place, he shall be imprisoned in the penitentiary not more than two years, or be fined not exceeding twenty-five hundred dollars, or both. [18 G. A., ch. 182, § 2; C. '73, § 4017; R., § 4356; C. '51, § 2714.]

Evidence that a body is disinterred during the night-time secretly, and is concealed, is evidence tending to show that it was disinterred for an unlawful purpose: *State v. Pugsley*, 75–742.

Where the state has shown the fact of disinterring or removing a dead body it is incumbent on the defendant by way of defense to show any license or authority he may have entitling him to do so: *State v. Schaeffer*, 64 N. W., 276.

SEC. **4946. Bodies for medical purposes.** Any coroner, or undertaker, or the superintendent or managing officer of any public asylum, hospital, poor-house or penitentiary, may, with the consent of the relatives or friends, if any are known, and without such consent if not known, deliver to any medical college or school, or any physician in the state, for the pur-

pose of medical and surgical study, the remains of any uninterred deceased person in his charge, unless such deceased person during his last sickness expressed a desire that his body should be buried. If such a body so delivered over is subsequently claimed by any relative or friend, the same shall be at once surrendered to such party. Any person delivering or receiving any body or remains, knowing that any of the foregoing provisions have been violated, shall be punished as provided in the preceding section. [20 G. A., ch. 195; C.'73, § 4018.]

SEC. **4947. Burial after dissection.** The person receiving a body as contemplated in the preceding section shall decently bury the remains thereof after it has been used for proper purposes, and a failure to do so shall be a misdemeanor. [C.'73, § 4019.]

SEC. **4948. Record kept.** Any physician receiving the body or remains of a deceased person for the purpose of medical or surgical study, and any professor or person in charge of a medical college or school at which such body or remains are received for such purpose, shall, in a suitable book, make or cause to be made a legible record of the time when, the name and the description of the person from whom, and the place where, such body or remains were received, and whether or not such body or remains, when so received, were inclosed in any box, cask or other receptacle, and, if so inclosed, shall record a description of such box, cask or receptacle sufficient to identify the same, together with the shipping marks or directions, if any, on same; and also a description of such body or remains, including the length, weight and sex of same, the apparent age of the person at the time of death, color of hair or beard, if any, and any and all marks or scars on such body by which the same might be identified, and whether or not such body, when so received, was mutilated so as to prevent identification of the same. And such physician, professor or person shall keep the said record, and on demand exhibit the same, as also any and all such bodies or remains of deceased persons then in his charge, for the inspection of any sheriff or his deputy, if the same is not required, one year or more after such body was received. [18 G. A., ch. 182, § 3.]

SEC. **4949. Penalty.** Any physician, professor or teacher in a medical college or school, who uses, or allows or permits others under his control or charge to use, the body or remains of a deceased person for the purpose of medical or surgical study without the record required in the preceding section having been first made, or, on demand being made by the sheriff or his deputy as therein specified, shall refuse and fail to exhibit any such record or body in his charge or under his control to such officer for his inspection, shall be guilty of a misdemeanor, and imprisoned in the county jail not exceeding one year, or be fined not exceeding one thousand dollars, or both. [Same.]

SEC. **4950. Remains—how used.** The remains of any person received as aforesaid shall be used for the purpose of medical and surgical study alone, and in this state only, and whoever having received such remains shall use them for any other purpose, or shall remove the same beyond the limits of this state, or in any manner traffic therein, shall be guilty of a misdemeanor, and be imprisoned for a term not exceeding one year in a county jail. [C.'73, § 4020.]

SEC. **4951. Obscene books, pictures, etc.** If any person import, print, publish, sell or distribute any book, pamphlet, ballad or any printed or written paper containing obscene language or obscene prints, pictures or descriptions, manifestly tending to corrupt the morals of youth; or introduce into any family, school or place of education, or buy, procure, receive or have in his possession any such book, pamphlet, ballad, printed or written paper, picture or description, either for the purpose of loan, sale, exhibition or circulation, or with intent to introduce the same into any family, school or place of education, he shall be imprisoned in the penitentiary not more

than one year, or be fined not exceeding one thousand dollars. [26 G. A., ch. 69; C.'73, § 4022; R., § 4359; C.'51, § 2717.]

SEC. **4952. Obscene literature—articles of immoral use.** Whoever sells or offers for sale or gives away, or has in his possession with intent to sell, loan or give away, any obscene, lewd, indecent or lascivious book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, model, cast, or any instrument or article of indecent or immoral use, or any medicine, article or thing designed or intended for procuring abortion or preventing conception, or advertises the same for sale, or writes or prints any letter, circular, hand-bill, card, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, when, where, how or by what means any of the articles or things hereinbefore mentioned can be purchased, or otherwise obtained or made, shall be fined not more than one thousand nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both. [21 G. A., ch. 177, § 1.]

This statute does not make illegal the sale of an instrument which is manufactured for a lawful purpose, such as an English catheter, although such sale is with the intention that the instrument be used in the attempt to procure an abortion: *State v. Forsyth*, 78–595.

SEC. **4953. Circulating through the mail.** Whosoever deposits in any post-office within this state, or places in charge of any person to be carried or conveyed, any of the articles or things named in the preceding section, or any circular, hand-bill, card, advertisement, book, pamphlet or notice of any kind, giving information, directly or indirectly, when, how, where or by what means any of the articles or things mentioned in the preceding section can be purchased or obtained, or knowingly or wilfully receives the same to carry or convey, or knowingly carries or conveys the same in any manner, except in the United States mail, shall be fined not more than one thousand dollars, nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both. [Same, § 2.]

SEC. **4954. Printing or publishing.** Whoever prints or publishes, or causes to be printed or published, in any newspaper published or circulated in this state, any advertisement of medicine, drug, nostrum or apparatus for the cure of private or venereal disease, or shall circulate or distribute any newspaper containing such an advertisement or notice, shall be guilty of a misdemeanor, and be fined not more than one thousand dollars nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both. [Same § 3.]

SEC. **4955. Giving obscene literature to minors.** Whoever sells, lends, gives away or shows, or has in his possession with intent to sell, give away or show, to any minor, any book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication, or principally made up of, criminal news, police reports or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibits upon any street or highway, or any place within the view, or which may be within the view, of any minor, any of the above described books, papers or pictures, or uses or employs any minor to give away, sell or distribute, or who, having the care, custody or control of any minor, permits him to sell, give away or distribute, any such books, papers or pictures, shall be fined not more than five hundred nor less than fifty dollars, or be imprisoned not more than six months in the county jail, or both. [Same, § 4.]

SEC. **4956. Warrants for search or seizure.** Any magistrate or police judge is authorized, on complaint supported by oath or affirmation of one or more persons, to issue a warrant, directed to the sheriff of the county within which such complaint is made, or to any constable or police officer within said county, directing him or them, or any of them, to search for, seize and take possession of such books, papers, pictures, circulars, articles and things named in this chapter; and said magistrate or police judge shall deliver personally, or shall transmit, inclosed and under seal, specimens

thereof to the county attorney of his county, and shall deposit within the county jail of his county, or other secure place, as to him shall seem meet, inclosed and under seal, the remainder thereof, and shall, upon the conviction of the person or persons offending under the provisions of this chapter, forthwith, in the presence of the person or persons upon whose complaint the seizure or arrest was made, if he or they shall elect to be present, destroy or cause to be destroyed the remainder thereof, and shall cause to be entered upon the record of his court the fact of such destruction. [Same, § 5.]

SEC. **4957. Exceptions.** Nothing in the five preceding sections shall be construed to affect teaching in regularly chartered medical colleges, or the publication or use of standard medical books, or the practice of regular practitioners of medicine or druggists in their regular business, or the possession by artists of models in the necessary line of their art. [Same, § 6.]

SEC. **4958. Obscene productions by phonograph.** If any person exhibit through a phonograph, or any other instrument for receiving and reproducing the human voice, any story, song or any other matter containing any obscene, indecent or immoral language, he shall be imprisoned in the penitentiary not more than one year, or be fined not exceeding one thousand dollars.

SEC. **4959. Disturbing worshiping congregations or other assemblies.** If any person wilfully disturb any assembly of persons met for religious worship by profane discourse or rude and indecent behavior, or by making a noise, either within the place of worship or so near as to disturb the order and solemnity of the assembly, or if any person wilfully disturb or interrupt any school, school meeting, teachers' institute, lyceum, literary society or other lawful assembly of persons, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. [C. '73, § 4023; R., § 4360; C. '51, § 2718.]

The charge of an offense under this section must allege that the act was wilfully done: *State v. Stroud*, 68 N. W., 450.

SEC. **4960. Selling liquor near camp-meeting.** If any person, within one mile from the place where any religious society is collected for religious worship in any field or woodland, expose to sale or gift any spirituous or other liquors, or any article of merchandise excepting provisions, he shall be guilty of a misdemeanor. [C. '73, § 4024; R., § 4361; C. '51, § 2719.]

SEC. **4961. Exceptions.** The preceding section does not apply to persons regularly pursuing or carrying on their ordinary and lawful calling or business in the places habitually and lawfully used by them for such calling or business, nor to any person who has a written permit from the person having the charge of such religious society to sell any of such prohibited articles, on complying with the regulations of such religious assembly and with the laws of the state. [C. '73, § 4025; R., § 4362; C. '51, § 2720.]

SEC. **4962. Keeping gambling houses.** If any person keep a house, shop or place resorted to for the purpose of gambling, or permit or suffer any person in any house, shop or other place under his control or care to play at cards, dice, faro, roulette, equality or other game for money or other thing, such offender shall be fined in a sum not less than fifty nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year, or both. In a prosecution under this section, any person who has the charge of or attends to any such house, shop or place is the keeper thereof. [C. '73, § 4026; R., § 4363; C. '51, § 2721.]

What constitutes: To constitute gambling as here contemplated, it is not necessary that the money or "other thing" should be "put up." Playing at a game with the understanding that the loser shall pay for the drinks around, which arrangement is carried out, is sufficient: *State v. Maurer*, 7–406; *State v. Cooster*, 10–453; *State v. Leicht*, 17–28: *State v. Bishel*, 39–42.

The offense of keeping a gambling-house is as complete if the house is kept for one day as if kept for a year. It does not consist in causing or continuing a public nuisance, as contemplated in § 5080: *State v. Crogan*, 8–523.

It is not necessary that the place occupied be generally or habitually resorted to, if it is kept for that purpose. One act of gambling,

as well as many, will complete the offense: *State v. Cooster*, 10–453.

An indictment against a tavern-keeper for suffering gaming in violation of statute need not state the names of the persons who played nor the sums of money for which they played, nor the property lost or won: *Romp v. State*, 3 G. Gr., 276.

A charge that defendant keeps a house resorted to, sufficiently charges intent and knowledge, and still more does the charge that he permits, etc., gambling, imply knowledge: *State v. Cure*, 7–479.

And an indictment charging that accused, being the keeper of a house resorted to for the purpose of gambling, knowingly and unlawfully did permit, etc., *held* sufficient, although it would have been better to have expressly charged that the house was under the control of accused: *State v. Middleton*, 11–246.

The "keeping," etc., and the "permitting," etc., constitute one and the same offense, and an indictment charging them both in separate counts is not objectionable on the ground of duplicity: *State v. Cooster*, 10–453.

An indictment substantially charging that defendant did keep a house, etc., in which he did permit divers persons, to the jurors unknown, to play at cards, etc., for money, cigars, beer and other things, *held* sufficient: *State v. Kaufman*, 59–273.

See, further, notes to § 4964.

SEC. **4963. Search warrant.** If any person make oath before a magistrate that he has probable cause to suspect, and does suspect, that any house, building or place, naming the house or place and the occupant, is unlawfully used as a gaming house or place for the purpose of gaming for money or other property, and that persons resort thereto for that purpose, whether they be known to the complainant or not, such magistrate may issue his warrant for the purpose of searching such house or building for and seizing the implements or gambling devices mentioned in the preceding section, and for the apprehension of the occupant or keeper thereof; and the said implements and keeper shall be carried before such magistrate to be dealt with as provided by law. Any gambling device brought before the magistrate may be destroyed by him, and an entry thereof shall be made upon his docket. [C.'73, § 4027; R., § 4364; C.'51, § 2722.]

SEC. **4964. Gaming and betting.** If any person play at any game for any sum of money or other property of any value, or make any bet or wager for money or other property of value, he shall be guilty of a misdemeanor. [C.'73, § 4028; R., § 4365; C.'51, § 2723.]

Playing at billiards or "pin-pool" with the agreement or understanding that the losing party shall pay for the game, is gambling: *State v. Book*, 41–550: *State v. Miller*, 53–154.

Whether the game played is one of skill or one of chance is immaterial under this section: *State v. Miller*, 53–154.

But playing at cards for recreation or amusement is not prohibited: *State v. Leicht*, 17–28.

The offering by an agricultural society of a premium to the winner at a horse-race held under its authority does not constitute an offense under this section: *Delier v. Plymouth County Ag'l Society*, 57–481.

Where it appeared that defendant was in a room where the crime of gambling was committed, and fled therefrom on the entrance of an officer, and no evidence was introduced tending to show that he was not guilty of the crime, *held*, that he was properly convicted: *State v. Boyer*, 79–330.

SEC. **4965. Gaming contracts void.** All promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, laid, staked or bet, at or upon any game of any kind or on any wager, are absolutely void and of no effect. [C.'73, § 4029; R., § 4366; C.'51, § 2724.]

Wager: A wager contract based upon the result of an election is void as against public policy: *David v. Ransom*, 1 G. Gr., 383.

Where, in pursuance of a contract previously made between the parties to a wager, plaintiff delivered to the successful party an article and charged it to the other party to the wager, *held*, that he could not recover from the person so charged the value of the article furnished: *Ibid.*

But *held*, that a request by the party charged, and subsequent to the determination of the wager, to deliver the article to the successful party, would render him liable if delivery was made in pursuance of such request: *Ibid.*

Recovery of money: Money lost on a wager and paid over cannot be recovered back: *Thrift v. Redman*, 13–25.

Recovery from stakeholder: A party depositing money or other property with a stakeholder as a wager may recover it back before it is paid over to the winner: *Shannon v. Baumer*, 10–210.

An action may be maintained against a stakeholder who has paid over to the winning party money placed in his hands as a wager after he has been notified by the

loser not to do so: *Adkins v. Flemming*, 29–122.

Where a promissory note for an amount greater than the wager was deposited with a stakeholder, and by him turned over to the winner, who appropriated it to his own use, *held*, that the original owner might recover from such winner the excess of the value of the note over the amount of the wager: *Shaw v. Gardiner*, 30–111.

A demand upon the stakeholder by one of the parties to the wager for the entire amount in his hands, on the ground that he is successful in the wager, is not a revocation of the wager so as to entitle him to recover from such stakeholder the amount deposited by him, and afterwards paid over in pursuance of the result of the wager to the opposite party: *Okerson v. Crittenden*, 62–297.

Action upon wagering contract: Action cannot be maintained upon a note showing upon its face that it was given in a betting transaction: *Sipe v. Finarty*, 6–394.

And even if the note is given upon an apparent consideration the agreement between the parties may be such as to make it clearly a wagering contract: *Craig v. Andrews*, 7–17.

Contracts and negotiable instruments of the character here described are void, even in the hands of an innocent purchaser, before maturity: *Ibid.; Traders' Bank v. Alsop*, 64–97.

Where one, in behalf of himself and others, deposited a sum as a wager, *held* that, in an action to recover such sum from the stakeholder, he could only recover the amount actually belonging to him, the contract being absolutely void and plaintiff having therefore no authority to sue for the others thereunder: *Toney v. Snyder*, 50–73.

Where a note was given for a sum claimed to be due under a written contract by which it was agreed between a person owning an interest in a shipment of cattle on its way to market and another, that if the cattle should sell for less than a certain price the difference should be paid by one party to the other, and if they sold for more than that the difference should be paid by the latter to the former, *held*, that the contract was void as a gambling contract, and the note given thereunder was also void even in the hands of the purchaser: *First Nat. Bank v. Carroll*, 80–11.

Anything which induces men to risk their money or property without any return except to get for nothing any given amount from another is gambling, and it is immaterial whether the transaction relates to actual property or not, if it does not involve a dealing with actual property: *Ibid.*

A note given for the sale of "prolific (or Bohemian) oats at fifteen dollars per bushel as a speculation," under a contract by which the seller agreed to resell for the buyer by a stated time a certain quantity of the same oats to be raised by the buyer, *held* not void as given in pursuance of a gambling contract, but *held*, that such contract was void as against public policy: *Hanks v. Brown*, 79–560; *Merrill v. Packer*, 80–542; *Shipley v. Reasoner*, 80–548.

Where a part of the consideration for a note is the purchase of lottery tickets the entire note is absolutely void. Money paid for lottery tickets is staked on a game of chance: *Koster v. Seney*, 68 N.W., 824.

It is the unlawfulness of the contract or agreement and not the fact of the lottery that renders the instrument invalid: *Ibid.*

Options: To invalidate a contract on the ground of the illegality of the transaction, as being a gambling or option contract, it must be shown that on the part of both parties the transaction was with the knowledge and purpose that no actual delivery of the property which was the subject of the sale should be made. If one of the parties acts in good faith, with the intention and expectation of delivering or receiving the property, the transaction as to him will be valid, and will be a sufficient consideration for a contract in his hands based thereon: *Murry v. Ochiltree*, 59–435.

Certain instructions to the effect that instruments purporting to convey the title to grain were void because they were issued to pay losses which might be suffered in the purchase of commodities, wherein it was not the purpose or intention of either of the parties that the purchase or sale should be consummated by the delivery or receipt of the article purchased or sold, but on the contrary it was the purpose of all the parties that the same should be settled by the payment of the difference between the purchase or selling price and the market price at the time of settlement, *held* correct: *Lowe v. Young*, 59–364.

The option contracts that are void are such as do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not intended to be delivered: *Gregory v. Wattowa*, 58–711.

When the parties to an executory contract for the sale of property intend that there shall be no delivery thereof, but that the transaction shall be settled by the payment of the difference between the contract price and the market price of the commodity at the time fixed, the contract is void: *First Nat. Bank v. Oskaloosa Packing Co.*, 66–41.

If the agent through whom the purchase is made knows that the transaction is an option contract, he cannot recover money advanced by him to one of the parties for the purpose of carrying on the transaction: *Ibid.*

While contracts for the sale and delivery of grain in the future, which are virtually bets in relation to the future price of grain, are of a purely gambling and criminal character, and, where their true character is known, the courts should hold them void, yet contracts for future delivery are, to some extent, a necessity, and they are as legitimate as any other, and that, too, though the parties may contemplate a possibility of settlement by the payment of differences. The real intention of the parties must determine the character of the transaction, and in arriving at the intention the court must be governed by the evidence and not by conjectures based upon its knowledge of other contracts: *Tomblin v. Callen*, 69–229.

A dealer in grain may sell and agree to deliver at some future time that which he has not, but which he expects to go into the market and buy: *Douglas v. Smith*, 74–468.

SEC. **4966. Pool-selling.** Any person who records or registers bets or wagers or sells pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, or upon the result of any political nomination or election, and any person who keeps a place for the purpose of doing any such thing, and any owner, lessee or occupant of any premises, who knowingly permits the same, or any part thereof, to be used for any such purpose, and any one who, as custodian or depositary thereof, for hire or reward, receives any money, property or thing of value staked, wagered or bet upon any such result, shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both.

SEC. **4967. Dealing in options—bucket shops.** It shall be unlawful for any person, corporation, association or society to keep within the state any store, office or other place for the pretended buying or selling of grain, pork, lard, or any mercantile, mining or agricultural products or corporation stocks, on margins, without any intention of future delivery, whether such pretended contracts are to be performed within or without the state; and no person, corporation, association or society within the state shall make or enter into any contract or pretended contract, such as is above stated and referred to; the intention of this section being to prevent and prohibit within the state the business now engaged in and conducted in places commonly known and designated as bucket shops. But this section shall not apply or in any way affect any contract for the actual buying or selling of any commodity whatever for present or future delivery, where the actual delivery or receipt of the thing sold is contemplated and in good faith intended by either of the parties to the contract. [20 G. A., ch. 93, § 1.]

SEC. **4968. Penalty.** Any person, whether acting individually, or as a member of any copartnership, corporation, association or society, guilty of violating any of the provisions of the preceding section, shall be fined not less than one hundred nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than one year, or both. [Same, § 2.]

SEC. **4969. Cruelty to animals.** If any person torture, torment, deprive of necessary sustenance, mutilate, overdrive, cruelly beat or cruelly kill any animal, or unnecessarily fail to provide the same with proper food, drink, shelter or protection from the weather, or drive or work the same when unfit for labor, or cruelly abandon the same, or carry or cause the same to be cruelly carried on any vehicle, or otherwise, he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [C. '73, § 4031; R., § 4358; C. '51, § 2716.]

SEC. **4970. By railways, when transporting.** No railway company in this state, in the carrying or transportation of cattle, sheep, swine or other animals, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storm or other accidental cause, without unloading for rest, water and feeding for a period of at least five consecutive hours. In estimating such confinement, the time the animals have been confined without such rest on connecting railways from which they are received shall be computed, it being the intention of this section to prevent their continuous confinement beyond twenty-eight hours, except upon the contingencies before stated; and animals unloaded for rest, water and feeding shall be properly fed, watered and sheltered during such rest by the owners or persons in custody thereof, or, in case of their default in so doing, then by the railway company transporting them, at the expense of said owners or persons in custody thereof, and said company shall have a lien upon such animals for food, care and custody furnished, and shall not be liable for any detention of such animals authorized by this section. But when such animals shall be carried in cars in which they shall and do have proper food, water, space and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply. Any railway company, owner or custodian of such animals, who shall fail to comply with the pro-

visions of this section, shall, for each and every such offense, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. [C.'73, § 4032.]

SEC. **4971. Keeping cock-pits and fighting dogs, bears, etc.** If any person keep or use, or in any way be connected with, or be interested in the management of, or receive money for the admission of any person to, any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock or other creature, or engage in, aid, abet, encourage, or assist in any bull, bear, dog or cock fight, or a fight between any other creatures, he shall be guilty of a misdemeanor. [C.'73, § 4033.]

SEC. **4972. Impounding animals without food and water.** If any person impound or confine, or cause to be impounded or confined, in any pound or other place, any creature, and fail to supply the same during such confinement with a sufficient quantity of food and water, he shall be guilty of a misdemeanor. [C.'73, § 4034.]

SEC. **4973. Exhibiting pictures of prize fights.** It shall be unlawful for any person, persons or corporation to exhibit in this state by means of the photograph, kinetograph, or any kindred device or machine, any picture of any prize fight, glove contest, or other match between men or animals, that is prohibited by the laws of this state.

SEC. **4974. Penalty.** Any person, persons or corporation who shall grant, lease, let or hire any theater, hall, room, building, roof-garden or park for the exhibition of pictures such as are prohibited by the preceding section shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both fine and imprisonment, in the discretion of the court.

SEC. **4975. Aiding.** Whoever shall assist or aid in any manner any person, persons or corporation in making exhibits of any such pictures as are prohibited in section forty-nine hundred and seventy-three shall be punishable by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail not more than thirty days, for each offense, in the discretion of the court.

CHAPTER 10.

OF OFFENSES AGAINST PUBLIC HEALTH.

SECTION **4976. Sale of poison without label.** If any apothecary, druggist or other person deliver to another any arsenic, corrosive sublimate, prussic acid or other poisonous liquid or substance without having the word "poison" and the true name thereof written or printed upon a label attached to or affixed upon the vial, box or parcel containing the same, he shall be guilty of a misdemeanor. [C.'73, § 4038; R., § 4374; C.'51, 2728.]

See, also, § 2593.

SEC. **4977. Spreading infectious disease.** If any person inoculate himself or any other person or suffer himself to be inoculated with the smallpox within the state, or come within the state with the intent to cause the prevalence or spread of this infectious disease, he shall be imprisoned in the penitentiary not more than three years, or be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [20 G. A., ch. 102; C.,73, § 4039; R., § 4375; C.'51, § 2729.]

SEC. **4978. Putting infected person on public conveyance.** If any person shall place or put, or aid or abet in placing or putting, any person upon any railroad car, steamboat or other public conveyance, knowing such person to be infected with diphtheria, smallpox or scarlet fever, he shall be

fined not more than one hundred dollars, or be imprisoned in the county jail not more than thirty days. [Same.]

SEC. **4979. Throwing dead animals in stream, spring, etc.** If any person throw, or cause to be thrown, any dead animal into any river, well, spring, cistern, reservoir, stream or pond, he shall be imprisoned in the county jail not less than ten nor more than thirty days, or be fined not less than five nor more than one hundred dollars. [C.'73, § 4041.]

SEC. **4980. Selling drugged liquors.** If any person wilfully sell or keep for sale intoxicating, malt or vinous liquors, which have been adulterated or drugged by admixture with any deleterious or poisonous substance, he shall be fined not exceeding five hundred dollars, or be imprisoned in the penitentiary not exceeding two years. [C.'73; § 4040; R., § 4376.]

SEC. **4981. Selling unwholesome provisions.** If any person knowingly sell any kind of diseased, corrupted or unwholesome provisions, whether for meat or drink, without making the nature and condition of the same fully known to the buyer, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars. [C.'73, § 4035; R., § 4371; C.'51, § 2725.]

SEC. **4982. Adulterating food or liquor.** If any person adulterate for the purpose of sale any substance intended for food, or any wine, spirituous, malt or other liquor intended for drinking, he shall be imprisoned in the county jail not more than one year, or be fined not exceeding three hundred dollars, and the article so adulterated destroyed. [C.'73, § 4036; R., § 4372; C.'51, § 2726.]

SEC. **4983. Drugs or medicines.** If any person adulterate for the purpose of sale any drug or medicine in such manner as to lessen the efficacy or change the operation of such drug or medicine, or to make it injurious to health, or sell it knowing that it is thus adulterated, he shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding five hundred dollars, and such adulterated drugs and medicines destroyed. [C.'73, § 4037; R., § 4373; C.'51, § 2727.]

SEC. **4984. Other adulteration.** No person shall mix, color, stain or powder, or order or permit any other person to mix, color, stain or powder, any article of food or confections with any ingredient or material so as to render the article injurious to health, with the intent that the same may be sold, and no person shall sell or offer for sale any such articles. [19 G. A., ch. 170, § 1.]

SEC. **4985. With intent to sell.** No person shall, except for the purpose of compounding in the necessary preparation of medicine, mix, color, stain or powder, or permit any other person to mix, color, stain or powder any drug or medicine with any ingredients or materials, so as to affect injuriously the quality or potency of such drug or medicine, with the intent to sell the same, or shall offer for sale any such drug or medicine. [Same, § 2.]

SEC. **4986. Labeling.** No person shall mix, color, stain or powder any article of food, drink or medicine, or any article which enters into the composition of food, drink or medicine, with any other ingredient or material, whether injurious to health or not, for the purpose of gain or profit, or sell or offer for sale the same, or order or permit any other person to sell or offer for sale any article so mixed, colored, stained or powdered, unless the same be so manufactured, used or sold or offered for sale, under its true and appropriate name, and notice that the same is mixed or impure is marked, printed or stamped upon each package, roll, parcel or vessel containing the same, so as to be and remain at all time readily visible, or unless the person purchasing the same is fully informed by the seller of the true names of the ingredients (if other than such as are known by the common name thereof) of such articles at the time of making the sale thereof or offering to sell the same; but nothing in this section shall prevent the use of harmless coloring material used in coloring butter and cheese. [Same, § 3.]

SEC. **4987. Glucose—skimmed-milk cheese—oleomargarine.** No person shall mix any glucose or grape sugar with sirup or sugar intended for human food, or shall mix or mingle any glucose or grape sugar with any article, without distinctly marking, stamping or labeling the article or the package containing the same with the true and appropriate name of such article, and the percentage in which glucose or grape sugar enters into its composition. Nor shall any person sell or offer for sale, or permit to be sold or offered for sale, any such food, into the composition of which glucose or grape sugar has entered, without at the same time informing the buyer of the fact, and the proportion in which glucose or grape sugar has entered into the composition. [Same, § 4.]

[As to imitation butter and cheese, see further §§ 2515–2528.]

SEC. **4988. Penalty.** Any person violating any provision of the four preceding sections shall, for the first offense, be fined not less than ten nor more than fifty dollars; for the second offense, not less than twenty-five nor more than one hundred dollars, or imprisoned in the county jail for not more than thirty days; for the third or any subsequent offense, not less than five hundred nor more than one thousand dollars, and imprisoned in the penitentiary not less than one nor more than five years. [Same, § 5.]

SEC. **4989. Sale of impure or skimmed milk—skimmed-milk cheese—labeling.** If any person shall sell, exchange, or expose for sale or exchange, or deliver or bring to another, for domestic or potable use, or to be converted into any product of human food, any unclean, impure, unhealthy, adulterated, unwholesome or skimmed milk, or milk from which has been held back what is commonly known as strippings, or milk taken from an animal having disease, sickness, ulcers, abscess or running sore, or which has been taken from an animal within fifteen days before or five days after parturition; or if any person, having cows for the purpose of producing milk or cream for sale, shall stable them in an unhealthy place or crowded manner, or shall knowingly feed them food which produces impure, unwholesome milk, or shall feed them distilled glucose or brewery waste in any state of fermentation, or upon any substance in a state of putrefaction or rottenness or of an unhealthy nature, or shall sell or offer for sale cream which has been taken from milk the sale of which has been prohibited, or who shall sell or offer for sale, as cream, an article which shall contain less than the amount of butter fat as prescribed in this chapter; or if any person shall sell or offer for sale any cheese manufactured from skimmed milk, or from milk that is partly skimmed, without the same being plainly branded, stamped or marked on the side or top of both cheese and package, in a durable manner, in the English language, the words "skimmed-milk cheese," the letters of the words to be not less than one inch in height and one-half inch in width, he shall be fined not less than twenty-five nor more than one hundred dollars, and be liable for double damages to the person or persons upon whom such fraud shall be committed; but the provisions of this section shall not apply to skimmed milk when sold as such and in the manner and subject to the regulations prescribed in this chapter. [24 G. A., ch. 50, § 1; 19 G. A., ch. 170, § 4; C.'73, § 4042.]

SEC. **4990. What deemed adulterated or impure milk.** For the purposes of this chapter, the addition of water or any other substance or thing to whole milk or skimmed milk or partially skimmed milk is hereby declared an adulteration, and milk which is obtained from animals fed upon waste as defined in this chapter, or upon any substance of an unhealthy nature, is hereby declared to be impure and unwholesome, and milk which is proved by any reliable method of test or analysis to contain less than twelve and one-half per cent. of milk solids to the hundred pounds of milk, or than three pounds of butter fat to one hundred pounds of milk, shall be regarded as skimmed or partially skimmed milk, and every article not containing fifteen per cent. or more of butter fat shall not be regarded as cream. [24 G. A., ch. 50, § 2.]

SEC. **4991. Enforcement.** It is hereby made the duty of the dairy commissioner to enforce the provisions of the two preceding sections. [Same, § 3.]

SEC. **4992. Fraud in lard—from diseased hogs.** All persons or associations that engage in the business of selling lard rendered from swine which have died of disease shall, before selling or offering to sell any such lard, plainly stamp, print or write upon the cask, barrel or other vessel containing it the words, "Lard from hogs which have died of disease"; or, if sold without such cask, barrel or other receptacles, the purchaser shall be informed that the lard is from hogs which have died of disease. For a violation of the provisions of this section he shall be fined not less than five nor exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [18 G. A., ch. 137.]

SEC. **4993. Compound lard—labeling.** No manufacturer or other person shall sell, deliver, prepare, put up, expose or offer for sale any lard, or any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine in any tierce, bucket, pail, package or other vessel or wrapper, or under any label bearing the words "pure," "refined," "family," or either of said words alone or in combination with other words of like import, unless every tierce, bucket, pail, package or vessel, wrapper or label in or under which said article is sold, delivered, prepared, put up, exposed or offered for sale bears on the top or outer side thereof, in letters not less than one-half inch in length, and plainly exposed to view, the words, "Compound lard," and the name and proportion in pound and fractional parts thereof of each ingredient contained therein. Any person violating the provisions of this section shall be fined, for the first offense not less than twenty nor more than fifty dollars, and for each subsequent offense not less than fifty nor more than one hundred dollars. [22 G. A., ch. 79.]

The subject of this section *held* sufficiently described in the title of the original act as "an act to prevent fraud in the sale of lard, and to provide punishment for the violation thereof," and as therefore not invalid as in violation of section 29, article III, of the constitution; *State v. Snow*, 81–642.

SEC. **4994. Canned food—label.** It shall be unlawful for any packer of or dealer in hermetically sealed, canned or preserved fruits, vegetables or other articles of food, not including canned or condensed milk or cream, to knowingly offer such canned or preserved articles for sale for consumption in this state, unless the cans or jars which contain the same shall bear the name, address and place of business of the person, firm or corporation that canned or packed the articles so offered, or the name of the wholesale dealer in the state who sells or offers the same for sale, together, in all cases, with the name of the state, city, town or village, where the same were packed plainly printed thereon, preceded by the words "packed at." Such name, address and place of business shall be plainly printed on the label, together with a mark or term indicating clearly the grade or quality of the articles contained therein. [21 G. A., ch. 174, §§ 1, 5.]

SEC. **4995. Soaked goods.** All packers of and dealers in soaked goods, or goods put up from products dried or cured before canning, shall, in addition to complying with the provisions of the preceding section, cause to be plainly branded on the face of the label in legible type, one-half of an inch in height and three-eighths of an inch in width, the word "soaked." [Same, § 2.]

SEC. **4996. Penalty.** Any packer or dealer who shall violate any of the provisions of the two preceding sections shall be fined not more than fifty dollars for each offense in the case of retail dealers, and in case of wholesale dealers or packers, not less than five hundred nor more than one thousand dollars for each offense. [Same, § 4.]

SEC. **4997. Who deemed "packer" or "dealer."** The terms "packer" and "dealer," as used in the three preceding sections, shall include any firm or corporation doing business as a dealer in or packer of the articles mentioned therein. [Same, § 4.]

SEC. **4998. Information by board of health.** It shall be the duty of any board of health, cognizant of any violation of the provisions of the four preceding sections, to inform the county attorney, whose duty it shall be to institute proceedings against any person who is charged with a violation of such provisions, and in case of conviction he shall receive twenty-five per cent. of the fines actually collected in addition to any salary otherwise provided for. [Same, § 4.]

SEC. **4999. Seats for female employes.** All employers of females in any mercantile or manufacturing business or occupation shall provide and maintain suitable seats, when practicable, for the use of such female employes, at or beside the counter or work-bench where employed, and permit the use thereof by such employes to such extent as the work engaged in may reasonably admit of. Any neglect or refusal to comply with the provisions of this section by any employer shall be punished by a fine not exceeding ten dollars. [24 G. A., ch. 47.]

CHAPTER 11.

OF OFFENSES AGAINST PUBLIC POLICY.

SECTION **5000. Lotteries and lottery tickets.** If any person make or aid in making or establishing, or advertise or make public any scheme for any lottery; or advertise, offer for sale, sell, negotiate, dispose of, purchase or receive any ticket or part of a ticket in any lottery or number thereof; or have in his possession any ticket, part of a ticket, or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars, or both. [C. '73, § 4043; R., § 4377; C. '51, § 2730.]

The disposal of lands by a scheme in which parties were to buy tickets and draw therefor, *held* a lottery, and a contract of purchase thus entered into was held void: *Guenther v. Dewein*, 11–133.

SEC. **5001. Disposing of liquors to Indians or intoxicated persons.** If any person give, sell or dispose of any spirituous or intoxicating drinks to any Indian within this state, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding one year, or both. [C. '73, § 4044; R., § 4378; C. '51, § 2735.]

SEC. **5002. Allowing minors in billiard rooms, saloons, etc.** No person who keeps a billiard hall, beer saloon or nine or ten pin alley, nor the agent, clerk or servant of any such person, nor any person having charge or control of any such hall, saloon or alley, shall permit any minor to remain in such hall, saloon or alley, or to take part in any of the games known as billiards or nine or ten pins. A violation of the provisions of this section shall be punished by a fine not less than five nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days. [15 G. A., ch. 59.]

Under this section it is the duty of saloonkeepers not only not to permit, but to prevent, minors remaining in their saloons, and the same duty is imposed on their employes. If the keeper or employe fails to take proper measures to prevent, he is to be deemed to permit it, and the liability will not depend upon the knowledge of the keeper or his employe of the fact that the person is a minor: *State v. Probasco*, 62–400.

SEC. **5003. Opium smoking.** Any person who shall keep and maintain any shop, house, room or other place to be resorted to by other persons, in which opium or any of its preparations or compounds is sold or given away to be smoked or used in such place, or who allows opium or any of its preparations to be smoked in such shop, house, room or other place, and every

person who resorts to such shop, house, room or other place for the purpose of smoking opium or its preparations and compounds, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both. The state, upon the trial of any person indicted for keeping a place described in this section, may, for the purpose of establishing the character of the place so kept by the defendant, introduce evidence of the general reputation of such place so kept, and such evidence shall be competent for such purpose. [26 G. A., ch. 95.]

SEC. **5004. Selling firearms to minors.** No person shall knowingly sell, present or give any pistol, revolver or toy pistol to any minor. Any violation of this section shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail not less than ten nor more than thirty days. [20 G. A., ch. 78.]

SEC. **5005. Sale of tobacco to minors.** No person shall directly or indirectly, by himself or agent, sell, barter or give to any minor under sixteen years of age any cigar or tobacco in any form whatever, except upon the written order of his parent or guardian. Any violation of this section shall be punished by a fine of not less than five nor more than one hundred dollars, and the offender shall stand committed until fine and costs of prosecution are paid. [25 G. A., ch. 61.]

SEC. **5006. Sale of cigarettes.** No one, by himself, clerk, servant, employe or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in the consideration of the purchase of any property, of any services, or in evasion hereof, or keep for sale, any cigarettes or cigarette paper or cigarette wrappers, or any paper made or prepared for the purpose of making cigarettes, or for the purpose of being filled with tobacco for smoking; or own or keep, or be in any way concerned, engaged or employed in owning or keeping, any such cigarettes or cigarette paper or wrappers, with intent to violate any provision of this section; or authorize or permit the same to be done. Whoever is found guilty of violating any of the provisions of this section, for the first offense shall pay a fine of not less than twenty-five dollars nor more than fifty dollars and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense, he shall pay, upon conviction thereof, a fine of not less than one hundred dollars nor more than five hundred dollars and the costs of prosecution, or be imprisoned in the county jail not to exceed six months: *provided* that the provisions hereof shall not apply to the sales of jobbers doing an interstate business with customers outside the state. [26 G. A., ch. 96.]

The former statute (26 G. A., ch. 96), from which this section differs in some respects, was held unconstitutional as applied to cigarettes brought into the state and sold in the original package: *State v. McRicker*, 76 Fed., 956.

SEC. **5007. Tax on sale.** There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state.

SEC. **5008. Infringement of civil rights.** All persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, chop houses, eating houses, lunch counters and all other places where refreshments are served, public conveyances, barber shops, bath houses, theaters and all other places of amusement. Any person who shall violate the provisions of this section by denying to any person, except for reasons by law applicable to all persons, the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated herein, or by aiding or inciting such denial, shall be guilty of a misdemeanor. [24 G. A., ch. 43; 20 G. A., ch. 105.]

An indictment under this statute should allege not only a refusal to grant equal accommodations, but absence of any good reason therefor: *State v. Hall*, 72–525.

Before the enactment of this statute it was *held* that the refusal of the owner of a skating rink to permit any particular person, as, for instance, a person of color, to enter and enjoy the privileges of his rink, did not give rise to a cause of action in behalf of the person thus denied, although the rink was kept open as a place of public amusement, it not being shown that the business of operating it was carried on under a license or privilege granted by the state, or the municipal corporation in which it was conducted, or that it was in any manner regulated or governed by any of the police regulations of the city: *Bowlin v. Lyon*, 67–536.

SEC. **5009. Bringing paupers into state.** If any person knowingly bring within this state any pauper or poor person, with the intent of making him a charge on any of the townships or counties therein, he shall be fined not exceeding five hundred dollars, and be charged with his support. [C.'73, § 4045; R., § 4379; C.'51, § 2736.]

SEC. **5010. Transacting business without license.** If any person carry on or transact any business or occupation without license therefor, when such license is required by any law of the state, he shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [C.'73, § 4046; R., § 4380; C.'51, § 2737.]

SEC. **5011. Circulation of foreign bank notes.** If any person pay out or offer to pay, or in any manner put in circulation or offer to put in circulation, any bank note, bill or other instrument intended to circulate as money, issued or purporting to be issued by any bank, individual or corporation elsewhere than in this state, excepting treasury notes, notes of any bank organized under the law of the United States, or any other description of currency issued by the authority of congress, he shall be fined the sum of five dollars for each note, bill or other instrument so paid out or offered to be paid out, put in circulation or offered to be put in circulation. In prosecutions under this section, it shall not be necessary to state in the indictment or information the name of the bank issuing the notes, nor to prove the existence of the bank or other person purporting to issue them; but it shall be sufficient to allege in general terms the fact of paying out, or attempting to pay out, as the case may be, of bank notes issued out of this state; and the proof may be made as if the particulars were alleged. Any number of offenses may be included in the same prosecution, and where the total fines shall not exceed one hundred dollars, the offense may be tried before a justice of the peace; but when they exceed one hundred dollars, it shall be within the juridiction of the district court. [C.'73, § 4047.]

Under ch. 147 of Code of '51, providing a penalty for issuing any bills, etc., to be put in circulation as money, *held*, that a deed given to secure the issuance of such notes was void: *Reynolds v. Nichols*, 12–398.

SEC. **5012. Bringing diseased sheep into the state.** If the owner of sheep, or any person having the same in charge, knowingly import or drive into this state sheep having any contagious disease; or knowingly turn out or suffer any sheep having any contagious disease to run at large upon any common, road or uninclosed lands; or sell or dispose of any sheep, knowing the same to be so diseased, he shall be fined in any sum not less than fifty nor more than one hundred dollars. [C.'73, § 4055.]

A contract for the sale of sheep having contagious diseases cannot be enforced against the purchaser, even when he knew of such disease before purchasing. The statute is intended, not for the protection of the purchaser only, but of the public. *Held*, however, that the statute would not apply where the seller did not know that the disease with which the sheep were afflicted was contagious, and that in such case the contract could be enforced: *Caldwell v. Bridal*, 48-15.

SEC. **5013. Bringing in diseased horses, mules, etc.** If any person knowingly import or bring within the state any horse, mule or ass affected by the diseases known as nasal gleet, glanders or button-farcey, or suffer the same to run at large upon any common, road or uninclosed land, or use or tie the same in any public place, or off his own premises, or sell, trade or offer for sale or trade any such animal, knowing the same to be so diseased, he shall be fined not less than fifty nor more than five hundred dollars, or be imprisoned not to exceed one year in the county jail, or both. [C. '73, § 4056.]

SEC. **5014. Allowing diseased horses, mules, etc., to run at large.** If any horse, mule, or ass reasonably supposed to be diseased with nasal gleet, glanders or button-farcey be found running at large without any known owner, it shall be lawful for the finder thereof to take such animal, so found, before some justice of the peace, who shall forthwith cause the same to be examined by some veterinary surgeon, or other person skilled in such diseases, and if, on examination, it is ascertained to be so diseased, it shall be lawful for such justice of the peace to order such diseased animal to be immediately destroyed and buried; and the necessary expense accruing under the provisions of this section shall be defrayed out of the county treasury. [C. '73, § 4057.]

See § 2339.

SEC. **5015. Swine dying from disease.** The owner or person having charge of any swine any of which die or are killed on account of any disease, shall upon such fact coming to his knowledge, immediately burn the same. [26 G. A., ch. 58, § 2.]

SEC. **5016. Not to be sold.** No person shall sell or give away or offer for sale any swine that have died of any disease, or that have been killed on account of any disease. [Same, § 3.]

SEC. **5017. Nor conveyed along highway.** No person shall convey upon or along any public highway or other public ground, or any private land except that owned or leased by him, any diseased swine, or swine that have died of or have been killed on account of any disease. Upon the trial for the violations of the provisions of this section, the proof that any person has hauled or is hauling dead swine from a neighborhood in which swine have been dying, or are at the time dying, from any disease, shall be presumptive evidence of his guilt. [Same, § 4.]

SEC. **5018. Allowing diseased hogs to escape.** It shall be unlawful for any person negligently or wilfully to allow his hogs or those under his control, infested with any disease, to escape his control or run at large. [Same, § 5; 22 G. A., ch. 67; 21 G. A., ch 79, § 1.]

SEC. **5019. Penalty.** Any person violating or failing to comply with any provision of the four preceding sections shall be fined not less than five nor more than one hundred dollars, or be imprisoned in the county jail not to exceed thirty days, or both. [26 G. A., ch. 58, § 6; 21 G. A., ch. 79, § 3.]

SEC. **5020. Bringing diseased cattle into state.** Any person driving any cattle into the state, or any agent, servant or employe of any railroad or other corporation who shall carry, transport or ship any cattle into this state, or any railroad company or other corporation or person who shall carry, ship or deliver any cattle into this state, or the owner, controller, lessee or agent or employe of any stock yard, receiving into such stock yard, or in any other inclosure for the detention of cattle in transit or shipment or reshipment or sale any cattle brought or shipped in any manner into this state, which at the time they were either driven, brought, shipped or trans-

ported into this state, were in such condition as to infect with or to communicate to other cattle pleuro-pneumonia, or splenitic or Texas fever, shall be fined not less than three hundred and not more than one thousand dollars, or be imprisoned in the county jail not exceeding six months, or both. [21 G. A., ch. 156, § 2; C.'73, § 4058.]

SEC. **5021. Action for damages.** Any person who shall be injured or damaged by any acts prohibited in the preceding section, in addition to the remedy therein provided, may recover the actual damages sustained by him from the person, agent, employe or corporation therein mentioned, and neither said criminal proceeding nor said civil action shall be a bar to a conviction or to a recovery in the other. [21 G. A., ch. 156, § 3; C.'73, § 4059.]

The liability for damages under this section does not arise where there is no negligence on the part of the carrier, and the presumption of negligence arising from injury may be rebutted by showing that there was in fact no such negligence: *Furley v. Chicago, M. & St. P. R. Co.*, 90–149.

SEC. **5022. Diseased hop roots or cuttings.** If any person use, transplant, cultivate or sell, or bring into this state for the purpose of using, planting, cultivating or selling, any hop roots, plants or cuttings which may be diseased in any manner, or infected with lice or vermin of any kind, or which may be brought from any state or country in which the cultivation of hops has been retarded or impaired by the presence of any disease, lice or vermin of a contagious character, he shall be fined not less than ten, nor more than one hundred dollars, and imprisoned not less than five nor more than twenty days. [C.'73, § 4060.]

SEC. **5023. Seizure and destruction of diseased plants.** If complaint is made before a justice of the peace by one or more responsible persons, that they have good reason to believe that hop roots have been introduced into or are being cultivated in the city or township where they reside in violation of the preceding section, the justice before whom such complaint is made shall issue a warrant authorizing any peace officer to seize such roots, and they shall be held in charge by such officer until action has been brought against the person so offending, and the cause determined; and in case it is found that the said plants, roots or cuttings are diseased, or are infected by lice or vermin of a contagious character, the officer before whom it is brought shall order the said roots, plants or cuttings to be burned, charging the expense of doing the same as costs upon the party owning or cultivating the roots, plants or cuttings; and in no case shall he allow them to be planted or delivered to a third party until the fact is established that they are not infected with any vermin or disease of a contagious character. [C.'73, § 4061.]

SEC. **5024. Canada thistles.** If any person or corporation, after having been notified in writing of the presence of Canada thistles on any lands owned or occupied by such person or corporation; or if any road supervisor, after having been notified in writing of the presence of any such thistles on the road under his jurisdiction, shall permit such thistles or any part thereof to blossom or mature, such person, corporation or road supervisor shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not more than thirty days. [24 G. A., ch. 45, § 2; C.'73, § 4062.]

As to extermination of Canada and Russian thistles, see §§ 1562–1565.

SEC. **5025. Boxing tumbling rods of threshing machines.** If any person run any threshing machine in this state without having two lengths of tumbling rods next the machine, together with the knuckles or joints and jacks of the tumbling rods safely boxed and secured while the machine is running, he shall be fined not less than ten nor more than fifty dollars for every day or part of day he shall violate this section. [15 G. A., ch. 38; C. '73, § 4064.]

This section does not make defendant absolutely liable. Proof of running a threshing machine not secured as here required establishes negligence, but the rule still applies that contributory negligence on the part of the person injured will defeat a recovery: *Reynolds v. Hindman*, 32-146.

A person injured through a violation of this provision has a right of action, and it is sufficient to allege the violation as the basis of the right to recover, and as constituting the negligence complained of: *Messenger v. Pate*, 42-443.

Where a contract was made for threshing to be done with a machine not boxed, etc., as here required, *held*, that the contract was void, and that such fact was a good defense in an action for services rendered thereunder: *Dillon v. Allen*, 46-299.

SEC. **5026. Steam boilers.** Any person owning or operating steam boilers in this state shall provide the same with steam-gauge, safety-valve and water-gauge, and keep the same in good order. Any person neglecting so to do shall be fined not less than fifty nor more than five hundred dollars. [15 G. A., ch. 14.]

SEC. **5027. Blacklisting employes.** If any person, agent, company or corporation, after having discharged any employe from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employe from obtaining employment with any other person, company or corporation, except by furnishing in writing on request a truthful statement as to the cause of his discharge, such person, agent, company or corporation shall be punished by a fine not exceeding five hundred nor less than one hundred dollars, and shall be liable for all damages sustained by any such person. [22 G. A., ch. 57, § 1.]

SEC. **5028. Same by agents.** If any railway company or other company, partnership or corporation shall authorize or allow any of its or their agents to blacklist any discharged employe, or attempt by word or writing or any other means whatever to prevent such discharged employe, or any employe who may have voluntarily left said company's service, from obtaining employment with any other person or company, except as provided for in the preceding section, such company or copartnership shall be liable in treble damages to such employe so prevented from obtaining employment. [Same, § 2.]

CHAPTER 12.

OF OFFENSES AGAINST THE PUBLIC PEACE.

SECTION **5029. Affray.** If two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in an angry or quarrelsome manner, in any public place, to the disturbance of others, they are guilty of an affray, and shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [C.'73, § 4065; R., § 4386; C.'51, § 2738.]

SEC. **5030. Unlawful assembly.** When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or, when together, attempt to do an act, whether lawful or unlawful, in an unlawful, violent or tumultuous manner, to the disturbance of others, they are guilty of an unlawful assembly, and shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars. [C.'73, § 4066; R., § 4387; C.'51, § 2739.]

SEC. **5031. Riot.** When three or more persons together and in a violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent or tumultuous manner, to the disturbance of others, they are guilty of a riot, and shall be punished as is provided in the preceding section. [C.'73, § 4067; R., § 4388; C.'51, § 2740.]

In order to constitute a riot it is necessary that the persons implicated shall be actually engaged in some physical act of violence: *Scott v. United States*, Mor., 142.

SEC. **5032. One person may be tried.** Any person guilty of unlawfully assembling, or of a riot, may alone be tried and convicted thereof, but it must be alleged in the information and proved on the trial that three or more persons were engaged therein. [C. '73, § 4068; R., § 4389; C. '51, § 2741.]

SEC. **5033. Exciting disturbance.** If any person make or excite any disturbance in a tavern, store or grocery, or at any election or public meeting, or other place where the citizens are peaceably and lawfully assembled, he shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days. [C. '73, § 4069; R., § 4390; C. '51, § 2742.]

This section is not intended to provide for the punishment of the unlawful and riotous assembly, but for the injury of a dwelling-house or other building as the result thereof: *State v. Johnson*, 89–594.

Where the assembly was for the unlawful purpose of expelling an employe from a railroad ticket office, and as a consequence thereof injury was done to the building, *held*, that there was a crime under this section: *Ibid.*

SEC. **5034. Using blasphemous or obscene language.** If any person publicly use blasphemous or obscene language, to the disturbance of the public peace and quiet, he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars, or both.

SEC. **5035. Riotous conduct.** If any person or persons, unlawfully or riotously assembled, pull down, injure or destroy, or begin to pull down, injure or destroy, any dwelling-house or other building; or destroy or attempt to injure or destroy any boat or vessel; or perpetrate any premeditated injury on the person of another, not being a felony, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained. [C. '73, § 4070; R., § 4391; C. '51, § 2743.]

SEC. **5036. Engaging in prize fight.** Whoever engages as principal in any prize fight shall be fined not less than one hundred nor more than one thousand dollars, or be imprisoned in the penitentiary for a term of not more than one year, or both. [25 G. A., ch. 97, § 1.]

SEC. **5037. Aiding or abetting.** Whoever aids or assists in any prize fight shall be fined not exceeding five hundred dollars, or imprisoned in the county jail for not more than one hundred and fifty days. [Same, § 2.]

SEC. **5038. Security to keep the peace.** Any peace officer who has reason to believe that any persons are about to engage in a prize fight within the state shall make complaint before some justice of the peace of the county, or other authorized magistrate, and thereupon such justice of the peace or authorized magistrate shall proceed, under the chapter relative to security to keep the peace, to make examination of the charges, and, if he shall find that there is just reason to fear the commission of such offense, he shall require security to keep the peace, to be given as therein provided. [Same, § 3.]

SEC. **5039. Racing or fast driving on highways.** Any person who shall be guilty of racing or driving upon the public highway, in a manner likely to endanger the persons or lives of others, shall be guilty of a misdemeanor, and shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days. [C. '73, § 4071.]

SEC. **5040. Breach of Sabbath.** If any person be found on the first day of the week, commonly called Sunday, engaged in carrying firearms, dancing, hunting, shooting, horse racing, or in any manner disturbing a worshiping assembly or private family, or in buying or selling property of any kind, or in any labor except that of necessity or charity, he shall be fined not more than five nor less than one dollar, and be imprisoned in the county jail until the fine, with costs of prosecution, shall be paid; but nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the Sabbath, or to prevent

persons traveling or families emigrating from pursuing their journey, or keepers of toll bridges, toll gates and ferrymen from attending the same. [C. '73, § 4072; R., §§ 4392-3.]

An express or implied contract for sale of property, made on Sunday, where the parties are not embraced within the exceptions of this section, will not be enforced by the courts: *Watrous v. Blair*, 32-58, 61; *Pike v. King*, 16-49.

Vendee of property sold on Sunday may retain it without paying the price agreed upon. The law will leave the parties where it finds them: *Pike v. King*, 16-49; *Kinney v. McDermot*, 55-674.

Where the parties traded horses on Sunday and on the next day plaintiff tendered back the animal received by him, *held*, that he was not thereupon entitled to maintain replevin for the animal which he gave in exchange: *Kelley v. Cosgrove*, 83-229.

If the contract is to pay for property bought and sold on Sunday, the plaintiff cannot recover the value aside from the contract: *Pike v. King*, 16-49.

A vendee obtaining possession of property under a Sunday contract may maintain replevin for such property when subsequently taken from him by the vendor by force: *Kinney v. McDermot*, 55-674.

The execution of a note on Sunday is within the prohibition of this section, and such note is, as against the maker, void in the hands of the payee or his assignees. And in this respect the laws of another state where the note was executed will be presumed to be the same as those of this state: *Sayre v. Wheeler*, 31-112; *S. C.*, 32-559.

The burden of proving that a contract made on Sunday is within one of the exceptions of this section is upon the party claiming under the exemption, which is in the nature of a proviso: *Ibid.*

A note signed on Sunday, but not, in fact, delivered until Monday, is not void: *Bell v. Mahin*, 69-408.

The defense that a contract is void because made on Sunday must be specially pleaded: *Riech v. Bolch*, 68-526.

It does not follow that where the contract only is unlawful the plaintiff cannot recover upon the original consideration in a proper case: *Sayre v. Wheeler*, 31-112.

Though the contract be void as made on Sunday the parties may make a valid contract with reference to the same subjectmatter on a subsequent weekday, and it would seem that a subsequent ratification of the Sunday contract would be binding: *Harrison v. Colton*, 31-16.

To amount to the ratification of a contract of lease executed on Sunday something more than mere occupation of the premises must be shown. Such occupancy might render the tenant liable under an implied promise for a *quantum meruit*, but not for the rent stipulated. To constitute a ratification there must be some new promise to perform the terms of the lease, or something equivalent thereto: *McIntosh v. Lee*, 57-356.

A promissory note made on Sunday is void, but if ratified by partial payment upon a secular day, it will be valid from the date of the ratification, and a ratification by one partner or joint maker will be binding upon the other partners or joint makers, and payment upon the note will be a ratification of the mortgage by which such note is secured: *Russell v. Murdock*, 79-101.

The admission of a debt such as will take it out of the bar of the statute of limitations is not void because made on Sunday: *Ayres v. Bane*, 39-518.

A party to a Sunday contract cannot set up the fact of its execution on Sunday to defeat it in the hands of one who is a good faith assignee thereof for value and without notice of the illegality: *Johns v. Bailey*, 45-241.

A negotiable note made on Sunday, but dated on another day, and having nothing on its face to indicate its invalidity, is not void in the hands of a *bona fide* holder acquiring it before maturity without notice: *Clinton Nat. Bank v. Graves*, 48-228.

The transferee, after maturity, without knowledge of the fact that the note bearing date on a secular day was actually executed on Sunday, may recover thereon. The defense to the note is not an equity which may be set up against one who purchases after maturity: *Leightman v. Kadetska*, 58-676.

An action for damages for fraud in trading a horse affected with glanders, *held* not maintainable where it appeared that the trade was made on Sunday: *Gunderson v. Richardson*, 56-56.

In an action for damages resulting from the frightening of plaintiff's horse by defendant's dog, *held*, that the fact that the accident happened on Sunday, while plaintiff was riding on a business errand, would not defeat his right of recovery: *Schmid v. Humphrey*, 48-652.

Nor will the fact that a railway train is operated in violation of the Sunday law render the railway company liable for damages accidentally occurring from the operation of such train without fault or negligence on the part of the company: *Tingle v. Chicago, B. & Q. R. Co.*, 60-333.

The fact that two parties are together violating the Sabbath will not constitute a defense in an action by one of them against the other for damages due to negligent shooting: *Gross v. Miller*, 93-72.

Where the insured in an accident policy engaged in hunting on Sunday and subsequently on the same day while returning from the trip received an injury causing his death, *held*, that the illegal hunting was not proximately connected with the death and would not defeat recovery under the condition in the policy that there should be no recovery for accident or death while engaged in violating the law: *Prader v. National Masonic Acc. Ass'n*, 63 N. W., 601.

The fact that a telegram is received by the company on Sunday for transmission does not relieve it from liability in damages for neglect in such transmission, even though the transmission on Sunday might be illegal; that fact is no defense for the negligence: *Taylor v. Western Union Tel. Co.*, 64 N. W., 660.

CHAPTER 13.

OF CHEATING BY FALSE PRETENSES, GROSS FRAUDS AND CONSPIRACY.

SECTION **5041. False pretenses.** If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods or other property, or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be imprisoned in the penitentiary not more than seven years, or be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or both such fine and imprisonment. [C.'73, § 4073; R., § 4394; C.'51, § 2744.]

What constitutes: This changes the common-law rule as to cheats, and a person may be guilty of cheating by false pretenses, consisting of representations and acts, although no false tokens are used: *State v. Reidel*, 26–430.

The crime of cheating by false pretenses may be committed by means of false representations. Therefore, *held*, that the indictment charging defendant with obtaining the signature of prosecutor to a promissory note, by means of false representations and pretenses that such note was an order for a certain number of patent churns, etc., well knowing such representations to be false, was sufficient: *State v. Joaquin*, 43–131.

A false promise will not sustain the charge of a crime under this section. There must be a pretense and representation, in fact, that is false, and which was relied upon by the party defrauded; but the fact that a false promise was combined with the false pretense does not take away the criminal character of the act: *State v. Dowe*, 27–273.

So, where a party, under the pretense of having come to pay a debt, on a promise to pay the same, fraudulently procured from his creditor and got into his possession a receipt for his debt, *held*, that the facts constituted an offense as here contemplated: *Ibid.*

A person who, by falsely personating another, obtains property with intent to convert it to his own use, is guilty of larceny (§ 4838): *State v. Brown*, 25–561.

Where defendant was indicted for obtaining property in exchange for a lot of a certain description which he pretended to point out, but it was in fact located elsewhere than was indicated and was of no value, *held*, that the party to whom the lot was shown was justified in believing the lot described was located as indicated, and that it was not error to refuse to instruct the jury that it must be shown that the party to whom the representations were made exercised ordinary prudence and diligence to inform himself of the truth of the representations: *State v. McConkey*, 49–499.

Also *held* that in such case the crime would have been complete, even if it had appeared that defendant was the owner of the lot which he pointed out as that conveyed by him: *Ibid.*

Representations made by acts or declarations intended to induce the belief that the person making them is some one else may be sufficient to constitute the crime, although not amounting to direct representations that the party's name is that of the person whom he personates: *State v. Goble*, 60–447.

To constitute the crime, the person must have obtained, by means of the false pretenses, either the title to the property, or the unqualified right of possession thereof, for some length of time: *State v. Anderson*, 47–142.

Obtaining an indorsement of credit on a note by false pretenses, with intent to defraud, does not constitute an offense under this section: *State v. Moore*, 15–412.

False promises, coupled with false statements of fact, may amount to false pretenses: *State v. Montgomery*, 56–195.

The question is for the jury whether the false representations actually misled the person claimed to have been defrauded, and in determining that question they should take into account his age, experience, state of health, etc.: *Ibid.*

The jury should be told that it is necessary to prove that defendant made the false representations, knowing them to be false, and that the other party was deceived and thereby induced to act: *State v. Rivers*, 58–102.

Where defendant was indicted for false pretenses in procuring a bank to accept as collateral security an invalid mortgage, *held*, that previous and subsequent dealings with the bank might be shown as throwing light upon the intent of the defendant, and the fact as to whether the cashier was in fact deceived: *Ibid.*

Evidence of other similar transactions is admissible for the purpose of showing the knowledge, intention and bad faith of defendant: *State v. Brady*, 69 N. W., 290.

Where defendant had borrowed money on the representation that his brother was to arrive with money, coupled with the promise to use it in payment of the sum borrowed, *held*, that such representation and promise amounted to a pretense that he had the money: *State v. Fooks*, 65–196.

To support a conviction it need not appear that the false pretenses were the only inducements for giving credit or delivering property to the accused. It is sufficient if they had such effect that without their influence upon the mind of the party defrauded he would not have parted with the property or given credit: *Ibid.*

If the false representations are made with the design of deceiving and thereby obtaining property, and have that effect, the guilty party cannot escape on the ground of weak credulity: *Ibid.*

Where defendant procured property by representing that he had purchased a farm in the neighborhood, *held*, that the crime was committed: *State v. Fooks*, 65–452.

Where a buyer acquires property by reason of statements by him to the seller respecting his condition, made to induce the sale, which statements he knows to be false, it is no defense that he nevertheless intended to pay for the property: *State v. Neimeier*, 66–634.

In the case of obtaining a signature by false pretenses the crime is committed when the instrument is delivered, and not when the signature is obtained. The delivery of the instrument with intent to defraud is essential: *State v. McGinnis*, 71–685.

This crime might be committed by fraudlently procuring a mortgage from another, although the maker was not the owner of the property described therein, if the mortgage contained covenants imposing pecuniary liability on the maker: *State v. Jamison*, 74–613.

An indictment charging defendant with obtaining money and other property of value stated by means of false pretenses, consisting of representations that a draft given by defendant, a banker, in exchange for property was drawn against funds with which it would be paid on presentation, and that the person from whom the property was procured by means of such draft believed and relied on such representations and was deceived by them, is sufficient to charge an offense under this section: *State v. Cadwell*, 79–473.

A member of a firm doing a banking business and acting as cashier of the bank is not guilty of procuring property by false pretenses in issuing, in the name of the bank, a draft upon another bank under the assumption that the latter has deposits to the credit of the former. Under an indictment charging defendant with falsely drawing a draft against funds in such other bank, the fact that such person might be liable on the draft as a partner of the firm drawing it does not make it his individual draft within the meaning of such indictment; *Ibid.*

A non-negotiable draft of an insurance company given by an adjuster in payment of a loss is an instrument the false obtaining of which is criminal under this section, although it must be accepted or approved by the company before becoming binding upon it. Such an instrument is within the definition of larceny: *State v. Patty*, 66 N. W., 727.

In a particular case, *held*, that the instrument by which the false pretense complained of was made was such as imported a liability, and was sufficient to constitute the offense: *State v. Kealey*, 89–98.

Material false representations of the age of animals covered by a policy of livestock insurance made for the purpose of securing payment of the loss under such policy may be criminal under this section: *State v. Patty*, 66 N.W., 727.

Indictment: In an indictment for obtaining money under false pretenses, the false pretenses should be particularly set forth: *United States v. Ross*, Mor., 164.

An indictment for this offense cannot be predicated upon representations which are mere matters of opinion: *State v. Webb*, 26–262.

An indictment charging that by means of false token and pretenses, etc., the defendant obtained the property described, *held* to sufficiently charge that the party to whom the pretense was made relied thereon: *State v. McConkey*, 49–499.

In a particular case, *held*, that the indictment sufficiently charged that the party defrauded parted with his property on the faith of defendant's false representations: *State v. Neimeier*, 66–634.

An indictment charging the obtaining by false pretenses of certain notes, designating them as property, and in the second count charging the obtaining in the same manner of the same notes, but designating them as written instruments, the false making of which would be forgery, does not charge two offenses. Such charges might be contained in the same count without rendering the indictment bad for duplicity: *State v. House*, 55–466.

It is not sufficient to charge in the indictment that the defendant by means of false pretenses induced another to sign a written instrument, the false making of which would be forgery; it must also be averred that he obtained from such person the instrument so signed: *State v. Clark*, 72–30.

The indictment must show delivery of the instrument obtained by false pretenses, but it is not necessary that any person should have been actually defrauded: *State v. Jamison*, 74–613.

Venue: That the false representations were made in another county will not prevent the offense being punishable in the county where the property was obtained. The latter county is the one where the offense was committed: *State v. House*, 55–466.

SEC. **5042. Fraudulent conveyances.** Any person who, knowingly being a party to any conveyance or assignment of any estate or interest in lands, goods or things in action, or of any rents or profits arising therefrom, or being a party to any charge on such estate, interest, rents or profits, made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay or defraud creditors or other persons, and every person who, being privy to or knowing of such fraudulent conveyance, assignment or charge, puts the same in use as having been made in good faith, shall be imprisoned in the penitentiary not exceeding three years, or may be fined in the discretion of the court not exceeding one thousand dollars, or imprisoned in the county jail not more than one year. [C.'73, § 4074; R., § 4395; C.'51, § 2745.]

The intention to hinder and delay creditors is the essential element in the crime here defined. An instrument such as is referred to is void: *Davenport v. Cummings*, 15–219.

To establish the crime, a fraudulent intent in fact, as distinguished from an intent which may be presumed in law, must be shown: *Lillie v. McMillen*, 52–463.

"Other persons," as here used, means some one who had, or might have, a claim of right to the property conveyed, which might be enforced at law or in equity. The intention with which a conveyance is made cannot render the act criminal, if no legal or equitable rights of others are affected thereby: *Day v. Lown*, 51–364.

Where the mortgagee of a mortgage executed in fraud of creditors, as contemplated in this section, seeks to recover possession of the property thereunder, the mortgagor may set up the invalidity of the mortgage as a defense: *Galpin v. Galpin*, 74–454.

An agreement between grantor and grantee to defeat recovery against the grantor in an action pending at that time, and to defeat, delay, retard and prevent the enforcement of the payment of obligations by the grantor is criminal: *Briggs v. Coffin*, 91–329.

SEC. **5043. Suppression of will.** If any person, having in his possession or under his control any last will of any deceased person, wilfully suppress, secrete, deface or destroy the same, or any codicil thereto belonging, with intent to injure or defraud any devisee, legatee or other person, he shall be imprisoned in the penitentiary not more than seven years, or be fined not exceeding one thousand dollars, and imprisoned in the county jail not more than one year. [C.'73, § 4075; R., § 4396; C.'51, § 2746.]

SEC. **5044. False weights and measures.** If any person, with intent to defraud, use a false balance, weight or measure in the weighing or measuring of anything whatever that is purchased, sold, bartered, shipped, or delivered for sale or barter, or that is pledged or given in payment, he shall be fined not exceeding five hundred nor less than fifty dollars, or be imprisoned in the county jail not more than six months, or both. [C.'73, § 4076; R., § 4397; C.'51, § 2747.]

The testimony of the state superintendent of weights and measures that a weight used by defendant was false need not necessarily be confined to a comparison of such weight with the official standard: *State v. Frolick*, 64 N.W., 264.

If a witness states that he knows whether a weight is correct or that it is not he may be permitted to testify as to the fact, and his competency to so testify may be tested by cross-examination: *Ibid.*

SEC. **5045. Seizure.** The magistrate granting a warrant of arrest under the preceding section must also direct the seizure of the false weights, balances or measures; and if the party be convicted, or they are found to be false, they shall be forfeited to the county, and, after being made of the standard weight or measure, may be sold, and the money arising from such sale must be paid into the county treasury. [C.'73, § 4077; R., § 4398; C.'51, § 2748.]

SEC. **5046. Altering brands, stamps, marks, etc.** If any person falsely alter any stamp, brand or mark on any cask, package, box or bale containing merchandise or produce, made by a public officer, appointed for that purpose, in order to denote the quality, weight or quantity of the contents thereof, with intent to defraud, he shall be fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 4078; R., § 4399; C.'51, § 2749.]

SEC. **5047. Counterfeiting mark of another.** If any person counterfeit any mark, stamp or brand of another, or falsely mark any cask, package, box or bale as to quality or quantity, with intent to defraud, he shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not more than six months, or both. [C.'73, § 4079; R., § 4400; C.'51, § 2750.]

The fact of making and branding, with intent to deceive, without reference to whether the articles so marked or branded are to be sold or not, is sufficient to constitute the crime here defined: *State v. Burge*, 7–255.

SEC. **5048. Fraudulently using stamped cask, package, box, etc.** If any person, with intent to defraud, use any cask, package, box or bale, marked, branded or stamped by another, for the sale of merchandise or produce of an inferior quality or less in quantity or weight than is denoted by such mark, stamp or brand, he shall be imprisoned in the county jail not

more than one year, or fined not exceeding two hundred dollars, or both. [C.'73, § 4080; R., § 4401; C.'51, § 2751.]

SEC. **5049. Falsely using label of labor union.** Every person, or association or union of working men or others, that has adopted or shall adopt for their protection any label, trade-mark or form of advertisement, may file the same for record in the office of the secretary of state by leaving two copies, counterparts or facsimiles thereof with the secretary of state. Said secretary shall thereupon deliver to such person, association or union so filing the same a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar. Such certificate of record shall in all actions and prosecutions under the following six sections be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and the right of said person, association or union to adopt the same. [24 G. A., ch. 36, §§ 1, 3.]

SEC. **5050. Injunction.** Every person, association or union adopting a label, trade-mark or form of advertisement, as specified in the preceding section, may proceed by action to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof; and all courts having jurisdiction of such actions shall grant injunctions to restrain such manufacture, use, display or sale, and shall award the complainant therein such damages resulting from such wrongful manufacture, use, display or sale, and a reasonable attorney's fee to be fixed by the court, and shall require the defendant to pay to such person, association or union the profits derived from such wrongful manufacture, use, display or sale, and a reasonable attorney's fee to be fixed by the court, and said court shall also order that all such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to an officer of the court to be destroyed. Such actions may be prosecuted for the benefit of any association or union by any officer or member thereof. [Same, §§ 4, 6.]

SEC. **5051. Imitation of such label.** It shall be unlawful for any person or corporation to imitate any label, trade-mark or form of advertisement adopted as provided in the second preceding section, or to knowingly use any counterfeit or imitation thereof, or to use or display such genuine label, trade-mark or form of advertisement, or the name or seal of such person, union or association, or of any officer thereof, unless authorized so to do, or in any manner not authorized by him or it. Any person violating any provision of this section shall be imprisoned in the county jail not more than thirty days, or be fined not less than twenty-five nor more than one hundred dollars. [Same, §§ 1, 2, 5, 7.]

SEC. **5052. Unlawful use or sale of bottles, boxes, etc., of another.** Persons engaged in the manufacture, bottling or selling of soda water, mineral or aerated waters, cider, milk, cream or other lawful beverages in bottles, boxes, casks, kegs or barrels, with their names or other marks of ownership stamped or marked thereon, may file in the office of the recorder of the county in which such articles are manufactured, bottled or sold a description of the name or marks so used by them, and cause notice thereof to be given by three consecutive publications in a weekly newspaper printed in the English language in said county. It shall thereupon be unlawful for any person, without the written consent of the owner, to fill such bottles, boxes, casks, kegs or barrels so marked or stamped, for the purpose of sale, or to sell, dispose of, buy or traffic in or wantonly destroy the same, whether filled or not, and any violation of this section shall be a misdemeanor. The using by any other person than the rightful owner, without written permission, of any such cask, barrel, keg, bottle or box, as prohibited in this section, or the possession thereof by any junk dealer, or dealer in such casks, barrels, kegs, bottles or boxes, the same being marked or stamped and registered as herein required, shall be *prima facie* evidence that such use, and the sale or possession, is unlawful, and search warrants

may be procured for the discovery and seizure of such bottles, boxes, casks, kegs or barrels, as in other criminal cases. [25 G. A., ch. 79.]

SEC. **5053. Gross fraud or cheat.** Every person who is convicted of any gross fraud or cheat at common law shall be fined not more than two hundred dollars, or imprisoned in the county jail not more than one year, or both. [C.'73, § 4081; R., § 4402; C.'51, § 2752.]

Punishment is here provided for *gross* frauds and cheats, and under this provision all frauds and cheats are certainly not punishable. Slanderous words charging a person with cheating, defrauding, etc., are therefore not actionable *per se: Lucas v. Flinn*, 35–9.

SEC. **5054. Fraudulent destruction of boats, etc.** If any person cast away, sink or otherwise destroy any raft, boat or vessel, within any county, with intent to defraud any owner or insurer thereof, or the owner or insurer of any property laden on board the same, or of any part thereof, he shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding two thousand dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 4082; R., § 4403; C.'51, § 2753.]

SEC. **5055. Fitting out for that purpose.** If any person lade, equip or fit out, or assist in lading, equipping or fitting out, any raft, boat or vessel, with intent that the same be cast away, burnt, sunk or otherwise destroyed, to injure or defraud any owner or insurer thereof, or of any property laden on board the same, he shall be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 4083; R., § 4404; C.'51, § 2754.]

SEC. **5056. Making false bills of lading.** If any owner of any boat or vessel, or of any property laden or pretended to be laden on board the same, or if any other person concerned in the lading or fitting out such boat or vessel, make out and exhibit, or cause to be made out and exhibited, any false estimate of any goods or property laden or pretended to be laden on board such boat or vessel, with intent to injure or defraud any insurer of such boat or vessel or property, or of any part thereof, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not more than three years. [C.'73, § 4084; R., § 4405; C.'51, § 2755.]

SEC. **5057. Making false affidavits or protests.** If any master or other officer of any boat or vessel make, or cause to be made, any false affidavit or manifest, or if any owner or other person concerned in such boat or vessel, or in the goods or property laden on board the same, procure any such false affidavit or manifest to be made, or exhibit the same, with intent to injure, deceive or defraud any insurer of such boat or vessel, or of the goods or property laden on board of the same, he shall be imprisoned in the penitentiary not exceeding five years, or be fined not exceeding three thousand dollars and imprisoned in the county jail not exceeding one year. [C.'73, § 4085; R., § 4406; C.'51, § 2756.]

SEC. **5058. Conspiracy to prosecute.** If two or more persons conspire or confederate together with intent, falsely and maliciously, to cause or procure another person to be indicted or in any way impleaded or prosecuted for an offense of which he is innocent, whether such person be so impleaded, indicted or prosecuted or not, they shall be guilty of a conspiracy, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one thousand nor less than one hundred dollars, and imprisoned in the county jail not exceeding one year. [C.'73, § 4086; R., § 4407; C.'51, § 2757.]

SEC. **5059. Conspiracy in general.** If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property or rights in property of another, or to do any illegal act injurious to the public trade, health, morals or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law, shall be

imprisoned in the penitentiary not more than three years. [C. '73, § 4087; R., § 4408; C. '51, § 2758.]

What constitutes: To constitute the crime of conspiracy the accused must confederate together to do either a criminal act, or an act which is not criminal by criminal means. In the latter case the acts constituting the illegal means must be specifically charged: *State v. Potter*, 28-554; *State v. Stevens*, 30-391; *State v. Jones*, 13-269.

In order that the object of the conspiracy may be criminal, the injury intended should appear on the face of the indictment to be a criminal one, such an injury as the statute makes an offense: *State v. Stevens*, 30-391.

An indictment charging conspiracy with fraudulent intent wrongfully to injure the character of prosecutrix by obtaining a divorce from her by making false charges of adultery, etc., does not charge facts sufficient to constitute conspiracy as against such prosecutrix: *Ibid.*

Where the conspiracy is to do a criminal act, it is sufficient if it be described by the proper name or term by which it is usually known in law: *State v. Potter*, 28-554; *State v. Savoye*, 48-562.

An indictment charging defendants with conspiracy to procure prosecutrix to go with them with a view of bringing about a sham marriage and thus causing her seduction, *held* sufficient to charge a conspiracy to commit a crime without charging that she was married or of previously chaste character: *State v. Savoye*, 48-562.

A charge that defendants conspired to "cheat and defraud," *held* not sufficient to charge the crime of conspiracy: *State v. Jones*, 13-269.

Where an indictment charges a conspiracy to do an act which is a crime, it is sufficient if the act be described by the proper name or terms by which it is generally known in law. It is only where the charge is of an act not in itself criminal, that the means used for its accomplishment must be averred: *State v. Grant*, 86-216.

A conspiracy to take from an officer on a writ of replevin intoxicating liquors seized under information for their forfeiture is a conspiracy to do an unlawful act under § 4850, and therefore punishable: *State v. Harris*, 38-242.

A charge of conspiracy to injure the property of another will not be supported where it appears that the acts complained of were done in the exercise of an avowed legal right, the existence of which the testimony strongly, if not conclusively, establishes, and that they were not done as the result of a conspiracy to wrongfully injure said property: *State v. Flynn*, 28-26.

The combination and agreement of the parties to commit a crime may be proven by the circumstances connected with the transaction which is the subject of the accusation. In other words, conspiracy may be shown by circumstantial evidence: *State v. Sterling*, 34-443.

An indictment for a conspiracy to "rob and steal" is not bad as charging more than one offense. Even should the conspiracy contemplate the commission of several distinct felonies, the crime would be single: *Ibid.*

A single conspiracy may embrace the agreement to do numerous distinct illegal acts: *State v. Grant*, 86-216.

In an indictment charging a conspiracy to injure several persons, it is not necessary to allege the names of all the persons intended to be injured, but is sufficient to state the names of some and that the names of others are to the grand jurors unknown: *State v. Grant*, 86-216.

Where the intended act charged is not criminal, the indictment should charge with what means the act was to be done; but if the intended act charged is criminal, an indictment charging a conspiracy to commit such injury need not charge the means intended to be used: *State v. Ormiston*, 66-143.

It is not necessary to charge the commission of the overt act which is the ultimate object of the conspiracy, but the commission of such overt act may be charged without rendering the indictment objectionable for duplicity, it appearing that the allegation as to the act was not with the intention of putting the defendant on trial for such act: *State v. Grant*, 86-216.

While the offense of conspiracy may be complete without the commission of the overt act, which the conspirators agreed to commit, and it is unnecessary to charge the commission of such act, even if committed, yet it is usual to set out the commission of the act by way of aggravation of the offense; and where the overt act is thus charged it does not follow necessarily that the indictment is designed to charge anything more than conspiracy, and if it does not appear that defendant was or was intended to be put on trial for anything but the crime of conspiracy, such indictment will not be defective as charging more than one crime: *Ibid.*

An allegation that defendants conspired to assault a person with intent to inflict great bodily injury charges conspiracy to assault and inflict such injury, and is not open to the objection of charging conspiracy with intent to intend: *Ibid.*

The crime is completed when the conspiracy is formed, and it is immaterial whether the object intended be accomplished or not: *State v. Savoye*, 48-562.

The crime of conspiracy is distinct from the crime which the parties are charged with attempting to commit, and an acquittal of the latter will not bar the former: *State v. Brown*, 64 N. W., 277.

The crime of conspiracy is not merged in the crime embraced in the complete act: *State v. Grant*, 86-216.

Acts and declarations of co-conspirators: Acts and declarations of one conspirator before the formation of the conspiracy or after its termination are not admissible: *State v. Arnold*, 48-566; *State v. Grant*, 86-216. The acts and declarations of one of two or more persons charged with a conspiracy in the commission of a crime are not admissible as against the others, unless a foundation is first laid sufficient, in the opinion of the

court, to establish *prima facie* the fact of conspiracy, or proper to be laid before the jury to establish such fact: *State v. Nash*, 7–347, 384.

Where two defendants were jointly indicted for horse stealing, *held*, that upon the trial of one the state could prove that the other conducted a witness to the horses for the purpose of showing when and how the horses were found, without first showing the existence of a joint purpose or conspiracy: *State v. Bowers*, 17–46.

Where several defendants were jointly indicted for murder, *held*, that it was error to admit against one of them declarations of co-defendants made after the commission of the crime: *State v. Westfall*, 49–328; *State v. Smith*, 54–656.

But acts and declarations of an accomplice, made while engaged with defendant in furthering, aiding and abetting a common design in the commission of a larceny, are admissible in evidence against him: *State v. Hudson*, 50–157.

Upon the trial of one of several co-defendants jointly indicted for burglary, *held*, that acts and conversations of the other defendants, tending to establish familiar relations and association of all the parties, and that they were in company at about the time of the commission of the crime, were admissible for the purpose of connecting defendant with the crime: *State v. Stevens*, 67–557.

It is common to permit evidence of acts and declarations of co-conspirators to be introduced in evidence before the fact of the existence of the conspiracy is established under a promise by the prosecution that the evidence of the conspiracy will be afterwards introduced. The order of the introduction of evidence is largely in the discretion of the court: *State v. Grant*, 86–216.

SEC. **5060. Pools and trusts.** Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership, association or individual, creating, entering into or becoming a member of or a party to any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, shall be guilty of a conspiracy. [23 G. A., ch. 28, § 1.]

This section is applicable to insurance companies, insurance being a commodity within the terms of the statute: *Beechley v. Mulville*, 70 N.W., 107.

An action for damages by an insurance agent for being expelled from an association of agencies on account of his violation of an agreement fixing rates of insurance, cannot be maintained where the company appointing the agent has the right to dismiss him at pleasure, and his damage is the result of such dismissal. A conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give the right of action: *Ibid.*

SEC. **5061. Corporation not to enter.** No corporation shall issue or own trust certificates, and no corporation, nor any agent, officer, employe, director or stockholder of any corporation, shall enter into any combination, contract or agreement with any person or corporation, or with any stockholder or director thereof, for the purpose of placing the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with intent to limit or fix the price or lessen the production or sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. [Same, § 2.]

SEC. **5062. Penalty.** Any corporation, company, firm or association violating any of the provisions of the two preceding sections shall be fined not less than one per cent. of its capital or amount invested in such corporation, company, firm or association, nor more than twenty per cent. of the same; and any president, manager, director, officer, agent or receiver of any corporation, company, firm or association, or any member of any corporation, company, firm or association, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both. [Same, § 3.]

SEC. **5063. Contracts void.** All contracts or agreements in violation of any provisions of the three preceding sections shall be void. [Same, § 4.]

SEC. **5064. Defense.** Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any

provisions of the four preceding sections shall not be liable for the price or payment thereof, and may plead such provisions as a defense to any action for such price or payment. [Same, § 5.]

SEC. **5065. Forfeiture of charter.** Any corporation created or organized by or under the law of this state, which shall violate any provision of the five preceding sections, shall thereby forfeit its corporate right and franchise, as provided in the next section. [Same, § 6.]

SEC. **5066. Notice by secretary of state.** The secretary of state, upon satisfactory evidence that any company or association of persons incorporated under the laws of this state have entered into any trust, combination or association in violation of the provisions of the six preceding sections, shall give notice to such corporation that, unless it withdraws from and severs all business connection with said trust, combination or association, its articles of incorporation will be revoked at the expiration of thirty days from date of such notice. [Same, § 7.]

SEC. **5067. Proceedings—inquiry by grand jury.** County attorneys, in their counties, and the attorney-general shall enforce the provisions of a public nature in the seven preceding sections, and any county attorney or the attorney-general securing a conviction under the provisions thereof shall be entitled, in addition to such fee or salary as by law he is allowed for such prosecution, to one-fifth of the fine recovered. When the attorney-general and county attorney act in conjunction in the prosecution of any action under such provisions, they shall be entitled to one-fourth of the fine recovered, which they shall divide equally between them, where there is no agreement to the contrary. It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust or combination within their respective counties. [Same, § 8.]

SEC. **5068. False warehouse receipts.** If any person sell, transfer or dispose of any receipt or voucher, given or purporting to have been given by any person for property in store, knowing that such person has not in his possession such property, or any part thereof, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding five years. [C.'73, § 4088.]

It is not competent for a defendant charged with crime under this section to show that the shipment or disposal of the property was with the knowledge or verbal consent of the person holding the receipt. The provision is intended for the protection of the community as well: *State v. Stevenson*, 52–701.

SEC. **5069. Swindling in sale of grain or seed.** Whoever, either for his own benefit or as the agent of any corporation, company, association or person, obtains from any other person anything of value, or procures the signature of any such person as maker, indorser, guarantor or surety thereon to any bond, bill, receipt, promissory note, draft, check, or any other evidence of indebtedness, as the whole or part consideration of any bond, contract or promise given the vendee of any grain, seed or cereal; binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed or cereal at a fictitious price, or at a price equal to or more than four times the market price thereof; and whoever sells, barters or disposes of, or offers to sell, barter or dispose of, either for his own benefit or as the agent of any corporation, company, association or person, any bond, bill, receipt, promissory note, draft, check or other evidence of indebtedness, knowing the same to have been obtained as the whole or part consideration for any bond, contract or promise given the vendee of any grain, seed or cereal, binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed or cereal at a fictitious price, or at a price equal to or more than four times the market price thereof, shall be imprisoned in the penitentiary not more than three years, or be fined not more than five hundred nor less than one hundred dollars, or both. [22 G. A., ch. 78.]

In a particular case, there being some evidence from which it was claimed that the transfer of the note in question, which was of the character referred to in this section, was not made until after the act took effect, *held*, that it was not error to instruct the jury as to the effect of the act: *Merrill v. Hole*, 85–66.

As to the validity of such notes given before the passage of this act, see notes to § 4965.

SEC. **5070. Weight of flour.** Where flour, meal or other mill products are sold by the sack or package purporting to weigh a certain number of pounds, the weight of such sack or package shall be plainly marked or stamped thereon; and if any such sack or package sold shall weigh less than the amount so marked, the person selling the same shall be fined not less than five nor more than twenty-five dollars. [22 G. A., ch. 80.]

SEC. **5071. Unlawfully wearing badge.** Any person who shall wilfully wear the badge or button of the grand army of the republic, or the insignia or rosette of the military order of the loyal legion of the United States, or use the same to obtain aid or assistance, unless entitled to wear the same under the rules and regulations or constitution of such organizations, shall be imprisoned not to exceed thirty days, or fined not to exceed twenty dollars. [22 G. A., ch. 104.]

SEC. **5072. Swindling by three-card-monte.** Whoever by means of three-card-monte, so called, or any other form or device, sleight-of-hand, or other means whatever, by use of cards or instruments of like character, obtains from another person any money or other property, shall be guilty of swindling, and be fined not less than two hundred nor more than two thousand dollars, or be imprisoned in the penitentiary not less than two nor more than five years, or both. All persons aiding, encouraging, advising or confederating with, or knowingly harboring or concealing, any such person or persons, or in any manner being accessory to the commission of the above described offense, or confederating together for the purpose of playing such games, shall be deemed principals therein, and punished accordingly. [16 G. A., ch. 102, § 1.]

This act embraces any "sleight-of-hand" performance, whether done by the use of cards or other devices: *State v. Quinn*, 47–368.

SEC. **5073. Who may make arrest for.** Any person may, and every conductor and other employe on any railroad car or train, every captain, clerk and other employe on any boat, every station agent at any railway depot, the officers of any fair or fair grounds, and the proprietor of any place of public resort and his employes, shall, with or without warrant, arrest any person found in the act of committing any of the offenses mentioned in the preceding section, or any person whom he or they may have good reason to believe to be guilty of the commission of any such offense. [Same § 3.]

SEC. **5074. Duty of conductor, captain, etc.** Any conductor, captain, hotel or saloon keeper, proprietor or manager of any public conveyance or place of public resort, and the officers of any fair or fair grounds, shall eject from his car, train, boat, hotel, saloon, public conveyance, fair grounds or place of public resort any person known to him or whom he has good reason to believe to be a three-card-monte man, or who offers to wager or bet money or other valuable thing upon what is commonly known as three-card-monte, or bet on any trick or game with cards or other gaming device, and any failure, neglect or refusal to do so, or to suppress or prevent a violation of the second preceding section, shall be a misdemeanor. [Same, §§ 4, 5.]

SEC. **5075. Posting copy of law.** Any person or company operating any public conveyance by which passengers are carried shall keep posted up in such conveyance a copy of the three preceding sections. [Same, § 4.]

SEC. **5076. Frauds upon hotel keepers.** Any person who shall obtain food, lodging or other accommodation at any hotel, inn or boarding or eating house, with intent to defraud the owner or keeper thereof, shall be fined not exceeding one hundred dollars, or imprisoned not exceeding thirty days. [18 G. A., ch. 76, § 1.]

SEC. **5077. Evidence.** Proof that lodging, food or other accommodation was obtained by false pretense, or by false or fictitious show or pretense of baggage, or that the party refused or neglected to pay for such food, lodging or other accommodation on demand, or that he absconded or left the premises without paying or offering to pay for such food, lodging or other accommodation, or that he surreptitiously removed or attempted to remove his baggage, shall be presumptive evidence of the fraudulent intent mentioned in the preceding section, but this section shall not apply to regular boarders, nor when there has been an agreement for delay in payment. [Same, § 2.]

CHAPTER 14.

OF NUISANCES, AND ABATEMENT THEREOF.

SECTION **5078. What deemed nuisances.** The erecting, continuing or using any building or other place for the exercise of any trade, employment or manufacture, which, by occasioning noxious exhalations, offensive smells or other annoyances, becomes injurious and dangerous to the health, comfort or property of individuals or the public; the causing or suffering any offal, filth or noisome substance to be collected or to remain in any place to the prejudice of others; the obstructing or impeding without legal authority the passage of any navigable river, harbor or collection of water; or the corrupting or rendering unwholesome or impure the water of any river, stream or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others; and the obstructing or incumbering by fences, buildings or otherwise the public roads, private ways, streets, alleys, commons, landing places or burying-grounds, are nuisances. [C.'73, § 4089; R., § 4409; C.'51, § 2759.]

What constitutes: While each of the acts enumerated is declared to be a nuisance, it is not declared in express terms which of them, or whether any of them, is a common nuisance under § 5081. They are public or private, as they tend to the public injury or only to the injury of private individuals: *State v. Close*, 35–570.

The close proximity of such a nuisance to a public highway, thus affecting those passing, would constitute it a public nuisance; so would causing the water of a mill-dam to become corrupt and to overflow, thus rendering the adjoining land marshy, etc., whereby the air should become corrupted and infected, etc.: *Ibid.*

Platform scales erected in a public street for private business may be ordered removed: *Emerson v. Babcock*, 66–257.

Shade trees at the side of the highway, which would not interfere with the traveled track if confined to the center of the highway, should be permitted to stand: *Quinton v. Burton*, 61–71. And see § 1556 and notes.

It is a nuisance to corrupt and render unwholesome and impure the waters of a stream, without regard to the number of persons injuriously affected thereby: *State v. Smith*, 82–423.

Where offensive matter is discharged into a stream in one county, and renders impure the waters of such stream as it flows through another county, the offense is one partly committed in each county, and indictable in either, under § 5157: *Ibid.*

A party who contributes to the contamination of water in a stream is guilty under this section: *Ibid.*

In a particular case, *held*, that the defendant was sufficiently in control of the manufactory which caused the pollution of the water in a stream to render him criminally liable under this section: *Ibid.*

Where a railroad company was indicted for obstructing a street, and the act was charged to have been done on a certain day, and an objection was made to evidence which tended to show that on different days, both before and after the finding of the indictment, the defendant obstructed the street, *held*, that the objection was properly overruled and that defendant should have moved the court to compel the prosecution to elect on which offense it would claim a verdict: *State v. Chicago, M. & St. P. R. Co.*, 77–442.

And *held*, that the court rightly directed the jury that defendant was guilty if it unreasonably obstructed the street within the time mentioned in the indictment: *Ibid.*

And *held* also, that an obstruction to a highway will not be excused on the plea of its being necessary for the carrying on of the party's business, though such obstruction is only occasional: *Ibid.*

An instruction that it was sufficient to find the defendant guilty if the street was wilfully obstructed, and that to act wilfully means to act intentionally and knowingly *held* not erroneous when taken in connection with other paragraphs where the jury were

instructed that to find the defendant guilty they must find that the obstruction complained of was unreasonable: *Ibid.*

A party obstructing a highway by a fence or otherwise may be punished under this section, although the road supervisor might, under § 1560, have a right to remove the obstruction: *State v. Berry*, 12–58.

It is sufficient to allege conjunctively that the highway was obstructed and incumbered: *State v. Finney*, 68 N. W., 568.

It is not necessary to designate the particular street or highway obstructed or incumbered: *Ibid.*

See further as to the obstruction of highways, § 4807 and cases there cited.

As to use of building for sale of intoxicating liquors, see § 2384 and notes.

Public benefit no defense: A defendant indicted for nuisance will not be permitted to show that the public benefit resulting from his act is equal to the public inconvenience arising from it: *State v. Kaster*, 35–221.

Evidence of offense not charged: Under an indictment charging the use of premises for the keeping of hogs, etc., occasioning noxious exhalations, offensive smells, etc., *held*, that evidence of noise made by the animals at night, annoying persons living in the vicinity, was receivable as part of the facts connected with the nuisance, although such disturbance could not be proved under the allegation of "other nuisances" specified in the indictment: *Ibid.*

The punishment provided in § 5081 is applicable to public as well as private nuisances embraced within the definition of this section: *Ibid.*

Abatement: A petition asking the abatement of a nuisance should be definite enough to enable the court to identify with certainty the obstruction to be removed: *Sloan v. Rebman*, 66–81.

Where it was shown that the nuisance was occasioned by the keeping of hogs within certain pens, *held*, that it was not proper in the abating of such nuisance to require the removal of lumber and materials composing the fence around such pens: *State v. Kaster*, 35–221.

The statutory provisions for the abatement of the nuisance do not take away the common-law right of the person injured by the erection of a mill-dam from abating it as a private nuisance: *State v. Moffett*, 1 G. Gr., 247.

SEC. **5079. Manufacture of gunpowder.** If any person carry on the business of manufacturing gunpowder, or of mixing or grinding the composition therefor, in any building within eighty rods of any valuable building erected at the time when such business may be commenced, the building in which such business is thus carried on is a public nuisance. [C. '73, § 4090; R., § 4410; C. '51, § 2760.]

SEC. **5080. Disorderly houses.** Houses of ill fame, kept for the purpose of prostitution and lewdness, gambling houses, or houses resorted to for the use of opium or hasheesh, or houses where drunkenness, quarreling, fighting or breaches of the peace are carried on or permitted to the disturbance of others, are nuisances, and may be abated and punished as provided in this chapter. [26 G. A., ch. 82; C. '73, § 4091; R., § 4411; C. '51, § 2761.]

Sec 4962

"To the disturbance of others" is the feature of the offense of keeping a house of ill fame as here described, which distinguishes it from that defined by § 4939: *State v. Alderman*, 40–375; *State v. Odell*, 42–75.

Failure to use the words "to the disturbance of others" in charging the keeping of a house where drunkenness, etc., are carried on, renders the indictment bad, but does not make it an indictment for an offense under § 4962: *State v. Dean*, 44–648.

Although the quarreling, fighting, etc., occur on the sidewalk *in front of*, and not *in* the house of defendant, yet if it is the character of the house which attacks the disorderly persons there, the defendant is guilty of keeping a nuisance: *State v. Webb*, 25–235.

Where defendant, at a farm house, kept and sold wine which was not drank upon the premises by those buying it, but upon the highway a half mile or more from the house, resulting in riotous conduct, etc., *held*, that he was not guilty of an offense under this section: *State v. Deffenbach*, 47–638.

A boat may be within the meaning of the term "house of ill fame" as here used: *State v. Mullen*, 35–199.

An indictment charging all these offenses as constituting a nuisance does not charge more than one offense: *State v. Spurbeck*, 44–667.

So, an indictment charging the doing of acts prohibited in this section, and also acts declared to be a nuisance in connection with the sale of intoxicating liquors, is not bad for duplicity. Such acts committed at one time constitute but one nuisance, and can not be the basis of separate indictments: *State v. Dean*, 44–648.

A defendant may be convicted of keeping a nuisance on proof that he kept a place described in the indictment as a brewery and saloon where drinking, quarreling, fighting and breaches of the peace were carried on, and by the defendant permitted to be carried on, to the disturbance of others, although there is no recurrence of such acts, and this even though the indictment charges such acts as occurring on more than one occasion: *State v. Pierce*, 65–85.

The prosecution may show that drinking, quarreling, etc., occurred at the place, but without the building, if they occurred by defendant's permission or where occasioned by the business which he carried on in the building: *Ibid.*

Evidence is admissible to show that the actions and appearance of persons immedi-

ately after going from the place indicated that they were intoxicated: *Ibid.*

A person is drunk in the legal sense within the meaning of the statute when he is so far under the influence of intoxicating liquors that his passions are visibly excited or his judgment impaired: *Ibid.*

Intoxicating liquors: A person keeping intoxicating liquors for sale for a proper purpose will not be guilty of the crime of nuisance on account of unlawful sales made by a clerk without his knowledge or authority: *State v. Hayes*, 67–27.

As the so-called prohibitory amendment submitted to the people by the nineteenth general assembly was not properly submitted, the act of selling beer which was therein prohibited did not become a nuisance within the general terms of the statute describing that offense: *State v. Johnson*, 61–504.

See further as to use of building for sale of intoxicating liquors, § 2384 and notes.

SEC. **5081. Penalty—abatement.** Whoever is convicted of erecting, causing or continuing a public or common nuisance as provided in this chapter, or at common law when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be fined not exceeding one thousand dollars, and the court, with or without such fine, may order such nuisance abated, and issue a warrant as hereinafter provided. [C.'73, § 4092; R., § 4412; C.'51, § 2762.]

The punishment here provided for the crime of nuisance is also to be applied to a person found guilty of that offense under § 2384 (keeping a building, etc., where intoxicating liquors are sold contrary to law): *State v. McGrew*, 11–112: *State v. Collins*, 11–141; *State v. Schilling*, 14–455; *State v. Little*, 42–51, 54; *State v. Dean*, 44–648.

The nuisance may be single, though all the various acts constituting it under the last section are charged: *State v. Spurbeck*, 44–667: and so an indictment charging the doing of the acts prohibited in § 2384 and § 5080 is not bad for duplicity. Such acts committed at one time constitute but one nuisance, and defendant cannot be convicted of separate nuisances for acts committed under these two sections at the same time: *State v. Dean*, 44–648.

The court may order a defendant fined under this section to be imprisoned until the fine is paid in accordance with the provisions of § 5440, or imprisoned at hard labor under § 5652: *State v. Jordan*, 39–387; *State v. Anwerda*, 40–151.

The punishment here provided is applicable to public as well as private nuisances embraced within the definition of § 5078: *State v. Kaster*, 35–221.

A judgment abating a liquor nuisance and ordering a sale of the furniture and fixtures used in the premises for carrying on the business, and ordering that the business should be closed for a year, is fully authorized by § 2408: *State v. Adams*, 81–595.

In an equitable action to correct a conveyance of a highway an injunction may be granted to restrain an obstruction of such highway, although such obstruction might be punishable as a nuisance: *Clayton County v. Herwig*, 69 N.W., 1035.

SEC. **5082. Process.** When upon indictment, complaint or civil action any person is found guilty of erecting, causing or continuing a nuisance, the court before whom such finding is had may, in addition to the fine imposed, if any, or to the judgment for damages or cost for which a separate execution may issue, order that such nuisance be abated or removed at the expense of the defendant, and, after inquiry into and estimating as nearly as may be the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor. [C.'73, § 4093; R., § 4413; C.'51, § 2763.]

Where the nuisance to be abated was a boat on the Mississippi river, anchored east of the middle of the channel, *held*, that as the Iowa court had jurisdiction to arrest an offender and punish an offense committed thereon, it also had power to order such boat seized and sold in case it was found to be a nuisance: *State v. Mullen*, 35–199.

Where it was shown that the nuisance was occasioned by the keeping of hogs within certain pens, *held*, that it was not proper in the abating of such nuisance to require the removal of lumber and materials composing the fence around such pens: *State v. Kaster*, 35–221.

A petition asking the abatement of a nuisance should be definite enough to enable the court to identify with certainty the obstruction to be removed: *Sloan v. Rebman*, 66–81.

The statutory provisions for the abatement of the nuisance do not take away the common-law right of the person injured by the erection of a mill-dam from abating it as a private nuisance: *State v. Moffett*, 1 G. Gr., 247.

SEC. **5083. Warrant.** When the conviction is had upon an action before a justice of the peace and no appeal is taken, the justice, after estimating as aforesaid the sum necessary to defray the expenses of removing or abating the nuisance, may issue a like warrant. [C.'73, § 4094; R., § 4414; C.'51, § 2764.]

SEC. **5084. Execution of, stayed.** Instead of issuing such warrant, the court or justice may order the same to be stayed upon motion of the

defendant, and upon his entering into an undertaking to the state, in such sum and with such surety as the court or justice may direct, conditioned either that the defendant will discontinue said nuisance, or that, within a time limited by the court, and not exceeding six months, he will cause the same to be abated and removed, as either is directed by the court; and, upon his failure to perform the condition of his undertaking, the same shall be forfeited, and the court in term time or vacation, or justice of the peace, as the case may be, upon being satisfied of such default, may order such warrant forthwith to issue, and action may be brought on such undertaking. [C.'73, § 4095; R., § 4415; C.'51, § 2765.]

SEC. **5085. Expenses.** The expense of abating a nuisance by virtue of a warrant can be collected by the officer in the same manner as damages and costs are collected on execution, except that the materials of any buildings, fences or other things that may be removed as a nuisance may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal, such balance must be paid by the officer to the defendant, or to the owner of the property levied upon; and if said proceeds are not sufficient to pay such expenses, the officer must collect the residue thereof. [C.'73, § 4096; R., § 4416; C.'51, § 2766.]

CHAPTER 15.

OF LIBEL.

SECTION **5086. Definition.** A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends. [C.'73, § 4097; R., § 4417; C.'51, § 2767.]

This definition of libel is applicable in a civil action for damages: *Stewart v. Pierce*, 93-136.

A petition in a civil action for damages for what would be a libel under this section is sufficient, though the alleged libel does not charge plaintiff with a public offense. The plaintiff will be entitled to recover at least nominal damages, though no special damages be alleged. The publications which the law regards are actionable *per se: Call v. Larabee*, 60-212.

In case of libel it is not necessary that the publication should charge plaintiff with the commission of a statutory crime, and it is not necessary to plead special damages: *Halley v. Gregg*, 74-563.

An indictment charging matter published to be false, and that it was written and published by defendant wilfully and maliciously and for criminal purposes, *held* sufficient without an allegation that it was not privileged, the question of privilege being one of defense: *State v. Conable*, 81-60.

Where an indictment charged libel in the publication of certain matter with reference to a person who was congressman and a candidate for re-election, *held*, that other portions of the article not set out in the indictment and other articles published about the same time were properly admitted in evidence as indicating a feeling on the part of defendant which might aid the jury in determining his real motives in pursuing the course he did: *Ibid.*

The matter set out charging a corrupt agreement with reference to the appointment of a postmaster, without naming the person who was by such agreement to be appointed, *held*, that a witness was properly allowed to testify that he was the person referred to and that no such corrupt agreement was made: *Ibid.*

Where in such case defendant sought to introduce in evidence an affidavit sent to him before such publication, stating the fact on which such publication was based, *held*, that while such affidavit was admissible, yet, under the circumstances, defendant had not taken the proper steps to have it considered in evidence: *Ibid.*

In such case, *held*, that defendant could be asked as to whether he had not previously supported the candidate referred to for congress and sought from him recommendation for an official appointment, which he had not received, as tending to show that his course was prompted by disappointment and not by proper motives: *Ibid.*

Under the circumstances of the particular

case, *held*, that while the jury might well have found that the article in question was privileged, yet there was not such lack of evidence in support of the verdict of guilty as to require reversal: *Ibid.*

SEC. **5087. Punishment.** Every person who makes, composes, dictates or procures the same to be done, or who wilfully publishes or circulates such libel, or in any way knowingly or wilfully aids or assists in making, publishing or circulating the same, shall be imprisoned in the county jail not more than one year, or be fined not exceeding one thousand dollars. [C.'73, § 4098; R., § 4418; C.'51, § 2768.]

SEC. **5088. Truth given in evidence.** In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted. [C.'73, § 4099; R., § 4419; C.'51, § 2769.]

See Const., art. I, § 7.

The fact that the matter published is privileged will not constitute a defense unless it is published with good motives and for a justifiable end: *State v. Conable*, 81–60.

SEC. **5089. Publication.** No printing, writing or other thing is a libel unless there has been a publication thereof. [C.'73, § 4100; R., § 4420; C.'51, § 2770.]

SEC. **5090. What constitutes.** The delivering, selling, reading or otherwise communicating a libel, or causing the same to be delivered, sold, read or otherwise communicated, to one or more persons or to the party libeled, is a publication thereof. [C.'73, § 4101; R., § 4421; C.'51, § 2771.]

SEC. **5091. Jury determine law and fact.** In all prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the fact. [C.'73, §§ 4402, 4138; R., §§ 4422, 4811; C.'51, §§ 2772, 3015.]

The "direction of the court" means instructions by the court. This section applies only in criminal prosecutions for libel, not in actions for damages: *Forshee v. Abrams*, 2-571.

Although the jury determine both the law and the facts, yet the court has the right to instruct the jury in this as well as other criminal cases, and the conclusive presumption is that the jury will follow the instructions of the court. Therefore an erroneous instruction of the court in such case will be regarded as prejudicial and a ground for reversal, as in other cases: *State v. Rice*, 56–431.

Section applied: *State v. Conable*, 81–60.

TITLE XXV.

OF CRIMINAL PROCEDURE.

CHAPTER 1.

OF PUBLIC OFFENSES.

SECTION **5092. Division of.** Public offenses are divided into:

1. Felonies;
2. Misdemeanors. [C.'73, § 4103; R., § 4428; C.'51, § 2816.]

Adultery is a public offense, within the provisions of this section: *State v. Corliss*, 85–18.

SEC. **5093. Felony.** A felony is a public offense which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary. [C.'73, § 4104; R., § 4429; C.'51, § 2817.]

SEC. **5094. Misdemeanor.** Every other public offense is a misdemeanor. [C.'73, § 4105; R., § 4430; C.'51, § 2818.]

SEC. **5095. How punishable.** No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof. [C.'73, § 4106; R., § 4431; C.'51, § 2819.]

SEC. **5096. All offenses bailable except.** All defendants are bailable both before and after conviction, by sufficient surety, except for offenses punishable with death under the laws of the state when the proof is evident or the presumption great. No defendant convicted of murder or charged with treason shall be admitted to bail. [17 G. A., ch. 103, § 1; C.'73, §§ 3845, 4107; R., § 4188; C.'51, § 2565.]

Where a bail bond recited that defendant was charged with "feloniously killing two persons," *held* that, as the offense was not necessarily punishable with death, the bond was not void under § 3211 of Code of '51 (since repealed): *State v. Klingman*, 14–404.

The fact that defendant is charged with an offense punishable with death will not justify a magistrate in refusing bail, if the proof is slight, or that which is offered tends to show that it was an offense committed under mitigating circumstances, and would not be punishable with death: *Ibid.*

A defendant examined by a magistrate upon charge of murder in the second degree committed in another state is entitled to bail, notwithstanding the language of § 5096: *State v. Hufford*, 23–579.

A person convicted of murder in the second degree cannot be admitted to bail pending an appeal from the judgment of conviction: *Baldwin v. Westenhaver*, 75–547.

The crime of murder in the second degree being bailable, if defendant under indictment for murder in the first degree is convicted of the second degree of the offense, and on appeal such conviction is reversed, he is entitled to bail, as he cannot again be put on trial for the first degree, and as to the second degree he stands in the position of one not convicted: *State v. Helm*, 92–540.

See Const., art. I, § 12.

And in general as to bail, see § 5500 *et seq.*

Knowledge of falsity: An indictment which charged that defendant at a certain time testified to certain matters, whereas he "did know" they were false, *held* to sufficiently charge knowledge of the defendant at the time defendant testified: *State v. Wood*, 17–18.

An indictment for perjury need not charge that the defendant knew the falsity of the matter sworn to, unless the assignment of perjury is upon a statement of the accused as to his belief: *State v. Raymond*, 20–582.

It should be clearly and distinctly averred that defendant swore "falsely," that word being used in § 4872, defining the offense: *State v. Nickerson*, 46–447.

Under a former statute it was held that an indictment was not sufficient which failed to charge knowledge of the falsity of the matter deposed to be true, or of the truth of the matter denied to be true: *State v. Morse*, 1 G. Gr., 503.

In general, see § 4872 and notes.

CHAPTER 2.

OF MAGISTRATES AND PEACE OFFICERS AND THEIR POWERS.

SECTION **5097. Magistrates—duties.** The term magistrate includes any judge of the supreme, district or superior court, throughout the

state, and justices of the peace, mayors of cities and towns, judges of police or other city courts, and police and other special justices in cities and towns, within their respective counties. [C.'73, § 4108; R., §§ 4439, 4447; C.'51, §§ 2778, 2823.]

SEC. **5098. Powers.** Magistrates have power to hear complaints or preliminary informations, issue warrants, order arrests, require security to keep the peace, make commitments and take bail as provided by law. [Same.]

SEC. **5099. Peace officers.** The following persons, respectively, are designated in this code under the general term "peace officer":

1. Sheriffs and their deputies;
2. Constables;
3. Marshals and policemen of cities and towns. [C.'73, § 4109; R., § 4440; C.'51, § 2830.]

A special constable appointed by a justice of the peace under the provisions of § 4589 is not a peace officer: *Foster v. Clinton County*, 51–541.

The marshal is a peace officer and may therefore arrest a person guilty of vagrancy and serve the order of a justice of the peace committing such person to imprisonment, and hold the prisoner under such order: *State v. Watson*, 66–670.

SEC. **5100. Officers of justice.** Magistrates and peace officers are sometimes designated by the term "officers of justice." [C.'73, § 4110; R., § 4441.]

SEC. **5101. Information defined.** A complaint or preliminary information is a statement in writing, under oath or affirmation, made before a magistrate, of the commission or threatened commission of a public offense, and accusing some one thereof. [C.'73, § 4111; R., § 4530; C.'51, § 2822.]

CHAPTER 3.

OF THE PREVENTION OF OFFENSES BY RESISTANCE.

SECTION **5102. Who may resist.** Lawful resistance to the commission of a public offense may be made by the party about to be injured, or by others. [C.'73, § 4112; R., § 4442.]

SEC. **5103. In what cases.** Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession. [C.'73, § 4113; R., § 4443.]

The nature of the resistance must, however, have regard to the nature of the offense to be committed. The common-law rule that the party is only justified in using a deadly weapon in a deadly manner, in self-defense, when it appears that he is in imminent peril of death or great bodily harm (see *State v. Thompson*, 9–188), is not changed by this section: *State v. Kennedy*, 20–569.

SEC. **5104. Any person may aid another.** Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the same. [C.'73, § 4114; R., § 4444.]

CHAPTER 4.

OF SECURITY TO KEEP THE PEACE.

SECTION **5105. Public offense threatened.** When complaint is made before a magistrate that any person has threatened to commit any public offense punishable by law, and such magistrate is satisfied that there is

reason to fear the commission thereof, he may issue a warrant for the arrest of the person complained of; and the officer to whom the same shall be delivered for service shall forthwith arrest and bring the accused before such magistrate, or, in case of his absence or inability to act, before the nearest and most accessible magistrate of the same county. When the name of the person complained of is unknown, he may be designated in the warrant by any name, and the warrant issued in pursuance hereof may be executed by any peace officer in any county of the state. [C.'73, § 4115; R., §§ 4447–54.]

SEC. **5106. Proceedings before magistrate.** When the person arrested is taken before a magistrate other than the one who issued the warrant, the peace officer who executed the same and who has charge of the person arrested must, at the same time, deliver to the magistrate before whom the person arrested is taken the warrant, with his return indorsed and subscribed by him. The complaint and other affidavits, if any, on which the warrant was issued must be sent to the magistrate before whom the person arrested is taken, and, if they cannot be procured, the complainant and his witnesses, if any, must be subpœnaed, if necessary, by the magistrate before whom the person arrested is taken, to appear before him and make a new complaint and affidavits. [C.'73, § 4116; R., § 4455.]

SEC. **5107. Examination.** When the person complained of is brought before the magistrate, if the charge be controverted, a change of venue may be had as in preliminary examinations, and at the hearing the magistrate must take the testimony in relation thereto, which must be reduced to writing and subscribed by the witnesses. [17 G. A., ch. 35; C.'73, § 4117; R., § 4456.]

A failure of the justice to reduce the examination to writing is no ground for dismissing the proceeding when brought into the district court: *Gribble v. State*, 3–217.

SEC. **5108. Discharge ordered—costs.** If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged, and the complainant may be ordered to pay the costs of the proceeding if the magistrate regards the complaint as unfounded and frivolous, and, unless when the proceeding is before a judge of the supreme, district or superior court, may issue execution therefor; and when the proceeding is before a judge of the supreme, district or superior court, he shall transmit the complaint, affidavits, warrant and order to the clerk of the district court of the county, who shall file the same, make a memorandum thereof in the judgment docket, and issue execution therefor immediately. [C.'73, § 4118; R., § 4457.]

Whether or not there is any right of appeal from an order taxing the costs to complainant, *quære;* but a motion to retax the costs made before a justice of the peace, the successor of the one by whom such taxation was made, not filed until three years after the order taxing the costs, *held* properly overruled: *State v. Rogers*, 58–644.

SEC. **5109. Defendants bound over.** If there be just reason to fear the commission of the offense, the person complained of shall be required to enter into an undertaking, in such sum as the magistrate may direct, with one or more sufficient sureties, to abide the order of the district court of the county at the next term thereof, and in the meantime to keep the peace towards the people of the state, and particularly towards the person against whom or whose property there is reason to fear the offense may be committed. [C.'73, § 4119; R., § 4458.]

Threats of violence to another may be ground to bind over to keep the peace, although coupled with a condition which includes the performance of a professional duty: *Ritchey v. Davis*, 11–124.

SEC. **5110. Committed to jail.** If the undertaking required by the last section be given, the party complained of must be discharged; if not, the magistrate must commit him to prison, specifying in the warrant the

requirements to give security, the amount thereof, and the omission to give the same; if committed for not giving such undertaking, he may be discharged by a magistrate upon giving the required bonds. [C.'73, § 4120; R., §§ 4459–60, 4464.]

SEC. **5111. Disposition of papers.** The undertaking, together with the complaints, affidavits, if any, and other papers in the proceeding, must be returned by the magistrate to the district court of the county by the first day of the next term thereof. [C.'73, § 4122; R., § 4461.]

SEC. **5112. Assault in presence of court or magistrate.** Any person who, in the presence of a court or magistrate, shall assault or threaten to assault another, or to commit an offense against the person or property of another, or contends with another with angry words, may be ordered, without process, to enter into an undertaking to keep the peace for a period of time not extending beyond the next term of the district court of the county, as hereinbefore provided, and in case of his omission to comply with said order, he may be committed accordingly. [C.'73, § 4123; R., § 4462.]

SEC. **5113. Bond required on conviction.** The district court, upon the conviction of any person for an offense against the person or property of another, when necessary for the public good, may require the defendant to enter into an undertaking to keep the peace, as hereinbefore provided, and, on his omission to do so, may commit him accordingly. [C.'73, § 4124; R., § 4463.]

SEC. **5114. Appearance.** A person who has entered into an undertaking to keep the peace, when required by a magistrate as hereinbefore provided, must appear on the first day of the next term of the district court of the county, and if the complainant appear and the person bound by the undertaking does not appear, the court may forfeit his undertaking and order the same to be prosecuted, unless his default be excused. [C.'73, § 4125; R., § 4465.]

SEC. **5115. Judgment.** If the principal in the undertaking appear, and the complainant does not appear, or if neither of the parties appear, the court shall enter an order discharging the undertaking; but if both parties appear, the court shall hear their proofs, and may require a new undertaking in such sum as it shall prescribe, for a period not exceeding one year, and may commit the defendant until the same be given. Judgment shall be entered against the party held to keep the peace for all the costs of the proceeding, but if it is made to appear to the court that the proceeding was instituted without probable cause, the court may render judgment against the complainant for such costs. [C.'73, § 4126; R., § 4466.]

The plaintiff is not bound to appear, and a failure to appear and prosecute does not subject him to judgment for costs, under § 5275: *State v. Holliday*, 22–397.

But he may become liable if he does further prosecute and his complaint is found groundless: *State v. Leathers*, 16–406.

If complainant appears and introduces evidence in support of the charge, defendant has undoubtedly the right to introduce evidence showing a want of probable cause, and if successful in that respect may reasonably ask the court to tax the costs of the proceedings to complainant. If complainant does not appear, defendant is equally entitled to introduce evidence showing want of probable cause for that purpose: *State v. Steinkopf*, 62 N. W., 787.

If plaintiff does not appear, defendant is not entitled to a trial, but should be discharged. The decision of the justice is not to be called in question: *State v. White*, 47–555.

Before defendant in a criminal prosecution was permitted to be a witness in his own behalf he was *held* not a competent witness in this proceeding: *State v. Darrington*, 47–518.

That the evidence before the justice was not taken down in writing, as provided by § 5107, is not ground for dismissing the porceeding against defendant. On the hearing, other evidence may be received than that produced before the justice, and if defendant is discharged, the costs in the district court should not be taxed against him: *Gribble v. State*, 3–217.

A person bound over to appear in the district court under security to keep the peace may be held liable for the costs, although the prosecutor does not appear in that court: *Houston v. United States*, Mor., 174.

Insanity is a defense to an action for breach of a bond to keep the peace: *State v. Geddis*, 42–264.

SEC. **5116. When undertaking broken.** An undertaking to keep the peace is broken by the forfeiture of the same by order of the court, as hereinbe-

fore provided, or upon the conviction of the party bound for a breach of the peace. [C.'73, § 4127; R., § 4467.]

SEC. **5117. Suit brought.** Upon the county attorney's producing evidence of such conviction to the district court to which the undertaking is returned, the court must order the enforcement of the undertaking, and the county attorney must thereupon commence an action upon it. [C.'73, § 4128; R., § 4468.]

SEC. **5118. Record of conviction.** In such action, the record of forfeiture or conviction must be alleged as the breach of the undertaking, and is conclusive evidence thereof. [C.'73, § 4129; R., § 4469.]

CHAPTER 5.

OF VAGRANTS.

SECTION **5119. Who deemed.** The following persons are vagrants: All common prostitutes and keepers of bawdy houses or houses for the resort of prostitutes; all habitual drunkards, gamesters or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons begging in public places, or from house to house, or procuring children or others so to do; all persons going about as collectors of alms for charitable institutions under any false or fraudulent pretenses; all persons playing or betting in any street or public or open place at any game or pretended game of chance, or at or with any table or instrument of gaming. [C.'73, § 4130; R., § 4470; C.'51, § 3310.]

SEC. **5120. Complaint—warrant.** Upon complaint made on oath to any magistrate against any person as being such vagrant within his jurisdiction, he may issue a warrant for the arrest of such person, and his examination, and the complaint, warrant and arrest, shall be governed by the provisions of the last chapter, as nearly as practicable, except as herein provided. [C.'73, § 4131; R., § 4471; C.'51, § 3311.]

SEC. **5121. Arrest.** Peace officers shall arrest any vagrant whom they may find at large, and not in the care of some discreet person, and take him before some magistrate of the county, city or town in which the arrest is made. [C.'73, § 4132; R., § 4472.]

SEC. **5122. Taking before magistrate.** If such arrest is made during the night, the officer may keep the person arrested in confinement until the next morning, unless bail be given, and if made within the jurisdiction of a police court, he must be taken before such court, unless the judge is absent. [C.'73, § 4133; R., § 4473.]

SEC. **5123. Security for good behavior.** If it appear by the confession of such person, or by competent testimony, that the person arrested is a vagrant, the magistrate may require an undertaking, with sufficient surety, for good behavior for the term of one year thereafter. [C.'73, § 4134; R., § 4474.]

SEC. **5124. Commitment.** The magistrate shall make up, sign, and file with the clerk of the district court of the county, a record of conviction of such person as a vagrant, specifying generally the nature and circumstances of the charge, and shall, in default of such security being given, commit such vagrant to the jail of the county, city or town, as the case may be, until such security is given or such vagrant discharged according to law. [C.'73, § 4135; R., § 4475; C.'51, § 3312.]

SEC. **5125. Breach of undertaking.** The committing of any of the acts which constitute such person so bound a vagrant shall be a breach of the condition of the undertaking. [C.'73, § 4136; R., § 4476; C.'51, § 3313.]

SEC. **5126. New security.** On a recovery upon the undertaking, the court before which such recovery is had may, in its discretion, require new

sureties for good behavior, or commit such vagrant to the county jail for any time not exceeding six months. [C.'73, § 4137; R., § 4477; C.'51, § 3314.]

SEC. **5127. Discharge of bail.** Any person committed to jail on account of failing to furnish undertaking for good behavior may be discharged by any magistrate upon giving the same as was originally required. [C.'73, § 4138; R., § 4478; C.'51, § 3315.]

SEC. **5128. Hearing.** The district court to which the papers are returned shall, on demand of the defendant, impanel a jury to inquire into and determine the truth of the charge made against him, and the rules of practice applicable to trials of misdemeanors shall govern such trial. [C.'73, § 4139; R., § 4479; C.'51, § 3316.]

SEC. **5129. Judgment.** If no jury is demanded, the district court may revise such conviction and discharge such vagrant from the undertaking or confinement absolutely, or upon sureties for good behavior, in its discretion. [C.'73, § 4140; R., § 4480; C.'51, § 3317.]

SEC. **5130. Imprisonment.** Such district court may, in its discretion, order any such vagrant to be kept in the common jail for any time, not exceeding six months, at hard labor. [C.'73, § 4141; R., § 4481; C.'51, § 3318.]

SEC. **5131. Labor.** Such vagrants may be employed at hard labor as provided in the chapter upon jails, or the court may direct the keeper thereof to furnish them such employment as it shall specify, and for that purpose he may purchase any necessary raw materials and implements, not exceeding such amount as the court shall prescribe, and compel such persons to perform such work as shall be allotted to them. [C.'73, § 4142; R., § 4482; C.'51, § 3319.]

SEC. **5132. Expenses.** The expenses incurred in pursuance of such order shall be audited by the board of supervisors of the county and paid out of the county treasury. [C.'73, § 4143; R., § 4483; C.'51, § 3320.]

SEC. **5133. Proceeds of labor.** One-half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury for the use of the county. [C.'73, § 4144; R., § 4484; C.'51, § 3321.]

SEC. **5134. Who deemed tramp.** Any male person sixteen years of age or over, physically able to perform manual labor, who is wandering about, practicing common begging, or having no visible calling or business to maintain himself, and is unable to show reasonable efforts in good faith to secure employment, is a tramp, and any person convicted of being a tramp shall be punished by imprisonment at hard labor in the county jail not exceeding ten days, or by imprisonment in such jail in solitary confinement not exceeding five days. [23 G. A., ch. 43, §§ 2, 3.]

SEC. **5135. Intimidation or other misconduct by.** Any tramp who shall wantonly or maliciously, by means of violence, threats or otherwise, put in fear any inhabitant of this state, or shall enter any public building, or any house, barn or outbuilding belonging to another, with intent to commit an unlawful act, or shall carry any firearm or other dangerous weapon, or indecently expose his person, or be found drunk and disorderly, or shall commit any offense against the laws of the state for which no greater punishment is provided, shall be guilty of a misdemeanor. [Same, § 4.]

SEC. **5136. Tried jointly.** If two or more tramps assemble or congregate together, they shall be tried jointly by the court before whom they are brought, and such court shall be entitled only to fees as for the arrest and trial of one person. [Same, § 5.]

SEC. **5137. Fees of officers.** The board of supervisors shall, at any regular or special session, fix the compensation to be allowed the officers in each case under this chapter; to the trial magistrate, not exceeding one dollar; to the peace officer, for all services, not more than one dollar, and mileage as now allowed by law. [26 G. A., ch. 99, § 6; 23 G. A., ch. 43.]

SEC. **5138. Method of imprisonment.** No sheriff or keeper of any jail shall permit any person convicted of being a tramp to have any tobacco,

intoxicating liquors, sporting or illustrated newspaper, cards, or other article of amusement or pastime, or permit such person to be kept or fed otherwise than stated in the commitment, and any person who knowingly violates this section shall be fined not exceeding one hundred nor less than twenty-five dollars. [23 G. A., ch. 43, § 7.]

SEC. **5139. Unlawful fees.** Any officer or magistrate who shall conspire with any person for the purpose of increasing the emoluments of his office, or to evade the provisions of this chapter, or who shall, with such intent, in any manner or by any means, encourage a tramp to remain within his jurisdiction or come within the same, shall be fined not exceeding one hundred dollars, and stand committed until the fine and costs are paid, not to exceed thirty days. [Same, § 8.]

SEC. **5140. Hard labor.** The sheriff or keeper of any jail, under the direction of the board of supervisors shall keep all persons sentenced to imprisonment at hard labor in such jail, under the provisions of this chapter, at such work as the board of supervisors may provide, and shall appoint or detail any deputy or other police officer to guard them while at work, or he may turn them over to the municipal authorities of any city or town, to be worked on the streets, or at such labor as may be provided. [Same, § 9.]

SEC. **5141. Solitary confinement.** Any tramp sentenced to hard labor, who wantonly or wilfully refuses to work, shall be punished by such jailer while so refusing by imprisonment in solitary confinement in the county jail not exceeding ten days, during which time he shall be fed on bread and water; but such punishment shall not exceed the time for which he is sentenced. [Same, § 10.]

SEC. **5142. Compensation for keeping.** No sheriff or jailer shall receive, and no board of supervisors allow, any compensation for keeping or boarding any tramp in the jail or other place in the county, unless such tramp has been duly arrested or committed under the provisions of this chapter, except the board of supervisors of each county may furnish one night's lodging for apparently deserving persons, and those who are sick or disabled may be cared for as the necessities of the case demand. [Same, § 11.]

CHAPTER 6.

OF RESISTANCE TO PROCESS AND SUPPRESSION OF RIOTS.

SECTION **5143. Calling out power of county.** When the sheriff or other officer authorized to execute process has reason to apprehend that resistance will be made, or finds that resistance is made, to the execution thereof, he may command as many male inhabitants of his county as he may think proper, and any military companies in the county, armed and equipped, to assist him in overcoming the resistance, and, if necessary, in seizing, arresting and confining the resisters, their aiders and abettors, to be held for punishment by law. [C.'73, § 4145; R., § 4489; C.'51, § 2793.]

See, also, § 502.

SEC. **5144. Certifying to court names of resisters.** The officers shall certify to the court from which the process issued the names of the resisters, their aiders and abettors, to the end that they may be punished as for a contempt. [C.'73, § 4146; R., § 4490; C.'51, § 2794.]

SEC. **5145. Refusing to assist.** Every person commanded by a public officer to assist him in the execution of process, as provided in this chapter, who, without lawful cause, refuses or neglects to obey such command, is guilty of a misdemeanor. [C.'73, § 4147; R., § 4491; C.'51, § 2795.]

SEC. **5146. Military force.** If it appears to the governor that the power of any county is not sufficient to enable the sheriff to execute process

delivered to him, he may, on the application of the sheriff, order such posse or military force from any other county or counties as is necessary. [C. '73, § 4148; R., § 4492; C.'51, § 2796.]

SEC. **5147. Unlawful assemblages.** When persons to the number of twelve or more, armed with dangerous weapons, or persons to the number of thirty or more, whether armed or not, are unlawfully or riotously assembled in any city or town, any judge, sheriff, and his deputies if they be present, the mayor, aldermen, marshal, constables and justices of the peace of such city or town must go among the persons assembled, or as near them as may be safe, and command them, in the name of the state, immediately to disperse. [C. '73, § 4149; R., § 4493; C. '51, § 2797.]

SEC. **5148. Arrest.** If the persons assembled do not immediately disperse, the magistrate and officers must arrest them, and for that purpose may command the aid of all persons present or within the county. [C. '73, § 4150; R., § 4494; C. '51, § 2798.]

SEC. **5149. Refusing to aid.** If any person commanded to aid the magistrate or officer neglect to do so without good cause, he is guilty of a misdemeanor. [C. '73, § 4151; R., § 4495; C. '51, § 2799.]

SEC. **5150. Failure of duty.** If a magistrate or officer, having notice of an unlawful or riotous assembly as defined in this chapter, neglect to proceed to the place of assembly, or as near thereto as may be with safety, and exercise the authority with which he is invested for suppressing the same and arresting the persons, he is guilty of a misdemeanor. [C. '73, § 4152; R., § 4496; C. '51, § 2800.]

SEC. **5151. Calling aid.** If the persons so assembled and commanded to disperse do not immediately obey, any two of the magistrates or officers before mentioned may command the aid of a sufficient number of persons, and proceed in such manner as in their judgment is necessary to disperse the assembly and arrest the offenders. [C. '73, § 4153; R., § 4497; C. '51, § 2801.]

SEC. **5152. Armed force.** When such armed force is called out, it shall obey the commands of the sheriff or other person appointed by the governor for that purpose, or by a judge of the supreme, district or superior court, or other magistrate in the order named, but such officer or person shall at all times be subject to the direction of the governor. [C. '73, § 4154; R., § 4498; C. '51, § 2802.]

CHAPTER 7.

OF LOCAL JURISDICTION OF PUBLIC OFFENSES.

SECTION **5153. Who subject to laws of state.** Every person, whether an inhabitant of this state or any other state or country or of a territory or district of the United States, is liable to punishment by the laws of this state for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States. [C. '73, § 4155; R., § 4500; C. '51, § 2803.]

SEC. **5154. District court.** The local jurisdiction of the district court is of offenses committed within the county in which it is held, and of such other cases as are or may be provided by law. [C. '73, § 4156; R., § 4502.]

Evidence as to venue: In a prosecution for assault it is sufficient for the state to prove the county in which the offense was committed. It is not requisite to prove either the village, city or township: *State v. Gibson*, 29-295.

The court will take judicial notice of the county in which an incorporated town is situated. Proof of the commission of the act in a certain town is sufficient proof of the commission within the county in which the town is located: *State v. Reader*, 60-527.

Where the evidence indicates that the crime was committed in a town of a certain name, the jury are to take judicial notice that the town is located in the county in which the crime is charged to have been committed: *State v. Farley*, 87-22.

The venue of a crime must be proven to warrant a conviction. Therefore where the

prosecuting witness testified that the offense was committed at her father's house, and her father testified that he lived in the county where the case was tried, but there was no proof to show where he lived when the offense was committed, *held*, that the venue was not sufficiently proven: *State v. Carr*, 60–453.

Although the witnesses may not testify explicitly as to the acts being in the county of the prosecution, yet the jury may be justified in finding, in view of the facts and circumstances which are testified to, that the crime was committed in that county: *State v. Hopkins*, 62 N.W., 656.

Testimony in a particular case considered, and *held* to show that the crime charged in the indictment was committed in another county than that in which the indictment was found, and that the conviction was erroneous: *State v. Byam*, 54-409.

Offense on Mississippi river: Jurisdiction being given to the state to punish offenses committed on the Mississippi river between the north and south boundaries of the state, the jurisdiction of the district court of each county bounded upon the river extends over the crimes committed upon such river between the north and south boundaries of such county: *State v. Mullen*, 35–199.

The jurisdiction of such court may extend to the punishment of the act of keeping a nuisance upon a boat moored to the east shore of an island situated on the east side of the center of the channel, and floating or resting upon the ground according to the stage of the water: *Ibid.* See notes to § 3.

SEC. **5155. Offenses consummated within the state.** When the commission of a public offense, commenced without the state, is consummated within its boundaries, the defendant is liable to punishment therefor, though he was without the state at the time of its consummation, if he committed the offense through the intervention of an agent within the state, or by any other means proceeding directly from himself. Jurisdiction thereof is in the county in which the offense is completed. [C.'73, § 4157; R., § 4505; C.'51, § 2804.]

Stealing property in another state and bringing it within this state is not an act contemplated by this section, but the thief is punishable in this state in the county into which the property is taken under the provisions as to larceny: *State v. Bennett*, 14–479.

SEC. **5156. Fighting duel without the state.** When an inhabitant or resident of the state, by previous appointment or engagement, fights a duel, or is concerned as second therein, without the jurisdiction of the state, and in such duel a wound is inflicted upon any person whereof he dies within the state, the jurisdiction of the offense is in the county where the death occurs. [C.'73, § 4158; R., § 4506; C.'51, § 2805.]

SEC. **5157. Offense partly in county.** When a public offense is committed partly in one county and partly in another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county, except as otherwise provided by law. [C.'73, § 4159; R., § 4507; C.'51, § 2806.]

This section does not apply to the crime of attempting to procure an abortion. Where the drug, etc., is administered in one county and the miscarriage occurs in another, the crime is completed where the drug is administered: *State v. Hollenbeck*, 36–12.

The provisions of this section are applicable to a case where offensive matter is discharged into a stream in one county, and renders impure the waters of such stream as they flow through another county: *State v. Smith*, 82–423.

The provisions of this section are applicable to a prosecution for keeping a liquor nuisance: *State v. Rockwell*, 82–429.

Where orders for intoxicating liquors are taken by an agent in one county, subject to approval by the principal in another county, the sale in either county being illegal, the offense is partly committed in each county and the courts of either have jurisdiction of the offense: *State v. Kriechbaum*, 81–633.

SEC. **5158. Near boundary of two counties.** When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county, except as otherwise provided by law. [C.'73, § 4160; R., § 4508; C.'51, § 2807.]

Where one county takes jurisdiction of a crime committed in an adjoining county, but within five hundred yards of the boundary, the former cannot recover the costs of prosecution from the latter: *Floyd County v. Cerro Gordo County*, 47–186.

Where the indictment is for an offense committed in an adjoining county within five hundred yards of the border line, it is not necessary to aver in the indictment that the defendant has not already been prosecuted for such offense in the adjoining county: *State v. Niers*, 87–723.

The officer who is authorized to make arrest in one county has the same authority to make arrest in an adjoining county, and within five hundred yards of the boundary line, for an offense there committed, as he has for making arrest in his own county: *State v. Seery*, 64 N.W., 631.

The substantial rights of defendant are not prejudiced where the crime is alleged to have been committed in one county and the evidence shows that it was committed in an adjoining county within five hundred yards of the boundary line: *State v. Pugsley*, 75–742.

This provision is not unconstitutional: *Ibid.*

SEC. **5159. On trains, boats, etc.** When an offense is committed within the jurisdiction of the state on any railroad car while passing over any railroad, or any boat, raft or vessel navigating a river, lake or canal, or lying therein in the prosecution of her voyage, the jurisdiction is in any county through which it passes in the course of its trip or voyage, or in the county where the trip or voyage shall begin or terminate. [16 G. A., ch. 102, § 2; C.'73, § 4161; R., § 4509; C.'51, § 2808.]

A former statutory provision that an offense committed on any vessel might be prosecuted in any county through which the vessel "may have passed on that trip," *held* not to be confined to that part of the voyage performed before the commission of the offense, but to extend to the entire trip: *Nash v. State*, 2 G. Gr., 286.

SEC. **5160. Jurisdiction in any county in certain cases.** The jurisdiction of an indictment for the crime of forcibly and without lawful authority seizing and confining another, or kidnaping him with intent, against his will, to cause him to be confined or imprisoned within the state, or to be sent out of the state, or of taking or enticing a child under the age of fifteen years away from the parents, guardian or other person having the legal charge of the person, with intent to detain or conceal such child, or of taking or enticing away an unmarried female of previously chaste character under the age of consent, for the purpose of prostitution, or of taking any woman unlawfully and against her will or by force, menace or duress, and compelling her to marry against her will, or of seducing and debauching any unmarried woman of previously chaste character, is in any county in which the offense is committed, or into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the offender in instigating, procuring, promoting, aiding in or being an accessory to the commission thereof, or in abetting the parties concerned therein. [C.'73, § 4162; R., § 4510; C.'51, § 2809.]

SEC. **5161. Bigamy.** When the offense of bigamy is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county. [C.'73, § 4163; R., § 4511; C.'51, § 2810.]

A prosecution for bigamy under § 4933 may be had in any county where the defendant unlawfully cohabits with a second wife, although the marriage was consummated in another county: *State v. Hughes*, 58–165.

SEC. **5162. When conviction a bar.** When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment therefor in another. [C.'73. § 4164; R., § 4512.]

The fact that defendant has been prosecuted for the same offense in an adjoining county, the offense having been committed within five hundred yards of the boundary line, is matter of defense, and need not be negatived in the indictment: *State v. Niers*, 87–723.

CHAPTER 8.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

SECTION **5163. For murder.** A prosecution for murder may be commenced at any time after the death of the person killed. [C.'73, § 4165; R., § 4513; C.'51, § 2811.]

SEC. **5164. What within eighteen months.** An indictment for a public offense must be found within eighteen months after its commission, in the following cases, and not after:

1. Taking or enticing away an unmarried female under the age of consent, for the purpose of marriage or prostitution;
2. Seducing or debauching an unmarried female of previously chaste character;
3. For rape or adultery;
4. For an assault with intent to commit a rape. [C.'73, § 4166; R., § 4514; C.'51, § 2812.]

The limitation in a criminal action cannot be raised by demurrer to the indictment: *State v. Hussey*, 7–409; *State v. Groome*, 10–308.

Nor can such limitation be raised by motion in arrest of judgment: *State v. Deitrick*, 51–467.

The limitation of the statute is not to be raised by special plea, no such plea being provided for, but by instructions of the court to the jury that to authorize a conviction it must appear that the offense was committed within the statutory period prior to the finding of the indictment: *State v. Whalen*, 68 N.W., 554.

Where the crime of adultery is charged as committed on a particular day, defendant may be convicted by proof of the commission of the offense on any day within the statutory period of limitations: *State v. Briggs*, 68–416.

So with the crime of seduction: *State v. Bell*, 49–440.

It is not material that the time of the commission of the offense, as stated in the indictment, should be such as to bring it within the period of limitations: See notes to § 5285.

SEC. **5165. Three years.** In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards. [C.'73, § 4167; R., § 4515; C.'51, § 2813.]

A defendant in a prosecution for embezzlement is not estopped by subsequent fraudulent statements from showing that the defalcation actually took place at such time that the prosecution therefor is barred: *State v. Hutchinson*, 60–478.

It is not error to instruct the jury that they must find that the crime of assault with intent to maim was committed on or about the time charged or at any date within the statutory period of limitations prior to the finding of the indictment: *State v. Fry*, 67–475.

SEC. **5166. Misdemeanor triable before a justice.** A prosecution for a misdemeanor triable before a justice of the peace, or violation of an ordinance of a city or town, must be commenced within one year after the commission thereof, and not after. [C.'73, § 4168.]

SEC. **5167. Defendant out of state.** If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state, and no period during which the party charged was not publicly resident within the state is a part of the limitation. [C.'73, § 4169; R., § 4516; C.'51, § 2814.]

The period of the defendant's nonresidence need not, however, be stated in the indictment. If he relies upon the bar of the statute of limitations he should raise the objection and the state may then show the non residence: *State v. Hussey*, 7–409.

The latter clause of this section is not to be restricted to offenses committed when the defendant is out of the state, but applies equally to all cases: *State v. McIntire*, 58–572.

Section applied: *State v. Moore*, 78–494.

SEC. **5168. Indictment deemed found.** An indictment is found, within the meaning of this chapter, when it is duly presented by the grand jury in open court and there filed. [C.'73, § 4170; R., § 4517; C.'51, § 2815.]

CHAPTER 9.

OF FUGITIVES FROM JUSTICE.

SECTION **5169. Agents appointed to apprehend—expenses.** The governor, in any case authorized by the constitution and laws of the United States, may appoint agents to demand of the executive authority of another

state or territory, or from the executive authority of a foreign government, any fugitive from justice charged with treason or felony, and the accounts of the agent appointed for that purpose must be audited by the auditor of state and paid out of the state treasury. The expenses to be allowed such agent shall be: fees paid the officers of the state upon whose governor the requisition is made; not exceeding ten cents per mile, each way, for all necessary travel of himself, and, for each fugitive, five cents per mile additional for the number of miles which he shall have been conveyed. Bills for such expenses shall be made out so as to show the actual route traveled, the number of miles, be verified and accompanied by proof that the fugitive for whom requisition was made has been returned and delivered into the custody of the proper authority; but the state shall in no case pay the cost of returning the fugitive if he has not been tried, unless it is shown to the satisfaction of the governor that a failure of trial has not occurred by any fault or neglect on the part of those interested in the prosecution. [17 G. A., ch. 65; C.'73, § 4171; R., § 4518; C.'51, § 3282.]

To constitute a person a fugitive from justice he must have been in the state where the crime is alleged to have been committed, must have there committed the crime, and must have fled therefrom to escape punishment. The state is not bound to surrender one of its citizens who has constructively committed a crime in another state, without having been there in person: *Jones v. Leonard*, 50–106.

A defendant brought into the state by virtue of extradition proceedings will not be exempt from prosecution for a different offense: *State v. Kealey*, 89–94.

SEC. **5170. No other compensation.** No compensation, fee or reward of any kind can be paid to or received by a public officer of the state for a service rendered or expense incurred in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him into the state, or detaining him therein, except as provided by law; a violation of this section is a misdemeanor. [C.'73, §§ 4172–3; R., §§ 4519–20.]

A deputy sheriff who has, under a contract with the surety on the bail bond of an escaped criminal, ascertained the whereabouts of such criminal and brought him back under requisition, cannot recover from such surety the sum stipulated in the contract, such contract being in violation of this section: *Day v. Townsend*, 70–538.

SEC. **5171. Sworn evidence—copy of indictment.** No executive warrant for the arrest and surrender of a person demanded by the executive authority of another state or territory, as a fugitive from the justice of such state or territory, and no requisition upon the executive authority of another state or territory for the surrender of any person as a fugitive from the justice of this state, shall be issued, unless the requisition from the executive authority of such other state or territory, or the application for such requisition upon the executive authority of such other state or territory, is accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, preliminary information or complaint, made before the court or magistrate authorized to receive the same. [C.'73, § 4174; R., § 4521.]

The fact that the governor considers the evidence submitted to him sufficient, and issues his warrant accordingly, does not preclude inquiry by the courts as to the sufficiency of such evidence, and his decision may be questioned in a *habeas corpus* proceeding: *Jones v. Leonard*, 50–106.

SEC. **5172. Requisition from another state.** Whenever a demand is made upon the governor by the executive of another state or territory, in any case authorized by the constitution and laws of the United States, for the delivery of a person charged in such state or territory with a crime, if such person is not held in custody or under bail to answer for an offense against the laws of the United States or of this state, he shall issue his warrant, under the seal of the state, authorizing the agent who makes such demand, forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this state at the expense of such agent, and may also, by such warrant, require all peace officers to

afford all needful assistance in the execution thereof. [C.'73, § 4175; R., § 4522; C.'51, § 3283.]

SEC. **5173. Complaint and warrant.** If any person is found in the state charged with a crime committed in another state or territory, and liable by the constitution and laws of the United States to be delivered over upon the demand of the governor thereof, any magistrate may, upon complaint on oath setting forth the offense, and such other matters as are necessary to bring the case within the provisions of law, issue a warrant for the arrest of such person. [C.'73, § 4176; R., § 4523; C.'51, § 3284.]

This and the following sections are only applicable where the party against whom the proceeding is brought is charged with a crime committed in some other state, etc., before some court, magistrate or other officer, by an indictment, information or other accusation known to the law of such state. Unless such fact is made to appear the magistrate has no jurisdiction: *State v. Hufford*, 28–391.

SEC. **5174. Bail.** If, upon examination, it appears that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the governor, he shall, if not charged with murder, be required to enter into an undertaking, with sufficient surety in a reasonable sum, to appear before such magistrate at a future day, allowing reasonable time to obtain the warrant from the governor, and abide the order of such magistrate in the premises. [C.'73, § 4177; R., § 4524; C.'51, § 3285.]

SEC. **5175. Commitment.** If such person does not give bail, he must be committed to prison and there detained until such day in like manner as if the offense charged had been committed within the state. [C.'73, § 4178; R., § 4525; C.'51, § 3286.]

If charged with murder in the second degree, he is entitled to be released on bail under Const., art. I, § 12, notwithstanding the language of this and the preceding sections as they stood in the Code of '73: *State v. Hufford*, 23–579.

SEC. **5176. Forfeiture of bail.** A failure of such person to attend before the magistrate at the time and place mentioned in the undertaking is a forfeiture thereof. [C.'73, § 4179; R., § 4526; C.'51, § 3287.]

Where bail has been taken without it being shown that the party was charged, etc., in some other state, as specified in note to § 5173, the proceedings are void, and a recovery cannot be had on the bond: *State v. Hufford*, 28–391.

SEC. **5177. Discharge.** If such person appear before the magistrate upon the day ordered, he must be discharged, unless he is demanded by some person authorized by the warrant of the governor to receive him, or unless the magistrate finds good cause to commit him, or to require him to enter into a new undertaking for his appearance at some other day to await a warrant from the governor. [C.'73, § 4180; R., § 4527; C.'51, § 3288.]

SEC. **5178. Arrest on governor's warrant.** Whether the person so charged be bound to appear, be committed or discharged, any person authorized by the warrant of the governor may at any time take him into custody, and the same is a discharge of the undertaking, if there be one, unless a forfeiture thereof has been previously entered of record. [C.'73, § 4181; R., § 4528; C.'51, § 3829.]

SEC. **5179. Costs.** The complainant in any such case is answerable for all the costs and charges, and for the support in prison of any person so committed, and the magistrate, before issuing his warrant or hearing the cause, must require the complainant to give security for the payment of all such costs, or may require them in advance. [C.'73, § 4182; R., § 4529; C.'51, § 3290.]

SEC. **5180. Expenses—conditions.** Upon the application for the appointment of an agent for the arrest of a fugitive from justice under the provisions of this chapter, the governor may make the appointment and the issuance of the writ conditional that the same be executed without expense to the state. [C.'73, § 4183.]

SEC. **5181. Paid by state.** When, in the opinion of the governor, expenses incurred in the arrest of fugitives from justice should be paid by the state, the claim therefor shall be itemized and sworn to, and approved by him and at least two other members of the executive council, and, when so approved, be audited and paid out of the general revenue of the state. [C.'73, § 4184.]

CHAPTER 10.

OF PRELIMINARY INFORMATION AND WARRANTS OF ARREST.

SECTION **5182. Complaint.** When a preliminary information is made before a magistrate, charging the commission of some designated public offense triable on indictment in the county in which such magistrate has local jurisdiction, by some person named therein, he may issue a warrant for the arrest of such person. The information may be substantially in the form required in criminal actions triable before a justice of the peace. [C.'73, § 4185.]

The fact that the warrant for arrest on preliminary examination is returnable on the next day after its issuance instead of forthwith will not render it void: *State v. Freeman*, 8-428.

SEC. **5183. Warrant.** The warrant of arrest on a preliminary information must be substantially in the following form:

STATE OF IOWA, }
County of..... }

To any peace officer of the state:

Preliminary information upon oath having been this day filed with me, charging that the crime (naming it) has been committed and accusing A..... B..... thereof:

You are commanded forthwith to arrest the said A..... B..... and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at.....this.....day of....., A. D. .....

C..... D.....(with official title).

[C.'73, § 4186; R., § 4534; C.'51, § 2827.]

SEC. **5184. To peace officer—what to contain.** The warrant must be directed to any peace officer in the state; give the name of the defendant, if known to the magistrate; if unknown, may designate him by any name, and must state by name or general description an offense which authorizes a warrant to issue, the time of issuing it, the county, city, town, village or township where issued, and be signed by the magistrate, with his name of office. [C.'73, §§ 4187-8; R., §§ 4535-6; C.'51, §§ 2828-9.]

SEC. **5185. Order for bail.** If the offense stated in the warrant be a misdemeanor, the magistrate issuing it must make an indorsement thereon as follows: "Let the defendant, when arrested, be admitted to bail in the sum of.....dollars," stating the amount in which bail may be taken. [C.'73, § 4189; R., § 4537.]

The accused may be admitted to bail without appearing before a magistrate, and surety on the bail bond cannot object that the bond was signed and accused was released before he was brought before the magistrate under a warrant: *State v. Benzion*, 79-467.

SEC. **5186. How executed.** The warrant may be delivered to any peace officer for execution, and served in any county in the state. [C.'73, § 4190; R., § 4538.]

SEC. **5187. Defendant brought before magistrate.** If the offense stated in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued it at the place mentioned in the command thereof, or, in the event of his absence or inability to act,

before the nearest or most accessible magistrate in the county in which it was issued. [C.'73, § 4191; R., § 4539; C.'51, § 2831.]

A bail bond in case of felony taken before a magistrate in the county where the prisoner is arrested, the warrant having been issued in another county, would not be good as a statutory bond, and would not become a lien on the property of the obligors as provided in § 5518; but the bond having been accepted and the defendant discharged thereunder, it may be enforced: *State v. Cannon*, 34–322.

SEC. **5188. Bail in case of misdemeanor.** If the offense stated in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate or the clerk of the district court of the same county in which he was arrested, for the purpose of giving bail, and the magistrate or clerk before whom he is taken in such county must take bail from him, in the sum indorsed upon the warrant, for his appearance at the district court of the county in which the warrant was issued, on the first day of the following term. [C.'73, § 4192; R., § 4540; C.'51, § 2832.]

SEC. **5189. Order for discharge.** On taking bail in the case provided for in the preceding section, the magistrate or clerk taking the same must indorse on the warrant his official order for the discharge of the defendant, substantially as follows:

STATE OF IOWA, }
County of..... ..... }

To the officer (naming him and his official title, thus A.....B....., Sheriff of.....county) having in custody C..... D.....,(naming him):

The defendant named in the within warrant of arrest, now in your custody under the authority thereof for the offense therein designated, having given sufficient bail to answer the same by the undertaking herewith delivered to you, you are commanded forthwith to discharge him from custody, and, without unnecessary delay, deliver this order, together with the said undertaking of bail, to the clerk of the district court of..... county, on or before the first day of the next term thereof.

Dated at....., this.....day of....., A. D.....

E.....F.....(with official title).

He must deliver the warrant with the order thereon, together with the undertaking of bail, to the officer having the defendant in custody, who shall forthwith discharge him from arrest, and at once inform the magistrate issuing the warrant of his doings; and the magistrate or clerk, on or before the first day of the next term of the court at which the defendant is required to appear, must deliver or transmit by mail, or otherwise, the warrant with the order thereon, together with the undertaking of bail, to the clerk of the court at which the defendant is required to appear, who shall forthwith file the same in his office. The magistrate who issued the warrant shall return to the clerk, on or before the first day of the next term of the court, the affidavits of the informant and his witnesses upon which the warrant was issued, who shall file all of the same in his office. [C.'73, § 4193; R., § 4541; C.'51, § 2833.]

SEC. **5190. If bail be not given.** If bail be not forthwith given by the defendant as above provided, the magistrate or clerk must redeliver to the officer the warrant, and the officer must take the defendant before the magistrate who issued it at the place mentioned in the command thereof, or, if he be absent or unable to act, before the nearest or most accessible magistrate in the county in which the warrant was issued. [C.'73, § 4194; R., § 4542; C.'51, § 2834.]

SEC. **5191. Proceedings after arrest.** In all cases the defendant, when arrested, must be taken before the magistrate or clerk without unnecessary delay, and the officer must at the same time deliver to the magistrate or clerk the warrant, with his return thereon indorsed and subscribed by him with his official title. [C.'73, § 4195; R., § 4543; C.'51, § 2835.]

In a prosecution for resisting arrest the warrant under which the officer attempted to make the arrest is admissible in evidence: *State v. Seery*, 64 N. W., 631.

SEC. **5192. Before another magistrate.** If the defendant be taken before a magistrate in the county in which the warrant was issued, other than the magistrate who issued it as hereinbefore provided, the affidavits on which the warrant was issued must be sent to such magistrate, or if they cannot be procured, the informant and his witnesses must be subpœnaed to make new affidavits. [C. '73, § 4196; R., § 4544; C. '51, § 2836.]

CHAPTER 11.

OF ARREST.

SECTION **5193. Defined—time.** Arrest is the taking of a person into custody when and in the manner authorized by law, and may be made at any time of any day or night. [C. '73, §§ 4197, 4203; R., §§ 4545, 4551; C. '51, §§ 2837, 2850.]

Jurisdiction first acquired: The court first acquiring authority over the accused by his arrest, or by otherwise obtaining custody of his person through its officers, first acquires jurisdiction of the case. The finding of an indictment does not confer jurisdiction of the person of the accused: *Ex parte Baldwin*, 69–502.

The power to imprison necessarily includes the power to arrest: *Davenport v. Bird*, 34–524.

Wrongful arrest outside of state: It is no defense that defendant was arrested in another state without authority and brought to this state by force and against his will: *State v. Ross*, 21–467.

A court will not, upon the trial of an indictment on a plea of not guilty, inquire as to whether or not the defendant was properly or improperly brought within the jurisdiction of the court: *State v. Day*, 58–678.

Reward for arrest: A city cannot legally offer a reward for the arrest and conviction of a criminal: *Hanger v. Des Moines*, 52–193.

Nor can a county offer such reward; but it may offer a reward for the recovery of stolen property belonging to the county: *Hawk v. Marion County*, 48–472.

Where a person in another state acts upon the promise made by a board of supervisors in Iowa to pay a reward for the arrest and conviction of persons who have robbed the county treasury, he is bound to know that the board has no power to offer such reward. Nor in such case will the members be individually liable: *Huthsing v. Bosquet*, 3 McCrary, 569.

Peace officers acting under process in arresting a criminal are not entitled to a reward offered for such arrest, unless the terms of the reward offered clearly include them: *Means v. Hendershott*, 24–78.

See, further, § 5170 and note.

SEC. **5194. What constitutes.** An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest. No unnecessary force or violence shall be used in making the same, and the person arrested shall not be subjected to any greater restraint than is necessary for his detention. [C. '73, §§ 4209–11; R., §§ 4557–9; C. '51, § 2838.]

It is not essential in order to constitute an arrest that the sheriff should have informed the prisoner of his intention to make the arrest, and that he was a peace officer. While the prisoner might ordinarily be entitled to such information, the legality of the arrest as between the sheriff and other parties is in no manner affected by the sheriff's failure in these respects: *Miller v. Dickinson County*, 68–102.

SEC. **5195. By whom.** An arrest may be made by a peace officer or by a private person. [C. '73, § 4198; R., § 4546.]

SEC. **5196. Peace officer—with and without warrant.** A peace officer may make an arrest in obedience to a warrant delivered to him; and without a warrant:

1. For a public offense committed or attempted in his presence;
2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it. [C. '73, §§ 4119, 4200; R., §§ 4547–8; C. '51, § 2840.]

A peace officer may make an arrest without a warrant when a public offense has in fact been committed, and he has reasonable ground for believing that the person arrested has committed it; and it is erroneous to charge the jury, in such a case, that, if the

officer makes an arrest without a warrant, he will be liable, unless the party arrested was likely to escape: *Montgomery v. Sutton*, 67–497.

Where an officer claims to act under a warrant he cannot justify, when sued for damages for having the wrong person, by showing that he had a right to make such arrest without warrant: *Holmes v. Blyler*, 80–365.

The question whether the officer had reasonable ground for believing plaintiff to have committed a public offense when the arrest was made should be submitted to the jury, in an action to recover damages for such arrest: *Yount v. Carney*, 91–559.

SEC. **5197. By private person.** A private person may make an arrest:

1. For a public offense committed or attempted in his presence;

2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it. [C. '73, § 4201; R., § 4549; C. '51, § 2846.]

SEC. **5198. Oral order of magistrate.** A magistrate may orally order a peace officer or a private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate, which order shall authorize the arrest. [C. '73, § 4202; R., § 4550; C. '51, § 2845.]

SEC. **5199. Manner.** The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of arrest, of his authority to make it, and that he is a peace officer, if such be the case, and require him to submit to his custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so; if acting under the authority of a warrant, he must give information thereof and show the warrant, if required. [C. '73, § 4204; R., § 4552; C. '51, §§ 2839, 2841, 2847.]

SEC. **5200. When resisted.** When the arrest is being made by an officer under the authority of a warrant, if, after information of the intention to make the arrest, the person to be arrested attempts to escape or forcibly resists, the officer may use all necessary means to effect the arrest. [C. '73, § 4205; R., § 4553; C. '51, § 2844.]

In a prosecution for murder committed in resistance of lawful arrest, the information and warrant under which the arrest was sought to be made may be given in evidence: *State v. Meshek*, 61–316.

SEC. **5201. May break and enter premises.** To make an arrest for any public offense, a peace officer, acting with or, when authorized, without a warrant, may break into a house or other building in which the person to be arrested may be, or in which the officer has reasonable grounds for believing he is, after having demanded admittance and explained the purpose for which admittance is desired. In case of a felony, a private person may use like means to make an arrest. [C. '73, § 4206; R., § 4554; C. '51, §§ 2843, 2848.]

SEC. **5202. Breaking out.** Any person who has lawfully entered a house for the purpose of making an arrest, under the provisions of the preceding section, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself; and an officer may do the same when necessary for the purpose of liberating a person who, acting in his aid and by his command, lawfully entered for the purpose of making an arrest, and is detained therein. [C. '73, § 4207; R., § 4555.]

SEC. **5203. Refusing to assist.** Any person making an arrest may orally summon as many persons as he finds necessary to aid him in making the arrest, and all persons failing to obey such summons shall be guilty of a misdemeanor. [C. '73, § 4208; R., § 4556.]

SEC. **5204. Taking weapons.** He who makes an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law. [C. '73, § 4212; R., § 4560.]

Police officers, upon the arrest of one charged with felony, may make search of his person for stolen property, instruments used in the commission of the crime, or any

article which may give a clue to its commission or the identification of the criminal: *Reifsnyder v. Lee*, 44–101.

The sheriff is justified in searching the person arrested and taking from him money or property connected in any way with the crime charged, or which may serve in identifying the prisoner, or be used by him in effecting an escape: *Commercial Exchange Bank v. McLeod*, 65–665.

Property thus taken from a prisoner by the officer, and which is not connected with nor the fruit of the crime for which he is arrested, is in the possession of the officer for the person under arrest, and is no more subject to attachment than if it were in the prisoner's personal possession: *Ibid.*

But where the money taken from the prisoner was the money obtained by him through the commission of the crime for which he was arrested, *held*, that it was subject to garnishment in the hands of the officer at the suit of the person rightfully entitled thereto; *Reifsnyder v. Lee*, 44–101.

Where a trunk belonging to a party under arrest was produced and opened under pretense of making a criminal examination, *held*, that money therein contained was not subject to levy of attachment: *Pomroy v. Parmlee*, 9–140.

As to search warrants, etc., see §§ 5515–5568 and notes.

SEC. **5205. Escape.** If a person after being arrested escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him in any part of the state, and may use the same means to retake as are authorized for an arrest; and this may be done at any time under the original warrant or commitment, when there is one. [C. '73, § 4213; R., § 4561; C. '51, § 2851.]

SEC. **5206. Private person making arrest.** A private person who has arrested another for the commission of an offense must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer, who may take the arrested person before a magistrate, but the person making the arrest must also accompany the officer before the magistrate. [C. '73, §§ 4214–16; R., §§ 4562–4; C. '51, §§ 2842, 2849.]

SEC. **5207. By officer with warrant.** An officer making an arrest in obedience to a warrant shall proceed with the person arrested as commanded by the warrant or as provided by law. [C. '73, § 4217; R., § 4565.]

Where, at the time of an arrest, the party arrested was intoxicated, *held*, that the officer was not liable in damages for having kept the person in custody without bringing him before the justice until he was in proper condition for trial: *Arneson v. Thorstad*, 72–145.

SEC. **5208. Arrest without warrant.** When an arrest is made without a warrant, the person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and the grounds on which the arrest was made shall be stated to the magistrate by affidavit, subscribed and sworn to by the person making the statement, in the same manner as upon a preliminary information, as nearly as may be. [C. '73, § 4218; R., § 4566.]

Where an officer makes an arrest without a warrant on proper cause, he may detain the offender for a reasonable time until he can be taken before a magistrate for examination, and will not be liable in trespass for doing so: *Hutchinson v. Sangster*, 4 G. Gr., 340.

SEC. **5209. Hearing before magistrate.** If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest was made, and there is sufficient ground for a trial or preliminary examination, as the case may require, and it will not be inconvenient for the witnesses on the part of the state that it should be had before him, he shall proceed as if the person arrested had been brought before him on arrest under a warrant, and, if the case be one within his jurisdiction to try and determine, shall order an information to be filed against him; but if the magistrate finds that it will be more convenient for the witnesses on the part of the state that such trial or examination should be had before some other magistrate in the county, he shall, by a written order, commit the person arrested to a peace officer, to be by him taken before the other magistrate, together with the order of commitment and affidavits, unless the person arrested give bail, when authorized, for his appearance, as in case of arrest under a warrant. [C. '73, §§ 4219–20; R., §§ 4567–8.]

SEC. **5210. Transfer to another magistrate.** Unless bail is given, the peace officer shall take the arrested person before the designated magistrate, and in any case shall deliver to him the affidavits and order of commitment, and when the person arrested is brought or appears before him, he shall proceed as on an arrest under a warrant, and, when necessary, shall order an information to be filed against the person arrested. [C.'73, § 4220; R., § 4568.]

SEC. **5211. Offense triable in another county.** If the magistrate believes from the statements in the affidavit that the offense charged is triable in a county different from that in which the arrest is made, and there is sufficient ground for a trial or preliminary examination, he shall, by a written order, commit the person arrested to a peace officer, to be by him taken before a magistrate in the county in which the offense is triable, and if the offense be a misdemeanor triable on indictment, shall fix in the order the amount of bail which the person arrested may give for his appearance at the district court of the county (naming it) in which the offense is indictable, on the first day of the next term thereof, to answer to an indictment. If the offense charged be a bailable crime, the arrested person may give bail, conditioned as above provided, before a clerk of the district court. [C.'73, § 4221; R., § 4569.]

SEC. **5212. Bail—commitment—discharge.** If bail be given before a magistrate, as provided in the preceding section, it may be either before the magistrate making the order, or the magistrate in the county in which the offense is triable before whom he is taken under the order, or a magistrate of any county through which he passes in going from the county in which the arrest was made to that in which the offense is triable, or, in any bailable case, before the clerk of the district court of either of said counties; and, when given, the magistrate or clerk taking the same shall make, on the order of commitment, an order for the discharge of the person arrested from custody, who shall forthwith be discharged, and shall transmit by mail, or otherwise, to the clerk of the district court of the county at which the person arrested is bound to appear, on or before the first day of the next term thereof and as soon as it can be conveniently done after taking the bail, the affidavits, the order of commitment and discharge, together with the undertaking of bail, and he shall file the same together in his office. [C.'73, § 4222; R., § 4570.]

SEC. **5213. Transfer to another county.** If bail be not given as above provided, or if the offense charged is a felony not bailable, or a misdemeanor triable on information, the magistrate must deliver the affidavits and order of commitment to a peace officer, who shall proceed with the person arrested as directed by the order or provided by law; and the magistrate in the county in which the offense is triable, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested. [C.'73, § 4223; R., § 4571.]

SEC. **5214. What magistrate—bail.** In the cases contemplated in the last three sections, the officer having the person arrested in custody, under the order, shall take him before the proper magistrate, in the county in which the offense is triable, which is most convenient for the witnesses on the part of the state, unless, in case of a misdemeanor triable on indictment as hereinbefore provided, the person arrested desires to give bail, in which case he shall take him before the most convenient magistrate in the county in which the offense with which he is charged is triable, or any county through which he passes in going from the county in which the arrest was made to the county in which the offense is triable, or before the clerk of the district court of either of said counties, for the purpose of giving bail. [C.'73, § 4224; R., § 4572.]

SEC. **5215. Officer's return.** In all cases, the peace officer, when he takes a person committed to him under an order as provided in this chapter

before a magistrate or clerk of the district court, either for the purpose of giving bail, if bail be taken, or for trial or preliminary examination, must make his return on such order, and sign such return with his name of office, and deliver the same to the magistrate or clerk. [C.'73, § 4225; R., § 4573.]

CHAPTER 12.

OF PRELIMINARY EXAMINATIONS.

SECTION **5216. Procedure — waiver.** When the arrested person is brought before the magistrate, with or without a warrant, upon preliminary information, the magistrate must immediately inform him of the offense with which he is charged, and of his right to counsel in every stage of the proceedings, and must allow him a reasonable time to send for counsel, and, if necessary, adjourn for that purpose. After waiting a reasonable time for or on the appearance of counsel for defendant, the magistrate shall immediately proceed with the preliminary examination, or may allow the defendant to waive the same. [C.'73, §§ 4226–8; R., §§ 4575–7; C.'51, §§ 2852–4.]

SEC. **5217. Change of venue.** Before any evidence is heard, the defendant may have a change of venue, upon filing an affidavit that the magistrate is prejudiced against him, or is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes. On filing such an affidavit a change of venue must be allowed, and the magistrate must immediately transmit all original papers, and a transcript of the entire record in the case, to the nearest magistrate in the township, if there be one; if not, to the nearest magistrate in the county, who shall proceed with said examination as hereinafter provided; but one such change shall be allowed. [C.'73, § 4228; R., § 4577; C.'51, § 2854.]

SEC. **5218. Adjournment.** The examination must be terminated at one session unless the magistrate, for good cause shown, adjourn it; but it shall not be adjourned for a longer period than thirty days. [C.'73, §§ 4229–30; R., §§ 4578–9; C.'51, §§ 2855–6.]

Adjournment may be made with the consent of the defendant, and the surety on his bail bond cannot object that such adjournment was without the knowledge or consent of such surety: *State v. Benzion*, 79–467.

SEC. **5219. Commitment or bail.** If an adjournment be had for any cause, the magistrate shall commit the defendant for examination, or require him to give ample bail for his appearance at the time and place to which the examination is adjourned. [C.'73, § 4231; R., § 4580; C.'51, § 2857.]

The fact that excessive bail is required cannot be shown in an action for malicious prosecution by way of increasing the damages: *Davis v. Seeley*, 91–583.

SEC. **5220. Where no jail.** If there is no jail in the county, the sheriff must retain the defendant in his custody until the examination. [C.'73, § 4232; R., § 4582; C.'51, § 2859.]

SEC. **5221. Witnesses.** The magistrate must issue subpœnas for any witnesses required by the state or defendant, and those who appear must be examined in the presence of the defendant. [C.'73, § 4233; R., § 4583; C.'51, § 2860.]

Until defendant is arrested, a magistrate has no authority to issue a subpœna for a witness to appear at the examination of such defendant. So where a subpœna was sent to another state before filing of information or arrest of defendant, and the witness attended in response thereto, but defendant having been in the meantime arrested, waived examination, *held*, that the witness could not recover fees from the county (distinguishing *Westfall v. Madison County*, 62–427): *Warnstaff v. Louisa County*, 76–585.

The person filing complaint is to be treated as the prosecuting witness, and the fact that

he is subpœnaed as a witness by the state does not change his situation: *In re Trenchard*, 16–53.

A witness who in another state accepts service of a subpœna issued by a justice of the peace in a criminal case before any information is filed before him charging the commission of a crime, and thereunder attends a preliminary examination, cannot recover from the county witness fees for such attendance: *Warnstaff v. Louisa County*, 76–585.

SEC. **5222. Depositions.** The deposition of a witness who resides out of the county in which the examination is had may be taken on application of the defendant, on the order of the magistrate, before any officer authorized to take depositions in civil actions, which order shall not be made until three days after the filing with the magistrate of the written interrogatories to be propounded to the witness, nor until three days after the service of notice on the state, or on the attorney who appears for the state, of the filing of such interrogatories. [C.'73, § 4234.]

SEC. **5223. Cross-interrogatories.** Before the order to take deposition is made, the state may file cross-interrogatories to be propounded to the witness, which shall be answered by him in the deposition. [C.'73, § 4235.]

SEC. **5224. Method of taking.** At the expiration of three days from the filing of the interrogatories and the service of the notice thereof on the state as above provided, the magistrate may order the testimony of the witness to be taken in answer to the interrogatories and cross-interrogatories, if any, on file, and the deposition thus taken may be read in evidence on the examination; nor shall the same be excluded because of any irregularity in the taking of it, if the magistrate is satisfied that the irregularity complained of could work no substantial prejudice to the opposite party. [C.'73, § 4236.]

[Section 4237 of Code of '73, which made defendant a competent witness in his own behalf in such cases, was repealed by 17 G. A., ch. 168, § 2, by which act that privilege was extended to defendant in all criminal proceedings. See § 5484.]

SEC. **5225. Witnesses separated.** While a witness is under examination before the magistrate, he may exclude all others who have not been examined, and may cause the witnesses to be kept separate, that they may not converse with each other until the examination is closed. [C.'73, § 4239; R., § 4591; C.'51, § 2867.]

SEC. **5226. Others excluded.** The magistrate must also, upon request of the defendant, exclude from hearing the examination all persons except the magistrate, his clerk, the peace officer who has the custody of the defendant, the attorney or attorneys representing the state, the defendant and his counsel. [C.'73, § 4240; R., § 4592.]

SEC. **5227. Minutes of examination.** The magistrate shall, in the minutes of the examination, write out or cause to be written out the substance of the testimony given on the examination by each witness, the name, place of residence, business or profession of each witness, and the amount he is entitled to for mileage and attendance. By agreement of parties or their attorneys, the magistrate may order the examination taken down in shorthand and certified substantially in the manner provided for taking depositions by a stenographer, but the cost thereof shall not be taxed against the county. [C.'73, § 4241; R., § 4593; C.'51, § 2868.]

The minutes so taken by the magistrate are not competent as evidence on the trial of the case in the district court: *State v. Collins*, 32–36; *State v. Hull*, 26–292; nor are they admissible for the purpose of impeaching a witness: *State v. Hayden*, 45–11. And see notes to § 5276.

But the testimony given on the preliminary examination by a witness who dies before the trial may be proved on the trial by witnesses who heard it: *State v. Fitzgerald*, 63–268.

The minutes of the evidence taken down in accordance with the provisions of this section may be used before the grand jury under the provisions of § 5254, although the person taking down the evidence is not sworn, and the minutes are not verified by the magistrate nor signed by the witnesses: *State v. Wise*, 83–596 See § 5272 and notes.

The magistrate or a person appointed by him to write out the minutes of the testimony cannot recover compensation therefor from the county. The usual fees of the

magistrate in such cases for conducting the examination are all that are allowed: *Sanford v. Lee County*, 49–148.

The magistrate is entitled to be reimbursed by the county for expenses of stationery used in taking down minutes of the evidence: *Evans v. Story County*, 35–126.

SEC. **5228. Certificate.** After the examination is closed, the magistrate must attach together the complaint, the warrant or order of commitment, if any, under which the defendant was brought before him, the minutes of the examination, including all depositions used, and annex thereto his certificate, which must set forth, in substance, the time and place of examination, and that the minutes thereof are true, which certificate must be officially signed by the magistrate. [C.'73, § 4242; R., § 4594; C.'51, §§ 2869–70.]

Although the minutes are not properly certified by the magistrate, yet if the grand jury act thereon, and return a proper memorandum thereof to the court in connection with the indictment, as required by § 5272, the defendant cannot object to the calling of witnesses whose names are indorsed on the back of the indictment, and a memorandum of whose testimony is thus returned: *State v. Kepper*, 65–745; *State v. Cook*, 92–483.

SEC. **5229. Discharge.** If after hearing the testimony it appears to the magistrate that a public offense has not been committed, or that there is no sufficient reason for believing the defendant guilty thereof, he must order him discharged, and such order must be indorsed on the minutes of the examination or annexed thereto and signed by the magistrate, to the following effect: "There being no sufficient cause for believing the defendant guilty of the offense herein mentioned, I order him to be discharged." [C.'73, § 4243; R., § 4595; C.'51, § 2871.]

SEC. **5230. Commitment.** If it appears from the examination that a public offense, triable on indictment, has been committed, and there is sufficient reason for believing the defendant guilty thereof, the magistrate shall in like manner indorse on or annex to the minutes of the examination an order signed by him to the following effect: "It appearing to me by the within minutes than an offense, triable on indictment (stating generally the nature thereof), has been committed, and that there is sufficient cause for believing the defendant guilty thereof, I order that he be held to answer the same." The order shall either state, "and I have admitted him to bail to answer thereto by the bail-bond hereto annexed"; or, if bail is not given, "and that he be committed to the county jail until he give bail in the sum of ..... dollars (naming it)"; but if the offense is not bailable, the order of commitment shall state, "without bail." [C.'73, §§ 4244–6; R., §§ 4596, 4598–9; C.'51, §§ 2872, 2874.]

The fact that such finding was made by the justice will be presumed in an action on a bail bond given by the person bound over; but if not made, such fact is a proper matter of defense: *State v. Patterson*, 23–575.

The warrant of commitment in a particular case *held* sufficient: *Cowell v. Patterson*, 49–514.

SEC. **5231. Warrant.** If the magistrate order the defendant to be committed, he shall make out a warrant of commitment, officially signed, and deliver it, with the defendant, to the officer to whom he is committed; or, if the officer be not present, to a peace officer, who shall deliver the defendant into the proper custody, together with the warrant of commitment, which may be in the following form:

THE STATE OF IOWA,

To the Sheriff of.....County:

An order having been this day made by me that A..... B..... (the name of the defendant) be held to answer upon a charge of (state the offense), you are commanded to receive him into your custody and detain him in the jail of the county until he be legally discharged.

Dated at.....this.....day of....., A. D.....

G..... H..... (with official title).

[C.'73, § 4247; R., § 4600; C.'51, § 2875.]

SEC. **5232. Witnesses bound.** On holding the defendant to answer, the magistrate may take from each material witness examined by him on the part of the state a written undertaking, to the effect that he will appear and testify at the court to which the defendant is bound to answer, when required in the further progress of the cause, and that he will not evade or attempt to evade the service of a subpœna, or will forfeit the sum of one hundred dollars. [18 G. A., ch 130; C.'73, § 4248; R., § 4601; C.'51, § 2876.]

These provisions are limited to preliminary examination before magistrates and are not to be extended, so as to authorize a judge to require security for the appearance of a witness on change of venue under penalty of confinement of the witness: *Comfort v. Kittle*, 81–179.

SEC. **5233. Security.** When the magistrate is satisfied by oath or otherwise that there is reason to believe any witness will not fulfill his undertaking and appear and testify unless surety be required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper for his appearance. [C.'73, § 4249; R., § 4602; C.'51, § 2877.]

SEC. **5234. Minors and married women.** Minors and married women who are material witnesses against the defendant may in like manner be required to procure sureties for their appearance as provided in the preceding section. [C.'73, § 4250; R., § 4603; C.'51, § 2878.]

SEC. **5235. Witness committed.** If a witness required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for the purpose, the magistrate must commit him until he comply or be legally discharged. [C.'73, § 4251; R., § 4604; C.'51, § 2879.]

A witness who is required by a committing magistrate to enter into a written undertaking, with security, to appear and testify on the trial of the case, and is committed to jail for failure to furnish security, is not entitled to witness fees for the time he is thus held in confinement: *Markwell v. Warren County*, 53–422.

As to binding over witnesses on appeal, see § 5616.

SEC. **5236. Return to district court.** When a magistrate has discharged a defendant, or held him to answer an indictment, he must return to the district court of the county, on or before its opening, on the first day of the next term thereof, and as soon after the closing of the examination as practicable, all the papers filed in the proceeding, including therewith the minutes of the evidence, together with the undertaking of bail for the appearance of the defendant, and the undertakings of the witnesses or for them, taken by him. [C.'73, § 4252; R., § 4605; C.'51, § 2880.]

SEC. **5237. In case not triable on indictment.** If it appear from the examination that a public offense has been committed which is not triable on indictment, but on information only, and there is sufficient reason for believing the defendant guilty thereof, the magistrate shall retain all the papers, and forthwith order an information to be filed against the defendant, before him. If he have not jurisdiction to try and determine the same, he shall indorse on or annex to the minutes of the examination an order, signed by him, to the following effect: "It appearing to me by the within minutes that the offense of (here state its name or nature generally) has been committed, and that there is sufficient reason for believing the defendant guilty thereof, I order that an information be filed against him therefor before (here name some magistrate who is the nearest and most accessible in the same county, giving the name of office), and that the defendant be committed to any peace officer to be taken before such magistrate." And the magistrate shall thereupon cause each material witness on the part of the state to enter into a written undertaking, to the effect that he will appear forthwith before the magistrate before whom the defendant is to be taken, or he will forfeit the sum of fifty dollars, and deliver the undertaking, with all the other papers, to a peace officer, who shall forthwith take the defendant before such magistrate, and deliver all the papers with the

undertakings of the witnesses to the magistrate directed in the order, and make his return thereto, and sign the same with his name of office, and the magistrate before whom he is taken shall thereupon proceed accordingly. [C.'73, § 4253; R., § 4607.]

SEC. **5238. Costs.** When the defendant is discharged, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause; or if the person commencing the prosecution by filing the information fail to appear by himself, agent or attorney to prosecute the same or give evidence, and the accused is discharged by reason thereof, the magistrate in his discretion may tax the costs and render a judgment therefor against such person, subject to the right of appeal therefrom in the manner provided for appeals by prosecuting witnesses in cases of acquittal upon trial. [25 G. A., ch. 101; 15 G. A., ch. 30; C. '73, § 4254.]

Under the provisions of the Revision allowing appeals by the state it was *held* that the power here conferred of taxing costs against the prosecuting witness in certain cases might be exercised by the district court upon the trial of a criminal cause on appeal, although such order was not entered by the justice of the peace before whom the case was originally tried, and although no additional evidence was introduced to show absence of probable cause: *In re Trenchard*, 16–53.

Also *held*, that, where the judgment was for defendant, the prosecuting witness might appeal from an order of the justice taxing to him the costs of prosecution: *State v. Roney*, 37–30.

The justice is invested with discretion as to the taxation of costs to the prosecutor, and his conclusion cannot be reversed by the district court unless he has abused such discretion. And the correctness of the judgment of the justice must be determined by the inspection of the record, and not by new evidence: *State v. Kerns*, 64–306.

An appeal by prosecuting witness from an order taxing the costs of the prosecution to him must be taken at the time judgment is rendered and not afterwards: *State v. Knapf*, 61–522.

As to taxation of costs in district court, see § 5275 and notes. And see § 5606 and notes.

SEC. **5239. Evidence may be taken.** On the demand of the county attorney, the magistrate shall take the evidence in writing of the state's witnesses, notwithstanding he has permitted the defendant to waive the preliminary examination.

CHAPTER 13.

OF IMPANELING THE GRAND JURY.

SECTION **5240. Drawing.** At the term of court at which grand jurors are required to appear, the names of the twelve persons constituting the panel of the grand jury shall, on the second day of each term of court, unless otherwise ordered by the court or judge, be placed by the clerk in a box, and, after thoroughly mixing the same, he shall draw therefrom seven names, and the persons so drawn shall constitute the grand jury for that term. Should any of the persons so drawn be excused or fail to attend on said second day of the court, the clerk shall draw other names until the seven grand jurors are secured. [21 G. A., ch. 42, § 3; C. '73, §§ 4255–6; R., §§4608–9; C. '51, § 2881.]

Selection of grand jurors: It is not a valid objection to a grand jury that the judges of election, in making returns of names of persons to serve as grand jurors, returned in all eighty-five names instead of seventy-five, as required by § 335, if the extra names had been stricken off before the grand jury was drawn and the proper number have been regularly drawn and summoned. Neither was it a sufficient objection under the Code of '73 that the names thus returned were not entered in the election book: *State v. Knight*, 19–94.

Where there has been no substantial departure in the selection, drawing, etc., of the grand jury affecting substantially the rights of defendant, a motion to set aside the indictment for irregularities in connection with their selection should not be sustained: *State v. Brandt*, 41–593.

It would seem that deviations from the method pointed out for the selection, etc., of the grand jury, of a slight and unimportant nature, should not be regarded: *State v. Carney*, 20–82.

In general, see §§ 332–353.

The impaneling is the final formation, by the court, of the grand jury, the act immediately preceding the swearing of the jury which ascertains who are to be sworn: *State v. Ostrander*, 18–435, 446.

The grand jury is to be reorganized each term by a selection of the requisite number from the eight or twelve constituting the panel selected at the first term during the year: *State v. Braskamp*, 87–588.

Filling panel: If a grand juror is discharged subsequently to the formation of the jury, the panel should be filled by the summoning of another juror: *Norris' House v. State*, 3 G. Gr., 513.

Where prior to impaneling a grand jury one of the jurors was excused, and the other persons not drawn had not yet been discharged, and the sheriff under the direction of the court selected one of the jurors not drawn to take the place of the juror excused, *held*, that the grand jury consisting of the six jurors not discharged and the one selected by the sheriff was properly constituted; and *held* also that it was immaterial whether the person thus selected was one of the jurors not drawn, or any other person qualified to serve as juror. A vacancy in the number of jurors, or the place of one excused, is to be filled by the sheriff: *State v. Gurlagh*, 76–141.

If, after the discharge of the balance of the panel, it becomes necessary by reason of challenge to the panel to add jurors they may be selected from the bystanders: *State v. Smith*, 88–178.

Objection to the substitution of one grand juror for another without having the vacancy filled in the manner here required must be made at the time of such substitution: *State v. Howard*, 10–101.

A judgment of conviction will not be reversed on the ground that, subsequently to the formation of the grand jury, one of the jurors was excused and a person substituted, as to whom defendant did not have opportunity to exercise his right of challenge, it not appearing that the new juror was disqualified or the defendant prejudiced: *State v. Fowler*, 52–103.

Where grand jurors were absent at a term of court by reason of instruction from the judge that they need not appear unless specially summoned, *held*, that it was error to impanel a grand jury omitting therefrom the persons thus failing to appear, and that a motion to quash an indictment found by such grand jury should have been sustained: *State v. Bowman*, 73–110.

After challenges allowed: In case of the challenge of an individual juror, there is no provision for summoning another juror in his place. The member thus challenged does not cease to become a member of the grand jury, and his place is not to be supplied; and an indictment found by the requisite number of grand jurors as to whom no cause of challenge by defendant is interposed will be good: *State v. Ostrander*, 18–435.

But where, by challenges to nine of the grand jurors, the number was reduced below twelve, *held*, that the court should, upon application of the district attorney, have ordered the vacancies in the grand jury to be filled: *State v. Garhart*, 35–315.

So where six grand jurors were challenged it was held not error to reorganize the jury and fill up the panel: *State v. Mooney*, 10-506.

Where, by reason of the sustaining of challenges to individual jurors, the panel is left with less than the requisite number of jurors qualified to act in the case in which the challenges have been allowed, it is competent for the court to order the panel to be filled by an addition of the requisite number of jurors to act only in such case; and it is the duty of the court to thus fill the panel where by challenges it is reduced to less than the requisite number but it is not error to refuse to thus fill the panel where a sufficient number of the regular jurors remain unchallenged: *State v. Shelton*, 64–333.

See, further, §§ 5241–5247 and notes.

New precept: The provision of § 244 of Code of '73 for the issuance of a new precept applies only to a case where all the jurors fail to appear, or it is determined that the whole panel has been illegally selected or drawn. Such provision has no reference to the case of failure of jurors to attend: *State v. Pierce*, 8–231.

At a term subsequent to the first term of the year, the grand jury must appear without being summoned, and may be required to appear, and may lawfully transact business on the first day of the term: *State v. Standley*, 76–215.

Where the precise number of grand jurors to fill the panel appears, after certain ones are excused, they may be impaneled and sworn, without being drawn by lot: *Ibid.*

Where a part of the grand jury fails to appear, the court may orally direct the sheriff to summon a sufficient number to complete the panel, which order should be entered of record, but a written precept is not necessary: *State v. Miller*, 53–84; *State v. Miller*, 53–154.

The discharge of one grand jury and the impaneling of another to which there is no objection except the fact that the first has been erroneously discharged will be no ground for quashing an indictment found by the second: *State v. Hughes*, 58–165.

At least this is so where there is no allegation or showing of prejudice or possible injustice to defendant from the fact of the discharge of the first jury: *State v. Hart*, 67–142.

Re-summoning: A grand jury having once been discharged may be re-summoned at the same term: *State v. Reid*, 20–413.

The court has no power to remove, reform or change the members of the grand jury: *Keitler v. State*, 4 G. Gr., 291.

SEC. **5241. Challenge to panel—motion.** A defendant held to answer for a public offense may, before the grand jury is sworn, challenge the panel, only for the reason that it was not selected, drawn or summoned as prescribed by law. A defendant indicted not having been held to answer, or having been so held after the impaneling of the grand jury, may for

the same reasons object to the panel by motion, but the right to make such motion is waived by entering a plea to an indictment. [C.'73, §§ 4258, 4260, 4266; R., §§ 4611–12, 4619; C.'51, §§ 2882–3, 2890.]

Who may challenge: The proper method of taking advantage of irregularity in the selection, summoning or impaneling the grand jury, where the defendant has been held to answer before the formation of the grand jury, is by challenge to the panel: *State v. Hart*, 29–268; *State v. Hinkle*, 6–380; *Dixon v. State*, 3–416; *State v. Howard*, 10–101; *State v. Ingalls*, 17–8.

In order to support the action of the court below in overruling a motion to set aside the indictment on the ground that the grand jury was irregularly drawn, where it does not appear whether the defendant was held to answer before indictment or not, it will be presumed that he was: *State v. Gibbs*, 39–318.

Where defendant was bound over to appear before the grand jury after the grand jury was organized, *held*, that he was still entitled to exercise his right of challenge to such grand jury: *State v. Mooney*, 10–506.

A defendant under arrest in a preliminary proceeding, but not yet bound over to appear before the grand jury, is not entitled to challenge grand jurors although it is possible that his case may afterwards come before them: *State v. Fitzgerald*, 63–268.

The grand jury may investigate a charge against one who has been bound over while they are in session without regard to such preliminary hearing, and in that event the defendant is not entitled to exercise his right of challenge to the grand jury: *State v. Chambers*, 87–1.

A defendant not bound over to appear before the grand jury before the finding of an indictment against him cannot be deprived of the right to attack the indictment for causes which would have been grounds of challenge: *Dutell v. State*, 4 G. Gr., 125; *Norris' House v. State*, 3 G. Gr., 513.

Before the enactment of the provision in this section authorizing challenges of individual jurors on the part of the state, it was held that the prosecution had no right of challenge: *Keitler v. State*, 4 G. Gr., 291.

Time for challenge: An objection to the grand jury, or an individual juror, cannot be interposed, by a defendant held to answer before the formation of the grand jury, for any cause of challenge after the jury is sworn: *State v. Ingalls*, 17–8; *Dixon v. State*, 3–416; *State v. Hinkle*, 6–380; *State v. Howard*, 10–101; *State v. Hart*, 29–268. And see § 5243 and notes.

A defendant held to answer has an opportunity to challenge a juror before the jury is sworn, and, failing to do so then, cannot afterward make objection: *State v. Gibbs*, 39–318.

The time within which the right of challenge to grand jurors shall be exercised is not prescribed, and the prisoner ought to be permitted to exercise it at any time before the consideration of his case. Therefore, where a case is resubmitted to the same grand jury after a previous indictment has been set aside, the prisoner should be allowed an opportunity to challenge the members of such grand jury on the ground that they have previously formed and expressed an opinion in returning the first indictment: *State v. Osborne*, 61–330; *State v. Gillick*, 7–287.

Defendant should exercise his right of challenge at the proper time or it will be held waived: *State v. Harris*, 38–242.

Where defendant was in court to answer an indictment, and on motion the indictment was quashed, and the court then referred the matter to the grand jury for further consideration, and they returned an indictment charging defendant with a different crime, *held*, that an objection to the panel should have been then raised, and could not be taken advantage of afterwards: *State v. Ruthven*, 58–121.

An objection to the grand jury must be made before pleading to the indictment: *State v. Reid*, 20–413.

Challenges must be interposed before the swearing of the jury: See § 5243.

A judgment of conviction will not be reversed on the ground that, subsequently to the formation of the grand jury, one of the jurors was excused and a person substituted, as to whom defendant did not have opportunity to exercise his right of challenge, it not appearing that the new juror was disqualified or the defendant prejudiced: *State v. Fowler*, 52–103.

Waiver of challenge: A defendant bound over to answer may waive his right to challenge the grand jury, and will not be in default if he does not appear for that purpose: *State v. Klingman*, 14–404; *Ringgold County v. Ross*, 40–176.

Nor will his bail bond be forfeited by failure to so appear: *Ringgold County v. Ross*, 40–176.

The right to challenge the panel on the ground that the grand jury was composed of five grand jurors instead of seven as required by law, in view of the population of the county, is waived if not taken at the proper time, and cannot be urged after judgment: *State v. Belvel*, 89–405.

Presence of defendant: It seems that the right of challenging an individual grand juror may be exercised or waived by defendant's attorney in the absence of defendant, even on a trial for felony. The presence of defendant at this proceeding is not made essential. At any rate, where it does not appear that there was any objection for which defendant could have challenged a juror, alleged error in forming the grand jury in defendant's absence will be error without prejudice: *State v. Felter*, 25–67.

Error not cured by conviction: The fact that defendant is convicted does not cure any error in refusing him the privilege of challenging grand jurors: *State v. Osborne*, 61–330.

A challenge to the panel need not be demurred or pleaded to by the state. Defendant must introduce evidence in support of his challenge or it will be overruled: *State v. Gillick*, 10–98.

The burden of showing irregularity in the selection of grand jurors is upon the party making the challenge: *State v. Hartman*, 10–589.

That the grand jury was reorganized during the term, *held* not a ground for challenge to the panel: *State v. Mooney*, 10–506.

A defendant held to answer must interpose these grounds of objection at the time the grand jury is impaneled and not afterward: See § 5321 and note.

The objection that two of the grand jury are from the same township, in violation of the provisions of § 339, may be taken by way of challenge, or if the defendant has not an opportunity to challenge then by motion to set aside the indictment: *State v. Russell*, 90–569.

As to method and time of challenging the panel, see § 5241 and notes.

SEC. **5242. Joinder in challenges.** When several persons are held to answer for one and the same offense, no challenge to the panel can be made unless they all join therein. [C.'73, § 4266; R., § 4619; C.'51, § 2890.]

SEC. **5243. Grounds of challenge.** A challenge to an individual grand juror may be made before the grand jury is sworn as follows:

By the state or the defendant, because the grand juror does not possess the qualifications required by law.

By the state only because:

1. He is related either by affinity or consanguinity nearer than in the fifth degree, or stands in the relation of agent, clerk, servant or employe, to any person held to answer for a public offense, whose case may come before the grand jury;

2. He is bail for any one held to answer for a public offense, whose case may come before the grand jury;

3. He is defendant in a prosecution similar to any prosecution to be examined by the grand jury;

4. He is, or within one year preceding has been, engaged or interested in carrying on any business, calling or employment the carrying on of which is a violation of law, and for which the juror may be indicted by the grand jury.

By the defendant only because:

1. He is a prosecutor upon a charge against the defendant;

2. He has formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial. [C.'73, §§ 4258–9, 4261, 4266; R., §§ 4611, 4613, 4619; C.'51, §§ 2882, 2884, 2890.]

Exemption from service (under § 333) is a personal privilege which may be waived: *State v. Adams*, 20-486.

Alienage: That a member of the grand jury is an alien is a ground of challenge, but not a ground for setting aside an indictment: *State v. Gibbs*, 39-318.

Alienage will not be presumed. The party asserting it as a ground of challenge has the burden of proving it: *State v. Haynes*, 54–109.

Bias; opinion of guilt or innocence: Under a statutory provision somewhat different from this section, *held*, that it was only where a juror had formed or expressed an unqualified opinion of defendant's guilt that he was disqualified as a juror, and that the fact that he had formed an opinion which, upon further interrogation, he stated was not unqualified, did not render him incompetent: *State v. Hinkle*, 6–380.

The statement of a juror that he had read some portion of the evidence taken at the coroner's inquest upon the body of the person with whose killing defendant was charged, but did not know that he had read the whole of it, and that he thought he had formed an opinion from what he had read as to the guilt of defendant, but that he had no prejudice or bias such as would prevent him from listening to the evidence and passing upon the question of guilt as impartially as though he had never heard of the case, *held* not sufficient to show that he was disqualified: *State v. Shelton*, 64–333.

Where, under § 5278, a case is sent back to the same grand jury after a former indictment found by them is set aside, it is a sufficient cause of challenge to the jurors that they have heard the evidence upon which the previous indictment was found, and by the finding of such indictment have formed and expressed an opinion as to the guilt of defendant: *State v. Gillick*, 7–287; *State v. Osborne*, 61–330.

It seems that a challenge to a grand juror may be allowed for any cause that would constitute an objection to a petit juror: *State v. Gillick*, 7 287.

Where one of the grand jurors who found an indictment for murder had talked with others in regard to lynching the defendant, but there was no evidence that he favored such step, and his examination failed to show that he had formed any prejudice or opinion that would disqualify him from acting as a

grand juror, *held*, that there was no error in overruling a challenge to him: *State v. Billings*, 77–417.

Relation to prosecutor: It is not a ground of challenge that one of the grand jurors is related to the prosecutor: *State v. Russell*, 90–569.

As to the time and method of making the challenges, see notes to § 5241.

SEC. **5244. Decided by the court.** Challenges to the panel or to an individual grand juror must be decided by the court. [C.'73, § 4262; R., § 4615; C.'51, § 2866.]

SEC. **5245. Challenge to panel allowed.** If a challenge to the panel be allowed, the grand jury is prohibited from inquiring into the charge against the defendant by whom it was interposed, and, if it does so and finds an indictment, the court must set it aside. [C.'73, § 4263; R., § 4616; C.'51, § 2887]

SEC. **5246. To individual juror.** If a challenge to an individual grand juror be allowed, he shall not be present at or take any part in the consideration of the charge against the defendant. [C.'73, § 4264; R., § 4617; C.'51, § 2888.]

In such case there is no provision for summoning another juror in place of one as to whom a challenge is sustained. He does not cease to be a member of the grand jury, and his place cannot be supplied under § 5240. An indictment against a defendant held to answer, found by grand jurors as to whom no challenge by defendant has been sustained (if sufficient in number), will be good (explaining *Norris' House v. State*, 3 G. Gr., 513): *State v. Ostrander*, 18–435. And see notes to § 5240.

Where the grand jury consists of five members and a challenge as to one of them is sustained, the remaining four may find a valid indictment: *State v. Billings*, 77–417.

SEC. **5247. Effect of violation.** The grand jury must inform the court of any violation of the last section, which offense shall be punished as a contempt. [C.'73, § 4265; R., § 4618; C.'51, § 2889.]

SEC. **5248. Foreman appointed.** From the persons impaneled as grand jurors the court must appoint a foreman, or when the foreman already appointed is discharged, excused, or from any cause becomes unable to act, before the grand jury is finally discharged. [C.'73, § 4267; R., § 4620; C.'51, § 2891.]

The foreman may be selected either from the grand jurors regularly drawn, or from those summoned to supply a deficiency: *State v. Brandt*, 41–593, 605.

SEC. **5249. Oath to foreman.** The following oath must be administered to the foreman of the grand jury: "You, as foreman of the grand jury, shall diligently inquire and true presentment make of all public offenses against the people of this state, triable on indictment within this county, of which you have or can obtain legal evidence; you shall present no person through malice, hatred or ill will, nor leave any unpresented through fear, favor or affection, or for any reward, or the promise or hope thereof, but in all your presentments you shall present the truth, the whole truth and nothing but the truth, according to the best of your skill and understanding." [C.'73, § 4268; R., § 4621; C.'51, § 2892.]

SEC. **5250. Oath to others.** The following oath must thereupon be administered to the other grand jurors: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part." [C.'73, § 4269; R., § 4622; C.'51, § 2893.]

SEC. **5251. Charge of court.** The grand jury, being impaneled and sworn, may be charged by the court, who shall give them such information as may be proper as to the nature of their duties, and any charges for public offenses returned to the court or likely to come before that body; and the court shall specially give in his charge the provisions of the law regulating the accounting by public officers for fines and fees collected by them, and those providing for the suppression of intemperance. [C.'73, § 4270; R., § 4623; C.'51, § 2894.]

While the judge is authorized to charge the grand jury, especially in regard to violations of the law for the suppression of intemperance, he is not authorized to go into the grand jury room and state to the grand jurors that certain persons have violated the law and should be indicted: *State v. Will*, 65 N.W., 1010.

SEC. **5252. Discharge.** The grand jury, on the completion of its business, shall be discharged by the court, but, whether its business be completed or not, it is discharged by the final adjournment thereof. [C. '73, § 4271; R., § 4625; C. '51, § 2896.]

An indictment may be found by a grand jury any time during a term of court which commenced within the year for which the jury was chosen, and has extended into the following year without adjournment: *State v. Winebrenner*, 67-230.

And see § 344 and notes.

Whether or not the grand jury has completed its work is a matter not entirely to be determined by that body, but its decision in that respect is always subject to the judgment of the court, and at any time during the sitting of the grand jury before its final discharge, the court may give further charges as to matters arising since the first charge was given. But the judge should not go into the grand jury room and instruct the grand jury as to their duty with reference to the indicting of certain persons: *State v. Will*, 65 N.W., 1010.

CHAPTER 14.

OF THE DUTIES OF THE GRAND JURY.

SECTION **5253. Powers.** The grand jury shall inquire into all indictable offenses which may be tried within the county, and present them to the court by indictment. [C. '73, § 4272; R., § 4626; C. '51, § 2897.]

The grand jury may on their own motion find an indictment against defendant on a charge which has been previously dismissed by them and without its re-submission to them by the court: *State v. Collins*, 73-542.

SEC. **5254. Evidence.** An indictment can be found only upon evidence given by witnesses produced, sworn and examined before the grand jury, or furnished by legal documentary evidence, or upon the minutes of evidence given by witnesses before a committing magistrate. [18 G. A., ch. 130, § 2; C. '73, § 4273; R., § 4627; C. '51, § 2899.]

The examination of an incompetent witness by the grand jury will not vitiate the indictment: *State v. Tucker*, 20-508.

The court cannot inquire into the character of evidence upon which the grand jury acted in finding an indictment. So *held* where it was claimed that after the witnesses were examined one of the grand jurors was discharged and his place supplied by a bystander, the evidence not being again presented: *State v. Fowler*, 52-103.

Where an indictment is set aside and the case recommitted to the same grand jury, they may consider evidence of witnesses who have already been before them without their being recalled: *State v. Clapper*, 59-279.

The grand jury is simply a court of inquiry and may call any person before it, whether favorable or unfavorable to the prosecution, and evidence given before the grand jury in an investigaeion as to the commission of a crime cannot, in the event of the death of the witness before the trial, be proved on the trial as the testimony of such witness, for the reason that there could be no cross-examination before the grand jury; and on the other hand the testimony of a witness on such investigation, tending to fix the crime upon another person than the one subsequently indicted for it, cannot be shown by defendant in case of the death of such witness, at least where the investigation before the grand jury was without the presence or knowledge of the prosecuting officer: *State v. Porter*, 74-623.

See, further, § 5272 and notes.

Minutes of the testimony of witnesses on a preliminary examination when taken in accordance with the provisions of § 5227 may be made the basis of an indictment by the grand jury, although such minutes are not verified or taken down by a person sworn, nor verified by the magistrate, nor signed by the witnesses, such steps not being required by that section: *State v. Wise*, 83-596.

Where the minutes of evidence of witnesses before the committing magistrate are before the grand jury and by them returned with the indictment, the names of the witnesses being endorsed on the indictment, the prosecution is entitled to examine such witnesses: *State v. Cook*, 92-483.

SEC. **5255. Administering oath.** The foreman of the grand jury may administer the oath to all witnesses produced and examined before it. [C. '73, § 4274; R., § 4628.]

SEC. **5256. Clerk.** The court may appoint as clerk of the grand jury a competent person who is not a member thereof. The following oath must be administered to him: "You solemnly swear that you will faithfully and impartially perform the duties of clerk of the grand jury, that you will not

reveal to any one its proceedings or the testimony given before it, and will abstain from expressing any opinion upon any question before it, to or in the presence or hearing of the grand jury or any member thereof." Such clerk shall strictly abstain from expressing an opinion upon any question before the body, either to or in the presence or hearing of it or any member thereof, and shall not be present when any vote is being taken upon the finding of an indictment, and shall receive compensation at the rate of two dollars per day for time actually and necessarily employed in the performance of the duties prescribed in this chapter. [25 G. A., ch. 71; 22 G. A., ch. 38; C.'73, § 4275; R., § 4629.]

The clerk should not take part in the proceedings of the grand jury, but though such practice is not to be commended it will not necessarily be a ground for setting aside the indictment that he asks questions of the witness in pursuance of suggestions of members of the grand jury: *State v. Miller*, 64 N. W., 288.

As to the minutes of evidence, their return, and for what they may be used, see § 5276 and notes.

SEC. **5257. Member appointed clerk.** If no such appointment is made by the court, the grand jury shall appoint as its clerk one of its own number who is not its foreman. [22 G. A., ch. 38; C.'73, § 4275; R., § 4629.]

SEC. **5258. Minutes to be kept.** The clerk of the grand jury shall take and preserve minutes of the proceedings and of the evidence given before it, except the votes of its individual members on finding an indictment. When the evidence is taken, it shall be read over to and signed by the witness. When an indictment is found, all minutes and exhibits relating thereto shall be returned therewith and filed by the clerk of the court, and attached to the indictment. [25 G. A., ch. 71; 22 G. A., ch. 38; C.'73, § 4275; R., § 4629.]

SEC. **5259. Evidence for defendant.** The grand jury is not bound to hear evidence for defendant, but may do so, and must weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it may order the same produced. [C.'73, § 4276; R., § 4630; C.'51, § 2900.]

Where the grand jury send for an accused person and examine him without advising him of his privilege not to answer or that his statements may be used against him, his testimony is in the nature of an involuntary confession and cannot be used on the trial of the case: *State v. Clifford*, 86–550.

SEC. **5260. Member as witness.** If a member of the grand jury knows or has reason to believe that a public offense has been committed, triable in the county, he must declare the same to his fellow jurors, and be sworn as a witness upon the investigation before them. [C.'73, § 4277; R., § 4631; C.'51, § 2901.]

SEC. **5261. Special duty.** It is made the special duty of the grand jury to inquire into:

1. The case of every person imprisoned in the jail of the county on a criminal charge and not indicted;
2. The condition and management of the public prisons within the county;
3. The wilful and corrupt misconduct in office of all county officers;
4. The obstruction of highways. [C.'73, § 4278; R., § 4632; C.'51, § 2902.]

The grand jury cannot report to the court the result of their inquiry into the conduct of county officers otherwise than by indictment; and the members of a grand jury charging a county officer with misconduct otherwise than by indictment may render themselves liable to an action for libel: *Rector v. Smith*, 11–302.

SEC. **5262. Issue subpœnas.** The clerk of the court must, when required by the foreman of the grand jury or county attorney, issue subpœnas for witnesses to appear before the grand jury. [C.'73, § 4279; R., § 4633; C.'51, § 2903.]

SEC. **5263. Access to county jails and public records.** The grand jury is entitled to free access at all reasonable times to the county jails, and to the examination without charge of all public records within the county. [C.'73, § 4280; R., § 4634; C.'51, § 2904.]

SEC. **5264. Advice of county attorney.** The grand jury may at all reasonable times ask the advice of the county attorney or the court; and the county attorney may attend before it for the purpose of examining witnesses, when necessary. [C.'73, § 4281; R., § 4635; C.'51, § 2905.]

Held, not error to give instructions to a portion only of the grand jury in response to an application by members as to a matter of law: *State v. Edgerton*, 69 N.W., 280.

SEC. **5265. Who present.** Such attorney shall be allowed at all times to appear before the grand jury on his own request for the purpose of giving information relative to any matter cognizable by it; but neither he nor any other officer or person except the grand jury must be present when the question is taken upon the finding of an indictment. [C.'73, § 4282; R., § 4636; C.'51, § 2906.]

One who is appointed county attorney for the purpose of a particular case is invested with the same right with reference to appearing before the grand jury in regard to that case, as the county attorney would be: *State v. Kovolosky*, 92–498.

SEC. **5266. Should find indictment.** An indictment should be found when all the evidence, taken together, is such as in the judgment of the grand jury, if unexplained, would warrant a conviction by the trial jury; otherwise it should not. [C.'73, § 4283; R., § 4637.]

SEC. **5267. Proceedings secret.** Every member of the grand jury must keep secret the proceedings of that body and the testimony given before it, except as provided in the next section; nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against a person not in custody or under bail, otherwise than by presenting the same in court or issuing or executing process thereon, until such person has been arrested. A violation of this section is a misdemeanor. [C.'73, § 4284; R., § 4638; C.'51, § 2907.]

This provision is general and without limit as to time. A grand juror is not allowed to make affidavit for the purpose of showing that an indictment was not found by the concurrence of twelve jurors: *State v. Gibbs*, 39–318, 322. And see *State v. Mexcherter*, 46–88.

The fact that a bailiff was present in the grand jury room during their proceedings, though not when the final vote was taken, *held* not sufficient to affect the validity of the indictment: *State v. Kimball*, 29–267.

It is not a violation of the provisions of this section for grand jurors to make affidavit as to matters taking place in the grand jury room which would be a ground for setting aside the indictment: *State v. Will*, 65 N. W., 1010.

SEC. **5268. Exception.** A member of the grand jury may be required by the court to disclose the testimony of a witness examined before it for the purpose of ascertaining whether it is consistent with that given by him before the court, or to disclose the same upon a charge of perjury against the witness. [C.'73, § 4285; R., § 4639; C.'51, § 2908.]

This may be done for the purpose of impeaching a witness who testified before the grand jury: *State v. Hayden*, 45–11.

This provision does not have the effect of making statements before the grand jury by a person accused of a crime, who is called by them to testify without being advised as to his privilege or that his statements may be used in evidence, admissible against defendant on the trial of a case: *State v. Clifford*, 86–550.

SEC. **5269. Jurors not to be questioned.** No grand juror shall be questioned for anything he may say or any vote he may give in the grand jury relative to a matter legally pending before it, except for perjury of which he may have been guilty in making an accusation, or in giving testimony to his fellow jurors. [C.'73, § 4286; R., § 4640; C.'51, § 2909.]

SEC. **5270. When witness refuses to testify.** When a witness under examination before the grand jury refuses to testify or to answer a question put to him, it shall proceed with the witness into open court, and the foreman shall then distinctly state to the court the question and the refusal of the witness, and if upon hearing the witness the court shall decide that he is bound to testify or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and, if he does, shall proceed with him as in cases of similar refusal in open court. [C.'73, § 4287; R., § 4641.]

Where the witness is brought before the court and the court decides that he need not answer the questions propounded to him it may nevertheless direct the witness to return to the grand jury for further examination: *State v. Lewis*, 65 N. W., 295.

SEC. **5271. Failure to obey subpœna.** If a witness fails to attend before the grand jury in obedience to a subpœna issued for that purpose and duly served, the court shall, upon the application of the county attorney or foreman of the grand jury, coerce the attendance of the witness by attachment, and may punish his disobedience as in the case of a witness failing to attend on the trial. [C.'73, § 4288; R., § 4642.]

SEC. **5272. Minutes of preliminary examination.** All papers and other matters of evidence relating to the arrest and preliminary examination of the charge against defendants who have been held to answer, returned to the court by magistrates, shall be laid before the grand jury, and shall be competent evidence upon which an indictment may be found, and the grand jury need not have before it for examination any witness who was examined before the committing magistrate, and whose evidence is returned by such magistrate in the minutes, unless requested by the county attorney. If an indictment was found in whole or in part upon the minutes of evidence taken before a committing magistrate, the clerk of the grand jury shall write out a brief minute of the substance of such evidence, and the same shall be returned to the court with the indictment. If, upon investigation, the grand jury refuses to find an indictment, it shall return all of said papers to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody if in jail, and the exoneration of bail if bail be given, unless the court, upon good cause shown, direct that the charge should again be submitted to the grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of court. [18 G. A., ch. 130, § 3; C.'73, § 4289; R., § 4643.]

Where an indictment is found by a grand jury upon the minutes of the testimony before the magistrate the names of the witnesses examined before the magistrate may be indorsed on the back of the indictment, and they may then be examined for the prosecution without their having testified before the grand jury: *State v. Rodman*, 62–456.

Minutes of evidence taken before a committing magistrate may be used by the grand jury and returned with the indictment, and the witnesses may be called on the trial without having been personally examined by the grand jury or notice having been given under the provisions of § 5373 *State v. Beal*, 62 N.W., 657.

Although the minutes of the evidence given before a committing magistrate are not certified to by him, as required by § 5227, yet where an indictment is found upon such minutes, and a minute thereof is returned by the grand jury as here provided, it will be presumed that they ascertained by satisfactory and competent evidence, before taking action, that the minutes were a true record of the evidence given before the magistrate; and the absence of such certificate is not ground for objecting to a witness, a minute of whose evidence is thus returned with the indictment: *State v. Kepper*, 65–745.

See §§ 5227, 5228 and 5254 and notes.

SEC. **5273. Dismissal of charge.** Such dismissal of the charge does not prevent the same from being submitted to a grand jury as often as the court may direct; but without such direction it cannot be again submitted. [C.'73, § 4290; R., § 4644.]

After the dismissal of a charge, and without re-submission thereof to the grand jury, they may find an indictment against the defendant for such charge on their own motion: *State v. Collis*, 73–542.

CHAPTER 15.

OF THE FINDING AND PRESENTATION OF INDICTMENT.

SECTION **5274. How found—indorsement.** An indictment cannot be found without the concurrence of four grand jurors when the grand jury is composed of five members, and of five when it is composed of seven

members. Every indictment must be indorsed "a true bill," and the indorsement signed by the foreman of the grand jury. [21 G. A., ch. 42, § 4; C.'73, § 4291; R., § 4645; C.'51, § 2910.]

Concurrence of grand jurors: Under the section of the Code of '73, *held*, that while the panel should contain fifteen jurors, and be kept full if any were discharged, yet the statute did not require that all be present at the finding of an indictment; and if any were absent by reason of a challenge having been interposed and sustained as to them at the instance of a defendant held to answer, provided twelve concurred in finding the indictment, it would be good (§ 5246 and notes): *State v. Ostrander*, 18–435. And see notes to § 5240

Record conclusive: Where the record shows that an indictment was found by a full grand jury, the fact that such grand jury was composed of less than the required number of jnrors cannot be shown by evidence *aliunde*: *Hall v. State*, 4 G. Gr., 73.

Objection on account of irregularity in the finding of an indictment is waived by pleading and submitting without objection to the verdict: *Harriman v. State*, 2 G. Gr., 270.

It is not necessary that the record, on appeal, state that the indictment was found by a legal grand jury, nor that it contain their names. The indorsement of the indictment by the foreman as a true bill is conclusive evidence that it was duly found and concurred in by a sufficient number of the grand jury: *Ibid.*

Affidavits of grand jurors are not competent for the purpose of proving that an indictment duly returned was not concurred in by twelve grand jurors: *State v. Gibbs*, 39–318; *State v. Mewherter*, 46–88.

After an indictment has been presented and become a matter of record, it is not competent for the grand jurors who found it to testify that they did not vote to find the bill, or how they voted, or what they intended to find. Therefore, *held*, that where the indictment charged acts constituting murder in the first degree, it was not competent to present affidavits of the grand jurors showing that they had refused to find an indictment for murder and intended to charge only manslaughter, even though, in the introductory part of the indictment, the crime was named as manslaughter: *State v. Davis*, 41–311.

Indorsement by foreman: An indorsement of the name of the foreman giving the initials of his Christian name instead of his full name, *held* sufficient: *State v. Groome*, 10–308.

The requirement that the foreman's name be subscribed to the indorsement of "a true bill" is merely directory, and if it otherwise appear that the indictment was properly returned by the grand jury, the absence of the proper indorsement by the foreman cannot be taken advantage of after conviction: *Waukon-chaw-neek-kaw v. United States*, Mor., 332.

The fact that it does not appear that the indictment is indorsed "a true bill" and marked filed by the clerk cannot be raised for the first time on appeal: *Hughes v. State*, 4–554.

SEC. **5275. Private prosecutor.** When an indictment is found at the instance of a private prosecutor, the following must be added to the indorsement required by the preceding section, "found at the instance of" (here state the name of the person) and, in such case, if the prosecution fails, the court trying the cause may tax the costs against him, if satisfied from all the circumstances that the prosecution was malicious or without probable cause. [C.'73, § 4292; R., § 4646.]

The court has the authority to tax costs to the prosecutor, and it will be presumed that such authority is correctly exercised, in the absence of a showing to the contrary: *State v. Donnell*, 11–452.

A party considering himself aggrieved by the action of the court must have the evidence on which the court acted presented to the supreme court on appeal in order to secure a review of such action: *Ibid.*

The mere failure of a private prosecutor to appear and prosecute a defendant put under bonds to keep the peace, as contemplated in §§ 5114 and 5115, will not warrant a judgment against such prosecutor for costs: *State v. Holliday*, 22–397.

The requirement of the indorsement of the name of the private prosecutor at whose instance the indictment is found is directory only, and for the purpose of enabling the court to tax the costs against such prosecutor in case the prosecution fails. The requirement of § 4932, that a prosecution for adultery shall be commenced only on complaint of the husband or wife of the offending party, does not render it necessary that the name of such husband or wife be indorsed on the indictment as prosecutor: *State v. Briggs*, 68–416.

As to taxation of costs by a justice of the peace against a prosecuting witness and on appeal, see § 5238 and notes, and § 5606 and notes.

SEC. **5276. Names of witnesses indorsed.** When an indictment is found, the names of all witnesses on whose evidence it is found must be indorsed thereon before it is presented in the court, and must be, with the minutes of the evidence of such witnesses, presented to the court by the foreman in the presence of the grand jury, and all of the same marked filed by the clerk, as provided in the chapter relating to the duties of the

grand jury, and shall remain in his office as a record. [18 G. A., ch. 130, § 4; C. '73, §§ 4293–4; R., §§ 4647–8; C. '51, §§ 2913–14.]

Indorsing names of witnesses: The objection that the names of witnesses examined before the grand jury are not indorsed on the indictment should be raised in the trial court or it will be regarded as waived: *Harriman v. State*, 2 G. Gr., 270.

Names of witnesses before the grand jury who do not give any material testimony, and the minutes of whose testimony are not returned, need not be indorsed on the indictment: *State v. Little*, 42–51.

Affidavits cannot be received to show that witnesses whose names are not indorsed, and minutes of whose evidence are not returned, were examined before the grand jury: *Ibid.*

The name of the witness, the minutes of whose testimony before a commiting magistrate have been presented to the grand jury, and by them returned with the indictment, may be indorsed on the indictment, and the witness may be called on the trial without having been examined before the grand jury: *State. v. Beal*, 62 N. W., 657.

Failure to indorse the name of such witness on the indictment is a ground for setting aside the indictment under § 5319, but not for objection to testimony of the witness: *Ibid.*

It is not necessary to indorse on the indictment the names of witnesses who testify before the grand jury, but whose evidence did not in any respect contribute to the finding of the indictment: *State v. Miller*, 64 N. W., 288.

The minutes of the evidence returned with the indictment and duly filed are the test and standard by which to determine whether the names of all the witnesses examined by the grand jury are indorsed on the indictment, and the affidavits of grand jurors or others cannot be received to show that witnesses were examined whose names are not indorsed: *Ibid.*

It is not error in the court to permit, upon motion of the prosecuting attorney, an indorsement to be made on the back of the indictment of the name of a witness who has been before the grand jury: *State v. Robinson*, 47–489.

The fact that the witness' name was indorsed on the indictment, and what appeared to be minutes of his testimony attached thereto, will not entitle the prosecution to introduce him on the trial under the provisions of § 5373, unless he was actually examined as a witness before the grand jury: *State v. Porter*, 74–623.

Where the names of witnesses who appeared before the committing magistrate, and the minutes of whose evidence were read before the grand jury and by them returned with the indictment, are indorsed on the indictment, the prosecution is entitled to examine such witnesses: *State v. Cook*, 92–483.

Failure of the state to produce all the witnesses that testified before the grand jury is not a wrong nor a presumption of wrong. The state is not required to produce all such witnesses at the trial of the case: *State v. Dillon*, 74–653.

As to what is a sufficient indorsement of witnesses' names, so as to entitle the prosecution to call them upon the trial, see § 5373 and notes.

Returning minutes of testimony: The minutes need not be attached to, or made a part of, the indictment, and a mere failure to file the same should not deprive the state of its evidence: *State v. Postlewait*, 14–446.

It is sufficient that they be returned into court and filed with the clerk: *State v. Hamilton*, 42–655.

That they are handed to the clerk and deposited with him sufficiently constitutes a filing: *State v. Guisenhause*, 20–227.

That the minutes include testimony taken in other cases does not necessarily invalidate them: *Ibid.*

The minutes, when returned, become a part of the record and cannot be impeached by affidavit: *State v. Little*, 42–51.

Affidavits of grand jurors as to what took place in the grand jury room are admissible for the purpose of showing ground for setting aside the indictment: *State v. Will*, 65 N.W., 1010.

Evidence taken before the grand jury, minutes of which are not returned with the indictment, does not become of record in the case even though preserved by the grand jury: *State v. Lewis*, 65 N.W., 295.

Failure of the clerk to file the minutes of testimony returned by the grand jury cannot be raised by demurrer to the indictment: *State v. Briggs*, 68–416.

If the minutes of testimony are returned by the grand jury with the indictment and placed by the clerk in his office, and remain there as a part of the record, this is a sufficient filing within the requirement of the statute, although it would be better practice for the clerk to indorse such minutes as filed: *Ibid.*

The minutes of the testimony thus returned by the grand jury cannot be introduced as independent evidence on the trial. If it is sought by them to impeach a witness, the foundation for such impeachment must be laid in the usual way: *State v. Ostrander*, 18–435.

Nor are such minutes admissible to impeach a witness on the trial by showing a conflict between his evidence and that appearing to have been given by him before the grand jury: *State v. Hayden*, 45–11.

The fact that the minutes of the evidence returned by the grand jury do not support the indictment is not ground for quashing it or setting it aside: *State v. Harris*, 36–268.

Documentary evidence or evidence identifying it need not be set out or noticed in the minutes: *State v. Mullenhoff*, 74–271.

Where an indictment is found on the minutes of evidence taken before a committing magistrate, the names of the witnesses whose testimony is thus preserved and considered by the grand jury may be indorsed on the indictment: *State v. Wise*, 83–596.

Although the minutes of the evidence taken before the committing magistrate are

not certified to as required by statute in such cases, yet if the grand jury act upon such minutes and return with the indictment a memorandum of the testimony thus submitted to them, it will be presumed that they had before them sufficient evidence that the minutes on which they acted were true minutes of the evidence before the magistrate, and the witnesses whose evidence is thus returned and whose names are properly indorsed upon the indictment cannot be excluded from testifying on the trial: *State v. Kepper*, 65–745.

Minutes of evidence given before the grand jury are to be taken by its clerk: See § 5256.

Failure to indorse names of witnesses on indictment, and failure to return the minutes of evidence therewith, are grounds for setting aside the indictment: See § 5319, ¶ 2, and notes.

An objection that the name of the witness is not indorsed on the indictment may be a ground of motion to set aside the indictment, but it is no reason for excluding the evidence where the witness was examined before the grand jury and the minutes of his evidence were returned: *State v. Story*, 76–262.

Witnesses whose names are not so indorsed, and minutes of whose evidence are not so returned, cannot be called by the prosecution except upon notice thereof having been previously given to the defendant: See § 5806 and notes.

The witnesses examined before the grand jury, and the minutes of whose testimony are returned with the indictment, may be examined on other questions of fact in the case than those stated in the minutes of testimony returned: *State v. Harlan*, 67 N.W., 381.

Presentation to the court: The requirement that the indictment must be presented, etc., is directory only, and a failure of the clerk to make the indorsement on the indictment will not invalidate the proceedings (explaining *State v. Glover*, 3 G. Gr., 249): *State v. Axt*, 6–511: *State v. Shepard*, 10–126.

In the absence of an affirmative showing to the contrary it will be presumed that the requirements of the statute as to the presentation were complied with: *State v. McIntire*, 59–267.

Where defendant moved to strike the indictment from the files because it had been altered by erasure and insertion of other words, *held*, that the affidavits introduced disproved the defendant's allegation: *State v. Hughes*, 58–165.

The provisions of this section do not modify those of § 5350 which direct the clerk, when a change of venue is granted, to transmit the indictment and minutes to the county to which the case is sent: *State v. McGuire*, 87–142.

Indorsement by the clerk: No record of the filing of the indictment, other than the indorsement of the clerk on the indictment itself, need be made, at least not until after the arrest of the accused: *Wrocklege v. State* 1–167; *Herring v. State*, 1–205.

It is not essential that the indorsement on the indictment should recite that it was presented by the foreman, in the presence of the grand jury, to the court: *State v. Jolly*, 7–15.

A mistake in the indorsement on the indictment as to the county in which it was filed, *held* not a fatal error, where it appeared that it was presented and filed in the proper county: *State v. Smouse*, 50–43.

Indorsements in particular cases *held* to be in substantial compliance with the provisions of the statute as to presenting and filing: *Dixon v. State*, 4 G. Gr., 381; *Wrocklege v. State*, 1–167.

The court should be named in the indorsement, although a failure to do so will not be fatal: *State v. Jolly*, 7–15.

The indorsement by the clerk on the back of the indictment should show the date of the filing, but the fact that such indictment is blank as to the date of presentation to the court is immaterial: *State v. McGuire*, 87–142.

Failure of the clerk to file the indictment will not invalidate the proceedings: *State v. Rivers*, 58–102.

The fact that it does not appear that the indictment was marked filed by the clerk cannot be raised for the first time on appeal: *Hughes v. State*, 4–554.

And see notes to preceding section.

Substitution of lost indictment: If the indictment is lost or abstracted after the arraignment of defendant, the court may, upon motion, substitute a copy and proceed upon the record thus made, the same as upon the original indictment: *State v. Rivers*, 58–102, *State v. Stevisgier*, 61–623.

Where, an indictment being lost, a second one was returned for the same offense, which being held defective, and the original being found, a trial was had under the first indictment, *held*, that such proceedings were proper and could not be dismissed on the ground of another indictment pending: *Reddan v. State*, 4 G. Gr., 137.

A copy of a lost indictment when substituted for the original is in effect the original and is to be so treated, and it is immaterial that the jury are sworn to try the case upon the indictment as returned by the grand jury and not upon the copy substituted therefor: *State v. Shank*, 79–47.

In a particular case, *held*, that it did not appear with sufficient certainty that a proposed substitute for a lost indictment was a substantial copy thereof and that it was not error to refuse to allow such substitution: *State v. Thomas*, 66 N. W., 743.

Where in the commencement of the indictment the time of the commission of the offense was by mistake given as of a date subsequent to the finding of the indictment, but the date was correctly stated in the body of the indictment, *held*, that it was not error for the court on motion to correct such clerical mistake: *State v. Brooks*, 85–366.

SEC. **5277. Minutes of evidence.** Such minutes of evidence shall not be open for the inspection of any person except the judge of the court, the county attorney or his assistant or clerk, the defendant and his counsel, or the assistant or clerk of such counsel. The clerk of the court must,

within two days after demand made, furnish the defendant or his counsel a copy thereof without charge, or permit the defendant's counsel, or the clerk of such counsel, to take a copy. [18 G. A., ch. 130, § 4; C. '73, § 4293; R., § 4647; C.'51, § 2913.]

SEC. **5278. Minutes used on resubmission.** When an indictment is held insufficient, and an order is made to resubmit the case to the same or another grand jury, or where the grand jury has ignored a bill and the same has been ordered back to the same or another grand jury for further investigation, it shall be unnecessary to summon the witnesses again before such jury in such cases, but the minutes of the testimony returned with the defective indictment or ignored bill or information shall be detached and returned to the grand jury, and thereupon, without more, such grand jury may find a bill and attach said minutes of the evidence thereto, and return said indictment therewith into court in the usual manner, and may in either case take additional testimony. [18 G. A., ch. 130, § 5.]

Where an indictment is set aside and the case recommitted to the same grand jury, there is no objection to their considering the evidence of witnesses who have already been before them without calling them the second time: *State v. Clapper*, 59–79.

When a case is sent back to the same grand jury, the prisoner should be allowed to challenge the members of such grand jury on the ground of having formed and expressed an opinion by the finding of the first indictment: *State v. Osborne*, 61–330.

CHAPTER 16.

OF THE INDICTMENT.

SECTION **5279. Defined.** An indictment is an accusation in writing, found and presented by a grand jury legally impaneled and sworn to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which by law is a public offense, punishable on indictment. [C. '73, § 4295; R., § 4649; C.'51, § 2915.]

SEC. **5280. What must contain.** The indictment must contain:

1. The title of the action, giving the name of the court to which it is presented, and the names of the parties;

2. A statement of the facts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. [C. '73, § 4296; R., § 4650.]

It is sufficient to charge an offense in the language of the statute when that shows the material facts constituting it: *State v. Whalen*, 68 N. W., 554.

An indictment describing the offense in the language of the statute will be sufficient without naming it; but naming the offense without stating the facts constituting it will not be sufficient. If the facts are properly stated, a wrong name will not vitiate the indictment, but will be mere surplusage: *State v. Shaw*, 35–575; *State v. Davis*, 41–311.

The facts constituting a public offense must be charged in the indictment, and when a statute creating such offense describes it in general terms, constituting a legal conclusion, the indictment must specifically describe the offense so as to bring it within the legal conclusion: *State v. Brandt*, 41–593, 607.

An indictment cannot be aided by intendment, or an omission supplied by construction. The facts necessary to constitute the offense must be in the manner indicated set out and averred: *State v. Potter*, 28–554.

Section applied: *State v. Jamison*, 74–602.

See, further, notes to the next two sections and §§ 5288–5290.

The offense charged in the indictment is determined by the statement of facts in the indictment, and not by the designation given to the offense in the caption: *State v. Wyatt*, 76–328.

As to sufficiency of the averments of an indictment for obtaining property by false pretenses, see *State v. Cadwell*, 79–473.

An indictment for assault with intent to commit great bodily injury, *held* not sufficient where the charge was an assault with a deadly weapon and the infliction of great bodily injury, it not being directly alleged that the assault was with such intent: *State v. Clark*, 80–517.

In an indictment for resisting an officer who has a person under arrest, it is not necessary to state the name of the person under arrest: *State v. Garrett*, 80–589.

It is immaterial that the caption of the indictment names the offense as burglary, while the charging party shows the offense of breaking into a store building in the night-time: *State v. Gillett*, 92–527.

SEC. **5281. Form.** It shall be substantially in the following form:

District court of the county of.....

THE STATE OF IOWA,
vs.
A.....B.....

The grand jury of the county of....., in the name of the state of Iowa, accuses A.....B..... of the crime of (here insert the name of the offense if it have one, such as treason, manslaughter, robbery, larceny, or the like, or if it have no general name, then a brief general description of it as given by law, such as "mingling poison with food, with intent to kill a human being,") committed as follows:

The said A.....B....., on the.....day of.....A. D....., in the county aforesaid (here insert the act or omission constituting the offense).

.....
County attorney of.....county.

[C. '73, § 4297; R., § 4651.]

Formal parts: The expressions "State of Iowa" and "The State of Iowa" are essentially the same: *Harriman v. State*, 2 G. Gr., 270.

An indictment in which the presentment is "in behalf of the state of Iowa" is good, although the expression "In the name and by the authority of the state of Iowa" is a more appropriate style. It need not be expressed in each proceeding in the conduct of a prosecution that it is made "in the name and by the authority," etc.: *Wrocklege v. State*, 1–167.

An indictment improperly naming the court, or failing to state the term thereof, is not subject to demurrer on that ground: *State v. Schill*, 27–263.

A mistake in the name of the state, or in the spelling of the name of the county, will not vitiate the indictment. These facts are not such as to prejudice the substantial rights of the defendant: *State v. Gurlock*, 14–444.

The fact that on the face of the indictment there is no title to the action, in accordance with the form given in this section, where the body of the indictment sets forth the names of the parties, does not constitute a valid objection thereto on motion or demurrer: *State v. McIntire*, 59–264; *State v. McIntire*, 59–267.

It is not essential that the indictment be signed by the district attorney: *State v. Ruby*, 61–86; *State v. Wilmoth*, 63–380.

An indictment signed A. B., "Pros. Atty. *pro tem.*," etc., *held* sufficient: *Wrocklege v. State*, 1–167.

The signature of a prosecuting attorney to the indictment is not essential. Therefore the fact that it is signed by one as county attorney, who should not properly have signed it, is immaterial: *State v. Kovolosky*, 92–498.

Venue: An indictment for larceny corresponding to the form given in this section, charging the offense as committed "in the county aforesaid," *held* sufficiently specific as to the venue of the crime: *State v. Lillard*, 59–479.

So an indictment in this form sufficiently charges that the offense was committed in Iowa: *State v. Windstrand*, 37–110.

Conclusion: In an indictment under a statute it is not necessary in the conclusion to refer specifically to the statute under which the indictment is found: *Zumhoff v. State*, 4 G. Gr., 526.

The formal ending of an indictment, "and so the jurors, etc., do say that the said," etc., is but a legal conclusion, and will not cure any defect in the charging part of the indictment: *State v. Parsons*, 54–405.

A mistake in the conclusion of the indictment in reciting the name of the person injured, such name being correctly given in the body of the indictment, *held* immaterial: *State v. McCunniff*, 70–217.

The name of the offense charged need not be stated: See notes to preceding section.

Further, see notes to next section, and to §§ 5288–5290.

SEC. **5282. Direct and certain.** The indictment must be direct and certain as regards:

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense. [C. '73, § 4298; R., § 4652.]

The party charged: An indictment against "a man in Turner Hall whose name to the grand jurors is unknown," *held* insufficient: *Geiger v. State*, 5–484.

An allegation that defendant did the act constituting the offense will support a conviction on evidence that such act was done by defendant through an authorized agent: *State v. Cadwell*, 79–432

The offense; particular circumstances: Only such facts need be stated in the indictment as are required to be proved on the trial: *Nash v. State*, 2 G. Gr., 286, 294.

In a prosecution under § 4840 for loaning public money, *held*, that an indictment stating that defendant "loaned" a certain sum of money "without authority of law," etc., was too general and should have stated the

person to whom the money was loaned. So, also, in another count charging the conversion, etc., of public money, *held*, that the manner of conversion should have been specified: *State v. Brandt*, 41–593, 609, 611.

The facts constituting an offense must be stated in the indictment in language direct and certain as to the circumstances which are necessary to show a crime punishable by law. Omissions cannot be supplied by construction: *State v. Porter*, 28–554; *State v. Chicago, B. & P. R. Co.*, 63–508.

Where the acts charged are such that they are lawful under certain circumstances, it is not sufficient to allege that they were unlawfully done, but the existence of the facts showing the acts to be unlawful must be set out in the indictment: *State v. Chicago, B. & P. R. Co.*, 63–508.

The act of keeping liquors for sale, and the selling contrary to law, each constitutes a nuisance by statute, but the particular circumstances in this respect must be charged in the indictment, and if not charged cannot be proven; *State v. Tierney*, 74–237.

An indictment charging an assault with a deadly weapon with intent to strike and bruise, etc., and the infliction upon prosecutor of great bodily injury, does not sufficiently charge an assault with intent to commit great bodily injury: *State v. Clark*, 80–517.

Needless particularity: Where a person or thing necessary to be mentioned in the indictment is described with unnecessary particularity, all the circumstances of the description must be proved: *State v. Newland*, 7–242; *State v. Hesner*, 55–494.

So *held* where the kind of liquor sold was specified in an indictment for illegal sale: *State v. Hesner*, 55–494.

Therefore, under an indictment for passing counterfeit bills on a certain bank, *held*, that the existence of such bank must be established, although by statutory provision the name of the bank need not have been charged: *State v. Newland*, 7–242.

Where the place is stated in the indictment as a matter of local description and not of venue, it is necessary to prove it as laid although it need not have been stated: *State v. Crogan*, 8–523.

But on the same point the supreme court was equally divided in *State v. Verden*, 24–126.

See, further, notes to §§ 5280 and 5288–5290.

SEC. **5283. Defendant's name.** When a defendant is indicted by a fictitious or erroneous name, and in any subsequent stage of the proceedings, before execution, his true name is discovered, an entry shall be made in the record of the proceedings of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name substantially as follows:

THE STATE OF IOWA,
vs.
A..... B....., indicted by the name of C..... D.....

[C.'73, § 4299; R., § 4653.]

SEC. **5284. Must charge but one offense.** The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means, may allege the modes and means in the alternative. Except in case of compound offenses, where in the same transaction more than one offense has been committed, the indictment may charge the several offenses and the defendant may be convicted of any offense included therein. [C. '73, § 4300; R., § 4654; C. '51, § 2917.]

Duplicity; charging distinct crimes: Although this section prohibits the charging of more than one offense in the same indictment, yet where two counts of the indictment charged two distinct offenses, one committed in the county where the indictment was found and the other in another county, *held*, that the latter count was mere surplusage and did not render the indictment bad: *State v. Smouse*, 50–43.

The same rule is applicable in case of an information: *State v. Smouse*, 49–634.

If there are different methods of committing one offense such different methods may be charged conjunctively in the indictment: *State v. Kowolski*, 65 N.W., 306.

Where several acts are defined in one section of the statute disjunctively as constituting a crime they may be charged in the indictment conjunctively without making the indictment vulnerable to objection on the ground of duplicity: *State v. Phipps*, 64 N.W., 411: *State v. Lewis*, 65 N. W., 295; *State v. Feuerhaken*, 65 N.W., 299.

It is proper in different counts to charge the same offense in different forms: *State v. Potts*, 78–656.

An indictment charging a conspiracy to rob and steal does not necessarily charge more than one offense. The fact that the conspiracy, if consummated, would involve several distinct felonies would not render the indictment for the conspiracy bad for duplicity: *State v. Sterling*, 34–443; *State v. Kennedy*, 63–197.

Where the indictment charges a conspiracy to commit a crime and also the commission of the overt act, it appearing that it was not intended to charge nor put defendant on trial for any other crime than that of conspiracy, the indictment will not be considered objectionable: *State v. Ormiston*, 66–143.

But where the indictment charged other crimes outside of the conspiracy and not

merely the overt act, *held*, that it was fatally defective: *State v. Kennedy*, 63–197.

The statement in an indictment for conspiracy of the overt act will not constitute duplicity, such statement not being for the purpose of putting the defendant on trial for such act: *State v. Grant*, 86–216.

An indictment charging an assault and battery does not charge two offenses. Every battery includes an assault: *State v. Twogood*, 7–252.

Nor does an indictment charging assault and battery with intent to commit great bodily injury charge more than one offense: *Cokely v. State*, 4–477.

Charging threats to kill two persons does not render the indictment objectionable as charging two offenses, the threat being the gist of the offense: *State v. O'Mally*, 48–501.

Where a party is found guilty upon one of several counts of an indictment, the legal inference will be that he was acquitted upon the others: *State v. Severson*, 79–750.

The offenses under § 4942 of enticing a female to a house of ill fame, and of knowingly concealing such female for the purpose of prostitution, constitute distinct offenses, which cannot be charged in the same indictment, although committed by the same person in connection with the same female: *State v. Terrill*, 76–149.

Where one count of an indictment charged the crime of murder by an attempt to produce an abortion with some instrument to the grand jurors unknown, and the second count charged that the crime had been committed by administering certain drugs to the grand jurors unknown, *held*, that there was but one crime charged and the indictment was not bad for duplicity: *State v. Baldwin*, 79–714.

An indictment which charged the keeping of a house of ill fame, resorted to for purposes of prostitution or lewdness, *held* to charge but one offense and not void for duplicity: *State v. Toombs*, 79–741.

An indictment for trespass upon the land of another, committed by cutting and carrying away trees, which charged that the trees were cut and taken from different sections not contiguous, *held* to charge but one offense if the cutting was at a single time: *State v. Paul*, 81–596.

And while the offense may consist in wilfully cutting, or wilfully destroying, or wilfully carrying away, under § 4829, yet if the cutting and carrying away are one transaction, they constitute a single offense: *Ibid.*

Where an indictment for setting fire to material with intent to burn a building also charged the actual burning of the building, *held*, that the latter allegation was intended only to show the intent with which the act was done and did not constitute a charge of a distinct offense: *State v. Hull*, 83–112.

The stealing in one transaction of property of different owners constitutes but one offense of larceny: *State v. Larson*, 85–659.

In cases of larceny and similar offenses, an indictment, in which the taking of several articles is charged in a single count, is not bad for duplicity: *State v. Pierce*, 77–245.

It is not improper to allege in the indictment for burglary the actual commission of the crime which the defendant is charged with having broken and entered with intent to commit, it not appearing from the indictment that there was any intention to secure the conviction of defendant for the crime thus committed subsequent to the breaking and entering: *State v. Phipps*, 64 N.W., 410.

It does not render an indictment for robbery objectionable that it charges that defendant was armed with a dangerous weapon with intent, if resisted, to kill or maim his victim; the allegation as to being armed is proper to bring the case under the provisions of § 4754. The allegations as to the intent may be treated as surplusage: *State v. Callahan*, 65 N.W., 150; *State v. Osborne*, 65 N.W., 159.

It being made criminal to run a steam engine over a highway bridge without supplying additional planking, the offense is committed when the engine is thus run over one bridge, and to charge such running over two or more bridges is to charge more than one offense: *State v. Orr*, 89–613.

Objection for duplicity, when raised: The court should, on application, allow the defendant to withdraw his plea of not guilty for the purpose of making objection to the indictment on the ground of duplicity. Indeed there would be no impropriety, it seems, in requiring an election to be made in such case, without the plea being withdrawn: *State v. Abrahams*, 6–117.

And *held*, that where one of the counts was dismissed before the introduction of any evidence, and the plea of guilty entered as to the remaining count, the defect in the indictment was cured and the defendant properly convicted: *State v. Buck*, 59–382.

Objection to the indictment on the ground of duplicity cannot be raised for the first time in the supreme court: *State v. Henry*, 59–391; *State v. Callahan*, 65 N.W., 150.

Separate counts: A defendant cannot be charged with two distinct offenses in a single count. In felony, if two or more distinct offenses are contained in the same indictment, though in different counts, it may be quashed or the prosecutor compelled to elect on which charge he will proceed; but such election will not be required to be made where several counts are introduced solely for the purpose of meeting evidence as it may transpire, the charges being substantially for the same offense: *State v. McPherson*, 9–53.

After the jury has returned a verdict of guilty on one count and not guilty on others: and a motion for arrest of judgment and a new trial, based, among other things, upon this alleged misjoinder of offenses, has been overruled, and there is nothing to show on appeal that the several counts relate to separate transactions, the objection on that ground will not be sustained: *Ibid.*

Where one indictment consists of two portions, each constituting a full and complete charge of an offense different from that stated in the other, it may be considered as containing two counts, although the two portions are not designated as such: *State v. Dow*, 73–587.

In charging the same offense in different

forms the pleader is not compelled to use alternative forms of expression: *State v. Watrous*, 13-489.

An indictment charging the same transaction in different forms in separate counts is not objectionable for duplicity: *State v. Brannon*, 50-372; *State v. House*, 55-466.

Dismissal of one count of the indictment where two or more counts are properly joined, as here authorized, does not eliminate such count from the indictment, and if the date of the transaction referred to in the different counts is therein stated such statement will be sufficient under § 5290, although not made in the count on which defendant is put on trial: *State v. Gaston*, 65 N.W., 415.

Where it is charged in one count for murder that the offense was committed with a certain knife, and in another that it was committed with a certain sharp instrument, to the grand jury unknown, it is not necessary that the counts be charged in the alternative, it being clear from the language that but one offense is sought to be charged: *State v. Dillon*, 74-653.

Requiring prosecution to elect: Where an indictment is not otherwise assailed for charging distinct crimes, the prosecutor ought to be required to elect upon which charge he will proceed: *State v. Fidment*, 35-541.

Different violations of ordinances: It may be provided in an ordinance that any number of violations may be included in one prosecution: *Eldora v. Burlingame*, 62-32.

Continuing offenses: In an indictment for retailing intoxicating liquors by the dram, any number of acts may be charged without constituting duplicity, the offense being a continuing one: *Zumhoff v. State*, 4 G. Gr., 526.

Under an ordinance making each separate unlawful sale of intoxicating liquor an offense, *held*, that an information charging the sale of liquor to persons unknown was not bad for duplicity, as it, in effect, charged one sale to several persons jointly: *State v. King*, 37-462.

While the offense of keeping intoxicating liquors for sale is a continuing one and any number of acts may be charged in the indictment therefor without rendering it open to objection, yet if the charge is of keeping the liquors in two distinct places the indictment is bad for duplicity: *State v. Chapman*, 62 N.W., 659.

Various acts constituting same offense: Where a statute contains several things in the alternative, an indictment charging all of them will not be considered as charging more than one offense: *State v. Cooster*, 10-453; *State v. Myers*, 10-448.

So an indictment charging the uttering, passing and tendering, etc., of a counterfeit bill, under § 4858, charges but one offense: *State v. Barrett*, 8-536.

And so *held* in case of an indictment for a nuisance, charging the commission of all the acts of illegally selling intoxicating liquors, keeping the same for sale, etc., etc., within the terms of §§ 2384, 5080: *State v. Dean*, 44-648; *State v. Spurbeck*, 44-667; *State v. Winebrenner*, 67-230.

The prosecution in such cases will not be required to support and cover all the alternative charges with its proof, but only so much as will show that the offense was committed in some of the ways specified: *State v. Cooster*, 10-453.

Under § 4941, providing a punishment for letting a house, knowing that the lessee intends to use it for improper purposes, and knowingly permitting the lessee to use it for such purposes, an indictment charging both the letting and the knowingly permitting the prohibited use is not improper: *State v. Abrahams*, 6-117.

Under § 4822, providing a punishment for maliciously injuring and defacing a building, *held*, that an indictment charging defendant with maliciously injuring and defacing a dwelling was not objectionable for duplicity: *State v. Hockenberry*, 11-269.

Under § 4818, providing for the punishment of any person who shall maliciously kill, maim or disfigure an animal, *held*, that an indictment charging that defendant did maliciously maim and disfigure an animal was not objectionable: *State v. Harris*, 11-414.

Under a statute prohibiting the keeping for sale or the selling of intoxicating liquors, *held*, that an indictment charging both did not charge distinct offenses: *State v. Becker*, 20-438.

Under a statute making it a nuisance to manufacture, sell, or keep with intent to sell, intoxicating liquors contrary to law, either or all of such acts may without duplicity be charged in the same indictment: *State v. Baughman*, 20-497.

Compound offenses: When the same act or transaction at the same point of time constitutes two or more offenses, it is a compound offense, and the different crimes thus committed may be charged in the same indictment under this section; but the two offenses, of breaking and entering with intent to commit larceny, and the crime of larceny alone, cannot be so committed by the same act as to constitute such compound offense: *State v. Ridley*, 48-370; *State v. Rhodes*, 48-702.

In such a case, the crime of breaking and entering with unlawful intent is completely consummated before the larceny is committed: *State v. Ridley*, 48-370.

Burglary is not a compound offense including larceny, and an indictment charging both burglary and larceny is improper, as charging two offenses: *State v. McFarland*, 49-99.

Where an indictment charges breaking and entering with felonious intent, and stealing, the charge of stealing may be regarded as surplusage; and if the case is tried as upon the indictment for the breaking and entering, a conviction thereunder will not be erroneous on the ground of duplicity. It is otherwise where, under such indictment, the defendant is convicted of larceny: *State v. Shaffer*, 59-290.

An indictment charging that defendant feloniously broke and entered a store, with intent, etc., and that he stole, carried away, etc., *held* not objectionable as charging two offenses, the charge as to stealing, etc., being merely surplusage: *State v. Hayden*, 45-11.

The offense of larceny in the nighttime from a dwelling-house, and that of larceny from a dwelling-house in the daytime, are not different offenses from that of larceny, but differ from it only in the circumstances affecting the degree of punishment, and they may be charged in the same indictment: *State v. Elsham*, 70-531.

An indictment charging in one count forgery, and in a second the uttering of the forged instrument, charges two offenses, and is bad. (Overruling *State v. Nichols*, 38-110): *State v. McCormack*, 56-585.

Rape, committed by a man upon a woman who is related to him within the degrees prohibited by § 4936, does not constitute incest, and an indictment charging both offenses is bad for duplicity: *State v. Thomas*, 53-214.

Distinct acts of adultery, committed with different persons, could not be charged in the same indictment, but where different acts of the same person were charged, *held*, that as any such criminal act, committed within the period of limitations, could be proven under an indictment charging but one act of adultery, the allegation that adultery with the person named was committed on divers other days might be rejected as surplusage, and the indictment was not objectionable for duplicity: *State v. Briggs*, 68-416.

See, further, as to surplusage in indictments, § 5290, ¶ 4.

Conviction for included offense: A defendant put on trial for an indictable offense may be convicted of an offense necessarily included therein, although the latter be of such character that it is not indictable, but only triable on information. And such conviction is not in violation of the provisions of art I, § 11, of the constitution: *State v. Jarvis*, 21-44: *State v. Shepard*, 10-126.

Under the provisions of §§ 5406, 5407, a defendant may be convicted of a lower degree of the crime charged in the indictment, or of any offense necessarily included therein: See notes to these sections.

As to reasonable doubt as to the degree of the offense, see § 5377 and notes.

SEC. **5285. Time.** The precise time at which the offense was committed need not be stated in the indictment, but it is sufficient if it allege that it was committed at any time prior to the time of the finding thereof, except where the time is a material ingredient of the offense. [C.'73, § 4301; R., § 4655.]

Time, when not material: That the allegation as to the time of commission of the offense does not bring it within the statutory period of limitation is not a ground of demurrer to the indictment: *State v. Hussey*, 7-409; *State v. Groome*, 10-308; *State v. Deitrick*, 51-467.

It is sufficient if the offense be shown to have been committed at any time within the period of the statute of limitations: *State v. Moore*, 78-494.

It is not material that the time at which the offense is alleged to have been committed should be so charged as to bring it within the statutory period of limitation for the prosecution of the offense. The precise time need only be stated in indictments for acts which were only made criminal at some particular time: *State v. Deitrick*, 51-467.

The time alleged in the indictment need not be proved as laid. Therefore, *held*, that under an indictment for illegal sale of intoxicating liquors, the selling at another time than that claimed in the indictment would support a convicton: *State v. Curley*, 33-359.

Where defendant was charged under several counts with distinct offenses of selling intoxicating liquors on different days specified, *held*, that it was not error to refuse to charge the jury that, to find him guilty as charged in each count, they must find that he sold to the person and at the time therein charged: *State v. Mulling*, 11-239.

In a prosecution for the violation of the intoxicating liquor law time is not a material ingredient, and the precise time need not be stated. Defendant may be convicted for any offense of that description committed within the period of limitation: *State v. Wambold*, 72-468.

Where the prosecution introduced evidence that the crime was committed at the particular time alleged in the indictment, and defendant's evidence was to the effect that he was not at the place where the offense was alleged to have been committed within three or four days of such time, *held*, that the jury were properly instructed that they might convict if they found the crime was committed on another day than that charged, and within the time prescribed by the statute of limitations for the prosecution of the crime: *State v. Bell*, 49-440.

Where an indictment charges that the offense was committed on a day certain, the prosecution may still prove the commission of the offense at a time prior to the day named and within the period of limitation: *State v. Kirkpatrick*, 63-554; *State v. Johnson*, 69-623.

The prosecution may prove the commission of the offense at any time prior to the finding of the indictment and within the period of limitation: *State v. Waterman*, 87-255.

Where the indictment fixes a time within which a nuisance was maintained, evidence of the maintenance of the nuisance during a period prior to the time named, but within the statutory limitation is admissible: *State v. Arnold*, 67 N.W., 252.

Where the statute with reference to punishment for crime is changed, it is not necessary to show in the indictment whether the offense was committed prior or subsequent to such change: *State v. Reylets*, 74-499.

It is not necessary to prove when an offense was committed if time is not a material ingredient of it. But the court should instruct the jury with reference to the necessity of its commission within the period of

limitation. A special plea of the statute of limitations is not necessary to raise such objection: *State v. Whalen*, 68 N.W., 554.

Proof that the criminal intercourse in case of having carnal knowledge of an imbecile female was at a different time than the day fixed in the indictment does not constitute a variance: *State v. Enright*, 90–520.

Videlicet: Where time is immaterial, if alleged under a *videlicet*, it need not be proved, and a repugnance between the allegations under the *videlicet* and other portions of the indictment will not vitiate it. If time is material, even though it be alleged under the *videlicet*, it is conclusive and traversable, and if repugnant to the premises will vitiate the indictment: *State v. Freeman*, 8–428.

Continuing offenses: An indictment charging a nuisance as committed "on or about" a day specified is sufficient as to time: *Cokely v. State*, 4–477.

In an indictment for a continuing offense, such as keeping a nuisance, no particular day need be alleged, but the doing of the prohibited act may be laid with a *continuando*. If so alleged, the trial will prevent another prosecution for the act charged at any time previous to the finding of the indictment: *Our House v. State*, 4 G. Gr., 172.

While the proof of the commission of an offense is not usually limited to the specified time or date charged in the indictment, yet where in two indictments for the crime of nuisance in keeping a place for the illegal sale of intoxicating liquors the time was so charged that it appeared that one offense law fixing the penalty for such offense, and that the other was committed subsequently to such time, *held*, that an acquittal under the latter indictment would not bar a prosecution under the former: *State v. Webber*, 76–686. was committed prior to the amendment of the

Time material: While the time is not material, yet where the offense of selling intoxicating liquors on a certain day was alleged and defendant pleaded guilty, *held*, that the time thus specified would determine the law under which the court was authorized to act, the law as to method of trial having been changed previously to the time alleged for the commission of the offense: *State v. Rollet*, 6–535.

While the allegation of the day upon which the offense was committed is not usually material, yet if, in an indictment for perjury, it is alleged that the oath was administered by a certain person as an officer before the date when, by law, he became entitled to enter upon the discharge of the duties of his office, the time will be deemed material and the indictment bad: *State v. Phippen*, 62–54.

Where the evidence tends to show the commission of the crime at different times so that it appears that the evidence relates to different acts, the state should be required at the close of its evidence to elect as to which act it will rely upon for conviction: *State v. Hurd*, 70 N. W., 613.

See, further, § 5289, ¶ 4.

As to limitation of prosecution for crime, see §§ 5163–5168 and notes.

SEC. **5286. Name of person injured.** When an offense involves the commission of or an attempt to commit an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured or attempted to be injured is not material. [C. '73, § 4302; R., § 4656.]

Name of person injured: Under the provisions of this section neither the name of the party injured, as used in the indictment, nor a name having the same sound, need necessarily be proved: *State v. Emeigh*, 18–122.

And *held* that an indictment, under § 4837, for stealing from the person certain property, in which the property was charged to be that of the party from whose person it was stolen, while the proof showed it to belong to him and another jointly, was sufficient: *State v. Cunningham*, 21–433.

Where, in an indictment for resisting an officer, the name of the officer was misstated, *held*, that an erroneous allegation respecting the name of the person injured was not material, and a variance was not fatal: *State v. Flynn*, 42–164.

Where an indictment for robbery incorrectly stated the name of the person alleged to have been robbed, *held*, that a conviction of defendant thereunder was not improper: *State v. Carr*, 43–418.

In an indictment for the illegal sale of intoxicating liquors it is not necessary to set out the names of the persons to whom the liquor was sold: *State v. Becker*, 20–438.

Under an information charging sales of intoxicating liquors to persons unknown, *held*, that proof of a sale to one person did not constitute a variance: *State v. King*, 37–462.

A misnomer of the person assaulted will not render an indictment for assault with intent to kill fatally defective, it appearing that defendant was in no way prejudiced by such mistake: *State v. Crawford*, 66–318.

Misnomer of the deceased in an indictment for homicide will not be fatal: *State v. Windahl*, 64 N.W., 420.

Where, in an indictment for embezzlement, the name of the corporation whose property was alleged to be embezzled was erroneously stated, by reason of using the word "railroad" therein in place of railway, *held*, that such slight error was immaterial: *State v. Goode*, 68–593.

A mistake in stating in the conclusion of the indictment the name of the person injured, *held* not material, his name being correctly stated in the charging part: *State v. McCunniff*, 70–217.

An erroneous allegation as to the ownership of the building in burglary is not material when the crime is in other respects described with sufficient certainty: *State v. Emmons*, 72–265.

Idem sonans: Where the orthography of an indictment composes a name which by the

ordinary rules of pronunciation produces a different sound from the true one, the two names will not be considered equivalent: *Donnel v. United States*, Mor., 141.

Variance as to name: In an indictment for bigamy charging the second marriage to have been with "Jane Jaco," while the proof showed the name of the person to have been "Jane Frances Jaco," *held*, that there was no variance: *State v. Williams*, 20–98.

The offense of injuring and defacing a building was charged as committed with reference to a building known as "National Hall" in a certain town. *Held*, that this sufficiently described the offense so that if the ownership of the building was erroneously stated to be in a corporation the variance was not fatal: *State v. Semotan*, 85–57.

Where the ownership was charged as being in certain persons as receivers of a certain railroad, *held*, that a mistake in the name of one of the receivers was immaterial: *State v. Hall*, 66 N. W., 725.

Where the name of the owner of a building broken into is given while the proof shows that such person is in possession and occupancy thereof while the title is in another, such evidence will not constitute a variance: *State v. Lee*, 64 N. W., 284.

Variance between the allegation and proof as to the ownership and occupancy of the building under an indictment for breaking and entering is not material, the building being otherwise described with sufficient certainty: *State v. Porter*, 66 N. W., 745.

The description of a store in an indictment for breaking and entering a store building as the "Grange store," *held* sufficient, it appearing that the building was usually known by this name and therefore that the defendant could not have suffered any prejudice for lack of a more definite description: *State v. Jelinek*, 64 N. W., 259.

SEC. **5287. Construction.** The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning. [C.'73, § 4303; R., § 4657.]

In a prosecution for seduction, an indictment charging the seduction of "Mary E. Starner, being then and there an unmarried female of previously chaste character," *held* sufficient to indicate that the charge had reference to the seduction of a woman: *State v. Hemm*, 82–609.

SEC. **5288. Words of statute.** Words used in a statute to define a public offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used. [C.'73, § 4304; R., § 4658; C.'51, § 2919.]

Following statutory definition: An indictment under a statute is sufficient if it follows the language of the statute: *State v. Seamons*, 1 G. Gr., 418; *State v. Chambers*, 2 G. Gr., 308; *Romp v. State*, 3 G. Gr., 276; *State v. Brewer*, 53–735; *State v. Toombs*, 79–741.

If the indictment charges the crime substantially in the words of the statute, or in language equivalent thereto, it is sufficient: *Buckley v. State*, 2 G. Gr., 162; *Munson v. State*, 4 G. Gr., 483.

An indictment under a statute is sufficient if it substantianlly embodies the langage employed by the statute: *State v. Blair*, 92–28.

An information in the language of the statute, so far as is necessary to constitute the offense, is sufficient: *State v. Snow*, 81–642.

Where the statute uses descriptive language to define a public offense, that language must be followed or words of the same meaning must be used: *Fouts v. State*, 4 G. Gr., 500.

While it is not necessary that the indictment should follow the very language of the statute, it should charge the facts and circstances constituting the offense in substantial compliance with the statute: *Reddan v. State*, 4 G. Gr., 137.

If the statute contains evident tautology, or terms some of which necessarily include the others, it is not essential that all be used. It is sufficient if the indictment fully describe the offense: *United States v. Lapoint*, Mor., 146.

The substance of the statutory definition must be contained in the indictment: *United States v Dickey*, Mor., 412.

The words used must have the same substantial meaning and import as those used in the statute, and the material facts which constitute the offense must be stated with such a degree of certainty and in such a manner as to enable a person of common understanding to know what was intended and the court to pronounce judgment upon a conviction according to the law of the case: *State v. Allen*, 32–491.

Therefore, where an illegal sale of liquor was charged, *held*, that the name of the person to whom the sale was made should have been stated, although the statute simply provided for the punishment of any person selling or giving liquor "to another person:" *Ibid.*

Ordinary language, if a person of good understanding may know thereby what is intended, is sufficient: *State v. Stanley*, 33–526.

The facts constituting a public offense must be charged in the indictment, and when a statute creating such offense describes it in general terms constituting a legal conclusion, the indictment must specifically describe the offense so as to bring it within the legal conclusion: *State v. Brandt*, 41–593, 607.

As to whether, in a prosecution of a public officer for loaning public money, an indictment stating that defendant "loaned" a certain sum of money "without authority of law," etc., was too general, and should have stated the person to whom the money was loaned, the court was equally divided: *Ibid.*, 609, 617.

An indictment following the statute, and using the language there employed in defin-

ing the offense of unlawfully exposing a child with intent to abandon it, *held* sufficient: *State v. Smith*, 46-670.

Where an offense is created by statute, it is sufficient to charge it in the words of the statute, unless the words used are such that they do not necessarily charge the offense. Therefore, *held*, that an indictment charging that defendant did "seduce and carnally know and debauch" was sufficient, without charging the means employed in the seduction: *State v. Curran*, 51-112.

Language in a particular case *held* sufficiently equivalent to that used in the statute in describing the offense of misconduct in office by public officers: *State v. Conlee*, 25-237.

See, further, notes to next section.

Exception or proviso: It is only necessary to negative an exception when it occurs in the same clause of the act which creates the offense: *Romp v. State*, 3 G. Gr., 276.

It is only necessary that the indictment should negative exceptions made in the enacting clause. Matters of exception contained in a subsequent act need not be negatived, but must be pleaded and proven by defendant if relied on as a defense: *State v. Beneke*, 9-203.

An exception in the purview of an act must be negatived in pleading, but a proviso need not, though found in the same section, if it is not referred to in and engrafted upon the enacting clause: *State v. Stapp*, 29-551.

Therefore under a former statutory provision that the prohibition of the sale of intoxicating liquors should not apply to wine from fruit grown in the state, etc., *held*, that an indictment for illegal sale of liquor need not allege that it was not made from native fruit: *Ibid.; State v. Curley*, 33-559; *State v. Miller*, 53-84.

Where a criminal offense is created by statute no presumption arises of an intention to render any person liable not clearly within the provisions of the statute. But if the statute is simply declarative of a common law offense, and limitations are annexed as to the persons to be prosecuted or the manner of prosecution, one claiming exemptions from its penalty must show himself clearly within its limitations: *State v. Roth*, 17-336.

If provisos and exceptions are contained in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions or to negative the provisos it contains: *State v. Williams*, 20-98.

Therefore, *held*, that an indictment for bigamy need not negative the absence of defendant's former husband or wife for the statutory period, etc., stated in a subsequent section of the statute as an exception: *Ibid.*

The burden of proving an exemption under a proviso rests upon the party claiming it: *Sayre v. Wheeler*, 31-112.

Section applied: *State v. Waite*, 70 N. W., 596.

SEC. **5289. What indictment must show.** The indictment is sufficient if it can be understood therefrom:

1. That it was found by a grand jury of the county impaneled in the court having authority to receive it, though the name of the court is not actually stated;

2. That the defendant is named, or if his true name is unknown to the grand jury, such fact is stated, and that he is described by a fictitious name;

3. That the offense is triable within the jurisdiction of the court;

4. That the offense was committed prior to the time of the finding of the indictment;

5. That the act or omission charged as the offense is stated in ordinary and concise language, with such certainty and in such manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to law upon a conviction;

6. That, when material, the name of the person injured or attempted to be injured be set forth when known to the grand jury, or, if not known, that it be so stated in the indictment. [C.'73, § 4305; R., § 4659; C.'51, § 2916.]

Court and county: An indictment improperly naming the court, or failing to state the term thereof, is not subject to demurrer on either ground: *State v. Schill*, 27-263.

The indictment must show on its face that the offense which it charges is triable at the court to which it is returnable: *State v. Mahan*, 81-121.

Therefore, when the indictment in a prosecution for adultery (§ 4932) shows that defendant was married at the time the prosecution was commenced, it should allege that it was commenced on the complaint of the husband or wife: *Ibid.*

Is is not necessary to negative an exception made in a criminal statute, unless it adds a qualification to bring the case within it which but for the qualification would be without it: *Ibid.*

A mistake in the name of the state, or in the spelling of the name of the county, will not vitiate the indictment: *State v. Gurlock*, 14-444.

Where the county and state are named in the margin at the commencement of the indictment, and the county is referred to as "said county," and the indictment avers that the grand jurors were duly selected, impaneled and sworn, the indictment sufficiently shows that it was found by a legal grand jury: *Zumhoff v. State*, 4 G. Gr., 526.

Where an indictment charged the keeping of a certain building as a nuisance on a certain date and on divers other days and

times between that date and the finding of the indictment, and then stated that "the building is situated in Franklin county, Iowa," *held*, that the indictment alleged with sufficient certainty that the offense was committed in Franklin county: *State v. Jacobs*, 75–247.

Name of defendant: It is only where the defendant's name cannot be discovered that the state is permitted to describe him by a fictitious name, with the statement that his name is unknown. The description of the defendant as "a man in Turner Hall whose name to the grand jury is unknown," *held* not sufficient: *Geiger v. State*, 5–484.

Where defendant answers that he is indicted in his right name, he cannot, after trial, object that he is not properly named. So *held* where, in the same indictment, defendant was designated by different names: *State v. White*, 32–17.

If misnomer is not taken advantage of on arraignment, it cannot afterward be raised, and will be waived: *State v. Winstrand*, 37–110.

Where the indictment named the defendant George M. Bowman, while George J. Bowman was arrested and put on trial, *held*, that the jury were properly directed to consider the guilt of the person on trial, although there was another person named George M. Bowman: *State v. Bowman*, 78–519.

In a particular case, *held*, that the name of the person injured was sufficiently shown by the indictment: *State v. Shinner*, 76–147.

As to giving true name on arraignment, see §§ 5315–5317.

Venue: In an indictment for retailing intoxicating liquors by the dram, *held*, that it was sufficient to state the crime as committed within the county, without specifying the particular premises or the city or town within which the act was done: *Zumhoff v. State*, 4 G. Gr., 526.

In an indictment for the illegal sale of liquors it is not necessary to describe the specific location of the building where the sale was made: *State v. Becker*, 20–438.

An indictment commencing "The grand jury of the county of Dubuque, in the name, etc., of the state of Iowa," charging the burglarious entering, etc., of a house "*there situate*," *held* to sufficiently lay the venue in Dubuque county: *State v. Reid*, 20–413.

While it would be better practice to allege the venue by express averments in the body of the indictment, yet if the words used are such that by reference to the caption it can be understood that the crime was committed within the jurisdiction of the court, the indictment is sufficient: *State v. Salts*, 77–193.

An indictment for larceny corresponding to the form contained in § 5281, charging the offense as committed "in the county aforesaid," *held* sufficiently specific as to the venue of the crime: *State v. Lillard*, 59–479.

An indictment in the form specified by § 5281 sufficiently charges the offense as having been committed in Iowa: *State v. Winstrand*, 37–110.

Under an indictment for bigamy, alleging that the void marriage was celebrated at a particular place, *held*, that a finding of such marriage anywhere within the same state would support the allegations of the indictment. The allegation as to the place of marriage not being essential as a jurisdictional matter, or as establishing the specific character of the offense, need not be proved as laid: *State v. Nadal*, 69–478.

An indictment alleging the commission of the offense at a time subsequent to the finding of the indictment is invalid. An indictment is not sufficient which states an impossible time: *State v. Smith*, 88–178.

Time: See § 5285 and notes.

Naming the offense: An indictment which sufficiently describes the offense charged will be good although the offense is not named therein: *State v. Hessenkamp*, 17–25; *State v. Baldy*, 17–39.

An indictment properly describing the offense will be sufficient without naming it, but naming the offense without stating the facts constituting it will not be sufficient. If the facts are properly stated, a wrong name will not vitiate the indictment, but will be mere surplusage: *State v. Shaw*, 35–575; *State v. Davis*, 41–311.

Under an indictment charging the commission of a crime defendant may be convicted on proof of having aided or abetted in its commission, and evidence of a conspiracy to commit a crime in which defendant participated and which was carried out by the others is admissible: *State v. Munchrath*, 78–268.

Requisites; statement of facts: An indictment must state facts constituting an offense in language direct and certain as to the circumstances which are necessary to show a crime punishable by law. It cannot be aided nor its omissions supplied by construction: *State v. Potter*, 28–554; *State v. Chicago, B. & P. R. Co.*, 63–508.

Where the acts charged are such that they are lawful under certain circumstances, it is not sufficient to charge that they were unlawfully done, but the existence of the facts showing the acts to be unlawful must be alleged: *State v. Chicago, B. & P. R. Co.*, 63–508.

The facts constituting the offense must be charged in the indictment, and when the statute defining such offense describes it in general terms, constituting a legal conclusion, the indictment must specifically describe the offense so as to bring it within the legal conclusion: *State v. Brandt*, 41–593, 607.

The offense charged in the indictment is determined by the statement of facts therein, and not by the designation given to the offense in the caption: *State v. Wyatt*, 76–328.

The conclusion of the indictment cannot be considered to help out the charging part where the latter is defective: *State v. Andrews*, 84–88.

Description of the offense: It is sufficient to describe the offense in such a manner as to enable a person of common understanding to know what is intended and the court to pronounce judgment: *State v. Hockenberry*, 30–504; *State v. Close*, 35–570.

The technical exactness of the common law as enforced in criminal prosecutions,

whereby many guilty persons escaped the just penalty due their crimes, and which justly became the reproach of that system of jurisprudence, has been wisely superseded in this state by statutory provisions. *State v. Thompson*, 19–299; *State v. Johnson*, 26–407.

So, if the proof offered in support of the charge in an indictment is such as would not mislead a person of common understanding, it is competent: *State v. Thompson*, 19–299.

Ordinary language is sufficient, if a person of common understanding may know therefrom what is intended: *State v. Stanley*, 33–526.

An indictment is sufficient which is intelligible to a person of ordinary understanding: *Bayard v. Baker*, 76–220.

The technical exactness of the common law as to indictments is not required. It is sufficient that the language used is such as to enable a person of common understanding to know what is intended: *State v. Caffrey*, 62 N.W., 664.

Matter of defense need not be negatived in the indictment: *State v. Williams*, 70–52.

Only such facts need be stated in the indictment as are required to be proved on the trial: *Nash v. State*, 2 G. Gr., 286, 294.

If the act is charged to have been against the statute it need not be charged to have been done unlawfully: *Ibid.*

In the case of a misdemeanor, where the facts related in the indictment appear to have been unlawful, it is not necessary to allege them to have been unlawfully done: *Capps v. State* 4–502.

In a prosecution for illegal voting, the indictment need not state the date of the general election at which the crime is alleged to have been committed, nor what officers were to be voted for at such election: *State v. Minnick*, 15–123.

In charging a threat to kill, the fact may be stated without setting out the words used: *State v. O'Mally*, 48–501.

An indictment for larceny of bank-bills, stating that their number and denominations are unknown, is sufficient: *State v. Hoppe*, 39–468.

A description of property in an indictment for larceny as "$180 in bank bills usually known and described as greenbacks," *held* sufficient: *State v. Hockenberry*, 30–504.

Where an information charged the illegal sale of beer, *held*, that the quantity sold was immaterial and need not be alleged: *State v. King*, 37–462.

Under an indictment for illegal sale of intoxicating liquors, *held* that, the sum for which the illegal sale was made being immaterial, uncertainty in stating such amount would not render the indictment bad: *Clare v. State*, 5–509.

It is not necessary in an indictment for rape to charge that the act was feloniously done where it appears that the assault was unlawful and felonious and that the act was by force and against the will of the person injured: *State v. Casford*, 76–330.

In an indictment for larceny, *held*, that it was not necessary to allege the act as felonious, nor to use the words "then and there" in the averment of the ownership of the property, nor to charge an intent to convert the property to defendant's use and deprive the owner thereof: *State v. Griffin*, 79–568.

Where the indictment charged embezzlement, alleging authority given to defendant as agent to sell certain property to a particular person, *held*, that evidence showing a general authority to sell to any one did not constitute a variance, there being some evidence of the special authority as alleged in the indictment: *State v. Foley*, 81–36.

It is not necessary in case of statutory exceptions for the indictment to show that the accused does not come within the provisions of the exception: *State v. Conable*, 81–60.

The use of the word "felonious" in charging a crime is not essential. Therefore *held*, that under an indictment for rape there might be conviction for assault and battery or assault alone although the indictment for rape did not charge a felonious assault: *State v. Hutchinson*, 64 N.W., 610.

In an indictment for receiving stolen goods it is not necessary to name the person of whom the goods were received: *State v. Feuerhaken*, 65 N.W., 299.

A technical error or omission in setting out the facts necessary to constitute an offense does not render the proceeding under an indictment void: *In re Rowe*, 77 Fed., 161.

In an indictment for adultery it is sufficient to charge that the name of the person with whom the act of adultery was committed was to the grand jury unknown, if that was the fact: *State v. Ean*, 90–534.

Arabic figures: The use of Arabic figures in place of words in an indictment will not vitiate it: *Winfield v. State*, 3 G. Gr., 339.

Numeral figures with the prefix A. D. are a sufficient statement of the year: *State v. Seamons*, 1 G. Gr., 418.

Deadly weapons: Where an indictment charges an assault as committed with different weapons described as deadly, it is immaterial whether it be proven that defendant used one or all of such weapons: *State v. McClintock*, 1 G. Gr., 392.

Under a statute prescribing punishment for assault with a deadly weapon, *held*, that no other description of the weapon used was essential: *State v. Seamons*, 1 G. Gr., 418.

See, further, notes to §§ 5280–5288, inclusive.

Description of property: Ordinary certainty in the description of property involved is required. So *held* in a proceeding against a building as constituting a nuisance: *Norris' House v. State*, 3 G. Gr., 513.

An indictment for maintaining a nuisance which charged that defendant did unlawfully establish, keep, use and maintain a certain building and place in which he owned and kept intoxicating liquor with intent to sell and give the same away in violation of law, and did at the aforesaid times and places so unlawfully sell and give away such intoxicating liquor, *held* to sufficiently charge the keeping of the place where the forbidden acts were done: *State v. Price*, 75–243.

An indictment for breaking into a store building, *held* sufficient to describe the building as the "Grange store": *State v. Jelinek*, 64 N. W., 259.

Name of owner of property: An indict-

ment, under § 4829. for trespass in cutting down trees and carrying away the timber, which fails to set out the name of the owner of the land on which the alleged trespass is committed, is properly demurrable: *State v. McConkey*, 20–574.

The name of the owner of the building should be set out in an indictment charging the breaking and entering thereof with intent to commit a felony, under § 4791. If the name of the owner is unknown it should be so stated: *State v. Morrissey*, 22–158.

In an indictment, under § 4802, for malicious injury to a church building belonging to an unincorporated association, the ownership of the property may be alleged as in the persons holding it in trust for such association. The character of the title or interest of such persons need not be set out: *State v. Brant*, 14–180.

Where the indictment stated only the initials instead of the full Christian name of a person in possession of a house in which the crime of burglary was alleged to have been committed, *held*, that the substantial rights of the defendant were not prejudiced by refusal of the court to charge that defendant was entitled to an acquittal: *State v. Short*, 54–392.

Where the indictment charged the larceny of goods from a railroad company, naming it, belonging to parties to the grand jurors unknown, *held*, that the indictment was sufficient: *State v. McIntire*, 59–264; *State v. McIntire*, 59–267.

It does not render an indictment defective that in describing a dwelling-house it describes it as belonging to the estate of a person deceased: *State v. Franks*, 64–39.

Section applied: *State v. Eifert*, 65 N.W., 309; *State v. Caywood*, 65 N.W., 385; *State v. Clark*, 69 N.W., 257.

SEC. **5290. Immaterial matters.** No indictment is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of any of the following matters:

1. For the want of an allegation of the time or place of any material fact, when the time and place have been once stated;

2. For the omission of any of the following allegations, namely, "With force and arms," "Contrary to the form of the statute, or of the statutes," or "Against the peace and dignity of the state";

3. For the omission to allege that the grand jury was impaneled, sworn or charged;

4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged;

5. For any other matter which was formerly deemed a defect or imperfection, but which does not tend to prejudice the substantial rights of the defendant upon the merits. [C.'73, § 4306; R., § 4660; C.'51, § 2920.]

Time and place: An indictment for a nuisance committed by keeping a place for the sale of intoxicating liquors is good without averments describing the *locus* of the offense. It might be necessary to describe the property particularly if an order of abatement is desired: *State v. Waltz*, 74–610.

The particular street incumbered or obstructed is not a material fact in a prosecution for obstructing a highway: *State v. Finney*, 68 N.W., 568.

In an indictment for maintaining a nuisance it is not necessary to specifically describe the place: *State v. Arnold*, 67 N.W., 252.

Where the allegation and the proof as to the date of an instrument alleged to have been forged varied, but the variance was not such as could have misled defendant to his prejudice, *held*, that the variance was immaterial: *State v. Blanchard*, 74–628.

Where a year has been stated in one count a subsequent count not stating the year will not be defective on that ground although the charge under the prior count is dismissed and the prosecution elects to rely entirely on the subsequent count: *State v. Gaston*, 65 N.W., 415.

See, further, § 5285 and notes as to allegations as to time; and § 5289 and notes as to allegations as to venue of the offense.

Surplusage: Where a defective averment may, without detriment to the indictment, be wholly omitted, it may be considered as surplusage and disregarded. It is only an inconsistency in the material allegations that will vitiate the indictment: *State v. Freeman*, 8–428.

An unessential portion of the indictment may be rejected as surplusage, if without it the allegations are sufficient to charge the offense: *State v. Ormiston*, 66–143.

Where a portion of the indictment might have been omitted without vitiating it, such portion may be considered as surplusage, and its insertion will not render the indictment defective: *State v. Ansaleme*, 15–44.

Where an information for illegal sale of liquors charged the selling and giving, *held*, that although the giving was not punishable, the charge was sufficient, and the allegations as to the giving would be treated as void and not affecting the information: *State v. Finan*, 10–19.

Words in a particular case *held* to be surplusage: *State v. Schilling*, 14–455.

Where an information charges two classes of nuisances, one of which is punishable under an ordinance under which the prosecution is commenced, and the other is not thus punishable, the allegations as to the latter will be deemed surplusage, and will not af-

fect the charge of the offense which is within the jurisdiction of the court to punish upon the information: *Eldora v. Burlingame*, 62–32.

Where, in an indictment for embezzling the funds of a corporation, it was alleged that defendant was over sixteen years of age, that fact not being material in case of embezzlement by the agent of a corporation, *held*, that the allegation was surplusage and might be disregarded: *State v. Goode*, 68–593.

Where the facts charged constitute an offense, the giving of a wrong name thereto will not invalidate the indictment. The name will be considered surplusage: *State v. Shaw*, 35–575.

Where the indictment will be sufficient without the defective averment contained therein, such averment may be disregarded. So *held* where there was an allegation of a possible date and in connection therewith the statement of an impossible date, due to a clerical error: *State v. Brooks*, 85–366.

In a prosecution for adultery it was charged that the woman with whom defendant had sexual intercourse was over eighteen years of age, *held*, that this fact, being immaterial, need not be proven as alleged: *State v. Ean*, 90–534.

An information for the seizure of intoxicating liquors on the ground that they were to be sold in violation of law stated that they were "intended to be sold in violation of the provisions of chapter 6, Code of Iowa," there being many chapters of that number in said Code; *held*, that the information was defective, and that although the allegation that the liquors were intended to be sold in violation of law would have been sufficient, the other portions of the indictment could not be rejected as surplusage: *State v. Thompson*, 44–399.

As to duplicity in indictments, see § 5284 and notes.

As to description of the offense and naming defendant, see notes to § 5289.

Statutory modifications: The constitutional provision requiring an indictment on which to put defendant on trial for a crime does not make it necessary that such indictment shall conform in every particular to the requirements of the common law, but such requirements may be modified by statute: *State v. Bevans*, 37–178.

But the leading requisites of an indictment at common law are not dispensed with by statute: *State v. Callendine*, 8–288.

Defects not cured: The prosecuting attorney cannot, by making specifications after arraignment upon indictment, cure a defect therein consisting in a want of particularity as to the acts constituting the crime: *United States v. Ross*, Mor., 164.

A mere clerical error which can be discovered and corrected by a casual reading of the indictment itself will not render it fatally defective: *State v. Crawford*, 66–318.

Immaterial defects: In general, under the provisions of this section, the proceedings upon an indictment are not to be affected by any defects therein not tending to the prejudice of the substantial rights of the defendant upon the merits: *State v. Gurlock*, 14–444; *State v. Emeigh*, 18–122; *State v. White*, 32–17.

Charging the offense as committed in one county, and proving it to have been committed in an adjoining county within five hundred yards of the boundary line, does not tend to prejudice the substantial rights of defendant on the merits: *State v. Pugsley*, 75–742.

Defects not tending to prejudice the substantial rights of the defendant upon the merits will not be considered: *State v. Casford*, 76–330.

SEC. **5291. Presumptions — judicial notice.** Neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment. [C.'73, § 4307; R., § 4661; C.'51, § 2921.]

Under an indictment for an assault with a deadly weapon, charging the assault was made by throwing an axe, *held*, that the court would take judicial notice of the fact that an axe used in such a manner was a deadly weapon, although such fact was not averred: *Dollarhide v. United States*, Mor., 233.

In a prosecution for illegal voting the indictment need not state the date on which the general election was held, nor what officers were to be voted for at such election: *State v. Minnick*, 15–123.

SEC. **5292. Pleading judicial proceedings.** In pleading a judgment or other determination of or proceeding before a court or officer of special jurisdiction, the facts conferring jurisdiction need not be stated in the indictment. It is sufficient to state that the judgment or determination was duly made, or the proceedings duly had, before such court or officer; but such jurisdictional facts must be established on the trial. [C.'73, § 4308; R., § 4662; C.'51, § 2922.]

SEC. **5293. Pleading private statute.** In pleading a private statute or right derived therefrom, it is sufficient to refer to the same by its title and the day of its approval, and the court must thereupon take judicial notice thereof. [C.'73, § 4309; R., § 4663; C.'51, § 2923.]

SEC. **5294. Indictment for libel.** An indictment for a libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter upon which the indictment is

founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial. [C.'73, § 4310; R., § 4664; C.'51, § 2924.]

For similar provisions in regard to civil actions for libel, see § 3887.

SEC. **5295. Instrument destroyed or withheld.** When an instrument which is the subject of an indictment has been destroyed or withheld by the act or procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial. [C.'73, § 4311; R., § 4665; C.'51, § 2925.]

SEC. **5296. Indictment for perjury.** In an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer the same, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or the authority of the court or person before whom the perjury was committed. [C.'73, § 4312; R., § 4666; C.'51, § 2926.]

Substance of false testimony: An indictment for false statement in a schedule sworn to in a proceeding in bankruptcy should state wherein such statement is false and incorrect: *United States v. Morgan*, Mor., 341.

In an indictment for perjury in testifying before a grand jury it is not necessary to allege that the party charged with the offense under investigation was or was not guilty thereof in order to state the facts constituting such offense: *State v. Schill*, 27–263.

The materiality of the false testimony must be shown by averment in the indictment, but this may be done either by express averment or by the statement of such facts as show its materiality: *State v. Cunningham*, 66–94.

In an indictment for perjury in making a false return to the assessor under oath it must be averred, not only that certain property was withheld from the statement, but also that such property was accessible within the township within which the assessor was authorized to act: *Ibid.*

Jurisdiction and authority of court or officer: It is necessary to aver the jurisdiction and authority of the officer before whom the oath was taken to administer same, but this may be done by express averment that the officer had such right, or by setting out such facts as to make this judicially appear: *Ibid.*

In an indictment for perjury committed before a justice of the peace, it is sufficient to aver, in relation to jurisdiction, that it was at a justice's court, held at the proper time and place, in a cause there tried, and that the justice had sufficient authority to administer an oath, without alleging that the case was within his jurisdiction: *State v. Newton*, 1 G. Gr, 160.

It is sufficient to charge in the indictment that defendant was duly sworn before a court having authority, etc., without alleging that the oath was administered by any one: *State v. O'Hagan*, 38-504.

An indictment not averring that the court or person before whom the oath was taken had authority to administer the same, *held* bad: *State v. Nickerson*, 46–447.

An indictment for perjury is bad which alleges that the oath was administered by one not clothed with authority to administer it: *State v. Phippen*, 62–54.

Therefore where the indictment charged that the oath was administered by a certain person as an officer, but at a time which by law was prior to the time when he was authorized to enter upon the discharge of his duties, *held*, that the indictment was demurrable: *Ibid.*

It is sufficient in an indictment for perjury to allege that the witness was sworn before a court and proof of swearing before an officer of court in the absence of the court will sustain such an allegation: *State v. Caywood*, 65 N.W., 385.

Although the statute (§ 393) does not expressly authorize the administration of an oath by the court, yet the power of the court to administer an oath in proper cases in proceedings before it inheres in the court itself: *Ibid.*

Under an allegation of the administration of the oath by the court it is competent therefore to prove that it was administered by the judge sitting as a court or by the clerk under the direction of the court: *Ibid.*

SEC. **5297. Conspiracy—overt act.** In an indictment for conspiracy, where an overt act is required by law to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged therein. [C.'73, § 4425; R., § 4790; C.'51, § 2996.]

SEC. **5298. Intent to defraud.** In any case where an intent to defraud is required to constitute the offense, it shall be sufficient to allege in the

indictment an intent to defraud, without naming the particular person or body corporate intended to be defrauded, and on the trial of such indictment it is sufficient if there appear to be an intent to defraud the United States or any state, county, city, township, body corporate, officer in his official capacity, copartnership or member thereof, or any particular person. [C. '73, § 4313; R., § 4667; C. '51, § 2927.]

The person intended to be defrauded, or the extent or particulars of the fraud, need not be stated: *State v. Maxwell*, 47–454.

In an indictment for having in possession counterfeit bank bills with intent to defraud, *held* not necessary to state the intent to defraud any person or corporation: *State v. Callendine*, 8–288; *State v. Barrett*, 8–536.

But if the name of the bank intended to be defrauded is mentioned it must be proved as stated: *State v. Newland*, 7–242.

It is not necessary that an indictment for forgery allege the name of the person to whom the instrument was uttered: *State v. Hart*, 67–142.

But in an indictment for the uttering of counterfeit money the name of the person injured must appear, if known, and if not known such fact must be stated: *Buckley v. State*, 2 G. Gr., 162.

Section applied: *State v. Kidd*, 89–54.

SEC. **5299. Principal and accessory.** The distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried and punished as principals. [C. '73, § 4314; R., § 4668; C. '51, § 2928.]

Under this section all persons concerned in the commission of a public offense, including aiders and abettors, are guilty as principals: *State v. Brown*, 25–561; *State v. Thornton*, 26–79; *State v. Stanley*, 48–221.

One who aids and abets is under this section in the same category with one who actually commits the offense: *In re Rowe*, 77 Fed., 161.

Under an ordinary indictment charging the commission of a crime the defendant may be found guilty of aiding and abetting in such commission: *State v. Hessian*, 58–68; *Bonsell v. United States*, 1 G. Gr., 111; *State v. Pugsley*, 75–742.

Two or more may be jointly indicted for a criminal act which is of such nature that it can actually be committed by but one person: *State v. Comstock*, 46–265. And under such indictment one who merely aided and abetted such offense can be convicted: *State v. Munchrath*, 78–268.

Therefore, under an indictment charging several defendants with murder, *held*, that one of them might be convicted thereof upon proof of conspiracy in which he participated, carried out by others of the defendants, although he himself was not present when the crime was committed: *Ibid.*

Where it appeared that defendant charged with murder had participated in a conspiracy for the whipping of deceased under such circumstances that it would have been unlawful, and that in the prosecution of such conspiracy deceased was shot by one of the conspirators, *held*, that defendant was properly convicted of manslaughter, he not being free from liability for the shooting by reason of the fact that the injury done was greater than that intended by the conspirators: *Ibid.*

Whether an accessory after the fact is punishable as principal, *quære*. But it is erroneous to charge the jury in a prosecution for larceny that if the defendant planned, aided or abetted the commission of the larceny, though not present at its commission, then he is equally guilty with the person who committed the larceny; or if after the commission of such act defendant aided, abetted or assisted the person committing the larceny to the disposition of the property secured thereby, then he will be guilty, inasmuch as the assisting in disposing of the stolen property without the knowledge that it is stolen will not render the person guilty either as principal or as accessory: *State v. Empey*, 79–460.

Where an indictment charged the defendant with the crime of murder as principal and the evidence showed that he was guilty as accessory before the fact, *held*, that there was no variance between the indictment and the testimony: *State v. Baldwin*, 79–714.

Where one is put on trial as principal in a murder charged with actual participation in the acts done, and not merely as an accessory before the fact charged as principal, the fact that his co-defendant is convicted of the second degree only will not prevent his trial for the first degree: *State v. Lee*, 91–499.

The effect of this provision is to make the offense of one who would have been at common law an accessory before the fact, substantive and so far independent that he may be indicted, tried and punished, and as a principal, without regard to the prosecution of a person who at common law would have been the principal. The guilt of a person who aids or abets the commission of a crime must be determined upon the facts which show the part he had in it and does not depend upon the degree of another's guilt: *State v. Smith*, 69 N. W., 269.

Therefore, *held*, that although the principal was guilty of assault with intent to commit murder, the accessory might be guilty of assault with intent to commit manslaughter: *Ibid.*

A different rule would prevail if the act done was the result of a conspiracy: *Ibid.*

SEC. **5300. Accessory after the fact.** An accessory after the fact to the commission of a public offense may be indicted, tried and punished, though the principal be neither tried nor convicted. [C.'73, § 4315; R., § 4669; C.'51, § 2929.]

SEC. **5301. Compounding offense.** A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another, or a gratuity or reward, or engagement or promise therefor, upon agreement or understanding, express or implied, to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offense has not been indicted or tried. [C.'73, § 4316; R., § 4670; C.'51, § 2930.]

SEC. **5302. Indictment for embezzlement.** In an indictment for the embezzlement or fraudulent conversion of money, it shall be sufficient to allege the embezzlement or fraudulent conversion to have been of money generally, without designating its particular species; and proof that the defendant embezzled or fraudulently converted any money or bank note will be sufficient to support the averment, although the particular species be not proved. [C.'73, § 4317; R., § 4671.]

CHAPTER 17.

OF PROCESS UPON AN INDICTMENT.

SECTION **5303. Bench warrant.** The process upon an indictment for the arrest of an individual shall be a warrant. [C.'73, § 4318; R., § 4672.]

The issuance of a bench warrant is not essential to give the court jurisdiction of the person of the defendant. If he appear and submit to the jurisdiction a warrant is unnecessary: *State v. Ray*, 50-520.

In the absence of any showing of prejudice or the improper exercise of discretion, it is not error for a judge to send a prisoner to the penitentiary for safe keeping to await his trial: *State v. Porter*, 34-131.

SEC. **5304. Warrant ordered — bail fixed.** When an indictment is filed by the clerk of the court against a defendant not in custody nor under bail, or who has not deposited money instead of bail, the judge of the court shall make an order on the indictment, which shall be signed by him with his name of office, that a warrant issue for the arrest of the defendant, and, if the offense charged be bailable, fix the amount in which bail may be taken. [C.'73, § 4319; R., § 4673.]

SEC. **5305. Issuance of warrant.** The clerk on the application of the county attorney shall at any time after the making of the order of the judge, whether the court be in session or not, issue a warrant into one or more counties. [C.'73, § 4320; R., § 4674.]

SEC. **5306. Form in case of felony.** A warrant, if the offense be a felony, shall be substantially in the following form:

THE STATE OF IOWA, }
County of..... }

To any peace officer in the state:

An indictment having been found in the district court of said county on the ..... day of ....., A. D. .....,(the day on which the indictment is marked filed by the clerk of the court) charging A. B. with the crime of (here designate the offense by the name, if it have one, or by a brief general description of it, substantially as in the indictment).

You are hereby commanded to arrest the said A. B. and bring him before said court to answer said indictment, if the said court be then in session in said county, or if not then in session in said county, that you deliver him into the custody of the sheriff of said county.

Given under my hand and the seal of said court at my office in the county aforesaid, this.....day of.....,A. D.....

.....

[Seal] Clerk.

By order of the judge of the court. [C.'73, § 4321; R., § 4675.]

SEC. **5307. In case of misdemeanor.** If the offense be a misdemeanor, the warrant may be in a similar form, adding to the body thereof a direction substantially to the following effect: "Or, if the said A. B. require it, that you take him before a magistrate or the clerk of the district court in said county, or in the county in which you arrest him, that he may give bail to answer the said indictment," and the clerk must make an indorsement thereon to the following effect: "The defendant is to be admitted to bail in the sum of ..... dollars" (the amount fixed by the judge and indorsed on the indictment). The warrant may be served in any county in the state. [C.'73, §§ 4322–4; R., §§ 4676–8; C.'51, § 2935.]

SEC. **5308. Proceedings as to bail.** If the defendant, when arrested, is brought before a magistrate or the clerk of the district court of any county for the purpose of giving bail, the same proceedings must be had in all respects as if he had been arrested on a warrant of arrest issued by a magistrate on a preliminary information, as nearly as may be. [C.'73, § 4325; R., § 4679.]

SEC. **5309. Process against corporation.** The process on an indictment against a corporation shall be a notice under the seal of the court, which shall be issued by the clerk, at any time after the filing of the indictment in his office, on the application of the county attorney, and shall substantially notify the defendant of the finding of the indictment, of the nature of the offense charged, and that it must forthwith appear and answer the same; it may be served by any peace officer in any county in the state on any officer or agent of the defendant, by reading the same to him and leaving with him a copy thereof, and shall be returned to the clerk's office without delay, with proper return of its service, and from and after two days from the time of the making of such service the defendant shall be considered in court, and present to all proceedings had on the indictment. [C.'73, § 4326.]

This section contemplates that there are some offenses for which corporations may be indicted and punished. It appears to be well settled that a corporation may be indicted and punished for a public nuisance, such as obstruction of the public highway, navigable streams, and the like; and *held*, that the corporation was liable under § 2403 the same as a natural person would be for the penalty there provided for the illegal sale of intoxicating liquors, to be collected for the benefit of the school fund: *Stewart v. Waterloo Turn Verein*, 71-226.

CHAPTER 18.

OF ARRAIGNMENT OF THE DEFENDANT.

SECTION **5310. How soon—waived—corporation.** As soon as practicable after an indictment is found, the defendant must be arraigned thereon, unless he waive the same; but where a corporation is defendant, arraignment shall not be required. [C.'73, § 4327; R., § 4680; C.'51, § 2931.]

Presumption: If the record is silent as to the arraignment it will be presumed that defendant was duly arraigned, or waived arraignment: *State v. Winstrand*, 37-110.

Where it does not appear from the record that defendant has been arraigned and has pleaded, or that he even appeared, the judgment will be reversed on appeal: *Powell v. United States*, Mor., 17.

Waiver: Voluntarily appearing and pleading to an indictment is a waiver of arraignment: *State v. Winstrand*, 37-110.

In a prosecution for larceny where the jury was called, impaneled and sworn and the opening arguments made for state before there had been an arraignment or plea entered, and defendant was afterwards arraigned against his objection and asked time to plead, which was granted and the jury discharged, *held*, that the objection to ar-

raignment was not a waiver of the same by defendant: *State v. Pierce*, 77–245.

While arraignment is essential yet it may be waived. Such waiver need not necessarily be formally made. There may be such acts on the part of defendant as in law should be held to amount to such a waiver: *State v. Thompson*, 64 N. W., 419.

And where it clearly appears that by mutual understanding a time for the trial has been fixed and witnesses on both sides have been subpœnaed, such waiver sufficiently appears: *Ibid.*

The fact that when the court's attention is called to the matter it orders an arraignment of defendant, without allowing him one day to plead as authorized by statute, does not disprove the sufficiency of the waiver of arraignment: *Ibid.*

Misnomer: If misnomer is not taken advantage of on arraignment it cannot afterward be raised, and will be waived: *State v. Winstrand*, 37–110.

Where defendant answers that he is indicted in his right name he cannot, after trial, object that he is not properly named. So *held* where, in the same indictment, the defendant was designated by different names: *State v. White*, 32–17.

As to mental condition of defendant at the time of his arraignment, see § 5540 and notes.

SEC. 5311. Personal presence. A person charged with a felony, or in custody without an attorney, must be personally present for arraignment, but in other cases he may appear therefor by counsel. [C.'73, §§ 4328–9; R., §§ 4681–2; C.'51, § 2932.]

Where the record as to defendant appearing and waiving arraignment was defective, and at a subsequent time was corrected on motion, *held*, that the presence of defendant at the time of said correction was not essential: *State v. Westfall*, 49–328.

A defendant held to appear before the grand jury is not required to be present at the time of impaneling such jury, and will not be in default on his bail bond for failure to appear at that time; his right to challenge is one which may be waived: *State v. Klingman*, 14–404; *State v. Felter*, 25–67; *Ringgold County v. Ross*, 40–176.

The plea of not guilty may be interposed by defendant's counsel in the absence of defendant: *State v. Jones*, 70–505; *State v. Andrews*, 84–88.

Where it does not appear but that the real party charged was present at the trial and identified, the proceeding must be regarded as a trial as to him, although the name of the defendant in the indictment is that of another person: *State v. Bowman*, 78–519.

The failure of the record to show affirmatively that the arraignment was made or waived and plea put in is a mere irregularity not prejudicial to defendant where he is tried on a plea of not guilty: *Ibid.*

Where it is claimed that defendant was arraigned and a plea of not guilty was entered for him in his absence and the showing on the record was conflicting, *held*, that the supreme court would not interfere with the action of the lower court, the fact in dispute having been doubtless within its knowledge: *State v. Andrews*, 84–88.

Although defendant after conviction before the justice, has escaped from custody, yet if on appeal at the time a motion to dismiss such appeal comes on for a hearing, defendant is in court ready to stand trial, it is not error to refuse to dismiss his appeal: *State v. Colby*, 92–463.

As to presence of defendant during trial, see § 5338 and notes; as to his presence at rendition of verdict, see § 5403 and notes: and at pronouncing of judgment, § 5432.

SEC. 5312. If out on bail. If the defendant is at large on bail or deposit of money, and fails to appear for arraignment, or when his personal presence is necessary, the court shall, in addition to the forfeiture of the undertaking of bail or money deposited, enter an order directing the clerk at any time, upon the application of the county attorney, to issue a warrant into one or more counties for his arrest. [C.'73, §§ 4330–1; R., §§ 4683–4; C.'51, §§ 2933–4.]

SEC. 5313. Right to counsel. If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel, and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours. [C.'73, § 4332; R., § 4685; C.'51, § 2936.]

When defendant during the trial dismissed his counsel, and had new counsel appointed by the court to defend him, *held*, that it was not error to refuse a continuance of several days, on the appointment of such new counsel, it not appearing of record that there was any good ground for the dismissal, defendant's guilt being conclusively shown, and his ability to understand his own case being apparent: *State v. House*, 55–466.

Statements of the defendant in open court that he has no means to employ counsel is a solemn admission that may be used against him if that fact becomes material to any issue in the case: *State v. Fooks*, 65–196.

SEC. **5314. Fee for attorney defending.** An attorney appointed by the court to defend a person indicted for homicide, or any offense the punishment of which may be life imprisonment, shall receive from the county treasury a fee of twenty dollars per day for time actually occupied in court in the trial of defendant. If the prosecution be for any other felony, he shall receive the sum of ten dollars in full for services. Such attorney need not follow the case into another county or into the supreme court, but if he does so shall receive an enlarged compensation on a scale corresponding to that fixed by this section. To be entitled to such compensation, the attorney must file with the court his affidavit that he has not directly or indirectly received, or entered into a contract to receive, any compensation for such services from any source. Only one attorney in any one case shall receive such compensation. [17 G. A., ch. 91; C.'73, §§ 3829–31; R., §§ 1578, 4168–70; C.'51, §§ 2561–3.]

An attorney appointed by the court to defend a pauper prisoner may maintain action against the county for compensation for such services although under the statute no provision for such compensation is made. (Overruling *Whicher v. Cedar County*, 1 G. Gr., 217): *Hall v. Washington County*, 2 G. Gr., 473.

The provisions of this section limiting the amount which an attorney shall receive in such cases are not unconstitutional: *Samuels v. Dubuque County*, 13–536.

Where several violations are charged in the same information or indictment, the attorney is entitled to the fee for only one prosecution: *Schulte v. Keokuk County*, 74–292.

The purpose of the statute in permitting the appointment of an attorney for defendant in a criminal case is to enable him to have the assistance of such attorney in making his defense to prevent a failure of justice. If the defense has already been made, there is no reason nor authority for the appointment. Therefore it is not proper on appeal to reverse the action of the lower court in refusing application of defendant for the employment of counsel to prosecute such appeal: *State v. Cross*, 64 N.W., 614.

No duty is hereby imposed upon an attorney appointed to defend a criminal to present the case to the supreme court, but if, in the exercise of his discretion, he does appear there, the statute provides a compensation shall be paid him by the county. The amount of such compensation is not to be what his services would have been reasonably worth in case he had been employed by the county, but an enlarged compensation, graded on a scale corresponding to the prices fixed for a trial in the district court. Therefore, *held*, that an allowance of twenty-five dollars for arguing the case in the supreme court was proper: *Baylies v. Polk County*, 58–357.

The provision as to affidavit must be complied with. It is not sufficient that the affidavit states the claim is just and true: *Ryce v. Mitchell County*, 65–447.

SEC. **5315. Arraignment—by whom and how made.** The arraignment may be made by the court, or by the clerk or county attorney under its direction, and consists in reading the indictment to the defendant, and, unless previously done, delivering to him a copy thereof and the indorsements thereon, and informing him that, if the name by which he is indicted is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment, and asking him what he answers to the indictment. [C.'73, § 4333; R., § 4686; C.'51, §§ 2937–8.]

Where defendant answers that he is indicted in his right name, he cannot, after trial, object that he is not properly named. So *held* where, in the same indictment, the defendant was designated by different names: *State v. White*, 32–17.

SEC. **5316. Giving name.** If he gives no other name or gives his true name, he is thereafter precluded from objecting to the indictment upon the ground of being therein improperly named. [C.'73, § 4334; R., § 4687; C.'51, § 2939.]

If defendant waive arraignment he cannot afterwards object that he is not indicted in his right name: *State v. Winstrand*, 37–110.

SEC. **5317. Entry of true name.** If he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted. [C.'73, § 4335; R., § 4688; C.'51, § 2940.]

SEC. **5318. Answer—time.** In answer to the arraignment, the defendant may move to set aside the indictment, or demur or plead to it, and is

entitled to one day after arraignment, if he demand it, in which to do so. [C.'73, § 4336; R., §§ 4689–90; C.'51, §§ 2941–2.]

It is not error for the court to cause defendant to be arraigned, and to order him to plead forthwith, where it appears that by mutual understanding, even without express agreement, the arraignment has been waived: *State v. Thompson*, 64 N.W., 419.

CHAPTER 19.

OF SETTING ASIDE THE INDICTMENT.

SECTION **5319. Grounds.** The motion to set aside the indictment can be made, before a plea is entered by the defendant, on one or more of the following grounds, and must be sustained:

1. When it is not indorsed "A true bill" and the indorsement signed by the foreman of the grand jury as prescribed by this code;
2. When the names of all witnesses examined before the grand jury are not indorsed thereon; when the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith;
3. When it has not been presented and marked "filed" as prescribed by this code;
4. When any person other than the grand jurors was present before the grand jury when the question was taken upon the finding of the indictment, or when any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law;
5. That the grand jury were not selected, drawn, summoned, impaneled or sworn as prescribed by law. [C.'73, § 4337; R., § 4691; C.'51, § 2943.]

Indorsement: The requirement of § 5274 that the foreman's name be subscribed to the indorsement of "a true bill," is merely directory, and the absence of such indorsement cannot be taken advantage of after conviction, where it otherwise appears that the indictment was properly returned: *Wau-kon-chaw-neek-kaw v. United States*, Mor., 332.

The fact that the indorsement on the indictment is the signature of the foreman with an initial only for his Christian name will not vitiate it where it appears that such initial corresponds with the true name of the grand juror: *State v. Van Auken*, 68 N. W., 454.

The fact that it does not appear that the indictment is indorsed "a true bill," and marked filed by the clerk, cannot be raised for the first time on appeal: *Hughes v. State*, 4–554.

See, further, § 5274 and notes.

Names of witnesses: The objection that the names of witnesses examined before the grand jury are not indorsed on the indictment should be raised in the trial court or it will be regarded as waived: *Harriman v. State*, 2 G. Gr., 270.

Where, in indorsing the name of the witness on the back of an indictment, his title, instead of his Christian name, was used, *held*, that if the witness was as unmistakably described as he would have been by the use of his Christian name, the object of the indorsement was accomplished and no prejudice could result to defendant: *State v. McComb*, 18–43.

Names of witnesses before the grand jury who do not give any material testimony, and the minutes of whose testimony are not returned, need not be indorsed on the indictment: *State v. Little*, 42–51.

Affidavits cannot be received to show that witnesses whose names are not indorsed, and minutes of whose testimony are not returned, were examined before the grand jury: *Ibid.*

This section does not require that the names of witnesses before the grand jury who give no material testimony, and the minutes of whose evidence are not returned, should be indorsed on the indictment: *State v. Levis*, 65 N.W., 295.

Failure to indorse on the indictment the name of the witness examined before the committing magistrate, the minutes of whose evidence have been considered by the grand jury, and returned with the indictment, can be taken advantage of only by motion to set aside the indictment, and not by objection to his evidence: *State v. Beal*, 62 N.W., 657.

It is not error to allow the name of a witness examined before the grand jury to be indorsed on the back of the indictment after the trial jury is called: *State v. Robinson*, 47–489.

That the evidence of an incompetent witness was received by the grand jury is no

reason for setting aside an indictment: *State v. Tucker*, 20-508.

Further, see § 5276.

Minutes of evidence: That the minutes of the evidence returned by the grand jury do not support the indictment is not a ground for setting it aside: *State v. Harris*, 36-268.

The minutes need not be attached to or made a part of the indictment, and a mere failure to file them, if they are properly returned, should not deprive the state of its evidence: *State v. Postlewait*, 14-446.

It is sufficient if the minutes are returned into court and filed with the clerk: *State v. Hamilton*, 42-655.

That they are handed to the clerk and deposited with him sufficiently constitutes a filing: *State v. Guisenhause*, 20-227.

That the minutes include testimony taken in other cases does not necessarily invalidate them: *Ibid.*

If the minutes are returned with the indictment and placed by the clerk in his office they are sufficiently filed, though it would be better for the clerk to indorse them as filed: *State v. Briggs*, 68-416.

Failure of clerk to file the minutes cannot be raised by demurrer: *Ibid.*

Failure to return minutes of the evidence will be immaterial as to evidence not offered on the trial: *State v. Hurd*, 70 N.W., 613.

The minutes required to be returned are those of the evidence of witnesses, and letters and pictures are not included: *Ibid.*

It is not necessary that the minutes returned be in the handwriting of the clerk of the grand jury. If a correct copy of his minutes is attached that is sufficient: *Ibid.*

An indictment cannot be set aside by motion on the ground that it was found on incompetent and insufficient evidence: *State v. Smith*, 74-580.

See, further, § 5373 and notes.

Presentment and filing: The requirement of § 5276 that the indictment must be presented, etc., is directory only, and a failure of the clerk to make the indorsement on the indictment will not invalidate the proceedings (explaining *State v. Glover*, 3 G. Gr., 249): *State v. Axt*, 6-511; *State v. Shepard*, 10-126; *State v. Rivers*, 58-102.

Where defendant moved to strike the indictment from the files because it had been altered by erasure and insertion of other words, *held*, that the affidavits introduced disproved the defendant's allegation: *State v. Hughes*, 58-165.

In the absence of affirmative showing to the contrary it will be presumed that the requirements of § 5276 as to presentment and filing were complied with: *State v. McIntire*, 59-267.

No record of the filing of the indictment, other than the indorsement of the clerk on the indictment itself, need be made, at least not until after the arrest of the accused: *Wrocklege v. State*, 1-167; *Herring v. State*, 1-205.

Indorsements in particular cases *held* sufficient: *Wrocklege v. State*, 1-167; *Dixon v. State*, 4 G. Gr., 381.

It is not essential that the indorsement on the indictment should recite that it was presented by the foreman, in the presence of the grand jury, to the court: *State v. Jolly*, 7-15.

The court should be named in the indorsement, although failure to do so will not be fatal: *Ibid.*

A mistake in the indorsement on the indictment as to the county in which it was filed, *held* not a fatal error, where it appeared that it was presented and filed in the proper county: *State v. Smouse*, 50-43

The fact that it does not appear that the indictment was marked filed by the clerk cannot be raised for the first time on appeal: *Hughes v. State*, 4-554. And see § 5276.

Presence of others: The fact that a bailiff was present in the grand jury room during their proceedings, though not when the final vote was taken, *held* not sufficient to affect the validity of the indictment: *State v. Kimball*, 29-267.

The objection under this paragraph, if not taken as here contemplated, cannot be raised after verdict: *Ibid.*

The fact that a person not the county attorney is present with the grand jury during the investigation of a charge does not constitute sufficient ground for setting aside the indictment where it does not appear that he was not the deputy of the county attorney, inasmuch as the county attorney may discharge his duties before the grand jury by deputy: *State v. Fertig*, 67 N.W., 87.

The fact that the judge has been present in the grand jury room during the session of the grand jury, and has directed the jury as to their duty to indict certain persons is a ground for setting aside the indictment: *State v. Will*, 65 N.W., 1010.

While it is not proper for the clerk to take any part in the proceedings of the grand jury, yet it may not be improper for him to ask questions of the witness at the suggestion of the jurors, though such practice may not be commended: *State v. Miller*, 64 N.W., 288.

It is questionable whether the fact that the wife of the accused was examined as a witness before the grand jury is a cause for setting aside or quashing the indictment: *State v. Frost*, 64 N. W., 401.

Irregularities in selecting grand jury: Substantial compliance with the provisions of the law in regard to the selection of jurors is required, and the uncertainty as to what may be regarded as a substantial deviation makes it safest and best in principle to conform, as far as may be, to the literal provisions of the statute: *State v. Beckey*, 79-368.

It is not a valid objection to a grand jury that the judges of election returned eighty-five names of persons to serve as grand jurors instead of seventy-five, as required by § 335. if the extra names had been stricken off before the grand jury was drawn, and fifteen jurors have been regularly drawn: *State v. Knight*, 19-94.

The fact that the names of the grand jurors as returned by the township officers are given with initials only for the Christian names will not vitiate an indictment found by them, it appearing that the initials thus given correspond to the true names of the

jurors who act in finding the indictment: *State v. Van Auken*, 68 N. W., 454.

Under a statute requiring the board of county commissioners to deliver copies of jury lists to the clerk thirty days before the commencement of the term, *held*, that failure to comply therewith was a defect which might be raised by plea in abatement: *United States v. Cropper*, Mor., 190.

It would seem that deviations from the method pointed out for the selection, etc., of the grand jury, of a slight and unimportant nature, should not be regarded: *State v. Carney*, 20–82.

Where there has been no substantial departure in the selection, drawing, etc., of the grand jury affecting substantially the rights of defendant, a motion to set aside the indictment for irregularities in connection with such selection, etc., should not be sustained: *State v. Brandt*, 41–593.

The impaneling is the final formation by the court of the grand jury, the act immediately preceding the swearing of the jury which ascertains who are to be sworn: *State v. Ostrander*, 18–435, 446.

The fact that, subsequently to the formation of the grand jury, one of the jurors was excused and a person substituted, as to whom defendant did not have opportunity to exercise his right of challenge, will not authorize the court to set aside the indictment, where it does not appear that the new juror was disqualified or the defendant prejudiced: *State v. Fowler*, 52–103.

Where grand jurors were absent at a term of court by reason of instruction from the judge that they need not appear unless specially summoned, *held*, that it was error to impanel a grand jury omitting therefrom the persons thus failing to appear, and that a motion to set aside an indictment found by such grand jury should have been sustained: *State v. Bowman*, 73–110.

The objection that two of the grand jury are from the same township in violation of the provisions of § 339 will be a ground for setting aside the indictment on motion: *State v. Russell*, 90–569.

The objection that one of the grand jury is related to the prosecutor will not be ground for setting aside the indictment: *Ibid.*

Where a challenge to one grand juror has been sustained, and an indictment has been found by the remaining members, the indictment is valid and cannot be set aside on motion: *State v. Ostrander*, 18–435.

But where, by challenges, the number of the grand jurors is reduced below the number required for finding indictment, the vacancies should first be filled: *State v. Mooney*, 10–506; *State v. Garhart*, 35–315; *State v. Shelton*, 64–333.

Where a part of the grand jury fails to appear, the court may, under § 5240, orally direct the sheriff to summon a sufficient number to complete the panel, and failure to issue a written precept is not ground for setting aside the indictment: *State v. Miller*, 53–84; *State v. Miller*, 53–154.

The discharge of one grand jury and the impaneling of another to which there is no objection except the fact that the first has been erroneously discharged is not ground for setting aside an indictment found by the second: *State v. Hughes*, 58–165; *State v. Hart*, 67–142.

The objection that the grand jury was improperly summoned should be made before pleading to the indictment and not by motion in arrest of judgment: *State v. Reid*, 20–413.

The proper method of taking advantage of irregularity in the selection, summoning or impaneling the grand jury, where the defendant has been held to answer before the formation of the grand jury, is by challenge to the panel. Defendant cannot interpose objections after the jury is sworn: *State v. Hart*, 29–268; *State v. Hinkle*, 6–380; *Dixon v. State*, 3–416; *State v. Howard*, 10–101.

In order to support the action of the court below in overruling a motion to set aside the indictment on this ground, if it does not appear whether defendant was held to answer before indictment or not, it will be presumed that he was, and that the motion was overruled on that ground: *State v. Gibbs*, 39–318.

Defendant should exercise his right of challenge at the proper time or it will be held waived, and an indictment will not afterward be set aside for causes which would have been good grounds for challenge: *State v. Harris*, 38–242; *State v. Ruthven*, 58–121. See, also, *State v. Felter*, 25–67.

A defendant not bound over to appear before the grand jury prior to the finding of an indictment, and against whom no charge is pending, may move to set aside the indictment for causes which would have been good grounds of challenge: *Norris' House v. State*, 3 G. Gr., 513; *Dutell v. State*, 4 G. Gr., 125.

That a defendant under arrest in a preliminary proceeding, but not yet bound over to appear before the grand jury, is not brought before the court and given an opportunity for challenging the grand jury, is not ground for setting aside the indictment: *State v. Fitzgerald*, 63–268.

For other cases as to the selection, drawing, summoning, impaneling and swearing of the grand jury, see notes to §§ 5240–5252.

SEC. **5320. Correction.** A motion to set aside the indictment on the ground that the names of all the witnesses examined before the grand jury are not indorsed thereon; or that the name of any other witness than those so examined is indorsed thereon as prescribed in the second subdivision of section fifty-three hundred and nineteen of this chapter, shall not be sustained, if the indorsement is corrected by the insertion or striking out of such names or name by the county attorney or the clerk of the court, under the direction of the court, so as to correspond with the minutes required to be kept by the clerk of the grand jury, and returned and preserved with the indictment to the court. [C. '73, § 4338, R., § 4692.]

It is not competent in support of a motion to set aside an indictment under ¶ 2 of the preceding section, to show by affidavits that witnesses were summoned before the grand jury whose names are not indorsed on the indictment, and minutes of whose evidence were not returned. Such minutes are part of the record and cannot be thus impeached: *State v. Little*, 42–51.

Where the name of a witness examined before the grand jury was not indorsed upon the indictment it was held not error to allow the indorsement to be made upon motion of the district attorney after the trial jury is called: *State v. Robinson*, 47–489.

And see notes to preceding section.

SEC. **5321. Objections to selection of grand jury.** The ground of the motion to set aside the indictment mentioned in the fifth subdivision of section fifty-three hundred and nineteen of this chapter is not allowed to a defendant who has been held to answer before indictment. [C. '73, § 4339; R., § 4693.]

The proper method of taking advantage of such irregularity, where the defendant had been held to answer, would be by challenge to the panel under § 5241: *State v. Hart*, 29–268.

And the objection in such case should be made before the grand jury is sworn: *State v. Ostrander*, 18–435; *State v. Gibbs*, 39–318.

In order to support the ruling of the court below, where it does not appear whether defendant was held to answer before indictment, it will be presumed that he was: *State v. Gibbs*, 39–319.

An objection to the grand jury, or to an individual juror, cannot be interposed by a defendant held to answer before the formation of the grand jury: *Dixon v. State*, 3–416; *State v. Hinkle*, 6–380; *State v. Howard*, 10–101; *State v. Ingalls*, 17–8; *State v. Hart*, 29–268.

A defendant not bound over to appear before the grand jury prior to the finding of an indictment against him, and against whom no charge is pending, is not deprived of the right to attack the indictment for causes which would have been grounds of challenge: *Norris' House v. State*, 3 G. Gr., 513; *Dutell v. State*, 4 G. Gr., 125.

Where a defendant was held to answer after the grand jury was organized, *held*, that he was still entitled to exercise his right of challenge to such grand jury: *State v. Mooney*, 10–506.

That a defendant, under arrest in a preliminary proceeding, but not yet bound over to appear before the grand jury, is not brought before the court and given an opportunity for challenging the grand jury, is not ground for setting aside the indictment: *State v. Fitzgerald*, 63–268.

See, also, §§ 5241, 5246, and 5319 and notes.

The right to challenge the panel on account of defect as to the number of the grand jury by reason of its consisting of five instead of seven as required, in view of the population of the county, may be waived by not being interposed at the proper time and cannot be taken advantage of after judgment: *State v. Belvel*, 89–405.

SEC. **5322. Hearing.** The motion must be heard when it is made, unless for good cause the court postpone the hearing to another time. [C. '73, § 4340; R., § 4695; C. '51, § 2945.]

SEC. **5323. If denied.** If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto. [C. '73, § 4341; R., § 4696; C. '51, § 2946.]

SEC. **5324. If granted.** If the motion be granted, the court must order the defendant, if in custody, to be discharged, or, if admitted to bail, that his bail be exonerated, or, if he has deposited money instead of bail, that the money deposited be refunded to him, unless the court direct that the case be resubmitted to the same or another grand jury. [C. '73, § 4342; R., § 4697; C. '51, § 2947.]

A judgment in a criminal case being reversed on appeal for a defect in the indictment the cause was remanded for new trial with direction that preliminary thereto it might be re-submitted to another grand jury: *State v. Morrissey*, 22–158.

It does not follow from the provisions of this section that unless the court orders the case re-submitted, the setting aside of the indictment bars a further prosecution. The intention was manifestly to authorize the court to direct the defendant to be held in custody or under bail until another grand jury might consider his case: *State v. Scott*, 68 N. W.. 451.

SEC. **5325. If resubmitted.** If the court direct that the case be resubmitted, the defendant, if already in custody, must so remain unless he be admitted to bail; or, if already admitted to bail, or money had been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment, if a resubmission has been ordered. [C. '73, § 4343; R., § 4698; C. '51, § 2948.]

SEC. **5326. Order to set aside, no bar.** An order to set aside the indictment, as provided in this chapter, shall be no bar to a future prosecution for the same offense. [C. '73, § 4344; R., § 4699; C. '51, § 2949.]

CHAPTER 20.

OF PLEADING BY THE DEFENDANT.

SECTION **5327. Demurrer or plea.** The only pleading on the part of the defendant is a demurrer or plea. [C. '73, § 4345; R., § 4700; C. '51, § 2950.]

SEC. **5328. Grounds of demurrer.** The defendant may demur to the indictment when it appears upon its face, either:

1. That it does not substantially conform to the requirements of this code;

2. That the indictment contains matter which, if true, would constitute a legal defense or bar to the prosecution. [C. '73, § 4352; R., § 4707; C. '51, § 2952.]

The question whether an offense is barred by the statute of limitations cannot be properly raised by demurrer: *State v. Hussey*, 7-409; *State v. Groome*, 10-308; *State v. Deitrick*, 51-467.

An indictment for conspiracy must allege the conspiracy to be for the purpose of doing an illegal act, or the doing of a legal act by illegal means, or it will be open to demurrer: *State v. Harris*, 38-242.

Questions as to the sufficiency of the statement of facts in the indictment to constitute the crime charged can be raised by demurrer, and the sufficiency of the indictment as a pleading is then to be determined from its averments. The fact that minutes of evidence before the grand jury are not filed by the clerk cannot be raised in that manner: *State v. Briggs*, 68-416.

The parties cannot, for the purpose of the determination of the sufficiency of an indictment on demurrer, add to or explain the indictment by the contents of a paper forming no part of it, and which is not provided for by law. Therefore, *held*, that a writing by the county attorney, conceding that certain threats charged in the indictment were not made in a certain manner, could not be considered on appeal in determining whether the ruling of the court on the demurrer was correct: *State v. Brownlee*, 84-473.

SEC. **5329. Issues—by whom tried.** An issue of law arises upon a demurrer to the indictment, which must be tried by the court, but no joinder is necessary. [C. '73, §§ 4347–8; R., §§ 4702–3.]

SEC. **5330. Method of demurring.** A demurrer to the indictment may be filed with the clerk or made in open court, and shall be entered of record substantially in the following form: "The defendant demurs to the indictment." [C. '73, §§ 4346, 4353; R., §§ 4701, 4708; C '51, § 2951.]

SEC. **5331. When heard.** When a demurrer is filed or entered of record, it must be heard immediately, or at such time as the court may appoint; if sustained on the ground that the offense charged was within the exclusive jurisdiction of another county in this state, the same proceedings shall be had as provided in case of the discharge of a jury for want of jurisdiction of the offense charged; if sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final and the defendant must be discharged; if sustained on any other ground, the defendant must be discharged and his bail exonerated, if bail has been given, unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided in another indictment, in which case the court may order the cause to be resubmitted to the same or another grand jury, and the defendant may be held in custody, if not at large on bail, in which case the undertaking given shall remain in force. [C. '73, §§ 4354–7; R., §§ 4709–12; C. '51, § 2954.]

Where a demurrer to an indictment is sustained and defendant is held to bail and his case re-submitted to the grand jury, under this section, he must then exercise his right of challenge to the grand jury or it will be held to be waived: *State v. Harris*, 38-242.

SEC. **5332. Pleading over—final judgment.** If the demurrer is overruled, the defendant has a right to plead to the indictment; if he fails to do so, final judgment may be rendered against him on the demurrer, and, if necessary, a jury may be impaneled to inquire and ascertain the degree of the offense. [C.'73, § 4358; R., § 4713; C.'51, § 2955.]

Where, upon the overruling of a demurrer to the indictment, the court proceeded to try defendant as though the plea of not guilty had been entered, and the jury returned a verdict of guilty, *held*, that the conviction was valid, and that defendant could not, upon motion in arrest of judgment, have it set aside and interpose the plea of not guilty: *State v. Greene*, 66-11.

SEC. **5333. Pleas to the indictment—what allowed.** There are but three pleas to the indictment—(1) guilty, (2) not guilty, or (3) of a former judgment of conviction or acquittal of the offense charged. [C.'73, § 4359; R., § 4714; C.'51, § 2957.]

The whole object of jury trials in criminal cases is to ascertain whether the accused is guilty or not guilty, and it is not proper for the plea to form an issue upon a fact which, although it may be an item of evidence, is not conclusive as to the innocence of defendant. Therefore, *held*, that in a prosecution for the sale of intoxicating liquors without a license, the plea that defendant had a license did not raise a proper issue for trial: *Peters v. State*, 3 G. Gr., 74.

The fact that the record does not show that any plea was interposed by defendant will not warrant the reversal of a conviction in the lower court. It will be presumed that there was a plea upon which the trial was had: *State v. Foster*, 40-303.

Pleas of not guilty, and of former conviction or acquittal, may be pleaded together. Where the plea of former conviction or acquittal only was interposed, and defendant was found guilty thereof and did not ask to plead over, *held*, that judgment of conviction was properly entered without further trial as to his guilt: *State v. Green*, 16-239.

If it is proved that the former conviction or acquittal was obtained by fraud or collusion it may be disregarded: *Ibid.*

A special plea to the effect that the prosecution is barred by the statute of limitations is not necessary to a presentation of that defense, nor authorized, and without any such plea the court may properly charge the jury in regard to the time within which the alleged offense must have been committed to authorize a verdict of guilty: *State v. Whalen*, 68 N.W., 554.

There is no provision for a plea in the nature of *res adjudicata* not amounting to former acquittal or former conviction: *State v. Caywood*, 65 N.W., 385.

And see § 5405 as to judgment on plea of former conviction or acquittal.

SEC. **5334. Entry—form—guilty.** The plea of guilty can only be made in open court and by the defendant himself, in substantially the following form: "The defendant pleads that he is guilty of the offense charged in the indictment," and shall be entered of record. [C.'73, §§ 4360–1; R., §§ 4715–16.]

The fact that defendant pleads guilty upon an expression of opinion by the district attorney that the court will thereupon impose a fine of not exceeding a certain amount does not entitle him to a new trial in the event of sentence for the payment of a greater fine: *State v. Reininghaus*, 43-149.

A plea of guilty even though made when the defendant is under no obligation to plead, constitutes an admission of guilt which may be shown in evidence against him: *State v. Briggs*, 68-416.

SEC. **5335. Other pleas.** The other pleas may be in writing, filed with the clerk, or made in open court, in substantially the following form: "The defendant pleads that he is not guilty of the offense charged in the indictment," or, "The defendant pleads that he has formerly been convicted (or acquitted, as the case may be) of the offense charged in the indictment by the judgment of the.....court of.....(naming it), rendered on the .....day of....., A. D....." (naming the time), which may be pleaded alone or with the plea of not guilty. The pleas shall be entered of record. [C.'73, §§ 4359–60; R., §§ 4714–15; C.'51, § 2957.]

SEC. **5336. Plea entered by court.** If the defendant fails or refuses to plead to the indictment by demurrer or plea, a plea of not guilty must be entered by the court. [C.'73, § 4367; R., § 4722; C.'51, § 2963.]

Where, upon the overruling of a demurrer to the indictment, the court proceeded to try defendant as though the plea of not guilty had been entered, and the jury returned a verdict of guilty, *held*, that the conviction was valid, and that defendant could not, upon motion in arrest of judgment, have it set aside, and interpose the plea of not guilty: *State v. Green*, 66–11.

It does not constitute reversible error to put defendant on trial without a plea having been entered: *State v. Hayes*, 67–27.

The court should, on application, allow defendant to withdraw his plea of guilty, for the purpose of raising the objection that the indictment charges more than one offense: *State v. Abrahams*, 6–117.

Under this section defendant has the right to withdraw the plea of guilty and substitute therefor a different one: *State v. Oehlshlager*, 38–297.

Where defendant pleaded guilty before a justice of the peace, and sentence was passed thereon, *held* that, on appeal to the district court, such plea might be withdrawn: *State v. Kraft*, 10–330; *State v. Abrahams*, 6–117; *State v. Farlee*, 74–451.

It is error to refuse to allow defendant to withdraw his plea and file a motion to set aside the indictment on the ground that the grand jury was not properly selected (§ 5319): *State v. Hale*, 44–96.

Where judgment was entered upon a plea of guilty, and a motion for leave to withdraw such plea and for new trial was filed, based on the ground that defendant was surprised by the punishment inflicted being greater than expected, *held*, that the alleged ground of surprise was not sufficiently established to entitle defendant to relief: *State v. Buck*, 59–382.

SEC. **5337. Withdrawal of plea of guilty.** At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted. [C.'73, § 4362; R., § 4717; C.'51, § 2961.]

SEC. **5338. Issues—trial—presence of defendant.** An issue of fact arises on a plea of not guilty or of former conviction or acquittal, and no further pleading is necessary. The plea of not guilty is a denial of every material allegation in the indictment, and all matters of fact may be given in evidence under it, except a former conviction or acquittal. Issues of fact must be tried by a jury. If a felony is charged, the defendant must be personally present at the trial, but the trial of a misdemeanor may be had in his absence, if he appears by counsel. [C.'73, §§ 4347, 4349–51, 4363; R., §§ 4702, 4704–6, 4718.]

Trial: A trial is a determination of issues of law or fact arising on a demurrer or plea; therefore, *held*, that a rendition by a justice of the peace in a criminal case of judgment on a plea of guilty was not a trial in such sense as to entitle him to a trial fee: *Mathews v. Clayton County*, 79–510.

Waiver of jury: Defendant cannot waive a jury trial and consent to a trial by the court, there being no provision in the code of criminal procedure by which the court, without a jury, has jurisdiction to try the issues of fact in a criminal case: *State v. Carman*, 63–130; *State v. Larrigan*, 66–426.

As the defendant in a criminal action may waive a statute enacted for his benefit, he may consent that the trial proceed with a jury of less than twelve jurors; and will be bound by the verdict rendered: *State v. Kaufman*, 51–578.

Where the defendant in a criminal prosecution, with the consent of the court and of the state, waives his right to trial by a jury of twelve men and agrees that the verdict of eleven jurors shall "be as valid and binding as though rendered by a full jury," he will be bound by such verdict: *State v. Grossheim*, 79–75.

Where defendant pleaded not guilty and the jury was impaneled, and thereupon by agreement between the district attorney and defendant the jury returned a verdict of guilty as charged in the indictment, *held*, that such verdict was not erroneous: *State v. Keegan*, 74–145.

There is no provision for the trial of an issue of fact under an indictment excepting by jury. The statute has not conferred upon the court jurisdiction to try such an issue, and jurisdiction cannot be conferred by consent or agreement of parties. The question is not whether the constitutional guaranty of jury trial in criminal cases may be waived, but whether by agreement a power may be conferred which the statute has withheld: *State v. Douglass*, 65 N.W., 151; *State v. Tucker*, 65 N.W., 152.

In the trial of criminal cases in the district court on appeal from a justice court this section is not applicable in view of the provisions of § 5617 which requires that they be tried in the manner in which they should have been tried before the justice and therefore a jury may be waived: *Ibid.; State v. Ill*, 74–441.

It is not improper to hear arguments on legal propositions with reference to the question involved in a prosecution after the close of the testimony in the absence of the jury: *State v. Row*, 81–138.

Presence of defendant: If defendant is shown to have been present at the beginning and conclusion of the trial, his presence at other times will be presumed, unless the contrary is shown: *State v. Wood*, 17–18.

If the record shows that defendant was present at arraignment, it will be presumed he was present at the rendition of the verdict where the contrary does not appear: *Harriman v. State*, 2 G. Gr., 270.

And it will be so presumed in the absence of any showing to the contrary: *State v. Kline*, 54–183.

It would seem that the *trial* at which de-

fendant accused of a felony is required to be present ends with the verdict, and that his presence at the argument and determination of a motion for new trial is not essential: *State v. Deckiotts*, 19–447.

Where the jury were recalled and given additional instructions in a misdemeanor case without notice to defendant's attorney, who could not be found, *held*, that there was no error: *State v. Hale*, 91–367.

Where defendant is put on trial for felony, but only convicted of a misdemeanor, his presence when judgment is rendered is not necessary: *Hughes v. State*, 4–554.

The fact that a defendant indicted for felony, who is arraigned and personally pleads not guilty, is not present at the impaneling of the jury, or during the trial, or at rendition of judgment, will not deprive the court of jurisdiction so as to render the judgment void: *Turner v. Barr*, 75–758.

Where defendant is not personally present in a prosecution for a misdemeanor, and is represented by an attorney, the court could refuse to allow the attorney to withdraw his appearance so as to deprive the court of jurisdiction to proceed, but if it allowed such appearance to be withdrawn it cannot proceed with the trial of the case in the defendant's absence: *State v. Young*, 81–406.

The plea of not guilty may be entered by defendant's counsel in the absence of defendant: *State v. Jones*, 70–505.

It is not error to require defendant to rise in the presence of the jury for identification, it appearing that there is an attempt to cause confusion in the minds of witnesses by reason of resemblance of defendant to another person placed near him. Such an order does not compel defendant to furnish evidence to criminate himself: *State v. Reasby*, 69 N. W., 451.

As to presence of defendant at arraignment, see § 5311 and notes; as to his presence at rendition of verdict, see § 5403 and notes; and at pronouncing of judgment, see § 5432.

SEC. 5339. Conviction or acquittal, when a bar. A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place. [C. '73, § 4364; R., § 4719.]

Dismissal of prosecution: Defendant being put upon trial under charge of a public offense, it is not within the scope of the authority of either the prosecuting attorney or of the court to take the case from the jury of his own arbitrary will and without a controlling cause, and again hold defendant to trial on the same charge, although it be newly presented. Such proceeding amounts to an acquittal, and may be pleaded as a bar: *State v. Callendine*, 8–288.

A *nolle prosequi* may be entered before the trial is entered upon, but after plea and the jury is sworn and the evidence is in it will amount to an acquittal: *Ibid.*

The fact that material witnesses for the prosecution cannot be called because their names are not indorsed on the indictment will not be such a peremptory or controlling cause as to justify the court in dismissing the case: *Ibid.*

The setting aside of an indictment on the ground that the grand jury finding it was not properly drawn, is no bar to a subsequent prosecution for the same offense: *State v. Scott*, 68 N.W., 451.

Where the indictment is not sufficient, jeopardy does not begin with the impaneling of the jury, there having been no trial or verdict but the cause having been taken from the jury for defects in the indictment: *State v. Smith*, 88–178.

Defective verdict: Although defendant is put upon trial on a good indictment, yet if the verdict is so defective that no judgment can be rendered upon it, it may be set aside and defendant again put on trial. The defective verdict will not amount to an acquittal: *State v. Redman*, 17–329; *State v. Arthur*, 21–322.

Discharge of jury: The fact that in the exercise of sound discretion the jury is discharged for failure to agree does not entitle defendant to be released as having been once in jeopardy: *State v. Vaughn*, 29–286.

Where, after all the evidence had been introduced, the judge, on receipt of a telegram announcing the sickness of his wife, adjourned court for a few days to go home, and, on the day to which the court was adjourned, by telegram adjourned court over the term, *held*, that there was sufficient cause to warrant the adjournment in the discretion of the judge, and that defendant could not, on a subsequent trial, plead previous jeopardy: *State v. Tatman*, 59–471.

In a criminal prosecution where the jury was called, impaneled and sworn, and the opening arguments made before there had been an arraignment or plea, and the defendant was afterwards arraigned against his objection, and asked time to plead, which was granted, and the jury discharged, *held*, that the defendant had not been previously put in jeopardy by the proceedings: *State v. Pierce*, 77–245.

New trial: The granting of a continuance because of the inability of prosecution to introduce material evidence which was not before the grand jury, and notice of which was not given to defendant before the trial, will not bar a subsequent trial in pursuance of such continuance: *State v. Parker*, 66–586; *State v. Falconer*, 70–416.

Motion in arrest of judgment: Where, after verdict, a motion by defendant in arrest of judgment is sustained, the proceeding cannot be relied upon, in a subsequent prosecution for the same offense, as constituting a previous conviction or acquittal under this section: *State v. Clark*, 69–196.

The sustaining of a motion in arrest of judgment on the ground that the verdict is not supported by the evidence which is a

statutory ground for the new trial it does not prevent another trial for the same offense: *State v. Bowman*, 62 N. W., 759.

Fraudulent acquittal or conviction: Where a person guilty of a criminal act procures a fraudulent conviction or acquittal by collusion, the state may elect to treat the action of the magistrate as a farce and the judgment a nullity, and it may commence a new prosecution: *State v. Green*, 16–239.

Where a defendant relies upon a plea of a former conviction, and the state claims that it is not concluded thereby for the reason that it was fraudulently obtained, the burden of proof is upon the state to establish the fraud: *State v. Maxwell*, 51–314.

Where the same act constitutes two crimes: A previous prosecution for an act as constituting one crime will not bar a subsequent prosecution for a greater crime committed in the same act. For instance, a prosecution for assault will not bar a subsequent prosecution for a riot committed in the same transaction: *Scott v. United States*, Mor., 142.

Acquittal of a crime will not be a bar to a prosecution for the crime of conspiracy to commit such act: *State v. Brown*, 64 N. W., 277.

A conviction for assault and battery will not bar a subsequent prosecution for assault with intent to do great bodily injury, committed in the same act: *State v. Foster*, 33–525.

The charge of an assault upon two persons is, in a legal sense, so far different from an assault upon one, that proof of the commission of the act in regard to one will not sustain an indictment charging an assault upon two; therefore, in a subsequent indictment for assault and battery upon one of the persons named, defendant could not show, under a plea of former conviction or acquittal, a judgment under an indictment for assault upon two. Such reasoning does not apply, however, to an indictment for an assault by two. In such case either one may be acquitted either on a joint or on a separate indictment: *State v. McClintock*, 8–203.

The act of using a building for the keeping of intoxicating liquors with intent to sell in violation of law, and that of using a building for the sale of the same in violation of law, are each by statute declared to be the crime of nuisance. Therefore a conviction for nuisance committed in one of these two ways will bar a prosecution for the same crime committed in the other way in the same building prior to the first indictment: *State v. Layton*, 25–193.

Where a person by one muscular action and one volition passed four forged checks, *held*, that he committed one crime, and that a conviction for passing one of such checks would bar a subsequent prosecution as to the others: *State v. Egglesht*, 41–574.

Former conviction or acquittal for larceny will bar a subsequent prosecution for larceny from the person in the same act: *State v. Gleason*, 56–203.

An acquittal of larceny is not a bar to a prosecution for burglary or breaking and entering with intent to commit larceny. The offense in one case is against the owner of the property stolen, and in the other against the owner of the premises broken and entered: *State v. Ingalls*, 68 N. W., 445.

A conviction for permitting a certain minor to remain in a saloon and play billiards at one date will not bar a prosecution for allowing another minor to do the same at another date: *State v. Derichs*, 42–196.

A defendant may be convicted of the crime of keeping a nuisance after a former acquittal in a prosecution for the same offense if the conviction is based on evidence of the keeping of a nuisance after the finding of the indictment for the first offense: *State v. Ingraham*, 65 N. W., 152.

Where it appeared that, under a previous prosecution for selling intoxicating liquor described as stomach bitters, defendant was in fact tried for all offenses for sales of intoxicating liquors, *held*, that he could not be prosecuted a second time for the sale of dandelion bitters during the time covered by the first prosecution: *State v. Sterrenberg*, 69–544.

Crime against state and United States: The crime of counterfeiting the coin of the United States may be punished under state law, congress not having attempted to exercise the exclusive power of punishing such offenses: *State v. McPherson*, 9–53.

Offense against state and city: An ordinance of a city punishing an act which is punishable under the laws of the state is not, on that account, void. The act may be punished under both without violating any constitutional principle: *Bloomfield v. Trimble*, 54–399.

Evidence as to identity of offense: Where defendant pleaded a former conviction before a justice of the peace, *held* proper to ask the justice before whom the former conviction was claimed to have been had whether the offense then charged was the same as testified to by the witnessess on the last trial, and whether the evidence was the same: *State v. Maxwell*, 51–314.

Pleading over: After verdict against the defendant on a plea of former conviction or acquittal, not accompanied with the plea of not guilty, if he does not ask to plead over, he may be sentenced without further trial: *State v. Green*, 16–239.

See, further, notes to following section.

SEC. **5340. In different degree.** When a defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for an offense necessarily included therein. [C. '73, § 4365; R., § 4720.]

Conviction of a lower degree of offense: A verdict of guilty in a lower degree of the crime than that charged in the indictment, or guilty of a crime necessarily included in that charged, operates as an acquittal of a higher degree or a higher crime, and defendant cannot, after having secured a reversal, be again put upon trial for a higher degree

or a higher crime than that of which he was convicted: *State v. Tweedy*, 11-350; *State v. Clemons*, 51-274.

Nor will the fact that defendant, being put on trial a second time for the higher degree or higher crime, is again found guilty of only the lower degree or lower crime of which he was previously convicted, render the error in improperly putting him on trial a second time of the higher degree or higher crime, error without prejudice: *State v. Tweedy*, 11-350.

Where the same essential element is included in two or more crimes, as, for instance, larceny in the crimes of larceny from a dwelling house in the night time and robbery, a previous conviction or acquittal for one of such crimes will bar a subsequent prosecution for the other. In the prosecution for the one crime the defendant might be convicted of the included crime: *State v. Mikesell*, 70-176.

The trial of defendant on the charge of murder in the first degree and his conviction of the crime of murder in the second degree is in effect an acquittal of the first degree and he cannot again be put on trial for it: *State v. Helm*, 92-540.

Therefore where defendant was under an indictment charged with murder in the first degree convicted of murder in the second degree, and on appeal secured a reversal, *held*, that he was entitled to bail: *Ibid.*

See notes to preceding section; also Const., art. I, § 12, and notes.

SEC. **5341. Judgment, when a bar.** Except where otherwise provided, the judgment for a defendant on a demurrer, or on an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense, if a resubmission has been ordered. [C.'73, § 4366; R., § 4721.]

CHAPTER 21.

OF CHANGE OF PLACE OF TRIAL IN CRIMINAL CASES.

SECTION **5342. On defendant's application.** In all criminal cases which may be pending in any of the district courts of this state, any defendant therein may petition the court for a change of place of trial to another county. [C.'73, § 4368; R., § 4727; C.'51, § 3270.]

SEC. **5343. What stated.** Such petition must set forth the nature of the prosecution, the court where the same is pending, and that such defendant cannot receive a fair and impartial trial owing to the prejudice of the judge, or to excitement or prejudice against him in such county, and must verify the same by his affidavit stating the same to be true as he verily believes. [C.'73, § 4369; R., § 4728; C.'51, § 3271.]

Where the petition is based upon the prejudice of the judge, the statute does not require affidavits in support thereof, nor contemplate the introduction of testimony, but the judge is not required to allow a change in such case as a matter of course: *State v. Mewherter*, 46-88.

The prejudice of the judge contemplated by this section is not merely a belief as to the guilt or innocence of the party, but the presence of such state of feeling as will incline him in his ruling and instructions, against the accused. Such prejudice is not established merely by the fact that the judge is shown to have believed on a former trial of the accused for the same offense that he was guilty: *State v. La Grange*, 62 N. W., 664.

In a particular case, *held*, that newspaper comments complained of did not show a sufficient prejudice in view of counter affidavits to the effect that no such prejudice existed: *State v. Edgerton*, 69 N.W., 280.

An attorney appointed by the court to defend a prisoner is not incompetent to make an affidavit to prove the facts necessary to entitle the prisoner to a change of venue: *State v. Mooney*, 10-506.

As to counter-affidavits, see § 5346 and notes.

As to the sufficiency of the petition and affidavits, see § 5348 and notes.

SEC. **5344. Verified.** When the ground alleged in the petition is excitement or prejudice against him in the county, it must be verified by three disinterested persons, residents of the county from which the change is sought, in addition to the petitioner himself. [C.'73, § 4370; R., § 4729.]

SEC. **5345. Need not state facts.** The petition need not state the facts upon which the belief of the petitioner or other person verifying the same is founded, but may allege the belief of the particular ground thereof in general terms. [C.'73, § 4371; R., § 4730.]

SEC. **5346. Additional testimony.** When the alleged ground in the petition is excitement or prejudice in the county against the petitioner, the court may receive additional testimony by affidavits only, either on the part of the defendant or the state. [C.'73, § 4372; R., § 4731.]

Upon an application for a change of venue in a prosecution for violation of a city ordinance it is not improper to consider counter-affidavits of the citizens of the city that there is no such prejudice against the defendant in the county as to entitle him to the change: *State v. Wells*, 46–662.

SEC. **5347. Filed with clerk.** The petition and affidavits must be filed with the clerk, and are parts of the record. [C.'73, § 4373; R., § 4732.]

SEC. **5348. Court's discretion.** The court, in the exercise of a sound discretion, must, when fully advised, decide the matter of the petition according to the very right of it. [18 G. A., ch. 9; 17 G. A., ch. 171; C.'73, § 4374; R., § 4733; C.'51, § 3272.]

Discretion of the court: The question of allowing the change rests in the sound discretion of the court, and unless such discretion has been abused the supreme court, on appeal, will not interfere with the decision: *State v. Ostrander*, 18–435, 447; *State v. Ross*, 21–467; *State v, Collins*, 32–36; *State v. Felter*, 32–49; *State v. Beck*, 73–616; *State v. Cadwell*, 79–473; *State v. Woodward*, 84–172.

Even though the extent of the prejudice in the county is shown the question whether it is such as to prevent a fair and impartial trial of the defendant is for the district court to decide in its discretion, and such discretion will not be reviewed on appeal unless abuse thereof is shown: *State v. Foster*, 91–164.

The supreme court will not on appeal interfere with the discretion lodged in the district court as to an application for change of venue, unless it appears that such discretion was improperly exercised or abused: *State v. Edgerton*, 69 N.W., 280.

But this discretion is not absolute, nor an arbitrary discretion: *State v. Hutchinson*, 27–212.

If it appear that this discretion has been improperly exercised, the action of the court will be reviewed and reversed; and in a particular case the refusal to grant a change was held error: *State v. Canada*, 48–448.

The rule that the court is to pass upon the question of granting a change of venue in the exercise of a sound discretion applies to cases where the change is asked on the ground of prejudice of the judge, or excitement and prejudice of the people of the county, and although these grounds may be averred in the very language of the statute they do not entitle the prisoner to a change as a matter of right (explaining *State v. Nash*, 7-347; *State v. Mooney*, 10–506): *State v. Arnold*, 12–479; *Gordon v. State*, 3–410; *State v. Barrett*, 8–536.

In a particular case, *held*, that the showing for a change was sufficient to render the action of the court in refusing it erroneous. *State v. Nash*, 7-347, 366.

Although the provision for a change of venue is addressed to the sound discretion of the court which will not be interfered with on appeal unless it has been abused, yet in a particular case, *held*, that the showing of prejudice was such that it was error not to grant the change: *State v. Crafton*, 89–109.

The showing for a change of venue in a particular case, *held* to be sufficiently rebutted by counter-affidavits, and that there was no abuse of discretion in overruling the application: *State v. Helm*, 92–540.

Abuse of discretion in denying a change of venue must be made to appear, or the decision of the court will not be interfered with, even when the ground alleged is the prejudice of the judge: *State v. Ray*, 50–520; *State v. Knight*, 19–94; *State v. Ingalls*, 17–8; *State v. Freeman*, 27–333; *State v. Mewherter*, 46–88; *State v. Weems*, 65 N. W., 387.

Where the record fails to show that the evidence is all that was produced on the hearing of the application for change of venue, the supreme court cannot pass upon the correctness of the action of the lower court: *State v. Malling*, 11–239; *State v. Leis*, 11–416.

To justify a reversal of the case for the action of the judge in overruling a motion for a change of venue, the record must show affirmatively that there was an abuse of the discretion reposed in the court in determining the same: *State v. Hale*, 65–575.

Therefore, where an affidavit for a change of venue was a mere statement of the belief of the applicant that the judge was prejudiced, founded on alleged facts of the existence of which the applicant had no personal knowledge, *held*, that such affidavit was insufficient to overcome the presumption arising from the action of the court in denying the application: *Ibid.*

Where a showing for a change is based on the ground of excitement or prejudice of the inhabitants of the county, and is resisted by affidavits on the part of the state, the supreme court will, on appeal, be slow to interfere with an order denying the change. The record must show that there was an abuse of discretion in determining the matter: *State v. Williams*, 63–135.

Though the petition for a change is based upon the prejudice of the judge, and shows sufficient ground, if true, to require a change, it does not follow that the change should be granted as a matter of course. The judge may consult his own feelings, as well as the papers, and grant or deny the change as he may think the right demands, in the exercise of a sound discretion. In a particular case, *held*, that the showing for a change was not sufficient to require the reversal of the action of the court in refusing it: *State v. Foley*, 65–51.

In a particular case, *held*, that the showing

for a change was not sufficient to necessitate a reversal: *State v. Perigo*, 70-657.

Where an application was made for change of venue on account of prejudice of the judge, and overruled, and subsequently, in response to an objection to a juror made by defendant, the judge remarked that he intended to give the defendant a better jury than he was entitled to, *held*, that this remark showed prejudice on the part of the judge, and that the motion for a change should have been sustained: *State v. Read*, 49–85.

It does not follow that because a change of venue on the ground of prejudice of the inhabitants of the county has been improperly denied, and the case is reversed on that ground, that when the case comes on for trial anew the defendant will be entitled to such change on the affidavits before filed: *State v. Nash*, 7–347, 374.

Error in overruling an application for change of venue will not entitle the defendant to a release on *habeas corpus: Jackson v. Boyd*, 53–536.

Where defendant was found guilty of murder, and the verdict was set aside on the ground that one of the jurors was an alien, and a motion by defendant for a change of venue on the ground of prejudice in the county where he had once been tried was overruled, *held*, that there was no abuse of discretion in overruling the motion, as the fact that defendant had once been tried and convicted in the county would not of itself be sufficient to justify a change of venue, and it was shown by counter-affidavits on behalf of the state that if there had been prejudice on the part of the public it had died out before the first trial: *State v. Kennedy*, 77–208.

And a motion to have the persons who executed the counter-affidavits brought into court and orally examined, *held* properly overruled, as there was nothing to indicate that the counter-affidavits were not made in good faith: *Ibid.*

Where an application for a change of venue is made on account of the alleged prejudice of the judge, it is the duty of the court to grant or deny the change, not according to his preferences or as to the belief of the applicant for the change, but as to the fact of prejudice as it appears to him, and his ruling will not be disturbed upon appeal unless it appears that there has been an abuse of discretion: *State v. Billings*, 77–417.

But where an application for a change was supported by affidavits of forty or fifty persons showing strong excitement and prejudice among the people, opposed to which were the affidavits of almost eight hundred others, which did not deny the excitement and prejudice, but claimed that it was not so great as to prevent a fair and impartial trial, *held*, that to have granted a change would have been according to general practice in such cases, and the refusal of the court to do so was an abuse of discretion: *Ibid.*

Where more than two months after the finding of an indictment and on the eleventh day of the next term of court, defendant filed an applicatian for a change of venue, verified by himself and three other persons, and the state filed counter-affidavits of eleven persons, and defendant asked for more time in which to file additional affidavits, *held*, that as there was no excuse for defendant's delay in making the application, there was no abuse of discretion in denying the request for additional time and denying the request for a change of venue: *State v. Adams*, 81–595.

In a prosecution for libelous publication with reference to a candidate for congress, change of venue being asked on the ground that such candidate had been recently elected by a large majority, receiving a majority of the votes in the county, *held*, that it appearing that there was no undue excitement at such election the change was properly denied in the discretion of the court: *State v. Conable*, 81–60.

The fact that the newspapers had published accounts of the trial of another person jointly indicted with defendant, but given a separate trial, will not make it necessary that a change of venue be granted from the county. The effect of prejudice as to each juror is to be determined by way of challenge: *State v. Hamil*, 65 N.W., 395.

In civil cases, see § 3505 and notes.

In police court: There is no provision for change of venue in proceedings before a police court for violation of a city ordinance. The provisions in that respect with reference to prosecutions before justices of the peace do not apply: *Zelle v. McHenry*, 51–572.

Affidavits: Where the petition is based upon the prejudice of the judge, the statute does not require affidavits in support thereof, nor contemplate the introduction of testimony, but the judge is not required to allow a change in such case as a matter of course: *State v. Mewherter*, 46–88.

Costs: The county in which the case is tried is liable, primarily, for the costs and charges, such county having the right under § 5354 to recover the amount thereof from the county in which the offense was committed: *Lockhart v. Montgomery County*, 76–79.

SEC. **5349. To what county.** If sustained, the court must, if the ground alleged be the prejudice of the judge, order the change of venue to the most convenient county in an adjoining district to which no objection exists. If sustained on the ground of excitement and prejudice in the county, it must be awarded to such county in the same district in which no such objection exists. [C. '73, §§ 4375–6; R., §§ 4734–5; C. '51, § 3272.]

For other provisions as to change of venue, see § 249.

SEC. **5350. Duty of clerk.** Upon the change of place of trial to another county, if there be but one defendant in the case, or if all have joined in the petition, the clerk must make out and certify a transcript of all papers on

file in the case, including the indictment, and file the same in his office, and all the original papers on file, with a certified copy of all record entries therein, must be without unnecessary delay transmitted to the clerk of the court to which the change is ordered. [C.'73, § 4377; R., § 4736; C.'51, § 3273.]

The transcript of record entries which is required to be made by the clerk in transferring the case upon change of venue to another county does not include the indictment itself, which is required to be transmitted in its original form: *Sharp v. State*, 2–454.

It is not error to allow the clerk of the court from which a change of venue is taken to amend his certificate by interlineation to supply an omission, there being no question as to the truthfulness of the amendment: *State v. Gibson*, 29–295.

The originals are to be transferred to the county to which the change of venue is granted and no identification thereof by the clerk transmitting them is essential: *State v. McGuire*, 87–142.

The provisions of this section are not affected by those of § 5276 directing the indictment and minutes of testimony to be retained finally by the clerk and remain in his office as a record: *Ibid.*

The clerk, on a change of venue being granted, should forward with the papers of the case, the bail bond for the appearance of the defendant, and the suit on such bond, in case of forfeiture, should be brought in the county to which the case is transferred. If money has been deposited with the clerk instead of bail such money should be sent to the clerk of the county to which the case is removed: *Warren County v. Polk Co.*, 89–44.

SEC. **5351. Where more than one defendant.** If there be more than one defendant in such case, and all the defendants have not joined in the petition, the clerk must, without unnecessary delay, make out and certify a transcript of all entries appearing on the record, and of all the papers on file in the case, including the indictment, and transmit the same to the clerk of the court to which the change of place of trial is ordered, retaining the originals. [C.'73, § 4378; R., § 4737.]

SEC. **5352. Duty of sheriff.** When a change of place of trial to another county has been ordered, if the defendant is in custody, the sheriff of the county from which the change is granted must, on the order of the court, deliver him to the sheriff of the county to which such change is allowed, and upon such delivery, with a certified copy of the order therefor, the sheriff last mentioned must receive and detain the defendant in his custody until legally discharged therefrom, and give a certificate of such delivery. [C.'73, § 4379; R., § 4738; C.'51, § 3274.]

SEC. **5353. Proceedings after change.** The court to which the change is granted must take cognizance of the cause, and proceed therein to trial, judgment and execution, in all respects as if the indictment had been found by the grand jury impaneled in such court. [C.'73, § 4380; R., § 4739; C.'51, § 3275.]

Where an indictment upon which defendant is put on trial appears to have been properly found in the county from which the change is taken, and no objection is made thereto until after verdict, defendant cannot object that it is not filed in the court in which the trial is had: *Sharp v. State*, 2–454.

Under § 4385 of Code of '73 [not here retained] it was held that the court to which the case was taken might require a new bail bond: *State v. Merrihew*, 47–112; but the sureties on the original bond were not thereby released: *State v. Brown*, 16–314.

Also *held* under that section, that the court or judge might require material witnesses to give bonds for their appearance: *Comfort v. Kittle*, 81–179.

SEC. **5354. Cost of change.** When the place of trial is changed under the provisions of this chapter, the county from which the change was taken shall pay the expenses and charges of removing, delivering and keeping the defendant, and all other expenses and costs necessary and consequent upon such change and trial, which shall be audited and allowed by the court trying the case, and all such expenses and costs may be recovered by the county to which the trial is changed in an action against the county in which the prosecution was commenced. [C.'73, §§ 3841, 4381, 4386; R., §§ 4740, 4745; C.'51, § 3276.]

This section simply provides that when costs are paid by the county where the trial is had they shall be charged to the county where the indictment is found. It does not determine for what costs the county shall be liable: *State v. Rainsbarger*, 74–539.

The provisions of § 3872, as to taxing jury fees, do not affect the amount of recovery

under this section: *Jones County v. Linn County*, 68–63.

This section applies in case of change of venue, and probably in case of preliminary examination, but it is not applicable where one county (under § 5158) takes jurisdiction of a crime committed in an adjoining county but within five hundred yards of the boundary line between them: *Floyd County v. Cerro Gordo County*, 47–186.

The expenses of a trial where change of venue is taken are to be paid by the county in which the trial is had, being recoverable by it under this section from the county where the crime is committed: *Lockhart v. Montgomery County*, 76–79.

This section was designed to relieve the county to which a criminal cause should be transferred from liability for costs of its prosecution and to require their payment by the county in which the offense charged was committed and from which the case was transferred. It was not designed to increase the items of taxable costs and does not include the expense of printing abstracts: *State v. Billings*, 81–566.

But where abstracts are prepared and printed by the defendants in criminal cases, neither the county nor the state is liable for such costs: *Ibid.*

Under this section, in all cases of change of venue, the county from which the case is removed is liable to the county wherein the trial is had for all the costs and expenses of the trial of the case, and not merely for the costs which may be taxed against accused in case of conviction: *Jones County v. Linn County*, 68–63.

An indorsement by the judge, not purporting to act as the court, recommending the allowance of an amount for costs, *held* not an auditing and allowance binding upon the county: *Barnes v. Marion County*, 54–482.

SEC. **5355. Sheriff's fees.** For delivering prisoners under the provisions of this chapter, sheriffs are entitled to the same fees as are allowed for the conveyance of convicts to the penitentiary. [C.'73, § 4382; R., § 4741; C.'51, § 3277.]

CHAPTER 22.

OF THE TRIAL JURY.

SECTION **5356. Drawing.** The rules for drawing the jury shall be the same as those provided in civil procedure. [C.'73, §§ 4389–95, 4397; R., §§ 4751–7, 4759; C.'51, §§ 2964–9, 2971.]

As to waiving jury trial, see notes to § 5338.

As to the selection, drawing and summoning of the jurors, see §§ 332–353 and notes.

SEC. **5357. Completion of panel.** If for any reason the regular panel is exhausted without a jury being selected, it shall be completed in the manner provided in the chapter upon selecting, drawing and summoning juries. [C.'73, § 4396; R., § 4758; C.'51, § 2970.]

CHAPTER 23.

OF CHALLENGING THE JURY.

SECTION **5358. To the panel.** All the provisions of law relating to challenges to the panel of trial jurors in civil procedure, the grounds therefor, the manner of exercising the same, and the effect thereof, shall apply to the panel of trial jurors in criminal cases. [C.'73, §§ 4398–4403; R., §§ 4760–5; C.'51, §§ 2972–7.]

It is not a ground for a challenge to the panel that the jurors may have heard the evidence in a preliminary inquiry, under § 5540, as to the prisoner's sanity: *State v. Arnold*, 12–479.

A challenge to the panel cannot be made after challenges to individual jurors: *State v. Davis*, 41–311.

If a venire is returned so as to show its defects, the defendant must ascertain the facts as they really exist, and make any challenges to the panel which he intends to raise, before challenging individual jurors: *State v. Bryan*, 40–379.

SEC. **5359. To individual juror.** A challenge to an individual juror is an objection which may be taken orally, and is either for cause or peremptory. [C.'73, § 4404; R., § 4766; C.'51, § 2978.]

SEC. **5360. For cause.** A challenge for cause may be made by the state or defendant, and must distinctly specify the facts constituting the causes thereof. It may be made for any of the following causes:

1. A previous conviction of the juror of a felony;
2. A want of any of the qualifications prescribed by statute to render a person a competent juror;
3. Unsoundness of mind, or such defects in the faculties of the mind or the organs of the body as render him incapable of performing the duties of a juror;
4. Affinity or consanguinity, within the ninth degree, to the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance, the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law;
5. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance, the prosecution was instituted, or in his employ on wages;
6. Being a party adverse to the defendant in a civil action, or having been the prosecutor against or accused by him in a criminal prosecution;
7. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;
8. Having served on a trial jury which has tried another defendant for the offense charged in the indictment;
9. Having been on a jury formerly sworn to try the same indictment and whose verdict was set aside, or which was discharged without a verdict after the cause was submitted to it;
10. Having served as a juror, in a civil action brought against the defendant, for the act charged as an offense;
11. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial;
12. Because of his being bail for any defendant in the indictment;
13. Because he is defendant in a similar indictment, or complainant or private prosecutor against the defendant or any other person indicted for a similar offense;
14. Because he is, or within a year preceding has been, engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where the defendant is indicted for a like offense;
15. Because he has been a witness, either for or against the defendant, on the preliminary trial or before the grand jury. [C.'73, § 4405; R., §§ 4767–71; C.'51, §§ 2982–6.]

Qualifications: See §§ 332–334 and notes.

Having served on a jury in the trial of another defendant: The provisions of this paragraph refer to cases where two or more defendants have been jointly indicted for the same offense, and have had separate trials; and not to cases where two defendants are separately indicted, although the offenses may be of the same kind: *State v. Sheeley*, 15–404; *State v. Leicht*, 17–28.

Having formed or expressed an opinion: Under the provisions of this section, an opinion of a juror in regard to some of the transactions involved in the case is not sufficient to disqualify him. In order to disqualify, the opinion must be as to the guilt or innocence of the prisoner: *State v. Bryan*, 40–379.

Having formed and expressed an opinion as to the killing, in a case of homicide, is not sufficient: *State v. Thompson*, 9–188.

Having formed a hypothetical opinion, based upon rumors, but which would not prevent the juror from rendering a true verdict upon the evidence, will not disqualify him: *State v. Ostrander*, 18–435, 451.

The opinion that defendant is guilty or innocent, which is good ground of challenge, is an unqualified opinion. If the opinion is qualified by the conditions that if what the juror has heard about the case is true, then defendant is guilty or not guilty, the opinion is a qualified one, and does not render the juror incompetent: *State v. George*, 62–682.

The fact that a person has heard part of the evidence and arguments on the trial of a

case against another person indicted with defendant for the crime with which defendant is charged, will not be a ground of challenge, where it appears that he has neither formed nor expressed an opinion as to the merits of the case: *State v. Philpot*, 66 N.W., 730.

Where a juror stated that he had no bias or prejudice against the prisoner (who was an Indian), but merely had heard reports, which he believed, that some Indians had done the deed for which the Indian was on trial; and that the act done was wrong, unless done in self-defense, *held*, that this was not such ground as to exclude him from sitting as a juror: *Wau-kon-chaw-neek-kaw v. United States*, Mor., 332.

Where the juror stated that he had formed and expressed an opinion upon rumor, but that he had no ill-will or prejudice against defendant, and no personal knowledge of the circumstances of the case; and that his opinion was conditional; and if what he had heard was true he had formed an opinion, and if what he had heard was untrue he had not formed an opinion, *held*, that the juror was subject to challenge for cause: *Trimble v. State*, 2 G. Gr., 404.

Under the existing statute no opinion which a juror entertains disqualifies him unless it would prevent him from rendering a true verdict upon the evidence submitted on the trial: *State v. Munchrath*, 78–268; *State v. Brady*, 69 N.W., 290.

A person otherwise unobjectionable is not disqualified for acting as a juror on the trial of one defendant if he has formed an opinion as to his guilt or innocence from having read what is claimed to be a full report of the evidence given on the trial of another defendant for the same offense: *Ibid.*

A person may form an opinion from reading a newspaper account of an alleged crime, or from hearing others speak of it, and not be disqualified from acting as a juror, provided the opinion so formed is not of a character to interfere with the rendering of a true verdict on the evidence submitted on the trial: *Ibid.*

It is the duty of the court, and not of the juror, to determine whether his opinion disqualifies him to act as a juror. The court should decide as to the fact of qualification from a consideration of the juror's examination as a whole, and of such other evidence and circumstances as may be relevant and which tend to aid it in reaching a just conclusion: *Ibid.*

The party challenging must distinctly specify which of the several facts disclosed by the juror's answers he relies upon as a cause of challenge; and where the defendant challenged a juror "on his answers for cause," *held*, that the ground of challenge was not sufficiently specified: *Ibid.*

In a particular case, *held*, that there was no error in overruling the challenges to two jurors for cause: *State v. King*, 81–587.

Error in overruling a challenge to a juror is error without prejudice, if the juror does not sit and the defendant does not exhaust all his peremptory challenges: *State v. Brownlee*, 84–473.

Where a juror stated that he had not formed an unqualified opinion; that if what he had heard should be proved he had an opinion made up, but that he thought he had no prejudice or bias, etc., *held*, that he was not disqualified: *State v. Sater*, 8–420.

The juror having testified that he has formed and expressed an unqualified opinion, etc., should not be required to state whether it is for or against the prisoner in order to render him subject to challenge for cause: *State v. Shelledy*, 8–477.

Where, in a prosecution for nuisance in using a building for illegal sale of intoxicating liquors, the juror testified that he was opposed to the business of saloon-keeping and to the law regulating the sale of intoxicating liquors, but that as long as the law stood he was not prejudiced against a man for selling beer or wine, *held*, that he was a competent juror: *State v. Nelson*, 58–208.

Where a juror stated that he had read an account of the matter (a murder) in the papers at the time it occurred, and came to the conclusion that defendant shot the deceased, and that it was a criminal thing for him to do, etc., but also stated that he had no bias against the defendant, and believed he could fairly and without prejudice determine upon the testimony the guilt or innocence of defendant, irrespective of what he had read, *held*, that it was not error to refuse to sustain a challenge for cause: *State v. Bruce*, 48–530. And see *State v. Lawrence*, 38–51; *State v. Sopher*, 70–494.

A juror cannot be said to have formed an unqualified opinion when the opinion he has formed is based upon hearsay and not upon statements made by any one claiming to have personal knowledge, and he still thinks that he can render a true verdict: *State v. Ormiston*, 66–143.

Where a juror testified that he had neither formed or expressed such an opinion as would prevent him from rendering a true verdict, *held*, that he was qualified, although on examination he said that he had an unqualified opinion, it appearing, however, that the juror adhered to the belief that he had no opinion which would prevent him from rendering a true verdict according to the evidence: *State v. Vatter*, 71–557.

Persons who have not formed or expressed such an opinion as would preclude them from rendering a true verdict upon the evidence submitted on the trial are not disqualified: *State v. Smith*, 73–32.

An opinion as to the guilt or innocence of the accused does not necessarily disqualify a juror even though some evidence would be required to remove it. The statute evidently contemplates the existence of such an opinion without its being such as to prevent the juror from rendering a true verdict: *State v. Field*, 89–34.

Knowledge of a case does not disqualify, nor does the fact of having formed an opinion. It is only such an opinion as would prevent the juror from rendering a true verdict upon the evidence that disqualifies, or as it is sometimes called, an unqualified opinion: *State v. Foster*, 91–164.

The fact that a juror has formed an opin-

ion on one or more of the facts of the case is not a sufficient ground of challenge. It is a question of fact for the court whether or not the opinion formed is one that would prevent the juror from rendering a true verdict upon the evidence: *State v. Weems*, 65 N. W., 387.

Where it appears that the juror's mind is in such condition that he can render an unbiased verdict on the evidence he is not subject to challenge although he may have previously formed an opinion based on what information he has heard with reference to the case: *State v. Yetzer*, 66 N. W., 737.

Opposed to death penalty: On trial for a capital offense it is no cause of challenge for the state that the juror is conscientiously opposed to the infliction of the death penalty: *State v. Lee*, 91–499.

Implied bias: The fact that a juror is a member of an association for the prosecution of persons generally who may be arrested for horse-stealing is not a ground for challenge upon the trial of a defendant charged with that crime: *State v. Wilson*, 8–407.

The fact that a juror is a resident of the city does not disqualify him to sit on a jury for the trial of a person for violation of a city ordinance: *State v. Wells*, 46–662.

Time of objection; new trial: If the juror is examined on oath at the proper time as to whether he has formed or expressed such an opinion as will disqualify him, and answers falsely with reference thereto, that fact being shown, may be a ground for a new trial, but such ground cannot be urged unless the witness has been interrogated with respect thereto at the proper time: *State v. Shelledy*, 8–477, 508.

Waiver: In accepting the jury, defendant waives an objection thereto for bias or prejudice, but if either of the jurors was disqualified to act as such, he does not waive his right of objection for this cause, but may make it a ground for new trial, unless he knew at the time the jury was sworn of the fact of disqualification: *State v. Groome*, 10–308.

Effect of disqualification: A judgment upon the verdict rendered by a disqualified jury is erroneous, but not void. It may be reversed upon appeal, but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59–550.

Error without prejudice: Where defendant does not exhaust all his peremptory challenges, any error in overruling a challenge to a juror for cause will be considered as error without prejudice: *State v. Elliott*, 45–486.

Failure of the court to sustain a challenge for cause to a juror who does not sit as one of the jurors on the trial will not constitute reversible error where it appears that defendant's peremptory challenges were not all exhausted when the jury was finally sworn: *State v. Davis*, 41–311.

And see notes to § 3686.

SEC. **5361. Juror examined.** Upon the trial of a challenge to an individual juror, the juror challenged shall be sworn, if demanded by either party, and examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon, but his answer shall not afterwards be testimony against him. [C.'73, § 4407; R., § 4773; C.'51, § 2988.]

It is not proper for counsel to ask a juror whether he has formed or expressed an opinion as to certain supposed defense: *State v. Arnold*, 12–479.

The proper method in examining a juror is to direct the investigation to the general question of opinion as to the guilt or innocence of the prisoner. The purpose of the inquiry is to ascertain the existence or nonexistence of actual bias. Counsel may direct the inquiry so as to prove to the mind of the jury facts, circumstances, and even hypothetical cases, and thus fully present his right to challenge for cause: *Ibid.*

Where the juror has been challenged for cause it is within the discretion of the court to allow the opposite party the privilege of recalling him for cross-examination as to his qualifications: *State v. Shelledy*, 8–477, 503.

SEC. **5362. Other witnesses.** Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge, and the court shall determine the law and the fact, and must allow or disallow the challenge. [C.'73, §§ 4408–9; R., §§ 4774–5; C.'51, §§ 2989–90.]

SEC. **5363. Order of challenges for cause.** The state shall first complete its challenge for cause, and the defendant afterwards, until twelve jurors have been obtained against whom no cause of challenge has been found to exist. [C.'73, §§ 4410–11; R., §§ 4776–7.]

SEC. **5364. Peremptory challenges.** Peremptory challenges shall be exercised in the same manner as is provided in the trial of civil actions. [22 G. A., ch. 39; C.'73, § 4414.]

The fact that the state waives the first peremptory challenge does not defeat the right of defendant to exercise his peremptory challenges: *Smith v. State*, 4 G. Gr., 189.

As to order of peremptory challenges under prior statute, see *State v. Pierce*, 8–231; *State v. Shelledy*, 8–477, 504.

As to order of challenges in civil cases, see § 3686 and notes.

That error in ruling for cause is waived by failure to exhaust peremptory challenges, see notes to § 5360.

SEC. **5365. Number.** If the offense charged in the indictment is or may be punishable with death or imprisonment for life, the state and defendant are each entitled to ten peremptory challenges; if any other felony, to six each, and if a misdemeanor, to three each. [22 G. A., ch. 39; C.'73, § 4413.]

Where the defendant in a criminal prosecution had a right to twenty peremptory challenges at the time the crime was committed and the law was subsequently amended so as to give the defendant but ten challenges, but the prosecution was commenced before the amendatory act took effect, *held*, that the amendment affected no vested right, but merely pertained to the remedy, and was applicable after it took effect, no matter when the proceeding was commenced: *State v. Shreves*, 81–615.

SEC. **5366. Vacancy filled.** After each challenge which is allowed, the vacancy occasioned thereby shall, if required, be filled before any further challenge is made, and any new juror thus introduced may be challenged for cause as well as peremptorily, if the peremptory challenges are not exhausted. [C.'73, § 4416; R., § 4782.]

SEC. **5367. Order of different kinds.** The challenges of either party need not be all taken at once, but separately, in the following order, including in each challenge all the causes of challenge belonging to the same class: to the panel; to an individual juror for cause; to an individual juror, peremptorily. [C.'73, § 4415; R., § 4781.]

SEC. **5368. Bias in favor of party.** Bias in a juror against either party is no cause of challenge by the other, and may be waived by the party against whom it exists. [C.'73, § 4418; R., § 4784.]

SEC. **5369. Jurors sworn.** When twelve jurors are accepted they shall be sworn to try the issues. [C.'73, § 4417; R., § 4783.]

Where it appeared that the jury, after being impaneled, were sworn "the truth to speak upon the issues joined," *held*, that the oath was sufficient: *Wrocklege v. State*, 1–167.

See, further, notes to § 5372.

As to trial by less than twelve, see notes to § 5338.

CHAPTER 24.

OF THE TRIAL TO A JURY.

SECTION **5370. Continuances.** The provisions of the code of civil procedure relative to the continuances of the trial of civil causes shall apply to the continuance of criminal actions, but no judgment for costs shall be rendered against a defendant on account thereof, except as in this code otherwise provided. The defendant shall, if he demands it upon entering his plea, be entitled to three days in which to prepare for trial. [C.'73, § 4419.]

Under a statutory provision, not now in force, as to the time of trial in criminal proceedings, *held*, that until the time fixed by law, or by the court in accordance with the provisions of statute, defendant could not be legally compelled to go to trial or show cause for continuance: *State v. Harris*, 33–356.

Defendant is not entitled, as a matter of right, to a continuance of a case to the term next after that at which the indictment is found: *State v. Arnold*, 12–479.

There is no rule of law granting to a defendant charged with a capital offense time beyond the first term to prepare for trial: *State v. Weems*, 65 N. W., 387.

A party cannot demand three days for preparation for trial where such time has been expressly or by mutual understanding waived by defendant: *State v. Thompson*, 64 N. W., 419.

Where, without demanding time to prepare for trial, defendant moved for a continuance on account of absence of witnesses, and the prosecution admitted the testimony of such witnesses, *held* that, not having asked specifically for the time allowed by statute, he must be deemed to have waived the provision. It has frequently been held that such provision may be waived: *State v. Harris*, 69 N. W., 413.

Where, without a formal plea having been entered, postponements of the time of trial were secured by the defendant, and the case finally set for trial by his consent, *held*, that he was not entitled to the time stipulated by statute after formal arraignment in which to plead: *State v. Jordan*, 87-86.

In a criminal case the state as well as defendant is entitled to reasonable opportunity to procure its witnesses and be prepared for trial; and where a proper application for a continuance is made by the state with sufficient showing of diligence, it should be granted: *State v. Painter*, 40-298.

When defendant during the trial dismissed his counsel, and had new counsel appointed by the court to defend him, *held* not error to refuse continuance of several days on such appointment, no ground for the dismissal appearing of record, and defendant's guilt being conclusively shown: *State v. House*, 55-466.

The time during the term at which the defendant shall be put upon his trial rests wholly in the sound discretion of the judge, and the fact that the court upon application of the prosecution passes the case to a later day of the term will not constitute error in the absence of any showing of abuse of discretion or prejudice: *State v. Maher*, 74-77.

In a prosecution for murder, where defendant asked for a continuance until the next term for the purpose of obtaining testimony and the application was overruled, but a continuance afterwards granted to a later day in the term, at which time defendant was tried, convicted and sentenced to death, and where the record showed that certain depositions had been taken in another state and mailed to the place of the trial but had failed to arrive, *held*, that the court should have continued the case upon its own motion until a subsequent term, that the defendant might have the benefit of the delayed testimony: *State v. Foster*, 79-726.

See, further, §§ 3663, 3664 and notes.

SEC. **5371. Provisions in civil cases.** All the provisions relating to mode and manner of the trial of civil actions, report thereof, translation of the shorthand reporter's notes, the making such report and translation a part of the record, and in all other respects, apply to the trial of criminal actions. [C. '73, § 4436; R., § 4809.]

SEC. **5372. Order of trial.** The jury having been impaneled and sworn, the trial must proceed in the following order: The clerk or county attorney must read the indictment and state the defendant's plea to the jury, and the county attorney may briefly state the evidence by which he expects to sustain the indictment; the attorney for the defendant may then briefly state his defense, and the evidence by which he expects to sustain it; the state may then offer the evidence in support of the indictment; the defendant or his counsel may then offer his evidence in support of his defense; the parties may then, respectively, offer rebutting evidence only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original case. When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the county attorney must commence, the defendant follow by one or two counsel, at his option, unless the court permit him to be heard by a larger number, and the county attorney conclude, confining himself to a response to the arguments of the defendant's counsel. Where two or more defendants are on trial for the same offense, they may be heard by one counsel each; and when the affirmative of the issue is with the defendant, the court may, in its discretion, award to the defendant the last argument. The court shall not restrict counsel as to time in their arguments to the jury. Upon the conclusion of the arguments, the court shall charge the jury in writing, without oral explanation or qualification, stating the law of the case. [17 G. A., ch. 19; C. '73, §§ 4420, 4423; R., §§ 4785, 4788; C. '51, § 2991.]

Administering oath to jury: No form of oath to the jury is prescribed by the statute; and, in the absence of a record showing the contrary, it will be presumed that the oath administered was in due form: *State v. Ostrander*, 18-435, 452.

Where the record recited that "the jury were duly impaneled and sworn to try the case (naming it), and a true verdict give therein, according to the evidence and the best of their ability," *held*, that even if that was literally the oath administered it was sufficient: *Ibid.*

Where it appeared that after being impaneled the jury were sworn "the truth to speak upon the issues joined," *held*, that the oath was sufficient: *Wrocklege v. State*, 1-167.

Under the provisions of the Code of '51, *held*, that the oath administered to the jury requiring them "the truth to speak," without including the direction "to try the issues joined," was not sufficient: *Dixon v. State*, 4 G. Gr., 381.

Under the provisions of the Revised Statutes of 1843 requiring an oath in a particular form, *held*, that where the record recited that the jury were sworn "the truth to speak" upon the issues joined between the parties, which was much less formal and solemn than the oath required by statute,

such irregularity was sufficient to warrant the reversal of a conviction for murder: *Harriman v. State*, 2 G. Gr., 270.

Method of impaneling: It is too late, after the verdict, to object to the manner of impaneling the jury when no objection was made on the trial: *Ibid.*

Dismissing juror: It is error, after the jury has been impaneled and the trial commenced, to dismiss a juror and substitute another in his place, even though the juror dismissed has been guilty of misconduct which would vitiate a verdict of guilty if rendered in such a proceeding. In such a case of misconduct the jury should be dismissed and the trial commenced anew: *Grable v. State*, 2 G. Gr., 559.

Order of trial: The order here specified may be varied by the court in the exercise of lawful discretion: *State v. Flynn*, 42–164; *State v. Falconer*, 70–416.

Right to open and close: Where after the opening argument for the prosecution defendant asked to have the cause submitted without further argument, waiving argument for the defense, *held*, that it was not error to allow another attorney to further address the jury on behalf of the prosecution: *State v. Row*, 81–138.

An argument of the prosecuting attorney in closing, *held* not to have introduced into the case any facts as to which there was no evidence or to have been otherwise unusual or prejudicial: *Ibid.*

As to right to open and close on plea of former conviction or acquittal, see § 5374.

Opening statement for prosecution: Statements by the district attorney, in opening the case to the jury, of facts which he expects to prove, and which if proved would be material and competent, may be made by him, if in good faith, believing and having good reason to believe he will be able to sustain them by evidence, although he is afterward unable to obtain evidence to sustain some of them: *State v. Meshek*, 61–316.

In the opening of a case some latitude must be allowed to counsel in stating what they expect to prove. In discussing the testimony in the closing arguments they may properly deduce therefrom facts which may be legitimately inferred from what appears in the record: *State v. Crafton*, 89–109.

If the attorney for the prosecution, and with reasonable ground to believe the evidence admissible, states what he claims will be the substance of the evidence, it does not follow that his conduct in so doing is censurable because in the further progress of the trial the court rules out the evidence offered as improper: *State v. Allen*, 69 N. W., 274.

Held, under a former statute, that the court might, in its discretion, allow the district attorney to make a statement of the case to the jury, and the only effect of the above provision is to secure, as a matter of right, what the court might, in its own discretion, have granted or refused: *State v. Bateman*, 52–604.

In a particular case, a lengthy statement, which was made by prosecuting attorney, of the evidence which it was expected would be introduced, and was followed by an unfair argument of the case based to a considerable extent upon facts which were wholly unsubstantiated by the evidence afterwards introduced, was held sufficient misconduct to require a reversal, the defendant having objected to the remarks of the prosecuting attorney at the time; and further *held*, that the fact that attorney for defendant replied to his opening argument in the same manner, did not render the action of the prosecuting attorney error without prejudice: *State v. Williams*, 63–135.

In a criminal prosecution where it was alleged that the county attorney in his opening statement to the jury was guilty of misconduct in stating that certain evidence would be introduced by the state, and no such evidence was offered, *held*, that an examination of the attorney's address in connection with the evidence failed to show a departure from proper methods sufficient to justify the granting of a new trial: *State v. Shreves*, 81–615.

The fact that by oversight the prosecution introduces its evidence before the indictment is read and the opening statement made will not constitute ground of reversal, such irregularity being waived by failure to interpose an objection to the introduction of evidence before the reading of the indictment: *State v. Norton*, 67–641.

Additional counsel for prosecution: The practice of allowing district attorneys to have the assistance of associate counsel has been too long acquiesced in, in this state, to be called in question. There can be no objection to leaving the matter of allowing associate counsel to the discretion of the court and prosecuting attorney: *State v. Fitzgerald*, 49–260.

An attorney employed by private parties may assist the county attorney, and the reading by him of the indictment to the jury will not be error: *State v. Crafton*, 89–109.

It is entirely proper, with the consent of the prosecuting attorney, that other counsel be employed to assist in the prosecution, and such counsel may be employed by the prosecuting witness for that purpose: *State v. Montgomery*, 65–483.

That the district attorney, at his own request, is assisted in the prosecution by another attorney, is not a ground for objection on the part of defendant: *State v. Ormiston*, 66–143.

In a proper case the court may permit an attorney to assist in the prosecution of an indictment without regard to the fees charged, even though he may not be employed by the supervisors and is not a deputy of the county attorney: *State v. Shinner*, 76–147.

A prosecuting witness or party complaining may employ additional counsel, with the approval of the court and county attorney, to assist in the prosecution of a criminal case: *State v. Shreves*, 81–615.

Even though the state has employed assistant counsel for the prosecuting attorney, it is not improper to allow counsel to assist in the prosecution who represent private parties, it not appearing that the private party represented has any interest in the

case antagonistic to that of the state: *State v. Holm*, 92–540.

And in general, see notes to § 301.

Burden of proof: See notes to § 5376.

Order of calling witnesses: While § 3119 does not apply to criminal cases, yet under some circumstances, and for some purposes, a witness may be called after the evidence is closed, and where no prejudice is shown from such introduction of testimony it will not be a ground for reversal: *State v. Shean*, 32–88.

The order in which evidence is allowed to be introduced is a matter so much in the discretion of the court that the supreme court will not feel justified in interfering unless upon the clearest showing of prejudice; so *held* where, upon rebuttal, the prosecution was allowed to introduce evidence in chief, while upon surrebuttal by defendant evidence in chief was excluded: *State v. Bruce*, 48–530.

Where evidence is offered in rebuttal which should have been offered in chief, the court may admit it as upon the original case, if in furtherance of justice it should be so admitted. The fact that it was not ostensibly so admitted will not justify a reversal in the absence of a showing of prejudice: *State v. Curran*, 51–112.

As to what is to be deemed rebutting testimony, see *State v. Parish*, 22–284.

The court is vested with discretion to permit the introduction of evidence out of the order prescribed by this section. And in the absence of showing of abuse of such discretion, it was held not error to allow the examination of a new witness in support of the indictment after several witnesses had been examined for defendant: *State v. Falconer*, 70–416. And see *State v. Flynn*, 42–164.

The state may in rebuttal support the proof before introduced by it, of the defendant's presence at the time and place of the crime, for the purpose of contradicting testimony on the part of defendant tending to show an *alibi: State v. Maher*, 74–77.

Under peculiar circumstances, *held*, that the testimony of witnesses who were not before the grand jury was admissible as rebutting evidence, and therefore no notice was necessary: *State v. Watson*, 81–380.

As to amount of evidence required, see notes to § 5376.

Statements in argument: Statements of an attorney for prosecution in a particular case, *held* reprehensible, but not sufficient to entitle defendant to a reversal: *State v. Winter*, 72–627.

In the argument of a cause to a jury it is proper for counsel to draw inferences from the evidence and comment upon the conduct of the parties, and a misstatement of the law in argument will not be regarded as prejudicial misconduct of counsel: *State v. Toombs*, 79–741.

Instructions: See § 5386 and notes.

SEC. **5373. Evidence for state—notice.** The county attorney, in offering the evidence in support of the indictment in the order prescribed in the last section, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant a notice in writing, stating the name, place of residence and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial. Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit, whereupon, if the court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the county attorney may examine said witness in the same manner and with same effect as though four days' notice had been given defendant as hereinbefore provided, except the county attorney, in the examination of witnesses, shall be strictly confined to the matters set out in his motion. [17 G. A., ch. 168, § 3; C.'73, § 4421; R., § 4786.]

Written instrument not witness: The word witness used in this section evidently refers to a person and not to an inanimate object or thing, and where it is sought to use in evidence an application for a continuance signed and sworn to by a party before the clerk of the court, and duly certified to by him, for the purpose of making comparison on the question of whether a signature was the handwriting of such party, *held*, that it is not necessary that such application for continuance should have been presented to the grand jury, and a minute thereof returned with the indictment, nor that any notice of the purpose to introduce it shall have been given: *State v. Farrington*, 90–673.

Witnesses whose names are not indorsed on the indictment cannot be introduced by the prosecution: *Smith v. State*, 4 G. Gr., 189: *Ray v. State*, 1 G. Gr., 316.

It is error to allow the prosecution to examine a witness not examined before the grand jury (without notice, etc.), although the name of such witness is indorsed on the

indictment, and what appear to be minutes of her testimony are attached thereto: *State v. Porter*, 74–623.

What sufficient indorsement: Variance between the name of a witness as indorsed on the indictment, and his true name, is not a valid objection, unless defendant is misled thereby: *State v. Ostrander*, 18–435, 459.

In a particular case, *held*, that the difference between the name of the witness as indorsed upon the indictment, and his real name, was so slight as not to justify his exclusion: *Houston v. State*, 4 G. Gr., 437.

The fact that an indorsement on the indictment gives the initials only of the witness' Christian name will not render it improper to allow such witness to testify: *State v. Pierce*, 8–231; *State v. Schlagel*, 19–169.

Where, in indorsing the name of the witness on the back of an indictment, his title, instead of his Christian name, was used, *held* that, if the witness was as unmistakably described as he would have been by the use of his Christian name, the object of the indorsement was accomplished, and no prejudice could result to defendant from allowing the witness to be called: *State v. McComb*, 18–43.

A mistake in the initials of a witness whose name is indorsed will not, in the absence of any showing of prejudice, be sufficient ground for objecting to his testimony: *State v. Stanley*, 33–526.

The mere misnomer in respect to the Christian name of a witness indorsed on the indictment will not prevent the state from using him on the trial when his identity sufficiently appears from the facts: *State v. Arnold*, 67 N. W., 252.

The indorsement is not the only evidence to be received on the question of identity of the witness called with the one who was examined before the grand jury. The minutes of evidence may be examined in determining that question, and such minutes, being a part of the record, need not be formally introduced in evidence; and where the name of the witness indorsed was "Mrs. Hutzel," and it appeared that the witness called was Mary E. Hutzel, *held*, that it would be presumed, in favor of the action of the court in allowing such witness to testify, that it appeared from the minutes that the person called was the person who was examined before the grand jury: *State v. Briggs*, 68–416.

For requirements as to indorsement of names of witnesses on the indictment, and the return of the minutes of evidence, see, further, § 5276 and notes.

Failure to indorse on the back of the indictment the name of a witness examined before the grand jury, and the minutes of whose evidence are returned, is not a ground for excluding his testimony; such defect can only be reached by motion to set aside the indictment: *State v. Fowler*, 52–103; *State v. Flynn*, 42–164.

An objection that the name of the witness is not indorsed on the indictment may be a ground of a motion to set aside the indictment, but it is no reason for excluding the evidence where the witness was examined before the grand jury and the minutes of his evidence were returned. *State v. Story*, 76–262.

Failure to indorse the names of the witnesses upon the indictment where the minutes of their testimony are returned is a ground for assailing the indictment but not a ground of objection to the introduction of the witness: *State v. Craig*, 78–637.

Where T. B. Ross was examined as a witness but the name on the indictment for illegal sale of liquor was Burr Ross, and one count in the indictment charged sales to Burr Ross, but such count was afterwards withdrawn from the jury, *held*, that any error in the receipt of the testimony of such witness relating to that count of the indictment was cured: *Ibid.*

Where evidence of witnesses whose names are not indorsed on the indictment is withdrawn from the jury, the fact that they were improperly allowed to testify will not be ground for reversal: *State v. Cummins*, 76–133.

And see § 5319 and notes.

A continuance being granted after the commencement of the trial, the ground therefor being an application by the district attorney showing discovery of evidence which it was not possible to introduce by reason of the witness not having been examined before the grand jury, and no notice of its proposed introduction having been given in proper time, *held*, that this did not constitute a bar to a subsequent trial: *State v. Parker*, 66–586; *State v. Falconer*, 70–416.

Duty to call: Failure of the state to call any of the witnesses whose names are indorsed on the indictment is no ground for presuming that the testimony of such witnesses would be in favor of defendant: *State v. Ostrander*, 18–435, 457.

Failure of the state to produce all the witnesses that have testified before the grand jury is no wrong, and creates no presumption of wrong: *State v. Dillon*, 74–653.

The prosecution is under no obligation to call all the witnesses whose names are indorsed on the indictment: *State v. Helm*, 92–540.

Failure to file minutes: The mere failure to file the minutes returned by the grand jury should not prevent the state from introducing its evidence: *State v. Postlewait*, 14–446.

Nor should the fact that minutes of the evidence as taken before the committing magistrate are not properly certified to: *State v. Kepper*, 65–745.

The minutes are sufficiently filed when they are left with the clerk of the court, although not indorsed by him nor entered in the appearance docket: *State v. Craig*, 78–637.

The delivery of the minutes to the clerk for the purpose of having them kept as a part of the record is a sufficient filing to comply with the statute. It is not necessary that they be attached to the indictment, nor is any caption or separate filing mark essential: *State v. Cross*, 64 N. W., 614.

Where the minutes are returned with the indictment, but not marked filed, the defect may be cured by order of court when the objection is made: *State v. Gillett*, 92–527.

In the examination of a witness the minutes of whose testimony were taken by the

grand jury and returned with the indictment, the prosecuting attorney is not limited to the testimony given by the witness before the grand jury, but may examine him as to other matters not therein referred to: *State v. Bowers*, 17–46; *State v. Ostrander*, 18–435; *State v. McCoy*, 20–262.

The mere brevity of the minutes of the witness' testimony taken by the grand jury will not justify the entire exclusion of the testimony of such witness: *State v. Van Vleet*, 23–27.

Where the indictment is found upon minutes of testimony taken before a magistrate, as provided by § 5272, and the names of the witnesses examined by such magistrate are indorsed on the back of the indictment, they may then be called to testify by the prosecution without having been examined by the grand jury: *State v. Rodman*, 62–456.

Other witnesses: This section applies only to evidence in support of the indictment, and does not preclude the testimony of other witnesses who were not before the grand jury, and whose evidence is not returned with the indictment, as to the fact that a certain witness testified before the grand jury: *State v. Fowler*, 52–103.

The state may call, in rebuttal, witnesses whose names are not indorsed on the indictment, and who were not examined before the grand jury: *State v. Parish*, 22–284; *State v. Gillick*, 10–98; *State v. Ruthven*, 58–121; *State v. Rivers*, 68–611.

If defendant becomes a witness in his own behalf, witnesses to impeach him may be called who were not examined before the grand jury, without serving notice of the intention to call them: *State v. Teeter*, 69–717.

A witness may be called in rebuttal without having been examined before the grand jury or notice given to the opposite party, even though the matter as to which he testifies might also have been proper in support of the state's case in the first instance: *State v. Munchrath*, 78–268.

Under particular circumstances, *held*, that the testimony of witnesses who were not before the grand jury was admissible as rebuting evidence, and therefore no notice was necessary: *State v. Watson*, 81–380.

A witness may be called for the purpose of contradicting the testimony on behalf of defendant although his name is not indorsed on the indictment: *State v. Clark*, 69 N. W., 257.

The notice: Under this section it is sufficient that the notice be served upon defendant personally. The mode of service or authentication is not prescribed. Authentication by the person making the service is sufficient: *State v. Ostrander*, 18–435, 452.

Service of notice on attorney for defendant is not sufficient: *State v. Russell*, 68 N. W., 433; *State v. Beal*, 62 N.W., 657.

The return of the sheriff without verification is sufficient to show service of the notice: *State v. Pugsley*, 75–742.

Such a notice if formally served should be returned as in the case of the service of an original notice or it should be shown by other evidence that a notice was in fact given: *State v. Allen*, 69 N.W., 274.

The purpose of the statute is to secure to the accused such knowledge of the evidence which will be given against him as will enable him to make proper preparation to contradict or explain it: *State v. Rainsbarger*, 74–196; *State v. Harlan*, 67 N.W., 381.

But errors in such notice as to the witness' place of residence, or the facts expected to be proved by him, will not render the introduction of the testimony of the witness erroneous where the defects or mistakes in the notice are not prejudicial: *State v. Rainsbarger*, 74–196.

The purpose of the notice is the same as that of the minutes of the evidence which are required to be returned with the indictment: *State v. Harlan*, 67 N.W., 381.

It is only required that the notice shall show the substance of what the state expects to prove: *State v. Hall*, 66 N.W., 725; *State v. Yetzer*, 66 N.W., 737.

The notice provided for by this statute is designed to inform the accused of the evidence which the witness described will give on the trial, that the accused may investigate and prepare to meet it. A notice to the effect that the state will prove by the witness that the defendant is guilty as charged does not meet the statutory requirement. It should state the matter to which the witness is expected to testify, and not its legal effect: *State v. Kreder*, 86–25.

When notice has been properly given, the witness may be examined not only as to the matter set forth in the notice but as to other material matters in the case: *State v. Craig*, 78–637; *State v. Lee*, 64 N. W., 284.

The testimony of the witness need not be confined to questions of fact set out or referred to in the minutes of his testimony taken before the grand jury or in the notice served upon the defendant in case the witness was not examined before the grand jury: *State v. Bernstein*, 68 N. W., 442.

If a witness not examined before the grand jury is examined on the trial without such notice having been given, an error is committed which will be presumed to have been prejudicial, but where the insufficiency in the notice is in the form of service thereof, and this objection is not made, the action of the court receiving the testimony of the witness will not constitute prejudicial error: *State v. Whalen*, 68 N. W., 554.

Where the minutes of evidence taken before the committing magistrate and considered by the grand jury are returned with the indictment it is not necessary to give the notice required in this section. If the name of the witness is not indorsed on the indictment, objection on that ground is to be taken by motion to set aside the indictment under § 5319 and not by way of objection to the evidence: *State v. Beal*, 62 N. W., 657.

Waiver of objection: That witnesses are examined whose names are not on the indictment cannot be raised as an objection for the first time after conviction: *Ray v. State*, 1 G. Gr., 316; *State v. Houston*, 50–512.

Objection to the introduction of a witness by the prosecution whose name is not indorsed on the indictment, and without previous notice, may be waived: *State v. Ward*, 73–532.

The prohibition is against the introduc-

tion of the witness and should be made at the time the witness is offered; if not so made it is deemed waived, and cannot be interposed after the examination has proceeded: *State v. Hurd*, 70 N.W., 613.

The objection that a witness was not examined before the grand jury, and that notice of his testimony was not served upon defendant, cannot be first urged in the supreme court: *State v. Bernstein*, 68 N.W., 442.

If the defendant permits a witness to be examined without objection who was not before the grand jury, and for whose examination no notice was given or leave granted, he cannot afterward complain, and if upon objection made he is given the right to a continuance as provided by statute, but elects to take exception, and proceed with the case, he cannot urge the ruling on appeal as error: *State v. Kidd*, 89–54.

SEC. **5374. Opening and closing by defendant.** When the defendant's only plea is a former conviction or acquittal, the order prescribed in the second preceding section shall be reversed, and the defendant shall first offer his evidence in support of his defense. [C.'73, § 4422; R., § 4787.]

As to burden of proof of affirmative defenses, see notes to § 5376.

SEC. **5375. Separate trials.** When two or more defendants are jointly indicted for felony, any defendant requiring it may be tried separately; in other cases defendants jointly indicted may be tried separately or jointly, in the discretion of the court. [C.'73, § 4424; R., § 4789; C.'51, § 2992.]

53 84

When defendants jointly indicted for a felony elect to be tried separately, the order in which they shall be tried rests with the district attorney, under the direction of the court: *State v. Hudson*, 50–157; *State v. Nash*, 7–347, 373.

Where defendants are jointly indicted for a misdemeanor they may be tried jointly or separately in the discretion of the court: *State v. Gigher*, 23–318.

And the state, as well as defendants, in such case may ask for a separate trial: *State v. Marvin*, 12–499.

Where the offense is not felony it is within the discretion of the court to refuse a separate trial: *State v. Kirkpatrick*, 75–505.

Whether tried separately or jointly, either one of the co-defendants is a competent witness for the other: *State v. Nash*, 10–81; *State v. Gigher*, 23–318.

In case of a joint trial one co-defendant is a competent witness for the other, the jury being properly cautioned that the evidence is not to be considered in behalf of the defendant so testifying: *State v. Stewart*, 51–312.

The record of the trial of one co-defendant from which it appears that he was convicted is not admissible in evidence on the separate trial of the other defendant: *State v. Fertig*, 67 N. W., 87.

Whether defendants be jointly or separately tried, a separate judgment is to be entered up as to each, and the clerk is entitled to a fee for the entry of each separate judgment; but where tried jointly he is entitled to but one trial fee: *State v. Hunter*, 33–361.

Acquittal of one of two defendants jointly indicted does not bar the prosecution of the other. One may be found guilty and the other acquitted: *State v. McClintock*, 1 G. Gr., 392.

Where defendants are jointly indicted, and the evidence shows that if both are guilty they are guilty of distinct offenses committed in separate transactions, the court should require the prosecution to elect upon which transaction it will proceed: *State v. Brown*, 58–298.

Two persons may be jointly indicted for the same crime without alleging that one is principal and the other accessory; or that either one was more directly the perpetrator of the act than the other: *State v. Zeibart*, 40–169.

Where two defendants are jointly indicted, and a separate trial is awarded, the one on trial has no legal right to have the other present in court for consultation: *State v. Weems*, 65 N. W., 387.

SEC. **5376. Reasonable doubt.** Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal. [C.'73, § 4428; R., 4807.]

Reasonable doubt: For a definition of reasonable doubt, see *State v. Ostrander*, 18–435, 458.

If the jury in considering the whole case have reasonable doubt upon any essential ingredient of the offense, this entitles the defendant to an acquittal because it generates a doubt of guilt: *State v. Hennessy*, 55–299.

The general instruction upon reasonable doubt which is usually given need not be repeated in each instruction which relates to the elements of the crime or facts of the case: *Ibid.*; *State v. Cross*, 68–180: *State v. Maloy*, 44–104; *State v. Mundy*, 81–603.

It is not a reasonable doubt of any one proposition of fact which entitles to an acquittal, but a reasonable doubt of guilt arising upon the consideration of all the evidence in the case: *State v. Hayden*, 45–11.

The doctrine of reasonable doubt is wisely limited to the general conclusion of guilty or not guilty upon all the evidence in the case. It cannot safely be applied to any one fact in the case, howsoever material it may be, as, for instance, insanity: *State v. Felter*, 32–49.

It is error to distinguish between two material facts and instruct as to one that it need only be fully and clearly proven: *State v. Stewart*, 52–284.

An hypothesis which will be sufficient to sustain a reasonable doubt must arise out of the evidence adduced and not out of facts of

which there is no proof: *State v. Porter*, 34–131.

The court is not required to charge that the jury should acquit if they have a reasonable doubt as to a specified element of the crime. It is sufficient to instruct them generally that they should acquit if upon the whole case they have such a doubt of the guilt of defendant: *State v. Curran*, 51–112; *State v. Stewart*, 52–284.

An instruction to the effect that if, after carefully weighing all the evidence and deliberately considering the whole case, the jury had a reasonable doubt of the guilt of defendant, they should return a verdict of not guilty, *held* sufficient; and *held*, also, that the rule as to reasonable doubt need not be repeated in other instructions: *State v. Miller*, 53–154.

It is not correct to charge that if the evidence creates in the minds of the jurors a belief in the defendant's guilt, they would not have a reasonable doubt that he was guilty. A person may entertain a belief in regard to a matter which is not sufficiently firm to exclude all reasonable doubt: *State v. Harris*, 66 N.W., 728.

The doubt that acquits is a reasonable doubt that exists in the mind after all the testimony is heard and considered. It is not necessary that the jury be instructed that the evidence must remove reasonable doubt. The existence of reasonable doubt is not to be presupposed: *State v. Perigo*, 80–37.

It is error to instruct that a preponderance of evidence in behalf of defendant is necessary to raise a reasonable doubt of guilt: *State v. Porter*, 64–237.

It is erroneous to charge the jury that if there is one material fact which is proved to the satisfaction of the jury by a preponderance of the evidence which is inconsistent with the guilt of defendant this is sufficient to raise a reasonable doubt, as such language throws upon defendant the burden to raise a reasonable doubt by preponderance of evidence: *State v. Judiesch*, 65 N.W., 157.

Where a paragraph of a charge to the jury fully and explicitly stated the degree of proof required to convict, and the following paragraphs failed to instruct that the jury must find beyond a reasonable doubt, *held* that, taking the instructions together, no doubt could have existed in the minds of the jury that their finding must be beyond a reasonable doubt: *State v. Rainsbarger*, 79–746.

The following instruction to the jury as to reasonable doubt, *held* proper: "Before you will be justified in convicting the defendant you must be satisfied of his guilt beyond a reasonable doubt:" *State v. Helvin*, 65–289.

Instructions as to reasonable doubt *held* sufficient in particular cases: *State v. Sterling*, 34–443; *State v. Bodekee*, 34–520; *State v. Pierce*, 65–85; *State v. Elsham*, 70–531.

Reasonable doubt of individual jurors: It is a reasonable doubt entertained by the jury and not by any one member thereof that justifies an acquittal: *State v. Rorabacher*, 19–154.

An instruction that a reasonable doubt must be one that arises in the minds of the whole jury, *held* erroneous, as liable to convey the impression that unless such doubt was shared by all the jurors there should be a conviction: *State v. Stewart*, 52–284; *State v. Sloan*, 55–217.

Each juror must, under his oath, vote according to his own convictions, and the doubt with which he has to do is the doubt in his own mind: *State v. Sloan*, 55–217.

Although each juror is to act upon his own judgment, and is not required to surrender his own conviction unless convinced, yet it is not necessary that such a proposition be stated in connection with the ordinary charge in regard to reasonable doubt: *State v. Hamilton*, 57–596.

It is not necessary that the jury be advised that each juror is to act upon his own convictions, and that he should not concur in a verdict which is against his judgment: *State v. Fry*, 67–475.

In civil actions: The rule of criminal law that a defendant can only be convicted upon proof of the crime charged beyond a reasonable doubt is not applicable in a civil action to recover damages for a criminal act, and in such case the plaintiff should be allowed to recover where the criminal act is established by preponderance of evidence. (Overruling *Barton v. Thompson*, 46–30): *Welch v. Jugenheimer*, 56–11; *Wood v. Porter*, 56–161; *Lewis v. Garretson*, 56–278; *Barton v. Thompson*, 56–571; *Kendig v. Overhulser*, 58–195.

So *held* in an action on an insurance policy, where it was alleged as a defense that plaintiff himself caused the fire in order to get the insurance: *Behrens v. Germania Ins. Co.*, 58–26.

In an action for false and fraudulent representations it is not necessary to prove the fact of fraud beyond a reasonable doubt, although intentional fraud might constitute a crime under the statute: *Faville v. Shehan*, 68–241.

Mere preponderance of evidence is sufficient to establish a fraudulent alteration of an instrument in writing: *Coit v. Churchill*, 61–296.

In actions for slander or libel in charging plaintiff with the commission of a crime, it defendant seeks to justify by pleading the truth of the charge, a preponderance of evidence of the commission of the crime is sufficient to support his defense. The criminal act need not be proven, as in criminal cases, beyond a reasonable doubt. (Overruling *Bradley v. Kennedy*, 2 G. Gr., 231; *Forshee v. Abrams*, 2–571; *Fountain v. West*, 23–9; *Ellis v. Lindley*, 38–461; *Mott v. Dawson*, 46–533): *Riley v. Norton*, 65–306.

Bastardy proceedings: The rule of criminal law requiring proof beyond a reasonable doubt is not applicable in favor of defendant in a bastardy proceeding: *State v. McGlothlen*, 56–544.

Amount of evidence: In criminal cases the jury do not weigh the evidence as in civil cases. Neither a preponderance of evidence nor any weight of preponderant evidence is sufficient to warrant a conviction in a criminal case unless it generates a full belief of the guilt of the party charged, to the

exclusion of all reasonable doubt: *Tweedy v. State*, 5-433.

Sufficiency of evidence: While the juror is not an artificial being whose judgment is to be governed by technical and artificial rules, but is a man, and should, while acting as juror, act as a man, exercising his reason, his intelligence, his every-day judgment and his common sense, yet it is erroneous to charge that he is not at liberty to disbelieve as a juror while he believes as a man: *State v. Collins*, 20-85.

But error in using such language was held not sufficient to warrant a reversal where the case was otherwise fairly presented and the evidence of guilt was satisfactory: *State v. Pratt*, 20-267.

It is improper to instruct the jury that what satisfies the mind outside of the jury-box should do so within it. Information derived from the evidence which might be sufficient to lead a person not acting as a juror to a belief of defendant's guilt might not be sufficient to justify a verdict of guilty by such juror: *State v. Ruby*, 61-86.

Burden of proof as to affirmative defenses: Any negative matter, such as the absence of self-defense, the want of sufficient provocation, etc., must be shown by the state, and defendant cannot be held to have the burden of proof cast upon him to show such matters. But whenever the matter of defense is wholly disconnected from the body of the offense charged (for instance, where in homicide it is claimed that the death is caused by neglect of a wound), this general rule does not properly apply, but in such cases the burden of proof rests upon the accused: *State v. Morphy*, 33-270.

Burden does not shift: It is error to instruct the jury that if evidence on the part of the state, alone and unexplained, would establish beyond a reasonable doubt the guilt of the defendant, then the burden of proof is shifted to the defendant to establish his defense by a preponderance of evidence: *State v. Porter*, 64-237.

Burden of proof as to proviso: The burden of proving an exemption under a proviso rests upon the party claiming it: *Sayre v. Wheeler*, 31-112.

As to pleading exception or proviso, see notes to § 5288.

Burden of proof as to insanity: Where insanity is sought to be established as an excuse for a crime, the presumption of sanity must be overcome by a preponderance of evidence. It is not sufficient for defendant to produce such evidence as to raise a reasonable doubt of sanity, nor is he, on the other hand, required to prove the insanity beyond a reasonable doubt: *State v. Felter*, 32-49; *State v. Bruce*, 48-530.

A preponderance of evidence of insanity raises a reasonable doubt of guilt: *Ibid.*

The burden of proving insanity rests upon the defendant, and he must overcome by a preponderance of evidence the proof of sanity on behalf of the prosecution: *State v. Geddis*, 42-264.

As to the defense of insanity as well as that of *alibi*, the burden of proof is upon defendant: *State v. Hemrick*, 62-414.

While the burden of proving insanity as a defense is upon defendant, he is only required to establish such defense by a preponderance of evidence. It is error to instruct the jury that if the evidence goes no further than to show such a state of mind to be possible or merely probable, it is not sufficient. The presumption of sanity simply imposes upon defendant the burden of proving insanity, and such presumption is not to be weighed against any measurable amount of evidence: *State v. Jones*, 64-349.

The fact that defendant undertakes to prove insanity does not relieve the prosecution of the burden of proving the criminal act and the criminal intent, and does not give defendant the opening and closing: *State v. Felter*, 32-49.

Burden of proving alibi: Where defendant seeks to establish an *alibi*, the burden of proof rests upon him, and it cannot be established except by a preponderance of evidence: *State v. Red*, 53-69; *State v. Rivers*, 68-611.

But this does not abrogate the doctrine that a person cannot be convicted upon a preponderance of evidence; and if a reasonable doubt arises upon the whole evidence, and upon the evidence establishing certain essential facts, or upon evidence of facts inconsistent with the prisoner's guilt, the jury should acquit. Where defendant relies upon an *alibi*, the burden of proof is upon him to establish by a preponderance of evidence the fact that he was not present at the commission of the crime: *State v. Red*, 53-69; *State v. Hamilton*, 57-596; *State v. Krewsen*, 57-588; *State v. Hemrick*, 62-414; *State v. Fry*, 67-57-475.

Evidence of an *alibi* cannot prevail unless it preponderates: *State v. Reed*, 62-40; *State v. Rowland*, 72-327.

A bare preponderance of proof in favor of defendant, where he relies upon an *alibi*, is sufficient: *State v. Vincent*, 24-570; *State v. Northrup*, 48-583; *State v. Kline*, 54-183.

It is error in such case to charge the jury that they must be *fully satisfied* of the *alibi*: *State v. Hardin*, 46-623; *State v. Henry*, 48-403.

It is not necessary to acquittal that an *alibi* should be clearly established; it is sufficient if it is established by a preponderance of evidence: *State v. Sipult*, 81-40.

It is not error to instruct the jury that they may acquit if there is a fair preponderance in support of the claim of *alibi*: *State v. Johnson*, 72-393.

An instruction that the burden of proof is on defendant to establish by preponderance of evidence his defense of *alibi*, but that the burden of proof is on the state to establish beyond a reasonable doubt that the crime charged was in fact committed, and that if the entire evidence upon the whole case raises a reasonable doubt as to defendant's guilt, then the jury should acquit *held* not objectionable: *State v. Van Winkle*, 80-15. And see *State v. Hatfield*, 75-592.

The rule in this state is that the burden is upon the defendant to prove a defense of *alibi* by a preponderance of the evidence. This burden is upon the accused because the

knowledge of the truth of it and of the means of proving it is peculiarly with him, and unless proven it is entitled to no consideration. It is as though no evidence had been offered upon the subject. Defendant must establish the *alibi* by a preponderance of the evidence before he is entitled to have it considered, even as the basis of a reasonable doubt: *State v. Beasley*, 84-83.

The jury cannot acquit on the defense of *alibi* unless it is supported by the preponderance of the evidence on that question: but if the evidence upon that defense considered alone, or in connection with all other evidence, leaves reasonable doubt in the minds of the jury of defendant's guilt, they cannot convict: *State v. Maher*, 74-77.

It is error to instruct the jury that an unsuccessful attempt to establish an *alibi* is of great weight against defendant, and implies an admission of the truth and relevancy of the facts alleged against him. It is only a fabricated or trumped-up defense of *alibi*, interposed with a knowledge of its falsity, that will constitute even a circumstance against defendant, and even that is not conclusive of his guilt: *State v. Collins*, 20-85.

It is not erroneous to instruct the jury that the defense of *alibi* is one easily manufactured, and that juries are generally and properly advised by the courts to scan the proofs of an *alibi* with care and caution: *State v. Blunt*, 59-468; *State v. Rowland*, 72-327.

The defense of *alibi* does not confess the act charged, and seek to excuse it, as in the defense of insanity, and therefore, the absence of instructions in reference to evidence of an *alibi* is no prejudice to the defendant, and, under the general instructions as to reasonable doubt on the facts in the case, the defendant would have the advantage of all the presumption which could arise in his favor by reason of such evidence: *State v. Sutton*, 70-268.

All the evidence in the case may be considered in determining the truth of the defense of *alibi*: *State v. Standley*, 76-215.

Instructions as to *alibi* in a particular case *held* not erroneous: *State v. Butler*, 67-643.

Recent possession of stolen property: Where there was evidence of recent possession of stolen property by defendant accused of the larceny thereof, *held* error to instruct the jury that the burden of proof was upon defendant to satisfy the jury that this possession was innocent. Less than a preponderance of evidence on that point may be sufficient to justify a reasonable doubt of defendant's guilt: *State v. Emerson*, 48-172; *State v. Kirkpatrick*, 72-500.

In such case defendant is only required to introduce sufficient evidence as to having honestly come into possession of the goods to raise a reasonable doubt of guilt: *State v. Richart*, 57-245; *State v. Hopkins*, 65-240. And see *State v. Peterson*, 67-564.

It is erroneous to instruct the jury that defendant may be convicted on proof of recent possession of stolen property unless he has established to their satisfaction that he did not steal it. It is sufficient if he raise a reasonable doubt as to his guilt in so far as that question rests alone upon the fact of his possession: *State v. Manley*, 74-561.

Possession of the stolen property immediately after a larceny is presumptive proof that the person so in possession is guilty of the larceny: *State v. Brady*, 27-126; *State v. Golden*, 49-48.

And such presumption is sufficient to convict unless rebutted: *State v. Hessians*, 50-135.

The presumption arising from the recent possession of stolen goods may be overcome by testimony establishing facts inconsistent with guilt. Good character may serve in some cases to overcome such presumption: *State v. Kelly*, 57-644; *State v. Richart*, 57-245.

The fact that recent possession of stolen property has not been explained in a manner consistent with defendant's innocence will not in itself necessarily establish his guilt: *State v. Jordan*, 69-506.

For other cases as to presumption of guilt from recent possession of stolen property, see notes to §§ 4831-4833.

Chastity of prosecutrix in seduction: The presumption being in favor of the chastity of the prosecutrix in a prosecution for seduction, defendant relying upon the want of such chastity must prove unchastity by a preponderance of evidence. It is not sufficient merely to produce such evidence as would raise a reasonable doubt of chaste character, but the evidence must be such as to overcome the presumption of chastity by a fair preponderance: *State v. Wells*, 48-671. And see *State v. Higdon*, 32-262; *Andre v. State*, 5-389.

The burden of proving want of chastity in a prosecution for seduction is with the defendant, and it is proper to instruct the jury that, unless such defense is made out by a preponderance of the evidence, they should find that prosecutrix was chaste: *State v. Hemm*, 82-609.

The presumption in favor of the chastity of the prosecutrix is not a presumption against the innocence of the defendant. He is presumed innocent of the fact, but the presumption is also entertained in favor of the rectitude of her character: *Andre v. State*, 5-389.

In a civil action for seduction the burden is upon defendant to establish unchastity, but no higher evidence or greater proof is required than to establish any other fact: *West v. Druff*, 55-335.

Presumption: The previous chaste character of the prosecutrix is presumed, and the *onus* is upon defendant to overcome such presumption by preponderance of evidence: *State v. Wells*, 48-671; *State v. Higdon*, 32-262; *Andre v. State*, 5-389.

Such presumption may be rebutted by proven or admitted facts or circumstances in the case: *State v. Bowman*, 45-418.

Where defendant introduces evidence of want of chastity on the part of prosecutrix, it is not proper to say that the burden of proof shifts upon the issue of chastity. The burden is on the defendant to show want of it: *State v. Hemm*, 82-609.

In such case it is not necessary to instruct the jury that if on all of the evidence, including the evidence as to want of chastity, there is a reasonable doubt as to whether the defendant is guilty, he should be acquitted. It

is proper to instruct that, if it has not been shown by a preponderance of the evidence that prosecutrix was unchaste in character, the jury should find that she was chaste: *Ibid.*

The presumption in favor of the chastity of the prosecutrix is not a presumption against the innocence of defendant. He is presumed innocent of the fact, but the presumption is also entertained in favor of the rectitude of her character: *Andre v. State*, 5-389.

The presumption of chastity on the part of the prosecutrix prior to the seduction continues until the contrary is shown by a preponderance of the evidence: *State v. Brown*, 86-121.

An instruction that the presumption of chastity might be overcome by proof of wantonness or indiscretion indicating an unchaste character, but which made no reference to other matters which might indicate unchastity, *held* not erroneous where there was no evidence of other facts indicating unchastity: *State v. Bell*, 49-440.

As to presumption of chastity in a civil action for damages and evidence to overcome it, see *West v. Druff*, 55-335.

See, further, as to evidence of chastity, § 4762 and notes; and as to corroboration of the testimony of prosecutrix in rape, seduction, etc., see § 5488 and notes.

Burden of proof as to self-defense: Proof of the homicide will not throw upon the defendant the burden of proving, by preponderance of evidence, excuse or justification arising from self-defense, where such excuse or justification is apparent from the evidence of the prosecution or from the circumstances attending the homicide: *Tweedy v. State*, 5-433.

Where in a prosecution for homicide defendant undertakes to establish that the act was done in self-defense, it is error to instruct the jury that the burden of proving the self-defense is upon him. He is entitled to acquittal if he shows by the facts attending the commission of the offense, as appearing from his own evidence or that of the prosecution, that there is a reasonable doubt that his act was wilful: *State v. Porter*, 34-131.

Where there is evidence tending to show that defendant acted in self-defense, the jury should be instructed that the burden of proof is upon the state to prove that the homicide was not committed in self-defense: *State v. Fowler*, 52-103; *State v. Cross*, 68-180; *State v. Donahoe*, 78-486.

Where defendant, in a prosecution for the crime of homicide, claims that he acted in self-defense, he is entitled to acquittal if he introduces evidence raising reasonable doubt whether the act was justifiable: *State v. Dillon*, 74-653.

Defendant's good character; for what purpose shown: General good character of accused may be shown to rebutt he presumption of guilt arising from circumstantial testimony, but it does not constitute a defense: *State v. Turner*, 19-144.

Good character is admissible in all criminal cases, and the jury should not be limited in their consideration of such evidence to cases where the crime is sought to be established solely by circumstancial evidence: *State v. Kinley*, 43-294; *State v. Rodman*, 62-456.

In passing upon the guilt or innocence of defendant, evidence of good character should be considered irrespective of whether the other evidence is conclusive or inconclusive, and it is for the jury to determine what weight such evidence of character shall have: *State v. Gustafson*, 50-194.

In trials for felony, and in some instances for misdemeanors, the prisoner is always allowed to call witnesses to his good character, and in any case of doubt proof of good character will have great weight. It is a circumstance always to be submitted to the consideration of the jury, together with the other facts of the case: *State v. Nash*, 7-347, 373.

It is always permissible for defendant to show his general good character and reputation as to the trait involved in the crime charged; and where defendant was on trial for perjury, *held*, that he should be allowed to show that his general reputation was good: *State v. Kinley*, 43-294.

Evidence of good character should be restricted to the general trait which is in issue. Thus, in a prosecution for larceny, the general character for honesty may be shown, but in case of seduction, evidence of character for virtue only is admissible, and not as to good character generally: *State v. Curran*, 51-112.

Previous good character is, of itself, no defense, but is a circumstance which should be considered by the jury in connection with all the other evidence and which may be sufficient to turn the scale in defendant's favor, but its value as evidence in any given case is to be determined by the jury: *State v. Donovan*, 61-278.

The jury may be instructed that, if they find good character established by the evidence, they should consider it and allow it such weight as they believe it fairly entitled to, as tending to show that men of such character would not be likely to commit the crime charged. Evidence of good character does not have a tendency to rebut the commission of the crime, except inferentially: *State v. Ormiston*, 66-143.

In a prosecution for an assault to commit murder, where defendent was permitted to testify in his own behalf, and evidence was introduced to impeach his testimony, and the court instructed the jury that this evidence should only be regarded to the extent of determining the right and credit to be given defendant's testimony in his own behalf. *held*, that the application of the testimony was clearly restricted to defendant as a witness, and it was unnecessary to add to the instruction that such testimony should not be allowed to influence them against defendant as a party to the suit: *State v. Rainsbarger*, 79-745.

Character not in issue: Although defendant may give evidence of his good character, his character is not in issue except as he may put it in issue by offering evidence in support of it, and the court should not instruct the jury that, as defendant had

a legal right to introduce testimony in support of his character, the fact that he failed to do so was a circumstance to be considered in determining the question of his guilt: *State v. Kabrich*, 39-277.

Failure to call a witness as to good character raises no presumption against the prisoner: *State v. Dockstader* 42-436.

Evidence of good character on the part of defendant should be confined to the time prior to the finding of the indictment: *State v. Kinley*, 43-294.

Where defendant has introduced evidence of his character while living in a certain community, it is competent for the state to show by witness having knowledge of the facts what his reputation was in this and other communities where he had lived: *State v. Foster*, 91-164.

Evidence of good conduct during confinement is not admissible to prove good character: *State v. Hart*, 29-268.

Where defendant offers a witness to testify as to his good character, the prosecution cannot, upon cross-examination, ask as to particular facts tending to show such character. The evidence must be confined to the general character or reputation: *Gordon v. State*, 3-410; *State v. McGee*, 81-17.

A witness as to good character of defendant may testify as to his personal observation and knowledge as to the trait of character of defendant in question, and is not limited to the general reputation of defendant in that respect in the community in which he lives: *State v. Sterrett*, 68-76.

Where a witness called by defendant to prove his good character testified that it was divided, *held*, that he might be asked on cross-examination what particular acts of defendant's life he had heard spoken of, and might state various crimes of the same character which defendant had been accused of by report during the five or six years preceding: *State v. Arnold*, 12-479.

Testimony as to good character should relate to the reputation of the defendant in the neighborhood where he lived at and before the commission of the alleged crime, the term character being used as synonomous with reputation: *State v. Ward*, 73-532.

Even when defendant's character is in issue, witnesses for the prosecution should not be allowed to testify with reference thereto, unless they are shown to have such knowledge as to render them competent: *State v. Grinden*, 91-505.

As raising reasonable doubt: The good character of accused is for the consideration of the jury in all cases and not merely in cases of doubt, and it is for them to determine its weight; and an instruction that it is a circumstance of slight weight and entitled to but little consideration when the proof is clear is erroneous. If reasonable doubt of defendant's guilt is generated by proof of good character, defendant should be acquitted: *State v. Northrup*, 48-583; *State v. Fitzgerald*, 49-260; *State v. Clemons*, 51-274; *State v. Jones*, 52-150; *State v. Lindley*, 51-343.

It is error to instruct that, if there is positive evidence of guilt, then good character avails nothing and should be disregarded: *State v. Horning*, 49-158; *State v. Jones*, 52-150.

It is error to instruct the jury that previous good character is not a defense, and, as against facts positively and strongly proven and clearly indicating the guilt of defendant, it cannot avail as a ground of acquittal: *State v. Lindley*, 51-343.

Where there was no positive or direct evidence as to defendant's having committed the offense, *held*, that an instruction that good character would not overcome evidence of guilt, but in the absence of such evidence might be considered as tending to show less probability of defendant's having committed the crime, while it was erroneous in the first part could not have been prejudicial: *State v. Linde*, 54-139.

Evidence of good character should be considered upon the question as to the degree of the offense, as well as upon the question of guilt or innocence: *State v. Jones*, 52-150.

Circumstantial evidence: To justify the verdict of guilty upon circumstantial evidence it is necessary not only that the circumstances should all concur to show that defendant committed the crime, but that they are inconsistent with any other rational conclusion: *State v. Johnson*, 19-230.

Whether, when a party is sought to be convicted upon circumstantial evidence alone, the evidence of the circumstances must be direct and not circumstantial, *quære: State v. Clemons*, 51-274.

In establishing defendant's guilt by circumstantial evidence, the state is not limited to proof of circumstances tending directly to show defendant's guilt. Any competent evidence tending to prove any material fact in the case is therefore admissible: *State v. Reno*, 67-587.

An instruction at length upon the weight to be given to circumstantial evidence, to the effect that strong evidence of that kind is often the most satisfactory of any from which to draw the conclusion of guilt, and explaining the reason thereof, *held* not error: *State v. Moelchen*, 53-310.

Evidence with reference to the presence of defendant near where stolen goods were concealed, and of his attempt to escape arrest, *held* sufficient to warrant the verdict of guilty of the larceny: *State v. Moody*, 50-443.

In a prosecution for arson, *held*, that the particular circumstances shown were insufficient of themselves to establish defendant's guilt: *State v. Melick*, 65-614.

In a particular case, *held*, that circumstantial evidence relied upon to show defendant's guilt as accessory to the crime of murder was not sufficient to support a conviction: *State v. Clouser*, 69-313.

Where defendant was on trial for setting fire to combustible material and it appeared that where the fire originated there was a gasoline stove from which the gasoline leaked, *held*, that it was error to reject evidence that on a previous occasion this gasoline had caught fire: *State v. Dulaney*, 92-467.

Corpus delicti: While the facts forming the *corpus delicti* must be clearly and distinctly proved, it is not necessary that the evidence should be direct and positive as distinct from circmstantial or presumptive evidence: *State v. Keeler*, 28-551.

It is necessary in every case to prove that a crime has been committed, and under a charge of arson there can be no conviction unless it be satisfactorily proven that the building was maliciously, wilfully and feloniously burned by some one and that such burning was not accidental: *State v. Carroll*, 85–1.

Identity of defendant: Evidence of non-identity of defendant with the person committing the crime should be weighed like any other evidence offered by defendant for the purpose of showing that he did not commit the crime. It is merely evidence in rebuttal of that of the prosecution, and if it raises a reasonable doubt of guilt defendant should be acquitted although it does not preponderate over that offered by the state: *State v. McCracken*, 66–569.

The identity of accused with the person named in the record of a marriage may be established by admissions and identity of names, in the absence of evidence that other persons of the same name performed the marriage ceremony recited in the record: *State v. Schaunhurst*, 34–547.

On a trial for murder, where there is evidence that would justify the jury in believing that the crime has been committed by some one, and there are circumstances which point to defendant as the guilty person, evidence of conduct explaining the bad state of feeling on the part of defendant toward the deceased is admissible: *State v. Cole*, 63–695.

Evidence of a witness as to facts which led him to believe that the prisoner was the person whom he saw present at the commission of a crime, *held* sufficient to support a verdict of guilty: *State v. Lucas*, 57–501.

Where the identity of defendant was in question in a prosecution for burglary, *held*, that evidence as to declarations made by the person committing the burglary, at the time of its commission, indicating that he was the defendant, was admissible as part of the *res gestæ*, and might be considered by the jury in connection with other circumstances bearing on the question of identity: *State v. Kepper*, 65–745.

And where it was evident that larceny or burglary was the object in view, *held*, that the fact that defendant was aware that the occupant of the house had in his possession a large sum of money was admissible as tending to identify defendant as the person who committed the burglary: *Ibid.*

Certain evidence considered, and *held* relevant and material as tending to implicate defendant in the crime: *State v. Hudson*, 50–157.

Under facts in a particular case, *held*, that the evidence of the identity of defendant as the person who five years before had committed a larceny and been arrested therefor and escaped from the officers, was such as to sustain a conviction: *State v. Foster*, 81–131.

Failure to produce evidence: It is not incumbent upon the prosecution to produce all the witnesses present at the commission of the act charged as a crime against defendant, but simply that proof of the whole transaction shall be produced before defendant can be put upon his defense: *State v. Middleham*, 62–150.

A suspicious circumstance, unexplained, whether defendant, in case he is innocent, can or cannot explain it, is only presumptive evidence tending to establish guilt. If the circumstance is one which defendant could explain if innocent, it would be simply stronger evidence against defendant than if it was one which he could not explain, though innocent; but the jury must in every case be the sole judge of its weight. Such presumption should not be deemed sufficient in law to overcome the presumption of innocence: *State v. Banks*, 43–595.

Failure to call witnesses by defendant to prove his general good character raises no presumption against it: *State v. Dockstader*, 42–436.

While it is true that the suppression or destruction of evidence is a question to be considered against the party charged with the crime, and the non-production of explanatory evidence clearly in defendant's power, must weigh against him, yet this rule has no application where the evidence is equally within the reach of both parties, and is as important for the prosecution as for the defendant: *State v. Rosier*, 55–517.

The doctrine, that the failure of the accused to introduce evidence explanatory of inculpating circumstances may be regarded as a circumstance against him, is to be cautiously applied and only where it is manifest that proofs are in possession of the accused not accessible to the prosecution: *State v. Cousins*, 58–250.

An instruction that, if defendant fails to introduce proof explaining facts established by the evidence against him, it is a circumstance to be considered in determining his guilt, and that if evidence within the power of defendant, and not accessible to the state, is withheld by the defendant, the jury may infer that if produced it would be against defendant, is not objectionable as misleading the jury with reference to the effect of a failure of defendant to testify in his own behalf: *State v. Rodman*, 62–456.

In general, as to evidence in criminal cases, see § 5483 and notes.

SEC. **5377. Reasonable doubt as to degree.** Where there is a reasonable doubt of the degree of the offense of which the defendant is proven to be guilty, he shall only be convicted of the lower degree. [C.'73, § 4429; R., § 4808.]

Doubt as to degree: It is error to fail to instruct the jury in accordance with this section even where proper instructions to the effect that they may convict of a lower degree or included crime are given: *State v. Jay*, 57–164; *State v. Neis*, 68–469; *State v. Walters*, 45–389.

To warrant a conviction of grand larceny, the fact that the value of the property exceeded twenty dollars, as well as the fact of

the stealing, should be proved beyond a reasonable doubt; *State v. Wood*, 46–116.

If in larceny there is reasonable doubt as to the value of the property being in excess of twenty dollars the conviction should be for petit larceny: *State v. Hathaway*, 69 N. W., 449.

It is error to fail to instruct the jury, in a prosecution for larceny of property of more than twenty dollars in value, that if they are not satisfied beyond a reasonable doubt that the value of the property stolen exceeds that amount they must find that it was less than that: *State v. McCarty*, 73–51.

Evidence of good character should be considered upon the question as to the degree of the offense as well as upon the question of guilt or innocence: *State v. Jones*, 52–150.

As to conviction for lower degree or included crime, see §§ 5406, 5407.

SEC. **5378. Higher offense proved.** If it appears by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged and all proceedings on the indictment to be suspended, and order the defendant to be committed or continued on bail to answer any new indictment which may be found against him for the higher offense. [C. '73, § 4430; R., § 4791; C. '51, § 3000.]

As to convicting for higher degree than charged in indictment, see §§ 5406, 5407.

SEC. **5379. New indictment not found.** If the indictment for the higher offense be not found and presented at or before the next term, the court must proceed to try the defendant on the original indictment. [C. '73, § 4431; R., § 4792; C. '51, § 3001.]

SEC. **5380. View of premises by jury.** When the court is of the opinion that it is proper the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which shall be shown them by a person appointed by the court for that purpose. The officers must be sworn to suffer no person to speak to or communicate with the jury on any subject connected with the trial, nor to do so themselves, except the person appointed by the court for that purpose, and that only to show the place to be viewed, and to return them into court without unnecessary delay at a specified time. [C. '73, § 4432; R., § 4800; C. '51, § 3009.]

For similar provisions in civil cases, see § 3710.

SEC. **5381. Juror as witness.** If a juror have personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial, and if, during the retirement of the jury, a juror declares any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court, and the juror must be sworn as a witness and examined in the presence of the parties, if his evidence be admissible; and in support of a motion to set aside a verdict, proof of such declaration may be made by any juror. [C. '73, § 4433; R., § 4801; C. '51, § 3010.]

It is not error for the court to call the attention of the jury to this provision: *State v. Cavanaugh*, 68 N.W., 452.

SEC. **5382. Separation of jury—before final submission.** The jurors sworn to try an indictment, in the discretion of the court, at any time before the final submission of the cause to them, may be permitted to separate, except where one of the parties objects thereto, or be kept together in charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, and to return them into court at the time to which it adjourns. [C. '73, § 4434; R., § 4802: C. '51, § 3011.]

This provision plainly implies that no separation is permissible after the cause is submitted to the jury, unless by consent: *State v. Fertig*, 84–79.

It will not necessarily constitute error for the court to refuse to direct, on application of defendant, that the jury shall be kept together without separation, if it is not made apparent that the court has therein exceeded its discretion, or exercised it to the prejudice of defendant's rights: *State v. Gillick* 10–98.

As to the propriety of not allowing the jury to separate when the defendant objects thereto, see *State v. Felter*, 25–67.

In the absence of a showing of prejudice, *held*, that the fact that one of the jurors, while on the way to the jury room, separated himself from the others for the purpose of getting some tobacco, would not vitiate the verdict: *State v. Wart*, 51–587.

The jury should not be allowed to separate during the trial if either the state or the defendant objects thereto. (The provision to this effect was first incorporated into the section as it appears in the Code of '73, and *State v. Rainsbarger*, 74–196, was decided without attention having been called to the change in the section thus made. See, also, *State v. Walton*, 92–455): *State v. Garrity*, 67 N. W., 92.

It is not necessary that it appear affirmatively that the jury were in charge of a sworn officer. That will be presumed unless the contrary appears: *State v. Pitts*, 11–343.

See §§ 5387 and 5424.

SEC. **5383. Admonition.** The jury, whether permitted to separate or kept together in charge of sworn officers, must be admonished by the court that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial, and that any and all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them; this admonition must be given or referred to by the court at each adjournment during the progress of the trial previous to the final submission of the cause to the jury. [C. '73, § 4435; R., § 4803; C. '51, § 3012.]

It need not appear of record that the jury were properly admonished prior to each adjournment; it will be presumed that the court did its duty in this respect: *State v. Shelledy*, 8–477.

It is not competent to show by affidavits that the court did not properly caution the jury on allowing them to separate. Such fact being within the knowledge of the court must be made to appear in the bill of exceptions, in order to be considered: *State v. Harris*, 66 N.W., 728.

SEC. **5384. Verdict as to several defendants.** Upon an indictment against several defendants, any one or more may be convicted or acquitted. [C.'73, § 4437; R., § 4810; C. '51, § 3014.]

5375

SEC. **5385. Law and fact.** On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court, saving the right of the defendant and the state to except; questions of fact are to be tried by jury; and although the jury have the power to find a general verdict which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court. [C. '73, § 4439; R., § 4812; C. '51, § 3016.]

That the jury is to judge of the law in libel cases, see § 5091.

SEC. **5386. Instructions.** The rules relating to the instruction of juries in civil cases shall be applicable to the trial of criminal prosecutions. [C.'73, §§ 4440–1; R., §§ 4813–14; C.'51, §§ 3017–18.]

Duty of court as to instructions: It is the duty of the court to instruct the jury upon material questions of law in the case whether requested to do so or not: *State v. Helm*, 66 N. W., 751.

It is the better practice, as a rule, for the judge to put aside the instructions asked by counsel, and cover the whole ground in a methodical charge of his own: *State v. Collins*, 20–85.

The fact that any proposition of the law upon a point involved is not stated will not avail defendant if that which was given was correct. In such a case the proper course would be to ask additional instructions to cover points not stated: *State v. Tweedy*, 11–350.

The court is not required to take up the several facts and circumstances testified to by the witnesses and instruct the jury as to their weight and effect: *State v. Miller*, 65–60.

It is the duty of the court to explain to the jury the offense with which defendant is charged, what acts constitute it, and explain or define the words used by the statute in prescribing the offense. More than this is not necessary by way of definition: *State v. Clark*, 78–492.

Where the instructions given are not erroneous a party cannot complain of a failure to instruct more specifically where more specific instructions have not been asked: *State v. Illsley*, 81–49; *State v. Watson*, 81–380.

Where complaint was made that the court had not in a prosecution for assault with intent to commit murder explained the doctrine of self-defense, *held* that if counsel thought that such instruction ought to have been given he should have asked it and could not complain on account of its not being given: *State v. Woodard*, 84–172.

Where the evidence tends to show that

defendant charged with murder acted in self-defense, the jury should be fully charged in reference to that subject: *State v. Donahoe*, 78-486.

Instructions in a particular case *held* to properly cover the ground as to manslaughter and self-defense: *State v. Perigo*, 80-37.

While mere failure to instruct the jury may constitute reversible error if it should be apparent that the failure resulted in depriving defendant of a fair trial, yet where instructions are correct as far as they go, the defendant should, if he desires further instructions, ask them or he will not be heard to complain: *State v. Helvin*, 65-289.

In a trial for forgery, *held*, that a failure by the court to give instructions respecting the law applicable to the offense, and to a certain line of defense of which there was sufficient evidence to require it to be considered by the jury, though no instructions were asked by the counsel for defendant, was sufficient to warrant a reversal, the court saying that, although the court below is not bound to give instructions on its own motion where those asked by counsel are sufficient, yet, when they are defective or insufficient, the law complicated, and the offense of a high criminal character, the court should point out the controverted questions of fact and state the law applicable thereto: *State v. Brainard*, 25-572 (cited in *State v. Hamilton*, 32-572, 574).

Where the court gave full instructions as to the theory of the case relied on by the prosecution, but failed to give instructions upon an essential part of the case upon the theory upon which defendant relied, *held*, that judgment should be reversed: *State v. O'Hagan*, 38-504.

An instruction which is correct as far as it goes will not be held erroneous where the defendant has not asked a more specific instruction: *State v. Jelinek*, 64 N. W., 259.

Failure to correctly instruct the jury on a particular question will be ground for a new trial, only where exception has been taken to instructions given or refused: *State v. Hathaway*, 69 N. W., 449; *State v. Reasby*, 69 N. W., 451.

An instruction not applicable to any evidence in the case should not be given: *State v. Bowman*, 62 N. W., 759.

It is not required of the court that it shall instruct the jury with reference to the law of pardon in a case of murder in the first degree: *State v. Dooley*, 89-584.

When the instructions given are not erroneous the judgment of the district court will not be reversed for a failure to give instructions not asked, unless in an exceptional case when the supreme court is satisfied that the failure to instruct properly has deprived defendant of a fair trial: *State v. Hathaway*, 69 N. W., 449.

That error in the admission of evidence may as a rule be cured by withdrawing such evidence from the consideration of the jury, see note to § 3705.

Issues: Matters of dispute arising upon the law or the evidence are not issues which the court must specifically present to the jury: *State v. Nadal*, 69-478.

Instructions upon questions of fact: An instruction to the effect that, if defendant did a certain act specified, the jury should infer a fraudulent intent, is not vulnerable to the objection that it assumes facts as proved: *State v. Thompson*, 19-299.

It is within the province of the court to state whether the facts proved, if believed, constitute the offense charged: *Pollard v. State*, 2-567.

An instruction which especially directed the attention of the jury to certain facts, and thereby excluded from their attention other facts bearing upon the same question, *held* erroneous: *State v. Meshek*, 51-308.

An instruction in which the court declared "that there is some evidence tending to show that defendant was drunk," where evidence of intoxication was relied upon as showing want of specific intent, *held* erroneous, as indicating an opinion of the court as to the weight and quantity of the evidence, unfavorable to defendant: *State v. Donovan*, 61-369.

It is error to assume that there have been acts and declarations, and direct the jury as to the effect to be given thereto, when the evidence is conflicting as to the facts: *State v. Potts*, 78-656.

It is not erroneous to assume in an instruction the existence of facts about which there is no controversy: *State v. Huff*, 76-200.

Where the court instructed as to murder in the first and second degree, and directed the jury that if they had any doubt as to defendant's guilt of murder, they should convict of manslaughter, assuming that the conceded facts showed manslaughter to have been committed, but on the contrary there was an issue in the evidence as to whether defendant was guilty of any offense, *held* that the instruction was erroneous: *State v. Lee*, 91-499.

As to alibi: The jury may be properly instructed to consider the evidence upon the defense of *alibi*, together with all the other evidence, in determining defendant's guilt: *State v. Standley*, 76-215.

Under the facts of a particular case, *held*, that it was not error to fail to instruct the jury with reference to an *alibi*, especially in view of the fact that no such instruction was asked: *State v. Seymore*, 63 N.W., 661.

Further, as to *alibi*, see notes to § 5376.

Upon statute: Where defendants were indicted for receiving deposits while insolvent, *held*, that an instruction incorporating the substance of the statute defining such offense, which described also the acts of being accessory to and permitting or conniving at the receipt of such deposits, was not erroneous, although no issue as to such acts was in the case: *State v. Cadwell*, 79-432.

Not supported by evidence: Where it appears that there was no evidence tending to show that defendant in any respect aided and abetted the commission of the crime charged, *held*, that an instruction with reference to his criminality if it should appear that he aided, abetted, etc., was erroneous: *State v. Myer*, 69-148.

Misleading: An instruction which may be misleading when applied to the particular facts of the case is erroneous: *State v. Benham*, 23-154.

An instruction in a prosecution for assault

which assumed that the assault was made, and called particular attention to the manner of the assault, etc., when there was great doubt from the evidence whether any assault was made, *held* erroneous, as being misleading: *State v. Bailey*, 54-414.

Offense of higher degree: The giving of instructions in regard to an offense of a higher degree than that for which defendant is properly on trial will be sufficient error to warrant a reversal, although he be only found guilty of an offense for which he was properly on trial: *State v. Tweedy*, 11-350.

Error committed in instructions with reference to a higher degree of a crime than that for which defendant is convicted will not necessarily be error without prejudice. Thus where in a prosecution for murder the court erred in instructing the jury as to whether certain facts would constitute a provocation reducing the crime to manslaughter, *held*, that such error was not without prejudice although the conviction was for manslaughter. *State v. Adams*, 78-292.

It is error to instruct the jury as to a crime or degree of a crime of which, under the evidence, the defendant could not be convicted, therefore under an indictment for rape, *held*, that an instruction as to rape was erroneous where there was no evideuce to establish the essential elements of that crime, although the defendant was convicted only of assault with intent to commit rape: *State v. Kyne*, 86-616.

Reading from indictment: It is error to read from the indictment for the purpose of stating the issues to the jury without setting out in the instructions the part of the indictment thus read: *State v. Birmingham*, 74-407.

In libel: As to instructions and their effect in prosecutions for libel, see § 5091 and notes.

Objection to evidence cannot be taken by way of instructions to the jury that such evidence should not be considered: *State v. Pratt*, 20-267.

Additional instructions: Remarks of the court to the jury, after they had been out for a considerable time without being able to agree, as to the impropriety of a juror going into the jury box with a predetermination as to the result which he will favor, and to hang the jury, or to cause a disagreement if the verdict cannot be rendered as he wants it, *held* not erroneous: *State v. Lawrence*, 38-51.

Where the jury, after having retired, sent to the court a communication asking further instructions as to a matter of fact in regard to which they were in doubt, *held*, that it was not incumbent upon the court to give them any further instructions upon such question: *State v. Maxwell*, 42-208.

In a particular case, *held*, that the court was warranted in giving additional instructions after the retirement of the jury: *State v. Pitts*, 11-343.

Where a jury after deliberating requested additional instructions, which were given orally by the court and taken down in shorthand by the reporter and afterwards written out and given to the jury, but the jury had previously, upon consideration of the oral instructions, agreed upon a verdict, and when the written instructions were received and read by vote adhered to the verdict as found, *held*, that the giving of the oral instructions, though they were subsequently reduced to writing, was error: *State v. Harding*, 81-599.

Remarks to jury: The court cannot, under the guise of determining some questions which are legitimate, make remarks in the presence and hearing of the jury which would constitute error if contained in an instruction, and thus deprive the defendant of the opportunity of having such error reviewed: *State v. Stowell*, 60-535.

If, during the progress of the trial, the judge makes remarks in the presence of the jury which would be erroneous and prejudicial had they been embodied in the formal charge given by him to the jury it will entitle the losing party to have a verdict to which they might have contributed, set aside: *State v. Philpot*, 66 N. W., 730.

Signing: The requirement of this section that the judge shall sign the instructions given by him is directory, and a failure to do so will not be ground for reversal when no prejurice resulted therefrom to defendant: *State v. Stanley*, 48-221.

If the instructions are properly passed upon by the court and embodied in a bill of exceptions, the failure to sign them will not be a ground of reversal: *State v. McCombs*, 13-426.

The supreme court, on appeal, will not pass upon instructions which have not been made part of the record, either by being signed as here required or embodied in a bill of exceptions: *State v. Gebhardt*, 13-473; *State v. Watrous*, 13-489.

In writing: Where it appeared that the charge of the court was given to the jury orally and afterwards reduced to writing, with the acquiescence of defendant, *held*, that such irregularity could not afterwards be taken advantage of: *State v. Sipult*, 17-575.

Construction: All the instructions in the case are to be construed together in determining the correctness of one of them: *State v. Standley*, 76-215; *State v. Shreves*, 81-615.

Objections to separate instructions which are groundless when the whole charge is taken together will not be considered: *State v. Murdy*, 81-603.

An erroneous instruction will not be ground for reversal when the error is cured by other instructions given in the case: *State v. Pugsley*, 75-743.

An instruction will not receive that construction which the professional mind might assume the court intended, but it must be given that meaning which the language used would reasonably convey to the jury: *State v. Billings*, 77-417.

Evidence which has been improperly admitted may be withdrawn by instruction of the court from the consideration of the jury, so as to prevent the error being prejudicial: *State v. Cummins*, 76-133.

Presumption: Where the evidence is not before the supreme court, it will be presumed in favor of the instruction that it was adapted to the evidence given on the trial and was correct: *State v. Wyatt*, 76-328.

Special interrogatories: Sections 3727,

3728, authorizing the submission to the jury of interrogatories for special findings on particular questions of fact, is not applicable in criminal cases: *State v. Fooks*, 65–196; *State v. Ridley*, 48–370. But now see §§ 5405, 5409.

Directing verdict: See notes to § 5404.

For instructions as to reasonable doubt, burden of proof, *alibi*, etc., see notes to § 5376.

For instructions as to different degrees and included crimes, see notes to §§ 5377, 5406.

And generally as to instructions, see §§ 3705–3709 and notes.

SEC. **5387. Deliberation of jury in charge of officer.** After hearing the charge, the jury may either decide in court or retire for deliberation; if they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place without food or drink, water excepted, unless directed by the court, and not to suffer any person to speak to or communicate with them, nor speak to or communicate with them themselves except to ask them whether they have agreed upon their verdict, and not to communicate to any one the state of their deliberation or the verdict agreed upon, until after the same shall have been declared in open court, and received by the court and to return them into court when they shall have so agreed upon their verdict, unless, by permission or order of the court, they be sooner discharged. [C. '73, § 4442; R., § 4815; C. '51, § 3019.]

It is not necessary that it appear affirmatively that the jury were in charge of a sworn officer. That will be presumed unless the contrary appears: *State v. Pitts*, 11–343.

These provisions are not merely directory, but are absolute requirements. No separation is admissible after the case is submitted to the jury, unless by consent; and where without consent of the parties the jury reduced their verdict to writing, and it was signed by the foreman and delivered to an officer who had the jury in charge, and the jury then separated, supposing in good faith that they were authorized to return a sealed verdict, *held*, that a new trial should be granted: *State v. Fertig*, 84–79.

The provisions as to the custody of the jury are not directory only, but mandatory, and it is required that the bailiffs to whose charge the jury are committed shall be specially sworn as here required; but an error in that respect is not made a ground for new trial, and therefore cannot be urged on appeal: *State v. Crafton*, 89–109.

The rule that the jury should not be allowed to separate after the case is submitted to them is probably applicable in criminal as in civil cases, but the misconduct of the jury in separating will not vitiate their verdict unless prejudice be shown or sufficient grounds appear for presuming prejudice: *State v. Wright*, 68 N. W., 440.

That one of the jurors was permitted to leave the jury room for a necessary and proper purpose, accompanied by the deputy sheriff, it appearing that the juror had no conversation with anyone while absent, except with such deputy, and with him only to the extent of asking permission to retire, *held* not such misconduct as to make a new trial necessary: *State v. Bowman*, 45–418.

Communication with the jury by a deputy sheriff after their retirement in relation to procuring for them a paper introduced in evidence, *held* not a ground for reversal in the absence of any showing of prejudice: *State v. Wart*, 51–587.

While it is not proper that the bailiff in charge of the jury should be in the room during their deliberations, yet where the jury were at night brought into the court room for convenience, and the bailiff remained in another part of the room, *held*, that in the absence of a showing of prejudice there was not sufficient ground for a new trial: *State v. Thompson*, 87–670.

It is misconduct on the part of the bailiff to communicate with the jury in regard to the case except as authorized by this section, and misconduct on the part of the jurors to seek information from the bailiff which he is not permitted to communicate, and to listen to improper communications from him: *State v. LaGrange*, 68 N.W., 557.

While it is not usually proper for the court on its own motion to recall the jury after they have been out three or four hours, and have not asked for additional instructions, yet the matter is within the discretion of the court, and in the absence of prejudice appearing its action will not be reversed: *State v. Hale*, 91–367.

In a proper case the jury may be questioned as to the probability of their reaching an agreement, and how they are divided as to numbers, and how long they have stood numerically the same: *Ibid.*

Where, after the jury had retired to determine the case, one of the jurors was permitted by the court to leave the jury room and attend the trial of another case in court in which he was a party, *held* not error where no prejudice to defendant appeared: *State v. Fertig*, 70–272.

The fact that during the deliberation of the jury, one of their number, being taken sick, is permitted to separate himself from the others and take a walk in the open air, accompanied by an officer, and without communication with any person about the case, will not be ground for disturbing the judgment upon such verdict: *State v. Griffin*, 71–372.

As to separation of jury during the trial, see § 5382 and notes.

In general as to conduct of jury after submission of cause, see §§ 5397–5401 and notes.

As to what misconduct of the jury is ground for new trial, see notes to § 5424.

SEC. **5388. When juror becomes sick.** If before the conclusion of a trial a juror becomes sick so as to be unable to perform his duty, the court may order him to be discharged, and in such case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled. [C.'73, § 4443; R., § 4804; C.'51, § 3013.]

The provisions of this section are not mandatory, and the court is not required to discharge the jury when a juror is taken sick, but may adjourn for a reasonable time: for instance, until the sick juror becomes able to discharge his duty, and then proceed with the trial: *State v. Garrity*, 67 N. W., 92.

SEC. **5389. Want of jurisdiction—no offense charged.** The court may also discharge the jury where it appears that it has not jurisdiction of the offense, or that the facts as charged in the indictment do not constitute an offense punishable by law. [C.'73, § 4444; R., § 4793; C.'51, § 3002.]

SEC. **5390. Crime committed in another state.** If the jury be discharged because the court has not jurisdiction of the offense charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the defendant must be discharged, or ordered to be retained in custody a reasonable time until the county attorney shall have a reasonable opportunity to inform the chief executive of the state in which the offense was committed of the facts, and for said officer to require the delivery of the offender. [C.'73, § 4445; R., § 4794; C.'51, § 3003.]

SEC. **5391. In another county.** If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as shall be reasonable to await a warrant from the proper county for his arrest, or, if the offense be bailable, he may be admitted to bail in an undertaking with sufficient sureties that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly designated in the undertaking, to surrender himself upon the warrant, if issued, or that the bail will forfeit such sum as the court may fix, to be mentioned in the undertaking. [C.'73, § 4446; R., § 4795; C.'51, § 3004.]

SEC. **5392. Papers transmitted.** In such case, the clerk must transmit, forthwith, a certified copy of the indictment, and all the papers in the action filed with him, except the undertaking mentioned in the last section, to the county attorney of the proper county. [C.'73, § 4447; R., § 4796; C.'51, § 3005.]

SEC. **5393. Defendant discharged.** If the defendant be not arrested on a warrant from the proper county, he shall be discharged from custody, and his bail, if any, exonerated, or money deposited instead of bail refunded, as the case may be, and the sureties in the undertaking must be discharged. [C.'73, § 4448; R., § 4797; C.'51, § 3006.]

SEC. **5394. When arrested.** If he be arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate. [C.'73, § 4449; R., § 4798; C.'51, § 3007.]

SEC. **5395. New indictment.** If the jury be discharged because the facts set forth do not constitute an offense punishable by law, the court must order the defendant discharged and his bail, if any, exonerated, or, if he has deposited money instead of bail, that the money deposited be refunded, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case the court may direct that the case be submitted to the same or another grand jury. [C.'73, § 4450; R., § 4799; C.'51, § 3008.]

SEC. **5396. Defendant committed during trial.** When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after such appearance, order him committed to the custody of the

proper officer to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly. [C.'73, § 4451; R., § 4816; C.'51, § 3020.]

CHAPTER 25.

OF THE JURY AFTER SUBMISSION.

SECTION **5397. May take papers.** Upon retiring for deliberation, the jury may take with it all papers which have been received in evidence, except depositions, and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession, also any notes of the testimony or other proceedings taken in the trial by themselves or any of them. [C.'73, §§ 4452–3; R., §§ 4817–18; C.'51, §§ 3021–2.]

It is not proper for the officer in charge of the jury, at their request to furnish them the minutes of the testimony: *State v. Griffin*, 71-372.

Where a medical book was introduced as evidence, and a portion of it read to the jury, *held*, that it was not proper for them to take such book to the jury room, the portions which were read not being marked: *State v. Gillick*, 10-98.

The jury on their retirement to consider their verdict, in an appeal from a conviction in a justice's court, were permitted to take with them the papers in the case, including the information, the transcript from the justice, transcript on change of venue, affidavits, etc., *held*, that there was no ground for reversal in the absence of a showing that the jury, or any of them, examined the papers, or that any prejudice resulted from their action: *State v. Gibson*, 29-295.

Where a juror sent for and read to his fellows a law book in support of the correctness of the instructions of the judge, *held*, that such misconduct was error without prejudice, the instructions having been as a matter of law correct: *State v. Carr*, 43-418.

Where newspapers containing what purported to be all the evidence given in the trial were taken to the jury room, *held*, that there was sufficient misconduct to require the granting of a new trial: *State v. Walton*, 92-455.

As applicable to this section, see notes to § 3717.

SEC. **5398. Additional instructions.** After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required must be given as provided by law, in the presence of or after oral notice to the county attorney and defendant's counsel. [C.'73, § 4454; R., § 4819; C.'51, § 3023.]

See notes § 5386.

SEC. **5399. Discharge of jury.** If, after retirement, one of the jury is taken sick so as to prevent further deliberation, or any other accident or cause occurs to prevent its being kept together, the court may discharge it; otherwise the jury cannot be discharged after the cause is submitted to it until it has agreed upon its verdict and rendered it in open court, unless, by the consent of both parties entered upon the record, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that it can agree. [C.'73, §§ 4455–6; R., §§ 4820–1; C.'51, §§ 3024–5.]

The fact that, in the exercise of sound discretion, the jury is thus discharged does not entitle the defendant to be released, as having been once in jeopardy: *State v. Vaughan*, 29-286.

Where, after all the evidence in a case had been introduced, the judge, on receipt of a telegram to the effect that his wife was sick, adjourned court for a few days and went to his home, and, on the day to which court was adjourned, by telegram adjourned court over the term, *held*, that there was sufficient cause to warrant adjournment in the discretion of the judge, and that the defendant could not, on the subsequent trial, plead a previous jeopardy: *State v. Tatman*, 59-471.

SEC. **5400. New trial.** In all cases where a jury is discharged or prevented from giving a verdict, except where the defendant is discharged

during the progress of the trial, or after submission to it, the cause may be again tried at the same or another term of the court. [C. '73, § 4457; R., § 4822; C. '51, § 3026.]

That defendant cannot plead a trial thus terminated as previous jeopardy in bar of another trial. see notes to § 5339.

SEC. **5401. Adjournment.** While the jury is absent, the court may adjourn from time to time as to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury is discharged, but a final adjournment of the court discharges the jury. [C. '73, §§ 4458-9; R., §§ 4823–4; C. '51, §§ 3027–8.]

CHAPTER 26.

OF THE VERDICT.

SECTION **5402. Jurors present.** When the jury has agreed upon its verdict, it must be conducted into court by the officer having it in charge; the names of the jurors must then be called, and if all do not appear the rest must be discharged without giving a verdict; in such case, the cause may again be tried at the same or another term. [C. '73, § 4460; R., § 4825; C. '51, § 3029.]

The provision as to calling the names of the jurors is directory only, and a failure to observe it will not be error sufficient to reverse the judgment unless prejudice is shown: *State v. Burge*, 7–255.

Separation of the jury after agreeing on a verdict and returning it to the court, under a misapprehension that they were authorized to return a sealed verdict, *held* error entitling the defendant to a new trial: *State v. Fertig*, 84–79.

If, without consent of parties or the court, the jury seal up their verdict and separate, defendant is deprived of the substantial right given him by § 5411 to poll the jury; and therefore the receiving of such verdict constitutes error: *State v. Callahan*, 55–364.

Juries in cases of misdemeanors may, by consent of defendant and the state, return a sealed verdict; and it will not be prejudicial error to receive such verdict without all the jurors being present if no demand is made for the presence of all, or for the polling of the jury, or if no objection is made to the absence of the jury: *State v. Thompson*, 74–119.

SEC. **5403. Presence of defendant.** If the indictment be for a felony, the defendant must be present at the rendition of the verdict; if it be for a misdemeanor, it may be rendered in his absence. [C. '73, § 4461; R., § 4826; C. '51, § 3030.]

In a prosecution for murder, presence of defendant at the time of verdict is essential: *Harriman v. State*, 2 G. Gr., 270.

The trial at which defendant accused of a felony is required to be present ends with the verdict; his presence at the argument and determination of a motion for new trial is not essential: *State v. Decklotts*, 19–447.

Where defendant is put on trial for felony, but only convicted of a misdemeanor, his presence when judgment is rendered is not necessary: *Hughes v. State*, 4–554.

In case of conviction for assault and battery the presence of defendant is not required, even though he has been on trial for a felony: *State v. Shepard*, 10–126.

Where the verdict of the jury was duly announced and recorded in the absence of the defendant, but such absence being discovered before the separation of the jury, they were ordered to return to their room, and defendant was then brought into court, and the verdict was again announced and recorded in his presence, *held*, that there was no error: *State v. Hutchison*, 64 N.W., 610.

As to presence of defendant at arraignment, see § 5311; as to his presence during the trial, see § 5338; and as to his presence at pronouncing of judgment, see § 5432.

SEC. **5404. Verdict rendered.** When the members of the jury have answered to their names, the court or the clerk shall ask them whether they have agreed upon the verdict, and if the foreman answers in the affirmative they must declare the same. [C. '73, § 4462; R., § 4827; C. '51, § 3031.]

No particular form of words is prescribed to be used by the court in requiring the jury to declare their verdict: *State v. Collins*, 32–36.

When there is no testimony sustaining the charge, or when it is so slight that a verdict of guilty would be instantly set aside, the court may direct a verdict of acquittal.

but not when there is a conflict of testimony: *State v. Smith*, 28–565.

The fact that the court causes the jury to return a verdict of guilty without deliberation or consultation, though grossly irregular, would not render a judgment based thereon void: *Turney v. Barr*, 75–758.

Where counsel for defendant moves the court, at the close of the evidence for prosecution, to direct a verdict for defendant, he cannot require that the jury be sent out while the motion is being heard. He must take the chances that the effect of overruling may have on the jury: *State v. Huff*, 76–200.

The separation of the jury without consent will entitle defendant to a new trial: *State v. Fertig*, 84–79.

SEC. **5405. General and special.** The jury must render a general verdict of "guilty" or "not guilty," which imports a conviction or acquittal on every material allegation in the indictment, except upon a plea of former conviction or acquittal of the same offense, in which case it shall be "for the state" or "for the defendant," and except in cases submitted to determine the grade of the offense and, when authorized, fixing the punishment therefor. It must also return with the general verdict answers to special interrogatories submitted by the court upon its own motion, or at the request of the defendant in prosecutions where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required. [C.'73, §§ 4463–4, 4474–7; R., §§ 4828–33; C.'51, §§ 3032–7.]

What sufficient verdict: If the intention of the jury is not doubtful the verdict will be upheld even without correction in form by the court: *Harrell v. Stringfield*, Mor., 18.

Where the verdict was as follows: "We, the jury in the case of *State of Iowa v. Harry Lee*, the defendant guilty as charged in the indictment," *held*, that the omission of the word "find" was not fatal, and that the verdict was sufficient to sustain a conviction: *State v. Lee*, 80–75.

A verdict in a particular case *held* sufficient to authorize conviction: *State v. Bond*, 8–540.

Although it is not necessary for the jury to find more than that the defendant is guilty of the charge in the indictment, yet a verdict finding specially as to the facts constituting such guilt is sufficient to justify the court in rejecting the portion relating to the facts, and rendering judgment on the portion constituting a general verdict: *State v. Williams*, 8–533.

In a trial upon information, the words "as charged in the indictment," held mere surplusage, and of no effect on the verdict: *State v. McCombs*, 13–426.

A verdict expressly reciting that the jury find the defendant "guilty of aiding and concealing," etc., thus specifying the crime charged in the indictment, is a general and not a special verdict: *State v. Turner*, 19–144.

Where defendant was charged with knowingly having in possession and uttering a forged instrument, but in the caption and indorsement of the indictment the crime was designated as forgery, and the court, while properly directing the jury as to the facts necessary to establish the crime with which defendant was properly charged, designated it as forgery, and gave the form of the verdict as though that were the crime charged, and the jury, following the form thus given, found defendant "guilty of the crime of forgery as charged in the indictment," *held*, that the verdict was simply informal, and was not vitiated by the error in designating the offense charged: *State v. Burgson*, 53–318.

Where there is a general verdict of guilty on an indictment containing several counts, if any one of them is good the judgment will be supported: *State v. Shelledy*, 8–477, 511.

In a prosecution under an indictment under several counts the jury may in one verdict find defendant guilty under different counts, designating them, and it is not necessary to render a separate verdict on each count under which the defendant is so found found guilty: *State v. Hopkins*. 62 N. W., 656.

On a conviction for murder in the first degree under which it is for the jury to fix the punishment as death or imprisonment for life at hard labor in the penitentiary, a verdict is sufficiently definite which specifies imprisonment in the penitentiary for life: *State v. Trout*, 74–545.

Defects cured by verdict: After verdict all objections to the proceedings of the grand jury in finding the indictment come too late: *Sharp v. State*, 2–454.

The verdict does not cure irregularities in the trial or in the finding of the indictment, such, for instance, as the refusal to allow the defendant the right of challenge to the grand jurors: *State v. Osborne*, 61–330.

Where the time within which, under the statute of limitations, the defendant might be found guilty under the second indictment includes a portion of the time covered by the first indictment, the first prosecution will be a bar to the second: *State v. Waterman*, 87–255.

Under the Code of '73 there was no provision for a submission to the jury of particular questions of fact on the trial of criminal actions: *State v. Ridley*, 48–370; *State v. Fooks*, 65–196.

As to special verdict in civil cases, see §§ 3726, 3727.

As to pleading former conviction or acquittal, see §§ 5333, 5335 and notes.

SEC. **5406. Finding an offense of different degree.** Upon an indictment for an offense consisting of different degrees, the jury may find the

defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment. [C.'73, § 4465; R., § 4835; C.'51, § 2918.]

Different degrees: Although the offense consists of different degrees, and defendant is not found guilty of any one of the degrees, he may still be convicted of an offense necessarily included in that for which he is indicted, as provided in the following section: *Gordon v. State*, 3-410. Thus, *held*, that though manslaughter is not a degree of murder, but a distinct offense, it is necessarily included in the crime of murder: *State v. Clemons*, 51-274.

Where an indictment charges murder in the first degree, the state may waive a trial for that degree and claim a conviction for any lesser degree embraced in the charge: *State v. Baldwin*, 79-714.

It has never been held in this state that where a party has been indicted for murder in the first degree the court should instruct the jury that defendant cannot be convicted of the degree of the crime charged, it appearing that homicide was committed by defendant: *State v. Adams*, 78-292.

It seems that the last clause of the section, "if punishable by indictment," relates alone to the preceding clause, "an attempt to commit the offense:" *State v. Jarvis*, 21-44.

Although the inferior degree of the offense be not indictable, but triable on information only, a defendant put on trial for a degree which is indictable may be convicted in such lower degree: *Ibid.* And see notes to Const., art. I, § 11.

Where defendant is put on trial for the higher degree of an offense, and is convicted of a lower, and judgment thereon is reversed on appeal, he cannot again be put on trial for a higher degree than that of which he was convicted: *State v. Tweedy*, 11-350; *State v. Clemons*, 51-274. And see notes to Const., art. I, § 12.

Instruction as to different degrees and included crimes: On the trial of an offense of such nature that defendant might properly be convicted of a lesser degree of the offense than that charged, or an offense necessarily included in that charged, the court should instruct the jury that they may find defendant guilty of such lower degree or included offense: *State v. Walters*, 45-389; *State v. Kegan*, 62-106.

In such cases the court should explain to the jury the elements of the lower degrees of the crime, and of all crimes of which defendant might be convicted under the indictment, and it will constitute error in the court to fail to do so: *State v. Vinsant*, 49-241; *State v. Clemons*, 51-274; *State v. Glynden*, 51-463.

Even though the counsel for the prisoner has claimed and insisted upon the trial that the prisoner, if guilty at all, is guilty of the degree of offense charged in the indictment, yet the prisoner has the right to the proper instructions as to lower degrees of the offense: *State v. Johnson*, 8-525.

This section has no application when the facts show that defendant is either guilty of the crime charged or not guilty, and in such case it is not incumbent in the court to charge as to the lower grades of crimes: *State v. Sterrett*, 80-609; *State v. Cody*, 62 N.W., 702; *State v. Beabout*, 69 N.W., 429; *State v. Cater*, 69 N.W., 880.

It is not error to fail to instruct with reference to an included offense where no question whatever is raised as to the guilt of such offense, it appearing that defendant is beyond question guilty of the offense charged: *State v. Akin*, 62 N.W., 667.

The offense of burglary includes the offense of breaking and entering in the daytime with felonious intent, and there may be a conviction of the latter offense where by reason of failure to show that the breaking and entering was in the night time there cannot be a conviction of burglary: *State v. Jordan*, 87-86.

Under an indictment charging assault with intent to inflict great bodily injury, it is error to fail to instruct the jury that they may convict defendant of assault and battery. In such case it is not sufficient to instruct that they may convict of a simple assault, although a simple assault and an assault and battery are offenses of the same grade: *State v. Welsh*, 73-106.

Upon the trial of an indictment for rape the court should instruct the jury not only as to assault with intent to commit rape, but also as to simple assault, and it will constitute error to fail to do so: *State v. Pennell*, 56-29; *State v. Peters* 56-263.

An instruction to the jury that if they failed to find that the shot was fired by the defendant wilfully, deliberately and premeditatedly, they would find him guilty of murder in the second degree, *held* not prejudicial as ignoring the fact that he might have been guilty of manslaughter only, when taken in connection with a preceding instruction in which the facts necessary to constitute the crime of murder in the first degree were specified, and one following which directed the jury that in case they failed to find the defendant guilty of murder in either the first or second degree they might then determine whether or not he was guilty of manslaughter: *State v. Murdy*, 81-603.

In a prosecution for assault with intent to commit murder, it is proper for the court to explain the crimes of murder and manslaughter: *State v. Woodard*, 84-172.

Assault and battery is not necessarily included in the crime of assault with intent to commit rape, and it is not necessary to instruct the jury that they might find defendant guilty of assault and battery: *State v. McDevitt*, 69-549. And see *State v. McAvoy*, 73-557.

In a particular case, *held*, that the instructions sufficiently directed the jury as to convicting for assault with intent to commit rape or assault and battery under an indictment for rape: *State v. Mitchell*, 68-116.

Where, in a prosecution for murder, it is admitted that the defendant by violence

caused the death of deceased, and claims that his act was done in self-defense and was not unlawful, it is not error to instruct the jury that they should either convict the defendant of murder or manslaughter, or acquit him. In such cases it is not necessary to instruct the jury as to offenses lower than manslaughter, which may be included in the crime of murder charged in the indictment: *State v. Mahan*, 68-304.

Where, in a prosecution for murder in the first degree, the evidence is indisputable that the deceased died from the effects of a wound inflicted by the defendant, it is not necessary to instruct the jury as to crimes less in degree than that of criminal homicide: *State v. Froelick*, 70-213; *State v. Munchrath*, 78-268; *State v. Perigo*, 80-37; *State v. Row*, 81-138.

Failure to instruct as to lower degrees of the offense will not be error where there is no evidence which would support a conviction of a lower degree: *State v. Cole*, 63-695; *State v. Casford*, 76-330; *State v. Reasby*, 69 N. W., 451.

There is no necessity for stating in the instructions the punishment provided for lower degrees of the crime for which defendant is put on trial or for other crimes included therein: *State v. Peffers*, 80-580.

And, further, see § 5377 and notes.

Error in instructing as to degree of offense: The giving of instructions in regard to an offense of a higher degree than that for which defendant is properly on trial will be sufficient error to warrant a reversal, although he be only found guilty of an offense for which he was properly on trial: *State v. Tweedy*, 11-350.

Putting on trial for a higher degree than charged: It is prejudicial error to put the defendant upon trial for a higher crime, or a higher degree of the crime, than is charged in the indictment: *State v. Boyle*, 28-522; *State v. Knouse*, 29-118; *State v. McNally*, 32-580; and this is true even though the indictment sufficiently charges the degree of the offense of which he is convicted: *State v. Andrews*, 84-88.

Under an indictment for murder in the second degree defendant cannot be convicted of murder in the first degree: *Fouts v. State*, 4 G. Gr., 500.

Where, under an indictment not sufficient to charge murder in the first degree, the defendant was found guilty in that degree, and defendant on appeal asked that the sentence be modified to one which would be proper under the indictment for the second degree, the court so reduced the sentence: *State v. McCormick*, 27-402.

But where, in a similar case, defendant denied the sufficiency of the evidence to establish his guilt in any degree, and demanded a new trial, *held*, that he was entitled thereto: *State v. Watkins*, 27-415.

Doubt as to degree: That in cases of reasonable doubt as to degree defendant is to be convicted only of lower degree, see § 5377 and notes.

Included crimes: See notes to next section.

SEC. **5407. Included offenses.** In all other cases, the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment. [C. '73, § 4466; R., § 4836; C. '51, § 3039.]

Verdict for included offense: Under this section whatever offense is necessarily included in the crime charged in the indictment may be punished, although the indictment contains no words specifically designating the offense so included: *Benham v. State*, 1-542.

Although the offense consists of different degrees, and defendant is not found guilty of any one of the degrees, he may still be guilty of an offense necessarily included in that for which he is indicted: *Gordon v. State*, 3-410.

A defendant put on trial for an indictable offense may be punished for an offense necessarily included therein, although the latter be of such a character that it is not indictable, but only triable on information: *State v. Jarvis*, 21-44; *State v. Shepard*, 10-126. And see notes to Const., art. 1, § 11.

If defendant is found guilty of a lesser offense included in the one for which he is put on trial, such conviction operates as an acquittal of the offense for which he was indicted, and if, on appeal, judgment is reversed, he can only be tried a second time for the offense of which he was convicted: *State v. Tweedy*, 11-350; *State v. Clemons*, 51-274. And see notes to Const., art. I, § 12.

What deemed included: Where a greater penalty is provided for the second or third conviction of an offense than for the first conviction thereof (as in § 2383), and the defendant is put on trial for such second offense, he may be convicted as for the first commission of the offense: *State v. Ensley*, 10-149; *State v. Gaffeny*, 66-262.

Where all the elements of one crime are included in another which is distinguished from the first simply in having distinct elements, the fact that the evidence shows the commission of the second crime will not prevent the punishment of defendant in the prosecution for the first: *State v. Graff*, 66-482.

Defendant can be convicted of an offense distinct from the one specifically charged in the indictment only when the offense is an essential element of that charged, or when it is shown by proper averment in the indictment that a minor offense was in fact included in the perpetration of the one charged: *State v. McAvoy*, 73-557.

Every battery necessarily includes an assault: *State v. Twogood*, 7-252.

A simple assault is necessarily included in a charge of an assault with intent to commit bodily injury: *Orton v. State*, 4 G. Gr., 140.

As every intentional maiming and disfiguring includes an assault and battery, a defendant indicted for the former may be convicted of the latter, although no assault was charged in the indictment: *Benham v. State*, 1-542.

Under an indictment for an assault with

intent to commit murder defendant may be convicted of assault and battery: *Dixon v. State*, 3-416.

Or of a simple assault: *State v. Jarvis*, 21-44; *State v. Shepard*, 10-126; *State v. White*, 45-325.

Assault with intent to commit manslaughter is necessarily included in a charge of an assault with an intent to commit murder: *State v. White*, 45-325.

Where defendant was convicted of assault with intent to commit murder, but on motion for new trial the court was of the opinion that the evidence was not sufficient to show malice aforethought, *held*, that the court might properly sentence defendant for an assault with intent to commit manslaughter: *State v. Keasling*, 74-528.

Upon conviction of assault with intent to commit great bodily injury, obtained under an indictment of assault with intent to commit murder, a sentence for a simple assault may be proper: *State v. Schele*, 52-608.

While an assault and battery will not in all cases be necessarily included in an assault with intent to murder, yet under an indictment charging the latter offense as committed by acts amounting to assault and battery a conviction of assault and battery would be warranted: *State v. Graham*, 51-72.

On an indictment for murder defendant may be found guilty of manslaughter: *Gordon v. State*, 3-410; *State v. White*, 45-325.

Under an indictment for murder in the first degree defendant may be convicted of assault with intent to commit great bodily injury, as well as of assault with intent to murder, or with intent to maim: *State v. Parker*, 66-586.

A charge of the crime of rape necessarily charges also the crime of assault with intent to commit rape: *State v. McLaughlin*, 44-82.

It also includes a simple assault: *State v. Vinsant*, 49-241.

But the charge of assault with intent to commit rape does not necessarily include the crime of assault and battery: *State v. McDevitt*, 69-549; *State v. McAvoy*, 73-557.

Under an indictment charging carnal knowledge of a child under the age of consent there may be a conviction for assault and battery or for a simple assault: *State v. Hutchison*, 64 N. W., 610.

Under an indictment for burglary defendant may be convicted of the offense of entering a dwelling-house in the night time, defined in § 4791: *State v. Maxwell*, 42-208.

The crime of larceny from a dwelling-house in the nighttime and that of robbery necessarily include the offense of larceny. A defendant who is tried on an indictment charging him with the commission of either of such crimes may be convicted of simple larceny; therefore, an acquittal of one of such crimes necessarily bars a subsequent prosecution for the other: *State v. Mikesell*, 70-176.

The charge of larceny from a building in the night time will sustain a conviction for larceny: *State v. Nordman*, 70 N.W., 621.

Forgery is not an included crime in the offense of uttering a forged instrument: *State v. Bigelow*, 70 N.W., 600.

The fact that the defendant charged with a crime is convicted of a lower degree of the crime than that charged or of an included offense, when under the evidence he was guilty if at all, of the crime itself charged in the indictment, does not entitle him to a reversal of the conviction for the included crime. The fact that the verdict by implication is an acquittal of the crime charged does not render the conviction for the included crime erroneous: *State v. Cody*, 62 N.W., 702.

Instructions as to included crimes, see notes to preceding section.

Trial for higher crime or degree of crime than properly charged in the indictment is error: See notes to preceding section.

SEC. **5408. Verdict against one of several.** On an indictment against several, if the jury cannot agree upon a verdict as to all, it may render a verdict as to those in regard to whom it does agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury. [C.'73, § 4467; R., § 4837; C.'51, § 3040.]

Where two or more are indicted jointly for an offense, one may be found guilty without regard to the others: *State v. McClintock*, 8-203.

SEC. **5409. Verdict insufficient.** If the jury renders a verdict which is neither a general nor special one, the court may direct it to reconsider it, and it shall not be recorded until it is rendered in some form from which the intent of the jury can be clearly understood, whether to render a general verdict, or to find the facts specially and leave the judgment to the court. [C.'73, §§ 4468, 4478; R., §§ 4834, 4838, C.'51, §§ 3038, 3041.]

Where the verdict in a criminal cause is special in nature, and defective in not giving the facts necessary to enable the court to enter judgment, the jury should be directed to retire for further deliberation, but the court may, against defendant's objection, set aside the verdict and order a retrial, and defendant is not, in such case, entitled to be discharged: *State v. Arthur*, 21-322.

Where the jury, in a prosecution for burglary, returned a verdict finding defendant guilty of entering a house in the night time, and recommended him to the mercy of the court, *held*, that such verdict did not amount to a special verdict authorizing an acquittal, but that, failing to respond to all the facts necessary to a conviction, the jury were properly directed to reconsider it: *State v. Maxwell*, 42-208.

SEC. **5410. Informal verdict.** If the jury persists in finding an informal verdict, from which, however, it can be understood that the intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly finds against the defendant upon the issue, or judgment is given against him upon a special verdict. [C.'73, § 4469; R., § 4839; C.'51, § 3042.]

See notes to § 5405.

SEC. **5411. Jury polled.** When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party; in which case each member thereof shall be asked whether it is his verdict, and if any one answers in the negative the jury must be sent out for further deliberation. [C.'73, § 4470; R., § 4840; C.'51, § 3043.]

Where a jury without authority, rendered a sealed verdict and separated, and after that they were called together again for the purpose of being polled and thus assented to the verdict, *held*, that this did not cure the error: *State v. Fertig*, 84–79.

As to when a sealed verdict may be received without all the jurors being present, see § 5402.

SEC. **5412. If any juror disagrees.** When the verdict is given and is such as the court may receive, the clerk may immediately enter it in full upon the record, and must read it to the jury, and inquire of the members thereof whether it is their verdict. If any juror disagrees, the fact must be entered upon the record and the jury again sent out. But if no disagreement is expressed, the verdict is complete and the jury must be discharged from the case. [C.'73, § 4471; R., § 4841.]

SEC. **5413. Defendant discharged.** If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given. [C.'73, § 4473; R., § 4843; C.'51, § 3045.]

SEC. **5414. Acquittal on ground of insanity.** If the defense is insanity of the defendant, the jury must be instructed, if it acquits him on that ground, to state that fact in its verdict. The court may thereupon, if the defendant is in custody, and his discharge is found to be dangerous to the public peace and safety, order him committed to the insane hospital, or retained in custody, until he becomes sane. [C.'73, § 4472; R., § 4842; C.'51, § 3044.]

CHAPTER 27.

OF EXCEPTIONS.

SECTION **5415. As to what.** On the trial of an indictment, exceptions may be taken by the state or by the defendant to any decision of the court upon matters of law, in any of the following cases:

1. In disallowing a challenge to an individual juror;
2. In admitting or rejecting witnesses or evidence on the trial of any challenge;
3. In admitting or rejecting witnesses or evidence;
4. In deciding any matter of law, not purely discretionary on the trial of the issue.

Exceptions may also be taken to any action or decision of the court which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on the trial. [C.'73, §§ 4479–80; R., §§ 4844–5; C.'51, § 3046.]

A general exception to the admission of testimony *en masse*, where such testimony includes much testimony that is unobjectionable, without having asked any ruling of the court as to its admissibility, will not entitle the defendant to have the question of admissibility of portions of such evidence considered on appeal: *State v. Benge*, 61–658.

To entitle a question to review on appeal in the supreme court some exception to the action of the trial court should be preserved: *State v. Osborne*, 65 N. W., 159.

Where a motion for a new trial on the ground that special *venires* were improperly issued was supported by affidavit of an attorney for defendant, *held*, that the facts complained of should have been made a part of the record by a bill of exceptions, and in the absence of such showing it would be presumed that the jury was properly impaneled: *State v. Kennedy*, 77-208.

And see notes to § 5462.

As to exceptions in civil cases, see §§ 3749-3754.

SEC. **5416. Bill of exceptions.** The office of a bill of exceptions is to make the proceedings or evidence appear of record which would not otherwise so appear. [C.'73, § 4481; R., § 4846.]

SEC. **5417. Papers deemed part of record.** All papers pertaining to the cause and filed with the clerk, and all entries made by him in the record book pertaining to them, and showing the action or decision of the court upon them or any part of them, and the judgment, are to be deemed parts of the record, and it is not necessary to except to any action or decision of the court so appearing of record. [C.'73, § 4482; R., § 4847.]

Affidavits in support of a motion for new trial become a part of the record when they are filed with the motion to which they are attached: *State v. Whalen*, 68 N.W., 554.

But if it is important that it shall appear that such affidavits were the only evidence before the court in ruling on the motion, that fact must be shown by a certificate of the trial judge, duly made of record: *Ibid.*

Misconduct of the bailiff in communicating with the jury, being a matter not occurring in the presence of the court, cannot be certified by the judge as a part of the bill of exceptions but may be shown by affidavits embodied therein: *State v. LaGrange*, 68 N. W., 557.

It is not competent by affidavits to show remarks of the court in the presence of the jury which are relied upon as constituting misconduct. The proper method of making such matters of record is by bill of exceptions, signed either by the judge or, in case of his refusal, by bystanders: *Ibid.*

Section applied: *State v. Fay*, 43-651.

In general, see corresponding provisions in civil cases, §§ 3749-3754 and notes.

SEC. **5418. Taking exceptions.** Either party may take an exception to any decision or action of the court, in any stage of the proceedings, not required to be and not entered in the record book, and reduce the same to writing, and tender the same to the judge, who shall sign it if true, and if signed it shall be filed with the clerk and become a part of the record of the cause; if the judge refuses to sign it, such refusal must be stated at the end thereof, and it may then be signed by two or more attorneys or officers of the court or disinterested bystanders, and sworn to by them, and filed with the clerk, and it shall thereupon become a part of the record of the cause. [C.'73, § 4483; R., § 4848; C.'51, § 3047.]

A certificate of the judge showing rulings made during the trial and exceptions thereto is a sufficient compliance with the statute to constitute a bill of exceptions: *State v. Fay*, 43-651.

While a certificate of the judge sufficiently setting out or identifying the testimony, may take the place of a bill of exceptions for the purpose of making the evidence a part of the record, such certificate, equally with a bill of exceptions, must be made at the time of the trial or at such time as the court may fix; otherwise the evidence may be stricken out on appeal: *State v. Newcomb*, 56-335.

The record entry of the clerk is a higher species of evidence than the bill of exceptions and in case of a conflict the record must control: *State v. Ingraham*, 65 N.W., 152.

SEC. **5419. Time allowed to approve.** The judge shall be allowed one clear day to examine the bill of exceptions, and the party excepting shall be allowed three clear days thereafter to procure the signatures and file the same. [C.'73, § 4484; R., § 4849.]

SEC. **5420. May be modified.** If the judge and the party excepting can agree in modifying the bill of exceptions, it shall be modified accordingly. [C.'73, § 4485; R., § 4850.]

SEC. **5421. Time allowed to prepare.** Time must be given to prepare the bill of exceptions when it is necessary; if it can reasonably be done, it shall be settled at the time of taking the exception. [C.'73, § 4486; R., § 4851.]

CHAPTER 28.

OF NEW TRIAL.

SECTION **5422. Definition.** A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given. [C. '73, § 4487; R., § 4852; C. '51, § 3050.]

SEC. **5423. Effect.** The granting of a new trial places the parties in the same position as if no trial had been had; all the testimony must be produced anew and the former verdict cannot be used or referred to either in the evidence or in argument. [C. '73, § 4488; R., § 4853; C. '51, § 3051.]

It is improper for an attorney for the prosecution to make any reference to the verdicts in former trials which have been set aside and new trials granted: *State v. Clouser*, 72–302.

Where on appeal in a prosecution on information for illegal sale of intoxicating liquors defendant was convicted upon evidence as to one transaction, but a new trial being granted was convicted under evidence relating to a different transaction, constituting the offense charged in the information, *held*, that there was no error, and the second trial, after the former conviction has been set aside, was entirely independent of the first trial: *State v. Dow*, 74–141.

Defendant cannot be again put on trial for a higher degree of the offense than that for which he was convicted. See notes to § 5406.

SEC. **5424. Causes for.** The court may grant a new trial for the following causes, or any of them:

1. When the trial has been had in the absence of the defendant, if the indictment be for a felony;
2. When the jury has received any evidence, paper or document out of court not authorized by the court;
3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case;
4. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all the jurors;
5. When the court has misdirected the jury in a material matter of law;
6. When the verdict is contrary to law or evidence; but no more than two new trials shall be granted for this cause alone;
7. When the court has refused properly to instruct the jury;
8. When from any other cause the defendant has not received a fair and impartial trial. [C. '73, § 4489; R., § 4854; C. '51, § 3052.]

As to absence of defendant, see §§ 5311, 5338, 5403 and 5432.

As to receiving papers, etc., out of court, see notes to §§ 5397, 5398.

Misconduct of jury: To vitiate the verdict of a jury for misconduct it must be such as to satisfy the court that a fair and impartial trial has not been had, and that the verdict is contrary to the law and the evidence: *State v. Accola*, 11–246.

That a juror left the jury room and was temporarily absent for a proper purpose, in charge of a deputy sheriff, *held* not sufficient ground for granting a new trial: *State v. Bowman*, 45–418.

Where a jury, without authority but under a misapprehension as to their right to do so, sealed up their verdict and separated, *held*, that there was such error as to entitle the defendant to a new trial without any showing of prejudice: *State v. Fertig*, 84–79.

While separation of the jury after the submission of the cause to them will be improper yet it will not be a ground for a new trial unless prejudice be shown or sufficient ground appear for presuming prejudice: *State v. Wright*, 68 N. W., 440.

For other cases as to separation of jury, etc., see notes to §§ 5382, 5387.

Where it is sought to set aside the verdict of a jury on the ground of statements of one of the jurors as to facts not in evidence, or the like, it is necessary to show that prejudice resulted to the party complaining. Prejudice will not be presumed: *State v. Woodson*, 41–425.

Where it appeared that a juror while the case was on trial had expressed to an outsider his views of the case, *held*, that while such conduct was reprehensible it appeared that it could not have been been prejudicial and therefore was not a ground for a new trial: *State v. Craig*, 78–637.

Under particular facts, *held*, that conduct of a juror in deriving knowledge as to the particular matter from circumstances not in evidence was not prejudicial, and therefore was not ground for reversal: *State v. Beasley*, 84–83.

The action of witnesses and others in approaching and talking to a juror during an interval of court, while a case is on trial, will not be ground for new trial, where it appears that the juror was not at fault, and no prejudice is shown: *State v. Allen*, 89–49.

Improper communication between the bailiff and the jury will be a ground for new trial unless it appears that prejudice did not result from such misconduct: *State v. LaGrange*, 68 N.W., 557.

Misconduct of the bailiff in communicating with the jury may be shown by affidavits, not being a matter occurring in the presence of the court: *Ibid.*

Affidavits of jurors that they were influenced by the action of the bailiff in communicating with them in regard to the case, relate to a matter inhering in the verdict and cannot be considered, but such affidavits are admissible to show the fact of misconduct on the part of the bailiff in talking to the jury, and on the part of the jurors in listening to him: *Ibid.*

The drinking of spirituous liquors during the time when a jury is out for the purpose of deliberating upon their verdict is sufficient misconduct to reverse a judgment on such verdict on appeal: *State v. Baldy*, 17-39.

Where one of the jurors was ill before submission of the cause to the jury, and took for medicinal purposes, without medical prescription, some brandy, etc., *held* not ground for new trial: *State v. Morphy*, 33-270.

Indulgence in intoxicating liquors during adjournment of the court, and before the final submission of the cause to the jury, is not ground for a new trial in the absence of a showing of prejudice resulting therefrom: *State v. Bruce*, 48-530.

The fact that a juror was intoxicated during an adjournment of the court, before submission of the case, *held* not ground for new trial, it not appearing that the juror was intoxicated while in the performance of his duties: *State v. Livingston*, 64-560.

Where misconduct of one of the jurors in drinking intoxicating liquor during the trial was made a ground for new trial, and the fact relied upon was shown only by defendant's affidavit, which did not state the juror's name nor the time and place, *held*, that the showing was insufficient, and that defendant's affidavit should be admitted, if at all, only in cases where where no other proof is practicable, and failure of justice might result from its rejection: *State v. McLaughlin*, 44-82.

It is misconduct, such as to require a new trial, that the jury take with them to the jury room, or are furnished with, newspapers containing what purport to be reports of the evidence given on the trial: *State v. Walton*, 92-455.

The drinking of intoxicating liquors by a juror during an adjournment of court will not authorize the setting aside of the verdict: *State v. Kennedy*, 77-208.

Where the motion for a new trial on the ground that a juror was intoxicated on the trial was supported by an affidavit of defendant and controverted by that of the juror, *held*, that the action of the lower court in refusing to grant a new trial would not be disturbed: *State v. Lee*, 80-75.

It is not such misconduct as to require a new trial, that the jury procure at their own expense a lunch, or allow the officer or an outsider to eat the same with them, no reference to the cause being made: *State v. Beste* 91-565.

An affidavit of the defendant as to misconduct of the jury, based upon information and belief, is not sufficient: *State v. Tucker*, 68-50.

In general, as to misconduct of jury, see notes to § 3755.

Misconduct of defendant's attorney: It will be a ground for a new trial that an attorney who acted for defendant in a preliminary examination in a case relating to the same transaction was allowed by the court, against defendant's objections, to assist the prosecution: *State v. Halstead*, 73-376.

Incompetence of defendant's attorney may, especially in cases involving the life of defendant, constitute a ground for a new trial, but to justify a reversal upon such ground there should be a strong showing both of incompetence and prejudice: *State v. Benge*, 61-658.

Misconduct of prosecuting attorney: Misconduct of prosecuting attorney will not be ground for new trial where upon objection to such conduct having been made in the trial court, the court has sustained the objection, and corrected the error: *State v. Beal*, 62 N.W., 657.

It will not constitute misconduct of the prosecuting attorney that he states, in opening, evidence which when offered is ruled out by the court, it not appearing that he acted in bad faith: *State v. Allen*, 69 N.W., 274.

It is not ground for new trial that the prosecuting attorney in his opening address tells the jury that the state will introduce dying declarations, and comments thereon, although such declarations are not afterwards received, it not appearing that the statement was made in bad faith: *State v. Tippet*, 63 N.W., 445.

The prosecutor has a right within reasonable limits to draw his own deductions as to facts from other facts which are admitted or proven: *Ibid.*

In a particular case, *held*, that misconduct of the district attorney in his opening statement to the jury was such as to require the granting of a new trial: *State v. Williams*, 63-135.

Misconduct of the district attorney in asking improper questions which were promptly excluded on objection, *held* not sufficient in a particular case to require a new trial: *State v. Noble*, 66-541.

The asking of questions on cross-examination which are improper will not constitute reversible error if the answers are favorable to the defendant: *State v. Tippet*, 63 N.W., 445.

Improper questions asked by the prosecuting attorney, although the court on objection thereto overrules them, may constitute such misconduct as to entitle defendant to new trial; but the matter is within the discretion of the lower court, and the supreme court will not interfere if the other court has held such misconduct not sufficient to entitle the defendant to relief: *State v. McIntire*, 89-139.

While the attorney for the prosecution

may, in attempting to introduce improper evidence tending to predjudice defendant, be guilty of misconduct such as to warrant a new trial, yet where the court below has refused a new trial on that ground the appellate court will be slow to interfere: *State v. Gadbois*, 89–25.

It is misconduct for the attorney for the prosecution to offer to prove, and call witnesses for the purpose of proving, facts tending to throw discredit on the defendant, which are clearly not admissible in evidence; but in a particular case, *held*, that the guilt of defendant was so conclusively shown that such misconduct would not be ground for reversal: *Ibid.; State v. Ean*, 90–534.

Where the prosecuting attorney, in the presence of the jury, demanded of the court that a witness, who testified for defendant, should be held by the court for the crime of perjury, committed in the giving of such evidence, and the court refused to do so, saying that there was a method of holding him by information, if there was any ground therefor, *held* there was not such misconduct as to require the granting of a new trial: *State v. Pilkington*, 92–92.

Language used in argument calculated to cast odium upon witnesses, and cause their testimony to have less weight with the jury than it would otherwise have, may be a ground for new trial when not justified by something shown or said during the course of the trial: *State v. Helm*, 92–540.

Violent and inflammatory language used by the county attorney in a prosecution for seduction, *held* to be so far unwarranted and prejudicial as to be a ground for new trial: *State v. Proctor*, 86–698.

A judgment in a criminal case will not be reversed because of certain language used by the counsel for the state in the closing argument, where there is a conflict in the record as to whether the language complained of was used and when no objection was made to it until after the verdict: *State v. Shreves*, 81–615.

A misstatement of law by counsel in argument cannot be regarded as prejudicial misconduct, and, upon appeal, will not be ground for reversal: *State v. Toombs*, 79–741.

Where the trial judge absented himself during the argument to the jury, leaving an attorney to preside in his place, *held*, that complaints with reference to misconduct of prosecuting attorney during such time in interrupting defendant's attorney and causing disorder in the court room were not such as to entitle defendant to a new trial: *State v. Griffin*, 79–568.

In a particular case, *held*, that there was not misconduct of counsel sufficient to require a reversal in referring to the effect of the evidence upon his own mind: *State v. Beasley*, 84–83.

As to misconduct of prosecuting attorney in referring to the fact that defendant does not testify, see § 5484 and notes.

Misconduct of counsel in addressing the jury may not be taken advantage of on appeal unless made of record by bill of exceptions. Such misconduct cannot be shown by affidavits: *State v. Helm*, 66 N.W., 751.

Conduct of prosecuting attorney in refusing to join with defendant's attorney in a request that the jury be not allowed to separate during the trial, *held*, not to be misconduct such as to require the granting of a new trial: *State v. Walton*, 92–455.

As to misconduct of counsel in opening statement to the jury, see notes to § 5372.

Disqualification of juror (for instance, not being an elector) is not waived by failure to object to him for cause, and may be a ground for new trial; but if defendant knew at the time that the jury were sworn that any of them were not qualified to act as jurors, he would, by failure to object, waive his right to object afterward. It must appear, however, that defendant had knowledge of the fact of disqualification before it can be inferred that he waived his objection: *State v. Groome*, 10–308.

But an objection to a juror on account of bias or prejudice is waived by failure to object at the proper time: *Ibid.*

If the juror is examined at the proper time as to whether he has formed or expressed an unqualified opinion as to defendant's guilt or innocence, and it should afterwards appear that, on such examination, he had sworn falsely as to not having formed or expressed such opinion, that fact might be a ground for a new trial. But defendant, to take advantage thereof, must show by the record that the juror was examined on oath as to the fact: *State v. Shelledy*, 8–477, 508.

Error in instructions: While refusal of the court to properly instruct the jury is a ground for new trial, yet when the court does charge the jury it is necessary in order to enable defendant to take advantage of an error in the charge that he shall have objected to it: *State v. Hathaway*, 69 N. W., 449; *State v. Reasby*, 69 N. W., 451.

Bailiff not sworn: Although the requirement that the bailiff, who is placed in charge of the jury on their retirement, shall be specially sworn is not directory only, but mandatory, yet as a failure in that respect is not made ground for new trial it cannot be urged on appeal: *State v. Crafton*, 89–109.

Fair verdict of all the jurors: A juror who has consented to the verdict cannot afterwards be permitted to say that it was not his honest judgment on the facts of the case: *State v. Griffin*, 71–372.

It cannot be shown by affidavits of jurors that they did not voluntarily assent to the verdict: *State v. Douglas*, 7–413.

As to the same question in civil cases, see notes to § 4044.

Erroneous instructions to the jury, or refusing to instruct, see § 5386 and notes.

Verdict against the evidence: Where a conviction is clearly contrary to the weight of evidence the supreme court should set it aside on appeal: *State v. Woolsey*, 30–251.

The supreme court will, on appeal, interfere more readily with a verdict because contrary to the weight of evidence in a criminal than in a civil case: *State v. Tomlinson*, 11–401.

But where every material allegation of the indictment is supported by the evidence, the supreme court must be satisfied of the insufficiency of the evidence to warrant the

overruling of the action of the lower court in refusing a new trial on that ground: *State v. Elliott*, 15–72.

It is the duty of the court to grant a new trial whenever in its judgment the verdict is not sustained by the evidence: *State v. Billings*, 81–99.

And where the judge of a trial court on passing upon a motion for new trial on this ground expressed it as his opinion that the verdict was not supported by the evidence, *held*, that such expression of opinion appearing on the record would be considered by the supreme court, although the judge overruled the motion for a new trial, and the case was reversed on the ground that such new trial should have been granted: *Ibid.*

A judgment on a verdict against the clear weight of the evidence will be reversed on appeal. The rule in criminal cases is different from that applied in civil cases: *State v. Pilkington*, 92–92.

The supreme court will but cautiously interfere with verdicts when it is claimed that they are against the evidence: *State v. Collins*, 20–85.

Where it does not appear from the evidence of record in a criminal case that the verdict was against the preponderance of evidence, a new trial will not be granted on appeal: *State v. Stoker*, 22–52.

Where the bill of exceptions does not profess to disclose the whole of the evidence, the supreme court will presume there was sufficient to warrant the verdict of the jury. It will not reverse on the ground that the verdict is against the weight of evidence, unless it is clearly and manifestly so: *State v. Lyon*, 10–340.

In a particular case, *held*, that the lower court should have sustained a motion for a new trial on the ground of insufficiency of evidence: *State v. Hilton*, 22–241.

Where the jury has rendered a verdict which the court has refused to set aside, the supreme court will not interfere if the correctness of the verdict depends upon the credit to be given the testimony of witnesses and there is nothing in such testimony rendering its truthfulness improbable: *State v. Quinn*, 47–368.

Fair and impartial trial: In a particular case a new trial was granted on appeal on the ground that it appeared that under the circumstances of the case the prisoner had not had a full, fair and impartial trial, although no error of law was sufficiently shown: *Trulock v. State*, 1–515.

Surprise: The fact that defendant is taken by surprise by the testimony of a witness may be ground for a new trial: *Ibid.*

Defendant is not entitled to a new trial on the ground of surprise in that his counsel did not have sufficient time to consult with regard to the defense, where no motion for continuance was made on that ground: *State v. Benton*, 65–482.

Remarks by the court, in passing upon challenges to jurors, while uncalled for, *held* not prejudicial to defendant and therefore not a ground for a new trial: *State v. George*, 62–682.

The action of the court in addressing a witness as an unwilling witness, and directing him to stand aside for a time to collect his thoughts, *held* not to be ground for a new trial: *State v. Gillett*, 92–527.

It will constitute misconduct for the court to indicate, by questions directed to a witness, that it suspects an attempt to have been made by the attorney for defendant to improperly influence the witness, there being no foundation in the record for such suspicion: *State v. Allen*, 69 N.W., 274.

Judges presiding at trials should be exceedingly discrete in what they say and do in the presence of the jury lest they seem to lean towards or lend their influence to one side or the other: *Ibid.*

It is error for the court during the trial to make remarks on the evidence in the presence of the jury which invade the province of the jury in passing upon its weight and effect. If the judge during the progress of the trial makes requirements in the presence of the jury which would be erroneous and prejudicial had they been embodied in the formal charge it will entitle the losing party to a new trial: *State v. Philpot*, 66 N.W., 730.

The misconduct of an attorney or of the judge in making improper remarks in the presence of the jury cannot be shown by affidavits and must be preserved by bill of exceptions: *State v. LaGrange*, 68 N.W., 557.

Affidavits of jurors: In a criminal case the court should receive the testimony of jurors as to any palpable misapprehension of the instructions of the court as a ground for a new trial: *Packard v. United States*, 1 G. Gr., 225.

The affidavits of jurors which may be received on a motion for a new trial must be voluntary. The court cannot, by rule upon the jury, compel them to answer under oath as to the manner of making up their verdict: *Forshee v. Abrams*, 2–571; *Grady v. State*, 4–461.

Affidavits of jurors cannot be received to show that they erroneously rejected evidence which was properly before them: *State v. McConkey*, 49–499.

Nor to show that it was agreed that if the court made no response to a request for instructions as to certain points, a verdict of guilty was to be rendered, and that this agreement was carried out: *Ibid.*

Affidavits as to what was said by the jurors in connection with their concurrence in the verdict are not admissible. These are matters which inhere in the verdict and cannot be shown by affidavit for the purpose of impeaching it: *State v. Lauderbeck*, 65 N. W., 158.

Affidavits of jurors are not admissible to show misconduct as to a matter essentially inhering in the verdict itself. The arguments used by jurors, and the deductions drawn by the jury from the testimony or want of testimony on some particular issue, cannot be shown to impeach the verdict: *State v. Beste*, 91–565.

See, further, as to affidavits of jurors, § 3756 and notes.

Affidavits as to statements of jurors: Affidavits of the attorney of the unsuccessful

party as to statements made to him by jurors, showing misconduct of the jury, *held* not admissible to impeach the verdict: *State v. Quinton*, 59–362.

An affidavit showing that a juror has made statements to the effect that the jury did not consider the instructions of the court, and that members of the jury refused to make affidavits as to that fact, cannot be considered: *Grady v. State*, 4–461.

Illness of defendant: Under particular facts, *held*, that a new trial could not be granted on the ground of defendant's claim that when giving his testimony as a witness he was suffering from nervous headache which affected his mind and memory, it appearing to the court that the facts on which the claim was based were not sufficiently shown: *State v. Montgomery*, 71–630.

It may be shown by affidavits that while the jury was deliberating upon its verdict, and before an agreement had been reached, portions of the code in regard to the crime charged were read to the jury, and explained by one or more of its members, and such affidavits may be considered on the question of misconduct: but the weight which the jurors gave to the reading and explanation is a matter which inheres in the verdict, and cannot be shown in that manner, and therefore such affidavits do not show facts from which prejudice must be presumed: *State v. Whalen*, 68 N.W., 554.

Newly discovered evidence: The statute makes no provision for a new trial on the ground of newly discovered evidence: *State v. Bowman*, 45–418; *State v. Lee*, 80–75; *State v. Watson*, 81–380; *State v. Whitmer*, 77–558; *State v. Burgor*, 62 N. W., 696; *State v. King*, 66 N. W., 735; *State v. Cater*, 69 N. W., 880.

A new trial cannot be granted in a criminal case on account of newly discovered evidence: *State v. Dimmitt*, 88–551.

Under the facts of a particular case (without referring to the question whether newly-discovered evidence is ground for new trial in a criminal case), *held*, that the evidence was cumulative, and that the party had not shown such diligence as to entitle him to a new trial on that ground: *State v. Foley*, 81–36.

Newly discovered evidence, cumulative and relating to collateral matters, is not ground for new trial: *State v. Potts*, 83–317.

Newly discovered evidence in a particular case, *held* sufficient to entitle defendant to a new trial, the right to a new trial on that ground not being discussed: *State v. Foster*, 37–404.

In other cases, without discussion of the right of defendant to new trial on that ground, the showing was held insufficient: *State v. Wells*, 48–671; *State v. Johnson*, 72–393; *State v. Gunagy*, 84–177.

Newly discovered evidence is not made a ground for granting a new trial in criminal cases, but under the provisions that the court may grant a new trial when from any other cause the defendant has not received a fair and impartial trial, but *held*, that a new trial might be granted when false testimony of a material character had been given in the case and the proof of its falsity had not, and by diligence could not, have been ascertained till after the trial: *State v. Foster*, 91–164.

Failure to obtain evidence: A new trial will not be granted on account of the inability of defendant to procure certain evidence which was simply cumulative and would clearly not have warranted a different verdict: *State v. Nadal*, 69–478.

Presumption; showing: It is not competent on appeal to overcome the presumption which must be indulged in favor of the proceedings in the trial court in regard to matters which occurred in the presence of the court, by means of an affidavit attached to the motion for a new trial: *State v. Kennedy*, 77–208.

Where there is no showing in the record as to the matter complained of as a ground for new trial except affidavits, and counter-affidavits, it will not be presumed that the action of the court in refusing a new trial was erroneous. In the absence of a bill of exceptions it will be presumed that there was other showing made to the court: *State v. Woodard*, 84–172.

SEC. **5425. Application—when made.** The application for a new trial can be made only by the defendant, and must be made before judgment. [C. '73, § 4490; R., § 4855; C. '51, § 3053.]

A motion for a new trial must be made before judgment: *State v. Bixby*, 39–465.

Presence of defendant, even in case of prosecution for a felony, is not required at the argument and determination of a motion for a new trial under § 5338: *State v. Deckloths*, 19–447.

CHAPTER 29.

OF ARREST OF JUDGMENT.

SECTION **5426. Grounds of.** A motion in arrest of judgment is an application to the court in which the trial was had, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty, and shall be granted:

1. Upon any ground which would have been ground of demurrer;
2. When upon the whole record no legal judgment can be pronounced. [C.'73, § 4491; R., § 4856; C.'51, § 3054.]

Objections to the impaneling of the grand jury cannot be raised for the first time by motion in arrest of judgment: *State v. Reid*, 20-413.

But the correctness of the ruling upon a challenge to a grand juror may be questioned by this motion: *State v. Haynes*, 54-109.

The objection that it does not appear from the indictment that it was found within the statutory period of limitation after the commission of the offense is not a ground for arrest of judgment: *State v. Deitrick*, 51-467.

Where an information is insufficient because the facts constituting the offense are not stated, the defect may be taken advantage of after the verdict by a motion in arrest of judgment: *State v. Butcher*, 79-110.

Where defendant demurred to the indictment, and upon the overruling of the demurrer he neglected to plead, but was tried as if a plea of not guilty had been entered, *held*, that defendant was not prejudiced by the irregularity, and a motion in arrest of judgment was properly overruled: *State v. Greene*, 66-11.

Where a motion in arrest of judgment is sustained, the proceeding cannot be pleaded in a subsequent prosecution as constituting a previous conviction or acquittal: *State v. Clark*, 69-196.

Where conviction is set aside on motion in arrest of judgment on the ground that the verdict is contrary to the evidence, which is a statutory ground for granting a new trial, defendant is not entitled to discharge on the ground of having been once in jeopardy: *State v. Bowman*, 62 N. W., 759.

As to grounds of demurrer to indictment, see § 5328 and notes.

SEC. **5427. On motion of court.** The court may also, upon its own observation of any of these grounds, arrest the judgment on its own motion. [C.'73, § 4492; R., § 4857; C.'51, § 3055.]

SEC. **5428. Defendant held to answer.** If the court is of opinion from the evidence on the trial that the defendant is guilty of a public offense of which no legal conviction can be had on the indictment, he may be held to answer the offense in like manner as upon a preliminary examination. [C.'73, § 4493; R., § 4858; C.'51, § 3057.]

That the first trial will not be a bar to another trial, see notes to § 5339.

SEC. **5429. When motion made.** The motion may be made at any time before or after judgment, during the same term. [C.'73, § 4494; R., § 4859.]

CHAPTER 30.

OF JUDGMENT.

SECTION **5430. Of acquittal.** Upon a verdict of not guilty for the defendant, or special verdict upon which a judgment of acquittal must be given, the court must render judgment of acquittal immediately. [C.'73, § 4495; R., § 4860.]

SEC. **5431. Of conviction—time for.** Upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction must be rendered, the court must fix a time for pronouncing judgment, which must be at least three days after the verdict is rendered, if the court remains in session so long, or, if not, as remote a time as can reasonably be allowed; but in no case can it be pronounced in less than six hours after the verdict is rendered, unless defendant consent thereto. [C.'73, § 4496; R., §§ 4861–2; C.'51, § 3058.]

Where the record showed that the court was in session more than three days after the verdict, *held*, that the statute is imperative, and unless the record clearly rebutted the presumption of prejudice it could not be disregarded; and in such case the judgment was reversed and the cause remanded for judgment upon the verdict, with leave for defendant to show any cause against the same which had not already been passed upon: *State v. Watrous*, 13-489.

Where the defendant appears to have been sentenced before the expiration of the three days here provided, it will be presumed, in the absence of any showing to the contrary, that the court deferred its judgment to as remote a period as it reasonably could: *State v. Wood*, 17-18; *State v. Marvin*, 12-499.

It will not be presumed that sentence was pronounced without allowing the time to elapse as here required: *State v. Turney*, 77-269.

Where the record did not show whether six hours intervened between the plea of guilty and the final adjournment of the term, and it appeared that a continuance was made without objection, the presumption would be that the court adjourned within less than six hours, and the case was continued for judgment by consent, and that there was no error in failing to pronounce judgment at the term in which the plea of guilty was entered: *State v. Stevens*, 47-276.

Where the last day of the term was fixed for pronouncing judgment, but upon that day the cause was continued for judgment until next term, when judgment was pronounced, *held*, that in the absence of a showing to the contrary, and of any objection at the time, it would be presumed that the continuance was for good cause or at the request of defendant: *State v. Miller*, 53-84.

It is not error to render judgment for the payment of a fine at the next term after conviction: *State v. Ray*, 50-520.

SEC. **5432. Presence of defendant.** When judgment is pronounced, if the conviction be for a felony, the defendant must be personally present; if for a misdemeanor, he need not. [C.'73, § 4497; R., § 4863.]

Where the offense charged is a misdemeanor, judgment may be rendered in the absence of the defendant: *Hughes v. State*, 4-534.

As to presence of defendant at rendition of verdict, see § 5403 and notes.

SEC. **5433. Forfeiture of bail.** If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail or money deposited, may make an order directing the clerk, on the application of the county attorney at any time thereafter, to issue a warrant into one or more counties for his arrest, which may be substantially in the following form:

County of....., }
THE STATE OF IOWA. }

To any peace officer in the state:

A..... B....., having been duly convicted on the.....day of..... ....., A. D....., in the district court of.....county, of the crime of (here designate it generally, as in the indictment).

You are hereby commanded to arrest the said A.....B..... and bring him before said court for judgment, if it be then in session, or, if not, to deliver him into the custody of the sheriff of said county.

Given under my hand and the seal of said court, at my office in....., in said county, this.....day of....., A. D. .....

[Seal.] .....
Clerk.

The warrant may be served in any county in the state. [C.'73, §§ 4498-4501; R., §§ 4865-8; C.'51, §§ 3061-3.]

SEC. **5434. Defendant arrested.** The officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant. [C.'73, § 4502; R., § 4869; C.'51, § 3064.]

SEC. **5435. Showing of cause.** When the defendant appears for judgment, he must be informed by the court, or the clerk under its direction, of the nature of the indictment, his plea, and the verdict, if any, thereon, and be asked whether he has any legal cause to show why judgment should not be pronounced against him. [C.'73, § 4503; R., § 4870; C.'51, § 3065.]

This section is declarative of the common law. The action of the court as here directed is not required to be made matter of record, although it may properly be done, but no presumption of its omission will arise from the fact that it does not appear of record: *State v. Wood*, 17-18; *State v. Stiefle*, 13-603.

Unless it otherwise appears it will be presumed that such steps were properly taken: *State v. Wells*, 46-662.

The defendant has the right to introduce evidence of good character, immature age and other matters which may properly be taken into account by the court by way of mitigation in fixing the sentence: *State v. Conners*, 64 N.W., 295.

The fact that it does not appear that defendant had an opportunity to present matter in mitigation of sentence, on a plea of guilty, is no ground for a new trial, it not appearing that he was in any way deprived of such opportunity: *State v. Reininghaus*, 43-149.

It appearing that defendant had all the

opportunity to prepare an application for a new trial or motion in arrest of judgment and showing in mitigation of punishment which could have been necessary, *held*, that the failure to fix any definite time for judgment after a continuance upon a plea of guilty was error without prejudice: *State v. Stevens*, 47–276.

It is not error for the judge to remark, in connection with the statement to the defendant of the charge against him, his plea thereto, the verdict of the jury, etc., upon the circumstances of the offense, and to state the reasons impelling him to pronounce against defendant a particular penalty imposed upon him. There is certainly no impropriety in the practice in this respect recognized in many of the courts of this state: *State v. Hale*, 65–575.

SEC. **5436. What may be shown.** He may show for cause against the judgment that he is insane, or any sufficient ground for a new trial, or in arrest of judgment. [C.'73, § 4504; R., § 4871.]

SEC. **5437. Insanity.** If the court is of opinion that there is reasonable ground for believing him insane, the question of his insanity shall be determined as provided in this code, and if he is found to be insane, such proceedings shall be had as are herein directed. [C.'73, § 4505; R., § 4872.]

SEC. **5438. New trial—motion in arrest.** If he moves for a new trial, or in arrest of judgment, the court shall defer the judgment and proceed to hear and decide the motions. If no sufficient cause is shown why judgment should not be pronounced, and none appears to the court upon the record, judgment shall be rendered. [C.'73, §§ 4506–7; R., §§ 4873–4; C.'51, § 3066.]

Form of judgment: It is not essential that the judgment recite in exact words the finding that defendant is guilty. If it is ordered and adjudged that he be imprisoned, etc., that is sufficient: *State v. Rudd*, 66 N.W., 748.

It is not necessary that the records show an express finding by the court based on the verdict that defendant is guilty. The record of the verdict of the jury followed by a sentence is sufficient to constitute a judgment: *State v. Cook*, 92–483.

Judgment on plea in bar: Where defendant interposes only the plea of former conviction or acquittal, without pleading not guilty, as he might do in connection therewith, and upon verdict being found against him he does not ask leave to plead over, judgment may properly be rendered against him without further trial as to his guilt: *State v. Green*, 16–239.

Sentence for included crime: Where defendant, under indictment for assault with intent to murder, was found guilty of assault with intent to commit great bodily injury, and the court, doubting its authority to sentence for the latter offense under the indictment, sentenced for a simple assault, *held*, that there was no error prejudicial to defendant: *State v. Schele*, 52-608.

Sentence to hard labor: Where the jury found defendant guilty of murder in the first degree and directed that he should be punished by imprisonment in the penitentiary at hard labor for life, and in rendering judgment the court sentenced to imprisonment in the penitentiary for life, *held*, that the judgment must be presumed to mean imprisonment at hard labor, and sufficiently corresponded with the verdict: *State v. Cole*, 63–695.

Where discretion is given to the court as to the amount of punishment to be imposed, it may take cognizance of facts and circumstances which the record does not and cannot disclose in fixing the punishment, and thereafter, on appeal, the action of the court will not be interfered with unless an abuse of discretion is shown: *State v. Maloney*, 79–413.

Without regard to whether it is proper for the trial judge to advise himself as to matter not disclosed in the evidence as an aid in fixing the punishment, it is *held* that if such action is unwarranted, it is not a ground for a new trial. Such action might be a ground for an application to reduce the punishment as excessive: *State v. Huff*, 76–200.

The failure of the court to specify in the judgment the length of imprisonment for fine will not render the judgment void so that defendant may be released on *habeas corpus* before the expiration of the length of time which might be specified in the sentence according to statute, but will be an error to be corrected on appeal: *Elsner v. Shrigley*, 80–30.

The judgment does not fix the particular penitentiary in which the prisoner shall be confined. That matter may be regulated, under statutory provisions, by the executive council: *O'Brien v. Barr*, 83–51.

SEC. **5439. Cumulative sentences.** If the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses. [C.'73, § 4508; R., § 4880; C.'51, § 3070.]

Where two judgments of imprisonment against a defendant were rendered on the same day, but no provision was made as to the commencement of either term as here contemplated, *held*, that the prisoner should be held in confinement until both were

served out, and that the term of imprisonment on the judgment last rendered would commence on the expiration of that under the first. Two terms of imprisonment cannot be concurrent: *Mier v. McMillan*, 51-240.

SEC. 5440. Imprisonment for fine. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine. [C.'73, § 4509; R., § 4881; C.'51, § 3071.]

Imprisonment for non-payment of fine: This section is applicable whether the statute under which the fine is imposed provides that punishment be by fine only or by both fine and imprisonment. The judgment should specify the extent of the imprisonment, but a failure to do so will not render the judgment void. It may be corrected on appeal: *State v. Myers*, 44-580, 584.

There cannot be imprisonment for non-payment of a fine unless the judgment so orders: *Lanpher v. Dewell*, 56-153.

Although the judgment provides for issuance of special execution and a general execution for the purpose of satisfying the fine, and then provides that defendant shall be imprisoned until the fine is paid, the imprisonment need not be postponed until it is ascertained whether or not the fine is satisfied by execution, but defendant may be imprisoned at once on failure to pay: *Elsner v. Shrigley*, 80-30.

The provisions of this section and of § 5604 are directory only. The extent of imprisonment for non-payment of a fine being thus fixed, a judgment that defendant be imprisoned until the fine is paid will not be void: *Jackson v. Boyd*, 53-536.

But when imprisonment is imposed under any statute the court should fix the extent of the imprisonment. To this extent the provision is mandatory: *Ex parte Tuicher*, 69-393.

This section is applicable to a fine imposed under § 2383 or § 2430, providing punishment for violation of the prohibitory liquor law, although it is therein provided defendant shall stand committed until the fine and costs assessed against him are paid: *Ibid.*

Although a judgment for failure to pay the five hundred dollars fine authorized under the prohibitory liquor law for violation of an injunction should limit the imprisonment to one hundred and fifty days, nevertheless a failure to make such order will not render a reversal of the judgment of fine and imprisonment necessary, but the judgment can be corrected on appeal: *Jordan v. Circuit Court*, 69-177.

The duration of the imprisonment, under this section, cannot be determined or limited by a partial payment of the fine: *Galles v. Wilcox*, 68-664.

The fact of imprisonment for non-payment of a fine to the limit of the law, as above specified, does not operate as a satisfaction of the judgment (see §§ 5533, 5652, 5657): *State v. Jordan*, 39-387; *State v. Anwerda*, 40-151; *Albertson v. Kriechbaum*, 65-11.

Imprisonment of defendant for non-payment of fine does not constitute a satisfaction of the fine, and therefore a surety on defendant's bail bond, who has undertaken that defendant shall pay the fine or undergo the imprisonment imposed upon him, is not released from liability for the fine by the fact that he surrenders the defendant to imprisonment for non-payment of such fine: *State v. Meier*, 65 N.W., 316.

But a prisoner who, having been confined for the non-payment of a fine, is liberated under the provisions as to poor convicts, contained in § 5533, is entitled to have the judgment against him satisfied: *State v. Van Vleet*, 23-168; *State v. Peck*, 37-342; *State v. Jordan*, 39-387; *In re Jordan*, 39-394.

The power to imprison for non-payment of a fine exists by virtue of this section, as incident to the power to impose a fine, and is not conferred by § 5533, providing for release of poor convicts. And if the statute authorizing the fine provides that a prisoner shall not be released under § 5533, such provision is controlling: *Hanks v. Workman*, 69-600.

Under the provisions of §§ 5652, 5657, that defendant may be sentenced to hard labor for non-payment of a fine, he is to be credited with one dollar and fifty cents per day upon the judgment against him, but the duration of his imprisonment cannot exceed that here specified: *Keokuk v. Dressell*, 47-597. And see *State v. Jordan*, 39-387; *In re Jordan*, 39-394; *State v. Anwerda*, 40-151.

Costs: The provisions of this section apply only to the fine and not to the costs: *State v. Erwin*, 44-637.

But it may be provided by statute that defendant be imprisoned for non-payment of costs as well as fine: *Albertson v. Kriechbaum*, 65-11.

Where imprisonment for non-payment of fine or fine and costs is authorized, such imprisonment is not a portion of the punishment for the crime, but only a method of enforcing payment of the fine or fine and costs: *Ibid.*

Therefore, *held*, that a statute making a crime punishable by fine not exceeding one hundred dollars, and providing for imprisonment until payment of fine and costs, did not take the crime out of the jurisdiction of a justice of the peace: *Ibid.*

For violation of a city ordinance a defendant may be imprisoned until fine and costs are paid, not to exceed thirty days (§ 694): *State v. Wells*, 46-662.

Payment of a fine imposed, and discharge of defendant from imprisonment for its non-payment, does not satisfy the costs, and execution may issue therefor: *State v. Gray*, 35-503; *Gray v. Ferreby*, 36-146.

In a particular case, *held*, that a judg-

ment was in effect a judgment for imprisonment until the fine be satisfied, and not for fine and costs, which would have been illegal: *State v. Boynton*, 75-753.

For similar provision, see § 5604.

SEC. **5441. Commitment to jail of another county.** When a person is to be committed to jail, if there is no jail or no sufficient one in the county where the party would be committed under the ordinary provisions of law, the court or magistrate committing may order him to be committed to the jail of some other county, which shall be the one which is most convenient and safe, and the county to which the cause originally belonged shall be liable for all the expenses thereof. [C. '73, § 4510; R., § 4884; C. '51, § 3073.]

SEC. **5442. Allowance of bail upon appeal.** In all cases, except murder in the first degree and treason, the court rendering judgment must make an order fixing the amount in which bail must be taken, and there shall be no execution of the judgment until such order is made. [C. '73, § 4511; R., § 4885.]

Failure of the court to make the order as to bail here contemplated will not entitle defendant to a discharge upon *habeas corpus*, but his only relief will be in such a proceeding to have the amount of bail properly fixed: *Murphy v. McMillan*, 59-515.

Before the amendment of section 4107 of the Code of '73, a person convicted of murder in the second degree was entitled to be admitted to bail, but by the provision of the amendment a person convicted of murder in either degree cannot be admitted to bail: *Baldwin v. Westenhaver*, 75-547.

See § 5506 as to bail upon appeal.

CHAPTER 31.

OF EXECUTION.

SECTION **5443. Copy of judgment.** When a judgment of imprisonment, either in the penitentiary or county jail, is pronounced, an execution, consisting of a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution. [C. '73, § 4512; R., § 4886; C. '51, § 3074.]

SEC. **5444. Notice of execution.** A judgment for imprisonment, or for imprisonment until a fine is paid, to be executed in the county where the trial is had, shall be executed by the sheriff thereof, and return made upon the execution, which shall be delivered to and filed by the clerk of said court. Under all other judgments for imprisonment, the sheriff shall deliver a certified copy of the execution with the body of the defendant to the keeper of the jail or penitentiary in which the defendant is to be imprisoned in execution of the judgment, and take his receipt therefor on a duplicate copy thereof, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon, and a minute of said return shall be entered by the clerk as a part of the record of the proceedings in the cause in which the execution issued; and when such defendant is discharged from custody, the jailer or warden of the penitentiary shall make return of such fact to the proper court, and an entry thereof shall be made by its clerk as is required in the first instance. [C. '73, §§ 4513-15, 4517, R., §§ 4897-9, 4901; C. '51, §§ 3075-7.]

The fact that the warrant of commitment to imprisonment is void will not entitle the prisoner to release on *habeas corpus* if the court or judge is satisfied from the evidence that he should be held to answer for the crime charged or any other crime (§ 4453). In such case the court or judge may make an appropriate order: *Jackson v. Boyd*, 53-536.

As to the order in which two or more terms of imprisonment are to be served out, see § 5439 and note.

Where the judgment is that defendant be fined and committed in default of payment, and certified copies of the judgment entries are delivered to the sheriff, such entries have the force and effect of, and confer

the same authority as, warrants, and it is the duty of the sheriff to hold them until executed by arrest and commitment. Such warrants do not expire by lapse of time and no return is authorized until after commitment: *McKay v. Woodruff*, 77-413.

Where a prisoner is committed to a state jail under sentence of a federal court, a certified copy of the entry should be furnished as provided for by this section, and the clerk is entitled to a fee therefor: *Van Duzee v. United States*, 48 Fed., 643, 650; *United States v. Van Duzee*, 52 Fed., 930.

SEC. **5445. Preventing escape.** The sheriff, or his deputy, while conveying the defendant to the proper prison, has the same authority to require the assistance of any citizen of the state in securing the defendant, and retaking him if he escapes, as if he was in his own county; and every person who neglects or refuses to assist him when so required shall be punishable accordingly. [C. '73, § 4516; R., § 4900; C. '51, § 3078.]

SEC. **5446. Execution for fine.** Upon a judgment for a fine, an execution may be issued as upon a judgment in a civil case, and return thereof shall be made in like manner. [C. '73, § 4518; R., § 4902.]

SEC. **5447. For abatement of nuisance.** When the judgment is for the abatement or removal of a nuisance, or for anything other than the payment of money by the defendant, an execution consisting of a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize and require him to execute such judgment, and he shall return the same, with his doings under the same thereon indorsed, to the clerk of the court in which the judgment was rendered, within seventy days after the date of the certificate of such certified copy, except as hereinbefore provided for. [C. '73, § 4519; R., § 4903.]

An order for the abatement or removal of a nuisance, to be delivered to the sheriff as here provided, should so describe the nuisance that the officer will be able to identify with certainty the object against which it is directed: *Sloan v. Rebman*, 66-81.

CHAPTER 32.

OF APPEALS.

SECTION **5448. When allowed.** The mode of reviewing in the supreme court any judgment, action or decision of the district court in a criminal case is by appeal. An appeal can only be taken from the final judgment, and within one year thereafter. Either the defendant or state may appeal. [C. '73, §§ 4520–2; R., §§ 4904–6.]

In civil cases: The chapter relating to proceedings in the supreme court in civil cases is intended to regulate generally the practice of that court in criminal cases as well. Therefore, *held*, that the sections relating to rehearing are applicable in criminal cases, and are applicable in behalf of the state as well as defendant: *State v. Jones*, 64-349.

In general, see notes to § 5462.

Appeal from final judgment: An appeal in a criminal case lies only from final judgment, which is the judgment here contemplated, and not from an intermediate order or decision. (Overruling *State v. Brandt*, 41-593): *State v. Swearingen*, 43-336.

This doctrine is applicable to appeals by the state as well as by defendant: *State v. Davis*, 47-634.

The action of the district court in sustaining a demurrer to an indictment is such a final judgment as that an appeal therefrom may be taken by the state: *State v. Blair*, 92-28.

A criminal case cannot be brought to the supreme court by agreement before rendition of final judgment: *Rutter v. State*, 1-99.

In a criminal case no appeal can be taken until after a judgment has been rendered. The fact of judgment is jurisdictional, and must affirmatively appear: *State v. Haworth*, 85-712.

An appeal from an order taxing the costs of prosecution to the prosecuting witness is an appeal in a criminal proceeding, within the provisions of this section: *State v. Hodgson*, 79-462.

An appeal by defendant will not lie in a criminal case from the overruling of one ground of demurrer to the indictment where another ground of demurrer is sustained and the indictment is dismissed: *State v. Hoffman*, 67-281.

Not by consent after time has expired: The supreme court cannot entertain jurisdiction by consent of parties to a case after the time for taking appeal has run out: *State v Fleming*, 13-443.

A party in a criminal as well as in a civil case must prosecute his appeal within the time prescribed by law, and cannot appeal after the expiration of the time allowed for appeal: *State v. Westfall*, 37-575.

Waiver of right: After payment of fine or serving out the imprisonment according to the sentence, defendant cannot appeal from the judgment: *Ibid.*

What must appear: Where the record fails to show that defendant was indicted, or was tried, or that a verdict was found against him, or that any judgment was entered, or that he has appealed, the appeal will be dismissed: *State v. Quigley*, 62-758.

Where the record shows no service of notice of appeal the court is without jurisdiction to examine any question in the case. *State v. Leslie*, 65-305.

Where it does not appear from the abstract that judgment has been rendered the appeal will be dismissed: *State v. Wheeler*, 65-619.

The abstract should show the fact that judgment has been entered: *State v. Briggs*, 73-456.

SEC. **5449. How taken.** An appeal is taken and perfected by the party or his attorney serving on the adverse party, or his attorney of record in the district court at the time of the rendition of the judgment, and on the clerk of such court, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto. [C.'73, §§ 4523-4; R., §§ 4907-8.]

Where it is not shown that appeal has been taken by serving notice, the court will decline to take jurisdiction of the case: *State v. Brooks*, 83-754.

SEC. **5450. Transcript—duty of clerk.** When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered to forthwith prepare and transmit to the attorney-general a certified copy of the notice of appeal in the case, with the date of service thereof, and, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record book, certify the same under the seal of the court, and transmit the same to the clerk of the supreme court. [C.'73, § 4525; R., § 4909.]

In a criminal case, the record after the caption, stating the time and place of holding the court, should consist of the indictment properly indorsed as found by the grand jury, the arraignment of the accused, his plea, the impaneling of the traverse jury, their verdict and the judgment of the court: *Harrman v. State*, 2 G. Gr., 270.

Other matters and proceedings, such as motions, objections, exceptions, and the like, do not form any part of the record unless made so by order of the court, by bill of exceptions, by agreement of parties, special verdict or otherwise: *Ibid.*

The provision of § 254 authorizing the trial judge on a proper showing to order a transcript of the shorthand notes at the expense of the county leaves the discretion with the judge, and a refusal to order such transcript will not be reversed on appeal: *State v. Waddle*, 64 N.W., 276.

Though the defendant do not appear, or fail to file a transcript, the state may file the same, and the court will examine the record, and render such judgment as the law demands: *State v. Pratt*, 20-267.

Although it is made the duty of the clerk to send up a transcript, yet where he fails to do so and the defendant takes no steps to secure the filing of a transcript, the state cannot upon the filing of such transcript have the appeal dismissed or the judgment affirmed, but the court must decide the appeal on its merits without, however, furnishing defendant a further opportunity to be heard, unless some showing or application therefor is made: *State v. McGlasson*, 86-44.

SEC. **5451. Several defendants may join.** When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards. [C.'73, § 4526; R., § 4917.]

SEC. **5452. By state—no stay.** An appeal taken by the state in no case stays the operation of a judgment in favor of the defendant. [C.'73, § 4527; R., § 4911.]

SEC. **5453. By defendant.** An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in; but where the judgment is imprisonment in the penitentiary, and an appeal is taken within ninety days after judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, or judge thereof, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to

abide the judgment on the appeal, if the defendant desires it. [C. '73, §§ 4528–9; R., §§ 4914–15.]

In no case can bail after conviction be allowed to a person convicted of murder in the second degree (§ 5096), and the district court can exercise no direction in the matter: *Baldwin v. Westenhaver*, 75–547.

SEC. **5454. Bail—proceedings when given.** When an appeal is taken by the defendant, and bail is given, the clerk must give to the defendant, or his attorney, a certificate, under the seal of the court, that an appeal has been taken and bail given, and the sheriff or other officer having the defendant in custody must, upon receiving it, discharge the defendant from custody and cease all further proceedings in execution thereof, and forthwith return to the clerk of the court who issued it the execution under which he acted, with his return thereon; and if it has not been issued it shall not be until after final judgment on the appeal. [C.'73, § 4530; R., § 4916.]

SEC. **5455. Title of case—how docketed.** The party appealing is the appellant, the adverse party the appellee, but the title of the action shall not be changed on the appeal, and the cause shall be so docketed at the commencement of the period assigned for trying causes from the judicial district from which the appeal comes, which causes shall take precedence of all other business, be tried at the term at which the transcript is filed, unless continued for cause or by consent of the parties, and be decided, if practicable, at the same term. [C.'73, §§ 4531–2; R., §§ 4918–19.]

A criminal case is properly for trial at the term at which the transcript is filed, and appellant cannot by stating in his notice of appeal that it will be for hearing at a succeeding term change the time for hearing: *State v. Fitzpatrick*, 88–615.

SEC. **5456. Appearance of defendant.** The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary. [C.'73, § 4533; R., § 4920.]

SEC. **5457. Not dismissed for informality.** An appeal shall not be dismissed for any informality or defect in taking it, if corrected in a reasonable time; and the supreme court must direct how it shall be corrected. [C. '73, § 4534; R., § 4921.]

Where the record in a criminal case on appeal was not in such form that the court was authorized to pass upon it, and the prosecuting officer insisted on such defect by motion, *held*, that the motion would be sustained and the submission set aside, and the case be put again on the docket for such further proceedings as the rules should direct and the rights of defendant demand: *State v. Havercamp*, 53–737.

The mere fact that the indictment is mislaid or stolen after the trial cannot be sent up with the writ of error to the supreme court on appeal will not authorize the supreme court to reverse the judgment: *Smith v. State*, 4 G. Gr., 189.

SEC. **5458. Assignment of error.** No assignment of error is necessary. [C.'73, § 4535; R., § 4922.]

Section applied: *State v. Pratt*, 20–267.

SEC. **5459. Argument.** The defendant is entitled to close the argument. [C.'73, § 4536; R., § 4933.]

SEC. **5460. Opinion.** The opinion of the supreme court must be in writing, filed with its clerk, and recorded. [C.'73, § 4537; R., § 4934.]

SEC. **5461. Provisions as to civil cases applicable.** The record and case may be presented in the supreme court by printed abstracts, arguments, motions and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases.

SEC. **5462. Decision—costs on reversal.** If the appeal is taken by the defendant, the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse or modify the judgment, or render such judgment as

the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it. And in case the judgment of the trial court is reversed or modified in favor of the defendant, on the appeal of defendant, he shall be entitled to recover the cost of printing abstract and briefs, not exceeding one dollar for each page thereof, to be paid by the county from which the appeal was taken. [C. '73, § 4538; R., § 4925; C. '51, §§ 3097–8.]

As to questions arising in both civil and criminal cases, see notes to § 4139.

What will be ground of reversal: Technicalities are to be disregarded: *State v. Ensley*, 10–149; *State v. Cumberland*, 90–525; *State v. Thompson*, 64 N.W., 419; *State v. Whalen*, 64 N.W., 554.

It is only errors and defects which affect substantial rights that can be considered: *Hintermeister v. State*, 1–101.

A purely technical objection, as, for instance, the erroneous discharge of one grand jury, and the summoning of another, by which the indictment was found, in the absence of any objection to the second except the discharge of the first, will not be ground for a reversal: *State v. Hughes*, 58–165.

Where the error urged was the overruling of a motion to set aside the judgment, based upon slight irregularities in the selection of the grand jury, the court held that they did not affect the substantial rights of the party and affirmed the judgment: *State v. Carney*, 20–82.

The violation of a purely technical right, the disregard of which does not affect the the substantial rights of the parties, will not be ground for reversal on appeal: *State v. Row*, 81–138.

A mere clerical error, apparent upon the face of the indictment, may be corrected in the lower court, and will not be a ground for reversal: *State v. Brooks*, 85–366.

The rule that the supreme court is to examine the record, and, without regard to technical errors or defects, render such judgment as the law demands, is applicable on an appeal by the state as well as on an appeal by the defendant: *State v. Beckey*, 79–368.

While technical errors or defects are to be disregarded, yet where it appears that there had been improper communication between the bailiff and the grand jury, and it did not appear that such communication was not prejudicial, *held*, that the conviction should be reversed: *State v. LaGrange*, 68 N. W., 557.

While technical objections are not to be regarded, yet an objection that the grand jury was improperly selected, to-wit: that two members thereof were from the same township, contrary to the provisions of § 241 of Code of '73 (see § 339), *held* not to be merely technical and to be a ground for reversal, proper objection thereto naving been made in the lower court: *State v. Russell*, 90–569.

Failure of defendant to object to an instruction at the time it was given cannot be considered as a technical error which is to be disregarded: *State v. Hathaway*, 69 N.W., 449.

In criminal cases the court will on appeal interfere more freely with a judgment based on a verdict which is claimed to be contrary to the evidence than in civil cases; but it will not reverse the judgment merely because it might, on the evidence as presented to it, have reached a different conclusion from that arrived at by the jury: *State v. Swafford*, 67 N.W., 284.

Where there is no appearance for appellant or assignment of errors, it is not the duty of the court to support the judgment of the court below by discussing imaginary errors: *State v. Stewart*, 71–754.

The court is not required to imagine possible objections and present reasons supporting the rulings of the district court as against them: *State v. Kraner*, 74–760.

Failure of the court to give instructions which are not asked will be ground for reversal only in an exceptional case when the supreme court is satisfied that the failure to instruct properly has deprived the defendant of a fair trial: *State v. Hathaway*, 69 N.W., 449.

An error in the proceedings which is not ground for appeal, as, for instance, failure to specially swear the bailiff who has charge of the jury, cannot be urged as error on appeal: *State v. Crafton*, 89–109.

The doctrine applicable in civil cases that objections not raised to the pleadings at the proper time are waived do not apply to indictments in criminal cases, and where the indictment is greatly defective the supreme court will reverse the judgment and conviction based thereon, even though no objection to the indictment has been made in the lower court: *State v. Daniels*, 90–491.

Section applied: *State v. Brandt*, 41–593, 634.

Error without prejudice: Where the evidence is all before the court, and it is apparent that an alleged error in the instructions could not have been prejudicial to defendant, the case will not be reversed: *State v. Guisenhause*, 20–227; *State v. Price*, 73–243.

A verdict of guilty will not be disturbed because of an erroneous assumption by counsel when it appears that no prejudice to the rights of the prisoner resulted therefrom: *State v. Turner*, 19–144.

The conviction will not be reversed for failure of the record to show arraignment and plea where it appears that defendant was tried on the issue of not guilty: *State v. Bowman*, 78–519.

Where an instruction was such that it would permit a conviction upon proof that an act was committed which was not prohibited by law when done, *held* erroneous, and in the absence of evidence to the contrary it would be presumed that it was prejudicial: *State v. Jacobs*, 75–247.

Where an erroneous instruction is given, it will be ground of reversal, even though the evidence would have warranted the same result had a correct instruction been given.

Under such circumstances an instruction cannot be deemed to have been without prejudice: *State v. Empey*, 79–460.

The erroneous admission of evidence for the state will not be considered to have been without prejudice, although there is other evidence in the case to the same effect: *State v. Kreder*, 86–25.

Error in prosecuting a violation of a city ordinance in the name of the state instead of the name of the city will not be ground of reversal, at least where the error was not objected to on the trial: *State v. King*, 37–462.

As malice aforethought is not an element of the crime of assault and battery, *held*, that in a criminal prosecution for assault with intent to murder, in which defendant was only convicted of assault and battery, the exclusion of evidence tending to show malice aforethought, even if erroneous, was without prejudice: *State v. Graham*, 51–72.

Where, after the overruling of a demurrer, defendant was tried as though on a plea of not guilty, but without any plea having been in fact made, *held*, that he was not entitled on appeal to have the conviction set aside and be allowed to enter a plea of not guilty: *State v. Greene*, 66–11.

Where the jury render a verdict for manslaughter under an indictment for murder, any error in the instructions with reference to malice as an element of murder will be error without prejudice: *State v. Winters*, 72–627.

Presumption in favor of ruling below: Where the evidence is not before the supreme court, it will be presumed in favor of the instruction that it was adapted to the evidence given on the trial and was correct: *State v. Wyatt*, 76–328.

Where it does not appear that the court has before it the entire showing made on the motion for a new trial, it will be presumed that there was such showing as to support the action of the court: *State v. Woodard*, 84–172.

Where, in the course of a cross-examination, the court directed the counsel of defendant to treat the witness with respect, and it did not appear from the record that, so far as regards the mere words used, there was any disrespect shown to the witness, *held*, that it would be presumed that the court was justified in using the language it did as reproof to counsel: *State v. Hatfield*, 75–592.

Verdict against evidence: In criminal cases the supreme court will on appeal interfere more readily with the action of the lower court than it will in civil cases, and it will not support a verdict if it be against the clear weight of evidence: *State v. Wise*, 83–596; *State v. Beasley*, 84–83.

Where defendant was convicted of murder upon circumstantial evidence alone, *held*, that it was the province of the jury to determine the value and weight of the evidence, and, upon appeal, the court would not be justified in saying that their verdict should be set aside because it is unsupported by the evidence: *State v. Kennedy*, 77–208.

In a prosecution for assault with intent to commit murder, where defendant was convicted of an assault to commit great bodily injury, and there was a conflict in the evidence, but the court below overruled a motion for a new trial, *held*, that the judgment would not be reversed on the ground of insufficient evidence: *State v. Rainsbarger*, 79–746.

The judgment of the lower court should not be reversed on the ground that the verdict is not supported by the evidence, when there is a conflict in the evidence: *State v. Sterrett*, 80–609.

Where it was urged that the verdict was contrary to the evidence, and a reversal asked, and this claim was not controverted by the prosecution, the judgment was reversed: *State v. Hogan*, 85–712.

Assignment of errors: The court will, in a criminal case, upon an appeal by defendant, examine the record and determine whether the law has been correctly administered, even though no formal objection has been made to the proceeding and though there be no formal assignment of error or argument: *State v. Sundermilk*, 50–695; *State v. Barlow*, 50–701.

The rule that objections not raised in the court below will not be considered in the supreme court does not apply in criminal cases: *State v. Potter*, 28–554.

In the absence of assignment of error and of argument in criminal cases, the appellate court is required to examine the record and render such judgment upon it as the law demands, but the court will not enter into a discussion of imaginary errors: *State v. Quinn*, 63–396.

Where there is no argument or assignment of errors the court will only examine the records, and if no error is found, announce that fact and its judgment: *State v. Allen*, 69 N.W., 274.

The record: Where the record fails to show that defendant was indicted, or was tried, or that a verdict was found against him, or that any judgment was entered, or that he has appealed, the appeal will be dismissed: *State v. Quigley*, 62–758.

Where the record shows no service of notice of appeal the court is without jurisdiction to examine any question in the case: *State v. Leslie*, 65–305.

Where it does not appear from the abstract that judgment has been rendered the appeal will be dismissed: *State v. Wheeler*, 65–619. And see *State v. Briggs*, 73–456.

Where it does not appear that any appeal was taken from the judgment of the lower court, the appeal will be dismissed: *State v. Campbell*, 80–770; *State v. Evans*, 81–748.

Where there was a trial by jury and a verdict of guilty against defendant, and the record showed no error or irregularity prejudicial to defendant, but the clerk certified that the evidence offered before the grand jury was read to the trial jury and that no other evidence was offered by either party, *held* that, as it was no part of the duty of the clerk to make such certificate, it would not be considered, and it would be presumed that defendant was convicted upon proper evidence; but even though the testimony taken before the grand jury was all the evidence introduced on the trial and no objection was made to such evidence, it would be

presumed that defendant waived his right to be confronted by the witnesses against him: *State v. Turney*, 77-269.

Allegations in a motion in arrest of judgment and for a new trial will not be considered on appeal in the absence of anything in the record to establish them: *State v. Braniff*, 76-291.

Where a case is submitted on what purports to be a transcript of the record, but it is not certified nor authenticated, it will not be considered, but the judgment of the trial court will be affirmed: *State v. Ill*, 75-543.

Where it did not appear from a bill of exceptions or otherwise that the evidence taken on the trial was embodied in the appellant's abstract, *held*, that it devolved upon appellant to make such showing, and in its absence it would be presumed that the verdict was in accordance with the evidence and that there was no error in the instructions given: *State v. Moore*, 77-449.

Misconduct of counsel for the state in arguments to the jury cannot be shown to the supreme court on appeal by affidavits, but must appear by bill of exceptions or certificate of the court below: *State v. Clemons*, 78-123.

Where the grounds of appeal required a consideration of the evidence and appellant's abstract was denied on the ground that there was no bill of exceptions making the evidence of record, and that it was not certified, and such denial was not controverted, *held*, that the judgment would not be disturbed: *State v. Kuhner*, 77-250.

Where neither the evidence nor the instructions are included in the transcript on the appeal of a criminal case, the court cannot determine whether there was error in the introduction of evidence and in the giving of instructions: *State v. Myers*, 80-573.

Where the abstract fails to show all the record in the case, it will not be reviewed upon appeal, although the certificate in the bill of exceptions may be in the abstract: *State v. Hogan*, 81-747.

Where the case is presented by a partial transcript, showing only the indictment and judgment, no errors being pointed out, the court cannot determine as to whether errors were committed on the trial or in the ruling on motion for new trial: *State v. Henderson*, 83-754.

Without the evidence and instructions before it, the supreme court cannot pass upon the correctness of the court's rulings on a motion for new trial: *State v. Duckworth*, 85-708.

In a particular case, *held*, that the records presented by the appellant showed no error: *State v. Daniels*, 76-87.

Rules as to printed abstracts: The court may make reasonable rules relating to practice upon appeals, and provide that upon a sufficient showing they may be waived or modified, and it having provided that the evidence on an appeal must be abstracted and the abstract printed, it will not consider a case not presented in accordance with these rules, unless application for the waiver of such rules has been duly made: *State v. Day*, 58-678.

The provisions of the rules of the supreme court for suspending such rules in regard to printed abstracts in criminal cases on account of the poverty of defendant appealing must be complied with. An abstract in writing or caligraphic writing must be submitted to the attorney-general, and the fact of the inability of appellant to pay for printing must be shown by affidavit, and further it must be shown by the counsel, by affidavit or professional statement, that there is merit in the appeal: *State v. Earl*, 66 84.

In criminal cases the court will not examine the transcript for the purpose of finding error where the appellant has filed an abstract. It is only where leave has been granted to present the case without printed abstract that the transcript will be examined: *State v. Butterfield*, 73-86.

As to abstracts, see notes to § 4118.

Appearance of defendant: Though the defendant do not appear, or fail to file a transcript, the state may file the same, and the court will examine the record and render such judgment as the law demands: *State v. Pratt*, 20-267.

Granting new trial: The supreme court will interfere more readily in a criminal than in a civil case, where a new trial, asked on the ground that the verdict was not supported by the evidence, has been refused: *State v. Tomlinson*, 11-401.

But it will cautiously interfere with verdicts in such cases: *State v. Collins*, 20-85.

When the evidence upon which defendant is convicted is so lacking in affirmative force as not to generate a belief of probable guilt, a new trial will be granted: *State v. Hilton*, 22-241.

While the duty of the supreme court to interfere with an unjust verdict is recognized, yet, when the testimony is conflicting, it must be satisfied of its insufficiency to convince the judgment, reason and conscience of the triers, before setting aside the conclusion arrived at by them: *State v. Elliott*, 15-72.

While the supreme court will exercise a just caution in interfering with the verdict of the jury, especially where the court below has refused to disturb it, yet a conviction clearly in conflict with the evidence will be set aside: *State v. Woolsey*, 30-251.

The supreme court cannot, on appeal, interfere with the verdict of the jury when there is clear conflict in the testimony, this rule being applicable in criminal as well as civil actions: *State v. Falconer*, 70-416.

In particular cases, *held*, that the evidence was not sufficient to sustain a verdict of guilty: *State v. Moffit*, 31-316; *State v. May*, 20-305; *State v. Campbell*, 69-556.

As to grounds for granting new trial in lower courts, see § 5424 and notes.

When the record must contain the whole evidence: The supreme court cannot pass upon the question whether the lower court ruled correctly upon a motion for a new trial on the ground that the verdict was contrary to the evidence, unless the whole evidence upon the trial was before it: *State v. Crawford*, 11-143.

In bringing before the supreme court the

question whether the verdict below was in accordance with the evidence, a motion for a new trial should be made in the lower court and all the evidence taken to the supreme court on appeal: *State v. Hockenberry*, 11-269.

The court cannot reverse the judgment on the ground that the verdict is against the evidence unless the record discloses that all the testimony is before it: *State v. Pitts*. 11-343; *State v. Carr*, 43-418.

A court cannot consider questions involving the necessity of having all the evidence before it where the abstract does not show that it contains all the evidence: *State v. French*, 65 N. W., 156.

Decision on the appeal: A judgment cannot be affirmed in a criminal case on motion: *State v. Bahne*, 79-472.

Neither can judgment be entered in the supreme court on the appeal bond in a criminal case where the bond is not before it: *Ibid.*

Where the clerk fails to send up a transcript and defendant takes no steps to present the case, but the state files such transcript and asks an affirmance, the supreme court will look into the merits of the case, but the defendant will not be entitled to a continuance or opportunity to be further heard, unless upon making a showing: *State v. McGlasson*, 86-44.

Where the state files a written confession of errors committed on the trial of the case as presented in the assignment of errors, and asks for reversal and remanding of the case for new trial, such application will be granted and the case remanded: *State v. Bailey*, 85-713.

In a prosecution for murder, where it appeared from the record that the court should have granted a continuance to a subsequent term in order that the defendant might have the benefit of certain testimony, an order was made, upon appeal, to that effect: *State v. Foster*, 79-726.

On the second appeal in a criminal case, the conviction being set aside on the ground that the evidence did not support a verdict of guilty, the supreme court expressed its view as to the sufficiency of such evidence in detail, as a guide to the prosecution in determining whether another trial should be had: *State v. Billings*, 81-99.

Where defendant was convicted of manslaughter, but the circumstances seemed such as to extenuate the crime, defendant being a mere boy, *held*, that the court would reduce the sentence to six months' imprisonment: *State v. Sterrett*, 80-609.

In determining the question of mitigation of punishment on appeal, considerations which do not appear of record cannot be taken into account: *State v. Turney*, 77-269.

Where a lower court has discretion as to the amount of fine to be imposed, and may properly take cognizance of facts and circumstances which the record does not and cannot disclose, in fixing the amount of such fine the supreme court will not on appeal interfere with the judgment, unless the discretion of the lower court is abused: *State v. Meloney*, 79-413.

Reducing the sentence: Where the sentence is too severe the court will reduce the punishment, but will not reverse the case on that account: *State v. Madden*, 35-511; *State v. Little*, 42-51.

The power to reduce the sentence will be exercised only when the court below has manifestly visited too severe a penalty, one disproportionate to the degree of guilt as shown by the proof: *State v. Freeman*, 27-333.

To justify the exercise of such power it must be made to appear that the punishment is excessive: *State v. Allen*, 32-248.

To authorize the supreme court on appeal to diminish the punishment, the record should show with sufficient clearness that the punishment inflicted is beyond the demands of justice: *State v. Wilmoth*, 63-380.

In determining whether the punishment in a particular case is excessive, the court will decide the case upon its peculiar facts, and each offender must receive the punishment he merits without regard to the punishment inflicted on others: *State v. Upson*, 64-248.

Where there is no evidence before it by which the proper amount of penalty may be determined, the supreme court will not reduce the punishment inflicted: *State v. Baughman*, 20-497.

The supreme court will not reduce the sentence of a lower court in a criminal case when the record does not disclose all the circumstances attending the commission of the offense: *State v. Patton*, 19-458.

The court must have some legal data upon which to base its action in reducing the sentence: *State v. Baughman*, 20-497.

The supreme court will not reduce the punishment imposed by the lower court unless all the evidence is before it: *State v. Harris*, 36-268; *State v. Durston*, 52-635; *State v. Baughman*, 20-497; *State v. Joaquin*, 43-131; *State v. Buck*, 59-382.

The supreme court will not reduce the sentence merely on an abstract of the evidence: *State v. Freeman*, 27-333.

Facts in a prosecution for murder, *held* not such as to require the reduction of the sentence: *State v. Houston*, 50-512. So *held* also in a case of accessory to assault with intent to commit murder: *State v. Mower*, 68-61. So *held* also in a case of seduction: *State v. Heatherton*, 60-175; and in a case of burglary: *State v. Franks*, 64-39; and in a case of larceny: *State v. Ritchie*, 69-123.

In a particular case, where the highest punishment permitted by the law for the offense charged was imposed for an act which was not the most aggravated form of the crime, *held*, that the sentence was excessive and it was accordingly reduced: *State v. Thompson*, 46-699.

In particular cases, *held*, that the sentence should be reduced as excessive: *State v. Madden*, 35-511; *State v. Hayden*, 45-11; *State v. Doering*, 48-650; *State v. Moody*, 50-443: *State v. Sullivan*, 51-142.

Where defendant was convicted on an indictment improperly charging in two counts two distinct crimes and was sentenced on both counts, *held*, that on appeal the sentence would be reduced to what would have been a proper sentence on one count, although the objection on the ground of duplicity had not

been raised in the court below: *State v. Henry*, 59–391.

In a particular case, *held*, that the evidence was insufficient to support a verdict of murder in the first degree; but it not being claimed that defendant was not guilty of manslaughter the court reduced the sentence to the proper one for the latter crime: *State v. Fields*, 70–196.

Effect of reversal: Upon reversal of a judgment of conviction the cause may be remanded for a new trial. Jeopardy is not considered as having attached if the defendant is erroneously convicted and obtains a reversal of the judgment: *State v. Knouse*, 33–365.

A judgment in a criminal case being reversed on appeal for a defect in the indictment, the cause was remanded for new trial with direction that preliminary thereto it might be re-submitted to another grand jury: *State v. Morrissey*, 22–158.

As to *procedendo*, see § 5466 and notes.

Final judgment in supreme court: The supreme court may, on appeal in criminal cases, render such judgment as the district court should have rendered: *State v. Thompson*, 31–393.

Costs of appeal: In case of appeal by the state and reversal, it is improper to tax the costs to defendant: *State v. Vail*, 57–103.

The statute does not provide for the payment by the county of costs of printing the abstract, etc., on appeal by defendant, although judgment against him is reversed: *Red v. Polk County*, 56–98; *State v. Rainsbarger*, 74–529.

The costs of defendant for transcript, abstract, etc., in presenting his appeal are not taxable to the county even though he secures a reversal: *State v. Rainsbarger*, 74–539.

SEC. **5463. In appeals by state.** If the state appeals, the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings or in the measure of punishment, and its decision shall be obligatory as law. [C.'73, § 4539; R., § 4926.]

Upon such an appeal the supreme court cannot interfere with the judgment of the district court, whether the appeal be from a judgment upon the trial on the merits, or upon demurrer or motion. The decision of the district court ends the proceeding as against the defendant: *State v. Kinney*, 44–444.

Upon an appeal by the state, without appearance of the defendant, the supreme court will only discuss and dispose of those questions which are proper to be determined as a precedent in other cases: *State v. Mackey*, 82–393.

In a particular case, *held*, that an instruction to the jury to find for defendant was erroneors as a matter of law, and the state might have such error corrected on appeal: *State v. Ward*, 75–637.

In such case, the court having given an exposition of the law, no further order is necessary or allowable: *State v. Keeler*, 28–551.

The fact that a *procedendo* issues in the usual form, requiring the lower court to proceed after an appeal by the state is determined, does not give the lower court any power in such cases. *State v. Kinney*, 44–444.

In case of appeal by the state, and reversal, it is improper to tax costs to defendant: *State v. Vail*, 57–103

And the same rule holds as to an appeal by a city in a proceeding commenced in its name for the violation of a city ordinance. *Columbus City v. Cutcomb*, 61–672.

Notwithstanding the provisions of this section, an erroneous taxation of costs may be corrected on an appeal by the state, the costs are merely incidental to the proceeding and no part of the punishment: *State v. Bell*, 92–258.

Section applied: *State v. Miller*, 81–72.

SEC. **5464. Release of defendant on reversal.** If a judgment against the defendant is reversed without ordering a new trial, the supreme court must direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him. [C.'73, § 4540; R., § 4927; C.'51, § 3099.]

SEC. **5465. Effect of affirmance.** On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as otherwise provided. [C.'73, § 4541; R., § 4928; C.'51, § 3100.]

A *procedendo* stating that the case has been affirmed by the supreme court, and directing the court below to proceed in the execution of its judgment the same as if no appeal had been taken, is not sufficient compliance with the requirements of this and the following sections so as to authorize the district court to declare defendant's bail bond forfeited for nonappearance: *State v. McEnturff*, 67 N. W., 272.

SEC. **5466. Decision recorded and transmitted.** The decision of the supreme court, with any opinion filed or judgment rendered, must be recorded by its clerk, and, after the expiration of the period allowed for a rehearing, or as ordered by the court or provided by its rules, a certified copy of the decision and opinion shall be transmitted to the clerk of the trial court, filed

and entered of record by him, and thereafter the jurisdiction of the supreme court shall cease, and all proceedings necessary for executing the judgment shall be had in the trial court, or by its clerk. [C. '73, §§ 4542–3; R., §§ 4929–30; C. '51, §§ 3101–2.]

The *procedendo* from the supreme court is not necessary to the jurisdiction of the district court on a new trial. The defendant may waive the objection. While consent cannot confer jurisdiction over the subject matter, it may over the parties: *State v. Knouse* 33–365. And see *Becker v. Becker*, 50–139.

It is not necessary to make any order remanding a cause except that contained in the *procedendo: State v. Clouser*, 72–302.

SEC. **5467. Judgment enforced.** Unless some proceeding in the district court is directed, a copy of the judgment of the trial court and decision on appeal, or of the judgment and decision on appeal certified by the clerk of the trial court, shall be delivered to the sheriff, or other proper officer, as an execution, and shall authorize him to execute the judgment of the court, or take any steps required to bring the action to a conclusion. [C. '73, § 4544; R., § 4931.]

SEC. **5468. Time of imprisonment deducted.** If a defendant imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction. [C. '73, § 4545; R., § 4932.]

Where the defendant has been imprisoned during appeal, and after judgment has been reversed he is again tried and convicted, it will be presumed, in the absence of showing to the contrary, that the judge, in fixing the term of imprisonment under the second conviction, took into consideration the imprisonment under the first conviction: *State v. Hopkins*, 67–285.

CHAPTER 33.

OF IMPEACHMENT.

SECTION **5469. Accusation.** An impeachment is a written accusation against the governor, or a judge of the supreme, district or superior court or other state officer, by the house of representatives before the senate, of a misdemeanor or malfeasance in office. [C. '73, § 4546; R., § 4937.]

SEC. **5470. What to contain—concurrence.** An impeachment must specify the offenses charged as in an indictment. If more than one misdemeanor or malfeasance is charged, each shall be stated separately and distinctly. A majority of all the members of the house of representatives elected must concur in the impeachment. [C. '73, §§ 4547–9; R., §§ 4938–40; C. '51, §§ 3157–8.]

SEC. **5471. Board of managers—articles.** When an impeachment is concurred in, the house of representatives shall elect from its own body seven members whose duty it shall be to prosecute the same, and, as a board of managers, they shall be authorized to exhibit and present articles of impeachment in accordance with the resolutions of the house previously adopted. [21 G. A., ch. 91, § 1.]

SEC. **5472. Notice to governor.** When an impeachment is concurred in, the clerk of the house of representatives must forthwith in writing notify the governor thereof.

SEC. **5473. Officer suspended.** Every officer impeached shall be suspended by the governor from the exercise of his official duties until his acquittal, and the governor shall forthwith appoint some suitable person to temporarily fill the office, and he, having qualified as required by law, shall perform all the duties and enjoy all the rights pertaining to the office until the removal of the suspension of his predecessor or the election of a successor. [21 G. A., ch. 151, § 1; C. '73, § 4554; R., § 4948; C. '51, § 3165.]

SEC. **5474. President of senate.** If the president of the senate is impeached, notice thereof must be immediately given to the senate; which shall thereupon choose another president, to hold his office until the result of the trial is determined. [C.'73, § 4555; R., § 4949; C.'51, § 3167.]

SEC. **5475. Warrant.** When presented with an impeachment, the senate must forthwith cause the person accused to be arrested and brought before it. The warrant of arrest or other process shall be issued by the secretary of the senate, signed by him, and may be served by any person authorized by the senate or president. [C.'73, §§ 4550–1; R., §§ 4941–2; C.'51, §§ 3159–60.]

SEC. **5476. Answer—counsel.** Upon the appearance of the person impeached, he is entitled to a copy of the impeachment, and to a reasonable time in which to answer the same, and shall be allowed counsel as in an ordinary criminal prosecution. [21 G. A., ch. 91, § 3; C.'73, § 4552; R., § 4943; C.'51, § 3161.]

SEC. **5477. Organization of court.** When an impeachment is presented, the senate shall, after the hour of final adjournment of the legislature, be forthwith organized as a court of impeachment for the trial thereof, at the capitol. An oath or affirmation shall be administered by the secretary of the senate to its president, and by him to each member of that body, to the effect that he will truly and impartially try and determine the charges of impeachment according to the law and evidence. No member shall sit on the trial or give his evidence thereon until he has taken such oath or affirmation. The organization of such court shall be perfected when such presiding officer and the members present, but not less than a majority of the whole number, have taken and subscribed the oath or affirmation. [21 G. A., ch. 91, § 2; C.'73, § 4553; R., § 4944; C.'51, § 3162.]

SEC. **5478. Powers.** The court of impeachment shall sit in the senate chamber, and have power: [21 G. A., ch. 151, § 3.]

1. To compel the attendance of its members as the senate may do when engaged in the ordinary business of legislation; [21 G. A., ch. 91, § 2.]

2. To establish rules and regulations necessary for the trial of the accused; [Same, § 7.]

3. To appoint from time to time such subordinate officers, clerks and reporters as are necessary for the convenient transaction of its business, and at any time to remove any of them; [Same § 5.]

4. To issue subpœnas, process and orders, which shall run into any part of the state, and may be served by any adult person authorized so to do by the president of the senate, or by the sheriff of any county, or his deputy, in the name of the state, and with the same force and effect as in an ordinary criminal prosecution, and to compel obedience thereto; [21 G. A., ch. 151, § 3.]

5. To exercise the powers and privileges conferred upon the senate for punishment as for contempts in the chapter entitled "Of the general assembly"; [Same, § 4.]

6. To adjourn from time to time, and to dissolve when its work is completed. [Same, § 3.]

SEC. **5479. Record of proceedings—administering oaths.** The secretary of the senate, in all cases of impeachment, shall keep a full and accurate record of the proceedings, which shall be a public record; and shall have power to administer all requisite oaths or affirmations, and issue subpœnas for witnesses. [21 G. A., ch. 91, § 4; C.'73, § 4570; R., § 4959.]

SEC. **5480. Process for witnesses.** The board of managers and counsel for the person impeached shall each be entitled to process for compelling the attendance of persons or the production of papers and records required in the trial of the impeachment. [21 G. A., ch. 91, § 6.]

SEC. **5481. Penalty—removal—disqualification.** When any person impeached is found guilty, judgment shall be rendered for his removal from office and his disqualification to hold any office of honor, trust or profit under the state. [21 G. A., ch. 151, § 2.]

SEC. **5482. Compensation of members—fees of officers and witnesses.** The presiding officer and members of the senate, while sitting as a court of impeachment, and the managers elected by the house of representatives, shall receive the sum of six dollars each per day, and mileage at the rate of five cents per mile in going from and returning to their places of residence by the ordinary traveled routes; the secretary, sergeant-at-arms, and all subordinate officers, clerks and reporters, shall receive such amount as shall be determined upon by a majority vote of the members of such court. The same fees shall be allowed to witnesses, to officers, and to other persons serving process or orders, as are allowed for like services in criminal cases, but no fees can be demanded in advance. The state treasurer shall, upon the presentation of certificates signed by the presiding officer and secretary of the senate, pay all of the foregoing compensations and the expenses of the senate incurred under the provisions of this chapter. [21 G. A., ch. 91, § 8; 21 G. A., ch. 151, § 3.]

CHAPTER 34.

OF EVIDENCE AND WITNESSES.

SECTION **5483. As in civil cases.** The rules of evidence prescribed in civil procedure shall apply to criminal proceedings as far as applicable and not inconsistent with the provisions of this chapter. [17 G. A., ch. 168, § 2; C. '73, §§ 4426, 4556; R., § 4805.]

Rules in civil cases: The provisions of § 3700 as to the order or introduction of evidence in special cases are to be followed in criminal cases so far as applicable: *State v. Yetzer*, 66 N. W., 737.

Inasmuch as by § 3833 testimony to sustain or resist a motion may be in the form of affidavits is proper in support of a motion to set aside an indictment to introduce affidavits of grand jurors as to what took place in the grand jury room, but it is not competent in this way to show that witnesses were examined before the grand jury whose names are not indorsed on the indictment, and the minutes of whose evidence are not returned therewith: *State v. Miller*, 64 N.W., 288.

Co-defendants: Where two or more defendants are indicted jointly, but put upon trial separately, either one is a competent witness for the other: *State v. Nash*, 10-81.

Where defendants are jointly indicted and jointly put on trial, one is still a competent witness for the other: *State v. Gigher*, 23-318.

In such case the jury should be properly cautioned not to consider such evidence in behalf of the party testifying: *State v. Stewart*, 51-312.

Where several co-defendants are on trial for the crime of unlawful assembly, *held*, that it was error to exclude the testimony of one, offered in behalf of another and not in behalf of himself, as to what was said and done by witness' co-defendants: *Ibid.*

If one of two defendants jointly indicted is called as a witness for the other, and the jury find that the one called as a witness was not an accomplice, his testimony should be regarded as that of other witnesses: *State v. Schlagel*, 19-169.

Where a party jointly charged with defendant with a crime, having testified before the grand jury, claimed his privilege on being questioned as a witness, but afterwards submitted to examination, *held*, that by giving testimony before the grand jury he waived the objection and might be required to testify fully; and further, that the defendant could not object to such testimony being admitted, the wrong, if any, being to witness and not to defendant: *State v. Van Winkle*, 80-15.

Testimony of husband or wife of defendant: Where a husband and wife are co-defendants the wife may, under § 4606, properly be called as a witness by her husband, and her evidence should be admitted under instructions restricting it in its application so that it shall not be considered in her own behalf: *State v. Donovan*, 41-587.

While the credibility of a wife testifying in behalf of her husband in a criminal prosecution is to be considered and weighed in view of her peculiar relation to defendant, it is error to charge the jury to examine her testimony with peculiar care. The same degree of care which the law requires to be given to the testimony of all witnesses should be applied to hers, and no other or different degree: *State v. Guyer*, 6-263; *State v. Rankin*, 8-355; *State v. Collins*, 20-85; *State v. Bernard*, 45-234.

It is not error to charge the jury that, while the wife is a competent witness for her husband, they should examine and consider her testimony with care and caution, and give it such credit as under the circumstances they think it entitled to: *State v. Nash*, 10-81.

As to when the husband or wife may be a competent witness for or against the other, see, further, § 4606 and notes.

Declarations or admissions of defendant: Declarations of the prisoner made in the very act of the crime are not admissible in his behalf unless they are part of the *res gestæ*. So *held* in a prosecution for illegal sale of intoxicating liquor with reference to the character of the liquor sold by defendant: *State v. Miller*, 53-84.

Admissions made in ordinary or random conversations are not generally considered in law as satisfactory proof: *State v. Donovan*, 61-278.

Where admissions of defendant are relied upon, it is not required that the jury accept them as a whole for the truth. They may accept those portions which are reasonable and which agree with other evidence, and reject other portions that are unreasonable and contradict other testimony: *State v. McIntire*, 66-339.

Conclusive presumptions and estoppels have no place in the criminal law in establishing the body of the crime charged. Therefore, *held*, that while statements made by a defaulting officer at the time of a settlement with him might estop him in a civil suit from claiming therein that the defalcation existed prior to such settlement, the estoppel would not apply in a criminal prosecution as showing that the offense was barred: *State v. Hutchison*, 60-478.

Where the significance and value of certain circumstantial evidence introduced by the prosecution depended entirely upon the fact that collateral facts appearing in evidence were contemporaneous and subsequent to the crime, *held*, that declarations of the accused with reference to one of the facts, made prior to the crime, were admissible in evidence as overthrowing the circumstantial evidence: *State v Cruise*, 19-312.

An instruction to the jury that a certain conversation in evidence had with a prisoner upon the subject of the crime with which he was charged occurred as stated, and the statements of accused could not be reconciled upon any other reasonable hypothesis than that of his guilt, then upon such evidence they might convict, *held* not erroneous where there was abundant and incontrovertible proof that the offense was committed: *State v. Rorabacher*, 19-154.

In a prosecution for incest, admissions and declarations of the parties as to the fact of the marriage claimed to be incestuous are admissible to prove it. *State v. Schaunhurst*, 34-547.

In a prosecution for murder, evidence of theories propounded at one time by defendant as to how deceased may have met his death, and which were inconsistent with his explanation of the same thing, were held admissible, subject to any explanation as to the discrepancy, and subject also to the caution that too much importance should not be attached to the circumstance, as an innocent man finding himself suspected might make false representations to allay suspicion: *State v. Feltes*, 51-495.

Evidence as to statements made by defendant as to his previous occupation, *held* not improperly admitted in a trial for murder: *State v. Moelchen*, 53-310.

Testimony as to statements made by defendant with reference to injuries received by him, couched in profane language, *held* not admissible as against him, and that if the fact that he refuses assistance in dressing his wound was material, it should have been testified to directly without giving the language used: *State v. Cross*, 68-180.

The statement by defendant on arraignment that he has no means to employ counsel is a solemn admission which may be used against him if that fact becomes material to any issue in the case: *State v. Fooks*, 65-196.

While a prisoner arrested on preliminary information is not required to plead upon the preliminary examination, yet if he does so plead, even before the magistrate has advised him of his right to counsel, such pleading may be shown in evidence against him as an admission of his guilt: *State v. Briggs*, 68-416.

Confessions: Voluntary evidence given by the defendant before the grand jury after being advised that he is under no obligation to testify can be proved by members of the grand jury as a confession: *State v. Carroll*, 85-1.

In a particular case, *held*, that certain statements of this character were not in the nature of confessions but might be shown and their falsity proven: *Ibid.*

Where it appeared that defendant had left the state on the day on which search was being made for the goods which were stolen, *held*, that as there was evidence from which the jury might infer that he was or would be charged with the crime when he left, the testimony was proper to go to the jury. Also *held*, that the fact that defendant denied his name and identity to the officer arresting him was admissible, there being some evidence that he was aware that he was charged with the crime: *State v. Van Winkle*, 80-15.

One who is present at the commission of the crime and runs away when the officer comes to make the arrest of the guilty party and fails to give any evidence to explain his presence and his flight may properly be deemed guilty: *State v. Boyer*, 79-330.

Declarations admissible as part of the res gestæ: Declarations made at the time of a transaction, expressive of its character, motive or object, are regarded as verbal acts indicating a present purpose or intent, and are therefore admissible as a part of the *res gestæ*. But where the declaration and the act are inconsistent, if the act goes beyond the declaration or contradicts it, the presumption of intention is to be gathered from the act: *State v. Shelledy*, 8-477, 506.

Defendant's statements as to what occurred at the time of the commission of an alleged crime are competent as being part of the *res gestæ*: *State v. Gillett*, 56-459.

To render declarations admissible as a part of the *res gestæ* it is not necessary that they should be precisely concurrent in point of time with the principal transaction. It is sufficient if they are nearly enough concurrent to clearly appear to be so unpremeditated as to offer a reliable explanation of the principal transaction: *State v. Jones*, 64-349.

Where an act is done, and the actor at the time makes a statement explanatory of it, the statement is admissible as part of the *res gestæ*, unless the circumstances are such as to preclude the supposition that the statement was free from sinister motives. In a prosecution for murder, certain statements of defendant *held* to be competent: *State v. Cross*, 68-180.

Where defendant was on trial for the murder of a companion with whom he was traveling by team, *held*, that a witness who had conversed with them on the day preceding the night when the crime was committed might state as a part of the *res gestæ* what the deceased said about where they had come from and where they were going, although such conversation was not had in the presence of defendant: *State v. Vincent*, 24-570.

In a prosecution for murder, certain statements of the deceased *held* to be receivable as part of the *res gestæ*: *State v. Porter*, 34-131.

Testimony as to acts subsequent to the commission of the offense, *held* to have been improperly admitted in a particular case: *State v. Fowler*, 52-103.

Statements made by a burglar while in the prosecution of his crime, to the effect that he is the person who is afterwards put on trial for the crime, may be proven as part of the *res gestæ*: *State v. Kepper*, 65-745.

Where defendant seeks to show an *alibi* he cannot prove declarations made by himself at a certain time as to where he had been, even though such declarations were made on his return to his place of residence: *State v. McCracken*, 66-569.

Declarations or admissions of co-defendants: Where a declaration or confession made by a defendant before his arrest is confirmed by acts and declarations of his co-defendant, though made after the commission of the alleged offense, such acts and declarations are admissible in evidence against the prisoner as a circumstance tending to prove his confession: *State v. Knight*, 19-94.

Where it appeared that there was no evidence tending to show conspiracy on the part of defendants jointly indicted for murder, prior to the time of the commission of the homicide, *held*, that declarations of one of the defendants, made before the commission of the crime, were not receivable against the other: *State v. Weaver*, 57-730.

Declarations of one of the parties after the completion of the crime contemplated in the alleged conspiracy are not admissible: *Ibid.*

Where statements by one of two persons jointly charged with a crime are made in the presence of the other while both are in custody, silence of the latter and failure to deny such statements will not constitute an admission on his part of their truth: *Ibid.*

Where two defendants are on trial declarations of one of them, although not made in the presence of the other, are admissible if material as to the one making them, the jury being instructed not to consider such evidence as against the other: *State v. Miller*, 81-72.

Declarations of others: Admissions of a prosecutor in a prosecution for malicious mischief to property are not receivable in behalf of defendant: *State v. DeLong*, 12-453.

A person charged with larceny may explain his possession of the stolen property by showing what was said to him at the time he acquired possession: *State v. Kelly*, 57-647; *State v. Jordan*, 69-506.

In a prosecution for rape, evidence that prosecutrix and her father offered to withdraw the charge if defendant would pay a sum of money, *held* properly refused, where it did not appear that the charge had been wrongly made as a ground for extorting money: *State v. McDevitt*, 69-549.

Conspiracy: Where it is claimed that the crime committed was in pursuance of a conspiracy, and it is sought to show as against defendant acts and declarations of other members of the conspiracy in furtherance of their designs, although made in the absence of defendant, the trial court is invested with a large discretion. In a particular case, *held*, that the showing was sufficient, *prima facie*, to justify the court in admitting the evidence: *State v. Row*, 81-138.

Evidence in a particular case, which tended to show that defendant participated in a conspiracy for the commission of the crime for which he was put on trial, although not present at the time of its commission, *held* to be properly admitted: *State v. Munchrath*, 78-268.

To justify the introduction of evidence of admissions by a co-conspirator, the proof must show *prima facie*, in the opinion of the judge, the existence of such conspiracy. The question of the sufficiency of such proof is one peculiarly for the determination of the trial court. The question of the actual existence of the conspiracy is one finally to be submitted to the jury, and the finding of the trial judge on that question is only a basis for the admission of evidence: *State v. McGee*, 81-17.

Certain statements made by one claimed to have been a co-conspirator with defendant which were not made in an attempt to further the object or plans of the conspiracy, *held* improperly admitted: *Ibid.*

Statements in the hearing of defendant: Where two defendants were jointly indicted for horse-stealing, *held*, that upon the trial of one it was competent to prove what was said by his accomplice in his hearing and presence with regard to taking the horses, coupled with evidence that defendant remained silent and did not object or assent to its correctness. The weight of such evidence or the presumption arising therefrom must depend on the circumstances and must be determined by the jury: *State v. Bowers*, 17-46

Statements in regard to the crime, made in the presence of the defendant, may be introduced in evidence without establishing that such statements were understood by him. It is for the jury to determine from all the circumstances whether he understood what was said: *State v. Middleham*, 62-150.

Subsequent declarations of a person injured in an assault are not admissible either

for or against defendant as independent evidence, but can be introduced to contradict or impeach the testimony of the person making such declarations, if called as a witness, the requisite foundation having been laid: *State v. Emeigh*, 18-122.

Dying declarations; apprehension of death: Declarations of deceased sought to be introduced in evidence as dying declarations must be shown to have been made under the sense of impending death and in the full belief that he could not recover. It is sufficient, however, if this satisfactorily appears in any mode. It may be shown by proof of evident danger, or conduct of the persen making the declaration, or other circumstances, such as the nature of the wound, the state of illness, etc.: *State v. Gillick*, 7-287, 309; *State v. Nash*, 7-347; *State v. Leeper*, 70-748.

It is not necessary to show that at the time the declarations were made deceased was under the apprehension of immediate dissolution, or that he was *in articulo mortis*. It is sufficient if he believes that his death is impending and certain. The length of time that elapses between the declaration and the death furnishes no rule as to the admission of evidence, nor will a declaration which was competent when made be rendered incompetent by the subsequent revival of strength in the dying person: *State v. Nash*, 7-347.

To render dying declarations competent evidence against one indicted for homicide of the person making the declaration it must appear that they were made in the full belief of deceased that he would not recover and that his death was impending. In a particular case, *held*, that it did not sufficiently appear that deceased, at the time he made the declarations offered in evidence, entertained such belief: *State v. Weaver*, 57-730.

Such declarations are restricted to the act of killing and to the circumstances immediately attending it, and must be made by the declarant under a solemn belief of impending death: *State v. Baldwin*, 79-714.

And in a particular case, *held*, that declarations made by deceased when conscious of her danger and when she had given up all hope of recovery, though plainly referring to defendant, did not necessarily connect him with the commission of the crime, and were therefore improperly admitted: *Ibid.*

Dying declarations are statements of material facts concerning the cause and circumstances of a homicide, made by the victim under solemn belief of impending death. They are restricted to the act of killing, and to the circumstances immediately attending it, and forming a part of the *res gestæ*. When they relate to former and distinct transactions, and embrace facts or circumstances not immediately illustrating or connected with the declarant's death they are inadmissible. They are admissible only as to those things to which the deceased would have been competent to testify. They must relate to facts and not to mere matters of opinion or belief: *State v. Perigo*, 80-37.

Therefore, *held*, that a statement by deceased as to the "hardship of being murdered on my farm," and as to threats that had been made against him by defendant in a prior transaction without date, were inadmissible: *Ibid.*

Under the particular facts, *held*, that a declaration was made under such belief of impending death that it was competent as a dying declaration: *State v. O'Brien*, 81-88.

As to a portion of such declaration to the effect that defendant was "the cause of his death," *held*, that while it was incompetent, yet, as the question did not call for such statement and no objection was offered to the answers given, the objection could not be considered on appeal: *Ibid.*

In a prosecution under an indictment for murder, where a statement made and signed by the deceased was offered in evidence, and it appeared that at the time it was made he believed he was mortally wounded and was going to die, and had been told by a physician that he could not recover, *held*, that the statement was competent as a dying declaration: *State v. Murdy*, 81-603.

And although the question of the admissibility of the statement was for the court alone, there was no impropriety in receiving evidence as to its competency in the presence of the jury: *Ibid.*

Admissibility: The competency of dying declarations is to be determined by the judge in view of all the surrounding and attendant circumstances, and he should hear and weigh the evidence both for and against the competency of such declarations before receiving them in evidence: *State v. Elliott*, 45-486; *State v. Leeper*, 70-748; *State v. Baldwin*, 79-714.

The fact that the person making dying declarations was a materialist, and did not believe in a God or a future conscious existence, is not competent as affecting the admissibility of such declarations, but should be received as affecting their credibility: *State v. Elliott*, 45-486.

Credibility: The person whose declarations are admitted must be considered as standing in the same situation as if he were sworn. Such declarations are to be given the same degree of credit as his testimony would have received if he had been examined under oath, and his state of mind at the time the declarations were made, and his behavior, and his character, may be shown for the purpose of affecting the credibility of his declarations: *State v. Nash*, 7-347.

The statement of deceased must be such as would be receivable if he were alive and could be examined as a witness. Therefore if the declaration shows upon its face that it is a mere opinion, it should be excluded; otherwise it should be received and its credibility left to the determination of the jury: *State v. Clemons*, 51-274.

Dying declarations can only be admitted in regard to facts, and such declarations are not admissible with reference to whether the act of assailment was purposely done or not: *State v. Donnelly*, 69-705.

The intoxication of the person at the time of making the dying declarations may be considered as affecting their credibility: *State v. Nolan*, 92-491.

How proved: Where dying declarations

are orally made and a statement thereof is also reduced to writing, if the writing and the oral statements are the same, the absence of the writing should be accounted for before evidence of the oral statements can be received. But if the declarations are repeated at different times, and one of them is reduced to writing, covering different grounds and referring to different matters from those comprised in the oral statements, then both the oral and written statements may be received: *State v. Tweedy*, 11-350.

Where dying declarations are incomplete by reason of death intervening, or temporary inability or interruption suspending their utterance, which is never resumed, the declaration is not receivable; but the fact that it does not give a complete narrative of what occurred, or might legitimately be supposed to have occurred, will constitute no objection to its competency or sufficiency: *State v. Nettlebush*, 20-257.

Where dying declarations are at the time reduced to writing by one who hears them, but the writing is not read over to nor signed by declarant, the writing is not itself admissible in evidence as a dying declaration; but it may be used by the person making it, as a memorandum from which to refresh his recollection in testifying as to the declarations: *State v. Fraunburg*, 40-555.

The failure to produce such writing or account for its absence will not render parol evidence of the declarations incompetent: *State v. Sullivan*, 51-142.

An affidavit made out for affiant by another party in the language of affiant and partly in substance from affiant's statements, and not read over to affiant before signing, is not admissible to prove his statements: *State v. Elliott*, 45-486.

Where there are both written and verbal declarations made at different times and under circumstances which render them otherwise admissible they are all competent: *State v. Walton*, 92-455.

Dying declarations of another person injured: Where defendant was on trial for the murder of one person, *held*, that it was error to admit in evidence dying declarations of another person killed at the same time, to the effect that he was stabbed by defendant: *State v. Westfall*, 49-328.

Hostile feelings: Letters merely showing a state of hostile feelings between defendant and the person injured and his family connections are not admissible in evidence unless merely for the purpose of showing the existence of such feelings, and if admitted for that purpose the jury should be limited in their consideration of them to the single purpose of ascertaining the feeling of defendant toward the injured party: *State v. Moffitt*, 31-316.

Where malicious intent is necessary to be shown, it is not competent to prove the relations existing between the family in which defendant lived and the person against whom malice is claimed to have existed: *State v. McDermott*, 36-107.

In a prosecution for murder evidence is admissible tending to show the previous relation of the parties as a motive for the commission of the crime: *State v. Crafton*, 89-109.

Threats made by defendant, after the commencement of the prosecution, against the parties engaged therein are admissible in evidence as showing the mind, spirit and purpose of defendant in his defense and in relation to the crime charged: *State v. Rorabacher*, 19-154.

Evidence that defendant charged with the crime and the person murdered had had an altercation, *held* competent, as tending to show that the parties had not lived together agreeably: *State v. Moelchen*, 53-310.

In the prosecution of a crime consisting of violence to an individual, it is always competent to show previous ill feeling, bad blood or threats as tending to show a probable motive for the commission of the crime; and threats or ill feeling by defendant toward the father of the person injured is competent evidence on a criminal charge for injury to the child of such father: *State v. Fry*, 67-475. And see *State v. Perigo*, 70-657.

On a trial for murder, where there are circumstances shown which point to defendant as the guilty person, evidence of conduct explaining the bad state of feeling on the part of defendant toward the deceased is admissible: *State v. Cole*, 63-695.

Conduct of defendant in averting suspicion by endeavoring to cast it upon another does not raise a strong presumption of guilt where defendant has not stated untruths respecting such person or directly charged him with the crime: *State v. Collins*, 20-85.

Compromise of civil suit is not competent evidence in a criminal prosecution for stealing property for the value of which defendant was sued in such civil action: *State v. Emerson*, 48-172.

Conduct of prisoner when charged with crime: The bodily or mental feelings of the prisoner, when material to be proved, may be shown by the usual expression of such feelings made at the time in question. The conduct and language of the prisoner when informed of the charges against him may therefore be shown: *State v. Nash*, 7-347, 382.

Declarations of deceased made in the presence of defendant are admissible for the purpose of showing defendant's conduct and behavior, when charged with causing the injuries done to the deceased, whether admissible as dying declarations or not: *State v. Gillick*, 7-287, 309; *State v. Nash*, 7-347, 376; *State v. Nash*, 10-81.

Declarations of the injured person, not competent as dying declarations, are not receivable where they are made in the presence of the officer having defendant under arrest, but not in the presence of defendant: *State v. Nash*, 10-81.

Testimony tending to show that the prisoner, when arrested, was charged with the crime and made no answer, is admissible, but its value is to be determined by all the circumstances, of which the jury are to be the judges: *State v. Pratt*, 20-267.

Attempt to escape: Where there is some evidence tending to show that defendant, after the commission of an offense, attempted to escape, the jury may be instructed that such attempt, if made, is a circumstance *prima facie* indicative of guilt: *State v. James*, 45-412. And see *State v. Schaffer*, 70-371.

An instruction that "if it be found that the defendant, after he was arrested, escaped from custody and secreted himself from lawful pursuit, or that defendant attempted to escape, this raises a strong presumption of his guilt," *held* erroneous, as stating the rule too strongly against defendant. An attempt to escape does not raise a strong presumption of guilt, but is a *prima facie* indication of guilt: *State v. Arthur*, 23-430.

Evidence of the good conduct of one under confinement for an offense, as tending to show him an honest man, is not admissible either to prove his good character or his innocence: *State v. Hart*, 29-268.

While an attempt of defendant to escape from jail while awaiting trial is admissible against him, it is improper to admit evidence of an effort on the part of the persons in such jail to escape, unless it is shown that defendant participated therein: *State v. Ruby*, 61-86.

The fact that a person leaves a jail through a hole made therein by some one is sufficient evidence of escape, and may be shown, as a circumstance indicating guilt, in the prosecution of the crime for which defendant was under arrest: *State v. Fitzgerald*, 63-268.

It seems that the fact of defendant's flight, after it becomes known to him that a crime has been committed, is admissible in evidence of the commission of the act by him only in criminal cases, and not in civil actions for damages: *Hopkins v. Mathias*, 66-333.

There is no distinction between an actual escape and an attempt to escape, as tending to show consciousness of guilt. The latter is equally admissible with the former as against the accused: *State v. Stevens*, 67-557.

Where evidence was introduced of flight by defendant after his arrest and the forfeiture of his bail, *held*, that it was not proper in rebuttal to show that threats were made of lynching him, and that the fact of such threats was communicated to him, where it did not appear that the flight was soon enough after the threats and communication to afford any indication that he was scared by the threats into flight: *State v. McDevitt*, 69-549.

Intent inferred from acts: Men are presumed to intend all the natural and probable consequences of their own deliberate acts: *State v. Jones*, 70-505.

Where the criminality of an act depends upon the intent with which it was committed, it is not necessary that the intent be established by distinct and positive proof, but it is sufficient if it can reasonably be inferred from the facts; and it is not necessary that, when such intent is sought to be established by circumstantial evidence, the proof be so far conclusive that it is inconsistent with any other rational conclusion: *State v. Maxwell*, 42-208.

The intent with which an act is done is seldom, if ever, capable of direct and positive proof, but is to be arrived at by such just and reasonable deductions or inferences from the acts and facts proved as the guarded judgment of a candid and cautious man would ordinarily draw therefrom. The law warrants the presumption or inference that a person intends the results or consequences which ordinarily follow from an act which he intentionally commits: *State v. Gillett*, 56-459.

While the general presumption is that the person intends the result of his acts, there is no presumption that a man always intends to do the very thing he does do. Therefore, in a prosecution for an assault with intent to commit murder, *held*, that it would not be presumed that the injury thus inflicted was the injury intended: *State v. Postal*, 83-460.

Detective: The motives and inducements under which a detective acts may be shown for the purpose of affecting his credibility: *State v. Carroll*, 85-1.

The court should not direct the jury to disregard the uncorroborated evidence of a detective. His credibility should be subjected to the same tests as those applied in case of any other witness: *Dickinson v. Bentley*, 80-482.

Malice presumed: Malice is presumed from the commission of an act wrongful in itself and without just cause or excuse: *State v. Decklotts*, 19-447.

Malice may, as at common law, be implied in case of homicide from any act unlawful and dangerous in its nature, unjustifiably committed. Therefore, *held*, that death caused in an unlawful attempt to procure an abortion was murder in the second degree: *State v. Moore*, 25-128.

There is no clearer rule of evidence than that malice may be inferred from the acts of a party: *State v. Linde*, 54-139.

Persons conspiring to do an unlawful act which is a trespass only will be guilty of murder only when death results in the prosecution of the design; but if the unlawful act be a felony, or more than a trespass, death resulting will be murder, although it happened outside the original design: *State v. Shelledy*, 8-477, 505.

When a man assaults another or uses upon another a deadly weapon in such a manner that the natural, ordinary and probable result of the use of such weapon in such manner would be to take life, the law presumes that such person so assaulting intends to take life: *State v. Sullivan*, 51-142; *State v. Hockett*, 70-442. And malice will be inferred from the deliberate, violent use of a deadly weapon: *State v. Zeibart*, 40-169.

Further as to malice aforethought, etc., see notes to §§ 4727, 4729.

Previous declarations: Evidence of statements made by defendant before the commission of the alleged murderous assault for which he was put on trial, as to his intention to go to the place where the assault was afterwards committed and his object in going there, *held* admissible: *State v. Driscoll*, 44-65.

Other unlawful purpose: Evidence tending to show that defendant went to the place of the commission of the crime with an unlawful purpose not connected with the crime committed is not admissible: *Ibid.*

Subsequent acts or declarations: The guilty intent of a party may be shown by his acts, conduct and declarations, not only before or at the time of, but also after, the commission of the criminal act: *State v. Lewis*, 45-20.

Evidence of distinct crime to show intent: While it is generally true that a person cannot be convicted of a particular crime with which he is charged by proof of another crime, yet where proof of intent to commit one crime is necessary as an element of another crime, the commission of the first may be shown to prove the intent: *State v. Golden*, 49–48.

Therefore, *held*, that in a prosecution for burglary, proof of larceny committed after the breaking and entering was admissible to show the intent with which the breaking and entering were done: *Ibid.*

Where an indictment for nuisance in obstructing a highway charges the offense as committed on a particular day, evidence of such obstruction on other days is admissible; the only relief defendant is entitled to in such case, if any, being to have the prosecution required to elect on motion on which act they will claim a conviction: *State v. Chicago, M. & St. P. R. Co.*, 77–442.

While the general rule is that evidence of a distinct, substantive offense cannot be admitted in proof of another offense, this rule is subject to the exception that whatever serves to establish the *scienter*, or *quo animo*, or a motive for the commission of the crime charged may be shown: *State v. Kline*, 54–183. And see *State v. Schaffer*, 70–371.

Therefore, *held*, that it was proper on a trial for assault with intent to commit murder by shooting, where the evidence tending to connect defendant with the crime was wholly circumstantial, to permit the prosecutrix to testify that defendant had seduced her and she was pregnant by him: *State v. Kline*, 54–183.

In a prosecution for cheating by false pretenses, evidence of other similar transactions is admissible to show knowledge, intention and bad faith of defendant: *State v. Brady*, 69 N. W., 290.

Where it appeared that defendant and another had agreed to rob whomever they should meet, and to accomplish their purpose by taking life if necessary, and in pursuance of such plan they had robbed others before attempting to commit the robbery resulting in death, for which they are on trial, the other acts of robbery may be shown: *State v. Lee*, 91–499.

While evidence of distinct and separate offenses is not admissible in general, it may be admissible to show guilty intent, and in such case it is no ground of objection that it also shows a distinct crime; so *held* in case of indecent exposure: *State v. Stice*, 88–27.

On a trial of defendant for an assault with intent to commit rape, evidence of previous assaults of like character on prosecutrix is admissible to show the intent. But evidence of like assaults on other persons having no connection with the one charged, and occurring long previous, are not admissible: *State v. Walters*, 45–389.

Where two persons were jointly indicted for larceny, and there was evidence that the one was keeper and the other an inmate of a house of ill fame, *held*, that it was improper to charge the jury that they might consider the habits of the parties defendant at the time, whether they were living together, acting together, or together were engaged in a common purpose to commit the crime, there being no evidence but their mutual relationship to indicate concert of action: *State v. Graham*, 62–108.

Where two or more acts are embodied in the same transaction, each constituting an assault, and together constituting but one assault, all may properly be shown to establish the animus of defendant, although one act alone would constitute the crime: *State v. Montgomery*, 65–483.

Evidence of a distinct crime is admissible where it tends to connect defendant with the commission of the crime charged. Therefore, in a prosecution for burglary in breaking and entering a dwelling with intent to commit assault and battery, *held*, that evidence that defendant knew that the occupant had a large sum of money was admissible as tending to show that it was defendant who broke and entered: *State v. Kepper*, 65–745.

In a prosecution for adultery other acts of adultery between the same parties prior to the statutory period of limitation, or outside of the jurisdiction of the court, are admissible in evidence as showing the disposition of the parties, and may be taken, in connection with evidence of opportunity existing within the jurisdiction and within the statutory period, as evidence of the commission of the crime: *State v. Briggs*, 68–416.

In a prosecution for incest evidence of similar acts between the parties not contemplated by the charge may be shown: *State v. Hurd*, 70 N.W., 613.

In a presecution for forgery or uttering forged paper other acts of the same character may be shown to show guilty knowledge; but it is doubtful whether the other paper as to which evidence is introduced must not be of the same character and manufacture, and precisely similar to that forged or uttered upon which the charge is based: *State v. Saunders*, 68–370.

But in order that knowledge may be inferred from other transactions it must appear that in such other transactions a crime was committed: *Ibid.*

In such cases the other forged instrument, with reference to which testimony is given, must be introduced in evidence or its absence accounted for: *Ibid.*; *State v. Breckenridge*, 67–204.

Right to be confronted with witnesses: See Const., art. I, § 10, and notes.

In general as to the rules of evidence, see § 4601 *et seq.*

As to confessions of the defendant, see § 5491 and notes.

As to reasonable doubt, burden of proof, evidence of good character, and circumstantial evidence, see notes to § 5376.

SEC. **5484. Who competent—defendant as witness.** Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state; and should a defendant

not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial. [17 G. A., ch. 168, § 1; C. '73, § 3636; R., § 3978; C. '51, § 2388.]

Defendant as a witness: Before the change of § 3636 of Code of '73, defendant in a criminal prosecution was not a competent witness in his own behalf: *State v. Laffer*, 38–422; *State v. Bixby*, 39–465; *State v. Gigher*, 23–318.

He might testify in his own behalf in a preliminary examination: *State v. Laffer*, 38–422.

But he was not a competent witness for himself on a trial on an information for security to keep the peace (§ 5115): *State v. Darrington*, 47–518.

Credibility: It is not error to instruct the jury that they may consider defendant's interest in the result of the action as affecting his credibility as a witness: *State v. Mœlchen*, 53–310: *State v. Sterrett*, 71–386.

Competency: The rules relating to the pertinency of testimony given by other witnesses are applicable when the prisoner testifies in his own behalf; and the fact that the evidence against him is strong and his story improbable cannot have any bearing upon the admissibility of the proposed testimony: *State v. Kelly*, 57–644.

May testify as to knowledge: Therefore, where defendant's guilt depends upon his knowledge of a fact, he should be permitted to testify upon his knowledge of the subject: *Ibid.*

Comment by prosecuting attorney: Any reference by the attorney for the state to the fact that defendant has not become a witness in his own behalf is misconduct sufficient to entitle defendant to a new trial: *State v. Graham*, 62–108.

But where the evidence as to whether the prosecuting attorney made such reference in his argument or not is conflicting, the supreme court will abide by the action of the lower court in reference thereto: *State v. Maynes*, 61–119.

In a particular case, *held*, that the fact of an improper reference by the prosecuting attorney to the failure of defendant to become a witness was not sufficiently shown to require a reversal: *State v. Black*, 59–390.

Where defendant makes himself a witness and testifies as to a part only of his defense, it is not improper for the county attorney to refer to defendant's omission to testify as to other material facts within his knowledge: *State v. Tatman*, 59–471.

It is clearly implied that the attention of either the court or the jury shall not be called to the fact that defendant has failed to testify in his own behalf; and where in arguing to the court, in the presence of the jury, a question as to an objection to the evidence, that fact was referred to, *held*, that there was ground for a new trial: *State v. Ryan*, 70–154.

The provisions of the statute are absolute that in case of its violation a new trial shall be granted: *State v. Baldoser*, 88–55.

Reference by the prosecuting attorney to the fact that the defendant may be a witness, made before the time when defendant may be called as a witness, is in violation of the statute equally with a reference to the fact after defendant has an opportunity to be called: *Ibid.*

The penalty provided for improper allusion to the failure of the defendant to be a witness is the granting of a new trial, and unless a new trial is moved for in the lower court and refused, complaint cannot be made: *Grier v. Johnson*, 88–99.

Where it was claimed that the county attorney had referred to the fact that the defendant had not been introduced as a witness in his own behalf in violation of this section, but the record failed to show that fact, *held*, that as the court below refused a new trial upon that ground, it would be presumed there was no such misconduct: *State v. Whitmer*, 77–558.

The statement of the proposition, that if defendant or his attorney knew who was the guilty party to the alteration of a record, with which defendant was charged, he should prove it, *held* not to be a reference to the failure of the defendant to testify as a witness: *State v. Kidd*, 89–54.

Where defendant did not testify, and the prosecuting attorney referred to the fact that there had been no evidence on the particular point in favor of defendant, *held*, that such remark did not refer to the failure of defendant to testify such as to require a new trial: *State v. Seeley*, 92–488.

Instructions: The fact that the judge gives no instructions to the jury in regard to the failure of the defendant to testify will not constitute error where he has not been requested to so charge, and the matter has not been alluded to in any way during the course of the trial: *State v. Stevens*, 67–557.

It is not error for the court to instruct the jury with reference to the fact that defendant has the right to testify in his own behalf, and that a failure to testify should not be construed against him. Such an instruction is in the interest of defendant, and cannot be deemed to have been prejudicial to him. *State v. Weems*, 65 N.W., 387.

Impeachment: When defendant in a criminal case offers himself as a witness, he may be impeached or contradicted in the same manner as other witnesses are, as provided by § 4614. His testimony is to be tested by the rules which are applicable to witnesses generally, and any fact or circumstance which might lawfully be shown for the purpose of affecting the credibility of other witnesses may be shown for the same purpose as to his testimony. Witnesses may therefore be introduced to testify that his reputation for truth and veracity is bad, and it is not necessary that the names of such witnesses shall have been indorsed on the in-

dictment and minutes of their evidence returned by the grand jury, or notice given of the intention to introduce such witnesses: *State v. Teeter*, 69–717.

Where one of two co-defendants on trial jointly is introduced by his co-defendant as a witness, evidence of his bad moral character may be introduced to impeach his credibility in the same manner as in the case of any other witness: *State v. Hardin*, 46–623.

SEC. **5485. Cross-examination of defendant.** When the defendant testifies in his own behalf, he shall be subject to cross-examination as an ordinary witness, but the state shall be strictly confined therein to the matters testified to in the examination in chief. [C.'73, § 4238.]

The rules governing the cross-examination of defendant when testifying in his own behalf are the same as those applicable to the cross-examination of other witnesses, and questions may be asked for the purpose of laying a foundation for impeaching his evidence by contradicting statements made in answer to such questions: *State v. Red*, 53–69. And see *State v. Johnson*, 72–393.

The rule permitting a witness to be questioned on cross-examination to show crimes committed by him in order to impeach him applies to persons charged with crime when they appear themselves as witnesses: *State v. O'Brien*, 81–93.

SEC. **5486. In prosecutions against railway for obstructing highway.** In a prosecution against a railway company for obstructing a highway or any private way, proof that any such way is in an unsafe condition, or that it is inconvenient for travel at the place of its intersection with such railway, shall be presumptive evidence that such company has obstructed such way. [C.'73, § 4557.]

SEC. **5487. Rape.** Proof of actual penetration into the body is sufficient to sustain an indictment for rape. [C.'73, § 4558; R., § 4101; C.'51, § 2997.]

In a prosecution for rape it is not necessary that actual penetration be shown by the testimony of the prosecutrix herself. But the jury may say whether, from all circumstances, the requisite facts are shown to establish the commission of the crime: *State v. Tarr*, 28–397.

SEC. **5488. Corroboration in rape, seduction, etc.** The defendant in a prosecution for rape, or assault with intent to commit rape, or enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or seducing and debauching any unmarried woman of previously chaste character, cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. [25 G. A., ch. 100; C.'73, § 4560; R., § 4103; C.'51, § 2999.]

Corroborating evidence; nature of: The corroborating evidence must tend to connect defendant with the commission of the crime: *State v. Willis*, 9–582; *Upton v. State*, 5–405; *State v. Talley*, 18–88; *State v. Clemens*, 38–257. And see notes to preceding section.

In cases of rape: In a prosecution for rape the fact that the crime has been committed by some one may be established by the testimony of the injured party alone; but to ascertain the guilty party it is necessary that the testimony of the injured party be corroborated by other evidence tending to connect defendant with the crime: *State v. McLaughlin*, 44–82.

The sufficiency of the corroborating evidence in a prosecution for rape is properly a question for the jury: *Ibid.*

Mere proof of opportunity is not sufficient corroboration: *State v. Chapman*, 88–254.

It is enough that the corroborating evidence tends to strengthen and corroborate the prosecutrix in connecting the defendant with the commission of the offense: *State v. French*, 65 N.W., 156.

Evidence that prosecutrix was bruised, etc., and made complaint, would not tend to connect defendant with the commission of the offense, and therefore should not be considered as tending to corroborate the testimony of prosecutrix: *State v. Stowell*, 60–535.

The fact of complaint made may be considered as corroborating evidence: *State v. Cook*, 92–483.

The corroboration in prosecutions for rape in particular circumstances, *held* sufficient: *State v. Comstock*, 46–265; *State v. Mitchell*, 68–116. And see *State v. Warner*, 25–200.

It is only the connection of the accused with the offense that requires corroboration; and where the fact of the sexual intercourse is established by defendant's admissions, the evidence of the prosecutrix in addition to such admissions may be sufficient: *State v. Cassidy*, 85–145.

This section has no application to a prosecution for adultery: *State v. Henderson*, 84–161.

The corroboration required by this section, in prosecutions for rape, is not required in case of assault with intent to commit rape: *State v. Hatfield*, 75–592; *Rogers v. Winch*, 76–546; *State v. Grossheim*, 79–76; *State v. Cook*, 92–483. (These decisions were made under the

Code of '73, but the language of the section in this respect is changed in the present code.)

The corroborating evidence required by this section is not required in a prosecution for forcible defilement: *State v. Montgomery*, 79–737. But see now § 4757.

An instruction in a particular case as to the requirement in regard to corroborating evidence, *held* not erroneous as directing the jury that the corroborating facts and circumstances were proved: *State v. Standley*, 76–215.

In cases of seduction: The corroborating evidence should not be confined to the act of illicit intercourse alone, but facts showing intimacy, opportunity and inducement may be shown for that purpose: *Andre v. State*, 5–389.

Under this section, proof of courtship and attendant circumstances may amount to sufficient corroboration: *State v. Wells*, 48–671; *State v. Curran*, 51–112; *Stevenson v. Belknap*, 6–97, 103.

It is not necessary that there be specific corroboration as to the employment of seductive arts or as to the act. The fact that the parties kept company together and acted as lovers usually do, and other circumstances, may be sufficient corroboration: *State v. McClintic*, 73–663.

But the mere proof of acquaintance and opportunity are not sufficient corroboration of the charge of seduction. The corroborating evidence must be such as to connect defendant with the commission of the offense: *State v. Painter*, 50–317; *State v. Smith*, 54–743; *State v. Araah*, 55–258.

Evidence other than that of prosecutrix that the parties were suitors constitutes a sufficient corroboration: *State v. Baldoser*, 88–55.

That the crime charged was in fact committed may be shown by the testimony of the prosecutrix alone; the corroborating testimony must be such as tends to connect defendant with the commission of it: *State v. Lauderbeck*, 65 N.W., 158.

While the fact that defendant visited prosecuting witness as a suitor may be shown by way of corroboration, evidence that prosecutrix was, at the same time, receiving attentions from others is admissible as tending to lessen if not destroy the effect of such corroboration: *State v. Brown*, 86–121.

In an action for seduction, certain letters written by defendant to the prosecutrix, in connection with other facts showing intimacy between the parties, *held* to be properly admitted as corroborating evidence: *State v. Bell*, 79–117.

Certain evidence as to conduct of defendant, *held* to be sufficient corroboration of his connection with the commission of the crime charged: *State v. Watson*, 81–380.

Evidence in a prosecution for seduction that defendant visited prosecutrix as a suitor is sufficiently corroborative of her evidence to connect defendant with the offense: *State v. Gnagy*, 84–177.

The fact that defendant was the suitor of prosecutrix for marriage, proven otherwise than by her own testimony, tends to corroborate her testimony that the seduction was effected by defendant, and therefore tends to connect him with the offense, within the requirements of this section: *State v. Smith*, 84–522.

Testimony by prosecutrix in an action for seduction that defendant on being informed by her that she was pregnant advised her to procure an abortion, *held* not to constitute sufficient corroborating evidence within the requirements of this section, as it depended upon the testimony of prosecutrix alone: *State v. Enke*, 85–35.

Testimony by a prosecutrix of her having made preparations for marriage with defendant in pursuance of agreement existing before the seduction does not tend to furnish the corroboration necessary under this section: *State v. Lenihan*, 88–670.

Evidence of such relations and acquaintance between the parties as would naturally result from the fact of their being members of the same family, *held* not sufficient evidence in corroboration: *State v. Richards*, 72–17.

The corroboration in prosecutions for seduction, *held* sufficient in particular cases: *State v. Shean*, 32–88; *State v. Heatherton*, 60–175; *State v. Fitzgerald*, 63–268.

Circumstances in a particular case, *held* to furnish sufficient corroboration: *State v. Knutson*, 91–549.

It is erroneous in a prosecution for seduction to admit a child, claimed to be the result of such seduction, to be shown to the jury and instruct them that they may consider a resemblance between the child and the defendant as evidence in corroboration of the testimony of the prosecutrix (explaining *Stumm v. Hummell*, 39–478): *State v. Danforth*, 48–43.

But this rule is not applicable in case of a child two years old; and *held*, in a bastardy case, that a child of that age might be shown to the jury, and its family resemblance, if any, to defendant considered by them as tending to prove that defendant was its father: *State v. Smith*, 54–104.

A fact testified to by the prosecutrix alone cannot be considered as sufficient corroboration of her other testimony: *State v. Kingsley*, 39–439.

The court is to determine whether evidence is corroborative, that is, whether it is competent, and the jury is to pass upon the credibility of the corroborating witnesses and the weight of their testimony. Instruction to the effect that the jury were to determine whether the testimony of the prosecutrix was sufficiently corroborated, etc., *held* correct: *State v. Bell*, 49–440.

It is a question for the court to determine whether, in a prosecution for incest, and in like cases, there is any corroborating evidence. But it is for the jury to weigh and determine the effect of such evidence and its sufficiency: *State v. Miller*, 65–60.

Without determining whether the provisions of this section apply to prosecutions for incest or not, in a particular case, *held*, that it was for the jury to determine the sufficiency of the evidence introduced as corroborating: *State v. Moore*, 81–578; But see *State v. Chambers*, 87–1.

The rule requiring corroboration of the testimony of the injured party, under this section, is not applicable in bastardy proceedings to charge the putative father with the support of the child: *State v. McGlothlen*, 56–544.

See, further, as to corroboration in cases of seduction, § 4762 and notes.

SEC. **5489. Corroboration of accomplice.** A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof. [C. '73, § 4559; R., § 4102; C. '51, § 2998.]

Who deemed accomplice: A detective who enters into an arrangement for the commission of a crime with the intention, from the beginning, of acting as a detective to ferret out and expose it, and who acts throughout with that motive, is not an accomplice: *State v. McKean*, 36–343.

One who receives stolen goods is not an accomplice in the crime of burglary committed at the time the goods are stolen: *State v. Hayden*, 45–11.

Where it appeared that a person who was guilty of breaking into and setting fire to a jail had notified another to be present, and such other person was near by and saw defendant enter the jail, but gave no assistance or advice, and did not know that the jail had been set on fire when he left, *held*, that he was not sufficiently an accomplice to render it necessary that his evidence be corroborated to warrant a conviction: *State v. Reader*, 60–527.

In a case of adultery the female may or may not be an accomplice. If consenting to the act, she too is guilty of adultery, and she is an accomplice; but if the act was against her will, she is free from guilt, and her evidence does not require corroboration under this section: *State v. Henderson*, 84–161.

In a prosecution for adultery it appeared that defendant and another man occupied two connecting rooms with women not their wives during the night, *held*, that the one so charged in the indictment was not an accomplice with the defendant so as to make necessary corroboration of his evidence: *State v. Ean*, 90–534.

The woman upon whom an abortion is attempted with her consent is not an accomplice in the crime, whose testimony must be corroborated: *State v. Smith*, 68 N. W., 428.

The crime of incest is committed where the prohibited degrees of relationship exist between the parties having sexual connection, and it is immaterial whether or not the female consents. Even though the connection is by force and without her consent so as to constitute a rape, it will be also the crime of incest so far as the male is concerned; therefore the female in the crime of incest is not necessarily a consenting party, and is not necessarily an accomplice in such sense as to require corroboration of her testimony: *State v. Chambers*, 87–1.

Parties do not become accomplices of a criminal by joining with him in the plan and assisting in its execution for the purpose of securing evidence against him by entrapping him before the commission of the crime which he intends to perpetrate: *State v. Brownlee*, 84–473.

Testimony of accomplice: An accomplice is a competent witness for the prosecution: *State v. Hudson*, 50–157.

It is not a ground for rejecting the testimony of an accomplice that it has not been shown that he is less guilty than the defendant, or that no order of the court has been made that he should be received as a witness. (Overruling *Ray v. State*, 1 G. Gr., 316): *Ibid.*

The order of the introduction of testimony being in the discretion of the prosecution under the approval of the court, it is not necessary that evidence connecting defendant with the crime shall be introduced before the testimony of the accomplice is received: *Ibid.*

Acts and declarations of co-conspirators or accomplices: The acts and declarations of one of two or more persons charged with a conspiracy in the commission of a crime are not admissible as against the others unless a foundation is first laid sufficient, in the opinion of the court, to establish *prima facie* the fact of conspiracy, or proper to be laid before the jury to establish such fact: *State v. Nash*, 7–347, 384.

Admissions of a co-conspirator made after the common enterprise is at an end are not admissible: *State v. Arnold*, 48–566.

Acts and declarations of an accomplice while engaged with defendant in furthering, aiding or abetting a common design are receivable in evidence against him: *State v. Hudson*, 50–157.

Where two defendants were jointly indicted for horse stealing, *held* that, upon the trial of one, the state could prove that the other person conducted a witness to the horses, for the purpose of showing when and how the horses were found, without first showing the existence of a joint purpose or conspiracy: *State v. Bowers*, 17–46.

Where several defendants were jointly indicted for murder, *held*, that it was error to admit, against one of them, declarations of co-defendants made after the commission of the crime: *State v. Westfall*, 49–328; *State v. Smith*, 54–656.

Upon the trial of one of several co-defendants jointly indicted for burglary, *held*, that acts and conversations of the other defendants tending to establish familiar relations and association of all the parties, and that they were in company at about the time of the commission of the crime, were admissible for the purpose of connecting defendant with the commission of the crime: *State v. Stevens*, 67–557.

See also notes to § 5483.

Corroboration of evidence of accomplice: In case of a prosecution for concealing stolen

property, the corroboration required of the evidence of an accomplice must go not merely to the fact of concealment, but also to the fact that the property was stolen: *Upton v. State*, 5–465.

The corroborating evidence must tend to connect defendant with the commission of the crime: *Upton v. State*, 5–465; *State v. Tulley*, 18–88; *State v. Clemens*, 38–257.

Corroborating evidence is not sufficient which merely shows the commission of the offense and the circumstances thereof without connecting defendant therewith. Therefore, *held*, that the mere proof that defendant was seen drunk in company with a burglar, at or near the time and place when and where the burglary was committed, was not sufficient corroborating evidence to warrant his conviction: *State v. Willis*, 9–582.

The corroboration need not be by the testimony of one credible witness; it may be circumstantial: *State v. Stanley*, 48–221.

The corroboration need not be founded upon facts directly connecting defendant with the offense. It may be founded upon circumstantial evidence: *State v. Miller*, 65–60.

Declarations of an accomplice may be proven tending to corroborate his testimony, although as independent evidence they would not be admissible against the principal defendant: *State v. Thompson*, 87–670.

Where the testimony of an accomplice is corroborated by other witnesses in any material point it is sufficient to convict: *State v. Schlagel*, 19–169.

It is not necessary that the accomplice be corroborated in every material fact to which he testifies: *State v. Feauerhaken*, 65 N. W., 299; *State v. Hall*, 66 N.W., 725.

But evidence tending to show that any of such facts are true is corroboration, and the jury is to judge of the weight of such corroborative evidence: *State v. Hall*, 66 N.W., 725.

It is not necessary that the accomplice be corroborated in every material fact. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which he is confirmed by unimpeachable evidence, this may be ground for them to believe that he also speaks the truth in other parts as to which there may be no corroboration: *State v. Allen*, 57–431; *State v. Hennessy*, 55-299.

It is not necessary that the accomplice be corroborated as to the commission of the crime if he is corroborated in the material facts as to the preparation for its commission, etc.: *State v. Hennessy*, 55–299.

Whether in a particular case there is any corroborating evidence is a question for the court to determine, but it is for the jury to weigh such evidence and its sufficiency: *State v. Miller*, 65–60; *State v. Dietz*, 67–220.

It is the province of the jury to determine whether the corroboration is sufficient: *State v. Allen*, 57–431.

In a particular case, *held*, that there was evidence which might properly be considered by the jury as corroborating the testimony of an accomplice and tending to connect defendant with the commission of the offense, the sufficiency of such evidence being for the jury: *State v. Van Winkle*, 80–15.

The fact that witnesses who might have been called to contradict the accomplice, if his testimony were false, were not called, should not be considered as corroborating such testimony: *State v. Hull*, 26–292.

Apparently without reference to any statutory provision, *held*, that the testimony of one accomplice would not constitute a sufficient corroboration of that of another to warrant conviction without other evidence: *Johnson v. State*, 4 G. Gr., 65.

In a prosecution for having counterfeit coin in possession with intent to pass, *held*, that the testimony of an accomplice as to such possession and intent was not sufficiently corroborated by evidence as to former acts of passing counterfeit money: *State v. Pepper*, 11-347.

Evidence that the parties were seen together in the vicinity of the crime at the time it was committed, *held* sufficient with other facts to constitute the necessary corroboration of the testimony of an accomplice: *State v. Russell*, 90–493.

The fact that the defendant and a person who has been convicted of crime were seen conversing together four or five hours before the commission of the crime, *held* not sufficient corroboration of the testimony of such accomplice to warrant defendant's conviction: *State v. Mikesell*, 70–176.

In particular cases, *held*, that the testimony of an accomplice was not sufficiently corroborated to warrant conviction thereon: *State v. Graff*, 47–384; *State v. Moran*, 34–453.

The evidence in particular cases *held* sufficiently corroborative of the testimony of an accomplice to sustain a conviction: *State v. Thornton*, 26–79; *State v. Wart*, 51–587; *State v. Dietz*, 67–220.

As to corroboration necessary in cases of rape, seduction, and the like, see preceding section and notes.

SEC. **5490. Conspiracy—overt act.** Upon a trial for conspiracy, a defendant cannot be convicted unless one or more overt acts alleged in the indictment are proved, when required by law to constitute the offense, but other overt acts not alleged in the indictment may be given in evidence. [C.'73, § 4425; R., § 4790; C.'51, § 2996.]

As to what evidence of conspiracy is necessary to make acts and declarations of a co-conspirator admissible, see notes to preceding section and to § 5483.

SEC. **5491. Confession of defendant.** The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed. [C.'73, § 2427; R., § 4806.]

What constitutes confession: The term "confession" as here used does not include admissions or declarations by the defendant: *State v. Schaunhurst*, 34–547.

The mere statement of a defendant accused of forgery that he wrote the name alleged to be forged is not sufficient to constitute a confession. To have such effect the admission must be that the writing was with fraudulent intent: *State v. Knowles*, 48–598.

In a prosecution for murder, *held*, that certain admissions of defendant that he was with deceased at or near the time and place of the commission of the crime were receivable in evidence, but that it was erroneous to consider them as confessions of guilt, and to instruct the jury on that basis: *State v. Glynden*, 51–463.

A confession of guilt is an admission of the criminal act itself, not an admission of the facts or circumstances from which guilt may be inferred. Statements of facts tending to show defendant's guilt are not to be treated as confessions: *State v. Red*, 63–69.

The admission of a person suspected of a crime that he has lied in relation to the matter is not a confession of guilt, but a circumstance against him, which may be shown in evidence: *State v. Feltes*, 51–495.

It is error to instruct the jury with reference to statements of defendant on the theory that they constitute confessions, when they are not admissions or acknowledgments of agency or participation in the commission of the crime, although they are such as, in connection with other facts and circumstances, warrant a conviction of guilt: *State v. Jones*, 33–9.

Voluntary confessions: Evidence of a confession should be examined with care, but when it is clearly established, whether made in the presence of the prosecutor or his friends, or to one person alone, if made voluntarily, it is entitled to the highest credit and greatest weight as evidence: *State v. Brown*, 48–382.

In order to exclude a confession as involuntary there must be some promise made or inducement held out, or injury threatened, otherwise it may be received in evidence: *State v. Fortner*, 43–494.

Facts considered and *held* not to show that the confession in question was made under such threats as to invalidate it: *State v. Ostrander*, 18–435.

Where an officer testified to conversations of defendant while in his custody, *held*, that it was not error to refuse evidence to the effect that defendant was ironed and harshly treated, it not being claimed that the treatment influenced the conversation: *State v. Sullivan*, 51–142.

Admissions which were freely and voluntarily made by the defendant to the officer having him in custody, and were not influenced by hope or fear, may be shown in evidence: *State v. Sopher*, 70–494; *State v. McLaughlin*, 44–82.

Voluntary testimony given before the grand jury by defendant after being advised that he is under no obligation to testify may be proven: *State v. Carroll*, 85–1.

Involuntary confessions: Confessions drawn from a person by hope or fear are inadmissible as evidence against him, and the jury should be directed without qualification to disregard them: *State v. Fidment*, 35–541. A confession in order to be admissible must be free and voluntary; not extracted by any sort of threats, nor obtained by promises, however slight; nor by the exertion of any improper influence. If a confession has been obtained by undue influence, any statement afterwards made under the influence of that confession cannot be admitted: *State v. Chambers*, 39–179.

Mental condition at time of making confessions: Where defendant had introduced evidence as to his condition at the time of making certain confessions with reference to being intoxicated at that time, which evidence it was claimed indicated *delirium tremens*, *held*, that it was error to exclude the opinion of an expert as to the mental condition indicated by the proven facts: *State v. Feltes*, 51–495.

While it is proper that evidence as to the condition of defendant at the time of making a confession should go to the jury, he cannot insist upon being allowed to introduce such evidence before the confession itself is testified to. The time when the jury are made acquainted with his condition is immaterial: *Ibid.*

Question for the court: Whether confessions proposed to be introduced in evidence against a prisoner were voluntarily made, or were extorted through hope or fear caused by inducements held out to him, is a question to be determined by the court upon preliminary evidence: *State v. Fidment*, 35–541.

Corroboration necessary: Under this section a confession not made in open court will not warrant a conviction unless there is other proof that the offense charged has in fact been committed: *State v. Turner*, 19–144.

Where every other ingredient of a crime was established by other evidence, except the falsity of certain representations which were shown to have been made, and it appeared that defendant did not act in accordance with such representations, *held*, that voluntary confessions out of court of such falsity were sufficient, without other evidence thereof, to warrant conviction: *State v. Lewis*, 45–20.

Under the facts of a particular case, *held*, that the *corpus delicti* was not proven aside from defendant's confessions out of court, and the conviction was therefore reversed: *State v. Dubois*, 54–363.

The evidence in a particular case *held* to be sufficiently corroborative of the confession of defendant to warrant a conviction: *State v. Feltes*, 51–495.

In a civil action, a confession alone will not be sufficient proof of the commission of a crime: *Georgia v. Kepford*, 45–48, 52.

SEC. **5492. Witnesses for defendant.** A magistrate in a criminal action before him, and the clerk of court in any criminal action pending

therein, shall issue blank subpœnas for witnesses, signed by him, with the seal of the court if by the clerk, and deliver as many of them as requested to the defendant or his attorney or the attorney for the state. They may be served in any part of the state. But witnesses for the defense shall be subpœnaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending, made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other disposition of the case, and the board of supervisors shall not allow any claims for fees of witnesses not thus authorized. Subpœnas for defendant's witnesses shall show whether they are summoned on the order of the court. [18 G. A., ch. 207; C.'73, §§ 3818, 4561–2, 4569; R., §§ 4950–1, 4958; C.'51, §§ 3168, 3170.]

The county is not liable for the fees of defendant's witnesses in a criminal case before a justice of the peace unless they have been subpœnaed upon order of the justice as thus provided: *Kennedy v. Delaware County*, 59–123.

This provision in regard to requiring the court to make an order for subpœnaing witnesses for defendant does not affect the right of a witness not subpœnaed to his fees, if he attends as a witness in the trial of the case, and his evidence is material for the defense: *Jones County v. Linn County*, 68–63.

It is not necessary under this provision, in order to authorize a district judge to order the payment of witness fees to witnesses who have attended and testified for defendant without being subpœnaed, that such an order should be made upon a showing or application by the accused: *Ibid.*

An order of the judge can be made when judgment is finally entered or when such order is made or action had as disposes of the case: *Ibid.*

Held not error to refuse an order for all the witnesses asked for defendant upon the showing made in a particular case: *State v. Benge*, 61–658.

Where witnesses are subpœnaed upon the order of the court or magistrate before whom the cause is to be tried, upon a satisfactory showing that the testimony of the witnesses is mate ial, the county becomes liable for their fees without an order to that effect being made at or subsequent to the trial; but the order may be made at the trial or when judgment is pronounced: *Wheelock v. Madison County*, 75–147.

Where a witness for defendant, residing in another state, attended the trial without subpœna having been issued for him, *held*, that he was not entitled to mileage, but only to fees for his attendance, and that this rule was applicable even as to a witness included in the order of court allowing witnesses to defendant: *State v. Willis*, 79–326.

SEC. **5493. Service.** A peace officer must serve without delay within his county, city or town any subpœna issued in a criminal action, delivered to him for service, and make written return thereof, stating the time, place and manner of service, but a subpœna may be served by any other adult person. Service thereof is made by delivering a copy and showing the original to the witness. [C.'73, §§ 4563–4; R., §§ 4952–3; C.'51, §§ 3171–2.]

SEC. **5494. Breaking in.** If a witness conceal himself to avoid the service of a subpœna, the officer may break open doors or windows for the purpose of making service. [C.'73, § 4565; R., § 4954; C.'51, § 3176.]

SEC. **5495. Disobedience.** Disobedience to a subpœna, or refusal to be sworn or to answer as a witness, may be punished by the court or magistrate as a contempt, as provided in the civil procedure. [C.'73, § 4566; R., § 4955; C.'51, § 3174.]

SEC. **5496. Liability for.** A witness wilfully disobeying a subpœna in a criminal case without good cause shall be liable to the party injured for the amount of the damages sustained by such party. [C.'73, § 4567; R., § 4956; C.'51, § 3175.]

SEC. **5497. Forfeiture of bond.** The undertakings of witnesses in criminal cases may be forfeited and enforced like the undertaking of bail. [C.'73, § 4568; R., § 4957.]

SEC. **5498. Depositions.** A defendant in a criminal case, either after preliminary information, indictment or information, may examine witnesses conditionally or on notice or commission, in the same manner and with like effect as in civil actions. [C.'73, § 4571; R., § 4960.]

Depositions may be used on behalf of defendant in criminal trials, but not on behalf of the state (Const., art. I, § 10): *State v. Collins*, 32–36.

Where a deposition has been taken on behalf of the prisoner and filed in court, it is not error to allow the prosecuting attorney to read the same in evidence, it not appearing that the prisoner sought to withdraw it from the files before the trial of the case: *Nash v. State*, 2 G. Gr., 286.

SEC. **5499. Perpetuating testimony.** A person apprehensive of a criminal prosecution may perpetuate testimony in his favor in the same manner, and with like effect, as may be done in apprehension of any civil action. [C.'73, § 4572; R., § 4961.]

CHAPTER 35.

OF BAIL.

SECTION **5500. On commitment.** When a defendant has been held to answer for any bailable offense, sufficient bail must be taken by the magistrate who held him to answer, by any judge of the supreme or district court, or by the court to which the papers on the preliminary examination are to be returned by the magistrate who held him to answer, or by the clerk thereof, or by any magistrate of the county in which the offense is triable. [C.'73, § 4573; R., § 4967; C.'51, §§ 3216–18.]

See § 5096 and Const., art. I, § 12, and notes.

SEC. **5501. Form of bond.** Bail is put in by a written undertaking, executed by one or more sufficient securities (with or without the defendant, in the discretion of the court, clerk or magistrate), accepted by the court, clerk or magistrate taking the same, and may be substantially in the following form:

County of .....

An order having been made on the ..... day of ....., A. D....., by A..... B....., a justice of the peace (or other magistrate), of the township of ....., (or as the case may be) that C..... D..... be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been duly admitted to bail, in the sum of ..... dollars.

We, E..... F..... and G..... H....., hereby undertake that the said C..... D....., shall appear at the district court of the county of ....., at the next term thereof, and answer said charge, and submit to the orders and judgment of said court, and not depart without leave of the same, or, if he fail to perform either of these conditions, that we will pay to the state of Iowa the sum of ..... dollars (inserting the sum in which the defendant is admitted to bail).

E.....F.....
G.....H.....

Accepted by me as....., in the township of....., in the county of....., this.....day of..... A. D.,.....

I.....J..... (with official title).

[C.'73, § 4574; R., § 4968; C.'51, § 3219.]

Execution of bond: The judge of the court has power to certify to the acknowledgment of the sureties of the bond, made in open court: *State v. Elgin*, 11-216.

The voluntary execution of a bail bond does not estop the obligors from denying the jurisdiction of the magistrate who takes it in a case where the proceedings in which it is taken are without authority: *State v. Hufford*, 28-391.

The bond provided for on appeal from conviction before a justice of the peace is for the appearance of defendant, and not that he will pay the amount adjudged against him on appeal: *State v. Beneke*, 9-203.

Acceptance of bond: Before the recognizance can have any force it must appear that it was accepted as a valid undertaking by a court or magistrate of competent authority: *State v. Carr*, 4-289.

A failure by the clerk to indorse the bond as "accepted" will not affect the right of the state to recover thereon: *State v. Emily*, 24-24.

Where a prisoner has been discharged upon the filing of a bond, the acceptance by the officer will be conclusively presumed; no written approval thereon is necessary to its validity: *State v. Wright*, 37-522.

Presumptions: A bail bond given upon commitment by a magistrate is *prima facie* evidence that the magistrate made a finding that a public offense had been committed (§ 5230), and the execution of the bond and its acceptance by the magistrate are presumptive evidence that it was taken and received in place of the body of the accused: *State v. Patterson*, 23-575.

Signature: It is not essential that defendant should sign the bond, and manifest

clerical errors therein will be disregarded: *Ibid.*

For what sureties liable: Sureties on a bond are not only bound for the appearance of the accused at the time and place mentioned therein, but also that he shall abide the order and judgment of the court and not depart without leave: *State v. Brown*, 16-314.

A failure to hold the term at which defendant is held to appear will not release his sureties from their obligation to have him at the next term, although no order is made in the case at the term mentioned in the bond. See § 236: *Ibid.; State v. Ryan*, 23-406.

The surety on a bail bond is liable for the amount of the bond, but is not liable for costs in the proceeding against the principal on the bond: *State v. Beebe*, 87-636.

That defendant held to answer for one crime is indicted for a higher crime does not release the sureties on his bond: *State v. Bryant*, 55-451.

Although a bond which is not authorized by statute, as where it is accepted by a magistrate who has no authority to take bail, will not become a lien upon the property of the obligors, as provided in § 5573, yet if voluntarily executed at the request and for the benefit of the accused, and under it he has been discharged from custody, the sureties are liable thereon: *State v. Cannon*, 34-322.

Surrender of defendant by sureties: A surety is not released by a surrender of the prisoner to the sheriff, unless in the manner pointed out by § 5528: *State v. Tieman*, 39-474.

Remission of penalty: The governor may remit the judgment for the penalty on the bond, but not for the costs in the action on the bond taxed in favor of officers, witnesses, etc.: *State v. Beebe*, 87-636.

Even after entry of forfeiture on the bond action must be brought in court against the obligors to have the fact adjudicated or determined against them. Such proceeding and judgment do not set aside the forfeiture, but affirm or establish between the parties the fact of its existence. After such judgment is rendered the obligation is still a forfeiture which the governor may remit: *Harbin v. State*, 78-263.

This power of remission extends to the sureties as well as to the accused or principal in the bond: *Ibid.*

See, further, as applicable to this section, notes to §§ 5504, 5513.

SEC. **5502. On indictment for misdemeanor.** When the offense charged in an indictment is a misdemeanor, the officer serving the warrant, if bail is authorized, must take the defendant before a magistrate in the county in which it was issued, or in which he is arrested, or before the clerk of the district court of either of such counties, for the purpose of giving bail. [C. '73, § 4582; R., § 4976; C. '51, § 3227.]

SEC. **5503. For felony.** If the offense charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody according to the command of the warrant. [C. '73, § 4583; R., § 4977; C. '51, § 3228.]

SEC. **5504. By whom taken.** When the defendant is so delivered into custody, if the felony charged be bailable, bail must be taken by that court, or its clerk, or by any magistrate in the same county. [C. '73, § 4584; R., § 4978; C. '51, § 3229.]

The bond, under the statute, should be executed and acknowledged before the clerk of the district court, and the sureties should justify before him, but these are directory matters, and where the bond has been accepted, it will be valid though it was executed and the sureties qualified before the clerk of the court in another county, and though it was not acknowledged at all. The execution, its acceptance, the discharge of the prisoner thereon, and his failure to appear according to its terms, are the essential matters. It is not necessary to call the sureties and have their default entered at the time the defendant fails to appear: *State v. Wells*, 36-238.

SEC. **5505. Form of bond.** The bail must be put in by a written undertaking, executed by one sufficient surety, with or without the defendant, in the discretion of the court, clerk or magistrate, acknowledged before and accepted by the court, clerk or magistrate taking the same, and may be substantially in the following form:

County of.....

An indictment having been found in the district court of the county of ....., on the.....day of....., A. D....., charging A.....B..... with the crime of (designating it as in the warrant), and he having been duly admitted to bail in the sum of.....dollars:

We, A.....B.....and C.....D....., hereby undertake that the said A.....B.....shall appear and answer the said indictment, and submit to the orders and judgment of said court, and not depart without leave of the same, or, if he fail to perform either of these conditions, that he will

pay to the state of Iowa the sum of.....dollars (inserting the sum in which the defendant is admitted to bail).

A..... B.....
C..... D .....
E..... F.....

Acknowledged before and accepted by me, at ....., in the township of ....., in the county of ....., this .... day of ....., A. D. ....
G..... H..... (with official title).

[C.'73, § 4585; R., § 4979.]

If the bond is deposited with the clerk of the proper court as a record the fact that it is not marked filed is immaterial: *State v. Merrihew*, 47–112, 120.

The clerk of the court to which a change of venue is granted has power to take a recognizance for the appearance of the prisoner: *Ibid.*

The provisions of Code of '73 as to giving a new bond upon change of venue, for appearance in the court to which the case was changed, were held to be merely directory, and did not operate to release the sureties on the original bail bond, who were still responsible for defendant's appearance: *State v. Brown*, 16–314.

The description of the crime in the bail bond need not be so particular as in an indictment. Where it was specified merely as "seduction" it was held sufficient: *State v. Marshall*, 21–143.

It is not necessary that the bond refer to the offense except in general terms. A description of the crime as "larceny in the nighttime,' *held* sufficient: *State v. Merrihew*, 47–112.

An averment of the petition on a bail bond alleging that it was taken in writing in such manner and form as the law provides and directs, *held* sufficient to show that the requirements of the law applicable to such cases were complied with: *Shelby County v. Simmonds*, 33–345.

The duty of the sureties is to have their principal ready to answer the judgment of the court until they have surrendered him as is provided by law or until the judgment is satisfied: *State v. Stewart*, 74–336.

SEC. **5506. Upon appeal.** After conviction, upon an appeal to the supreme court, the defendant must be admitted to bail, if it be from a judgment imposing a fine, upon the undertaking of bail that he will, in all respects, abide the orders and the judgment of the supreme court upon the appeal; if from a judgment of imprisonment, upon the undertaking of bail that the defendant will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court upon the appeal. The bail may be taken, either by the court where the judgment was rendered, or the district court of the county in which he is imprisoned, or by the supreme court, or a judge or clerk of any of uch courts. [C.'73, § 4587; R., §§ 4966, 4981.]

After the bail required on appeal has been given and the appeal prosecuted, it is too late to complain of the amount of bail required: *State v. Wells*, 46–662.

Failure of the court in rendering judgment to fix the bail required pending appeal, as required by § 5442, will not entitle defendant to discharge on *habeas corpus*. His only remedy in such proceeding will be to have the amount of such bail fixed: *Murphy v. McMillan*, 59–515.

It is doubtful whether defendant has the right to bail pending an appeal in a proceeding by *habeas corpus* to secure release from imprisonment for non-payment of fine: *Elsner v. Shrigley*, 80–30.

In a proceeding by *certiorari* to review the action of the district court in punishing for contempt, the district court cannot admit the defendant to bail: *State v. District Court*, 84–167.

The provision as to surrender of defendant by bail does not apply in a case of bail given on appeal from a judgment for fine only: *State v. Stommel*, 89–67.

The surety is bound, not only for the surrender of the defendant, but also for the payment of the fine imposed if any, and the surrender of the defendant will not relieve the surety from liability for payment of the fine: *State v. Meier*, 65 N.W., 316.

This is true even though the imprisonment is the means provided by the state for coercing the payment of the fine. The imprisonment in such a case does not release the defendant from liability for the fine: *Ibid.*

SEC. **5507. Qualifications of surety.** The surety must be a resident and householder or freeholder within the state, worth the amount specified in the undertaking, exclusive of property exempt from execution; but in taking bail each signer may justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to one sufficient bail. [C.'73, § 4575; R., § 4960; C.'51, § 3220.]

SEC. **5508. Justification.** The surety must in all cases justify by affidavit taken before an officer authorized to administer oaths, and the affidavit

must state that each possesses the qualifications prescribed in the last section. [C.'73, § 4576; R., § 4970; C.'51, § 3221.]

Before an accused held to bail can demand a discharge upon tendering bond and surety, his bail must justify as here required; but a failure to require such justification will not render the bond void nor discharge the sureties: *State v. Emily*, 24-24; *State v. Wells*, 36-238.

See, further, notes to § 5501.

SEC. **5509. Examination as to sufficiency.** The court in which the action is pending, or the clerk thereof, or the county attorney or magistrate may require the personal appearance of sureties offered, and may thereupon further examine them upon oath concerning their sufficiency, and may also receive other evidence for or against the sufficiency of the bail. [C.'73, §§ 4577-8; R., §§ 4971-2; C.'51, §§ 3222-3.]

SEC. **5510. Order of allowance.** When the examination is closed the court, clerk or magistrate must make an order, either allowing or disallowing the bail, and forthwith cause the same, with the affidavits of justification and the undertaking of bail, to be filed with the clerk of the court to which the papers on the preliminary examination are required to be sent. [C.'73, § 4579; R., § 4073; C.'51, § 3224.]

The clerk should file the bond, and while, if it should appear that it was deposited with the clerk before the forfeiture was declared, and omission to mark it as filed might be remedied by subsequent filing, yet the fact that it was so deposited before forfeiture should be averred and proved, otherwise the bond should not be admitted in evidence: *State v. Klingman*, 14-404.

Until the bail bond is before the court the forfeiture thereof cannot be entered: *Ibid.*

SEC. **5511. Discharge of defendant.** Upon the allowance of bail and the execution of the undertaking, the court, clerk or magistrate must make an order, signed officially, for the discharge of the defendant, to the following effect:

The State of Iowa,

To the sheriff of the county of .....:

C..... D....., who is detained by you on commitment (or indictment or conviction, as the case may be) for the offense of (here designate it generally), having given sufficient bail to answer the same, you are commanded forthwith to discharge him from custody.

Dated at ....., in the township (town or city) of ....., in the county of ....., this ..... day of ....., A. D. ....

K..... L..... (with official title).

[C.'73, § 4580; R., § 4974; C.'51, § 3225.]

SEC. **5512. Disallowance.** If the bail be disallowed, the defendant must be detained in custody until other bail is put in and justifies. [C.'73, § 4581; R., § 4975; C.'51, § 3226.]

CHAPTER 36.

OF THE LIEN AND RELEASE OF BAIL.

SECTION **5513. On real estate.** Undertakings of bail, immediately after filing by the clerk of the district court, shall be docketed and entered upon the lien index as required for judgments in civil cases, and, from the time of such entries, shall be liens upon real estate of the persons executing the same, with like effect as judgments in civil actions. [C.'73, §§ 4606-7; R., §§ 5000-1.]

A bond which is not authorized by statute, as for instance, where it is accepted by a magistrate who has no authority to take bail, will not become a lien upon the property of the obligors, as here provided; but if it has secured the release of the principal it may be enforced by action: *State v. Cannon*, 34-322.

SEC. **5514. Attested copies.** Attested copies of such undertakings may be filed in the office of the clerk of the district court of the county in

which the real estate is situated, in the same manner and with like effect as attested copies of judgments, and shall be immediately docketed and indexed in the same manner. [C. '73, § 4608; R., § 5002.]

CHAPTER 37.

OF FORFEITURE OF BAIL.

SECTION 5515. Entry of forfeiture. If the defendant fails to appear for arraignment, trial or judgment, or at any other time when his personal appearance in court is lawfully required, or to surrender himself in execution of the judgment, the court must direct an entry of such failure to be made on the record, and the undertaking of his bail, or the money deposited instead of bail, is thereupon forfeited. [C. '73, § 4596; R., § 4990.]

What constitutes forfeiture: Failure of a defendant, indicted for misdemeanor, to appear in person at the trial, or at the rendition of verdict, or at the sentence, will not constitute forfeiture of his bond if he makes appearance by counsel and thereby waives his personal presence: *State v. Conneham*, 57-351.

Failure of defendant to appear at the time for challenging the grand jury does not constitute a default amounting to a forfeiture of his bond: *State v. Klingman*, 14-404; *Ringgold County v. Ross*, 40-176.

A court will not be justified in holding bail, who has become responsible for the appearance of an accused to answer a certain charge, also responsible for his appearance to answer another and different charge, even in the same court: *State v. Brown*, 16-314.

A bond to appear to answer the indictment, and not depart without leave of court, and obey all orders of the court, is forfeited by failure of accused to surrender himself, upon being called, in satisfaction of the judgment, after he has appeared and pleaded guilty: *State v. Kraner*, 50-575.

The fact that the forfeiture of bail appears to have been made after conviction of the defendant will not show that such forfeiture was erroneous. The court may at any time after conviction require the person convicted to appear and surrender himself or perform the judgment, and on failure to do so default may be entered on the bond: *State v. Baldwin*, 78-736.

The principal may be required to appear at any term subsequent to the term specified by the bond without notice to him or his sureties. His former appearance to answer the charge will not discharge the sureties: *Ibid.*

It will be presumed if the forfeiture was taken at a subsequent term that the case was continued by operation of law to the term when default was taken: *Ibid.*

The sureties cannot call in question the facts upon which the order of forfeiture is based; the order is conclusive as to them: *Ibid.*

The surety in a bail bond is estopped by the recitals therein that an adjournment of the case had been ordered, and that the bond is executed under such order, from claiming that such bond was executed before the prisoner had been brought before the justice or the order for continuance made: *State v. Benzion*, 79-467.

By a bail bond a surety becomes bound that the accused shall obey the order of the court, and the fact that by consent of the accused continuances are had from time to time, without the knowledge or consent of the surety on the bond, will not release such surety from liability: *Ibid.*

By executing the bond the sureties assent that their liability shall be determined in a proceeding to which they are not otherwise made parties, and the record of the default of the principal in the bond will be deemed presumptive evidence that he had been indicted, although no indictment is shown: *State v. Coppock*, 79-482.

Where the bond obligates the accused to appear at the next term of the district court, parol evidence is not admissible to show that the magistrate binding defendant over advised sureties that the accused would not be required to appear until the second term: *Ibid.*

Evidence in a particular case, *held* sufficient to show forfeiture of a bail bond for failure of the defendant to appear at the time fixed: *State v. Burdick*, 84-626.

A bail bond given upon being bound over by a magistrate to appear at the district court to answer to the charge of manslaughter is not rendered invalid by the fact that the accused is subsequently indicted for murder instead of manslaughter. The obligation of the bond is "to abide the judgment and order of the court and not to depart without leave of the same:" *State v. Bryant*, 55-451.

Entry of forfeiture: A forfeiture of the bail bond cannot be entered until the bond is before the court: *State v. Klingman*, 14-404.

The forfeiture need not be taken on the very day on which accused was required to appear, but may be taken on any subsequent day of that or a succeeding term, unless defendant has been surrendered or discharged. It is not necessary that the accused or his bail have notice of the time when forfeiture will be claimed: *State v. Brown*, 16-314.

If a forfeiture of bail is not entered at the first term it will be presumed that the cause was continued by operation of law: *State v. Merrihew*, 47-112, 119.

One entry of default against defendants jointly indicted, who have both failed to ap-

pear, is sufficient although they have given separate bonds: *State v. Lighton*, 4 G. Gr., 278.

In a case where defendant was bound to appear before a justice, it was held that a default should not have been entered against him until he was formally called, and that the entry of default by the justice not showing that defendant was called, no breach of the bond was shown; but the record of the justice was held conclusive as to the appearance or non-appearance of defendant, and not to be contradicted by extrinsic evidence: *State v. Gorley*, 2-52.

At the time of rendering sentence for a misdemeanor the court may enter default of defendant for not appearing to submit to the judgment and thereupon declare forfeiture of the bail bond: *State v. Howorth*, 70-157.

The court may at any time require one convicted to appear and surrender himself or perform the judgment, and upon failure to do so default may be entered against him. He may be required to appear at any term subsequent to the term at which he is bound to appear according to the language of the bond, without notice to him or his sureties, and his appearance to answer the charge does not discharge the sureties. It will be presumed, if the forfeiture was taken at a subsequent term, that the cause was continued by operation of law to the term when default was taken: *State v. Baldwin*, 78-737.

A record of default cannot be varied by parol evidence: *State v. Clemons*, 9-534.

The record made by the court of the forfeiture of a bail bond by failure of the person bound to appear is conclusive evidence of the forfeiture, and a mere denial of the breach of the bond raises no issue: *State v. Bryant*, 55-451.

Order of forfeiture: An order declaring a bail bond forfeited, and taxing costs to defendant, is a final judgment in such sense that an appeal may be taken therefrom: *State v. Conneham*, 57-351.

The order of forfeiture is conclusive, and the sureties cannot call into question the facts upon which it is based: *State v. Baldwin*, 78-737.

SEC. **5516. Discharge.** If, before the final adjournment of the court for the term, the defendant appear and satisfactorily excuse his failure, the court may direct an entry to be made on the record that the forfeiture of the undertaking or deposit be discharged. [C.'73, § 4597; R., § 4991.]

Where, after default upon the bond is entered, the defendant is arrested upon a bench warrant and held for trial, the forfeiture of the bond is not thereby discharged. *State v. Emily*, 24-24.

An entry of default does not of itself operate as a transfer of the money to the school fund, but the right to discharge the forfeiture of the bail upon the appearance of the defendant and the satisfactory excuse of the default is absolute in the court during the term at which default was entered, and no right of action in favor of the school fund becomes vested until after the adjournment of such term: *Arquette v. Supervisors*, 75-191.

And where, upon entry of default, the money deposited as security for the appearance of defendant was turned over to the school fund by order of the board of supervisors, and the default and forfeiture were set aside at the next term of court, *held*, that plaintiff was entitled to a writ of *mandamus* for an order to refund the money: *Ibid.*

Where a bail bond was forfeited on account of failure of defendant to appear in court in order that the judgment which had been rendered by the court, and from which an appeal had been taken, might be executed and performed upon an affirmance of such judgment in the supreme court, and it was shown that at the time he was thus required to appear he had already been arrested in another state under requisition at the instance of the sureties on his bond and was in the penitentiary serving out his sentence, *held*, that such forfeiture should be set aside: *State v. Row*, 89-581.

And see notes to § 5519.

SEC. **5517. Action.** If the forfeiture is not discharged, the county attorney may, at any time after the adjournment of the court for the term, proceed by civil action upon the undertaking of the bail. [C.'73, § 4598; R., § 4991.]

SEC. **5518. In what court.** The action on the undertaking must be in the court which the defendant was or would have been required to appear by the undertaking; save, when it requires the appearance of the defendant before a justice of the peace or a court of limited jurisdiction, or before an examining magistrate, such court or officer, upon the forfeiture of the undertaking, shall within thirty days file the same, together with a copy of all his official entries in relation thereto, in the office of the clerk of the district court of the county; and thereupon it shall be the duty of the county attorney to proceed to collect the same by a civil action in the district court of said county, or any other court of said county having jurisdiction. [C.'73, § 4599; R., § 4993.]

Suit on the bond: Action upon a bail bond given for appearance upon a change of venue should be brought in the county to which the venue is changed: *Decatur County v. Maxwell*, 26-398.

Suit for the penalty on the bail bond may be brought in the name of the county. It has the right to sue as being the trustee of an express trust: *Shelby County v. Simmonds*, 33-345.

Action on a forfeited bond may be brought in the name of the state, and in the event of

error in the proceedings on such bond prejudicial to the state, it will have the right to appeal: *Warren County v. Polk County*, 89–44.

Where a bond is given for the appearance of the defendant to answer an indictment, and afterward a change of venue is granted, on his application, to another county, and he fails to appear in the action in the county to which the change is granted, action on the bond for such failure to appear should be brought in the latter county: *Lucas County v. Wilson*, 59–354.

Under Rev., § 4993 (which did not contain the provisos of this section), *held*, that a bond for the appearance of a defendant before a magistrate might be sued on in the district court, and that the section was intended to apply only to actions on bail bonds given in that court: *State v. Emerson*, 16–206.

Under the provisions of Code of '51, which allowed an action of *scire facias* to be brought upon a bail bond, *held*, that an action of detinue would nevertheless lie as at common law: *State v. Gorley*, 2–52.

See, further, notes to §§ 5501, 5505.

Measure of damages: Upon forfeiture of a bail bond when the punishment is a fine, the measure of damages is not the amount of the fine and costs, but the penalty named in the bond: *State v. Hirronemus*, 50–545.

Disposition of forfeiture: Under the provisions of §§ 2839, 4338, that fines and forfeitures shall go into the treasury of the county where the same are collected for the benefit of the school fund, the county in which the fine is collected is deemed to be the county in which judgment therefor is rendered and execution issued, and not the county in which the execution may be enforced against defendant's property: *Pottawattamie County v. Carroll County*, 67–456. See, also, Const., art. IX, § 4.

The fact that a fine or forfeiture is to go into the county treasury for the benefit of the school fund does not make the county such party to an action therefor brought by the state as to entitle defendant to a change of venue: *State v. Merrihew*, 47–112.

SEC. **5519. Surrender before judgment.** The undertaking of bail will in all cases be exonerated, the sureties discharged and, if a judgment has been docketed and lien perfected as in this chapter provided, the same released and satisfied, if the defendant is produced in execution of a judgment of imprisonment, or commitment for a fine, or fine and costs, or if the judgment is for a fine or fine and costs only, without an order of commitment. When the bail is exonerated, sureties discharged and lien released, the clerk must at once enter a satisfaction of the judgment, making a memorandum of the facts, following the docket entry thereof, and if judgments have been entered up in other counties, he shall transmit to the several clerks of such counties a certified copy of such satisfaction and memorandum, who shall enter the same in the same manner, and from and thereafter such judgment shall be canceled and satisfied. [C. '73, § 4600; R., § 4994.]

Arrest of defendant after forfeiture: Where, after default upon the bond is entered, the defendant is arrested upon a bench warrant and held for trial, the forfeiture of the bond is not thereby discharged: *State v. Emily*, 24–24.

If there is no surrender or arrest of defendant the court has no authority to grant relief from the forfeiture: *State v. Scott*, 20–63.

Death of principal in the bond two years after its forfeiture, *held* not a defense to an action thereon against the surety: *Ibid.*

Detention in another jurisdiction: The arrest and detention in another county of a prisoner who is under bond for appearance does not have the effect to release his sureties, in the absence of a showing by them that proper steps were taken to secure his production by the state at the proper time: *State v. Merrihew*, 47–112, 115. And see notes to § 5516.

The fact that defendant is in the military service of the United States or another state will not excuse the sureties for his non-appearance: *State v. Scott*, 20–63.

Discretion of the court: The granting of relief to the sureties upon the surrender or arrest of the defendant, as here provided, is in the discretion of the court: *Ibid.*

The discretion conferred on the court by this section will not be interfered with on appeal unless abuse of discretion is shown: *State v. Kraner*, 50–575; *State v. Kraner*, 50–582.

It would require a very strong showing of abuse to justify the supreme court in interfering with such discretion: *State v. Hirronemus*, 50–545.

The remission of the forfeiture is within the discretion of the court, and in a particular case, *held*, that the court was authorized to set aside the default and forfeiture at a subsequent term: *Arquette v. Supervisors*, 75–191.

CHAPTER 38.

OF THE RECOMMITMENT OF THE DEFENDANT AFTER BAIL.

SECTION **5520. Grounds for.** The district court in which a criminal action is pending, or during the pendency of an appeal from its judgment

therein, or in which a judgment is to be carried into effect, may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail, or deposited money instead thereof, in the following cases:

1. When by reason of his failure to appear he has incurred a forfeiture of his bail, or money deposited instead thereof;

2. When it satisfactorily appears to the court that his bail, either by reason of the death of one or more of them, or from any other cause, is insufficient, or have removed from the state;

3. When, after the filing of an indictment, the court finds the bail taken by or money deposited with the committing magistrate insufficient. [C. '73, § 4601; R., § 4995; C. '51, § 3243.]

Where the accused, who is out on bail, is re-arrested for some of the causes specified in this section, he is then completely in the custody of the state, and his sureties having no more control over him are released from responsibility: *State v. Holmes*, 23-458; *State v. Orsler*, 48-343.

When a person held to appear was indicted and subsequently ordered arrested, and was so arrested, *held*, that it would be presumed that such arrest was on the ground that the bail was insufficient, and that the surety was therefore released: *State v. Orsler*, 48-343.

See § 5528 and notes, as to surrender of defendant by his sureties.

SEC. **5521. Order.** The order for recommitment must recite generally the facts upon which it is founded, and must direct that the defendant be arrested and committed to the custody of the sheriff of the county where the depositions and statement were returned, or the indictment was found, or the conviction was had, as the case may be, to be detained until legally discharged. [C. '73, § 4602; R., § 4996; C. '51, § 3244.]

SEC. **5522. Arrest.** The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county in the state. [C. '73, § 4603; R., § 4997; C. '51, § 3245.]

SEC. **5523. Commitment.** If the order recite, as the ground on which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirements of the order; if made for any other cause and the offense is bailable, the court must cause a direction to be inserted in the order that the defendant be admitted to bail, in a sum to be stated in the order. [C. '73, §§ 4604-5; R., §§ 4998-9; C. '51, §§ 3246-7.]

CHAPTER 39.

OF DEPOSIT OF MONEY INSTEAD OF BAIL.

SECTION **5524. With whom and effect.** The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the district court to which the undertaking is required to be sent the sum mentioned in the order, and, upon delivering to the officer in whose custody he is, a certificate under seal from said clerk of the deposit, he must be discharged from custody. [C. '73, § 4589; R., § 4983; C. '51, § 3232.]

Where the default of defendant is satisfactorily excused, the forfeiture as to the money deposited may be discharged, as in the case of the undertaking of bail, whether it has been deposited by the defendant or another: *Arquette v. Supervisors*, 75-191.

There is no provision permitting the payment of money to the sheriff, and the action of the sheriff in receiving such money would not only be unauthorized, but would not entitle the prisoner to release. Therefore, *held*, that in case of forfeiture of bail the state was not entitled to recover for the benefit of the school fund in an action against the sheriff: *State v. Farrell*, 83-661.

Where money is deposited in lieu of bail and the case is afterwards transferred to another county for trial, the money thus deposited should also be transferred to the clerk of such county: *Warren County v. Polk County*, 89-44.

SEC. **5525. After giving bail.** If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner

deposit the sum mentioned in the undertaking, and, upon the deposit being made, the bail shall be exonerated. [C. '73, § 4590; R., § 4984; C. '51, § 3233.]

SEC. **5526. Bail after deposit of money.** If money is deposited as provided in the last section, bail may be given in the same manner as if it had been originally given, upon the order for admission to bail at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken shall thereupon direct, in the order of allowance, that the money deposited be refunded by the clerk to the defendant, and it shall be done. [C. '73, § 4591; R., § 4985; C. '51, § 3234.]

SEC. **5527. Application of money.** When money has been deposited by the defendant, if it remain on deposit at the time of a judgment against him, the clerk, under the direction of the court, shall apply the money in satisfaction of so much of the judgment as requires the payment of money, and shall refund the surplus, if any, to him, unless an appeal be taken to the supreme court, and bail put in, in which case the deposit shall be returned to the defendant. [C. '73, § 4592; R., § 4986; C. '51, § 3235.]

CHAPTER 40.

OF SURRENDER OF THE DEFENDANT.

SECTION **5528. Method.** At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself, to the officer to whose custody he was committed at the time of giving bail, in the following manner:

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

2. Upon the undertaking and the certificate of the officer, the court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during term time, at the same term, and upon three clear days' notice thereof to the county attorney, with a copy of the undertaking and certificate, may order the bail to be exonerated. [C. '73, § 4593; R., § 4987; C. '51, § 3236.]

A surety is not released by a surrender of the prisoner to the sheriff, unless in the manner here pointed out: *State v. Tieman*, 39–474.

That the bail presented to the sheriff a certified copy of the bond, and in writing directed him to arrest defendant, *held* not to impose any duty upon the sheriff, or be a surrender of defendant as here contemplated: *State v. Kraner*, 50–582.

The failure or refusal of the sheriff to arrest the defendant will not exonerate the surety. It is the latter's duty to see that defendant is arrested, and if he fail in that duty he is liable on the bond: *Ibid.*

Sureties on the bail bond are not released by the fact that a sheriff does not at once serve warrant of commitment when it comes into his hands for service: *State v. Stewart* 74–336.

The fact that a person released on bail voluntarily submits to being taken in custody by the surety on his bail, and then brings action of *habeas corpus* to secure release from such restraint with the sole purpose of testing the constitutionality of the statute under which he is arrested, will not prevent the court from trying the *habeas corpus* proceeding and determining the question at issue: *Brown v. Duffus*, 66–193.

The fact that a person arrested has previously procured his sureties to go his bail under a statute the validity of which he proposes to test will estop him from in any way rendering them liable by contesting the validity of such statute, but would not prevent his contesting the validity for the purpose of releasing them entirely from liability: *Ibid.*

Provisions as to surrender of defendant do not apply upon an appeal from a judgment imposing a fine only; in such case the defendant is not subject to imprisonment under the judgment: *State v. Stommel*, 89–67.

As to effect of surrender or arrest of defendant before judgment against the bail, see § 5519 and notes.

As to recommitment of defendant by the court, see § 5520 and notes.

SEC. **5529. Arrest by bail.** For the purpose of surrendering the defendant, the bail, at any time before they are finally charged, and at any

place within the state, may themselves arrest him, or, by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so. [C.'73, § 4594; R., § 4988; C.'51, § 3237.]

SEC. **5530. Return of money deposited.** If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall surrender himself to the officer to whom the commitment was made or directed in the manner prescribed in this chapter, the court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during the term, at the same term, must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon three clear days' notice to the county attorney, with a copy of the certificate. [C.'73, § 4595; R., § 4989; C.'51, § 3238.]

CHAPTER 41.

OF THE LIEN OF JUDGMENTS AND STAY OF EXECUTIONS.

SECTION **5531. On real estate.** Judgments for fines, in all criminal actions rendered, are liens upon the real estate of the defendant, and shall be entered upon the lien index in the same manner and with like effect as judgments in civil actions. [C.'73, § 4609; R., § 5003.]

A judgment of a justice of the peace for a fine or illegal sale of liquor does not become a lien, as provided in § 2422, until filed with the clerk of the district court: *State v. McCulloch*, 77-450.

SEC. **5532. Stay.** The defendant may have a stay of execution for the same length of time and in the same manner as provided by law in civil actions, and with like effect, and the same proceedings may be had therein. [C.'73, § 4610; R., § 5004.]

CHAPTER 42.

OF THE LIBERATION OF POOR CONVICTS.

SECTION **5533. Note and schedule.** Except when otherwise provided, when any person convicted of a criminal offense is sentenced to pay a fine and costs only, and stand committed until paid, if the sentence be not complied with within thirty days next following, the sheriff may liberate him from prison, if committed for no other cause, if he be unable to pay such fine and costs, upon his giving his promissory note to the treasurer of the county where he was committed for the amount, due on demand, with interest, accompanied with a written schedule containing a true account of all his property of every kind, signed by him and sworn to; which note and schedule must be by such sheriff delivered without delay to the treasurer for the use of the county. [C.'73, § 4611; R., § 5005; C.'51, § 3268.]

Under the provisions of this section, actual imprisonment for thirty days is made a prerequisite to the right to be liberated: *In re Curley*, 34-184.

Where a prisoner is thus liberated upon giving note, etc., he is entited to have the judgment against him canceled: *State v. Van Vleet*, 23-168; *State v. Peck*, 37-342; *State v. Jordan*, 39-387; *In re Jordan*, 39-394.

Authority to imprison for non-payment of costs, not being expressly given by § 5440, this section does not warrant imprisonment for costs; and such imprisonment can be imposed only for non-payment of the fine: *State v. Erwin*, 44-637.

Under the provision (§ 5657) that such release shall not be made if, in the opinion of the sheriff, the judgment may be satisfied under the provisions for imprisonment at hard labor and credit of the amount allowed therefor on the judgment, *held*, that where it had been made to appear by the sheriff's answer in a *habeas corpus* proceeding that in his opinion the judgment could not thus be

satisfied, a subsequent pleading stating a contrary opinion could not operate to prevent the discharge: *In re Jordan*, 39-394.

The power to commit for non-payment of a fine not being conferred by this section, but existing by virtue of § 5440, as incident to the power to impose a fine, if the statute authorizing a fine provides that a prisoner shall not be released under this section, such provision is controlling: *Hanks v. Workman*, 69-600.

The provisions of this section apply only to persons convicted of criminal offenses. The fine authorized by the prohibitory liquor law for violation of an injunction is not a fine for a crime, and the provisions for release of poor convicts does not apply thereto: *Ibid.*

In general as to imprisonment for non-payment of fine, see § 5440 and notes.

As to imprisonment at hard labor, see §§ 5652-5659.

SEC. **5534. False schedule.** If such convict knowingly and wilfully make any false schedule, on oath, relating to the amount or nature of his property, he is guilty of perjury. [C.'73, § 4612; R., § 5006; C.'51, § 3269.]

CHAPTER 43.

OF THE DISMISSAL OF CRIMINAL ACTIONS.

SECTION **5535. If indictment not found.** When a person is held to answer for a public offense, if an indictment be not found against him at the next regular term of the court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown. [C.'73, § 4613; R., § 5007; C.'51, § 3248.]

SEC. **5536. If not tried at second term.** If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of the court in which the indictment is triable after the same is found, the court must order it to be dismissed, unless good cause to the contrary be shown. [C.'73, § 4614; R., § 5008; C.'51, § 3249.]

Where the failure to have a trial at the next regular term after the finding of the indictment results from a default of defendant, or from his seeking to have the verdict set aside, and without a demand on his part for trial, or objection to continuance, he is not entitled to a dismissal as here provided: *State v. Arthur*, 21-322.

Where the terms of court were so fixed that there was a September, a November and a January term, and the defendant was indicted at the September term, and the case was continued on his application, and he was then put on trial at the November term, and the jury failed to agree, whereupon the cause was continued until the January term, *held*, that he was not entitled to release. It is not necessary, where defendant is put on trial at one term, and the jury disagree, that he again be put on trial at the same term: *State v. Enke*, 85-35.

SEC. **5537. Discharge on undertaking.** If the defendant be not indicted or tried as above provided, and sufficient reason therefor is shown, the court may order the prosecution continued from term to term, and discharge the defendant from custody on his own undertaking, or on the undertaking of bail for his appearance to answer the charge at the time to which the same is continued, but no continuance under this section shall be extended beyond the following three terms of the court. [C.'73, § 4615; R., § 5009; C.'51, § 3250.]

SEC. **5538. Discharge on dismissal.** If the court direct the prosecution to be dismissed, the defendant, if in custody, must be discharged, or his bail, if any, exonerated, and if money has been deposited instead of bail, it must be refunded to him. [C.'73, § 4616; R., § 5010.]

SEC. **5539. Dismissal by court.** The court, upon its own motion or the application of the county attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a misdemeanor; but it is not a bar if the offense charged be a felony. [C.'73, §§ 4617–19; R., §§ 5011–13; C.'51, §§ 3251–2.]

After the trial is entered upon, a dismissal of the proceedings by the court or the district attorney, except under the circumstances authorized by the preceding sections, will operate as an acquittal, and defendant cannot again be put on trial: *State v. Callendine*, 8–288.

A *nolle prosequi* may be entered before the trial is commenced, but, after plea is made, the jury sworn, and the evidence introduced, its entry will amount to an acquittal: *Ibid.*

The fact that material witnesses for the prosecution cannot be called because their names are not indorsed on the indictment is not sufficient to justify the court in dismissing the case: *Ibid.*

At any time before the impaneling and swearing of a jury it is competent for the prosecutor to *nol. pros.* the entire indictment, or any count or number of counts therein. The same thing may be done in case of a verdict upon an indictment containing several counts, where the jury has failed to respond to a part of the charge, and judgment may then be taken upon the balance: *State v. McPherson*, 9–53.

Where, by mistake, the court announces the case as dismissed, and so marks it on his calendar and afterwards rescinds such order, there is not such a dismissal as to prevent further proceedings: *State v. Manley*, 63–344.

Where the indictment charges burglary and also facts constituting an assault with intent to commit murder, for the purpose of subjecting the defendant to the aggregate punishment provided by § 5191, the charge of assault with intent to commit murder may be dismissed and defendant put on trial for burglary alone: *State v. Struble*, 71–11.

In general, see Const., art. I, § 12.

CHAPTER 44.

OF THE INSANITY OF A DEFENDANT.

SECTION **5540. Proceedings suspended.** If a defendant appears in any stage of the trial of a criminal prosecution, and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had upon that question. [C.'73, §§ 4620–1; R., §§ 5015–16; C.'51, §§ 3260–1.]

The prisoner's mental condition at the time he appears for arraignment, or upon any other occasion when required, is thus to be inquired into, and not his condition at the time of the commission of the offense. In determining as to whether a reasonable doubt exists as to his sanity, the judge may, before impaneling the jury, investigate the whole matter, obtain all the light reasonably attainable, and determine from all the circumstances as to whether the necessity for the inquiry exists: *State v. Arnold*, 12–479.

It is not a ground of challenge to the panel on the trial that the jurors have heard the evidence on such preliminary inquiry as to the prisoner's sanity: *Ibid.*

SEC. **5541. Trial.** Such trial shall be conducted in all respects, so far as may be, as the prosecution itself would be, except the defendant shall hold the burden of proof, and first offer his evidence and have the opening and closing argument. [C.'73, § 4622; R., § 5017.]

SEC. **5542. Discharge or commitment.** If the accused shall be found insane, no further proceedings shall be taken under the indictment until his reason is restored, and, if his discharge will endanger the public peace or safety, the court must order him committed to the department for the criminal insane at Anamosa until he becomes sane; but if found sane, the trial upon the indictment shall proceed, and the question of the then insanity of the accused cannot be raised therein. [C.'73, § 4623–4; R., §§ 5018–19; C.'51, §§ 3262–3.]

SEC. **5543. Return to custody.** If the accused is committed to the department for the criminal insane, as soon as he becomes mentally restored, the person in charge shall at once give notice to the sheriff and county attorney of the proper county of such fact, and the sheriff, without delay, must receive and hold him in custody until he is brought to trial or judgment, as the case may be, or is legally discharged, the expense for conveying and returning him, or any other, to be paid in the first instance by the county from which he is sent, but such county may recover the same from his estate, or a relative, or another county or municipal body bound to provide for or maintain him elsewhere, and the sheriff shall be allowed for his services the same fees as are allowed for conveying convicts to the penitentiary. [C.'73, §§ 4625–8; R., §§ 5020–3; C.'51, §§ 3264–7.]

SEC. **5544. After commitment to jail.** If, after conviction for a misdemeanor and judgment of imprisonment in jail, the defendant is suspected

of being insane, the same proceedings shall be taken as is provided in the chapter "Of the care of the insane," and, if found insane, he shall be committed to the department for the criminal insane at Anamosa, and all subsequent proceedings shall be as provided in the preceding section.

CHAPTER 45.

OF SEARCH WARRANTS AND PROCEEDINGS THEREON.

SECTION **5545. Definition.** A search warrant is an order in writing, in the name of the state, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magistrate. [C.'73, § 4629; R., § 5024; C.'51, § 3291.]

A search warrant is not unreasonable, within the meaning of Const., art. I, § 8, when it is for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause: *Santo v. State*, 2-165.

Therefore, *held*, that § 2413, authorizing the issuance of a search warrant for the seizure of intoxicating liquors, is not unconstitutional, as not requiring sufficient particularity in description, or as authorizing unreasonable search and seizure: *Ibid.*

Description of the place to be searched *held* sufficient in a particular case: *State v. Thompson*, 44-399.

An objection to the sufficiency of a warrant under which property has been seized cannot be raised for the first time in the district court on appeal from the justice issuing the warrant: *Ibid.*

For constitutional provisions relative to search warrants, see Const., art. I, § 8.

For provisions as to search warrant for seizure of intoxicating liquors, see § 2413 and notes.

A third person claiming the property may become so identified with the proceeding as to be bound by the result: *Haworth v. Newell*, 71 N.W., 404.

SEC. **5546. Grounds for.** It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of any person in whose possession it may be;

2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of any person in whose possession it may be;

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to which he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, from a house or other place occupied by him or under his control. [C.'73, § 4630; R., § 5025; C.'51, § 3292.]

SEC. **5547. Affidavit.** No search warrant can be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched. [C.'73, § 4631; R., § 5026; C.'51, § 3293.]

SEC. **5548. Applicant examined.** The magistrate must, before issuing a warrant, examine on oath the applicant therefor and any witnesses he may produce, and take their affidavits. [C.'73, § 4632; R., § 5027; C.'51, § 3294.]

SEC. **5549. Facts stated.** The affidavit must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. [C.'73, § 4633; R., § 5028; C.'51, § 3295.]

SEC. **5550. Warrant.** If the magistrate is satisfied of the existence of the grounds of the application, or there is probable cause to believe their existence, he shall issue a search warrant, signed by him with his name of office, directed to any peace officer in the county, commanding him forthwith to search the person or place named for the property specified, and bring it before him. [C.'73, § 4634; R., § 5029; C.'51, § 3296.]

SEC. **5551. Form.** The warrant may be, substantially, in the following form:

County of.....,)
THE STATE OF IOWA.)

To any peace officer of said county:

Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken) that (stating the particular grounds of the application as above provided; or, if the affidavit be not positive, that there is probable cause for believing that—stating the ground of the application in the same manner), you are therefore commanded, in the daytime (or at any time of the day or night, as provided in this chapter) to make immediate search on the person of C.....D....., or in the house situated (describing it or any other place to be searched, with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity), and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place).

Dated at....., this.....day of.....A. D.....

E.....F....., (with official title).

[C'73, § 4636; R., § 5031.]

An objection to the sufficiency of a warrant under which property has been seized cannot be raised for the first time in the district court on appeal from the justice issuing the warrant: *State v. Thompson*, 44-399.

As to requisites of search-warrants, see § 5545 and notes.

SEC. **5552. Service.** A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requisition, he being present and acting in its execution. [C.'73, § 4637; R., § 5032; C.'51, § 3297.]

SEC. **5553. Breaking in.** The officer may break open any outer or inner door or window of a house, or any part thereof, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. [C.'73, § 4638; R., § 5033; C.'51, § 3298.]

SEC. **5554. Liberating person assisting.** He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or, when necessary, for his own liberation. [C.'73, § 4639; R., § 5034.]

SEC. **5555. Served in daytime.** The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavit be positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it may be served at any time of the day or night. [C.'73, § 4640; R., § 5035.]

SEC. **5556. Return.** A search warrant must be executed and returned to the magistrate who issued it within ten days after its date. After the expiration of such time the warrant, unless executed, is void. [C.'73, § 4641; R., § 5036; C.'51, § 3299.]

SEC. **5557. Receipt for property.** When the officer takes any property under the warrant, he must give to the person from whom it was taken, or in whose possession it was found, or, in the absence of the person, must leave in the place where he found the property, an itemized receipt therefor. [C.'73, § 4642; R., § 5037; C.'51, § 3300.]

SEC. **5558. Return with inventory.** The officer must forthwith return the warrant to the magistrate, with a complete inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they be present, verified by the affidavit of the officer at the foot of the inventory and taken before the magistrate, to the following effect: "I, the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant." [C.'73, § 4643; R., § 5038; C.'51, § 3301.]

SEC. **5559. Copy of inventory.** The magistrate, if required, must deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant. [C.'73, § 4644; R., § 5039; C.'51, § 3302.]

SEC. **5560. Hearing.** If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto. [C.'73, § 4645; R., § 5040; C.'51, § 3303.]

SEC. **5561. Evidence reduced to writing.** The testimony given by each witness must be reduced to writing and authenticated by the magistrate. [C.'73, § 4646; R., § 5041; C.'51, § 3304.]

SEC. **5562. Property restored.** If it appear that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken. [C.'73, § 4647; R., § 5042; C.'51, § 3305.]

SEC. **5563. Return to owner.** If the property taken by virtue of a search warrant was stolen or embezzled, it must be restored to the owner, upon his making satisfactory proof to the magistrate of his ownership thereof or of his right of possession thereto, as provided in the next chapter If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of the section of this chapter, prescribing the grounds for issuing search warrants, the magistrate must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court having jurisdiction to try the offense which the property taken was used as a means of committing, or so intended to be. [C.'73, § 4648; R., § 5043; C.'51, § 3306.]

SEC. **5564. Disposition of papers.** When returned to a magistrate, he must annex together the affidavits taken before the issuing of the warrant, the warrant, the return and the inventory, and return them to the next district court of the county, at or before its opening on the first day of the next term thereof. [C.'73, § 4649; R., § 5044; C.'51, § 3307.]

SEC. **5565. Maliciously suing out.** Whoever maliciously and without probable cause procures a search warrant to be issued and executed is guilty of a misdemeanor. [C.'73, § 4650; R., § 5045; C.'51, § 3308.]

SEC. **5566. Officer exceeding authority.** A peace officer who, in executing a search warrant, wilfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor. [C.'73, § 4651; R., § 5046.]

SEC. **5567. Searching person charged with felony.** When a person charged with a felony is supposed by the magistrate before whom he is brought to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or evidence to be retained, subject to his order, or the order of the court in which the defendant may be tried. [C.'73, § 4652; R., § 5047; C.'51, § 3309.]

SEC. **5568. Property kept for evidence.** When any officer in the execution of a search warrant shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by this chapter, all the property and things so seized shall be safely kept, by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced as evidence on any trial; and as soon as may be afterwards all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant may be destroyed under the direction of the court or magistrate. [C.'73, § 4653; R., § 5048.]

This section and § 5574 simply direct the disposition to be made of stolen or embezzled property by the officer, and the receipts to be given therefor, but they in no manner affect the competency of testimony for either the state or the accused respecting such property: *State v. Mullen*, 30-203.

CHAPTER 46.

OF PROPERTY STOLEN OR EMBEZZLED.

SECTION **5569. Held by officer** When property alleged to have been stolen or embezzled comes into the custody of a peace officer, he must hold the same subject to the order of the proper magistrate directing the disposal thereof. [C.'73, § 4654; R., § 5049; C.'51, § 3253.]

SEC. **5570. Delivered to owner.** On satisfactory proof of title by the owner of the property, the magistrate before whom the information is laid, or who shall examine the charge against the person accused of stealing or embezzling the same, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in the preservation and keeping thereof, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property. [C.'73, § 4655; R., § 5050; C.'51, § 3254.]

SEC. **5571. Proof of title.** If the property stolen or embezzled come into the custody of a magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified as before provided. [C.'73, § 4656; R., § 5051; C.'51, § 3255.]

SEC. **5572. By order of court.** If the property stolen or embezzled has not been delivered to the owner, the court before which a conviction is had may, on proof of his title, order its restoration. [C.'73, § 4657; R., § 5052; C.'51, § 3256.]

Where a defendant is acquitted of the crime of larceny, money which was seized under a search warrant as the subject of the larceny should be surrendered to the defendant; the court has no authority to retain the case upon the docket for the purpose of determining the ownership of the property: *State v. Williams*, 61-517.

But if a third person claiming the property makes himself a party to the proceeding, he may be bound by the result: *Haworth v. Newell*, 71 N.W , 404.

SEC. **5573. When not claimed.** If the property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of the person for stealing or embezzling it, the magistrate or other officer having it in his custody must, on payment of the necessary expenses incurred for its preservation, deliver it to the auditor of the county, to be applied under the direction of the board of supervisors thereof for the benefit of the poor of the county. [C.'73, § 4658; R., § 5053; C.'51, § 3257.]

SEC. **5574. Receipt given.** When money or other property is taken from the defendant arrested upon a charge of a public offense, the officer taking it shall, at the time, give duplicate receipts therefor, specifying particularly the amount of money and the kind of property taken; one of which receipts he must deliver to the defendant, and the other he must forthwith file with the clerk of the district court of the county where the depositions and statements are to be sent by the magistrate. [C.'73, § 4659; R., § 5054; C.'51, § 3258.]

See note to § 5568.

CHAPTER 47.

OF PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

SECTION **5575. Jurisdiction.** Justices of the peace have jurisdiction of, and must hear, try and determine all public offenses, less than felony, committed within their respective counties, in which the punishment prescribed by law does not exceed a fine of one hundred dollars or imprisonment thirty days. [C.'73, § 4660; R., § 5055; C.'51, § 3322.]

Jurisdiction: The district court has concurrent jurisdiction with that of justices of the peace over crimes within the jurisdiction of the latter, and therefore a defendant put on trial in the district court on indictment may be convicted of a lower degree of the offense or of a crime necessarily included within the offense charged, although such lower degree or included crime is not in itself indictable, and could have been prosecuted before a justice of the peace: *Orton v. State*, 4 G. Gr., 140.

Where there is nothing appearing affirmatively on the face of the proceedings before a justice of the peace showing a want of jurisdiction, defendant cannot complain that the evidence shows an offense to have been committed which can only be prosecuted on indictment: *State v. Sipult*, 17-575.

A justice of the peace has jurisdiction over offenses consisting in the violation of city ordinances. The jurisdiction of the mayor in such cases is not exclusive: *Jacquith v. Royce*, 42-406.

Venue: To show that the case is within the territorial jurisdiction of a justice the prosecution need only prove that the offense was committed in the county. The township where it was committed is immaterial: *State v. Gibson*, 29-295.

Where defendant is brought before a justice of the peace of the proper county upon a warrant issued by another justice for an offense triable by a justice of the peace and makes no objection to the jurisdiction, he thereby waives any objection which he may have on that account and cannot raise it upon appeal: *State v. Kinney*, 41-424.

SEC. **5576. Information.** Criminal actions for the commission of a public offense must be commenced before a justice of the peace by an information, subscribed and sworn to, and filed with the justice. [C. '73, § 4661; R., § 5056; C. '51, § 3323.]

If the informant subscribes and swears to the affidavit at the end of the information, it is sufficient to comply with the provisions requiring the information to be subscribed and sworn to: *Devine v. State*, 4-443.

As to amending, see notes to next section.

SEC. **5577. Must contain.** Such information must contain:

1. The name of the county and of the justice where the information is filed;

2. The names of the parties, if the defendants be known, and if not, then such names as may be given them by the complainant;

3. A statement of the acts constituting the offense, in ordinary and concise language, and the time and place of the commission of the offense, as near as may be. [C. '73, § 4662; R., § 5057; C. '51, § 3324.]

Under the provisions of the following section as to the form of an information, the facts constituting the offense should be stated with as much precision as in an indictment: *State v. Bitman*, 13-485; *State v. Allen*, 32-491; *State v. Butcher*, 79-110; *State v. Stroud*, 68 N. W., 450.

The same strictness is not required in an information for violating an ordinance as in an indictment. The information in a particular case, *held* sufficient: *Bayard v Baker*, 76-220.

An information charging the illegal sale of intoxicating liquor should state the name of the person to whom the liquor was sold, and a mere allegation that defendant "did sell intoxicating liquors in violation of," etc., is not sufficient: *State v. Allen*, 32-491.

Where an ordinance prohibited the sale of beer or wine to any person, an information for the violation of such ordinance charging the sale to "divers persons" was *held* sufficient: *State v. Smouse*, 49-634.

Where the information charging the keeping of intoxicating liquors for sale was entitled "State of Iowa, Clayton County," and stated the liquors to be in defendant's saloon in Strawberry Point, *held*, that the information sufficiently showed that the liquors were in Clayton county: *State v. Thompson*, 44-399.

An information charging the illegal sale of intoxicating liquors need not specify the quantity sold: *State v. King*, 37-462. Nor the method of sale: *Devine v. State*, 4-443. Nor the kind of liquor sold: *State v. Whalen*, 54-753. Informations in particular cases *held* sufficient: *State v. Mohr*, 53-261; *Foreman v. Hunter*, 59-260; *State v. Johnson*, 69-623.

As to sufficiency of information charging sale, etc., of intoxicating liquors, see, further, § 2424 *et seq.*

An information charging larceny, *held* defective in failing to allege that it was feloniously committed, although the accusation was in the language of the statute defining the offense: *State v. Sipult*, 17-575.

It is not sufficient in an information to charge the offense by its technical name; the acts constituting the offense must be stated: *State v. Murray*, 41-580.

Therefore, *held*, that in an information for an assault it was not sufficient to charge simply that defendant "did assault" the person injured: *Ibid.*

An information is insufficient which merely states the offense charged, though in the language of the statute: *State v. Butcher*, 79-110.

Therefore *held*, that an information which charged the defendant with the crime of unlawfully and wilfully disturbing a school was not sufficient to sustain a conviction, as the acts constituting the offense were not stated: *Ibid.*

An information which fails to state the facts constituting the offense charged cannot be amended by setting out the facts relied upon for the first time, after the verdict has been rendered: *Ibid.*

Although it is proper to state the name of

the person assaulted in an information charging assault and battery, yet where the information charged the assault as committed "upon the person of this informant," which information was signed and sworn to, *held*, that the person assaulted was sufficiently designated: *State v. McKinley*, 82–445.

An information for assault and battery is sufficient which charges violently beating, wounding, etc., without charging the manner or purpose thereof: *State v. Boynton*, 75–753.

Where an information for violation of an ordinance was headed "State of Iowa, City of Washington, versus," etc., *held*, that the words "State of Iowa" were surplusage and did not make the prosecution one under the state law: *State v. Smouse*, 49–634.

Where an information charges an offense of which the court has jurisdiction, and also one of which it has not, the allegations as to the latter will be deemed surplusage and will not vitiate the information: *Ibid.; State v. Silhoffer*, 48–283.

An information may be amended, upon application, to any extent consistent with the orderly conduct of judicial business with public interest and private rights: *State v. Doe*, 50–541; *State v. Merchant*, 38–375.

SEC. **5578. Form.** The information may be substantially in the following form:

..... County:
The State of Iowa
against
A..... B....., defendant.
} Before justice ..... (here insert the name of the justice).

The defendant is accused of the crime (here name the offense).

For that the defendant, on the.....day of....., A. D....., at the (here name the city, town or township), in the county aforesaid (here state the act or omission constituting the offense as in an indictment). [C. '73, § 4663; R., § 5058; C. '51, § 3325.]

Under these provisions the information is required to state the facts constituting the offense intended to be charged with as much precision as an indictment: *State v. Allen*, 32–491; *State v. Bitman*, 13–485.

In general, see notes to preceding section.

SEC. **5579. Filing.** The justice must file such information and mark thereon the time of filing the same. [C. '73, § 4664; R., § 5059; C. '51, § 3326.]

SEC. **5580. Warrant.** Immediately upon the filing of such information, the justice may, in his discretion, issue a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a preliminary information, which may be served in like manner. [C. '73, § 4665; R., § 5060; C. '51, § 3327.]

SEC. **5581. Service.** The officer who receives the warrant must serve the same by arresting the defendant, if in his power, and bringing him without unnecessary delay before the justice who issued the same. If defendant is a corporation, it may be proceeded against upon notice as in case of indictment. [C. '73, § 4666; R., § 5061; C. '51, § 3328.]

SEC. **5582. Appearance.** When the defendant is brought before the justice, the charge against him must be distinctly read to him, and he shall be asked whether he is presented by his right name, and be required to plead. If he objects that he is wrongly named in the information, he must give his right name, and if he refuses to do so, or does not object that he is wrongly named, the justice shall make an entry thereof in his docket, and he is thereafter precluded from making any such objection. [C. '73, § 4667; R., § 5062; C. '51, § 3329.]

SEC. **5583. Pleading.** The defendant may plead the same as upon an indictment, orally or in writing, and such pleas shall be entered on the docket of the justice. [C. '73, § 4668; R., § 5063; C. '51, § 3330.]

SEC. **5584. Trial.** Upon a plea other than that of guilty, if the defendant does not demand a trial by jury, the justice must proceed to try the issue, unless a change of venue be applied for by the defendant. [C. '73, § 4669; R., § 5064; C. '51, § 3331.]

A justice has no authority to try a prisoner after he has demanded a jury: *Dupont v. Downing*, 6–173.

As the trial before the justice may be without jury the defendant may also on appeal waive a jury in accordance with § 5617, although jury trial cannot be waived in a criminal prosecution originally commenced in the district court: *State v. Ill*, 78–543; *State v. Douglass*, 65 N.W., 151.

SEC. **5585. Change of venue—affidavit.** Before any testimony is heard, a change of place of trial may be applied for by an affidavit filed, stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as the affiant verily believes. [C. '73, § 4670; R., § 5065.]

Prejudice of a justice against a defendant can only be taken advantage of by motion for change of venue. The existence of prejudice will not render the conviction void: *Foreman v. Hunter*, 59-550.

The provisions as to change of venue from a justice of the peace do not entitle a defendant to change of venue in a trial in the police court: *Zelle v. McHenry*, 51-572.

SEC. **5586. Change allowed—transmission.** If such affidavit be filed, the change of place of trial must be allowed, and the justice must immediately transmit all the original papers, and a transcript of all his docket entries in the case, to the next nearest justice in the township, unless said justice be a party to the action, or is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding, and in such case the justice before whom such action or proceeding is commenced shall transmit all the original papers, together with a transcript of all his docket entries, to the next nearest justice in the county against whom none of the above objections exist, who shall proceed with the case as provided in this chapter, but no more than one change of place of trial in the same case shall be allowed. [C. '73, § 4671; R., § 5066.]

Where the justice to whom the case is sent on change of venue refuses to act, the officer having the defendant in charge has no authority to take him before another justice, and any action of such justice in the matter would be void: *Connell v. Stelson*, 33-147.

The "above objections" here referred to are the ones specified in this section, and are not the same as those which are made a ground for change of venue in the first place. Prejudice of the justice is a ground for asking a change of venue, but not a ground for objection to the next nearest justice: *Albertson v. Kriechbaum*, 65-11.

Where defendant, in asking a change of venue, urges objections to a justice to whom the case might be sent, and thereby procures it to be sent to another justice, he cannot afterwards object that the justice to whom it is sent has not jurisdiction, for the reason that the objection made to the nearest justice was not one authorized by statute as a ground for not sending the case to him. By requesting the change to the justice before whom the case is taken, and appearing before him, defendant waives any objection to his jurisdiction: *State v. McEvoy*, 68-355.

It is not proper to send the case to the mayor of a city or town though he is nearer than the next nearest justice: *State v. Jamison*, 69 N.W., 529.

SEC. **5587. Jury trial.** Before the justice has heard any testimony upon the trial, the defendant may demand a jury. [C. '73, § 4672; R., § 5067; C. '51, § 3332.]

When the police judge of a city is exercising the powers and jurisdiction of a justice, a defendant on trial before him may demand a jury as here provided, but in a prosecution before such judge for the violation of a city ordinance the defendant is not entitled to a jury: *Zelle v. McHenry*, 51-572.

A justice of the peace has no authority to try a prisoner without a jury after he has demanded a jury trial: *Dupont v Downing*, 6-172.

SEC. **5588. Jury—how obtained.** If a trial by jury is demanded, the justice shall direct any peace officer of the county to make out a list of eighteen inhabitants of the county having the qualifications of jurors in the district court, from which list the prosecutor and defendant may each strike out three names. [C. '73, § 4673; R., § 5068; C. '51, § 3333.]

A judgment rendered upon a verdict by a disqualified jury is erroneous but not void. It may be reversed upon appeal, but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

By this section the justice is empowered to designate the sheriff, or one of his deputies, or any constable in the county, for the performance of the duty, and use his discretion in making the selection; and this power to select necessarily includes the power to institute inquiry as to the fitness of the one intended to be designated. When the question arises the informant as well as the defendant has a right to object to the one designated on the ground of unfitness for the performance of the duty. Therefore, *held*, that statements made in good faith in an affidavit by the informant with reference to facts claimed to constitute disqualification on the part of the constable were privileged: *Rainbow v. Benson*, 71-301.

SEC. **5589. Striking names.** In case the prosecutor or the defendant neglect or refuse to strike out such names, the justice shall direct some disinterested person to strike them out for either of the parties so neglecting or refusing, and, it being done, he must issue a venire, directed to any peace officer of the county, requiring him to summon the twelve persons whose names remain upon the list to appear before him at the time and place named therein, to make a jury for the trial of the cause. [C.'73, § 4674; R.. 5069; C.'51, § 3334.]

SEC. **5590. Jurors summoned.** The officer to whom such venire is delivered must forthwith summon such jurors, and return the venire to the justice within the time therein specified, naming the persons summoned and the manner of service. [C.'73, § 4675; R., § 5070; C.'51, § 3335.]

SEC. **5591. Failure to return—new venire.** If the officer by whom the venire is received does not return it as required, he may be punished by the justice as for contempt, and a new venire shall issue for the summoning of the same jurors, which shall be served as above provided. [C.'73, § 4680; R., § 5075; C.'51, § 3340.]

SEC. **5592. Names of jurors.** The names of the persons returned as jurors shall be written on separate ballots, folded each in the same manner as nearly as possible, and so that the name is not visible, and shall, under the direction of the justice, be deposited in a box or other convenient thing. [C.'73, § 4676; R., § 5071; C.'51, § 3336.]

SEC. **5593. Drawing.** The justice must then draw out six of the ballots successively, and if any of the persons whose names are drawn do not appear, or are challenged, or are set aside, such further number must be drawn as will make a jury of six, after all challenges have been allowed. [C.'73, § 4677; R., § 5072; C.'51, § 3337.]

SEC. **5594. Challenges.** The same challenges may be taken by either party to any individual juror as on the trial of an indictment for a misdemeanor, but no challenge to the panel is allowed. [C.'73, § 4678; R., § 5073; C.'51, § 3338.]

SEC. **5595. Talesmen.** If any of the jurors named in the venire cannot be found, or do not attend, or are challenged by either party, so that a sufficient number cannot be obtained, the justice may direct the officer to summon any bystander or others who may be competent, and against whom no sufficient cause of challenge appears, to act as jurors. [C.'73, § 4679; R., § 5074; C.'51, § 3339.]

SEC. **5596. Jury of six.** When six jurors appear and are accepted, they shall constitute the jury. [C.'73, § 4681; R., § 5076; C.'51, § 3341.]

SEC. **5597. Oath.** The justice must thereupon administer to them the following oath or affirmation: You do swear (or, do you solemnly affirm, as the case may be) that you will well and truly try the issue between the state of Iowa and the defendant, and a true verdict give according to the law and evidence. [C.'73, § 4682; R., § 5077; C.'51, § 3342.]

SEC. **5598. Proceedings of jury.** After the jurors are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public. After which, they may either decide in court or retire for consideration. [C.'73, § 4683; R., § 5078; C.'51, § 3343.]

SEC. **5599. Retire with officer—oath.** If they do not immediately agree, they must retire with the officer, who shall take the following oath: "You do swear that you will keep the jury together in some private and convenient place, without food or drink, water excepted, unless otherwise ordered by the court; that you will not permit any person to speak to them, nor speak to them yourself, unless it be to ask them if they have agreed upon a verdict, and that you will return them into court when they have so agreed." [C.'73, § 4684; R., § 5079; C.'51, § 3344.]

SEC. **5600. Verdict.** When the jury have agreed upon a verdict, they must deliver it publicly to the justice, who shall enter it on his docket. [C.'73, § 4685; R., § 5080; C.'51, § 3345.]

SEC. **5601. Kept together.** The jury must be kept together after the cause is submitted to them until they have agreed upon and rendered a verdict, unless, for good cause, the justice sooner discharge them. [C. '73, § 4686; R., § 5081; C. '51, § 3346.]

SEC. **5602. Discharged.** If the jury is discharged as provided in the last section, the justice may proceed again to the trial in the same manner as upon the first, and so on till a verdict is rendered. [C. '73, § 4687; R., § 5082; C. '51, § 3347.]

This section does not prohibit an adjournment in such case without the consent of parties for more than three days, as is provided in §§ 4496, 4519 in regard to civil actions: *State v. Valure*, 64 N. W., 280.

SEC. **5603. Judgment.** When the defendant pleads guilty or is convicted, either by the justice or by a jury, the justice shall render judgment thereon of fine or imprisonment, as the case may require, being governed by the rules prescribed for the district court, as far as the same are applicable, in rendering such judgment. [C. '73, § 4688; R., § 5083; C. '51, § 3348.]

Where defendant was tried before a justice of the peace and found guilty upon the first of several counts of an information, *held*, that by legal inference he was acquitted upon the others, and upon appeal to the district court could only be tried upon the first count: *State v. Severson*, 79–750.

SEC. **5604. Imprisonment for non-payment of fine.** A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. [C. '73, § 4689; R., § 5084.]

There can be no imprisonment for non-payment of a fine unless the judgment so orders: *Lanpher v. Dewell*, 56-153.

See, further, § 5440 and notes.

SEC. **5605. Defendant discharged.** When the defendant is acquitted, either by the justice or by a jury, he must be immediately discharged. [C. '73, § 4690; R., § 5085; C. '51, § 3350.]

SEC. **5606. Costs taxed to prosecutor—appeal.** If the prosecuting witness fails to appear by himself, agent or attorney to prosecute or give evidence on the trial, and defendant is discharged on account of such non-appearance, the justice may, in his discretion, tax the costs of the proceeding against such prosecuting witness and render judgment therefor; and if defendant is acquitted, the justice shall, if satisfied that the prosecution is malicious or without probable cause, so tax the costs and render judgment therefor In either case the prosecuting witness may appeal from such judgment to the district court, by giving notice thereof as provided in this chapter with reference to appeals by defendant, and the fact of the giving of such notice shall be entered by the justice on his record. If notice of an appeal is given, the justice shall, without delay, make out, sign and file in the office of the clerk of the district court a full and true statement of all the testimony admitted on the trial, and on which he bases his finding that the prosecution was malicious or without probable cause, and a transcript of his docket entries, and all other papers on file in the case, and such appeal, shall stand for hearing in said court at the term thereof commencing next after said papers are filed. The court shall have full power to compel the correction by said justice of any error made apparent in his transcript, statement of testimony, or in any papers returned by him, or may make the necessary correction itself, and, on the papers, may affirm or reverse the judgment of the justice, or render such judgment as he should have done. [25 G. A., ch. 101; C. '73, § 4691; R., § 5086.]

An appeal by a prosecuting witness from the action of a justice of the peace in taxing to him the costs of the prosecution in case of defendant's acquittal must be taken at the time judgment is rendered, and cannot be taken afterwards: *State v. Knapf*, 61-522.

Such appeal is to be taken to the district court, and is a criminal proceeding: *Ibid.*

The justice is invested with discretion as to the taxation of costs to the prosecutor, and his conclusion cannot be reversed by the district court unless he has abused such discretion. While the proceeding in the district court is called an appeal, it is in fact a writ of error, and the correctness of the judgment of the justice is to be determined by an in-

spection of the record. New or additional evidence should not be introduced: *State v. Kerns*, 64-306.

Under Rev., § 5094, which allowed appeals by the state, *held*, that although the justice did not tax up the costs to the prosecuting witness, the district court might, on appeal, make such taxation under § 5617 (Rev., § 5100) without taking further evidence than that introduced on the trial, provided that was in itself sufficient to authorize its action: *In re Trenchard*, 16 53.

Also, *held*, that where the judgment was for defendant, the prosecuting witness might appeal from an order of the justice taxing to him the costs of prosecution: *State v. Roney*, 37-30.

Where defendant has been convicted before a justice of the peace of the crime charged, the costs of prosecution cannot be taxed in the district court to the prosecuting witness: *State v. Hodgson*, 79-462.

See, further, as to taxation of costs against the prosecuting witness, §§ 5238, 5275, and notes.

SEC. **5607. Certificate of conviction.** When a conviction is had upon a plea of guilty, or upon trial, the justice must make and officially sign a certificate thereof, in which it shall be sufficient briefly to state the offense charged, the conviction and judgment thereon, and, if any fine has been collected, the amount thereof. [C. '73, § 4692; R., § 5087; C. '51, § 3351.]

SEC. **5608. Judgment—how executed.** The judgment shall be executed by a peace officer of the county where the conviction is had, by virtue of a warrant under the hand of the justice, specifying the particulars of such judgment. [C. '73, § 4693; R., § 5090; C. '51, § 3354.]

SEC. **5609. Fine—payment to justice.** If a fine is imposed, and paid before commitment, it shall be received by the justice and paid over to the county treasurer within thirty days after the receipt thereof. [C. '73, § 4694; R., § 5091; C. '51, § 3355.]

SEC. **5610. Payment to sheriff.** If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person, who must in like manner, within thirty days after the receipt thereof, pay it into the county treasury. [C. '73, § 4695; R., § 5092; C. '51, § 3356.]

SEC. **5611. Receipt.** If the fine, or any part thereof, is paid to the justice or sheriff, he must execute duplicate receipts therefor, one of which he must file without delay with the county auditor. [C. '73, § 4696; R., § 5093; C. '51, § 3357.]

SEC. **5612. Appeal—how taken.** The justice rendering a judgment against the defendant must inform him of his right to an appeal therefrom, and make an entry on the docket of the giving of such information, and the defendant may thereupon take an appeal, by giving notice orally to the justice that he appeals, or by delivering to the justice, not later than twenty days thereafter, a written notice of his appeal, and in either case the justice must make an entry on his docket of the giving of such notice. [C. '73, § 4697; R., § 5095.]

Appeals from judgment of justice: There is no provision for a review of errors of law only, in a criminal case tried before a justice of the peace. The provisions of § 4569 *et seq.* as to writs of error in civil cases are not applicable in criminal prosecutions: *Part of Lot, etc., v. State*, 1-507; *State v. Flinn*, 51-133.

The provisions of this section are applicable to trials before a mayor for violation of a city ordinance: *State v. Hoag*, 46-337.

The provision of the Revision allowing an appeal by the prosecution was held unconstitutional so far as it authorized a retrial in the district court of a defendant acquitted before a justice having jurisdiction of the offense: *State v. Van Horton*, 26-402.

But under such provision it was held that where defendant pleaded guilty the state might appeal from the judgment upon such plea, and in the district court inquiry might be made into the circumstances in order to settle the amount of fine or punishment, especially where the plea and judgment were entered in the absence of the prosecutor and before the day fixed for trial: *State v. Tait*, 22-140.

The receipt of the fine in such case by the county treasurer was held not such an acceptance of the adjudication as to bar all right of appeal by the prosecution: *Ibid.*

Where defendant was tried before a justice of the peace upon information which contained several counts, and was found guilty upon the first, *held*, that the legal inference would be that he was acquitted upon the others, and upon appeal to the district court he could only be tried upon the first count: *State v. Severson*, 79 750.

How taken: The mere filing of an appeal bond does not effect the appeal; it must be taken by giving notice, and if not so taken the case may be stricken from the docket of the district court: *State v. Leyden*, 13-433.

In order to secure an appeal, notice

thereof must be given at the time judgment is rendered: *State v. Knapf*, 61-522.

If defendant gives proper notice of appeal there is nothing which the justice can do which will deprive the party of his right to such appeal, and therefore the justice cannot be liable in damages for refusing an appeal, or committing the party without appeal, whatever may be his motives: *Anderson v. Park*, 57-69.

The fact that the justice fails to inform defendant of his right to appeal, or fails to make an entry of the fact on his docket, does not render the conviction void. The defendant may have the amount of bail fixed in a *habeas corpus* proceeding, but is not entitled to be discharged without bail: *Jacoby v. Waddell*, 61-247.

Mere mistake or inadvertence will not excuse the failure to take an appeal at the time of judgment, and render an appeal afterwards taken proper: *Cook v. United States*, 1 G. Gr., 39.

SEC. **5613. Bail—form of bond.** The justice must thereupon enter an order on his docket, fixing the amount in which bail may be given by the defendant, and the execution of the judgment against the defendant shall not be stayed unless bail in that amount be put in, by an undertaking substantially in the following form:

County of.....

A..... B..... having been convicted before C..... D....., a justice of the peace of said county, of the crime of (here designate it generally as in the information), by a judgment rendered on the....day of....., A. D. ...., and having appealed from said judgment to the district court of said county:

We, A..... B....., and E..... F....., hereby undertake that the said A..... B..... will appear in the district court of said county, at the term thereof to which the appeal is returnable, and submit to the judgment of said court, and not depart without leave of the same, or that we (or I, as the case may be) will pay to the state of Iowa the sum of.....dollars (the amount of bail fixed).

A..... B.....
E..... F.....

Accepted by me, at....., in the township of....., this....day of ....., A D. .....

C..... D.....
Justice of the peace.

[C '73, § 4698; R., 5096; C.'51, § 3359.]

This bond provides only for appearance of defendant, and not that he will pay the amount adjudged against him on appeal: *State v. Benke*, 9 203.

SEC. **5614. Qualifications of surety.** The bail must possess the qualifications, justify and be taken in the manner prescribed in the chapter upon bail, and the same proceedings had in all respects, as far as applicable, except as in this chapter otherwise provided. [C.'73, § 4699; R., § 5097.]

SEC. **5615. By whom taken.** Bail may be taken by the justice who rendered the judgment, or by any magistrate in the county who has authority to admit to bail, or by the district court or the clerk thereof. [C.'73, § 4700; R., § 5098.]

SEC. **5616. Witnesses bound over.** When an appeal is taken, the justice must cause all material witnesses to enter into an undertaking, as in a case where a defendant is held to answer on a preliminary examination, to appear and testify on the trial of the appeal in the district court, at the term at which it is returnable, and shall, as soon as practicable, and at least ten days before the first day of such term of the district court of the county, file in the office of the clerk thereof a certified copy of the entries on his docket, together with all the undertakings and papers in the case. [C.'73, § 4701; R., § 5099; C.'51, § 3360.]

For similar provisions in case of preliminary examination, see §§ 5232-5235 and notes.

SEC. **5617. Trial on appeal.** The cause shall stand for trial anew in the district court in the same manner that it should have been tried before the justice, and as nearly as practicable as an issue of fact upon an indictment, without regard to technical errors or defects which have not prejudiced

the substantial rights of either party; and the court has full power over the case, the justice of the peace, his docket entries and his return, to administer the justice of the case according to the law, and shall give judgment accordingly. [C.'73, § 4702; R., § 5100; C.'51, §§ 3361–4.]

On appeal the case stands for trial anew, and such trial is to be conducted in the same manner as the first or original trial: *State v. Dow*, 74-141.

An appeal brings up the case on its merits. There is no method by which defendant may secure a review of errors of law only: *State v. Flinn*, 51-133.

An appeal brings the case into the district court for trial on its merits, and the court should disregard all merely technical errors or defects not prejudicing the substantial rights of the parties, such, for instance, as that upon change of venue the case was sent to the wrong justice: *State v. McEroy*, 68-355.

Failure of the justice to make proper and timely entries upon his docket cannot be urged on a trial in the district court on appeal from his judgment: *State v. Valure*, 64 N.W., 280.

If no plea is entered of record by the justice of the peace it may be entered by the district court on the trial of the appeal: *State v. McCombs*, 13-426.

An appeal waives any irregularities in the proceedings before the justice: *Ibid.*

A defendant who has pleaded guilty before the justice, and been sentenced upon such plea, may, on appeal, withdraw the plea as provided in § 5337 with reference to proceedings upon an indictment: *State v. Kraft*, 10-330; *State v. Oehlslager*, 38-297; *State v. Farlee*, 74-451.

Where, upon the trial before the justice, two of the counts of the information were withdrawn, and defendant was convicted on a third, *held*, that it was error, on an appeal to the district court, to convict defendant on the two counts which had been withdrawn before the justice: *State v. Shilling*, 10-106.

Where defendant was tried before a justice upon an information containing several counts, and was found guilty and sentenced for one offense, *held*, that on appeal he was subject to retrial upon all the counts, and could not insist upon having been acquitted as to any of them: *State v. Malling*, 11-239.

Defendant cannot, upon trial of an appeal in the district court, have the cause remanded in the lower court in which it was tried, with directions for further proceedings therein, as to grant a change of venue it must be tried in the district court: *Ottumwa v. Schaub*, 52-515.

As defendant may be tried without a jury before a justice, the provisions of this section authorize the waiver of the jury on trial of an appeal from the justice, although the jury cannot be waived in criminal prosecutions originally commenced in the district court: *State v. Ill*, 74 441: *State v. Douglass*, 65 N.W., 151. And see notes to § 5338.

See, further, § 5606 and notes.

The fact that after taking an appeal defendant escapes from custody will not entitle the prosecution to a dismissal of such appeal in the justice court, it appearing that at the time when the motion comes on for hearing the defendant is in court ready for trial: *State v. Colby*, 92–463.

SEC. **5618. Appeal not dismissed.** No appeal from the judgment of a justice of the peace in a criminal case shall be dismissed. [C.'73, § 4703; R., § 5101.]

SEC. **5619. Judgment enforced.** If any proceedings are necessary to carry the judgment upon the appeal into effect, they shall be had in the district court. [C.'73, § 4704; R., § 5102.]

SEC. **5620. Appeal to supreme court.** Either party may appeal from the judgment of the district court to the supreme court in the same manner as from a judgment in a prosecution by indictment, and the defendant may be admitted to bail in like manner, and similar proceedings shall be had on the appeal in all respects, as far as applicable. [C.'73, § 4705; R., § 5103; C.'51, § 3366.]

Where the trial is in the district court on the appeal of defendant from proceedings prosecuted by a city in the justice's court, the city may take an appeal to the supreme court: *Burlington v. Unterkircher*, 68 N.W., 795

SEC. **5621. Judgment upon such appeal.** The same proceedings shall be had to carry into effect the judgment of the supreme court upon the appeal as if it had been taken from a judgment prosecuted by indictment. [C.'73, § 4706; R., § 5104; C.'51, § 3367.]

CHAPTER 48.

OF COMPROMISING CERTAIN OFFENSES BY LEAVE OF THE COURT.

SECTION **5622. When allowed.** When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act

constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:

1. By or upon an officer while in the execution of the duties of his office:
2. Riotously; or,
3. With an intent to commit a felony. [C.'73, § 4708; R., § 5106.]

SEC. **5623. Stay of proceedings.** If the party injured in such a case appear before the court to which the papers on a preliminary examination are returned, at any time before trial on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein and entered upon the minutes. [C.'73, § 4709; R., § 5107.]

SEC. **5624. Order a bar.** The order authorized by the last section is a bar to another prosecution for the same offense. [C.'73, § 4710; R., § 5108.]

SEC. **5625. Otherwise not allowed.** No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in this chapter. [C.'73, § 4711; R., § 5109.]

CHAPTER 49.

OF PARDONS AND THE REMISSION OF FINES AND FORFEITURES.

SECTION **5626. By governor.** The governor shall have power to remit fines and forfeitures upon such conditions and with such restrictions and limitations as he may think proper. After conviction of murder in the first degree, no pardon shall be granted by the governor until he shall have presented the matter to and obtained the advice of the general assembly thereon, but he may commute a death sentence to imprisonment in the penitentiary for life. Before presenting the matter to the general assembly for its action, he shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, for four successive weeks, the last publication to be at least twenty days prior to the commencement of the session of the general assembly to which the matter shall be presented. [C.'73, § 4712; R., § 5116; C.'51, § 3278.]

A pardon does not operate to discharge the convict from the payment of costs adjudged against him on his trial: *Estep v. Lacy*, 35-419.

The governor may grant a pardon upon conditions; and where one condition was that he might revoke it upon such showing as he might deem sufficient, *held*, that the person pardoned could not claim a judicial investigation as to whether he had violated the condition: *Arthur v. Craig*, 48-264.

Neither the district attorney nor board of supervisors has any power to remit fines or to compromise judgments therefor for a less sum than the amount of the fines imposed: *McKay v. Woodruff*, 77-413.

Therefore, where certain judgments were satisfied of record by the district attorney for a less sum than the fines for which they were rendered, and by authority of the board of supervisors, *held*, that the satisfactions were absolutely void and no bar to further proceedings to enforce the judgments: *Ibid.*

And a commutation of the judgments by the governor, so far as they were a lien on certain property, but not releasing defendant from personal liability, and upon condition that he pay all costs and forever refrain from engaging in the saloon business in Iowa, *held* to be no bar to his subsequent arrest and imprisonment, where it did not appear that he had complied with the condition upon which the commutation was granted: *Ibid.*

The governor may remit the forfeiture under a bail bond after judgment has been rendered thereon: *Harbin v. State*, 78-263.

While the governor may remit the forfeiture of a bail bond and a judgment against the surety on account of such forfeiture, he cannot remit the costs included in such judgment as they are claims in favor of the officers, witnesses, etc., rendering legal services in the case and not in favor of the state: *State v. Beebe*, 87-636.

The law as to pardon in a case of murder in the first degree need not be given to the

jury even at defendant's request in trial for that offense. It has no relation to the verdict for the offense: *State v. Dooley*, 89–584.

As to power of governor to pardon, see Const., art. IV, § 16.

SEC. **5627. Application for.** When an application is made to the governor for a pardon, reprieve or commutation, or for the remission of a fine or forfeiture, he may require the judge of the court, or the county attorney or attorney-general by whom the action was prosecuted, or the clerk of such court, to furnish him without delay a copy of the minutes of the evidence taken on the trial, and of any other facts having reference to the propriety of his exercise of his powers in the premises. He may also take the testimony of such persons, bearing upon such application, as he may deem advisable. Any person who, in giving such testimony, shall swear falsely, and any person who shall knowingly and corruptly make any false statements in an affidavit intended to be used in connection with an application for pardon, or for remission of fine or forfeiture, shall be guilty of perjury, and be punished accordingly. [C. '73, § 4713; R., § 5120.]

SEC. **5628. Return to secretary of state.** When any convict is pardoned or reprieved, or his sentence commuted, or any fine or forfeiture is remitted, the officer to whom the warrant is directed shall, as soon as may be after executing the same, make thereon a return in writing of his doings, sign the same with his name and official title, and file the same with the secretary of state, and file in the office of the clerk of the court in which the conviction was had, or in which it was to have been enforced, a certified copy of the warrant and return, the proper entries in relation to which shall be made by such clerk. [C. '73, § 4714; R., § 5121; C. '51, § 3279.]

CHAPTER 50.

OF ILLEGITIMATE CHILDREN.

SECTION **5629. Complaint.** When any woman residing in any county of the state is delivered of an illegitimate child, or is pregnant with a child which, if born alive, will be illegitimate, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceedings shall be entitled in the name of the state against the accused as defendant. [C. '73, § 4715; R., § 1416; C. '51, § 848.]

Nature of proceeding; costs: An action under this and following sections is a civil and not a criminal action, and the county is not liable for costs in case the judgment is in favor of defendant: *McAndrew v. Madison County*, 67–54.

This proceeding is to establish a civil liability and the issues are to be determined by the preponderance of the evidence, the weight of the evidence and credibility of the witnesses being for the jury: *State v. Severson*, 78–653.

It is for the jury to weigh the testimony of the witnesses as well as all the facts and circumstances tending to corroborate or discredit them and determine the case according to the preponderance of the evidence: *State v. Ginger*, 80–574.

Dismissal: And *held*, that the mother might dismiss the prosecution and release defendant, if she chose, or receipt in full for the judgment: *Holmes v. State*, 2 G. Gr., 501.

Whether she might settle and receipt in full, so as to preclude the county from the right to resort to this proceeding to compel the putative father to execute a bond, with surety, to indemnify the county, *quære;* but she may thus preclude herself and the county from the right to maintain the proceeding to secure to her the maintenance of the child: *Black Hawk County v. Cotter*, 32–125; *State v. Noble*, 70–174.

A contract on the part of a female while under age to accept a sum paid in full of all claims against the father of the child is not binding upon the state further than it would be upon the female herself: *State v. Baker*, 89–188.

The statutory provisions as to disaffirmance of contracts by a minor have no application to such a case: *Ibid.*

Jurisdiction: The action cannot be maintained outside of the jurisdiction within which it arose, but a judgment therein is entitled to full faith and credit in any other state. (So *held* in relation to such proceeding, under the statutes of Indiana): *State of Indiana v. Hellmer*, 21–370.

Procedure under prior statutes discussed: *Mills County v. Hamaker*, 11–206.

Limitation: The action is not barred in two years after pregnancy. It is not a proceeding for a statutory penalty within the provisions of § 3447: *State v. Laughlin*, 73 351.

Object of the proceeding: The proceeding is a civil action of a summary nature, intended to secure the maintenance of the bastard, to the end that in no event shall the public become chargeable therewith. Therefore, where another person was chargeable for the maintenance of the bastard, by virtue of having married the mother while *enciente*, knowing the fact, and therefore standing to the child *in loco parentis*, *held*, that the proceeding could not be maintained: *State v Shoemaker*, 62-343.

The only issue under the present statutory provision is the issue of guilty or not guilty, and if the defendant is found guilty the only judgment that can be rendered is to charge him with the maintenance of the child, and with such sum or sums and in such manner as the court shall direct and with the costs of the suit. His liability does not depend upon ability or inability of others to support the child or prevent its becoming a charge on the county, and, therefore, evidence as to the financial condition of complainant should not be admitted: *State v. Lavin*, 80-555.

If the child is not born alive, an action, if already commenced, abates; and no judgment can be rendered for maintenance, nor for costs. In no event can the defendant be liable for lying-in expenses and medical attendance upon the mother: *State v. Beatty*, 61-307.

It is not improper in a bastardy proceeding, to inform the jury that the object of the proceeding is to protect the county from the expense of keeping an illegitimate child: *State v. Pratt*, 40-631.

After recognition of an illegitimate child the father is liable for its support under the provisions of §§ 2250, 3385: *State v. Hastings*, 74-574.

Evidence: The provisions of §§ 5488, 5489, requiring corroboration of the testimony of an accomplice, or of that of the prosecutrix, in case of rape, seduction, etc., to warrant a conviction in a criminal prosecution, are not applicable in this proceeding. Neither need the case against defendant be made out beyond a reasonable doubt; a preponderance of evidence is sufficient: *State v. McGlothlen*, 56-544.

But this rule applies to the question of guilt or innocence upon the whole case, and does not dispense with the force and effect to be given to presumptions arising from facts disclosed in evidence: and where it appeared that the child was born three months after the marriage of prosecutrix, *held*, that the presumption would arise that the child was begotten by the person to whom prosecutrix was married, and that unless this presumption was rebutted by clear, satisfactory and conclusive evidence, there would not be a preponderance of evidence such as to warrant conviction of defendant: *State v Romaine*, 58-46.

Where the prosecutrix, after cohabiting with defendant, returned to her house, *held*, that proof that defendant had knowledge of declarations by her that she did so for the purpose of becoming the mother of a child and holding him for its support was not pertinent in his behalf: *State v. Pratt*, 40-631.

The fact that the jury find that prosecutrix had connection with other men will not preclude them from finding defendant to be the father of the child: *Ibid.*

In such a proceeding it is always allowable to show unchaste conduct with a man other than the defendant, and especially if the circumstances are such as not to preclude the possibility that the other was the father of the child: *State v. Karrer*, 65-53.

But unchaste and indecent conduct in general is not material: *State v. Johnson*, 89-4.

Where the complainant has been guilty of illicit intercourse with a man other than the defendant, it is competent to show such fact as a circumstance to be used in corroboration of the defendant in denying the paternity of the child; and this circumstance may become very important if it is shown who the other man was, and that his intimacies and opportunities continued until after the child in question was begotten: *State v. Woodworth*, 65-141.

It is not allowable to consider unchaste conduct of complainant with other men than defendant, unless it has bearing upon the question of the paternity of the child: *State v. Lavin*, 80-555.

The jury may be directed to consider evidence relating to the connection of complainant with other men, but if they find that defendant is the father of the child it is immaterial whether complainant is chaste or not: *State v. Ginger*, 80-574.

Where it appeared that the mother of the child, about the time the child must have been begotten, was associating with another man than the one sought to be charged as father, and it was claimed that such other man was the father of the child, *held*, that circumstances tending to show illicit cohabitation between such other man and complainant eight years before the time the child was begotten were not too remote, as they would tend to prove what the relations between the parties were at a later time: *State v. Borie*, 79-605.

Evidence tending to show illicit intercourse with another man at a time long prior to the time when the child was begotten is not admissible: *State ex rel. v. Granger*, 87-355

Facts as to intercourse of the female with other men are important only in determining the question of parentage, but although they make difficult the solution of this question, they do not constitute a defense except as they show that defendant was not the father of the child: *State v. Johnson*, 89-4; *State v. Baker*, 89-188.

Evidence of fact that complainant was accustomed, before and after the time the child was conceived, to occupy the same bed with a person who might have been the father of the child, is admissible as tending to affect the credibility of her testimony charging defendant with the child's paternity: *State v. Read*. 45-469.

A child over two years of age, whose paternity is in question in a bastardy proceeding, may be exhibited to the jury for the purpose of showing the resemblance between the child and the defendant. And *held* not error to allow counsel to call attention to alleged resemblances, the jury being in-

structed that if they did not clearly see the resemblance they should disregard all claims based thereon: *State v. Smith*, 54-104.

Evidence that prosecutrix was pregnant at the time of the alleged intercourse not only tends to corroborate defendant in testifying that he did not have connection with prosecutrix, but shows that he was not the father of the child, even if he did have connection with prosecutrix as alleged: *State v. Smith*, 61-538.

Also *held*, that evidence that the child was prematurely born did not corroborate the testimony of prosecutrix that defendant had connection with her at a time which was too near the birth of the child to allow full period of gestation: *Ibid.*

The fact that the child was born before the usual period of gestation from the time fixed by the complainant in her testimony for the connection with defendant will not be conclusive that defendant was not the father of the child. The exact time of gestation is not a controlling circumstance: *State v. Ginger*, 80-574.

Evidence in a particular case *held* sufficient to support a verdict against the defendant: *State v. Quinton*, 59-362.

In a particular case, *held*, that under the evidence the instructions were not as favorable to the defendant as they should have been. *State v. Smith*, 61-538.

The fact of an offer to compromise is not admissible in evidence on behalf of complainant: *State v Lavin*, 80-555.

SEC. **5630. Notice.** Upon the filing of the complaint, the clerk shall cause notice to be given to the person so charged as in an ordinary action. [C. '73, § 4716; R., § 1417; C. '51, § 849.]

SEC. **5631. Lien created.** From the time of the filing of such complaint, a lien shall be created upon the real property of the accused in the county where the action is pending for the payment of any money and the performance of any order adjudged by the proper court. [C. '73, § 4717; R., § 1418; C. '51, § 850.]

SEC. **5632. Attachment.** If the complaint is verified, the district judge may order an attachment to issue thereon without bond, which order shall specify the amount of property to be seized thereunder, and may be revoked at any time by such judge or the district court, on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises. [C. '73, § 4718.]

SEC. **5633. County attorney to prosecute.** The county attorney, on being notified of the facts justifying a complaint as provided in this chapter, or of the filing of such complaint, shall prosecute the matter in behalf of the complainant. [C. '73, § 4719.]

SEC. **5634. Issue—how tried.** The issue on the trial shall be "guilty" or "not guilty," and shall be tried as an ordinary action. [C. '73, § 4720; R., §§ 1419, 1422; C. '51, §§ 851, 854.]

Where the defendant's motion to quash the complaint is overruled and he goes to trial on the merits, he thereby waives his right to further object to the ruling. The proceeding is to be tried as an ordinary action to establish a civil liability and not as a criminal action: *State v. Johnson*, 89-4.

SEC. **5635. Judgment and execution.** If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner, as the court shall direct, and with the costs of the action; and the clerk may immediately issue execution for any sum ordered to be paid, and afterward, from time to time, as it shall be required to compel compliance with the order of the court. [C. '73, § 4721; R., §§ 1423-4; C. '51, §§ 855-6.]

The judgment may be enforced in another state: *State of Indiana v. Helmer*, 21-370.

If the child is not born alive, an action, if already commenced, abates, and no judgment can be rendered, for maintenance, nor for costs. In no event can the defendant be liable for lying-in expenses and medical attendance upon the mother: *State v. Beatty*, 61-307.

In a particular case, *held*, that a judgment requiring defendant to pay $100 at once and $50 a year until $700 had been paid was not excessive: *State v. Ginger*, 80-574.

See, further, notes to § 5629.

SEC. **5636. Change of order.** The court may at any time increase or diminish such sums, or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe. [C. '73, § 4722.]

The court has the power to vacate such an order, and it may do so if it thinks that it is better to hold defendant to the general obligation to support his child under § 2250: *State v. Hastings*, 74-574.

TITLE XXVI.

OF THE DISCIPLINE AND GOVERNMENT OF JAILS AND PENITENTIARIES.

CHAPTER 1.

OF THE JAILS.

SECTION **5637. How used.** The jails in the several counties in the state shall be in charge of the respective sheriffs and used as prisons:

1. For the detention of persons charged with an offense and committed for trial or examination;

2. For the detention of persons who may be committed to secure their attendance as witnesses on the trial of a criminal cause;

3. For the confinement of persons under sentence, upon conviction for any offense, and of all other persons committed for any cause authorized by law.

The provisions of this section extend to persons detained or committed by authority of the courts of the United States as well as of this state. [C.'73, § 4723; R., § 5122; C.'51, § 3103.]

SEC. **5638. Minors separately confined.** Any sheriff, city marshal or chief of police, having in his care or custody any prisoner under the age of eighteen years, shall keep such prisoner separate and apart, and prevent communication by such prisoner with prisoners above that age, while such prisoners are not under the personal supervision of such officer, provided suitable buildings or jails are now or hereafter may be provided for that purpose. But the foregoing provisions may, at the discretion of such officer, be suspended as to any such prisoner who, in his judgment, is likely to or does exercise an immoral influence over those with whom he is associated. Any officer having charge of prisoners who without just cause or excuse neglects or refuses to perform the duties imposed on him by this section may be suspended and removed from office therefor. [26 G. A., ch. 105, §§ 2, 4.]

SEC. **5639. Females.** All jails shall be provided with a separate apartment for females, and they shall be detained only in such apartment, nor shall males and females be at the same time allowed in the same apartment. [21 G. A., ch. 176.]

SEC. **5640. Keeper's duty.** The keeper of the jail shall see that it is kept in a cleanly and healthy condition, and pay strict attention to the personal cleanliness of all the prisoners in his custody, as far as may be. Each prisoner must be furnished daily with sufficient clean water for drink and personal use, with a clean towel and shirt once a week, and served three times each day with wholesome food, well cooked, and in ample quantity. [C.'73, § 4724; R., § 5123; C.'51, § 3104.]

SEC. **5641. Sheriff's duty.** The sheriff must keep a true and exact calendar of all prisoners committed under his care, which shall contain the names of all persons, their place of abode, the time of their commitment and discharge, the cause and term of commitment, the authority that committed them, and a description of their person, occupation, education and general habits. When any prisoner is discharged, such calendar must show the time when and the authority by which it took place, and if a person escapes, it must state particularly the time and manner thereof. [C.'73, § 4725; R., § 5124; C.'51, § 3105.]

SEC. **5642. Calendar returned.** At the opening of each term of the district court within its county, the sheriff must return a copy of such calen-

dar to the judge thereof. If a sheriff neglects or refuses so to do, he shall be punished by fine not exceeding one hundred dollars. [C.'73, § 4726; R., § 5125; C.'51, § 3106.]

SEC. **5643. What furnished prisoners.** The keeper of each jail must furnish necessary bedding, clothing, fuel and medical aid for all prisoners under his charge and keep an accurate account of the same. [C.'73, § 4727; R., § 5127; C.'51, § 3108.]

SEC. **5644. Removal in case of fire.** When a jail is on fire, or any building contiguous or near thereto, and there is reason to apprehend the prisoners therein may be injured thereby, the sheriff or keeper must remove such prisoners to some safe and convenient place, and there confine them so long as it may be necessary to avoid such danger. [C.'73, § 4728; R., § 5128; C.'51, § 3109.]

SEC **5645. Inspectors of jails.** The clerk of the district court and county attorney are inspectors of the jails, and have power from time to time to visit and inspect the same and inquire into all matters connected with the government, discipline and police thereof. [C.'73, § 4729; R., § 5129; C.'51, § 3110.]

SEC. **5646. Visitation.** Such inspectors shall visit and examine such prisons twice each year, and at the next term of the district court held in their county present to such court, on the first day of its sitting, a detailed report of the condition of such prisons at the time of such inspection. [C.'73, § 4730; R., § 5130; C.'51, § 3111.]

SEC. **5647. Report.** Such report must state the number of persons confined, for what cause, the number of persons usually confined in one room, the distinction, if any, observed in the treatment of prisoners, the evils found to exist in such prisons, and particularly whether any provision of this chapter has been violated or neglected, and the cause thereof. [C.'73, § 4731; R., § 5131; C.'51, § 3112.]

SEC. **5648. Right to inspect.** The keepers of prisons shall admit the inspectors or either of them into any part thereof, exhibit to them, upon demand, all the books, papers, documents and accounts pertaining thereto, or to the prisoners confined therein, and render them every facility in their power to enable them to discharge their duties. [C.'73, § 4732; R., § 5132; C.'51, § 3113.]

SEC. **5649. Officers examined.** For the purpose of obtaining the necessary information to make the reports above required, the inspectors have power to examine, upon oath to be administered by either of them, any of the officers of the prison, or prisoners therein. [C.'73, § 4733; R., § 5133; C.'51, § 3114.]

SEC. **5650. Refractory prisoners.** If any person confined in a jail upon a conviction or charge of an offense is refractory or disorderly, or if he wilfully destroys or injures any article of bedding or furniture, door, window or any other part of the prison, the sheriff may chain or secure such person, or cause him to be kept in solitary confinement, not more than ten days for any one offense, during which time he may be fed with bread and water only, unless other food is necessary for the preservation of his health. [C.'73, § 4734; R., § 5134; C.'51, § 3115.]

SEC. **5651. Expenses of jail.** All charges and expenses for the safe keeping and maintaining of convicts and persons charged with public offenses, and committed to the jail for examination or trial, shall be allowed by the board of supervisors, except prisoners committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county. [C.'73, § 4735; R., § 5135; C.'51, § 3116.]

This section does not authorize the sheriff to receive any further fees for taking charge of prisoners, etc., than as provided by § 511: *Grubb v. Louisa County*, 40-314. And the county is not liable for the service of a jailer employed by the sheriff: *McDonald v. Woodbury County*, 48-404.

While the sheriff is entitled to reasonable compensation as here provided, he cannot sue the county therefor until his account

has been presented for settlement and allowance: *Marvin v. Fremont County*, 11-463.

A person furnishing clothing to prisoners on the sheriff's request may maintain an action against the county therefor, and while only necessary clothing can be procured at the expense of the county, the discretion of the sheriff, acting in good faith, cannot be controlled by the board of supervisors. The person furnishing clothing upon the sheriff's request is only bound to know that it is for prisoners, and suitable, and, perhaps, necessary: *Feldenheimer v. Woodbury County*, 56-379.

The county is liable for necessaries for a prisoner, although by reason of his condition it is impossible to confine him in jail: *Miller v. Dickinson County*, 68-102.

An order made by a justice issuing a warrant for arrest, that the sheriff keep the prisoner in some safe place and provide for his necessities until he is able to be brought before a magistrate for trial, is a nullity and has no effect upon the liability of the county: *Ibid*

SEC. **5652. Hard labor may be required.** Able-bodied male persons over the age of sixteen and under fifty years, confined in any jail under the judgment of any tribunal authorized to imprison for the violation of any law, ordinance, by-law or police regulation, may be required to labor during the whole or part of the time of his sentence, as hereinafter provided, and such tribunal, when passing final judgment of imprisonment, whether for non-payment of fine or otherwise, shall have the power to and shall determine whether such imprisonment shall be at hard labor or not. [C.'73, § 4736; R., § 5136; C.'51, § 3107.]

Where the judgment of a court of general jurisdiction is that the defendant shall be imprisoned at hard labor as provided by this section, it will be presumed that the facts as to age, etc., necessary to warrant such judgment were shown to the court: *State v. Winstrand*, 37-110, 113.

A judgment may direct that defendant be confined to hard labor at the rate of $1.50 per day (§ 5657), but it cannot direct that he be confined at that rate until the judgment is paid. The duration of the imprisonment is to be determined by § 5440: *Keokuk v. Dressell*, 47-597; *State v. Jordan*, 39-387; *In re Jordan*, 39-394; *State v. Anwerda*, 40-151.

Where the jury found defendant guilty of murder in the first degree and directed that he should be punished by imprisonment in the penitentiary at hard labor for life, and in rendering judgment the court sentenced to imprisonment in the penitentiary for life, *held*, that the judgment must be presumed to mean imprisonment at hard labor, and sufficiently corresponded with the verdict: *State v. Cole*, 63-695.

SEC. **5653. On highways, public grounds and buildings.** Such labor may be on the streets or public roads, on or about public buildings or grounds, or at such other places in the county where confined, and during such reasonable time of the day, as the person having charge of the prisoners may direct, not exceeding eight hours each day. [C.'73, § 4737.]

SEC. **5654. Under whose direction.** If the sentence is for the violation of any of the statutes of the state, the sheriff of the county where the imprisonment is shall superintend the performance of the labor, and furnish the tools and materials, if necessary, to work with, at the expense of the county in which the convict is confined, and such county shall be entitled to his earnings. Such labor shall be performed in accordance with such rules and regulations as may be made by resolution of the board of supervisors, not inconsistent with the provisions of this chapter, and such labor shall not be leased. [21 G. A., ch. 153; C.'73, § 4738.]

SEC. **5655. For violation of city ordinance.** When the imprisonment is under the judgment of any court, police court, police magistrate, mayor or other tribunal of a city or town, for the violation of any ordinance, by-law or other regulation thereof, the marshal shall superintend the labor, and furnish the tools and materials, if necessary, at the expense of the city or town requiring the labor, and such city or town shall be entitled to the earnings of its convicts. [C.'73, § 4739.]

SEC. **5656. Attempt to escape.** The officer having charge of any convicts for the purpose specified in this chapter may use such means as are necessary to prevent escape; and if a convict attempts to escape while going from or returning to the jail, or while at labor, or at any time, or if he refuses to labor, the officer having him in charge may, to secure such person, or cause him to labor, use the means allowed in case of a disorderly or refractory person confined upon conviction or charged with the commission

of an offense, such punishment to be inflicted within the jail or jail inclosure, and shall not be considered as any part of the time for which the prisoner is sentenced. [C.'73, § 4740.]

SEC. **5657. Credit for labor.** For every day's labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him the sum of one dollar and fifty cents, and no person shall be entitled to the benefits of the law providing for the liberation of poor convicts if, in the opinion of the sheriff, the judgment may be satisfied by the labor of the person as herein authorized. [C.'73, § 4741.]

Under this section a judgment may direct that defendant be confined to hard labor at the rate of $1.50 per day, but it cannot direct that he be confined at that rate until the judgment is paid. The duration of the imprisonment is determined by § 5440: *Keokuk v. Dressell*, 47-597; *State v. Jorden*, 39-387; *In re Jorden*, 39-394; *State v. Ancerda*, 40-151.

Where it has been made to appear by the sheriff's answer in a *habeas corpus* proceeding, that in his opinion the judgment could not be satisfied by the labor of the convict, under the provisions of this section, a subsequent pleading stating a contrary opinion on the part of the sheriff will not operate to prevent the convict's discharge: *In re Jordan*, 39-394.

See, further, §§ 5440, 5604, and notes.

As to provisions for release of poor convicts, see § 5533.

SEC. **5658. Cruel treatment.** If any officer or other person treat any prisoner in a cruel or inhuman manner, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding twelve months, or by both such fine and imprisonment. [C.'73, § 4742.]

SEC. **5659. Protecting prisoners.** The officer having a prisoner in charge shall protect him from insult and annoyance and communication with others while at labor, and going to and returning from the same, and may use such means as are necessary and proper therefor. Any person persisting in insulting and annoying or communicating with any prisoner, after being commanded by such officer to desist, shall be punished by a fine not exceeding ten dollars, or by imprisonment not exceeding three days. [C.'73, § 4743.]

SEC. **5660. City jails.** The provisions of this chapter shall apply, as far as may be, to city jails and the persons in charge thereof.

CHAPTER 2.

OF PENITENTIARIES.

SECTION **5661. Warden—how chosen—duties.** The penitentiaries shall each be under the management and control of a warden, subject to the supervision of the governor. The wardens shall be elected by joint ballot of the general assembly, and hold office for two years from the first day of April following their election. They shall be general financial and superintending agents of the state for the institutions, and held responsible for their government and disciplinary regulations, for the receipt and disbursement of all moneys which may be appropriated for building, construction, general support, the payment of indebtedness or salaries of their under officers, or for any other purpose in connection with the institution. [20 G. A., ch. 17; C.'73, § 4746; R., § 5174.]

SEC. **5662. Bond—oath.** Each shall, before entering upon the discharge of his duty, execute a bond payable to the state in the penal sum of fifty thousand dollars, with not less than five freehold sureties, to be approved by the governor, conditioned that he will faithfully discharge all his duties as general superintendent and financial agent of the state for said institution; that he will faithfully apply any and all moneys that may come into his hands by virtue of his office to the purposes for which they are appropriated, and none other; that he will cause to be kept a full and

intelligible record of all the transactions of a monetary character connected with the institution; that he will impartially, and to the best of his ability, administer the disciplinary regulations of the institution so as to contribute to the health, safe keeping and profitable employment of the convicts; that he will appoint no one to the office of clerk, deputy warden or guard through favoritism or other personal consideration, and no one without due and proper regard to his qualifications for said stations; that he will render a faithful account of all the transactions of the institution to the governor, or his lawfully authorized agent, every thirty days, and oftener, as he may be required; that he will not become directly or indirectly interested in any contract for supplying materials, labor, provisions, clothing or any other thing for the use of said penitentiary, and that, at the expiration of his official term, he will surrender all books, papers, records, moneys or other property or securities belonging to said institution to his successor in office. Each shall also take and subscribe an oath or affirmation, which shall be indorsed on the back of said bond, that he will support the constitution of the United States and that of the state of Iowa, and that he will scrupulously observe all the stipulations and conditions of said bond, and faithfully discharge all his duties agreeably to law according to the best of his ability, which bond shall be filed with the secretary of state. [C.'73, § 4747; R., § 5175.]

SEC. **5663. Restrictions—clerk—guards.** The warden must not carry on nor be concerned in the business of trade or commerce during his continuance in office; he must reside constantly within the precincts of the prison, and shall take charge of the penitentiary and of all the interests of the state connected therewith, and shall appoint some suitable person as clerk, who shall also act as commissary under the direction of the warden, and one deputy, and as many guards as may be necessary to the safe keeping and government of the convicts, not exceeding one for every ten convicts under his charge at Fort Madison, and one for every eight at Anamosa. At no time shall there be less than thirteen guards at Fort Madison. [17 G. A., ch. 149; C.'73, § 4748; R., § 5142; C.'51, § 3128.]

SEC. **5664. Monthly report.** Each warden shall render to the governor between the first and tenth days of every month, and as nearly as practicable every thirty days, and oftener as the governor may require, a statement under oath of all the transactions of the institution, including the receipts and disbursements of funds—for which disbursements he shall in all cases present the proper vouchers—the entering into or discharging contracts, the reception and discharge of convicts, the construction, altering or repairing the buildings, walls or other structures, and all his official acts and doings for thirty days next preceding the presentation of said monthly report; which statement must contain an exact account of all moneys received, together with a copy of all proposals received by him, and from what source and on what account, and all moneys paid out, and for what purpose the same were expended, and a succinct account of all his doings as warden during said period, and a reference to his authority for such action. [C.'73, § 4749; R., § 5177.]

SEC. **5665. Biennial report.** Each warden shall biennially report under oath to the governor all his acts and doings for the preceding two years, and the general condition of the institution, financially and otherwise, together with the estimates necessary for the next succeeding two years, specifying distinctly the items for which those estimates and the basis upon which his calculations are made, and the governor may require a like or any other report before any special session of the general assembly. [22 G. A., ch. 82, § 35; C.'73, § 4750; R., § 5178.]

SEC. **5666. Discipline—discharge of officers.** Each warden shall see that the laws and disciplinary rules and regulations of the institution are faithfully executed by his under officers and obeyed by the convicts; and it shall be his duty, upon failure or refusal of any clerk, deputy warden or guard to discharge his duty, forthwith to discharge him, and fill the vacancy

by the appointment of another person; and disobedience by the convicts shall be punished by the infliction of such penalties as are provided by law and the rules which are prescribed for the government of said institution. The warden shall keep a register of all punishments inflicted on any convict, and the cause for which they were inflicted. [C. '73, § 4751; R., § 5179.]

SEC. **5667. Clerk—bond—oath.** Each clerk of the penitentiary shall receive his appointment from and hold his office during the pleasure of the warden, and be in all things responsible to him. Before entering upon the discharge of his duties, he shall give bond to the state in the penal sum of forty thousand dollars, with two or more freehold sureties, to be approved by the governor, conditioned that he will keep a fair, honest, impartial and faithful record of the affairs of the penitentiary, written in a legible hand, with proper indices, upon a system of bookkeeping which shall enable him at all times to present in a plain and intelligible manner the financial condition of the institution; that he will discharge all his duties as clerk and commissary faithfully; and that he will not become interested, directly or indirectly, in any contract for furnishing supplies for the use of said institution; and that he will yield strict and implicit obedience to the laws, rules and regulations of the institution, and to all the legal orders of the warden. He shall also take and subscribe an oath, which shall be indorsed on the bond, that he will support the constitution of the United States and that of this state, and that he will scrupulously observe all the conditions, stipulations and requirements thereof, and will faithfully discharge his duty as clerk and commissary during his continuance in office, according to the best of his judgment and ability; which bond shall be filed in the office of the secretary of state, and action thereon may be brought for the violation of any of its conditions, in the name of the state, for the use of the warden or any other person injured by such violation. [26 G. A., ch. 79, § 1; C. '73, § 4752; R., § 5180.]

SEC. **5668. Accounts kept.** Among other entries to be made in the books of the institutions, each clerk shall open a separate account with the state, and he shall have a cash prisoners' fund, construction, repairing, provision, bedding and lights, fuel, salaries, hospital, and miscellaneous account, an account with the lessees of convict labor, and an account with each officer and guard; and all the entries belonging to any one of the classes, whether they are debits or credits, shall be made under the appropriate head, and the clerk shall, whenever required by the warden, make out a complete balance sheet and swear to the same. [C.'73, § 4753; R., 5181.]

SEC. **5669. Deputy warden.** Each deputy warden shall receive his appointment from the warden, and shall hold his office during his pleasure; he shall give bond with sureties and in the same manner, take a like oath, and be in all respects subject to like responsibilities, as the clerk, so far as the same are applicable; but the amount of the bond shall be five thousand dollars. He shall keep a regular time-table of the convict labor, and record the same in a book to be kept for that purpose, and shall keep a record of all the business under his control, and return an account thereof, together with an account of the convict labor, to the clerk at the close of each day. [18 G. A., ch. 154, § 3; C.'73, § 4754; R., §§ 5169, 5182.]

SEC. **5670. Guards.** Each of the guards, when appointed, shall give bond to the warden with sureties to be approved by him, in the penal sum of one thousand dollars, conditioned that he will faithfully discharge his duty and obey the lawful orders of the warden; and shall take and subscribe an oath, which shall be indorsed thereon, that he will support the constitution of the United States and that of this state, and will scrupulously observe all the conditions and stipulations of his bond; which bond shall be filed in the office of the clerk of the penitentiary, and a note thereof made on the record as to the date, amount and name of the principal and his sureties, and he shall hold his office during the pleasure of the warden. [C. '73, §§ 4755–6; R., §§ 5183–4.]

SEC. **5671. Chaplain.** Each warden shall appoint some suitable minister of the gospel chaplain of the penitentiary, who shall hold his office during the pleasure of the warden, and shall give as much of his time as the condition and employment of the convicts will reasonably justify in giving them moral and religious instruction, and who shall at all times, when in the opinion of the warden the necessary labor of the convicts or the safety of the prison does not render it impracticable, have access to the convicts for that purpose, and should any of them be illiterate, the chaplain shall give them instruction in the ordinary branches of learning. [C.'73, § 4757; R., § 5185.]

SEC. **5672. Physician—medical record.** Each warden shall appoint, with the approval of the governor, a physician for the penitentiary under his charge, who shall be a regular practicing physician under the laws of this state, be possessed of sufficient surgical instruments to perform all ordinary operations, who shall visit the prison at least once each day, and oftener, if necessary, personally examine all prisoners who are ill or claiming to be and reported to him, prescribe for such as in his judgment require treatment, examine every prisoner when admitted to the prison, keep a book to be called the hospital record, make therein a record of the physical condition, age, constitution, habits and health of all such, record the name of each patient treated, his age, occupation, symptoms, disease and treatment, have power with the concurrence of the warden to purchase such medicines and other supplies as in his judgment are necessary for the use of the hospital, and furnish the clerk immediately with the bills therefor, who shall compare them with the articles received, shall, when visiting the prison, conform to the rules and regulations thereof, express no opinion of the ability or disability of a prisoner, except in his record, which shall be authority for the officers in administering the regulations of the prison in relation to such prisoners, and, when a prisoner dies, he shall have the privilege of making a *post-mortem* examination of his remains, unless objection thereto shall be made by the relatives of such deceased, and shall record the result of it in the hospital record in connection with the record of treatment. He shall also be physician for the department for the criminal insane. [C.'73, §§ 4758–65.]

SEC. **5673. Steward.** There shall be a steward nominated by him, who shall receive his appointment from the warden, and whose duty it shall be to dispense the medicine prescribed by the physician, and to do all other things necessary to carry out the treatment as directed. He shall act as guard or keeper of the prisoners in the hospital, and shall receive the same wages as other day guards or keepers, and be subject to the same rules and regulations. [C.'73, § 4766.]

SEC. **5674. Matron.** The warden may appoint a matron of the women's department who, under his general direction, shall have exclusive charge thereof, and shall keep a time-table of female convict labor, recording the same in a book for that purpose, and keep a record of all business under her control, returning an account thereof with an account of the female contract labor to the clerk at the close of each day. [20 G. A., ch 187, § 2.]

SEC. **5675. Hard labor—solitary confinement.** All punishment in the penitentiary by imprisonment must be by confinement to hard labor, and not by solitary imprisonment; but solitary imprisonment may be used as a prison discipline for the government and good order of the convicts. [C.'73, § 4770; R., § 5137; C.'51, § 3118.]

SEC. **5676. Prisoners of United States.** Convicts sentenced for a life or less term at hard labor shall be received by the warden into the penitentiary designated by the executive council, and those so sentenced by any court of the United States may be so received, and there kept in pursuance of their sentences, and it shall be unlawful for the warden of either penitentiary to receive convicts from outside of the districts named by the execu-

tive council, except upon their order or that of the governor. [16 G. A., ch. 40, § 8; C.'73, § 4771; R., § 5138; C.'51, § 3119.]

These provisions vesting in the executive council the authority to determine in which penitentiary convicts shall be confined is not unconstitutional: *O'Brien v. Barr*, 83–51.

And *held*, that the council might designate by classes instead of by individuals the persons who should be transferred from one penitentiary to another: *Ibid.*

SEC. **5677. Service of process upon prisoner.** All original or other legal notices addressed to a prisoner shall be served upon him by the warden or his deputy, and all processes against him, whether directed to the warden or any peace officer, shall be executed by the warden or his deputy, and the returns made accordingly. [C.'73, § 4772; R., § 5144; C.'51, § 3130.]

SEC. **5678. Contracts for supplies.** All articles of food, clothing, bedding, raw materials for manufacture, fuel and other articles that may be necessary for the use of either penitentiary must be contracted for by the year, when such contracts can be advantageously made, in the following manner: Each warden shall annually make out an estimate of the quantity of each article necessary for the next ensuing year, commencing on the first day of October of each year, and ending on the last day of September thereafter, and advertise that he will receive sealed proposals for furnishing and delivering at the prison such articles, or any of them, until the first day of October, payment to be made quarterly, stating the quantity and quality of each article required, the time when each must be delivered, and the terms of payment; which advertisement he shall cause to be inserted in one or more of the papers published in Fort Madison and Anamosa, and in one or more of the papers published at the seat of government, three weeks successively, the last publication to be at least one month before the first day of October in each year; but no advertisement shall be made until the estimates are submitted to the executive council and are approved by it, and all bills and awards of contracts for supplies shall be allowed and approved by it. [17 G. A., ch. 186; C.'73, § 4773; R., § 5145; C.'51, § 3131.]

SEC. **5679. Bills of supplies.** The warden must take bills of the quantity and price of the supplies furnished for the prison at the time of the delivery, and must exhibit the same to the clerk, who must compare the same with the articles delivered. If the bills are found correct, he must enter them with the date in a book to be kept for that purpose. In like manner bills shall be taken and entered of all services rendered for the prison. If any such bill be found incorrect, the clerk shall omit to enter it, and immediately give notice to the warden, that the error may be corrected. [C.'73, § 4774; R., § 5148; C.'51, § 3134.]

SEC. **5680. Contractor to give security.** No contract shall be accepted by the warden unless the contractor gives satisfactory security for the performance of it. [C.'73, § 4775; R., § 5149; C.'51, § 3135.]

SEC. **5681. Escape of prisoner—reward.** If a convict escapes from the penitentiary, the warden shall take all proper measures for his apprehension; and for that purpose he may offer a reward, not exceeding fifty dollars, to be paid by the state, for the apprehension and delivery of such convict. [C.'73, § 4776; R., § 5160; C.'51, § 3147.]

SEC. **5682. Discharge.** No convict shall be discharged from the penitentiary until he has remained the full term for which he was sentenced, to be computed from and including the day on which he was received into the same, exclusive of the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, unless he be pardoned or otherwise released by legal authority. [C.'73, § 4777; R., § 5161; C.'51, § 3148.]

SEC. **5683. Property of convict.** The warden shall receive and care for any property any convict may have on his person upon entering, and, if convenient, place the same, if money, at interest for the owner's use, keeping an account thereof, and on the discharge of the convict return, and if money, repay the same with the interest so earned, to him or his legal rep-

resentatives, unless in the meantime it has been previously disposed of according to law. [C.'73, § 4778; R., § 5162; C.'51, § 3149.]

SEC. **5684. On discharge.** When a convict is discharged, the warden shall furnish transportation to him by means of a ticket for passage to the point in this state nearest his home, if he have one, or to any point of a like distance without the state, and, in addition thereto, the warden shall furnish him a suit of common clothing, and not less than three nor more than five dollars in money, all at the expense of the state, an account of which shall be kept by the warden. [15 G. A., ch. 48; C.'73, § 4779; R., § 5163; C.'51, § 3150.]

SEC. **5685. Visitors.** The warden shall demand and receive of each person, except those exempt by law and relatives of a convict confined therein, who visits the prison for the purpose of viewing the interior or precincts, a sum of twenty-five cents, of which the warden shall keep an account, which shall be applied for the purchase of books for the use of the prison under the direction of the governor, or some one appointed by him for that purpose. [C.'73, § 4780; R., § 5164; C.'51, § 3151.]

SEC. **5686. Who may visit.** The following persons are authorized to visit the penitentiary at pleasure: The governor, secretary, auditor and treasurer of state, members of the general assembly, judges of the supreme, district and superior courts, county attorneys, and all regular officiating ministers of the gospel; and no other person shall be permitted to go within the prison where convicts are confined except by permission of the warden. [C.'73, § 4781; R., § 5165; C.'51, § 3152.]

SEC. **5687. Expenditures.** Each warden shall see that rigid economy is practiced in all matters pertaining to the prison and the employment of the convicts, and that duplicate receipts be taken for all expenditures made on account thereof, one copy of which shall be forwarded to the auditor of state monthly. [C.'73, § 4782; R., § 5166; C.'51, § 3153.]

SEC. **5688. Collection of debts due.** The state auditor shall cause all debts due the state on account of the penitentiaries or connected therewith to be collected, and to this end shall place all such claims in the hands of the attorney-general or the county attorney of the proper county, to take such steps as may be required to accomplish the same. The officer in whose hands such matters shall be placed shall give the same personal attention. Action may be brought upon all demands in the name of the state or the warden, and judgments rendered, collected by execution and sale, at which sale the property may be bid off in the name of the state, and held and disposed of by the governor as in other cases of property owned by the state, for the use of the proper penitentiary. [C.'73, §§ 4788–9.]

SEC. **5689. Actions by or against warden.** All actions founded on contract made with the warden in his official capacity may be brought by or against the warden for the time being; and any action for injuries done or occasioned to the real or personal property belonging to the state and appropriated to the use of the penitentiary, or being under the management of the warden thereof, may be prosecuted in the name of the warden for the time being, and no such action shall abate by the warden's ceasing to be in office, but his successor, upon notice, shall assume the prosecution or defense thereof, and any judgment thereon shall stand as an ascertained claim against the state. When a new warden is appointed, all the books, accounts and papers belonging to the penitentiary shall be delivered to him, and he shall be vested with all the powers and subject to all the obligations with regard to any contract or any debts due to or from the penitentiary that his predecessor would have been if no change had taken place in the office. [C.'73, § 4791; R., § 5150; C.'51, § 3136.]

SEC. **5690. Vacancy in office of warden.** Whenever the office of warden is vacant, or he is absent from the penitentiary, or unable to perform the duties of his office, the deputy shall perform the duties and be sub-

ject to all the obligations and liabilities of the warden. [C.'73, § 4792; R., § 5151; C.'51, § 3137.]

SEC. **5691. Overseers.** Persons having suitable knowledge and skill in the branches of labor and manufactures carried on in the penitentiary may be employed as overseers, when practicable, and they must, respectively, superintend such portions of the labor of convicts for which they are most suitably qualified and which shall be assigned to them by the warden, and all of them, as well as the other subordinate officers thereof, must perform such services in the management, superintending and guarding of the same as may be prescribed by the rules and regulations or directed by the warden. [C.'73, § 4793; R., § 5153; C.'51, § 3140.]

SEC. **5692. Delinquency of officers.** If any subordinate officer of the penitentiary is guilty of negligence or unfaithfulness in the discharge of his duties, or of a violation of any of the laws, rules and regulations for the government thereof, the warden may deduct from the pay of such officer a sum not exceeding one month's pay. [C.'73 § 4794; R., § 5154; C.'51, § 3141.]

SEC. **5693. Pestilence among convicts—minors separated.** In case any pestilence or contagious sickness breaks out among the convicts, the warden may cause those confined in the penitentiary or any of them to be removed to a suitable place of security, where the sick shall receive all necessary care and medical attendance, and those removed must be returned as soon as may be to the penitentiary, to be confined according to their respective sentences, if the same be unexpired. It shall be the duty of the warden of the penitentiary to keep prisoners under the age of eighteen, when not under the personal supervision of the officers of the penitentiary or at work, separate from the prisoners above that age, and to prevent personal communication between such classes, except as to such prisoner under eighteen years of age who is likely to or does exercise an immoral influence over those with whom he is associated. Any warden who shall fail or refuse to obey the provisions of this section may be removed from office therefor. [26 G. A., ch. 105, §§ 1, 3, 4; C.'73, § 4795; R., § 5156; C.'51, § 3143.]

SEC. **5694. Negligence of officers.** If any officer or other person employed in the penitentiary or its precincts negligently suffer any convict confined therein to be at large without its precincts, or out of the cell or apartment assigned to him, or to be conversed with, relieved or comforted contrary to law or the rules and regulations of the penitentiary, he shall be punished by a fine not exceeding five hundred dollars. [C.'73, § 4796; R., § 5157; C.'51, § 3144.]

SEC. **5695. Resistance to authority.** If a convict sentenced to the penitentiary resists the authority of any officer, or refuses to obey his lawful commands, such officer shall immediately enforce obedience by the use of such weapons or other aid as may be effectual, and if, in so doing, any convict thus resisting be wounded or killed by such officer or his assistants, they are justified. [C.'73, § 4797; R., § 5158; C.'51, § 3145.]

SEC. **5696. Insurrection.** Every officer and citizen of the state within reach shall, by every means within his power, suppress and aid in suppressing any insurrection among the convicts in the penitentiary, and prevent and aid in preventing the escape or rescue of any convict therefrom, or from any legal confinement, or from any person in whose custody a convict may be. If in the performance of this duty, or in arresting or assisting to arrest a convict who has escaped or been rescued, such officer or person wound or kill the convict, or a person aiding or assisting him, the same shall be held justifiable. [C.'73, § 4798; R., § 5159; C.'51, § 3146.]

SEC. **5697. Governor to visit.** The governor shall visit said penitentiary personally, as often at least as once in three months, to inspect the books, papers and records of the clerk and deputy warden, and strictly to inquire into the official conduct of the warden, to examine into the general, economical, sanitary and disciplinary regulations thereof, and to alter and amend the same in any manner which may be best calculated to promote

economy in expenditure, and the health, safe keeping and obedience of convicts; and all such alterations and amendments shall be reduced to writing, signed by the governor, and filed by him with the clerk, who shall forthwith record the same. And in case it is impracticable at any time for the governor to make such visit and inspection personally, he may appoint some suitable person to perform that service and report to him; but such person so appointed shall not have the power to make any alteration in the government of the institution, but may report to the governor only; and it is hereby made the duty of the governor to perform the service personally, if practicable. [C.'73, § 4799; R., § 5186.]

SEC. **5698. Appointment of visitor.** In making the appointment of visitor, as provided for in the preceding section, the governor shall take care that no one is appointed who may be supposed to be under the influence surrounding either the penitentiary or any of its officers, nor shall any one be appointed who has hitherto been officially connected therewith, nor shall the same person be appointed twice in succession. [C.'73, § 4800; R., § 5187.]

SEC. **5699. Removal of warden.** Should the governor at any time become satisfied that the warden is guilty of official negligence or misconduct in any particular so that the safety or health of the convicts is endangered, or that any funds appropriated for said institution are illegally invested or misapplied, or that said warden is in any manner conducting the affairs of the prison contrary to law and good faith, he shall forthwith remove said warden, notifying him of the specific cause for his removal, and also reporting to the next session of the general assembly, specifying his reasons therefor. He shall also appoint a warden to fill the vacancy thus occasioned, who shall qualify in the same manner as the regularly elected warden, but shall hold his office only until the vacancy is filled by the succeeding general assembly. [C.'73, § 4801; R., § 5188.]

SEC. **5700. Filling vacancy.** The governor shall fill all vacancies that may occur in the office of warden by death, resignation or otherwise between the sessions of the general assembly, but no appointment thus made shall last over a session of the general assembly. [C.'73, § 4802; R., § 5189.]

SEC. **5701. Penalty for failure of duty.** Should any person required to perform any duty relative to either penitentiary wilfully fail or refuse to perform the same, he shall be punished by fine in any sum not exceeding one thousand dollars, and shall forfeit his office; and should said wilful failure or refusal result in the escape of any of the convicts, or in loss of any of the funds appropriated to the use and benefit of the penitentiary, provided said sum so lost shall exceed the amount of twenty dollars, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than ten years. [C.'73, § 4805; R., § 5196.]

SEC. **5702. Contracts for convict labor.** The warden, with the consent of the executive council, shall make contracts for the labor of convicts at the penitentiary of the state at Fort Madison for such time, not exceeding ten years, and at such prices, as said council may think for the best interests of the state, and, with the approval of the executive council and with the consent of contracting parties, he may modify or cancel any existing contracts in relation to the labor of convicts. [18 G. A., ch. 149.]

SEC. **5703. Good conduct—diminution of sentence.** The deputy warden of each penitentiary shall keep a book in which shall be entered a record of each infraction of the published rules of discipline committed by a prisoner, with his name, and he shall forfeit, as herein provided, any diminution of time earned under this section. Each prisoner who shall have no infraction of the rules and regulations of the penitentiaries or laws of the state recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to the diminution of time from

his sentence as appears in the following table for the respective years of the sentence, and if the sentence be for less than a year, then the *pro rata* part thereof:

NO. OF YEAR OF SENTENCE.	GOOD TIME GRANTED.	TOTAL GOOD TIME MADE.	TIME TO BE SERVED IF FULL TIME IS MADE.
1st year	1 month	1 month	11 months.
2d year	2 months	3 months	1 year and 9 months.
3d year	3 months	6 months	2 years and 6 months.
4th year	4 months	10 months	3 years and 2 months.
5th year	5 months	1 year and 3 months	3 years and 9 months.
6th year	6 months	1 year and 9 months	4 years and 3 months.
7th year	6 months	2 years and 3 months	4 years and 9 months.
8th year	6 months	2 years and 9 months	5 years and 3 months.
9th year	6 months	3 years and 3 months	5 years and 9 months.
10th year	6 months	3 years and 9 months	6 years and 3 months.
11th year	6 months	4 years and 3 months	6 years and 9 months.
12th year	6 months	4 years and 9 months	7 years and 3 months.
13th year	6 months	5 years and 3 months	7 years and 9 months.
14th year	6 months	5 years and 9 months	8 years and 3 months.
15th year	6 months	6 years and 3 months	8 years and 9 months.
16th year	6 months	6 years and 9 months	9 years and 3 months.
17th year	6 months	7 years and 3 months	9 years and 9 months.
18th year	6 months	7 years and 9 months	10 years and 3 months.
19th year	6 months	8 years and 3 months	10 years and 9 months.
20th year	6 months	8 years and 9 months	11 years and 3 months.
21st year	6 months	9 years and 3 months	11 years and 9 months.
22d year	6 months	9 years and 9 months	12 years and 3 months.
23d year	6 months	10 years and 3 months	12 years and 9 months.
24th year	6 months	10 years and 9 months	13 years and 3 months.
25th year	6 months	11 years and 3 months	13 years and 9 months.

[23 G. A., ch. 57, § 1; 18 G. A., ch. 154, § 1.]

SEC. **5704. Forfeiture.** Any convict entitled to any diminution of his sentence under the preceding section, who shall violate any of the rules, regulations or laws for the government of the penitentiaries, shall forfeit, for the first offense, two days; for the second, four days; for the third, eight days; for the fourth, sixteen days, and, in addition thereto, whatever number of days more than one that he is in punishment shall also be forfeited; for more than four offenses, or for an escape or attempt to escape, the warden shall have the power, with the approval of the governor, to deprive him of any portion or all of the good time that the convict may have earned, but not less than as provided for the fourth offense. [23 G. A., ch. 57, § 2.]

SEC. **5705. Separate sentences.** When a convict is committed under several convictions with separate sentences, they shall be construed as one continuous sentence in the granting or forfeiting of good time. [Same, § 3.]

SEC. **5706. Restoration to citizenship.** The governor shall have the right to grant any convict who has been confined in the penitentiaries, whom he shall think worthy thereof, a certificate of restoration to all his rights of citizenship, although such convict may have been guilty of an infraction of the rules and regulations of the penitentiary. The warden, upon request of the governor, shall, in case of application for such restoration, furnish him with a statement of the convict's deportment during his imprisonment, and may at all times make such recommendations to the governor as he shall think proper respecting his restoration thereto. [Same, § 4.]

SEC. **5707. Work in stone quarries.** Able-bodied male persons sentenced to imprisonment in the penitentiary may be taken to that at Anamosa, there confined and worked upon the state stone-quarries near said penitentiary, but the labor of such convicts shall not be leased, and the warden shall keep a regular time-table of the convict labor and record thereof in a book provided for that purpose, and shall also keep a record of all the business under his control, returning to the clerk at the close of each day an

account thereof, together with that of convict labor. He shall also have all stone which is not used for building purposes by the state, together with all refuse stone at the quarries, broken with hammers into pieces of not more than two and one-half inches in diameter, to be used for the improvement and macadamizing of streets and highways, this work to be done by convict labor when not otherwise employed, but the warden may in his discretion make such disposition of any surplus refuse stone at the quarries as may be for the best interest of the state. [25 G. A., ch. 20, § 1; 18 G. A., ch. 154, § 3; 17 G. A., ch. 187; 16 G. A., ch. 40, §§ 7, 8; 14 G. A., ch. 43, § 14.]

SEC. **5708. Disposal of stone.** If any county, township, town, city or road district desires such stone for such purposes, the road supervisor or other officer having the supervision of streets and roads shall notify the county auditor, who, if satisfied the stone is needed for said purposes, shall issue his requisition upon the warden of the penitentiary for the quantity desired, but this shall not exceed ten car loads to any county, township town, city or road district per month, until all other like orders are filled; upon receipt of the requisition for the stone, the warden shall cause it to be loaded upon the cars, free of all charges, but the transportation thereof shall be at the expense of the party in whose favor the requisition is issued. and all such requisitions shall be filed in the office of the warden and filled in the order in which they were received, and the stone thus broken shall be used or disposed of for no other purpose, except by the state, or such other purposes as may be named in this chapter. [25 G. A., ch. 20, §§ 2, 3.]

SEC. **5709. Department of criminal insane.** The department for the criminal insane in the penitentiary at Anamosa shall be under the control and management of the warden, and as a part thereof, in which all insane convicts shall be confined and treated. Any convict confined in the penitentiary at Fort Madison, becoming insane, shall be transferred by order of the governor, to be issued by him upon receipt of a certificate from the physician of said penitentiary, to the department for the insane at Anamosa, and confined therein until he shall have served out his sentence or shall be pronounced cured, in which latter event he shall be there held in the penitentiary to serve out his unexpired sentence; and whenever a convict in the penitentiary at Anamosa is pronounced insane by the physician thereof, the like course shall be pursued. [22 G. A., ch. 69, §§ 1–5.]

SEC. **5710. Examination at end of term.** No insane convict shall be discharged from the hospital apartment provided for the criminal insane until restored to reason, except as hereinafter provided. At the expiration of the term of sentence of such convict, an examination shall be made by competent physicians, and if it shall be found that he has not been restored to reason, such fact shall be certified to the governor, who shall investigate the matter, and if in his opinion such convict should be transferred to one of the hospitals for the insane, he may so order, or he may order that said convict shall be retained in the hospital apartment of the prison for criminal insane. [Same, § 6.]

SEC. **5711. Assistant deputy warden.** An assistant deputy warden shall be appointed, with the approval of the governor, for the penitentiary at Anamosa, who shall have charge of the department of the criminal insane, and who shall give bond in the sum of three thousand dollars with sureties, to be approved by the governor and filed with the secretary of state. [22 G. A., ch. 69, §§ 9, 10.]

SEC. **5712. Removal of officers.** Any officer of either penitentiary may be removed by the officer appointing him, and in the same manner.

SEC. **5713. On account of interest in contracts.** Should any officer be or become in any manner interested in contracts for furnishing provisions, clothing or other necessities for the use of a penitentiary, or be or become in any manner interested in contracts for buildings or the construction of buildings of any kind, in any way connected therewith, or for furnishing material of any kind for the construction of such buildings, or in any con-

tract for the labor of convicts, such officer so interested shall, upon proof thereof being made, be removed from office and forfeit any interest he may have therein, and, on conviction thereof, shall be fined in any sum not more than two thousand, nor less than five hundred dollars. [C.'73, § 4769; R., § 5191.]

SEC. **5714. Governor's traveling expenses.** The traveling expenses of the governor, incurred in the performance of any of the services required by this chapter, shall be paid out of the state treasury, upon his filing an itemized and verified account thereof with the auditor, who shall thereupon audit the same and draw his warrant upon the treasurer for the amount. [C.'73, § 4803; R., § 5194.]

SEC. **5715. Compensation of visitor.** Should he be unable to perform such duties in person, and appoint any one to make visits and inspection for him, such person shall render to him at once an itemized and verified account of his traveling and other expenses, together with the time engaged, and he shall determine the amount due, which shall not exceed three dollars per day and such expenses, and shall issue to such person his certificate thereof, and, upon its presentation to the auditor, he shall draw his warrant upon the treasurer for the amount. [C.'73, § 4804; R., § 5195.]

SEC. **5716. Compensation of officers and employes.** The officers and employes of each penitentiary shall be paid for their services the following sums, monthly: the warden, one hundred and sixty-six dollars and sixty-seven cents; the deputy warden, one hundred dollars; the clerk, one hundred dollars; the chaplain, seventy dollars; each turnkey and guard, fifty dollars; the physician at Fort Madison, fifty dollars; the physician at Anamosa, for his entire services in the penitentiary and the department for the criminal insane, one hundred dollars; the assistant deputy warden in charge of the criminal insane department, eighty-three dollars and thirty-four cents; the matron, seventy-five dollars; which amounts shall be paid by the state treasurer upon the requisition of the warden, accompanied with a detailed itemized statement duly verified, showing the number and kind of guards employed, the separate, several payments of the money drawn the previous month, and such other matters, if any, as the state auditor may require. [26 G. A., ch. 79, § 2; 22 G. A., ch. 69, §§ 7, 10; 20 G. A., ch. 187, § 2; 18 G. A., ch. 200; 17 G. A., ch. 167; 16 G. A., ch. 156; C.'73, §§ 4783–4; R., § 5192.]

SEC. **5717. House rent of warden—affidavit.** The warden shall also be furnished with house rent, fuel and lights for himself and family at the expense of the state, but no other perquisites or allowances. No warrant shall issue to the warden for his compensation until he shall make and file with the auditor of state an affidavit that he has not since the last payment to him, directly or indirectly, converted to his own use any provisions, supplies, waste or materials belonging to the state, nor permitted the same to be done by any other officer or person, except as herein provided. [18 G. A., ch. 200; 17 G. A., ch. 167; 16 G. A., ch. 156; C.'73, § 4783; R., § 5192.]

SEC. **5718. Support of convicts.** For the general support of the convicts confined in the penitentiaries, there shall be paid out of the state treasury the sum of nine dollars monthly for each convict at Fort Madison, and nine dollars and fifty cents monthly for each convict at Anamosa, or so much thereof as may be necessary, to be estimated by the average number for the preceding month, subject to a deduction of the sum charged to contractors of convict labor for that month, which sum shall be paid upon the requisition of the warden, accompanied with a statement of the number of convicts and the amount charged to contractors for that month, by the state treasurer. If the sum so charged to contractors cannot be collected in time to be available for such support for any given month, the governor may direct the payment of the full amount allowed for the support, or any part thereof, as may be necessary. [19 G. A., ch. 91; 17 G. A., ch. 83; C.'73, §§ 4785–7.]

STATUTES AND RULES

REGULATING PRACTICE IN THE

SUPREME COURT OF IOWA.

REVISED AND ADOPTED AT THE MAY TERM, 1897,
AND TO TAKE EFFECT OCTOBER 1, 1897.

[Notes of decisions referring to the subject matter of the rule will be found under the corresponding section of the Code. Even where the rule is not directly based on any Code section, the cases bearing on the rule are incorporated into notes to sections of the Code and references to such sections are given.]

I. OF THE ORGANIZATION.

SECTION 1. The supreme court shall consist of six judges, four of whom constitute a quorum for the transaction of business, but one alone may adjourn from day to day, or to a particular day, or until the next term. [Code, § 193.]

SEC. 2. The judge whose term first expires shall be the chief justice, and so on in rotation. [Const., art. V, § 3.]

II. OF THE JURISDICTION.

SEC. 3. The supreme court has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law. [Code, § 4100.]

SEC. 4. An appeal may also be taken to the supreme court from:

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

2. A final order made in special actions affecting a substantial right therein, or made on a summary application in an action after judgment;

3. An order which grants or refuses, continues or modifies a provisional remedy; grants or refuses, dissolves, or refuses to dissolve an injunction or attachment; or grants or refuses a new trial; or sustains or overrules a demurrer;

4. An intermediate order involving the merits or materially affecting the final decision;

5. An order or judgment on habeas corpus. [Code, § 4101.]

SEC. 5. If any of the above orders or judgments are made or rendered by a judge, the same are reviewable, the same as if made by a court. [Code, § 4102.]

SEC. 6. The supreme court has power to issue all writs and processes necessary to secure justice to parties, and to enforce its appellate jurisdiction; and it may exercise supervisory control over all inferior judicial tribunals. [Const., art. V, § 4; Code, § 4109.]

SEC. 7. It may enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may continue until its mandates are obeyed. [Code, § 4147.]

III. OF THE TERMS.

SEC. 8. The supreme court shall be held at the seat of government, and shall convene and hold three terms each year, one of which shall commence on the third Tuesday in January, one on the second Tuesday in May, and one on the first Tuesday in October. Each of said terms of court shall be for the submission and determination of causes and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of the court. The court shall remain in session so far as practicable until it is determined what the opinion of the court shall be in all causes submitted to it, except in causes where a re-argument is ordered. Judgments of affirmance, rulings and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time regardless of the terms of court. [Code, § 192.]

IV. OF APPEALS.

SEC. 9. Appeals from the superior and district courts may be taken to the supreme court at any time within six months from the rendition of the judgment or order appealed from, and not afterward. No appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall, during the term in which judgment is entered, certify that the cause is one in which the appeal should be allowed, and upon such certificate being filed the same shall be appealable regardless of the amount in controversy, but this limitation shall not affect the right of appeal in any action in which an interest in real estate is involved, nor shall the right of appeal be affected by the remission of any part of the verdict or judgment returned or rendered. [Code, § 4110.]

SEC. 10. A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon those not joining therein and file proof thereof with the clerk of the supreme court. [Code, § 4111.]

SEC. 11. Co-parties refusing to join in an appeal cannot afterwards appeal or derive any benefit therefrom, unless from the necessity of the case, but they shall be held to have joined, and be liable for their proportion of the costs unless they appear and object thereto. [Code, § 4112.]

SEC. 12. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice. [Code, § 4150.]

SEC. 13. An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part. [Code, § 4114.]

SEC. 14. A notice of appeal shall be served and return made thereon in the same manner as an original notice in a civil action and filed in the office of the clerk in which the judgment or order appealed from was rendered or made. All other notices connected with or growing out of the appeal shall be served and the return made in like manner and filed in the office of the clerk of the supreme court and all notices provided for in this section become a part of the record in the case on being filed. [Code, § 4115.]

V. OF DOCKETING CAUSES.

SEC. 15. A notice of appeal must be served thirty, and the cause filed and docketed fifteen, days before the first day of the next term of the

supreme court, or the same shall not be submitted at that term, unless the parties consent thereto. If the appeal is taken less than thirty days before the term, it must be so filed and docketed for the next succeeding term. [Code, § 4116.]

SEC. 16. The cause on appeal shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee. No case shall be docketed until the fees provided by law therefor have been paid. [Code, §§ 4108, 4121.]

SEC. 17. The clerk shall docket the causes as they are filed in his office, and shall arrange and set a proper number for trial for each day of the term, placing together those from the same judicial district. No cause shall be docketed unless the abstract is filed fifteen days before the first day of the term at which the cause is set down for trial unless otherwise ordered by the court. If the abstract is not so filed the case shall be docketed for the next succeeding term. [Code, §§ 4117, 4119; Old Rules, § 114.]

SEC. 18. Immediately after the time expires during which causes may be docketed for trial at a term of court, the clerk shall make and cause to be printed, without delay, the docket for the term, which shall give all causes, whether continuances or appearances, for trial at such term, which shall designate the number, the party appealing, the court and county from which the appeal is brought, the counsel of the parties, the day each cause is assigned for trial, and such other matter for information of the court and attorneys as may be conveniently given. He shall forward to each judge of the court, to each attorney having causes at the term, and to the clerk of the district and superior courts of each county, a copy of said docket. [Old Rules, § 115.]

VI. OF ADVANCING CAUSES.

SEC. 19. If a cause involves the decision of a question of public importance, or rights which are likely to be lost or greatly impaired by delay, the court will, in its discretion, upon motion supported by affidavit, order the submission of the cause at a term in advance of that at which it would otherwise be submitted.

VII. OF ABSTRACTS, TRANSCRIPTS AND RECORDS.

SEC. 20. At least thirty days before the day assigned for the hearing of a cause, the appellant shall serve upon each appellee, or his attorney, a printed copy of so much of the abstract of record as may be necessary to a full understanding of the questions presented for decision, which abstract shall be prepared as required by §§ 67, 68 and 69 of these rules. The appellant shall also, fifteen days before the first day of the term for which the cause is to be docketed for trial, file with the clerk twelve copies of said abstract. No cause shall be heard until thirty days after such service and fifteen days after such filing with the clerk, unless advanced by order of the court. In case of cross-appeals the party first giving notice of appeal shall, under this rule, be considered the appellant. [Old Rules, § 18.]

SEC. 21. If it appear from an inspection of the abstract that the appellant has negligently or intentionally failed to comply with the rule requiring only so much of the record as may be necessary to a full understanding of the question presented for decision to be included therein, the court may, in its discretion, order a new abstract prepared in conformity with such rule or affirm the judgment of the lower court without considering the appeal.

SEC. 22. The abstract so filed will be presumed to contain the record unless denied or corrected by a subsequent abstract. Every denial shall point out as specifically as the case will permit the defects alleged to exist in the abstract. A denial by the appellee shall be taken as true unless the appellant sustains his abstract by a certification of the record. Should the appellee deem the appellant's abstract incorrect or unfair he may prepare

such additional abstract as he shall deem necessary to a full understanding of the questions presented to the court for decision. A denial by the appellant of such additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record. The appellee shall serve one printed copy of his additional abstract or denial on each appellant or his attorney and deliver twelve printed copies thereof to the clerk within ten days after receiving the appellant's abstract, and a denial by the appellant shall be served on the appellee and twelve printed copies thereof delivered to the clerk within five days after service of the additional abstract. [Code, §§ 4118, 4120.]

SEC. 23. No certification of the record shall be required unless ordered by the supreme court, or a judge thereof, which order must be made upon an application in writing or by motion, designating the matters and things of record desired to be included therein, and showing the necessity therefor. The order, if granted, shall contain similar designations and show the parts to be given by an abstract of the original record and the portions to be by transcript, and may require any or all the matters to be presented by an amended abstract. The application and the order made shall be filed in the office of the clerk of the supreme court, who shall transmit the order to the clerk of the lower court, and send a notice or copy thereof to the appellant or his attorney. The order shall be attached to and returned with the record certified, and be submitted with the papers in the case. The appellant, upon notice or copy of the order being received by him or his attorney, shall, within five days unless otherwise ordered, pay or secure to the satisfaction of the clerk of the lower court his fees and expenses for preparing and forwarding the record ordered. [Code, § 4122; Old Rules, § 12.]

SEC. 24. When certification of the record is required the designated papers, notices, depositions, exhibits identified as evidence, notice of appeal with return or acceptance of service thereon, and any other papers filed in the case, or any part thereof, may be transmitted to the supreme court in the original form or by a transcript of the same, excepting that the shorthand reporter's translation of his report shall be transmitted in its original form, but all entries of record must be certified by transcript. The clerk of the trial court shall verify his return, whether it be of the record or transcription thereof, by his certificate, under seal, distinguishing between originals and transcripts, and such certification so made shall constitute a part of the record in the supreme court. [Code, § 4123; Old Rules, § 20.]

SEC. 25. Where a view of an original paper or exhibit in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in the manner provided for the transmission of certifications of the record. [Code, § 4124.]

SEC. 26. A transcript may be denied; and when such denial is made it shall be as specific as the case will permit. The trial court, the supreme court, or a judge of either court may make any orders necessary to secure a perfect record or transcript thereof, upon a showing by affidavit or otherwise, and upon such notice as the court or judge may prescribe. [Code, § 4120.]

SEC. 27. The transcript of any paper or exhibit required for use in the supreme court may be transmitted thereto by the clerk of the trial court, by express or other safe and speedy method, but not by a party or any attorney of a party. [Code, § 4125.]

SEC. 28. If an abstract of the record is not filed by appellant thirty days before the second term after the appeal was taken, unless further time is given by the court, or a judge thereof, for cause shown, the appellee may file an abstract of such matters of record as are necessary, or may file a copy of the final judgment or order appealed from, notice of appeal and return of service thereof, certified by the clerk of the trial court, and cause the case to be docketed, and the appeal upon motion shall be dismissed, or the judgment or order affirmed. [Code, § 4120; Old Rules, § 21.]

SEC. 29. If the appellant fail to promptly pay or secure to the satisfaction of the clerk of the trial court his fees and expenses for preparing and forwarding to the clerk of the supreme court any record ordered to be certified by the supreme court, or a judge thereof, upon receiving notice thereof or copy of the order therefor, the appeal, upon motion supported by proof of the facts, may be dismissed or the judgment affirmed as the appellee may elect. [Code, § 4122.]

SEC. 30. Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss it, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit. [Code, § 4151.]

SEC. 31. The appellee may, by answer or abstract filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper or destroy the appellant's right of further prosecuting the same, to which the appellant may file a reply or abstract likewise verified by himself, his agent or attorney, and the question of law or fact therein shall be determined by the court, upon evidence in the form of affidavits unless otherwise ordered. [Code, § 4152; Old Rules, § 27.]

VIII. OF SUPERSEDEAS BONDS.

SEC. 32. No proceedings under a judgment or order nor any part thereof shall be stayed by an appeal unless the appellant executes a bond with one or more sureties to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal, and will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When thus filed and approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby, but no appeal or stay shall vacate or affect such judgment or order. [Code, § 4128.]

SEC. 33. If a party has perfected his appeal and the clerk of the lower court refuses for any reason to approve the bond or requires an excessive penalty or unjust or improper conditions, he may apply to the district court or judge thereof, who shall fix the amount and conditions of the bond and approve the same. Pending the application, the judge may, by a written order, recall and stay all proceedings under the order or judgment appealed from, until the decision of the application. The bond thus approved shall be filed with the clerk who shall issue a written order to stay proceedings. [Code, § 4132.]

SEC. 34. The appellee may move the court rendering the judgment or making the order appealed from, or the supreme court, or a judge of either court, if in vacation, upon ten days' notice in writing to appellant, to discharge the bond on account of defect in substance or insufficiency in security, which motion, if well taken, shall be sustained, unless appellant shall, within a day to be fixed in the order made and filed therein, give a new and sufficient bond as required by said order. If the new bond is not given, proceedings shall be had in the lower court as though no bond had been given, but a new and sufficient bond may be given at any time with like effect and results as though given in the first instance. [Code, § 4133.]

SEC. 35. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not

for the payment of money, the condition shall be to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars. [Code, § 4134.]

IX. OF THE TRIAL, DECISION AND EXECUTION.

ASSIGNMENTS OF ERROR.

SEC. 36. Except in actions triable *de novo* no question shall be considered by the supreme court unless pointed out by an assignment of error, which need follow no stated form, but must clearly and specifically indicate the very error complained of, and among several points made in demurrer, motion, instructions or rulings, the one, or those relied upon, must be separately stated. The court need consider only such errors as are thus assigned, but must decide upon each one that is. [Code, § 4136.]

SEC. 37. If errors are not assigned and filed, and a copy thereof served on the appellee or his attorney ten days before the first day of the trial term, unless good cause for the failure be shown, the appellee may have the appeal dismissed or the judgment or order affirmed. [Code, § 4137.]

MOTIONS.

SEC. 38. (1.) All motions must be in writing, filed with the clerk and entered upon the motion book. No motion shall be submitted without being publicly called by the court, unless the parties otherwise agree.

(2.) All motions must be served by copy of the same and of all affidavits or documents upon which they are based, upon the opposite party or attorney, ten days before the morning on which the causes for the district are set for hearing. Such opposite party shall then have five days to file papers in resistance to the same, copies of which must be served upon the other party or attorney, and no papers will be regarded which do not appear to have been so served. This rule shall not apply to motions the causes whereof arise after the filing of the abstract, but in such cases timely notice of such motions shall be given to the opposite attorneys. Nor shall this rule apply, as to time of service, to motions for continuance.

(3.) Motions made in a cause after judgment rendered by the supreme court, or after the time assigned for the hearing of causes from the district from which it was appealed, will be heard only upon proof of service of reasonable notice of such motion upon the adverse party or attorney.

(4.) Arguments in support of motions, if any, must be in writing or print, and shall be filed before the morning of the day set for the hearing of the cause, and served by copy upon the opposite party or attorney when the motion is served; and arguments in resistance, if any, must be in writing or print and filed before the morning of the day set for the hearing of the cause, and served by copy on the opposite party or attorney when the papers in resistance are served. [Code, § 4138; Old Rules, § 52.]

X. OF BRIEFS AND ARGUMENTS.

SEC. 39. When the appeal presents to the court only questions of law upon rulings of the court below, the appellant shall open and close the argument, and must, at least thirty days before the day assigned for the hearing of the case, serve upon an attorney for each appellee copies of his brief of points and authorities or argument. If appellee desires to be heard, he shall, at least ten days prior to the hearing, serve upon an attorney for each appellant copies of his brief or argument; and the reply, if in print, shall be served at least three days before the case is to be finally submitted. If the trial in the supreme court is *de novo*, and the appellant has the burden, he shall observe the foregoing rules. But if appellee has the burden, he may waive his right to open the argument by serving notice in writing of his intention to do so upon appellant or his attorney at least thirty days before the day assigned for the hearing of the cause. Appellant will then

be entitled to open the argument, and must serve copies of his argument upon an attorney for each appellee ten days before the hearing. Appellee may then, and at least three days before the submission, serve upon an attorney for each appellant copies of his argument, which must be strictly confined to matters in reply to appellant's argument. A failure to comply with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance or to have the case submitted at his option upon the brief and arguments on file when the default occurred. [Code, § 4139; Old Rules, §§ 53, 57.]

SEC. 40. All printed briefs and arguments shall be prepared as required by § 66 hereof, and each party shall file with the clerk twelve printed copies of each brief or argument, together with proper evidence of service of the same upon opposing attorneys. The clerk shall note upon his docket the date of the service and filing of all manuscripts and arguments, and no brief or argument not served or filed within the time prescribed by these rules will be transmitted to the judges or considered by them in disposing of the case. No cause will be entered as submitted until the arguments are finally and actually concluded. [Old Rules, §§ 53, 54.]

SEC. 41. Notice in writing or in print of intention to argue a case orally shall be served upon an attorney for the adverse party and filed with the clerk fifteen days before the first day of the term, and the party who fails to so serve and file such notice shall not be entitled to argue orally, except in reply to an oral argument for the adverse party. [Old Rules, § 55.]

SEC. 42. If appellant has given the notice, he is entitled to open and close the argument, unless the cause is triable *de novo* and the appellee has the burden. If the notice was given by appellee only, he is entitled to the opening, and the appellant must confine his remarks to a reply, unless the cause is triable *de novo*. If the cause is triable *de novo* and appellee has the burden, he may, if he has given the requisite notice, open and close the argument. [Old Rules, § 57.]

SEC. 43. No oral argument shall exceed one hour in length unless an extension of time be granted before the argument of the case is commenced. Only two attorneys will be heard on each side, but in case no oral argument is made on one side, only one attorney shall be heard for the other. [Old Rules, § 56.]

SEC. 44. At the commencement of each assignment for the term all causes included in the assignment will be called, but the submission of a cause will not be taken on the first call if any party thereto object. The court will hear all causes included in the assignment and take the submissions thereof in the order in which they are assigned, excepting those which have been continued or otherwise disposed of by direction of court. [Code, § 4139; Old Rules, §§ 58, 68.]

XI. OF DECISIONS AND OPINIONS.

SEC. 45. The court may reverse, modify or affirm the judgment, decree or order appealed from, or render such as the inferior court should have done. [Code, § 4139.]

SEC. 46. No cause will be considered as decided until a written decision is filed with the clerk. The decisions of the court on all questions passed upon by it, including motions and points of practice, shall be specifically stated, and shall be accompanied by an opinion upon all such matters as are deemed of sufficient importance, together with any dissent therefrom, which dissent may be stated with or without an opinion; and all decisions and opinions, including dissents, shall be in writing and be filed with the clerk except rulings on motions which may be entered upon the announcement book. If the decision is not accompanied with an opinion, it shall briefly state the title of the case, the county from which the case was appealed, the name of the presiding judge, the nature of the action, the names of counsel appearing on either side, and the conclusions reached. [Code, §§ 198, 4139.]

SEC. 47. When the court is equally divided in opinion the judgment of the court below shall stand affirmed, but the decision is of no further force or authority. In case of such division, opinions may be filed at the option of the court. If no opinion is filed a written announcement shall be made of the division of the court upon the questions presented, and that the judgment is affirmed by operation of law. [Code, §§ 195, 198.]

XII. OF RECORDS AND REPORTS.

SEC. 48. The records and reports must in all cases show whether a decision was made by a full bench, and whether either, and if so, which, of the judges dissented from the decision. [Code, § 199.]

SEC. 49. All decisions and opinions of the court shall be published in the official reports, except such as the court may think unimportant. Decisions and opinions which are not to be included will be marked, "Not to be officially reported," and when so marked they shall not be included in the reports. [Code, § 200; Old Rules, § 60.]

XIII. OF JUDGMENTS AND DECREES.

SEC. 50. The supreme court, if it affirms the judgment, shall also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial. [Code, § 4140.]

SEC. 51. Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or part has been stayed by an appeal bond, the court may award to the appellee damages upon the amount so stayed; and, if satisfied by the record that the appeal was taken for delay only, may award as damages a sum not exceeding fifteen per cent. thereon. [Code, § 4141.]

SEC. 52. Decrees to be entered in this court shall be prepared by the attorney of the parties in whose favor they are rendered. Copies shall be served on the opposite attorney and filed in the court within twenty days after the attorney preparing them shall have received notice of the decision in the cause in which they are entered. [Old Rules, § 71.]

SEC. 53. When, by the decision, a decree is to be entered in this court at the option of either party, such option shall be declared and a decree furnished under the above rule within twenty days from the date at which the attorney required to prepare the decree received notice of the decision. [Old Rules, § 72.]

SEC. 54. No procedendo, except in criminal cases and in cases where petitions for rehearing have been overruled, shall issue in any case until the expiration of thirty days from the filing of the opinion in the case, except upon an order of one of the judges of the court, upon cause shown. [Old Rules, § 70.]

XIV. OF EXECUTIONS.

SEC. 55. If the supreme court affirms the judgment or order it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require. [Code, § 4143.]

SEC. 56. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court. [Code, § 4144.]

SEC. 57. If by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue

for the purpose of restoring to him such property or its value. [Code, § 4145.]

SEC. 58. Executions issued from the supreme court shall be like those from the district court, attended with the same consequences, and returnable in the same time. [Code, § 4153.]

SEC. 59. In cases in which the judgment below is affirmed in this court, the parties in whose favor the judgment is affirmed may have execution either from this court or the court below. In case of an execution from this court, if a process of garnishment is served upon the execution defendant, either principal or surety, the sheriff, in addition to his return, shall return a copy of the execution and his returns to the district or superior court from which the cause was appealed, and all issues of fact which may arise in said garnishment process shall be tried by that court. [Old Rules, § 67.]

XV. OF REHEARINGS.

SEC. 60. No petition for rehearing shall be filed after sixty days from the filing of the opinion or decision of the supreme court. [Code, § 4149; Old Rules, § 88.]

SEC. 61. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney, and the clerk of the court, within thirty days after the filing of the opinion or decision, and if no such notice is served, the petition for rehearing shall not be filed after the expiration of such thirty days. [Code, § 4149; Old Rules, § 89.]

SEC. 62. The petition for rehearing shall be printed and, with proof of service thereof on the opposite party, or his attorney, shall be filed with the clerk of the court within sixty days after the opinion is filed, and may be made the argument or brief of authorities relied upon for a rehearing. It shall include a copy of the opinion or decision of the court to which objection is made, or a reference to the volume and page of the Northwestern Reporter in which it has been printed. The adverse party may file an argument in response. [Code, § 4149; Old Rules, §§ 90, 92.]

SEC. 63. A copy of the petition shall be served upon the attorney of the adverse party, and if there be more than one, upon the attorney of each of them, within sixty days after the opinion or decision is filed; and twelve copies shall be delivered to the clerk of the court. If there be a printed argument in resistance of the petition, a copy thereof shall be served upon the attorney for the petitioner ten days before the day fixed for the hearing of the cause, and twelve copies shall be delivered to the clerk of the court. [Code, § 4149; Old Rules, §§ 90, 91.]

SEC. 64. The cause shall be placed on the docket and assigned for hearing at the next term, the first day of which shall not be less than twenty days after the filing of the petition. If the party applying for a rehearing shall give notice of oral argument in his petition, both parties shall be entitled to be heard orally, unless the party giving notice waive oral argument. [Code, § 4149; Old Rules, § 90.]

SEC. 65. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing. [Code, § 4148.]

XVI. OF PREPARING AND PRINTING ABSTRACTS, TRANSCRIPTS, BRIEFS, ARGUMENTS AND PETITIONS FOR REHEARING.

SEC. 66. All abstracts, denials of abstracts, briefs, arguments and petitions for rehearing shall be printed upon unruled writing paper, with type commonly known as small pica, leaded lines, the printed page to be four inches wide by seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid, or brevier with leaded lines. The first page of the abstract, denial, brief or argument, shall show the title of the cause, designating the appellant and the appellee, the term

of the supreme court to which the appeal is brought, the court from which the appeal is taken, the name of the judge who presided at the trial, and the names of the attorneys for both the appellant and appellee. [Old Rules, § 96.]

SEC. 67. The abstract must be accompanied by a complete index of its contents. [Old Rules, § 97.]

SEC. 68. Abstracts of record shall be made substantially in the following form:

IN THE SUPREME COURT OF IOWA.

JANUARY TERM, 18....

JOHN DOE, *Appellant*, vs. RICHARD ROE, *Appellee*. } Appellant's Abstract of Record. ("In Equity" or "At Law.")

Appeal from Van Buren District Court.

JOHN SMITH, Judge.

J. C. K., *for the Appellant.*
H. H. S., *for the Appellee.*

On the....day of....., 18.., the plaintiff filed in the Van Buren district court a

PETITION

stating his cause of action as follows:

[Set out all of petition necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts, as, for example, if the exhibit be a deed or mortgage and no question is raised as to the acknowledgment, omit the acknowledgment.

When the defendant has appeared it is useless to encumber the record with the original notice, or the return of the officer.]

On the....day of....., A. D. 18.., the defendant filed a

DEMURRER

to said petition setting up the following grounds:

[State only the grounds of demurrer, omitting the formal parts. If the pleading was a motion, and the ruling thereon is one of the questions to be considered, set it out in the same way, and continue.]

And on the....day of....., 18.., the same was submitted to the court, and the court made the following rulings thereon: [Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case—let each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract, but it should continue.]

And on the....day of....., 18.., the defendant filed his

ANSWER

to the petition, setting up the following defenses:

[Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the petition.

Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the abstract shows issue joined, proceed.]

BILL OF EXCEPTIONS.

On the....day of....., 18.., said cause was tried to a jury (or the court, as the case may be) and on the trial the following proceedings were had:

[Here set out so much of the evidence and proceedings as is necessary to show the rulings of the court to which exceptions were taken during the progress of the trial.]

INSTRUCTIONS.

After the evidence and the arguments of counsel were concluded, the plaintiff (or defendant, as the case may be) asked the court to give each of the following instructions to the jury:

[Set out the instructions referred to, and continue.]

Which the court refused as to each instruction, to which several rulings the plaintiff [or defendant] excepted at the time, and thereupon the court gave the following instructions to the jury:

[Set out the instructions.]

To the giving of those numbered (give the number) and to the giving of each thereof the plaintiff (or defendant) at the time excepted.

VERDICT.

On the....day of....., 18.., the jury returned into court with the following verdict:

[Set out the verdict.]

MOTION FOR NEW TRIAL.

On the....day of....., 18.., the plaintiff (or defendant) filed a motion praying the court to set aside the verdict and grant a new trial upon the following grounds:

[Set out the grounds aforesaid for the new trial.]

On the....day of....., 18.., the court made the following ruling upon said motion:

[Set out the record of the ruling.]

To which the plaintiff (or defendant) at the time excepted.

JUDGMENT.

On the....day of....., 18.., the following judgment was entered:

[Set out the judgment entry appealed from.]

On the....day of....., 18.., the plaintiff perfected an appeal to the supreme court of the state of Iowa, by serving upon the defendant and the clerk of the district court of Van Buren county a notice of appeal.

[If supersedeas bond was filed, state the fact.]

ASSIGNMENT OF ERRORS.

And the appellant herein says there is manifest error on the face of the record in this:

[Set out the errors assigned.]

This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course, no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: Preserve everything material to the questions to be decided, and omit everything else. [Code, §§ 3675, 3749; Old Rules, § 98.]

SEC. 69. The printed brief and argument shall state in divisions thereof, properly numbered, the several propositions of law claimed by the party making such brief or argument to be involved in the case before the supreme court, and authorities relied upon in support of the same. When an authority cited is an adjudicated case, the brief or argument must show the names of the parties, the volume in which it is reported, and the page or pages containing the matter to which the attorney desires to call the attention of the court. When the reference is a text-book, the number or date of the edition must be stated, with the number of the volume and page. [Old Rules, § 99.]

SEC. 70. Transcripts of the record, when required by the supreme court, or a judge thereof, may be made substantially in the manner following, viz:

STATE OF IOWA, }
County of..... }

In the district (or superior) court of Iowa, at a term begun and holden in the county of ...., on the .... day of .... , A. D. 18 .., before J. H. G., judge of the .... judicial district (or judge of the .... superior court) of the State of Iowa.

N. P. }
v. }
C. D. }

Be it remembered that heretofore, to wit, on the .... day of ...., A. D. 18 .., a petition was filed in the office of the clerk of the district (or superior) court, in and for the county of .... in words and figures following, to wit:

[Here insert the petition in full.]

[Proceed in the same manner in relation to whatever paper is filed, such as the original notice, or a petition for attachment, etc.

If the cause has come from another county by a change of venue, begin as above: "Be it remembered," and state in like manner all that was done in the county from which the venue was changed.]

And afterward there was filed in the office of the said clerk a notice, in the words and figures following, to wit:

[Here insert the notice in full.]

[Copy all indorsements on the face of the transcripts, or copy of record, and not upon the back of the leaf.]

Upon which (or attached to which) was a return as follows: [Copy the officer's return, with all indorsements in full; if the suit be by attachment, copy the petition or affidavit, writ or attachment, bond, notice, return, etc.]

And afterward, to wit: on the .... day of ...., A. D. 18..., there was filed in the office of the said clerk an answer in words and figures following, to wit:

[Here insert answer in full.]

[Should the clerk doubt what the paper is, let him call it a "paper in the words and figures following," etc.]

Where a paper is filed in term time, add the day of the term to the day of the month, as in the next form.

A. B. }
v. }
C. D. }

And afterward, to wit: on the .... day of ...., A. D. 18..., it being the .... day of the .... term of said court, the said A. B. (or plaintiff) filed the following demurrer to the answer of the said C. D. (or of the said defendant), to wit:

[Here insert demurrer in full.]

[If a party files more than one pleading at the same time, they should be numbered in their legal order, as for instance a demurrer and answer, and the transcript may say .... (stating the date) .... the said C. D. (or defendant) filed his demurrer and answer, which are filed subject to the rule.]

A. B. }
v. }
C. D. }

And now, on this .... day of .... A. D. 18..., it being the .... day of the said term thereof, this cause coming on for hearing on the plaintiff's demurrer to the defendant's answer [copy the entry of the proceedings of the court, sustaining or overruling the demurrer.]

And afterward, on the .... day of the said ...., it being the .... day of the said term, the said plaintiff filed his reply in the words and figures following, to wit:

[Here set out reply in full.]

And afterward on the same day the said defendant filed motion and affidavit for a continuance, as follows, to wit:

[Here set out copy of motion and affidavit.]

And the same being now heard and considered by the court, the said motion is sustained, and it is ordered that this cause be continued until the next term of the court (at the cost of the defendant).

In the district (or superior) court, ... county.

A. B. }
v. } .....term, A. D. 18..
C. D. }

And now on this.....day of....., it being the.....day of said term, this cause coming on for trial, came a jury, to wit.: ....., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., twelve good and lawful men, who were sworn well and truly to try the issue between the said parties, and a true verdict render, according to the law and evidence given them in court. The jury retired to consider on their verdict, and afterward, on the same day, the jury returned into court and rendered its verdict, as follows.

[Here insert in full the verdict as rendered.]

[Or if the jury does not return until the next day:]

A. B. }
v. }
C. D. }

And afterward, on the.....day of....., A. D. 18.., the jury in the foregoing cause returned into court and rendered its verdict as follows:

[Here insert in full verdict as rendered.]

A. B. }
v. }
C. D. }

And afterward, on the.... day of....., A. D. 18.., being the ..... day of said term, the shorthand reporter filed his report in writing, or in shorthand (as the case may be) cer-

tified as required by law, the translation of which, duly certified, was filed on the..... day of....., A. D. 18.., and is as follows: [Here attach the original translation unless otherwise directed by order of the supreme court, or a judge thereof.]

A. B. }
v. }
C. D. }

Now, on this.... day of....., A. D. 18.., the plaintiff filed his motion for a new trial, to wit:

[Here insert in full the motion for a new trial.]

A. B. }
v. }
C. D. }

And now, on this.... day of....., A. D. 18.., this cause coming up for a hearing on the motion of the plaintiff for a new trial, it is considered by the court that the same be overruled (or, as the case may be).

[Then add the final entries of record, comprising final judgment, etc., and certificate of clerk.]

The foregoing form is only an example, and is to be varied according to the circumstances. The actual facts of the case will dictate what is to be done, but in all cases it is to be done substantially in like manner with the above, giving the proper order and date of the filing of papers and incorporating them at the proper date into the proceedings of the court. When the order made by this court, or a judge thereof, pursuant to rules 22, 23 and 24, requires but a part of the record to be transcribed, the foregoing form should be so modified as that it will include only those matters directed to be certified. All other, except the mere formal parts, must be omitted. [Code, §§ 3675, 3749, 4122, 4123; Old Rules, § 100.]

XVII. OF APPEALS IN CRIMINAL ACTIONS.

SEC. 71. The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case, is by appeal. An appeal can only be taken from the final judgment and within one year thereafter. Either the defendant or state may appeal. [Code, § 5448.]

SEC. 72. An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, and on the clerk of such court, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto. [Code, § 5449.]

SEC. 73. When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards. [Code, § 5451.]

SEC. 74. When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered to forthwith prepare and transmit to the attorney-general a certified copy of the notice of appeal in the case, with the date of service thereof, and, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record-book, certify the same under the seal of the court, and transmit the same to the clerk of the supreme court. [Code, § 5450.]

SEC. 75. An appeal taken by the state in no case stays the operation of a judgment in favor of the defendant. [Code, § 5452.]

SEC. 76. An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in; but where the judgment is imprisonment in the penitentiary, and an appeal is taken within ninety days after judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, or judge thereof, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain

him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desires it. [Code, § 5453.]

SEC. 77. When an appeal is taken by the defendant, and bail is given, the clerk must give to the defendant, or his attorney, a certificate under the seal of the court that an appeal has been taken and bail given, and the sheriff or other officer having the defendant in custody must, upon receiving it, discharge the defendant from custody and cease all further proceedings in execution thereof, and forthwith return to the clerk of the court who issued it the execution under which he acted, with his return thereon, and if it has not been issued, it shall not be until after final judgment on the appeal. [Code, § 5454.]

SEC. 78. The party appealing is the appellant, the adverse party the appellee, but the title of the action shall not be changed on the appeal, and the cause shall be so docketed at the commencement of the period assigned for trying causes from the judicial district from which the appeal comes, which causes shall take precedence of all other business, be tried at the term at which the transcript is filed, unless continued for cause or by consent of the parties, and be decided, if practicable, at the same term. [Code, § 5455.]

SEC. 79. The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary. [Code, § 5456.]

SEC. 80. An appeal shall not be dismissed for any informality or defect in taking it, if corrected in a reasonable time, and the supreme court must direct how it shall be corrected. [Code, § 5457.]

SEC. 81. No assignment of error is necessary. [Code, § 5458.]

SEC. 82. Criminal actions shall be presented in the supreme court, by printed abstracts, denials, arguments and petitions for rehearing, as required by the rules applicable to civil actions, provided that the defendant shall be entitled to close the argument. The provisions of the code and the rules of the court in civil procedure relating to the printing, serving and filing of abstracts, denials, arguments, petitions for rehearing, notice thereof and of oral arguments, motions and resistances thereto, the certification of the record and the filing of decisions and opinions, shall apply in criminal cases. [Code, §§ 5459, 5461.]

SEC. 83. If the appeal is taken by the defendant the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it. And in case the judgment of the trial court is reversed or modified in favor of the defendant on the appeal of the defendant, he shall be entitled to recover the cost of printing abstract and briefs not exceeding one dollar for each page thereof, to be paid by the county from which the appeal was taken. [Code, § 5462.]

SEC. 84. If the state appeals, the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory at law. [Code, § 5463.]

SEC. 85. If a judgment against the defendant is reversed without ordering a new trial, the supreme court must direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him. [Code, § 5464.]

SEC. 86. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as otherwise provided. [Code, § 5465.]

SEC. 87. The decision of the supreme court, with any opinion filed, or judgment rendered, must be recorded by its clerk and after the expiration of the period allowed for a rehearing or as ordered by the court, or provided by its rules, a certified copy of the decision and opinion shall be transmitted

to the clerk of the trial court, filed and entered of record by him, and thereafter the jurisdiction of the supreme court shall cease and all proceedings necessary for executing the judgment shall be had in the trial court, or by its clerk. [Code, § 5466.]

SEC. 88. Unless some proceeding in the district court is directed, a copy of the judgment of the trial court and decision on appeal, or of the judgment and decision on appeal, certified by the clerk of the trial court, shall be delivered to the sheriff, or other proper officer, as an execution, and shall authorize him to execute the judgment of the court, or take any steps required to bring the action to a conclusion. [Code, § 5467.]

SEC. 89. If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court, is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction. [Code, § 5468.]

XVIII. OF CONSTRUCTION AND MODIFICATION OF RULES.

SEC. 90. When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation and argument of causes, ought to be waived or modified in any case the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application shall be in writing, shall set out the peculiar facts relied upon by the applicant, and shall be verified by the party, or a person having knowledge of the facts, and certified by counsel as being true and made in good faith. The order upon such application shall be in writing, and shall be filed with the clerk of this court. In no case will these rules be waived or modified upon agreement of counsel alone. [Old Rules, § 101.]

XIX. OF DISTRIBUTION OF PRINTED MATTER.

SEC. 91. The clerk shall make the following distribution of all printed abstracts, denials of abstracts, briefs and arguments received under the foregoing rules: One copy to each judge of the court, one copy to the state library, two copies to the law department of the state university, and the remainder shall be placed in his office, one copy of which shall remain permanently among the files. [Old Rules, § 102.]

XX. OF RETURN OF PAPERS AND EXHIBITS.

SEC. 92. If a new trial is granted, the clerk, as soon as the cause is at an end in the supreme court, shall transmit to the clerk of the court below all original papers or exhibits certified up from said court; if a new trial is not awarded, or if the cause is triable *de novo*, either party desiring to withdraw the same may, by motion, showing proper grounds therefor, and upon five days' notice to the other party or his attorney, secure an order from the court or a judge thereof, allowing him to do so, upon filing a receipt for the same with the clerk of this court. [Code, § 4126; Old Rules, § 113.]

XXI. OF COSTS.

SEC. 93. The appellant may be required to give security for costs, under the same circumstances and upon the same showing as plaintiffs in civil actions in the inferior courts may be. [Code, § 4135.]

SEC. 94. When the parties, or their attorneys, shall furnish printed abstracts, denials of abstracts, briefs, arguments or petitions for rehearing in conformity to the rules of this court, the clerk will tax the actual cost of printing the same, which shall not exceed the sum of one dollar for every five hundred words, embraced in a single copy thereof, against the unsuc-

cessful party not furnishing the document, to be collected and paid to the successful party as other costs. It will be the duty of any party who files any printed matter to state, either on the title page or at the end of the document, in writing or in print, and have certified by his attorney as being correct, the actual cost of the printing of the same, and no costs will be taxed for such printing unless this statement is made. [Code, § 4142; Old Rules, § 95.]

SEC. 95. If any denial of the abstracts, transcripts or records is made, or if an additional abstract is filed, without good and sufficient cause, the costs of the same, or any unnecessary part thereof, and of any transcript thereby made necessary, shall be taxed to the party causing the same; and when any unnecessary costs have been made by either party the court will, upon application, tax the same to the party making them without reference to the disposition of the case. [Code, §§ 4118, 4120; Old Rules, § 95.]

SEC. 96. Whenever the translation of the shorthand notes is required to be filed in this court, the clerk shall tax, as part of the costs in the case, the expense of procuring the same, which shall not exceed the rate of five cents per hundred words. If the amount paid or agreed to be paid is not stated in the translation so filed, the clerk shall tax at the statutory rate. [Code, § 4142.]

SEC. 97. All other taxable fees and costs shall abide the result of the appeal and be taxed to the unsuccessful party, unless otherwise ordered. [Code, §§ 3853, 4142.]

XXII. OF ADMISSION OF ATTORNEYS.

SEC. 98. Examinations of applicants for admission to the bar will be held at each regular term of court, commencing on the first day of the term. [Old Rules, § 103.]

SEC. 99. Each applicant for admission shall, at least five days before the first day of the term at which he asks to be examined, file with the clerk a written request for examination in his own handwriting and signed by himself, accompanied with proofs of his qualifications as to age, residence, and character and time of study, as required by Code, § 310, all prepared and presented in the manner prescribed by these rules. [Old Rules, § 104.]

SEC. 100. Proof of qualification as to age, character, place of residence, and time and place of study, shall be by affidavit made before some officer authorized to administer oaths. When made before an officer not having a seal, other than a judge of the supreme, district or superior courts of this state, his official character and signature shall be authenticated by a proper certificate attested by the seal of the clerk of a court of record. Proof of the applicant's character, residence and age shall be by affidavits from at least two witnesses, and the applicant shall also make affidavit as to his age and place of residence. Proof of his term of study shall be by affidavit of the member of the bar, or judge, with whom he pursued his studies; and when he has studied at a law school, such fact and his term of study shall be shown by the affidavit of one or more of the professors or instructors of such school. Such affidavits must show that the applicant has actually and in good faith pursued the study of the law in the manner and for the time prescribed by the statute; and must also show that the affiant is a practicing lawyer, judge of a court of record, or professor or instructor in a law school at which the applicant studied. [Code, § 315; Old Rules, § 108.]

SEC. 101. In estimating the time of study, a school year of thirty-six weeks spent at a reputable law school in the United States shall be equivalent to a full year spent in an office, and a fraction of a school year spent in such law school shall be considered the equivalent of the same fraction of a full year spent in the office of an attorney or judge. [Code, § 310; Old Rules, § 112.]

SEC. 102. On the morning of the first day appointed for the examination, the court will appoint a committee of not less than three members of the bar, who, with the attorney-general, as *ex officio* chairman of the com-

mittee, will assist in the examination of applicants for admission. [Old Rules, § 105.]

SEC. 103. The court will also prepare not less than thirty printed questions to be submitted to each applicant, which he shall answer in writing. While engaged in answering these questions he shall not have access to books or papers, nor will he communicate with any one upon the subject of the examination. The printed questions will be varied at each term. [Old Rules, § 106.]

SEC. 104. Upon consideration of the proofs as to qualification and of the oral and written examinations, the court will admit or reject the candidate. [Old Rules, § 107.]

SEC. 105. Students in the law department of the university who are recommended by the faculty of said department as candidates for graduation, and as persons of good moral character who have actually and in good faith studied law for the time and in the manner required by statute, at least one year of such study having been as a student in said department, may be examined at the university by a committee composed of not less than three persons, members of the bar, or judges of courts of record, appointed by the supreme court for that purpose, and upon the certificate of such committee that such candidates possess the learning and skill requisite for the practice of law, they shall be admitted without further examination. [Code, § 312.]

SEC. 106. The chief justice or any judge of this court may administer the oath prescribed by the statute at Iowa City to each and every person recommended by the examining committee appointed to examine students of the law department, and the person so administering the oath shall report to the clerk of this court the names and post-office addresses of the persons so admitted. The clerk will thereupon enter of record the fact of their admission, and upon payment of the requisite fee will issue to each of the persons so reported, a certificate of admission to the bar. [Old Rules, § 110.]

SEC. 107. Any person who becomes a resident of this state after having been admitted to the bar of any other of the United States in which he has previously resided, upon satisfactory proof that he is at least twenty-one years of age, of good moral character and an inhabitant of this state, and that he has practiced law regularly for not less than one year in the state from which he came, may be admitted to practice in this state, without examination or proof of the period of study required of other applicants. Proof of admission to the bar in another state may be made by the original certificate of admission, or by a duly authenticated copy of the record showing his admission to the bar, proved as records of sister states must be when admitted in evidence in the courts of this state. Proof of other qualifications must be made in the same manner as the showing required of applicants for examination. [Code, § 313; Old Rules, § 109.]

SEC. 108. Any member of the bar of another state actually engaged in any cause or matter pending in this court may appear in and conduct such cause or matter, while retaining his residence in such other state, without being admitted to practice under the foregoing provisions. [Code, § 316.]

INDEX.

This index covers the Code, the Constitution of Iowa, and the Rules of the Supreme Court. The other articles in the "Prefix" are referred to only in a general way.

The references are to both sections and pages — the page number following the section number, after a colon.

The letter "R" before a section number indicates that the section is found in the Rules of the Supreme Court.

The expression "*et seq.*," following a section number, means "and sections following."

A

Acts of General Assembly Session 38 G.A. 3 S.

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

Y